SULLIVAN & WORCESTER
ONE POST OFFICE SQUARE
BOSTON, MASSACHUSETTS 02109
(617) 338-2800
TELECOPIER NO. 617-338-2880
TWX: 710-321-1976

IN WASHINGTON, D.C.
1025 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036
(202) 775-8190
TELECOPIER NO. 202-293-2275

IN PITTSBURGH, PENNSYLVANIA
UNITED STATES STEEL BUILDING
600 GRANT STREET
PITTSBURGH, PENNSYLVANIA 15219
(412) 391-3750

August 3, 1984

Mr. James H. Bayne, Secretary
Interstate Commerce Commission
12th and Constitution Avenues, N.W.
Washington, D.C. 20423

Re: Santa Fe Southern Pacific Corporation--Southern Pacific Transportation Company; I.C.C. Finance Docket No. 30,400 ~~et al.~~ 18

Dear Mr. Bayne:

I have enclosed for filing an original and twenty copies of the Response of The Kansas City Southern Railway Company to Petition of Railway Labor Executives' Association Dated July 30, 1984. A certificate of service is attached to the original.

Very truly yours,

Morris Raker

MR/dr
Enclosures

cc: The Honorable James E. Hopkins
All parties on service list
Rail Section, Office of Proceedings

KCS-9

Before The

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 30,400 (Sub No. 18)

Kansas City Southern Railway Company
and Louisiana & Arkansas Railway Company
-- Trackage Rights and
Independent Ratemaking Authority

RESPONSE OF KCS TO PETITION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION DATED JULY 30, 1984

The Railway Labor Executives' Association ("RLEA") has filed a petition asking the Commission to reconsider its Decision No. 10, decided July 3, 1984 (served July 9, 1984), to the extent that it authorizes The Kansas City Southern Railway Company ("KCS") to limit the scope of the labor impact analysis to be included in its Responsive Application now due to be completed by September 10, 1984.[1] KCS submits that the petition of RLEA should be dismissed, or otherwise rejected, for the following reasons:

1. Although denominated a petition for review, RLEA's pleading is nothing more than a late-filed reply to KCS' petition for waiver and clarification. It is well settled under the Commission's practice that RLEA's reply would have been dismissed had it been filed prior to entry of the Commission's order; RLEA

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[1] A similar waiver was granted to Union Pacific Railroad Company and Missouri Pacific Railroad Company ("UP/MP").

should fare no better by having waited until after the order was entered. As the Commission has previously held,

> The Commission's position on replies to waiver petitions is both longstanding and clear. The sole purpose of waiver and clarification petitions is to facilitate rail consolidation proceedings by determining at the outset what information will be necessary in preparing a complete application. See Burlington Northern Inc. -- Control & Merger --- St. L., 354 I.C.C. 182, 190-191 (1977); accord 49 CFR §1100.10 (1979). Since there is no adjudicatory proceeding at the waiver stage, interested parties do not have a right to reply to a waiver petition and suggest what information prospective applications [sic] must file with their application. An adversary proceeding will not begin until the application is formally accepted. See Finance Docket No. 28499 (Sub-No. 1), Norfolk & Western Railway Company and Baltimore & Ohio Railroad Company -- Control - Detroit, Toledo & Ironton Railroad Company (not printed), decided November 15, 1977. The appropriate time for interested parties to seek further information is after a proceeding has been initiated by the acceptance of an application. Additional information may be sought at several points throughout the proceeding such as at the prehearing conference, during the discovery stages, or in the course of the hearing. We believe the rights of interested parties are adequately protected, since our decision on the application's completeness only relates to whether or not the application will be rejected. If any party can establsh the need for further information, we can order the applicants to provide information at a later stage of the proceeding.

Union Pacific Corporation and Union Pacific Railroad Company -- Control -- Missouri Pacific Corporation and Missouri Pacific Railroad Company, Finance Docket No. 30,000 (served August 25, 1980).

The only exception to the foregoing rule depends upon the pendency before the Commission of a related transaction involving the same parties. RLEA has made none of the requisite factual allegations, nor has it raised any issue of legal entitlement to the benefit of such exception. Indeed, the exception is not available to it. The proposed merger of The Atchison Topeka and Santa Fe Railway Company ("ATSF") and Southern Pacific Transportation Company ("SP") is not such a related proceeding.

2. Even if, arguendo, RLEA would have had standing to file a timely reply, it has waived that right by having failed diligently to protect its own interests. The Commission's order accepting the ATSF/SP merger application, which was published in the Federal Register on April 20, 1984, Fed. Reg. 16,881, expressly addressed the issue of petitions for waiver or clarification concerning responsive applications. It fixed June 4, 1984 as the final date for filing such petitions.

RLEA was served with that order, either actually or constructively. If it had wished to receive copies of petitions for waiver or clarification, it could have indicated that interest to all railroads which filed written comments, or it could have reviewed the Commission's docket to ascertain whether any petitions for waiver or clarification had been filed on or before June 4, 1984. Its failure to exercise reasonable

diligence wholly contradicts the level of significance now sought to be attached to the absence in KCS' forthcoming application of its predictions of what might be the impact on ATSF/SP's employees of KCS' requested line extensions.

3. As for the merits of the contentions raised by RLEA, it is appropriate to draw a distinction between the waiver granted here, in connection with a responsive application, and what might be the appropriate course of action in connection with an application by two railroads for trackage rights (or an independent ratemaking authority) by one of the applicants over the lines of the other.

The waiver granted to KCS merely acknowledges that certain apsects of the Commission's regulations prescribing the contents of an application under 49 U.S.C. § 11343 are appropriately modified in the case of a responsive application. The regulations are designed for voluntary arrangements between railroads, where it is in the interest of both to cooperate in developing the requisite data. In the case of responsive applications, it is far more direct to have certain of the data developed and furnished directly by the primary applicants. This is all that has been decided here. RLEA still has adequate opportunity, through discovery or by an appropriate petition,

to obtain the data from ATSF/SP.[2]

WHEREFORE, it is respectfully requested that the petition of RLEA be dismissed or otherwise denied.

Respectfully submitted,

David M. Schwartz
Robert L. Calhoun
Sullivan & Worcester
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 775-8190

Robert E. Zimmerman
Robert K. Dreiling
114 West 11th Street
Kansas City, Missouri 64105
(816) 556-0392

Joseph Auerbach
Morris Raker
Harvey E. Bines
Louis A. Rodriques
Sullivan & Worcester
One Post Office Square
Boston, Massachusetts 02109
(617) 338-2800

Attorneys for The Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company

August 3, 1984

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[2] Not only are the primary applicants the appropriate source for the information desired by RLEA, but also it is difficult to imagine how RLEA can be prejudiced by the delay. KCS' Responsive Application is designed to maintain the existing level of competition in important transportation markets and to prevent the establishment of a rail monopoly in the southern corridor for transcontinental traffic. Preservation of competition will eliminate the threat that monopoly pricing would force traffic to other modes, with a concomitant loss of rail-related jobs. Moreover, under the independent ratemaking authority being sought by KCS, the traffic moving in KCS' account would actually be carried in ATSF/SP's trains. The likelihood that this would have a negative impact on employees of ATSF/SP is remote.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of August, 1984, true copies of the foregoing were served by first class mail, postage prepaid, on the following:

Vince Alosie
Suite 1
P.O. Box 3010
2727 Alhambra Ave.
Martinez, CA 94553

Victor Anderson
Allen A. Housh
Michael J. Smith
P.O. Box 9300
Minneapolis, MN 55440

John E. Archibold
Duane Woodward
Charles B. Howe
Richard H. Foreman
500 State Services Building
1525 Sherman Street
Denver, CO 80203

Joseph L. Ashbaker
Farmers Elevator, Inc.
Box 280
Temple, OK 73568

Harvey R. Atchison
4201 East Arkansas Avenue
Denver, CO 80222

Ron Barnett
P.O. Box 278
Hennessey, OK 73742

James Blaze
Consolidated Rail Corp.
1334 Six Penn Center
Philadelphia, PA 19104

Arthur Boone
Frostex Foods
1179A Springdale Rd.
Austin, TX 78762

Roldan Borbolla
Chaparral Steel Co.
300 Ward Road
Midlothian, TX 76065

Morris A. Braatan
425 Moraga Avenue
Piedmont, CA 94611

Barry J. Brooks
Suite 416
One Turtle Creek Village
Dallas, TX 75219

Michael G. Brooks
3000 Rainier Bank Tower
Seattle, WA 98101

Jim Brown
P. O. Box 25325
Albuquerque, NM 87125

Peter C. Cabrera
2 John Street
New York, New York 10038

Roy A. Cantrell
P. O. Box 2218
Richmond, VA 23217

James Bolt
Jim Thorpe Office Building
Oklahoma City, OK 73105

Honorable John Carlin
Office of the Governor
State Capitol
Topeka, KS 66612

Robert F. Carlson
Edward J. Connor, Jr.
Richard W. Bower
O. J. Solander
1120 N Street
Sacramento, CA 95814

Linn Cheatham
500 West Vilas
Guthrie, OK 73044

Roger S. Clarke
P. O. Box 351
Cedar Rapids, IA 50346

W. C. Collins
Phillips Petroleum Co.
8 C2 Adams Building
Bartlesville, OK 74004

H. W. Cormier
P. O. Drawer 152
501 W. Third
Dewitt, AR 72040

George A. Coulas
P. O. Box 2383
Kansas City, 66110

John D. Craig
Montana Dept. of Commerce
1424 9th Avenue
Helena, MT 59620

Daniel Carey
101 South Wacker Drive
Chicago, IL 60606

Robert A. Cashell
2501 E. Sahara Ave.
Las Vegas, NV 89185

Royce C. Caskey
P. O Box 3758
6100 South Yale
Tulsa, OK 74102

Jim B. Cloudt
Capital Station
P. O. Drawer 12967
Austin, TX 78711

E. L. Coale
P. O. Box 666
Weir, TX 78674

John W. Courtney, Jr.
P. O. Box 12847
Austin, TX 78711

Milton E. Nelson, Jr.
Dennis W. Wilson
Robert R. Cowell
80 East Jackson Blvd.
Chicago, IL 60604

Don Cunningham
2768 Sargent Avenue
San Pabio, CA 94806

Paul A. Cunningham
Suite 200
1777 F Street, N.W.
Washington, D.C. 20006

Harry T. Dimmerman
701 Commerce Street
Dallas, TX 75202

Joseph Dolan
Executive Director
CO Dept. of Highways
4201 E. Arkansas Ave.
Denver, CO 80222

John F. Donelan
John K. Maser, III
John F. Donelan, Jr.
914 Washington Blvd.
15th & New York Ave., N.W.
Washington, D.C. 20005

Paul Foley
Farmers Coop Grain Co
Box 278
Silver Creek, NE 68663

Mark Foster
P. O. Box 5170
Denver, CO 80217

Samuel R. Freeman
P. O. Box 5482
Denver, CO 80217

Stuart F. Gassner
One North Western Center
165 North Canal Street
Chicago, IL 60606

T. L. Green
5863 SW
29 Shadow Wood Ofc Park
Topeka, KS 66614

Stanley P. Herbert
P.O. Box 2064
66 Jack London Square
Oakland, CA 94604

Judith M. Espinosa
P.E.R.A. Bldg.
P. O. Box 1028
Santa Fe, NM 87503

Cowton Materials, Inc.
4301 Old Denton Road
Ft. Worth, TX 76117

Fed. Land Bank Assn.
of Anadarko
P. O. Box 910
Anadarko, AK 73005

F.S. Friedman
Transportation Department
P. O. Box 1028
Santa Fe, NM 87504

Leon Galoob
Interstate Metals Corp.
Box 24063
Oklahoma City, OK 73124

Edward A. Geltman
1201 Pennsylvania Ave.,N.W.
Washington, D.C. 20004

Kenneth C. Gilliland
P. O. Box 2130
Newport Beach, CA 92663

Joseph Guerrieri, Jr.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036

Robert N. Hunter
P.O. Box 270
Jefferson City, MO 65102

Robert C. Hickerson
80 Raposa Vista
Novato, CA 94947

T. Med Hogg
P.O. Box 380
Port Allen, LA 70767

Mark C. Hollis
P.O. Box 407
Lakeland, FL 33802

John Hutchens
P.O. Box 778
Corpus Christi, TX 78403

Jim Ingram
5130 Boyd Ste B
Rowlett, TX 75088

M.E. Jacks
Big Three Industries, Inc.
Houston, TX 77253

Robert N. Kharasch
Canal Square
1054 Thirty-First St., N.W.
Washington, D.C. 20007

Howard D. Koontz
233 North Michigan Ave.
Chicago, IL 60601

Richard H. Kraushaar
Standard Building
1370 Ontario Street
Cleveland, OH 44113

N.B. Ladd, Jr.
Justice Building
Little Rock, AR 72201

David J. Astle
Assistant Commissioner
Labor & Industries Bldg.
Salem, OR 97310

Richard Humphreys
Farmers Grain Co.
P.O. Box 655
Pond Creek, OK 73766

R.E. Johnson
1401 S. Harlem Ave.
Berwin, IL 60402

Denton R. Johnston
P.O. Box Drawer 9310
9419 E. 63rd Street
Kansas City, MO 64133

William C. Evans
Fritz L. Kahn
Suite 1100
1660 L Street, N.W.
Washington, D.C. 20036

Richard I. Kilroy
Railway Labor Executives'
Association
400 First Street, N.W.
Washington, D.C. 20001

Vernon R. Ladd
603 Whipporwill Way
Suisun, CA 94585

Gerald J. LaFave
1601 Exposition Blvd.
Sacramento, CA 95815

Leslie A. Holland
Iowa DOT
800 Lincoln Way
Ames, IA 50070

R. Lyle Key, Jr.
500 Water Street
Jacksonville, FL 32202

James E. Bartley
National Industrial
Transportation League
Suite 410
1090 Vermont, Ave., N.W.
Washington, D.C. 20005

John A. Matta
Michael Retruccelli
PPG Industries, Inc.
One PPG Place
Pittsburgh, PA 15270

Paul R. Norris
Department of Transportation
135 Transportation Building
Salem, OR 97310

David Stott
Utah Public Service Comm.
160 East 300 South
Heber M. Wells Building
Fourth Floor
P.O. Box 5802
Salt Lake City, UT 84110-5802

R. Allan Wimbish
Norfolk So. Corp.
204 Jefferson Street
Roanoke, VA 24042

L.S. Young
Room 214
1520 Texas Avenue
Houston, TX 77002

Carl Liba
P.O. Box 1436
Greenwich, CT 06830

Charles Lindstrom
6062 Diane Court
Rohenrt, CA 94928

Vic Moser
Flatland Prof. Services
Suite 30
335 N. Washington Street
Hutchinson, KS 67501

John R. Scherman
Kansas DOT
State Office Bldg.
8th Floor
Topeka, KS

David L. Wilkinson
236 State Capital Bldg.
Salt Lake City, UT 84110

Vincent V. MacKenzie
Public Utilities Commission
California State Building
San Francisco, CA 94102

J. L. Zimmerman
Room 3, Box 345
Harrah, OK 73045

Arizona Public Services Co.
P.O. Box 21666
411 N. Central Avenue
Phoenix, AZ 85036

Bill Lindstead
595 East Perkins Street
Ukiah, CA 95482

Eugene T. Lipfert
Suite 100
1660 L Street, N.W.
Washington, D.C. 20036

Robert J. Logan
151 West Mission Street
San Jose, CA 95110

Joe L. Mackechnie
Suite 222
2448 76th Avenue, SE
Mercer Island, WA 98040

Jim Mattox
P.O. Box 12548
Austin, TX 78711

William G. Mahoney
John O'B. Clarke, Jr.
Kimberly A. Madigan
John A. Edmond
Highsaw and Mahoney, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036

Jack W. McLaughlin
2808 Doidge Avenue
Pinole, CA 94564

Paul G. McQuiston
Commerce Title Building
P.O. Box 3057
12 South Main Street
Memphis, TN 38103

Michael W. Mitchell
1014 West Third Street
Little Rock, AR 72203

Stephen Music
United Waste Material Co.
301 N. Crowdus Street
Dallas, TX 75226

Gerald E. Newfarmer
801 N. First Street
San Jose, CA 95110

Steven F. Ford
P.O. Box 2068
561 West 18th Street
Merced, CA 95344

Gordon P. MacDougall
1120 Connecticut Ave., N.W.
Washington, D.C. 20036

James A. McKelvey
2326 Fresno Street
Fresno, CA 93721

Leon Poag
Poag Grain, Inc.
100 North Choctaw
Chickasha, OK 73018

Adele Miller
P.O. Box 24204
1760 Sixth Avenue South
Seattle, WA 98124

Charles A. Miller
P.O. Box 7566
1201 Pennsylvania Ave., NW
Washington, D.C. 20044

Nicholas P. Moros
176 East Fifth Street
St. Paul, MN 55101

National Fiber Supply Co.
55 E. Monroe Street
Chicago, IL 60603

Denise M. O'Brien
888 Sixteenth St., N.W.
Washington, D.C. 20006

Frederick C. Only
Amtrack
400 North Capitol Street
Washington, D.C. 20001

Louis A. Schmitt
206 S. 17th Avenue
Phoenix, AZ 85005

Lloyd John Osborn
Suite 1100
1660 L Street, N.W.
Washington, D.C. 20036

William L. Phillips
Suite 888
516 West Jackson Blvd.
Chicago, IL 60606

E. Barrett Prettyman, Jr.
815 Connecticut Ave., N.W.
Washington, D.C. 20006

Ken Price
W&W Steel Company
Box 25369
Oklahoma City, OK 73125

James R. Ratner
Antitrust Division
Department of Justice
P.O. Box 481
Washington, D.C. 20044

Arvid E. Roach
P.O. Box 7566
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044

Barry Roberts
600 Maryland Ave., N.W.
Washington, D.C. 20004

Michael E. Roper
Katy Building
701 Commerce Street
Dallas, TX 75202

Allan Parker
Drawer 1431
Duncan, OK 73536

L.W. Partridge
Room 1027
760 Market Place
San Francisco, CA 94102

Williston Putnam
F. Korbel and Bros.
Guerneville, CA 95446

George Puravs
The Wickes Corporation
706 Deerpath Drive
Vernon Hills, IL 60061

Russell W. Rickett
4000 Kruse Way Place
Lake Oswego, OR 97034

Beecher Rintoul
Box 3090, Rincon Annex
San Francisco, CA 94119

William R. Mudd
General Manager
Traffic and Transportation
One Progress Street
Keokuk, IA 52632

Michael Sagebiel
ITG, Inc.
P.O. Box 1777
Victoria, TX 77902

Harold A. Ross
The Standard Building
1370 Ontario Street
Cleveland, OH 44113

Santa Fe Industries
224 S. Michigan Avenue
Chicago, IL 60604

Henry Sarnecke
2901 Butterfield Rd.
Oak Brook, IL 60521

Schroeder Grain Company
P.O. Box 728
Elreno, OK 73036

Peter J. Schultz
Terminal Tower
P.O. Box 6419
Cleveland, OH 44101

Thormund A. Miller
Douglas E. Stephenson
Michael A. Smith
One Market Plaza
San Francisco, CA 94105

Robert N. Kharasch
Edward D. Greenberg
Kathleen Mahon
Peter Snow
Galland and Kharasch
1054 31st St., 2nd Floor
Washington, D.C. 20007

State of New Mexico DOT
P.O. Box 1028
Santa Fe, NM 87504

Tim Salome
M Lipsitz & Co.
P.O. Box 1175
Waco, TX 76703

Eric P. Serna
P.O. Drawer 1269
Santa Fe, NM 87501

Frederick L. Shreves, II
Suite 302
1220 19th Street, N.W.
Washington, D.C. 20036

H. A. Siler
P.O. Box 640
189 Commercial
Portola, CA 96122

J.R. Snyder
Room 704
400 First Street, N.W.
Washington, D.C. 20001

James V. Faulkner, Jr. Esq.
Deputy General Counsel -
Operations
Union Pacific Corp.
345 Park Avenue
New York, New York 10054

J.M. Todd
7217 Kathleen Ave., N.W.
Albuquerque, NM 87110

Robert S. Steiner
507 Tenth Street
Des Moines, IA 50319

P.C. Thompson
Suite A-3
8115 W. 63rd Street
Shawnee Mission, KS 66202

David G. Tittsworth
Seventh Floor
915 Harrison
Topeka, KS 66612

Rangeley Wallace
Antitrust Division
P.O. Box 481
Washington, D.C. 20044

R.L. Waltz
Nekossa Papers, Inc.
Port Edwards, WI 54469

Rube Warren
City of Martinez
525 Henrietta Street
Martinez, CA 94553

D.E. Watson
P.O. Box 1087R
Morristown, NJ 07960

David I. Williams
Unimin Corp.
50 Locust Avenue
New Canaan, CT 06840

James V. Dolan,Esq.
Vice President - Law
Union Pacific Railroad Co.
Missouri Pacific
Railroad Co.
1416 Dodge Street
Omaha, Nebraska 68179

Thomas E. Twist
100 Justice Building
Salem, OR 97310

John K. Van De Kamp
Department of Justice
1515 K Street
Sacramento, CA 95814

John A. Vuono
2310 Grant Building
Pittsburgh, PA 15219

Weil, Gotshal and Manges
Suite 500
1101 14th St., N.W.
Washington, D.C. 20005

Edward K. Wheeler
1729 H Street, N.W.
Washington, D.C. 20006

Charles H. White, Jr.
Suite 501
1000 Potomac St., N.W.
Washington, D.C. 20007

Wilkins Draying Co.
5853 Florin-Perkins Rd.
Sacramento, CA 95828

Frank H. Spears
520 S. W. Yamhill Street
Suite 800
Portland, OR 97204

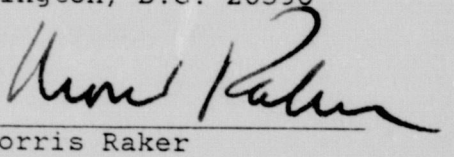
R. Eden Martin
G. Paul Moates
1722 Eye Street, N.W.
Washington, D.C. 20006

Bill R. Moore
Traffic Manager
Tennessee Eastman Co.
Division of Eastman Kodak Co.
P.O. Box 1973
Kingsport, TN 37662

Dickson R. Loos
Holland and Knight
888 17th Street, N.W.
Washington, D.C. 20006

Diane R. Liff, Assistant General Counsel for Litigation
Mary Bennett Reed, Trial Attorney
Office of the General Counsel
C-30, Room 10106
400 Seventh Street, S.W.
Washington, D.C. 20590

John M. Mason, Chief Counsel
Joseph Pomponio, Attorney
Office of the Chief Counsel
RCC-20, Room 5101
Federal Railroad Administration
400 Seventh Street, S.W.
Washington, D.C. 20590



Morris Raker

STEERE TANK LINES, INC.,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and United States of America, Respondents.

Nos. 82-4175, 83-4086, 83-4212 and 83-4322.

United States Court of Appeals, Fifth Circuit.

July 23, 1984.

Petition was filed seeking review of Interstate Commerce Commission's authorization to carrier to transport certain specific commodities. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) ICC is required to consider fitness and willingness of applicants to provide transportation for specific commodities in bulk, and (2) ICC improperly failed to include bulk hauling restrictions in authority granted to carrier to transport certain specific commodities where carrier represented that it did not render and did not intend in the future to render bulk service.

Remanded with instructions.

1. Commerce ⇐85.27(2)

Interstate Commerce Commission is required to consider fitness and willingness of applicants to provide transportation for specific commodities in bulk. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(b)(1)(A).

2. Commerce ⇐85.28(1)

Interstate Commerce Commission improperly failed to include bulk hauling restrictions in authority granted to carrier to transport certain specific commodities where carrier represented that it did not render and did not intend in the future to render bulk service. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(b)(1)(A).

Petitions for Review of Orders of the Interstate Commerce Commission.

Before GOLDBERG, RUBIN, and REAVLEY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The Interstate Commerce Commission requires applicants for certificates as motor common carriers of specific commodities to accept authority to transport such commodities in bulk, whether or not the carrier has demonstrated fitness to do so, has equipment suitable for such transportation, or is willing to accept it, on the basis that a grant with a restriction against carriage in bulk would be unduly restrictive, contrary to the mandate of the Motor Carrier Act of 1980. A carrier who opposed the grant of bulk authority to another carrier argues that the Commission has acted without a showing that the applicant is either fit or willing to transport such commodities in bulk, in violation of the Act's requirement that every applicant be "fit, willing, and able to provide the transportation to be authorized by the certificate"[1] as construed by this court in *American Trucking*

1. 49 U.S.C. § 10922(b)(1)(A).

Associations, Inc. v. ICC.[2] We conclude that the statute requires the Commission to consider the fitness and willingness of the applicant, and that, in these cases, the Commission's insistence upon conferring the broader authority was improper.

I.

In two separate applications, C.D.B. sought authority to transport (1) food and related products and chemical and petroleum products;[3] and (2) chemical and petroleum products, plastic and rubber products, and paper and related products.[4] The first application was unqualified; the second excepted transportation in bulk. Steere Tank Lines, a bulk commodities carrier, appeared in both proceedings to argue that any grants to C.D.B. should exclude transportation in bulk. C.D.B. operates a fleet of more than 100 trucks, all van-type. C.D.B. represented that it does not now render and does not intend in the future to render bulk service. It stated that it would not contest the insertion of a restriction against bulk carriage in the first application and in fact, after Steere objected, requested the ICC to insert such a restriction. C.D.B. also stated that it would accept the issuance of a certificate containing a restriction in accordance with its application in the second.

In the first proceeding, the Commission declined to insert the restriction in either certificate stating, "It is contrary to Commission policy to exclude bulk commodities from specified commodity authorization." In a maneuver that smacks more of gamesmanship than compliance with the statutory mandate, the Commission sought to satisfy the statutory requirement of willingness by giving C.D.B. thirty days either to accept or to reject the unlimited authorization in total. In the second proceeding, the Commission deleted the bulk restrictions from C.D.B.'s request and published the commodity description in the Federal Register notice without it. After an administrative appeal, the Commission failed to reach a majority decision and, in accordance with its Review Board's decision, issued an unrestricted certificate.

II.

[1, 2] To obtain authority to operate as a motor common carrier, an applicant must be "fit, willing, and able" to provide the service proposed. 49 U.S.C. § 10922(b)(1)(A) (Supp. V 1981). In addition, the transportation must "serve a useful public purpose, responsive to a public demand or need." *Id.* at § 10922(b)(1)(B). These are not only requirements exacted of the applicant; they also are limitations on the Commission. The demonstration of fitness is no less essential when the service to be rendered is bulk transportation.[5] "Pub-

2. 659 F.2d 452 (5th Cir.1981), enforced by mandamus, 669 F.2d 957 (5th Cir.1982), *cert. denied*, — U.S. —, 103 S.Ct. 1272, 75 L.Ed.2d 493 (1983).

3. Proceeding Sub. No. 34.

4. Proceeding Sub. No. 48.

5. *American Trucking Associations, Inc. v. ICC*, 659 F.2d at 465.

Commodities are transported in "bulk" if they are transported in a form that is flowable, fungible, and homogeneous, and if they are restrained during transportation only by the confines of the transporting vehicle. *See John J. Mulqueen Contract Carrier Application*, 250 I.C.C. 436, 439 (1942). Commodities such as sand, coal, chemicals and petroleum products are often transported in dump trucks or tank trucks, thus being transported in bulk. However, the same products may be packaged in bags or cans, in which case they would move in nonbulk form.

lic need for the bulk service must also be shown."[6] These findings must be supported by substantial evidence on the record as a whole;[7] and the agency's determinations will be reversed if arbitrary, capricious, or otherwise not in accordance with law.[8]

The Act charges the Commission to "reasonably broaden the categories of property authorized by the carrier's certificate or permit." 49 U.S.C.A. § 10922(i)(1)(B)(i) (West Pamphlet 1983). The Commission is reasonable in reading this provision to imply that the evidence of public need to extend a carrier's authority to embrace additional categories of property need not be as substantial as that deemed requisite for the initial category of property. And, as the District of Columbia Circuit held in *Port Norris Express Company v. I.C.C.*,[9] the same implication of congressional intent supports a like relaxation when authority is extended from a specified commodity in packages to the same commodity in bulk.

In either event, however, fitness must be demonstrated. That a carrier is fit to transport petroleum products does not per se prove its fitness to transport food products. Fitness to carry petroleum products in containers does not alone demonstrate fitness to transport diesel fuel in bulk: Different equipment may be required; different cleaning facilities may be needed; and handling methods, safety regulations, and insurance requirements may vary. Demonstrated fitness and willingness to carry commodities in containers does not alone supply evidence representative of fitness and willingness to transport them in bulk.

In *American Trucking Associations*, therefore, we rejected the Commission's decision to eliminate all bulk restrictions from authorities to transport general commodities. We later noted that an applicant may demonstrate fitness even though it does not have bulk hauling equipment at the time bulk authority is granted, if it is "willing and has the financial resources to obtain the equipment." *Steere Tank Lines, Inv. v. ICC*, 675 F.2d 103, 104 n. 2 (5th Cir.1982). Our analysis was adopted by the Third Circuit in *Port Norris I*, and in *Port Norris III*.[10]

The Commission argues, as it did in *Port Norris III*, that the general commodities-in-bulk rule of *American Trucking Associations* and *Port Norris I* should not be applied to authorities for specific commodities. Differences in equipment, cleaning, safety, and insurance are not so great when specific commodities are involved and the sole issue relates to the transportation of that commodity in containers as compared to its transportation in bulk, it argues. The Commission acknowledges, however, that bulk hauling of some commodities may occasion special concern.

The Commission's key argument is that an unencumbered grant promotes the public interest because the Act was designed

Port Norris Express Co., Inc. v. ICC, 728 F.2d 543, 544 n. 1 (D.C.Cir.1984).

6. *Port Norris Express Co.*, 728 F.2d at 545.

7. 5 U.S.C. § 706(2)(E). See *Bowman Transportation, Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 285–86, 95 S.Ct. 438, 441–42, 42 L.Ed.2d 447 (1974).

8. 5 U.S.C. § 706(2)(A).

9. 728 F.2d 543, 545 (D.C.Cir.1984).

10. *Port Norris Express Co., Inc. v. ICC*, 687 F.2d 803, 808–13 (3d Cir.1982) (*Port Norris I*); *Port Norris Express Co., Inc. v. ICC*, 729 F.2d 204, 207–08 (3d Cir.1984) (*Port Norris III*). *See also Port Norris Express Co., Inc. v. ICC*, 697 F.2d 497 (3d Cir.1982) (*Port Norris II*).

to "remove unnecessary regulation by the Federal Government." The argument carries its own rebuttal: Congress did not deregulate the industry completely. It relaxed certain requirements but it retained substantial regulatory control including the paramount ones: no common carrier may operate without a certificate and no certificate shall be issued unless the Commission finds the carrier fit, willing, and able.[11] We, therefore, conclude that the *American Trucking Associations* analysis is applicable to grants of bulk authority for specific as well as general commodities.

The Commission urges that, because the Act forbids it to "prescribe a condition preventing ... a motor common carrier ... from adding to its equipment and facilities or its transportation *within the scope of the certificate* to satisfy business development and public demand,"[12] it must insist upon bulk authority. This begs the question: the equipment or transportation "within the scope of the certificate" depend on the scope of the certificate. It is equally ingenuous to state, as the Commission did, that, before passage of the Act, it was never required to accept operating restrictions agreed to and proposed by the parties. The Commission is still not required to yield to the whim or manipulation of carriers. It does, however, have a duty to determine whether an applicant has met the statutory requirements. And administrative presumptions or coercion cannot vitiate the standard of "willingness."

The Commission further contends that, because it has authority to require applicants to accept a degree of breadth in the commodities to be transported and the geographic area to be served, it also has authority to require applicants who seek to carry commodities to accept authority to carry them in bulk, citing our *American Trucking Associations* decision. We reject this contention. Our opinion did not approve abandonment of the tripartite standard. Indeed, we held that the guidelines adopted by the ICC must be applied in a reasonably flexible manner to accommodate that standard.[13] Moreover, the elimination of unreasonably restrictive geographic limits and commodities specifications for the same kind of service differ from the requirement that an applicant render two different kinds of service. Bulk transport, as we have mentioned, may involve different kinds of equipment, expertise, and facilities, rather than varying degrees of the same kind of service.

Like the Third Circuit in *Port Norris III*, we leave to the Commission the determination of the amount of evidence required to show fitness to haul specific commodities in bulk. The quantum may indeed vary dependent on the nature of the commodities and other factors. And, again like the Third Circuit, we do not reach out to determine whether the Commission may formulate rules governing the quantum of evidence or whether the nature of some commodities makes fitness to transport them in containers demonstrate fitness to carry the same commodities in bulk. As the Commission has noted, technological developments have narrowed the traditional differences between transportation in bulk and non-bulk.

These technological developments do not, however, affect all kinds of commodities alike. Some commodities may doubtless be

11. *Port Norris I*, 689 F.2d at 806.

12. 49 U.S.C. § 10922(g)(3)(A). [Emphasis supplied.]

13. 659 F.2d at 464–65.

transported in bulk by non-bulk trucks using large collapsible and stackable plastic containers. Such factors may properly be considered in determining a carrier's ability to render bulk service. We hold only that the Commission improperly failed to include a bulk hauling restriction in the authority now before us on the basis of the record presented to the Commission.

For these reasons, we REMAND each of these proceedings to the Commission with instructions to revise the certificates in question so as to exclude from each authority to transport the commodities in bulk or, in lieu thereof, to conduct such further proceedings as may be consistent with this opinion.

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