

FD-30400

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the Commission -- ten days after its December 6 Petition and two days after the Commission had stated in its decision served December 14, 1983, that it intended to rule on the UP Petition to Institute Proceedings no later than December 29, 1983.

Of course, UP has a strong basis for its concern that the Commission itself will not allow delay by discovery. The Commission obviously did not believe when it issued its December 14 order that discovery was necessary in order for it to decide on the merits of UP's December 6 Petition. To the contrary, when the Commission issued its Order -- and by then the Commission had had all of the court affidavits before it for five days -- the Commission said that by December 29 it would make its "determination of the issues raised in the petitions presently pending before us,"¹³ i.e., it would decide on the merits of the petitions. The Commission issued an order of "short duration to enable us to examine in depth the involved matters."¹⁴ The Commission obviously saw no need for discovery in order to conduct the "in depth" examination. The issue, of course, ultimately is not what UP

13. Finance Docket No. 30360, Petition Of Union Pacific Railroad Company And Missouri Pacific Railroad Company To Institute A Proceeding Under Clayton Act Section 11, at 2 (order served December 14, 1983)

14. Id.

claims to have known and when, but what the Commission's knows of the industry and of this very transaction.¹⁵

UP's Claims About Applicants' Affidavits Do Not Withstand Analysis

UP's last justification for discovery -- that applicants' affidavits raise new issues -- is without merit. See, Response to Applicants' Emergency Petition for Vacation of the Commission's December 16 order cross referenced in Discovery Pet., 3. Instead, UP once again argues the merits about management, incentives, and financial strength.

UP's argument concerning management simply rehashes the characterizations it has already presented to the Commission, based upon the undisputed facts as to who is leaving and who is remaining with SPT. See UP Response, 8-10. None of these characterizations even suggest the need for further discovery; indeed they underscore the absence of need. UP complains about the relative "stature" of those who will

15. By letter dated December 16, 1983, UP invited the Commission's attention to its decision of April 18, 1980, in Finance Docket No. 28799 (Sub-No. 1) in which depositions "on a similar expedited basis were ordered to be conducted." A copy of this decision is attached. As the decision referred to makes clear, discovery was ordered in that case because certain factual statements contained in the briefs of the parties appeared to contradict the evidence which had previously been filed by those same parties. There are no such conflicting statements here. Moreover, in that case, unlike the present case, the underlying transaction itself would not have been jeopardized by any delay which the taking of depositions might have caused.

remain at SPT, Response, 10; does UP seriously want to delay consummation beyond December 29 for a deposition about stature? Indeed, UP's Discovery Petition, when it outlines the subjects of the proposed depositions, actually omits completely the relative stature and experience of the transferring and remaining management. See Discovery Pet., 5. UP itself simply could not find a way to cast its argument about management as a discovery request.

Most importantly, UP inadvertently underscores how utterly unnecessary discovery is here when it states that "[a] critical factor in evaluating the significance of this 'brain drain' is the vast degree of direct competition between Santa Fe and Southern Pacific." UP Response, 9. The Commission hardly needs discovery to understand this "critical factor." As the expert body charged with implementing national transportation policy, and familiar with the western railroad mergers of recent years, the Commission is well aware of the competition between ATSF and SPT.

UP fares no better in its attempt to show that the applicants' affidavits raise new issues about incentives. Part of applicants' response concerning incentives to maintain SPT as a vigorous competitor is that SPT's profits will substantially affect the profitability of SFSP because the financial results for SPT will be consolidated in the financial

statements of SFSP during the period of the Voting Trusts. See McNear Aff., 13-15. UP now asserts that the use of consolidated returns raises new issues that require discovery. UP Response, 11. The UP assertion is -- there is no gentler word -- inexplicable. As the McNear affidavit itself points out, the consolidated accounting treatment was detailed in the proxy statement of November 10, 1983, and UP referenced that document extensively in its District Court papers. McNear Aff., 13-14.¹⁶

UP also asserts that the main purpose in combining the two railroads is to eliminate duplicate operations, and goes on to speculate that "the participants would undoubtedly like to start sooner rather than later." UP Response, 13; see also id., 19. UP refers to the statements in the Miller Affidavit concerning the "closing down of ... duplicative facilities", but those statements obviously were about non-

16. The Commission should be aware that UP's effort to justify discovery has led it now to argue that the incentives at SPT and ATSF will be not to weaken SPT but to maintain and even strengthen it. UP argues that neither railroad will have an incentive to lower rates in order to take market share from the other, and that if ATSF raises a rate, SPT will have an incentive to raise its rate also, thereby "increas[ing] the return of both." . . . UP Response, at 11-12. This argument belies UP's claim of injury to it, let alone immediate and irreparable injury. Moreover, since the theory is the reverse of the theory heretofore maintained by UP before both the District Court and the Commission that SPT will be weakened, it also underscores that now that it has obtained a temporary cease and desist order, UP will proffer any theory that might gain it further delay. The fact that UP can think up new theories does not repeal the fact that consolidated returns were described in the November 10 proxy statement.

rail assets during the period of the Voting Trust. UP's argument is but another way of saying that SPT will lack incentives to be a vigorous competitor during the Voting Trust -- an argument that challenges the very concept of a voting trust; that the Commission is amply equipped to assess; and that is fully addressed in the affidavits and other papers already before the Commission.

UP's arguments concerning SPT's financial strength also show there are no new issues and no need for discovery. Instead, UP presents argument once again on the merits of the question whether SPT will or will not be financially healthy. UP Response, 15. In that argument, UP simply chooses to emphasize different facts from those emphasized by applicants, or to evaluate them differently. For example, applicants have pointed out that as of October, 1983, all of SPC's advances to SPT had been repaid. Smith Aff., 7-8, 9-10. UP acknowledges that fact, but claims that that accomplishment has created a liquidity problem for SPT. UP Response, 15. Applicants could now counter with other facts in the record about SPT's cash flow -- but to do so here would be beside the point. The point is, nothing UP says justifies its claim that the affidavits raise issues of such startlingly new impact as to explain its earlier failure to seek discovery before the Commission and implicit representations that no

discovery was needed; to show that the Commission was wrong when it said on December 14 that a stay of "short duration" would enable it to examine the issues "in depth" and reach a decision; or to justify the abandonment of the December 29 commitment.¹⁷

The ineluctable fact is that the Commission presently is able to make the findings and judgments required to dispose of UP's petition. It is familiar with the ramifications of national transportation policy, and with competitive relationships among the western railroads. It does not need depositions about "present traffic relationships between UP and the Southern Pacific railroad," to take one of the subjects about which UP wants to conduct a deposition. Discovery Pet., 5. More importantly, the Commission is entirely capable of evaluating these interim arrangements without additional detail, no amount of which can change UP's basic contention that SFSP will want to destroy a multibillion dollar asset. No discovery is necessary to evaluate that claim. UP's proposed depositions at most could be an occasion for argumentative exchanges reflecting different outlooks that will

17. The advantages to UP of delay are illustrated by the potential financial impact of delay on SPC. For example, SPC recently received \$750 million as a result of its sale of its telecommunications operations; pending consummation of the Combination, SPC is obliged to hold those proceeds in marketable securities rather than invest them in more advantageous business opportunities consistent with SPC's strategic direction. Moreover, under the terms of the merger agreement SPC is barred until consummation or termination from raising equity financing. Fogg Aff., 7-8.

add nothing of importance to what the Commission already knows.

The Commission Has Remedial Authority To Deal Now Or In The Future With Particular Problems, and Need Not Enjoin The Entire Transaction

If SPT's behavior or condition warrants further investigation during the term of the Voting Trust, the Commission will have retained jurisdiction over the Voting Trust and is perfectly capable of ordering an investigation and appropriate discovery at that time. Applicants have already stated that they are willing to make any amendments to the Voting Trust that the Commission may require during that period if the Commission concludes that such amendments are necessary to avoid violation of either the Interstate Commerce Act or the Clayton Act. See Schmidt Aff., 2.

The Commission will be able during this period to monitor traffic movements, operations, tariffs and financial health. It will be available to hear specific complaints by UP of either acts or practices that UP might claim confirm its present speculations. Further, the Commission will have available to it a wide array of remedies in the event that it concludes that the interim arrangements are having effects that are contrary to the public interest.

Further, if the Commission presently has a serious doubt about some element in the proposed transaction, it is far preferable to allow the transaction to go forward now with some modifications than to subject it to the indefinite delays of UP's discovery schedule.

With respect to management transfers, for example, applicants have already stated that they would agree to any of the SPC or SPT management continuing at SPT if they choose to do so during the period of the Voting Trust. See Schmidt Aff., 2.¹⁸ The Commission could go further and prohibit any former SPC or SPT officers who had access to confidential information of competitive value from using such information to the competitive advantage of the ATSE relative to the SPT. The Commission could also prohibit the award, without Commission approval, to an officer of SPT of any right to benefits whose economic value depends upon the profitability of SFSP. The propriety of such acquisition could be measured by whether it is substantially contrary to the competitive interests of SPT. These alternatives all lie within the Commission's power, and can be required if and to the extent that the circumstances warrant under the relevant legal standards.

18. UP's response to this offer is to insist that the "entire corps" of SPC/SPT officials remain where they are. UP Response, 19. UP's position requires no comment.

With respect to SPT's financial health, applicants have already made known their willingness to accept an order under which SFSP and SPC would be required to make such interest bearing cash advances to SPT as may be required to maintain the competitive viability of SPT.¹⁹

More broadly, the applicants have agreed to a provision that would require SPT to conduct its operations and business in the manner in which it did so prior to October 4, 1983, except as to changes required in the ordinary course of business.²⁰ Such a provision would establish a standard by which to measure any future complaints by UP or investigations by the Commission.

While none of these measures are, in applicants' view, necessary or appropriate, applicants are willing to accept them in order to enable the proposed transaction to be consummated. What applicants are unwilling to accept, and what is patently contrary to the public interest, is delay of the entire transaction. To prohibit the entire transaction for any additional length of time is to utilize an order that

19. See proposed Hold Separate Order, (Civ. No. 83-3631) (letter to Judge Flannery from Paul A. Cunningham, Dec. 12, 1983); see also Schmidt Aff., 2-3 (attached to applicants' Emergency Petition For Vacation Of Cease and Desist Order, filed December 15, 1983). UP's objection (UP Response, 18) that the Commission will be required to make a "business judgment" about "SPT's financial needs" is hardly compelling, particularly for an agency long familiar with assessing carrier finances.

20. See proposed Hold Separate Order, supra, n.19.

is far broader and more intrusive, and far more likely to cause irreparable harm to applicants, than is reasonably required to meet any conceivable concern about the public interest during the period of the Voting Trust.²¹

For these reasons, applicants vigorously oppose UP's Discovery Petition, and request that it be denied in its entirety.

Finally, applicants respectfully request a decision in this matter on or before December 23. There can be little or no benefit to holding this proceeding over beyond the Christmas holiday until the Commission's final deadline, December 29. On December 23, this basic matter will have been before the Commission for over a month since MKT's first petition²² and 17 days since UP's initial petition.

21. It is virtually axiomatic that an entire transaction should not be enjoined where less extreme means exist by which to safeguard the public interest. See FTC V. Exxon Corp., 636 F.2d 1336, 1344 (D.C. Cir. 1980).

22. See Petition of Missouri-Kansas-Texas Railroad Company for Limited Hearing, November 14, 1983.

This should be adequate time for this decision; and every day that passes brings further harm to applicants and their shareholders.

Respectfully submitted,

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December 20, 1983

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of December, 1983, served the foregoing Response by causing copies thereof to be hand delivered to the following persons:

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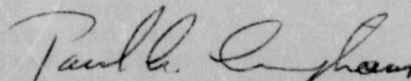
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Paul A. Cunningham

INTERSTATE COMMERCE COMMISSION
DECISIONFinance Docket No. 28799 (Sub-No. 1)^{1/}ST. LOUIS SOUTHWESTERN RAILWAY COMPANY--PURCHASE
(PORTION)--WILLIAM M. GIBBONS, TRUSTEE OF THE PROPERTY OF
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR

Decided: April 17, 1980

On April 9, 1980, two petitions to reopen this proceeding were filed by many of the rail protestants. Applicants responded on April 17, 1980.

RELIEF SOUGHT

The Chicago and North Western Transportation Company, (CNW) and the Atchison, Topeka and Santa Fe Railway Company (ATSF) filed a petition seeking an order:

- (1) Allowing depositions, interrogatories and other discovery regarding SP's undisclosed plans for the financing of the transaction;
- (2) Scheduling hearings on SP's plans to finance the transaction out of the federal treasury; and
- (3) Prohibiting SP from destroying documents relating to financing of the transaction.

1/ This proceeding embraces the corresponding applications in Finance Docket No. 28799 (Sub-No. 2), St. Louis Southwestern Railway Company, Securities; Finance Docket No. 28799 (Sub-No. 3), St. Louis Southwestern Railway Company, Use of Terminal Facilities at St. Louis, MO-East St. Louis, IL; Finance Docket No. 28799 (Sub-No. 4), St. Louis Southwestern Railway Company, Use of Terminal Facilities at Kansas City, MO; Finance Docket No. 28799 (Sub-No. 5), William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company, Debtor, Use of Terminal Facilities at Kansas City, KS-Kansas City, MO; and Finance Docket No. 28799 (Sub-No. 6), St. Louis Southwestern Railway Company and William M. Gibbons Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company, Debtor, Pooling Agreement.

This proceeding also embraces Finance Docket No. 29028, Missouri Pacific Railroad Company--Purchase (Portion)--William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company, Debtor; Finance Docket No. 28799 (Sub-No. 7), Los Angeles and Salt Lake City Railroad Company and Union Pacific Railroad Company - Trackage Rights Over Southern Pacific Transportation Company in Orange County, CA; and Finance Docket No. 28799 (Sub-No. 8), Los Angeles and Salt Lake City Railroad and Union Pacific Railroad Company - Trackage Rights Over Southern Pacific Transportation Company in Los Angeles/Long Beach Harbor, CA.

Four other protestants, the Missouri-Kansas-Texas Railroad Company (MKT), Missouri Pacific Railroad Company (MP), Norfolk and Western Railway Company (N&W) and Union Pacific Railroad Company (UP), filed a similar petition requesting expedited action. These protestants specifically requesting the reopening of the proceeding

For the limited purpose of taking testimony concerning preliminary discussions between applicants and FRA regarding:

- (a) the availability of section 505 of the 4 R Act to rehabilitate the Tucumanri line; and
- (b) applicants' intention to file an application for financial assistance in the near future.

BACKGROUND

Both petitions arise out of a footnote contained in the brief of the United States Department of Transportation (DOT) (filed March 24, 1980). In that footnote DOT indicated that SPT/SSW had had preliminary discussions with the Federal Railroad Administration (FRA) regarding the availability of section 505 funding to rehabilitate the Tucumanri line. Furthermore, DOT noted that applicants had informed FRA of their intention to file an application for financial assistance in the near future.

Protestants allege that this statement contradicted applicants' statements in the application, in the record, and even in applicants' brief filed the same day. In their brief applicants stated that "the actual costs of rehabilitation are to be borne by SPT and SSW, not by the public or the protestants."^{2/} (emphasis added)

PROTESTANTS' ARGUMENTS

In their petition CNW and ATSF argue that we must investigate applicants' financing plan. They give 3 examples of how public financing, if involved, can impact these proceedings

- (1) Applicants' misrepresentation of a critical fact to the Commission is sufficient basis -- by itself -- for denying the Application;
- (2) The need for Section 505 financing is antithetical to SP's claim that the transaction is financially viable if privately financed; and

^{2/}Brief of Applicants Southern Pacific Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company and William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company, Dabtor, in Support of Principal Applications and in Opposition to Trackage Rights and Inconsistent Applications, at VI-24

- (3) Section 505 financing involves a substantial cost to the public which this Commission must consider in determining whether the proposed transaction is in the public interest and there is nothing in the record on this issue.

The other petition raises the same arguments.

DISCUSSION AND CONCLUSION

At this time we are not deciding whether additional oral hearing should be ordered on the issue of applicants' alleged plans to seek FRA financing for the proposed rehabilitation. We will not make that decision until: (1) the protestants have had discovery; and (2) all parties are given the opportunity to address the issue of whether further hearings are necessary at oral argument.

Accordingly, we order applicants to: (1) allow depositions, interrogatories and other discovery regarding their allegedly undisclosed plans for financing the transaction, and (2) not destroy any documents relating to the financing of the transaction. We delegate to Deputy Director Michael Erenberg, Section of Finance, authority to settle any discovery disputes.

By authorizing discovery at this time, we expect the parties to conduct the necessary discovery prior to April 29, 1980, the date set for oral argument in this proceeding. On that date, the parties should report to us the results, explaining (1) what evidence would be adduced at any further hearing, and (2) the bearing which that evidence would have on the issues in this proceeding. Our notice on April 24, 1980, setting forth the scheduled appearances at oral argument, shall allocate a time period for the parties to address the issue of whether the Commission should reopen the record.

In ordering discovery to begin today we believe that we will enable protestants to clarify the record as to whether there was any misrepresentation and, if so, how material such misrepresentation might be to our ultimate determinations in these proceedings. Furthermore, if we should decide to reopen the record, today's discovery order will avoid unnecessary delay that would otherwise be necessary before hearings could be held.

It is ordered:

1. Applicants will comply with discovery requests which are confined to the issues at hand.
2. Applicants will destroy no documents relating to financing of the transaction.

Parties shall be available to address the issue of whether the proceedings should be reopened at oral argument on April 29, 1980.

4. This decision shall be effective upon the date served.

By the Commission, Chairman Gosking, Vice-Chairman Gresham, Commissioners Stafford, Clapp, Trantow and Alexis. Vice Chairman Gresham dissented with a separate expression. Commissioner Stafford absent and not participating.

AGATHA I. MURGINOVICH
Secretary

(SEAL)

VICE CHAIRMAN GRESHAM, dissenting:

Applicants state that their access to Section 505 funding was not made possible until November 4, 1979, with passage of the Milwaukee Railroad Restructuring Act. Applicants apparently made no moves to investigate the possibility of funding until some time in January 1980, when conference with FRA was requested. That conference was reportedly held on February 13, 1980, after close of the record in this case, and according to SP/SSW, the corporate decision to seek Section 505 funds was made after the conference. The application was executed on March 26, filed on March 31, and published in the Federal Register only yesterday.

On the basis of these facts, I find nothing reprehensible in applicants' conduct. There is surely nothing wrong in seeking more reasonably priced financing if it is available, and there is nothing excessive about an application sure to be published in the Federal Register. Moreover, this seems to be much ado about very little. Whether Section 505 funding is made available or not is a matter left to FRA's judgment, and if they disperse the funds it certainly does not detract from the merits of this purchase. If anything, it would probably be a positive factor.

I will not join in the authorization of this fishing expedition.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

IN RE: PROPOSED VOTING TRUST,)
SOUTHERN PACIFIC TRANSPORTATION)
COMPANY)



FD 30400

VERIFIED PETITION FOR PRODUCTION OF
DOCUMENTS IN AID OF LIMITED HEARING

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November 14, 1983

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BEFORE THE
INTERSTATE COMMERCE COMMISSION

IN RE: PROPOSED VOTING TRUST,)
SOUTHERN PACIFIC TRANSPORTATION)
COMPANY)

VERIFIED PETITION FOR PRODUCTION OF
DOCUMENTS IN AID OF LIMITED HEARING

In a simultaneous filing, the Missouri-Kansas-Texas Railroad Company ("MKT") has petitioned the Commission for a limited hearing to consider facts showing that the proposed Voting Trust for the stock of the Southern Pacific Transportation Company ("SP") will not effectively insulate or prevent improper control or combination of or prevent anti-competitive actions by, the SP and The Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") prior to Commission approval of the proposed merger of the SP and the Santa Fe.

By this petition, the MKT, pursuant to 49 C.F.R. §§ 1114.21(b)(2) and 1114.30, requests the Commission, in aid of that limited hearing and to avoid unnecessary delay, to immediately issue an order requiring both the SP and the Santa Fe to produce the following documents:

DOCUMENTS TO BE PRODUCED

Definitions:

As used herein:

(1) The term "SP" means the Southern Pacific Transportation Company and its corporate parents, subsidiaries and

affiliates, and the term "Santa Fe" means the Atchison, Topeka & Santa Fe Railway Company and its corporate parents, subsidiaries and affiliates.

(2) The term "documents" means all papers, writings and recordings of any nature, including without restriction communications, reports, studies, internal or external corporate memoranda or communications and minutes or recordings or memoranda of meetings.

(3) The term "Voting Trust" means the proposed Voting Trust for the stock of the Southern Pacific Transportation Company and the term "Voting Trust period" means the period during which the Voting Trust will be effective prior to the time the Commission will pass upon an SP-Santa Fe merger or combination or common control.

Documents to be produced by each of the SP and Santa Fe:

All documents in the possession of the SP or of the Santa Fe that are, or in any way mention, involve, concern or relate to:

(a) Any plans, studies, proposals, or reports of any kind dealing with the conduct of operations of the SP and of the Santa Fe during the Voting Trust period including without limitation the setting-up of working or study groups, and their membership and duties;

(b) Any plans, studies, proposals, or reports of any kind produced within the last two years that deal with:

(i) rates or traffic routings or contracts involving the MKT or any other railroad now connecting with or participating in rates or routings with the SP or Santa Fe, or (ii) without limitation, with such rates or routings or contracts during the Voting Trust period;

(c) Any plans, studies, proposals, or reports of any kind produced within the last two years that deal with changed or proposed changes in rates or routings or contracts involving the SP and the Santa Fe for traffic that is now or was formerly routed in part via the MKT or any other railroad, including without limitation changes or proposed changes in such rates or routings or contracts during the period of the Voting Trust or the elimination of such rates or routings with the MKT or any other railroad during the Voting Trust period; and

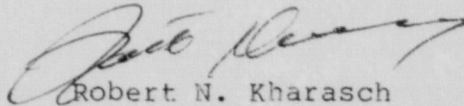
(d) Any plans, studies, proposals or other reports of any kind produced within the last two years, that deal with traffic flows, or changes in traffic flows, during the the Voting Trust period or the setting up of working or study groups to consider or to effectuate or to accomplish such changes in such traffic flows during the Voting Trust period or later.

CONCLUSION

The accompanying Petition of the MKT for a Limited Hearing, and the Affidavit of Harry T. Dimmerman submitted

therewith, demonstrate the urgent need for the Commission to hold a limited hearing to consider the effects of the proposed SP Voting Trust prior to "approving" the Voting Trust or allowing it to go into effect. For the Commission to have all available facts before it, this Petition should be granted, and the SP and the Santa Fe should be ordered to produce the documents in Washington, D.C., at the offices of the attorneys for the MKT, at least ten days prior to the time set for a limited hearing, or at such other time and place as the Commission may designate.

Respectfully submitted,



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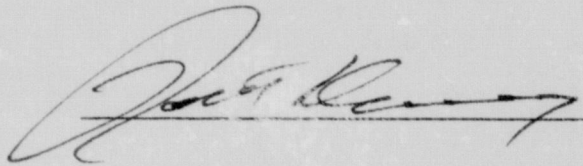
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November 14, 1983

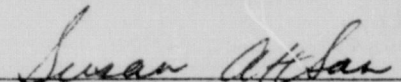
VERIFICATION

Robert N. Kharasch, being first duly sworn, states that he is one of the counsel for the Missouri-Kansas-Texas Railroad Company, and that he has read and has signed the foregoing Petition and that the facts set forth therein are true to the best of his knowledge and belief.



District of Columbia: SS:

Subscribed and sworn to before me this 14th day of November, 1983.


Notary Public in and for
the District of Columbia

My commission expires:

My Commission Expires November 30, 1983

CERTIFICATE OF SERVICE

Copies of the foregoing Verified Petition for Production of Documents in Aid of Limited Hearing and all accompanying papers were this 14th day of November, 1983, mailed by Express Mail, postage prepaid, to:

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and

Gus Svolos, Esq.
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Kathleen Mahon

BEFORE THE
INTERSTATE COMMERCE COMMISSION

IN RE: PROPOSED VOTING TRUST,)
SOUTHERN PACIFIC TRANSPORTATION)
COMPANY)

FD 30400

PETITION OF
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
FOR LIMITED HEARING

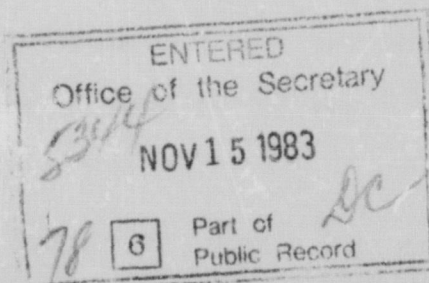
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November 14, 1983



BEFORE THE
INTERSTATE COMMERCE COMMISSION

IN RE: PROPOSED VOTING TRUST,)
SOUTHERN PACIFIC TRANSPORTATION)
COMPANY)

PETITION OF
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
FOR LIMITED HEARING

I. INTRODUCTION

Santa Fe Industries, Inc., the parent company of the Atchison, Topeka and Santa Fe Railway Company (hereafter, the "Santa Fe") and Southern Pacific Company, the parent company of the Southern Pacific Transportation Company (the "SP") have announced that the two parent companies intend to combine, each present parent becoming a subsidiary of a new giant holding company to be called "Santa Fe Southern Pacific Corporation." The two present parent companies intend to consummate their transaction by year end, prior to any Commission consideration of the Santa Fe-SP railroad merger.

Meanwhile, the two present parents say they "intend to make arrangements acceptable to the Interstate Commerce Commission to permit consummation of the transaction prior to final ICC approval of the affiliation of the two railroads." (Quote from SP press release). A form of Voting Trust for SP

stock has now been submitted for Commission action pursuant to 49 C.F.R. Part 1013.

Petitioner, The Missouri-Kansas-Texas Railroad Company (the "MKT") petitions the Commission for a limited hearing prior to any action approving the Voting Trust.

The MKT offers the shortest and most direct North-South route from Kansas City to Denison, Texas, Dallas/Forth Worth, Texas, and points south to Mexico. Shippers now have the benefit of MKT competition and MKT short routes, but they will risk losing these benefits if the Voting Trust is approved prior to any Commission consideration of the Santa Fe-SP merger.

In the attached affidavit and the following statement, the MKT shows that there are facts available that demonstrate that the proposed Voting Trust, absent the imposition of practical conditions controlling the actions of the SP and Santa Fe managements, will not prevent anticompetitive consequences and unauthorized control during the period of the Voting Trust, prior to Commission approval -- if that occurs -- of the merger.

Accordingly, the MKT urgently requests that the Commission hold a limited hearing, prior to the issuance of any Voting Trust approval, to consider facts presented by the MKT -- and further facts obtainable from the SP and Santa Fe -- that show the anticompetitive consequences that will occur

during the interim term of the Voting Trust, and hence the effective exercise of unauthorized control and combination prior to Commission approval (if any) of the proposed merger. The MKT requests the Commission to order the Santa Fe and the SP to respond to the Verified Petition for discovery (submitted herewith) in order that these critical facts relevant to the issue of control and combination during the term of the Voting Trust may be fully available to the Commission.

II. STATEMENT IN SUPPORT OF PETITION FOR LIMITED HEARING

A. Summary.

The MKT requests a limited hearing at the ICC before any opinion is issued approving the proposed voting trust as insulating the Santa Fe and SP from violation of the strictures of the Interstate Commerce Act forbidding unauthorized common control of two rail carriers. The MKT's request for a limited hearing is based upon the following points, more fully elaborated below:

First, the issuance of an ICC staff opinion approving a Voting Trust, even though called "informal" and "nonbinding," has enormous practical effects, permitting immediate implementation of working arrangements prior to Commission consideration or approval of the merger itself.

Second, the affidavit accompanying this petition shows that there are facts that now demonstrate that operations

during the proposed Voting Trust will have anticompetitive effects now, prior to approval of the merger, despite the purported insulation blanket of the Voting Trust.

Third, whatever relief there may be at the end of the road for a mistaken opinion approving this Voting Trust -- either by Commission disapproval of the merger or by later findings that the Voting Trust has been abused -- such future relief will be of no help in repairing injuries done to competitors and to shippers now, in the interim before the Commission decides whether the merger should be approved.

The MKT thus asks for a limited hearing appropriate to the fact issue to be resolved: whether this Voting Trust in fact prevents unauthorized common control and combination prior to approval of the merger itself, and whether the Commission thus must disapprove the Trust in its present form, leaving the merger parties to await the full future merger hearing.

Where there are facts available to demonstrate that a voting trust will be inadequate to prevent injury to shippers and carriers during its interim term, despite apparent formal compliance with loose "guidelines," it would be arbitrary and capricious for the Commission to refuse even to obtain and consider those facts.

B. The Facts: The Circumstances In This Case
Require A Limited Hearing Prior To Any
Approval of the Voting Trust

As the Commission is well aware, an opinion that the proposed Voting Trust effectively insulates the corporate parents from the power to control the SP will have a decided practical effect. While such opinions are said to be "informal" and "nonbinding," in fact, in this case, approval means that the parties may and will proceed with their plans for cooperative action during the Voting Trust period in advance of Commission approval of the merger itself.

The Commission is also well aware that voting trusts can be used improperly. Indeed, when it determined to take the "minimal regulatory approach" to the problem of abuse of voting trusts, at the time of issuance of its guidelines in 1979, the Commission indicated that the adoption of simplified rules was not to be viewed as an invitation to abuse voting trust agreements, and that it would closely monitor the use of these devices and "take whatever action is necessary" where a voting trust agreement has been used improperly. 44 Fed. Reg. at 59909 (Oct. 17, 1979).

The MKT believes that action is necessary in this case now to prevent improper use of the Voting Trust and serious anticompetitive consequences during its term. The merger that will be facilitated by the proposed Voting Trust is largely a

parallel merger of two major roads. The elimination of competition that will result if the merger is approved is patently substantial, and the MKT has every reason to believe that the anticompetitive consequences that will ensue during the period of the Voting Trust will likewise be substantial. Indeed, the parties to the proposed merger have already taken anticompetitive actions that adversely affect shipper opportunities for competitive rail service and the MKT's ability to provide competitive service.

The MKT has presented facts to demonstrate that operations during the interim Voting Trust period are likely to amount to de facto (and unapproved) combination of operations between the to-be-merged carriers, and there are other facts that this Commission can obtain to demonstrate that operations by the two carriers under the Voting Trust will favor each other to the exclusion of competition, including the MKT. Thus:

-- The SP and the Santa Fe are free during the Voting Trust to cut off shippers' opportunities to use the MKT and the MKT's short routes, to the tune of some \$16 million a year in MKT revenues. Dimmerman Affidavit, ¶ 6.

-- The SP is now taking actions that prevent shippers from using MKT routings, deprive shippers of the benefit of competition, and exclude the MKT from important markets. These actions have included the circuitous routing of specific

types of traffic to eliminate the MKT's efficient and direct short line routes. Dimmerman Affidavit, ¶¶ 10, 18 and 19.

-- The SP has been a recent leader in cancelling joint rates and through routes and denying MKT participation in carriage. Details are provided in the Dimmerman Affidavit, ¶¶ 10(b), 16, 17, 18 and 19.

-- There are no restrictions in the proposed Voting Trust on the SP's making arrangements with the Santa Fe to hand over traffic to the Santa Fe to the exclusion of the MKT, and indeed the SP management will have every incentive to take such actions. Again, details are in the Dimmerman Affidavit, ¶¶ 10, 11, 12 and 13.

In addition to these and other facts the MKT presents to show that de facto operational combinations eliminating competition can -- and will -- be exercised during the period of the Voting Trust, there are other facts that the Commission can obtain to show that the Voting Trust as proposed will not prevent control and combination of SP and Santa Fe operations. As the Dimmerman Affidavit points out, there are almost certainly plans in existence for the operation of the SP and the Santa Fe during the interim Voting Trust period (Affidavit, ¶ 15). In the attached MKT Petition for limited discovery, the Commission is asked to require those planning papers to be produced, most particularly the plans of the two

roads for new and restrictive rate and route practices favoring each other, so that all the operational facts will be before the Commission prior to any decision on the effects of the Voting Trust.

C. The Law: Refusal To Grant A Limited Hearing In The Circumstances Of This Case Would Be Arbitrary and Capricious

The Commission plainly has the authority to hold a limited hearing -- or indeed any sort of investigation it deems appropriate -- prior to taking any action on the Voting Trust. As one court has said, the "power of the Commission to respond to conditions of illegal control is practically plenary under the Interstate Commerce Act."^{1/} Such a hearing would be entirely in accord with the case law relating to the use of voting trusts.

While the ICC has long permitted an acquiring carrier to put the stock of an acquired carrier into an independent voting trust pending ICC approval of a proposed merger, it is also plain from the cases that it is the success and effectiveness of the trust that makes its use permissible. Furthermore, the Commission has been quite plain that the

^{1/} Illinois Central R.R. Co. v. United States, 263 F. Supp. 421, 428 (N.D. Ill. 1966) (three-judge court), aff'd mem., 385 U.S. 457 (1967). See 49 U.S.C. § 11701 (general authority to begin an investigation on ICC's own initiative or on complaint).

question of control is a fact issue to be determined, "not by artificial tests but by the circumstances of each case." New York, Chicago & St. Louis R.R. Co. Control, 295 I.C.C. 703, 713 (1958) (emphasis added).

Court cases upholding the use of a voting trust to avoid violation of the statutory prohibition against mergers and other forms of control between carriers prior to ICC approval have likewise emphasized the effectiveness of the voting trust in insulating the one carrier from the other's control. Thus:

This [the question of effective insulation] is a question addressed more to the realities of the railroad business than the niceties of trust law.

Illinois Central R.R. Co v. United States, supra note 1, 263 F. Supp. at 427-28 (emphasis added). Approving the ICC's findings that the trust "along with other self-imposed restraining measures" had been successful and that the one railroad had not acquired control of the other "through the trusts or otherwise," the Court continued:

This is the language of reality and practicality. The Commission focused on the success and effectiveness of the trust.

263 F. Supp. at 428 (emphasis in original).

In short, the cases upholding the use of voting trusts do not stand for the proposition that any voting trust that in its formalities merely appears to be independent necessarily

insulates the acquiring carrier from control of the carrier to be acquired.^{2/}

Here, the facts indicate a clear threat that severe anticompetitive effects will occur during the period of the

^{2/} In one instance of Court approval, the argument that the trust did not provide effective insulation was solely addressed to the legal inefficacy of the trust, and not at all to the practicalities of operation under the trust agreement. Illinois Central R.R. Co. v. United States, supra, 263 F. Supp. at 424. In the other, the district court did not address the issue, dismissing the complaint on jurisdictional grounds. The court did observe at one point that the complainant had previously made the same claim before the ICC, and that the ICC had denied the petition in an order the preamble of which included the statement that "the Commission has held that the placing of stock in an independent voting trust constitutes divestiture of control thereof, see Missouri Pacific Railroad Company - Control - Chicago & Eastern Illinois Railroad Co. et al., 327 I.C.C. 279." B. F. Goodrich Co. v. Northwest Industries, Inc., 303 F. Supp. 53, 59 (D. Del. 1969), aff'd without reaching this issue, 424 F.2d 1349 (3d Cir.), cert. denied, 400 U.S. 822 (1970). The Missouri Pacific case cited, however, makes it plain that it is the particular circumstances of each case that are crucial; the ICC said, for example:

The record makes it abundantly evident that . . . Missouri Pacific did not otherwise have power to control Eastern, and that it did not exert any apparent influence on Eastern's management, prior to or after the creation of the voting trust.

327 I.C.C. at 319 (emphasis added). It is actual divestiture of control that is significant: Central of Georgia Ry. Co. Control, 295 I.C.C. 563, 576 (1957) (the "creation of voting trusts as a means of satisfying the provisions of section 5 [now section 11343] cannot be effective for that purpose unless and until we are satisfied that the trusts constitute an actual divestiture of control") (emphasis added).

Voting Trust, before any plenary hearing can be held on the approvability of the merger. In addition, there are further facts which the Commission can obtain revealing the plans the SP and the Santa Fe already have made (or are making) for operations during the Voting Trust period. In the face of actual facts that can be presented to show anticompetitive consequences and hence improper use of the voting trust device, a limited hearing is essential prior to any Commission action (including an "informal" staff opinion) that would effectively permit implementation of the Voting Trust.

The MKT asks only for a limited hearing, appropriate to the circumstances of the case. Such a hearing is essential in this instance. See Marine Space Enclosures, Inc. v. FMC, 420 F.2d 577 (D.C. Cir. 1969). A refusal by the Commission to grant a limited hearing, and to listen to the facts that would establish that this particular Voting Trust will not effectively insulate the SP from improper common control -- and thus that the strictures of the Interstate Commerce Act requiring prior approval will be violated -- would plainly be arbitrary, capricious, and an abuse of the Commission's discretion. See Marine Space Enclosures, supra; Morgan v. United States, 298 U.S. 468, 480-81 (1936).

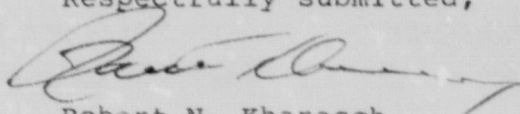
III. CONCLUSION

As noted earlier, this Commission has said that "[t]he existence of control is an issue of fact to be determined, not by artificial tests but by the circumstances of each case." New York, Chicago & St. Louis R.R. Co. Control, supra, 295 I.C.C. at 713. The MKT has presented facts in the accompanying affidavit, and there are other, additional facts obtainable by the Commission, to show that without any practical conditions controlling the interim actions of the SP and Santa Fe managements, severe anti-competitive effects will ensue immediately upon implementation of the Voting Trust. Mere theoretical voting control lodged in a trustee should not be allowed to obscure the fact of practical, operational control, demonstrable from anticompetitive actions already taken and from operational plans of the two roads. Under these circumstances, a limited hearing is required to receive those facts, prior to issuance of any opinion approving the Trust that would effectively give the two roads carte blanche for anticompetitive operations prior to approval of the merger. There is a compelling urgency for exercise of the Commission's plenary powers to obtain and then to consider the facts.

Copies are attached of an Affidavit of Harry T. Dimmerman, Vice President Traffic of the MKT railroad, and

of an application for discovery in aid of the Petition for
Limited Hearing.

Respectfully submitted,



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November 14, 1983

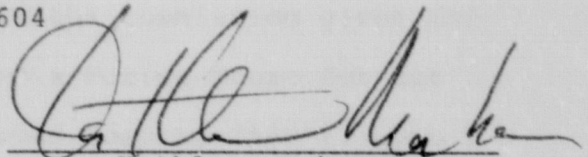
CERTIFICATE OF SERVICE

Copies of the foregoing Petition and all accompanying papers were this 14th day of November, 1983, mailed by Express Mail, postage prepaid, to:

William R. Denton, Esq.
Vice President and General Counsel
Southern Pacific Transportation Company
One Market Plaza
San Francisco, California 94105

and

Gus Svolos, Esq.
Vice President - Law
The Atchison, Topeka and Santa Fe Railway Company
80 East Jackson Boulevard
Chicago Illinois 60604



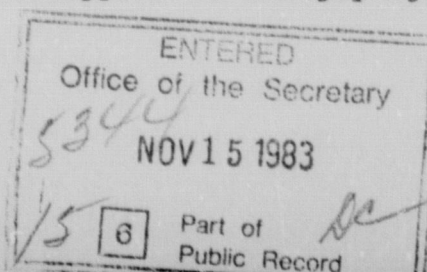
Kathleen Mahon

AFFIDAVIT OF HARRY T. DIMMERMAN
VICE PRESIDENT - TRAFFIC
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

H. T. Dimmerman, being first duly sworn, deposes and says:

1. My name is Harry T. Dimmerman; I am Vice President-Traffic of the Missouri-Kansas-Texas Railroad Company ("MKT") and its subsidiary, the Oklahoma, Kansas and Texas Railroad Company ("OKT"). I have held my present position of Vice President-Traffic, for eight years and have been employed by railroads since 1946.

2. I make this affidavit in support of the petition of the MKT for a limited hearing before the Commission gives any approval permitting establishment of a Voting Trust for the stock of the Southern Pacific Railroad Company ("SP"). The SP and the Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") have announced that they plan to merge, and that in advance of merger proceedings before the ICC the parent companies of the two railroads will merge, with the stock of the SP to be placed in a Voting Trust. As I explain below, the placing of the SP's stock in a Voting Trust with only formal conditions and without any practical conditions controlling the actions of the SP and Santa Fe managements, will have severe anti-competitive effects immediately upon the establishment of the Trust, will prevent shippers from enjoying the



benefits of competitive railroad services, and will harm both shippers and the MKT before the Commission has any opportunity to consider the effect of the proposed merger and pass upon it. The MKT asks the Commission, before the Voting Trust receives any sort of Commission approval, to hold a limited hearing to consider the facts the MKT presents and to obtain facts as to the plans of the SP and Santa Fe for operations during the Voting Trust period prior to a Commission decision on the merger.

3. As the Commission of course knows, a merger of the Santa Fe and the SP is largely a parallel merger. These two roads are the routes from Pacific Coast and United States southwest origins to U.S. Gulf ports and to Mexico. The Santa Fe and the SP are not parallel in the important Kansas City to North Texas corridor and at key points in Oklahoma and on the Mexican border.

4. The MKT, with the OKT, is a north-south carrier from Salina, Omaha, and St. Louis in the north to Dallas/Fort Worth, San Antonio, Houston, and Galveston. The MKT offers the shortest route from Kansas City to Denison and Dallas/Fort Worth, Texas, and to points south.

5. The SP, and to a lesser extent the Santa Fe, are important connections of the MKT, and at least prior to this merger agreement, the Santa Fe and SP have been vigorous competitors. In the first nine months of 1983, the MKT/OKT's

direct interchange of cars with the SP and the Santa Fe amounted to 28,309 cars; if these figures are annualized, the total of the interchange is 37,746 cars per year, for revenue of \$26.4 million a year. Some details appear in the following table, based on MKT computer printouts:

	<u>ANNUALIZED 1983</u>	
	<u>Carloads</u>	<u>Revenue</u> (Million \$)
MKT/OKT Deliveries To:		
ATSF	5,395	\$ 3.200
SP	15,382	11.989
SSW	<u>2,675</u>	<u>1.661</u>
Subtotal	23,452	\$16.850
MKT/OKT Receipts From:		
ATSF	5,532	\$ 3.618
SP	5,715	4.103
SSW	<u>3,047</u>	<u>1.843</u>
Subtotal	14,294	\$ 9.564
MKT/OKT Total To/From:		
ATSF	10,927	\$ 6.818
SP	21,097	16.092
SSW	<u>5,722</u>	<u>3.504</u>
GRAND TOTAL	37,746	\$26.414

6. As I explain below, the SP and the Santa Fe will be free under the Voting Trust arrangement to cut off shippers' opportunities to use the MKT and the MKT's short routes. Subject to further refinement, our best estimate is that up to 18,000 cars, with a revenue of up to approximately \$16 million

a year, of present MKT interchange traffic are subject to being cut off by actions of the SP and the Santa Fe during the period of the Voting Trust and before the Commission has passed on the merger.

7. Up until this merger proposal, the vigorous competition between the SP and the Santa Fe has led the SP to maintain some rate and route arrangements with the MKT that permit shippers to use the MKT routes, to the shippers' substantial benefit. For example, chemicals coming from U.S. Gulf port areas served by the SP move to Houston and Denison and then north by the MKT to Kansas City and beyond via the MKT short route. Similarly, grain moving from MKT origins and northern connections in Kansas, Nebraska, Iowa and Missouri moves directly down to the SP at Denison, Texas, for southwest destinations and Mexico. This Mexican traffic is particularly significant. The SP in the past, competing vigorously with the Santa Fe, has made routes and rates via the MKT (which does not reach to Mexican border crossings) and then via the Texas-Mexican Railroad Company (TM) from Corpus Christi to Laredo, Texas, which is the major railroad gateway into Mexico.

8. The proposed Voting Trust for SP stock must be considered: (a) in the context of the Staggers Act ability of railroads to make contract rates with shippers without restriction; and (b) in the context of the ability of large railroad systems, with monopoly control of traffic, to cut off

joint rates and joint routes and prevent shippers from enjoying the benefit of competition by using competitive railroads such as the MKT.

9. Three facts should be kept in mind by the Commission in considering the effect of the proposed Voting Trust for SP stock: First, the SP and the Santa Fe have each already demonstrated their willingness to take anticompetitive actions to prevent shippers from enjoying competitive service and to prevent the MKT and other railroads from competing with them. I will discuss these actions in further detail below. Second, nothing in the Voting Trust prevents the SP management from acting in concert with the Santa Fe management to favor each other, to exclude the MKT, and to deprive shippers of competition and the MKT of the ability to compete. I provide an example of what I believe can be done and, no doubt will be done, below. Third, there are strong reasons to believe that if the Voting Trust goes into effect there will be a number of pressures on SP management to act prior to merger in ways which the Commission should prohibit if it should approve the merger. Again, these factors are described below, along with the critical point that the Commission does not have before it evidence which it could obtain of the plans which the SP and Santa Fe have made for operations under the Voting Trust and prior to merger.

10. As to the potential for unlimited anticompetitive action by the SP and Santa Fe during the period of the Voting Trust, I call the Commission's attention to the following facts:

(a) The SP is now taking actions, apparently including the making of Staggers Act contracts, which prevent shippers from using MKT routings, deprive shippers of MKT short routes, deprive shippers of the benefit of competition, and exclude MKT from important markets. Some details are described below.

(b) The SP particularly has been a recent leader in canceling application of joint rates, canceling through routes, and denying MKT participation in carriage. Some details - and by no means all, are discussed below.

(c) These two major proponents have taken actions to extend their monopoly carriage beyond the points where they are the only carriers by tying their monopoly carriage to their on-transportation to destinations where they face competition.

(d) Most important, under the proposed Voting Trust there would be no restrictions at all on the SP making arrangements with the Santa Fe to hand over traffic to the Santa Fe to the exclusion of the MKT. The situation with respect to Mexican traffic is an excellent example of this threat to competition during the period of the Voting Trust.

11. At the present time the MKT participates in traffic moving from or through Kansas City via the MKT to Denison, thence via the SP to Mexico at Eagle Pass or, via the Texas-Mexican Railway at Corpus Christi to the main Mexican gateway at Laredo. The Santa Fe, until now, has moved traffic via its own gateways to Mexico at Presidio and El Paso. There is nothing under the Voting Trust which will prevent SP management, who will have every incentive to favor the Santa Fe, from moving traffic to Mexico via the Santa Fe route from Kansas City to either SP or Santa Fe gateways into Mexico, thereby (a) excluding the MKT and (b) eliminating the main gateway of Laredo and (c) depriving shippers of the short competitive route via the MKT.

12. This example of the important Mexican traffic is only one example of the type of action which the SP management can take under the Voting Trust, and will have every incentive to take before the Commission has ever passed on the merger. As another example, the SP-Cotton Belt is now routing traffic to Texas via Kansas City over a highly circuitous route. The SP is able to force traffic over this circuitous route because it has cancelled MKT's direct short line routes from Kansas City to Texas. Under the Voting Trust the SP management could, apparently without restrictions, force its Kansas City-Texas traffic via the Santa Fe, a route which is still not as direct and short as the MKT route. When shippers are free to choose, they use the direct, short, MKT route from Kansas City

to Texas, but by selective and restrictive tariff publications such as the SP has already employed, the SP management will be free to prevent all MKT competitive participation.

13. There are a number of reasons why the mere existence of the Voting Trust during the period prior to any Commission approval of the SP-Santa Fe merger will induce the SP management (and for that matter, the Santa Fe management) to take anticompetitive actions favoring the Santa Fe or the SP to the exclusion of competition, particularly MKT competition:

(a) There is the obvious and natural pressure on SP traffic officers during the period of the Voting Trust to comply with the wishes of their future major merger partner. Under the Voting Trust, the SP and Santa Fe traffic officers are free to meet and free to plan and free to take anticompetitive actions favoring each other. I understand from the press reports that the top management of the proposed merged Santa Fe-SP has already been selected. From my experience, it is impossible to believe that SP traffic officers will not be affected by the wishes of their future superiors and will not give these wishes overriding priorities over the interest of shippers in obtaining competition and short and efficient routing.

(b) Actions of the SP traffic officers during the period of the Voting Trust to favor the Santa Fe and to

exclude competition from roads such as the MKT will not cost the SP anything out of pocket. This is because rail divisions are established, and if the SP directs traffic via the Santa Fe, even though the Santa Fe routing is circuitous compared to the MKT, the established divisions between points could be the same to the Santa Fe and to the MKT.

(c) Under the vigorous competition between the SP and the Santa Fe which has existed until now, shippers have benefited from the SP's competitive routings via the MKT. The elimination of this competition during the Voting Trust period by uncontrolled SP diversions favoring the Santa Fe, while it will hurt shippers in the competitive market, will not outweigh the natural wish of the SP management to favor its future partner. Again, taking the Mexican traffic example, a decision by the SP during the Voting Trust period to force traffic over the circuitous routing via the Santa Fe through Presidio or back to the SP line at Fort Worth, would harm shippers (and the MKT) but it would favor the prospective merger partner.

14. I want to emphasize that this SP-Santa Fe proposed merger is quite different from most mergers the Commission has recently considered. This is in major part a merger of parallel lines and as such well might not be approved and indeed,

should not be approved. In considering this SP-Santa Fe merger, with its major elimination of parallel competition, the Commission of course should and will, consider the granting of major trackage rights and other conditions preserving competition as prerequisites to an approval -- if, indeed, there can be any approval. Meanwhile, under the Voting Trust, the SP is free to behave as if the merger had been consummated without regard to any restrictions or conditions preserving competition.

15. I also want to emphasize an extremely important point for Commission consideration, that is, that there almost certainly are plans in existence for the operation of the SP under the Voting Trust and plans for the operation of the SP and the Santa Fe during the Voting Trust period. I was employed by the former Great Northern Railway at the time the Northern line merger was first announced. I participated in a number of joint studies involving personnel from the three major lines to be merged. The studies were extensive, detailed, and continuous. Based on this experience, I am convinced that in connection with the SP-Santa Fe merger, there are or will be similar teams formed to plan not only for post merger operations, but very likely to plan interim operations during the period of the Voting Trust. Accordingly, I urge the Commission to obtain full information from the SP and the Santa Fe as to their plans for the Voting Trust

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period, including most particularly their plans for new and restrictive rate and route practices favoring each other. Only by requiring the actual planning papers to be produced by the SP and the Santa Fe can the Commission make an informed judgment as to what is going to happen during the Voting Trust period before the Commission has passed on the merger. Without this evidence of actual plans, the Commission should not accept protestations of innocence by the merger partners, particularly in light of the individual lines' recent actions cutting off competitive service and preventing shippers from enjoying the benefit of direct short route competition.

16. The SP has in particular taken actions in the recent past which have resulted in reduction of competition between the SP and other railroads. Earlier this year the SP/SSW published a provision in the Trans-Continental Freight Bureau (TCFB) tariffs by which it cancelled joint rates on all traffic via its southern routes where it physically served both the origins and the destinations either directly or through reciprocal switching. Similar provisions had previously been published in the TCFB Lumber tariff, effective December 28, 1982. As a result, the SP eliminated shippers' competitive service options and precluded all other carriers from participating in those movements via the SP. This action effectively prevented the MKT from participating in the movement of such commodities as lumber, canned goods, paper products,

sugar, etc., which originated in California and Oregon on the SP. The MKT was, therefore, no longer able to participate in numerous movements of such commodities which it had previously handled in 1982 and the first part of 1983. This occurred despite the fact that in most instances MKT's routings were the most efficient and most direct. This particular conduct of the SP resulted in a spate of retaliatory actions being taken by other western carriers. More specifically, those carriers cancelled reciprocal switching arrangements at origins and destinations served by the SP in those instances where they, in turn, had been eliminated from participation in joint line routes previously involving the SP. However, because the MKT has consistently adhered to a policy of maintaining a vigorous competitive posture on as much traffic as possible in order to provide alternative and often superior service to shippers, it did not participate in those retaliatory actions.

17. More recently, in TCFB tariffs which are to become effective on November 22, 1983, the SP published a further tariff cancelling joint rates. This time it cancelled joint rates on all traffic where it served both the origins and destinations, regardless of whether the consignor and consignee locations were closed to the SP. This effectively eliminated our line haul participation in virtually all traffic originating in areas served by the SP which is routed via its

southern routes. As a result, we are now essentially relegated to a lower level of participation in handling the traffic we have historically handled as a competitive alternative to the SP's longhaul, notwithstanding our shippers' desires to retain our previous service.

18. The SP, within the same time frame, has also taken a series of unilateral actions to circuitously route specific types of traffic over its own lines in order to eliminate the MKT's efficient and direct joint line routes and thereby retain all of the revenue for the movements regardless of efficiency, fuel or cost considerations. For example, lumber traffic out of western Canada has historically moved from origins in western Canada via the Kansas City gateway south by the MKT to Denison/Dallas, Texas, where it was turned over to the SSW/SP for movement to destinations on the SP/SSW. However, the SP recently diverted this traffic over its own line from the Kansas City gateway to East St. Louis, then down through Illinois, Missouri and Arkansas, and then back into Texas. The absurdity of this routing is obvious since this circuitous movement results in a total line haul distance to Houston, Texas, for example, of 1,116 miles as opposed to the more direct MKT-SP routing of 748 miles via north Texas junctions. To Beckman, Texas, SSW-SP mileage is 1,322 versus 834 via MKT-SP; to Miller, Texas, SSW-SP mileage is 1,027 versus 490 via MKT-SP.

19. Similarly, I understand, the SP has taken comparable action on grain originating at Kansas City, Missouri/Kansas, destined to Eagle Pass and Laredo, Texas, by not including joint routes with MKT at the going rate level. The result is that this grain is moving over a grossly circuitous route of SSW-SP via East St. Louis, Illinois, rather than the more direct and fuel efficient MKT-SP joint line route over which this type of traffic has historically moved. By comparison, mileages via the SSW-SP route are 1,468 and 1,327 versus MKT-SP mileages of 979 and 900 to Eagle Pass and Laredo (via Corpus Christi, thence TM), respectively.

20. In addition, in a most unusual development, the SP has apparently begun entering into contracts with shippers to offer single line rates and service to industries which are closed to it and which are located on MKT. Aside from the patent unlawfulness of such actions -- since the SP has no right to enter into contracts establishing single line rates where it cannot provide the complete service on a single line basis -- this has created a situation where the shipper and/or the SP have been taking the position that the MKT is to provide the completion of the service for no charge.

21. I expect that all of these types of actions will aggravate the substantial disadvantage of the shipping public and the MKT once the SP and the Santa Fe are brought together in a new formalized operating relationship. Clearly, approval

of the Voting Trust agreement would serve to accelerate these types of anticompetitive actions and hasten the elimination of competitive service to the public provided by the MKT even before the agency has the opportunity to determine whether the impending merger of those two carriers is in the public interest.

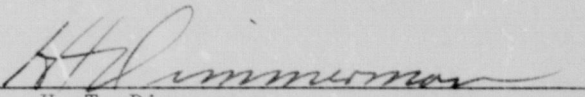
22. Accordingly, I urge the Commission to grant the petition of the MKT for a limited hearing directed to determining the effects of the Voting Trust during the Voting Trust period and prior to Commission approval, if any, of the merger. The Commission should, on the facts the MKT has presented, and on the basis of the facts that can be determined, take all possible steps to prevent the Voting Trust from going into effect until the Commission can consider the full implications of this massive merger in a full hearing on the merger application.

23. Further, the Commission should require the Santa Fe and SP to produce all documents relating to their contingent plans for the divestiture of the SP should the proposed merger be disapproved. If no such documents and/or plans are now available, then, in such event, the Commission should defer consideration of the Voting Trust until such plans have been formulated and submitted to the Commission for its decision.

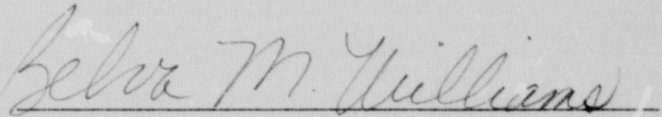
V E R I F I C A T I O N

THE STATE OF TEXAS:

H. T. Dimmerman, being duly sworn, deposes and says that he has read the foregoing affidavit, knows the facts asserted therein, and that the same are true as stated.


H. T. Dimmerman

Subscribed and sworn to before me this 11th day of November, 1983.


Notary Public in and for the State of Texas

My Commission expires: March 24, 1983

FD-30400

I

 **United
States
Steel
Corporation**

600 GRANT STREET
PITTSBURGH, PENNSYLVANIA 15230
CABLE: USSCOLAW PGHPA

LAW DEPARTMENT

(412) 433-2920

October 4, 1985



AIRBORNE

Secretary
Interstate Commerce Commission
12th & Constitution Ave., N.W.
Washington, D.C. 20423

Re: Santa Fe Southern Pacific Corporation
-- Control -- Southern Pacific Transp.
Company; Merger -- The Atchison, Topeka
and Santa Fe Railway Company and Southern
Pacific Transportation Company
Finance Docket No. 30400

Dear Sir:

Enclosed herewith for filing in the above-referenced matter please find an original and six (6) copies of the Motion to Intervene on behalf of United States Steel Corporation.

Very truly yours,

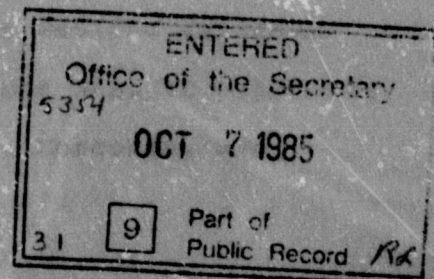
Richard J. Munsch/mab

Richard J. Munsch
General Attorney-Transportation
& Energy

/mab

Enclosures

cc (w/enc.): All Parties of Record
Arvid E. Roach II, Esquire
Mark Kalafut, Esquire
R. M. Corcoran



ENTERED
Office of the Secretary
5354
OCT 7 1985
31 9 Part of Public Record RA

BEFORE THE
INTERSTATE COMMERCE COMMISSION



Finance Docket No. 30400

SANTA FE SOUTHERN PACIFIC CORPORATION
-- CONTROL --
SOUTHERN PACIFIC TRANSPORTATION COMPANY;
MERGER -- THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY AND SOUTHERN PACIFIC
TRANSPORTATION COMPANY

MOTION TO INTERVENE

AND NOW COMES, United States Steel Corporation ("USS"), by and through its attorneys, and moves this Honorable Commission for permission to intervene in the above-referenced proceeding for the limited purpose of filing a brief in support of Protestant Railroads on or before October 21, 1985. In support of its Motion, USS states:

- (1) USS has been an active participant in this proceeding. USS provided testimony in support of Protestants Union Pacific/Missouri Pacific Railroad and Protestant Denver and Rio Grande Western Railroad, and the USS witness, Mr. Robert M. Corcoran, was

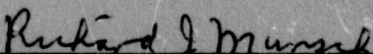
cross-examined on January 25, 1985 in Washington, D.C. As noted in the testimony which it has provided, USS is a major shipper with a substantial interest in the above proceeding. USS desires to protect those interests by filing a brief in the above matter.

2. Intervention by USS will not broaden the issues involved in this proceeding.

3. Intervention by USS will not cause any delays in this matter or in any way prejudice any party to this proceeding.

WHEREFORE, for the above reasons, United States Steel Corporation requests that this Commission grant permission for United States Steel Corporation to intervene in the above-captioned matter for the limited purpose of filing a brief on or before October 21, 1985.

Respectfully submitted,


Richard J. Munsch
Rafael Caminero
600 Grant Street - Room 1501
Pittsburgh, PA 15230
(412) 433-2920/2967

Attorneys for
UNITED STATES STEEL CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that I today served a copy of the foregoing Motion to Intervene on all parties of record by mailing a true and correct copy thereof, via first-class mail, postage prepaid on this 4th day of October, 1985.

Richard J. Munsch
Richard J. Munsch

DOCKET NO. 30400

1 - 19

BEFORE THE UNITED STATES
INTERSTATE COMMERCE COMMISSION

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SANTA FE SOUTHERN CORPORATION :
-----CONTROL----- : Finance Docket
: No. 30400
SOUTHERN PACIFIC TRANSPORTATION :
COMPANY :

Hearing Room A
Interstate Commerce Commission
12th & Constitution Avenue, N.W.
Washington, D.C.
Tuesday, June 30, 1987

The above-entitled matter came on for open
conference, pursuant to notice, at 10:00 a.m.

BEFORE:

- HEATHER J. GRADISON, Chairman
- PAUL H. LAMBOLEY, Vice Chairman
- JOSEPH J. SIMMONS, III, Commissioner
- FREDERIC N. ANDRE, Commissioner
- MALCOLM M.B. STERRETT, Commissioner

1 **ALSO PRESENT:**

2

3

JANE MACKALL, Director,

4

Office of Proceedings

5

JOSEPH DETTMAR, Deputy Director,

6

Office of Proceedings, Rail Section

7

DONALD SHAW, Assistant Deputy Director,

8

Office of Proceedings, Rail Section

9

ELLEN GOLDSTEIN

10

Office of Proceedings

11

DAVID WUEHRMANN

12

Office of Proceedings

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ROBERT BURK

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Office of the General Counsel

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NORETA R. MCGEE, Secretary

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P R O C E E D I N G S

1
2 CHAIRMAN GRADISON: Good morning.

3 The Commission is meeting this morning to decide
4 whether or not to reopen Finance Docket No. 30400, Santa Fe
5 Southern Pacific Corporation -- Control -- Southern Pacific
6 Transportation Company.

7 During 1986, the Commission considered the proposed
8 merger and denied the application. The merger applicants now
9 seek reopening based on changed circumstances and ask that they
10 be given the opportunity to submit new evidence which they have
11 described in their reopening petition and supplemental
12 materials.

13 The Commission has provided an opportunity for all
14 parties to express their positions through written submissions
15 and last month heard oral arguments on the question of
16 reopening.

17 The Commission has before it today a draft decision
18 which has been prepared by Agency staff. The draft will
19 provide a focus for the Commission's discussion. The existence
20 of a draft decision should not be interpreted as a prediction
21 of the outcome on the question of reopening. That is to be
22 decided here this morning in the votes cast by the Agency
23 members. Each Commissioner has worked hard on this proceeding
24 and given it a tremendous amount of thought. Members have not
25 offered to volunteer which way the scales tip and indeed,

1 individual decisions may turn on the discussions with the staff
2 here today.

3 Should the Commission vote today to approve the draft
4 decision, with or without substantive changes, there will be a
5 brief period after the conference during which Commissioners
6 may vote on the actual language or make editorial changes.

7 Before beginning discussion, we will hear an opening
8 presentation from Jane Mackall, Director of the Office of
9 Proceedings. Director Mackall?

10 MS. MACKALL: Thank you and good morning, Madam
11 Chairman.

12 CHAIRMAN GRADISON: I'm sorry. I can't hear you.

13 MS. MACKALL: Mr. Vice Chairman and Commissioners.
14 Before proceeding, I would like to introduce the
15 staff with me today at the table. Everyone is here.

16 On my right is Deputy Director Dettmar of the Rail
17 Section. On his right is General Counsel, Bob Burk. On my
18 left is Assistant Deputy Director of the Rail Section, Donald
19 Shaw. On his left is Ellen Goldstein and David Wuehrmann, two
20 of the attorneys working on the merger. In the front row
21 behind me are various staff from the Office of Transportation
22 and Rail System Accounts who have assisted the Commission.

23 This proceeding began in 1983 with the creation of a
24 new entity, Santa Fe Southern Pacific Corporation, merging the
25 two non-carrier holding companies, Southern Pacific Company and

1 Santa Fe Industries.

2 SFSP sought to control SP Transportation Company and
3 certain of its subsidiaries with the ATSF Railway and its
4 carrier subsidiaries. You approved SP's being held in a voting
5 trust and that arrangement continues. The proposed merger of
6 these two sets of carriers is a large one. ATSF operates
7 approximately 12,000 miles in 13 states, principally in the
8 west and midwest. SP operates approximately 13,000 miles in a
9 somewhat overlapping 14 state area.

10 After extensive hearings and record building, the
11 Commission voted in a July, 1986 open conference to deny the
12 merger. The written decision was served October 10th. You
13 found that the merger would produce public benefits in the \$180
14 million range, benefits greater than ever before seen in a
15 railroad merger case. However, you also found severe anti-
16 competitive impact.

17 While a merger in such circumstances could still be
18 authorized with conditions designed to ameliorate the negative
19 effects on competition, you declined to do so. There were two
20 basic reasons underlying this result.

21 First, the conditions you deemed necessary were
22 substantial. Second, SFSP has claimed throughout the
23 proceeding that the major conditions sought by opposing parties
24 were "deal breakers." That is, they would have negated the
25 benefits to the merged carriers.

1 The Commission stated it would not use conditioning
2 power substantially to restructure a transaction beyond its
3 proposed scope, where applicants were unwilling to accept the
4 conditions and where the conditions themselves might have had
5 anti-competitive effects.

6 In the October decision, you also directed
7 divestiture, but all these actions were stayed, pending
8 resolution of applicants' petition to reopen.

9 The period between July, 1986 and March, 1987 saw
10 considerable activity. Applicants sought reopening and reached
11 various agreements with opposing carriers attempting to address
12 the competitive issues. Comments have been received. Madam
13 Chairman, as you noted, on May 14th, you held oral argument.

14 The standards for reopening are material error,
15 changed circumstances or new evidence. Applicants argue that
16 changed circumstances exist in that as a result of the new
17 privately negotiated agreements, they have addressed the
18 Commission's concerns. They wish you to consider new evidence
19 due to these agreements.

20 One point needs underlying in this context. In
21 justifying reopening, applicants are not required to justify
22 ultimate merger. To support reopening, they need only convince
23 you that another look at the case is warranted.

24 The staff believes applicants have done so and you
25 have before you a draft decision granting reopening. Most

1 significantly, applicants' submission on reopening, first,
2 anticipate public benefits of \$272 million per year as opposed
3 to the earlier approximately \$180 million projection. Second,
4 address the California and Southern Corridor competition issues
5 by adding UP trackage rights in the San Francisco/L.A. Corridor
6 and on the California/El Paso route. Third, address the
7 continued vitality of the Central Corridor by ensuring that the
8 Rio Grande remains an effective competitor.

9 The lease and trackage rights agreements for the
10 Central and Southern Corridors are quite similar to those
11 opposing parties originally sought and diversion from the
12 merged carriers would be extensive. However, SFSP states that
13 they are practical and obviously desires to proceed.

14 Those losses are counterbalanced not only by public
15 and private benefits, but also by SFSP's agreement with the UP
16 under which, among other things, SFSP obtains trackage rights
17 over the UP across Texas and between St. Louis and Chicago.
18 These rights are alleged to produce new efficiency benefits of
19 \$40 million, and would improve SFSP's competitiveness on
20 transcontinental traffic.

21 The draft decision also sets a new procedural
22 schedule and directs the filing of certain evidence necessary
23 to a thorough analysis of the changed circumstances. The draft
24 declines to accept new inconsistent or responsive applications.
25 It also rejects the claim that an entirely new application must

1 be filed with the proceedings of the past three years ignored.

2 This concludes my opening remarks. We are here to
3 answer any questions you may have.

4 CHAIRMAN GRADISON: Thank you. We will now go to
5 questions and comments from the members of the Commission.
6 Commissioner Simmons?

7 COMMISSIONER SIMMONS: I have a question on one thing
8 in particular. The proposal and your recommendation have
9 advocated a radical and unprecedented restructuring of the
10 entire western rail system in this nation. Are you comfortable
11 with that?

12 MS. MACKALL: We are comfortable at this point
13 suggesting to the Commission that it look at that.

14 COMMISSIONER SIMMONS: It's quite unpredictable, the
15 results.

16 MS. MACKALL: Yes. I think that is certainly an
17 issue that all the parties would address, should the Commission
18 reopen the case.

19 COMMISSIONER SIMMONS: That's all I have.

20 CHAIRMAN GRADISON: Thank you, Commissioner Simmons.
21 Commissioner Andre?

22 COMMISSIONER ANDRE: I have no questions.

23 CHAIRMAN GRADISON: Commissioner Sterrett?

24 COMMISSIONER STERRETT: I have no questions but I
25 would like to make a brief statement.

1 I am going to vote to deny the petition to reopen for
2 essentially three reasons. First, I do not think the
3 applicants have really demonstrated changed circumstances to
4 warrant reopening. The circumstances which have allegedly
5 changed have been within applicants' control from the
6 beginning.

7 If we were to permit a reopening in this sort of
8 situation, it would set a precedent for any applicant to have
9 two bites at the apple and in my view, it would make a mockery
10 of the strict deadlines Congress has mandated for handling
11 mergers.

12 Secondly, as a practical matter and as a matter of
13 fairness for all concerned, I disagree with you on the grounds
14 for reopening. I think we have to have a sense that the
15 initial decision would change in order to grant a reopening.

16 After looking at this proposal, I am not convinced
17 that the anti-competitive impacts that we identified in our
18 initial decision have been adequately remedied. As
19 Commissioner Simmons has suggested, I think at best it would
20 result in a highly artificial, restructuring rationalization
21 for the western rail system.

22 Given previous testimony in this proceeding, I find
23 it very difficult to give what they say now much credibility.

24 Litigation posturing is to be expected, I suppose,
25 but this has been ridiculous.

1 CHAIRMAN GRADISON: Thank you, Commissioner Sterrett.
2 Vice Chairman Lamboley?

3 VICE CHAIRMAN LAMBOLEY: Thank you, Madam Chairman.
4 Again, I want to congratulate the staff for the
5 amount of effort and work they did. Again, I also have to make
6 the observation that I disagree with the recommendation of the
7 staff.

8 I cannot support the reopening. It seems to me that
9 the basis for reopening by virtue of the statute as well as
10 regulation is material error, new evidence or substantially
11 changed circumstances, as you outlined, Director Mackall.

12 Petitioners' request is primarily and fundamentally
13 focused on new evidence and changed circumstances. The new
14 evidence, they suggest, would relate to the conditions which
15 would alleviate competitive concerns, the deteriorating
16 financial condition of the railroads in question, and increased
17 merger savings.

18 The essence of the request is that the evidence that
19 is offered regarding voluntary agreements and the public
20 benefits ought to be enough taken as presented for the
21 Commission to reopen. To me, the basic question in this case
22 has been and is in the reopening, whether or not the
23 information taken and accepted as presented solitarily alters
24 or changes the case such that one right now on reopening would
25 reach a different conclusion. To me, as I say, the answer is

1 no.

2 The applicants have expressly accepted the existing
3 factual record in the course of oral argument, and I think very
4 importantly, they acknowledged and accepted the findings and
5 conclusions based on that record that this Commission made.
6 They accepted those conclusions as the law of the case in a
7 technical setting.

8 Consequently, material error cannot be considered at
9 all. The reopening on new evidence and substantially changed
10 circumstances, in my way of thinking, the shippers' supporting
11 statements, the political statements of support, if you will,
12 the merger savings recalculations, the financial conditions,
13 much of that information was available to us before, a little
14 differently stated, but the essence and substance of it was
15 available to us in the first consideration.

16 What has been termed "new" in my judgment only is the
17 new agreements. They are also claiming changed circumstances,
18 substantially or materially changed circumstances. In my view,
19 there is neither. In my view, the changed circumstances is
20 really little more than a change in position. It is an
21 internal consideration and not an external consideration
22 presented in this case.

23 I think reopening requires more than merely a party
24 changing their position and changing their minds. I think
25 there must be some external circumstances that legitimately

1 exist. More importantly, however, for me, I don't think there
2 is really a change at all.

3 We had the opportunity to impose as conditions, those
4 things which are now offered as remedial to address and
5 mitigate the competitive issues and enhanced public benefits.
6 In short, what is presented is voluntary agreements with
7 subject matters previously considered and rejected as being
8 effective remedies for competitive concerns.

9 Indeed, as Commissioner Sterrett has pointed out,
10 there was then and there is now concern that such arrangements
11 may in fact increase the competitive harm. Then as now also,
12 it seems to me the private benefits to this transaction as
13 proposed outweigh the public benefits.

14 The Northern Lines case, I would observe, has been
15 cited as precedence. In my view, any similarity between that
16 case and this ends with the procedural similarity, that a
17 request to reopen was made in that case, based upon voluntary
18 agreements reached subsequent to the initial decision. The
19 substance of that case is much different than this case.

20 Importantly, the voluntary agreements reached in that
21 case did not then and do not now demand or dictate or otherwise
22 require that there be a reopening.

23 In my judgment, the divestiture as previously ordered
24 should now proceed and reopening is not warranted.

25 CHAIRMAN GRADISON: Thank you, Mr. Vice Chairman.

1 I have a few questions of the staff. Do the
2 agreements that the applicants have reached with other parties
3 fully address the competitive concerns expressed by the
4 Commission last year, Director Mackall?

5 MS. MACKALL: We believe they do, Madam Chairman.

6 CHAIRMAN GRADISON: Is the procedural schedule set
7 out in the draft decision realistic?

8 MS. MACKALL: We think so. It provides for
9 approximately seven months of hearings.

10 CHAIRMAN GRADISON: Could we build a complete record
11 in seven months?

12 MS. MACKALL: We think so.

13 CHAIRMAN GRADISON: It has been suggested that the
14 proposed merger along with various agreements could be imposed
15 as conditions for approval of a merger, that this would
16 constitute a restructuring of the rail system in the west.

17 Without debating whether or not that proposition is
18 true, would that be a reason not to reopen this case?

19 MS. MACKALL: I don't think so. In fact, as I
20 responded to Commissioner Simmons, I think that is one of the
21 major issues that would be addressed.

22 CHAIRMAN GRADISON: Thank you.

23 We have a draft decision before the Commission that
24 we grant the reopening. I would like to vote on that draft
25 decision at this time.

1 MS. MCGEE: Answer yes or no, please.

2 Should this application proceeding be reopened?

3 Commissioner Simmons?

4 COMMISSIONER SIMMONS: No.

5 MS. MCGEE: Commissioner Andre?

6 COMMISSIONER ANDRE: No.

7 MS. MCGEE: Commissioner Sterrett?

8 COMMISSIONER STERRETT: No.

9 MS. MCGEE: Vice Chairman Lamboley?

10 VICE CHAIRMAN LAMBOLEY: No.

11 MS. MCGEE: Chairman Gradison?

12 CHAIRMAN GRADISON: Absolutely yes.

13 Having denied the draft decision before us, we now
14 have to address the issue, should the stay on filing of a
15 divestiture plan be lifted.

16 MS. MCGEE: Should the stay on filing of a
17 divestiture plan be lifted?

18 Commissioner Simmons?

19 COMMISSIONER SIMMONS: Yes.

20 MS. MCGEE: Commissioner Andre?

21 COMMISSIONER ANDRE: Yes.

22 MS. MCGEE: Commissioner Sterrett?

23 COMMISSIONER STERRETT: Yes.

24 MS. MCGEE: Vice Chairman Lamboley?

25 VICE CHAIRMAN LAMBOLEY: Yes.

1 MS. MCGEE: Chairman Gradison?

2 CHAIRMAN GRADISON: Yes.

3 Given the answer yes, when should this divestiture
4 plan be due? I'd like to have some comments from the staff as
5 to whether or not it should be 90 days after service of a
6 decision of 60 days after service of a decision.

7 MS. MACKALL: The October decision proposed a 90 day
8 due date. I think that was because up until the decision was
9 served, the applicants had no notice of the timing. Right now,
10 today, they are being given that notice. We will prepare a
11 draft decision. We think that draft decision, once it goes
12 out, can say 60 days from that time. We would have it to you
13 within two weeks.

14 COMMISSIONER STERRETT: Excuse me; if I might suggest
15 a compromise. Why don't we put out an order today for 90 days?

16 MS. MACKALL: We hope to circulate a draft decision
17 to the Commission within two weeks.

18 COMMISSIONER STERRETT: A short order, all it would
19 do is lift that status.

20 CHAIRMAN GRADISON: Is there a consensus among the
21 Commissioners, to put out a statement today that would lift
22 that today, effective 90 days from today?

23 MS. MACKALL: That would then reimpose the conditions
24 in the October decision.

25 COMMISSIONER STERRETT: That's right.

1 CHAIRMAN GRADISON: Is there a consensus among the
2 Commissioners to do so? Hearing no objections, that is what we
3 will do.

4 Should the Commission order the trustee of the voting
5 trust holding the stock of Southern Pacific Transportation
6 Company to provide access or information about the SPT to
7 potential buyers during the divestiture process?

8 Any discussion?

9 COMMISSIONER STERRETT: It was suggested in a memo
10 from the General Counsel's Office to Commissioner Andre that
11 could and perhaps should be done.

12 CHAIRMAN GRADISON: Shall we address it in our draft
13 decision?

14 COMMISSIONER SIMMONS: I think so, Madam Chairman.

15 CHAIRMAN GRADISON: I'd like to take a few moments to
16 review this case and to preview the future of these railroads
17 and what I see as the hazards of selling a railroad or in fact
18 running a railroad today.

19 Last year, this Commission denied the proposal, a
20 proposed merger of the Southern Pacific and Santa Fe, saying
21 that certain expected anti-competitive effects outweighed the
22 many public benefits of the merger. The Commission determined
23 then that the applicants and other private parties should try
24 to figure out how to solve the competitive problems instead of
25 the Commission having to fashion specific conditions which

1 could be based upon less than complete factual information.

2 In the days that followed, the merger applicants did
3 just that. They worked with other railroads, they devised a
4 series of agreements designed to solve all of the possible
5 problems highlighted by the Commission. Despite these efforts
6 and despite the fact that the parties have put forth solutions
7 to competitive problems, solutions that would be thoroughly
8 examined by the Commission on reopening, the Commission today
9 has decided to give no further consideration to this merger
10 proposal.

11 What does this Commission decision mean? What
12 message can be taken from it? I don't claim to know the minds
13 of my fellow Commissioners, but I will tell you what I think
14 the message is.

15 I think that reopening was denied not because this
16 was a bad merger proposal but because there is a feeling that
17 there is a better merger proposal out there somewhere. Some
18 might say there is nothing wrong with that. I believe that
19 view if held is contrary to the Commission's responsibility in
20 reviewing mergers. I repeat, in reviewing mergers.

21 It is not our task to find the perfect merger or
22 determine whether a proposal before us is the best plan
23 conceivable. The statute says that the Commission shall
24 approve and authorize the transaction when it finds the
25 transaction is consistent with the public interest. That

1 statute does not say that a transaction must be consistent with
2 the public interest and no other transaction could be better.

3 For the future, what would this mean for the
4 divestiture or the sale of the Southern Pacific or the Santa
5 Fe? It means "buyer beware." It means that a buyer might want
6 to be a non-carrier which does not control other carriers, so
7 it can avoid the Commission's jurisdiction and hence, its
8 second guessing.

9 If you are a carrier buyer, keep looking over your
10 shoulder for the specter of a buyer with what looks like a
11 better deal to watchful regulators.

12 The Commission's approach to railroad mergers as
13 demonstrated here, poses a serious and broad threat to the
14 railroad industry and its shippers and it goes well beyond the
15 outcome of this proceeding.

16 After today, there are increased risks for buyers and
17 sellers, for employees and shippers and last but certainly not
18 least, for the American taxpayers who will be forced to foot
19 the bill if a rail system disintegrates while pursuit of the
20 perfect merger plan continues.

21 The Commission voted today to deny reopening of this
22 merger. A written decision will be served within 30 days.
23 During the divestiture process, the Commission's Office of
24 Compliance and Consumer Assistance will continue to monitor the
25 relationship of the SFSP, ATSF and SPT and the voting trust as

1 ordered by the Commission's decision served February 27, 1987.

2 Approximately ten minutes after the conclusion of
3 this conference, Agency staff will be available to answer
4 questions and in addition, I understand several railroads have
5 statements they wish to make at that time.

6 Are there any additional comments from the members of
7 the Commission?

8 [No response.]

9 CHAIRMAN GRADISON: Hearing none, that concludes the
10 Commission's conference. We stand adjourned.

11 [Whereupon, at 10:24 a.m., the conference was
12 adjourned.]

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