FD-30400

3392

EC

INTERSTATE COMMERCE COMMISSION

SERVICE DATE

OCT 9 1986

DECISION NO. 26

Finance Docket No. 30400

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

Decided: October 3, 1986

By petition filed September 2, 1986, the Santa Fe Southern Pacific Corporation (SFSP), The Atchison, Topeka and Santa Fe Railway Company (ATSF), and Southern Pacific Transportation Company (SPT) (applicants) request (1) that the Commission reopen this proceeding for the purpose of considering new evidence, and (2) that the Commission defer issuing a written decision and order implementing the Commission's vote of July 24, 1986, pending receipt and consideration of the new evidence.

In support of the petition to reopen, applicants state that they propose to submit new evidence "relating to (1) conditions that could be imposed to ameliorate adverse impacts that the proposed merger might have on competition, (2) the deteriorating financial condition of SPT, and (3) increased merger savings." In support of the request for deferral, the applicants state that the issuance of a decision implementing the Commission's vote "could restrict their ability to fashion remedies through negotiations or other means."

The Denver and Rio Grande Railroad Company filed a statement in support of applicants' petition to reopen along with a "Settlement Agreement and Memorandum of Intent Between the Denver and Rio Grande Western and the Southern Pacific and Santa Fe Railway Company." Other supporting statements were filed by the Public Utility Commissioner of Oregon/State of Oregon Department of Transportation and the United States Department of Transportation.

The Union Pacific Railroad Company and Missouri Pacific Railroad Company filed a reply stating that it was not opposed to reopening and ultimately approving the merger if it is conditioned to remedy the resulting anti-competitive effects.

Replies in opposition to applicants' petition to reopen were filed by the United States Department of Justice, the Attorney General of the State of California, Missouri-Kansas-Texas Railroad Company System, ICI Americas Inc., and Mazda Motors of America (Central), Inc.

Insofar as applicants seek reopening of this proceeding, we will withhold ruling on this aspect of their petition for a period of time to enable applicants to complete their efforts to attain workable solutions to the potential adverse impacts of the merger. In their petition, applicants state that they are negotiating voluntary agreements to resolve the competitive issues in this proceeding. If agreements are negotiated which address those public interest issues and not merely the private interests of their negotiating partners, the Commission will be receptive to reopening the proceeding to give consideration to the changed circumstances. Applicants should supplement their petition to reopen with a detailed description of their entire proposal and the evidence they intend to submit in support of it. They should also include a proposed procedural schedule for the Commission's consideration of their revised transaction.

As a corollary issue, we recognize that we voted in our open conference to require applicants to present to us a plan of divestiture. In view of our decision to hold applicants' petition to reopen the proceeding in abeyance, the time period for the submission of that plan, if ultimately necessary, will not begin until we have finally ruled on applicants' petition to reopen.

We are denying applicants' petition insofar as it seeks deferral of a written decision for essentially three reasons. Firstly, while applicants have argued that the issuance of a decision will restrict their ability to negotiate remedies, we are unwilling, as a matter of simple fairness, to disrupt our normal decisional process to favor the applicants' negotiating position over that of the other parties in this proceeding. Secondly, the public interest requires us to issue a reasoned decision on the basis of the record, particularly in view of the substantial number of inquiries from applicants' employees and stockholders, Members of Congress, Governors, and the general public. Thirdly, our statutory and administrative obligations require that we issue our decision in a timely fashion.1/ See 49 U.S.C. Section 11345 and 5 U.S.C. Section 555(e).

1/ The record in this proceeding was closed on April 20, 1986 and certified to the Commission on April 21, 1986. Oral argument was presented May 21, 1986. At an open conference held on July 24, 1986, a majority of the Commission voted to deny the merger application.

Finally, the National Industrial Transportation League (NITL) filed a petition on August 18, 1986, to reopen and reconsider the Commission's "action taken in the instant case on July 24, 1986 when the applications herein were denied." International Minerals & Chemical Corporation filed a statement in support of this petition. NITL argues that during the open conference at which we decided the matter "the Commission erred in . . . cutting off any discussion as to the possibility of granting the application, subject to the imposition of conditions which would insure the preservation and strengthening of competition between and among railroads in the service areas affected." However, NITL fails to demonstrate any material error as a ground for reopening. Indeed, it cannot do so absent issuance of a final decision.

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

It is ordered:

1. Applicants' request to reopen the record in this decision, along with support statements and tenders of evidence, will be held in abeyance for a period of 60 days after the issuance of a decision on the merits to allow applicants the opportunity to perfect a petition to reopen.

2. The Commission's order that applicants file a plan of divestiture is stayed pending a final decision by the Commission on applicants' petition to reopen the record.

3. Applicants' request to delay issuance of a decision on the merits is denied.

4. The petitions or requests for reconsideration and/or reopening filed by parties other than the applicants, are rejected without prejudice to refiling after a decision on the merits is issued.

5. This decision is effective on the date served.

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

Noreta R. McGee
Secretary

(SEAL)

CHAIRMAN GRADISON, concurring in part and dissenting in part:

I agree with the decision to the extent it delays the due date for filing a plan of divestiture until after the Commission decides the petition to reopen. I would, however, have granted reopening now to permit new evidence to be filed and considered.

The majority deserves an opportunity to articulate their concerns about the merger through a written decision. To this end I support the majority's action in denying the request to delay the issuance of the written decision.

COMMISSIONER ANDRE, dissenting in part:

I would have granted the petition for delay in issuance of a decision and for reopening of the record.

This decision will be included in the bound volumes of the ICC 2d series

SERVICE DATE

OCT 10 1986

INTERSTATE COMMERCE COMMISSION

Finance Docket 30400, et al.

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

TABLE OF CONTENTS

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 30400[1]

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

Decided: July 24, 1986

In Finance Docket No. 30400, the acquisition of control by Santa Fe Southern Pacific Corporation of Southern Pacific Transportation Company and its rail carrier subsidiaries, and the merger of The Atchison, Topeka and Santa Fe Railway Company and Southern Pacific Transportation Company into The Southern Pacific and Santa Fe Railway Company, are denied. Related applications are also denied.

---

[1] This decision embraces Finance Docket No. 30400 (Sub-No. 1), St. Louis Southwestern Railway Company--Merger Exemption--Southern Pacific Transportation Company; Finance Docket No. 30400 (Sub-No. 2), The Southern Pacific and Santa Fe Railway Company--Control Exemption--Sunset Railway Company; Finance Docket No. 30400 (Sub-No. 3), The Southern Pacific and Santa Fe Railway Company--Control Exemption--Central California Traction Company; Finance Docket No. 30400 (Sub-No. 4), The Southern Pacific and Santa Fe Railway Company--Abandonment and Discontinuance of Service Exemption; Finance Docket No. 30400 (Sub-No. 5), The Southern Pacific and Santa Fe Railway Company--Use of Terminal Facilities--Union Pacific Railroad Company; Finance Docket No. 30400 (Sub-No. 6), The Southern Pacific and Santa Fe Railway Company--Construction Exemption--Los Angeles, CA; Finance Docket No. 30400 (Sub-No. 7), The Southern Pacific and Santa Fe Railway Company--Assumption of Obligation and Liability; Docket No. MC-F-15628, Santa Fe Southern Pacific Corporation--Control--Pacific Motor Trucking Company, Pacific Motor Transport Company, and Louis Heller, Incorporated; Finance Docket No. 30400 (Sub-No. 8), Missouri-Kansas-Texas Railroad Company--Trackage Rights--Southern Pacific Transportation Company Between San Antonio and Corpus Christi, TX; Finance Docket No. 30400 (Sub-No. 9), Missouri-Kansas-Texas Railroad Company--Use of Terminal Facilities of Missouri Pacific Railroad Company at Corpus Christi, TX; Finance Docket No. 30400 (Sub-No. 10), Missouri-Kansas-Texas Railroad Company--Trackage Rights--Southern Pacific Transportation Company Between San Antonio and Eagle Pass, TX; Finance Docket No. 30400 (Sub-No. 11), Missouri-Kansas-Texas Railroad Company--Trackage Rights--St. Louis Southwestern Railway Company Between Topeka and Liberal, KS; Finance Docket No. 30400 (Sub-No. 12), Missouri-Kansas-Texas Railroad Company--Trackage Rights--Southern Pacific Transportation Company Between Houston and Texas City, TX; Finance Docket No. 30400 (Sub-No. 13), Missouri-Kansas-Texas Railroad Company--Trackage Rights--Southern Pacific Transportation Company Between Houston and Beaumont, TX; Finance Docket No. 30400 (Sub-No. 14), Missouri-Kansas-Texas Railroad Company--Trackage Rights--The Atchison, Topeka and Santa Fe Railway Company Between Dallas and Ward Spur, TX; Finance Docket No. 30400 (Sub-No. 16), Union Pacific Railroad Company and Missouri Pacific Railroad Company--Trackage Rights--(1) Southern Pacific Transportation Company Between El Paso, TX and Colton, CA; Between Mojave and Bakersfield, CA; Between Colton and Mojave, CA; Between Bakersfield and Lathrop, CA; and Between Sacramento and Oakland, CA; (2) The Atchison, Topeka and Santa Fe Railway Company Between Barstow and Mojave, CA; Between Kern Junction and Oil Junction, CA; and Between Escalon and Riverbank, CA; and (3) The Atchison, Topeka and Santa Fe Railway Company and Southern Pacific Transportation Company Between Oil Junction and Maltha, CA; and Between Martinez and Antioch, CA,

(Footnote continued on next page)

Michael W. Blaszak, Robert R. Cowell, Ronald S. Flagg, Terence M. Hynes, Ronald A. Lane, R. Eden Martin, Thormund A. Miller, C. Paul Moates, Milton E. Nelson, Jr., Vincent F. Prada, John MacDonald Smith, Michael A. Smith, Douglas E. Stephenson, Gus Svolos, Stuart E. Vaughn, Guy Vitello, Kurt E. Vragel, Jr., Louis P. Warchot, Richard E. Weicher, Michael L. Whitener, and Dennis W. Wilson for Santa Fe Southern Pacific Corporation, The Atchison, Topeka and Santa Fe Railway Company, and Southern Pacific Transportation Company.

Edward D. Greenberg, Robert N. Kharasch, Mark T. Priesing, Kathleen Mahon, and Michael E. Roper for Missouri-Kansas-Texas Railroad Company System.

William G. Barr, Paul A. Conley, Jr., James V. Dolan, J. Michael Hemmer, Mark A. Kalafut, Forrest N. Krutter, Gregg H. Levy, S. William Livingston, Jr., Charles A. Miller, David H. Remes, Arvid E. Roach, II, Virginia G. Watkin, and Lawrence E. Wzorek for Union Pacific Railroad Company and Missouri Pacific Railroad Company.

Joseph Auerbach, Harvey E. Bines, Robert G. Bleakney, Jr., Robert L. Calhoun, Robert K. Drieling, Eric Fishman, Morris Raker, David M. Schwartz, and Robert E. Zimmerman for the Kansas City Southern Railway Company and Louisiana and Arkansas Railway Company.

Charles H. White, Jr., for The Texas Mexican Railway Company.

Nell Hoffman Bonaparte, Susan S. DeSanti, Samuel R. Freeman, Thomas B. Leary, Kevin I. MacKenzie, Mary Anne Mason, George W. Mayo, Jr., E. Barrett Prettyman, Jr., Peter F. Rousselot, Eric Von Salzen, and Kendall T. Sanford for The Denver and Rio Grande Western Railroad Company.

Douglas H. Ginsburg, Catherine B. Klion, Donna N. Kooperstein, Charles F. Rule, and James R. Weiss for United States Department of Justice.

G. Joseph King, Rosalind A. Knapp, Diane R. Liff, Jim J. Marquez, John M. Mason, Mary Bennett Reed, Miguel Rovira, and Paul Samuel Smith for United States Department of Transportation.

Donald [illegible] Engle and Nicholas P. Moros for Burlington Northern Railroad Company.

Peter S. Craig and Frederick C. Ohly for National Railroad Passenger Corporation (AMTRAK).

Beecher Rintoul for Association of Railway Technical Employees.

(Continuation of footnote 1)
Finance Docket No. 30400 (Sub-No. 18), The Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company--Trackage Rights--Southern Pacific Transportation Company Between Avondale and West Lake, LA; Between Beaumont and Houston, TX; Between Houston and Galveston, TX; and Between Greenville and Fort Worth, TX; Finance Docket No. 30400 (Sub-No. 19), The Texas Mexican Railway Company--Trackage Rights--Southern Pacific Transportation Company Between Corpus Christi and San Antonio, TX; and Finance Docket No. 30400 (Sub-No. 20), The Denver and Rio Grande Western Railroad Company--Acquisition or Trackage Rights--Southern Pacific Transportation Company Between Ogden, UT and Klamath Falls, OR/Roseville, CA, and Between Points in California, Oregon, and Nevada.

Richard H. Kraushaar and Harold A. Ross for Brotherhood of Locomotive Engineers.

Deborah S. Merkel for International Brotherhood of Teamsters.

John O' B. Clarke, Jr., John J. Delaney, and William G. Mahoney for Railway Labor Executives' Association.

Gordon P. MacDougall for Patrick W. Simmons, Illinois Legislative Director for United Transportation Union.

Nelson B. Ladd, Jr., for Arkansas Transportation Commission and Arkansas State Highway and Transportation Department.

Janice E. Kerr, Vincent V. MacKenzie, and J. Calvin Simpson for People of the State of California and the Public Utilities Commission of California.

Donald A. Reiter and John K. Van DeKamp for the California Attorney General.

Gordon S. Baca, Eugene E. Bonnstetter, Thomas A. Carroll, and O. J. Solander for the California Department of Transportation.

Dwight Bower for Colorado Department of Highways.

Michael B. Rees and John R. Scheirman for the State of Kansas.

Robert N. Hunter for Missouri Highway and Transportation Department.

James W. Bolt and R.A. Ward for Oklahoma Department of Transportation and Oklahoma Corporation Commission.

Thomas E. Twist for the Public Utility Commissioner of Oregon and the Oregon Department of Transportation.

Jim B. Cloudt and Michael A. James for Railroad Commission of Texas.

Nelson Atkins for City of Compton.

James A. McKelvey for City of Fresno.

J. Michael Cavenaugh, Boris H. Lakusta, David J. Marchant, and Grace N. Parke for City of Martinez and East Bay Regional Park District.

Sandra J. Fox, Robert J. Logan, Steven A. Lancellotta, Robert L. Oswald, Chandler L. Van Orman, and Edward K. Wheeler for City of San Jose.

Brien E. Kehoe and Frederick L. Shreves, II for Port of San Francisco.

Sharon L. Anderson and Victor J. Westman for Contra Costa County.

Blair H. Checketts and William E. Grass for County of Merced.

David C. Fine, Colin Lennard, Mark A. Pisano, and Katherine E. Stone for Southern California Association of Governments.

David S. Ainsworth for American President Companies, Inc.

Kevin J. Dowd, C. Michael Loftus, and William L. Slover for Arizona Electric Power Cooperative.

Barry J. Brooks for ARMCO.

Lyman D. Griswold for CALCOT, Ltd.

Richard Harrington for the California Grape and Tree Fruit League.

Victor Anderson for Cargill, Incorporated.

Allen E. Parker for Halliburton Services, Inc.

Ronald N. Cobert for LACNY Freight Forwarders, Inc.

Michael C. Hanzel, M. E. Petruccelli, John A. Vuono, and Richard R. Wilson for PPG Industries, Inc.

Dickson R. Loos and Barry Roberts for Sunkist Growers, Inc.

Richard J. Munsch for United States Steel Corporation.

Marion Quesenbery for Western Growers Association.

Robert D. Hughes for Witco Corporation.

DECISION

BY THE COMMISSION:

SYNOPSIS

The primary applications seek authority for Santa Fe Southern Pacific Corporation (SFSP)2/ to control Southern Pacific Transportation Company, and certain subsidiaries, and to merge Southern Pacific Transportation Company and its carrier subsidiaries with the Atchison, Topeka and Santa Fe Railway Company and its carrier subsidiaries, for ownership, management and operation. Southern Pacific Transportation Company has been held in a voting trust3/ since Southern Pacific Company and Santa Fe Industries, both non-carrier holding companies, merged on December 23, 1983.

Responsive applications were filed by protesting railroads, seeking various trackage rights, purchase, and ratemaking conditions. These rail carriers are Denver & Rio Grande Western Railroad Company (DRGW), Kansas City Southern Railroad Company (KCS), Missouri-Kansas-Texas Railroad Company (MKT), Texas-Mexican Railroad Company (TM), and Union Pacific Railroad Company-Missouri Pacific Railroad Company (UP/MP). The United States Department of Justice opposed the merger, while the United States Department of Transportation supported it. Other State and Federal agencies, labor organizations, shippers, and other railroads participated in the proceedings.

2/ A list of abbreviations frequently used in this decision may be found in Appendix A.

3/ See Finance Docket No. 30400, Decision No. 2, Santa Fe Southern Pacific Corporation - Control - Southern Pacific Transportation Company (not printed), served December 23, 1983 (the "voting trust decision").

In considering a merger application, we are required to weigh the public benefits of the proposed transaction against any harmful effects. The proposed merger is being denied because, as presently structured, the transaction's anticompetitive effects outweigh its potential public benefits. Moreover, it has not been shown that the corrective conditions sought by other railroads would be effective in mitigating the anticompetitive consequences of the merger.

The merger has the potential to produce substantial public benefits through reduced transportation costs for applicants and improved service for shippers. These could be achieved through consolidation of facilities at common points (particularly at West Oakland, CA, Los Angeles, Phoenix, Dallas, Kansas City, and other points in California and Texas); more efficient use of equipment, resulting in fuel and maintenance savings; consolidation of the carriers' traffic and sales personnel, engineering and mechanical operations, and other operating functions; and more efficient service through traffic rerouting within the merged system, added run-through trains, and improved blocking. The carriers' proposed operating plan specifies other improvements as well.

However, the harmful effects of the transaction would be greater. The merger would create a strong potential for substantial profits over and above any cost savings by greatly reducing or eliminating competition, particularly on the West Coast and the Central and Southern Corridors. Specifically, the merged carriers' market share of Pacific Coast rail traffic would exceed 90 percent. Over the Southern Corridor, from Southern California through the Southwest to Texas and the Gulf, the merged carriers would have nearly an absolute monopoly over rail transportation. And for all rail traffic originating or terminating in the San Francisco Bay Area, to or from any point, the merged company would hold more than an 85 percent market share. Moreover, although not essential to our decision, we note that our conclusion that the merger would have serious anticompetitive effects is consistent with documentary evidence obtained from SFSP indicating that an express purpose of the merger was to achieve monopoly power.

The fact that the proposed merger would have anticompetitive effects is, in itself, not a barrier to approval of the transaction, provided that corrective conditions can be imposed to mitigate potential harms. However, the conditions proposed by the parties were not shown to be effective remedies in this case. The solicitation agreement entered into by SFSP and Burlington Northern failed to include a substantial amount of monopolized traffic and did not provide for service competition. Similarly, SFSP's rate constraint proposal would apply to less than 2 percent of the merged carriers' traffic and even that traffic would be unprotected after five years. The independent ratemaking authority proposed by the Kansas City Southern would leave the Southern Corridor wholly without service competition. Finally, the extensive trackage rights proposed by the Union Pacific to allow it to operate over the Southern Corridor and into California, and the trackage rights proposed by the Rio Grande to allow it to operate over the Central Corridor and into California would apparently alleviate some of the anticompetitive effects of the merger in those areas, but could create others. Moreover, such major rail restructuring could have significant unforeseen consequences. The Commission will not use its conditioning power to substantially restructure a transaction beyond the scope proposed.

Notwithstanding the anticompetitive effects of the proposed merger, SFSP argued that the Commission should approve the transaction, without corrective conditions, because of SPT's allegedly deteriorating financial condition. However, SPT's financial condition was not shown to be significantly different from that of December 1983, when SFSP characterized the company as a financially viable and vigorous competitor. The SFSP was simply unable to show that the SPT's financial condition should be an overriding factor in our consideration of the public interest.

Weighing these considerations, the merger, as now structured, is denied and SFSP must divest either SPT or ATSF. Until divestiture is accomplished, the Commission will retain jurisdiction over all involved entities. SFSP shall provide such financial assistance as may be necessary to maintain SPT's financial and competitive viability. Reporting requirements are imposed on the applicants to ensure orderly divesture. A plan of divestiture shall be filed with the Commission within 90 days of this decision.

INTRODUCTION

On November 22, 1983, Santa Fe Southern Pacific Corporation, the Atchison, Topeka and Santa Fe Railway Company, and the Southern Pacific Transportation Company jointly filed a notice of intent to file an application under 49 U.S.C. 11343 et seq., seeking authorization of SFSP's acquisition of control of SPT and the merger of ATSF and SPT. On December 14, 1983, we issued a cease and desist order preventing the imminent combination of SFI and SPC, the respective holding companies of ATSF and SPT, until we had an opportunity to evaluate whether the proposal to place SPC's stock in SPT in an irrevocable independent voting trust would insulate SPT from control by SPC, SFI, and SFSP during the pendency of this proceeding.

Despite our deep reservations about the wisdom of placing SPT in a voting trust, we determined that the voting trust, subject to acceptance of specific conditions and subject to possible further conditions, was compatible with our regulations and our oversight responsibilities. Accordingly, on December 23, 1983, only hours after we issued our decision lifting the cease and desist order, the voting trust was established, and the holding companies were merged.

On March 22, 1984, the control and merger application was filed. In a related application, applicants filed a notice of exemption for the merger of St. Louis Southwestern Railway Company (SSW), now controlled by SPT, into SPT, contingent upon the merger of SPT and ATSF. Petitions for exemption were also filed for SPSF Railway to control the Sunset Railway Company and the Central California Traction Company under 49 U.S.C. 11343, and for exemption from prior approval under 49 U.S.C. 10901 forthe construction of a new track connection between existing lines. Applicants also sought approval under 49 U.S.C. 11103 for the joint use of certain terminal facilities owned by UP, and under 49 U.S.C. 11341 for authority of SPSF Railway to assume obligations and liabilities on securities issued or guaranteed by SPT and ATSF. In addition, a petition for exemption for several merger-related abandonments and discontinuances of service were filed. The applications were accepted for filing, and a notice of filing was published in the Federal Register on April 20, 1984, 49 Fed. Reg. 16881 (1984).4/

NATURE AND SCOPE OF THE PRIMARY APPLICATIONS

As a result of the combination of SFI and SPC, the common stock of those corporations was converted into shares of common stock in SFSP. If the application in Finance Docket No. 30400 were approved, the voting trust would be dissolved and SPT and ATSF would be merged into SPSF Railway, which would be a wholly owned subsidiary of SFSP. Immediately prior to consummation of the merger, SSW would be merged into SPT.

The shares of both preferred and common stock of SSW issued and outstanding on the effective date of the agreement would be canceled and any shares held by a stockholder other than SPT would be converted into a right to receive cash. Each share of Series A and Series B Preference shares, held by the United States pursuant to 45 U.S.C. 825(d), would be converted into a Series A or Series B Preference Share of SPT, and then would be converted into issued and outstanding redeemable Preference Shares of SPSF Railway. Under the merger agreement, all property of SPT and ATSF would be vested in SPSF Railway, which would assume all liabilities and obligations of SPT and ATSF. Authorized capital stock of SPSF Railway would be owned solely by SFSP. All issued and outstanding common stock of SPT and ATSF would be canceled, and no other securities would be issued.

SFI is a wholly-owned subsidiary of SFSP. Prior to the merger of SPC and SFI, SFI was a noncarrier holding company with subsidiaries engaged in rail, truck, and pipeline operations, natural resources development, real estate development and construction, forest projects, manufacturing, and retailing.5/ Its gross revenues and sales for 1982, its last full year of independent operations, were $3,159.6 million. ATSF is its rail subsidiary.

ATSF operates over 12,319 miles of railroad in Arizona, California, Colorado, Illinois, Indiana, Iowa, Kansas, Louisiana, Missouri, Nebraska, New Mexico, Oklahoma, and Texas. Its principal routes are as follows:

> Southern transcontinental route: between Chicago and Illinois/Kansas City gateways on the east and northern and southern California on the west.
>
> Northern transcontinental route: between the same areas as the Southern route; branches from the Southern route near Emporia, KS, and rejoins it near Albuquerque, NM. ATSF also serves Denver and Pueblo, CO.

4/ The application for SFSP to control three motor carriers controlled by SPT was also accepted in No. MC-F-15628, Santa Fe Southern Pacific Corporation - Control - Pacific Motor Trucking Company, Pacific Motor Transport Company and Louis Heller, Incorporated. Notice was published in the Federal Register on April 20, 1984, 49 Fed. Reg. 16880 (1984).

5/ Other than ATSF, SFI's subsidiaries included Santa Fe Natural Resources, Inc., SF Mineral Corporation, Kirby Forest Industries, Inc., Santa Fe Land Improvement Company, Robert E. McKee, Inc., and the Zia Company. During the pendency of these proceedings, The Santa Fe Trail Transportation Company was sold to a non-carrier entity.

East-west route: between northern and southern California on the west and Houston and Texas gateways on the east; branches from the Southern route near Clovis, NM.

North-south route: between Chicago and Illinois/Kansas City gateways on the north and Dallas/Ft. Worth and Houston on the south.

Principal terminals for ATSF include those located at Los Angeles and Barstow, CA, Kansas City, and Chicago; the principal points of interchange for ATSF include Kansas City, Chicago and Streator, IL, Pueblo, CO, Ft. Worth and Dallas, TX, Stockton, CA, and Avard, OK.

Based on revenues, the principal commodities handled by ATSF in recent years have been merchandise, chemicals, food products, grain, coal, vehicles and parts, and petroleum products. ATSF is a leading rail carrier in trailer-on-flatcar and container-on-flatcar (TOFC/COFC) services.

SPC is also a wholly-owned subsidiary of SFSP. Prior to its merger with SFI, SPC was a noncarrier holding company with subsidiaries engaged in rail, truck and pipeline operations, real estate and natural resources activities, and various insurance, financial services, and leasing activities.6/ Its gross operating revenues for 1982, its last full year of independent operations, were $2,710.7 million. Prior to the SFSP combination, SPT was its major rail subsidiary.

SPT, including SSW, operates over 13,270 miles of railroad in Arizona, Arkansas, California, Illinois, Kansas, Louisiana, Missouri, Nevada, New Mexico, Oklahoma, Oregon, Tennessee, Texas, and Utah. Its principal routes are as follows:

West Coast route: between the Los Angeles Basin and Portland, OR.

Sunset route: between the Los Angeles Basin, on the west, and Houston and New Orleans on the east.

Golden State route: between the Los Angeles Basin, on the west, and Kansas City and East St. Louis, IL, on the east, via Tucumcari, NM, branching off the Sunset route at El Paso, TX.

Cotton Belt route: between Gulf of Mexico points on the south and Memphis, TN, and East St. Louis, on the north, via Pine Bluff, AR, with service between California and the northern points connecting at Flatonia, TX.

Overland route: between northern California and Oregon and points to the east, via the Ogden, UT gateway.

Principal terminals for SPT include those located at Eugene and Roseville, OR, Los Angeles and West Colton, CA, Houston, TX,

6/ Other than SPT, SPC's subsidiaries included Southern Pacific Pipe Lines, Southern Pacific Development Company, Bravo Oil Company, Southern Pacific Land Company, Constellation Reinsurance Company, and Bankers Leasing.

Pine Bluff, AR, and Kansas City. SPT's principal points of interchange include Los Angeles, CA, Ogden, UT, New Orleans and Shreveport, LA, Portland, OR, Dallas/Ft. Worth and Caldwell, TX and Deming, NM.

Based on revenues, the principal commodities handled by SPT in recent years have been processed food products, lumber products, chemicals, transportation equipment, farm products, paper products, ores, minerals, and fuels, and miscellaneous manufactured items.

POSITIONS OF THE PARTIES

As noted above, there have been numerous active participants in this case. While some of the participants opposed the consolidation, most of the participants sought or recommended that conditions be imposed on the consolidation to address its adverse consequences. The positions of the principal parties are summarized below.

United States Department of Justice

DOJ opposes the merger because of its serious adverse effect on competition, and because applicants have not demonstrated that the benefits would outweigh the adverse effects. It argues that no adequate remedy to the adverse effects is identifiable, and that the financial condition of SPT does not justify approval of the merger.

United States Department of Transportation

While identifying traffic that may suffer a loss of competition, DOT urges that the consolidation would be in the public interest and recommends approval subject to conditions to address the anticompetitive effects.

The Denver and Rio Grande Western Railroad Company

DRGW operates over 1,800 miles of track from Denver and Pueblo, CO, to Salt Lake City and Ogden, UT, and has trackage rights between Pueblo and Kansas City, MO. DRGW asserts that the merger would destroy competition provided by its joint-line service with SPT and asks that the consolidation be denied unless DRGW is granted conditions that would enable it to continue providing competitive service through the Central Corridor. DRGW seeks a combination of purchase and trackage rights over SPT lines from Ogden, UT to the San Francisco Bay area and Portland, OR.

Kansas City Southern Railway Company

KCS (and its wholly-owned subsidiary Louisiana and Arkansas Railway Company) operates over 1,600 miles of railroad over a north-south route between Kansas City, MO, and the Gulf ports of New Orleans, LA, and Beaumont/Port Arthur, TX, and an east-west route between New Orleans and Dallas, TX, via Baton Rouge and Shreveport, LA. KCS seeks denial of the merger because of its anticompetitive consequences. If the merger is authorized, KCS seeks independent rate-making authority over ATSF and SPT routes between California and the Houston/Galveston, TX area, related trackage rights, and trackage rights between Ft. Worth and Greenville, TX.

Missouri-Kansas-Texas Railroad Company

MKT (and its wholly-owned subsidiary the Oklahoma, Kansas and Texas Railroad Company) operates over 3,100 miles of railroad between Council Bluffs, IA, Omaha, NE, St. Louis, MO, and Kansas City MO/KS, and Dallas, Fort Worth, San Antonio, Houston and Galveston, TX. MKT seeks denial of the merger unless its trackage rights and related requests are granted to address the loss of rail competition in its region. MKT seeks trackage rights over SPT between San Antonio and Corpus Christi, TX or, in the alternative, between San Antonio and Eagle Pass, TX. MKT also seeks trackage rights over SSW lines between Topeka and Liberal, KS; over SPT between Houston and Texas City, TX, and between Houston and Beaumont, TX; and over ATSF between Dallas and Ward Spur, TX.

Texas Mexican Railway Company

TM is a Class II railroad, operating primarily between Laredo and Corpus Christi, TX. TM seeks trackage rights over SPT between San Antonio and Corpus Christi, TX, to preserve competitive rail service over U.S.-Mexico border crossing points.

Union Pacific Railroad Company and Missouri Pacific Railroad Company

UP/MP operate over 22,000 miles of railroad in Arkansas, California, Colorado, Idaho, Illinois, Iowa, Kansas, Missouri, Montana, Mississippi, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Tennessee, Texas, Washington, and Wyoming. UP/MP set forth in detail the loss of competitive rail options in New Mexico, Arizona, and California that would result from a grant of the merger, and seek trackage rights over SPT between El Paso, TX, and Colton, CA, and over SPT and ATSF lines between Colton and the San Francisco Bay area to address the anticompetitive effects.

States

A number of States[7] participated in this proceeding. Some filed comments, and some filed verified statements whose sponsors were subject to cross-examination and/or filed briefs. The positions of the States that sponsored verified statements and/or filed briefs are set out here.

The Attorney General of California, the California Department of Transportation (CALT), and the Public Utilities Commission (CPUC) participated individually in the proceeding. Both CALT and CPUC recommend approval of the merger but also recommend conditions to address certain adverse competitive effects. The Attorney General urges denial of the application unless conditions are imposed to mitigate adverse effects on competition. The three entities recommend similar conditions:

7/ Many States did not make appearances as formal parties but filed comments. The following States or State entities filed comments in support of the consolidation: Arizona Legislature; Arkansas Transportation Commission & State Highway & Transportation Department; Governor of Illinois and Illinois Department of Transportation; Governor of Indiana; Indiana Department of Transportation; Governor of Missouri; Lt. Governor of Nevada.

The Governor of Arizona filed a comment in opposition to the consolidation.

The following States, or State entities, filed comments in support of one or more protestant railroad's proposed conditions: Colorado Public Utilities Commission; Louisiana Public Service Commission; Louisiana State Planning Office, Department of Commerce, and Department of Agriculture; Nevada Department of Transportation; New Mexico Corporation Commission; Oklahoma Department of Transportation and Corporation Commission; Attorney General of Texas; and Washington Utilities and Transportation Commission.

(1) DRGW's purchase and/or trackage rights request, with an expansion of trackage rights from Fresno to Bakersfield over SPT and ATSF; and (2) UP/MP's trackage rights request between El Paso and Colton, and from Colton to Lathrop, CA. CALT also recommended conditions relating to rail passenger service, as did the National Rail Passenger Corporation (AMTRAK).

The Colorado Department of Highways opposes the merger because of its adverse effects on the ability of the DRGW to continue as a competitor for transcontinental rail traffic. It expressses concern over the potential impact on its highway system if DRGW service levels fall and cause rail-to-motor carrier diversions. Therefore, Colorado supports DRGW's purchase and trackage rights conditions.

The State of Kansas supports the merger, because it would result in the continuing survival of the SPT and ATSF rail systems. Kansas asks the Commission to retain jurisdiction to later evaluate the need for conditions.

The Oregon Public Utility Commissioner and Department of Transportation support the merger as necessary to ensure continued rail service to its shippers, and support DRGW's request for purchase and trackage rights over SPT lines so that DRGW may continue to provide transcontinental service.

The Utah Public Service Commission opposes the merger because of its adverse effect on DRGW's ability to continue as a transcontinental rail competitor. Consequently, Utah supports DRGW's sale and trackage rights requests.

Local Governmental Agencies

The Port of San Francisco opposes the merger absent conditions proposed by DRGW as amended to provide service into the Port to maintain competitive rail service into the Bay Area and over the Central Corridor.

A number of local agencies oppose consolidation unless conditions are imposed to address problems of traffic density and routing that they argue would adversely affect their interests. They are: The Southern California Association of Governments, Kern County Board of Supervisors, Kings County Regional Planning Agency, Orange County (TX) Navigation and Port District, Port of Stockton, the Cities of Carson, Claremont, Compton, San Jose, Martinez, Merced, Modesto, Montclair, Pomona, Rancho Cucamonga, Tracy, Antioch, Brentwood, Pinole, Upland, and Visalia, CA, East Bay Regional Park District, Contra Costa County, Fresno County, Merced County, and Tulare County, CA, and the Cities of Midlothian and San Antonio, TX.

Labor

Various labor organizations[8] filed comments in opposition to the merger, arguing that the transactions would be harmful to the employees' interests. They sought conditions with greater compensation for adversely affected employees than those previously imposed in merger proceedings. The International Brotherhood of Teamsters seeks protection for motor carrier employees of applicants.

8/ Railway Labor Executives' Association, Brotherhood of Locomotive Engineers, Association of Railway Technical Employees, and United Transportation Union.

THE PUBLIC INTEREST STANDARD

Statutory Policies. Under the basic standard of 49 U.S.C. 11344(c), "the Commission is required to approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest."9/ In determining what is consistent with the public interest, 49 U.S.C. 11344(b)(1) requires consideration of at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public;

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;

(C) the total fixed charges that result from the proposed transaction;

(D) the interest of carrier employees affected by the proposed transaction; and

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

The fifth factor, dealing with competitive effects on other railroads, was added by section 228(a)(2) of the Staggers Rail Act of 1980, Pub. L. No. 96-448 (Staggers Act). This additional factor is, in effect, a codification of the Commission's traditional approach to the evaluation of rail consolidations. See Norfolk Southern Corp.-Control-Norfolk & W. Ry. Co., 366 I.C.C. 171, 190 (1982) (Norfolk Southern), where we stated:

> The Staggers Act was intended to modernize "economic regulation of the railroad industry with a greater reliance on the marketplace." Staggers Act, section 2. . . . [T]he primary theme of the 15 elements of the Rail Transportation Policy (added by the Staggers Act) is that we "ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes," 49 U.S.C. 10101a(4). Indeed, the Rail Transportation Policy emphasizes the importance of the relationship between ensuring adequacy of transportation and retention of competition. We are "to allow . . . competition and the demand for services to establish reasonable [rail] rates," section 10101a(1); "to foster sound economic conditions . . . and to ensure effective competition and coordination between rail carriers and other modes," section 10101a(5); "to minimize the need for Federal regulatory control over the rail transportation system" while maintaining "reasonable rates where there is an absence of effective competition," section 10101a(2), (6); and "to avoid undue concentrations of market power," section 10101a(13).

The 15 elements of the rail transportation policy set forth at 49 U.S.C. 10101a, taken as a whole, emphasize reliance on competitive forces, not government regulation, to moderate railroad actions and to promote efficiency. H. Rep. No. 96-1430, 96th Cong., 2d Sess. 88 (1980).

9/ See Missouri-Kansas-Texas R.R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980), cert. denied 447 U.S. 9793 (1981) (Missouri-Kansas-Texas).

Antitrust Considerations. The policies embodied in the antitrust laws also provide guidance on public interest considerations in merger proceedings.[10] The Supreme Court has observed that the antitrust laws give "understandable content to the broad statutory concept of the public interest." FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 244 (1968).

In McLean Trucking Co. v. United States, 321 U.S. 67, 87 (1944) (McLean), the Supreme Court noted the proper weight to be accorded to antitrust policy in carrier consolidation proceedings:

> In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy . . . .

Accord, Bowman Transportation v. Arkansas-Best Freight, 419 U.S. 281, 298 (1975); Port of Portland v. United States, 408 U.S. 811, 841 (1972); Northern Lines Merger Case, 396 U.S. 509, 514 (1970); and Denver & R. G. W. R. Co. v. United States, 387 U.S. 485 (1967) (Denver & R.G.W.R.).

Even though we must consider competition in analyzing a proposed consolidation, the Commission does not sit as an antitrust court in determining compliance with the Clayton, Sherman, or related antitrust acts. Northern Lines Merger Case, supra, at 514. The Commission's statutory obligation under the public interest standard requires that any anticompetitive effects of a consolidation be balanced against its anticipated benefits. The Commission is empowered to disapprove consolidations which would not violate the antitrust laws and to approve consolidations even if they otherwise would violate the antitrust laws. United States v. ICC, supra at note 11.

Special Findings. The Commission is also required by 49 U.S.C. 11344(c) to make special, narrowly focused public interest findings (where applicable) on the following aspects of any major rail consolidation: (1) a guaranty or assumption of the payment of dividends or of fixed charges, or an increase of total fixed charges; (2) joint rail-motor operations; and (3) inclusion of rail carriers located in the area.

Environmental and Energy Factors. Environmental and energy factors also have a bearing on the public interest. Under the National Environmental Policy Act of 1969 (NEPA),[11] the effects of the transaction on the environment must be considered, and, under the Energy Policy and Conservation Act (EPACA),[12] the effects of the transaction on energy resources must be considered.

Policy Statement. On February 2, 1981, a policy statement on rail consolidations was issued in Railroad Consolidation

---

10/ Under 49 U.S.C. 11341(a), transactions approved by the Commission are exempt from the antitrust laws, and all other laws, as necessary, to effectuate the transactions. United States v. ICC, 396 U.S. 491, 504 (1970).

11/ 42 U.S.C. 4321; 49 CFR 1108.

12/ 42 U.S.C. 6201; 49 CFR 1106. Energy conservation is also a matter for our consideration under the rail transportation policy. See 49 U.S.C. 10101a(15).

Procedures, 363 I.C.C. 784 (1981), to clarify how we incorporate the numerous elements of the public interest in evaluating specific consolidation proposals. We perform a balancing test weighing "the potential benefits to applicants and the public against the potential harm to the public." 49 CFR 1180.1(c).

Benefits are realized from operating efficiencies and marketing opportunities that can make the consolidated carrier financially stronger and, therefore, a better competitor that can more easily provide adequate service on demand. 49 CFR 1180.1(c)(1). Operating efficiencies often result from elimination of duplicative facilities and the use of more direct routings.

Potential harm from a proposed consolidation may be realized from a reduction in either intra- or intermodal competition and from any harm to a carrier's ability to provide essential services. This may occur if the traffic shifts between competing carriers are so substantial that the ability to provide essential services would be greatly diminished. 49 CFR 1180.1(c)(2).

The Commission's Policy Statement recognizes that the consolidation of two carriers serving the same market would result in the elimination of competition between the two, which may be contrary to the public interest. The Commission also recognizes that, in evaluating the effect on long-haul movements of bulk commodities, the focus may be on retaining effective intramodal competition. 49 CFR 1180.1(c)(2)(i).

Standards Applicable to Responsive Applications. The responsive applications are not independent applications, but rather require the exercise of our conditioning power under 49 U.S.C. 11344(c) as a part of any approval of the primary transaction.

ADEQUACY OF TRANSPORTATION

Public Benefits. In our determination whether a consolidation is consistent with the public interest, we examine its effect on adequacy of transportation to the public. We must first examine the public benefits that will result from the consolidation.

Benefits such as increased revenues to the merging entities do not necessarily reflect benefits to the public, so we must distinguish purely private benefits from those that will also benefit the public. Revenue transfers from one carrier to another that do not affect transportation efficiency or the ability of a carrier to provide essential services are considered neutral as to the public. Revenue transfers that result in reduced competition, the exaction of monopoly profits, and the reduction of efficient transportation services reflect private benefits harmful to the public. Revenue transfers resulting from more efficient service may reflect public benefits.

In merger proceedings, most revenue transfers result from the diversion of traffic to the merged carrier from other rail carriers. Intramodal diversion, intrinsically neither a public benefit nor a harm, may reflect improved service or may result from the exercise of market power. This may result in reduced competition, the ability to achieve monopoly profits, inefficiency, and harm to essential services. Intermodal diversion may reflect the benefit to the public of a competitive, fuel-efficient alternative for shippers who formerly relied only on motor carrier transportation.

Cost reductions and service improvements that result from operating efficiencies are both public and private benefits. To the extent that cost reductions are passed on to shippers through reduced rates or deferral of rate increases, they benefit the public directly, and reflect the amount of resources freed for other productive uses. CSX, 363 I.C.C. at 556.

In this proceeding, applicants estimate consolidation will result in $188.2 million in quantifiable annual net benefits from operating and administrative efficiencies in a normal year after effectuating consolidation. Applicants estimate annual net gains from diverted rail traffic to be $65.9 million, and annual net gains from diverted motor carrier traffic to be $7.5 million. We essentially accept applicants' operating and administrative savings estimates, and discuss them in more detail in Appendix C. Our discussion of applicants' estimates of diverted traffic appears in Appendix E.

Applicants' operating plan was developed with the following policy objectives: (1) to establish routes that would maximize service improvements through the combined use of line segments of both railroads; (2) to permit, through consolidation of redundant facilities, maximum integration of rail operations at the lowest possible cost (in terms of capital project outlays); (3) to maximize the use of well-maintained, high capacity routes, and avoid the need for extensive rehabilitation; (4) to design traffic flows that would, to the extent compatible with other objectives, balance the impact on labor forces on parallel lines; and (5) to avoid abandoning line segments where rail service is currently provided to shippers.[13/] A description of specific operational changes, including the anticipated public benefits that would result from implementation of the operating plan, is contained in Appendix C.

In determining where the public interest lies, the Commission must balance the interest in a financially strong competitor against the effect of reduced competition and harm to essential services. 49 CFR 1180.1(c). A financially sound competitor should be able to provide adequate service on demand by realizing operating efficiencies and increased marketing opportunities. On the other hand, a lessening of competition, particularly when two carriers serving the same market consolidate, may be contrary to the public interest. A substantial lessening of competition may result in the loss of incentive for a merged carrier to provide the public with adequate and efficient service.

13/ SFSP-13, VS of Lacy at 4.

THE MERGER, AS PROPOSED, WOULD BE ANTICOMPETITIVE

In this section, we summarize the competitive analyses of certain major parties to the case and discuss the applicants' approach, particularly as it concerns market definition. We conclude that the relevant market is rail freight transportation over certain corridors in the Western United States. We further conclude that exempt rail transportation and rail traffic not within the rate review jurisdiction of the Commission must be considered in the definition of the relevant product market. Finally, we find that the proposed consolidation would have very serious anticompetitive effects.

The effect of a transaction on competition is a critical factor in our consideration of the public interest. The Commission may disapprove a transaction if the harm to the public from the loss of competition outweighs the expected benefits to the public from consolidation. Often among those benefits are operating and management efficiencies. See, e.g., CSX, 363 I.C.C. at 552. We have the difficult task of accommodating an interest in efficiency in the rail industry, with the benefits that efficiency brings, and a concern for the adverse effects of concentration. As we noted in Norfolk Southern, 366 I.C.C. at 216,

> . . .[S]trong competition promotes efficiency. The thread running through our criteria governing rail consolidation proceedings is the goal of maximizing efficiency in the allocation of transportation resources. The spur of competition provides incentive for firms to minimize the cost involved in providing a given level of service, to provide good service and lower prices to customers, and to seek out innovation in all aspects of their operations. We encourage competition, among railroads and between the various modes, in order to maximize efficiency and consequently to obtain the best combination of price and service for the transportation consumer.

In UP Control, we recognized that the extensive deregulation of the rail industry brought about by the Staggers Act, other recent reform legislation and numerous administrative actions undertaken by this Commission to reduce regulation require that the anticompetitive effects of a consolidation be examined even more carefully than in the past because "[t]he ability of the railroads to take various actions free of regulatory restraints will make it easier to exert or abuse market power gained as a result of a consolidation." UP Control, 366 I.C.C. at 502. We recognized in that decision, and affirm here, that our primary concern is with implementing the Interstate Commerce Act. We are not an antitrust tribunal, although the principles of the antitrust laws, particularly section 7 of the Clayton Act[14/] and

---

14/ 15 U.S.C. 18 (1981). Mergers subject to section 7 are prohibited if their effect "may be substantially to lessen competition, or to tend to create a monopoly." Section 11 of the Clayton Act, 15 U.S.C. 21 (1981), confers jurisdiction on both the Commission and DOJ to enforce section 7 of the Act as to regulated carriers. See Denver & R. G. W. R., 387 U.S. 495 (1967).

sections 1 and 2 of the Sherman Act,[15] provide us with guidance as we evaluate proposed rail consolidations. As we noted earlier, the rail transportation policy of the Staggers Act favors increased reliance on competition rather than regulation to constrain the actions of railroads. It is in this environment that we must evaluate the proposal before us.

Positions of the Parties

A. The Primary Applicants

Applicants SPT and ATSF argue that their proposed merger would enhance competition in affected markets. In applicants' opinion, the appropriate product market is "freight transportation", and the appropriate geographic markets consist of 19 "regions" of the United States comprised of one or more "Business Economic Areas" (BEA's). The technical evidence applicants used to define and elaborate on these market definitions is described in the subsequent parts of this discussion.

The applicants argue that it is essential that markets not be defined too narrowly because many sources of competition influence markets. Thus, applicants contend that the record establishes that nearly all of their traffic is subject to competition from other railroads and other transport modes. Corollaries to this principal argument are applicants' contentions that (1) a significant volume of their traffic has been exempted from regulation because of pervasive competition, and (2) motor and water carrier service is readily substitutable for rail service in applicants' markets.

In terms of geographic markets, applicants acknowledge that they presently compete in a number of areas: (1) from Southern California through the Southern Corridor to Dallas/Ft. Worth and the Gulf Coast, (2) between the San Francisco Bay Area and the Los Angles Basin, and (3) between California on the one hand, and Kansas City, Chicago, and points beyond on the other hand. SPT and ATSF claim that even in these markets, where their proposal would result in a horizontal merger of competitors, the evidence shows that the anticompetitive consequences would be limited to a very small percentage of the traffic handled by them.

In the Southern Corridor, applicants state that approximately 73 percent of the "units" of their traffic consists of ocean container and domestic TOFC/COFC traffic. The ocean traffic involves minilandbridge (MLB) movements between a foreign port and a United States port via an intermediate United States port. Applicants contend that this traffic is routed by ocean carriers, with the rates being set by market forces. Applicants assert that the domestic TOFC/COFC traffic moved through the Southern Corridor by SPT and ATSF is subject to intense motor

---

15/ 15 U.S.C. 1, 2 (1981) Mergers subject to section 1 are prohibited if they constitute a "contract, combination . . . or conspiracy in restraint of trade." Section 2 provides criminal penalties for persons "who shall monopolize, or attempt to monopolize, or combine or conspire to monopolize trade . . . ."

carrier competition at rates which are highly competitive with the lowest contract rates offered by SPT and ATSF. They claim that motor carriers are operating in "massive numbers" on interstate highways through the Southern Corridor parallel to applicants' routes, with average hauls well in excess of 1,000 miles for most traffic.

With respect to other types of Southern Corridor traffic, applicants argue that motor carriers provide an economically viable alternative to SPT and ATSF service for chemicals and petroleum products, and that further geographic competitive constraints are provided from alternate domestic and foreign sources for these commodities. Applicants also contend that competing modes are available to the vast majority of shippers of paper and forest products, food products, automobiles, and other commodities moving in the Southern Corridor.

In the San Francisco Bay-Los Angeles Basin markets, applicants state that 70 percent of all shipments in both directions are presently handled by motor carriers, and that motor carriers are by far the "dominant mode" for movements of California perishables to all destinations regardless of length of haul. In the latter instance, applicants also argue that source competition from Idaho, Texas, and Florida also constrains rates and service for the transportation of produce originating in the San Joaquin Valley. Thus, applicants conclude that motor carriers competing in the Bay Area-Los Angeles markets and for the San Joaquin perishables traffic would limit the anticompetitive effects of the merger to only a small amount of traffic.

In the Central Corridor, applicants claim that the merged carrier would face vigorous competition from "other rail carriers (including UP/MP and DRGW)" and motor carriers for transcontinental traffic. Applicants point out that Commission decisions have recognized that the Central Corridor is more efficient than the Southern Corridor for transcontinental traffic to and from Oregon and Northern California and for "many" shipments originating or terminating in Central and Southern California. Further, applicants claim that motor carriers handle "large volumes" of transcontinental traffic. Consequently, applicants argue, any attempt by SPSF to exercise market power on transcontinental traffic would result in diversion of traffic to competing rail or motor carriers.

Specifically, applicants contend that the merger would not cause "vertical foreclosure" of joint routes and rates with DRGW via Ogden. Applicants assert that DRGW is in the same competitive position in the instant proceeding as in the UP Control proceeding and in St. Louis S.W. Ry.-Pur.-Rock Island (Tucumcari proceeding), 363 I.C.C. 320 (1980). Notwithstanding the DRGW position, applicants note that SPT-DRGW interchanges of traffic at Ogden have increased since 1982, and a "substantial share" of that traffic originates or terminates on DRGW lines. Finally, applicants state that SPT carloads of forest products from origins in Washington, Oregon and Northern California have decreased by over 50 percent in the past decade while truck shares have more than doubled.

Applicants also deny that vertical foreclosure would take place on joint routes to Mexico as alleged by Katy and Tex-Mex. Applicants state that they will continue to participate in efficient joint-line routes because of the highly competitive nature of the traffic, principally grain shipments to Central and Eastern Mexico. Noting that UP/MP handles 47 percent of such traffic and that SPT and ATSF combined handle 26 percent, applicants claim that these relative percentages do not reveal the existence of water carrier competition. However, according to the applicants, water carriers in fact moved over 60 percent of the grain transported to Eastern and Central Mexico in 1984, and the water carriers are "acknowledged" to be the price leaders in this transportation market. Applicants claim that Laredo is the predominant rail gateway for the traffic, and only UP/MP serves Laredo with single-line service. (Applicants must interline with Tex-Mex to provide through service via Laredo.)

In summary, it is applicants' position that (1) the vertical aspects of the proposed merger present no competitive problems and indeed will enhance competition; (2) the horizontal aspects of the proposal "may have anticompetitive effects in certain circumstances," but the "reduction by one in the number of competitors in a market does not necessarily harm competition or the public interest"; (3) overall, the intermodal, product and source competition in broadly defined markets will mitigate most of the anticompetitive concerns of the proposed transaction; and (4) the proposed agreement between BN and applicants (discussed elsewhere in this decision), together with applicants' pledge to maintain efficient joint-line service, are sufficient to ameliorate the relatively few anticompetitive effects of the proposed transaction.

B. Denver and Rio Grande Western Railroad

Rio Grande contends that the proposed merger would have harmful effects on competition within the Central Corridor, and on the competitive relationships between rail transportation in the Central Corridor and the Southern Corridor. Rio Grande argues here that the Central Corridor competition preserved by granting it trackage rights in UP Control would be destroyed if the instant proposal is approved without imposition of the additional conditions sought here by DRGW.

Rio Grande asserts that the Commission defined the appropriate product market as rail transportation in UP Control and found that motor carrier transportation should not be considered as part of the product market.[16] Further, Rio Grande asserts that the Commission correctly recognized that the Central Corridor constituted a separate geographic market.[17] Rio Grande points out that the Commission granted the DRGW request for trackage rights between Pueblo and Kansas City because the Rio Grande would lose one of its two "friendly" connections to the West Coast (Western Pacific) and therefore would have to rely solely on its SPT connection at Ogden together with new connections at Kansas City to compete effectively with the newly-formed UP/MP/WP system through the Central Corridor. Finally, Rio Grande notes that the Commission denied its request for independent ratemaking authority on traffic moving over the Utah gateways to provide an incentive for SPT and DRGW to cooperate in the routing of traffic over the Ogden gateway.[18] These findings, notes Rio Grande, were affirmed on appeal[19] and on remand to the Commission.[20]

16/ 366 I.C.C. at 503.

17/ Id. at 504.

18/ Id. at 579. See also Union Pac. Corp. -- Control -- Missouri Pac. Corp., F.D. No. 30,000 (not printed), served April 16, 1985, slip op. at 3.

19/ Southern Pac. Transp. Co. v. ICC, 736 F.2d 708, 718 (D.C. Cir. 1984), cert. denied sub nom., Kansas City S. Ry. v. United States, 105 S. Ct. 1171 (1985).

20/ Union Pac. Corp. -- Control -- Missouri Pac. Corp., F.D. No. 30,000 (not printed), served April 16, 1985.

Rio Grande argues that the findings and conditions imposed in UP Control would be undone if this merger were approved without Rio Grande's proposed conditions. Rio Grande asserts that an unconditioned merger of SPT and ATSF would allow the merged carrier to route former Central Corridor traffic over the Southern Corridor, leaving Union Pacific in a monopoly position in the Central Corridor and creating a monopoly carrier (SPSF) in the Southern Corridor. This situation reflects what DRGW terms a "basic fact of life in railroading," namely that "when a railroad system has a single-line route that can compete with a joint-line route, it is in the self interest of the single-line carrier to market its services over its single-line route." DRGW Opening Brief at 8. Rio Grande argues that the end result of the creation of Central and Southern Corridor monopolies would be higher rail rates and diminished service. Without freedom of entry to provide competitive discipline, Rio Grande maintains the creation of Central and Southern Corridor monopolies would be exacerbated.

Rio Grande also points to the fact that motor carriers can not effectively compete for long-haul rail movements of high-volume, bulk, heavy-loading, and/or contract-rate traffic. It asserts that rail movements in boxcar and TOFC service are oriented to the long-haul. Rio Grande states that (1) the shortest mileage blocks for "western transcontinental" traffic, e.g., Denver to Oakland (1218 miles) are roughly equal to the longest haul in the eastern United States, e.g., Chicago to Miami (1327 miles), and (2) the average transcontinental haul is over 2,400 miles.21/ Thus, Rio Grande claims that motor carriers play a much more limited role in the West than they do in the East. In addition, motor carrier competition, according to Rio Grande, cannot constrain rail rates. Contrary to applicants' assertions, Rio Grande claims that rail rates could rise 25 percent across the board for transcontinental traffic, but existing motor carrier rates would still be higher for 85 percent of the traffic.

In summary, Rio Grande takes the position that an unconditioned SPSF merger would result in (1) creation of rail monopolies in both the Central and Southern Corridors; (2) higher rail rates and diminished levels of service because intermodal competition is insufficient to constrain a merged SFSP; and (3) elimination of the Rio Grande as an effective competitor through the Central Corridor for Northern California and Oregon transcontinental traffic.

C. Kansas City Southern Railway

KCS argues that the proposed merger would totally eliminate intramodal competition in the fastest growing region of the United States, and therefore the proposal is inconsistent with the primary policy of the Staggers Act: the achievement of an efficient and viable rail system through reliance on competition.

Intermodal competition provided by motor carriers, according to KCS, cannot be relied on to constrain railroad rate increases because motor carriers have higher cost structures. Further, KCS argues that the comparison of rail and water carriers' costs made by the applicants is contradicted by the record. Finally, it contends that even if applicants had been able to establish that

---

21/ Based on an average of movements in the Commission's one-percent Waybill Sample hauled between the California and Oregon portion of Central Pacific territory and the "transcontinental east" (defined by DRGW to include roughly the area east of the Dakotas, Wyoming, all but Northeastern Colorado, New Mexico, and Western and Southern Texas).

motor carriers recently have become as efficient as railroads, the Commission would still not be permitted under the Staggers Act to approve a broad elimination of intramodal competition.

In KCS's view, the Commission must consider the long-term impact of the proposed merger because of the inevitability of material changes in the transportation marketplace, particularly here, where the only railroads in a large and growing market are seeking merger. Thus, KCS claims that applicants' use of 1982 as a base year for their studies distorts the long-term projections of traffic levels because the base year was a recessionary period of low carloadings and profitability. KCS argues that a different, non-recession base year would have identified greater traffic diversions and anti-competitive consequences related to the proposed merger.

More importantly, in KCS' opinion, where a monopoly situation would be created, sole reliance on intermodal competition for the future would fail if events would impose relatively higher costs on the competing modes, reducing their competitiveness. Similarly, KCS states that growing regions (such as the Southern Corridor and the San Joaquin Valley) will demand in the long-term more transportation than historical data can predict. Competition between rail carriers therefore must be preserved to accommodate anticipated growth.

In general, KCS contends that the intent of applicants' proposal is to create monoply power over rates, and that the end result, as far as KCS is concerned, would be the loss of KCS' last "friendly" connection for (1) transcontinental traffic (ATSF via Dallas) and (2) north-south traffic (SPT via various routes between Kansas City and points in Texas).

D. Union Pacific Railroad

The Union Pacific claims that the proposed merger is a "classic parallel rail merger," unlike recent major end-to-end consolidations which put together the railroads forming BN-Frisco, CSX, Norfolk Southern, Union Pacific, and the Guilford system. UP does not question the large economic benefits resulting from efficiencies created by a merged SPSF system. In UP's opinion, however, the anticompetitive affects of the SPSF merger must be rectified if the merger is to be approved as in the public interest.

Union Pacific claims that the merger will permanently extinguish the "vigorous and effective" competition that now exists between SPT and ATSF between California and the Gulf Coast and Southeast regions, as well as in Arizona and the San Joaquin Valley. Rail competition in these areas, according to Union Pacific, is particularly important because of the high percentage of commodities moving by rail. The commodities cover a wide range of characteristics, e.g., plastics, chemicals, cotton, perishables, TOFC, grain, minilandbridge, wine, canned goods, minerals, bulk food products, automobiles and metal, petroleum, and lumber products. UP states that applicants' various studies of competitive impacts all failed to withstand scrutiny, particularly with respect to the long-haul and bulk commodity markets at issue. Truck and water transportation, in Union Pacific's view, offer only limited competition in the foregoing markets. SPSF, having nearly a 100-percent rail market share of Southern Corridor traffic and a 100-percent rail market share of San Joaquin Valley and Arizona traffic would constitute a monopoly in the fastest-growing region in the United States.

Although UP serves points in the Bay Area and the Los Angeles Basin, it notes that it cannot compete for Southern

Corridor traffic, because the Central Corridor route served by both UP and DRGW is much too circuitous. As an example, UP states that its Los Angeles-Houston route via the Central Corridor is 1,143 miles, or 70 percent longer than a merged SPSF's Southern Corridor route. Further, UP claims that for Bay Area traffic, the Southern Corridor is the only competitive, non-circuitous routing option to and from all of Texas and Louisiana and much of Mississippi, Alabama, and Florida. With respect to Los Angeles traffic, UP asserts that the Southern Corridor is the only such route to and from an even larger area comprised of all or part of Kansas, Oklahoma, Missouri, Tennessee, Georgia, North Carolina, South Carolina, and Virginia.

Union Pacific emphasizes that no other railroad possesses a route competitive with those of applicants between the Bay Area and the Los Angeles Basin. UP's own lines connect the two areas but with about a 1,200-mile circuity (over 260 percent). Union Pacific also points out that circuity prevents it from competing for traffic between Portland and (1) the Bay Area and (2) the Los Angeles Basin.

The applicants, according to UP, would become the sole railroad serving present SPT-ATSF common points in the Bay Area, namely, Richmond, Oakdale, and the Antioch-Martinez industrial and port "zone." These points are in addition to the San Joaquin Valley common points and Phoenix, AZ, which are served only by applicants. Union Pacific notes that its existing carload and TOFC service reaches no farther south into the San Joaquin Valley than Turlock, CA, and no farther north than Colton. As a result, UP cannot compete with applicants in the entire area from Fresno south to Bakersfield.

UP argues that the growth of California, Arizona, Texas, and Louisiana outstrips all other areas in the rate of expansion in population, employment, and manufacturing. Los Angeles County, for example, accounted for $69 billion worth of manufactured goods in 1983, the largest amount for any county in the nation, and half the amount for California alone. Los Angeles, in UP's words, is the "premiere" U.S. port for the Far East trade, and is therefore highly dependent on rail competition for high-volume COFC and "other" import-export traffic.

In Union Pacific's view, shipper testimony conclusively shows that shippers have depended on competition between SPT and ATSF in the matters of rates, service, contracts, and technological innovations. UP noted, for example, that SPT was the initiator of double-stack container trains in the Southern Corridor, and ATSF responded with low-cost alternatives different from double-stack trains. UP states that, when inadequate service or rates that are too high have been offered by one of the applicants, shippers have switched their business to the other applicant, resulting in lower rates and improved service. Similar situations have occurred, according to UP, when potential shippers have located new facilities and existing shippers have relocated facilities in negotiations with each applicant.

For the foregoing reasons, Union Pacific contends that the anticompetitive effects of the proposed merger must be counteracted by the conditions sought by the UP in the Southern Corridor and the San Joaquin Valley.

E. Missouri-Kansas-Texas Railroad Company System

Katy argues that the proposed SPSF merger will deprive MKT and its shippers of competitive access to Mexico and the Gulf ports and will destroy rail competition in some markets "contiguous to present MKT service, but not now served by the

MKT." Specifically, these markets include southwest Kansas and the chemical industry complex in the Houston industrial area served exclusively by SPT via the Bayport line. At the present time, Katy states that the southwestern area of Kansas is provided competitive service by ATSF and SPT, and in the Bayport area, SPT provides interline service to non-SPT points via connections in Houston. MKT claims that, after the merger, all points on the Santa Fe will lose competitive rail service from the Bayport industries because the combined SPT-ATSF routes will be used exclusively for the traffic. Similarly, Katy claims that the Midlothian/Ward Spur area (south of Dallas at a point where SPT and ATSF lines cross) will lose competitive service, and in Houston, a major grain installation presently served by SPT and MKT (through terminal access) will lose competitive service if applicants decide to withdraw access rights from Katy.

Katy contends that applicants' attempts to study competitive impacts of the proposed merger ignored the fact that trucks are not competitive for long-distance, high-volume, heavy commodities. MKT also claims that applicants' studies were self-contradictory as to assumptions, theories, and methodologies, and that applicants' witnesses in fact contradicted each other.

F. Texas-Mexican Railway Company

Tex-Mex's position on competition is restricted to a single issue. As a bridge carrier it provides joint-line service in connection with SPT to and from Mexico via Laredo, and it claims that if the merger is granted, the combined SPSF will favor its own single-line routes to other border crossing points to the exclusion of Tex-Mex.

G. U.S. Department of Justice

DOJ opposes the proposed merger on the grounds that there would be serious adverse competitive effects on the transportation of numerous commodities, particularly in the West, Southwest, Midwest, and Southeast. These effects, in DOJ's opinion, could not be mitigated by any of the proposed conditions. Further, DOJ asserts that applicants have not met their burden of demonstrating significant efficiencies that would outweigh the competitive harms, and that SPT's financial condition does not justify approval of the merger, notwithstanding the anticompetitive effects.

DOJ contends that because the proposed merger is largely parallel in nature, rail competition would be substantially reduced. While trucks and other modes compete with railroads for certain traffic, DOJ claims that the record overwhelmingly shows that trucks are at a distinct competitive disadvantage for large segments of rail traffic, particularly movements of bulk commodities in large volumes over long distances. In addition, DOJ states that intramodal competition is the most consistently effective constraint on a railroad's ability to raise rates.

Specifically, DOJ states that, at a minimum, 6.2 million tons of freight representing some $240 million in revenue would be adversely affected. This traffic is comprised of certain agricultural products, manufactured food products, chemicals, paper products, motor vehicles, primary metals, petroleum products, nonmetallic minerals, and lumber moving in some or all of the following markets:

(1) Between California and the Midwest, Southeast, and Northeast;

(2) Between California and the Texas Gulf Coast, including shorter moves within this corridor;

(3) Between the Midwest and Texas/Southwest points; and

(4) From the Pacific Northwest to Southern California and Arizona.

DOJ argues that the merged carrier would be a monopolist in many markets and a duopolist in many others. With respect to the conditions proposed by other railroads, DOJ states that, standing alone or in combination, such conditions would not be sufficient to remedy the competitive problems of the merger, because each condition is confined to a particular geographic area, while the competitive problems would exist throughout the merged carrier's system. KCS's proposed independent rate-making authority condition, in DOJ's view, is a poor substitute for competition, and indeed would offset some of the public benefits from the merger. Finally, DOJ considers applicants' proposed pricing constraints unsatisfactory, because they: (1) provide no meaningful protection against market power; (2) constitute a commitment to phase in substantial price increases over a period of five years; and (3) repudiate rail deregulation and reliance on competition.

H. The United States Department of Transportation

DOT's position with respect to the issue of competition is substantially similar to applicants' position, as indeed were the analyses prepared by DOT and applicants. Our analysis of the evidence and arguments of both parties is set forth in considerable detail later in this decision.

I. State of California and the Public Utilities Commisssion of the State of California (California or CPUC)

California states that if the proposed merger is approved, rail competition will be largely eliminated for over 30 percent of total rail traffic originating or terminating in the State, and would result in SPSF control of nearly 80 percent of total California originated or terminated traffic. As a result, SPSF would be the dominant carrier in the Southern Corridor and UP would be dominant in the Central Corridor. In California's view, neither carrier would have a "strong incentive" to compete aggressively against the other outside their dominant areas.

Based on evidence submitted by CPUC, California states that, after merger, existing or potential rail competition would be eliminated east of the Los Angeles Basin and in the South San Joaquin Valley. Further, the number of rail competitors would be reduced from 3 to 2 in the Los Angeles Basin, the North San Joaquin Valley, and the Bay Area. These areas generate nearly 80 percent of California's total rail tonnage.

In addition, California argues that a near monopoly would be created for traffic flows between the Los Angeles Basin and (1) Northern California, (2) Oregon/Washington, (3) Arizona, (4) New Mexico, and (5) the South Central Region of the United States (TX, OK, AR, and LA). Creation of the near monopoly on these traffic flows, according to California, would result in the diversion of 50 to 55 percent of SPT's current Central Corridor traffic to the Southern Corridor and rate increases averaging 43 percent or more for such traffic, with the South San Joaquin Valley traffic being most adversely affected (by rate increases of about 55 percent).

Market Definition and Analysis

We must first define the markets the consolidation will affect by examining the "area of effective competition." Standard Oil Co. v. United States, 537 U.S. 293, 299-300 n. 5 (1949). A relevant market has two dimensions, product and geographic. Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962). Relevant markets must also reflect commercial realities. United States v. Grinnell Corp., 384 U.S. 563, 572 (1966). As a tool in defining what is and what is not a relevant market, we may refer to the United States Department of Justice Merger Guidelines, issued June 14, 1984. Although not binding on the Department, the courts or this Commission, they are instructive in that they define a market as "a product or group of products and a geographic area in which it is sold such that a hypothetical, profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products in that area would impose a 'small but significant and nontransitory' increase in price above prevailing or likely future levels." Merger Guidelines, § 2.0. In most contexts, the Department of Justice uses a price increase of five percent lasting one year as the measure of a "small but significant and nontransitory" increase. Id., § 2.11.

Product Market

In order to be part of a relevant product market, the products at issue must be "reasonably interchangeable." United States v. E.I. du Pont de Nemours & Co., 357 U.S. 377, 395 (1956). The cross-elasticity of demand for the products and their substitutes may be examined, Brown Shoe, 370 U.S. at 325, keeping in mind that under section 7 of the Clayton Act, technically different products or services are rarely grouped together. See United States v. Philadelphia National Bank, 374 U.S. 321, 356-57 (1963); United States v. Aluminum Company of America, 377 U.S. 271, 275 (1964). In this regard, we are required, under 49 U.S.C. 11344(b)(5), to examine the effect of a proposed transaction on competition among rail carriers in the affected region.

The product provided by railroads is the transportation of freight. An initial issue in this proceeding is whether motor and water carrier transportation should be included in the product market in order to determine the competitive effects of the transaction. Applicants strenuously argue, and provide studies designed to demonstrate, that the existence of motor carriers, and in some instances water carriers, will provide a sufficient constraint on any market power applicants might gain as a result of merger. Applicants ask us to find that motor and water carriers are reasonably substitutable for rail carriers in the geographic markets they serve. In order for applicants to prevail on this issue, we must be able to find that the rates and service provided by, or likely to be provided by, motor and water carriers are sufficiently close to those provided by applicants. In that situation, applicants would not risk abusing their market power, because they would risk losing a significant share of the market. For reasons discussed in more detail below, applicants have not persuaded us that in the relevant geographic markets, motor or water carriers are likely to provide a sufficient constraint on applicants' post-consolidation market power.

This is not to say that motor and water carriers cannot and do not carry freight in the geographic markets served by applicants, but rather that their rates and/or service cannot be found to reliably constrain the behavior of applicants. As we said in UP Control, 366 I.C.C. at 504:

> at the margin, motor carriers are unlikely to be direct substitutes for rail transportation in the markets affected by the proposed transactions. In such circumstances, a rise in rail rates would not necessarily result in a significant amount of traffic shifting between modes and the railroad

could effectively increase its profit by raising its rates absent other competitive factors.

A. Exempt and non-market dominant rail traffic must be considered in defining the relevant product market.

Exempt Traffic. In their analysis of the competitive effects of the proposed merger, applicants and USDOT excluded from consideration traffic which had been exempted from regulation by the Commission under 49 U.S.C. 10505(a).[22] These parties contend that our exemption decisions[23] relied upon intermodal competition as a sufficient constraint on the railroads' ability to exercise market power over boxcar, TOFC/COFC, and perishables traffic. The protesting parties dispute these readings of the Commission's exemption decisions, pointing to our reliance on intramodal competition in addition to intermodal competition. We conclude that the failure to consider the effect of the proposed merger on exempt traffic has seriously flawed applicants' and DOT's competitive analyses.

First, applicants and DOT have misread the basis for our exemption decisions in TOFC/COFC and Boxcars, and thus erred by failing to study the effects of the proposed merger on this deregulated traffic. Both our decisions in TOFC/COFC and Boxcars, and the court decisions affirming our exemptions, were based substantially on the existence of actual and potential intramodal rail competition in addition to intermodal competition.[24] Contrary to applicants' and DOT's assertions, we relied upon intramodal competition in concluding that traffic

---

22/ Section 10505(a) provides that we shall grant exemption from regulation when regulation (1) is not necessary to carry out the transportation policy of section 10101a of the Interstate Commerce Act, and (2) either (a) the transaction or service is of limited scope, or (b) the application of a provision of the Interstate Commerce Act is not needed to protect shippers from the abuse of market power.

23/ Improvement of TOFC/COFC Regulation, 364 I.C.C. 731 (1981), aff'd in part, rev'd in part sub nom. American Trucking Associations, Inc. v. I.C.C., 656 F.2d 1115 (5th Cir. 1981); Exemption from Regulation - Boxcar Traffic, 367 I.C.C. 424 (1983), aff'd in part, rev'd in part sub nom. Brae Corp. v. United States, 740 F.2d 1023 (D.C. Cir. 1984) (per curiam), cert. denied, 105 S. Ct. 2149 (1985).

24/ See, e.g., Improvement of TOFC/COFC Regulation: Notice of Proposed Rulemaking, 45 Fed. Reg. 79123-24 (1980); Improvement of TOFC/COFC Regulation, 364 I.C.C. at 735, 736; American Trucking Associations, Inc. v. ICC, 656 F.2d at 1125; Exemption From Regulation - Boxcar Traffic Proposed Exemption, 47 Fed. Reg. 4100, 4101 (1982); Exemption From Regulation - Boxcar Traffic, 367 I.C.C. at 433, 446; Brae Corp. v. United States, 740 F.2d at 1036-37, 1039.

such as boxcar[25] and TOFC/COFC should be exempted. Therefore, the premise for the exclusion of exempt traffic is in error.

Second, the applicants' and DOT's decision to exclude exempt traffic from consideration in their analyses of the competitive effects of the merger is contrary to the directive of 49 U.S.C. 11344(b)(1)(E), which requires us to consider the effects of the proposed transaction on rail competition, or "competition among rail carriers." Even if we had based our exemptions only on the existence of intermodal (motor-rail) competition,[26] it is clear that exempt traffic would have to be examined to determine if the proposed rail merger would have an effect on rail competition. Section 11344(b)(1)(E) requires no less. In this proceeding, we assessed both intramodal and intermodal competition, and we must examine exempt traffic to see if there is a possibility of the loss of intramodal competition resulting from the proposed merger. By failing to do so, applicants have seriously erred in their competitive analyses.

We have taken a similar approach to competitive analysis in the context of a rail-water merger. In Finance Docket No. 30300, CSX Corp.--Control--American Commercial Lines, Inc., ___ I.C.C.2d ___, ___ (served Sept. 7, 1984), slip op. at 24 & n. 30, we required that private water carriage, as well as common and contract water carriage, be considered in our competitive analysis.[27] Private water carriage is exempt from our regulation. Similarly, we believe that exempt rail transportation should have been analyzed by the applicants in considering the competitive impact of their proposed consolidation. Applicants' and DOT's treatment of exempt traffic for purposes of the competitive analysis in this merger was approached as if the traffic was non-existent and beyond our concern or jurisdiction.

Third, the failure to examine exempt traffic also inherently assumes the loss of Commission jurisdiction over such traffic. As we recently explained in Consolidated Rail Corp.--Declaratory Order--Exemption, 1 I.C.C. 2d 895, 898-900 (1986), our decisions exempting certain traffic from regulation do not deprive us of jurisdiction over that traffic. Indeed, the statute provides for revocation of an exemption should the circumstances that once justified the exemption no longer pertain. Id. at 899; 49 U.S.C. 10505(d). See also H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980). Clearly, we remain concerned about the competitive environment surrounding traffic exempted by us from regulation.

25/ We did not completely and unconditionally exempt boxcar traffic. For example, we retained jurisdiction to require reciprocal switching or joint use of terminal facilities should the assessment of the existence of rail competition change after the exemption went into effect (Exemption from Regulation - Boxcar Traffic, 367 I.C.C. at 454-55), and, upon remand from the District of Columbia Circuit, decided that boxcar traffic for short line railroads should not be exempted. Exemption from Regulation - Boxcar Traffic (not printed), served September 12, 1986.

26/ See Rail General Exemption Authority - Fresh Fruits and Vegetables, 361 I.C.C. 211 (1979).

27/ On appeal, the Sixth Ciruit affirmed our decision, including our consideration of private water carriage in the competitive analysis. Crounse Corp. v. ICC, 781 F.2d 1176, 1188 (6th Cir. 1986), pet. for cert. pending, No. 85-2133 (filed June 6, 1986).

Finally, applicants' and DOT's elimination of exempt traffic from their competitive analyses assumed that we had performed a functionally equivalent competitive analysis in our exemption decisions, making such an analysis unnecessary here. However, the type of analysis performed in an exemption decision differs from the type of analysis performed in a merger proceeding. The competitive analysis in an exemption decision does not necessarily examine separate specific origin-destination markets in terms of traffic flows, distances involved, the number of railroad competitors involved, the possible impacts of technological changes on each mode, and the shipper's options to choose between available competing carriers within the chosen mode once the modal choice itself has been made. Exemption analysis takes a broad-brush approach to analysis of the competitive environment as a whole and looks to the remedy of partial revocation to address specific competitive situations should that become necessary. Thus, the competitive analysis in exemptions cannot be equated with the competitive analysis we make here in assessing a proposed merger.28/

In sum, the failure of the applicants and DOT to consider exempt traffic in their competitive analyses was inappropriate and a misreading of our exemption decisions. Moreover, as we discuss below, the overwhelming evidence of record demonstrates that competitive rail rates and service are vital for much of exempt as well as regulated traffic. The failure to assess the effect of the proposed merger on competitive rail services offered for exempt traffic flaws applicants' and DOT's studies.

Applicability of Market Dominance Standards. Applicants and DOT also assert that we should apply market dominance standards29/ to our competitive analysis in this merger case. They suggest that we should not be concerned in this proceeding with traffic moving at rates below the statutory 180 percent revenue to variable cost threshold, contending that if the existing carriers are not market dominant and will not become so as a result of the merger, competition would not be reduced as a result of the merger and should be of no concern. We reject this approach to our analysis.

First, we note that none of our decisions addressing rail mergers has ever adopted the approach suggested by applicants and DOT. Instead, we have consistently evaluated competitive effects by defining existing markets, measuring the anticipated effects on those markets, and determining whether the effects are substantial. See, e.g., UP Control, 366 I.C.C. at 512. Market dominance concepts have never governed our competition analysis. See Tucumcari, 363 I.C.C. 320, 348 n.11 (1980) (noting that the ratemaking market dominance concept must be distinguished from the competitive analysis used in rail mergers). The reason is

---

28/ The difference in the Commission's role in exemption and merger cases is demonstrated by contrasting the stage in the proceeding at which the Commission considers adverse effects of a proposal. The Congressional admonition on exemptions in the Staggers Act Conference Report, H.R. Rep. No. 96-1430, 96th Cong., 2d Session 105 (1980), states that "[T]he conferees expect . . . that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power." However, section 11344(b) directs us to apply certain criteria prior to authorizing a merger.

29/ 49 U.S.C. 10709(a) defines "market dominance" as "an absence of effective competition from other carriers or modes of transportation to which a rate applies." The current quantitative factor in deciding whether a railroad is market dominant is whether the ratio of revenue to variable cost on a specific movement exceeds 180 percent.

apparent. Market dominance analysis involves an assessment of past competitive conditions. This is an inappropriate measure of the forward-looking assessment we must make under section 11344(b)(1)(E) in analyzing a proposed merger.

Second, the market dominance concept is simply not applicable to merger competition analysis. It is found in the section of the statute addressing our jurisdiction over railroad rates, not mergers, and there is no indication that Congress intended us to incorporate such standards into our merger analysis. Our analysis of market dominance addresses intramodal, intermodal, product, and geographic competition to determine whether there is an absence of effective competition. However, Congress in the Staggers Act amended the merger section to require us to evaluate "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region." 49 U.S.C. 11344(b)(1)(E).[30] That section does not incorporate or even refer to market dominance standards.[31]

We believe that it would be inconsistent with the Rail Transportation Policy to create a post-merger situation where it might be necessary to become involved in recurring questions of market dominance or rate reasonableness that could well develop where there is the elimination of or massive reduction in competition.[32] See 49 C.F.R. 1180.1(a) ("Our analysis of the competitive impacts of a consolidation is especially critical in light of the Congressionally mandated commitment to give railroads greater freedom to price without regulatory interference.") By, among other things, curtailing the scope of rate regulation, enabling the Commission to exempt certain traffic from regulation, and authorizing rail carriers and shippers to enter into contracts, the Staggers Act sought to promote the goals of the Rail Transportation Policy to "minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required." 49 U.S.C. 10101a(2). As we stated in UP Control, 366 I.C.C. at 502,

> The new policy favoring increased reliance on competition to regulate activities will govern the environment in which the new [rail transportation] system will operate. The ability of the railroads to take various actions free of regulatory restraints will make it easier to exert or abuse market power gained as a result of consolidation. For these

---

30/ Consistent with this section is the Rail Transportation Policy's instruction that we should seek "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. 10101a(1).

31/ Indeed, in our merger procedure guidelines, we did not incorporate market dominance standards. Compare 49 C.F.R. 1180.

32/ The problems with determining market dominance for each and every shipper in the relevant markets is apparent, as recognized by DOT (DOT-8 at 27). Even the so-called conservative approach it recommends (see id.) would potentially require us to ignore virtually all traffic in the relevant markets in performing our competitive analysis, so limiting the scope of our inquiry that no meaningful analysis could be performed.

> reasons, we must take even greater care to identify harmful competitive effects and to mitigate those effects when possible.

In short, we conclude that market dominance standards have no role to play in our analysis of competition in rail mergers.

B. The relevant market is rail transportation.

Applicants assert that all but a minor portion of rail traffic is subject to effective and pervasive competition from other modes of transportation, notably from motor carriers. They further assert not only that the proposed merger will merely have minor anti-competitive effects, but also that it will actually enhance transportation competition because the merged carrier will be financially stronger and more efficient. Without a merger, applicants contend that neither ATSF nor SPT will survive in the long-run, and that SPT could not survive in the short-run. Thus, in applicants' view, rail competition would be destroyed throughout much of the western United States without their proposed merger.

Applicants and DOT prepared competitive analyses which were substantially similar in approach and which resulted in basically the same conclusions. Our discussion here therefore applies to both parties' studies. At the outset, it should be noted that applicants' and DOT's competitive analyses were predicated on determining the effect of the merger on rate competition and virtually excluded any consideration of service competition. Both studies used methodologies based on broad assumptions which categorically eliminated huge quantities of rail traffic from consideration. These categorical eliminations, which in some instances were referred to as a "screening process," were the basis for voluminous cross-examination, and presentation by applicants of additional evidence modifying and correcting the original studies. The protestant railroads, particularly Union Pacific, Rio Grande, Katy, and KCS, presented evidence and arguments specifically attacking the assumptions used by applicants and DOT and showing the effects such assumptions had on the outcome of applicants' studies. We have thoroughly examined the studies and the underlying record. The following discussion focuses on the premises upon which the studies were based.

Table 1 (all numbered tables in this section appear in Appendix D) is based on data submitted by the Rio Grande. Table 1 shows that, with the exceptions of fresh fish or marine products, ordnance or accessories, leather or leather products, photographic or optical instruments, miscellaneous shipments, and hazardous materials, over-the-road truck traffic is highly concentrated on hauls of less than 1,000 miles. One of the largest TOFC shippers, United Parcel Service (UPS), submitted statements not only on behalf of applicants, but also on behalf of Union Pacific and Rio Grande. UPS stated that it depends on the continuing availability of flat cars, trailers, and efficient terminals and that most of its movements having distances in excess of 500 miles move in TOFC service. Further, UPS ships over 21,000 trailers annually between Los Angeles and points in Arizona, Texas, Louisiana, and other destinations in the Southeast. UPS states that railroads are an "integral arm" of their company and that their experience shows that service is best where competition exists. UPS supports the Union Pacific and Rio Grande responsive applications on the basis that they would tend to maintain both pricing and service competition in the Southern and Central Corridors.

Our exemption of rail TOFC/COFC service, as stated earlier, did not differentiate between sub-markets. The record here firmly establishes the identity of two distinct sub-markets: (1) the conventional domestic movement of trailers or containers on flat cars; and (2) the movement of containers by rail COFC service in the international trades. American President Companies, Ltd., a major shipper with subsidiaries engaged in both sub-markets, intervened in these proceedings in support of Union Pacific's proposed trackage rights. It presented witnesses from each subsidiary: American President Lines (APL), a major ocean carrier, and National Piggyback Services, Inc. (NPS), an I.C.C. licensed property broker.

National Piggyback Service, like UPS, is a major TOFC user, handling nearly 200,000 trailerloads annually in nearly every major transportation corridor across the United States. In 1983, NPS shipped approximately 40,000 trailers over SPT and 36,000 via Santa Fe. Of these shipments, approximately 20,000 trailerloads moved through the Southern Corridor. ATSF and SPT are the only direct competitors for this traffic. The routes of the two carriers between Los Angeles, Dallas, Houston and New Orleans are substantially equal in distance and have comparable transit times. Their TOFC rates between 1978 and 1984 were practically identical, which, NPS claims, reflects the intense competition between the carriers.

In NPS' experience, where competitive rail TOFC service exists, rates on the average are 75 cents per mile (in 1984), as compared to 89 cents where no competitive service exists. The inherent circuity of 800 to 1,000 miles via the Central Corridor dictates the use of the Southern Corridor between Los Angeles and New Orleans in view of the importance to NPS of fast transit time and low cost. Motor carriers do not provide an option to NPS because motor carrier rates generally range from $1.00 to $1.54 per mile, and those rates apply to movements of under 900 miles. Indeed, NPS states that a "large portion" of its own business comes from motor carriers because of the cost effectiveness of rail TOFC service. NPS points out that this effectiveness likely will be enhanced as double-stack container trains eventually replace conventional TOFC equipment for many flows of domestic freight.

American President Lines either individually or jointly with other carriers ships substantial volumes of minilandbridge (MLB) traffic from Asia to Gulf Coast and Atlantic ports. APL provides the water transportation and arranges with one or more railroads (occasionally in combination with a motor or air carrier) to move cargo from a port to the destination. APL offers shippers port-to-port through rates under a single bill of lading, and the revenues are divided with the railroad providing the land transportation. Among the commodities handled by APL are garments, electronics, and other consumer goods, as well as perishables, cotton, and other raw materials. Almost half of APL's eastbound traffic in foreign commerce involves partial movement by rail, and the remainder of the traffic primarily involves movements originating or terminating in or near West Coast port areas by motor carrier. Minilandbridge traffic between Los Angeles and the Gulf amounts to about 17,000 containers annually. In 1983, APL's bill for rail services amounted to more than $90 million.

APL flatly contradicts applicants' and DOT's treatment of minilandbridge traffic, asserting that (1) all-water service is not a competitive alternative for Asia-Gulf Coast service, (2) the Southern Corridor is the most efficient corridor for Gulf Coast MLB traffic, and (3) truck service is not a realistic alternative to rail service between the West Coast and Gulf ports.

The data presented by APL are convincing. In the first three quarters of 1983, at least 73 percent of all ocean carrier eastbound containerizable cargo (435,163 short tons) moved to the Gulf Coast States via rail across the Southern Corridor, with the remaining 27 percent (161,559 short tons) moving via all-water routes. Much of the Asia-Gulf Coast trade still carried in all-water service is not containerizable for either economic or physical reasons, and thus is not subject to MLB competition. About 85 percent of total Asia-Gulf Coast MLB imports move through Los Angeles/Long Beach and about 10 percent through San Francisco/Oakland, with only occasional shipments through Pacific Northwest ports. For marketing and cost purposes, most carriers have their containerships call first at Southern California ports to serve the large, highly competitive market there, before moving on to Northern California ports, thereby slowing service.

APL notes that distance is the key to the cost and speed of rail service, and by far the shortest rail routes between California and Gulf Coast ports are over the SPT and Santa Fe, which have historically been very strong competitors for West Coast-Gulf MLB traffic. The reason that almost 100 percent of the Asia-Gulf Coast MLB traffic moves over the SPT and Santa Fe systems is that they offer lower rates and faster transit times than rail carriers serving the Pacific Northwest ports. APL today provides the rail portion of its MLB service to Gulf Coast and South Atlantic markets through multi-year joint-service contracts with SPT and the Southern Railway. Santa Fe, with whom APL also participates in some operations today, has in the past been a prime carrier for APL to and from these markets. Union Pacific, which must use the Central Corridor, does not even bid on MLB traffic moving from West Coast ports to Gulf Coast or South Atlantic ports. (Tr. 8782, 8797).

APL states that all-water service is not a competitive alternative to Asia-Gulf Coast MLB service. Such service is significantly (1) more costly for ocean carriers to provide, (2) less frequent, and (3) slower. MLB service from Asia to the Gulf Coast costs about $1,110 per TEU (twenty-foot equivalent unit), while all-water service via the Panama Canal costs about $1,325 per TEU and takes more than 2-1/2 times as long. Part of the reason for the disparity in cost and time is that the Asia-Gulf Coast market is not large enough to support direct all-water service. (See Tr. 8790 and Tr. 4570). As a result, containerships bound for the Gulf Coast must also carry cargo for Atlantic Coast markets, and the products destined for these markets dictate that Atlantic Coast ports be served first.

APL states that only a single water carrier provides regular, direct all-water container service between the full range of Far East ports and the Gulf Coast via the Panama Canal, while more than two dozen trans-Pacific carriers offer Asia-Gulf Coast MLB service on the same routes. Of the 13 other carriers which advertise all-water service between Asia and the Gulf, 11 serve only South and Southeast Asia ports (via Suez) and not the much larger Far Eastern market. One carrier has inaugurated a feeder service serving the Gulf from Far East ports. (Tr. 8821). Currently there are about 35 times as many MLB as all-water sailings per month between Asia and Gulf Coast ports. On the average, three trans-Pacific containerships sail each day, compared with an average of one all-water Asia-Gulf Coast containership sailing every 10 days.

As stated earlier, between 80 percent and 90 percent of inbound Gulf Coast MLB traffic is handled through Los Angeles/Long Beach. The reasons are that the distance between Oakland and Houston over the Central Corridor is more than 800 miles longer than over the Southern Corridor, and the distance between

Los Angeles and Houston over the Central Corridor is more than 1000 miles longer than over the Southern Corridor. APL states that rail rates are 60% higher for this movement via the Union Pacific over the Central Corridor than via SPT over the Southern Corridor.

Finally, APL points out that motor carriers cannot provide competition for rail service for import container traffic. Long-haul truck costs are economically prohibitive: quotes received by APL are 80-90 percent higher than over existing rail divisions of APL through revenues. Moreover, the logistical problems associated with trucking alternatives are insurmountable. For example, APL ocean-going vessels can carry as many as 3200 containers each.

Because a truck generally handles no more than 1 or 2 containers, many hundreds of trucks would be required at dockside to move all the cargo for each such vessel. Even assuming that there were enough trucks to meet the demand, a highly dubious proposition in APL's opinion, coordination of this amount of truck traffic on a transcontinental basis would be "truly nightmarish." Railroads, by contrast, can efficiently handle large numbers of containers in a single train.

Curiously, nothwithstanding their elimination of rail TOFC/COFC traffic from consideration in most of their analyses, applicants attempted to survey minilandbridge traffic in a study prepared by a consultant. DOT also gave specific attention to MLB traffic. The railroad protestants and APL variously criticize these limited studies of MLB traffic. Their criticisms are fully substantiated by the record and can be summarized as follows:

1. Applicants and DOT studied only minilandbridge traffic, thereby excluding from consideration any competitive impacts of the merger on microbridge, landbridge and domestic offshore (e.g., mainland-Puerto Rico) container traffic. (Tr. 4712-15).

2. To the extent MLB traffic was studied, the analyses were restricted solely to MLB traffic moving between Los Angeles and Houston in only two foreign trade routes, the Far East-Gulf Coast route and the West Coast-Europe Trade route. Excluded were MLB routes between (a) the West Coast (via the Gulf Coast) and Central America, South America, the Caribbean nations, Africa, and the Middle East, and (b) the Gulf Coast and Australia/New Zealand via the West Coast. (Tr. 16,959-17,001).

3. Applicants erroneously characterized the relationships among railroads, ocean carriers and actual shippers of MLB traffic. Applicants claim that the relationship between railroads and ocean carriers is simply that of a partnership wherein the ocean carrier collects the revenue and divides it with the railroads, with the leverage clearly on the side of ocean carriers because of all-water and alternative MLB route competition.

As protestants point out, railroads must compete with each other to offer rate divisions and services to ocean carriers which are consistent with the ocean carriers' operations. Further, MLB service via other West Coast ports and railroad corridors to and from the Gulf Coast ports are not substitutable from either a cost or service viewpoint in comparison with the Los Angeles - Gulf Coast routes via SPT or ATSF. (See the discussion of APL's evidence above, Exhibits KCS-14, KCS-25, and Tr. 4679). There is general agreement among the parties that the rates charged shippers by ocean carriers have little relationship to the rate or division charged the ocean carriers by the railroads. Possible exceptions to the situation may occur in the case of low-value commodities such as cotton or resins moving MLB to the Far East. (Tr. 8784-8787).

As we stated earlier, our decisions exempting rail TOFC/COFC and boxcar traffic neither addressed specific markets or competitors, nor precluded further consideration of competitive impacts on the traffic resulting from rail mergers. The same conclusions hold true with respect to our decision exempting rail perishables traffic.[33] Although we did not rely on rail intramodal competition as a reason for granting the perishables traffic exemption, the record here unequivocally shows that in specific markets served exclusively by ATSF and SPT, rail competition between those two carriers has actually become more important as a result of deregulation. A prime example of such markets is the fresh fruit and vegetable traffic originating in the San Joaquin Valley of California, and the testimony of Sunkist Growers, Inc. (Sunkist) is typical of the testimony of other San Joaquin producers and their customers.

Sunkist, an agricultural cooperative that markets fresh citrus fruit throughout the United States, Canada, and abroad, must rely exclusively on ATSF and SPT for the origination of rail traffic to the Northeast and Canada. ATSF and SPT have historically competed for Sunkist's traffic, and Sunkist has relied even more heavily on this competition since deregulation because the free market has dictated improvements in service and rate levels. Service competition is extremely important to Sunkist in terms of obtaining adequate supplies of refrigerated boxcars and trailers.

For Sunkist, Santa Fe is the dominant TOFC origin carrier, while SPT dominates the originations of refrigerated boxcar traffic. In Sunkist's experience, motor competition is not significant for the key markets of Montreal, Boston, New York, Philadelphia and Toronto. About 60 percent of Sunkist's products move to this region, and the rail share of the traffic to the key markets is as follows: Philadelphia, 70 percent; New York, 85 percent; Toronto, 88 percent; Boston, 90 percent; and Montreal 97 percent. In recent years, rail shipments have increased, particularly in TOFC service. Refrigerated boxcar service actually is competitive with TOFC service, in part because the typical refrigerated boxcar shipment now exceeds 50 tons.

Contrary to applicants' assertions that citrus fruit is source-competitive and that applicants would therefore be constrained from raising rates on the traffic, Sunkist points out that California and Arizona oranges are seasonally complementary to Florida-Texas oranges. Further, Florida oranges primarily are processed into frozen concentrate, while California oranges are primarily sold as fresh fruit. Variations in demand for other citrus products also preclude direct source substitution. (Tr. 9774-9791, and 9854-9855).

Another San Joaquin Valley agricultural shipper presenting evidence was Calcot, Ltd. (Calcot). This shipper is a 3,600-member cotton-marketing cooperative that markets approximately 2 million bales of raw cotton annually from both the San Joaquin Valley and Arizona. Calcot acts as its own shipment consolidator, shipping about 5,000 boxcars and TOFC trailers yearly to the Southeast as well as other TOFC shipments to Gulf and West Coast ports for export. Calcot is the largest cotton shipper in California.

33/ Rail General Exemption Authority -- Fresh Fruits and Vegetables, 361 I.C.C. 211 (1979).

copper products, petroleum products and chemicals. From their standpoint, containerization of their carload traffic would not be economically justified on the bases of their own production methods and/or the cost of transportation by truck. In the case of chemicals, safety considerations were cited as additional factors necessitating rail movement.

Various witnesses presented by applicants alluded to source and product competition as a constraint on applicants' combined market power. Methodologies employed ranged from another "screen" to case studies. As with the portions of the studies already discussed, applicants relied heavily on assumptions instead of facts to justify exclusions of broad categories of traffic from further consideration as relevant subjects of analysis.

We will next discuss applicants' case studies. These constituted their best effort to demonstrate that motor carriers are actually a reasonable substitute for rail carriers and can adequately constrain rail rates, thus diminishing the significance of a high rail market share and expanding the relevant product market to include transportation by truck.

Applicants made two efforts to show that because motor transportation is sufficiently substitutable for rail, rail rates would be adequately constrained. The first presentation focused on national aggregated statistics. In response to substantial criticism, a rebuttal study was presented through 39 case studies that sought to compare motor and rail rates for 39 specific commodities over one or more specified geographic flows. Shippers, brokers, and motor carriers were telephored and asked whether and for what rate they could ship a commodity between two points. These examples sought to compare motor rates with rail rates, showing the distances of movements. The examples were selected to rebut traffic flows identified by government parties as competitive problems, but applicants' study "did not . . . try to find the points where today significant amounts of potentially competitively impacted traffic are moving on these two railroads . . . ."34/

Of the 39 case studies, the following table demonstrates that 26 show the lowest truck rate to be at least 22 percent higher than the lowest rail rate. Even if we could rely upon applicants' presentation, these rate disparities are significant.

COMPARATIVE RATES35/

Case Study and Flow	Percent By Which Lowest Truck Rate Exceeds Lowest Rail Rate
#3, #4 - grain	
Council Bluffs - LA	78%
Council Bluffs - Brawley	79%
Council Bluffs - Long Beach	79%
Kansas City - LA	104%
Kansas City - Brawley	86%
Kansas City - Long Beach	106%

34/ Tr. 17,529. See Tr. 17,560.

35/ UP, supported by other protestants, sought to have the testimony stricken. The motion was based on procedural and substantive criticisms. See Tr. 17,983-18,004.

Calcot states that cotton shippers place heavy reliance on boxcar transportation because of its lower cost relative to TOFC or all-motor transportation. Cotton prices, according to Calcot, cannot absorb high transportation costs. Cotton can be stored until market and transportation prices are optimal. Calcot must ship large quantities of cotton over long distances and has benefitted from the competition between SPT and ATSF over the years. This competition has been based on rates and TOFC ramp locations. Because Calcot has plants located on both SPT and ATSF, even though the plants are served exclusively by one or the other, the two railroads have been compelled to offer competitive rates and service at all plants. While SPT has provided most of Calcot's boxcar transportation, TOFC service has allowed both carriers to serve all of Calcot's plants.

In Calcot's view, California and Arizona cotton is unique in that the fibers are finer and stronger than those in cotton grown in Arkansas, Texas, and the Southeast. Although Calcot uses motor carrier service, this use has amounted to only about 15 percent of domestic Calcot business. The principal reasons for this limited use of trucks are higher rates and insufficient capacity per truck (less than half that of a boxcar). The availability of equipment and the variation of rates associated with truck transportation is highly seasonal. In times of peak demand, truck service is not reliable, because the truckers prefer to haul higher-rated commodities, and equipment shortages become acute.

This evidence clearly documents our earlier conclusion that applicants' failure to study exempt traffic was both legally and factually incorrect and resulted in substantially distorted conclusions.

Applicants used other "screens" in their competitive studies to exclude certain rail traffic from further competitive analysis. One such screen in fact eliminated Calcot's traffic from consideration by applicants. This screen eliminated ATSF and SPT rail traffic from consideration if more than 50 percent of a commodity group moved by any other carrier of any mode. Most of the commodity groups excluded were 2-digit Standard Transportation Commodity Code (STCC) groups which in most instances encompass huge varieties of specific commodities. For example, Calcot's product, raw cotton, is included in STCC 01, Farm Products, which includes, obviously, products having vastly different transportation characteristics ranging from large-volume, bulk movements of grains to small-volume, highly perishable products such as strawberries. Thus, while more than half of the 2-digit group, Farm Products, may move via other modes, exclusion of the entire universe of farm products from competitive analysis represents nothing more than contrived methodology.

Another screen used by applicants was a "containerizability" screen, i.e., if a shipment known to be carried by applicants could physically be carried in a truck trailer or container, such traffic was eliminated from further consideration. The theory, as here applied, is untenable, because it gave no consideration to (1) the economic feasibility of transporting "containerizable" commodities presently handled in rail carload service, and (2) the economic feasibility for shippers to put their shipments in containers in the first place. Applicants' witness admitted that he had not interviewed any shippers concerning the subject. (Tr. 10772).

Shippers appearing on behalf of Union Pacific testified that their traffic was excluded under applicants' containerizability screen. These shippers produce steel and blast furnace products,

#8 - aggregates/clays

Bentonite - Houston	24%
Belle Fourche - Houston	23%

#10, #11, #12 - Liquid chemicals

Houston - LA (glycol	165%
(toluene)	147%
(acetone)	165%

#14 - sodium compounds

LA - Little Rock	32%

#15 - asphalt

LA - Phoenix (liquid)	80%
Bakersfield - Phoenix (liquid)	102%

#16 - petroleum lubricating oils

Houston - SF	26%

#18 - corn syrup

Cedar Rapids - LA	67%
Springfield - LA	58%
Davenport - LA	66%

#19, #31, #32, #33 - paper products

Portland - LA (fibreboard)	98%
(wrapping paper)	50%
(newsprint)	39%

#21 - iron or steel bars or pipe

Beaumont - LA (bar)	30%
Beaumont - SF (bar)	43%

#22 - cement

Dallas - Amarillo	54%

#23 - industrial sand

Minneapolis - Fresno	91%
LaCrosse - Fresno	94%

#25 - soybean cake

Sioux City - LA	"Not truck Competitive"
Sioux City - Fresno	"Not truck Competitive"
Des Moines - LA	"Not truck Competitive"
Lincoln - LA	"Not truck Competitive"*

#26 - frozen foods

LA - Chicago	(frozen citrus)	25%
	(frozen foods)	25%
LA-KC	(frozen foods)	53%
Stockton/Fresno - KC	(frozen foods)	53%

#27 - canned goods

LA - Chicago	38%
Stockton - Chicago	46%
Stockton - Atlanta	23%
Stockton - Rochester	38%

#28 - wine and brandy

SF/Stockton - Chicago	(boxcar)	22%
SF/Stockton - Miami	(boxcar)	42%

#29 - granulated sugar

SF - Chicago	(bulk)	76%
SF - Dallas		40%

#35 - iron, steel or aluminum scrap

Fresno - SF	40%

#36 - soybean oil

Minneapolis - LA	41%
Kansas City - LA	31%

#37 - beer

LA - Phoenix	45%

#39 - native asphalt

Dabney TX - Beaumont TX	67%

*SFSP-52 VS Baker at 64.

Were we to accept the case studies at face value, we would conclude that applicants failed to prove motor-for-rail substitutability. A substantial number of rates presented are too high to offer a reasonable constraint on rail market power, and are much higher than DOJ's Merger Guidelines' "small but significant nontransitory" test of five percent a year. Merger Guidelines, at 2.11.

In addition, the study does not provide adequate reliability to indicate actual substitutability. We cannot give any weight to the study as evidence of motor-for-rail substitutability for several reasons. Selective use was made of the information. Potentially damaging information was discarded. Supporting papers were heavily redacted as to shippers' use of alternative modes, so as to call into question the validity of both rail and motor rates. Much of the study is based on hearsay without corroborating data.

The rail rates provided by applicants were subjected to continued revisions and dispute and could not be shown to be the lowest available rail rates, against which to compare truck rates. Applicants made two formal "errata" filings to both rail and motor rates on July 26 and August 1, 1985. Additional refinements to the rates were made as applicants' witness testified. Some rates were demonstrated to be substantially in error during cross examination. Some rates were simply withdrawn in response to protestants' criticisms. Rail contract rates were incomplete as presented. UP counsel pointed out that by the time the dust had cleared, 108 changes had been made to 105 rates presented.

The following determinations, contrary to applicants' study's findings, were possible:

1. Applicants finding that rail and truck rates for cotton shipments were virtually identical was inconsistent with Calcot's

witness who stated: "The rail rates, both boxcar and TOFC, that Calcot pays for shipments of cotton from the San Joaquin Valley to the Southeast are well below the lowest truck rates available."36/

2. Applicants' finding of no difference between motor and rail rates for transcontinental potato movements was inconsistent with DOT reporting of 50 to 99 percent higher motor rates.

3. Applicants alleged that there was no difference between motor and rail rates for plastics movement, but applicants' witness admitted that the percentage difference for bulk movements "would approach 80 to 100 percent."

4. Both the motor and rail rates on lumber from Seattle to Phoenix were admitted "to be a mistake."

5. The TOFC rates from Los Angeles to Houston were admitted to be up to 33 perent higher by truck, although the study shows them to be only 15 percent higher by truck.

Numerous rail rates that were lower than those relied upon were not provided because of applicants' opinion that they were not presently being used.

Traffic and contract rate information was provided the witness through applicants' counsel. However, he was not provided with all relevant information. For example, TOFC information was not provided, because it was "too sensitive."

The witness admitted that ". . . there are some corridors where rail costs are significantly below truck costs and only applicants provide competitive service." He also admitted that interline rail service provides competition that trucks cannot, for example, for movements of soybean meal to Fresno.

Numerous concessions were made that the case studies were either irrelevant or inappropriate. For example, the studies concerning sodium compounds, plastics and wheat flour compared bulk rail rates with packaged motor rates. A comparison of the bulk motor rates indicated motor rates that were twice as high as those quoted. The witness admitted that motor rates (unspecified) were too high to handle bulk shipments, for example, of petroleum oil and chemicals. He further admitted the following commodities can be transported significantly less expensively by rail than truck: grain, clay aggregates, sodium compounds, and corn syrup. The witness could find no truck movements of grain for Case Study #3 because of prohibitively higher motor carrier costs.

TOFC information was presented as if it included COFC traffic when it did not. Motor carrier costs and rates were predicated on backhaul operations only. Yet, for important examples, such as grain and paper into Phoenix, and for corn syrup, backhauls do not generally exist. The witness admitted that the lack of backhauls would approximately double motor costs.

Comparisons were made between motor transport of one commodity with rail transport of another, as if the two commodities were substitutable when they were not; for example: liquid asphalt and black asphalt. When a comparison of motor and rail could not be made, the witness relied upon source and product competition: for example, petroleum products, iron and

---

36/ All quotes are from Testimony presented August 22, 1985. See Tr. 17,478-17,726.

steel, and sodium compounds. No supporting evidence as to whether these products were in fact substitutable was presented.

Reliance was placed on subsequent local distribution costs to include post-rail movement motor deliveries, but no offsetting savings for shippers that result from rail distribution were considered. Applicants' witness testified that some shippers "ship virtually 100 percent rail to save on the warehousing cost." And the importance of rail service to warehouses for perishable and frozen food shippers and for canned goods shippers was ignored.

The witness also testified that heavy loadings, long distances, high volumes, and loading investments by shippers, etc., were determinative of whether motor carriers could compete with rail. No attempt was made in applicants' presentation to quantify the amount of traffic affected by those considerations.

"The principle [sic] issue is the degree to which trucks are interchangeable with railroads from the perspective of shippers so that they can act to constrain railroads' rates and services to competitive levels." UP Control, 366 I.C.C. at 672. If the rate and service differentials between rail and motor transportation are significantly great for a substantial amount of traffic, so that motor service is unlikely to constrain rail monopoly behavior, the relevant product market should be defined as transportation service provided by rail carriers.

Applicants' market impact studies are replete with errors of assumption and fact, and internal inconsistencies. Their adoption of DOT's methodology late in the proceeding compounded the problem because DOT excluded exempt traffic from consideration. Both studies had as their main thrust the effect of the merger on transportation rate competition, with only token acknowledgment of service competition. Railroads are in the business of selling railroad transportation service. Price competition for rail service can be and is important where rail service is truly competitive with transportation service provided by other modes, but applicants and DOT eradicated all but an insignificant amount of rail traffic from study.

DOJ, like applicants and DOT, relied on a screening process to define relevant markets, although DOJ's screens were not as exclusionary. Nonetheless, DOJ assumed that if non-rail modes handled 50 percent or more of a commodity between origin-destination pairs (in those instances where movements of the commodity exceeded 10,000 tons by rail), the non-rail mode was substitutable. While DOJ's methodology was to look at all rail traffic, including exempt traffic, and then to apply screens such as the one mentioned above, the assumptions in the screens were almost all oriented to the conclusion that a large market share held by other modes, or, in some instances, by other railroads, constituted substitutability for applicants' services. We reject that conclusion.

Several of the opposing parties presented modal share data. As is generally known, and as demonstrated on this record, market share data for trucks and water carriers carry a high degree of imperfection due to an absence of uniform data reporting by private and exempt carriers, to the extent they publish data at all. Further, some of the truck data sources rely on observations taken at the shipper's loading dock and may not take into account a subsequent haul by rail in TOFC service. Thus, we recognize that the modal share data used by all parties are not precise, and we must conclude that such data offer only an insight as to the magnitude of the market shares held by each of the various modes. Such data do not offer an insight into the general substitutability of one mode for another.37/ However, there are modal share data of record here that suggest the effectiveness of the various modes in specific geographic markets in excess of 1,000 miles.

Table 1, already discussed, shows the few commodity groups that motor carriers handle in excess of 1,000 miles without regard to specific geographic markets. Using an updated and at least partially corrected set of data initially used by applicants, Union Pacific produced the following overall rail shares of total transportation for certain markets in excess of 1,000 miles.

Geographic Market	Rail % of Total
Southeast to S. Cal.	66
Gulf Coast to S. Cal.	60
S. Cal. to Southeast	52
San Joaquin to Southeast	75
Southeast to Bay Area	60

Table 2 (see Appendix D), is also based on data presented by Union Pacific and shows modal share data for traffic flows between San Francisco and Los Angeles on the west, and Houston, Dallas, New Orleans and Atlanta on the east. Of particular interest here is the information in the footnote to Table 2. This shows that, where railroads have a relatively low share of total traffic in one direction between major cities, the non-rail mode having the largest share handles large volumes of particular commodities. Special note also should be made of the rail flows from San Francisco to Dallas and New Orleans and from Atlanta to San Francisco: Each of these flows shows a rail share of less than 50 percent. On the eastbound movements to Dallas and New Orleans, the truck shares are dominated by shipments of farm products and food products. From Atlanta to San Francisco, about one-sixth of the truck share is comprised of food products, while another one-third involves textile mill products. Thus, the Atlanta to San Francisco market represents an exception to the general conclusions we have reached. If the record were all-encompassing of traffic flows between major pairs of cities, other exceptions undoubtedly would surface.

We note, therefore, that modal share data are influenced by geographic definition, and the Atlanta-San Francisco traffic flow is a case in point. There, rail share is 48 percent, but when we consider the entire Southeast to the Bay Area (see the small table above), the rail share is 60 percent. Protestants rather uniformly and accurately criticized applicants' use of geographic market definition on the basis that relatively small rail-served areas were being compared to much larger geographic areas with the result that rail shares were understated compared to truck shares.

Applicants, DOT, and DOJ have all placed a great deal of weight on rate competition while virtually ignoring service competition, including the economic feasibility of one mode physically to substitute for another in terms of unit capacity, shipment volume (other than for obvious bulk commodities), scheduling, equipment ownership and availability, reliability of

---

37/ In UP Control, 366 I.C.C. at 671-672, the Commission recognized that a nontrivial share for trucks in certain markets does not imply that motor carriers are generally substitutes for railroads; rather, the nature of the substitution must be understood.

service, and, where significant, transit time. The methods used by these parties to determine the competitive impact of the proposed merger were each designed to "back into" a relevant body of rail traffic subject to anticompetitive consequences. It would have been helpful if each party had begun by using the traffic data available to the applicants from their own records, identifying movements to or from points where the number of rail competitors would be reduced to at least 3 or less, and systematically interviewing the shippers/receivers of those movements to see if other options were available to them.

Great emphasis has been placed by applicants, DOT, and DOJ on the absolute amount of tonnage in specific movements that have been "identified" as having anticompetitive consequences from the proposed merger. These numbers reflect a static world. Much of the traffic data were for the year 1982. It may well be that 1982 was not typical, being a recession year. The point is that rail traffic volumes are anything but static for an individual carrier, let alone the industry. Shippers and receivers, even in "basic industries", are constantly changing, as are the products produced or used by them.[38]

As discussed at length above, the record makes it abundantly clear that the relevant product market here is railroad freight transportation. Equally as clear is the necessity, to the extent our authority permits, for this Commission to assure the continuation of adequate levels of rail intramodal competition.

Geographic Market

Geographic markets must "correspond to economic realities." Brown Shoe, 370 U.S. at 336. We recognize that railroads "sell their geography," UP Control, 366 I.C.C. at 505, so the distinctions between product and geographic markets may tend to blur. Under section 7 of the Clayton Act, we must examine significant submarkets where the transaction may "substantially . . . lessen competition." Brown Shoe, 370 U.S. at 325.

There has been no attempt on the record to uniformly define relevant geographic corridors, although definitions were largely consistent among the parties. For purposes of this proceeding, the following corridors within the Western District constitute the relevant geographic markets (these definitions are geographic as opposed to being definitions of specific carrier routes):

1. Central Corridor - Northern California and Oregon through Ogden and Salt Lake City to the Chicago, Kansas City and St. Louis gateways.

2. Southern Corridor - California through Arizona, New Mexico, Texas, Louisiana and Arkansas to the gateways of New Orleans and Memphis.

3. Pacific Coast Corridor - Washington, Oregon and California.

4. Intrastate California Corridor - Bay Area to the Los Angeles Basin.

5. Midwest North-South Corridor - Kansas to Louisiana and Texas, including Texas border crossings to Mexico.

38/ In fact, SFSP's Chairman relied upon expected rail traffic growth in the territory served by ATSF as a reason for advocating the merger to the SFI Board of Directors. Tr. at 258.

Each of the applicants and responsive applicants operates routes in one or more of the above corridors. As a preliminary matter, a brief description of these routes is necessary to provide a proper context for discussion of the rail markets relevant to the proposed merger.

In the Central Corridor, Union Pacific operates from the Bay Area through Salt Lake City, Ogden, Cheyenne, and Denver to Omaha/Council Bluffs, thence via connections to Chicago, and to St. Louis via Kansas City. SPT operates from the Bay Area to Ogden, and from Kansas City to St. Louis. Rio Grande operates from Ogden through Salt Lake City to Denver and to Kansas City via Pueblo. Both applicants have routes from the Bay Area through W. Colton (SPT) and Barstow (ATSF) thence eastward through the Southern Corridor to points in New Mexico and Texas, where main lines extend northward to Kansas City. ATSF extends beyond to Chicago, and SPT extends beyond to St. Louis/E. St. Louis.

In the Southern Corridor, SPT operates from the Los Angeles Basin eastward through the southern portions of Arizona and New Mexico, Texas, Arkansas, and Louisiana to Memphis and New Orleans. ATSF operates from the Los Angeles Basin eastward through the northern portions of Arizona and New Mexico to gateways in (1) Texas, primarily Dallas/Ft. Worth and Sweetwater, and (2) Oklahoma at Avard. ATSF Southern Corridor traffic moving to or from points east of these gateways is handled by connections. Union Pacific operates from El Paso to New Orleans via Dallas/Ft. Worth.

The Pacific Coast Corridor contains an SPT single-line route from Southern California north to Klamath Falls and Portland, each of which are gateways for traffic to/from points in Washington and other points north of SPT lines. ATSF's route extends from San Diego and the Los Angeles Basin north to Stockton. Connecting routes beyond are provided by UP from Stockton to Bieber, CA, thence BN to the Pacific Northeast. A highly circuitous route is provided by UP from the Los Angeles Basin to Seattle via Salt Lake City and Portland.

The Intrastate California Corridor is served solely by applicants. SPT has two routes, one along the Pacific Coast, the other via the San Joaquin Valley. ATSF operates from San Diego through the Los Angeles Basin and Barstow to Richmond (in the Bay Area).

Finally, the Midwest North-South Corridor is served by routes of several railroads operating from Kansas points to the Gulf. ATSF, UP, Katy, and BN operate from Kansas points south to Houston/Galveston via Dallas/Ft. Worth. KCS, ATSF and UP operate from Kansas to Beaumont and Dallas, and KCS and UP alone operate directly from Kansas City to New Orleans. SPT lines in this corridor extend from Dallas/Ft. Worth to the Texas Gulf ports and New Orleans. Only SPT and UP have lines extending southward to Brownsville, TX. Other Mexican border crossings are described later.

ATSF and SPT common points where the number of serving class I line-haul railroads would be reduced to only one as a result of the merger, are listed below.

Arizona

Phoenix

California

Antioch
Bakersfield
Belmont Ave (Elk)
Exeter
Famoso
Fresno
Hanford
Lindsay
Madera
Maltha
Martinez
Merced
Oakdale
Oil Junction
Porterville
Strathmore
Tulare
Visalia
Mojave

New Mexico

Deming
Vaughn

Texas

Alpine
Caldwell
Cleveland
Eagle Lake
Kountze
Mcgregor
Newgulf
Rosenberg
Tenaha
Wharton

Note: All of the California points except Antioch, Martinez, and Mojave are located in the San Joaquin Valley.

Each of the applicants presently serves large geographic areas as an exclusive class I line-haul railroad. In Oregon, SPT exclusively serves all points on its lines except those between and including (1) Portland and Eugene, and (2) Chemult and Klamath Falls. In California, exclusive SPT territory extends between (1) Klamath Falls, OR, southeastward to Flanigan, NV, (2) Klamath Falls and Medford, OR, southward to Chico and Woodland, CA, in the Sacramento area, (3) from San Bernardino, CA, southeastward to Yuma, AZ, including the Imperial Valley, and (4) from San Jose southward via San Luis Obispo and Santa Barbara to Los Angeles (the Coast Line). Santa Fe's exclusive territory in California extends from the Los Angeles Basin south to and including San Diego, and from Barstow eastward to the Arizona border near Needles, CA, and Parker, AZ.

Generally speaking, other than Phoenix, AZ, and Vaughn and Deming, NM, ATSF exclusively serves the northern portions of Arizona and New Mexico, while SPT similarly serves the southern portions. In central New Mexico, Santa Fe has a north-south line between Belen (NM) and El Paso including branch lines from Rincon to Deming and beyond. SPT's Tucumcari line extends northward from El Paso through Vaughn and Tucumcari to the Texas Panhandle. In eastern New Mexico, ATSF has an exclusive branch line from Clovis southward through the Carlsbad area to Pecos, TX, where it connects with Union Pacific.

The exclusively served areas generally descibed above obviously will not experience any diminution of direct competitive service as a result of the proposed merger except at the common points served by ATSF and SPT listed earlier.

The economic importance of all of the corridors described above must be emphasized. The corridors in whole or in part reach a 5-state area (comprised of California, Arizona, New Mexico, Texas, and Louisiana) which has exhibited tremendous growth in population and economic development over the past 25 years. This growth has far surpassed that of the balance of the United States.

The five States' population increased over 66 percent during the 1960-1985 period (from 30.8 million people to 51.3 million), while the balance of the United States showed population growth of slightly over 25 percent (from 148.5 million to 186.1 million). As a percentage of total United States population, the five-state population represented 17 percent in 1960 and 22 percent in 1985, reflecting the shift of population into the area.

The relative percentage growth of each of the five States compared to the balance of the United States in the manufacturing sector is shown below for the 1972-1982 period:

Percentage Growth in Manufacturing
Five-State Region vs. Balance of USA
1972-1982

State or Region	Value of Goods Shipped by Manufacturers (Percent)	Manufacturers' Capital Expenditures (Percent)
Arizona	219	286
California	218	413
Louisiana	407	351
New Mexico	319	292
Texas	369	509
Five-State Region	285	430
Balance of USA	137	169

Source: KCS Opening Brief at 11 and 12.

A similar trend has taken place with respect to growth in the service industries, wholesale sales and retail sales, as shown below:

Percentage Growth in Sales,
Five-State Region vs. Balance of USA
1972-1982

State or Region	Wholesale Sales	Retail Sales	Sale of Services
Arizona	217	192	360
California	218	154	351
Louisiana	268	177	412
New Mexico	239	175	219
Texas	368	218	465
Five-State Region	278	177	378
Balance of USA	167	121	251

Source: KCS Opening Brief at 13 and 14.

Clearly the above data, while certainly not all-inclusive, amply demonstrate the fact that growth in the five States has far surpassed that of the balance of the United States. Underlying data of record substantiate that this growth has been sustained even through the recession years of the early 1980's. Of utmost significance here is that this region of unparalleled growth is served in whole or in part (i.e., as an origin/destination area) by each of the rail corridors at issue, and possible anti-competitive effects of the proposed merger must therefore be viewed with extreme caution.

We have already determined that the relevant product market is rail freight transportation. The market shares held by applicants are next examined in the rail corridors listed above.

The Effects of the Proposed Merger on the Relevant Markets

Applicants, in their reply brief, argue that the protestants' market share analyses generally assign to applicants a 100 percent market share of all interline traffic in which applicants participate, regardless of whether such participation is an originating, terminating or bridge carrier. Applicants cite a hypothetical example where Union Pacific originates a shipment, interchanges it to SPT, which in turn interchanges it to Conrail for delivery. Under this example, applicants claim that protestants would attribute a 100 percent share to SPT. The record reveals that to the limited extent the applicants attributed specific "market shares" to individual railroads, their methodology using the same hypothetical example would result in a 33 percent "market share" of the movement. See, e.g., Tr. 5029-32. Further, the applicants' study arranged origin and destination regions in some instances so that origins or destinations served exclusively by either SPT or ATSF were grouped with origins or destinations served by other railroads, resulting in understatements in the actual market share held at specific points by applicants. Tr. 5032-46.

The methodology espoused by applicants represents a convenient method for ignoring the market impact on an origin/destination point such as Phoenix, which is served only by SPT and ATSF. Even if the two carriers each originated 50 percent of the rail traffic and each terminated 50 percent of the rail traffic destined to Phoenix and a half dozen other railroads participated in each and every movement, the fact remains that applicants after merger would handle 100 percent of the rail traffic into and out of Phoenix.

Applicants' assert (Reply Brief at 92) that protestants' analyses of railroad market share data are of little, if any, probative value. We find the contrary to be true.

The Public Utilities Commission of the State of California prepared rail market share analyses using applicants' own data base. This base consisted of the Commission's One Percent Waybill Sample for 1982 modified by the substitution of an approximately 10 percent sample of applicants' traffic for the one percent of their traffic included in the Commission sample. Union Pacific prepared analyses based on traffic tapes supplied by applicants together with Union Pacific's own traffic data for the year 1983. This data base consisted of 2 percent traffic samples. The ATSF and SPT data were limited to points agreed by applicants and UP to be relevant to the latter's trackage rights diversion study. Union Pacific therefore also relied on 1982 data used by applicants (supplied by a consultant). The described data sources relied on by the parties are not "perfect" in that they are samples of total rail traffic and subject to statistical adjustments for validity and reliability not materially affecting their use here. The results of the analyses using the various data bases are very close, and we will rely on the market share data next discussed as reasonably accurate estimates.

The most obvious reductions in competition between railroads as a result of the proposed merger are at the points served only by SPT and ATSF. These points have been listed previously. Each of the common points in California, Arizona, New Mexico and Texas would be served exclusively by applicants for the movement of any commodity to or from any other point.

California is the pivotal State in terms of assessing the competitive impact of the proposed merger because the Pacific, Central, and Southern Corridors all begin (or end) in California. In addition, other than BN's line from the Pacific Northwest to Bieber (and connection with UP), California is served by only three class-I line-haul railroads: the applicants and Union Pacific. Based on 1982 and 1983 data, the UP handles slightly over one-fifth of California's rail tonnage, and applicants handle the balance--in other words, nearly 80 percent.

In view of our earlier conclusion that railroads dominate transportation markets of 1,000 miles or more in length, we will discuss each of the corridors in turn with particular emphasis on long-haul rail traffic. Certain general considerations should be kept in mind in connection with this discussion.

The Commission has traditionally analyzed competitive effects of rail consolidations in parallel and end-to-end terms. UP Control, 366 I.C.C. at 505; Norfolk Southern, 366 I.C.C. at 216; Railroad Consolidation Procedures, 363 I.C.C. 784. These terms are analogous to the horizontal and vertical terminology used under Clayton section 7 in Brown Shoe, 370 U.S. at 323, 334. Parallel, or horizontal consolidations, concern companies involved with comparable goods performing similar functions; end-to-end, or vertical consolidations, concern companies in a supplier-customer relationship.

End-to-End Effects: While the proposed transaction may appear to be essentially parallel in nature, requiring close scrutiny because of the prospect for elimination of competition, there are three areas where the effect of the transaction is a vertical one: north-south traffic in the Midwest to the Gulf; transcontinental traffic through the Central Corridor; and north-south traffic on the West Coast.

Parallel Effects: ATSF and SPT lines are essentially parallel across the Southern Corridor between Southern California and the Gulf and Southeastern gateways, and through the Central Valley of California.

a. The Pacific Coast and California Intrastate Corridors

Only one carrier, SPT, provides direct single-line rail service between the Los Angeles Basin and Portland, OR, the Pacific Coast Corridor. The most direct route competing with the SPT is that provided by ATSF from the Los Angeles Basin via Barstow to Stockton, where connection is made with UP, which in turn connects with BN at Bieber, CA. The BN line continues northward via Klamath Falls and Bend, OR, to a connection with BN's line at Wishram, WA and routes to points throughout the Pacific Northwest, including Portland. Union Pacific also has a single-line route between Los Angeles and Portland via Salt Lake City and Ogden, which is highly circuitous (about 450 miles, or 39 percent longer than the SPT route).

Based on 1982 data submitted by CPUC,39/ the following tables clearly show applicants' dominance of Pacific Coast Corridor rail traffic.

L.A. Basin to Washington (% of tons originated)

SPT	68.0	
ATSF	24.5	Total tonnage = 262,000
UP	7.4	

Washington to L.A. Basin (% of tons terminated)

SPT	58.6	
ATSF	29.2	Total tonnage = 873,900
UP	11.3	
All others....	.9	

L.A. Basin to Oregon (% of tons originated)

SPT	81.8	
ATSF	16.8	Total tonnage = 377,900
UP	1.4	

Oregon to L.A. Basin (% of tons terminated)

SPT	90.8	
ATSF	6.7	Total tonnage = 2,475,700
UP	2.5	

All traffic moving between the San Joaquin Valley and the States of Oregon and Washington either originates or terminates on applicants' lines in the valley. Northbound, SPT originated 74 percent of traffic to Washington and 93 percent to Oregon. Southbound, the SPT termination percentages were 90 percent from Washington and 99 percent from Oregon. Santa Fe in each case, obviously, accounted for the balance.

CPUC's evidence indicates that SPT holds an 81.8-percent share of the rail market for Los Angeles to Oregon traffic and a 90.8-percent share of traffic in the reverse direction. ATSF's market shares are small, although comprising almost all of the remaining traffic. Washington traffic is more evenly distributed, SPT holding 68 percent of the northbound market and 58.6 percent of the southbound market. ATSF's respective shares are 24.5 and 29.2 percent. Although its own lines do not extend into Washington, ATSF participates in joint-line service with UP/MP and BN (those two carriers connecting at Bieber, CA) to move this traffic. This service is directly competitive with SPT's single-line service and could expect to be discontinued if applicants merge. Moreover, the distances involved diminish the competitiveness of motor carriage. After the merger, Santa Fe as part of SPSF would no longer be a part of the competitive ATSF-UP-BN route between the Pacific Northwest and the Los Angeles Basin-San Joaquin Valley area. Union Pacific would remain competitive in connection with BN only for the limited area of Northern California served directly by UP, namely, from the Bay Area through the Stockton-Sacramento area. The proposed consolidation thus would eliminate an important competitive rail

---

39/ CPUC-5, VS of Williams at II-39-46. "Northern California" consists of 5 sub-state areas defined by Williams and comprises roughly the Bay Area and the area east and north of it.

option and have seriously adverse effects on the overall competitive situation in the Pacific Coast Corridor.

The California intrastate corridor extends from the Los Angeles Basin to the Bay Area, and applicants possess all three of the lines in the corridor. Although Union Pacific originates or terminates a very small share of the traffic moving through this corridor, it is almost certainly traffic interchanged to/from applicants, either one of which provided the line haul between the Bay Area and the Los Angeles Basin. Union Pacific theoretically could provide single-line service via Salt Lake City, but this is so circuitous as to make it an unrealistic alternative. The evidence submitted by the CPUC shows that applicants together hold a 90.2-percent share of this rail traffic, which in 1982 amounted to 26,360 carloads, or 1.76 million tons.

The record does not establish that the merger would create serious anticompetitive problems for Los Angeles-Northern California traffic. CPUC treats Northern California as a single area, yet its own analysis of the five individual sub-State areas produces a varied picture of the anticompetitive effects there. ATSF is shown as participating in virtually no traffic between Los Angeles and the Northwest and Northeast California sub-State areas or from the Sacramento Valley area to Los Angeles. In most other flows both carriers are substantial participants. By far the bulk of the traffic moves from and to the Bay Area and the territory immediately to the east of it.[40] We have already found that motor carriage is most effective up to distances of 1,000 miles. Table 1 (in Appendix D) shows that motor carriers are even more effective in markets of less than 500 miles. The California Intrastate Corridor clearly falls within a geographic market area in which truck competition is most formidable. There is evidence of some rail hauls wholly within this corridor. On balance, however, we cannot find that the rail monopoly position (created by the proposed merger) would be of the same significance as the monopoly created over other corridors. Distances between the Bay Area and Los Angeles are short enough that trucks would be effective competitors for most traffic, thus providing a constraint on applicants' rate and service behavior.[41] At the same time, however, it is obvious that the existing competition between SPT and ATSF would be entirely eliminated.

b. <u>The Southern Corridor</u>

Existing Competitive Situation

In the Southern Corridor, rail movements between the San Joaquin Valley and the Los Angeles Basin on the west, and points in Texas and eastward through the Southeast would be dominated by a merged SPSF. From the Los Angeles Basin to the Southeast (defined here to include Virginia, Texas, North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Florida), applicants originate over 95 percent of the rail traffic, and in the opposite direction, applicants terminate approximately 90 percent of such traffic moving to the Los Angeles Basin. Between the Los Angeles Basin and points in Texas, Oklahoma, Arkansas and Louisiana, the applicants originate nearly 100 percent of the eastbound traffic and terminate approximately 95 percent of the westbound traffic. All of this traffic is moved between the Los Angeles Basin and Texas via either SPT's or ATSF's Southern Corridor routes, encompassing an area geographically analogous to most of Conrail's operating territory. To the extent other

---

40/ Referred to as North San Joaquin Valley, though not part of the area applicants would serve exclusively. CPUC-5, VS of Williams, Appendix A, Tables A-13, 17-18, 21-23.

41/ For example, the Rand McNally Road Atlas lists the distance between San Francisco and Los Angeles as 414 miles.

carriers participate in the movements via interchanges with applicants, such interchanges take place at the east end of the Southern Corridor no farther west than El Paso (SPT-UP, with a 1983 interchange volume of about 16,000 carloads, of which over 13,000 terminated on SPT), or Sweetwater, TX (ATSF-UP, with about 22,000 carloads, including some 12,000 terminated on ATSF and 8,700 originated by ATSF). If the movements are terminated or originated by Union Pacific within the Los Angeles Basin, the bulk of that traffic is originated or terminated outside of the Basin on the lines of either applicant.

Union Pacific, as did applicants and other parties, presented evidence showing applicants' rail market shares between specific BEA areas in the Southern Corridor. The BEA areas used were for Los Angeles, Houston, Dallas, New Orleans and Atlanta. In each case the areas encompass considerably more than just the metropolitan areas lending the names to the BEA's. Thus, for example, the Los Angeles BEA encompasses most of Southern California, namely, the Counties of San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Nyo, and Mono. The latter three counties and a large portion of Riverside County lie in the desert areas east of Los Angeles and the Sierra Nevada Mountains.

In short, the BEA-to-BEA data should not be interpreted as city-to-city traffic flows. Given this consideration, the traffic flows between the BEA areas in some instances, such as the Los Angeles BEA, include rail traffic not affected by changes in the levels of competition resulting from the proposed merger. For example, in the Los Angeles BEA, traffic terminated at Needles, CA, on the ATSF would not be affected because it is a point exclusive to ATSF at the present time, and, in fact, is near the Arizona border. Use of the BEAs also obscures the fact that short-line railroads connecting only with applicants are included within various BEA areas, e.g. the Trona Railway and the Ventura County Railway (in the Los Angeles BEA), each of which connect exclusively with SPT.

Bearing in mind, then, that the BEA areas are geographic areas including one or more major urban centers, the following BEA data conclusively show applicants' dominance of the Southern Corridor for traffic moving to and from the Los Angeles BEA (data are for 1982):

	Percent of Total Rail Traffic	
Los Angeles eastbound to:	Applicants	Other*
Houston	94	6
Dallas	90	10
New Orleans	100	-
Atlanta	86	14
Westbound to Los Angeles from:		
Houston	98	2
Dallas	97	3
New Orleans	92	8
Atlanta	100	-

*See text immediately following.

The data above exclude applicants' bridge traffic originated on the lines of short-line railroads connecting solely with applicants as well as traffic interchanged by applicants and Class I line-haul railroads within the Los Angeles BEA (in other words, UP) and at gateways in Texas and Louisiana. If this traffic is added in, it can then be seen that applicants handle from 97 to 100 percent of the traffic shown in the table above with the exception of the traffic westbound from the New Orleans BEA to the Los Angeles BEA, in which applicants handle about 92 percent.

Applicants argue that traffic participation shares should not be considered because other carriers obviously participate in interline traffic and have some influence over it. Normally, we would agree. However, the Southern Corridor presents a unique situation: Whether or not applicants' Southern Corridor traffic is originated, terminated, or "bridged" by applicants, it must move over their lines between the Los Angeles Basin and gateways from El Paso and Sweetwater east. Generally, the traffic therefore must move in excess of 1,000 miles (except for El Paso) over applicants' lines to or from their eastern gateways. The record reveals beyond doubt that only a minor portion of ATSF and SPT traffic moving to and from the Texas and Louisiana east/west gateways is bridge traffic for applicants:

Applicants' Major Texas and Louisiana
East/West Southern Corridor Gateways
Revenue Carloads Interchanged, 1983

Gateway	Applicants' Class of Traffic Interchanged		
	Originated	Terminated	Bridge
Santa Fe Gateways			
Ft. Worth*	9,541	81,954	1,331
Dallas*	57,998	24,969	3,347
Sweetwater	8,740	12,134	1,049
Beaumont	5,228	5,381	67
SPT (excluding SSW) Gateways			
Dallas/Ft. Worth*	9,757	52,982	5,781
Houston*	4,008	11,497	2,561
El Paso	2,949	14,127	655
Corsicana**	45,578	96,640	6,541
Shreveport *	49,137	37,298	7,388
New Orleans	60,845	35,420	7,980

Note: Excludes gateways at which ATSF and SPT are the only connecting carriers. Gateways shown are those at which at least 10,000 carloads were interchanged in 1983.

*The traffic interchanged at these gateways also includes north-south traffic moving in the Midwest North-South Corridor.

**These gateways are the principal Southern Corridor connections between SPT and its subsidiary SSW. The latter acts as a bridge carrier between SPT and the Memphis and St. Louis/E. St. Louis gateways. Thus, some of the traffic moves only in the Midwest North-South Corridor. SSW interchanged 70,964 carloads at Memphis, of which 53,478 moved as bridge traffic over SSW. Almost 64,000 carloads were interchanged by SSW with Norfolk Southern and CSX at Memphis.

In addition to the gateways shown in the table above, ATSF also interchanges Southern Corridor traffic with BN at Avard, OK, which is actually located on ATSF's Kansas City main line. In 1983, 17,040 carloads originated by ATSF were interchanged to BN at Avard, and 34,277 carloads were received from BN and terminated on ATSF. Only 812 carloads interchanged at Avard involved a bridge haul over ATSF.

The record shows that applicants, following merger, would have an almost absolute monopoly over rail traffic moving to and from Southern California via the Southern Corridor.

Union Pacific also presented evidence showing that traffic moving between the San Francisco BEA and the Dallas, Houston, New Orleans and Atlanta BEAs would have participation by applicants of 93 to 100 percent in each direction. Of more significance here are the underlying data which reveal the relative volumes of this traffic which move through the Southern Corridor and the Central Corridor. The following tables detail the traffic flows involving the applicants to and from the San Francisco BEA. All data are for rail movements in 1982.

San Francisco - Dallas (Percent of Total Tons)

Eastbound		Westbound	
SP direct	21.6	SP direct	24.3
SP-MKT	11.9	MP-SP	28.6
SP-MP	5.6	Total SPT	52.9
WP-SP-MKT	13.1		
Total SPT	52.2	ATSF direct	34.0
		ATSF-DRGW-WP	13.1*
ATSF direct	42.8	Total ATSF	47.1
Total SPSF	95.0	Total SPSF	100.0

San Francisco - Houston (Percent of Total Tons)

Eastbound		Westbound	
SP direct	50.9	SP direct	37.4
SP-DRGW-MP-MKT	1.4*	SP-WP	0.5
WP-SP-BN	1.0	MP-SP	2.6
CWR-SP	3.8	Total SPT	40.5
Total SPT	57.1		
ATSF direct	40.4	ATSF direct	42.7
WP-DRGW-ATSF	1.1*	ATSF-WP	1.7
ATSF-SP	1.3	MP-ATSF	10.5
		MP-RSP-ATSF-SP	1.3
Total ATSF	42.8	Total ATSF	56.2
Total SPSF	99.9	Total SPSF	96.7

San Francisco - New Orleans (Percent of Total Tons)

Eastbound		Westbound	
SP direct	83.1	SP direct	56.1
SP-MP	4.4	MP-SP	0.9
Total SPT	87.5	Total SPT	57.0
ATSF-KCS	9.3	KCS-ATSF	36.0
ATSF-MP	0.6	MP-ATSF	3.6
		MP-DRGW-WP-ATSF	3.4*
Total ATSF	9.9	Total ATSF	43.0
Total SPSF	97.4	Total SPSF	100.0

San Francisco - Atlanta (Percent of Total Tons)

Eastbound

SP-SOU	35.8
SP-SBD	12.2
SP-DRGW-MP-SBD	4.4*
Total SPT	52.4
ATSF-SBD	22.2*
ATSF-KCS-SBD	3.9
ATSF-KCS-SOU	14.8
Total ATSF	40.9
Total SPSF	93.3

Westbound

SOU-SP	17.7
SOU-MP-UP-SP	41.0*
SOU-BN-UP-SP	6.8*
Total SPT	65.5
SBD-ATSF	6.8*
SBD-BN-ATSF	13.7
SOU-BN-ATSF	14.0
Total ATSF	34.5
Total SPSF	100.0

*See text immediately below.

In the above tables, several routes between the San Francisco BEA and the Dallas, Houston, New Orleans, and Atlanta BEA's are marked with an asterisk (*). These routes, with one exception, indicate a Central Corridor routing in part involving Rio Grande and its connections to San Francisco (WP and SP). The exception is a rather circuitous route involving Santa Fe and the Seaboard System between San Francisco and Atlanta, which by inference must be routed via one or more Illinois gateways between the two carriers because direct connection between them is available only in that State. The ATSF portion of the haul would thus be via Kansas City and Barstow, using the combination of Santa Fe's Southern Corridor route and mainline to Chicago as described earlier. Table 3, in Appendix D, also shows the distribution of Santa Fe's Bay Area traffic at eastern gateways compared to Central Corridor gateways.

The tables clearly show that the Southern Corridor is the preferred route for Bay Area traffic to and from Texas and New Orleans, but that for Atlanta traffic, the Central Corridor and the ATSF-SBD route are substitutable for the strictly Southern Corridor routing. Also indicated in the tables is the strength of SPT and ATSF as originating carriers in the San Francisco BEA as compared to being the terminating carriers, particularly for traffic originating in the Atlanta BEA. Again referring to the 1982 data submitted by CPUC, of all rail traffic to any point originated in the Bay Area, applicants originate over 85 percent and the UP originates the balance. With respect to all terminations from any point, applicants account for 88 percent and the Union Pacific for 12 percent.

Analysis

To summarize, the proposed consolidation clearly would eliminate rail competition for traffic moving across the Southwest between California (the areas of primary importance being Los Angeles, the San Joaquin Valley, and the Bay Area) and the Gulf area and South Southeast, i.e., that traffic requiring a Southern Corridor routing if it is to move most economically by rail from origin to destination. It would also create a rail monopoly at points now served exclusively by both applicants, primarily Phoenix and a number of points in central California (all but three of them in the San Joaquin Valley) in which lines of no other railroad are present.[42] These problems overlap to the extent Phoenix and San Joaquin Valley traffic must move over the Southern Corridor from and to the Gulf and beyond. The monopolization of San Joaquin Valley traffic as it relates to routings through the Central Corridor will be discussed in a separate section.[43]

It is clear from the record that most of the rail traffic moving between California and the Gulf/South Southeast prefers a Southern Corridor movement. The only other railroad even remotely available for the traffic would be UP/MP, with lines extending from Los Angeles and the Bay area to Salt Lake City, then eastward to Kansas, and ultimately south and east to the Gulf and the St. Louis and Memphis gateways. Although this routing would be feasible for some of the involved traffic, e.g., between the Bay Area and parts of the South Southeast,[44] it is too circuitous to move most of this traffic economically. For example, the UP/MP Central Corridor route between Los Angeles and

---

42/ Although these are the only San Joaquin Valley points that would experience a reduction in direct service of from two railroads to one, and although many other San Joaquin Valley points are now exclusively served by ATSF or SPT, the consolidation would effectively eliminate rail competition throughout the Valley. This is due to the proximity of the two carriers' lines to each other throughout the Valley and the pervasive nature of rail-rail competition there due to the extension of each railroad's service to points not located on its own lines through drayage to and from TOFC ramps. See, e.g., UP/MP-23, VS of Hemb at 2.

The State of California, through CPUC, is also concerned that the consolidation would eliminate competition in an area east of the Los Angeles basin. We are unable to determine that any significant competition exists at present. Applicants' lines through this area, though roughly parallel, are widely separated from each other. CPUC states that historicially ATSF has used TOFC service to compete for SPT traffic in the Imperial Valley, but the record does not disclose evidence of any substantial competiton of this type. SPT's rail market share is 93 percent for originating traffic and over 96 percent for terminating traffic. It would seem likely that the bulk of the traffic ATSF handles originates or terminates in the area of its own lines. There appears to be little rail competition requiring preservation. See CPUC-5, VS of Williams at II-5, 27 and 32.

43/ The Phoenix area occupies a unique position in this analysis. It is the only major shipping and receiving area served exclusively by both applicants that is intermediate to the "end points" (California and eastern Texas) of applicants' parallel lines across the Southern Corridor. Some Phoenix rail shipments move across the corridor to and from the East, South, and Midwest; the remainder move to and from California and beyond. But all are dependent on a Southern Corridor "solution" to the extent the proposed consolidation threatens the Phoenix area with the loss of rail competition. In contrast, because many San Joaquin Valley shipments move over the Central rather than the Southern Corridor, loss of Southern Corridor rail options is not the only anticompetitive problem that requires analysis with respect to the San Joaquin Valley.

44/ As a measure of this, UP/MP indicated that even if it received Southern Corridor trackage rights, it would continue to use its existing lines to move traffic between the Bay Area and points in Georgia, the Carolinas, and much of Mississippi, Alabama, and Florida. UP/MP-23, VS of Peterson at 10.