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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

**BNSF RAILWAY COMPANY, a
Delaware Corporation,**

Plaintiff,

v.
**SAN JOAQUIN VALLEY RAILROAD
COMPANY, a California Corporation,
and TULARE VALLEY RAILROAD
COMPANY, a Nevada Corporation,**

Defendants.

CV F 08 - 1086 AWI SMS

**MEMORANDUM OPINION
AND ORDER ON CROSS-
MOTIONS FOR SUMMARY
JUDGMENT OR SUMMARY
ADJUDICATION**

Doc's No. 121, 127 and 128

This is an action for breach of contract by plaintiff BNSF Railway Company (“BNSF” or “Plaintiff”) against defendants San Joaquin Valley Railroad Company (“SJVR”) and Tulare Valley Railroad Company (“TVRR”) (collectively, “Defendants”). The currently-operative First Amended Complaint (“FAC”) was filed by BNSF on November 6, 2009. On November 30, 2009, SJVR filed an answer to the FAC that incorporated counterclaims against BNSF for declaratory judgment on breach of contract and damages. Currently before the court are cross-motions for summary judgment or summary adjudication by BNSF, Doc. # 121, TVR, Doc. # 128, and SJVR, Doc. # 127. TVRR, in its motion for summary judgment seeks its own dismissal from this action. The court will consider TVRR’s motion first and will then proceed to the cross-motions of SJVR and BNSF. Diversity Jurisdiction exists pursuant to 28 U.S.C. § 1332. Venue is proper in this court.

1 **TVRR’S MOTION FOR SUMMARY JUDGMENT**

2 **I. Factual Background**

3 BNSF’s FAC alleges that its predecessor, the Atchison, Topeka and Santa Fe Railroad
4 Company (hereinafter “Santa Fe”), entered into an agreement with TVRR in November 1992
5 leasing and selling “designated rail lines between Bakersfield and Fresno, California (the
6 “1992 Agreement”).¹ Shortly thereafter, TVRR entered into a service agreement with SJVR
7 wherein the latter carried out most of the operations and received a set proportion of the
8 tariffs paid to TVRR by BNSF. BNSF alleges that it set routes and rates for freight
9 originating from or delivered to stations covered by the 1992 Contract according to the terms
10 of the 1992 Agreement. Until April 1, 1994, TVRR paid SJVR from the funds that were
11 collected by BNSF and paid to TVRR according to a percentage that was agreed upon
12 between TVRR and SJVR. Beginning on April 1, 1994, BNSF paid SJVR directly as a result
13 of a letter of agreement between SJVR and BNSF. In 1999 TVRR sold almost all of its
14 assets to SJVR retaining only a 6-mile rail spur referred to by the parties as the “Ultra to
15 Ducor line” or as the “Ultra Spur.” TVRR contends that the 1999 transfer of assets to SJVR
16 included any claims TVRR may have had against BNSF. BNSF’s FAC alleges that SJVR
17 was acquired by Fortress Investment Group LLC in 2007 and that this action was occasioned
18 by the new owner’s contentions that BNSF had breached the terms of the 1992 Agreement
19 and the demand by the new owners for retroactive application of substantially higher rates.
20 TVRR contends it is neither a proper nor necessary party in this action because it has no
21 interest in the outcome because all rights and duties it may have that are at issue in this action
22 have been assigned to SJVR as a result of the 1999 sale.

23 **II. Analysis of Parties Arguments**

24 The FAC alleges a single claim against TVRR for declaratory judgment in which
25 BNSF requests that the court declare the rights of the parties with regard to whether:

26 _____
27 ¹ The entire document designated the “1992 Agreement” is titled “Agreement for Sale of Certain Assets,
28 Rights and Obligations of The Atchison, Topeka and Santa Fe Railway Company to Tulare Valley Railroad
Company” and is set forth under seal and in full at Document # 41.

1 An actual, justiciable, present and continuing dispute and controversy exists
2 between BNSF and [D]efendants regarding whether Paragraphs 29 and 30 of
3 the [1992 Agreement] are enforceable, whether [D]efendants are obliged to be
4 included in BNSF through routes and to concur in BNSF through rates, and
whether BNSF has complied with all other contractual obligations, including
those governing the revenue arrangement for direct dealings between SJVR
and BNSF.

5 Doc. # 85 at ¶ 48. The FAC alleges the court “is empowered and obligated, pursuant to [the
6 Declaratory Judgment Act,] 28 U.S.C. § 2201 to declare the rights and obligations” of the
7 parties with respect to the 1992 Contract.

8 TVRR has alleged no counterclaims against BNSF and seeks summary judgment on
9 the ground there exists no dispute between TVRR’s and BNSF. BNSF opposes TVRR’s
10 motion for summary judgment primarily on two grounds. First, BNSF contends the 1999
11 transfer of assets from TVRR to SJVR (hereinafter the “1999 Transfer”) did not effectuate a
12 transfer of obligations owed by TVRR to SJVR from 1992 to 1999 under the 1992
13 Agreement. BNSF does not specify what those residual obligations might be. BNSF also
14 contends that TVRR remains owner of the Ultra Spur to the present time and is bound by the
15 terms of pre-existing agreements with regard to freight traffic over that spur. BNSF therefore
16 contends that TVRR is a proper party because it will be bound by any judgment in this action
17 that declares rights under the 1992 Agreement with regard to either TVRR’s obligations prior
18 to 1999 under the 1992 Agreement or since 1999 with regard to any obligations arising from
19 its ownership of the Ultra Spur. Second, BNSF contends that BNSF’s rights in this action
20 arise from the 1992 Agreement to which TVRR is a signatory and therefore TVRR is an
21 indispensable party.

22 ***A. Declaratory Judgment Act and “Actual Controversy”***

23 BNSF quotes extensively from the 1992 Agreement which, in Paragraph 8, provides
24 certain limitations on the rights of the parties to assign rights and obligations under the
25 Agreement to an assignee or purchaser. The paragraph quoted by BNSF provides that an
26 assignment of rights to a successor requires that the assignee specifically “assume in writing
27 all of Buyer’s or Seller’s continuing and existing or thereafter arising obligations under this
28 agreement. . . .” Doc. # 151 at 7:20-21. BNSF further highlights Paragraph 8's provision

1 that, although a party to the 1992 Agreement can assign rights and obligations existing at the
2 time of the assignment or accruing thereafter, the assigning party “shall remain responsible
3 after the assignment for those obligations existing up until the time of the assignment. . . .”
4 Id. at 24-25.

5 As an initial matter, the court notes that there are no allegation of the existence of
6 *obligations* owing by TVRR to BNSF under the 1992 Agreement for any of TVRR’s
7 activities between 1992 and the assignment of TVRR’s interests to SJVR. In addition, other
8 than TVRR’s retention of the Ultra Spur line, there is no allegation of any *obligation* owed by
9 TVRR to BNSF arising *after* the 1999 assignment to SJVR. There is also no contention by
10 BNSF, that following TVRR’s assignment of its interests to SJVR in 1999, TVRR retained
11 any interest in SJVR’s potential recovery against BNSF as a consequence of SJVR’s
12 counterclaims against BNSF. BNSF contends that, because the 1992 Agreement imposes a
13 continuing obligation on TVRR to be responsible for obligations that accrued prior to the
14 date of any assignment and assumption of obligations by SJVR, TVRR’s rights and
15 obligations will be affected by BNSF’s action for declaratory relief. BNSF gives no
16 explanation as to how or why TVRR’s rights and obligations would be affected other than to
17 posit the hypothetical existence of a potential obligation.

18 “The Declaratory Judgment Act provides that, ‘[i]n a case of actual controversy
19 within its jurisdiction . . . any court of the United States . . . may declare the rights and other
20 legal relations of any interested party seeking such declaration, whether or not further relief is
21 or could be sought.’ 28 U.S.C. § 2201(a).” Medimmune, Inc. v. Genentech, Inc., 549 U.S.
22 118, 126, 127 S.Ct. 764, 770 (2007). The Medimmune Court directly addressed the issue of
23 what constitutes an “actual controversy” under the Declaratory Judgement Act. The court
24 held that:

25 [T]he dispute [must] be “definite and concrete, touching the legal relations of
26 parties having adverse interests”; that it be “real and substantial” and admit of
27 specific relief through a decree of a conclusive character, as distinguished
28 from an opinion advising what the law would be upon a hypothetical state of
facts.” [Aetna Life Ins. v. Haworth, 300 U.S. 227, 240-241 [. . .] (1937). In
Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S> 270, 273 [. . .](1941),
we summarized as follows: “Basically, the question in each case is whether

1 the facts alleged, under all the circumstances, show that there is a substantial
2 controversy, between parties having adverse legal interests, of sufficient
immediacy and reality to warrant the issuance of a declaratory judgment.”

3 Id. at 126.

4 TVRR contends that no “actual controversy” exists between it and BNSF. The court
5 agrees. Medimmune and its progeny require something more than the simple fact of a
6 contract to which both the plaintiff and defendant are signatory. There must be an actual
7 opposition of legal interests that has ripened into an actual controversy. Here, TVRR has not
8 threatened to sue BNSF under the 1992 Agreement and has, in fact, stated its lack of any
9 interest in the case at all. BNSF has not pointed to any issue of actual opposition between
10 itself and TVRR under the 1992 Agreement. With regard to the six-mile Ultra Spur line,
11 discovery has been had, as TVRR points out, and BNSF remains unable to point to any traffic
12 over that spur that occurred since the 1999 transfer of assets to SJVR that would implicate
13 any obligations or rights as between TVRR and BNSF. BNSF’s argument that TVRR is a
14 proper defendant in this action implies that, should BNSF prevail in its action for declaratory
15 judgment, the terms of the 1992 Agreement will apply to freight traffic on TVRR’s spur line.
16 TVRR has not contended otherwise nor does BNSF point to any action or representation by
17 TVRR that would indicate even the least probability that TVRR is in a position of
18 “substantial controversy” over BNSF’s implied contention.

19 ***B. Indispensable Party***

20 BNSF cites a number of cases for the proposition that, as a signatory to the 1992
21 Agreement, TVRR is an indispensable party to this proceeding. Each of the cases BNSF
22 cites, however, concern the application of joinder of indispensable parties under Rule 19 of
23 the Federal Rules of Civil Procedure. The issue at hand is not one of joinder under Rule 19,
24 however, because TVRR is already a party. The more appropriate question is whether, and
25 under what conditions, a party that is a signatory to a contract that is the focus of an action for
26 declaratory judgment may be dismissed from the action. Even though the issue at hand is not
27 one of joinder, Rule 19 provides necessary insight into the question of whether a party can be
28 forced to maintain its status as a plaintiff or defendant when it seeks to be excused from the

1 proceeding. Rule 19(a) describes the attributes of a person who must be joined if possible.
2 That person is “a person in whose absence complete relief cannot be accorded among those
3 who are already parties by affording them a complete adjudication of their dispute.” Japan
4 Petroleum Co. Ltd. v. Ashland Oil, Inc., 456 F.Supp. 831, 836 (D. Del. 1978). The policy
5 objectives of Rule 19's requirement to join all “indispensable parties” are to “protect the
6 interests of the parties by affording them complete adjudication of their dispute. It [also]
7 serves the interest of judicial economy by avoiding repeated lawsuits involving the same
8 subject matter.” Id.

9 While BNSF correctly notes that “[g]enerally, where rights sued upon arise from a
10 contract, all parties thereto must be joined,” Regan Henry Broad. Grp., Inc. v. Hughes, 1992
11 WL 151308 (E.D. Pa. 1992), the status of a party as indispensable does not arise as a result of
12 its being signatory to a contract, it’s status as indispensable is the result of the needs of the
13 other parties to fully adjudicate their claims. There is no policy purpose to be served by
14 compelling a party to maintain its status in an action as plaintiff or defendant where a party,
15 having been joined, is later able to show upon all the evidence that its presence in the action
16 is not necessary to the interests of either party in litigating their claims. TVRR contends that
17 its presence in this action is not necessary to the claims of either party and the court agrees.
18 As discussed above, in an action for declaratory judgment, BNSF can only achieve judgment
19 over a party against whom it an actual, present and substantial controversy. This controversy
20 exists between BNSF and SJVR. BNSF has the burden under the Declaratory Judgment Act
21 to show it has an “actual controversy” against all Defendants and, as the court has noted, has
22 failed to carry that burden with respect TVRR.

23 BNSF’s action is essentially a preemptive strike against SJVR’s claims of breach and
24 SJVR’s effort to retrospectively enforce through rates according to its determination. TVRR,
25 by asserting no counter-claims against BNSF cannot, now or in the future, assert claims
26 against BNSF that it has specifically decided not to assert in this action. Therefore, BNSF
27 has no claims that it can assert preemptively against TVRR by means of its declaratory
28 judgment claims. Similarly, TVRR has assigned to SJVR all its *rights* under the 1992

1 Agreement and has asserted no claims on its own behalf relating to the sole remaining
2 interest it owns in the Ultra Spur line. Stated another way, SJVR's counterclaims against
3 BNSF are based on rights that have already been assigned by TVRR to SJVR. As a
4 consequence, TVRR's participation is not necessary in order for SJVR to fully litigate its
5 claims.

6 Because neither BNSF nor SJVR require the participation of TVRR to fully litigate
7 their claims in this action, and because in seeking dismissal from this action TVRR is
8 estopped from asserting any claims under the 1992 Agreement against BNSF, the court
9 concludes that TVRR is not an indispensable party to this action. Because TVRR is not an
10 indispensable party and because BNSF has not carried its burden to show that an "actual
11 controversy" exists between it and TVRR, the court concludes that TVRR is entitled to
12 judgment against BNSF as to BNSF's first claim for relief. TVRR will therefore be
13 dismissed from this action.

14 **BNSF'S CLAIMS AND SJVR'S COUNTERCLAIMS**

15 The FAC lists four claims for relief. The first two claims seek declaratory judgment
16 against SJVR on SJVR's claim that BNSF breached its duties under the fee-setting provisions
17 of the 1992 Agreement, and declaratory judgment on SJVR's claim that BNSF breached its
18 duties under the 1994 Letter of Agreement, respectively. BNSF's third and fourth claims for
19 relief allege that SJVR breached the rate setting provisions of the 1992 Agreement and the
20 1994 Letter of Agreement, respectively, by attempting to set rates unilaterally and by
21 attempting to recover from BNSF alleged underpayment of rates that SJVR alleges were
22 wrongfully not increased since 1994.

23 SJVR's answer to the FAC alleges four counterclaims. The first two counterclaims
24 allege breach of the 1992 Agreement by BNSF arising from BNSF's failure to notify TVRR
25 or SJVR of through rate changes, as required by paragraph 31 of the Agreement, and to
26 increase the division of revenues according to the upward movement of through rates,
27 respectively. SJVR's third counterclaim seeks declaratory judgment on the issue of whether
28 SJVR has sole discretion to set rates under the 1992 Agreement in light of BNSF's breaches.

1 SJVR's fourth counterclaim alleges breach of the 1992 Agreement by BNSF arising from
2 BNSF's refusal to pay rates unilaterally set by SJVR in 2008 under the rate-setting authority
3 claimed by SJVR under the 1992 Agreement.

4 Somewhat atypically, the motions for summary judgment consist basically of two
5 opposing propositions regarding SJVR's counterclaims against BNSF. SJVR seeks summary
6 judgment in its favor and BNSF seeks summary judgment on SJVR's counterclaims in its
7 favor. Neither party appears to have moved for summary judgment as to the claims alleged in
8 BNSF's FAC.

9 **I. The 1992 Agreement and Subsequent Agreements**

10 At the core of the dispute between the two remaining parties is the question of what
11 provisions of which agreement provide the basis for the revenues that were paid to SJVR
12 from 1992 to 1999, and from 1999, when SJVR purchased most of TVRR's interest, to 2008,
13 when this action was commenced. SJVR contends that BNSF's authority to set rates, and
14 SJVR's duty to concur in those rates, was conditioned under the terms of the 1992
15 Agreement on BNSF's performance of its duty under that agreement to report at year's end
16 the percent of increase or decrease in the through rates charged by BNSF for freight arriving
17 at, or originating from, the stations listed in Table 1 and to apply that percent change to the
18 rates set forth in Table 1. BNSF's authority to set rates and the duty of short-line hauler to
19 concur in those rates is set forth in Paragraph 30 as follows:

20 As part of Buyer's and Seller's agreement to cooperate in marketing their
21 interline freight transportation service via the California Interchange Points to
22 an from the Market Area, Buyer and Seller agree that, for twenty-five years
23 following the date of closing of this agreement, Seller shall have authority to
24 establish and offer through freight rates via through routes involving both
25 Buyer and Seller with interchange between Buyer and Seller at such California
26 Interchange Points. Buyer hereby automatically concurs in all such through
27 rates established by Seller, whether for present or future freight traffic, so long
28 as Buyer shall receive for transporting the traffic the amount of revenue set
forth in Paragraph 31 of this agreement.

BNSF's duty to calculate, report and apply percent changes to the rate is set forth
in Paragraph 31, *Division of Revenue*, provides as follows:

Buyer and Seller agree that for so long as Seller establishes through freight
rates for interline freight transportation service via the California Interchange

1 Points routes as authorized in Paragraph 28 and Paragraph 29 of this
2 agreement, the through revenues accruing to Buyer on all existing and future
3 traffic movements via the California Interchange Points to or from rail
4 destinations or origins at facilities on or along the Rail Lines and interchanged
5 between Buyer and Seller shall be divided on the basis of the General Traffic
6 Divisions set forth in Table 1, included as part of this Paragraph. Buyer agrees
7 to concur in all through freight rates established by Seller on all existing and
8 future carload traffic movements via the California Interchange Points to or
9 from rail destinations or origins at facilities on or along the Rail Lines,
10 whether a rate is in a tariff, quotation, freight transportation contract, or some
11 other transportation offer or agreement, so long as Buyer receives for
12 transporting the traffic the amount of revenue set forth in Table.

13 [Non-relevant portion and Table 1 omitted]

14 At the end of each calendar year, commencing with year-end 1993,
15 Seller shall determine whether there has been a percentage increase,
16 percentage decrease or no change in the level of its through rates on
17 movements to or from the stations listed in Table 1 between the month of
18 January of the subject year and the month of December of the such year.
19 Seller shall notify Buyer of the results of this determination and any
20 percentage change, whether an increase or a decrease, shall be applied to the
21 divisions set forth in Table 1 for movements to or from the above-referenced
22 stations during the calendar year immediately following the year for which the
23 determination was made. Nothing in this agreement shall preclude Seller and
24 Buyer from negotiating and agreeing to different divisions than those specified
25 in Table 1 for contract movements to or from any of the aforementioned
26 stations.

27 Doc. 41 at ¶¶ 30-31. SJVR's central contention is that BNSF's failure to report its yearly
28 percentage increase or decrease in Rates and to apply the percentage to the Rates listed in
Table 1 deprived BNSF of Rate-setting authority and constituted breach of the 1992
Agreement.

BNSF contends that, as the 1992 Agreement provides that "[n]othing in [the]
agreement shall preclude Seller and Buyer from negotiating and agreeing to different
divisions [of revenue] than those specified in Table 1," and that the parties to the 1992
Agreement took the opportunity to negotiate a different division almost immediately. The
parties have submitted a number of letters, memoranda, amendments and other writings that
BNSF contends have served to modify or supplant the rate-setting terms of the 1992
Agreement; particularly the duty of BNSF to provide yearly statements of upward or
downward movement of through rates and to adjust Table 1 rates accordingly. From the
execution of the 1992 Agreement to April 1, 1994, the court is aware of three documents that

1 the parties have referred to as relevant in one respect or another to the binding or non-binding
2 nature of the rate-setting authority of the 1992 Agreement. The court will briefly discuss
3 each of these documents.

4 ***A. Marketing Agreement of November 24, 1992***

5 On November 24, 1992, all parties – including TVRR, SJVR, and Santa Fe Railroad,
6 the predecessor of BNSF – executed an agreement of cooperation in which the parties agreed
7 to cooperate in the efforts of each to market freight traffic to and from locations in the
8 “market area” which included stations and lines owned at the time by TVRR and operated by
9 SJVR. Doc. # 52, Exhibit “B” (Sealed) (hereinafter, the “Marketing Agreement”). The
10 primary basis of cooperation the parties agreed to was the ability of Santa Fe (now BNSF) to
11 set through routes and through rates and the obligation of TVRR and SJVR to concur in those
12 routes and rates.² Of significance to BNSF’s contentions, the Marketing Agreement does not
13 impose a duty on BNSF to report percentages of rate increase or decrease or to adjust revenue
14 sharing on the basis of percentage of change. Paragraph 3 of the Marketing Agreement
15 provides as follows:

16 Tulare and SJV Railroad shall concur automatically in any through
17 rate established by Santa Fe pursuant to Paragraph 2 of this agreement for any
18 shipment to or from the rail lines of Tulare and of SJV Railroad so long as
19 Tulare and SJV Railroad individually or combined receive the divisions of of
20 revenue which are set forth in Table 1 of Paragraph 30 of the [1992
21 Agreement]. If a shipment covered by the provisions is made from a station
22 that is not listed in Table 1 of Paragraph 30, then the division payable to
23 Tulare and SJV Railroad, or to either of them, shall be equal to the division to
24 the listed station that is closest to such unlisted station. SJV Railroad
25 acknowledges that has received a copy of Paragraph 30 of the [1992
26 Agreement] and affirms that it accepts the divisions set forth therein.

22 ***B. Service Agreement Between TVRR and SJVR***

23 On December 21, 1992, TVRR executed a document titled “Service Agreement”
24 (hereinafter, the “Service Agreement”) that set forth the conditions of SJVR’s activities as

26 ² Through routes and through rates refer to the arrangements made between BNSF and shippers whereby
27 a single price is quoted for freight being hauled to, or originating from, stations served by SJVR. The single price
28 quoted to the shipper includes both BNSF’s portion as the long-haul transporter and SJVR’s portion as the short haul
transporter. The total payment received by BNSF is divided between BNSF and SJVR according to the rates
provided in Table 1.

1 agent of TVRR. Doc. # 52, Exhibit “A” (sealed). Of significance to this action, the Service
2 Agreement prohibited the following acts by SJVR:

- 3 1. [Publication] tariffs or enter[ing] into transportation contracts or agreements other
4 than in the name of [TVRR].
- 5 2. [Participation] in or [entrance] into contracts or agreements with third parties other
6 than in the name of [TVRR].
- 7 3. [Participation] in or [entrance] into agreements establishing joint rates or through
8 routes other than in the name of [TVRR].
- 9 4. [Acceptance or receipt of] any divisions of rates or allowances, switching charges, or
10 other payments, accept as otherwise provided [in the Service Agreement.]

11 The Service Agreement provided that TVRR would retain all non-operating revenues
12 accruing to it under the 1992 Agreement. The Service Agreement provided that SJVR
13 would submit an account of gross operating revenue earned for each month and would be
14 paid 85% of the gross revenue within fourteen days of submission of the accounting. The
15 Service Agreement also provided that the total of operating revenue paid to SJVR by TVRR
16 could be adjusted in order to provide the later with certain minimum amounts to cover
17 Taxes, maintenance costs covered by TVRR and administrative costs.

18 *C. The 1994 Letter of Agreement*

19 The document that appears to be at the center of BNSF’s contention regarding its
20 obligations to report on yearly through rate changes and to make corresponding adjustments
21 to Table 1 rates is a document titled “Letter of Agreement” dated April 1, 1994, (hereinafter,
22 the “1994 Letter”). The 1994 Letter reflects an agreement between BNSF’s predecessor,
23 Santa Fe, and SJVR. TVRR is not involved in the 1994 Letter. The 1994 Letter appears to
24 be primarily concerned with two activities; the rental and storage of freight cars, and the
25 direct payment of revenues from Santa Fe to SJVR for the hauling and switching between
26 main-line and branch-line stations. With regard to car rentals, the 1994 Letter provides that
27 BNSF (Santa Fe) is to have the first right of refusal to supply freight cars for loading by
28 SJVR at branch line stations. The 1994 Letter sets forth terms for rental, delivery and

1 storage of freight cars by the parties and the allocation of liability that might arise from car
2 rental, storage and switching.

3 With regard to revenue payments, the 1994 Letter has an attachment also referred to
4 as "Table 1" which sets forth what are termed "switching absorption rates" for all of the
5 branch line stations serviced by SJVR. BNSF contends, and SJVR does not appear to
6 dispute, that the "Switching Absorption Charges" referenced in the "Table 1" contained in
7 the 1994 Letter (hereinafter, "1994 Table 1") are the same as "General Traffic Divisions" set
8 forth in Table 1 of the 1992 Agreement. By inspection, the rates set forth in the 1994 Table
9 1 are, as BNSF alleges, the same as the rates on the 1992 Table 1, except that the per car
10 division for the Visalia station is increased to \$395 in the 1994 Table 1 and there is an
11 additional station, Goshen, listed in the 1994 Table 1. The court also notes that, although
12 the 1994 Letter applies the term "Switching Absorption Charges" for what appears to be the
13 first time, "Table 1" in both the 1992 and 1994 versions bears the same title – "General
14 Traffic Divisions" – and uses the same verbiage to describe the fees listed in the third
15 column – "Division per Loaded Car (other than STCC 32952 or STCC 14413)." Based on
16 these similarities and on the representations of the parties, the court concludes the
17 "Switching Absorption Rates" paid by BNSF pursuant to the 1994 Table 1 represent
18 payment for the same services that were paid under Table 1 of the 1992 Agreement.

19 With regard to the payment of Switching Absorption Charges, the 1994 Letter
20 provided:

21 [Santa Fe] shall pay [SJVR] the per car charges (hereinafter "Switching
22 Absorption") as shown in Table 1 for each loaded revenue car interchanged
23 between [Santa Fe] and [SJVR] on freight shipments originating on or
destined to facilities located on branch lines served by [SJVR].

24 The 1994 Letter makes no other provisions with regard to the duty of Santa Fe
25 (BNSF) to report changes in its through rates or to adjust the Switching Absorption Charges
26 on the basis or increases or decreases in its through rates. Other than two provisions not
27 relevant to this dispute, the only other relevant provision of the 1994 Letter dealt with the
28 entirety of the agreement as follows:

1 This Letter constitutes the entire agreement between the parties with respect
2 to the subject matter hereof, and no modification or alteration of the terms
3 hereof shall be binding unless such modification or alteration shall be in
4 writing and executed by the parties. If any term, covenant or provision of this
5 Letter, or the application thereof to any person or circumstance, shall ever be
6 held to be invalid or unenforceable, then in such event the remainder of this
7 Letter or the application of such terms, covenants or provisions to any party
8 or circumstance shall not be affected thereby, and each term, covenant and
9 provision here of shall remain valid and enforceable to the fullest extent
10 permitted by law.

11 Doc. # 52 at ¶ 8 (sealed).

12 **II. Key Contentions**

13 ***A. Is the Yearly Adjustment to Rates in Either Table 1 a Condition Precedent?***

14 SJVR contends that BNSF’s duty under the last portion of Paragraph 31 of the 1992
15 Agreement to report changes in its through rates to stations served by SJVR and to apply the
16 percentage change, whether up or down, to the Divisions of Revenue in Table 1 is a
17 condition precedent to BNSF’s authority to set through rates and to SJVR’s duty concur in
18 those through rates. The court disagrees. “Under the law of contracts, parties may *expressly*
19 agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or
20 event. [. . .] Thus a condition precedent is either an act of a party that *must* be performed or
21 an uncertain event that must happen before the contractual right accrues or the contractual
22 duty arises.” Platt Pacific, Inc. v. Andelson, 6 Cal.4th 307, 313 (1993) (italics added). So
23 far as the court can determine, there is no express provision in Paragraph 31 of the 1992
24 Agreement or elsewhere in that agreement or in any subsequent agreement that would
25 indicate that the duty to report through rate changes and apply them to the rates in Table 1 is
26 a condition precedent to BNSF’s right to set through rates and SJVR’s duty to concur in
27 those rates. At best, from SJVR’s standpoint, the last portion of Paragraph 31 creates an
28 ambiguity.

The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. [Cal.Civ.Code § 1636]. If contractual language is clear and explicit, it governs. (Civ.Code § 1638). On the other hand, if the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it. [. . .] The mutual intention to which the court give effect is determined by objective manifestations of the parties’ intent, including the words used in the agreement, as well as extrinsic

1 evidence of such objective matters as the surrounding circumstances under
2 which the parties negotiated or entered into the contract; the object, nature
and subject matter of the contract; and the subsequent conduct of the parties.

3 People v. Shelton, 37 Ca.4th 759, 767 (2006) (internal citations and quotation marks
4 omitted).

5 A number of facts, both intrinsic and extrinsic to the 1992 Agreement, indicate that
6 neither party intended that the portion of Paragraph 31 that required BNSF or its predecessor
7 to report increases or decreases in through rates established a condition precedent to
8 TVRR's or SJVR's obligation to concur in the through rates. First, the language imposing
9 the duty to report increases or decreases in through rates yearly is physically separate from
10 the provisions establishing Table 1 as the division of revenues to be paid and establishing
11 the duty of SJVR or TVRR to concur in those rates. While that fact is certainly not
12 dispositive, the court finds it notable that Paragraph 31 is the only paragraph in the entire
13 1992 Agreement that contains three un-numbered separate paragraphs. The first is the
14 largest paragraph dealing with the setting of divisions of revenue under Table 1 and the duty
15 of SJVR or TVRR to concur in the rates so long as the division of revenue is maintained
16 according to Table 1. The second paragraph of Paragraph 31 confines BNSF's duty to pay
17 to cases where BNSF is in the line-haul route and where the car being moved is a revenue
18 car. The third paragraph of Paragraph 31 is physically separated and deals with BNSF's
19 duty to report percentages of increase or decrease in through rates and to adjust Table 1
20 accordingly. The impression that arises out of the physical relation of the three paragraphs
21 is that the parties primary purpose was to set up a mechanism that would enable BNSF to set
22 through rates that would be stable over time and that would not be contingent on subsequent
23 concurrence of the short-haul providers. The second and, in particular, the third paragraphs
24 of Paragraph 31 appear to have been added as afterthoughts to protect the concerns of both
25 the "seller" and "buyer."³

26
27 ³ The court also finds it notable that neither party currently employs any person who was closely involved
28 with the drafting or execution of the 1992 Agreement. This fact alone, while again not dispositive, argues against
providing meaning or consequence to any provision of the 1992 Agreement that is not explicit therein.

1 Second, an examination of the whole of the 1992 Agreement indicates that the
2 parties' primary concern was not a mechanism for the adjustment of freight revenues
3 between the long-haul and short-haul providers. Rather, the purpose appears to be the
4 establishment of an agreement that establishes the "buyer" as the regional short-haul
5 provider and provides a framework that is both stable and adjustable so that both parties can
6 effectively market the services without need to quote hauling rates that are contingent on
7 approval by the other party. The reliance on the division of revenues in Table 1 and the duty
8 of TVRR and SJVR to concur in those rates provided the stability needed to effectively
9 market freight services. The freedom of the parties to make other agreements – an option
10 that was apparently used with some frequency – provided the flexibility to address the
11 concerns of each party over time. In this context it appears to the court that the duty of
12 BNSF or its predecessor to report upward or downward movement in its through rates and to
13 make corresponding adjustments to Table 1 was intended as a separate mechanism to check
14 imbalances in financial benefits or burdens accruing to either party. The court cannot find
15 from the context of the 1992 Agreement as a whole any intent to establish the reporting of
16 increases or decreases in through rates as a condition precedent to BNSF's obligation to pay
17 according to the rates set in Table 1 or in SJVR's duty to concur in those rates.

18 Third and finally, an examination of the conduct of the parties following the
19 execution of the 1992 Agreement, the 1992 Marketing Agreement and the 1994 Letter
20 evinces no intention by any of the parties that the reporting of increases or decreases in
21 through rates was intended to be a condition precedent for the authority of Santa Fe (BNSF)
22 to pay the divisions of revenue as listed in either Table 1 or in the 1994 Table 1 or of the
23 obligation of TVRR or SJVR to concur in those rates. SJVR has moved to admit additional
24 documents that it contends demonstrate that SJVR was not bound under the 1994 Letter but
25 that the April 1, 1994 Letter was superceded by a Letter that was executed fifteen days later;
26 that Letter also between Santa Fe and SJVR. With regard to the April 15, 1994 Letter SJVR
27 contends:

28 Consideration of the SJVR/BNSF April 15, 1994 Amendment reveals two

1 important facts which have thus far not been revealed to the Court: (1) the
2 April 1st and 15th Letter Agreements were meant to amend the SJVR Contract
3 [by which SJVR means the 1992 Marketing Agreement and an “Interchange
4 Agreement executed in 1993], *not* the 1992 TVRR Agreement; and (2) the
5 SJVR/BNSF April 1 1994 Amendment was superceded two weeks later by
6 the April 15th Letter Agreement and was therefore no longer operative.

7 Doc. # 228 at 4:4-8.

8 The court disagrees with SJVR’s interpretation of the status of the 1994 Letter with
9 regard to division of revenues. As noted above, the 1994 Letter enabled Santa Fe (BNSF)
10 and SJVR to deal directly with each other with regard to two main topics; car rental (“car
11 hire”) and direct payment of divisions of revenue under the 1994 Table 1. The April 15,
12 1994 Letter is concerned with the former function only. As the April 15 Letter states: “[t]he
13 care hire and reclaim provisions set forth in the interchange agreement dated April 1, 1994,
14 are superseded by the provisions of this letter agreement so long as this letter agreement
15 remains in effect.” Doc. 228 at Exh. “C”. Contrary to SJVR’s assertion, the April 15, 1994,
16 Letter did not supercede the April 1 Letter with regard to divisions of revenue under Table 1.
17 The Letter of April 15, 1994, does not have any effect on the court’s conclusion regarding
18 the issue of whether the provisions of Paragraph 31 in the 1992 Agreement were intended to
19 be a condition precedent to BNSF’s authority to set through rates and SJVR and TVRR’s
20 duty to concur in those rates.

21 As something of an aside, the court also rejects SJVR’s contention that either the
22 1994 Letter or the Letter of April 15, 1994, modified the 1992 Agreement. SJVR was not a
23 signatory to the 1992 Agreement and had no rights thereunder. Starting on April 1, 1994,
24 SJVR dealt directly with BNSF through the Letter agreements of April 1 and April 15, 1994,
25 until SJVR purchased TVRR’s rights under the 1992 Agreement in 1999. From the facts
26 alleged by both parties, it appears clear to the court that what happened on April 1, 1994,
27 was that BNSF arranged to pay SJVR 100% of the freight revenue for SJVR’s short-haul
28 services using the 1994 Table 1 as the document that determined the fees payable for
all. As of April 1, 1994, Paragraph 31 of the 1992 Agreement became superfluous because

1 all divisions of revenue arising from through rates were paid directly by BNSF to SJVR
2 under the April 1, 1994 Letter. After the execution of the 1994 Letter, TVRR received no
3 revenues under Paragraph 31 for division of through rate revenues because those revenues
4 were paid directly by BNSF to SJVR. As a consequence, TVRR had no interest in whether
5 BNSF made adjustments to Table 1 based on BNSF's increases or decreases in through rates
6 and SJVR had no authority to make any such demands because it was entitled to direct
7 payment only under the terms of the 1994 Letter.

8 Because the court concludes that the duty of Santa Fe (BNSF) to report percentage
9 increases or decreases in its through rates to or from the stations served by SJVR is not a
10 condition precedent to the ability of BNSF to maintain the division of revenues set forth in
11 Table 1 or the 1994 Table 1, the court finds that BNSF or its predecessor Santa Fe did not
12 lose authority to set through rates until such time as SJVR provides or provided the required
13 90-day notice of cancellation of the 1994 Letter pursuant to Paragraph 11 of the 1994 Letter.

14 Based on the foregoing, the court finds that BNSF did not breach the 1992
15 Agreement in any way from the date of execution until 1999 when TVRR's rights and
16 interests were sold to SJVR. Stated another way, from 1994 until 1999, BNSF had no duty
17 to report percent increases or decreases in through rates or to adjust rates payable under
18 Table 1 because the party entitled to receive that adjustment – TVRR – was not receiving
19 any revenue from through route hauling because all of that revenue was going to SJVR.
20 SJVR, in turn was bound by solely the terms of the 1994 Letter which did not provide for
21 automatic adjustments based on increases or decreases in the through rates. It is also clear
22 from the foregoing that SJVR, as assignee of TVRR's rights under the 1992 Agreement
23 cannot maintain the claims it now asserts against BNSF for breach of duties under Paragraph
24 31 of the 1992 Agreement between 1994 and 1999 since BNSF did not owe anything to
25 TVRR under Paragraph 31 from 1994 until TVRR assigned its rights in 1999.

26 ***B. Waiver and Estoppel***

27 What remains to be determined is whether BNSF can be held liable for breach of the
28 terms of Paragraph 31 of the 1992 Agreement based on its failure to report on or adjust

1 divisions of revenue based on upward or downward variations in through rates occurring
2 after SJVR purchased TVRR's rights under the 1992 Agreement. The answer to that
3 question requires an examination of the legal basis for any such claims and whether such
4 claims are barred by waiver, estoppel or the applicable statute of limitations.

5 As an initial matter, the court notes that its determination that the obligation in
6 Paragraph 31 of the 1992 Agreement to report and adjust Rates in Table 1 according to
7 increases or decreases in through rates is not a condition precedent to BNSF's ability to
8 maintain the rates set forth in Table 1 forecloses any claim by SJVR based on the retroactive
9 application of rates that SJVR contends it had the "untrammelled" right to set. SJVR did not
10 obtain the untrammelled right to set rates under the 1992 agreement because BNSF's breach
11 of its duty to adjust rates in Table 1 – assuming there was such a breach – did not divest
12 BNSF's authority to set through rates and SJVR's obligation to concur in those rates
13 according to the terms in the 1992 Agreement. Assuming that it is determined that BNSF
14 has or had a continuing obligation under the 1992 Agreement to make yearly adjustments to
15 the divisions of revenue set forth in Table 1 – a proposition the court will address shortly –
16 such damages as SJVR may claim may only be found in the difference between the divisions
17 of revenue SJVR should have been paid had BNSF performed its obligations under
18 Paragraph 31 and the divisions of revenue that were actually paid.

19 Paragraph 16 of the 1992 Agreement sets forth what is essentially a no-waiver
20 provisions as follows:

21 No waiver by either Buyer or Seller, or their respective successors or
22 assignees, or failure of either Buyer or Seller, or their respective successors or
23 assignees, to insist upon full and complete performance by the other party to
24 this agreement of any of the obligations of that party in this agreement shall
25 constitute or effect a waiver or release of such party's right to insist upon full
26 and complete performance of such obligations prior to, or following, the
27 waiver or release, or such party's right to insist upon full and complete
28 performance of all other obligations in this agreement. This agreement shall
be amended or modified only by written agreement signed by the parties
hereto.

Doc. # 41 at ¶ 16 (Sealed).

While the wording of Paragraph 16 is a little confusing, the court interprets the

1 parties to have agreed to the proposition that future conduct would not erode the rights or
2 obligations of either party under the 1992 Agreement even if, for a time, the parties agreed
3 informally to alter their conduct in one way or another. What the court does *not* read into
4 this provision is the parties’ intent to create present causes of action based on past non-
5 conforming conduct that would not be otherwise actionable either because such causes of
6 action are time barred or because there was a reasonable understanding at the time that the
7 conduct would not be held as actionable later. In short, the court finds that the no-waiver
8 provisions of Paragraph 16 preserve the parties rights to insist on performance that may have
9 been formally or informally foregone for some period of time but does not create or preserve
10 a cause of action where the cause of action would otherwise be subject to estoppel or time-
11 limits.

12 “The doctrine of equitable estoppel is founded on concepts of equity and fair dealing,
13 It provides that a person may not deny the existence of a state of facts if he intentionally led
14 another to believe a particular circumstance to be true and to rely upon such a belief to his
15 detriment.” Strong v. County of Santa Cruz, 15 Cal.3d 720, 725 (1975). In California, the
16 traditional elements of equitable estoppel are: “(1) the party to be estopped must be
17 appraised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act
18 that the party asserting the estoppel had a right to believe it was so intended; (3) the [party
19 asserting estoppel] must be ignorant of the true state of facts; and (4) [the party asserting
20 estoppel] must rely on the conduct to his injury.” Oakland Raiders v. Oakland - Alameda
21 County Coliseum, 144 Cal.App.4th 1175, 1189 (3rd Dist. 2006) (internal quotes and citation
22 omitted). In cases, such as the one at bar, where the facts alleged sound in fraud or, at
23 minimum as claims of purposeful manipulation of contractual obligations, the Oakland
24 Raiders court observed that the doctrine of equitable estoppel is distinct from waiver
25 because waiver of a contractual right must be *intentional* and the proof of waiver focuses
26 solely on the intent of the party relinquishing the right. Equitable estoppel, on the other
27 hand, focuses on the *conduct* of the party to be estopped and the reasonable inferences that
28 may be drawn by the other party. Oakland Raiders, 144 Cal.App.4th at 1190. Noting that

1 equitable estoppel “is, for practical purposes, indistinguishable from the doctrine of implied
2 waiver through conduct,” the Oakland Raiders court held that ““California courts will find
3 waiver [equitable estoppel] when a party intentionally relinquishes a right *or when that*
4 *party’s acts are so inconsistent with an intent to enforce the right as to induce a reasonable*
5 *belief that such right has been relinquished.*” [Citation.]” Id. (quoting Waller v. Truck Ins.
6 Exchange, Inc., 11 Cal.4th 31, 33-34 (1995) (italics added in Oakland Raiders)).

7 Here, undisputed facts indicate that between 1994 and 2007, Santa Fe, and its
8 successor BNSF paid divisions of revenue directly to SJVR that were billed by SJVR
9 pursuant to the rates set forth in the 1994 Table. Both before and after 1999, SJVR accepted
10 those payments without apparent complaint and without any evident contention that
11 divisions of revenue other than those set forth in the 1994 Table 1 were due or that specific
12 performance of the rate-adjusting function set forth in Paragraph 31 of the 1992 Agreement
13 was demanded or even being contemplated. To cast these facts in the context of the
14 requirements of equitable estoppel, the fact known to SJVR but unknown to BNSF was
15 SJVR’s intent to insist on enforcement of the rate-adjusting provisions of Paragraph 31. The
16 fact represented to BNSF through SJVR’s conduct reasonably affirmed BNSF’s belief that
17 (1) the provisions of the 1994 Letter governed the terms of division of revenue after 1999
18 and (2) SJVR concurred in that belief or intent. SJVR’s failure to give any indication of its
19 intent to demand specific performance of the rate-adjusting provisions of Paragraph 31 of
20 the 1992 Agreement for a period of at least eight and perhaps nine years and its consistent
21 conduct during that period of apparent assent to the terms of the 1994 Letter leads the court
22 to conclude that it would be inequitable at this point to allow SJVR reach back in time to
23 demand payment accruing from rights that it undeniably had notice of and could have
24 asserted at least from 1999.

25 The court notes in passing that the foregoing conclusion could have been arrived at
26 by another route as well. Having rejected SJVR’s contention that the April 15, 1994 Letter
27 rendered the revenue division terms of the April 1, 1994 Letter null, the question that
28 remains is which agreement provided the actual legal basis for division of revenues between

1 the parties during the period of time from 1999 to 2008? Because there is no basis to find
2 that either the 1992 Agreement or the 1994 Letter had become inoperative by 1999, the
3 ambiguity as to the source of authority for division of revenues is resolvable, at least in part,
4 by the conduct of the parties after 1999. Neither party contends that the divisions of revenue
5 that were actually provided between 1994 and 2008 were any different than would
6 have been provided by the 1994 Table 1. Thus, the conduct of the parties after 1994 until
7 the filing of this action indicate clearly that the parties intended to conduct themselves
8 according to the revenue division provisions of the 1994 Letter. Given that the 1994 Letter
9 dealt with “switching absorption charges” – which the court has determined are to be
10 considered synonymous with “Division of Revenues” – and given that the 1994 Letter
11 “constitutes the entire agreement between the parties with respect to the subject matter
12 hereof,” the court concludes that both the text of the 1994 Letter and the conduct of the
13 parties thereafter indicates that the 1994 Letter superceded the terms of Paragraph 31 of the
14 1992 Agreement for the period of time from 1994 through 2008. There is no contention that
15 BNSF breached the terms of the 1994 Letter.

16 Based on the foregoing the court concludes that BNSF was not bound by the duty
17 imposed by Paragraph 31 to report percent changes in through rates or to adjust the division
18 of revenues set forth in the 1994 Table 1. To the extent any duties imposed on BNSF by
19 Paragraph 31 of the 1992 Agreement went unfulfilled, SJVR is equitably estopped to
20 retroactively enforce any such duties or to claim damages arising therefrom. In neither case
21 did BNSF lose the right to fulfill its obligation to divide revenues with SJVR by paying
22 SJVR the division of revenues or “switching absorption fees” set forth in the 1994 Table 1.

23 **CONCLUSION**

24 The parties’ cross-motions for summary judgment come before the court in a posture
25 that could have been less convoluted. Basically, Plaintiff’s claims as expressed in the FAC
26 are requests for declaratory relief against the counterclaims set forth in SJVR’s answer to the
27 FAC. BNSF’s motion for summary judgment is actually a motion for summary judgment
28 against SJVR’s counterclaims and SJVR’s motion for summary judgment is a motion for

1 summary judgment on its own counterclaims. As previously noted, neither party appears to
2 have moved for summary judgment on BNSF's claims as set forth in the FAC. The court
3 will declare its findings with regard to SJVR's motion and BNSF's counter-motion for
4 summary judgment on SJVR's cross-claims. The court will then leave it to the parties to
5 determine if there remains any issues in dispute. The court notes that it has reached its
6 decisions based on the foregoing analysis. BNSF has alleged other grounds, such as time
7 limits, to support its motion for summary judgment. The court finds it need not address
8 these arguments at this time. The court will conduct an analysis of BNSF's additional
9 arguments only if appellate review of this opinion should so require.

10 THEREFORE, in consideration of the foregoing analysis, it is hereby ORDERED
11 that:

- 12 1. The motion for summary judgment as to TVRR is hereby GRANTED. TVRR is
13 hereby DISMISSED from this action as to all claims and cross-claims alleged by
14 either of the remaining parties.
- 15 2. The court hereby FINDS and DECLARES as follows: (1) BNSF was not obliged
16 under the terms of the 1992 Agreement to make yearly REPORTS to TVRR as to
17 upward or downward changes in its through rates from 1994 until TVRR assigned its
18 rights and obligations to SJVR in 1999 and did not breach the 1992 Agreement with
19 TVRR by failing to do so; and (2) BNSF was not obliged under the terms of
20 Paragraph 31 of the 1992 Agreement to REPORT upward or downward changes in
21 its through rates to SJVR from its assumption of TVRR's rights and responsibilities
22 in 1999 until the initiation of this action in 2008 or until SJVR provided 90-day
23 notice of cancellation of the 1994 Letter, whichever occurred sooner, and did not
24 breach the terms of the 1994 Letter by failing to do so. To the extent BNSF may
25 have been obliged to report upward or downward changes in its through rates to
26 SJVR after 1999 under the 1992 Agreement, SJVR is equitably estopped from
27 asserting such claim.
- 28 3. BNSF's motion for summary judgment on SJVR's first cross-claim for breach of the

1 1992 Agreement is hereby GRANTED. The court hereby FINDS BNSF is entitled to
2 judgment in its favor as to SJVR's first cross-claim for relief. SJVR's motion for
3 summary judgment as to its first cross-claim for relief is correspondingly DENIED.

4 4. The court hereby FINDS and DECLARES as follows: (1) BNSF was not obliged
5 under the terms of the 1992 Agreement to make yearly ADJUSTMENTS to the
6 division of revenues set forth in Table 1 of the 1992 Agreement based on upward or
7 downward changes in BNSF's through rates from 1994 until TVRR assigned its
8 rights and obligations to SJVR in 1999 and did not breach the 1992 Agreement with
9 TVRR by failing to do so; and (2) BNSF was not obliged under the terms of
10 Paragraph 31 of the 1992 Agreement to ADJUST, upward or downward, divisions of
11 revenue as set forth in Table 1 of the 1994 Letter from SJVR's assumption of
12 TVRR's rights and obligations in 1999 until the initiation of this action in 2008 or
13 until SJVR provided 90-day notice of cancellation of the 1994 Letter, whichever
14 occurred sooner, and did not breach the terms of the 1994 Letter by failing to do so.
15 To the extent BNSF may have been obliged to ADJUST the through rates paid to
16 SJVR after 1999 under the terms of Paragraph 31 of the 1992 Agreement, SJVR is
17 equitably estopped from asserting such claim.

18 5. BNSF's motion for summary judgment on SJVR's second cross-claim for breach of
19 the 1992 Agreement is hereby GRANTED. The court hereby FINDS BNSF is
20 entitled to judgment in its favor as to SJVR's second cross-claim for relief. SJVR's
21 motion for summary judgment as to its second cross-claim for relief is
22 correspondingly DENIED.

23 6. The court hereby FINDS and DECLARES as follows: (1) the right of Santa Fe or its
24 successor BNSF to set through rates and to satisfy its obligation to pay to TVRR the
25 division of revenues due by paying the amount set forth in Table 1 of the 1992
26 Agreement is NOT conditioned on BNSF's performance of a duty to report yearly
27 upward or downward changes in through rates or to apply such changes to the rates
28 set forth in Table 1, and (2) BNSF consequently did not lose authority under

1 Paragraphs 29, 30 or 31 of the 1992 Agreement to set through rates and TVRR did
2 NOT correspondingly acquire the untrammelled right to set divisions of revenue or
3 other charges pertaining to the performance of its duties under the 1992 Agreement.

4 7. The court hereby FINDS and DECLARES as follows: (1) the right of Santa Fe or its
5 successor BNSF to set through rates and to satisfy its obligation to pay to SJVR the
6 division of revenues due by paying the amount set forth in Table 1 of the 1994 Letter
7 is NOT conditioned on BNSF's performance of a duty to report yearly upward or
8 downward changes in through rates or to apply such changes to the rates set forth in
9 Table 1, and (2) BNSF consequently did not lose authority under Paragraphs 29, 30
10 or 31 of the 1992 Agreement to set through rates and SJVR did NOT
11 correspondingly acquire the untrammelled right to set divisions of revenue or other
12 charges pertaining to the performance of its duties under the 1994 Letter or the 1992
13 Agreement.

14 8. In view of the findings and declarations set forth in paragraphs 6 and 7, above, the
15 court hereby GRANTS BNSF's motion for summary judgment as to SJVR's third
16 and fourth cross-claims for relief. SJVR's motion for summary judgment on its third
17 and fourth cross-claims for relief is correspondingly DENIED.

18 9. Either party may notify the court of any remaining issue in contention in this action
19 or may otherwise move for disposition of this action in light of this ruling. If no
20 notice or moving papers are received within twenty-one (21) days of the date of
21 service of this order, the court will declare final judgment in favor of BNSF and will
22 order the case closed.

23 10. SJVR's *ex parte* application for leave to file supplemental evidence is hereby
24 GRANTED

25 IT IS SO ORDERED.

26 Dated: April 18, 2012

27 
28 CHIEF UNITED STATES DISTRICT JUDGE