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(Sub 21)

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SERVICE DATE - MARCH 6, 1997

SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

February 26, 1997

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC TRANSPORTATION — CONTROL —
SOUTHERN PACIFIC TRANSPORTATION COMPANY

NOTICE

A court action, entitled as shown below,
was instituted on or about February 5, 1997,
involving the above-entitled proceeding:

No. 97-70144

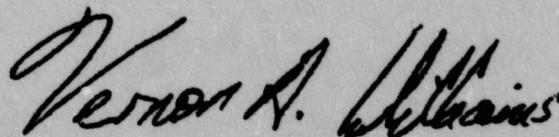
Sieu Mei Tu

V.

Surface Transportation Board

before the

United States Court of Appeals for the Ninth Circuit



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(SUB 21)

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SERVICE DATE - MARCH 11, 1997

SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

February 26, 1997

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC TRANSPORTATION — CONTROL —
SOUTHERN PACIFIC TRANSPORTATION COMPANY

NOTICE

A court action, entitled as shown below,
was instituted on or about February 5, 1997,
involving the above-entitled proceeding:

No. 97-70144

Sieu Mei Tu

v.

Surface Transportation Board

before the

United States Court of Appeals for the Ninth Circuit

VERNON A. WILLIAMS
Secretary

STB

FD

30400

(Sub 21)

12-10-96

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SERVICE DATE

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SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION - CONTROL -
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: November 26, 1996

INTRODUCTION

This proceeding concerns requests by rail employees for labor protective benefits allegedly due because of employer actions taken in anticipation of a rail merger that was not approved by the ICC. The employees (as a class) were given an opportunity to demonstrate that they were harmed by actions taken by the holding company, allegedly in violation of the Interstate Commerce Act (ICA), while the carrier was held in a voting trust pending ICC approval of the consolidation. We conclude that the employees have failed to provide probative evidence that they were harmed by actions of the holding company.

BACKGROUND

In Santa Fe Southern Pacific Corp.-Control-SPT Co., 2 I.C.C.2d 709 (1986) (SFSP I) and 3 I.C.C.2d 926 (1987) (SFSP II), the ICC denied the proposed merger of The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and Southern Pacific Transportation Company (SPT). Before the merger application was

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11323. Therefore, this decision applies the law in effect prior to the ICCTA and citations are to the former sections of the statute, unless otherwise indicated.

filed, the railroads' holding companies were merged to form the Santa Fe Southern Pacific Corporation (SFSP). To avoid unlawful common control of the two railroads pending ICC consideration of the merger proposal, SFSP had arranged for a trustee to acquire the stock of SPT under an ICC-approved independent voting trust.

After the rail merger was denied, SFSP was forced to divest its interest in either Santa Fe or SPT. SFSP sold its interest in SPT to Rio Grande Industries (RGI) under authority granted in Rio Grande Industries, Et Al.-Control-SPT Co. Et Al., 4 I.C.C.2d 834 (1988) (Rio Grande), aff'd sub nom. Kansas City Southern Industries, Inc. v. I.C.C., 902 F.2d 423 (5th Cir. 1990). The voting trust was dissolved on October 13, 1988, when the Rio Grande-SPT acquisition was consummated.

During the Rio Grande proceeding, rail labor interests asserted that certain employees of Santa Fe and SPT had been adversely affected by employer actions taken in anticipation of the proposed Santa Fe-SPT merger and that labor protective conditions should be imposed. The ICC determined that it did not have authority under 49 U.S.C. 11347 to impose conditions for those employees in Rio Grande.² However, the ICC held that it did have continuing jurisdiction over the SPT voting trust to impose additional conditions and thus could impose conditions for those SPT or Santa Fe employees who could demonstrate that they were adversely affected as a consequence of actions taken or orders issued by SFSP.

The ICC thus instituted this sub-numbered proceeding to consider the matter. After comments were filed, the ICC, by decision served February 9, 1989, concluded that: (1) unilateral

² Section 11347 required the ICC to impose protective conditions for the benefit of carrier employees affected by a transaction under 49 U.S.C. 11344-45 or 11346. These transactions included consolidations, mergers and acquisitions of control.

displacement of employees by Santa Fe or SPT management would be governed by applicable collective bargaining agreements; (2) because SFSP was lawfully in control of Santa Fe, any grievances by Santa Fe employees could properly be resolved through collective bargaining agreements; (3) no basis had been shown to justify imposing conditions for the benefit of SPT employees under section 11347; and (4) if actions in anticipation of the merger adverse to SPT employees were shown to have been ordered by SFSP, in violation of section 11343, the adversely affected individuals would have a court remedy under 49 U.S.C. 11705.

On judicial review,³ the court affirmed portions of the ICC's decision, but disagreed that aggrieved SPT employees had available to them a cause of action in the courts under section 11705, citing its earlier decision in Kraus v. Santa Fe Southern Pacific Corp., 878 F.2d 1193 (9th Cir. 1989) (Kraus).⁴ Instead, the court concluded that while 49 U.S.C. 11347 did not require the ICC to impose labor protection for employees, section 11344(c) gave the ICC discretionary power to do so.

On rehearing,⁵ the court found that the labor protective conditions mandated by section 11347 for approved transactions were not appropriate because SFSP was involved in a divestiture, not a section 11343 merger or consolidation. However, the court concluded that the ICC had general discretionary authority to impose appropriate conditions and remanded the case for consideration of this issue. As a result, this proceeding was reopened to give SPT employees (as a class) an opportunity to demonstrate that they were adversely affected as a direct

³ Railway Labor Executives' Assn v. I.C.C., 924 F.2d 961 (9th Cir. 1991).

⁴ The court in Kraus held that section 11705 authorized court enforcement of the merger provisions of the ICA only after the ICC had considered whether the alleged violations occurred.

⁵ Railway Labor Executives' Ass'n v. I.C.C., 958 F.2d 252 (9th Cir. 1992) (superseding previous opinion).

consequence of actions taken or orders issued by SFSP in contemplation of the proposed Santa Fe-SPT merger.

The Brotherhood of Maintenance of Way Employees (BMWE) and International Association of Machinists and Aerospace Workers (IAMAW) (collectively, the unions) filed a brief and evidence. SPT and the Santa Fe Pacific Corporation (SFP) replied.⁶ The unions filed a brief in rebuttal. In addition, Sieu Mei Tu (Tu), a former employee of the Pacific Fruit Express (PFE), an SPT subsidiary, participated in this proceeding as an aggrieved employee.⁷ Her husband joined in her request for conditions.

THE STANDARD OF REVIEW

Union Arguments. The unions take issue with the standard of review as articulated in the prior decision. They contend that requiring specific evidence of adverse effect resulting from SFSP orders in contemplation of the merger is a standard which cannot be met and which amounts to "an unlawful prejudgment" that labor protective conditions will not be imposed in this case. The unions argue that it is highly unlikely that SFSP, as a sophisticated corporation, would have issued any direct order in blatant violation of the voting trust, but that in any event, they were not able to find any "written trace of such communication" through discovery.

⁶ After the rail merger was denied and Rio Grande acquired SPT, SFSP changed its name to Santa Fe Pacific Corporation.

⁷ A large portion of Tu's filings, responded to by SPT and SFP, concern her allegation that PFE employees were SPT employees. We need not decide this issue unless we determine that discretionary employee protective conditions should be imposed on the transaction.

Tu also seeks to demonstrate that the loss of her individual position was a consequence of actions taken or orders issued by SFSP in contemplation of the proposed Santa Fe-SPT merger. Although we sought information on whether employees as a class were adversely affected by SFSP orders, Tu's submissions that address specific evidence with respect to those actions or orders issued by SFSP which may have affected SPT operations and work-related assignments are considered in the context of the unions' submissions on these issues.

In lieu of requiring specific evidence of actions or orders issued by SFSP that may have affected SPT operations and work-related assignments, the unions would apply a different standard. They propose that we interpret the phrase "actions taken or orders issued" to mean a mutually understood course of dealing between SPT and SFSP wherein SPT communicated its business decisions to SFSP and attempted to conform those decisions to the best interests of the proposed merged company. They submit that such behavior would violate the voting trust, which prohibited direct or indirect arrangements or dealing between SFSP and SPT.

In support of this interpretation, the unions contend that this standard was applied by the trial court and affirmed on appeal in Kraus. There, in assessing a tort claim of two former SPT managers under state law, the court concluded that, although SFSP did not issue direct orders to SPT, the course of dealing established "a willingness on [SPT's] part to find ways to comply with the cost-cutting desires of the group that seemed only a regulatory approval away from becoming [SPT's] master." Kraus, 878 F.2d at 1199. The unions urge us similarly to find that contacts between the two which indicated a desire on SPT's part to cut costs and to make it an attractive merger partner should be deemed "actions taken or orders issued by SFSP" regarding labor matters.

Railroad Arguments. In reply, SFP argues that the unions did not contest the appropriateness of the standard of review until after they completed discovery and determined that their evidence was insufficient to meet their burden of proof. SFP urges that we reject the unions' belated attempt to establish a different standard.

According to SFP, the unions' standard of a mutually understood course of dealing is inappropriate for the

circumstances of this case: because the voting trust is the mechanism by which protective conditions might be imposed, SFP's position is that the unions must show that the voting trust was violated, that is, that SFSP directed SPT's conduct. Thus, SFP argues that requiring specific evidence of actions or orders to show that SFSP exercised improper control over SPT is sensible because the purpose of the voting trust was to insulate SPT from SFSP's control.

Finally, both SFP and SPT argue that, from a policy standpoint, adopting the unions' standard would be unwise. SFP predicts that railroads would be hesitant even to undertake merger discussions for fear that any employee who suffers a change in employment status during the negotiation period would assert that the merger discussions constitute a mutually understood course of dealing. In addition to the chilling effect for railroad mergers outside of the voting trust context, SPT asserts that the unions' standard would signal the death-knell for use of the voting trust in railroad mergers because of the potential exposure to labor protection liability.

Discussion and Conclusion. We agree with SFP and SPT that the standard articulated by the ICC in this matter is appropriate and should not be changed. Our authority to impose conditions in this case derives solely from the ICC's "continuing jurisdiction over SFSP from the time the voting trust was in effect, through the time the merger was denied, until the time the divestiture was consummated" (June 18, 1992 decision, slip op. at 2). To justify the extraordinary imposition of relief here, we would have to find that the terms of the voting trust were not honored, and that consequently SFSP unlawfully controlled SPT, even if for only limited purposes. The unions' proposed standard does not provide for the necessary cause-and-effect relationship between

orders of SFSP, allegedly in control, and SPT, allegedly controlled.

The standard proffered by the unions also assumes that adverse employee actions somehow establish that SFSP was improperly influencing SPT's labor policy. That assumption ignores the very real possibility that legitimate business considerations unrelated to the proposed merger prompted the employee reductions. SPT should have taken steps to assure its viability irrespective of whether the merger was approved. Without an affirmative showing that SFSP was dictating these actions, it would not be reasonable to infer that the actions were taken for illegitimate purposes absent other factors (such as if the actions were against SPT's own best interests) from which it might be possible to draw a conclusion of outside control.

We also agree with SFP and SPT that adoption of the suggested standard of "mutually understood course of dealing" could jeopardize the legitimate use of voting trusts and inhibit merger agreements generally, even if a voting trust is not used. Carriers contemplating consolidation might well fear that operating and personnel changes which either may take independently might later be used as the basis for imposing labor conditions on a merger which is not approved.

Notwithstanding any belated claims to the contrary, we conclude that the standard previously imposed in this proceeding is appropriate. The relevant issue is whether, during the pendency of the voting trust, SFSP exercised unlawful control of SPT in such a way as to affect its labor policy.

THE EVIDENCE

Union Argument. The unions refer to documents received in discovery⁸ as proving the existence of what they characterize as a mutual course of action on the part of SPT and SFSP that adversely affected BMW- and IAMAW-represented employees. Through the discovery of documents containing questions posed by SFSP's Chairman and Chief Executive Officer and answered by SPT in July 1985, and answers to interrogatories, the unions learned that, as a result of an SPT equipment maintenance schedule instituted in January 1985, 135 IAMAW employees had been furloughed during 1985. In addition, track maintenance and route upgrades had been reduced and limited, resulting in the abolition of at least 150 BMW positions during the first half of 1985. Furthermore, in response to interrogatories, they learned that 49 BMW positions on the Northwestern Pacific Railroad Company (NWP), an SPT subsidiary, had been eliminated between December 1984 and April 1985. According to the unions, this cost cutting continued into 1986, when SPT informed SFSP that it intended to eliminate approximately 4,000 union employees' jobs during that year.

The unions contend that any claims which SPT might make that these programs were undertaken due to financial problems and a decline in business are without merit, because SFSP and SPT are estopped from alleging that SPT was in serious financial straits,

⁸ On SFP's motion, a protective order was issued on September 3, 1992, to protect against the disclosure of confidential, proprietary or commercially sensitive business information and data obtained by any party through discovery or otherwise during the course of this proceeding. Although most of the evidence we must consider was filed under seal, pursuant to the protective order, we have no choice but to refer to that information to explain rationally our decision. We do not believe that any of the information referred to in this decision is confidential, proprietary or commercially sensitive.

citing the ICC's decision in SFSP II, 3 I.C.C.2d at 932-33.⁹ They also note that, if SPT needed money, it could have asked SFSP for any necessary funds,¹⁰ but it never did so. In any event, the unions view the communications between SPT and SFSP management as indicating that the cost-cutting actions were made in consideration of SPT's place in a merged system.¹¹

The unions allege that the reductions-in-force mentioned above evince an adverse effect suffered by those classes of employees in anticipation of the proposed merger. In their view, the class-wide effect fully justifies the exercise of the ICC's discretion to impose conditions. In sum, the unions submit that they have made a sufficient showing of adverse effect to warrant conditions for their members.

Other documents were submitted as evidence of contacts and policy directives by SFSP to SPT. These include: SFSP's 1984 Annual Report; a 1985 Audit Committee report; the verified statement of the vice-presidents for labor relations of Santa Fe and SPT submitted with the merger application, supporting the application's labor impact exhibit (as required by the ICC's consolidation regulations); a press release describing the anticipated benefits of consolidation including reduced labor requirements; a confidential memo from SPT to SFSP's officers describing SPT's anticipated course of action in 1987 to be positioned as either a merger partner or a stand-alone entity, which includes force reductions; and SFSP's proposed responses to

⁹ In SFSP II, the ICC stated: "Moreover, applicants have expressly abandoned the 'failing firm' theory as a supporting basis for merger. They acknowledge that both ATSF and SPT can stand alone."

¹⁰ In approving the voting trust, the ICC noted that SFSP had committed to supply any necessary funds to SPT.

¹¹ The unions point to communications between SFSP and SPT regarding changes in SPT's operations. These, they claim, led to the reductions-in-force and were carried out by SPT with the knowledge of, and in furtherance of, SFSP's plans for the merger.

the press as to the labor effects of a merger. In addition, Tu submitted documents purporting to show a close corporate relationship between PFE and SPT such that PFE's employees were in fact employees of SPT and who, like the union members, were adversely affected by SPT's actions allegedly directed by SFSP.

Railroad Arguments. In response to the submissions of the unions and Tu, SFP submitted evidence to show that any reductions-in-force SPT experienced during the voting trust were due not to the proposed merger, but rather to the same structural conditions in the industry as a whole which led to overall decreases in employment. In fact, SFP states that reductions on SPT were less severe than the reductions made by most other railroads. SFP's evidence shows that SPT's employment fell by 5,975 employees (20.1%), compared to 74,504 employees (23.1%) industrywide. Of the 5,975 SPT employees, 3,917 (71.5%) were affected in 1987, after the ICC had denied the merger.

SFP avers more specifically that, from 1985 to 1986, SPT employment of maintenance-of-way (MOW) and maintenance-of-equipment (MOE) personnel actually increased. SFP indicates that, during 1984-87, overall rail industry MOW employment declined by 15,762 (23.8%), compared to a decline on SPT of 248 (5.1%). In 1986, SPT's average employment in this category increased by 692 employees. SFP shows similar results during the same period for MOE employees. Overall employment in the rail industry for these workers declined by 14,163 (23.1%), while SPT's employment declined by 883 (18.1%). In 1986, SPT's average employment in this category increased by 54 employees. Similar data were presented based on ton-miles (a measure of work performed) for overall employment as well as for MOW and MOE workers.

SPT states that business circumstances prompted the reductions in its work force. It notes the ICC's findings in SFSP I that it was, and for some years had been, a marginal carrier, 2 I.C.C.2d at 833, and the ICC's findings in Rio Grande that SPT had suffered substantial intramodal and intermodal competition and had been forced to supplement operating revenue with proceeds from the sale of real estate, 4 I.C.C.2d at 942. SPT states that, in the face of its problems, it attempted to manage its system so that it could cope with conditions and remain an effective competitor.

SPT introduced a study of its actions between 1978 and 1988 in relation to other western Class I carriers. The study was performed jointly by an outside consultant and SPT's Managing Director for Strategic Planning. They concluded:

[A]ctions taken by SPTC management during the period of the independent voting trust were reasonable within the competitive environment SPTC faced, were similar in nature to those taken by other western Class I railroads facing many of the same business circumstances, and were consistent with SPTC's economic self-interest as an independent railroad.

The study notes a difficult business environment influenced by industry deregulation, increased competition, loss of traditional traffic sources, and lack of certainty as to SPT's future. During the period from 1978 to 1988, SPT's revenues were growing more slowly than those of other western Class I railroads, while its costs were increasing at about the same rate. Consequently, SPT's net revenue from rail operations suffered relative to its competitors. During the same period, SPT's employee productivity, when measured by revenue per employee, net ton-miles per employee, and carloads per employee, was lower than for the other western Class I railroads. Thus, SPT had to reduce employment to improve productivity. Nevertheless, during the period from 1983-87, when the voting

trust was in effect, average employee levels relative to 1978 were higher for SPT than for its competitors.

Specifically with regard to MOW employees, the study found that, SPT's MOW employee force reductions were prudent in light of its declining traffic volume, and, if anything, on the cautious side relative to other western Class I railroads. SPT submits that the study strongly contradicts the unions' assertion that the force reductions were directed by SFSP or were in any way contrary to the actions which SPT management unilaterally and logically should have taken to serve SPT's own independent business interests.

Turning to the specific evidence submitted by the unions, SPT states that many of the 149 MOE employees that left SPT during 1985 left because of resignations, discharges for cause, furloughs, severance, retirements, and so forth, and that, in any event, 139 of the 149 positions had been eliminated by June 1985, i.e., before the inquiry from SFSP's Chairman in July 1985 asking whether any equipment programs could be deferred. The MOW employee data, SPT states, directly contradicts the unions' theory that SFSP was forcing SPT to hold down employment levels during the voting-trust period: from January 1985 to September 1986, the number of BMW-represented employees increased by 649 positions; more specifically, from July 1985 (when SFSP's Chairman sent the letter to SPT's Chairman about deferring equipment programs) to September 1986, the number increased by 186.

SPT argues that the correspondence relied upon by the unions shows only that (1) SPT's Chairman reported certain historical information to SFSP's Chairman, and (2) the former advised the latter that SPT would not do certain things which SFSP might have thought desirable. SPT views the correspondence as indicative of

SPT's independence, and not of any responsiveness to SFSP direction.

Union Rebuttal. In rebuttal, the unions characterize the explanations submitted by SFP and SPT as after-the-fact rationalizations for their actions. They argue that SFP and SPT did not submit any documentary evidence created during the pendency of the voting trust to support their claim that their behavior was an innocuous product of "market forces." Moreover, in the unions' view, the employees are not required to produce a "smoking gun" document clearly and unequivocally stating SFSP's orders to SPT.

To the contrary, the unions state, in Kraus, 878 F.2d at 1199, the court of appeals found that the evidence supported a jury verdict that the defendants interfered in SPT's business relationships to avoid the costs of potential post-merger approval labor protection and that SPT was willing to comply with defendant's desires. Based on their contention that SFP is collaterally estopped from denying that SFSP interfered in SPT's management, the unions apparently see the issue here as whether SPT's actions adverse to union workers can reasonably be inferred as having been taken in response to SFSP's cost-cutting desires, which were proved in Kraus.

DISCUSSION AND CONCLUSIONS

Based upon the evidence presented, we find that the employees (as a class) have failed to establish that they were adversely affected as a direct consequence of actions taken or orders issued by SFSP in contemplation of the proposed merger.

Collateral Estoppel. Initially, we will address the issue of collateral estoppel,¹² which was raised by the unions. They urge us to use the Kraus verdict offensively,¹³ by finding that SFP and SPT are estopped from denying that SFSP interfered in SPT's business decisions.

We find that the use of collateral estoppel would be inappropriate here. The Court of Appeals in Kraus dismissed plaintiffs' Federal claim of unlawful control over SPT in violation of 49 U.S.C. 11343. This is the relevant issue here; as the court noted, it is entirely distinct from the issue involved in the state tort proceeding (whether SFSP interfered with SPT's economic relationships with its employees).

In rejecting defendants' contention that the Interstate Commerce Act preempted the state law claim raised by the plaintiffs, the court in Kraus concluded that a violation of section 11343 is not an essential element of the state law claim of tortious interference with economic relationships. The court noted that, to be found liable under the state law claim, defendants "need not have 'controlled' Southern Pacific; rather, they need only have wrongfully interfered with plaintiffs' economic relationships." Kraus, 878 F.2d at 1200. Because the

¹² Collateral estoppel (also referred to as "issue preclusion"), like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (Parklane).

¹³ Offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant. Id.

issues litigated in Kraus differ significantly from the relevant issues here, this is not a proper instance for the offensive use of collateral estoppel.

Furthermore, SPT was not a defendant in that case on either the Federal or state cause of action with regard to the termination of the two plaintiffs. Because "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard," Parklane, 439 U.S. at 327, citing Blonder-Tongue v. University Foundation, 402 U.S. 313, 329 (1971) and Hansberry v. Lee, 311 U.S. 32, 40 (1940), no findings in Kraus may be used to make a case against SPT here.

The Evidence. Turning to evidence in this case, the employment data relied upon by the unions show that from January 1985 to September 1986, MOW employees on SPT increased. Although MOE employees decreased by 149 positions (from 1,349 to 1,200), SPT attributes the decrease to necessary cost-cutting measures due to its poor financial condition as well as to low employee productivity, traffic declines, competition, and other factors not related to the merger. Moreover, 139 of the 149 positions were eliminated prior to the mid-1985 correspondence from SFSP to SPT,¹⁴ and comparable cost cutting was pursued in areas other than labor.

The unions ask us to draw inculpatory inferences about the motivation behind SPT's actions. However, the evidence indicates that SPT's labor-reducing actions were motivated by its rational self-interest in preserving and enhancing its position in the industry. SPT presented evidence that its actions were consistent with industry conditions and trends between 1983 and

¹⁴ The bare data also do not reflect the number of employee reductions attributable to resignations, retirements, discharges for cause, and other normal events.

1988, when major reductions in the railroad industry's work force occurred because of traffic declines and increased competition, among other reasons. In fact, SPT's workforce reductions were somewhat lower than those of Class I railroads overall.

The unions attack SPT's study as an after-the-fact rationalization and submit that contemporaneous documents should have been produced to substantiate the claim that SPT's actions were not dictated by SFSP. The fact that the study was prepared after the events in question does not detract from the accuracy of the data in the study or the motivation that SPT attributes to its management. It is highly unlikely that documents would have been prepared to memorialize SPT's motivation when there was no pending question concerning SPT's labor actions. Moreover, the unions have not presented any contemporaneous documents to show that SPT was not acting in its self-interest or was acting under the control of SFSP. The unions claim that it is highly unlikely that the merger parties would have left behind a "smoking gun": by the same token, there is no reason to believe that the merger parties would have prepared documents to the contrary, which would be available to refute the unions' charges.

SPT's failure to seek financial assistance from SFSP should not have any bearing upon our consideration of the actions the railroad did take to reduce operating expenses. Additional money from SFSP would have been warranted if conditions justified a higher level of MOW and MOE spending. SPT's study contains a strong showing that it responded to conditions rationally, taking the same general kinds of actions as other Class I carriers, except perhaps that it was too cautious in reducing MOE and MOW activity during the relevant time period. While the unions disagree, they have not shown that SPT's decisions were dictated by SFSP.

We draw nothing conclusive from the fact that some communications occurred between SPT and SFSP, and that some changes in SPT employment occurred. The timing and content of the communications and nature of SPT's changes in employment do not meet the established standard for this proceeding, or for that matter, even the unions' alternative standard. The evidence is persuasive that SPT's cost-cutting actions during the relevant period were in keeping with its needs and consistent with those of other Class I carriers. The unions have failed to bolster their case by any substantive findings from the communications and the employment changes themselves. We have not seen any reliable evidence that the actions taken by SPT were ordered by SFSP, or that SFSP was controlling SPT's decisions at the time.

Employees (as a class) were provided an opportunity to present persuasive evidence on the relevant issue, that is, whether, during the pendency of the voting trust, SFSP exercised unlawful control of SPT so as to affect its labor policy. They have failed to do so. We are unpersuaded by the implication in their pleadings that this was an impossible burden and thus that the ICC's words should not be taken literally. The language used in the earlier decision was carefully chosen to frame the issue in a manner appropriate to the unique circumstances of whether labor conditions should be imposed on a failed merger where any changes in employment were presumably made pursuant to existing collective bargaining agreements. The burden imposed was not insurmountable. Written materials are not the only way the employees could have met the established burden. Depositions could have been taken from managerial personnel who worked for SFSP, Santa Fe, and SPT at the time to elicit testimony showing improper influence of SPT's labor policy. Such statements, if not wholly supportive, might have been bolstered by circumstantial evidence such as a clear showing that SPT was acting contrary to its own self-interest in the job cuts it made

and thus must have been acting under the direction of an outside influence.

Moreover, the unions have not satisfied the burden under even their own standard. The dates of the communications cited by the unions as the basis for their case do not create a logical cause-and-effect relationship with the actions complained of; many of the job actions occurred prior to the communications, and in some instances, employment actually increased after the cited correspondence.¹⁵ In addition, SPT's responses do not contain any implication that it considered itself under SFSP's control. While the unions rely heavily on the evidence of relevant force reductions, the timing of the communications and the operating changes suggests no cause-and-effect relationship.

The unions' evidence and argument also ignore the need for cost-cutting as a necessary part of management's job, no less so during the pendency of a merger proceeding. With or without ICC approval of the merger, SPT reasonably should have taken steps to assure its viability; it would either merge with Santa Fe or have to find another disposition to allow dissolution of the voting trust.

With regard to Tu, she has not shown any causal connection between the communications between SPT and SFP and her furlough from employment by PFE. The communications between SPT and SFP occurred in July 1985. A report prepared in June 1985 by T. D.

¹⁵ Tu cites documents, including verified statements submitted with the merger application and press releases prepared for use during the pendency of the proceeding, to demonstrate unlawful control. She fails to recognize that, in seeking approval of a merger, applicants must demonstrate the expected effect of the transaction on employees, as well as the anticipated savings which in part lead to the public benefits of the transaction. Such required evidentiary submissions cannot logically be used to demonstrate undesirable communications or unlawful control. Press releases were presumably prepared to inform the public about the nature of the presentation lawfully submitted to the ICC.

Ellen, General Manager of PFE, entitled "The Future of the Perishable Business and PFE" (the Report) (which was put into the record by both SPT and Tu), shows that SPT was actively considering the disposition of PFE for independent business reasons before the July communications between SPT and SFP. The Report makes clear that by 1982, as a result of the deregulation that occurred after the Staggers Act of 1980 was enacted, PFE was confronted with serious structural problems in the perishables business. At that time, PFE employed approximately 500 persons to service an under-utilized fleet of 5,000 refrigerated freight cars. By May 1985, PFE had reduced employment to 250 persons and was handling the same volume of business it had in 1982. The Report describes various attempts that were made between 1982 and 1985 to make PFE stable and profitable, but by 1985 PFE could not provide service at less than the cost to produce that service. Thus, by June 1985, SPT had already concluded that PFE was not a viable enterprise and was considering actions to reduce the cash drain at PFE well before the communications between SPT and SFP in July 1985. After analyzing its options, SPT decided to eliminate PFE as a separate entity and fold back its remaining operations into SPT. As a result of this decision, Tu was laid off, along with several other employees, in August 1985. We conclude that Tu was laid off because of the need to eliminate losses at PFE and that SPT's actions with respect to PFE would have occurred even if there had been no proposed merger. Therefore, Tu would not be entitled to employee protective benefits even if she were considered to be an employee of SPT.

The unions and Tu have not presented evidence sufficient to link SPT's cost-cutting measures to directions from SFSP to enable us to conclude that SFSP and SPT violated the ICA or the conditions of the ICC's voting trust that SPT continue to operate independently of SFSP during the pendency of the merger proceeding before the ICC. Accordingly, their requests for us to

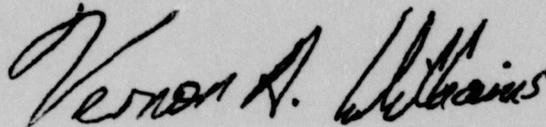
exercise our general discretionary conditioning power to impose employee protective conditions will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request of BMW and IAMAW for employee protective conditions in this proceeding is denied.
2. The request of Sieu Mei Tu for employee protective conditions in this proceeding is denied.
3. This proceeding is discontinued.
4. This decision is effective on its date of service.

By the Board, Chairman Morgan, Vice Chairman Simmons, and
Commissioner Owen.



Vernon A. Williams
Secretary

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SERVICE DATE
DEC 10 1996

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION - CONTROL -
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: November 26, 1996

INTRODUCTION

This proceeding concerns requests by rail employees for labor protective benefits allegedly due because of employer actions taken in anticipation of a rail merger that was not approved by the ICC. The employees (as a class) were given an opportunity to demonstrate that they were harmed by actions taken by the holding company, allegedly in violation of the Interstate Commerce Act (ICA), while the carrier was held in a voting trust pending ICC approval of the consolidation. We conclude that the employees have failed to provide probative evidence that they were harmed by actions of the holding company.

BACKGROUND

In Santa Fe Southern Pacific Corp.-Control-SPT Co., 2 I.C.C.2d 709 (1986) (SFSP I) and 3 I.C.C.2d 926 (1987) (SFSP II), the ICC denied the proposed merger of The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and Southern Pacific Transportation Company (SPT). Before the merger application was

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11323. Therefore, this decision applies the law in effect prior to the ICCTA and citations are to the former sections of the statute, unless otherwise indicated.

filed, the railroads' holding companies were merged to form the Santa Fe Southern Pacific Corporation (SFSP). To avoid unlawful common control of the two railroads pending ICC consideration of the merger proposal, SFSP had arranged for a trustee to acquire the stock of SPT under an ICC-approved independent voting trust.

After the rail merger was denied, SFSP was forced to divest its interest in either Santa Fe or SPT. SFSP sold its interest in SPT to Rio Grande Industries (RGI) under authority granted in Rio Grande Industries, Et Al. - Control - SPT Co. Et Al., 4 I.C.C.2d 834 (1988) (Rio Grande), aff'd sub nom. Kansas City Southern Industries, Inc. v. I.C.C., 902 F.2d 423 (5th Cir. 1990). The voting trust was dissolved on October 13, 1988, when the Rio Grande-SPT acquisition was consummated.

During the Rio Grande proceeding, rail labor interests asserted that certain employees of Santa Fe and SPT had been adversely affected by employer actions taken in anticipation of the proposed Santa Fe-SPT merger and that labor protective conditions should be imposed. The ICC determined that it did not have authority under 49 U.S.C. 11347 to impose conditions for those employees in Rio Grande.² However, the ICC held that it did have continuing jurisdiction over the SPT voting trust to impose additional conditions and thus could impose conditions for those SPT or Santa Fe employees who could demonstrate that they were adversely affected as a consequence of actions taken or orders issued by SFSP.

The ICC thus instituted this sub-numbered proceeding to consider the matter. After comments were filed, the ICC, by decision served February 9, 1989, concluded that: (1) unilateral

² Section 11347 required the ICC to impose protective conditions for the benefit of carrier employees affected by a transaction under 49 U.S.C. 11344-45 or 11346. These transactions included consolidations, mergers and acquisitions of control.

displacement of employees by Santa Fe or SPT management would be governed by applicable collective bargaining agreements; (2) because SFSP was lawfully in control of Santa Fe, any grievances by Santa Fe employees could properly be resolved through collective bargaining agreements; (3) no basis had been shown to justify imposing conditions for the benefit of SPT employees under section 11347; and (4) if actions in anticipation of the merger adverse to SPT employees were shown to have been ordered by SFSP, in violation of section 11343, the adversely affected individuals would have a court remedy under 49 U.S.C. 11705.

On judicial review,³ the court affirmed portions of the ICC's decision, but disagreed that aggrieved SPT employees had available to them a cause of action in the courts under section 11705, citing its earlier decision in Kraus v. Santa Fe Southern Pacific Corp., 878 F.2d 1193 (9th Cir. 1989) (Kraus).⁴ Instead, the court concluded that while 49 U.S.C. 11347 did not require the ICC to impose labor protection for employees, section 11344(c) gave the ICC discretionary power to do so.

On rehearing,⁵ the court found that the labor protective conditions mandated by section 11347 for approved transactions were not appropriate because SFSP was involved in a divestiture, not a section 11343 merger or consolidation. However, the court concluded that the ICC had general discretionary authority to impose appropriate conditions and remanded the case for consideration of this issue. As a result, this proceeding was reopened to give SPT employees (as a class) an opportunity to demonstrate that they were adversely affected as a direct

³ Railway Labor Executives' Assn v. I.C.C., 924 F.2d 961 (9th Cir. 1991).

⁴ The court in Kraus held that section 11705 authorized court enforcement of the merger provisions of the ICA only after the ICC had considered whether the alleged violations occurred.

⁵ Railway Labor Executives' Ass'n v. I.C.C., 958 F.2d 252 (9th Cir. 1992) (superseding previous opinion).

consequence of actions taken or orders issued by SFSP in contemplation of the proposed Santa Fe-SPT merger.

The Brotherhood of Maintenance of Way Employees (BMWE) and International Association of Machinists and Aerospace Workers (IAMAW) (collectively, the unions) filed a brief and evidence. SPT and the Santa Fe Pacific Corporation (SFP) replied.⁶ The unions filed a brief in rebuttal. In addition, Sieu Mei Tu (Tu), a former employee of the Pacific Fruit Express (PFE), an SPT subsidiary, participated in this proceeding as an aggrieved employee.⁷ Her husband joined in her request for conditions.

THE STANDARD OF REVIEW

Union Arguments. The unions take issue with the standard of review as articulated in the prior decision. They contend that requiring specific evidence of adverse effect resulting from SFSP orders in contemplation of the merger is a standard which cannot be met and which amounts to "an unlawful prejudgment" that labor protective conditions will not be imposed in this case. The unions argue that it is highly unlikely that SFSP, as a sophisticated corporation, would have issued any direct order in blatant violation of the voting trust, but that in any event, they were not able to find any "written trace of such communication" through discovery.

⁶ After the rail merger was denied and Rio Grande acquired SPT, SFSP changed its name to Santa Fe Pacific Corporation.

⁷ A large portion of Tu's filings, responded to by SPT and SFP, concern her allegation that PFE employees were SPT employees. We need not decide this issue unless we determine that discretionary employee protective conditions should be imposed on the transaction.

Tu also seeks to demonstrate that the loss of her individual position was a consequence of actions taken or orders issued by SFSP in contemplation of the proposed Santa Fe-SPT merger. Although we sought information on whether employees as a class were adversely affected by SFSP orders, Tu's submissions that address specific evidence with respect to those actions or orders issued by SFSP which may have affected SPT operations and work-related assignments are considered in the context of the unions' submissions on these issues.

In lieu of requiring specific evidence of actions or orders issued by SFSP that may have affected SPT operations and work-related assignments, the unions would apply a different standard. They propose that we interpret the phrase "actions taken or orders issued" to mean a mutually understood course of dealing between SPT and SFSP wherein SPT communicated its business decisions to SFSP and attempted to conform those decisions to the best interests of the proposed merged company. They submit that such behavior would violate the voting trust, which prohibited direct or indirect arrangements or dealing between SFSP and SPT.

In support of this interpretation, the unions contend that this standard was applied by the trial court and affirmed on appeal in Kraus. There, in assessing a tort claim of two former SPT managers under state law, the court concluded that, although SFSP did not issue direct orders to SPT, the course of dealing established "a willingness on [SPT's] part to find ways to comply with the cost-cutting desires of the group that seemed only a regulatory approval away from becoming [SPT's] master." Kraus, 878 F.2d at 1199. The unions urge us similarly to find that contacts between the two which indicated a desire on SPT's part to cut costs and to make it an attractive merger partner should be deemed "actions taken or orders issued by SFSP" regarding labor matters.

Railroad Arguments. In reply, SFP argues that the unions did not contest the appropriateness of the standard of review until after they completed discovery and determined that their evidence was insufficient to meet their burden of proof. SFP urges that we reject the unions' belated attempt to establish a different standard.

According to SFP, the unions' standard of a mutually understood course of dealing is inappropriate for the

circumstances of this case: because the voting trust is the mechanism by which protective conditions might be imposed, SFP's position is that the unions must show that the voting trust was violated, that is, that SFSP directed SPT's conduct. Thus, SFP argues that requiring specific evidence of actions or orders to show that SFSP exercised improper control over SPT is sensible because the purpose of the voting trust was to insulate SPT from SFSP's control.

Finally, both SFP and SPT argue that, from a policy standpoint, adopting the unions' standard would be unwise. SFP predicts that railroads would be hesitant even to undertake merger discussions for fear that any employee who suffers a change in employment status during the negotiation period would assert that the merger discussions constitute a mutually understood course of dealing. In addition to the chilling effect for railroad mergers outside of the voting trust context, SPT asserts that the unions' standard would signal the death-knell for use of the voting trust in railroad mergers because of the potential exposure to labor protection liability.

Discussion and Conclusion. We agree with SFP and SPT that the standard articulated by the ICC in this matter is appropriate and should not be changed. Our authority to impose conditions in this case derives solely from the ICC's "continuing jurisdiction over SFSP from the time the voting trust was in effect, through the time the merger was denied, until the time the divestiture was consummated" (June 18, 1992 decision, slip op. at 2). To justify the extraordinary imposition of relief here, we would have to find that the terms of the voting trust were not honored, and that consequently SFSP unlawfully controlled SPT, even if for only limited purposes. The unions' proposed standard does not provide for the necessary cause-and-effect relationship between

orders of SFSP, allegedly in control, and SPT, allegedly controlled.

The standard proffered by the unions also assumes that adverse employee actions somehow establish that SFSP was improperly influencing SPT's labor policy. That assumption ignores the very real possibility that legitimate business considerations unrelated to the proposed merger prompted the employee reductions. SPT should have taken steps to assure its viability irrespective of whether the merger was approved. Without an affirmative showing that SFSP was dictating these actions, it would not be reasonable to infer that the actions were taken for illegitimate purposes absent other factors (such as if the actions were against SPT's own best interests) from which it might be possible to draw a conclusion of outside control.

We also agree with SFP and SPT that adoption of the suggested standard of "mutually understood course of dealing" could jeopardize the legitimate use of voting trusts and inhibit merger agreements generally, even if a voting trust is not used. Carriers contemplating consolidation might well fear that operating and personnel changes which either may take independently might later be used as the basis for imposing labor conditions on a merger which is not approved.

Notwithstanding any belated claims to the contrary, we conclude that the standard previously imposed in this proceeding is appropriate. The relevant issue is whether, during the pendency of the voting trust, SFSP exercised unlawful control of SPT in such a way as to affect its labor policy.

THE EVIDENCE

Union Argument. The unions refer to documents received in discovery⁸ as proving the existence of what they characterize as a mutual course of action on the part of SPT and SFSP that adversely affected BMW- and IAMAW-represented employees. Through the discovery of documents containing questions posed by SFSP's Chairman and Chief Executive Officer and answered by SPT in July 1985, and answers to interrogatories, the unions learned that, as a result of an SPT equipment maintenance schedule instituted in January 1985, 135 IAMAW employees had been furloughed during 1985. In addition, track maintenance and route upgrades had been reduced and limited, resulting in the abolition of at least 150 BMW positions during the first half of 1985. Furthermore, in response to interrogatories, they learned that 49 BMW positions on the Northwestern Pacific Railroad Company (NWP), an SPT subsidiary, had been eliminated between December 1984 and April 1985. According to the unions, this cost cutting continued into 1986, when SPT informed SFSP that it intended to eliminate approximately 4,000 union employees' jobs during that year.

The unions contend that any claims which SPT might make that these programs were undertaken due to financial problems and a decline in business are without merit, because SFSP and SPT are estopped from alleging that SPT was in serious financial straits,

⁸ On SFP's motion, a protective order was issued on September 3, 1992, to protect against the disclosure of confidential, proprietary or commercially sensitive business information and data obtained by any party through discovery or otherwise during the course of this proceeding. Although most of the evidence we must consider was filed under seal, pursuant to the protective order, we have no choice but to refer to that information to explain rationally our decision. We do not believe that any of the information referred to in this decision is confidential, proprietary or commercially sensitive.

citing the ICC's decision in SFSP II, 3 I.C.C.2d at 932-33.⁹ They also note that, if SPT needed money, it could have asked SFSP for any necessary funds,¹⁰ but it never did so. In any event, the unions view the communications between SPT and SFSP management as indicating that the cost-cutting actions were made in consideration of SPT's place in a merged system.¹¹

The unions allege that the reductions-in-force mentioned above evince an adverse effect suffered by those classes of employees in anticipation of the proposed merger. In their view, the class-wide effect fully justifies the exercise of the ICC's discretion to impose conditions. In sum, the unions submit that they have made a sufficient showing of adverse effect to warrant conditions for their members.

Other documents were submitted as evidence of contacts and policy directives by SFSP to SPT. These include: SFSP's 1984 Annual Report; a 1985 Audit Committee report; the verified statement of the vice-presidents for labor relations of Santa Fe and SPT submitted with the merger application, supporting the application's labor impact exhibit (as required by the ICC's consolidation regulations); a press release describing the anticipated benefits of consolidation including reduced labor requirements; a confidential memo from SPT to SFSP's officers describing SPT's anticipated course of action in 1987 to be positioned as either a merger partner or a stand-alone entity, which includes force reductions; and SFSP's proposed responses to

⁹ In SFSP II, the ICC stated: "Moreover, applicants have expressly abandoned the 'failing firm' theory as a supporting basis for merger. They acknowledge that both ATSF and SPT can stand alone."

¹⁰ In approving the voting trust, the ICC noted that SFSP had committed to supply any necessary funds to SPT.

¹¹ The unions point to communications between SFSP and SPT regarding changes in SPT's operations. These, they claim, led to the reductions-in-force and were carried out by SPT with the knowledge of, and in furtherance of, SFSP's plans for the merger.

the press as to the labor effects of a merger. In addition, Tu submitted documents purporting to show a close corporate relationship between PFE and SPT such that PFE's employees were in fact employees of SPT and who, like the union members, were adversely affected by SPT's actions allegedly directed by SFSP.

Railroad Arguments. In response to the submissions of the unions and Tu, SFP submitted evidence to show that any reductions-in-force SPT experienced during the voting trust were due not to the proposed merger, but rather to the same structural conditions in the industry as a whole which led to overall decreases in employment. In fact, SFP states that reductions on SPT were less severe than the reductions made by most other railroads. SFP's evidence shows that SPT's employment fell by 5,975 employees (20.1%), compared to 74,504 employees (23.1%) industrywide. Of the 5,975 SPT employees, 3,917 (71.5%) were affected in 1987, after the ICC had denied the merger.

SFP avers more specifically that, from 1985 to 1986, SPT employment of maintenance-of-way (MOW) and maintenance-of-equipment (MOE) personnel actually increased. SFP indicates that, during 1984-87, overall rail industry MOW employment declined by 15,762 (23.8%), compared to a decline on SPT of 248 (5.1%). In 1986, SPT's average employment in this category increased by 692 employees. SFP shows similar results during the same period for MOE employees. Overall employment in the rail industry for these workers declined by 14,163 (23.1%), while SPT's employment declined by 883 (18.1%). In 1986, SPT's average employment in this category increased by 54 employees. Similar data were presented based on ton-miles (a measure of work performed) for overall employment as well as for MOW and MOE workers.

SPT states that business circumstances prompted the reductions in its work force. It notes the ICC's findings in SFSP I that it was, and for some years had been, a marginal carrier, 2 I.C.C.2d at 833, and the ICC's findings in Rio Grande that SPT had suffered substantial intramodal and intermodal competition and had been forced to supplement operating revenue with proceeds from the sale of real estate, 4 I.C.C.2d at 942. SPT states that, in the face of its problems, it attempted to manage its system so that it could cope with conditions and remain an effective competitor.

SPT introduced a study of its actions between 1978 and 1988 in relation to other western Class I carriers. The study was performed jointly by an outside consultant and SPT's Managing Director for Strategic Planning. They concluded:

[A]ctions taken by SPTC management during the period of the independent voting trust were reasonable within the competitive environment SPTC faced, were similar in nature to those taken by other western Class I railroads facing many of the same business circumstances, and were consistent with SPTC's economic self-interest as an independent railroad.

The study notes a difficult business environment influenced by industry deregulation, increased competition, loss of traditional traffic sources, and lack of certainty as to SPT's future. During the period from 1978 to 1988, SPT's revenues were growing more slowly than those of other western Class I railroads, while its costs were increasing at about the same rate. Consequently, SPT's net revenue from rail operations suffered relative to its competitors. During the same period, SPT's employee productivity, when measured by revenue per employee, net ton-miles per employee, and carloads per employee, was lower than for the other western Class I railroads. Thus, SPT had to reduce employment to improve productivity. Nevertheless, during the period from 1983-87, when the voting

trust was in effect, average employee levels relative to 1978 were higher for SPT than for its competitors.

Specifically with regard to MOW employees, the study found that, SPT's MOW employee force reductions were prudent in light of its declining traffic volume, and, if anything, on the cautious side relative to other western Class I railroads. SPT submits that the study strongly contradicts the unions' assertion that the force reductions were directed by SFSP or were in any way contrary to the actions which SPT management unilaterally and logically should have taken to serve SPT's own independent business interests.

Turning to the specific evidence submitted by the unions, SPT states that many of the 149 MOE employees that left SPT during 1985 left because of resignations, discharges for cause, furloughs, severance, retirements, and so forth, and that, in any event, 139 of the 149 positions had been eliminated by June 1985, i.e., before the inquiry from SFSP's Chairman in July 1985 asking whether any equipment programs could be deferred. The MOW employee data, SPT states, directly contradicts the unions' theory that SFSP was forcing SPT to hold down employment levels during the voting-trust period: from January 1985 to September 1986, the number of BMW-represented employees increased by 649 positions; more specifically, from July 1985 (when SFSP's Chairman sent the letter to SPT's Chairman about deferring equipment programs) to September 1986, the number increased by 186.

SPT argues that the correspondence relied upon by the unions shows only that (1) SPT's Chairman reported certain historical information to SFSP's Chairman, and (2) the former advised the latter that SPT would not do certain things which SFSP might have thought desirable. SPT views the correspondence as indicative of

SPT's independence, and not of any responsiveness to SFSP direction.

Union Rebuttal. In rebuttal, the unions characterize the explanations submitted by SFP and SPT as after-the-fact rationalizations for their actions. They argue that SFP and SPT did not submit any documentary evidence created during the pendency of the voting trust to support their claim that their behavior was an innocuous product of "market forces." Moreover, in the unions' view, the employees are not required to produce a "smoking gun" document clearly and unequivocally stating SFSP's orders to SPT.

To the contrary, the unions state, in Kraus, 878 F.2d at 1199, the court of appeals found that the evidence supported a jury verdict that the defendants interfered in SPT's business relationships to avoid the costs of potential post-merger approval labor protection and that SPT was willing to comply with defendant's desires. Based on their contention that SFP is collaterally estopped from denying that SFSP interfered in SPT's management, the unions apparently see the issue here as whether SPT's actions adverse to union workers can reasonably be inferred as having been taken in response to SFSP's cost-cutting desires, which were proved in Kraus.

DISCUSSION AND CONCLUSIONS

Based upon the evidence presented, we find that the employees (as a class) have failed to establish that they were adversely affected as a direct consequence of actions taken or orders issued by SFSP in contemplation of the proposed merger.

Collateral Estoppel. Initially, we will address the issue of collateral estoppel,¹² which was raised by the unions. They urge us to use the Kraus verdict offensively,¹³ by finding that SFP and SPT are estopped from denying that SFSP interfered in SPT's business decisions.

We find that the use of collateral estoppel would be inappropriate here. The Court of Appeals in Kraus dismissed plaintiffs' Federal claim of unlawful control over SPT in violation of 49 U.S.C. 11343. This is the relevant issue here; as the court noted, it is entirely distinct from the issue involved in the state tort proceeding (whether SFSP interfered with SPT's economic relationships with its employees).

In rejecting defendants' contention that the Interstate Commerce Act preempted the state law claim raised by the plaintiffs, the court in Kraus concluded that a violation of section 11343 is not an essential element of the state law claim of tortious interference with economic relationships. The court noted that, to be found liable under the state law claim, defendants "need not have 'controlled' Southern Pacific; rather, they need only have wrongfully interfered with plaintiffs' economic relationships." Kraus, 878 F.2d at 1200. Because the

¹² Collateral estoppel (also referred to as "issue preclusion"), like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (Parklane).

¹³ Offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant. Id.

issues litigated in Kraus differ significantly from the relevant issues here, this is not a proper instance for the offensive use of collateral estoppel.

Furthermore, SPT was not a defendant in that case on either the Federal or state cause of action with regard to the termination of the two plaintiffs. Because "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard," Parklane, 439 U.S. at 327, citing Blonder-Tongue v. University Foundation, 402 U.S. 313, 329 (1971) and Hansberry v. Lee, 311 U.S. 32, 40 (1940), no findings in Kraus may be used to make a case against SPT here.

The Evidence. Turning to evidence in this case, the employment data relied upon by the unions show that from January 1985 to September 1986, MOW employees on SPT increased. Although MOE employees decreased by 149 positions (from 1,349 to 1,200), SPT attributes the decrease to necessary cost-cutting measures due to its poor financial condition as well as to low employee productivity, traffic declines, competition, and other factors not related to the merger. Moreover, 139 of the 149 positions were eliminated prior to the mid-1985 correspondence from SFSP to SPT,¹⁴ and comparable cost cutting was pursued in areas other than labor.

The unions ask us to draw inculpatory inferences about the motivation behind SPT's actions. However, the evidence indicates that SPT's labor-reducing actions were motivated by its rational self-interest in preserving and enhancing its position in the industry. SPT presented evidence that its actions were consistent with industry conditions and trends between 1983 and

¹⁴ The bare data also do not reflect the number of employee reductions attributable to resignations, retirements, discharges for cause, and other normal events.

1988, when major reductions in the railroad industry's work force occurred because of traffic declines and increased competition, among other reasons. In fact, SPT's workforce reductions were somewhat lower than those of Class I railroads overall.

The unions attack SPT's study as an after-the-fact rationalization and submit that contemporaneous documents should have been produced to substantiate the claim that SPT's actions were not dictated by SFSP. The fact that the study was prepared after the events in question does not detract from the accuracy of the data in the study or the motivation that SPT attributes to its management. It is highly unlikely that documents would have been prepared to memorialize SPT's motivation when there was no pending question concerning SPT's labor actions. Moreover, the unions have not presented any contemporaneous documents to show that SPT was not acting in its self-interest or was acting under the control of SFSP. The unions claim that it is highly unlikely that the merger parties would have left behind a "smoking gun"; by the same token, there is no reason to believe that the merger parties would have prepared documents to the contrary, which would be available to refute the unions' charges.

SPT's failure to seek financial assistance from SFSP should not have any bearing upon our consideration of the actions the railroad did take to reduce operating expenses. Additional money from SFSP would have been warranted if conditions justified a higher level of MOW and MOE spending. SPT's study contains a strong showing that it responded to conditions rationally, taking the same general kinds of actions as other Class I carriers, except perhaps that it was too cautious in reducing MOE and MOW activity during the relevant time period. While the unions disagree, they have not shown that SPT's decisions were dictated by SFSP.

We draw nothing conclusive from the fact that some communications occurred between SPT and SFSP, and that some changes in SPT employment occurred. The timing and content of the communications and nature of SPT's changes in employment do not meet the established standard for this proceeding, or for that matter, even the unions' alternative standard. The evidence is persuasive that SPT's cost-cutting actions during the relevant period were in keeping with its needs and consistent with those of other Class I carriers. The unions have failed to bolster their case by any substantive findings from the communications and the employment changes themselves. We have not seen any reliable evidence that the actions taken by SPT were ordered by SFSP, or that SFSP was controlling SPT's decisions at the time.

Employees (as a class) were provided an opportunity to present persuasive evidence on the relevant issue, that is, whether, during the pendency of the voting trust, SFSP exercised unlawful control of SPT so as to affect its labor policy. They have failed to do so. We are unpersuaded by the implication in their pleadings that this was an impossible burden and thus that the ICC's words should not be taken literally. The language used in the earlier decision was carefully chosen to frame the issue in a manner appropriate to the unique circumstances of whether labor conditions should be imposed on a failed merger where any changes in employment were presumably made pursuant to existing collective bargaining agreements. The burden imposed was not insurmountable. Written materials are not the only way the employees could have met the established burden. Depositions could have been taken from managerial personnel who worked for SFSP, Santa Fe, and SPT at the time to elicit testimony showing improper influence of SPT's labor policy. Such statements, if not wholly supportive, might have been bolstered by circumstantial evidence such as a clear showing that SPT was acting contrary to its own self-interest in the job cuts it made

and thus must have been acting under the direction of an outside influence.

Moreover, the unions have not satisfied the burden under even their own standard. The dates of the communications cited by the unions as the basis for their case do not create a logical cause-and-effect relationship with the actions complained of; many of the job actions occurred prior to the communications, and in some instances, employment actually increased after the cited correspondence.¹⁵ In addition, SPT's responses do not contain any implication that it considered itself under SFSP's control. While the unions rely heavily on the evidence of relevant force reductions, the timing of the communications and the operating changes suggests no cause-and-effect relationship.

The unions' evidence and argument also ignore the need for cost-cutting as a necessary part of management's job, no less so during the pendency of a merger proceeding. With or without ICC approval of the merger, SPT reasonably should have taken steps to assure its viability; it would either merge with Santa Fe or have to find another disposition to allow dissolution of the voting trust.

With regard to Tu, she has not shown any causal connection between the communications between SPT and SFP and her furlough from employment by PFE. The communications between SPT and SFP occurred in July 1985. A report prepared in June 1985 by T. D.

¹⁵ Tu cites documents, including verified statements submitted with the merger application and press releases prepared for use during the pendency of the proceeding, to demonstrate unlawful control. She fails to recognize that, in seeking approval of a merger, applicants must demonstrate the expected effect of the transaction on employees, as well as the anticipated savings which in part lead to the public benefits of the transaction. Such required evidentiary submissions cannot logically be used to demonstrate undesirable communications or unlawful control. Press releases were presumably prepared to inform the public about the nature of the presentation lawfully submitted to the ICC.

Ellen, General Manager of PFE, entitled "The Future of the Perishable Business and PFE" (the Report) (which was put into the record by both SPT and Tu), shows that SPT was actively considering the disposition of PFE for independent business reasons before the July communications between SPT and SFP. The Report makes clear that by 1982, as a result of the deregulation that occurred after the Staggers Act of 1980 was enacted, PFE was confronted with serious structural problems in the perishables business. At that time, PFE employed approximately 500 persons to service an under-utilized fleet of 5,000 refrigerated freight cars. By May 1985, PFE had reduced employment to 250 persons and was handling the same volume of business it had in 1982. The Report describes various attempts that were made between 1982 and 1985 to make PFE stable and profitable, but by 1985 PFE could not provide service at less than the cost to produce that service. Thus, by June 1985, SPT had already concluded that PFE was not a viable enterprise and was considering actions to reduce the cash drain at PFE well before the communications between SPT and SFP in July 1985. After analyzing its options, SPT decided to eliminate PFE as a separate entity and fold back its remaining operations into SPT. As a result of this decision, Tu was laid off, along with several other employees, in August 1985. We conclude that Tu was laid off because of the need to eliminate losses at PFE and that SPT's actions with respect to PFE would have occurred even if there had been no proposed merger. Therefore, Tu would not be entitled to employee protective benefits even if she were considered to be an employee of SPT.

The unions and Tu have not presented evidence sufficient to link SPT's cost-cutting measures to directions from SFSP to enable us to conclude that SFSP and SPT violated the ICA or the conditions of the ICC's voting trust that SPT continue to operate independently of SFSP during the pendency of the merger proceeding before the ICC. Accordingly, their requests for us to

exercise our general discretionary conditioning power to impose employee protective conditions will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request of BMW and IAMAW for employee protective conditions in this proceeding is denied.
2. The request of Sieu Mei Tu for employee protective conditions in this proceeding is denied.
3. This proceeding is discontinued.
4. This decision is effective on its date of service.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

STB

FD-30400

(SUB 21)

12-4-92

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SERVICE DATE

DEC 4 1992

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION -- CONTROL --
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: December 3, 1992

By decision served June 18, 1992, the Commission reopened this proceeding and established a procedural schedule to give employees of the Southern Pacific Transportation Company (SPT) an opportunity to demonstrate that they were adversely affected as a direct consequence of actions taken or orders issued by the Santa Fe Southern Pacific Corporation (SFSP) in contemplation of the proposed merger of The Atchison, Topeka and Santa Fe Railway Company and SPT.¹ Discovery matters were subsequently referred to the Office of Hearings, and the procedural schedule has been modified several times to accommodate them.

Urging that they are injured parties, Sieu Mei Tu, a former employee of Pacific Fruit Express (PFE), and her husband Joseph Tu (collectively, Tu) moved to compel the production of documents from SPT and SFSP. SPT and SFSP objected. On November 9, 1992, the Chief Administrative Law Judge (CALJ) issued an order granting production of certain of these documents, but only as they related to PFE. Only one of the ten production requests approved by the CALJ was made applicable to SFSP since it had otherwise complied with the CALJ's limited production requirements. On November 13, 1992, SPT appealed the CALJ's decision. Tu replied.

SPT's appeal is taken pursuant to 49 CFR 1011.7(b)(1). Under this section, the Chairman acts on appeals. These appeals are not favored; they may be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.

SPT argues that the CALJ's order: (1) is contrary to precedent because it has been established that Tu's former employer is not a carrier subject to this Commission's jurisdiction and as a consequence Tu is not a proper party; (2) is inconsistent with the Commission reopening decision because it precluded employees from pursuing individual claims at this time; and (3) violates the doctrines of res judicata and collateral estoppel because Tu's claims have previously been litigated.

¹ The proposed merger was denied in Santa Fe Southern Pacific Corp.--Control--SPT Co., 2 I.C.C.2d 709 (1986) reconsideration denied, 3 I.C.C.2d 926 (1987). Thereafter, in Railway Labor Executives' Assn. v. ICC, 924 F.2d 961 (9th Cir. 1991), the court determined that this Commission possessed discretionary conditioning authority under 49 U.S.C. 11344(c) to "impose conditions governing the transaction" with respect to labor protection for adversely affected employees. It remanded the case for the Commission to determine whether to exercise that discretionary authority, and in response this proceeding was reopened.

The CALJ expressed reservations as to the propriety of Tu's participation in this proceeding. Similarly, he questioned the breadth of the discovery request. He opined that there was some color to the argument that Tu was a railroad employee and that her discharge from PFE appeared more attributable to market forces than the aborted merger. He nevertheless concluded that he was not in a position to make causative findings. SPT's appeal does not demonstrate that the CALJ committed a clear error of judgment in permitting Tu's continued participation. Nor does there appear to be manifest injustice arising from the CALJ's order, particularly in view of SFSP's cooperation. Accordingly, SPT's appeal will be denied, and instead it will be directed to respond expeditiously to the November 9 production decision.

Counsel for Tu is reminded that in reopening this proceeding, the Commission specifically stated that it did not seek at this time, nor would it consider, individual claims. Only if it were to find that employees were adversely affected as a consequence of actions taken in contemplation of merger (e.g. through actions or orders issued by SFSP which may have affected SPT operations and work-related assignments) would it address the issue of relief. At that time the Commission will consider Tu's personal statement and the arguments raised by SPT against Tu's participation here.

On November 25, 1992, the Brotherhood of Maintenance of Way Employees and International Association of Machinists and Aerospace Workers petitioned to extend the December 7, 1992 due date for filing opening statements of evidence and argument. In support they refer to the pendency of the instant appeal, and SPT's unanticipated failure by November 24, 1992 to locate and make available certain documents. They alternatively seek an extension of the filing date through December 15, 1992, or an indefinite extension pending resolution of the instant appeal. SFSP replied. The filing date will be extended to permit the completion of discovery.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. The appeal of the November 9, 1992 decision is denied; SPT shall respond expeditiously to its terms.
2. Initial statements of evidence and argument shall be filed by December 18, 1992; replies shall be filed by January 18, 1993; and rebuttal shall be filed by February 8, 1993.
3. This decision is effective on its service date.

By the Commission, Edward J. Philbin, Chairman.



Sidney L. Strickland, Jr.
Sidney L. Strickland, Jr.
Secretary

Interstate Commerce Commission
Office of the Secretary

Service Date

DEC 4, 1992

Service of Process

Docket No.

Listing of All Parties Served

FD - 30400 sub 21

Total Number Served

22

Embraced Cases

Regional Office(s) served: E C W

I certify that on the Service Date noted above, a copy of the attached

- | | |
|---|---|
| <input type="checkbox"/> Entire Commission | <input type="checkbox"/> Director |
| <input type="checkbox"/> Employee Board | <input type="checkbox"/> Name Change |
| <input type="checkbox"/> Unopposed Notice (NH) | <input checked="" type="checkbox"/> Commissioner |
| <input type="checkbox"/> Certificate, Permit, License | <input type="checkbox"/> Administrative Law Judge |
| <input type="checkbox"/> Secretary | <input type="checkbox"/> Other |

Decision/notice was served on the individuals named below:

J. Hunter
Scheduling Clerk

DEC 4, 1992
Date

Individuals Served:

FD030400/0021/ 142647 SCSS
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Service Date

DEC 4, 1992

Docket Number

FD - 30400 - 21

FD030400/0021/ 495 SCSS
SOUTHERN PACIFIC TRANSPORTATION COMPANY
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FD-30400 (sub-no 21)
KUNDEL TRANSPORTATION SERVICES INC
FOR: ATCHISON TOPEKA & SANTA FE RY CO
919 F STREET NW STE 410
WASHINGTON DC 20004

Service Date

DEC 4, 1952

Docket Number

FD - 30400 - 21

FD030400/0021/ 7818 SCSS
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FD030400/0021/ 91343 SCSS
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FD030400/0021/ 131454 SCSS
DENNIS W. WILSON
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5853

FD030400/0021/ 12100 SCSS
GUY VITELLO
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FD030400/0021/ 143073 SCSS
WAYNE M BOLIO
SOUTHERN PACIFIC BLDG
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Service Date

DEC 4, 1992

Docket Number

FD-30400 -21

FD030400/0021/ *107336 SCSS
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FD030400/0021/ *144512 SCSS
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SAN LEANDRO CA 94579

FD030400/0021/ 115803 SCSS
RIO GRANDE INDUSTRIES, INC. ET AL
SOUTHERN PACIFIC BLDG.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105

FD030400/0021/ 147192 SCSS
R G SNYDER
1 MARKET PLAZA RM 824
SAN FRANCISCO CA 94105

FD030400/0021/ 147637 SCSS
BARBARA A YOUNG
ONE MARKET PLAZA
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FD030400/0021/ 19407 SCSS
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WASHINGTON DC 20001-2130

FD030400/0021/ 98725 SCSS
DONALD F GRIFFIN
SUITE 210
1050 - 17TH STREET., N.W.
WASHINGTON DC 20036-5503

STB

FD-30400

(SUB 21)

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NOV 20 1992

INTERSTATE COMMERCE COMMISSION

SUPPLEMENTAL ORDER

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL-- SOUTHERN PACIFIC TRANSPORTATION COMPANY

In an order served October 28, 1997, subject to certain contingencies, the following procedural schedule was adopted:

Statements of evidence and arguments of former employees of Southern Pacific Transportation Company (SPT) or their representatives are due on or before December 7, 1992;

Reply statements of evidence and arguments are due on or before January 8, 1993; and

Rebuttal statements of evidence and arguments are due on or before January 29, 1993.

The parties are instructed that the above filing dates are to be observed.

There is a question whether one participant herein, Sieu Mei Tu, is a proper party. Tu worked for Pacific Fruit Express Company (PFE), which was owned by SPT. In a separate order served November 9, 1992, SPT was directed to search its records for information which may lead to the production of relevant evidence concerning the operational relationship between PFE and SPT. The November 9, 1992 order is being appealed by SPT to the entire Commission.

Paul S. Cross
By Paul S. Cross, Administrative Law Judge, on the 16th day of November, 1992.



Sidney L. Strickland, Jr.
Sidney L. Strickland, Jr.
Secretary

INTERSTATE COMMERCE COMMISSION
WASHINGTON, DC 20423-0001

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FD - 30400 S-5 21

FD030400/0021/ 144512 SCSS VIS
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FD030400/0021/ 6830 SCSS POR
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FD030400/0021/ 131454 SCSS POR
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FD - 30400 (Sub-No. 21)

KUNKEL TRANSPORTATION SERVICES INC
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918 F STREET NW STE 410
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Service Date

NOV 20, 1992

Docket Number

FD- 30400 SJS 21

FD030400/0021/ 19407 SCSS POR
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FD030400/0021/ 91343 SCSS APP
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FD030400/0021/ 147192 SCSS POR
R G SNYDER
1 MARKET PLAZA RM 824
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Service Date

NOV 20, 1992

Docket Number

FD-30400

FD030400/0021/ 2190 SCSS POR
THE ATCHISON, TOPEKA & SANTA FE RWY CO,
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FD030400/0021/ 143073 SCSS POR
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FD030400/0021/ 98725 SCSS POR
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WASHINGTON DC 20036

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FD-30400

(SUB 21)

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NOV 9 1992

INTERSTATE COMMERCE COMMISSION

ORDER

Finance Docket No. 30400 (Sub-No. 21)

**SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL-- SOUTHERN PACIFIC TRANSPORTATION COMPANY**

A telephone conference was held on November 4, 1992, respecting a motion to compel discovery filed by Sieu Mei Tu, as supplemented by a second pleading dated October 30, 1992. Tu seeks the documents described in the appendix hereto.

Southern Pacific Transportation Company (SPT) and Santa Fe Southern Pacific Corporation (Santa Fe) oppose the Tu motion upon the ground that it is overbroad. In addition, SPT and Santa Fe assert that Tu, as a former employee of Pacific Fruit Express Company (PFE) is not a proper party herein and that in any event her claim already has been rejected by other judicial forums. They also say that Tu is not representative of a class of employees and that she is not entitled to an individual adjudication at this time.

In my opinion, the sought discovery is overbroad. However, I believe, without deciding, that there is some color to the arguments of Tu that she was a railroad employee. Also, her claim for Santa Fe merger related employment protection has not been decided in the context of the Interstate Commerce Act (ICA).

The cause of her discharge from PFE, based upon other non-ICC proceedings, appears to have been the result of market conditions, not the aborted merger of SPT and Santa Fe. However, I am not in a position to make causative findings.

Finally, Tu may be one of a kind. She may appear here in a representative sense in that she was the only employee in her class with a particular seniority date. No one else in her category may exist.

In the circumstances presented, the parties shall provide the documents specified in item (10) of the appendix provided counsel for Tu agrees to a protective order previously entered in this matter. In addition, SPT shall provide the documents listed in items (1) through (9) of the appendix, but only as they relate specifically to PFE. (Santa Fe already has met this limited requirement.)

In all other respects, the motion of Tu is denied.

Paul S. Cross

By Paul S. Cross, Chief Administrative Law Judge on the 4th day of November, 1992.



Sidney L. Strickland, Jr.

~~Sidney L. Strickland, Jr.~~
Secretary

APPENDIX

- (1) All documents produced to the plaintiffs in Kraus v. Santa Fe Southern Pacific Corp. et al.
- (2) Minutes of all meetings attended by SPTC., ATSF, and/or SPSF CORP. wherein any discussion took place concerning the proposed merger between ATSF and SPTC.
- (3) All editions of the Southern Pacific Update, from January 1, 1980 to December 31, 1989.
- (4) Document entitled "The Future of the Perishable Business and PFE" and all exhibits and addenda thereto prepared by Thomas D. Ellen, Vice President & General Manager, on or about June 7, 1985.
- (5) All memorandum, minutes, notes, regarding personnel to be moved to SPTC offices from PFE, of all meetings held wherein said subject was discussed from January 1, 1981 to October 30, 1985.
- (6) All memos from E. E. Clark to T. D. Ellen from January 1, 1985 to October 30, 1985.
- (7) Minutes of all special and regular Board of Directors meetings of PFE from January 1, 1981 to October 30, 1985.
- (8) Document from T. D. Ellen to D. K. McNear and D. M. Mohan dated April 2, 1984.
- (9) Memorandum to T. R. Ashton, from T. C. Wilson, Re: SP's Revenue Estimation Process w/P& L implications received by T. D. Ellen on or about June 29, 1984.
- (10) All documents produced to any other party to these proceedings.

Interstate Commerce Commission Office of the Secretary Service of Process Listing of All Parties Served	Service Date NOV 9, 1992
	Docket No. FD-30400 SUB 21
Total Number Served 21	Embraced Cases

Regional Office(s) served: E C W

I certify that on the Service Date noted above, a copy of the attached

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| <input type="checkbox"/> Employee Board | <input type="checkbox"/> Name Change |
| <input type="checkbox"/> Unopposed Notice (NH) | <input type="checkbox"/> Commissioner |
| <input type="checkbox"/> Certificate, Permit, License | <input checked="" type="checkbox"/> Administrative Law Judge |
| <input type="checkbox"/> Secretary | <input type="checkbox"/> Other |

decision/notice was served on the individuals named below:

J. HUNTER
Scheduling Clerk

NOV 9, 1992
Date

Individuals Served:

FD030400/0021/ 142647 SCSS APR
 ADRIAN L. STEEL, JR.
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Service Date

NOV 9, 1992

Docket Number

FD-30400 SLD 21

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1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5860

FD030400/0021/ 143073 SCSS POR
WAYNE M BOLIO
SOUTHERN PACIFIC BLDG
ONE MARKET PLAZA, STE. 837
SAN FRANCISCO CA 94105-1001

FD030400/0021/ 7586 SCSS POR
JOHN O'B. CLARKE, JR.
SUITE 210
1050 SEVENTEENTH STREET, NW
WASHINGTON DC 20036-5503

FD030400/0021/ 93533 SCSS PRP
RICHARD S EDELMAN
SUITE 210
1050 17TH STREET., N.W.
WASHINGTON DC 20036-5503

FD030400/0021/ 98725 SCSS POR
DONALD F GRIFFIN
SUITE 210
1050 - 17TH STREET., N.W.
WASHINGTON DC 20036-5503

FD030400/0021/ 7818 SCSS PRP
HIGSAW & MAHONEY, P. C.
SUITE 210
1050 17TH STREET, N. W.
WASHINGTON DC 20036-5503

FD030400/0021/ 138617 SCSS POR
INTERNATIONAL ASSOC OF MACHINISTS
1300 CONNECTICUT AVE., N.W.
WASHINGTON DC 20036

Service Date

NOV 9, 1952

Docket Number

FD-30400 S.S. 21

FD030400/0021/ 19407 SCSS POR
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 LOUISIANA AVENUE, NW
WASHINGTON DC 20001-2130

FD030400/0021/ 107396 SCSS VIS
CHARLES KONG
1017 BROWN STREET
BAKERSFIELD CA 93305-4741

FD030400/0021/ 144535 SCSS PRP
LEE J KUBBY
BOX 60485
SUNNYVALE CA 94086

FD030400/0021/ 144531 SCSS PRP
WM G MAHONEY
SUIE 210
1050 SEVENTEENTH ST NW
WASHINGTON DC 20036

FD030400/0021/ 115803 SCSS POR
RIO GRANDE INDUSTRIES, INC. ET AL
SOUTHERN PACIFIC BLDG.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105

FD030400/0021/ 91343 SCSS APP
SANTA FE SOUTHERN PACIFIC CORP
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5560

FD030400/0021/ 495 SCSS POR
SOUTHERN PACIFIC TRANSPORTATION COMPANY
SOUTHERN PACIFIC BLDG
ONE MARKET PLAZA., SUITE 846
SAN FRANCISCO CA 94105-1001

Service Date

NOV 9, 1992

Docket Number

FD-30400 SJ 21

FD030400/0021/ 12100 SCSS POR
GUY VITELLO
1700 EAST GOLF RD
SCHAUMBURG IL 60173-5860

FD030400/0021/ 6830 SCSS POR
RICHARD E. WEICHER
ATCHISON, TOPEKA SANTA FE
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173

FD030400/0021/ 131454 SCSS POR
DENNIS W. WILSON
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5853

RENKEL TRANSPORTATION SERVICES INC
FOR: ATCHISON TOPEKA & SANTA FE RR CO
418 E STREET NW STE 418
WASHINGTON DC 20002

STB

FD-30400

(SUB 21)

10-28-92

C

12793

12793
OH

SERVICE DATE

OCT 28 1992

INTERSTATE COMMERCE COMMISSION

ORDER

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

Pursuant to a telephone conference held on October 21, 1992, the following procedural schedule is established:

1. Southern Pacific Transportation Company ("SPT") shall respond to BMW/IAMAW's First Set of Interrogatories and Informal Request for Production of Documents on or before November 16, 1992;
2. Statements of evidence and arguments of former employees of the SPT or their representatives are due on or before December 7, 1992;
3. Reply statements of evidence and arguments are due on or before January 8, 1993; and
4. Rebuttal statements of evidence and arguments are due on or before January 29, 1993.

In the event that SPT fully responds to BMW's and IAMAW's discovery requests before November 16, 1992, all dates thereafter shall be adjusted accordingly with all time intervals to remain the same.

Issues relating to the pending discovery by Sieu Mei Tu and Joseph Z. Tu are severed from the instant proceeding. Parties shall file responses, if any, to the "Motion Of Injured Party Sieu Mei Tu For Order Compelling Inspection And Production; Sanctions For Failure To Give Discovery; Extension Time To Complete Discovery And Submit Evidence" ("Tu's Motion") on October 27, 1992. A conference call shall be convened with counsel on November 4, 1992 to resolve any pending issues relating to Tu's Motion and to determine when, if appropriate, a statement of evidence and argument of Mr. and Mrs. Tu is to be filed in this sub-docket. Nothing in this Order is intended as determinative of the right of Mr. and Mrs. Tu to participate in this sub-docket at this stage of the proceeding or otherwise.

Paul S. Cross
By Paul S. Cross, Chief Administrative Law Judge, on the 26th day of October, 1992.

Sidney L. Strickland, Jr.
Sidney L. Strickland, Jr.
Secretary



INTERSTATE COMMERCE COMMISSION
WASHINGTON, DC 20423-0001

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE \$300

FIRST CLASS MAIL
POSTAGE AND FEES PAID
INTERSTATE COMMERCE COMMISSION
PERMIT G-64



Interstate Commerce Commission Office of the Secretary Service of Process Listing of All Parties Served	Service Date 10-28-92
Total Number Served 21	Docket No. FD 30400 (21)
Regional Office(s) served: <input type="checkbox"/> E <input type="checkbox"/> C <input type="checkbox"/> W	
I certify that on the Service Date noted above, a copy of the attached	
<input type="checkbox"/> Entire Commission <input type="checkbox"/> Employee Board <input type="checkbox"/> Unopposed Notice (NH) <input type="checkbox"/> Certificate, Permit, License <input type="checkbox"/> Secretary	<input type="checkbox"/> Director <input type="checkbox"/> Name Change <input type="checkbox"/> Commissioner <input checked="" type="checkbox"/> Administrative Law Judge <input type="checkbox"/> Other
decision/notice was served on the individuals named below:	
BS _____ Scheduling Clerk	10-27-92 _____ Date
Individuals Served:	
FD030400/0021/ 2190 SCSS POR THE ATCHISON, TOPEKA & SANTA FE RWY CO, 1700 EAST GOLF ROAD SCHAUMBURG IL 60173-5860	
FD030400/0021/ 143073 SCSS POR WAYNE M BOLIO SOUTHERN PACIFIC BLDG ONE MARKET PLAZA, STE. 837 SAN FRANCISCO CA 94105-1001	
FD030400/0021/ 7586 SCSS POR JOHN O'B. CLARKE, JR. SUITE 210 1050 SEVENTEENTH STREET, NW WASHINGTON DC 20036-5503	
FD030400/0021/ 93533 SCSS PRP RICHARD S EDELMAN SUITE 210 1050 17TH STREET., N.W. WASHINGTON DC 20036-5503	

Service Date

10-28-92

Docket Number

7D 30400 (21)

FD030400/0021/ 98725 SCSS POR
DONALD F GRIFFIN
SUITE 210
1050 - 17TH STREET., N.W.
WASHINGTON DC 20036-5503

FD030400/0021/ 7818 SCSS PRP
HIGSAW & MAHONEY, P. C.
SUITE 210
1050 17TH STREET, N. W.
WASHINGTON DC 20036-5503

FD030400/0021/ 138617 SCSS POR
INTERNATIONAL ASSOC OF MACHINISTS
1300 CONNECTICUT AVE., N.W.
WASHINGTON DC 20036

FD030400/0021/ 19407 SCSS POR
INTEFNATIONAL BROTHERHOOD OF TEAMSTERS
25 LOUISIANA AVENUE, NW
WASHINGTON DC 20001-2130

FD030400/0021/ 107396 SCSS VIS
CHARLES KONG
1017 BROWN STREET
BAKERSFIELD CA 93305-4741

FD030400/0021/ 144535 SCSS PRP
LEE J KUBBY
BOX 60485
SUNNYVALE CA 94086

FD030400/0021/ 144531 SCSS PRP
WM G MAHONEY
SUIE 210
1050 SEVENTEENTH ST NW
WASHINGTON DC 20036

FD030400/0021/ 115803 SCSS POR
RIO GRANDE INDUSTRIES, INC. ET AL
SOUTHERN PACIFIC BLDG.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105

Service Date

10-28-92

Docket Number

70 30400 (21)

FD030400/0021/ 91343 SCSS APP
SANTA FE SOUTHERN PACIFIC CORP
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5560

FD030400/0021/ 495 SCSS POR
SOUTHERN PACIFIC TRANSPORTATION COMPANY
SOUTHERN PACIFIC BLDG
ONE MARKET PLAZA., SUITE 846
SAN FRANCISCO CA 94105-1001

FD030400/0021/ 142647 SCSS APR
ADRIAN L. STEEL, JR.
MAYER BROWN & PLATT
2000 PENNSYLVANIA AVENUE, N. W.
WASHINGTON DC 20006

FD030400/0021/ 116619 SCSS POR
E. R. STRAATSMA
P. O. BOX 214
FALSOM CA 95630-0214

FD030400/0021/ 144512 SCSS VIS
SIEU MEI TU
1697 HICKORY AVE.
SAN LEANDRO CA 94579

FD030400/0021/ 12100 SCSS POR
GUY VITELLO
1700 EAST GOLF RD
SCHAUMBURG IL 60173-5860

FD030400/0021/ 6830 SCSS POR
RICHARD E. WEICHER
ATCHISON, TOPEKA SANTA FE
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173

FD030400/0021/ 131454 SCSS POR
DENNIS W. WILSON
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5853

Service Date

10-28-92

Docket Number

7D 30400(21)

FD - 30400 - 21

KUNKEL TRANSPORTATION SERVICES INC
FOR: ATCHISON TOPEKA & SANTA FE RY CO
918 F STREET NW STE 410
WASHINGTON DC 20004

STB

FD-30400

(SUB 21)

10-20-92

C

12792

12792

SERVICE DATE
OCT 20 1992

OH

INTERSTATE COMMERCE COMMISSION

ORDER

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION
--CONTROL--
SOUTHERN PACIFIC TRANSPORTATION COMPANY

The date for the filing of opening statements is extended past October 19, 1992 to a date to be fixed. A conference call is set for October 21, 1992.

Paul S. Cross
By Paul S. Cross, Chief Administrative Law Judge, on October 19, 1992.

Sidney L. Strickland, Jr.
Sidney L. Strickland, Jr.
Secretary

(SEAL)



INTERSTATE COMMERCE COMMISSION
WASHINGTON, DC 20433-0001

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE \$300

FIRST CLASS MAIL
POSTAGE AND FEES PAID
INTERSTATE COMMERCE COMMISSION
PERMIT G-64

Interstate Commerce Commission
Office of the Secretary

Service Date

OCT 20, 1992

Service of Process

Docket No.

FD-30400

Listing of All Parties Served

Total Number Served

19

Embraced Cases

Regional Office(s) served: E C W

I certify that on the Service Date noted above, a copy of the attached

- | | |
|---|--|
| <input type="checkbox"/> Entire Commission | <input type="checkbox"/> Director |
| <input type="checkbox"/> Employee Board | <input type="checkbox"/> Name Change |
| <input type="checkbox"/> Unopposed Notice (NH) | <input type="checkbox"/> Commissioner |
| <input type="checkbox"/> Certificate, Permit, License | <input checked="" type="checkbox"/> Administrative Law Judge |
| <input type="checkbox"/> Secretary | <input type="checkbox"/> Other |

decision/notice was served on the individuals named below:

J. HUNTER
Scheduling Clerk

OCT 20 1992
Date

Individuals Served:

FD-30400 (Sub-No. 21)

KUNKEL TRANSPORTATION SERVICES INC
 FOR: ATCHISON TOPEKA & SANTA FE RY CO
 918 F STREET NW STE 410
 WASHINGTON DC 20004

FD030400/0021/ 142647 SCSS
ADRIAN L. STEEL, JR.
MAYER BROWN & PLATT
2000 PENNSYLVANIA AVENUE, N. W.
WASHINGTON DC 20006

FD030400/0021/ 138617 SCSS
INTERNATIONAL ASSOC OF MACHINISTS
1300 CONNECTICUT AVE., N.W.
WASHINGTON DC 20036

FD030400/0021/ 6830 SCSS
RICHARD E. WEICHER
ATCHISON, TOPEKA SANTA FE
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173

FD030400/0021/ 144535 SCSS
LEE J KUBBY
BOX 60485
SUNNYVALE CA 94086

FD030400/0021/ 115803 SCSS
RIO GRANDE INDUSTRIES, INC. ET AL
SOUTHERN PACIFIC BLDG.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105

FD030400/0021/ 19407 SCSS
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 LOUISIANA AVENUE, NW
WASHINGTON DC 20001-2130

FD030400/0021/ 7818 SCSS
HIGSAW & MAHONEY, P. C.
SUITE 210
1050 17TH STREET, N. W.
WASHINGTON DC 20036-5503

FD030400/0021/ 7586 SCSS

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WASHINGTON DC 20036-5503

FD030400/0021/ 93533 SCSS
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1050 17TH STREET., N.W.
WASHINGTON DC 20036-5503

FD030400/0021/ 98725 SCSS
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SUITE 210
1050 - 17TH STREET., N.W.
WASHINGTON DC 20036-5503

FD030400/0021/ 91343 SCSS
SANTA FE SOUTHERN PACIFIC CORP
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5560

FD030400/0021/ 131454 SCSS
DENNIS W. WILSON
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5853

FD030400/0021/ 2190 SCSS
THE ATCHISON, TOPEKA & SANTA FE RWY CO,
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5860

FD030400/0021/ 12100 SCSS
GUY VITELLO
1700 EAST GOLF RD
SCHAUMBURG IL 60173-5860

FD030400/0021/ 495 SCSS
SOUTHERN PACIFIC TRANSPORTATION COMPANY
SOUTHERN PACIFIC BLDG
ONE MARKET PLAZA, SUITE 846

FD030400/0021/ 116619 SCSS
E. R. STRAATSMA
P. O. BOX 214
FALSCM CA 95630-0214

FD030400/0021/ *144512 SCSS
SIEU MEI TU
1697 HICKORY AVE.
SAN LEANDRO CA 94579

FD030400/0021/ *107396 SCSS
CHARLES KONG
1017 BROWN STREET
BAKERSFIELD CA 93305-4741

STB

FD-30400

(SUB 21)

9-10-92

C

13202

13202
OH

INTERSTATE COMMERCE COMMISSION

SERVICE DATE

ORDER

SEP 10 1992

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION
--CONTROL--
SOUTHERN PACIFIC TRANSPORTATION COMPANY

In a decision served August 4, 1992, a procedural schedule established in a decision served June 18, 1992 was vacated and at the same time this proceeding was assigned to the Office of Hearings for the purpose of assisting the opposing parties through the process of responding to interrogatories and informal document requests. Even though discovery is continuing, in a letter dated September 4, 1992, the parties agree that before discovery is finally completed, establishment of a new procedural schedule is appropriate. Therefore, a schedule which tracks the time intervals set in the June 12, 1992 decision is imposed in accordance with the September 4, 1992 agreement of the parties.

The following filing dates are set:

October 19, 1992	--	Evidence and argument of former employees of the Southern Pacific Transportation Company ("SPT") or their representatives due.
November 18, 1992	--	Reply evidence and argument due.
December 8, 1992	--	Rebuttal evidence and argument due.

Paul S. Cross
By Paul S. Cross, Chief Administrative Law Judge on
September 4, 1992.

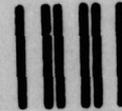


Sidney L. Strickland, Jr.
Sidney L. Strickland, Jr.
Secretary

Interstate Commerce Commission
Office of the Secretary, Service Section
Washington, D.C. 20423

Official Business
Penalty For Private Use, \$300

Address Correction Requested



POSTAGE AND FEES PAID
INTERSTATE COMMERCE COMMISSION
ICC 630

Interstate Commerce Commission
Office of the Secretary

Service Date

SEP 10, 1992

Service of Process

Docket No.

Listing of All Parties Served

FD-30400 Sub 21

Total Number Served

18

Embraced Cases

Regional Office(s) served: E C W

I certify that on the Service Date noted above, a copy of the attached

- | | |
|---|--|
| <input type="checkbox"/> Entire Commission | <input type="checkbox"/> Director |
| <input type="checkbox"/> Employee Board | <input type="checkbox"/> Name Change |
| <input type="checkbox"/> Unopposed Notice (NH) | <input type="checkbox"/> Commissioner |
| <input type="checkbox"/> Certificate, Permit, License | <input checked="" type="checkbox"/> Administrative Law Judge |
| <input type="checkbox"/> Secretary | <input type="checkbox"/> Other |

Decision/notice was served on the individuals named below:

J. HUNTER
Scheduling Clerk

SEP 10, 1992
Date

Individuals Served:

FD-30400 (Sub-No. 21)

KUNKEL TRANSPORTATION SERVICES INC
FOR: ATCHISON TOPEKA & SANTA FE RY CO
918 F STREET NW STE 410
WASHINGTON DC 20004

FD030400/0021/ 138617 SCSS
INTERNATIONAL ASSOC OF MACHINISTS
1300 CONNECTICUT AVE., N.W.
WASHINGTON DC 20036

FD030400/0021/ 6830 SCSS
RICHARD E. WEICHER
ATCHISON, TOPEKA SANTA FE
1700 EAST GOLF ROAD
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FD030400/0021/ 144535 SCSS
LEE J KUBBY
BOX 60485
SUNNYVALE CA 94086

FD030400/0021/ 115803 SCSS
RIO GRANDE INDUSTRIES, INC. ET AL
SOUTHERN PACIFIC BLDG.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS
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SCHAUMBURG IL 60173-5860

FD030400/0021/ 73949 SCSS
JEROME F DONOHOE
224 SOUTH MICHIGAN AVENUE
CHICAGO IL 60604-2507

FD030400/0021/ 495 SCSS
SOUTHERN PACIFIC TRANSPORTATION COMPANY
SOUTHERN PACIFIC BLDG
ONE MARKET PLAZA., SUITE 846
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FD030400/0021/ 116619 SCSS
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FD030400/0021/ *144512 SCSS
SIEU MEI TU
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SUNNYVALE CA 94086

FD030400/0021/ *107396 SCSS
CHARLES KONG
1017 BROWN STREET
BAKERSFIELD CA 93305-4741

STB

FD-30400

(SUB 21)

9-3-92

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13201

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SERVICE DATE

SEP 3 1992

OH

INTERSTATE COMMERCE COMMISSION

ORDER

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

By motion filed August 27, 1992, Santa Fe Pacific Corporation (formerly Santa Fe Southern Pacific Corporation) ("SFP") requests issuance of a protective order to govern the disclosure and use of confidential, proprietary or commercially sensitive information and data that may be produced during discovery or otherwise divulged by any party to another during the course of this proceeding. A reply to the motion of SFP was filed on August 28, 1992 by "rail labor." A telephone conference with the parties then was held August 31, 1992.

There is good cause shown for the motion to be granted at this time. Unrestricted disclosure of confidential, proprietary or commercially sensitive information and data could cause serious competitive or commercial injury to the parties. Issuance of the requested protective order would ensure that such information and data produced by any party in response to a discovery request or otherwise unless upon further order will be used solely for purposes of this proceeding and not for any other business or commercial use. The requested protective order would also facilitate the prompt and efficient resolution of this proceeding by minimizing potential discovery disputes. The subject may be revisited at a later date upon appropriate request.

This action will not adversely affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. The motion for protective order is granted, and the Protective Order reproduced in the Appendix to this order is adopted as an order of the Commission.
2. This order is effective on the date served.

By the Commission, Paul S. Cross, Chief Administrative Law Judge, on August 31, 1992.

Paul S. Cross

Sidney L. Strickland, Jr.

Sidney L. Strickland, Jr.
Secretary



APPENDIX

PROTECTIVE ORDER

On the motion of Santa Fe Pacific Corporation (formerly Santa Fe Southern Pacific Corporation) ("SFP"), and for the purpose of protecting against improper use or disclosure of confidential, proprietary or commercially sensitive business information and data obtained or to be obtained by any party or person through discovery or otherwise during the course of this proceeding,

It is ordered that:

1. The term "Proceeding," as used in this Protective Order, shall mean the proceeding of the Interstate Commerce Commission (the "Commission") designated as Finance Docket No. 30400 (Sub-No. 21), as well as any subsequent Commission proceeding concerning the interpretation or application of any labor protective conditions imposed by the Commission in connection with the transaction(s) at issue in Finance Docket No. 30400 and all related sub-dockets.
2. This Protective Order shall apply: (a) to all documents, information and other products of discovery obtained by any party to this Proceeding pursuant to discovery requests, whether directed to another party or to a person not a party to this Proceeding; and (b) to all documents and information contained in any materials filed with the Interstate Commerce Commission (the "Commission") by any party during the course of this Proceeding (including transcripts of oral testimony and hearings before the Commission).
3. Any party or person responding to a discovery request may designate as "Confidential Information" any response (including production of documents) or portion thereof that it in good faith contends contains confidential, proprietary or commercially sensitive information. Except as provided by Paragraph 6 below, "Confidential Information" as used herein includes all such designated responses, any copies, extracts, abstracts or summaries of such responses, and all information contained in or obtained from such responses.
4. Responses to discovery requests (including documents produced in response to discovery requests) may be designated as "Confidential Information" in the following manner:

(a) Responses or portions of responses to interrogatories, written deposition interrogatories, and requests for admission may be designated by stamping or printing "Confidential" or "Confidential Information" in the front thereof and, if only portions of the response are to be so designated, clearly marking the confidential portions.

(b) Prior to the production of copies to the requesting party, documents may be designated by separating them from other documents and informing the requesting party that they are "Confidential Information." Copies of documents or portions of documents produced to the parties may be designated by producing such documents in separate containers clearly marked as containing "Confidential Information" or stamping "Confidential" or "Confidential Information" on each page (and all copies thereof) containing "Confidential Information" and, if only portions of a document page are to be so designated, clearly marking the confidential portions.

(c) A witness or the attorney for a witness may designate the witness's entire testimony and the transcript thereof to be treated as "Confidential Information" by so requesting on the record prior to the conclusion of the hearing at which such testimony is taken. Such designation shall be effective only until 15 days after the availability of the transcript of the hearing, after which portions of the witness testimony may be designated "Confidential Information" only by informing each party in writing of the pages, and the portions thereof, that contain "Confidential Information."

5. If a party or person inadvertently fails to designate discovery or other material as "Confidential Information," that party subsequently may notify the receiving party within one week following delivery of the discovery or other material to the receiving party that the material is "Confidential Information." After receipt of such notification, such materials and information shall be treated as if they had been designated in a timely fashion.

6. Any party at any time may by written notice request that the producing party or person cancel the "Confidential Information" designation of any transcript, document or discovery response or portion thereof. Such request should particularly

identify the designated responses which the requesting party contends should not be treated as "Confidential Information," provide the reasons therefor, and explicitly state that the request is made pursuant to this paragraph. Such request shall be deemed granted ten days after receipt of the request, unless the producing party or person, prior to the end of the ten-day period, denies the request by written notice to the requesting party. If such request is denied in whole or in part, the requesting party may file a motion with the Commission to have the "Confidential Information" designation removed as to the discovery responses listed in the request.

7. Other than as provided in Paragraph 8 below, "Confidential Information" may only be disclosed to "Authorized Persons." An "Authorized Person" is a person who, prior to the receipt of any "Confidential Information," has signed an affidavit (in the form included as Attachment A to this Order) in which he or she states his or her identity, title and employer and further states that he or she has read this Protective Order and agrees to abide by its terms, and is:

(a) an attorney actively involved in this Proceeding on behalf of a party (or a legal assistant under such attorney's supervision);

(b) a person who is not a permanent employee of a party but who has been employed by any of the parties to provide advice, expertise or assistance in this Proceeding;

(c) a person who is a permanent employee of a party (including an employee or official of the Brotherhood of Maintenance of Way Employees or the International Association of Machinists and Aerospace Workers) and who has been assigned direct responsibility in connection with this Proceeding;

(d) a person who is or was once employed by one of the rail carrier parties and is presently or was formerly represented for collective bargaining purposes by the Brotherhood of Maintenance of Way Employees or the International Association of Machinists and Aerospace Workers, but only if and to the extent that such person reasonably requires access to particular "Confidential Information" in order to prepare written or oral testimony to be submitted in this Proceeding; or

(e) a reporter employed to record oral testimony or other hearings.

Each such affidavit by an "Authorized Person" shall be kept for the duration of this Proceeding and any related court litigation or judicial appeals by the party with which such "Authorized Person" is affiliated or associated, and a copy of each such affidavit shall be served upon counsel of record for each party no later than ten days after such affidavit is executed.

8. "Confidential Information" may also be disclosed to:

(a) an employee of the producing party during oral testimony of such employee;

(b) a witness employed by an organization that also employs the person who produced the "Confidential Information" to be disclosed to the witness;

(c) an assistant or clerical employee under the supervision of any "Authorized Person"; or

(d) any person so authorized either (i) in writing by the party or person that produced the "Confidential Information" to be disclosed to such person or (ii) by the Commission upon motion by any party for good cause.

9. Storage, transmission or communication of "Confidential Information" must be such as to reasonably ensure that the "Confidential Information" will not be disclosed, accidentally or otherwise, to non-authorized persons.

10. No person may be present at a hearing during the discussion of "Confidential Information" who has not been authorized by this Protective Order to review the "Confidential Information" to be discussed.

11. "Confidential Information" may be used by the receiving party, and by any "Authorized Person", solely for purposes of this Proceeding and any related court litigation, and not for any other purpose whatsoever (including any business or commercial purpose).

12. All "Confidential Information" filed with the Commission, and any pleading, motion, or other paper filed with the Commission that contains or discloses "Confidential Information"

shall be filed under seal and kept under seal until further order of the Commission.

13. All documents containing "Confidential Information" shall, at the option of the party or person that produced such "Confidential Information," be destroyed or returned to the producing party/person at the termination of this Proceeding, including any related court litigation or judicial appeals. In the event that the producing party/person requests the destruction of such "Confidential Information" pursuant to this Paragraph, the producing party/person shall notify the receiving party in writing of this request, and the receiving party within 30 days after such written notice shall destroy the "Confidential Information" and shall certify to the producing party/person in writing that all "Confidential Information" produced to the receiving party during the course of this Proceeding has been destroyed. In the event that the producing party/person requests the return of such "Confidential Information" pursuant to this Paragraph, the producing party/person shall notify the receiving party in writing of this request, and the receiving party within 30 days after such written notice shall return the "Confidential Information" to the producing party/person and shall also certify to the producing party/person in writing that all "Confidential Information" produced to the receiving party during the course of this Proceeding has been returned.

14. The provisions of this Protective Order that restrict the handling, communication and use of "Confidential Information" shall continue to be binding after the termination of this Proceeding, including any related court litigation or judicial appeals, unless the Commission or the producing party/person authorizes in writing alternative handling, communication or use of such "Confidential Information".

15. This Protective Order shall not bar or otherwise restrict:

(a) an "Authorized Person" from making copies, abstracts, digests and analyses of "Confidential Information" for use in connection with this Proceedings, subject to the requirement that all such copies, abstracts, digests and analyses be treated as "Confidential Information" and clearly marked as such;

(b) an "Authorized Person" from rendering advice or opinions with respect to this Proceeding to his or her client or employer based upon his or her examination of "Confidential Information" itself to a person

not authorized by this Protective Order to have access to the "Confidential Information";

(c) a party from using any "Confidential Information" during hearings in this Proceeding, subject to any further order of the Commission;

(d) a party or producing person from using its own "Confidential Information" in any manner it sees fit, or from revealing such "Confidential Information" to whomever it chooses, without the prior consent of any other party or of the Commission; and

(e) a party or producing person from applying to the Commission at any time for additional protection, or to relax or rescind the restrictions of this Protective Order, when convenience or necessity requires.

16. If "Confidential Information" in the possession of any party is subpoenaed by any court, administrative or legislative body, or any other person purporting to have authority to subpoena such information, the party to whom the subpoena is directed will not produce such information without first giving written notice (including the delivery of a copy thereof) to the producing party/person or the attorneys for the producing party/-person, within 24 hours after receipt of the subpoena. If a subpoena purports to require production of such "Confidential Information" on less than four business days' notice, the party to whom the subpoena is directed shall also give immediate notice by telephone of the receipt of such subpoena.

17. To the extent that "Confidential Information" is produced by a party or other person in this Proceeding and held and used by the receiving party in compliance with the terms of this Protective Order, such production, disclosure and use of such "Confidential Information" are deemed essential for the disposition of this Proceeding and shall not be deemed a violation of 49 U.S.C. § 11343 or § 11910.

18. The terms of this Protective Order are imposed without prejudice to the right of affected rail carrier employees to request, for good cause shown, modification of the terms of this Protective Order to authorize use of Confidential Information by individual employees as reasonably necessary to prosecute individual claim and arbitration proceedings required under any labor protective conditions that may be imposed by the Commission in this case.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 30400 (SUB-NO. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

COUNTY OF _____)
STATE OF _____) ss:

CONFIDENTIALITY AFFIDAVIT

I, _____ [Name] _____, being duly sworn, do hereby depose and state that I am _____ [Position or Job Title] _____ of _____ [Name of Employer or Firm] _____; that my offices are located at _____ [Address] _____; that [I am an attorney actively involved in the above-captioned proceeding on behalf of _____ [Name of Party Represented] _____] or [I am a legal assistant under the supervision of attorneys actively involved in the above-captioned proceeding on behalf of _____ [Name of Party Represented] _____] or [I have been employed by _____ [Name of Party Represented] _____ to provide advice, expertise and assistance in connection with the above-captioned proceeding] or [I am a permanent employee of _____ [Name of Party Represented] _____ and have been assigned direct responsibility in connection with the above-captioned proceeding]

or [I was/am employed by _____ [Name of Rail Carrier Party] _____,
am presently or was formerly represented for collective bargain-
ing purposes by the _____ [Brotherhood of Maintenance of Way
Employes or International Association of Machinists and Aerospace
Workers] _____, and intend to submit testimony in the above-
captioned proceeding] or [I am a reporter employed to record oral
testimony or other hearings in the above-captioned proceeding];
and that I have read, understand and agree to abide by the terms
of the Protective Order entered in the above-captioned proceed-
ings by order served August __, 1992.

[Name]

Subscribed and Sworn to
Before Me This ____ Day
of _____, 1992.

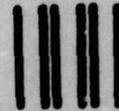
Notary Public

My Commission expires:

Interstate Commerce Commission
Office of the Secretary, Service Section
Washington, D.C. 20423

Official Business
Penalty For Private Use, \$300

Address Correction Requested



POSTAGE AND FEES PAID
INTERSTATE COMMERCE COMMISSION
ICC 630

Interstate Commerce Commission Office of the Secretary Service of Process Listing of All Parties Served	Service Date <div style="text-align: center; font-size: 1.2em;">SEP 3, 1992</div> <hr/> Docket No. <div style="text-align: center; font-size: 1.2em;">FD-30400-21</div>
Total Number Served <div style="text-align: center; font-size: 1.5em;">18</div>	Embraced Cases
Regional Office(s) served: <input type="checkbox"/> E <input type="checkbox"/> C <input type="checkbox"/> W	
I certify that on the Service Date noted above, a copy of the attached	
<input type="checkbox"/> Entire Commission <input type="checkbox"/> Employee Board <input type="checkbox"/> Unopposed Notice (NH) <input type="checkbox"/> Certificate, Permit, License <input type="checkbox"/> Secretary	<input type="checkbox"/> Director <input type="checkbox"/> Name Change <input type="checkbox"/> Commissioner <input checked="" type="checkbox"/> Administrative Law Judge <input type="checkbox"/> Other
decision/notice was served on the individuals named below:	
<div style="font-size: 1.2em; font-family: cursive;">J. HUNTER</div> <hr/> Scheduling Clerk	<div style="font-size: 1.2em; font-family: cursive;">SEP 3, 1992</div> <hr/> Date
Individuals Served:	
<div style="display: flex; justify-content: space-between;"> <div style="width: 60%;"> <p>FD030400/0021/ GUY VITELLO 1700 EAST GOLF RD SCHAUMBURG IL 60173-5860</p> </div> <div style="width: 35%;"> <p>12100 SCSS POR</p> </div> </div> <div style="display: flex; justify-content: space-between;"> <div style="width: 60%;"> <p>FD030400/0021/ RICHARD E. WEICHER ATCHISON, TOPEKA SANTA FE 1700 EAST GOLF ROAD SCHAUMBURG IL 60173</p> </div> <div style="width: 35%;"> <p>6830 SCSS POR</p> </div> </div> <div style="display: flex; justify-content: space-between;"> <div style="width: 60%;"> <p>FD030400/0021/ DENNIS W. WILSON 1700 EAST GOLF ROAD SCHAUMBURG IL 60173-5853</p> </div> <div style="width: 35%;"> <p>131454 SCSS POR</p> </div> </div>	

Service Date

SEP 3, 1992

Docket Number

FD - 30400

FD030400/0021/ 107396 SCSS VIS
CHARLES KONG
1017 BROWN STREET
BAKERSFIELD CA 93305-4741

FD030400/0021/ 144535 SCSS PRP
LEE J KUBBY
BOX 60485
SUNNYVALE CA 94086

FD030400/0021/ 115803 SCSS POR
RIO GRANDE INDUSTRIES, INC. ET AL
SOUTHERN PACIFIC BLDG.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105

FD030400/0021/ 91343 SCSS APP
SANTA FE SOUTHERN PACIFIC CORP
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5560

FD030400/0021/ 495 SCSS POR
SOUTHERN PACIFIC TRANSPORTATION COMPANY
SOUTHERN PACIFIC BLDG
ONE MARKET PLAZA., SUITE 846
SAN FRANCISCO CA 94105-1001

FD030400/0021/ 116619 SCSS POR
E. R. STRAATSMA
P. O. BOX 214
FALSOM CA 95630-0214

FD030400/0021/ 144512 SCSS VIS
SIEU MEI TU
BOX 60485
SUNNYVALE CA 94086

Service Date

SEP 3, 1992

Docket Number

FD-30400 -21

FD030400/0021/ 2190 SCSS POR
THE ATCHISON, TOPEKA & SANTA FE RWY CO,
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5860

FD030400/0021/ 7586 SCSS POR
JOHN O'B. CLARKE, JR.
SUITE 210
1050 SEVENTEENTH STREET, NW
WASHINGTON DC 20036-5503

FD030400/0021/ 73949 SCSS APR
JEROME F DONOHUE
224 SOUTH MICHIGAN AVENUE
CHICAGO IL 60604-2507

FD030400/0021/ 98725 SCSS POR
DONALD F GRIFFIN
SUITE 210
1050 - 17TH STREET., N.W.
WASHINGTON DC 20036-5503

FD030400/0021/ 7818 SCSS PRP
HIGSAW & MAHONEY, P. C.
SUITE 210
1050 17TH STREET, N. W.
WASHINGTON DC 20036-5503

FD030400/0021/ 138617 SCSS POR
INTERNATIONAL ASSOC OF MACHINISTS
1300 CONNECTICUT AVE., N.W.
WASHINGTON DC 20036

FD030400/0021/ 19407 SCSS POR
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 LOUISIANA AVENUE, NW
WASHINGTON DC 20001-2130

Service Date

9-3-92

Docket Number

FD 30400 (21)

FD 30400 (21)

KUNKEL TRANSPORTATION SERVICES INC
FOR: ATCHISON TOPEKA & SANTA FE RY CO
918 F STREET NW STE 410
WASHINGTON DC 20004

STB

FD-30400

(SUB 21)

8-18-92

C

13200

OH

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INTERSTATE COMMERCE COMMISSION

DECISION

SERVICE DATE

Finance Docket No. 30400 (Sub-No. 21)

AUG 18 1992

SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

Pursuant to the joint request dated August 11, 1992 of Santa Fe Southern Pacific Corporation ("Santa Fe"), The Brotherhood of Maintenance of Way Employees ("BMWE"), and the International Association of Machinists and Aerospace Workers ("IAMAW"), it is hereby ordered that:

1. The petition for leave to serve requests for production of documents filed on July 27, 1992 by BMWE and IAMAW is granted.
2. Santa Fe shall respond to the requests for production of documents on or before September 1, 1992.
3. Santa Fe shall serve on August 17, 1992 partial answers to BMWE's and IAMAW's Interrogatories, and shall serve the remainder of its answers on September 1, 1992.

Paul S. Cross

By Paul S. Cross, Chief Administrative Law Judge, on the 12th day of August, 1992.



(S)

Sidney L. Strickland, Jr.
Sidney L. Strickland, Jr.
Secretary

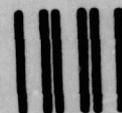
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.. ..

Interstate Commerce Commission
Office of the Secretary, Service Section
Washington, D.C. 20423

Official Business
Penalty For Private Use, \$300

Address Correction Requested



POSTAGE AND FEES PAID
INTERSTATE COMMERCE COMMISSION
ICC 630

Service Date

AUG 18 1992

Docket Number

FD - 30400

FD030400/0021/ 2190 SCSS POR
THE ATCHISON, TOPEKA & SANTA FE RWY CO,
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5860

FD030400/0021/ 7586 SCSS POR
JOHN O'B. CLARKE, JR.
SUITE 210
1050 SEVENTEENTH STREET, NW
WASHINGTON DC 20036-5503

FD030400/0021/ 73949 SCSS APR
JEROME F DONOHUE
224 SOUTH MICHIGAN AVENUE
CHICAGO IL 60604-2507

FD030400/0021/ 98725 SCSS POR
DONALD F GRIFFIN
SUITE 210
1050 - 17TH STREET., N.W.
WASHINGTON DC 20036-5503

FD030400/0021/ 7818 SCSS PRP
HIGHSAW & MAHONEY, P. C.
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1050 17TH STREET, N. W.
WASHINGTON DC 20036-5503

FD030400/0021/ 138617 SCSS POR
INTERNATIONAL ASSOC OF MACHINISTS
1300 CONNECTICUT AVE., N.W.
WASHINGTON DC 20036

FD030400/0021/ 19407 SCSS POR
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 LOUISIANA AVENUE, NW
WASHINGTON DC 20001-2130

Service Date

Aug 18, 1992

Docket Number

FD-30400

FD030400/0021/ 107396 SCSS VIS
CHARLES KONG
1017 BROWN STREET
BAKERSFIELD CA 93305-4741

FD030400/0021/ 144535 SCSS PRP
LEE J KUBBY
BOX 60485
SUNNYVALE CA 94086

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SOUTHERN PACIFIC BLDG.
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FD030400/0021/ 495 SCSS POR
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FALSOM CA 95630-0214

FD030400/0021/ 144512 SCSS VIS
SIEU MEI TU
BOX 60485
SUNNYVALE CA 94086

STB

FD-30400

(SUB 21)

8-4-92

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SEC

SERVICE DATE

AUG 4 1992

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION--CONTROL--SOUTHERN
PACIFIC TRANSPORTATION COMPANY

Decided: July 29, 1992

By decision served June 18, 1992, the Commission reopened this proceeding and established a new procedural schedule for the filing of evidence and argument. The due date for former employees of the Southern Pacific Transportation Company or their representatives to file evidence and argument is August 3, 1992.

On July 27, 1992, employees' representatives the Brotherhood of Maintenance of Way Employees (BMW) and International Association of Machinists and Aerospace Workers (IAMAW) (collectively Petitioners) filed a Motion for Extension of Time and Petition for Leave to Serve Requests for Production of Documents. Petitioners state they have served interrogatories on Santa Fe Pacific Corporation, responses to which are not due under Commission rules until August 8, 1992. Petitioners also state that action on their Petition for Leave to Serve Requests for Production of Documents cannot occur before the August 3, 1992 due date.

The request for an extension of time is reasonable. This proceeding will be referred to the Office of Hearings for resolution of this and any other discovery matter that may arise. The procedural schedule established in the decision served June 18, 1992, is vacated pending disposition of the instant discovery request.

It is ordered:

1. This proceeding is referred to the Office of Hearings for all action needed to resolve discovery issues.
2. The procedural schedule established in this proceeding is vacated pending disposition of the instant discovery issues.
3. The Office of Hearings shall notify the Secretary of its decision in this matter.
4. This decision is effective on the service date.

By the Commission, Sidney L. Strickland, Jr., Secretary.



Sidney L. Strickland, Jr.
Sidney L. Strickland, Jr.
Secretary

**INTERSTATE COMMERCE COMMISSION
WASHINGTON D.C. 20423**

**OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, \$300**



**POSTAGE AND FEES PAID
INTERSTATE COMMERCE COMMISSION
ICC-880**

Handwritten signature or scribble

Interstate Commerce Commission

SERVICE OF PROCESS

Listing of all parties served

Service Date Aug 4, 1992

Docket No. FD - 30400 sub 21

Embraced Cases

Total Number Served 15

Regional Office(s) served: [] 1 [] 2 [] 3

I certify that on the Service Date noted above, a copy of the attached

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| <input type="checkbox"/> | Entire Commission | <input type="checkbox"/> | Division | <input type="checkbox"/> | Commissioner |
| <input type="checkbox"/> | Employee Board | <input type="checkbox"/> | Director | <input type="checkbox"/> | Admin. Law Judge |
| <input type="checkbox"/> | Unopposed Notice
(NH) | <input type="checkbox"/> | Modified Procedure Order
(MP) | | |
| <input type="checkbox"/> | Certificate, License, or Permit | | | <input checked="" type="checkbox"/> | Other |

decision/notice was served on the individuals named below.

JEROME HUNTER

Service Clerk

Aug 4, 1992
Date

Individuals Served:

FD030400/0021/ 115803 SCSS POR
 RIO GRANDE INDUSTRIES, INC. ET AL
 SOUTHERN PACIFIC BLDG.
 ONE MARKET PLAZA
 SAN FRANCISCO CA 94105

FD030400/0021/ 91343 SCSS APP
 SANTA FE PACIFIC CORPORATION
 1700 EAST GOLF ROAD
 SCHAUMBURG IL 60173-5560

FD030400/0021/ 495 SCSS POR
 SOUTHERN PACIFIC TRANSPORTATION COMPANY
 SOUTHERN PACIFIC BLDG
 ONE MARKET PLAZA., SUITE 846
 SAN FRANCISCO CA 94105-1001

FD030400/0021/ 116619 SCSS POR
 E. R. STRAATSMA
 P. O. BOX 214
 FALSOM CA 95630-0214

Service Date

AUG 4, 1992

Docket Number

FD-30400

FD030400/0021/ 12100 SCSS POR
GUY VITELLO
1700 EAST GOLF RD
SCHAUMBURG IL 60173-5860

FD030400/0021/ 6830 SCSS POR
RICHARD E. WEICHER
ATCHISON, TOPEKA SANTA FE
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173

FD030400/0021/ 131454 SCSS POR
DENNIS W. WILSON
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5853

FD - 30400 (Sub-no. 21)

KUNKEL TRANSPORTATION SERVICES INC
FOR: ATCHISON TOPEKA & SANTA FE RY CO
918 F STREET NW STE 410
WASHINGTON DC 20004

Service Date

AUG 4, 1992

Docket Number

FD-30400 S.S. 21

FD030400/0021/ 2190 SCSS POR
THE ATCHISON, TOPEKA & SANTA FE R.R. CO,
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5860

FD030400/0021/ 7586 SCSS POR
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25 LOUISIANA AVENUE, NW
WASHINGTON DC 20001-2130

FD030400/0021/ 107396 SCSS VIS
CHARLES KONG
1017 BROWN STREET
BAKERSFIELD CA 93305-4741

STB

FD-30400

(SUB 21)

6-18-92

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13198

SERVICE DATE

JUN 18 1992

EC

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION -- CONTROL --
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: June 12, 1992

BACKGROUND

In Santa Fe Southern Pacific Corp.--Control--SPT Co., 2 I.C.C.2d 709 (1986); recon. den., 3 I.C.C.2d 926 (1987) (SFSP), the Commission denied the proposed merger of The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and Southern Pacific Transportation Company (SPT). The Santa Fe Southern Pacific Corporation (SFSP) had owned the stock of SPT since December 1973 under a Commission-approved independent voting trust that had enabled the two railroads' holding companies to merge. After the proposed rail merger was denied, SFSP was required to divest its interest in either Santa Fe or SPT. SFSP chose to sell SPT's stock to Rio Grande Industries (Rio Grande), and that acquisition was approved by the Commission in Rio Grande Industries, Et Al.--Control--SPT Co., Et Al., 4 I.C.C.2d 834 (1988) (Rio Grande), aff'd sub nom. Kansas City Indus., Inc. v. United States, 902 F.2d 423 (5th Cir. 1990). The voting trust was dissolved on October 13, 1988, when the Rio Grande-SPT acquisition was consummated.

During the Rio Grande proceeding, the Railway Labor Executives' Association (RLEA) and the International Brotherhood of Teamsters (IBT) argued that certain SPT and Santa Fe employees had been adversely affected by employer actions taken in anticipation of the Santa Fe-SPT merger. In Rio Grande, the Commission concluded that it was not required to impose labor protective conditions under 49 U.S.C. 11347 for the benefit of employees adversely affected by the rejected ATSF-SPT merger and that it was not appropriate to impose labor protection for those employees in the context of Rio Grande's acquisition of SPT. Because of its continuing jurisdiction over the SFSP voting trust, the Commission instead noted that SFSP was in a different position than Rio Grande and that the Commission's labor protection power would extend to employees adversely affected by SFSP.

After consideration of comments, in a decision served February 9, 1989, the Commission determined that: (1) the unilateral displacement of employees by Santa Fe or SPT management, even in anticipation of the disapproved merger, would be governed by the applicable collective bargaining agreements between those carriers and their employees; (2) there would be no basis for imposing labor protection on SFSP for merger anticipatory actions it could be shown to have ordered Santa Fe to take because SFSP was lawfully in control of Santa Fe and any grievances by Santa Fe employees would be found in collective bargaining agreements between Santa Fe and its employees; (3) no basis had been shown to impose conditions for the benefit of SPT employees pursuant to section 11347; and (4) if any merger anticipatory actions adverse to SPT employees were shown to have been ordered by SFSP, in violation of section 11343, the adversely affected individuals would have a court remedy under 49 U.S.C. 11705.

On judicial review, the United States Court of Appeals for the Ninth Circuit largely affirmed the February 9 decision.¹ It concluded that aggrieved SPT employees did not have available to them a cause of action in the courts under section 11705.² Instead, it determined that the Commission possessed discretionary conditioning authority under 49 U.S.C. 11344(c) to "impose conditions governing the transaction" with respect to labor protection for adversely affected employees, and remanded the case for the Commission to determine whether to exercise that discretionary authority.

The Commission sought rehearing of the portion of the court's decision remanding the proceeding to the Commission to consider in its discretion whether labor protection should have been imposed upon the merger denial. We argued that section 11344(c) clearly contemplates imposing conditions only when a transaction is approved.

On rehearing, the Ninth Circuit expressly agreed with our conclusion that the labor protective conditions mandated by section 11347 for approved transactions are not appropriate here.³ Additionally, the court deleted the explicit reference in its earlier decision to a discretionary Commission authority under section 11344(c) to impose labor protection when denying a transaction.

Instead, the court determined that section 11344(c) contains a general discretionary conditioning authority under which the Commission is to consider and condition a transaction with respect to anti-competitive [section 11344(b)(1)(E)] and other relevant factors including labor [section 11344(b)(1)(D)]. Coupling this general conditioning authority with the Commission's divestiture order (and possibly the Rio Grande approval decision), the court directed us to consider in our own discretion whether labor protection should be imposed as a condition of the divestiture.

DISCUSSION AND CONCLUSIONS

We do not view the court decision on rehearing as basing our discretionary conditioning authority on the merger denial. Indeed, we continue to view divestiture as a legal requirement emanating from our merger disapproval. Accordingly, we view the court decision on remand as relating to our continuing jurisdiction over SFSP from the time the voting trust was in effect, through the time the merger was denied, until the time the divestiture was consummated. Several of the early Commission decisions reflected the intention to monitor SPT's situation continually as it was held in the voting trust pending consummation.

¹ Railway Labor Executives' Assn. v. ICC, 924 F.2d 961 (9th Cir. 1991).

² The court cited its earlier decision in Kraus v. Santa Fe Southern Pacific Corp., 878 F.2d 1193 (1989) (Kraus). There it had ruled that the Commission's merger jurisdiction was exclusive and precluded aggrieved employees from filing claims directly with the district court under section 11705. It noted that in Kraus it had explicitly rejected our February 9 decision's reasoning on the section 11705 issue.

³ Railway Labor Executives' Ass'n v. ICC, 958 F.2d 252 (9th Cir. 1992) (superseding previous opinion).

For example, the Commission approved the voting trust in the SFSP consolidation proceeding,⁴ based in part on the stipulation that the voting trust could at any time be modified to ensure compliance with the law. Also, interested parties affected by SPT's actions were to be free to petition the Commission where it might be shown that actions were taken against SPT's interest and for the benefit of Santa Fe or its parent. The Commission stated at page 13 that "...we do not at the outset put any limit on the type of condition that might be imposed We should not hesitate to impose conditions to rectify abuses that might develop in these or any other areas."

Subsequently, on February 27, 1987, the Commission served a decision based on an investigation of the operations of the voting trust up to that time. The investigation had disclosed undesirable contacts among the parties in several areas. Between the voting trust as implemented and SFSP's undertakings, the Commission concluded that SPT had not been insulated from SFSP to the extent intended. The decision clarified the trustee's obligations, emphasized that SPT's independence was the responsibility of both the SFSP and SPT managements, and stated that the relationships among the parties would continue to be monitored.

Then, in the remanded February 9, 1989 decision, the Commission stated that any control SFSP exercised over SPT during the voting trust period would be subject to its jurisdiction by virtue of the voting trust. Specifically, it noted at page 2 that "[t]he carriers agree...that we would have authority over violations of the voting trust."

In the Rio Grande decision, supra, at 255-56, the Commission again recognized its continuing jurisdiction over the voting trust and matters related to it. It stated as follows:

In authorizing [SFSP] to control SPT through a voting trust, we subjected SFSP to our continuing jurisdiction with respect to any number of matters, including the possible imposition of additional conditions that we might deem necessary.... [W]e believe it is within our power to provide that ATSF or SPT employees who can demonstrate that they were adversely affected as a direct consequence of actions taken, or orders issued, by SFSP in contemplation of the merger which we ultimately denied, be afforded labor protection in Finance Docket No. 30400.

Consistent with the court remand, we are reopening this proceeding to give SPT employees (as a class) an opportunity to demonstrate that they were adversely affected as a direct consequence of actions taken or orders issued by SFSP in contemplation of the proposed ATSF-SPT merger. We seek specific evidence from the parties with respect to those actions or orders issued by SFSP which may have affected SPT operations and work-related assignments. We are not at this time seeking personal statements from individual employees who believe they were adversely affected by SPT actions. The parties may also comment on whether and how New York Dock Ry. -Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock), may be modified

⁴ Finance Docket No. 30400, Decision No. 2, Santa Fe Southern Pac. Corp. -Control-Southern Pac. Trans. Co.; Merger-Atchafalaya T. & S. F. R. Co. and Southern Pac. Trans. Co. (not printed), served December 23, 1983.

procedurally and substantively to provide relief to adversely affected employees.⁵

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. This proceeding is reopened.
2. Former employees of the Southern Pacific Transportation Company or their representatives shall file evidence and argument as described above by August 3, 1992, replies shall be filed by September 1, 1992, and rebuttal shall be filed by September 21, 1992.
3. This decision is effective on June 18, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Phillips, and Emmett.



Sidney L. Strickland, Jr.
Sidney L. Strickland, Jr.
Secretary

⁵ In the February 9 decision, at page 3, the Commission recognized that the conditions fashioned in New York Dock are ordinarily imposed in approved consolidation cases and that they:

provide for preservation of seniority, negotiated implementing agreements and arbitration, and severance pay, [and] are clearly designed to cushion the adverse impacts on labor of consummated transactions.

Interstate Commerce Commission SERVICE OF PROCESS Listing of all parties served	Service Date <u>Jun 18, 1992</u>
	Docket No. <u>FD - 30400 SS 21</u>
Total Number Served <u>16</u>	Embraced Cases

Regional Office(s) served: 1 2 3

I certify that on the Service Date noted above, a copy of the attached

- | | | | |
|--|--------------------------|--|---|
| <input checked="" type="checkbox"/> Entire Commission | <input type="checkbox"/> | <input type="checkbox"/> Division | <input type="checkbox"/> Commissioner |
| <input type="checkbox"/> Employee Board | <input type="checkbox"/> | <input type="checkbox"/> Director | <input type="checkbox"/> Admin. Law Judge |
| <input type="checkbox"/> Unopposed Notice (NH) | <input type="checkbox"/> | <input type="checkbox"/> Modified Procedure Order (MP) | |
| <input type="checkbox"/> Certificate, License, or Permit | | <input type="checkbox"/> Other | |

decision/notice was served on the individuals named below.

J. HUNTER Service Clerk Jun 18, 1992 Date

Individuals Served:

- FD030400/0021/ 2190 SCSS POR
THE ATCHISON, TOPEKA & SANTA FE RY CO
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5860
- FD030400/0021/ 7586 SCSS POR
JOHN O'E. CLARKE, JR.
SUITE 210
1050 SEVENTEENTH STREET, NW
WASHINGTON DC 20036-5503
- FD030400/0021/ 73249 SCSS APR
JEROME F DONOHUE
224 SOUTH MICHIGAN AVENUE
CHICAGO IL 60604-2507
- FD030400/0021/ 98725 SCSS POR
DONALD F GRIFFIN
SUITE 210
1050 - 17TH STREET., N.W.
WASHINGTON DC 20036-5503
- FD030400/0021/ 106809 SCSS PRP
HIGSAW & MAHONEY, P. C.
SUITE 210
1050 17TH STREET, N.W.
WASHINGTON, DC 20036-5503

FD-30400 Sub-7021

Service Date

JUN 18, 1992

LUNCEL TRANSPORTATION SERVICES INC
FOR ATCHISON TOPEKA & SANTA FE RY CO
19 F STREET NW STE 410
WASHINGTON DC 20004

Docket Number

FD-30400 sub 21

FD030400/0021/ 19407 SCSS POR
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 LOUISIANA AVENUE, NW
WASHINGTON DC 20001-2130

FD030400/0021/ 107396 SCSS VIS
CHARLES KONG
1017 BROWN STREET
BAKERSFIELD CA 93305-4741

FD030400/0021/ 7818 SCSS PRP
WILLIAM G. MAHONEY
SUITE 210
1050 17TH STREET, N. W.
WASHINGTON DC 20036-5503

FD030400/0021/ 91343 SCSS APP
SANTA FE SOUTHERNN PACIFIC CORP.
224 SOUTH MMICHIGAN AVENUE
CHICAGO IL 60604-2507

FD030400/0021/ 495 SCSS POR
SOUTHERN PACIFIC TRANSPORTATION COMPANY
SOUTHERN PACIFIC BLDG
ONE MARKET PLAZA., SUITE 846
SAN FRANCISCO CA 94105-1001

FD030400/0021/ 116619 SCSS POR
E. R. STRAATSM
P. O. BOX 214
FALSOM CA 95630-0214

FD030400/0021/ 6830 SCSS POR
RICHARD E. WEICHER
ATCHISON, TOPEKA SANTA FE
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173

STB

FD-30400

(SUB 21)

1-28-93

C

12799

12799

OH

INTERSTATE COMMERCE COMMISSION

SERVICE DATE

JAN 28 1993

ORDER

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL-- SOUTHERN PACIFIC TRANSPORTATION COMPANY

Pursuant to the Motion of Santa Fe Pacific Corporation For Application Of Protective Order dated December 22, 1992, it is hereby ordered that the Evidence and Argument and the Declaration of Barbara Boutourlin filed by Lee Kubby on behalf of Sieu Mei Tu on or around December 18, 1992 be treated as confidential as it pertains to Santa Fe unless and until such time as the Commission otherwise may decide. In this regard, please cross-reference a related order entered this day concerning a separate claim of privilege asserted by Southern Pacific Transportation Company.

Paul S. Cross

By Paul S. Cross, Chief Administrative Law Judge, on the
of January, 1993



Sidney L. Strickland, Jr.
Sidney L. Strickland, Jr.
Secretary

Service Date

1-28-93

Docket Number

FD-30400-21

FD030400/0021/ 93533 SCSS PRP
RICHARD S EDELMAN
SUITE 210
1050 17TH STREET., N.W.
WASHINGTON DC 20036-5503

FD030400/0021/ 148610 SCSS POR
THOMAS ELLEN
400 SEVENTH ST NW
WASHINGTON DC 20590

FD030400/0021/ 98725 SCSS POR
DONALD F GRIFFIN
SUITE 210
1050 - 17TH STREET., N.W.
WASHINGTON DC 20036-5503

FD030400/0021/ 7818 SCSS PRP
HIGSAW & MAHONEY, P. C.
SUITE 210
1050 17TH STREET, N. W.
WASHINGTON DC 20036-5503

FD030400/0021/ 138617 SCSS POR
INTERNATIONAL ASSOC OF MACHINISTS
1300 CONNECTICUT AVE., N.W.
WASHINGTON DC 20036

FD030400/0021/ 19407 SCSS POR
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 LOUISIANA AVENUE, NW
WASHINGTON DC 20001-2130

FD030400/0021/ 137198 SCSS APR
ERIKA Z. JONES
2000 PENNSYLVANIA AVE. N. W.
WASHINGTON DC 20006

Service Date

1-28-93

Docket Number

FD-30400-21

FD030400/0021/ 107396 SCSS VIS
CHARLES KONG
1017 BROWN STREET
BAKERSFIELD CA 93305-4741

FD030400/0021/ 144535 SCSS PRP
LEE J KUBBY
BOX 60485
SUNNYVALE CA 94086

FD030400/0021/ 144531 SCSS PRP
WM G MAHONEY
SUITE 210
1050 SEVENTEENTH ST NW
WASHINGTON DC 20036

FD030400/0021/ 148484 SCSS POR
PACIFIC FRUIT EXPRESS
116 NEW MONTGOMERY
SAN FRANCISCO CA 94105

FD030400/0021/ 115803 SCSS FOR
RIO GRANDE INDUSTRIES, INC. ET AL
SOUTHERN PACIFIC BLDG.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105

FD030400/0021/ 91343 SCSS APP
SANTA FE SOUTHERN PACIFIC CORP
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5560

FD030400/0021/ 147192 SCSS POR
R G SNYDER
1 MARKET PLAZA RM 824
SAN FRANCISCO CA 94105

Service Date

1-28-93

Docket Number

FD-30400-21

FD030400/0021/ 495 SCSS POR
SOUTHERN PACIFIC TRANSPORTATION COMPANY
SOUTHERN PACIFIC BLDG
ONE MARKET PLAZA., SUITE 846
SAN FRANCISCO CA 94105-1001

FD030400/0021/ 116619 SCSS POR
E. R. STRAATSMA
P. O. BOX 214
FALSOM CA 95630-0214

FD030400/0021/ 144512 SCSS VIS
SIEU MEI TU
1697 HICKORY AVE.
SAN LEANDRO CA 94579

FD030400/0021/ 12100 SCSS POR
GUY VITELLO
1700 EAST GOLF RD
SCHAUMBURG IL 60173-5860

FD030400/0021/ 6830 SCSS POR
RICHARD E. WEICHER
ATCHISON, TOPEKA SANTA FE
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173

FD030400/0021/ 131454 SCSS POR
DENNIS W. WILSON
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5853

FD030400/0021/ 147637 SCSS PRP
BARBARA A YOUNG
ONE MARKET PLAZA
SAN FRANCISCO CA 94105

Service Date

1-28-93

Docket Number

7D 30400(21)

FD-30400(21)

XUNKEL TRANSPORTATION SERVICES INC
FOR: ATCHISON TOPEKA & SANTA FE RY CO
918 F STREET NW STE 410
WASHINGTON DC 20004

STB

FD-30400

(SUB 21)

1-28-93

C

12798

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SERVICE DATE
JAN 28 1993

OH

INTERSTATE COMMERCE COMMISSION

ORDER

Finance Docket No. 30400 (Sub-No. 21)

**SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL-- SOUTHERN PACIFIC TRANSPORTATION COMPANY**

Previously, Sieu Mei Tue presented certain formal discovery motions and requests which were satisfied in part. Because the requests for information and the responses thereto passed in the mail, a schedule was established in an order served January 11, 1993, for the purpose of identifying those discovery matters still in dispute. As well, the January 11, 1993 order provided for the filing of further arguments upon a disputed claim of attorney-client privilege. The required filings were made and a discussion upon those filings were held in a follow-up telephone conference call with the active parties today (January 25, 1993).

The cited conference call deals specifically with two matters. First, a Supplemental Motion of Sieu Mei Tue of January 11, 1993, updating prior Sieu Mei Tu motions to compel discovery is denied for the reasons stated in answers to the Supplemental Motion filed by Southern Pacific Transportation Company (SPT) and Santa Fe Pacific Company dated January 21, 1993. Second, a decision upon a prior request of SPT for removal from the Commission's files and return to SPT of certain asserted attorney-client information is referred to the entire Commission. The asserted SPT "attorney-client" documents were obtained by Sieu Mei Tu by some means other than as a result of Office of Hearings' ordered discovery. There is no violation by Sieu Mei Tu of any discovery order issued by the Office of Hearings. Therefore, I believe that the attorney-client matter raised by SPT is one for initial Commission determination. The dispute goes to the ultimate merits of the employee benefit claim of Tu (which is a matter not assigned to the Office of Hearings).

However, an interim protective order is required. The SPT documents filed by Tu with the Commission on December 18, 1992 shall be treated as confidential information until otherwise determined by the Commission. This creates no inference that any of the Tu filing is confidential. Instead, the intent is to freeze the matter until such time as the Commission is able to make authoritative findings on the merits of the overall dispute between Tu and SPT and Santa Fe.

Paul S. Cross
By Paul S. Cross, Chief Administrative Law Judge, on the
25th day of January, 1993.

Sidney L. Strickland, Jr.
Sidney L. Strickland, Jr.
Secretary



INTERSTATE COMMERCE COMMISSION
WASHINGTON, DC 20423-0001

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE \$300

FIRST CLASS MAIL
POSTAGE AND FEES PAID
INTERSTATE COMMERCE COMMISSION
PERMIT G-64

Handwritten signature



Interstate Commerce Commission Office of the Secretary Service of Process Listing of All Parties Served	Service Date JAN 28, 1993
	Docket No. FD - 30400 SUB 21
Total Number Served 25	Embraced Cases

Regional Office(s) served: E C W

I certify that on the Service Date noted above, a copy of the attached

- | | |
|---|--|
| <input type="checkbox"/> Entire Commission | <input type="checkbox"/> Director |
| <input type="checkbox"/> Employee Board | <input type="checkbox"/> Name Change |
| <input type="checkbox"/> Unopposed Notice (NH) | <input type="checkbox"/> Commissioner |
| <input type="checkbox"/> Certificate, Permit, License | <input checked="" type="checkbox"/> Administrative Law Judge |
| <input type="checkbox"/> Secretary | <input type="checkbox"/> Other |

Decision/notice was served on the individuals named below:

J. HUNTER
Scheduling Clerk

JAN 28, 1993
Date

Individuals Served:

FD030400/0021/ 6830 SCSS POR
 RICHARD E. WEICHER
 ATCHISON, TOPEKA SANTA FE
 1700 EAST GOLF ROAD
 SCHAUMBURG IL 60173

FD030400/0021/ 131454 SCSS POR
 DENNIS W. WILSON
 1700 EAST GOLF ROAD
 SCHAUMBURG IL 60173-5853

FD030400/0021/ 147637 SCSS PRP
 BARBARA A YOUNG
 ONE MARKET PLAZA
 SAN FRANCISCO CA 94105

Service Date

JAN 28, 1993

Docket Number

FD-30400 SJ 21

FD030400/0021/ 2190 SCSS POR
THE ATCHISON, TOPEKA & SANTA FE RWY CO,
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5860

FD030400/0021/ 143073 SCSS POR
WAYNE M BOLIO
SOUTHERN PACIFIC BLDG
ONE MARKET PLAZA, STE. 837
SAN FRANCISCO CA 94105-1001

FD030400/0021/ 7586 SCSS POR
JOHN O'B. CLARKE, JR.
SUITE 210
1050 SEVENTEENTH STREET, NW
WASHINGTON DC 20036-5503

FD030400/0021/ 93533 SCSS PRP
RICHARD S EDELMAN
SUITE 210
1050 17TH STREET., N.W.
WASHINGTON DC 20036-5503

FD030400/0021/ 148610 SCSS POR
THOMAS ELLEN
400 SEVENTH ST NW
WASHINGTON DC 20590

FD030400/0021/ 98725 SCSS POR
DONALD F GRIFFIN
SUITE 210
1050 - 17TH STREET., N.W.
WASHINGTON DC 20036-5503

FD030400/0021/ 7818 SCSS PRP
HIGSAW & MAHONEY, P. C.
SUITE 210
1050 17TH STREET, N. W.
WASHINGTON DC 20036-5503

Service Date

JAN 28, 1993

Docket Number

FD - 30400 - 21

FD030400/0021/ 138617 SCSS POR
INTERNATIONAL ASSOC OF MACHINISTS
1300 CONNECTICUT AVE., N.W.
WASHINGTON DC 20036

FD030400/0021/ 19407 SCSS POR
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 LOUISIANA AVENUE, NW
WASHINGTON DC 20001-2130

FD030400/0021/ 137198 SCSS APR
ERIKA Z. JONES
2000 PENNSYLVANIA AVE. N. W.
WASHINGTON DC 20006

FD030400/0021/ 107396 SCSS VIS
CHARLES KONG
1017 BROWN STREET
BAKERSFIELD CA 93305-4741

FD030400/0021/ 144535 SCSS PRP
LEE J KUBBY
BOX 60485
SUNNYVALE CA 94086

FD030400/0021/ 144531 SCSS PRP
WM G MAHONEY
SUIE 210
1050 SEVENTEENTH ST NW
WASHINGTON DC 20036

FD030400/0021/ 148484 SCSS POR
PACIFIC FRUIT EXPRESS
116 NEW MONTGOMERY
SAN FRANCISCO CA 94105

Service Date

JAN 28, 1993

Docket Number

FD - 30400 SJS 21

FD030400/0021/ 115803 SCSS POR
RIO GRANDE INDUSTRIES, INC. ET AL
SOUTHERN PACIFIC BLDG.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105

FD030400/0021/ 91343 SCSS APP
SANTA FE SOUTHERN PACIFIC CORP
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5560

FD030400/0021/ 147192 SCSS POR
R G SNYDER
1 MARKET PLAZA RM 824
SAN FRANCISCO CA 94105

FD030400/0021/ 495 SCSS POR
SOUTHERN PACIFIC TRANSPORTATION COMPANY
SOUTHERN PACIFIC BLDG
ONE MARKET PLAZA., SUITE 846
SAN FRANCISCO CA 94105-1001

FD030400/0021/ 116619 SCSS POR
E. R. STRAATSMA
P. O. BOX 214
FALSOM CA 95630-0214

FD030400/0021/ 144512 SCSS VIS
SIEU MEI TU
1697 HICKORY AVE.
SAN LEANDRO CA 94579

FD030400/0021/ 12100 SCSS POR
GUY VITELLO
1700 EAST GOLF RD
SCHAUMBURG IL 60173-5860

Service Date

1-28-93

Docket Number

FD 30400 (21)

FD-30400 (401-710-21)

KUNKEL TRANSPORTATION SERVICES INC
FOR: ATCHISON TOPEKA & SANTA FE RY CO
918 F STREET NW STE 410
WASHINGTON DC 20004

STB

FD-30400

(SUB 21)

1-11-93

C

12797

12797

SERVICE DATE
JAN 11 1993

OH

INTERSTATE COMMERCE COMMISSION

ORDER

Finance Docket No. 30400 (Sub-l.o. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION
-- CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

On January 5, 1992 a conference call in the above-entitled matter was held by me with Southern Pacific Transportation Company (SPT) and Pacific Fruit Express (PFE), Santa Fe Pacific Company (SFP), IAMAW and BMW, and Sieu Mei Tu. The conference call was scheduled to address SPT/PFE's Motion to Strike and Request for Return of Materials Improperly Included In The Record, SFP's Motion for Application of A Protective Order, and Tu's Motion to Compel. After considering the arguments of the parties during the telephone conference call, it is Ordered as follows:

1. SPT/PFE will file a supplemental memoranda in support of its motion by January 11, 1993;
2. Tu will file any further opposition to that motion by January 21, 1993;
3. Tu will file any supplemental papers in support of her Motion to Compel Further Responses by January 11, 1993.
4. SPT/PFE and SFP will file any response to that Motion by January 21, 1993.
5. All parties will serve their papers by overnight mail;
6. A further conference call on the parties respective Motions is scheduled for January 23, 1993 at 11:00 a.m. (EDT).

Paul S. Cross
By Paul S. Cross, Chief Administrative Law Judge this 7th day of January, 1993.

Sidney L. Strickland, Jr.
Sidney L. Strickland, Jr.
Secretary

(SEAL)

12797

SERVICE DATE

JAN 11 1993

OH

INTERSTATE COMMERCE COMMISSION

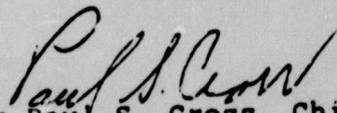
ORDER

Finance Docket No. 30400 (Sub-l.o. 21)

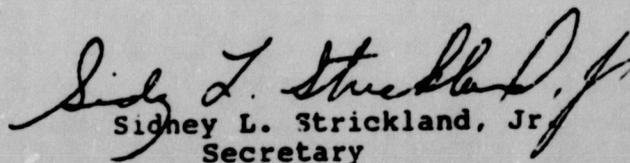
**SANTA FE SOUTHERN PACIFIC CORPORATION
-- CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY**

On January 5, 1992 a conference call in the above-entitled matter was held by me with Southern Pacific Transportation Company (SPT) and Pacific Fruit Express (PFE), Santa Fe Pacific Company (SFP), IAMAW and BMWE, and Sieu Mei Tu. The conference call was scheduled to address SPT/PFE's Motion to Strike and Request for Return of Materials Improperly Included In The Record, SFP's Motion for Application of A Protective Order, and Tu's Motion to Compel. After considering the arguments of the parties during the telephone conference call, it is Ordered as follows:

1. SPT/PFE will file a supplemental memoranda in support of its motion by January 11, 1993;
2. Tu will file any further opposition to that motion by January 21, 1993;
3. Tu will file any supplemental papers in support of her Motion to Compel Further Responses by January 11, 1993.
4. SPT/PFE and SFP will file any response to that Motion by January 21, 1993.
5. All parties will serve their papers by overnight mail;
6. A further conference call on the parties respective Motions is scheduled for January 23, 1993 at 11:00 a.m. (EDT).



By Paul S. Cross, Chief Administrative Law Judge this 7th day of January, 1993.



Sidney L. Strickland, Jr.
Secretary

(SEAL)

STB

FD-30400

(SUB 21)

4-12-89

C

14376

14376

12
SERVICE DATE

**INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.
20423**

APR 12 1989

April 4, 1989

Finance Docket No. 30400 (Sub-No. 21)

**SANTA FE SOUTHERN PACIFIC CORPORATION -- CONTROL -- SOUTHERN
PACIFIC TRANSPORTATION COMPANY**

NOTICE

A court action, entitled as shown below,
was instituted on or about March 21, 1989,
involving the above-entitled proceeding:

No. 89-70134

**RAILWAY LABOR EXECUTIVES' ASSOCIATION, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AND UNITED
TRANSPORTATION UNION**

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

before the United States Court of Appeals
for the Ninth Circuit

Noreta R. McGee
**NORETA R. MCGEE
Secretary**

**INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C. 20423**

**OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, \$300**



**POSTAGE AND FEES
INTERSTATE COMME
COMMISSION
ICC 630**

Interstate Commerce Commission SERVICE OF PROCESS Listing of all parties served	Service Date APR 12, 1989
	Docket No. FD-30400 S-5 21
Total Number Served 12	Embraced Cases

Regional Office(s) served: [] 1 [] 2 [] 3

I certify that on the Service Date noted above, a copy of the attached

- | | | | | | |
|--------------------------|---------------------------------|--------------------------|----------------------------------|-------------------------------------|------------------|
| <input type="checkbox"/> | Entire Commission | <input type="checkbox"/> | Division | <input type="checkbox"/> | Commissioner |
| <input type="checkbox"/> | Employee Board | <input type="checkbox"/> | Director | <input type="checkbox"/> | Admin. Law Judge |
| <input type="checkbox"/> | Unopposed Notice
(NH) | <input type="checkbox"/> | Modified Procedure Order
(MP) | | |
| <input type="checkbox"/> | Certificate, License, or Permit | | | <input checked="" type="checkbox"/> | Other |

decision/notice was served on the individuals named below.

Service Clerk *Jerome N. ...* Date **4-12-89**

Individuals Served:

FD030400/0021/ 10916 SCSS POR
THE ATCHISON, TOPEKA AND SANTA FE RAILWA
SUITE 510
2300 CLAYTON ROAD
CONCORD CA 94520

FD030400/0021/ 7586 SCSS POR
JOHN O'B. CLARKE, JR.
SUITE 210
1050 SEVENTEENTH STREET, NW
WASHINGTON DC 20036

FD030400/0021/ 73949 SCSS APR
JEROME F DONOHOE
224 SOUTH MICHIGAN AVENUE
CHICAGO IL 60604

FD030400/0021/ 98725 SCSS POR
DONALD F GRIFFIN
SUITE 210
1050 - 17TH STREET., N.W.
WASHINGTON DC 20036

FD030400/0021/ 106809 SCSS PRP
HIGSAW & MAHONEY, P. C.
SUITE 210
1050 17TH STREET, N.W.
WASHINGTON, DC 20036

SERVICE DATE

4-12-89

DOCKET NO.

FD 30400.21

FD030400/0021/ 107396 SCSS VIS
CHARLES KONG
1017 BROWN STREET
BAKERSFIELD CA 93305

FD030400/0021/ 7818 SCSS PRP
WILLIAM G. MAHONEY
SUITE 210
1050 17TH STREET, N. W.
WASHINGTON DC 20036

FD030400/0021/ 77690 SCSS POR
JAN MATINO
1001 PENNSYLVANIA AVENUJE, NW.
WASHINGTON, DC 20006

FD030400/0021/ 91343 SCSS APP
SANTA FE SOUTHERNN PACIFIC CORP.
224 SOUTH MMICHIGAN AVENUE
CHICAGO IL 60604

FD030400/0021/ 495 SCSS POR
SOUTHERN PACIFIC TRANSPORTATION COMPANY
SOUTHERN PACIFIC BUILDING
ONE MARKET PLAZA
SAN FRANCISCO CA 94105

FD030400/0021/ 6830 SCSS POR
RICHARD E. WEICHER
224 SOUTH MICHIGAN AVENUE
CHICAGO IL 60604

FD-30400 (Sub 21)

KUNKEL TRANSPORTATION SERVICES INC
FOR: ATCHISON TOPEKA & SANTA FE RY CO
1331 PENN. AVE., N.W., SUITE 1211
WASHINGTON DC 20004

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.
20423

SERVICE DATE

APR 12 1989

April 4, 1989

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION -- CONTROL -- SOUTHERN
PACIFIC TRANSPORTATION COMPANY

NOTICE

A court action, entitled as shown below,
was instituted on or about March 21, 1989,
involving the above-entitled proceeding:

No. 89-70134

RAILWAY LABOR EXECUTIVES' ASSOCIATION, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AND UNITED
TRANSPORTATION UNION

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

before the United States Court of Appeals
for the Ninth Circuit

NORETA R. MCGEE
Secretary

STB

FD-30400

(SUB 21)

2-9-89

C

14375

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14375

SERVICE DATE

11

FEB 9 1989

EC

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION -- CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: January 25, 1989

BACKGROUND

In a decision in this proceeding served October 10, 1986, Santa Fe S.P. Corp.-Con.-Southern Pacific Transp. Co., 2 I.C.C.2d 709 (SFSP), we denied the proposed merger of The Atchison, Topeka and Santa Fe Railway Company (ATSF or Santa Fe) and the Southern Pacific Transportation Company (SPT). The Santa Fe Southern Pacific Corporation (SFSP) had owned the stock of SPT since December 1983, when the Commission approved use of an independent voting trust to hold the stock of the SPT, enabling the holding companies of the two railroads to merge. Once the proposed merger of the railroads was denied, and in order to avoid a violation of the Interstate Commerce Act, 49 U.S.C. 11343,¹ SFSP was required to divest its interest in either Santa Fe or SPT. SFSP chose to sell the stock of the SPT to Rio Grande Industries (Rio Grande), and by decision served September 12, 1988, Rio Grande Industries, Inc., SPTC Holding, Inc., and the Denver and Rio Grande Western Railroad Company - Control - Southern Pacific Transportation Company, I.C.C.2d (Rio Grande), that acquisition was approved. The voting trust was dissolved on October 13, 1988, when the Rio Grande-SPT acquisition was consummated.

During the Rio Grande proceeding, the Railway Labor Executives' Association (RLEA) and the International Brotherhood of Teamsters (IBT) argued that certain SPT and Santa Fe employees had been adversely affected by actions of their employers taken in anticipation of the Santa Fe-SPT merger. In Rio Grande, the unions urged that the relationship between the Rio Grande proceeding and the already denied SFSP case made both railroads subject to the labor protective conditions at 49 U.S.C. 11347. We concluded that we had no authority in connection with the Rio Grande acquisition to mandate protective conditions as sought by the unions. Slip op. at p. 95. We stated, however, that due to our continuing jurisdiction over the voting trust, SFSP was in a different position than was Rio Grande. We stated our belief that it was within our power to afford employees adversely affected by actions of SFSP labor protection in this docket. By notice served September 27, 1988, in this subnumbered proceeding, we sought comments on whether the Commission has the authority to impose such labor protective conditions, whether such conditions are warranted here, and, if so, how the conditions should be framed.

In response to our notice, we received comments from RLEA, SFSP and SPT and replies from the same three parties.² RLEA has

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not attempted to provide any new evidence to lay a factual basis for concluding that employees were adversely affected by actions taken in anticipation of the proposed Santa Fe-SPT merger. Instead, RLEA urges the Commission to impose protective conditions which would apply if any employees were so affected.

In responding to our question whether the Commission has the authority to impose labor protective conditions in these circumstances, RLEA argues not only that we have the authority, but that under 49 U.S.C. 11347 we are required to do so. It contends that the voting trust, SFSP, Rio Grande and the divestiture constitute one continuous section 11343 proceeding for which labor protection is mandatory under section 11347. SFSP and SPT argue, however, that such an approach is unprecedented, because what is sought is the imposition of employee protection on a transaction that has been denied, *i.e.*, the SFSP consolidation. The carriers state that our authority to impose conditions hinges upon approving a transaction. The denial of a transaction, they argue, affords no basis for imposing conditions under section 11347. They agree, however, that we would have authority over violations of the voting trust.

RLEA further argues that employee protection is warranted because employees have in fact been adversely affected by actions taken by SPT and/or SFSP in anticipation of consolidation. RLEA has submitted verified statements (that had been submitted in 1984 in SFSP) from two SPT employees who argue that certain operating adjustments made by SPT were in anticipation of consolidation with Santa Fe. SFSP and SPT argue that there is no new evidence that SPT employees were affected by SFSP ordered actions, and that the evidence presented does not support a claim of adverse effects.

RLEA urges imposition of the New York Dock conditions,³ which set out the minimum statutory protection afforded employees affected by a consolidation. RLEA proposes the procedural approach taken in the consolidated Finance Docket No. 31250, National Railroad Passenger Corporation -- Conveyance, and Finance Docket No. 31259, Central Vermont Railway, Inc. -- Petition for Exemption (not printed), served August 9, 1988. That is, we need not find that employees were adversely affected but would simply impose the New York Dock conditions. Thus, any employee believing himself to be adversely affected would pursue the matter through the prescribed process.

DISCUSSION AND CONCLUSIONS

In general, employee grievances unrelated to the Rio Grande acquisition of SPT are governed by the grievance procedures contained in collective bargaining agreements with their respective employing carriers. Any adverse effects upon SPT employees causally related to Rio Grande's acquisition of SPT are of course covered by the employee protective conditions we imposed upon our approval of that transaction. Displacement of employees unilaterally undertaken by ATSF or SPT management even if it is in anticipation of the disapproved SFSP acquisition of control over SPT would be governed by collective bargaining agreements between those carriers and their respective employees. Although in initiating this further inquiry we believed there

the time limitations set in our notice. These letters will be added to the correspondence section of the public docket in this proceeding but will not otherwise be considered here as they were not served on the parties. To the extent these individuals might be eligible for relief, they would need to pursue it through some other channel such as that outlined later in this decision.

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might be some basis for imposing labor protection obligations upon SFSP for any actions that it ordered be taken by ATSF or SPT management in anticipation of consolidation which adversely affected the employees of either carrier, we now conclude that there would be no basis for imposing labor protection on SFSP even for merger anticipatory actions it could be shown to have ordered ATSF to take because SFSP was at all times lawfully in control of ATSF as a result of a transaction which did not require Commission approval. As to grievances by ATSF employees against SFSP-ordered actions, the appropriate avenue for redress of such grievances, like grievances arising out of actions unilaterally taken by ATSF management, is to be found in the procedures contained in collective bargaining agreements between ATSF and its employees.

This leaves only the question of what relief, if any, we may appropriately afford SPT employees for the adverse effects that can be shown to be causally related to actions ordered by SFSP to be taken by SPT management in anticipation of the consolidation of the ATSF and SPT under the control of SFSP. Such actions by definition could only have been ordered during the period SFSP had the power to control decisions of SPT and prior to disapproval of their application to control SPT, i.e., during the period December 23, 1983 to October 10, 1986.

We agree with SFSP and SPT that no basis has been shown here to impose conditions pursuant to section 11347. Based upon the comments and replies filed and upon further consideration, we conclude that we do not have authority to impose labor protection as a condition of our action disapproving a merger proposal. Section 11347 speaks in terms of approved transactions, and the New York Dock conditions and their variants, which provide for preservation of seniority, negotiated implementing agreements and arbitration, and severance pay, are clearly designed to cushion the adverse impacts on labor of consummated transactions.

During the period from December 23, 1983, to October 10, 1986, any control exercised by SFSP over SPT was subject to Commission jurisdiction over the voting trust into which SPT stock was placed. If any actions adverse to employees are shown to have been ordered by SFSP in anticipation of consolidation and in violation of the provisions of 49 U.S.C. 11343, which prohibit common control absent Commission approval, the adversely affected individuals have a remedy as provided by 49 U.S.C. 11705.

SPT employees who believe they were harmed by actions taken in anticipation of the proposed SPT-ATSF consolidation would be required to show, in addition to causation, that SFSP exercised unlawful control of SPT, in violation of the Act or the conditions in our approval of SFSP's voting trust for SPT stock.⁴ Persons injured by a carrier violating the Act or an order of the Commission may file suit, and the carrier is liable for the damages sustained as a result of those violations. 49 U.S.C. 11705. In such a suit any adversely affected employees would have an opportunity to prove the necessary elements of the action -- that SFSP took actions that violated the Act, and that those actions resulted in harm to the employees. We do not think that the essentially factual matters that would be in issue in a civil proceeding are such that would require the exercise of

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administrative expertise, so as to invoke the doctrine of primary jurisdiction. See Hansen v. Norfolk & Western Ry. Co., 689 F.2d 707 (7th Cir. 1982); Chicago & NW Transp. Co. - Abandonment, 3 I.C.C.2d 729 (1987), affd. sub nom. Int. Bhd. of Elec. Workers v. ICC, No. 87-1629 (D.C. Cir., decided November 25, 1988). This is the course of action provided by Congress to redress any financial harms caused by unlawful actions.

For these reasons, we will discontinue this proceeding.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. This proceeding is discontinued.
2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Vice Chairman Simmons and Commissioner Lamboley dissented in part with a separate expression.

Noreta R. McGee

Noreta R. McGee
Secretary



VICE CHAIRMAN SIMMONS, dissenting in part:

I disagree with the majority's somewhat perfunctory treatment of the Commission's responsibility to enforce the Interstate Commerce Act and its own orders. I believe the Commission should take initial cognizance of any employee action arising out of a violation of the voting trust. Even if invocation of primary jurisdiction is not clearly required, the Commission should at least indicate its intention rigorously to enforce its own decisions and the requirements of the Act.

COMMISSIONER LAMBOLEY, dissenting in part:

While denial of specific relief under the ICA as requested; i.e., imposition of NY Dock conditions under §11347, may be appropriate, in my view, it is not appropriate to merely leave the potential issues as subject matter for §11705 civil action remedy in the Courts.

There is no sound reason for the Commission to abdicate its primary jurisdiction to judicial forums. To do so is a disservice to the transportation interests of both the rail

carrier, and the rail employees alike.¹ Causes of actions which may be brought against SFSP must of necessity involve actions undertaken by SFSP under the egis of the Commission established voting trust. The primacy of Commission jurisdiction is tied to the trust. Claims made will require construction and interpretation of the trust and conduct thereunder. Such complaints are cognizable by the Commission under §11701.²

In my view, the needs for expertise, efficiency and consistency of disposition auger well for the claim and exercise of primary jurisdiction by the Commission in complaint cases under §11701 for any employment claims as may be made under the voting trust.

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DECISION

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION -- CONTROL -- SOUTHERN
PACIFIC TRANSPORTATION COMPANY

Decided: January 25, 1989

BACKGROUND

In a decision in this proceeding served October 10, 1986, Santa Fe S.P. Corp.-Con.-Southern Pacific Transp. Co., 2 I.C.C.2d 709 (SFSP), we denied the proposed merger of The Atchison, Topeka and Santa Fe Railway Company (ATSF or Santa Fe) and the Southern Pacific Transportation Company (SPT). The Santa Fe Southern Pacific Corporation (SFSP) had owned the stock of SPT since December 1983, when the Commission approved use of an independent voting trust to hold the stock of the SPT, enabling the holding companies of the two railroads to merge. Once the proposed merger of the railroads was denied, and in order to avoid a violation of the Interstate Commerce Act, 49 U.S.C. 11343,¹ SFSP was required to divest its interest in either Santa Fe or SPT. SFSP chose to sell the stock of the SPT to Rio Grande Industries (Rio Grande), and by decision served September 12, 1988, Rio Grande Industries, Inc., SPTC Holding, Inc., and the Denver and Rio Grande Western Railroad Company - Control - Southern Pacific Transportation Company, ___ I.C.C.2d ___ (Rio Grande), that acquisition was approved. The voting trust was dissolved on October 13, 1988, when the Rio Grande-SPT acquisition was consummated.

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In response to our notice, we received comments from RLEA, SFSP and SPT and replies from the same three parties.² RLEA has

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For these reasons, we will discontinue this proceeding.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. This proceeding is discontinued.
2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Vice Chairman Simmons and Commissioner Lamboley dissented in part with a separate expression.

(SEAL)

Noreta R. McGee
Secretary

VICE CHAIRMAN SIMMONS, dissenting in part:

I disagree with the majority's somewhat perfunctory treatment of the Commission's responsibility to enforce the Interstate Commerce Act and its own orders. I believe the Commission should take initial cognizance of any employee action arising out of a violation of the voting trust. Even if invocation of primary jurisdiction is not clearly required, the Commission should at least indicate its intention rigorously to enforce its own decisions and the requirements of the Act.

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DECISION

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION -- CONTROL -- SOUTHERN
PACIFIC TRANSPORTATION COMPANY

Decided: January 25, 1989

BACKGROUND

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We agree with SFSP and SPT that no basis has been shown here to impose conditions pursuant to section 11347. Based upon the comments and replies filed and upon further consideration, we conclude that we do not have authority to impose labor protection as a condition of our action disapproving a merger proposal. Section 11347 speaks in terms of approved transactions, and the New York Dock conditions and their variants, which provide for preservation of seniority, negotiated implementing agreements and arbitration, and severance pay, are clearly designed to cushion the adverse impacts on labor of consummated transactions.

During the period from December 23, 1983, to October 10, 1986, any control exercised by SFSP over SPT was subject to Commission jurisdiction over the voting trust into which SPT stock was placed. If any actions adverse to employees are shown to have been ordered by SFSP in anticipation of consolidation and in violation of the provisions of 49 U.S.C. 11343, which prohibit common control absent Commission approval, the adversely affected individuals have a remedy as provided by 49 U.S.C. 11705.

SPT employees who believe they were harmed by actions taken in anticipation of the proposed SPT-ATSF consolidation would be required to show, in addition to causation, that SFSP exercised unlawful control of SPT, in violation of the Act or the conditions in our approval of SFSP's voting trust for SPT stock. Persons injured by a carrier violating the Act or an order of the Commission may file suit, and the carrier is liable for the damages sustained as a result of those violations. 49 U.S.C. 11705. In such a suit any adversely affected employees would have an opportunity to prove the necessary elements of the action — that SFSP took actions that violated the Act, and that those actions resulted in harm to the employees. We do not think that the essentially factual matters that would be in issue in a civil proceeding are such that would require the exercise of

We stated, in Rio Grande, slip op. at page 96, that we would entertain comments concerning employees who were alleging harm as a consequence of actions taken or orders issued by SFSP in anticipation of merger. This proceeding was not intended to encompass actions that may have been taken by SPT or ATSF independently. As discussed earlier in this decision any adverse effects of such actions may be covered by existing collective bargaining agreements. SPT, in its reply comments, refers to several grievances that have already been decided concerning such allegations.

administrative expertise, so as to invoke the doctrine of primary jurisdiction. See Hansen v. Norfolk & Western Ry. Co., 689 F.2d 707 (7th Cir. 1982); Chicago & NW Transp. Co. - Abandonment, 3 I.C.C.2d 729 (1987), affd. sub nom. Int. Bhd. of Elec. Workers v. ICC, No. 87-1629 (D.C. Cir., decided November 25, 1988). This is the course of action provided by Congress to redress any financial harms caused by unlawful actions.

For these reasons, we will discontinue this proceeding.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. This proceeding is discontinued.
2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Vice Chairman Simmons and Commissioner Lamboley dissented in part with a separate expression.

Noreta R. McGee

Noreta R. McGee
Secretary

(SEAL)

VICE CHAIRMAN SIMMONS, dissenting in part:

I disagree with the majority's somewhat perfunctory treatment of the Commission's responsibility to enforce the Interstate Commerce Act and its own orders. I believe the Commission should take initial cognizance of any employee action arising out of a violation of the voting trust. Even if invocation of primary jurisdiction is not clearly required, the Commission should at least indicate its intention rigorously to enforce its own decisions and the requirements of the Act.

COMMISSIONER LAMBOLEY, dissenting in part:

While denial of specific relief under the ICA as requested; i.e., imposition of NY Dock conditions under §11347, may be appropriate, in my view, it is not appropriate to merely leave the potential issues as subject matter for §11705 civil action remedy in the Courts.

There is no sound reason for the Commission to abdicate its primary jurisdiction to judicial forums. To do so is a disservice to the transportation interests of both the rail

carrier, and the rail employees alike.¹ Causes of actions which may be brought against SFSP must of necessity involve actions undertaken by SFSP under the egis of the Commission established voting trust. The primacy of Commission jurisdiction is tied to the trust. Claims made will require construction and interpretation of the trust and conduct thereunder. Such complaints are cognizable by the Commission under §11701.²

In my view, the needs for expertise, efficiency and consistency of disposition auger well for the claim and exercise of primary jurisdiction by the Commission in complaint cases under §11701 for any employment claims as may be made under the voting trust.

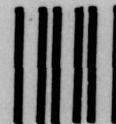
¹ This approach also lacks consistency with the strength and breadth of Commission jurisdictional claims with respect to other employment conditions under §10901 (discretionary) and §11347 (mandatory), and review of arbitration awards on employment issues, e.g., Lace Curtain cases AB-1 (Sub-Nos. 83 and 113) aff'd sub nom IBEW v. I.C.C., ___ F.2d ___ (1989).

² To characterize the potential causes as fact bound and not requiring Commission administrative action is strikingly reminiscent of MC-177 cases, in which the Commission has deferred to the courts in rate/tariff undercharge cases, notwithstanding the consequence of considerable confusion and inconsistent results.

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	Docket No. <u>F.D. - 30400(21)</u>
Total Number Served	Embraced Cases

Regional Office(s) served: [] 1 [] 2 [] 3

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<input type="checkbox"/> Employee Board	<input type="checkbox"/> Director	<input type="checkbox"/> Admin. Law Judge
<input type="checkbox"/> Unopposed Notice (NH)	<input type="checkbox"/> Modified Procedure Order (MP)	
<input type="checkbox"/> Certificate, License, or Permit		<input type="checkbox"/> Other

decision/notice was served on the individuals named below.

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Individuals Served:

FD030400/0021/ 6830 SCSS
 RICHARD E. WEICHER
 224 SOUTH MICHIGAN AVENUE
 CHICAGO IL 60604

FD030400/0021/ 91343 SCSS
 SANTA FE SOUTHERN PACIFIC CORP.
 224 SOUTH MICHIGAN AVENUE
 CHICAGO IL 60604

FD030400/0021/ 495 SCSS
 SOUTHERN PACIFIC TRANSPORTATION COMPANY
 SOUTHERN PACIFIC BUILDING
 ONE MARKET PLAZA
 SAN FRANCISCO CA 94105

FD030400/0021/ 10916 SCSS
 THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
 SUITE 510
 2300 CLAYTON ROAD
 CONCORD CA 94520

Interstate Commerce Commission SERVICE OF PROCESS Listing of all parties served	Service Date <u>Feb 9, 1989</u>
	Docket No. <u>FD 30400 Sub 21</u>
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(NH) | <input type="checkbox"/> | Modified Procedure Order
(MP) | | |
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decision/notice was served on the individuals named below.

Joseph S. Hamblet
 Service Clerk

Feb 8, 1989
 Date

Individuals Served:

FD030400/0021/ 10916 SCSS POR
 THE ATCHISON, TOPEKA AND SANTA FE RAILWA
 SUITE 510
 2300 CLAYTON ROAD
 CONCORD CA 94520

FD030400/0021/ 7586 SCSS POR
 JOHN O'B. CLARKE, JR.
 SUITE 210
 1050 SEVENTEENTH STREET, NW
 WASHINGTON DC 20036

FD030400/0021/ 73949 SCSS APR
 JEROME F DONOHOE
 224 SOUTH MICHIGAN AVENUE
 CHICAGO IL 60604

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FD030400/0021/ 98725 SCSS POR
DONALD F GRIFFIN
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WASHINGTON DC 20036

FD030400/0021/ 106809 SCSS PRP
HIGSAW & MAHONEY, P. C.
SUITE 210
1050 17TH STREET, N.W.
WASHINGTON, DC 20036

FD030400/0021/ 107396 SCSS VIS
CHARLES KONG
1017 BROWN STREET
BAKERSFIELD CA 93305

FD030400/0021/ 7818 SCSS PRP
WILLIAM G. MAHONEY
SUITE 210
1050 17TH STREET, N. W.
WASHINGTON DC 20036

FD030400/0021/ 77690 SCSS POR
JAN MATINO
SUITE 600
1667 K ST., N. W.
WASHINGTON DC 20006

FD030400/0021/ 91343 SCSS APP
SANTA FE SOUTHERNN PACIFIC CORP.
224 SOUTH MMICHIGAN AVENUE
CHICAGO IL 60604

FD030400/0021/ 495 SCSS POR
SOUTHERN PACIFIC TRANSPORTATION COMPANY
SOUTHERN PACIFIC BUILDING
ONE MARKET PLAZA
SAN FRANCISCO CA 94105

FD030400/0021/ 6830 SCSS POR
RICHARD E. WEICHER
224 SOUTH MICHIGAN AVENUE
CHICAGO IL 60604

SERVICE DATE

2-9-89

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FD.30400-21

FD.30400-21

WHEEL TRANSPORTATION SERVICES INC
MATCHISON TOPEKA & SANTA FE RY CO
1331 PENN. AVE., N.W., SUITE 1211
WASHINGTON DC 20004

FD030400/0021/ *107396 SCSS
CHARLES KONG
1017 BROWN STREET
BAKERSFIELD CA 93305

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FD030400/0021/ 77690 SCSS
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WASHINGTON, DC 20006

FD030400/0021/ 106809 SCSS
HIGSAW & MAHONEY, P. C.
SUITE 210
1050 17TH STREET, N.W.
WASHINGTON, DC 20036

FD030400/0021/ 7586 SCSS
JOHN O'B. CLARKE, JR.
SUITE 210
1050 SEVENTEENTH STREET, NW
WASHINGTON DC 20036

FD030400/0021/ 7818 SCSS
WILLIAM G. MAHONEY
SUITE 210
1050 17TH STREET, N. W.
WASHINGTON DC 20036

FD030400/0021/ 98725 SCSS
DONALD F GRIFFIN
SUITE 210
1050 - 17TH STREET., N.W.
WASHINGTON DC 20036

FD030400/0021/ 73949 SCSS
JEROME F DONOHOE
224 SOUTH MICHIGAN AVENUE
CHICAGO IL 60604

STB

FD-30400

(SUB 21)

10-14-88

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SERVICE DATE

OCT 14 1988

FR-7035-01
DO

INTERSTATE COMMERCE COMMISSION

CORRECTED NOTICE

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION - CONTROL- SOUTHERN
PACIFIC TRANSPORTATION

AGENCY: Interstate Commerce Commission.
ACTION: Corrected Notice.
SUMMARY: By decision served September 27, 1988, the Commission sought comments on matters relating to whether to impose labor protective conditions for the benefit of employees of either the Atchison, Topeka and Santa Fe Railway Company or the Southern Pacific Transportation Company. Due to an administrative error, the date set for replies was improperly computed. The correct filing dates are set out below.
DATES: Comments must be filed by October 28, 1988, and replies must be filed by November 17, 1988.
ADDRESSES: Send an original and 20 copies of pleadings referring to this notice to:

- (1) Office of the Secretary
Case Control Branch
Interstate Commerce Commission
Washington, DC 20423

(2) Send one copy each to representatives:

Jerome F. Donohoe
Richard E. Weicher
Santa Fe Southern Pacific Corporation
224 South Michigan Avenue
Chicago, IL 60604

William G. Mahoney
John O'B. Clark, Jr.
Highsaw & Mahoney, P.C.
Suite 210
Washington, DC 20036

FOR FURTHER INFORMATION CONTACT:

Joseph H. Dettmar
(202) 275-7245

[TDD for hearing impaired (202) 275-1721]

SUPPLEMENTARY INFORMATION:

Additional information is contained in the September 27, 1988 decision, and in the decision in Finance Docket No. 32000, Rio Grande Industries, Inc., SPT Holding, Inc., and The Denver and Rio Grande Western Railroad Company - Control - Southern Pacific Transportation Company, _____ I.C.C.2d _____ (served September 12, 1988.) To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289-4357/4359. [Assistance for

the hearing impaired is available through TDD services (202) 275-1721.]

Decided: October 4, 1988

By the Commission, Jane F. Mackall, Director, Office of Proceedings.



Noreta R. McGee

NORETA R. MCGEE
Secretary

Interstate Commerce Commission
Office of the Secretary, Service Section
Washington, D.C. 20423

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	Docket No. <u>F. Dkt. 30400-21</u>

Total Number Served <u>9</u>	Embraced Cases
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Regional Office(s) served: [] 1 [] 2 [] 3 [] 4 [] 5 [] 6

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<input type="checkbox"/> Employee Board	<input type="checkbox"/> Director	<input type="checkbox"/> Admin. Law Judge
<input type="checkbox"/> Unopposed Notice (NH)	<input type="checkbox"/> Modified Procedure Order (MP)	
<input type="checkbox"/> Certificate, License, or Permit		<input type="checkbox"/> Other

decision notice was served on the individuals named below.

[Signature] 10/13/88
Service Clerk Date

- Individuals Served:
- FD030400/0021/ 10916 SCSS POR
THE ATCHISON, TOPEKA AND SANTA FE RAILWA
114 SANSOME STREET
SAN FRANCISCO CA 94104
 - FD030400/0021/ 7586 SCSS POR
JOHN O'B. CLARKE, JR.
SUITE 210
1050 SEVENTEENTH STREET, NW
WASHINGTON DC 20036
 - FD030400/0021/ 73949 SCSS APR
JEROME F DONOHOE
224 SOUTH MICHIGAN AVENUE
CHICAGO IL 60604
 - FD030400/0021/ 106809 SCSS PRP
HIGSAW & MAHONEY, P. C.
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1050 17TH STREET, N.W.
WASHINGTON, DC 20036

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WILLIAM G. MAHONEY
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WASHINGTON DC 20036

FD030400/0021/ 91343 SCSS APP
SANTA FE SOUTHERNN PACIFIC CORP.
224 SOUTH MMICHIGAN AVENUE
CHICAGO IL 60604

FD030400/0021/ 495 SCSS POR
SOUTHERN PACIFIC TRANSPORTATION COMPANY
SOUTHERN PACIFIC BUILDING
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FD030400/0021/ 6830 SCSS POR
RICHARD E. WEICHER
224 SOUTH MICHIGAN AVENUE
CHICAGO IL 60604

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FD. 30400-21

KUNKEL TRANSPORTATION SERVICES INC
FOR: ATCHISON TOPEKA & SANTA FE RY CO
1331 PENN. AVE., N.W., SUITE 1211
WASHINGTON DC 20004

PR-7035-01
DO

SERVICE DATE

OCT 14 1988

INTERSTATE COMMERCE COMMISSION

CORRECTED NOTICE

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION - CONTROL- SOUTHERN
PACIFIC TRANSPORTATION

AGENCY: Interstate Commerce Commission.

ACTION: Corrected Notice.

SUMMARY: By decision served September 27, 1988, the Commission sought comments on matters relating to whether to impose labor protective conditions for the benefit of employees of either the Atchison, Topeka and Santa Fe Railway Company or the Southern Pacific Transportation Company. Due to an administrative error, the date set for replies was improperly computed. The correct filing dates are set out below.

DATES: Comments must be filed by October 28, 1988, and replies must be filed by November 17, 1988.

ADDRESSES: Send an original and 20 copies of pleadings referring to this notice to:

(1) Office of the Secretary
Case Control Branch
Interstate Commerce Commission
Washington, DC 20423

(2) Send one copy each to representatives:

Jerome F. Donohoe
Richard E. Weicher
Santa Fe Southern Pacific Corporation
224 South Michigan Avenue
Chicago, IL 60604

William G. Mahoney
John O'B. Clark, Jr.
Higsaw & Mahoney, P.C.
Suite 210
Washington, DC 20036

FOR FURTHER INFORMATION CONTACT:

Joseph H. Dettmar
(202) 275-7245

[TDD for hearing impaired (202) 275-1721]

SUPPLEMENTARY INFORMATION:

Additional information is contained in the September 27, 1988 decision, and in the decision in Finance Docket No. 32000, Rio Grande Industries, Inc., SPT Holding, Inc., and The Denver and Rio Grande Western Railroad Company - Control - Southern Pacific Transportation Company, _____ I.C.C.2d _____ (served September 12, 1988.) To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289-4357/4359. [Assistance for

the hearing impaired is available through TDD services (202) 275-1721.]

Decided: October 4, 1988

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

(SEAL)

NORETA R. MCGEE
Secretary

Interstate Commerce Commission
Office of the Secretary, Service Section
Washington, D.C. 20423

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FD 30400 (Sub-No. 21) **Interstate Commerce Commission**
Washington, D.C. 20423

AL:gw

October 14, 1988

Service of the attached decision is hereby made on the following named carrier which has no designated agent in the Washington, D.C. area by posting same in the Office of the Secretary of the Interstate Commerce Commission.

SANTA FE SOUTHERN PACIFIC CORPORATION

Norita D. Mc Gee
Secretary

STB

FD-30400

(SUB 21)

9-27-88

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SERVICE DATE
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FR-7035-01

INTERSTATE COMMERCE COMMISSION

NOTICE

Finance Docket NO. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION -- CONTROL --
SOUTHERN PACIFIC TRANSPORTATION COMPANY

AGENCY: Interstate Commerce Commission.

ACTION: Notice of request for comments.

SUMMARY: The Commission is considering whether to impose labor protective conditions for the benefit of employees of either The Atchison, Topeka and Santa Fe Railway Company or the Southern Pacific Transportation Company who were adversely affected by actions taken in contemplation of the merger of those railroads. The Commission seeks comments on whether it has the authority to impose such conditions, whether such conditions, whether and to what extent such conditions are warranted in this instance, and, if so, how should the procedural and substantive provisions of such conditions be framed.

DATES: Comments must be filed by October 28, 1988, and replies must be filed by October 18, 1988.

ADDRESSES: (1) Send an original and 20 copies of pleadings referring to this notice to:

- (1) Office of the Secretary
Case Control Branch
Interstate Commerce Commission
Washington, DC 20423
- (2) Send one copy each to representatives:

Jerome F. Donohoe
Richard E. Weicher
Santa Fe Southern Pacific Corporation
224 South Michigan Avenue
Chicago, IL 60604

William G. Mahoney
John O'B. Clarke, Jr.
Highsaw & Mahoney, P.C.
Suite 210
1050 17th Street, N.W.
Washington, DC 20036

FOR FURTHER INFORMATION CONTACT:

Joseph H. Dettmar
(202) 275-7245

[TDD for hearing impaired (292) 275-1721]

SUPPLEMENTARY INFORMATION:

Additional information is contained in the Commission's decision in Finance Docket No. 32000, Rio Grande Industries, Inc., SPTC Holding, Inc., and The Denver and Rio Grande Western Railroad Company - Control - Southern Pacific Transportation Company, I.C.C.2d ___ (served September 12, 1988). A copy of that decision, as well as the public docket, is available for inspection in the Commission's Docket Room, Room 1221, Interstate Commerce Commission Building, Washington, D.C. 20423. A copy of that decision may be purchased by writing to Dynamic Concepts,

Inc., Room 2229, Interstate Commerce Commission Building,
Washington, DC 20423, or call (202) 289-4357/4359 (D.C.
metropolitan area), (assistance for the hearing impaired is
available through TDD services (202) 275-1721) or by pickup from
Dynamic Concepts, Inc., in Room 2229 at Commission headquarters.

Decided: September 19, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre,
Commissioners Simmons, Lamboley, and Phillips.

Kathleen M. King
Kathleen M. King
Acting Secretary



Robert M. [unclear]

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Office of the Secretary, Service Section
Washington, D.C. 20423

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decision/notice was served on the individuals named below.

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Individuals Served:

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 SAN FRANCISCO CA 94104

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 JOHN O'B. CLARKE, JR.
 SUITE 210
 1050 SEVENTEENTH STREET, NW
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FD030400/0021/ 73949 SCSS APR
 JEROME F DONOHOE
 224 SOUTH MICHIGAN AVENUE
 CHICAGO IL 60604

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 1050 17TH STREET, N.W.
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 SUITE 210
 1050 17TH STREET, N. W.
 WASHINGTON DC 20036

FD030400/0021/ 91343 SCSS APP
SANTA FE SOUTHERN PACIFIC CORP.
224 SOUTH MICHIGAN AVENUE
CHICAGO IL 60604

SERVICE DATE 9/27/88
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FD030400/0021/ 6830 SCSS POR
RICHARD E. WEICHER
4100 SOUTH KEDZIE AVE
CHICAGO IL 60632

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9-27-88

DOCKET NO.

FD-30400 (21)

KUNKEL TRANSPORTATION SERVICES INC
FOR: ATCHISON TOPEKA & SANTA FE RY CO
1331 PENN. AVE., N.W., SUITE 1211
WASHINGTON DC 20004

FD-30400 (sub 21)

FD-30400

SUB

NO. 21

C

EC

SERVICE DATE

JUN 18 1992

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION -- CONTROL --
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: June 12, 1992

BACKGROUND

In Santa Fe Southern Pacific Corp.--Control--SPT Co., 2 I.C.C.2d 709 (1986) recon. den., 3 I.C.C.2d 926 (1987) (SFSP), the Commission denied the proposed merger of The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and Southern Pacific Transportation Company (SPT). The Santa Fe Southern Pacific Corporation (SFSP) had owned the stock of SPT since December 1983 under a Commission-approved independent voting trust that had enabled the two railroads' holding companies to merge. After the proposed rail merger was denied, SFSP was required to divest its interest in either Santa Fe or SPT. SFSP chose to sell SPT's stock to Rio Grande Industries (Rio Grande), and that acquisition was approved by the Commission in Rio Grande Industries, Et Al.--Control--SPT Co., Et Al., 4 I.C.C.2d 834 (1988) (Rio Grande), aff'd sub nom. Kansas City Indus., Inc. v. United States, 902 F.2d 423 (5th Cir. 1990). The voting trust was dissolved on October 13, 1988, when the Rio Grande-SPT acquisition was consummated.

During the Rio Grande proceeding, the Railway Labor Executives' Association (RLEA) and the International Brotherhood of Teamsters (IBT) argued that certain SPT and Santa Fe employees had been adversely affected by employer actions taken in anticipation of the Santa Fe-SPT merger. In Rio Grande, the Commission concluded that it was not required to impose labor protective conditions under 49 U.S.C. 11347 for the benefit of employees adversely affected by the rejected ATSF-SPT merger and that it was not appropriate to impose labor protection for those employees in the context of Rio Grande's acquisition of SPT. Because of its continuing jurisdiction over the SFSP voting trust, the Commission instead noted that SFSP was in a different position than Rio Grande and that the Commission's labor protection power would extend to employees adversely affected by SFSP.

After consideration of comments, in a decision served February 9, 1989, the Commission determined that: (1) the unilateral displacement of employees by Santa Fe or SPT management, even in anticipation of the disapproved merger, would be governed by the applicable collective bargaining agreements between those carriers and their employees; (2) there would be no basis for imposing labor protection on SFSP for merger anticipatory actions it could be shown to have ordered Santa Fe to take because SFSP was lawfully in control of Santa Fe and any grievances by Santa Fe employees would be found in collective bargaining agreements between Santa Fe and its employees; (3) no basis had been shown to impose conditions for the benefit of SPT employees pursuant to section 11347; and (4) if any merger anticipatory actions adverse to SPT employees were shown to have been ordered by SFSP, in violation of section 11343, the adversely affected individuals would have a court remedy under 49 U.S.C. 11705.

On judicial review, the United States Court of Appeals for the Ninth Circuit largely affirmed the February 9 decision.¹ It concluded that aggrieved SPT employees did not have available to them a cause of action in the courts under section 11705.² Instead, it determined that the Commission possessed discretionary conditioning authority under 49 U.S.C. 11344(c) to "impose conditions governing the transaction" with respect to labor protection for adversely affected employees, and remanded the case for the Commission to determine whether to exercise that discretionary authority.

The Commission sought rehearing of the portion of the court's decision remanding the proceeding to the Commission to consider in its discretion whether labor protection should have been imposed upon the merger denial. We argued that section 11344(c) clearly contemplates imposing conditions only when a transaction is approved.

On rehearing, the Ninth Circuit expressly agreed with our conclusion that the labor protective conditions mandated by section 11347 for approved transactions are not appropriate here.³ Additionally, the court deleted the explicit reference in its earlier decision to a discretionary Commission authority under section 11344(c) to impose labor protection when denying a transaction.

Instead, the court determined that section 11344(c) contains a general discretionary conditioning authority under which the Commission is to consider and condition a transaction with respect to anti-competitive [section 11344(b)(1)(E)] and other relevant factors including labor [section 11344(b)(1)(D)]. Coupling this general conditioning authority with the Commission's divestiture order (and possibly the Rio Grande approval decision), the court directed us to consider in our own discretion whether labor protection should be imposed as a condition of the divestiture.

DISCUSSION AND CONCLUSIONS

We do not view the court decision on rehearing as basing our discretionary conditioning authority on the merger denial. Indeed, we continue to view divestiture as a legal requirement emanating from our merger disapproval. Accordingly, we view the court decision on remand as relating to our continuing jurisdiction over SFSP from the time the voting trust was in effect, through the time the merger was denied, until the time the divestiture was consummated. Several of the early Commission decisions reflected the intention to monitor SPT's situation continually as it was held in the voting trust pending consummation.

¹ Railway Labor Executives' Ass'n. v. ICC, 924 F.2d 961 (9th Cir. 1991).

² The court cited its earlier decision in Kraus v. Santa Fe Southern Pacific Corp., 878 F.2d 1193 (1989) (Kraus). There it had ruled that the Commission's merger jurisdiction was exclusive and precluded aggrieved employees from filing claims directly with the district court under section 11705. It noted that in Kraus it had explicitly rejected our February 9 decision's reasoning on the section 11705 issue.

³ Railway Labor Executives' Ass'n v. ICC, 958 F.2d 252 (9th Cir. 1992) (superseding previous opinion).

For example, the Commission approved the voting trust in the SFSP consolidation proceeding,⁴ based in part on the stipulation that the voting trust could at any time be modified to ensure compliance with the law. Also, interested parties affected by SPT's actions were to be free to petition the Commission where it might be shown that actions were taken against SPT's interest and for the benefit of Santa Fe or its parent. The Commission stated at page 13 that "...we do not at the outset put any limit on the type of condition that might be imposed We should not hesitate to impose conditions to rectify abuses that might develop in these or any other areas."

Subsequently, on February 27, 1987, the Commission served a decision based on an investigation of the operations of the voting trust up to that time. The investigation had disclosed undesirable contacts among the parties in several areas. Between the voting trust as implemented and SFSP's undertakings, the Commission concluded that SPT had not been insulated from SFSP to the extent intended. The decision clarified the trustee's obligations, emphasized that SPT's independence was the responsibility of both the SFSP and SPT managements, and stated that the relationships among the parties would continue to be monitored.

Then, in the remanded February 9, 1989 decision, the Commission stated that any control SFSP exercised over SPT during the voting trust period would be subject to its jurisdiction by virtue of the voting trust. Specifically, it noted at page 2 that "[t]he carriers agree...that we would have authority over violations of the voting trust."

In the Rio Grande decision, supra, at 955-56, the Commission again recognized its continuing jurisdiction over the voting trust and matters related to it. It stated as follows:

In authorizing [SFSP] to control SPT through a voting trust, we subjected SFSP to our continuing jurisdiction with respect to any number of matters, including the possible imposition of additional conditions that we might deem necessary.... [W]e believe it is within our power to provide that ATSF or SPT employees who can demonstrate that they were adversely affected as a direct consequence of actions taken, or orders issued, by SFSP in contemplation of the merger which we ultimately denied, be afforded labor protection in Finance Docket No. 30400.

Consistent with the court remand, we are reopening this proceeding to give SPT employees (as a class) an opportunity to demonstrate that they were adversely affected as a direct consequence of actions taken or orders issued by SFSP in contemplation of the proposed ATSF-SPT merger. We seek specific evidence from the parties with respect to those actions or orders issued by SFSP which may have affected SPT operations and work-related assignments. We are not at this time seeking personal statements from individual employees who believe they were adversely affected by SPT actions. The parties may also comment on whether and how New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock), may be modified

⁴ Finance Docket No. 30400, Decision No. 2, Santa Fe Southern Pac. Corp.-Control-Southern Pac. Trans. Co.: Merger-Atchison, T. & S. F. R. Co. and Southern Pac. Trans. Co. (not printed), served December 23, 1983.

On judicial review, the United States Court of Appeals for the Ninth Circuit largely affirmed the February 9 decision.¹ It concluded that aggrieved SPT employees did not have available to them a cause of action in the courts under section 11705.² Instead, it determined that the Commission possessed discretionary conditioning authority under 49 U.S.C. 11344(c) to "impose conditions governing the transaction" with respect to labor protection for adversely affected employees, and remanded the case for the Commission to determine whether to exercise that discretionary authority.

The Commission sought rehearing of the portion of the court's decision remanding the proceeding to the Commission to consider in its discretion whether labor protection should have been imposed upon the merger denial. We argued that section 11344(c) clearly contemplates imposing conditions only when a transaction is approved.

On rehearing, the Ninth Circuit expressly agreed with our conclusion that the labor protective conditions mandated by section 11347 for approved transactions are not appropriate here.³ Additionally, the court deleted the explicit reference in its earlier decision to a discretionary Commission authority under section 11344(c) to impose labor protection when denying a transaction.

Instead, the court determined that section 11344(c) contains a general discretionary conditioning authority under which the Commission is to consider and condition a transaction with respect to anti-competitive [section 11344(b)(1)(E)] and other relevant factors including labor [section 11344(b)(1)(D)]. Coupling this general conditioning authority with the Commission's divestiture order (and possibly the Rio Grande approval decision), the court directed us to consider in our own discretion whether labor protection should be imposed as a condition of the divestiture.

DISCUSSION AND CONCLUSIONS

We do not view the court decision on rehearing as basing our discretionary conditioning authority on the merger denial. Indeed, we continue to view divestiture as a legal requirement emanating from our merger disapproval. Accordingly, we view the court decision on remand as relating to our continuing jurisdiction over SFSP from the time the voting trust was in effect, through the time the merger was denied, until the time the divestiture was consummated. Several of the early Commission decisions reflected the intention to monitor SPT's situation continually as it was held in the voting trust pending consummation.

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³ Railway Labor Executives' Ass'n v. ICC, 958 F.2d 252 (9th Cir. 1992) (superseding previous opinion).

For example, the Commission approved the voting trust in the SFSP consolidation proceeding,⁴ based in part on the stipulation that the voting trust could at any time be modified to ensure compliance with the law. Also, interested parties affected by SPT's actions were to be free to petition the Commission where it might be shown that actions were taken against SPT's interest and for the benefit of Santa Fe or its parent. The Commission stated at page 13 that "...we do not at the outset put any limit on the type of condition that might be imposed We should not hesitate to impose conditions to rectify abuses that might develop in these or any other areas."

Subsequently, on February 27, 1987, the Commission served a decision based on an investigation of the operations of the voting trust up to that time. The investigation had disclosed undesirable contacts among the parties in several areas. Between the voting trust as implemented and SFSP's undertakings, the Commission concluded that SPT had not been insulated from SFSP to the extent intended. The decision clarified the trustee's obligations, emphasized that SPT's independence was the responsibility of both the SFSP and SPT managements, and stated that the relationships among the parties would continue to be monitored.

Then, in the remanded February 9, 1989 decision, the Commission stated that any control SFSP exercised over SPT during the voting trust period would be subject to its jurisdiction by virtue of the voting trust. Specifically, it noted at page 2 that "[t]he carriers agree...that we would have authority over violations of the voting trust."

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Consistent with the court remand, we are reopening this proceeding to give SPT employees (as a class) an opportunity to demonstrate that they were adversely affected as a direct consequence of actions taken or orders issued by SFSP in contemplation of the proposed ATSF-SPT merger. We seek specific evidence from the parties with respect to those actions or orders issued by SFSP which may have affected SPT operations and work-related assignments. We are not at this time seeking personal statements from individual employees who believe they were adversely affected by SPT actions. The parties may also comment on whether and how New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock), may be modified

⁴ Finance Docket No. 30400, Decision No. 2, Santa Fe Southern Pac. Corp.-Control-Southern Pac. Trans. Co.: Merger-Atchison, T. & S. F. R. Co. and Southern Pac. Trans. Co. (not printed), served December 23, 1983.

procedurally and substantively to provide relief to adversely affected employees.⁵

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. This proceeding is reopened.
2. Former employees of the Southern Pacific Transportation Company or their representatives shall file evidence and argument as described above by August 3, 1992, replies shall be filed by September 1, 1992, and rebuttal shall be filed by September 21, 1992.
3. This decision is effective on June 18, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Phillips, and Emmett.



Sidney L. Strickland, Jr.
Sidney L. Strickland, Jr.
Secretary

⁵ In the February 9 decision, at page 3, the Commission recognized that the conditions fashioned in New York Dock are ordinarily imposed in approved consolidation cases and that they:

provide for preservation of seniority, negotiated implementing agreements and arbitration, and severance pay, [and] are clearly designed to cushion the adverse impacts on labor of consummated transactions.

Interstate Commerce Commission SERVICE OF PROCESS Listing of all parties served	Service Date <u>Jun 18, 1992</u>
	Docket No. <u>FD-30400 JS 21</u>
Total Number Served <u>16</u>	Embraced Cases

Regional Office(s) served: [] 1 [] 2 [] 3

I certify that on the Service Date noted above, a copy of the attached

<input checked="" type="checkbox"/> Entire Commission	[]	Division	[]	Commissioner
[] Employee Board	[]	Director	[]	Admin. Law Judge
[] Unopposed Notice (NE)	[]	Modified Procedure Order (MP)	[]	
[] Certificate, License, or Permit	[]	Other	[]	

decision/notice was served on the individuals named below.

J. HUNTER Service Clerk Jun 18, 1992 Date

Individuals Served:

FD030400/0021/ 2190 SCSS POR
THE ATCHISON, TOPEKA & SANTA FE RY CO
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5860

FD030400/0021/ 7586 SCSS POR
JOHN O'B. CLARKE, JR.
SUITE 210
1050 SEVENTEENTH STREET, NW
WASHINGTON DC 20036-5503

FD030400/0021/ 73949 SCSS APR
JEROME F DONOHUE
224 SOUTH MICHIGAN AVENUE
CHICAGO IL 60604-2507

FD030400/0021/ 98725 SCSS POR
DONALD F GRIFFIN
SUITE 210
1050 - 17TH STREET., N.W.
WASHINGTON DC 20036-5503

FD030400/0021/ 106809 SCSS PRP
HIGSAW & MAHONEY, P. C.
SUITE 210
1050 17TH STREET, N.W.
WASHINGTON, DC 20036-5503

FD-30400 (Sub - 70-2)

Service Date

JUN 18, 1992

KUNKEL TRANSPORTATION SERVICES INC
FOR: ATCHISON TOPEKA & SANTA FE RY CO
918 F STREET NW STE 410
WASHINGTON DC 20004

Docket Number

FD - 30400 sub 21

FD030400/0021/ 19407 SCSS POR
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 LOUISIANA AVENUE, NW
WASHINGTON DC 20001-2130

FD030400/0021/ 107396 SCSS VIS
CHARLES KONG
1017 BROWN STREET
BAKERSFIELD CA 93305-4741

FD030400/0021/ 7818 SCSS PRP
WILLIAM G. MAHONEY
SUITE 210
1050 17TH STREET, N. W.
WASHINGTON DC 20036-5503

FD030400/0021/ 91343 SCSS APP
SANTA FE SOUTHERNN PACIFIC CORP.
224 SOUTH MMICHIGAN AVENUE
CHICAGO IL 60604-2507

FD030400/0021/ 495 SCSS POR
SOUTHERN PACIFIC TRANSPORTATION COMPANY
SOUTHERN PACIFIC BLDG
ONE MARKET PLAZA., SUITE 846
SAN FRANCISCO CA 94105-1001

FD030400/0021/ 116619 SCSS POR
E. R. STRAATSMA
P. O. BOX 214
FALSOM CA 95630-0214

FD030400/0021/ 6830 SCSS POR
RICHARD E. WEICHER
ATCHISON, TOPEKA SANTA FE
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173

FD 30400

SUB NO. 21 (F)

C

OH

SERVICE DATE

JAN 11 1993

INTERSTATE COMMERCE COMMISSION

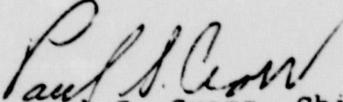
ORDER

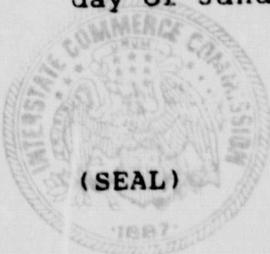
Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION
-- CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

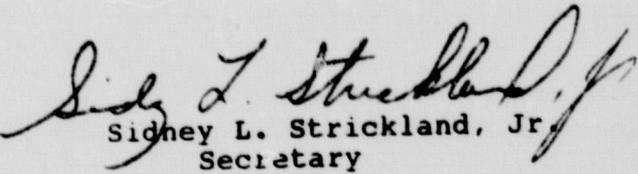
On January 5, 1992 a conference call in the above-entitled matter was held by me with Southern Pacific Transportation Company (SPT) and Pacific Fruit Express (PFE), Santa Fe Pacific Company (SFP), IAMAW and BMW, and Sieu Mei Tu. The conference call was scheduled to address SPT/PFE's Motion to Strike and Request for Return of Materials Improperly Included In The Record, SFP's Motion for Application of A Protective Order, and Tu's Motion to Compel. After considering the arguments of the parties during the telephone conference call, it is Ordered as follows:

1. SPT/PFE will file a supplemental memoranda in support of its motion by January 11, 1993;
2. Tu will file any further opposition to that motion by January 21, 1993;
3. Tu will file any supplemental papers in support of her Motion to Compel Further Responses by January 11, 1993.
4. SPT/PFE and SFP will file any response to that Motion by January 21, 1993.
5. All parties will serve their papers by overnight mail;
6. A further conference call on the parties respective Motions is scheduled for January 23, 1993 at 11:00 a.m. (EDT).


By Paul S. Cross, Chief Administrative Law Judge this 7th day of January, 1993.



(SEAL)


Sidney L. Strickland, Jr.
Secretary

Interstate Commerce Commission Office of the Secretary Service of Process Listing of All Parties Served	Service Date JAN 11, 1993
	Docket No. FD-30400 SS 21
Total Number Served 25	Embraced Cases

Regional Office(s) served: E C W

I certify that on the Service Date noted above, a copy of the attached

- | | |
|---|--|
| <input type="checkbox"/> Entire Commission | <input type="checkbox"/> Director |
| <input type="checkbox"/> Employee Board | <input type="checkbox"/> Name Change |
| <input type="checkbox"/> Unopposed Notice (NH) | <input type="checkbox"/> Commissioner |
| <input type="checkbox"/> Certificate, Permit, License | <input checked="" type="checkbox"/> Administrative Law Judge |
| <input type="checkbox"/> Secretary | <input type="checkbox"/> Other |

decision/notice was served on the individuals named below:

J. HUNTER
Scheduling Clerk

JAN 11, 1993
Date

Individuals Served:

FD030400/0021/ 6830 SCSS POR
 RICHARD E. WEICHER
 ATCHISON, TOPEKA SANTA FE
 1700 EAST GOLF ROAD
 SCHAUMBURG IL 60173

FD030400/0021/ 131454 SCSS POR
 DENNIS W. WILSON
 1700 EAST GOLF ROAD
 SCHAUMBURG IL 60173-5853

FD030400/0021/ 147637 SCSS PRP
 BARBARA A YOUNG
 ONE MARKET PLAZA
 SAN FRANCISCO CA 94105

Service Date

JAN 11, 1993

Docket Number

FD-30400 SB 21

FD030400/0021/ 91343 SCSS APP
SANTA FE SOUTHERN PACIFIC CORP
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5560

FD030400/0021/ 147192 SCSS POR
R G SNYDER
1 MARKET PLAZA RM 824
SAN FRANCISCO CA 94105

FD030400/0021/ 495 SCSS POR
SOUTHERN PACIFIC TRANSPORTATION COMPANY
SOUTHERN PACIFIC BLDG
ONE MARKET PLAZA., SUITE 846
SAN FRANCISCO CA 94105-1001

FD030400/0021/ 142647 SCSS APR
ADRIAN L. STEEL, JR.
MAYER BROWN & PLATT
2000 PENNSYLVANIA AVENUE, N. W.
WASHINGTON DC 20006

FD030400/0021/ 116619 SCSS POR
E. R. STRAATISMA
P. O. BOX 214
FALSOM CA 95630-0214

FD030400/0021/ 144512 SCSS VIS
SIEU MEI TU
1697 HICKORY AVE.
SAN LEANDRO CA 94579

FD030400/0021/ 12100 SCSS POR
GUY VITELLO
1700 EAST GOLF RD
SCHAUMBURG IL 60173-5860

Service Date

JAN 11, 1993

Docket Number

FD 30400 SS 21

FD030400/0021/ 138617 SCSS POR
INTERNATIONAL ASSOC OF MACHINISTS
1300 CONNECTICUT AVE., N.W.
WASHINGTON DC 20036

FD030400/0021/ 19407 SCSS POR
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 LOUISIANA AVENUE, NW
WASHINGTON DC 20001-2130

FD030400/0021/ 107396 SCSS VIS
CHARLES KONG
1017 BROWN STREET
BAKERSFIELD CA 93305-4741

FD030400/0021/ 144535 SCSS PRP
LEE J KUBBY
BOX 60485
SUNNYVALE CA 94086

FD030400/0021/ 144531 SCSS PRP
WM G MAHONEY
SUITE 210
1050 SEVENTEENTH ST NW
WASHINGTON DC 20036

FD030400/0021/ 148484 SCSS POR
PACIFIC FRUIT EXPRESS
116 NEW MONTGOMERY
SAN FRANCISCO CA 94105

FD030400/0021/ 115803 SCSS POR
RIO GRANDE INDUSTRIES, INC. ET AL
SOUTHERN PACIFIC BLDG.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105

Service Date

JAN 11, 1953

Docket Number

FD 30400 SUB 21

FD030400/0021/ 2190 SCSS POR
THE ATCHISON, TOPEKA & SANTA FE RWY CO,
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173-5860

FD030400/0021/ 143073 SCSS POR
WAYNE M BOLIO
SOUTHERN PACIFIC BLDG
ONE MARKET PLAZA, STE. 837
SAN FRANCISCO CA 94105-1001

FD030400/0021/ 148123 SCSS POR
BARBARA BOUTOURLIN
LEE J KUBBY, INC.
P. O. BOX 60485
SUNNYVALE CA 94086

FD030400/0021/ 7586 SCSS POR
JOHN O'B. CLARKE, JR.
SUITE 210
1050 SEVENTEENTH STREET, NW
WASHINGTON DC 20036-5503

FD030400/0021/ 93533 SCSS PRP
RICHARD S EDELMAN
SUITE 210
1050 17TH STREET., N.W.
WASHINGTON DC 20036-5503

FD030400/0021/ 98725 SCSS POR
DONALD F GRIFFIN
SUITE 210
1050 - 17TH STREET., N.W.
WASHINGTON DC 20036-5503

FD030400/0021/ 7818 SCSS PRP
HIGSAW & MAHONEY, P. C.
SUITE 210
1050 17TH STREET, N. W.
WASHINGTON DC 20036-5503

Service Date

1-11-93

Docket Number

FD 30400 (21)

FD-30400 (Sub-70, 21)

KUNKEL TRANSPORTATION SERVICES INC
FOR: ATCHISON TOPEKA & SANTA FE RY CO
918 F STREET NW STE 410
WASHINGTON DC 20004