LAW OFFICES
LEE J. KUBBY, INC.
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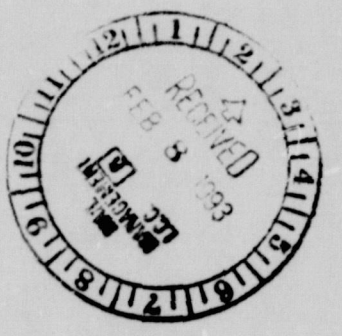
38421

February 07, 1993

Secretary
Interstate Commerce Commission
12th and Constitution Aves. N.W.
Washington, D.C. 20423
Fin Doc 30400 Sub 21



Re: Interstate Commerce Commission
Decision
Finance Docket No. 30400
(Sub-No. 21)
Santa Fe Southern Pacific Corporation
Control
Southern Pacific Transportation Company
Reply To Opposition of SFSP and SPT

Dear Gentle People:

Enclosed please find original and 8 copies of Reply to Opposition of SFSP and SPT. Please file and return the enclosed face sheet endorsed filed in the enclosed self addressed and stamped envelope.

Thank you for your courtesies.

Respectfully submitted,
LEE J. KUBBY, INC.
A Professional Corporation
By:

LEE J. KUBBY
ATTORNEY FOR
SIEU MEI TU

LJK:me
Encls.

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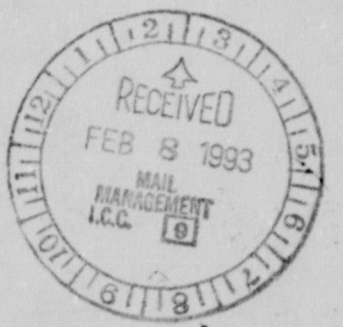
Attorney for Employee Party Sieu Mei Tu



INTERSTATE COMMERCE COMMISSION

SIEU MEI TU Employee Party VS SOUTHERN PACIFIC TRANSPORTATION COMPANY; ATCHISON, TOPEKA, SANTA FE RAILROAD COMPANY; PACIFIC FRUIT EXPRESS COMPANY; SANTA FE SOUTHERN PACIFIC CORP. Applicants Interested Parties	Finance Docket NO. 30400 (Sub-No. 21) Demonstration of SPT Employees Adversely Affected as a Direct Consequence of Actions Taken or Orders Issued By SFSP In Contemplation of the Proposed ATSF SPT Merger. Evidence and Argument in Support Thereof Reply to Opposition of SFSP and SPT

Re: Interstate Commerce Commission
Decision
Finance Docket No. 30400
(Sub-No. 21)
Santa Fe Southern Pacific Corporation
Control
Southern Pacific Transportation Company

SOME OF THE MATERIAL CONTAINED HEREIN IS SUBJECT TO AN INTERIM ORDER OF CONFIDENTIALITY

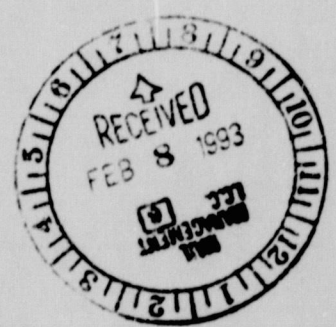
38422

BEFORE THE
INTERSTATE COMMERCE COMMISSION

SANTA FE SOUTHERN PACIFIC CORP.-- CONTROL--SOUTHERN PACIFIC TRANS. CO.	:	Finance Docket No. 30400 (Sub-No. 21)

REBUTTAL BRIEF OF BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

(CONFIDENTIAL MATERIALS SUBJECT TO A REQUEST FOR A PROTECTIVE ORDER)



William G. Mahoney
Donald F. Griffin

HIGHSAW, MAHONEY & CLARKE, P.C.
1050 17th Street, N.W.
Suite 210
Washington, DC 20036
(202) 296-8500

Attorneys for Brotherhood of Maintenance of Way Employes and International Association of Machinists and Aerospace Workers

Dated: February 8, 1993

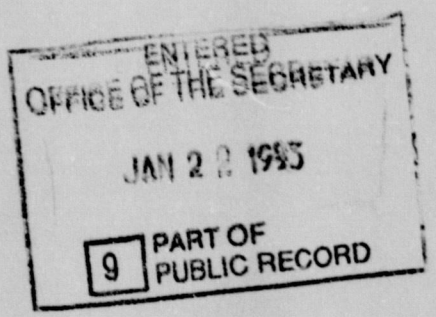
38418

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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

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

RESPONSE OF SANTA FE PACIFIC CORPORATION TO SIEU MEI TU'S SUPPLEMENTAL MOTION TO COMPEL



Erika Z. Jones
Adrian L. Steel, Jr.
Kathryn A. Kusske
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Suite 6500
Washington, D.C. 20006-1882
(202) 463-2000

Attorneys for Santa Fe Pacific Corporation

DATED: January 21, 1993

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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

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

RESPONSE OF SANTA FE PACIFIC CORPORATION
TO SIEU MEI TU'S SUPPLEMENTAL MOTION TO COMPEL

Santa Fe Pacific Corporation ("SFP") submits this response to the Supplemental Motion to Compel filed by Sieu Mei Tu in this proceeding on January 11, 1993. As discussed below, Mrs. Tu has failed in any significant way to limit or justify the scope of her discovery requests as she was expressly directed to do by the Commission. SFP thus is not obligated to provide further responses to her overly broad and burdensome requests. Mrs. Tu's motion, therefore, should be denied because: (1) she has failed to comply with the Commission's prior directives regarding the scope of permissible discovery; and (2) SFP has voluntarily produced relevant and responsive information and numerous documents (including SFP's concurrently filed supplemental responses) to Mrs. Tu and her counsel.

Background

During the parties' conference call with Judge Cross on January 5, 1993, argument was heard on Mrs. Tu's December 2, 1992 motion to compel. After hearing the parties' arguments, Judge

Cross determined that, since SFP and Southern Pacific Transportation Company ("SPT") had served responses to Mrs. Tu's discovery requests after the filing of her December 2, 1992 motion to compel, Mrs. Tu should review those responses and supplement her motions to take into account the information and documents provided in those responses. Counsel for Mrs. Tu was also instructed to adhere to the prior limitation imposed on its discovery requests that only information and documents relevant to Pacific Fruit Express Company ("PFE"), Mrs. Tu's former employer, be sought. See Finance Docket No. 30400 (Sub-No. 21), Santa Fe Southern Pacific Corporation -- Control -- Southern Pacific Transportation Company (not printed), served December 4, 1992 at 1; Finance Docket No. 30400 (Sub-No. 21), Santa Fe Southern Pacific Corporation -- Control -- Southern Pacific Transportation Company (not printed), served November 9, 1992 at 1-2 (because Mrs. Tu's "sought discovery is overly broad", SFP and SPT are required to produce "only [documents] as they relate specifically to PFE").

Argument

Contrary to the direction provided by Judge Cross during the January 5, 1993 conference call, Mrs. Tu has not narrowed or justified the scope of her discovery requests in any significant respect. In fact, her latest motion to compel reiterates nearly all of the same discovery requests that she had previously made. Mrs. Tu simply lists her prior interrogatories and document requests without any justification of relevance to PFE or any attempt to narrow her requests.

For example, during the conference call, counsel for Mrs. Tu indicated that he wanted identification of persons whose names appear in documents produced by SFP. However, Mrs. Tu's counsel has not identified any documents relevant to PFE and has merely reiterated his request to produce substantially everything he initially sought. Further, Mrs. Tu has failed to take into account the information and documents SFP has already provided to her counsel in response to Mrs. Tu's Second Set of Interrogatories Nos. 1, 3, 4, 8, 12, 13, 15, 17-19, 24, 27 and 31, concerning the identity of various individuals, and her counsel has once again demanded that SFP identify persons that have already been identified. Mrs. Tu's demand for answers to these interrogatories is contrary to 49 C.F.R. § 1114.26(b) which permits SFP to respond to her interrogatories through the production of documents, as SFP has previously done.

In spite Mrs. Tu's failure to comply with the Commission's prior orders, and in yet a further attempt to be cooperative and provide Mrs. Tu's counsel with the information he seeks, SFP is filing concurrently with this response, supplemental responses to those interrogatories subject to Mrs. Tu's Supplemental Motion to Compel. Those supplemental responses identify people whose names appear in documents that: 1) were produced by SFP during discovery; and 2) are attached to or mentioned in Mrs. Tu's evidence and argument dated December 17, 1992.[1/]

[1/] SFP's supplemental responses identify or provide additional information concerning those individuals in Mrs. Tu's Second Set of Interrogatories Nos. 13, 19, and 28.

Accordingly, as was recognized during the conference call, the discovery which Mrs. Tu's counsel seeks to conduct is overly broad and unduly burdensome and should not be allowed. Absent further clarification and specification by Mrs. Tu and her counsel as to exactly which documents and/or individuals they believe relate to PFE, SFP has no further obligation under the Commission's prior orders and rules to respond to her requests.[2/]

Conclusion

For the reasons set forth above, SFP respectfully requests that the Commission deny Mrs. Tu's Supplemental Motion to Compel.

Respectfully submitted,

Erika Z. Jones /KMK

Erika Z. Jones
Adrian L. Steel, Jr.
Kathryn A. Kusske
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
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Washington, D.C. 20006-1882
(202) 463-2000

Attorneys for Santa Fe Pacific Corporation

DATED: January 21, 1993

[2/] Mrs. Tu has also asserted two further grounds in support of her motion. First, she complains that SFP failed to answer certain interrogatories relating to documents generated by SPT. However, SFP stated that, even apart from the fact that the documents were generated by SPT, it had located no responsive information or documents in the limited time frame available due to the untimeliness of Mrs. Tu's request. Second, Mrs. Tu asserts that SFP failed to verify its responses. As the attached copy of the verification which was submitted with SFP's responses indicates, SFP did provide the requisite verification.

CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of January, 1993, I served the foregoing "Response of Santa Fe Pacific Corporation to Sieu Mei Tu's Supplemental Motion to Compel" by causing a copy thereof to be delivered to each of the following in the manner indicated:

Lee J. Kubby
Lee J. Kubby, Inc.
Box 60485
Sunnyvale, California 94086-0485
(By Express Mail)
and
231 Acalanes #5
Sunnyvale, California 94086
(By Federal Express)

William G. Mahoney
Donald F. Griffin
Highsaw, Mahoney & Clarke, P.C.
1050 17th Street, N.W.
Suite 210
Washington, D.C. 20036
(By Messenger)

Wayne M. Bolio
Southern Pacific Transportation Company
819 Southern Pacific Building
One Market Plaza
San Francisco, California 94105
(By Federal Express)

George W. Mayo, Jr.
Hogan & Hartson
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(By Messenger)

Kathryn Kusske

COUNTY OF COOK)
) SS:
STATE OF ILLINOIS)

VERIFICATION

I, Guy Vitello, being duly sworn, do hereby depose and state that I am a General Attorney of The Atchison, Topeka and Santa Fe Railway Company; that my offices are located at 1700 East Golf Road, Schaumburg, Illinois 60173; and that I have read the foregoing Responses and Objections of Santa Fe Pacific Corporation to Second Set of Interrogatories and Request For Production of Documents of Sien Mai Tu dated November 20, 1992, and that such responses are true and correct to the best of my knowledge and information.

Guy Vitello

Subscribed and Sworn to
Before Me This 11th Day
of December, 1992.

Notary Public

My Commission expires: February 6, 1994

"OFFICIAL SEAL"
Sherry Vasina
Notary Public, State of Illinois
My Commission Expires 2/6/94

38417

LEE J. KUBBY, INC.
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BOX 60485
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(415) 691-9331

Attorney for Employee Party Sieu Mei Tu

INTERSTATE COMMERCE COMMISSION

SIEU MEI TU Employee Party VS SOUTHERN PACIFIC TRANSPORTATION COMPANY; ATCHISON, TOPEKA, SANTA FE RAILROAD COMPANY; PACIFIC FRUIT EXPRESS COMPANY; SANTA FE SOUTHERN PACIFIC CORP. Applicants	Finance Docket NO. 30400 (Sub-No. 21) Demonstration of SPT Employees Adversely Affected as a Direct Consequence of Actions Taken or Orders Issued By SFSP In Contemplation of the Proposed ATSF SPT Merger. SUPPLEMENTAL REPLY SPT MOTION TO STRIKE AND COMPEL RETURN OF DOCUMENTS INCLUDED IN AND REFERRED TO IN NON CONFIDENTIAL REPORT Declaration of Barbara Boutourlin

DATED: January 20, 1993

A CLAIM OF CONFIDENTIALITY AS TO SOME OF THE MATERIAL INCLUDED HEREIN HAS BEEN RAISED

Re: Interstate Commerce Commission
Decision
Finance Docket No. 30400
(Sub-No. 21)
Santa Fe Southern Pacific Corporation
Control
Southern Pacific Transportation Company

FACTUAL BACKGROUND

Southern Pacific Transportation (SPT) seeks to strike and get possession of material included in a non confidential report prepared by the General Manager of Pacific Fruit Express (PFE). SPT's motions are based on a claim of attorney client privilege and attorney work product doctrine.

SPT has maintained in these proceedings that PFE is a separate entity from SPT and not part of these proceedings. SPT has argued that PFE is not a carrier subject to the jurisdiction of the ICC. SPT admits that the documents they seek to strike are not documents produced by them and that the documents are part of a report which PFE circulated to SPT employees. The document in which they are included is not marked confidential. Mrs. Boutourlin's declaration states:

> "I went to work for Pacific Fruit Express December 16, 1968. Approximately 1975 I became secretary to the manager of the industrial relations department of PFE, Mr. T. D. Walsh, and served continuously in that position until I was terminated from my position in October, 1985, and forced to go on early retirement, inorder to have any income. My position as secretary included responsibility for filing and maintaining the files of the industrial relations department, in the normal course of business of that department. In that capacity I recognize the following documents attached hereto as being true copies of business records of Pacific Fruit Express, prepared and or received in the regular course of business to record at or near the time of the act, condition, or event recorded, that act, condition, or event as a history of the event, act, or condition:..."

Described in and attached to that declaration is a document

entitled "The Future of The Perishable Business and PFE" stamped N.J.H. June 17, 1985, with addendum and attachments, 110 pages (attached hereto as Exhibit A is the first page of that document from the declaration of Boutourlin). Attached hereto as Exhibit B is the first page of a document having the same title, which was produced by SPT. Neither copy is marked "confidential" or "for your eyes only", or restricted as to circulation in any way. Neither the document as a whole nor any of its attachments or addendum individually indicate they were prepared for litigation purposes.

No objection has been raised by SPT as to the materiality of the evidence which they desire stricken, nor should such an objection be entertained since the evidence is clearly highly probative of the issues raised in this proceeding.

There is no pending discovery motion to compel production of the redacted portions of the exhibit removed from it by SPT.

THE EVIDENCE SPT SEEKS TO STRIKE IS SUFFICIENTLY RELIABLE AND PROBATIVE TO SUPPORT A DECISION UNDER THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT SO THAT SPT'S MOTION SHOULD BE DENIED.

49 Code of Federal Regulations 1114.1 provides:

> "Any evidence which is sufficiently reliable and probative to support a decision under the provisions of the Administrative Procedure Act...will be admissible in hearings before the Commission."

49 Code of Federal Regulations 1114.3 provides:

> "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any

> act, transaction, occurrence, or event, will be admissible, as evidence thereof if it appears that it was made in the regular course of business, and it was the regular course of business to make such memorandum or record...."

Under each of these rules the matters SPT seeks to strike are admissible evidence, and should not be stricken.

The rules of the Commission recognize unspecified privileged or proprietary information being exempt from compelled production during discovery, but do not prohibit evidence which is offered without the need to procure it through a motion to compel production.

THE WORK PRODUCT DOCTRINE IS NOT APPLICABLE TO THE PRESENT MOTIONS TO STRIKE AND RETURN. THE DOCTRINE WOULD BE APPLICABLE HERE, IF AT ALL, ONLY IF THERE WERE A MOTION TO COMPEL PRODUCTION OF THE MATERIAL TO WHICH THE CLAIM IS MADE, OR AN ATTEMPT TO MAKE THE CLIENT OR LAWYER TESTIFY AS TO WHAT TRANSPIRED BETWEEN THEM, BUT THERE IS NO MOTION TO COMPEL PRODUCTION OF THIS MATERIAL PENDING, NOR ANY ATTEMPT TO SOLICIT TESTIMONY FROM ANY LAWYER OR ALLEGED CLIENT.

SPT correctly states the doctrine of attorneys work product exemption as applying to discovery. The doctrine does not apply to documents not developed in anticipation of litigation. The declaration of Mr. Thomas Ellen states the purpose of the investigation giving rise to the documents sought to be stricken by SPT was "to recommend a course of action to eliminate the losses of PFE, that were being suffered by its parent SPT." No where is it suggested that these documents were developed in anticipation of litigation, so that even if production of these documents by SPT were in issue, production would properly be compelled. Clearly here the doctrine does not entitle SPT to strike this reliable and probative evidence, developed for corpo-

rate purposes other than use in litigation.

SPT has not offered any case law that would apply the doctrine to documents not the subject of a compelled production. There is no pending motion to compel production of the documents SPT objects to, so that the raising of an objection to compelled production is a total non sequiter.

SPT ATTEMPTS TO APPLY THE ATTORNEY CLIENT PRIVILEGE TO CORRESPONDENCE ATTACHED TO, INCORPORATED IN, AND REFERRED TO BY PFE IN A GENERAL STUDY AS TO THE OPERATIONAL FUTURE PROFITABILITY OF PFE. THE GENERAL STUDY DOES NOT SEEK TO LIMIT ACCESS TO ITS CONTENTS AT ALL, SO THAT IF ANY PRIVILEGE WERE APPLICABLE TO THE MATERIAL OBJECTED TO, SUCH PRIVILEGE WAS WAIVED BY INCLUSION IN THE GENERAL REPORT WITHOUT NOTING ON THE GENERAL REPORT A CLAIM OF CONFIDENTIALITY OR EVEN PROPRIETARY CLAIM.

It has long been recognized that if the attorney client privilege exists, it is the clients privilege, and the client can waive the privilege. Section 912 (a), California Evidence Code provides:

> "Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege)...is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication ...."

Here the entire communication was disclosed without any attempt or instruction to the person or persons to whom it was disclosed to keep its contents confidential. Under these circumstances SPT can not claim such a privilege. This has been recognized in the case law where otherwise privileged corporate documents are intermingled with other nonconfidential documents. See In Re Grand Jury Proceedings Involving Berkley & Co. (D Minn 1979) 466 F Supp 863, 870;

U.S. v Kelsey-Hayes Wheel Co. (ED Mich 1954) 15 FRD 461, 465. Here SPT recognized this principle, and instructed its personnel in a memorandum dated December 29, 1983, attached to the declaration of Barbara Boutourlin as follows:

> "All reasonable steps must be taken to prevent opposing parties from obtaining privileged internal company data, studies and correspondence developed in connection with the proposed merger applications to the Interstate Commerce Commission.
>
> Two well-established legal privileges, the attorney-client privilege and the attorney work-product doctrine, often protect materials from discovery. The attorney client privilege applies to communications between an attorney and his client concerning matters in litigation.* The attorney work-product doctrine protects materials prepared in anticipation of litigation by a litigant or its employees and/or agents.
>
> The following procedures must be followed by all members of each railroad's merger task force, as identified in Appendix A to this memorandum. By following these procedures, we can make sure that the attorney-client and attorney work product privileges can be asserted to protect privileged merger-related materials from discovery by opposing parties during proceedings before the ICC, and also to provide the greatest degree of confidentiality to all merger materials.
>
> Requests for Legal Advice
>
> Requests for legal advice concerning the merger should be made by members of the merger task force directly to a member of the Law Department. Correspondence requesting legal advice should be marked, "Privileged and Confidential." Requests should be specific. Copies of correspondence to and from the Law Department should be restricted to those member of the merger task force having a direct "need to know."
>
> Circulation of Merger Materials

> Circulation of all merger-related materials should be restricted to those persons having a direct "need to know." Merger related materials should not be circulated to departmental personnel who are not members of the merger task force.
>
> Copying
>
> Unnecessary photocopying of merger materials should be avoided.
>
> Files
>
> Confidential files should be maintained for all merger materials. These confidential files should be kept separate from general departmental files. Merger files should be kept in a secure place and only members of the merger task force should have access to such files."

These precautions were not followed with the material sought to be stricken. The report is not marked limited to members of the task force on a need to know basis. The report was not kept separate from general departmental files in the industrial relations department. Letter February 11, 1985 from A. I. Weber to Mr. R. S. Kopf attached to the report is not marked "Privileged and Confidential" nor is document entitled Questions 3 and 8, nor letter dated February 13, 1985, to Mr. Thomas D. Ellen from Greg Cunningham (Appendix c), nor letter March 7, 1985 to Mr. R. S. Kopf (Appendix D). nor letter March 11, 1985 from Kenneth E. Norman to Mr. R. S. Kopf (Appendix E). In addition none of the facts set forth in any of the attached documents indicate they were anything more than general knowledge, such as PFE being a wholly owned subsidiary of SP; the individuals serving on the Boards of Directors of both corporations are identical, with the exception of Ellen on the PFE Board as Vice President and General Manager, all other PFE Vice Pre-

sidents are also officers of SP; are paid solely by SP and receive no compensation from PFE; PFE's President was Executive Vice President of SP and received no compensation from PFE; SP performed a variety of functions for PFE, including all treasury functions, including holding of cash, collection of interest, marketing, pricing, claims functions, accounting functions, legal, data processing, management services, marketing, sales and operating functions, etc. These factual matters are not communicated from PFE to attorneys so can not be the subject of privilege since they are known between both parties. Mr. Ellen claims the report was not merger related but an intellectual inquiry to determine the future viability of PFE, which he was asked to prepare by some unnamed person. However, Ex C-1, 12/17/92 Submission, Ex C-1, (SFP 01095 A) is a part of questions asked by SFP of SPT prior to May 15, 1985 (SFP 1091), which contradict Mr. Ellen's testimony. SFSP specifically asks :

" 9. Subsidiary Companies (RDK)

a. Pacific Fruit Express

i. Can this company be folded and its remaining operations assumed by SPT?
ii. What are the savings? "

These are exactly the questions explored by Mr. Ellen in the report to which the documents sought to be stricken are incorporated and attached. Page SFP 01091 is dated May 15, 1985, and is entitled Re: Combination/SP/Voting Trust. This is exactly the time Mr. Ellen states in his declaration that he was preparing the report in question. There can be no doubt that Mr. Ellen's Report was a merger related docum-

ent and none of the procedures outlined by SFSP to be followed concerning maintaining the attorney client privilege as to such documents were followed. The accuracy of Mr. Ellen's declaration is further questioned since he alleges he circulated the document only to Mike Mohan, T. A. Miller, Denman K. McNear, and T. D. Walsh. However Exhibit A clearly shows it was circulated to others including N. J. H. and H. W. __ .

Knowledge independent of attorney client communication is not privileged. Here SPT seeks to strike the entire documents, which contain information of general knowledge.

In the corporate setting the applicability of the privilege to communications transmitted directly or indirectly between a corporate clients employees and its corporate attorneys depends on the "dominant purpose" of the communication. See D. I. Chadbourne, Inc. v. Superior Court (1964) 60 C2d 723, 36 CR 468.

Wherefore it is respectfully submitted the motion of SPT should be denied.

Dated January 20, 1993

LEE J. KUBBY, INC.
A Professional Corporation
By:

LEE J. KUBBY
Attorney for
SIEU MEI TU

THE FUTURE OF THE PERISHABLE BUSINESS AND PFE

HISTORY

It is now approaching three years since all functions related to the perishables business have been consolidated into Pacific Fruit Express as a Profit Center of Southern Pacific. These questions now need to be answered: What results have been attained from this organizational restructuring? What is the future viability of the perishables business? And what should the future be for Pacific Fruit Express?

On August 16, 1982, PFE took over all responsibility for Traffic functions relating to perishable traffic; namely, Marketing, Pricing and Sales. In late 1983, all Freight Claims and Loading Services functions were also transferred to the jurisdiction of PFE. With these changes almost all functions directly relating to the perishable business, with the exception of freight revenue accounting and transportation, were consolidated under PFE management as a Profit Center of Southern Pacific. This was done to try to improve our market position and profitability in the perishable business through the synergistic effects of pushing profit responsibility further down in the organization for this specific business segment.

Transporting fresh fruit and vegetables has always been a complex business. Due to the perishable nature of the products the service requires substantial investment in specialized equipment, intensive servicing and maintenance, and a high level of service. Despite the high cost of producing a premium service we must compete in an intensely competitive environment which keeps rates among the lowest of all commodities transported. In addition, the business is further exacerbated by the varying demand for service due to the seasonality of crops and the lack of bi-directional traffic. These factors are major contributors to the low rate of utilization of PFE equipment, which in 1984 averaged only 5.8 revenue trips per car and forty-two (42) percent of total car miles being run off empty. Despite these many problems, perishable business was profitable and Southern Pacific's market share was significant through the late 1960's.

With the completion of the Interstate Highway System and the advent of larger more efficient tractor-trailers the relative service standard changed from that which the railroads provided to that which the truckers provided. The 1970's and 1980's were periods of continuous decline in market share and profitability. Today our overall market share is only about four (4) percent, the service we provide is, in aggregate, the most inferior and the cost of producing that service is too high to sell it on price alone. While we face many problems in attempting to make the perishable business viable, the

THE FUTURE OF THE PERISHABLE BUSINESS AND PFE

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EXHIBIT B

CONFIDENTIAL

The first page of this document begins on SFP 01091, already produced to you.

REDACTED

9. Subsidiary Companies (RDK)

a. Pacific Fruit Express

i. Can this company be folded and its remaining operations assumed by SPT?

ii. What are the savings?

b. Northwestern Pacific

i. What can be done to further reduce losses incurred by this subsidiary?

EXHIBIT C-1

CONFIDENTIAL

May 15, 1985

Mr. Booth:

Re: Combination/SP/Voting Trust

Attached is a summary of questions from Messrs. Cena, Krebs and Swartz. We have clarified these as you requested. Also attached are an analysis of general and administrative expenses, which indicates SP's level is not extraordinary when compared to other roads, and a breakdown of equipment rents.

Gary A. Kent

Attachments

SFP 01091

CONFIDENTIAL

April 17, 1985

Mr. Schmidt:

Re: Combination/SP/Voting Trust

I have discussed with Mr. Booth and Mr. Krebs the questions raised in Mr. Krebs' reply to your memorandum asking for questions which should be asked of Mr. McNear. I have also reviewed Mr. Cena's memorandum on this subject. I am in agreement with the questions they suggest raising and I would hone in on the following areas:

REDACTED

Employment Levels

1. What is SPT doing to reduce employment levels in line with business levels?

REDACTED

SFP 00526

W. J. Swartz

PROOF OF SERVICE BY MAIL

State of California
County of Santa Clara

I am and at the time of the service hereinafter mentioned was a resident of the State of California, County of Santa Clara, and at least 18 years old. I am not a party to the within entitled action. I am an attorney licensed to practice in the State of California.

My business address is Box 60485, Sunnyvale, California 94086-0485. On 1-20-93 I deposited with Federal Express overnight mail at Sunnyvale, California, enclosed in a sealed envelope per instructions Hon. Paul Cross the attached

Supplemental Reply to Motion of SPT To Strike and Compel Return

addressed to the persons listed on the attached sheet:

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on 1-20-93 at Sunnyvale, California.

LEE J. KUBBY

ATTACHED SHEET

Honorable Paul S. Cross
Interstate Commerce Commission
12th & Constitution Aves. NW
Washington, DC 20423

Adrian L. Steel, Jr.
Mayer, Brown, & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C.20006

Wayne M. Bolio
Southern Pacific Transpo_ ıtion Company
Southern Pacific Building
1 Market Plaza #846
San Francisco, CA 94105-1001

Donald F. Griffin, Esq.
Highsaw, Mahoney & Clarke, P.C.
Suite 210
1050 Seventeenth Street, N.W.
Washington, D.C. 20036

38416

MAYER, BROWN & PLATT

CHICAGO
LONDON
NEW YORK
HOUSTON
LOS ANGELES
TOKYO
BRUSSELS

2000 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006-1882

202-463-2000
TELEX 892603
FACSIMILE:
202-861-0473

January 21, 1993

ERIKA Z. JONES
202-778-0642

By Hand

The Honorable Sidney L. Strickland, Jr.
Secretary
Interstate Commerce Commission
12th Street and Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 30400 (Sub-No. 21),
Santa Fe Southern Pacific Corporation --
Control -- Southern Pacific Transportation Company

Dear Secretary Strickland:

Enclosed please find, for filing with the Commission, the original and eleven copies of the Supplemental Responses And Objections Of Santa Fe Corporation To Second Set Of Interrogatories And Request For Production Of Documents Of Sieu Mei Tu and Response Of Santa Fe Pacific Corporation To Sieu Mei Tu's Supplemental Motion To Compel.

Please time and date stamp one copy of each filing and return them to our messenger.

Please call me if you have any questions concerning this matter. Thank you for your assistance.

Sincerely yours,

Erika Z. Jones/KAK

Erika Z. Jones
Counsel For Santa Fe
Pacific Corporation

Enclosures

cc: Honorable Paul S. Cross
All Parties of Record

ENTERED
OFFICE OF THE SECRETARY
JAN 22 1993
9 PART OF PUBLIC RECORD

RECEIVED
JAN 21 1993
I.C.C. BUILDING
GUARD DESK

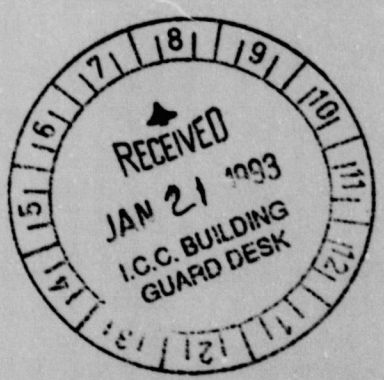
38416

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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

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

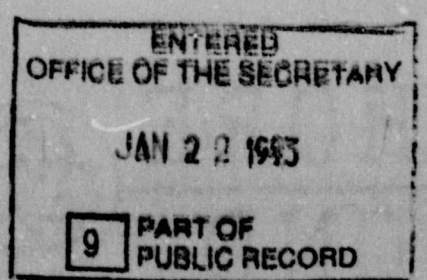
SUPPLEMENTAL RESPONSES AND OBJECTIONS OF SANTA FE PACIFIC CORPORATION TO SECOND SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS OF SIEU MEI TU



Erika Z. Jones
Adrian L. Steel, Jr.
Kathryn A. Kusske
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Suite 6500
Washington, D.C. 20006-1882
(202) 463-2000

Attorneys for Santa Fe Pacific Corporation

DATED: January 21, 1993



BEFORE THE
INTERSTATE COMMERCE COMMISSION

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

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

SUPPLEMENTAL RESPONSES AND OBJECTIONS OF SANTA FE PACIFIC CORPORATION TO SECOND SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS OF SIEU MEI TU

Pursuant to the Commission's Rules of Practice (49 C.F.R. § 1114), Santa Fe Pacific Corporation (formerly Santa Fe Southern Pacific Corporation ("SFSP")) ("SFP") hereby submits the following supplemental responses and objections to the "Interrogatories and Informal Request for Production of Documents" dated November 20, 1992, served by Sieu Mei Tu ("Tu").

GENERAL OBJECTIONS

SFP hereby incorporates as if set forth fully herein (i) the General Objections asserted in its initial Responses and Objections served on December 11, 1992, to Tu's "Interrogatories and Informal Request for Production of Documents" dated November 20, 1992, and (ii) to the extent not supplemented herein, its Responses and Objections to Specific Interrogatories and Document Requests contained therein.

SUPPLEMENTAL RESPONSES AND OBJECTIONS TO
SPECIFIC INTERROGATORIES AND DOCUMENT REQUESTS

13. SFP 00232

Identify D. K. McNear

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to Pacific Fruit Express Company ("PFE"), and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states, on information and belief, that D.K. McNear was Chairman, President and Chief Executive Officer of Southern Pacific Transportation Company at the time SFP 00232 was written.

19. SFP 00344

Identify Schmidt,
F. N. Grossman
Krebs
Swartz
Knowlton

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of certain individuals. SFP further states that at the time SFP 00344 was

written John J. Schmidt was Chairman and Chief Executive Officer of SFSP, F.N. Grossman was Vice President-Corporate Communications of SFSP, R.D. Krebs was President and Chief Operating Officer of SFSP, W.J. Swartz was Vice Chairman of SFSP, and R.K. Knowlton was Senior Vice President-Law of SFSP.

28. SFP 01091

Identify Gary A. Kent
Mr. Booth

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of certain individuals. SFP further states that at the time SFP 01091 was written Gary A. Kent was Senior Manager of Planning/Corporate Development Dept. of SFSP and T.J. Booth was Director of Corporate Development/Corporate Development Dept. of SFSP.

Respectfully submitted,

Erika Z. Jones /KHK

Erika Z. Jones
Adrian L. Steel, Jr.
Kathryn A. Kusske
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Suite 6500
Washington, D.C. 20006-1882
(202) 463-2000

Attorneys for Santa Fe Pacific Corporation

DATED: January 21, 1993

COUNTY OF COOK)
) ss:
STATE OF ILLINOIS)

VERIFICATION

I, Guy Vitello, being duly sworn, do hereby depose and state that I am a General Attorney of The Atchison, Topeka and Santa Fe Railway Company; that my offices are located at 1700 East Golf Road, Schaumburg, Illinois 60173; and that I have read the foregoing Supplemental Responses and Objections of Santa Fe Pacific Corporation To Second Set of Interrogatories and Request for Production of Documents of Siou Mei Tu dated November 20, 1992, and that such responses are true and correct to the best of my knowledge and information.

Guy Vitello
Guy Vitello

Subscribed and Sworn to
Before Me This 20th Day
of January, 1993.

Sherry Vasica
Notary Public

"OFFICIAL SEAL"
Sherry Vasica
Notary Public, State of Illinois
My Commission Expires 2/6/94

My Commission expires:
February 6, 1994

[illegible]

CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of January, 1993, I served the foregoing "Supplemental Responses and Objections of Santa Fe Pacific Corporation to Second Set of Interrogatories and Request for Production of Documents of Sieu Mei Tu" by causing a copy thereof to be delivered to each of the following in the manner indicated:

Lee J. Kubby
Lee J. Kubby, Inc.
P.O. Box 60485
Sunnyvale, California 94086-0485
(By Express Mail)
and
231 Acalanes #5
Sunnyvale, California 94086
(By Federal Express)

William G. Mahoney
Donald F. Griffin
Highsaw, Mahoney & Clarke, P.C.
1050 17th Street, N.W.
Suite 210
Washington, D.C. 20036
(By Messenger)

Wayne M. Bolio
Southern Pacific Transportation Company
819 Southern Pacific Building
One Market Plaza
San Francisco, California 94105
(By Federal Express)

George W. Mayo, Jr.
Hogan & Hartson
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(By Messenger)

Kathryn Kuske

38410

LAW OFFICES
LEE J. KUBBY, INC.
A PROFESSIONAL CORPORATION

BOX 60485
SUNNYVALE, CALIFORNIA 94086-0485
(415) 691-9331

December 30, 1992

Secretary
Interstate Commerce Commission
12th and Constitution Aves. N.W.
Washington, D.C. 20423
Fin Doc 30400 Sub 21

Re: Interstate Commerce Commission
Decision
Finance Docket No. 30400
(Sub-No. 21)
Santa Fe Southern Pacific Corporation
Control
Southern Pacific Transportation Company
Response to Motions of SFP and SPT

D

Dear Gentle People:

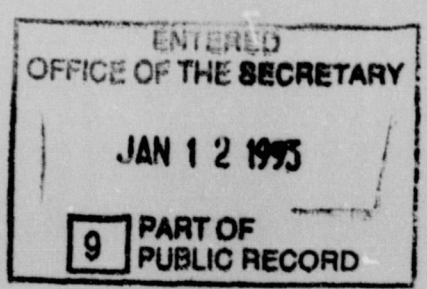
Enclosed please find original and 8 copies of Resonse to Motions of SFP and SPT in the above matter. Please file and return the enclosed face sheet endorsed filed in the enclosed self addressed and stamped envelope.

Thank you for your courtesies.

Respectfully submitted,
LEE J. KUBBY, INC.
A Professional Corporation
By:

LEE J. KUBBY
ATTORNEY FOR INJURED PARTY
SIEU MEI TU

LJK:me
Encls.



LEE J. KUBBY, INC.
A PROFESSIONAL CORPORATION
BOX 60485
Sunnyvale, CA 94086-0485
(415) 691-9331

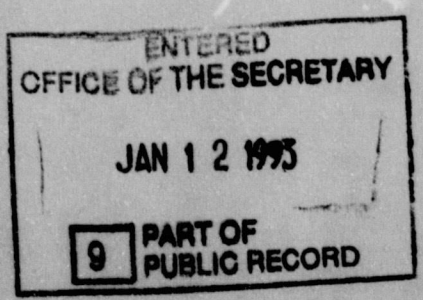
Attorney for Employee Party Sieu Mei Tu

INTERSTATE COMMERCE COMMISSION

SIEU MEI TU Employee Party VS SOUTHERN PACIFIC TRANSPORTATION COMPANY; ATCHISON, TOPEKA, SANTA FE RAILROAD COMPANY; PACIFIC FRUIT EXPRESS COMPANY; SANTA FE SOUTHERN PACIFIC CORP. Applicants Interested Parties	No. 30400 (Sub-No. 21) Response to Motions of SFP and SPT

Re: Interstate Commerce Commission
Decision
Finance Docket No. 30400
(Sub-No. 21)
Santa Fe Southern Pacific Corporation
Control
Southern Pacific Transportation Company

Original



MOTION SANTA FE PACIFIC CORPORATION FOR APPLICATION OF PROTECTIVE ORDER

By order dated August 31, 1992, this commission provided in Paragraph 15 (a) and (c) of Appendix thereto:

> "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;
>
> (c) a party from using any "Confidential Information" during hearings in this Proceeding. "

All documents submitted to the Commission for filing by Tu sourced from SFP and claimed by it as "Confidential" were treated as confidential by Sieu Mei Tu and clearly marked as such in her submission.

SFP in its motion claims that Sieu Mei Tu somehow violated the terms and conditions of paragraph 12 of the above order.

The parties do not file in this proceeding. Filing is an act of the commission and its clerk. Paragraph 12 in so far as it directs filing under seal and keeping under seal is a direction to the staff, and not to the parties. Once a party has submitted a document for filing, and has clearly marked a document as "confidential" that party has complied with the order of the commission and no further act is required of that party thereunder.

The declaration of Boutourlin submitted for filing by Sieu Mei Tu, does not contain any document produced by SFP,

49 CFR 1104.14 cited by SFP, is not applicable here, once a protective order has been entered. Once such an order has issued, this section no longer applies. Further the section leaves it to the belief of the submitter, as to whether the material is entitled to be kept confidential. Sieu Mei Tu does not have such a belief as to any of the material submitted for filing on her behalf.

Wherefore it is respectfully submitted that the motion of SFP be denied.

SOUTHERN PACIFIC TRANSPORTATION COMPANY'S MOTION TO STRIKE AND REQUEST FOR RETURN OF MATERIALS IMPROPERLY INCLUDED IN THE RECORD

Southern Pacific Transportation admits in its motion (not numbered page 5) "...the Report served by Tu on the parties, ..., is <u>not</u> the copy of the Report produced by PFE/SPT." Therefore it cannot be returned to SPT, since it was not produced by SPT. To the extent that SPT claims attorney client privilege to portions of the Report submitted by Sieu Mei Tu, it would clearly be only the privilege of PFE, which SPT claims is not a carrier and not subject to the ICC rulings in this matter. Further PFE clearly waived any privilege that it might have been entitled to, by reason of including the communications in another document, generally circulated without designation of the Report in its entirerty as confidential. Further no attorney client privilege is recognized by the courts when:

(1) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.
(2) When two or more clients have retained or consulted a lawyer upon a matter of common interest.
(3) When the privilege has been waived by disclosure or a consent to disclosure of a significant part of the communication claimed to be privileged, made by the holder of the privilege.

Wherefore it is respectfully submitted that both motions are without merit and should be denied.

Dated December 30, 1992

Respectfully submitted,
LEE J. KUBBY, INC.
A Professional Corporation
By:

LEE J. KUBBY
ATTORNEY FOR EMPLOYEE PARTY
SIEU MEI TU

PROOF OF SERVICE BY MAIL

State of California
County of Santa Clara

I am and at the time of the service hereinafter mentioned was a resident of the State of California, County of Santa Clara, and at least 18 years old. I am not a party to the within entitled action. I am an attorney licensed to practice in the State of California.

My business address is Box 60485, Sunnyvale, California 94086-0485. On 12-30-92 I deposited in the United States mail at Sunnyvale, California, enclosed in a sealed envelope and with the postage prepaid the attached

Response to Motions of SFP and SPT

addressed to the persons listed on the attached sheet:

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on 12-30-92 at Sunnyvale, California.

LEE J. KUBBY

ATTACHED SHEET

Honorable Paul S. Cross
Interstate Commerce Commission
12th & Constitution Aves. NW
Washington, DC 20423

Adrian L. Steel, Jr.
Mayer, Brown, & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C.20006

Wayne M. Bolio
Southern Pacific Transportation Company
Southern Pacific Building
1 Market Plaza #846
San Francisco, CA 94105-1001

Donald F. Griffin, Esq.
Highsaw, Mahoney & Clarke, P.C.
Suite 210
1050 Seventeenth Street, N.W.
Washington, D.C. 20036

38402

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

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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

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

PACIFIC FRUIT EXPRESS COMPANY'S AND SOUTHERN PACIFIC TRANSPORTATION COMPANY'S RESPONSES TO INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

COMES NOW Pacific Fruit Express Co. ("PFE") and Southern Pacific Transportation Co. (SPT), through its counsel, and pursuant to 49 CFR § 1114.26, responds to Sieu Mei Tu and Joseph Tu (hereinafter "Tu") Request for Production of Documents and Interrogatories.

GENERAL OBJECTIONS

Pacific Fruit Express Company and SPT hereby assert the following general objections to the Interrogatories and Requests for Productions of documents submitted by Tu.

1. PFE and SPT object to said Discovery requests to the extent that it seeks information protected by the attorney/client and/or work product privilege.

2. PFE and SPT objects to any discovery requests to the

extent that it seeks proprietary and otherwise confidential information. However, subject to the terms of the Confidentiality and Protective Order signed by any party, PFE and SPT will respond to the Discovery requests as more fully set forth herein. Each and every document produced herein and every interrogatory answer or response is subject to and covered by the Confidentiality and Protective Order executed by all parties.

3. PFE and SPT objects to said Discovery requests to the extent that said requests are overbroad, burdensome, irrelevant and oppressive in that the information sought in such Discovery requests may be equally available to Tu through a reasonable search and review of their own records and files, has already been produced, or is otherwise overbroad, burdensome, irrelevant or oppressive.

4. SPT and PFE object to the Interrogatories and Request for production on the basis that said discovery requests are untimely. See, e.g. 49 CFR §1114.26(c). SPT and PFE further object on the basis that Tu did not informally request the discovery materials prior to serving the document request, and has not obtained any order from the Commission directing SPT or PFE to respond. 49 CFR §1114.21(b).

5. PFE and SPT will only respond to this Discovery request to the extent that it involves PFE, and reserves the right to object to the discovery request which seeks information relating to SPT. By previous Order of the ICC, Tu's discovery requests must be specifically related to PFE and not to any other parent or

subsidiary company.

6. The fact that SPT and PFE have responded to discovery requests by Tu is without prejudice to their position that Tu is not a proper party to any proceeding before the ICC and that she was not an employee of SPT and is not proceeding as a class of SPT employees.

7. Subject to the previously stated objections, and as supplemented by any more specific objections contained below, PFE and SPT hereby responds to the request for production of documents and interrogatories submitted by Tu.

RESPONSE TO INTERROGATORY NO. 1

Interrogatory No. 1 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory. Without waiving or in any way qualifying said objection or response, SPT and PFC note that Benjamin Biaggiani (sic), Alan Furth, and Robert Krebs were, at various times prior to June 24, 1986 employed by SPT and Southern Pacific Co. As of June 24, 1986, Biaggiani, Krebs and Furth were employed by Santa Fe Southern Pacific Co., and were not employed by SPT.

Response to Interrogatory No. 2

Interrogatory No. 1 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or

generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 3

Interrogatory No. 1 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 4

Interrogatory No. 4 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory. Without waiving or in any qualifying said objection or response, SPT notes that at various times in the past prior to October 1983, W. R. Denton was employed by Southern Pacific Transportation Company in various capacities.

Response to Interrogatory No. 5

SPT and PFE object to said Interrogatory on the basis that it is burdensome, oppressive, overbroad, irrelevant and not calculated to lead to the discovery of relevant or admissible evidence, and outside the scope of the ICC Order dated on or about November 9, 1992. By Order of the Commission, discovery requests by Tu can only relate to PFE and not SPT. The document in issue, SFP 00022-00090 apparently relates to Southern Pacific Transportation Company and its operations. No attempt is made in the Interrogatory to

separate out PFE from SPT, and the majority of that document appears to deal with the operations of SPT only, its track, equipment, and road bed. Because the interrogatory is outside the scope of the Commission's Order, no response is required. As information, to the best SPT's knowledge and belief, SFP 000022-00090 did not involve information relating to PFE, but only to SPT, St. Louis Southwestern Railway Company, Northwestern Pacific Railroad Company, and Southern Pacific Equipment Company.

Response to Interrogatory No. 6

Interrogatory No. 6 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Compan[illegible]. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory. Without waiving or in any qualifying said objection or response, SPT notes that the "SSW" normally refers to the St. Louis Southwestern Railway Company, a subsidiary of SPT.

Response to Interrogatory No. 7

SPT and PFE object to said Interrogatory on the basis that it is burdensome, oppressive, overbroad, irrelevant and not calculated to lead to the discovery of relevant or admissible evidence, and outside the scope of the ICC Order dated on or about November 9, 1992. By Order of the Commission, discovery requests by Tu can only relate to PFE and not SPT. The document in issue, SFP 00022-00090 apparently relates to Southern Pacific Transportation Company and its operations. No attempt is made in the Interrogatory to

separate out PFE from SPT, and the majority of that document appears to deal with the operations of SPT only, its track, equipment, and road bed. Because the interrogatory is outside the scope of the Commission's Order, no response is required. As information, to the best SPT's knowledge and belief, SFP 000022-00090 did not involve information relating to PFE, but only to SPT, St. Louis Southwestern Railway Company, Northwestern Pacific Railroad Company, and Southern Pacific Equipment Company.

Response to Interrogatory No. 8

Interrogatory No. 8 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory. Without waiving or in any qualifying said objection or response, Mr. McNear refers to Denman K. McNear. Mr. McNear held a variety of positions with Southern Pacific Transportation Company throughout his career, and is now retired from the Company effective October 13, 1988. His last position with SPT was as Chairman and Chief Executive Officer.

Response to Interrogatory No. 9

Interrogatory No. 9 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory. SPT's information processing system, in and around 1986, was a data base known as "FMIS". SPT

is informed and believes, and on that basis allege, that in and around 1986 SFSP's data base was known as "SIMPLAN." Apparently these two data base system could interact. While SFP 0249 through 0254 refer to Southern Pacific, SPT asserts that this document is in the SIMPLAN format, and not FMIS. On information and belief, SPT asserts that this document was therefore generated by SFSP. While SPT cannot therefore interpret an SFSP document, SPT can provide information as to its general financial reporting practices in and around 1986. Without reference to SFP 00249, in 1986 its financial forecasts would generally include revenue and expenses from PFE.

Response to Interrogatory No. 10

Interrogatory No. 10 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 11

Interrogatory No. 11 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 12

Interrogatory No. 12 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because

said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 13

See response to Interrogatory 8A.

Response to Interrogatory No. 14

Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, Northwestern Pacific Railroad Company, Pacific Motor Trucking Company, Visalia Electric Co., Pacific Motor Transport Co., Southern Pacific International Inc., Pacific Fruit Express Co., PMT of the Southwest Inc., Southern Pacific Air Freight Inc., Southern Pacific Equipment Company, Southern Pacific Marine Transport Inc., Southern Pacific Warehouse Co. While said companies are subsidiaries of SPT, that does not necessarily mean that those companies actually reported income.

Response to Interrogatory No. 15

Interrogatory No. 15 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 16

Interrogatory No. 16 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to

respond to said Interrogatory.

Response to Interrogatory No. 17

Interrogatory No. 17 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory. See also response to Interrogatory 8A, and 4A.

Response to Interrogatory No. 18

Interrogatory No. 18 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 19

Interrogatory No. 19 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 20

SPT objects to said Interrogatory on the basis that it is vague, ambiguous, and unintelligible as to use of the term "make-up".

Response to Interrogatory No. 21

"Agreement" employees are those whose terms and conditions of

employment are governed by one or more collective bargaining agreements negotiated between SPT and/or PFE and the applicable labor union which has been certified by the National Mediation Board to represent said employees.

Sub b. "Operating" employees refers to those employees with direct responsibility for the movement of equipment and rail cars over the rail system. Said operating employees, as of the date of SFP 00324-325 generally involve the classifications of engineers, brakeman, conductors, fireman, switchmen, and hostlers; in general, SPT refers to the operating crafts as those classifications of employees represented by either the United Transportation Union and/or Brotherhood of Locomotive Engineers.

Sub. B. "Non-operating" classifications refers to all other types of agreement employees other than set forth in Sub. A. Those agreement classifications of employees would generally be clerks, dispatchers, yardmasters, shop craft employees, ARSA members, and carmen.

Response to Interrogatory 22

SPT and PFE will produce a copy of this document if Tu has not already received a copy from SFSP.

Response to Interrogatory 23

Interrogatory No. 23 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory 24

Interrogatory No. 24 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory. Without waiving or in any qualifying the previous responses and objections, SPT identifies L. G. Simpson and R. O. Bredenberg as employees of Southern Pacific Transportation Company. As of March 25, 1985, R. D. Bredenberg was employed as General Manager, Southern Region; L. G. Simpson was employed as General Manager, Eastern Region.

Response to Interrogatory No. 25

Interrogatory No. 25 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 26

Interrogatory No. 26 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory. Without waiving or in any way qualifying the previous response and/or objection. See response to Interrogatory 14.

Response to Interrogatory No. 27

Interrogatory No. 27 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory. Without waiving or in any qualifying said objection, R. D. Krebs has at times in the past been employed by Southern Pacific Transportation Company. In April 1985 Krebs was not employed by SPT. See response to Interrogatory 1.

Response to Interrogatory No. 28

Interrogatory No. 28 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 29

SPT objects to said Interrogatory on the basis it is vague, ambiguous, and unintelligible. The wording on SFP 01094 speaks for itself. To the extent that the Interrogatory seeks response to the redacted portion of SFP 01094, the answer is no.

Response to Interrogatory No. 30

See response to Interrogatory No. 14.

Response to Interrogatory No. 31

Interrogatory No. 31 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because

said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 32

See response to Interrogatory No. 26.

Response to Interrogatory No. 33

See response to Interrogatory No. 26.

Response to Interrogatory No. 34

Interrogatory No. 34 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 35

SPT and PFE object to said Interrogatory to the extent that it seeks information concerning any company other than PFE. By previous order of the Commission, Tu's Discovery is limited only to PFE. To the best of PFE's knowledge and belief, no such document was sent by PFE to BRAC. To the best SPT's information and belief, a letter similar to SFP 01345 was sent by SPT to BRAC. Without waiving or in any way qualifying the objection that information regarding SPT need not be produced in this request, SPT will make available to Tu a copy of the letter sent by SPT to BRAC if the letter does exist and can be located.

Response to Interrogatory No. 36

Interrogatory No. 36 seeks information concerning a document

apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 37

Interrogatory No. 37 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 38

PFE clerks were not included in Document SFP 01365.

Response to Interrogatory No. 39

Santa Fe Southern Pacific Company. "SP" normally refers to Southern Pacific Transportation Company. "SF" normally refers to the Atchison Topeka and Santa Fe Railway Company.

Response to Interrogatory No. 40

Interrogatory No. 40 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 41

Southern Pacific Transportation Company objects to said Interrogatory on the basis that it does not relate to Tu's claims in this case. Tu was employed as a clerical employee, and issues

related to maintenance of way and/or engineer is outside the scope of this proceeding.

Response to Interrogatory No. 42

Interrogatory No. 42 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Response to Interrogatory No. 43

Interrogatory No. 43 seeks information concerning a document apparently produced by Santa Fe Southern Pacific Company. Because said document, and the Interrogatory in issue, were not produced or generated by SPT, SPT lacks foundation and personal knowledge to respond to said Interrogatory.

Dated: 12/16/92

WAYNE M. BOLIO

g:\wmb\santa\p\ano.ob

COUNTY OF SAN FRANCISCO)
) ss:
STATE OF CALIFORNIA)

VERIFICATION

I, Wayne M. Bolio, being duly sworn, do hereby depose and state that I am an Assistant General Counsel in Southern Pacific Transportation Company; that my office is located at the Southern Pacific Building, One Market Plaza, San Francisco, California 94105; and that I have read the foregoing Responses and Objections of Southern Pacific Transportation Company to Request for Production Documents of Sieu Mei Tu and that such responses are true and correct and to the best of my knowledge and information.

Wayne M. Bolio

Subscribed and Sworn to
Before Me This 16 Day
of December, 1992.

Notary Public

My Commissions expires:

J. E. JURGENS
NOTARY PUBLIC-CALIFORNIA
Principal Place of Business in
CITY AND COUNTY OF
SAN FRANCISCO
My Commission Expires Jan. 15, 1994

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CERTIFICATE OF SERVICE

I, hereby certify that on this 16th day of December, 1992 I served the foregoing **PACIFIC FRUIT EXPRESS COMPANY'S AND SOUTHERN PACIFIC TRANSPORTATION COMPANY'S RESPONSES TO INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS** by causing a copy thereof to be delivered to each of the following the manner set forth below:

The Honorable Paul S. Cross
Chief Administrative Law Judge
Office of Hearings
Interstate Commerce Commission, Room 4117
12th Street and Constitution Avenue, N.W.
Washington, D.C. 20423
(By Federal Express)

Erika Z. Jones
Adrian L. Steel, Jr.
Mayer, Brown & Platt
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Lee J. Kubby
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Wayne M. Bolio

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38400

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ERIKA Z. JONES
202-778-0642

December 11, 1992

By Hand

The Honorable Sidney L. Strickland, Jr.
Secretary
Interstate Commerce Commission
12th Street and Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 30400 (Sub-No. 21),
Santa Fe Southern Pacific Corporation --
Control -- Southern Pacific Transportation Company

Dear Secretary Strickland:

Enclosed please find, for filing with the Commission, the original and eleven copies of the Responses and Objections of Santa Fe Pacific Corporation to Second Set of Interrogatories and Request for Production of Documents of Sieu Mei Tu. Please time and date stamp one copy and return it to our messenger.

Please call me if you have any questions regarding the enclosed materials. Thank you for your assistance.

Sincerely yours,

Erika Z. Jones /KAK

Erika Z. Jones
Counsel For Santa Fe
Pacific Corporation

Enclosures

cc: Honorable Paul S. Cross
All Parties of Record

38400

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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

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

RESPONSES AND OBJECTIONS OF SANTA FE PACIFIC CORPORATION TO SECOND SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS OF SIEU MEI TU

Erika Z. Jones
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(202) 463-2000

Attorneys for Santa Fe Pacific Corporation

DATED: December 11, 1992

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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

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

RESPONSES AND OBJECTIONS OF SANTA FE PACIFIC CORPORATION TO SECOND SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS OF SIEU MEI TU

Pursuant to the Commission's Rules of Practice (49 C.F.R. § 1114), Santa Fe Pacific Corporation (formerly Santa Fe Southern Pacific Corporation) ("SFP") hereby submits the following responses and objections to the "Interrogatories and Informal Request for Production of Documents" dated November 20, 1992, served by Sieu Mei Tu ("Tu").

GENERAL OBJECTIONS

The following general objections are asserted as to each interrogatory and document request propounded by Tu and are incorporated by reference in the responses to each interrogatory and document request below. The fact that SFP responds to all or part of any interrogatory or document request is not intended to, and shall not be construed to be, a waiver of any general or specific objection made by SFP to any interrogatory or document request.

1. SFP objects to the interrogatories on the ground that Tu has not complied with the Commission's rules for timely serving interrogatories. Under 49 C.F.R. § 1114.26(c), interrogatories can not be served within 20 days prior to the filing of opening statements, and Tu's interrogatories were served less than 20 days prior to the filing date for Tu's evidence and argument in effect at the time the interrogatories were served.

2. SFP objects to the document requests on the ground that Tu has not complied with the Commission's rules for serving document requests on a party. See 49 C.F.R. § 1114.21(b). Tu has not contacted counsel for SFP to secure an informal agreement concerning her document requests, and, in the absence of such an agreement, has not obtained a decision from the Commission approving document requests as required by 49 C.F.R. § 1114.21(b)(2).

3. SFP objects to the interrogatories and document requests insofar as they seek the production of documents and information unrelated to Pacific Fruit Express Company ("PFE"). Under the order entered in this matter by Chief Administrative Law Judge Cross on November 9, 1992, SFP is obligated to respond to Tu's discovery requests only as they specifically relate to PFE, and Tu's counsel has made no effort to conform his second set of discovery requests to comply with this order.

4. SFP objects to the interrogatories and document requests insofar as they seek the production of documents and information

unrelated to actions or orders issued by SFP which may have affected Southern Pacific Transportation Company's ("SPT") operations and work-related assignments. Under the Commission's decision served on June 18, 1992, reopening this proceeding, only evidence of such actions or orders is relevant at this stage of the proceeding.

5. SFP objects to the interrogatories and document requests on the ground that Tu's participation in this proceeding is improper because the Commission's decision reopening the proceeding specifically states that it is not "at this time seeking personal statements from individual employees who believe they were adversely affected by SPT actions", but that the proceeding would encompass only "SPT employees (as a class)". Commission's June 18, 1992 Decision at 3 (emphasis added). Tu is apparently a former clerical employee of PFE, a wholly-owned subsidiary of SPT until its merger with SPT in 1985.

6. SFP objects to the interrogatories and document requests insofar as they request SFP to provide responsive information on behalf of The Atchison, Topeka and Santa Fe Railway Company ("ATSF") (a wholly-owned subsidiary of SFP). ATSF is not now, and has never been, a party to this sub-docket proceeding.

7. SFP objects to the interrogatories and document requests to the extent they seek documents and information for the time period prior to December 23, 1983 (the service date of the Commission's decision approving the SPT voting trust) or subsequent

to August 4, 1987 (the service date of the Commission's decision denying the Applicants' petition for reconsideration). Actions taken or omitted by SFP prior to December 23, 1983 or subsequent to August 4, 1987 are beyond the scope of the issues raised by this reopened proceeding, and the requests are not therefore reasonably calculated to lead to the discovery of admissible evidence.

8. SFP objects to the interrogatories and document requests insofar as they seek the production of documents and information protected against disclosure by the attorney-client privilege or by the attorney work product doctrine.

9. SFP objects to the interrogatories and document requests insofar as they seek the production of proprietary or confidential business information of SFP. Without waiving this objection, any proprietary or confidential information produced in response to these interrogatories and document requests will be made available pursuant to the Protective Order entered in this proceeding.

10. Subject to and without waiving the foregoing objections and subject to SFP's other objections, SFP will respond below to the interrogatories and document requests to the extent possible given the limited time frame available due to the untimeliness of Tu's discovery requests. SFP further states that it previously provided to Tu's counsel copies of its annual reports for the period 1984 - 1987 and a 1983 Fact Book which contain information responsive to Tu's second set of discovery requests.

RESPONSES AND OBJECTIONS TO
SPECIFIC INTERROGATORIES AND DOCUMENT REQUESTS

1. SFP 00001

Identify Directors

Alibrandi, Biaggini, Flamson, Furth, Gilmore, Krebs, Miller, Morphy, Parker, Reed, Runnells, Schmidt, Sisco, Swartz, Swift, West, Woelfle, and Wriston.

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of individual directors.

2. SFP 00002

(A) Did any of the rail merger related writedowns include writing down of refrigerated cars?

(B) If so what entity was record owner of those cars?

(C) Did any of the estimated rail merger writedowns and separation charges on income, include payments to any persons who had been employees of PFE on or before October 1, 1985?

(D) If so state the amount of such estimate.

(E) If so state how the figure was arrived at (including but not limited to what records were used to arrive at the figure).

Response:

(A)-(E) SFP objects to this discovery request on the ground that it is overly broad and unduly burdensome given the limited time frame available due to the untimeliness of Tu's requests. SFP further objects to the discovery request to the extent that it seeks information and documents irrelevant to any matter involving Tu in this proceeding since SFP 00002 is dated subsequent to Tu's furlough by SPT.

3. SFP 00004

Identify Munroe.

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of certain individuals.

4. SFP 00009

(A) Identify Adam, Denton, Donohoe, Dodd, Kever, J.R. McKenzie, J. A. McMullen, J.A. Eidam, J. L. Steffan.

(B) By what Board(s) was this Audit Committee appointed and/or formed?

Response:

(A)-(B) SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of certain individuals.

5. SFP 00022-00090

(A) By whom was this document prepared? (B) For what purpose? (C) Whose initials appear on 00022? (D) What is the hand written date on page 00022? (E) Whose handwriting appears on pages 00084-00088? (F) What words and numbers appear on each of said pages (00084-00088)?

Response:

(A)-(E) SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE. SFP further objects to this discovery request to the extent it seeks information and documents concerning SFP 00022 - 00090 which appear, to the best of SFP's knowledge and belief, to be a document generated by SPT, and SFP has located no responsive information or documents in the limited time frame available due to the untimeliness of Tu's requests.

6. SFP 00042

Identify SSW.

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states to the best of its knowledge and belief that "SSW" refers to St. Louis Southwestern Railroad Company.

7. SFP 00085

What clerks are included in the designation clerks on this page?

Response:

SFP objects to this discovery request to the extent it seeks information and documents concerning SFP 00085 which appears, to the best of SFP's knowledge and belief, to be a document generated by SPT, and SFP has located no responsive information or documents in the limited time frame available due to the untimeliness of Tu's requests.

8. SFP 00248

(A) Identify T. J. Booth

Mr. Adam
Mr. Moreland
Mr. McNear
Mr. Dodd

(B) Define "big bang"

Response:

(A) SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the

ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of certain individuals.

(B) SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding.

9. SFP 00249

(A) Do revenues listed include income from refrigerated cars?

(B) Does Swift, Wesated statement include PFE?

Response:

(A)-(B) SFP objects to this discovery request to the extent it seeks information and documents concerning SFP 00249 which appears, to the best of SFP's knowledge and belief, to be a document generated by SPT, and SFP has located no responsive information or documents in the limited time frame available due to the untimeliness of Tu's requests.

10. SFP 00246

(A) Define "Settlement Case"

Response:

(A) SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the

ground that it seeks information irrelevant to any matter involving Tu in this proceeding.

11. SFP 00242

Define "Kirby"

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding.

12. SFP 00240

Identify W. J. Taylor
J. R. Fitzgerald
J. P. Frestel, Jr.

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of certain individuals.

13. SFP 00232

Identify D. K. McNear

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding.

14. SFP 00234

Identify what subsidiary companies are included in Statements of consolidated income.

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, is unrelated to actions or orders issued by SFP which may have affected SPT's operations and work-related assignments, and is overly broad and unduly burdensome given the limited time frame available due to the untimeliness of Tu's requests.

15. SFP 00237

Identify John J. Schmidt
Messrs. Swartz, Adam, Donohoe

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983

Fact Book which contain information about the identities of certain individuals.

16. SFP 00223

Identify (A) subsidiaries
(B) major subsidiaries

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding.

17. SFP 00213

Identify Messrs. Krebs, Furth, Swartz, Adam, Davis, Denton, Dodd, Grossman, Hayes Knowlton, McLean, Cena.

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of certain individuals.

18. SFP 00348

Identify J. R. Fitzgerald
Q. W. Torpin

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of certain individuals.

19. SFP 00344

Identify Schmidt,
F. N. Grossman
Krebs
Swartz
Knowlton

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of certain individuals.

20. SFP 00324

(A) What is make up of 40,000 employment?

(B) What is make up of 1,130 jobs net reduction?

Response:

(A)-(B) SFP objects to this discovery request to the extent it seeks information and documents concerning SFP 00324 which appears, to the best of SFP's knowledge and belief, to be generated by SPT, and SFP has located no responsive information or documents in the limited time frame available due to the untimeliness of Tu's requests.

21. SFP 00334-335

Define (A) agreement employees

(B) operating employment

(C) non-operating crafts

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding.

22. SFP 00332

Produce Labor Impact Exhibit Volume I Railroad Merger Application Section 1180.6.

Response:

Subject to its objections, SFP states that it will make available to Tu documents responsive to this discovery request.

23. SFP 00509

Define Audit Committee of the Board.

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding.

24. SFP 00513-514

Identify J. R. Fitzgerald
R. L. Banion
L. G. Simpson
R. O. Bredenberg
T. D. Mason

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of certain individuals.

25. SFP 00516

Define Santa Fe/Southern Pacific Five Year Plan.

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding.

26. SFP 00521

Identify Subsidiary Companies.

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding, and is overly broad and burdensome given the limited time frame available due to the untimeliness of Tu's requests.

27. SFP 00522

Identify R. D. Krebs
Swartz
Cena
Booth

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of certain individuals.

28. SFP 01091

Identify Gary A. Kent
Mr. Booth

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of certain individuals.

29. SFP 01094

(A) Are refrigerated cars discussed in this section?

(B) If so what is written?

Response:

(A)-(B) Subject to its objections, SFP states that refrigerated cars are not discussed in the section identified by the request.

30. SFP 01095

Identify Subsidiary companies (RDK)

Response:

Relevant, non-privileged documents responsive to this request will be made available to Tu pursuant to the terms and conditions of the Protective Order in this proceeding.

31. SFP 01249

Identify R. M. Champion, Jr.

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of certain individuals.

32. SFP 01257

Identify Subsidiary Companies

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding, and is overly broad and burdensome given the limited time frame available due to the untimeliness of Tu's requests.

33. SFP 01275

Identify Subsidiary companies

Response:

See response to Request No. 32.

34. SFP 01303

Identify (A) Mr. Booth

(B) "core" railroad

(C) OR-85 objective

(D) Define and identify "a peer group"

Response:

(A) SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of certain individuals.

(B)-(D) SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding, and is overly broad and unduly burdensome given the limited time frame available due to the untimeliness of Tu's requests.

35. SFP 01345

(A) Was a like letter mailed to the Brotherhood of Railway, Airline and Steamship Clerks Union? (B) If so, to whom was it addressed? (c) When was it mailed? (d) If so produce a copy.

Response:

A relevant, non-privileged documents responsive to this discovery request which answers the questions posed will be made available to Tu pursuant to the terms and conditions of the Protective Order in this proceeding.

36. SFP 01347

Identify Mr. Kent

Mr. Conley

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has already made copies available to Tu of its annual reports for the period 1984 - 1987 and its 1983 Fact Book which contain information about the identities of certain individuals.

37. SFP 01349

(A) Was further detail regarding the clerks categories (and of the specific Departments involved) thereafter developed? (B) If so identify by whom. (C) Were clerks involved in clerical duties connected with handling refrigerated cars and or perishable goods included?

Response:

(A)-(C) SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding, is overly broad and unduly burdensome, and is untimely filed. Subject to these objections and its other objections, SFP states that it has located no responsive information or documents in the limited time frame available due to the untimeliness of Tu's requests.

38. SFP 01365

Were clerks involved in clerical duties concerning servicing refrigerated cars and or perishable goods included in Div 212, 213, 214 and or 215?

Response:

SFP objects to this discovery request to the extent it seeks information and documents concerning SFP 01365 which appears, to the best of SFP's knowledge and belief, to be generated by SPT, and SFP has located no responsive information or documents in the limited time frame available due to the untimeliness of Tu's requests.

39. SFP 01496

Identify SFSP
SP & SF

Response:

SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that the term "SFSP" refers to Santa Fe Southern Pacific Corporation and the term "SP & SF" refers to The Southern Pacific and Santa Fe Railway Company.

40. SFP 01625

Define (A) Refrigerator Mechanical

(B) Refrigerator Non-Mechanical

(C) Identify who prepared this document. When was it prepared?

(D) For what purpose was it prepared?

Response:

(A) Subject to its objections, SFP states that the term "Refrigerator Mechanical" generally refers to refrigeration cars which are cooled by diesel engine.

(B) SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that the term "Refrigerator Non-Mechanical" generally refers to insulated cars which are cooled by ice.

(C) SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding. Subject to these objections and its other objections, SFP states that it has located no responsive information in the limited time frame available due to the untimeliness of Tu's requests.

(D) Subject to its objections, SFP states that to its knowledge and belief, SFP 01625 was prepared for the purpose of analyzing the car fleet that would have resulted had the merger of the railroads been approved by the ICC.

41. SFP 01682-01693

Do any of the categories in this document include any maintenance of Way and Engineering forces that had been employed by PFE at Roseville and or Tucson on or before October 1, 1985?

Response:

SFP objects to this discovery request on grounds that it is overly broad and unduly burdensome given the limited time frame available due to the untimeliness of Tu's requests.

42. SFP 01954

Define "off in force reduction employees"

Response:

SFP objects to this discovery request on grounds that it is overly broad and unduly burdensome given the limited time frame available due to the untimeliness of Tu's requests.

43. SFP 01955-01956

Identify (A) who prepared this document.

(B) SMW, BM's, and BS's

(C) For what purpose was it prepared?

(D) When was it prepared?

Response:

(A)-(D) SFP objects to this discovery request to the extent that it seeks information and documents not relating to PFE, and on the ground that it seeks information irrelevant to any matter involving Tu in this proceeding.

Respectfully submitted,

Erika Z. Jones /KAK

Erika Z. Jones
Adrian L. Steel, Jr.
Kathryn A. Kusske
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Suite 6500
Washington, D.C. 20006-1882
(202) 463-2000

Attorneys for Santa Fe Pacific Corporation

DATED: December 11, 1992

COUNTY OF COOK)
) SS:
STATE OF ILLINOIS)

VERIFICATION

I, Guy Vitello, being duly sworn, do hereby depose and state that I am a General Attorney of The Atchison, Topeka and Santa Fe Railway Company; that my offices are located at 1700 East Golf Road, Schaumburg, Illinois 60173; and that I have read the foregoing Responses and Objections of Santa Fe Pacific Corporation To Second Set of Interrogatories and Request For Production of Documents of Siew Mai Tu dated November 20, 1992, and that such responses are true and correct to the best of my knowledge and information.

Guy Vitello
Guy Vitello

Subscribed and Sworn to
Before Me This 11th Day
of December, 1992.

Sherry L. Vasin
Notary Public

My Commission expires: February 6, 1994

"OFFICIAL SEAL"
Sherry Vasina
Notary Public, State of Illinois
My Commission Expires 2/6/94

CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of December, 1992, I served the foregoing "Responses and Objections of Santa Fe Pacific Corporation to Second Set of Interrogatories and Request for Production of Documents of Sieu Mei Tu" by causing a copy thereof to be delivered to each of the following in the manner indicated:

Lee J. Kubby
Lee J. Kubby, Inc.
Box 60485
Sunnyvale, California 94086-0485
(By Express Mail)

William G. Mahoney
Donald F. Griffin
Highsaw, Mahoney & Clarke, P.C.
1050 17th Street, N.W.
Suite 210
Washington, D.C. 20036
(By Messenger)

John MacDonald Smith
Southern Pacific Transportation Company
819 Southern Pacific Building
One Market Plaza
San Francisco, California 94105
(By Federal Express)

Charles Kong
1017 Brown Street
Bakersfield, California 93305
(By Mail)

Kathryn Kusske

38396

BEFORE THE
INTERSTATE COMMERCE COMMISSION

SANTA FE SOUTHERN PACIFIC CORPORATION-- CONTROL--SOUTHERN PACIFIC TRANSPORTATION COMPANY	Finance Docket No. 30400 (Sub-No. 21)

MOTION OF BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS FOR EXTENSION OF TIME

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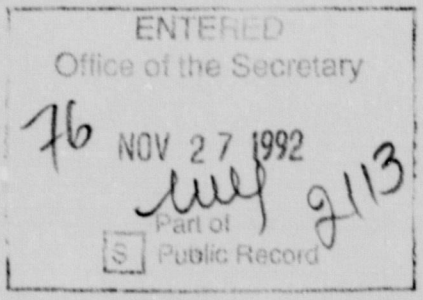

William G. Mahoney
Donald F. Griffin

HIGHSAW, MAHONEY & CLARKE, P.C.
1050 17th Street, N.W.
Suite 210
Washington, DC 20036
(202) 296-8500

Attorneys for BMWE and IAMAW

Dated: November 25 1992

BEFORE THE
INTERSTATE COMMERCE COMMISSION

SANTA FE SOUTHERN PACIFIC CORPORATION--CONTROL--SOUTHERN PACIFIC TRANSPORTATION COMPANY	Finance Docket No. 30400 (Sub-No. 21)

MOTION OF BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS FOR EXTENSION OF TIME

The Brotherhood of Maintenance of Way Employes ("BMWE") and International Association of Machinists and Aerospace Workers ("IAMAW") respectfully submit the following motion seeking an extension of time in which to file opening briefs and evidence in this proceeding. BMWE and IAMAW seek, alternatively, either an eight (8) day extension of time, up to and including December 15, 1992 in which to file or an indefinite extension of time until the appeal by the Southern Pacific Transportation Company ("SPT") of the Order served November 9, 1992 compelling SPT to respond to discovery requests from Ms. Sieu Mei Tu is resolved by the full Commission. In support of this motion, BMWE and IAMAW state the following.

The previous briefing schedule established in this proceeding pursuant to the Order served October 28, 1992, was predicated upon SPT's complete response to the discovery requests propounded by BMWE and IAMAW by November 16, 1992. BMWE and IAMAW had been obligated to seek the services of the Commission to compel such responses when the SPT initially refused to

respond to any of BMWE's and IAMAW's requests. SPT responded to BMWE and IAMAW in answers to interrogatories served on November 16, 1992; received by counsel for BMWE and IAMAW on November 17, 1992. While SPT answered the five numbered interrogatories, it objected to making any response to the request for production of documents on the grounds that the request was "overbroad, burdensome, and oppressive" and the request otherwise "invades the attorney/client and/or work product doctrine." SPT Response at 11. On November 19, 1992, counsel for BMWE and IAMAW wrote to SPT and sought to clarify the scope of their request as well as seek SPT's reconsideration of its objections. On November 24, 1992, SPT faxed a response to that letter wherein SPT concluded that "[a]fter a more than diligent effort, SPT has simply been unable to locate documents responsive to your request." SPT Letter of November 24, 1992 at 3.[1]

BMWE and IAMAW respectfully submit that SPT's initial answers asserting attorney/client or work product doctrine privileges created an inference that documents were retrieved, reviewed by counsel and the privilege asserted. Accordingly, BMWE and IAMAW assumed that documents responsive to their discovery request existed and took initial steps to resolve the dispute with SPT without filing another motion to compel responses. SPT's subsequent response alleging a lack of responsive documents appears flatly inconsistent with the earlier

---

[1] A copy of the November 24, 1992 letter is attached hereto as Exhibit 1 (without the confidential attachment).

claims of privilege that presupposed the existence of such documents. Accordingly, counsel for BMWE and IAMAW did not expedite preparation of the opening brief because, until November 24, 1992, there appeared to be documents responsive to the discovery request in the possession of SPT. However, it is now clear that SPT has no such documents, and apparently never did.

Due to this now moot discovery dispute with SPT, counsel for BMWE and IAMAW used up eight (8) days of preparation time in handling other pressing matters. BMWE and IAMAW seek to recover those days for the preparation of their brief and evidence because SPT did not fully respond to BMWE's and IAMAW's discovery request until November 24, 1992, not November 16, 1992 as specified in the Order served October 28, 1992. Therefore, BMWE and IAMAW respectfully request that the Commission extend the time for their filing opening briefs and evidence up to and including December 15, 1992.

Alternatively, BMWE and IAMAW suggest that the Commission hold the briefing in this proceeding in abeyance until the full Commission rules on SPT's appeal of the Order served November 9, 1992 compelling responses to the discovery requests of Ms. Tu. If the Commission denies SPT's appeal, Ms. Tu will be provided the discovery so that she can file evidence and argument on her behalf in this proceeding. Therefore, the Commission's consideration of this proceeding will by necessity be delayed until the record is completed by Ms. Tu's filings. Holding the briefing schedule in abeyance until SPT's appeal is resolved will

prevent a needless duplication of briefs from other interested parties and promote an economy of Commission and private party resources.

WHEREFORE, BMWE and IAMAW respectfully request the Commission to grant their motion for extension of time, either in the amount of an additional eight (8) days, up to and including December 15, 1992 in which to file openings briefs and evidence, or, alternatively, to hold the briefing schedule in abeyance until the full Commission resolves SPT's appeal of the Order served November 9, 1992.

Respectfully submitted,

Donald F. Griffin

William G. Mahoney
Donald F. Griffin

HIGHSAW, MAHONEY & CLARKE, P.C.
1050 17th Street, N.W.
Suite 210
Washington, DC 20036
(202) 296-8500

Attorneys for BMWE and IAMAW

Dated: November 25, 1992

CERTIFICATE OF SERVICE

I hereby certify that today I served copies of the foregoing upon the following by overnight mail delivery to:

Wayne Bolio, Esq.
Southern Pacific Transportation Company
819 Southern Pacific Bldg.
One Market Plaza
San Francisco, CA 94105

Lee J. Kubby, Esq.
P.O. Box 60485
Sunnyvale, CA 94086-0485

Jerome F. Donohoe, Esq.
Santa Fe Pacific Corporation
1700 East Golf Road
Schaumburg, IL 60173

Guy Vitello, Esq.
The Atchison, Topeka & Santa Fe Railway Company
1700 East Golf Road
Schaumburg, IL 60173

and by hand delivery to:

Adrian Steele, Esq.
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006

Vincent Prada, Esq.
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, DC 20006

Donald F. Griffin

Donald F. Griffin

Dated: November 25, 1992

EXHIBIT 1

Southern Pacific
Transportation Company

Southern Pacific Building • One Market Plaza • San Francisco, California 94105
(415) 541-1000

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VICE PRESIDENT AND GENERAL COUNSEL

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JOHN D. PEENEY
GENERAL ATTORNEYS

BARBARA A. SPRUNG
ASSISTANT GENERAL ATTORNEY

ROBERT E. PATTERSON
CECELIA C. PUSICH
ATTORNEYS

November 24, 1992

VIA FAX

Donald F. Griffin, Esq.
Highsaw, Mahoney & Clarke, P.C.
1050 Seventeenth Street, N.W.
Suite 210
Washington, D.C. 20036

Re: Finance Docket No. 30400 (Sub-No. 21),
Santa Fe Southern Pacific Corp.--Control--
Southern Pacific Transportation Company

Dear Mr. Griffin:

With reference to your correspondence dated November 19, 1992, received in my office late on the afternoon of November 20, the following represents the position of Southern Pacific Transportation Company.

Initially, I enclose for your reference a copy of the printout referred to in SPT's responses to Interrogatory No. 1B. Please be advised that Southern Pacific Transportation Company considers this document, as well as the information contained in SPT's response to the interrogatories and request for production of IAMAW and BMWE to the privileged and confidential, and subject to the protective order and confidentiality agreement previously executed by your clients. The remainder of this letter will address SPT's response to Interrogatory and request for production of documents No. 5.

At the outset, your letter dated November 19, 1992, purports to clarify the scope of the Union's request. The original request for production of documents did not refer to the redacted memoranda you sent to SPT on or about October 22, 1992, by fax. Rather, the original request for production sought "all documents" reviewed by SPT in connection with its responses to questions framed by SFSP in 1985. Your November 19, 1992, correspondence significantly modifies the scope of the request for production. Notwithstanding, SPT is unable to respond for the following reasons.

First, the specific information sought by BMWE and IAMAW is still not clear. The request No. 6 seeks information concerning questions transmitted to SPT via the voting trust trustee. The letters you faxed to me on or about October 22, 1992, contained a letter dated June 18, 1985, to Mr. Schmidt from Mr. McNear. However, SPT's records show that this June 18, 1985, letter was not transmitted via the trustee and was not in response to questions submitted by the trustee, but was correspondence directly between Messrs. Schmidt and McNear. SPT's records do not reflect any questions submitted via the voting trustee until July 1985. Therefore, it is still unclear as to whether you seek supporting documentation relevant to the June 18, 1985, correspondence between Schmidt and McNear (which SPT's records do not show as transmitted via the trustee), or SPT's response to Mr. Schmidt on or about July 29, 1985.

However, regardless of whether you seek supporting documentation for the June 18, 1985, correspondence or the July 29, 1985, correspondence, SPT has been unable to respond. As you know, the information contained in those letters is extremely general in nature, with reference to both BMWE and IAMAW issues. The letters address SPT's overall income and expense position as well as general issues relating to locomotive repair and maintenance, operating practices, general business levels, and track repair and maintenance, and equipment repair and maintenance.

In connection with responding to either possible discovery request of IAMAW and BMWE, I have spoken to numerous employees in the Executive, Labor Relations, Engineering, Finance, and Law Departments. I have further located and met on several occasions with D. K. McNear, former CEO of Southern Pacific Transportation Company. I further contacted the prior Vice President and General Counsel for Southern Pacific Transportation Company who is now retired. I have personally reviewed and obtained files from the Labor Relations Department, Engineering Department, Executive Department, Finance Department, and Law Department on the subject of the information contained in your discovery request No. 6. Since these questions were general in nature, no one recalls any specific information reviewed in preparing the response nor have any documents in the files of those departments referenced that it was used in connection with SPT's response. I have therefore not been able to assemble any specific information that would be responsive to your request as framed.

Your November 19, 1992, correspondence seeks documents that "deal only with issues related to maintenance of way employees, maintenance of equipment employees or employee issues generally that touched upon either group of employees." As the quoted and

emphasized language makes clear, this request is extremely broad on its face, as virtually all of the company's business documentation or records could directly or indirectly "relate to" or "generally touch upon" IAMAW and BMWE employees. Notwithstanding the breadth of the Union's request, I have again contacted numerous employees -- including the current President of Southern Pacific Transportation Company and the former CEO of Southern Pacific Transportation Company -- in an effort to find documents that are responsive. That effort has not been successful. While SPT has located the June 18, 1985, correspondence from McNear to Schmidt and the July 29, 1985, correspondence from McNear to Schmidt via the voting trust trustee, the files simply do not reflect what documentation SPT considered or reviewed prior to responding to those responses. Neither do any of the present and former employees recall any specific documents reviewed prior to formulating a response.

As you are aware, the information you seek goes back to 1985 and implicitly seeks source documentation prior to that date; obviously, information concerning SPT's performance and situation in 1985 is in part reflective of the company's past performance. Since 1985, SPT has since been acquired by Rio Grande Industries and has experienced a dramatic turnover in personnel, especially at the senior levels. After a more than diligent effort, SPT has simply been unable to locate documents responsive to your request. SPT is more than willing to consider a more narrowly tailored discovery request. However, SPT has been unable to specifically locate "all documents prepared by, produced for, or reviewed by SPT ... in connection with the preparation of answers to questions framed by SPSP and transmitted to SPT via the voting trust trustee", which deal with "issues related to ..." or "employee issues generally" concerning IAMAW and BMWE employees.

If you have any questions, feel free to contact me.

Very truly yours,

Wayne M. Bollo

Attachment
WMB/aam

38394

LAW OFFICES
LEE J. KUBBY, INC.
A PROFESSIONAL CORPORATION

BOX 60485
SUNNYVALE, CALIFORNIA 94086-0485
(415) 691-9331

November 21, 1992

Secretary
Interstate Commerce Commission
12th and Constitution Aves. N.W.
Washington, D.C. 20423
Fin Doc 30400 Sub 21

Re: Interstate Commerce Commission
Decision
Finance Docket No. 30400
(Sub-No. 21)
Santa Fe Southern Pacific Corporation
Control
Southern Pacific Transportation Company
Response to Appeal Southern Pacific Transportation

FED EX 2567775571

Dear Gentle People:

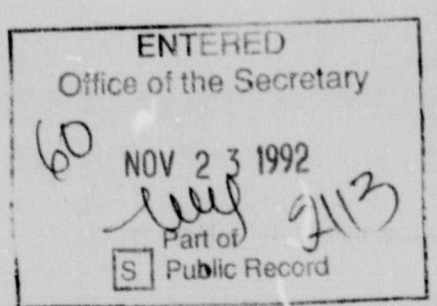
Enclosed please find original and 8 copies of RESPONSE TO APPEAL OF SOUTHERN PACIFIC TRANSPORTAION COMPANY FOR ORDER OF CHIEF ADMINISTRATIVE LAW JUDGE, HON. PAUL CROSS ON DISCOVERY MATTER by Tu in the above matter. Please file and return the enclosed face sheet endorsed filed in the enclosed self addressed and stamped envelope.

Thank you for your courtesies.

Respectfully submitted,
LEE J. KUBBY, INC.
A Professional Corporation
By:

LEE J. KUBBY
ATTORNEY FOR INJURED PARTY
SIEU MEI TU

LJK:me
Encls.



LEE J. KUBBY, INC.
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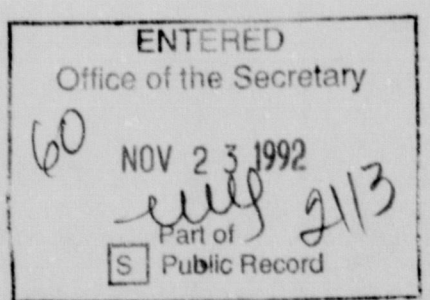
Attorney for Sieu Mei Tu

ORIGINAL

INTERSTATE COMMERCE COMMISSI(

Interstate Commerce Commission
Decision
Finance Docket No. 30400
(Sub-No. 21)
Santa Fe Southern Pacific Corporation
Control
Southern Pacific Transportation Company

RESPONSE TO APPEAL OF SOUTHERN PACIFIC TRANSPORTATION COMPANY FROM ORDER OF CHIEF ADMINISTRATIVE LAW JUDGE, HON. PAUL CROSS ON DISCOVERY MATTER



INTRODUCTION\ STATEMENT OF FACTS

Southern Pacific Transportation Company ("SPT") appeals from an interim limited discovery order issued on November 4, 1992, by the Honorable Paul S. Cross, Chief Administrative Law Judge. No decision was made by the Chief Judge as to whether or not Sieu Mei Tu (SMT) is a proper party to these proceedings, but limited discovery was granted SMT to seek facts supporting her entitlement to participate for the class she represents and to demonstrate said class was adversely affected as a direct consequence of actions taken or orders issued by SFSP which affected SPT operations and work related assignments, and whether and how New York Dock may be modified procedurally and substantively to provide relief to adversely affected employees.

Pacific Fruit Express (PFE) was a wholly owned subsidiary of Southern Pacific (SPT). The individuals serving on the Boards of Directors of both corporations were identical at all times material hereto, except Tom Ellen, vice president and general manager of PFE was on the board of PFE but not SPT. All other PFE vice Presidents were also officers of SPT, paid solely by SPT and received no compensation from PFE. All of PFE's treasury functions were handled by SPT's treasury department. PFE maintained no separate cash account. PFE's cash was held by SPT , and SPT collected all accrued interest on that cash. PFE's accounting functions were performed by SPT. SPT also performed PFE's legal, data

processing, management services, marketing, sales, and operating functions. PFE relied on SPT's TOPS data system to manage its car inventory. Similarly, PFE was the perishable equipment and supply arm of SPT, and beginning in 1982 performed all of the marketing, pricing and claims functions for SPT's transportation of perishable business.

Until 1982, PFE was physically located in the San Francisco General Offices of SPT.

In 1982 PFE's operation was moved to a different building in an attempt to create the impression of lack of substantial alignment between SPT and PFE, but all of the relationships remained the same.

PFE's business was to own, lease and operate a fleet of refrigerated rail cars on behalf of Southern Pacific and market SPT's services for the transportation of fresh and frozen perishables in refrigerated cars. PFE was operated as a profit center of SP, and an income statement consolidating the results of PFE with perishable operations of SPT was developed and produced monthly by SPT's accounting department showing the current month and year to date results. In January, 1985, Tom Ellen, the vice-president and general manager of PFE, met with the SPT Law and Labor Relations Departments to discuss development of alternative means available to make the perishable business profitable by either liquidating the assets "or some unconventional means of revitalizing the business". The closure of PFE and liquidation of assets related to the perishable business, was not deemed advantageous because of employee severance

costs. By October, 1985 all of the functions of PFE were performed directly by SPT.

The close operational relationship and parent subsidiary relationship between SPT and PFE, demonstrate the substantial alignment between the two entities. The subsidiary PFE was being operated primarily for the benefit of the parent SPT.

The management personnel of PFE were instructed to work through the SPT merger task force in matters related to the merger which is the subject of these proceedings. Management was instructed to communicate through the legal department so as to maximize the confidentiality of the communication between the railroads contemplating merger. The stock of PFE which was owned by SPT (100% of the stock of PFE was owned by SPT) was deposited by SPT in the trust required by the ICC pending decision on the merger. The stock of PFE was contemplated to be transferred to SPSF as part of the merger. The accounting practices of SPT were altered at the direction of SPSF and ATSF, in aid of the merger.

During the course of the litigation in the United States District Court for the Northern District of California, and in the subsequent appeal, SPT, PFE and SFSP Corp. advised those courts that no civil action was permissible because the matter was governed by 49 USC 11347, and exclusive jurisdiction of the conspiracy claim of Sieu Mei Tu was with the ICC. Mr. Bolio one of the attorneys for SPT in these hearings was also one of the attorneys for SPT-PFE in

the civil action. Mr. Bolio signed the "Opening Brief On Behalf of Appellees Southern Pacific Transportation Company and Pacific Fruit Express Company" as attorney for those parties. (A copy of the applicable pages is attached hereto for the convenience of the Commission) At pages 24-30 he urged the court "The Fifth Cause of Action Is Preempted by the Interstate Commerce Act" and relying on the authority of Kraus v. Santa Fe Southern Pacific Corp. (9th Cir. 1989) 878 F.2d 1193 stated at 25 in reference to Sieu Mei Tu the plaintiff in the civil action:

> "The Ninth Circuit ruled that employees like plaintiff could not raise these claims in a civil action but were required to pursue their disputes before the Interstate Commerce Commission."(emphasis added)

He thereafter pointed out:

> "The district court dismissed the fifth cause of action on the basis that it was preempted by the Interstate Commerce Act and subject to the exclusive jurisdiction of the Interstate Commerce Commission."

The ICC decision of June 12, 1992, reopening these hearings provides:

> "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...."
> (emphasis added).

The Transportation, Communications Union (TCU) formerly BRAC, the bargaining union for the PFE clerks took part in the Rio Grande Industries , et al-Control SPT et al-ICC proceedings as part of the Railway Labor Executives' Association. They have declined to represent any of their

members in these pending proceedings.

In the Leiberman grievance arbitration the only issue raised by BRAC was the issue of the right of their members to follow work from PFE to SPT or in lieu thereof, grant claimants separation allowances. No evidence was presented at the arbitration of the overall profitability of SPT nor of the unique grievances of Sieu Mei Tu.

Sieu Mei Tu was the only remaining employee whose seniority date preceded March 16, 1963, and was covered by the following provision of the applicable collective bargaining agreement:

> "Section 11 - In the event of a decline in a carrier's business in excess of 5%...a reduction in permanent positions and employees may be made ....The provisions of this section will not apply to Pacific Lines employes in the San Francisco General Offices with seniority date of March 16, 1963 or earlier...."

SFSP and SPT acted in concert to avoid giving terminated employees New York Dock conditions upon the merger. Economic Decline in business presented to the arbitrator Lieberman was based on so called depreciation accounting which SPT was directed to use by SPSF. In fact SPT was enjoying a remarkable yearly increase in revenues.

ARGUMENT

PFE EMPLOYEES ARE RAILROAD EMPLOYEES FOR PURPOSES OF 49 USC 11347, WHERE THERE IS A SUBSTANTIAL ALIGNMENT BETWEEN PFE AS A SUBSIDIARY OF SPT, PFE SUPPLEMENTED THE RAIL SERVICE OF SPT, AND WAS PART OF SPT'S OVERALL TRANSPORTATION SYSTEM.

In Cosby v. ICC, (CA 8, 1984) 741 F.2d 1077, cert.dn'd 105 S.CT 2344, 471 US 1110, 85 L.Ed.2d 861, it was found that FTC's operations were generally restricted to service which was auxiliary to or supplemental to Frisco's rail service, the court then held at 1081:

> "FTC can thus be viewed as part of Frisco's and, after the merger, BN's, single transportation system. FTC was intimately tied to the railroad's main transportation function, in contrast to subsidiaries which are non-transportation oriented such as warehouses and mining enterprises. FTC employees should therefore be considered railroad employees."

Likewise, PFE was intimately tied to SPT's main transportation function, and was a engaged in transportation oriented activities, in that it owned, leased, and operated a fleet of refrigerated rail cars on behalf of SPT.

The Cosby court supra holds at 1080:

> "Thus, FTC employees are clearly employees affected by the transaction.
>
> They were also employees of Frisco, a participant in the merger. The Commission has "long considered that a carrier and its subsi-

diaries constitute a single transportation system with respect to transaction under section 5 of the Act." Pennsylvania Railroad Company-Merger-New York Central Railroad, 347 ICC 536, 546 (1974) (citing Louisville & J.B. 7 R. Co. Merger, 290 ICC 725, 733; 295 ICC 11; Woods Industries, Inc.-Control-United Transports, Inc. 85 MCC 672, 675). As the Commission noted in Pennsylvania Railroad, "the parent by reason of ownership, has the legal right to direct the affairs of the subsidiaries and the latter have no alternative but to accept this direction, even if such were to result***in complete abandonment of the subsidiaries' operations or the extinction of their corporate existence. Id at 547."

Section 11121 of the Interstate Commerce Act provides in pertinent part that:

> "A rail carrier providing transportation is subject to the jurisdiction of the Interstate Commerce Commission...shall furnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service. The Commission may require a rail carrier to provide facilities and equipment that are reasonably necessary to furnish safe and adequate care service if the Commission decides that a rail carrier has materially failed to furnish that service." (49 USC 11121 (a) (1)).

The courts and the Commission have consistently interpreted this provision as requiring common carriers to

furnish cars reasonably necessary for the transportation of all commodities which they hold themselves out to carry. General American Tank Car Corp. v. El Dorado Terminal Co., 308 U>S> 422, 428 (1940); Johnson v. Chicago, Milwaukee, St. Paul and Pacific R. Cop., 400 F. 2d 971 (9th Cir. 1968); Docket No. 38692 Shippers Committee OT-5-Revieiw of OT-5 Agreements at 9 (Decision served December 23, 1981); and Use of Privately Owned Refrigerator Cars, 201 ICC 323, 373-74 (1934).

In Winnebago Farmers Elevator Co. v. Chicago and NorthWestern Transportation Co., 354 ICC 859, 866-67 (1978) the Commission ruled that it had jurisdiction to require the provision of "adequate car service".

This obligation has been specifically applied to refrigerator cars:

> "It is well-settled law that it is the duty of common carriers by railroad to furnish such cars as may be reasonably necessary for the transportation of all the commodities they hold themselves out to carry. That duty, imposed by statute, necessarily implies that the carriers have the exclusive right to furnish such equipment. It is optional with them, whether they exercise that right by furnishing cars owned by them, cars owned by other carriers, or cars leased from independent contractors. Under modern conditions, refrigerator cars have become regular equipment." (Use of

Privately Owned Refrigerator Cars, 2101 ICC 323, 373 (1934)).

SPT's reliance on Edwards v. Pacific Fruit Express Company, (1968) 390 U.S. 538 is misdirected. The Edwards case involved an interpretation of the Federal Employers' Liability Act, 45 U.S.C. 51. It did not involve the Interstate Commerce determination of application of 49 U.S.C. 11343.

The ICC looks to the combined profitability of the parent and the subsidiary combined to determine economic issues (New York Dock RY-Control-Brooklyn Eastern Dist. Fin. Dkt. 28250 at 401-403 (April 11, 1978)) so that SPT's argument that they were entitled to discharge Sieu Mei Tu because of economic decline of PFE without regard to the overall profitability of SPT is without merit.

THE ISSUES OF SIEU MEI TU'S LABOR PROTECTION RIGHTS VIS A VIS THE CONSPIRACY OF THESE RAILROADS TO AVOID NEW YORK DOCK CONDITIONS FOR EMPLOYEES TERMINATED BY REASON OF THIS FRUSTRATED MERGER RESTING WITH THE ICC AND THE FACT OF THAT CONSPIRACY ARE RESJUDICATA AND SPT IS DIRECTLY AND COLLATERALLY ESTOPPED FROM CLAIMING OTHERWISE.

During the course of the litigation in the United States District Court for the Northern District of California, and in the subsequent appeal, SPT, PFE and SFSP Corp. advised those courts that no civil action was permissible because the matter was governed by 49 USC 11347, and exclusive jurisdiction of the conspiracy claim of Sieu Mei Tu was with the ICC. Mr. Bolio one of the attorneys for SPT in these hearings was also one of the attorneys for SPT-PFE in the civil action. Mr. Bolio signed the "Opening Brief On

Behalf of Appellees Southern Pacific Transportation Company and Pacific Fruit Express Company" as attorney for those parties. At pages 24-30 he urged the court "The Fifth Cause of Action Is Preempted by the Interstate Commerce Act" and relying on the authority of Kraus v. Santa Fe Southern Pacific Corp. (9th Cir. 1989) 878 F.2d 1193 stated at 25 in reference to Sieu Mei Tu the plaintiff in the civil action:

> "The Ninth Circuit ruled that employees like plaintiff could not raise these claims in a civil action but were required to pursue their disputes before the Interstate Commerce Commission." (emphasis added)

He thereafter pointed out:

"The district court dismissed the fifth cause of action on the basis that it was preempted by the Interstate Commerce Act and subject to the exclusive jurisdiction of the Interstate Commerce Commission."

In Kraus supra the Ninth Circuit reviewed the facts found by the jury in the District Court which supported the state court cause of action there involved, and sustained the lower courts judgment as to that cause of action, stating at 1194:

> "Plaintiffs' factual contention, which the jury accepted was that Santa Fe had induced the plaintiff's employer to terminate plaintiffs in order to avoid possible post merger liabilities which might have been imposed by the Interstate Commerce Commission."

SPT's ARGUMENT THAT THE PROVISIONS OF 49 U. S. C. 11343 DO NOT APPLY TO PFE EMPLOYEES IN THE SUBJECT PROCEEDINGS IS INGENIOUS AND WITHOUT MERIT

The subject proceedings are between two rail carriers, who sought to merge. The merger includes the operations and assets of PFE. SPT's own advisors in early 1985 after the subject proceedings were commenced advised SPT of the role of PFE in this contemplated merger.

SPT's REMAINING ARGUMENTS ARE LIKEWISE WITHOUT MERIT

Southern Pacific Transportation is estopped from claiming that (1) PFE employees are not employees of a carrier by rail as defined in the Interstate Commerce Act; and (2) PFE employees would not be entitled to labor protection payments when imposed by the Commission. To the contrary for purposes of determining who are employees of SPT entitled to protection under 49 U.S.C. 11343, PFE employees are in fact employees of the parent SPT and would be entitled to labor protection payments when imposed by the commission.

Sieu Mei Tu, however is neither collaterally estopped nor is the issue res judicata for her claim for conspiracy, since there was no finding on the merits of that claim, but the court ruled it had no jurisdiction to hear that claim, since it ruled at the urging of the railroads that the ICC had exclusive jurisdiction to initially hear that claim.

The District Court found that Sieu Mei Tu had produced evidence that her discharge was due to discrimination

by reason of her race, sex, and or national origin, but did not satisfy an obligation to show that the employers' stated reason of economic decline was pretextural.

Sieu Mei Tu filed in this proceeding on behalf of herself and all others similarly situated.

The alleged economic decline of PFE is totally irrelevant, because 1) the consolidated financial statement of SPT (which includes PFE) demonstrates that there was no economic decline justifying discharge of PFE clerks in anticipation of the merger; 2) the accounting system of SPT was altered at the direction of SPSF; and 3) Sieu Mei Tu was contractually not subject to termination by reason of economic decline, and if arguendo she had been, it would be necessary to look to the economics of SPT as well as PFE to determine that issue.

The Leiderman arbitration did not consider any of Sieu Mei Tu's grievances other than the right to follow work to SP.

Discovery under the RLA is essentially non existent, witness the Union's failure to present any evidence on the economic decline argument at the Leiberman arbitration, and since the District Court accepted the argument that the conspiracy claim was exclusively in the initial jurisdiction of the ICC under 49 U.S.C. 11343, no discovery was given by the applicants on that issue.

SPT HAS FAILED TO SHOW ANY CLEAR ERROR OF JUDGMENT OR ANY MANIFEST INJUSTICE FLOWING FROM THE CHIEF JUDGE'S LIMITED DISCOVERY ORDER

This is an appeal under 49 CRF 1011.7, since it is a procedural matter. 49 C.R. F. 1011.7 (c) (1) specifically excludes "interlocutory appeals from the rulings of hearing officers." Authority to dismiss is delegated to the Secretary and the Chief Administrative Law Judge of the Commission.

SPTS ARGUMENT OF LACK OF RELEVANCY OF DISCOVERY SOUGHT BY TU IS WITHOUT MERIT

49 C. R. F. 1114.21(2) provides:

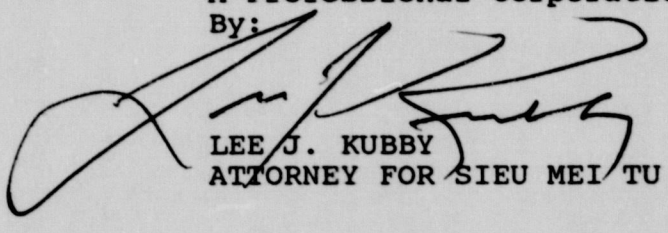
> "It is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Clearly Chief Administrative Law Judge, the Hon. Paul Cross's order establishes that the discovery sought falls within this provision, and his decision can in no way be construed to be a gross abuse of discretion or mistake.

Wherefore it is respectfully submitted that the Appeal of SPT be denied and the proceedings be returned to the Hon. Paul S. Cross.

Dated: November 21, 1992

Respectfully submitted,
LEE J. KUBBY, INC.
A Professional Corporation
By:



LEE J. KUBBY
ATTORNEY FOR SIEU MEI TU

UNITED STATES COURT OF APPEALS

NINTH JUDICIAL CIRCUIT

SIEU MEI TU AND JOSEPH TU, Plaintiffs-Appellants, v. SOUTHERN PACIFIC TRANSPORTATION COMPANY, et al., Defendants-Appellees. AND RELATED CROSS-APPEALS.	Docket No. 89-161-86

OPENING BRIEF ON BEHALF OF APPELLEES SOUTHERN PACIFIC TRANSPORTATION COMPANY AND PACIFIC FRUIT EXPRESS COMPANY

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Attorneys for Appellees Southern Pacific
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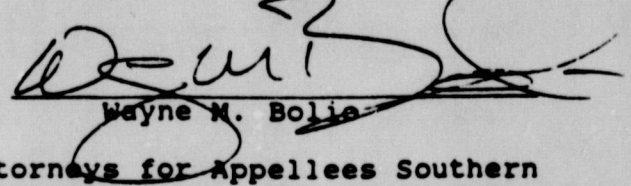
UNITED STATES COURT OF APPEALS

NINTH JUDICIAL CIRCUIT

SIEU MEI TU AND JOSEPH TU, Plaintiffs-Appellants, v. SOUTHERN PACIFIC TRANSPORTATION COMPANY, et al., Defendants-Appellees. AND RELATED CROSS-APPEALS.	Docket No. 89-161-86 STATEMENT PURSUANT TO LOCAL RULE 13(b)(c)

The undersigned, counsel of record for appellees Southern Pacific Transportation Company and Pacific Fruit Express Company, certifie that there are no known interested parties other than those participating in the case. This representation is made to enable the judges of the court to evaluate possible disqualifications or recusal.

DATED: June 25, 1990 McLAUGHLIN AND IRVIN

By 
Wayne M. Bolio

Attorneys for Appellees Southern
Pacific and Pacific Fruit Express

TOPICAL INDEX

tive remedy provided by the Railway Labor Act for [employment disputes] ... stems not from any contractual undertaking between the parties but from the Act itself ...' Andrews v. Louisville & Nashville R.R. Co., 406 U.S. 320, 323, 92 S.Ct. 1562, 1565 (1972).

The first, second, third, fifth,[14/] and seventh causes of action -- whether pled in tort or contract -- all take issue with the layoff from employment. Because the causes of action constitute minor disputes subject to mandatory arbitration, this court lacks subject matter jurisdiction. Plaintiff arbitrated her claims and lost. The arbitration decision is final and binding under the Railway Labor Act. 45 U.S.C. § 153 First (m). The district court properly dismissed these causes of action as constituting minor disputes subject to the exclusive jurisdiction of an arbitrator, and this court should affirm that decision.

C. THE FIFTH CAUSE OF ACTION IS PREEMPTED BY THE INTERSTATE COMMERCE ACT.

Plaintiff argues at length that defendants conspired among themselves to eliminate her job in anticipation of a proposed merger between Southern Pacific and Santa Fe Industries and that this claim is cognizable in court. (AOB 37-38.) In support of this argument, she cites the court to a decision of the Interstate Commerce Commission allegedly providing her a private right of action. (AOB 37-38.)

14/ In the alternative, the fifth cause of action is preempted by the Interstate Commerce Act. See infra, at pp. 24-26.

However, the Ninth Circuit has expressly refused to follow that decision of the ICC.

In Kraus v. Santa Fe Southern Pacific Corp., 878 F.2d 1193 (9th Cir. 1989), two terminated Southern Pacific employees sued Santa Fe Southern Pacific Corp., alleging that the two railroad holding companies conspired to terminate them in anticipation of a railroad merger. The employees, like plaintiff herein, claimed that the actions violated the Interstate Commerce Act. Kraus at 1197. The Ninth Circuit ruled that employees like plaintiff could not raise these claims in a civil action but were required to pursue their disputes before the Interstate Commerce Commission.

> Under the statutory grant of authority over mergers, the ICC, and not the courts, has been given authority to define what constitutes an unauthorized merger or acquisition of control within the meaning of the statute. The ICC has been given wide administrative discretion to tailor remedies and sanctions for violation of the statute and its own orders.

878 F.2d at 1198. The court squarely ruled that no private right of action exists for violation of 49 U.S.C. § 11705, the statute relied upon by plaintiff. Id. at 1199 n.3. Because the ICC had exclusive jurisdiction over these claims, "the district court lacked jurisdiction over plaintiff's federal statutory claim." Id. at 1198-99. In so holding, the Ninth Circuit expressly refused to adopt the reasoning of the Interstate Commerce Commission decision relied upon by plaintiff herein. Id. at 1198 n.2. The district court dismissed the fifth cause of action on the basis that it was preempted by the Interstate Commerce Act and subject to the exclusive jurisdic-

tion of the Interstate Commerce Commission. (RE 305.) As Kraus makes clear, the district court's ruling was entirely proper and should be affirmed.

D. BECAUSE PLAINTIFF MAY NOT STATE ANY CLAIM FOR VIOLATION OF THE DUTY OF FAIR REPRESENTATION, THE ARBITRATION AWARD IS FINAL AND BINDING. 15/

It is settled that under certain circumstances an individual employee may sue his or her employer for breach of a collective bargaining agreement. Smith v. Evening News Ass'n, 371 U.S. 195 (1962). Where the collective bargaining agreement provides for the resolution of disputes through arbitration, however, the employee is ordinarily confined to his arbitral remedies, and my not obtain judicial review of his claim.

> Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced.

Vaca v. Sipes, 386 U.S. 171 (1967).

Only if the union violated its duty of fair representation may plaintiff attack the arbitration award. Hines v. Anchor Motor Freight, 424 U.S. 554 (1976); UPS v. Mitchell, 451 U.S. 56 (1981). Plaintiff must therefore bring herself within an exception to the finality rule. Otherwise "plenary review by a court of the merits would make meaningless the provisions

---

15/ Appellees were dismissed from this claim on the basis that it was barred by the statute of limitations; although the district court granted the motion for reconsideration as to BRAC, it denied it as to SP and PFE. Because resolution of this issue impacts the Employer, PFE and Southern Pacific address it on the merits.

VII

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court affirm the decision in all respects.

DATED: June 25, 1990

McLAUGHLIN AND IRVIN

By _____
Wayne M. Bolio

Attorneys for Appellees Southern Pacific Transportation Company and Pacific Fruit Express Company

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(footnote continued from previous page)
meritless. A loss of consortium claim must be based on an underlying wrong to the spouse. Rodriguez v. Bethlehem Steel Corp., 12 Cal.3d 382, 408 (1974). The husband's loss of consortium necessarily stands or falls with the employee's claim. Santiago v. Employee Benefit Services, 168 Cal.App.3d 898, 906 (1985). The court properly dismissed this claim. (RE 895-96.)

31/ Neither may plaintiff complain of the failure to answer the second amended filed in June 1989. (AOB 36-37.) Judgment in favor of PFE and SP had been entered on February 6, 1989, thus terminating the litigation against these appellees. (DEN 98, 99.)

PROOF OF SERVICE BY MAIL

State of California
County of Santa Clara

I am and at the time of the service hereinafter mentioned was a resident of the State of California, County of Santa Clara, and at least 18 years old. I am not a party to the within entitled action. I am an attorney licensed to practice in the State of California.

My business address is Box 60485, Sunnyvale, California 94086-0485. On 11-21-92 I deposited in the United States mail at Sunnyvale, California, enclosed in a sealed envelope and with the postage prepaid the attached

RESPONSE TO APPEAL OF SOUTHERN PACIFIC TRANSPORTATION COMPANY FROM ORDER OF CHIEF ADMISTRATIVE LAW JUDGE, HON. PAUL CROSS ON DISCOVERY MATTER.

addressed to the persons listed on the attached sheet:

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on 11-21-92 at Sunnyvale, California.

LEE J. KUBBY

ATTACHED SHEET

Honorable Paul S. Cross
Interstate Commerce Commission
12th & Constitution Aves. NW
Washington, DC 20423

Adrian L. Steel, Jr.
Mayer, Brown, & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C.20006

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38393

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GENERAL ATTORNEYS

BARBARA A. SPRUNG
ASSISTANT GENERAL ATTORNEY

ROBERT E. PATTERSON
CECELIA C. PUSICH
ATTORNEYS

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RECEIVED
NOV 17 1992

November 16, 1992

The Honorable Paul Cross
Administrative Law Judge
The Interstate Commerce Commission
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Santa Fe Southern Pacific Corporation -- Control -- Southern Pacific Transportation Company

Dear Judge Cross:

Enclosed please find an original and ten copies of Southern Pacific Transportation Company's Response to BMWE/IAMAW' First Set of Interrogatories and Requests for Production of Documents. By copy of this letter I am likewise enclosing a copy of these Responses to Santa Fe Southern Pacific Company and BMWE/IAMAW. Please be advised that Southern Pacific Transportation Company considers these responses to be confidential and thus covered by the Protective Order and Confidentiality Agreement.

Please be further advised that as of this date, Southern Pacific Transportation Company has not received from Mr. Kubby a copy of an executed Confidentiality Agreement and Protective Order. Pursuant to my previous representations to Mr. Kubby, Southern Pacific Transportation Company will not disclose its responses until that Protective Order was executed and returned to Southern Pacific. Upon receiving that fully executed Order, Southern Pacific will serve on Mr. Kubby a copy of these Responses.

Southern Pacific Transportation Company respectfully requests leave to file a late Verification to Interrogatory answers 1-3. On November 16, 1992 I contacted the individual in the Labor Relations Department who could verify the responses to Interrogatory answers 1-3 and 5. I was informed that, on November 16, the employees father-in-law had suddenly passed away, and the employee left work for the day. Upon his return, I will have executed the

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Verification and forward it to all parties. Due to the unexpected absence of the employee, Southern Pacific Transportation Company respectfully requests that there is good cause for serving the Verification on a later date. The Responses to Interrogatories 1-3 and 5 have been previously discussed with the employee in question and those responses reflect the Company's best efforts at responding to the requests of BMWE and IAMAW.

Thank you for your attention to these matters. If you have any questions, feel free to contact me.

Very truly yours,

Wayne M. Bolio

cc: All parties of record

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CERTIFICATE OF SERVICE

I hereby certify that today I served copies of the foregoing upon the following by overnight mail delivery to:

Adrian Steele, Esq.
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Donald Griffin
Highsaw, Mahoney and Clarke
1050 Seventeenth Street, N.W.
Washington, D.C. 20036

Wayne M. Bolio

Dated: November 16, 1992

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

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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

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

COMES NOW Southern Pacific Transportation Company, through its counsel, and pursuant to 49 CFR §1114.26, and responds to BMWE/IAMAW's First Set of Interrogatories and Request for Production of Documents.

GENERAL OBJECTIONS

Southern Pacific Transportation Company hereby asserts the following general objections to the Interrogatories and Requests for Productions of documents submitted by BMWE and IAMAW.

1. Southern Pacific Transportation Company objects to said Discovery requests to the extent that it seeks information protected by the attorney/client and/or work product privilege.

2. Southern Pacific Transportation Company objects to any discovery requests to the extent that it seeks proprietary and

otherwise confidential information. However, subject to the terms of the Confidentiality and Protective Order signed by any party, Southern Pacific Transportation Company will respond to the Discovery requests as more fully set forth herein.

3. Southern Pacific Transportation Company objects to said Discovery requests to the extent that said requests are overbroad, burdensome, and oppressive in that the information sought in such Discovery requests may be equally available to BMWE and IAMAW through a reasonable search and review of its own records and files.

4. Subject to the previously stated objections, and as supplemented by any more specific objections contained below, Southern Pacific Transportation Company hereby responds to the interrogatories and request for production of documents submitted by BMWE and IAMAW.

INTERROGATORIES AND INFORMAL DOCUMENT PRODUCTION REQUESTS ADDRESSED TO SPT

1. Were any of the "over two thousand agreement personnel" eliminated from SPT payrolls through voluntary separations referenced on Page 3 of a letter dated October 1, 1986 from D. K. McNear to John J. Schmidt represented by either BMWE or IAMAW?

Answer to Interrogatory Number 1:

Southern Pacific does not maintain data in a format which would allow it to fully answer the interrogatory. With reference to BMWE represented employees, those employees fall within the jurisdiction of the Engineering Department. The Engineering

Department does not maintain records in such a manner that it could discretely determine the number of BMWE employees who were laid off at any particular time. Under the applicable collective bargaining agreements, BMWE employees can be furloughed due to a decline in need for maintenance of way work. The carrier customarily issues a five day notice to affected employees of a particular Maintenance of Way gang or unit indicating that they are being furloughed in five days. Under the terms of the collective bargaining agreements, those employees may thereafter exercise their seniority to "bump" into any other available position. Therefore, the employees receiving the five day furlough notice may be able to exercise seniority, thus forcing other employees with less seniority to be furloughed. The carrier does not maintain copies of five day notices. Moreover, because of bumping rights and the ripple effect caused by employees displacing other BMWE employees with less seniority, it is not possible for the carrier to accurately state which specific employees at specific locations may have been furloughed during the relevant time period.

The Engineering Department does not retain specific business documents which would allow it to respond to whether, and how many, BMWE Employees may have been severed through voluntary separation programs as referenced in the October 1, 1986 correspondence from D. K. McNear. There are no separate files, either in San Francisco or at outlying locations, in which severance information is separately maintained. Rather, the Engineering Department maintains thousands of pages of documents in San Francisco and in

outlying locations, but those documents are not segregated in such a manner that would produce the specific information sought in Interrogatory 1. The efforts made by the carrier to obtain information regarding BMWE employees sought in Interrogatory Number 1 is contained in the Declaration of R. G. Snyder served with these interrogatories.

Notwithstanding the foregoing, it is theoretically possible that the over two thousand employees referenced in the October 1, 1986 correspondence from Mr. McNear may have involved reductions of IAMAW employees. However, the majority of voluntary separation programs utilized by Southern Pacific Transportation Company during 1985 and 1986 which included the payment of severance amounts involved the reduction of employees in the clerical ranks and employees in engine service (engineers, firemen, conductors, and brakeman). BMWE and IAMAW employees, in 1985 and 1986, did not normally receive severance payments, and the carrier officers and labor relations officials, have no recollection of either BMWE or IAMAW employees (unlike clerks, train service, and locomotive engineers) being offered any formal severance programs. A review of the carriers Labor Relations files have disclosed only two IAMAW employees who received any severance buyout. Kurt Hirschmann, a carman who nevertheless appears in the carrier's records as a machinist, accepted a buyout of $20,000 net in exchange for a resignation, on or about December 6, 1985; Hirschmann was employed in Ogden, Utah. D. J. Perry, a travelling motor car mechanic, accepted a buyout of $8,000.00 net in exchange for a resignation on

or about April 15, 1986; Perry was employed in Dunsmuir, California. These two buyouts were apparently pursuant to an informal "superintendent's buyout program" which existed in and around 1985-86 in which individual employees negotiated directly with the Company for buyouts. No information has been located referring to any buyouts for BMWE employees. Moreover, the employment totals for BMWE employees increased over said time period, thus making it unlikely BMWE employment levels were reduced in that time frame pursuant to any severance programs. See also Response to Interrogatory 1A.

Southern Pacific Transportation Company likewise asserts that some of the information sought within Interrogatory 1 and its sub parts may be available through the IAMAW and BMWE. Local chairman and/or general chairman of that organization may have more specific information concerning employees, their locations, and tenure of employment with Southern Pacific Transportation Company.

a. If the answer is yes, identify by number and location those BMWE or IAMAW represented employees eliminated from SPT payrolls.

Sub.A See response to Interrogatory Number 1. Notwithstanding the response to Interrogatory 1, the carrier does maintain records which indicated overall employee counts on a month by month basis. An examination of the differences in total employee counts by comparing employment levels on a month to month basis may disclose the number of employees who left the service of the carrier for any reason. Said figures do not indicate that

employee counts changed as a result of the acceptance of severance programs, but would likewise reflect employment levels which may change for a variety reasons including resignation, discharge for cause, furlough, severance, retirement and other reasons. The carrier's records indicate the following information:

IAMAW EMPLOYEES

December 1984	1,351
January 1985	1,349
February 1985	1,350
March 1985	1,321
April, 1985	1,308
May 1985	1,216
June 1985	1,210
July 1985	1,230
August 1985	1,225
September 1985	1,201
October 1985	1,206
November 1985	1,199
December 1985	1,200
January - February 1986	unable to locate
March 1986	1,215
April 1986	1,214
May 1986	1,223
June 1986	unable to locate
July 1986	1,205
August 1986	1,197

September 1986	1,194

BMWE EMPLOYEES

December 1984	4,458
January 1985	4,646
February 1985	4,661
March 1985	4,631
April 1985	5,094
May 1985	5,163
June 1985	5,108
July 1985	5,109
August 1985	5,150
September 1985	5,125
October 1985	5,073
November 1985	4,961
December 1985	4,884
January 1986	4,915
February 1986	4,799
March 1986	4,911
April 1986	5,202
May 1986	5,237
June 1986	5,261
July 1986	5,244
August 1986	5,287
September 1986	5,295

b. Identify the terms of the separations offered to the BMWE or

IAMAW employees.

Sub.B. See response to Interrogatory Number 1 and 1 (A). The carrier's records do not indicate the terms of any specific separation amounts offered to BMWE or IAMAW employees, if any, with the exception of K. Hirschmann and D. J. Perry referred to above. At that time neither BMWE or IAMAW employees received severance buyouts pursuant to any formal severance programs. However, the carrier has located a document which purport to be "recap" of summary information as to amounts paid pursuant to "seniority buyouts". The document indicates that as of December 22, 1986 a total of 14 employees identified to be in the "mechanical" craft participated in a "seniority buyout" for a total amount of $304,052, for an average net severance amount of $21,718. The employees are identified only as being in the "mechanical" craft, and it is not possible to determine whether those employees were members of BMWE, IAMAW, or, more likely, some other craft.

The carrier has likewise located a document which purports to reflect all seniority buyouts in the year 1985. Those employees are not identified by craft or union affiliation, but by name and social security number. Upon request, the carrier will make available the seniority buyout printout for the parties.

c. What entity provided the monies used to pay for the separation of these employees?

Sub. C. To the extent that any separation payments were made to any SPT employee (as defined in these interrogatories) in 1985 and 1986, those sums were paid from the funds of Southern Pacific

Transportation Company.

2. Identify by number and location those machinists positions of the 465 Maintenance of Equipment employees positions reduced by SPT during April and May, 1985 referenced on page 2 of the memo dated June 18, 1985 from D. K. McNear addressed to J. J. Schmidt.

Answer To Interrogatory No. 2:

The Carrier's labor relations records indicate that the following machinist's positions were eliminated by Southern Pacific Transportation Company at the following locations:

Location	4/18/85	5/6/85	8/31/85	9/3/85	11/27/85
Houston, TX	9	0	0	0	0
Los Angeles,CA	23	0	0	0	0
Oakland, CA	0	4	0	10	0
Ogden, UT	31	0	0	0	0
Roseville, CA	15	0	0	0	1
Sacramento, CA	29	5	0	0	0
San Antonio,TX	0	5	0	0	0
Ozol, CA	0	0	0	1	0
Sparks, NV	0	0	2	0	0

3. Identify by number and location those 150 Maintenance of Way maintenance forces reduced by SPT during the first quarter of 1985 referenced on page 3 of the memo dated June 18, 1985 from D. K. McNear addressed to J. J. Schmidt.

Answer to Interrogatory No. 3:

See response to Interrogatory Number 1 and its subparts.

4. Identify the "core routes" of the SPT referenced on page 3 of the memo dated June 18, 1985 from D. K. McNear addressed to J. J. Schmidt.

Answer to Interrogatory No. 4:

The "core routes" referred to in the letter involved, in general, the main lines of Southern Pacific Transportation Company. Those core routes included: Oakland, California to Ogden, Utah; Los Angeles, California to New Orleans, Louisiana; Los Angeles, California to Portland, Oregon; El Paso, Texas to Kansas City, Missouri; Oakland, California to Los Angeles, California; Martinez, California to Lathrop, California; Flatonia, Texas to St. Louis, Missouri; Houston Texas, to Dallas, Texas; Houston, Texas to Lewisville, Arkansas; Brinkley, Arkansas to Memphis, Tennessee.

5. Identify by name and last known address, those BMWE represented Maintenance of Way personnel working on the Northwestern Pacific Railroad whose positions were abolished during March and April of 1985.

Answer to Interrogatory No. 5:

After due diligence, the carrier has not been able to locate any specific information concerning BMWE employees working on the Northwestern Pacific Railroad Company as requested in Interrogatory 5. However, as reflected in Southern Pacific's Answers to Interrogatory Number 1, and its subparts the carrier does maintain overall employee counts. Subject to those qualifications as set forth in the response to Interrogatory 1, the carrier's records

disclose the following employee levels on the NWP:

	BMWE Employees
December 1984:	75
January 1985:	38
February 1985:	39
March 1985:	34
April 1985:	25

6. Produce all documents prepared by, produced for or reviewed by SPT, its officers, agents, and employees, in connection with the preparation of answers to questions framed by SFSP and transmitted to SPT via the Voting Trust Trustee in 1985.

Answer to Request for Production No. 6:

Southern Pacific Transportation Company objects to the Interrogatory as overbroad, burdensome, and oppressive. Southern Pacific Transportation Company further objects to said Request for Production of Documents on the basis that it invades the attorney/client and/or work product doctrine.

The questions framed by SFSP and transmitted to SPT via the Voting Trust Trustee in 1985 sought detailed information concerning virtually all Southern Pacific Transportation Companies operations. Those questions sought information concerning SP's expense levels, revenues, operating expenses, budgetary controls, managerial and financial controls, wage and salary levels, information concerning Maintenance of Way activities, track repair, equipment, capital expenditures, line abandonments, and lease commitments, among other subjects. Responding to this Request would require a review of

essentially all business records and source documents maintained by Southern Pacific Transportation Company which directly or indirectly contained information responsive to the questions posed. Said Request would require the production of virtually all company documents maintained in 1985 and prior thereto.

Without waiving or in any way qualifying the preceding objection, and as further objection, Southern Pacific Transportation Company objects on the basis that said information is protected by the attorney-client and/or attorney work product doctrine. The individual designated by SPT to respond to the questions posed by SFP through the trustee was the former Vice President and General Counsel of SPT, Herbert Waterman. Mr. Waterman has been deceased for several years. Therefore, it is impossible to obtain the information sought in Request for Production of Documents Number 6.

Dated: 11/16/92

WAYNE M. BOLIO

38391

Southern Pacific Transportation Company

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November 12, 1992

VIA FEDERAL EXPRESS

Sidney Strickland
Secretary
Interstate Commerce Commission
12th Street and Constitution Avenue, N.W.
Washington, D.C. 20423

Re: **Santa Fe Southern Pacific Corporation -- Control--**
Southern Pacific Transportation Company
F.D. No. 30400 (Sub. -No. 21)

Dear Ms. Strickland:

Enclosed for filing are the original and 11 copies of the Appeal of Southern Pacific Transportation Company From Order Of Administrative Law Judge.

Please return the extra copy to me in the stamped self-addressed envelope enclosed for your convenience.

Very truly yours,

Barbara A. Sprung

Barbara A. Sprung

BAS:cmt
Encls.

ORIGINAL

BEFORE THE
INTERSTATE COMMERCE COMMISSION

SANTA FE SOUTHERN PACIFIC CORPORATION-- CONTROL--SOUTHERN PACIFIC TRANSPORTATION COMPANY	:	Finance Docket No. 30400 (Sub.-No. 21)

APPEAL OF SOUTHERN PACIFIC TRANSPORTATION COMPANY FROM ORDER OF ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION

This is an appeal from an Order issued on November 4, 1992 by the Honorable Paul S. Cross, Administrative Law Judge (the "ALJ").[1] The Order, which was the outcome of a discovery dispute between Southern Pacific Transportation Company ("SPT") and Sieu Mei Tu and Joseph Tu (collectively "Tu"), requires SPT to produce certain documents to Tu and implicitly denies SPT's Request for Dismissal of Tu's claims. As set forth more fully below, the Commission should reverse the ALJ's Order in order to correct a clear error of judgment and to prevent manifest injustice. See 49 C.F.R. §1011.7 (b) (1).

This appeal is based on three grounds. First, the ALJ's Order is contrary to factual and legal precedent which establish that Tu is not a proper party to this proceeding because her former employer is not a carrier subject to the Commission's jurisdiction. Second, the ALJ's Order is inconsistent with the Commission's Decision reopening this phase of the proceedings, as that Decision

[1] A copy of the Order is attached as Exhibit A.

precludes Tu from pursuing an individual claim at this time. Finally, Tu's claims have previously been litigated in arbitration and in two federal court proceedings, and thus the ALJ erred by failing to find that the doctrines of res judicata and collateral estoppel barred her claims. These arguments were presented to the ALJ by the Objection of Southern Pacific Transportation Company to Discovery Propounded by Sieu Mei Tu and Joseph Tu and Request for Dismissal ("SPT's Objection").

II. BASIS FOR COMMISSION'S AUTHORITY TO REVIEW ALJ'S ORDER

The Commission is empowered to consider this appeal of the ALJ's Order pursuant to 49 C.F.R. § 1011.7, § 1113.15, § 1115.1(c), § 1117.1 and pursuant to SP/SSW Switching Charges On Carloads of Grain at Kansas City, Decision No. 40178 (June 7, 1989) (review of ALJ's discovery ruling is within authority of the Commission).

Moreover, it is well-settled that the Commission has inherent authority to protect the integrity of the regulatory process and correct material error. See American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970); Delaware and Hudson Ry. -- Unilateral Joint Rate Cancellation, 2 ICC 2d 631, 633-34 (1986). The Commission has in the past exercised this authority to correct clearly erroneous discovery rulings by an ALJ. See Docket No. 38025S, Dayton Power and Light Co. v. Louisville and Nashville R.R. (decision served Sept. 9, 1982) (waiving application of interlocutory appeal rule where denial of document requests "was so

significant an error as to warrant our accepting an immediate appeal").[2]

Finally, in view of the fundamental principle that administrative law judges remain subject to the agency on all matters of law and policy (Mullen v. Bowen, 800 F.2d 535, 540-41 and n.5 (6th Cir. 1986); Assoc. of Admin. Law Judges, Inc. v. Heckler, 594 F. Supp. 1132, 1141 (D.D.C. 1984)), the Commission clearly possesses the intrinsic authority to review and reverse an order of the ALJ.

III. STATEMENT OF FACTS AND SUMMARY OF ARGUMENT

Tu is a former employee of Pacific Fruit Express ("PFE"), a non-carrier subsidiary of SPT. PFE was not a carrier by rail, but rather was a car line engaged in the repair, maintenance and leasing of refrigerated rail cars. PFE derived no revenue from actual rail movements and owned no locomotive or track; its business was limited to providing refrigerated rail cars to rail carriers for the purpose of shipping perishable fruits and vegetables.

The instant ICC proceedings are directed at SPT. However, at the time of her layoff in 1985, Tu was employed by PFE as a clerk

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[2] See also Docket No. 39306, Kansas City Power & Light Co. v. Burlington Northern R.R., at 1 (decision served June 29, 1984) (permitting interlocutory appeal of ALJ rulings on motions to compel, even as to matters outside the scope of 49 C.F.R. § 1113.5, "[b]ecause of the significance of the issues presented"). See also Docket No. 37809, McCarty Farms, Inc. v. Burlington Northern R.R., at 2 (decision served December 19, 1986) (permitting an interlocutory appeal of Chairman's decision on discovery matters even where not provided for under the Commission's rules, "so that this matter can finally be resolved").

in Brisbane, California and was not an employee of SPT. Because PFE is not a "carrier" under the Interstate Commerce Act and was not part of the control proceeding before the ICC involving Santa Fe and SPT, no possible issue of New York Dock protection could arise.

The only issue pending before the ICC is whether employees of SPT (clearly a carrier by rail as defined in the Interstate Commerce Act) who were allegedly laid off in anticipation of the unsuccessful Santa Fe-SPT merger are entitled to labor protection benefits. Employees of PFE and any other non-carrier subsidiaries are not part of the instant proceedings. Simply put, because PFE is not a "carrier" by rail as that term is defined in the Interstate Commerce Act, labor protection payments would not theoretically be available to laid off PFE employees. Accordingly, any discovery concerning PFE employees or other non-rail subsidiaries of SPT could serve no valid purpose.[3] Thus, the ALJ's assertion that "there is some color to the arguments of Tu that she was a railroad employee," and his determination that SPT must respond to her discovery requests, are unsupported by the record and contrary to the law.

Moreover, Tu's participation is improper because the Commission's June 18, 1992 Decision reopening this proceeding plainly states that it is not "at this time seeking personal

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[3] Joseph Tu has no role at all in this proceeding. He was never even employed by PFE, let alone SPT. Joseph Tu was the spouse of Sieu Mei Tu, and could not be an "employee" for purpose of labor protection benefits.

statements from individual employees who believe they were adversely effected by SPT actions," but that the proceedings would encompass only "SPT employees (as a class)." Decision at 3. Tu's filings make it abundantly clear that she is seeking to pursue an individual claim, inappropriate for consideration by the Commission at this phase of the proceeding.[4]

Tu is not an SPT employee, nor is she a representative of a class of SPT employees. Therefore, she is plainly excluded from this proceeding. Nontheless, the ALJ states that Tu "may appear here in a representative sense in that she was the only employee in her class with a particular seniority date." In so holding, the ALJ has broadened the ordinary definition of "class" so as to include anyone with a unique seniority date, and has distorted the plain meaning of "SPT employee" so as to include an individual who was employed by non-carrier subsidiary PFE. Such an expansive interpretation is inconsistent with and improperly broadens the scope of the Commission's Decision.

Even assuming arguendo that Tu had standing to seek labor protection, she is precluded from litigating the reason for her furlough from PFE. The ALJ erred by failing to give preclusive

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[4] Indeed, Mr. Lee Kubby, Tu's counsel, stated during a conference call with Judge Cross on October 21, 1992, that he has not been retained nor is he authorized to represent other claimants in this proceeding. This confirms that Mrs. Tu is acting in an individual capacity and is seeking redress for her individual grievance.

Moreover, the inclusion of Mr. Tu's claim for loss of consortium -- a noncompensable grievance in this proceeding and before this forum -- further underscores the individual nature of Tu's participation.

effect to an arbitration award and two federal court decisions which have determined that Tu was furloughed by PFE as a result of poor economic conditions in the fruit and perishable business.

Tu's union grieved her furlough, as well as the furlough of other PFE clerks. The Union contended that the layoffs were improperly implemented under the applicable collective bargaining agreements. In 1987, Arbitrator I. M. Lieberman denied the claim, holding that PFE was justified in laying off clerks (including Tu) under the decline-in-business formula of the applicable agreement, that the clerks had no right to transfer to SPT, and that protective payments under the collective bargaining agreement are not due when work is absorbed by a parent company.[5] The arbitrator unambiguously held that Tu was laid off as a result of a serious decline in business that ultimately led to PFE's demise as an entity. Arbitration awards are final and binding under the Railway Labor Act. 45 U.S.C. §153 First (M).

Furthermore, Tu, represented by the same attorney involved in this ICC proceeding, has previously fully litigated a lawsuit against PFE and SPT. That case was ultimately dismissed on summary judgment by a United States District Court in San Francisco, California. In the course of that litigation, the District Court squarely ruled that Tu had been laid off as a result of the decline in PFE business caused by market factors in the perishable fruit and vegetable market. That decision was affirmed

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[5] A copy of the Arbitration Award, which was included in SPT's Objection, is attached as Exhibit B.

in a decision of the Ninth Circuit Court of Appeals. In upholding the District Court, the Ninth Circuit again ruled that Tu had been laid off at PFE as a result of a precipitous decline in the perishable fruit and vegetable market.[6] Tu's Petition for Reconsideration and Rehearing on En Banc was denied by the Court. No further purpose would be served by protracted ICC proceedings in a claim which has already been fully litigated and a final determination on the merits has been reached adverse to Tu.

IV. ARGUMENT

A. The ALJ's Order Fails To Recognize That PFE Is Not A Carrier And Thus Cannot Be Liable For Labor Protection Benefits

The Order is based in part upon the ALT's stated belief that "there is some color" to Tu's argument that she was a railroad employee. This belief is unsupported by legal precedent and by the facts and thus provides no valid basis for requiring Southern Pacific to respond to Tu's discovery requests and for allowing Tu to maintain her claims.

Labor protection benefits are awarded by the ICC in certain transactions subject to its approval processes. By its own terms, the Interstate Commerce Act requires labor protection conditions to be imposed in transactions between "carriers." 49 U.S.C. §11343. Where a transaction is approved by the ICC, appropriate labor protective conditions are imposed for the benefit of effected employees of a carrier. See e.g., New York Dock Railway -- Control

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[6] Copies of the district court and appellate court decisions, which were included in SPT's Objection, are attached as Exhibits C and D, respectively.

-- Brooklyn Eastern District Terminal 360 ICC 60, 84-90; 49 U.S.C. §11347. However, on its face, these provisions apply where "a rail carrier is involved in a transaction for which approval is sought ..." 49 U.S.C. §11347.

The ALJ failed to recognize that Tu lacks standing to proceed before the ICC because her former employer, PFE, is not a carrier and thus labor protection benefits should not be awarded in any event. It is undisputed that at the time of her layoff Tu was employed as a clerk with PFE and was not employed with SPT. The ALJ failed to follow judicial and administrative precedent establishing that entities like PFE are not common carriers by rail. In Edwards v. Pacific Fruit Express Company, 390 U.S. 538 (1968), the Supreme Court addressed this very issue regarding Tu's specific employer. In holding that PFE was not a common carrier by rail under the FELA, the court ruled that "the business of renting refrigerator cars to railroads or shippers and providing protective service in the transportation of perishable commodities is not of itself that of a 'common carrier by railroad.'" 390 U.S. at 540. Even prior to Edwards, the Supreme Court had ruled that corporations engaged in the ownership and maintenance of refrigerated rail cars are not common carriers as defined in the Interstate Commerce Act. Ellis v. Interstate Commerce Commission 237 U.S. 434, 443-444 (1915). See also Pennsylvania R. Co. - Merger - New York Central R. Co., 347 ICC 536, 549-51 (1984) (holding that a wholly-owned subsidiary of a railroad that owned and leased refrigerator cars to railroads and that provided

refrigeration car services to various railroads was not a common carrier and that its employees were not entitled to labor protection).

Because PFE is not a "carrier," it cannot be liable to Tu for any theoretical labor protection benefits. Accordingly, Tu's discovery requests cannot lead to any admissible evidence, and thus the ALJ should have denied Tu's discovery requests and dismissed the matter.

Moreover, the current ICC proceeding at issue was never directed at any Southern Pacific entity other than SPT. The original merger application filed by the parties did not seek authority for Santa Fe to acquire PFE. Santa Fe Southern Pacific Corporation -- Control - Southern Pacific Transportation Company, 2 ICC 2d 709. In the merger application, and all of the subproceedings, no authority was apparently sought by Santa Fe for acquisition or control of PFE. Id. at 709 footnote 1. PFE did not appear to be part of the control proceeding because it is not a common carrier by rail and therefore its status was not subject to ICC approval.

Furthermore, when this matter was remanded to the Commission, the Ninth Circuit asked the ICC to consider whether employees of SPT who were allegedly laid off in anticipation of the failed merger would be entitled to protection. See, e.g., Railway Labor Executives Assoc. v. ICC, 924 F.2d 961 (9th Cir. 1991), as superseded Railway Labor Executives v. ICC, 958 F.2d 252 (9th Cir. 1992).

In sum, because Tu was employed by PFE, a non-carrier, and because the Commission's proceedings in this case have never been directed at non-carrier subsidiaries like PFE, she should not be entitled to labor protection benefits. Discovery of any type is improper, as the Commission lacks jurisdiction over the claims of laid off employees of PFE. Accordingly, the ALJ erred in granting the discovery request and by failing to dismiss Tu's claims.

B. The ALJ's Order Is Inconsistent With And Expands the Commission's Prior Decision

The ICC's own June 18, 1992 Decision specifically states that employees of "SPT (Southern Pacific Transportation Company) employees (as a class)" can submit evidence. The Commission's Order clearly stated that it was not "at this time seeking personal statements from individual employees who believed they were adversely affected by SPT actions . . .". As noted earlier, Tu was not an SPT employee. She is acting in an individual capacity and, as her own attorney acknowledged, is not part of any class of employees. The document production ordered by the ALJ thus relates only to Tu's personal claims as an former employee of PFE and not to any class-wide claims by SPT employees. Thus, the discovery cannot lead to admissible evidence and is outside the scope of the re-opened ICC proceeding. Clearly, the Commission's own Decision does not authorize employees of non-carrier subsidiaries of SPT to apply for protective benefits, especially where discovery sought applies to purely personal claims.

Furthermore, by characterizing Tu as "one of a kind," and allowing her to appear in a representative sense because she has a

particular seniority date, the ALJ's Order improperly broadens the Commission's Decision. The Order allows a PFE employee with a particular seniority date to constitute a class and to maintain her claims, regardless of the personal nature of her claims. This interpretation is contrary to the Commission's Decision.

Moreover, SPT should not be required to respond to discovery requests that do not relate to the subject matter of this stage of the proceedings. The Commission has succinctly delineated the scope of its inquiry and the evidence which is admissible at this time: "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." Commission's June 18, 1992 Decision at 3. Other discovery ordered by the ALJ bears no relevance to the limited scope of the Commission's inquiry concerning alleged actions or orders issued by SFSP which may have affected SPT's operations. For example, items 4 and 9 apparently refer to internal discussions of the business climate for PFE, including profit and loss expectations and future prospects for perishable business. Item 7 requires production of the minutes of directors meetings of PFE. Such internal documents simply are irrelevant to the subject matter of this phase of the proceeding.

C. The ALJ's Order Fails To Recognize That Tu's Claims Are Barred By The Doctrine Of Res Judicata And Collateral Estoppel

Even assuming arguendo that Tu somehow had standing to seek labor protection as a former rail carrier employee, the ALJ erroneously failed to recognize that the doctrines of res judicata

and collateral estoppel preclude her from relitigating the reasons for her layoff from PFE. Between 1986 and 1992, Tu and PFE/SPT litigated the propriety of her layoff before an arbitrator and before the federal court. The ALJ failed to give effect to a prior arbitration award, a federal district court decision, and a federal appellate court decision all holding that Tu was furloughed for economic reasons related to the decline of the perishable business. Accordingly, because those determinations are res judicata on the circumstances surrounding her layoff, and because Tu is collaterally estopped from re-litigating those issues, the ALJ should have denied her requests for discovery and dismissed her Petition. Although the ALJ acknowledged that the cause of Tu's layoff "based upon other non-ICC proceedings, appears to have been the result of market conditions, not the aborted merger of SPT and Santa Fe," the ALJ committed error by ignoring the preclusive and binding effect of those other proceedings and of the factual determinations established therein. The findings established by those prior proceedings are controlling in the context of Tu's claims for labor protection and bar her from re-litigating these same factual matters here.

1. The Economic Decline of PFE.

PFE was in the business of providing rail cars for the shipment of perishables. When Tom Ellen, PFE's former general manager, assumed leadership of the Company, it was already struggling with the recent deregulation of the railroad industry.

It was also facing stiff competition from the trucking industry and from direct imports of fruits and vegetables.[7]

According to Ellen, PFE was grossly over-staffed for its volume of business in 1982. He therefore implemented a reduction-in-force, cutting the work force by half. The company's performance improved in 1983. The following year, however, it suffered a $10 million loss. PFE's attempts to recoup that loss were unsuccessful due to factors beyond its control, namely, the 1983 citrus freeze and the 1984 discovery of citrus canker disease.

PFE's profitability declined substantially from 1979 to 1984. A large wage increase brought about by the railroad unions accelerated the company's decline. By 1985, management had decided that PFE could not longer provide a competitive service. The decision was made to merge PFE into Southern Pacific or, more precisely, to have Southern Pacific absorb most of PFE's remaining functions. Only a few jobs were preserved.

2. Tu's Furlough.

Tu was employed in various capacities with PFE. Her last job was a miscellaneous clerk. Throughout her employment she was represented by the Brotherhood of Railway, Airline and Steamship Clerks ("BRAC", now "TCU"). The Union was empowered to adjust grievances with the railroad under the terms of the Railway Labor Act.

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[7] Mr. Ellen's Declaration outlining PFE's demise was presented to and relied upon by the District Court in connection with SPT's summary judgment motion. This declaration was included in SPT's Objection and is attached hereto as Exhibit E.

Tu's position with PFE was covered by three overlapping collective bargaining agreements. There were two agreements between PFE and the Union, and one industry-wide "protective" agreement, known as TOPS. The TOPS agreement generally provides job security for covered employees. Article I, Section 3, however, allows the carrier to furlough employees in the event of a decline in business (known as the "decline in business clause"), as calculated by a formula specified in TOPS itself. The decline in business clause is contained in the TOPS agreement.

By October 1985, the decision was made to merge most of PFE's remaining functions into Southern Pacific. Certain positions were transferred to Southern Pacific, while others were abolished pursuant to the decline-in-business provision of the TOPS agreement. PFE management decided which positions to transfer and which to eliminate based upon the business needs of PFE and Southern Pacific. In making that decision, management did not consider the identity of the individual holding a particular position. The only criteria were the duties attendant to various job classifications. If those duties would need to be performed at Southern Pacific, the position was transferred; if they were unnecessary, the PFE position was abolished. Of 16 clerks on the PFE seniority roster, seven positions were abolished and nine were transferred.

Tu was classified as a miscellaneous clerk. Her functions were not in demand at Southern Pacific. Therefore, her position was abolished and she was placed on furlough status.

3. The Lieberman Arbitration Award.

As noted earlier, Tu's union grieved Tu's furlough, as well as the furlough of other PFE clerks. The Union contended that the layoffs had been improperly implemented under TOPS and the local collective bargaining agreements.

In his award, Arbitrator Lieberman first reviewed the precipitous drop in business experienced by PFE. The figures show a monthly drop of between 32.5% and 85.2% in revenue and ton-miles during 1985. The Arbitrator therefore held that PFE was justified in laying off clerks, including Tu, under the decline-in-business formula of the TOPS agreement. He specifically held that the clerks had no right to transfer to Southern Pacific, and that protective payments under the collective bargaining agreement are not due when work is absorbed by a parent company. Arbitrator Lieberman unambiguously held that Tu was laid off as a result of a serious decline in business that ultimately led to the demise of PFE as an entity. Arbitration awards under the Railway Labor Act are final and binding. 45 U.S.C. §153 First (M).

4. Federal Court Litigation

Following her 1985 layoff from PFE, Tu filed suit against PFE and SPT. The suit, which was litigated in U.S. District Court for the Northern District of California, challenged Tu's layoff from employment. Defendants successfully moved for summary judgment. The Court's Order, dated February 6, 1989, specifically stated the reasons and basis for Tu's layoff from PFE:

> "The Court finds that there is not a genuine issue regarding the following material facts

> in this action. Plaintiff Sieu Mei was furloughed from her position as accountant with defendant PFE when it merged with defendant Southern Pacific ("SP"), its parent corporation, during a reorganization of SP in 1985. This reorganization was the result of economic hardship suffered by PFE due to increased competition in the transportation industry." [Order, page 3]
>
> * * *
>
> "Defendants have rebutted the presumption of discrimination created by plaintiff's initial showing by offering substantial proof supporting their contention that Sieu Mei was furloughed for economic reasons. PFE had experienced a severe decline in business due to increased competition from the trucking industry prior to the 1985 merger." [Order, page 5][8]

Tu subsequently appealed the case to the Ninth Circuit. In an unpublished decision dated June 1, 1992, the Ninth Circuit adjudicated the facts and circumstances surrounding Tu's layoff from PFE. In affirming dismissal of the entire action and affirming judgment in favor of SP and PFE, the Ninth Circuit ruled:

> "Moreover, defendant submitted substantial evidence to support their contention that PFE was experiencing economic problems. Tom Ellen, former General Manager of PFE, submitted a declaration regarding his knowledge of the economic pressures created by deregulation, competition from the trucking industry, and a large wage increase awarded to the union. Under California law, reduction of work force necessitated by circumstances constitutes good cause for dismissal. (citations omitted) . . . The District Court

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[8] The "merger" referred to by the Court dealt with SPT and PFE. After PFE effectively went out of business in 1985, its minimal remaining operations were absorbed by SPT. Accordingly, after finding that Tu was laid off from PFE following a serious decline in business, the Court dismissed all claims against PFE and SPT.

> reasonably found that the defendants had asserted legitimate, non-discriminatory reasons for plaintiff's termination." (Opinion at page 22-23)

Clearly, the parties have previously litigated, at great length, the facts and circumstances surrounding Tu's layoff from PFE. Even assuming that PFE, as a noncarrier, is somehow still subject to labor protection benefits, no further purpose would be served by discovery or further proceedings in this matter as it has been previously adjudicated by one arbitrator, a district court, and a federal court of appeals that Tu was laid off for economic reasons associated with the demise of PFE. Accordingly, the ALJ erred by failing to recognize that this issue is res judicata as to the circumstances surrounding Tu's lay off, and that she is collaterally estopped from attempting to challenge those findings before the ICC.

The doctrines of collateral estoppel and res judicata bar relitigation of claims that were raised, or could have been raised, in prior proceedings.

> "In its narrower sense res judicata bars a second suit involving the same parties and same causes of action on all matters that were part of the first suit and all issues that could have been litigated. The doctrine of collateral estoppel precludes relitigation only of issues that were actually litigated in the initial suit, whether or not the second suit is based on the same cause of action."

Precision Air Parts Inc. v. Avco Corp. 736 F.2d 1499, 1501 (11th Cir. 1984) (citation omitted). However, the defense of res judicata does not depend upon whether the party actually litigated all issues in the prior proceeding. "The judgment prevents

litigation of all grounds and defenses that were or could have been raised in the action. Davis and Cox v. Summa Corp. 751 F.2d. 1507, 1518 (9th Cir. 1985) (citations omitted; emphasis added). Even where a party specifically does not raise certain claims in a prior proceeding, res judicata acts to bar the assertion of those omitted claims in any subsequent proceeding if they could have been raised initially. Ellingson v. Burlington Northern Inc., 653 F.2d 1327, 1331 (9th Cir. 1981)

The policies underlying res judicata and collateral estoppel likewise prevent a party from merely changing a legal theory in an attempt to avoid the bar. A party may not maintain two suits based on the same set of facts by the simple expediency of limiting the theories of recovery advanced in the first, nor may she maintain two suits based on the same set of facts simply by altering the claim for relief from one suit to the next. Hagee v. City of Evanston, 729 F.2d 510, 514 (7th Cir. 1984); accord, Patzer v. Board of Regents of University of Wisconsin, 763 F.2d 851, 855 (7th Cir. 1985).

Tu is foreclosed from relitigating the issues surrounding her layoff from PFE. Tu made no attempt to approach the ICC for relief until her federal court action was fully litigated and she received an adverse decision. After approximately six years of litigation in the federal courts, it has been conclusively established that Tu was furloughed from PFE as a result of a serious decline in the perishable business. Despite adequate opportunity, Tu proposed no evidence that her layoff from PFE had anything to do with Santa Fe

or was in violation of any ICC Order. See, e.g., Kraus v. Santa Fe Pacific Corp., 878 F.2d 1193 (9th Cir. 1989). To allow Tu to maintain her claims would only encourage protracted litigation and the splitting of claims for relief in various forums. See, e.g., Southern Pacific v. Young 890 F.2d 777, 780 (5th Cir. 1989). Given the history of the previous litigation between the parties and the issues adjudicated in federal court, the ALJ should have denied discovery and dismissed Tu's claims on the basis that the facts and circumstances surrounding the reasons for Tu's furlough from PFE have been previously adjudicated. The effect of the ALJ's Order is to improperly permit Tu to utilize independent ICC proceedings to overturn matters that were decided adversely in the now final federal court proceedings.[9]

V. CONCLUSION

For the foregoing reasons, Southern Pacific Transportation Company respectfully requests that the ICC reverse the November 4,

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[9] In other words, Tu's discovery request should have been denied on the ground that she has already had the opportunity to obtain material relevant to her claim. The federal court suit alleged, inter alia, that SPT and Santa Fe allegedly conspired to terminate her employment. Discovery relevant to that cause could have been obtained through the federal court action, and this proceeding should not be further delayed by additional independent discovery proceedings. Tu should not be allowed to utilize ICC proceedings to re-discover matters that were part of earlier final litigation.

1992 Order of the ALJ, and enter an order denying Tu's discovery requests and dismissing Tu's claims.

DATED: November 12, 1992

Barbara A. Sprung

WAYNE M. BOLIO
BARBARA A. SPRUNG
SOUTHERN PACIFIC TRANSPORTATION COMPANY
One Market Plaza, Room 835
San Francisco, CA 94105
(415) 541-2057

CERTIFICATE OF SERVICE

I, hereby certify that on this 12th day of November, 1992 I served the foregoing **APPEAL OF SOUTHERN PACIFIC TRANSPORTATION COMPANY FROM ORDER OF ADMINISTRATIVE LAW JUDGE** by causing a copy thereof to be delivered to each of the following in the manner set forth below:

The Honorable Paul S. Gross
Chief Administrative Law Judge
Office of Hearings
Interstate Commerce Commission, Room 4117
12th Street and Constitution Avenue, N.W.
Washington, D.C. 20423
(By Federal Express)

Erika Z. Jones
Adrian L. Steel, Jr.
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2000 Pennsylvania Avenue, N.W., Suite 6500
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Highsaw, Mahoney & Clarke, P.C.
1050 17th Street, N.W., Suite 210
Washington, D.C. 20036
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Barbara A. Sprung

Exhibit A

OH

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 [redacted] is not representative of a class of employees and [redacted] 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.

F. D. No. 30400 (Sub-No. 21)

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 PTR. (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.

(SEAL)

Sidney L. Strickland, Jr.
Secretary

F.D. No. 30400 (Sub-No. 21)

APPENDIX

(1) All documents produced to the plaintiffs in Evans 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. McWear 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.

Exhibit B

In the Matter of the Arbitration Between

PACIFIC FRUIT EXPRESS COMPANY

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

-OPINION AND AWARD
-(Transfer of work-
- separation allowance)

The hearing in the above matter, upon due notice, was held in Stamford, Connecticut on August 6, 1987, before I.M. Lieberman, serving as Chairman of the Board of Arbitration, in accordance with the agreement between Pacific Fruit Express and Brotherhood of Railway, Airline and Steamship Clerks dated July 15, 1987. The parties waived the tripartite provisions of the Agreement in favor of a single arbitrator.

The case for Pacific Fruit Express, hereinafter referred to as the Carrier, was presented by K. R. Peifer, Assistant Vice President, Labor Relations. The case for the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, herein after referred to as the Organization, was presented by R.B. Brackbill, General Chairman.

At the hearing the parties were offered full opportunity to offer evidence and argument. Both parties submitted documents with the substance of evidence in the case together with oral arguments to supplement that documentation:

THE ISSUE

From the entire record the issue may be posed as follows:

> "Did the Carrier violate the Agreement by failing to grant Claimants the right to follow work from the Pacific Fruit Express Company to the Southern Pacific Transportation Company or, in lieu thereof, grant Claimants separation allowances as provided for in the January 7, 1980 Agreement?"

DISCUSSION

The Carrier herein during this period was a wholly owned subsidiary of the Southern Pacific Transportation Company. On August 15, 1985 following an article which appeared in the press the Organization filed a claim on behalf of all the employees (42) on the Pacific Fruit Express Seniority District I Roster alleging that Carrier was wrongly transferring their work to other companies in violation of the Agreements and also was taking steps to lay off all the Claimants through misapplication of the Agreement's decline in business provisions.

In the Claim the Organization insisted that the employees follow their position and/or work with their full rights and be compensated at their last assigned rate or protected rate, which ever is higher, until normal retirement age, or be given, if the employee so elects, a lump sum severance of 360 days pay at their last assigned or protected rate, which ever is the higher. The organization alleged that Carrier was taking steps to

discontinue the Perishable Freight Division of its activities, namely the Carrier herein, and was giving away the work of Claimants.

Carrier insisted that the Claim in question herein was premature and anticipatory. Further, Carrier alleged that its actions were in total concord with the provisions of the applicable Agreements of 1971 and the Special Agreement of January 7, 1980. By letter dated September 9, 1985, Carrier gave notice under those Agreements (20 days notice required) of its intent to abolish a number of positions in its Brisbane Headquarters and to transfer the clerical work of those positions to Southern Pacific Transportation Company. Nine employees were offered the opportunity to transfer with their positions. The remaining positions were abolished. Nine positions were created at the Southern Pacific Transportation Company in its San Francisco General office. All employees who were not offered the opportunity to follow their work when the Brisbane office was subsequently closed, were furloughed, thus triggering the claims herein.

Carrier relies in part on the decline in business of this Carrier. Specifically, Carrier notes that the business decline

was caused by the competition of the trucking industry to the particular speciality of this Carrier. In that context it is noted that the 1971 Agreement between the parties provided for a formula to determine decline in business which set forth that a decline in business in excess of 5% of the average percentage of both gross operating revenue and net ton miles in any 30 day period, compared with the average of the same period for the years 1968 and 1969 would permit a reduction in permanent positions and employees.

It is noted that that formula was amended in the course of the January 7th 1980 Agreement between the parties (specifically Pacific Fruit Express) which specified that the percentages would be compared to 1978 and 1979 and that the old formula would be no longer applicable. In accordance with the new formula, Carrier submitted information concerning its activities during 1985 as compared to the averages of 1978 and 1979. Those figures on a month by month basis indicated declines ranging from January of 1985 where there was a 32.5% decline to December of 1985, where there was an 85.18% decline. It is evident from an analysis of the figures that there was a precipitous decline in Carrier's revenue and ton-miles during the year 1985. In fact the figures show that the least percentage of decline during the 12 month

period occurred in June of 1985, when there was merely a 16.09% decline (minus the 5%) and the high occurred in November of 1985 when there was a 97.06% decline.

Several problems exist in this claim. First, it is evident that there were certain specific functions and work which were transferred from Carrier to the Southern Pacific Transportation Company. Those were specified and spelled out in Carrier's notice to the organization in accordance with the Agreement. Certain employees were permitted to transfer and follow their position.

The organization alleges that certain other work was also transferred to the Southern Pacific Transportation Company upon the closing of the Brisbane office of Carrier. However, there is no evidence whatever to indicate precisely what amount of work the Organization claims was indeed transferred. The lack of evidence makes it impossible for the Arbitrator to determine that there was indeed sufficient work transferred without the concomitant opportunity for employees to follow their work. There is no evidence, and this is particularly significant, of the establishment of any new positions beyond those indicated by Carrier after the closing of the Brisbane office. The Organization relies on Article IV Section 1 (a) of the January 7,

1980 Agreement in support of its claims. Unfortunately, those provisions which deal with an employee following his work or being permitted a severance allowance rely on facts which are not evident in this matter. Carrier has submitted ample evidence that its business declined precipitously during the year 1985. In addition there is no evidence that any positions were established at the Southern Pacific Transportation Company to which the furloughed employees from Brisbane could aspire. Carrier supported this practical application of the Agreement by providing copy of former B. R. A. C. General Chairman T. J. Diehl's October 5, 1982 letter interpreting the Agreement wherein he stated: "...parties to the September 16, 1971 Agreement Article IV Section 1 (a)...since no positions are being established, an employee cannot follow his work...." Clearly, Paragraph 3 of Article IV Section 1A which provides a severance allowance is not applicable since that provision relies in principal part on the requirement of an employee to move his residence in order to follow his position or work. There was no requirement that an employee from Brisbane going to San Francisco, even if a position were available, would be required to move his residence (the distance was not that great).

In summary, therefore, it is apparent that the Organization has not presented facts which would indicate that there was work

indeed transferred from Carrier to its parent in San Francisco, which accrued to the incumbents who were laid off in Brisbane. In addition, Carrier has submitted significant evidence with respect to its decline in business. It is also apparent that this entire matter may be characterized as the parent company taking back work from its own subsidiary. Such actions have long been held to be proper and do not constitute "coordinations" or triggering mechanisms for various protective benefits (see S.B.A. 605, Awards 390, 414, 420 and others). There is, in fact, no Rule support for Claimant's position. However, it must be noted that it is extremely desirable that the employees who were laid off at Brisbane and furloughed should be given priority consideration for future openings at the Southern Pacific Transportation Company in the San Francisco General office. The Arbitrator cannot mandate such action but can recommend it strongly.

For the foregoing reasons, however, the Claims in this instance do not have merit and they must be denied.

AWARD

Carrier did not violate the Agreement by failing to grant employees the right to follow work from Carrier to the Southern Pacific Transportation Company or in lieu thereof grant employees a separation allowance.

I. M. Lieberman, Arbitrator

Stamford, Connecticut

November 30, 1987

Exhibit C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIEU MEI TU and JOSEPH TU,

Plaintiffs,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, et. al.,

Defendants.

C87-1198-DLJ

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION TO DISQUALIFY

The Court heard defendants' Motions for Summary Judgment and for Disqualification on February 2, 1989. Appearing for plaintiffs Sieu Mei Tu and Joseph Tu was Lee J. Kubby. Appearing on behalf of defendant Southern Pacific and Pacific Fruit Express was Kevin P. Block. Appearing for the Union defendants were James M. Darby and Kathleen S. King.

Plaintiff Sei Mei Tu is a sixty-two year old asian female. Plaintiff claims that her employment with defendant Pacific Fruit Express ("PFE") was terminated because of her age, sex and race in violation of the California Fair Employment and Housing Act ("FEHA"). Cal.Gov.Code §§ 12900-12993 (1980). Plaintiffs also contend that they have suffered a loss of consortium as a result of defendants' actions. Finally, plaintiffs claim that the defendant unions breached their duty of fair representation under federal labor law. After reviewing the briefs submitted by the parties, the arguments of counsel and the applicable law, the Court hereby

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GRANTS defendants' Motions for Summary Judgment.

Also before the Court is defendants' Motion for Disqualification of plaintiffs' counsel. This motion is based on defendants' contention that plaintiffs' counsel engaged in unethical conduct by communicating, ex parte, with an employee of Southern Pacific regarding this litigation. Based on the representations made by Mr. Kubby during oral argument that no such communication occurred, the Court hereby DENIES defendants' Motion for Disqualification.

I.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the party is entitled to a judgment as a matter of law."

In a motion for summary judgment, the Supreme Court has held that the moving party has the "burden of showing the absence of material fact." Adickes v. S.H. Kress and Co., 90 S.Ct. 1598, 1608 (1970). However, the Court has also stated that summary judgment could issue "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-54 (1986).

The Court finds that there is not a genuine issue regarding the following material facts in this action. Plaintiff Sieu Mei was furloughed from her position as an accountant with defendant PFE when it merged with defendant Southern Pacific ("SP"), its parent corporation, during a reorganization of SP in 1985. This reorganization was the result of economic hardships suffered by PFE due to increased competition in the transportation industry.

There were 16 clerical employees at PFE at the time of the merger. Prior to the reorganization, PFE and SP management determined that PFE employees in those positions that would not be required at SP after the merger would be furloughed and those employees in the remaining positions would be transferred to SP. Out of the 16 clerical positions on the "seniority district one" roster at PFE, 7 were furloughed and 9 were transferred to SP. Within this group of 16 PFE employees, there were 15 clerks over the age of 40, 7 female clerks and 2 asian american employees. Following the merger, defendants transferred 9 of the 15 clerks over the age of 40, 4 of the 7 female clerks, and 1 of the 2 asian american employees to positions at SP. Defendants have interviewed Sieu Mei since furloughing her, but she has not been rehired.

II.

To state a prima facie case under the FEHA for intentional discrimination, plaintiff must show that:

1) she belongs to a protected group;

2) her job performance was satisfactory;

3) she was discharged from her position;

4) others not in the protected class were retained by defendants.

Mixon v. Fair Employment & Housing Commission, 192 Cal.App.3d 1306, 1318 (1987)(citing McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976)).

After the initial prima facie case is presented by plaintiff, defendants are given an opportunity to rebut plaintiff's case by showing that there was a legitimate reason for dismissal. Id. at 1317. "The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Id. at 1318 (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)). The Ninth Circuit has held that economic hardship is a sufficient reason to terminate an employee. Gianaculas v. Trans World Airlines, Inc., 761 F.2d 1319, 1395 (9th Cir. 1985); Clutterham v. Coachmen Industries, Inc., 169 Cal.App.3d 1223, 1227, 215 Cal.Rptr. 795 (1985).

If a defendant succeeds in creating a genuine issue of material fact concerning the reason for dismissing an employee, the burden of proof then shifts back to the plaintiff to prove "that the proffered reason was not the true

reason for the employment decision." Id. A plaintiff may accomplish this either directly by "persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. at 1318-19. (citing Burdine, 450 U.S. at 256).

In the present case, plaintiff Sieu Mei has stated a prima facie case of discrimination. She is a member of three protected groups. Her job performance prior to her dismissal was at the very least satisfactory, and several of her superiors rated her work as exceptional. She was furloughed instead of being transferred to SP in 1985. Other employees who were not over 40, female, or asian, were transferred into positions at SP that Sieu Mei was qualified to perform. Thus, a prima facie showing of intentional discrimination has been made by plaintiffs.

Defendants have rebutted the presumption of discrimination created by plaintiffs' initial showing by offering substantial proof supporting their contention that Sieu Mei was furloughed for economic reasons. PFE had experienced a severe decline in business due to increased competition from the trucking industry prior to the 985 merger. Defendants assert that Seiu Mei was not transferred to SP because the position she was in at PFE was not needed at SP. Defendants provided the Court with sufficient evidence to create a genuine issue of material fact as to whether

intentional discrimination motivated the decision to furlough plaintiff. This position is supported by the fact that other employees who are not members of a protected class were also not transferred to SP following the merger. Accordingly, defendants have satisfied their burden of rebutting plaintiffs' prima facie case of discrimination.

Plaintiffs have failed to present evidence which raises a genuine issue related to defendants' factual showing of economic hardship. Although plaintiffs assert that PFE intentionally turned away business prior to the merger in order to facilitate the combination of SP and PFE, the evidentiary showing necessary to support this assertion is clearly insufficient. After ample time for discovery has passed, plaintiffs have not presented the Court with evidence sufficient to overcome defendants' justification for their actions. Thus, plaintiffs have not met their overall burden and have not stated a valid claim for intentional discrimination against SP and PFE.

III.

Plaintiffs' state tort claim for loss of consortium is dependent upon the validity of the underlying discrimination action. Santigo v. Employees Benefits Services, 168 Cal.App.3d 898, 906, 241 Cal.Rptr. 679 (1985). Because plaintiffs have failed to state a claim for discrimination, summary adjudication of this claim is also appropriate. Accordingly, defendants' Motion for Summary Judgment is also

GRANTED for plaintiffs' loss of consortium claim.

IV.

Plaintiffs claim against the defendant Unions alleges that Union representatives breached their duty of fair representation under section 301 of the National Labor Relations Act, 29 U.S.C. §§ 151-188 (1984), by not fully prosecuting plaintiff Sieu Mei's grievance against PFE.

Claims for breach of a union's duty of fair representation under section 301 are subject to a six month statute of limitations. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983). This statute of limitations begins to run when "an employee knows or should know of the alleged breach of the duty of fair representation." Galindo v. Stoody Co., 793 F.2d 1502, 1503 (9th Cir. 1986).

This cause of action was filed in April of 1988. Plaintiffs and their attorney were aware of the procedures being followed by the Union defendants to prosecute plaintiffs' grievance in 1986. Plaintiffs' counsel admitted knowledge of the acts alleged to constitute a breach of defendants' duty in a letter dated January 20, 1986, threatening to sue defendants for breach of their duty. Therefore, because the six month statute of limitations had expired prior to the filing of this claim, defendant Unions' Motion for Summary Judgment of plaintiffs' claim under section 301 is GRANTED.

V.

Therefore, defendants' Motions for Summary Judgment are hereby GRANTED as to plaintiffs' claims for discrimination, loss of consortium and breach of the duty of fair representation. Defendants Motion for Disqualification is hereby DENIED.

IT IS SO ORDERED.

DATED: February 6, 1989.

D. Lowell Jensen
United States District Judge

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Exhibit D

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIEU MEI TU and JOSEPH Z. TU, Plaintiffs/Appellants/ Cross-Appellees, v. SOUTHERN PACIFIC TRANSPORTATION CO., PACIFIC FRUIT EXPRESS CO., ATCHISON, TOPEKA, SANTE FE RAILROAD CO., SANTA FE SOUTHERN PACIFIC CORP., and BROTHERHOOD OF RAILWAY, AIRLINE, AND STEAMSHIP CLERKS, Defendants/Appellees/ Cross-Appellants.	CA Nos. 89-16186, 89-16292 DC No. CV-87-1198-DLJ M E M O R A N D U M *

Appeal from the United States District Court
for the Northern District of California
D. Lowell Jensen, District Judge, Presiding

Argued and Submitted September 12, 1991
San Francisco, California

BEFORE: CANBY and KOZINSKI, Circuit Judges, and CARROLL**, District Judge

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The Honorable Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

OVERVIEW

Plaintiffs Sieu Mei Tu and Joseph Z. Tu, her husband, appeal from the District Court's orders denying plaintiffs' motion to remand, and granting defendants' motions to dismiss and motions for summary judgment. Defendant Brotherhood of Railway, Airline and Steamship Clerks cross appeals.

FACTUAL BACKGROUND

In May, 1962, Sieu Mei Tu ("Tu" or "plaintiff"), a woman of Chinese Ancestry who is now 64 years old, began working in various clerical positions for Pacific Fruit Express Company ("PFE"), a wholly-owned subsidiary of Southern Pacific Transportation Company ("SP"). Plaintiff was a member of the Brotherhood of Railway, Airline and Steamship Clerks ("Union").[1] When PFE merged with SP in 1985, the plaintiff was furloughed from her position. The Union filed a grievance on August 15, 1985, alleging that the collective bargaining agreement prohibited the company from laying off plaintiff and seven other clerical workers without payment of certain sums. On November 30, 1987, the arbitrator held against the Union, holding that the employer had a right under the collective bargaining agreement to lay off the clerks due to the decline in business experienced by PFE.

Before the case went to arbitration, the plaintiff filed a charge of discrimination with the California Department of Fair

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[1]Effective September 1, 1987, the Union changed its name to Transportation Communications International Union.

Employment and Housing ("DFEH"), alleging discrimination on the basis of race, sex or age. Pursuant to her right-to-sue letter from DFEH, plaintiff filed a lawsuit on September 26, 1986, in the San Francisco County Superior Court against PFE, SP, the Atchison, Topeka, Santa Fe Railroad Company ("ATSF"), Santa Fe Southern Pacific Corp. ("SFSP"), various individuals, and Doe corporations. The plaintiff's complaint alleged two counts of wrongful termination, violation of good faith and fair dealing, violations of 42 U.S.C. §§ 1981, 1983, 1985, California Government Code § 12900, et. seq., and California Public Utilities Code § 453(a), conspiracy, and loss of consortium.[2]

The action was removed to the United States District Court for the Northern District of California on March 20, 1987. The plaintiff moved to remand the action to state court, which was denied by the Honorable D. Lowell Jensen on October 13, 1987. The District Court ruled that federal jurisdiction existed due to the plaintiff's membership in a union whose conditions of employment were governed by a collective bargaining agreement negotiated pursuant to the Railway Labor Act ("RLA"). 45 U.S.C. § 151, et. seq.

Defendants SP and PFE thereafter moved to dismiss the complaint. On April 6, 1988, the District Court did so, agreeing with the defendants that the wrongful termination claims and breach of good faith and fair dealing claim were "minor disputes"

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[2]As only the consortium claim involves plaintiff Joseph Tu, the singular "plaintiff" will be used throughout this disposition.

within the meaning of the RLA and must thus be referred to the National Railroad Adjustment Board ("NRAB") for mandatory arbitration. The Court declined to exercise pendent jurisdiction over the state discrimination claims and consortium claim.[3] The plaintiff was given leave to amend the complaint within 30 days in order to state a federal claim.

The plaintiff filed her First Amended Complaint on May 2, 1988, again alleging wrongful termination, breach of good faith and fair dealing, violations of 42 U.S.C. §§ 1981, 1983, 1985, California Government Code § 12900, et. seq., and California Public Utilities Code § 453(a), conspiracy, and loss of consortium. The plaintiff added a claim against the Union for breach of fair representation.

On July 1, 1988, upon motion by defendants, the District Court dismissed defendant ATSF and SFSP pursuant to Fed.R.Civ.P. Rule 4(j), for plaintiff's failure to timely serve. Further, the District Court again dismissed Counts 1 - 3 alleging wrongful termination and breach of good faith and fair dealing, and Count 7 for intentional infliction of emotional distress, as "minor disputes" subject to mandatory arbitration. The Court further dismissed Count 5, alleging conspiracy of all defendants to merge SP with ATSF and cease operations of PFE in order to avoid their contractual responsibilities to plaintiff, holding that the ICC was the proper forum for the initial determination of violations

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[3]The District Court did not address the claims for violations of 42 U.S.C. §§ 1981, 1983 and 1985, or the conspiracy count.

of 49 U.S.C. § 11347. Finally, the Court dismissed the claim against the Union for failing to file within the applicable statute of limitations. Two counts remained: the District Court exercised pendent jurisdiction over plaintiff's claim for discrimination and plaintiff Joseph Tu's claim for loss of consortium against defendants SP and PFE; the Court construed the claims as state claims for discrimination.[4]

On January 5, 1989, defendants PFE and SP filed a motion for summary judgment which was granted on February 6, 1989. The Court held that although the plaintiff had established a prima facie case of employment discrimination, the defendants had introduced substantial proof of a nondiscriminatory, legitimate reason for her furlough, that is, that PFE had experienced economic decline and the plaintiff's position was not needed at SP when PFE's business was transferred to the parent company. Further, the plaintiff had not introduced sufficient evidence to satisfy her burden of showing that the defendants' asserted nondiscriminatory reason was pretextual. Because Joseph Tu's claim for loss of consortium was wholly reliant on the success of plaintiff Sieu Tu's claims, that claim was dismissed. Judgment was entered on February 8, 1989.

The plaintiff thereafter moved for reconsideration. On May 5, 1989, the Court denied the motion for reconsideration

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[4]The District Court did not explain why it did not address the claims under 42 U.S.C. §§ 1981, 1983, and 1985, although the plaintiff does not challenge this decision, presumably because the plaintiff seeks to remand the action.

regarding summary judgment to defendants SP and PFE, but granted the motion for reconsideration as to the Union. The Union appeals this ruling.

The plaintiff filed a Second Amended Complaint on June 2, 1989, again alleging wrongful termination, breach of good faith and fair dealing, violations of 42 U.S.C. §§ 1981, 1983, 1985, California Government Code § 12900, et. seq., and California Public Utilities Code § 453(a), conspiracy, loss of consortium, and breach of fair representation by the Union. The Union responded to the second amended complaint by filing a motion for summary judgment. The District Court granted that motion on August 14, 1989, holding that the plaintiff had made no evidentiary showing that the Union's actions were discriminatory or taken in bad faith. The Court also dismissed the individual union officials, which is not challenged by the plaintiff on appeal.

Plaintiff appeals the denial of her motion to remand to state court, the dismissal of defendants ATSF and SFSP for plaintiff's failure to timely serve under Fed.R.Civ.P., Rule 4(j), the dismissal of plaintiff's claims of conspiracy and intentional infliction of emotional distress, the denial of her request for more time for discovery, and the granting of summary judgment in favor of defendants SP, PFE and the Union.

The Union appeals the District Court's finding that the statute of limitations for plaintiff's breach of fair representation claim had not lapsed.

DISCUSSION

(1) Denial of plaintiff's motion to remand

The denial of a motion to remand to state court is reviewed de novo. Chmiel v. Beverly Wilshire Hotel Co., 873 F.2d 1283, 1285 (9th Cir. 1989).

Under the well-pleaded complaint rule, federal jurisdiction exists only if a federal question is presented on the face of a complaint. Caterpillar, Inc. v. Williams, 482 U.S. 386, 107 S.Ct. 2425, 2428, 96 L.Ed.2d 318 (1987). A case may not be removed based on a defense unless an area of state law has been completely preempted, and the claim is therefore considered as arising under federal law. Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24, 103 S.Ct. 2841, 2853, 77 L.Ed.2d 420 (1983).

Plaintiff first argues that all causes of action were pled under state law and that the District Court erred in failing to remand the suit. In point of fact, Count 4 of the original complaint alleges violations of 42 U.S.C. §§ 1981, 1983 and 1985.

The District Court denied the plaintiff's motion to remand, holding that the state law claims constituted "minor disputes" under the RLA, 45 U.S.C. § 151, et seq. If plaintiff's claims are characterized as "minor disputes" within the meaning of the RLA, state law is preempted and her exclusive remedy is under the RLA. Andrews v. Louisville & N.R.Co., 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972). If the defendants' actions are "arguably" governed by the collective bargaining agreement or

have a "not obviously insubstantial" relationship to the contract, the dispute is "minor" and governed by the RLA. Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369-70 (9th Cir.), cert. denied 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323 (1978). Alternatively, "minor" disputes involve the "interpretation or application of collective bargaining agreements." Edelman v. Western Airlines, Inc., 892 F.2d 839, 843 (9th Cir. 1989).

The plaintiff argues that reference to the collective bargaining agreement is unnecessary, and that the action can therefore be decided under state law. Plaintiff contends that she and her employer have a "common law agreement" arising out of a letter written on December 18, 1978, by plaintiff's employer in order to assist Mrs. Tu in her father's immigration to the United States. The letter states:

> Mrs. Tu was employed by this company on May 31, 1962 and has worked continuously for us from that date. Her position with this company is not only permanent in nature but she also is, under our contract with the Brotherhood of Railway, Airline & Steamship Clerks, "fully protected" so that in the unlikely event we were not to have a job for her, she would continue to be paid under that contract until she reaches age 65 and can retire under the provisions of Railroad Retirement Act and receive the appropriate pension therefrom...
>
> She is, and has always been, a valued employee and even if her present position were to be eliminated, we would find some other position for her to hold as we would not want to lose her services.

The letter on which plaintiff bases her claims refers to the collective bargaining agreement as the source by which the plaintiff is "fully protected". Further, plaintiff's complaint

alleges that certain promises were implied "by said defendant's contracts with plaintiff's bargaining agent," and that plaintiff is "a beneficiary of contracts of employment entered into between defendant PFE and defendant [Union]." Reference to the collective bargaining agreement in the complaint and reliance on the contract through the grievance process brings the complaint within federal preemption. Newberry v. Pacific Racing Ass'n, 854 F.2d 1142, 1147 (9th Cir. 1988).[5]

While plaintiff cites Caterpillar, Inc., supra, for the contention that remand is required where an employee alleges breach of an individual employment contract, in Caterpillar the employees relied on contracts made while they were salaried employees not covered by a collective bargaining agreement. Here, the plaintiff was covered by the collective bargaining agreement at all relevant times. In addition, "any independent agreement of employment could be effective only as part of the collective bargaining agreement. " Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044, 1048 (9th Cir. 1987), citing Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1474 (9th Cir. 1984). Thus, plaintiff's claims are "arguably" governed by the collective bargaining agreement and have a "not obviously insubstantial"

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[5]In Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, 1885, 100 L.Ed.2d 410 (1988), the Supreme Court held that state law is preempted by § 301 of the Labor Management Relations Act of 1947 "only if such application requires the interpretation of a collective-bargaining agreement." The Court in Newberry, 854 F.2d at 1147, determined that reference to the collective bargaining agreement in the complaint and reliance on the grievance process required interpretation of the collective bargaining agreement.

relationship to the contract.

The plaintiff also argues that under 28 U.S.C. § 445(a), all civil actions against a railroad arising under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-60, are not removable. However, the plaintiff has not alleged a claim under FELA.

The District Court properly denied the plaintiff's motion to remand, and this Court has jurisdiction pursuant to 45 U.S.C. § 151, et seq.

(2) Dismissal of defendants ATSF and SFSP for plaintiff's failure to timely serve under Fed.R.Civ.P., Rule 4(j)

This Court reviews a dismissal of a complaint pursuant to Rule 4(j) for abuse of discretion. Wei v. State of Hawaii, 763 F.2d 370 (9th Cir. 1985).

On July 1, 1988, the District Court dismissed defendants ATSF and SFSP for plaintiff's failure to serve the defendants within 120 days, finding that plaintiff had not demonstrated good cause for her failure to do so.

Plaintiff first argues that the District Court in fact gave her an extension of time to serve defendants ATSF and SFSP, based on the following colloquy during the hearing on the motion to remand:

> THE COURT: I think we also ought to schedule a status conference on this matter for about 60 days. Could you give us a date in November?
>
> MR. KUBBY [plaintiff's counsel]: Your honor, if it's going to be necessary to serve all of the other defendants, I wonder if 60 days...

> THE COURT: Maybe we'll give you some more time than that. There isn't any real reason to have it earlier. Let's put it on December 16th. That will be at 9:00 o'clock and we'll review where we are at that time. In the meantime you can discuss this issue among yourselves.

This language -- ambiguous at best -- does not clearly indicate that the District Court extended the time for service. Further, the plaintiff did not raise this issue before the District Court, and Rule 46 of the Federal Rules of Civil Procedure provides that a party "should make[] known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor..." The limited exceptions to the general rule that failure to raise an issue in the trial court will prevent review include, (1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) when a change in law raises a new issue while an appeal is pending, and (3) when the issue is purely one of law. Javanovich v. United States, 813 F.2d 1035, 1037 (9th Cir. 1987), citing Bolker v. Commissioner of Internal Revenue, 760 F.2d 1039, 1042 (9th Cir. 1985). Plaintiff does not argue the applicability of these exceptions, and none of these factors militates in favor of their application. Plaintiff cannot therefore argue on appeal that the District Court extended the time period for service.

Next, plaintiff argues that she showed good cause for her failure to serve defendants. Plaintiff has the burden of showing good cause. Geiger v. Allen, 850 F.2d 330 (7th Cir. 1988); Townsel v. Contra Costa County, CA, 820 F.2d 319, 320 (9th Cir.

1987). First, plaintiff contends that she purposefully did not serve ATSF and SFSP due to defendant SP's request that plaintiff delay service on those defendants in order to facilitate settlement. However, plaintiff cites nothing in the record to support this contention.[6]

Second, plaintiff argues that she had good cause to believe that the case would be remanded to the California state court, where three years is allowed for service. However, given that plaintiff's complaint alleged violations of federal statutes, including 42 U.S.C. §§ 1981, 1983, and 1985, and explicitly referred to plaintiff's "bargaining agent" thus implicating the collective bargaining agreement, plaintiff's belief that the case would be remanded was unreasonable, and not good cause for failure to serve the remaining defendants in the case.

The plaintiff also argues that the District Court's dismissal of defendants ATSF and SFSP only applied to the original complaint, as the first amended complaint had been served by the date of the dismissal. However, this argument was raised in plaintiff's reply brief, and an appellant "cannot raise a new issue for the first time in [her] reply brief." Eberle v. City of Anaheim, 901 F.2d 814, 818 (9th Cir. 1988). Moreover, the

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[6]Plaintiff cites Kraus v. Santa Fe Southern Pacific Corp., 878 F.2d 1193 (9th Cir. 1989), for the contention that SP's request not to serve ATSF and SFSP was in fact the request of ATSF and Santa Fe. In Kraus, this Court had recited evidence introduced at trial that all non-rail operations between SFSP and SP had been merged. However, plaintiff cites no authority for her argument that SP's request not to serve the other defendants should be attributed to the other defendants.

District Court's order dismissed the first amended complaint.

Plaintiff also contends that the District Court erred by dismissing the second amended complaint, contending that the filing of the second amended complaint brought all defendants who had been previously dismissed back into the lawsuit. The plaintiff argues, "All parties who have appeared in an action remain in the action until a final judgment is rendered." However, a final judgment was rendered on February 6, 1989, before the second amended complaint was filed on June 2, 1989.

Next, the plaintiff argues that Rule 4(j) is not applicable in removed cases, and that Rule 81(c) applies instead.[7] Again, this argument was raised in plaintiff's reply brief, and issues raised for the first time in appellant's reply brief need not be considered. Eberle, 901 F.2d at 818 (9th Cir. 1988).

Finally, plaintiff argues that the defendants ATSF and SFSP waived the Rule 4(j) objection by answering without raising objections to untimely process. Here again, plaintiff raised this issue for the first time in her reply brief. Eberle, 901 F.2d at 818 (9th Cir. 1988).

The District Court's dismissal of ATSF and SFSP was not an

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[7] Rule 81(c) states, in relevant part:

> In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest.

abuse of discretion.

On appeal, defendants ATSF and SFSP have requested an award of sanctions against plaintiffs and their counsel pursuant to Fed.R.App.P. Rule 38, Fed.R.Civ.P. Rule 11, and 28 U.S.C. §§ 1912 and 1927. This Court declines to do so.

(3) Dismissal of conspiracy claim

This Court reviews de novo the dismissal of a complaint for failure to state a claim. Gobel v. Maricopa County, 867 F.2d 1201, 1203 (9th Cir. 1989). Dismissal under Fed.R.Civ.P. 12(b)(6) is not appropriate "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

In Count 5 of the original and first amended complaint, plaintiff alleged that all defendants conspired to merge defendant SP into defendant ATSF, cease operations of PFE, and terminate plaintiff in order to avoid their "contractual and moral responsibilities" to plaintiff. On July 1, 1988, the District Court dismissed this count in the first amended complaint as to all defendants. The Court ruled, in part:

> Insofar as a private cause of action might exist for termination due to the aborted merger, this Court concludes that it is not the proper forum for an initial determination of any claimed violation of 49 U.S.C. § 11347, which provides for employee protection in any rail carrier merger. See, Walsh v. United States, 723 F.2d 570 (7th Cir. 1983), Engelhardt v. Consolidated Rail Corp., 594 F.Supp. 1157, 1164 (N.D.N.Y. 1984).

When plaintiff filed her second amended complaint on June 2,

1989, she alleged a violation of 49 U.S.C. § 11705, stating that the Interstate Commerce Commission (ICC) had terminated its proceedings and allowed SP employees to pursue civil remedies. Plaintiff challenges the dismissal of the second amended complaint.

Defendant SFSP is a holding company formed in contemplation of the proposed merger. The holding companies of SP and ATSF had merged when defendant SFSP acquired the stock of SP in December of 1983 in an independent voting trust. When the ICC denied the proposed merger on October 10, 1986, SFSP was required to divest its interest in either SP or ATSF, and sold the stock of SP to Rio Grande Industries. The voting trust was dissolved on October 13, 1988 when that acquisition was approved.

On February 9, 1989, the ICC concluded that it could not provide protection for those employees harmed by any actions taken in anticipation of the merger:

> [W]e do not have the authority to impose labor protection as a condition of our action disapproving a merger proposal. Section 11347 speaks in terms of approved transactions....
>
> ***
>
> If any actions adverse to employees are shown to have been ordered by [SFSP] in anticipation of consolidation and in violation of the provision of 49 U.S.C. § 11343, which prohibits common control absent Commission approval, the adversely affected individuals have a remedy as provided by 49 U.S.C. § 11705. [SP] employees who believe they were harmed by actions take in anticipation of the proposed [SP]-ATSF consolidation would be required to show, in addition to causation, that [SFSP] exercised unlawful control of [SP], in violation of the Act or the conditions in our approval of [SFSP's] voting trust for [SP] 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. 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 administrative expertise, so as to invoke the doctrine of primary jurisdiction. [Citations omitted].

However, this Court has held that there is no private right of action pursuant to 49 U.S.C. § 11705 due to the exclusive jurisdiction of the ICC. In Kraus v. Santa Fe Southern Pacific Corp., 878 F.2d 1193 (9th Cir. 1989), plaintiffs had brought suit against SP, SFSP, and ATSF, stemming from plaintiffs' allegations that ATSF had induced SP to terminate plaintiffs in order to avoid post-merger liabilities which may have been imposed by the ICC. Plaintiffs alleged state law claims of tortious interference with economic relations[6] and a federal claim pursuant to 49 U.S.C. § 11343 for unauthorized merger or acquisition of control by ATSF over SP. This Court held:

> Neither 49 U.S.C. § 11343(a), however, nor any other provision of the subchapter governing combinations of carriers, provides for any remedy by way of a private civil damage action for violation of its provisions...
>
> The jurisdictional provision upon which plaintiffs attempt to rely is contained in a separate statutory subchapter relating to the enforcement of interstate commerce laws and regulations. The precise provision relied upon is 49 U.S.C. § 11705(b)(2), which states that a carrier is "liable for damages sustained by a person as a result of an act or omission of that carrier in violation of [the ICA]"...
>
> [T]he subchapter of the ICA relating to mergers specifically provides that "the authority of the Interstate Commerce Commission under this subchapter is exclusive." 49 U.S.C. § 11341. Under the statutory

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[6]The plaintiffs' recovery on this count was upheld.

> grant of authority over mergers, the ICC, and not the courts, has been given authority to define what constitutes an unauthorized merger or acquisition of control within the meaning of the statute.
>
> ***
>
> We agree with [ATSF] that the provision upon which plaintiffs rely, 49 U.S.C. § 11705(b)(2) & (c)(1), authorizes court enforcement for violations of the merger provisions only after the ICC has considered whether the alleged violations have occurred.

Kraus, 878 F.2d at 1197 - 1198. There has been no finding of a violation by the ICC in this case. Further, this Court specifically rejected the contention that the February 9, 1989 ICC decision, quoted above, conferred a private right of action. Kraus, 878 F.2d at 1198, n. 2. Thus, the District Court here properly dismissed Count 5 as to all defendants.

The defendants also argue that plaintiff's claim of conspiracy is preempted by the RLA as a "minor dispute". Because this Court has clearly held that there is no private right of action pursuant to § 11705, it is unnecessary to reach this issue.

(4) Dismissal of plaintiff's claim for intentional infliction of emotional distress

The dismissal of a claim is reviewed de novo. Gobel, 867 F.2d at 1203.

On July 1, 1988, the District Court dismissed Count 7 of plaintiff's complaint alleging intentional infliction of emotional distress. The Court correctly held that claims for emotional distress arising from termination are subject to mandatory arbitration under the RLA. Lewy, 799 F.2d at 1290 ("We

have consistently held that the RLA preempts state tort claims by employees against railroads for wrongful discharge or for intentional infliction of emotional distress, where the alleged tortious activity is "arguably" governed by the collective bargaining agreement or has a "not obviously insubstantial" relationship to the labor contract, and where the "gravamen of the complaint is wrongful discharge"); Stallcop, 820 F.2d at 1049, citing Carter v. Smith Food King, 765 F.2d 916, 921 (9th Cir. 1985); Olguin, 740 F.2d at 1475-76; Tellez v. Pacific Gas & Electric, 817 F.2d 536, 539 (9th Cir. 1987) (actions for intentional and negligent infliction of emotional distress not preempted since they arose from conduct not covered by the collective bargaining agreement); Magnuson v. Burlington Northern, Inc., 576 F.2d at 1367.

(5) Denial of plaintiff's request for additional discovery time

The plaintiff next claims that the District Court was in error by failing to allow more time for discovery. This Court reviews a denial of discovery for abuse of discretion. Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1442 (9th Cir. 1986), citing Foster v. Arcata Associates, Inc., 772 F.2d 1453, 1467 (9th Cir. 1985), cert. denied, 475 U.S. 1048, 106 S.Ct. 1267, 89 L.Ed.2d 576 (1986).

Pursuant to Fed.R.Civ.P. Rule 56(f), a court may refuse an application for summary judgment or may continue a matter for further discovery if a party opposing a motion "cannot for reasons stated present by affidavit facts essential to justify

the party's opposition." Plaintiff's counsel submitted an affidavit in opposition to the motions for summary judgment in which he averred that he had been unable to resolve discovery disputes with the defendants. He stated that the union cancelled the depositions of two union officials, and the continuance of the depositions was granted by a magistrate; the date then set for the deposition was cancelled due to plaintiff's counsel's trial schedule, and the union had not been cooperative in resetting the date.

The Union provided the declaration of Kathleen S. King, counsel for the Union, in reply to the plaintiff's opposition to summary judgment, stating that the Union had cooperated with all discovery requests; further, the Union had been willing to produce Union officials for deposition but plaintiff's counsel did not attempt to reschedule until the date on which defendants filed motions for summary judgment. Plaintiff's counsel also did not take the deposition of either Tom Ellen or Rick Fend, PFE officials whom plaintiff claims were instrumental in the discriminatory actions.

At the hearing on February 2, 1989, plaintiff's counsel asked the District Court for more time to take the depositions of the Union officials. The Court took the matter under advisement, and in the February 6, 1989 Order, the Court held that the plaintiff had had ample time for discovery.

Given the plaintiff's dilatory efforts at discovery and because the plaintiff has not indicated what facts this discovery

was expected to show, Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1416 (9th Cir. 1987), the District Court did not abuse its discretion in denying the request for further discovery.

(6) Defendants SP's and PFE's motion for summary judgment

On February 6, 1989, the District Court granted defendants SP's and PFE's motion for summary judgment on Count 4 and Count 6.

This Court reviews the District Court's grant of summary judgment de novo. Miller v. Fairchild Industries, Inc., 797 F.2d 727 (9th Cir. 1986), appeal after remand, 876 F.2d 718, opinion amended, 885 F.2d 498 (1989), cert. denied ___ U.S. ___, 110 S.Ct. 1524, 108 L.Ed.2d 764 (1990). This Court must determine whether there are any genuine issues of material fact, viewing the evidence in the light most favorable to the moving party, and whether the District Court correctly applied the law. Ashton v. Cory, 780 F.2d 816, 818 (9th Cir. 1986).

To establish a prima facie discrimination claim, plaintiff must show that she is (1) a member of a protected group; (2) her job performance was satisfactory; (3) she was discharged from her position; and (4) others not in the protected class were retained by defendants. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976). The burden then shifts to the defendants to articulate a legitimate nondiscriminatory reason for the action. If that burden is sustained, the burden then shifts back to the plaintiff to establish pretext by showing either that a discriminatory reason

more likely than not motivated the employer or that the employer's explanation is unworthy of credence. Perez v. Curcio, 841 F.2d 255, 257 (9th Cir. 1988), citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981).

The District Court held that the plaintiff had established a prima facie case of discrimination, finding that plaintiff is a member of three protected groups, her job performance was satisfactory since several of her superiors rated her work as exceptional, she was discharged, and other employees who were not female, Asian, or over 40 were transferred to positions at SP that the plaintiff was qualified to perform. Defendants challenge the District Court's finding that the plaintiff was eligible for transfer, but our disposition makes it unnecessary for us to rule on that point.

Second, the Court held that the defendants had rebutted the presumption of discrimination. The Court found that the defendants had offered "substantial proof supporting their contention that Sieu Mei was furloughed for economic reasons. PFE had experienced a severe decline in business due to increased competition from the trucking industry prior to the 1985 merger." The Court further pointed out that other employees who were not members of a protected class were also not transferred to SP.

The District Court then found that the plaintiff had not presented evidence which raised a genuine issue of fact challenging defendants' explanation of plaintiff's termination.

Plaintiff challenges the District Court's finding that the defendants had demonstrated a nondiscriminatory reason for her termination. First, she argues that the defendants are estopped from arguing that her termination was a result of PFE's economic decline due to representations contained in the alleged "common law agreement". The December 18, 1978 letter stated that plaintiff's position was permanent and "fully protected" under the union contract so that if the company did not have a job for her, she would continue to be paid and gain retirement benefits. She also argues that the decline in business clause does not apply to her due to the date at which she started working.

These arguments essentially restate the plaintiff's claim for wrongful termination. In order to find that defendants were "estopped" from asserting that plaintiff was fired due to economic reasons, this Court would have to interpret the collective bargaining agreement and resolve the wrongful termination claims on the merits. The plaintiff has not appealed the dismissal of the wrongful termination claims, and they are in any event subject to mandatory arbitration under the RLA.

Moreover, defendants submitted substantial evidence to support their contention that PFE was experiencing economic problems. Tom Ellen, former General Manager of PFE, submitted a declaration regarding his knowledge of the economic pressures created by deregulation, competition from the trucking industry, and a large wage increase awarded to the union. Under California law, reduction of work force necessitated by economic

circumstances constitutes good cause for dismissal. Gianaculas v. Trans World Airlines, Inc., 761 F.2d 1391 (9th Cir. 1985).

Richard Fend, Assistant Controller of PFE at the time the company was absorbed by the parent company, submitted a declaration stating that he was responsible for deciding which positions would be transferred to SP, and made that decision based on the job duties of a particular position, not the identity of the employee holding that position. He attached exhibits detailing which of the 16 clerks at PFE were furloughed and/or transferred to SP, which information was obtained from the company personnel files. Fifteen of the PFE clerks were over age 40; nine of these were transferred. Of the seven female clerks, four were transferred. Of the two Asian clerks, one was transferred to SP. Fend avers, "Ms. Tu was not transferred because, at the time, she was performing miscellaneous or general clerk functions almost all of which ceased to exist after October 1, 1985." The plaintiff did not depose either Ellen or Fend. The District Court reasonably found that the defendants had asserted legitimate, nondiscriminatory reasons for plaintiff's termination.

The plaintiff also challenges the District Court's finding that she did not present evidence rebutting defendants' explanation. However, little of plaintiff's evidence is admissible. Plaintiff asserts in her "Declaration in Opposition to Motion for Summary Judgement [sic]", that the work conditions were made intolerable so that she would voluntarily leave and

that she was moved to positions that were designed to be terminated so that she would not receive job protection. These assertions have no foundation and are not within her personal knowledge. Plaintiff's allegations of sexual jokes contain no citation to the record.

Plaintiff testified in her deposition regarding friction with the management over expense reports; i.e. the plaintiff's manager, Rick Fend, was angry when she questioned his expense reports. She also testified that Walsh told her that she was fired because Rick Fend and Edna Clark (whose role is unclear) did not like her and that another supervisor stated that she had trouble with Fend. This testimony is inadmissible hearsay and fails to relate to plaintiff's claims of discrimination based on sex, race, or age. Defendants also argue that these discovery materials were not presented to the trial court, a fact which plaintiff does not contest. Daly-Murphy v. Winston, 837 F.2d 348, 351 (9th Cir. 1988) (the reviewing court will normally not supplement the record on appeal with material not considered by the trial court).

In her deposition plaintiff also testified to derogatory remarks made about Chinese persons: Mr. Walsh, one of her supervisors, once stated that "pretty soon the Chinese would own San Francisco." Another time when the plaintiff had trouble working a new phone system, Rick Fend stated, "You can't talk English. You can't even push the button." The plaintiff testified that Fend made numerous remarks about Chinese, although

she could not remember other comments. She also could not remember if any other employees made racially derogatory remarks to her. In Stallcop, supra, the plaintiff cited her supervisor's statement that she "did not know the English language" as proof of discriminatory conduct. The Court held, "derogatory ethnic statements, unless excessive and opprobrious, are insufficient to establish a case of national origin discrimination." Stallcop, 820 F.2d at 1050-51. The derogatory statements cited in this case are also not excessive and opprobrious. Also, the defendants assert that this deposition material was not presented to the District Court.

Although plaintiff claims that PFE intentionally caused its economic decline, her only evidence is her declaration that she was told not to answer the phone because PFE did not want the business.

The District Court did not err by holding that plaintiff had failed to demonstrate the existence of specific facts showing there is a genuine factual issue that defendants' reason for her termination was pretextual.

Plaintiff also claims that SP's failure to rehire her is retaliatory discrimination for bringing this lawsuit. This claim was not alleged in either the initial compliant or the first amended complaint;[9] the plaintiff does not address the

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[9]Plaintiff argues that the retaliatory discrimination claim was explicitly alleged in the second amended complaint; however, this complaint was filed after the District Court granted defendants' motion for summary judgment.

applicability of the exceptions to the general rule against considering issues for the first time on appeal. Javanovich, 813 F.2d at 1037, citing Bolker, 760 F.2d at 1042. Thus, this issue will not be considered.

(7) Union's motion for summary judgment

Whether a union has breached its duty of fair representation is a mixed question of law and fact which this Court reviews de novo. Galindo v. Stoody Co., 793 F.2d 1502, 1513 (9th Cir. 1986), citing United States v. McConney, 728 F.2d 1195, 1204 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984); see also Johnson v. United States Postal Service, 756 F.2d 1461, 1465 (9th Cir. 1985) (applying de novo standard to "ultimate findings"); but see Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1091 (9th Cir. 1978) (suggesting issue is a question for the trier of fact).

On August 14, 1989, the Court granted the defendant Union's motion for summary judgment, holding that plaintiff had made no evidentiary showing that the Union's actions were discriminatory or in bad faith and that the Union had adhered to established procedures for handling grievances.

To establish a breach of fair representation, the plaintiff must show that the Union's conduct was "arbitrary, discriminatory, or in bad faith." Galindo, 793 F.2d at 1513, citing Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842 (1967). Union decisions regarding the handling of grievances are afforded wide latitude, and "a union's conduct may

not be deemed arbitrary simply because of an error in evaluating the merits of a grievance... or in presenting the grievance at an arbitration hearing." Galindo, 793 F.2d at 1515, citing Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985), cert. denied, 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986) (emphasis added by Galindo author).

In Galindo, this Court found that the Union representative's failure to bring up an issue at arbitration reflected a judgmental decision. Similarly here, the Union's failure to address the plaintiff's individual considerations -- her claims that she was exempt from the decline in business clause of the collective bargaining agreement and her claims of discrimination based on sex, race, and age -- reflect a judgmental decision. As in Galindo, "this representation was, at worst, negligent." Galindo, 793 F.2d at 1515. Negligent conduct may only be the basis of a fair representation claim when "the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." Dutrisac v. Caterpillar Tractor Co, 749 F.2d 1270, 1274 (9th Cir. 1983) (emphasis added). The Union's conduct in question here was not ministerial.

In order to recover for a breach of fair representation, the plaintiff must also establish the underlying grievance had merit. Skillsky v. Lucky Stars, Inc., 893 F.2d 1088 (9th Cir. 1990). As discussed above, the plaintiff did not introduce evidence to support her claim of discrimination. In addition, plaintiff has

not introduced specific evidence to support her claim that the decline in business clause did not apply to her. This Court has only the language of the decline in business clause to evaluate: "the provisions of this section will not apply to Pacific Lines employees in the San Francisco General Offices with seniority dates of March 16, 1963 or earlier." On its face, this applies only to certain [SP] employees of Pacific Lines working in the San Francisco office, whereas the plaintiff was an employee of PFE working in Brisbane, California at the time of the termination. Moreover, the plaintiff introduced no evidence that there was a conflict of interest by the Union which resulted in its failure to effectively represent plaintiff.[10]

The District Court did not err in granting summary judgment to the Union.

(8) The cross-appeal

On February 6, 1989, the District Court ruled that plaintiff's breach of fair representation claim against the defendant Union was barred by the six month statute of limitations in section 10(b) of the National Labor Relations Act. The Court later reconsidered and reversed its previous ruling that the plaintiff's claim was barred, concluding that the limitations period did not begin to run until the plaintiff was informed of the arbitrator's decision. The Union cross-appeals this issue. However, since the District Court properly granted

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[10]Plaintiff references only counsel's statements during plaintiff's deposition and at hearing.

summary judgment to the Union on plaintiff's breach of fair representation claim, it is not necessary for this Court to decide the cross appeal, and it will be dismissed as protective.

CONCLUSION

In summary, the District Court properly denied the plaintiff's motion to remand since her claims were arguably governed by the collective bargaining agreement and she alleged violations of 42 U.S.C. §§ 1981, 1983, and 1985. Second, the District Court properly dismissed defendants ATSF and SFSP for plaintiff's failure to timely serve under Fed.R.Civ.P. Rule 4(j). The District Court also did not err in dismissing Count 5, alleging conspiracy, since there is no private right of action pursuant to 49 U.S.C. § 11705. Further, the plaintiff's claim for intentional infliction of emotional distress was properly dismissed as a "minor dispute" subject to mandatory arbitration. The District Court did not err in not allowing the plaintiff more time for discovery, and properly granted summary judgment to defendants SP and PFE. Plaintiff failed to demonstrate the existence of specific facts showing a genuine factual issue that defendants' claims of economic decline were pretextual.

In addition, this Court need not decide the cross appeal because the District Court properly granted summary judgment to the Union on plaintiff's breach of fair representation claim. The cross appeal will therefore be dismissed as protective.

Finally, this Court declines to award defendants ATSF and SFSP an award of sanctions against plaintiffs and their counsel.

APPEAL NO. 89-16186 AFFIRMED; CROSS-APPEAL NO. 89-16292 DISMISSED. Costs in favor of appellees.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

JUN 23 1992

by: Deputy Clerk

Exhibit E

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIEU MEI TU AND JOSEPH TU, Plaintiffs, v. SOUTHERN PACIFIC TRANSPORTATION COMPANY, et al., Defendants.	No. C87-1198-DLJ DECLARATION OF TOM ELLEN IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Date: February 2, 1989 Time: 10:00 a.m. Place: Courtroom No. 3

I, Tom Ellen, declare:

1. I have been employed directly or indirectly in the railroad industry since 1969. I first joined the management of Southern Pacific in 1972. From 1977 to 1979, I was employed by the Federal Railroad Administration in Washington, D.C., where I performed economic analyses leading to the passage of the Staggers Act, which largely deregulated the railroad industry. In June 1982, I became the General Manager

of Pacific Fruit Express Company ("PFE"), a wholly-owned subsidiary of Southern Pacific. I remained in that position until November of 1985. Throughout my tenure as General Manager, I was fully aware of the business conditions affecting PFE and its employment needs.

2. PFE was engaged in the interstate shipment of perishable goods in refrigerated rail cars. PFE had to do much of its business on an inter-line basis, meaning that it had to deal with a number of different rail carriers. After railroad perishable traffic was deregulated in 1979, it was difficult for PFE to work out agreements with rail carriers due to the instability of the industry. It was difficult to negotiate partnership arrangements with railroads that would allow the company to profitably develop new areas of business that were opened up by deregulation.

3. When I began running PFE in 1982, it was obvious that the company would go out of business if current trends continued. The company employed approximately 500 individuals to service an under-utilized fleet of 5,000 refrigerated freight cars. The company was overstaffed for the volume of business it had and was not a viable operation. By May of 1985, employment had been reduced to approximately 250 persons. At this level of staff, the company was capable of handling the same volume of business that it handled in 1982.

4. PFE's business consisted primarily of transporting fruits and vegetables from the West Coast to the Midwest.

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/ / / / /

In the 1980's, there was a substantial increase in imported fruits and vegetables which were brought directly to the East and Midwest without the need for refrigerated rail car service from California.

5. In 1982, PFE began efforts to find loads to bring back on trips from the East Coast and Midwest. A promising area for this "back haul" business was the transportation of citrus fruit from growing regions in Florida and Texas. Just as this business was beginning to develop in late 1983, however, there were severe freezes in Texas and Florida. The Texas fruit trees were killed and it was clear that the business could not revive for a minimum of five years. In Florida, one year's fresh citrus crop was destroyed, though it appeared that the Florida "back haul" business could be restored. However, in 1984, citrus canker disease was discovered in Florida, putting an end to the Florida "back haul" business. Florida citrus was subject to local embargoes and could not longer be shipped into any other state which had a citrus industry.

6. In addition to coping with deregulation of the railroad industry, and the destruction of the Texas and Florida "back haul" business, PFE also faced substantial changes in its competition. The trucking industry was PFE's primary competition in shipping perishables. Trucks had the potential to deliver goods more rapidly, with greater flexibility, and at lower rates. The deregulation of the trucking industry caused aggressive pricing. At the same time, the federal government was increasing the size and weight allowances for trucks and

the highway systems were being improved. Thus, PFE was at a competitive disadvantage with the trucking industry.

7. In 1983, due to management changes, increased marketing, and decreased staffing, the company was able to substantially improve its financial performance. However, its financial performance deteriorated badly in 1984 and the company lost approximately $10 million. By 1985, it was clear that the company was going to have to raise its rates in order to stem large losses and it was equally clear that any increase in rates would cause a decrease in business. PFE's improvements in efficiency and marketing could not overcome serious industry-wide negative factors that were out of PFE's control.

8. PFE was part of a multi-employer labor contract negotiating process. Although the company explored ways of pulling out of the national negotiations, it was concluded that this was legally and economically impossible. As a consequence, when national contract negotiations led to a wage increase of approximately 40% in September 1982, PFE found that even substantial layoffs could not significantly reduce its high labor costs.

9. From 1979 to 1984, the profitability of Southern Pacific's and PFE's joint perishable operations declined substantially, from a net profit of $3 million to a net loss of $10 million annually. Total carloads declined by 41% over this period. By early 1985, it was clear that PFE could not provide a competitive service that could be sold for more than it cost to produce it. The company could not justify any further investment and began exploring options for down-sizing. By

June 1985, PFE's management was considering the options of continuing PFE, selling it, merging it with Southern Pacific, or closing it entirely.

10. In August 1985, the decision was made to merge all of the functions of PFE other than routine maintenance of rail cars into Southern Pacific in order to more efficiently provide the same level of service. The only jobs that would be preserved would be unionized refrigerator car repair and service positions and one or two non-union management positions. Southern Pacific was able to carry out almost all of the functions of PFE with only minimal increase in staff. All departments at PFE, including the Accounting Department, suffered substantial losses in employment which could not be absorbed by Southern Pacific. The economic demise of PFE, unfortunately, led to a widespread layoff of PFE employees.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed January 3, 1989 in North Granby, Connecticut.

Tom Ellen

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*ADMITTED IN MICH. & MAINE ONLY

OF COUNSEL:
JAMES L. HIGHSAW

-38340?

November 3, 1992

Adrian L. Steel, Jr., Esq.
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006

Re: Finance Docket No. 30400 (Sub-No. 21), Santa Fe Southern Pacific Corp.--Control--Southern Pacific Transportation Co.

Dear Mr. Steel:

Please accept this letter as a response to your written inquiry of October 8, 1992 regarding the responses of the Brotherhood of Maintenance of Way Employes ("BMWE") and the International Association of Machinists and Aerospace Workers ("IAMAW") to the interrogatories and requests for production of documents propounded by the Santa Fe Pacific Corporation ("SFP"). I apologize for not responding by October 23, 1992, however on that date my wife gave birth to our new daughter and I have been out of the office on parental leave since that time.

In response to your inquiry regarding the BMWE's and IAMAW's responses to Interrogatory No. 2(B), a further search of the unions' files has revealed no documents related to the types of severance offers made to BMWE or IAMAW represented employees by the Southern Pacific Transportation Company ("SPT") during the time period specified. This lack of documents is not surprising since such unilateral severance offers are by their very nature designed to bypass the duly designated collective bargaining representative of the employees to whom the offers are directed. Indeed, such unilateral offers are illegal unless the union has waived its right to object. See, Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342 (1944); Bhd. of Ry. Carmen v. Atchison, T. & S.F. Ry., 894 F.2d 1463 (5th Cir.), cert. denied, 112 L.Ed.2d 99 (1990).

As regards BMWE's and IAMAW's responses to Interrogatory No. 3, the term "claim" is a term of art within the railroad industry applying to claims and grievances arising out of collective bargaining agreements or ICC-imposed employee protective conditions. Accordingly, both BMWE and IAMAW submit that in the context within which the interrogatory was propounded, their answers were full and complete. Nevertheless, without waiving

any objection to SFP's inquiry, both BMWE and IAMAW state that their previous responses are complete even under SFP's new definition of the term "claim".

If you have any further questions regarding this response, please contact me. Of course, both BMWE and IAMAW are aware of their continuing duty to supplement SFP's discovery requests and if non-privileged information relevant to those requests becomes available, it will be provided to SFP in a prompt manner.

Sincerely,

HIGHSAW, MAHONEY & CLARKE, P.C.

By: Donald F. Griffin
Donald F. Griffin

Attorneys for BMWE and IAMAW

cc: Hon. Paul S. Cross
Hon. Sidney L. Strickland, Jr.
all parties of record

38389

LAW OFFICES
LEE J. KUBBY, INC.
A PROFESSIONAL CORPORATION

BOX 60485
SUNNYVALE, CALIFORNIA 94086-0485
(415) 691-9331

October 31, 1992

Secretary
Interstate Commerce Commission
12th and Constitution Aves. N.W.
Washington, D.C. 20423
Fin Doc 30400 Sub 21

Re: Interstate Commerce Commission
Decision
Finance Docket No. 30400
(Sub-No. 21)
Santa Fe Southern Pacific Corporation
Control
Southern Pacific Transportation Company
Response to SPT Objection Discovery etc.

Dear Gentle People:

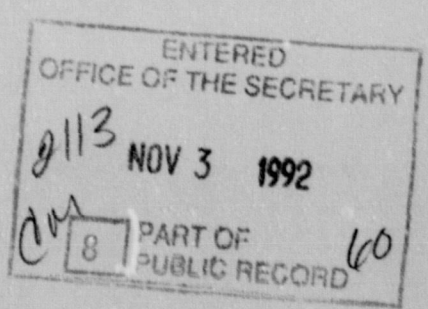
Enclosed please find original and 8 copies of Response to SPT Objection Discovery, etc. in the above matter. Please file and return the enclosed face sheet endorsed filed in the enclosed self addressed and stamped envelope.

Thank you for your courtesies.

Respectfully submitted,
LEE J. KUBBY, INC.
A Professional Corporation
By:

LEE J. KUBBY
ATTORNEY FOR INJURED PARTY
SIEU MEI TU

LJK:me
Encls.



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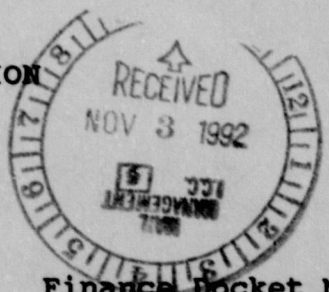
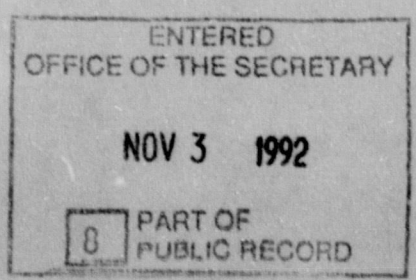
Attorney for Injured Party Sieu Mei Tu

INTERSTATE COMMERCE COMMISSION



SIEU MEI TU AND JOSEPH Z. TU Injured Parties VS SOUTHERN PACIFIC TRANSPORTATION COMPANY; ATCHISON, TOPEKA, SANTA FE RAILROAD COMPANY; PACIFIC FRUIT EXPRESS COMPANY; SANTA FE SOUTHERN PACIFIC CORP. Applicants Interested Parties	Finance Docket No. 30400 (Sub-No. 21) INJURED PARTY SIEU MEI TU RESPONSE TO OBJECTION SPT TO DISCOVERY REQUEST DISMISSAL

Re: Interstate Commerce Commission
Decision
Finance Docket No. 30400
(Sub-No. 21)
Santa Fe Southern Pacific Corporation
Control
Southern Pacific Transportation Company



TO DEFENDANTS AND EACH OF THEM AND TO THEIR ATTORNEYS OF RECORD:

INTRODUCTION\ STATEMENT OF FACTS

Pacific Fruit Express (PFE) was a wholly owned subsidiary of Southern Pacific (SPT). The individuals serving on the Boards of Directors of both corporations were identical at all times material hereto, except Tom Ellen, vice president and general manager of PFE was on the board of PFE but not SPT. All other PFE vice Presidents were also officers of SPT, paid solely by SPT and received no compensation from PFE. All of PFE's treasury functions were handled by SPT's treasury department. PFE maintained no separate cash account. PFE's cash was held by SPT , and SPT collected all accrued interest on that cash. PFE's accounting functions were performed by SPT. SPT also performed PFE's legal, data processing, management services, marketing, sales, and operating functions. PFE relied on SPT's TOPS data system to manage its car inventory. Similarly, PFE was the perishable equipment and supply arm of SPT, and beginning in 1982 performed all of the marketing, pricing and claims functions for SPT's transportation of perishable business. Until 1982, PFE was physically located in the San Francisco General Offices of SPT.

In 1982 PFE's operation was moved to a different building in an attempt to create the impression of lack of substantial alignment between SPT and PFE.

PFE's business was to own, lease and operate a fleet of refrigerated rail cars on behalf of Southern

Pacific and market SPT's services for the transportation of fresh and frozen perishables in refrigerated cars. PFE was operated as a profit center of SP, and an income statement consolidating the results of PFE with perishable operations of SPT was developed and produced monthly by SPT's accounting department showing the current month and year to date results. In January, 1985, Tom Ellen, the vice-president and general manager of PFE, met with the SPT Law and Labor Relations Departments to discuss development of alternative means available to make the perishable business profitable by either liquidating the assets "or some unconventional means of revitalizing the business". The closure of PFE and liquidation of assets related to the perishable business, was not deemed advantages because of employee severance costs. By October, 1985 all of the functions of PFE were performed directly by SPT.

The close operational relationship and parent subsidiary relationship between SPT and PFE, demonstrate the substantial alignment between the two entities. The subsidiary PFE was being operated primarily for the benefit of the parent SPT.

During the course of the litigation in the United States District Court for the Northern District of California, and in the subsequent appeal, SPT, PFE and SFSP Corp. advised those courts that no civil action was permissible because the matter was governed by 49 USC 11347, and exclusive jurisdiction of the conspiracy claim of Sieu Mei Tu was with the ICC. Mr. Bolio one of the attor-

neys for SPT in these hearings was also one of the attorneys for SPT-PFE in the civil action. Mr. Bolio signed the "Opening Brief On Behalf of Appellees Southern Pacific Transportation Company and Pacific Fruit Express Company" as attorney for those parties. (A copy of the applicable pages is attached hereto for the convience of the Commissioner) At pages 24-30 he urged the court "The Fifth Cause of Action Is Preempted by the Interstate Commerce Act" and relying on the authority of Kraus v. Santa Fe Southern Pacific Corp. (9th Cir. 1989) 878 F.2d 1193 stated at 25 in reference to Sieu Mei Tu the

plaintiff in the civil action:

> "The Ninth Circuit ruled that employees like plaintiff could not raise these claims in a civil action but were required to pursue their disputes before the Interstate Commerce Commission."

He thereafter pointed out:

> "The district court dismissed the fifth cause of action on the basis that it was preempted by the Interstate Commerce Act and subject to the exclusive jurisdiction of the Interstate Commerce Commission."

The ICC decision of June 12, 1992, reopening these hearings provides:

> "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...."

The Transportation, Communications Union (TCU) formerly BRAC, the bargaining union for the PFE clerks took part in the Rio Grande Industries , et al-Control SPT et al-ICC proceedings as part of the Railway Labor Executives'

Association. They have declined to represent any of their members in these pending proceedings.

In the Leiberman grievance arbitration the only issue raised by BRAC was the issue of the right of their members to follow work from PFE to SPT or in lieu thereof, grant claimants separation allowances. No evidence was presented at the arbitration of the overall profitability of SPT nor of the separate grievances of Sieu Mei Tu.

Sieu Mei Tu was the only remaining employee whose seniority date preceded March 16, 1963, and was covered by the following provision of the applicable collective bargaining agreement:

> "Section 11 - In the event of a decline in a carrier's business in excess of 5%...a reduction in permanent positions and employees may be made ....The provisions of this section will not apply to Pacific Lines employes in the San Francisco General Offices with seniority date of March 16, 1963 or earlier...."

SFSP and SPT acted in concert to avoid giving terminated employees New York Dock conditions upon the merger.

ARGUMENT

PFE EMPLOYEES ARE RAILROAD EMPLOYEES FOR PURPOSES OF 49 USC 11347, WHERE THERE IS A SUBSTANTIAL ALIGNMENT BETWEEN PFE AS A SUBSIDIARY OF SPT, PFE SUPPLEMENTED THE RAIL SERVICE OF SPT, AND WAS PART OF SPT'S OVERALL TRANSPORTATION SYSTEM.

In Cosby v. ICC, (CA 8, 1984) 741 F.2d 1077, cert.dn'd 105 S.CT 2344, 471 US 1110, 85 L.Ed.2d 861, it was found that FTC's operations were generally restricted to service which was auxiliary to or supplemental to Frisco's rail service, the court then held at 1081:

> "FTC can thus be viewed as part of Frisco's

and, after the merger, BN's, single transportation system. FTC was intimately tied to the railroad's main transportation function, in contrast to subsidiaries which are non-transportation oriented such as warehouses and mining enterprises. FTC employees should therefore be considered railroad employees."

Likewise, PFE was intimately tied to SPT's main transportation function, and was a engaged in transportation oriented activities, in that it owned, leased, and operated a fleet of refrigerated rail cars on behalf of SPT.

The Cosby court supra holds at 1080:

"Thus, FTC employees are clearly employees affected by the transaction.

They were also employees of Frisco, a participant in the merger. The Commission has "long considered that a carrier and its subsidiaries constitute a single transportation system with respect to transaction under section 5 of the Act." Pennsylvania Railroad Company-Merger-New York Central Railroad, 347 ICC 536, 546 (1974) (citing Louisville & J.B. 7 R. Co. Merger, 290 ICC 725, 733; 295 ICC 11; Woods Industries, Inc.-Control-United Transports, Inc. 85 MCC 671, 675). As the Commission noted in Pennsylvania Railroad, "the parent by reason of ownership, has the legal right to direct the affairs of the subsidiaries and the latter have no alternative but to accept this direction, even if such were to result***in complete abandonment of the subsidiaries' operations or the extinction of their corporate existence. Id at 547."

Section 11121 of the Interstate Commerce Act provides in pertinent part that:

"A rail carrier providing transportation is subject to the jurisdiction of the Interstate Commerce Commission...shall furnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service. The Commission may require a rail carrier to provide facilities and equipment that are reasonably necessary to furnish safe and adequate care service if the Commission decides that a rail carrier has materially failed to furnish that service." (49 USC

11121 (a) (1)).

The courts and the Commission have consistently interpreted this provision as requiring common carriers to furnish cars reasonably necessary for the transportation of all commodities which they hold themselves out to carry. General American Tank Car Corp. v. El Dorado Terminal Co., 308 U>S> 422, 428 (1940); Johnson v. Chicago, Milwaukee, St. Paul and Pacific R. Co., 400 F. 2d 971 (9th Cir. 1968); Docket No. 38692 Shippers Committee OT-5-Revieiw of OT-5 Agreements at 9 (Decision served December 23, 1981); and Use of Privately Owned Refrigerator Cars, 201 ICC 323, 373-74 (1934).

In Winnebago Farmers Elevator Co. v. Chicago and NorthWestern Transportation Co., 354 ICC 859, 866-67 (1978) the Commission ruled that it had jurisdiction to require the provision of "adequate car service".

This obligation has been specifically applied to refrigerator cars:

> "It is well-settled law that it is the duty of common carriers by railroad to furnish such cars as may be reasonably necessary for the transportation of all the commodities they hold themselves out to carry. That duty, imposed by statute, necessarily implies that the carriers have the exclusive right to furnish such equipment. It is optional with them, whether they exercise that right by furnishing cars owned by them, cars owned by other carriers, or cars leased from independent contractors. Under modern conditions, refrigerator cars have become regular equipment." (Use of Privately Owned Refrigerator Cars, 2101 ICC 323, 373 (1934)).

The ICC looks to the combined profitability of the parent and the subsidiary combined to determine economic

issues (New York Dock RY-Control-Brooklyn Eastern Dist. Fin. Dkt. 28250 at 401-403 (April 11, 1978)) so that SPT's argument that they were entitled to discharge Sieu Mei Tu because of economic decline of PFE without regard to the overall profitability of SPT is without merit.

THE ISSUES OF SIEU MEI TU'S LABOR PROTECTION RIGHTS VIS A VIS THE CONSPIRACY OF THESE RAILROADS TO AVOID NEW YORK DOCK CONDITIONS FOR EMPLOYEES TERMINATED BY REASON OF THIS FRUSTRATED MERGER RESTING WITH THE ICC AND THE FACT OF THAT CONSPIRACY ARE RESJUDICATA AND SPT IS DIRECTLY AND COLLATERALLY ESTOPPED FROM CLAIMING OTHERWISE.

During the course of the litigation in the United States District Court for the Northern District of California, and in the subsequent appeal, SPT, PFE and SFSP Corp. advised those courts that no civil action was permissible because the matter was governed by 49 USC 11347, and exclusive jurisdiction of the conspiracy claim of Sieu Mei Tu was with the ICC. Mr. Bolio one of the attorneys for SPT in these hearings was also one of the attorneys for SPT-PFE in the civil action. Mr. Bolio signed the "Opening Brief On Behalf of Appellees Southern Pacific Transportation Company and Pacific Fruit Express Company" as attorney for those parties. At pages 24-30 he urged the court "The Fifth Cause of Action Is Preempted by the Interstate Commerce Act" and relying on the authority of Kraus v. Santa Fe Southern Pacific Corp. (9th Cir. 1989) 878 F.2d 1193 stated at 25 in reference to Sieu Mei Tu the plaintiff in the civil action:

> "The Ninth Circuit ruled that employees like plaintiff could not raise these claims in a civil action but were required to pursue their disputes before the Interstate Commerce Commission."

He thereafter pointed out:

> "The district court dismissed the fifth cause of action on the basis that it was preempted by the Interstate Commerce Act and subject to the exclusive jurisdiction of the Interstate Commerce Commission."

In Kraus supra the Ninth Circuit reviewed the facts found by the jury in the District Court which supported the state court cause of action there involved, and sustained the lower courts judgment as to that cause of action, stating at 1194:

> "Plaintiffs' factual contention, which the jury accepted was that Santa Fe had induced the plaintiff's employer to terminate plaintiffs in order to avoid possible post merger liabilities which might have been imposed by the Interstate Commerce Commission."

SPT's REMAINING ARGUMENTS ARE LIKEWISE WITHOUT MERIT

Southern Pacific Transportation is estopped from claiming that PFE employees are not a carrier by rail as defined in the Interstate Commerce Act and would not be entitled to labor protection payments when imposed by the Commission. Sieu Mei Tu, however is neither collaterally estopped nor is the issue res judicata for her claim for conspiracy, since there was no finding on the merits of the claim, but the court ruled it had no jurisdiction to hear that claim, since it ruled that the ICC had exclusive jurisdiction to hear that claim.

The District Court found that Sieu Mei Tu had produced evidence that her discharge was due to discrimination by reason of her race, sex, and or national origin, but did not satisfy an obligation to show that the employers' stated

reason of economic decline was pretextural.

In telephone conference attorney for Sieu Mei Tu advised that he had filed in this proceeding on behalf of Sieu Mei Tu and all others similarly situated. Commissioner Cross inquired whether any others had asked the attorney to represent them, and he replied no.

The alleged economic decline of PFE is totally irrelevant, because Sieu Mei Tu was not subject to termination by reason of economic decline, and if arguendo she had been, it would be necessary to look to the economics of SPT as well as PFE to determine that issue.

The Leiderman arbitration did not consider any of Sieu Mei Tu's grievances other than the right to follow work to SP.

Sieu Mei Tu is entitled to pursue discovery to fully present to this Commission why it should impose labor protective conditions on this frustrated merger.

Wherefore Sieu Mei Tu on behalf of herself and all others similarly situated respectfully moves the Commission for an order compelling applicants and each of them to produce for inspection and copying of documents pursuant to the pending motion the following documents:

> (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 Per-

ishable 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.

Dated: October 30, 1992

Respectfully submitted,
LEE J. KUBBY, INC.
A Professional Corporation
By:

LEE J. KUBBY
ATTORNEY FOR INJURED PARTY
SIEU MEI TU

UNITED STATES COURT OF APPEALS

NINTH JUDICIAL CIRCUIT

SIEU MEI TU AND JOSEPH TU, Plaintiffs-Appellants, v. SOUTHERN PACIFIC TRANSPORTATION COMPANY, et al., Defendants-Appellees. AND RELATED CROSS-APPEALS.	)	Docket No. 89-161-86

OPENING BRIEF ON BEHALF OF APPELLEES SOUTHERN PACIFIC TRANSPORTATION COMPANY AND PACIFIC FRUIT EXPRESS COMPANY

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Attorneys for Appellees Southern Pacific Transportation Co. and Pacific Fruit Express Co.

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Attorneys for Appellees Southern Pacific
Transportation Co. and Pacific Fruit Express Co.

UNITED STATES COURT OF APPEALS

NINTH JUDICIAL CIRCUIT

SIEU MEI TU AND JOSEPH TU, Plaintiffs-Appellants, v. SOUTHERN PACIFIC TRANSPORTATION COMPANY, et al., Defendants-Appellees. AND RELATED CROSS-APPEALS.	Docket No. 89-161-86 STATEMENT PURSUANT TO LOCAL RULE 13(b)(c)

The undersigned, counsel of record for appellees Southern Pacific Transportation Company and Pacific Fruit Express Company, certifie that there are no known interested parties other than those participating in the case. This representation is made to enable the judges of the court to evaluate possible disqualifications or recusal.

DATED: June 25, 1990 McLAUGHLIN AND IRVIN

By _____
Wayne M. Bolio

Attorneys for Appellees Southern
Pacific and Pacific Fruit Express

TOPICAL INDEX

tive remedy provided by the Railway Labor Act for [employment disputes] ... stems not from any contractual undertaking between the parties but from the Act itself ..." Andrews v. Louisville & Nashville R.R. Co., 406 U.S. 320, 323, 92 S.Ct. 1562, 1565 (1972).

The first, second, third, fifth,[14/] and seventh causes of action -- whether pled in tort or contract -- all take issue with the layoff from employment. Because the causes of action constitute minor disputes subject to mandatory arbitration, this court lacks subject matter jurisdiction. Plaintiff arbitrated her claims and lost. The arbitration decision is final and binding under the Railway Labor Act. 45 U.S.C. § 153 First (m). The district court properly dismissed these causes of action as constituting minor disputes subject to the exclusive jurisdiction of an arbitrator, and this court should affirm that decision.

C. THE FIFTH CAUSE OF ACTION IS PREEMPTED BY THE INTERSTATE COMMERCE ACT.

Plaintiff argues at length that defendants conspired among themselves to eliminate her job in anticipation of a proposed merger between Southern Pacific and Santa Fe Industries and that this claim is cognizable in court. (AOB 37-38.) In support of this argument, she cites the court to a decision of the Interstate Commerce Commission allegedly providing her a private right of action. (AOB 37-38.)

14/ In the alternative, the fifth cause of action is preempted by the Interstate Commerce Act. See infra, at pp. 24-26.

However, the Ninth Circuit has expressly refused to follow that decision of the ICC.

In Kraus v. Santa Fe Southern Pacific Corp., 878 F.2d 1193 (9th Cir. 1989), two terminated Southern Pacific employees sued Santa Fe Southern Pacific Corp., alleging that the two railroad holding companies conspired to terminate them in anticipation of a railroad merger. The employees, like plaintiff herein, claimed that the actions violated the Interstate Commerce Act. Kraus at 1197. The Ninth Circuit ruled that employees like plaintiff could not raise these claims in a civil action but were required to pursue their disputes before the Interstate Commerce Commission.

> Under the statutory grant of authority over mergers, the ICC, and not the courts, has been given authority to define what constitutes an unauthorized merger or acquisition of control within the meaning of the statute. The ICC has been given wide administrative discretion to tailor remedies and sanctions for violation of the statute and its own orders.

878 F.2d at 1198. The court squarely ruled that no private right of action exists for violation of 49 U.S.C. § 11705, the statute relied upon by plaintiff. Id. at 1199 n.3. Because the ICC had exclusive jurisdiction over these claims, "the district court lacked jurisdiction over plaintiff's federal statutory claim." Id. at 1198-99. In so holding, the Ninth Circuit expressly refused to adopt the reasoning of the Interstate Commerce Commission decision relied upon by plaintiff herein. Id. at 1198 n.2. The district court dismissed the fifth cause of action on the basis that it was preempted by the Interstate Commerce Act and subject to the exclusive jurisdic-

tion of the Interstate Commerce Commission. (RE 305.) As Kraus makes clear, the district court's ruling was entirely proper and should be affirmed.

D. BECAUSE PLAINTIFF MAY NOT STATE ANY CLAIM FOR VIOLATION OF THE DUTY OF FAIR REPRESENTATION, THE ARBITRATION AWARD IS FINAL AND BINDING. 15/

It is settled that under certain circumstances an individual employee may sue his or her employer for breach of a collective bargaining agreement. Smith v. Evening News Ass'n, 371 U.S. 195 (1962). Where the collective bargaining agreement provides for the resolution of disputes through arbitration, however, the employee is ordinarily confined to his arbitral remedies, and my not obtain judicial review of his claim.

> Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced.

Vaca v. Sipes, 386 U.S. 171 (1967).

Only if the union violated its duty of fair representation may plaintiff attack the arbitration award. Hines v. Anchor Motor Freight, 424 U.S. 554 (1976); UPS v. Mitchell, 451 U.S. 56 (1981). Plaintiff must therefore bring herself within an exception to the finality rule. Otherwise "plenary review by a court of the merits would make meaningless the provisions

---

15/ Appellees were dismissed from this claim on the basis that it was barred by the statute of limitations; although the district court granted the motion for reconsideration as to BRAC, it denied it as to SP and PFE. Because resolution of this issue impacts the Employer, PFE and Southern Pacific address it on the merits.

VII

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court affirm the decision in all respects.

DATED: June 25, 1990

McLAUGHLIN AND IRVIN

By _____
Wayne M. Bolio

Attorneys for Appellees Southern Pacific Transportation Company and Pacific Fruit Express Company

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(footnote continued from previous page)
meritless. A loss of consortium claim must be based on an underlying wrong to the spouse. Rodriguez v. Bethlehem Steel Corp., 12 Cal.3d 382, 408 (1974). The husband's loss of consortium necessarily stands or falls with the employee's claim. Santiago v. Employee Benefit Services, 168 Cal.App.3d 898, 906 (1985). The court properly dismissed this claim. (RE 895-96.)

31/ Neither may plaintiff complain of the failure to answer the second amended filed in June 1989. (AOB 36-37.) Judgment in favor of PFE and SP had been entered on February 6, 1989, thus terminating the litigation against these appellees. (DEN 98, 99.)

PROOF OF SERVICE BY MAIL

State of California
County of Santa Clara

I am and at the time of the service hereinafter mentioned was a resident of the State of California, County of Santa Clara, and at least 18 years old. I am not a party to the within entitled action. I am an attorney licensed to practice in the State of California.

My business address is Box 60485, Sunnyvale, California 94086-0485. On 10-31-92 I deposited in the United States mail at Sunnyvale, California, enclosed in a sealed envelope and with the postage prepaid the attached

INJURED PARTY SIEU MEI TU RESPONSE TO OBJECTION SPT TO DISCOVERY REQUEST DISMISSAL

addressed to the persons listed on the attached sheet:

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on 10-31-92 at Sunnyvale, California.

LEE J. KUBBY

ATTACHED SHEET

Honorable Paul S. Cross
Interstate Commerce Commission
12th & Constitution Aves. NW
Washington, DC 20423

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was expected to show, Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1416 (9th Cir. 1987), the District Court did not abuse its discretion in denying the request for further discovery.

(6) Defendants SP's and PFE's motion for summary judgment

On February 6, 1989, the District Court granted defendants SP's and PFE's motion for summary judgment on Count 4 and Count 6.

This Court reviews the District Court's grant of summary judgment de novo. Miller v. Fairchild Industries, Inc., 797 F.2d 727 (9th Cir. 1986), appeal after remand, 876 F.2d 718, opinion amended, 885 F.2d 498 (1989), cert. denied ___ U.S. ___, 110 S.Ct. 1524, 108 L.Ed.2d 764 (1990). This Court must determine whether there are any genuine issues of material fact, viewing the evidence in the light most favorable to the moving party, and whether the District Court correctly applied the law. Ashton v. Cory, 780 F.2d 816, 818 (9th Cir. 1986).

To establish a prima facie discrimination claim, plaintiff must show that she is (1) a member of a protected group; (2) her job performance was satisfactory; (3) she was discharged from her position; and (4) others not in the protected class were retained by defendants. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976). The burden then shifts to the defendants to articulate a legitimate nondiscriminatory reason for the action. If that burden is sustained, the burden then shifts back to the plaintiff to establish pretext by showing either that a discriminatory reason

more likely than not motivated the employer or that the employer's explanation is unworthy of credence. Perez v. Curcio, 841 F.2d 255, 257 (9th Cir. 1988), citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981).

The District Court held that the plaintiff had established a prima facie case of discrimination, finding that plaintiff is a member of three protected groups, her job performance was satisfactory since several of her superiors rated her work as exceptional, she was discharged, and other employees who were not female, Asian, or over 40 were transferred to positions at SP that the plaintiff was qualified to perform. Defendants challenge the District Court's finding that the plaintiff was eligible for transfer, but our disposition makes it unnecessary for us to rule on that point.

Second, the Court held that the defendants had rebutted the presumption of discrimination. The Court found that the defendants had offered "substantial proof supporting their contention that Srey Mei was furloughed for economic reasons. PFE had experienced a severe decline in business due to increased competition from the trucking industry prior to the 1985 merger." The Court further pointed out that other employees who were not members of a protected class were also not transferred to SP.

The District Court then found that the plaintiff had not presented evidence which raised a genuine issue of fact challenging defendants' explanation of plaintiff's termination.

Plaintiff challenges the District Court's finding that the defendants had demonstrated a nondiscriminatory reason for her termination. First, she argues that the defendants are estopped from arguing that her termination was a result of PFE's economic decline due to representations contained in the alleged "common law agreement". The December 18, 1978 letter stated that plaintiff's position was permanent and "fully protected" under the union contract so that if the company did not have a job for her, she would continue to be paid and gain retirement benefits. She also argues that the decline in business clause does not apply to her due to the date at which she started working.

These arguments essentially restate the plaintiff's claim for wrongful termination. In order to find that defendants were "estopped" from asserting that plaintiff was fired due to economic reasons, this Court would have to interpret the collective bargaining agreement and resolve the wrongful termination claims on the merits. The plaintiff has not appealed the dismissal of the wrongful termination claims, and they are in any event subject to mandatory arbitration under the RLA.

Moreover, defendants submitted substantial evidence to support their contention that PFE was experiencing economic problems. Tom Ellen, former General Manager of PFE, submitted a declaration regarding his knowledge of the economic pressures created by deregulation, competition from the trucking industry, and a large wage increase awarded to the union. Under California law, reduction of work force necessitated by economic

circumstances constitutes good cause for dismissal. Gianaculas v. Trans World Airlines, Inc., 761 F.2d 1391 (9th Cir. 1985).

Richard Fend, Assistant Controller of PFE at the time the company was absorbed by the parent company, submitted a declaration stating that he was responsible for deciding which positions would be transferred to SP, and made that decision based on the job duties of a particular position, not the identity of the employee holding that position. He attached exhibits detailing which of the 16 clerks at PFE were furloughed and/or transferred to SP, which information was obtained from the company personnel files. Fifteen of the PFE clerks were over age 40; nine of these were transferred. Of the seven female clerks, four were transferred. Of the two Asian clerks, one was transferred to SP. Fend avers, "Ms. Tu was not transferred because, at the time, she was performing miscellaneous or general clerk functions almost all of which ceased to exist after October 1, 1985." The plaintiff did not depose either Ellen or Fend. The District Court reasonably found that the defendants had asserted legitimate, nondiscriminatory reasons for plaintiff's termination.

The plaintiff also challenges the District Court's finding that she did not present evidence rebutting defendants' explanation. However, little of plaintiff's evidence is admissible. Plaintiff asserts in her "Declaration in Opposition to Motion for Summary Judgement [sic]", that the work conditions were made intolerable so that she would voluntarily leave and

that she was moved to positions that were designed to be terminated so that she would not receive job protection. These assertions have no foundation and are not within her personal knowledge. Plaintiff's allegations of sexual jokes contain no citation to the record.

Plaintiff testified in her deposition regarding friction with the management over expense reports; i.e. the plaintiff's manager, Rick Fend, was angry when she questioned his expense reports. She also testified that Walsh told her that she was fired because Rick Fend and Edna Clark (whose role is unclear) did not like her and that another supervisor stated that she had trouble with Fend. This testimony is inadmissible hearsay and fails to relate to plaintiff's claims of discrimination based on sex, race, or age. Defendants also argue that these discovery materials were not presented to the trial court, a fact which plaintiff does not contest. Daly-Murphy v. Winston, 837 F.2d 348, 351 (9th Cir. 1988) (the reviewing court will normally not supplement the record on appeal with material not considered by the trial court).

In her deposition plaintiff also testified to derogatory remarks made about Chinese persons: Mr. Walsh, one of her supervisors, once stated that "pretty soon the Chinese would own San Francisco." Another time when the plaintiff had trouble working a new phone system, Rick Fend stated, "You can't talk English. You can't even push the button." The plaintiff testified that Fend made numerous remarks about Chinese, although

she could not remember other comments. She also could not remember if any other employees made racially derogatory remarks to her. In Stallcop, supra, the plaintiff cited her supervisor's statement that she "did not know the English language" as proof of discriminatory conduct. The Court held, "derogatory ethnic statements, unless excessive and opprobrious, are insufficient to establish a case of national origin discrimination." Stallcop, 820 F.2d at 1050-51. The derogatory statements cited in this case are also not excessive and opprobrious. Also, the defendants assert that this deposition material was not presented to the District Court.

Although plaintiff claims that PFE intentionally caused its economic decline, her only evidence is her declaration that she was told not to answer the phone because PFE did not want the business.

The District Court did not err by holding that plaintiff had failed to demonstrate the existence of specific facts showing there is a genuine factual issue that defendants' reason for her termination was pretextual.

Plaintiff also claims that SP's failure to rehire her is retaliatory discrimination for bringing this lawsuit. This claim was not alleged in either the initial compliant or the first amended complaint;[9] the plaintiff does not address the

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[9]Plaintiff argues that the retaliatory discrimination claim was explicitly alleged in the second amended complaint; however, this complaint was filed after the District Court granted defendants' motion for summary judgment.

applicability of the exceptions to the general rule against considering issues for the first time on appeal. Javanovich, 813 F.2d at 1037, citing Bolker, 760 F.2d at 1042. Thus, this issue will not be considered.

(7) Union's motion for summary judgment

Whether a union has breached its duty of fair representation is a mixed question of law and fact which this Court reviews de novo. Galindo v. Stoody Co., 793 F.2d 1502, 1513 (9th Cir. 1986), citing United States v. McConney, 728 F.2d 1195, 1204 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984); see also Johnson v. United States Postal Service, 756 F.2d 1461, 1465 (9th Cir. 1985) (applying de novo standard to "ultimate findings"); but see Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1091 (9th Cir. 1978) (suggesting issue is a question for the trier of fact).

On August 14, 1989, the Court granted the defendant Union's motion for summary judgment, holding that plaintiff had made no evidentiary showing that the Union's actions were discriminatory or in bad faith and that the Union had adhered to established procedures for handling grievances.

To establish a breach of fair representation, the plaintiff must show that the Union's conduct was "arbitrary, discriminatory, or in bad faith." Galindo, 793 F.2d at 1513, citing Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842 (1967). Union decisions regarding the handling of grievances are afforded wide latitude, and "a union's conduct may

not be deemed arbitrary simply because of an error in evaluating the merits of a grievance... or in presenting the grievance at an arbitration hearing." Galindo, 793 F.2d at 1515, citing Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985), cert. denied, 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986) (emphasis added by Galindo author).

In Galindo, this Court found that the Union representative's failure to bring up an issue at arbitration reflected a judgmental decision. Similarly here, the Union's failure to address the plaintiff's individual considerations -- her claims that she was exempt from the decline in business clause of the collective bargaining agreement and her claims of discrimination based on sex, race, and age -- reflect a judgmental decision. As in Galindo, "this representation was, at worst, negligent." Galindo, 793 F.2d at 1515. Negligent conduct may only be the basis of a fair representation claim when "the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." Dutrisac v. Caterpillar Tractor Co, 749 F.2d 1270, 1274 (9th Cir. 1983) (emphasis added). The Union's conduct in question here was not ministerial.

In order to recover for a breach of fair representation, the plaintiff must also establish the underlying grievance had merit. Skillsky v. Lucky Stars, Inc., 893 F.2d 1088 (9th Cir. 1990). As discussed above, the plaintiff did not introduce evidence to support her claim of discrimination. In addition, plaintiff has

not introduced specific evidence to support her claim that the decline in business clause did not apply to her. This Court has only the language of the decline in business clause to evaluate: "the provisions of this section will not apply to Pacific Lines employees in the San Francisco General Offices with seniority dates of March 16, 1963 or earlier." On its face, this applies only to certain [SP] employees of Pacific Lines working in the San Francisco office, whereas the plaintiff was an employee of PFE working in Brisbane, California at the time of the termination. Moreover, the plaintiff introduced no evidence that there was a conflict of interest by the Union which resulted in its failure to effectively represent plaintiff.[10]

The District Court did not err in granting summary judgment to the Union.

(8) The cross-appeal

On February 6, 1989, the District Court ruled that plaintiff's breach of fair representation claim against the defendant Union was barred by the six month statute of limitations in section 10(b) of the National Labor Relations Act. The Court later reconsidered and reversed its previous ruling that the plaintiff's claim was barred, concluding that the limitations period did not begin to run until the plaintiff was informed of the arbitrator's decision. The Union cross-appeals this issue. However, since the District Court properly granted

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[10]Plaintiff references only counsel's statements during plaintiff's deposition and at hearing.

summary judgment to the Union on plaintiff's breach of fair representation claim, it is not necessary for this Court to decide the cross appeal, and it will be dismissed as protective.

CONCLUSION

In summary, the District Court properly denied the plaintiff's motion to remand since her claims were arguably governed by the collective bargaining agreement and she alleged violations of 42 U.S.C. §§ 1981, 1983, and 1985. Second, the District Court properly dismissed defendants ATSF and SFSP for plaintiff's failure to timely serve under Fed.R.Civ.P. Rule 4(j). The District Court also did not err in dismissing Count 5, alleging conspiracy, since there is no private right of action pursuant to 49 U.S.C. § 11705. Further, the plaintiff's claim for intentional infliction of emotional distress was properly dismissed as a "minor dispute" subject to mandatory arbitration. The District Court did not err in not allowing the plaintiff more time for discovery, and properly granted summary judgment to defendants SP and PFE. Plaintiff failed to demonstrate the existence of specific facts showing a genuine factual issue that defendants' claims of economic decline were pretextual.

In addition, this Court need not decide the cross appeal because the District Court properly granted summary judgment to the Union on plaintiff's breach of fair representation claim. The cross appeal will therefore be dismissed as protective.

Finally, this Court declines to award defendants ATSF and SFSP an award of sanctions against plaintiffs and their counsel.

APPEAL NO. 89-16186 AFFIRMED; CROSS-APPEAL NO. 89-16292 DISMISSED. Costs in favor of appellees.