STB FD 32760 (Sub 21) 10-17-97 D 183110

183110

AOA-1

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. ~~32660~~ 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, et al

--CONTROL AND MERGER--

SOUTHERN PACIFIC RAIL CORPORATION, et al
[OVERSIGHT]

Ex Parte No. 573

RAIL SERVICE IN THE WESTERN UNITED STATES

COMMENTS

on behalf of

ALUMINUM COMPANY OF AMERICA

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October 17, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. ~~32660~~ 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, et al

--CONTROL AND MERGER--

SOUTHERN PACIFIC RAIL CORPORATION, et al
[OVERSIGHT]

Ex Parte No. 573

RAIL SERVICE IN THE WESTERN UNITED STATES

COMMENTS

on behalf of

ALUMINUM COMPANY OF AMERICA

INTRODUCTION

Pursuant to Decision No. 1 in Finance Docket No. 32760 (Sub-No.21), Aluminum Company of America ("Alcoa") files these late filed comments regarding service under the control and merger decision. In addition, Alcoa submits its comments as a written submission in the newly instituted Ex Parte No. 573 docket.

COMMENTS

Alcoa joins with what is now apparently a legion of shippers complaining about the deterioration in the quality of rail service provided in the Western United States by the merged UP/SP system. Alcoa is experiencing extremely serious service problems in the states set forth below.

Texas

Alcoa has had significant slow downs in inbound lime, pitch and petroleum coke shipments into its Rockdale and Point Comfort facilities in Texas. Truck shipments have been required to keep the plants operating. In addition, the alumina unit train service between Point Comfort and Rockdale, Texas has been both extremely slow and inconsistent. This has occasioned cut backs in production at these facilities and resulting cutbacks in shipments to Alcoa customers throughout the United States. Truck shipments to customers from these facilities have also been required.

Tennessee

Similarly, Alcoa is experiencing significant delays in service at its Mira Loma, Fairfield and Conroe/Sugarland, Tennessee facilities. Frequently, Alcoa has had to transload shipments from rail to truck in order to continue production. In addition, Alcoa has been forced to use barge service from Point Comfort, Texas to Paradise Point, Virginia in order to continue production at its Tennessee operations. The cost of additional motor and barge services is extremely high, particularly on a short term, spot basis.

Arkansas

Inbound feedstock and outbound customer shipments have been adversely affected by the disruption in rail service. Alcoa's Bauxite facility, which is normally switched six days a week, has on more than one occasion been switched only once a week. This has resulted in production delays and rescheduling. Production facilities have had to be shut do waiting for inbound materials.

Louisiana

Two of Alcoa's three production facilities in Louisiana have been negatively impacted by the UP service problems. In particular, truck shipments have been required from Port Allen and West Lake Charles to keep customers from completely depleting their inventories.

Indiana

At its Warrick, Indiana facility, Alcoa has had to supplement rail service by truck. Again, this has resulted in significant cost increases.

Washington State

Alcoa is experiencing a severe car shortage for outbound loads at its Wenatchee Works in Washington State.

In summary, within the last six months, Alcoa has suffered a significant deterioration in service by the UP. These problems have not been focused in a limited geographic area. Rather, they are being experienced at facilities widely distributed throughout the entire UP system. This has caused Alcoa significant interruptions in its production lines, has delayed shipments to its customers and has caused a very significant increase in operating costs to Alcoa.

CONCLUSION

While Alcoa certainly can appreciate the difficulties in merging one major rail system into another, these very issues were pointed out throughout the merger proceeding, particularly by Western shippers. UP steadfastly represented to the Board and to the shipping public that the lessons learned in the painful process of merging the CNW into the UP system would insure that the same problems would not recur here. Shippers justifiably relied on those assurances. Unfortunately, the problems have actually been substantially greater.

To the extent that the Board has jurisdiction, Alcoa urges it to require that the UP make restitution to affected shippers. In addition, the UP should be required to report on a expedited and ongoing basis on efforts it is making to restore service. Finally, if service is not timely restored, then the Board should order directed service over the affected lines.

This deterioration in rail service is a matter of national economic importance. All of the Board's available resources should be directed to this problem.

Respectfully submitted,

David H. Baker
Attorney for
Aluminum Company of America

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 1997 a copy of these comments was served upon all parties of record in Finance Docket No. 32660 (Sub No. 21), by first class mail, postage prepaid, in accordance with the Board's Rules of Practice.

David H. Baker

A:\alcoa.wpd

STB FD 32760 (Sub 21) 10-23-97 D 183060

183060

UP/SP-327

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

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APPLICANTS' REPLY TO COMMENTS OF CYPRUS AMAX AND
TWENTYMILE COAL COMPANY AND SUPPLEMENTAL COMMENTS OF RAILCO

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October 23, 1997

UP/SP-327

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY -- OVERSIGHT

APPLICANTS' REPLY TO COMMENTS OF CYPRUS AMAX AND TWENTYMILE COAL COMPANY AND SUPPLEMENTAL COMMENTS OF RAILCO

Applicants UPC, UPRR, SPR and SPT[1] respectfully submit this reply to the "Reply Comments of Cyprus Amax Coal Sales Corporation and Twentymile Coal Company," filed October 20, 1997 and to "Railco, Inc.'s Supplemental Comments in Oversight Proceeding on Effects of Merger on Competition," filed October 15, 1997. The purpose of this short reply is to address briefly two factual matters raised by those filings.[2]

Cyprus Amax and Twentymile. In their comments, Cyprus Amax and Twentymile indicate that, while Applicants'

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[1] Acronyms used herein are the same as those in Appendix B of Decision No. 44.

[2] To the extent that this reply might otherwise be deemed to constitute an impermissible reply to a reply, we seek leave to file in order to address two factual issues that were raised for the first time in the filings to which we respond in order to provide the Board with a complete and accurate record.

October 1 report states that UP/SP had "negotiated with shippers regarding the temporary service reductions" described in the report, Cyprus Amax and Twentymile did not agree to UP/SP's reduction of rail service from Twentymile's Energy, Colorado, mine to an export point at Eagle Pass, Texas -- one of the service reductions described. Cyprus Amax and Twentymile are correct that the reduction in service was not the result of a negotiated agreement. UP/SP did negotiate service reductions with certain of its customers, but the statement in the October 1 report was too broad. We apologize for this error.

UP/SP acted after discussing the need for the service reduction with Cyprus Amax and Twentymile and after exploring potential ways to mitigate any potential harm to the companies and the affected customer. UP/SP has continued to work with Cyprus Amax and Twentymile to evaluate whether conditions justify increasing the current service levels and to explain UP/SP's current service difficulties to the affected customer in an attempt to help Cyprus Amax and Twentymile avoid contractual disputes with the customer.

Railco. Railco's comments, in large part, simply repeat claims regarding competition between Railco and Savage that Applicants have refuted in previous filings, and we will not waste the Board's time refuting them again here. Railco's only new point is to speculate that UP/SP's plan to divert certain coal business to BNSF might unfairly result in diversion of business from Railco to Savage. Railco's speculation has no basis in fact. The only coal shipments that UP/SP has agreed to divert [illegible] BNSF are shipments from Wyoming's Powder River Basin. None involves coal that might otherwise be shipped from Railco's facilities, which are located in Utah.

Respectfully submitted,

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October 23, 1997

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 23rd day of October, 1997, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760 (Sub-No. 21), and on

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Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

Michael L. Rosenthal

STB FD 32760 (Sub 21) 10-20-97 D 182844

182844

UP/SP-326

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
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APPLICANTS' REPLY TO BNSF QUARTERLY REPORT

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October 20, 1997

UP/SP-326

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY -- OVERSIGHT

APPLICANTS' REPLY TO BNSF QUARTERLY REPORT

Applicants UPC, UPRR, SPR and SPT[1/] respectfully submit this brief reply to BNSF's "Quarterly Progress Report" filed on October 1, 1997 (BNSF-PR-5). We realize that the focus of the Board and the parties at this time is on UP/SP's service problems, and we will be addressing those issues in our October 23 filing in Ex Parte No. 573. The purpose of this short reply is to address very briefly two other matters on which BNSF advanced new arguments in its October 1 filing.

"2-to-1" Facility List. At pages 7-11 of the Verified Statement of Peter J. Rickershauser submitted with BNSF-PR-5, various new and inaccurate claims are made about the process for refining the list of "2-to-1" facilities that BNSF is entitled to serve. We have already extensively addressed these issues and will not burden the Board with

[1/] Acronyms used herein are the same as those in Appendix B of Decision No. 44.

detailed retorts to every new BNSF assertion. We do wish to be clear, however, about four points.

First, it is not correct that a facility has to be on the "2-to-1" list in order for BNSF to move a car. BNSF cars are not held for this reason. Cars have often moved subject to resolving access and billing issues, and in many cases, such as the paired track in Nevada, it is absolutely clear, even though every last shipper facility is not listed and probably never will be, that BNSF is entitled to handle the traffic. BNSF cars have only been held when BNSF has completely failed to provide billing information (which has happened with some frequency).

Second, contrary to suggestions in the Rickershauser statement, whenever BNSF has needed a quick response in order to handle specific traffic, UP/SP has provided such a response. The specific situations referred to on page 9 of the Rickershauser statement were instances in which UP/SP did respond promptly to BNSF inquiries, and BNSF failed to follow up for substantial periods of time.

Third, the table at pages 7-8 of the Rickershauser statement is not an accurate portrayal of data as to agreed-upon "2-to-1" facilities. One of the categories in the table, reciprocal switching, apparently refers to new BNSF access to non-"2-to-1" shipper facilities served by other railroads at such points as New Orleans. UP/SP has nothing to do with the number and identification of these facilities. Also, UP/SP has not, as the table suggests, "removed" large numbers of facilities from the agreed "2-to-1" list. We do not know what BNSF intends by this heading, but if the intent is to refer to facilities that BNSF proposed and that UP/SP investigated and found were not "2-to 1" facilities, it is highly misleading to show them as "removed by UP." Remarks by Mr. Rickershauser that UP/SP has added facilities as the result of BNSF's "challenging UP's denial of such status," and that UP/SP "has withdrawn '2-to-1' status from over 100 shippers" simply do not accurately describe the process or the facts. BNSF has proposed new facilities and has demanded that UP/SP investigate each one. In the vast majority of cases, it has turned out that the facilities do not exist or are not "2-to-1" facilities. In those instances, the facility is never placed on the list in the first place; it is not, as BNSF suggests, "removed by UP" from the list. In the few instances where UP/SP has found that a facility should be added to the list -- almost always involving dormant facilities or facilities that have shipped only tiny amounts of traffic in recent periods -- it has been added to the list. In those instances, the listing has occurred as the result UP/SP's good faith research efforts, not as the result of some BNSF "challenge" to an improper "denial" of listing by UP/SP.

Finally, it is not true that the tariff listings that BNSF used as a source for proposing additional facilities to be added to the "2-to-1" list were current. While the tariff itself is current, many of the specific shipper facilities about which BNSF inquired had long since ceased using rail service (some as long as 15 years ago), and consequently, had been removed from the tariff.

Eagle Pass Service. BNSF also asserts, at pages 19-20 of the Verified Statement of Ernest L. Hord, that its traffic is being discriminated against by UP/SP at Eagle Pass. We are mystified by this claim. UP/SP had received no complaints about this matter prior to the BNSF filing. We have inquired of the UP/SP personnel on the spot, and they advise that, far from disadvantaging BNSF traffic, UP/SP has worked with BNSF and the Mexican railway to speed the movement of BNSF cars across the border at Eagle Pass. The Mexican railway, not UP/SP, decides what traffic to receive at any particular time, based on the number of cars tendered and its own available track space. UP/SP has often agreed to place later-arrived BNSF movements ahead of UP/SP traffic, has agreed to combine BNSF and UP/SP traffic into single movements to hasten their transit into Mexico, has assisted BNSF in switching cars when not required to do so, and has assisted BNSF with customs clearance procedures. BNSF cars are sometimes delayed because, although traffic is required to be pre-cleared in order to cross the border, BNSF cars are tendered without pre-clearance. We understand that a Board investigator interviewed individuals in Eagle Pass approximately a month ago, and concluded that there was no basis for BNSF complaints.

Respectfully submitted,

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October 20, 1997

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 20th day of October, 1997, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760 (Sub-No. 21), and on

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STB FD 32760 (Sub 21) 10-14-97 D 182597

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STB

October 14, 1997

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Mr. Vernon A. Williams
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ATTN: STB Finance Docket No. 32760 (Sub-No. 21)
Surface Transportation Board
Suite 700
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Washington, D.C. 20006

Re: Finance Docket No. 32760 (Sub-No. 21), *Union Pacific Corporation, et al. -- Control & Merger -- Southern Pacific Rail Corporation, et al. Oversight Proceeding*

Dear Secretary Williams:

Enclosed for filing in the above captioned proceeding are the original and twenty-six copies of KCS-4/TM-4, The Reply Comments Of The Texas Mexican Railway and The Kansas City Southern Railway Company. Please date and time stamp one of the copies for return to our offices. Included with this filing is a 3.5 inch Word Perfect, Version 5.1 diskette with the text of the pleading.

ENTERED
Office of the Secretary
OCT 16 1997
5 Part of Public Record

Sincerely yours,

William A. Mullins
Attorney for The Kansas City Southern Railway Company

cc: Robert K. Dreiling, Esquire
Erika Z. Jones, Esquire
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0006099.01

KCS-4
TM-4

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY --CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

OVERSIGHT PROCEEDING

REPLY COMMENTS OF THE TEXAS MEXICAN RAILWAY AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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October 14, 1997

KCS-4
TM-4

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
--CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER
AND RIO GRANDE WESTERN RAILROAD COMPANY

OVERSIGHT PROCEEDING

REPLY COMMENTS OF THE TEXAS MEXICAN RAILWAY AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY

INTRODUCTION

On October 1, UPSP[1] and BNSF[2] submitted their fifth quarterly progress reports, UPSP-323 and BNSF-PR-5, which are required by Decision No. 44, ¶ 10. UPSP's report references certain actions with respect to The Texas Mexican Railway Company ("Tex Mex") and The Kansas City Southern Railway Company ("KCS"). Some of those references and factual assertions are simply inaccurate. Furthermore, while both UPSP and BNSF have submitted "plans" for relieving the crisis situation faced by numerous shippers and the rail industry because

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[1] Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company are referred to collectively as "UPSP."

[2] "BNSF" refers to the entity created by the merger of the BN and the ATSF. *See Burlington Northern Inc. & Burlington Northern R.R. -- Control and Merger -- Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry.*, Finance Docket No. 32549 (ICC served Mar. 7, 1995).

of UPSP's congestion and merger implementation problems, these "plans" do not adequately address the crisis. These reply comments are submitted to clarify the record with respect to some of the inaccurate statements made in the recent quarterly reports and to address UPSP's rail service crisis.[3]

ARGUMENT

I. THE PROGRESS REPORTS LACK MEANINGFUL INFORMATION AND IN SOME CASES ARE MISLEADING

Although the UPSP report contains a great deal of information about tonnages, volume counts, etc., that information is not really meaningful or useful to the Board, shippers, and other parties in the absence of established, objective standards by which the effects of the merger on service and competition can be measured. Furthermore, there are no procedures in the oversight process for determining the accuracy of the information. As a result, the UPSP report proffers numerous charts and statistics in support of the proposition that the conditions imposed by the Board are working well and providing competition. On the other hand, the BNSF report coveys the very different message that "UPSP is not properly implementing certain aspects of the Board's conditions and that those actions are further impeding BNSF's ability to provide service at the level shippers have a right to expect." BNSF-PR-5 at 3 & 4.

Without some established and objective standards, it is virtually impossible for the Board or other parties to judge which of these very different messages is correct. Moreover, in the absence of such standards, both the UPSP and the BNSF reports shed little light on how BNSF competes with UPSP in those parallel markets where BNSF received trackage rights or how

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[3] These comments are intended to reply to specific issues raised in the most recent BNSF and UPSP progress reports and are not intended as a substitute for KCS's or Tex Mex's comments and written statements in *Rail Service In The Western United States*, Ex Parte No 573 (STB served Oct. 2, 1997). KCS and Tex Mex applaud the Board's adoption of the Ex Parte No. 573 proceeding.

BNSF's traffic volumes compare with SP prior to the merger. Nor is there any evidence of how BNSF compares to UPSP in the corridors that saw a reduction from "2-to-1." More pertinently, neither UPSP's nor BNSF's progress reports reveal how each compares to the other. The only information reported is the extent to which BNSF's volumes or tonnage has increased. For instance, it is not a meaningful comparison to simply say that the carloads on BNSF trackage rights trains increased from 18,781 in May to 22,630 in August, UPSP-232 at 2, if, pre-merger, SP was running 100,000 carloads in those same corridors, or correspondingly, post-merger, UPSP was running 200,000 carloads in those same corridors and increasing at 50,000 carloads a month.

KCS therefore urges the Board, as it did in KCS-2 filed herein on August 1, 1997, to establish clear, objective standards by which the Board and the public will be able to judge the extent which the conditions imposed by the Board have or have not preserved effective competitive rail service after the merger. KCS strongly believes that the market share analysis proposed in KCS-2 under "The Standard" would be the best mechanism for that purpose. In any event, the need for some objective standard is unequivocally supported by the comments of numerous parties in this proceeding.

Unfortunately, there are no mechanisms in this proceeding to verify the accuracy of the information produced. There is no document depository containing the workpapers and back-up information; no traffic tapes have been made available to the public to verify the accuracy of the information; no witnesses have been offered for deposition; and there is no attempt to adjust the information for standard economic factors, such as seasonal or economic growth factors. Indeed, the UPSP report contains neither verified statements nor a verification from anyone within UPSP that attests to the facts contained therein. Nor does it contain a mechanism by which the Board can measure whether UPSP's "Service Improvement Plan" is actually being implemented and working.[4]

The lack of complete information contained within the current UPSP report is clearly exhibited in some of the statements made about Tex Mex and KCS. UPSP states that, "Tex Mex has advised that it intends to add six new trackage rights trains per week between Houston and Corpus Christi beginning in early October. Tex Mex has indicated that these new trains will handle traffic to and from shippers served by the Port Terminal Railroad Association." UPSP-323 at 7. In fact, Tex Mex has been unable to determine that anyone "advised" UPSP, nor the basis for UPSP's making that statement. Given that Tex Mex is having enough difficulties moving its own trains over the trackage rights due to the UPSP congestion problems, the addition of new trains is inconceivable without further structural and operational changes.

Another example of misleading or incomplete information relates to KCS's movement of UPSP grain trains to the Gulf coast. On September 24, 1997, UPSP and KCS entered into a haulage agreement whereby KCS was to handle two loaded grain trains per day for UPSP's account between Kansas City, Missouri and Beaumont, Texas and two returning empty trains per day, to complete the cycle. Thus, UPSP is correct that KCS has agreed to move UPSP grain trains between Kansas City and the Gulf Coast. UPSP-323 at 16 & 23. However, in the two week period following September 24, UPSP has given KCS only 4 loaded and 3 empty trains.

Furthermore, despite UPSP's purported willingness to work with KCS to move these trains, its actions tell another story. On at least two occasions UPSP advised KCS that it could

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[4] This similar point was recently reemphasized in an October 8 letter from Edward M. Emmett, President, National Industrial Transportation League, to Chairman Morgan where Mr. Emmett requested the Board to "implement a system of measurements that will allow the Board to follow trends in rail service in the affected area. Otherwise, how will the Board know if service is improving or deteriorating?"

not forward a train to KCS due to a lack of power, so KCS offered to provide the power. Yet, in both instances, UPSP rejected KCS's offer of power. Thus, UPSP's assertion that "UP/SP is shuttling grain trains between Kansas and Nebraska and Iowa origins and Kansas City for movement south on KCS to avoid congestion on UP/SP lines between Kansas City and Texas points," UPSP-323 at 16, actually describes more of a wish than a reality, especially given UPSP's inability to give KCS more than 4 loaded trains. Notwithstanding UPSP's actions, KCS and Tex Mex continue to stand ready to handle this and other UPSP traffic on a haulage basis in order to relieve congestion on the UPSP system.[5]

It is clear that the information provided in the quarterly progress reports falls far short of providing the Board with the data necessary for the Board to make a meaningful judgment on whether its conditions "have effectively addressed the competitive issues they were intended to remedy." As stated above, this is true in spite of the fact that the Board stated in Decision No. 1 of this oversight proceeding, that "we fully expect that the information presented by UPSP in their July 1 progress report will be more extensive, including specific details of how each condition has been met." Decision No. 1 at 6. The Board needs to do more that "expect" and needs to adopt methods by which outside parties can test statements made in these progress reports and a means by which the Board can measure whether UPSP's service is in fact improving.

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[5] UPSP also touts the fact that it is working "with TFM to maximize the number of cars UP/SP can deliver to Mexico each day" and cites to the 850 cars interchanged in one day. UPSP-232 at 29. UPSP failed to disclose, however, that Tex Mex voluntarily offered, and did in fact, stop moving cars for its own account and indeed, shut down its own system in order for UPSP to take those 850 cars.

II. THE CONGESTION AND SERVICE PROBLEMS MUST BE QUICKLY RESOLVED AND NEITHER UPSP NOR BNSF CAN BE RELIED UPON TO RESOLVE THEM

To a large extent, both UPSP's and BNSF's progress reports focus, not upon the competition between the two of them, but upon the severe congestion and service problems facing UPSP's system. UPSP offers its "Service Recovery Plan" as the ultimate solution and utilized its report to attack the plans offered by others. However, the Board should not consider UPSP's plan to be the "know all, cure all" answer to the crisis. BNSF has also presented a plan that the Board should consider in formulating a remedy.[6] And Tex Mex and KCS hereby offer the Board their modest plan as an ingredient in that mix.[7]

A. The Congestion And Service Crisis Cannot Be Resolved By UPSP Alone

UPSP first addressed its "congestion problem" in its July 1, 1997, quarterly report to the Board, wherein it assured the Board that it was implementing operating practices that would relieve the problem. UPSP-303 at 11-14. It again addressed the problem in its August 20, 1997, filing, UPSP-311 at 86-93, again assuring the Board that "the problem was being addressed and would be resolved." Now, three months later, UPSP refers to "congestion problems that [the merged system] has faced in recent months," UPSP-323 at 2, and advises the Board that during the six day period between September 18 and 23, 1997, apparently finally having realized the

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6 In mid-September, BNSF circulated among the members of three major shippers' organizations a plan to relieve congestion in the Gulf Coast area. BNSF's plan is described in its October 1, 1997, Quarterly Progress Report. *See* BNSF-PR-5, V.S. Hord. Although the BNSF plan is somewhat overreaching, it is consistent with some of the proposals BNSF, Tex Mex and KCS had jointly considered.

7 Tex Mex and KCS have submitted to the shipping public a proposal for assistance that would afford those shippers alternative routing options away from the most congested parts of the UP/SP system, principally in the Houston, Texas terminal area; on that portion of UP/SP's "Sunset Route" extending between Houston and Flatonia, Texas; in the New Orleans terminal area; and in the corridors extending between Houston and the New Orleans, Memphis, and St. Louis gateways. *See* "Tex Mex/KCS Gulf Coast Congestion Relief Plan" attached hereto as Exhibit A.

severity of the problem, it conducted "the most intensive service review in memory" wherein "UP/SP officials and managers devoted September 18th through the 23rd to studying UP/SP's problems and devising solutions to address them." UPSP-323 at 11. As a result of this review, it now submits a "Service Recovery Plan" to the Board and implores the Board's indulgence while it takes up to another 90 days to fully implement it. UPSP-323, at 14. In spite of UPSP's earlier comments and apparent realizations that a problem was occurring, UPSP did not initiate a study to determine the true cause and develop a possible cure for the problems until September 18, 1997. The proposed plan now comes over 60 days after the problem first began to occur.

A partial explanation for UPSP's belated realization that it has created a national transportation crisis requiring drastic remedies is UPSP's obvious reluctance to shoulder any responsibility for the mess, as evidenced by its explanation of the tardiness:

> UP/SP reaffirms its conclusion that the problems, which began in areas where the merger had not yet been implemented and its efficiencies could not be realized, were not merger related. UP/SP continues to gain a deeper understanding of the fundamental frailty of SP prior to the merger, resulting from more than a decade of financial deprivation. Tracks, yards, locomotives, personnel, information systems and other resources were all starved. The July 1 and August 20 reports described the factors, such as a surge in chemicals and plastics traffic and the imposition by BNSF of operational restrictions on a pivotal section of SP's Sunset Route, that precipitated the service problems.
>
> Were it not for the time-consuming New York Dock negotiation process that delays actual merger implementation, the service crisis probably would never have arisen . . . .

UPSP-323 at 9-10. The Board should take, with the proverbial grain of salt, UPSP's effort to fault others for their problems.

For example, BNSF, in its October 1 Progress Report describes a problem situation that is totally the product of UP's post-merger decision to alter SP's pre-merger operations. At page 5 of its Progress Report, BNSF states:

Until very recently, UP and BNSF had continual interface problems moving shipments to or from customers located on the former SP Baytown Branch, which is currently switched by UP. The result was than many shipments that should have moved to Dayton for interchange with BNSF were instead being diverted by UP to Englewood Yard. Shippers were denied service or suffered unreasonable delays as the traffic had to be returned to BNSF at Dayton or, at a minimum, rerouted to BNSF at an inefficient interchange point. This misdirected traffic has compounded the congestion problems at UP's Englewood Yard. While there has been some improvement in the situation recently, it is far from clear that the problem has been solved for the long term.

BNSF-PR-5 at 5 and V.S. Hord at 3.

BNSF's report does not reveal that the decision to move the Baytown Branch traffic directly to Engelwood Yard, rather than avoiding that yard by interchanging the traffic at Dayton, <u>was a UP decision, made subsequent to the merger and in direct conflict with more efficient operations in place on the SP prior to the merger.</u> Prior to the merger, SP switched its Baytown Branch traffic to its Dayton Yard. At its Dayton Yard, that traffic was placed directly in eastbound or westbound SP road trains and thereby avoided the heavily used Englewood Yard facility. UP's management changed that practice and instead, directed all of that traffic into what now is a gridlocked Englewood Yard facility. UP cannot contend that this was SP's fault, unrelated to implementation of their merger and it calls to question UPSP's general assertion that these are SP problems, unrelated to their implementation of the merger.[8]

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[8] UP eliminated terminal operations at another SP satellite facility at Houston that the SP had used to allay capacity problems at Englewood Yard. Both Englewood and SP's Strang Yard are "hump" yards, which are used to make up and break up trains. The Strang facility is just north of SP's "Bayport Loop", a track on which approximately 40 industries are situated, and is immediately south of the Houston Light and Power ("HLP") Lead. Prior to consummation of the merger, SP had utilized the hump facility at Strang Yard to make up trains from outbound cars from the industries on the Bayport Loop and the HLP Lead. These trains would then bypass Englewood Yard and move westbound and eastbound directly out of Houston. SP's use of the Strang yard to make up these trains allowed between 300 to 400 daily cars to bypass Englewood Yard. Similar to their change involving the Dayton Yard, after the merger, UP chose to eliminate the "humping" operations at Strang Yard and to combine those functions with the existing "humping" operating at Englewood. UP thereby avoided fairly high labor costs resulting from a special agreement effective on the Strang Yard operations, but did so at the cost of operating efficiency, or, as it turned out, operating gridlock. UP has reportedly realized its

Similarly, Applicants' assertion that the service crisis "probably would never have arisen . . . [w]ere it not for the time-consuming New York Dock negotiation process that delays merger implementation" is of questionable credence. UPSP would have us believe that this negotiation process always takes better than a year for all mergers. However, the procedures established under *New York Dock*[9] specifically provide against such inordinate delays. Under the procedures set forth in Article I, Section 4 of the *New York Dock* conditions, an implementing agreement can be negotiated (or established through arbitration) in a 90 day period, which nearly coincides with the required 90 day notice to the unions of an intended transaction. The *New York Dock* procedures provide a strict time frame for the request for negotiations (5 days); the period for actual negotiations (30 days); the selection of a neutral referee (5 days); the commencement of a arbitration hearing (20 days); and the rendition of a final arbitration decision (30 days). Either party has the right to insist upon strict adherence to this 90 day time frame.

Any failure to take advantage of this expedited time frame for putting in place an implementing agreement would be at the option of one or both of the parties. UPSP apparently chose to rely upon the negotiation process and not to commence arbitration after 30 days of negotiation. Thus, UPSP could have obtained an implementing agreement within 90 days of giving the unions notice of the merger transaction. They should not be heard to place the fault for their problems on the *New York Dock* negotiation process.

Although criticism of UPSP's efforts to resolve its problem could be counter-productive, ignoring the gravity of this crisis and blindly relying upon UPSP to define and resolve the

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error and is now in the process of shifting some of the "humping" operation back to reportedly Strang Yard.

[9] *See New York Dock Railway – Control – Brooklyn Eastern District*, 360 ICC 60 (1979)("*New York Dock*").

problem, under the circumstances, is not warranted, especially in light of UPSP's failure to credibly perceive the true reasons for its service crisis, as discussed above. Tex Mex and KCS both urge a resolution of UPSP's problems as quickly as possible and are holding themselves out to assist in the crisis.

B. The Joint KCS/Tex Mex Proposal Would Help Alleviate Some Of The Congestion And Service Problems

While certain aspects of the BNSF proposal have merit, the bulk of BNSF's proposal simply shifts control of the congested rail lines from UPSP to BNSF with no explanation of how this shift will relieve congestion on those lines. For example, BNSF's proposal to dispatch the former SP routes between Houston and Memphis and Iowa Junction to Houston involves a complicated procedure that may not be easily implemented. As a result, shippers would need significant assurances that all factors would be addressed, such as concerns about service, competitive options, and improved car supply.

The joint KCS/Tex Mex proposal avoids such problems, while at the same time, attempts to cooperate with both BNSF and UPSP. The only stark inconsistency between the BNSF proposal and the joint KCS/Tex Mex proposal involves trackage rights to Caldwell, Texas. BNSF proposes that it be granted trackage rights over UPSP's line from Caldwell to Flatonia and then to Bloomington, Texas, in order to connect with Tex Mex at Robstown. Because Tex Mex currently has trackage rights between Flatonia and Bloomington, BNSF's proposal would put a third railroad in that segment. The KCS/Tex Mex proposal would simply extend Tex Mex's current trackage rights from Flatonia to Caldwell, which would serve the same purpose of rerouting Mexican bound traffic away from Houston, but without introducing a third carrier on the line between Flatonia and Bloomington.

Tex Mex and KCS have discussed with BNSF the concept of Tex Mex's extending its trackage rights to Caldwell, and in the course of those discussions, BNSF has agreed to the concept. This specific proposal would have a significant, beneficial effect upon the congestion problem because it would allow BNSF/Tex Mex to interchange traffic moving between the upper Midwest and the Laredo Gateway to bypass the congested Houston terminal.

Other aspects of the KCS/Tex Mex proposal are also generally consistent with BNSF's proposal. The shift of Tex Mex's trackage rights operations south of Houston from the Flatonia route to the Algoa route would remove Tex Mex trains from UPSP's "Sunset Route," which UPSP describes as being "severely congested." UPSP-323 at 16. The shift from the Flatonia route to the Algoa route could be achieved without a significant increase in train traffic if Tex Mex was allowed to handle BNSF's traffic south of Houston on a contract basis. The fact that Tex Mex, at UPSP's request, currently handles UPSP trains over the Algoa route argues favorably for its feasibility. Again, this is a concept that KCS, Tex Mex, and BNSF agreed to in principle during earlier discussions.

Another aspect of the proposal would allow Tex Mex to serve Houston shippers for northbound traffic to be interchanged with KCS at Beaumont. As a result, those shippers would have an additional routing option to and from the Mississippi gateways that largely avoids the congested UPSP system between Houston and those gateways. BNSF utilizes much of the UPSP system in its operations between Houston and the Mississippi gateways. Furthermore, BNSF cannot avoid the currently very congested New Orleans gateway. A KCS routing over Beaumont avoids most of the UPSP system, and because KCS serves Jackson, Mississippi, an interchange point with the Illinois Central; Meridian, Mississippi, a convenient interchange point with Norfolk Southern; and Birmingham, Alabama, where it can interchange with CSX, a Tex

Mex/KCS routing can avoid the New Orleans gateway. Again, the key advantage of this part of the KCS/Tex Mex proposal is that it gives shippers routing options that take traffic off of UPSP, and it thereby serves as a relief valve to congestion on the most congested parts of that system.

BNSF proposes the expansion of the switching limits of the Port Terminal Railroad Association ("PTRA") in Houston. BNSF-PR-5, V.S. Hord, at 4. Tex Mex and KCS support such a move toward a neutral switching agency for all shippers in the Houston metropolitan area with the additional proposal that the neutral switching agency be allowed to interchange traffic with all rail carriers serving Houston, including Tex Mex. That additional feature would further expand shippers' alternative routing options outside of the congested UPSP system.

UPSP's assertion that KCS proposes divestiture at this time is simply inaccurate. While the joint KCS/Tex Mex proposal also stresses that the current crisis bespeaks the need to reconsider the question of divestiture, rather than trackage rights as a method of conditioning rail mergers, that consideration calls for more time than the current crisis allows. KCS and Tex Mex are fully cognizant of the need for immediate fixes and will support any such temporary methods to achieve a solution.

C. The Current Congestion Crisis Is Also Harming Tex Mex's and KCS's Abilities to Serve Their Customers

As parts of the national rail infrastructure, Tex Mex and KCS are also suffering the same types of damages from the UPSP service crisis that shippers are experiencing, and thus any remedy must alleviate harms to both shippers and carriers. For example, as a result of the UPSP's inability to return KCS cars for service to KCS's shippers, KCS is currently suffering a car shortage on its own system, and it is having to forgo revenue loads because its rail cars are marooned on the UPSP. Thus, KCS shippers are having to utilize alternative means of transportation at higher costs, not because of KCS, but because of UPSP. KCS is also experiencing service disruptions of its own at its Kansas City, Texarkana, and Shreveport terminals because of delays or total failures in UPSP's receiving interchange traffic from KCS at those stations.

Other areas of the KCS system are suffering even more. KCS relies on UP train service to conduct its "North End" haulage rights operations between Omaha/Council Bluffs and Kansas City. Those operations have been seriously disrupted since the UPSP merger. When KCS has attempted to relieve the situation on the North End by contributing more locomotive units to the locomotive pool established for those operations, either those locomotives cannot be manned because of insufficient UPSP crews, or in some instances, they have been converted by UPSP for use in train service elsewhere on UPSP's system. Either way, KCS's trains do not move, even though KCS has the power and the crews to move the trains.

The severe congestion and deterioration of service on the UPSP system in Texas has largely nullified any benefits that the shipping public would otherwise be experiencing from the trackage rights that the Board granted to Tex Mex in Decision No. 44. After steadily building up the number of trains operated by Tex Mex on those trackage rights between Corpus Christi and Beaumont to a high of 24 in March, 1997, the number of trains has steadily declined to 18 in July, the most recent month for which figures have been compiled.

Even more damaging than the reduction in number of trains has been the devastating increase in transit times and delays. In the comments it filed on August 1, 1997 in TM-2 in this proceeding, Tex Mex noted that in the previous four months, the average transit time for Tex Mex trains between Corpus Christi and Beaumont had gone from approximately 36 hours to more than 72 hours. The situation has not improved since then. Because hours-of-service regulations prohibit train crews from operating more that 12 consecutive hours, these delays have caused further delays to Tex Mex trains resulting from the necessity of stopping trains and changing crews at other than normal crew change points. Normally, a Tex Mex train operating between Corpus Christi and Beaumont requires three crews. In recent months, Tex Mex has frequently had to make six crew changes on a single train between those points, and on several occasions seven crew changes. In July, 13 of Tex Mex's 18 trains operating between Beaumont and Corpus Christi -- 72%-- experienced hours-of-service tie ups. In recent weeks, all of Tex Mex trains have experienced such tie ups. Obviously, no railroad can run an efficient, profitable or competitive service under those circumstances.

UPSP's problems have also had a serious adverse effect on international rail traffic interchanged at Laredo between Tex Mex, UPSP and TFM, the newly established private railroad operating the line between Laredo and Mexico City, which is affiliated with Tex Mex and KCS. In their progress report, UPSP has alluded to "the transition to a privatized rail system in Mexico" (which is TFM) as a cause of the decline in both UPSP and Tex Mex traffic volumes at Laredo since May of this year. UPSP-323 at 6. This is an inaccurate implication, however, because any problems that TFM has experienced in interchanging rail traffic over the International Bridge at Laredo has been overwhelmingly due to UPSP congestion at Laredo and in south Texas, rather than the other way around. Of course, service disruptions suffered by TFM will also have an adverse effect upon KCS and Tex Mex traffic being handled across the International Bridge.

To relieve the growing congestion at Laredo, in June 1997, Tex Mex offered to reroute northbound trains that UPSP was unable to handle over Tex Mex's line from Laredo to Robstown and, thence, over its trackage rights over UPSP to Houston. Three months later, on September 15, 1997, UPSP finally indicated its willingness to accept Tex Mex's offer. Since

VERIFICATION

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

A.W. Rees, being duly sworn, deposes and says that he is the Senior Vice President - Operations of The Kansas City Southern Railway Company; that he has knowledge of the matters contained in the foregoing Reply Comments of The Kansas City Southern Railway Company and the Texas Mexican Railway Company; and that the statements made in those Reply Comments are true and correct to the best of his knowledge and belief.

AW Rees

A.W. Rees

Subscribed and sworn to before me this 13th day of October, 1997.

Julie A. Robinson

Notary Public

My Commission Expires:

then, Tex Mex has provided crews and locomotive power to haul UPSP trains between Laredo and Houston. On September 16, 1997, UPSP asked Tex Mex to handle its trains over its route between Robstown, Texas and Houston via Algoa rather than Tex Mex's trackage rights route via Victoria and Flatonia, Texas.

D. Any Proposed Remedy Must Resolve The Harm To Both Shippers And Carriers

Although rail carriers may face one another as competitors with respect to certain traffic, to a very large extent, rail carriers also are part of the national rail infrastructure wherein they interline traffic with one another and share their rail cars as part of a flowing national car fleet. Thus, to the extent that loaded cars are delayed on trains sitting in sidings or terminals on the UPSP system, all rail carriers who are involved in the interline transportation of those cars are damaged. To the extent that any cars, empty or loaded, are marooned on UPSP, the owner of the cars is damaged because it is unable to utilize its cars to protect loadings on its system and, as a result, loses revenues from such loads. To the extent that UPSP is unable to receive carloads in regular interchange, those cars have to be held in the terminals of the interchanging railroads, thereby introducing congestion to those carriers' systems. Finally, to the extent UPSP's inability to meet the transportation needs of its shippers results in those shippers' disenchantment with rail transportation and their shifting to other modes, all railroads are damaged. Accordingly, regardless of the merits of the UPSP plan, the BNSF plan, or the KCS/Tex Mex plan, any proposed remedy, by necessity, must involve the cooperation and coordination of all carriers, which cannot be achieved unless all carriers are included in the dialogue and in fashioning the solution.

Additionally, the Board must not rely exclusively on remedies crafted by railroads. The Board should consider the need for the development of a recovery strategy based upon the perceptions and needs of those most seriously impacted, the shipping public, and its implementation by someone other than those responsible for creating the crisis. The shippers are favorably positioned to devise portions of the remedy that will best serve their immediate needs, and it is their voice that should be the final arbiter of the relative merits of each proposal. One thing is clear, however. The remedy must be effective and prompt, even though it may be painful, and it cannot be one voluntarily adopted and implemented solely by UPSP.

CONCLUSION

The evidence currently available indicates that due to the lack of meaningful data, the Board should continue its oversight of the operations of both UPSP and BNSF to insure that the competitive harms resulting from the merger are alleviated by the conditions imposed in Decision No. 44. In effecting this oversight, the Board should adopt an objective standard by which BNSF's competitiveness could be measured and adopt means by which parties, and the Board, may verify the information in those reports.

In examining the various congestion relief proposals, the Board must not rely exclusively on remedies crafted by railroads. The Board should consider the need for the development of a recovery strategy based upon the perceptions and needs of those most seriously impacted, the shipping public. Furthermore, the implementation of any such recovery program cannot be unilaterally adopted and carried out solely by UPSP. The remedy must be quickly implemented and must involve a dialogue among shippers and carriers.

Respectfully Submitted,

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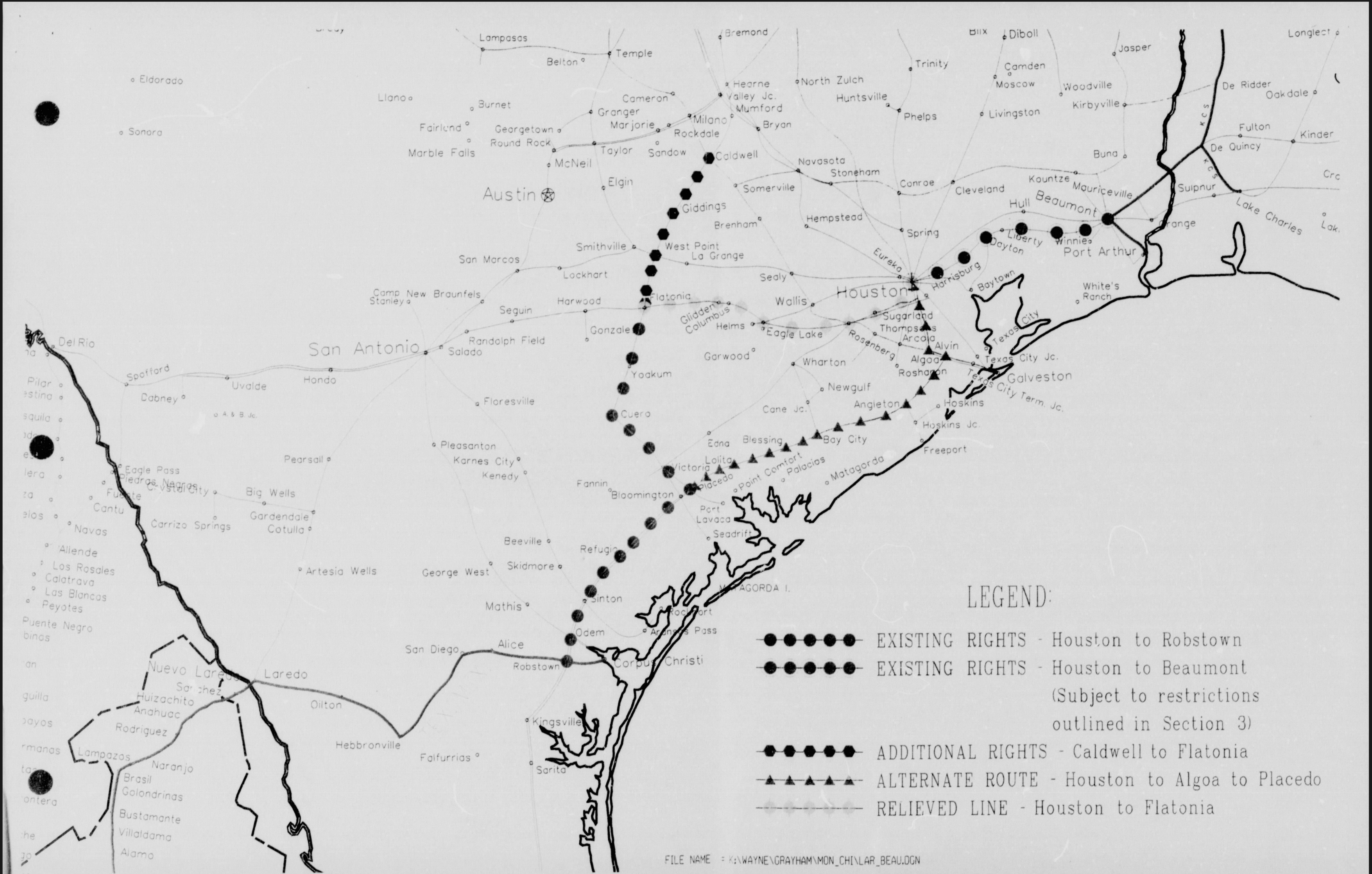

LEGEND:
EXISTING RIGHTS - Houston to Robstown
EXISTING RIGHTS - Houston to Beaumont (Subject to restrictions outlined in Section 3)
ADDITIONAL RIGHTS - Caldwell to Flatonia
ALTERNATE ROUTE - Houston to Algoa to Placedo
RELIEVED LINE - Houston to Flatonia
FILE NAME = K:\WAYNE\GRAYHAM\MON_CHI\LAR_BEAU.DGN
Lampasas
Temple
Belton
Bremond
Diboll
Jasper
Longlect
Eldorado
Llano
Burnet
Hearne
Valley Jc.
Mumford
Cameron
North Zulch
Trinity
Camden
Moscow
Woodville
Kirbyville
De Ridder
Oakdale
Huntsville
Phelps
Livingston
Sonora
Fairland
Marble Falls
Georgetown
Round Rock
Granger
Marjorie
Milano
Rockdale
Bryan
Taylor
Sandow
Caldwell
McNeil
Elgin
Navasota
Stoneham
Conroe
Cleveland
Kountze
Mauriceville
Buna
Fulton
De Quincy
Kinder
Sulphur
Lake Charles
KCS
Austin
Somerville
Giddings
Brenham
Hempstead
Spring
Hull
Beaumont
Orange
Liberty
Dayton
Winnie
Port Arthur
Smithville
West Point
La Grange
San Marcos
Lockhart
Eureka
Houston
Harrisburg
Baytown
White's Ranch
Sealy
Wallis
Flatonia
Camp Stanley
New Braunfels
Seguin
Harwood
Glidden
Columbus
Helms
Eagle Lake
Sugarland
Thompsons
Arcola
Rosenberg
Alvin
Algoa
Rosharon
Texas City
Texas City Jc.
Galveston
Texas City Term. Jc.
Del Rio
Gonzales
Randolph Field
San Antonio
Salado
Spofford
Uvalde
Hondo
Cabney
Garwood
Wharton
Newgulf
Yoakum
Floresville
A. & B. Jc.
Cane Jc.
Angleton
Hoskins
Hoskins Jc.
Cuero
Edna
Blessing
Bay City
Freeport
Pleasanton
Pearsall
Karnes City
Kenedy
Lolita
Victoria
Placedo
Point Comfort
Palacios
Matagorda
Eagle Pass
Piedras Negras
Crystal City
Big Wells
Fannin
Bloomington
Port Lavaca
Cantu
Navas
Carrizo Springs
Gardendale
Cotulla
Seadrift
Allende
Los Rosales
Calatrava
Las Blancas
Peyotes
Puente Negro
Artesia Wells
George West
Beeville
Skidmore
Refugio
Matagorda I.
Sinton
Mathis
Rockport
Odem
Aransas Pass
San Diego
Alice
Robstown
Corpus Christi
Nuevo Laredo
Laredo
Sanchez
Huizachito
Anahuac
Rodriguez
Oilton
Hebbronville
Kingsville
Falfurrias
Sarita
Lampazos
Naranjo
Brasil
Golondrinas
Bustamante
Villaldama
Alamo

2. Relieve UP Mainline Congestion by Shifting Tex Mex Trackage Rights to an Alternate Route

The Tex Mex should be granted trackage rights from Houston to Robstown on the shorter route, which begins south of Houston at Algoa (BNSF would need to grant Tex Mex additional trackage rights over its line between Houston and Algoa). This route is the same as BNSF's trackage rights route. The Tex Mex is willing to operate trackage rights on behalf of both parties between Houston and Robstown/Brownsville, to gain efficiencies. BNSF would retain its right to operate directly in the event Tex Mex fails to provide service at an agreed to level. By operating on the trackage rights from Algoa to Robstown, the Tex Mex would not operate between Houston and Flatonia, which is the UP/SP main line to San Antonio and also an Amtrak route. This proposal would reduce congestion on a very congested route and, therefore, would benefit Houston shippers. Again, Tex Mex and KCS, in discussions with the BNSF, have already reached an agreement in principal on this concept.

3. Expand Routing Options for Houston Shippers

The restriction on the Tex Mex to serve Houston should be lifted. The STB, in its UP/SP merger decision, limited the Tex Mex's access to Houston shippers. The decision limits Tex Mex to handling traffic for Houston shippers where traffic has a subsequent or prior move over the Tex Mex line between Corpus Christi and Laredo (e.g., Mexico traffic). The effect of this limitation is that the Tex Mex is prohibited from handling traffic which could be interchanged with KCS at Beaumont. This traffic would be flowing to or from Houston, to and from the north, northeast or southeast. By lifting this limitation, traffic that connects with KCS' uncongested system at Beaumont for all eastern gateways could avoid the congested UP/SP and BNSF systems.

4. Give Houston Shippers an Alternative to Routing via the UP/SP System by Extending PRTA Switching Limits

Tex Mex and KCS would support any extension of PTRA switching limits or other neutral switching arrangements at Houston, as proposed by BNSF. However, any extension must ensure that affected Houston shippers would have access to the routing alternatives provided by all the railroads serving Houston.

5. Evaluate Other Long-Term Solutions. Reconsider Trackage Rights as a Competitive Solution in the UP/SP Merger

The current problems associated with the implementation of the UP/SP merger, including BNSF's trackage rights operations, raise a question as to the effectiveness of trackage rights as a competitive tool. This problem warrants reconsideration of the need for a divestiture condition. Such a condition would ideally result in a structure similar to that worked out by NS and CSX in their acquisition of Conrail.

VERIFICATION

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

William J. Slinkard, being duly sworn, deposes and says that he is the General Superintendent of the Joint Agency of The Kansas City Southern Railway Company at Kansas City, Missouri; that he was employed by the Southern Pacific Transportation Company from November of 1963 until August of 1996, having served in the Houston terminal between August, 1994 through June, 1995; that during July and August of 1997, he was assigned to Houston as part of a Union Pacific team created to study the congestion problems in the Gulf Coast region; that he has knowledge of the matters contained in the foregoing Reply Comments of The Kansas City Southern Railway Company and the Tex Mexican Railway Company, to the extent that they related to descriptions of pre-merger and post merger operations in the Houston, Texas terminal; and that the statements made in those regards in those Reply Comments are true and correct to the best of his knowledge and belief.

William J. Slinkard

William J. Slinkard

Subscribed and sworn to before me this 13th day of October, 1997.

Julie A. Robinson

Notary Public

My Commission Expires:

JULIE A. ROBINSON
Notary Public - State of Missouri
Commissioned in Jackson County
My Commission Expires May 18, 1998

A

VERIFICATION

I, Patrick L. Watts, as Vice President-Transportation of the Texas Mexican Railway Company. I hereby certify under penalty of perjury that I have read the foregoing Reply Comments of the Texas Mexican Railway Company and the Kansas City Southern Railway Company, and, to the best of my knowledge, the statements of fact therein concerning the Texas Mexican Railway are true and correct. Executed this 14th Day of October, 1997.

Patrick L. Watts

Draft - 9/18/97

KCS/Tex Mex Gulf Coast Congestion Relief Proposal
September 18, 1997

Addressing Gulf Coast Congestion - Chronic congestion throughout the UP/SP system, including in the Gulf Coast, has disrupted shipper operations and hampered the ability of connecting railroads to satisfactorily service their shippers. UP/SP congestion has caused shippers to limit or shut down production and has resulted in extensive business losses. Because UP/SP has not been able to resolve its congestion problems and doesn't anticipate significant improvements through the remainder of the year, the shipping public must consider solutions which can be implemented quickly to address congestion problems.

Limitations of the BNSF Proposal - BNSF recently has circulated a document among Gulf Coast shippers and shipper organizations proposing a plan to relieve congestion in the Houston area. While certain aspects of the BNSF proposal have merit, the bulk of the proposal simply shifts control of the congested rail lines from UP/SP to BNSF without explaining how this shift will relieve congestion on those lines. BNSF's proposal to dispatch the former SP routes between Houston and Memphis and Iowa Junction to Houston involves a complicated procedure which may not be easily implemented. As a result, shippers would need significant assurances that all factors would be addressed such as concerns about service, competitive options, and improved car supply.

KCS/Tex Mex Proposal - KCS and Tex Mex recommend the following actions to address congestion problems. These actions could be implemented immediately without significant labor or regulatory problems.

1. **Divert Traffic out of Houston by Extending Tex Mex Trackage Rights From Flatonia to Caldwell, Texas**

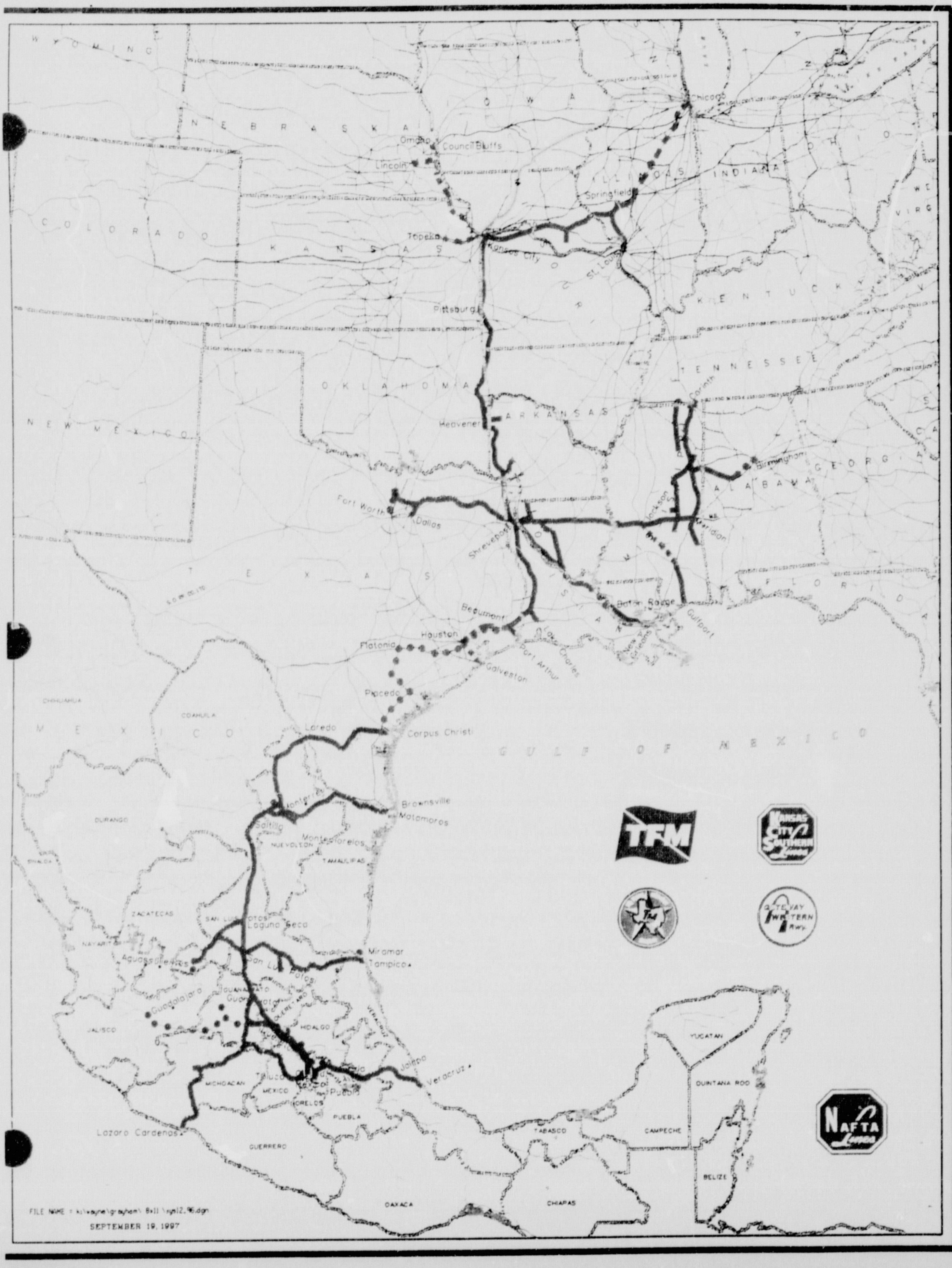
   Tex Mex should be granted trackage rights from Caldwell, TX to Flatonia, TX, where the Tex Mex has existing trackage rights to Robstown, TX.

   This proposal is similar to the BNSF proposal, however, due to the fact that the Tex Mex already has trackage rights from Flatonia to Robstown, it makes sense that the trackage rights from Caldwell that connect to Flatonia would be provided to the Tex Mex rather than the BN. This would avoid introducing an additional carrier on the Flatonia to Placedo part of the route. The primary benefit of the trackage rights from Caldwell to Flatonia is that BNSF traffic to and from Mexico, which currently has to go into Houston, would be able to avoid going into Houston. This proposal would reduce congestion and dispatch issues for the UP/SP. This concept, including the operation of these trackage rights by the Tex Mex, previously has been discussed with and conceptually agreed to by the BNSF.

In the negotiation process with CSX, NS refused to accept trackage rights and insisted upon ownership to assure its ability to compete and adequately serve its customers.

In the NS letter to all rail shippers dated October 29, 1996, titled *Balanced Rail Competition*, it states "If you do not own your own line, you do not control this investment, so you lack control over safety, efficiency, and service. In short, you cannot stay competitive."

Conclusion - The KCS/Tex Mex proposal details practical solutions which can provide immediate relief for shippers confronted by problems related to congestion on the UP/SP system. This proposal is intended to enhance competition and provide additional service options to shippers. It also points to the need to consider other solutions to provide a long-term remedy for congestion problems related to the UP/SP merger. KCS and Tex Mex are committed to working with shippers and shipper organizations to evaluate and implement short- and long-term solutions which will result in their mutual best interest.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BELIZE
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Kansas City Southern Lines
Gateway Western Rwy.
NAFTA Lines
SEPTEMBER 19, 1997

KCS-4
TM-4

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "REPLY COMMENTS OF THE TEXAS MEXICAN RAILWAY AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY" (KCS-4, TM-4) was served this 14th day of October, 1997, by hand-delivery, overnight delivery, or first-class mail in a properly addressed envelope with adequate postage thereon addresses to all known parties of record.

William A. Mullins
Attorney for The Kansas City Southern Railway Company

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October 10, 1997

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D

BY HAND

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, D.C. 20423-0001

Re: Finance Docket No. 32760 (Sub-No. 21), Union Pacific Corp., et. al. -- Control & Merger -- Southern Pacific Rail Corp., et al. -- Oversight

Dear Secretary Williams:

We previously wrote to point out two errata to UP/SP-323, filed October 1, 1997. Please note the following additional corrections, all on page 10. The sentence at lines 12-14 should read: "Were it not for the time-consuming process of merger implementation, the service crisis probably never would have arisen." The sentence at lines 16-18 should read: "But completing merger implementation requires several years, and the full merger benefits are too far into the future." And at line 20, a new paragraph should begin with the word "In."

Sincerely,

Arvid E Roach

Arvid E. Roach II

cc: All Parties of Record

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STB FD-32760 (SUB 21) ID-181691 9-3-97 D

18169

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September 3, 1997

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

Re: Finance Docket No. 32760 (Sub-No. 21)

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket, please find an original plus twenty-five (25) copies of Reply of The Burlington Northern and Santa Fe Railway Company To Comments Of United States Department of Agriculture (BNSF-3). Also enclosed is a diskette containing the text of BNSF-3.

Please date-stamp the enclosed extra copy and return it to the messenger for our files. Thank you for your time and attention.

Sincerely,

Kelley E. O'Brien

Kelley E. O'Brien

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Enclosures

cc: Parties of Record

BNSF-3

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY

-- CONTROL AND MERGER --

SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

**REPLY OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY TO COMMENTS OF
UNITED STATES DEPARTMENT OF AGRICULTURE**

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Richard E. Weicher
Janice G. Barber
Michael E. Roper
Sidney L. Strickland, Jr.

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Attorneys for The Burlington Northern and Santa Fe Railway Company

September 3, 1997

BNSF-3

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
— CONTROL AND MERGER —
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

REPLY OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY TO COMMENTS OF UNITED STATES DEPARTMENT OF AGRICULTURE

Pursuant to the Surface Transportation Board's Decision No. 5 in this sub-docket, served July 22, 1997, The Burlington Northern and Santa Fe Railway Company ("BNSF") submits the following reply to the Comments of the United States Department of Agriculture ("USDA") filed on August 15, 1997, regarding the Board's oversight of the Union Pacific/Southern Pacific ("UP/SP") merger.

INTRODUCTION AND SUMMARY

In Decision No. 1 in this sub-docket, the Board instituted this proceeding to implement the oversight condition imposed as a condition of the UP/SP merger and sought comments from interested persons on any effects of the merger on competition and the implementation of the conditions imposed to address competitive harms. BNSF filed both comments and a reply in accordance with Decision No. 1. BNSF-1 and BNSF-2.

In Decision No. 5, the Board granted USDA's request for an extension of time to file its comments. Pursuant to that Decision, USDA's comments were due on August 15, 1997, and reply comments are due on September 3, 1997.

On August 15, 1997, USDA filed its comments in which it asks the Board to address four concerns. BNSF will respond to USDA's first concern -- relating to rail movements from the lower Plains to the Gulf of Mexico ("Gulf") and exports to Mexico.[1/]

REPLY

USDA asserts that BNSF is not providing the kind of effective competition that the STB expected for grain movements from Kansas, Oklahoma, and Texas to the Gulf and Mexico. Comments, p. 4. However, as evidenced by the increase in BNSF grain traffic and the overall decrease in UP grain rates reported by UP, BNSF has offered vigorous and effective competition to UP for grain movements to the Gulf and Mexico.

For example, in June and July, 1997, BNSF carloads of hard red winter wheat ("HRW") from Texas, Oklahoma, Kansas, Colorado and Nebraska to the Gulf for export increased by 43% compared to June and July, 1996. During this same period, carloads

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1/ USDA's second and third areas of concern, relating to the Tex Mex haulage agreement and the use of the Central Corridor, were addressed by UP in its August 20 Reply to Comments. UP/SP-311. USDA acknowledges that its fourth area of concern is not directly related to the UP merger. As such, it should not be a subject of this oversight proceeding, and will not be addressed by BNSF in this reply.

of HRW from Texas, Oklahoma, Kansas, Colorado and Nebraska to all markets increased 35%. BNSF's wheat carloadings from Kansas alone increased 73% between July, 1996, and July, 1997.

Further, UP reports that, as a result of the aggressive competition from BNSF, it has had to lower its own grain rates on particular movements and that its systemwide grain rates are down since the merger. See UP-304, Conf. Apps. C and E. Moreover, BNSF has secured new Midwest grain traffic for export to Mexico or other international destinations by offering lower rates and/or better rate structures than UP offered the shipper. Id. Conf. App. B. Thus, BNSF is offering market-based rates for the movement of grain from the lower Plains to the Gulf, and those rates, while they may fluctuate in response to demand and the pressures of competition, are providing the competitive discipline the Board expected BNSF to provide with the [illegible] it received as a result of the UP/SP merger.

CONCLUSION

As the evidence submitted to the Board establishes, BNSF continues to offer vigorous and effective competition for grain movements out of the lower Plain states to the Gulf and Mexico, and USDA's expressed concerns as to this competition do not warrant action by the Board.

Respectfully submitted,

Erika Z. Jones /KEO

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and

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Schaumburg, Illinois 60173
(847) 995-6887

Attorneys for The Burlington Northern and Santa Fe Railway Company

September 3, 1997

VERIFICATION

THE STATE OF TEXAS)

COUNTY OF TARRANT)

Philip F. Weaver, being duly sworn, deposes and says that he has read the foregoing reply and that the contents thereof are true and correct to the best of his knowledge and belief.

Philip F. Weaver

Subscribed and sworn to before me on this 2nd day of September, 1997.

Margaret Aclin

Notary Public

My Commission expires: MARGARET ACLIN NOTARY PUBLIC STATE OF TEXAS My Comm. Exp. 04-25-2001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of The Burlington Northern and Santa Fe Railway Company To Comments Of United States Department of Agriculture was served this 3rd day of September, 1997, on all Parties of Record in Finance Docket No. 32760 (Sub-No. 21).

Kelley E. O'Brien

Kelley E. O'Brien

STB FD-32760 (SUB 21) ID-181522 8-26-97 D

UP/SP-314

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY -- OVERSIGHT

D

APPLICANTS' REPLY TO BNSF SERVICE ALLEGATIONS

Applicants UPC, UPRR, SPR, SPT and SSW[1] submit this reply to new allegations made in BNSF's August 20 filing regarding the trackage rights and haulage service that UP/SP has provided to BNSF. Applicants respectfully submit that those allegations should either be struck or this short reply should be received.

In its August 20 filing, BNSF for the first time advanced specific contentions regarding the quality of service provided to it by UP/SP in connection with BNSF's trackage rights and haulage, including assertions that UP/SP has discriminated against BNSF trains in dispatching. BNSF-2, pp. 9-12. These claims could have been made in BNSF's July 1 or August 1 filings, when Applicants could have replied to them,

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[1] Acronyms used herein are the same as those in Appendix B of Decision No. 44.

but instead BNSF withheld them until its August 20 filing, evidently to prevent Applicants from replying.

BNSF's service allegations are not in reply to anything in the August 1 comments of other parties, and as such are clearly improper. It would thus be appropriate to strike them. However, as they are inflammatory and without merit, Applicants urge the Board instead to receive the following short reply:

UP/SP does not dispute that UP/SP's operating difficulties, particularly in the Gulf Coast area, have adversely affected BNSF traffic, just as they have affected UP/SP's own traffic. Many sidings have been full, delaying trains. Crews have been unavailable to handle UP/SP and BNSF trains alike. Terminals are congested, particularly in the Houston area. As previously reported, UP/SP is doing everything possible to rectify these problems.[2] But BNSF now for the first time suggests anticompetitive or discriminatory conduct. These claims are absolutely unwarranted.

BNSF alleges -- without offering any particulars -- that it has been the victim not only of UP/SP's service problems but also of intentional discrimination. Any such issue could and should have been presented to the Joint

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[2] Since our August 20 filing, it has been decided to accelerate the implementation of TCS. Final implementation will be in two additional phases, on December 1 and March 1.

Service Committee established in the settlement agreement to address just such concerns. But these allegations have not been made in that forum[3] -- even though the Joint Service Committee has met several times and has resolved numerous issues on a cooperative basis[4] -- nor have they been made through any other channels.

As previously reported, UP/SP issued formal written instructions to its dispatchers to give BNSF trains equal handling with UP/SP trains and provided a copy of the instructions to BNSF, all as required by the parties' written dispatching protocol. Claims of discriminatory dispatching are easy to make but usually do not withstand close inspection. As UP explained at great length during the UP/CNW proceeding, trackage rights tenants are always suspicious of their landlord and its motives, and they often think they see discrimination that is not really there once all the facts are developed. We have seen an example in this proceeding: Amtrak's August 1 filing contained a long recitation of

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[3] BNSF and UP/SP established an elaborate written protocol to prevent discrimination and to address any concerns as they arose. BNSF has consistently failed to exercise its rights under that protocol. For example, the protocol requires UP/SP to pay for a BNSF management position at the UP/SP dispatching center to monitor UP/SP's handling of BNSF trains and traffic. BNSF did not fill this position until August 12, 1997, eight days before its August 20 filing. By comparison, UP/SP placed a high-level supervisor in BNSF's dispatching center last November.

[4] Another meeting has now been scheduled for September 25.

alleged violations of Amtrak's priority over UP/SP freight trains in the handling of a specific Amtrak train. Review of the dispatching tapes showed, however, that the dispatcher had given Amtrak proper priority and that the delays were caused by unexpected or unavoidable events beyond the dispatchers' control.

So far as Applicants are aware or have been able to determine in investigating BNSF's new assertions, UP/SP dispatchers have complied with UP/SP's clear policy -- and their specific instructions -- to treat BNSF trains with strict neutrality. Neither UP/SP nor the Board can form any judgment about BNSF's claims of discrimination because BNSF has not provided any details about the alleged events, only vague accusations. See BNSF-2, pp. 9-10. If BNSF wants to explore specific events through the Joint Service Committee, UP/SP is prepared to join BNSF in a careful investigation.

Beyond its general claims about dispatching discrimination, BNSF makes the following specific complaints:

1. Houston Area Trackage Rights. BNSF says that UP/SP has been "unduly restricting BNSF trains to certain windows" between Houston and Robstown. BNSF-2, p. 10. Whoever authored this allegation was evidently unaware that, in connection with a recent expansion of BNSF's operations in this corridor, a very senior BNSF operating officer asked UP/SP to identify windows when UP/SP could most easily

accommodate BNSF's trains. UP/SP complied with that request, and apparently is now accused of impropriety for doing so. Contrary to the assertion in BNSF's August 20 paper, UP/SP does not limit BNSF operations to these windows.

BNSF also accuses UP/SP of unacceptable delays to BNSF trains on the same line. BNSF-2, p. 10. BNSF trains have indeed suffered delays on this line; but UP/SP trains have suffered comparable delays. This is a line on which UP/SP is short on crews, and not all trains can run immediately. UP/SP has not discriminated against BNSF trains, but it also should not be required to give preferences to BNSF trains, as BNSF suggests. The dispatching protocol, which both railroads signed and which the Board adopted, provides that trains of the same priorities should be given equal handling, not that BNSF trains should be given priority over comparable UP/SP trains, as BNSF now contends.

2. BNSF Service to Eagle Pass and Mexico. BNSF asserts that UP/SP assigns BNSF undesirable interchange slots with FNM at Eagle Pass. BNSF-2, p. 10. Contrary to BNSF's suggestion, UP/SP does not control assignment of interchange times at Eagle Pass. FNM, the Mexican carrier, controls the slots. BNSF also says that UP/SP has denied it appropriate use of two long tracks to stage its trains for Mexico. This is a complex issue, but we have found that a UP/SP officer did recently fail to give BNSF track space as requested, after the

knowledgeable UP/SP manager left the area. UP/SP has taken steps to rectify this.

3. Delays to Little Rock & Western Traffic. As for Pine Bluff-Little Rock haulage delays (BNSF-2, pp. 10-11), Applicants addressed this issue at page 107 of their August 20 Reply. This traffic has presented substantial information systems coordination problems, including improper and delayed billing of cars by BNSF and Little Rock & Western, as well as UP/SP difficulties. Applicants are hopeful that these problems have been solved through extensive efforts on both sides and recent consolidations of operating systems. BNSF is free to exercise trackage rights between Pine Bluff and Little Rock, and has indicated that it may soon do so.

BNSF has contributed to delays in resolving such problems, especially with its haulage traffic, by failing to assign sufficient resources to problem-solving activities. For example, when UP/SP and BNSF conduct their now twice-weekly problem-solving calls, UP/SP brings representatives not only from three organizations responsible for information services on UP/SP but also the Customer Service Center and the Finance Department. BNSF usually limits its participation to personnel from its Information Services department. A greater commitment of BNSF resources would aid problem resolution.

4. Delays to BNSF Shipments From Baytown Branch. BNSF says that UP/SP should stop moving cars originating on

the Baytown Branch into Houston, where they suffer delays. BNSF-2, p. 11. This issue has two aspects.

First, three large shippers on the branch often release loaded cars billed for a UP/SP line-haul, but then, after the cars are blocked to move to Houston, change the billing to route the cars via BNSF. UP/SP has proposed to BNSF that in this situation UP/SP deliver the cars to BNSF at Houston instead of breaking up the Houston blocks, causing further delay.

Second, as discussed in Applicants' August 20 reply, in recent months customers have been sending more plastics into SIT, and the Dayton SIT facility has often been filled to capacity, forcing UP/SP to send the excess cars to other UP/SP SIT facilities such as Spring and Pine Bluff. This situation has affected cars originated by UP/SP at "2-to-1" shippers on the Baytown Branch and in turn has affected BNSF because UP/SP has agreed to permit these shippers to designate BNSF as the line-haul carrier <u>after</u> UP/SP has moved the cars into storage.

BNSF does not reveal that it signed an interim agreement on August 19 to deal with precisely this situation. This agreement provides that when UP/SP places "2-to-1" SIT cars into storage at locations other than Dayton, it will turn such cars over to BNSF at the nearest agreed-upon, operationally feasible interchange point, once the shipper decides that BNSF is to handle the shipment. This will reduce the delays. The only complete solution would be for the shippers to specify the line-haul carrier before their shipments are placed into storage. If that were done, the BNSF traffic could be segregated and stored at Dayton, where BNSF acknowledges (BNSF-2, p. 16) it has ample capacity. By contrast, requiring UP/SP to place all of the SIT cars it originates at "2-to-1" shippers on the Baytown Branch into storage at Dayton would only exacerbate the congestion problems that already confront both UP/SP and BNSF in the Gulf region.

5. Delays to Utah Railway Switchers. BNSF says that Utah Railway switch engines carrying BNSF traffic have suffered undue delays at Grant Tower in Salt Lake City. BNSF-2, p. 11. Grant Tower has been a point of severe congestion for years. UP/SP switch engines also suffer severe delays there, as dispatchers give priority to large numbers of through trains. UP/SP had observed instances in which the delays seemed excessive, and it had already adopted procedures to remind dispatchers to move switch engines whenever possible. UP/SP is now generating a daily report to a senior manager on this situation, which should give it consistent attention. Congestion at Grant Tower will increasingly be alleviated as former-SP trains are shifted to the UP mainline. BNSF's demand that Utah switch engines be given equal priority with higher priority UP/SP through trains directly contradicts

the terms of the dispatching protocol, which requires equal handling of trains of the same priority.

Respectfully submitted,

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Attorneys for Union Pacific Corporation, Union Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company and St. Louis Southwestern Railway Company

August 26, 1997

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 26th day of August, 1997, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760 (Sub-No. 21), and on

Director of Operations
Antitrust Division
Suite 500
Department of Justice
Washington, D.C. 20530

Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

Michael L. Rosenthal

STB FD-32760 (SUB 21) ID-181297 8-20-97 D

181297

DONELAN, CLEARY, WOOD & MASER, P.C.

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August 20, 1997

D

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K St. N.W.
Washington, D.C 20423

Re: Finance Docket No. 32760 (Sub-No. 21), *Union Pacific Corporation, et al -- Control and Merger -- Southern Pacific Rail Corporation, et. al., [OVERSIGHT]*

Dear Secretary Williams:

Please find enclosed an original and twenty-five (25) copies of the REPLY COMMENTS SUBMITTED ON BEHALF OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE. Also enclosed is a diskette formatted for WordPerfect 5.1.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

Karyn A. Booth

NICHOLAS J. DIMICHAEL
KARYN A. BOOTH

ENCLOSURE
0124-482

cc: All parties of record

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UNION PACIFIC CORPORATION, et al.

— CONTROL AND MERGER —

SOUTHERN PACIFIC RAIL CORPORATION, et al.
[OVERSIGHT]

REPLY COMMENTS

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Attorneys for The National Industrial Transportation League

August 20, 1997

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, et al.

— CONTROL AND MERGER —

SOUTHERN PACIFIC RAIL CORPORATION, et al.
[OVERSIGHT]

REPLY COMMENTS

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

In accordance with Decision No. 1 in this oversight proceeding, the National Industrial Transportation League ("League") submits the following comments that respond to and comment upon the filings submitted by other parties on August 1, 1997.

I. THE LEAGUE STRONGLY CONCURS WITH THOSE PARTIES WHO HAVE IDENTIFIED SEVERE SERVICE PROBLEMS RESULTING FROM THE MERGER, PARTICULARLY IN TEXAS

In its earlier Comments in this proceeding, the League submitted the results of a survey of the members of its Rail Transportation Committee regarding the merger of the Union Pacific Railroad Company and the Southern Pacific Railroad Company, and the related activities of the Burlington Northern Santa Fe Railroad

Company. That survey, conducted in July 1997, indicated that a significant number of League members were experiencing a deterioration of railroad service as a result of the merger, particularly in Texas, and that few League members were as yet experiencing the service improvements promised as a result of the merger.

Significant or severe service problems were identified by a number of other parties to this case. See comments of Millennium Petrochemicals, pp. 3-4; the Chemical Manufacturers' Association/Society of the Plastics Industry, Inc., pp. 5, 16 [hereinafter "CMA/SPI"]; Capital Metropolitan Transit Authority, pp. 1-2; Fina Oil and Chemical Company, pp. 4-5; Sasol Alpha Olefins North American, Inc., pp. 4-6; Texas-Mexican Railway Company, pp. 9-10; Champion International Corporation, pp. 1-4; LCRA/Austin, pp. 4-5. Indeed, as the League's survey also indicated, service problems do not seem to be confined to Texas, but are being experienced in the Central Corridor as well. See Comments of Cyprus Amax Coal Sales Corporation, pp. 5-6; California Public Utilities Commission, p. 8.

The League strongly concurs with these parties who have identified severe service problems as a result of the merger, particularly in Texas. Indeed, since the League's survey and the filing of the League's comments, the League has received further information from its members indicating that the service problems, particularly in Texas, have not receded; are substantial and widespread; and if anything are even more intense than reported by the League in its Comments on August 1. For example, some League members have reported that rail service in the Houston area is "virtually dead-locked." Shippers are facing "lost cars, misrouted cars, and cars that simply go nowhere." Transit times to plants in or near Houston have more than doubled and, in some cases, tripled. By other accounts, rail cars billed in late June and early July were not yet received more than three to four weeks later. Many League members with facilities in or near Houston have been required to transload their products into trucks, requiring the absorption of unexpected substantial cost increases. Even worse, there have been reports of plant closings caused by the service failures, which have resulted (and continue to result) in serious financial impacts on the effected businesses.

The League further notes that a meeting in Houston of shippers and representatives of the UP has been scheduled for Friday, August 29, at which a discussion of the UP service problems and failures will take place. Accordingly, because the League expects that important information concerning the implementation of the UP/SP merger will be provided at the meeting, the League requests that the Board hold this proceeding open for a reasonable amount of time thereafter and allow parties that attend the meeting to file comments with the Board or supplement their prior comments made in this proceeding.

II. THE BOARD SHOULD ACT TO INSURE THAT THE PRO-COMPETITIVE CONDITIONS IMPOSED IN THE MERGER ARE EFFECTIVELY IMPLEMENTED

In Decision No. 44 in the merger proceeding, the Board granted certain trackage rights to the BNSF as a condition of the merger of the UP and SP, and added several other conditions designed to "permit BNSF to replace the competition that will be lost when SP is absorbed into UP." Decision No. 44, at 116.

In its August 1 Comments in this oversight proceeding, the BNSF has identified a number of disturbing problems in implementing the merger conditions, including problems in identifying "2-to-1" shippers eligible for two-carrier service [BNSF Comments, p. 11]; UP's narrow interpretation of the Board's conditions with respect to "new facilities" and "transloads" [*Id.* at 13]; difficulties with Guideline No. 9 in Decision No. 57 [*Id.* at 14]; and a variety of service issues at various specific points [*Id.* at 15-18]. Indeed, the dispute between BNSF and UP over one of these situations -- at the Halsted facility of the Lower Colorado River Authority -- has apparently gotten so severe that the Board was very recently required to issue an order flatly rejecting UP's contentions and admonishing the railroad that it would be held to the broad representations that it made during the merger proceeding. *See,* Decision No. 73 in Finance Docket No. 32760, *Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al.,* slip op. at 5, served August 14, 1997.

A number of other parties have also identified similar problems in implementing the merger conditions. See, *e.g.*, comments of Fina Oil and Chemical Company, pp. 3-4; CMA/SPI, pp. 6-12.

The League believes that the Board needs to take action to resolve these disputes -- promptly. An entire year has passed since the Board approved the merger, during which time contracts have expired, and shippers were supposed to have had access to BNSF as an effective competitor to replace the competition lost as a result of the merger. But it appears that, one year later, BNSF and UP have not even been able to agree upon who constitutes a "2-to-1" shipper -- the class of shippers <u>most</u> affected by the merger. As suggested by the necessity of the Board's recent decision regarding the Halsted facility of LCRA, there appears to be some significant problems implementing conditions designed to replace competition. Moreover, it was only recently that UP has been able to agree with BNSF on the conditions for implementing BNSF service in the I-5 corridor, a condition designed to provide increased competition to shippers in a key area of the country. Service in this corridor did not even begin until July 15, 1997. See, Comments of the California Public Utilities Commission, pp. 6-7.

The League also believes that the suggestions contained in pages 11-18 of the BNSF Comments regarding resolution of these difficulties appear useful. This is particularly true of the BNSF's suggestion that the Board should establish a presumption that any shipper located at a "2-to-1" location is entitled to two-carrier service, with the burden of proof on the UP to disprove the presumption. Moreover, UP should be required to notify the shipper when UP removes the shipper's location at a "2-to-1" point from access to BNSF, and provide the shipper with an opportunity to refute the claimed basis for the removal <u>before</u> it is implemented (including, the League believes, an opportunity to appeal an adverse determination by UP to the Board). See, BNSF Comments, pp. 12-13.

Likewise, the League concurs in BNSF's suggestion that clearer guidelines and speedier resolutions of disputes should be implemented for the definition of such terms as "new facilities," "transloads," "team tracks," and others. BNSF's comments indicate that the haulage arrangements, because of UP's service failures, "are not functioning as intended and as promised." BNSF Comments, p. 15. BNSF indicates that it will seek STB intervention as part of the oversight process if its service proposals to UP are not acted upon expeditiously. *Id.* The League suggests that the Board indicate in its decision in this first oversight proceeding that it will consider any such BNSF petition on an expedited basis.

The Board, in granting extensive trackage rights rather than other relief in order to ameliorate the anticompetitive effects of the merger, is required to take prompt action to see that its conditions are implemented to give the fullest opportunity to BNSF to compete, in order to insure that the purpose of the Board's conditions are fulfilled.

III. THE LEAGUE CONCURS THAT THE BOARD SHOULD IMPOSE CLEAR INFORMATION REQUIREMENTS ON UP AND BNSF TO INSURE THAT BOTH THE BOARD AND OTHER PARTIES CAN EVALUATE THE PROGRESS OF THE MERGER

The Comments of CMA/SPI suggest that the Board should require UP and BNSF to provide in their future reports information of an objective nature demonstrating clearly and concretely the progress made in implementing the merger and by BNSF in capturing traffic made available to it under the merger conditions. CMA/SPI, p. 14. The League concurs.

In their first report on October 1, 1996, UP and BNSF submitted fairly substantial reports, particularly given the fact that the merger was barely consummated. However, the two railroads' reports on January 1 and April 1, 1997 contained virtually no useful information, and it was impossible to tell how the merger was progressing. The League, in conjunction with other parties, filed discovery on UP and BNSF in June 1997. To their credit, both carriers' reports on July 1, 1997 were considerably more detailed. UP responded to the discovery propounded by the League and other parties and made its traffic tapes available; BNSF recently also made its traffic tapes available, and these are being analyzed now.

The League believes that the Board has taken too much of a "hands off" approach in the oversight of the merger process thus far. The League concurs with CMA/SPI that the Board should establish requirements that would provide concrete information to the Board and the parties to this proceeding as to the progress of merger implementation, and in particular the use of the trackage rights granted to BNSF. The League believes that this should include information regarding the amount and type (commodity and car type) of new business over the trackage rights from shippers at "2-to-1" points; the amount and type (commodity and car type) of reroutes by BNSF of traffic originating at points off the trackage rights lines but using the trackage rights lines (to evaluate whether BNSF has attained sufficient traffic density on the trackage rights lines to be a competitive force); information on infrastructure required for BNSF competitiveness on and near the trackage rights lines, including storage in transit facilities; and information (under appropriate protective conditions) on the competitiveness of BNSF costs and rates compared to UP. The latter is necessary because market share information alone may not reveal why BNSF is or is not succeeding as a competitor. As CMA/SPI suggests, information should be compared to a "baseline," namely the situation existing prior to the merger. See, CMA/SPI Comments, p. 14.

This information should be divided by key transportation corridors, including but not limited to Houston to Memphis, Houston to New Orleans, the Central Corridor, and the I-5 Corridor. Objective information on service should also be provided, and both BNSF and UP should be required to provide their traffic tapes to the Board and to interested parties.

Moreover, the League believes that this information should be provided each quarter. It is not enough to have a yearly "snapshot" of the merger, and both the Board and interested parties should be able to spot trends and patterns that would be hidden until the next annual examination.

IV. THE LEAGUE DISAGREES WITH BNSF AS TO THE PROPER STANDARD TO BE USED IN EVALUATING THE COMPETITIVE EFFECTS OF THE MERGER

In its August 1 Comments, BNSF argues that the Board contemplated a substantial change in western railroad operations only if BNSF "fail[ed] to conduct trackage rights operations" in three corridors: the Central Corridor, Houston-New Orleans, and Houston-Memphis. BNSF Comments, p. 5. BNSF then notes that BNSF was conducting trackage rights operations over all three corridors by mid-January 1997. *Id.* BNSF then goes on to appropriately note that inducing customers who had long-term business relationships with UP or SP to switch to BNSF is "not done instantaneously or without substantial effort by BNSF," *id.*, and later, that after ten months, BNSF's performance cannot sensibly be compared to the service that SP was able to establish over a long period of time. *Id.* at 9.

However, BNSF goes on to conclude from all this that "the proper analysis [of BNSF's performance] is not structural, but essentially behavioral." *Id.* [Emphasis added] What BNSF apparently means by this is that, if the railroad has, even in some minimal way, "entered the markets it is supposed to enter," *id.*, and it is somehow poised to compete (*i.e.*, if there is the "availability of competition" from BNSF, *id.*), then the Board should not be concerned about whether BNSF is a successful competitor, that is, whether it has actually been able to garner business.

The League disagrees. While certainly the Board or shippers cannot realistically expect full and instantaneous competition from BNSF as it attempts to establish rail operations over thousands of miles of track owned by its competitor (and BNSF's own comments reveal that there are numerous legal and service difficulties), a "behavioral" analysis is not adequate. This is particularly true in the coming months as BNSF can realistically be expected to actually establish a competitive presence.

Certainly, during the merger proceeding, both UP and BNSF offered glowing assurances to the Board as to the traffic available to the BNSF to compete, and BNSF's likely ability to garner a substantial amount of that traffic. *See* Applicants' Rebuttal, Vol. 1 - Narrative [UP/SP-230], pp. 108-118 [discussing the Rebuttal Verified Statement of Mr. Peterson, pp. 161-85]; BN/Santa Fe's

Response to Inconsistent and Responsive Applications, Vol. I [BN/SF-54], pp. 10-16. BNSF and UP should be held to that "structural" analysis, which the League believes is the proper one, certainly after a reasonable "ramp-up" period. The failure of BNSF to establish a substantial actual competitive presence in the trackage rights corridors, at rates that approximate those where BNSF and UP compete head-to-head over their own systems, would certainly call into question BNSF's ability to compete in the trackage rights corridors under the conditions established by the Board, and thus the efficacy of the Board's own assurances in Decision No. 57 that it will act to preserve pre-merger competition between UP and SP.

Conclusion

The League strongly believes that continuing oversight of this transaction is necessary. The comments filed in this proceeding show that there are continuing concerns regarding service benefits from the merger; difficulties in implementing key merger conditions; and concerns over BNSF's ability to be an effective competitor in important transportation corridors. The League believes that the Board should monitor this situation closely, take action as indicated in these Reply Comments, and continue a strong and effective oversight as requested in these Reply Comments.

Respectfully submitted,

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August 20, 1997

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing *Reply Comments to the Union Pacific Corporation, et al. - Control Merger - Southern Pacific Rail Corporation, et al. [OVERSIGHT]* on behalf of *The National Industrial Transportation League* have been served this date, by first class mail, postage paid, to the persons on the attached list.

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181295

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VIA HAND DELIVERY
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Re: Finance Docket No. 32760 (Sub-No. 21)

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket, please find an original plus twenty-five (25) copies of the Reply of The Burlington Northern and Santa Fe Railway Company to August 1 Comments (BNSF-2). Also enclosed is a 3.5-inch diskette containing the text of BNSF-2.

Please date stamp the enclosed extra copy and return it to the messenger for our files. Thank you for your time and attention.

Sincerely,

Kelley E. O'Brien

Kelley E. O'Brien

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Office of the Secretary
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Enclosures

181295

BNSF-2

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY

-- CONTROL AND MERGER --

SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

REPLY OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY TO AUGUST 1 COMMENTS

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BNSF-2

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
— CONTROL AND MERGER —
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

REPLY OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY TO AUGUST 1 COMMENTS

Pursuant to the Surface Transportation Board's Decision No. 1, served May 7, 1997, The Burlington Northern and Santa Fe Railway Company ("BNSF") submits the following reply to the comments filed on August 1, 1997, regarding the Board's oversight of the Union Pacific/Southern Pacific ("UP/SP") merger.

INTRODUCTION AND SUMMARY

In Decision No. 1 in this sub-docket, the Board instituted this proceeding to implement the oversight condition imposed as a condition of the UP/SP merger. The purpose of the oversight proceeding is to determine whether the conditions imposed by the Board have effectively addressed the competitive harms that they were intended to remedy. The Board sought comments from interested persons on any effects of the merger on competition and the implementation of the conditions imposed to address competitive harms.

On August 1, 1997, BNSF and over twenty-five other parties filed comments pursuant to the Board's directive. In its comments, BNSF states that the Board's confidence in BNSF's ability to compete vigorously with the merged UP/SP system for the traffic opened to BNSF was fully justified and, given BNSF's progress and the effectiveness of the conditions, the oversight proceeding should not permit relitigation of the fundamental legal issues that were resolved in the primary case. Instead, the oversight proceeding should focus on the particular circumstances where relief is warranted and should police UP's commitment and performance under the Board's conditions. BNSF believes that UP is not properly implementing certain aspects of the Board's conditions and that those actions are impeding BNSF's competitiveness.

The August 1 comments filed by the other parties are generally consistent with BNSF's comments, and no shipper opposes any of the requests made by BNSF. In addition, no commenter seeks to relitigate the Board's basic decision to rely on the BNSF Settlement Agreement to address the competitive harms that would otherwise result from the UP/SP merger. Various commenters, as described below, confirm the need to police UP's performance.

BNSF will respond to the comments filed August 1, 1997,[1] particularly those that relate to the procedures and principles that should govern this and future oversight proceedings. Further, BNSF will respond to those comments that raise questions about

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[1] Pursuant to Decision No. 5 in this sub-docket (served July 23, 1997), the United States Department of Agriculture ("USDA") filed its comments on August 15, 1997. Unless otherwise advised by the Board, BNSF will reply to USDA's comments on or before September 3, 1997, the date set by the Board for the Applicants' reply to those comments.

the effectiveness of BNSF's operations over the trackage rights it received access to as a remedy to the competitive harms that would otherwise arise as a result of the UP/SP merger. [2]

I. THE AUGUST 1 COMMENTS IDENTIFY SEVERAL DISCRETE AREAS REQUIRING IMMEDIATE BOARD ATTENTION

The August 1 comments highlight the need for immediate Board action to address several instances where UP is impeding BNSF's ability to offer competitive service. The sooner these issues are addressed, the more quickly BNSF will be able to effectively compete in the ways the Board contemplated in imposing the merger conditions. This section provides a summary of those areas requiring immediate Board action.

A. IDENTIFICATION OF "2-to-1" SHIPPERS

Among the obstacles faced by BNSF in competing effectively with UP and achieving continued growth in the relevant markets are the unnecessary delays in identifying "2-to-1" shippers. (BNSF-PR-4, V.S. Rickershauser at 10-11). As implemented by UP, the identification process has been exceedingly labor-intensive and slow. Moreover, UP's insistence that it must approve a shipper's "2-to-1" status before BNSF can have access to the shipper has discouraged shippers from making requests for new service. BNSF recommends that the Board establish a presumption that any

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[2] BNSF notes that Texas Mexican Railway Company ("Tex Mex") and Kansas City Southern Railway Company ("KCS") are incorrect in asserting that BNSF has refused to respond to discovery and has refused to provide traffic tapes. (KCS-2 at 9; TM-2 at 3, 8). In fact, BNSF agreed to provide -- and has in fact provided -- BNSF's 1995, 1996 and 1997 (Jan. - June) traffic tapes. The parties agreed that, by providing these tapes, BNSF would be deemed to have fulfilled its obligations under the pending discovery requests.

shipper located at a "2-to-1" location is entitled to two-carrier service, and place the burden of proof on UP to disprove the presumption to the Board with evidence that the shipper was not served by both UP and SP pre-merger.

Several commenting parties agree with BNSF that the "2-to-1" identification process needs improvement.[3/] For instance, the United States Department of Transportation ("DOT") states that it "supports the request of BNSF that UPSP provide it with a clear determination on the shippers at 2-to-1 points to which BNSF has access rights." (DOT at 6). In fact, DOT requests that, "since the Board's merger analysis primarily addressed 2-to-1 'points' and traffic in 2-to-1 'corridors' rather than 2-to-1 'shippers' . . . the Board revisit the terms of the traffic rights agreement to consider providing BNSF access to all shippers at 2-to-1 points, regardless of whether a shipper was closed or open to switching under a tariff in place at the time of the merger." (DOT at 6). DOT's proposal would be a workable solution to the competitive problem created by the merger, and BNSF would offer competitive service to any shippers to which it gained access under DOT's proposal.

Fina Oil and Chemical Company ("Fina") and The Chemical Manufacturers Association and The Society of the Plastics Industry, Inc. ("CMA/SPI") also support BNSF's position. CMA/SPI requests Board action to eliminate the delays that have occurred in identifying "2-to-1" shippers (CMA-2/SPI-3 at 13), and Fina states that "Fina

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[3/] Another commenter, Railco, Inc. ("Railco"), asks the Board to modify its merger decision to allow Utah Railway access to its facility on the CV Spur. BNSF notes that, if the Board grants Railco's request, BNSF will vigorously compete to participate in the transportation of the Railco traffic.

[requests] resolution of the issues that hinder definition of all 2:1 points in order to expedite the expansion of the traffic base to BNSF." (FINA-1 at 7). The remedy requested by BNSF would substantially address the concerns raised by these parties.

B. DEFINITIONS OF "NEW FACILITIES" and "TRANSLOADS"

BNSF disputes UP's narrow interpretation of the Board's "new facilities" and "transload" conditions. UP has contended that only totally new "greenfield" sites or existing facilities to which rail service is extended for the first time qualify for BNSF service under these conditions. (BNSF-PR-4, V.S. Rickershauser at 11, 24). BNSF recommends that the Board set clear principles defining these two terms so that shipper access to two-carrier service will not be delayed by protracted disputes.[4] Specifically, BNSF requests that the Board determine that the definition of "new facilities," although it does not include expansions of or additions to existing facilities, does include (1) vacant or existing rail-served facilities that undergo a change of ownership or lessee and (a) change the product shipped from or received at the facility, or (b) have not shipped or received by rail for at least 12 months prior to the resumption or proposed resumption of rail service; (2) existing facilities constructing trackage for accessing rail service for the first time; and (3) newly constructed rail-served facilities.

Several commenting parties agree with BNSF with respect to the interpretation of "new facilities". For example, DOT supports BNSF's position that the identification of "new facilities," both in the context of "2-to-1" points and the transload condition, "should

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[4] On August 8, 1997, BNSF and R.R. Donnelley & Sons Company filed a Joint Petition for Enforcement of Merger Condition (BN/SF-81, RRD-1) to require UP to comply with the transload condition.

be resolved on a functional basis, i.e., if newly rail-served or newly established as a transloading operation, a facility should be considered 'new' regardless of whether a building or structure was already in place on the property." (DOT at 6-7). And, DOT concluded, "We believe the STB should rule on this issue in such a way that allows BNSF access to the maximum number of shippers." (DOT at 7).

CMA/SPI expresses "concern[] that UP/SP and BNSF have not yet been able to agree on a written protocol to implement [the new facilities] condition." (CMA-2/SPI-3 at 6). Millennium Petrochemicals Inc. ("Millennium") also supports BNSF's request for a prompt resolution of this dispute. Millennium maintains that "BNSF is hampered from being an effective competitor by uncertainty over how to implement the Board's conditions regarding BNSF's right to serve new facilities along trackage rights lines." (MPI-2 at 3, 8). Millennium urges the STB to intervene if the UP and BNSF cannot quickly come to agreement regarding the "new facilities" condition. (MPI-2 at 3, 8).

C. CONTRACT MODIFICATION CONDITION

BNSF's ability to compete at "2-to-1" points has been obstructed by UP's ability to foreclose BNSF from access to traffic by bundling rates and volumes at "2-to-1" points with rates and volumes at solely-served UP points. (BNSF-PR-4 at 12, V.S. Rickershauser at 20-24). BNSF recommends that Guideline No. 9 (the contract termination option) be eliminated and that BNSF should be granted access to bundled solely-served facilities when necessary to restore competitive alternatives lost as a result of the merger combined with UP's leveraging practices. (BNSF-PR-4 at 12, V.S.

Rickershauser at 20-24). The August 1 comments of other parties evince strong support for BNSF's request to eliminate Guideline No. 9.

The National Industrial Transportation League ("NITL") states that "[t]his cancellation option . . . has been an impediment to utilization of the contract reopener condition," and "strongly supports" BNSF's request for the Board to rescind Guideline No. 9. (NITL-2 at 3). Fina also asserts that the ability of UP to cancel contracts of shippers that open up 50% of their volume to BNSF impedes BNSF's ability to compete. It "respectfully requests the Board to rescind Guideline No. 9 of Decision No. 57 . . . ." (FINA-1 at 3).

CMA and SPI "also suggest the need for modification of the 50% contract reopener provision to . . . eliminate the ability of the UP/SP to cancel contracts where 50% of the business is given to BNSF." (CMA-2/SPI-3 at 4-5). They state that "[g]ranting UP/SP the power to avoid its obligations under the balance of the contract in most cases has effectively eliminated the shipper's ability, and even willingness, to negotiate competitive offerings with BNSF," id. at 8, and that "the contract cancellation power bestowed upon UP/SP is counterproductive to the intent of the contract opener condition." (Id. at 9). In conclusion, they "urge the Board to rescind Guideline No. 9 of Decision No. 57." (Id. at 10).[5]

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[5] CMA/SPI also supports BNSF's concern that UP has used its market power to leverage customers through bundling to limit BNSF's ability to secure traffic from "2-to-1" shippers. (CMA-2/SPI-3 at 10-11). They suggest that the Board may need to consider "enhancing the conditions in a manner that would enable BNSF successfully to compete for ["2-to-1"] traffic." (Id. at 11.)

Tex Mex also supports rescission of Guideline No. 9. It states that the evidence to date "supports BNSF's concern that the contract modification condition is fundamentally flawed and gives UP/SP substantially more power to retain business than was intended under the condition." (TM-2 at 6-7).

CMA/SPI also supports BNSF's request that Lake Charles, West Lake Charles, and Westlake, Louisiana, be treated as "2-to-1" points for purposes of the contract modification condition. (CMA-2/SPI-3 at 5, 12-13).

D. UP'S REFUSAL TO PERMIT BNSF ACCESS TO CERTAIN SHIPPERS

UP has directly prevented competition in certain instances by refusing BNSF access to certain shippers adversely affected by the UP/SP merger. Several of these instances have already been brought to the attention of the Board by BNSF and the shippers involved.[6]

In addition, UP has refused to permit BNSF to access former UP or SP customers in New Orleans through reciprocal switch. (BNSF-PR-4 at 12, V.S. Rickershauser at 25). DOT agrees that reciprocal switching in New Orleans is a problem, and states that, "to the extent that routes to the West are restricted under a new switching tariff to a single

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[6] See Finance Docket No. 32760, Joint Petition of The Burlington Northern and Santa Fe Railway Company and The Lower Colorado River Authority and The City of Austin for Enforcement of Merger Condition (BN/SF-80, LCRA-11); Joint Petition of The Burlington Northern and Santa Fe Railway Company and R.R. Donnelley & Sons Company for Enforcement of Merger Condition (BN/SF-81, RRD-1); and Petition of Montell USA, Inc. for Determination of West Lake Charles as a 2-to-1 Point (MONT-13); Reply of The Burlington Northern and Santa Fe Railway Company to Petition of Montell USA, Inc. for Determination of West Lake Charles as a 2-to-1 Point (BN/SF-82) (supporting Montell's Petition). On August 14, 1997, the Board granted the Joint Petition of BNSF and LCRA/Austin. See Finance Docket No. 32760, Decision No. 73 (served Aug. 14, 1997).

carrier, UPSP, it appears that UPSP has effectively created a 2-to-1 situation. We urge the Board to inquire into this problem and to take remedial action as necessary." (DOT at 6). As BNSF described in its August 1 comments, BNSF plans to file a separate petition for relief, seeking an order to require UP to open these industries to reciprocal switching by BNSF.

E. UP SERVICE IS ADVERSELY AFFECTING BNSF's COMPETITIVENESS

Various commenters share BNSF's concerns with the impact of UP service failures on BNSF's competitiveness. BNSF's July 1 Quarterly Progress Report and August 1 comments described the impact of service issues in several instances, including haulage failures between Houston and Brownsville, failure to provide trackage at Oroville, California, mishandling of cars at the Sjolander facility in Dayton, Texas, and general failures to properly and timely handle BNSF cars in reciprocal switching. UP service delays and failures involving BNSF traffic or dispatching of BNSF trains on trackage rights lines are increasing and are adversely affecting BNSF's competitiveness.

At Houston, and between Houston and Iowa Junction, extreme congestion continues to exist with many trains tied up in operating sidings causing unacceptable delays to BNSF trains. UP appears to be giving preference to its trains over BNSF trains contrary to the dispatching protocol. In any event, shippers reliant on BNSF overhead train operations should not bear the consequences of UP service problems. BNSF is working with UP on solutions to the Houston congestion problem, but neither BNSF nor UP has not yet identified a workable solution.

Further, BNSF has been experiencing problems in providing service to Robstown for interchange to Tex Mex. On several occasions, access to the UP line at Algoa for BNSF's trains for this service has been unacceptably delayed. It appears that UP has been favoring its own trains over BNSF trains and unduly restricting BNSF trains to certain windows. BNSF understands that UP has recently addressed this issue with its operations personnel, but it is too soon to tell if the problem has been rectified.

BNSF has also experienced unacceptable delays in the haulage service by UP from Algoa to Brownsville. UP has been favoring its own trains and has not furnished sufficient power to provide the haulage service for BNSF trains. Recently, BNSF has agreed to furnish the power for these haulage trains, but is still experiencing unacceptable delays in the service to Brownsville.

At Eagle Pass, BNSF has an agreement with UP under which BNSF is to have preferential use of two 10,000 ft. tracks near Mile Post 22 at Ryan's Ruin. UP is entitled to use those tracks, but only if BNSF is not using them. Despite that agreement, UP recently has been occupying those tracks and denying BNSF the preferential use of the tracks. In addition, BNSF's interchange with the FNM has been degraded by UP. UP slots BNSF's interchange with FNM at times which result in a one day's delay in the interchange. The interchange should be on a first come, first served basis.

Additionally, UP continues to fail to deliver BNSF traffic originating from the Little Rock and Western Railway ("LRWN"), the Little Rock Port Authority Railroad ("LRPA"), and other customers in Little Rock to BNSF at Pine Bluff within the three-day standard previously agreed upon. Many cars are taking two weeks or more to be delivered to

BNSF. This unacceptable service has already led to the loss of a significant volume of competitive traffic from Green Bay Packaging's Perry, AR mill. To remedy this situation, BNSF has made a request to UP that it be given the right to operate between Little Rock and Pine Bluff, connecting directly with the LRWN and LRPA, or, in the alternative, that UP operate a train dedicated to BNSF traffic each day between Little Rock and Pine Bluff.

UP also continues to cause delays on traffic originating from customers BNSF can serve on the Baytown Branch. The agreement for UP to deliver all cars from the Baytown Branch to BNSF at Dayton is not being accomplished, with many cars going to Houston causing six to eight day delays. UP should be ordered to cease the practice of taking BNSF cars to Houston when those cars are originated at Baytown Branch customers accessible to BNSF.

Further, BNSF has experienced UP-caused delays of its Utah Railway switchers at Grant Tower in the Salt Lake City area and North Salt Lake in either direction and in accessing track to switch customers in the area. It was anticipated that the diversion of SP trains through Ogden to UP's Cheyenne route would reduce the delays, but the situation has not appreciably improved. BNSF's local trains should be given equal dispatch with UP's trains, other than intermodal and automotive trains.

BNSF knows that customers hold BNSF accountable for the quality of service it provides them, whether provided on its own lines, over trackage rights lines or in conjunction with haulage or reciprocal switching -- even if the shortcomings are attributable to UP. BNSF believes that the burden of UP's service problems -- whether caused by the UP/SP merger implementation or otherwise -- should not be permitted to fall upon shippers seeking to use the new entrant, BNSF, as it seeks to establish and expand a competitive presence as the Board intended.

BNSF is closely reviewing these issues with UP and, if workable operating procedures are not properly adopted and the issues ameliorated, BNSF will seek recourse from the Board in appropriate proceedings.

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The Board must address each of the above obstacles before BNSF will be able to compete with UP as effectively as the Board contemplated in imposing the conditions. Thus, prompt Board action is required in these discrete areas which the Board should be able to address expeditiously, without the need for a proceeding that seeks to relitigate any of the issues that it addressed in its merger decision.

II. THE BOARD SHOULD NOT ASSESS THE EFFECTIVENESS OF COMPETITION BY COMPARISON TO PRE-SET MARKET SHARES

KCS urges the Board to prejudge the amount of time it will take for competition between BNSF and UP to become fully effective, to equate competitive vigor with market share, to prejudge the market share necessary for competition to be deemed effective, and to decide in advance that the remedy if BNSF should not meet KCS's market-share "Standard" will be divestiture. Those self-serving proposals misunderstand the nature of competition and are not in the best interests of shippers.

The Board and the ICC have long analyzed railroad mergers *without* placing heavy reliance on market shares. The Board's analysis of mergers contrasts with the analysis used in other industries, where market share-driven analytic tools such as the

Herfindahl-Hirschman Index are used heavily.[7/] The Board instead focuses -- properly -- on the number of railroads in a market and on whether each has the basic attributes necessary to provide effective competition.[8/] How much share each carrier will end up with is determined by their respective successes in beating each other for business. That is the competitive process. And it works only when both competitors in a two-carrier market strive hard for business.

KCS, for its own purposes, suggests a different model. According to KCS (KCS-2 at 11-12), BNSF cannot be deemed to have successfully replaced the competitive discipline supplied by SP unless it replicates SP's market share "within a specified period (perhaps three years) after the merger consummation date," and "failure" by BNSF to meet that "Standard" should result in divestiture of lines. That analysis is seriously flawed.

Market share is a rough measure at best of the competitive pressure a railroad (or any other business) exerts on its rival.[9/] As "upstart" companies in many businesses

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[7/] See Department of Justice & Federal Trade Commission, Merger Guidelines (April 2, 1992).

[8/] See, e.g., Dec. No. 44, at 117 ("We now believe that rail carriers can and do compete effectively with each other in two-carrier markets."); id. at 118 ("In prior mergers, the ICC often permitted the number of railroads offering service in a given market to decrease to two railroads.").

[9/] See W. Baumol, J. Panzar & R. Willig, *Contestable Markets and the Theory of Industry Structure* 222 (1982) ("we can no longer accept as per se indicators of poor market performance evidence such as concentration"); Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 947 (1981) ("Market share alone is misleading."); *Metro Mobile CTS, Inc.* v. *NewVector Communications, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989) ("[r]eliance on statistical market share in cases involving regulated industries is at best a tricky enterprise"; "'[b]lind reliance upon market share, divorced from commercial reality, [can] give a misleading picture of a firm's actual ability to control show, even a competitor with very little market share can have a substantial effect on the behavior of incumbent firms, bringing consumers the benefits of competition by causing the incumbents as well as the new entrant to improve price/service offerings to win business. What is necessary for such competition to be effective is not any particular market share, but an action-backed commitment by the new entrant to the market.

Here, the Board should ask not whether BNSF has achieved any particular market share by any particular date, but whether it has made the necessary action-backed commitments -- training and qualifying crews, rehabilitating lines, actively soliciting business, acquiring necessary storage capacity, and so on -- to serve the new markets (and, if not, why not). To the extent that such investments have been made, the competitive process will push both UP and BNSF to try to win business, since fixed costs at that point have ceased to be an obstacle. To the extent that such investments have not been made, the Board should inquire whether BNSF faces impediments to committing capital that should be removed.

Even if market share were to be used to measure BNSF's competitiveness, the "Standard" KCS proposes would be the wrong one. BNSF does not have access, as UP and SP did, to all customers along the trackage rights lines or at "2-to-1" points, but only to customers UP establishes and confirms as "2-to-1". Further, all of the "2-to-1" customers for whose business BNSF is competing have been doing business in the past with UP or SP, some for decades or even more than a century. Many of those

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prices or exclude competition'"); *Ball Memorial Hospital, Inc.* v. *Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986) ("[m]arket share is just a way of estimating market power, which is the ultimate consideration").

customers have contracts with UP or SP. BNSF certainly hopes (and intends to compete vigorously) to win at least as much of their business as SP had, but it is not realistic to describe as a "failure" by BNSF any situation in which the merged UP/SP system might succeed in retaining for three or more years the business of at least as high a percentage of those customers as UP alone used to have, especially if UP has to make rate or service concessions (because of BNSF competition) to retain some of that business. Indeed, to the extent that UP finds BNSF a more formidable competitor than it did SP, UP may well make competitive offerings that result in a *higher* market share than UP alone had pre-merger, all to the benefit of shippers, yet KCS's test would deem such a situation non-competitive and BNSF's efforts unsuccessful.

Furthermore, even if the merger conditions are working exactly as they should (even if, for example, the problems identified here and in BNSF's August 1 comments are successfully solved), it is likely that in some markets BNSF will exceed SP's pre-merger market share over time, while in others it will not meet it, even while providing strong competitive discipline in all affected markets. A market-by-market analysis requiring BNSF to capture as high a share in every market as SP had -- which is what KCS appears to propose -- would result in numerous inaccurate conclusions that BNSF had not provided competitive discipline in particular markets.

Finally, KCS's self-serving proposal could result in real and substantial harm to shippers. KCS's interest in bringing about divestiture (if its "Standard" is not met) is obvious. But KCS's "Standard" might be met in a way that would do shippers no good. If the Board announced that UP would be required to divest a line unless BNSF achieved a specified market share by a particular date, UP would have a perverse incentive to avoid that result by competing *less* aggressively. UP might let the quality of its service deteriorate, cease making necessary investments, or simply refuse to bid (or refuse to bid aggressively) on particular business so as to increase BNSF's market share until the threat of divestiture had passed. Whatever benefits such a scenario might have for BNSF, it would certainly not benefit shippers or the public interest. It is little wonder, then, that the only proposal for a specific market share "test" comes not from any shipper, shipper organization, or governmental entity, but from an opportunistic railroad that sees potential advantages for itself if BNSF "fails" the test and divestiture results. The Board should reject KCS's proposed market share test.

III. BNSF IS WORKING TO SATISFY THE BASIC GOALS OF THE MERGER CONDITIONS

A few commenters raise concerns with respect to BNSF's operations or its ability to compete over the trackage rights lines. Many of these concerns are either based on misinformation, or are being actively addressed by BNSF.

A. SIT CAPACITY IN THE GULF COAST REGION

Several commenters express concern that BNSF has been impeded in the Gulf Coast region by a lack of SIT facilities necessary to serve the plastics industry. (CMA-2/SP-3 at 11-12; FINA-1 at 3-4; MPI-2 at 3). For example, Fina states that it does not believe that either UP or BNSF has adequate and effective storage space for existing business and that neither carrier appears to have any definite plans to expand its existing SIT capacity. (Fina-1 at 3). Millennium states that BNSF is not yet an effective competitor in the Gulf Coast region. Among the reasons for this alleged failure, it cites

BNSF's inability to obtain adequate SIT within the region. (MPI-2 at 3, 6-8). CMA/SPI states that, while "additional information is required concerning the implementation of the SIT access conditions," CMA-2/SPI-3 at 11, it is evident that "shippers cannot have confidence in BNSF's service quality if SIT capacity is not committed to BNSF". (CMA-2/SPI-3 at 12).

BNSF has adequate SIT capacity at the Sjolander facility at Dayton, TX to handle the demand for storage for the foreseeable future. (See BNSF-PR-4, V.S. Rickershauser at 26-27). Under its April 28, 1997 agreement with UP, BNSF has the right to utilize one-half of the capacity of that facility (approximately 1400 cars). However, as discussed in BNSF's August 1 comments, BNSF's difficulties in utilizing this SIT capacity have impeded BNSF's competitiveness in the Gulf Coast region. UP has continuously mishandled cars from "2-to-1" shippers on the Baytown Branch -- including cars that should go to the Sjolander facility. Rather than directing that the cars of those "2-to-1" shippers (including potential BNSF traffic) be stored at the Sjolander facility where they could be promptly accessed by BNSF once the shipper decides to bill the cars out to BNSF, UP has directed the cars to be stored at Houston or elsewhere. This practice has disadvantaged BNSF in competing with UP on the Gulf Coast. The Board should require UP to store "2-to-1" shippers' traffic in Sjolander whenever possible and, if stored elsewhere, to deliver the traffic to BNSF at the most efficient point, rather than returning it for interchange with BNSF at Dayton, thereby eliminating the impediment BNSF has been facing with respect to SIT utilization in the Gulf Coast region.

In addition, BNSF is using its existing pre-merger SIT facilities for its other Gulf Coast plastics customers and is continuing staged expansion of the capacity of these facilities as necessary. BNSF is also discussing with other parties additional SIT capacity expansions at various points along its trackage rights lines to meet anticipated growing demand.

B. SOUTH TEXAS

Tex Mex asserts that it "has been at a substantial competitive disadvantage to UP/SP and BNSF, and especially to UP/SP, by not being able to bid for their non-Mexican traffic as well." (TM-2 at 11, V.S. Turner at 1-2). Throughout the merger proceeding, Tex Mex argued that, as a condition of the merger, it should be able to compete for non-Mexican traffic originating or terminating in Houston. The Board rejected Tex Mex's arguments in Decision No. 44, and should not relitigate the issue in this proceeding.

Tex Mex further suggests that UP's congestion at Houston has caused operational problems for BNSF along the Algoa route. Tex Mex alleges that UP recently has limited BNSF to one train a day in each direction on that route and that the restriction significantly limits the amount of traffic BNSF can carry over that line. Tex Mex is incorrect in suggesting that UP has limited BNSF traffic over the Algoa route. At no point has UP limited BNSF from operating more than one train a day over this route. Further, UP and BNSF presently are working on a plan for adding a second daily BNSF train along the Algoa route.

C. CENTRAL CORRIDOR

Several commenters express concern that BNSF's service levels and tonnage have been less than anticipated in the Central Corridor. For example, the California Public Utilities Commission ("CPUC") asserts that, as of June 30, 1997, BNSF was operating only 3 manifest trains a week in each direction, as opposed to the daily train service that was projected and the approximately 20 daily trains that are operated by UP. (CPUC at 3-6). The CPUC also asserts that BNSF is not running intermodal trains in Central Corridor. (CPUC at 9-10).

In fact, BNSF is operating daily train service along the Central Corridor. Daily operations commenced on July 14, 1997. BNSF service has been increasing and is meeting current demand. As traffic demand increases, BNSF will increase its operations in the corridor.

The CPUC also expresses concern that UP and BNSF have not moved forward with plans to construct a joint intermodal terminal ("JIT") at the Port of Oakland. BNSF is actively working with the Port of Oakland to design an adequate JIT facility that will provide BNSF the capability to serve the Port of Oakland directly.

With respect to intermodal service, BNSF continues to offer such service between the Salt Lake Valley and points on the BNSF system by handling intermodal traffic on daily merchandise trains between Denver and Salt Lake City. BNSF intends to reexamine the feasibility of providing dedicated intermodal service after UP reroutes its through trains to the UP mainline through Wyoming, thereby relieving the congestion on the Denver-Salt Lake City route which has prevented BNSF from consistently achieving the required transit times and trailer availability.

D. I-5 CORRIDOR

The CPUC notes that BNSF is operating one train a day in each direction over the I-5 Corridor while UP operates 20 trains a day into and out of California along its I-5 route. (CPUC at 6-9). It should be noted, however, that BNSF did not begin operating over the Bieber to Keddie route until July 15, 1997. BNSF's one daily train over this route already is approaching capacity. In fact, due to increasing volumes and to improve customer service (in light of UP's refusal to permit BNSF to set out Salt Lake City route traffic at Oroville), BNSF is planning to add a second scheduled train between Klamath Falls and Provo by September 1, 1997. In addition, BNSF now operates a second "extra" merchandise train several times each week and anticipates replacing this train with a second scheduled merchandise train between Klamath Falls and Stockton. BNSF remains committed to growing operations along the Bieber-Keddie route.

E. GENERAL COMPETITIVENESS AND AGGRESSIVENESS IN MARKETING

A few shippers express concerns regarding BNSF's ability to compete with UP. While such shippers may be disappointed with the results of the competitive process, that disappointment does not indicate that BNSF lacks the commitment or has failed to exert the necessary effort to compete with UP. For instance, NITL's survey, attached to its August 1 comments, indicates that some shippers on trackage rights lines may not have yet been contacted by BNSF regarding the possibility of BNSF service. BNSF is, however, continuing its efforts to contact all "2-to-1" customers along the trackage rights lines either via telephone or in-person. Much of the difficulty in contacting these customers is due to name changes, customer relocation, or new customers moving into existing facilities. In many such situations, these changes are not reflected in UP's "2-to-1" list or in local industrial or telephone directories. Many of those customers who have not been contacted are those to whom BNSF only recently gained access, and eight BNSF teams are currently involved in a canvassing "blitz" effort at the major "2-to-1" points to identify and contact additional customers. BNSF plans to substantially complete this effort by the end of August, 1997.

Similarly, with respect to Mexican traffic, BNSF has steadily grown its business with Tex Mex over the Corpus Christi/Robstown interchange and is aggressively seeking to grow the business further. In particular, BNSF is working with both Tex Mex and TFM to increase its Mexico commercial offerings for its customers and is establishing a Mexico commercial group to facilitate growth, both in the United States and Mexico. Arriving at a long-term commercial arrangement for BNSF competitive access to the Mexican market remains a high priority for BNSF.

Further, while International Paper Company ("IP") asserts that BNSF failed to provide it with timely and complete responses to its RFP's for traffic originating at its Camden and Pine Bluff facilities and that BNSF has been unable to meet IP's boxcar needs and requests, IP-19 at 4-10, BNSF representatives have met regularly with representatives of IP to address IP's concerns. At the most recent meeting on August 15, 1997, BNSF expressed its commitment to provide IP with timely and complete responses to IP's RFP's and to work to meet IP's equipment and service needs. In response, IP confirmed that BNSF will be shortly receiving additional RFP's for business opportunities from both Camden and Pine Bluff.

Several other commenters assert that BNSF is unable to compete effectively with UP notwithstanding BNSF's efforts. For instance, Cyprus Amax Coal Sales Corporation ("Cyprus Amax") indicates that BNSF has informed it that BNSF can not be competitive with UP over the former SP route for service at its Willow Creek and Plateau mines. (See BNSF-PR-4, V.S. Rickershauser at 13-14.) As a result, UP service to the mines is deteriorating, and UP has announced a revision to its pricing policy which Cyprus Amax believes could result in significantly higher rates for its coal. (CYP-2 at 6). To remedy this situation, Cyprus Amax proposes that the Board take action to restore pre-merger competition, including granting BNSF trackage rights over UP's line through Las Vegas or reducing BNSF's cost structure over the former SP route. (Id. at 7).

Similarly, Sierra Pacific Power Company ("Sierra Pacific") states that the contract rates for URC-BNSF dual line service received in response to its solicitations were significantly above the UP/SP single-line contract rates from comparable Utah mines. (SPP-2 at 5-6). To remedy the competitive disadvantage which Sierra Pacific believes is inherent in a joint BNSF-URC movement, Sierra Pacific suggests that the Board act to provide it with the right to receive single-line service at its North Valmy plant or to revise the trackage rights compensation BNSF must pay so that BNSF can provide competitive service to the plant. (Id. at 9). Both Cyprus Amax's and Sierra Pacific's proposed solutions would remedy the competitive harm which they assert has resulted due to the merger.

BNSF continues to remain committed to competing vigorously over the trackage rights lines. The evidence submitted by BNSF, as well as the comments filed August 1, demonstrate that BNSF has been working for the past year to become fully competitive. This is, however, an ongoing, dynamic process, and BNSF continues to work hard in both operations and marketing to make its new service fully competitive.[10]

CONCLUSION

The Board should use the oversight proceeding as an opportunity to address specific circumstances in which UP is impeding BNSF's ability to compete in the ways that the merger conditions contemplated. The Board should not adopt principles or procedures that result in the relitigation of the merger or a static assessment of the sufficiency of the merger conditions. Rather, in assessing BNSF's effectiveness over the trackage rights lines, the Board should review whether BNSF has made the necessary commitments to serve new markets.

The August 1 comments highlight the need for Board action on certain issues in order to ensure that the BNSF is able to compete as fully and as effectively over the trackage rights lines as the Board contemplated. Specifically, as set forth in BNSF's August 1 comments and as further described below,[11] the Board should :

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[10] In its comments, Fina asserts that BNSF diverted Fina's traffic over BNSF's New Orleans trackage rights without Fina's consent. (Fina-1 at 6). However, in the instance cited by Fina, the rerouting of Fina's traffic to New Orleans enabled BNSF to avoid congestion on its line to Birmingham, AL which would have severely delayed Fina's and other customers' traffic between the Gulf Coast and the Southeast. Nonetheless, BNSF now routes Fina's traffic to Birmingham as Fina has requested.

[11] BNSF has not repeated herein all of the requests for Board action that were set forth in its August 1 comments. Each of those requested actions is, however, necessary

- establish a presumption that any shipper located at a "2-to-1" location is entitled to two-carrier service and place the burden on UP to rebut that presumption.
- establish clear principles governing the definitions of "new facilities" and "transloads" and clear procedures requiring UP to respond promptly to requests to recognize BNSF access to particular projects.
- rescind Guideline No. 9 in Decision No. 57.
- grant BNSF access to bundled UP sole-served facilities when necessary to restore competitive alternatives lost to shippers as a result of the UP/SP merger combined with UP's leveraging activity.
- address service issues, including but not limited to those existing at:
  - the Sjolander facility in Dayton, where UP should be required to prefer the storage of cars from "2-to-1" customers over those from non-"2-to-1" customers when space at Sjolander is constrained, and to return any cars not stored at Dayton to BNSF at the most efficient point;
  - South Texas involving the movement of BNSF trains and traffic between Algoa and Robstown and Brownsville and at Eagle Pass, where UP should be required to refrain from actions that unduly delay BNSF's service;
  - Little Rock and Pine Bluff, where BNSF should be given the right to operate between Little Rock and Pine Bluff, connecting directly to the LRWN and LRPA, or, alternatively, UP should be required to operate a daily train dedicated to BNSF traffic between Little Rock and Pine Bluff;
  - the Baytown Branch, where UP should be required to cease the practice of taking BNSF cars originated at Baytown Branch customers to which BNSF has access to Houston and instead to interchange those cars with BNSF at Dayton; and

---

to ensure BNSF's competitiveness with the merged UP/SP system.

- Grant Tower in the Salt Lake City area and North Salt Lake, where BNSF's local trains should be given equal dispatch with UP's trains, other than intermodal and automotive trains.

BNSF believes that UP is not properly implementing certain aspects of the Board's conditions and that those actions are impeding BNSF's competitiveness. BNSF requests the Board act either upon the comments or replies to address these issues before it ends this phase of oversight, or institute appropriate subproceedings to take evidence as necessary to examine and remedy these issues on an expedited basis.

Respectfully submitted,

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Attorneys for The Burlington Northern and Santa Fe Railway Company

August 20, 1997

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of The Burlington Northern and Santa Fe Railway Company To August 1 Comments was served this 20th day of August, 1997, on all Parties of Record in Finance Docket No. 32760 (Sub-No. 21).

Kelley E. O'Brien

Kelley E. O'Brien

STB FD-32760 (SUB 21) ID-181296 8-20-97 D

181296

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August 20, 1997

D

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VIA COURIER

Mr. Vernon A. Williams, Secretary
Office of the Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, DC 20423-0001

Re: Finance Docket No. 32760 (Sub-No. 21)--Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company (Oversight)

Dear Secretary Williams:

Enclosed for filing in the above-captioned case is an original and twenty (25) copies of the Reply of The International Paper Company, designated as document IP-20. We have also enclosed an additional copy to be date-stamped when filed and returned to us.

Also enclosed is a 3.5" WordPerfect 6.1 disk containing the text of IP-20.

Very truly yours,

Edward D. Greenberg

Enclosures

ENTERED
Office of the Secretary
AUG 21 1997
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IP-20

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

[OVERSIGHT]

REPLY OF THE INTERNATIONAL PAPER COMPANY

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Counsel for The International Paper Company

Dated: August 20, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

[OVERSIGHT]

REPLY OF THE INTERNATIONAL PAPER COMPANY

In accordance with the Board's Decision No. 1 in this oversight proceeding, served May 7, 1997, The International Paper Company ("IP") submitted its initial comments on August 1, 1997 that addressed the issue of whether the conditions imposed on the merger had been effective in addressing the anticompetitive effects of the merger. In that submission, IP focused heavily on relating the facts concerning BNSF's ability to provide a competitive service. Without belaboring the point made there, IP noted that BNSF has not in fact been able to provide anything approaching a competitive alternative to the UP/SP at IP's Pine Bluff facility and has provided no service at all at its Camden mill. In this Reply, IP is addressing two additional points--namely, UP/SP's restrictive interpretation of the merger conditions and UP's worsening service.

IP has reviewed very carefully the comments filed by the U.S. Department of Transportation and the Oregon Department of Transportation on August 1 and concurs in all of those sentiments.

Prior to the Board's decision approving the merger, IP also contended that the Board should require divestiture of one of the parallel lines in the Houston-Memphis Corridor as the best way to ensure that there would be meaningful competitive service provided to shippers after the merger. We took this position because of our concern that there would be operational constraints and insufficient traffic available to the BNSF in this region to enable it to replace the competition lost by UP's acquisition of SP. Declining to order divestiture, the STB chose instead to give the BNSF traffic rights with substantial conditions that were intended to preserve competition in this region, which directly affects many IP facilities (including the major mills at Pine Bluff and Camden, Arkansas). And, prior to consummating its acquisition, the UP agreed with every pro-competitive condition that was imposed and reiterated its position that the BNSF would be a vigorous competitor for the combined UP/SP in any affected region.

From the comments filed to date, it appears that the UP has set about to minimize the BNSF's ability to become the competitive alternative by interpreting those conditions very narrowly. While we understand that UP/SP also has the right to compete for the business in these regions, its narrow interpretations have worked to deprive BNSF of the traffic base it needs to become a viable competitor. For example, IP is disturbed that UP/SP has removed a large number of customer facilities from the "2-to-1" category, taking the position instead that they are not entitled to BNSF competition. Similarly, the fact that BNSF is required to file petitions seeking to enforce the "new facility" and "transload" conditions (see, for example, the Joint Petition of the Burlington Northern and Santa Fe Railway Company and R.R. Donnelly & Sons Company for Enforcement of Merger Condition, filed August 8, 1997, BN/SF-81) is very troubling. And, DOT's concern about UP/SP's denial of access by BN to shippers that were open to UP and SP reciprocal switching prior to the merger is correct. Simply stated, it ill-behooves the UP/SP to take a narrow construction of the merger conditions at this point, when it premised its entire application on the promise that BNSF would be able to vigorously compete with UP/SP at all points.

Moving on, and contrary to UP/SP's assertions that the service along the system has been rapidly improving since the merger, the facts are to the contrary. IP's facilities throughout the southwest--but specifically at Pine Bluff, Camden and Mansfield, Louisiana and Texarkana, Texas--have been experiencing inordinate delays in obtaining cars to handle outbound product. Over the last two months, the service being provided by UP/SP has deteriorated drastically, as car shortages have threatened to shut down these mills. It frequently takes UP/SP four to five days to bring empty cars the short 71-mile distance from Pine Bluff to Camden, and in any even we totally unable to rely upon UP/SP promises when cars will be provided. Similarly, our large Mansfield mill has been subjected to missed switches on an increasingly regular basis, all of which threaten its ability to continue functioning.

The same problems confront IP's Gardiner mill in Oregon, where lack of cars and inordinately extended transit times have become a way of life. In addition, we are advised that other western and even eastern carriers are experiencing similar car supply and transit problems, as the UP's difficulties have begun to have a domino effect on the other railroads. Whatever the reason, it appears plain that UP/SP does not have enough locomotives or crews to handle the business that is there. And, given the fact that BNSF is not able to service this traffic either, IP finds itself in a worsening crisis concerning the availability of rail service to its facilities in the southwest.

Respectfully submitted,

GALLAND, KHARASCH & GARFINKLE, P.C.

By: ______________________
Edward D. Greenberg

1054 Thirty-First Street, N.W.
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(202) 342-5200

CERTIFICATE OF SERVICE

I certify that on this 20th day of August, 1997 I caused a copy of the foregoing Reply of The International Paper Company to be served by first-class mail, postage prepaid, on all parties of record in this proceeding.

Edward D. Greenberg

STB FD-32760 (SUB 21) ID-181294 8-20-97 D

181294

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RICHARD A. ALLEN

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TM-3

August 20, 1997

Via Hand Delivery

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

D

Re: Union Pacific Corporation, et al. -- Control & Merger -- Southern Pacific Rail Corp., et al.
Finance Docket No. 32760 (Sub-No. 21)

Dear Secretary Williams:

Enclosed for filing is an original and twenty five copies of TM-3, Reply of The Texas Mexican Railway Company, filed in the above-reference proceeding. Also enclosed is a 3 1/2" computer disk containing the filing in Wordperfect 5.1 format, which is capable of being read by Wordperfect for Windows 7.0.

Should you have any questions regarding this, please call.

Sincerely,

Richard A. Allen

Richard A. Allen

Enclosure

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Trans. Co., St. Louis Southwestern Railway Co., SPCSL Corp. and The Denver and Rio Grande Western Railroad Co.

Finance Docket No. 32760 (Sub-No. 21)
(UP/SP Oversight)

REPLY OF
THE TEXAS MEXICAN RAILWAY COMPANY

Pursuant to the Surface Transportation Board's ("Board") Decision No. 1, served May 7, 1997, in the UP/SP Oversight proceeding,[1] The Texas Mexican Railway Company ("Tex Mex") hereby submits its reply to comments submitted by parties on August 1, 1997 with regard to the effects of the merger on

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[1] The "UP/SP Oversight proceeding" refers to the proceeding instituted in Finance Docket No. 32760 (Sub-No. 21), Union Pacific Corp., Union Pacific Co. and Missouri Pacific Railroad Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Trans. Co., St. Louis Southwestern Railway Co., SPCSL Corp. and The Denver and Rio Grande Western Railroad Co., Decision No. 1, served May 7, 1997. The UP/SP Oversight proceeding embraces the proceeding in Finance Docket No. 32760, Union Pacific Corp., Union Pacific Co. and Missouri Pacific Railroad Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Trans. Co., St. Louis Southwestern Railway Co., SPCSL Corp. and The Denver and Rio Grande Western Railroad Co., hereinafter referred to as "UP/SP."

competition and implementation of certain conditions imposed to address competitive harms. Specifically, Tex Mex would like to address 1) comments of the Burlington Northern Santa Fe Railroad ("BNSF") concerning its dealings with Tex Mex, and 2) the comments of a number of parties, including the Railroad Commission of Texas ("RRCT"), the National Industrial Transportation League ("NITL"), the United States Department of Agriculture ("USDA") and large shippers in the Houston area attesting to the significant problems that remain unresolved in connection with the UP/SP merger.

1. BNSF says that it continues to be concerned with "lack of long-term stability and other problems in the relationships and business arrangements necessary to serve Mexico over Laredo using the trackage rights granted BNSF for that purpose." BNSF-1 at 17. In that connection, BNSF asserts:

> The absence of a long-term agreement precludes BNSF from offering long-term commitments to customers and is a substantial impediment to BNSF's effective use of Mexico-related trackage rights to provide competitive discipline on UP. Furthermore, Tex Mex has been pressing BNSF to route traffic over Houston. The result is that shippers desiring to use BNSF service to Mexico via Laredo could be required to use Tex Mex's inferior route from Houston to Corpus Christi. The more efficient route is to use BNSF to Robstown and Tex Mex to Laredo. If Tex Mex is allowed to insist on Houston routings, BNSF's ability to provide competitive service to Mexico will be diminished.

Id. at 17-18. Accordingly, BNSF contends that, "[w]here necessary, the Board should modify the conditions to ensure that they are serving the purpose for which they were intended. In particular, the Board should . . . address Mexico-related issues if Tex Mex continues to prevent inefficient routings that harm competition..." Id. at 20.

With respect to these comments, Tex Mex wishes to respond that it has been working well with BNSF in connection with traffic moving over Laredo and interchanged with BN[illegible] at Robstown, and expects to continue to do so. As noted in the comments filed by Tex Mex (TM-2), UPSP has restricted BNSF movements to one train per day due ostensibly to congestion and operational problems. While Tex Mex no less than BNSF believes that a long-term agreement among the two railroads is desirable, there is no basis for the apparent implication in BNSF's comments that Tex Mex is somehow to blame that such an agreement has not been concluded. It takes two to reach an agreement.

For the same reason, there is no basis for BNSF's suggestion that it may need to invoke the Board's protection to resist Tex Mex's "pressure" to interchange traffic at Houston rather than Robstown. Tex Mex does believe that for many, if not most types of traffic, an interchange between Tex Mex and BNSF at Houston would provide better and more efficient service to shippers than is now provided for a number of reasons. Obviously, however, Tex Mex cannot force BNSF to change the interchange. Unless required by the Board, any such change would require the consent of both carriers. BNSF's implication that one of the smallest railroads in the country could coerce the largest one against its will is flattering but fanciful.

2. In its comments (TM-2), Tex Mex discussed significant problems remaining unresolved in Houston and the south Texas market with respect to the merger. Tex Mex's concerns are amply echoed and confirmed by the comments of a number of other parties, of which the Board should take special note.

Of particular importance generally are the comments of the National Industrial Traffic League ("NITL"). NITL reports that a survey of its members indicates that "for many shippers there has been a significant deterioration in the quality of service on both UP/SP and on BNSF." NITL-2. Like Tex Mex, NITL believes that it is too soon to determine the effectiveness of the conditions imposed to preserve competition, and it urges the Board to continue to monitor the merger conditions closely. Id. at 3, 5.

Of specific importance to the markets served by Tex Mex are the filings of the RRCT, USDA, Fina Oil and Chemical Company ("Fina") and Millennium Petrochemicals, Inc. ("Millennium").

RRTC has recently sought to intervene in this proceeding because it has "received numerous phone calls from irate shippers and shortline railroads protesting the condition of services received resulting from the ongoing attempts to integrate the Union Pacific's and Southern Pacific's operations in Texas." RRCT-1 at 2. RRCT cites several problems, including shortages of motive power and crews and delays in the delivery and return of loaded and empty cars. Id. RRCT attributes these problems to congestion in the "Houston terminal area operations hub". Id.

Similarly, USDA filed comments based on two "listening sessions" held in Dodge City and Wichita, Kansas and on "numerous contacts we have received by phone, fax and mail." USDA Comments at 4. The comments received indicate to USDA that "BNSF does not appear to be providing the kind of effective competition the STB requires in these [grain] movements from Kansas, Oklahoma and Texas to the Gulf and Mexico." Id. USDA's comments focus particularly on the importance of Mexico as a market for U.S. grain producers and on "the availability of low-cost, competitive overland railroad services to Mexico." Id. at 5. USDA notes that "[a]gricultural shippers are generally frustrated by the apparent lack of vigorous competition among the only two carriers left in this important corridor, and between UPSP and the BNSF generally in railroad originations to all destinations from the lower Plains" (id. at 4), and it specifically suggests that the Board may need to modify the conditions granted to Tex Mex "to preserve effective competition for U.S. agricultural exporters to the Mexican market." (Id. at 6).[2]

Fina is a major oil and chemical company with production facilities located predominately along the Texas and Louisiana Gulf Coast, including facilities in the Houston area served by BNSF. Fina reports that it "has experienced critical service deterioration from both UP and BNSF since the merger was

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[2] Although USDA appears to believe, mistakenly, that Tex Mex only has haulage rights between Robstown and Beaumont, that misunderstanding does not lessen the force of its general point that the Board may need to impose stronger conditions to preserve competition.

established." FINA-1 at 2. Fina has incurred numerous unnecessary costs as a result of increased congestion, lost rail cars, inconsistent transit times and inadequate storage space available on the UP or the BNSF. Id. at 3-4. With respect specifically to Mexico, Fina states:

> Fina is very interested in exporting its product into Mexico, preferably by rail. One provision of the merger gave BNSF trackage rights into Corpus Christi, with connections to the Tex Mex Railroad. BNSF has not been aggressive in marketing these rights.

Millennium is another major chemical company with manufacturing plants in the Houston area. Like Fina, Millennium also reports that there has been "a severe degradation of rail service in the Gulf coast region of Texas post-merger," as well as an "effective failure of the conditions imposed upon the merger by the Board to maintain effective rail-to-rail competition in the Gulf coast region." MI-2 at 3. In that connection, Millennium cites, among other things, admissions by UP/SP customer service personnel that service in that region is at its "worst in twenty-eight years", as well as increased transit times on outbound shipments from Gulf Coast facilities, disrupted delivery schedules, and $200,000 in additional monthly freight expenses. Id. at 3, 5.

These comments fully confirm the problems and concerns expressed by Tex Mex in its comments. They also underscore the need for the Board to continue to monitor the UPSP merger closely in this oversight proceeding and, if necessary, to modify the conditions imposed or to impose additional conditions to the extent needed to protect competition and the public interest.

Respectfully submitted,

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Attorneys for The Texas Mexican Railway Company

CERTIFICATE OF SERVICE

I, Bianca C. Bennett, certify that on August 20, 1997 I have caused to be served by first class mail, postage prepaid, or by more expeditious means a true and correct copy of the foregoing Reply of The Texas Mexican Railway Company, on all parties that have appeared in STB Finance Docket No. 32760 (Sub-No. 21) (UP/SP Oversight):

Bianca C. Bennett

Bianca C. Bennett

Dated: August 20, 1997

STB FD-32760 (SUB 21) ID-181293 8-20-97 D

181293

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August 20, 1997

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Mr. Vernon A. Williams
Case Control Unit
ATTN: STB Finance Docket No. 32760 (Sub-No. 21)
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20006

Re: Finance Docket No. 32760 (Sub-No. 21), *Union Pacific Corporation, et al. -- Control & Merger -- Southern Pacific Rail Corporation, et al. Oversight Proceeding*

Dear Secretary Williams:

Enclosed for filing in the above captioned proceeding are the original and twenty-six copies of KCS-3, The Reply Comments Of The Kansas City Southern Railway Company. Please date and time stamp one of the copies for return to our offices. Included with this filing is a 3.5 inch Word Perfect, Version 5.1 diskette with the text of the pleading.

Sincerely yours,

William A. Mullins
Attorney for The Kansas City Southern Railway Company

cc: Robert K. Dreiling, Esquire
W. James Wochner, Esquire
Erika Z. Jones, Esquire
Arvid E. Roach II, Esquire

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181293

KCS-3

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
--CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER
AND RIO GRANDE WESTERN RAILROAD COMPANY

OVERSIGHT PROCEEDING

REPLY COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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August 20, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
--CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER
AND RIO GRANDE WESTERN RAILROAD COMPANY

OVERSIGHT PROCEEDING

REPLY COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

INTRODUCTION

This proceeding was initiated by the Surface Transportation Board ("STB" or "Board") in Finance Docket No. 32760 (Sub-No. 21), Decision No. 1, served May 7, 1997, to "take comments from interested persons on the effectiveness and implementation" of the conditions imposed in Decision No. 44. Numerous parties, including The Kansas City Southern Railway Company ("KCS") filed comments in response to the Board's decision. A review of those comments clearly indicates that there is a need for continued oversight and for the adoption of objective standards by which to judge BNSF's performance. KCS hereby replies to those comments filed by the other parties and joins in the request for an adoption of a process that guarantees the filing of more data and the use of objective standards.

Any assessment of the effect of the merger upon competition must be based upon data supplied by Applicants and BNSF. To date, however, there has not been development and disclosure of significant meaningful data upon which to measure BNSF's competitiveness vis-à-vis the newly merged system.[1] This lack of information is due in part to the limited time that has elapsed since control was authorized. More importantly, UP and BNSF have failed to present specific quantitative market share data or other specific data upon which the Board could accurately assess the competitiveness between UP and BNSF. This lack of information, combined with the Houston service problems, support the need for the Board's continued oversight of the effectiveness of competition and the necessity of adopting an objective "measuring stick" by which to judge that competition.

I. UP AND BNSF SHOULD BE REQUIRED TO PROVIDE SPECIFIC QUANTITATIVE INFORMATION TO BE UTILIZED IN THE BOARD'S CONTINUED OVERSIGHT OF THE MERGER

The lack of information provided in the quarterly progress reports and in answers to the joint discovery requests have failed to provide the requisite data necessary for the Board to determine whether or not its conditions "have effectively addressed the competitive issues they were intended to remedy." As stated above, this is true in spite of the fact that the Board stated in Decision No. 1 of this oversight proceeding, that "we fully expect that the information presented by applicants in their July 1 progress report will be more extensive, including specific details of how each condition has been met." Decision No. 1 at 6. Although both UP and BNSF

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[1] As stated in KCS's original comments, KCS is setting aside for the purpose of this reply KCS's arguments regarding the efficacy of the conditions imposed in Decision No. 44. KCS should not be deemed hereby to waive its argument that BNSF's trackage rights do not make it an effective competitor or that the Board's proposed conditions are either ineffective or unlawful. These issues have been preserved for appeal in KCS's Petitions for Review filed in the U.S. Court of Appeals for the District of Columbia. *See* Docket Nos. 97-1004 and 97-1072.

in their respective July 1 progress reports (UP/SP-303 and BNSF-PR-4) make a concerted effort to portray BNSF as an aggressive competitor, neither party even mentions the absence or existence of their respective "market shares."[2]

The meager numbers and examples given to date by UP and BNSF speak nothing of how BNSF competes with UP in those markets where BNSF was given trackage rights or how BNSF's traffic volumes compare with SP's prior to the merger. In short, there is no evidence of how BNSF compares to UP in the 2-to-1 corridors. More pertinently, neither UP nor BNSF have revealed in their progress reports how each compares to the other.

As set forth in KCS-2, the Board's ability to monitor the merger conditions relies on the self-serving reporting of the parties being policed and fails to provide a trigger for the invocation of Board action, such as divestiture of a parallel line[3]. Therefore, KCS proposed in KCS-2 a method consisting of clear, objective standards by which the Board and the public could judge BNSF's competitive ability. The five-step proposal called "The Standard" relies on market share as the standard upon which effectiveness of competition is measured.[4] In addition to KCS's proposal, the comments filed by other parties in the oversight proceeding emphasize the necessity for an objective standard to evaluate the competition, or lack thereof, between UP and BNSF.

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[2] *See* KCS-2 at p. 8.

[3] KCS contends that the Board should use this objective standard as a measuring stick to judge the competitiveness of BNSF. If BNSF fails to compete or use the rights given them under the merger, the Board should give those rights to someone else.

[4] The Verified Statement of Dr. Curtis M. Grimm and Mr. Joseph J. Plaistow, attached hereto as Exhibit A, confirms that the use of market share date is an appropriate means by which to judge the effectiveness of a given competitor in the marketplace.

The comments filed by at least eight other parties in the oversight proceeding suggest that additional reporting of specific information and data should be imposed on UP and BNSF. For example, the State of Oregon Department of Transportation ("ODOT") "support[s] the ongoing oversight process that will allow the Board to develop quality data on the competitive effects of major railroad mergers." ODOT at 3. Similarly, the Public Service Company of Colorado requests the Board to "order UP and BNSF to provide detailed information concerning changes in traffic volume, service levels and transit times." PCS-8 at 4. Sasol Alpha Olefins North America, Inc. ("SNA") also requests the Board to continue the five year oversight and modify the reporting condition of UP to include details of all merger related service problems. SNA-02 at 7. Finally, the comments of Empire District Electric Company imply that UP might not be accurately reporting its service performance, (EDEC-04 at 5), which suggests that additional objective reporting is appropriate.

In addition to these general comments and requests for additional and/or modified reporting requirements, four parties have requested that the Board establish clear and specific guidelines or metrics with which the Board should use to fully evaluate whether BNSF has in fact become an effective substitute for a pre-merger SP. Millennium Petrochemicals, Inc. ("MPI"), the Chemical Manufactures Association ("CMA"), the Society of the Plastics Industry, Inc. ("SPI"), and FINA Oil & Chemical Company ("FINA") all assert that additional data in the form of some sort of standard is needed in order to gain any meaningful analysis of the effect of the merger conditions imposed by the Board. MPI, CMA and SPI support the reporting requirement of "performance metrics demonstrating clearly and concretely the progress (or lack of progress) made by the UP/SP in implementing their merger and by BNSF in capturing traffic available to it under the merger conditions." CMA-2, SPI-3 at 14; and *see* MPI-2 at 4.

Likewise, FINA "requests that the Board establish clear guidelines in terms of performance measurements and dates to which the full impact of the merger can be realized." FINA-1 at 10.

The record makes it clear that some objective mechanism is needed. As set forth in KCS-2 and the Verified Statement of Dr. Grimm and Mr. Plaistow, the market share analysis under "The Standard" would be an optimal mechanism that will enable the Board to measure the effectiveness of competition as a result of the merger. The need for a standardized mechanism for this evaluation is unequivocally supported by the suggestions and requests found in the comments of the parties cited above.

As pointed out in KCS-2 and condensed here, requiring some specified reporting and measuring mechanism would produce the following benefits: it (a) would assure that pre-merger levels of competition will be maintained; (b) would require BNSF and UP to prove, through their actions, that the BNSF Settlement Agreement, as modified by the Board in Decision No. 44, provides effective competition for all markets; (c) would utilize objective criteria not susceptible to the subjective arguments that might be leveled against cost or rate level data or self-fulfilling comments; (d) would eliminate reliance upon UP's and BNSF's self-policing and reporting; and (e) would provide the Board with a cost effective mechanism by which it could conduct its oversight process, eliminating the need of the Board to constantly warn, or otherwise chastise, UP and BNSF for the lack of meaningful information. The Board therefore should adopt the procedures and requirements set forth in "The Standard."

II. UP'S SERVICE PROBLEMS IN HOUSTON ARE A FURTHER INDICATION OF THE NEED FOR CONTINUED OVERSIGHT OF THE MERGER

As stated in KCS-2, UP fails to acknowledge that service problems in the Houston area are bottlenecking the nation's largest petrochemical complex. The merged rail system of UP and

SP is now the only rail line serving many of the petrochemical companies in Houston. As further detailed in KCS-2, a recent press account reported that there are chemical plants in the Houston area that are a heartbeat away from being forced to close their doors due to UP's inability to ship chemicals to customers.[5] UP's failure to provide any information or data on the service problems in Houston further supports the Board's continued oversight of the merger.

Other parties to this oversight proceeding also have pointed out the Houston service problems. These comments provide additional buttress to the necessity for continued oversight by the Board. For example, MPI points out that the problems in the Gulf Coast region of Texas, particularly the Dayton SIT yard, are thwarting shippers' businesses. MPI-2 at 4-5. Similarly, CMA and SPI point out that severe service deficiencies in the Houston area are adding to costs borne by shippers. CMA-2/SPI-3 at 16-17. Furthermore, Champion International Corporation ("CIC") shows that potential production interruptions have plagued its facilities based on the Houston congestion. CIC-2 at 1-3. SNA estimates that the Houston service problems have increased its overall transportation costs by 25%. SNA-02 at 5-6.

Finally, the National Industrial Transportation League (NITL) conducted a survey of its members to assess the effectiveness of the merger. An overwhelming conclusion of the survey found that "there has been a significant deterioration in the quality of rail service provided in the western United States by the merged BNSF and UP/SP systems." NITL-2 at 2. Moreover, NITL's August 15, 1997 issue of "Notice" states that rail service problems in Houston are getting even worse. Even emergency calls to UP have been necessary because of reports of a total shutdown of service in the Houston area. *See* Notice, The Shippers' Voice since 1907, August

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[5] *See* Nelson Antosh, *Plants Deal With Rail Bottleneck*, Houston Chronicle, July 26, 1997, at B1, attached to KCS-2 as Exhibit A.

15, 1997, at 149, attached as Exhibit B. These service problems indicate that the Board needs to consider alternative means by which these shippers can transport their goods out of the Houston area.

CONCLUSION

Due to the lack of meaningful market share data, the Board should continue its oversight of the operations of both UP and BNSF to insure that the competitive harms resulting from the merger are alleviated by the conditions imposed in Decision No. 44. In effecting this oversight, the Board should adopt the five step program outlined by KCS, or another similar program, in order to provide for a meaningful, objective assessment of the efficacy of the conditions. At a minimum, both UP and BNSF should be required to produce its current 100% traffic tapes in a timely manner for subsequent oversight proceedings.

Respectfully Submitted,

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Attorneys for The Kansas City Southern
Railway Company

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY" (KCS-3) was served this 20th day of August, 1997, by hand-delivery, overnight delivery, or first-class mail in a properly addressed envelope with adequate postage thereon addresses to all known parties of record.

Sandra L. Brown

Sandra L. Brown

Attorney for The Kansas City
Southern Railway Company

EXHIBIT A

KCS-3

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
-CONTROL AND MERGER-
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER
AND RIO GRANDE WESTERN RAILROAD COMPANY

OVERSIGHT PROCEEDING

VERIFIED STATEMENT

OF

CURTIS M. GRIMM AND JOSEPH J. PLAISTOW

AUGUST 20, 1997

I. INTRODUCTION

A. Qualifications

My name is Curtis M. Grimm, and I am Professor and Chair of Transportation, Business and Public Policy, College of Business and Management, University of Maryland at College Park. Recently, I have participated actively in a number of rail merger proceedings. Specifically, I provided testimony evaluating the competitive consequences of these transactions. My background and qualifications are fully set forth in my previous statement in this proceeding on behalf of KCS (KCS-33, Vol. II, dated March 29, 1996).

My name is Joseph J. Plaistow, Vice President and partner of Snavely, King, Majoros, O'Connor & Lee, Inc. with offices at 1220 L Street, N.W., Washington, D.C. 20005. I have submitted three prior verified statements in this proceeding on behalf of KCS, including *Comments of Kansas City Southern Railway Company on Proposed Procedural Schedule,* (KCS-3) dated September 18, 1995, and *Comments of Kansas City Southern Railway Company and Request for Conditions* (KCS-33, Vol. II) dated March 29, 1996. My background and qualifications are fully set forth in those statements.

B. Summary of Statement

A number of parties in their comments noted the value of a more rigorous and specific approach to conducting UP/SP oversight. Such an approach, based on development of specific market share data from the UP and BN traffic tapes, is both conceptually sound and feasible. This statement endorses and provides detail regarding this approach.

II. A RIGOROUS APPROACH TO EVALUATING THE EFFICACY OF THE BNSF COMPETITIVE FIX

As one of the conditions to its approval of the merger, the STB imposed a five year oversight condition to "examine whether the conditions we imposed have effectively addressed the competitive issues they were intended to remedy." To that end the Board has initiated this oversight proceeding. The competition provided by BNSF has been designated as a key matter to be considered in these proceedings, specifically whether the access provided to BNSF satisfactorily ameliorates the competitive harm resulting from the UP/SP merger. Otherwise stated, the key issue is whether the degree of competition between BNSF and UP/SP is as vigorous as the pre-merger competition between UP and SP.

The specific focus of the oversight is crucial. A Board attempt to undertake a broad based inquiry which seeks to develop data on efficiency and competitive effects of the merger is a difficult undertaking; however, the Board need not take on such a challenge. The Board should focus attention on the specific issue of BNSF's competitive strength in the markets where UP and SP were direct competitors since the overall post-merger competitive strength of BNSF does not have much relevance to such an inquiry.

The market share attained by BNSF in these specific markets is the best measure of BNSF's competitive strength. This measure takes into account the outcome of BNSF's efforts, reflecting its will and ability to compete against UP. It directly addresses issues raised in the proceeding as to whether BNSF would or would not be an effective competitor. For example, this measure addresses whether there would be cost and service disadvantages from such extensive, unprecedented use of trackage rights or whether BNSF has sufficient strength to provide competition as effective as SP, the competitor for which BNSF is substituting.

The use of market share data to assess competitiveness is solidly grounded in the leading paradigm of industrial organization economics -- the structure-conduct-performance framework. The framework posits that the structure of the industry influences the conduct of the firms within that industry, which in turn determines industry performance. Structure of an industry refers to the number of sellers in an industry and their respective market shares. Within this framework, market share indices are widely accepted as important indicators of a market's competitive character and of a particular firm's strength within that market. For example, the Herfindahl index, commonly used in antitrust proceedings, sums the square of each firm's market share. The C4 index sums the market share of the four leading firms in an industry. Thus, focusing on market share indicators is consistent with this framework, which has long been followed in antitrust procedures, where market structure and changes in market structure provide the key evidence as to likely changes in conduct and performance resulting from mergers.

While measures of conduct and/or performance, such as rate levels and service performance indicators, can be used to supplement structural measures of BNSF's competitive effectiveness, such measures have a number of limitations compared to market share data. Market share data is conceptually grounded and readily available through analysis of UP and BNSF traffic tapes while evidence on conduct and other performance measures, such as service quality, are difficult to quantify on a systematic basis[1]. Evidence on price outcomes and trends as a performance measure could also supplement market share indicators and would be available through the traffic tapes, but caution must be used when drawing conclusions based on such data. First, rate data on individual movements from carrier traffic tapes can be unreliable, with actual contract rates masked or rates provided in conjunction with specific movements actually representing revenues for larger volumes of traffic from the same shipper. Second, rate comparisons over time are not valid in gauging changes in competitive circumstances unless resulting cost changes that are also occurring are controlled for in the analysis. The railroad

[1] However, given the severe service problems in Houston and elsewhere, evidence on service levels should clearly be a supplemental component of future monitoring proceedings.

industry has exhibited declining costs from productivity increases and changing traffic mix and this has largely driven corresponding declines in rates. Indeed, both UP and BNSF have predicted substantial cost savings as a result of their respective consolidations. As a result, in those circumstances where costs and rates are generally declining, one cannot conclude from an absence of rate increases that rivalry in a particular market is unchanged. As with evidence on conduct and service quality, rate data, properly controlling for cost changes and general rate trends, can be a useful supplement to market share data, but should not be used as a substitute.

III. SUMMARY

In summary, data on BN and UP's market shares in specific markets provides a direct, conceptually sound, and feasible measure of the efficacy of the merger conditions. The Board should encourage and facilitate a more rigorous market share based oversight in subsequent monitoring proceeding. "The Standard" proposed by KCS would accomplish such a rigorous oversight proceeding. A key element of such facilitation would be a requirement that BNSF and UP provide traffic tapes on a regular and timely basis as "The Standard" suggests. It is important however, that in adopting an objective standard by which to judge competitiveness, the Board should initiate its oversight proceedings when the most recent traffic tapes are available. These traffic tapes should be provided to all parties and then a reasonable period to analyze such tapes should be given before comments are due. This would remedy the problem encountered in this proceeding, where BNSF's traffic tapes for the first two quarters of 1997 were made available only after the due date for comments.

VERIFICATION

DISTRICT OF COLUMBIA

Personally appeared the undersigned Curtis M. Grimm, who under oath states that the information contained in the foregoing Verified Statement for Finance Docket No. 32760 Sub No. 21, is true and correct.

Curtis M. Grimm

Curtis M. Grimm

Subscribed and sworn to before me this 20th day of August, 1997.

George M. Dick

Notary Public

My Commission Expires:

Georgia M. Dickens
Notary Public, District of Columbia
My Commission March 14, 2002

VERIFICATION

DISTRICT OF COLUMBIA

Joseph J. Plaistow, being duly sworn, deposes and says that he has read the foregoing statement concerning ICC Finance Docket No. 32760 Sub No. 21, knows the contents therein, and that the same are true and correct.

Joseph J. Plaistow

Joseph J. Plaistow

Subscribed and sworn to before me
this 20th day of August, 1997

My Commission expires 12/31/99

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

EXHIBIT B

NOTICE

THE SHIPPERS' VOICE SINCE 1907

Volume 61 *Pages 149-152* *August 15, 1997*

UP Rail Service Problems in Texas

There have been growing indications of severe rail service problems in Texas, especially in the Houston area. Results of a survey of League members' experience with BNSF and UP since the UPSP merger were attached to the League's August 1 comments to the Surface Transportation Board for its merger oversight proceeding. The survey detailed deteriorating service problems on both rail systems.

More recently, a number of League members have called to report that the problems are fast growing worse. Unacceptable transit times both from the West Coast to Texas and between Texas points, lost cars, even reports of a total shutdown of service in the Houston area, have prompted emergency calls to UP headquarters.

League President Ed Emmett spoke with senior UP managers on August 14. They explained it was a personnel problem, a shortfall of experienced operating people in the area, especially on the old SP lines. Brad King, vice president of transportation at Union Pacific, said that the following actions are already being taken to solve the problems:

- An aggressive hiring plan of over 500 employees, primarily in the Texas, California, and Central corridors.
- Acquiring 150 additional locomotives by the end of 1997, over and above the 260 new units already purchased in 1997.
- Adding management resources to the Texas region and the Omaha Harriman Center.
- Reducing all non-essential track work in order to minimize maintenance windows.
- Opening satellite switching operations to assist major terminal flows.
- Negotiating a Houston labor agreement that is tentatively scheduled for implementation on September 16.
- Initiating consolidation of the former SP Dispatching Center into the Omaha Harriman Center, scheduled for completion by November 1.

Hopefully these actions will begin to show results soon. Members should continue to report serious problems to the League so the situation can be monitored.

HIGHLIGHTS

UPS Strike Update

Talks between UPS and its striking Teamsters began again on Thursday and continued Friday morning. UPS has apparently signaled that it may be ready to withdraw its last and best final offer and begin negotiating again. But while UPS's proposal to withdraw from the multi-employer Teamster pension fund, and begin its own that is more generous to its own Teamsters, appears to be the most important provision for the company, there are numerous other provisions in the proposal that are important for the union, such as the right to cross the picket lines of other unions.

Thus, UPS's softening on the pension issue does not necessarily signal a quick end to the strike. Even if there were an agreement reached over the weekend, it would be several days before the employees went back to work.

Another factor is the UPS pilots, whose contract negotiations were put on hold earlier in the summer. The pilots, whose contract demands centered mainly on money, and salary parity with other airline pilots, could strike in the fall, and the Teamsters are already on record as promising to honor their picket lines.

SAC Update

The Federal Railroad Administration has decided to begin publishing regular announcements of the Railroad Safety Advisory Committee's working group activities and status reports. The August 4 edition of the *Federal Register* constitutes the first such status report. For information, contact Vicky McCully, (202) 632-3330.

Tripartite Shippers Meeting Set for September in Scotland

Preparations are being finalized for the fourth annual Tripartite Meeting of shippers which will be held September 7-9 in Dunblane, Scotland. Since 1994, representatives of the European Shippers' Council (ESC), Japan Shippers Council (JSC), and the League have met to discuss and formulate positions on a variety of transportation issues.

From the first meeting in Brussels, Belgium to last year's session in Washington, DC, the Tripartite group has engaged in a series of cooperative activities that have helped solidify shipper support on a number of key matters. These have included U.S. ocean shipping reform legislation, deregulatory efforts in Japan, and ongoing court cases in Europe that could lead to reversing the current liner block exemption authority.

At last year's meeting, the joint group agreed that the forum should expand to include shipper observers from other organizations. This year's meeting in Scotland is expected to include representatives from the Hong Kong Shippers Council, Canadian Shippers Council, and the Canadian Industrial Transportation League.

A critical focus for the upcoming meeting will be how the tripartite forum can be an even more effective voice for shippers worldwide. There has been a growing realization among shipper groups that many shipowners and other transport providers enjoy a tremendous advantage over shippers in many influential international policymaking bodies. As a consequence, they, and not shippers, have a tremendous influence in the outcome of transportation policy. This year's tripartite delegation will explore how shippers might better represent themselves in those international organizations where transport policy is now set. These groups include but are not limited to the International Chamber of Commerce (ICC): International Maritime Organization (IMO): the Consultative Shipping Group (CSG): and the Organization for Economic Cooperation and Development (OECD).

Also included for discussion on this year's meeting agenda, for the first time, will be aviation issues. Over the course of the past several years, issues pertaining to air freight transportation have taken on increasing importance for shippers. Recent contacts by both the ESC and League with the International Air Cargo Association and Cargo Airline Association are likely to be discussed.

Sanctions on Japanese Flag Ships Could Occur Next Month

Although the U.S. and Japan agreed this Spring to the ending of unfavorable operating conditions at Japan's ports, the lack of action by the Japanese government has prompted the possibility that the U.S. may impose economic sanctions on Japan's flag carriers that call at U.S. ports.

The *Notice*--a weekly newsletter that provides up-to-date information on domestic and international transportation issues--is published by The National Industrial Transportation League. The League, founded in 1907, is the nation's oldest and largest shipper association representing businesses of all sizes, using all modes of transportation to move their goods in intrastate, interstate, and international commerce.

Members and associates may also view the *Notice* each week on the League's website: www.nitl.org.

Direct editorial and advertising questions to Pat Mascari, 1700 North Moore Street, Suite 1900, Arlington, VA 22209-1904; (703) 524-5011; e-mail: mascari@nitl.org.

STB FD-32760 (SUB 21) ID-181292 8-20-97 D

181292

U.S. Department of Transportation
Office of the Secretary of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

RECEIVED
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STB

August 20, 1997

Vernon A. Williams
Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 32760 (Sub-No. 21)

D

Dear Mr. Williams:

Enclosed please find an original and 25 copies of the Reply Comments of the United States Department of Transportation in the above-referenced docket. Also enclosed is a copy of the document saved on a 3-1/2 inch computer disk in WordPerfect version 5.1.

Sincerely,

Dale C. Andrews
Deputy Assistant General Counsel
for Litigation

Enclosures

ENTERED
Office of the Secretary
AUG 21 1997
5 Part of Public Record

ORIGINAL 181292

DOT-2

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

Union Pacific Corp., Union Pacific Railroad Co. and Missouri Pacific Railroad Co. -- Control and Merger -- Southern Pacific Railroad Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp., and the Denver & Rio Grande Western Railroad Company (OVERSIGHT)	F.D. No. 32760 (Sub-No. 21)

REPLY COMMENTS OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION

Introduction

The Surface Transportation Board ("STB" or "Board") has instituted this proceeding to implement the oversight condition it imposed in Finance Docket No. 32760, the merger of the Union Pacific ("UP") and Southern Pacific ("SP") railroads (collectively, "UPSP"). Decision No. 1, served May 7, 1997 ("Decision"). The United States Department of Transportation ("DOT" or "Department") submitted initial comments expressing its concern both with the safety implications of the ongoing integration of the UP and SP, and with the delay in implementing those conditions designed to position the Burlington Northern Santa Fe ("BNSF") railroad as a competitor of UPSP. DOT-1, filed August 1, 1997. We now offer this reply to the initial comments of other parties.

Service Problems Since the Merger

Most shippers who have filed comments have severely criticized service since the merger. Although there are a some exceptions (Statement of the Port of Corpus Christi Authority, CC-1 at 1-3; Statement of Sea-Land Service, Inc.), these parties generally have reported a substantial deterioration in service. However, very few have provided any quantification of the adverse changes. See Comments of North American Logistics Services, NALS-1. The complaints most often concern the situation in Texas, particularly service in the Houston area, but they extend as well to the Central Corridor. Joint Comments of the Chemical Manufacturers Association and the Society of the Plastics Industry, CNA-2/SPI-3 at 10; Comments of the California Public Utilities Commission, passim; Comments of the Intermountain Power Agency, IPA-3 at 4; Comments of Fina Oil and Chemical Co., FINA-1; Comments of Cyprus Amax Coal Sales Corp., CYP-2 at 5-6. Most of the criticism is directed at UPSP, but BNSF is included as well. See CYP-2 at 5-6; Comments of Champion International Corp. at 2-4; Comments of Millennium Petrochemicals, Inc., MPI-1 at 3-8.

The Department is concerned, and we believe the Board should be as well, about this apparent erosion of service quality, whatever the cause. However, the pivotal question for the purpose of this oversight proceeding is the degree to which the operational problems UPSP has encountered are a consequence of the merger, and not the result of other market developments that affect service levels. The information available to date does not provide a sufficient basis to make this determination.

For example, the Board recognized in the merger proceeding that storage in transit ("SIT") capacity was critical to viable competition for chemical and plastics traffic in Texas. F.D. No. 32760, Decision No. 44 at 151-52 (served August 12, 1996). Because UPSP is handling virtually all of this traffic with SIT facilities that were in place before the merger, a reasonable argument could be made that capacity constraints, combined with a significant rise in demand for chemicals and plastics, have contributed importantly to present service problems. See Comments of the Texas Mexican Railway Co., Attachment B. The extreme congestion and delays in the Houston area, at least in part, may be linked to this demand/capacity situation. Such problems can cause cascading delays throughout the rail system, resulting in poor utilization of equipment. To the extent capacity constraints may be involved, the service problem is broader than the merger-related issues of major concern in the instant proceeding.

DOT recommends that the STB require UPSP to address the capacity/congestion problems related to the merger (paying particular attention to the Houston area), and provide a plan to address these issues, with appropriate milestones that will permit the Board to monitor this situation closely. It should also consider having BNSF and other interested parties address the causes of this situation and suggest corrective action.

Additionally, Amtrak has raised serious service-related problems in its filing in this proceeding. Service levels do not appear to have improved on former SP lines, and have deteriorated significantly on the former UP lines. Amtrak is particularly concerned with what it considers to be UPSP violations of Amtrak's statutory priority over freight trains.

DOT agrees with Amtrak (comments at 10) that with passenger train service (as with freight service) it is still too early to make a definitive conclusion on the effects of the merger. DOT believes that the new agreement currently being negotiated between Amtrak and UPSP should contain more meaningful penalties for railroad-caused delays in passenger train schedules. Nevertheless, we support Amtrak's request that UPSP provide more detailed information in its quarterly reports on the effect, including freight traffic increases on shared track, that the merger has had on Amtrak's on-time arrivals, as well as on the progress the carrier is making to improve passenger train performance. (Comments at 10.)

Access to Traffic

For BNSF to be a credible competitor to UPSP, it must be able to attract sufficient traffic to sustain service levels that meet shippers' needs. DOT has always been concerned that the trackage rights awarded in this consolidation could not, despite their broad scope, provide access to enough of the market to mitigate the otherwise anticompetitive effects of the merger. See F.D. No. 32670, DOT-4 at 34-39 (filed June 3, 1996). As we noted previously, there appear to be disputes over the definition of some of the markets and shippers covered by the conditions that have hampered BNSF in its efforts to win new customers. DOT-1 at 5-7. Specifically, we note that there are at least two formal petitions before the Board to designate specific facilities as transloading points to which BNSF should have access. BNSF-80/LCRA-11; BNSF-81/RRD-1. Such a facility-by-facility, shipper-by-shipper approach will significantly delay the development of BNSF's traffic base, and will, in turn, risk a further delay of BNSF's ability to compete effectively. We urge the Board to ensure that such disputes are resolved expeditiously, through a general, rather than a case-by-case, approach, and in a manner that allows BNSF access to sufficient traffic to sustain competitive service.

The question of access to traffic moving under contract rates poses a different problem. It is disappointing that so few existing contracts have been reopened to allow BNSF to bid. Many shippers have commented that they are reluctant to reopen a UPSP contract in cases where the contract covers multiple plants, some in 2-to-1 markets, and some that were always solely-served by either UP or SP. Those shippers have expressed concern that UPSP would cancel the contract on the portion of the traffic BNSF could not serve, and raise the rates on the remaining traffic, and that this has discouraged them from exercising their rights under this condition of the merger. CMA-2/SPI-3 at 8-10; FINA-1 at 3; NITL-2 at 3. They have asked the Board to eliminate Guideline No. 9, announced in Decision No. 57 (served November 20, 1996), so that UPSP would be required to maintain the existing contract rate on a smaller volume of traffic.

We understand shippers' desire to maintain the lowest possible rates for their traffic. However, in contracts, as in multiple car and unit train tariffs, rates are often tied to volume because of the economies generated thereby. If UPSP has negotiated a rate covering multiple plants, with associated traffic levels, it should not be required to offer that same rate on significantly lower volume movements. The Board, however, could require not only that UPSP respond promptly to shippers as to whether it would cancel the contract if BNSF obtained access to some of the traffic, but also that UPSP supply at the same time a good-faith rate quote for the traffic in question in the event the contract rate were canceled. This would enable shippers to assess the combined costs of the BNSF and UPSP rates versus the existing contract.

This situation will not go away as contracts expire. There will always be manufacturers with multiple locations, some open to both BNSF and UPSP, and some solely-served by UPSP. It is realistic to expect that UPSP will continue to offer multiple plant agreements covering all a shipper's facilities, with more attractive terms than those offered to solely-served facilities. If the rates proffered by BNSF on the plants it can serve do not offset any increased rates UPSP may offer for lower volume movements, these shippers will not sign contracts with BNSF. This, too, would have significant long term implications for the ability of BNSF to amass a sufficient traffic base to provide competitive service via trackage rights.

Standards

In our initial filing in this proceeding DOT indicated that it would file substantive comments only after review of the evidence submitted by shippers and other interested parties. DOT-1 at 1-2. However, most of the initial comments contained little or no hard data on which to base a decision on the progress UPSP has made towards implementing the rate and service benefits of the merger, or the degree to which BNSF has been able to provide sufficient and effective competition. We agree with the majority of the commenters, who stated that it was still far too early to judge the merger's success or failure. Nevertheless, we had expected that there would be more evidence filed, particularly on the effect BNSF's presence (or absence) in the market has had on rate levels.

Several parties -- NITL, CMA/SPI, and the Kansas City Southern Railway Company ("KCS"), among others -- have proposed that the Board establish standards and/or guidelines to help it determine the merger's progress towards anticipated rate and service benefits. See KCS-2 at 7-13. Data on areas covered by the standards would be provided in BNSF and UPSP quarterly reports, and by other parties in their periodic comments to the STB. This would allow the Board and others to have an objective means by which to judge whether the conditions placed on the merger to mitigate its adverse competitive impacts were effective, and the extent of UPSP's progress toward full consolidation and improved service. DOT agrees in principle with this approach. Without meaningful standards or benchmarks, it is difficult for the Board and interested parties to judge whether the conditions placed on the merger are working properly, and whether the benefits envisioned by UPSP have been realized.

It is particularly important to have standards by which to assess the implementation of the trackage rights conditions. Unless BNSF is an effective competitor to UPSP in markets where rail competition would have otherwise been reduced from 2 carriers to 1, the Board must consider alternative measures to protect shippers, up to and including divestiture. Although it is unrealistic to expect that BNSF would be a full competitor so soon after implementation, it is critical that the Board establish objective measures for assessing BNSF's performance and its impact in the market.

However, BNSF market share, supported by several parties as the primary standard for this purpose (e.g., KCS-2 at 11), should not be the decisive criterion by which the level of competition is judged. BNSF must have sufficient traffic to sustain service levels that allow it to be a realistic choice for shippers, but that traffic level could be far less than that of an independent SP.

The most important indicator of the impact of the trackage rights conditions is the effect BNSF's presence in the market has on the rates offered by UPSP. Additionally, to assess the degree to which the merger has been successful in producing benefits for shippers, criteria should be developed that allow parties to judge service improvements (or deterioration) that are closely (if not solely) tied to the consolidation, not to increases or decreases in traffic, or other events that would have occurred with or without the merger.

We recognize that rate data, in particular, are difficult to come by, and that much of the information must be submitted by shippers as well as by the two railroads. Nevertheless, the Board should explore this issue more fully, and develop a list of data that should be provided on a quarterly basis (for the carriers) and during the course of the oversight proceeding (for other parties).

Conclusion

Although the service problems currently being experienced by shippers and Amtrak give cause for concern, it is not yet clear to what extent those problems result from implementation of the merger. We urge the Board to require UPSP to provide a plan for addressing any merger-related problems, and submit detailed updates in their quarterly reports. To the extent that the problems extend to BNSF service via trackage rights, that carrier should provide updates as well.

The Department urges the Board to take all the steps it can to assure BNSF access to as wide a market as possible. We believe the STB should remain sensitive to the possibility that, even with all these actions, the trackage rights conditions may fail to perform their function in providing effective competition to UPSP. It is still too early to make judgments on the effectiveness of the trackage rights conditions. However, the necessity of making such a determination in the not-too-distant future is a compelling argument for the establishment of standards and benchmarks by which to make that determination.

DOT commends the STB for the efforts it is expending in monitoring the effects of this merger. We look forward to working with the Board throughout the rest of this oversight proceeding.

Respectfully submitted,

Nancy E. McFadden

Nancy E. McFadden
General Counsel

August 20, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a copy of the foregoing Reply Comments of the United States Department of Transportation, which have been filed today in Finance Docket No. 32760 (Sub-No. 21), on all parties of record by first class mail, postage prepaid.

Dale C. Andrews

August 20, 1997

STB FD-32760 (SUB 21) ID-181291 8-20-97 D

181291

U. S. Department of Justice

Antitrust Division

325 7th Street, N.W., Suite 500
Washington, DC 20530

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August 20, 1997

D

BY HAND
Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, D.C. 20423

Re: Finance Docket No. 32760 (Sub.- No. 21)

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and 25 copies of the Reply of the United States Department of Justice (DOJ-2). Also enclosed is a 3.5 inch disk containing the filing in WordPerfect 6.1 format. Thank you for your assistance in this matter.

Sincerely yours,

Michael D. Billiel
Attorney
Antitrust Division

Enclosures

cc: Parties of Record

ENTERED
Office of the Secretary
AUG 21 1997
5 Part of Public Record

181291

DOJ-2

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

UNION PACIFIC CORP., UNION PACIFIC RAILROAD CO. AND MISSOURI PACIFIC RAILROAD CO.-- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORP., SOUTHERN PACIFIC TRANSPORTATION CO., ST.LOUIS SOUTHWESTERN RAILWAY CO., SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN RAILROAD CO.

FINANCE DOCKET NO. 32760 (Sub-No. 21)

OVERSIGHT

REPLY OF THE UNITED STATES DEPARTMENT OF JUSTICE

The United States Department of Justice ("the Department" or "DOJ") hereby replies to comments filed by various parties concerning the effectiveness of the trackage rights remedies ordered in Decision No. 44. While in some respects it is too soon to assess whether the BNSF trackage rights have adequately restored the competition lost when UP acquired SP, the Department agrees with several of the commenters that additional action is required to protect shippers affected by the merger. Most importantly, the Board should examine the extent to which service handicaps may be preventing BNSF from being an effective competitor, and take prompt action to remedy any such problems. The Board should also take action to finally resolve the issue of which shippers - both existing and new - BNSF may serve, and should consider whether additional action is necessary to permit BNSF to become and remain an effective competitor for the traffic of shippers affected by the merger. Finally, the Department urges the Board to continue its oversight of the BNSF agreement and to ensure that BNSF and UP submit sufficiently detailed reports to allow for an adequate assessment of the effectiveness of the merger conditions in mitigating the competitive harm the merger otherwise would have caused. The Board should also remain wary of the ultimate effectiveness of trackage rights to restore pre-merger competition, and continue to evaluate whether a structural remedy should be implemented. Below, we address various issues raised by commenters in this proceeding.

1. Service Problems

A large number of the comments cite severe post-merger service problems with both UP and BNSF that have resulted in long delays, significantly increased transportation costs, and in some cases possible plant closures. (*E.g.*, Oregon DOT at 2; RRCT-1 at 2; NITL-2 at 2; CMA-2/SPI-3 at 16-18; NALS-1, DeVoe VS; MPI-2 at 4-5; CIC-2 at 1-4; SNA-02 at 3-6) The Board should carefully monitor these problems, and if necessary take action to enable shippers to receive the service improvements promised by the merging carriers. Many of these disruptions may prove to be temporary problems created by the UP/SP integration and the entry of BNSF into new markets. Indeed, some shippers report that the situation has recently improved somewhat. (NITL-2 at 2; CIC-2 at 3-4)

Of far greater concern are the reports that in some cases BNSF has had difficulty offering competitive service levels due to lack of cooperation by UP. BNSF's complaints include inconsistent switching service, long delays in hauling shipments of BNSF customers, and inadequate access to terminal and other facilities. (BNSF-1 at 14-16) BNSF also reports that it is being disadvantaged by UP's handling of plastic cars at its SIT facilities (BNSF-1 at 16-17), a concern echoed by plastics shippers (CMA-2/SPI-3 at 11-12). Utah Railway, while generally positive about the trackage rights operations in the Central Corridor, reports that its service has been adversely affected by lack of yard access, delays due to congestion in Salt Lake City, and in some cases actions by UP employees to impede the movement of Utah's switch crews. (UTAH-2, West VS at 8-9)

As BNSF correctly observes, shippers are likely to react to such service disruptions by shifting traffic from BNSF to UP. (BNSF-1 at 15) Unfortunately, given the myriad subtle ways that a track owner can disrupt a tenant's service, it will be extremely difficult for either BNSF, through negotiations with UP, or the Board, through regulatory intervention, to be sure that BNSF's service levels are competitive with UP's.

The Board should attempt, however, to identify and if practicable take steps to remedy any service problems attributable to UP. In addition, the Department agrees with the suggestion by CMA/SPI (CMA-2/SPI-3 at 16-18) that the Board should establish objective measurements for service and require that UP and BNSF report information on their performance in their quarterly reports.

2. Identification of 2-to-1 Shippers

BNSF reports that the "2-to-1 status" of a significant number of shippers is still unresolved. (BNSF-1 at 11-12) The process described by BNSF, in which it must identify 2-to-1 shippers to UP and wait (sometimes months) for UP's confirmation before service can begin, is unduly time-consuming and cumbersome. It is unacceptable that questions about BNSF's access to shippers remain open a year after the merger was approved and two years after UP, in announcing the merger, committed that all 2-to-1 shippers would have access to a second competitor.

BNSF proposes that the Board establish a presumption that all shippers at 2-to-1 points may be served by BNSF and that UP have the burden of showing that the shipper had only one pre-merger carrier. (BNSF-1 at 12-13) While an improvement on the current system, this proposal would still require BNSF, UP, and possibly the Board to expend resources establishing the status of particular shippers. The Department believes that the Board should instead adopt the suggestion of the Department of Transportation that BNSF be given access to <u>all</u> shippers at 2-to-1 points regardless of whether the shipper was closed or open to switching at the time of the merger. (DOT-1 at 6) This would eliminate the uncertainty about which shippers BNSF may serve at 2-to-1 points once and for all, and would eliminate any need for the Board to make numerous decisions on access to particular shippers. While UP will no doubt argue that this gives some shippers a windfall, it is far more important that all shippers who have lost a competitive option have access to BNSF than to meticulously ensure that no solely-served shipper benefits from the trackage rights.

3. Definition of "New Facility" and "Transload Point"

There appears to be similar uncertainty about the interpretation of the provisions in Decision No. 44 giving BNSF access to "new facilities" and "transload" points on the trackage rights, with UP apparently taking the position that these provisions apply only to newly constructed facilities or existing facilities that have never previously been served by rail. (BNSF-1 at 13) BNSF and UP have been unable to agree on a "formal written protocol" defining new facilities and establishing procedures for BNSF access (UP/SP-303 at 84), and BNSF has requested that the Board adopt a definition and establish procedures in this proceeding. (BNSF-1 at 13)

The Department supports BNSF's request that the Board resolve this matter, both because it is important to eliminate the uncertainty now faced by shippers contemplating new facilities or transload points and because a definition established by the Board is likely to be preferable to one agreed upon by competitors. The Department concurs with DOT that the definition of "new facility" should be functional (DOT-1 at 6-7), *i.e.*, that it should turn on whether new service is being established as opposed to whether existing structures are being served. For example, a shipper converting an existing structure that is abandoned or that has been without rail service for some time should be in the same position as a shipper building a similar facility from the ground up. The Board should also establish procedures to ensure that any dispute about BNSF's access to new facilities or transload points can be resolved promptly.

4. <u>BNSF Access to Traffic Under Contract</u>

Under the CMA Agreement, as extended by Decision No. 44, shippers at 2-to-1 points are allowed to modify their existing UP/SP contracts to allow BNSF access to at least 50% of the contract volume. The Board subsequently adopted a number of guidelines interpreting this provision, one of which (Guideline No. 9) gives UP the right to terminate a contract if the shipper exercises this right, on the theory that since the UP or SP rates were established based on assumptions about receiving a particular volume of traffic, it is unfair to hold UP to the contract if it gets less. BNSF to date has gained relatively little traffic through this contract reopener provision, (BNSF-PR-4 at 10) and a number of commenters, arguing that UP's right to terminate makes shippers reluctant to give contract traffic to BNSF, request that Guideline No. 9 be rescinded. (BNSF-PR-4, Rickerhauser VS at 23; CMA-2/SPI-3 at 6-10; NITL-2 at 4; FINA-1 at 3)

Contracts of the type at issue here - exclusive contracts or contracts guaranteeing a carrier a certain volume of traffic - can have procompetitive efficiencies, and typically do not raise competitive concerns. Such contracts can reduce competition, however, where the incumbent locks up enough business that it becomes difficult or impossible for an entrant to achieve the scale necessary to remain viable. BNSF has not argued that the inability to get traffic under the contract reopener provision threatens its ability to compete using the trackage rights (not surprising, since questioning its viability is not conducive to attracting traffic), and indeed states that its operations are successful and growing. (BNSF-PR-4 at 5-6)

It is unclear from the evidence to date whether BNSF has been or will be able to achieve sufficient density on the trackage rights routes to maintain itself as a competitive force. There are some indications, however, in particular BNSF's limited service in the Central Corridor (CPUC at 3-5; NITL-2 at 4; SPP-2 at 6-8), which suggest that BNSF has been unable to attract the level of traffic predicted by UP, BNSF, and the Board. BNSF's Cotton Belt operations are more substantial, but, as some commenters point out (KCS-2 at 8; TM-2 at 7-8), it is unclear what volume of this traffic is new traffic from 2-to-1 points as opposed to traffic re-routed from elsewhere on BNSF's system.[1]

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[1] BNSF's volume of re-routed traffic is also relevant, of course, as such operations may assist BNSF in achieving the density necessary to support competitive service to 2-to-1 shippers. If relatively little of BNSF's traffic in the corridor is moving from 2-to-1 points, however, it may indicate that BNSF is not competitive for that traffic for some reason.

The Board should examine whether the limited use of the contract reopener provision threatens BNSF's ability to become and remain a strong competitor for traffic at 2-to-1 points, and, if so, take the steps necessary to make more traffic open to effective competition by BNSF. As discussed further below, the Board should also require BNSF and UP to submit the information necessary to allow the Board to adequately assess the competitive situation on the trackage rights routes.

5. Continuing Oversight

Although the implementation of the remedies ordered by the Board is still at a fairly early stage, it is apparent from the comments submitted in this proceeding that continuing and vigorous oversight by the Board is warranted. It is imperative that where necessary the Board take action that will make the trackage rights remedy operate as promised. Where effective oversight is not possible or is too costly, the Board should consider structural alternatives to oversight as a means of providing affected shippers with competitive alternatives.

In order to adequately assess the progress made by BNSF and UP, the Board should establish more specific requirements for the information to be included in quarterly reports, including, at a minimum, information on service performance and more specific information on BNSF traffic at 2-to-1 points. The Department also supports the proposal that UP and BNSF submit 100% traffic tapes annually in order to facilitate oversight of the effectiveness of the trackage rights remedy.[2]

August 20, 1997

Respectfully submitted,

Michael D. Billiel
Attorney
Antitrust Division
U.S. Department of Justice
325 Seventh St., N.W.
Washington, D.C. 20530

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[2] UP has made its traffic tapes available in this proceeding.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing REPLY OF THE UNITED STATES DEPARTMENT OF JUSTICE to be served on all parties of record, this 20th day of August 1997.

Michael D. Billiel

STB FD-32760 (SUB 21) ID-181290 8-20-97 D

181290

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August 20, 1997

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Office of the Secretary
Case Control Unit
ATTENTION: STB Finance Docket No. 32760 (Sub No. 21)
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, D. C. 20423-0001

Re: Finance Docket No. 32760 (Sub No. 21), Union Pacific Corporation, et al. — Control and Merger — Southern Pacific Rail Corporation, et al.

Dear Mr. Secretary:

Enclosed herewith for filing in the above-captioned proceeding are the original and 25 copies of the Reply Verified Statement on Behalf of North American Logistic Services, a Division of Mars, Incorporated.

Also enclosed is a 3.5-inch diskette for this document that is formatted for WordPerfect 7.0.

ENTERED
Office of the Secretary
AUG 21 1997
5 Part of Public Record

Yours very truly,

Terrence D. Jones

Attorney for North American Logistic Services, a Division of Mars, Incorporated

Enclosures

181290

NALS-2

BEFORE THE

SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 32760 (SUB-NO. 21)

UNION PACIFIC CORPORATION,
UNION PACIFIC RAILROAD COMPANY,
AND MISSOURI PACIFIC RAILROAD COMPANY
— CONTROL AND MERGER —
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

[OVERSIGHT]

REPLY VERIFIED STATEMENT ON BEHALF OF NORTH AMERICAN LOGISTIC SERVICES, A DIVISION OF MARS, INCORPORATED

OF COUNSEL:

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ATTORNEY FOR NORTH AMERICAN LOGISTIC SERVICES, A DIVISION OF MARS, INCORPORATED

AUGUST 20, 1997

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BEFORE THE

SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 32760 (SUB-NO. 21)

UNION PACIFIC CORPORATION,
UNION PACIFIC RAILROAD COMPANY,
AND MISSOURI PACIFIC RAILROAD COMPANY
— CONTROL AND MERGER —
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

[OVERSIGHT]

REPLY VERIFIED STATEMENT OF JAMES E. DEVOE

1. My name is James E. DeVoe. I am Rail Transportation Manager of North American Logistic Services, a Division of Mars, Incorporated ("NALS"). I previously submitted a Verified Statement in this oversight proceeding on behalf of NALS on August 1, 1997 ("NALS-1"). As I explained in my prior statement, NALS is responsible for arranging the transportation service received by the production units of Mars, Incorporated. Those units include M&M/Mars, Uncle Ben's Inc., and Kal Kan Foods, Inc.

2. Several parties have claimed that the rail merger which is the subject of this oversight proceeding has produced more responsive rail service, increased rail competition, improved

communications, and increased service options for their traffic.[1] Others have discussed the problems they are experiencing with the merged carriers' service, particularly in Texas.[2] This statement is submitted in reply to those parties who claim that this merger has resulted in improved service, to corroborate and confirm those statements which have described deficiencies in the service of the Union Pacific Railroad Company ("UP") in Texas, and to up[illegible] the STB on NALS's problems with the UP service which I described in my prior statement. The STB will thus have available to it the most current and complete information concerning the UP's service to NALS as it discharges its important oversight duties in this proceeding.

3. In my prior statement, I requested that the STB, among other things, order the UP to allow the Burlington Northern Santa Fe Railroad Company ('BNSF") to have direct access to a Kal Kan plant at Wunotoo, NV. ¶13. That request is reaffirmed here. In addition, I detailed in my statement the severe difficulties that the Uncle Ben's facility in Houston, TX has experienced with the UP service since the merger, particularly on shipments to one of Uncle Ben's Canadian customers. ¶14. I stated that the UP service is so poor that it is placing Uncle Ben's business with that customer at risk. Events that have occurred since my earlier statement have confirmed the

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[1] See, e.g., Statements of Charles G. Raymond on behalf of Sea-Land Service, Inc. and W. Gary Quinn, on behalf of Tennessee Valley Authority, filed by applicants on August 1, 1997, and Statement of the Port of Corpus Christi Authority of Neuces County, Texas (CC-1), dated August 1, 1997.

[2] See, e.g., Comments of Sasol Alpha Olefins North America, Inc. (SNA-02); Comments of Fina Oil and Chemical Company (FINA-1); and Comments of Champion International Corporation (CIC-2).

inability of the UP to provide the service that Uncle Ben's needs to meet its customer's requirements, and have resulted in the serious consequences I had feared.

4. In Paragraph 15 of my prior statement, I stated that four cars of Uncle Ben's rice destined to Canada were still sitting in Houston on July 30, 1997, although they had been tendered to UP days before. Those four cars have now been delivered, as follows:

Car No.	Date Tendered To UP by Uncle Ben's	Date Delivered to Canadian Customer
SSW74733	7/23/97	8/10/97
SSW74305	7/24/97	8/12/97
CRLE53078	7/29/97	8/10/97
GVSR525003	7/25/97	8/12/97

5. I have been informed by the UP that its standard transit time for these movements is nine days — seven days to move the cars from Houston to Chicago and two days for delivery by the Canadian National Railroad to the Uncle Ben's customer. Instead, Uncle Ben's was provided transit times of 19 days on one shipment and 18 days on two others. Even the shipment that was handled the most efficiently by the UP was in transit for 12 days.

6. As a result of UP's inability to provide efficient rail service for Uncle Ben's, this customer's rice inventory was depleted and it was forced to shut down its production operations for seven days, beginning on August 5, 1997. A shutdown of a customer's plant because of a lack of product is a supplier's worst nightmare; it frequently means the end of the business relationship since the customer, understandably, will seek more dependable sources of supply. If Uncle Ben's is to retain this customer's business, it must have available to it rail service which can meet the customer's delivery requirements.

7. Post-merger bottlenecks at the UP yard in Ft. Worth, TX have resulted in inadequate rail service for the facilities of other Mars units for which NALS arranges transportation. For example, a confectionery plant of M&M/Mars at Waco, TX is dependent upon UP service for inbound shipments of corn syrup and granulated sugar.

8. The UP's problems at Ft. Worth have caused production disruptions at the Waco plant and have required it to use motor carrier service for its inbound shipments, resulting in tens of thousands of dollars in increased transportation costs. The congestion at UP's Ft. Worth yard has resulted in loaded cars which are destined to the plant but which have been detained for days at Ft. Worth because of a lack of power and labor, and cars that have been misrouted to Houston instead of to Waco. These problems have been compounded by the UP's failure to interchange cars with the BNSF at Ft. Worth.

9. Specific, representative examples of the UP's failure to provide adequate service to the Waco facility is seen from its handling of the following shipments of granulated sugar in hopper cars from origins that should involve a transit time of eight or nine days to Waco:

Car No.	Origin	Ship Date	Date Delivered at Waco
BN413236	Wahpeton, ND	7/17/97	8/8/97
PCSX9231	Kelim, CO	7/21/97	8/14/97 (Car was misrouted to Houston)
BN481405	E. Grand Forks, ND	7/25/97	8/11/97
GVSR508065	Crockett, CA	7/14/97	Not Delivered as of 8/18/97 (Car was misrouted to Houston)
BN413265	Wahpeton, ND	7/31/97	8/15/97
BN410479	Wahpeton, ND	7/25/97	8/11/97
BN413280	Hillsboro, ND	7/23/97	8/8/97

10. UP has proven equally unable to transport in a timely fashion the corn syrup which the Waco plant requires for its operations. For example two cars — GATX4078 and CRGX4667 — which originated at Decatur, IL on August 8, 1997 and Memphis, TN on August 1, 1997, respectively, are loaded with corn syrup consigned to the Waco plant. These cars were in Ft. Worth last week but now, I am told by the UP, are in Wagner, OK. At some point last week, these cars — according to the UP — were also in Parison, KS. I don't believe the UP knows where these cars are. I only know that they are not in Waco, where they should have been days ago.

11. Another car of corn syrup — No. STMX 400 — originated in Decatur, IL and was received by the UP on August 1, 1997. As of August 18, 1997 — almost three weeks later — that car is sitting in UP's Ft. Worth yard unable to move to the Waco plant because of a lack of power.

12. Because of the UP's inability to provide in-bound transportation for the raw materials necessary for the Waco plant to maintain production, the plant has been forced to resort to motor carrier service for such materials. That service, however, results in significant increased transportation costs and is incapable of meeting the plant's production needs on anything other than a short-term basis. For example, since August 1, 1997, the M&M/Mars plant at Waco has incurred in excess of $76,500 in additional transportation costs each week because of the plant's forced utilization of motor carriers to replace the service the UP has failed to provide.

13. But even the incurring of these significant, additional costs does not assure that the plant will be able to continue operations. On August 18, 1997, the plant was required to delay production for four hours because of a shortage of raw materials caused by the UP's failure to fulfill its transportation obligations. Additional delays and production disruptions are certain to occur if the UP — the plant's primary provider of inbound transportation service — continues to fail to provide the service the plant requires.

14. In my prior statement, at Paragraph 8, I stated that the UP had failed to respond to the numerous written communications I had sent it documenting its service deficiencies. Since the filing of my statement on August 1, 1997, I have received telephone calls from several UP executives at

the highest level, including Mr. Richard Davidson and Mr. Jerry Davis. While I am flattered by this sudden attention from the UP, I was only offered apologies and excuses in these conversations; no concrete assurances were given as to when NALS and the Mars units can expect adequate UP service. Similarly, the attached letter I received on August 18, 1997 from Mr. William R. Eilbracht, Business Director -- Food of the UP, fails to address the documented UP service failures suffered by NALS and to provide any assurance that these specific problems will be corrected in the near future. Indeed, many of the steps mentioned by Mr. Eilbracht in his letter have already been taken by UP and NALS, as seen, is still experiencing serious service difficulties.

15. In a telephone call from Mr. Drew Collier, Executive Vice President of the UP, during the week of August 4, 1997, I was informed that the UP would "refute" the claims of its service deficiencies contained in my earlier statement. This is the UP response I have learned to expect. It refuses to acknowledge that serious problems exist and, as a result, concrete remedial action concerning those problems is not taken. In the meantime, customers are forced to shut down, production is delayed and disrupted, and increased and unexpected transportation costs are incurred.

16. For the reasons contained in my prior statement and in this statement, NALS requests that the STB, in the exercise of its oversight function, order the UP to allow the BNSF direct access to Kal Kan's Wunotoo plant. In addition, the UP should be ordered to provide a specific proposal for resolving the service problems resulting from this merger, including furnishing the STB with periodic reports of service problems reported to it by shippers, the steps taken to correct those problems, and the results of that corrective action.

UNION PACIFIC RAILROAD COMPANY

MARKETING & SALES

1416 DODGE STREET
OMAHA, NEBRASKA 68179

August, 18, 1997

Mr. James E. DeVoe
Rail Transportation Manager
North American Logistics Services
P.O. Box 731, 800 High Street
Hackettstown, NJ 07840

Dear Jim:

I wanted to take this opportunity to respond to the various letters that you have recently sent to Maureen Horrigan concerning service related issues at your Kal Kan facility in Sparks, NV and your Uncle Ben's facility in Houston, TX.

The Union Pacific has implemented numerous action steps to improve service in and around Houston, TX.

We have created a new service unit in Central Texas to help manage both the UP and SP corridors in this area to reduce congestion and address traffic flow issues. We have also created a cross-functional team of managers at the Harriman and TSC Dispatching Centers to help improve train slotting and car flow management for Houston, Fort Worth and San Antonio to improve our efficiency and eliminate delays. In Houston, we have created a temporary 24-hour command center to address congestion issues, working closely with our National Customer Service Center and Operations to focus on customer issues and ensure that they are addressed through the command center. An industrial switch team is also in place to ensure customer switching commitments are being met.

Jim, in addition to these tactical action steps, we also have a number of strategic action steps to help improve service in the Houston Area and across our system.

To improve traffic flow, UP will establish directional train running from Houston to Beaumont and Fort Worth to Houston. To reduce congestion in the Houston Englewood yard, UP plans to run trains eastbound, bypassing the Englewood yard and eliminating delays. UP has reached agreement with the Tex-Mex to cross an additional 200 cars a day into Mexico which will help reduce congestion. We have approved track expansion for the Englewood yard which will improve efficiency of operations and the flow of traffic through the yard. Track expansion at Coady yard will add additional tracks for improved traffic flow. With the Livonia yard expansion completed on September 1, UP will have the option of routing more traffic through Livonia, avoiding the Houston area. With labor agreements in place in the central corridor, UP will have the flexibility to route trains more efficiently between the UP and the former SP systems, cutting overall transit time.

Over the last six months, UP has hired over 1,500 new employees, with plans to hire an additional 500 before year-end to improve train operations.

In Salt Lake City, labor agreements have been ratified by TE & Y employees that will enable Union Pacific to begin to make operational changes and improvements in the Salt Lake City area. This is a "hub-and-spoke" concept whereby Salt Lake City becomes an operational hub and all lines in and out of Salt Lake City, in all directions, becomes spokes. We now have the ability to consolidate numerous UP and SP seniority rosters in that region into a single seniority district. The result of this action will help to improve flexibility and service throughout the Region. We expect that this concept will be duplicated at Houston within the week.

Jim, to date, Union Pacific has spent in access of $1.2 billion or 50% of our $2.25 billion combined UP-SP 1997 capital budget. We continue to merger the operations of the Union Pacific and former Southern Pacific and as you are aware, we completed our TCS cutover of the former DRGW on May 1st and the former SSW / SSWN on August 1st. We will continue to make improvements in all areas of the railroad to provide the service that our Customers demand. As we work through these issues and you encounter disruptions in service, please contact either Maureen Horrigan or myself at (402) 271-6856 to assist you in your needs. We appreciate your business and we look forward to a healthy working relationship in the future.

Sincerely,

Bill Ellbracht

William R. Ellbracht
Business Director - Food

cc: Drew Collier
Maureen Horrigan

VERIFICATION

STATE OF NEW JERSEY)
) ss
COUNTY OF WARREN)

JAMES E. DEVOE, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

James E. DeVoe

James E. DeVoe

Subscribed and sworn to before me this 18 day of August, 1997

Katherine Ann Clift
Notary Public

My commission expires: 12/10/97

KATHERINE ANN CLIFT
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Dec. 10, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served a copy of the foregoing document on all parties of record by first-class mail, postage prepaid.

Terrence D. Jones

August 20, 1997
Washington, D.C.

STB FD-32760 (SUB 21) ID-181272 8-18-97 D

181272

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August 18, 1997

D

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 I St. N.W.
Washington, D.C.

RE: Finance Docket No. 32760 (Sub-No. 21), *Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al. [OVERSIGHT]*

Dear Sir:

Undersigned counsel for Sierra Pacific Power Company and Idaho Power Company ("SPP/IDPC") wish to supplement its comments of August 1, 1997 in order to report to the Board its view as to the results of discussions between SPP/IPDC, Union Pacific Railroad Company ("UP") and Burlington Northern Santa Fe Railway Company ("BNSF") regarding provision of information referred to in SPP/IDPC's August 1 Comments in this proceeding.

In those Comments, SPP/IDPC generally described the results of a bid solicitation sent to UP and BNSF in May of 1997 regarding the delivery of coal the SPP/IDPC's North Valmy Station. SPP/IDPC indicated that bids for joint-line service submitted by BNSF (in conjunction with the Utah Railway Company) were significantly above UP's single line bids from comparable mines. The attached verified statement of SPP/IDPC witness Hill also indicated that absent further action by the Board, or agreement by the UP and BNSF that the railroads responses may be disclosed under a Highly Confidential designation, the railroads' responses could only be described in general terms, since the responses to the bid solicitations were provided by both carriers on the condition that they be kept confidential.

On August 8, 1997, counsel for SPP/IDPC received a request from UP for release of information referred to in the Hill Verified Statement on a Highly Confidential basis. That same day, counsel for SPP/IDPC contacted counsel for BNSF to seek its agreement for SPP/IDPC to provide this information on a "Highly Confidential" basis. However, on August 13, 1997, counsel for BNSF informed counsel for SPP/IDPC that BNSF would not agree that the bid response information could be provided to the Board and counsel for UP on a "Highly Confidential" basis (a designation that under the Board's current orders would also permit counsel for other parties in this proceeding limited access to the information). SPP/IPDC conveyed BNSF's response to UP on the morning of August 14. A three-way conference call on August 14, 1997 arranged by counsel for SPP/IDPC with counsel for UP and BNSF failed to resolve the issue. Indeed, it would be a serious understatement to report that there was substantial three-way disagreement among the parties on this question during the conference call.

Failure of UP and BNSF to agree upon whether and how the Board might see information referred to in SPP/IDPC's comments puts SPP/IDPC in a very difficult position, to say the least.

First of all, it is SPP/IDPC's position that the Board and its staff should have access to the information referred to in witness Hill's Verified Statement. If persons other than the Board and Board staff are to have access to this information, it should be under a designation no less confidential than the "Highly Confidential" designation established by the Board in the merger proceeding. SPP/IDPC take no position as to whether there should be a more restrictive designation than "Highly Confidential" in this particular case.

However, given the failure of BNSF and UP to agree on a confidential treatment of the bid information, or lacking an order from the Board, SPP/IDPC feels constrained from offering the material to the Board under a Highly Confidential designation, for both legal and business reasons. (The Board thus far has established no formal procedures or standards for *in camera* review or for a more restrictive designation than "Highly Confidential.")

It is first unclear as to what, if any, SPP/IDPC's legal exposure might be for doing so. But SPP/IDPC's business concerns are equally, if not more, significant. For SPP/IDPC is attempting to get BNSF to play a strong competitive role in transportation of coal to the North Valmy Station. If SPP/IDPC would, over BNSF's strong objections and without an order from the Board, reveal to UP what BNSF has stated to be extremely highly sensitive very recent commercial bid information, SPP/IDPC fears that this could seriously impact BNSF's willingness to provide bids for rates in the future. This would undermine the competitive situation that SPP/IDPC wants to foster, particularly since this oversight proceeding is contemplated to last five years.

Sincerely,

Nicholas J. DiMichael

NICHOLAS J. DIMICHAEL
THOMAS W. WILCOX

cc: Counsel for UP and BNSF (via fax)
All other parties of record (via first-class mail)

Certificate of Service

I hereby certify that copies of the foregoing *Union Pacific Corporation, et al.-- Control and Merger -- Southern Pacific Rail Corporation, et al. [OVERSIGHT]* have been served this date, by first class mail, postage paid, to the persons on the attached list.

DATE: August 18, 1997

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STB FD-32760 (SUB 21) ID-181233 8-15-97 D

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BEFORE THE

SURFACE TRANSPORTATION BOARD

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MAIL MANAGEMENT STB 7

STB FINANCE DOCKET NO. 32760 (SUB-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY
----CONTROL AND MERGER----
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY [OVERSIGHT]

D

COMMENTS OF THE

UNITED STATES DEPARTMENT OF AGRICULTURE

ENTERED
Office of the Secretary
AUG 18 1997
5 Part of Public Record

Lon Hatamiya
Administrator

Agricultural Marketing Service

U.S. Department of Agriculture
Washington, D.C. 20250

Due: August 15, 1997

These comments are filed on behalf of the United States Department of Agriculture (USDA) and are in response to the Surface Transportation Board's (STB) decision served May 7, 1997, initiating a proceeding to implement the oversight condition it imposed in approving the Union Pacific and Southern Pacific Railroad (UPSP) merger of 1996. STB is seeking comments from interested parties on the effects of the merger on competition and as to the implementation of the conditions imposed by the STB to address actual or potential competitive harms.

AUTHORITY AND INTEREST

The Secretary of Agriculture is charged with the responsibility under the Agricultural Adjustment Act of 1938 (7 U.S.C. 1291) and the Agricultural Marketing Act of 1946 (7 U.S.C. 1622 (j)), as amended, to represent the interest of agricultural shippers and producers in improving transportation services and facilities, by among other things, initiating and participating in STB proceedings involving rates, charges, tariffs, practices, and services.

As an active participant in the UPSP merger proceeding, USDA submitted comments to STB on March 29, April 29, and June 3, 1996. In those comments we pointed out that rail service is critical to the economic well-being of this Nation's agricultural and rural economies. Many agricultural products are produced in areas located great distances from export and domestic markets. Moreover, agricultural shippers generally have limited access to alternative providers of transportation services because many are located beyond effective trucking distances from these markets and far from available waterway transportation. We highlighted the importance of competitive rail service for agricultural producers and shippers and the entire rural economy and expressed concern over the significantly increasing concentration in the U.S. rail industry and the adverse effects on U.S. agriculture of this continuing consolidation and concentration. Our concern was based on the decline in the number of major U.S. railroads from 33 in the early 1980's to just 7 more recently, and the greatly increased overall levels of concentration in the railroad industry which has resulted. Whereas the top 5 railroads handled 44 percent of all railroad freight in 1982, the top 5 railroads handled 87 percent of all rail freight in 1995. Although the top 5 railroads originated 57 percent of all rail grain traffic in 1982, the top 5 railroads originated over 90 percent of rail grain traffic in 1995.

USDA LISTENING SESSIONS ON IMPACTS OF RAIL MERGERS

In a letter dated July 16, 1997, USDA notified the STB of a planned series of listening sessions to be held in major grain-producing states as part of our efforts to gather and evaluate information on the general impact of recent railroad mergers on agricultural shippers and communities and on the specific impact of the UPSP merger. Because the grain harvest in many states had just been completed or was still underway, USDA requested and was granted a two-week extension of time by the STB to evaluate the input presented at the sessions and to submit comments in this proceeding. On August 6 and 7, listening sessions were held by the USDA in Dodge City, Kansas and Wichita, Kansas, respectively. Listening sessions on the general impact of rail mergers on agricultural shippers are planned for other grain-producing states.

USDA believes input from actual shippers who have been affected by the UPSP merger, such as was obtained from these Kansas listening sessions, is vital to the STB oversight process. A national announcement of the holding of the listening sessions resulted in substantial other comment and input being provided to the USDA on effects of the UPSP merger from shippers, local and state officials, farmers and rural residents from several other grain-producing States. Comments received at the listening sessions or submitted directly to the USDA as a result of the listening sessions were incorporated into this statement.

RAIL COMPETITION IN THE LOWER PLAINS

Initial Concerns

The USDA expressed concern about the UPSP merger, in part, because of our belief that a third major railroad operating in the Kansas City, Wichita and Fort Worth corridor to Gulf and Mexican markets was necessary to preserve competition in the movement of lower Plains wheat to the Gulf and to Mexico. The lower Plains states of Kansas, Oklahoma and Texas, combined with Colorado, usually produce more than three-fourths of all U.S. hard red winter wheat. A third Class I railroad operating in this corridor was considered necessary to satisfy service concerns and to provide a competitive balance for shippers in these States who would be completely dependent on the Burlington Northern Santa Fe (BNSF) and the UPSP for rail service.

While the STB eventually decided in favor of the merger, the USDA was heartened by the STB's determination to mitigate any potential competitive harm to agricultural and other shippers caused by the merger. The STB imposed 35 specific conditions on the merger, the most important of which was granting nearly 4,000 miles of trackage rights to BNSF to replace the service formerly offered by SP. In granting these trackage rights, the STB made clear that it expected BNSF to compete vigorously for the traffic opened up to it and imposed a common-carrier obligation upon BNSF with respect to this traffic.

Post-Merger Effects

Unfortunately, more than a year after approving the merger, BNSF does not appear to be providing the kind of effective competition the STB required in these movements from Kansas, Oklahoma and Texas to the Gulf and Mexico. The comments from our listening sessions and the numerous contacts we have received by phone, fax, and mail indicate that BNF's presence has been illusory -- as one shipper put it, BNSF "hasn't even shown up on the agricultural side." Agricultural shippers are generally frustrated by the apparent lack of vigorous competition among the only two carriers left in this important corridor, and between the UPSP and the BNSF generally in railroad originations to all destinations from the lower Plains. For instance, some shippers participating at the hearings in Kansas reported that they had been told almost simultaneously by BNSF and the UPSP representatives that both firms would be increasing rates on all domestic and export movements from the lower Plains wheat locations by $200 a car on September 1, 1997. The appearance of such rate announcements by the two carriers suggests at minimum a lack of vigorous competition between the two carriers and highlights the need for the STB to reexamine the competitive conditions it imposed on movements from the lower Plains.

The STB made it clear that should the BNSF fail to conduct trackage rights operations in movements from the lower Plains, those rights could be terminated and another carrier could be substituted in its place. On the basis of comments received from shippers, the USDA urges the STB to begin a careful and public examination of the competitive situation in rail movements from the lower Plains to the Gulf and Mexico. The scope of BNSF's use of its trackage rights, the performance of the UPSP as the landlord, and any changes in rates and in the adequacy of service which shippers have experienced since the merger should be carefully reviewed.

RAILROAD SERVICE TO MEXICO

Mexico is an important and growing market for U.S. grains and oilseeds. The volumes of U.S. grain being exported to Mexico were at all-time record levels in 1996 largely because of the trade liberalization which occurred from the North American Free Trade Agreement (NAFTA) and the reduction in domestic producer subsidies for basic grains in Mexico which have accompanied trade liberalization. To allow U.S. grain producers to continue to share in the benefits of NAFTA by exporting U.S. grain to Mexico, overland railroad services from the U.S. to Mexico must be competitive. Many small Mexican feed grain importers prefer the small unit sizes of feed grains available by railcar, and cannot handle or afford the minimum ship-size lots of feed grains available by maritime transportation. The USDA has a special interest in the availability of low-cost, competitive overland railroad services to Mexico because it underwrites the importation of almost all U.S. feed grains by Mexican importers through its GSM-102 credit guarantee program. Decreases in the competitiveness of railroad transportation to the border increase purchase prices of U.S. feed grains to Mexican importers and decrease the volume of U.S. feed grains the USDA can underwrite and the U.S. can export to Mexico. Yet, information received by the USDA is that some of the conditions imposed by the STB in the UPSP merger to maintain competitive rail service to Mexico are not being effectively implemented.

USDA believes that it is important for U.S. agricultural exports to Mexico that adequate competition be provided in this market, and we urge the STB to review the implementation of its conditions aimed at preserving railroad competition to the border. Information obtained from U.S. railroad companies indicates that the service provided to the Tex-Mex railway under the terms of its haulage agreement with UPSP has declined dramatically since the merger. This haulage agreement, which requires the UPSP to provide connecting service between the Kansas City Southern and the Tex-Mex between two Texas interchange points, must be reviewed carefully for its effectiveness in allowing continued access by the Kansas City Southern to the Mexican border through Laredo, Texas, and its new concession route into Mexico. The decline in service experienced by the Tex-Mex may be evidence that a stronger condition such as trackage rights, rather than haulage rights, might be needed to preserve effective competition for U.S. agricultural exporters to the Mexican market.

ABANDONMENT OF THE CENTRAL CORRIDOR LINE

A third major issue relating to the UPSP merger is the future disposition of the Central Corridor line from Salina, Kansas to Pueblo, Colorado. This corridor is particularly important to the wheat growers in southeastern Colorado who annually produce 17 million bushels of wheat, in addition to other crops. Over 70 percent of this wheat is sold on the export market, making the growers heavily dependent on railroad delivery to terminals which are distant from Colorado. Although Colorado shippers are not the only shippers who will be damaged by the loss of this line, their experiences and concerns are representative of the rest of the shippers on the line.

The Central Corridor line was formerly owned by the Missouri Pacific Railroad. Shippers received adequate, reliable and prompt rail service until the Union Pacific purchased the line. Immediately after acquisition of the line, shippers allege that the Union Pacific began to deliberately deny service and downgrade the service provided. In its request to abandon a line segment in the region, UP claimed that the line had carried only 142 carloads the previous year.

A study by the Colorado Department of Transportation estimated a potential demand of 4000 carloads of originated traffic per year on that same line.

Considering the quality of the Union Pacific's prior service and its perceived lack of concern for shippers, many shippers on the Central Corridor line are concerned the UPSP will abandon this line, especially since it now owns a parallel line to the north. Due to reduced competition giving shippers no other viable shipping alternatives, the UPSP can reduce its costs by abandoning this Central Corridor line without losing much of the revenue from the haulage.

If this line is abandoned, wheat growers in the region would be burdened with the extra cost of trucking their grain an additional 60 miles or more to another location on the UPSP rather than hauling it to a local elevator on the nearby former Missouri Pacific line. This additional cost, currently 10-12 cents per bushel, absorbs the price premium being paid by 100 car loadout facilities located on the UPSP main line. The removal of sidings on this Central Corridor line may well result in the certain failure of many independently-owned and cooperative elevators, leaving growers with fewer competitive options and possibly leading to one monopsonistic buyer in some areas. With competing elevators and nearby shipping alternatives removed, there will be little incentive for elevators on the main UPSP line to pay a premium to attract wheat to their facility. In addition, with the removal of rail competition, the USDA anticipates that the price of trucking will also increase. Due to distance, trucking the wheat to the Port of Catoosa, Oklahoma, or Kansas City, Kansas, is not a viable option for these shippers. Thus, the end result will be a decrease in prices received by agricultural producers while their costs continue to escalate, resulting eventually in the erosion of their land values.

The effects upon communities and state governmental units of abandonment of this line will also be severe. Agriculturally-based local economies will be severely damaged, eroding the local tax base necessary to support basic local services. With the loss of essential transportation services, these rural communities will also be unable to attract alternative industries. Additional trucking will also damage the roads in the region, greatly increasing the costs of road maintenance.

Extensive testimony was received by the USDA at the Kansas listening sessions as to the impacts of anticipated rail abandonments on several rural communities which is expected to occur as a result of the UPSP merger. One of these rural communities is Kiowa County, Colorado, where the 1,700 residents in this rural agricultural community are heavily dependent on UPSP rail service. In 1994, over 5 million bushels of wheat was produced in Kiowa County. The seven grain elevators in the county are equipped to load a maximum of 17 cars each and cannot take advantage of cheaper 100-car unit train rates offered by UPSP. Although the Union Pacific lines through Kiowa County were approved for abandonment in 1996 with the UPSP merger, efforts have been underway to find a buyer for the lines. If a successful bidder is not found soon, the 100 miles of UPSP track in Kiowa county will soon be abandoned.

Representatives of Kiowa county at the Kansas listening sessions reported that Kiowa County has already lost two million dollars in 1997 in assessed property valuation because of the UPSP merger. Two elevators in the county had over 150,000 bushels of grain stored on the ground this past summer because of inability to secure railroad services. Other potential impacts on this rural community from loss of rail service include the loss of $726,000 in tax revenue, which is 33 percent of the county's budget for schools, hospitals and the municipalities of four small towns. Representatives of Kiowa county at the Kansas listening session stated that the

STB should require that the UPSP continue service to agricultural shippers on the UPSP's Central Corridor line in Kiowa County, Colorado until a short line or regional carrier can take over the trackage.

The UPSP has opened up segments of the Central Corridor for bidding and some shippers believe that segments which are not sold will eventually be abandoned. If any segments in the Central Corridor are abandoned, no other carrier will ever be able provide effective through-route competition on the Central Corridor to the UPSP. The recommendation of the USDA is that the STB require the UPSP to maintain the trackage in this Central Corridor in its entirety at status quo ante levels until its disposition is determined.

Although many short line railroads provide excellent service to agricultural users, the shippers in this area are also concerned that the line will be sold to a firm that is more interested in collecting lease fees than in providing good rail service. Many Kansas shippers complained about significantly-increased lease payments being imposed by the Class I and shortline railroads serving Kansas for leases of railroad sidings and rights-of-way which used to be provided almost free of charge and on which shippers have constructed loading and unloading facilities. Should the STB approve sale of this line to a short line railroad, the USDA recommends that the STB consider using its authority to ensure that the short line railroad purchasing the line maintains an adequate level of service and does not astronomically increase the lease fees charged for the use of rights of way and sidings.

A more economically sound remedy for the STB might be to require the UPSP to divest itself of this Central Corridor line in favor of establishing a third Class I carrier. This is a viable alternative with willing applicants who applied to the STB to buy this line at market prices and assume operation of the former Missouri Pacific line.

GENERAL POST-MERGER RAIL SERVICE ISSUES

There are other issues relating to rail service of great concern to our constituents, but which are not directly related to the UPSP merger. Although many of these issues are long standing, the decreased level of competition among railroads has greatly increased their severity.

For instance, many agricultural shippers have expressed great concern regarding the new UPSP co-loading policy. Prior to this new policy, a firm operating at several locations could combine the number of cars shipped from each location to obtain a quantity tariff rate. The new policy requires that each location ship the required quantity to obtain that price level. For example, in order to get the 25 car tariff rate under the new co-loading policy, each elevator must ship 25 carloads as a unit. Under the old policy, several elevators could combine their shipments to obtain the 25 carload price.

Additionally, many shippers have reported a decline in the level of rail service since the merger. In particular, many shippers of less-than-unit train lots report they have great difficulty obtaining rail service from the UPSP, and if they do receive service, it is infrequent. The UPSP emphasis on moving unit trains to the reported exclusion of smaller shipments, when combined with the new co-loading policy, will force many elevators to make large investments in sidings just to maintain rail service. It will take long periods of time for many elevators to aggregate the 100 carloads required for a unit train, causing them to hold the grain purchased from farmers for longer periods prior to shipping, significantly increasing their costs, and subsequently resulting in lower prices to farmers.

The alternative scenario is that many smaller shippers will be forced out of business, leaving only those able to load unit trains. The extra cost of shipping by truck to an unit train loading facility will come directly from the farmer producing the grain. In addition to the costs born by the farmers, communities will lose needed tax bases, and states and counties will incur increased road maintenance costs.

Forcing unit trains from each shipper has greater impact upon those shipping wheat and other grains and upon those shipping from more arid regions of the country. It requires a larger area to aggregate a unit train shipment of wheat than it does for one of corn. Unirrigated semi-arid regions of the country also generally have lower yields, and are more dependent on rail service to reach terminal and export markets. The impact upon roads caused by trucking grain to unit loading facilities in these regions will be much greater than in other regions of the United States, creating an additional road maintenance burden upon governmental units in those regions.

Shippers on Class I railroads have also expressed much frustration with the centralized ordering systems. They end up talking with six or eight railroad representatives before reaching anyone who can help them order cars. The next time they call back, they talk with another person they have never dealt with before. When trying to find out why promised cars have not been delivered on time, no one seems to be able to tell them when they will receive the cars. When asked to find out and call the elevator back, they refuse and tell the elevator to call again. Thus, elevator managers have great difficulty in planning the work activities for each day. The new UPSP voucher system for railcars has also been confusing to many shippers.

The result of these car service and car availability problems has been excessive storage of grain on the ground throughout the Midwest. As a result, the elevator expends more labor handling the grain and considerable deterioration and quality problems occur if it rains on grain stored in such a manner.

The railroads have a common carrier obligation to provide reasonable service to their shippers. On the basis of information provided by shippers, the USDA is convinced that reasonable service has not been provided to smaller agricultural shippers, and recommends that the STB exercise its powers to require Class I railroads improve the level of service to these shippers and to the short line railroads to which they connect. The USDA also encourages the STB to examine the new railroad policy of discontinuing multi-station loading of unit trains, which the railroads have typically allowed in the past.

CONCLUSIONS

USDA appreciates the opportunity to submit comments on the effect of the UPSP merger on agricultural and rural shippers. From its listening sessions and extensive contacts among agricultural interests over the past months, USDA has identified four general categories of concerns related to the impact of the UPSP and other railroad mergers on agricultural shippers.

First, as the USDA has cited in previous comments on the UPSP merger, vigorous competition in lower Plains movements of grain to the Gulf and Mexico is essential to agricultural shippers in the states of Kansas, Oklahoma and Texas. In light of comments the USDA has received about the lack of aggressive competition between the two remaining carriers, USDA recommends that the STB begin a careful examination of the competitive situation in rail movements from the lower Plains to the Gulf and Mexico. Key concerns include the scope of the BNSF's use of its trackage rights, the performance of the UPSP as the landlord, and changes in rates and as to the adequacy of service which shippers have experienced since the merger.

Second, the USDA also believes it is critical for U.S. agricultural exports to Mexico that adequate overland rail competition to this market be maintained and we urge the STB to review and reconsider the effectiveness of its conditions aimed at preserving competition among U.S. railroads to Mexico for their effectiveness. From contacts among U.S. railroad companies, it appears that the service provided to the Tex-Mex railway under the terms of its haulage agreement with UPSP has declined dramatically since the merger.

Third, many shippers have raised concerns to the USDA about the future disposition of the Central Corridor line from Salina, Kansas to Pueblo, Colorado. This corridor is particularly important to the wheat growers in southeastern Colorado who annually produce 17 million bushels of wheat, in addition to other crops. The USDA urges the STB to require the UPSP to maintain the trackage in this Central Corridor in its entirety at status quo ante levels until its disposition can be determined

Finally, the USDA has also identified other rail service issues not directly related to the UPSP merger but which are of concern to agricultural shippers. One issue the USDA recommends the STB examine is discontinuance by railroads of their policy of allowing multi-station loading of unit trains. The USDA also encourages the STB to consider requiring railroads to provide the same multi-station loading on unit trains that they have in the past -- a policy which allowed several elevators to combine shipments for a lower tariff rate.

Respectfully submitted,

Lon Hatamiya
Administrator

Agricultural Marketing Service

U.S. Department of Agriculture
Washington, D.C. 20250

CERTIFICATE OF SERVICE

I, Keith A. Klindworth, certify that on this 15th day of August, 1997, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, on all parties of record in STB Finance Docket No. 32760 (Sub-No. 21), including counsel for UPSP and counsel for BNSF.

Keith A. Klindworth
Keith A. Klindworth
Program Manager
Marketing and Transportation Analysis
Agricultural Marketing Service

STB FD-32760 (SUB 21) ID-181090 8-7-97 D

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MAYER, BROWN & PLATT

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AUG 7 1997
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August 7, 1997

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

Re: Finance Docket No. 32760 (Sub-No. 21)

Dear Secretary Williams:

In the Comments filed by The Burlington Northern and Santa Fe Railway Company on August 1, 1997, in this proceeding (BN/SF-1), there was a typographical error on page 20 of the Comments. Accordingly, we are requesting that you please replace the original page 20 with the attached replacement page 20. We are including an original plus twenty-five (25) copies of this replacement page 20.

Please date-stamp the enclosed extra copy and return it to the messenger for our files. If there is anything further we need to do in this regard, please contact me at (202) 778-0642. Thank you for your assistance.

Sincerely,

Erika Z. Jones

Erika Z. Jones

ENTERED
Office of the Secretary
AUG 11 1997
5 Part of Public Record

Enclosures

cc: All Parties of Record

Even with the growth in its business to date, BNSF will not be satisfied until the conditions are working as intended to provide customers with a full substitute for the competition that was lost when SP merged into UP. BNSF will take all necessary steps to cause the conditions to achieve that goal. Where necessary, the Board should modify the conditions to ensure that they are serving the purpose for which they were intended. In particular, the Board should:

- establish a presumption that any shipper located at a "2-to-1" location is entitled to two-carrier service and place the burden on UP to rebut that presumption;
- establish clear principles governing the definitions of "new facilities" and "transloads" and clear procedures requiring UP to respond promptly to requests to recognize particular projects as such;
- grant BNSF access to bundled UP sole-served facilities when necessary to restore competitive alternatives lost as a result of the UP/SP merger combined with UP's leveraging activity;
- address service issues, including but not limited to those existing at the Sjolander facility in Dayton, where UP should be required to prefer cars from "2-to-1" customers over those from non-"2-to-1" customers when space at Sjolander is short, and to return any cars not stored at Dayton to BNSF at the most efficient point;
- promptly reject UP's indefensible position that LCRA's Halsted facility is not a point to which BNSF received immediate access;
- address Mexico-related issues if Tex Mex continues to insist on inefficient routings that harm competition; and

STB FD-32760 (SUB 21) ID-180916 8-4-97 D

180916

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

- CONTROL AND MERGER -

SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORPORATION AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY - OVERSIGHT

COMMENTS OF:

FINA OIL AND CHEMICAL COMPANY

I. INTRODUCTION

Fina Oil and Chemical Company engages in crude oil and natural gas exploration and production; petroleum products refining, supply and transportation, and marketing; and chemicals manufacturing and marketing. Fina relies heavily on the rail transportation industry to deliver its products such as polystyrene, polypropylene, polyethylene, asphalt and other chemical products, to a variety of customers located across the United States, Canada and Mexico. Fina's production facilities are located predominately along the Texas and Louisiana Gulf Coast. Some of its facilities are located in the Houston, Texas area and are served by the Burlington Northern Santa Fe and the Union Pacific. Therefore, it is necessary to file comments with the Board.

Rail transportation accounts for over 80 percent of Fina's chemical deliveries and is responsible for over 20 percent of the cost of finished petrochemical products. Fina is involved in the oversight process to ensure that the merger conditions granted by the Board maintain a competitive balance and maintain the level of service and costs that are reasonably expected of Fina's service providers.

Oversight Proceedings:

Fina appreciates having the opportunity to comment to the Surface Transportation Board in this Decision. Fina believes that the oversight process is essential in this rail merger due to rail transportation's critical importance to the company. Fina has concerns as to the effectiveness of the conditions imposed by the Board as it pertains to Fina.

Summary:

Fina applauds the detailed information provided by both UP and BNSF in their July 1 quarterly filing. The information was clear, concise and provided detail of their progress given in layperson terms. Fina's findings conclude that there are several stumbling blocks which do not allow BNSF to be an effective competitor to UP. Both railroads have challenges that are preventing them from providing reasonable cost and effective service performance for Fina and Fina's customers. Fina requests that the Board establish clear guidelines in terms of performance measurements and dates to which the full impact of the merger can be realized. Fina will identify areas of concerns that it has in terms of competition related conditions. In addition, Fina has experienced critical service deterioration from both UP and BNSF since the merger was established. This deterioration is hampering the effectiveness of both organizations to be effective competitive service providers.

II. <u>COMMENTS ON SELECTED CONDITIONS INFLUENCING FINA</u>

Competition:

Fina has a plant located in La Porte, Texas served by the PTRA, a terminal railroad jointly owned by BNSF and UP, and a plant located in Bayport, Texas served solely by the Union Pacific, formerly the Southern Pacific. These two plants, along with other Fina locations, have been directly affected by the merger. Fina is concerned that BNSF has not significantly added more business as a result of the trackage rights gained. Fina expects BNSF to be an effective competitor in the Gulf Coast, allowing Fina to have the option at its La Porte facility. Without true rail to rail competition, Fina believes that service will continue to deteriorate, while costs continue to rise. One reason could be the effects of the condition that requires UP to open up to 50% of its contracted volume to BNSF. This opens up the possibility for a shipper to risk losing the current contract held by UP due to UP's ability to cancel the contract. The other reason was stated quite clearly in the SPI's report of the problem of source competition advantage that UP exhibits due to its domination of the Gulf Coast plastics transportation market. This influencing factor inhibits BNSF's ability to secure additional traffic. In summary, Fina respectfully requests the Board to rescind Guideline No. 9 of Decision No. 57, in addition to understanding the source competition issue.

Gulf Coast Plastics Storage:

Fina is very concerned about the current and future capacity of storage facilities for plastics in the Gulf Coast area. Fina has been very fortunate in expanding facilities in the Gulf Coast by over 35 percent in 1996 with plans to increase an additional 35 percent in the upcoming year to a capacity over 3.9 billion pounds of annual production capacity. Plastics' storage is a vital part of Fina's current plans along with its anticipated expansion. As it stands today, Fina does not believe that either UP or BNSF railroad has adequate and effective storage space for existing business, and Fina is not aware of either railroad's plans for additional storage. Fina asks the Board to request information for the planned expansions of storage facilities, along with an anticipated timetable, to be coordinated with planned production expansions in the Gulf Coast area. Fina has been approached by third parties interested in Gulf Coast storage expansions, but they do not have indications from the railroads for supporting these facility expansions. For example, Fina's use of UP storage locations that were once concentrated at the Dayton facility. Now Fina's products are stored in Dayton, Galveston, Texarkana, Pine Bluff, and St. Louis without Fina's approval. Fina has great difficulty in releasing its rail cars and shipping them to its customers timely when stored in these numerous and geographically spread out locations. In addition, Fina is concerned about BNSF's comment in the quarterly report to give priority to 2:1 shippers in the Dayton facility to ease the operations issues. Fina believes that this would give an unfair advantage to these shippers over the current 1:1 shippers such as Fina. Fina encourages the Board not to allow any preferential treatment at the Dayton facility for any rail customer. Fina does not believe that it is the Board's intentions to give preferential access to BNSF at Dayton over the UP. BNSF must have an adequate density of base traffic to create competitive and efficient rail service.

Service Deterioration:

Fina is extremely concerned about the trend in continuing service deterioration prevailing since the merger, with major emphasis in the Houston area. Since the merger, Fina has seen increased congestion, increased number of lost rail cars, increased delays and decreased responsiveness to issues by both BNSF and UP. This has led to significantly increased and inconsistent transit times. These problems appear to be related to the integration of the railroads, Union Pacific and Southern Pacific, and Burlington Northern and Santa Fe. In the quarterly reports, UP has addressed several areas to improve the situation. Fina requests the Board to monitor the service provided by both UP and BNSF and hold the railroads accountable to their plans of improving the situation.

In an attempt to quantify the problems, Fina supports the addition of concrete performance measurements to the quarterly reports that specifically address the service issues. Fina requests information for its specific company as well as the entire plastics industry concerning: 1) delays in the Houston area from time of billing to departure out of Houston plastics plants storage locations and 2) number of cars adhering to a mutually agreed upon service standard from Origin to Gateway for UP and BNSF origins.

Additional Costs Incurred by Fina as it Pertains to Service:

As a result of the increased number of service issues, Fina has incurred additional costs of doing business. These additional costs have been borne by Fina and because all railroads have refused to pay, even in part, any cost directly attributable to railroad service failures. For example, when rail cars are delayed or lost, Fina's customers still require product to keep their operations functional. In order to satisfy the basic need to keep customers operational, Fina is making numerous emergency shipments by non-optimum alternative modes of transportation to provide its customers with product. These emergency shipments are directly raising the costs of doing business for Fina. In addition, Fina is required to hold additional inventory in the system to account for delays and inconsistency of transit times. This results in increased working capital costs such as increased inventory and a larger number of private cars to hold the inventory. After repeated attempts, Fina has been unsuccessful in recovering even a portion of the costs. Fina respectfully asks the Board for assistance in recovering costs borne by Fina, which is a direct result of railroad service failures. As these additional costs increase, the cost of doing business for Fina increases and will ultimately affect the consumers of Fina's products and ultimately, the general public.

Use of trackage rights by BNSF:

Fina understands the Board's intention of extending the trackage rights agreement. The performance measurements presented in the quarterly reports could be misleading by indicating new business when, in fact, this was existing business diverted from other trackage. At Fina, traffic that is routed to the Southeast via an existing BNSF gateway. BNSF, eager to use the new trackage routes, diverted Fina's traffic over its New Orleans trackage rights without Fina's consent and without contractual agreements in place. This caused a deterioration of service as the rail cars started on the billed routing and then were changed to the new routing adding days of transit delay. While Fina does agree that the new trackage will potentially improve service levels, it would like to make the routing decision by ensuring the same or better transits and more effective overall cost advantage, should the situation warrant. Fina asks the Board to require the railroads to adhere to routing instructions provided by the shipper under normal operating conditions. Fina asks the Board to separate the information provided by the railroads between new SP competitive replacement traffic and existing base load traffic.

Mexico Access:

As part of the NAFTA agreement, Fina is very interested in exporting product into Mexico, preferably by rail. One provision of the merger gave BNSF trackage rights into Corpus Christi, Texas with connections to the Tex Mex Railroad. BNSF has not been aggressive in marketing these rights. As stated in BNSF's quarterly report, it has not completed long term negotiations with the Tex Mex Railroad. Fina believes actual BNSF trains on the Corpus Christi route would be more competitive than existing UP haulage. Fina recommends that the Board expedite the discussions to accelerate the use of these trackage rights by BNSF.

Effectiveness of 2:1 Points:

Fina has the opportunity to take advantage of 2:1 points on the destination side of its shipments, but Fina has been disappointed with the opportunities presented to date. First, there has not been an aggressive approach to marketing 2:1 customers. In the quarterly reports, BNSF states that it has not successfully agreed on the final list of 2:1 points. Fina requires resolution of the issues that hinder definition of all 2:1 points in order to expedite the expansion of the traffic base to BNSF. Secondly, once a 2:1 point has been identified by marketing, transition to operations has been difficult. When Fina shipments are made to a 2:1 point, the railroad operating departments do not recognize that the point is open to BNSF. If this continues, it will force a revert back to the original routing due to the problems encountered, and thus does not provide an effective alternative to the former Southern Pacific railroad. Fina does not think it was the Board's intention to have service become an impediment in the servicing of 2:1

points. Fina asks the Board to require immediate effective operational access of the 2:1 points.

Information Technology Integration:

The importance of information technology in the merger process was grossly underestimated by both railroads. In order for an individual merger to be effective, the information of the merged companies must be interchangeable. In addition, for a merger with interdependence between additional railroads such as UPSP and BNSF, information must be easily interchanged with all parties. The difficulty of integrating the computer systems was acknowledged by both railroads in their quarterly filings. This has caused great confusion in the transit of Fina's product, such as having inaccurate or lost information leading to significant delays in delivery. Fina requests the Board to require both railroads to provide clear updates on the progress of their computer systems integration in their quarterly reports and that the integration does not lead to delays in transit times.

III. CONCLUSION

In summary, Fina Oil and Chemical Company is very concerned about the specific issues surrounding the Union Pacific / Southern Pacific merger and the general trend of rail concentration as it pertains to Fina's commitment of ***" on time, low cost delivery of quality products that meet our customers' requirements both now and in the future."*** Fina expects rail mergers to enhance service levels and reduce cost provided to the railroad's customers. Fina also expects to see that this particular merger creates an effectively competitive environment for Fina. Unfortunately, Fina has seen a deterioration of service levels from pre-merger to the present and is deeply concerned about the declining trend. The competitive rail environment implemented to date has not been as effective as the Board must have intended.

Fina appreciates the Board's willingness to hear the progress of the mergers by having the oversight process. This oversight process should be beneficial for both the shippers and railroads, and it should continue over the next five years as conditioned by the Board. Fina expects the quality of the quarterly reports to be improved with the addition of performance measurements, which are measurable means of determining the success of imposed conditions. Performance measurements will provide an objective answer to the questions posed in this filing and should be impartial indicators of gains experienced by both the railroads and the customers that they serve.

As to the future, the issues presented in this filing should be considered when the Board decides conditions to be granted in the continuing consolidation of the rail industry. Fina expects the Board to monitor the commitments made by the railroads in an expedited fashion.

For the Board's convenience, Fina has listed its specific requests for consideration in Appendix A. In addition, Fina supports the joint filing of the Chemical Manufacturers Association and Society of Plastics Industry as Fina is an active member of both organizations.

Respectfully submitted,

Mike Spahis

Mike Spahis
Fina Oil and Chemical Company
Manager of Logistics and Distribution
8350 North Central Expressway, Suite 1620
Dallas, TX 75206
(214) 750-2898

APPENDIX A

SUMMARY OF REQUESTS

1. Fina requests that the Board establish clear guidelines in terms of performance measurements and dates to which the full impact of the merger can be realized.
2. Fina respectfully requests the Board to rescind Guideline No. 9 of Decision No. 57, in addition to understanding the source competition issue.
3. Fina asks the Board to request information on the planned expansions of storage facilities along with an anticipated timetable to be coordinated with planned expansions in the Gulf Coast area.
4. Fina encourages the Board not to allow any preferential treatment at the Dayton facility for any rail customer.
5. Fina requests the Board to monitor the service provided by both UP and BNSF and hold the railroads accountable for their plans of improving the service.
6. Fina supports the addition of performance measurements to the quarterly reports on: 1) delays in the Houston area from time of billing to departure out of Houston area from all plastics storage locations and 2) number of cars adhering to a mutually agreed upon service standard from Origin to Gateway for UP and BNSF origins.
7. Fina respectfully asks the Board for assistance in recovering costs borne by Fina that are a direct result of railroad service failures.
8. Fina asks the Board to require the railroads to adhere to the routing provided by the shipper under normal operating conditions.

9. Fina asks the Board to separate the information provided by the railroads in their data between SP competitive replacement traffic and existing base load traffic.

10. Fina recommends that the Board expedite Tex Mex / BNSF discussions to accelerate the use of the trackage rights by BNSF.

11. Fina requires resolution of the issues that hinder definition of all 2:1 points, in order to expedite the expansion of the traffic base to BNSF.

12. Fina asks the Board to require immediate, effective operational access of the 2:1 points.

13. Fina requests the Board to require both railroads to provide clear updates on the progress of their computer systems integration in their quarterly reports and that the integration does not lead to delays in transit times.

14. Fina intends for this oversight process to be beneficial for both the shippers and railroads and to continue over the next five years as conditioned by the Board.

15. Fina expects the Board to monitor the commitments made by the railroads in an expedited fashion.

CERTIFICATE OF SERVICE

I hereby certify that copies of the comments of Fina Oil and Chemical Company have been served this 31st day of July by next day air to the Surface Transportation Board, Union Pacific and Burlington Northern Santa Fe and by first-class mail, postage prepaid on all parties of record in Docket No. 32760 (Sub-No. 21).

Mike Spahis
Fina Oil and Chemical Company
Manager of Logistics and Distribution
8350 North Central Expressway,
Suite 1620
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STB FD-32760 (SUB 21) ID-180912 8-4-97 D

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202 347-7170

August 4, 1997

RECEIVED
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MAIL MANAGEMENT
STB

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Unit
ATTN: STB Finance Docket No. 32760(Sub-No. 21)
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 32760 (Sub-No. 21)
Union Pacific Corporation, et al. --
Control and Merger -- Southern Pacific
Rail Corporation, et al.

Dear Mr. Secretary:

Enclosed for filing in the above-referenced proceeding are an original and 25 copies of the Confidential version of the Comments of the Lower Colorado River Authority and the City of Austin, Texas **(LCRA-8)**, and 25 copies of a Redacted Public Version **(LCRA-9)**. Also enclosed is a diskette containing the text of this filing in WordPerfect 5.1 format.

An additional copy of the pleading is also enclosed. Kindly indicate receipt by date-stamping this extra copy and returning it with our messenger.

ENTERED
Office of the Secretary
AUG 04 1997
3 Part of Public Record

Sincerely,

C. Michael Loftus

C. Michael Loftus
An Attorney for the Lower Colorado River Authority and the City of Austin, Texas

Enclosures

cc: Parties of Record

LCRA-9

BEFORE THE SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760 (Sub-No. 21)

COMMENTS OF THE LOWER COLORADO RIVER AUTHORITY AND THE CITY OF AUSTIN, TEXAS

REDACTED PUBLIC VERSION

THE LOWER COLORADO RIVER AUTHORITY
AND THE CITY OF AUSTIN, TEXAS

By: C. Michael Loftus
Donald G. Avery
Andrew B. Kolesar III
Slover & Loftus
1224 Seventeenth Street, N.W.
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(202) 347-7170

Attorneys for the Lower Colorado River Authority and the City of Austin, Texas

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: August 4, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760 (Sub-No. 21)

COMMENTS OF
THE LOWER COLORADO RIVER AUTHORITY
AND THE CITY OF AUSTIN, TEXAS

The Lower Colorado River Authority ("LCRA") and The City of Austin, Texas ("Austin") (jointly "LCRA/Austin") submit the following comments in response to the Board's Decision No. 1 in this docket served May 7, 1997. That decision instituted a proceeding to implement the oversight condition imposed by the Board in approving the Union Pacific/Southern Pacific ("UP/SP") merger in Finance Docket No. 32760 (Decision No. 44 served August 12, 1996) ("Merger Decision").

IDENTITY AND INTEREST

LCRA is a conservation and reclamation district of the State of Texas, and Austin is a municipal corporation, existing under its home rule charter and the laws of the State of Texas. LCRA/Austin are joint owners of the Fayette Power Project

("FPP"), a coal-fired electric generating station located at Halstead, Texas. FPP consumes approximately 6 million tons per year of low-sulfur coal from the Powder River Basin ("PRB") of Wyoming, which is transported in unit train service to Texas.

LCRA/Austin participated in the UP/SP merger proceeding and have a continuing interest in the implementation of the merger. They are particularly interested in the implementation of the trackage rights obtained by the Burlington Northern and Santa Fe Railway Company ("BNSF") to operate over UP/SP lines to provide service to FPP. These trackage rights were established by agreement between UP/SP and BNSF and were imposed by this Board as a condition upon its approval of the merger. As one of UP/SP's largest coal shippers, LCRA/Austin also has a strong and continuing interest in the impact of the merger upon the adequacy of the service UP/SP is able to provide.

COMMENTS

A. UP Has Wrongfully Refused to Allow BNSF to Provide Service to LCRA/Austin

BNSF obtained trackage rights to serve LCRA/Austin's Fayette Power Project pursuant to Section 4(a) of the Settlement Agreement entered into between UP/SP and BNSF on September 25, 1995. The Board imposed the terms of the Settlement Agreement, as modified by Supplemental Agreements dated November 18, 1995 and June 27, 1996, as a condition of its approval of the UP/SP merger. See Finance Docket No. 32760, Decision No. 44, at 145. Pursuant to Section 9(f) of the Settlement Agreement, a separate agreement dated June 1, 1996 was entered into by Missouri-Pacific Railroad Company, SP, and BNSF in order to implement BNSF's trackage rights over the Sealy, Texas to Waco and Eagle Pass, Texas line segments. These trackage rights were effective pursuant to the terms of these agreements upon the consummation of the merger.

As explained in the accompanying Verified Statement of Daniel G. Kuehn, LCRA's Manager, Fuel & Energy Management, LCRA/Austin have very recently entered into a rail transportation contract with BNSF for certain volumes of coal that are not contractually committed to the UP. Mr. Kuehn relates that UP/SP has advised both BNSF and LCRA/Austin that it will not permit BNSF to run over its lines to provide service under this new contract.

In a Petition for Clarification filed September 4, 1996 (LCRA-4), LCRA/Austin sought confirmation that it was entitled to reduce its obligations under its contract with UP by up to 50% pursuant to the contract modification condition imposed by the Board. See Decision No. 44, at 146. The Board denied LCRA/Austin's petition finding that Applicants had "never represented that LCRA/Austin would be treated as a 2-to-1 shipper for the purposes of CMA Paragraph 3." Decision No. 57, at 7. The Board confirmed, however, that LCRA/Austin was entitled to service from BNSF pursuant to the terms of the Settlement Agreement. The Board noted that the Applicants agreed to "treat[ ] LCRA/Austin as one of the many 2-to-1 shippers that would gain access to BNSF under the terms of the BNSF agreement. This is the representation that applicants made and this, therefore, is the representation to which they will be held." Id. The UP's action in refusing BNSF access to FPP is in clear violation of the terms of the Settlement Agreement.

LCRA/Austin and BNSF intend to raise this matter with the Board within the next several days in order to obtain enforcement of BNSF's rights on an emergency basis. For this reason, this matter is not addressed in detail in these Comments. However, in this oversight proceeding, in which the Board is evaluating inter alia, the vigor with which the Applicants are implementing the conditions imposed by the Board, UP/SP's efforts to prevent implementation of BNSF's trackage rights to provide service to the FPP manifest a clear aversion to embracing competition under the merger conditions.

B. UP/SP's Service to LCRA/Austin Has Been Deteriorating

In its Report submitted in this proceeding on July 1, 1997, UP/SP presents a glowing description of the service it is providing to Powder River Basin coal consumers. In particular, the Report states at page 42 that:

> UP/SP has consistently exceeded its own performance goals and contractual performance commitments for Powder River Basin coal in recent months. Indeed, performance levels have reached all-time records. During the first five months of 1997, UP/SP cycled PRB coal trains more quickly than scheduled 93% of the time, versus performance targets ranging from 87% to 90%. The performance

level in May was 94%, despite the huge volume of coal leaving the Basin.

The experience of LCRA/Austin stands in stark contrast to these claims by UP/SP. Despite the fact that LCRA/Austin's contract with UP provides for a cycle time of approximately hours (when loading and unloading times are included), the actual cycle times averaged hours in May, hours in June, and hours in July! Kuehn V.S. at 4.

As explained by Mr. Kuehn, UP/SP has attributed its extremely poor recent performance primarily to the fact that it has an insufficient number of trained and qualified crews. This explanation does not bode well in terms of any hopes for rapid improvement in the situation since it takes several months to train new crew members and place them in service. Kuehn V.S. at 4-5.

The Labor Impact Exhibit that appears at pages 407-422 in Volume 3 of the Applicants' Railroad Merger Application (UP/SP-24) indicates a net reduction of 457 enginemen and trainmen in connection with the merger. We are unable to determine to what extent the Applicants actually implemented the labor reductions projected in the Application. However, to the extent they did, it would appear that the current severe service conditions afflicting the movement of Powder River Basin coal may be attributable in significant part to these merger-related actions.

C. UP/SP's Abandonment of the Kansas City Bypass Deprives Texas Unit Train Coal Shippers of Promised Benefits of the Merger

One of the projects that the Applicants touted as providing benefits to western coal shippers as a result of the merger, was creation of a new rate for coal and grain traffic to Texas via Topeka, Kansas, bypassing Kansas City. As explained in the Verified Statement of R. Bradley King and Michael D. Ungerth, in Volume 3 of the Application (UP/SP-24), "[i]n recent years, Kansas City has become the second busiest rail terminal in the United States, . . . Kansas City has become a major bottleneck for the UP system, because all traffic between the original UPRR and MPRR must pass through the terminal. This includes the river of coal flowing out of the Powder River Basin in Wyoming destined to Georgia, Missouri, Arkansas, Oklahoma, Louisiana and Texas." Id. at page 54. Applicants' Witness Richard B. Peterson assured the Board that, "Powder River Basin coal users will greatly benefit from the new Kansas City bypass and from other efficiencies that will shorten cycle times and increase reliability." Peterson V.S., Application, Volume 2 (UP/SP-23), at 116).

In their Report in this oversight proceeding, the Applicants advise that they have abandoned the Kansas City Bypass project and intend to leave coal trains on their present routes. See Report at pages 24-25. Although there was no requirement in the merger that UP/SP undertake this project, the Board should look askance at a failure of rail merger applicants to carry through with promised benefits to rail shippers that are relied upon by the applicants to obtain the Board's approval.

CONCLUSION

At least insofar as LCRA/Austin are concerned, the Applicants' Report concerning the implementation of the merger is very misleading. Rather than cooperating with BNSF to implement service to LCRA/Austin, UP has refused to honor the terms of the BNSF Settlement Agreement. Rather than receiving the type of improved cycle time performance described in the Applicants' Report, LCRA/Austin's cycle times have deteriorated in recent months. Finally, LCRA/Austin, like other UP/SP Powder River Basin coal consumers, have been disappointed by the Applicants' abandonment of the promised Kansas City Bypass project.

As noted above, LCRA/Austin, together with BNSF, will be seeking relief on an emergency basis from UP/SP's refusal to cooperate in the implementation of BNSF's trackage rights to serve FPP. With respect to its other concerns, LCRA/Austin respectfully requests the Board to continue to monitor the situation with regard to service conditions for Powder River Basin coal traffic, and to require the Applicants to report on a regular basis the progress of their efforts to improve such service conditions.

Respectfully submitted,

THE LOWER COLORADO RIVER AUTHORITY
AND THE CITY OF AUSTIN, TEXAS

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Dated: August 4, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760 (Sub-No. 21)

– REDACTED PUBLIC VERSION –

VERIFIED STATEMENT

OF

DANIEL G. KUEHN

My name is Daniel G. Kuehn. I am Manager, Fuel & Energy Management for the Lower Colorado River Authority ("LCRA") which is located in Austin, Texas. This Verified Statement is presented on behalf of LCRA and the City of Austin, Texas ("Austin"). LCRA/Austin are joint owners of the Fayette Power Project located in Halstead, Texas which burns approximately 6 million tons per year of coal from the Powder River Basin of Wyoming.

There are three subjects that I will address in this statement. The first is the recent refusal of the Union Pacific Railroad Company ("UP") to permit Burlington Northern and Santa Fe Railway Company ("BNSF") to utilize trackage rights that BNSF obtained in the UP/SP merger to haul coal traffic to the Fayette

Power Project. The second is recent problems LCRA/Austin have experienced with respect to substandard cycle times under our rail transportation agreement with UP. The third is our concern about UP's decision, announced in this proceeding, to abandon the project to bypass Kansas City for coal unit trains moving from the Powder River Basin to the State of Texas.

A. <u>UP's Refusal to Implement BNSF Trackage Rights</u>

LCRA/Austin had some discussions with BNSF concerning the possibility of obtaining BNSF service for up to 50% of our traffic in the fall of 1996. At that time, we were seeking clarification from this Board as to LCRA/Austin's entitlement to reduce our minimum volume commitments to the UP under our existing contract by up to 50% pursuant to the contract modification condition that was imposed by the Board in approving the UP/SP merger. After the Board issued its decision denying our petition for clarification, BNSF approached us about the possibility of entering into a contract for transportation of any portion of our coal traffic that might not be committed under our existing coal transportation agreement with the UP.

We were very interested in this possibility for two reasons. The first is that we are interested in obtaining proposals from BNSF for transportation of our coals upon the expiration of the initial term of our current agreement. A contract with BNSF for transportation of even the small portion of our volume that is not committed under our UP agreement would enable BNSF to test out its operations for this movement, guage the commercial and operational effectiveness of the subject trackage rights, and put it in a better position to compete vigorously for the larger volumes when they become available. Secondly, we have been experiencing significant and growing problems with respect to the cycle time performance provided by the UP recently, and we hoped that converting one of our trainsets over to BNSF service would increase the productivity of that trainset and help to alleviate the impact of the UP service problems.

We signed a rail transportation agreement with BNSF on July 22, 1997 for service to begin as soon as possible. This contract covers only tonnage which is not committed to UP under our pre-existing agreement with the it. Our UP contract covers 95% of our shipments from the PRB. The BNSF contract has a minimum volume of 270,000 tons for each of two periods, subject to the limitation that in no event will LCRA/Austin ship, or be obligated to ship, more than 5% of our coal traffic to the Fayette Power Project.

Both LCRA/Austin and BNSF have been informed by UP, within the last few days, that UP will refuse to permit BNSF to utilize its trackage rights to initiate service under our new contract on the grounds that BNSF's trackage rights are not effective until the expiration of the initial term of our UP contract. This is contrary to both BNSF's and LCRA/Austin's understanding, which is that the BNSF's trackage rights were effective upon consummation of the merger. LCRA/Austin are currently conferring with BNSF about raising this matter with the Board on an emergency basis so that service under the new contract can be initiated.

It is especially troubling to LCRA/Austin that UP is attempting to prevent the implementation of BNSF service at a time when UP, itself, is encountering tremendous problems in providing timely service to us. We viewed the initiation of BNSF service as a positive step both for LCRA/Austin and for UP, because it would relieve some of the pressure on UP.

B. UP Service Problems

The rail service commitment provisions of our contract with the UP call for a cycle time of hours. This figure does not include loading and unloading time (typically hours per cycle) or time associated with such causes as force majeure events. We have had problems with high cycle times in various periods in the past but have generally been able to work with UP (and with the Chicago & Northwestern Transportation Company prior to its acquisition by UP) to address these situations. However, within the last few months, our service has deteriorated rapidly, with cycle times going from an average of hours in May, to hours in June, and hours in July. (These figures are for the total cycle, and include loading and unloading times).

In recent conversations with UP personnel, I have been advised that the current service problems we are encountering are attributable in significant part to inadequate numbers of trained and qualified crews. I was told that UP/SP has recently hired approximately 800 new crews to address this situation, but that it will be several months before these crews can be trained and placed in service. I do not know to what extent the merger of UP and SP may be responsible for the service problems LCRA/Austin are currently experiencing. However, since a shortage of qualified crew members is apparently one of the principal causes of the current problems, it would seem that the merger may be a cause to the extent it reduced the number of qualified crew members.

C. __Kansas City Bypass__

One of the benefits of the UP/SP merger that was promised to unit train coal shippers in the State of Texas was improvement in cycle times associated with a project to bypass Kansas City for unit coal trains moving from the Powder River Basin to Texas. LCRA/Austin welcomed this plan because of the improvements in cycle times it was anticipated to yield. We were very disappointed to learn from UP/SP's report in this oversight proceeding that this project has been abandoned.

Our disappointment is heightened by the very poor level of service we have been receiving from UP lately. It is very important to us that UP meet its contractual service commitments, as we have a large fleet of private cars that we use in PRB coal service, and efficient utilization of this equipment is an important factor in the economics of our fuel supply at the Fayette plant.

VERIFICATION

STATE OF TEXAS)
) ss:
COUNTY OF TRAVIS)

DANIEL G. KUEHN, being duly sworn, deposes and says that he has read the foregoing, knows the contents thereof, and that the same are true as stated to the best of his knowledge, information and belief.

Daniel G. Kuehn

Sworn and subsribed before me this 1st
day of August, 1997

Notary Public
My Commission Expires: 1-13-99

LESLIE HUDSON
NOTARY PUBLIC
State of Texas
Comm. Exp. 01-13-99

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 1997, I served Confidential copies of the foregoing Comments by hand upon the following:

Arvid E. Roach II, Esq.
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I further certify that Redacted copies of the foregoing Comments were served this 4th day of August by hand upon Erika Z. Jones, Esq., Mayer, Brown & Platt, 2000 Pennsylvania Avenue, N.W., Suite 6500, Washington, D.C., 20006, and by first-class mail, postage pre-paid, upon all parties of record in Finance Docket No. 32760 (Sub-No. 21).

C. Michael Loftus

C. Michael Loftus

STB FD-32760 (SUB 21) ID-180918 8-1-97 D

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BEFORE THE
SURFACE TRANSPORTATION BOARD
FINANCE DOCKET NO. 32760 (Sub No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY
CONTROL AND MERGER
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., and THE DENVER and RIO GRAND WESTERN RAILROAD COMPANY

OVERSIGHT PROCEEDING

STATEMENT OF THE PORT OF CORPUS CHRISTI AUTHORITY
OF NEUCES COUNTY, TEXAS

Pursuant to its May 22, 1997 notice of intent to participate in the above-entitled oversight proceeding, the Port of Corpus Christi Authority of Neuces County, Texas (sometimes referred to herein as "Port of Corpus Christi" or "Port") submits the following comments.

As a party of record in the UP/SP merger proceeding, the Port of Corpus Christi submitted comments which supported approval of the UP/SP merger, conditioned upon inclusion of the terms and conditions of the Union Pacific/Burlington Northern Santa Fe Settlement Agreement, and inclusion of a third Class-1 railroad if, in the Board's judgement, additional competitive rail service was deemed necessary at Corpus Christi. In response to the Port's comments and other submissions, the Board in its August 6, 1996 decision approved the UP/SP Settlement Agreement as a condition to the merger, and through trackage rights granted to the Texas Mexican Railway Company allowed Texas Mexican Railway Company better marketing opportunities for services to the Port.

Having had approximately one year of operation and experience under the Board's decision, the Port believes at this junction that the approval of the UP/SP merger and the competitive conditions imposed by the Board are achieving very beneficial results for the Port and its shipping community.

UP/SP

UP/SP's efforts to implement the merger are well documented in APPLICANTS REPORT ON MERGER AND CONDITION IMPLEMENTATION (UP/SP-303 dated July 1, 1997). With particular application to the Port of Corpus Christi, Applicants' commitment to investing in physical improvements to plant and equipment are viewed as extremely beneficial for their long-term viability. For the short term, UP's commitment of locomotive power and personnel appears to be another indication of its desire to improve SP's prior service.

One example of the benefits of the merger involving new business for the Port occurred earlier this year. The traffic in question moved to and from a former SP-served western point. Because it was post merger new business, the traffic was able to move on a much more efficient combined UP/SP route versus the old SP direct route which would have been significantly more circuitous. Without the combined routing, this business would have been lost to the Port of Corpus Christi and the shipper would have had to pay much higher freight charges through an alternative port.

There have been some post-merger service interruptions, service inconsistencies, and delayed transit times. We believe these problem areas result, in part, because the UP and SP EDI systems have not been unified into a single system. To realize the full potential of the merger, Applicants must maintain their schedule for finalizing labor agreements and unification of electronic data systems for operations, customer service and related functions.

BURLINGTON NORTHERN SANTA FE

As with UP/SP, Burlington Northern Santa Fe's post-merger implementation is well documented in THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY'S QUARTERLY PROGRESS REPORT (BNSF-PR-4 dated July 1, 1997).

For the Port, we believe BNSF has demonstrated a positive effort to bring effective rail competition to this market. This is particularly true for export grain. Additionally, BNSF's marketing and operating officials have been very cooperative in exploring new business development opportunities.

THE TEXAS MEXICAN RAILWAY COMPANY

The Port of Corpus Christi was satisfied with the merger condition granting Tex Mex certain trackage rights and terminal access. The Port believes these conditions have preserved and should continue to preserve effective rail competition by providing additional routing and service options in certain markets. To achieve the benefits of its trackage rights, the Port further believes the Tex Mex must continue to focus on maintaining in Corpus Christi competitive pricing, an adequate car supply, and service reliability for its traditional business, in addition to continuing its efforts to develop new business opportunities over its trackage rights routes.

CONCLUSION

The Port of Corpus Christi highly values its rail service, the relationship with its carriers, and the importance of effective rail competition in the market place. Over both the short and long term, the Port believes approval of the UP/SP merger, including approval conditions, is working as planned, will strengthen the Port's relationship with the railroads, and will produce the intended effective competition without the need for imposing any additional conditions. The Port appreciates the opportunity to make these comments and would be pleased to provide the Board any additional information it may require.

Respectfully submitted,

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August 1, 1997

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Statement has been served on all parties of record in this proceeding either by hand or by first-class mail this 1st day of August, 1997.

Paul D. Coleman

Paul D. Coleman