

Docket No. F.D. 30400 - 10/11/84 - PAGES - 1567 - 1624

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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In the Matter of: :

SANTA FE SOUTHERN PACIFIC CORPORATION : Finance Docket

-- CONTROL -- : 30400 et al.

SOUTHERN PACIFIC TRANSPORTATION :

COMPANY :

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Hearing Room A
12th & Constitution, N.W.
Washington, D.C.
Thursday, October 11, 1964

The hearing in the above-entitled matter was convened, pursuant to notice, at 9:00 a.m.

BEFORE:

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Administrative Law Judge

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C O N T E N T S

	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1					
2					
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C O N T E N T S

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WITNESS

DIRECT CROSS REDIRECT RE-CROSS

Robert G. Rhodes

By Mr. Greenberg

1809

James S. Heuer

By Mr. Wilson

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By Mr. Roberts

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By Mr. Ratner

1855

By Mr. Vincent MacKenzie

1868

E X H I B I T S

Exhibit No.

IDENTIFIED

RECEIVED

DRGW-C-9

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DRGW-C-10

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DRGW-C-11

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P R O C E E D I N G S

(9:00 a.m.)

JUDGE HOPKINS: Let's come to order.

Who will be the next witness?

MR. MOATES: Your Honor, we'd like to enter an additional appearance.

MR. HYNES: Your Honor, I'd like to enter my appearance at this time, Terence Hynes. I'm with the law firm of Sidley and Austin, with offices at 1722 Eye Street, Northwest, Washington, D.C., and I'll be appearing on behalf of the Santa Fe Southern Pacific Corporation.

MR. MOATES: Your Honor, Applicants call as their next witness Mr. Lester Kloss.

(Witness sworn.)

Whereupon,

LESTER K. KLOSS

was called as a witness by counsel for Applicants and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOATES:

Q Sir, would you please state your full name and business address for the record.

A My name is Lester K. Kloss. My business

1 address is 222 South Riverside Plaza in Chicago,
2 Illinois.

3 Q Mr. Kloss, are you affiliated with any
4 particular company?

5 A I'm a vice president of A.T. Kearny, Inc.

6 Q Have you caused to be submitted in this
7 proceeding a 29-page verified statement, plus a
8 verification page?

9 A Yes, I have.

10 MR. MOATES: Your Honor, for the record, the
11 statement of Mr. Kloss and those of the other A.T.
12 Kearny witnesses appear in volume SFSP-15.

13 BY MR. MOATES: (Resuming)

14 Q Mr. Kloss, do you have any corrections to make
15 to that statement?

16 A I do not.

17 Q Is that statement true and correct to the best
18 of your knowledge, information and belief?

19 A Yes, it is.

20 MR. MOATES: Your Honor, Mr. Kloss is
21 available.

22 JUDGE HOPKINS: Thank you.

23 Who's going to start?

24 MR. VON SALZEN: Your Honor, Eric Von Salzen
25 for the Denver & Rio Grande.

CROSS EXAMINATION

BY MR. VON SALZEN:

Q Good morning, Mr. Kloss.

A Good morning.

Q As I understand it, you were a person who was in overall charge of the A.T. Kearny study that is discussed in your verified statement and in the statements of Messrs. Cohn, Fudd, Seeger, Hughes, Reagan, Mark, and Dyle; is that correct?

A That is correct. I was the officer in charge of the project for our firm.

Q And with respect to the commodity-specific studies that are described in the other gentlemen's verified statements, what role did you play beyond overall supervision, if any?

A Perhaps I can preface my response to that by explaining the purpose and thrust of my specific statement. The purpose and thrust of my specific statement is twofold:

Number one, to provide an overview of the logistics function and how transportation, and more specifically the impact of this merger, impacts that function for businesses generally. That testimony appears nowhere else in any of the other statements.

The second function of my statement is to

1 provide, if you will, an overview, a digest, a road map
2 to what is to follow. I do not elaborate on issues, but
3 summarize them in my statement.

4 I did review, as is my responsibility as a
5 partner in the firm, I did review and pass on the
6 quality of the work of each of the people who handled
7 the specific commodity statements. I did not in detail
8 participate in the preparation of those statements.

9 Q So each of the, I believe, seven or eight, how
10 many it is, individuals are in each case responsible for
11 their own verified statement and the judgments that are
12 reported in those verified statements; is that correct?

13 A That's partially correct. The judgments were
14 finally reviewed by me. Once again, it is a policy of
15 our firm that an officer of the firm must review the
16 quality of any report of any kind of project that we
17 make, and I played that role in this project.

18 Q Did you, in playing that role, direct any
19 changes in any of the conclusions that had preliminarily
20 been reached by these gentlemen?

21 A In this instance, no, I did not.

22 Q Do you have a copy of your verified
23 statement?

24 A Yes, I do.

25 Q Would you turn to page 9, please. In the

1 first paragraph on that page, you refer a couple of
2 times to the study -- that is, the Kearny study -- as
3 being objective. I think in the second line of that
4 paragraph, the phrase used is "objective evaluations,"
5 and in the next to the last line of the paragraph you
6 see "totally independent and objective statement."

7 Do you see the language to which I am
8 referring?

9 A Yes, I do.

10 Q What is it about this study that is
11 particularly or unusually objective, if anything?

12 A It is as objective as any project which we
13 undertake for any client. It meets all of our
14 professional standards for objectivity and independence
15 of judgment.

16 Q It's not any different, I take it, then, in
17 terms of objectivity, from the reports or expert
18 testimony your firm has provided in the Norfolk Southern
19 case, the Yale Express case, United Parcel case, and so
20 forth, those cases that are described at pages 2 and 3
21 of your statement?

22 A We have a single standard of professional
23 objectivity, which we protect in all projects.

24 Q I'm a little bit -- well, it seems to me --
25 perhaps I'm just reading too much into this -- that you

1 were laying an unusual degree of stress on objectivity
2 in this introductory paragraph. Is it your view that
3 your study in this case and in all cases is more
4 objective than other consultants' studies that are
5 presented in cases that you're familiar with?

6 A I can't judge the objectivity of other
7 consultants, because I don't know what their policies,
8 et cetera, are. I can only judge it against the
9 standards of my own firm, which are very high.

10 I am a charter member of the Institute of
11 Management Consultants, and as such am a certified
12 management consultant. I subscribe to their code of
13 ethics. My firm is a founding member of the Association
14 of Management Consultants, and as such we subscribe to
15 and adhere to their code of ethics, which is not unlike
16 your own code of ethics.

17 Q In the context of this paragraph in this
18 particular study we are dealing with today, what do you
19 mean by objective?

20 A The same thing I would mean in any project, in
21 that it was our own independent judgment of the issues,
22 uncolored by any influence from the client.

23 Q In your view, is it a part of objectivity in a
24 study of this kind for you or your firm to decide what
25 factors should be examined in evaluating shipper

1 benefits from this merger?

2 A That was basically our judgment. In fact, to
3 go back one step preceding, our whole process of
4 professional objectivity commences before we accept an
5 engagement. There are engagements, dozens of them every
6 year, that we decline on because a client has asked us
7 to perform an adversary position and that is not our
8 role.

9 Q I understand that, and I think you suggested
10 that earlier. But the specific point that I would like
11 to focus on was the question of who decides what factors
12 are to be evaluated and looked at in a study of this
13 kind. Do I understand you to say that it is part of
14 objectivity that your firm makes that decision and not
15 the client?

16 A I think perhaps the best way to answer that
17 question, rather than answering it in a theoretical, is
18 to bring it to a very practical level and review with
19 you the process that preceded this project. We were
20 approached by the Santa Fe, representatives of the Santa
21 Fe, on behalf of the Santa Fe and the Southern Pacific
22 jointly, and basically two questions were posed to us in
23 terms of describing this project.

24 And those two questions are: Are there
25 benefits to the shipping public in aggregate stemming

1 from the -- this merger? And then the corollary
2 question: If so, what are they?

3 There was a definition of particular commodity
4 groups, individual commodities, groups of commodities,
5 in which they expressed an interest. We sat down, we
6 reviewed the question, we reviewed the commodity
7 groups. In fact, there was one commodity group that we
8 elected not to undertake, that being coal, because we
9 felt we had some very distinct conflicts of interest in
10 the case of coal and we said: No, we can undertake the
11 project as you describe it, exclusive of coal.

12 And there was, of course, the usual pricing of
13 the project and so forth, and the project was approved.
14 From that point forward, my instructions to the
15 individuals who performed the analysis in the individual
16 commodity groups were relatively simple. I said: Here
17 are the two questions which we are to answer.

18 I looked at personal qualifications, selected
19 the people to assign to each of the commodity groups.
20 Here is the commodity group that you are to study. We
21 met as a group and agreed upon what the structure of
22 each statement would be, not the content. I want to be
23 very clear about that. There was no influence on the
24 content of the statements at any time, but what the
25 structure was, just so that we would have a consistent

1 structure in the final statements.

2 And from that point forward, it became the
3 responsibility of each of the commodity people to
4 develop the particular methodology that they used for
5 their approach, and that methodology varied slightly
6 from commodity to commodity. It was appropriate to
7 whatever commodity they were studying and they proceeded
8 with the study.

9 I was available for guidance and counsel.
10 Bill Best, who is not presenting a statement because he
11 played only a supervisory administrative role -- he's a
12 principal in our firm -- coordinated for me the entire
13 project. He was available for counsel and assistance.
14 We met periodically to review progress, monitor progress
15 against schedule, and so forth.

16 And then each of the statements was submitted,
17 initially to Bill Best and finally to me, for quality
18 review. That was the process. Other than dictating the
19 structure of the final statements, the physical
20 structure of the final statements, the instructions to
21 each of the individuals who were studying the commodity
22 were relatively brief and simple.

23 Q Would you characterize as totally independent
24 and objective a study that was conducted in which the
25 client instructed your firm not to consider certain data

1 and not to consider certain factors touching on the
2 question of shipper benefits?

3 A We had no instructions from the client that
4 limited our review of the shipper benefits.

5 Q Mr. Kloss, let me show you a letter which we
6 have marked as Exhibit DRGW-C-9, on the letterhead of
7 Kearny Management Consultants, dated December 6th,
8 1983.

9 JUDGE HOPKINS: That will be marked for
10 identification.

11 MR. MCATES: Counsel, do you have copies for
12 us?

13 (The document referred to
14 was marked Exhibit No.
15 DRGW-C-9 for
16 identification.)

17 BY MR. VON SALZEN: (Resuming)

18 Q Mr. Kloss, have you had an opportunity to look
19 at Exhibit 9?

20 A Yes, I'm familiar with this. This was our
21 original proposal letter to the Santa Fe and the
22 Southern Pacific.

23 Q And on the page -- well, repository number
24 00035 of this document, is that your signature?

25 A That is correct.

1 Q Would you please turn to page 3 of this
2 letter, depository page 26. Starting at that point,
3 there are a series of numbered paragraphs that describe
4 the proposed steps for this project; is that correct?

5 A That's correct.

6 Q Would you just go through these one by one and
7 tell us which of these steps Kearny did in fact perform
8 in doing the study and which were not done?

9 A Starting with step one, identifying traffic
10 patterns, we indicated in the original proposal that we
11 would rely on Reebie and Associates, who were also doing
12 other work in this case, who were already under way in
13 this case, to identify the traffic patterns of existing
14 rail traffic.

15 As we moved along in the project, in some
16 instances we modified that approach slightly and used
17 also some of our own proprietary programs to provide
18 data that may not have been an output of the Reebie
19 tapes and which we felt were essential to our analysis.
20 So we performed that with some modification.

21 Step two, researching industry reports. We
22 have, not only from our own primary files but also from
23 a very large information center which we maintain
24 internally, we have a great deal of secondary data. We
25 also have the capability to access a number of

1 computerized information bases.

2 We exercised those in step two to get at hand
3 all of the primary and secondary data which was
4 immediately available to us. We refer to the GMA
5 customer service study, the Grocery Manufacturers
6 Association. That is merely illustrative of the kinds
7 of background material we used, and Mr. Seger later will
8 be elaborating on the specific findings of that.

9 We made a preliminary identification of the
10 primary shippers and receivers in the Southern
11 Pacific-traffic corridors as possible contacts. The
12 list that we finally settled upon, we contacted, I would
13 estimate, 80-plus percent of that list.

14 Q How many people would that be?

15 A Well, that would be -- I have that in my
16 working papers. I don't have it here in front of me.
17 In round numbers, 15, 18.

18 As I indicated earlier, we left the specific
19 methodology of the project to the judgment of each of
20 the people who were studying individual commodity
21 areas. Some of them made the judgment that they needed
22 interviews. Others made the judgment that they did not
23 need the interviews in order to produce their statement,
24 and for that reason some commodities have three, four,
25 five interviews, others have zero interviews. So it was

1 the judgment of the individual studying that commodity
2 as to whether or not he needed the field interviews.

3 But the list that was developed was developed
4 initially by us. I don't think it's surprising to
5 anybody that it leaned heavily on either clients or
6 contacts of ours where we felt we could get enough time,
7 enough attention from them, to review the issues. And
8 also, it was heavy on people that we in our judgment,
9 from our experience in the logistics field, identified
10 as leaders, influencemakers in their industry, people
11 who have had reputations as being logistical thinkers in
12 their industry.

13 We had a session -- in step four, we had a
14 session with the Santa Fe team who were developing the
15 operational statement to get an overview of the
16 conceptual operating plan at that time, against which we
17 could screen our industry knowledge and the information
18 and data that we collected.

19 We also had the opportunity at later points,
20 with respect to step four, to go back to the Santa Fe
21 Southern Pacific operational team and, where necessary,
22 raise specific questions that related to benefits that
23 we had postulated and wanted to test against operating
24 conditions.

25 We developed in step five an interview guide,

1 which is pretty standard procedure with us. And just in
2 terms of semantics, it was an interview guide; it was
3 not a questionnaire. We tend in this kind of a project
4 to use interview guides rather than questionnaires, in
5 that an interview guide is in effect a checklist that
6 makes sure that, where we are conducting interviews,
7 that they are consistent across segments and we have
8 covered all the subjects that we want to cover, but they
9 don't suffer from the weakness of a questionnaire, that
10 weakness being that in a questionnaire you have to
11 prejudge the issues, and we didn't want to prejudge the
12 issues.

13 We wanted, where we were doing interviews, to
14 give the respondents an opportunity to free flow and
15 perhaps to in some cases lead us to issues which were
16 important to them that perhaps we may not have
17 identified in the rigidity of a questionnaire.

18 In step six we did the interviews to the
19 extent that each product area consultant felt was
20 necessary.

21 In seven, we documented the results, in some
22 cases making extrapolations, but in most cases not
23 making extrapolations.

24 And then we prepared our final verified
25 statements. As we would do in any client situation, we

1 reviewed these verified statements with the client,
2 particularly with their legal departments, much more in
3 terms of structure. We did not make any changes in any
4 findings of fact. We would not have accepted that. But
5 we did review them for them for consistency, format, et
6 cetera.

7 From that point forward, as is the case in any
8 of our projects, the verified statements became the sole
9 property of the client, as any of our reports do, and
10 what they did with them from that point forward was
11 their option. As you well realize, the client has
12 introduced all of them into testimony.

13 Q So I understand.

14 MR. VON SAIZEN: Let me ask that a letter be
15 marked for identification as Exhibit DRGW-C-10, a letter
16 on Kearny stationery bearing the date January 20, 1984.

17 JUDGE HOPKINS: It will be marked for
18 identification.

19 (The document referred to
20 was marked Exhibit No.
21 DRGW-C-10 for
22 identification.)

23 BY MR. VON SAIZEN: (Resuming)

24 Q On the second page of that letter, Mr. Kloss,
25 do you recognize your signature again?

1 A Yes, I do.

2 Q Okay. Would you identify this letter.

3 A Yes. This was in effect an amendment or a
4 modification of the earlier proposal letter, December
5 6th.

6 Q In what I guess I would call the last
7 paragraph on the first page after the bullets, the text
8 reads: "Kearny will not be allowed to conduct a broad
9 spectrum of shipper interviews for all commodities."

10 And in fact, is it not correct that your study
11 as performed did not include a broad spectrum of shipper
12 interviews for all commodities?

13 A Not as many interviews as we originally
14 postulated as we initially thought through the proposal,
15 but in our judgment a number that was adequate to
16 protect the quality of the work. You will also notice
17 we went on to say that we will continue to study these
18 commodities with the intent to produce high quality
19 results.

20 Q You skipped the sentence that I wanted to ask
21 you about, and that is the sentence that says: "As we
22 discussed, there are several commodities where this
23 approach may adversely impact the quality of the final
24 documents, particularly in sulphur, cotton, metals,
25 perishables and petroleum."

1 With respect to the categories of commodities,
2 the so-called eight broad commodity groups that are
3 bulleted immediately above that paragraph, would you
4 tell me what category sulphur falls into?

5 A Sulphur is in a group -- was grouped, I
6 believe, into a group that was later developed to pool
7 some together, which is a group of bulk commodities.

8 Q Cotton I assume is in the group on this list
9 called grain and cotton?

10 A That is correct.

11 Q Metals I assume is in the group called copper
12 and metals; is that correct?

13 A I don't believe so. I think in the final
14 analysis metals, because of our later judgment that the
15 impact of metals was not going to be that great, I
16 think, as I recall, it was consolidated into that bulk
17 group.

18 Q But with reference to the list on this page,
19 perishables is in the category intermodal and
20 perishables, is it not?

21 A That is correct.

22 Q And where does petroleum fall on this list?

23 A The later judgment was that petroleum would
24 not be dealt with in detail as an individual group.

25 Q Was petroleum, then, excluded from your

1 study?

2 A It was excluded from the study in terms of
3 being a highlighted commodity.

4 Q Were any other commodities excluded from your
5 study other than petroleum and coal?

6 A Well, coal was never on this list, never
7 reached the first cut, for the reasons that I discussed
8 earlier.

9 Q That's correct.

10 A Aggregates were excluded, once again, from an
11 individual group, but aggregates were folded into the
12 bulk and neo-bulk group which Mr. Pyle will be
13 testifying on later.

14 Q Let me turn back for a moment, Mr. Kloss, to
15 Exhibit 9, DRGW-C-9. On document depository page 00036,
16 the last page of that document, is an Exhibit I listing
17 the number of interviews that you were then proposing;
18 is that correct?

19 A That is correct.

20 Q And I count between 86 and 113 interviews
21 recommended on that exhibit. Would you say I've gotten
22 in the ballpark?

23 A I'll accept that.

24 Q And you indicated earlier that the actual
25 number of interviews conducted was on the order of 15 to

1 18, in that range?

2 A There was a step that intervened here, and
3 it's reflected in the letter of January 20th, where the
4 marketing managements of the two railroads made the
5 decision that -- came back to us with a decision that
6 they would prefer not to have this broad spectrum of
7 shipper interviews conducted.

8 We went back to the drawing board, looked at
9 it, came back to them with this letter of January 20th.
10 In the statement that you read, the second statement in
11 that final paragraph on page 1, I think you moved rather
12 quickly over what I think is the key word in that
13 statement, and that is: "As we discussed, there are
14 several commodities where this approach may adversely
15 impact."

16 That "may" I think is the key word in that
17 sentence. As we did go back to the drawing board and
18 explored other ways of developing the same information
19 and the same conclusion, we found that the impact, even
20 on the commodities that we mention there, was not as
21 significant as we originally postulated. So we went
22 with a reduced list of potential shipper interviews and,
23 as I say, that reduced list was something on the order
24 of 20-plus, and the ones that were actually used out of
25 that list were 16, 18.

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And as I indicated earlier also, in some commodity groups we did no field interviewing.

1 Q I would like you to turn back to Exhibit 10,
2 the second page of that exhibit. That is the January
3 20th letter. The first paragraph on that page reads,
4 "However, Kearney will be allowed to conduct up to 20
5 selected interviews with past Kearney clients for close
6 industry contact. They will keep the interview
7 confidential." Do you see that line there?

8 A Yes.

9 Q Who made the decision that Kearney would be
10 allowed up to 20 selected interviews?

11 A It was a mutual agreement between the Kearney
12 team and the client.

13 Q Well, if it was a mutual decision -- excuse
14 me, Mr. Kloss -- allowed is rather a strange word to use
15 to describe it, isn't it?

16 A I am not going to debate semantics with you.
17 It is the word I used at the time.

18 Q Would you think me unreasonable in
19 interpreting the word "allowed" to mean this was
20 something dictated to Kearney by your client?

21 A It was not dictated. As I indicated on the
22 earlier page, they had come back and said that for
23 reasons internal to the two railroads, bear in mind the
24 two railroads are still operating independently in the
25 solicitation of traffic. In fact, with a legal

1 agreement that keeps them at arm's length, but for
2 reasons internal to the two railroads, they did not
3 desire to have that number of field interviews
4 conducted.

5 We sat down with them, and what we worked out
6 was in effect a compromise position which we felt was
7 acceptable to us and would not diminish the quality of
8 our final reports or our verified statements. And that
9 is where we got to the 20, and from the 20, I guess our
10 actual interviews were something like 15 or 16 out of
11 the 20 in that final list.

12 Q The sentence we have been discussing allows
13 Kearney to interview up to 20 past Kearney clients or
14 close industry contacts who will keep the interview
15 confidential. Who decided the interview had to be kept
16 confidential? Was that Kearney or the client?

17 A No, that was our decision. In terms of
18 contact with past clients or with close industry
19 contacts, one of the reasons that we enjoy access to
20 that level of judgment in industry is because of our
21 past reputation for being reliable and dependable in
22 terms of protecting confidentiality. It is not unique
23 to this study.

24 Any kind of market-oriented study that we do,
25 we frequently go to, among the people we interview, our

1 former and current clients, past clients, and once
2 again, that information stream exists because of their
3 respect for the way we treat confidentiality.

4 Q Well, excuse me, Mr. Kloss, but this sentence
5 that I am calling your attention to doesn't talk about
6 Kearney keeping something confidential. It refers to
7 industry contacts who will keep the interview
8 confidential.

9 A I think that is your interpretation of the
10 statement. The same statement I could demonstrate to
11 you in dozens of Kearney proposals.

12 Q Well, I don't want to debate semantics with
13 you either. Will you agree with me that what this
14 letter says is, Kearney will be allowed to conduct up to
15 20 selected interviews with past Kearney clients or
16 close industry contacts who will keep the interview
17 confidential?

18 A That was not the intent of the statement. The
19 intent of the statement was that the interviews would be
20 conducted on a confidential basis. It is the only way
21 we could conduct them.

22 Q So if I had read this letter as saying that
23 you wanted the interviews kept confidential, I would be
24 incorrect. Is that what your testimony is?

25 A My testimony is that we were indicating in

1 that statement a two-way confidentiality that flowed
2 both from interviewer to interviewee and in the reverse,
3 because in some cases we were discussing issues that
4 were pretty strategic in the logistical programs of some
5 of the people that we interviewed.

6 Q And if one of these client contacts told you
7 something that you didn't want to report because it was
8 inconsistent with the conclusion you wanted to reach,
9 that contact would be kept confidential?

10 A That is a false statement, counsel. I resent
11 that statement. It's a false statement.

12 Q Let's turn back to Exhibit 9. On the second
13 page, under the heading Objective, that letter or
14 proposal states, the benefits will be evaluated along
15 three dimensions, the third of which is competition. Is
16 that correct?

17 A Yes, competition in a very broad sense,
18 including the competition that that industry faces, and
19 competition broadly stated in terms of transportation
20 competition which extends to the total transportation
21 competitive spectrum and not exclusively to rail versus
22 rail.

23 Q What you are proposing to study with respect
24 to competition is described at the top of Page 3 in that
25 exhibit, is it not?

1 A In that statement at the top of Page 3, we
2 were merely elaborating upon how competitive impacts on
3 rate levels, and rate levels, as you well know, were not
4 ultimately dealt with in our segment of the project, but
5 we were just making a discussion of, you know, what are
6 the competitive effects, what are the factors that
7 affect the competitive impacts on rate levels, and we
8 just said for three of them. We probably could have
9 listed six or nine or twelve.

10 Q But in the end, that was not covered in the
11 Kearney study. Is that what you just said?

12 A Competition?

13 Q That's correct.

14 A Competition, if you will allow me to make my
15 definition of competition, because this is my document,
16 competition, as defined in terms of competition that
17 that user of transportation faces in the marketplace and
18 competition in the sense that we now have a vastly
19 different competitive environment for the whole
20 transportation industry.

21 It is no longer in most commodities rail
22 against rail, but it is rail against rail, against
23 truck, against barge, against all other options. And we
24 are defining competition in that broader sense.

25 Q In what sense did you study competition in

1 that broader sense in this study?

2 A We looked at, in each of the areas, what other
3 transportation capability is available, rail and
4 nonrail.

5 Q Did your study consider the impact on shippers
6 of having in some instances the number of rail carriers
7 available to them reduced from two to one?

8 A It was certainly within the framework of our
9 evaluation.

10 Q And what did you conclude?

11 A My personal conclusion --

12 Q No, no, in this study what did you conclude?

13 A That two is not necessarily better than one,
14 that a shipper, and I can speak from a shipper vantage
15 point -- I have been back many years ago, a substantial
16 shipper. I have worked with hundreds of shippers in the
17 last 22 years.

18 A shipper faced with a question of one versus
19 many in terms of making site selection decisions, et
20 cetera, may not opt for the many if the many cannot
21 provide him the commitment to service, the commitment to
22 facilities, to equipment, to long-term stability that a
23 one strong may.

24 Q Turn to Page 13 in your verified statement,
25 please. At the very bottom of Page 13, carrying over to

1 Page 14, the statement appears, it is likely that SFSP
2 will pass through some portion of these cost savings to
3 the shipping community were the merger to take place.

4 Did your study attempt to quantify the extent
5 to which SFSP would pass through any portion of these
6 costs in savings to the shipping public?

7 A No, the study did not quantify it. That is my
8 professional judgment based on experience as to what
9 prudent management would do with these benefits.

10 Q Turn, if you will, to Page 10 of your verified
11 statement, the second full paragraph on that page.
12 Towards the end of that paragraph, the statement
13 appears, past experience shows that operational
14 efficiencies and economies of scale allow a merged rail
15 system to be more competitive in the marketplace. That
16 statement, I take it, assumes that there is in the
17 marketplace effective competition for the merged
18 system. Is that correct?

19 A There is no place in the marketplace that
20 there is not competition for this merged system, and you
21 know, I think you are trying to narrow the question to
22 rail versus rail. I am talking a rail carrier versus
23 all other options, some of which may be rail, and some
24 of them may be other modes, and that competition
25 factually exists.

1 Q And is that statement you just made based on a
2 study or based on your judgment?

3 A Based on my judgment related to a number of
4 studies with which I have had experience, not only in
5 rail, but in truck and air and barge.

6 Q But this study we are talking about today does
7 not concern itself as I understand your testimony with
8 the effect of this merger on competition per se. Is that
9 correct?

10 A No. But if you will go back and move up one
11 line in the statement that you quoted, the first two
12 words after the comma, or first three words are "past
13 experience shows that operational efficiencies and
14 economies of scale allow a merged rail system to be more
15 competitive in the marketplace." It is a statement of
16 experience. There was nothing in what we did in this
17 project that did anything other than augment that
18 opinion for me.

19 MR. VON SALZEN: I have no further questions,
20 Your Honor.

21 MR. BATERA: Your Honor, a number of our
22 questions were asked. If I could have a couple of
23 minutes, I think I could reduce it. Thank you.

24 (Pause.)

25 CROSS EXAMINATION

1 BY MR. BATERA:

2 Q Mr. Kloss, I am Victor Batera, representing
3 the KCS. You state in your verified statement on Page
4 11 that one of the sources of information you relied on
5 was a selected number of interviews with key shippers to
6 verify our understanding of the probability of
7 implementing the anticipated benefits of the merger. Is
8 that correct?

9 A That is correct.

10 Q In other words, do you mean by that that you
11 started with a hypothesis or view relating to benefits
12 and then confirmed that through discussion with the
13 shippers?

14 A Where they were used, the interviews were used
15 for one primary purpose, and that was to make certain
16 that in some highly volatile industries where there had
17 been frequent and rapid change in a short time period,
18 that our historical understanding of that industry was
19 still valid.

20 Q What industries were those?

21 A I think those will become obvious as the later
22 testimonies unfold, and you can see which ones utilized
23 interviews, and in what manner they used them.

24 Q Well, can you tell me which ones did?

25 A Not offhand, other than I can tell you, for

1 example, within the food industry where the logistics
2 process changes almost daily, we did a limited number of
3 interviews for the purpose of updating state of the art,
4 and validating our understanding of the state of the
5 art.

6 Q Do you know who was interviewed in the food
7 industry?

8 A No. Mr. Seger can speak to that.

9 Q Did Kearney interview any shipping companies
10 engaged in maritime intermodal, to your knowledge?

11 A In connection with this project, no.

12 Q Was Kearney aware of the views of any shippers
13 engaged in maritime intermodal in connection with this
14 project? Excuse me, the views of any shipper engaged in
15 maritime intermodal as to the merger.

16 A I don't believe so, except to the extent that
17 I guess any -- are you defining a bulk movement that
18 goes to a port as intermodal, or are you talking --

19 Q Well, how do you define maritime intermodal?
20 What is your understanding of that term?

21 MR. MOATES: I'll object to that.

22 JUDGE HOPKINS: You were the one who asked the
23 question. You should define what you meant by it.

24 BY MR. BATERA: (Resuming)

25 Q A mini-bridge or land bridge movements.

1 A A mini-bridge, land bridge, were not covered
2 in any of the interviews, I don't believe, except that
3 to the extent those were part of the logistic system,
4 anybody that was interviewed, but offhand I can't think
5 of any interviewees, because mini-bridge, land bridge is
6 passthrough traffic that does not have any impact on
7 domestic logistics. It is just traffic that is flowing
8 through.

9 Q Looking at Exhibit DFGW-C-10, your January 20
10 letter, you refer on the second page, in the second
11 paragraph, to Kearney being allowed to interview
12 selected marketing managers from Santa Fe and Southern
13 Pacific. Do you see that language?

14 A Yes.

15 Q What were those interviews in regard to?

16 A They were background interviews to contribute
17 to the body of knowledge in the project. We wanted to
18 be aware of any internal studies that had been done in
19 any of the product areas, what their findings were,
20 those kinds of issues. It was an attempt to, to the
21 maximum extent possible, avoid reinventing the wheel,
22 but the content of those reports --

23 Q I am just asking you about the interviews.

24 A Okay.

25 Q Did you rely on the railroad marketing

1 managers to any degree to describe proposed shipper
2 benefits?

3 A No.

4 Q Kearney was on a time frame in completing this
5 report, was it not?

6 A That is correct. That is why we used multiple
7 people on the project.

8 Q Your proposal scheduled initially, I believe,
9 two months to complete the project?

10 A That's about right.

11 Q How would you have structured the study
12 differently if you had had, say, six months?

13 A In retrospect, I don't think we would have
14 structured it any differently. The time -- once again,
15 the time constraint was one that was made known to us
16 before we accepted the project, and tight time
17 constraints in proceedings of this type are not unusual
18 for consultants. We never have as much time as we would
19 like, but in retrospect it turns out it was not a
20 constraint that was of any significance.

21 Q So you would not have restructured the project
22 in any way?

23 A No.

24 Q In the next to the last paragraph on
25 DRGW-C-10, you refer to numerous delays and

1 redirection. Do you see that language?

2 A Yes.

3 Q What redirection are you referring to?

4 A The redirection refers specifically to the
5 issue of to what extent field interviewing was going to
6 be included in the process. The delays to which I refer
7 are of two natures. One, the standard delay that we
8 always face or frequently face in terms of getting a
9 client to make a decision. A client takes four months
10 to make a decision, and then wants the results next
11 week. And that is not unusual in our business. The
12 other kind of delay was the one that was specifically
13 related to reaching a compromise on the issue of field
14 interviewing.

15 Q Excuse me. I didn't --

16 A The other delay, other than the normal delays
17 in the approval process or the decision process on the
18 part of the client, the other delay was related to the
19 second point, reaching a compromise on the field
20 interviewing.

21 Q Who was the source of the redirection?

22 A Well, we had -- I thought I had clarified that
23 with the previous questioner, but I will go back over it
24 for you. We had initially prepared, as is already in
25 the record, a rather lengthy list of interviews at Page

1 36, or Record Number 36 of C-9.

2 We had prepared a rather extensive list of
3 interviews, and as I indicated earlier, for some policy
4 reason within the two railroads, they came back to us
5 and said, you know, we don't want to do that many field
6 interviews. Can the project be done in another way?
7 And we came back with a revised position.

8 The position was presented by us. It was
9 approved by the client as being a reasonable compromise
10 that met whatever their objections were to the broader
11 scale field interviewing, and I do not know what those
12 objections were.

13 Q So, was the source of the redirection the
14 clients?

15 A No. You apparently missed my answer. My
16 answer was that we proposed a redirection which was
17 acceptable to the client. We proposed in light of his
18 objection to the number of field interviews, and as I
19 say, those objections were based on apparently some kind
20 of policy issues within one or both of the railroads to
21 which I am not privy.

22 Q Mr. Kloss, I would like to give you a
23 hypothetical, turning to a different subject area.
24 Assuming that you are advising a business which wants to
25 locate a new facility on a rail line. Transportation

1 logistics are important to the business.

2 And they ask your advice as follows. Is it
3 important for the facility to locate where there are two
4 competitive rail lines instead of just one rail line?
5 Can you respond to that?

6 A I answered that question earlier also, and my
7 answer is again that that is a simplistic -- one versus
8 two is a very simplistic issue. It is the quality of
9 service, the commitment of the carrier to invest in
10 service, the commitment of the carrier and the
11 capability of the carrier to invest in both service,
12 equipment, facilities, the long-run viability of the
13 carrier, because I am evaluating a 30 or 40-year
14 investment in brick and mortar, and I am not going to
15 make that on the basis of a very short-term condition.

16 Also, the availability of other transportation
17 modes, because there are so very few commodities or
18 manufactured products now moving that don't move by
19 multi-modes, and I think it is probably for most
20 shippers more important to have a variety of
21 transportation options available to them than it is this
22 question of one versus two railroads.

23 Q So is your answer -- correct me if I am
24 wrong -- that you would need more information to respond
25 to the hypothetical client?

1 A I guess that is part of the answer, but I
2 guess the basic answer is that the question of one
3 versus two railroads is overly simplistic in something
4 as complicated as the structuring of a logistic system.
5 I have to know more about the performance and the
6 investment capability, how important am I to that
7 carrier, and if my business is split between two, three,
8 four rail carriers, I am of lesser importance to my
9 primary carrier.

10 And that primary carrier is going to be
11 reluctant to make investments that are specifically
12 focused on facilitating my business.

13 And that is the viewpoint in those kinds of
14 projects that we have to take. We sit in the role not
15 of the policy question of one or two railroads, good or
16 bad, but from the vantage point of what is the best
17 posture long-term in this decisionmaking. Where do
18 we -- how do we best protect our markets?

19 Q Let me add some information and see if this
20 changes your answer in any way. Let's assume that the
21 hypothetical client has a facility which will be
22 receiving petrochemicals in large quantities. And also
23 let's assume that they want to locate in Southern
24 California area, say north of Los Angeles, south of
25 Fresno, for example. Does that affect your answer in

1 any way?

2 A No, because even in that example you are
3 speaking only to the inbound side of the logistics
4 process. An equally or probably even more important
5 aspect for the user of transportation is the outbound
6 side of the logistics process, because that determines
7 how he can serve his customers and how he can compete
8 vis-a-vis his competitors in the marketplace.

9 So, you would have to take a view of the total
10 logistics, the inbound, what impact that has on the
11 in-process inventories, the location of that facility
12 relative to my markets, the transportation resources
13 that are available to me multimodal to move from that
14 facility to the marketplaces and then an evaluation of
15 the quality of ongoing service that I am likely to
16 receive from those transportation options.

17 So, it is a process that starts with the
18 source of the raw materials, and we process them
19 through, we transport them into a manufacturing plant,
20 and we process them into finished or semifinished
21 goods. We may then transport them to another facility
22 for fabrication, and to a third facility for
23 distribution, and, you know, you can't look, with all of
24 the complicated tradeoffs that are involved, you can't
25 look simplistically at a single link of that system.

1 Q Are you distinguishing, and maybe again I am
2 being too simplistic, are you distinguishing between the
3 need for rail service, and you are assuming that the
4 facility wants rail service, and the need for
5 competitive rail service?

6 A Well, you used two terms which have different
7 meanings for me. Wanting is one thing. Needing is
8 another thing. I have a little anecdote that I
9 frequently use with my clients when we are in very
10 difficult situations in getting them to make difficult
11 decisions about their future, and it goes -- everybody
12 wants to go to heaven, but nobody wants to die, and you
13 know, I think that to me differentiates the need
14 between -- wanting is a wish list. Needing is more
15 specific. And I am dealing with needs.

16 Q Taking my example of the petrochemical
17 receiver, are you saying that in your view it may not
18 need to be on rail at all?

19 A It depends upon a number of factors.

20 Q What are those factors?

21 A There are a number of producers of
22 petrochemical products, for example, in the Chicago area
23 which I am most familiar with that receive virtually all
24 of their inbound by truck because of the location of
25 their supplier.

1 Q Well, I am talking about supplies to a
2 Southern California facility from, say, the Houston
3 Beaumont area. Would that be a movement that in your
4 experience would not need to be on rail?

5 A I would have to have more information about
6 the availability of other alternatives, the cost of
7 other alternatives. It may or may not have a need for
8 rail access, but if it has a need for rail access, it
9 may or may not also have the need for dual rail access.
10 That may not be an issue.

11 Q All right. Assuming, then, that it does have
12 a need for rail access.

13 A Today, I qualify that by today, because there
14 are things happening today. There are commodities
15 moving by truck today over distances that I would have
16 considered unbelievable five, six, seven years ago. I
17 have been, as I indicated in my verified statement, I
18 have been in various aspects of the transportation
19 logistics industry for 37 years, the last 22 as a
20 consultant.

21 In those 37 years, I have seen more
22 transportation competitive change in the last three
23 years than I saw in the previous 34, so you know, I
24 don't think you can adopt the old rules of thumb that
25 this commodity moving this distance is inherently rail,

1 because, boy, the truckers have come in and they have
2 taught the railroads that nobody owns any market
3 virtually.

4 Q And by the same token, is it possible that
5 truck at some time in the future will become a less
6 effective method of competition?

7 A That is conceivable, but the trends certainly
8 are not indicative of that. If you look at where the
9 growth has been, the most rapid growth has been in the
10 trucking industry.

11 It has been in the specialized irregular route
12 carriers who are dealing largely with rail competitive
13 types of commodities, and the Schneiders and the
14 Commercial Transport Division of North American Van
15 Lines who built their businesses on taking traffic off
16 rail are growing at a much more rapid rate than the rail
17 industry.

18 So, you know, it is obvious to me from that
19 that they are effective competitors, and the trend line
20 just continues to go up and up. Now, if you want to say
21 what is going to happen ten years from now, your guess
22 on that is as good as mine.

23 Q Is it your view that a merger should be
24 approved today on the assumption that motor carriers
25 will provide effective competition, say, 30 to 40 years

1 in the future?

2 A I think you can make some reasonable
3 assumptions about the longer term viability of motor
4 carriers as a competitive mode, but we are not talking
5 about -- you know, to get to the 30 and 40-year
6 horizons, we have to pass through the five and ten-year
7 horizons, and if we don't pass through those as viable
8 entities, forget about the 30 and 40. That is pipe
9 dreams.

10 Q Pardon me. I am a little confused. Is your
11 answer yes or no?

12 MR. MOATES: Your Honor, I think his answer
13 was very clear.

14 JUDGE HOPKINS: I think the answer was. You
15 would say yes, wouldn't you?

16 THE WITNESS: Pardon?

17 JUDGE HOPKINS: You said yes, didn't you, at
18 the beginning, and then explained it all?

19 THE WITNESS: There is certainly every reason
20 to suspect if you look at the data, look at the trends,
21 there is every reason to suspect that motor carriers are
22 doing to continue to be a viable competitor for rail,
23 and in fact are taking year after year an increase in
24 share of the total.

25 JUDGE HOPKINS: That is yes, isn't it? Why

1 don't we say yes?

2 MR. MCATES: I liked the other answer better.

3 JUDGE HOPKINS: Well, he can say yes with the
4 other answer. Go ahead.

5 BY MR. BATERA: (Resuming)

6 Q Are you familiar with the term "market
7 dominance" as it is applied to the Commission's
8 jurisdiction over railroad rates?

9 A In general, yes.

10 Q What is your understanding of the term?

11 A It relates to the captive shipper issue and
12 the extent to which a single railroad dominates the
13 potential traffic of that shipper. It was not an issue,
14 incidentally, that was any part of my statement or that
15 we dealt with in this study.

16 Q Has Kearney to your knowledge been involved in
17 any proceeding where -- on behalf of a shipper where the
18 question of market dominance has been raised by the
19 shipper?

20 A We have been involved, going back a number of
21 years. We were involved with the Interstate Commerce
22 Commission in some studies that assisted them in making
23 some decisions and recommendations in the area of market
24 dominance.

25 I believe -- this is in another area of cur

1 practice that does not report to me, but I believe that
2 we have also done some shipper work which has some
3 relativity to issues of market dominance, primarily
4 regulatory issues growing out of the Staggers Act, and I
5 am not qualified to speak further to those issues.

6 Q Do you know if any of those studies or
7 proceedings have involved the Santa Fe or the Southern
8 Pacific?

9 A As I indicate in -- if you will refer to
10 DRGW-C-9, on the first page, the second paragraph, which
11 is where we talk about right up front are there any
12 inherent conflicts of interest that affect our ability
13 to effectively serve you, you as a client are going to
14 have to help us make that decision.

15 And in that we say Kearney currently is
16 preparing verified statements on behalf of shippers in
17 rate cases before the Interstate Commerce Commission
18 opposing both Southern Pacific and the Santa Fe. It is
19 a matter of record.

20 Q And did those cases involve the market
21 dominance theory?

22 A I cannot speak to that specifically.

23 Q In that same paragraph, well, it is the last
24 sentence, you state that Kearney will not accept any
25 proprietary data in the proposed study which may

1 endanger the legal case or the suitability of witnesses
2 in either the rate case or the merger case. Do you see
3 that language?

4 A Yes.

5 Q Did Kearney in fact not accept any proprietary
6 data as described there?

7 A The only thing that would in any way border on
8 proprietary data, and I think, you know, this tribunal
9 has to make the judgment as to whether it was
10 proprietary or not, we did have access to certain
11 conceptual elements of their operating plan. Those are
12 now a public document in this proceeding.

13 Q Is there any information which you feel should
14 have gone into the study which you did not rely on?

15 A No, because we were taking a shipper
16 viewpoint. That statement, because I do a reasonable
17 amount of expert witness work with federal courts, with
18 the Interstate Commerce Commission, with the Postal Pat-
19 Commission, and so forth over the years, I have learned
20 to be very selective in terms of what proprietary
21 information I allow to come into my possession, and to
22 give you an example, back a number of years ago I was
23 discussing --

24 Q Mr. Kloss, I don't mean to interrupt, but I
25 think your answer was no.

1 A Yes. And it is based on experience and in
2 terms of what it might do to our ability in the future
3 to respond to other situations.

4 Q Mr. Kloss, of the shippers that you did
5 interview, or that the Kearney people did interview, did
6 you interview both large and small shippers?

7 A Yes.

8 Q Did you interview both large and small
9 shippers in each of the commodity areas that you
10 studied?

11 A No, not in all the commodity areas. In fact,
12 as I indicated earlier, in some commodity areas we had
13 no interviews.

14 Q Did you interview receivers as well as
15 shippers?

16 A Not to my recollection, but you might address
17 that question to people who are presenting the
18 individual statements.

19 Q Did you interview any shippers who were
20 opposed to the merger?

21 A I couldn't answer that question, because that
22 was not an issue we explored. We did not explore, never
23 in any of the interviews did we raise the question, are
24 you in favor or opposed to the merger. That was not an
25 issue -- we were not conducting a poll. We were

1 expanding some information on which to make a judgment
2 on shipper benefits specifically.

3 Q In preparing your verified statement, did you
4 review the statements of the other Kearney witnesses?

5 A Yes, I did.

6 Q And did you agree with those statements?

7 A Obviously.

8 Q And you relied on them in preparing yours?

9 A I relied on them, supplemented by my own
10 professional judgment, my own experience.

11 Q For instance, with regard to intermodal
12 traffic, say, you relied on -- accepted Mr. Heuer's
13 verified statement?

14 A Yes.

15 Q Mr. Heuer?

16 A Yes.

17 Q Is that a correct statement?

18 A That is correct, although I have an experience
19 base on which to make significant judgments of my own on
20 intermodal. I have appeared before the House and Senate
21 Maritime Committees as an expert witness at their
22 request on issues relating to intermodal.

23 Q In your review of the other Kearney verified
24 statements, did you find any consistencies regarding the
25 conclusions of various witnesses?

1 A No.

2 Q What about in the underlying assumptions?
3 Were they consistent?

4 A There really were no underlying assumptions
5 other than the information that we received from the
6 Santa Fe and the SP team in terms of the conceptual
7 operating plan. I asked nobody to make any assumptions.
8 As I indicated earlier, my instructions to the team were
9 relatively brief.

10 You have these two questions to deal with.
11 This is going to be the structure of our final
12 statement. You develop your own study methodologies,
13 and study methodology includes assumptions, but this is
14 not a project that was based on assumptions. It was
15 based on findings.

16 Q Mr. Kloss, on Page 5 of your verified
17 statement, you note that, in the first paragraph, that
18 significant management or significant freedoms were
19 first introduced -- significant management freedoms were
20 first introduced to the transportation industry by the
21 Staggers Act and other legislation.

22 A That is a little bit of a misstatement, in
23 that I think the Staggers Rail Act and the Motor Carrier
24 Act of 1980 were sort of the climax and the gathering
25 together of a progression of events that had happened in

1 the two, three years preceding it, but I think the
2 combination of that progression of events and the
3 Stagers Act and the Motor Carrier Act, that package
4 combined, yes.

5 Q Are you familiar with the contents of what has
6 been introduced in this case as KCS-C-1? It is a
7 document entitled The Strategic Assessment of Santa Fe's
8 Position in the Railroad Industry.

9 A I don't even know what the document looks like
10 or contains. I would have had no reason to have access
11 to it.

12 Q You have not seen it?

13 A I have not seen it.

14 MR. BATEFA: Your Honor, I understand this was
15 designated to counsel, so I would like to read --

16 MR. MOATES: No, sir, it was designated, and I
17 seriously object to its use with this witness. The
18 witness has not seen it. Your Honor recalls what that
19 document is. It is the confidential document submitted
20 to the Santa Fe board of directors on which we had
21 extensive cross examination of Mr. Fitzgerald line by
22 line, paragraph by paragraph. Do you agree with this?
23 Do you agree with that?

24 It is under a protective order. We are
25 playing games with protective orders in my view in this

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1 case. At least counsel have. They signed the order.
2 They agreed that they are going to limit the people that
3 get them, and then they bring them into the hearing room
4 and say, all right, he is an outside consultant, so he
5 can look at it.

6 Because he is an outside consultant, it
7 doesn't mean that we gave him this confidential
8 document. We don't intend him to have it. It is
9 inappropriate. Furthermore, he had nothing to do with
10 its creation. It is clear from the prior testimony that
11 that is the case.

12 He has just said he has not seen it, and
13 anything that this counsel would ask him about it would
14 simply be in my view argumentative or a way to try to
15 conduct discovery through an expert witness, and it is
16 entirely inappropriate, and if he intends to use it, I
17 would like to hear a proffer of his line for examination
18 and relevance.

19 JUDGE HOPKINS: Go ahead.

20 MR. BATEBA: Your Honor, what I intend to do
21 with the document is simply read the witness a portion
22 of it, and Your Honor has the document. It is on Page
23 32, Paragraph 1. It is a statement as to opportunities
24 that railroads now have under the current Staggers Act
25 environment, and I want to see if the witness agrees

1 with that. It is not designed to --

2 JUDGE HOPKINS: Is that the only question you
3 are asking?

4 THE WITNESS: I am sorry. Did you say
5 question or questions?

6 JUDGE HOPKINS: Do you still object?

7 MR. MOATES: If that is the sole purpose of
8 counsel's use of this, I will not object, but I reserve
9 the right to renew it if I hear him go beyond.

10 JUDGE HOPKINS: I understand. Go ahead.

11 MR. BATERA: I will have a series of
12 questions. If he does not agree, I want to narrow down
13 what his agreement is on it.

14 JUDGE HOPKINS: Well, that is all right on
15 this one point.

16 THE WITNESS: Your Honor, may I raise a
17 question as a witness?

18 JUDGE HOPKINS: What is it?

19 THE WITNESS: Okay. I am confused. Counsel
20 said question, and now he is expanding it to say a
21 series of questions.

22 JUDGE HOPKINS: The problem is, if he asks you
23 a question and you say something and it isn't the answer
24 he wants, he is liable to expand on that. I believe
25 that is what he is talking about on the same subject.

1 Go ahead.

2 MR. BATERA: Counsel, on Page 32, depository
3 Page 32.

4 BY MR. BATERA: (Resuming)

5 Q Mr. Kloss, I am going to read you a section, a
6 brief paragraph from this document and ask whether you
7 agree with it or not, and it is referring to the
8 consequences of the Staggers Act, and the statement is
9 as follows. "Railroads have enhanced opportunity to
10 favor their own single line routes between origin and
11 destination pairs. This gives railroads flexibility in
12 setting single line rates provided two conditions can be
13 met. A, the carrier can handle the movement on a single
14 line basis without any great circuitry, and B, it is the
15 only carrier serving either or both the origin or
16 termination."

17 That is the end of the statement. Would you
18 agree with that statement?

19 A I can neither agree nor disagree with that
20 statement, because inherent in it is the question of
21 ratemaking, and I have not presented myself as an
22 authority on ratemaking. Far from it. I have not
23 studied ratemaking consequences in this procedure. So
24 any question that has anything related to ratemaking
25 inherent in it I'm afraid I can't handle.

1 Q So you are saying you don't know the answer as
2 to whether you agree with that statement or not?

3 A That is correct.

4 Q On Page 20 of your verified statement, up at
5 the top, you state that, and I believe this is under the
6 Staggers Act, the nation's railroads have used the
7 freedom under the Staggers Act to stop participating in
8 unprofitable routes and services."

9 Do you see that language?

10 A That is correct.

11 Q Are you using the term unprofitable there to
12 mean the loss of money on particular routes or rates --
13 routes or services, rather?

14 A I am using it in a bottom line context. Is
15 this segment of business profitable, unprofitable, not
16 only in terms of as a stand alone business, but also in
17 terms of its synergism with the rest of the business,
18 because I think these are issues that you can't judge
19 solely in a vacuum, that you have to look at them not
20 only in terms of their individual content, but also in
21 terms of what the synergism is with the rest of the
22 system.

23 Q What do you mean by synergism with the rest of
24 the system?

25 A What does it contribute to the rest of the

1 system? If I can use an example maybe to illustrate, an
2 example from a transportation environment, but not from
3 the railroad industry, for example, motor carriers face
4 a very serious problem in terms of what we call minimum
5 shipments, shipments of roughly 150 pounds or less, that
6 are inherently, by themselves inherently unprofitable to
7 rail carriers.

8 So, the simplistic decision might be that,
9 well, what we are going to do is, we are going to
10 embargo shipments of that size, but beyond that are
11 questions of synergism related to how many shipments at
12 each pickup, how many minimum shipments at each pickup
13 will you get from that shipper, what traffic do we get
14 from that shipper at other locations that might be
15 adversely affected by our very specific decision in this
16 case.

17 And that is what I am referring to as
18 synergism. How does it relate to the entire system?

19 Q Are you using the term unprofitable then to
20 also mean simply the cancelling of routes and services
21 that make less money than other routes and services,
22 even though it might not be losing money?

23 A No, I am not talking about it in a relative
24 sense. In fact, the term unprofitable was used in a
25 pretty generic sense, but I had no thought of, does it

1 rank 17th in profitability among 24 opportunities. I am
2 talking more specifically about the issue, is it
3 basically profitable or basically unprofitable, and if
4 it is basically unprofitable, are there any other
5 reasons we could use to justify our continued
6 participation in that route, that market segment?

7 And those, once again, are pretty complex
8 questions.

9 Q Did Kearney make any study of whether shippers
10 have been disadvantaged by route cancellations of either
11 the Santa Fe or the Southern Pacific?

12 A No.

13 Q On Page 9 of your verified statement, you
14 refer to identifying benefits that had a reasonable
15 probability of being achieved. Is that correct?

16 A That's correct.

17 Q I am curious. Do you have any benefits in
18 mind that are not likely to be achieved?

19 A Well, the achievement of any benefit
20 opportunity is a function of management decision. We
21 have based our evaluation of whether or not this is a
22 benefit that is likely to be realized using the
23 framework of the prudent manager.

24 Now, you are always going to find in any
25 industry, in any situation, a manager who is a

1 noneconomic animal, and is going to do some things
2 emotionally, and no way can anybody predict that
3 emotional animal, but we are using the context and the
4 vantage point of the prudent manager who is an economic
5 animal.

6 Q Did you have any basis, then, for
7 distinguishing benefits which were likely to be
8 achieved?

9 A I suspect if you added up the logistical
10 experience, just the logistical consulting experience,
11 if you set aside the industrial logistics experience
12 they had before coming into our firm, you are probably
13 talking about 100 plus years of logistical experience
14 working with these very same kinds of problems.

15 You know, what is the management likely to do
16 with an opportunity that is put in front of them? And
17 we are saying that these are ones that are in our
18 judgment, our experience, likely to be realized. We
19 can't guarantee you 100 percent on any of them.

20 Q Do you think there would be a difference in
21 your experience as to the benefits that are likely to be
22 achieved before Staggers as opposed to after Staggers?

23 A I think that Staggers has brought almost a
24 whole new mindset to the total logistics function, not
25 only the people who were buying transportation and the

1 other services that are involved in transportation -- in
2 the logistics function, but also the people that are
3 providing those services.

4 There is a whole new level of -- a whole new
5 frontier spirit, so to speak. People are saying, hell,
6 we can probably find a way to do most anything that is
7 economically logical to us. We can probably find a way
8 to do it. So, yes -- I think the answer is yes, there
9 is a whole new degree of sophistication out there on
10 both sides of the fence who are looking at opportunities
11 and options that we probably wouldn't even have thought
12 about pre-Staggers because of the constraints that were
13 on both parties.

14 We can now get together and fashion price
15 service packages that would have been unheard of
16 pre-Staggers. So, I think, yes, the mindset, the
17 creativity is flowing at a much more rapid rate than it
18 was pre-Staggers.

19 Q I would like to turn to Page 11 of your
20 verified statement. And you state that your experience
21 shows that not all the proposed operating changes of a
22 merged system are actually implemented. Is that
23 correct?

24 A That's true.

25 Q What operating changes do you expect not to be

1 implemented?

2 A I have no opinion on that. I merely presented
3 that as a generic statement. I think it is an honest
4 attempt to be conservative. We are not saying that
5 everything absolutely is going to be implemented,
6 because we know in our past experience that for one
7 reason or another not all the operating improvements
8 that are proposed are actually implemented when the
9 merger is approved.

10 And that is a generic statement. I had no
11 specifics in mind when I wrote that.

12 Q Do you have specifics in mind relating to the
13 intervening economic and competitive circumstances?

14 A No. I think those are a matter of historical
15 record.

16 Q Does a lack of competition equate to one of
17 those intervening circumstances?

18 A No.
19
20
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25

1 Q Now, you stated in your testimony that you
2 believe shippers will recognize the opportunity provided
3 to them by improved service to save on inventory
4 carrying costs, and that they will take prompt action to
5 adjust their inventory to take advantage of those
6 improvements; is that fair?

7 A That's correct.

8 Q So at least some shippers' inventory carrying
9 costs are an important item?

10 A In the preamble or -- in the preamble to my
11 testimony, if you'll turn to page 6, we took the total
12 U.S. logistics costs and broke them out by category.
13 And as you will see, inventory carrying costs are
14 currently in excess of 20 percent of total logistics
15 costs.

16 So yes, it is. Not only is it a major
17 element, but increasingly shippers are seeing it as a
18 manageable element.

19 Q Is it your understanding that international
20 shippers of high value merchandise are particularly
21 cognizant of the benefits of low inventory?

22 A This evaluation did not involve international
23 shippers. This was a domestic study.

24 Q But is that a fair statement? Do
25 international shippers of high value merchandise pay

1 particular heed to the benefits?

2 A No more so than domestic shippers of the same
3 commodity.

4 JUDGE HOPKINS: Do you have more questions?

5 MR. BATERA: I have a few more.

6 JUDGE HOPKINS: A few more. What is a few?

7 MR. BATERA: Maybe ten minutes.

8 JUDGE HOPKINS: Well, let's finish. Go ahead
9 and we'll take a break after you finish.

10 BY MR. BATERA: (Resuming)

11 Q Mr. Kloss, one of the benefits that you have
12 indicated for shippers -- and I believe this is on page
13 16 -- is that a single line system will avoid
14 interchanges; is that correct?

15 A That's correct.

16 Q In connection with this, you point out that by
17 avoiding interchanges this reduces handling and the
18 possibility of routing errors and delays; is that
19 correct?

20 A That's correct.

21 Q Are you familiar with the term run-through
22 train service?

23 A I am.

24 Q And what do you understand that to mean?

25 A It's a method of running a train from origin

1 to destination without intermediate classification or
2 intermediate yarding, accomplishing some of the same
3 benefits as the elimination of interchanges.

4 Q Which benefits?

5 A It still doesn't speak to the issue of single
6 responsibility, single accountability.

7 Q But which benefits are accounted for?

8 A Well, to the extent in a run-through train
9 that you bypass terminal operations, you bypass, you
10 eliminate the delays that occur at terminals and the
11 interruptions of service that occur at terminals, their
12 impact on reliability of service.

13 Q Is loss and damage also a benefit that is
14 found from run-through train service to the same extent
15 as a single carrier?

16 A Yes.

17 Q Are you familiar with the Santa Fe-KCS service
18 to Dallas, known as the Big D?

19 A I did not do an operations study.

20 Q On page 14 in item two, you note that
21 intermodal traffic growth has been phenomenal for the SF
22 and SP. Do you see that language?

23 A That's correct.

24 Q Did Kearny's analysis give you any reason to
25 believe that the merger is needed because there's not

1 enough traffic for these railroads?

2 A That's a detailed question that I think Mr.
3 Heuer can speak to with more authority than I can.

4 Q Would you have any opinion on that?

5 A No, except that, within limits, in a capital
6 intensive business such as railroading is, within
7 limits, the increase of throughput through a system
8 obviously is going to have economic benefits. If you
9 can manage that throughput and avoid severe peaking, et
10 cetera, the more throughput you get through a facility,
11 the more you are going to reduce the unit costs of that
12 facility. And that's true of investments in
13 sophisticated hardware for intermodal.

14 Q Okay, but you have no specific knowledge or
15 opinion one way or the other whether this particular
16 merger is needed because of lack of traffic; is that
17 correct? You're referring me to Mr. Heuer?

18 A On intermodal, yes.

19 Q What about for any other traffic? Do you have
20 a view on that?

21 A Well, I've just expressed my general view. If
22 you're talking about specific commodities, specific line
23 segments, no, because this project, our portion of this
24 project dealt with shippers in the aggregate. It dealt
25 with the system in the aggregate.

1 Q Referring to page 20, you state that some
2 shippers are concerned over the long-term viability of
3 the SP; is that correct?

4 A That's correct.

5 Q Why are shippers concerned with the loss of
6 the SP?

7 A In our logistics work with shippers, and
8 particularly shippers who are located on the West Coast
9 who are making facility decisions, this is a point that
10 is frequently raised, and that is the question of, what
11 happens to me vis a vis the Southern Pacific in the long
12 term?

13 Now, I have done no financial analysis of the
14 Southern Pacific. I am reporting only the consensus of
15 concerns that have come to me in our logistics
16 practice.

17 Q Well, why can't those shippers replace the
18 Southern Pacific with truck, for instance, or some other
19 mode?

20 A In some cases they are doing it.

21 Q Is that an example of shipper desire regarding
22 the continuation of the SP or is that shipper need?

23 A It may be either one, depending upon the
24 individual shipper.

25 Q In the absence of effective competition to a

1 rail carrier, is there any incentive for that carrier to
2 provide service benefits to its shippers?

3 A Well, I think I'd first of all have to ask you
4 to define what is effective competition, because I have
5 yet to find a situation that does not have effective
6 competition.

7 Q For example, a railroad with market
8 dominance.

9 A Pardon?

10 Q A railroad with market dominance.

11 A That shipper may still have effective
12 competition from some other mode, whether or not they
13 are exercising it.

14 But to get back to the issue of, I guess what
15 you're referring to is a shipper who is captive to a
16 single rail carrier and who feels he has an inherent
17 need for rail service -- Did I understand you
18 correctly?

19 Q Well, let's take that example.

20 A Do I understand? Is that the premise of your
21 question?

22 Q We'll use that.

23 A The carrier still has before him the issue of
24 the ability of that shipper to compete in his markets,
25 and as soon as the carrier -- should the carrier take

1 short-sighted pricing actions that limit that shipper's
2 capability to compete in one or more markets, the
3 carrier has to understand -- and once again, this is the
4 prudent management issue -- has to understand that he's
5 drying up his own traffic. And you know, what incentive
6 is there for a carrier to dry up his own traffic?

7 Q Is there less incentive for the carrier to
8 provide the service benefits than if there is effective
9 competition?

10 A I don't think so, because the carrier is
11 still, with or without competition, is interested in the
12 long-term viability of that shipper as a source of
13 traffic for him. Transportation is a derived demand.
14 It is not something that you create. It's a derived
15 demand.

16 Q If the Commission were to approve this merger,
17 but determine that it needed conditions, from a shipper
18 benefit point of view, would conditions which imposed
19 the least restrictions on the operating plan be
20 preferable?

21 A I can't speak to conditions, because as soon
22 as you talk about conditions you are changing the system
23 that we analyzed, that our team analyzed. It's a
24 different system then. It has different freight flows,
25 different players in the game. It's a different system,

1 and we didn't analyze that system. We analyzed the
2 system as proposed by the Santa Fe and the SP.

3 MR. BATERA: I have no further questions.

4 JUDGE HOPKINS: We'll take a 15-minute
5 recess.

6 (Recess.)

7 JUDGE HOPKINS: Let's go back on the record.
8 Who's going to be next? Mr. Roberts.

9 CROSS EXAMINATION

10 BY MR. ROBERTS:

11 Q Mr. Kloss, my name is Barry Roberts. I
12 represent Sunkist Growers, Inc.

13 Mr. Kloss, I'd like to turn to your verified
14 statement at page 11, the bottom of the page, where you
15 indicate five primary sources of information. Could you
16 tell us what experience you have had in the
17 transportation of fresh perishable commodities?

18 A Both pre-consulting and post-consulting.
19 Pre-consulting, I was the organizer of the department
20 and the first director of distribution and customer
21 service for TOPCO Associates, with whom you may be
22 familiar, who are substantial shippers of perishables
23 off the West Coast.

24 I also, prior to consulting, was a regional
25 manager, later divisional manager, for Midwest Emory

1 Freight System, which is the parent company of Little
2 Audrey Transportation, a considerable transporter of
3 perishables off the West Coast. I was president during
4 that same time, president of the Nebraska Haulers, which
5 was also a Midwest Emory Company, who were truck brokers
6 of perishables and others off the West Coast.

7 A number of the studies that we have done with
8 food chains have involved, but not been limited to, the
9 transportation of perishables.

10 JUDGE HOPKINS: Do you need much more?

11 THE WITNESS: Do you put frozen foods in the
12 perishable category?

13 BY MR. ROBERTS: (Resuming)

14 Q I suppose you would, but I had in mind fresh
15 produce.

16 A Okay, fine.

17 Q And can you now tell us what you did in
18 connection with your studies in this case in connection
19 with perishable shippers and perishable commodities?
20 And I would like to limit that to fresh commodities such
21 as our client Sunkist's.

22 A I reviewed the results of Mr. Heuer's
23 evaluation of that product group.

24 Q Did you do any?

25 A Did I do any original field work myself?

1 Q Yes.

2 A I didn't feel the need to.

3 Q Does that mean the answer is no, you did not?

4 A The answer is no, I did not feel a need to.

5 Q On page 11, number two, you indicate that
6 interviews were conducted with Santa Fe and Southern
7 Pacific market managers. Were interviews conducted with
8 the market managers responsible for fresh perishable
9 commodities on each railroad?

10 A Yes.

11 Q Can you tell us who conducted the interviews
12 and which Santa Fe and then which Southern Pacific
13 managers were interviewed?

14 A I think Mr. Heuer can respond to that when he
15 presents his statement.

16 Q Is that because you don't know?

17 A I do not have the information immediately at
18 hand.

19 Q On number five, you indicate that there were
20 interviews with key shippers. Do you know if there were
21 any interviews with any shippers of fresh perishable
22 commodities?

23 A I don't know specifically. Once again, Mr.
24 Heuer would be, I am sure, ready to proceed to respond
25 to that question.

1 Q Are you familiar with the document that I
2 believe has been introduced as DRGW-C-10? That would be
3 a letter that you wrote to Mr. Fosanko and Mr. Lawson
4 dated January 20th, 1984.

5 A Yes, I have it before me.

6 Q At the bottom of that letter you indicate that
7 there are several commodities where this approach, and I
8 assume by "this approach" you mean the broad spectrum of
9 shipper interviews you previously referred to, may
10 adversely impact the quality of the final document,
11 particularly in sulphur, cotton, metals, perishables and
12 petroleum.

13 Can you explain to us what you meant in
14 including perishables in that category?

15 A Well, there was extensive inquiry on that very
16 subject with both of the preceding cross-examinations.
17 Do you want me to go through?

18 JUDGE HOPKINS: Short and sweet.

19 BY MR. ROBERTS: (Resuming)

20 Q Short and sweet, limited to perishables.

21 MR. MOATES: That's what I assume the question
22 was limited to.

23 THE WITNESS: As I explained at that time --
24 and you read the sentence in the same way that you --
25 that the two other counsel did, in that the word "may"

1 was read rather softly, and "may" is really the key word
2 in that sentence.

3 At the time this letter was written, we had
4 some concerns that this modified approach may adversely
5 affect. As we got into the individual studies, we came
6 to the conclusion that there was not an adverse impact
7 on the quality of those statements as a result of that
8 change, slight change of direction in that approach.

9 Q So that the lack of interviews with perishable
10 shippers in your opinion would not affect the quality of
11 your study?

12 A No.

13 Q Turning to page 19 of your statement, you list
14 six supposed shipper benefits, and at the bottom you
15 talk about "intermodal and perishable shippers from
16 Southern Pacific origins to the East will experience
17 improved transit times over more efficient Santa Fe
18 gateways."

19 Now, are there any perishable shippers in the
20 Southern Pacific's California origins who today don't
21 have available Santa Fe TOFC service?

22 A I couldn't answer that question. Once again,
23 Mr. Heuer may be able to answer that specifically.

24 Q Now, assuming arguendo that shippers -- that
25 shippers on Southern Pacific origins in California,

1 perishable shippers, have available today Santa Fe TCFC
2 service, then the benefit that you alleged in number six
3 really wouldn't be applicable to those shippers?

4 A Well, it still is a line haul benefit in that
5 as a result of the merger we would be opening up for the
6 combined system gateways to the East other than
7 Chicago. We'd be opening up St. Louis, Memphis, New
8 Orleans for the East and Southeast.

9 Q And those would be opened up on the Santa Fe?

10 A In the combined system, they would open up for
11 the combined system.

12 Q Turning to page 22 of your statement, you
13 again refer to benefits and you refer at the bottom to
14 loss and damage. Are you aware that today the Southern
15 Pacific and the Santa Fe have differing policies,
16 practices and procedures with respect to the handling
17 and payment of loss and damage claims on fresh produce?

18 A I am not personally aware of that.

19 Q Was that an item that was studied or
20 considered in any way?

21 A The issue of loss and damage was an item that
22 was evaluated in each of the commodity groups, and what
23 impact or what benefit the merger might provide in that
24 area. And that's discussed in the individual
25 statements.

1 Q Did the consideration of loss and damage
2 matters include consideration of the competitive impact
3 that differing policies, practices and procedures of the
4 different carriers have on the shippers' choice?

5 A Yes. I think you'll find in a number of the
6 statements the evaluation of the loss and damage area
7 and, you know, the implied finding that we would adopt
8 one of the two systems according to their impact and
9 benefit to the shipper.

10 Q So that, to the extent there is any
11 competitive advantage to shippers from having different
12 systems of competing carriers, that will be lost?

13 A Let me stop here and correct you on one issue
14 that I thought we got resolved earlier today, and that
15 is that our study was not a study of railroad
16 competition, period.

17 Q And to the extent, then, that benefits to
18 shippers are presumed from competition between and among
19 the carriers, not only with respect to price but with
20 respect to a whole panoply of service areas, that was
21 not considered in your study; is that correct?

22 A It was considered only to the extent that the
23 merger presented some opportunity, specifically to SP
24 and Santa Fe shippers, to derive benefits from
25 merger-related opportunities.

1 Q Turning to page 28 of your statement, you are
2 giving some examples of single line service, and you, in
3 the second to the last under Southern Pacific origins,
4 refer to perishables from California to the Chicago
5 market and Chicago gateway. I take it you mean that
6 shippers would have available the existing Santa Fe line
7 into Chicago?

8 A Let me back up one step, and once again, at
9 the risk of being redundant, repeat another point of
10 clarification that I made very early in my initial
11 testimony this morning, and that relates to what is the
12 purpose and the thrust of my verified statement, and
13 that is twofold:

14 Number one, it is to present a discussion of
15 the logistics function, the role of transportation in
16 the total logistics function, the impact, if any, of
17 this merger on the total logistics function. And that
18 appears nowhere else in the statements.

19 The second purpose of my testimony was to
20 provide merely a summary of opportunities that are
21 identified and discussed in later testimony and to sort
22 of provide you a preview of what's coming and a roadmap
23 to what's coming.

24 So with that as a preface, I think detailed
25 questions concerning the transportation of perishables,

1 even though a summary of them may appear in my
2 statement, can best be responded to by Mr. Heuer.

3 Q Returning to the specific question I asked, on
4 page 28, 2(b), when you refer to perishable shipments
5 from California to the Chicago market and the Chicago
6 gateway, can you now tell me whether you are referring
7 to the existing Santa Fe line?

8 A I repeat my answer. I answered that that that
9 is a question that can best be answered by Mr. Heuer.

10 Q Does that mean you can't tell me?

11 A I thought I answered your question.

12 JUDGE HOPKINS: No, you didn't specifically
13 answer the question.

14 THE WITNESS: No, if you're asking can I
15 specifically answer in detail that question, the answer
16 is no. But there is someone in the room who will.

17 MR. ROBERTS: Thank you.

18 I have no further questions, Your Honor.

19 MS. BUDEIRI: Good morning, Your Honor. The
20 Department of Justice has some questions for Mr. Kloss.
21 But before I start, I would like to introduce myself.
22 My name is Priscilla Budeiri and I represent the
23 Department of Justice today.

24 CROSS EXAMINATION

25 BY MS. BUDEIRI:

1 Q Mr. Kloss, referring to page 10 of your
2 testimony, you don't know for a fact, do you, that SFSP,
3 if allowed to merge, will translate the estimated \$200
4 million in operating cost reductions into reduced costs
5 to shippers, do you?

6 A Ratemaking was not an issue in our study. As
7 I responded to a very similar question earlier this
8 morning, I think in terms -- it's going to be a
9 decision, a strategic decision of prudent management as
10 to whether those savings are passed on to shippers in
11 whole or in part, are used to improve plant and
12 equipment, are passed on to stockholders, any of which
13 are pretty beneficial as far as I'm concerned.

14 But at the very minimum it provides an
15 opportunity for the merged carriers, an opportunity for
16 the merged carriers to be more competitive in the
17 marketplaces that they serve. Now, how they exercise
18 that is a managerial judgment.

19 Q Further down in that paragraph, you discuss
20 past experience. What past experience do you refer to
21 that you have showing that operational efficiencies and
22 economies of rail allow a merged rail system to be more
23 competitive in the marketplace?

24 A I have worked repeatedly with probably a dozen
25 railroads --

1 Q Pardon me?

2 A I have worked repeatedly with probably a dozen
3 railroads on both operational and strategic issues. I
4 was a witness in the Norfolk & Western-Southern
5 consolidation case. I have been a witness beyond the
6 rail system in numerous motor carrier merger and
7 acquisition cases.

8 And I think what we're talking about here --
9 you know, economies of scale is a pretty well
10 established economic concept and a pretty well proven
11 economic concept in the minds of anybody who has worked
12 with it over a number of years.

13 Q Are you saying that your only experience in
14 railroad mergers besides this one is the
15 Norfolk-Southern railroad merger?

16 A I have had other experience with other
17 clients, railroad clients, which for reasons of
18 confidentiality I cannot mention, who were looking at
19 the potential impact of a wide range of merger
20 opportunities that they may have been considering and
21 how they would impact their system and the combined
22 systems.

23 Those were not regulatory proceedings, but
24 were strategic planning exercises within the individual
25 carriers.

1 Q Have you done any in-depth analyses of that
2 issue yourself?

3 A Yes.

4 Q What analyses have you done?

5 A I have just referred to my personal
6 involvement in the Norfolk & Western-Southern case. I
7 referred to my personal involvement with a number of
8 individual carriers, who for purposes of client
9 confidentiality I can't name names.

10 Q Mr. Kloss, in this proceeding have you done
11 any analysis?

12 A I reviewed the analyses of all the individual
13 groups and reflected them against my background of
14 experience and knowledge, and in terms of economies of
15 scale there is nothing unique about this transaction
16 that's any different than any other economy of scale
17 evaluation.

18 Q So you haven't done any specific studies for
19 this particular merger?

20 A Well, could you define what you mean by
21 specific studies?

22 Q Any analysis?

23 A I analyzed everybody's output on this
24 project.

25 Q Did you do any independent analysis beside

1 reviewing what your colleagues had written?

2 A The same question seems to be coming back.

3 Q Concentrating on the independent analysis.

4 A Pardon?

5 Q Concentrating on the word "independent."

6 A The end product of this whole study is my
7 independent analysis.

8 Q Does your past experience show that a merged
9 railroad will pass cost reductions on to shippers?

10 A As I indicated earlier, it's a managerial
11 decision that may take any of two or three formats. But
12 I think in the highly competitive situation that we're
13 in right now -- and I'm not speaking for the management
14 of either of these two railroads, but I think that in
15 the highly competitive situation that we are in now, any
16 carrier has pricing pressures on him and is looking for
17 a means of exercising pricing actions to remain more
18 competitive in the marketplace.

19 Because, you know, as I pointed out this
20 morning, competition, if we're thinking rail to rail
21 competition we've got our heads in the sand, because
22 that's not where the ballgame is right now. It's modal
23 competition is where the ballgame is now.

24 Q Directing your answer, please, to your past
25 experience, does it show that a merged railroad will

1 pass cost reductions on to shippers?

2 A In some cases, yes.

3 Q In what cases did it, based on your
4 experience?

5 A I'm afraid that that's proprietary information
6 that I cannot discuss in this forum.

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1 Q Are you referring to the Norfolk-Western
2 merger?

3 A If I said yes to that, what validity does my
4 statement on confidentiality have?

5 Q Well, that was another proceeding, wasn't it?

6 A I also referred to proceedings that were
7 nonregulatory.

8 Q Well, let's stick to the regulatory
9 proceedings.

10 A I do not know what actions
11 Norfolk-Western-Southern have taken that specifically
12 relate to savings that were incurred as a result of the
13 merger.

14 Q And you cannot give us another specific
15 example in your past experience showing that a merged
16 railroad will pass on cost benefits and reductions to
17 shippers?

18 A Well, in the first place, how do you trace
19 from a rate reduction to the motive for that rate
20 reduction? You have to be inside the heads of the
21 strategic management of that railroad to trace that
22 audit trail. There is no audit trail that you could
23 follow to say we saved \$3 here, and that's reflected
24 over here in this rate.

25 Q Referring again to page 10, the paragraph that

1 begins "Reductions," the last part of it, the last line
2 discusses -- well, the words appear more competitive.
3 Do you see that?

4 A Yes.

5 Q Referring to that, would a railroad
6 necessarily be more competitive with respect to rates if
7 it has no competition with respect to serving certain
8 shippers?

9 A I cannot imagine a situation where a railroad
10 in a shipper situation has no competition, so it's very
11 difficult for me to respond to a theoretical that has no
12 proxy in reality.

13 Q To clarify the record a little bit, did you
14 yourself talk to shippers in preparing your testimony in
15 this matter?

16 A No, I did not. I didn't feel the need to.

17 Q How did you determine who was a key shipper
18 that was talked to in preparing the testimony?

19 A Their position in the industry they served,
20 whether they were a leader or a follower in that
21 industry, what their reputation was for creativity in
22 the logistics area.

23 Q Did you take a random sample of SFSP shippers
24 for that purpose?

25 A We did not use any Santa Fe-SP source in

1 developing our list. It was developed by us, presented
2 to them for approval. And no, if you want to say it is
3 a statistically valid sample, I think it's pretty
4 obvious it isn't, but it didn't set out to be that.

5 Q What incentive is there to SFSP to pass on
6 cost saving benefits to shippers when the merged SFSP
7 faces no rail or truck competition in serving certain
8 shippers?

9 A As I answered earlier, I cannot in my own mind
10 create a shipper that does not have competitive modes
11 available to them.

12 Q Referring to pages 12 and 13, based on your
13 experience, how long do you estimate it will take for
14 the merged Santa Fe-Southern Pacific to coordinate, to
15 realize the operating improvements that you discuss?

16 A We did not study that factor. I have no
17 opinion on it.

18 Q Referring to page 10 and your discussion --
19 I'm sorry -- page 13 and your discussion of
20 rate-sensitive traffic, in the first full paragraph what
21 traffic is not rate sensitive?

22 A Well, I guess in answer to that there is
23 traffic that tends to be more service sensitive than it
24 is rate sensitive. There are other commodities, perhaps
25 low value commodities, perhaps manufactured products,

1 that have very low margins that tend to be more rate
2 sensitive.

3 You know, you take the whole array of factors
4 of how do shippers choose transportation modes, and
5 within those modes how do they select carriers, and
6 there are issues. There's service reliability. There's
7 transit time. There's rate. And for any given shipper,
8 those priorities will change.

9 Q You testify on page 13 that a reduction in
10 cost level will lead to rate actions, and rate action
11 "could expand the geographic market area presently being
12 served by the shippers while still producing an
13 acceptable operating margin for the merged system."

14 A shipper can expand his geographic area by
15 negotiating and using joint rates, can't he?

16 A Yes. But my point is that the combined system
17 is going to enjoy economies; that is, going to lower
18 their bargaining threshold on ratemaking. And I'm
19 referring here to commodities where the relationship
20 between the value of the commodity and the
21 transportation cost is such that currently they may be
22 distributed in only a very small geographic area.

23 To the extent that we can make any impact
24 through reduced operating costs on those rates, we are,
25 in fact, expanding the effective marketing of that

1 particular producer and expanding the traffic for this
2 rail system.

3 Q For which geographic areas and commodities are
4 shippers currently unable to expand by using truck?

5 A Oh, that would take five days to answer that
6 question. Commodities -- I'll give you an example.
7 Aggregate is a commodity that is geographically
8 constrained because of the relationship of
9 transportation cost to product value.

10 Cement -- people have located cement plants
11 relative to markets because of transportation cost as a
12 percentage of value. Change that transportation cost,
13 and people may make entirely different decisions on
14 plant siting. Instead of six we may have four.

15 More efficient production facilities which
16 when coupled with an efficient transportation system
17 gives us an opportunity to reach the same markets now
18 are expanded markets at a lower total cost than we are
19 now reaching.

20 Q Although I don't want to be here five days --
21 I'm sure no one else does -- but can you give us some
22 more examples?

23 JUDGE HOPKINS: How many examples do you want?

24 MS. BUDEIRI: A couple more.

25 JUDGE HOPKINS: I don't know what we're

1 proving by this, as a matter of fact. I think that's
2 enough.

3 MS. BUDEIRI: Okay. We'll move on.

4 BY MS. BUDEIRI: (Resuming)

5 Q Referring to page 13, you testify, "I would
6 expect that lower cost levels will be reflected in rate
7 levels in the long term." Would you please define "long
8 term?"

9 A Long term versus short term, it's a very
10 familiar discussion. I just went through it three or
11 four weeks ago with the Postal Rate Commission. And
12 long term and short term do not have finite time
13 limits. Long term and short term typically relate to
14 the time frame in which the management of a business
15 venture can make changes, and they may relate to the
16 term of labor contracts; they may relate to the term of
17 leases; they may relate to the term of car life.

18 And certainly "long term" to me is not less
19 than two or three years, but may extend -- the break
20 point may be a longer period in a given industry in a
21 given situation. It's not a finite -- economic theory
22 has abandoned finite definitions of short term and long
23 term.

24 Q Did you investigate whether any of the shipper
25 benefits you identify could be achieved short of merger?

1 A The framework of our evaluation -- and this
2 gets back once again to the definition of the project
3 that I presented earlier -- the questions that were
4 posed to us are given the system as now proposed -- and
5 that is, the Santa Fe-SF proposal for merger -- given
6 that system as now proposed, either benefits to the
7 shippers from that merger, what are they?

8 The question of benefits, when you start
9 talking about conditions or other approaches, you're
10 changing, as I indicated earlier, you're changing the
11 system that I evaluated. You're changing all the forces
12 on that system -- the traffic flows, the investment
13 incentives, everything else -- when you introduce other
14 conditions.

15 I'm sorry I couldn't respond to it, because I
16 didn't study those other conditions.

17 Q So the answer is no to my question?

18 A Would you repeat your question?

19 Q The question was did you investigate whether
20 any of the shipper benefits you identify could be
21 achieved short of merger?

22 A No, because that was not within the scope of
23 our project.

24 JUDGE HOPKINS: You know, it might be wise to
25 answer in a short way, too. We get short questions and

1 short answers. We can have a short hearing that way.

2 (Laughter.)

3 MS. BUDEIRI: I'll try to do my part.

4 BY MS. BUDEIRI: (Resuming)

5 Q On page 14 you discuss network coordination.
6 How does network coordination positively impact the
7 shipping public in their physical distribution process?

8 A Network coordination I think provides at least
9 two, three benefits. First of all, taking two systems
10 and putting them under single management and flowing
11 that freight over the best elements of both systems puts
12 a single management in control of those traffic flows.
13 That can have very positive impacts on transit time, on
14 transit reliability.

15 The other opportunity or another opportunity
16 that's inherent in it is the opportunity to now take two
17 car fleets, manage them as one, and our experience,
18 whether you're talking about an inventory of widgets or
19 whether you're talking about an inventory of rail cars,
20 when you can manage a lesser number of inventories, you
21 can get better utilization out of those inventories.

22 So car supply, car utilization should also be
23 enhanced by the network coordination and the single
24 management of the network.

25 Q How does the intermodal facility maximization

1 you discuss on pages 14 and 15 translate into cost
2 savings for shippers?

3 A Potential cost savings? Because to the extent
4 there are -- they're cost savings, but they're not
5 shipper cost savings until they're translated into
6 rates, and ratemaking was not an issue for us, okay?

7 In terms of intermodal facilities, the
8 selection of hardware and operating system for an
9 intermodal facility is largely justified in a step
10 arrangement by the kind of throughput that you're going
11 to have through a facility.

12 To give you two absurd examples, at the one
13 end if we're talking about a point that originates four
14 trailers a month, maybe the only facility we could
15 justify in that case is an earthen ramp, but earthen
16 ramps are notoriously inefficient.

17 At the other end of the spectrum, as we can
18 marshal more traffic into a single system, we can
19 justify more sophisticated, more cost effective handling
20 methods at a terminal -- cranes, piggybackers, the whole
21 realm.

22 So it does have -- the justification of some
23 of these highly capital intensive but very efficient
24 systems have volume relationships to make them
25 economically viable.

1 Q Do you know of any shippers who oppose the
2 merger or believe their transportation options will be
3 reduced to their detriment because of the merger?

4 MR. MOATES: Objection, Your Honor.

5 JUDGE HOPKINS: That question was asked and
6 answered, I think.

7 MR. MOATES: I also think those questions go
8 beyond the scope of any of the Kearney witnesses'
9 testimony.

10 JUDGE HOPKINS: I thought he was asked that
11 question before anyway.

12 MS. BUDEIRI: My question is more general,
13 Your Honor, in terms of whether he knows of any. I
14 believe the questions before were whether he had spoken
15 to any shippers. And we do think it's relevant because
16 Mr. Kloss has testified as to logistic benefits, one of
17 which is transportation costs, which is, of course,
18 reflective of competition, and that's what we believe
19 this hearing is about.

20 JUDGE HOPKINS: Can you answer that question?

21 BY MS. BUDEIRI: (Resuming)

22 Q Do you want me to repeat the question?

23 A I think I remember it.

24 Q First of all, I have no knowledge of who is
25 supporting or who is opposing this merger. I had no

1 reason to gather that information. It's beyond the
2 scope of my study. And for the same reasons I had no
3 knowledge of anybody who was speaking to the
4 anticompetitive issues. No one has spoken to me about
5 anticompetitive issues.

6 Q Did you evaluate in any way the possible
7 competitive harms or other downsides of this merger?

8 A Competition was not an issue that we evaluated
9 in this project.

10 MS. BUDEIRI: That's all. Thank you, Mr.
11 Kloss.

12 JUDGE HOPKINS: Thank you.
13 Mr. MacKenzie.

14 CROSS EXAMINATION

15 BY MR. VINCENT MAC KENZIE:

16 Q Good morning, Mr. Kloss. My name is Vincent
17 Mackenzie representing the State of California.

18 Most of the questions I originally was going
19 to ask have been answered, and so I'll try to skirt
20 around them. I'll limit my questions to those things
21 pertaining specifically to California.

22 On page 17 you outline as a result of your
23 inquiries and studies by you and your Kearney employees
24 the various shipper benefits you believe will be
25 obtained as a result of this merger, is that correct?

1 A That's correct.

2 Q Can you specify or can you refer me to which
3 of the witnesses later will specify whether there are
4 any shippers in California that are part of these
5 groups?

6 A Oh, yes.

7 Q And which commodities would be involved. They
8 would be able to answer those questions, yes?

9 A Yes. Mr. Seger can speak to that.

10 Q All right. It would be just Mr. Seger on each
11 of these, or could you specify who would be involved?

12 A Are you talking about the five that are listed
13 in the middle of the page?

14 Q Yes. Mr. Seger will speak to food. A number
15 of people will speak to the question of export, though I
16 think that is pretty much self-explanatory that when you
17 improve the reliability of transit time, you are
18 obviously improving the likelihood of your meeting ship
19 sailing dates, and as you reduce transit time in an
20 absolute sense, you may have more choice of sailing
21 dates.

22 If I have a six-day transit time and I have a
23 shipment to make, that may mean that I'm going to miss a
24 particular sailing and have to wait for a later
25 sailing. If I have a four-day transit time, I may be

1 able to make an earlier sailing. And all of those have
2 impact on inventory, and somebody owns inventory,
3 whoever it is in the system.

4 Q Specifically, do you know whether any export
5 shippers located in California at any of the specific
6 port sites would be benefited by that, or who would be
7 able to answer those questions?

8 A Mr. Heuer may have some information for you on
9 that.

10 Q All right. Thank you.

11 A Mr. Heuer also on intermodal, Mr. Kohn on
12 automotive. I can speak to finished goods distribution
13 centers. It's an area in which I have worked with
14 hundreds of clients over many, many years. And once
15 again --

16 Q Excuse me for interrupting. Could you limit
17 just to locations within the State of California?

18 A Yes. I have worked with people in the State
19 of California, and the question of workload planning and
20 warehouse space utilization, this is an area in which
21 the management sophistication has exploded in the last
22 four or five years.

23 But if I am going to do effective workload
24 planning at a distribution center and warehouse space
25 planning, I have to have a high reliability, I have to

1 place high reliability in the carrier's service
2 commitments. I'm going to schedule labor, and I'm going
3 to schedule warehouse space around the arrival of a car
4 or a trailer.

5 As you probably know, coming from a state that
6 is a heavy producer of foodstuffs, the major grocery
7 chains in their distribution centers are going to a
8 scheduled receiving system now. If you're delivering to
9 me, you're going to do it at 3:00 on Tuesday, because
10 that's when I have space available for you. That's when
11 I have work force scheduled for you. And if you can't
12 do that, I'm going to use a carrier who has the schedule
13 reliability that can do it.

14 Q Mr. Kloss, could you define for the record, if
15 you haven't already, what is a finished good
16 distribution center? Give us some examples in
17 California. Safeway distribution centers for one
18 thing?

19 A Safeway, any consumer goods manufacturer that
20 operates his own distribution centers. It may be
21 somebody that's selling television sets or clothing or
22 foodstuffs -- a wide range of products.

23 Q They have been manufactured, assembled or
24 fabricated; they're in the mode of being ready to be
25 sold?

1 A Yes. A finished good distribution center is a
2 market facing facility, and it's there not for the
3 purpose of storing goods, but merely for performing a
4 short-term buffer function between the receipt of that
5 product off the transportation system and the delivery
6 of that product to the end customer. And as a
7 consequence, they have very high service requirements,
8 and they are very conscious of inventory.

9 Q And that distribution is primarily done by
10 motor carrier, I assume?

11 A Between production point and distribution
12 center it may be rail, it may be truck, it may be a mix
13 of the two. Typically beyond distribution center it
14 will be primarily truck, although there are some massive
15 distribution systems -- you suffer from one across the
16 border from you where people flee to avoid California
17 inventory taxes -- where the reforwarding may be over a
18 greater distance and may even involve rail in the final
19 leg.

20 Q Those California points that we'd be talking
21 about primarily would be the Los Angeles basin?

22 A Throughout the state.

23 Q Any major metropolitan area are you talking
24 about then in California?

25 A Are we referring to distribution centers now?

1 Q Yes. Finished goods distribution centers.

2 A No. A distribution center can be any place.
3 To give you an example, last week I was with a client in
4 a very small town in northern Indiana, and Scott
5 Forsman, the textbook publisher, has their major
6 national distribution center in a little town called
7 Pinola, Indiana. And they went through obviously a
8 tradeoff exercise in the location of that. So they can
9 be both in major metropolitan areas or not.

10 But typically, yes. You know, you can take
11 the large five largest metropolitan centers in the
12 United States, and you've probably got 80 percent of the
13 distribution centers.

14 Q Would that be true in California for the five
15 metropolitan districts?

16 A I think in California if you took Los Angeles,
17 San Francisco, San Diego, probably in that descending
18 order -- and you almost have to throw in --

19 Q Sacramento?

20 A No. You almost have to throw in Phoenix,
21 because it's part of the distribution network.

22 Q I was a little confused about the interview
23 problem as far as -- or the interviews actually given or
24 taken. As I understand it from my notes, there was, in
25 fact, 16 to 18 interviews that were used.

1 A That were conducted. Every interview that was
2 conducted was used.

3 Q All right. That's one question. Now that's
4 established.

5 Do you know or would you refer me to a witness
6 as to which of those 16 to 18 -- I'm not sure how many
7 there are -- were located in California and who they
8 are?

9 A Okay. I can suggest two questions that you
10 might address to each of the following witnesses.
11 Number one, as I indicated this morning, some witnesses
12 interviewed two, three, four; others interviewed none.
13 So you might start your line of questioning did you
14 conduct any interviews in your commodity area, and your
15 answer may be yes or no. If the answer is yes, then
16 they can respond as to how many and were any of them in
17 California.

18 Q Okay. What you're doing, you're referring me
19 to each of the witnesses to ask those questions as to
20 whether or not --

21 A Yes. I think that's your best source of
22 information.

23 Q Do you not know yourself whether any of them
24 are located in California?

25 A No.

1 Q And as I understand it, you don't know either
2 whether any of those shippers located in California
3 submitted statements on behalf of the applicants?

4 A I have not reviewed statements either in
5 support or in opposition.

6 MR. VINCENT MAC KENZIE: Thank you.

7 JUDGE HOPKINS: Thank you.

8 Any redirect?

9 MR. MOATES: Just one or two questions, Your
10 Honor.

11 REDIRECT EXAMINATION

12 BY MR. MOATES:

13 Q Mr. Kloss, with respect to the series of
14 questions about the limitation of the number of shipper
15 interviews, let me ask you the following. In your
16 judgment, sir, did the limitation of the number of
17 shipper interviews conducted by Kearney adversely affect
18 the quality of the final document submitted by your
19 firm?

20 A No. If I felt that it had, I would have
21 refused the project.

22 Q Let me direct your attention, if I may, to
23 page 11 of your verified statement. You were asked on
24 the top carryover paragraph, the second to the last
25 sentence starts, "Further, based on your own

1 experience," you were asked some questions just in the
2 last hour about the basis of your making that
3 statement. Do you recall those questions?

4 A Yes.

5 Q Based on your past experience, do merged rail
6 carriers sometimes implement operating improvements
7 which were not initially proposed in their application?

8 A Certainly. And I think, you know, when merger
9 applicants are putting together plans, obviously there
10 are time pressures because they want to move ahead. If
11 it's a project worth doing, let's do it now, the sooner,
12 the better. And in so doing, I'm sure they approach it
13 in their very best judgment as to what the operating
14 improvements might be, but six months later or two years
15 later as the system starts to operate, obviously other
16 potential operating improvements are going to surface
17 which may or may not be implemented.

18 So the ones that are discussed in this
19 proceeding I don't think they're necessarily the final
20 list of everything that's going to happen. There's
21 going to be some of those that are going to fall cut,
22 but there's going to be others that are going to
23 surface. It may be of equal importance to some of the
24 things we have discussed.

25 Q Lastly, sir, I want to ask you a question that

1 arose in connection with examination with respect to
2 DRGW-C-10, which is the two-page January 20th, 1984
3 letter that you wrote to Messrs. Bosanko and Lawser. Do
4 you have that in front of you?

5 A Yes, I do.

6 Q On the last paragraph on the first page of
7 that document you have been asked a series of questions
8 about the second sentence, and you've drawn the
9 attention of the examiners to certain language there. I
10 want to draw your attention to one of the commodities,
11 the last commodity, petroleum. Do you see that
12 reference?

13 A Yes.

14 Q With respect specifically to your firm's
15 analysis of petroleum, could you tell us, first, did
16 applicants instruct you to drop your studies on that?

17 A No. That was a decision that was made
18 internally by us, ultimately approved by me; and we went
19 through a two-stage screening. Our initial look at
20 petroleum was that the amount of petroleum products
21 moving over the systems of these two railroads appeared
22 not to be significant, so our first decision was to
23 combine it into the bulk area. That was assigned to Mr.
24 Pyle.

25 Mr. Pyle, after further evaluation of it, came

1 to an even more severe conclusion, that in the petroleum
2 area or in the petroleum product group, and looking at
3 the southwest we were talking primarily about crude oil,
4 which tends to move 99 percent by pipeline and/or
5 barge. So as a consequence of that, we felt that it had
6 so little impact on the issues that we are discussing
7 here today that we made the judgment to eliminate it
8 from further consideration.

9 Q One last question. I hesitate in going back
10 to it because it's with respect to something I objected
11 to, but there seems to be some concern on this side of
12 the table that the question may not have been heard
13 correctly by the witness. So I would like to ask you,
14 sir, when you answered to counsel for the Department of
15 Justice that it would take five days to give a complete
16 answer to one of her questions, do you recall that
17 colloquy?

18 A Yes.

19 Q Did you understand her question to be are
20 there markets which today cannot be reached by truck,
21 and it would take you five days to explain those
22 markets?

23 A No. As I understood it, the question was are
24 there markets, and then there was an additional
25 qualification to that statement, could you give me

1 examples? And it was in the context of giving examples
2 that I said, you know, I could probably give a five-day
3 speech, that it's obvious I'm not reluctant to give.

4 (Laughter.)

5 The presiding judge may object to it.

6 Q Mr. Kloss, I'm asking you, sir, if you
7 understood the question which you say would take five
8 days to answer to be -- so let me finish -- to be are
9 there markets today that cannot be served by truck, and
10 you say it would take five days to give you all these
11 markets?

12 A No. That is not the question I was responding
13 to.

14 Q That's what I thought.

15 A The question I was responding was -- that was
16 part of a series of questions where we were talking
17 about, as I understood it, market expansion and
18 producers being able to reach more distant markets, and
19 then the question was expanded to say, you know, are
20 there such markets, and if so, would you give me
21 specific examples. And I used aggregates as an
22 example.

23 MR. MCATES: Thank you, Your Honor.

24 JUDGE HOPKINS: Thank you. Any further
25 questions?

1 MR. BATERA: Your Honor, we have one
2 question.

3 RECROSS EXAMINATION

4 BY MR. BATERA:

5 Q With regard to merged rail carriers which
6 sometimes institute operating improvements not
7 originally planned, do you have specific examples in
8 mind?

9 JUDGE HOPKINS: Short and sweet.

10 (Laughter.)

11 THE WITNESS: I don't have specific examples
12 in mind, no.

13 MR. BATERA: Thank you.

14 JUDGE HOPKINS: Thank you.

15 No further questions? You are excused.

16 THE WITNESS: Thank you.

17 (The witness was excused.)

18 MR. MOATES: Move the exhibits, Your Honor.
19
20
21
22
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24
25

1 JUDGE HOPKINS: Any objections?

2 (No response.)

3 They will be received in evidence. They are
4 DRGW-9 and 10.

5 They will be received in evidence.

6 (The documents referred to,
7 previously marked Exhibits
8 DRGW-C-9 and DRGW-C-10 for
9 identification, were
10 received in evidence.)

11 MR. MOATES: Your Honor, Applicants call to
12 the stand Mr. Lawrence Kohn.

13 Whereupon,

14 LAWRENCE F. KOHN

15 was called as a witness by counsel for Applicants and,
16 having been duly sworn by the Administrative Law Judge,
17 was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. MOATES:

20 Q Sir, would you state your full name and
21 business address for the record?

22 A Lawrence F. Kohn, 222 Riverside Plaza,
23 Chicago.

24 Q What company are you employed by?

25 A Yes. I'm employed by A. T. Kearney, Inc.,

1 management consultants.

2 Q Have you caused to be prepared for submission
3 in these proceedings, sir, a verified statement
4 consisting of 33 pages of text and a 22 page appendix
5 and verification?

6 A I have.

7 Q Do you have that statement in front of you?

8 A Yes.

9 Q Do you have any corrections to make at this
10 time?

11 A No.

12 Q Is the testimony in that verified statement
13 true and accurate to the best of your knowledge,
14 information and belief?

15 A Yes, it is.

16 MR. MOATES: Your Honor, Mr. Kohn is
17 available.

18 CROSS EXAMINATION

19 BY MS. MASON:

20 Q Good morning, Mr. Kohn. I will be asking you
21 a few questions on behalf of the Denver and Rio Grande
22 Western Railroad.

23 Just to begin, would you mind briefly
24 describing for us the process that you went through in
25 developing your verified statement that you submitted

1 for us today?

2 A It was pretty much the process that Mr. Klcss
3 outlined in his testimony, although he did mention that
4 each of us had a wide latitude in exactly how we were
5 going to approach a specific commodity.

6 I might add that I have got quite an extensive
7 background in automotive. Incidental to working on this
8 assignment, I have been conducting a study for General
9 Motors during this same time, and assembled quite a bit
10 of data and information on the automotive industry.

11 I started with that as a working base. There
12 are many ways of approaching the study. One of them was
13 to make use of the data that was available to us, and
14 that was the 1982 waybill sample, and in determining the
15 exact approach I was going to take in my study, I felt
16 that this information would give me the data from which
17 to draw my conclusions.

18 I examined the waybill statistics and analyzed
19 it, and from those statistics characterized freight
20 flows of automotive shippers, and based on those freight
21 flows and my understanding insofar as the operating
22 improvements which were supplied to me, I projected
23 benefits.

24 Q As you just mentioned, the operating
25 improvements were supplied to you entirely, I assume, by

1 the Applicants?

2 A The operating improvements were discussed with
3 me in some detail by the Applicants.

4 JUDGE HOPKINS: I think we are all going to
5 have trouble trying to hear you. I think Mr. Moates has
6 got the same trouble I have.

7 Is there some way you could move over here?

8 Sorry to move you, but there is no mike.

9 MS. MASON: Why don't I try to project a
10 little more.

11 Does that help?

12 JUDGE HOPKINS: Could you stand or something?
13 I think it would be easier if you moved over here
14 because I'm afraid all of us are going to have the same
15 problem.

16 You are on my bad side, too.

17 (General laughter.)

18 MS. MASON: Now am I on your better side?

19 JUDGE HOPKINS: I can hear you now.

20 BY MS. MASON: (Resuming)

21 Q You mentioned at the end of your answer to my
22 last question that the operating improvements were
23 supplied to you by the Applicants, and you said in some
24 detail?

25 A Discussed in some detail the operating

1 improvements, yes.

2 Q Did you do any independent assessment of
3 whether or not those operating improvements might
4 actually occur?

5 A Based on my experience, and looking at the
6 opportunities that the two rail systems would have as a
7 result of the merger, it seemed to me, based on
8 operations analyses I performed while with the Chicago
9 and North Western Railroad, that these operating
10 improvements were relatively easy to implement, some of
11 them, and would in all likelihood be implemented.

12 Q In developing the conclusions that you
13 reached, particularly this conclusion that these
14 operating improvements were likely to occur, did you
15 consult any of the industry, particularly, any of the
16 automotive industry?

17 Did you conduct some number of the 16 to 18
18 interviews that we understand were conducted?

19 A Could you repeat that question?

20 Q Did you interview some number of the 16 to
21 18?

22 A Yes, I did.

23 Q How many did you interview?

24 A I conducted a number of interviews while at
25 General Motors in conjunction with my assignment with

1 General Motors. I was there, so I felt it was a good
2 opportunity to talk with them about this issue, and also
3 to get some sort of feeling for their support for the
4 merger since General Motors did submit a verified
5 statement in support of the merger.

6 I really wanted, just for my own personal
7 knowledge, to determine whether they were supportive or
8 very supportive, exactly what the shading was insofar as
9 their support for the merger, and I did find that out.

10 Q Did you also interview, for example, Ford
11 Motor Company?

12 A No, I did not, but I also am aware that they
13 did submit a verified statement again in support of the
14 merger.

15 Q I see.

16 Are you aware that they also submitted a
17 verified statement in support of conditions attached to
18 that merger?

19 A I'm aware that they did submit something. I
20 am not aware of the specifics at all.

21 Q So so far you have mentioned just interviews
22 with General Motors.

23 Did you interview anyone else in the
24 automotive shipping industry outside of General Motors?

25 A No, I didn't. And getting back to my original

1 description of how I conducted the study, I was very
2 surprised and pleased with the richness of the data in
3 the waybill sample which really, when you are looking at
4 these freight flows, cuts across shippers. It is a
5 cross section. And I felt that my work with the waybill
6 sample and that data was in fact a better way to
7 approach the study than many shippers.

8 Q I'm glad that you had enough data. I did ask
9 more specifically whether you had talked to any other
10 members of the automotive industry, and your answer is
11 specifically that you had only talked to General
12 Motors?

13 Is that true also for the automotive parts
14 shipping industry?

15 A Yes. But I would like to add that General
16 Motors is probably the largest auto parts producer in
17 the country as well.

18 JUDGE HOPKINS: I think you ought to limit
19 your answers to the questions. We have been running
20 into this with several witnesses.

21 Limit your answers to what you are asked, and
22 if there is a need for further explanation, your counsel
23 can ask those questions.

24 BY MS. MASON: (Resuming)

25 Q Would you turn, please, to page 19 of your

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1 verified statement?

2 On page 19, the final sentence of the second
3 paragraph on that page, you have previously on that page
4 referred to six different categories of benefits, and
5 you say at the end of that second paragraph that taking
6 the statements made by the Santa Fe and Southern Pacific
7 management as realistic projections of future operating
8 circumstances, the following benefits are anticipated.

9 And then could we look, please, at page 33 of
10 your verified statement? In the final sentence of that
11 paragraph that is your summary paragraph, you say again,
12 based on detailed review of these areas, I believe that
13 a Santa Fe-Southern Pacific merger would be of
14 significant overall benefit to many automotive shippers,
15 and that I take it is your generalized conclusion that
16 the merger will in fact positively benefit shippers.

17 In that regard, I would like to ask you to
18 look at this document.

19 MS. MASON: Could we mark this document as
20 DRGW-C-11?

21 JUDGE HOPKINS: Thank you.

22 It will be marked for identification as
23 DRGW-C-11.

24 (The document referred to
25 was marked Exhibit No.

1 DRGW-C-11 for
2 identification.)

3 BY MS. MASCN: (Resuming)

4 Q Can you identify this document, please?

5 A Yes. It's a draft of my statement, one of the
6 initial drafts.

7 Q And this is in your handwriting?

8 A Yes, printing.

9 Q Would you turn to the page marked in the
10 depository lettering in the bottom SPA-37?

11 On that page, could you read for me, please,
12 the second paragraph that appears on that page?

13 A As with any projection of future events, this
14 examinatin into potential shipper benefits is somewhat
15 speculative in nature. Moreover, many of the examples
16 of potential service-related benefits are based on Santa
17 Fe-Southern Pacific management statements concerning
18 specific operating improvement that would accrue from
19 the merger. Taking these statements of Santa
20 Fe-Southern Pacific management as realistic projections
21 of future operating circumstances, the following
22 benefits are put forth.

23 Q Now, would you turn to page SBA-48?

24 Would you read for me, please, the paragraph
25 that appears there under the heading "Summary?"

1 A The entire paragraph?

2 "Based on the potential service-related
3 benefits described in the previous section, I believe a
4 Santa Fe-Southern Pacific merger could be of some
5 benefit to the major automotive shippers. However, it
6 must be mentioned that most benefits are directly
7 related to Santa Fe-Southern Pacific's implementation of
8 projected operating improvements. Any failure on the
9 part of Santa Fe-Southern Pacific to successfully
10 implement the projected improvements will necessarily
11 place any future shipper benefits in jeopardy."

12 Q Is your opinion the same as it was when you
13 wrote this handwritten draft?

14 A Is it the same? The results of my analysis
15 and the conclusions I drew were basically the same,
16 yes.

17 Q But you would agree with me that there is some
18 difference in the two paragraphs as they finally
19 appeared in your verified statement. They are somewhat
20 more positive about the likely benefits that would
21 accrue to the automotive shippers, are they not?

22 MR. MOATES: Excuse me.

23 I'm going to object, Your Honor. The document
24 is a draft. Counsel has identified it as a draft. By
25 definition, drafts aren't the same as final documents,

1 and frankly, I think this shows the problem in producing
2 drafts to lawyers, because they have a field day trying
3 to find all the nits and gnats when things change a
4 little bit.

5 I think if we are going to cross examine
6 witnesses on their draft verified statements and not the
7 ones submitted, we are going to be here for a very long
8 time.

9 JUDGE HOPKINS: I think so, too.

10 Don't they speak for themselves?

11 MS. MASON: Your Honor, I believe we are
12 entitled simply to demonstrate that there is a
13 difference.

14 JUDGE HOPKINS: There is a difference. You
15 have already demonstrated that.

16 MS. MASON: I will go on, then.

17 BY MS. MASON: (Resuming)

18 Q Between the time that you wrote this
19 handwritten draft and the time you wrote your final
20 draft, was there any additional information that you
21 learned that caused you to change your view, to modify
22 this language?

23 A We were consistently undergoing review of our
24 notes and analyses that we performed, and there was some
25 general discussion among the people as far as the

1 statements. But each of the conclusions that the
2 separate people drew were their own, and essentially
3 they remained the same.

4 I think that the basic thrust of these two
5 paragraphs are essentially the same.

6 MR. RATNER: Your Honor, could you ask the
7 witness to speak up, too? I am having a little trouble
8 hearing him.

9 JUDGE HOPKINS: All right, everybody speak up,
10 including me.

11 THE WITNESS: I think the essential thrusts of
12 these paragraphs are essentially the same, are
13 projecting benefits.

14 BY MS. MASON: (Resuming)

15 Q The essential thrust is the same, despite the
16 fact that you felt it necessary to provide certain
17 cautionary advice in your earlier drafts?

18 A It was just simply a matter of editing. Any
19 time that I write a report that is going to be a formal
20 document, it undergoes many editings, and as a matter of
21 fact, this is not the sole --

22 Q I'm sure we all do a lot of editing, but this
23 does reflect a certain change in view and certainly in
24 tone, and you mentioned earlier that you had certain
25 discussion in-house at Kearney.

1 Did anyone review your drafts and suggest
2 certain changes, particularly in these kinds of
3 conclusions?

4 A No one suggested that I change the basic
5 thrust of my testimony. Perhaps there were some areas
6 that weren't clear simply because of my writing or
7 sentence structure.

8 Q I'm not talking about sentence structure. I'm
9 sure we understand that.

10 Did anyone suggest that your conclusions
11 should be more positive?

12 A No.

13 JUDGE HOPKINS: Can you hear him back there?
14 You heard the no?

15 BY MS. NELSON: (Resuming)

16 Q Just one final question on those paragraphs.
17 Subsequent to writing your initial drafts and
18 any others that you may have produced, did you encounter
19 any information that led you to conclude that shipper
20 benefits would in fact be placed in jeopardy if the
21 Santa Fe and Southern Pacific were unable to implement
22 the operating improvements?

23 A Would you repeat the question?

24 Q Subsequent to writing your initial drafts, did
25 you encounter any additional information that would have

1 led you to change your conclusion that shipper benefits
2 would be placed in jeopardy if the Santa Fe and Southern
3 Pacific does not successfully implement?

4 A No.

5 Q Would you turn now to page 51 of your
6 handwritten draft, SBA -- I'm sorry, we had a problem
7 with our numbering system. We went SBA-44, please.

8 Under the first paragraph there, labeled
9 Equipment Supply Benefits --

10 JUDGE HOPKINS: What page did you say?

11 MS. MASON: SBA-44.

12 JUDGE HOPKINS: Thank you.

13 BY MS. MASON: (Resuming)

14 Q Would you agree that that paragraph indicates
15 that the Santa Fe-Southern Pacific personnel had
16 projected a combined equipment shortfall in 1984 of no
17 less than 674 cars, and perhaps as great as 751 cars?

18 A You are talking about the first paragraph
19 under Equipment Supply Benefits?

20 Q First and second paragraphs. I'm sorry, I
21 didn't notice there was a second one.

22 A Okay.

23 (Pause.)

24 Now I've read it.

25 Could you repeat the question?

1 Q Yes.

2 By my count -- and my arithmetic is not always
3 good -- you have suggested that there would be a
4 combined equipment shortfall on the merged system in
5 1984 of somewhere between 674 and 751 cars.

6 A A projected shortfall, yes.

7 Q And these projections were projections that
8 you were informed of by the Santa Fe-Southern Pacific
9 personnel?

10 A In my discussions with both the Santa Fe and
11 Southern Pacific staff, yes, they had some information
12 on equipment shortfall.

13 Q So yes, this is their projection, is that your
14 answer?

15 A That is their projection.

16 Q Now, I didn't find this paragraph in your
17 final verified statement.

18 Can you remember who suggested deleting that
19 paragraph?

20 MR. MOATES: I will object.

21 JUDGE HOPKINS: You should ask if anyone did
22 suggest deleting that paragraph.

23 I will sustain the objection.

24 BY MS. MASON: (Resuming)

25 Q Did anyone suggest deleting that paragraph?

1 A Someone did suggest that since these were
2 marketing projections that do fluctuate very rapidly
3 based on market conditions and the demand for equipment
4 that they wouldn't be representative.

5 Q So the answer is yes, that someone did suggest
6 it.

7 Can you remember who suggested it?

8 JUDGE HOPKINS: The answer that you gave is
9 all right in there, but go ahead and answer the question
10 that way, too. But he's already got something. You are
11 stating certain things that are not exactly correct in
12 what he said.

13 Go ahead.

14 THE WITNESS: I can't really recall, no.

15 BY ES. MASON: (Resuming)

16 Q You did suggest that someone suggested that
17 this be deleted.

18 A I don't know if we suggested it should be
19 deleted. I think we suggested or discussed that there
20 could be some variability in these projections, and it
21 might not be appropriate for this one section.

22 Q Now, in any case, these paragraphs indicate
23 that there would be an equipment shortfall, and yet I
24 notice on page 30 of your verified statement, your final
25 verified statement, you indicated that the transit time

1 benefits from this merger will reduce the likelihood of
2 future shortages, isn't that correct, despite the fact
3 that the Santa Fe-Southern Pacific personnel have said
4 that the shortages are in fact likely to occur?

5 A The transit time improvements will result in
6 the opportunity to reduce car miles, and as a result,
7 there may be some additional equipment becoming
8 available.

9 Q But the Santa Fe-Southern Pacific people still
10 project a shortfall based on this paragraph which you
11 had deleted from your verified statement.

12 MR. MOATES: I object. I don't follow this at
13 all. It seems to me the testimony, counsel, is
14 absolutely consistent. The deleted paragraph that you
15 are so fascinated with says that the shortfall problem
16 would be addressed by the merger, and that's what the
17 testimony is pointing to on page 36.

18 JUDGE HOPKINS: I didn't find a question
19 before the house at that stage anyway. I think you were
20 making a statement rather than a question.

21 MS. MASON: Just confirming my understanding.

22 JUDGE HOPKINS: Well, that wasn't a question.
23 That's the problem that I find with it.

24 I mean, Counsel isn't making the statements
25 and the evidence. That's one of the problems I'm

1 finding on all sides.

2 Go ahead.

3 MS. MASON: I'll move on.

4 BY MS. MASON: (Resuming)

5 Q Would you turn to the page in your handwritten
6 draft marked SBA-40?

7 On that page you estimated the annual
8 inventory carrying cost savings to be \$1,670,000,
9 \$1,670,285. In your verified statement on page 25 you
10 estimated the annual inventory carrying cost savings to
11 be \$3,075,381.

12 What caused you to modify the estimate of the
13 applicable carrying cost rate?

14 MR. MOATES: Your Honor, again I would like to
15 object. I think the witness can answer the question,
16 but I question the utility of going through the man's
17 draft and questioning why he made changes when he didn't
18 submit this draft to the Commission and it is not
19 something he relied upon.

20 JUDGE HOPKINS: One of the problems I find is
21 how far back are we going? He might have had five, six,
22 seven drafts, and if we are going through all this --
23 now, how many more do you have of these particular type
24 of questions you are talking about?

25 MS. MASON: Your Honor, I only have this one,

1 and these are only this draft which was produced in the
2 discovery process.

3 JUDGE HOIKINS: Let's go on with this one
4 because otherwise we could be going on and on, and I
5 know just like I write several drafts and I can
6 understand somebody else writing several drafts. But
7 you have a right to go ahead and ask this question.

8 Go ahead.

9 BY MS. MASON: (Resuming)

10 Q What caused you to modify the estimate of the
11 applicable carrying cost?

12 A I understated it. I came up with 15 percent
13 only, considering interest in the 15 percent, but when
14 you are taking a look at the carrying cost calculation,
15 you really should bring into the consideration the cost
16 of obsolescence of the material that is being
17 transported and there should also be some sort of
18 reflection of the opportunity cost or opportunity for
19 employing your assets elsewhere.

20 Q Was this a figure that was used generally in
21 the Kearney studies? Was the figure that you used the,
22 the 25 percent I think was the ultimate figure.

23 Was that standard across the Kearney studies?

24 A I'm not sure.

25 Q Turning to your verified statement on page 8,

1 you indicate that recent adoption by the auto makers of
2 the just-in-time parts delivery concept increases their
3 needs for rapid delivery of parts.

4 Are you suggesting now that the auto makers
5 are more rail dependent than they were before, that they
6 are more dependent on rapid and reliable rail service?

7 A No. What I am saying is that just-in-time
8 inventory requires the rapid delivery of smaller
9 quantities, and as a result, many of the automotive
10 shippers are leaning in the direction of reducing their
11 reliance on railroads and they are emphasizing more in
12 the motor carriage area.

13 If you will notice, the usage of rail and
14 truck by the various automotive manufacturers insofar as
15 auto parts transportation is concerned, motor carriage
16 is increasing their tonnage each year, and according to
17 the projections of the people in the automotive
18 industry, this trend will continue and accelerate.

19 Q Thank you.

20 Do you have an opinion as to whether the
21 merged Santa Fe-Southern Pacific would be more likely to
22 provide the kinds of service improvements for auto
23 makers if there were competition from other railroads?

24 A Not really, no.

25 I think that the combined system would be

1 looking at trying to attract traffic, and when you have
2 motor carrier competition, that's enough incentive for
3 them to provide the benefits that shippers are looking
4 for.

5 I think that especially in automotive, and
6 especially in auto parts, the pressure that is being put
7 on the railroads by the motor carrier industry is very
8 intense, and it is more than enough stimulus to get them
9 to look for ways to improve operations and make it more
10 conducive to automotive shippers.

11 Q If the merged Santa Fe-Southern Pacific system
12 faces no significant traffic or competition for
13 automotive traffic, would it necessarily have as much
14 incentive to supply, for example, the multilevel cars
15 that will be in shortfall which we discussed earlier?

16 A But there is competition out there. There is
17 very intense competition.

18 Q That's not my question.

19 A Is this a hypothetical?

20 Q No. My question is if they do not have
21 adequate competition over the automotive traffic on
22 their system, would they necessarily have an incentive
23 to supply additional specialized cars for automobiles?

24 A Yes, because they want to transport the
25 traffic, and if they don't have the proper equipment,

1 they are not going to be able to carry the tonnage, and
2 they are not going to be able to generate revenues for
3 themselves.

4 Q There are certain additional benefits that you
5 have mentioned such as efforts to reduce loss and
6 damage, and one of the efforts that I understand has
7 occurred in the industry recently is to provide
8 specialized protection to the sides and tops of the
9 cars. But these are expensive cars.

10 Would the merged system have an additional
11 incentive to provide those kinds of cars in the absence
12 of competition?

13 A I think there is an incentive, yes.

14 Q On pages A-13 and A-14 of the appendix to your
15 verified statement, on those pages you have mentioned
16 the automotive shipper reload program, and you have
17 indicated that it has led to certain improvements in
18 equipment utilization.

19 Is it correct that the reload program is now
20 providing benefits for shippers, and that it will do so
21 regardless of the merger?

22 A Yes. But the point that I was raising here,
23 there is a very real possibility that as a result of the
24 merger, the combined system will have the capability and
25 also the services to potentially attract imports into

1 the ports of California.

2 Q I didn't ask about imports. The question was
3 simply whether or not those benefits would occur,
4 regardless of the merger, and your answer I believe was
5 yes.

6 A Some of the benefits would occur. I'm saying
7 that there could be a possibility of greater benefits as
8 a result of the merger.

9 Q On page 29 of your verified statement, and I
10 believe perhaps elsewhere, you indicate that you are
11 assuming that there will be a one-day reduction in
12 transit time for carloads.

13 How did you arrive at that one-day reduction
14 in transit time?

15 A What page was this?

16 Q This is on page 29.

17 A 29.

18 That's not in my statement.

19 MR. MOATES: Could you point to the specific
20 place on the page?

21 BY MS. MASCN: (Resuming)

22 Q The first sentence of the middle paragraph
23 there, you talked about 24-hour reductions in trip
24 times.

25 A That was replaced in the errata that was

1 provided. It doesn't exist.

2 Q I'm sorry.

3 What is the corrected time?

4 A I don't know exactly what methodology was used
5 by Mr. Winner in arriving at the potential equipment
6 supplied benefits. I'm not sure.

7 MS. MASON: That's all my questions.

8 Thank you.

9 JUDGE HOPKINS: Is that all? You're
10 finished?

11 MS. MASON: Yes.

12 JUDGE HOPKINS: How much would you have, Mr.
13 Ratner?

14 MR. RATNER: It's hard to estimate. It
15 depends on the answers. I would guess about 15
16 minutes.

17 JUDGE HOPKINS: If you can do it in 15
18 minutes.

19 Let's try in 15 minutes, and maybe we can get
20 rid of this witness before the luncheon recess. I know
21 probably there are a lot of people getting hungry. But
22 let's try.

23 We move things along faster sometimes this
24 way, and that's my reason for doing it.

25 CROSS EXAMINATION

1 BY MR. RATNER:

2 Q Mr. Kohn, my name is James Ratner. I'm with
3 the United States Department of Justice.

4 On page 4 of your verified statement you have
5 a sentence that says "Prompt and practical
6 implementation of shipper programs."

7 Do you see that sentence? It is in the middle
8 of the second paragraph.

9 A Mm-hmm.

10 Q You describe it as a critical assumption.

11 A Yes.

12 Q Do I understand from the last sentence of that
13 paragraph that you have assumed this critical assumption
14 will occur by the basis of I have assumed the shippers
15 will recognize this opportunity?

16 A Yes.

17 Q Did you specifically investigate as to the
18 efficiencies associated with this merger, how easily it
19 could or would be done by shippers?

20 A I work with shippers all the time in these
21 very same areas where they try to take advantage of the
22 opportunities in the transportation marketplace and
23 attempt to take advantage of reducing their inventory
24 carrying costs, and my experience is that the shippers
25 are increasingly becoming more sophisticated and are

1 able to capitalize on these opportunities.

2 Q I see.

3 Did you systematically take the benefits that
4 you perceived would happen from this merger and review
5 those with shippers to evaluate which shippers would be
6 able to translate those efficiencies into benefits for
7 shippers?

8 A Many of the benefits that I arrived at were
9 also benefits that were laid out in some detail in
10 shipper supporting statements, and those shippers and
11 those statements said that they would be able to
12 implement and benefit from the results of the
13 improvements.

14 Q My question was did you go over it yourself
15 with the shippers?

16 A In my discussions with General Motors and
17 talking about the reasons why they were supporting the
18 merger, we did discuss whether in fact they would be
19 able to implement some of these opportunities and
20 benefits.

21 Q So one of the bases for this assumption is a
22 conversation you had with General Motors?

23 A One of them, yes.

24 Q Are there any other shippers you talked to
25 which added to this basis?

1 A Not specifically relating to this specific
2 assignment, but in the course of talking to shippers all
3 the time.

4 Q On page 5 you talk about two categories. The
5 first says Impacts on A Shipper's Logistics Costs.

6 Do you see that?

7 A What paragraph is that?

8 Q It's right in the middle of the first
9 paragraph.

10 A Yes.

11 Q You see that?

12 A Yes.

13 Q Am I correct in understanding that when you
14 say transportation, you are referring to the line haul
15 and other costs associated with moving a commodity from
16 Point A to Point B?

17 A Yes.

18 Q On page 5, the next paragraph down, you say I
19 could not estimate the extent to which the merged rail
20 system actually will pass some or all of the cost
21 reductions through in the form of reduced rates.

22 Briefly, why is it that you were unable to
23 estimate the extent?

24 A Because I can't get into the heads of the
25 senior management of the two railroads once this merger

1 is consummated. If, as Mr. Kloss mentioned, if they
2 were rational men, and given the market conditions that
3 these railroads are facing in a lot of key areas insofar
4 as competition against motor carriers, it would seem to
5 me that they would go out of their way to pass some of
6 these benefits through to the shippers and attract that
7 traffic.

8 Q On page 6, the top paragraph spilling over
9 from what was on page 5, you say based on my own
10 experience, not all operating improvements proposed by a
11 new merged rail system are actually implemented.

12 What is your past experience on implementation
13 of operating efficiencies with rail mergers?

14 A Well, while I was on the Chicago & North
15 Western, I participated in quite a few analyses on
16 consolidation of rail lines which have many of the same
17 characteristics of mergers insofar as potential
18 operating improvements, and through those analyses I got
19 a pretty good feel for the likelihood.

20 Q Can you estimate a percentage as to what
21 percent will be actually implemented and what percent
22 will not?

23 A No, I can't.

24 Q Do you have any specific ones that are more
25 likely not to be implemented than others?

1 A No. I would have to get into very great
2 detail and specific characteristics of each operating
3 improvement, and I didn't have that information.

4 Q So you didn't do that for this merger.

5 A No.

6 Q Did you do any consideration or any
7 investigation or any estimate of how long it would take
8 for the merged firm to achieve the operating
9 efficiencies that you discuss in your testimony?

10 A No.

11 Q At the bottom of page 6 you say in developing
12 this statement you relied on these five sources, and the
13 fifth is a selected number of interviews.

14 From the attorney's questions from the Denver
15 and Rio Grande, I heard you talked to General Motors.

16 Were there any other shippers you talked to?

17 A No other shippers. I had a number of
18 interviews within GM.

19 Q Different departments within GM?

20 A Different departments, different sections,
21 yes.

22 Q You didn't talk to Ford, for example?

23 A No.

24 I had the benefit of Ford's verified statement
25 in support of the merger.

1 Q Did you have the benefit of anybody's verified
2 statement who was not supporting the merger?

3 A I did not.

4 MR. MOATES: Objection. At the time this man
5 submitted his statement, by definition the application
6 hadn't been submitted, and by definition there couldn't
7 have been verified statements in opposition.

8 JUDGE HOPKINS: That takes care of that.

9 MR. RATNEF: That's fine.

10 If I can have a moment, I think I can maybe
11 narrow this down a little bit further.

12 JUDGE HOPKINS: Go ahead.

13 MR. MOATES: We will grant the moment.

14 (Pause)

15 BY MR. RATNEF: (Resuming)

16 Q I could very easily be blundering into an
17 errata problem here, but on page 25, the second
18 paragraph --

19 A Mm-hmm.

20 Q It says if we assume that the average transit
21 time savings of those opportunities listed in Table 6 is
22 one day, has that been changed or does that still
23 stand?

24 A It's one day. It still stands.

25 Q What was the basis of picking one day?

1 A In my discussions with Santa Fe and Southern
2 Pacific staff, we took a look at the operating
3 improvements, and there were a range of savings on each
4 of the opportunities listed in Table 6. I selected one
5 day as an average, and I think I may have been
6 conservative since some of the supporting testimony by
7 some shippers indicated higher than one day, one to two
8 days, specifically from Earl Weisman of General Motors.
9 But I thought that one day was an average, and it was a
10 conservative average.

11 Q But again you didn't talk to any other
12 shippers other than General Motors about it.

13 A About the one day? No.

14 Q On page 29, the second sentence of the second
15 full paragraph, this car day savings would be the
16 equivalent of 205 additional multi-level cars per
17 year --

18 You don't see that? That whole sentence is
19 gone?

20 A That is correct.

21 Q I can understand that. Okay.

22 On page 31, under Facility-Related Benefits,
23 you refer to the plans to construct a new automobile
24 unloading facility near Willow Springs.

25 Do you know if Santa Fe is intending to build

1 this facility regardless of the merger?

2 A No, I don't.

3 Q A hypothetical question, but if the facility
4 were built, would the benefits you have talked about be
5 achievable by shippers regardless of whether there was a
6 merger or not?

7 MR. MOATES: Excuse me, Mr. Ratner. Benefits
8 specifically with respect to this facility as opposed to
9 all the benefits?

10 BY MR. RATNER: (Resuming)

11 Q The benefits associated with the construction
12 of this facility, yes.

13 A What is your question?

14 Q The question is, if this facility were built
15 and there were no merger, would the benefits that you
16 have described associated with this facility occur for
17 shippers anyway?

18 A Yes, although not to the same degree because
19 the merger will supposedly attract more traffic, which
20 will create greater throughput through the facility.

21 Q Did you ask General Motors if their
22 transportation options would be detrimentally reduced as
23 a result of the merger in your discussions with General
24 Motors?

25 A No, I didn't. That was not the scope of my

1 study, which was to look specifically at benefits.

2 Q Did you ask that question to any other shipper
3 in the scope of this study?

4 A No, I didn't.

5 Q When you were preparing your testimony, were
6 you aware of shippers who might be at your disposal who
7 either opposed the merger or believed their
8 transportation options would be reduced to their
9 detriment by the merger?

10 A I wasn't aware of any.

11 Q I think this has been asked, but to clarify,
12 did you in any way evaluate the possible competitive
13 harms or other down sides of this merger in your
14 testimony?

15 A Competition again was not the focus of this
16 study. I have to have somewhat of a feel for
17 competition, but again, it was not the main thrust at
18 all.

19 Q Was the anticompetitive aspects of the merger
20 in any way evaluated by you?

21 A Not at all.

22 MR. HOATES: Let counsel state for the record,
23 so we don't have to do this with each witness, I thought
24 Mr. Kloss stated, and we will state as a fact, that the
25 Kearney witnesses were not asked to evaluate any

1 competitive aspects of this transaction with respect to
2 rail transportation.

3 JUDGE HOPKINS: Thank you.

4 MR. RATNER: So I understand. Mr. Kloss also
5 said that each witness developed their own methodology
6 and their own process for analyzing these, and so I
7 intended to ask every single one of these witnesses just
8 to make sure that they did not do that. If this is your
9 representation that none of them did that, that's fine.

10 JUDGE HOPKINS: I think we could take his word
11 on it.

12 MR. BAKER: Your Honor, I understood counsel
13 represents that they were not asked to do it and I think
14 there is a distinction between whether they were asked
15 to do it and whether --

16 MR. MOATES: Counsel will state that they were
17 not asked to do it.

18 MR. RATNER: Can counsel state that they did
19 not do it?

20 MR. MOATES: Oh, yes, counsel can state they
21 did not do it.

22 BY MR. RATNER: (Resuming)

23 Q Since you said you have to have a general feel
24 for the competitive circumstances, would you agree with
25 me that anticompetitive aspects of the merger could

1 affect the shipper logistics costs that you have
2 identified on page 4?

3 A I didn't study that. I don't know the
4 details. I really can't make a comment.

5 When I said competitive, I didn't mean in
6 regard to this merger, but in my day to day dealings
7 with shippers, competition does come up.

8 Q So you have no opinion as to whether an
9 anticompetitive aspect could affect the logistics costs
10 that you have identified on page 4?

11 A No. It is too detailed a subject matter, I
12 believe, for an opinion.

13 Q So as far as you are concerned, it is quite
14 possible that that could affect it.

15 A I have no feeling one way or the other. I
16 don't have enough information to make that evaluation or
17 assessment or judgment.

18 Q If it does affect it --

19 MR. MOATES: Excuse me. What is the "it?"

20 BY MR. RATNER: (Resuming)

21 Q If the anticompetitive aspects of the merger
22 affect the transportation logistics costs identified on
23 page 4 of your testimony --

24 MR. MOATES: I object unless this is a
25 hypothetical question because we certainly do not

1 concede that there are any anticompetitive effects.

2 JUDGE HOPKINS: You are giving a hypothetical
3 question anyway, aren't you?

4 MR. RATNER: I'm not asking him to concede
5 it. He has already said that he has no opinion one way
6 or the other.

7 JUDGE HOPKINS: But this is a hypothetical?

8 MR. RATNER: That's correct.

9 BY MR. RATNER: (Resuming)

10 Q If the -- I'll start the entire thing over.

11 If the anticompetitive aspects of the merger
12 affect the transportation costs that you have noted on
13 page 4, that could conceivably distort the benefits that
14 you claim associated with this merger for various
15 shippers, is that correct?

16 MR. MCATES: I hate to do this, but I'm going
17 to object to that for the record because I still can't
18 accept that phraseology. I think if Mr. Ratner would
19 ask the question "if you assume for the sake of argument
20 there may be -- "

21 JUDGE HOPKINS: Let's take it on that basis
22 and get to the answer.

23 Can you repeat it?

24 MR. RATNER: I'll take that.

25 JUDGE HOPKINS: Will you be able to repeat it

1 now?

2 MR. RATNER: I don't know if I will be able to
3 repeat it. I thought the question was pretty clear.

4 JUDGE HOPKINS: Let's make that an
5 assumption.

6 Go ahead. We are assuming. Let's base it on
7 that, that we are assuming.

8 BY MR. RATNER: (Resuming)

9 Q Assuming there are anticompetitive aspects of
10 the merger, would that distort the benefits that a
11 shipper might receive?

12 A Given that assumption, I would say that
13 necessarily that would follow.

14 Q On page 33, the last clause of the last
15 sentence, you say I believe an SFSP merger should be of
16 significant overall benefit to many automotive
17 shippers.

18 That overall benefit could be changed assuming
19 that the merger had anticompetitive consequences,
20 couldn't it?

21 A It could change. I don't know how it might
22 change, but it could conceivably change if you are
23 giving me that assumption, yes.

24 Q So then it is correct to read this clause as I
25 believe an SFSP merger could be of significant overall

1 benefit to many automotive shippers assuming there are
2 no anticompetitive aspects to this merger, a question I
3 have not examined at all, is that correct?

4 A I would not have placed that statement in
5 here.

6 Q I understand you wouldn't have because you
7 didn't, but is that an incorrect statement of what I am
8 supposed to conclude from your testimony?

9 A Given that assumption, yes.

10 Q Given which assumption?

11 A The last clause of my new statement.

12 Q All right.

13 To make sure the record is clear, is it a
14 correct conclusion that I can draw from your testimony
15 and what you have said today that your statement that I
16 believe an SFSP merger should be of significant overall
17 benefit to many automotive shippers should also contain
18 the caveats that overall benefit cannot be determined
19 without assessing in some way the anticompetitive nature
20 of the merger, and that is something you have not done?

21 A I have not examined the anticompetitive
22 aspects, if there are any.

23 Q Last question.

24 Did you in any way evaluate or estimate
25 whether the benefits you have discussed in your

1 testimony could be achieved in whole or in part by
2 methods other than merger?

3 A Based on my experience, I would find it very
4 hard to believe that the complexity of these operating
5 improvements, as envisioned in the operating plan, could
6 conceivably be implemented short of merger.

7 Q Did you evaluate or estimate these benefits,
8 estimate or consider in any way whether they could be
9 achieved short of the Southern Pacific-Santa Fe merger?

10 A The context we were asked to look at was the
11 merger. I didn't examine it in any other context.

12 Q Did you take these benefits, for example, the
13 loss and damage benefit on page 30, and evaluate whether
14 that benefit could be achieved in whole or in part some
15 way other than through a merger between Santa Fe and
16 Southern Pacific?

17 MR. MOATES: Objection. Asked and answered
18 twice. He clearly stated in his last answer that it
19 only affected the merger.

20 JUDGE HOPKINS: He hasn't been willing to
21 state specifically the answer to the question that Mr.
22 Ratner gave.

23 MR. MOATES: I thought it was pretty clearly
24 answered.

25 JUDGE HOPKINS: No, it hasn't been.

1 Ask him the question again.

2 BY MR. RATNER: (Resuming)

3 Q Did you estimate or evaluate the specific
4 benefits that you testified to to consider whether they
5 could be achieved in whole or in part by methods other
6 than merger by the Santa Fe and Southern Pacific?

7 A No, I exclusively looked at it in the context
8 of a merger consideration.

9 MR. RATNER: It took a little longer. I'm
10 sorry, Your Honor.

11 I have no other questions.

12 JUDGE HOPKINS: That's all right.

13 Any redirect?

14 MR. MOATES: May we have one moment?

15 (Pause)

16 REDIRECT EXAMINATION

17 BY MR. MOATES:

18 Q The question, Mr. Kohn. In your expert
19 judgment based on the credentials you set out in your
20 testimony, including your prior employment with Chicago
21 & North Western, do you have a judgment as to whether
22 all the benefits that you have identified and described
23 in this verified statement could be achieved by methods
24 short of the merger with the Santa Fe and Southern
25 Pacific?

1 A Based on my experience, I would consider it
2 very unlikely that all the improvements could be
3 implemented without the two railroads merging. The
4 complexity of some of the improvements and the
5 coordinations that would be required would be very
6 difficult to imagine with two separate railroad
7 entities.

8 MR. MOATES: Thank you.

9 No further questions.

10 JUDGE HOPKINS: Any further questions?

11 MR. RATNER: Your Honor, I am tempted now, in
12 light of that, to go back to some of those individual
13 benefits and find out what the background of his
14 expertise is and how much he really knows. But I think
15 I will forgo it at this time.

16 JUDGE HOPKINS: I'm not stopping you from
17 doing it.

18 MR. RATNER: That's fine.

19 MR. BAKER: Your Honor, may I ask a question?

20 Mr. Rhodes I believe is the next witness. He
21 filed two verified statements. It would be helpful to
22 know how the Applicants wish to go forward immediately
23 after the lunch break.

24 JUDGE HOPKINS: Do we need this on the
25 record?

1 MR. HYNES: Whether we would like to go with
2 respect to grain or cotton or go back, as a practical
3 matter, that's how it would shake out anyway because I
4 believe the different parties have asked different
5 questions in different areas, and it is only DOJ which
6 crosses and wants to ask questions about what cotton
7 is.

8 MR. RATNER: I can tell you right now, I don't
9 think we are going to have any questions for Mr.
10 Rhodes.

11 MR. HYNES: Then I think a a practical matter
12 there is no problem then.

13 MR. MOATES: We move the statement of the
14 witness.

15 JUDGE HOPKINS: Any objection to his
16 statement?

17 His statement will be received in evidence.
18 What about the Denver and Rio Grande, C-11?
19 Any objection?

20 MR. MOATES: Yes, Your Honor, I do object. I
21 realize that typically there is a lot of latitude. Your
22 Honor has a lot of latitude in letting counsel's
23 exhibits in, but this, Your Honor, is a 55 page
24 document. The man testified it was one of several
25 drafts. To the extent counsel thought she proved

1 anything by asking him about particular deletions, she
2 stated on the record what the prior words on the page
3 said, and I don't think we need to put the entire
4 document in. And I think it could frankly result in
5 considerable mischief with the entirety of the draft
6 there, not having had an opportunity ahead of time to
7 review it with him and to anticipate this kind of
8 examination.

9 Who knows what else someone might argue on
10 brief on this?

11 So I think also it is a bad precedent. There
12 are a lot of big documents like this in the work papers,
13 some things that have been discovered.

14 I understand there are times when you need the
15 entire document to understand an excerpt, but I don't
16 think this is one of those times. She read into the
17 record the few selected portions on which there was
18 examination.

19 JUDGE HOPKINS: Well, at the present time she
20 only cross examined on certain, particular points, and
21 only those particular points, it appears to me, are the
22 points at issue in this, and I don't like to separate
23 the document then from the particular points, and I will
24 receive it on that basis.

25 We are receiving this document concerning the

1 particular points that she questioned, and that's all we
2 are doing it on.

3 MR. MOATES: Thank you.

4 JUDGE HOPKINS: I will receive it in
5 evidence.

6 (The document referred to,
7 previously marked Exhibit
8 DRGW-C-11 for
9 identification, was received
10 in evidence.)

11 JUDGE HOPKINS: Let's be in recess until 2:00
12 o'clock.

13 (Whereupon, at 1:00 o'clock p.m., the hearing
14 in the above-entitled matter recessed, to reconvene at
15 2:00 o'clock p.m., this same day.)
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AFTERNOON SESSION

(2:05 p.m.)

1
2
3 JUDGE HOPKINS: Let's get back on the record.
4 Mr. Wilson.

5 MR. WILSON: Yes, Your Honor. I have one
6 preliminary matter. It's a clarification of a
7 stipulation made before lunch with regard to the Kearney
8 witnesses' study of competition. The Kearney witnesses
9 did not study any competition between railroads or
10 between modes.

11 However, of course, the Kearney witnesses, as
12 is clear from their statements, did study competition,
13 how this merger would make shippers more competitive in
14 the markets that they now serve or perhaps permit
15 shippers to compete in new markets. And to that extent,
16 of course, the Kearney witnesses did study the improved
17 competition that the shippers would have as a result of
18 this merger in their industries.

19 JUDGE HOPKINS: Mr. Ratner.

20 MR. RATNER: Your Honor, my understanding of
21 the stipulation was that the Applicant would stipulate
22 that the Kearney witnesses did not investigate whether
23 there were anticompetitive aspects to the merger. I
24 don't think I disagree with anything that Mr. Wilson has
25 said, but that is stating a little bit differently what

1 I understood the stipulation was.

2 MR. WILSON: We did not -- I agree with Mr.
3 Ratner. Let's leave it at that.

4 JUDGE HOPKINS: Well, let's leave it at that
5 then.

6 (laughter.)

7 JUDGE HOPKINS: When you agree, don't start,
8 Mr. Greenberg.

9 MR. GREENBERG: No, I'm not going to cause any
10 mud, hopefully, but I would like to have it stated one
11 more time, because I didn't completely understand the
12 restatement, not Mr. Ratner's restatement, but
13 counsel -- Mr. Wilson's.

14 JUDGE HOPKINS: Mr. Wilson is withdrawing.
15 Now, we're taking what Mr. Ratner said. Isn't that my
16 understanding now?

17 MR. WILSON: No, Your Honor. I was agreeing
18 with what Mr. Ratner said also.

19 JUDGE HOPKINS: So we're having both in other
20 words.

21 MR. WILSON: Right, both.

22 MR. GREENBERG: Maybe we can have it read by
23 the reporter. I'm not looking for further
24 clarification.

25 JUDGE HOPKINS: He'll restate it.

1 MR. WILSON: He'll restate it. I'll restate
2 it.

3 The Kearney witnesses looked at the
4 competitive impacts of the transaction to the extent
5 that the transaction would cause shippers to be more
6 competitive in the markets where they now compete or
7 would enable shippers to compete in new markets.

8 They looked then at how shippers would be
9 better able to compete against other shippers in their
10 industries. The Kearney witnesses did not look at rail
11 versus rail competition or rail versus other mode
12 competition.

13 JUDGE HOPKINS: Or the anticompetitive factors
14 that Mr. Ratner was talking about.

15 JUDGE HOPKINS: Are we ready then? Anything
16 further?

17 Call your next witness.

18 MR. HYNES: We'd like to call Mr. Robert G.
19 Rhodes.
20 Whereupon,

21 ROBERT G. RHODES

22 was called as a witness by counsel for Santa Fe Southern
23 Pacific Railroad and, having been first duly sworn by
24 the Administrative Law Judge, was examined and testified
25 and follows:

DIRECT EXAMINATION

BY MR. HYNES:

1
2
3 Q Would you please state your name and business
4 address for the record?

5 A Yes. My name is Robert G. Rhodes. My address
6 is 699 Prince Street, Alexandria, Virginia 22313.

7 Q By whom are you employed, Mr. Rhodes?

8 A I am employed by A. T. Kearney, Inc.

9 Q And what is your position with that firm?

10 A I'm an associate, associated with them -- an
11 associate, senior associate more specifically.

12 Q Mr. Rhodes, did you prepare two verified
13 statements for submission in this proceeding?

14 A Yes, I did.

15 Q Let me direct your attention to a volume
16 marked SFSP-15. Do you have that before you?

17 A I have that before me.

18 Q What's in that volume? I'd like to direct
19 your attention to the third and the fifth numbered
20 verified statements.

21 A Yes.

22 Q And ask if those are the verified statements
23 which you prepared.

24 A They are.

25 Q With the exception of the errata which were

1 distributed to the parties and His Honor and the court
2 reporter earlier today, do you have any other additions,
3 changes, or corrections to make to that testimony?

4 A No, sir.

5 Q With those errata, do you adopt those verified
6 statements as your testimony in this proceeding?

7 A I do.

8 MR. HYNES: Your Honor, the witness is
9 available for cross-examination at this time.

10 CROSS EXAMINATION

11 BY MR. GREENBERG:

12 Q Good afternoon. My name is Edward Greenberg,
13 and I'm representing the MKT this afternoon. The first
14 question I'd like to ask you springs from a stipulation
15 that has just been modified by Mr. Wilson.

16 As I understand it, A. T. Kearney, or at least
17 you -- I'll confine my questions to you, sir -- that you
18 did look at the competitive impact of the merger, at
19 least to the extent that it would cause shippers to be
20 more competitive in their existing markets or in new
21 markets they may be able to reach as a result of the
22 merger.

23 Is that correct?

24 A Yes. That's generally correct. I need to
25 qualify it in the sense -- to give you the sense of what

1 I was doing in terms of my study.

2 I took a look at the movement of the
3 commodities with which I was concerned -- cotton and
4 grain.

5 MR. HYNES: Excuse me. I'm going to interject
6 for clarification of the witness. We discussed before
7 lunch break the way in which the cross-examination would
8 be broken down.

9 Since Mr. Greenberg has begun the
10 cross-examination, and his interest as stated in the
11 designation of cross is grain, the cross-examination at
12 this time, at least for the first few parties, will be
13 with respect to your grain verified statement and the
14 last two parties, Department of Justice and the State of
15 California, will be concerned with your cotton. Just so
16 that we have the context.

17 MR. BATERA: Well, if I can interject --

18 MR. HYNES: That is correct. KSC has
19 requested to change the focus of their cross-examination
20 to cotton.

21 MR. RATNER: Excuse me, Your Honor. Just to
22 clarify. And I didn't mean to mislead counsel earlier,
23 but I may have one or two questions concerning grain and
24 one or two questions concerning cotton. It will
25 probably be the same form of question.

1 MR. HYNES: All right.

2 JUDGE HOPKINS: That's all right.

3 MR. HYNES: Just so that the witness
4 understands that he's beginning this afternoon with
5 respect to his grain verified statement.

6 JUDGE HOPKINS: Thank you.

7 THE WITNESS: The process that I followed in
8 the course of my study was to look at grain and where it
9 was produced and ultimately consumed, and how it moved
10 between those points. And then against the background
11 of the operating improvements on which the merger is
12 premised, I then analyzed the extent to which the
13 shippers would be benefitted.

14 And in the course of that, I found that I
15 would expect that there would be considerable
16 opportunity for shippers to enhance their marketing
17 opportunities through the broadened service.

18 BY MR. GREENBERG: (Resuming)

19 Q In your analysis, did you consider the
20 possibility that the merged system might move to close
21 rates -- routes, excuse me -- would move to close routes
22 that are presently available to other carriers?

23 A No. It was under my understanding -- well,
24 first of all, I didn't study the rate issue. With
25 respect to routes, it's my understanding from the

1 application that all routes will be maintained on a
2 relative rate basis. So that is obviously included in
3 the assumptions that I have made in the course of my
4 study.

5 Q Who advised you that the assumption -- that it
6 would be a proper assumption to assume that all routes
7 would remain open?

8 A That was my understanding that that was the
9 policy of the carriers with respect to this merger.

10 Q Have you ever been called upon to analyze the
11 effects of any route closings that have previously been
12 implemented by the Southern Pacific?

13 A No.

14 Q Have you ever been called upon to analyze the
15 effect of any route closings that have been implemented
16 by the Santa Fe?

17 A No.

18 Q Have you ever been called upon to analyze the
19 effects of any route closings that have been implemented
20 by any carrier?

21 A No.

22 Q To the extent that -- strike that.
23 If one assumes -- I'll make this hypothetical
24 -- that there is a possibility that notwithstanding this
25 fine policy that the merged carriers will have, that

1 they will not close routes, that nonetheless routes do
2 end up being closed.

3 Would that have any effect on the conclusions
4 you reached in your study?

5 A No, I don't think it would.

6 Q Can you explain why there would be no effect
7 at all?

8 A Well, I'm not saying there wouldn't be any
9 effect at all because I don't know the specifics of any
10 particular situation that might be involved with your
11 hypothetical, so I don't know what routes are involved,
12 I don't know how much traffic is involved, I don't know
13 what shippers would be affected by it.

14 So it would be pretty hard for me to project
15 on the basis of no knowledge what the impacts might be.

16 Q Well, let's carry on with the assumption for a
17 moment, then, and let's assume that as of today a
18 shipper has competitive options available on the Santa
19 Fe at points served both by the Santa Fe and by some
20 other carrier. Let's take, for example the MKT.

21 And that as of the effect of the merger, the
22 Santa Fe moves to close routes so that a shipper who
23 would have tendered grain from that common point can no
24 longer find a market via the MKT in one or the other of
25 the Gulf ports.

1 In that situation, and in the situation where
2 we're talking about a sizeable amount of tonnage, would
3 you consider there would be an adverse effect upon that
4 shipper resulting from the merger?

5 A Let me see if I understand what you're saying
6 in your hypothetical. You're saying that there is a
7 shipper which now routes via one of the carriers --
8 we'll say SP -- via MKT?

9 Q Let me clarify it so that we'll understand.
10 Let's just say that there is a common point at which
11 that shipper maintains a grain terminal.

12 A A common point being?

13 Q A common point being -- let's take, for
14 example, Hutchinson, Kansas. And let's say that that
15 point is served both by the MKT and by the Santa Fe.
16 And the fact that the are served at that point by both
17 carriers permits today -- permits that shipper to effect
18 delivery of his grain to the Port of Houston either via
19 the MKT on an interchange with the SP, or via the Santa
20 Fe who would then interchange with the SP.

21 In the event that the merger is consummated
22 and the SFSP moves to close that route so that the MKT
23 can no longer interchange with the SP at Fort Worth or
24 Dallas for the Port of Houston, would there be an
25 anticompetitive effect that would adversely impact the

1 shipper?

2 A No, I don't believe that would be the case.

3 Q Why is that?

4 A Well, because he would still have the
5 opportunity to serve his market. And whether or not he
6 serves it by one route or another, if he gets the
7 service that he needs, he is not suffering as a result
8 of the merger.

9 Q Is it beneficial to a shipper that he have
10 competitive service by rail carriers?

11 A As a general proposition?

12 Q Yes, sir.

13 A It may be in some instances, but not in every
14 instance. We heard a lot of discussion this morning
15 about that. Less Kloss -- I believe I went into that in
16 detail. There are many factors which determine whether
17 or not a particular shipper in a particular situation
18 needs one, two, three, four, or five carriers or only
19 one carrier.

20 Q Can you think of an instance in which it would
21 be detrimental to a shipper to have additional service
22 available?

23 A Yes.

24 Q Can you give me an example?

25 A If the traffic with which these moves are

1 associated is such that the provision of the service by
2 two carriers affects both of their efficiencies and
3 therefore makes the service more costly.

4 Q I see.

5 So I guess then, if I'm understanding your
6 answer, that given a shipper who is located in
7 Hutchinson, Kansas, that if he had two carriers
8 presently available, that there may be something
9 inefficient about that today?

10 A No, I don't know what your situation is you're
11 talking about. I haven't made any study of the
12 Hutchinson movement per se.

13 Q Is the fact that, all other things being
14 equal, is it normally the case that the presence of
15 competition, intramodal competition, on rail captive
16 traffic -- is that ordinarily going to have an effect
17 toward keeping the rate level relatively depressed?

18 A Well, I'm not sure I understand what you mean
19 by captive traffic, the sense in which you're using it.
20 You are saying that this particular rail shipper has
21 only one railroad to serve his plant, and you're saying
22 he's a captive shipper; is that what you're saying?

23 A No. I'm saying that the shipper is captive to
24 rail; that, historically, that shipper has moved over 90
25 percent of his traffic by rail, that is, long haul

1 volume shipments of grain.

2 Q Well, you know, it's pretty hard for me to
3 conceive of that kind of a situation where no
4 competition exists for traffic.

5 Now, you may have situations where there are a
6 number of competitors, but the general competitive
7 situation, you know, involves all kinds of carriers by
8 all modes. And when we're talking about grain, we're
9 also talking about product competition which involves
10 competition, intramodal competition, and also involves
11 geographic service.

12 Q Let me ask you the question perhaps a little
13 differently. In your study you indicate, I believe, at
14 pages 10 and 16, that historically in excess of 80
15 percent of grain traffic moving out of southwest Kansas
16 moves by rail.

17 A Could you show me on the page where you're
18 speaking from?

19 Q I believe I've got that correct.

20 A Is that the next-to-the-last paragraph?

21 Q Page 10, the middle of the page, under
22 subparagraph (d), the last line. You state, for
23 example, "In Kansas, the rail share in 1977 was 82.2
24 percent for intrastate shipments and 88.2 percent for
25 interstate shipments."

1 A Yes. Those are data from a reliable source.

2 Q And we'll talk about the sources in a moment.
3 But in your mind, would you believe that that indicates
4 that that shipper is essentially tied to railroads for
5 transportation?

6 A No. No, I wouldn't say he's tied to it at
7 all. I think what we're talking about here is just one
8 particular movement with respect to the total marketing
9 of the grain. All the grain, in the first place, comes
10 in usually by truck into these terminals, and there is a
11 variety of elevators from which -- to which he can ship
12 the grain.

13 Further, the grain itself, once it gets into
14 the elevator, is going to move in many directions. Some
15 of it will go into milling, some of it will go into
16 export, some will go to feed lots.

17 Q Well, let's tie the assumption down again,
18 then. Let's say we're talking about export traffic, and
19 we're moving not between the farm and the country
20 elevator, and not between a country elevator and a
21 terminal elevator; we're moving from a terminal elevator
22 to the export ports in the Gulf.

23 A Right. Well, that trade via the railroad,
24 that movement via the railroad, has been the result of
25 the railroad's aggressively seeking out this traffic by

1 the development of the unit train concept and by the
2 jumbo hopper cars at an earlier date, and they have
3 developed their facilities to accommodate this traffic,
4 and the trade accepts that and uses it.

5 Q Then is it your opinion that that traffic is
6 -- can be diverted to truck?

7 A I haven't made any study on whether it can be
8 or not. I do know that, if my memory serves me, not too
9 long ago, the Commission here itself indicated that
10 truck movement of grain may be competitive 200 miles or
11 more.

12 Q Now, in fact, I think you say something like
13 that. Let me find it for a moment. Give me one second,
14 because I am somewhat confused. At page 15 of your
15 testimony -- do you have that before you?

16 A Yes.

17 Q At the bottom of the page, you're discussing
18 country elevators, unit train shippers, and terminal
19 houses. And you indicate that: "This does not imply
20 that these elevators are captive to rail, since truck
21 transportation at competitive rates is often
22 available."

23 What did you have in mind when you said that?

24 A I had in mind that truck service is available
25 to these terminals.

1 Q And is that from the terminals to the export
2 ports? Are we now talking about terminals in southwest
3 Kansas? Is truck service available to move grain?

4 A That I don't know. I haven't looked at what
5 truck services are available.

6 Q And what truck transportation did you have in
7 mind when you said competitive rates are available?

8 A Knowing that grain does move by truck, and the
9 facility exists for transportation of it, given the
10 service characteristics that are in mind and the
11 requirements of the shippers, I have not made a specific
12 study of that.

13 Q In the study that you did do, isn't it a fact
14 that the truck transportation that you found was truck
15 transportation that moved from the farms to the country
16 elevators or from the country elevator to a terminal?
17 Isn't that where grain can move by truck?

18 A Grain does move by truck there.

19 Q Does truck also carry a significant portion of
20 the tonnage out of the terminals to the markets?

21 MR. HYNES: Your Honor, I think that question
22 was asked and answered. Two or three questions ago, you
23 asked the same question and Mr. Rhodes stated that he
24 had not studied the extent to which trucks do or do
25 not.

1 JUDGE HOPKINS: I believe he said it can,
2 though he hasn't studied it.

3 MR. GREENBERG: Well, Your Honor, I asked him
4 that question before I turned to the point about truck
5 transportation being rate-competitive. Now I'm
6 wondering where is it rate-competitive.

7 JUDGE HOPKINS: I'm not saying -- I'm not
8 going along sustaining the objection. Go ahead and
9 answer the question.

10 BY MR. GREENBERG: (Resuming)

11 Q Mr. Rhodes, do you have that question in
12 mind?

13 A No. You better repeat the question to me.

14 Q Now I'm wondering is truck transportation --
15 competitive truck transportation available to move grain
16 from terminals to the markets?

17 A I haven't looked at that service available at
18 terminals to the ports via truck, so I have no basis in
19 my study here to make that statement.

20 Q Then can I assume that the sentence that you
21 have on page 15 discussing truck competitive rates is
22 confined solely to those points where you know the truck
23 competition is in existence -- let me finish my question
24 -- is confined to that situation where you know truck
25 competition does exist, and that's from the farms to the

1 country elevators?

2 A No. No. What I am saying here, on the basis
3 that the facility to move grain by truck exists. Now,
4 whether it moves to the port in substantial quantity, I
5 haven't made a study of that, and I have no knowledge of
6 the rates.

7 But I do know that equipment exists to
8 transport grain from the terminals to any point where
9 they are able to provide a service that the shipper is
10 interested in.

11 Q Do you know whether the terminals are
12 susceptible of handling the amount of truck volume that
13 would be required to replace rail transportation?

14 A I have not made a study of that.

15 Q I'm sorry?

16 A I have not made a study of that.

17 Q Do you know whether the states that must be
18 traversed to move grain from terminals in Kansas to the
19 Gulf ports will permit the loading and movement of high
20 volume, heavy loading trucks?

21 A I have no knowledge of that.

22 Q Do you know whether there is a significant
23 amount of truck capacity to handle the movement of grain
24 from the terminals during the harvest season?

25 A No.

1 Q I'd like to move away from this for a moment
2 and ask you, Mr. Rhodes, when did you prepare your
3 statement?

4 A In the early part of this year sometime,
5 January, February, and on through till it was finally
6 verified and submitted.

7 Q When you were instructed to perform the study
8 that you conducted, were you given any instructions
9 about the need to conduct interviews with shippers?

10 A When the study was first discussed, there was
11 initially a plan, as I understood, to use a methodology
12 which contemplated a number of interviews with
13 shippers. And, in fact, I submitted in preparation for
14 this, a list of companies which I thought might be
15 suitable companies to talk with with respect to the
16 movements that might be involved.

17 Q Can you tell me which companies you had
18 selected?

19 A Somewhere in my notes, I made a list which I
20 submitted to Chicago. My office is here in town, and I
21 transmitted that to Chicago.

22 MR. HYNES: That list was in the work papers.

23 THE WITNESS: They were in the work papers, or
24 should have been if they weren't.

25 BY MR. GREENBERG: (Resuming)

1 Q Did you conduct any of those interviews?

2 A No, sir.

3 Q Why not?

4 A Well, in the first place, the methodology of
5 the study was modified, and I think Mr. Kloss discussed
6 that. I was not a participant in the reasons or the
7 decision with respect to the change.

8 Q So you relied, then, in terms of your
9 independent knowledge of the benefits shippers might
10 experience upon what fact?

11 A Well, I thought I had outlined that at the
12 beginning of the cross-examination. And that is that I
13 took a look at the movements of grain, as represented by
14 state-to-state movements or movements from origin points
15 to export points, tried to get some understanding of
16 where the production is and where the consuming areas
17 are, knowing that this is a highly fluid industry that
18 we're talking about.

19 I then looked at generally how the traffic was
20 moving by rail. Then I looked more specifically at how
21 that traffic was moving by each of the companies who are
22 applicants for the merger.

23 I was then briefed on the operating improvement
24 plan, and with that premise as a guide, I then
25 considered how the shippers in general on the two

1 systems would be benefitted as a result of the merged
2 system.

3 That was essentially the process.

4 Q So you referred to the benefits without
5 discussing them individually with any individual
6 shippers?

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1 A Well, prior to the time that I submitted this
2 statement as a verified statement, a number of shippers
3 supporting the application submitted verified
4 statements, much to my satisfaction in terms of the work
5 that I had done, had come to about the same conclusions
6 that I had come to with respect to the opportunities for
7 market enhancement, for example, under the merged
8 system. So I felt that, you know, the work that I had
9 done, that I had fairly well evaluated the merger in
10 terms of the shippers.

11 Q Are the shippers whose testimony you are
12 referring to now the shippers that are referred to in
13 your testimony?

14 A Yes. There are a number. I selected these as
15 examples.

16 Q But there were others as well that you relied
17 upon?

18 A Yes. I don't know whether I looked at all of
19 them or not, but I looked at a great many of them.

20 MF. HYNES: Once again I would like to state
21 for the record that the shipper statements upon which
22 Mr. Rhodes relied were supplied as work papers, even
23 though they appear in the application as well.

24 BY MR. GREENBERG: (Resuming)

25 Q When did you receive the shipper statements

1 upon which you relied?

2 A I received them at various times throughout
3 the course of my work. I can't tell you the dates I
4 received, they are not stamped in, with any way that I
5 could tell you what it is. I can tell you that I had
6 already prepared a draft and probably revised a draft by
7 the time that I started receiving the verified
8 statements of supporters, and as I went through them, I
9 modified my statement to include them as examples of the
10 specific things that I was addressing.

11 Q In your initial plan of what topics ought to
12 be addressed in the study, did you plan to analyze
13 whether there would be any abandonments that would occur
14 after the merger?

15 A I had the information available that very few
16 abandonments were involved in it, and none of which
17 involved as part of our briefing on the operating plan,
18 that none of the abandonments would be opposed because
19 of the absence, apparently, of the need for the service
20 on those particular branches. I can't identify them,
21 but I do recall from the briefing that that statement
22 was made.

23 Q Who gave you this briefing?

24 A Mr. Neil Owen, who I think will be or has been
25 a witness in this case.

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1 Q And was anyone besides Mr. Owen and employees
2 of A. T. Kearney present at that briefing?

3 A Most of A. T. Kearney, if I recall, all of the
4 A. T. Kearney personnel were present.

5 Q As part of your analysis here, did you review
6 what use might be made of the SSW's Tucumcari line after
7 the merger is consummated?

8 A Well, so far as I know, the Tucumcari line is
9 part and parcel of the planned operations of the
10 railroad. I have no reason to believe that it would not
11 be.

12 Q To be more specific, did you review with
13 anyone the question of whether the Tucumcari line would
14 still remain available for use by grain shippers?

15 A I have no reason to question the provision of
16 service over the Tucumcari line. It is in operation
17 today. It is in operation under the plan in which the
18 merger is made. So I don't know what else I can say on
19 that.

20 Maybe it ain't clear.

21 Q It's very clear. Thank you.

22 Did you have an opportunity after you
23 submitted your testimony to review any of the
24 submissions of the Protestants in this proceeding?

25 A No, sir, I haven't.

1 Q Has anyone sent you a copy of the submissions
2 of any of the Protestants in this proceeding?

3 A No.

4 Q Aside from just the submissions of the
5 Protestants, have you had an opportunity to review any
6 of the verified statements submitted by shippers who are
7 supporting the request by certain of these protestants
8 for the imposition of trackage rights?

9 A No.

10 Q I would like you to turn, please, to page 6 of
11 your testimony.

12 Do you have that before you?

13 A Yes.

14 Q At the top of the page, the first full
15 sentence, you state "Based on my own experience, not all
16 operating improvements proposed by a new merged rail
17 system are actually implemented when the merger is
18 approved."

19 What experience did you have in mind when you
20 made that statement?

21 A Well, my experience in general tells me that
22 most plans that are conceived by man are somewhat
23 modified prior to execution, and I don't think any
24 merger plan at this time and date, even though it is the
25 full intention and the best thinking of management at

1 this time as to the way to operate a merged system, I am
2 sure that in the passage of time and the change of
3 personnel and the changes that exist elsewhere in
4 transportation may incline the railroad to modify to
5 some extent those changes that they are proposing at
6 this time.

7 I would think, and I think common sense tells
8 me that people try to improve plans and not back away
9 from plans if they are pursuing an objective as a
10 rational man would do.

11 Q If plans are improved upon, then I would
12 assume that you meant that to be a net plus, that that
13 would be additional benefits accruing.

14 A Well, I have no way of knowing what
15 improvements could be made to this plan so that when
16 that plan would change, it would be necessary to look at
17 the benefits to see if, you know, some other changes
18 might result in a different set of benefits. I don't
19 know. I would have to study that.

20 Q What sort of economic and competitive
21 circumstances might occur that would cause adjustments
22 to the proposed plan?

23 A Well, I think the economy is just full of
24 various things that could occur. For example, let's
25 suppose that the export of grain quadruples over a

1 period of -- a short time period. I think operating
2 plans would have to be adjusted to take this into
3 account.

4 Conversely, if all export traffic of grain
5 expired and there were no more -- there were an embargo,
6 a world embargo on grain, I think that is a factor. And
7 I am using, you know, extreme things. And all between
8 that is a whole -- are a host of factors which might
9 affect it.

10 There might be some technologica improvement
11 that comes along. I don't know what they might be, but,
12 you know, things are constantly changing in our economy,
13 and alert management keeps on top of these things.
14 That's why they are managers.

15 Q What sort of competitive circumstances did you
16 have in mind?

17 A I didn't have any particular competitive
18 circumstances in mind. My general statement is that
19 experience tends to indicate that man makes a plan and
20 prior to execution it may go in exactly as planned, but
21 th chances are there is going to be some modification.
22 If you are planning a vacation, for example, an
23 opportunity may come along that by changing your
24 itinerary you are going to get the benefit of an extra
25 day at the seashore. You might take that into accurt

1 and gain from that modification in the plan.

2 Q I appreciate the extra vacation day, but the
3 question I asked you, though, related to the competitive
4 circumstances that you indicate in your testimony might
5 occur.

6 A Where do I indicate that, sir?

7 Q On page 6, the following sentence from the one
8 that I just read to you.

9 A Well, competitive circumstances do change. I
10 had no specific competitive circumstance in mind as a
11 result of it. That's a generalized use of the word
12 "competitive."

13 Q Because you did not study the competitive
14 intramodal relationships?

15 A Particularly I did not study the intramodal or
16 intermodal competitive situation.

17 Q Now, throughout your testimony you indicate
18 that one of the benefits of the merger would be that you
19 will decrease transit times with the merged system,
20 excuse me, not yourself, but the merged system would
21 decrease transit times and could cut one day off of a
22 movement of cars from terminals in I believe you gave
23 the example of Salina to Houston.

24 My question is how does that increase the
25 available car supply?

1 A Well, if you reduce the time in transit, that
2 transit, we will say, is roughly two days, and you
3 increase it to three days. So you increase the
4 availability of that car. It turns around faster, and
5 therefore it is available for loading.

6 Q Is car supply an issue today?

7 A Well, whether or not it is an issue today, the
8 answer to your question is I suppose there are spots. I
9 have not followed the car shortage situation. There may
10 be some spot shortages arising from time to time.
11 However, it is not like some periods in the past, as,
12 for example, during the Russian grain movement, where
13 there were substantial car delays.

14 Q Isn't it a fact that today there's actually a
15 glut of covered hoppers on the market?

16 A I don't know that to be the fact, and I would
17 think it probably would depend upon the particular
18 carrier and the services that he is providing. I have
19 no knowledge of that.

20 Q Did A. T. Kearney participate in the
21 proceeding in Docket No. 39169, which is Shippers
22 Committee OT5 v. the Ann Arbor Railroad Company?

23 A I can't answer for the firm. It is pretty
24 hard for me to keep track of what everybody in that firm
25 does, but I can tell you that I did not participate in

1 it.

2 Q Do you know whether the AER submitted
3 testimony in that proceeding that indicated there was a
4 car surplus?

5 A No, I don't know that.

6 Q Would you be surprised if I told you the AER
7 did?

8 A No, I wouldn't be surprised.

9 Q One of the benefits, I gather, that would
10 accrue from the merger would be that you feel that
11 shippers could minimize their own investments in cars,
12 is that correct?

13 A That's one potential, yes.

14 Q Is it likely that shippers will do that?

15 A I think each shipper will give consideration
16 to his own best economic interest and act in accordance
17 with it, and that opportunity is enhanced by the merger,
18 and therefore, if -- giving consideration to any other
19 factors or variables that he has to take into account,
20 the opportunity exists, and I think that is simply what
21 I reported.

22 Q Is it likely that shippers would do that if
23 the SFSP ends up with no competition whatsoever on
24 movements of grain out of Kansas destined to the Gulf
25 ports?

1 A Well, how as a result of this merger will
2 there be no competition? What you are talking about I
3 think is maybe the loss of a competitor out of southwest
4 Kansas. I don't think we are talking about an absence
5 of competition.

6 Q We are talking about an absence of competition
7 on the corridor between southwest Kansas and the Gulf
8 ports.

9 A Now, I am just hypothesizing that that might
10 be the result in the event that the merged system does
11 not carry forward its enlightened plan to no longer
12 affect route cancellations.

13 A I can't speculate with respect to that. I
14 have no basis for speculation on that point.

15 Q Well, would you assure with me -- it's a
16 hypothetical, just a hypothetical -- that there is --
17 the merger is consummated and the merged system does
18 move to close routes with the MKT -- that's a historical
19 fact. They have done it in the past, but we are just
20 assuming now for the purpose of this hypothetical that
21 they may do it in the future.

22 In that instance, there would be no rail
23 competition between points in southwest Kansas and the
24 Gulf ports. In that instance, is it likely that
25 shippers would throw the dice and just drop their own

1 investments in car supply, relying instead upon the
2 benevolence of the single railroad that serves them?

3 A I'm not sure what any shipper would do in the
4 circumstances that you have described because you are
5 giving a limited set of facts upon which to make a
6 judgment, and it is a little hard knowing that these
7 decisions rest on many variables.

8 So I couldn't agree or disagree with you on
9 the basis of your hypothetical.

10 Q I would like you to please turn to page 27,
11 and under Item 4 on that page, you discuss the situation
12 existing with Atterbury Grain, and what I understand to
13 be a circuitous movement of grain. He is served
14 apparently on an interline movement by both the SP and
15 the SF today, is that correct?

16 A Yes.

17 Q How does it happen, do you believe, that he
18 ends up with a circuitous routing on his grain today?

19 A Well, I think that question is better asked of
20 Mr. Ed Heuer in the circumstances. What I have done is
21 accepted what he said in his verified statement. I
22 don't recall at this time the detail with which he
23 discussed his particular movements, and so I don't think
24 I can respond adequately to your question, knowing his
25 reasons.

1 Q Let me ask you another hypothetical, then.

2 In the event that both the Santa Fe and the
3 Southern Pacific decided to impose a circuitous routing
4 on this traffic, and assuming that they followed their
5 own self-interest and made sure that those routings were
6 efficient, notwithstanding the fact that they were
7 circuitous, is it likely that that routing would change
8 in the future?

9 A I'm not sure I understand your question or
10 what you are driving at.

11 Q Well, maybe I should cut it into parts.

12 Do you believe that when carriers impose a
13 circuitous routing on traffic, that they do so in the
14 belief that the more circuitous routing is more
15 efficient than the shorter, more direct routing?

16 A Well, I think that is an operating question.
17 I'm not an operating official. I have no reason to
18 question their judgment with respect to their choice of
19 routes.

20 That is a question, if in fact your
21 hypothetical has some relationship to a true
22 statement -- then I think it is better put to a railroad
23 person. I wouldn't want to speculate on why a railroad
24 does anything in that regard.

25 Q Okay, then.

1 So you did not then consider yourself to be a
2 sufficient expert -- sufficiently expert to determine
3 for the purpose of this study whether the merger would
4 lead to operating efficiencies?

5 A I used as a premise for my study the operating
6 improvement that were postulated by the operating plan
7 as I understood them and on which I was briefed.

8 Q Now, you say in a number of places in your
9 testimony, at least with respect to a major benefit for
10 grain shippers, that it would give them additional
11 markets for their grain.

12 A Yes.

13 Q Do you consider that very important?

14 A Yes. I consider that a considerable benefit,
15 and I think the verified statements in support of the
16 application are replete with examples of that.

17 Q But why is it a benefit, an additional benefit
18 to a shipper if he today is able to dispose of all the
19 grain that he can possibly handle through one given
20 point? Why is it a benefit to give him access to an
21 entirely different market?

22 A Well, one reason is he may get a better price
23 in that market, if he can reach it. That's one reason.

24 Q So basically you feel that the more markets a
25 shipper has available to him, the better off he is?

1 A Yes. He can seek his opportunities in any of
2 these markets, and the same way on the receiver side.
3 He can look around for sources of traffic which may be
4 of benefit to him.

5 Q Now, we have spent a lot of time talking about
6 the Gulf ports, and just to make sure that there is no
7 confusion, do you believe it is also beneficial for a
8 shipper to have markets in not just the Gulf ports but
9 also to be able to reach Mexico?

10 A Yes.

11 Q Do you believe that that is true with respect
12 to all the various grains that move out of southwest
13 Kansas, both corn and wheat?

14 A Well, the movement of grain, for example, if
15 we are talking about Mexico, I am not sure you confined
16 your question to Mexico, but that's primarily corn and
17 sorghum that moves in that direction, certainly it is a
18 benefit to a shipper to move his grain over the
19 additional routes that would be available to it, using
20 alternatives. He is bidding on a contract for the sale
21 of his grain in Mexico, and the ability to route via
22 different routes, since the costs of transportation are
23 going to be reflected in the price that he is going to
24 receive for his grain.

25 Q Have you reviewed the trackage rights request

1 of the MKT in this proceeding?

2 A I have just a general knowledge of it. I
3 don't know, you know, where they begin and where they
4 end. As a general thing, I know that trackage rights
5 have been requested on the Tucumcari route, if that is
6 what you mean. I don't know the details of it. I
7 haven't read it. It hasn't been made available to me.

8 Q Are you familiar with the various track
9 systems at least from map standpoint, the track systems
10 at least from a map standpoint in Kansas?

11 A Generally. I say generally speaking.

12 Q Do you know what carriers serve southwest
13 Kansas,

14 A Yes. SP.

15 Q Does anybody else?

16 A Well, I'd have to refresh myself and look over
17 on the map here -- the Santa Fe, of course.

18 Q And there are two Santa Fe lines flanking the
19 SP line?

20 A Yes, that's correct.

21 Q And if the merger is approved, then in
22 southwest Kansas there will be just a single system in
23 the grain gathering area?

24 A That is correct, except that I would point out
25 that grain does have to grow in the field, and it does

1 have to move from that field into an elevator, and there
2 are points that can be reached by truck transportation
3 which may or may not be on the merged system.

4 Q Did you perform a study as to how far grain
5 growers could economically move their grain from the
6 field in southwest Kansas before they reach a
7 competitive rail system?

8 A No, I haven't made a study of that.
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1 Q I recognize that you didn't do a study here to
2 determine whether any cost savings would accrue to
3 shippers; is that correct?

4 A That's correct.

5 JUDGE HOPKINS: Did you say yes? Did you say
6 that's right?

7 THE WITNESS: That's correct, yes.

8 JUDGE HOPKINS: Just trying to get it for the
9 record.

10 BY MR. GREENBERG: (Resuming)

11 Q Nonetheless, assuming that the operating
12 efficiencies that you believe will happen will generate
13 cost savings, is it reasonable to assume that a portion
14 of those cost savings will be passed on to the
15 railroad's customers?

16 A That is one possibility. There are other
17 possibilities of what might happen to any particular
18 cost improvement translated into dollars. I don't know
19 what will happen to it, but that's certainly one place
20 that the improved cost efficiency could be translated
21 to.

22 Whether it's done or not, again, is a
23 managerial choice. One advantage of having that is it
24 will enable him to have a little bit more thrust in the
25 market than he had before from a price standpoint. It

1 provides him that opportunity. What his decision will
2 be will depend on many factors, I would think.

3 Q Do you think it is likely that if a carrier
4 and its management believes that it is sitting in
5 essentially a monopoly position, that it will pass those
6 cost savings on to shippers in the market in which it
7 has a monopoly?

8 A It may not be -- a monopolist may not always
9 decide to generate out of his traffic, his traffic
10 service or product, that which is the maximum, because
11 he may lose his customer and then not have anything left
12 as a result of the elimination of that traffic or that
13 service or that product.

14 So I think management would look at it in
15 their own best interests, and one of the considerations
16 would be, is the amount of money that he could make out
17 of that. And if he dries up the traffic, if he were to
18 do that, he just isn't going to make any money.

19 Q But it would be up to the carrier at that
20 point to decide what the break point was?

21 A He would have to make a lot of decisions, it
22 would seem to me.

23 Q And in that situation, is it likely that he
24 would pass any cost savings on to the shippers?

25 A If he felt that were to his best advantage,

1 he's likely to do it, or he may decide to invest in some
2 plant and equipment which would enable him, again, to
3 provide more efficient service, and there again would
4 have additional funds which he could then consider
5 whether to pass on to the shipper.

6 Q Do you believe that competition is required to
7 prevent the carrier from just sucking up those
8 additional cost reductions?

9 A Well, if I understand the Staggers Act, I
10 think the whole purpose of the Staggers Act was a
11 recognition of the general condition of competition that
12 exists in this country today with respect to
13 transportation, and therefore to minimize the regulation
14 and enable the carrier to make these judgments in light
15 of this competition would be to the benefit of the
16 public as well as to the carriers.

17 Q I think the D.C. Circuit has said that, but
18 I'm not sure the Commission has espoused it in quite the
19 same way.

20 But if there is no effective competition, is
21 there any check on what the carrier may decide to do?

22 A Yes. His own self-interest serves as a
23 check.

24 Q Do you believe that competition is in the
25 public interest, so that it is not just the carrier's

1 self-interest that provides a check?

2 A When you're talking about competition, what do
3 you have in mind? There are all kinds of competition.
4 You're talking about intermodal, intramodal, all forms
5 of competition, product competition?

6 Q Mr. Rhodes, I hope it's been very clear that I
7 have really been attempting to confine my remarks to the
8 movement of grain from southwest Kansas down to the Gulf
9 ports.

10 JUDGE HOPKINS: By rail?

11 MR. GREENBERG: By any mode.

12 Because I don't believe, Mr. Rhodes, that
13 there is any barge potential moving out of southwest
14 Kansas, so we can eliminate that possibility, unless you
15 believe that I'm wrong.

16 THE WITNESS: No, I don't know of any canals
17 that run up in that area.

18 BY MR. GREENBERG: (Resuming)

19 Q And I don't believe that the statistics that
20 you cite indicate that there is any significant motor
21 carrier transportation, also, on grain moving out of
22 southwest Kansas down to the Gulf.

23 A But I think you would also have to agree with
24 me that there does exist a considerable amount of
25 geographic competition with respect to those movements.

1 In other words, a shipper in southwest Kansas has to
2 give consideration to what his competitor may be
3 offering out of another area, and the carrier then must
4 take that into consideration in his movement to the
5 Gulf.

6 Q I understand that. Doesn't that give the
7 carrier the choice of where that shipper markets his
8 grain?

9 A Well, I think the shipper is constantly
10 looking for the best place to market his grain under the
11 circumstances that he's faced with on a particular -- at
12 a particular time in the course of a business year.

13 Q If the shipper believes he can get a better
14 price for his grain in Galveston than he can get in
15 Kansas City, he would prefer to move his grain to
16 Galveston, would he not?

17 A I would judge that to be the case. If I were
18 in his shoes, I would probably want to do that, where
19 I'd make the most.

20 Q But if, because of the fluke of circumstances,
21 he is not offered a rail rate that permits him to get
22 there economically, he may be forced to move his grain
23 to Kansas City, is that not correct?

24 A Well, maybe not to Kansas City. He may want
25 to move it to someplace else. He would have to look, as

1 all shippers of grain have to do all the time, to find
2 the best market for the grain.

3 I don't know what -- you mentioned a fluke. I
4 don't know what kind of a fluke you have in mind. So
5 far as I know, service will be available from that
6 location to Galveston at a rate.

7 Q The kind of fluke I had in mind was the kind
8 of fluke you indicated Congress had in mind when it
9 passed the Staggers Act, and that was the situation
10 where there was no rail competition.

11 A Well, I think Congress had in mind -- and I
12 don't want to debate this issue with you, but I think
13 Congress had in mind something broader than competition
14 between rail in discussing competition.

15 Q Did you review the number of border crossings
16 between the United States and Mexico that will be
17 reachable only by the SFSP system if the merger is
18 eventuated?

19 A No, sir, I did not look at service by other
20 carriers. I think that would logically fall in a study
21 of competition among the carriers, and that wasn't part
22 of our study.

23 Q So I gather, then, the answer as saying that
24 you did not review the number of ports in the Gulf that
25 would be served exclusively by the SFSP?

1 A Same answer would be applicable there.

2 Q You also indicate that one of the benefits of
3 the merger will be the reduction of time it will take to
4 develop rate quotations for shippers. Did you make any
5 sort of study of this topic, what procedures are
6 normally followed by the carriers in developing rate
7 quotes, how much time it normally takes?

8 A Well, it seems to me the matter of -- that if
9 you're going to negotiate a rate and you have a single
10 service involved, it's far better to deal with a single
11 carrier than multiple carriers if you're going to get a
12 contract rate.

13 That's the kind of thing that I had in mind,
14 the provision of single carrier service. It's
15 administratively, it's much easier if you have two
16 parties dealing than if you're dealing with three
17 parties or more.

18 Q But you don't know specifically how much time
19 it takes either of these carriers to develop those rate
20 quotations?

21 A No, I have not -- Kearny has done some work in
22 this area and my understanding from talking with others
23 on the staff, it's a very complex procedure that one has
24 to go through to make certain, either the shipper or the
25 carrier, that the contract serves both their needs, and

1 the negotiations on it are many times quite
2 substantial.

3 Q Well, let's also assume that the SFSP system
4 offers grain shippers a specific type of contract, one
5 which ties transit grain to non-transit grain. Do you
6 have that in mind?

7 A I have that fairly well in mind, yes.

8 Q And by that I mean, it ties a shipper's
9 production of grain so that all of its transit grain
10 must move if it's going to get any kind of a beneficial
11 contract rate for its non-transit grain, okay?

12 A Okay.

13 Q In that circumstance, and in light of what's
14 going to happen with the merged system -- I'm staring
15 not at the sky, but instead at the State of Kansas up
16 there.

17 MR. HYNES: It's an inspiration to us all.

18 MR. GOLDBERG: Yes, it is.

19 (Laughter.)

20 BY MR. GOLDBERG: (Resuming)

21 Q What kind of contracts are those grain
22 shippers in southwest Kansas going to get? Are they
23 going to have any option where they market their grain?

24 A I think they will have the option of whether
25 to enter into the contract or not. I guess the merged

1 system will take a look at the carloadings that are
2 available and, as he is expected to do, put his best
3 foot forward to try to tie as much of that traffic down
4 as he can. That's in his interest.

5 The shipper, on the other hand, is going to
6 take a look at his options, in which he may decide to go
7 with that contract or he may not, depending on how that
8 particular situation fits his marketing strategy and
9 other characteristics of his business.

10 I think it's something you can't generaliz
11 on.

12 Q But you didn't --

13 A I didn't study that particular thing. Rates
14 was not a part of our assignment.

15 Q Now, on page 22 of your testimony, in the
16 first line of the second paragraph, you indicate that
17 Mexico is a substantial market for corn and sorghum.
18 The wheat producers of Kansas would be shattered by that
19 statement. Where's the wheat? Is there any wheat
20 marketed in Mexico?

21 A I have some data in here. Let me check my
22 data on that. I think on table 4 of page 16 I show
23 there, in terms of thousand metric tons, the wheat that
24 is moving. If you notice, that has declined in 1979
25 through 1983 substantially, whereas the feed grains,

1 corn and sorghum, have increased, and I think that's why
2 I expressed it as I did in the statement.

3 Q Did you go back before 1979 in your study?

4 A No, I didn't look behind that.

5 Q So you don't know whether it may be cyclical
6 in nature?

7 A I do know it's a volatile market. I do know
8 that, and it depends on, you know, what the wishes of
9 the Mexican people are at any particular time as to how
10 much traffic is going. They make an offering to deliver
11 so much grain of the kind they want. It's their
12 decision.

13 Q Okay. But you're not stating here that there
14 is no market in Mexico for Kansas grain -- Kansas
15 wheat?

16 A No, I'm not stating that as a fact.

17 MR. GREENBERG: I have no further questions.
18 Thank you, Mr. Rhodes.

19 JUDGE HOPKINS: Who will be next?

20 MR. BATERA: Your Honor, KCS is listed next,
21 but since we're doing cotton, did you want to do all of
22 the grain at once?

23 MR. HYNES: That was Mr. Rhodes' preference,
24 so I guess the Rio Grande, which was the only other
25 noticed for grain, should probably go next and keep

1 things in order.

2 JUDGE HOPKINS: Thank you. Go ahead.

3 MS. MASON: I just have a few questions.

4 JUDGE HOPKINS: Let's see if we can hear.

5 THE WITNESS: I'd like to say, I have an ear
6 that doesn't work too well. I don't know whether it's
7 the same one as the Judge's or not, but I would
8 appreciate if you would speak up a little bit louder
9 than you were this morning. It would help me and I
10 think help others, too.

11 CROSS EXAMINATION

12 BY MS. MASON:

13 Q In your testimony, you have already indicated
14 that you did not interview any shippers; is that
15 correct?

16 A That's correct.

17 Q Did you have any discussions with members of
18 the SFSP staff about shipper views on this merger?

19 A No, not about shipper views. My discussions
20 with the SP and SF staff had to do with their movements
21 of these grains, and in fact, as my work papers, which I
22 am sure were made available to you -- they provided me
23 with machine listings of their grain movements, in the
24 case of the Santa Fe for three months of '83, in the
25 case of the SP for the year 1983.

1 Q Perhaps you can clear up something that raised
2 a question in my mind, then, and that was in your work
3 papers.

4 JUDGE HOPKINS: This will be marked for
5 identification as DRGW-C-12.

6 (The document referred to
7 was marked Exhibit No.
8 DRGW-C-12 for
9 identification.)

10 BY MS. MASON: (Resuming)

11 Q Could you identify this document for us,
12 please.

13 A These are notes that I made in the course of a
14 meeting in Chicago with the Kearny staff who were
15 engaged in this project early in January.

16 Q And were members of the SFSP there in
17 addition?

18 A No, this was not attended by their staff.
19 That's my recollection.

20 Q Could you turn to page SBC-184. Do you see
21 there item number 12?

22 A Yes.

23 Q That item indicates the carriers are concerned
24 about shipper opposition building up. Can you enlighten
25 me about the discussions that led you to make that

1 notation?

2 A Well, okay. My recollection of this comment
3 -- and remember, these notes are made as a mind jogger;
4 sometimes the mind is good and sometimes the mind is
5 not. But my recollection of it is that we were advised
6 as a staff that the shippers -- that the shipper
7 approach that had been originally planned and later
8 changed, that for some reason the carriers were
9 concerned about using that approach and the possibility
10 that our going out among the shippers may develop some
11 kind of attitudes that would exist in their minds.

12 Now, that's the best recollection I have.

13 Q Thank you. Do you mean by "shipper approach"
14 the shipper interviews that were planned initially?

15 A Yes.

16 Q And that is the reason why?

17 A I don't know the reasons why. As I say, I'm
18 only reflecting here what I listened to and what I
19 interpreted, so that's not even what somebody said.
20 It's what came through to me.

21 Q Thank you.

22 Also on that page, at the bottom, item number
23 21, I notice that there is some sort of an admonition to
24 keep your discussions in a positive vein. What
25 discussions does that item number 21 refer to?

1 A I think -- I'm trying to recollect this, and
2 this note is obviously out of context with this, but it
3 looks -- appears to me to be in connection with from the
4 preceding notations and the subsequent -- well, and
5 through 21, had to do with the interview process, in
6 which I didn't participate.

7 Q Can you recall who made these instructions or
8 who discussed those?

9 A The discussion was led by Mr. Kloss. All of
10 us in a meeting of that kind have something to say one
11 way or another, as you might well imagine.

12 Q I have just one more set of questions for
13 you.

14 JUDGE HOPKINS: This will be marked for
15 identification as DRGW-C-13.

16 (The document referred to
17 was marked Exhibit No.
18 DRGW-C-13 for
19 identification.)

20 BY MS. MASON: (Resuming)

21 Q Do you recognize this document, Mr. Rhodes?

22 A I recognize this as a document which is in my
23 work papers. I also recognize it as a document which to
24 my recollection I used to a very minor extent.

25 Q Can you identify the source of the document?

1 A This came from Chicago, apparently to my
2 office in Alexandria, although I don't see any
3 identification other than Bill Best's name on it, so
4 that must have come to Bill and Bill must have sent it
5 to me, although I can't tell you exactly how I got a
6 hold of the document.

7 Q That means it was produced by your office?

8 A Well, I don't know. I'm only trying to read
9 the notes at the top. Since it was delivered to Bill
10 Best, maybe Bill received it on such and such a date and
11 thought that I might be interested in having a copy of
12 it and sent it to me.

13 That's my recollection of it. I don't recall
14 using this to any great extent and I don't know when I
15 received it. This may have come in any time between
16 January and today -- well, not today.

17 Q At least before it was submitted to the
18 depository.

19 Would you look at pages SBC-1568 and 1569.
20 Now, as I understand this, this is a brief outline of
21 marketing opportunities and related matters. On page
22 1569 there is an item marked "miscellaneous" and a
23 recommendation under that that the Denver & Rio Grande
24 be included in the new system.

25 Did you consider this recommendation in the

1 course of preparing your statement?

2 A No. We were given an operating plan which was
3 to be the premise of our analysis.

4 JUDGE HOPKINS: This will be marked for
5 identification as DFGW-C-14.

6 (The document referred to
7 was marked Exhibit No.
8 DRCW-C-14 for
9 identification.)

10 BY MS. MASON: (Resuming)

11 Q Do you recognize this document, Mr. Rhodes?

12 A Yes.

13 Q Can you identify where this meeting was held?

14 A This meeting was held in Chicago in the
15 offices of the Santa Fe Railroad.

16 Q I note that you have written on the top "A
17 summary of notes on the operating plan."

18 A Yes.

19 Q Then down below you have a heading marked
20 "Premise," and in that you indicate that shippers will
21 not be worse off, some will be better off. Was there
22 any discussion of this premise in this meeting?

23 A No. I think that Neal Owen in the
24 presentation of the highlights of the operating plan as
25 they had developed it at that time were, as indicated

1 here, as I interpreted what he was saying. It's better
2 to ask Neal Owen what his premises were, rather than to
3 rely on the notes that I made at a meeting and probably
4 didn't capture the full significance of everything he
5 was saying.

6 To me, this is what I needed to know from that
7 and as I interpret it.

8 Q In other words, you understood that as an
9 operating assumption for your work the operating
10 plan --

11 A Was designed as it says, that the shippers
12 would be not worse off. They were designing their plan
13 with that in mind.

14 MS. MASON: Thank you. I have no further
15 questions.

16 JUDGE HOPKINS: Is there anybody else on the
17 grain part?

18 MR. HYNES: Why don't we continue.

19 JUDGE HOPKINS: We'll take it all at the end.

20 MR. HYNES: We wouldn't have very much at this
21 point anyhow.

22 JUDGE HOPKINS: Let's get to the cotton, then,
23 now.

24 CROSS EXAMINATION

25 BY MR. BATERA:

1 Q Mr. Rhodes, I am Victor Batera, representing
2 the KCS. I'll give you a moment.

3 Do you have it?

4 A I hve it in front of me now.

5 Q Mr. Rhodes, do you know what Calcot is?

6 A Calcot, no.

7 Q You're not familiar with that term?

8 A No.

9 Q Have you done studies of shipper benefits
10 similar to the one that you've done that you're
11 testifying about here today before?

12 A Before?

13 Q Before this study?

14 A Well, I've been doing studies of
15 transportation I guess better than 35 years, and I don't
16 know what uses are being made of those. I expect
17 somewhere along the line that they involved matters
18 which would tend to improve service to shippers. Or
19 working here at the Commission, I thought the purpose of
20 all the work we were doing was in some way to serve the
21 transportation community, including the shippers.

22 Q Prior studies that you have done, have they
23 included shipper interviews?

24 A Yes, I've done a number of shipper
25 interviews.

1 Q And why did you include shipper interviews in
2 those studies?

3 A Why did I include them? Well, it depends on
4 the particular study that you're undertaking. Sometimes
5 time permits it, sometimes time doesn't permit it.
6 Sometimes shippers are willing, sometimes shippers are
7 unwilling.

8 What you're doing when you're designing your
9 study is to try to get the best information that you
10 think is reasonably obtainable and to do it in a way
11 that is somewhat cost effective to the objectives of
12 your particular mission.

13 Q When you have included shipper interviews,
14 what is the purpose then for the interviews?

15 A To obtain their views or to obtain data from
16 them that would be useful to your study.

17 Q And how have you determined which shippers,
18 which particular shippers, to interview?

19 A Again, I think that goes to the methodology.
20 If you're going to do a sample study where you want to
21 rely on estimates that have a statistical -- reasonable
22 statistical probability of being close to the answer you
23 are seeking, that's one approach.

24 The other approach I think may be
25 characterized by the kind of shipper interviews that Les

1 Kloss was talking about in his testimony this morning.
2 So there may be multiple purposes that you have in mind
3 in any particular study. You have to look at, you know,
4 what am I trying to do, how am I going to do it, where
5 am I going to get my data. And if shippers are a source
6 of information, fine, you'll use them.

7 Q With reference to the study set forth in your
8 verified statement on cotton, did you originally propose
9 to interview cotton shippers in connection with it?

10 A Yes.

11 Q And how many did you propose to interview?

12 A I've forgotten the number, but I would say
13 that it was somewhere in the neighborhood of 15 to 25.
14 That's been pretty far back in the list, and it may be
15 included in my work papers because I did prepare a list
16 of such companies, and in developing that list I called
17 several of the associations in the cotton industry and
18 inquired of them of people in different locations of the
19 country who were shippers, and I asked them to identify
20 both large and small shippers for the purpose of that.

21 Q What specific shippers, to the best of your
22 recollection, did you propose interviewing in connection
23 with this?

24 A I would have to look. They're on a piece of
25 paper somewhere, and if you need to know them I think

1 they're in my work papers.

2 Q Do you recall any?

3 A No, not specifically.

4 Q What was the basis for your selection of the
5 particular shippers you chose?

6 A I just indicated in my previous answer: first
7 of all, I tried to identify who these cotton shippers
8 are; secondly, I tried to spread them geographically;
9 and third, I tried to get some representation of
10 different size companies.

11 What I didn't get to was their willingness.
12 We didn't approach the shippers. The methodology was
13 altered before those contacts were made.

14 Q Now, with reference to the cotton statement,
15 what sources did you use to determine shipper benefits?

16 A The shipper benefits were derived from my
17 analysis of the movement of cotton between its
18 production and either consumption or export, and the way
19 it moves generally in the railroad industry, and
20 specifically how it's moving over the Santa Fe and the
21 SP.

22 Knowing the origins, destinations, in light of
23 that kind of matrix of information, knowing what the
24 operating plan called for, I then made a determination,
25 a judgment, on how I felt the shippers might be

1 benefited as a result of this merger if it were carried
2 out.

3 Q Did you discuss shipper benefits with Santa Fe
4 and Southern Pacific operating personnel?

5 A Not per se. I did ask them a number of
6 questions on the kinds of services that they were
7 providing and I asked them for their traffic studies,
8 which they obliged by giving them to me, so I could get
9 a better feel for how it was moving.

10 With respect to improvements, I do know, for
11 example, that cotton moves transcontinentally from
12 California to the East, I know it moves by rail, and I
13 tried to find out just how much time was involved in
14 that. And so I made inquiry with respect to such
15 movements and made a judgment, knowing how routing might
16 be changed, in terms of how the shipper might be better
17 off as a result of that.

18 Q Did you discuss shipper benefits with Santa Fe
19 and Southern Pacific marketing personnel?

20 A Well, I don't know, you know, just who these
21 people are. I assume they were in the marketing
22 department because they are commodity representatives.
23 I assumed they were into marketing. I could look at
24 their cards and tell you their affiliation in the
25 company.

1 But they were the people to whom I was
2 directed for information on how cotton moves on the two
3 railroads.

4 Q Now, on page 4 of your verified statement you
5 state that you have assumed shippers or receivers will
6 recognize the opportunity for inventory carrying cost
7 savings because of improved transit time. Is that your
8 statement?

9 A Yes.

10 Q And that these shippers and receivers will
11 take prompt action to adjust inventory levels or
12 invoicing; is that correct?

13 A That's correct.

14 Q Have you done any study on the likelihood that
15 cotton shippers or receivers will recognize these
16 opportunities and respond accordingly?

17 A I haven't done a study with respect to it, but
18 I would certainly give credit to a producer in the
19 Southeast who is competing with other cotton merchants,
20 textile producers, competing in the various textile
21 markets who use cotton, to be alert to his opportunity,
22 or he's not going to last long in that business.

23 And if he sees an opportunity and if the
24 marketing people of the railroad capitalize upon this
25 improvement and solicit traffic in light of this and

1 call it to their attention, that they are not aware of
2 it, he will become aware of it, and if he can he will
3 take advantage of it. That is, if he's the normal
4 economic man.

5 Q How much time do you estimate would be
6 necessary for cotton shippers to adjust inventories?

7 A I have no way of estimating that. I would
8 give you a personal impression with respect to it that,
9 if a new service were to be offered, I'd want to test
10 that service for a period of time before I substantially
11 changed my production methods in light of it. But I
12 would probably study that matter very carefully before I
13 made a change in inventory policy.

14 But if I found by experience that I could rely
15 on that new service and that new service would permit me
16 to reduce my inventory holdings for purposes of the
17 production, I think I would take that into account and
18 act upon it. But I would need a period of time for the
19 carriers to demonstrate to me that they are capable of
20 providing that service.

21 I think it's also true that this is not the
22 only service that's available to them. We know that in
23 these markets, for example, out of Texas into the
24 Southeast, you know, about half of that traffic, even
25 though it's long haul, is moving over the road. So I

1 don't know what kind of service they are providing.
2 Apparently it's a service that a lot of the textile
3 manufacturers can live with.

4 Q Have you discussed with any cotton shippers or
5 receivers the idea of adjusting inventory to take
6 advantage of transit time improvements?

7 A I think my testimony is I haven't talked with
8 any cotton shippers.

9 Q I mean not just simply in connection with this
10 study.

11 A No, I have not.

12 Q On page 5 in the middle of the page is a
13 reference to a reduction in operating costs estimated to
14 be in excess of \$200 million. Do you see that?

15 A Yes.

16 Q What's the source of your estimate there?

17 A That estimate I think came to me as a part of
18 the briefing by Neal Owen in terms of the savings that
19 might accrue when the plan is implemented.

20 Q So you're relying on the railroads, then?

21 A Well, that's the only premise I have.

22 Q What is the largest cotton producing area in
23 California?

24 A In the San Joaquin Valley.

25 Q And who are the serving carriers to that?

1 A The Santa Fe and Southern Pacific.

2 Q Did you take into account at all in your study
3 of shipper benefits the fact that these are the only two
4 serving carriers to that area?

5 A Well, obviously the operating plan calls for
6 the rationalization of that trackage serving various
7 points, in Fresno and Bakersfield, generally in that
8 area. So to the extent that, you know, there would be
9 operating improvements, naturally I took it into
10 account.

11 Q Were you aware during your study whether the
12 cotton growers in the San Joaquin Valley had expressed
13 concern with the merger because they felt it would
14 eliminate competition?

15 A No, I was not aware of that.

16 Q Assume with me, a hypothetical, that that
17 indeed is the case, that the cotton shippers in that
18 area were concerned. Would that change your analysis
19 any regarding the benefits of the merger?

20 A No, I don't believe it would. I think the
21 service that's projected under the route will be an
22 improvement, and if the shipper takes advantage of it he
23 will be better off.

24 Q You testified on page 12 that truckers are
25 growing in modal share at the expense of rail on cotton

1 movements; is that correct?

2 A Yes.

3 Q Can you identify the specific corridors in
4 which trucks are competitive with rail?

5 A Yes.

6 Q What are those corridors?

7 A Well, if we take the Texas-Oklahoma area into
8 the Southeast in the textile mill area, about half of
9 that moves by truck and about half of that moves by
10 rail. It's a little less than half for rail and a
11 little more for truck.

12 Now, this data that I'm relying on is similar
13 to the data in the 1975 study that I referred to on page
14 12. After I had completed the study, I located a later
15 study along the same lines which provided that
16 information.

17 From Texas and Oklahoma to the Gulf ports,
18 about 72 percent of that moves by truck and about 28
19 percent moves by rail. From the Texas-Oklahoma area to
20 California ports, rail handles about 85 percent and
21 truck about 15 percent, despite the fact that that's a
22 very long haul.

23 From California to the Southeast, about 75
24 percent moves by rail and a surprising 25 percent moves
25 by truck, and that's about a 3,000 mile haul. From

1 California to the California ports, none of it moves by
2 rail; it's a 100 percent truck movement.

3 Q What is the basis for your statement on page
4 13 that Santa Fe and Southern Pacific have separate
5 substantial traffic losses to truck, even in the long
6 haul? Is it the statistics that you just stated?

7 A I think it is, you know, looking at the data.
8 And I think the table on page 5 is kind of a general
9 indication of the loss of rail traffic over time. This
10 study that I referred to on page 12, were it indicated
11 that the rail share had declined from 73 to 53 percent,
12 by the 1980-'81 study rail had declined to 31 percent
13 and motor to 69.

14 Now, the Santa Fe and Southern Pacific
15 probably account for most of the movements outside of
16 the territory of the Southeast mills, for most of the
17 cotton movements. There are some in bridge service over
18 the Dallas movement. But apart from that, most of the
19 cotton traffic -- some by the MP, but I would say the
20 largest share of the rail movement of cotton is by
21 either the SP or the SF or the SSW.

22 So if rail's share is declining, it's
23 declining on those railroads, by logic.

24 Q In determining that rail share is declining,
25 did you consider that cotton travels in both boxcar and

1 TOFC?

2 A Yes.

3 Q Were you able to identify whether particular
4 cotton shipments were made in boxcar or TOFC?

5 A The information that I received from the
6 Southern Pacific indicated that they moved a very small
7 amount of cotton via boxcar -- I mean by TOFC. The
8 Southern -- I beg your pardon.

9 The Santa Fe, in their traffic distribution,
10 moves a volume of traffic by TOFC. Now, I don't know
11 whether they furnished me traffic which they could not
12 identify as cotton which may have shipped in either TOFC
13 or COFC service. That's a question that might be
14 addressed to their people. But I thought I was
15 receiving their movements.

16 Now, with respect to traffic information which
17 I obtained from the ICC reports, I can only report what
18 the carriers reported to the Commission in terms of the
19 commodity descriptions under which they report. So if
20 there was some traffic in cotton which was embodied in
21 the TOFC movements or COFC movements under some generic
22 term, I've forgotten. Shippers --

23 Q Freight all cars?

24 A Freight all cars. If it's in there, I would
25 have no knowledge of it. But I relied primarily on the

1 movements by the two carriers who are applying.

2 JUDGE HOPKINS: Before you start another
3 question, I think this would be a good time for a
4 15-minute recess.

5 (Recess.)
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1 JUDGE HOPKINS: Let's get back on the record.
2 We have to have Mr. Rhodes up here, haven't we?

3 BY MR. BATERA: (Resuming)

4 Q Mr. Rhodes, on page 16 you've testified --
5 I'll give you a moment to find it.

6 A Page 16? All right.

7 I've got the wrong one, on page 16 of another
8 statement. All right.

9 Q You've testified in the top paragraph that
10 transit time considerations and their impact on
11 inventory carrying costs have led these shippers -- and
12 I believe you were referring to California shippers to
13 the southeast -- to use TOFC movements.

14 Is that correct?

15 A Where is the specific language which you're
16 referring to?

17 Q The top paragraph. I guess it's the fourth
18 line.

19 A All right. May I have a moment to review
20 that?

21 (Pause.)

22 Yes.

23 Q You're looking at your cotton statement?

24 A Yes.

25 Q Have you done any studies to determine what

1 considerations leads shippers to use TOFC?

2 A No. I haven't done a specific study with
3 respect to that.

4 Q Any surveys?

5 A No. You might refer your question to Mr.
6 Heuer who studied TOFC questions specifically as part of
7 his assignment.

8 Q Do you believe that the existence of service
9 benefits depend on the availability of effective
10 competition?

11 A Well, I think that the data that I furnished
12 just a minute ago attests to a considerable amount of
13 competition throughout the cotton growing and receiving
14 areas.

15 Q Well, I'm not disputing that data one way or
16 the other. I'm just asking you, do you believe that the
17 existence of effective competition is necessary to
18 provide an incentive to provide service benefits?

19 A As a general proposition, the existence of
20 competition provides a stimulus in the economy to better
21 service. Now, that's the nature of business.

22 So, as a general rule, I don't think anybody
23 could go wrong with expressing that view, that if you
24 have a competitor, you are going to strive to provide
25 better service.

1 Q Did you do any studies to determine the
2 importance of transit time reliability to cotton
3 shippers?

4 A It's my view, given the value of the shipment,
5 that transit time consideration and particularly in
6 relation to the reliability of service, would be a
7 considerable consideration, although I have not done a
8 particular study.

9 Q Have you discussed the topic with shippers at
10 any time? I realize you didn't do it in connection with
11 this.

12 A I suppose over the course of the years that
13 I've been working with transportation -- let me recall
14 an experience from Commission times. I think it was
15 back in the investigation Ex Parte 272 sub 2, which had
16 to do with the service being provided by the railroads.
17 And there was considerable contention respecting transit
18 time as a factor of service.

19 And I conducted a study, designed and
20 conducted a study to find out, you know, just what
21 transit time was from various points to other points.

22 So that, yes, over the course of the time that
23 I've been in transportation, I have taken into account
24 the transit time as a factor in provision of service.

25 Q Regarding TOFC cotton interlined by the Santa

1 Fe to Dallas --

2 A Yes.

3 Q Are you referring in your statement -- I
4 believe this is on page 16 and then again at 21 --
5 primarily to the connection between the Santa Fe and the
6 KCS?

7 A That is a connection on which a lot of TCFC
8 traffic moves. That's correct. I wouldn't say that's
9 the only point. They do interchange TCFC traffic at
10 other points, but that's certainly one of the points
11 that I had in mind. Yes.

12 Q And is that connection between Santa Fe and
13 KCS known as the Big D?

14 A I have not heard it referred to as the Big D.

15 Q Do you know whether the service provided by
16 Santa Fe and KCS is joint -- that joint line service is
17 a dedicated run-through train? Do you know whether
18 that's true or not?

19 A It's my understanding that that is true; yes.

20 Q And that this provide service to New Orleans?

21 A Yes.

22 Q Does the elimination of an interchange
23 necessarily mean faster service?

24 A In my experience, yes. And I referred a
25 minute ago to a study we did while I was here at the

1 Commission some years ago, and the results of that
2 study, if my memory serves me, was that as a general
3 rule, an interchange takes 24 hours.

4 Now, of course, it may be faster, it may be
5 slower, but I'm talking about a generalized rule of
6 thumb that an interchange is about 24 hours. Now, that
7 will vary, depending on the circumstances surrounding
8 any particular move.

9 We had, you know, wide variation.

10 Q Is it possible for a run-through train to be
11 the operational equivalent of single line service?

12 A It's not the operational equivalent. It
13 wouldn't be exactly the same as single line service, but
14 it has some of the characteristics of it and a design,
15 you know, to overcome some of the problems that are
16 caused by the necessity of the interchange.

17 That's the purpose of the run-through train.

18 Q Do you know the duration of the KCS-Santa Fe
19 connection at Dallas?

20 A Are you talking about the transit time from
21 California to New Orleans?

22 Q Yes. Do you know that?

23 A Yes. It's my understanding that's somewhere,
24 95 to 100 hours.

25 Q What's the basis of your estimate?

1 A It's a discussion that I had with some of the
2 staff at the SF.

3 Q And when was that discussion?

4 A Well, I've had a number of discussions. I
5 can't tell you exactly when the discussion and when all
6 the facts have occurred.

7 Q Was it prior to your preparing your verified
8 statement, your final verified statement?

9 A During some course of the time.

10 Q Is cotton traffic now moving to New Orleans
11 preblocked?

12 A I don't know the answer to that question.

13 Q On page 20, you describe a movement between
14 Las Cruces, New Mexico and Clinton, South Carolina. Is
15 that correct?

16 A Yes. This is an example that was filed as
17 part of a verified statement by Mr. Arnold which came to
18 my attention and I inserted as an example of the kind of
19 thing that I was talking about.

20 Q Now, are you suggesting by that example that
21 after the merger, two carriers will be eliminated from
22 that route?

23 A I think the route that is prescribed there
24 would be Santa Fe-Dallas, I&A, I&N. And the alternative
25 to New Orleans would be one carrier. What we're talking

1 about under the route that he describes, we would
2 eliminate one carrier, I believe.

3 Q And the L&N Seaboard are, for practical
4 purposes, one railroad.

5 MR. BATERA: Thank you, Mr. Rhodes. That's
6 all I have.

7 CROSS EXAMINATION

8 BY MR. RATNER:

9 Q Mr. Rhodes, I'm James Ratner. I'm with the
10 United States Department of Justice. I have a very
11 small, I hope, number of questions, some of which may be
12 familiar to you. And as far as I'm concerned, they
13 apply both to grain and to cotton.

14 And if you feel a distinction must be made
15 between the two, could you just go ahead and make that?
16 Is that all right as far as you're concerned?

17 A That's a bit of a burden, but I'll do my best
18 with it.

19 Q Let me know if it gets to be too much of a
20 burden and we'll make another arrangement.

21 A All right.

22 Q Referring to your cotton testimony, but I
23 believe the language is in both of them, on page 4 you
24 assume down here at the last line -- you assume that
25 shippers or receivers will recognize the opportunity to

1 take advantage of the efficiencies?

2 A Yes.

3 Q For either grain or cotton, did you
4 specifically investigate how easy it would be for
5 shippers to realize the benefits you have testified
6 about?

7 A No. That was not part of my study. My
8 assumption was that prudent men would do what was
9 necessary to take advantage of an opportunity.

10 Q I understand.

11 On page 5, you refer -- there's a number 2
12 there, a number 1 and a number 2. And in number 1, you
13 refer to shipper logistics costs.

14 A Yes.

15 Q And one of those costs is transportation?

16 A Yes.

17 Q Are you referring to transportation, the costs
18 of actually transporting a commodity from A to B that
19 the shipper incurs?

20 A That's -- yes, that's the transportation. I'm
21 talking about at some point in whatever process that he
22 is engaged in, too. I'm not talking about
23 transportation within plant, if that's what you mean.

24 Q Assuming that they existed, could
25 anticompetitive aspects of the merger affect those

1 transportation costs?

2 A I'm not sure what you mean by anticompetitive
3 costs.

4 Q By anticompetitive, I mean an effect on a
5 shipper which is harmful in terms of raising his costs,
6 reducing his options.

7 A On the assumption which I, you know, find hard
8 to believe that there would be anticompetitive effects,
9 but if in fact some do exist, and in fact his costs do
10 rise, then it's obviously not going to be to his benefit
11 as a result of it.

12 But that, you know, there's a big step from
13 reality into your assumption with respect to it.

14 Q I understand.

15 A And you must recognize that when these
16 situations arise, that a shipper is not stuck to one or
17 two or three alternatives. He searches around for his
18 best way of overcoming any adversity that he's faced
19 with at a particular time.

20 Q Mr. Rhodes, if your attorney wishes to discuss
21 with you on redirect how realistic the hypothetical is,
22 that's fine. But why don't we just confine it to the
23 answers right now?

24 On page 5, a little further down, you indicate
25 that you could not estimate the extent to which the

1 merged rail system will actually pass some or all these
2 costs reductions through in the form of reduced rates.

3 Why were you unable to estimate?

4 A Well, I would have no way of knowing, you
5 know, what management is going to do; how to, you know,
6 take this dollar and put it over someplace else.

7 I made the assumption that, you know,
8 something is going to happen to these cost savings.
9 Some portion of them might be -- take the form of
10 reduced rates. Some may not. Some may go into
11 investment. Some may, you know, go to stockholders or
12 reduce some outstanding debt.

13 You know, there are a lot of things that could
14 happen to a dollar, and it's pretty hard to trace a
15 dollar through that whole decisional process.

16 Q On page 6, you indicate that based on your own
17 experience, not all operating improvements proposed by
18 the new merged rail system -- do you see that sentence?

19 A Yes.

20 Q What is your past experience in the
21 implementation of rail merger operating improvements?

22 A Well, I thought I had answered that question
23 pretty well earlier.

24 Q You may have. I'm sorry if I didn't pick that
25 up.

1 A Basically, what I'm saying there is that plans
2 made by anyone for any purpose, including a merger, are
3 made with a person's best judgment at the time they are
4 making, giving consideration to the objectives that they
5 are trying to reach.

6 And what I'm saying is that between the time
7 that that plan is submitted to the Commission as a basis
8 for the Commission's judgment and when it is finally
9 executed in whole or in part, that something is going to
10 occur, some things are bound to occur, or some persons
11 may change, which will lead to different judgments with
12 respect to certain aspects of it.

13 And my guess would be that if management is
14 prudent, that they will be seeking to improve the
15 operation of the system so that the benefits to
16 themselves that they are projecting may be even more
17 than presented in their plan to the Commission.

18 Q I asked you what your past experience was
19 concerning implementation.

20 A Well, I'm giving you an indication of my past
21 experience as applied whether to merger or to any other
22 facet of the business.

23 Q Do you have any past experience specifically
24 applied to rail merger?

25 A Yes.

1 Q What is that?

2 A I was an employee of the Commission here for
3 some 20 years and, in the course of that, had various
4 assignments or submitted my views to different people
5 with respect to a number of mergers.

6 Q All right. That's fine.

7 Did you estimate, evaluate, or consider
8 whether any of the benefits you discussed in your
9 testimony could be achieved without a merger of Southern
10 Pacific and Santa Fe?

11 A No, I did not.

12 Q So then it's fair to say that your testimony
13 should not be taken to suggest that the Santa
14 Fe/Southern Pacific merger is necessary to achieve the
15 efficiencies you discuss?

16 A I wouldn't agree with that statement, no.

17 Q What is it that you disagree with?

18 A Well, as I understood your question -- and
19 perhaps I misunderstood it -- but you're saying that the
20 merger doesn't have to take place for these benefits to
21 be achieved.

22 Did I misinterpret your question?

23 Q You may have. What I said is, your testimony
24 should not be taken to suggest that the SF/SP merger is
25 necessary to achieve the efficiencies you discuss.

1 A Well, I haven't made a study. You know, I've
2 made a study of, you know, the way the traffic is
3 moving, what the merger plans to do, and the benefits
4 which will result from that.

5 Now, if you change the scenario, it's a
6 different analysis, and I can't make any judgment on
7 that.

8 Q Are you aware that there was a stipulation
9 entered into that basically says that you did not
10 examine any anticompetitive aspects of this merger?

11 A No, I'm not.

12 MR. HYNES: For clarification, the stipulation
13 was not as to whether the Kearney witnesses examined any
14 anticompetitive aspects. It was that A. T. Kearney's
15 witnesses did not consider the competitive issues raised
16 by the merger.

17 To state anticompetitive aspects states a
18 conclusion and implies that there were, in fact,
19 anticompetitive aspects, if there are such aspects
20 attached to this transaction.

21 MR. RATNER: I know I'm not clear what we had
22 as a stipulation, so I'm going to go ahead and ask the
23 question, Your Honor.

24 JUDGE HOPKINS: Go ahead, because one of the
25 problems is, this is has been changed, it appears, as we

1 have moved along, depending on who it is that is stating.

2 BY MR. RATNER: (Resuming)

3 Q Did you evaluate, estimate, or examine in any
4 way the possible anticompetitive aspects of the
5 Santa Fe/Southern Pacific merger?

6 A No, I did not.

7 Q Given that you did not, and assuming that
8 there might be anticompetitive aspects to the merger,
9 you cannot conclude that the merger on net is beneficial
10 to either grain or cotton shippers. Is that correct?

11 A Well, could you restate your question? You've
12 kind of gone around a loop for me on that. If you could
13 state your question more directly, I may be able to give
14 you a more satisfactory answer.

15 Q I would like to, Mr. Rhodes, and I'm doing the
16 best I can, believe me. I've been hampered somewhat by
17 Applicant's counsel, but I'll try again.

18 JUDGE HOPKINS: He's not hampering you now.
19 You can say what you want.

20 MR. HYNES: I haven't objected to a single
21 question.

22 JUDGE HOPKINS: That's right.

23 MR. RATNER: Fair enough.

24 BY MR. RATNER: (Resuming)

25 Q Assuming there might be anticompetitive

1 aspects to the merger which you have not evaluated, it's
2 not possible for you to conclude that the merger on net
3 is beneficial to grain or cotton shippers. Is that
4 correct?

5 A Well, I don't think there's a relationship
6 between one and the other. If I can't make -- draw a
7 conclusion with respect to anticompetitive measures, I
8 certainly can't draw a conclusion with respect to the
9 benefits, whether they would be achieved or not.

10 I have no basis one way or another for drawing
11 a conclusion with respect to that.

12 Q So then you cannot conclude that on net, the
13 merger is beneficial?

14 A I can't conclude one way or another, I think I
15 said.

16 Q Does one way or another, which you just
17 explained to me, mean that you can't conclude on net
18 that it's beneficial, and you cannot conclude on net
19 that it's not beneficial?

20 A I cannot conclude whether there will be any
21 net benefits or whether there will not be any net
22 benefits.

23 MR. RATNER: Fine. That's all the questions I
24 have, Your Honor.

25 JUDGE HOPKINS: Thank you.

1 Mr. MacKenzie.

2 CROSS EXAMINATION

3 BY MR. VINCENT MAC KENZIE:

4 Q Mr. Rhodes, I'm Vincent MacKenzie,
5 representing the State of California. I have a few
6 questions, primarily related to California, obviously
7 California interests.

8 The answers you gave to, I believe it was KCS
9 counsel, related to information you received from
10 Southern Pacific on the extent of the volume of traffic
11 on the sunset route that you referred to at the bottom
12 of page 20.

13 You make a statement there in the last
14 paragraph, the last sentence, that begins with -- the
15 prior sentence, that certain operational improvements
16 are planned for the merger, and they hold promise of
17 increased reliability in transit time.

18 Then you say, first, which I assume you are
19 beginning to build your reasons for that statement, that
20 "the Southern Pacific single track sunset route is now
21 operating at or near capacity, which results in service
22 uncertainties and interference to expedited traffic
23 caused by the operations of the manifest trains."

24 Did you assume in that statement that
25 post-merger, the Applicants were not -- were going to