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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE INTERSTATE COMMERCE COMMISSION

DKT/CASE NO. Finance Docket No. 30400, et al.

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

PLACE Washington, D. C.

DATE July 24, 1986

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UNITED STATES

INTERSTATE COMMERCE COMMISSION

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

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Hearing Room A
12th and Constitution
Avenue, N.W.
Washington, D.C.

Thursday, July 24, 1986

The voting conference in the above-entitled
matter was convened, pursuant to notice, at 10:00 a.m.

BEFORE:

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

COMMISSION STAFF PRESENT:

RITA MCGEE, Secretary

1 COMMISSION MERGER TEAM MEMBERS PRESENT:

2 DONALD SHAW

3 ELLEN GOLDSTEIN

4 HAROLD MC NULTY

5 HENRI RUSH

6 DOUGLAS GALLCWAY

7 DAVID WUEHRMANN

8 MELVIN CLEMENS

9 JOHN HEDETINIEMI

10 ED DAVITT

11 RUSSELL JONES

12 JOSEPH HURLEY

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P R O C E E D I N G S

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2 CHAIRMAN GRADISON: Ladies and gentlemen, the
3 Commission is meeting today in open public session to
4 vote on the proposed consolidation of the Southern
5 Pacific Transportation Company and the Atchison, Topeka,
6 and Santa Fe Railway Company. The case is entitled
7 Finance Docket Number 30400, Santa Fe Southern
8 Pacific -- Control -- Southern Pacific Transportation
9 Company.

10 It is no surprise that there are so many
11 people here today. This is a significant, interesting,
12 and complex case involving the merger of two large
13 railroads serving the western United States, including
14 California and the southwest and many shippers located
15 in those areas.

16 The format for this conference will be as
17 follows. Don Shaw, Acting Deputy Director of the Rail
18 Section, will have a brief statement. Then because of
19 the potentially large number of issues involved, I will
20 introduce each question for consideration and ask for
21 the Commissioners' questions or comments on that issue
22 and any pertinent Commission discussion, then ask for
23 votes on that issue before proceeding to the next item.

24 Each Commissioner's office has been working
25 steadily on this matter, and consequently the staff is

1 not here this morning to provide a briefing. The staff
2 is here primarily to respond to questions or to
3 participate in the discussions as requested by members
4 of the Commission.

5 I don't know how long the conference will
6 last, but I will tentatively schedule a ten-minute break
7 for approximately 11:15 and an hour's lunch break
8 beginning about 12:30. Mr. Shaw, would you begin by
9 introducing the people at the table with you?

10 MR. SHAW: Thank you, Madam Chairman, members
11 of the Commission. The staff team working on this case
12 consisted of attorneys, economists, financial cost and
13 operating experts, many of whom have devoted themselves
14 entirely to this proceeding since it was filed. It has
15 been a challenging and difficult job for all of us.
16 Present with us today are members of the merger team
17 whom I would like to introduce at this time.

18 Sitting at the table with me on my immediate
19 right is Ellen Goldstein, and on her right is Harold
20 McNulty. Seated in the first row are Douglas Galloway,
21 David Wuehrmann, John Hedetniemi, Melvin Clemens, Paul
22 Graham, Ed Davitt, Russell Jones, and Joseph Hurley. We
23 are all available to answer your questions.

24 The application in this proceeding was filed
25 in March of 1984, three months after the Southern

1 Pacific Corporation and the Santa Fe Industries merged,
2 having previously placed the Southern Pacific
3 Transportation Company in an independent voting trust.
4 Hearings were held on and off between October of 1984
5 and January of 1986, resulting in over 18,000 pages of
6 transcript and over 600 exhibits, in addition to the
7 written pleadings.

8 The proceeding involved the proposed merger of
9 the Southern Pacific Transportation Company which
10 operates over 13,000 miles of railroad between
11 California and Oregon in the west and Louisiana,
12 Tennessee, Kansas, Missouri, and Illinois in the east.
13 With the Achison, Topeka, and Santa Fe Railway, which
14 operates over 12,000 miles of railroad between
15 California on the west and Louisiana, Kansas, Missouri,
16 and Indiana on the east, the combined systems would
17 operate over 25,500 miles of railroad, blanketing the
18 far west and the southwest.

19 Annual savings recognized as public benefits
20 as a result of coordinating the two systems' operations
21 are estimated to be just under \$200 million. One-time
22 savings are estimated at around \$500 million, largely
23 from avoiding capital projects.

24 The record in this case is lengthy and the
25 issues complex. Applicants urge the Commission to

1 approve the merger, among other reasons, because they
2 claim the Southern Pacific is in a precarious financial
3 condition. Protestants urge us to impose conditions if
4 the merger is approved to address the alleged
5 substantial adverse effects on competition. The
6 Department of Transportation urges approval, while the
7 Department of Justice urges denial, even if that would
8 result in the failure of the SP.

9 Your review of this case is governed by the
10 basic standard of 49 USC 11344. The Commission must
11 approve the merger if it is consistent with the public
12 interest. Section 11344(b) requires consideration of at
13 least the following five factors: the effect of the
14 proposed transportation on the adequacy of
15 transportation to the public; the effect on the public
16 interest of including or failing to include other rail
17 carriers in the area; the total fixed charges resulting
18 from the transaction; the interest of employees affected
19 by the transaction; and whether the transaction would
20 adversely affect competition among rail carriers in the
21 affected region.

22 The Commission is also guided by the National
23 Transportation Policy, Section 10101, and the Rail
24 Transportation Policy of Section 10101(a). In addition,
25 the Commission must consider the policies embodied in

1 the antitrust laws in analyzing the public interest, and
2 then balance any anticompetitive effects against the
3 anticipated transportation benefits. Thus in
4 appropriate circumstances you may approve a transaction
5 that would otherwise violate the antitrust laws.

6 Finally, the Commission must consider the
7 transaction's effect on the environment under the
8 National Environmental Policy Act and on energy
9 conservation under the Energy Policy and Conservation
10 Act. This concludes my opening remarks.

11 CHAIRMAN GRADISCN: Thank you.

12 At this point we will pursue some general
13 questions with regard to whether there is sufficient
14 public benefit to the proposed transaction to merit
15 consideration of approval of the primary application and
16 pursue some general questions.

17 COMMISSIONER LAMBOLEY: Thank you, Madam
18 Chairman.

19 I would simply like to make an observation
20 that I am sure is shared by yourself as well as my
21 colleagues to you, Don, and your staff. As you have
22 outlined, this is a most difficult and complex case.
23 And from my perspective, your staff has been very able,
24 very competent, and very helpful in organizing the
25 record and organizing the material as well as being

1 thoroughly prepared in the nuances and sophistication
2 required, and we are very pleased, and I am personally
3 very pleased with the amount of energies and the amount
4 of industry that you put into this case, and the staff
5 should be publicly complimented on that score because it
6 is and has been one of the most difficult cases the
7 Commission has faced in a number of years, and for
8 myself, I really appreciate the efforts you have made.
9 You have made our job in weighing and balancing the
10 evidence in the record much more easy, more facilitated,
11 and your briefing has been excellent in all respects,
12 and we thank you very much for that, and I do
13 personally.

14 MR. SHAW: On behalf of the merger team, we
15 appreciate your expression.

16 CHAIRMAN GRADISON: Commissioner Sterrett?

17 COMMISSIONER STERRETT: I don't have any
18 questions of the staff. I have harassed them enough
19 over the last several weeks, and I don't want to wear
20 out my welcome. I do want to echo Commissioner
21 Lamboley's comments and express my appreciation to the
22 staff for all their work both for me and for the
23 Commission. While we have not always agreed, I have
24 been very much impressed with their competence, candor,
25 and their knowledge of both the record and of the

1 context in which we consider this merger proposal.

2 With respect to the proposal, although the
3 record is replete in my opinion with self-contradictory
4 evidence, omissions, and just plain fuzziness,
5 purposeful and otherwise, it is clear to me that the
6 claimed public benefits are far outweighed by the
7 anticompetitive impacts that would ensue from the
8 combination of the SP and Santa Fe.

9 In the territory served by the applicants, the
10 reduction of both rail rate and service competition
11 would be substantial. Indeed, if you strip away the
12 blandishments of all the assorted professors,
13 economists, other consultants, and lawyers, common sense
14 should tell us that if any proposal fails to meet the
15 statutory tests and our own merger guidelines, this
16 proposal would be it.

17 Having reached this conclusion, I gave
18 considerable thought to whether the adverse consequences
19 could somehow be corrected by any of the conditions that
20 have been suggested. It became obvious to me that the
21 conditions necessary to even ameliorate the situation
22 were far too clumsy a mechanism and fraught with
23 unintended consequences that only created additional
24 problems. Like a house of cards, every solution
25 ultimately fell of its own weight.

1 Finally, I should add, since the applicants
2 now place such great emphasis on the poor financial
3 condition of the two railroads as an overriding
4 consideration justifying approval of the merger, that in
5 my opinion they have not met any of the tests of the
6 failing company doctrine. I am certainly sympathetic
7 with the plight of the two railroads, but they have
8 simply not made a case in this respect.

9 With that, Madam Chairman, I am prepared to
10 vote to deny the merger application.

11 CHAIRMAN GRADISON: Thank you, Commissioner
12 Sterrett.

13 Vice Chairman Simmons.

14 VICE CHAIRMAN SIMMONS: I have already
15 complimented the staff. I think they have done an
16 outstanding job in briefing. It is grueling, and I can
17 see the wear and tear on the staff. They cannot hear
18 me? I don't believe that.

19 I have already complimented them, but I would
20 like to do it publicly. The competence that you
21 exhibited and the objectivity with which you briefed us
22 are probably the best I have ever had. Maybe it is
23 because I gave a little more time and studied this case
24 more than any that I have received.

25 We will be voting shortly, but I would like to

1 also say that very briefly, the way that I saw the case,
2 anticompetitive effects outweighed the public benefits
3 that are there.

4 Thank you, Madam Chairwoman.

5 CHAIRMAN GRADISON: Thank you, Mr. Vice
6 Chairman. For my own part, I feel the Staggers Act
7 mandated a strong and healthy rail system, one that
8 thrives to the benefit of shippers, rail investors, and
9 railway labor, and one that is not a drain on the
10 American taxpayer. In my view, the only result here
11 that clearly carries out the Congressional mandate is
12 approval of the merger application.

13 If there are no further comments at this point
14 I think we can go ahead and address Question IA. Are
15 there sufficient public benefits to the proposed
16 transaction to merit consideration of approval of the
17 primary application? Madam Secretary?

18 SECRETARY MCGEE: Commissioner Lamboley.

19 COMMISSIONER LAMBOLEY: Yes.

20 SECRETARY MCGEE: Commissioner Andre.

21 COMMISSIONER ANDRE: Yes.

22 SECRETARY MCGEE: Commissioner Sterrett.

23 COMMISSIONER STERRETT: Yes.

24 SECRETARY MCGEE: Vice Chairman Simmons.

25 VICE CHAIRMAN SIMMONS: Yes.

1 SECRETARY MCGEE: Chairman Gradison.

2 CHAIRMAN GRADISON: Yes.

3 Which brings us to the next issue. If so, are
4 these public benefits nonetheless outweighed by adverse
5 effects so great that they cannot be remedied, requiring
6 the merger to be denied?

7 SECRETARY MCGEE: Commissioner Lamboley.

8 COMMISSIONER LAMBOLEY: Yes.

9 SECRETARY MCGEE: Commissioner Andre.

10 COMMISSIONER ANDRE: Yes.

11 SECRETARY MCGEE: Commissioner Sterrett.

12 COMMISSIONER STERRETT: Yes.

13 SECRETARY MCGEE: Vice Chairman Simmons.

14 VICE CHAIRMAN SIMMONS: Yes.

15 SECRETARY MCGEE: Chairman Gradison.

16 CHAIRMAN GRADISON: No.

17 I was ready for this, but I still am not.

18 The Commission recognizes the expected
19 benefits of the merger, but also concluded that
20 substantial adverse effects on competition would
21 result. Because conditioning could not remedy these
22 problems, or could not do so without overburdening the
23 merged system, the Commission has decided to deny the
24 merger.

25 Action denying the merger represents an

1 opportunity missed. If the Commission is too timid to
2 permit a combination which would result in some
3 rationalization of the nation's rail operations, it
4 should at least recognize the deterrent effect of its
5 actions on railroad initiative. The railroad is
6 expected to make money, but it is to do so without
7 abandoning lines, without raising rates, and without
8 severing employees. It is apparently okay to improve
9 profitability through theoretical efficiency gains, but
10 not through actual efficiency gains.

11 At the oral argument on this case, the Kansas
12 Department of Transportation expressed support for the
13 merger and stressed the importance of both the Santa Fe
14 and the Southern Pacific to the State of Kansas.

15 The spokesman for the Kansas DOT noted that
16 Kansas has endured the failure of the Rock Island. He
17 said that while most of the Rock Island lines in Kansas
18 were preserved, this was only possible because of
19 federal funding. The Commission's decision,
20 unfortunately, leaves the people of Kansas in a familiar
21 though unsatisfactory situation.

22 The staff will -- let's see, with this I think
23 we are going to have to ask a question. Should the
24 Commission retain jurisdiction over this proceeding
25 pending divestiture and require the applicants to submit

1 a divestiture plan for Commission approval?

2 I think that we should vote on this question.
3 Madam Secretary, should the Commission retain
4 jurisdiction over this proceeding pending divestiture
5 and require the applicants to submit a divestiture plan
6 for Commission approval?

7 Would you like a copy of the question?

8 COMMISSIONER ANDRE: Yes. I would like to
9 pose a question perhaps to the general counsel first to
10 get his opinion about retention of jurisdiction.

11 CHAIRMAN GRADISON: Certainly. Mr. Rush.

12 COMMISSIONER ANDRE: Is there a need for this
13 retention of jurisdiction on our part in order to
14 oversee the divestiture, in order to perform our
15 statutory duties?

16 MR. RUSH: It seems to me that the retention
17 is implicit in the approval of the voting trust in the
18 first place, which provides that they will divest. That
19 implicitly is subject to Commission jurisdiction. I
20 certainly see no harm in making explicit by the adoption
21 of some condition here of what is implicit anyway.

22 COMMISSIONER ANDRE: What is the bare minimum
23 that we must do to fulfill our statutory duties toward
24 this divestiture process?

25 MR. RUSH: This is coming at me cold. I will

1 preface my comments with that. But it would seem to me
2 to ensure that they be returned, that SP be returned as
3 a railroad from the voting trust in as good condition as
4 it went into the voting trust. That seems not
5 unreasonable absent some showing that there were
6 unavoidable extrinsic circumstances that would have
7 weakened its condition anyway.

8 COMMISSIONER ANDRE: Would any of you like to
9 address yourself to that subject?

10 MR. SHAW: I believe that it would be good if
11 I had Ellen brief you on exactly what the voting trust
12 provides, because it does have something that approaches
13 a self-destruct mechanism in it.

14 CHAIRMAN GRADISON: For the moment, the
15 question before the Commission is whether we should
16 retain jurisdiction over this proceeding as our general
17 counsel has stated. It is implied, and the question
18 that we are about to vote on is whether we should retain
19 jurisdiction over this proceeding pending divestiture
20 and require the applicants to submit a divestiture plan
21 for Commission approval. Madam Secretary.

22 SECRETARY MCGEE: Commissioner Lamboley.

23 COMMISSIONER LAMBOLEY: Yes.

24 SECRETARY MCGEE: Commissioner Andre.

25 COMMISSIONER ANDRE: No.

1 SECRETARY MCGEE: Commissioner Sterrett.

2 COMMISSIONER STERRETT: Yes.

3 SECRETARY MCGEE: Vice Chairman Simmons.

4 VICE CHAIRMAN SIMMONS: Yes.

5 SECRETARY MCGEE: Chairman Gradison.

6 CHAIRMAN GRADISON: Yes.

7 The staff will prepare a draft decision which
8 implements the Commission's vote. The Commission's
9 staff members will be on hand in Hearing Room C to
10 answer questions by the public or press regarding this
11 proceeding.

12 With that, the conference is adjourned. Thank
13 you.

14 (Whereupon, at 10:17 a.m., the Commission was
15 adjourned.)

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