✓ 209228
209229
209230
209231
209232
209233
209234
209235
209236
209237
209238
209239
209240
209241
209242
209243
209244

BAKER & MILLER PLLC

ATTORNEYS AND COUNSELLORS

SUITE 1000
915 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2318

TELEPHONE: (202) 637-9499
FACSIMILE: (202) 637-9394

October 28, 2003

Honorable Vernon A. Williams
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

RE: **Change of Address**

Dear Secretary Williams:

Effective **Thursday, October 30, 2003**, the offices of Baker & Miller PLLC will relocate to the following address:

Baker & Miller PLLC
2401 Pennsylvania Avenue, NW
Suite 300
Washington, DC 20037
TEL: (202) 637-9499
FAX: (202) 637-9394

Please update the Surface Transportation Board's ("STB") records to reflect the above change of address for all active proceedings included on the enclosed list in which William A. Mullins, David C. Reeves and/or Christine J. Sommer have appeared. Copies of all STB notices, decisions, pleadings or other correspondence related to these proceedings dated October 30, 2003 and thereafter should be sent to the attention of Messrs. Mullins, Reeves or Ms. Sommer at Baker & Miller PLLC at their new address.

All known parties of record in the proceedings listed on the enclosure have been sent a copy of this change of address notification.

Sincerely yours,

William A. Mullins / David C. Reeves / Christine J. Sommer

Enclosure

Change of Address Notification

Effective Thursday, October 30, 2003
Baker & Miller PLLC
2401 Pennsylvania Avenue, NW
Suite 300
Washington, DC 20037
TEL: (202) 637-9499 / FAX: (202) 637-9394

William A. Mullins / David C. Reeves / Christine J. Sommer

Docket No. or Finance Docket No.	Name of Proceeding at the STB
Docket No. AB-308 (Sub-No. 3X)	Central Michigan Railway Company-Abandonment Petition-In Saginaw, MI
Docket No. AB-468 (Sub-No. 5X)	Paducah & Louisville Railway, Inc.-Abandonment Exemption-In McCracken County, KY
Docket No. AB-468 (Sub-No. 6X)	Paducah & Louisville Railway, Inc.-Abandonment Exemption-In Hopkins County, KY
F.D. No. 34397	Keokuk Junction Railway Co.-Alternative Rail Service-Line Of Toledo, Peoria And Western Railway Corporation
F.D. No. 34342	Kansas City Southern-Control-The Kansas City Southern Railway Company, Gateway Eastern Railway Company, And The Texas Mexican Railway Company
F.D. No. 34335	Keokuk Junction Railway Company-Feeder Railroad Development Application-Line Of Toledo, Peoria & Western Railway Corporation Between La Harpe And Hollis, IL
F.D. No. 34178	Dakota, Minnesota & Eastern Railroad Corporation And Cedar American Rail Holdings, Inc.-Control-Iowa, Chicago & Eastern Railroad Company
F.D. No. 34177	Iowa, Chicago & Eastern Railroad Company-Acquisition And Operation Exemption-Lines Of I&M Rail Link, LLC
F.D. No. 34015	Waterloo Railway Company-Acquisition Exemption-Bangor and Aroostook Railroad Company and Van Buren Bridge Company
F.D. No. 34014	Canadian National Railway Company-Trackage Rights Exemption-Bangor and Aroostook Railroad Company and Van Buren Bridge Company
F.D. No. 33740 and F.D. No. 33740 (Sub-No. 1)	The Burlington Northern and Santa Fe Railway Company-Petition For Declaration Or Prescription Of Crossing, Trackage Or Joint Use Rights and For Determination Of Compensation and Other Terms
F.D. No. 33388	CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company-Control and Operating Leases/Agreements-Conrail Inc. and Consolidated Rail Corporation
F.D. No. 33388 (Sub-No. 91)	CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company-Control and Operating Leases/Agreements-Conrail Inc. and Consolidated Rail Corporation (General Oversight)
F.D. 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
F.D. 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
F.D. No. 32760 (Sub-Nos. 26 - 32)	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

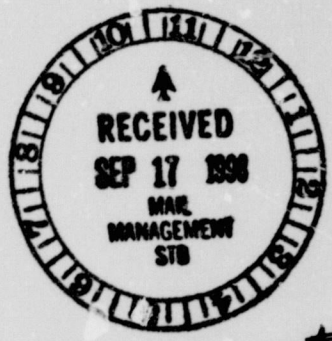
STB FD 32760 (Sub 26) 9-17-98 D 191169

Knightsbridge Drive
Hamilton, Ohio 45020
513 868-4974, Fax: 513 868-5778

Richard E. Kerth
Transportation/Distribution Manager—Commerce, Regulatory Affairs
and Organizational Improvement
Corporate Transportation/Distribution

191169

Champion
Champion International Corporation



ENTERED
Office of the Secretary

SEP 17 1998

Part of
Public Record

September 15, 1998

Office of the Secretary
Surface Transportation Board
Case Control Unit
Attn: STB Docket No. 32760 (Sub.-No. 26)
1925 K Street, N.W.
Washington, D.C. 20423-0001

re: Union Pacific Corporation, et. al – Control and Merger –Southern Pacific Rail Corporation, et. al ; Houston /Gulf Coast Oversight [STB Finance Docket No. 32760 (Sub.-No. 26)]

Dear Mr. Secretary:

Enclosed for filing are an original and twenty-five (25) copies of the Statement of Champion International Corporation on behalf of itself and its short line railroad subsidiary, the Moscow, Camden & San Augustine Railroad Company in the above reference docket proceeding. We have also enclosed a computer diskette containing our filing in Word Perfect 5.0 format which can be converted to Word Perfect 7.0. (Unfortunately, we do not have access to the 7.0 version; however, your version will read this file).

One copy of this filing has been sent to UP's representative and Administrative Law Judge Stephen Grossman. Copies have also been sent to all parties of record on the Service List issued September 9th.

Sincerely,

Richard E. Kerth

Richard E. Kerth
Transportation Manager - Commerce
and Regulatory Affairs

REK/rk
enclosures

191169

BEFORE THE
SURFACE TRANSPORTATION BOARD

CIC-2

Finance Docket No. 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 PROCEEDING

VERIFIED STATEMENT OF CHAMPION INTERNATIONAL CORPORATION
ON BEHALF OF ITSELF AND ITS SHORT LINE RAILROAD
SUBSIDIARY OPERATION:
MOSCOW, CAMDEN & SAN AUGUSTINE RAILROAD

Champion International Corporation (hereinafter referred to as " Champion") respectfully submits this statement to the Board under Decision No. 2 in the Houston / Gulf Coast oversight proceeding. The merger of the Union Pacific ("UP") and Southern Pacific ("SP") systems continues to have a negative impact on Champion's manufacturing operations and short line railroad operations in East Texas serviced by UP/SP from its Houston base of operations.

I. Identity and Interest of Champion International Corporation

Champion is an integrated forest products company that manufactures paper, paperboard, pulp, lumber and plywood. In east Texas, Champion's Corrigan and Camden plants manufacture plywood. The Corrigan facility is rail served directly by the UP/SP Railroad. The Camden facility is rail served by a wholly owned Champion subsidiary, the Moscow, Camden & San Augustine Railroad ("MC&SA"), which operates as a switch carrier over seven (7) miles of

track and interchanges traffic with the UP/SP Railroad at Moscow, Texas. The MC&SA Railroad has only one customer - Champion's plywood manufacturing facility at Camden, Texas

Prior to June 1, 1998, Champion also owned and operated two newsprint manufacturing mills in East Texas; one in the Houston suburb of Sheldon and the other at Lufkin, Texas[1]. The Sheldon mill is currently rail served by the UP/SP but may receive rail service in the future by the Burlington Northern Santa Fe ("BNSF") as a result of the trackage arrangement between the UP/SP and BNSF announced February 13, 1998.[2] The newsprint facility at Lufkin, Texas is rail served by the Angelina & Neches River Railroad ("A&NR")[3], a fifty percent owned affiliate of Champion. The A&NR provides general freight service for a number of customers on its 12 miles of mainline track and interchanges traffic with the UP/SP at Lufkin (Herty), Texas. The A&NR will file a separate expression in this proceeding on behalf of itself and its customers.

Champion's East Texas operations, namely Camden, Corrigan, the A&NR and the MC&SA, are located on the former SP mainline between Fair Oaks, AR and Houston, Texas. These operations are completely dependent upon the UP/SP as the only means of rail access. Rail service to these facilities continues to be impacted by events in Houston and the Gulf Coast area.

II. Champion's Participation in the UP/SP Merger Proceeding

Champion expressed concern in our initial filing in Finance Docket No. 32760[4] that local service to our operations located on the SP mainline between Fair Oaks and Houston would be impacted by the merger of UP and SP due to: (a) overhead trackage rights granted to the BNSF as a competitive condition of merger; and, (b) plans for directional (southbound) running of trains destined to Houston would interfere with the local service to our facilities (supply of empty equipment from Houston to our facilities and the subsequent movement of loaded cars). Champion also expressed concern that the merger of UP and SP would eliminate a competitive

---

[1] On June 1, 1998, Champion sold these operations to Donohue Industries, Inc., a subsidiary of Donohue, Inc. of Montreal, Canada

[2] On February 12, 1998, the BNSF and UP/SP announced the parties agreed to exchange half interest in the two pieces of former SP 342 miles Houston to New Orleans lines now owned by each railroad.

[3] The Angelina & Neches River Railroad is a fifty percent owned affiliate of Champion International Corporation. Champion acquired this ownership position in 1985 after Champion merged with St. Regis Paper Company.

UP reload at Palestine, TX (which has clearly been eliminated as a post merger alternative) and suggested that the competitive BNSF reload at Cleveland, TX might also eliminated as a post merger alternative in the wake of various realignments triggered by the BNSF trackage rights agreement. Champion asked the Board to condition the merger by allowing the BNSF open access to all Class III railroad lines to alleviate any effects of the merger. The Board denied Champion's request for conditions[5] citing that "Class III railroads and their customers on this line are rail served exclusively by SP pre-merger and UP/SP post merger and that there is no reason to believe the new post merger traffic flows will cause service problems."

On July 31, 1997, Champion filed supplemental comments with the Board when rail service in East Texas had deteriorated to unacceptable levels and on-going efforts to resolve those problems directly with the UP/SP were not effective. In its comments, Champion cited instances of boxcar equipment shortages; boxcars being tendered as empty yet were under load and moving without billing; lack of local service; and the likelihood of a production disruption at our facilities because UP/SP could not deliver necessary raw materials. Champion did not seek additional orders, modification to any decision, or imposition of additional remedial conditions opting, instead, to continue to work directly with the UP/SP to resolve these problems. Champion's intent was to keep the Board apprised of our situation and to encourage the Board to maintain oversight of this merger for the full five (5) year period.

III. Effects on Champion in Texas and the Gulf Coast Region

Champion and its affiliate operations continue to experience service problems which we believe are directly related to the conditions imposed to ameliorate competitive impact of the merger. UP/SP and BNSF, under trackage rights granted in the merger, are both funneling numerous southbound trains each day into Houston over the mainline between Fair Oaks and Houston which impacts the local operation which services Champion .

---

[4] Comments of Champion International Corporation dated December 19, 1995; see also Finance Docket No. 32760, Decision No. 44, Decided August 6, 1996, page 76

[5] Finance Docket No. 32760, Decision No. 44, Decided August 6, 1996, page 193

Our service problems include:

- a severe reduction in the frequency of car pickups and set outs by the UP, from five days a week to three days a week to zero (at times);
- local service failures due to congestion in Houston and directional traffic flows;
- Corrigan, TX unable to have cars switched in and out by Leggett switching crew because of failures of local service from Houston;
- Leggett switching crew using SP road (heavy) locomotives for switching service have resulted in derailments at Corrigan;
- increased transit times for movements via the UP/SP;
- substantially increased costs related to shipping products by truck or other modes; trans-loading rail cars to trucks; in order to meet customer's delivery schedules and press times.

It's difficult to discern whether these current problems are lingering from the UP's service "melt-down" in Houston or the operational changes UP/SP made in the Southern Tier on February 1, 1998, including "directional running", (using the parallel SP and UP lines to run one way traffic between Houston and Chicago at increased speeds). It is clear to us that additional traffic and congestion from both UP/SP and BNSF trains on the main line has impacted our businesses as discussed below.

CAMDEN, TX AND MC&SA : As earlier indicated, Champion's East Texas operations are located on the mainline between Fair Oaks and Houston which has been designated a "southbound" track. Camden and the MC&SA depend on UP/SP northbound service originating in Houston (Englewood yard) which must compete against southbound traffic. Train LEF51 is designated to provide northbound local service for movement of primarily empty cars to all stations from Houston to Lufkin, TX (including Moscow, TX) three times per week –Monday, Wednesday, and Friday. Local train LEF50 is designated to provide southbound local service from Lufkin, TX back to Houston with loaded cars on Tuesday, Thursday and Saturday. LEF51 crews are called at 3:30 a.m. to provide local service moving north against the flow of southbound trains. On many occasions, the LEF51 crew runs out of hours without ever getting clearance past Tower 26 in Englewood yard; or if they do get out of the yard, they often don't get further than Humble, TX –(20 miles north of Houston). On some occasions, LEF 51 can't operate at all due to lack of power and/or congestion in the Englewood

yard that backs up through trains onto the mainline. The result is Champion does not receive a consistent supply of cars for loading . When train LEF 51 can't operate northbound, there is no train LEF 50 to operate southbound. Recently, 26 cars loaded with product for our customers sat for eight consecutive days at the Moscow, TX interchange yard awaiting local service to Houston. UP/SP and BNSF southbound trains passed by the connection several times each day while our shipments sat idle as through trains are (and were) not authorized to move our shipments.

Since January 1, 1998, rail shipments from Camden have averaged a 138 % increase in transit time **over** the previous year – which by UP/SP measurements included their "worst" service period on record. Shipments to Utility, TX, which should be 4 days transit time, now average 25 days yet were only taking 11 days during the "meltdown crisis". Shipments to the southern California marketplace which should take 10 days now average 24 days. Customers in Eau Claire, Wisconsin; San Antonio, TX; Brownsville, TX; Corona, California and La Mirada, California will only accept shipments from our Camden plant if we ship by truck or through the BNSF reload at Cleveland, TX.

However, Champion is restricted on use of the Cleveland, TX BNSF reload facility for only those shipments which deliver on the BNSF, principally in California, Washington and New Mexico. The facility does not have the capacity to handle additional volumes to replace UP/SP rail service. During the "meltdown crisis", BNSF limited shipments at Cleveland to the same shipper volumes as were tendered prior to the crisis. Although Camden has been able to ship 18% of our rail shipments through this reload; 82% of our rail shipments must still be tendered to the UP/SP. Truck shipments from Camden increased 107% in 1996 (over 1995) and 110% in 1997 (over 1996). Camden shipped an average 825 trucks a month in 1997 as compared to 700 trucks per month in 1995.

From an operational viewpoint, Camden has "peaked" on the number of trucks it can safely load each day. The Cleveland reload is being used by Champion to the maximum extent. Without consistent rail service by UP/SP, Champion could be potentially shut out of certain markets for our products. We are seeking other cost and service effective reload alternatives to take our product to market to avoid UP/SP rail service.

CORRIGAN, TEXAS: Champion's Corrigan, TX facility is similarly affected by UP/SP service failures. The same local trains providing service to Camden provide service to Corrigan. The difference is that UP/SP's Leggett train crew is responsible for switching the mill. When local trains, LEF 51 and LEF 50, cannot provide service from and to Houston, the Leggett train crew does not switch the mill. Often times, the Leggett train crew cannot gain access to the mainline due to the congestion on the main line from southbound UP/SP and BNSF trains. In addition, the switching locomotive provided to the Leggett crew is too heavy for switching service over our tracks and has resulted in several derailments on our property.

The Corrigan facility places 29% of its rail shipments through the Cleveland reload for BNSF rail service; however, 71% of the shipments from this facility require UP/SP service. For the last two years, Corrigan has consistently shipped its maximum capacity of 380 trucks per month to avoid rail service. Again, without consistent rail service by UP/SP, Champion could be potentially shut out of certain markets. Here, too, we are seeking other cost and service effective reload alternatives to take our product to market to avoid UP/SP rail service.

To relieve pressure on the Corrigan mill manufacturing operation caused by switch failures by UP/SP, the MC&SA Railroad has proposed to UP/SP, on several occasions, that it be permitted to provide switching services at Corrigan. (The MC&SA would accomplish this by transferring one of its switch locomotives to the Corrigan facility. The MC&SA railroad crew would divide its time between Camden and Corrigan using highway transportation to shuttle the crew between the mills.) UP/SP has been considering this proposal for well over a year now. UP/SP contends they have been focused on the Houston "meltdown" problems and need further study of the labor implications of this proposal. With the closure of the Louisiana Pacific facility in Corrigan earlier this year, the only business remaining for the Leggett switch crew to handle in addition to Champion's Corrigan mill is LP's wood chip operation in Kirby, TX. Indeed, it is quite possible that the Kirby, TX operation may also close in the near future as a direct result of a curtailment in Simpson Paper's Pasadena, Texas operation. (The Kirby facility supplies wood chips almost exclusively to Simpson Pasadena.). The MC&SA Railroad is willing to provide switching service at Corrigan tailored to meet the mill's needs just as it does for the Camden facility. We don't understand why UP/SP has not been more responsive to our proposal to allow

the MC&SA Railroad to switch the Corrigan facility and transfer the Leggett crew to another area where service is deficient

IV. Remedial Conditions

When approving this merger, the Board retained jurisdiction and the authority to impose additional conditions (if the facts warrant). The Board retained five years of oversight " to ensure the merger related competitive problems do not develop." [6] In this sub proceeding, (Sub.-No. 26), the Board is "examining whether there is any relationship between market power gained by UP/SP through the merger and the failure of service that occurred in the region, and if so, whether additional remedial conditions would be appropriate."

Champion believes the unprecedented service problems in Houston and the Gulf Coast make it difficult to reach any firm conclusion on the question posed in this proceeding. We simply do not know what constitutes "normal" operations for the UP/SP in Houston and the Gulf Coast because service deterioration began almost immediately after the merger. Our definition of "normal" can only be equated to the consistent service afforded our operations by SP prior to the merger. We have not experienced that service level on a consistent basis.

Congestion on the Fair Oaks to Houston main line by UP/SP and BNSF southbound trains (via overhead trackage rights granted to BNSF to preserve competition) are key contributors to the lack of service we experience today. Additional trains on this line have hindered local service. While the trackage rights may have been designed to create competition between BNSF and UP/SP on traffic moving to, from, or through Houston and the Gulf Coast area, that special condition has adversely affected and disadvantaged shippers on this line.

Champion wants and needs consistent local service restored to our operations in order that we are able to take our products into our marketplace. Therefore, we can not endorse any additional competitive conditions which would be counterproductive to restoration of consistent local service in Houston and the entire Gulf Coast.

---

[6] Decision No. 77 (January 2, 1998) at page 7

V. Houston / Gulf Coast Region

We acknowledge that the Board has instituted a proceeding, Finance Docket No. 32760 (Sub.-No. 21) wherein the Board seeks comments on the ***general effects*** of the merger of Union Pacific and Southern Pacific and on the implementation of conditions used to address the transaction's competitive harms. In its first annual review, Decision No. 10, served October 27, 1997, the Board preliminarily concluded that the merger as conditioned had not caused substantial competitive harm and that post merger safety and service problems were not based upon market power created from the merger. (Currently, the Board is considering comments filed in the second annual review and will render a decision under Sub.-No. 21).

Champion is filing our comments in the Sub.-No. 26 proceeding, rather than in the general oversight proceeding, because we wish to bring to the Board's attention the transaction's effect specifically in Texas and the Gulf Coast region. However, we submit that both proceedings are so entangled for Texas and Gulf Coast shippers that it is difficult to comment on one without reference to the other. Based upon our experiences with local service to our operations, Champion offers the following comments:

1. Champion supports removing service restrictions to short lines railroads by carriers granted overhead trackage rights, or "open interchange". However, rather than singling out UP/SP for such treatment as would be the case in this proceeding, we believe the issue of "open interchange" should be addressed in a proceeding applicable to all railroads. Champion supports (and expands) the position of AF&PA[7] who encouraged the Board "to maximize routing options by increasing opportunities for short line rail carriers to participate in UPSP's rail traffic; to remove 'paper barriers' in sales agreements and pricing policies of Class I railroads which can severely restrict the ability of a short line railroad to provide service and interchange traffic. During the service "crisis", Champion would have been able to move our BNSF traffic via rail, rather than through a reload, if BNSF had the ability and authority to use its through trains to move our cars that UP/SP's local service could not move. This type

[7] Comments of AF&PA [AFPA-2] by: David B. Hershey dated August 14, 1998 STB Finance Docket No. 32760 (Sub No. 21)

of competition may have spurned UP/SP to provide service to our company with its own through trains rather than lose business to the BNSF.

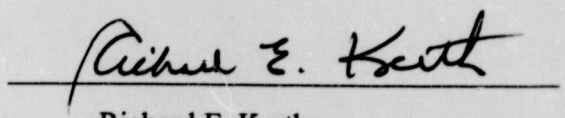
2. Champion supports the National Industrial Transportation League[8] position that the Board require the UPSP to "submit information on key terminals and routes" in a public -- not private forum. We concur that more detailed and corridor specific information is necessary for the Board to monitor and evaluate the service problems still being experienced by shippers. The UP claims in its Second Annual Report dated July 1, 1998 that directional running has made great improvements in service. Champion has not seen this "great improvement"; our service has been less than consistent and we believe corridor specific information would substantiate this point. System wide information will not provide the Board with first hand information of local service problems.
3. Several parties in this proceeding, including the "Consensus Plan" (Sub.-No. 30), the BNSF (Sub.-No. 29), and the Greater Houston Partnership, have asked the Board for neutral switching in Houston as a new condition. Those parties who suggest "neutral switching" or "coordinated switching" in Houston to alleviate congestion and improve coordination of trains in the east Texas corridor also need to provide for specific daily local service to short lines who interchange traffic with the UP/SP (or BNSF) over main lines into or out of Houston. Local crews should get priority to travel over or across main lines to switch local industries and collect or deliver shipments and/or equipment to shortline railroads.

Champion and the Moscow, Camden & San Augustine Railroad urge the Board to maintain continued and vigilant oversight of the UP/SP merger with continued emphasis on Houston, the Gulf Coast, and east Texas. Just as we were dependent on SP for rail service prior to the merger, we are dependent on UP/SP for that same level of service post merger. The UP/SP changed that relationship when it agreed to grant overhead trackage rights to the BNSF as a competitive condition. If the UP/SP can't restore that service, then we must look at other solutions including additional remedial conditions. We have been more than fair in our support of the UP/SP by trying to work directly with them to resolve these problems. With the expiration

[8] Comments of the National Industrial Transportation League, Finance Docket No. 32760 (Sub No. 21) by Nicholas J. DiMichael dated August 14, 1998

of STB Service Order No. 1518 on August 2, 1998 and the 45 day "wind down period" nearly exhausted, UP/SP must now prove to itself and others that it can operate the properties it acquired in the merger.

Respectfully submitted:



Richard E. Kerth
Transportation Manager - Commerce & Regulatory Affairs

Champion International Corporation
101 Knightsbridge Drive
Hamilton, OH 45020

September 15, 1998

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing petition have been served this 15th day of September, 1998, by first class mail, postage prepaid, upon all parties of record in the oversight proceeding.

Richard E. Kerth

Richard E. Kerth
Transportation Manager - Commerce &
Regulatory Affairs
Champion International Corporation
101 Knightsbridge Drive
Hamilton, OH 45020

LAW OFFICES
ZUCKERT, SCOUTT & RASENBERGER, L.L.P.
888 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20006-3939
TELEPHONE : (202) 298-8660
FACSIMILES: (202) 342-0683
(202) 342-1316

191109

D

RICHARD A. ALLEN

DIRECT DIAL.
(202) 973-7902

September 14, 1998

BY HAND

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: STB Finance Docket No. 32760 (Sub. No.-26) Service List

Dear Mr. Williams:

I am writing to correct several errors in the Service List for this proceeding that you issued on September 10, 1998.

First, it shows me as representing three parties: Chemical Manufacturers Association ("CMA"); Railroad Commission of Texas ("RTC"); and Texas Mexican Railway ("Tex Mex"). I represent only Tex Mex. Although Tex Mex has joined CMA, RTC and several other parties in supporting a proposal for the Houston/Gulf Coast area, I do not represent any parties other than Tex Mex. The Service List correctly lists Thomas E. Schick as the representative of CMA. The Service list does not list the representative of the RTC. It is:

Lindil C. Fowler, Jr.
General Counsel
The Railroad Commission of Texas
1701 Congress Avenue
P.O. Box 12967
Austin, TX 78711-2967

Second, the Service List also lists Mr. Jarvis V. Woodrick as a representative of Tex Mex. This is incorrect and should be deleted.

Sincerely yours,

Richard A. Allen
Attorney for Texas Mexican Railway Company

Enclosures (25)

cc: All Parties of Record

190885

CHARLES L. LITTLE
International President

BYRON A. BOYD, JR.
Assistant President

ROGER D. GRIFFETH
General Secretary and Treasurer

united transportation union

14600 DETROIT AVENUE
CLEVELAND, OHIO 44107-4250
PHONE: 216-228-9400
FAX: 216-228-0937

LEGAL DEPARTMENT

CLINTON J. MILLER, III
General Counsel • KEVIN C. BRODAR
Associate General Counsel • ROBERT L. McCARTY
Associate General Counsel • DANIEL R. ELLIOTT, III
Assistant General Counsel

August 28, 1998

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
Case Control Unit, STB FD No. 32760 Sub-No, 26
1925 K Street, N.W.
Washington, DC 20423-0001
(202) 565-1650

Re: Surface Transportation Board
Finance Docket No. 32760 Sub-No. 26

Dear Mr. Williams:

Please find enclosed the original and 25 copies of United Transportation Union's Notice of Intent to Participate in the above-named matter. According to previous Board orders we have also enclosed a diskette.

Thank you for your cooperation in this matter.

Sincerely,

D. R. Elliott

Daniel R. Elliott, III
Assistant General Counsel

cc: C. J. Miller, General Counsel

190885

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 26)

UNION PACIFIC CORPORATION, UNION PACIFIC 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]

NOTICE OF INTENT TO PARTICIPATE

Pursuant to the August 4, 1998 order and in supplement to its May 22, 1998 notice of intent to participate, United Transportation Union submits its notice of its intent to participate in this Houston/Gulf Coast proceeding. United Transportation Union is the largest rail labor organization on the UP/SP and has a strong presence in the Houston/Gulf Coast area. As a result, United Transportation Union has a great interest in this matter.

Respectfully submitted,

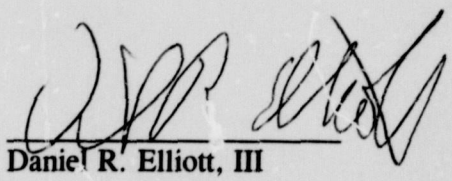
Daniel R. Elliott, III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107
(216) 228-9400

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing United Transportation Union's Notice of Intent to Participate has been served this 28th day of August, 1998 via first-class, postage pre-paid mail upon the following:

Arvid E. Roach, III, Esquire
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, DC 20044

Stephen Grossman
Administrative Law Judge
Federal Energy Regulatory Commission
888 First Street, N.E., Ste. 11F
Washington, DC 20426



Daniel R. Elliott, III

190817

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 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]

AMTRAK'S NOTICE OF INTENT TO PARTICIPATE

The National Railroad Passenger Corporation (Amtrak) hereby gives notice that it intends to participate as a party of record (POR) in the above-captioned proceeding.

Respectfully submitted,

Rachel G. Slatty

Richard G. Slattery
NATIONAL RAILROAD PASSENGER CORPORATION
60 Massachusetts Avenue, N.E.
Washington, D. C. 20002
(202) 906-3987
Counsel for National Railroad Passenger Corp.

Dated: August 28, 1998

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August 1998, I served a copy of the foregoing Amtrak's Notice of Intent to Participate by first class mail, postage prepaid, upon:

Administrative Law Judge Stephen Grossman
Federal Energy Regulatory Commission
Office of Administrative Law Judges
888 First Street, N.E., Suite 11F
Washington, D. C. 20426

Arvid E. Roach II, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044

Richard G. Slattery

190816

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

TELEPHONE:
(202) 347-7170
FAX:
(202) 347-3619
WRITER'S E-MAIL:
camills@loverandloftus.com

August 28, 1998

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Unit
ATTN: STB Finance Docket No. 32760 (Sub-No. 26)
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 32760 (Sub-No. 26)
Union Pacific Corporation, et al. --
Control and Merger -- Southern Pacific
Rail Corporation, et al.

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and 25 copies of the Notice of Intent to Participate of Houston Lighting & Power Company.

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

Sincerely,

Christopher A. Mills
An Attorney for Houston
Lighting & Power Company

CAM:mfw
Enclosures

cc: Parties listed in Certificate of Service

190816

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760 (Sub-No. 26)

NOTICE OF INTENT TO PARTICIPATE
OF HOUSTON LIGHTING & POWER COMPANY

Pursuant to the Board's decision served August 4, 1998, Houston Lighting & Power Company ("HL&P") hereby notifies the Board that it intends to participate in the above-referenced Houston/Gulf Coast oversight proceeding as a party of record.

Respectfully submitted,

HOUSTON LIGHTING & POWER COMPANY

By: C. Michael Loftus
Christopher A. Mills
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys for Houston Lighting and Power Company

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

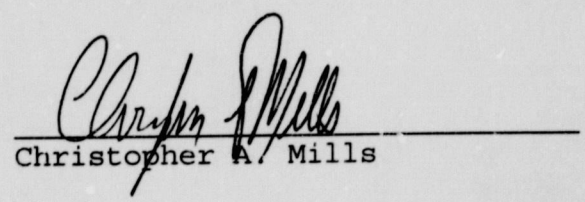
Dated: August 28, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 28h day of August, 1998, I served copies of the foregoing Notice of Intent to Participate of Houston Lighting & Power Company by hand delivery to each of the following:

Arvid E. Roach II, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Hon. Stephen Grossman
Administrative Law Judge
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426



Christopher A. Mills

BEFORE THE
SURFACE TRANSPORTATION BOARD

190813 — FINANCE DOCKET NO. 32760 (Sub-No. 26)
190814 — FINANCE DOCKET NO. 32760 (Sub-No. 29)
190815 — FINANCE DOCKET NO. 32760 (Sub-No. 30)

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

NOTICE OF INTENT TO PARTICIPATE

Pursuant to Decision No. 6, served August 4, 1998 in the above referenced matters, the Port of Corpus Christi Authority hereby submits an original and twenty-five copies of its Notice of Intent to Participate as a party of record in STB Finance Docket No. 32760 (Sub-No. 26), STB Finance Docket No. 32760 (Sub-No. 29), and STB Finance Docket No. 32760 (Sub-No. 30). The Port of Corpus Christi will adopt the acronym "CC" to identify each of its filings.

The Port of Corpus Christi requests that its representative, as listed below, be included in the service list maintained by the Board in these oversight proceedings so that the listed representative receives copies of all orders, notices, and pleadings:

Paul D. Coleman
Hoppel, Mayer & Coleman
Suite 400
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Tel: 202-296-5460
Fax: 202-296-5463

The Port of Corpus Christi also requests that the parties serve copies of their pleadings on:

Mr. John P. LaRue
Executive Director
Port of Corpus Christi Authority
P.O. Box 1541
Corpus Christi, TX 78403

Thank you for your assistance in this matter. A diskette containing this Notice, formatted to WordPerfect 7.0, is included herewith.

Respectfully submitted,

Paul D. Coleman

Paul D. Coleman
Hoppel, Mayer & Coleman
Suite 400
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for:
Port of Corpus Christi Authority

August 28, 1998

Certificate of Service

I hereby certify that on this 28th day of August, 1998, I served by first class mail, postage prepaid, the Notice of Intent to Participate of the Port of Corpus Christi Authority, on the following:

Arvid E. Roach II, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044

The Honorable Stephen Grossman
Administrative Law Judge
Federal Energy Regulatory Commission
888 First Street, N.E. Suite 11F
Washington, D.C. 20426

Paul D. Coleman

Paul D. Coleman

BRGI-1

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

190811

STB Finance Docket No. 32760 (Sub-No. 26) and (Sub-No. 29)

190812

Union Pacific Corp., et al.
-- Control and Merger --
Southern Pacific Corp., et al.

[Houston/Gulf Coast Oversight]

NOTICE OF INTENT TO PARTICIPATE
BROWNSVILLE & RIO GRANDE INTERNATIONAL RAILROAD

In connection with the above captioned proceeding and as directed pursuant to the Board's decision served August 4, 1998, Brownsville & Rio Grande International Railroad ("BRGI") hereby gives notice of its intent to participate.

BRGI's interest is primarily (but not exclusively) focused upon The Burlington Northern and Santa Fe Railway Company's "proposal number 2" as that proposal is described on page 10 of the Board's August 4th decision.[1]

BRGI will be represented in this proceeding by counsel as follows:

Robert A. Wimbish
REA, CROSS & AUCHINCLOSS
1707 "L" Street, N.W.
Suite 570
Washington, D.C. 20036
(202) 785-3700

---

[1] BNSF's proposals have received the following Board designation -- Finance Docket No. 32760 (Sub-No. 29).

BRGI will serve copies of this notice upon all other parties of record as soon as the Board publishes a complete list of participants in this proceeding.

Respectfully submitted,

Robert A. Wimbish
REA, CROSS & AUCHINCLOSS
1707 "L" Street, N.W.
Suite 570
Washington, D.C. 20036
(202) 785-3700

Counsel for Brownsville & Rio Grande International Railroad

cc: All parties of record

190802
190803
190804
190805
190806
190807
190808

ORIGINAL

Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 26)[1/]

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]

NOTICE OF INTENT TO PARTICIPATE

Joseph C. Szabo,[2/] for and on behalf of United Transportation Union-Illinois Legislative Board, gives notice of intent to participate. 63 Fed. Reg. 42482-86. (August 7, 1998).

Gordon P. MacDougall

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for Joseph C. Szabo

August 28, 1998

1/Embraces also Finance Docket No. 32760 (Sub-Nos. 27 thru 32).

2/Illinois Legislative Director for United Transportation Union, with offices at 8 So. Michigan Avenue, Chicago, IL 60603.

CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the foregoing upon the following in accordance with the decision served August 4, 1998 by first class mail postage-prepaid:

Arvid E. Roach II
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington DC 20044

Stephen Grossman, ALJ
Federal Energy Regulatory Comm.
888 First St., N.E.-#11F
Washington DC 20426

Gordon P. MacDougall

GORDON P. MacDOUGALL

Dated at
Washington DC
August 28, 1998

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 27, 1998

D

VIA HAND DELIVERY

Office of the Secretary
Surface Transportation Board
Case Control Unit
1925 K Street, N.W.
Washington, DC 20423-0001

190783
190784
190785
190786

26

Re: Finance Docket No. 32760 (Sub-Nos. 26, 28, 29 & 30)

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of The Burlington Northern and Santa Fe Railway Company's Notice of Intent to Participate (BNSF-6). Also enclosed is a 3.5-inch disk containing the text of the filing in WordPerfect 6.1 format.

I would appreciate it if you would date-stamp the enclosed extra copy and return it to the messenger for our files.

Sincerely,

Erika Z. Jones/KEO

Erika Z. Jones

Enclosures

cc: Parties of Record

BNSF-6

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760
(Sub-No. 26) - 190783
(Sub-No. 28) - 190784
(Sub-No. 29) - 190785
(Sub-No. 30) - 190786

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 PROCEEDING

NOTICE OF INTENT TO PARTICIPATE OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

The Burlington Northern and Santa Fe Railway Company hereby files its notice of intent to participate in these proceedings as a party of record.

Please enter the appearances in these proceedings of the below-named attorneys on behalf of The Burlington Northern and Santa Fe Railway Company and place them on the service list, at the addresses provided, to receive all pleadings and decisions in these proceedings.

Respectfully submitted,

Erika Z. Jones /EO

Erika Z. Jones
Adrian L. Steel, Jr.
Kathryn A. Kusske
Kelley E. O'Brien

Mayer, Brown & Platt
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 463-2000

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

The Burlington Northern and
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 27, 1998

190768

A&NR

Angelina & Neches River Railroad Co.

ANR-1

ENTERED
Office of the Secretary
AUG 28 1998
Part of
Public Record

August 25, 1998

Office of the Secretary
Case Control Unit
Surface Transportation Board
1925 K. Street N.W.
Washington, DC 20423-0001

Re: Finance Docket No. 32760 (Sub. No. 26), *Union Pacific Corp., et al. --Control and Merger – Southern Pacific Rail Corporation, et al.--Houston/Gulf Coast Oversight*

D

Dear Secretary Williams:

This letter is to notify the Board that the Angelina & Neches River Railroad ("A&NR") intends to participate in this proceeding as a party of record. Please include the undersigned on the service list as representative of the A&NR.

In accordance with 49 C.F.R. δ 1180.4(a)(2), the A&NR selects the acronym "ANR" for identifying all documents and pleadings its submits in this proceeding.

Enclosed with this letter are 25 copies. Copies of this letter are also being served on UP's representative and Administrative Law Judge Stephen Grossman in accordance with Decision No. 6. Copies will be served on all parties of record upon issuance of a formal service list.

Sincerely,

David M. Perkins

David M. Perkins
President & General Manager

cc: Arvid E. Roach, II Esquire
Covington & Burling
1201 Pennsylvania Avenue, N. W.
Washington, DC 20004

The Honorable Stephen Grossman
Administrative Law Judge
Federal Energy Regulatory Commission
888 First Street, N.E. Suite 11F
Washington, DC 20426

P.O. Box 1328, Lufkin, Texas 75902-1328
Telephone 409-634-4403

190767

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

TELEPHONE:
(202) 347-7170
FAX:
(202) 347-3619
WRITER'S E-MAIL:
jhl@sloverandloftus.com

August 27, 1998

VIA HAND DELIVERY

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

Re: STB Finance Docket No. 32760 (Sub-No. 26)

Dear Mr. Williams:

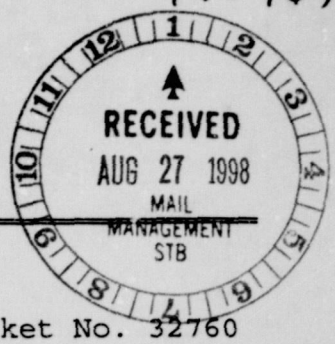
Enclosed please find an original and twenty-five (25) copies of Texas Utilities Electric Company's Notice of Intent to Participate in the above-referenced proceeding. A computer disk is also enclosed.

Respectfully submitted,

John H. LeSeur
An Attorney for Texas
Utilities Electric Company

JHL:mfw
Enclosures

190767



BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, and MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., and THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760 (Sub-No. 26) [Houston/Gulf Coast Oversight]

NOTICE OF
INTENT TO PARTICIPATE
OF TEXAS UTILITIES ELECTRIC COMPANY

Pursuant to the Surface Transportation Board's notice served on August 4, 1998, Texas Utilities Electric Company, via its undersigned counsel, hereby notifies the Board of its intent to participate in this proceeding.

Respectfully submitted,

John H. LeSeur
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Counsel for Texas
Utilities Electric Company

Dated: August 27, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have served one copy of the foregoing Notice of Intent to Participate by first-class United States mail, postage prepaid, on Arvid E. Roach II, Esq., Covington & Burling, 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, D.C. 20044, and on Administrative Law Judge Steven Grossman, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, D.C. 20426

Dated this 27th day of August, 1998 at Washington, D.C.

John H. LeSeur

190766

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 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

D

NOTICE OF INTENT TO PARTICIPATE

Union Pacific Corporation, Union Pacific Railroad Company and Southern Pacific Rail Corporation hereby notify the Board of their intention to participate in this proceeding as parties of record. Please place the undersigned representatives of Union Pacific on the official service list in this proceeding.

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
(202) 662-5388

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

August 27, 1998

*/ Including related subdockets.

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 27th day of August, 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 that have filed appearances in Finance Docket No. 32760 (Sub-No. 26) and related subdockets.

Michael L. Rosenthal

[redacted]
190760
190761
190762
190763
190764
190765

ARU-1

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760(Sub-No. 26)
[and Sub. Nos. 27-31]

UNION PACIFIC CORP. et al.
--Control and Merger--
SOUTHERN PACIFIC RAIL CORP. et al.
[HOUSTON/GULF COAST OVERSIGHT]

26

NOTICE OF INTENT TO PARTICIPATE

Pursuant to the Board's Decision No.6 in these proceedings, the Brotherhood of Railroad Signalmen; International Brotherhood of Boilermakers, Blacksmiths, Iron Ship Builders Blacksmiths Forgers and Helpers; National Council of Firemen and Oilers/SEIU; and Sheet Metal Workers International Association, give notice of their intention to participate in these proceedings through their counsel O'Donnell, Schwartz & Anderson. These organizations will participate together in this proceeding and they will be referred to collectively herein as the "Allied Rail Unions" or "ARU". Service of filings in this case on the ARU should be provided to Richard S. Edelman, Of Counsel, O'Donnell, Schwartz & Anderson, as counsel for the ARU.

Respectfully submitted,

Richard S. Edelman
Of Counsel
O'Donnell, Schwartz & Anderson
1900 L Street, N.W.
Suite 707
Washington, D.C. 20036
(202) 898-1824

August 27, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of the foregoing Notice of Intent To Participate, by first-class mail, postage prepaid, to the offices of the parties on the official service list in this proceeding.

Dated at Washington, D.C. this 27th day of August, 1998.

Richard S. Edelman

189882

SNAVELY KING MAJOROS O'CONNOR & LEE, INC.
ECONOMIC AND MANAGEMENT CONSULTANTS

July 13, 1998

Office of the Secretary
Case Control Unit
Attn: STB Finance Docket No. 32760 (Sub-No. 26)
Surface Transportation Board
1925 K. Street, N.W.
Washington, D.C. 20423-0001

D

Dear Sir or Madam:

I request that I be listed as a party of record in STB Finance Docket No. 32760 (Sub-No. 26). I am Vice President, Snavely King Majoros O'Connor & Lee, Inc. and have submitted verified statements in this proceeding as an expert witness on behalf of Kansas City Southern, Tex Mex and others. I serve as an expert witness on matters relating to railroad economics, rate structure, and rate reasonableness.

I hope it will be possible to obtain some of the submissions other parties filed on July 8, 1998.

Thank you very much.

Sincerely,

Joseph J. Plaistow

Joseph J. Plaistow

ENTERED
Office of the Secretary

JUL 16 1998

Part of
Public Record

1220 L STREET, NW, SUITE 410, WASHINGTON, DC 20005-(202)371-1111, FAX (202)842-4966

1471 CASTILLO DELMAR, CAROLINA, PR 00979 - (809)783-7683, FAX(809)783-7559

FD 32760 Sub 26

TROUTMAN SANDERS LLP

ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

208333

401 NINTH STREET, NW
SUITE 1000
WASHINGTON, DC 20004-2134
WWW.TROUTMANSANDERS.COM

William A. Mullins
william.mullins@troutmansanders.com

Direct Dial: 202-274-2953
Direct Fax: 202-654-5621

July 9, 2003

Honorable Vernon A. Williams
Office of the Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

RE: **Change of Counsel/Change of Address**

Dear Secretary Williams:

Effective **Monday, July 14, 2003**, William A. Mullins and David C. Reeves will join the law firm of:

Baker & Miller PLLC
915 Fifteenth Street, NW
Suite 1000
Washington, DC 20005-2318
TEL: (202) 637-9499
FAX: (202) 637-9394
wmullins@bakerandmiller.com
dreeves@bakerandmiller.com

Please update the Board's records to substitute Baker & Miller PLLC as counsel of record for all proceedings included on the enclosed list, and to reflect that Troutman Sanders LLP will no longer be counsel of record for clients represented by Messrs. Mullins and Reeves as noted on the enclosed list of proceedings in which either or both have entered an appearance. However, with respect to Finance Docket No. 33388 and 33388 (Sub No. 91), Baker and Miller should be shown as counsel of record for Gateway Western Railway Company and Troutman Sanders LLP should remain as counsel of record for New York State Electric and Gas.

Copies of any STB notices, pleadings or other correspondence related to these proceedings after July 11, 2003 should be sent to the attention of Messrs. Mullins or Reeves at Baker & Miller PLLC (at the address listed above).

All known parties of record in the proceedings listed on the enclosure have been sent a copy of this change of counsel/change of address notification.

Sincerely yours,

William A. Mullins and David C. Reeves

Enclosure

Change of Counsel/Change of Address Notification
for
William A. Mullins and David C. Reeves

Effective Monday, July 14, 2003

Baker & Miller PLLC
915 Fifteenth Street, NW
Suite 1000
Washington, DC 20005-2318

TEL: (202) 637-9499
FAX: (202) 637-9394

Docket No. Ex Parte No. or Finance Docket No.	List of Proceedings Before the STB
Docket No. AB-468 (Sub-No. 5X)	Paducah & Louisville Railway, Inc. - Abandonment Exemption - In McCracken County, KY
F.D. No. 34342	Kansas City Southern - Control - The Kansas City Southern Railway Company, Gateway Eastern Railway Company, And The Texas Mexican Railway Company
F.D. No. 34335	Keokuk Junction Railway Company - Feeder Railroad Development Application - Line Of Toledo, Peoria & Western Railway Corporation Between La Harpe And Hollis, IL
F.D. No. 34178	Dakota, Minnesota & Eastern Railroad Corporation And Cedar American Rail Holdings, Inc. - Control - Iowa, Chicago & Eastern Railroad Company
F.D. No. 34177	Iowa, Chicago & Eastern Railroad Company - Acquisition And Operation Exemption - Lines Of I&M Rail Link, LLC
F.D. No. 34015	Waterloo Railway Company - Acquisition Exemption - Bangor and Aroostook Railroad Company and Van Buren Bridge Company
F.D. No. 34014	Canadian National Railway Company - Trackage Rights Exemption - Bangor and Aroostook Railroad Company and Van Buren Bridge Company
F.D. No. 33740 and F.D. No. 33740 (Sub-No. 1)	The Burlington Northern and Santa Fe Railway Company - Petition For Declaration Or Prescription Of Crossing, Trackage Or Joint Use Rights and For Determination Of Compensation and Other Terms
F.D. No. 33388	CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company - Control and Operating Leases/Agreements - Conrail Inc. and Consolidated Rail Corporation
F.D. No. 33388 (Sub-No. 91)	CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company - Control and Operating Leases/Agreements - Conrail Inc. and Consolidated Rail Corporation (General Oversight)
F.D. 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
F.D. 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
F.D. No. 32760 (Sub-Nos. 26 - 3[illegible])	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

STB FD-32760(SUB26) 5-29-98 D ID-187925

187925

Commonwealth Consulting Associates

May 27, 1998

Honorable Vernon A. Williams
Office of The Secretary
Case Control Unit
Attn: STB Finance Docket No. 32760 (Sub-No.26)
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Surface Transportation Board Finance Docket No. 32760 (Sub-No. 26)

Dear Secretary Williams:

Please accept this letter as Notice of Intent to Participate in the proceeding referenced above and add my name to the service list as a party of record. Commonwealth Consulting Associates will file comments on behalf of Shell Chemical Company and Shell Oil Company.

Respectfully submitted,

David L. Hall
Commonwealth Consulting Associates
13103 F.M. 1960 West
Suite 204
Houston, TX 77065

Voice: (281) 970-6700
Fax: (281) 970-6800
E-Mail: commonwealth_consulting@compuserve.com

STB FD-32760(SUB26) 5-29-98 D ID-187948

187748

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

May 29, 1998

BY HAND

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

Re: STB Finance Docket No. 32760 (Sub-No. 26) --
UP/SP Houston/Gulf Coast Oversight Proceeding

Dear Secretary Williams:

Enclosed for filing are an original and 25 copies of Union Pacific's Reply to KCS/Tex Mex's Motion to Compel Second Set of Discovery. Please date stamp and return the enclosed extra copy of this document with our waiting messenger.

Also enclosed is a diskette containing an electronic version of this document in WordPerfect 5.1 format.

Thank you very much for your assistance.

Sincerely,

David L. Meyer

David L. Meyer

Attorney for Union Pacific Railroad Company

ENTERED
Office of the Secretary
JUN 01 1998

Enclosures

cc: Hon. Stephen Grossman (by hand)
All Parties of Record

UP/SP-342

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 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

UNION PACIFIC'S REPLY TO KCS/TEX MEX'S MOTION TO COMPEL SECOND SET OF DISCOVERY

Union Pacific Railroad Company ("UP") hereby replies to the "Motion to Compel Discovery Second Set of Discovery" (the "Motion") jointly filed by the Kansas City Southern Railway Company ("KCS") and the Texas Mexican Railway Company ("Tex Mex") (collectively, "KCS/Tex Mex") on May 26, 1998 (TM-2/KCS-2). In light of the hearing before Administrative Law Judge Grossman on the morning of June 1 to address outstanding discovery issues, UP has undertaken to provide this reply less than three full days after receiving KCS/Tex Mex's motion. To the extent there is any question about factual issues addressed herein, such as the burdensomeness of KCS/Tex Mex's discovery, UP is prepared to supplement this reply with sworn testimony as appropriate.

KCS/Tex Mex's motion seeks to compel responses to discovery requests filed by KCS/Tex Mex on April 29, 1998, see TM-11/KCS-12 (Exh. A to KCS/Tex Mex Motion), to which UP responded on May 14, 1998, see UP/SP-340 (Exh. B to KCS/Tex Mex Motion). KCS/Tex Mex's motion (p. 1) seeks an order compelling UP to produce a "reasonable amount of readily available information" responsive to KCS/Tex Mex's requests. As demonstrated herein, UP has already provided reasonable responses to KCS/Tex Mex's requests, and no further responses should be compelled.

As a threshold matter, KCS/Tex Mex mischaracterize the responses that UP has already provided to KCS/Tex Mex's discovery requests. KCS/Tex Mex assert (p. 3) that UP's responses have been "insufficient and illusory." Although KCS/Tex Mex acknowledge that UP has supplied hundreds of pages in response to their requests, they assert that only eight of those pages "are even close to being called responsive." Motion, p. 3. This is nonsense. All of the documents UP produced are directly responsive to KCS/Tex Mex's requests. They include documents reflecting UP's policy of not discriminating against Tex Mex trackage rights trains (First Set, Request No. 2), data on terminal dwell times (Second Set, Doc. Request No. 3) and standing car capacities of Houston-area yards (id., Int. No. 7), diagrams of UP's trackage in the Houston area (id., Doc. Request No. 4 & Int. No. 8), and UP's current capital plans for the Houston area (id., Int. No. 9).

KCS/Tex Mex's specific criticisms of UP's responses are equally meritless. UP will address those criticisms in the order they are set forth in KCS/Tex Mex's motion.

I. DEMANDS FOR DETAILED INFORMATION ABOUT THE WHARTON BRANCH

KCS/Tex Mex seek extensive and detailed information concerning UP's Wharton Branch, a UP line between Rosenberg and Victoria, Texas, that KCS/Tex Mex desire to purchase from UP. UP stated its specific objections to the interrogatories and document requests at issue as follows:

> "UP objects to this interrogatory as vague, ambiguous, overbroad, unduly burdensome and seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this interrogatory as an improper abuse of discovery in an effort by KCS/Tex Mex to gain advantage in ongoing negotiations with UP over the sale of the Wharton Branch. UP has responded to KCS/Tex Mex's expression of interest in purchasing the Wharton Branch by making a reasonable offer to sell the line. KCS/Tex Mex summarily rejected UP's reasonable offer and have not responded with a counteroffer of their own. Instead of negotiating in good faith, KCS/tex Mex's discovery requests reflect an intention to abuse the discovery process to advance their negotiating position and/or improperly inject the Board into commercial negotiations. KCS/Tex Mex should seek information about the Wharton Branch through the negotiating process, not through formal Board discovery."

UP Response to Interrogatory No. 3, p. 8.[1/] UP asserted similar objections to the requests for admission at issue, but, contrary to KCS/Tex Mex's assertion, UP also provided reasonable responses to those requests.[2/]

KCS/Tex Mex attempt to justify their requests by pointing out (pp. 7-8) that they have filed with the Board an application seeking authorization to "re-construct" and rehabilitate the Wharton Branch once they acquire it, and that the information they seek "go[es] directly to the scope of and analysis of the construction petition." KCS/Tex Mex (p. 7) also offer assurances that "are not seeking information that would in any way undercut UP's negotiating position or otherwise divulge confidential information to UP's detriment." These contentions, however, are belied by the substance of KCS/Tex Mex's requests. Although KCS/Tex Mex's motion (p. 7) describes those requests as seeking innocuous information on the physical characteristics of the line -- e.g., acreage and the weight of rail -- most of

---

1/ KCS/Tex Mex erroneously state that "UP does not raise an objection based upon privilege or relevance or even burden." As reflected in UP's objection to Interrogatory No. 3 (set forth above), which was incorporated by reference in UP's response to Interrogatories Nos. 4-6 and was substantively identical to UP's objections to Document Requests Nos. 5-12, UP consistently objected to these requests on the grounds of relevance and burden. UP's responses incorporated UP's general objection (No. 2) to the production of privileged documents or information.

2/ UP denied Request for Admission Nos. 3 and 4 because the propositions KCS/Tex Mex asked UP to admit were factually untrue. UP admitted part of Request No. 8. With regard to the other requests at issue -- Request No. 5 and the remaining portion of Request No. 8 -- UP conducted a reasonable inquiry but was unable to determine whether the propositions set forth in these requests were accurate based on readily available information.

the requests are aimed directly at developing information on line value. For example, KCS/Tex Mex seek "documents relating to a valuation" of any part of the line (Doc. Request No. 10; Request for Admission No. 5), "bids received by UP" for track structures on the line (Doc. Request Nos. 6, 8), "bid information documents" prepared by UP with respect to the line (Doc. Request No. 5), documents relating to any "sale" or "potential sale" of the line or track structures thereon (Doc. Request Nos. 7, 9), and correspondence between UP and third parties (i.e., potential purchasers) concerning the line (Doc. Request Nos. 12, 13). This information, much of which is confidential and not disclosed to bidders for a line, is irrelevant to KCS/Tex Mex's construction application, but would instead provide KCS/Tex Mex with an improper advantage in negotiations with UP over a purchase price for the Wharton Line. In light of the Board's strong preference for negotiated outcomes over Board-imposed ones,[3/] KCS/Tex Mex must not be permitted to abuse the discovery process to skew

---

[3/] See, e.g., ICC Finance Docket No. 32549, Burlington Northern, Inc. & Burlington Northern R.R. -- Control & Merger -- Santa Fe Pacific Corp. & Atchison, T. & S.F. Ry., Decision served Aug. 23, 1995, p. 227 (ICC has made "clear" its "preference for privately negotiated terms and conditions"); ICC Service Order No. 1516, Dardanelle & Russellville R.R. -- Authorized to Operate -- Lines of Arkansas Midland R.R., Decision served Oct. 27, 1994 (ICC prefers to leave appropriate level of compensation to parties and will set compensation only if railroad "has exhausted all reasonable efforts toward a negotiable agreement"); see also Ex Parte No. 575, Review of Rail Access & Competition Issues, Decision served April 17, 1998, p. 9 ("private sector solutions are generally preferable").

negotiations.[4/]

The other information KCS/Tex Mex seek -- i.e., detailed information about all UP and non-UP property interests in the Wharton Branch (Int. Nos. 3-6; Doc. Request No. 11) and information on the acreage and the weight of rail currently on the line (Request for Admission Nos. 3, 5) -- may have some commercial relevance to KCS/Tex Mex if and when they acquire the line and undertake to rehabilitate it, but is not pertinent to whether KCS's application for authority to purchase and reconstruct the branch should be granted. Moreover, gathering the requested information would entail significant burden. If and when such an acquisition takes place, KCS/Tex Mex would have access to materials from which such information could be derived through the consensual due diligence process. KCS/Tex Mex should not be permitted to shift the burden of developing this information to UP by interposing a discovery demand.

[4/] See, e.g., Empire of Carolina, Inc. v. Mackle, 108 F.R.D. 323, 326 (S.D. Fla. 1985) (denying motion to compel seeking production of material regarding "bargaining position and goals in current negotiations with a party to the litigation," which would provide requesting party "unfair advantage in its negotiations"); BNS Inc. v. Koppers Co., 683 F. Supp. 454, 457-58 (D. Del. 1988) (denying motion to compel seeking production from recipient of an acquisition bid of materials relating to analysis of the offer); see also, e.g., Parsons v. Jefferson Pilot Corp., 141 F.R.D. 408, 419-20 (M.D.N.C. 1992); Coastal Corp. v. Texas Eastern Corp., 707 F. Supp. 280, 281 (S.D. Tex. 1989).

II. INTERROGATORY NO. 7

This interrogatory seeks information regarding the "standing car capacity" of UP's yards in the Houston area. In response, UP supplied all of the responsive information that was readily available to it. UP uses the term "standing car capacity" to refer to the number of cars that could be stored in a yard if every yard track were filed. Although UP makes use of many operating statistics in managing the flow of traffic through its terminals, "standing car capacity" is not a statistic that UP regularly uses or computes. In the Ex Parte No. 573 proceeding, UP was required to report information on the "standing capacity" of UP's two largest Houston yards -- Englewood and Settegast. Decision served Oct. 16, 1997, p. 2. UP has reported those statistics, and has produced them to KCS/Tex Mex in this proceeding, but doing so required that UP conduct a special study to compute this information. In response to KCS/Tex Mex's interrogatory, UP went a step further and calculated the standing capacity of two additional yards -- Strang and Spring -- for which information permitting such a calculation was readily available. With respect to each of the other 19 yards for which KCS/Tex Mex demand similar information (see Motion, p. 9), making such a calculation would be much more burdensome. Under governing Board precedent, UP cannot be required to conduct a special study in order to develop information that UP does not possess.[5/]

[5/] See, e.g., Docket No. 42012, Sierra Pacific Power Co. & Idaho Power Co. v. (continued...)

In addition, KCS/Tex Mex's explanation of the reason this information is needed -- i.e., to determine whether their request for a forced transfer of UP's Booth Yard "is supportable" (see Motion, p. 9) -- is frivolous. KCS/Tex Mex have asked for information about 19 additional yards, only one of which is Booth. Moreover, KCS/Tex Mex have been given access to UP track diagrams and, by virtue of Tex Mex's presence and operations in Houston, have access of their own to information about the configuration and capabilities of UP's Houston-area yards.

III. INTERROGATORY NO. 9

This interrogatory seeks a description of "UP's plans for capital projects for the Houston area." In response, UP supplied KCS/Tex Mex with a 60-page report dated May 1, 1998 that sets forth in detail UP's "plans for capital projects in the Houston area."[6/] That report was the product of exhaustive study and analysis by

---

[5/](...continued)
Union Pacific R.R., Decision served Apr. 16, 1998, p. 4 ("parties in litigation are not required to conduct burdensome special studies to produce information in the form requested"); Finance Docket No. 31012, Cheney R.R. -- Feeder Line Acquisition -- CSX Transportation, Inc. Line Between Greens & Ivalee, AL, Decision served Apr. 28, 1989 p. 2 ("to the extent special studies are required, motions to compel will not be granted") (citations omitted). KCS/Tex Mex acknowledge this principle. Their May 29, 1998 responses to UP's First Set of Discovery Requests (TM-4/KCS-4) object to requests for "information in a form not maintained by Tex Mex or KCS in the regular course of business or not readily available in the form requested, on the ground that such information could only be developed, if at all, through unduly burdensome and oppressive special studies, which are not ordinarily required and which Tex Mex/KCS object to performing." General Objection No. 6, p. 2.

[6/] This report was prepared pursuant to the Board's order requiring UP to report as to its "plans for addressing the Houston infrastructure." Ex Parte No. 573, Decision served Feb. 25, 1998, p. 5.

UP of its capacity-related capital needs in the region and reflects the capital "plans" about which KCS/Tex Mex inquired. KCS/Tex Mex's suggestion (p. 10) that UP's response was "non-responsive" is ludicrous.

The only additional material KCS/Tex Mex suggest should have been produced are "the underlying engineering report which was the basis for the May 1 report as well as any other engineering report such as the one completed by DMJM." Motion, p. 10. UP does not know what KCS/Tex Mex are referring to with their reference to an engineering report "completed by DMJM." Moreover, "engineering reports" such as those KCS/Tex Mex demand would not be responsive to KCS/Tex Mex's interrogatory, which asked only about UP's "plans for capital projects." Engineering data, which may be one of the factors considered in the capital planning process, are not "plans."[7/]

IV. INTERROGATORY NO. 10

In response to this interrogatory, UP agreed to provide an identification of the trains that are scheduled to operate against the current of flow on the directionally-operated UP lines over which Tex Mex has trackage rights. KCS/Tex Mex do no quarrel with this response, but correctly note (p. 10) that the promised identification had not yet been placed in UP's document depository as of the time of KCS/Tex Mex's visit to the depository. That identification will be supplied shortly.

7/ Were KCS/Tex Mex to make a request for engineering materials associated with any specific capital project, UP would be prepared to address that request.

V. DOCUMENT REQUEST NO. 2

In response to Document Request No. 2, UP has agreed to supply KCS/Tex Mex with 100% traffic data for 1997 in a format comparable to the traffic tapes produced in the general oversight proceeding, and UP is in the process of preparing such tapes. KCS/Tex Mex say (p. 11) that they will accept these tapes "as long as they contain substantially the information requested in Document Request No. 2." UP believes that the tapes it is preparing will meet this criteria. In any event, they will contain all of the information that KCS/Tex Mex could reasonably need for purposes of this proceeding. No party objected to the content of the comparable tapes that UP produced during 1997 in the Board's general oversight proceeding. Given that the Board has required UP to produce similar tapes in this year's general oversight proceeding, there can be no serious question that the format of the tapes UP is preparing for KCS/Tex Mex is adequate. See UP/SP Oversight Decision No. 10, served Oct. 27, 1997, p. 19; see also Decision No. 1, served May 19, 1998, p. 6 n.13.

KCS/Tex Mex also demand (p. 11) that they be "assured by UP that either (1) this format includes all adjustments later made to the traffic or (2) that UP waives its right to later object to the traffic data tape because it does not include adjustments." UP presumes that KCS/Tex Mex are referring to the fact that adjustments and corrections are made to railroad traffic records on an ongoing basis in the ordinary course of business for various reasons, including to reflect retroactive refunds and allowances. The tapes that UP is preparing will reflect all of the

adjustments and corrections that have been made to UP's traffic records as of the time the tapes are prepared. However, because the process of making such corrections and adjustments is an ongoing one, UP cannot stipulate that no further adjustments and/or corrections will be made to the underlying traffic records subsequent to the preparation of a tape for KCS/Tex Mex.

Finally, KCS/Tex Mex ask (pp. 11-12) that UP be "admonished for attempting to delay their discovery further" as a result of UP's insistence that KCS/Tex Mex contemporaneously produce the 100% Tex Mex traffic data UP has requested. There can be no serious doubt that, if UP's traffic tapes are to be available for study in this proceeding, tapes reflecting the traffic of the other railroads serving the Houston-area -- including Tex Mex -- should also be available. KCS/Tex Mex do not appear to take issue with this proposition, because they state (p. 11) that they are "in the process of responding to UP's discovery and plan to make their traffic tapes available."

Accordingly, the only issue appears to be one of timing.[8/] As noted, the Board ordered UP to produce its 100% traffic tapes in the general oversight proceeding by July 15, 1998. UP is working to make its tapes available sooner in response to KCS/Tex Mex's requests herein, but those tapes are not yet ready. Although UP asked for Tex Mex data about a week later than KCS/Tex Mex asked

---

[8/] UP reserves the right to contest the adequacy of the tapes KCS/Tex Mex produce pursuant to the undertaking set forth in their motion.

for UP's data, there is no reason KCS/Tex Mex should not be able to make the requested Tex Mex traffic tapes available to UP on the same schedule, so that UP and KCS/Tex Mex can make a simultaneous exchange of their respective traffic tapes. KCS/Tex Mex's burden is much smaller than that facing UP. The UP traffic encompassed by KCS/Tex Mex's requests include 100% of UP's system-wide traffic records -- which involve over 7 million units of traffic. KCS/Tex Mex, by contrast, have only been asked to produce records for Tex Mex, which handles about 45,000 units annually. See KCS/Tex Mex Evidentiary Submission (TM-7/KCS-7), Mar. 30, 1998, p. 127. In a situation such as this, where it is important for both parties to have access to each other's comparable data, a simultaneous exchange is the fairest and most sensible approach.

CONCLUSION

For the foregoing reasons, KCS/Tex Mex's Motion to Compel Second Set of Discovery from UP should be denied.

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
DAVID L. MEYER
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 Railroad Company

May 29, 1998

CERTIFICATE OF SERVICE

I, David L. Meyer, certify that, on this 29th day of May, 1998, I caused a copy of Union Pacific's Reply to KCS/Tex Mex's Motion to Compel Second Set of Discovery by hand on:

Hon. Stephen Grossman
Administrative Law Judge
Federal Energy Regulatory Commission
Suite 11F
888 First Street, N.E.
Washington, D.C. 20426

Richard A. Allen
John V. Edwards
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W.
Suite 600
Washington, D.C. 20006-3939

William A. Mullins
Sandra L. Brown
David C. Reeves
Troutman Sanders LLP
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005-3314

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

and by first-class mail, postage prepaid, on all other parties of record.

David L. Meyer

STB FD-32760 (SUB26) 5-28-98 D ID-187908

AGRICULTURE INDUSTRY

HOISINGTON

COMMUNITY **CROSSROADS OF KANSAS** PETROLEUM

Hoisington Chamber of Commerce
123 North Main Street
Hoisington, Kansas 67544-2594
Telephone (316) 653-4311
Facsimile (316) 653-4311

May 26, 1998

187908

Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-001

26

RE: STB Finance Docket No. 32760 (Sub-No.21), Decision 12: Union Pacific Corp. et. al. Control and Merger - Southern Pacific Rail Corp., et. al. Oversight Proceedings

Dear Mr. Williams:

Hoisington Chamber of Commerce (HCC), pursuant to Oversight Notice Decision 12 served on March 31, 1998, submits this Notice of Intention to Participate in the oversight proceedings as a party of record (POR) and request we be placed on the Service List.

Hoisington Chamber of Commerce is made up of various Businesses, Manufacturers, Professionals, Grains Dealers and Farmers.

Twenty-Five copies accompany the original of this notice to participate.

Very truly yours,

Robert K. "Bob" Glynn
Executive Vice President

CERTIFICATE OF SERVICE

We hereby certify that we will cause to be served, by first class mail, postage prepaid, copies of all filings in Finance Docket No. 32760 (Sub-No. ~~21~~ 24), Oversight Proceedings, on all parties of record identified in the final service list.

Robert K. Glynn

FOR: Hoisington Chamber of Commerce
123 North Main
Hoisington, KS 67544-2501

187830

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

May 26, 1998

BY HAND

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

Re: STB Finance Docket No. 32760 (Sub-No. 26) --
UP/SP Houston/Gulf Coast Oversight Proceeding

Dear Secretary Williams:

Enclosed for filing are an original and 25 copies of Union Pacific's Reply to KCS/Tex Mex's Motion to Compel. Please date stamp and return the enclosed extra copy of this document with our waiting messenger.

Also enclosed is a diskette containing an electronic version of this document in WordPerfect 5.1 format.

Thank you very much for your assistance.

Sincerely,

David L. Meyer

David L. Meyer

Attorney for Union Pacific Railroad Company

Enclosures

cc: Hon. Stephen Grossman (by hand)
All Parties of Record

187830

UP/SP-341

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 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

UNION PACIFIC'S REPLY TO KCS/TEX MEX'S MOTION TO COMPEL

Union Pacific Railroad Company ("UP") hereby replies to the "Motion to Compel Discovery" (the "Motion") jointly filed by the Kansas City Southern Railway Company ("KCS") and the Texas Mexican Railway Company ("Tex Mex") (collectively, "KCS/Tex Mex") on May 4, 1998 (TM-13/KCS-14).

KCS/Tex Mex's motion seeks to compel responses to four requests for production of documents that seek massive amounts of computer data and documents that KCS/Tex Mex assert are relevant to the question whether, because of asserted discrimination by UP against Tex Mex trackage rights trains, the Board should strip UP of responsibility for dispatching of certain lines in the Houston area and repose such responsibility in a "neutral" third party. Motion, p. 10.

Contrary to the implicit premise of KCS/Tex Mex's discovery requests, UP has not sought to shield its dispatching decisions from KCS/Tex Mex's scrutiny. UP does not discriminate in the dispatching of tenant carrier trains (including those of Tex Mex) operating over its lines, and has afforded KCS/Tex Mex every opportunity to review (and challenge, as appropriate) UP's dispatching of Tex Mex trains. KCS/Tex Mex are well aware that UP's dispatching of Tex Mex's trains has been fair and impartial, and that every railroad serving Houston has experienced delays as a result of severe congestion in and around the Houston terminal.

KCS/Tex Mex do not seek discovery of UP's dispatching data and documents in order to conduct a bona fide inquiry as to whether there has been discrimination, since they have long had all of the commercial rights they need to carry out such a review. Instead, they wish to go on a fishing expedition in the hope of picking out isolated, out-of-context facts that they will attempt to portray as suggesting the presence of discrimination even though none actually occurred. Their aim is to further their request for conditions that would confer upon them valuable commercial rights at UP's expense. As we demonstrate herein, KCS/Tex Mex cannot begin to justify the burden UP would be forced to bear in responding to these outstanding requests.

BACKGROUND

KCS/Tex Mex initially served the document requests at issue herein on March 12, 1998, before the Board issued Decision No. 1 establishing a procedural

schedule for this oversight proceeding devoted to Houston/Gulf service issues. See TM-6/KCS-6.[1/] UP moved for a protective order on March 27, 1998. See UP/SP-334.[2/] UP's motion for protective order explained, first, that KCS/Tex Mex's discovery requests were improper under Board rules because there was no proceeding pending and, second, that they amounted to a massively overbroad and unduly burdensome fishing expedition into past dispatching decisions, which was particularly inappropriate in light of the opportunities KCS/Tex Mex have had to oversee and participate in UP's dispatching of the trackage over which Tex Mex trackage rights trains operate. See Motion for Protective Order (UP/SP-334), pp. 7-13, & Tholen V.S.

On April 8, 1998, after Decision No. 1 had been issued, KCS/Tex Mex withdrew their initial requests and "re-served" them in this proceeding. See TM-8/KCS-8. Because this action rendered UP's motion for protective order moot, UP withdrew that motion and, on April 23, 1998, responded to KCS/Tex Mex's four discovery requests. See UP/SP-336. Although KCS/Tex Mex's requests were still premature because Decision No. 1 was explicit in stating (at p. 2) that a proceeding

---

1/ Decision No. 1 was initially served as Decision No. 12 in Finance Docket No. 32760 (Sub-No. 21), the Board's general UP/SP oversight proceeding. On May 19, 1998, the Board corrected that decision by redesignating it as Decision No. 1 in Finance Docket No. 32760 (Sub-No. 26).

2/ A copy of that motion is appended hereto as Exhibit A.

would not commence until June 8,[3] UP nevertheless responded voluntarily to KCS/Tex Mex's requests.

Although UP remained unwilling to accede to the massive fishing expedition reflected in KCS/Tex Mex's requests, it did provide responsive documents setting forth its policy with regard to the dispatching of Tex Mex trackage rights trains. As described in UP's Responses, those documents reflect UP's policy of providing -- and Tex Mex's contractual right to receive -- non-discriminatory dispatching. See UP's Responses, Apr. 23, 1998 (UP/SP-336), which are attached hereto as Exhibit B. With regard to KCS/Tex Mex's quest for massive data concerning past UP dispatching decisions, however, UP objected to the extreme burdensomeness and overbreadth of KCS/Tex Mex's requests and reminded KCS/Tex Mex of their ample rights and opportunities to oversee and participate in the dispatching of Tex Mex trains operating on UP's lines. Id. at 3-4 (General Objection No. 2).[4]

---

[3] KCS/Tex Mex's suggestion (p. 2 n.2) that this position was inconsistent with that taken in UP's April 15, 1998 letter withdrawing its motion for protective order (which is Exh. B to the present motion) is incorrect. UP withdrew its motion for protective order because KCS/Tex Mex had withdrawn the discovery requests to which the motion was addressed. The letter did not acquiesce in KCS/Tex Mex's position that discovery was available as of right prior to June 8, when a proceeding will formally commence.

[4] General Objection No. 2, which KCS/Tex Mex's motion fails to cite or even acknowledge, states as follows:

(continued...)

On May 4, more than 10 days after UP served its responses and made documents available for inspection by KCS/Tex Mex, KCS/Tex Mex filed their motion to compel. That motion acknowledges that KCS/Tex Mex's requests were massively overbroad and unduly burdensome. KCS/Tex Mex now say (p. 1) that they only want UP to produce a "reasonable amount of readily available information," rather than insisting on the overwhelmingly burdensome search for data and documents that would have been called for by their requests as written.

Unfortunately, KCS/Tex Mex's attempt to reform their requests falls far short of making those requests (to the extent they have not already been responded

---

4/(...continued)

> "UP objects to all of the requests on the ground that they vastly exceed the scope of discovery that is appropriate in this proceeding. The requests reflect a vastly overbroad fishing expedition that would impose extraordinary and unreasonable burdens on UP, and are unconnected to any specific or colorable claims of 'discrimination' in dispatching. The requests are especially inappropriate in light of the fact that KCS and Tex Mex have been afforded ample opportunity to participate in and oversee UP's dispatching decisions with respect to lines over which those railroads operate. Specifically KCS and Tex Mex have been invited to participate in the joint dispatching center at Spring, Texas, and Tex Mex has the contractual right to be admitted to UP dispatching facilities and personnel responsible for dispatching to review the handling of trains on the UP lines over which its trains operate. Cooperative oversight of the dispatching process offers a far more constructive means of ensuring 'non-discriminatory' dispatching than any effort to dissect all of the detailed facts surrounding past dispatching decisions. Any such effort would be extraordinarily burdensome, and would be unproductive given the nature of dispatching decisions. See UP Motion for Protective Order, Mar. 31, 1998 (UP/SP-334), at 9-13."

to) reasonable in burden and scope. UP's objections to KCS/Tex Mex's requests, even as somewhat narrowed in this motion, are well-founded, and UP should not be ordered to produce the additional materials sought by KCS/Tex Mex's motion to compel.

ARGUMENT

The Board established this proceeding for the purpose of examining whether there is "any relationship" between "market power gained by UP/SP through the merger and the failure of service" that occurred in the Houston area. Decision No. 1, p. 8.[5/] In doing so, the Board emphasized that it did not intend a full-scale re-evaluation of its decision approving the merger, and would confine the proceeding to Houston/Gulf Coast service issues. Id., pp. 8-9; see also Response of Respondent STB to Motion to Vacate and Remand, Apr. 13, 1998, pp. 2, 4, Western Coal Traffic League v. STB, No. 96-1373 (D.C. Cir.) ("limited reopening" of the record "undertaken by the STB concerns only service problems in Houston, not the fundamental premises of the merger").

With regard to discovery in this proceeding, the Board has held that, although parties are entitled to some discovery into "relevant matters," this oversight proceeding "will clearly be more confined than [the Board's] prior consideration of

---

[5/] In fact, as the Board has previously found, and as UP will again show in its evidence in this proceeding, UP did not gain any "market power" as a result of the UP/SP merger, as conditioned by the Board.

the merger as a whole." Decision No. 2, p. 2. Chairman Morgan has emphasized that the oversight process is intended to be a "focused, probing and productive process, but one that is not unduly burdensome." Finance Docket No. 32760 (Sub-No. 21), Decision No. 1, served May 7, 1997, p. 9.

Accordingly, while UP acknowledges its obligation to respond to reasonable requests for information pertinent to the issues in this proceeding, the fact that some discovery is appropriate does not mean that KCS/Tex Mex should be permitted to turn UP's files and data upside-down in a futile effort to unearth every possible shred of evidence that KCS/Tex Mex might construe as supporting their request for additional conditions that would provide significant commercial benefit to KCS/Tex Mex at UP's expense. KCS/Tex Mex's requests must be considered in light of the strong guidance from the Board that this proceeding should not be allowed to grow into a hugely burdensome exercise characterized by a full-blown discovery campaign.

Viewed in this context, it is clear that KCS/Tex Mex should not be entitled to any further production of materials responsive to their discovery requests.

Request No. 1:

UP's objections to this request are explained in detail in UP's motion for protective order and the verified statement of Dennis Tholen accompanying that motion (Exh. A hereto). Requiring UP to respond to this request would sanction a fishing expedition that would impose extreme burdens on UP without achieving any

legitimate objective in this proceeding. See UP Motion for Protective Order (Exh. A hereto), pp. 7-13, & Tholen V.S.

KCS/Tex Mex implicitly acknowledge the undue burden and overbreadth of their initial request, which would have called for every byte of data in UP's computer systems and every document in UP's files concerning the myriad of dispatching decisions made 24-hours-a-day, 365-days-a-year with respect to the UP trackage over which Tex Mex operates. See Tholen V.S. (Exh. A hereto), pp. 2-10. Conceding that UP should only be required to produce "a reasonable amount of readily available information" (p. 2), KCS/Tex Mex now ask for only two categories of material -- access to Digicon tapes (and associated audio tapes) and Corridor Managers' Reports. Contrary to KCS/Tex Mex's assertions, however, producing these materials would still entail extraordinary and unwarranted burden.

First, KCS/Tex Mex seek the opportunity for their personnel to "view replays of the Digicon system and accompanying voice tapes from the dispatching centers." See Motion, p. 12, & Watts V.S., pp. 1-2. While using UP's Digicon system to re-play the tape of one specific, very recent dispatching episode could be accomplished (see Tholen V.S. (Exh. A hereto), p. 7; Verified Statement of Thom Williams (Tab 1 hereto), ¶ 8),[6/] that is not the nature of KCS/Tex Mex's request.

[6/] If Tex Mex sincerely wished to review the dispatching of specific Tex Mex train movements, it has the contractual right to send its personnel to UP's dispatching centers or request a review of UP's dispatching tapes covering the episode of interest. See pages 12-13, infra.

Instead, they demand the re-playing of all tapes of all dispatching decisions since June 1, 1997 for the lines over which Tex Mex operates.

As Mr. Williams explains in his accompanying verified statement (Tab 1 hereto), re-playing Digicon tapes in this blunderbuss fashion would be an extraordinarily (and indeed insurmountably) burdensome and time-consuming process. The Digicon system is capable of maintaining only a short period of dispatching history (not more than several weeks) in active files. These recent active files would be the easiest to re-play. However, even for very this recent period, which is a tiny fraction of the period covered by KCS/Tex Mex's demands, re-playing the tapes covering just one full day of dispatching on the lines over which Tex Mex operates (which cover two corridors and three dispatching districts) would require approximately one full day of review. This review would have to occur at UP's Harriman Dispatching Center in Omaha, where the associated audio tapes reside, and would require that UP devote a Digicon terminal and a trained Digicon operator on a full-time basis. Reviewing only four weeks of tapes would require about four weeks of review (considerably more time than is available within the procedural schedule established by the Board). Even if KCS/Tex Mex reimbursed UP for the considerable expense associated with this effort, UP simply does not have manpower or Digicon terminals to spare to carry out this task without interfering with UP's railroad operations and sacrificing its ongoing service recovery efforts. Williams V.S. (Tab 1 hereto), ¶¶ 8-9.

With regard to Digicon tapes reflecting dispatching that took place more than about four weeks ago, the burdens would be even more extraordinary. Tapes for this period are archived and would have to be downloaded from UP facilities in Denver and reloaded onto the Digicon system before they could be re-played. Because it is not possible to download tapes covering specific dispatching districts, tapes covering the entire SP system would have to be downloaded together. This downloading process would add requiring considerable data processing time and effort to the burdens associated with re-playing the tapes. Moreover, in order to make room for the downloaded data on the Digicon system, it would be necessary to remove active tapes. Because most of the active tapes must be maintained in that state to facilitate vital railroad functions, at most a single week of archived tapes could be downloaded at any one time. The process of reviewing only one week of archived tapes would be highly and time-consuming all by itself. Attempting to review dozens of weeks of tapes, which KCS/Tex Mex demand, would likely take a full year. Again, even were KCS/Tex Mex to reimburse UP for the expense of carrying out this process, acceding to KCS/Tex Mex's demands would deprive UP of vital skilled manpower that it cannot spare from the ongoing work of running the railroad. Williams V.S. (Tab 1 hereto), ¶ 10.

The burden and overbreadth of KCS/Tex Mex's demand for inspection of Digicon tapes is magnified by the fact that such a review would be both futile and inappropriate. As explained in UP's motion for protective order, the nature of

dispatching decisions is such that they cannot be understood based on a post-hoc review of a subset of the information that was before the dispatcher when the decisions were made. Dispatching involves the complex exercise of judgment in balancing competing factors to achieve the best possible performance of all of the trains operating on the segment of railroad the dispatcher controls. If a thorough investigation is conducted in the immediate aftermath of a delay experienced by a tenant's train, it is sometimes possible to determine whether the delay was caused by a dispatching decision that improperly disadvantaged the tenant's train. However, there is virtually no hope of making such a determination days, weeks or months after the fact. That is especially true if a post-hoc investigation is limited to Digicon tapes (even if supplemented with contemporaneous voice tapes), because the Digicon system does not record all of the factors that underlay the dispatcher's decisions in a given situation. See Williams V.S. (Tab 1 hereto), ¶ 7; UP Motion for Protective Order (Exh. A hereto), pp. 12-13, & Tholen V.S., p. 5.[7/]

The futility of embarking on an extraordinarily burdensome process of attempting to dissect weeks- and months-old dispatching decisions is underscored by the fact that KCS/Tex Mex have, since the creation of Tex Mex's trackage rights in

---

[7/] UP explained the nature of dispatching decisions to the ICC in greater detail when it replied to allegations of discriminatory dispatching made by SP in the UP/CNW control proceeding in 1994. See Finance Docket No. 32133, UP's Reply to SP Allegations of "Service Discrimination" (UP/CNW-93), Mar. 30, 1994, pp. 18-26, pertinent excerpts of which are attached as Exhibit C hereto. The ICC approved UP's application and rejected SP's requests for relief.

September 1996, had far superior means of overseeing UP's dispatching decisions and enforcing Tex Mex's right to non-discriminatory dispatching. Under Tex Mex's trackage rights agreement with UP, Tex Mex is entitled to non-discriminatory dispatching of its trackage rights trains, and the agreement contains detailed "dispatching protocols" that are designed to facilitate enforcement of that right.[8/] When the Board approved the UP/SP merger, it expressly acknowledged that dispatching protocols such as those incorporated in Tex Mex's trackage rights agreement with UP would "ensure equal treatment of all trains without regard to ownership." UP/SP, Decision No. 44, p. 132.[9/] Those dispatching protocols enable Tex Mex to monitor in real time the handling of its trains by UP, allow access by Tex Mex's supervisory employees at UP's dispatching centers, and, if a dispute arises, provide for dispute resolution procedures, prompt arbitration and sanctions. Id. In addition to these contractual rights, KCS and Tex Mex have been invited to join the Spring, Texas, dispatching center that UP and BNSF jointly established in March 1998 to provide coordinated dispatching of the Houston-area lines over which

---

[8/] For example, the trackage rights agreement expressly states that Tex Mex trains shall be treated equally in the operation (including dispatching) of the UP lines over which they operate (Exh. B, § 2.4), and that Tex Mex officials shall "be admitted at any time to dispatching facilities and personnel responsible for dispatching the Joint Trackage to review the handling of trains" (Dispatching protocols, ¶ 10). A copy of the UP-Tex Mex trackage rights agreement is Exhibit D hereto.

[9/] The Board was addressing similar protocols agreed to between UP and BNSF with respect to BNSF's trackage rights over UP.

those railroads operate, which includes the UP lines over which Tex Mex operates. Williams V.S. (Tab 1 hereto), ¶¶ 3-4.

These are the appropriate mechanisms for KCS/Tex Mex to assure itself -- on an ongoing, real-time basis -- that UP's dispatching of Tex Mex's trains is non-discriminatory. As Mr. Williams explains, moreover, Tex Mex have taken advantage of these rights to some extent. Although they have not bothered to visit UP's Harriman Dispatching Center in Omaha to review dispatching decisions carried out there, they have recently stationed an employee in the new joint dispatching center at Spring, Texas. Williams V.S. (Tab 1 hereto), ¶ 4.

In addition, Tex Mex has on occasion inquired about the handling of particular trains that experienced delays during the recent period of congestion in the Houston/Gulf region. As Mr. Williams explains, on those occasions UP has investigated the situation thoroughly -- while the facts were still fresh in people's memories -- and has reported the findings to Tex Mex. On at least one occasion, Tex Mex has been provided with the audio tapes relating to a particular dispatching episode. UP's investigations have disclosed no evidence that delays to Tex Mex trains were the result of discriminatory dispatching, as opposed to the general congestion that has plagued all of the railroads in the Houston area. Williams V.S. (Tab 1 hereto), ¶¶ 5-6.

Tex Mex's ability to oversee UP's dispatching on a real time basis and to request (and participate in) prompt investigations of the handling of Tex Mex's

trains establish that massively burdensome discovery of past dispatching decisions is inappropriate. UP should not be required to bear the extraordinary burden of responding to KCS/Tex Mex's request for the sole purpose of letting KCS/Tex Mex and its lawyers attempt to dig through huge volumes of stale data about long-past dispatching decisions that KCS/Tex Mex -- as a commercial matter -- have already had an opportunity to review. The only conceivable purpose of such an inquiry would be so that KCS/Tex Mex could pick out isolated, out-of-context facts to advance their spurious theory of dispatching discrimination. The Board has long regarded this sort of burdensome fishing expedition as an improper use of the discovery process. See, e.g., Docket No. 40411, Farmland Industries, Inc. v. Gulf Central Pipeline Co., Decision served Jan. 6, 1993, p. 3.

Second, KCS/Tex Mex demand production of "Corridor Managers' Reports," which KCS/Tex Mex describe as daily logs kept by corridor managers[10/] reporting on train movements.[11/] KCS/Tex Mex assert that these documents are

---

[10/] Corridor managers are the immediate supervisors of UP's train dispatchers. Before the consolidation of UP and SP operations, which has occurred at various times over the past 18 months in various regions, there was no position known as a "corridor manager" for former SP lines.

[11/] KCS/Tex Mex also refer (p. 13) to unspecified "other memos and correspondence with local managers, or at higher levels of the UP organization, which talk about dispatching trains and whose trains should be brought through a given terminal." Because there is no self-contained set of such documents, this needle-in-a-haystack request would require UP to conduct a highly burdensome search of all of its files for material that would be no more relevant to the issues in this proceeding than the Corridor Managers' Reports.

"readily available for the last several months," and they explain that they want UP to produce these reports because they "would provide revealing insights" as to UP's dispatching decisions. See Motion, pp. 12-13 & Watts V.S., p. 2.

Producing these reports, even for just the last few months, would be very burdensome. Tex Mex's trackage rights straddle two dispatching corridors. A corridor manager's "turnover report" is prepared twice daily for each dispatching corridor. Such reports typically are dozens of pages long and cover the status of the entire corridor, of which Tex Mex's movements are a small fraction. Just the past several months of reports would entail downloading, printing and copying several thousand pages of records. Williams V.S. (Tab 1 hereto), ¶ 11.

More importantly, for the reasons set forth above, producing these documents would serve no useful purpose. As KCS/Tex Mex acknowledge, the only reason they want these documents is to comb through them in search of unspecified "insights" about UP's dispatching practices. The desire to conduct this sort of fishing expedition is manifestly an inappropriate basis for compelling responses to burdensome discovery requests. See, e.g., Docket No. 40411, Farmland Industries, Inc. v. Gulf Central Pipeline Co., Decision served Jan. 6, 1993, p. 3. And it is particularly inappropriate here where KCS/Tex Mex have had ample opportunities to oversee UP's dispatching on a real-time basis, and thus garner all the "insights" they wish concerning how that dispatching is carried out in practice. See pages 12-13, supra.

Request No. 2:

KCS/Tex Mex describe the subset of documents that they seek by this request as all "policy statements, directives, procedures and memos that mention dispatching" pertaining to the question whether UP dispatches Tex Mex trains in a non-discriminatory manner. Motion at 11. KCS/Tex Mex take issue with UP's production of documents of this nature because, they argue, UP has only produced documents reflecting UP's policy of dispatching Tex Mex's trains in a non-discriminatory manner, and has thus only produced documents that support UP's position. Id.

KCS/Tex Mex have misconstrued UP's response to this request.[12/] UP has produced all of the documents of which it is aware that describe UP's dispatching policies and bear on the question whether (or not) the dispatching of Tex Mex trains is non-discriminatory. KCS/Tex Mex appear to be unhappy with the facts reflected in the documents UP has produced, but the fact is that UP does have a policy of not discriminating against Tex Mex trains.

Accordingly, UP has produced the documents responsive to this request that KCS/Tex Mex purport to seek in their motion to compel.

[12/] They have also misconstrued their own request, which explicitly asked only for documents supporting UP's position, i.e., those "that UP contends prove that KCS and Tex Mex have not received adverse, discriminatory treatment in dispatching of their trains." See Motion at 6 (quoting Request No. 2). In any event, as explained in the text, UP believes it has provided a reasonable response to the request even as it is framed in KCS/Tex Mex's motion.

Requests Nos. 3-4:

KCS/Tex Mex group these two requests together, and UP will accordingly address them in that manner. KCS/Tex Mex explain that they seek documents reflecting positions taken by UP outside the Houston/Gulf region -- indeed, anywhere on its system -- regarding the need for "neutral dispatching." KCS/Tex Mex contend that there is a nexus between this request and the present proceeding because the documents they seek would supposedly demonstrate the nature of UP's views concerning "neutral dispatching" when the "shoe is on the other foot," and UP's trains operate over other railroads. See Motion, pp. 14-15.

KCS/Tex Mex do not even begin to address the significant burden that would be entailed in searching UP's files for any correspondence that might state UP's position regarding the desirability of non-discriminatory dispatching. Although KCS/Tex Mex's Motion (p. 15, & Watts V.S., p. 1) identifies three locations in particular -- Chicago, St. Louis and Memphis -- their requests demand a wide-scale search for any correspondence concerning any and all of the hundreds of locations throughout the West where UP operates over the lines (or uses the reciprocal switching services) of another carrier. These requests thus reflect another unduly burdensome fishing expedition. See UP Motion for Protective Order (Exh. A hereto), p. 11, & Tholen V.S., pp. 10-11.

Moreover, undertaking the burden of complying with these requests would be pointless. KCS/Tex Mex concede that they have in mind documents

concerning locations on UP's system far afield from the Houston/Gulf region, where the track configuration, ownership and operating conditions are inherently dissimilar to the situation in Houston, and where the service UP provides has nothing to do with the Houston/Gulf Coast service at issue this proceeding. The only thing that all of these locations have in common is the applicability of the general principle -- to which UP would stipulate -- that the dispatching of the trains of a tenant railroad (whether the tenant is UP or any other carrier) should be carried out in a neutral and non-discriminatory manner. As set forth above (at page 12), UP's trackage rights agreement with Tex Mex expressly provides that UP will dispatch Tex Mex's trains in precisely this manner (see also Exh. D hereto), just as UP expects its trains to receive non-discriminatory treatment when they operate on the lines of other railroads.

In seeking to compel a response to these requests, KCS/Tex Mex appear to have confused the concept of neutral, non-discriminatory dispatching -- which UP favors -- with the position that KCS/Tex Mex are taking in this proceeding that dispatching must be carried out by a third party other than the owner of the railroad lines over which Tex Mex operates. For example, KCS/Tex Mex's contention (p. 13) that a recent request by UP for "neutral dispatching" of its trains that operate over the lines of other carriers in Chicago is "relevant" to KCS/Tex Mex's request for "such neutral treatment in Houston" is at odds with the facts. The UP request that KCS/Tex Mex describe did not involve a request that the owner of

trackage used by UP cede the dispatching function to a third party. Instead, UP merely requested that the owner formally agree -- in the form of a dispatching protocol agreement akin to that already in place between UP and Tex Mex -- that UP trains would be entitled to "equal access and priority."[13/]

Because KCS/Tex Mex's requests seek to impose a significant burden on UP without achieving any productive purpose, UP should not be required to undertake the burden of responding to them.

13/ Since KCS/Tex Mex evidently have somehow secured access to these specific documents relating to Chicago, which were produced with a Highly Confidential designation by the applicants in the pending CSX/NS/Conrail merger proceeding, there is no need for UP to produce them.

CONCLUSION

For the foregoing reasons, KCS/Tex Mex's Motion to Compel should be denied.

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
DAVID L. MEYER
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 Railroad Company

May 26, 1998

CERTIFICATE OF SERVICE

I, David L. Meyer, certify that, on this 26th day of May, 1998, I caused a copy of Union Pacific's Reply to KCS/Tex Mex's Motion to Compel Discovery by hand on:

Hon. Stephen Grossman
Administrative Law Judge
Federal Energy Regulatory Commission
Suite 11F
888 First Street, N.E.
Washington, D.C. 20426

Richard A. Allen
John V. Edwards
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W.
Suite 600
Washington, D.C. 20006-3939

William A. Mullins
Sandra L. Brown
David C. Reeves
Troutman Sanders LLP
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005-3314

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

and by first-class mail, postage prepaid, on all other parties of record.

David L. Meyer

US OFFICE PRODUCTS

VERIFIED STATEMENT

OF

THOM WILLIAMS

1. My name is Thom Williams. I am employed by the Union Pacific Railroad Company ("UP") as General Director, Trackage Rights Operations, at UP's Harriman Dispatching Center in Omaha, Nebraska. I have been employed in the railroad industry for 32 years. I have spent 13 years as a train dispatcher and 12 years managing five different SP train dispatching centers. I have been directly involved in the use of SP's Digicon system since its installation, and I use that system daily in my current position.

2. As General Director, Trackage Rights Operations, I serve as liaison between UP and Tex Mex with respect to Tex Mex's trackage rights operations over UP's lines in Texas. During the early period of Tex Mex's trackage rights operations, I was in almost daily contact with Tex Mex about their planned train operations, so that UP could make appropriate plans to accommodate Tex Mex's trains on the congested trackage over which they operate. (With experience, it has become possible for those routine contacts to be made directly between Tex Mex and UP's corridor managers and other dispatching personnel.) In addition, I am also the principal point of contact for inquiries by Tex Mex about the handling of its trains by UP's dispatchers.

3. UP does <u>not</u> discriminate against Tex Mex's trains. UP's trackage rights agreement with Tex Mex embodies UP's policy of dispatching UP

and Tex Mex trains in an equal and nondiscriminatory manner. That agreement contains detailed "Dispatching Protocols" that assure that that policy is adhered to. Tex Mex has extensive rights to review (and challenge, if necessary) UP's dispatching decisions.

4. For example, Tex Mex is entitled to access to UP's dispatching facilities and personnel to oversee UP's dispatching of Tex Mex's trains. At the Harriman Center, where UP has carried out most of the dispatching of the UP lines over which Tex Mex operates, Tex Mex has not exercised this right. I am unaware of any occasion on which Pat Watts or any other Tex Mex representative visited the Harriman Center to oversee UP's dispatching of Tex Mex trains. (Those dispatching functions have recently been transferred to Spring, Texas, where UP and BNSF have established a joint dispatching center to improve service by permitting greater coordination in the dispatching of Houston-area lines. I understand that Tex Mex has decided to accept UP's invitation to station an employee in that dispatching facility, but has declined to join the center and participate in UP and BNSF's efforts to improve dispatching coordination in the region.)

5. During UP's recent service difficulties in the Houston/Gulf region, congestion in the region was at times quite severe, causing significant delays to the trains of all railroads in the area, including UP, BNSF and Tex Mex. Delays to Tex Mex trains on several occasions prompted inquiries from Tex Mex, typically by Pat Watts, about the treatment of Tex Mex trains by UP dispatchers.

6. On each of the occasions when Tex Mex has asked me to investigate whether delays to Tex Mex trains were caused by improper (or discriminatory) dispatching decisions, I have conducted a thorough investigation, taking advantage of all available information about the dispatching episode in question, including a review of applicable dispatching tapes and the recollections of dispatching personnel involved. As I have reported to Tex Mex, on none of those occasions has there been any evidence of discriminatory dispatching. On one occasion, I supplied Tex Mex with a tape of voice recordings reflecting the dispatching at issue; on another, at Tex Mex's specific request, I supplied Tex Mex with a transcript of those audio tapes.

7. Attempting to understand all of the factors bearing on the exercise of dispatching judgement in a given situation is inherently difficult even when an investigation is made in the immediate aftermath of a dispatching decision. Achieving such an understanding weeks or months after the fact is impossible, even with a thorough review of available computer records and voice tapes. That is because those records simply do not reflect all of the factors that bear on the exercise of dispatching judgment.

8. KCS/Tex Mex also misunderstand the burden that would be involved in re-playing Digicon tapes. Although it is reasonably easy to re-play a specific portion of the Digicon records within a few days of their creation, that is not what KCS/Tex Mex envision. Instead, they propose an across-the-board review of all

of UP's Digicon tapes since June 1, 1997. Even if such a review were limited to a few weeks of tapes, it would involve an incredibly burdensome and time-consuming process.

9. The Digicon system is capable of maintaining only about four-to-six weeks of dispatching history in active files. Even for this recent period (which is only a small fraction of the time period of KCS/Tex Mex's demand), re-playing the tapes covering the dispatching of the lines over which Tex Mex operates, which cover four separate dispatching districts, for just a single day would itself require approximately one full day. This review would have to occur at UP's Harriman Dispatching Center in Omaha, where the associated audio tapes reside, and would require that UP devote a Digicon terminal and a trained Digicon operator on a full time basis. Reviewing tapes covering several weeks of dispatching decisions would itself require several weeks to complete. Even if KCS/Tex Mex reimbursed UP for the considerable expense associated with this effort, UP simply does not have manpower or Digicon workstations to spare to carry out this task without interfering with its operations and adversely affecting its ongoing service recovery efforts. All of UP's trained Digicon operators and Digicon workstations are in full-time use to handle the real-world dispatching of trains on UP's lines, and could not be devoted to the "re-play" effort KCS/Tex Mex demand without interfering with those vital functions.

10. With regard to Digicon tapes reflecting dispatching that took place more than four weeks ago, the burdens would be even more extraordinary. Tapes for this period are archived and would have to be downloaded from UP facilities in Denver and reloaded onto the Digicon system, demanding considerable data processing effort. Because it is not possible to download tapes covering specific dispatching districts, tapes covering the entire SP system would have to be downloaded. In order to make room for these tapes on the Digicon system, it would be necessary to remove active tapes from the system. However, for accounting and other important operating purposes, UP cannot remove most of the active tapes from the system. Therefore, at most one week of tapes could be downloaded at any one time. The process of reviewing a single week of archived tape would be incredibly burdensome and time-consuming all by itself. Attempting to review dozens of weeks, which KCS/Tex Mex demand, would likely take a full year. Again, even were KCS/Tex Mex to reimburse UP for the expense of carrying out this process, acceding to KCS/Tex Mex's demands would deprive UP of skilled manpower that it does not have to spare.

11. KCS/Tex Mex's request for Corridor Managers' reports would also impose significant burdens on UP. Such reports are prepared twice daily for the two UP corridors in which Tex Mex's trains operate. Those reports are quite voluminous, and only small portions of them have anything to do with Tex Mex (although there would be no easy way to segregate the Tex Mex information).

Producing these reports just for the past several months would entail the downloading, printing and copying of many thousand pages of text. It is particularly inappropriate to require UP to suffer this burden given that these documents would not shed light on the reasons for the dispatching decisions made by UP's dispatcher respecting the handling of Tex Mex's trains in any particular situation.

VERIFICATION

I, Thom Williams, declare under penalty of perjury that the foregoing is true and correct, and that I am qualified and authorized to file this statement.

Thom Williams

Thom Williams

Dated: 5-22-98

Exhibit A

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); 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 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 PTRA 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

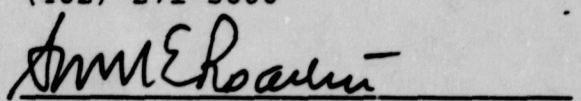
cons of dispatching decisions made days, weeks or months earlier. See Finance Docket No. 32133, Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control -- Chicago & North Western Holdings Corp. & Chicago & North Western Transportation Co., UP's Reply to SP Allegations of "Service Discrimination"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

Michael L. Rosenthal

Exhibit B

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

UNION PACIFIC'S RESPONSES AND OBJECTIONS TO KCS/TEX MEX'S DOCUMENT PRODUCTION REQUESTS

Union Pacific Railroad Company ("UP") hereby responds to the "Document Production Requests Directed to UP" served by Kansas City Southern Railway Company ("KCS") and Texas Mexican Railway Company ("Tex Mex") (collectively, "KCS/Tex Mex") on April 8, 1998 (TM-8/KCS-8).

These responses are being provided voluntarily. UP does not agree that parties are entitled to any discovery at this time, or to general discovery at any time in this and future merger oversight proceedings, which are not intended as a forum to relitigate the merger.

GENERAL RESPONSES

The following general responses are made with respect to all of the requests.

1. UP has conducted a reasonable search for documents responsive to the requests. Except as objections are noted herein,[1/] all responsive documents shortly will be made available for inspection and copying in UP's document depository, which is located at the offices of Covington & Burling in Washington, D.C. UP will be pleased to assist KCS/Tex Mex to locate particular responsive documents to the extent that the index to the depository does not suffice for this purpose. Copies of documents will be supplied upon payment of duplicating costs (including, in the case of computer tapes, costs for programming, tapes and processing time).

2. Production of documents or information does not necessarily imply that they are relevant to this proceeding, and is not to be construed as waiving any objection stated herein.

3. To the extent any of the documents to be produced contain sensitive shipper-specific and other confidential information, UP will produce such documents only upon the express agreement of counsel for KCS/Tex Mex that the

---

[1/] Thus, any response that states that responsive documents are being produced is subject to the General Objections, so that, for example, any documents subject to attorney-client privilege or the work product doctrine (General Objection No. 3) are not being produced.

production will be subject to the protective order that was entered in the merger proceeding.

GENERAL OBJECTIONS

UP asserts the following general objections with respect to all of the requests. Additional specific objections are stated at the beginning of the response to each request.

1. UP objects to all of the requests on the ground that, as set forth in Decision No. 12, served March 31, 1998, this "proceeding will commence on June 8, 1998." Accordingly, until June 8, all discovery is premature. Nevertheless, as set forth below, UP will respond voluntarily in advance of June 8 to reasonable discovery requests that address issues relevant to the forthcoming oversight proceeding relating to Houston/Gulf Coast service problems.

2. UP objects to all of the requests on the ground that they vastly exceed the scope of discovery that is appropriate in this proceeding. The requests reflect a vastly overbroad fishing expedition that would impose extraordinary and unreasonable burdens on UP, and are unconnected to any specific or colorable allegations of "discrimination" in dispatching. The requests are especially inappropriate in light of the fact that KCS and Tex Mex have been afforded ample opportunity to participate in and oversee UP's dispatching decisions with respect to lines over which those railroads operate. Specifically, KCS and Tex Mex have been invited to participate in the joint dispatching center at Spring, Texas, and Tex Mex

has the contractual right to be admitted to UP dispatching facilities and personnel responsible for dispatching to review the handling of trains on the UP lines over which its trains operate. Cooperative oversight of the dispatching process offers a far more constructive means of ensuring "non-discriminatory" dispatching than any effort to dissect all of the detailed facts surrounding past dispatching decisions. Any such effort would be extraordinarily burdensome, and would be unproductive given the nature of dispatching decisions. See UP Motion for Protective Order, Mar. 31, 1998 (UP/SP-334), at 9-13.

3. UP objects to the production of, and is not producing, documents that are protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable privilege or immunity.

4. UP objects to the production of, and is not producing, documents prepared in connection with, or containing information relating to, possible settlement of this or any other proceeding.

5. UP objects to the requests to the extent they seek the production of documents that are confidential or proprietary. Any such documents will only be produced subject to the protective order that was entered in the merger proceeding.

6. UP objects to the requests to the extent that they seek the production of documents that are not in UP's possession, custody, or control, or cannot be found in the course of a reasonable search.

7. UP objects to the requests to the extent that they seek the production of public documents that are readily available, including but not limited to documents on public file at the Board or the SEC or clippings from newspapers or other public media, to KCS/Tex Mex. Notwithstanding this objection, UP will be producing some responsive materials of this kind, but UP will not attempt to produce all responsive material of this kind.

8. UP objects to the requests to the extent that they seek the production of documents that are as readily obtainable by KCS and/or Tex Mex from their own files. Notwithstanding this objection, UP will be producing some responsive materials of this kind, but UP will not attempt to produce all responsive material of this kind.

9. UP objects to the production of, and is not producing, draft submissions to the Board and documents related thereto.

10. UP objects to Definition No. 3 ("document") as overbroad and unduly burdensome.

11. UP objects to Definition No. 4 ("identify") as overbroad and unduly burdensome.

12. UP objects to Instruction No. 3, which calls for documents pre-dating the UP/SP merger by several months, as overbroad, unduly burdensome, and seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

13. UP objects to the requests, including the Definitions and Instructions, to the extent they purport to impose any burden or obligation that exceeds that imposed by the Board's Rules of Practice and applicable precedents.

14. Because all of the documents that might be viewed as responsive to KCS/Tex Mex's Requests have not yet been located and identified, UP reserves the right to assert additional objections as appropriate and to supplement the objections stated herein.

SPECIFIC RESPONSES AND ADDITIONAL OBJECTIONS

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."

Response:

UP objects to this request as overbroad, unduly burdensome, and seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. This request purports to impose on UP the overwhelmingly burdensome task of gathering and producing a vast amount of computer records and other documents reflecting all of the innumerable circumstances underlying each and every one of the thousands of dispatching decisions made every day with respect to train movements on lines used by KCS and/or Tex Mex. The request reflects the purest of "fishing expeditions," in that KCS/Tex Mex have made

no effort to tie the request to any specific or colorable claim of discrimination with respect to any particular train movement. The request is especially inappropriate in light of the ample opportunities that KCS/Tex Mex have had to oversee, review and participate in dispatching decisions affecting UP lines over which they operate, as further described in General Objection No. 2.

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."

Response:

UP objects to this request as overbroad, unduly burdensome, and seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. This request purports to impose on UP the overwhelmingly burdensome task of gathering and producing a vast amount of computer records and other documents reflecting all of the innumerable circumstances underlying each and every one of the thousands of dispatching decisions made every day with respect to train movements on lines used by KCS and/or Tex Mex. The request reflects the purest of "fishing expeditions," in that KCS/Tex Mex have made no effort to tie the request to any specific or colorable claim of discrimination with respect to any particular train movement. The request is especially inappropriate in light of the ample opportunities that KCS/Tex Mex have had to oversee, review and

participate in dispatching decisions affecting UP lines over which they operate, as further described in General Objection No. 2. Subject to and without waiver of the foregoing objections, UP will be producing responsive documents in the nature of "policy statements, policy directives and memoranda" that reflect UP's policy of dispatching lines used by KCS/Tex Mex in a non-discriminatory manner, including documents disseminated to UP train management personnel (including dispatchers) and used in the training of such personnel.

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."

Response:

UP objects to this request as overbroad, unduly burdensome, and seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP also objects to this request as seeking information having no nexus with issues relating to rail service in the Houston/Gulf Coast area, as to which the Board has stated it intends to limit the forthcoming oversight proceeding, see Decision No. 12, p. 8, and instead seeks documents pertaining to UP's system as a whole.

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, snow, 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."

Response:

UP objects to this request as overbroad, unduly burdensome, and seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP also objects to this request as seeking information having no nexus with the issues relating to rail service in the Houston/Gulf Coast area, as to which the Board has stated it intends to limit the forthcoming oversight proceeding, see Decision No. 12, p. 8, and instead seeks documents pertaining to UP's system as a whole.

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
DAVID L. MEYER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-7566
(202) 662-5388

Attorneys for Union Pacific
Railroad Company

April 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 1998, I served a copy of Union Pacific's Responses and Objections to KCS/Tex Mex's Document Production Requests by hand on:

Richard A. Allen
John V. Edwards
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W.
Suite 600
Washington, D.C. 20006-3939

William A. Mullins
Sandra L. Brown
David C. Reeves
Troutman Sanders LLP
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005-3314

and by first-class mail, postage prepaid, on all other parties of record.

David L. Meyer

Exhibit C

UP/CNW-93

Before the

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 32133

UNION PACIFIC CORPORATION,
UNION PACIFIC RAILROAD COMPANY AND
MISSOURI PACIFIC RAILROAD COMPANY – CONTROL –
CHICAGO AND NORTH WESTERN HOLDINGS CORP. AND
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

Finance Docket No. 32133 (Sub-No. 2)

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
AND SPCL CORP. – TRACKAGE RIGHTS
OVER LINES OF UNION PACIFIC RAILROAD COMPANY AND
MISSOURI PACIFIC RAILROAD COMPANY
IN WYANDOTTE COUNTY, KS, AND
JACKSON COUNTY, MO

RAILROAD COMMON CONTROL APPLICATION

VOLUME 4 – UP REPLY TO SP ALLEGATIONS
OF "SERVICE DISCRIMINATION"

CARL W. VON BERNUTH
RICHARD J. RESSLER
Union Pacific Corporation
Martin Tower
Eighth and Eaton Avenues
Bethlehem, Pennsylvania 18018
(215) 861-3290

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

ARVID E. ROACH II
J. MICHAEL HEMMER
TIMOTHY C. HESTER
DAVID L. MEYER
THOMAS H. ODOM
STEVEN F. HUEFNER
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
Missouri Pacific Railroad Company

March 30, 1994

standard component of trackage rights agreements, allow tenants to seek damages and other relief if owners fail to perform their obligations.

* * *

UP'S EVIDENCE ON SP'S "DISCRIMINATION" CLAIMS

An Introduction to Train Dispatching

Before embarking on a review of UP's evidence responding to SP's "discrimination" claims, UP will offer an overly-simplified tour of the unique world of train dispatching, which may help put conflicting SP and UP evidence into perspective.

Twenty-four hours a day, seven days a week, train dispatchers coordinate the over-the-road movement of trains on every railroad line. Dispatchers must decide where and when trains moving in opposite directions will go by each other (called a "meet"), where and when one train will overtake another train moving in the same direction (called a "pass"), and where and when maintenance forces will be allowed to close a track for repairs or improvements. They also must balance train crews in order to ensure that enough crews are available at each end of a crew district to operate expected trains.

On track equipped with Centralized Traffic Control ("CTC"), dispatchers control train movements by remote control, manipulating switches and track signals from a control

panel tens or even thousands of miles away. On tracks without CTC, dispatchers typically use track warrants or permits, which allow a train to use sections of track. Warrants or permits are cancelled and new warrants are issued by radio as trains move over the line.

As a very general rule, subject to innumerable exceptions, dispatchers try to favor faster trains over slower trains. The basic guidelines are explained in Mr. Hare's statement for SP: Passenger trains have the highest priority. Intermodal trains and auto-parts trains are often next, followed by general manifest trains with no speed-restricted cars. Next come trains subject to speed restrictions. Locals and work trains have the lowest priorities. Hare V.S.(SP), pp. 228-29.

A reader of SP's statements might be left with the impression that a dispatcher's job is quite repetitive and mechanical, determined entirely by these priorities. However, dispatching does not work like that in the real world.[12/] Each section of railroad is unique every day. Each day, varying numbers of trains show up in different

---

12/ An article in our Attachment provides a somewhat dated but neverthless realistic portrayal of an average "trick" (8-hour shift) for a train dispatcher. See Frailey, South End Desk, *Trains Magazine*, Sept. 1986 (Att., pp. 30-40). The article describes eight hours with a former MKT dispatcher named Steve Culbertson, who now dispatches trains for UP.

orders, and different sections of track are closed for repair. King V.S.(E), p. 5.

More significantly, every dispatcher each day considers not only train priorities but also numerous additional factors and pieces of information that influence how the dispatcher does her or his job. Mr. King, who supervised UP's Harriman Dispatching Center for several years, describes many of these additional factors and explains how they influence train dispatching. They include

- whether trains are on schedule;
- locomotive horsepower;
- locomotive reliability;
- train weight and length;
- conflicting traffic over hundreds of miles of track;
- the dispatcher's experience with the performance of each train and each engineer;
- the performance of each train that day;
- the presence of speed-restricted and oversized cars;
- length of sidings;
- proximity of sidings and crossovers;
- the ability of terminals to accept trains;
- radio and communications problems;
- special information and instructions that override normal operations, delivered by operators, dispatchers, yardmasters and train crews;

- maintenance activity;
- availability of crews;
- Hours of Service restrictions on train crews;
- signal and equipment malfunctions;
- delays when equipment detectors indicate a possible problem;
- terrain; and
- weather factors.

King V.S.(E), pp. 6-11. SP witness Larry Henley also described some of the many reasons that "trains fail to meet [a dispatchers'] expectations." Henley V.S.(SP), p. 208; Henley Tr. (Att., pp. 51-52). As Mr. Henley put it, "Anything that could happen, would happen." Id. (Att., p. 52).

New items of information flow to a dispatcher constantly, requiring continuous changes to the dispatcher's plans. Much of the information is conveyed orally and is never recorded. For example, yardmasters at SP's Kansas City and St. Louis yards frequently announce that they cannot take trains, delaying SP trains on UP lines, blocking other trains and disrupting dispatching plans. E.g., Faircloth V.S.(K), p. 3. Train crews radio the dispatcher because signals or locomotives are not working. Maintenanance-of-way employees need more time than expected to finish a job. Thus, although dispatchers must make judgments hours in advance based on

their best projections about future events,[13] developments the dispatcher cannot control often require new judgments or make it look like the dispatchers have made mistakes.[14]

The human dimension adds a further level of variability. As UP's CEO Dick Davidson explains, dispatchers are human and fallible. Their estimates of where two trains should meet three hours later may turn out to be less than perfect. They have varying levels of ability and individual personalities that react differently to disruption and disagreement. Some are easier to anger than others. Davidson V.S.(A), p. 7. A dispatcher's knowledge of physical track arrangements and local operating pratices hundreds of miles away can make a difference. Chambers V.S.(T). A dispatcher may occasionally act inconsistently with company policy (as Mr. Frailey's vignette about SP dispatching on page 1 may or may not demonstrate). There are also occasional instances of retaliation by one railroad for perceived slights by the other, until calmer management judgment intervenes. Dettmann V.S.(D), p. 2; Husman V.S.(R), pp. 2-3; Faircloth V.S.(K), pp. 1-2.

---

[13] Henley Tr. (Att., pp. 53-54).

[14] See Mr. Frailey's "South End" article: "In 15 minutes, Culbertson has laid out a scenario that will take hours to unfold. Almost immediately, events overtake his plans." (Att., p. 35).

It is also important to understand that most railroaders have an entirely different view of dispatching decisions than dispatchers. Railroaders commonly believe that dispatchers mishandle their trains. As SP's witness Larry Henley told SP witness Coates, "I thought all engineers thought that the dispatchers were discriminatory [sic] against them." Henley Tr. (Att., p. 48). Jerry R. Davis, a former dispatcher on UP and now Chief Operating Officer at CSX Transportation, explains that "dispachers are subject to more criticism and Monday-morning-quarterbacking than employees in any other railroad craft. Everyone thinks he or she would have done a better job of running the railroad." Davis V.S.(B), p. 5. Railroaders who work in the field, such as train crews, are often unhappy with dispatchers because they have only a keyhole view of the broad geographic perspective and comprehensive information available to the dispatcher. Complaining about dispatching is therefore part of daily discourse on railroads. Naro V.S.(G), p. 15. Illustrating the point in the extreme, some UP engineers believe UP dispatchers favor SP trains between Kansas City and St. Louis. Penning Letter (Tab V), p. 2.

When the dispatcher is employed by a competitor, there is a natural tendency to recast these day-to-day dissatisfactions as "discrimination." Several UP witnesses explain how tenant employees, from train crews to senior operating

officials, are generally suspicious of landlord dispatchers on every trackage-rights facility. E.g., Kenefick V.S.(C), pp. 7-8; Davis V.S.(B), p. 4; King V.S.(E), p. 12.

Investigation usually shows that suspicions of discrimination are unfounded. Jerry Davis describes his questions about UP's dispatching of CSXT trains on UP-CSXT joint track south of Chicago, and his conclusion after investigation that "CSXT trains were getting a fair shake." Davis V.S.(B), pp. 4-5. Another splendid example was provided by an SP witness, J. Earl Hare. In his deposition, he described how SSW used to accuse Mr. Hare's employer, the Rock Island, of discriminating against SSW trains. As Mr. Hare adamantly testified, though, SSW was wrong. SSW claimed "discrimination," but Rock Island "policy was to handle the trains as they arrived and departed." Hare Tr. (Att., pp. 86-87).

As Mr. Davis and others explain, unless a railroad investigates a train delay promptly, accurate investigation will be impossible. The dispatching of virtually every train on every busy railroad is affected by both routine and unusual events that are not recorded and that no one can recall more than a few days later. Mr. Davis states: "As a dispatcher . . . I know that unless you are asked to recreate your decisions within the first few hours after you made them, you cannot do it. . . . It is impossible to go back months or

years after a complicated night of decisions and figure out why the dispatcher made particular choices." Davis V.S.(B), p. 5.

For example, no dispatcher has the ability to recall from memory weeks later that SP's Kansas City Yardmaster instructed the UP dispatcher to leave the "Blue Streak Merchandise" behind a slower SP train because the SP Yardmaster wanted the trains to arrive in that order. Nor can anyone recall precisely which SP trains ran slowly because of locomotive problems, as so often happens. Railroad operating officers -- whether of the trackage rights tenant or the landlord -- must investigate train delays promptly, on a day-to-day basis, or accuracy will be unattainable.

By asserting discrimination claims covering roughly ten years,[15/] SP is challenging literally millions of individual dispatching judgments made over a decade by human beings who were making difficult judgments under pressure and in changing conditions, where there was no "right" answer and every choice could be second-guessed. Memories have faded, and the numerous factors that influenced each decision, many of them oral communications, cannot be reconstructed.

[15/] SP claims discrimination from early 1983 through the present, although several of its witnesses, assert that matters improved in 1992. That decade has seen innumerable changes in train operations, traffic levels, technology, operating conditions, track capacity, management capabilities and other factors.

Although it is sometimes possible to show after the fact that a complaint about dispatching is mistaken, neither the Commission nor the most illustrious panel of railroad operating experts on earth could hope to sort out the pros and cons of dispatching decisions over a period of ten years on a single section of track, much less on a dozen or more segments. Fortunately, in this proceeding at least, neither SP nor UP asks the Commission to attempt that impossible task. In addition, UP offers a better alternative -- a private-sector solution that will satisfy SP's desire for future protection while also ensuring equal protection for UP against SP misconduct.

I. UNION PACIFIC DOES NOT HAVE, AND WITHIN MEMORY HAS NEVER HAD, A POLICY OF DISCRIMINATING AGAINST SP TRAINS USING UP TRACKAGE RIGHTS.

A. Union Pacific Expects Its Dispatchers to Provide Equal Professional Handling of UP and Tenant Trains.

If Union Pacific or Missouri Pacific has ever had a policy of discriminating against trains of trackage rights tenants, senior managers and supervisors responsible for train dispatching are unaware of it. As they testify, Union Pacific policy is now, and has been since well before 1983 (and as far back as anyone can remember), to provide equal handling for all trains in accordance with the priority of each train, all other appropriate dispatching considerations, and information provided by the tenant about its trains.

US OFFICE PRODUCTS

Exhibit D

TERMS FOR TEXAS MEXICAN RAILWAY COMPANY TRACKAGE RIGHTS

The following terms (hereinafter referred to as the "Terms") shall govern rights provided by MISSOURI PACIFIC RAILROAD COMPANY, a Delaware corporation ("MP"), and SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation ("SP"), with MP and SP jointly and severally referred to as "MP/SP" or "Owner," on the one hand, to THE TEXAS MEXICAN RAILWAY COMPANY ("Tex Mex" or "User"), on the other hand, with MP/SP and Tex Mex sometimes referred to collectively as "Parties," pursuant to the decision of the Surface Transportation Board ("STB") in Finance Docket No. 32760 served August 12, 1996 (the "Decision").

RECITALS

A. MP/SP owns lines of railroad consisting of track structure extending between Robstown, Texas and Odem, Texas, and between Corpus Christi, Texas, and Beaumont, Texas, by way of Odem, Texas, identified as follows:

> MP's line between Robstown, Texas, in the vicinity of MP Milepost 141.48 and Placedo, Texas, in the vicinity of MP Milepost 224.2;
>
> MP's line between Corpus Christi, Texas, in the vicinity of MP Milepost 145.59, and Odem, Texas, in the vicinity of MP Milepost 132.2, via Savage Lane to MP's Viola Yard;
>
> SP's line between Placedo, Texas, in the vicinity of SP Milepost 14.2, and West Junction, Texas, in the vicinity of SP Milepost 12.6, via Victoria, Texas, and Flatonia, Texas;
>
> SP's line between West Junction, Texas, in the vicinity of SP Milepost 12.6, and T&NO Junction, Texas, in the vicinity of SP Milepost 4.6;
>
> SP's line from West Junction through Bellaire Junction to Chaney Junction, in the vicinity of SP Milepost 2.8;
>
> SP's line from Chaney Junction, in the vicinity of SP Milepost 2.8, to Tower 26, in the vicinity of SP Milepost 360.7, via the Houston Passenger station;

SP's line from Chaney Junction, in the vicinity of SP Milepost 2.8, to Tower 26, in the vicinity of SP Milepost 360.7, via the Hardy Street yard;

MP's line from Settegast Junction, in the vicinity of MP Milepost 381.61, to the connection with HB&T at Interstate Junction, in the vicinity of MP Milepost 7.60;

SP's line from T&NO Junction, in the vicinity of SP Milepost 4.6, to the connection with PTRA, in the vicinity of Katy Neck (GH&H Junction), in the vicinity of SP Milepost 1.3;

SP's line from SP Milepost 360.7 near Tower 26 to the connection with HB&T at Quitman Street, in the vicinity of SP Milepost 1.45;

MP's line between Gulf Coast Junction, Texas, in the vicinity of MP Milepost 377.98, and Amelia, Texas, in the vicinity of MP Milepost 451.4;

MP's line between Amelia, Texas, in the vicinity of MP Milepost 451.4, and the connection with SP at Langham Road, Texas, in the vicinity of MP Milepost 456.7;

SP's line between Langham Road, Texas, in the vicinity of MP Milepost 456.7, and Tower 74, in the vicinity of MP Milepost 458.8;

MP's line between Tower 74, in the vicinity of MP Milepost 458.8, and (1) the connection with The Kansas City Southern Railway Company ("KCS") at GLC Jct., Texas, in the vicinity of MP Milepost 460.36 (KCS Milepost 766.7), and (2) the connection with KCS at the Neches River Draw Bridge in Beaumont, Texas, in the vicinity of KCS Milepost 766.0;

as shown by bold line on the attached prints dated September 23, 1996 (and identified as Exhibit "A") and further described in Section 1.7 of Exhibit "B," which shall be referred to herein as the "Joint Trackage."

B. The STB in Finance Docket No. 32760 approved the common control and merger of the rail carriers controlled by Union Pacific Corporation ("UPC"), including MP and Union Pacific Railroad Company ("UPRR") (UPC, UPRR and MP are referred to collectively as "UP"), and the rail carriers controlled by Southern Pacific Rail Corporation ("SPR"), including SP, conditioned on, among other things, partial grant of the Responsive Application of Tex Mex, dated March 29, 1996.

C. In order to exercise its authority to acquire control of SPR as granted by the STB in Finance Docket No. 32760, MP/SP is willing to provide Tex Mex with the rights specified in the Decision.

D. Tex Mex desires to receive said rights and desires to conduct operations over said rights. Tex Mex and MP/SP now wish to assist the STB in specifically defining the terms and conditions under which said rights shall be exercised.

E. It is the position of Tex Mex and MP/SP that these Terms do not constitute the acquiescence by either of them in the Decision and shall not preclude either of them from seeking any reopening, reconsideration or judicial review of the Decision.

TERMS

1. General Conditions:

The General Conditions set forth in Exhibit "B" attached hereto are hereby made a part of these Terms. All capitalized Terms used and not otherwise defined in these Terms shall have the meaning ascribed to them in the General Conditions. If any conflict between the General Conditions and these Terms shall arise, the provisions of these Terms shall prevail.

2. Rights of Tex Mex:

(a) Subject to the terms and conditions contained herein, MP/SP shall grant to Tex Mex the nonexclusive right to use the Joint Trackage for the limited operation of Equipment in Tex Mex's account over the Joint Trackage in common with MP/SP and such other railroad company or companies as MP/SP has heretofore admitted or may hereafter at any time in the future admit to the joint use of all or part of the Joint Trackage (provided that such future admittance shall not materially hinder or obstruct the fair and reasonable exercise of the rights granted in these Terms), such other railroad company or companies to be considered MP/SP for the purposes of these Terms, it being understood and agreed that Tex Mex shall not have the right to:

(i) Switch industries upon the Joint Trackage, except as otherwise provided in Section 2(g);

(ii) Set out, pick up or store Equipment upon the Joint Trackage, or any part thereof, except as otherwise provided in Sections 2.11, 2.12 and 2.13 of Exhibit B;

(iii) Serve any industry, team or house track, intermodal or auto facility now existing or hereafter located along the Joint Trackage, except as otherwise provided in Section 2(g);

(iv) Permit or admit any third party to the use of all or any portion of the Joint Trackage, nor, under the guise of doing its own business, contract or make any agreement to handle as its own Equipment over or upon the Joint Trackage, or any portion thereof, the Equipment of any such third party which in the normal course of business would not be considered the Equipment of Tex Mex; provided, however, that the foregoing shall not prevent Tex Mex, pursuant to a run-through agreement with any railroad, from using the locomotives and cabooses of another railroad as its own under these terms;

(v) Connect with or interchange with any other railroad, except as otherwise provided in Section 4; or

(vi) Establish any transload facilities on the Joint Trackage or build into or out from any facility from/to the Joint Trackage.

(b) The rights granted in Section 2 shall be only for rail traffic of all kinds and commodities, both carload and intermodal, in Equipment that meets all applicable specifications established by the Association of American Railroads and the Federal Railroad Administration, provided that all freight handled by Tex Mex pursuant to such rights must have a prior or subsequent movement on Tex Mex's Laredo-Robstown-Corpus Christi Line.

(c) User shall have the right to establish crew change points at points on the Joint Trackage as from time to time may be mutually agreed to in writing by Owner and User. However, User agrees that if sufficient trackage is not available at such locations(s) to facilitate crew changes of User, Owner may require User to construct additional trackage ("Crew Change Facilities") in the vicinity of such location as may be required, in the reasonable judgment of Owner, the cost and expense of which shall be borne solely by User. If User does not agree that such Crew Change Facilities are necessary, the Owner may nevertheless insist that they be constructed, with the question of their necessity, and the User's obligation to bear their cost and expense, to be determined by arbitration pursuant to Section 6 of the General Conditions. In the event such Crew Change Facilities are constructed at the cost and expense of User, and Owner shall choose to use such Crew Change Facilities, Owner shall pay User fifty percent (50%) of the cost of constructing such Crew Change Facilities. Should Owner decline to participate, Owner shall be denied access to such Crew Change Facilities. However, should Owner elect at a later date to use such Crew Change Facilities, such right shall be granted to Owner by User upon payment of fifty percent (50%) of User's initial costs plus per annum interest thereon at a rate equal to the average paid on 90-day Treasury Bills of the United States Government as of the date of completion until the date of use by User commences. Per annum interest shall be adjusted annually on the first day of the twelfth (12th) month following the date of completion and every year thereafter on such date, based on the percentage increase or decrease, in the average yield of 30-year U.S. Treasury Notes for the prior year compared to their average yield in first year of completion of the Improvements. Each annual adjustment shall be subject, however, to a "cap" (up or down) of two percentage points of the prior year's

interest rate (i.e. the adjustment may not exceed an amount equal to two percentage points of the immediately preceding year's interest rate).

In addition, Owner shall lease to User, by separate written agreement at reasonable and customary charges, existing facilities for office, locker, change and lunchroom purposes by User's personnel upon request of User to Owner, and as reasonably available, or property of Owner as reasonably available for User to establish its own facilities.

(d) User agrees that when entering or exiting the Joint Trackage or using the Joint Trackage to set out or pick up ("User's Operations"), it shall do so without unreasonable interference or impairment of the Joint Trackage. However, User agrees that if sufficient trackage is not available at such location(s) to facilitate User's Operations, Owner may require User to construct additional trackage in the vicinity of such location(s) as may be required, in the reasonable judgment of Owner, the cost and expense of which shall be borne solely by User. If User does not agree that such additional trackage is necessary, the Owner may nevertheless insist that it be constructed, with the question of its necessity, and the User's obligation to bear its cost and expense, to be determined by arbitration pursuant to Section 6 of the General Conditions. In the event such trackage is constructed at the cost and expense of User, and Owner shall choose to use such trackage, Owner shall pay User fifty percent (50%) of the cost of constructing such trackage plus interest as calculated pursuant to Section 2(c) above.

(e) User shall have the right to such use of SP's Glidden Yard at Glidden, Texas, as is reasonably necessary to effectuate the rights granted by these Terms and on such terms and conditions (including reasonable compensation terms) as may be agreed to in writing by the parties or determined by arbitration pursuant to Section 6 of the General Conditions if the parties fail to agree; provided, however, that such use by User shall not unreasonably interfere with Owner's operations. Any dispute between User and Owner regarding the reasonableness of User's use of Glidden Yard shall be submitted to arbitration pursuant to Section 6 of the General Conditions.

(f) If Owner implements a directional flow of operations between Houston, Texas, and Beaumont, Texas, Owner will assure that User's operations are not adversely affected thereby.

(g) User shall have the right to serve all shippers that, as of September 10, 1996, were capable of receiving service from both MP and SP and no other railroad, directly or through reciprocal switching.

3. GTM Rate:

(a) In addition to other payments to be made under these Terms, User shall remit to Owner monthly for the use of the Joint Trackage in the operation of its Equipment therealong and thereover, the total amount of 3.84 mills per GTM for all Equipment, which sum per GTM ("GTM Rate") shall be deemed to include ordinary and programmed maintenance of the Joint

Trackage, Changes in and/or Additions to the Joint Trackage (to the extent required by the first sentence of Section 2.2 of the General Conditions), operating expenses, interest rental, depreciation and taxes.

(b) For the purpose of computing the GTM Rate under this Section 3, the distance between the designated points of the Joint Trackage shall be determined by reference to MPRR's EPMS Engineering Mileage Master or SP's Station Pair Master File, whichever is applicable, both of which shall be subject to verification by User.

(c) The GTM Rate set forth in Section 3(a) of these Terms shall be subject to adjustment annually, commencing as of July 1, 1997, as follows:

All trackage rights charges under this Section 3 shall be subject to adjustment annually beginning as of the effective date of these Terms to reflect seventy percent (70%) of increases or decreases in Rail Cost Adjustment Factor, not adjusted for changes in productivity ("RCAF-U") published by the ICC or successor agency or other organizations. In the event the RCAF-U is no longer maintained, the parties shall select a substantially similar index and failing to agree on such an index, the matter shall be referred to binding arbitration.

4. Interchange:

In exercising the rights granted by these Terms, Tex Mex shall have the right to interchange traffic (a) with carriers other than MP/SP at the existing interchange points with those carriers on the Joint Trackage, i.e., (i) at Houston, Texas, with the Port Terminal Railroad Association ("PTRA"), the Houston Belt Terminal Railway Company ("HBT"), The Atchison, Topeka & Santa Fe Railway Company ("ATSF") and Burlington Northern Railroad Company ("BN") (ATSF and BN are referred to collectively as "BNSF"), and (ii) at Beaumont, Texas, with BNSF and The Kansas City Southern Railway Company ("KCS"); (b) with BNSF at Robstown and Corpus Christi and at any new interchange point on the Joint Trackage that may hereafter be established between MP/SP and BNSF; and (c) with MP/SP at Houston, Beaumont and such other points as may mutually be agreed. Any interchange between Tex Mex and PTRA or between Tex Mex and HBT at Houston, Texas, shall be governed by agreements entered into between those parties or terms imposed by the STB.

5. Additions:

(a) Owner and User shall conduct a joint inspection to determine what connections ("Connections") and sidings or siding extensions associated with Connections ("Sidings") are necessary in the reasonable judgment of Owner to implement the rights granted under Section 2 of these Terms. User, at its sole cost and expense, shall pay the cost of such Connections and Sidings. If User does not agree that such Connections and Sidings (other than those described in subsections (i) and (ii), the necessity for which is not in dispute, and to which this sentence does not apply) are necessary, Owner may nevertheless insist that they be constructed, with the question of their necessity, and the User's obligation to bear their cost and expense, to be

determined by arbitration pursuant to Section 6 of the General Conditions. In the event that the User bears the sole cost and expense of any such Connections and Sidings, no other railroad shall have the right to use them except upon terms agreed to by User and such other railroad. In the event Owner shall elect to use such Connections and Sidings, Owner shall pay to User fifty percent (50%) of the cost to User of constructing the Connections and Sidings, plus interest as calculated pursuant to Section 2(c) above, and, having made such payment, Owner may also admit other railroads to the use of such Connections and Sidings. Owner shall maintain the part of any Connection or Siding on its property at its sole cost and expense, and User, at its sole cost and expense, shall maintain the part of any Connection or Siding on its property or property of others. Such necessary Connections and Sidings shall include, but are not necessarily limited to, those described in subsections (i) and (ii) below:

(i) User shall construct a connection to access MP at Robstown, Texas, to include track 8500 feet in length to permit Tex Mex trains to clear the MP main line (the "Robstown Connection"). The design for the Robstown Connection shall be submitted to Owner for its written approval within forty-five (45) days following the effective date of these Terms, which approval shall not be unreasonably withheld, and User's operation thereover shall be subject to Owner's prior written acceptance of the Robstown Connection. User agrees that the Robstown Connection shall be constructed within one hundred eighty (180) days of acquisition of the required property and approval by Owner of its design. Owner grants User the right to use, as daily dispatching conditions reasonably permit, the existing connection between Tex Mex and Owner at Robstown and 8500 feet of Owner's main line south of that connection, for a period of six (6) months following the date of Owner's approval of the design of the Robstown Connection, which connection and trackage shall be deemed part of the Joint Trackage during the period of Tex Mex's usage thereof, including any extensions of the period as provided below. Owner will extend the period of User's use of the existing connection for an additional six (6) months in the event (a) User is unable to complete the Robstown Connection within the time frame specified in the preceding sentence and User is making a bona fide effort to complete the construction of the new connection, and (b) User's continued operations over the existing connection will not, in Owner's judgment, unreasonably interfere with Owner's operations. If BNSF constructs the Robstown Connection, Tex Mex shall have the right to use the Robstown Connection on terms agreed to by Tex Mex and BNSF. If the Robstown Connection is not constructed by BNSF, Tex Mex shall construct the Robstown Connection as provided above.

(ii) User shall also construct a connection to access SP at Flatonia, Texas, to include track parallel to SP's Victoria Subdivision, Port LaVaca Branch, 8500 feet in length to permit Tex Mex trains to clear the SP main line (the "Flatonia Connection"). The design for the Flatonia Connection shall be submitted to Owner for its written approval within forty-five (45) days following the effective date of these Terms, which approval shall not be unreasonably withheld, and

User's operation thereover shall be subject to Owner's prior written acceptance of the Flatonia Connection. User agrees that the Flatonia Connection shall be constructed within one hundred eighty (180) days of acquisition of the required property and approval by Owner of its design. Owner grants User the right to use the existing connection between SP's Victoria Subdivision, Port LaVaca Branch, and SP's Glidden Subdivision at Flatonia and siding south of Owner's main line West of that connection for a period of six (6) months following the date of Owner's approval of the design of the Flatonia Connection, which existing connection and trackage shall be deemed part of the Joint Trackage during the period of Tex Mex's usage thereof.

(b) Except as provided in Section 5(a) above, expenditures for any future Changes in and/or Additions to the Joint Trackage, such as, but not limited to, sidings, Centralized Traffic Control, grade separations, and future connections, shall be handled as follows: (i) if the Change in and/or Addition to the Joint Trackage is for the sole benefit of one party, that party shall be solely responsible for the entire cost and expense thereof; (ii) all other Changes in and/or Additions to the Joint Trackage shall be shared by MP/SP and Tex Mex on the basis that the parties' respective GTM's operated over the Joint Trackage bear to total GTM's operated over the Joint Trackage for the twelve (12) month period immediately prior to the month work on the project is commenced. The use of Joint Trackage by any third party shall be attributed to MP/SP for purposes of computing respective GTM's for purposes of this Section 5(b).

(c) In the event such Changes in and/or Additions to the Joint Trackage are constructed at the sole cost and expense of one party (party of the first part), the other party (party of the second part) shall be denied access to such Change in and/or Addition to the Joint Trackage. If the party of the second part at some future date shall choose to use such Changes in and/or Additions to the Joint Trackage, such right shall be granted to party of the second part by party of the first part upon payment of fifty percent (50%) of party of the first part's initial costs plus per annum interest calculated pursuant to Section 2(c).

6. Notices:

All notices, demands, requests, submissions and other communications which are required or permitted to be given pursuant to these Terms shall be given by either party to the other in writing and shall be deemed properly served if delivered by hand, or mailed by overnight courier or by registered or certified mail, return receipt requested, with postage prepaid, to such other party at the address listed below:

If intended for MP/SP:

Executive Vice President-Operation
Room 1206
1416 Dodge Street
Omaha, Nebraska 68179

With a copy to:

Director Joint Facilities
Room 1200
1416 Dodge Street
Omaha, Nebraska 68179

If intended for Tex Mex:

The Texas Mexican Railway Company
1200 Washington Street
P.O. Box 419
Laredo, Texas 78042

Notice of address change may be given any time pursuant to the provisions of this Section 6.

7. Term:

These Terms shall be effective upon consummation of the control authority granted in the Decision for a term of ninety-nine (99) years. These Terms shall terminate, and all rights conferred pursuant thereto shall be canceled and deemed void ab initio, if, in a Final Order, the application for authority for UP to control SPC has been denied or has been approved on terms unacceptable to the applicants or has been granted on terms that do not require the rights provided herein, provided, however, that if these Terms become effective and are later terminated, any liabilities arising from the exercise of rights under Sections 1 through 5 during the period of its effectiveness shall survive such termination. For purposes of this Section 7, "Final Order" shall mean an order of the Surface Transportation Board, any successor agency, or a court with lawful jurisdiction over the matter which is no longer subject to any further direct judicial review (including a petition for writ of certiorari) and has not been stayed or enjoined.

Approved:

For MP/SP: James V Dolan

Position: Vice President - Law

Date: DEC 12 1996

For Tex Mex: Jerry W Fields

Position: President

Date: Nov 20, 1996

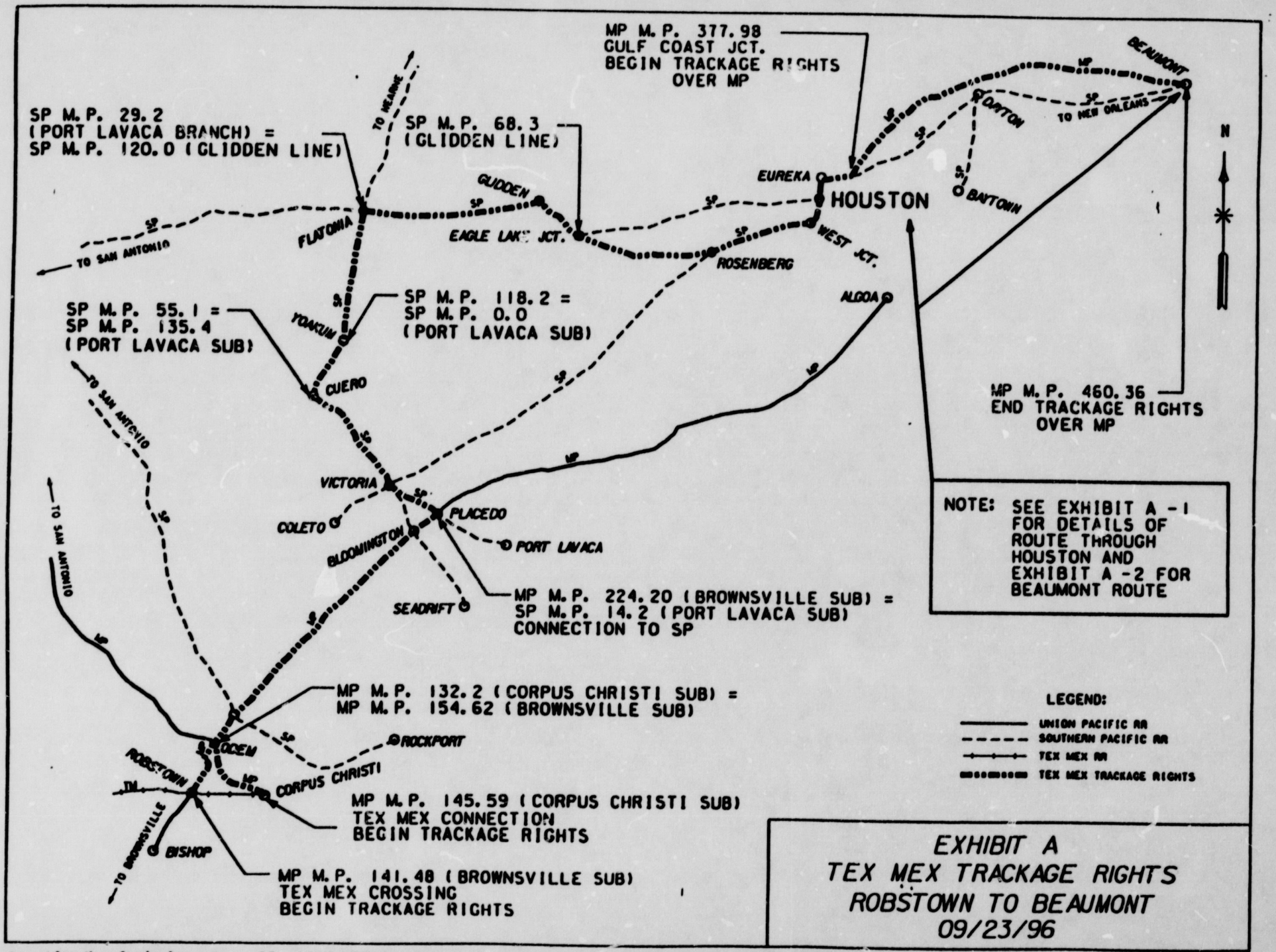
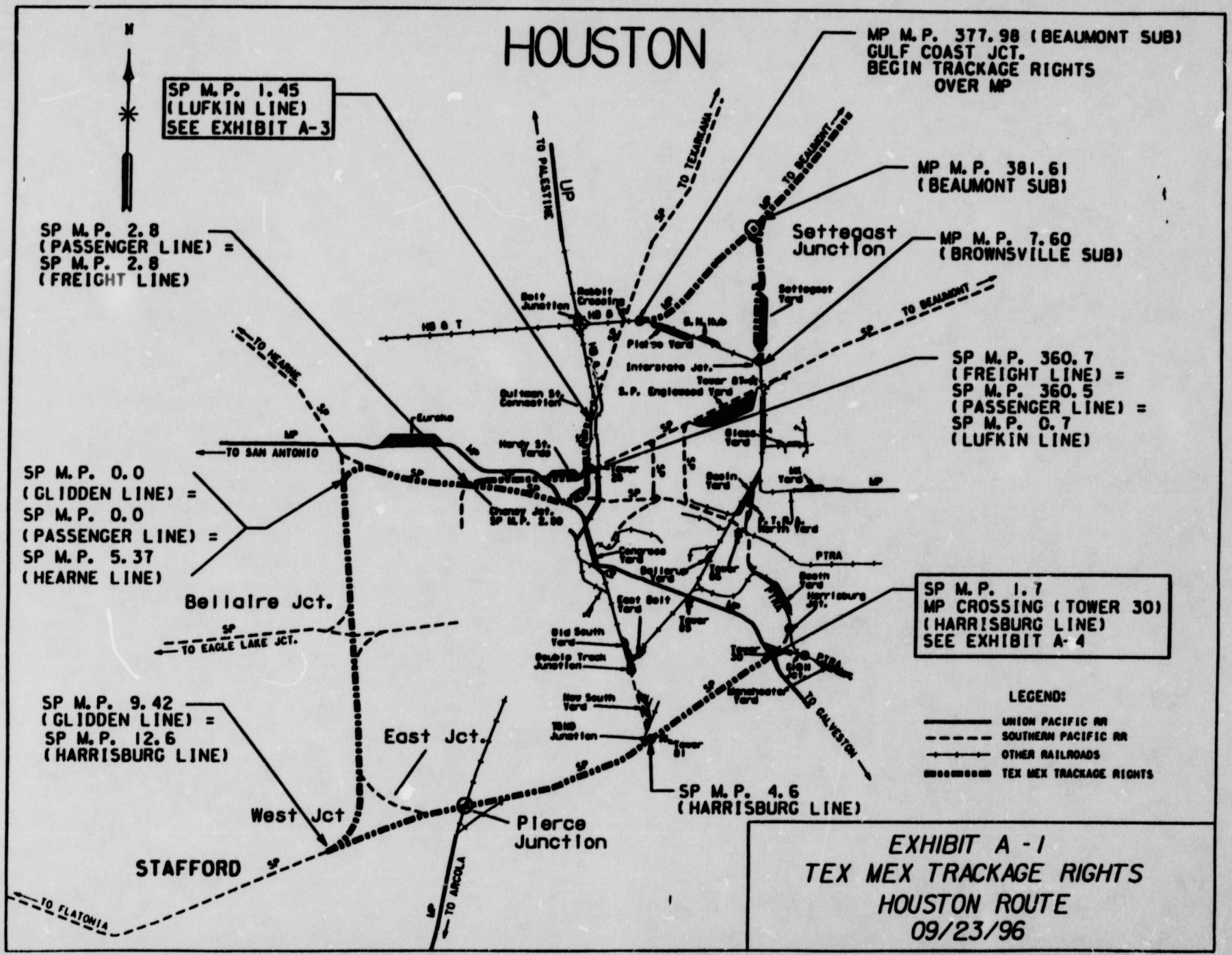
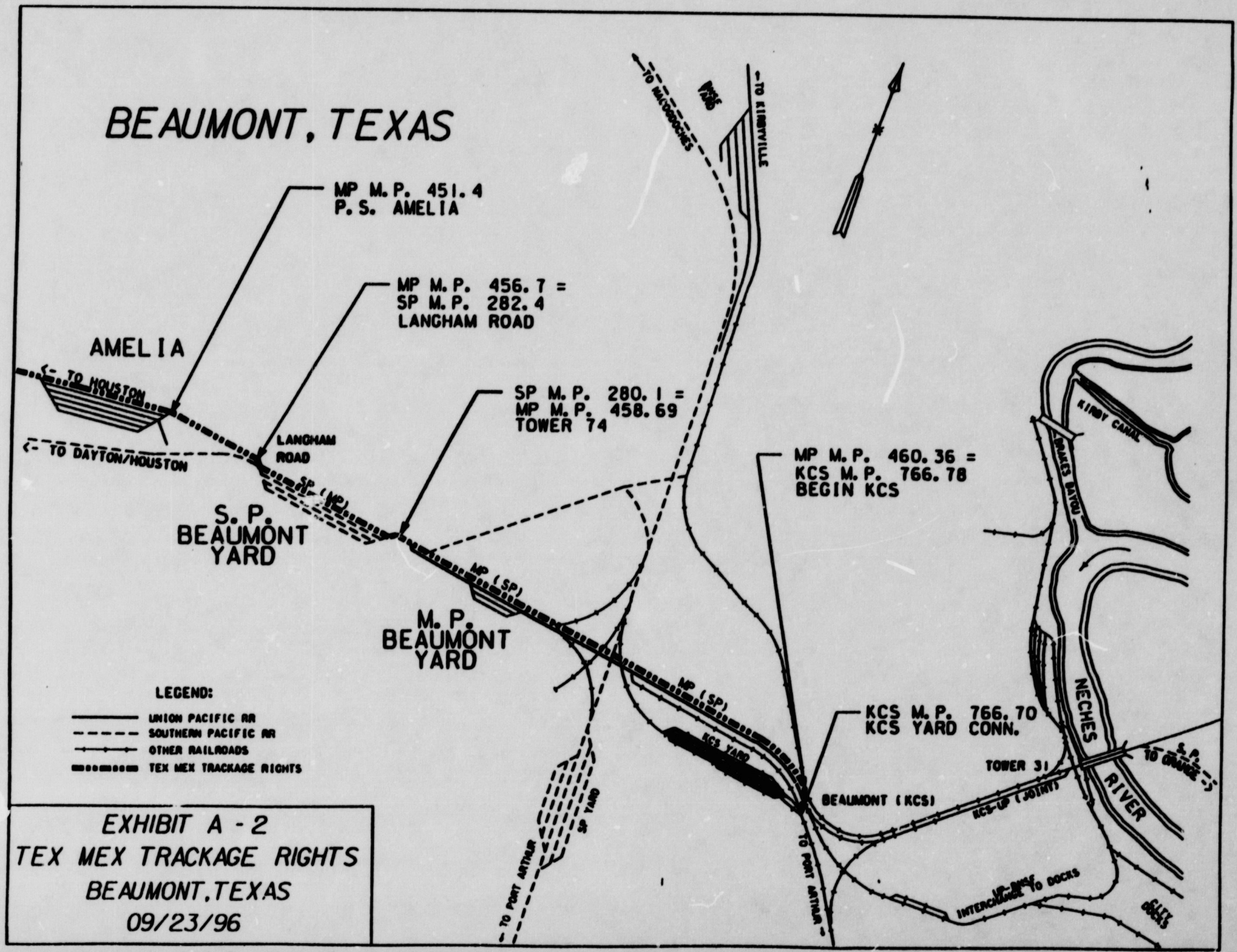


EXHIBIT A
TEX MEX TRACKAGE RIGHTS
ROBSTOWN TO BEAUMONT
09/23/96

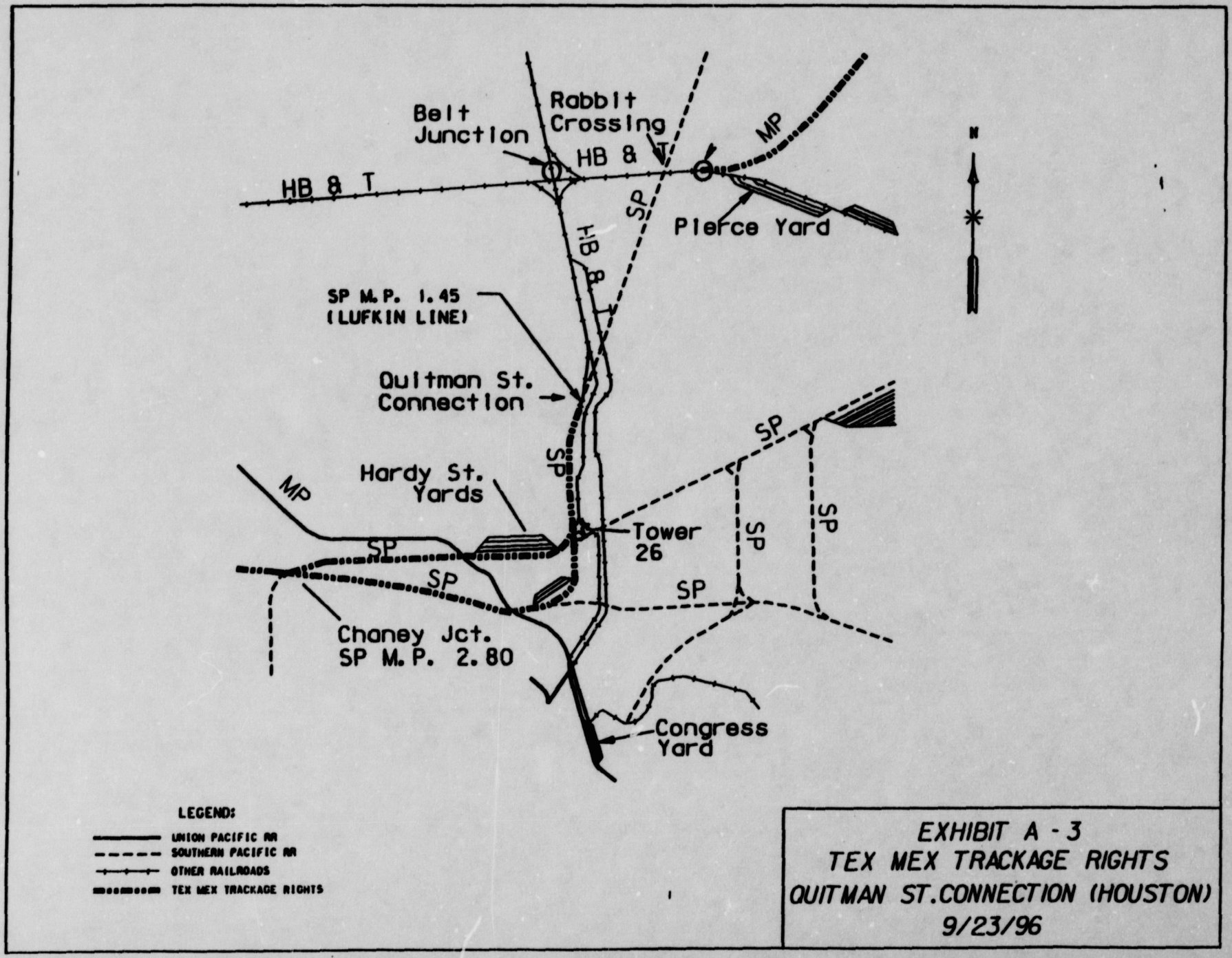
/usr/dgn/bnsftrk.dgn Sep. 25, 1996 08:04:18



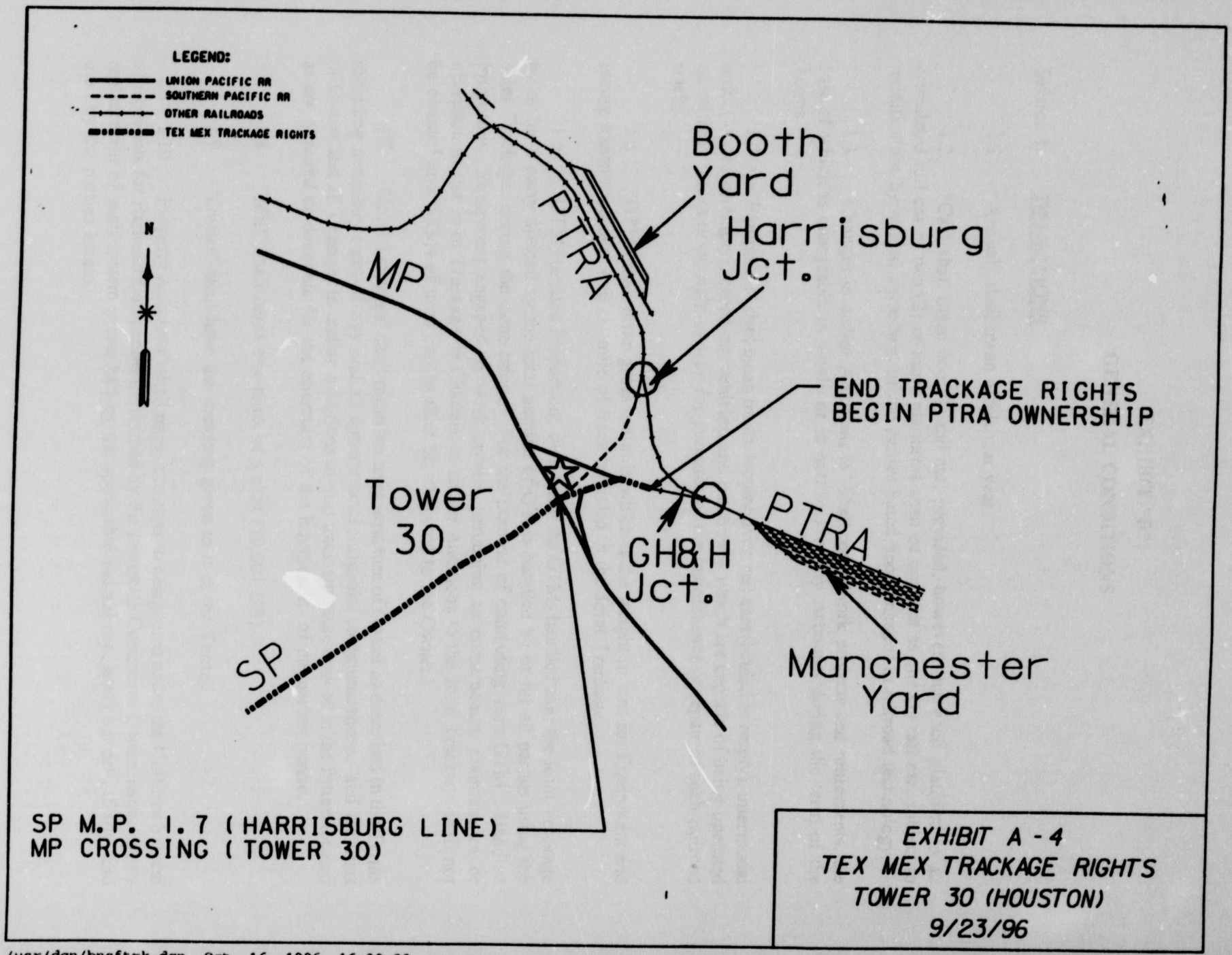
/usr/dgn/bnsftrk.dgn Oct. 16, 1996 16:31:36



/usr/remote/tmp/bnsftrk.dgn Sep 26 1996 09:37:54



/usr/dgn/bnsftrk.dgn Oct. 16, 1996 16:29:09



/usr/dgn/bnsftrk.dgn Oct. 16, 1996 16:30:08

EXHIBIT "B"

GENERAL CONDITIONS

Section 1. DEFINITIONS

1.1 "Annual" shall mean a calendar year.

1.2 "Car" shall mean one (1) rail car; provided, however, that each platform in an articulated rail car of two (2) or more platforms shall be counted as one (1) rail car, subject to modification by mutual agreement of the parties based upon changes in railroad technology.

1.3 "Changes in and/or Additions to" shall mean work projects and retirements, the cost of which is chargeable in whole or in part to Property Accounts during the term of the Terms.

1.4 "Equipment" shall mean trains, locomotives, rail cars (loaded or empty), intermodal units (loaded or empty), cabooses, vehicles, and machinery which are capable of being operated on railroad tracks or on right-of-way for purposes of the maintenance or repair of such railroad tracks.

1.5 "GTM" shall mean gross ton mile which is the weight in tons for Equipment and lading transported over one (1) mile of track included in the Joint Trackage.

1.6 "GTM Handled Proportion" shall mean the GTMs handled over the Joint Trackage by or for a party divided by the total number of GTMs handled by or for all parties using the Joint Trackage, during the same period. For the purpose of computing such GTM's Handled Proportion, Equipment engaged in work service pertaining to construction, maintenance or operation of the Joint Trackage or Changes in and/or Additions to the Joint Trackage shall not be counted and GTMs of third parties shall be attributed to the Owner.

1.7 "Joint Trackage" shall mean the track structure of Owner as described in the Terms including necessary right-of-way and all appurtenances, signals, communications, and facilities of Owner and all Changes in and/or Additions to said track structure now or in the future located as are required or desirable for the operation of the Equipment of the parties hereto.

1.8 "Mill" shall mean one-tenth of a cent ($0.001 US).

1.9 "Owner" shall have the meaning given to it in the Terms.

1.10 "Property Accounts" shall mean accounts so designated under the Uniform System of Accounts for Railroad Companies prescribed by the Interstate Commerce Commission, or any replacement of such system prescribed by the applicable federal regulatory agency, if any, and used by the parties hereto.

1.11 "STB" shall mean the Surface Transportation Board of the United States Department of Transportation or any successor agency.

1.12 "Terms" shall mean those certain Terms for Texas Mexican Railway Company Trackage Rights to which this Exhibit "B" is attached.

1.13 "User" shall have the meaning given to it in the Terms.

Section 2. MAINTENANCE, ADDITIONS, OPERATION, AND CONTROL

2.1 Owner shall have sole charge of the maintenance and repair of the Joint Trackage with its own supervisors, labor, materials and equipment. Owner, from time to time, may make such Changes in and/or Additions to the Joint Trackage as shall be required by any law, rule, regulation or ordinance promulgated by any government body having jurisdiction, or as Owner, in its sole discretion, shall deem necessary, subject to Section 2.2. Such Changes in and/or Additions to the Joint Trackage shall become a part of the Joint Trackage or in the case of retirements shall be excluded from the Joint Trackage.

2.2 Unless otherwise mutually agreed to by the parties in writing, Owner shall, (i) keep and maintain the Joint Trackage on a consistent basis at no less than the track standard designated in the timetable in effect on the date of the Terms, including special instructions for the Joint Trackage as of the date of the Terms, (ii) maintain at least the physical capacity of the Joint Trackage as of the date of the Terms (i.e., number of main tracks, support tracks, signal systems, rail weight, line clearances, etc.), and (iii) be responsible for any Changes in and/or Additions to the Joint Trackage as shall be necessary to accommodate the traffic of Owner and User while maintaining existing service standards (including transit times) in effect on the date of the Terms. In the event that User desires that the Joint Trackage be improved to a condition in excess of the standard set forth in this Section 2.2, or desires that other Changes in and/or Additions to be made to the Joint Trackage, Owner agrees to make such Changes in and/or Additions to the Joint Trackage if funded in advance by User. Thereafter, such Changes in and/or Additions to the Joint Trackage shall become part of the Joint Trackage and shall be maintained by Owner in such improved condition.

2.3 Owner shall employ all persons necessary to construct, operate, maintain, repair and renew the Joint Trackage. Owner shall be bound to use reasonable and customary care, skill and diligence in the construction, operation, maintenance, repair and renewal of the Joint Trackage and in managing of the same. Owner shall make its best effort to ensure that User is given the same advance notice of maintenance plans and schedules as is provided to Owner's personnel.

2.4 The trackage rights granted hereunder shall give User access to and joint use of the Joint Trackage, for such use as is permitted by Section 2 of the Terms, equal to that of Owner. The management, operation (including dispatching) and maintenance of the Joint Trackage shall, at all times, be under the exclusive direction and control of Owner, the movement

of Equipment over and along the Joint Trackage shall at all times be subject to the exclusive direction and control of Owner's authorized representatives and in accordance with such reasonable operating rules as Owner shall from time to time institute, but in the management, operation (including dispatching) and maintenance of the Joint Trackage, Owner and User shall be treated equally. All operating, dispatching and maintenance decisions by Owner affecting the movement of Equipment on the Joint Trackage shall be made pursuant to the Tex Mex-UP/SP Dispatching Protocols attached hereto as Attachment 1. User shall, at User's sole cost and expense, obtain, install and maintain necessary communication equipment to allow User's Equipment to communicate with Owner's dispatching and signaling facilities the same as Owner's trains so utilize. Owner shall consult with User prior to the adoption of new communication or signaling systems to be employed on the Joint Trackage, which have not theretofore been generally adopted in the railroad industry.

2.5 A Joint Service Committee ("Committee"), comprised of the chief transportation officers of Owner and User (or their designees) shall be established, and shall be responsible for establishing rules and standards as appropriate to ensure equitable and non-discriminatory treatment, appropriate maintenance and efficient joint use of the Joint Trackage. The Committee shall meet on a regular basis, but not less often than every three (3) months during the first year of operation under the Agreement, and thereafter when any party serves upon the other party thirty (30) days' written notice of its desire to meet to review the overall performance of equipment on the Joint Trackage, conflicts, if any, experienced between Equipment of Owner and Equipment of User, grievances over the handling of particular Equipment or operational events, maintenance of the Joint Trackage, ways in which future conflicts may be minimized, ways of improving operations and maintenance of the Joint Trackage and such other relevant matters as the Committee may decide to consider. The Committee may issue standards or rules to prevent unnecessary interference or impairment of use of the Joint Trackage by either party or otherwise insure fair and equal treatment as between Owner and User. Either party may request a special meeting of the Committee on reasonable notice to the other. Informal telephonic conferences shall be held by the Committee where appropriate to address immediate concerns of either party. It is expected that the work of the Committee shall be undertaken in a spirit of mutual cooperation consistent with the principles expressed in the Terms.

2.6 If the use of the Joint Trackage shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, neither party shall have or make any claim against the other for loss, damage or expense caused by or resulting solely from such interruption or delay.

2.7 Owner may from time to time provide any track or tracks on the Joint Trackage other than those delineated in Exhibit A to the Terms for use by User provided there shall at all times be afforded User a continuous route of equal utility and quality for the operations of its Equipment between the termini of the Joint Trackage. When such tracks which are not part of the Joint Trackage are used as provided herein, the Terms shall govern for purposes of direction and control and liability as if all movement had been made over the Joint Trackage.

2.8 Each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel and train and other supplies necessary for the operation of its own Equipment over the Joint Trackage. In the event a party does furnish such labor, fuel or train and other supplies to another party, the party receiving the same shall promptly, upon receipt of billing therefor, reimburse the party furnishing the same for its reasonable costs thereof, including customary additives.

2.9 User shall be responsible for the reporting and payment of any mileage, per diem, use or rental charges accruing on Equipment in User's account on the Joint Trackage. Except as may be specifically provided for in the Terms, nothing herein contained is intended to change practices with respect to interchange of traffic between the parties or with other carriers on or along the Joint Trackage.

2.10 Except as otherwise may be provided in the Terms, User shall operate its Equipment over the Joint Trackage with its own employees, but before said employees are assigned or permitted to operate Equipment over the Joint Trackage as herein provided, and from time to time thereafter as and when reasonably requested by Owner, they shall be required to pass the applicable rules examinations required by Owner of its own employees. Owner shall delegate to specified User's officers the conduct of such examinations in the event User chooses to conduct such examinations. If an Owner officer conducts such examinations of employees of User, User shall pay Owner a reasonable fee for each employee so examined, such fee to be mutually agreed upon by the parties from time to time in a separate agreement. Notwithstanding any such examination, User shall be responsible for ensuring that its employees are qualified and have taken all such rules examinations. Upon request of User, Owner shall qualify one or more of User's supervisory officers as pilots and such supervisory officer or officers so qualified shall qualify employees of User engaged in or connected with User's operations on or along the Joint Trackage. At User's request, Owner shall furnish a pilot or pilots, at the expense of User, to assist in operating trains of User over the Joint Trackage.

2.11 If any employee of User shall neglect, refuse or fail to abide by Owner's rules, instructions and restrictions governing the operation on or along the Joint Trackage, such employee shall, upon written request of Owner, be suspended by User from working on the Joint Trackage unless and until requalified to return to work and approved to do so by Owner. If either party shall deem it necessary to hold a formal investigation to establish such neglect, refusal or failure on the part of any employee of User, then upon such notice presented in writing, Owner and User shall promptly hold a joint investigation in which the parties concerned shall participate and bear the expense for their respective officers, counsel, witnesses and employees. Notice of such investigations to User's employees shall be given by User's officers, and such investigation shall be conducted in accordance with the terms and conditions of schedule agreements between User and its employees. If, in the judgment of Owner, the result of such investigation warrants, such employee shall, upon written request by Owner, be withdrawn by User from service on the Joint Trackage, and User shall release and indemnify Owner from and against any and all claims and expenses arising from such withdrawal.

If the disciplinary action is appealed by an employee of User to the National Railroad Adjustment Board or other tribunal lawfully created to adjudicate such cases; and if the decision of such board or tribunal sustains the employee's position, such employee shall not thereafter be barred from service on the Joint Trackage by reason of such disciplinary action.

2.12 If any Equipment of User is bad ordered enroute on the Joint Trackage and (i) it is necessary that it be set out, and (ii) only light repairs to the Equipment are required, such bad ordered Equipment shall be promptly repaired, and, thereafter, be promptly removed from the Joint Trackage by User. Owner may, upon request of User and at User's sole cost and expense, furnish the required labor and material and perform light repairs to make such bad ordered Equipment safe for movement. The employees and Equipment of Owner while in any manner so engaged or while enroute to or returning to Owner's terminal from such an assignment shall be considered Sole Employees (as hereinafter defined) of User and Sole Property (as hereinafter defined) of User. However, should Owner's employees after repairing such bad ordered Equipment for User move directly to perform service for Owner's benefit rather than return to Owner's terminal, then User's exclusive time and liability will end when Owner's employees depart for work to be performed for Owner's benefit. In the case of such repairs by Owner to freight cars in User's account, billing therefor shall be in accordance with the Field and Office Manuals of the Interchange Rules, adopted by the Association of American Railroads ("AAR"), hereinafter called "Interchange Rules", in effect on the date of performance of the repairs. Owner shall then prepare and submit billing directly to and collect from the car owner for car owner responsibility items as determined under said Interchange Rules, and Owner shall prepare and submit billing directly to and collect from User for handling line responsibility items as determined under said Interchange Rules. Owner also shall submit billing to and collect from User any charges for repair to freight cars that are User's car owner responsibility items as determined under said Interchange Rules, should said car owner refuse or otherwise fail to make payment therefor. Repairs to locomotives shall be billed as provided for in Section 3 of these General Conditions.

2.13 If Equipment of User shall become derailed, wrecked, or otherwise disabled while upon the Joint Trackage, it shall be rerailed or cleared by Owner, except that employees of User may rerail User's derailed Equipment on the Joint Trackage whenever use of motorized on or off track equipment is not required; however, in any such case, employees of User shall consult with and be governed by the directions of Owner. Owner reserves the right to rerail Equipment of User when, in the judgment of Owner, Owner deems it advisable to do so to minimize delays and interruptions to train movement. The reasonable costs and expenses of rerailing or clearing derailed, wrecked or disabled Equipment shall be borne by the parties in accordance with Section 5 of these General Conditions. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.

2.14 In the event Equipment of User shall be forced to stop on the Joint Trackage, and such stoppage is due to insufficient hours of service remaining among User's employees, or due to mechanical failure of User's Equipment (other than bad ordered Equipment subject to light repairs pursuant to Section 2.12), or to any other cause not resulting from an accident or

derailment (including the failure of User to promptly repair and clear bad ordered Equipment pursuant to Section 2.12), and such Equipment is unable to proceed, or if a train of User fails to maintain the speed required by Owner on the Joint Trackage, or if, in emergencies, disabled Equipment is set out of User's trains on the Joint Trackage, Owner shall have the option to furnish motive power or such other assistance (including but not limited to the right to recrew User's train) as may be necessary to haul, help or push such Equipment, or to properly move the disabled Equipment off the Joint Trackage. The reasonable costs and expenses of rendering such assistance shall be borne by User. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.

2.15 User shall pay to Owner reasonable expenses incurred by Owner in the issuance of timetables made necessary solely by changes in the running time of the trains of User over the Joint Trackage. If changes in running time of trains of Owner or third parties, as well as those of User, require the issuance of timetables, then User shall pay to Owner that proportion of the expenses incurred that one bears to the total number of parties changing the running time of their trains. If changes in running time of trains of Owner or third parties, but not those of User, require the issuance of timetables, then User shall not be required to pay a proportion of the expenses incurred in connection therewith.

2.16 User, at Owner's request, shall be responsible for reporting to Owner the statistical data called for in the Terms, which may include, but is not limited to, the number and type of Equipment and GTMs operated on the Joint Trackage.

Section 3. BILLING

3.1 Billing shall be accomplished on the basis of data contained in a billing form mutually agreed to between the parties. Such billing forms shall contain sufficient detail to permit computation of payments to be made hereunder. Billing shall be prepared according to the rules, additives, and equipment rental rates as published by the Owner. User shall pay to Owner at the Office of the Treasurer of Owner, or at such other location as Owner may from time to time designate in writing, all the compensation and charges of every name and nature which in and by the Terms User is required to pay in lawful money of the United States within sixty (60) days after the rendition of bills therefor. Bills shall contain a statement of the amount due on account of the expenses incurred, properties and facilities provided and services rendered during the billing period.

3.2 Errors or disputed items in any bill shall not be deemed a valid excuse for delaying payment, but shall be paid subject to subsequent adjustment; provided, no exception to any bill shall be honored, recognized or considered if filed after the expiration of three (3) years from the last day of the calendar month during which the bill is rendered and no bill shall be rendered later than three (3) years (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) in the case of claims disputed as to amount or liability, after the amount is settled and/or the liability is established. This provision shall not limit the retroactive

adjustment of billing made pursuant to exception taken to original accounting by or under authority of the STB or retroactive adjustment of wage rates and settlement of wage claims.

3.3 So much of the books, accounts and records of each party hereto as are related to the subject matter of the Terms shall at all reasonable times be open to inspection by the authorized representatives and agents of the parties hereto. All books, accounts, and records shall be maintained to furnish readily full information for each item in accordance with any applicable laws or regulations.

3.4 Should any payment become payable by Owner to User under the Terms, the provisions of Sections 3.1 and 3.2 of these General Conditions shall apply with User as the billing party and Owner as the paying party.

3.5 Either party hereto may assign any receivables due it under the Terms; provided, however, that such assignments shall not relieve the assignor of any rights or obligations under the Terms.

Section 4. COMPLIANCE WITH LAWS

4.1 With respect to operation of Equipment on the Joint Trackage, each party shall comply with all applicable federal, state and local laws, rules, regulations, orders, decisions and ordinances ("Standards"), and if any failure on the part of any party to so comply shall result in a fine, penalty, cost or charge being imposed or assessed on or against another party, such other party shall give prompt notice to the failing party and the failing party shall promptly reimburse and indemnify the other party for such fine, penalty, cost or charge and all expenses and reasonable attorneys' fees incurred in connection therewith, and shall upon request of the other party defend such action free of cost, charge and expense to the other party.

4.2 User agrees to comply fully with all applicable Standards concerning "hazardous waste" and "hazardous substances" ("Hazardous Materials"). Except with Owner's prior consent, User covenants that it shall not treat or dispose of Hazardous Materials on the Joint Trackage. User further agrees to furnish Owner (if requested) with proof, satisfactory to Owner, that User is in such compliance.

In the event any accident, bad ordered Equipment, derailment, vandalism or wreck (for purposes of this Section 4.2 and Section 4.3 hereinafter called collectively "Derailment") involving Equipment of or a train operated by User carrying Hazardous Materials shall occur on any segment of the Joint Trackage, any report required by federal, state or local authorities shall be the responsibility of User. User shall also advise the owner/shipper of the Hazardous Materials involved in the Derailment, and Owner, immediately.

In the event of a Derailment, Owner shall assume responsibility for cleaning up any release of Hazardous Materials from User's Equipment in accordance with all federal, state, or local regulatory requirements. User may have representatives at the scene of the Derailment to

observe and provide information and recommendations concerning the characteristics of Hazardous Materials release and the cleanup effort. Such costs shall be borne in accordance with Section 5 of these General Conditions.

If a Hazardous Materials release caused by a derailment involving Equipment of User, or on a train operated by User, results in contamination of real property or water on the Joint Trackage or on real property or water adjacent to the Joint Trackage (whether such real property or water is owned by Owner or a third party), Owner shall assume responsibility for emergency cleanup conducted to prevent further damage. User shall be responsible for performing cleanup efforts thereafter. Any costs associated with cleaning up real property or water on or adjacent to the Joint Trackage contaminated by Hazardous Materials shall be borne in accordance with Section 5 of these General Conditions.

If Hazardous Materials must be transferred to undamaged Equipment or trucks as a result of a release caused by a derailment involving Equipment of User, or on a train operated by User, User shall perform the transfer; PROVIDED, HOWEVER, that if the Hazardous Materials are in damaged Equipment that is blocking the Joint Trackage, Owner, at its option, may transfer the Hazardous Materials with any costs associated with such transfer borne in accordance with Section 5 of these General Conditions. Transfers of Hazardous Materials by User shall only be conducted after being authorized by Owner.

4.3 The total cost of clearing a Derailment, cleaning up any Hazardous Materials released during such Derailment, and/or repairing the Joint Trackage or any other property damaged thereby shall be borne by the party or parties liable therefor in accordance with Section 5 of these General Conditions.

4.4 In the event of release of Hazardous Materials caused by faulty Equipment or third parties, cleanup will be conducted as stated in Sections 4.2 and 4.3 of these General Conditions.

Section 5. LIABILITY

5.1 General. The provisions of this Section 5 shall apply only as between the parties hereto and are solely for their benefit. Nothing herein is intended to be for the benefit of any person or entity other than the parties hereto. It is the explicit intention of the parties hereto that no person or entity other than the parties hereto is or shall be entitled to bring any action to enforce any provision hereof against any of the partes hereto, and the assumptions, indemnities, covenants, undertakings and agreements set forth herein shall be solely for the benefit of, and shall be enforceable only by, the parties hereto. Notwithstanding anything contained in this Section 5, no provisions hereof shall be deemed to deprive Owner or User of the right to enforce or shall otherwise restrict any remedies to which they would otherwise be entitled under other provisions of the Terms as a result of the other party's failure to perform or observe any other obligation or duty created by the Terms. The provisions of this Section 5 shall apply as between the parties hereto irrespective of the terms of any other agreements between the parties hereto and

other railroads using the Joint Trackage, and the allocation of liabilities provided for herein shall control as between the parties hereto.

5.2 Definitions and Covenants. The parties agree that for the purposes of this Section 5:

(a) The term "Employee(s)" of a party shall mean all officers, agents, employees and contractors of that party. Such Employees shall be treated either as "Sole Employees" or "Joint Employees", as hereinafter specified:

(b) "Sole Employees" and "Sole Property" shall mean one or more Employees, Equipment, tools and other equipment and machinery while engaged in, en route to or from, or otherwise on duty incident to performing service for the exclusive benefit of one party. Pilots furnished by Owner to assist in operating Equipment of User shall be considered the Sole Employees of User while engaged in such operations. Equipment shall be deemed to be the Sole Property of the party receiving the same at such time as deemed interchanged under AAR rules or applicable interchange agreements, or when such party is responsible for the car hire or per diem for the Equipment under agreement between the parties;

(c) "Joint Employee" shall mean one or more Employees while engaged in maintaining, repairing, constructing, renewing, removing, inspecting or managing the Joint Trackage or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while preparing to engage in, en route to or from, or otherwise on duty incident to performing such service for the benefit of both parties;

(d) "Joint Property" shall mean the Joint Trackage and all appurtenances thereto, and all Equipment, tools and other equipment and machinery while engaged in maintaining, repairing, constructing, renewing, removing, inspecting, managing or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while being prepared to engage in, en route to or from, or otherwise incident to performing such service;

(e) "Loss and/or Damage" shall mean injury to or death of any person, including Employees of the parties hereto, and loss or damage to any property, including property of the parties hereto and property being transported by the parties, which arises out of an incident occurring on, the Joint Trackage and shall include liability for any and all claims, suits, demands, judgments and damages resulting from or arising out of such injury, death, loss or damage, except liability for punitive and exemplary damages. Loss and/or Damage shall include all costs and expenses incidental to any claims, suits, demands and judgments, including attorneys' fees, court costs and other costs of investigation and litigation. Loss and/or Damage shall further include the expense of clearing wrecked or derailed Equipment and the costs of environmental protection, mitigation or clean up necessitated by such wreck or derailment and shall include any liabilities for any third-party claims for personal injury or death, property damage, natural

resource damage, or any penalties, judgments or fines associated with a release of any contaminants resulting from such wreck or derailment;

(f) Operating Employees of Owner whose service may be jointly used by the parties hereto for the movement of trains over the Joint Trackage, including, but not limited to, train dispatchers, train order operators, operator clerks and watchmen shall at the time of performing their services be deemed to be Sole Employees of the party hereto for whose benefit said services may be separately rendered (during the time they are so separately rendered) and be deemed to be Joint Employees of the parties hereto at such time as their services may be rendered for the parties' joint benefit;

(g) All Employees, Equipment, tools and other equipment and machinery other than as described in (b), (c), (d) or (f) above or in Section 5.4, shall be deemed the Sole Employees of the employing party and the Sole Property of the using party;

(h) Any railroad not a party to the Terms heretofore or hereafter admitted to the use of any portion of the Joint Trackage, shall, as between the parties hereto, be regarded in the same light as a third party. Without limiting the generality of the foregoing, neither of the parties hereto assumes any responsibility to the other under the provisions of the Terms for any Loss and/or Damage occasioned by the acts or omissions of any employees of any such other railroad, or for any Loss and/or Damage which such other railroad shall be obligated to assume in whole or in part pursuant to law or any agreement relating to such other railroad's use of any portion of the Joint Trackage;

(i) For the purpose of this Section 5, Equipment of foreign lines being detoured over the Joint Trackage, and all persons other than Joint Employees engaged in moving such Equipment, shall be considered the Equipment and Employees of the party hereto under whose detour agreement or other auspices such movement is being made.

5.3 Reimbursement and Defense. The parties agree that:

(a) Each party hereto shall pay promptly Loss and/or Damage for which such party shall be liable under the provisions of this Section 5, and shall indemnify the other party against such Loss and/or Damage, including reasonable attorneys' fees and costs. If any suit or suits shall be brought against either of the parties hereto and any judgment or judgment shall be recovered which said party is compelled to pay, and the other party shall under the provisions of the Terms be solely liable therefor, then the party which is so liable shall promptly repay on demand to the other party paying the same any monies which it may have been required to pay, whether in the way of Loss and/or Damage, costs, fees or other expenses; and if the Loss and/or Damage in such case or cases is joint or allocated between the parties to the Terms, the party defendant paying the same or any costs, fees or other expenses shall be reimbursed by the other party as allocated pursuant to the Terms;

(b) Each party covenants and agrees with the other party that it will pay for all Loss and/or Damage, both as to persons and property, and related costs which it has herein assumed, or agreed to pay, the judgment of any court in a suit by third party or parties to the contrary notwithstanding, and will forever indemnify and save harmless the other party, its successors and assigns, from and against all liability and claims therefor, or by reason thereof, and will pay, satisfy and discharge all judgments that may be rendered by reason thereof, and all costs, charges and expenses incident thereto;

(c) Each party hereto shall have the sole right to settle, or cause to be settled for it, all claims for Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 5, and the sole right to defend or cause to be defended all suits for the recovery of any such Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 5;

(d) User shall provide written notice to Owner of any accidents or events resulting in Loss and/or Damage within seven (7) days of its discovery or receipt of notification of such occurrence;

(e) In the event both parties hereto may be liable for any Loss and/or Damage under the provisions of this Section 5 ("Co-Liable"), and the same shall be settled by a voluntary payment of money or other valuable consideration by one of the parties Co-Liable therefor, release from liability shall be taken to and in the name of all the parties so liable; however, no such settlement in excess of the sum of One Hundred Thousand Dollars ($100,000) shall be made by or for any party Co-Liable therefor without the written consent of the other parties so liable, but any settlement made by any party in consideration of One Hundred Thousand Dollars ($100,000) or a lesser sum shall be binding upon the other parties and allocated in accordance with Section 5.5; and no party shall unreasonably withhold its consent to a settlement proposed by the other party; provided, however, that failure by a party to secure consent from the other shall not release such other party to the extent the party who failed to obtain such consent demonstrates that the other party was not prejudiced by such failure.

(f) In case a claim or suit shall be commenced against any party hereto for or on account of Loss and/or Damage for which another party hereto is or may be solely liable or Co-Liable under the provisions of this Section 5, the party against whom such claim or suit is commenced shall give to such other party prompt notice in writing of the pendency of such claim or suit, and thereupon such other party shall assume or join in the defense of such claim or suit as follows: If the claim or suit involves Loss and/or Damage to the Sole Employees or Sole Property of a party or its invitee or property in its care, custody or control, that party shall assume and control the investigation and defense of such claim or suit;

if the claim or suit involves Loss and/or Damage to third parties. Joint Employees or the Joint Trackage. the party whose Sole Employees or Equipment were involved in the incident shall investigate and defend such claim or suit: and if such claim or suit involves Loss and/or Damage to third parties. Joint Employees or the Joint Trackage and neither or both party's Equipment and Sole Employees were involved in the incident. Owner shall investigate and defend such claim or suit: provided that the other party also may participate in the defense of any of the foregoing if it may have liability as a result of such incident:

(g) No party hereto shall be conclusively bound by any judgments against the other party. unless the former party shall have had reasonable notice requiring or permitting it to investigate and defend and reasonable opportunity to make such defense. When such notice and opportunity shall have been given. the party so notified and the other party shall be conclusively bound by the judgment as to all matters which could have been litigated in such suit. including without limitation a determination of the relative or comparative fault of each.

5.4 Wrecks and Derailment. The cost and expense of repairing bad ordered Equipment. clearing wrecks or otherwise disabled Equipment or rerailing Equipment (and the costs of repair or renewal of damaged Joint Trackage or adjacent properties) shall be borne by the party whose Equipment was wrecked. disabled. or derailed or caused such damage. All Employees or Equipment. while engaged in. en route to or from. or otherwise incident to operating wrecker or work trains clearing wrecks. disabled Equipment or Derailments or engaged in repair or renewal of the Joint Trackage subsequent to any such wreck. disability or Derailment. shall be deemed to be Sole Employees and/or Sole Property of the party whose Equipment was wrecked. disabled or derailed. However. such Employees or Equipment. while en route from performing such clearing of wrecks. disabled Equipment or Derailments or repairing or renewing the Joint Trackage to perform another type of service. shall not be deemed to be performing service incident to the instant wreck. disability or Derailment.

5.5 Allocation.

(a) Each party shall bear all costs of Loss and/or Damage to its Sole Employees or its Sole Property. or property in its care. custody or control or its invitees without regard to which party was at fault.

(b) Loss and/or Damage to third parties (i.e.. any person or entity other than a party hereto. a Sole Employee of either party. a Joint Employee or an invitee of either party) or their property. to Joint Employees or their property or to Joint Property shall be borne by the parties hereto as follows:

(i) If the Loss and/or Damage is attributable to the acts or omissions of only one party hereto. that party shall bear and pay all of such Loss and/or Damage.

(ii) If such Loss and/or Damage is attributable to the acts or omissions of more than one party hereto, such Loss and/or Damage shall be borne and paid by those parties in accordance with a comparative negligence standard, whereby each such party shall bear and pay a portion of the Loss and/or Damage equal to the degree of causative fault or percentage of responsibility for the Loss and/or Damage attributable to that party without regard to laws limiting recovery if one party is more than fifty percent (50%) at fault.

(iii) Loss and/or Damage to third parties or Joint Employees occurring in such a way that it cannot be determined how such Loss and/or Damage came about shall be apportioned between Owner, User and any other party(ies) authorized to use the Joint Trackage as a trackage rights tenant, on a usage basis considering each party's gross ton miles over the Joint Trackage for the preceding twelve (12) months or, if such Loss and/or Damage occurs during the first twelve (12) months following the effective date of the Terms, the usage of each party between the occurrence of such Loss and/or Damage and the effective date of the Terms, provided that, without limitation, User shall not bear or incur any liability for claims, suits, demands, judgments, losses or damages resulting from environmental contamination of or hazardous material on or released from the Joint Trackage, except contamination or a release of hazardous materials from User's own Equipment or caused by or arising from the actions or omissions of User or User's Employees, and then only in accordance with the other provisions hereof.

(c) The parties agree that the characterization herein of certain Employees as "Sole Employees" or "Joint Employees" is only for the purpose of allocating Loss and/or Damage suffered by those Employees. Except as specified in subsection (a) of this Section 5.5. (which provides for the allocation of certain Loss and/or Damage between the parties without regard to fault), no party shall be liable for the acts or omissions (negligent or otherwise) of any other party's Employee.

5.6 OWNER AND USER EXPRESSLY INTEND THAT WHERE ONE PARTY IS TO INDEMNIFY THE OTHER PURSUANT TO THE TERMS, SUCH INDEMNITY SHALL INCLUDE (1) INDEMNITY FOR THE NEGLIGENCE OR ALLEGED NEGLIGENCE, WHETHER ACTIVE OR PASSIVE, OF THE INDEMNIFIED PARTY WHERE THAT NEGLIGENCE IS A CAUSE OF THE LOSS OR DAMAGE; (2) INDEMNITY FOR STRICT LIABILITY OF THE INDEMNIFIED PARTY RESULTING FROM A VIOLATION OR ALLEGED VIOLATION OF ANY FEDERAL, STATE OR LOCAL LAW OR REGULATION BY THE INDEMNIFIED PARTY, INCLUDING BUT NOT LIMITED TO THE FEDERAL EMPLOYERS LIABILITY ACT ("FELA"), THE SAFETY APPLIANCE ACT, THE BOILER

INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT ("OSHA"), THE RESOURCE CONSERVATION AND RECOVERY ACT ("RCRA"), THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT ("CERCLA"), THE CLEAN WATER ACT ("CWA"), THE OIL POLLUTION ACT ("OPA"), AND ANY SIMILAR STATE STATUTE IMPOSING OR IMPLEMENTING SIMILAR STANDARDS; AND (3) INDEMNITY FOR ACTS OR ALLEGED ACTS OF GROSS NEGLIGENCE OF THE INDEMNIFIED PARTY, OR OTHER CONDUCT ON THE PART OF THE INDEMNIFIED PARTY FOR WHICH PUNITIVE DAMAGES MIGHT BE SOUGHT.

Section 6. ARBITRATION

6.1 If at any time a question or controversy shall arise between the parties hereto in connection with the Terms upon which the parties cannot agree, such question or controversy shall be submitted to and settled by arbitration. Unless other procedures are agreed to by the parties, arbitration between the parties pursuant to this Section 6 shall be governed by the rules and procedures set forth in this Section 6.

6.2 If the parties to the dispute are able to agree upon a single competent and disinterested arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any party (the notifying party) may notify the other party (the noticed party) in writing of its request for arbitration and nominating one arbitrator. Within twenty (20) days after receipt of said notice, the noticed party shall appoint an arbitrator and notify the notifying party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of such notice to name its arbitrator, said arbitrator may be appointed by the Chief Judge (or acting Chief Judge) of the United States District Court for the District of Columbia upon application by either party after ten (10) days' written notice to the other party. The two arbitrators so chosen shall select one additional arbitrator to complete the board. If the arbitrators so chosen fail to agree upon an additional arbitrator, the same shall, upon application of a party, be appointed by said judge in the manner heretofore stated.

6.3 Upon selection of the arbitrator(s), said arbitrator(s) shall, with reasonable diligence, determine the questions as disclosed in said notice of arbitration, shall give both parties reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, may take such evidence as the arbitrator(s) shall deem reasonable or as either party may submit with witnesses required to be sworn, and hear arguments of counsel or others. If an arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) by whom the arbitrator was chosen or said judge shall appoint another to act in the arbitrator's place.

6.4 After considering all evidence, testimony and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state such decision or award and the reasoning for such decision or award in writing which shall be final, binding, and conclusive on all parties to the arbitration when delivered to them. The award rendered by the arbitrator(s) may

be entered as a judgment in any court having jurisdiction thereof and enforced as between the parties without further evidentiary proceeding, the same as entered by the court at the conclusion of a judicial proceeding in which no appeal was taken. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for arbitration, performance under the Terms shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it.

6.5 Each party to the arbitration shall pay all compensation, costs, and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits, and counsel. The compensation, cost, and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by all partes to the arbitration.

6.6 The parties may obtain discovery and offer evidence in accordance with the Federal Rules of Civil Procedure Rules 26 - 37, and Federal Rules of Evidence, as each may be amended from time to time.

6.7 Interest computed annually, at a rate equal to the Prime Rate plus two (2) percentage points, shall be applied to any and all arbitrator's awards requiring the payment of money and shall be calculated from thirty (30) days following the date of the applicable arbitration decision. The term "Prime Rate" shall mean the minimum commercial lending rate charged by banks to their most credit-worthy customers for short-term loans, as published daily in the Wall Street Journal.

Section 7. GOVERNMENTAL APPROVAL AND ABANDONMENT

7.1 Owner and User shall, at their respective cost and expense, initiate by appropriate application or petition and thereafter diligently prosecute proceedings for the procurement of all necessary consent, approval or authority from any governmental agency for the sanction of the Terms and the operations to be carried on or conducted by User thereunder. User and Owner agree to cooperate fully to procure all such necessary consent, approval or authority.

7.2 In the event Owner shall be involuntarily dispossessed, including by threat of condemnation by competent public authority, of the right to operate upon and maintain any portion of its Joint Trackage and Owner fails or declines to replace said Joint Trackage, Owner shall have no obligation hereunder to provide tracks in replacement of such Joint Trackage for User's use, and User shall have and shall make no claim of any kind, legal or otherwise, against Owner for failure to provide such Joint Trackage for User's use.

7.3 To the extent that Owner may lawfully do so, Owner reserves to itself the exclusive right, exercisable at any time during the life of the Terms without concurrence of User, to elect to abandon all or any part of the Joint Trackage by giving six (6) months' prior written notice to User of its intention so to do ("Notice of Abandonment").

Owner shall, concurrent with its Notice of Abandonment, if legally able to do so, give to User the option to purchase the part or parts of the Joint Trackage thereof to be abandoned at the Net Liquidation Value thereof, on the date of said notice: provided, however, it is understood that Burlington Northern Railroad Company and The Atchison, Topeka & Santa Fe Railway Company (collectively, "BNSF") shall be given an option upon the Terms set forth in this Section 7.3, prior to that given User, to purchase the Placedo, Texas to Robstown, Texas segment of the Joint Trackage, subject to User's trackage rights, if BNSF is operating over that segment at the time of its proposed abandonment. "Net Liquidation Value" shall mean fair market value of land and salvage value of track components and other facilities less estimated cost of removal. User shall have three (3) months from the date of receipt of Owner's notice to exercise its option and shall evidence the exercise of its option by giving Owner written notice thereof. Thereafter User shall immediately make appropriate application to secure all necessary governmental authority for such transaction. Within thirty (30) days following the effective date of all requisite governmental approval of the transaction, User shall pay to Owner the amount of money required to purchase said Joint Trackage to be abandoned at the aforesaid Net Liquidation Value. Upon the receipt of payment of such sum, the Terms shall terminate as to the part of the Joint Trackage so purchased by User. Contemporaneously with such payment, by instrument or instruments, Owner shall convey and assign by good and sufficient quit claim deed or deeds, bills of sale or other instruments, all of Owner's right, title, interest and equity, in and to the Joint Trackage so purchased. Owner agrees that it shall promptly take all necessary action to obtain from the trustees of its mortgages all releases or satisfactions covering the same and shall deliver to User such instruments.

If User fails to exercise the option herein granted within the time and in the manner above specified, Owner may forthwith proceed free of all obligation to User to abandon the portion of Joint Trackage or make appropriate application, if necessary, to secure all necessary governmental authority for such abandonment. User agrees that at such time it shall concurrently make application for all necessary governmental authority for abandonment of its right to operate over such Joint Trackage. The Terms shall terminate as to the section of Joint Trackage so abandoned upon the effective date of such approval by governmental authority.

7.4 Owner and User each shall be responsible for and shall bear labor claims, and employee protection payable to, its own respective employees (and employees of its respective affiliated companies) including any amounts that either Owner or User may be required to pay to its own respective employees pursuant to labor protective conditions imposed by the STB.

Section 8. CATASTROPHIC EXPENSE

Catastrophic expense to the Joint Trackage, such as, but not limited to, that arising from flood, earthquake or acts of God, etc., in excess of One Hundred Thousand Dollars ($100,000) for each occurrence shall be billed in addition to the GTM Rates and apportioned on the basis of the parties' GTMs operated over the Joint Trackage for the twelve (12) month period ending immediately prior to the first day of the month of occurrence.

Section 9. TERM

9.1 User shall have the right to terminate the Terms upon twelve (12) months' prior written notice to Owner. Liabilities created under the Terms, if it becomes effective and is later terminated, shall survive such termination.

9.2 Upon termination of the Terms, or any partial termination, as the applicable case may be, however the same may occur, User shall be released from any and all manner of obligations and shall be deemed to have forever relinquished, abandoned, surrendered and renounced any and all right possessed by User to operate over that part of the Joint Trackage to which such termination applied, and as to such part, User shall forever release and discharge Owner of and from any and all manner of obligations, claims, demands, causes of action, or suits which User might have, or which might subsequently accrue to User growing out of or in any manner connected with, directly or indirectly, the contractual obligations of Owner under the Terms, in all events provided, however, the aforesaid relinquishment, abandonment, surrender, renunciation, release and discharge by User shall not in any case affect any of the rights and obligations of either Owner or User which may have accrued, or liabilities accrued or otherwise, which may have arisen prior to such termination or partial termination. Upon any termination, Owner shall remove from Owner's right of way any connecting track, and any exclusive facility of User, at User's expense with salvage to be delivered to and retained by User. Upon any partial termination of the Terms, however the same may occur, the terms and conditions hereof shall continue and remain in full force and effect for the balance of the Joint Trackage.

Section 10. ASSIGNMENT

The Terms and any rights granted hereunder may not be assigned in whole or in part by User without the prior written consent of Owner except (i) as provided in Section 3.5, and (ii) to the purchaser of substantially all of User's rail properties. The Terms may be assigned by Owner without restriction. In the event of an authorized assignment, the Terms and the operating rights hereunder shall be binding upon the successors and assigns of the parties.

Section 11. DEFAULT

11.1 Notwithstanding the provisions of Section 3 of these General Conditions, either party hereto claiming default of any of the provisions of the Terms (including these General Conditions) shall furnish notice and written demand to the other party for performance or compliance with the covenant or condition of the Terms claimed to be in default, which notice shall specify wherein and in what respect such default is claimed to exist and shall specify the particular Section or Sections of the Terms under which such claim of default is made.

11.2 If the default shall continue for an additional period of thirty (30) days after receipt of such written notice and demand, and such default has not been remedied within said thirty (30) day period, or reasonable steps have not been nor continue to be taken to remedy a failure or default which cannot reasonably be remedied within said thirty (30) day period, and such default

relates to the provisions and terms of the Terms, either party shall resort to binding arbitration provided that the arbitrator shall not have the authority to amend, modify or terminate the Terms.

11.3 Failure of a party to claim a default shall not constitute a waiver of such default. Either party hereto entitled to claim default may waive any such default, but no action by such party in waiving such default shall extend to or be taken to affect any subsequent defaults or impair the rights of either party hereto resulting therefrom.

Section 12. OTHER CONSIDERATIONS

12.1 The Terms and each and every provision hereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right in any third person to recover by way of damages or otherwise against any of the parties hereto.

12.2 If any covenant or provision of the Terms not material to the right of User to use the Joint Trackage shall be adjudged void, such adjudication shall not affect the validity, obligation or performance of any other covenant or provision which is in itself valid. No controversy concerning any covenant or provision shall delay the performance of any other covenant or provision. Should any covenant or provision of the Terms be adjudged void, the parties shall make such other arrangements as will effect the purposes and intent of the Terms.

12.3 In the event there shall be any conflict between the provisions of these General Conditions and the Terms, the provisions of the Terms shall prevail, except that the definition of Joint Trackage set forth in Section 1.7 of these General Conditions shall prevail.

12.4 All section headings are inserted for convenience only and shall not affect any construction or interpretation of the Terms.

12.5 Reference to any agency or other organization shall include any successor agency or organization, and reference to any index or methodology (e.g., RCAF-U, URCS, etc.), if such index or methodology ceases to exist or is no longer available, shall include any substantially similar index or methodology selected by the parties or, if the parties fail to agree on such, one determined by binding arbitration under Section 6 of these General Conditions.

END OF EXHIBIT "B"

TEX MEX - MP/SP DISPATCHING PROTOCOLS

1. Scope: These protocols apply on all segments of the Joint Trackage.

2. Purpose: To ensure that Tex Mex and MP/SP trains operating on Joint Trackage are given equal dispatch without any discrimination in promptness, quality of service or efficiently and that the competitiveness of Tex Mex operations on the Joint Trackage is not adversely affected by the fact that MP/SP owns the track.

3. General Instructions: MP/SP will issue written instructions to all personnel (including supervisors) responsible for train dispatching on the Joint Trackage that Tex Mex trains are to be dispatched exactly as if they were trains of the same class of MP/SP and given equal treatment with trains of MP/SP. These instructions will be issued at agreed intervals or at the request of Tex Mex.

4. Monitoring Systems: MP/SP will provide Tex Mex with timely and accurate information about the status of Tex Mex trains operating over the Joint Trackage.

5. Train Information: Tex Mex will provide the MP/SP, and regularly update, information about its expected train operations and schedules (including priorities, time commitments, horsepower per trailing ton, etc.) over the Joint Trackage, preferably using electronic data interchange. Tex Mex and MP/SP will establish run time standards by train category based on expected train volumes for Tex Mex. If train volumes are different than expected then adjustments to run time standards will be made by mutual agreement. Tex Mex will provide reliable and current information about trains approaching the Joint Trackage, including train arrival time and train characteristics, preferably by providing at its expense computer terminals, facilities or capabilities showing trains approaching the Joint Trackage, sufficiently in advance to allow dispatchers to plan for them. MP/SP will provide to Tex Mex advance notice of planned maintenance-of-way projects, line closures and train or equipment restrictions. Tex Mex and MP/SP will consult in advance about maintenance-of-way windows resulting from planned maintenance projects so as to minimize disruptions to the operations of both carriers.

6. Specific Instructions: MP/SP will permit Tex Mex to transmit instructions regarding the requirements of specific trains and shipments to designated dispatching center employees responsible for handling those trains.

7. Train Priorities/Run Time Standards: MP/SP will provide to Tex Mex current procedures for assigning dispatching priorities or rankings to trains and information sufficient to show how those procedures are applied to their own trains. Tex Mex will assign priorities or rankings to its trains operating on the Joint Trackage using MP/SP's procedures, and MP/SP will dispatch Tex Mex trains in accordance with those priorities or rankings. It is understood that

technological advances in computer aided dispatching might result in changes to priority assignment methodologies. The parties agree to discuss technological changes which might affect priority assignment methodologies prior to implementation. The Joint Service Committee will be responsible for reviewing these assignments to ensure that they are applied equitably by both railroads.

8. Entry to Joint Trackage: At points where Tex Mex trains enter the Joint Trackage, entry will be provided by MP/SP on a first-come first-served basis, taking into consideration the relative priorities of affected trains and the specific needs and operating characteristics of individual trains of both railroads. If operating circumstances make strict application of this principle difficult or uncertain, Tex Mex and MP/SP may jointly establish standards for determining sequence of entry to Joint Trackage. The parties will communicate daily on any conflicts concerning entry to the Joint Trackage to gain resolution.

9. Communication: MP/SP will provide to Tex Mex, and keep current, lists of dispatching personnel responsible for dispatching the Joint Trackage and contact numbers. Tex Mex and MP/SP will designate more supervisory employees to serve as the day-to-day contacts for communications about operating changes, service requests and concerns. Where feasible and economical, dedicated phone lines or computer links will be established for these communications.

10. Access to Dispatching Center: Appropriate officials of Tex Mex will be admitted at any time to dispatching facilities and personnel responsible for dispatching the Joint Trackage to review the handling of trains on the Joint Trackage (although both railroads will take reasonable steps to prevent disclosure of proprietary information not relevant to the review). It is understood that management and supervision of dispatching operations is the responsibility of MP/SP.

11. Performance Measurement: Tex Mex and MP/SP will cooperate to develop train performance evaluation methods under which train performance of Tex Mex trains on the Joint Trackage can be compared to train performance of MP/SP's trains on the Joint Trackage for the same train category and priority.

12. Personnel Incentives and Evaluation: In evaluating the performance of employees and supervisors responsible for dispatching the Joint Trackage, MP/SP will consider train performance of Tex Mex trains and effectiveness in cooperating with Tex Mex personnel and meeting Tex Mex service requirements in the same manner as such factors are considered with respect to MP/SP's trains, personnel and requirements. If bonuses, raises or salaries of those persons are affected by performance of MP/SP's trains, performance of Tex Mex's trains shall be considered on the same basis to the extent feasible.

13. Disagreements: The designated contact supervisors are expected to raise questions, disagreements, concerns or disputes about compliance with these protocols promptly as and when any such matters arise and to use their best efforts to resolve them. If a matter is not resolved to the satisfaction of both parties, it will be presented to the Joint Service Committee. If a satisfactory resolution cannot be achieved by the Joint Service Committee the matter will be submitted to binding summary arbitration before a neutral experienced railroad operating official within fourteen days. The parties will agree in advance on the sanctions available to the arbitrator to address failures to comply with these protocols.

14. Modifications: As the ultimate objective of these protocols is the equal, flexible and efficient handling of all trains of Tex Mex and MP/SP on the Joint Trackage, these protocols may be modified at any time by mutual agreement, consistent with that objective.

STB FD-32760(SUB26) 5-22-98 D ID-187692

CHARLES L. LITTLE
International President

BYRON A. BOYD, JR.
Assistant President

ROGER D. GRIFFETH
General Secretary and Treasurer

187692

united transportation union

14600 DETROIT AVENUE
CLEVELAND, OHIO 44107-4250
PHONE: 216-228-9400
FAX: 216-228-0937

LEGAL DEPARTMENT

CLINTON J. MILLER, III
General Counsel

KEVIN C. BRODAR
Associate General Counsel

ROBERT L. McCARTY
Associate General Counsel

DANIEL R. ELLIOTT, III
Assistant General Counsel

D

UPS Next Day Air

May 22, 1998

Mr. Vernon A. Williams, Secretary
Case Control Unit
ATTN: STB Finance Docket No. 32760 (Sub-No. 26)
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Finance Docket No. 32760 (Sub-No. 26)

Dear Mr. Williams:

Please find enclosed the original and 25 copies of United Transportation Union's Notice of Intent to Participate in the above-captioned matter for filing. In accordance with Board orders we have also enclosed a disk in WordPerfect format.

Thank you for your cooperation.

Sincerely,

Daniel R. Elliott, III
Associate General Counsel

cc: C. J. Miller, III, General Counsel

ENTERED
Office of the Secretary
MAY 26 1998
Part of
Public Record

87692

ENTERED
Office of the Secretary

MAY 26 1998

Part of
Public Record

RECEIVED
MAY 22 1998
MAIL
MANAGEMENT
STB

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 26)

UNION PACIFIC CORPORATION, UNION PACIFIC 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]

NOTICE OF INTENT TO PARTICIPATE

Pursuant to the May 19, 1998 order, United Transportation Union submits its notice of its intent to participate in this Houston/Gulf Coast proceeding. United Transportation Union is the largest rail labor organization on the UP/SP and has a strong presence in the Houston/Gulf Coast area. As a result, United Transportation Union has a great interest in this matter.

Respectfully submitted,

Daniel R. Elliott, III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107
(216) 228-9400

STB FD-32760(SUB26) 5-21-98 D ID-187668

18768

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: 202-274-2917
INTERNET: william.mullins@troutmansanders.com

ENTERED
Office of the Secretary

MAY 21 1998

Part of
Public Record

William A. Mullins
202-274-2953

May 21, 1998

RECEIVED
MAY 21 1998
MAIL
MANAGEMENT
STB

HAND DELIVERY

Honorable Vernon A. Williams
Case Control Unit
Attn: STB Finance Docket No. 32760 (Sub-No. 26)
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20006

D

Re: Finance Docket No. 32760 (Sub-No. 26) (Houston/Gulf Coast Oversight)
Union Pacific Corporation, et al. -- Control & Merger -- Southern Pacific Rail Corporation, et al. Oversight Proceeding

Dear Secretary Williams:

Yesterday, I filed a Motion for Extension of Time on behalf of six different parties seeking a 30 day extension to the June 8, 1998 filing deadline in the above referenced proceeding. I wanted to make clear that the Requesting Parties listed on the motion intended that the 30 day extension, if granted, would be effective for all interested persons. As a result, the entire procedural schedule would need to be adjusted for all interested persons and not just the Requesting Parties.

I hope this clears up any confusion that the motion may have created. If you have any questions, please feel free to call me.

Sincerely yours,

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

cc: Parties of Record
Honorable Stephen J. Grossman

CMA-1 SPI-1
RCT-1 TCC-1
TM-1 KCS-1

1765

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 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 PROCEEDING

D

MOTION FOR EXTENSION OF TIME

THE CHEMICAL MANUFACTURERS ASSOCIATION

THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

THE RAILROAD COMMISSION OF TEXAS

THE TEXAS CHEMICAL COUNCIL

THE TEXAS MEXICAN RAILWAY COMPANY

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

May 20, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 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 PROCEEDING

MOTION FOR EXTENSION OF TIME

As set forth in the Board's Decision No. 12 in this proceeding issued March 31,1998, June 8th is the deadline for any party to file requests for, and evidence supporting the imposition of additional remedial conditions to the UP/SP merger. Any new conditions are to focus on the Houston, Texas/Gulf Coast area. Decision No. 12 at 2. The Chemical Manufacturers Association ("CMA"), The Society of the Plastics Industry, Inc. ("SPI"), The Texas Chemical Council ("TCC"), The Railroad Commission of Texas ("RCT"), The Texas Mexican Railway Company ("Tex Mex") and The Kansas City Southern Railway Company ("KCS") (collectively "Requesting Parties") together hereby request the Surface Transportation Board (the "Board" or "STB") to extend that deadline by thirty days to July 8 and to make corresponding changes to the rest of the procedural schedule. An extension is necessary to allow the Requesting Parties time to work toward reaching a consensus regarding the scope of any such filing requesting additional remedial conditions.

The Board has repeatedly stated its preference for consensus proposals and solutions. The Requesting Parties have been trying to reach a consensus with respect to additional remedial conditions that may be requested in this oversight proceeding. The Requesting Parties are in agreement that additional remedial conditions for Houston and the Texas Gulf Coast should be required, however, the exact details of such additional remedial conditions are still being discussed. While the Requesting Parties are working toward a consensus proposal, an additional 30 days, beyond June 8, 1998, is needed to work on the agreement and prepare all of the supporting documentation, including traffic diversion studies and operating plans, which would be required to support any such consensus proposal.

While some meetings between the affected carriers and shippers have been held, the various shippers and shipper organizations will again be meeting shortly with affected carriers in an attempt to reach a voluntary, consensus plan to permanently solve the rail service crisis and competitive problems in the Houston/Gulf Coast areas. As a result of these ongoing meetings and because of the need to submit supporting evidence in the event a consensus proposal is developed, the Requesting Parties seek an extension of time of an additional 30 days.

It is in the public interest to present the most comprehensive, thorough and evidentiary supported plan with the broadest basis of consensus and in order to so, additional time is necessary. Furthermore, since the Board adopted the original schedule to consider various proposals, including those set forth by RCT and Tex Mex/KCS, and those groups are supportive of this request, no party should be harmed by this extension.

Therefore, the Requesting Parties respectfully request that the Board grant a 30 day extension, until July 8, 1998, for the Requesting Parties to work toward and put together supporting documentation for any requests for new remedial conditions to the UP/SP merger in the new oversight proceeding and adjust the remainder of the procedural schedule accordingly.

Respectfully submitted and signed on each party's behalf with express permission,

Tom Schick, Assistant General Counsel
THE CHEMICAL MANUFACTURERS ASSOCIATION
1300 Wilson Boulevard
Arlington, Virginia 22209
Tel: (703) 741-5172

Martin W. Bercovici
KELLER AND HECKMAN, L.L.P.
1001 G Street, N.W., Suite 500W
Washington, D.C. 20003
Tel: (202) 434-4144
COUNSEL FOR THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

Lindil C. Fowler, Jr., General Counsel
THE RAILROAD COMMISSION OF TEXAS
1701 Congress Avenue
P.O. Box 12967
Austin, Texas 78711-2967
Tel: (512) 463-7149

Jim Woodrick
THE TEXAS CHEMICAL COUNCIL
1402 Nueces Street
Austin, Texas 78701-1586
Tel: (512) 477-4465

Richard A. Allen
John V. Edwards
ZUCKERT, SCOUTT & 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
Sandra L. Brown
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

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the "Motion for Extension of Time" was served this 20th day of May, 1998, by hand delivery to counsel for Union Pacific Railroad Company and counsel for Burlington Northern and Santa Fe Railway Company, and by first class mail upon all other parties of record in the Sub-No. 21 and 26 oversight proceedings.

Sandra L. Brown
Attorney for The Kansas City Southern
Railway Company

187668

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: 202-274-2917
INTERNET: william.mullins@troutmansanders.com

May 21, 1998

HAND DELIVERY

Honorable Vernon A. Williams
Case Control Unit
Attn: STB Finance Docket No. 32760 (Sub-No. 26)
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20006

Re: Finance Docket No. 32760 (Sub-No. 26) (Houston/Gulf Coast Oversight)
Union Pacific Corporation, et al. -- Control & Merger -- Southern Pacific Rail Corporation, et al. Oversight Proceeding

Dear Secretary Williams:

Yesterday, I filed a Motion for Extension of Time on behalf of six different parties seeking a 30 day extension to the June 8, 1998 filing deadline in the above referenced proceeding. I wanted to make clear that the Requesting Parties listed on the motion intended that the 30 day extension, if granted, would be effective for all interested persons. As a result, the entire procedural schedule would need to be adjusted for all interested persons and not just the Requesting Parties.

I hope this clears up any confusion that the motion may have created. If you have any questions, please feel free to call me.

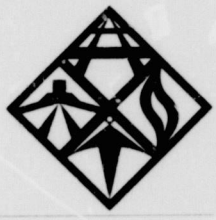
Sincerely yours,

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

cc: Parties of Record
Honorable Stephen J. Grossman

187532

Fieldston
Fieldston Company, Inc.



D

May 11, 1998

Mr. Vernon C. Williams, Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

26

RE: STB Finance Docket No. 32760 (Sub-No. ~~21~~), Decision 12: Union Pacific Corp. et.al. Control and Merger – Southern Pacific Rail Corp., et.al. Oversight Proceedings

Dear Mr. Williams:

Enclosed for filing please find an original and twenty-five (25) copies of the Notice of Intent to Participate in the above captioned proceeding filed on behalf of Fieldston Company, Incorporated. Also enclosed is a 3.5 inch IBM-compatible diskette containing the text of this material.

Fieldston Company Incorporated respectfully requests that our name be added to the Party of Record Service List and that we be served with all notices and orders issued by the Board in this proceeding.

Sincerely,

Thomas A. Schmitz

cc: All Parties of Record

ENTERED
Office of the Secretary

MAY 14 1998

Part of
Public Record

1800 Massachusetts Ave., N.W. ◆ Suite 500 ◆ Washington, D.C. ◆ 20036-1883 ◆ (202) 775-0240 ◆ Fax (202) 872-8045

BEFORE THE

SURFACE TRANSPORTATION BOARD

U.S. DEPARTMENT OF TRANSPORTATION

26

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

Union Pacific Corporation, et.al
Control and Merger – Southern pacific Corporation, et.al

Fieldston Company Incorporated ("Fieldston"), pursuant to Oversight Notice Decision 12 served March 31, 1998, submits this Notice of Intention to Participate in the oversight proceedings as a party of record ("POR") and requests that it be appropriately placed on the Service List as such.

Fieldston previously participated as a party of record in Finance Docket No. 32760. Fieldston is a consulting firm assisting rail shippers and receivers to monitor and gauge the impact of the recent rail crisis on their businesses.

Fieldston respectfully requests placement on the Party of Record Service List and all notices and orders issued by the Board or other parties to this proceeding be served upon:

Thomas A. Schmitz
Director, Consulting Services
Fieldston Company Incorporated
1800 Massachusetts Avenue, N.W.
Suite 500
Washington, DC 20036

Dated: May 11, 1998

Thomas A. Schmitz
Director, Consulting Services
FIELDSTON COMPANY, INCORPORATED

STB FD-32760(SUB26) 5-6-98 D ID-187410

18740

BEFORE THE

SURFACE TRANSPORTATION BOARD

U.S. DEPARTMENT OF TRANSPORTATION

Finance Docket No. 32760 (Sub-No. ~~21~~ 26)

Union Pacific Corporation, etc. al
Control and Merger - Southern Pacific Corporation, et. Al

D

American Natural Soda Ash Corporation (ANSAC), pursuant to Oversight Notice Decision, 12 served March 31, 1998, submits this Notice of Intention to Participate in the oversight proceedings as a party of record (POR) and requests that it be appropriately placed on the Service List as such.

ANSAC purchases bulk, dense soda ash for export, on freight on rail from six (6) producers dependent upon the Union Pacific Railroad. In its export role, ANSAC ships over one million tons per year to Gulf Coast ports and Mexican Gateways, and two and one half million tons to the Pacific Northwest, which have been impacted by the serious service difficulties since the merger (Decision No. 44 served August 12, 1996). ANSAC is interested in all request for new remedial conditions and proposals for long term solutions affecting the Gulf Coast, Pacific Northwest and Mexican Gateways to determine how those conditions may improve or hinder service to our business.

ANSAC respectfully requests placement on the Party of Record Service List and all notices and orders issued by the Board or other parties to this proceeding be served upon:

John W. Reinacher
Director of Distribution
ANSAC
15 Riverside Avenue
Westport, CT 06880

Dated: May 4, 1998

J. W. Reinacher
Director, Distribution

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

May 1, 1998

187357

26

BY HAND

Honorable Vernon A. Williams
Surface Transportation Board
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:

Enclosed for filing are an original and 25 copies of Union Pacific's Reply to Joint Petition of KCS and Tex Mex for Protective Order, Discovery Guidelines and Appointment of Administrative Law Judge (UP/SP-337). Please date stamp and return the enclosed extra copy of this document via our waiting messenger.

Also enclosed is a diskette containing an electronic version of this document in WordPerfect 5.1 format.

Thank you very much for your assistance.

Sincerely,

David L. Meyer

Attorney for Union Pacific Railroad Company

Enclosures

cc: All Parties of Record

UP/SP-337

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. ~~21~~ 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 --
OVERSIGHT PROCEEDING

UNION PACIFIC'S REPLY TO JOINT PETITION OF KCS AND TEX MEX FOR PROTECTIVE ORDER, DISCOVERY GUIDELINES AND APPOINTMENT OF ADMINISTRATIVE LAW JUDGE

Union Pacific Railroad Company ("UP") submits this reply to the Joint Petition of the Texas Mexican Railway Company ("Tex Mex") and the Kansas City Southern Railway Company ("KCS") (collectively, "KCS/Tex Mex") for Protective Order, Discovery Guidelines and Appointment of Administrative Law Judge ("ALJ"), filed on April 22, 1998 (TM-9/KCS-9).

KCS/Tex Mex's Petition (at 4) asks that the Board assign an ALJ "to preside over discovery issues," and that the Board adopt a proposed protective order and proposed "discovery guidelines" to govern and "facilitate" discovery in the oversight proceeding recently established by the Board in order to "examin[e] requests for new conditions to the merger relating to rail service in the Houston/Gulf

Coast area." Decision No. 12, served Mar. 31, 1998, p. 8. UP urges the Board to reject KCS/Tex Mex's proposals. Entry of the proposed protective order is unnecessary, as parties, including KCS/Tex Mex, have already agreed to be bound by the merger-case protective order in oversight proceedings. Moreover, the protective order submitted by KCS/Tex Mex contains an inappropriate new provision not contained in the merger-case protective order. KCS/Tex Mex's proposed "guidelines" and discovery processes, including the appointment of an ALJ, would sanction and institutionalize the sort of broad-ranging and burdensome discovery that the Board has sought to avoid in carrying out its oversight function.

I. KCS/TEX MEX'S PROPOSED DISCOVERY "GUIDELINES" AND PROCESSES SHOULD BE REJECTED

Although KCS/Tex Mex ask the Board to rule on procedures for discovery in the abstract -- since the discovery that would be governed by the those processes is still inchoate -- it is clear from their Petition that they envision a massive discovery campaign if and when the Board establishes the discovery processes they propose.[1/] Indeed, the stated premise of KCS/Tex Mex's Petition is that "discovery similar to that undertaken in the UP/SP merger proceeding must be undertaken in this new oversight proceeding." Petition at 3 (emphasis added).

1/ Thus far, KCS/Tex Mex have served UP with only four discovery requests, although each of them is sweepingly overbroad and unduly burdensome. As described at page 7 below, UP has responded to those requests voluntarily. It is certain, however, that KCS/Tex Mex have not proposed the processes described in their Petition to deal with just their extant requests.

In light of this plan, it is no coincidence that KCS/Tex Mex have proposed discovery "guidelines" and processes that mirror those used in full-blown merger proceedings. As KCS/Tex Mex point out (Petition at 4), their proposed guidelines are "substantially similar" to those used in the UP/SP proceeding. They are also similar in many respects to the guidelines used in the BN/Santa Fe and CSX/NS/Conrail proceedings.[2/] As suggested by the contexts in which guidelines such as those proposed by KCS/Tex Mex have been employed, the formalized set of processes created by discovery guidelines can be useful in full-blown merger proceedings. The provisions of such guidelines -- especially the presumption of weekly hearings before an ALJ to address a litany of discovery disputes -- presuppose that the parties will be undertaking massive amounts of burdensome and fast-paced discovery addressing the broad range of issues presented by major merger applications, and that numerous disputes will inevitably arise.[3/]

[2/] See, e.g., Finance Docket No. 33388, CSX Corp. & CSX Transportation, Inc., Norfolk Southern Corp. & Norfolk Southern Ry. -- Control & Operating Leases/Agreements -- Conrail Inc. & Consolidated Rail Corp. ("CSX/NS/Conrail"), Decision No. 10, served June 27, 1997 (adopting discovery guidelines agreed among parties).

[3/] Such guidelines are typically the product of agreement among the parties participating in a merger case, all of whom understand the need for extensive and burdensome discovery in the course of developing a factual record in a major merger proceeding. See, e.g., UP/SP, Order Adopting Discovery Guidelines, Served Dec. 7, 1995 ("Discovery Guidelines appended hereto have been negotiated by the parties"); CSX/NS/Conrail, Decision No. 10, served June 27, 1997 (same). The voluntary adoption of such guidelines in these contexts stands in sharp contrast to KCS/Tex Mex's proposal that their proposed guidelines be imposed by the Board to implement their own view of the appropriate scope and scale of discovery.

This oversight proceeding, however, is not a full-blown merger case. UP believes that the Board did not intend, in establishing this proceeding, to re-create the massive discovery program that was necessary to build a comprehensive factual record on the broad array of issues presented in the initial UP/SP merger proceeding. That discovery campaign involved the exchange of hundreds of thousands of pages of documents and several dozen depositions over the course of six months. By contrast, Chairman Morgan has explained that the oversight process is intended to be a "focused, probing and productive process, but one that is not unduly burdensome." Decision No. 1, served May 7, 1997, p. 9. After giving careful consideration to requests by KCS and Tex Mex for extensive formal discovery in the general oversight proceeding,[4/] the Board concluded that "[t]here is no reason to open this proceeding for formal discovery procedures as some have suggested" and that "[f]ormal discovery would add no new relevant information . . . and would complicate this oversight process unnecessarily." Decision No. 10, served Oct. 27, 1997, p. 19. The Board explained that, in place of formal discovery, the production by UP (and BNSF) of discrete categories of information would facilitate the oversight process. Thus, UP and BNSF were required to make available their 100% traffic tapes by July 15, 1998 (id.; see also Decision No. 12, p. 9 n.12), and the Board noted that it had also required UP to provide certain information regarding rail service in

---

[4/] See, e.g., KCS Comments (KCS-2), Aug. 1, 1997, pp. 9-10, Ex. C (entitled "Details Regarding Specific Discovery Disputes").

the West in connection with the ongoing Ex Parte No. 573 proceeding. See Decision No. 10, p. 19.[5/]

The Board has made clear that it intends this proceeding to be even narrower than the general oversight process. The Board established this proceeding for the purpose of "examin[ing] . . . whether there is any relationship between the market power gained by UP/SP through the merger and the failure of service that has occurred here." Decision No. 12, p. 8. In doing so, the Board emphasized that it did not intend a full-scale re-evaluation of its decision approving the merger, and would confine the proceeding to Houston/Gulf Coast service issues. See Decision No. 12, pp. 8-9; see also Response of Respondent STB to Motion to Vacate and Remand, Apr. 13, 1998, pp. 2, 4, Western Coal Traffic League v. STB, No. 96-1373 (D.C. Cir.) ("limited reopening" of the record "undertaken by the STB concerns only service problems in Houston, not the fundamental premises of the merger"). The Board also expressly distinguished the present proceeding from the broader general annual oversight proceeding. See Decision No. 12, pp. 8-9 & n.13.

Formal discovery, much less the extensive campaign KCS/Tex Mex appear to envision, would be out of place in this proceeding. Instead, the Board has requested that interested parties comment on whether additional remedial conditions

---

[5/] UP's obligations to provide information concerning service issues have subsequently been expanded, most recently to include a report being filed today as to plans for addressing Houston/Gulf infrastructure. See Ex Parte No. 573, Decision served Feb. 25, 1998, p. 5.

are necessary, and submit any evidence they might have supporting their position, based on their own experiences supplemented by the extensive information on service that UP has already made available both voluntarily (at conferences with shipper groups, for example) and as a result of the Board's Order in Ex Parte No. 573. See Decision No. 12.

This is a logical and reasonable approach. No railroad has ever publicly reported as much information and data about its performance as has UP over the past seven months. Advocates of additional conditions should by now be in a position to present whatever factual basis might exist for their proposals without the need for expansive merger-case-style formal discovery. Indeed, KCS/Tex Mex have themselves already proven that interested parties can prepare their cases for additional conditions without an extensive discovery campaign. Without any discovery at all, KCS/Tex Mex filed their March 20 "Joint Petition for Imposition of Additional Remedial Conditions" (TM-7/KCS-7), which is more than 300 pages long and accompanied by the verified statements of ten witnesses.[6/]

For the same reasons that the Board concluded that formal discovery would not be necessary or desirable in the general oversight process, broad-gauged formal discovery here would only serve to increase the burdens of this proceeding for the parties and the Board. The steps KCS/Tex Mex have proposed -- the

---

6/ UP will in due course show that nothing in KCS/Tex Mex's Joint Petition justifies the imposition of additional conditions.

appointment of an ALJ, the requirement that discovery requests be responded to on an extraordinarily accelerated schedule (with objections due within five days, and full responses within fifteen), the presumption of weekly conferences before the ALJ to address discovery disputes, and the appointment of KCS's counsel as the keeper of a restricted service list -- would sanction and make inevitable a burdensome and wide-ranging discovery campaign of the sort KCS/Tex Mex apparently plan. Granting KCS/Tex Mex's Petition would be an open invitation to commence fishing expeditions through the files of UP (and other parties) without any support other than bald rhetoric about the merger's effects such as that offered by KCS/Tex Mex.

* * *

All this being said, UP does not take the position that it (or any other party) ought to be immune from discovery in this proceeding. To the contrary, notwithstanding that the Board's March 31 order took pains to state that this proceeding will not commence until June 8, 1998[7] -- such that there is no current entitlement to any discovery under the Board's precedents -- UP has already provided voluntarily responses to discovery requests to the extent those requests have called for information within the scope of this proceeding and were not unduly burdensome.[8]

---

[7] See Decision No. 12, p. 2.

[8] See UP's Response and Objections to KCS/Tex Mex's Document Production Requests, April 23, 1998 (UP/SP-336). UP has had documents responsive to these requests available for KCS/Tex Mex's inspection since April 24. Contrary to KCS/Tex Mex's characterization (Petition at 3 n.1), however, UP has not

(continued...)

UP is prepared to continue to cooperate voluntarily in responding to reasonable requests for specific information relevant to the Board's examination in this proceeding. There is accordingly no purpose to be served by formal Board involvement in this process, much less the adoption of the regimented process envisioned by KCS/Tex Mex.

II. THE UP/SP PROTECTIVE ORDER, RATHER THAN THE ADAPTATION OF IT PROPOSED BY KCS/TEX MEX, SHOULD GOVERN ANY DISCOVERY HEREIN

KCS/Tex Mex also urge the adoption of a protective order in the form attached to the Petition, which they say (at 4) is "substantially similar" to that used in the main UP/SP proceeding. UP believes it is appropriate for a protective order to be in place to govern any exchange of confidential or highly confidential materials (including the 100% traffic tapes that UP is to produce by July 15 in the general oversight proceeding). However, there is no need to adopt a protective order that is "substantially similar" to that in UP/SP when the UP/SP protective order itself is already in place. See UP/SP, Decision No. 2, served Sept. 1, 1995 (Exhibit A hereto). In the general oversight proceeding conducted last summer, the parties -- including KCS and Tex Mex -- had no difficulty agreeing that the exchange of

---

[8]/(...continued)
acknowledged generally that "discovery is appropriate in this new proceeding." See UP/SP-336, p. 1 ("These responses are being provided voluntarily. UP does not agree hat parties are entitled to any discovery at this time, or to general discovery at any time in this and future merger oversight proceedings, which are to intended as a forum to relitigate the merger.").

confidential materials would be governed by the protective order entered in the merger proceeding,[9] and there is no reason the same protective order should not apply here.[10] Rather than adopting KCS/Tex Mex's adaptation of that order, the most the Board need do is clarify that the September 1, 1995 order will govern any exchange of confidential (or highly confidential) materials in this and other oversight proceedings.

A further reason that KCS/Tex Mex's proposed protective order should not be entered is that it contains inappropriate language that differs materially from the language in the protective order entered in the merger proceeding. Although KCS/Tex Mex's proposed order is on the whole quite similar to the UP/SP protective order, paragraph 2 of the proposed order alters in an important way language contained in the second half of paragraph 1 of the UP/SP order. In the UP/SP order, the Board authorized personnel of the primary applicants (i.e., UP and SP) to exchange confidential information and data for the purpose of preparing and pursuing

---

[9] See, e.g., Consolidated Information Requests to UP, June 17, 1997, p. 7 (requests joined in by KCS and Tex Mex and served by KCS's counsel; Instruction No. 8 stated that "Undersigned Parties subscribe to the terms of the Protective Order in this proceeding, and any confidential or proprietary information responsive to these information and discovery requests may be submitted under the Protective Order"); Letter from Arvid E. Roach II to William A. Mullins and Nicholas J. DiMichael, June 26, 1997 (clarifying parties' understanding that all information submitted by primary applicants will be "subject to the protective order that was in effect during the merger proceeding") (Exhibit B hereto).

[10] Indeed, counsel for KCS has already agreed orally to abide by the merger-case protective order with respect to confidential materials produced in response to their April 23, 1998 requests in this proceeding.

their application. KCS/Tex Mex's proposed order would modify this language to add that personnel of KCS and Tex Mex may exchange confidential information.

KCS/Tex Mex may have misunderstood the purpose of this provision, which was not to facilitate discovery but to allow a control application to be prepared and pursued. This long-standing provision, which has been included in ICC and STB merger-case protective orders for two decades, is intended to overcome legal impediments to the exchange of confidential information among the primary applicants so that they could jointly develop their merger application.[11] Why KCS/Tex Mex have modified the language of the UP/SP order to include reference to themselves is unclear. Nevertheless, it would certainly be inappropriate for the Board to sanction the open exchange of competitively-sensitive information between KCS and Tex Mex, which (unlike UP and SP) have not filed any common control application pursuant to 49 U.S.C. § 11323 addressing their relationship and apparently have no intention of doing so.[12]

---

[11] Underscoring this purpose, the protective order was sought and entered several months prior to the filing of the UP/SP merger application.

[12] See, e.g., Letter from William A. Mullins to Vernon A. Williams, Nov. 24, 1997 (denying that KCS exercises "any unlawful control over the operations or management of the Tex Mex").

CONCLUSION

For the foregoing reasons, the Board should deny the relief requested by KCS/Tex Mex's Petition.

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
DAVID L. MEYER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-7566
(202) 662-5388

Attorneys for Union Pacific
Railroad Company

May 1, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 1998, I served a copy of Union Pacific's Reply to Joint Petition of KCS and Tex Mex for Protective Order, Discovery Guidelines and Appointment of Administrative Law Judge by hand on:

Richard A. Allen
John V. Edwards
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W.
Suite 600
Washington, D.C. 20006-3939

William A. Mullins
Sandra L. Brown
David C. Reeves
Troutman Sanders LLP
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005-3314

and by first-class mail, postage prepaid, on all other parties of record.

David L. Meyer

Exhibit A

EC

INTERSTATE COMMERCE COMMISSION

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

Decision No. 2

PETITION FOR PROTECTIVE ORDER

Decided: August 28, 1995

On August 4, 1995, Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively, applicants) filed a notice of intent (UP/SP-1) to file an application seeking Commission authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC.

In a petition filed concurrently with the notice, applicants request that the Commission enter a protective order (UP/SP-2). Applicants explain that a protective order is necessary for two reasons: (1) to protect confidential information, such as shipper-specific material contained in traffic data and tapes, and to facilitate compliance with 49 U.S.C. 11343 and 11910; and (2) to facilitate any necessary discovery during later stages of the proceeding by protecting the confidentiality of materials reflecting the terms of contracts, shipper-specific traffic data, and other confidential and proprietary information in the event that parties produce such materials. Applicants propose to include in the protective order a provision governing the production of highly confidential competitive information in discovery, and restricting that information to use by outside counsel or outside consultants for the parties. The provision is similar to provisions approved in protective orders in other control cases. See Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served July 15, 1994) (BN/Santa Fe). On August 14, 1995, The Kansas City Southern Railway Company (KCS) filed its opposition to the proposed protective order (KCS-2). Applicants filed a reply on August 18, 1995 (UP/SP-7).

KCS appears primarily concerned with the provision designating certain material as "highly confidential" and restricting its use to outside counsel or outside consultants for the parties. KCS argues that 49 CFR 1104.14 provides sufficient procedures for the protection of confidential materials, and that there is no need to create a separate category of "highly confidential" information to deny access to certain in-house counsel of opposition parties. KCS argues that the Commission should adopt a protective order similar to that adopted in other proceedings, such as in Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Holdings Corp. and Chicago and North Western Transportation Company, Finance Docket No. 32133 (ICC served Aug. 24, 1992) (UP/CNW), which did not create a separate

category for "highly confidential" material. Applicants argue, however, that when KCS had to produce its own documents for discovery in UP/CNW, KCS insisted on a distinction like the one it challenges here. An order entered on December 16, 1993, by the Administrative Law Judge in UP/CNW provided that KCS could stamp documents CONFIDENTIAL--OUTSIDE COUNSEL/EXPERTS ONLY, and thus restrict access to those documents.

KCS further argues that, under the proposed protective order, applicants can violate the restriction on in-house counsel and employees of competitors seeing "highly confidential material" and can review each others' "highly confidential" materials in preparation of the application and other materials; however, similarly situated in-house personnel of opposing parties cannot review the same material in preparing their arguments. KCS maintains that this results in non-merging parties' in-house counsel and employees having a "second-class status."

In their reply, applicants note that KCS's complaint disregards the "essential difference between adversaries and co-applicants" in a consolidation proceeding. Applicants explain that they must remain competitors until the Commission approves the application, but that they have a compelling need to share certain confidential data to prepare the application, and collusion of the type KCS fears would risk Commission disapproval of the transaction and would subject the applicants to severe legal sanctions. As applicants point out, however, in-house counsel for non-applicant parties have no compelling need for access to competitively sensitive data, and that outside counsel for these parties can adequately protect their clients' interests in these proceedings without expanding competitors' potential access to commercially sensitive data.

The proposed protective order is substantially similar to the one entered in BN/Santa Fe, which adequately served the intended purpose of restricting disclosure of material which is particularly sensitive.[1] The modifications to the protective order in BN/Santa Fe were relatively minor and addressed

---

[1] It is also substantially similar to the protective order entered in Illinois Central Corporation--Common Control--Illinois Central Railroad Company and The Kansas City Southern Railway Company, Finance Docket No. 32556 (ICC served Aug. 12, 1994) (IC/KCS). In IC/KCS, the Commission entered a protective order at the request of the applicants in that proceeding substantially similar to that proposed by the applicants in this proceeding regarding the designation of some material as "highly confidential." The following similarities are particularly noteworthy: (1) personnel of Illinois Central Corporation (IC), Illinois Central Railroad Company (ICR), and their affiliates (collectively, IC), and of Kansas City Southern Industries, Inc. (KCSI), The Kansas City Southern Railway Company (KCSR) and their affiliates (collectively, KCS) were allowed to exchange confidential material for the purpose of the IC/KCS proceeding and any related proceedings (Paragraph 1); (2) parties producing materials in response to requests for discovery by a party to the IC/KCS proceeding or any related proceeding were allowed to stamp particular competitively sensitive materials as "HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY" (Paragraph 5); (3) material designated as highly confidential was not to be disclosed except to outside counsel or outside consultants of the requesting party (Paragraph 5); and (4) the restriction of highly confidential material to outside counsel and consultants did not apply to exchanges of information pursuant to Paragraph 1 of the protective order.

circumstances wherein parties argued persuasively that a modification was appropriate and necessary.[2] KCS, and any other parties, would have the same opportunity to petition for modification of the protective order. In instances where parties argue that there is a necessity for lifting the restriction of highly confidential material to outside counsel and consultants, the Commission will consider the merits of the argument and determine whether to modify the protective order.

Good cause exists to grant the petition. Unrestricted disclosure of confidential, proprietary or commercially sensitive information and data could cause serious competitive injury to the parties. Issuance of the requested protective order ensures that such information and data produced by any party in response to a discovery request or otherwise will be used solely for purposes of this proceeding and not for any other business or commercial use. The requested protective order will facilitate the prompt and efficient resolution of this proceeding.

It is ordered:

1. The petition for a protective order is granted and the parties to this proceeding must comply with the protective order in the Appendix.[3]

2. This decision is effective on the service date.

By the Commission, Chairman Morgan, Vice Chairman Owen, and Commissioners Simmons and McDonald.

(SEAL)

Vernon A. Williams
Secretary

---

[2] See BN/Santa Fe, Finance Docket No. 32549 (ICC served March 13 and June 20, 1995).

[3] This decision protects the information, materials, and data set forth in the attached Appendix whether it is contained on printed material or in computer-derived memory devices (i.e., floppy diskettes).

APPENDIX A

PROTECTIVE ORDER

1. For purposes of this Protective Order, "confidential information and data" means traffic data (including but not limited to waybills, abstracts, study movement sheets and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets and cost workpapers), the identification of shippers and receivers in conjunction with shipper-specific traffic data, the confidential terms of contracts with shippers, confidential financial and cost data, and other confidential or proprietary business information. Personnel of Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR) and their affiliates, (collectively, Union Pacific), and of Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) and their affiliates, (collectively, Southern Pacific), including outside consultants and attorneys, may exchange confidential information and data for the purpose of this and any related proceedings, but not for any other business, commercial or other competitive purpose, unless and until their joint application is approved.

2. To the extent that any meetings, conferences, exchanges of data or other cooperative efforts between representatives of Union Pacific and Southern Pacific or their affiliates are held and carried out for purposes of this and any related proceedings, such meetings, conferences, exchanges of data and other cooperative efforts are deemed essential for the disposition of such proceedings and will not be deemed a violation of 49 U.S.C. 11343 or 11910.

3. If the control application is ultimately denied, or if control is not effected, or if no application is filed, all confidential information and data exchanged by Union Pacific with Southern Pacific, or by their representatives, in preparing the application for filing and in the course of this and any related proceedings will be returned to the originating party or destroyed. However, outside counsel for a party are permitted to retain file copies of all pleadings filed with the Commission.

4. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data or other confidential or proprietary information are produced pursuant to a request for discovery by any party to this or any related proceedings, or are submitted in pleadings, such materials must be treated as confidential. Such materials, any copies, and any data derived therefrom:

(a) Shall be designated and stamped as "CONFIDENTIAL" and shall be used solely for the purpose of this and any related proceedings, and any judicial review proceeding arising therefrom, and not for any other business, commercial or competitive purpose.

(b) Shall not be disclosed in any way or to any person without the written consent of the party producing the materials or an order of the Commission or the Administrative Law Judge presiding in this and any related proceedings, except: (i) to employees, counsel or agents of the party requesting such materials, solely for use in connection with this and any related proceedings, and any judicial review proceeding arising therefrom, provided that such employee, counsel or agent has been

given and has read a copy of this Protective Order and agrees to be bound by its terms prior to receiving access to such materials; and (ii) to any participant in this or any related proceedings who is not an employee, counsel or agent of the requesting party, only in the course of public hearings in such proceedings.

(c) If produced through discovery, must be destroyed, and notice of such destruction served on the Commission and the presiding Administrative Law Judge and the party producing the materials, at such time as the party receiving the materials withdraws from this or any related proceedings, or at the completion of this and any related proceedings and any judicial review proceeding arising therefrom, whichever comes first. However, outside counsel for a party are permitted to retain file copies of all pleadings filed with the Commission.

(d) If contained in any pleading filed with the Commission, shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside "Confidential Materials Subject to Protective Order." See 49 CFR 1104.14.

5. Any party producing material in discovery to another party to this or any related proceedings, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as "HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY." If any party wishes to challenge such designation, the party may bring such matter to the attention of the Administrative Law Judge presiding in this and any related proceedings. Material that is so designated shall not be disclosed except to outside counsel or outside consultants of the party requesting such materials, solely for use in connection with this and any related proceedings, and any judicial review proceeding arising therefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order and agree to be bound by its terms prior to receiving access to such materials. Material designated as "HIGHLY CONFIDENTIAL" and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 4. However, this paragraph shall not apply to exchanges of information pursuant to paragraph 1 of this Protective Order.

6. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material at hearings in this or any related proceedings, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material to the Administrative Law Judge, the Commission or the reviewing court, as appropriate, under seal, and shall accompany such submission with a written request to the Administrative Law Judge, the Commission or the court to (a) restrict attendance at the hearings during discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material, and (b) restrict access to the portion of the record or briefs reflecting discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with this Protective Order.

7. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in the course of any deposition in this or any related proceedings, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent and all other counsel attending the deposition, and

all portions of the deposition at which any such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material is used shall be restricted to persons who may review that material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material shall be kept under seal and treated as "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.

8. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data or other proprietary information are produced by a party in this or any related proceedings and held and used by the receiving person in compliance with paragraphs 1, 2 or 4 above, such production, disclosure and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11343 or 11910.

9. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Commission, is shown by any party to warrant suspension of any of the provisions herein.

UNDERTAKING
[CONFIDENTIAL MATERIAL]

I, _____, have read the Protective Order served on _____, 1995 governing the production of confidential documents in ICC Finance Docket No. 32760, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in Finance Docket No. 32760 or any judicial review proceedings taken or filed in connection therewith. I further agree not to disclose any data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form hereof.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

_____

Dated: _____

UNDERTAKING

[HIGHLY CONFIDENTIAL MATERIAL]

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on _____, 1995 governing the production of confidential documents in ICC Finance Docket No. 32760, understand the same, and agree to be bound by its terms. I also understand and agree that, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY," I will limit my use of those documents and the information they contain to this proceeding and any judicial review thereof, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, that at the conclusion of this proceeding, I will promptly return or destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me to counsel for the originating party, provided, however, that outside counsel may retain file copies of pleadings filed with the Commission. I further understand that I must destroy all other notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing confidential documents

shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

_____

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____

Exhibit B

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

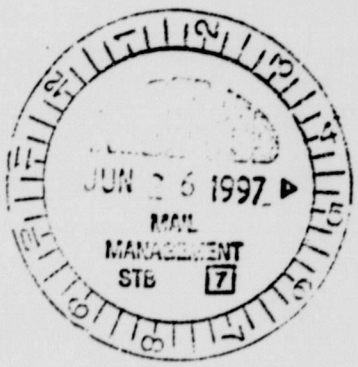
FACSIMILE: (202) 662-6291

LECONFIELD HOUSE
CURZON STREET
LONDON W1Y 8AS
ENGLAND
TELEPHONE: 44-171-495-5655
FACSIMILE: 44-171-495-3101

BRUSSELS OFFICE
KUNSTLAAN 44 AVENUE DES ARTS
BRUSSELS 1040 BELGIUM
TELEPHONE: 32-2-549-5230
FACSIMILE: 32-2-502-1598

ARVID E. ROACH II
DIRECT DIAL NUMBER
(202) 662-5388
DIRECT FACSIMILE
(202) 778-5388

June 26, 1997



BY FACSIMILE

William A. Mullins, Esq.
Troutman Sanders
Suite 640 - North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2994

Nicholas J. DiMichael, Esq.
Donelan, Cleary, Wood & Maser, P.C.
Suite 750
1100 New York Avenue, N.W.
Washington, D.C. 20005-3934

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

Dear Bill and Nick:

This will clarify one point in my letter of June 20. In light of Instruction 8 in the "Consolidated Information and Discovery Requests to Union Pacific" that you served on June 17 in the above-referenced proceeding, we understand that all of the information that the primary applicants produce to the parties submitting the Consolidated Requests will be subject to the protective order that was in effect during the merger case. If our understanding is incorrect, please let us know.

Sincerely,

Arvid E. Roach II/mwa

Arvid E. Roach II

cc (by hand): Hon. Vernon A. Williams

186247

MAYER, BROWN & PLATT

2000 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006-1382

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

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

March 4, 1998

D

VIA HAND DELIVERY

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

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket, please find an original plus twenty-five (25) copies of BNSF's Reply in Opposition to KCS/Tex Mex Petition for Additional Remedial Conditions (BNSF-5). Also enclosed is a diskette containing the text of BNSF-5.

Please date-stamp the enclosed extra copy and return it to the messenger for our files. Please contact me at (202) 778-0642 if you have any questions. Thank you.

Sincerely,

Erika Z. Jones

Erika Z. Jones

Enclosures

cc: Parties of Record

186247

BNSF-5

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

REPLY OF BNSF IN OPPOSITION TO KCS/TEX MEX PETITION FOR ADDITIONAL REMEDIAL CONDITIONS

Jeffrey R. Moreland
Richard E. Weicher
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

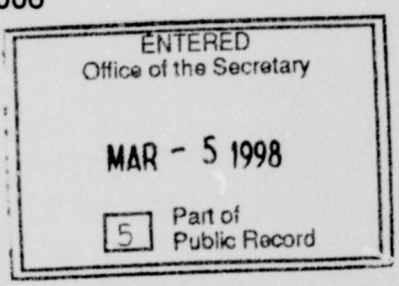
and

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

Erika Z. Jones
Adrian L. Steel, Jr.
David I. Bloom
Roy T. Englert, Jr.

Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Attorneys for The Burlington Northern and Santa Fe Railway Company



March 4, 1998

BNSF-5

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

REPLY OF BNSF IN OPPOSITION TO KCS/TEX MEX PETITION FOR ADDITIONAL REMEDIAL CONDITIONS

The Burlington Northern and Santa Fe Railway Company ("BNSF") respectfully submits this opposition to the relief that The Kansas City Southern Railway Company ("KCS") and The Texas Mexican Railway Company ("Tex Mex") seek in their February 12, 1998 petition for additional remedial conditions. The Board should deny their petition outright, for the reasons discussed below. Even if the Board is not prepared to deny the petition before KCS/Tex Mex make the full evidentiary presentation promised in their February 12 petition, the Board should at least reject their request to establish a procedural schedule to consider their proposal. KCS/Tex Mex's February 12 petition has already demonstrated that the relief they seek should not and cannot be granted without doing violence to Board and Commission precedent.

The Board should not set a procedural schedule unless and until, after KCS/Tex Mex have filed their promised evidentiary submission and any required applications for

the specific relief they seek, it finds that there is some possibility that the Board will grant the requested relief. Because the relief sought (as described in the February 12 petition) is inconsistent with Board and Commission precedent, including very recent findings, it is extremely unlikely that the Board could or would ever make such a finding.

KCS/Tex Mex are not petitioning for an extension or revision of the Emergency Service Order. Instead, they are urging the Board to transform temporary emergency measures, themselves not justified by KCS/Tex Mex, into permanent revisions to the merger conditions. However, even if UP's service problems continue, the KCS/Tex Mex proposal to impose new conditions on the merger would not be justified unless (1) those problems could be traced to a loss of competition resulting from the UP/SP merger, and (2) the particular remedies suggested by KCS/Tex Mex for those competitive problems are appropriate in light of precedent. The Board has rejected both contentions, and there is no basis for commencing an extensive proceeding to reconsider recent findings.

1. The Board has found on three separate occasions that there is no proof that the UP service problems result from decreased competition traceable to the UP/SP merger. Only two weeks ago, in STB Service Order No. 1518 (Denial of Request for Reconsideration filed by Railroad Commission of Texas) (served Feb. 17, 1998), the Board chided the Railroad Commission of Texas, which was promoting actions similar to those now proposed by KCS/Tex Mex, for "claim[ing], without specific proof, that UP/SP's service problems were caused by a lack of competition" and for asserting "without support" that UP's service problems result from increased concentration effected by the UP/SP merger. Slip op. 4 & n.7. The Board further stated (slip op. 6):

> [T]he evidence does not lead to the conclusion that approval of the merger was the cause of the service emergency * * *.

Earlier, the Board in UP/SP Decision No. 77 (served Jan. 7, 1998) stated that "in Decision No. 44 [the Board] imposed a coherent set of conditions *that seems to be working well to date in preserving competition*." Slip op. 7 (emphasis added). And, in the more detailed Oversight Decision No. 10 (served Oct. 27, 1997), slip op. 2, the Board stated:

> [T]he evidence submitted does not indicate any reduction in competition in the markets that UP services, which is the focus of the oversight condition imposed by the Board in its approval of the merger. Rather, the record reflects that [service] disruptions have been caused by a variety of factors, including UP's efforts to rehabilitate the deteriorating SP system and establish facilities that will ultimately benefit shippers with improved service, and by other system integration efforts that have not proceeded as they should have.

The Board has not foreclosed the possibility that someone might yet prove competitive harm stemming from the merger, but the Board has made it clear that it will require proof, not mere assertion, that UP's service problems reflect such competitive harm. No such proof is contained, or even promised, in the February 12 KCS/Tex Mex petition. Especially after these decisions, KCS/Tex Mex have failed to provide the Board with sufficient reason to take any steps, including adopting of a procedural schedule, toward initiation of a proceeding premised on an alleged diminution in competition.

2. The Board has repeatedly concluded, based on detailed comments and evidentiary submissions filed with it, that the merger has not adversely affected competition. Further, even if a diminution in competition had been proven (or stood a reasonable likelihood of being proven), there would be no reason to start a new

proceeding premised on the overreaching "solutions" KCS/Tex Mex propose. In large measure, those "solutions" are the same ones, first offered by the Railroad Commission of Texas, that the Board rejected — precisely because they constitute overreaching — in its February 17 decision. But they are flawed for other reasons as well.

If the Board, and the Commission before it, have made anything clear, it is that the sole justification for imposing remedial conditions is to protect *competition*, not *particular competitors*. Decision No. 44 at 145 n.176; Union Pacific Corp. — Control — Missouri-Kansas-Texas R.R., 4 I.C.C.2d 409, 460 (1988), petition for review dismissed, 883 F.2d 1079 (D.C. Cir. 1989), modified, 929 F.2d 742 (D.C. Cir. 1991); Burlington Northern, Inc. — Control and Merger — St. Louis-San Francisco Ry., 360 I.C.C 788, 951, aff'd, 632 F.2d 392 (5th Cir. 1980). Yet KCS/Tex Mex make it clear in practically the opening words of their petition that they seek conditions to protect *their operations*: "Tex Mex/KCS state that in order to for Tex Mex to be the effective provider of competitive rail service in the NAFTA corridor and to ensure Tex Mex's financial viability, Tex Mex/KCS must control, to the maximum extent possible, the management of the rail facilities over which they operate." Petition at 2 (emphasis added). KCS and Tex Mex seek protection for themselves, not for competition.

Even if the harms KCS/Tex Mex propose to show were cognizable, the radical remedy they seek — divestiture specifically to KCS, to Tex Mex, or to both of UP's Houston-Beaumont line — would be flatly inconsistent with Board precedent favoring

private agreements over governmental mandates.[1] Broad-scale restructuring of the rail system should be "left primarily to the initiative of the private sector." UP/MP/WP at 564. Thus, even in the unlikely event that the Board reversed its recent rulings and found this to be "an extreme case" warranting divestiture (Wisconsin Central Transportation Corp. — Continuance in Control — Fox Valley & Western Ltd., 9 I.C.C.2d 233, 248 (1992)), the proper course would be to order UP to divest the line to *a* carrier capable of providing sufficient competition using the divested assets, but not to order divestiture to *a particular carrier*.[2]

Finally, the suggested "remedy" would be wholly disproportionate to the harms KCS/Tex Mex propose to show. The drastic measure of forced, involuntary divestiture of UP's track between Houston and Beaumont is hardly a measured remedy appropriate to preserve "essential services" on the 157-mile line from Corpus Christi to Laredo that constitutes the entire trackage that Tex Mex owns.

In the past, the Board went quite far in Decision No. 44 to protect Tex Mex's supposed "essential services."[3] When Tex Mex returned to the Board seeking still

---

[1] KCS/Tex Mex propose various other "remedies" in addition to divestiture of the Houston-Beaumont line. Because it is clear that divestiture of the Houston-Beaumont line is at the heart of KCS/Tex Mex's request, and that the remaining remedies are not proposed as "stand-alone" remedies, we do not comment separately on those proposals, except to note that BNSF's position concerning the Houston Belt and Terminal Railway has been stated in BNSF's filings in Finance Docket Nos. 33461, 33462, 33463, and 33507.

[2] Furthermore, were the Board to select a particular carrier, KCS/Tex Mex, with its limited route system, would be a dubious choice.

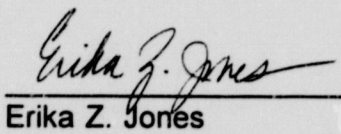
[3] As the Board is aware, BNSF believes that the Board went too far, and is challenging the award of trackage rights to Tex Mex before the D.C. Circuit. Even if the Board's action in Decision No. 44 was correct, however, it provides no support for the vastly greater "relief" KCS/Tex Mex seeks here.

greater rights as a means to enhance its revenue and thereby further protect its "essential services," the Board firmly rejected its entreaties. See Decision No. 62 (served Nov. 27, 1996). Having failed in its efforts to receive a relatively modest expansion of its rights (removal of the requirement that traffic handled on Tex Mex's merger-related trackage rights have a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line), Tex Mex now comes to the Board seeking a vastly more expansive and intrusive remedy. The concerns of disproportionality that motivated the Board in Decision No. 62 apply *a fortiori* here.

For the foregoing reasons, BNSF urges the Board to deny the KCS/Tex Mex petition. There is no reason to reopen issues so recently decided by the Board in order to pursue remedies fundamentally inconsistent with Board and Commission precedent.

At a minimum, the Board should decline to impose a procedural schedule (or to require any responsive filings at all) unless and until the Board preliminarily reviews the evidentiary submission that KCS/Tex Mex propose to make in late March, and determines that it states a minimally plausible claim for relief. Given the inconsistency of the KCS/Tex Mex proposal with settled Board precedent, as well as the absence of proof that UP's service problems constitute cognizable competitive harm resulting from the UP/SP merger, the Board should not allow KCS/Tex Mex to force the Board and parties to expend resources debating a request for relief that cannot possibly succeed.

Respectfully submitted,



Erika Z. Jones
Adrian L. Steel, Jr.
David I. Bloom
Roy T. Englert, Jr.

Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Jeffrey R. Moreland
Richard E. Weicher
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

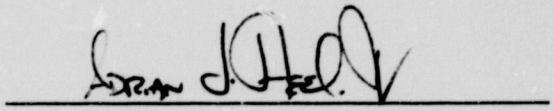
1700 East Golf Road
Schaumburg, Illinois 60173
(847) 995-6887

Attorneys for The Burlington Northern and Santa Fe Railway Company

March 4, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of BNSF in Opposition to KCS/Tex Mex Petition for Additional Remedial Conditions (BNSF-5) was 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).



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

March 4, 1998

VIA HAND DELIVERY

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

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket, please find an original plus twenty-five (25) copies of BNSF's Reply in Opposition to KCS/Tex Mex Petition for Additional Remedial Conditions (BNSF-5). Also enclosed is a diskette containing the text of BNSF-5.

Please date-stamp the enclosed extra copy and return it to the messenger for our files. Please contact me at (202) 778-0642 if you have any questions. Thank you.

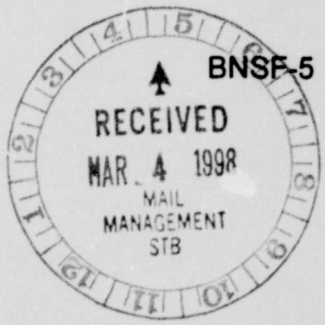
Sincerely,

Erika Z. Jones

Erika Z. Jones

Enclosures

cc: Parties of 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

REPLY OF BNSF IN OPPOSITION TO KCS/TEX MEX PETITION FOR ADDITIONAL REMEDIAL CONDITIONS

Jeffrey R. Moreland
Richard E. Weicher
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

Erika Z. Jones
Adrian L. Steel, Jr.
David I. Bloom
Roy T. Englert, Jr.

Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Attorneys for The Burlington Northern and Santa Fe Railway Company

March 4, 1998

BNSF-5

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

REPLY OF BNSF IN OPPOSITION TO KCS/TEX MEX PETITION FOR ADDITIONAL REMEDIAL CONDITIONS

The Burlington Northern and Santa Fe Railway Company ("BNSF") respectfully submits this opposition to the relief that The Kansas City Southern Railway Company ("KCS") and The Texas Mexican Railway Company ("Tex Mex") seek in their February 12, 1998 petition for additional remedial conditions. The Board should deny their petition outright, for the reasons discussed below. Even if the Board is not prepared to deny the petition before KCS/Tex Mex make the full evidentiary presentation promised in their February 12 petition, the Board should at least reject their request to establish a procedural schedule to consider their proposal. KCS/Tex Mex's February 12 petition has already demonstrated that the relief they seek should not and cannot be granted without doing violence to Board and Commission precedent.

The Board should not set a procedural schedule unless and until, after KCS/Tex Mex have filed their promised evidentiary submission and any required applications for

the specific relief they seek, it finds that there is some possibility that the Board will grant the requested relief. Because the relief sought (as described in the February 12 petition) is inconsistent with Board and Commission precedent, including very recent findings, it is extremely unlikely that the Board could or would ever make such a finding.

KCS/Tex Mex are not petitioning for an extension or revision of the Emergency Service Order. Instead, they are urging the Board to transform temporary emergency measures, themselves not justified by KCS/Tex Mex, into permanent revisions to the merger conditions. However, even if UP's service problems continue, the KCS/Tex Mex proposal to impose new conditions on the merger would not be justified unless (1) those problems could be traced to a loss of competition resulting from the UP/SP merger, and (2) the particular remedies suggested by KCS/Tex Mex for those competitive problems are appropriate in light of precedent. The Board has rejected both contentions, and there is no basis for commencing an extensive proceeding to reconsider recent findings.

1. The Board has found on three separate occasions that there is no proof that the UP service problems result from decreased competition traceable to the UP/SP merger. Only two weeks ago, in STB Service Order No. 1518 (Denial of Request for Reconsideration filed by Railroad Commission of Texas) (served Feb. 17, 1998), the Board chided the Railroad Commission of Texas, which was promoting actions similar to those now proposed by KCS/Tex Mex, for "claim[ing], without specific proof, that UP/SP's service problems were caused by a lack of competition" and for asserting "without support" that UP's service problems result from increased concentration effected by the UP/SP merger. Slip op. 4 & n.7. The Board further stated (slip op. 6):

> [T]he evidence does not lead to the conclusion that approval of the merger was the cause of the service emergency * * *.

Earlier, the Board in UP/SP Decision No. 77 (served Jan. 7, 1998) stated that "in Decision No. 44 [the Board] imposed a coherent set of conditions *that seems to be working well to date in preserving competition*." Slip op. 7 (emphasis added). And, in the more detailed Oversight Decision No. 10 (served Oct. 27, 1997), slip op. 2, the Board stated:

> [T]he evidence submitted does not indicate any reduction in competition in the markets that UP services, which is the focus of the oversight condition imposed by the Board in its approval of the merger. Rather, the record reflects that [service] disruptions have been caused by a variety of factors, including UP's efforts to rehabilitate the deteriorating SP system and establish facilities that will ultimately benefit shippers with improved service, and by other system integration efforts that have not proceeded as they should have.

The Board has not foreclosed the possibility that someone might yet prove competitive harm stemming from the merger, but the Board has made it clear that it will require proof, not mere assertion, that UP's service problems reflect such competitive harm. No such proof is contained, or even promised, in the February 12 KCS/Tex Mex petition. Especially after these decisions, KCS/Tex Mex have failed to provide the Board with sufficient reason to take any steps, including adopting of a procedural schedule, toward initiation of a proceeding premised on an alleged diminution in competition.

2. The Board has repeatedly concluded, based on detailed comments and evidentiary submissions filed with it, that the merger has not adversely affected competition. Further, even if a diminution in competition had been proven (or stood a reasonable likelihood of being proven), there would be no reason to start a new

proceeding premised on the overreaching "solutions" KCS/Tex Mex propose. In large measure, those "solutions" are the same ones, first offered by the Railroad Commission of Texas, that the Board rejected — precisely because they constitute overreaching — in its February 17 decision. But they are flawed for other reasons as well.

If the Board, and the Commission before it, have made anything clear, it is that the sole justification for imposing remedial conditions is to protect *competition*, not *particular competitors*. Decision No. 44 at 145 n.176; Union Pacific Corp. — Control — Missouri-Kansas-Texas R.R., 4 I.C.C.2d 409, 460 (1988), petition for review dismissed, 883 F.2d 1079 (D.C. Cir. 1989), modified, 929 F.2d 742 (D.C. Cir. 1991); Burlington Northern, Inc. — Control and Merger — St. Louis-San Francisco Ry., 360 I.C.C. 788, 951, aff'd, 632 F.2d 392 (5th Cir. 1980). Yet KCS/Tex Mex make it clear in practically the opening words of their petition that they seek conditions to protect *their operations*: "Tex Mex/KCS state that in order to for Tex Mex to be the effective provider of competitive rail service in the NAFTA corridor and to ensure Tex Mex's financial viability, Tex Mex/KCS must control, to the maximum extent possible, the management of the rail facilities over which they operate." Petition at 2 (emphasis added). KCS and Tex Mex seek protection for themselves, not for competition.

Even if the harms KCS/Tex Mex propose to show were cognizable, the radical remedy they seek — divestiture specifically to KCS, to Tex Mex, or to both of UP's Houston-Beaumont line — would be flatly inconsistent with Board precedent favoring

private agreements over governmental mandates.[1] Broad-scale restructuring of the rail system should be "left primarily to the initiative of the private sector." UP/MP/WP at 564. Thus, even in the unlikely event that the Board reversed its recent rulings and found this to be "an extreme case" warranting divestiture (Wisconsin Central Transportation Corp. — Continuance in Control — Fox Valley & Western Ltd., 9 I.C.C.2d 233, 248 (1992)), the proper course would be to order UP to divest the line to *a* carrier capable of providing sufficient competition using the divested assets, but not to order divestiture to *a particular carrier*.[2]

Finally, the suggested "remedy" would be wholly disproportionate to the harms KCS/Tex Mex propose to show. The drastic measure of forced, involuntary divestiture of UP's track between Houston and Beaumont is hardly a measured remedy appropriate to preserve "essential services" on the 157-mile line from Corpus Christi to Laredo that constitutes the entire trackage that Tex Mex owns.

In the past, the Board went quite far in Decision No. 44 to protect Tex Mex's supposed "essential services."[3] When Tex Mex returned to the Board seeking still

---

[1] KCS/Tex Mex propose various other "remedies" in addition to divestiture of the Houston-Beaumont line. Because it is clear that divestiture of the Houston-Beaumont line is at the heart of KCS/Tex Mex's request, and that the remaining remedies are not proposed as "stand-alone" remedies, we do not comment separately on those proposals, except to note that BNSF's position concerning the Houston Belt and Terminal Railway has been stated in BNSF's filings in Finance Docket Nos. 33461, 33462, 33463, and 33507.

[2] Furthermore, were the Board to select a particular carrier, KCS/Tex Mex, with its limited route system, would be a dubious choice.

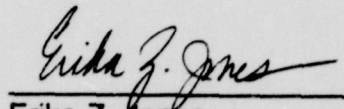
[3] As the Board is aware, BNSF believes that the Board went too far, and is challenging the award of trackage rights to Tex Mex before the D.C. Circuit. Even if the Board's action in Decision No. 44 was correct, however, it provides no support for the vastly greater "relief" KCS/Tex Mex seeks here.

greater rights as a means to enhance its revenue and thereby further protect its "essential services," the Board firmly rejected its entreaties. See Decision No. 62 (served Nov. 27, 1996). Having failed in its efforts to receive a relatively modest expansion of its rights (removal of the requirement that traffic handled on Tex Mex's merger-related trackage rights have a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line), Tex Mex now comes to the Board seeking a vastly more expansive and intrusive remedy. The concerns of disproportionality that motivated the Board in Decision No. 62 apply *a fortiori* here.

For the foregoing reasons, BNSF urges the Board to deny the KCS/Tex Mex petition. There is no reason to reopen issues so recently decided by the Board in order to pursue remedies fundamentally inconsistent with Board and Commission precedent.

At a minimum, the Board should decline to impose a procedural schedule (or to require any responsive filings at all) unless and until the Board preliminarily reviews the evidentiary submission that KCS/Tex Mex propose to make in late March, and determines that it states a minimally plausible claim for relief. Given the inconsistency of the KCS/Tex Mex proposal with settled Board precedent, as well as the absence of proof that UP's service problems constitute cognizable competitive harm resulting from the UP/SP merger, the Board should not allow KCS/Tex Mex to force the Board and parties to expend resources debating a request for relief that cannot possibly succeed.

Respectfully submitted,



Erika Z. Jones
Adrian L. Steel, Jr.
David I. Bloom
Roy T. Englert, Jr.

Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Jeffrey R. Moreland
Richard E. Weicher
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

March 4, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of BNSF in Opposition to KCS/Tex Mex Petition for Additional Remedial Conditions (BNSF-5) was 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).