

STB FD 32760 (Sub 21) 8-19-98 I 190592

190592

SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.

WASHINGTON, D. C. 20036

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL

ENTERED
Office of the Secretary

AUG 19 1998

Part of
Public Record

August 19, 1998

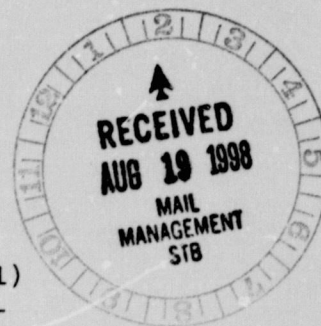
TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:
wls@sloverandloftus.com

Via: Hand Delivery

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 10 copies of Petition of the Western Coal Traffic League For A Modification To The Procedural Schedule.

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

Very Truly Yours,

William L. Slover
An Attorney for the Western Coal
Traffic League

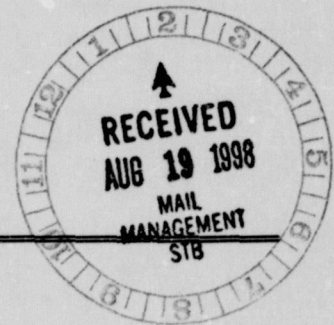
Enclosures

cc: Parties of Record

180592
ENTERED
Office of the Secretary

BEFORE THE
INTERSTATE COMMERCE COMMISSION

AUG 19 1998



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

PETITION OF THE
WESTERN COAL TRAFFIC LEAGUE FOR A
MODIFICATION TO THE PROCEDURAL SCHEDULE

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

By: William L. Slover
Donald G. Avery
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: August 19, 1998

Attorneys for the Western
Coal Traffic League

BEFORE THE
INTERSTATE COMMERCE COMMISSION



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)

PETITION OF THE
WESTERN COAL TRAFFIC LEAGUE FOR A
MODIFICATION OF THE PROCEDURAL SCHEDULE

Comes now the Western Coal Traffic League ("WCTL"),
pursuant to the Rules of Practice, (49 C.F.R. § 1117.1), and
petitions the Board for a modification in the procedural schedule
in this proceeding and in support thereof shows:

I

INTEREST OF WCTL

On July 8, 1998, WCTL filed a request for a new reme-
dial condition in Finance Docket 32760 (Sub-No. 26), 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 [Houston/Gulf Coast Oversight] ("Sub-No. 26"). In Sub-No. 26, Decision No. 6, served August 4, 1998, the Board announced that WCTL's request would be considered in the above-captioned proceeding ("Sub No. 21") instead of Sub-No. 26. Id. at 7 n.11.

II

THE DIFFERENT PROCEDURAL SCHEDULES IN SUB-NOS. 21 AND 26

In its Decision establishing the Sub-No. 26 procedural schedule, the Board afforded parties seeking new remedial conditions the opportunity to file rebuttal evidence and argument. Sub-No. 21, Decision No. 12 (served March 31, 1998), at 12.¹ This was of course consistent with the Board's (and the Interstate Commerce Commission's) longstanding practice of allowing parties with the burden of proof to both open and close the submission of evidence. See, e.g., 49 C.F.R. §§ 1111.8; 1113.8. By contrast, the Sub-No. 21 procedural schedule does not provide

¹ The procedural schedule for Sub-No. 26 adopted in Sub-No. 21, Decision No. 12 was reaffirmed in Sub-No. 26, Decision No. 1 (served May 19, 1998).

for rebuttal. Sub-No. 21, Decision No. 10 (served October 27, 1997), at 19).

III

WCTL'S NEED FOR REBUTTAL

In its Sub-No. 26 request (now a Sub-No. 21 request), WCTL sought an order from the Board imposing an accounting condition on Union Pacific Railroad Company. WCTL's participation commenced under the Sub-No. 26 three (3) part evidentiary procedure, and as such WCTL had no reason to augment its filing with anticipatory rebuttal of arguments that UP might, or might not, advance. By transferring consideration of WCTL's request to the Sub-No. 21 proceeding the Board has perhaps inadvertantly changed the ground rules in the middle of the process, to WCTL's manifest disadvantage.

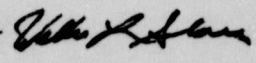
Because WCTL bears the burden of proof on its request, it should be permitted to open and close. Moreover, rebuttal will assist the Board in its consideration of WCTL's requested condition.

WHEREFORE, Petitioner prays that it be afforded a reasonable time to file a rebuttal to any reply or replies to its

July 8, 1998 request for an accounting condition. WCTL requests that it be given thirty (30) days, to October 1, 1998, within which to prepare and file its rebuttal evidence.

If, for some reason, the Board is unable to grant Petitioner's request for rebuttal, Petitioner prays that its Request in Sub-No. 26 (now Sub-No. 21) be dismissed without prejudice to WCTL's right to seek its accounting condition independently from the oversight proceedings.

Respectfully submitted,

By: William L. Slover 
Donald G. Avery
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

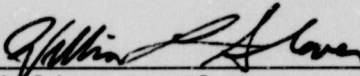
OF COUNSEL:
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys for the Western Coal
Traffic League

Dated: August 19, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 1998, copies of the foregoing Petition of the Western Coal Traffic League To Modify Procedural Schedule were served via first-class United States mail, postage prepaid on all persons on the service list for Finance Docket No. 32760 (Sub-No. 21).



William L. Slover

STB FD 32760 (Sub 21) 7-16-98 1 189886

189886

TROUTMAN SANDERS LLP

ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

1300 I STREET, N.W.
SUITE 500 EAST
WASHINGTON, D.C. 20005-3314
TELEPHONE: 202-274-2950
FACSIMILE: 202-274-2994
INTERNET: william.mullins@troutmansanders.com

William A. Mullins

July 16, 1998



ENTERED
Office of the Secretary

JUL 17 1998

Part of
Public Record

HAND DELIVERY

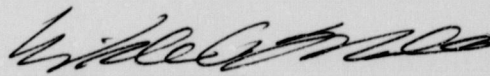
The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K St., N.W., Suite 700
Washington, DC 20423

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

Dear Secretary Williams:

Enclosed are an original and twenty-six copies of the Motion Of The Kansas City Southern Railway Company To Strike The Arkansas, Louisiana And Mississippi Railroad Company's Reply to Replies. Also enclosed is a computer disk containing the text of the motion. Please acknowledge the receipt and filing of the enclosed materials by file stamping the enclosed twenty-sixth copy of the motion and returning that copy to the person delivering the filing.

Sincerely,



William A. Mullins

Enclosures

cc: All Known Parties of Record

189886

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

MOTION OF THE KANSAS CITY SOUTHERN RAILWAY
COMPANY TO STRIKE THE ARKANSAS,
LOUISIANA AND MISSISSIPPI RAILROAD
COMPANY'S REPLY TO REPLIES

ENTERED
Office of the Secretary

JUL 17 1998

Part of
Public Record

Richard P. Bruening
Robert K. Dreiling
THE KANSAS CITY SOUTHERN
RAILWAY COMPANY
114 West 11th Street
Kansas City, Missouri 64105
Tel: (816) 983-1392
Fax: (816) 983-1227

William A. Mullins
David C. Reeves
TROUTMAN SANDERS LLP
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005-3314
Tel: (202) 274-2950
Fax: (202) 274-2994

Attorneys for The Kansas City Southern
Railway Company

July 16, 1998

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

**MOTION OF THE KANSAS CITY SOUTHERN RAILWAY
COMPANY TO STRIKE THE ARKANSAS,
LOUISIANA AND MISSISSIPPI RAILROAD
COMPANY'S REPLY TO REPLIES**

The Kansas City Southern Railway Company ("KCS") hereby moves, pursuant to 49 C.F.R. Section 1104.13(c) (1997), to strike the June 26, 1998, reply of the Arkansas, Louisiana and Mississippi Railroad Company ("AL&M"). The June 26 reply does nothing more than reply to the replies filed in response to AL&M's May 12, 1998, petition in this matter. Alternatively, if the Surface Transportation Board ("STB" or "Board") denies this motion, KCS requests that it be allowed 20 days from the denial of said motion in which to respond to AL&M's June 26 reply.

BACKGROUND

On May 12, 1998, AL&M petitioned the Board to amend the conditions imposed on the UP/SP Merger¹ by allowing The Burlington Northern and Santa Fe Railway Company ("BNSF")

¹ See *Union Pacific Corporation, et al.—Control and Merger—Southern Pacific Rail Corporation, et al.*, Finance Docket No. 32760, Decision No. 44 (STB served Aug. 12, 1996).

to utilize its overhead trackage rights on the former Southern Pacific line between Memphis and Texarkana to interchange with AL&M at Fordyce, AR. KCS replied to AL&M's petition on June 1, 1998. Union Pacific Railroad Co. ("UP") replied on June 2, 1998. Other interested parties² also filed replies. Then, on June 26, AL&M submitted what it called a "supplement" to its May 12 petition, submitting argument and evidence primarily targeted toward rebutting KCS' and UP's June 1 and 2 filings and re-arguing AL&M's assertions from its initial petition.³

SUMMARY OF ARGUMENT

AL&M's June 26 "supplement" to its petition ("AL&M's Reply") is a reply to a reply which is prohibited by 49 C.F.R. Section 1104.13(c) (1997), and which is not permitted by any other directive of the Board. All but a small portion of the material submitted could have been submitted with AL&M's petition, but was not. Accordingly, there is no good cause for waiving the Board's rule against replies to replies. The Board should therefore enforce that regulation by striking AL&M's "supplement." If the Board chooses to deny this motion, KCS requests that it be granted 20 days following such denial in which to respond to AL&M's improper reply.

ARGUMENT

AL&M's Reply, though couched as a "supplement" to AL&M's petition is, in truth, merely a thinly-disguised reply to a reply. The Board should strike that reply.

AL&M's Reply is clearly a reply to KCS' and UP's replies to AL&M's petition; it is not a supplement to AL&M's petition. AL&M's statements make clear that its filing is addressed to the replies filed by KCS and UP. For example, the second paragraph of the filing states, "Union Pacific responds to the AL&M's petition with three arguments The KCS repeats the themes

² Georgia Pacific Corporation and International Paper Company.

³ In addition, AL&M included on pages 12 and 13 of its pleading and on page 5 of the Supplemental Verified Statement of Larry J. Ahlers a few paragraphs dealing with alleged UP service problems that occurred after the date of AL&M's petition.

advanced by the UP . . . these arguments . . . [are] each addressed below." AL&M Reply, at 1-2. Phrases that appear throughout the remainder of the filing, such as "UP argues that . . . [but that] is irrelevant," *id.*, at 2, "Contrary to UP's assertion . . . the reality is quite the opposite," *id.*, at 3, "Also irrelevant are UP's various references . . ." *id.*, at 5, and "KCS' reply is premised in part on the incorrect assumption . . ." *id.*, at 7, make patently clear that AL&M's Reply is not a supplement to AL&M's petition but is really a reply to the evidence and arguments tendered to the Board in replies filed by KCS and UP. For example, AL&M argues that KCS is not a competitive restraint on UP, a subject which KCS convincingly refuted in its June 1 reply to the AL&M petition.⁴

Only the three paragraph portion of AL&M's argument on pages 12 and 13 under the heading "Contrary to UP's Assertions, UP Service Has Again Deteriorated," and the portion of page 5 of the Supplemental Verified Statement of Larry J. Ahlers under the heading "Continued UP Service Problems" that supports that argument, are in reality supplemental information because they discuss circumstances allegedly arising after AL&M's petition was filed, but that information also is improper at this stage of the proceeding begun by AL&M. If AL&M desires to submit that information on alleged performance failures by UP, it should do so by responding to UP's quarterly report on or before August 14. Such a response in the general oversight proceeding would be appropriate. As for the remainder of AL&M's Reply, it contains replies to replies, reiteration of AL&M's previous arguments and information which was previously available to AL&M but which AL&M apparently did not think important enough to submit initially.

⁴ Interestingly, however, AL&M does not appear to dispute KCS' assertion that AL&M's complaint is merely a divisions dispute between AL&M and UP disguised as a complaint about service to shippers. AL&M admits that its ability to provide essential services to shippers or to stay in business is not impacted by its dispute with UP. AL&M Reply at 8.

Filing a reply to a reply is prohibited by the Board's regulations. Section 1104.13(c) of 49 C.F.R. states, "A reply to a reply is not permitted." This admonition falls within the Board's general provisions for filing a reply to "any pleading." See 49 C.F.R. 1104.13(a). KCS' June 1 reply to AL&M's May 12 petition was a reply to "any pleading [other than a reply]." Therefore, absent special authorization by the Board, which AL&M neither sought nor received, AL&M had no right to reply to KCS' June 1 reply. Instead, AL&M bluntly submitted its "supplement" without even seeking the Board's leave.

AL&M's Reply is not excused by the fact that AL&M is the party seeking affirmative relief or even by any attempt of AL&M to show good cause why its reply to replies should be accepted. Merely because it is the party seeking affirmative relief does not entitle AL&M to 'the last word' on its filing.⁵ Therefore, absent a showing of good cause by AL&M,⁶ AL&M's Reply should be rejected by the Board.

AL&M has not even attempted to show that good cause exists for acceptance of its June 26 filing, nor could it have succeeded in doing so had it tried. AL&M did not request leave for submitting its June 26 filing. Perhaps this is because AL&M recognized that there was no substantial reason for its late filing of evidence that was available to it prior to the filing of its

⁵ See *Illinois Central Railroad Company—Abandonment Exemption—In Perry County, IL*, Docket No. AB-43 (Sub-No. 164X), 1997 STB LEXIS 148 at 7, n. 5 ["contrary to Freeman's assertions, our procedures do not entitle Freeman {the party petitioning for relief} to file the closing pleading"], and *CSX Corporation—Control—Chessie System, Inc., et al. (Arbitration Review)*, STB Finance Docket No. 28905 (Sub-No. 28), 1997 STB LEXIS 213 (served Sept. 3, 1997) at 6 ["CSXT expresses a desire for a 'more complete discussion of the issues raised in TCU's reply.' But this is merely an attempt to have the last word in pleading, an advantage that is not granted to appellants in labor arbitration appeals."]

⁶ See, e.g., *CSX Corporation—Control—Chessie System, Inc., et al. (Arbitration Review)*, STB Finance Docket No. 28905 (Sub-No. 28), 1997 STB LEXIS 213 (served Sept. 3, 1997) at 6 ["we may allow additional pleading for good cause shown"], and *CSX Corporation—Control—Chessie System, Inc., et al. (Arbitration Review)*, STB Finance Docket No. 28905 (Sub-No. 27), 1997 STB LEXIS 152 (served July 15, 1997) at 6, n. 7 ["Under 49 CFR 1104.13(c) replies to replies are prohibited. This prohibition may be waived upon a showing of good cause,"].

May 12 petition.⁷ Indeed, other than the information concerning alleged service failures by UP in early June, none of the information submitted in AL&M's Reply is information which could not have been submitted as a part of AL&M's petition. Allowing submission at this time of such previously-available information would merely encourage protracted rounds of filing of evidence and argument, as the parties sequentially seek to respond to their opponents' previous round of filings.⁸ Because there is no apparent reason why AL&M could not have submitted the information and arguments contained in its June 26 Reply as part of its original petition,⁹ the Board should strike AL&M's Reply.

CONCLUSION

AL&M's June 26 "supplement" to its petition is a prohibited reply to a reply. All but a small portion of the material submitted could have been submitted with AL&M's petition, but was not. To allow AL&M to submit its June 26 filing by labeling it a supplement will simply allow those wishing to circumvent the Board's prohibition on filing replies to replies another avenue for doing so. In accord with the Board's regulations, and in support of those regulations, KCS moves the Board to strike AL&M's Reply. In the event that the Board chooses to deny this

⁷ See, e.g., AL&M's Reply at 2, addressing contract prices that were changed a minimum of three months prior to the filing of AL&M's petition.

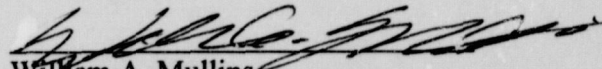
⁸ See *Application of the National Railroad Passenger Corp. Under 49 U.S.C. 24308(a)—Springfield Terminal Railway Co., et al.*, STB Finance Docket No. 33381, 1997 STB LEXIS 101 (served May 6, 1997) at 4 [rejecting reply to reply as cumulative: "B&M contends that Amtrak's reply raises issues that could not have been previously addressed and that new facts have developed after Amtrak filed its reply. To the contrary, we find B&M's submission to be cumulative. Its assertions . . . are argumentative. They add nothing new. . . B&M has failed to justify a departure from 49 CFR 1104.13(c)."].

⁹ Or should not submit the portions specified in Footnote 3 hereof as a response to UP's quarterly report in the general oversight proceeding.

motion, KCS requests that the Board notify KCS' counsel of such decision and order that KCS be allowed 20 days from that denial to submit further reply to AL&M's improper filing.¹⁰

Respectfully submitted, this 16th day of July, 1998.

Richard P. Bruening
Robert K. Dreiling
THE KANSAS CITY SOUTHERN RAILWAY COMPANY
114 West 11th Street
Kansas City, Missouri 64105
Tel: (816) 983-1392
Fax: (816) 983-1227



William A. Mullins

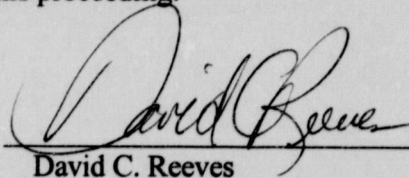
David C. Reeves
TROUTMAN SANDERS LLP
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005-3314
Tel: (202) 274-2950
Fax: (202) 274-2994

Attorneys for The Kansas City Southern
Railway Company

¹⁰ Failure to afford opposing parties an opportunity to reply to evidence introduced at a late stage violates the rules of the Commission and all notions of due process. *San Antonio, TX v. Burlington Northern, Inc.*, 362 I.C.C. 161, 164-165 (1979).

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 1998, a true copy of the foregoing "Motion Of The Kansas City Southern Railway Company To Strike Arkansas, Louisiana And Mississippi Railroad Company's Reply to Replies," was served by first class mail or more expeditious service upon all known parties of record to this proceeding.

A handwritten signature in cursive script, appearing to read "David C. Reeves", is written over a horizontal line.

David C. Reeves

Attorney for Kansas City Southern Railway
Company

STB

FD-32760 (SUB21)

6-26-98

I

ID-189085

PUBLIC VERSION

ENTERED
Office of the Secretary

JUN 29 1998

Part of
Public Record

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

SUPPLEMENT TO PETITION OF THE ARKANSAS, LOUISIANA AND
MISSISSIPPI RAILROAD COMPANY FOR
AN ADDITIONAL REMEDIAL CONDITION

The Arkansas Louisiana & Mississippi Railroad Company ("AL&M") respectfully submits this supplement to its petition to the Board for an additional remedial condition. This supplement addresses points raised in the reply of Union Pacific filed June 2, 1998 (UP/SP-343) and the reply of Kansas City Southern filed June 1, 1998.¹

Union Pacific responds to the AL&M's petition with three arguments: (1) the revenue increases imposed by the Union Pacific should be disregarded because they were part of a negotiated rate package; (2) the KCS provides effective competition with the UP and (3) UP's

¹ Because this filing is a supplement to the AL&M's petition, UP and KCS will have the opportunity to respond in the interest of creating the fullest and most accurate factual record.

poor service to the AL&M has recently improved. The UP also denies that it has plans to raise SP rates further as additional contracts expire. The KCS repeats the themes advanced by the UP, claims that the AL&M petition is not supported by AL&M shippers, and argues that the Board does not have the power to act to prevent competitive harm to the AL&M, as opposed to its shippers. None of these arguments has merit, and each is addressed below.

1. The Fact that Rate Changes Have Been Negotiated by Georgia-Pacific Does Not Mean that UP Has Not Exercised Its Increased Market Power Resulting from Its Merger with SP.

UP argues that the evidence of UP rate increases presented in the AL&M's petition "mischaracterizes an ongoing process of rate simplification and adjustment being negotiated between Georgia-Pacific and UP." (UP Reply at 1-2, emphasis in original.)

The fact that the rates at issue are negotiated contract rates² is irrelevant to, and does not detract from, the fact that those rates reflect additional market power gained by the UP as a result of the UP/SP merger. It is beyond dispute that railroad market power can be exercised notwithstanding that the rates resulting from that market power are contained in contracts rather than tariffs. For example, the Board in the UP/SP case has imposed far-reaching conditions designed to preserve competition notwithstanding that the great majority of rail traffic today moves under contract. The availability of those conditions was not made dependent on whether particular traffic moved under contract or tariff. In fact, at least one of the conditions imposed by

² As explained by AL&M's President, Mr. Larry J. Ahlers, in his Verified Statement attached to AL&M's Petition (at 6) those rates needed to be renegotiated because the _____ contracts existing as of the time of the merger expired in 1998, beginning in February 1998.

the Board in the UP/SP merger related directly to contract traffic -- the condition permitting the reopening of a portion of UP contract traffic to competition by the BNSF.

Disregarding the false issue that negotiated contract rates are involved, the evidence shows that those contract rates reflect the UP's increased market power.

2. UP's Rate Increases Clearly Show Its Increased Market Power Following the Merger.

The evidence of increased UP market power is very strong indeed. Contrary to the UP's assertion that the new rate package with G-P has "radically reduced many SP rates" (UP Reply, at 2), the reality is quite the opposite.

In order that the Board can appreciate the full impact of G-P's renegotiated _____ package, the effect of the new contract rates is shown in Exhibit A to the attached Supplemental Verified Statement of Mr. Ahlers.³ As the Exhibit confirms, the UP has imposed substantial rate increases on G-P _____, which are only partly offset by AL&M's decreasing its own revenues. In order to estimate the total change in revenue to the UP and AL&M resulting from these changes, these exhibits show, for each destination point, the changes in UP and AL&M revenue, and the dollar impact of those changes applied to AL&M actual 1997 traffic to those destinations. As the final line of Exhibit A shows, UP's total revenue (based on 1997 traffic volumes) increases by \$ _____, while the AL&M's decreases by \$ _____. Plainly, UP was able to exercise market power significantly in excess of what either UP or SP were able to

³ The attached supplement verified statement of Mr. Ahlers will be referred to as "Ahlers Supp. V.S.", while the original verified statement of Mr. Ahlers attached to the AL&M's petition will be referred to as "Ahlers V.S." Exhibit A to the Ahlers Supp. V.S. shows the UP and AL&M revenue changes as applied to all G-P _____ traffic moving in 1997 under the contracts renegotiated with effect from May 1, 1998.

exercise separately prior to their merger. As Mr. Ahlers testifies in his attached verified statement, G-P and AL&M accepted the new contract despite the substantial UP revenue increases because they believed this was the best they could do.⁴ The fact that the AL&M was forced to offset much of the UP's increase by decreasing its own revenue is further evidence of UP's increased market power.

The UP increases were substantial. For example, on the two most important routes for AL&M traffic -- to the Memphis and East St. Louis gateways -- the UP increased its revenues ____% and ____%, respectively.⁵ UP increases to other points were also substantial -- including increases of __-__% (as a percentage of the total rate) to points in Oregon and Washington. While there are some instances of UP revenue decreases, Exhibit A shows that of 152 points served in 1997 under the relevant contracts, only 20 points (13% of all points) received a UP decrease in revenue. By contrast, 109 points (72%) received UP increases. Almost all of the UP decreases are __% or less (as a percentage of the total rate). Most of these small decreases are to points in California. These reductions are not surprising given the UP's statement in its merger application that South Central forest products producers would benefit from the merger by enjoying shorter routes to California.⁶ Presumably the lower revenues reflect lower UP costs. What is surprising is that the UP rates to Oregon and Washington should go up by __-__% when the UP claimed in its merger application that there would be "much shorter routes" between the Pacific Northwest and the South Central region.⁷

⁴ Ahlers Supp. V.S. at 4.

⁵ Ahlers Supp. V.S. at 2.

⁶ UP/SP-23, Railroad Merger Application, vol. 2 at 102.

⁷ Id. at 101-102.

UP's argument that it decreased other rates for other products moving from G-P origins in the Northwest (UP Reply at 3-4) is irrelevant. The Board grants conditions in merger cases based upon the effects of a merger within a "defined market."⁸ The market at issue in AL&M's petition is traffic moving to and from the AL&M, not all movements of forest products in the west. While UP alludes vaguely to the effects of "intense competition in the lumber and panel products marketplace" on UP and AL&M rates (UP Reply at 4), it has not offered evidence sufficient to support a finding that the relevant market for purposes of the instant petition is anything other than AL&M traffic. Certainly, the evidence in Exhibit A to Mr. Ahlers statement is that UP was able to increase its rates on traffic moving to a variety of western destinations in the Northwest, West, Midwest, Northeast and Southeast. If any product and geographic competition exists, it is quite limited and localized.

Also irrelevant are UP's various references to AL&M's revenue levels, such as its assertion that certain AL&M rates are or were higher than most others short lines' "for comparable movements" (UP Reply at 4, 6). Again, the relevant inquiry is whether the merger increased UP's market power over AL&M traffic because of its reduction in rail competition. The substantial overall increases in UP's revenues were largely offset by corresponding reductions (not increases) in AL&M revenues.⁹ Hence, UP's market power has clearly increased at the expense of the AL&M and its shippers as a result of the merger. AL&M did not decrease its revenues as a gesture of charity to UP, but because it had no choice, and G-P undoubtedly did

⁸ See, e.g., Decision No. 44, slip op. at 100, third paragraph.

⁹ Ahlers Supp. V.S., Exhibit A.

not agree to pay UP substantially more than it had pre-merger on the basis of UP's superior service.¹⁰

3. UP Can Be Expected to Continue to Raise Rates As Other Contracts Expire.

The AL&M has informed the Board about statements made by UP personnel to G-P on more than one occasion, and recounted by Mr. G.W. Courtwright of G-P in an October 6, 1997 letter to UP, to the effect that UP intended to raise SP rates in effect at the time of the merger.¹¹ Similar statements have been made to the AL&M.¹² The UP now asserts that it "has no such plans" (UP Reply at 3).

AL&M submits that off-the-record statements are often more candid and reliable than the often over-optimistic and self-serving statements made in formal filings with the Board. Moreover, UP's Reply appears to say only that UP has not embarked on a "campaign" to raise SP rates. Even if UP currently has no formal plan to raise SP rates across the board, it may plan to raise rates selectively and opportunistically as its new market power permits. AL&M justifiably believes that if the requested BNSF access is not granted here, UP will consider that it has a green light to raise rates further.

¹⁰ AL&M on the other hand, has offered what one of its large customers, International Paper, considers to be "superior service." IP Reply, V.S. of McHugh at 6. Some of the components of AL&M's superior service are noted by Mr. Ahlers in his attached supplemental verified statement, including AL&M's maintenance of a fleet of 3,342 rail cars to service its customers, AL&M's tracking, monitoring and measurement of rail service performance for its customers, and AL&M's EDI transmission of bills of lading for its customers. Ahlers Supp. V.S. at 9.

¹¹ AL&M Petition, Attachment 3 to Ahlers V.S.

¹² Ahlers Supp. V.S. at 3.

UP's actions to date show its capability, because of its increased market power, to raise rates as contracts expire. The power to raise rates should be the main focus of the Board's inquiry. UP has increased its revenues on _____ because it now has the market power to do so and the contracts for that product have already expired. Contracts for other products are set to expire within the coming year or two. Ahlers Supplemental V.S. at 3.

AL&M does not believe there is any reason for the Board to question the veracity or reliability of the statements reported by Mr. Courtwright and Mr. Ahlers on UP's intention to raise SP rates. While the AL&M is concerned about protecting the involved employee(s) from possible retaliation by the UP for speaking candidly to G-P and AL&M, the AL&M would be willing, if the Board desires, to identify the source of the statements in a sealed submission available to UP's outside counsel only.

4. Contrary to KCS's Contention, AL&M's Petition is Supported By Shippers; In Any Event the Board May Impose a Condition to Remedy a Reduction in Competition Formerly Available to a Short Line and Its Shippers.

KCS' reply is premised in part on the incorrect assumption that the AL&M Petition was not supported by its shippers. (KCS Reply at 2.) To the contrary, statements supporting the AL&M's Petition have been filed by virtually every shipper on the AL&M: International Paper, Georgia-Pacific's Paper and Building Products groups, Century Redi-Mix Corporation, and Abell Corporation (on behalf of its subsidiary Oachita Fertilizer Company). These companies have complained of the adverse effects of the UP/SP merger on both UP pricing and UP service.

KCS also contends, incorrectly, that the Board lacks the authority to provide relief from competitive harm to a short line carrier. (KCS Reply at 5.) KCS cites a portion of Decision No.

PUBLIC VERSION

44 addressing the issue of preserving essential services. On this point, the Board stated that "our concern is the preservation of essential service, not the survival of particular carriers." Slip Op. at 101. This point is inapposite, because the AL&M has not argued that UP will likely put the AL&M out of business and eliminate essential service. Rather, the AL&M has requested an additional condition to remedy competitive harm created by the merger. On this latter point, Decision No. 44 clearly contemplates the possibility of relief for the benefit of shippers, railroads, and communities:

In evaluating whether a merger is in the public interest, we seek to determine what competitive harm is directly and causally related to the merger and to distinguish that harm from any pre-existing, anticompetitive condition or disadvantage that other railroads, shippers or communities may have been experiencing.

Decision No. 44, slip op. at 100 (emphasis added).

The AL&M's petition does not involve a situation in which the AL&M has been injured by the creation of a more efficient route that bypasses its system, or that makes AL&M's service less valuable. Rather, the AL&M and its customers are injured directly by the reduction in head-to-head competition that formerly existed between the UP and SP, creating increased raw market power by which UP can extract more monopoly rents/profit at the expense of AL&M and its shippers. This is clearly a harm that the Board can and should remedy by imposing the condition requested by the AL&M.

5. KCS Competition Has Been Ineffective to Prevent UP's Revenue Increases and Poor Service.

UP and KCS endeavor by various arguments to show that the KCS offers effective competition for UP in the movement of traffic from the AL&M. In the final analysis, these arguments founder on the fact that, notwithstanding the competition supposedly offered by KCS, the UP has been able to increase its rates above those that UP and SP charged Georgia-Pacific prior to the merger, notwithstanding that the higher rates are being extracted in exchange for worse service.

UP argues in particular that KCS creates competitive pressure on AL&M traffic routed over UP to Memphis, East St. Louis and beyond (UP Reply at 7). That contention is obviously false, because the UP increases have included ___% increases on virtually all traffic moving via East St. Louis to points in the Northeast, Southeast, and Midwest, and ___% increases on all traffic moving via Memphis to points in the Southeast, Midwest and Northwest.¹³ Although KCS, in combination with IC, is able to reach Memphis and St. Louis-area gateways, its competition did not prevent these substantial increases in UP rates. Even to points in the Kansas City area, where KCS is based, UP raised its rates by 5%.¹⁴

KCS argues that its competitiveness is proven by the fact that AL&M shippers have shifted a substantial amount of traffic to the KCS during UP's service crisis.¹⁵ Likewise, UP argues that certain KCS-BNSF joint routes "have been highly effective in taking business from UP."¹⁶ But as Mr. Ahlers testifies, all available alternatives to the UP -- including substantially

¹³ Ahlers Supp. V.S. at 2.

¹⁴ Exhibit A to Ahlers Supp. V.S. at 1.

¹⁵ KCS Reply at 5-6.

¹⁶ UP Reply at 7.

more expensive intermodal and motor carrier service -- have been used in an effort to avoid the congestion and delays that have plagued UP shippers in the past year.¹⁷ This does not prove that the KCS is competitive -- only that it was and is the only rail alternative to the UP. Certainly no one could argue that motor carrier and intermodal services are "competitive" for most UP traffic, even though trucking has been used extensively by AL&M shippers as an alternative to UP's poor service, resulting in the loss of substantial rail revenues to AL&M.¹⁸

While the KCS has rendered commendable and valuable service to shippers seeking an alternative to the UP during its service crisis, the limited scope of KCS' system and resources has been evident. Indeed, the fact that expensive motor carrier and intermodal services were used extensively by AL&M customers proves that KCS was not able to offer an acceptable alternative to the UP for a large proportion of former UP traffic. For example, Georgia-Pacific's Director of Logistics for paper states that since July 1997, G-P has reduced its rail business by 40% because of UP's poor service and the demand of G-P's customers to be converted to truck to receive their product.¹⁹ From G-P's Crossett, AR facility on the AL&M, the reduction in G-P rail loadings was even more pronounced, amounting to nearly a 50% reduction.²⁰ Plainly, KCS has not been able to step into the gap created by UP's service deficiencies.

Similarly, International Paper states in its Reply (IP-21), the KCS could not furnish sufficient cars -- at a time when the AL&M was also seriously short of cars as a result of UP's

¹⁷ Ahlers Supp. V.S. at 4.

¹⁸ AL&M Petition, Ahlers V.S. at 8-9.

¹⁹ May 28, 1998 letter to Board from Norman Langberg, Director of Logistics, Paper for G-P, in support of AL&M's petition (filed June 1, 1998).

²⁰ Ahlers Supp. V.S. at 4.

failure to timely return AL&M cars²¹ -- to enable IP to route traffic via AL&M-KCS as an alternative to UP service at Bastrop, LA. As a result, IP at present uses the UP to move 54% of its rail traffic directly from the Bastrop plant, even though IP had awarded UP only 30% of its traffic in the recent past.²² Conversely, IP's use of the AL&M and KCS has declined sharply from IP's projections.²³ IP, like G-P, has also often been forced to move its product by truck "at substantial'y higher cost"²⁴ -- something IP and its customers would not willingly do but for the inability of KCS to handle the business that UP could not.

KCS makes an effort to show, based on an analysis of routings to points mentioned by the AL&M in its petition, that its routes are competitive.²⁵ KCS's analysis unfortunately shows the opposite -- that KCS's routes most often are longer than the UP's, and more often require KCS to interchange traffic.

Tellingly, while the UP attempts to argue that KCS' recently announced marketing agreement with the Illinois Central and Canadian National enhances KCS' competitiveness (UP Reply at 7), the KCS apparently does not think this point significant, since KCS did not even mention it in its reply. In any event, even before the marketing agreement, KCS and IC were fully capable of interchanging traffic, and KCS-IC routes were used by AL&M shippers. Yet contrary to UP's contention that those KCS-IC routings create competitive pressure on AL&M traffic routed over UP to Memphis, East St. Louis and beyond (UP Reply at 7), whatever

²¹ See AL&M Petition at 5 and Ahlers V.S. at 4-5.

²² IP-21, V.S. of McHugh at 6-7.

²³ Id. at 6-7.

²⁴ Id. at 3.

²⁵ KCS Reply at 6-7.

KCS-IC competition there was did not prevent the UP from increasing its revenues via Memphis and East St. Louis by ___% and ___%, respectively, effective May 1, 1998.

UP presents the somewhat mystifying argument that "[i]f KCS did not provide effective competition, one would have expected UP to raise rates in the specific markets KCS serves, to take advantage of its newly-created 'market power'." (UP Reply at 6.) To the contrary, the point of AL&M's petition, and a key reason for the Lake Charles condition already imposed by the Board, is that the points served by the KCS are simply too few and that the UP is likely to exercise its increased market power because KCS can reach most points only indirectly and through interchange with other carriers. It is the limited single system reach of the KCS that is the principal reason the Board should extend the Lake Charles condition to permits BNSF access to the AL&M at Fordyce.²⁶

6. Contrary to UP's Assertions, UP Service Has Again Deteriorated.

The UP claims in its June 2 filing that its service to the AL&M has improved, with the exception of a brief period of congestion during the last week of May following a washout east of Texarkana. UP Reply at 10.

To the contrary, the UP service problems have continued during June. On Saturday 6/6/98, AL&M had a train crew awaiting the UP local, so AL&M could provide the additional

²⁶ UP also misunderstands AL&M's proffered exclusion from its requested condition. See UP Reply at 6, bottom. AL&M is willing to exclude from BNSF access traffic that travels from the AL&M direct to a destination on the KCS (or vice versa). This exclusion should not encompass traffic that can reach its destination only after being interchanged by the KCS to another carrier, nor, conversely, traffic originating off the KCS and routed over the KCS to AL&M destinations.

switch to the G-P Fordyce plant. No UP train ever came. AL&M received service on Monday 6/8/98, and then none on Tuesday and Wednesday. As a result, the Fordyce facility almost shut down.²⁷

Moreover, despite UP's attempt to explain away its recent service deficiencies as being the result of a late May washout, AL&M was never even advised about the washout -- Mr. Ahlers read about it for the first time in UP's June 2 filing. In the meantime, for two days following Memorial Day, there was no service to Fordyce because of a lack of experienced crews.²⁸

UP devotes extensive discussion to its claims that it has finally straightened out its local service to AL&M. For example, UP notes that the local will now be operated by an assigned crew "even though [this] solution would further increase UP's costs."²⁹ AL&M is skeptical that this will fix UP's ever-changing service difficulties. The change to assigned crews, which was effective May 30, certainly did not prevent the service problems experienced during the period June 6-June 10, as detailed above. But even if the change does fix the service inadequacies for a time, two questions remain: (1) why did it take so long for UP to decide to spend the money need to provide adequate service, rather than waiting until after the AL&M had filed this petition, and (2) in the absence of the requested service by the BNSF, what would induce UP to continue to provide adequate service?

²⁷ Ahlers Supp. V.S. at 5.

²⁸ Ahlers Supp. V.S. at 5.

²⁹ UP Reply at 11.

7. BNSF Service is Feasible.

UP argues incorrectly that track capacity at Fordyce is inadequate to support interchanges with both UP and BNSF. UP Reply at 11, citing Franklin V.S. at 5. Mr. Franklin in turn cites AL&M as the source of his information about track capacity at Fordyce. Mr. Franklin is confused. Mr. Ahlers has never said that track capacity at Fordyce was limited -- rather, the reference to limited track capacity involved the UP's proposal in February 1998 to set off all empty cars for AL&M at Bastrop, LA. Mr. Ahlers' response to that proposal noted the limited track capacity at Bastrop, not Fordyce.³⁰

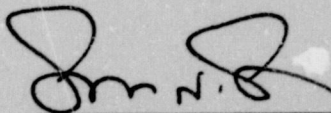
UP's only other objections to the proposed BNSF operations are that (1) interchanging with both UP and BNSF will require the AL&M to do more switching work and (2) adding a new BNSF local or stopping the current BNSF through train at Fordyce would threaten to delay traffic on the main line. The first of these objections answers itself, as the AL&M obviously is willing to perform the switching that would be required to exchange traffic with BNSF.³¹ The second objection is vague and speculative, and echoes the objections UP has typically made whenever the BNSF, TexMex, KCS or other railroad has sought to provide service over UP's lines. The best answer is that where there's a will, there's a way. UP and BNSF are already coordinating the dispatch of the former SP/SSW line through Fordyce, over which BNSF has trackage rights. Mr. Ahlers in his attached statement expresses confidence that, working together, the UP, BNSF and AL&M can communicate and cooperate so as to conduct the necessary operations as efficiently as possible.³²

³⁰ AL&M Petition, Attachment 5 to Ahlers V.S. See also Ahlers Supp. V.S. at 8.

³¹ Ahlers Supp. V.S. at 9.

³² Ahlers Supp. V.S. at 10.

Respectfully submitted,



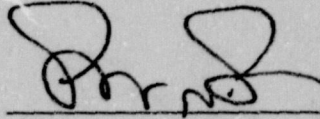
John L. Oberdorfer
Scott N. Stone
Patton Boggs, L.L.P.
2550 M Street, NW
Washington, DC 20037
Phone: 202-457-6335
Fax: 202-457-6315
E-mail: joberdorfer@pattonboggs.com
ssone@pattonboggs.com

Attorneys for The Arkansas Louisiana and
Mississippi Railroad Company

dated: June 26, 1998

CERTIFICATE OF SERVICE

This is to certify that I have, on this 26th day of June, 1998, served the PUBLIC version of the foregoing Supplement to the Petition of the Arkansas Mississippi and Louisiana Railroad Company for an Additional Remedial Condition on all parties of record in the oversight proceeding by first class mail. Copies of the HIGHLY CONFIDENTIAL version have been served by hand upon outside counsel for the Union Pacific and Kansas City Southern, and will be provided to other outside counsel who so request and who have signed the appropriate confidentiality undertakings.

A handwritten signature in black ink, appearing to read "S. N. Stone", is written over a horizontal line.

Scott N. Stone

PUBLIC VERSION

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

SUPPLEMENTAL VERIFIED STATEMENT OF
LARRY J. AHLERS

I submit this verified statement to supplement the statement I provided in support of the AL&M's petition filed May 12, 1998. I address in part the renegotiated rates on Georgia-Pacific _____ which I referred to in my previous statement, as well as details relating to service and other matters. In part, I respond to issues addressed in the UP's June 2, 1998 reply and the KCS' June 1, 1998 reply.

UP Increases on _____ Rates

In my previous statement I referred to UP increases on renegotiated contract rates for the movement of Georgia-Pacific _____. The UP has taken issue with the examples of increases

PUBLIC VERSION

that I cited, pointing out that to certain points under the contract, UP rates went down or stayed the same.

I believe that the examples I gave were representative, but in order that the Board may judge for itself I present in Exhibit A a spreadsheet showing the effects of the new contract as applied to all of the AL&M's 1997 traffic. As can be seen in the last line of Exhibit A, UP's total revenues (based on 1997 traffic volumes) increase by \$_____ while the AL&M's decrease by \$_____. Of 152 points to which traffic was shipped in 1997 under the relevant contracts, 109 points (72%) received UP increases, while only 20 points (13% of all points) received a UP decrease in revenue. The UP increases, expressed conservatively as a percentage of the total previous rate (combining the UP and AL&M factors) ranged up to __%. By contrast, almost all of the UP decreases were _% or less. Most of these reductions were to points in California. The reductions are not very surprising given that UP in its merger application told the Board that South Central forest products producers would benefit from the merger by enjoying shorter routes to California.

Among the most significant UP's increases were those on traffic routed via Memphis and East St. Louis, which together accounted for 45% of all traffic volume moving under the relevant _____ contracts in 1997. Exhibit A shows that UP's increases, as percentages of the previous rates, were __% for East St. Louis and __% for Memphis. Expressed as a percentage of UP's previous revenue, the increases are even higher. For East St. Louis, UP's revenues went from \$____/car to \$____/car, an increase of ____%. For Memphis, UP's revenues went from \$____/car to \$____/car, an increase of ____%.

PUBLIC VERSION

At the same time, the AL&M reduced its revenues on most points under the renegotiated contract. This had the effect of largely offsetting the UP increases, although given that the AL&M is owned by G-P, the UP increases and AL&M reductions involved a substantial transfer of revenue from the Georgia-Pacific corporate family to UP. This is not revenue that G-P or AL&M gave up willingly, and the revenues would not have been given up if G-P and the AL&M still had the benefit of competition from the SP. As always, contracts represent the best each party thinks it can do given the available leverage. The fact that the UP won substantial rate increases at a time when it has been providing the worst service in history, and when rail rates nationwide have been decreasing, shows quite clearly the increased leverage the UP has following its merger.

I have emphasized the G-P _____ contract because it was the first G-P contract to expire following the UP/SP merger. We believe that our experience with this contract foreshadows additional substantial rate increases as other contracts become due for renegotiation within the next year or two -- unless the Board grants our requested relief and permits access by the BNSF.

In my previous verified statement (page 6) I referred to repeated statements made by UP personnel to G-P that UP intended to increase rates (see Mr. Courtwright's letter, Attachment 3 to my previous statement). This is precisely what has happened. Such statements have also been made "off the record" to the AL&M, and if the Board considers it necessary, we would disclose confidentially the identity of the UP personnel who gave us this information.

UP now denies that it has any intention of conducting a "campaign" to raise SP rates. I am not sure how meaningful it is to deny that there is a "campaign" underway, but raising the

PUBLIC VERSION

East St. Louis and Memphis rates by ___% and ___%, affecting almost half of G-P's _____ traffic from the AL&M, is enough of a campaign for me, and in my view shows the necessity of granting access to BNSF to restore the competitive balance lost with the elimination of SP.

Competitiveness of KCS

I have read the replies of UP and KCS which argue that KCS is competitive with UP. If KCS is really competitive, how is it that UP was able to increase its revenues at the same time it is providing much worse service?

Both UP and KCS place a great deal of emphasis on the increases in traffic seen on KCS and KCS-interlined routes since the UP service meltdown. Of course there has been a large increase in KCS traffic, because every shipper West of the Mississippi has been trying to find any available alternative to the UP. In fact, UP was looking for help to rid itself of excess traffic. As I emphasized in my previous verified statement (page 8), much of that traffic shifted to truck and intermodal service, contributing to a 32% overall reduction in AL&M carloadings since July 1997. For certain categories of G-P traffic, the reduction was even greater. Rail shipments of printing paper from G-P's Crossett, AR facility dropped from 13,974 tons during March-May 1997 to 7,162 tons during the same period in 1998, a reduction of nearly 50%.

Plainly, the KCS was used to the maximum by shippers seeking any alternative to the UP, but just as plainly, the KCS could not accommodate much of that traffic. It simply does not have the same resources and scope as the UP, even as the UP is hobbled by its service crisis. I note International Paper's statement that they actually had to increase their use of UP because neither the KCS nor the AL&M (because of the UP's delays in returning cars) had sufficient cars

PUBLIC VERSION

to ship IP's product. To say that the KCS imposed competitive pressure on the UP is therefore simply not accurate. Again, KCS competition has not prevented higher rates and worse service from UP.

Continued UP Service Problems

The UP claims in its reply that its service to the AL&M has improved, except for congestion during the last week of May following a washout east of Texarkana.

Unfortunately, UP service problems have continued during June. On Saturday 6/6/98, AL&M had a train crew awaiting the UP local, so AL&M could provide the additional switch to the G-P Fordyce plant. No UP train ever came. AL&M received service on Monday 6/8/98, and then none on Tuesday and Wednesday. As a result, G-P's Fordyce facility almost shut down. Overall, UP missed 50% of the scheduled Fordyce interchange service the week of June 8.

AL&M was never even advised about the the late May washout -- I read about it for the first time in UP's June 2 filing. In the meantime, for two days following Memorial Day, there was no service to Fordyce because of a lack of experienced crews. UP missed 50% of the scheduled Fordyce interchange service the week of May 24.

UP has repeatedly failed in its efforts to straighten out service to the AL&M. Now UP claims that the problem has been solved because the local for Fordyce will be operated by an assigned crew. AL&M is skeptical that this will fix UP's service problems. The change to assigned crews, which was effective May 30, certainly did not prevent the service problems experienced during the period June 6-June 10, and the week of June 8, as detailed above.

PUBLIC VERSION

I was struck by UP's statement (Reply at 11) that it would assign crews to the Fordyce local even though doing so "would further increase UP's costs." AL&M for its part has been incurring extra costs for a long time sending crews to wait for trains that never come and about which UP often fails to pick up the phone to even call AL&M. We continue to wonder why we don't get advance notice that there will be "no service provided" when the UP runs into operational problems. It appears they lack interest in the impact the service failures have on the AL&M and its customers.

Even if the new crew changes fix the service problems for a time, I would like to know why it took so long for UP to decide to spend the money need to provide adequate service, rather than waiting until after the AL&M had filed this petition. Also, if the requested service by the BNSF is not provided, will UP continue to think it is worth spending the money to provide adequate service?

Past UP Service

The UP in its reply and in the verified statements submitted with the reply spends a lot of time talking about past service issues, mostly in an effort to show that UP was trying to be responsive and trying to work with the AL&M.

UP's service has improved and deteriorated throughout the last year. Some of the UP responses have worked, but none of them have been sustained. Management changes and operational changes have been on-going, and contributed to the problems. Communication from UP about changes in operations management or anticipated operational problems to the AL&M have been sorely lacking.

PUBLIC VERSION

It is certainly true that UP has made some efforts to work with us, although we notice a very definite correlation between the level of their attention and our efforts to seek assistance from the STB. For our part, we want to cooperate with UP to try to work out service problems as best we can. We have no choice but to work with UP. But the statistics we have presented about UP's service problems speak for themselves.

The UP cites a May 20 article in the Arkansas Democrat & Gazette which quotes me as saying that "the essence of our complaint is not about service," but about the fact that UP has "gobbled up" the competition. What I was trying to convey to the reporter was that our petition is about the lack of competition, rather than seeking a temporary fix as the result of the UP service meltdown. Newspapers are not always known for conveying the subtleties of statements made to them, and this is no exception. Certainly UP's deficient service, as well as UP's rate increases, are part of the problems resulting from the reduction of competition brought about by the merger, and which we hope will be solved by the BNSF access requested in our petition.

There are several statements made by Mr. Franklin in his verified statement that are somewhat misleading. Let me clarify some of them, beginning with Mr. Franklin's discussion at page 2 of his statement:

- UP did suggest delivering all empty cars in Bastrop, LA and accepting all loaded cars at Fordyce, AR, and I did respond in writing to UP's Wes Parker, Project Coordinator - Rail Line Planning. (See Attachments 4 and 5 to my previous verified statement.) This proposal made no sense, since the AL&M did not have enough track space in Bastrop (a secondary interchange location) to accommodate the empty cars. Also, the greatest delays and poorest service had consistently been from Fordyce, so it made no sense for me to commit all my loads to a location that UP had not serviced adequately.
- The majority of the loads did not and do not originate at or closer to Fordyce, as Mr. Franklin apparently believes. Most originate in Crossett and Bastrop.

PUBLIC VERSION

- AL&M did ask for a meeting to address the operating issues in a realistic manner. UP was supposed to send operating people to the meeting, but only UP's Buddy Darrington, Manager - Monroe Train Operations was present to meet Phil Schueth, Bruce Coffey, and myself from the AL&M. We took Buddy to lunch, and he said that although he did not have authority for Pine Bluff operations (which had management control of the Fordyce interchange), he thought that with all the problems the UP was having, loaded railcars taken to Monroe would have a better chance of receiving service, since they would move directly to Little Rock. We acted upon this reasonable suggestion, with the hope of improving service. The service did improve to some extent.
- Regarding empties at Pine Bluff, Buddy Darrington said he would work on trying to get the AL&M cars moved out of Pine Bluff to Fordyce. He said he had a meeting with the Pine Bluff management and would get back to us. Within days, Buddy was assigned to Baton Rouge for a couple weeks to deal with problems there, so it was over three weeks before any improvement in empty car flow resulted.
- Mr. Franklin is surprised by my wanting to have BNSF serve Fordyce because he recalls incorrectly that I told UP there was not sufficient track space. The insufficient track space comment was in writing and in response to UP's suggestion of receiving all empties at Bastrop, LA, and not Fordyce! See Attachment 5 to my previous verified statement.

I am not surprised that Mr. Franklin is not fully aware of the AL&M circumstances. The UP has made a significant number of management changes and contacts for the AL&M. Typically, when a change takes place, the new person has expressed interest in assisting the AL&M, and in some cases they did improve the situation. Unfortunately, the improvements tend to falter, and then we start over with a new individual.

AL&M Rates and Service

Although I do not believe AL&M's rates and service are relevant issues, I note UP's claims that AL&M's rates are higher than other short line's rates for "comparable" movements. I

PUBLIC VERSION

do not know what UP considers comparable. As far as I know, there is no comparable shortline to the AL&M based upon the service provided its customers. Consider:

- ♦ All the existing track, from Monroe, LA to Bastrop, LA to Crossett, AR to Fordyce, AR was completely rebuilt by the AL&M and its affiliates over the last 17 years.
- ♦ The AL&M maintains a fleet of 3,342 railcars to service its customers.
- ♦ The AL&M tracks, monitors, and measures rail service performance for its rail customers, which has become a significant benefit with the UP/SP service debacle.
- ♦ The AL&M provides EDI transmission of Bills of Lading for its customers.

International Paper in its reply recognizes the premium service provided by the AL&M. The only reason IP is unable to use the AL&M more (to connect to the KCS) is that the KCS lacks sufficient cars, and AL&M cars have been tied up by UP's failure to return them, as detailed in my previous verified statement.

Feasibility of BNSF Service

The UP is incorrect in arguing that track capacity at Fordyce is inadequate to support interchanges with both UP and BNSF. The source of UP's mistake is Mr. Franklin's confusion, noted above, concerning my letter noting inadequate track at Bastrop, LA. Although UP is correct in saying that interchanging with two railroads at Fordyce will require the AL&M to perform additional switching, this is work the AL&M is easily capable of doing, and is certainly willing to do to gain the needed competition by BNSF.

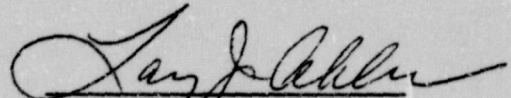
PUBL 'C VERSION

UP's only other objection to the proposed BNSF operations is that adding a new BNSF local or stopping the current BNSF through train at Fordyce would threaten to delay traffic on the main line. UP has not presented any evidence that convinces me that a BNSF stop cannot be accommodated. It seems illogical to me that the additional capacity that was supposed to be generated by directional running has already been exhausted after only four months.

BNSF, which is knowledgeable about operations on the line, believes that the operation will work either of two ways (running a local or stopping the through train. UP and BNSF have shown that they are capable of coordinating dispatching functions, and I am confident that, working together, the UP, BNSF and AL&M can communicate and cooperate so as to conduct the necessary operations as efficiently as possible.

VERIFICATION

I, Larry J. Ahlers, swear under penalty of perjury under the laws of the United States that I have read the foregoing statement and that the statement is true and correct to the best of my knowledge.


Larry J. Ahlers

Date: 6/19/98

Arkansas, Louisiana & Mississippi Railroad and Union Pacific Railroad
(Volumes shipped via UP during 1997)

Rate Negotiations

Destination	St	1997 Units	Previous Rate	Route	05/01/98 New Rate	Rate Difference	ALM Change	ALM change as % of rate	UP Change	UP change as % of rate	ALM Impact	UP Impact	Total cost before change	Total change in cost
-------------	----	---------------	------------------	-------	----------------------	--------------------	---------------	----------------------------	--------------	---------------------------	---------------	--------------	-----------------------------	-------------------------

Arkansas, Louisiana & Mississippi Railroad and Union Pacific Railroad
(Volumes shipped via UP during 1997)

Rate Negotiations

Destination	St	1997 Units	Previous Rate	Route	05/01/98 New Rate	Rate Difference	ALM Change	ALM change as % of rate	UP Change	UP change as % of rate	ALM Impact	UP Impact	Total cost before change	Total change in cost
-------------	----	---------------	------------------	-------	----------------------	--------------------	---------------	----------------------------	--------------	---------------------------	---------------	--------------	-----------------------------	-------------------------

Arkansas, Louisiana & Mississippi Railroad and Union Pacific Railroad
(Volumes shipped via UP during 1997)

Rate Negotiations

Destination	St	1997 Units	Previous Rate	Route	05/01/98 New Rate	Rate Difference	ALM Change	ALM change as % of rate	UP Change	UP change as % of rate	ALM Impact	UP Impact	Total cost before change	Total change in cost
-------------	----	---------------	------------------	-------	----------------------	--------------------	---------------	----------------------------	--------------	---------------------------	---------------	--------------	-----------------------------	-------------------------

STB FD

32760 (Sub 21)

6-2-98

I

188011

(8801)

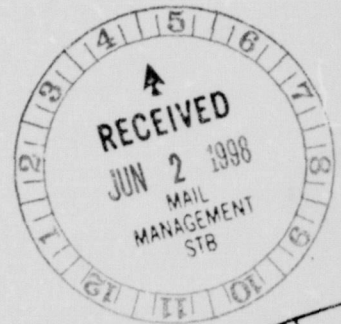
ENTERED
Office of the Secretary

JUL 03 1998

Part of
Public Record

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 --

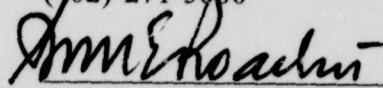
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER
AND RIO GRANDE WESTERN RAILROAD COMPANY -- OVERSIGHT

MOTION FOR LEAVE TO FILE ONE DAY LATE

Union Pacific Railroad Company ("UP") hereby seeks leave to file the accompanying reply to the Petition of the Arkansas, Louisiana and Mississippi Railroad Company for an Additional Remedial Condition, dated May 12, 1998, one day after it would be due under 49 C.F.R. § 1104.13. ALM's petition could arguably be considered a premature filing in the annual UP/SP oversight proceeding, in which case UP's response would not be due until September 1. UP has endeavored, however, to respond within the period provided by Section 1104.13, but ultimately required one extra day to check all facts and complete the verified statements that accompanies this reply. Granting UP's motion for leave to file its response one day late will not result in any prejudice to ALM.

Respectfully submitted,

JAMES V. DOLAN
PAUL A. CONLEY, JR.
LAWRENCE E. WZOREK
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000



ARVID E. ROACH II
J. MICHAEL HEMMER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-7566
(202) 662-5388

*Attorneys for Union Pacific
Railroad Company*

June 2, 1998

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, hereby certify that on this 2nd day of June, 1998, 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).

A handwritten signature in cursive script, appearing to read "Michael L. Rosenthal", is written over a horizontal line.

Michael L. Rosenthal

STB

FD-32760 (SUB21)

/ 4-15-98

I

ID-187145

187145

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE, N. W.

P.O. BOX 7566

WASHINGTON, D.C. 20044-7566

(202) 662-6000

FACSIMILE: (202) 662-6291

DAVID L. MEYER

DIRECT DIAL NUMBER

(202) 662-5582

DIRECT FACSIMILE NUMBER

(202) 778-5582

dmeyer@cov.com

LECONFIELD HOUSE

CURZON STREET

LONDON W1Y 8AS

ENGLAND

TELEPHONE: 44-171-495-5655

FACSIMILE: 44-171-495-3101

KUNSTLAAN 44 AVENUE DES ARTS

BRUSSELS 1040 BELGIUM

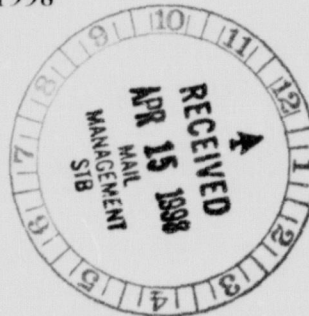
TELEPHONE: 32-2-549-5230

FACSIMILE: 32-2-502-1598

April 15, 1998

BY HAND

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



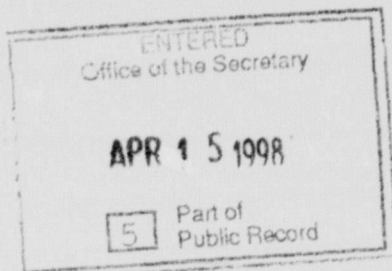
I

**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:

On March 27, 1998, UP filed a motion for a protective order relating to discovery requests (styled TM-6/KCS-6) that KCS/Tex Mex had served on March 12 in Finance Docket No. 32760 (Sub-No. 21). On April 8, we received a letter from KCS's counsel stating that KCS/Tex Mex were withdrawing their March 12 discovery requests and re-serving an identical set of requests with a new pleading number (now TM-8/KCS-8) in light of the Board's March 31 decision in the above-captioned docket.

In light of this development, we believe that UP's motion regarding KCS/Tex Mex's March 12 discovery has become moot, and UP is therefore withdrawing that motion. UP intends to respond to KCS/Tex Mex's new discovery requests on April 23, as KCS/Tex Mex have requested.



Sincerely,

David L. Meyer

Attorney for Union Pacific Railroad
Company

cc: William A. Mullins, Esq.
Richard A. Allen, Esq.

STB

FD

32760

(Sub 21)

3-31-98

I

186792

186792
COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE, N. W.
P.O. BOX 7566
WASHINGTON, D.C. 20044-7566
(202) 662-6000

TELEFAX: (202) 662-6291
TELEX: 89-593 (COVLING WSH)
CABLE: COVLING

MICHAEL L. ROSENTHAL

DIRECT DIAL NUMBER
(202) 662-5448

DIRECT TELEFAX NUMBER
(202) 778-5448

March 31, 1998



LECONFIELD HOUSE
CURZON STREET
LONDON W1Y 8AS
ENGLAND

TELEPHONE: 44-171-495-5655
TELEFAX: 44-171-495-3101

BRUSSELS CORRESPONDENT OFFICE
44 AVENUE DES ARTS
BRUSSELS 1040 BELGIUM
TELEPHONE: 32-2-512-9690
TELEFAX: 32-2-502-1598

BY HAND

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

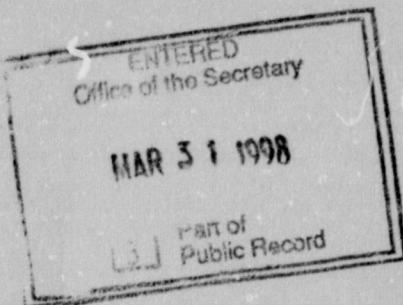
Re: Finance Docket No. 32760 (Sub-No. 21), Union
Pacific Corp., et al. -- Control & Merger --
Southern Pacific Rail Corp., et al. -- Oversight

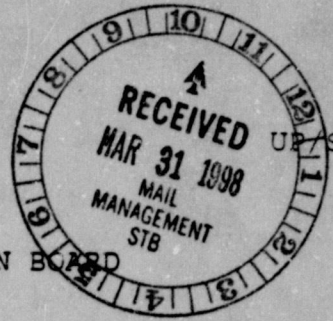
Dear Secretary Williams:

It has come to our attention that Exhibit A to Applicants' Motion for Protective Order (UP/SP-234) was inadvertently omitted from that filing. Enclosed please find twenty-five copies of that filing with Exhibit A attached. I apologize for any confusion this may have caused.

Sincerely,

Michael L. Rosenthal





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

MOTION FOR PROTECTIVE ORDER

Applicants UPC, UPRR and SPR¹/ hereby move for a protective order pursuant to 49 U.S.C. § 1114.21(c)(1). This motion is necessary because Kansas City Southern Railway Company ("KCS") and Texas Mexican Railway Company ("Tex Mex") have served UPRR with a number of very broad requests for documents relating to UPRR dispatching and reciprocal switching in general and UPRR Houston-area dispatching in particular (Exhibit A hereto). A protective order is necessary to bar this unjustified discovery, which even KCS/Tex Mex effectively admit is no more than a fishing expedition. The KCS/Tex Mex discovery is not proper under the

¹ Acronyms used herein are the same as those in Appendix B of Decision No. 44 in Finance Docket No. 32760, served Aug. 12, 1996. The following original Applicants have been merged with UPRR: MPRR (on January 1, 1997); DRGW and SPCSL (on June 30, 1997); SSW (on September 30, 1997); and SPT (on February 1, 1998).

Board's Oversight decisions and would subject Applicants to great and unjustified burden and expense.

I. BACKGROUND

Despite the Surface Transportation Board's repeated admonitions that Western railroads stop bickering among themselves and instead work together to solve Houston-area congestion problems, KCS/Tex Mex have hewn to an adversarial course. KCS/Tex Mex held to that course when, on February 12, 1998, they filed a Joint Petition -- supported by no evidence -- demanding the imposition of additional merger conditions. They filed the Joint Petition in the face of overwhelming evidence -- and the Board's conclusion -- both that the merger has not resulted in competitive harm and that the KCS/Tex Mex proposals would be counterproductive to service recovery efforts. See, e.g., Applicants' Opposition to KCS/Tex Mex Petition for Imposition of Additional Conditions, Mar. 2, 1998, pp. 2-5; Reply of BNSF in Opposition to KCS/Tex Mex Petition for Additional Remedial Conditions, Mar. 4, 1998, pp. 2-4.

In their opposition to the KCS/Tex Mex Joint Petition, Applicants stressed that they were eager to work with KCS/Tex Mex to address Houston/Gulf Coast service issues. In particular, Applicants explained that they had reached an agreement with BNSF to establish a regional dispatching center for Houston-area and Houston-New Orleans trackage, and that

KCS and Tex Mex had been invited to participate in the new dispatching center. Applicants also explained that they were interested in working with KCS/Tex Mex on a voluntary basis as to certain other aspects of the proposal contained in the Joint Petition.

It is therefore rather surprising that, instead of withdrawing their ill-advised Joint Petition, KCS/Tex Mex have pressed forward in an adversarial posture by serving UPRR with a series of document production requests. It is even more surprising that, in explaining the "rationale" for their discovery requests, KCS/Tex Mex say they are seeking to unearth evidence of discriminatory dispatching.

KCS/Tex Mex's decision to search for support for discriminatory dispatching claims through document discovery is surprising for four reasons. First, for several months, KCS/Tex Mex have had the opportunity to see for themselves whether any discriminatory dispatching has been occurring. In the Board's Supplemental Order No. 1 to Service Order No. 1518, served Dec. 4, 1997, p. 5, the Board responded to concerns about UP/SP's ability to favor its own traffic in dispatching operations by directing UP/SP "to permit representatives of BNSF and Tex Mex full access to UP/SP's Spring, Texas, dispatching facility as neutral observers." KCS/Tex Mex did not take advantage of this opportunity until earlier this month, when Tex Mex placed an observer in UP/SP's

existing Spring facility. There is no justification for allowing KCS/Tex Mex to resort to burdensome document discovery to examine UP/SP dispatching practices when a less burdensome and, as discussed below, the only realistic, alternative for monitoring dispatching has long been available.

Second, the Board has recently addressed allegations of discriminatory dispatching by UP/SP. In the Board's decision served February 25, 1998 in Service Order No. 1518, and Ex Parte No. 573, p. 3 n.4, the Board stated: "We have not seen any evidence of preferential dispatching decisions adverse to carriers such as Tex Mex." KCS/Tex Mex have never, at least until now, suggested that the Board's conclusion was wrong.

Third, as mentioned above, UP/SP has repeatedly invited both KCS and Tex Mex to participate in the new consolidated regional dispatching center for Houston and Gulf Coast lines, where they will be able to assure themselves that no discriminatory dispatching is occurring. UP/SP has met with KCS/Tex Mex and has shown them the space in the new dispatching center that has been set aside for their use. But neither KCS nor Tex Mex has yet accepted UP/SP's invitation. Moreover, as discussed above, KCS/Tex Mex have not, until recently, taken advantage of their opportunity to place an observer in UP/SP's dispatching center to assist UP/SP in

coordinating dispatching with KCS/Tex Mex. And since last year, KCS/Tex Mex have had the opportunity to join in the twice-daily conference calls with UP/SP, BNSF and PTRR to discuss traffic flow to and from the Houston area, but they have participated only intermittently. Apparently, KCS/Tex Mex do not agree that participation in a cooperative process is preferable to adversarial posturing.

Finally, KCS/Tex Mex as much as admit that their discovery requests are nothing more than a fishing expedition. In an "introduction" section of their document request filing written in an attempt to justify the requests (pp. 1-2), KCS/Tex Mex acknowledge the Board's February 25 conclusion that discrimination has not occurred, and they offer not a shred of evidence to justify the discovery they now seek.

II. A PROTECTIVE ORDER SHOULD BE GRANTED

A. KCS/Tex Mex Has No Right to Conduct Discovery

KCS/Tex Mex have served their discovery requests in the Board's UP/SP Oversight Jocket, but those requests are clearly inappropriate in light of the Board's Oversight Decision No. 10, served Oct. 27, 1997. In that decision, the Board made clear that it would conduct annual oversight proceedings, and that "parties seeking immediate, merger-related relief should use [the Board's] ordinary formal complaint or declaratory order procedures." Decision No. 10, p. 18. The Board then indicated that it would commence its

second annual oversight proceeding on August 14, 1998. As there is no oversight proceeding presently pending, and as KCS/Tex Mex have not filed a formal complaint or a declaratory order petition, the KCS/Tex Mex document requests are clearly inappropriate. See 49 C.F.R. § 1114.21(a) (parties "may obtain discovery . . . which is relevant to the subject matter involved in a proceeding") (emphasis added). Furthermore, as explained in Applicants' opposition to the KCS/Tex Mex Joint Petition, KCS/Tex Mex have provided absolutely no basis for the commencement of a proceeding of any kind.

Even if it were appropriate for KCS/Tex Mex to seek Board action in the UP/SP Oversight docket, the Board has never indicated that parties may conduct any discovery in oversight proceedings. Applicants provided appropriate discovery voluntarily in the first proceeding, but the Board rejected arguments by KCS and others for full-blown formal discovery: "There is no reason to open this proceeding for formal discovery procedures as some parties suggested. . . . Formal discovery procedures would . . . complicate this oversight process unnecessarily." Decision No. 10, p. 10. The Board then limited Applicants' and BNSF's obligation in the future annual Oversight proceedings to the provision of traffic data. Id. It thus follows a fortiori that no discovery is proper here. Allowing the oversight process to open the door to wide-ranging discovery would run counter to

Chairman Morgan's view that the oversight process be "one that is not unduly burdensome." Oversight Decision No. 1, p. 9.

B. KCS/Tex Mex's Discovery Is An Impermissible Fishing Expedition for Irrelevant Material, and Would Impose Great and Unjustified Burdens

A protective order is warranted not only because KCS/Tex Mex's discovery requests are procedurally inappropriate, but also because KCS/Tex Mex have provided no basis for their requests and because the requests are extremely burdensome.

1. The Discovery Requests Are a Fishing Expedition

The Board has repeatedly rejected discovery requests that amount to nothing more than fishing expeditions. See, e.g., Docket No. 40411, Farmland Industries, Inc. v. Gulf Central Pipeline Co., Decision served Jan. 6, 1993, p. 3; Docket No. 38676, Changes in Routing Provision -- Conrail -- July, 1981, Decision served Mar. 21, 1988, p. 5. Here, KCS/Tex Mex as much as admit that this is their purpose.

KCS/Tex Mex have provided no basis for the discovery they seek. Despite the fact that more than a year and a half has passed since the UP/SP merger, and despite being granted Board-ordered access to UP/SP dispatching operations and having observed those operations on occasion, KCS/Tex Mex have not pointed to a single incident that they claim demonstrates discrimination. KCS/Tex Mex have not pointed to any evidence that KCS/Tex Mex trains have suffered greater delays as a

result of Houston-area service problems than UP/SP trains. In fact, in their discovery request, KCS/Tex Mex even acknowledge without challenge (p. 2) the Board's statement that it has "not seen any evidence of preferential dispatching decisions adverse to carriers such as Tex Mex."

The only justification that KCS/Tex Mex give for their discovery requests is that "because neither Tex Mex nor KCS have in their possession records relevant to UP's past and present dispatching practices, it is necessary to seek this information from UP" (p. 2). KCS/Tex Mex cannot point to anything that they expect to find as a result of their discovery requests -- they simply want to conduct an open-ended search of massive records. This is the very definition of an impermissible fishing expedition.

It is in fact not surprising that KCS/Tex Mex cannot point to any examples of discrimination. As the attached verified statement of Dennis D. Tholen, UPRR's Assistant Vice President in charge of the Harriman Dispatching Center, explains, UP/SP has issued formal instructions to its dispatchers to dispatch Tex Mex trains in a nondiscriminatory manner. Tholen V.S., p. 2. In the Houston area, UP/SP trains have been delayed as much as, if not more than, KCS/Tex Mex trains, because the problem is congestion, not discrimination. Id.

2. The Discovery Requests Are Unduly Burdensome

As Mr. Tholen explains in his verified statement, compliance with KCS/Tex Mex's extremely broad discovery requests would impose extraordinary burdens on UPRR, and would seriously interfere with UPRR's ongoing service recovery efforts. The document requests are of tremendous breadth, encompassing (a) every computerized or paper record relating in any way to the dispatching of the thousands of UPRR, Tex Mex and BNSF trains that passed through the Houston area during a span of almost nine months; (b) every document relating to any instance in which UPRR did not dispatch its own trains at any location, but wished to do so using a "neutral" dispatcher or a dispatcher selected by UPRR and other carriers; and (c) every document relating to any instance in which UPRR expressed a desire to perform reciprocal switching for itself or by a carrier other than an existing switching carrier. Finally, KCS/Tex Mex literally ask UPRR to prove a negative as to discrimination by producing "all documents" that "prove that KCS and Tex Mex have not received adverse, discriminatory treatment."

The burden of actually producing the requested documents would be overwhelming. As Mr. Tholen explains (p. 1), responding to KCS/Tex Mex's document requests would require UP/SP to devote thousands of hours of programming and staff time to searching files, computer databases and

communications systems in order to find and review almost every document pertaining to UP/SP, BNSF or Tex Mex operations in Houston over a nine-month period. UP/SP does not have the resources to comply with these requests without diverting the energies of personnel directly involved in service recovery efforts (and in UP's efforts to deal with Year 2000 issues).
Id.

To produce the computerized information responsive to KCS/Tex Mex's first request alone would take several months. The UP and SP dispatching systems record millions of items of information every day about train operations in the Houston area. Id., p. 4. Producing these basic dispatching records would be extremely expensive and burdensome and would take several months of programming work. Id., p. 5. In addition, the KCS/Tex Mex requests would also require UP/SP to produce train sheets, which are stored in UP/SP's mainframe computer. Production of these documents would require an estimated 150 days of programming time and possibly twice that much time. Id., p. 6. Information that would probably be responsive to the KCS/Tex Mex is also contained in UP/SP's Transportation Control System and other UP/SP databases. Again, UP/SP would have to engage in an intensive programming effort to extract such data for the Houston area. Id., p. 9.

Mr. Tholen's verified statement explains why responding to KCS/Tex Mex's second request would also be

unduly burdensome burden. In order to respond to this request, UP/SP would be required to locate all documents that reflect congestion on UP/SP's Houston-area lines since last spring, since congestion, not discrimination, is the cause of Tex Mex delays. Id., p. 10. Searching for all such documents would require weeks of labor. The search would have to include virtually every operating, marketing, information service and legal office in the UP/SP headquarters building in Omaha, as well as numerous field offices across the system, since all of them are likely to have documents relating to Houston-area congestion. Id.

Finally, as Mr. Tholen explains (p. 11), responding to KCS/Tex Mex's third and fourth document requests would be unduly burdensome because UP/SP operates over other railroads on hundreds of track segments, and reciprocal switching arrangements exist in many locations, UP/SP would be forced to review all of its joint facility files, as well as the files of personnel who deal with other railroads. In addition, the KCS/Tex Mex requests ask UP/SP to search dispatching records in order to respond to these requests, which would expand the necessary search exponentially. Id.

3. The Burden of Production Would Vastly Outweigh Any Benefit KCS/Tex Mex Could Hope To Gain From Discovery

Even if UP/SP were able to produce all of the dispatching records encompassed by the KCS/Tex Mex requests,

this would only be the beginning of KCS/Tex Mex's quixotic search for evidence of discrimination. In the first place, as Mr. Tholen explains in his verified statement (pp. 5-6), it would take KCS/Tex Mex months to study and analyze not only the dispatching data, but also the daily operating conditions on all the dispatched territories. Moreover, even "with complete records of every dispatching decision made by every dispatcher, KCS/Tex Mex would not be able to understand why the dispatcher made any decision. Most of the information that flows continually to a dispatcher arrives by radio or telephone, or through a verbal communication with a supervisor and is not recorded." Id., p. 5.

As UP has explained before in responding to unfounded allegations of discrimination that were made, and ultimately withdrawn, by SP in 1993-94, dispatching is a complex, difficult process that requires dispatchers to make judgment calls to balance competing factors. Although railroaders commonly believe that dispatchers mishandle their trains, and although there is a natural tendency to recast day-to-day dissatisfactions with a competitor's dispatching decisions as "discrimination," investigation virtually always shows that suspicions of discrimination are unfounded. Moreover, while it is sometimes possible to show immediately after the fact whether a complaint about dispatching has merit, no one can reasonably hope to sort out the pros and

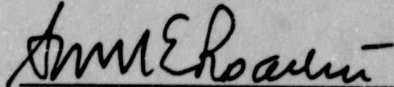
cons of dispatching decisions made days, weeks or months earlier. See Finance Docket No. 32133, Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control -- Chicago & North Western Holdings Corp. & Chicago & North Western Transportation Co., UP's Reply to SP Allegations of "Service Discrimination" (UP/CNW-93), Mar. 30, 1994, pp. 18-26.

Here, KCS/Tex Mex already have a far better alternative than a lengthy legal battle that will be extraordinarily burdensome for everyone involved and will ultimately prove utterly fruitless. UP/SP and BNSF have invited KCS and Tex Mex to participate in the regional dispatching center that will coordinate Houston-area train operations. This is a real solution. KCS/Tex Mex's tactics of failing to participate and then hoping to find some basis for throwing stones should not be countenanced. KCS/Tex Mex have shown no basis for the extraordinarily burdensome discovery they seek, and the Board should not allow it to proceed.

Respectfully submitted,

CARL W. VON BERNUTH
RICHARD J. RESSLER
Union Pacific Corporation
Suite 5900
1717 Main Street
Dallas, Texas 75201
(214) 743-5640

JAMES V. DOLAN
PAUL A. CONLEY, JR.
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000



ARVID E. ROACH II
J. MICHAEL HEMMER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-5388

Attorneys for Union Pacific
Corporation, Union Pacific
Railroad Company and Southern
Pacific Rail Corporation

March 27, 1998

VERIFIED STATEMENT

of

DENNIS D. THOLEN

My name is Dennis D. Tholen. I am Assistant Vice President in charge of Union Pacific's Harriman Dispatching Center in Omaha, Nebraska. I am providing this verified statement in support of UP's Motion for Protective Order (UP/SP-334) submitted on March 25, 1998 in Finance Docket No. 32760 (Sub-No. 21).

I have reviewed the document requests submitted by Kansas City Southern Railway Company ("KCS") and Texas Mexican Railway Company ("Tex Mex"). I am generally familiar with the types of documents and records that would be responsive to these requests and with the expense and burden of finding and producing those documents and records. The KCS/Tex Mex document requests would require UP to devote thousands of hours of programming and staff time to searching files, computer databases and communications systems in order to find and review almost every document pertaining to UP, BNSF or Tex Mex operations in the Houston area over a nine-month period. The documents would include massive volumes of dispatching records, which would take KCS/Tex Mex months to evaluate. UP does not have the resources to comply with these requests, without diverting the energies of personnel directly involved in our service recovery efforts and in bringing us into compliance with Year 2000 information services requirements.

KCS/Tex Mex Requests Nos. 1 and 2, either separately or together, effectively demand every computer record, document or communication that relates to the operation of any of the thousands of UP, BNSF and Tex Mex trains that passed through an undefined "Houston area" during a span of almost nine months. Request No. 1 asks for every document relating in any way to the dispatching of every such train. Request No. 2 asks for every document that shows we did not discriminate against Tex Mex in dispatching its trains. UP has issued formal instructions to its dispatchers to treat Tex Mex trains like UP trains of the same class, but in order to demonstrate the absence of discrimination, one would have to examine the full range of documents and records reflecting how UP operated its own trains, as well as those of other railroads, and all documents reflecting congestion in the Houston area. Congestion is the cause of Tex Mex delays.

REQUESTS NO. 1 AND 2

Dispatching Records

Most UP, BNSF and Tex Mex trains on UP lines in the Houston area are controlled by two large dispatching operations, which were combined during 1997. UP's dispatching operation is based at the Harriman Dispatching Center ("HDC") in Omaha and relies primarily on the Union Switch and Signal Computer-Assisted Dispatch ("CAD") and related systems. SP's dispatching office was located in Denver but was moved to HDC,

where it remains a separate operation relying on SP's Digital Concepts ("DigiCon") system.

In November 1997, UP and BNSF assumed joint responsibility for dispatching HB&T lines in Houston. These lines are dispatched using the DigiCon system from a newly established Houston Control Center. Earlier this month, BNSF and UP expanded the Houston Control Center and began dispatching their joint line between Houston and New Orleans, as well as the HB&T trackage and a portion of PTRR. UP and BNSF have invited Tex Mex and KCS to join this dispatching center.

UP dispatchers control UP's Brownsville Subdivision south of Algoa, Texas; the Beaumont Subdivision from Gulf Coast Junction in Houston past Settegast Yard toward Beaumont; UP's Palestine Subdivision from Settegast Yard to Spring and on toward Longview, Texas; UP's Baytown Branch and other branches; UP's Fort Worth Subdivision from Spring toward Waco; UP's Houston Subdivision through Houston to Galveston; and, until it was closed during 1997, UP's Houston Subdivision toward Smithville. SP dispatchers control the SP Houston Terminals Subdivision within Houston (now controlled by the UP/BNSF Houston Control Center), including the line to Strang Yard; SP's Hearne Subdivision between Houston and Hearne, Texas; SP's Lafayette Subdivision toward Lafayette and New Orleans; SP's Glidden Subdivision to Flatonia; SP's Victoria

Subdivision toward Placedo; SP's Lufkin Subdivision toward Shreveport and various branches in the Houston area.

To evaluate UP dispatching decisions, KCS/Tex Mex would have to study the daily operating conditions on all these dispatching territories. To dispatch trains on the segments BNSF and Tex Mex trains use -- the Beaumont Subdivision, the Lafayette Subdivision, the Glidden Subdivision, the Victoria Subdivision, the Brownsville Subdivision, the Houston Terminals Subdivision and the HB&T trackage -- dispatchers must take into account trains, events and conditions on the other lines in the area. UP dispatchers on the Beaumont Subdivision must also consider conditions on the KCS line east of Beaumont -- which forms part of a through route with the Beaumont Subdivision -- just as KCS dispatchers controlling the KCS line east of Beaumont must consider conditions in the Beaumont area and on the connecting UP line.

The UP and SP dispatching systems record millions of items of data every day about train operations on UP. On lines with Centralized Traffic Control, every time a route is cleared for a train, a switch is opened or closed, or a train or switch engine moves past a control point, the event is recorded. This produces voluminous computer records of operations over each line segment. These records fall within the KCS/Tex Mex discovery requests for computer records that reflect the dispatching of trains of the three railroads.

KCS/Tex Mex cannot recreate a dispatching event without studying all of this data.

Even with complete records of every dispatching decision made by every dispatcher, KCS/Tex Mex would not be able to understand why the dispatcher made any decision. Most of the information that flows continually to a dispatcher arrives by radio or telephone, or through a verbal communication with a supervisor and is not recorded. For example, KCS/Tex Mex might find an instance in which a UP train and a Tex Mex train were held at Tower 86 for a lower-priority BNSF train, but they will never know that the trains were held because the BNSF crew had only 25 minutes to reach South Yard before running out of time under the Hours of Service Law, or that the physical limitations of the plant precluded any other course of action. Computerized dispatching records do not contain information about mechanical defects, crew transport problems, yard conditions, signal failures and other events that determine and explain dispatching decisions.

Producing the basic dispatching records would be extremely expensive and burdensome and would take months of programming work. Studying them would take KCS/Tex Mex much longer than that. In the UP CAD system, dispatching records can be retrieved only for an individual control point -- a switch, a signal, a segment of track -- of which there could

be hundreds in the Houston area, depending on how it is defined. To obtain information about events at a control point requires special programming. I estimate that a skilled programmer could extract one month of data for several control points in a day of work. Extracting data for all the control points for the Houston area since June 1, 1997 would take several months. Someone would then need to evaluate the data, which is highly disjointed. Based on my experience, this would be an almost impossible task on the scale of the KCS/Tex Mex inquiry. And there would be additional data for track warrant territory, such as UP's line between Houston and Galveston. We would need to assign a programmer to download track warrants and then perform a "re-dispatch" of the defined territory, all of which would take months to complete.

The KCS/Tex Mex document requests also would require us to produce train sheets, which are stored in UP's mainframe computer. This, again, would require special programming. I estimate that a skilled programmer would spend not less than three and up to five days to obtain the train sheets for all trains that ran on one UP subdivision during one month. Thus, to obtain train sheets for the UP territories in the Houston area would require not less than 150 days of programming time and possibly almost twice that much time. This is the time required merely to download the data, not to evaluate it.

The SP DigiCon system would present a lesser challenge. DigiCon has "replay" capability, which allows it to replay in real or accelerated time all the actions a dispatcher takes and all the movements over the dispatcher's territory. It does not explain why she or he made a decision, only what happened. The replays for the entire SP dispatching system are recorded on tape, with five to eight days of systemwide activity on a tape. The tapes would have to be loaded overnight by a programmer in Denver. However, we do not have the ability to segregate the territories KCS/Tex Mex would want to inspect from the rest of the system. We therefore would be required to have someone accompany the KCS/Tex Mex reviewer to identify the relevant portions of the tapes and to prevent improper access to other information.

The DigiCon system can also be used to generate train sheet records. These records produce various data reflective of the operation of an individual train and are not integrated to produce a record of all train activities on a particular track segment. Such an effort would require considerable computer programming and dispatching expertise and would take months to complete.

KCS/Tex Mex may be interested in the handling of trains on SP's Houston Terminals Subdivision and on the HB&T in Houston, but in those territories the computerized dispatching records are the least informative. In many

instances, the computer records do not show the identities of the trains. Yard and switch engine movements generally are not identified. In the busy Houston terminal, dispatchers try to move any train they can at every opportunity, regardless who owns it.

UP also maintains additional dispatching documents in computerized form. Each Region Director and Corridor Manager provides a turnover to his or her successor. The turnovers are often, but not always, preserved in UP's computer records. We would have to perform a monumental manual effort to extract from each day's records the turnovers for specific territories. This would be an extremely time-consuming, cumbersome task because the researcher would have to look at each message which is simply constructed of free form text and make a visual determination concerning its pertinence to Houston-area dispatching.

Our Transportation Control System ("TCS") computer system also contains comprehensive information on UP train movement records that may possibly be responsive to the KCS/Tex Mex requests, because it contains records that reflect the movement of UP trains in the Houston area. Currently this information is incomplete because it does not contain information about all trains dispatched in the SP DigiCon system. It would be unrealistic to attempt to utilize this information in its present form. TCS time sequence reporting

edits also prohibit the data from being supplemented with information from another system after the train has reached its destination point. TCS also contains data bases that track UP operations on all corridors of the system. These are voluminous data bases, and all of the information in the databases is historical and does not support replay capabilities. We would have to perform expensive special programming not only to provide the replay capability but also to extract the segments containing Houston-area information.

UP does not have excess computer programming personnel to do all of this work. It could not supply the necessary personnel to assume these monumental tasks without causing a severe negative impact on our ability to operate our railroad. This type of research and programming effort also would jeopardize Union Pacific's efforts to prepare and resolve its information systems Year 2000 challenges.

Recreating dispatching decisions as KCS/Tex Mex are attempting here weeks and months later is virtually impossible. Too many of the reasons are not recorded, and no one can remember them. Dispatching should be monitored and supervised on a current basis. KCS and Tex Mex are welcome to join us in the Houston Control center, which will confirm that we are handling Tex Mex trains fairly.

Other Potentially Responsive Documents

Because congestion, not discrimination, caused delays to Tex Mex trains in the Houston area, in order to respond fully to Request No. 2, we would have to locate all documents that reflect congestion on UP's Houston-area lines since last spring. Searching for all such documents would, of course, be an enormous undertaking and would require weeks of labor. Virtually every operating, marketing, information services and legal office in the Union Pacific headquarters building in Omaha, as well as numerous field offices across the system, would have to be searched, because all of them likely have documents relating to congestion in the Houston area. We do not have the resources to conduct such a search without interfering with operation of the railroad.

REQUESTS NO. 3 AND 4

Request No. 3 asks for all documents reflecting a UP desire to have trains that it operates over other railroads controlled by dispatchers other than those of the owning railroad. Request No. 4 asks for all documents reflecting a UP desire to have reciprocal switching performed by a carrier other than the existing switching carrier. We probably would find documents responsive to Request No. 4, because there are many reasons why railroads might modify reciprocal switching arrangements. For example, railroads sometimes alternate in performing reciprocal switching. The problem would be finding

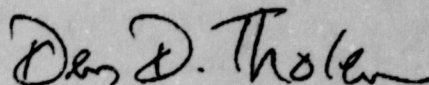
these documents, and looking for any document that might be responsive to Request No. 3.

UP operates over other railroads on hundreds of track segments, and reciprocal switching arrangements exist in so many locations that even identifying all the agreements would be difficult. To respond to the KCS/Tex Mex requests, UP would be forced to review joint facility files for every one of the hundreds of trackage rights arrangements in which it operates over another carrier, as well as the files of all UP personnel who deal with other railroads. It would also be required to review correspondence with reciprocal switching partners in every terminal and location where reciprocal switching takes place, searching both headquarters and local offices. These searches would require weeks of work.

The search would not end there. KCS asks us to search dispatching records in order to respond to these requests. This means that we would have to review every internal memorandum, turnover and administrative message generated by either the SP or the UP dispatching center to ascertain whether it might contain a passing comment of the sort KCS/Tex Mex wants to find. Since almost every dispatching territory involves a trackage rights or reciprocal switching area, I believe that a searcher could spend a full year on this task alone.

VERIFICATION

I, Dennis D. Tholen, declare under penalty of perjury that the foregoing statement is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on March 27, 1998.



DENNIS D. THOLEN

TM-6
KCS-6

**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

**JOINT PETITION OF THE TEXAS MEXICAN RAILWAY COMPANY AND THE
KANSAS CITY SOUTHERN RAILWAY COMPANY FOR IMPOSITION OF
ADDITIONAL REMEDIAL CONDITIONS PURSUANT TO THE BOARD'S RETAINED
OVERSIGHT JURISDICTION**

**DOCUMENT PRODUCTION REQUESTS DIRECTED TO UNION PACIFIC
RAILROAD COMPANY**

**Richard P. Bruening
Robert K. Drelling
THE KANSAS CITY SOUTHERN RAILWAY
COMPANY
114 West 11th Street
Kansas City, Missouri 64105
Tel: (816) 983-1392
Fax: (816) 983-1227**

**Richard A. Allen
John V. Edwards
ZUCKERT, SCOUTT & RASENBERGER, LLP
Suite 600
888 17th Street, N.W.
Washington, D.C. 20006-3939
Tel: (202) 298-8660
Fax: (202) 342-0683**

**Attorneys for The Texas Mexican Railway
Company**

**William A. Mullins
Alan E. Lubel
David C. Reeves
TROUTMAN SANDERS LLP
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005-3314
Tel: (202) 274-2950
Fax: (202) 274-2994**

**Attorneys for The Kansas City Southern
Railway Company**

March 12, 1998

**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

**JOINT PETITION OF THE TEXAS MEXICAN RAILWAY COMPANY AND THE
KANSAS CITY SOUTHERN RAILWAY COMPANY FOR IMPOSITION OF
ADDITIONAL REMEDIAL CONDITIONS PURSUANT TO THE BOARD'S RETAINED
OVERSIGHT JURISDICTION**

**DOCUMENT PRODUCTION REQUESTS DIRECTED TO UNION PACIFIC
RAILROAD COMPANY**

INTRODUCTION AND RATIONALE

On February 12, 1998, The Kansas City Southern Railway Company ("KCS") and The Texas Mexican Railway Company ("Tex Mex") notified the Surface Transportation Board ("STB" or "Board") of their intent to file, on March 30, 1998, a plan for operations in south Texas which calls for neutral dispatching and switching in Houston to replace Union Pacific Railroad Company ("UP")-run Houston dispatching and switching. Neutral dispatching and switching are necessary because the trains of KCS and Tex Mex have experienced severe delay in attempting to operate in and through Houston, delay that cannot be solely attributable to the general congestion in Houston. This additional delay to KCS and Tex Mex, which has made it

even more difficult for Tex Mex and KCS to cope with the crisis, has been caused by UP's dispatching and switching practices, which have favored the movement and switching of UP's trains in preference to the movement of KCS/Tex Mex trains.

In Footnote 4 to its February 25, 1998, decision served in *Joint Petition for Service Order*, STB Service Order No. 1518, and *Rail Service in the Western United States*, STB Ex Parte No. 573 ("ESO"), the Board stated in part "We have not seen any evidence of preferential dispatching decisions adverse to carriers such as Tex-Mex." Furthermore, UP has previously claimed that neutral dispatching is not necessary. Because neither Tex Mex, nor KCS have in their possession records relevant to UP's past and present dispatching practices, it is necessary to seek this information from UP. UP has previously assured the Board, the public, Tex Mex, and KCS that "computerized records of UP's dispatching are capable of being retrieved in the event of a dispute over a particular dispatching episode."¹ In addition, the positions taken by UP on the need for neutral dispatching and/or neutral switching when "the shoe is on the other foot," i.e., when UP's trains or cars are being dispatched or switched by another carrier or entity, would be relevant to the Board's determination of the need for such neutral switching and dispatching in the Houston area. Accordingly, pursuant to 49 C.F.R. §§ 1114.21 - 1114.31, Tex Mex and KCS direct the following document requests to Union Pacific Railroad Company.

¹ *Union Pacific Corporation, et al. - Control and Merger - Southern Pacific Rail Corporation, et al.*, Finance Docket No. 32760, Decision No. 47 (STB, served September 10, 1996), at 23, n. 6, citing UP/SP-272 at 21, n. 25.

THE RAILROAD ENTITIES

1. "BNSF" means The Burlington Northern and Santa Fe Railway Company.
2. "HBT" means Houston Belt & Terminal Railway Company.
3. "KCS" means The Kansas City Southern Railway Company.
4. "Tex Mex" means The Texas Mexican Railway Company.
5. "The Undersigned Parties" means The Texas Mexican Railway Company and Kansas City Southern Railway Company.
6. "UP" means Union Pacific Railroad Company and its predecessors, including but not limited to Missouri Pacific Railroad Company, Southern Pacific Rail Corporation and Southern Pacific Transportation Company, individually and collectively.

DEFINITIONS

1. "Board" or "STB" means the Surface Transportation Board (or its predecessor agency, the Interstate Commerce Commission, if applicable).
2. "Describe" when used in relation to a discussion, meeting or other communication means to identify the participants, the date or time period when the communication took place, the location of the participants at the time of the communication and a detailed summary of the content of the communications.
3. "Document" means any writing or other compilation of information, whether printed, typed, handwritten, recorded, or produced or reproduced by any other process, including: intra-company communications; electronic mail; correspondence; telegrams; memoranda; contracts; instruments; studies; projections; forecasts; summaries; notes, or records of conversations or interviews; minutes, summaries, notes, or records of conferences or meetings; records or reports of negotiations; diaries; calendars; photographs; maps; tape

recordings; computer tapes; computer disks; other computer storage devices; computer programs; computer printouts; models; statistical statements; graphs, charts; diagrams; plans; drawings; brochures; pamphlets; news articles; reports; advertisements; circulars; trade letters; press releases; invoices; receipts; financial statements; accounting records; and workpapers and worksheets. Further the term "document" includes:

- a. both basic records and summaries of such records (including computer runs);
and
 - b. both original versions and copies that differ in any respect from original version, including notes.
4. "Identify,"
- a. when used in relation to an individual, means to state the name, address, and business telephone number of the individual, the job title or position and the employer of the individual at the time of the activity inquired of, and the last-known position and employer of the individual;
 - b. when used in relation to a corporation, partnership, or other entity, means to state the name of the entity and the address and telephone number of its principal place of business;
 - c. when used in relation to a document, means to:
 - (1) state the type of document (e.g., letter, memorandum, report, chart);
 - (2) identify the author, each addressee, and each recipient; and
 - (3) state the number of pages, title, and date of the document;
 - d. when used in relation to an oral communication or statement, means to:

- (1) identify the person making the communication or statement and the person, persons, or entity to whom the communication or statement was made;
- (2) state the date and place of the communication or statement;
- (3) describe in detail the contents of the communication or statement; and
- (4) identify all documents that refer to, relate to or evidence the communication or statement;

e. when used in any other context means to describe or explain in detail.

5. "Including" means including without limitation.
6. "Person" means an individual, company, partnership, or other entity of any kind.
7. "Provide" (except where the word is used with respect to providing service or equipment) or "describe" means to supply a complete narrative response.
8. "Produce" means to make available to the Undersigned Parties for copying and viewing.
9. "Relating to" a subject means making a statement about, referring to, or discussing the subject, including, as to actions, any decision to take, not take, defer, or defer decision, and including, as to any condition or state of affairs (e.g., competition between carriers), its absence or potential existence.
10. "Shipper" means a user of rail services, including a consignor, a consignee, or a receiver.
11. "Studies, analyses and reports" include studies, analyses, and reports in whatever form, including letters, memoranda, tabulations, and computer printouts of data selected from a database.

12. References to railroads, shippers, and other companies (including UP) include: parent companies; subsidiaries; controlled, affiliated, and predecessor firms; divisions; subdivisions; components; units; instrumentalities; partnerships; and joint ventures.

13. Unless otherwise specified, all uses of the conjunctive include the disjunctive and vice versa, and words in the singular include the plural and vice versa.

INSTRUCTIONS

1. Any delay in production of requested documents is certain to prejudice the Undersigned Parties' ability to present to the Board the type of evidence sought by the Board and discussed in the Board's February 25, 1998 ESO order. Accordingly, responsive documents should be produced to the undersigned counsel at Troutman Sanders LLP, 1300 I Street, N.W., Suite 500 East, Washington, D.C. 20005-3314, not later than fifteen (15) days after the date of service. Serial production of relevant documents during that fifteen-day period is encouraged and requested. Objections, if any, should be made as soon as possible, and not later than fifteen (15) days after the date of service of the requests.

2. UP should contact William A. Mullins or Alan E. Lubel at (202) 274-2950 immediately to discuss any objections or questions with a view to resolving any dispute or issues of interpretation informally and expeditiously.

3. Unless otherwise specified, these discovery requests cover the period beginning June 1, 1997 and ending with the date of the response.

4. If UP has information that would permit a partial answer to any document request, but it would have to conduct a special study to obtain information necessary to provide a more complete response to that request, and if the burden of conducting such special study would be greater for UP than for KCS or Tex Mex:

- a. state that fact;
 - b. provide the partial answer that may be made with information available to UP;
 - c. identify such business records, or any compilation, abstract, or summary based thereon, as will permit the undersigned parties to derive or ascertain a more complete answer; and
 - d. as provided in 49 C.F.R. § 1114.26(b), produce such business records, or any compilation, abstract, or summary based thereon, as will permit the undersigned parties to derive or ascertain a more complete answer.
5. If any information or document is withheld on the ground that it is privileged or otherwise not discoverable.
- a. identify the information or document (in the manner provided in Definition 5 *supra*); and
 - b. state the basis for the claim that it is privileged or otherwise not discoverable.
6. If UP knows or later learns that its response to any document request is incorrect, it is under a duty seasonably to correct that response.
7. Pursuant to 49 C.F.R. § 1114.29, UP is under a duty seasonably to supplement its responses with respect to any question.

DOCUMENT REQUESTS

Request No. 1

Produce all documents, including corridor managers' reports, that reflect, discuss, analyze, refer to, or evaluate the dispatching of the trains of UP, Tex Mex, BNSF or any combination of them, for movement to, from, between or through points in the Houston, TX area, along with copies of all non-publicly available computer programs necessary to view, review or analyze such of the documents as are in computer-readable form.

Request No. 2

Produce all documents (including, but not limited to, policy statements, policy directives, procedures, or memos that mention KCS or Tex Mex) that UP contends prove that KCS and Tex Mex have not received adverse, discriminatory treatment in dispatching of their trains moving to, from between or through points in the Houston, TX area.

Request No. 3

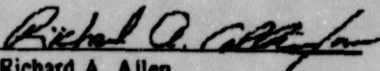
In all instances where UP conducts train operations but does not currently dispatch the operations of those UP trains, produce all documents (including, but not limited to, corridor managers' reports, internal memos, or reports that reflect communications between UP and the carrier that controls the dispatching of the UP train operations) that reflect, discuss, analyze, show, or refer to, instances where UP has expressed a desire to have its trains dispatched by UP, a neutral dispatcher, or a dispatcher selected by UP and any other carrier that may conduct operations over, or in, the same trackage or area.

Request No. 4

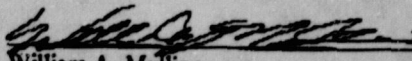
In all instances where UP receives cars through reciprocal switching from another Class I carrier or a switching carrier, owned (either in whole or in part) by a Class I carrier, produce all documents (including, but not limited to, corridor managers' reports, internal memos, or reports that reflect communications between UP and the carrier that performs the switching of the UP trains or cars) that reflect, discuss, analyze, show, or refer to, instances where UP has expressed a desire to perform such reciprocal switching for itself or its desire to have such reciprocal switching performed by another switching carrier other than the existing switching carrier.

Respectfully submitted this 6th day of March, 1998.

Richard P. Bruening
Robert K. Dreiling
THE KANSAS CITY SOUTHERN RAILWAY
COMPANY
114 West 11th Street
Kansas City, Missouri 64105
Tel: (816) 983-1392
Fax: (816) 983-1227


Richard A. Allen
John V. Edwards
ZUCHERT, SCOUTY & RASENBERGER, LLP
888 17th Street, N.W.
Suite 600
Washington, D.C. 20006-3939
Tel: (202) 298-8660
Fax: (202) 342-0683

Attorneys for The Texas
Mexican Railway Company

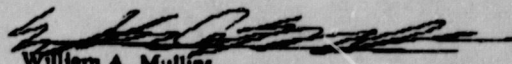

William A. Mullins
Alan E. Lubel
David C. Reeve
TROUTMAN SANDERS LLP
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005-3314
Tel: (202) 274-2950
Fax: (202) 274-2994

Attorneys for The Kansas City Southern
Railway Company

TM-6
KCS-6

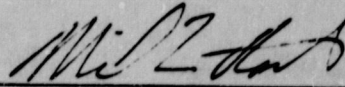
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "Document Production Requests Directed To Union Pacific Railroad Company" was served this 12th day of March, 1998, by hand delivery to Arvid E. Ruech, counsel for Union Pacific, and by first class mail upon other parties of record.


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

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 27th day of March, 1998, 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).

A handwritten signature in cursive script, appearing to read "Michael L. Rosenthal", written over a horizontal line.

Michael L. Rosenthal

STB

FD

32760

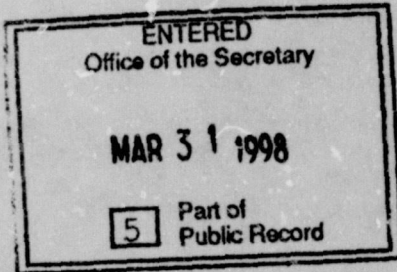
(Sub 21)

3-27-98

I

186751

186757



UP/SP-334

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

MOTION FOR PROTECTIVE ORDER

Applicants UPC, UPRR and SPR^{1/} hereby move for a protective order pursuant to 49 U.S.C. § 1114.21(c)(1). This motion is necessary because Kansas City Southern Railway Company ("KCS") and Texas Mexican Railway Company ("Tex Mex") have served UPRR with a number of very broad requests for documents relating to UPRR dispatching and reciprocal switching in general and UPRR Houston-area dispatching in particular (Exhibit A hereto). A protective order is necessary to bar this unjustified discovery, which even KCS/Tex Mex effectively admit is no more than a fishing expedition. The KCS/Tex Mex discovery is not proper under the

^{1/} Acronyms used herein are the same as those in Appendix B of Decision No. 44 in Finance Docket No. 32760, served Aug. 12, 1996. The following original Applicants have been merged with UPRR: MPRR (on January 1, 1997); URGW and SPCSL (on June 30, 1997); SSW (on September 30, 1997); and SPT (on February 1, 1998).

Board's Oversight decisions and would subject Applicants to great and unjustified burden and expense.

I. BACKGROUND

Despite the Surface Transportation Board's repeated admonitions that Western railroads stop bickering among themselves and instead work together to solve Houston-area congestion problems, KCS/Tex Mex have hewn to an adversarial course. KCS/Tex Mex held to that course when, on February 12, 1998, they filed a Joint Petition -- supported by no evidence -- demanding the imposition of additional merger conditions. They filed the Joint Petition in the face of overwhelming evidence -- and the Board's conclusion -- both that the merger has not resulted in competitive harm and that the KCS/Tex Mex proposals would be counterproductive to service recovery efforts. See, e.g., Applicants' Opposition to KCS/Tex Mex Petition for Imposition of Additional Conditions, Mar. 2, 1998, pp. 2-5; Reply of BNSF in Opposition to KCS/Tex Mex Petition for Additional Remedial Conditions, Mar. 4, 1998, pp. 2-4.

In their opposition to the KCS/Tex Mex Joint Petition, Applicants stressed that they were eager to work with KCS/Tex Mex to address Houston/Gulf Coast service issues. In particular, Applicants explained that they had reached an agreement with BNSF to establish a regional dispatching center for Houston-area and Houston-New Orleans trackage, and that

KCS and Tex Mex had been invited to participate in the new dispatching center. Applicants also explained that they were interested in working with KCS/Tex Mex on a voluntary basis as to certain other aspects of the proposals contained in the Joint Petition.

It is therefore rather surprising that, instead of withdrawing their ill-advised Joint Petition, KCS/Tex Mex have pressed forward in an adversarial posture by serving UPRR with a series of document production requests. It is even more surprising that, in explaining the "rationale" for their discovery requests, KCS/Tex Mex say they are seeking to unearth evidence of discriminatory dispatching.

KCS/Tex Mex's decision to search for support for discriminatory dispatching claims through document discovery is surprising for four reasons. First, for several months, KCS/Tex Mex have had the opportunity to see for themselves whether any discriminatory dispatching has been occurring. In the Board's Supplemental Order No. 1 to Service Order No. 1518, served Dec. 4, 1997, p. 5, the Board responded to concerns about UP/SP's ability to favor its own traffic in dispatching operations by directing UP/SP "to permit representatives of BNSF and Tex Mex full access to UP/SP's Spring, Texas, dispatching facility as neutral observers." KCS/Tex Mex did not take advantage of this opportunity until earlier this month, when Tex Mex placed an observer in UP/SP's

existing Spring facility. There is no justification for allowing KCS/Tex Mex to resort to burdensome document discovery to examine UP/SP dispatching practices when a less burdensome and, as discussed below, the only realistic, alternative for monitoring dispatching has long been available.

Second, the Board has recently addressed allegations of discriminatory dispatching by UP/SP. In the Board's decision served February 25, 1998 in Service Order No. 1518 and Ex Parte No. 573, p. 3 n.4, the Board stated: "We have not seen any evidence of preferential dispatching decisions adverse to carriers such as Tex Mex." KCS/Tex Mex have never, at least until now, suggested that the Board's conclusion was wrong.

Third, as mentioned above, UP/SP has repeatedly invited both KCS and Tex Mex to participate in the new consolidated regional dispatching center for Houston and Gulf Coast lines, where they will be able to assure themselves that no discriminatory dispatching is occurring. UP/SP has met with KCS/Tex Mex and has shown them the space in the new dispatching center that has been set aside for their use. But neither KCS nor Tex Mex has yet accepted UP/SP's invitation. Moreover, as discussed above, KCS/Tex Mex have not, until recently, taken advantage of their opportunity to place an observer in UP/SP's dispatching center to assist UP/SP in

coordinating dispatching with KCS/Tex Mex. And since last year, KCS/Tex Mex have had the opportunity to join in the twice-daily conference calls with UP/SP, BNSF and PTRR to discuss traffic flow to and from the Houston area, but they have participated only intermittently. Apparently, KCS/Tex Mex do not agree that participation in a cooperative process is preferable to adversarial posturing.

Finally, KCS/Tex Mex as much as admit that their discovery requests are nothing more than a fishing expedition. In an "introduction" section of their document request filing written in an attempt to justify the requests (pp. 1-2), KCS/Tex Mex acknowledge the Board's February 25 conclusion that discrimination has not occurred, and they offer not a shred of evidence to justify the discovery they now seek.

II. A PROTECTIVE ORDER SHOULD BE GRANTED

A. KCS/Tex Mex Has No Right to Conduct Discovery

KCS/Tex Mex have served their discovery requests in the Board's UP/SP Oversight docket, but those requests are clearly inappropriate in light of the Board's Oversight Decision No. 10, served Oct. 27, 1997. In that decision, the Board made clear that it would conduct annual oversight proceedings, and that "parties seeking immediate, merger-related relief should use [the Board's] ordinary formal complaint or declaratory order procedures." Decision No. 10, p. 18. The Board then indicated that it would commence its

second annual oversight proceeding on August 14, 1998. As there is no oversight proceeding presently pending, and as KCS/Tex Mex have not filed a formal complaint or a declaratory order petition, the KCS/Tex Mex document requests are clearly inappropriate. See 49 C.F.R. § 1114.21(a) (parties "may obtain discovery . . . which is relevant to the subject matter involved in a proceeding") (emphasis added). Furthermore, as explained in Applicants' opposition to the KCS/Tex Mex Joint Petition, KCS/Tex Mex have provided absolutely no basis for the commencement of a proceeding of any kind.

Even if it were appropriate for KCS/Tex Mex to seek Board action in the UP/SP Oversight docket, the Board has never indicated that parties may conduct any discovery in oversight proceedings. Applicants provided appropriate discovery voluntarily in the first proceeding, but the Board rejected arguments by KCS and others for full-blown formal discovery: "There is no reason to open this proceeding for formal discovery procedures as some parties suggested. . . . Formal discovery procedures would . . . complicate this oversight process unnecessarily." Decision No. 10, p. 10. The Board then limited Applicants' and BNSF's obligation in the future annual Oversight proceedings to the provision of traffic data. Id. It thus follows a fortiori that no discovery is proper here. Allowing the oversight process to open the door to wide-ranging discovery would run counter to

Chairman Morgan's view that the oversight process be "one that is not unduly burdensome." Oversight Decision No. 1, p. 9.

B. KCS/Tex Mex's Discovery Is An Impermissible Fishing Expedition for Irrelevant Material, and Would Impose Great and Unjustified Burdens

A protective order is warranted not only because KCS/Tex Mex's discovery requests are procedurally inappropriate, but also because KCS/Tex Mex have provided no basis for their requests and because the requests are extremely burdensome.

1. The Discovery Requests Are a Fishing Expedition

The Board has repeatedly rejected discovery requests that amount to nothing more than fishing expeditions. See, e.g., Docket No. 40411, Farmland Industries, Inc. v. Gulf Central Pipeline Co. Decision served Jan. 6, 1993, p. 3; Docket No. 38676, Changes in Routing Provision -- Conrail -- July, 1981, Decision served Mar. 21, 1988, p. 5. Here, KCS/Tex Mex as much as admit that this is their purpose.

KCS/Tex Mex have provided no basis for the discovery they seek. Despite the fact that more than a year and a half has passed since the UP/SP merger, and despite being granted Board-ordered access to UP/SP dispatching operations and having observed those operations on occasion, KCS/Tex Mex have not pointed to a single incident that they claim demonstrates discrimination. KCS/Tex Mex have not pointed to any evidence that KCS/Tex Mex trains have suffered greater delays as a

result of Houston-area service problems than UP/SP trains. In fact, in their discovery request, KCS/Tex Mex even acknowledge without challenge (p. 2) the Board's statement that it has "not seen any evidence of preferential dispatching decisions adverse to carriers such as Tex Mex."

The only justification that KCS/Tex Mex give for their discovery requests is that "because neither Tex Mex nor KCS have in their possession records relevant to UP's past and present dispatching practices, it is necessary to seek this information from UP" (p. 2). KCS/Tex Mex cannot point to anything that they expect to find as a result of their discovery requests -- they simply want to conduct an open-ended search of massive records. This is the very definition of an impermissible fishing expedition.

It is in fact not surprising that KCS/Tex Mex cannot point to any examples of discrimination. As the attached verified statement of Dennis D. Tholen, UPRR's Assistant Vice President in charge of the Harriman Dispatching Center, explains, UP/SP has issued formal instructions to its dispatchers to dispatch Tex Mex trains in a nondiscriminatory manner. Tholen V.S., p. 2. In the Houston area, UP/SP trains have been delayed as much as, if not more than, KCS/Tex Mex trains, because the problem is congestion, not discrimination. Id.

2. The Discovery Requests Are Unduly Burdensome

As Mr. Tholen explains in his verified statement, compliance with KCS/Tex Mex's extremely broad discovery requests would impose extraordinary burdens on UPRR, and would seriously interfere with UPRR's ongoing service recovery efforts. The document requests are of tremendous breadth, encompassing (a) every computerized or paper record relating in any way to the dispatching of the thousands of UPRR, Tex Mex and BNSF trains that passed through the Houston area during a span of almost nine months; (b) every document relating to any instance in which UPRR did not dispatch its own trains at any location, but wished to do so using a "neutral" dispatcher or a dispatcher selected by UPRR and other carriers; and (c) every document relating to any instance in which UPRR expressed a desire to perform reciprocal switching for itself or by a carrier other than an existing switching carrier. Finally, KCS/Tex Mex literally ask UPRR to prove a negative as to discrimination by producing "all documents" that "prove that KCS and Tex Mex have not received adverse, discriminatory treatment."

The burden of actually producing the requested documents would be overwhelming. As Mr. Tholen explains (p. 1), responding to KCS/Tex Mex's document requests would require UP/SP to devote thousands of hours of programming and staff time to searching files, computer databases and

communications systems in order to find and review almost every document pertaining to UP/SP, BNSF or Tex Mex operations in Houston over a nine-month period. UP/SP does not have the resources to comply with these requests without diverting the energies of personnel directly involved in service recovery efforts (and in UP's efforts to deal with Year 2000 issues).
Id.

To produce the computerized information responsive to KCS/Tex Mex's first request alone would take several months. The UP and SP dispatching systems record millions of items of information every day about train operations in the Houston area. Id., p. 4. Producing these basic dispatching records would be extremely expensive and burdensome and would take several months of programming work. Id., p. 5. In addition, the KCS/Tex Mex requests would also require UP/SP to produce train sheets, which are stored in UP/SP's mainframe computer. Production of these documents would require an estimated 150 days of programming time and possibly twice that much time. Id., p. 6. Information that would probably be responsive to the KCS/Tex Mex is also contained in UP/SP's Transportation Control System and other UP/SP databases. Again, UP/SP would have to engage in an intensive programming effort to extract such data for the Houston area. Id., p. 9.

Mr. Tholen's verified statement explains why responding to KCS/Tex Mex's second request would also be

unduly burdensome burden. In order to respond to this request, UP/SP would be required to locate all documents that reflect congestion on UP/SP's Houston-area lines since last spring, since congestion, not discrimination, is the cause of Tex Mex delays. Id., p. 10. Searching for all such documents would require weeks of labor. The search would have to include virtually every operating, marketing, information service and legal office in the UP/SP headquarters building in Omaha, as well as numerous field offices across the system, since all of them are likely to have documents relating to Houston-area congestion. Id.

Finally, as Mr. Tholen explains (p. 11), responding to KCS/Tex Mex's third and fourth document requests would be unduly burdensome because UP/SP operates over other railroads on hundreds of track segments, and reciprocal switching arrangements exist in many locations, UP/SP would be forced to review all of its joint facility files, as well as the files of personnel who deal with other railroads. In addition, the KCS/Tex Mex requests ask UP/SP to search dispatching records in order to respond to these requests, which would expand the necessary search exponentially. Id.

3. The Burden of Production Would Vastly Outweigh Any Benefit KCS/Tex Mex Could Hope To Gain From Discovery

Even if UP/SP were able to produce all of the dispatching records encompassed by the KCS/Tex Mex requests,

this would only be the beginning of KCS/Tex Mex's quixotic search for evidence of discrimination. In the first place, as Mr. Tholen explains in his verified statement (pp. 5-6), it would take KCS/Tex Mex months to study and analyze not only the dispatching data, but also the daily operating conditions on all the dispatched territories. Moreover, even "with complete records of every dispatching decision made by every dispatcher, KCS/Tex Mex would not be able to understand why the dispatcher made any decision. Most of the information that flows continually to a dispatcher arrives by radio or telephone, or through a verbal communication with a supervisor and is not recorded." Id., p. 5.

As UP has explained before in responding to unfounded allegations of discrimination that were made, and ultimately withdrawn, by SP in 1993-94, dispatching is a complex, difficult process that requires dispatchers to make judgment calls to balance competing factors. Although railroaders commonly believe that dispatchers mishandle their trains, and although there is a natural tendency to recast day-to-day dissatisfactions with a competitor's dispatching decisions as "discrimination," investigation virtually always shows that suspicions of discrimination are unfounded. Moreover, while it is sometimes possible to show immediately after the fact whether a complaint about dispatching has merit, no one can reasonably hope to sort out the pros and

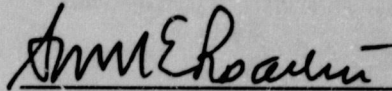
cons of dispatching decisions made days, weeks or months earlier. See Finance Docket No. 32133, Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control -- Chicago & North Western Holdings Corp. & Chicago & North Western Transportation Co., UP's Reply to SP Allegations of "Service Discrimination" (UP/CNW-93), Mar. 30, 1994, pp. 18-26.

Here, KCS/Tex Mex already have a far better alternative than a lengthy legal battle that will be extraordinarily burdensome for everyone involved and will ultimately prove utterly fruitless. UP/SP and BNSF have invited KCS and Tex Mex to participate in the regional dispatching center that will coordinate Houston-area train operations. This is a real solution. KCS/Tex Mex's tactics of failing to participate and then hoping to find some basis for throwing stones should not be countenanced. KCS/Tex Mex have shown no basis for the extraordinarily burdensome discovery they seek, and the Board should not allow it to proceed.

Respectfully submitted,

CARL W. VON BERNUTH
RICHARD J. RESSLER
Union Pacific Corporation
Suite 5900
1717 Main Street
Dallas, Texas 75201
(214) 743-5640

JAMES V. DOLAN
PAUL A. CONLEY, JR.
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000



ARVID E. ROACH II
J. MICHAEL HEMMER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-5388

Attorneys for Union Pacific
Corporation, Union Pacific
Railroad Company and Southern
Pacific Rail Corporation

March 27, 1998

VERIFIED STATEMENT

of

DENNIS D. THOLEN

My name is Dennis D. Tholen. I am Assistant Vice President in charge of Union Pacific's Harriman Dispatching Center in Omaha, Nebraska. I am providing this verified statement in support of UP's Motion for Protective Order (UP/SP-334) submitted on March 25, 1998 in Finance Docket No. 32760 (Sub-No. 21).

I have reviewed the document requests submitted by Kansas City Southern Railway Company ("KCS") and Texas Mexican Railway Company ("Tex Mex"). I am generally familiar with the types of documents and records that would be responsive to these requests and with the expense and burden of finding and producing those documents and records. The KCS/Tex Mex document requests would require UP to devote thousands of hours of programming and staff time to searching files, computer databases and communications systems in order to find and review almost every document pertaining to UP, BNSF or Tex Mex operations in the Houston area over a nine-month period. The documents would include massive volumes of dispatching records, which would take KCS/Tex Mex months to evaluate. UP does not have the resources to comply with these requests, without diverting the energies of personnel directly involved in our service recovery efforts and in bringing us into compliance with Year 2000 information services requirements.

KCS/Tex Mex Requests Nos. 1 and 2, either separately or together, effectively demand every computer record, document or communication that relates to the operation of any of the thousands of UP, BNSF and Tex Mex trains that passed through an undefined "Houston area" during a span of almost nine months. Request No. 1 asks for every document relating in any way to the dispatching of every such train. Request No. 2 asks for every document that shows we did not discriminate against Tex Mex in dispatching its trains. UP has issued formal instructions to its dispatchers to treat Tex Mex trains like UP trains of the same class, but in order to demonstrate the absence of discrimination, one would have to examine the full range of documents and records reflecting how UP operated its own trains, as well as those of other railroads, and all documents reflecting congestion in the Houston area. Congestion is the cause of Tex Mex delays.

REQUESTS NO. 1 AND 2

Dispatching Records

Most UP, BNSF and Tex Mex trains on UP lines in the Houston area are controlled by two large dispatching operations, which were combined during 1997. UP's dispatching operation is based at the Harriman Dispatching Center ("HDC") in Omaha and relies primarily on the Union Switch and Signal Computer-Assisted Dispatch ("CAD") and related systems. SP's dispatching office was located in Denver but was moved to HDC,

where it remains a separate operation relying on SP's Digital Concepts ("DigiCon") system.

In November 1997, UP and BNSF assumed joint responsibility for dispatching HB&T lines in Houston. These lines are dispatched using the DigiCon system from a newly established Houston Control Center. Earlier this month, BNSF and UP expanded the Houston Control Center and began dispatching their joint line between Houston and New Orleans, as well as the HB&T trackage and a portion of PTRR. UP and BNSF have invited Tex Mex and KCS to join this dispatching center.

UP dispatchers control UP's Brownsville Subdivision south of Algoa, Texas; the Beaumont Subdivision from Gulf Coast Junction in Houston past Settegast Yard toward Beaumont; UP's Palestine Subdivision from Settegast Yard to Spring and on toward Longview, Texas; UP's Baytown Branch and other branches; UP's Fort Worth Subdivision from Spring toward Waco; UP's Houston Subdivision through Houston to Galveston; and, until it was closed during 1997, UP's Houston Subdivision toward Smithville. SP dispatchers control the SP Houston Terminals Subdivision within Houston (now controlled by the UP/BNSF Houston Control Center), including the line to Strang Yard; SP's Hearne Subdivision between Houston and Hearne, Texas; SP's Lafayette Subdivision toward Lafayette and New Orleans; SP's Glidden Subdivision to Flatonia; SP's Victoria

Subdivision toward Placedo; SP's Lufkin Subdivision toward Shreveport and various branches in the Houston area.

To evaluate UP dispatching decisions, KCS/Tex Mex would have to study the daily operating conditions on all these dispatching territories. To dispatch trains on the segments BNSF and Tex Mex trains use -- the Beaumont Subdivision, the Lafayette Subdivision, the Glidden Subdivision, the Victoria Subdivision, the Brownsville Subdivision, the Houston Terminals Subdivision and the HB&T trackage -- dispatchers must take into account trains, events and conditions on the other lines in the area. UP dispatchers on the Beaumont Subdivision must also consider conditions on the KCS line east of Beaumont -- which forms part of a through route with the Beaumont Subdivision -- just as KCS dispatchers controlling the KCS line east of Beaumont must consider conditions in the Beaumont area and on the connecting UP line.

The UP and SP dispatching systems record millions of items of data every day about train operations on UP. On lines with Centralized Traffic Control, every time a route is cleared for a train, a switch is opened or closed, or a train or switch engine moves past a control point, the event is recorded. This produces voluminous computer records of operations over each line segment. These records fall within the KCS/Tex Mex discovery requests for computer records that reflect the dispatching of trains of the three railroads.

KCS/Tex Mex cannot recreate a dispatching event without studying all of this data.

Even with complete records of every dispatching decision made by every dispatcher, KCS/Tex Mex would not be able to understand why the dispatcher made any decision. Most of the information that flows continually to a dispatcher arrives by radio or telephone, or through a verbal communication with a supervisor and is not recorded. For example, KCS/Tex Mex might find an instance in which a UP train and a Tex Mex train were held at Tower 86 for a lower-priority BNSF train, but they will never know that the trains were held because the BNSF crew had only 25 minutes to reach South Yard before running out of time under the Hours of Service Law, or that the physical limitations of the plant precluded any other course of action. Computerized dispatching records do not contain information about mechanical defects, crew transport problems, yard conditions, signal failures and other events that determine and explain dispatching decisions.

Producing the basic dispatching records would be extremely expensive and burdensome and would take months of programming work. Studying them would take KCS/Tex Mex much longer than that. In the UP CAD system, dispatching records can be retrieved only for an individual control point -- a switch, a signal, a segment of track -- of which there could

be hundreds in the Houston area, depending on how it is defined. To obtain information about events at a control point requires special programming. I estimate that a skilled programmer could extract one month of data for several control points in a day of work. Extracting data for all the control points for the Houston area since June 1, 1997 would take several months. Someone would then need to evaluate the data, which is highly disjointed. Based on my experience, this would be an almost impossible task on the scale of the KCS/Tex Mex inquiry. And there would be additional data for track warrant territory, such as UP's line between Houston and Galveston. We would need to assign a programmer to download track warrants and then perform a "re-dispatch" of the defined territory, all of which would take months to complete.

The KCS/Tex Mex document requests also would require us to produce train sheets, which are stored in UP's mainframe computer. This, again, would require special programming. I estimate that a skilled programmer would spend not less than three and up to five days to obtain the train sheets for all trains that ran on one UP subdivision during one month. Thus, to obtain train sheets for the UP territories in the Houston area would require not less than 150 days of programming time and possibly almost twice that much time. This is the time required merely to download the data, not to evaluate it.

The SP DigiCon system would present a lesser challenge. DigiCon has "replay" capability, which allows it to replay in real or accelerated time all the actions a dispatcher takes and all the movements over the dispatcher's territory. It does not explain why she or he made a decision, only what happened. The replays for the entire SP dispatching system are recorded on tape, with five to eight days of systemwide activity on a tape. The tapes would have to be loaded overnight by a programmer in Denver. However, we do not have the ability to segregate the territories KCS/Tex Mex would want to inspect from the rest of the system. We therefore would be required to have someone accompany the KCS/Tex Mex reviewer to identify the relevant portions of the tapes and to prevent improper access to other information.

The DigiCon system can also be used to generate train sheet records. These records produce various data reflective of the operation of an individual train and are not integrated to produce a record of all train activities on a particular track segment. Such an effort would require considerable computer programming and dispatching expertise and would take months to complete.

KCS/Tex Mex may be interested in the handling of trains on SP's Houston Terminals Subdivision and on the HB&T in Houston, but in those territories the computerized dispatching records are the least informative. In many

instances, the computer records do not show the identities of the trains. Yard and switch engine movements generally are not identified. In the busy Houston terminal, dispatchers try to move any train they can at every opportunity, regardless who owns it.

UP also maintains additional dispatching documents in computerized form. Each Region Director and Corridor Manager provides a turnover to his or her successor. The turnovers are often, but not always, preserved in UP's computer records. We would have to perform a monumental manual effort to extract from each day's records the turnovers for specific territories. This would be an extremely time-consuming, cumbersome task because the researcher would have to look at each message which is simply constructed of free form text and make a visual determination concerning its pertinence to Houston-area dispatching.

Our Transportation Control System ("TCS") computer system also contains comprehensive information on UP train movement records that may possibly be responsive to the KCS/Tex Mex requests, because it contains records that reflect the movement of UP trains in the Houston area. Currently this information is incomplete because it does not contain information about all trains dispatched in the SP DigiCon system. It would be unrealistic to attempt to utilize this information in its present form. TCS time sequence reporting

edits also prohibit the data from being supplemented with information from another system after the train has reached its destination point. TCS also contains data bases that track UP operations on all corridors of the system. These are voluminous data bases, and all of the information in the databases is historical and does not support replay capabilities. We would have to perform expensive special programming not only to provide the replay capability but also to extract the segments containing Houston-area information.

UP does not have excess computer programming personnel to do all of this work. It could not supply the necessary personnel to assume these monumental tasks without causing a severe negative impact on our ability to operate our railroad. This type of research and programming effort also would jeopardize Union Pacific's efforts to prepare and resolve its information systems Year 2000 challenges.

Recreating dispatching decisions as KCS/Tex Mex are attempting here weeks and months later is virtually impossible. Too many of the reasons are not recorded, and no one can remember them. Dispatching should be monitored and supervised on a current basis. KCS and Tex Mex are welcome to join us in the Houston Control center, which will confirm that we are handling Tex Mex trains fairly.

Other Potentially Responsive Documents

Because congestion, not discrimination, caused delays to Tex Mex trains in the Houston area, in order to respond fully to Request No. 2, we would have to locate all documents that reflect congestion on UP's Houston-area lines since last spring. Searching for all such documents would, of course, be an enormous undertaking and would require weeks of labor. Virtually every operating, marketing, information services and legal office in the Union Pacific headquarters building in Omaha, as well as numerous field offices across the system, would have to be searched, because all of them likely have documents relating to congestion in the Houston area. We do not have the resources to conduct such a search without interfering with operation of the railroad.

REQUESTS NO. 3 AND 4

Request No. 3 asks for all documents reflecting a UP desire to have trains that it operates over other railroads controlled by dispatchers other than those of the owning railroad. Request No. 4 asks for all documents reflecting a UP desire to have reciprocal switching performed by a carrier other than the existing switching carrier. We probably would find documents responsive to Request No. 4, because there are many reasons why railroads might modify reciprocal switching arrangements. For example, railroads sometimes alternate in performing reciprocal switching. The problem would be finding

these documents, and looking for any document that might be responsive to Request No. 3.

UP operates over other railroads on hundreds of track segments, and reciprocal switching arrangements exist in so many locations that even identifying all the agreements would be difficult. To respond to the KCS/Tex Mex requests, UP would be forced to review joint facility files for every one of the hundreds of trackage rights arrangements in which it operates over another carrier, as well as the files of all UP personnel who deal with other railroads. It would also be required to review correspondence with reciprocal switching partners in every terminal and location where reciprocal switching takes place, searching both headquarters and local offices. These searches would require weeks of work.

The search would not end there. KCS asks us to search dispatching records in order to respond to these requests. This means that we would have to review every internal memorandum, turnover and administrative message generated by either the SP or the UP dispatching center to ascertain whether it might contain a passing comment of the sort KCS/Tex Mex wants to find. Since almost every dispatching territory involves a trackage rights or reciprocal switching area, I believe that a searcher could spend a full year on this task alone.

VERIFICATION

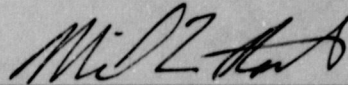
I, Dennis D. Tholen, declare under penalty of perjury that the foregoing statement is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on March 27, 1998.

Dennis D. Tholen

DENNIS D. THOLEN

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 27th day of March, 1998, 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).

A handwritten signature in dark ink, appearing to read "Mi. L. Rosenthal", written over a horizontal line.

Michael L. Rosenthal

STB

FD

32760

(Sub 21)

10-23-97

I 183344

SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036

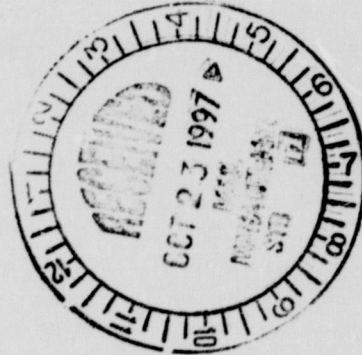
WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III

202 347-7170

October 23, 1997

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423



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

Dear Mr. Secretary:

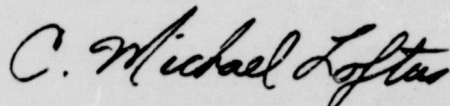
Enclosed for filing in the above-referenced proceeding please find a separately packaged original and twenty-five (25) copies of the HIGHLY CONFIDENTIAL VERSION of the Petition of Entergy Services, Inc. and Entergy Arkansas, Inc. for Modification Of Decision No. 44, Or In The Alternative, For Additional Condition (ESI-28) (the "Petition"), which is being filed under seal in accordance with the procedure set forth at 49 C.F.R. § 1104.14. In addition, please find an original and twenty-five (25) copies of the PUBLIC, REDACTED VERSION of the Petition (ESI-29). In accordance with prior orders in this proceeding, we have also enclosed a Wordperfect 5.1 diskette containing the HIGHLY CONFIDENTIAL VERSION of the Petition.

Extra copies of these filings are enclosed. Kindly indicate receipt and filing by time-stamping these copies and returning them to the bearer of this letter.

The Honorable Vernon A. Williams . . .
October 23, 1997
Page 2

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "C. Michael Loftus".

C. Michael Loftus
An Attorney for Entergy Services,
Inc. and Entergy Arkansas, Inc.

CML/raw
Enclosures

cc: Arvid E. Roach II, Esq.
Paul A. Cunningham, Esq.
Parties of Record

STB FD 32760 (Sub 21) 10-23-97 I 183342

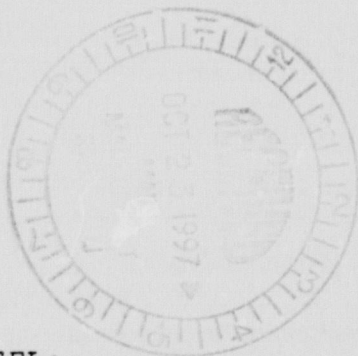
BEFORE THE
SURFACE TRANSPORTATION BOARD

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 Nos. 32760-183341
and 32760 (Sub-No. 21) - 183342

PETITION OF ENTERGY SERVICES, INC.
AND ENTERGY ARKANSAS, INC. FOR
MODIFICATION OF DECISION NO. 44 OR, IN
THE ALTERNATIVE, FOR ADDITIONAL CONDITION

PUBLIC, REDACTED VERSION



OF COUNSEL:

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

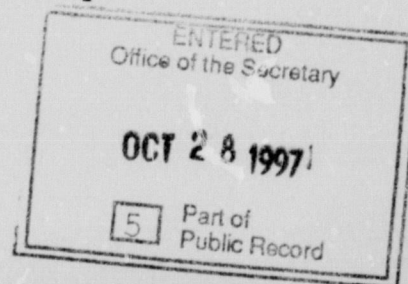
Dated: October 23, 1997

ENTERGY SERVICES, INC. and its
affiliate ENTERGY ARKANSAS, INC.

By: O. H. Storey
Deputy General Counsel
Entergy Services, Inc.
Mail Unit L-ENT-26D
639 Loyola Avenue
New Orleans, LA 70113

C. Michael Loftus
Frank J. Pergolizzi
Andrew B. Kolesar III
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Their Attorneys



Bluff") near Redfield, AR, so as to permit Burlington Northern and Santa Fe Railway Company ("BNSF"), on an immediate but temporary basis, to serve the White Bluff plant via its trackage rights over UP between Pine Bluff and Little Rock, AR, rather than via a build-out from the plant to Pine Bluff. Entergy requests that such interim BNSF service be effective for a period of three years, which is the estimated length of time required for Entergy to design, permit and construct a build-out from the White Bluff plant to Pine Bluff.

BACKGROUND

In Decision No. 44, the Board granted Entergy's request for a condition authorizing BNSF's use of its trackage rights between Memphis and Pine Bluff, AR¹ to serve the White Bluff plant upon completion of a 21-mile build-out from the plant to Pine Bluff. See Decision No. 44 at 154, 185, 232. This condition, which will be referred to herein as the "White Bluff condition," was intended to preserve a competitive alternative to UP for the transportation of PRB coal (which can be originated by either UP or BNSF) to the White Bluff plant. Under the White Bluff condition as imposed, however, BNSF cannot use these trackage rights to serve White Bluff independently of UP unless and until Entergy constructs the build-out line.

¹ The Memphis-Pine Bluff line segment is part of SP's line between Memphis and Houston, over which BNSF has obtained trackage rights pursuant to its settlement agreement with Applicants ("BNSF agreement").

The build-out line would parallel UP's existing line between Pine Bluff and Little Rock, which is the line UP presently uses to serve the White Bluff plant. (Entergy has a private spur that connects the plant with UP's Pine Bluff-Little Rock line at Redfield, AR.) Under the BNSF agreement, BNSF also received overhead trackage rights over the UP line between Pine Bluff and Little Rock, but these rights do not include the right to serve any shipper facilities located at intermediate points, such as the White Bluff plant.² A schematic showing these lines and the location of the White Bluff plant is attached hereto as Counsel's Exhibit 1.

After the UP/SP merger was consummated, BNSF began serving Little Rock via haulage. According to its Quarterly Progress Report filed in the merger oversight proceeding on October 1, 1997, BNSF intends in the near future to begin operating its own trains between Pine Bluff and Little Rock using the trackage rights available to it under the BNSF agreement. (BNSF Quarterly progress Report dated October 1, 1997 (BNSF-PR-5), Verified Statement of Ernest L. Hord at 21.)

² Notwithstanding the waste of societal resources entailed in building a duplicate line parallel to an existing line, Entergy did not seek a condition requiring direct BNSF service to the White Bluff plant using its trackage rights over UP's Pine Bluff-Little Rock line because, under existing precedent, such a condition would almost certainly have been denied as putting Entergy in a better position than it was in prior to the UP/SP merger. The build-out condition was intended to preserve, as closely as possible, Entergy's pre-merger competitive transportation options at White Bluff. Cf. Finance Docket No. 32549, Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation, et al., Decision No. 38 (served August 23, 1995) at 68.

As detailed in Entergy's March 29, 1996 Comments (ESI-12), all of the PRB coal traffic presently moving to the White Bluff plant and to Entergy Arkansas' other coal-fired power plant, the Independence Steam Electric Station ("Independence") near Newark, AR, is presently committed to UP (which directly serves both plants) under a rail transportation contract that expires on December 31, 1999 (the "Interim Agreement").³ See Verified Statement of Roy A. Giangrosso in ESI-12 at 6-7. Each of the two plants consumes approximately 6.5 million tons of coal annually under normal conditions; the 13 million tons of coal transported annually to these plants make Entergy Arkansas UP's largest single PRB coal customer. (Id. at 4, 6.)

As the Board is well aware from extensive recent news media coverage,⁴ and as UP has acknowledged in Applicants' Third Quarter 1997 Progress Report (UP/SP-323) in the merger oversight proceeding, UP's service, particularly south of Kansas City and extending into Arkansas, Oklahoma and Texas, has deteriorated

³ Entergy has two rail transportation contracts with UP executed in 1983, referred to as the "1983 Agreements," which have been suspended while the Interim Agreement is in effect but which become effective again (subject to renegotiation of certain rate terms) when the Interim Agreement expires. Under the 1983 Agreements, Entergy is committed to ship to White Bluff and Independence.

⁴ See, e.g., "Wrong Track; A Big Railroad Merger Goes Terribly Awry In a Very Short Time," The Wall Street Journal, October 2, 1997. A copy of this article is attached hereto as Counsel's Exhibit 2.

drastically in the past few months.⁵ Entergy Arkansas has experienced the effects of this service deterioration first-hand. Its Interim Agreement with UP contains a service standard, under which UP has committed to transporting coal from the PRB mines to White Bluff

"Elapsed Transit Time" (which excludes specified time for loading coal trains at the mines and unloading them at the plants) of hours in the case of White Bluff and hours in the case of Independence. See the accompanying Verified Statement of Charles W. Jewell, Jr. ("Jewell V.S.") at 5.

UP's performance under its contractual service standard has been very poor -- and it is getting worse.

UP's average Elapsed Transit Time was hours for coal trains moving to the White Bluff plant and hours for coal trains moving to the Independence plant; these cycle times exceeded the contractual standard by an average of hours in the case of White Bluff and hours in the case of Independence. UP's average Elapsed Transit Times ballooned to hours for White Bluff and hours for Independence. On average,

⁵ Indeed, the Board itself has indicated that "[t]he recent operational difficulties that have been experienced by UP/SP are well known. . . ." Finance Docket No. 33469, Application of the National Railroad Passenger Corporation Under 49 U.S.C. 24308(a) -- Union Pacific Railroad Company and Southern Pacific Transportation Company, Decision served September 30, 1997, at 1. UP's present service problems were further acknowledged by the Board in its Decision served October 2, 1997, in Ex Parte No. 573, Rail Service in the Western United States, instituting a proceeding to focus on "the immediate resolution of existing [service] problems." Id. at 1.

UP exceeded its contractual service standard by _____ hours, or
%.⁶ These cycle times resulted in net "deficit tonnage" (the
volume of coal UP should have transported in Entergy's 18 new
aluminum trainsets had it met its contracted service standard) of
more than

. Jewell V.S. at 6-7.⁷

The ramifications of UP's increasingly bad cycle times
for Entergy Arkansas' coal tonnage are significant. The inven-
tory of coal stockpiled at the White Bluff and Independence
plants, which Entergy targets at _____ days' burn, has dwindled to
_____ days in the case of White Bluff and _____ days in the case of
Independence. Entergy Arkansas has had to curtail burn (and thus
the generation of electricity) at these plants, and as a result
the Entergy system, which is economically dispatched, has had to
purchase more expensive power from the grid and use more expen-
sive power generated at its gas-fired plants. Given UP's virtual
service meltdown south of Kansas City, the situation is approach-

_____ UP
exceeded its service standard by an average of _____ hours, or
. This means that Entergy's trains are taking more than
_____ longer to complete train cycles than they should.

⁷ Under the Interim Agreement, one remedy for UP's breach
of the cycle time standard is that UP can "make up" a deficit
if it fails to do so, must pay liquidated damages _____, and
_____. However, as a practi-
cal matter, UP has "rolled over" deficits
and the cumulative deficit is getting larger and larger. As
Entergy alleges in the court complaint described below in the
text, the Interim Agreement does not permit these make-up provi-
sions to be in lieu of UP ever meeting the contractually pre-
scribed cycle times.

ing critical proportions and Entergy does not expect UP's service to return to "normal" levels

in the foreseeable future. Id. at 8.

Entergy has repeatedly informed UP of the vital importance of compliance with the contract service standards, and of the worsening situation in terms of inventory and reduced coal burn at the White Bluff and Independence plants. On September 23, 1997, Entergy wrote to UP and informed it that the situation had deteriorated to the point where Entergy believed UP had materially breached its contractual obligations under the Interim Agreement. In the same letter (a copy of which is appended to the Jewell V.S. as Exhibit CWJ-2), Entergy requested UP's permission to waive the 100%-volume requirement of the Interim Agreement and its cooperation in making alternative transportation arrangements with other carriers, in particular BNSF. Finally, Entergy requested assurances from UP as to its ability to meet its contracted service commitments in the future.

On October 3, 1997, UP responded to Entergy's letter. The response, a copy of which is appended to Mr. Jewell's testimony as Exhibit CWJ-3, did not provide the kind of assurances Entergy requested

UP's program for remedying its service meltdown is very general in nature, and contains no representations as to when its

PRB coal service will return to normal levels.⁹

Given UP's continuing service deterioration and its refusal to respond to Entergy's entreaties, on October 3, 1997, Entergy filed suit in the United States District Court for the Middle District of Louisiana alleging that UP has materially breached both the Interim Agreement and the underlying 1983 Agreements due to its continuing failure to meet the contractual service standards, and seeking both the right to terminate the agreements and damages. Entergy Services, Inc. and Entergy Arkansas, Inc. v. Union Pacific Railroad Company, Civil No. 97-967-B-M3 filed October 3, 1997. A copy of the complaint in this action is appended to Mr. Jewell's testimony as Exhibit CWJ-4.

⁹ It should be noted that the program is set forth in a pleading by counsel with no accompanying sworn testimony. UP's unsworn representations are to be contrasted with the statements in Applicants' Progress Report dated July 1, 1997 (which did contain verified statements by UP operating officials). In its July 1 Progress Report, UP stated that its coal service "has consistently exceeded its own performance goals and contractual performance commitments for Powder River Basin coal shippers in recent months. Indeed, performance levels have reached all-time records." Id. at 42.

If the relief requested in its complaint is granted, Entergy will be free from its contractual volume obligations to UP.

The Board should understand that Entergy is not asking it either to interpret Entergy's rail transportation contracts with UP, or otherwise to interject itself into Entergy's contractual relationship with UP. That is clearly a matter for the court in Louisiana, not the Board. Rather, Entergy is seeking the Board's assistance in enabling it to make alternative transportation arrangements for transporting PRB coal to White Bluff during the present UP service emergency. The action by the Board which Entergy requests herein would remove a possible impediment to Entergy's obtaining effective relief from the United States District Court in Louisiana, where its action for breach of contract is pending.

ARGUMENT

I. THE BOARD SHOULD MODIFY THE CONDITION IMPOSED
FOR ENTERGY'S BENEFIT BY PERMITTING BNSF TO
USE ITS PRESENT UP OVERHEAD TRACKAGE RIGHTS
TO SERVE THE WHITE BLUFF PLANT

In Decision No. 44, the Board held that conditions to its approval of the UP/SP merger would be imposed if:

the merger produces effects harmful to the public interest (such as a significant loss of competition) that a condition will ameliorate or eliminate. A condition must also be operationally feasible, and produce net public benefits.

Decision No. 44 at 144. See, also, Union Pacific -- Control --
Missouri Pacific; Western Pacific, 366 I.C.C. 469, 562-565

(1992), aff'd sub. nom. Southern Pacific Transp. Co. v. I.C.C., 736 F. 2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985).

The Board applied these criteria in imposing the White Bluff condition. That condition requires UP to permit BNSF to use its overhead trackage rights between Memphis and Pine Bluff (which it obtained under the BNSF agreement) to serve Entergy's White Bluff plant via a build-out if and when the build-out is constructed. Id. at 154, 185. The condition was intended to preserve Entergy's pre-merger option of building out to SP at Pine Bluff, thereby providing an all-rail competitive option to UP in transporting PRB coal to White Bluff. Id. at 154.

In Decision No. 44 the Board also imposed a five-year oversight condition. The express rationale for this condition was to:

retain jurisdiction to impose additional remedial conditions if, and to the extent, we determine that the conditions already imposed have not effectively addressed the competitive harms caused by the merger.

Id. at 146. The oversight condition further required that both Applicants and BNSF submit quarterly progress reports and implementing plans regarding compliance with, and the effectiveness of, the conditions imposed.

On May 7, 1997, the Board instituted a proceeding in Finance Docket No. 32760 (Sub-No. 21) to implement the oversight condition imposed in Decision No. 44. In its Decision No. 1 in the oversight proceeding, the Board reiterated that, by imposing

the oversight condition, it intended to retain jurisdiction to impose additional remedial conditions if necessary to assure the effective resolution of competitive problems created by the merger. Id. at 3.

Entergy submits that the build-out preservation condition imposed for its benefit in Decision No. 44 is inadequate to protect it from competitive harm during the present UP service crisis, and that the public interest requires that the condition be modified to permit BNSF immediate access to the White Bluff plant in order to provide a coal transportation alternative to UP. UP has proved wholly unable, in recent months, to provide service at the level contemplated by its rail transportation contract with Entergy -- with the result that Entergy's coal inventory at both the White Bluff and Independence plants has dwindled to dangerously low levels, requiring curtailment of coal burn (and electric generation) at these plants.

The modified condition requested by Entergy is operationally feasible, and will produce a net public benefit by enabling Entergy to continue to provide its customers throughout Arkansas with the low-cost electricity generated by the White Bluff and Independence plants.¹⁰ With respect to operational

¹⁰

feasibility, BNSF already has overhead trackage rights on UP's line between Pine Bluff and Little Rock, which is the very same line used by UP to serve the White Bluff plant.¹¹ In its October 1, 1997 Quarterly Progress Report, BNSF has indicated that it is in the process of converting its present haulage arrangement with UP into a full-fledged trackage rights operation. It would be a simple matter for BNSF coal trains to use this same line in delivering coal to the White Bluff plant, which is connected to the UP line at Redfield, AR, by Entergy's private rail spur.

Moreover, BNSF service to White Bluff would not entail any additional train movements over the Pine Bluff-Little Rock line. The volume of coal moving to White Bluff would not change from normal levels; BNSF trains (using some of Entergy's private trainsets that are now in UP service) would simply replace UP trains. The only operational difference is that BNSF coal trains would enter the line from the east, at Pine Bluff, rather than from the west, at Little Rock, as UP trains do.

Entergy recognizes that its proposed modification to the White Bluff condition would enable BNSF to serve the White Bluff plant sooner than if it were required to wait for Entergy to construct the build-out from the White Bluff plant to Pine Bluff.¹² However, the public interest requires that BNSF be

¹¹ See Counsel's Exhibit 1 which shows the BNSF trackage rights between Memphis-Pine Bluff-Little Rock, as well as the locations of the White Bluff and Independence plants.

¹²

(continued...)

permitted access to White Bluff immediately, so that Entergy can begin the process of restoring the coal inventories at the White Bluff and Independence plants to a level that assures coal burn will not continue to be curtailed.

Moreover, Entergy is not seeking permanent direct access to BNSF using its Pine Bluff-Little Rock trackage rights, but only access during the present UP service crisis. Entergy is not sanguine that UP can return to anything approaching normal service levels in the foreseeable future. Accordingly, it requests that BNSF be permitted to serve the White Bluff plant for a period of three years (the estimated time required to construct and place in service a build-out line to Pine Bluff). If the build-out is not completed within three years, BNSF's ability to serve the plant directly would terminate until such time as the build-out is completed.

In further support of its proposed modification to the White Bluff condition, Entergy notes that in Applicants' Third Quarter 1997 Progress Report filed October 1, 1997 in the merger oversight proceeding, UP has made certain representations concerning its willingness to relieve PRB coal shippers from their contractual obligations in order to help ease its service crisis. In particular, UP states:

Working collaboratively with its utility customers in Texas, UP/SP has allowed shippers to shift coal to other carriers,

¹² (...continued)

including traffic subject to UP/SP contracts. These arrangements include . . . agreeing that movements by BNSF be credited to the uncommitted volume in contracts with volume commitments, and agreeing to relax volume commitments where necessary to allow BNSF to handle traffic. . . .

Id. at 17.¹³ UP has indicated that these measures will shift a total of four million tons of coal off its system over the next 15 months. Id. at 18.

These representations sound good on paper

¹³ UP also represents that it is taking steps to have MNA move empty coal trains from Newport, Arkansas to Pleasant Hill, Missouri. Id.

This is a step that could and should have been taken many months ago. Indeed, prior to UP's sale of its line serving the Independence plant to the MNA in 1993, this shorter route was used by all Independence coal trains, both loaded and empty. Jewell V.S. at 10.

II. ALTERNATIVELY, THE BOARD SHOULD IMPOSE AN
ADDITIONAL CONDITION PERMITTING BNSF TO
SERVE WHITE BLUFF ON AN INTERIM BASIS

If the Board is not inclined to modify the White Bluff condition in the manner requested by Entergy, then it should impose a new condition permitting BNSF to serve the White Bluff plant as a temporary matter. Such a condition should allow direct BNSF service to White Bluff, in the manner described above, for a period of three years from the effective date of the condition. The condition should provide that direct BNSF service to White Bluff will terminate after three years if Entergy has not completed the White Bluff build-out by then.

The Board clearly has the authority to impose such an additional condition if it finds it necessary to ameliorate "effects harmful to the public interest" produced by the UP/SP merger. Decision No. 44 at 144. The Board has retained oversight jurisdiction in the merger proceeding, and expressly reserved jurisdiction to impose "additional remedial conditions"

both in Decision No. 44 (at 146) and in Decision No. 1 in the separate oversight proceeding (at 3).¹⁴

There is no question that Entergy's present predicament at White Bluff and Independence is largely a consequence of UP's failure to implement the UP/SP merger in an orderly manner. Although it puts a somewhat different spin on its service problems in its October 1 Progress Report, UP clearly has failed to plan properly, and has moved far too quickly, in implementing its merger with SP. It makes a number of excuses for this, such as pointing to the "time-consuming New York Dock negotiating process" and its lack of prior understanding of "the fundamental frailty of SP prior to the merger, resulting from more than a decade of financial deprivation." Id. at 10. The bottom line, however, is that the merger clearly is a major factor that has caused UP's service to utility coal shippers such as Entergy to deteriorate to the point where drastic remedial action is required to avoid a real crisis.

Once again, the Board should understand that by imposing an additional condition permitting BNSF to use its existing overhead trackage rights to serve the White Bluff plant, the Board would not be either interpreting Entergy's rail transportation contract with UP or otherwise interfering with the parties' contractual relationship. Entergy has filed a breach of contract

¹⁴ Further support for the Board's authority to grant relief to remedy an emergency situation involving traffic congestion lies in the "directed service" provisions of 49 U.S.C. § 11123.

action in federal district court in Louisiana, and it is for the court to determine if Entergy may terminate its contract with UP. If the court grants the relief requested by Entergy, then Entergy will be in a position to make use of the relief requested from the Board in the instant Petition. On the other hand, absent the relief requested from this Board, Entergy may be unable to obtain an effective remedy from the court in Louisiana.

CONCLUSION

For all of the foregoing reasons, Entergy respectfully requests that the Board either modify the White Bluff condition imposed in Decision No. 44, or impose a new condition, in either case permitting BNSF to use its existing overhead trackage rights between Pine Bluff and Little Rock, AR to serve the White Bluff plant for a period of three years (the period required to design,

permit and construct the build-out contemplated by the original White Bluff condition).

Respectfully submitted,

ENTERGY SERVICES, INC. and its
affiliate ENTERGY ARKANSAS, INC.

By: O. H. Storey
Deputy General Counsel
Entergy Services, Inc.
Mail Unit L-ENT-26D
639 Loyola Avenue
New Orleans, LA 70113

OF COUNSEL:

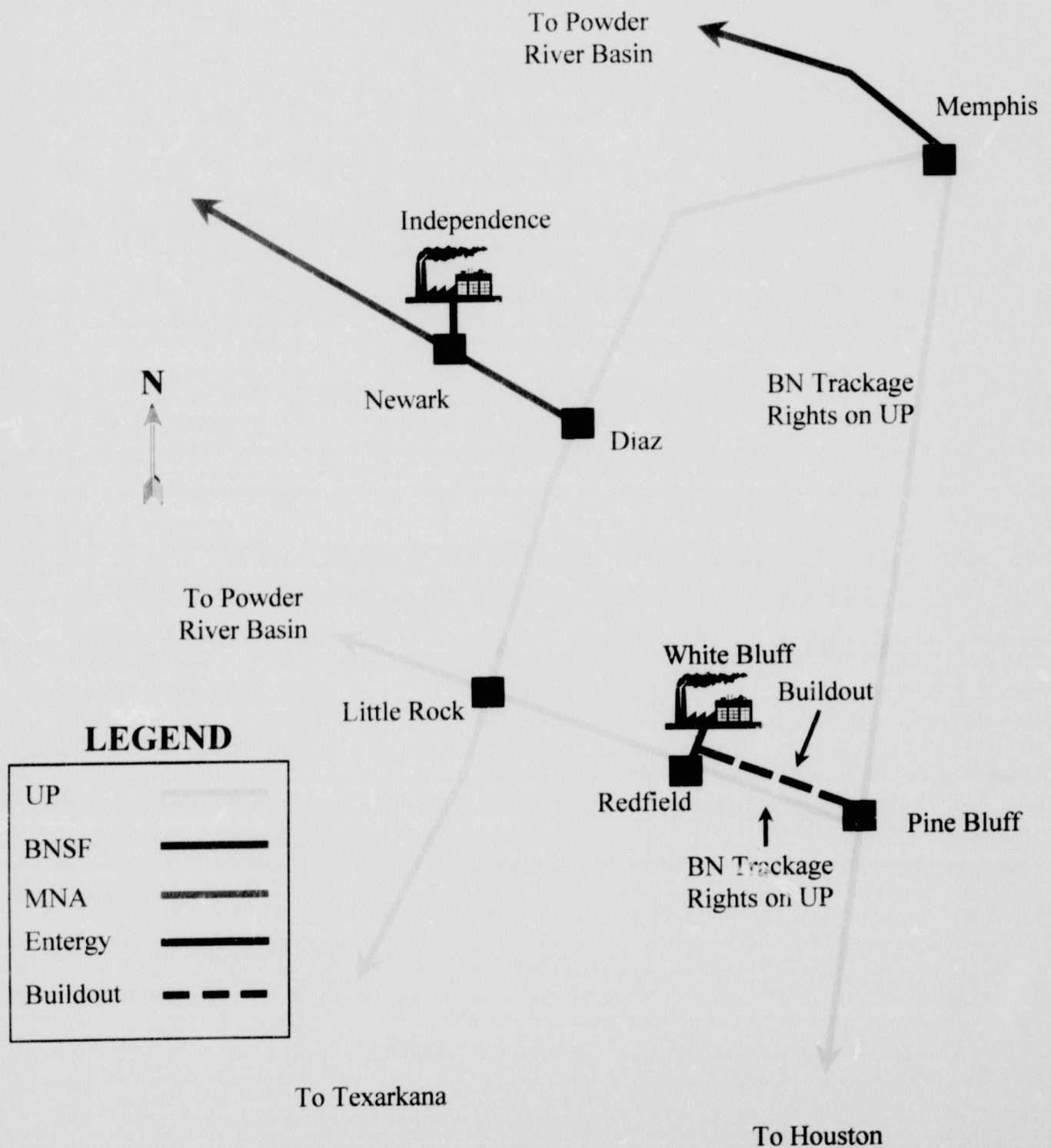
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

C. Michael Loftus
Frank J. Pergolizzi
Andrew B. Kolesar III
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: October 23, 1997

Their Attorneys

Schematic of Principal Rail Lines in Arkansas



THE WALL STREET JOURNAL THURSDAY, OCTOBER 2, 1997

Wrong Track

A Big Railroad Merger Goes Terribly Awry In a Very Short Time

**Union Pacific Is Hammered
Over Service and Safety;
Have Patience, It Says
Have You Seen Our Rice?**

By DANIEL MACHALABA
Staff Reporter of THE WALL STREET JOURNAL

Its railroad safety record, marred by three fatal crashes in three months, is being characterized as a "fundamental breakdown" by federal regulators. Its route system west of the Mississippi River has slipped into near gridlock in many places, with thousands of freight cars backed up in the Houston area alone. Its chairman was forced to publicly apologize in August to its big customers.

So bad has service become that customers say Union Pacific Corp., the nation's largest railroad, can't account for millions of dollars of shipments for weeks at a time. Riviana Foods Corp., a Texas rice producer, tried to ship a freight car full of rice from Missouri to Tennessee in early August. A month later, the car was spotted on a track in Devil's Slide, Utah. The latest word is that it was somewhere in Texas. "I still don't know where it's at," says Terry Nickens, Riviana's distribution manager.

Is this any way to run a railroad?

A Major Debacle

Union Pacific's attempts to put together the biggest railroad merger in history is fast becoming one of the industry's biggest debacles. With high hopes last year, the company bought Southern Pacific Rail Corp. for \$3.9 billion and promised to begin merging the systems this summer into a seamless link between the West Coast and the Midwest.

Instead, with amazing speed, the merger has unraveled in recent weeks into a series of service and safety snafus. Analysts estimate the carrier has already lost about \$125 million in revenue as customers diverted shipments. Hundreds of customers have threatened to take away business, and the Federal Railroad Administration could well impose stiff fines on the company for safety violations. The company concedes that its service problems will reduce its third-quarter earnings by 10% to 15%. And the stock price has fallen 13% in the past month.

Yesterday, things got worse. The Dallas-based company said it would abandon an embarrassing plan to move goods by ship through the Panama Canal—a plan that was rejected this week by its customers. Instead, in an even-more-remarkable step, it agreed to hand over some of its business to competing railroads and to "borrow" the services of dozens of former managers from Eastern railroads to help untangle the mess.

Surprised Observers

The setbacks have startled industry observers, who only a few months ago expected the merger to go smoothly, especially because Union Pacific had had a sterling reputation in railroading.

"They thought they could conquer the world," says William Withuhn, transportation curator at the Smithsonian Institution in Washington and a widely recognized expert on railroads. "They were counting on having a great success. But they just didn't plan it right. It fell apart."

Union Pacific acknowledges that it has been caught by surprise — and humbled by the experience. Richard Davidson, its chief executive, said in an interview after a recent meeting with more than 200 angry chemicals-company officials and other shippers in Houston: "I never imagined in my wildest dreams that I'd be down here apologizing for our service." Yesterday, a Union Pacific spokesman said, "There's no denying we have severe service problems, but we are making headway."

Problems Acknowledged

The carrier's executives concede that they overestimated their ability to combine giant rail systems operating hundreds of thousands of freight cars. Its own long record of success, unmatched through much of the late 1980s and early 1990s, may have bred overconfidence. "We are arrogant," Greg Garrison, Union Pacific's Houston superintendent, said last month. "We consider ourselves the best."

Union Pacific's woes raise troubling questions about how well railroads can transport goods in the nation's ever-growing economy. For more than a decade, the industry has been on an unprecedented merger binge that was supposed to give the remaining five powerful railroads a better chance at competing against trucks, which now earn nearly 80% of the nation's freight revenues. That improvement, in turn, was supposed to help reduce everything from highway congestion to air pollution to fuel consumption. Consumers would gain, too, because railroads can haul goods about 20% more cheaply than trucks can, with much of the saving to be passed on to the public.

But Union Pacific's problems suggest that the railroads are a long way from fulfilling this promise and that shippers may be discouraged from using them. Chemicals companies on the Gulf Coast have been switching to trucks whenever possible because Union Pacific's delays have cost them an estimated \$100 million in plant closings, lost revenues and extra expenses.

In Waverly, Ohio, Mill's Pride Inc., a maker of prefabricated kitchens that had turned to railroads to save money, says it

Please Turn to Page A13, Column 1

Big Railroad Merger Quickly Goes Awry

Continued From First Page

has dropped Union Pacific and the railroad industry entirely. "They give us excuses. They have derailments, floods, breakdowns, snow, just stuff you wouldn't think would happen," says Armando Sanchez, the distribution manager. "You would think, if a truck can get through, why can't they?"

Moreover, Union Pacific's headaches pose a threat to the next great railroad merger—the \$10 billion breakup of Conrail Inc. between Norfolk Southern Corp. and CSX Corp. Once considered almost certain to be cleared by the government's Surface Transportation Board, the merger is now raising questions from members of Congress, labor unions and community leaders worried about a repeat performance.

An Enormous Challenge

To be sure, Union Pacific faced an enormous challenge in trying to create a system with 36,000 miles of track and more than 150,000 freight cars. What's more, the company it was buying, Southern Pacific, was the weakest of the major railroads; it suffered from inadequate investment in freight yards and locomotives. Some industry executives, who jokingly called it "the Suffering Pacific," say it couldn't have survived on its own over the long haul.

Nevertheless, Union Pacific officials hoped that the merger, which became effective in September 1996, would yield huge rewards, not only through major cost savings but by increasing freight business with more direct routes between the Midwest and West Coast. Southern Pacific's major routes stretch in a great arc from Portland, Ore., to Los Angeles, Houston, St. Louis and Chicago; Union Pacific forms a large funnel-like system, from the Midwest to Salt Lake City, with branches to Seattle, Oakland, Calif., and Los Angeles. Combining the two, Union Pacific promised, would slash delivery times as much as 20%, more than enough to win new business.

But company officials concede that they badly underestimated the number of crews and locomotives they would need; in part, they relied on their past success in acquiring other railroads. Those mergers allowed Union Pacific to lay off great numbers of employees and still keep the trains running. But instead of adding to a combined work force of 53,000, the company offered buyouts to more than 1,000 workers at a time when freight shipments were booming nationwide.

"We miscalculated," says Mr. Garrison, the Houston superintendent. "It upset a lot of customers."

The Houston Trouble

The company also cut back operations at an important railyard near Houston, shifting 300 freight cars a day to the bigger but overtaxed Englewood yard in Houston 20 miles away. The result: Within a few weeks, the bigger yard was swamped, causing delays of as long as a month in various areas. "The yard is like a coffee cup that's already too filled," says Rick

Carswell, a yard manager at Englewood. "It just overflowed."

In a railroad, delays at a hub can quickly spread throughout the system—and this one did in a big way. By August, at the start of the peak season for shipping holiday merchandise, trains were backed up for miles along the Gulf Coast.

In one 7-mile stretch outside Houston recently, five Union Pacific freight trains—each with about 100 cars—were backed up nose to tail; frustrated crews were simply taken off, leaving the trains unmanned. "Finally, you throw up your hands and say the heck with this," says Bert Hohlt, a Union Pacific crew member after a particularly grueling run aboard a Texas-to-Chicago freight train.

A Union Pacific spokesman says floods in Texas as well as hurricane-related damage in the Gulf Coast region compounded the problems. The company tried to persuade its labor unions to agree to new flexible work rules, but the unions didn't go along until last month. By then, the snarl had spread to Union Pacific's facilities in the Los Angeles/Long Beach harbor complex, where as many as 3,000 containerized shipments have been piling up for lack of freight cars. "I've never seen it this bad," says David McLean, director of global marketing for Circle International Inc., of San Francisco, which arranges freight transportation for major firms.

Through its buyouts, Union Pacific also encouraged an exodus of many Southern Pacific executives and managers, whom industry officials said were skilled at keeping the weaker line going. "They lost a lot of institutional knowledge," says Ed Emmett, president of the National Industrial Transportation League, which represents about 1,200 rail and truck customers.

What's more, the exodus aggravated the clash of corporate cultures that a merger would be sure to provoke. Led by the 6-foot-4-inch Mr. Davidson, who surrounded himself with equally imposing subordinates, Union Pacific runs a well-heeled and aggressive rail operation out of its Omaha, Neb., rail headquarters. Executives there, accustomed to using the latest equipment to dispatch trains and repair tracks, were skeptical about the talents of many Southern Pacific people. Former Southern Pacific executives say many of their suggestions were ignored. "You are merging two cultures, one that had no money and one that had a lot of money," says Art Shoener, who resigned last week as Union Pacific's executive vice president for operations.

Traditions Slighted

Most merging railroads, to bolster morale, have tried hard to preserve the traditions of their predecessors. But recently, Union Pacific replaced the name of a famous Southern Pacific high-speed freight train, the Memphis Blue Streak, with the symbol "IMELB" (standing for Intermodal Memphis to Long Beach train). "It was an inspirational thing," says Fred

Frailley, who wrote a book about the Blue Streak. "The Memphis Blue Streak was the heart and soul of the Southern Pacific. But all that was lost on the Union Pacific." In response, a Union Pacific spokesman says: "That's the least of our concerns right now."

Yesterday, the company hit what analysts described as rock bottom: It announced a service-recovery plan that appears to mirror parts of a rescue operation outlined by its chief rival, Burlington Northern Santa Fe Corp. Union Pacific said it would temporarily divert certain business, including coal, grain and automobile shipments, to other railroads throughout the western two-thirds of the country, including Burlington Northern. In addition, Union Pacific plans to reroute trains around congested hubs and use less-busy freight yards to handle more of its business. It also said it would operate fewer trains and reduce the number of locomotives on its faster trains and spread them around the system.

"Everyone at our company is working hard on restoring service to levels that will satisfy our customers," Mr. Davidson said in a statement yesterday.

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

VERIFIED STATEMENT OF
CHARLES W. JEWELL, JR.

My name is Charles W. Jewell, Jr. I am the Director, Coal Supply for Entergy Services, Inc. ("ESI"). My office address is 10055 Grogans Mill Road, Suite 300, The Woodlands, Texas 77380.

I joined ESI (in my present position) on March 31, 1997. Prior to joining Entergy, I was employed by PacifiCorp, a large investor-owned electric utility operating in the northwestern United States, as Director of Coal and Fuel Supply. I held that position for approximately four years. Prior to joining PacifiCorp, I worked for several coal companies, primarily in the financial and business development areas. I have a B.S. in Accounting from West Virginia University and a Masters in Business Administration from Marshall University.

As Director, Coal Supply for ESI, I am responsible for the acquisition of coal and related transportation for all of the electric utility operating subsidiaries of Entergy Corporation.

Entergy Corporation is an investor-owned public utility holding company registered pursuant to the Public Utility Holding Company Act of 1935. The Entergy operating companies include Entergy Arkansas, Inc. ("Entergy Arkansas", formerly known as Arkansas Power & Light Company); Entergy Gulf States, Inc. (formerly Gulf States Utilities Company); Entergy Louisiana, Inc. (formerly Louisiana Power & Light Company); Entergy Mississippi, Inc. (formerly Mississippi Power & Light Company); and Entergy New Orleans, Inc. (formerly New Orleans Public Service, Inc.). ESI is a wholly-owned subsidiary of Entergy Corporation, and acts as agent for the above-named operating companies in acquiring fuel and related transportation for their coal-fired power plants. In this Verified Statement I will focus in particular on Energy Arkansas.¹

The purpose of this testimony is to provide the Surface Transportation Board ("Board") with facts concerning the present critical situation faced by Entergy as a result of UP's continuing and very severe service problems in transporting coal to Entergy Arkansas' two large coal-fired plants in Arkansas, the White Bluff Steam Electric Station ("White Bluff") and the Independence Steam Electric Station ("Independence"). I will also demonstrate Entergy's need for modification of the White Bluff build-out preservation condition imposed by the Board in granting merger authority to Union Pacific Railroad Company

¹ I will refer to ESI and Entergy Arkansas, Inc. collectively as "Entergy" in my testimony.

("UP") and Southern Pacific Transportation Company ("SP") in 1996. This condition, which I will refer to as the "White Bluff condition", is described in more detail on page 2 of Entergy's accompanying Petition for Modification in this proceeding.

I. BACKGROUND

Entergy Arkansas produces, distributes and sells electric power to approximately 600,000 residential, commercial and agricultural customers located in 63 counties in Arkansas, and also engages in the wholesale power market. Its White Bluff and Independence plants collectively consist of four units (two at each plant), with a combined capacity of approximately 3,337 megawatts. Each plant normally burns approximately 6.5 million tons of coal annually, or 13 million tons in total, all of which is produced in the southern Powder River Basin of Wyoming, and all of which is transported to the plants by rail (specifically, by UP). Entergy's present coal supply and transportation arrangements for the White Bluff and Independence plants are described at pp. 5-8 of the Verified Statement of Roy A. Giangrosso (who was then ESI's Director, Coal Supply) in Entergy's Comments in this proceeding served March 29, 1996.

Entergy's present rail transportation contract with UP, known as the "Interim Agreement", whose term runs through

requires that 100% of the coal

destined to White Bluff and Independence be transported by UP. Unfortunately, the level of service

provided by UP in transporting coal to these plants under the Interim Agreement is abysmal. As I will describe in more detail below, UP is completely failing to meet the service standards set forth in the Interim Agreement, with the result that Entergy is unable to receive all the coal these plants need to meet their generation requirements. Entergy has been forced to curtail burn (and thus generation) at these plants, and either purchase more expensive power from the grid or use more expensive gas generation.

In order to remedy the present situation, which is growing to near-critical proportions due to UP's continuing service crisis in the south-central part of the nation, Entergy must supplement UP's inadequate coal transportation service with transportation by other rail carriers, in particular the Burlington Northern and Santa Fe Railway Company ("BNSF") -- which also serves the PRB mines in Wyoming -- at White Bluff.² It is for this reason that Entergy is requesting the Board to modify the White Bluff condition previously imposed in approving the UP/SP merger to enable BNSF to serve the White Bluff plant immediately, without waiting for construction of the build-out.

² BNSF service to White Bluff would enable UP to concentrate on providing service to Independence.

The build-out involves construction of a 21-mile line to a connection with the former SP Memphis-Houston line at Pine Bluff, AR. BNSF was granted trackage rights over this line as a condition to the UP/SP merger, and the White Bluff condition will enable BNSF to use these trackage rights to access the White Bluff plant after the build-out is completed. It will take approximately three years to construct the build-out, from engineering design to final completion, so completion will not occur until approximately the year 2001. In the interim, without the relief requested herein, Entergy must rely on UP to haul coal to its Arkansas power plants -- a totally unacceptable situation considering UP's failure to meet Entergy's coal delivery requirements.

II. UP's CONTRACTUAL SERVICE COMMITMENTS

Entergy presently operates 18 trainsets, each consisting of 115 high-capacity aluminum cars acquired by Entergy in 1995, in PRB coal service to the White Bluff and Independence plants. The economics of acquiring and using this equipment are dependent on an assured level of rail service. Thus, Entergy's Interim Agreement with UP (which became effective in 1990) contains a service standard, under which UP has committed to transporting coal from the PRB mines to White Bluff

"Elapsed Transit Time" (excluding specified time for loading coal trains at the mines and unloading them at the plants) of hours in the case of White Bluff and hours in

the case of Independence. If UP fails to meet its
Elapsed Transit Time , it then
has a deficit, which it must make up
If UP incurs a deficit and
fails to make it up it is obligated to pay
Entergy liquidated damages

UP is also under an express contractual obligation to
exercise good faith in avoiding the creation of deficits. It is
Entergy's position that the make-up and liquidated damages
provisions of the Interim Agreement are not intended to be used
as substitutes for contract transit time requirements in the
chronic, pervasive manner that UP has resorted to in recent
years.

³ Virtually identical service standards are also contained
in Entergy's original rail transportation contracts with UP and
its then-partner, the Chicago and North Western ("CNW"), and with
Missouri Pacific, which were signed in 1983. These agreements
are also described in Mr. Giangrosso's Verified Statement filed
as part of Entergy's Comments of March 29, 1996.

UP's average Elapsed
Transit Time was hours for coal trains moving to the White
Bluff plant and hours for coal trains moving to the Indepen-
dence plant. These cycle times exceeded the contractual standard
by an average of hours in the case of White Bluff and hours
in the case of Independence.

UP's average Elapsed Transit Times ballooned to hours
for White Bluff and hours for Independence.

these transit times soared even further, to _____ hours and _____ hours, respectively. On average, _____ UP exceeded its contractual service standard by _____ hours, or _____. _____ UP exceeded its service standard by an average of _____ hours, or _____. _____ UP exceeded its service standard by an average of _____ hours, or _____. _____

These poor cycle times resulted in deficit tonnages -- the volumes of coal by which UP fell short of the quantity it should have transported in the trainsets provided by Entergy had it met its service standard --

addition, UP has effectively "rolled over" deficits
, and the cumulative deficit stood at about
. We are seeing

no improvement in UP's cycle times

and the deficit is growing at an accelerated rate.

As a direct result of UP's dismal performance in transporting coal to the White Bluff and Independence plants, the inventory of coal stockpiled at the plants, which Entergy attempts to keep at a level equal to days' projected coal burn, has rapidly dwindled. At present, the inventory amounts to only days at White Bluff and days at Independence. The reduced inventories, with no prospect of improvement in UP's service, have resulted in Entergy Arkansas' curtailing burn (and thus the generation of electricity) at these plants. As a result, the Entergy system (which is economically dispatched) has had to purchase more expensive power from the grid and shift more generation to its expensive gas-fired plants. Given UP's virtual service meltdown south of Kansas City, which Entergy does not expect UP to be able to remedy in the foreseeable future, the situation is becoming critical for Entergy (and, I understand, for other utilities particularly in Texas).

III. ENTERGY'S ATTEMPTS TO USE ALTERNATE RAIL SERVICE

Entergy has repeatedly informed UP of the vital importance of compliance with its service commitments under the Interim Agreement, and of the worsening situation in terms of inventory and reduced coal burn at the White Bluff and Independence plants. Entergy has had several meetings and conference calls with UP, to no avail. Finally, on September 23, 1997, I

wrote to UP's Senior Vice President in charge of coal marketing and transportation, Art Peters, and informed him that the situation had deteriorated to the point where Entergy believed UP had materially breached its contractual obligations under the Interim Agreement. A copy of my letter to Mr. Peters is attached hereto as Exhibit CWJ-1.

My September 23 letter also requested UP's permission to waive the 100%-volume requirement of the Interim Agreement, and sought UP's cooperation in making alternative transportation arrangements with other carriers, in particular BNSF. Finally, we requested definitive assurances from UP as to its ability to meet its contracted service standard in the future, and indicated that the matter had to be resolved by September 30, 1997.

Mr. Peters did not respond to my September 23 letter until late on October 3, 1997 (after the lawsuit discussed below had been filed). A copy of Mr. Peters' October 3 letter is attached hereto as Exhibit CWJ-2. To say the least, his response did not provide the kind of assurances Entergy had requested

Equally important, Mr. Peters' October 3 letter rejected Entergy's request that UP waive the volume requirements of the Interim Agreement and cooperate with Entergy in arranging alternative transportation service with other carriers to help Entergy through the present crisis.

Given UP's continuing service deterioration⁵ and its refusal to respond in a meaningful way to our requests for cooperation in resolving the present crisis, on October 3, 1997, Entergy filed suit in the United States District Court for the Middle District of Louisiana alleging that UP has materially breached both the Interim Agreement and the underlying 1983 Agreements due to its continuing failure to meet the contractual service standards, and seeking both the right to terminate the agreements and damages. Entergy Services, Inc. and Entergy Arkansas, Inc. v. Union Pacific Railroad Company, Civil No. 97-967-B-M3 filed October 3, 1997. A copy of the complaint in this action is attached hereto as Exhibit CWJ-3.

The modified condition being sought here would remove an impediment to Entergy obtaining effective relief through the federal court action. With the modified condition, Entergy would be able to make alternative transportation arrangements with BNSF.

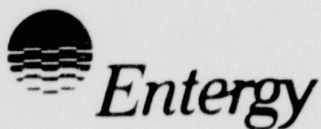
IV. CONCLUSION

UP's present service difficulties are a direct result of its haste and failure to plan adequately in implementing its merger with SP. Entergy urgently needs the Board's help in

⁵ As an example of how bad things are, on September 29, 1997 one of our trains was released after unloading at the White Bluff plant. UP then took the empty train to Durand, KS, where it arrived on September 30. The train was then parked on a siding and the locomotives removed. This train was finally returned to service on October 11, but other trains either are not moving or have been removed from service from time to time.

obtaining substitute rail service to make up for UP's merger-related inability to keep the White Bluff and Independence plants supplied with coal.

On behalf of Entergy, I respectfully urge the Board to modify the White Bluff build-out condition to enable BNSF to serve the White Bluff plant directly, using its existing trackage rights over the UP line that passes right by the plant, until Entergy is able to construct the build-out.



Entergy Services, Inc.
Parkwood II Building, Suite 300
10055 Grogans Mill Road
The Woodlands, TX 77380
Tel: 281 297 3562

Charles W. Jewell, Jr.
Director
Coal Supply

September 23, 1997

VIA FACSIMILE AND
CERTIFIED MAIL RETURN RECEIPT REQUESTED

Mr. Art Peters
Senior Vice President
& General Manager
Union Pacific Railroad Company
1416 Dodge Street, Room 500
Omaha, NE 68179

RE: Breach of Railroad's Service Commitments

Dear Mr. Peters:

Entergy Arkansas, Inc. currently receives rail transportation services to its Arkansas coal plants from Union Pacific Railroad Company pursuant to Interim Rail Transportation Agreement ICC-WRPI-C-0065, dated October 1, 1991, which superseded certain provisions of Agreement ICC-UP-C-0505 and Agreement ICC-MP-C-0430. Upon termination of the interim agreement, the terms of Agreements ICC-UP-C-0505 and ICC-MP-C-0430 again are applicable, subject to amendment/renegotiation.

Entergy's coal plants in Arkansas have experienced significant shortages in coal deliveries from Union Pacific. As a result of these delivery shortages and Union Pacific's failure to meet the service standards set forth in the agreement, Entergy, among other things, has been forced to curtail its coal burns, seek alternate fuel sources and purchase electric power from other sources, all to the detriment of Entergy and its ratepayers.

Based on Union Pacific's actions and its inadequate responses to concerns expressed by Entergy representatives, Entergy believes that Union Pacific has breached its contractual obligations under the agreement. Specifically, Entergy believes that Union Pacific, among other things, has failed and refused to abide by the contractual obligations with respect to cycle times, minimum train lading weight and the good faith obligation to avoid creating deficit tonnages.

Mr. Art Peters

Page 2

9/23/97

While the agreement provides for deficit service payments, such payments do not provide an adequate remedy. Union Pacific's persistent and continuing failure to meet its cycle time commitments under the agreement, and its continued failure and refusal to make good faith efforts to avoid deficit tonnages as required by our agreement are unacceptable. Such failure and refusal are causing Entergy substantial and irreparable harm, and constitute a material breach of the agreement. Among other things, and without waiving any other alternatives available to it, given the current near-emergency situation with respect to the coal inventory at the White Bluff and Independence plants, Entergy will explore immediately options (1) with respect to the movement of coal to the Independence plant via Burlington Northern Santa Fe and Missouri & Northern Arkansas Railroads; (2) for the barge delivery of coal to the White Bluff plant, and (3) for the movement of coal via BNSF to Pine Bluff, Arkansas, and thence via Union Pacific to the White Bluff Plant.

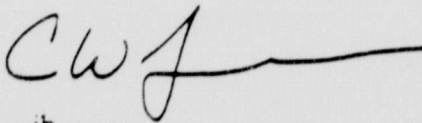
Entergy expects that Union Pacific will cooperate with it in every respect in its efforts to make alternative transportation arrangements with alternate providers. You are requested to provide information with respect to any restrictions that may exist with respect to the M&NA's delivery of coal to White Bluff in connection with BNSF, and to waive such restrictions. You are also requested to provide Entergy with a rate for the movement of trainloads of coal in Entergy cars between a point of interchange with BNSF at Pine Bluff, Arkansas, and the White Bluff plant, that can be used in combination with a BNSF rate from the Powder River Basin mines to Pine Bluff.

Additionally, Entergy demands adequate assurances from the Union Pacific as to its ability to meet its cycle time commitments under the agreement from this date forward, and as to its ability to transport all deficit tonnage that has accrued and that will accrue so as to become completely current and remain current. In order to receive adequate assurances with respect to these issues, it will be necessary for Union Pacific to provide documentation sufficient to enable Entergy to perform a due diligence review of Union Pacific's operations with a view toward satisfying itself with reasonable certainty as to Union Pacific's ability to perform in accordance with any such assurances. Entergy expects that Union Pacific will cooperate in making information available for this purpose.

Mr. Art Peters
Page 3
9/23/97

While Entergy will be pursuing these alternatives, it in no way considers these to be the only remedies available to it. Under the circumstances, Entergy intends to evaluate all of its remedies. We plan to resolve this matter no later than September 30, 1997. Please contact me immediately so that we may discuss this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read 'CWJ' followed by a long horizontal flourish.

jb

cc: James F. Kenney

bcc: Ms. Kelly Cupero
Mr. Chris Mills, Slover & Loftus
Mr. Bud Storey

EXHIBIT CWJ-2

REDACTED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CCNY
ORIGINAL FILED
USDC MD/LA

97 OCT -3 PM 4:16

RICHARD T. MARTIN
CLERK

ENTERGY SERVICES, INC. AND
ENTERGY ARKANSAS, INC.,

PLAINTIFFS,

VERSUS

UNION PACIFIC RAILROAD COMPANY,

DEFENDANTS.

CV NO. 97-967-B-M3

C O M P L A I N T

Plaintiffs, Entergy Services Inc. ("ESI") and Entergy Arkansas, Inc. ("Entergy Arkansas") (collectively referred to herein as "Entergy"), complain of defendant Union Pacific Railroad Company ("UP") as follows:

Jurisdiction and Venue

1.

This is a civil action in which the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states. This Court has jurisdiction of the parties and the subject matter pursuant to 28 U.S.C. § 1332.

2.

Venue is properly in this Court pursuant to 28 U.S.C. §1391(a), because UP resides in this judicial district; UP owns, controls and operates railroad lines and other facilities

throughout the State of Louisiana, including extensive business operations and properties in parishes included within the Middle District of Louisiana.

The Parties

3.

Entergy Arkansas, formerly known as Arkansas Power & Light Company, is an Arkansas corporation with its principal place of business in Arkansas. It operates and holds title to an interest in the electric generating stations described below in ¶ 6, and is a wholly-owned subsidiary of Entergy Corporation, an investor-owned public utility holding company organized and existing under the laws of Delaware and registered pursuant to the Public Utility Holding Company Act of 1935, and having its principal place of business in New Orleans, Louisiana. Entergy Arkansas produces, distributes and sells electric power at retail in Arkansas, engages in wholesale sale of power, and through a system of entitlements to energy produced by each Entergy operating company, distributes electric power throughout Entergy's service area in the states of Louisiana, Texas, Mississippi and Arkansas.

4.

Plaintiff ESI is a wholly-owned subsidiary of Entergy Corporation. ESI is a corporation organized and existing under the laws of the State of Delaware, and having its principal place of business in New Orleans, Louisiana. ESI acts as an agent for Entergy Corporation's public utility operating subsidiaries, including Entergy Arkansas, and Entergy Gulf States, Inc., and is

responsible for acquiring fuel and related transportation for coal-fired power plants operated by its electric utility affiliates. In particular, ESI is responsible for procuring and arranging transportation of approximately 13 million tons of coal annually for transportation to, and use by, Entergy Arkansas at its coal-fired electric generating stations in Arkansas.

5.

Defendant UP is a corporation organized under the laws of the State of Utah having its principal place of business in Omaha, Nebraska. UP engages in interstate for-hire rail transportation in Louisiana, Arkansas and other states in the midwestern and western United States.

Background

6.

Entergy Arkansas operates two large coal-fired power plants, the White Bluff Steam Electric Station and the Independence Steam Electric Station (respectively referred to herein as "White Bluff" and "Independence"). White Bluff is located near Redfield, in Jefferson County, Arkansas, and consists of two generating units with a combined generating capacity of 1,659 megawatts ("MW") of electric power. Independence is located near Newark, in Independence County, Arkansas, and also consists of two generating units, with a combined generating capacity of 1,678 MW.

7.

In generating electric power, Entergy Arkansas burns approximately 6.5 million tons of coal at each station, for a total of

approximately 13.0 million tons annually at both plants. All of the coal burned at White Bluff and Independence is produced in the southern Powder River Basin of Wyoming ("PRB") and is transported to White Bluff and Independence by rail.

8.

Since August of 1984, Entergy Arkansas' PRB coal has been transported to its White Bluff and Independence plants pursuant to long-term rail transportation agreements. The first of these agreements was entered by and between Entergy Arkansas, UP, and two UP predecessor companies, Western Railroad Properties, Incorporated ("WRPI") and Chicago and North Western Transportation Company ("CNW"), on July 22, 1983, and provided for the transportation of coal originating in the PRB and destined for Entergy Arkansas' White Bluff and Independence plants (the "UP Agreement"). A related agreement was executed the same day by and between Entergy Arkansas and another UP predecessor company, Missouri Pacific Railroad Company ("MP") (the "MP Agreement"). (The UP Agreement and the MP Agreement are collectively referred to herein as the "1983 Agreements"). The 1983 Agreements became effective upon their approval by the Interstate Commerce Commission ("ICC") pursuant to 49 U.S.C. § 10713, and are identified as Contract Numbers ICC-UP-C-505 and ICC-MP-C-0403.

9.

The UP Agreement provided for the transportation of coal between the PRB mines and Kansas City, Missouri/Kansas; the MP Agreement provided for the transportation of the same coal from

Kansas City, Missouri/Kansas to the White Bluff and Independence plants. Use of both agreements was necessary to provide for the continuous rail carriage of coal from the PRB to the White Bluff and Independence plants.

10.

On October 1, 1991, Entergy Arkansas, UP, WRPI, CNW and MP entered an Interim Rail Transportation Agreement ("Interim Agreement"), ICC-WRPI-C-0065, which was also approved by the ICC. The Interim Agreement is currently in effect. A recent amendment to the Interim Agreement provides that the parties will negotiate market-based rates for the movement of PRB coal to White Bluff and Independence by rail starting in the year 2000.

11.

Both the 1983 Agreements and Interim Agreement set forth the rates, services and other terms and conditions governing transportation of coal by UP between PRB mine origins in Wyoming and the White Bluff and Independence plants. The agreements contain confidential provisions that prohibit disclosure of certain information regarding these agreements, and Entergy has therefore framed in general terms portions of this pleading relating to the agreements.

12.

The 1983 Agreements represented the first agreements entered by UP and WRPI/CNW for the transportation of PRB coal. The first movements under these agreements occurred in August of 1984, when WRPI first instituted service to the PRB mines from which Entergy

Arkansas purchased (and purchases) coal for use in generating electricity at the White Bluff and Independence plants.

13.

Pursuant to the terms of the 1983 Agreements and the Interim Agreement, Entergy Arkansas is obligated to ship, and UP is obligated to transport, a certain minimum volume of coal each year.

14.

Both the 1983 Agreements and the Interim Agreement include a number of provisions that describe UP's commitments concerning the service to be provided in connection with the contract movements to White Bluff and Independence, including but not limited to the following:

- (a) UP has a duty to transport all coal tendered by Entergy Arkansas within a defined average elapsed transit time.
- (b) If UP fails to meet the transit time standard, and as a result, fails to transport the required volume of coal during a defined time period, UP must transport (in its own railcars) the shortfall to Entergy Arkansas within a certain time thereafter. If UP fails to do so, UP must pay a prescribed amount of liquidated damages to Entergy Arkansas.
- (c) UP is expressly obligated to exercise good faith efforts to avoid creating any deficit tonnages.

15.

Among other things, the purpose of the contract provisions described in paragraph 14, herein, is to optimize the productivity

of Entergy Arkansas' railcar fleet and to assure an adequate and continuous supply of coal to maintain electric generation at Entergy Arkansas' White Bluff and Independence plants. As the parties expressly stated in the 1983 Agreements, it was their "desire that the contractual arrangement promote maximum equipment utilization and transportation efficiency and provide all parties with economic incentives."

16.

In reliance on the service standards and other contractual provisions described in paragraphs 14 and 15 herein (collectively referred to herein as "the service standards"), in 1995 Entergy Arkansas replaced its fleet of steel railcars used for the transportation of coal from the PRB to the White Bluff and Independence plants with a fleet of higher-capacity aluminum railcars, and made certain modifications to the coal unloading facilities at both plants, at a total capital cost in excess of \$100 million.

The Controversy

17.

In spite of the stated intent to promote maximum equipment utilization and transportation efficiency, and the obligation to make a good faith effort to avoid creating deficit tonnages, UP has consistently ignored its contractual service commitments to Entergy Arkansas, and has breached, and continues to breach, the service standards by:

- (a) Continually failing to meet the transit time standard.

- (b) Continually failing to comprise trains of the required length.

18.

Entergy has repeatedly informed UP of the vital importance of compliance with the service standards, and the consequent impact of UP's failure to meet these standards on Entergy Arkansas' ability to plan and provide electric utility service to its customers.

19.

Despite Entergy's efforts, UP has refused to either correct the service deficiencies, or provide adequate assurances that it would (or could) take the necessary steps to assure its ability to comply with its contractual service commitments to the end that Entergy is confronted with an escalating deficit in its coal supply which has forced curtailment of power production and reduced reserves to a critical level.

20.

Entergy Arkansas has fully complied with all of its obligations and responsibilities under its contracts with UP.

21.

Under the terms of the 1983 Agreements and the Interim Agreement, Entergy is not free to seek alternative transportation of coal for the White Bluff and Independence plants. Unless Entergy is freed from this restriction, Entergy is precluded from taking action to ensure the reliability of its system, and as a consequence, both Entergy and its customers may suffer irreparable harm.

COUNT I

BREACH OF CONTRACT

22.

Entergy hereby realleges and incorporates by reference ¶¶ 1-21 of this Complaint.

23.

In entering the 1983 Agreements and the Interim Agreement, Entergy Arkansas reasonably expected that UP would substantially perform its contractual promises relating to the service standards, and particularly the stated intent to promote maximum equipment utilization and transportation efficiency and the express commitment to exercise good faith efforts to avoid the creation of deficit tonnages.

24.

Rather than promote maximum equipment utilization and transportation efficiency and exercise good faith, UP has instead persistently failed to meet its duty to comply with the service standards.

25.

UP's persistent failure to meet the service standards has caused, and is continuing to cause, substantial hardship to Entergy and has substantially impaired, and will continue to impair, the ability of Entergy Arkansas to serve its ratepayers.

26.

In entering the 1983 Agreements and the Interim Agreement, Entergy Arkansas relied on UP's agreement to provide service in

accordance with the service standards and did not expect that UP would persistently fail to comply with the service standards.

27.

Entergy also reasonably relied on UP's commitment in the Interim Agreement to exercise good faith to avoid creating deficit tonnages, and reasonably did not expect that UP would engage in a practice of creating and cumulating (rolling over) deficit tonnages in lieu of meeting the contractual elapsed transit time standard.

28.

As a direct and proximate result of UP's failure to meet the service standards, Entergy and Entergy Arkansas have been deprived of maximum equipment utilization and transportation efficiencies in entering the 1983 Agreements and the Interim Agreement.

29.

The liquidated damages remedy contained in the 1983 Agreements and the Interim Agreement was not intended to apply to chronic, pervasive failures to meet the railroad service standards, such as have occurred.

30.

By persistently failing to meet the service standards, UP has materially breached and repudiated the 1983 Agreements and the Interim Agreement.

31.

Entergy has provided UP with an opportunity to cure the above-described breach and UP has exhibited an inability, or unwillingness, to correct the same.

32.

As a direct and proximate result of this breach, Entergy has incurred damages relating to, inter alia, the cost of replacement power, the loss of sales and revenues associated with curtailing production from the plants in question, and other costs and expenses associated with the UP's failure to provide adequate rail transportation service, in an amount in excess of \$1 million.

COUNT II

BREACH OF COVENANT OF GOOD FAITH

33.

Entergy hereby realleges and incorporates by reference ¶¶ 1-32 of this Complaint.

34.

In entering the 1983 Agreements and the Interim Agreement, the parties stated their desire to promote maximum equipment utilization and transportation efficiency and UP expressly committed to exercise good faith to avoid the creation of deficit tonnages.

35.

Under its contractual commitments to Entergy, UP has both an implied and express duty to cooperate with Entergy in order to accomplish the stated objectives set forth in paragraph 34 herein.

36.

UP has refused to comply with the service standards, which were intended to ensure maximum equipment utilization and transportation efficiency, and has been unable, or unwilling, to correct past deficiencies in service.

37.

UP has engaged in a practice of creating and cumulating (rolling over) deficit tonnages, rather than fulfilling its contractual commitment to act in good faith to avoid the creation of such deficit tonnages.

38.

While UP has neglected to comply with its contractual service standards and refused to correct such deficiencies, UP's service to other PRB coal shippers has, in UP's words, "consistently exceeded [UP's] own performance goals and contractual performance commitments...in recent months." Though service to Entergy has continued to deteriorate, UP's "performance levels" for other customers "have reached all-time records." See Applicants' Report on Merger Condition Implementation, Surface Transportation Board Docket No. 32760 (Sub-No. 21), Union Pacific Corporation, Union Pacific Company and Missouri Pacific 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] at 42 (filed July 1, 1997).

39.

In ignoring and/or refusing to comply with its duty to satisfy the express service standards and stated intent set forth in its contractual commitments to Entergy, while at the same time choosing to provide "record level" service to other PRB coal shippers, UP has breached the covenant of good faith and fair dealing, and has otherwise failed to act in compliance with standards of commercial reasonableness.

40.

As a direct and proximate result of UP's breach of the duty of good faith and fair dealing, Entergy has incurred damages relating to, inter alia, the cost of replacement power, the loss of sales and revenues associated with curtailing production from the plants in question, and other costs and expenses associated with the UP's failure to provide adequate rail transportation service, in an amount in excess of \$1 million; but such monetary damages may be inadequate to fully compensate Entergy for the losses and harm which may be experienced by Entergy and its customers.

PRAYER FOR RELIEF

WHEREFORE, Entergy prays for the following relief:

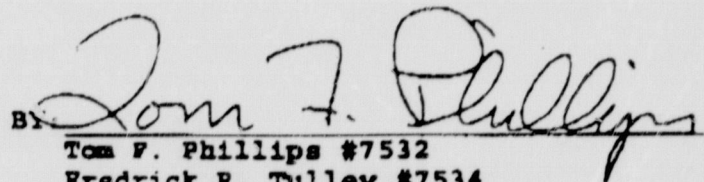
(a) that on the basis of Counts I and II, the Court enter a judgment (i) declaring that UP has materially breached the 1983 Agreements and the Interim Agreement, that because of the material breach those agreements are unenforceable by UP, and that Entergy is excused from performance under those agreements; and (ii)

ordering UP to pay damages relating to the failure to meet the service standards set forth in those agreements;

(b) that the Court, alternatively, order UP to pay all direct, consequential and incidental damages incurred by Entergy as a result of UP's material breach of the 1983 Agreements and the Interim Agreement; and

(c) that the Court award such other and further relief as it deems just and proper.

TAYLOR, PORTER, BROOKS & PHILLIPS, L.L.P.

By 

Tom F. Phillips #7532
Fredrick R. Tulley #7534
Deborah E. Lamb #18991
John P. Murrill #23878
P. O. Box 2471
Baton Rouge, Louisiana 70821
504-387-3221

WILLIAMS & ANDERSON

J. Leon Holmes, Ark. Bar #82078
James E. Hathaway III, Ark. Bar #86085
Steven W. Quattlebaum, Ark. Bar #84127
Twenty-Second Floor
111 Center Street
Little Rock, AR 72201
501-372-0800

SLOVER & LOFTUS

C. Michael Loftus, D.C. Bar #225730
Christopher A. Mills, D.C. Bar #449325
Frank J. Pergolizzi, D.C. Bar #405174
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
202-347-7170

Attorneys for Entergy Arkansas, Inc. and
Entergy Services, Inc.

VERIFICATION

STATE OF TEXAS)
) SS:
COUNTY OF MONTGOMERY)

Charles W. Jewell, Jr., being duly sworn, deposes and says that he has read the foregoing verified statement, knows the contents thereof, and that the same are true as stated, except as to those statements made on information and belief, and as to those, that he believes them to be true.

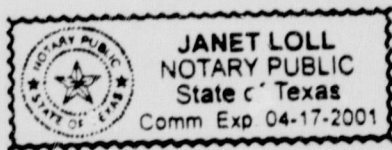
CWJ

Subscribed and sworn to before me
this 22 day of October, 1997.

Janet Loll

Notary Public for Montgomery County, Texas

My Commission expires 04-17-2001



CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of October, 1997, caused HIGHLY CONFIDENTIAL copies of the foregoing Petition to be served by hand upon Applicants' counsel:

Arvid E. Roach II, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Paul A. Cunningham, Esq.
Harkins Cunningham
1300 Nineteenth Street, N.W.
Washington, D.C. 20036

I further certify that I caused REDACTED, PUBLIC copies of the foregoing to be served by first class mail, postage prepaid, on:

The Hon. Rodney E. Slater
Secretary
U.S. Dept. of Transp.
400 7th Street, S.W.
Suite 10200
Washington, D.C. 20590

The Hon. Janet Reno
Att'y Gen. of the United States
U.S. Dept. of Justice
10th & Constitution Ave., N.W.
Room 4400
Washington, D.C. 20530

all other parties of record in Finance Docket No. 32760 and Finance Docket No. 32760 (Sub-No. 21).

Andrew B. Kolesar III

STB FD-32760 (SUB 21) ID-181014 8-6-97 I

162014
I

MAYER, BROWN & PLATT

2000 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006-1882

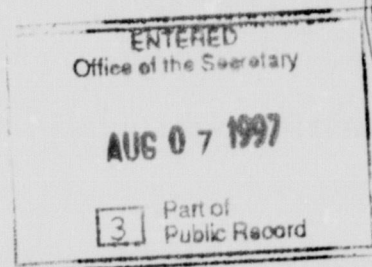
ERIKA Z. JONES
DIRECT DIAL (202) 778-0642
ejones@mayerbrown.com

MAIN TELEPHONE
202-463-2000
MAIN FAX
202-861-0473

August 6, 1997

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Room 711
Washington, DC 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 Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of the Highly Confidential version of the 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). In addition, 25 copies of the Redacted Public Version of this filing are also enclosed as well as a 3.5-inch disk containing the text of the Highly Confidential version in Wordperfect 6.1 format.

I would appreciate it if you would date-stamp the enclosed extra copy of this filing and return it to the messenger for our files. Thank you for your assistance.

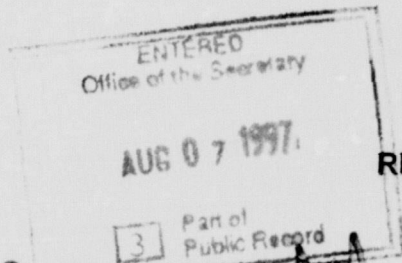
Sincerely,

Erika Z. Jones
Erika Z. Jones

Enclosures

cc: All Parties of Record

181014



REDACTED PUBLIC VERSION

NOT FOR PUBLIC INSPECTION
This document, with this filing sent
to working office. Original copy is in the
Office of the Secretary
UNDER SEAL

BN/SF-80
LCRA-11



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

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

C. Michael Loftus
Donald G. Avery
Andrew B. Kolesar III
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

OF COUNSEL:

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

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

Erika Z. Jones
Adrian L. Steel, Jr.
Roy T. Englert, Jr.
Kathryn A. Kusske
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

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

The Burlington Northern
and Santa Fe Railway Company
3017 Lou Menk Drive
P.O. Box 961039
Ft. Worth, Texas 76161-0039
(817) 352-2353

and

1700 East Golf Road
Schaumburg, Illinois 60173
(847) 995-6887

Attorneys for
The Burlington Northern
and Santa Fe Railway Company

REDACTED PUBLIC VERSION

BN/SF-80
LCRA-11

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Department No. 32760

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

**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**

EXPEDITED HANDLING REQUESTED

Pursuant to Decision No. 44 and Decision No. 72 in the above-referenced proceeding, petitioners The Burlington Northern and Santa Fe Railway Company ("BNSF")^{1/} and the Lower Colorado River Authority and the City of Austin (collectively "LCRA/Austin") petition the Surface Transportation Board ("Board") for an order of enforcement directing UP to permit BNSF to utilize its trackage rights over UP to provide

^{1/} The acronyms used herein are the same as those in Appendix B to Decision No. 44.

rail service to LCRA/Austin's Fayette Power Project coal-fired station at Halsted, TX.^{2/} BN obtained these trackage rights under Section 4 of the BNSF Agreement, which agreement, with certain modifications, was imposed by the Board as a condition of the merger of Union Pacific and Southern Pacific ("UP/SP merger").

LCRA/Austin has entered into a contract with BNSF for transportation of volumes of coal that are not subject to an existing contract between LCRA/Austin and UP. See Verified Statement of Daniel G. Kuehn (hereinafter "Kuehn V.S.") at 4. As explained by Mr. Kuehn, this contract is of major importance to LCRA/Austin and to BNSF -- importance that extends well beyond the several hundred thousand tons of coal traffic directly involved -- because of its implications for BNSF's ability to compete more effectively for the bulk of LCRA/Austin's coal traffic in bidding that will occur. LCRA/Austin also believe that BNSF service under the new contract will help to alleviate the impact of very high recent UP cycle times. BNSF has scheduled a loaded coal train to depart from the PRB on or about August 15, 1997, but UP has refused to permit BNSF to use its trackage rights to access the Halsted plant and has informed LCRA/Austin that BNSF has no present right to use the trackage rights.^{3/}

^{2/} In Decision No. 72, the Board stated that "any beneficiary of the Decision No. 44 conditions has the right to seek relief from the Board." Slip op. at 8 (footnote omitted). See also *id.* at 8 n.18 ("We wish to clarify that shippers have rights under the BNSF agreement because we have imposed the terms thereof as a condition of the merger. * * * [S]hippers have recourse to the Board for enforcement of the merger conditions.").

^{3/} Because the BNSF coal train is scheduled to depart for the Halsted facility on or about August 15, 1997, petitioners request that UP be required to respond to this petition as soon as practical and that the Board expedite consideration of the petition, issuing a decision as soon thereafter as practical.

As the Board has stated, UP has represented that LCRA/Austin would be regarded as a 2-to-1 shipper "that would gain access to BNSF under the terms of the BNSF agreement." Decision No. 57, slip op. at 7. The BNSF Agreement and the June 1, 1996 Agreement implementing BNSF's trackage rights between Sealy, TX and Waco and Eagle Pass, TX expressly provide that BNSF's trackage rights are effective upon the consummation of the merger.^{4/} Moreover, UP stated, in answer to a direct question put at deposition by counsel for LCRA/Austin, that BNSF would have access to LCRA's Halsted facility immediately after the UP/SP merger to move any volumes not under UP contract. Rebensdorf Jan. 23, 1996 Dep. 344-346. Accordingly, petitioners request that the Applicants be required to "honor the representations they made during the course of the merger proceeding" (Decision No. 57, slip op. at 6) and be directed to permit BNSF to move coal to the Halsted plant under a contract covering volumes not committed to UP under the existing contract between LCRA/Austin and UP.

ARGUMENT

BNSF obtained trackage rights to serve LCRA/Austin's Fayette Power Project located at Halsted, Texas pursuant to Section 4 of the BNSF Agreement. *See* BNSF Agreement, dated Sept. 25, 1995, Section 4 and Appendix A (listing "Halsted TX (LCRA plant") as a 2-to-1 point "Referred to in Section 4b"); *see also* Supplemental Agreement,

^{4/} As noted above (note 2, *supra*), the Board has expressly provided for shippers, such as LCRA/Austin, to seek enforcement of merger conditions. Moreover, because this matter does not involve a dispute over the meaning of the agreements' terms or the appropriateness of any proposed implementation arrangement, but rather the availability of rights that are set forth unambiguously in the agreements and imposed as a merger condition by the Board, this matter is properly within the jurisdiction of the Board, rather than subject to arbitration.

dated Nov. 18, 1995, Appendix A, at 2 (same). In Decision No. 57, the Board recognized that Applicants had represented LCRA/Austin to be "*one of the many 2-to-1 shippers* that would gain access under the terms of the BNSF agreement." Slip op. at 7 (emphasis added). The Board further stated that the Applicants would be "held" to this representation. Decision No. 57, slip op. at 7. As "one of the many 2-to-1 shippers" covered by the trackage rights agreements between BNSF and UP, LCRA/Austin is the beneficiary of trackage rights that were to become "effective upon UP's acquisition of control of SP pursuant to the application currently pending before the STB in Finance Docket No. 32760." Sealy, Texas to Waco and Eagle Pass, Texas Trackage Rights Agreement, dated June 1, 1996, at 2. See also BNSF Agreement, dated Sept. 25, 1995, at 19 (stating that agreement would be effective "upon UP's acquisition of control of SP").

As detailed in the Verified Statement of Earl W. Woolley (hereinafter "Woolley V.S."), at no time during the negotiations leading up to the execution of the implementing trackage rights agreements did UP ever state or take the position that BNSF's rights to serve the Halsted plant would not commence upon consummation of the merger but only when UP's current contract with LCRA/Austin expires. Neither the BNSF Agreement nor the final trackage rights agreement contain any such limitation, and the understanding of the parties was "that the Halsted Agreement was to become effective at the same time the other trackage rights agreements arising out of the Settlement Agreement became effective." Woolley V.S. at 2.

UP also made representations that BNSF's rights to serve under the BNSF Agreement would be effective immediately upon consummation of the UP/SP merger in

the deposition of John H. Rebensdorf, then Vice President — Strategic Planning for Union Pacific Railroad. Mr. Rebensdorf clearly stated that, under the BNSF Agreement, BNSF could gain access to the Halsted plant immediately upon consummation of the UP/SP merger and begin to move any traffic that was not then under contract.

Q. Is it your intention that LCRA be treated as a two-to-one point, the Fayette power project of LCRA in the City of Austin be treated as a two-to-one point?

A. Halsted is a two-to-one point.

* * * *

Q. * * * * Those trackage rights are exercisable by BN for the Halsted plant immediately after the merger takes effect, correct?

A. That is correct.

Q. Ignoring whether LCRA is in a position to take advantage of them by virtue of other contractual obligations, they're exercisable immediately upon consummation of the merger?

A. That's correct.

Rebensdorf Jan. 23, 1996 Dep. at 344-346. Mr. Rebensdorf's testimony is thus consistent with Mr. Woolley's understanding of the effective date of BNSF's right to serve the Halsted plant under the BNSF Agreement and the implementing trackage rights agreement.^{5/} Accordingly, the terms of the agreements between BNSF and UP

^{5/}

A little over four weeks later, however, Applicants entered into the June 1, 1996 Sealy, Texas to Waco and Eagle Pass, Texas Trackage Rights Agreement, which, as noted above, reiterated the representation that BNSF's trackage rights would commence immediately upon UP's acquisition of control of SP and

unambiguously confer upon BNSF the right to access LCRA/Austin's Halsted plant immediately upon UP's acquisition of control of SP, which took place on September 11, 1996.

UP, however, has asserted that its refusal to permit BNSF to access the Halsted plant is justified by Decision No. 57. UP's reliance on Decision No. 57 is misplaced. In that decision, the Board denied LCRA/Austin the right to invoke the contract modification condition as to the Halsted plant. In denying LCRA/Austin the benefits of the contract modification condition, the Board stated that LCRA/Austin is not a 2-to-1 shipper "*for the purposes of the contract modification condition.*" Decision No. 57, slip op. at 7 (emphasis added). The Board specifically relied upon the fact that "Applicants . . . never represented that LCRA/Austin would be treated as a 2-to-1 shipper for purposes of CMA Paragraph 3." *Id.* But the Applicants clearly did represent that BNSF's rights to serve LCRA/Austin's plant would be effective immediately after the merger. These representations were made both in the effective date terms of the BNSF Agreement and the trackage rights implementation agreement, and in the statements of Mr. Rebensdorf at his deposition. In the words of Decision No. 57, "This is the representation that applicants made and this, therefore, is the representation to which they [should] be held." *Id.*

made direct reference to LCRA, but did *not* except LCRA from the provision relating to the immediate commencement of BNSF's trackage rights upon consummation of the merger. The express terms of the agreements between BNSF and UP should be given effect by the Board now.

Petitioners here, however, are not seeking to invoke the contract modification condition or revisit the issue of whether LCRA/Austin is a 2-to-1 shipper for the purposes of that condition. Because the coal traffic at issue here is not committed under the existing UP contract, this petition has nothing whatever to do with reopening or modifying any existing contract between LCRA/Austin and UP. Rather, this petition seeks only to hold UP to the terms of its agreements with BNSF and its representations during the merger proceeding that LCRA/Austin would be treated as 2-to-1 shipper for purposes of BNSF access over the trackage rights, and that those rights would be effective upon consummation of the merger. Nothing in Decision No. 57 altered LCRA/Austin's 2-to-1 status for purposes of receiving BNSF service for movements not covered by a UP contract. Accordingly, Decision No. 57 provides no grounds whatever to deny BNSF access to LCRA/Austin's Halsted plant for the purpose of transporting coal not subject to an existing UP contract.

Finally, the order sought here is consistent with the intent of the Board to promote effective competition between BNSF and UP. As Mr. Kuehn discusses in his Verified Statement, LCRA/Austin is interested in obtaining proposals from BNSF for transportation of coal upon the expiration of

∴ Kuehn V.S. at

3. "[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, gauge 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." *Id.*^{6/} Thus, UP's refusal to permit BNSF to access the Halsted facility not only violates the plain terms of its agreements with BNSF, which, as modified, were imposed by the Board as conditions of the UP/SP merger, but also frustrates the intent of those agreements to promote effective competition for affected rail shippers.

CONCLUSION

As noted above, BNSF has a coal train scheduled to depart from the PRB to the Halsted plant on or about August 15, 1997. Accordingly, petitioners request that UP be required to file its response as soon as practical, and that the Board expedite its consideration of the petition and issue its decision as soon thereafter as practical.

For the reasons set forth in this petition, the Board should enforce the conditions imposed in the UP/SP merger and order UP to permit BNSF to serve LCRA/Austin at its Halsted power plant.

^{6/} Furthermore, BNSF service for non-covered coal would also "help to alleviate the impact of the UP service problems" that LCRA/Austin has recently experienced. Kuehn V.S. at 4.

Respectfully submitted,

C. Michael Loftus /ej

C. Michael Loftus
Donald G. Avery
Andrew B. Kolesar III
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

OF COUNSEL:

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

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

Erika Z. Jones

Erika Z. Jones
Adrian L. Steel, Jr.
Roy T. Englert, Jr.
Kathryn A. Kusske
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

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

The Burlington Northern
and Santa Fe Railway Company
3017 Lou Menk Drive
P.O. Box 961039
Ft. Worth, Texas 76161-0039
(817) 352-2353

and

1700 East Golf Road
Schaumburg, Illinois 60173
(847) 995-6887

Attorneys for
The Burlington Northern
and Santa Fe Railway Company

August 6, 1997

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Joint Petition for Enforcement (BN/SF-80; LCRA-11) was served, by first-class mail, postage prepaid, on all Parties of Record in Finance Docket No. 32760.

A handwritten signature in dark ink, appearing to read 'Adam C. Sloane', is written over a horizontal line.

Adam C. Sloane
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

VERIFIED STATEMENT

OF

EARL W. WOOLLEY

My name is Earl W. Woolley and I am Director Contracts and Joint Facilities of The Burlington Northern and Santa Fe Railway Company ("BNSF"). My business address is 2600 Lou Menk Drive, Fort Worth, TX 76131. I began my railroad career in 1961 as a clerk for the St. Louis-San Francisco Railway Company ("Frisco") and have held numerous positions with Frisco and Burlington Northern Railroad Company. These positions include Traveling Auditor, Internal Auditor, Manager of Contracts and Assistant Director Contracts and Joint Facilities. I assumed my present position in 1995. In my present position, I am responsible for negotiation and administration of all operating and joint facility contracts for the southern portion of BNSF. In addition, I negotiated all trackage rights and other operating agreements with Union Pacific Railroad Company ("UP") resulting from the September 25, 1995 Settlement Agreement ("Settlement Agreement"), as amended, with UP.

One of the trackage rights agreements that I negotiated with UP is the Trackage Rights Agreement dated as of June 1, 1996, covering the grant of trackage rights to BNSF from Sealy to Waco to Eagle Pass ("the June 1, 1996 Agreement"). A copy of the June 1, 1996 Agreement is included in Exhibit B of UP/SP-266, filed with the Board on June 28, 1996. Included in the grant of trackage rights is the right for BNSF to move loaded and empty unit coal trains into and out the Lower Colorado River Authority ("LCRA") Plant at Halsted, Texas, on the UP's line between Sealy

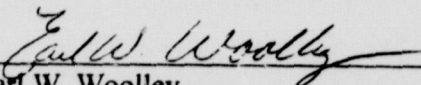
and Taylor, Texas. The June 1, 1996 Agreement, like all of the other trackage rights arising from the Settlement Agreement, became effective upon consummation of the UP consolidation with Southern Pacific ("SP"). I understand the UP is taking the position that BNSF does not have the right to serve the LCRA Halsted Plant until UP's contract with LCRA covering the transportation of coal to the Halsted Plant expires. The June 1, 1996 Agreement contains no such limitation. BNSF's right to move loaded and empty unit coal trains to and from the Halsted Plant is completely unrestricted and became effective as of the date of the UP/SP consolidation.

During the negotiation process, I met with UP several times to discuss the various trackage rights agreements arising out of the Settlement Agreement with UP. At no time during my meetings with UP did UP ever state that BNSF's trackage rights to serve LCRA at Halsted were not to become effective until the expiration of a rail contract with UP or any other future time. The understanding was that the June 1, 1996 Agreement was to become effective at the same time the other trackage rights agreements arising out of the Settlement Agreement became effective.

VERIFICATION

THE STATE OF TEXAS)
)
COUNTY OF TARRANT)

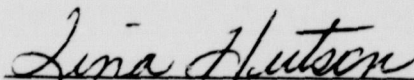
Earl W. Woolley, being duly sworn, deposes and says that he has read the foregoing statement, and that the contents thereof are true and correct to the best of his knowledge and belief.



Earl W. Woolley

Subscribed and sworn to before me on this 4th day of August, 1997.





Notary Public

My Commission expires:

6-26-98

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)	Finance Docket No. 32760
PACIFIC TRANSPORTATION COMPANY,)	
ST. LOUIS SOUTHWESTERN RAILWAY)	
COMPANY, SPCSL CORP., AND THE)	
DENVER AND RIO GRANDE WESTERN)	
RAILROAD COMPANY)	

- 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 Halsted, Texas ("FPP") which burns approximately 6 million tons per year of coal from the Powder River Basin of Wyoming ("PRB").

This statement is submitted in support of the Joint Petition of the Burlington Northern and Santa Fe Railway Company ("BNSF") and LCRA/Austin for Enforcement of Merger Condition.

LCRA/Austin have recently entered into a rail transportation contract with BNSF for the movement of coal from the PRB to the FPP. Service under this contract is scheduled to commence on August 15, 1997. The Union Pacific Railroad Company ("UP") has refused to permit BNSF to utilize trackage rights that BNSF obtained in the UP/SP merger to haul this coal traffic to the FPP. It is extremely important to LCRA/Austin that BNSF be permitted to exercise its rights to serve our plant both because of our desire to facilitate effective competition from BNSF for our traffic, and because of problems UP is having with its cycle time performance for our unit coal trains in UP service.

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

we naturally want to request proposals from BNSF for a contract that would take effect

we have to request proposals from BNSF some time in late or early in order to allow time for negotiation and execution of a contract if BNSF proves to be the most economical option.

We believe that a contract with BNSF now 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, gauge 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 in .

A second reason for our interest in BNSF service is that we have been experiencing significant and growing problems recently with respect to the cycle time performance provided by the UP. 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 the 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 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.

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.

PRB coal traffic. The on-the-ground experience BNSF obtains will eliminate uncertainty and allow it to compete more effectively for our traffic. In addition, we believe the BNSF service will be helpful from a service/trainset productivity perspective. We request this Board's prompt action on this matter so that BNSF may initiate service on our contract on August 15 or as soon thereafter as possible.

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

Daniel G. Kuehn

Sworn and subscribed before me this 6th
day of August, 1997

Leslie Hudson
Notary Public

My Commission Expires: 01-13-99



**VERIFIED STATEMENT
OF
EARL W. WOOLLEY**

My name is Earl W. Woolley and I am Director Contracts and Joint Facilities of The Burlington Northern and Santa Fe Railway Company ("BNSF"). My business address is 2600 Lou Menk Drive, Fort Worth, TX 76131. I began my railroad career in 1961 as a clerk for the St. Louis-San Francisco Railway Company ("Frisco") and have held numerous positions with Frisco and Burlington Northern Railroad Company. These positions include Traveling Auditor, Internal Auditor, Manager of Contracts and Assistant Director Contracts and Joint Facilities. I assumed my present position in 1995. In my present position, I am responsible for negotiation and administration of all operating and joint facility contracts for the southern portion of BNSF. In addition, I negotiated all trackage rights and other operating agreements with Union Pacific Railroad Company ("UP") resulting from the September 25, 1995 Settlement Agreement ("Settlement Agreement"), as amended, with UP.

One of the trackage rights agreements that I negotiated with UP is the Trackage Rights Agreement dated as of June 1, 1996, covering the grant of trackage rights to BNSF from Sealy to Waco to Eagle Pass ("the June 1, 1996 Agreement"). A copy of the June 1, 1996 Agreement is included in Exhibit B of UP/SP-266, filed with the Board on June 28, 1996. Included in the grant of trackage rights is the right for BNSF to move loaded and empty unit coal trains into and out the Lower Colorado River Authority ("LCRA") Plant at Halsted, Texas, on the UP's line between Sealy

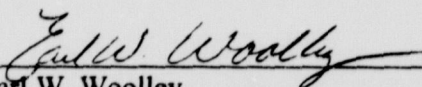
and Taylor, Texas. The June 1, 1996 Agreement, like all of the other trackage rights arising from the Settlement Agreement, became effective upon consummation of the UP consolidation with Southern Pacific ("SP"). I understand the UP is taking the position that BNSF does not have the right to serve the LCRA Halsted Plant until UP's contract with LCRA covering the transportation of coal to the Halsted Plant expires. The June 1, 1996 Agreement contains no such limitation. BNSF's right to move loaded and empty unit coal trains to and from the Halsted Plant is completely unrestricted and became effective as of the date of the UP/SP consolidation.

During the negotiation process, I met with UP several times to discuss the various trackage rights agreements arising out of the Settlement Agreement with UP. At no time during my meetings with UP did UP ever state that BNSF's trackage rights to serve LCRA at Halsted were not to become effective until the expiration of a rail contract with UP or any other future time. The understanding was that the June 1, 1996 Agreement was to become effective at the same time the other trackage rights agreements arising out of the Settlement Agreement became effective.

VERIFICATION

THE STATE OF TEXAS)
)
COUNTY OF TARRANT)

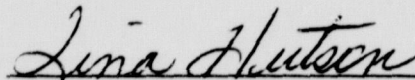
Earl W. Woolley, being duly sworn, deposes and says that he has read the foregoing statement, and that the contents thereof are true and correct to the best of his knowledge and belief.



Earl W. Woolley

Subscribed and sworn to before me on this 4th day of August, 1997.





Notary Public

My Commission expires:

6-26-98

STB FD-32760 (SUB 21) ID-180910 8-4-97 I

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR II

SLOVER & LOFTUS

ATTORNEYS AT LAW
1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036

100810

August 4, 1997



802 347-7170

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Unit

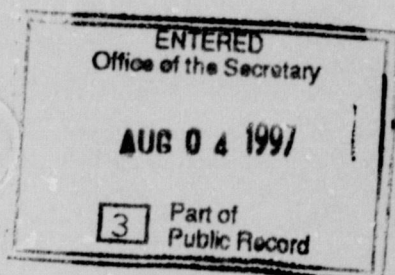
ATTN: STB Finance Docket No. 32760 (Sub-No. 21)
1925 K Street, N.W.
Washington, D.C. 20423-0001

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 please find an original and twenty-five (25) copies of the Petition of the Lower Colorado River Authority and the City of Austin, Texas for Leave to File Out of Time (LCRA-10).

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



Sincerely,

C. Michael Loftus

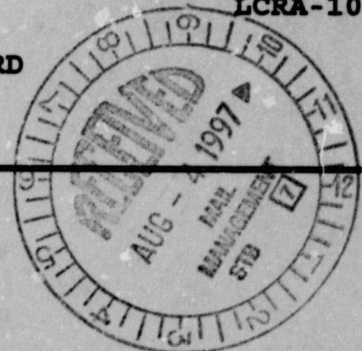
C. Michael Loftus
An Attorney for the Lower Colorado
River Authority and the City of
Austin, Texas

Enclosures

cc: Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

LCRA-10



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)

PETITION OF
THE LOWER COLORADO RIVER AUTHORITY
AND THE CITY OF AUSTIN, TEXAS
FOR LEAVE TO FILE OUT OF TIME

The Lower Colorado River Authority ("LCRA") and The City of Austin, Texas ("Austin") (jointly "LCRA/Austin") hereby Petition for Leave to File their comments in response to the Board's Decision No. 1 in this docket one business-day out of time. LCRA/Austin endeavored to file these comments on Friday, August 1, 1997, but due to an unanticipated delay in reproduction, LCRA/Austin's representative did not arrive at the Board's offices until approximately 5:18 p.m., and as a result, LCRA/Austin were unable to file the comments on that date.

Since granting this Petition will not prejudice any party's interests in this proceeding, LCRA/Austin respectfully request that the Board accept their comments out of time.

Respectfully submitted,

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

By: *C. Michael Loftus*
C. Michael Loftus

Donald G. Avery

Andrew B. Kolesar III

Slover & Loftus

1224 Seventeenth Street, N.W.

Washington, D.C. 20036

(202) 347-7170

Attorneys for the Lower
Colorado River Authority

OF COUNSEL:

Slover & Loftus

1224 Seventeenth Street, N.W.

Washington, D.C. 20036

Dated: August 4, 1997

CERTIFICATE OF SERVICE

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

Arvid E. Roach II, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Paul A. Cunningham, Esq.
Harkins Cunningham
1300 Nineteenth Street, N.W.
Washington, D.C. 20036

Michael D. Billiel, Esq.
Joan S. Huggler, Esq.
U.S. Department of Justice
Antitrust Division, Suite 500
325 Seventh Street, N.W.
Washington, D.C. 20530

Erika Z. Jones, Esq.
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Suite 6500
Washington, D.C. 20006

and by first class mail, postage prepaid, on all other parties of
record in Finance Docket No. 32760 (Sub-No. 21).

Andrew B. Kolesar III
Andrew B. Kolesar III

STB FD-32760 (SUB 21) ID-180896 8-1-97 I

180896

HOPKINS & SUTTER

(A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS)

888 SIXTEENTH STREET, N.W., WASHINGTON, D.C. 20006-4103 (202) 835-8000

FACSIMILE (202) 835-8136

INTERNET <http://www.hopsut.com>

CHICAGO OFFICE THREE FIRST NATIONAL PLAZA 60602-4205

DETROIT OFFICE 2800 LIVERNOIS SUITE 220 TROY, MI 48063-1220

180896

CHARLES A. SPITULNIK
(202) 835-8196

August 1, 1997

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

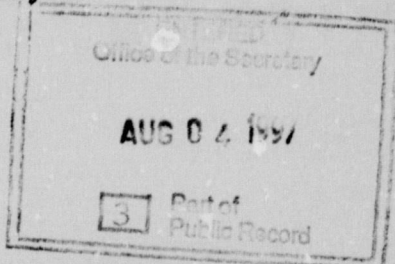


Re: *Union Pacific Corp. et al. - Control & Merger -
Southern Pacific Rail Corp., et al.
Finance Docket No. 32760 (Sub-No. 21)*

Dear Mr. Williams:

Enclosed please find an original and 25 copies of the Petition of Southern California Regional Rail Authority ("SCRRA") For Leave To File Comments ("SCRR-5") for filing in the above-referenced action. Also enclosed is a 3.5 inch diskette containing the text of this pleading in WordPerfect 5.1 format.

Please date-stamp the extra copy provided and return it with our messenger.
Thank you.



Sincerely,

A handwritten signature in dark ink, appearing to read "Charles A. Spitulnik".

Charles A. Spitulnik

Enclosure

cc: All Parties of Record

SURFACE TRANSPORTATION BOARD
Washington, D.C.

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]

**PETITION OF SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY
FOR LEAVE TO FILE COMMENTS**

Southern California Regional Rail Authority ("SCRRA") hereby petitions this Board pursuant to 49 C.F.R. §1117.1 for leave to file Comments with respect to the Board's oversight of the control and merger transactions approved in Finance Docket No. 32760, *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* ("UP/SP"), Decision No. 44 (Service Date August 12, 1996). The Board's order establishing this proceeding, issued on May 1, 1997, required all parties who wished to participate as a party of record to notify the Board of their intention by no later than May 27, 1997. At that time, SCRRA did not believe that comments would be required. However, changing circumstances since that time have caused SCRRA to conclude that

it should advise the Board of the impact on its operations of the merger transaction approved in Decision No. 44.

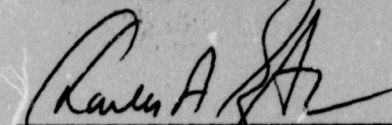
SCRRA is a joint powers authority, formed pursuant to Cal. Pub. Utilities Code §130255 and Cal. Govt. Code §6500 *et seq.*, and pursuant to an agreement among its five member county transportation agencies: the Los Angeles County Metropolitan Transportation Authority; the Orange County Transportation Authority, the Riverside County Transportation Commission, San Bernardino Associated Governments; and the Ventura County Transportation Commission. It is charged with responsibility for planning, design and construction, and then administering the operation of regional passenger lines serving the five member counties. SCRRA participated as a party of record in the proceedings in which the Board approved this merger.

In the application, Union Pacific Railroad Company ("UP") and Southern Pacific Transportation Company ("SP") made representations as required by 49 C.F.R. §1180.8(a)(2) about the potential impact of the merger on SCRRA's commuter rail service. As explained in more detail in its Comments (SCRR-6), which are being filed today along with this Petition, SCRRA has begun experiencing problems on the lines on which it shares operations with UP, including the lines previously owned or operated by the former SP. Because of these experiences and of the expectation that the situation will worsen as traffic on those lines continues to increase, SCRRA seeks to participate in these Oversight proceedings. SCRRA's comments now, and its continuing participation in this Oversight proceeding, will ensure that the Board has a complete picture of the impacts of the merger.

Granting SCRRA's petition will not prejudice UP or any other party, since SCRRA's comments are being filed today at the same time as the first round of comments of all other participants in this proceeding.

WHEREFORE, SCRRA requests the Board to grant its Petition and permit it to participate as a party of record in this Oversight proceeding, and to file the Comments (SCRR-6) which are submitted today along with this Petition.

Respectfully submitted,



Charles A. Spitulnik
Alicia M. Serfaty
HOPKINS & SUTTER
888 16th Street, N.W.
Washington, D.C. 20006
(202) 835-8000

Counsel for Southern California
Regional Rail Authority

Dated: August 1, 1997

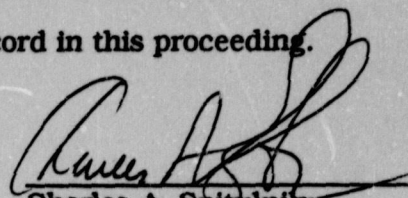
CERTIFICATE OF SERVICE

I hereby certify that on August 1, 1997, a copy of the foregoing Petition Of Southern California Regional Rail Authority For Leave To File Comments (SCRR-5) was served by hand delivery upon the following:

Erika Z. Jones, Esquire
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Suite 6500
Washington, D.C. 20006

Arvid E. Roach II, Esquire
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

I also certify that copies of the aforementioned pleading were served by first class mail, postage prepaid upon all parties of record in this proceeding.



Charles A. Spitznik

STB

FD

32760

(Sub 21)

5-29-97

I

179965

TROUTMAN SANDERS LLP
ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

1300 I STREET, N.W.
SUITE 500 EAST
WASHINGTON, D.C. 20005-3314
TELEPHONE: 202-274-2950
FACSIMILE: 202-274-2994

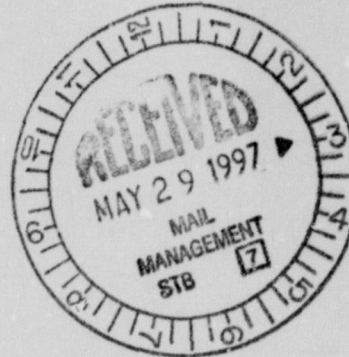
WILLIAM A. MULLINS

DIRECT: 202-274-2953

May 29, 1997

HAND DELIVERY

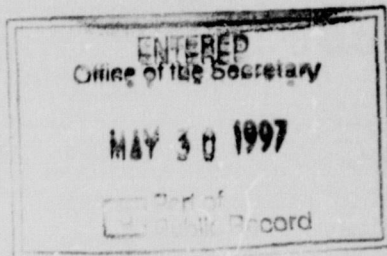
Mr. Vernon A. Williams
Case Control Unit
ATTN: STB Finance Docket No. 32760 (Sub-No. 21)
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20006



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:

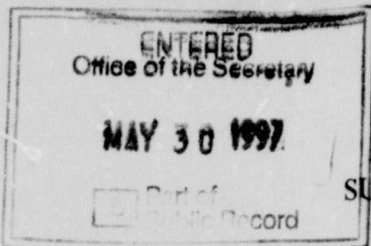
Enclosed for filing in the above captioned proceeding are the original and twenty-six copies of The Withdrawal as a Party of Record of Occidental Chemical Corporation. Please date and time stamp one of the copies for return to our offices. Included with this filing is a 3.5 inch Word Perfect, Version 5.1 diskette with the text of the pleading.



Sincerely yours,

William A. Mullins

cc: Donald Thomas
Enclosure



ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

179925
FINANCE DOCKET NO. 32760 (Sub-No. 21)

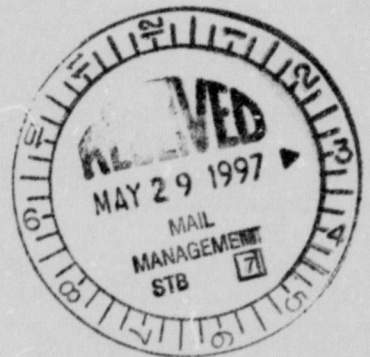
UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY

--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

WITHDRAWAL AS A PARTY OF RECORD



Donald Thomas
Occidental Chemical Corporation
Order Fulfillment - Re-Engineering Group
5005 Lyndon B. Johnson Freeway
3rd Floor
Dallas, Texas 75380-9050

May 29, 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

WITHDRAWAL AS A PARTY OR RECORD

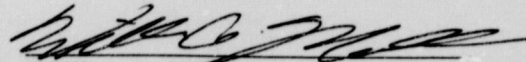
The Occidental Chemical Corporation hereby withdraws itself as a party of record (POR) in this oversight proceeding. Occidental also requests that its representative, as listed below, be removed from the service list maintained by the Board in this oversight proceeding.

Donald Thomas
Occidental Chemical Corporation
Order Fulfillment - Re-Engineering Group
5005 Lyndon B. Johnson Freeway
3rd Floor
Dallas, Texas 75380-9050

May 29, 1997

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "OCCIDENTAL CHEMICAL CORPORATION'S NOTICE OF INTENT TO WITHDRAW FROM PROCEEDING" was served this 29th day of May, 1997, by hand-delivery, overnight delivery, facsimile, or by first-class mail in a properly addressed envelope with adequate postage thereon addresses to all known parties of record.


William A. Mullins