STB FD 32760 (Sub 26) 11-10-98 I 192183

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November 10 1998

HAND DELIVERY
The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Room 711
Washington, D.C. 20423

Re: Finance Docket No. 32760 (Sub 26-32)

Enclosed for filing in the above captioned docket are the original and twenty six copies of the Motion to Strike Union Pacific's October 27, 1998 Letter, or alternatively, Sur-rebuttal in Support of the Consensus Plan

Also enclosed is a 3.5-inch computer disk containing the enclosed motion in WordPerfect 5.1 format.

Please date stamp the enclosed extra copy of the pleading and return it to the messenger for our files.

Sincerely yours,

ENTERED
Office of the Secretary

NOV 12 1998

Part of
Public Record

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

Enclosures

ORIGINAL

CMA-10 SPI-10
RCT-9 TCC-10
TM-26 KCS-17

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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 TO STRIKE UNION PACIFIC'S OCTOBER 27, 1998 LETTER, OR ALTERNATIVELY, SUR-REBUTTAL IN SUPPORT OF THE CONSENSUS PLAN

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

November 10, 1998

(* and embraced sub-dockets)

CMA-10 SPI-10
RCT-9 TCC-10
TM-26 KCS-17

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INTRODUCTION AND SUMMARY

On October 27, 1998, counsel for Union Pacific, submitted a letter to Secretary Vernon Williams (hereinafter "UP Letter") in the above referenced docket number. The express purpose of the letter was to constitute a "reply" to the October 16 rebuttal filing by the Consensus Parties. The Consensus Parties move to strike the UP Letter on the grounds that it constitutes an impermissible reply to a reply prohibited under 49 C.F.R. 1104.13(c).

While UP claims it is "strongly adverse to burdening the Board and the record by tendering additional, sur-reply materials," UP nonetheless then proceeds to do just that and replies to the Consensus Parties' rebuttal on the grounds that it is entitled to do so because the Consensus Parties' rebuttal contained "two items of [new] evidence." UP Letter at 1. The Consensus Parties emphatically disagree with UP's characterization that any portion of the

Consensus Parties' rebuttal contained "new" evidence. In the event the Board does not strike the UP Letter, the Consensus Parties believe they are entitled to file sur-rebuttal and therefore respectfully request that the Board accept the following evidence and argument in rebuttal of the UP Letter.

ARGUMENT

The Board's rule prohibiting a reply to a reply is very clear and emphatically states that "[a] reply to a reply is not permitted." 49 C.F.R. 1104.13(c). While the Consensus Parties recognize that the Board and its predecessor sometimes have waived this rule in the interest of developing a complete record, UP's inaccurate allegations do not provide sufficient grounds to waive this long standing rule. Neither Messrs. Grimm, Plaistow nor Thomas presented any new evidence as part of their rebuttal verified statements (hereinafter "R.V.S. Grimm/Plaistow" and "R.V.S. Thomas"). Even a cursory look at the opening filings in this proceeding made on March 30, 1998 and July 8, 1998, combined with a look at the Replies made on September 18, 1998 plainly indicates that all of the rebuttal testimony presented by these rebuttal witnesses was proper rebuttal testimony.

The evidence in the R.V.S. Grimm/Plaistow rebuttal was in direct response to UP's criticism filed on September 18, 1998. *See* V.S. Barber at 4-8, 14-53 and V.S. Peterson at 2-5, 19-22. For example, Mr. Barber states that all "2-to-1" shippers have benefited from competition between BNSF and UP. V.S. Barber at 23-24. Mr. Barber than goes on to attack the value of Messrs. Grimm and Plaistow's competitive analysis because they have aggregated the traffic data including the "2-to-1" traffic. V.S. Barber at 24, including footnote 4. Mr. Peterson echoes Mr. Barber's view on the aggregated "2-to-1" traffic analysis. V.S. Peterson at 19-22. As a result, it is proper rebuttal for Messrs. Grimm and Plaistow to submit a study separating out the "2-to-1" traffic and rebutting UP's allegations made in its September 18, 1998 filing.

Accordingly, while the R.V.S. Grimm/Plaistow "study" was new, the study was done in direct rebuttal of UP's arguments raised in its reply. This is similar to the original UP/SP proceeding where KCS moved to strike the rebuttal statements of Mr. LaLonde and Mr. Uremovich on the grounds that they were new studies and/or were inappropriate for rebuttal testimony. *Union Pacific, et al. -Control and Merger - Southern Pacific, et al.*, Finance Docket No. 32760, Decision No. 37 (STB served May 22, 1996) at 2. The Board rejected KCS's argument, finding that "each [study] [could] be properly characterized as generally rebutting some evidence, argument, or testimony submitted ... by an opponent." *Id.* at 4. The Board went on to conclude, in Decision 37, that "[i]f all 'new' testimony, evidence, and argument were stricken from the record, applicants could not properly respond to the opposition." *Id.* at 4.

UP also claims that the rebuttal evidence presented by Grimm/Plaistow on the "2-to-1" issue could have been presented in the July 8th filing. This is incorrect. In UP's reply, both Messrs. Barber and Peterson strongly criticized Grimm/Plaistow's use of second half 1997 data in the July 8th filing. V.S. Barber at 26 and V.S. Peterson at 19-20. However, UP was not required to provide first half 1998 data until July 15, 1998, a full week after the requests for new remedial conditions were due at the STB. In addition, UP did not actually forward the first half 1998 traffic data to the Consensus Parties until August 5, 1998. Thus, none of the 1998 data could have been used in the opening testimony. Grimm and Plaistow took note of UP's criticisms and updated their study to include 1998 data in their rebuttal verified statement and to take issue with UP's claims regarding 2-1 traffic. This is precisely the purpose and point of rebuttal, and was entirely proper.

Furthermore, as the party with the burden of proof, the Consensus Parties are entitled to close their case. *See UP/SP*, Finance Docket No. 32760, Decision No. 40 (STB served June 13, 1996) at 12. Equally important to note, is that the Board instituted a procedural schedule in this proceeding on May 19, 1998. *See* Decision No. 1 of *Union Pacific et al. – Control and Merger – Southern Pacific et al.*, Finance Docket No. 32760 (Sub-No. 26) (STB served May 19, 1998) (Houston/Gulf Coast Oversight).[1] Under that procedural schedule, the close of evidence and argument occurred on October 16, 1998, unless or until the Board determines that briefing, oral argument, and voting conference are necessary. Decision No. 1 at 8. As a result, UP's attempt to submit additional argument should also be stricken as untimely.

For the above cited reasons, UP's October 27, 1998 Letter should be stricken from the record.

ALTERNATIVELY, if the Board considers UP's Letter and agrees with the rationale for UP's tendering of a sur-reply, then fundamental due process requirements and prior ICC and Board precedent require that the Consensus Parties be given an opportunity to submit sur-rebuttal. The Board and its predecessor have previously accepted sur-rebuttal testimony in cases such as *Shell Chemical Company, et al. v. Boston Maine Corp., et al*, No. 41670, (STB served Dec. 8, 1997) (accepting both a reply to a reply and surrebutal) 1997 STB LEXIS 394 at *3-4 and *Gateway Western Railway Company -- Construction Exemption -- St. Clair County, IL.; Gateway Western Railway Company -- Petition Under 49 U.S.C. 10901(d)*, Finance Docket No. 32158 (Sub-No. 1), (ICC Served May 11, 1993), finding that "liberal construction of our rules is permitted where necessary to develop an adequate record." 1993 ICC LEXIS 88 at *3. See also

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1 The Board first instituted the procedural schedule in Decision No. 12 of *Union Pacific et al. – Control and Merger – Southern Pacific et al.*, Finance Docket No. 32760 (Sub-No. 21) (STB served March 31, 1998) (Oversight). The proceeding was subsequently re-designated the Houston/Gulf Coast oversight proceeding as cited above.

Association of P&C Dock Longshoremen v. The Pittsburgh Conneaut Dock Co., et al., Finance Docket No. 31363 (Sub-No. 1), 8 I.C.C.2d 280 (January 3, 1992), 1992 ICC LEXIS 27 at *13 (reply and sur-rebuttal allowed "to assure fairness and a complete factual record.")[2] Accordingly, the Consensus Parties offer the following sur-rebuttal to the inaccurate claims of UP in its October 27, 1998 Letter:

A. SURREBUTTAL TO THE CURTIS GRIMM/JOSEPH J. PLAISTOW REBUTTAL VERIFIED STATEMENT

UP makes four points in an effort to provide additional argument against the joint R.V.S. Grimm/Plaistow. Each of these points will be addressed in turn.

1. **Identification of "2-to-1" traffic.** UP claims that the R.V.S. Grimm/Plaistow includes as "2-to-1" shippers many companies that do not have "2-to-1" facilities, or any facilities at all, at the indicated locations. As examples, UP claims the following shippers are incorrectly labeled as maintaining Baytown facilities: Chevron, Fina, Advanced Aromatics, Air Products, ALCOA, Hi Port, Jim Huber, Texas Petrochemicals. UP also claims that although Carlisle Plastics at Victoria is a "2-to-1" point, it is not a "2-to-1" shipper. UP Letter at 1.

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2 Sur-rebuttal has been allowed "to complete the record" in numerous other ICC proceedings, *e.g., National Railroad Passenger Corporation and Consolidated Rail Corporation -- Application under Section 402(a) of the Rail Passenger Service Act for an Order Fixing Just Compensation*, Finance Docket No. 32467 (ICC Served January 19, 1996) 1995 ICC LEXIS 338 at *2, fn.4; *CSX Transportation, Inc. -- Abandonment -- Between South Hardeeville & North Savannah in Jasper County, SC and Chatham County, GA*, Docket No. AB-55 (Sub-No. 469), (ICC Served December 10, 1993), 1993 ICC LEXIS 270 at *21 and 27; *Coal, Wyoming to Redfield, AR*, No. 37276 (Sub-No. 1), (December 7, 1984) 1984 ICC LEXIS 85 at *1; *Potomac Electric Power Co. v. Consolidated Rail Corp.*, No. 36114 (Sub-No. 1), 367 I.C.C. 532 (July 22, 1983) 1983 ICC LEXIS 22 at *8; *Increased Rates on Coal, Midwestern Railroads, August 1979*, No. 37246, 364 I.C.C. 29 (June 16, 1980) 1980 ICC LEXIS 79 at *5; *Trainload Rates on Radioactive Materials, Eastern Railroads*, Docket No. 9205, 362 I.C.C. 756 (April 11, 1980) 1980 ICC LEXIS 98 at *5 and 9-10; *Radioactive Materials, Special Train Service, Nationwide*, No. 36325, 359 I.C.C. 70 (March 8, 1978) 1978 ICC LEXIS 88 at *17); *Investigation of the Railroad Rate Structure -- Lumber and Lumber Products [Part 1 of 2]*, Ex Parte No. 270 (Sub-No. 7), 345 I.C.C. 2552, 1977 ICC LEXIS 61 at *5; *Determination of Cost Reimbursement Under Section 405(f) of the Rail Passenger Service Act, as Amended*, Finance Docket No. 27194 347 I.C.C. 325 (Dec. 18, 1972) 1972 ICC LEXIS 1 at *6.

Notably, as shown in more detail below, eliminating these nine shipper locations from the analysis results in BNSF's market share of terminations actually falling to 2% and UP's market share rising to 98% of terminated traffic. Nevertheless, the response as to why each of these nine shippers and locations were included is the same.

It was Union Pacific, Southern Pacific and Burlington Northern Santa Fe that identified each of these locations as "2-to-1" points. In late 1995, UP and SP furnished records which purported to list all their "2-to-1" traffic as defined by them (that is, traffic served by UP and SP only before the merger and by the merged applicants post-merger). This traffic was contained in 4 files, 2 per railroad.[3] The files received from UP and SP were designated by Grimm/Plaistow as follows and the relevant portions[4] of these files are attached to this filing as Highly Confidential Exhibits:[5]

UPO2 = UP traffic originated from "2-to-1" industries as defined by UP/SP, attached as Exhibit A;

SPO2 = SP traffic originated from "2-to-1" industries as defined by UP/SP, attached as Exhibit B;

UPD2 = UP traffic terminated at "2-to-1" industries as defined by UP/SP, attached as Exhibit C; and

SPD2 = SP traffic terminated at "2-to-1" industries as defined by UP/SP, attached as Exhibit D.

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3 It should be noted that the lists provided in 1995 did not include many shippers that should have been designated 2-to-1 shippers because nearly a year before the actual merger application was filed (but during the period in which UP and SP were negotiating their merger), SP closed many locations to reciprocal switching by UP. This action then allowed UP and SP to treat, in the merger application, these locations as "exclusive SP shippers" and not 2-to-1 shippers, even though they had been prior to the merger served by both UP and SP.

4 Exhibits A-D are excerpts of Houston "2-to-1" traffic from the traffic files provided by UP and SP back in 1995 and which were previously filed with the Board in their complete form.

5 All of the Highly Confidential Exhibits to this Motion have only been attached to the copies of the Motion filed with the STB and those copies served on counsel known to have signed the Highly Confidential Undertaking in this proceeding.

The nine shippers and locations were identified in the UP/SP files as a "2-to-1" location as follows: Chevron at East Baytown: Exhibits A and B; Fina at East Baytown: Exhibits A, B, and D; Advanced Aromatics at Baytown: Exhibits A and C; Air Products at Baytown: Exhibits A, B, and D; ALCOA at Baytown: Exhibits A and C; Hi Port at Baytown. Exhibits A; Jim Huber at Baytown: Exhibits A, B, and D; Texas Petrochemicals at Baytown: Exhibit C; and Carlisle Plastics at Victoria: Exhibits C, B, and D.

The Consensus Parties believe that UP should be estopped from declaring that these locations are not now "2-to-1" locations. UP's claim here is analogous to UP's attempt to deny BNSF access to the South Texas Liquid Terminal, Inc. which the Board recently rejected. *See UP/SP*, Finance Docket No. 32760, Decision No. 81 (STB served Oct. 5, 1998). Nevertheless, as shown more fully below, removing the disputed shippers from the R.V.S. Grimm/Plaistow calculation makes little change in UP's market share, and, in some cases, actually increases UP's market share.

UP also disputes the inclusion of the Lower Colorado River Authority ("LCRA") at Halsted, Texas as a "2-to-1" shipper. UP asserts that LCRA was not subject to the Board's "2-to-1" contract reopener condition, and, because of a contractual provision, the vast majority of LCRA's traffic has not yet become available to BNSF. Importantly, UP does not dispute that LCRA is a "2-to-1" shipper, because LCRA is listed as a "2-to-1" location on Exhibits A and C; the UP-BNSF Settlement Agreement dated September 25, 1995, Appendix A, page 2 included at page 342 of UP/SP-22, UP's "Railroad Merger Application", Volume 1, Finance Docket No. 32760; and the UP-BNSF Supplemental Agreement, dated November 18, 1995, Appendix A, page 2 included at page 359 of UP/SP-22, UP's "Railroad Merger Application", Volume 1, Finance Docket No. 32760.

UP claims that BNSF's market share is so low at LCRA because LCRA was not subject to the Board's "2-to-1" contract reopener provision. Even accepting this criticism, BNSF's overall market share of "2-to-1" traffic to the Houston BEA is virtually the same with or without the LCRA traffic. Therefore, UP's market share does not significantly change whether or not LCRA traffic is included.

Next, UP argues that the Grimm/Plaistow rebuttal statement allegedly contains data for shippers not located in the Houston BEA. For example, UP states that Mobil's Amelia, Texas, facility is located in the Port Arthur/Beaumont BEA, not the Houston BEA. Mobil's Amelia facility was included in the Grimm/Plaistow rebuttal because it was identified from BNSF's "2-to-1" customer list included as Attachment 9 to BNSF-PR-5, October 1, 1997 without the BEA identifier. Locating Amelia on the map suggested that it was either included in, or was very close to the Houston BEA. However, exclusion of the Amelia facility from the listing does not affect BNSF's market share significantly. In fact, excluding the Amelia facility would actually increase UP's overall market dominance.

As a final point under UP's issue number one in the October 27th letter, UP seems baffled that the Grimm/Plaistow rebuttal would list shippers that moved no traffic on either UP or BNSF and for which UP claims are not "2-to-1" shippers. First, as to whether or not these shippers which moved no traffic were "2-to-1" points, a simple inspection of Exhibits A-D establishes that in 1995, UP and SP identified them as "2-to-1" locations. Second, these shippers are listed simply because UP/SP identified them in 1995 as being "2-to-1" shippers. Figures 8 and 9 of the R.V.S. Grimm/Plaistow were intended to be comprehensive lists of all Houston BEA "2-to-1" shippers. If Figures 8 and 9 had not comprehensively listed all known "2-to-1" shippers, UP surely would have objected to that as well.

To further address UP's objections to the Grimm/Plaistow "2-to-1" market share analysis, Messrs. Grimm and Plaistow eliminated every shipper to which UP expressed an objection. The results are shown in Table 1 below which reproduces Figure 3 from the R.V.S. Grimm/Plaistow statement after eliminating the shippers subject to UP's objections. Significantly, as pointed out above, BNSF's market share of terminations actually falls to 2% and UP's market share rises to 98% of terminated traffic.

Table 1

		Origin ations		Termi nations	
		Cars	**Tons**	**Cars**	**Tons**
UP Modified	**BN**	9.2%	9.1%	1.7%	1.5%
	UP	90.8%	90.9%	98.3%	98.5%
	Total	100.0%	100.0%	100.0%	100.0%
Original Market Shares	**BN**	8.8%	8.7%	9.3%	9.4%
	UP	91.2%	91.3%	90.7%	90.6%
	Total	100.0%	100.0%	100.0%	100.0%

2. **Comparison of Houston BEA v. Western U.S.** In its second point, UP argues that the Grimm/Plaistow rebuttal is not representative of the experiences of "2-to-1" shippers throughout the Western United States. UP Letter at 2. UP does not substantiate this claim and it merely states that Grimm/Plaistow's Houston BEA "2-to-1" shippers cannot be representative because there are a fewer number of shippers in the Houston BEA than in the entire Western United States. Nevertheless, the actual number of shippers included does not significantly change the percentages of market share between UP and BNSF. Table 2 below is another reproduction of Figure 3 from the R.V.S. Grimm/Plaistow, but it includes a comparison of the comparable market shares from the entire Western United States, as well as the Houston BEA. The detail of the Western US market share data, which was obtained from UP and BNSF traffic data, is attached as Highly Confidential Exhibit E.

Table 2

Region		Originations Cars	Originations Tons	Terminations Cars	Terminations Tons
Houston BEA	BN	8.8%	8.7%	9.3%	9.4%
	UP	91.2%	91.3%	90.7%	90.6%
	Total	100.0%	100.0%	100.0%	100.0%
Western US	BN	11.0%	13.5%	8.2%	10.6%
	UP	89.0%	86.5%	91.8%	89.4%
	Total	100.0%	100.0%	100.0%	100.0%

Obviously, UP dominates all "2-to-1" traffic regardless of location or commodity and the figure confirms the prior Grimm/Plaistow analysis for the Houston/Gulf Coast area. Such UP market dominance makes it clear that regardless of the attempts to make BNSF a full competitive alternative to UP, the conditions imposed by the Board to preserve the pre-merger levels of competition are not working.

3. **Shipper Support.** In Item 3 of UP's October 27th letter, UP appears to argue that the fact that certain shippers have filed letters supporting the UP/SP merger unquestionably proves that BNSF has been an effective competitor to UP. The Grimm/Plaistow market share analysis proves that BNSF has not, in fact, been able to compete successfully using trackage rights over the UP landlord's rail lines. The market share analysis for both the Houston BEA and for the Western United States proves this point.

UP also argues that "none of the shippers on the Grimm/Plaistow list … has filed a statement supporting the "Consensus Plan."" UP Letter at 2. This is incorrect. Solvay Polymers, Inc. (shown on the attached Exhibits A and B) has written to the Board regarding its support for the Consensus Plan principles. The Solvay letter was also included in Volume I, CMA-4/SPI-4/RCT-3/TCC-4/TM-20/KCS-11 at page 364. In addition, the sister company of the

Baytown shipper shown on Exhibits A, B and D, the Lyondell-Citgo Refining Comp. Ltd. has filed a letter supporting the Consensus Plan's principles. The Lyondell letter can be found at page 293 of Volume I, CMA-4/SPI-4/RCT-3/TCC-4/TM-20/KCS-11. More importantly, broad shipper support for the Consensus Plan is apparent from the make up of the Consensus Parties which includes CMA, SPI and TCC. A complete analysis of the individual shipper support was addressed in the Rebuttal Verified Statement of Margaret Kinney found in Volume II of CMA-5/SPI-5/RCT-4/TCC-5/TM-21/KCS-12 at page 85.

4. <u>**Service Crisis.**</u> Item 4 of UP's October 27th letter references the impact of the service crisis. Specifically, UP states, that "[i]t is therefore not surprising that traffic did not shift from UP to BNSF – it reflects operating realities resulting from the service crisis, not a failure of competition related to the merger conditions." UP Letter at 2. UP's reference to "operating realities" is the precise proof the Consensus Parties cited as to why the STB-prescribed conditions are not working sufficiently well to preserve the pre-merger levels of competition or to provide shippers an outlet during such service crises. Any competitor needs a competitive route independent of the UP route if it is to provide a viable alternative to UP during a service crisis or even under "normal" operating conditions. Conditions prescribed in the merger decision require BNSF and Tex Mex to depend upon UP tracks and facilities, UP switching, and UP dispatching practices. As such, neither BNSF nor Tex Mex is able to provide effective competitive alternatives and to maintain the pre-merger level of competition. The Consensus Plan remedies that shortcoming.

B. SURREBUTTAL TO THE LARRY L. THOMAS REBUTTAL VERIFIED STATEMENT

UP asserts that the data submitted by Larry L. Thomas, President of SPI, in his Rebuttal Verified Statement ("R.V.S. Thomas"), regarding UP transit times is "new evidence" and further alleges the information "is grossly misleading." UP Letter at 2. Both statements are erroneous. In the July 8th Request for Adoption of a Consensus Plan, Mr. Thomas stated:

> Indeed, our members' experience with UP service, even before the onset of the service meltdown, reflect a progressive erosion of transit times following UP's agreement to merge with the Southern Pacific. This fact is demonstrated in **Exhibit D**, a graph showing average transit time for outbound plastics movements on the Union Pacific from January 1995 to May 1998.

See CMA/RCT/TM/ SPI/TCC/KCS-2 at 120 and 125, July 8, 1998. Exhibit D to that statement at page 141 of the July 8th filing, is essentially the same graph as Exhibit A to the R.V.S. that Mr. Thomas filed on October 16. The differences are the fact that Exhibit D to the July 8th Verified Statement was presented in linear form, while Exhibit A to the Mr. Thomas' October 16 Rebuttal Verified Statement is presented on a calendar-year basis, with each year shown in a different color. Another difference is that the July 8th Exhibit D covered the period January 1995 through May 1998 while the October 16 Exhibit A extends 1998 data through September.[6] Accordingly, this data is not "new evidence," and UP had an ample opportunity to refute this service evidence in its September 18 reply by presentation of factual evidence. UP did not take this opportunity and instead relies upon erroneous and non-verified argument of its counsel in the UP Letter.

UP's assertion that it has "repeatedly pointed out to SPI the defects of this data, and has repeatedly supplied correct information to SPI" also is erroneous. UP Letter at 2. When the joint SPI/UP Task Force was established, SPI asked UP to provide transit time information from shipment origin to destination for single-line movements and to gateways for interline movements. This is information which UP necessarily has in its car location message data files. The Union Pacific declined to do so. Instead, UP suggested that SPI develop the data from its members. As was recognized at that time, the ability of SPI members to retrieve historical data

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6 The same UP outbound data also is shown on Exhibits E and F of the R.V.S. Thomas.

varies by company. With full recognition of these circumstances, the Joint UP/SPI Task Force went forward and developed the data collection program.

The joint Task Force effort was initiated in January 1998. Since that time, there have been close to a dozen meetings and conference calls involving both SPI members and UP representatives. Representatives of both organizations were involved in development of the survey form. After the transit time data was developed and began to receive industry and public attention, UP in one instance did tender to the Task Force its own very selective data to indicate that service is improving. That information reflected selective movements which were not representative of a broad cross-section of UP's service to the plastics industry. Furthermore, the type of information UP tendered to the Task Force, in an effort to rebut the claims of poor service, is the same type of information which Dow and Formosa informed the Board in their rebuttal statements was not representative of UP service to their facilities. *See Reply to UP/SO's Opposition to Dow's Request for Additional Conditions*, DOW-2 and *Reply Comments of Formosa Plastics Corp. USA*, filed October 16, 1998. In no case has UP - "repeatedly" or otherwise - "pointed out to SPI the defects in these data," nor "supplied correct information to SPI, which SPI has ignored."

UP has offered four specific criticisms of the transit time survey data. Each of those criticisms is unwarranted. First, UP alleges that the data consists of a comparison of "apples to oranges to pineapples," entailing different mixes of shippers and different routes. UP Letter at 3. Five member companies are participating in the survey data. These companies represent 30% of the plastics resin production capacity nationwide, and more than 32% of the Gulf Coast resins production capacity.[7] As noted above, some companies had limitations in retrieving historical data; and accordingly, participation for 1995 and 1996 is less extensive than for 1997 and 1998. Nonetheless, those submitting data for 1996 represent more than 25% of the Gulf Coast production capacity. The data measured was average transit time for UP, including UP's traffic, the former SP traffic, and traffic switched to the UP or SP by the PTRA. No effort is made to collect data by route. The data is comparable from period to period, and UP's criticisms are unwarranted and misleading.

Second, UP asserts that some shipments measured do not originate in Texas at all and include shipments "originating, for example, in Clinton, Iowa." UP Letter at 3. Again, this is an unwarranted and misleading criticism. From the beginning of this program it was <u>mutually</u> agreed that the survey was intended to measure UP service performance system-wide. Specifically, non-Texas origins were to be included, although it also was recognized that the overwhelming majority of shipments were from the Gulf Coast, and particularly Texas.

UP objects to the inclusion of a UP exclusively-served plastics producer at Clinton, Iowa because that producer is not in the Houston/Gulf Coast area. However, the inclusion of that data properly reflects UP's service to the plastics industry. Nevertheless, the Clinton production capacity represents less than two percent of the total U.S. plastics production capacity, and less than seven percent of the production capacity of the producers participating in the survey. Moreover, data for the Clinton plant has been included only since December 1997, following a business combination involving that producer and one of the reporting companies and the

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7 The calculation of market share represented, and similar calculations in this section of the sur-rebuttal, are based upon the industry data submitted in the Verified Statement of Larry D. Ruple, Comments of The Society of the Plastics Industry, Inc., UP/SP merger, Verified Statement at Exhibit 1 (SPI-11, Mar. 29, 1996).

consolidation of those operations. UP's intimation that there are other non-Gulf production points included in the survey further confuses the record regarding UP's service performance.

Third, UP alleges that the Joint Task Force's data shows identical transit times for shipments from origin to final destination as for shipments from origin to interchange. SPI, for the Joint Task Force, did not collect data to interchange points. As discussed above, UP refused to provide data from origin to gateway; and in order to obtain consistent information for each of the participating producers, the Task Force determined to utilize origin to destination data. One entry on the data survey forms provides transit information for movements from origin, *i.e.*, production plants, to destination inside Houston. These movements typically entail product moving from production plants to contract packagers since most plants load all production directly into hopper cars. What this data reveals is that transit times for local movements purely within Houston may be equal to movements that move half way across the country, and which require an interchange. While UP attributes this situation to 1995 and 1996, in fact some data reports in 1997 and even 1998 reflect that average transit times for movements within Houston were similar to — and even greater than — the average for all UP shipments, reflecting the serious problems UP experienced in the Houston terminal area.

Finally, UP criticizes SPI's characterization of the transit time as "UP only," asserting that 70% of the traffic is interline business. The "UP only" designation, as agreed by the Task Force, reflects that UP was the origin line-haul carrier, whether handled by UP itself, the former SP or the PTRA and switched to the UP or SP. Again, the data reflects origin to destination movements since that was the data that was most readily available to the member companies after UP had declined to provide transit information from its records which could have limited the transit time analysis to UP service only (single-line movements and origin to interchange).

UP further attempts to attribute its own delays, without quantification or specification, to problems on other railroads ("transit times for this traffic often reflect congestion, delays, flooding and other problems"). In fact though, whatever delays may have been experienced on the lines of other carriers, they were of short duration and in no way explain the continual erosion of UP service from the Fall of 1995 and continuing into 1998.

The data presented by Mr. Thomas reflects exactly what it is stated to portray: that rail service on the Union Pacific has deteriorated since the Fall of 1995 and that service levels today are grossly inferior compared to pre-merger levels. Considering that approximately 90% of plastics resins capacity exists in the Gulf Coast; that UP has access to approximately 90% of that Gulf Coast production and UP exclusively serves almost 40% of that traffic;[8] and considering the public record concerning the UP service meltdown, there can be no doubt that the graphs attached to the R.V.S. Thomas accurately depict UP service quality in Houston and the Gulf Coast generally. This evidence clearly shows that UP's Houston/Gulf Coast area service problems are not over, contrary to the assertion in the UP Reply. All of these issues were raised in the opening testimony and were then replied to by UP, making them proper for rebuttal. UP's criticisms of the Joint Task Force's transit time data are erroneous. Furthermore, UP having declined to provide comprehensive data from its car location message records, it should not now be heard to complain that the Joint Task Force survey data does not accurately report the quality of UP's performance.

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8 *See* Ruple V.S. at Exhibits 2 and 3.

CONCLUSION

For the forgoing reasons, Union Pacific's October 27, 1998 letter to the Board should be stricken from the record in this proceeding. Alternatively, if the Board decides not to strike UP's letter, then the preceding sur-rebuttal should be entered into the record.

VERIFICATION

I, Dr. Curtis M. Grimm, affirm under penalty of perjury that the facts of Part A of the foregoing Sur-rebuttal statement are true and correct based on my knowledge, information and belief.

Curtis M. Grimm
Dr. Curtis M. Grimm

Date: 11/10/98

VERIFICATION

I, Joseph J. Plaistow, affirm under penalty of perjury that the facts of Part A of the foregoing Sur-rebuttal statement are true and correct based on my knowledge, information and belief.

Joseph J Plaistow
Joseph J. Plaistow

Date: 11/10/98

VERIFICATION

I, Maure... A. Healey, state that I am the Director of Transportation at The Society of Plastics Industry, Inc. and I am responsible for the management of the Joint Task Force data collection and I affirm under penalty of perjury that the facts of Part B of the foregoing Sur-rebuttal statement are true and correct based on my knowledge, information and belief.

Maureen A. Healey

Maureen A. Healey

Date: 11/10/98

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

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the "**MOTION TO STRIKE UNION PACIFIC'S OCTOBER 27, 1998 LETTER, OR ALTERNATIVELY, SUR-REBUTTAL IN SUPPORT OF THE CONSENSUS PLAN**" was served this 10th day of November, 1998, by hand delivery to counsel for Union Pacific Railroad Company, counsel for Burlington Northern and Santa Fe Railway Company and by first class mail upon all other parties of record in the Sub-No. 26 oversight proceedings.

Sandra Brown

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

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October 23, 1998

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HAND DELIVERY
Honorable Vernon A. Williams
Case Control Unit
Attn: STB FD 32760 (Sub-Nos. 26-32)
Surface Transportation Board
Room 700
1925 K Street, N.W.
Washington, D.C. 20006

RE: Finance Docket No. 32760 (Sub-Nos. 26 - 32), *Union Pacific Corp., et al. – Control & Merger – Southern Pacific Rail Corp., et al. – Houston/Gulf Coast Oversight*

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceedings are an original and twenty-six copies of the Consensus Parties' Request for Oral Argument, CMA-9, *et al.*, filed on behalf of The Chemical Manufacturers Association, The Society of Plastics Industry, Inc., The Railroad Commission of Texas, The Texas Chemical Council, The Texas Mexican Railway, and The Kansas City Southern Railway Company (collectively, the "Consensus Parties"). Also enclosed is 3.5-inch diskette containing the text of the pleading in WordPerfect format.

Please date and time stamp one copy of the enclosed Consensus Parties' Request for Oral Argument for return to our offices.

Sincerely,

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

cc: Parties of Record
Honorable Stephen J. Grossman

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Office of the Secretary

OCT 26 1998

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CMA-9 SPI-9
RCT-8 TCC-9
TM-25 KCS-16

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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

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HOUSTON/GULF COAST OVERSIGHT PROCEEDING

CONSENSUS PARTIES' REQUEST FOR ORAL ARGUMENT

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

October 23, 1998

(and embraced sub-dockets)

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

CONSENSUS PARTIES' REQUEST FOR ORAL ARGUMENT

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, the "Consensus Parties") hereby petition the Surface Transportation Board ("STB" or "Board") to conduct oral argument in this proceeding to allow the Board give and take with the parties to clarify the wide-ranging and complex issues in this important proceeding. The Consensus Parties request that the Board schedule oral argument the week of November 30, 1998, unless the Board determines that briefs are required prior to the argument, in which case oral argument during the week beginning December 7 is suggested. The Consensus Parties request 90 minutes' argument each for the Consensus Parties and for Union Pacific Railroad Company ("UP"), with 40 minutes allocated to The Burlington Northern and

Santa Fe Railway Company ("BNSF") and such lesser periods allocated to other interested parties as may be appropriate.

SUMMARY

Because of the importance and complexity of this proceeding, the Board should give this matter its full attention through the give and take of oral argument. The issues presented in this proceedin[illegible] very important, as demonstrated by the damage caused by the western rail service crisis stemming from UP's failure to maintain fluid rail operations in Houston, by the scope of damage UP alleges it would incur if the Consensus Plan were granted, and by the cost of the proposed infrastructure investments at stake. The complexity of this proceeding results from the number and diversity of the issues, with matters ranging from economic theory and Constitutional law to how well a particular switching plan will function and how great an increase in effective capacity will result from double-tracking the Lafayette Subdivision, and from the size of the written record. The importance and complexity of this proceeding, which seeks to determine the relationship between UP's consolidation of market power in Houston and the service crisis, and whether a change in conditions to the merger is needed to remedy that relationship, dictate the need for oral argument of these matters before the Board.

ARGUMENT SUPPORTING PETITION

Oral argument is warranted in proceedings which, because of the significance and complexity of issues they present, call for full consideration by the Board through the give and take of oral argument. This is such a proceeding.[1]

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[1] This petition is submitted pursuant to 49 C.F.R. Parts 1116 and 1117.

Oral argument normally is conducted in proceedings which, like the insta : matter, involve complex and significant issues, particularly those involving major rail mergers. Oral argument is a standard feature of major merger or control proceedings before the Board. *See generally Canadian National Railway Company, et al.—Control—Illinois Central Corporation, et al.*, STB Finance Docket No. 33556, Decision No. 11, served Oct. 2, 1998 at 8, and *CSX Corporation, et al.—Control and Operating Leases/Agreements—Conrail Inc., et al.*, STB Finance Docket No. 33388, Decision No. 6, served May 30, 1997 at 9 (each including oral argument as part of the basic procedural schedule for the matter). Indeed, the Board scheduled five hours of argument time to allow its full consideration of the original UP/SP merger application, with the argument itself lasting much longer because of the valuable give and take between parties and the Board. *See Union Pacific Corporation, et al.—Control and Merger—Southern Pacific Rail Corporation, et al.*, STB Finance Docket No. 32760 (and embraced sub dockets), Decision No. 41, served June 19, 1996 at Appendix A. Other, non-merger matters have also been subject to oral argument before the Board and its predecessor in recent years because of their importance. *See, e.g., Central Power and Light Company v. Southern Pacific Transportation Company; Pennsylvania Power & Light Company v. Consolidated Rail Corporation; Midamerican Energy Company v. Union Pacific Railroad Company And Chicago And North Western Railway Company*, Nos. 41242, 41295 and 41626 (STB served Aug. 27, 1996) ("*Bottleneck Cases*") (rate reasonableness issues for bottleneck rail transportation considered); *City Of Detroit v. Canadian National Railway Company, et al.; Canadian Pacific Limited v. Canadian National Railway Company, et al.*, Finance Docket Nos. 32243 and 32266 (ICC served Sept. 9, 1993) ("*Detroit Tunnel*") (scope of the ICC's jurisdiction under 10901 considered); and *Wilmington Terminal Railroad, Inc.* --

Purchase And Lease --CSX Transportation, Inc. Lines Between Savannah And Rhine, and Vidalia And Macon, GA, Finance Docket No. 31530 (ICC served Jan. 22, 1990) ("*Wilmington Terminal*") (important rail labor issues raised). *See also Rail Service in the Western United States*, Ex Parte No. 573 (STB served Oct. 2, 1997) (ordering public hearing and oral presentations by affected parties due to severity of rail service emergency). Thus, in proceedings raising important issues, and particularly in merger-related matters, the Board commonly holds oral argument to allow a complete exploration of the issues.

The issues in this proceeding are important and require oral argument. First, this proceeding is an outgrowth of the UP/SP merger proceeding, and involves issues related to those argued before the Board in that matter. The relationship between the issues that were important enough to require oral argument in the original merger and the issues involved here, plus the fact that this proceeding arises as part of ongoing oversight of the UP/SP merger, weighs in favor of oral argument.[2]

Second, the impact of the issues at stake here is comparable to that of other proceedings in which the Board or the ICC conducted oral argument. The Board has conducted oral argument in cases such as the *Bottleneck Cases* and *Detroit Tunnel*, for example, because the decisions in those cases have the potential to impact large numbers of parties. The western rail service crisis has graphically demonstrated that rail operations in Houston have the ability to impact shippers and railroads throughout much of the country, as even UP conceded. "System

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[2] The 90 minute argument periods requested for the Consensus Parties and UP and the lesser periods suggested for other parties reflect the argument time allocations of the original UP/SP merger argument. *See Union Pacific Corporation, et al.—Control and Merger—Southern Pacific Rail Corporation, et al.*, STB Finance Docket No. 32760 (and embraced sub dockets), Decision No. 41, served June 19, 1996 at Appendix A.

congestion started in the Gulf Coast region and spread throughout the system as the Registrant shifted resources . . . Traffic slowed further as rail yards in the Gulf Coast region filled, slowing access into and out of the yards and forcing trains to be held on sidings." UP 10-K dated March 30, 1998, filed with the Securities and Exchange Commission at 2 - 3. Because the Board's decision in this matter will affect an important rail corridor where fluidity of rail operations can have widespread effects, oral argument is warranted.

Third, the practical and financial impact of matters at issue here also call for full exploration of the issues through oral argument. The service crisis of the past year started in Houston. That crisis has had huge financial impacts across the nation. As early in the crisis as February 1998, economists were already estimating the damages to Texas shippers alone at more than $1.1 billion, and at $2.0 billion nationally. *See* Consensus Plan[3] at 192 and 210. Losses of this magnitude in current dollars effectively cancel out even the optimistic projections of future shipper logistics benefits that UP's merger application predicted would result after full implementation of the merger. *See generally* Railroad Merger Application, UP/SP-22, Volume 1, filed November 30, 1995 in Finance Docket No. 32760 at 8.[4] The Consensus Plan is designed to help assure that the crisis and deteriorated rail service that western U.S. rail shippers have endured for more than a year do not recur. It will do so in part by adding many millions of

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[3] *Request for Adoption of a Consensus Plan In Order to Resolve Service and Competitive Problems in the Houston/Gulf Coast Area*, CMA-2, SPI-2, RCT-2, TCC-2, TM-2, KCS-2, Finance Docket No. 32760 (Sub-No. 26), filed July 8, 1998 ("Consensus Plan").

[4] The discounted current value of those approximately $90 million in deferred shipper logistics benefits is far less than the costs already inflicted on shippers by the UP service meltdown; that is, even if UP's projected shipper logistics benefits ever arose, they never could make up the losses shippers already have suffered. Moreover, the Consensus Parties' rebuttal shows that UP's projected shipper logistics benefits will not materialize. *Rebuttal Evidence and Argument in Support of the Consensus Plan*, CMA-4, SPI-4,

dollars' worth of new Gulf Coast infrastructure, and by ensuring that Houston rail operations do not become gridlocked again as has happened during the past year. Because of the economic impact throughout the West of such changes,[5] and because of the size of the new infrastructure investment which the Consensus Plan offers, the Consensus Plan and UP's response thereto deserve thorough consideration by the Board. Oral argument will facilitate that consideration.

Oral argument also is needed in this matter because the issues in this proceeding are complex, wide-ranging and hotly disputed. Issues presented range from economic issues of what conditions encourage infrastructure investment to Constitutional "takings" issues raised by UP (and rebutted by the Consensus Parties) to nuts and bolts issues of how effectively a particular type of switching operation will function or the extent to which the proposed double tracking of the Lafayette Subdivision will increase the effective capacity of that line. Thus, issues presented range from somewhat esoteric economic and legal questions to very practical issues of how best to utilize or augment existing rail facilities. Because of the diversity and complexity of these issues, the give and take of oral argument would be an effective tool for the Board.

That the parties have not briefed this proceeding even more strongly suggests the need for oral argument. The Consensus Parties and UP each have presented over 1000 pages of written material for the Board's consideration. Oral argument in this matter would be especially useful for distilling that large volume of material. Indeed, the give and take between the Board and the parties at oral argument would be very effective in that respect because the parties could directly address the issues that are of the most concern to the Board, focusing the Board's examination on

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RCT-3, TCC-4, TM-20, KCS-11, Finance Docket No. 32760 (Sub-No. 26 and embraced sub dockets), filed Oct. 16, 1998, Vol. 1 at 81-2, Vol. II at 110.

crucial points.[6] Again, oral argument is an effective and necessary tool available for the Board's use in this complex matter.

The ultimate issue in this proceeding - "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, and, if so, whether the situation should be addressed through additional remedial conditions"[7] - is as hotly disputed as it is complex. Unquestionably, the Consensus Parties have answered the Board's question affirmatively; that is, that UP's accumulation of market power through its merger with SP is related to the rail service crisis, and that additional remedial conditions proposed by the Consensus Plan are necessary to prevent a recurrence of the crisis and to deliver benefits to rail shippers that UP has promised but cannot deliver. UP, on the other hand, takes exactly the opposite view. Because the views of the principal parties are so diametrically opposed, the Board needs to test those views and the evidence that underlies them through the direct interchange of questions and answers that only oral argument will allow.

CONCLUSION

The importance of this proceeding and the complex and wide-ranging issues it presents dictate the need for oral argument before the Board. The unprecedented western rail service crisis stemmed from the inability of Union Pacific Railroad Company ("UP") to maintain fluid

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[5] Including UP's claims of prospective financial losses if the Consensus Plan is implemented.

[6] "[T]he purpose of the oral argument is . . . to summarize and emphasize the key points of each party's case and to provide an opportunity for questions from Members of the Board." *CSX Corporation, et al.—Control and Operating Leases/Agreements—Conrail Inc., et al.*, STB Finance Docket No. 33388, Decision No. 80, served May 12, 1998, 1998 WL 331620 at *1.

[7] *Union Pacific Corporation, et al.—Control and Merger—Southern Pacific Rail Corporation, et al., Oversight*, STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 12, served March 31, 1998 at 8.

rail operations in Houston. The result of that crisis was a loss to Texas businesses alone by February 1998 of more than $1.1 billion, with estimates of damage to shippers nationwide during the past 15 to 18 months being much larger. The scope of those damages, their effective nullification of the shipper logistics benefits which UP projected would result from the merger, and the many millions of dollars in new infrastructure investment riding on the outcome of this proceeding require the Board's utmost attention by all available means, including oral argument. The complexity and diversity of the issues involved and the size of the written record also call for distillation of the crucial issues through the medium of oral argument.

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I hereby certify that a true copy of the "**CONSENSUS PARTIES' REQUEST FOR ORAL ARGUMENT**" was served this 23rd day of October, 1998, by hand delivery to counsel for Union Pacific Railroad Company and Burlington Northern and Santa Fe Railway Company and on Judge Grossman, by overnight delivery service to the Port Terminal Railway Association and the Houston Belt & Terminal Railway Company, by first class mail upon all other known parties of record in the Sub-No. 26 oversight proceedings.

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Railway Company

STB FD 32760 (Sub 26) 9-18-98 I 191223 1/3

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BEFORE THE

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 26) 191223
FINANCE DOCKET NO. 32760 (Sub-No. 28) 191224
FINANCE DOCKET NO. 32760 (Sub-No. 29) 191225

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

THE TEXAS MEXICAN RAILWAY COMPANY'S RESPONSE AND OBJECTIONS TO THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY'S APPLICATION FOR ADDITIONAL REMEDIAL CONDITIONS REGARDING THE HOUSTON/GULF COAST AREA

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September 18, 1998

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Frank Bailey Grain Co., Inc.
Wright Materials, Inc.
Barr Iron & Metal Company
Gulf Compress
Ray West Warehouse, Inc.
Ingram Readymix Inc.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 26)
FINANCE DOCKET NO. 32760 (Sub-No. 28)
FINANCE DOCKET NO. 32760 (Sub-No. 29)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --
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HOUSTON/GULF COAST OVERSIGHT

THE TEXAS MEXICAN RAILWAY COMPANY'S RESPONSE AND OBJECTIONS TO THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY'S APPLICATION FOR ADDITIONAL REMEDIAL CONDITIONS REGARDING THE HOUSTON/GULF COAST AREA

The Texas Mexican Railway Company ("Tex Mex") hereby submits its response and objections to the application for additional remedial conditions regarding the Houston/Gulf Coast area filed by the Burlington Northern and Santa Fe Railway Company ("BNSF") on July 8, 1998 in Finance Docket No. 32760 (Sub-No. 29) as part of the Houston/Gulf Coast Oversight proceeding (Finance Docket No. 32760 (Sub-No. 26)), and the accompanying terminal trackage rights application filed in Finance Docket No. 32760 (Sub-No. 28). Although portions of BNSF's proposal are unobjectionable, Tex Mex strenuously opposes, and urges the Board to reject, BNSF's request for overhead trackage rights over UP's line between San Antonio and

Laredo, and the accompanying request for terminal trackage rights over the International Bridge at Laredo.

INTRODUCTION

In response to, among other things, a petition filed by Tex Mex and the Kansas City Southern Railway Company ("KCS") on February 12, 1998, the Board, as part of its five-year oversight of the Union Pacific/Southern Pacific merger, instituted a proceeding in Finance Docket No. 32760 (Sub-No. 26) to examine requests for remedial conditions to that merger as they pertain to rail service in the Houston, Texas/Gulf Coast region. The purpose of the proceeding is to permit the Board to examine "the legitimacy and viability of longer-term proposals for new conditions" to the UP/SP merger "as they pertain to service and competition" in the Houston/Gulf Coast region. Finance Docket No. 32760 (Sub-No. 26) Decision 1, slip op. at 5.

The Consensus Plan

On July 8, 1998, Tex Mex, the Kansas City Southern Railway Company, the Society of the Plastics Industry, Inc., the Chemical Manufacturers' Association, the Texas Chemical Council, and the Texas Railroad Commission, (together, the "Consensus Parties") filed with the Board an 8-point Consensus Plan that would resolve the serious service and competition problems that plague the Houston/Gulf Coast region. In brief,[1] the Consensus Plan calls for:

1. (a) Trackage rights to Tex Mex as granted to it in Decision No. 44 of the UP/SP merger proceeding, but without the restriction imposed in that decision on the type of traffic Tex Mex can carry under those rights;

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[1] For brevity's sake, discussion of the various aspects of the Consensus Plan is condensed and paraphrased here. This discussion should not be construed as altering, limiting, or interpreting the contents of Consensus Parties' July 8, 1998 evidentiary filing, which filing remains the definitive statement of the proposed Consensus Plan.

(b) Permanent trackage rights to Tex Mex over UP's Brownsville Subdivision between Placedo and Algoa, Texas, and over BNSF's line between Algoa and TN&O Junction, Texas; (c) Certain service performance reporting by Tex Mex;

2. Trackage rights and use of yards over the lines of the former Houston Belt & Terminal Railroad Company ("HB&T") to the Port Terminal Railroad Association ("PTRA") so as to permit neutral switching to all railroads serving Houston;

3. Trackage rights to PTRA over the former SP Galveston Subdivision between Harrisburg Junction and Galveston, and use of yards at Strang and Galveston, to provide neutral switching to all railroads serving Houston;

4. Neutral dispatching by PTRA within the neutral switching area, with terminal trackage rights to all railroads over all tracks serving Houston to permit the most efficient routings by PTRA dispatchers;

5. Acknowledgment by UP and BNSF of Tex Mex's full voting membership on PTRA's board, and restoration of the Port of Houston Authority as a full voting member of the PTRA board;

6. The sale to Tex Mex, on reasonable terms, of the SP line between Rosenberg and Victoria, Texas;

7. UP's sale or lease of a Houston yard to Tex Mex, at a reasonable rate; and

8. Construction by Tex Mex of a second track along UP's Lafayette Subdivision, and exchange of that new line for UP's Beaumont Subdivision, with trackage rights retained by Tex Mex over the Lafayette Subdivision and granted by Tex Mex to UP and BNSF over the Beaumont Subdivision.

<u>The BNSF Application</u>

Also on July 8, 1998, BNSF filed its own application seeking the following remedial conditions:

1. Permanent bi-directional overhead trackage rights on UP's Caldwell-Flatonia-San Antonio and Caldwell-Flatonia-Placedo lines;

2. Trackage rights over both the UP line and the SP line between Harlingen and Brownsville (until UP constructs a connection between the two lines at Brownsville), with the Brownsville & Rio Grande International Railroad ("BRGI") acting as BNSF's agent for such service;

3. Overhead trackage rights on UP's Taylor-Milano line;

4. Neutral switching supervision, by a supervisor selected by the parties, on the former SP Baytown and Cedar Bayou Branches and on the former SP Sabine and Chaison Branches serving the Beaumont-Port Arthur area;

5. PTRA operation of the Clinton Branch;

6. Overhead trackage rights enabling BNSF to join directional operations over any UP line or lines in corridors where BNSF has trackage rights over one, but not both, of the lines involved in the directional flows, including, specifically, over the Ft. Worth to Dallas line (via Arlington);

7. Trackage rights over any UP lines to permit BNSF to operate over any clear route through the Houston terminal area as determined and managed by the Spring Consolidated Dispatching Center, including the SP route between West Junction and Tower 26 via Chaney Junction;

8. Coordinated dispatching of operations over the UP and SP routes between Houston and Longview, and Houston and Shreveport, by the Spring Consolidated Dispatching Center; and

9. Overhead trackage rights on UP's San Antonio-Laredo line between MP 264.3 at South San Antonio and MP 412.51 at Laredo.

Much of the relief BNSF requests Tex Mex does not oppose *per se*; indeed, certain elements of BNSF's request are consistent with elements of the Consensus Plan. Tex Mex does not oppose the trackage rights requests listed in items 1, 2, 3, and 6 above. Moreover, BNSF's proposals for neutral switching, listed in items 4 and 5 above, are consistent with, though more limited than, the neutral switching proposal of the Consensus Plan. Tex Mex, of course, endorses the concept of neutral switching but urges the Board to adopt the Consensus Plan proposal for neutral switching, which embraces the BNSF's proposal and would provide BNSF, and all other Houston carriers, with the neutral switching that is essential for effective competition and improved service in Houston

The trackage rights BNSF requests in item 7 above -- trackage rights over any UP lines to permit BNSF to operate over any clear route through the Houston terminal area – are similar in concept to the terminal trackage rights requested in the Consensus plan intended to permit PTRA to dispatch all carriers' trains through Houston over the most efficient routing. The BNSF proposal, however, would provide trackage rights, and thus the possibility of more efficient routings, only to BNSF, and is thus a halfway measure that would benefit one Houston carrier, BNSF, at the expense of others. The Consensus Plan, on the other hand, provides for terminal trackage rights for all carriers through Houston within the proposed neutral switching and dispatching district, and thus is a far more comprehensive and pro-competitive solution that will better ensure efficient movement of traffic in and around Houston. Tex Mex, therefore, urges the Board not to adopt this element of BNSF's proposal unless the Board also adopts the Consensus Plan proposal for terminal trackage rights for all Houston carriers throughout the proposed neutral switching and dispatching district.

By far Tex Mex's greatest concern, however, and the focus of the comments and argument that follow, is BNSF's request for trackage rights over the UP line between San Antonio and Laredo. These is no justification whatever for that request. The contentions advanced by BNSF in support of it are completely without merit. Furthermore, granting the request would be fatal to Tex Mex, and would cause its shippers to lose essential transportation services.

SUMMARY OF ARGUMENT

BNSF bases its request for trackage rights over UP's rail line between San Antonio and Laredo essentially on four contentions. BNSF contends that it needs its own alternative route to Laredo through San Antonio because of: (1) traffic congestion in Houston; (2) UP's favoring of its own traffic; (3) BNSF's asserted inability to establish a competitively effective interline service with Tex Mex through Robstown, and (4) asserted "lower-than-expected" rail competition in Mexico for traffic through the Eagle Pass and Laredo gateways. Each of these contentions either is wrong, or does not support the relief requested, or both.

With respect to congestion in and around Houston, BNSF does not need a route through San Antonio to avoid that congestion. BNSF-originated traffic destined for Laredo can avoid the Houston area today by proceeding south from Caldwell through Flatonia and Placedo to Robstown, and from there to Laredo via the Tex Mex. BNSF's traffic to Laredo in fact moves that way today. That route is less congested than a route through San Antonio, which is heavily used. Tex Mex also has made and is making substantial investments in its own system to increase capacity significantly on its route to Laredo.

BNSF is correct that UP often favors its own traffic over that of its trackage rights tenants in the dispatching of traffic over its own lines. While UP's tendency to favor its own trains is a reason to adopt the neutral switching and neutral dispatching proposals of the Consensus Plan, it provides no support for BNSF's request for additional trackage rights over UP. Additional rights over UP will not rectify or help to compensate for UP's tendency to favor its own traffic.

BNSF's claim that it is unable to establish competitively effective interline service with Tex Mex is simply wrong. As detailed in the verified statement of Tex Mex's president, Larry Fields, Tex Mex has negotiated terms with BNSF for interline Tex Mex/BNSF service that is fully competitive with UP service, and had been led to believe those terms were acceptable to BNSF. There is no truth to BNSF's charge that the Kansas City Southern Railroad Company ("KCS") is preventing Tex Mex from establishing a competitive service with BNSF. It is clearly in both Tex Mex's and KCS's interests for Tex Mex to attract as much BNSF traffic as it can and to make it as competitive as possible.

There is also no truth to BNSF's claim that rail competition in Mexico between the railroads serving the Laredo and Eagle Pass gateways has failed to materialize, contrary to expectations, and is less than before the UP/SP merger. As shown in the verified statement of Brad Skinner, Executive Vice President of Transportacion Ferroviaria Mexicana ("TFM"), this claim is refuted by BNSF's own actions. After the new private railroad that acquired the line to Eagle Pass (which is part of the Pacific-Northwest concession) commenced operations in February 1998, BNSF began diverting to Eagle Pass, and thus to TFM's competitor there, substantial amounts of traffic that it had previously routed through Tex Mex to TFM at Laredo. For BNSF to do so and then to claim that there is no competition between the Mexican carriers serving the Laredo and Eagle Pass gateways is astonishing, to say the least.

BNSF's request for trackage rights also cannot be justified by reason of any need to prevent the UP/SP merger from reducing competition from pre-merger levels. In Decision No. 44 approving the UP/SP merger, the STB conditioned its approval on a grant of certain trackage rights to Tex Mex (as well as to BNSF) in order to preserve two independent and competitively effective routings for traffic through Laredo – UP's route and Tex Mex's route – which existed before the merger. Granting BNSF's request for trackage rights would create a third routing for traffic through Laredo where only two existed before – a result plainly devoid of any competitive rationale.

Not only is there no justification for BNSF's request for trackage rights on competitive or any other grounds, but also granting that request would be fatal to Tex Mex and to the essential services it provides to more than 30 customers on its lines. BNSF has undertaken no serious analysis of the impacts of its request, if granted, on other carriers, and, as shown in the verified statements of Michael Rogers and Joseph Plaistow, BNSF's off-hand claim that there would be no serious impact on other carriers is completely false. A substantial portion of Tex Mex's revenues is from traffic interchanged with BNSF. That traffic would largely disappear if BNSF's request were granted, and Tex Mex could not operate profitably in that event even if the Board granted the Consensus Plan urged by Tex Mex and others. That result would completely negate the Board's purpose in Decision No. 44, which was "to ensure the continuation of an effective competitive alternative to UP's routing into the border crossing at Laredo." Decision No. 44 at 149.

ARGUMENT

I. THERE IS NO JUSTIFICATION FOR BNSF'S REQUESTED TRACKAGE RIGHTS BETWEEN SAN ANTONIO AND LAREDO.

A. BNSF Trackage Rights Between San Antonio and Laredo Will Not Avoid or Reduce Congestion

As explained in the verified statement of Larry Fields at 5-6, contrary to BNSF's contentions, a BNSF route to Laredo through San Antonio is not needed to avoid congestion in and around Houston or on the route between Algoa and Robstown. BNSF can and does route its traffic to Laredo today south from Caldwell, Texas through Flatonia and Placedo to Robstown, where it interchanges with Tex Mex. This route does not have heavy traffic. Also, Tex Mex has made and is making substantial investments, totaling more than $17 million, to increase the capacity and efficiency of its lines. These investments consist of new and expanded and upgraded sidings, a new yard in Laredo with 1,400 car capacity, a new connection at Robstown and other improvements. Tex Mex is also proposing in the Consensus Plan to acquire and rehabilitate an out-of-service line between Victoria and Rosenberg, Texas, where BNSF could also interchange traffic with Tex Mex.

Furthermore, BNSF's routing Laredo-bound traffic to Laredo via San Antonio would add substantially to congestion on already heavily used routes, including the Sunset route between Flatonia and San Antonio currently used by Amtrak.

B. UP's Favoritism Does Not Justify BNSF's Request.

BNSF's application identifies "UP's favoritism of its own business" as another reason supporting its requested trackage rights (BNSF Appl. at 15), but it provides no other explanation or supporting evidence as to how the requested rights would in any way remedy the effects of that favoritism. As Mr. Fields points out (Fields V.S. at 6-7), they would not. Tex Mex agrees with BNSF that UP has favored its traffic over other carriers' traffic through its control of the dispatching and switching of its lines in and around Houston. The remedy for that, however, is neutral switching and dispatching of all lines in the Houston area, as proposed by the Consensus Plan. The remedy is not to give BNSF rights over additional UP lines.

C. BNSF Has Not Been Prevented From Establishing Effective Competitive Service with Tex Mex.

There is no substance to BNSF's claim that BNSF, contrary to the Board's purpose in Decision No. 44, has been prevented from establishing effective competitive service with Tex Mex.

Again, as Mr. Fields explains (Fields V.S. at 2-3), in the UP/SP merger proceeding, Tex Mex sought trackage rights over UP lines between Robstown and Beaumont in order to preserve the second route for U.S.-Mexican rail traffic through Laredo that would compete with the UP's route through Laredo via San Antonio as effectively after the merger as it had before the merger, when the SP was Tex Mex's principal interline connection for that traffic. Although UP proposed to give BNSF trackage rights over UP lines to Robstown, where it could interchange with Tex Mex, Tex Mex submitted substantial evidence that BNSF would not be a full competitive replacement for SP on that route for several reasons. While Tex Mex expected, and still expects, to interline a substantial amount of traffic with BNSF, its evidence indicated that it could not survive if it had to depend solely on BNSF traffic and that it therefore needed a connection to another Class I railroad, the KCS, to survive and to preserve over its route the same level of competition with UP for traffic over the Laredo gateway as existed before the merger.

In Decision No. 44, the STB approved the merger as well as the UPSP/BNSF Settlement Agreement giving BNSF some 4000 miles of trackage rights, which the Board also expanded in significant respects. The Board also found Tex Mex's arguments and evidence persuasive. Decision No. 44 at 148-149. The Board found that BNSF would not have access to much of the traffic that SP had interchanged with Tex Mex and that BNSF would not be able to retain all of the SP traffic that it did get access to. It also noted that BNSF would receive trackage rights from UP to the Eagle Pass gateway to Mexico, and thus likely would divert traffic to that gateway that it would otherwise interchange with Tex Mex and route through Laredo. Accordingly, the Board concluded:

> [A] partial grant of Tex Mex's responsive application is required to ensure the continuation of an effective competitive alternative to UP's routing into the border crossing at Laredo.

Id. at 149. The Board also found persuasive Tex Mex's evidence that "the merger might endanger the essential service [Tex Mex] provides to the more than 30 shippers on its line." Id. at 148.

Although Tex Mex sought and obtained a connection to KCS at Beaumont, its responsive application and supporting evidence made clear, and the Board fully understood, that Tex Mex would continue to depend vitally on traffic interchanged with BNSF at Robstown and elsewhere.

For that reason, from the moment BNSF acquired its trackage rights to Robstown, Tex Mex has been working very hard to attract and develop that traffic and has been trying to negotiate a long-term agreement with BNSF regarding rates and divisions on all commodities.

BNSF's claim that Tex Mex has been unwilling to agree, or has somehow been prevented by KCS from agreeing, to rates and divisions that would permit a competitively-effective BNSF-Tex Mex service is baseless, and at odds with common sense. As Mr. Fields states,

> [A]part from the specifics of proposed agreements, it is absurd to suggest that Tex Mex (or KCS, for that matter) would not want to make the rates and divisions Tex Mex establishes with BNSF to be market competitive. By far the largest and most effective competitor for traffic through Laredo, of course, is UP, which provides single-line service to Laredo from all the points on its system, which include most of the major points served by KCS and many of those served by BNSF. The STB granted trackage rights to Tex Mex and to BNSF to provide effective competition to UP. Tex Mex has an obvious and vital interest in establishing interline service with both BNSF and with KCS that will be competitive with UP and will attract as much traffic as possible to Tex Mex's route.

Fields V.S. at 9. In any event, as Mr. Fields states. Tex Mex, with the specific concurrence of the KCS-designated member of its executive committee, finally negotiated an agreement in May 1998 with BNSF regarding rates, divisions and other matters that he understood was acceptable to the BNSF's negotiators, although (according to BNSF's July 8 filing) it was not accepted by BNSF upper management. Mr. Fields shows in detail how that agreement on its face refutes BNSF's contentions. The first substantive provision specifically delegates to BNSF "the authority and right on TM's [Tex Mex's] behalf to make and quote rates for movement over TM's lines to and from points and interchanges served by BNSF to gateways served by TM, which rates BNSF may include in transportation contracts, quotes and rate publications, on exempt and regulated traffic." Furthermore, in the event the specific divisions established by the agreement for Tex Mex turn out to make specific movements not "market competitive with other transportation options or modes," another provision would specifically obligate Tex Mex and

BNSF to negotiate in good faith to reach agreement to make them market competitive if economically feasible for both parties. As Mr. Fields points out, although BNSF wanted Tex Mex to accept lower divisions (just as Tex Mex wanted BNSF to agree to higher ones), BNSF has not and could not show that the divisions agreed to by BNSF's negotiators would not permit BNSF-Tex Mex service that would compete effectively with UP's service through Laredo in furtherance of the Board's purpose in Decision No. 44.[2]

Mr. Fields also refutes BNSF's contention that it has been unable to negotiate an agreement with Tex Mex that is "long-term." As Mr. Fields notes, the May 1998 agreement has a five-year term automatically renewable for successive five-year terms. Although the agreement contained a provision allowing a one-time renegotiation of divisions after one year, that is a commonly-used contract feature and does not make the agreement a short-term one. *See* Fields V.S. at 9.

BNSF evidently wants to use this proceeding to obtain terms from Tex Mex more to BNSF's liking than it was able to obtain in negotiation; indeed, Mr. Rickershauser specifically asks to Board to impose such terms if it decides not to grant BNSF's trackage rights request. Rickershauser V.S. at 35. There is no basis, however, for the Board to intervene in what are properly matters for commercial negotiation.

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[2] Mr. Fields also shows that the correspondence cited by BNSF between KCS and BNSF chief executives does not support BNSF's claims. Fields V.S. at 9-11. Mr. Fields did not know of or approve any of the cited correspondence, but in any case, as he explains, it does not reflect a purpose or desire by KCS to prevent BNSF and Tex Mex from reaching terms that would be fully competitive with UP's service through Laredo. And as noted, KCS's designated member of the Tex Mex executive committee specifically concurred with the agreement discussed above.

D. BNSF's Claims About Rail Competition in Mexico Are Wrong, and In Any Event, Do Not Support Its Trackage Rights Request

As an additional reason supporting its request, BNSF argues that rail competition in Mexico between the railroads now serving the Laredo and Eagle Pass gateways has not developed for traffic between the United States and Mexico, contrary to supposed expectations. As discussed in the verified statement of Brad Skinner, Executive Vice President of the new Mexican railroad serving Laredo, Transportacion Ferroviaria Mexicana ("TFM"), this argument is simply contrary to fact and also makes no sense, since the extent of rail competition in Mexico has no relevance to BNSF's request for additional conditions on the UP/SP merger.

As Mr. Skinner explains, TFM was formed by the Mexican transportation company Transportacion Maritima Mexicana ("TMM") and Kansas City Southern Industries ("KCSI") in 1997 to purchase and operate rail lines in Mexico, which the Government of Mexico had decided to privatize after 70 years of government ownership and operation. TFM acquired one of the four groups of lines being offered for sale, known as the Northeast Concession. TFM started operating these lines, which include lines from central and eastern Mexico to the Laredo and Brownsville gateways, in July 1997. Another group of lines, known as the Pacific-North Concession, was acquired by Ferrocarril Mexicano ("FXE"), a consortium that includes UP. FXE's lines include lines from central Mexico to Eagle Pass, and FXE began operating those lines in February 1998.

Contrary to BNSF's claim, Mr. Skinner shows that there has in fact been substantial competition between FXE and TFM for U.S.-Mexican traffic, and the clearest proof of that is the fact that, soon after FXE commenced operations, BNSF shifted very substantial amounts of its Mexico-bound traffic away from Laredo and TFM and to Eagle Pass and FXE. Skinner V.S. at

5-9. As Mr. Skinner points out, moreover, this shift occurred while FXE was experiencing all the difficulties of start-up operations; accordingly, FXE's competitive threat will continue to grow as it gains experience and infrastructure. While these facts alone squarely refute BNSF's claim that competition among Mexican lines has not developed, Mr. Skinner also shows that there is no merit to the claims of BNSF's witnesses that trackage rights fees or Mexican policy prevents competition between the Mexican railroads. Id. at 10-11.[3]

Furthermore, BNSF's arguments make no sense. As Mr. Skinner notes: "The extent of rail competition in Mexico, or lack thereof, has no relevance to BNSF's request for an alternative trackage-rights route to Laredo and can provide no justification for that request. Nothing in the UP/SP merger affected the extent of rail competition in Mexico, and BNSF does not explain why the state of affairs in Mexico should provide any basis for the STB to impose new conditions on that merger." Skinner V.S. at 4-5.

E. There is No Competitive Justification For BNSF's Requested Trackage Rights.

BNSF has advanced various grounds in support of its trackage rights (all of which are without merit, as discussed above), but it has not even attempted to offer a competitive justification for them, perhaps for the obvious reason that there plainly is none. As noted above and in the verified statement of Professor Curtis Grimm, before the UP/SP merger, there were two independent routings for U.S. Mexican traffic through Laredo: the UP routing and the Tex Mex routing. The Board in Decision No. 44 granted Tex Mex's responsive application in part to preserve the second, Tex Mex routing, and to ensure that it remained as competitive to UP's

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[3] Mr. Skinner also notes that BNSF's claim that there has been a reduction in intergateway competition in Mexico from pre-merger levels (BNSF Appl. at 11) is absurd on its face, since (continued...)

routing as it had been before the merger. If BNSF's trackage rights request were granted, (and assuming that Tex Mex would survive, contrary to the testimony of Messrs. Rogers and Plaistow discussed in the following section), it would create a third independent routing for traffic through Laredo – a BNSF routing. As Professor Grimm concludes: "That result cannot be justified on the basis of any need to prevent a reduction of competitive alternatives from pre-merger levels."

II. GRANTING BNSF'S REQUEST FOR TRACKAGE RIGHTS BETWEEN SAN ANTONIO AND LAREDO WOULD CAUSE TEX MEX SHIPPERS TO LOSE ESSENTIAL SERVICES, AND WOULD DESTROY THE TEX MEX COMPETITIVE OPTION THAT THE BOARD FOUND TO BE A NECESSARY CONDITION TO THE UP/SP MERGER

Throughout its application, BNSF asserts that "the interests of the shipping public would be served" by the changes it proposes, BNSF App. At 20, that Tex Mex traffic levels "would not be substantially affected" by the San Antonio to Laredo trackage rights BNSF seeks, *id.* at 16, and that its requests for relief "would not significantly impact" Tex Mex, Rickershauser V.S. at 37.

But BNSF provides no support for those assertions. BNSF's "Market Impact Analysis" with respect to Tex Mex amounts to a few conclusory sentences. See Brown V.S. at 1-2, and Attachment 1 thereto at 1-2. Even with respect to the diversions that BNSF summarily concludes would be diverted away from Tex Mex, BNSF provides no analysis whatsoever of the impact of those diversions on Tex Mex. And even accepting, for the sake of argument, BNSF's

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(...continued)
two private railroads are now serving gateways that, before the merger, were served by a single government monopoly. Skinner V.S. at 5.

numbers regarding diversions away from Tex Mex (13,297 cars diverted out of a total of 15,510)[4] those numbers on their face suggest a significant harmful impact on Tex Mex.

Against BNSF's unsupported assurances that the rights BNSF seeks would not substantially impact Tex Mex, the facts paint a very different picture – one with disastrous consequences for Tex Mex's shippers and the railroad itself.

The Board granted Tex Mex's request for trackage rights in the UP/SP merger proceeding expressly "both to preserve a competitive routing at Laredo and to preserve the essential services now provided by Tex Mex.." UP/SP Decision No. 47, slip op. at 16 (STB served Sept. 10, 1996). Granting BNSF's request for trackage rights between San Antonio and Laredo, either with or without the Board's adoption of the Consensus Plan, would financially devastate Tex Mex, thus rendering Tex Mex unable to provide essential services to its shippers as the Board contemplated and destroying the Tex Mex routing to Laredo that the Board explicitly sought to preserve.

A. Essential Services Would Be Lost if BNSF is Awarded Direct Access to Laredo.

The Board has long construed its mandate to serve the public interest in rail consolidations to include an obligation to protect against harm to essential services. *See* 49 CFR § 1180.1(c)(2), Conrail Control, Decision No. 89, slip. op. at 48-49. Essential services are those for which there is a sufficient public need and adequate alternative transportation is not available. 49 CFR § 1180.1(c)(2)(ii).

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4 Under BNSF's assumption that 90% of BNSF/Tex Mex interline traffic would be diverted, application of that percentage to the asserted 1997 total interchange figure of 15,510 cars indicates an expected diversion of 13,959 cars, not the 13,297 that BNSF states.

For approximately 35 customers located along Tex Mex's line, Tex Mex provides the only available access to rail transportation. Fields V.S. at 12. If the Board grants to BNSF the trackage rights it seeks between San Antonio and Laredo, with or without the Consensus Plan, the essential transportation service that Tex Mex now provides to these shippers would be eliminated.

ALK Associates conducted a detailed study of the rail traffic diversions that can be expected to follow from a grant of the San Antonio to Laredo trackage rights BNSF seeks both with and without adoption of the Consensus Plan. That study is discussed in the Verified Statement of Michael L. Rogers. Using the results of that study, Joseph J. Plaistow of Snavely King Majoros O'Connor & Lee then calculated the financial impact on Tex Mex of those expected diversions. The results of these analyses are clear that under either scenario – that is, either with or without the Consensus Plan -- the financial impact of the BNSF trackage rights would prevent Tex Mex from being able to continue to provide rail service to local shippers for whom that service now is the only economically feasible transportation option.[5]

1. Scenario A: BNSF trackage rights and other relief <u>without</u> the Consensus Plan.

Looking first at the effect of BNSF's proposal in the absence of the Consensus Plan, ALK's diversion study shows that adoption of the BNSF plan would divert roughly 21,250 carloads of traffic off Tex Mex as compared with the UP/SP merger Base Case. *See* Rogers V.S., Exhibit 2 (showing 45,134 carloads handled by Tex Mex under the Base Case, compared with 23,884 under the BNSF proposal.). This loss, nearly half of Tex Mex's carloads, would

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[5] As Mr. Rogers notes in his verified statement, although the analysis took into account adoption of the entire BNSF Plan, virtually all of the impact of that Plan on Tex Mex arises from the requested trackage rights between San Antonio and Laredo. *See* Rogers V.S. at 5, n.1.

translate into a devastating loss of about $12.9 million in Tex Mex revenue, a collapse of *48%* below expected revenues under the Base Case.

This dramatic falloff of revenue translates into an annual net operating loss for Tex Mex of $1.2 million, and an annual net loss of $0.6 million. Plaistow V.S. at 6 and Exhibit JJP-7. A complete look at the resulting financial pro formas shows, in Mr. Plaistow's words, "a financially failing Tex Mex." Plaistow V.S. at 15. This includes an operating ratio of 108.09%, a return on equity of negative 2.06%, and a debt-to-equity ratio of 33.77%. Under these circumstances, Tex Mex would be unable to sustain its operations. *See* Plaistow V.S. at 15.

2. Scenario B: BNSF trackage rights and other relief with the Consensus Plan

Even if the Consensus Plan is adopted, imposing the BNSF's requested San Antonio-Laredo trackage rights and other relief on top of that Plan would still critically financially impair Tex Mex and render it unable to continue to serve the customers on its line. The economic analysis of the effect on Tex Mex of adding BNSF's San Antonio-Laredo trackage rights and other requested relief on top of the Consensus Plan also shows that granting the BNSF plan would make it impossible for Tex Mex to afford the major investments in Houston-area infrastructure contemplated under the Consensus Plan. Those investments simply could not take place.

ALK's analysis shows that under this scenario, Tex Mex could expect to lose about 31,000 cars of traffic that it otherwise would handle if the Consensus Plan were in place. Rogers V.S., Exhibit 5 (showing Tex Mex handling 144,288 cars under the Consensus Plan, but dropping to only 113,281 if BNSF's request is granted). As a result, Tex Mex's revenues would fall by some $25 million below the levels anticipated under the Consensus Plan, a drop of about 30%. Rogers V.S., Exhibits 4 and 5.

Facing that kind of revenue loss, Tex Mex would slide from an expected annual net income of $7.7 million under the Consensus Plan to an annual net <u>loss</u> of $1.9 million. Plaistow V.S. at 16 and Exhibit JJP-15. The impact on other financial ratios would be just as dramatic: If BNSF gets the rights it seeks, even taking the Consensus Plan into account, Tex Mex's operating ratio would be 89.74%, its return on equity would be <u>negative</u> 4.43%, and its debt-to-equity ratio would be 76%. Plaistow V.S. at 16 and Exhibit JJP-17. Under the kind of projections reflected here, it is apparent that the very significant infrastructure improvements in the Houston area contemplated under the Consensus Plan – including increased storage capacity, rehabilitation of the Victoria to Rosenberg line, and double-tracking of the Houston to Beaumont line, would be financially impossible to undertake, and thus would not be made, if the BNSF trackage rights and other relief are granted. *See* Plaistow V.S. at 16. But even more fundamentally, as Mr. Plaistow points out, Tex Mex simply could not stay in business or sustain its operations under those devastating financial circumstances. *Id.*

3. The consequences for Tex Mex's shippers.

The serious financial injury to Tex Mex flowing from the trackage rights BNSF seeks would translate into a loss of essential services for a number of Tex Mex shippers. As set forth in Larry Fields' verified statement, some 35 shippers who are served by Tex Mex have access to no other rail transportation alternative and cannot feasibly ship their products by other means due to the nature of the product and the distances involved.

Bulk commodities dominate Tex Mex's local traffic. Grimm V.S. at 5. Such commodities, including the grain, cotton, scrap metal and aggregates shipped by a number of Tex Mex's local customers, are especially dependent on transportation by rail. *Id.*

A number of Tex Mex's local shippers themselves attest to their reliance on Tex Mex's rail service and the unavailability of workable alternatives. They testify that loss of Tex Mex rail service would eliminate the only economically feasible option for meeting their transportation needs. For example:

- Frank A. Bailey III, President of Frank Bailey Grain Co., Inc., an exporter of grain to Mexico, states that "The Tex-Mex is the only rail carrier serving our facilities," and notes that "truck shipments are not feasible because of the distance between the origin and the destination."

- Bar Iron & Metal Company is a is a scrap metal recycler located in Alice, Texas. Tex Mex is the only rail carrier serving its facilities, and the company ships approximately 120 to 140 cars of scrap over the Tex Mex each year. Company President Kenneth Barr notes that "the rail service we receive from Tex Mex is critical to the success of our company in keeping our costs down and our products competitive." Further, the effect of the loss of Tex Mex service "would be severe, as there is no other feasible way to meet our transportation needs." Barr Iron cannot use truck transportation "because of the large volume and the distances" to the mills it serves.

- Wright Materials, Inc. for more than 30 years has operated an aggregate processing plant on the Tex Mex line. As General Manager Milus Wright states, Wright Materials in the past six months has moved some 2100 cars over Tex Mex, and transportation by truck is not an economically viable option in its market.

- Ray West Warehouses, Inc. operates a public merchandise warehouse in Corpus Christi that stores and handles inventory such as forest products, chemical products, and drilling materials. Tex Mex is the only railroad with access to Ray West's facilities. President Peter B. Anderson states that "without prompt and reliable rail service we would lose a significant portion of our business," and that several of the company's customers use Ray West "only because we can handle shipments by rail, which allows them to enjoy cost advantages that make them competitive in their respective businesses."

• Gulf Compress is an agricultural cotton warehouse in Corpus Christi which typically handles approximately 375,000 bales of cotton per year. Tex Mex is the only rail carrier with access to Gulf Compress's facilities in Corpus Christi. According to Robert Weatherford, general manager of Gulf Compress, many of the company's services and markets depend entirely on the rail transportation provided by Tex Mex, and "any loss of service by the Tex Mex would cause severe consequences" with respect to the company's ability "to provide needed services to our customers at a reasonable cost. There are many of our services and markets, which would cease to be available to us without the railroad."

• Ingram Readymix Inc. is a concrete producer located in Corpus Christi that relies on gravel shipped via Tex Mex. Ingram's President, Bruce Ingram, Sr., says that for that service, "we entirely rely upon the Tex Mex, which is the only rail carrier that accesses our facility. Without Tex Mex our company would be close to closing our doors. . . . Without access to Tex Mex, the consequences to us would be severe, as there is no feasible way to meet our transportation needs."

Professor Grimm reviews the testimony of these shippers and concludes that "the nature of the commodities that dominate Tex Mex's local shipments and the testimony of shippers that transport a representative variety of those commodities demonstrate that the rail service that Tex Mex now provides to its local customers is essential service," and that in the absence of Tex Mex service, "Tex Mex's local shippers would be left without any adequate alternative means of transportation." Grimm V.S. at 7-8.

Further, as Messrs. Fields and Grimm note, if Tex Mex were to go out of business, there is no reason to assume that any other railroad would purchase its assets and continue to operate over its lines. Tex Mex is widely known to be a very efficient, low-cost railroad, and in fact recently was named Regional Railroad of the Year by Railway Age magazine. If Tex Mex is unable to operate profitably, there is no reason to believe that any other existing or newly-formed railroad could do so. *See* Grimm V.S. at 8-9; Fields V.S. at 14-15.

B. Loss of Tex Mex Service Also Would Eliminate the Vital Tex Mex Competitive Option at Laredo That the Board Expressly Sought to Preserve.

As the Board acknowledged in Decision No. 44, the Board in that decision granted the relief sought by Tex Mex in part specifically to preserve a strong competitive option to UP at Laredo -- a Tex Mex option that would provide a link between Mexico, on the one hand, and the U.S., via connections with both the KCS and BNSF systems, on the other. The Board found that granting relief to Tex Mex "is required to ensure the continuation of an effective competitive alternative to UP's routing into the border crossing at Laredo." Decision No. 44 at 149. The Board thus viewed Tex Mex as a vital connection for rail traffic between the United States and Mexico.

The financial devastation that Tex Mex has shown it would suffer if the Board grants the relief BNSF seeks not only would deprive Tex Mex's local shippers of essential transportation services, but would also eliminate the crucial Tex Mex routing between the U.S. and Mexico – a role for Tex Mex that the Board expressly sought to protect and preserve in the UP/SP merger.

III. BNSF'S TERMINAL TRACKAGE RIGHTS APPLICATION <u>SHOULD BE DENIED.</u>

Along with its application for additional remedial conditions, BNSF also filed an Application for Terminal Trackage Rights (Finance Docket No. 32760 (Sub-No. 28)), seeking terminal trackage rights over the International Bridge in Laredo, Texas. Specifically, BNSF seeks terminal trackage rights over Tex Mex track between MP 0.0 and approximately MP 0.50, including over the International Bridge at Laredo, and "equal access to use the International

Bridge for interchange purposes through establishment of defined operational windows for BNSF's use." The Board should deny the request.

As BNSF itself acknowledges, the sole reason for seeking these terminal trackage rights is in support of overhead trackage rights BNSF is seeking over UP between San Antonio and Laredo. *See* BNSF App. 18; BNSF Application for Terminal Trackage Rights at 1, 2. But for the requested San Antonio-Laredo rights, the requested terminal trackage rights over the International Bridge are useless.

As Tex Mex has shown throughout these comments, the request for San Antonio to Laredo trackage rights is not well-founded and would result in the loss of essential rail service to Tex Mex's customers, and thus should be denied. Without those rights, BNSF's request for terminal trackage rights over the International Bridge is moot and similarly should be denied.

CONCLUSION

For the reasons discussed above, BNSF's request for trackage rights over UP between San Antonio and Laredo, and for terminal trackage rights over the International Bridge at Laredo, should be denied.

Respectfully submitted,

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Attorneys for the Texas Mexican Railway Company

Dated: September 18, 1998

CERTIFICATE OF SERVICE

I hereby certify that a true copy of "The Texas Mexican Railway Company's Response And Objections To The Burlington Northern And Santa Fe Railway Company's Application For Additional Remedial Conditions Regarding The Houston/Gulf Coast Area" was served this 18th day of September, 1998, by hand delivery upon The Honorable Stephen Grossman, by hand delivery upon the below-named counsel for Burlington Northern Santa Fe and Union Pacific, respectively:

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Adrian L. Steel, Jr.
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and by first class mail upon all other parties of record in the Houston/Gulf Coast Oversight proceeding, Finance Docket No. 32760 (Sub-No. 26 *et al.*).

Scott M. Zimmerman
Attorney for the Texas Mexican Railway Company

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 26)
FINANCE DOCKET NO. 32760 (Sub-No. 28)
FINANCE DOCKET NO. 32760 (Sub-No. 29)

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

VERIFIED STATEMENT OF LARRY D. FIELDS

My name is Larry Fields. I am the President of the Texas Mexican Railway Company ("Tex Mex"), headquartered at 1200 Washington St, Laredo, Texas 78042. I submitted a verified statement dated March 25, 1996 to the Surface Transportation Board ("STB") in support of the responsive application filed by Tex Mex in Finance Docket 32760 seeking trackage rights over UP and SP lines between Robstown, TX and Beaumont, TX, which the STB granted in part in Decision No. 44 in that proceeding.

I am submitting this statement to respond to certain contentions made by the Burlington Northern Santa Fe Railroad ("BNSF") in support of its Application For Additional Remedial Conditions Regarding the Houston/Gulf Coast Area filed on July 8, 1998 (hereafter "BNSF Appl.") in the STB's Houston/Gulf Coast Oversight Proceeding, Finance Docket No. 32760 (Sub Nos.-26, 28, 29).

RELEVANT EXPERIENCE

I have worked in the railroad industry since going to work for the Kansas City Southern Railroad's ("KCS") maintenance of way department in 1965. I worked for KCS in various capacities between 1965 and 1991; my last position was Vice President Operations. From 1991 to 1993 I consulted on rail operations and privatization of lines in Africa and Russia. In 1993 and 1994 I was general manager of a short line railroad. I became president of the Tex Mex on December 1, 1994. I have a bachelor of science degree from Kansas State Teachers College and a masters of business administration degree from Rockhurst College.

DECISION NO 44

In the UP/SP merger proceeding, Tex Mex sought trackage rights over UP lines between Robstown and Beaumont, Texas in order to preserve a second route for U.S.-Mexican rail traffic through Laredo that would compete with the UP's route through Laredo as effectively after the merger as it had before the merger, when the SP was Tex Mex's main interline connection for that traffic. Tex Mex submitted evidence showing that the BNSF, operating via trackage rights to Robstown, would not be a full competitive replacement for SP on that route for a number of reasons. While Tex Mex certainly expected – and still expects – to interline a substantial amount of traffic with BNSF, we felt that we could not survive if we had to depend solely on BNSF traffic. We therefore needed our own independent connection to another Class I U.S. railroad, the KCS, in order to ensure, first, that Tex Mex, interlining with both BNSF and KCS, would preserve by its route the same level of competition with UP for traffic through Laredo that existed before the merger, and, second, that Tex Mex would survive to provide essential services to the more than 30 local shippers on its line.

In Decision No. 44, the STB approved the UPSP/BNSF Settlement Agreement giving BNSF some 4,000 miles of trackage rights over the UP/SP system; in fact, the Board expanded BNSF's rights in significant respects. The STB also found Tex Mex's arguments and evidence persuasive. It noted that BNSF would not have access to a substantial amount of traffic that SP previously interchanged with Tex Mex and that BNSF would not be able to retain all the SP-origin traffic that it would get access to. Decision No. 44 at 148. It also noted that BNSF would, through its Settlement Agreement with UP/SP, gain direct access, via trackage rights, to the Eagle Pass gateway into Mexico, and would thus be likely to divert traffic to that gateway that was previously interchanged with Tex Mex and routed through Laredo. The Board therefore concluded that "a partial grant of Tex Mex's responsive application is required to ensure the continuation of an effective competitive alternative to UP's routing into the border crossing at Laredo." Id. at 149. The Board was also persuaded by Tex Mex's evidence that "the merger might endanger the essential service [Tex Mex] provides to the more than 30 shippers located on its line." Id. at 148.

BNSF's CURRENT APPLICATION

In the Application BNSF filed on July 8, 1998 in the Houston/Gulf Coast Oversight Proceeding, BNSF asked the STB to impose a number of additional remedial conditions. Most of those Tex Mex does not oppose. Some of them, such as requests for neutral switching in Houston and trackage rights over all lines in Houston, are similar to proposals made by Tex Mex and other parties in what is termed the Consensus Plan.

Tex Mex does, however, strongly object to one of the additional conditions requested by BNSF – additional trackage rights for BNSF over UP's line from San Antonio to Laredo.

There is no justification for this request, and the reasons advanced by BNSF in support of it are groundless. Furthermore, granting the request would almost certainly be fatal to Tex Mex, even if the Board also approved all elements of the Consensus Plan, as shown by Mr. Michael Rogers of ALK Associates and Mr. Joseph Plaistow of Snavely King Majoros O'Connor & Lee. That result would be directly contrary to the Board's purpose in Decision No. 44, which was to preserve "an effective competitive alternative to UP's routing into the border crossing at Laredo" based on well-founded doubts about the ability of BNSF alone, through trackage rights, to replace the competition to UP that SP, working with Tex Mex, provided before the merger. Granting BNSF's request would be fatal to Tex Mex even if the Board granted all elements of the Consensus Plan, and it would certainly preclude Tex Mex and KCS from making the substantial infrastructure investments called for in the Consensus Plan.

The main purpose of my statement is to address three of the contentions made by BNSF as to why it needs direct access to Laredo via San Antonio: (1) to bypass the congestion in and around Houston, (2) because UP favors its own traffic, and (3) because, BNSF claims, it has been unable to establish a competitively effective interline service with Tex Mex.[1] As I explain below, BNSF does not need a route through San Antonio to bypass congestion in and around Houston and on the Algoa route; UP's favoritism does not justify more trackage rights for BNSF over UP; and there is no truth to the assertion that BNSF has been unable to establish a competitive interline service with Tex Mex. I will also describe the essential

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[1] Mr. Brad Skinner of TFM is responding in his verified statement to the BNSF's other contention in support of its trackage rights request – that competition among rail lines in Mexico has not materialized, contrary to alleged expectations.

services that Tex Mex provides to its local customers on its line, services that would be lost if the BNSF proposal were granted.

BNSF TRACKAGE RIGHTS BETWEEN SAN ANTONIO AND LAREDO WILL NOT AVOID OR REDUCE CONGESTION

BNSF argues that its getting trackage rights between San Antonio and Laredo will help it avoid the congestion on UP lines in and around Houston and on the heavily congested route between Algoa and Robstown. BNSF Appl. at 15; Rickershauser V.S. at 30. Contrary to BNSF's argument, however, BNSF's routing traffic to Laredo through San Antonio is not needed to avoid that congestion. BNSF currently has trackage rights from its own line at Caldwell, Texas, south through Flatonia and Placedo to Robstown and the interchange with Tex Mex. This route does not have heavy traffic and is generally not congested (although there have been times over the past year when UP has left unattended trains on it), and BNSF currently uses it to route its traffic to Tex Mex. Although BNSF has only southbound rights south of Flatonia for as long as UP operates directionally, Tex Mex has bi-directional rights over the line to Flatonia and has interchanged traffic with BNSF at Flatonia and could do so again if UP ceased directional operations. Furthermore, as part of the Consensus Plan, Tex Mex is proposing to rehabilitate and reestablish service over the out-of-service line between Victoria and Rosenberg, where it could also interchange traffic with BNSF.

Also, in addition to the proposed new Victoria-Rosenberg line, Tex Mex has made and is making substantial investments in its own system to enhance the capacity of its route and make it even more competitive with UP's route. Tex Mex has just completed a new 8,500 foot siding just west of Robstown and a new connection at Robstown to the UP track and thus to the BNSF, at a cost of about $2.5 million. Tex Mex is also completing construction of a new yard at Laredo which will have 14 general merchandize tracks and two intermodal tracks, with a total capacity to handle 1,400 cars. This project should be finished in October 1998 at a total cost of almost $10 million. Tex Mex also plans to substantially lengthen or upgrade sidings at Muil, Realitos and Killam, will replace a bridge at Killam, and will replace some 40,000 mainline ties, all for a cost of approximately $4.7 million.

Not only are BNSF rights through San Antonio not needed to avoid congestion around Houston and on the Algoa route, but also BNSF's routing Laredo-bound traffic through San Antonio would add substantially to congestion. BNSF would route that traffic either from Temple to San Antonio via Smithville or from Caldwell to San Antonio via Flatonia. Both routes are heavily congested already. BNSF and UP both acknowledge that the former route is "possibly the most congested segment on the railroad,"[2] and the Flatonia-San Antonio segment of the latter route is part of the heavily used Sunset Line used by Amtrak. Furthermore, UP's line from San Antonio to Laredo is itself heavily used and often congested.

UP FAVORITISM DOES NOT JUSTIFY BNSF'S REQUEST

Although BNSF's application identifies "UP's favoritism of its own business" as another reason supporting its requested trackage rights (BNSF Appl. at 15), it provides no explanation of how the requested rights would remedy the effects of that favoritism, and there is no reason to believe that they would. The parties proposing the Consensus Plan agree fully with BNSF that UP has favored its traffic over other carriers' traffic through its control of the dispatching of its lines in and around Houston and of switching services on those lines. The

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[2] BNSF Appl. at 13, quoting from UP's May 1, 1998 report on Houston and Gulf Coast infrastructure at p. 43.

remedy for that, however, is neutral switching and dispatching of all the lines in the Houston area, as proposed by the Consensus Plan. Giving BNSF additional trackage rights over UP lines would not remedy the effects of UP favoritism; it would merely expand the scope for it.[3]

BNSF IS ABLE TO ESTABLISH EFFECTIVE COMPETITIVE SERVICE WITH TEX MEX

BNSF's contention that it needs an alternative route to Laredo because it has been unable to establish an effective competitive service with Tex Mex is completely incorrect. In support of this contention, BNSF variously claims that Tex Mex has been unwilling to establish such service with BNSF, or has been prevented from doing so by KCS or by a joint venture agreement between KCS's parent, Kansas City Southern Industries ("KCSI") and Tex Mex's principal owner, Transportacion Maritima Mexicana ("TMM"). None of these claims is correct.

Because Tex Mex depends for its very survival on traffic it interchanges with BNSF at Robstown, Tex Mex has made every effort to attract and grow that traffic from the moment BNSF acquired its trackage rights to Robstown. Tex Mex has been trying to negotiate a long term agreement with BNSF regarding rates and divisions for all commodities transported over Robstown since shortly after the UP/SP merger was consummated. In May 1998, Tex Mex and BNSF's negotiators finally arrived at an agreement that I, as Tex Mex's chief negotiator,

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[3] I would also note in this connection that BNSF has been in a far stronger position than Tex Mex to prevent UP from discriminating against its traffic in Houston. First, BNSF dispatchers participate formally in the Joint Dispatching Center at Spring, Texas. Second, BNSF has its own lines in Houston, including a portion of the recently-disbanded Houston Belt & Terminal Company, on which BNSF dispatches and performs switching services for UP. Finally, BNSF is of comparable size to UP and overlaps at hundreds of points throughout the western United States. Accordingly, unlike Tex Mex, BNSF has innumerable ways it can ensure fair

was led to understand was acceptable to the BNSF negotiators, subject only to upper management approval. (A copy of that Term Sheet Agreement (with the actual rates and divisions redacted) is attached as Exhibit A.) BNSF's July 8, 1998 submission to the STB, however, indicates that the agreement has not been approved by upper management.

I believe the provisions of this Term Sheet Agreement on their face clearly refute BNSF's claim that Tex Mex has been unwilling or unable to establish a competitively effective interline service with BNSF. Section II.1 of the agreement specifically delegates to BNSF the "authority and right on TM's [Tex Mex's] behalf to make and quote rates for movement over TM's lines to and from points and interchanges served by BNSF to gateways served by TM, which rates BNSF may include in transportation contracts, quotes and rate publications, on exempt and regulated traffic." As to Tex Mex's divisions on such interline movements, BNSF, of course, sought lower divisions than those ultimately negotiated, and Tex Mex sought higher ones; but I submit that the divisions ultimately negotiated were reasonable and would certainly permit BNSF to establish interline rates and service with Tex Mex that would be fully competitive with any other competing single-line or interline service through Laredo. BNSF has submitted no evidence or plausible argument to the contrary. Furthermore, the agreement contains another specific provision to ensure that BNSF could do so. Section II.2 provided:

> Where rates and divisions contained in this Term Sheet Agreement do not permit BNSF and TM to be market competitive for specific movements with other transportation options or modes, including for large volume potential movements, BNSF and TM agree to negotiate in good faith toward reaching agreement on specific movement pricing, divisions and service packages on individual movements, where economically

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(..continued)
treatment from UP in Houston through the threat of retaliation elsewhere.

> feasible for both parties, that permits BNSF and TM to be market competitive for such movements.

Moreover, contrary to BNSF's claim, this is not a short-term agreement, but has a five-year term which would be automatically renewed for successive five-year terms unless terminated by either party on one year's written notice. Although it would give either party a one-time right to renegotiate the divisions after a year's experience, that is a common and reasonable protection for both parties and does not make the agreement a short-term one.

More importantly, apart from the specifics of proposed agreements, it is absurd to suggest that Tex Mex (or KCS, for that matter) would not want to make the rates and divisions Tex Mex establishes with BNSF to be market competitive. By far the largest and most effective competitor for traffic through Laredo, of course, is UP, which provides single-line service to Laredo from all the points on its system, which include most of the major points served by KCS and many of those served by BNSF. The STB granted trackage rights to Tex Mex and to BNSF to provide effective competition to UP. Tex Mex has an obvious and vital interest in establishing interline service with both BNSF and with KCS that will be competitive with UP and will attract as much traffic as possible to Tex Mex's route.

There is no basis for BNSF's charge that KCS has somehow prevented or hindered Tex Mex from establishing a competitively effective interline service with BNSF. The Term Sheet Agreement discussed above was specifically approved by all of the members of the executive committee of Tex Mex's board of directors, including the member designated by KCS.[4] That

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[4] As described in the verified statement of Brad Skinner submitted to the STB with Tex Mex's responsive application on March 29, 1996 (TM-23 at 148), on December 1, 1995, TMM and KCSI entered into a joint venture agreement committing TMM and KCSI to work together to bid for one or more of the rail lines in Mexico then being sold by the Mexican government and

fact alone refutes BNSF's contention that KCS is preventing Tex Mex from establishing a competitive interline service with BNSF.

In support of its claim, BNSF cites certain correspondence between the chief executive officers of KCS and BNSF and from KCS's counsel to the STB regarding the joint venture agreement and Tex Mex's negotiations with BNSF. BNSF Appl. at 9-10. Several things should be said about that correspondence. First, neither I nor, to my knowledge, any other employee or representative of Tex Mex or TMM were aware of, authorized or approved any of that correspondence before it was sent. Furthermore, although Tex Mex is not a party to the joint venture agreement between TMM and KCSI, I am not aware of any provision in any agreement that would prevent Tex Mex from making an agreement with BNSF that Tex Mex deems necessary and appropriate to attract traffic and be fully competitive with any other rail movements through Laredo. I also understand that TMM believes that nothing in the joint venture agreement would do so. Contrary to BNSF, I do not read the letter from KCS's counsel to the STB as urging BNSF to spend its time developing the Eagle Pass and Brownsville gateways rather than working with Tex Mex to develop traffic through Laredo, but in any event I would strongly disagree with any such suggestion. It is important that the Board understand that Tex Mex is not controlled by KCS. While Tex Mex will certainly consult and take into account the views of KCS, as the holder of a large minority interest, Tex Mex will ultimately take the actions that are in best interests of Tex Mex.

(..continued)
to form a company to acquire and operate one or more such lines. In addition, in November 1995, KCSI purchased 49 percent of the capital stock of Tex Mex's parent, Mexrail. TMM retained and still owns 51 percent of Mexrail's stock, and thus retains a controlling interest in Tex Mex.

More importantly, nothing in the cited correspondence supports BNSF's claim that KCS is preventing Tex Mex from establishing an interline service with BNSF that is fully competitive with other traffic through Laredo in furtherance of the STB's purpose in granting trackage rights to Tex Mex and approving BNSF's negotiated trackage rights in south Texas. As I have noted, the STB's purpose was to ensure that the Tex Mex route for traffic through Laredo would remain as competitive with UP service through Laredo as it had been before the merger. As I have also noted, both Tex Mex and KCS (as a substantial owner of Tex Mex and of TFM) have a strong interest in attracting BNSF traffic to Tex Mex, and thus in making BNSF-Tex Mex as competitive with UP as possible. The cited correspondence does not reflect a concern that BNSF might make terms with Tex Mex that are competitive with UP traffic; instead, it reflects a concern that BNSF and Tex Mex might make terms that are disadvantageous to KCS-Tex Mex traffic. Even if KCS were able to influence Tex Mex not to agree to such terms, that result would not contravene the STB's purpose in Decision No. 44; it would simply be irrelevant to that purpose.[5]

In any event, the Term Sheet Agreement ultimately proposed to BNSF, which KCS's representative approved, would establish a BNSF-Tex Mex service that would be fully competitive with any other service through Laredo. And if that service proved not to be fully

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[5] Furthermore, the only Laredo-bound traffic that KCS could be reasonably be concerned about protecting from competition arising from BNSF-Tex Mex interline service would be traffic that BNSF and KCS compete for against each other but for which UP does not compete. That is a very small portion of U.S.-Mexican traffic through Laredo. For traffic that BNSF and UP or BNSF, UP and KCS all compete for, UP's competition will ensure that BNSF-Tex Mex and KCS-Tex Mex rates and service are maximally competitive. If they are not, UP will get the traffic.

competitive, the agreement, as noted, contains a provision requiring the parties to negotiate in good faith to establish one.

In sum, there is no truth to BNSF's charge that Tex Mex is either unwilling or unable to establish a fully competitive service with BNSF for traffic through Laredo.

TEX MEX'S LOCAL COSTOMERS WOULD LOSE ESSENTIAL TRANSPORTATION SERVICES IF BNSF'S REQUEST WERE GRANTED.

In addition to Tex Mex's role as a bridge carrier interlining traffic between Mexico and various U.S. carriers, Tex Mex also serves approximately 35 customers locally on its line between Laredo and Corpus Christi, for whom Tex Mex provides the only rail service with access to the customers' facilities. Tex Mex's responsive application in 1996 included statements from a number of these shippers that they depended on Tex Mex to get their products to their customers, including customers in Mexico, and that neither trucks nor service by UP (which would be through San Antonio or Brownsville in the case of movements to Mexico) were an adequate alternative. Based on that evidence, the STB in Decision No. 44 found persuasive Tex Mex's arguments that the merger would endanger essential transportation services to its customers.

The same conclusions apply with respect to BNSF's application for trackage rights between San Antonio and Laredo. The economic and financial analyses performed by Mr. Rogers of ALK and Mr. Plaistow of Snavely King show that granting BNSF's request would have fatal consequences for Tex Mex, with or without the Consensus Plan. That result would deprive many of Tex Mex's customers of essential transportation services for which there is no available, economically feasible alternative, as shown by the accompanying statements of the same shippers that submitted statements in 1996 as well as others. These shippers, whose commodities consist largely of bulk products such as grain, coal, paper, aggregates, and scrap metal, include the following:

- Frank Bailey Grain Co., Inc., a grain trading company that exports grain to Mexico. Bailey operates an elevator on the Tex Mex in Corpus Christi. As the company's President Frank A. Bailey III states in his September 9, 1998 verified statement opposing BNSF's trackage rights request, "[t]he Tex-Mex is the only rail carrier serving [Bailey's] facilities," and "truck shipments are not feasible because of the distance between the origin and the destination."

- Barr Iron & Metal Company, a scrap metal recycler located on Tex Mex's line in Alice, Texas. Barr ships approximately 120 to 140 cars of scrap over the Tex Mex each year, and Tex Mex is the only rail carrier serving Barr's facilities. Company President Kenneth Barr notes that "the rail service we receive from Tex Mex is critical to the success of our company in keeping our costs down and our products competitive." Further, the effect of the loss of Tex Mex service "would be severe, as there is no other feasible way to meet our transportation needs." Barr Iron cannot use truck transportation "because of the large volume and the distances" to the mills it serves.

- Wright Materials, Inc., which for more than 30 years has operated an aggregate processing plant on the Tex Mex line, from which it ships sand, gravel, and base materials throughout south Texas. As General Manager Milus Wright states, Wright Materials in the past six months has moved some 2100 cars over Tex Mex, and transportation by truck is not a safe or economically viable option in its market.

- Ray West Warehouses, Inc., which operates a public merchandise warehouse in Corpus Christi that stores and handles inventory such as forest products, chemical products, and drilling materials. Tex Mex is the only railroad with access to Ray West's facilities. As President Peter B. Anderson writes, "without prompt and reliable rail service we would lose a significant portion of our business," and several of the company's customers use Ray West "only because we can handle shipments by rail, which allows them to enjoy cost advantages that make them competitive in their respective businesses."

- Gulf Compress, an agricultural cotton warehouse in Corpus Christi which typically handles approximately 375,000 bales of cotton per year. Tex Mex is the only rail carrier with access to Gulf Compress's facilities in Corpus Christi. According to Robert Weatherford, general manager of Gulf Compress, many of the company's services and markets depend entirely on the rail transportation provided by Tex Mex, and "any loss of service by the Tex Mex would cause severe consequences" with respect to the company's ability "to provide needed services to our customers at a reasonable cost. There are many of our services and markets, which would cease to be available to us without the railroad."

- Ingram Readymix Inc., a concrete company that uses gravel shipped over the Tex Mex. President Bruce Ingram, Sr., writes that they "entirely rely upon the Tex Mex, which is the only rail carrier that accesses [Ingram's] facility. Without Tex Mex our company would be close to closing its doors."

If Tex Mex went out of business, these shippers and others would lose transportation services for which they have no available alternative. Moreover, it is unlikely that any other railroad would acquire Tex Mex's line and provide those services. Tex Mex is an efficient, relatively low-cost railroad, and if Tex Mex is unable to operate its line profitably, there is no reason to believe that any other existing or newly-formed railroad would be able to do so.

EXHIBIT A

5/23/98 Draft 3

TERM SHEET AGREEMENT
COVERING INTERLINE PRICING BETWEEN BNSF AND TM

I GENERAL PRINCIPLES

The purpose of this Term Sheet Agreement is to create a coordinated effort between The Burlington Northern and Santa Fe Railway Company (BNSF) and The Texas Mexican Railway Company (TM) (a) to make Laredo the cost and service gateway of choice for the movement of traffic to and from Mexico, (b) to explore development of Temple and Houston, TX as the preferred BNSF-TM gateways to and from Mexico, subject to TM acting as BNSF's agent for such traffic, and (c) to explore TM acting as BNSF's agent for providing service in South Texas based upon the following principles:

1. The parties agree to jointly study and explore a basis to reach agreement within one hundred twenty (120) days upon mutually acceptable terms and conditions upon which TM would act as BNSF's agent for the purpose of providing line haul service, and local service at all UP/SP merger agreement "2-to-1" points, south of Temple and Houston to which BNSF has access, to be implemented when the parties are able to reach mutually acceptable terms and agreements, subject to obtaining any necessary regulatory authorization or consent of UP for such operations.

2. BNSF agrees to support TM's efforts to secure neutral switching in Houston of HB&T and PTRA industries by PTRA, and to secure yard space in Houston to support TM operations.

II. SPECIFIC TERMS COVERING INTERLINE PRICING FOR MEXICO TRAFFIC

1. TM agrees to grant to BNSF the authority and right on TM's behalf to make and quote through rates for movement over TM's lines to and from points and interchanges served by BNSF to gateways served by TM, which rates BNSF may include in transportation contracts, quotes, and rate publications, on exempt and regulated traffic. TM and BNSF agree to establishment of northbound/southbound divisions or factors for such rates, in US dollars per unit, as shown in Attachment A.

2. Where rates and divisions contained in this Term Sheet Agreement do not permit BNSF and TM to be market competitive for specific movements with other transportation options or modes, including for large volume potential movements, BNSF and TM agree to negotiate in good faith toward reaching agreement on specific movement pricing, divisions and service packages on individual movements, where economically feasible for both parties, that permit BNSF and TM to be market competitive for such movements.

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3. Based on implementation of the principles stated above, TM and BNSF believe the following combined unit volume including northbound and southbound movements are targeted through the Laredo gateway:

Year	Loaded Unit Targets
1998 (Year 1)	[redacted]

4. TM and BNSF agree to meet and review the volumes achieved six months and twelve months after execution of this Term Sheet Agreement, and annually thereafter, to determine the extent progress is being made to achieve the target in paragraph 3 above and in Attachment A, TM Division-BNSF Volume Matrix following, and what steps could be taken to increase the effectiveness of TM- BNSF or BNSF-TM routing.

III. SPECIFIC TERMS COVERING OPERATIONS

1. BNSF and TM will interchange traffic at Robstown, while efforts to study and explore the ability to price and route via Houston and/or Temple, TX for interline handling are pursued.

2. In order to enable TM to act as BNSF's agent for northbound traffic to Temple through Algoa, the parties shall engage in good faith negotiations and use their mutual best efforts to enter into a trackage rights agreement between BNSF and TM, providing for TM operation over BNSF trackage between Algoa and Temple, TX, with right to enter and exit at Caldwell, TX. Such agreement will be completed following agreement on mutually acceptable terms and conditions upon which basis TM would provide linehaul and local switching service for BNSF over lines in south Texas through the Temple, TX interchange.

3. BNSF will grant TM sufficient access to BNSF facilities at Houston and Temple required to implement this Term Sheet Agreement following agreement on mutually acceptable terms and conditions upon which TM would provide linehaul and local switching service for BNSF over lines in south Texas through the Houston and Temple, TX interchanges, pursuant to Section IV. At Houston and Temple, TX, BNSF shall make up all trains to be handled for this account hereunder, with proper blocking, air tests, and all other actions generally necessary to make up a train.

4. Power, crews and management for all trains operated over or by TM will be provided by TM. In the event TM power is not available, BNSF power may be substituted, at BNSF's election, subject to terms and conditions of the interline power agreement between BNSF and TM. BNSF power may not be used across the international bridge at Laredo without prior written permission of BNSF Vice President Operations-South or designee.

5. BNSF and TM will agree to service standards, and TM will agree to service commitments, applicable by class of traffic interchanged between BNSF and TM. TM will

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report quarterly on service levels provided BNSF traffic, using mutually agreed to data sources and standards.

6. BNSF shall continue to prepare, complete, and forward to TM depacho previo documentation on all cars which it interchanges to TM hereunder.

7. To the extent practicable and information is available, the parties shall continue to use their best efforts to preblock all trains they interchange with each other hereunder in order to expedite such trains across Tex Mex's system and at the Laredo border crossing.

IV. CONSIDERATION OF TM SERVICE FOR BNSF IN SOUTH TEXAS FOR UP/SP MERGER AGREEMENT TRAFFIC

1. TM and BNSF agree to jointly study and explore a basis to reach agreement within one hundred twenty (120) days upon mutually acceptable terms and conditions upon which TM would provide linehaul and local switching service for BNSF over lines in south Texas operated by TM as agent for BNSF, between points and interchanges served by BNSF, and "2-to-1" points and interchanges served by TM as agent for BNSF. It is the intent of BNSF and TM that such an agreement will be for an initial term of 15 years with five (5) year renewable terms thereafter.

2. Operations by TM as agent for BNSF in south Texas would be subject to the terms and conditions in the agreement referred to in Section IV.1 above, and would be contingent upon obtaining any necessary regulatory authorization or UP consent to TM's acting as BNSF's agent under existing trackage rights agreements, and the continuation of directional operations south of Houston and Flatonia necessary to perform such operations. Until such time as TM and BNSF reach agreement on the terms of such operations, obtain such necessary consent of UP and or the necessary regulatory authority to permit operations of TM over BNSF trackage rights, and as long as this Term Sheet Agreement is in effect, BNSF and TM will interchange traffic at Robstown, subject to the rates contained on Attachment A. BNSF and TM agree to pursue obtaining long term bi-directional trackage rights for BNSF and TM as BNSF's agent between Caldwell, Flatonia and Placedo, TX, for use under this agreement in the event UP discontinues directional operations in the corridor between Flatonia and Placedo, TX, to maintain the viability of the proposed Temple interchange between BNSF and TM.

V. GENERAL

1. The parties agree to cooperate with each other and make and prosecute diligently whatever filings or applications, if any, are necessary to implement the provisions of this Term Sheet Agreement.

2. To the extent necessary, the parties agree to use their best efforts to promptly complete definitive agreements reflecting the intent and provisions of this Term Sheet Agreement.

3. Unresolved disputes and controversies concerning any of the terms and provisions of this Term Sheet Agreement shall be submitted for binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association, which shall be the exclusive remedy of the parties.

4. The parties shall engage in good faith negotiations toward entering into a trackage rights agreement with BNSF for TM operations between Algoa and T&NO Junction, TX as soon as practical after execution by all parties of the Term Sheet Agreement, and file for exemption within 30 days of the date of execution of entry into such trackage rights agreement. Trackage rights charges applicable to such trackage rights shall only apply to cars handled by TM for its own account and shall not apply to cars handled by TM for BNSF's account. The parties agree that such charges shall be equal to the charges which apply to the trackage rights which UP has granted BNSF south of Houston.

5 TM and BNSF shall have no rights under this Term Sheet Agreement to make rates or offer service in connection with the other, other than as specifically provided herein.

6. BNSF agrees to support TM becoming a voting member of the PTRA Board of Directors.

7. This Term Sheet Agreement shall be effective upon execution, and shall remain in effect for an initial period of five (5) years from that date. After one (1) year following the execution of this Term Sheet Agreement, either party may request the other party in writing to renegotiate the terms of this Term Sheet Agreement. If the terms have not been renegotiated 90 days after the date of the request, the requesting party may terminate this Term Sheet Agreement on 120 days written notice to the other party, provided, however, that any rates in Attachment A, to the extent they are incorporated in any transportation contract, would remain in effect for the term of such contract. Otherwise, after expiration of the initial period, this Term Sheet Agreement shall continue in effect for additional five (5) year periods unless either party elects to terminate, by giving the other party one year written notice prior to the end of the initial period or any subsequent period.

8 This Term Sheet Agreement and any rights granted hereunder may not be assigned in whole or in part without the prior consent of the other parties except as provided in this Section. This Agreement may be assigned by either party without the consent of the other only as a result of a merger, corporate reorganization, consolidation, change of control or sale of substantially all of its assets. In the event of an authorized assignment, and in the event of a merger, corporate reorganization, consolidation, change of control or sale of substantially all of its assets, this Term Sheet Agreement and the operating rights hereunder shall be binding upon the successors and assigns of the parties. In the event of such a merger or other transaction involving TM, it is the intention of the parties that the divisions, factors and rates in Attachment A and subsequent attachments as jointly developed and agreed to would continue to be applied without change for the services provided by the TM system prior to such transaction.

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9. TM warrants and represents that it has the power and authority to enter into this Term Sheet Agreement and provide service in accordance with its terms, and that this Term Sheet Agreement does not conflict with or violate any other agreements of TM, or to the best of TM's knowledge, of Transporacion Maritima Mexicana. BNSF warrants and represents that it has the power and authority to enter into this Term Sheet Agreement and provide service in accordance with its terms, and that this Term Sheet Agreement does not conflict with or violate any other agreements of BNSF.

10. The parties agree to maintain the confidentiality of business terms and conditions in Attachment A and subsequent attachments, unless otherwise agreed to, provided, however, that the parties may share such information with their respective affiliated companies and produce such information pursuant to a subpoena issued and served upon them by a court of law or regulatory agency, in which instance the subpoenaed party shall give the other party timely notice of said subpoena sufficient to allow such party to seek protection against disclosure of such information from the court or agency issuing said subpoena.

11. The parties agree to coordinate any initial public announcement of this agreement.

Attachment A
TM Division-BNSF Volume Matrix

BNSF Annual Carload Volumes**		TM Per Car Robstown-Laredo Division* Southbound	Northbound
1997	[redacted] (Actual)	[redacted] average	
1998	[redacted] (Target)	[redacted]	[redacted]
1998 Auto Carload Rates:		[redacted]	[redacted]

Notes:

*Includes equipment expenses (per diem or mileage)

**Volumes count on all loaded units, including intermodal; intermodal divisions are not included in the above matrix.

Divisions apply on carload traffic, all commodities, southbound or northbound as shown.

Divisions do not apply on intermodal traffic (trailers or containers, loaded or empty), which are shown below. Northbound divisions have been established a[redacted] of the southbound divisions.

Carload Exception: Automotive Multilevels northbound will move at the same divisions as provided for all carload business as shown above southbound.

Division Adjustment Process:

The above divisions shall be adjusted on January 1 of each year to reflect [redacted] of the annual change in the RCAF - (U) for the previous year.

Intermodal Per Unit Divisions Between Robstown And Laredo:

	Southbound System	Southbound Private	Northbound* System	Northbound* Private
Trailer (1)				
Loaded	[redacted]	[redacted]	[redacted]	[redacted]
Empty	N/A	N/A	[redacted]	[redacted]
Container (2)				

Loaded	[redacted]	[redacted]	[redacted]	[redacted]
Empty	N/A	N/A	[redacted]	[redacted]

Divisions shown are for overhead business only, and do not include equipment ramping or deramping on TM. If equipment ramping or deramping at TM's Laredo facility is required, TM will pass through contracted costs with a maximum of [redacted] per lift. Business opportunities involving private cars will be negotiated.

The above divisions shall be adjusted on January 1 of each year to reflect [redacted] of the annual change in the RCAF - (U) for the previous year.

*No empty charge for free running equipment, both trailers and containers, while on TFM system which are returned via TM to BNSF empty at the discretion of TFM.

(1) Trailer equipment demand and availability, and associated divisions, to be jointly reviewed by TM and BNSF within the next 60 days.

(2) Container divisions are applicable on NACS equipment only.

VERIFICATION

STATE OF TEXAS)
) ss.
COUNTY OF WEBB)

I, Larry D. Fields, being first duly sworn, upon oath and under penalty of perjury state that I have read the foregoing statements and the contents thereof are true and correct as stated.

Larry D. Fields

Larry D. Fields

Subscribed and sworn to before me this 11th day of September, 1998.

NOTARY PUBLIC STATE OF TEXAS
SANDRA SUE WEBBER
NOTARY PUBLIC
STATE OF TEXAS
My Commission Expires 8-14-2001

Sandra Sue Webber

Notary Public

My commission expires: 8-14-01

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 26)
FINANCE DOCKET NO. 32760 (Sub-No. 28)
FINANCE DOCKET NO. 32760 (Sub-No. 29)

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

VERIFIED STATEMENT OF BRAD LEE SKINNER

My name is Brad Lee Skinner. I am Executive Vice President of Transportacion Ferroviaria Mexicana, S.A. de C.V. ("TFM"), which operates the Northeast concession of the recently privatized Mexican rail system. I am also a member of the Board of Directors of the Texas Mexican Railway Company ("Tex Mex"). I am also Chief Operating Officer, Multimodal Division, of Transportacion Maritima Mexicana ("TMM"), which owns a 51 percent interest in TMM and Tex Mex. I provided a verified statement to the Surface Transportation Board ("STB") on March 28, 1996 in Finance Docket No. 32760, Union Pacific Corp., Union Pacific RR Co. and Missouri Pacific RR Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Trans. Co. St. Louis Southwestern RW. Co., SPCSL Corp. and the Denver & Rio Grande Western Corp., in support of the responsive application of the Tex Mex for trackage rights between Robstown and Beaumont, Texas.

I am providing this verified statement to respond to certain assertions made by The Burlington Northern and Santa Fe Railroad ("BNSF") in its Application for Additional Remedial Conditions Regarding the Houston/Gulf Coast Area filed on July 8, 1998 (hereafter "BNSF Appl.") in the STB's Houston/Gulf Coast Oversight proceeding (Finance Docket No. 32760 (Sub. Nos.-26, 28, 29) concerning railroad competition in Mexico.

RELEVANT EXPERIENCE

I have been directly involved with the development of privately owned and operated rail transportation systems in Mexico since I joined TMM in November 1994. In a joint venture with Kansas City Southern Industries ("KCSI"), TMM formed TFM in 1997 to purchase and operate rail lines in Mexico, which the Government of Mexico had decided to privatize after more than 70-years of government ownership and operation. In 1997, TFM was the successful bidder for one of the four groups of lines, known as the Northeast Concession, being offered for sale. TFM's system consists of 2,445 miles of track, and it connects the cities of Matamoros and Nuevo Laredo on the U.S. border with cities throughout eastern and central Mexico, including Mexico City, Monterrey, San Luis Potosi, and the ports of Tampico and Vera Cruz on the Gulf of Mexico and Lazaro Cardenas on the Pacific Ocean. TFM began operating its system on June 24, 1997. Since joining TMM in 1994, my responsibilities have included analyzing the business potential of most of Mexico's rail lines, developing TMM's and TFMs business and operating plans, developing and pursuing the bid for the Northeast Concession, and, since the commencement of rail operations last year, implementing TFM's business and operating plans. In addition, my responsibilities as a member of the Board and the Executive Committee of Tex Mex and included oversight of that railroad's business and its efforts to serve as an effective competitive alternative to the recently merged Union Pacific/Southern Pacific Rail systems for rail traffic between the United States and Mexico.

Before joining TMM, my experience for most of my career has involved marketing transportation services. After obtaining a Bachelor of Science degree from Portland State University in 1970, I spent several years in public service, working for the United Nations and as an Assistant City Manager in Vancouver, Washington. In 1976 I went to work for IBM in marketing. From 1978 to 1983 I worked for Schneider National in several marketing positions, the last one as Corporate Director of National Accounts. From 1983 to 1988 I worked for Burlington Motor Carriers and for one of its trucking subsidiaries in various executive positions. From 1989 to 1990 I worked in marketing for American President Lines. From 1990 to 1994, before joining TMM, I worked for Southern Pacific Transportation Company ("SP"), first as Vice President of Forest Products and later as Vice President of Intermodal.

Based on my experience with TMM and TFM, I am very familiar with the Mexican transportation system and with the intramodal and intermodal competition faced by TFM over various routes. Based on that experience as well as my four years with SP, I am also familiar with the U.S. railroad industry, and especially with competition among the western railroads, including competition among them for traffic between the United States and Mexico.

BNSF'S CONTENTIONS

In its application in the Houston/Gulf Coast proceeding, BNSF seeks, among other things, trackage rights over the Union Pacific ("UP") line between San Antonio and Laredo, Texas. Rail traffic moving to or from Mexico via Laredo can and does move from or to the BNSF system via the Tex Mex, which connects with BNSF at Robstown, Texas. In addition, BNSF also serves the Mexican gateway of Eagle Pass/Piedras Negras via some of the 4000 miles of trackage rights BNSF obtained in the UP/SP merger, and interchanges Mexico-bound traffic with Ferrocarril Mexicano ("FXE") there. BNSF, however, now claims it needs even more trackage rights, between San Antonio and Laredo, in order to enable it to reach Laredo directly by an alternative route.

One of the arguments BNSF makes in support of this request is that rail competition within Mexico, between TFM, which serves the Laredo/Nuevo Laredo and Brownsville/Matamoros gateways, and FXE, which serves the Eagle Pass/Piedras Negras gateway, has not developed for traffic between the United States and Mexico, contrary to supposed expectations. As a result of an alleged "reduction in intergateway competition from pre-merger levels," BNSF claims that "Eagle Pass has become a less attractive alternative to Laredo for many shippers than it was pre-merger, thus further insulating UP's Laredo operations from market discipline." BNSF Appl. at 11. BNSF concludes:

> This lower than expected level of competition in Mexico means that the gateways between Mexico and the United States have become increasingly segmented and differentiated by the serving Mexican carrier to a degree that was not expected before the merger. It is of increasing importance to shippers which Mexican carrier will carry their traffic to/from its destination/origin and which border crossing will be used. As a result, the ability of BNSF service at Eagle Pass to discipline UP service at Laredo has been reduced. Therefore, the importance of providing competition in servicing Laredo north of the border for Transportacion Ferroviaria Mexicana ("TFM") customers has likewise increased, and the Board should act to assure that competition to that gateway is vigorous and viable for BNSF as a post-merger replacement for SP.

Id. Verified statements of Peter J. Rickershauser and Joseph P. Kalt are offered in support of these claims.

BNSF'S CLAIMS ABOUT COMPETITION IN MEXICO ARE WRONG

BNSF's claims regarding competition in Mexico are fallacious on two grounds. First, BNSF's arguments make no sense and provide no rational support for the trackage rights

BNSF seeks to Laredo. Second, BNSF's claims are simply wrong as a matter of fact. There is vigorous competition between TFM and FXE for rail traffic between the United States and Mexico, as evidenced most indisputably by the fact that BNSF has, since March 1998 shifted a substantial amount of Mexican-bound traffic from Laredo and TFM to Eagle Pass and FXE.

Before even discussing the actual facts, I would point out that BNSF's arguments make no sense. The extent of rail competition in Mexico, or lack thereof, has no relevance to BNSF's request for an alternative trackage-rights route to Laredo, and can provide no justification for that request. Nothing in the UP/SP merger affected the extent of rail competition in Mexico, and BNSF does not explain why the state of affairs in Mexico should provide any basis for the STB to impose new conditions on that merger. Nor does BNSF explain why, if TFM enjoys an absence of competition in Mexico, providing another U.S. railroad direct access to the connection with TFM at Laredo would enhance competitive alternatives for shippers. Under well-settled economic principles regarding the competitive effects of vertical integration, it would not.[1]

Furthermore, as a factual matter, BNSF's claims regarding lack of competition in Mexico are simply wrong. Indeed, its contention that there is less rail competition in Mexico today between lines serving the Laredo and Eagle Pass gateways than there was before the

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[1] See, e.g., Finance Docket No. 32760, Union Pacific Corp. et al. - Control and Merger - Southern Pacific Rail Corp et al., Decision No. 44, served August 12, 1996 at 119-20; Finance Docket No. 32549, Burlington Northern Inc. et al. - Control and Merger - Santa Fe Pacific Corp., et al., Decision served August 23, 1995 at 70-78, aff'd sub nom., Western Resources, Inc. v. STB, 109 F.3d 782, 787 (D.C. Cir. 1997); Union Pacific Corp. et al. - Control - Missouri-Kansas-Texas R.R., 4 I.C.C. 2d 409, 476 (1988); Union Pacific Corp. et al. - Control - Missouri Pacific Corp. et al., 366 I.C.C. 459, 538, aff'd in part and remanded in part sub nom. Southern Pacific Transportation Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985).

UP/SP merger is preposterous on its face. Before the UP/SP merger, there was only one railroad in Mexico, the government-owned FNM, which owned both of those lines. Today, each of those lines is owned by different, privately owned railroads. Even if there were some impediments to full competition between them, there could not possibly be less competition between them today that the zero competition that existed before the UP/SP merger.

In any event, BNSF is simply wrong as a matter of fact in contending that competition between TFM and FXE has not materialized. BNSF's own actions refute that contention and demonstrate that such competition is very much alive.

FXE is owned by a consortium consisting of Grupo Mexico, Ingenieros Civiles Asociados ("ICA"), and UP. This group bid $525 million for the Pacific-North concession, and was awarded that concession in July 1997. The Pacific-North concession, operating as FXE, ships rail traffic via a 3,885-mile system connecting the U.S.-Mexican border cities of Calexico-Mexicali, El Paso-Ciudad Juarez, Presidio-Ojinaga, and Eagle Pass-Piedras Negras, with cities throughout Mexico, including Monterrey, Tampico, Aguascalientes, Guadalajara, and Manzanillo. With the ability to provide service to northern and western Mexico, to provide direct service between Monterrey and the port city of Tampico, and to interline with TFM to serve shippers on the Northeast line, FXE also has the potential to provide efficient and valuable service to customers in Mexico and the United States. FXE began operations in February 1998.

Since March, 1998, BNSF has diverted a substantial amount of its Mexico-bound traffic away from Laredo and TFM and shifted it to Eagle Pass and FXE. From the commencement of TFM operations in July 1997 through March 1998, BNSF routed substantial amounts of traffic to TFM at Laredo via the Tex Mex. BNSF traffic data show that BNSF delivered the following numbers of southbound cars to Tex Mex at Flatonia or Robstown, Texas, virtually all of which were delivered by Tex Mex to TFM at Laredo:

July 1997	1,117
August 1997	1,171
September 1997	1,459
October 1997	2,349
November 1997	1,021
December 1997	745
January 1998	2,073
February 1998	2,474
March 1998	3,754

This traffic constituted a substantial portion of Tex Mex's and TFM's business during that period.

As BNSF acknowledges, the Laredo gateway is generally superior to Eagle Pass and TFM's lines are generally shorter and in better condition than FXE's lines from Eagle Pass to most major rail markets in central and eastern Mexico.[2] Notwithstanding those facts, BNSF has, over the past year, significantly increased the amount of traffic routed to Eagle Pass and interchanged there with FNM and with FXE after FXE commenced operations in February, 1998. BNSF traffic data show that in the seven months from August 1997 through February 1998, BNSF delivered southbound cars to FNM at Eagle Pass in the following amounts:

August 1997	520

[2] See BNSF Appl., Rickershauser V.S. at 34.

September 1997	751
October 1997	1,062
November 1997	429
February 1998	117

After FXE commenced operations in February 1998, the number of cars BNSF delivered to FXE at Eagle Pass increased dramatically, as follows:

March 1998	1,772
April 1998	2,473
May 1998	2,765
June 1998	1,409

The number of cars BNSF delivered to Tex Mex after March 1998 experienced a comparable decline, as follows:

April 1998	2,453
May 1998	1,920
June 1998	1,399
July 1998	1,404

The same trends are reflected in attachments to BNSF's own latest Quarterly Progress Report (BNSF-PR-8, dated July 1, 1998), showing a decline since March 1998 in the number of loaded units handled by BNSF in the "Gulf South Corridor" between Temple, Corpus Christi and Brownsville, Texas (Attachment 12) and an increase in the number of loaded units handled by BNSF in the "Eagle Pass Corridor" between Temple, San Antonio and Eagle Pass, Texas (Attachment 14). These figures confirm BNSF's own statements in that report regarding service and competition through Eagle Pass. There BNSF stated:

> In early November, 1997, BNSF increased its Temple-Eagle Pass service from three days per week to five days per week due to increasing traffic volumes. In December, 1997, BNSF further increased that service to six days per week in each direction, as traffic continued to increase.

BNSF-PR-8 at 36. Specifically regarding FXE, BNSF stated:

> On February 18, 1998, FXE commenced operations on the trackage connecting with BNSF at Eagle Pass (and El Paso), TX. Start-up of this privatized carrier is expected to bring renewed commercial focus to customers south of the Eagle Pass gateway, and should further strengthen BNSF operations and plans to provide competitive service through this gateway.

Id. at 38 (emphasis supplied).

While the data cited above do not indicate the origins and destinations or the shippers of the BNSF traffic moved through Eagle Pass and Laredo, there is no question in my mind that these figures reflect a significant shifting of traffic by BNSF after March 1998 from Laredo to Eagle Pass. This shift in traffic has significantly impacted Tex Mex's and TFM's revenues. Indeed, for that reason, it is remarkable to us at TFM that BNSF can shift substantial business to our main rail competitor in Mexico and yet assert that there is no effective competition between us. It is also noteworthy that FXE was able to attract this traffic right after FXE commenced operations and was experiencing all the normal difficulties of start-up operations. What these facts establish beyond question is that FXE has not only been competitive, but has in fact successfully competed with TFM for U.S.-Mexican traffic, contrary to BNSF's claims.

Furthermore, FXE will continue to grow as a competitive threat as it gains operating experience and improves its infrastructure. FXE itself has stated publicly that it has seen increased freight traffic at the Eagle Pass-Piedras Negras gateway, and believes that gateway has the most growth potential for FXE traffic. Progressive Railroading reports that FXE has aggressive growth plans, expecting to increase its traffic by 15 percent in one year.

Progressive Railroading, Vol. 41, No. 8, p. 48 (August 1998). Mr. Reyes is quoted as saying, "We expect much of this growth to take place along the border. We have already started growing our freight from the border at Piedras Negras. That has the most potential, we think." Id.

Another reason FXE can be expected to grow as a competitive factor for U.S.-Mexican traffic is that UP has a substantial financial interest in FXE. UP's financial stake in FXE provides UP with a strong economic incentive to develop traffic through Eagle Pass as its own alternative gateway to Laredo. Further, it appears that UP has wasted no time in acting on that incentive. It has been publicly reported that officials with ties to UP have worked as consultants with FXE to assist in FXE's start up and have been invaluable participants in FXE's early success. Progressive Railroading, Vol. 41, No. 8, p. 46 (August 1998).

Nothing in the verified statements included in BNSF's trackage rights application refutes these conclusions or support BNSF's claims regarding lack of rail competition in Mexico. None of them mention, or appear to be aware of, the significant shift in BNSF traffic from Laredo to Eagle Pass after March 1998. Mr. Rickershauser merely repeats the bald assertions in the application that competition between TFM and FXE have not materialized, but provides no bases or support whatever for those assertions. BNSF Appl., Rickershauser V.S. at 6, 33-34. Mr. Rickershauser states his understanding that FXE "must pay at least $1.50 per loaded car mile to move cars via trackage rights to destinations on TFM" (id. at 33), but that fact does not establish an absence of competition between TFM and FXE. Railroads in the United States (unlike those in Mexico) do not have any trackage rights over most of the rail lines of their competitors, at any price, but that fact does not mean they do not compete with each other. Furthermore, depending on distances, commodities and other circumstances, a charge of $1.50 per loaded car mile for trackage rights could make a trackage rights tenant highly competitive with the track owner for particular movements.

Mr. Rickershauser also asserts his understanding that "prior to the UP/SP merger, SP had an equalization agreement with FNM that made rates from Eagle Pass equal to those from Laredo notwithstanding any differences in distances. That agreement has now lapsed . . . ." Id. at 34. If there were such an agreement, it would hardly have been pro-competitive. Such an agreement would effectively prevent the operator of the Laredo line (now TFM) from competing on price with the operator of the Eagle Pass line notwithstanding any advantages the former might have in distance, efficiency and infrastructure.

Professor Joseph Kalt largely relies on Mr. Rickershauser's unsupported claims in reiterating the charge that rail competition has not materialized in Mexico. Kalt V.S. at 18-22. Professor Kalt asserts that "Mexican policy has restricted the TFM and FXE routings' competitiveness with one another" (id. at 19), but provides no basis for that claim and no analysis of the two railroad's respective route structures, which in fact intersect at and serve many common points. Like Mr. Rickershauser, Professor Kalt cites the trackage fee of $1.50 per loaded car mile, and asserts: "At this high rate, it cannot be assumed that FXE can compete with TFM for destinations solely served by TFM, which operates from the Laredo gateway southward." Id. at 20. But Professor Kalt does not claim expertise, or even familiarity, with Mexican rail transportation rates and costs, and provides no basis for assuming that the rate is "high" or that FXE cannot compete with TFM at that rate. That rate was established by the Mexican authorities, not by TFM, and how competitive it permits FXE to be would depend on the characteristics and market conditions of specific movements, none of which are analyzed by Professor Kalt. Furthermore, as noted earlier, railroads (BNSF and

UP, for example) can be fully competitive with each other even if they have no trackage rights over each other, which they typically do not in the United States.

In summation, BNSF's claim that rail competition in Mexico between the Laredo and Eagle Pass gateways has not materialized is untrue and is refuted by BNSF's own actions recently in shifting substantial amounts of traffic from the Laredo gateway to Eagle Pass.

VERIFICATION

I, Brad Lee Skinner, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on September 11, 1998.

Brad Lee Skinner

STB FD 32760 (Sub 26) 9-18-98 I 191223 2/3

3

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 26)
FINANCE DOCKET NO. 32760 (Sub-No. 28)
FINANCE DOCKET NO. 32760 (Sub-No. 29)

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

VERIFIED STATEMENT OF MICHAEL H. ROGERS

Introduction

My name is Michael H. Rogers. I am a Vice President at ALK Associates, Inc. ("ALK"), a transportation consulting and software development firm located in Princeton, New Jersey. Since joining ALK in June 1989, I have conducted numerous railroad traffic diversion studies for strategic planning and merger and acquisition filing support. My education includes a B.S.E. in Engineering and Management Systems from Princeton University, and an M.B.A. from Columbia University.

Scope and Assumptions of Traffic Diversion Analysis

ALK was retained to study the impact of the Burlington Northern – Santa Fe Railroad proposal for additional remedial conditions in the Houston/Gulf Coast Area. The proposed trackage rights would give BNSF access to Laredo, revised access to Brownsville, the Caldwell to Placedo line, and the Taylor to Milano line. This study includes both extended haul traffic and new business markets. ALK did not attempt to address changes in rail origin/destination patterns, transportation modal shifts, or economic growth considerations. In conducting this study, I operated under the following parameters:

a. The expanded BNSF will operate as a single-line system from between its newly acquired trackage rights and its original system.

b. The railroad industry competitive environment can be represented by the results of 1996, except for the impact of other rail industry changes that occurred during or after 1996. The Base study includes the changes primarily from the Union Pacific acquisition of Southern Pacific and the numerous protective conditions and trackage rights associated with that merger.

c. In order to better reflect the markets served by Tex Mex, an internal 1996 Tex Mex 100% traffic database was integrated with the 1996 Waybill Sample data.

The traffic diversion study analyzed two scenarios. Scenario A models the effects of the BNSF proposal with respect to the Base Case Scenario described above -- that is, the effect of granting the BNSF proposal without the changes proposed under the Consensus plan filed by Tex Mex, Kansas City Southern Railway and others. Scenario B shows the effect of granting BNSF's request for trackage rights and other requested relief assuming that the Consensus Plan has been granted as well.

This analysis was conducted in response to the BNSF application for additional remedial conditions regarding the Houston/Gulf Coast area. The results of my traffic diversion were provided to Mr. Joe Plaistow of Snavely King Majoros O'Connor & Lee for economic analysis.

Methodology

On an ongoing basis, ALK maintains a computerized representation of the North American railroad network, consisting of links and nodes. The links correspond to track segments. For each segment, ALK is aware of the railroad(s) operating over the segment, the exact distance, and the mainline/branchline classification. The nodes correspond to freight stations and to interline junctions between railroads. For each node, ALK is aware of the Freight Station Accounting Codes (FSACs) for the freight stations, and the 5-character Association of American Railroads (AAR) codes for the interline junctions.

Using this network, ALK can generate the most likely route between an origin and a destination, for all combinations of originating and terminating railroads. The most likely route for each combination is the route with the minimum sum of "impedances" over the route. There are impedances for each track link and interline junction. The track impedances are a function of distance and mainline/branchline designation, and the origin carrier's track impedances are discounted to account for the originating carrier's ability to extract a longer length of haul. The interline junction impedances are a function of the quality of service offered: run-through, through block, daily switching, and less than daily switching. Using information provided by the railroads on actual routes used, ALK calibrated the track and junction impedances relative to one another.

ALK uses its Advanced Traffic Diversion (ATD) methodology to conduct this study. The ATD methodology begins by extracting pertinent origin-destination pairs from a traffic data set. For the purposes of its diversion study, ALK refers to these origin-destination pairs in shorthand form as "markets."

For this diversion analysis, ALK integrated the 1996 100% Tex Mex traffic data with the 1996 Waybill Sample. Because the 1996 Waybill Sample overstated the Tex Mex traffic volumes, all Tex Mex participatory records were removed from the Waybill and replaced with their 100% traffic records. We then extracted all markets from the 1996 ICC Waybill Sample where the Tex Mex could conceivably offer routes to connecting carriers.

For each origin-destination market, the model generated a route for every combination of origin and terminating railroad. If, for example, the origin was served by three railroads and the destination by two railroads, we generated six routes. We screened out routes unlikely to attract traffic, such as overly circuitous routes. We then estimated market shares for the remaining routes based on their relative impedances, using a formula that was calibrated based on actual market shares from the 1996 waybill.

We diverted traffic to each affected BNSF route in Scenario A and to both BNSF and Tex Mex routes in Scenario B until the total BNSF and Tex Mex market shares equaled the share suggested by the model. Finally, for multicarrier routes involving BNSF, Tex Mex, and other carriers, we allocated revenue among the participating carriers using a revenue allocation model. This model allocated revenue in proportion to each carrier's share of the route's mileage, constrained to provide a minimum share to each carrier, and extra shares for origin and terminating carriers.

Results and Discussion

Scenario A: BNSF Trackage Rights and Other Relief Without the Consensus Plan

Diversion projections for Scenario A – adoption of the trackage rights requested by BNSF without adoption of the Consensus Plan – are summarized in Exhibit 1 of this

Statement. Under that scenario, ALK projects that, compared with the Base Case (*i.e.*, the UPSP merger scenario) Tex Mex will lose approximately $12.9 million – roughly 48% of its revenue base – if BNSF gains the San Antonio-Laredo and other relief it seeks.[1] BNSF, meanwhile, will gain approximately $160 million of additional freight revenue as a result of diversions of traffic to the BNSF system.

Exhibit 2 presents detailed Tex Mex data under this scenario, showing the results by category of traffic. Under this scenario, Tex-Mex is shown to capture no share of the finished automobile traffic between Laredo and Houston, based on the testimony of Danny M. Beers, the TFM official responsible for the marketing and sale of finished auto transportation, who concludes that Tex Mex would be unable to compete for any share of this traffic under the competitive environment presented by the addition of direct BNSF access to Laredo. See Verified Statement of Danny M. Beers. Exhibit 1 also shows a drop of more than $6 million in general merchandise revenues, and other substantial losses in revenue from intermodal and coal/grain traffic.

Under this scenario, as depicted in Exhibit 3, Tex Mex's Laredo market share drops by more than half, from a market share of 14.4% in the base case to just 6.4% if the BNSF trackage rights and other relief are granted.

Scenario B: BNSF Trackage Rights and Other Relief Added to the Consensus Plan

Scenario B assumes the adoption of the Consensus Plan, and examines the effect of superimposing on top of that the San Antonio-Laredo trackage rights and other relief requested by BNSF. As set out in Exhibit 4, the ALK analysis shows that granting BNSF

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[1] Although our analysis involved examining the entire BNSF Plan, virtually 100% of the impact on Tex Mex of that Plan arises from BNSF's request for San Antonio to Laredo trackage rights.

the relief it seeks would reduce Tex Mex's expected revenues under the Consensus Plan by $25 million, from $82.5 million to $57.5 million – a reduction of 30%. Exhibit 5 shows this reduction broken down by traffic type, and indicates substantial losses in every category of traffic.

Exhibit 6 presents the effect of Scenario B – imposing the BNSF proposal on top of the Consensus plan -- on Laredo market shares. By adding the BNSF proposal to the Consensus Plan, the Tex Mex market share in Laredo is reduced by more than half, from 37.8% to 14%.

Exhibits 7 through 14 are maps showing changes in traffic flow by service type. Exhibits 7 through 10 show changes in traffic flows for various categories of traffic under Scenario A (adoption of BNSF Plan alone) compared with the Base Case; Exhibits 11 through 14 are maps showing changes in traffic flows for various categories of traffic under Scenario B – that is, resulting from the addition of BNSF's San Antonio-Laredo trackage rights and other requested relief on top of adoption of the Consensus Plan.

Exhibit 1

Total Revenue in Millions

Post UP/SP Merger with BNSF Proposal

Traffic	UPSP Base Case	UPSP Post-BNSF Diversion	UPSP Change	UPSP %	BNSF Base Case	BNSF Post-BNSF Diversion	BNSF Change	BNSF %	Tex-Mex Base Case	Tex-Mex Post-BNSF Diversion	Tex-Mex Change	Tex-Mex %
Merchandise	$5,085	$5,036	($49)	-1%	$2,965	$3,023	$58	2%	$16.7	$10.6	($6.1)	-37%
Intermodal	$2,035	$2,003	($32)	-2%	$2,232	$2,265	$33	1%	$0.9	$0.2	($0.7)	-74%
Coal and Bulk	$2,977	$2,966	($11)	0%	$3,176	$3,189	$13	0%	$4.1	$3.4	($0.7)	-18%
Finished Autos	$1,179	$1,129	($50)	-4%	$462	$518	$56	12%	$5.4	$0.0	($5.4)	-100%
Total	***$11,276***	***$11,134***	***($142)***	***-1%***	***$8,835***	***$8,995***	***$160***	***2%***	***$27.1***	***$14.2***	***($12.9)***	***-48%***

Exhibit 2

Tex Mex Traffic Summary
BNSF Proposal without Consensus Plan

Base Case: 1996 TexMex Projected Traffic with UP/SP Merger Conditions

Service Type	Cars	Car-Miles	Vans	Van-Miles	Tons	Ton-Miles	TM Revenue
General Merch.	27,547	4,754,753	-	-	2,004,538	342,263,698	$ 16,663,986
Intermodal	3,240	574,812	4,497	811,411	65,772	12,053,863	$ 887,527
Coal/Grain	8,450	1,359,951	-	-	722,286	116,364,497	$ 4,139,160
Auto Racks	5,897	1,207,029	-	-	119,877	24,453,512	$ 5,448,639
Total	45,134	7,896,545	4,497	811,411	2,912,473	495,135,8[illegible]9	$ 27,139,312

Scenario A: 1996 TexMex Projected Traffic with UP/SP Merger Conditions and BNSF Proposal

Service Type	Cars	Car-Miles	Vans	Van-Miles	Tons	Ton-Miles	TM Revenue	Change in TMRev vs. Base Case
General Merch.	16,737	2,805,794	-	-	1,288,120	210,796,646	$ 10,566,285	$ (6,097,701)
Intermodal	320	142,368	744	221,110	14,902	3,776,512	$ 234,166	$ (653,361)
Coal/Grain	6,827	1,100,575	-	-	587,139	94,864,299	$ 3,412,373	$ (726,787)
Auto Racks	-	-	-	-	-	-	$ -	$ (5,448,639)
Total	23,884	4,048,737	744	221,110	1,890,161	309,437,457	$ 14,212,824	$ (12,926,488)

Exhibit 3

Laredo Market Share
Post UP/SP Merger with BNSF Proposal

Base Case: 1996 TexMex Projected Traffic with UP/SP Merger Conditions	UPSP		BNSF		Tex-Mex		Total
	Loads	Share	Loads	Share	Loads	Share	Market
Merchandise	74,581	76.5%	-	0.0%	22,964	23.5%	97,545
Intermodal	107,983	96.0%	-	0.0%	4,497	4.0%	112,480
Coal/Bulk	20,870	68.5%	-	0.0%	9,591	31.5%	30,461
Finished Autos	52,358	89.9%	-	0.0%	5,882	10.1%	58,240
Total	***255,792***	**85.6%**	**-**	**0.0%**	***42,934***	**14.4%**	**298,726**

Base Case Plus BNSF Proposal	UPSP		BNSF		Tex-Mex		Total
	Loads	Share	Loads	Share	Loads	Share	Market
Merchandise	56,075	57.5%	29,513	30.3%	11,957	12.3%	97,545
Intermodal	72,546	64.5%	39,465	35.1%	469	0.4%	112,480
Coal/Bulk	17,571	57.7%	6,077	20.0%	6,813	22.4%	30,461
Finished Autos	35,196	60.4%	23,044	39.6%	-	0.0%	58,240
Total	***181,388***	**60.7%**	***98,099***	**32.8%**	***19,239***	**6.4%**	**298,726**

Exhibit 4

Total Revenue in Millions
Post UP/SP Merger with Consensus Plan and BNSF Proposal

	UPSP				BNSF				Tex Mex			
Traffic	Consensus Plan	Post-BNSF Diversion	Change	%	Consensus Plan	Post-BNSF Diversion	Change	%	Consensus Plan	Post-BNSF Diversion	Change	%
Merchandise	$4,987	$4,948	($39)	-1%	$2,992	$3,034	$42	1%	$46.3	$36.8	($9.5)	-21%
Intermodal	$2,017	$1,992	($25)	-1%	$2,227	$2,258	$31	1%	$7.6	$5.2	($2.4)	-32%
Coal and Bulk	$2,972	$2,965	($7)	0%	$3,176	$3,188	$11	0%	$6.0	$4.7	($1.4)	-23%
Finished Autos	$1,145	$1,113	($32)	-3%	$460	$506	$46	10%	$22.5	$10.9	($11.6)	-52%
Total	***$11,121***	***$11,018***	***($103)***	***-1%***	***$8,855***	***$8,986***	***$130***	***1%***	***$82.5***	***$57.5***	***($25.0)***	***-30%***

Exhibit 5

Tex Mex Traffic Summary
BNSF Proposal with Consensus Plan

Base Case: 1996 TexMex Projected Traffic with UP/SP Merger Conditions

Service Type	Cars	Car-Miles	Vans	Van-Miles	Tons	Ton-Miles	TM Revenue
General Merch.	27,547	4,754,753	-	-	2,004,538	342,263,698	$ 16,663,986
Intermodal	3,240	574,812	4,497	811,411	65,772	12,053,863	$ 887,527
Coal/Grain	8,450	1,359,951	-	-	722,286	116,364,497	$ 4,139,160
Auto Racks	5,897	1,207,029	-	-	119,877	24,453,812	$ 5,448,639
Total	45,134	7,896,545	4,497	811,411	2,912,473	495,135,869	$ 27,139,312

Scenario 2: Base Case plus Adoption of Consensus Plan

Service Type	Cars	Car-Miles	Vans	Van-Miles	Tons	Ton-Miles	TM Revenue	Change in TMRev vs. Base Case
General Merch.	72,246	13,246,061	-	-	5,557,320	957,503,737	$ 46,282,143	$ 29,618,157
Intermodal	39,640	8,539,876	44,914	9,739,117	649,872	133,702,589	$ 7,642,955	$ 6,755,428
Coal/Grain	11,552	2,174,063	-	-	1,022,745	188,632,414	$ 6,048,078	$ 1,908,918
Auto Racks	20,850	6,792,715	-	-	428,072	138,580,230	$ 22,509,576	$ 17,060,937
Total	144,288	30,752,714	44,914	9,739,117	7,658,009	1,418,418,969	$ 82,482,752	$ 55,343,440

Scenario B: Base Case and BNSF Proposal with Consensus Plan

Service Type	Cars	Car-Miles	Vans	Van-Miles	Tons	Ton-Miles	TM Revenue	Change in TMRev vs. Scenario 2
General Merch.	60,309	9,978,699	-	-	4,781,737	742,115,694	$ 36,778,667	$ (9,503,476)
Intermodal	32,800	5,755,248	36,851	6,512,949	542,101	91,114,875	$ 5,200,756	$ (2,442,199)
Coal/Grain	9,533	1,600,298	-	-	849,386	140,394,408	$ 4,655,816	$ (1,392,262)
Auto Racks	10,639	2,941,479	-	-	221,208	60,562,887	$ 10,877,837	$ (11,631,739)
Total	113,281	20,275,724	36,851	6,512,949	6,394,432	1,034,187,863	$ 57,513,076	$ (24,969,676)

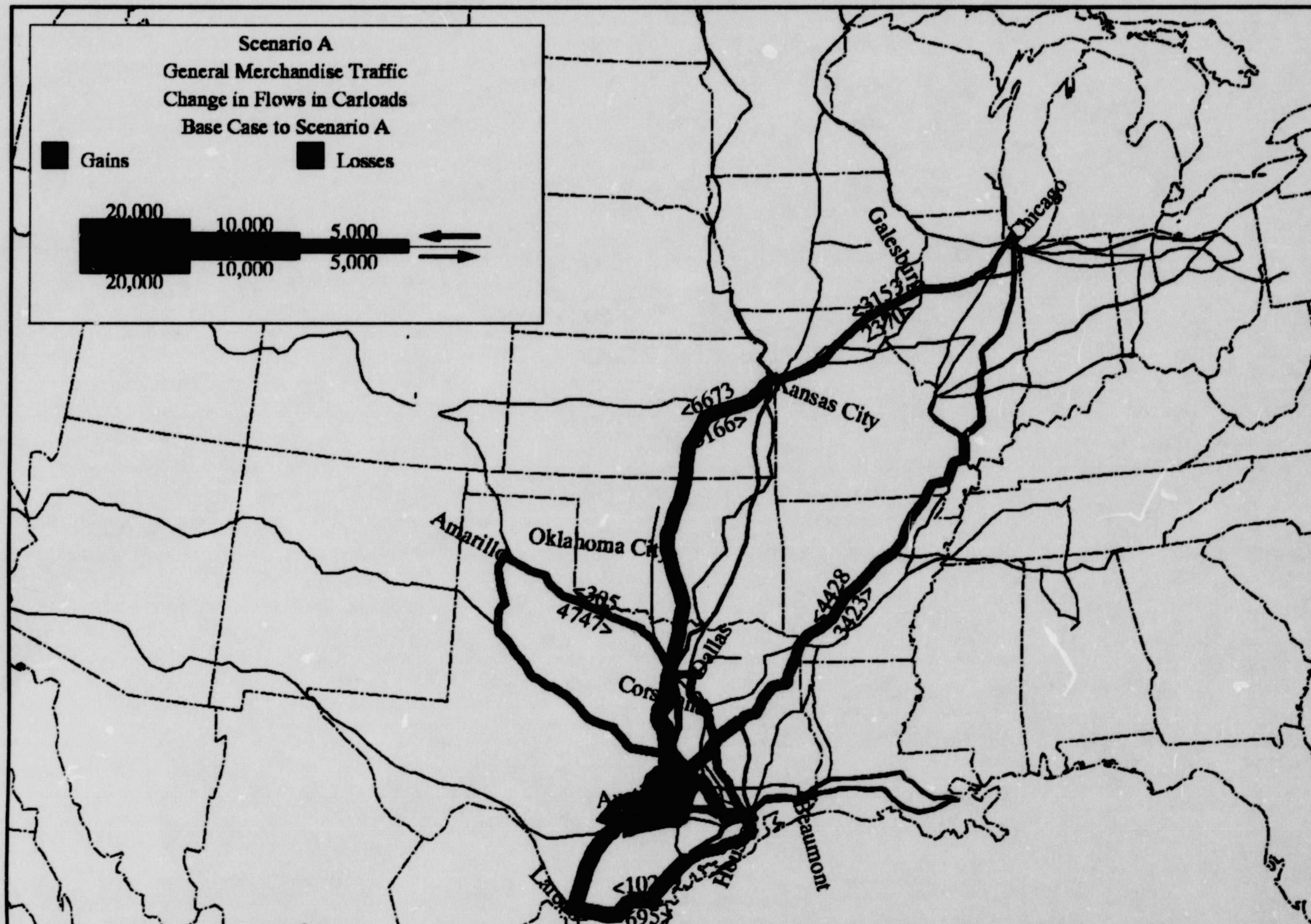
Exhibit 6

Laredo Market Share
Consensus Plan with BNSF Proposal

Base Case Plus Consensus Plan	UPSP		BNSF		Tex-Mex		Total
	Loads	Share	Loads	Share	Loads	Share	Market
Merchandise	66,436	68.1%	-	0.0%	31,109	31.9%	97,545
Intermodal	56,469	50.2%	-	0.0%	56,011	49.8%	112,480
Coal/Bulk	20,992	68.9%	-	0.0%	9,469	31.1%	30,461
Finished Autos	42,051	72.2%	-	0.0%	16,189	27.8%	58,240
Total	***185,948***	**62.2%**	**-**	**0.0%**	***112,778***	**37.8%**	**298,726**

Base Case with Consensus Plan Plus BNSF Proposal	UPSP		BNSF		Tex-Mex		Total
	Loads	Share	Loads	Share	Loads	Share	Market
Merchandise	52,310	53.6%	26,347	27.0%	18,888	19.4%	97,545
Intermodal	66,908	59.5%	36,156	32.1%	9,416	8.4%	112,480
Coal/Bulk	17,560	57.6%	5,451	17.9%	7,450	24.5%	30,461
Finished Autos	31,838	54.7%	20,424	35.1%	5,978	10.3%	58,240
Total	***168,616***	**56.4%**	***88,378***	**29.6%**	***41,732***	**14.0%**	**298,726**

Exhibit 7



Scenario A
General Merchandise Traffic
Change in Flows in Carloads
Base Case to Scenario A
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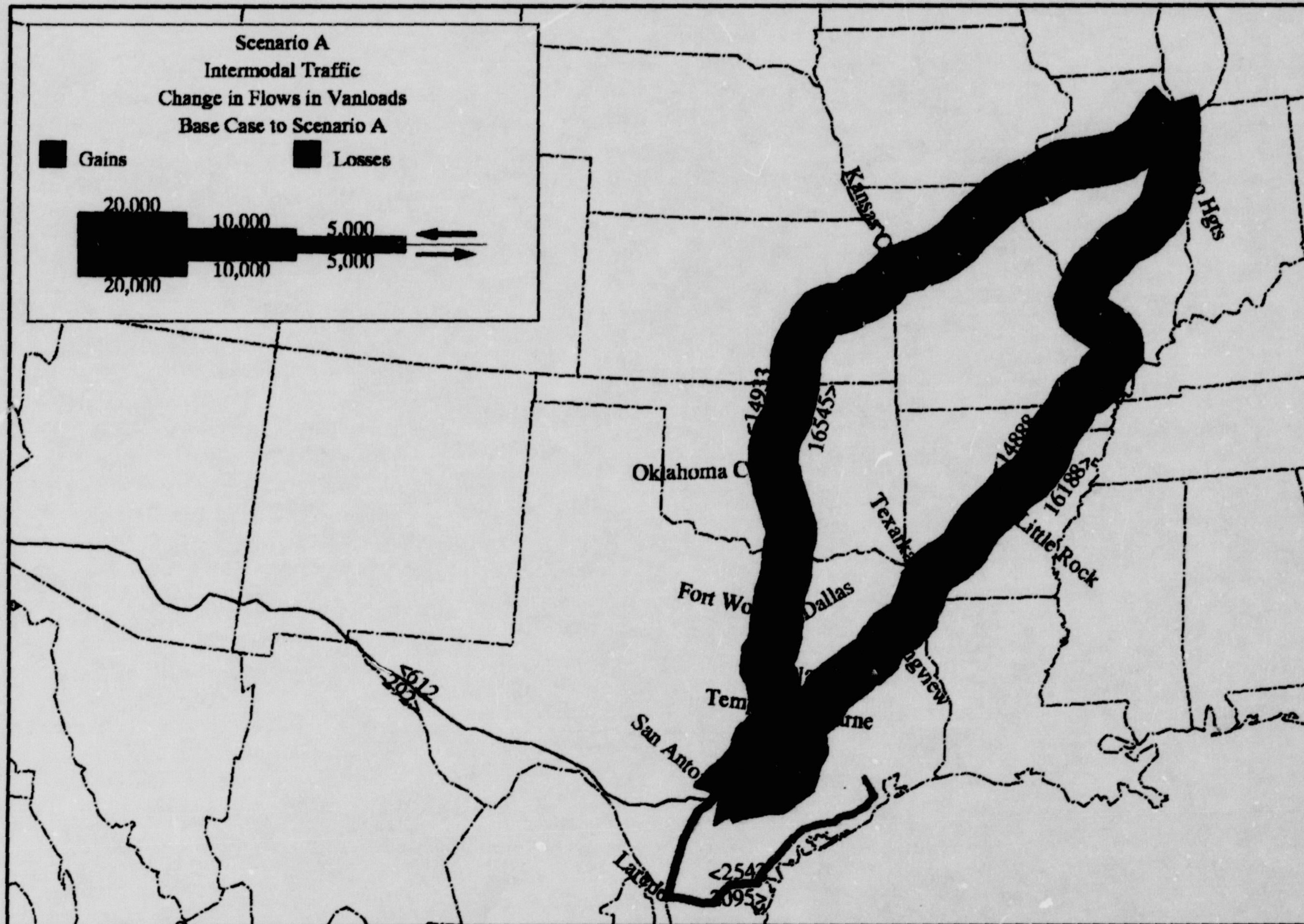
Exhibit 8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Intermodal Traffic
Change in Flows in Vanloads
Base Case to Scenario A
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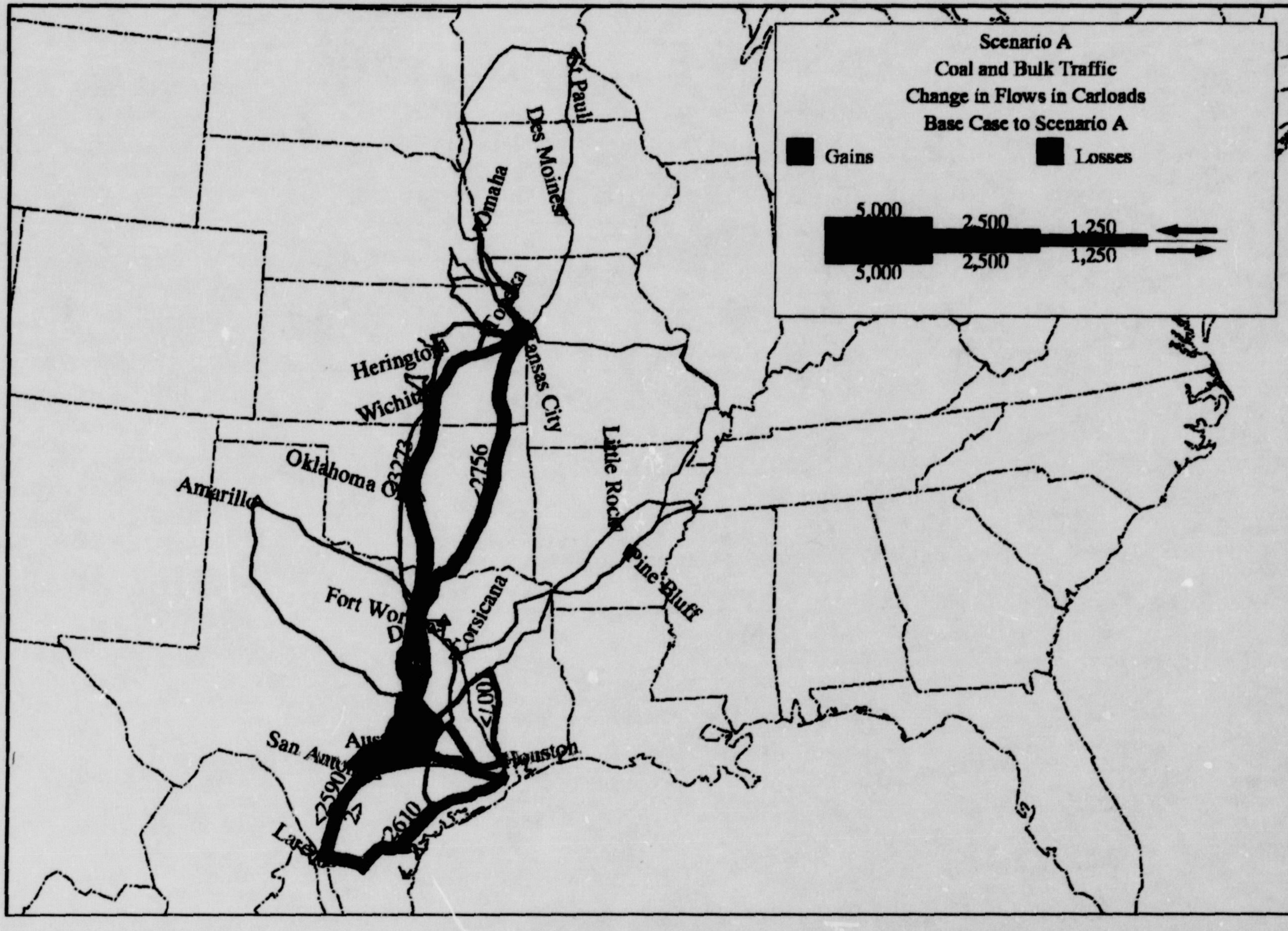
Exhibit 9



Scenario A
Coal and Bulk Traffic
Change in Flows in Carloads
Base Case to Scenario A
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Losses
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1,250
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Omaha
Topeka
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Wichita
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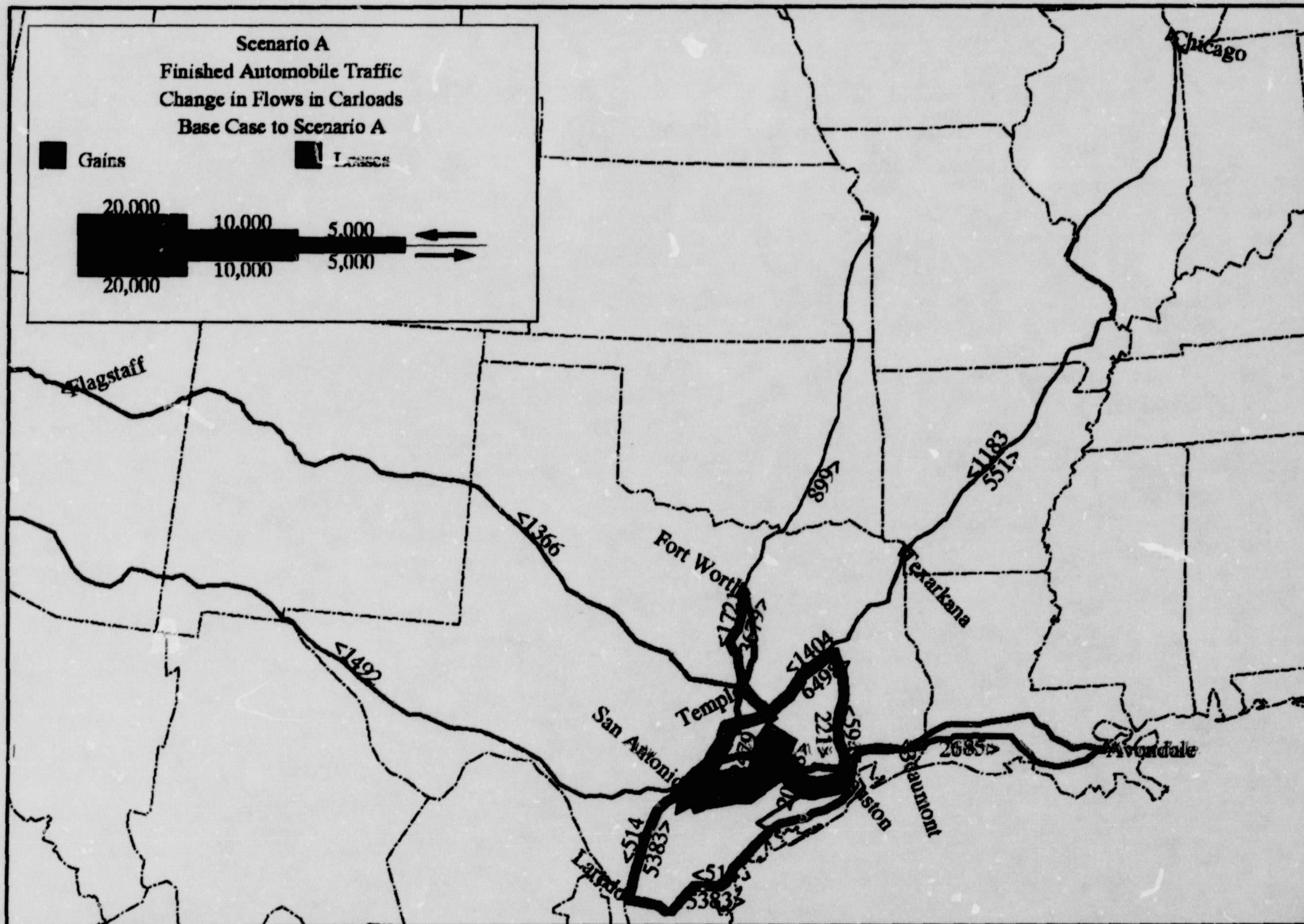
Exhibit 10



Scenario A
Finished Automobile Traffic
Change in Flows in Carloads
Base Case to Scenario A
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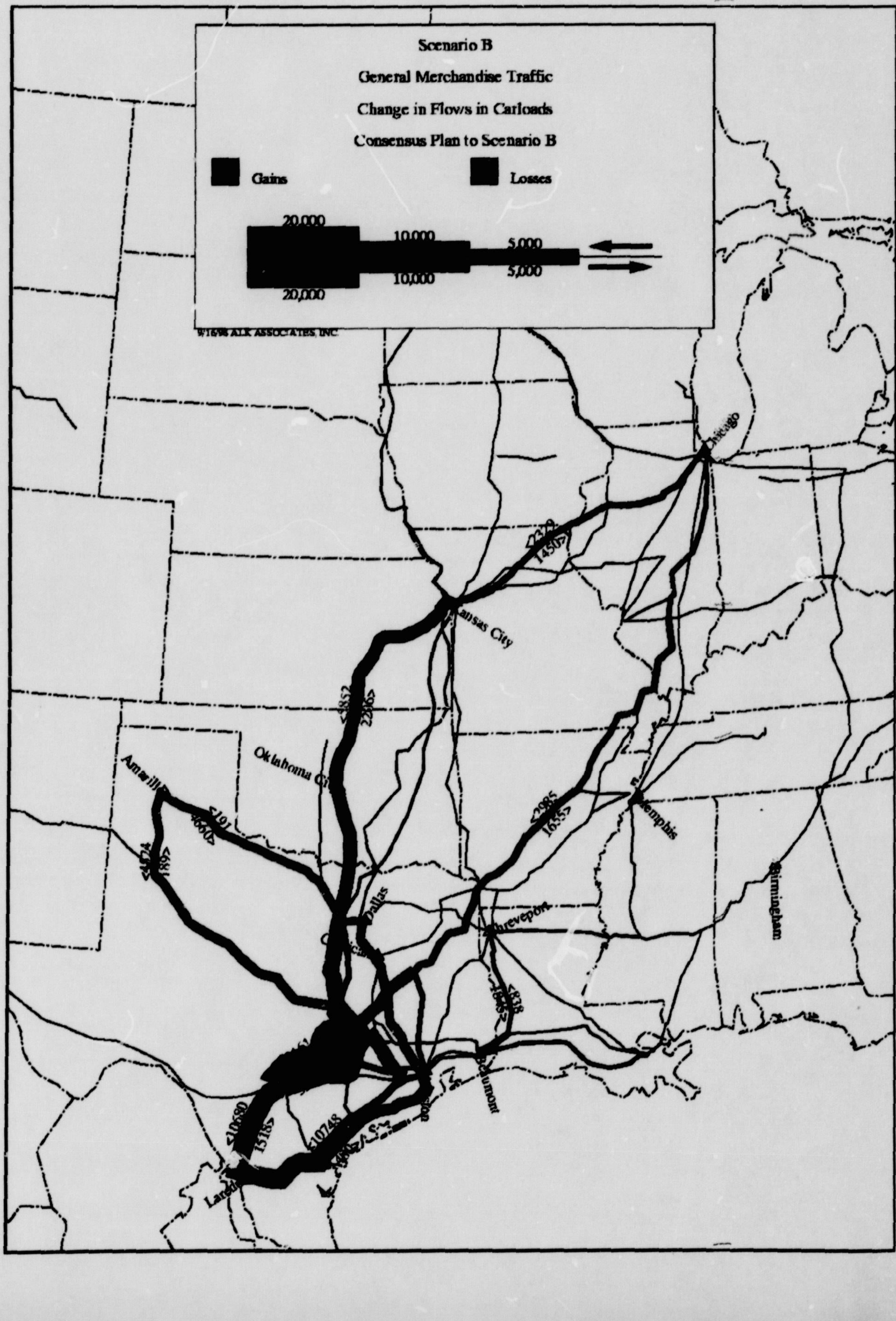
Exhibit 11


Scenario B
General Merchandise Traffic
Change in Flow/s in Carloads
Consensus Plan to Scenario B
Gains
Losses
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20,000
W16/98 ALK ASSOCIATES, INC.
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Oklahoma City
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Dallas
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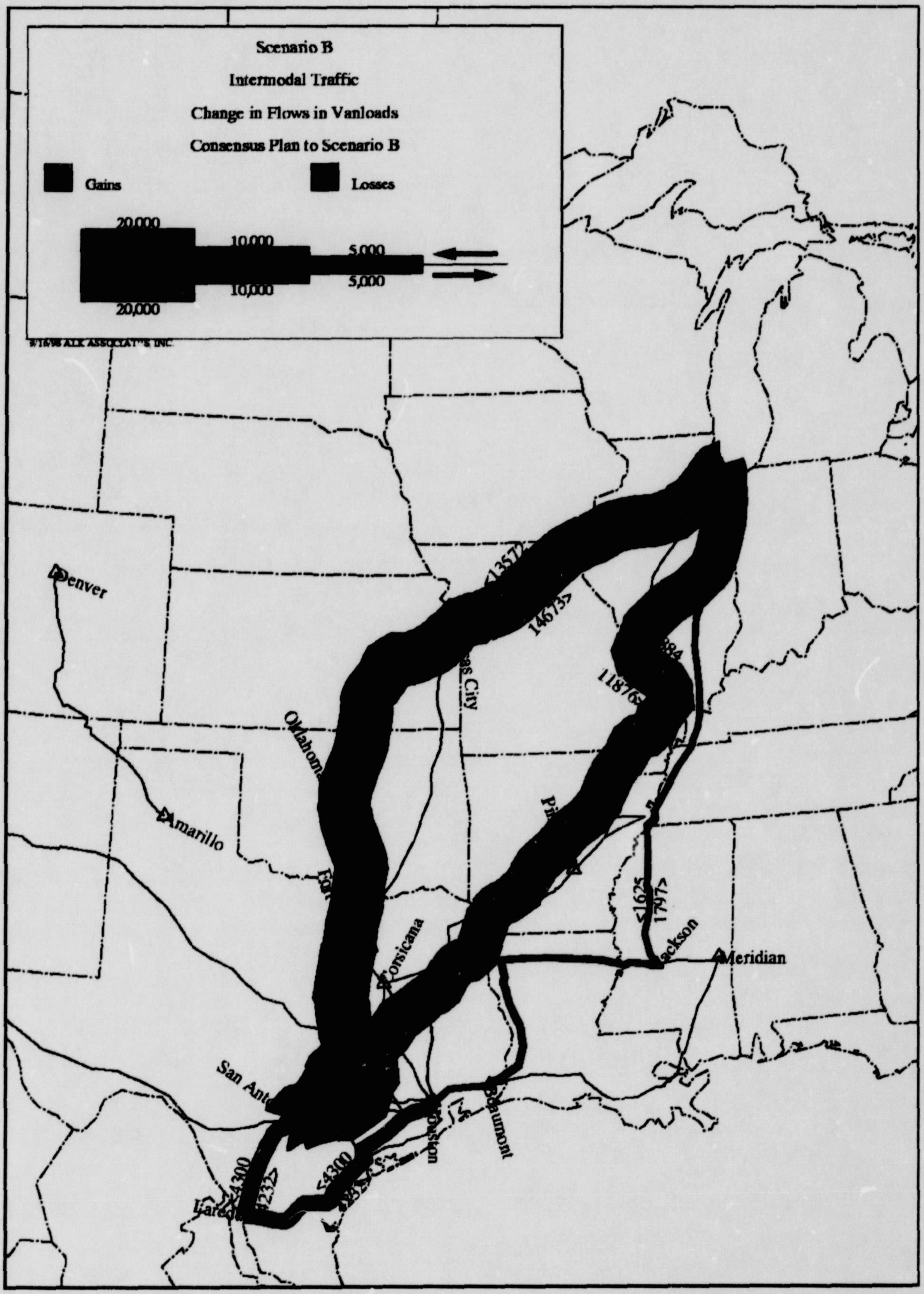
Exhibit 12



Scenario B
Intermodal Traffic
Change in Flows in Vanloads
Consensus Plan to Scenario B
Gains
Losses
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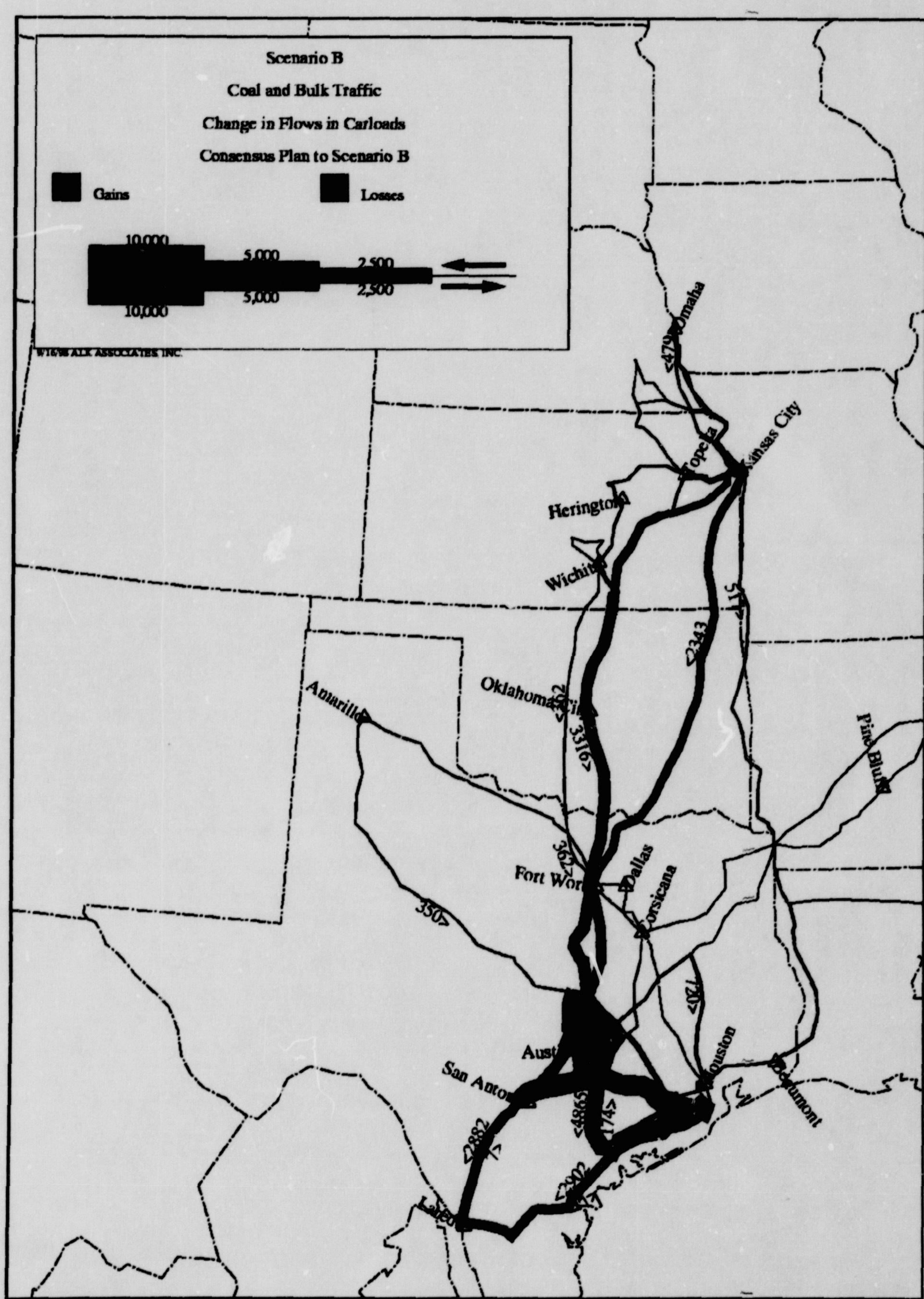
Exhibit 13



Scenario B
Coal and Bulk Traffic
Change in Flows in Carloads
Consensus Plan to Scenario B
Gains
Losses
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5,000
2,500
2,500
5,000
10,000
Omaha
Kansas City
Herington
Amarillo
Pine Bluff
Dallas
Corsicana
Houston
Beaumont
511
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4865
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2882
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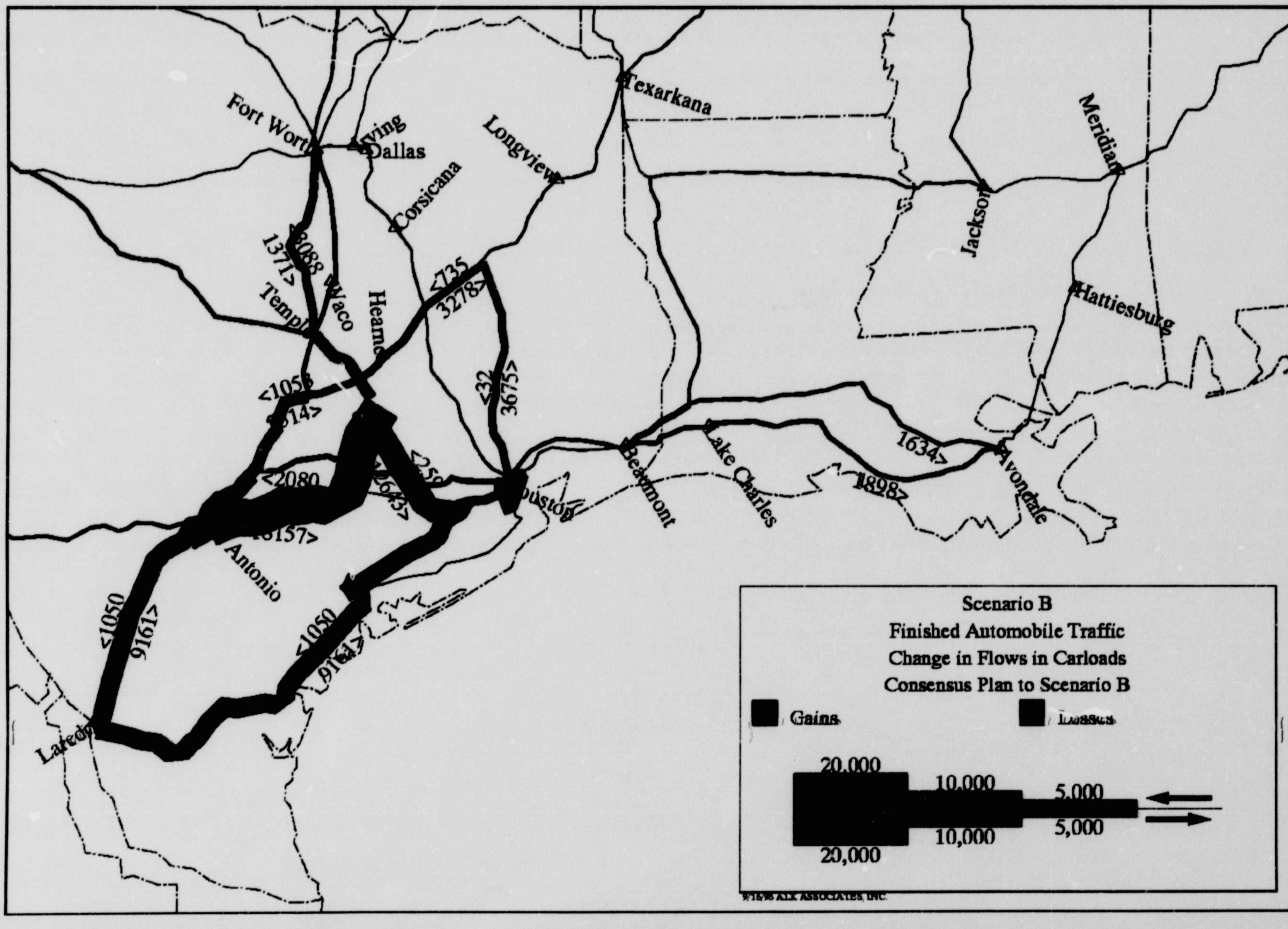
Exhibit 14



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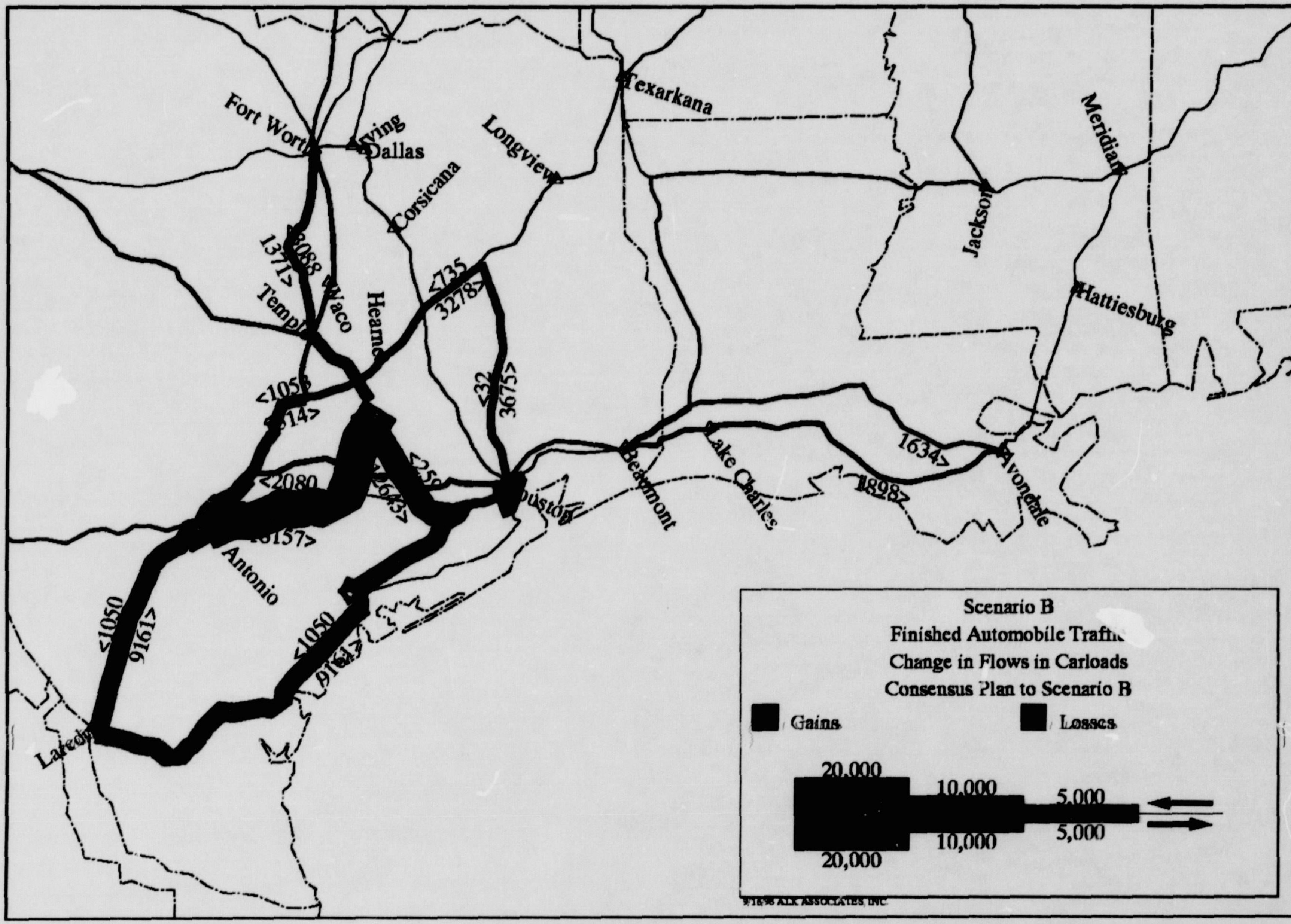
Antonio
Laredo
1634>
1898>
Scenario B
Finished Automobile Traffic
Change in Flows in Carloads
Consensus Plan to Scenario B
Gains
Losses
20,000
10,000
5,000

Exhibit 14



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Scenario B
Finished Automobile Traffic
Change in Flows in Carloads
Consensus Plan to Scenario B
Gains
Losses
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ALK ASSOCIATES, INC.

VERIFICATION

STATE OF NEW JERSEY)
) ss.
COUNTY OF MERCER)

I, Michael H. Rogers, being first duly sworn, upon oath and under penalty of perjury state that I have read the foregoing statements and the contents thereof are true and correct as stated.

Michael H. Rogers

Michael H. Rogers

Subscribed and sworn to before me this 15th day of September, 1998.

Mary B. Kelly

Notary Public

MARY B. KELLY
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES DEC. 2, 1998

My commission expires: 12/2/98

4

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 26)
FINANCE DOCKET NO. 32760 (Sub-No. 28)
FINANCE DOCKET NO. 32760 (Sub-No. 29)

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

VERIFIED STATEMENT OF JOSEPH J. PLAISTOW

My name is Joseph J. Plaistow, and I am Vice President and principal of Snavely King Majoros O'Connor & Lee, Inc. (hereinafter, "SK") with offices at 1220 L Street, NW, Suite 410, Washington, DC 20005. Throughout my 26-year career in transportation, I have studied the economics of providing transportation services by private and public transportation companies. For much of that time, I also studied how railroads can meet shippers' needs in a cost- and operationally-efficient manner.

Many of my cost and economic analyses have been prepared as testimony before the Surface Transportation Board ("STB") or its predecessor the Interstate Commerce Commission. In 1976, I was admitted to practice before the Interstate Commerce Commission as a non-attorney practitioner. I have submitted several verified statements in this proceeding and related matters on behalf of The Texas Mexican Railway Company ("Tex Mex" or "TM") and the Kansas City Southern Railway Company ("KCS").

In Finance Docket No. 33388, the joint control of Conrail by Norfolk Southern and CSX, I was responsible for the development of the estimated benefits Norfolk Southern will realize as a result of the transaction.

Exhibit No. JJP-1, attached, is a more detailed statement of my background and qualifications.

INTRODUCTION

In connection with the STB's Houston/Gulf Coast Oversight proceeding (Finance Docket No. 32760 (Sub No. 26) and related sub-dockets), Tex Mex has asked me to study the financial and economic impact that would result from implementing the remedial conditions requested by the Burlington Northern and Santa Fe Railroad in its July 8, 1998 Application for Additional Remedial Conditions Regarding the Houston/Gulf Coast Area (Finance Docket No. 32760 (Sub-No. 29)) (hereinafter, the "BNSF Plan"). Previously in the Houston/Gulf Coast Oversight proceeding, I filed a verified statement as part of the joint petition filed by Tex Mex and KCS on March 30, 1998 (now designated as Finance Docket No. 32760 (Sub-No. 27)), describing the financial impact of the petition on Tex Mex; and on July 8, 1998, I filed a verified statement describing the financial impact on Tex Mex of implementing the "Consensus Plan" offered by the Consensus Parties (Tex Mex, KCS, The Railroad Commission of Texas, The Texas Chemical Council, The Chemical Manufacturers Association, and The Society of the Plastics Industry, Inc.), TM-2/KCS-2, et al., in Finance Docket No. 32760 (Sub-No. 30).

This verified statement describes the devastating effect that adoption of the BNSF Plan would have on the ability of Tex Mex to provide essential transportation services to its on-line customers.

The BNSF Plan provides:

- Overhead trackage rights on UP's San Antonio-Laredo line between MP 264.3 at South San Antonio and MP 412.51 at Laredo;

- Permanent bi-directional overhead trackage rights on UP's Caldwell-Flatonia-San Antonio and Caldwell-Flatonia-Placedo lines;

- Trackage rights over both the UP line and the SP line between Harlingen and Brownsville (until UP constructs a connection between the two lines at Brownsville), with the Brownsville & Rio Grande International Railroad ("BRGI") acting as BNSF's agent for such service;

- Overhead trackage rights on UP's Taylor-Milano line;

- Neutral switching supervision, by a supervisor selected by the parties, on the former SP Baytown and Cedar Bayou Branches and on the former SP Sabine and Chaison Branches serving the Beaumont-Port Arthur area;

- PTRA operation of the Clinton Branch;

- Overhead trackage rights enabling BNSF to join directional operations over any UP line or lines in corridors where BNSF has trackage rights over one, but not both, of the lines involved in the directional flows, including, specifically, over the Ft. Worth to Dallas line (via Arlington);

- Trackage rights over any UP lines to permit BNSF to operate over any clear route through the Houston terminal area as determined and managed by the Spring Consolidated Dispatching Center, including the SP route between West Junction and Tower 26 via Chaney Junction; and

- Coordinated dispatching of operations over the UP and SP routes between Houston and Longview, and Houston and Shreveport, by the Spring Consolidated Dispatching Center.

The element of the BNSF Plan primarily of concern to Tex Mex is the request for trackage rights between San Antonio and Laredo.

My verified statement is divided into two major parts to review two sets of circumstances under which the BNSF Plan might be implemented. The two scenarios I investigated are as follows:

1. **Scenario A**: The Consensus Plan is not implemented, but the BNSF Plan is adopted, and
2. **Scenario B**: The Consensus Plan is implemented, and the BNSF Plan is also adopted.

From Tex Mex's perspective, Scenario A implements the BNSF Plan following realization of the full effects of Tex Mex's Base Case. (See pages 123 and 124 of my March 30, 1998 verified statement for a description of the Base Case.) Scenario B implements the BNSF Plan assuming adoption of the Consensus Plan as well. (See pages 251 and 252 of my July 8, 1998 verified statement for a description of the Consensus Plan.)

The purpose of this Verified Statement is to explain the preparation of the Statement of Benefits and of the pro forma financial statements (balance sheets and income accounts) which describe the BNSF Plan's financial effects under the two scenarios investigated.

Michael H. Rogers, Vice President of ALK Associates, Inc., has provided me with traffic level projections expected to result from implementation of the BNSF Plan. Traffic diversions and the resulting carload volume and revenue levels provided by Witness Rogers are reflected in the Statement of Benefits. Pat Watts, Tex Mex Vice President-Transportation, provided me with equipment and manpower requirements for the projected traffic levels consistent with the BNSF Plan.

I report the financial information that would be required by Section 1180.9 of 49 CFR. This includes pro forma balance sheets, income accounts and sources and applications of funds for the number of years following consummation of the transaction necessary to effect the operating plan. I report the earnings available for fixed charges, net earnings, effect on total fixed charges, operating ratios and a number of other financial ratios.

The financial statements are created in the following steps:

- Select the financial statements representing the most recent 12-month period prior to implementation of the BNSF Plan. In this case, I selected Normal Year Base Case financial statements for Scenario A and Normal Year Consensus Plan financial statements for Scenario B.[1]
- Calculate the Statement of Benefits reflecting the financial effect of implementing the BNSF Plan.
- Develop the Tex Mex pro formas post-BNSF Plan by adjusting the financial statements to reflect the financial effects summarized in the Statement of Benefits.

I. SCENARIO A: IMPLEMENTATION OF THE BNSF PLAN WITHOUT ADOPTION OF THE CONSENSUS PLAN

My Scenario A Statement of Benefits reflects the implementation of the BNSF Plan without adoption of the Consensus Plan, that is, the change between the Base Case and full adoption of the BNSF Plan:

- The **Base Case**, as described in my March 30, 1998 verified statement at pages 123 and 124, is the state from which the BNSF Plan is implemented in this Scenario A.
- The **BNSF Plan** is as described above.

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[1] For Tex Mex Laredo to Houston traffic, certain car miles associated with the portion of the movement between Corpus Christi and Houston were inadvertently excluded from the car mile calculations originally provided to me for use in calculating the economic scenarios for the Base Case and the Consensus Plan. This omission required a small adjustment to the Base Case figures, which, in turn, required a slight adjustment to the Consensus Plan economic evaluation. The Base Case and Consensus Plan data referred to herein have already been adjusted accordingly. Errata will be filed shortly to correct the corresponding data in my March 30, 1998 and July 8, 1998 verified statements.

In the following discussion of Scenario A, I first state my conclusions from the completed Scenario A analyses, then I explain the development of the Scenario A Statement of Benefits and the pro forma financial statements.

A. CONCLUSION: IF BNSF'S REQUESTED SAN ANTONIO TO LAREDO TRACKAGE RIGHTS AND OTHER RELIEF ARE GRANTED, IN THE ABSENCE OF THE CONSENSUS PLAN, TEX MEX WILL CEASE TO BE FINANCIALLY VIABLE, AND WILL BECOME UNABLE TO PROVIDE ESSENTIAL TRANSPORTATION SERVICES TO ITS ON-LINE CUSTOMERS

From the completed financials, I conclude the following:

i) In spite of Tex Mex's infrastructure investments (including its Laredo yard investments and other infrastructure investments)and traffic base development efforts, adoption of the BNSF Plan would deprive Tex Mex of the traffic base it relied upon to justify those investments in the first place.

ii) In this Scenario A, adoption of the BNSF Plan would cause Tex Mex to incur a net operating loss of $1.2 million per year and an overall net loss of $0.6 million. Tex Mex cannot sustain financial losses of this magnitude and will not be able to continue providing essential transportation services to the on-line rail freight customers dependent on the Tex Mex.

iii) Financial ratios for the Scenario A normal year demonstrate that Tex Mex would not be able to sustain itself financially. Its operating ratio would be 108% and its return on equity would be negative 2.06%.

B. DISCUSSION: ADOPTION OF THE BNSF PLAN WOULD JEOPARDIZE TEX MEX'S ABILITY TO PROVIDE ESSENTIAL TRANSPORTATION SERVICES TO ITS ON-LINE CUSTOMERS.

Tex Mex lost $994,000 in 1995, had net operating income of only $972,000 in 1996, and lost $1,193,000 in 1997. In spite of this, the rights granted to Tex Mex as UP/SP merger conditions (see my July 8, 1998 verified statement at pages 254 and 255) have made it possible for Tex Mex to continue providing essential transportation services and to continue as the primary operator of Laredo's International Bridge. These rights made it feasible for Tex Mex to invest $9.5 million in the new Laredo yard and in the future of this international traffic. This investment, the largest single investment Tex Mex has ever undertaken, is nearly completed now. The new Laredo yard was intended to enable Tex Mex to handle intermodal and automotive traffic for the first time, breaking Union Pacific's Laredo monopoly over these commodities. Tex Mex Witness Beers testifies in his verified statement that the STB adoption of the BNSF Plan would prevent Tex Mex from competing for Laredo to Houston automotive traffic. Adoption of the BNSF Plan would seriously jeopardize the financial viability of the Laredo Yard investment.

With the help of the Laredo Yard investment, Tex Mex should be able to handle 45,134 carloads and produce $5.1 million of net income in the Base Case normal year.

The following table summarizes the harm that adoption of the BNSF Plan would do to the ability of Tex Mex to provide essential services. The first line reports statistics and financial information related to the Base Case. The second line reports the *incremental* change in those items of information caused by the adoption of the BNSF Plan. The third line reports those items for Tex Mex after adoption of the BNSF Plan.

Table 1
Texas Mexican Railway
Incremental Results of Traffic Analyses: **Base Case to BNSF Plan**

Traffic Category	**Carloads**	**Car Miles (000's)**	**Expenses (000's)**	**Other Revenues (000's)**	**Freight Revenues (000's)**	**Net Operating Income (000's)**
Base Case	45,134	7,897	$23,872	$1,839	$27,139	$5,107
***Incremental* Change**	*(21,250)*	*(3,848)*	*($7,500)*	*($905)*	*($12,926)*	*($6,333)*
BNSF Plan	23,884	4,049	$16,372	$934	$14,213	($1,226)

Approving the BNSF Plan would cause Tex Mex to lose 21,250 carloads. Tex Mex interchange traffic with BNSF would drop off by 17,386 carloads, or 95%. Tex Mex interchanges with TFM would fall by 19,734 carloads, or 50%. Changes in the pattern of interchange among Tex Mex and the other railroads in the region from Witness Rogers' traffic flow analyses are shown in Table 2 below.

Table 2
Texas Mexican Railway
Summary of Changes in Tex Mex Interchanges: **Base Case to BNSF Plan**

Tex Mex Interchange Partner	**Carloads Interchanged: Base Case**	**Carloads Interchanged: BNSF Plan**	**Carloads Interchanged: Net Change**
UP/MP	**850**	**989**	**139**
SP	**7,916**	**5,395**	**(2,521)**
BNSF	**18,387**	**1,001**	**(17,386)**
TFM	**39,391**	**19,657**	**(19,734)**

The net economic effect of these changes is devastating to Tex Mex, which suffers a decrease in net operating income from a gain of $5.1 million in the Base Case normal year to a loss of $1.2 million in the BNSF Plan normal year. That's a reversal of $6.3 million on freight revenues of only $14.2 million. Net income drops from a profit of $3.2 million to a loss of $0.6 million in the BNSF Plan normal year. Tex Mex cannot stay in business with an annual net operating loss of more than $1.2 million a year. Tex Mex's operating ratio would balloon to an unsustainable 108% in the BNSF Plan's normal year.

Tex Mex's financial results in 1997 were not good. If the STB were now to adopt the BNSF Plan, Tex Mex would not be capable of continuing to provide service to its on-line customers.

C. STATEMENT OF BENEFITS

This section, (1) describes the incorporation of the financial effects of implementing the BNSF Plan into my economic analysis and (2) estimates the change in costs associated with the Tex Mex traffic diversions described in Witness Michael Rogers' verified statement. These results were incorporated into the Tex Mex pro forma financial statements as described in Section D, below.

Development of the Statement of Benefits can be divided into three parts as follows:

i) Selection of the appropriate Uniform Rail Costing System ("URCS") application for the transaction;

ii) Compilation of the effect on operating expenses of implementing the BNSF Plan; and

iii) Compilation of the costs and revenues associated with the traffic changes described in Witness Rogers' verified statement.

i) Selection of the appropriate Uniform Rail Costing System ("URCS") application

While the STB has developed approved URCS applications for each of the Class I railroads in the United States, it has not developed applications for smaller railroads. As a general practice, regional URCS applications are used in proceedings involving non-Class I railroads.[2] My cost calculations employ the STB's Region VII (that is, the Western Region) unit costs. I applied those costs to the traffic changes described above to estimate the costs associated with the changes in traffic volumes.

ii) Quantification of the BNSF Plan's effect on Tex Mex operating expenses, and quantification of the costs and revenues associated with the traffic changes described in Witness Rogers' verified statement

a) Incorporating Tex Mex operational requirements following adoption of the BNSF Plan

I coordinated with Witness Patrick L. Watts, Tex Mex Vice President-Transportation, to ensure that my economic analyses corresponded with Tex Mex operational requirements.[3] The traffic characteristics developed by Witness Rogers were used to develop the operating requirements described by Witness Watts.

b) Incorporating operating expenses of Tex Mex following traffic losses due to the adoption of the BNSF Plan

Costs associated with the Base Case and the BNSF Plan were calculated by multiplying *incremental* service units by the correct cost per service unit as determined from the STB's Region VII URCS analysis.

The service units accumulated by Witness Rogers were as follows:

- Total and incremental carloads by car type, ownership and commodity group;
- Total and incremental net tons;
- Total and incremental loaded car-miles by car type, ownership and commodity group;
- Total and incremental net ton-miles by commodity group;
- Cars handled in terminals; and
- Total and incremental revenue.

The service units for which I determined specific Tex Mex factors were as follows:

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[2] See, for example, Rate Guidelines - Non-Coal Proceedings, STB Ex Parte No. 347 (Sub-No. 2), Decision served May 1, 1997 at 1.
[3] See the Verified Statement of Patrick L. Watts.

- Total and incremental gross tons using Tex Mex ratio of gross to net;
- Train miles using Tex Mex cars per train; and
- Locomotive unit-miles using the number of Tex Mex locomotives per train.

The Region VII URCS application was used to develop most of the unit costs (that is, the cost per service unit) and the following parameters:

- Empty return ratios;
- Car days (utilizing Witness Rogers car miles and the Region VII URCS car days per car mile); and
- Switch engine minutes (utilizing Witness Rogers number of cars handled in terminals and the Region VII URCS switch engine minutes per switch event).

Required labor costs were estimated directly. Witness Watts determined the number of employees, by category, that Tex Mex would need to handle the traffic volumes associated with Scenario A. He determined that Tex Mex would need 48 fewer employees than under the Base Case. I used the Tex Mex cost per employee to determine their annual economic impact. Labor cost data were compiled with Tex Mex assistance. These data developed an average annual 1996 wage associated with personnel in each craft (including overtime and constructive allowances, if appropriate) and associated fringe benefits. The number of incremental employees by category was multiplied by the annual wages and fringes for each employee category to calculate the change in annual labor costs.

c) Equipment requirements

Decreases in traffic volume means that Tex Mex equipment requirements are reduced. Witness Watts states that Tex Mex, following adoption of the BNSF Plan, would require 14 fewer locomotives than were required to handle Base Case traffic levels. I calculated the associated capital and operating costs.

Since most Tex Mex traffic is bridge traffic, Tex Mex freight car requirements will be unaffected by the loss of traffic. The traffic is already handled in freight cars of various ownerships. Most of the traffic lost by Tex Mex will involve private cars or the shifting of existing freight cars from Tex Mex routes to the routes of competing carriers. I account for the ownership and operating costs associated with these freight cars on a car hire basis. Because substantially fewer car-miles will be handled, car hire costs will be decreased substantially. My costs reflect these car-hire savings.

Cost savings associated with the reduced locomotive and freight car equipment requirements were included in my economic analysis using the capital cost portion of the appropriate URCS unit costs.

d) Fixed plant investment capital requirements

The capital and operating costs associated with the new investment in fixed property (primarily, the new Laredo Yard) were included in the Base Case costs I submitted on July 8, 1998. These investments are nearly complete, and continue to be included (along with the associated costs) throughout Scenario A.

e) Adjustments required by Scenario A's adoption of the BNSF Plan

Traffic volumes and the associated revenue and expense levels reflect several major adjustments to those previously reported for the Base Case. The adjustments flow from the traffic losses previously described.

f) Inclusion of cost and economic results in the pro forma financial statements

My cost and economic results, discussed above, were incorporated into the Tex Mex pro forma financial statements for Scenario A. Exhibit No. JJP-2 presents the Tex Mex Statement of Benefits following adoption of the BNSF Plan.

D. PRO FORMAS FOR THE BASE CASE AND FOR TEX MEX FOLLOWING ADOPTION OF THE BNSF PLAN

In this section, I discuss the creation of the pro forma financial statements[4] for Tex Mex following implementation of the BNSF Plan.

I created the pro forma financials in the following stages:

- Select the financial statements representing the starting point. In this case, I selected Tex Mex financial statements for the Base Case normal year.
- Calculate the Statement of Benefits associated with Tex Mex responses to adoption of the BNSF Plan.
- Modify the Base Case pro forma financial statements to reflect the financial effects summarized in the Statement of Benefits.

I also computed, based on adoption of the BNSF Plan, financial ratios typically used in assessing a corporation's financial soundness of the entity resulting from Tex Mex responses to adoption of the BNSF Plan.

i) Tex Mex pro formas for each case

Tex Mex Base Case and BNSF Plan financial statements include the following:

- A pro forma Balance Sheet for the Base Case, each of the three following years required to adjust to adoption of the BNSF Plan, and for the normal post- BNSF Plan year. These Balance Sheets are included as Exhibit No. JJP-6.
- A pro forma Income Statement for the Base Case, each of the three following years required to adjust to adoption of the BNSF Plan, and for the normal post-BNSF Plan year. These Income Statements are included as Exhibit No. JJP-7.
- A pro forma Sources and Applications of Funds for the Base Case, each of the three following years required to adjust to adoption of the BNSF Plan, and for the normal

[4] These financial statements conform to the requirements of Section 1180.9 of 49 CFR.

post- BNSF Plan year. These Sources and Applications of Funds statements are included as Exhibit No. JJP-8.

ii) Tex Mex pro formas following adoption of the BNSF Plan

Base Case normal year results are used as the starting point for the projections: Exhibit No. JJP-3 (Base Case Balance Sheet), Exhibit No. JJP-4 (Base Case Income Statement), and Exhibit No. JJP-5 (Base Case Sources and Applications of Funds). Creating Tex Mex pro formas for the BNSF Plan normal year (following adoption of the BNSF Plan) required several adjustments to Base Case normal year results. Adjustments were made to reflect known operational changes post-Base Case and their financial effects. These operational changes – discussed in the verified statement of Patrick Watts -- include the following:

- 14 fewer locomotives; and
- 48 fewer employees (4 MOW, 4 clerical, 4 G&A directors, 18 conductors and 18 engineers).

iii) Projection years pro formas

The financial statements for years 1, 2, 3 and the normal year are derived from the Base Case financials modified by the changes identified in the Statement of Benefits. The Tex Mex Statement of Benefits corresponding to the BNSF Plan is Exhibit No. JJP-2. We project that three years will be required to fully implement Tex Mex operational changes responsive to adoption of the BNSF Plan. We project that revenue and expense changes will be realized 15% in year 1, 75% in year 2, and the remaining 10% in year 3. Consequently, this schedule for realizing revenues and expenses is reflected in the Statement of Benefits and the pro forma financials appearing as Exhibit Nos. JJP-6 through JJP-8.

iv) Financial ratios to evaluate the financial strength of Tex Mex following implementation of the BNSF Plan

In this section, I report the financial information (described in Section 1180.9 of 49 CFR) permitting the STB to evaluate the financial strength of Tex Mex resulting from consummation of the BNSF Plan. Earnings Available for Fixed Charges and financial ratios bearing on the security of the financial structure are most important in this regard.

The financial information and ratios I report are as follows:

- Earnings Available for Fixed Charges
- Fixed Charge Coverage Ratio
- Operating Ratio
- Return on Equity
- Debt to Equity Ratio

I report this information in Exhibit No. JJP-9 for Scenario A following adoption of the BNSF Plan. I computed this information for the Base Case and for each of the pro forma years. The reported information demonstrates that Tex Mex will not be able to continue providing essential services to its on-line customers.

Exhibit No. JJP-9 depicts a financially failing Tex Mex. With this financial picture, Tex Mex: 1) will not be able to continue to provide essential services to its on-line shippers; 2) will not be able to continue to provide a competitive alternative to the UP at Laredo, and 3) will not be able to continue to serve as primary operator of Laredo's International Bridge. Because of its financial weakness Tex Mex will not be able to contribute to relieving congestion in the Houston region. Neither will Tex Mex be able to provide competitive relief to Houston's shippers.

II. SCENARIO B: IMPLEMENTATION OF THE BNSF PLAN FOLLOWING ADOPTION OF THE CONSENSUS PLAN

Scenario B models the impact of adopting the BNSF Plan assuming that the Consensus Plan also is adopted – that is, it reflects the change between the Consensus Plan alone, on the one hand, and the Consensus Plan and the BNSF Plan together, on the other.

As with the discussion of Scenario A, I first will set forth my conclusions from the completed Scenario B analyses, then explain the development of the Statement of Benefits and the post-BNSF Plan pro forma financial statements.

A. CONCLUSION: IF BNSF'S REQUESTED SAN ANTONIO TO LAREDO TRACKAGE RIGHTS AND OTHER RELIEF ARE GRANTED, EVEN IF THE CONSENSUS PLAN IS APPROVED, TEX MEX WILL CEASE TO BE FINANCIALLY VIABLE, AND WILL BECOME UNABLE TO PROVIDE ESSENTIAL TRANSPORTATION SERVICES TO ITS ON-LINE CUSTOMERS

I conclude the following from the completed financials:

i) In spite of Tex Mex's infrastructure investments and traffic base development efforts including the following:

- Booth Yard investments,
- Victoria to Rosenberg line investments,
- Houston to Beaumont line investments,
- Laredo yard investments, and
- Other investments.

Imposition of the BNSF Plan on top of the Consensus Plan would deprive Tex Mex of the traffic base it would rely upon to justify those investments in the first place and this would render the undertaking of those investments economically infeasible.

ii) Imposition of the BNSF Plan on top of the Consensus Plan would cause Tex Mex to incur a net <u>loss</u> of $1.9 million per year. Tex Mex cannot sustain financial losses of this magnitude and would not be able to continue providing essential transportation services to its on-line rail freight customers dependent on the Tex Mex.

iii) Financial ratios for the BNSF Plan normal year demonstrate that Tex Mex would not be able to sustain itself financially. Its return on equity would be a <u>negative</u> 4.43%. Its debt to equity ratio would be 76%.

B. DISCUSSION

i) Adoption of the BNSF Plan even along with the Consensus Plan would jeopardize Tex Mex's ability to provide essential transportation services.

As a condition of the UP/SP merger, the STB granted Tex Mex the rights described in my July 8, 1998 verified statement at pages 254 and 255. These rights made it feasible for Tex Mex to invest $9.5 million in the new Laredo yard and in the future of this international traffic. Adoption of the BNSF Plan would seriously jeopardize the financial viability of the Laredo Yard investment.

With the help of the Consensus Plan investments, Tex Mex was to have been able to handle 144,288 carloads and produce $7.7 million of net income in the Consensus Plan normal year.

The following table summarizes the harm that adoption of the BNSF Plan would do to the ability of Tex Mex to provide essential services even if the Consensus Plan is adopted. The first line reports statistics and financial information related to the Consensus Plan. The second line reports the *incremental* change in those items of information caused by the adoption of the BNSF Plan. The third line reports those items for Tex Mex after adoption of the BNSF Plan.

Table 3
Texas Mexican Railway
Incremental Results of Traffic Analyses: **Consensus Plan to BNSF Plan**

Traffic Category	Carloads	Car Miles (000's)	Expenses (000's)	Other Revenues (000's)	Freight Revenues (000's)	Net Operating Income (000's)
Consensus Plan	144,288	30,753	$66,900	$5,715	$82,483	$21,298
***Incremental* Change**	***(31,007)***	***(10,477)***	***($11,725)***	***($1,748)***	***($24,970)***	***($14,993)***
BNSF Plan	113,281	20,276	$55,175	$3,967	$57,513	$6,305

Full implementation of the BNSF Plan causes Tex Mex to lose 31,007 carloads. Most dramatic are the losses of interchange traffic with BNSF (24,687 carloads) and with TFM

(30,392 carloads). Changes in the pattern of interchange among Tex Mex and the other railroads in the region from Witness Rogers' traffic flow analyses are shown in Table 4 below.

Table 4
Texas Mexican Railway
Summary of Changes in Tex Mex Interchanges: **Consensus Plan to BNSF Plan**

Tex Mex Interchange Partner	**Carloads Interchanged: Consensus Plan**	**Carloads Interchanged: BNSF Plan**	**Carloads Interchanged: Net Change**
UP/MP	**2,284**	**2,202**	**(82)**
SP	**5,782**	**4,451**	**(1,331)**
BNSF	**27,267**	**2,580**	**(24,687)**
TFM	**72,124**	**41,732**	**(30,392)**

The net economic effect of these changes is devastating to Tex Mex, which suffers a decrease in net operating income from $21.3 million in the Consensus Plan normal year to $6.3 million in the BNSF Plan normal year, a drop of $15.0 million, or 70%. More importantly, net income sinks from a profit of $7.7 million under the Consensus Plan to a loss of $1.9 million in the BNSF Plan normal year. This means that the debt and interest burden Tex Mex would absorb to finance the investment in the Victoria to Rosenberg line ($65.5 million) and the Houston to Beaumont double-tracking ($57.6 million) cannot be supported if the STB adopts the BNSF Plan. Return on equity falls to negative 4.43%.

With financial results such as these, Tex Mex cannot make the infrastructure investments Houston needs. Indeed, Tex Mex could not long stay in business losing more than $1.9 million a year. If the STB were to adopt the BNSF Plan even with the Consensus Plan, Tex Mex would not be capable of continuing to provide essential services to its on-line customers.

ii) If the Board adopts the BNSF Plan, Tex Mex's planned infrastructure and capacity improvement projects and capital improvements, including those contemplated by the Consensus Plan, could not be economically justified, and so could not be made.

The net economic effect of all these changes is to decrease Tex Mex's net operating income by $15 million and transform a net <u>income</u> of $7.7 million under the Consensus Plan to a net <u>loss</u> of $1.9 million if the BNSF Plan is adopted. These results would make it impossible for Tex Mex to pay for the capacity-increasing, service-improving, infrastructure investments that the Houston/Gulf Coast region so badly needs and that the Consensus Plan contemplates. Without profits, not only will Tex Mex be unable to provide essential services, it will not be able to support the $65.5 million capital investment in the Victoria to Rosenberg line, the $57.6 million capital investment in double-tracking the Houston to Beaumont line, the $3.1 million storage yard, nor any of its other planned investments.

C. STATEMENT OF BENEFITS

This section, (1) describes the incorporation of the financial effects of implementing the BNSF Plan into my economic analysis and (2) estimates the change in costs associated with the Tex Mex traffic diversions described in Witness Michael Rogers' verified statement.

As with Scenario A, development of the Statement of Benefits for Scenario B can be divided into three parts as follows:

i) Selection of the appropriate Uniform Rail Costing System ("URCS") application for the transaction;

ii) Compilation of the effect on operating expenses of implementing the BNSF Plan; and

iii) Compilation of the costs and revenues associated with the traffic changes described in Witness Rogers' verified statement.

i) Selection of the appropriate Uniform Rail Costing System ("URCS") application

My cost calculations employ the STB's development of Region VII costs for the reasons stated in Section I.C.i., above, and for the following reasons.

If Tex Mex unit costs were available, and they are not, I still would have used Region VII unit costs since historic Tex Mex unit costs would not have properly represented the cost characteristics of Tex Mex following adoption of the BNSF Plan. The Tex Mex of 1996 is much smaller than Tex Mex would be following adoption of the Consensus Plan and the BNSF Plan. Unit costs also will be very different. The post-BNSF Plan includes the Tex Mex trackage rights awarded in the UP/SP merger, the Laredo Intermodal Yard, the Houston-Beaumont line segment, and the Victoria to Rosenberg line segment including the new storage yard.

ii) Quantification of the BNSF Plan's effect on Tex Mex operating expenses, and quantification of the costs and revenues associated with the traffic changes described in Witness Rogers' verified statement.

a) Incorporating the Tex Mex Operations following adoption of the BNSF Plan

As with scenario A, I coordinated with Witness Patrick L. Watts, Tex Mex Vice President-Transportation, to ensure that my economic analyses corresponded with Tex Mex operational requirements.[5] The traffic characteristics developed by Witness Rogers were used to develop the operating requirements described by Witness Watts.

b) Operating expenses of the Tex Mex Operations following traffic losses due to the adoption of the BNSF Plan

Costs associated with the Consensus Plan and the BNSF Plan were calculated by multiplying *incremental* service units by the correct cost per service unit as determined from the STB's Region VII URCS analysis. Relevant procedures and considerations were discussed at Section I.C.ii.b), above.

Required labor costs were estimated directly. Witness Watts determined the number of employees, by category, that Tex Mex would need to handle the traffic volumes associated with each scenario. He determined that under Scenario B Tex Mex would require 59 fewer employees than it would under the Consensus Plan without adoption of the BNSF Plan. I used the Tex Mex cost per employee to determine their annual economic impact. Labor cost data were compiled with Tex Mex assistance. These data developed an average annual 1996 wage associated with

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5 See the Verified Statement of Patrick L. Watts.

personnel in each craft (including overtime and constructive allowances, if appropriate) and associated fringe benefits. The number of incremental employees by category was multiplied by the annual wages and fringes for each employee category to calculate the change in annual labor costs.

c) Equipment requirements

Decreases in traffic volume as compared with the Consensus Plan mean that Tex Mex equipment requirements are reduced. Witness Watts states that Tex Mex, following adoption of the BNSF Plan, would require 14 fewer locomotives than required to handle Consensus Plan traffic levels. I calculated the associated capital and operating costs.

Since most Tex Mex traffic is bridge traffic, Tex Mex freight car requirements will be unaffected by the loss of traffic. The traffic is already handled in freight cars of various ownerships. Most of the traffic lost by Tex Mex will involve private cars or the shifting of existing freight cars from Tex Mex routes to the routes of competing carriers. I account for the ownership and operating costs associated with these freight cars on a car hire basis. Because substantially fewer car-miles will be handled, car hire costs will be decreased substantially. My costs reflect these car-hire savings.

Cost savings associated with the reduced locomotive and freight car equipment requirements were included in my economic analysis using the capital cost portion of the appropriate URCS unit costs.

d) Fixed plant investment capital requirements

The capital and operating costs associated with the new investment in fixed property (including the investment in the Victoria to Rosenberg line segment and the double-tracking of the Houston to Beaumont line segment) were included in the Consensus Plan costs I submitted on July 8, 1998. In Scenario B, these costs would be required even with the adoption of the BNSF Plan, so the associated costs continue to be incurred and reflected.

e) **Adjustments required by Scenario B's adoption of the BNSF Plan**

Traffic volumes and the associated revenue and expense levels reflect several major adjustments to those previously reported for the Consensus Plan. The adjustments flow from the traffic losses previously described that follow from adoption of the BNSF Plan.

f) **Inclusion of cost and economic results in the pro forma financial statements**

My cost and economic results, discussed above, were incorporated into the Tex Mex pro forma financial statements for Scenario B. Exhibit No. JJP-10 presents the Tex Mex Statement of Benefits following adoption of the Consensus Plan and the BNSF Plan.

D. PRO FORMAS FOR THE CONSENSUS PLAN AND FOR TEX MEX FOLLOWING ADOPTION OF THE BNSF PLAN

In this section, I discuss the creation of the pro forma financial statements[6] for Tex Mex following implementation of the Consensus Plan and the BNSF Plan.

I created the pro forma financials in the following stages:

- Select the financial statements representing the starting point. In this case, I selected Tex Mex financial statements for the Consensus Plan normal year.
- Calculate the Statement of Benefits associated with Tex Mex responses to adoption of the BNSF Plan.
- Modify the Consensus Plan pro forma financial statements to reflect the financial effects summarized in the Statement of Benefits.

I also computed, based on adoption of the BNSF Plan on top of the Consensus Plan, financial ratios typically used in assessing a corporation's financial soundness .

i) **Tex Mex pro formas for each case**

Tex Mex Consensus Plan and BNSF Plan financial statements include the following:

[6] These financial statements conform to the requirements of Section 1180.9 of 49 CFR.

- A pro forma Balance Sheet for the Consensus Plan, each of the three following years required to adjust to adoption of the BNSF Plan, and for the normal post- BNSF Plan year. These Balance Sheets are included as Exhibit No. JJP-14.
- A pro forma Income Statement for the Consensus Plan, each of the three following years required to adjust to adoption of the BNSF Plan, and for the normal post-BNSF Plan year. These Income Statements are included as Exhibit No. JJP-15.
- A pro forma Sources and Applications of Funds for the Consensus Plan, each of the three following years required to adjust to adoption of the BNSF Plan, and for the normal post- BNSF Plan year. These Sources and Applications of Funds statements are included as Exhibit No. JJP-16.

ii) Tex Mex pro formas following adoption of the BNSF Plan

Consensus Plan normal year results are used as the starting point for the projections: Exhibit No. JJP-11 (Consensus Plan Balance Sheet), Exhibit No. JJP-12 (Consensus Plan Income Statement), and Exhibit No. JJP-13 (Consensus Plan Sources and Applications of Funds). Creating Tex Mex pro formas for the BNSF Plan normal year (following adoption of the BNSF Plan) required several adjustments to Consensus Plan normal year results. Adjustments were made to reflect known operational changes post-Consensus Plan and their financial effects. These operational changes – discussed in Patrick Watts' verified statement -- include the following:

- 14 fewer locomotives; and
- 59 fewer Tex Mex employees (4 MOW, 4 clerical, 5 G&A directors, 23 conductors and 23 engineers).

iii) Projection years pro formas

The financial statements for years 1, 2, 3 and the normal year are derived from the Consensus Plan financials modified by the changes identified in the Statement of Benefits. The Tex Mex Statement of Benefits corresponding to the BNSF Plan is Exhibit No. JJP-10. We project that three years will be required to fully implement Tex Mex operational changes responsive to adoption of the BNSF Plan. We project that revenue and expense changes will be realized 15% in year 1, 75% in year 2, and the remaining 10% in year 3. Consequently, this schedule for realizing revenues and expenses is reflected in the Statements of Benefits and the pro forma financials appearing as Exhibit Nos. JJP-14 through JJP-16.

iv) Financial ratios to evaluate the financial strength of Tex Mex following implementation of the BNSF Plan

In this section, I report financial information (described in Section 1180.9 of 49 CFR) permitting the STB to evaluate the financial strength of Tex Mex resulting from consummation of the Consensus Plan and the BNSF Plan. Earnings Available for Fixed Charges and financial ratios bearing on the security of the financial structure are perhaps most important in this regard.

I report this information in Exhibit No. JJP-17 for Scenario B following adoption of the BNSF Plan. I computed this information for the Consensus Plan and for each of the pro forma years. The reported information demonstrates that Tex Mex will not be able to survive financially if the BNSF Plan is adopted.

Exhibit No. JJP-17 depicts a financially failing Tex Mex if the STB imposes the BNSF Plan With this financial picture, Tex Mex: 1) will not be able to continue to provide essential services to its on-line shippers; 2) will not be able to continue to provide a competitive alternative to the UP at Laredo, and 3) will not be able to continue to serve as primary operator of Laredo's International Bridge. Because of its financial weakness Tex Mex will not be able to contribute to relieving congestion in the Houston region. Neither will Tex Mex be able to provide competitive relief to Houston's shippers. Adoption of the BNSF Plan will doom Tex Mex's promising future as a strong competitor in the Houston area.

Exhibit No. JJP-1

STATEMENT OF QUALIFICATIONS

OF

JOSEPH J. PLAISTOW

My name is Joseph J. Plaistow, Vice President and principal of Snavely King Majoros O'Connor & Lee, Inc. with offices at 1220 L Street, NW, Washington, DC 20005. I graduated in 1967 from Michigan Technological University with a Bachelor of Science Degree in Metallurgical Engineering. In 1972 I graduated from the University of Minnesota with a Masters Degree in Business Administration. I was employed by Burlington Northern Railroad for 15 years from 1972 to 1987 as Director of Costs and Economic Analyses in the Finance Department, as Director of Equipment and Service, and Director of Planning and Equipment in the Food and Manufactured Products Business Unit of the Marketing Department. In 1987 and 1988, I was employed by Fleet Management Inc. as a Vice President managing the efficient operation of refrigerated boxcars. In 1988, I joined Snavely King & Associates (now known as Snavely King Majoros O'Connor & Lee, Inc.).

As Director of Costs and Economic Analyses for Burlington Northern, I was responsible for all corporate cost analyses. During that period, I designed and coordinated the implementation of a totally reconstructed costing system. I testified many times on the cost of moving coal unit trains to electric utility power plants. I also testified and spoke on the cost of capital, rate of return regulation, and corporate investment policies.

Acquisitions, divestitures and investment analyses were a primary focus during several stages of my career. I have established sales prices and negotiated the sale of shortline railroads. I worked with investment bankers in advising Burlington Northern regarding the potential purchase of several railroads. I was responsible for the development of the estimated benefits Norfolk Southern will realize as a result of their joint acquisition with CSX of Conrail.

As Director, Planning and Equipment, I developed the revenue, contribution, and equipment requirement projections. I was also responsible for customer service functions. This included identifying customers' needs and coordinating with Operations to insure that those needs were met. This included the provision of an adequate car supply and the assurance that the freight car fleet serving customers was adequately maintained. Databases were developed to support analyses of required maintenance, car acquisition and utilization improvements.

As Vice President of Fleet Management Incorporated, I was responsible for managing the optimal distribution of most of the country's insulated boxcars. Responsibilities included marketing, railroad relations, and daily management.

At Snavely King, I provide expert testimony on transportation economics, rate structures and rate reasonableness for private and public corporations. In addition to providing expert testimony regarding the economics of coal movements in the United States and Canada, I also provide testimony in the areas of economics and competitive analysis in the major railroad mergers. I have conducted dozens of merger studies.

Other assignments have included re-engineering the freight car management function for a major railroad as part of their corporate-wide re-engineering effort. I have also provided expert testimony in the branch line abandonment/feeder line area. For several major United States corporations, I was responsible for optimizing the rail portion of their distribution network. I have conducted rail contract and rate negotiations on behalf of major corporations.

I have also studied the economics of the provision of passenger service by rail. For Amtrak, I recommended the route structure designed to optimize their financial viability in the year 2000. I have also worked with the Government Accounting Office on a follow-up to the original Amtrak Review. For a major Northeast commuter agency, I evaluated the relative economics of passenger service provision in adjoining states.

I am a Past President of the Washington Chapter of the Transportation Research Forum and a member of the Association for Transportation Law, Logistics and Policy. I am also the national Secretary of the Cost Analysis Chapter of the Transportation Research Forum.

In 1976 I was admitted to practice before the Interstate Commerce Commission and its Surface Transportation Board successor, as a non-attorney practitioner. I am familiar with practice before the Commission, and I have testified before the Board and the Interstate Commerce Commission dozens of times on cost and economic issues.

Professional Organizations

Transportation Research Board and Forum; Past President, Washington Chapter

Association for Transportation Law, Logistics and Policy; Registered Practitioner

American Society of Transportation and Logistics

The Revised Base Case Plus Adoption of BNSF's Plan Statement Of Benefits [1/]

JJP-2
September 18, 1998

The Texas Mexican Railway Company

	Description	Year 1 (000s) (a)	Year 2 (000s) (b)	Year 3 (000s) (c)	Normal Year (000s) (d)
	Incremental Revenue [2/]				
1	Freight	$ (1,939)	$ (11,634)	$ (12,926)	$ (12,926)
	Incremental Operating:				
	Non - Labor				
2	Way and Structures	$ -	$ -	$ -	$ -
3	Equipment	(310)	(2,017)	(2,172)	(2,172)
4	Transportation	(28)	(165)	(184)	(184)
5	URCS related	(276)	(1,658)	(1,842)	(1,842)
	Labor				
6	Train & Engine	(429)	(2,288)	(2,574)	(2,574)
7	General & Administrative	(129)	(518)	(518)	(518)
8	Yard & Maintenance	-	(210)	(210)	(210)
9	Total Operating Costs	$ (1,172)	$ (6,856)	$ (7,500)	$ (7,500)
10	**Total Benefits**	**$ (767)**	**$ (4,778)**	**$ (5,427)**	**$ (5,427)**

[1/] See text for capital investment.

[2/] Other incremental losses (switching, demurrage and incidental revenues) were $-0.2 million, $-1.1 million and $-1.3 million in years 1, 2 and 3 respectively. Including other revenue increases Total Losses to $-0.95 million, $-5.875 million and $-6.646 million in years 1, 2 and 3 respectively.

STB FD 32760 (Sub 26) 9-18-98 I 191223 3/3

Base Case
Balance Sheet
(Revised)

Exhibit No. JJP-3
September 18, 1998

The Texas Mexican Railway Company

	Description	December 31, 1996 Audited (000s) (a)	Adjustment Amount (000s) (b)	Adjusted Base Period Amount (000s) (c)
	Assets			
	Current Assets:			
1	Cash and cash equivalents	$ 392	$ 1,679	$ 2,071
2	Investments	572		572
3	Net Accounts and Notes Receivable	6,663	168	6,831
4	Inventory	1,562		1,562
5	Due from Parent and Other related parties	912		912
6	Current deferred income taxes	984		984
7	Other	590		590
8	Total Current Assets	$ 11,675	$ 1,847	$ 13,522
	Properties:			
9	Equipment	23,481		23,481
10	Land, Buildings & improvements	18,931	13,643	32,574
11	Less accumulated depreciation	(17,870)	(222)	(18,092)
12	Net Properties	$ 24,542	$ 13,421	$ 37,963
	Other Assets:			
13	Investments in other partnership	3,889		3,889
14	Net other assets	1,099		1,099
15	Total Other Assets	$ 4,988	$ -	$ 4,988
16	**Total Assets**	**$ 41,205**	**$ 15,268**	**$ 56,473**
	Liabilities & Equities			
17	Accounts Payable	$ 1,912	$ 487	$ 2,399
18	Due to Parent and other related parties	410		410
19	Other accrued liabilities	4,344	1,034	5,378
20	Total current liabilities	$ 6,666	$ 1,521	$ 8,187
21	Long Term Debt	3,800	11,524	15,324
22	Deferred Income Taxes	5,203		5,203
23	Total liabilities	$ 15,669	$ 13,046	$ 28,715
	Stockholder's equity:			
24	Common Stock	2,500		2,500
25	Additional paid in capital	981		981
26	Retained earnings	22,055	2,223	24,278
27	Total Stockholder's equity	$ 25,536	$ 2,223	$ 27,759
28	**Total Liabilities & Equity**	**$ 41,205**	**$ 15,268**	**$ 56,473**

Exhibit No. JJP-4
September 18, 1998

Base Case
Income Statement
(Revised)

The Texas Mexican Railway Company

	Description		December 31, 1996 Audited (000s)		Adjustment Amount (000s)		Adjusted Base Period Amount (000s)
			(c)		(d)		(e)
	Operating Revenues:						
1	Freight	$	18,107		9,032	$	27,139
2	Switching		554		276		830
3	Demurrage		550		274		824
4	Incidental		603		301		904
5	Uncollectible Accounts		(480)		(239)		(719)
6	Total Operating Revenues		19,334		9,644		28,978
	Operating Expenses:						
7	Maintenance of Way & Structures		2,294		-		2,294
8	Maintenance of Equipment		1,720		931		2,651
9	Transportation		9,403		3,994		13,397
10	General & Administrative		3,343		388		3,731
11	Depreciation Expense		1,577		222		1,799
12	Loss (Gain) On Sale of Fixed Assets		25		(25)		-
13	Total Operating Expenses	$	18,362	$	5,510	$	23,872
14	**Income (Loss) From Operations**	**$**	**972**	**$**	**4,135**	**$**	**5,107**
15	Other Income & Expense Net		636		(878)	$	(242)
16	Income (Loss) before Income Taxes		1,608		3,256		4,864
17	Income Tax Rate						34%
18	Income Taxes		620		1,034		1,654
19	**Net Income (Loss)**	**$**	**988**	**$**	**2,223**	**$**	**3,210**

Base Case
Sources and Applications of Funds
(Revised)

Exhibit No. JJP-5
September 18, 1998

The Texas Mexican Railway Company

Description	December 31, 1996 Audited (000s) (a)	Adjustment Amount (000s) (b)	Base Period Adjusted (000s) (c)
From Operating Activities:			
1 Net Income (Loss)	$ 988	2,223	3,210
2 Depreciation	1,577	222	1,799
3 Deferred Income Taxes	620	-	620
4 Equity Earnings - Partnership Investment	(477)		(477)
5 Dividend Distribution - Partnership Investment	556		556
6 Change in current assets - (Increase) or Decrease	(899)	(168)	(1,067)
7 Change in current liabilities - Increase or (Decrease)	(988)	1,521	533
8 Change in amounts due to/from parent and other related parties -Increase or (Decrease)	498		498
9 **Net Cash Provided by Operating Activities**	1,875	3,797	$ 5,672
From Investing Activities:			
10 Purchases of Equipment & Improvements, net of gain or loss on disposition of fixed assets	(2,011)	(13,643)	$ (15,654)
11 Proceeds from sale of investments	1,224		1,224
12 Investment in Long Term Assets	(1,099)		(1,099)
13 **Net Cash Used by Investing Activities**	$ (1,886)	$ (13,643)	$ (15,529)
From Financing Activities:			
14 Long Term Debt Borrowings	-	11,524	11,524
15 **Net Cash Provided by Financing Activities**	-	$ 11,524	$ 11,524
16 Increase (Decrease) in Cash & Cash Equivalents	$ (11)	$ 1,679	$ 1,668
17 Cash & Cash Equivalents at Beginning of Year	403		403
18 Cash & Cash Equivalents at End of Year	**$ 392**	**$ 1,679**	**$ 2,071**

The Revised Base Case Plus Adoption of BNSF's Plan
Balance Sheet

Exhibit No. JJP-6
September 18, 1998

The Texas Mexican Railway Company

Description	Adjusted Base Period Amount (000s) (a)	Adjustment Amount (000s) (b)	Year 1 After Change in Operations (000s) (c)	Adjustment Amount (000s) (d)	Year 2 After Change in Operations (000s) (e)	Adjustment Amount (000s) (f)	Year 3 After Change in Operations (000s) (g)	Adjustment Amount (000s) (h)	Normal Year After Change in Operations (000s) (i)
Assets									
Current Assets:									
1 Cash and cash equivalents	$ 2,071	$ 4,036	$ 6,107	$ (519)	$ 5,588	$ 747	$ 6,335	$ 1,145	$ 7,480
2 Investments	572		572		572		572		572
3 Net Accounts and Notes Receivable	6,831	(36)	6,795	(181)	6,614	(24)	6,590	-	6,590
4 Inventory	1,562		1,562		1,562		1,562		1,562
5 Due from Parent and Other related parties	912		912		912		912		912
6 Current deferred income taxes	984		984		984		984		984
7 Other	590		590		590		590		590
8 Total Current Assets	$ 13,522	$ 4,000	$ 17,522	$ (700)	$ 16,823	$ 723	$ 17,545	$ 1,145	$ 18,690
Properties:									
9 Equipment	23,481		23,481		23,481		23,481		23,481
10 Land, Buildings & improvements	32,574	-	32,574	-	32,574	-	32,574	-	32,574
11 Less accumulated depreciation	(18,092)	(1,799)	(19,891)	(1,799)	(21,690)	(1,799)	(23,489)	(1,799)	(25,288)
12 Net Properties	$ 37,963	$ (1,799)	$ 36,164	$ (1,799)	$ 34,365	$ (1,799)	$ 32,565	$ (1,799)	$ 30,766
Other Assets:									
13 Investments in other partnership	3,889		3,889		3,889		3,889		3,889
14 Net other assets	1,099		1,099		1,099		1,099		1,099
15 Total Other Assets	$ 4,988	$ -	$ 4,988	$ -	$ 4,988	$ -	$ 4,988	$ -	$ 4,988
16 **Total Assets**	**$ 56,473**	**$ 2,201**	**$ 58,674**	**$ (2,499)**	**$ 56,175**	**$ (1,077)**	**$ 55,099**	**$ (654)**	**$ 54,445**
Liabilities & Equities									
17 Accounts Payable	$ 2,399	$ (108)	$ 2,292	$ (521)	$ 1,770	$ (59)	$ 1,711	$ -	$ 1,711
18 Due to Parent and other related parties	410	-	410	-	410		410		410
19 Other accrued liabilities	5,378	(256)	5,122	(1,541)	3,581	(194)	3,387	30	3,418
20 Total current liabilities	$ 8,187	$ (364)	$ 7,823	$ (2,062)	$ 5,761	$ (253)	$ 5,509	$ 30	$ 5,5[illegible]9
21 Long Term Debt	15,324	(148)	15,176	(159)	15,017	(170)	14,847	(89)	14,758
22 Deferred Income Taxes	5,203	-	5,203		5,203		5,203		5,203
23 Total liabilities	$ 28,715	$ (512)	$ 28,202	$ (2,221)	$ 25,982	$ (423)	$ 25,559	$ (59)	$ 25,500
Stockholder's equity:									
24 Common Stock	2,500		2,500		2,500		2,500		2,500
25 Additional paid in capital	981		981		981		981		981
26 Retained earnings	24,278	2,713	26,991	(278)	26,713	(654)	26,059	(595)	25,464
27 Total Stockholder's equity	$ 27,759	$ 2,713	$ 30,472	$ (278)	$ 30,194	$ (654)	$ 29,540	$ (595)	$ 28,945
28 **Total Liabilities & Equity**	**$ 56,473**	**$ 2,201**	**$ 58,674**	**$ (2,499)**	**$ 56,175**	**$ (1,077)**	**$ 55,099**	**$ (654)**	**$ 54,445**

Exhibit No. JJP-7
September 18, 1998

The Revised Base Case Plus Adoption of BNSF's Plan
Income Statement

The Texas Mexican Railway Company

Description	Adjusted Base Period Amount (000s)	Adjustment Amount (000s)	Year 1 After Change in Operations (000s)	Adjustment Amount (000s)	Year 2 After Change in Operations (000s)	Adjustment Amount (000s)	Year 3 After Change in Operations (000s)	Adjustment Amount (000s)	Normal Year After Change in Operations (000s)
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
Operating Revenues:									
1 Freight	$ 27,139	$ (1,939)	$ 25,200	$ (9,695)	$ 15,505	$ (1,293)	$ 14,213	$ -	$ 14,213
2 Switching	830	(59)	771	(297)	474	(40)	435	-	435
3 Demurrage	824	(59)	765	(294)	471	(39)	432	-	432
4 Incidental	904	(65)	839	(323)	516	(43)	473	-	473
5 Uncollectible Accounts	(719)	47	(672)	235	(438)	31	(406)	-	(406)
6 Total Operating Revenues	28,978	(2,075)	26,904	(10,374)	16,530	(1,383)	15,146	-	15,146
Operating Expenses:									
7 Maintenance of Way & Structures	2,294	-	2,294	(210)	2,084	-	2,084	-	2,084
8 Maintenance of Equipment	2,651	(310)	2,340	(1,706)	634	(155)	479	-	479
9 Transportation	13,397	(733)	12,664	(3,379)	9,285	(489)	8,797	-	8,797
10 General & Administrative	3,731	(129)	3,602	(388)	3,214	-	3,214	-	3,214
11 Depreciation Expense	1,799	-	1,799	-	1,799	-	1,799	-	1,799
12 Loss (Gain) On Sale of Fixed Assets	-	-	-	-	-	-	-	-	-
13 Total Operating Expenses	$ 23,872	$ (1,173)	$ 22,699	$ (5,683)	$ 17,016	$ (644)	$ 16,372	$ -	$ 16,372
14 **Income (Loss) From Operations**	**$ 5,107**	**$ (902)**	**$ 4,204**	**$ (4,691)**	**$ (486)**	**$ (739)**	**$ (1,226)**	**$ -**	**$ (1,226)**
15 Other Income & Expense Net *(Interest)*	$ (242)	$ 148	$ (94)	$ 159	$ 65	$ 170	$ 235	$ 89	$ 324
16 Income (Loss) before Income Taxes	4,864	(754)	4,111	(4,532)	(421)	(570)	(991)	89	(901)
17 Income Tax Rate	34%		34%		34%		34%		34%
18 Income Taxes	1,654	(256)	1,398	(1,541)	(143)	(194)	(337)	30	(306)
19 **Net Income (Loss)**	**$ 3,210**	**$ (497)**	**$ 2,713**	**$ (2,991)**	**$ (278)**	**$ (376)**	**$ (654)**	**$ 59**	**$ (595)**

Exhibit No. JJP-8
September 18, 1998

The Revised Base Case Plus Adoption of BNSF's Plan
Sources and Applications of Funds

The Texas Mexican Railway Company

	Description	Base Period Adjusted (000s)	Year 1 After Change in Operations (000s)	Year 2 After Change in Operations (000s)	Year 3 After Change in Operations (000s)	Normal Year After Change in Operations (000s)
		(a)	(b)	(c)	(d)	(e)
	From Operating Activities:					
1	Net Income (Loss)	3,210	2,713	(278)	(654)	(595)
2	Depreciation	1,799	1,799	1,799	1,799	1,799
3	Deferred Income Taxes	620	(256)	(1,541)	(194)	30
4	Equity Earnings - Partnership Investment	(477)	-	-	-	-
5	Dividend Distribution - Partnership Investment	556	-	-	-	-
6	Change in current assets - (Increase) or Decrease	(1,067)	36	181	24	-
7	Change in current liabilities - Increase or (Decrease)	533	(108)	(521)	(59)	-
8	Change in amounts due to/from parent and other related parties -Increase or (Decrease)	498	-	-	-	-
9	**Net Cash Provided by Operating Activities**	$ 5,673	$ 4,184	$ (360)	$ 917	$ 1,235
	From Investing Activities:					
10	Purchases of Equipment & Improvements, net of gain or loss on disposition of fixed assets	$ (15,654)	$ -	$ -	$ -	$ -
11	Proceeds from sale of investments	1,224	-	-	-	-
12	Investment in Long Term Assets	(1,099)	-	-	-	-
13	**Net Cash Used by Investing Activities**	$ (15,529)	$ -	$ -	$ -	$ -
	From Financing Activities:					
14	Long Term Debt Borrowings	11,524	(148)	(159)	(170)	(89)
15	**Net Cash Provided by Financing Activities**	$ 11,524	$ (148)	$ (159)	$ (170)	$ (89)
16	Increase (Decrease) in Cash & Cash Equivalents	$ 1,669	$ 4,036	$ (519)	$ 747	$ 1,145
17	Cash & Cash Equivalents at Beginning of Year	403	2,072	6,108	5,589	6,336
18	Cash & Cash Equivalents at End of Year	**$ 2,072**	**$ 6,108**	**$ 5,589**	**$ 6,336**	**$ 7,481**

The Revised Base Case Plus Adoption of BNSF's Plan
Selected Financial Ratios

Exhibit No. JJP-9
September 18, 1998

The Texas Mexican Railway Company

Description	December 31, 1996 Audited (000s)	Base Period Adjusted (000s)	Year 1 After Change in Operations (000s)	Year 2 After Change in Operations (000s)	Year 3 After Change in Operations (000s)	Normal Year After Change in Operations (000s)
	(a)	(b)	(c)	(d)	(e)	(f)
Selected Items from Pro forma Statements						
1 Net Income	$ 988	$ 3,210	$ 2,713	$ (278)	$ (654)	$ (595)
2 Interest Expense	409	1,287	1,139	980	810	721
3 Operating Revenues	19,334	28,978	26,904	16,530	15,146	15,146
4 Operating Expenses	18,362	23,872	22,699	17,016	16,372	16,372
5 Long Term Debt	3,800	15,324	15,176	15,017	14,847	14,758
6 Stockholder's Equity	25,536	27,759	30,472	30,194	29,540	28,945
7 Earnings Available for Fixed Charges	$ 1,875	$ 5,673	$ 4,184	$ (360)	$ 917	$ 1,235
8 **Fixed Charge Coverage Ratio**	**4.58**	**4.41**	**3.67**	**-0.37**	**1.13**	**1.71**
9 **Operating Ratio**	**94.97%**	**82.38%**	**84.37%**	**102.94%**	**108.09%**	**108.09%**
10 **Return on Equity**	**3.87%**	**11.57%**	**8.90%**	**-0.92%**	**-2.21%**	**-2.06%**
11 **Debt to Equity Ratio**	**12.95%**	**35.57%**	**33.25%**	**33.22%**	**33.45%**	**33.77%**

The Revised Consensus Plan Plus
Adoption of BNSF's Plan
Statement of Benefits[1/]

Exhibit No. JJP-10
September 18, 1998

The Texas Mexican Railway Company

	Description	Year 1 (000s)	Year 2 (000s)	Year 3 (000s)	Normal Year (000s)
		(a)	(b)	(c)	(d)
	Incremental Revenue 2/				
1	Freight	$ (3,745)	$ (22,473)	$ (24,970)	$ (24,970)
	Incremental Operating:				
	Non - Labor				
2	Way and Structures	$ -	$ -	$ -	$ -
3	Equipment	(310)	(2,017)	(2,172)	(2,172)
4	Transportation	(206)	(1,235)	(1,372)	(1,372)
5	URCS related	(613)	(3,675)	(4,083)	(4,083)
	Labor				
6	Train & Engine	(429)	(3,003)	(3,289)	(3,289)
7	General & Administrative	(129)	(599)	(599)	(599)
8	Yard & Maintenance	-	(210)	(210)	(210)
9	Total Operating Costs	$ (1,687)	$ (10,738)	$ (11,725)	$ (11,725)
10	**Total Benefits**	**$ (2,058)**	**$ (11,734)**	**$ (13,245)**	**$ (13,245)**

1/ See text for capital investment.

2/ Other incremental revenue losses (switching, demurrage and incidental revenues) were $-.5 millio $-3.0 million and $-3.4 million in years 1, 2 and 3 respectively. Including other revenue increases Total Losses to $-2.564 million, $-14.775 million and $-16.624 million in years 1, 2 and 3 respectively.

Exhibit No. JJP-11
September 18, 1998

Revised Consensus Plan
Balance Sheet
(Includes revised Base Year)

The Texas Mexican Railway Company

	Description	Adjusted Base Period Amount (000s) (a)	Adjustment Amount (000s) (b)	Year 1 After Change in Operations (000s) (c)	Adjustment Amount (000s) (d)	Year 2 After Change in Operations (000s) (e)	Adjustment Amount (000s) (f)	Year 3 After Change in Operations (000s) (g)	Adjustment Amount (000s) (h)	Normal Year After Change in Operations (000s) (i)
	Assets									
	Current Assets:									
1	Cash and cash equivalents	$ 2,071	$ (1,719)	$ 353	$ 13,454	$ 13,807	$ 9,770	$ 23,577	$ 12,749	$ 36,325
2	Investments	572		572		572		572		572
3	Net Accounts and Notes Receivable	6,831	155	6,986	775	7,761	103	7,864	-	7,864
4	Inventory	1,562		1,562		1,562		1,562		1,562
5	Due from Parent and Other related parties	912		912		912		912		912
6	Current deferred income taxes	984		984		984		984		984
7	Other	590		590		590		590		590
8	Total Current Assets	$ 13,522	$ (1,564)	$ 11,959	$ 14,229	$ 26,188	$ 9,873	$ 36,061	$ 12,749	$ 48,809
	Properties:									
9	Equipment	23,481		23,481		23,481		23,481		23,481
10	Land, Buildings & improvements	32,574	129,462	162,036	-	162,036	-	162,036	-	162,036
11	Less accumulated depreciation	(18,092)	(3,772)	(21,863)	(5,744)	(27,608)	(5,744)	(33,352)	(5,744)	(39,096)
12	Net Properties	$ 37,963	$ 125,691	$ 163,653	$ (5,744)	$ 157,909	$ (5,744)	$ 152,165	$ (5,744)	$ 146,421
	Other Assets:									
13	Investments in other partnership	3,889		3,889		3,889		3,889		3,889
14	Net other assets	1,099		1,099		1,099		1,099		1,099
15	Total Other Assets	$ 4,988	$ -	$ 4,988	$ -	$ 4,988	$ -	$ 4,988	$ -	$ 4,988
16	**Total Assets**	**$ 56,473**	**$ 124,127**	**$ 180,600**	**$ 8,485**	**$ 189,085**	**$ 4,129**	**$ 193,214**	**$ 7,004**	**$ 200,218**
	Liabilities & Equities									
17	Accounts Payable	$ 2,399	$ 610	$ 3,009	$ 2,881	$ 5,891	$ 376	$ 6,266	$ (282)	$ 5,984
18	Due to Parent and other related parties	410	2,000	2,410	(1,000)	1,410	(1,000)	410		410
19	Other accrued liabilities	5,378	(3,371)	2,007	3,834	5,841	712	6,553	1,112	7,665
20	Total current liabilities	$ 8,187	$ (761)	$ 7,426	$ 5,716	$ 13,142	$ 87	$ 13,230	$ 830	$ 14,059
21	Long Term Debt	15,324	128,221	143,546	(1,342)	142,204	(1,450)	140,753	(1,475)	139,278
22	Deferred Income Taxes	5,203		5,203		5,203		5,203		5,203
23	Total liabilities	$ 28,715	$ 127,460	$ 156,175	$ 4,374	$ 160,549	$ (1,363)	$ 159,186	$ (646)	$ 158,540
	Stockholder's equity:									
24	Common Stock	2,500		2,500		2,500		2,500		2,500
25	Additional paid in capital	981		981		981		981		981
26	Retained earnings	24,278	(3,333)	20,945	4,110	25,055	5,492	30,547	7,650	38,197
27	Total Stockholder's equity	$ 27,759	$ (3,333)	$ 24,426	$ 4,110	$ 28,536	$ 5,492	$ 34,028	$ 7,650	$ 41,678
28	**Total Liabilities & Equity**	**$ 56,473**	**$ 124,127**	**$ 180,600**	**$ 8,485**	**$ 189,085**	**$ 4,129**	**$ 193,214**	**$ 7,004**	**$ 200,218**

Exhibit No. JJP-12
September 18, 1998

Revised Consensus Plan
Income Statement
(Includes Revised Base Year)

The Texas Mexican Railway Company

	Description	Adjusted Base Period Amount (000s) (a)	Adjustment Amount (000s) (b)	Year 1 After Change in Operations (000s) (c)	Adjustment Amount (000s) (d)	Year 2 After Change in Operations (000s) (e)	Adjustment Amount (000s) (f)	Year 3 After Change in Operations (000s) (g)	Adjustment Amount (000s) (h)	Normal Year After Change in Operations (000s) (i)
	Operating Revenues:									
1	Freight	$ 27,139	$ 8,302	$ 35,441	$ 41,508	$ 76,948	$ 5,534	$ 82,483	$ -	$ 82,483
2	Switching	830	254	1,084	1,270	2,354	169	2,524	-	2,524
3	Demurrage	824	252	1,077	1,261	2,337	168	2,505	-	2,505
4	Incidental	904	276	1,180	1,382	2,563	184	2,747	-	2,747
5	Uncollectible Accounts	(719)	(201)	(921)	(1,006)	(1,926)	(134)	(2,060)	-	(2,060)
6	Total Operating Revenues	28,978	8,883	37,861	44,415	82,277	5,922	88,199	-	88,199
	Operating Expenses:									
7	Maintenance of Way & Structures	2,294	384	2,678	491	3,169	-	3,169	-	3,169
8	Maintenance of Equipment	2,651	931	3,581	4,654	8,235	621	8,856	-	8,856
9	Transportation	13,397	5,204	18,601	25,460	44,061	3,347	47,407	(3,075)	44,332
10	General & Administrative	3,731	129	3,861	809	4,670	129	4,799	-	4,799
11	Depreciation Expense	1,799	1,973	3,772	1,973	5,744	-	5,744	-	5,744
12	Loss (Gain) On Sale of Fixed Assets	-	-	-	-	-	-	-	-	-
13	Total Operating Expenses	$ 23,872	$ 8,621	$ 32,493	$ 33,386	$ 65,879	$ 4,096	$ 69,975	$ (3,075)	$ 66,900
14	**Income (Loss) From Operations**	**$ 5,107**	**$ 262**	**$ 5,369**	**$ 11,029**	**$ 16,398**	**$ 1,826**	**$ 18,223**	**$ 3,075**	**$ 21,298**
15	Other Income & Expense Net	$ (242)	$ (10,176)	$ (10,419)	$ 249	$ (10,170)	$ 267	$ (9,902)	$ 195	$ (9,707)
16	Income (Loss) before Income Taxes	4,864	(9,914)	(5,050)	11,278	6,228	2,093	8,321	3,270	11,591
17	Income Tax Rate	34%		34%		34%		34%		34%
18	Income Taxes	1,654	(3,371)	(1,717)	3,834	2,117	712	2,829	1,112	3,941
19	**Net Income (Loss)**	**$ 3,210**	**$ (6,543)**	**$ (3,333)**	**$ 7,443**	**$ 4,110**	**$ 1,381**	**$ 5,492**	**$ 2,158**	**$ 7,650**

Revised Consensus Plan
Sources and Applications of Funds
(Includes Revised Base Year)

Exhibit No. JJP-13
September 18, 1998

The Texas Mexican Railway Company

Description	Base Period Adjusted (000s) (a)	Year 1 After Change in Operations (000s) (b)	Year 2 After Change in Operations (000s) (c)	Year 3 After Change in Operations (000s) (d)	Normal Year After Change in Operations (000s) (e)
From Operating Activities:					
1 Net Income (Loss)	3,210	(3,333)	4,110	5,492	7,650
2 Depreciation	1,799	3,772	5,744	5,744	5,744
3 Deferred Income Taxes	620	-	-	-	-
4 Equity Earnings - Partnership Investment	(477)	-	-	-	-
5 Dividend Distribution - Partnership Investment	556	-	-	-	-
6 Change in current assets - (Increase) or Decrease	(1,067)	(155)	(775)	(103)	-
7 Change in current liabilities - Increase or (Decrease)	533	(2,761)	6,716	1,087	830
8 Change in amounts due to/from parent and other related parties -Increase or (Decrease)	498	2,000	(1,000)	(1,000)	-
9 **Net Cash Provided by Operating Activities**	$ 5,672	$ (477)	$ 14,796	$ 11,220	$ 14,224
From Investing Activities:					
10 Purchases of Equipment & Improvements, net of gain or loss on disposition of fixed assets	$ (15,654)	$ (129,462)	$ -	$ -	$ -
11 Proceeds from sale of investments	1,224	-	-	-	-
12 Investment in Long Term Assets	(1,099)	-	-	-	-
13 **Net Cash Used by Investing Activities**	$ (15,529)	$ (129,462)	$ -	$ -	$ -
From Financing Activities:					
14 Long Term Debt Borrowings	11,524	128,221	(1,342)	(1,450)	(1,475)
15 **Net Cash Provided by Financing Activities**	$ 11,524	$ 128,221	$ (1,342)	$ (1,450)	$ (1,475)
16 Increase (Decrease) in Cash & Cash Equivalents	$ 1,668	$ (1,719)	$ 13,454	$ 9,770	$ 12,749
17 Cash & Cash Equivalents at Beginning of Year	403	2,071	352	13,807	23,576
18 Cash & Cash Equivalents at End of Year	**$ 2,071**	**$ 352**	**$ 13,807**	**$ 23,576**	**$ 36,325**

The Revised Consensus Plan Plus Adoption of BNSF's Plan
Balance Sheet

Exhibit No. JJP-14
September 18, 1998

The Texas Mexican Railway Company

	Description	Consensus Plan Normal Year (000s)	Adjustment Amount (000s)	Year 1 After Change in Operations (000s)	Adjustment Amount (000s)	Year 2 After Change in Operations (000s)	Adjustment Amount (000s)	Year 3 After Change in Operations (000s)	Adjustment Amount (000s)	Normal Year After Change in Operations (000s)
		(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
	Assets									
	Current Assets:									
1	Cash and cash equivalents	$ 36,325	$ 10,956	$ 47,281	$ 435	$ 47,715	$ 3,003	$ 50,719	$ 3,800	$ 54,519
2	Investments	572		572		572		572		572
3	Net Accounts and Notes Receivable	7,864	(70)	7,794	(350)	7,445	(47)	7,398	-	7,398
4	Inventory	1,562		1,562		1,562		1,562		1,562
5	Due from Parent and Other related parties	912		912		912		912		912
6	Current deferred income taxes	984		984		984		984		984
7	Other	590		590		590		590		590
8	Total Current Assets	$ 48,809	$ 10,886	$ 59,695	$ 85	$ 59,780	$ 2,957	$ 62,737	$ 3,800	$ 66,537
	Properties:									
9	Equipment	23,481		23,481		23,481		23,481		23,481
10	Land, Buildings & improvements	162,036	-	162,036	-	162,036	-	162,036	-	162,036
11	Less accumulated depreciation	(39,096)	(5,744)	(44,840)	(5,744)	(50,584)	(5,744)	(56,329)	(5,744)	(62,073)
12	Net Properties	$ 146,421	$ (5,744)	$ 140,677	$ (5,744)	$ 134,933	$ (5,744)	$ 129,188	$ (5,744)	$ 123,444
	Other Assets:									
13	Investments in other partnership	3,889		3,889		3,889		3,889		3,889
14	Net other assets	1,099		1,099		1,099		1,099		1,099
15	Total Other Assets	$ 4,988	$ -	$ 4,988	$ -	$ 4,988	$ -	$ 4,988	$ -	$ 4,988
16	**Total Assets**	**$ 200,218**	**$ 5,141**	**$ 205,359**	**$ (5,659)**	**$ 199,701**	**$ (2,788)**	**$ 196,913**	**$ (1,944)**	**$ 194,969**
	Liabilities & Equities									
17	Accounts Payable	$ 5,984	$ (155)	$ 5,829	$ (830)	$ 4,999	$ (91)	$ 4,909	$ -	$ 4,909
18	Due to Parent and other related parties	410		410		410		410		410
19	Other accrued liabilities	7,665	(750)	6,915	(3,694)	3,221	(527)	2,694	49	2,743
20	Total current liabilities	$ 14,059	$ (905)	$ 13,154	$ (4,524)	$ 8,630	$ (618)	$ 8,012	$ 49	$ 8,062
21	Long Term Debt	139,278	(148)	139,130	(159)	138,971	(170)	138 801	(89)	138,711
22	Deferred Income Taxes	5,203	-	5,203		5,203		5,203		5,203
23	Total liabilities	$ 158,540	$ (1,053)	$ 157,487	$ (4,683)	$ 152,804	$ (788)	$ 152,016	$ (40)	$ 151,976
	Stockholder's equity:									
24	Common Stock	2,500		2,500		2,500		2,500		2,500
25	Additional paid in capital	981		981		981		981		981
26	Retained earnings	38,197	6,194	44,391	(976)	43,416	(2,000)	41,416	(1,904)	39,512
27	Total Stockholder's equity	$ 41,678	$ 6,194	$ 47,872	$ (976)	$ 46,897	$ (2,000)	$ 44,897	$ (1,904)	$ 42,993
28	**Total Liabilities & Equity**	**$ 200,218**	**$ 5,141**	**$ 205,359**	**$ (5,659)**	**$ 199,701**	**$ (2,788)**	**$ 196,913**	**$ (1,944)**	**$ 194,969**

The Revised Consensus Plan Plus Adoption of BNSF's Plan
Income Statement

Exhibit No. JJP-15
September 18, 1998

The Texas Mexican Railway Company

Description	Consensus Plan Normal Year (000s)	Adjustment Amount (000s)	Year 1 After Change in Operations (000s)	Adjustment Amount (000s)	Year 2 After Change in Operations (000s)	Adjustment Amount (000s)	Year 3 After Change in Operations (000s)	Adjustment Amount (000s)	Normal Year After Change in Operations (000s)
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
Operating Revenues:									
1 Freight	$ 82,483	$ (3,745)	$ 78,738	$ (18,727)	$ 60,010	$ (2,497)	$ 57,513	$ -	$ 57,513
2 Switching	2,523	(114)	2,409	(573)	1,836	(76)	1,760	-	1,760
3 Demurrage	2,505	(113)	2,392	(569)	1,823	(76)	1,747	-	1,747
4 Incidental	2,747	(125)	2,622	(624)	1,998	(83)	1,915	-	1,915
5 Uncollectible Accounts	(2,060)	91	(1,969)	454	(1,516)	60	(1,455)	-	(1,455)
6 Total Operating Revenues	88,198	(4,007)	84,191	(20,039)	64,152	(2,672)	61,480	-	61,480
Operating Expenses:									
7 Maintenance of Way & Structures	3,169	-	3,169	(210)	2,959	-	2,959	-	2,959
8 Maintenance of Equipment	8,856	(310)	8,545	(1,706)	6,839	(155)	6,684	-	6,684
9 Transportation	44,332	(1,247)	43,085	(6,666)	36,419	(832)	35,588	-	35,588
10 General & Administrative	4,799	(129)	4,670	(469)	4,201	-	4,201	-	4,201
11 Depreciation Expense	5,744	-	5,744	-	5,744	-	5,744	-	5,744
12 Loss (Gain) On Sale of Fixed Assets	-	-	-	-	-	-	-	-	-
13 Total Operating Expenses	$ 66,900	$ (1,687)	$ 65,213	$ (9,051)	$ 56,162	$ (987)	$ 55,175	$ -	$ 55,175
14 **Income (Loss) From Operations**	**$ 21,298**	**$ (2,320)**	**$ 18,978**	**$ (10,988)**	**$ 7,990**	**$ (1,685)**	**$ 6,305**	**$ -**	**$ 6,305**
15 Other Income & Expense Net	$ (9,707)	$ 114	$ (9,593)	$ 124	$ (9,469)	$ 134	$ (9,335)	$ 145	$ (9,190)
16 Income (Loss) before Income Taxes	11,591	(2,206)	9,386	(10,864)	(1,479)	(1,551)	(3,030)	145	(2,885)
17 Income Tax Rate	34%		34%		34%		34%		34%
18 Income Taxes	3,941	(750)	3,191	(3,694)	(503)	(527)	(1,030)	49	(981)
19 **Net Income (Loss)**	**$ 7,650**	**$ (1,456)**	**$ 6,194**	**$ (7,170)**	**$ (976)**	**$ (1,024)**	**$ (2,000)**	**$ 96**	**$ (1,904)**

The Revised Consensus Plan Plus Adoption of BNSF's Plan
Sources and Applications of Funds

Exhibit No. JJP-16
September 18, 1998

The Texas Mexican Railway Company

	Description	Consensus Plan Normal Year (000s) (a)	Year 1 After Change in Operations (000s) (b)	Year 2 After Change in Operations (000s) (c)	Year 3 After Change in Operations (000s) (d)	Normal Year After Change in Operations (000s) (e)
	From Operating Activities:					
1	Net Income (Loss)	7,650	6,194	(976)	(2,000)	(1,904)
2	Depreciation	5,744	5,744	5,744	5,744	5,744
3	Deferred Income Taxes	-	-	-	-	-
4	Equity Earnings - Partnership Investment	-		-	-	-
5	Dividend Distribution - Partnership Investment	-		-	-	-
6	Change in current assets - (Increase) or Decrease	-	70	350	47	-
7	Change in current liabilities - Increase or (Decrease)	830	(905)	(4,524)	(618)	49
8	Change in amounts due to/from parent and other related parties -Increase or (Decrease)	-	-	-		-
9	**Net Cash Provided by Operating Activities**	$ 14,224	$ 11,104	$ 594	$ 3,173	$ 3,889
	From Investing Activities:					
10	Purchases of Equipment & Improvements, net of gain or loss on disposition of fixed assets	$ -	$ -	$ -	$ -	$ -
11	Proceeds from sale of investments	-	-	-	-	-
12	Investment in Long Term Assets	-	-	-	-	-
13	**Net Cash Used by Investing Activities**	$ -	$ -	$ -	$ -	$ -
	From Financing Activities:					
14	Long Term Debt Borrowings	(1,475)	(148)	(159)	(170)	(89)
15	**Net Cash Provided by Financing Activities**	$ (1,475)	$ (148)	$ (159)	$ (170)	$ (89)
16	Increase (Decrease) in Cash & Cash Equivalents	$ 12,749	$ 10,956	$ 435	$ 3,003	$ 3,800
17	Cash & Cash Equivalents at Beginning of Year	23,576	36,325	47,281	47,715	50,719
18	Cash & Cash Equivalents at End of Year	**$ 36,325**	**$ 47,281**	**$ 47,715**	**$ 50,719**	**$ 54,519**

The Revised Consensus Plan Plus Adoption of BNSF's Plan
Selected Financial Ratios

Exhibit No. JJP-17
September 18, 1998

The Texas Mexican Railway Company

Description	December 31, 1996 Audited (000s) (a)	Consensus Plan Normal Year (000s) (b)	Year 1 After Change in Operations (000s) (c)	Year 2 After Change in Operations (000s) (d)	Year 3 After Change in Operations (000s) (e)	Normal Year After Change in Operations (000s) (f)
Selected Items from Pro forma Statements						
1 Net Income	$ 988	$ 7,650	$ 6,194	$ (976)	$ (2,000)	$ (1,904)
2 Interest Expense	409	10,752	10,638	10,514	10,380	10,257
3 Operating Revenues	19,334	88,198	84,191	64,152	61,480	61,480
4 Operating Expenses	18,362	66,900	65,213	56,162	55,175	55,175
5 Long Term Debt	3,800	139,278	139,130	138,971	138,801	138,711
6 Stockholder's Equity	25,536	41,678	47,872	46,897	44,897	42,993
7 Earnings Available for Fixed Charges	$ 1,875	$ 14,224	$ 11,104	$ 594	$ 3,173	$ 3,889
8 **Fixed Charge Coverage Ratio**	**4.58**	**1.32**	**1.04**	**0.06**	**0.31**	**0.38**
9 **Operating Ratio**	**94.97%**	**75.85%**	**77.46%**	**87.54%**	**89.74%**	**89.74%**
10 **Return on Equity**	**3.87%**	**18.36%**	**12.94%**	**-2.08%**	**-4.45%**	**-4.43%**
11 **Debt to Equity Ratio**	**12.95%**	**76.97%**	**74.40%**	**74.77%**	**75.56%**	**76.34%**

VERIFICATION

DISTRICT)
OF) ss.
COLUMBIA)

I, Joseph J. Plaistow, being first duly sworn, upon oath and under penalty of perjury state that I have read the foregoing statements and the contents thereof are true and correct as stated.

Joseph J. Plaistow
Joseph J. Plaistow

Subscribed and sworn to before me this 14th day of September, 1998.

Notary Public

My commission expires: March 31, 2003

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 26)
FINANCE DOCKET NO. 32760 (Sub-No. 28)
FINANCE DOCKET NO. 32760 (Sub-No. 29)

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

VERIFIED STATEMENT OF DANNY M. BEERS

My name is Danny M. Beers. I am Vice President - Intermodal/Automotive for Transportacion Ferroviaria Mexicana, S.A. de C.V. ("TFM"). My office is located at Av. Periferico Sur No. 4829, 3er. Piso, Col. Parques del Pedregal, C.P. 14010, Delegacion Tlalpan, Mexico, D.F.

I have served as TFM's Vice President - Intermodal/Automotive since April of 1997. Before serving in my present position, I served in numerous other railroad positions dating back to 1984, when I was Hub Manager in Dallas for the Burlington Northern Railroad. In 1989, I assumed responsibility for "BN America," Burlington Northern's domestic container program. In 1991, I became BN's Director for Intermodal Sales, and in 1992 I joined the Southern Pacific Railroad as Vice President for Intermodal Sales. In 1995 I joined Tex Mex as Vice President for

Marketing and Sales, and also served as Executive Director for U.S. rail sales for Transportacion Maritima Mexicana ("TMM"), the parent company of both TFM and Tex Mex.

In my present position, I am responsible for the marketing, sales, and pricing of TFM's intermodal and automotive services, as well as terminal operations and equipment for both the intermodal and automotive divisions. As such, I have an intimate knowledge of the market for automotive traffic between Mexico and the United States.

I am submitting this verified statement in support of Tex Mex's response and objections to the application for additional remedial conditions regarding the Houston/Gulf Coast area filed by the Burlington Northern and Santa Fe Railway Company ("BNSF") on July 8, 1998. Tex Mex strongly objects to BNSF's request for trackage rights over the UP's line between San Antonio and Laredo.

My statement focuses on the likely effect of the BNSF trackage rights proposal on Tex Mex's ability successfully to solicit and obtain business in shipping finished automobiles from Laredo to Houston in the absence of the "Consensus Plan" filed by the Consensus Parties on July 8, 1998. Based on my experience, I believe it is very likely that, if BNSF receives the San Antonio to Laredo trackage rights it seeks and the Consensus Plan is not adopted, Tex Mex would, as a practical matter, be altogether foreclosed from obtaining any such automotive business in the face of single-line competition at Laredo from both UP and BNSF.

There are a number of reasons for that conclusion. First and foremost, the addition of direct BNSF access to Laredo would mean that Tex Mex would compete not only against a single giant railroad with the financial resources and market reach that Tex Mex cannot begin to match, but against two such railroads. Also, these railroads would be competing not only against Tex Mex but against *each other* as well. Tex Mex would be faced with not one but two carriers who would have the capability, and would compete with each other, to make the auto traffic a "loss leader" by offering unrealistically low rates in an effort to attract market share. Under those circumstances, there is no reasonable prospect that Tex Mex would be able to offer competitively-priced bids that would allow it to attract or maintain any share of the market for Laredo-Houston finished auto traffic. Although there is a reasonable prospect that Tex Mex would be able to participate in the market as an attractive alternative to UP alone (and indeed, Tex Mex has begun to handle a modest amount of auto traffic), the addition of a new and unwarranted direct BNSF option as well would most certainly result in a market consisting entirely of BNSF and UP that would crowd out Tex Mex altogether.

Further, the rates that would result from UP and BNSF competition would be too low to justify the cost of leasing the equipment needed to move the auto traffic in any event. With no reasonable assurance of capturing any of the Laredo-Houston auto traffic from BNSF and UP, the lease of auto equipment necessary to move the traffic could not be justified. Further, the 52 auto rack cars now used by TFM would have to be retrofitted for use in moving auto traffic over Tex Mex, to replace the car doors with new doors that would make them acceptable for use in the U.S. market. This retrofitting would cost approximately $15,000 per car – an expense that simply could not be economically justified without any reasonable prospect of gaining any of the auto traffic in question.

VERIFICATION

I, Danny M. Beers, declare under penalty of perjury under the laws of the United States that the forcgoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on September 16, 1998.

Danny M. Beers

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 26)
FINANCE DOCKET NO. 32760 (Sub-No. 28)
FINANCE DOCKET NO. 32760 (Sub-No. 29)

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

VERIFIED STATEMENT OF PATRICK L. WATTS

My name is Patrick L. Watts. I am Vice President – Transportation for the Texas Mexican Railway Company. My business address is 4600 Gulf Freeway, Suite 250, Houston, Texas 77023. In my current position, I am responsible for directing all of Tex Mex's train operations across its line between Laredo and Beaumont, Texas including the Greater Houston Terminal Area.

At the request of Joseph J. Plaistow of Snavely King Majoros O'Connor & Lee, I estimated certain operational requirements flowing from the traffic analysis performed by ALK Associates under what is referred to as Scenario A (implementation of the BNSF plan in the absence of the Consensus Plan filed by Tex Mex and others on July 8, 1998), and Scenario B (implementation of the BNSF proposal and the Consensus Plan). The purpose of this verified statement is to set forth briefly the operational information I provided.

Granting BNSF's requested trackage rights between San Antonio and Laredo and the other relief BNSF seeks would substantially reduce Tex Mex traffic volumes under both Scenario A, as compared with the Base Case, and Scenario B, as compared with implementation of the Consensus plan alone. In both cases, Tex Mex's locomotive requirements would be reduced by 14 locomotives. Scenarios A and B also both would affect Tex Mex employment levels. Under Scenario A, Tex Mex would require 18 fewer engineers and 18 fewer conductors than under the Base Case, and 4 fewer each of maintenance of way employees, clerical employees, and G&A directors. Under Scenario B, Tex Mex would require 23 fewer engineers and 23 fewer conductors than under the Consensus Plan, 4 fewer each of maintenance of way and clerical employees, and 5 fewer G&A directors.

These changes are summarized in the following chart:

Category	Scenario A	Scenario B
Locomotives	(14)	(14)
Maintenance of Way	(4)	(4)
Clerical	(4)	(4)
G&A Directors	(4)	(5)
Engineers	(18)	(23)
Conductors	(18)	(23)

VERIFICATION

STATE OF TEXAS)
) ss.
COUNTY OF HARRIS)

I, Patrick L. Watts, being first duly sworn, upon oath and under penalty of perjury state that I have read the foregoing statements and the contents thereof are true and correct as stated.

Patrick L. Watts
Patrick L. Watts

Subscribed and sworn to before me this 16th day of September, 1998.

Sam E. Meade
Notary Public

My commission expires: March 18, 2002

SAM E. MEADE
MY COMMISSION EXPIRES
MARCH 18, 2002

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 26)
FINANCE DOCKET NO. 32760 (Sub-No. 28)
FINANCE DOCKET NO. 32760 (Sub-No. 29)

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

VERIFIED STATEMENT OF PROFESSOR CURTIS M. GRIMM

I. Qualifications and Introduction

My name is Curtis M. Grimm, and I am Professor and Chair of Logistics, Business and Public Policy, College of Business and Management, University of Maryland at College Park. I have been a member of this College since 1983. I received my B.A. in economics from the University of Wisconsin-Madison in 1975 and my Ph.D. in economics from the University of California-Berkeley in 1983. My Ph.D. dissertation investigated competitive impacts of railroad mergers.

My background includes extensive exposure to public policy issues regarding transportation. I have previously been employed by the Wisconsin Department of Transportation, the U.S. Interstate Commerce Commission, and the Australian Bureau of Transport and

Communication Economics and have consulted for several other government agencies and private firms regarding transportation issues. I served as Assistant to the Chief of Intercity Transport Development, Planning Division, Wisconsin Department of Transportation in two separate stints between 1975 and 1978, with a focus on rail policy issues such as abandonments and the creation of shortline railroads. I also worked on a consolidation involved competing bids from Burlington Northern and the Soo Line/Milwaukee Road/CNW for the Green Bay and Western Railroad, decided by the ICC in 1977.

While serving as an economist at the ICC's Office of Policy Analysis from January to December 1981, my duties included analysis of competitive effects for the Union Pacific-Missouri Pacific-Western Pacific merger. During 1982, I served as a consultant for the Commission while the UP-MP-WP decision was being drafted and subsequently consulted for the ICC with regard to the Ex Parte No. 347 decision ("Coal Rate Guidelines - Nationwide").

I have participated actively in several ICC and STB merger proceedings, providing testimony which evaluated the competitive consequences of a merger. I previously submitted statements in the initial UP/SP merger proceeding on behalf of the Texas Mexican Railway Company ("Tex-Mex") and the Kansas City Southern Railway Company ("KCS") and filed a statement on behalf of KCS in the instant Houston/Gulf Coast Oversight Proceeding. On November 8, 1995, I testified regarding competition issues in rail mergers before a joint meeting of the U.S. Senate's and House of Representatives' Committees on Small Business.

My research has involved deregulation, competition policy, competitive interaction and management strategy, with a strong focus on transportation. This research has resulted in over 60 publications, including articles in leading journals such as Journal of Law and Economics, Transportation Research, Transportation Journal, Logistics and Transportation Review, Academy of Management Journal, Management Science, Strategic Management Journal, and Journal of Management. More than two dozen publications have dealt specifically with the railroad industry, mainly on deregulation, mergers, and competition issues. I have also co-authored four monographs. Further details may be found in my vitae, which was attached to my July 8, 1998 filing on behalf of KCS.

I have been asked by Tex Mex to address certain questions presented by the request of the Burlington Northern Santa Fe Railroad ("BNSF") to the Surface Transportation Board ("STB") for trackage rights over the Union Pacific Railroad's ("UP'") line between Laredo and San Antonio, Texas in BNSF's Application For Additional Remedial Conditions Regarding the Houston/Gulf Coast Area submitted on July 8, 1998 in Finance Docket No. 32760 (Sub No. 26). Traffic impact and financial impact analyses presented in the verified statements of Michael H. Rogers of ALK Associates, Inc. and Joseph Plaistow of Snavely King Majoros O'Connor & Lee conclude that the effect on Tex Mex of granting BNSF's requested trackage rights would be that Tex Mex could not operate its lines profitably and would go out of business. I have been asked by Tex Mex to address the consequences to essential transportation services, as that term is used by the STB, if Tex Mex goes out of business and also to consider whether the BNSF's request is competitively justified.

In my opinion, Tex Mex's going out of business would result in the loss of essential transportation services. The STB's regulations provide that a transportation "service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available." 49 C.F.R. § 1180.1(c)(2)(ii). For the reasons discussed below, I conclude that in the event of Tex Mex going out of business, a number of shippers who now rely on Tex Mex service would be left without any feasible alternatives, either by rail or by any other mode. In addition, if Tex Mex were not to go out of business (as BNSF assumes and contrary to the analyses of Messrs. Rogers and Plaistow), then in my opinion there could be no competitive justification for BNSF's requested trackage rights.

II. Much of Tex Mex's Traffic is Rail Dependent.

Many of Tex Mex's customers are solely served by Tex Mex and cannot readily shift to truck as an alternative. Although truck competition can provide an adequate substitute for rail service for some products and markets, it is not an effective substitute for rail service now provided by Tex Mex. The relative costs of truck and rail, and thus the extent to which motor carriers are competitive with rail in a particular market, depend on the commodity being transported and the distance between origin and destination.[1] For longer distances and for movements of bulk products, rail usually has a significant cost advantage. The nature of products, volume and commercial value are also factors that would tend to limit intermodal substitution.[2]

Table 1 reports Tex Mex commodity statistics for 1997 for all Tex Mex loads. The leading commodity is Farm Products (STCC 01), with approximately one-third of total carloads. Grain is an important commodity within this group , and it is well established that rail has a significant advantage over truck for movements of grain beyond those of a short distance. As noted in a 1992 USDA report: "Railroads remain the predominant mode of grain transportation in the United States."[3]

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[1] Keeler, Theodore, Railroads, Freight and Public Policy, Brookings, Washington, D.C. 1983.
[2] "The feasibility of using motor carriage as an alternative to rail may depend on the nature of the product and the needs of the shipper or receiver." *McCarty Farms v. Burlington Northern Inc.*, No. 37809, 3 ICC 2d 822, 829 (1987).
[3] J.D. Norton, P.J. Bertels, and F.K. Buxton, "Transportation of U.S. Grains: A Model Share Analysis," Agricultural Marketing Service, U.S. Department of Agriculture, July 1992, p. 5.

Referring back to Table 1, the second leading Tex Mex commodity is Nonmetallic Minerals (STCC 14). This STCC category includes crushed or broken stone, sand and gravel. In the UP-MKT decision, the ICC made clear the limited basis upon which truck could compete for such bulk products: "Truck transport is prohibitively expensive for the long haul; crushed stone is a high-bulk, heavy loading commodity, for which motor carriers are effective only for distance of less than 75 to 100 miles."[4]

Again referring to Table 1, other leading Tex Mex commodities are Waste and Scrap Materials (STCC 40), Food and Kindred Products (STCC 20), Petroleum and Coal Products (STCC 29), Pulp and Paper Products (STCC 26), Chemicals (STCC 28), Primary Metal Products (STCC 33), and Coal (STCC 11). Overall, the commodity consist of Tex Mex is dominated by high bulk, rail-dependent products.

A similar picture emerges when examining the subset of traffic shipped by customers located on Tex Mex lines. Table 2 provides commodity data based on 1996 data grouped according to Tex Mex originating, terminating, local and bridge. Focusing on commodities of customers in the first three categories, those arguably most dependent on Tex Mex, the leading commodities are: Nonmetallic Minerals (STCC 14), Farm Products (STCC 1), Petroleum and Coal Products (STCC 29), Waste and Scrap Materials (STCC 40), Coal (STCC 11), and Primary Metal Products (STCC 33). As I have discussed, shippers of these kinds of bulk commodities are especially dependent on rail transportation.

---

[4] UP-MKT, 4 ICC 2d at 464-465 (1988).

III. Tex-Mex's Shippers Have Documented Their Dependence on Tex-Mex and the Harm They Would Incur in the Absence of This Alternative

A number of Tex Mex shippers have written verified statements documenting their dependence on Tex Mex and the adverse effects their businesses would suffer from any loss of Tex Mex services. As they indicate in their statements, all of the shippers quoted below are served exclusively by Tex Mex. These shippers reinforce the conclusion that Tex Mex provides essential transportation services to its local customers.

- Frank A. Bailey III, President of Frank Bailey Grain Co., Inc., provides documentation of a grain shipper heavily dependent on Tex Mex for export shipments to Mexico:

> Frank Bailey Grain Co., Inc. buys milo and corn from the farmer and sells it into Mexico by rail. We have been exporting to Mexico by rail since 1980, so our business depends heavily on reliable and efficient rail service.
>
> Generally we export over 100,000 N.T. of milo and corn into Mexico per year and we rely entirely on the Tex-Mex Railway. The Tex-Mex is the only rail carrier serving our facilities and truck shipments are not feasible because of the distance between the origin and the destination….
>
> My concern is that if the STB continues to weaken the Tex-Mex, Frank Bailey Grain Co., Inc. will not have viable transportation to our Mexican markets, thus causing us large financial loss.

- Wright Materials is a family business in Robstown dependent on Tex Mex for shipments of sand and gravel:

> In 1963 and 1964 we built a rail spur and processing plant on location. Since that time we have depended entirely on the Tex Mex Railway to furnish rail cars and move the loaded cars to Laredo, Corpus Christi and points in between…. Without the rail service to this plan we could not compete in our market. The 90 mile distance makes trucking a much more expensive and much less safe method of transportation.

- Barr Iron is a scrap iron and metals company located on Tex Mex in Alice, Texas, which ships approximately 120 to 140 car loads of scrap iron per year. Kenneth Barr, President, explained the critical importance of Tex Mex's service:

> The rail service we receive from Tex Mex is critical to the success of our company in keeping our costs down and our products competitive. Without access to Tex Mex, the consequences to us would be severe, as there is no other feasible way to meet our transportation needs. We do not use trucks because of the large volume and the distance to these mills.

- Another example is Gulf Compress, an agricultural cooperative cotton warehouse located in Corpus Christi. Robert Weatherford, General Manager, pointed to his company's reliance on Tex Mex:

> We rely entirely on the Tex Mex Railway for our rail service since it is the only carrier that accesses our two locations in Corpus Christi. The service provided by the Tex Mex is very important to our business today, and as the Canadian and Mexican markets grow, it will become ever more important. A new service we are offering to our customers, which involves moving and storing cotton from other areas of the United States, which is bound for Mexico, depends entirely on the service provided by Tex Mex. Any loss of service by the Tex Mex would cause severe consequences in our ability to provide needed services to our customers at a reasonable cost. There are many of our services and markets, which would cease to be available to us without the railroad.

- Ray West Warehouses, Inc. operates a public merchandise warehouse in Corpus Christi that stores and handles inventory such as forest products, chemical products, and drilling materials. Company President Peter B. Anderson writes, in part, that:

> Several of our customers rely on rail transportation as the only economical alternative for their needs. We regularly receive or ship forest products, drilling related materials, and other chemical products by rail. Inbound products typically ship from Oregon, Nevada, and Texas. Destinations include California and Michigan. We usually handle 3 to 5 railcars per month.
>
> We rely entirely on the Tex Mex railroad for our service, which is the only railroad with access to our facilities.
>
> The service we receive from the Tex Mex is vital to our ability to satisfy our customers' needs. Without prompt reliable rail service we would lose a significant potion of our business. Several of our customers use us only because we can handle shipments by rail, which allows them to enjoy cost advantages that make them competitive in their respective businesses.

* Ingram Readymix Inc. is a concrete producer located in Corpus Christi. Ingram's President, Bruce Ingram, Sr., notes that:

> Our company depends on reliable, efficient rail service. All our gravel is shipped from Realitos, Texas by Tex Mex Railroad.
>
> For that service, we entirely rely upon the Tex Mex, which is the only rail carrier that accesses our facility. Without Tex Mex our company would be close to closing our doors.
>
> The rail service we receive from Tex Mex is critical to the success of our company, in keeping our costs down and our products competitive. Without access to Tex Mex, the consequences to us would be severe, as there is no feasible way to meet our transportation needs. Our plants are located on Tex Mex spurs which keep us competitive.

The nature of the commodities that dominate Tex Mex's local shipments and the testimony of shippers that transport a representative variety of those commodities demonstrate that the rail service that Tex Mex now provides to its local customers is essential service, and that, if Tex Mex rail service becomes unavailable, as Mr. Plaistow testifies it would if BNSF's trackage rights request and other relief is granted, Tex Mex's local shippers would be left without any adequate alternative means of transportation.

In addition, if Tex Mex were unable to operate profitably and were forced to go out of business, there is no reason to assume that any other existing or newly formed railroad would purchase its assets and continue to provide transportation services to its customers. Tex Mex is reputed to be a highly efficient regional railroad, and neither BNSF nor anyone else has contended otherwise. Tex Mex in fact was recently named by Railway Age magazine as Regional Railroad of the Year. Class I railroads generally have higher cost structures than shortline or regional railroads, and neither UP nor BNSF would likely be interested in acquiring

Tex Mex's assets for purposes of acquiring its route to Mexico, since each of them would already have their own direct routes to Laredo as well as to Eagle Pass and Brownsville.

IV. On BNSF's Assumptions, BNSF's Trackage Request Is Not Competitively Justified.

If, as BNSF seems to assume and contrary to the conclusions of Messrs. Rogers and Plaistow, Tex Mex would not go out of business as a result of the BNSF plan and if Tex Mex (or some other railroad) would continue to provide service over its route for traffic to and from Mexico through Laredo, then it seems to me there is no competitive justification for granting BNSF trackage rights between San Antonio to Laredo as a condition of the merger of the UP and the Southern Pacific Railroad ("SP"). Before the merger there were two independent alternatives with regard to U.S. railroads serving Laredo . Tex Mex/SP interline service over Tex Mex's route competed with UP's single-line service. Based on its doubts about whether BNSF, interchanging with Tex Mex via BNSF's trackage rights to Robstown, Texas, would be a full competitive replacement for SP/Tex Mex service, the STB, in Decision No. 44 approving the UP/SP merger, granted Tex Mex trackage rights from Robstown to Beaumont "in order to ensure the continuation of an effective competitive alternative to UP's routing into the border crossing at Laredo." Decision No. 44 at 149. This maintained two independent alternatives through Laredo. If BN's request were granted, there would then be three independent alternatives through Laredo – UP, Tex Mex /KCS and BNSF – whereas there were only two with such access before the merger. That result cannot be justified on the basis of any need to prevent a reduction of competitive alternatives from pre-merger levels.

EXHIBIT 1

Comparative Commodity Statistics -
All Loads - Year to Date '97 vs. Year to Date '96

Commodity	Year to Date - December 1997 Loads	Tonnage
01 - Farm Products	17,721	1,720,951
10 - Metallic Ores	65	6,058
11 - Coal	1,582	142,602
14 - Nonmetallic Minerals	6,735	634,682
20 - Food & Kindred Products	4,239	366,997
22 - Textile Mill Products	1	52
23 - Apparel/Fin.Tex.Products	0	0
24 - Lumber & Wood Prod	262	17,429
25 - Furniture & Fixtures	0	0
26 - Pulp Paper & Allied Prod.	3,882	274,373
28 - Chemical & Allied Prod.	2,986	279,495
29 - Petroleum & Coal Prod.	4,432	347,473
30 - Rubber & Misc. Prod	4	109
32 - Stone,Clay,Glass,Conc.	950	72,928
33 - Primary Metal Products	1,666	129,221
34 - Fabr. Metal Prod.	32	2,152
35 - Machinery, except elec.	9	524
36 - Electrical machinery	1	352
37 - Transportation Equip.	688	17,821
39 - Misc. Prod. Manufactmg	151	10,688
40 - Waste & scrap materials	5,333	323,175
41 - Misc freight shipments	5	250
42 - Containers, ret empty	31	2,401
45 - Shipper Association	0	0
46 - Misc. mixed shipment	2	137
48 - Hazardous Waste	639	57,114
49 - Hazardous materials	469	39,854
50 - Bulk Commodity	36	2,446
Total	51,921	4,449,284

(Source: Tex Mex Commodities Statistics Report)

EXHIBIT 2

1. Give the particulars called for concerning the commodities carried by the respondent during the year, on the basis of the 2-digit codes named in 49 C.F.R. 1235.2. In stating the revenue received from the carriers, include all commencing carriers, whether rail or water and whether the freight is received directly or indirectly (as through elevators).
2. Traffic involving less than three shippers reportable in any one commodity class may be excluded from this schedule, but must be submitted unbound in a separate schedule supplemental to this one and marked Supplemental. Supplemental reports will be withheld from public inspection.
3. Particulars for Codes 01 to 46 inclusive, should include all traffic moved in lots of 10,000 pounds or more. Forwarder traffic includes freight traffic shipped by or consigned to any forwarder. Code 47 should include all traffic moved in lots of less than 10,000 pounds.
4. Gross freight traffic means respondent's gross freight revenue without adjustment for absorption or corrections.
5. Local traffic refers to traffic which both originates and terminates on-line.

Assn	Association	Misc	Miscellaneous
Exc	Except	Nat	Natural
Fabr	Fabricated	Opt	Optical
Fwdr	Forwarder	Ordn	Ordnance
Gd	Goods	Petro	Petroleum
Gsln	Gasoline	Phot	Photographic
Inc	Including	Prd	Products
Instr	Instruments	Shpr	Shipper
LCL	Less than carload	Tex	Textile
Machy	Machinery	Transp	Transportation

Line No.	Commodity Description	Code No.	Originating on respondent's road (except local traffic)		Terminating on respondent's road (except local traffic)		Received from connecting carriers (bridge traffic)		Local traffic (originating & terminating traffic on line)	
			Carloads	Number of tons (2000 lbs.)	Carloads	Number of tons (2000 lbs.)	Carloads	Number of tons (2000 lbs.)	Carloads	Number of tons (2000 lbs.)
1	Farm Products	01	3,872	374,231	12	596	5,944	408,720	37	3,483
2	Forest Products	08								
3	Fresh fish and other marine products	09								
4	Metallic ores	10			10	797	7	779		
5	Coal	11	136	11,855					1,714	163,873
6	Crude petro, nat gas, & nat gsln	13								
7	Nonmetallic minerals, except fuels	14	9	918	1,427	140,598	180	15,697	4,139	342,532
8	Ordnance and accessories	19								
9	Food and kindred products	20	1	90	248	13,379	1,681	125,700	1	74
10	Tobacco products	21								
11	Textile mill products	22					2	122		
12	Apparel & other finished tex prd inc knit	23								
13	Lumber & wood products, except furniture	24	2	143	8	631	86	4,564		
14	Furniture and fixtures	25								
15	Pulp, paper and allied products	26	5	374	47	2,888	3,969	287,511	1	63
16	Printed matter	27								
17	Chemicals and allied products	28	35	3,322	100	8,600	721	59,866	6	510
18	Petroleum and coal products	29	2,052	162,892	71	5,108	464	28,461		
19	Rubber & miscellaneous plastic products	30					7	90		
20	Leather and leather products	31								
21	Stone, clay, glass & concrete prd	32	43	1,871	105	8,925	609	43,852		
22	Primary metal products	33	740	69,822	327	16,953	621	46,449	6	452
23	Fabr metal prd, exc ordn, machy & transp	34					29	2,004		
24	Machinery, except electrical	35			16	501	12	382	1	50
25	Electrical machy, equipment & supplies	36								
26	Transportation equipment	37					85	3,078	1	75
27	Instr, Phot & opt gd, watches & clocks	38								
28	Miscellaneous products of manufacturing	39								
29	Waste and scrap materials	40	1,883	123,088	15	622	4,716	249,292	94	4,283
30	Miscellaneous freight shipments	41								
31	Containers, shipping, returned empty	42								
32	Freight forwarded traffic	44								
33	Shipper Assn or similar traffic	45								
34	Misc mixed shipment exc fwdr & shpr assn	46					1	23		
35	Waste Hazardous	48			81	6,979	322	23,177		
36	Hazardous mater	49	1	29	43	3,556	314	21,704		
37	Hazardous mater	50					31	1,841		
	TOTAL		8,711	744,447	[illegible]510	210,133	19,372	[illegible],295,658	6,000	[illegible],455

(Source: Tex Mex 1996 Railroad Annual Report ~~of~~ to the Railroad Commission of Texas)

VERIFICATION

DISTRICT)
OF) ss.
COLUMBIA)

I, Curtis Grimm, being first duly sworn, upon oath and under penalty of perjury state that I have read the foregoing statements and the contents thereof are true and correct as stated.

Curtis Grimm
Curtis Grimm

Subscribed and sworn to before me this 15 day of September, 1998.

Cassie J. Jones
Notary Public

My commission expires: May 21, 2000

8

FRANK BAILEY GRAIN CO.,INC.

P.O. Box 510, Fort Worth, Texas 76101-0510 • (817) 731-6341 • Established 1924

SEPTEMBER 9, 1998

VERIFIED STATEMENT OF FRANK A. BAILEY III, PRESIDENT OF FRANK BAILEY GRAIN CO., INC.

The Burlington Northern - Santa Fe (BN-SF) has requested trackage rights over the Union Pacific (U.P.) from San Antonio, Texas to Laredo, Texas. Our company is strongly opposed to this request.

Frank Bailey Grain Co., Inc. buys milo and corn from the farmer and sells it into Mexico by rail. We have been exporting to Mexico by rail since 1980, so our business depends heavily on reliable and efficient rail service.

Generally we export over 100,000 M.T. of milo and corn into Mexico per year, and we rely entirely on the Tex-Mex Railway. The Tex-Mex is the only rail carrier serving our facilities and truck shipments are not feasible because of the distance between the origin and the destination.

The Tex-Mex Railway Co. has been in business for 123 years and has done a wonderful job of operating a class 3 railroad and taking care of their customers. They have competed admirably with the Union Pacific for Laredo bound traffic for over 100 years and have survived some tough times.

Before the STB approved the UP-SP merger, a large part of the Tex-Mex revenues came from the S.P. traffic to Laredo. For the past 1½ years (since the UP-SP merger), the Tex-Mex finally has been in a position where the BN-SF needs to move traffic across their line. This has been good for the Tex-Mex, but the BN-SF would rather have trackage rights from San Antonio to Laredo, Texas. If the STB approves these trackage rights, you will take away another revenue source from the Tex-Mex. My concern is that if the STB continues to weaken the Tex-Mex, Frank Bailey Grain Co., Inc. will not have viable transportation to our Mexican Markets, thus causing us large financial loss.

Currently Laredo, Texas is a very competive border cressing with the UP-SP and the Tex-Mex competing for the business. Only the BN-SF will profit from San Antonio - Laredo trackage rights.

Also, BN-SF has Texas border crossings at Brownsville, Eagle Pass and El Paso. BN-SF is the only railroad serving the El Paso crossing.

Please deny BN-SF request for trackage rights from San Antonio to Laredo, Texas.

FRANK BAILEY GRAIN CO., INC.

Frank A. Bailey III

by Frank A. Bailey III

I, Frank A. Bailey III, declare under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on the 9th day of September, 1998.

Frank A. Bailey III

Frank A. Bailey, III

WRIGHT MATERIALS INC.

ROBSTOWN, TEXAS 78380

August 28, 1998

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

RE: BNSF Trackage Rights request over UP San Antonio to Laredo line

Dear Secretary Williams:

My name is Milus Wright and I am General Manager of Wright Materials, Inc. Wright Materials is a family business started in 1939 by my grandfather, M. P. Wright, Jr., to supply sand, gravel, and base materials to Corpus Christi, Laredo, and surrounding areas in South Texas. Since 1939 the demand for aggregate has doubled many times. In 1962, to meet this demand, Wright Materials located a materials deposit 90 miles west of Corpus Christi near The Texas Mexican Railway. In 1963 and 1964 we built a rail spur and processing plant on location. Since that time we have depended entirely on the Tex Mex Railway to furnish rail cars and move the loaded cars to Laredo, Corpus Christi, and points in between. During extreme shortages we have also sent material to the Houston area. Without the rail service to this plant we could not compete in our market. The 90 mile distance makes trucking a much more expensive and much less safe method of transportation. I feel, in the decision effecting the well being of The Tex Mex Railway, you should consider our already over crowded highway systems and the effect it would have should The Tex Mex Railway be forced to discontinue or even reduce the service they now afford our company. In the last six months Wright Materials has moved two thousand one hundred cars over the Texas Mexican Railway.

I, therefore, feel it is extremely important that in the ongoing oversight proceeding being conducted by the Surface Transportation board with respect to the Houston and Gulf Coast region, the Board not take any action that would impair Tex Mex's ability to continue to provide us with the rail service we rely on.

Sincerely,

Milus Wright

Milus Wright

I, Milus Wright, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on August 28, 1998.

Milus Wright

signature

Milus Wright
General Manager Wright Materials, Inc.
Rt. 1, Box 143
Robstown, TX 78380

STATE OF TEXAS

This instrument was acknowledged before me on August 28, 1998 by Milus Wright as General Manager of Wright Materials Inc., a Texas corporation, on behalf of said corporation.

LINDA K. ESTES
Notary Public
STATE OF TEXAS
My Comm. Exp. Feb. 14, 2000

Linda K. Estes

Notary

My commission expires:
2-14-00

BARR IRON & METAL COMPANY

STRUCTURAL STEEL AND PIPE
1500 WEST FRONT
ALICE, TEXAS 78333

AUGUST 24, 1998

THE HONORABLE VERNON A. WILLIAMS
SECRETARY
SURFACE TRANSPORTATION BOARD
1925 K STREET, N.W., ROOM 711
WASHINGTON, D.C. 20423

DEAR MR. WILLIAMS:

MY NAME IS KENNETH BARR, AND I AM PRESIDENT OF BARR IRON & METAL.

BARR IRON & METAL CO. IS A SCRAP METAL RECYCLING BUSINESS, AND WE ARE LOCATED AT ALICE, TEXAS.

OUR COMPANY DEPENDS ON RELIABLE, EFFICIENT RAIL SERVICES TO SHIP OUR SCRAP MATERIAL TO THE MILLS. WE SHIP ALL OUR SCRAP IRON TO MEXICO AND OTHER PARTS OF TEXAS. WE SHIP APPROXIMATELY 120 TO 140 CAR LOADS OF SCRAP AT APPROXIMATELY $75,000 TO $87,500 PER YEAR FOR ANNUAL FREIGHT EXPENDITURES.

FOR THIS SERVICE WE RELY ENTIRELY UPON THE TEXAS MEXICAN RAILWAY. IT IS THE ONLY RAIL CARRIER THAT ACCESSES OUR FACILITY. WE HAVE AN EXCELLENT RELATIONSHIP WITH TEXAS MEXICAN RAILWAY, AND THEY HAVE ALWAYS GIVEN US DEPENDABLE SERVICE.

THE RAIL SERVICE WE RECEIVE FROM TEX MEX IS CRITICAL TO THE SUCCESS OF OUR COMPANY IN KEEPING OUR COSTS DOWN AND OUR PRODUCTS COMPETITIVE. WITHOUT ACCEESS TO TEX MEX, THE CONSEQUENCES TO US WOULD BE SEVERE, AS THERE IS NO OTHER FEASIBLE WAY TO MEET OUR TRANSPORTATION NEEDS. WE DO NOT USE TRUCKS BECAUSE OF THE LARGE VOLUME AND THE DISTANCE TO THESE MILLS.

IT IS EXTREMELY IMPORTANT, THEREFORE, THAT IN THE ONGOING OVERSIGHT PROCEEDING BEING CONDUCTED BY THE SURFACE TRANSPORTATION BOARD WITH RESPECT TO THE HOUSTON AND GULF COAST REGION, THE BOARD NOT TAKE ANY ACTION THAT WOULD IMPAIR TEX MEX'S ABILITY TO CONTINUE TO PROVIDE US WITH THE RAIL SERVICES WE RELY ON.

I, KENNETH RAY BARR, DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. FURTHER, I CERTIFY THAT I AM QUALIFIED AND AUTHORIZED TO FILE THIS VERIFIED STATEMENT. EXECUTED ON AUGUST 24, 1998.

Kenneth Ray Barr

KENNETH RAY BARR - PRESIDENT
BARR IRON & METAL CO. INC.
P. O. BOX 184
ALICE, TEXAS 78333-0184

Gulf Compress

P.O. Box 1378
Corpus Christi, Texas 78403

Plant #1 located at 201 N. 19th Street, Corpus Christi, Texas (Main Office)
Plant #2 located at Bear Lane and Heinsohn Road, Corpus Christi, Texas

August 25, 1998

Verified Statement of Robert Weatherford, Gulf Compress

To: The Honorable Vernon A. Williams
Secretary of Surface Transportation Board
Washington, D.C. 20423-0001

From: Robert Weatherford
General Manager
Gulf Compress

Gulf Compress is an agricultural cooperative cotton warehouse located in Corpus Christi, Texas. On behalf of the 32 South Texas cotton gins that we serve, we warehouse and ship bales of raw cotton to destinations all over the world. On a normal year we expect to handle approximately 375,000 bales. This would equate to about 1,875 boxcars if it all shipped by rail. About ½ goes to domestic destinations and ½ is exported. In the past few years Mexico has become our largest export destination. Rail transportation volumes are dictated by market factors, which may fluctuate from year to year, but rail service is a critical factor in the service we provide our customers – especially in the Mexican market.

We rely entirely on the Tex Mex Railway for our rail service since it is the only carrier that accesses our two locations in Corpus Christi. The service provided by the Tex Mex is very important to our business today, and as the Canadian and Mexican markets grow, it will become ever more important. A new service we are offering to our customers, which involves moving and storing cotton from other areas of the United States, which is bound for Mexico, depends entirely on the service provided by the Tex Mex. Any loss of service by the Tex Mex would cause severe consequences in our ability to provide needed services to our customers at a reasonable cost. There are many of our services and markets, which would cease to be available to us without the railroad.

We feel it is extremely important in the ongoing oversight proceedings currently being conducted by the Surface Transportation Board with respect to the Houston and Gulf Coast region, that the Board not take any action that might impair Tex Mex's ability to continue to provide us with the rail services we rely on. Specifically, we are opposed to the BNSF request for San Antonio – Laredo trackage rights.

I, Robert Weatherford, declare under penalties of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement. Executed on August 25, 1998

Robert Weatherford

Robert Weatherford
General Manager

RAY WEST Warehouses, Inc.

Peter B. Anderson
President, CEO

David H. Allin
Vice-President

Phone 512 • 884-5595
Fax 512 • 884-0309

VERIFIED STATEMENT OF PETER B. ANDERSON, PRESIDENT
RAY WEST WAREHOUSES, INC.

August 27, 1998

I am Peter B. Anderson, President of Ray West Warehouses, Inc.

We operate a public merchandise warehouse in Corpus Christi, Texas, employing 22 people, and operating over 300,000 sq. ft. of space for storing and handling inventory for about 100 customers. Several of our customers rely on rail transportation as the only economical alternative for their needs. We regularly receive or ship forest products, drilling related materials, and other chemical products by rail. Inbound products typically ship from Oregon, Nevada, and Texas. Destinations include California and Michigan. We usually handle 3 to 5 railcars per month.

We rely entirely on the Tex Mex railroad for our service, which is the only railroad with access to our facilities.

The service we receive from the Tex Mex is vital to our ability to satisfy our customer's needs. Without prompt reliable rail service we would lose a significant portion of our business. Several of our customers use us only because we can handle shipments by rail, which allows them to enjoy cost advantages that make them competitive in their respective businesses.

It is very important to us that in the ongoing oversight proceedings by the Surface Transportation Board with respect to Houston and the Gulf Coast region, that the board take no action that would weaken Tex Mex's ability to continue to provide the rail service we rely on.

I, Peter B. Anderson, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on August 27, 1998.

Peter B Anderson

Peter B. Anderson
President
Ray West Warehouses, Inc.
4801 Baldwin Blvd.
Corpus Christi, TX 78408

Ingram Readymix Inc.

September 15,1998

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

Dear Mr. Vernon A. Williams,

My name is Bruce Ingram, and I am President of Ingram Readymix Inc. Our company is in the Readymix Concrete Business in Corpus Christi, Texas.

Our company depends on reliable,efficient rail service. All our gravel is shipped from Realitos, Texas by Tex Mex Railroad.

For that service, we entirely rely upon the Tex Mex, which is the only rail carrier that accesses our facility. Without Tex Mex our company would be close to closing our doors.

The rail service we receive from Tex Mex is critical to the success of our company, in keeping our costs down and our products competive. Without access to Tex Mex, the consequences to us would be severe, as there is no feasible way to meet our transportation needs. Our plants are located on Tex Mex spurs which keep us competitive.

It is important, therefore, that in the ongoing oversight proceeding being conducted by the Surface Transportation Board with respect to the Houston and Gulf Coast region, the Board not take any action that would impair Tex Mex's ability to continue to provide us with the rail service we rely on.

3580 FM 482 NEW BRAUNFELS, TEXAS 78132 (830) 625-0198 FAX (830) 625-3174

BOERNE • CONVERSE • CORPUS CHRISTI • DEL RIO • DEVINE • FREDERICKSBURG • HONDO • KERRVILLE • KINGSVILLE • LAREDO
MARBLE FALLS • NEW BRAUNFELS • PEARSALL • PLEASANTON • PORT LAVACA • SAN ANTONIO • SAN ANTONIO #2
SAN MARCOS • SEGUIN • VICTORIA

I, Bruce Ingram, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement. Executed on September 15,1998.

Bruce Ingram Pres

Bruce Ingram, Sr.
President
3580 FM 482, New Braunfels, Texas 78130

STB FD 32760 (Sub 26) 9-4-98 I 190976

TROUTMAN SANDERS LLP

ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

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

William A. Mullins

202-274-2953

September 4, 1998

HAND DELIVERED
The Honorable Vernon A. Williams
Case Control Unit
ATTN: STB Finance Docket No. 32760 (Sub-No. 26 & 30)
Surface Transportation Board
1925 K Street, N.W., Suite 700
Washington, D.C. 20006

190 MC 190977

Re: Finance Docket No. 32760 (Sub-No. 26 & 30), *Union Pacific Corporation, et al. - Control & Merger - Southern Pacific Rail Corporation, et al. [Houston Gulf Coast Oversight Proceeding]*

Dear Secretary Williams:

Enclosed for filing in the above captioned proceeding are the original and twenty-six copies of CMA-3/ SPI-3/TCC-3/TM-14/KCS-7, Petition For The Recalculation And Recovery Of Filing Fees.

Please date and time stamp one of the copies enclosed herewith for return to our offices. Included with this filing is a 3.5 inch Word Perfect, Version 5.1 diskette with the text of the pleading.

Sincerely yours,

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

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

CMA-3 SPI-3
TM-14 KCS-7
TCC -3

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

PETITION FOR THE RECALCULATION AND RECOVERY OF FILING FEES

THE CHEMICAL MANUFACTURERS ASSOCIATION

THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

THE TEXAS MEXICAN RAILWAY COMPANY

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

THE TEXAS CHEMICAL COUNCIL

September 4, 1998

CMA-3 SPI-3
TM-14 KCS-7
TCC -3

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 26)
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, SPSCL CORP. AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

HOUSTON/GULF COAST OVERSIGHT PROCEEDING

PETITION FOR THE RECALCULATION AND RECOVERY OF FILING FEES

Pursuant to 49 C.F.R. §1117.1 and 49 C.F.R. §1002.2, the Chemical Manufacturers Association ("CMA"), the Society of the Plastics Industry, Inc. ("SPI"), the Texas Chemical Council ("TCC"), The Texas Mexican Railway Company ("Tex Mex"), and The Kansas City Southern Railway Company ("KCS") (collectively, "Petitioners")[1], hereby request that the Surface Transportation Board ("STB" or "Board") recalculate and repay to the Petitioners a portion of the filing fees that the Board required to be paid as a precondition to acceptance of filings made in this proceeding[2] on March 30th and July 8th by members of the Consensus Parties.

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[1] While The Railroad Commission of Texas (RCT) is a member of the "Consensus Parties" and joined in the July 8th filing, the RCT did not share in the costs of the filing fees associated with the July 8th filing. Accordingly, the RCT does not join in this petition.

[2] "This proceeding" refers to the portion of the UP/SP general oversight proceeding docketed as STB Finance Docket No. 32760 (Sub-No. 21), that was subsequently renumbered as STB Finance Docket No. 32760 (Sub-No. 26) and which now is designated STB Finance Docket No. 32760 (Sub-No. 30).

BACKGROUND

The Petitioners commend the Board's decision to address the consequences of the extremely difficult situation in the Houston/Gulf Coast area by instituting the Houston/Gulf Coast oversight proceeding. The Petitioners are committed to developing and implementing a plan to improve the rail situation in Houston and the surrounding areas. To this end, the Consensus Parties filed their plan on July 8, 1998, as the Board requested in Decision No. 1 served in Finance Docket No. 32760 (Sub-No. 26) on May 19, 1998. In addition to the July 8th filing, on March 30, 1998, Tex Mex and KCS individually filed a plan, which was supplemented and supplanted by the July 8th filing.

As a precondition to accepting the March 30th and July 8th filings, the Board required the filing parties to pay a total of $101,300 in filing fees; specifically, a fee of $48,300 was paid with the March 30th filing and a fee of $53,000 was paid for the July 8th filing. The March 30th fee was assessed by the Board on the premise that it was required under 49 C.F.R. § 1002.2(f)(12)(i) for construction of a rail line. The July 8th fee consisted of two parts: 1) a $48,300 fee, which corresponds to the filing fee for an application for the construction of a rail line under 49 C.F.R. §1002.2(f)(12)(i); and 2) a $4,700 fee under 49 C.F.R. § 1002.2(f)(11)(i) for an application for a certificate authorizing the extension, acquisition or operation of railroad lines.[3] The Petitioners assert that the bases of the Board's fee assessments in this matter are incorrect and that a portion of the fees paid for the March 30th and July 8th filings should be returned to the Petitioners.

SUMMARY OF ARGUMENT

The instant request that the Board relinquish the portion of filing fees which was not properly due is necessary to correct the Board's unintended mischaracterization of the March 30th

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[3] The letter transmitting the July 8, 1998 filing noted the incorrect fee requirement and stated that the Consensus Parties would subsequently petition to recover a portion of the filing fees.

and July 8th filings and is warranted by public interest considerations. The $48,300 filing fee for the March 30 filing was assessed on the basis that KCS and Tex Mex sought to construct a new rail line between Rosenberg and Victoria, TX. In fact, however, UP has advised Tex Mex and KCS that although Southern Pacific Transportation Company ("SP") was granted authority to abandon the Rosenberg-Victoria line, that permissive grant was never consummated by SP or UP, and the line accordingly has never been abandoned. Therefore, the Consensus Parties' proposal for Tex Mex to acquire and rehabilitate that line is merely a line acquisition transaction, not a line construction application, warranting a filing fee of only $4,700 rather than the $48,300 assessed by the Board. Similarly, the Consensus Parties' proposal to double-track the Lafayette Subdivision within the existing right-of-way and to exchange the new double-track for the title to UP's Beaumont Subdivision is merely a line acquisition by Tex Mex, since double-tracking a line between markets already served by a carrier is not "construction" subject to the Board's jurisdiction under Section 10901. As for the remainder of the Consensus Parties' proposals, together they constitute an application for relief responsive to the UP/SP merger application, warranting only a $5,000 filing fee.

As a precondition to accepting the March 30th and July 8th filings, the Board assessed the Petitioners total filing fees of $101,300. Properly characterized, the March 30th and July 8th filings warrant filing fees totaling only $14,400; that is, the appropriate fee for two line acquisition applications ($4,700 apiece, per 49 C.F.R. § 1002.2(f)(11)(i)) and the fee for filing an application responsive to the UP/SP merger proposal ($5,000, per 49 C.F.R. § 1002.2(f)(38)(v)). Accordingly, the Petitioners are entitled to, and hereby seek, recovery of at least $86,900 of the filing fees paid in connection with the March 30th and July 8th filings.

ARGUMENT

Among a series of requested conditions, point six of the Consensus Plan requests that the Board direct UP to sell the unused former SP Rosenberg to Victoria, Texas line to Tex Mex, and point eight of the plan requests that UP be required to allow Tex Mex and KCS to double-track UP's existing Lafayette Subdivision. The newly-built double-track line would then be deeded to the UP in exchange for a deed to UP's Beaumont Subdivision.[4] Neither of these proposals constitutes construction of a rail line within the Board's jurisdiction under 49 U.S.C. Section 10901. Accordingly, the filing fees for those applications should be the fees applicable to line acquisitions under Section 10901 - $4700 - not the $48,300 assessed for each application by the Board. Public interest justifications also justify partial or complete waiver of the filing fees.

I. THE ROSENBERG TO VICTORIA LINE HAS NOT BEEN ABANDONED AND IS STILL SUBJECT TO THE BOARD'S JURISDICTION; ACCORDINGLY TEX MEX NEEDS ONLY ACQUISITION, NOT CONSTRUCTION, AUTHORITY

SP was granted abandonment authority for the Rosenberg-Victoria line by the Interstate Commerce Commission ("ICC") in two proceedings, but never exercised that authority. Accordingly, the Rosenberg-Victoria line remains a line of railroad, and its proposed rehabilitation by Tex Mex does not require "construction" approval under Section 10901 Therefore, the Board's assessment of a $48,300 filing fee for a construction application in relation to the Rosenberg-Victoria portion of the Consensus Plan is improper, entitling the Petitioners to recover the $43,600 difference between the amount paid by the Petitioners and the $4,700 they should have had to pay for a line acquisition application.

In *Southern Pacific Transportation Company - Abandonment Exemption - In Jackson, Victoria and Wharton Counties, TX*, Docket No. AB-12 (Sub-No. 162X) (ICC served Nov. 1,

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[4] The Consensus Parties are not seeking transfer of title to UP's real estate, including subsurface rights, as part of the transfer of the Beaumont Subdivision.

1993), a notice of exemption was published for SP's abandonment of the 62 mile portion of the Wharton Branch[5] between Milepost 25.8, near Wharton rail station and Milepost 87.8, near Victoria rail station. In *Southern Pacific Transportation Company - Abandonment Exemption - In Fort Bend and Wharton Counties, TX*, Docket No. AB-12 (Sub-No. 166X) (ICC served March 8, 1995), SP was granted an exemption to abandon certain rail lines, including the 23.3 mile portion of the Wharton Branch extending between Milepost 2.5, west of rail station McHattie to Milepost 25.8, west of and including the Wharton rail station. However, according to UP, neither portion of the Rosenberg to Victoria line has been abandoned. *See Union Pacific's Responses and Objections to KCS/Tex Mex's Second Set of Discovery*, UP/SP-340 at 7, attached as Exhibit 1.

A grant of abandonment authority is permissive, and does not itself terminate the Board's jurisdiction over a rail line. *See Union Pacific Railroad - Abandonment and Discontinuance of Operations - In Canyon and Ada Counties, ID*, Docket No AB-33 (Sub-No. 79) (ICC served Feb. 16, 1995) at *5, n. 6, and *Fox Valley & Western Ltd. - Abandonment Exemption - In Portage and Waupaca Counties, WI*, Docket No. AB-402 (Sub-No. 3X) (STB served March 28, 1996) at *4 and cases cited therein. For the Board to lose jurisdiction over a line, the railroad must have fully exercised the abandonment authority. *Id. See also Birt v. Surface Transportation Board*, 90 F.3d 580, 585-86 (D.C. Cir. 1996) ("*Birt*"). The question of whether abandonment has been consummated is a question of fact based upon an examination of the carrier's intent as ascertained from the carrier's actions and statements with respect to the line. *T and P Railway - Abandonment Exemption - In Shawnee, Jefferson and Atchison Counties, KS*, Docket No. AB-

[5] SP's name for the Rosenberg-Victoria line.

381 (Sub-No. 1X) (ICC served July 20, 1995) at *10, *petition for reconsideration denied* 1997 STB LEXIS 33 (STB served Feb. 20, 1997) ("*T&P*").

UP's actions and statements with respect to the Rosenberg to Victoria line, show that UP and its predecessor SP have not abandoned that line. UP has stated that it has not abandoned any part of the line. *See* UP/SP-340, *supra*. The fact that UP has removed some of the rail and ties over a portion of the line does not mean that the abandonment was consummated, *see, e.g., T&P* at *10 and *Birt* at 586, particularly when UP has not removed structures such as bridges or culverts along the line. *T&P* at *6.

Restoration of a non-abandoned line to service does not require construction authorization from the Board. *See Missouri Central Railroad Company - Acquisition and Operation Exemption - Lines of Union Pacific Railroad Company, et al.*, Finance Docket No. 33508 (STB served April 28, 1998) at *13-*14 (rehabilitation of a rail line, purchased from another carrier, does not require construction authority). The Board's recent decision in *Union Pacific Railroad Company—Petition for Declaratory Order—Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX*, STB Finance Docket No. 33611 (served Aug. 21, 1998) provides a good example of this principle. In that case, UP asked the Board to determine whether UP was required to seek construction authority under Section 10901 in order to rehabilitate the line formerly operated by the Missouri-Kansas-Texas Railroad Company ("MKT"), which UP received authority to abandon as a part of the UP-MKT merger case. While UP discontinued service over the line in 1989, it claimed, as it likewise does in this proceeding, that it had never consummated the abandonment. Accordingly, when UP sought to reactivate the line in 1998, proposing to replace virtually all of the ties in the line, dump over 1000 tons of ballast per mile and reinstall a number of grade crossings that had been removed, the Board found that UP did not require authority under Section 10901 to rehabilitate the line. Similarly here, a UP predecessor received authority to abandon its line and service was discontinued but, as UP says, the line was not abandoned. Significant portions of the track remain, the subgrade remains in place throughout the route, and the many bridges along the line also remain in place. Small segments at each end of the line continue in use. Accordingly, the Rosenberg-Victoria line has not been abandoned and STB jurisdiction of the line has not been lost, meaning that Tex Mex does not need authority under Section 10901 to construct a line from Rosenberg to Victoria, but needs only authority under Section 11323 to acquire the existing line from UP.

Tex Mex is in the process of trying to negotiate the sale of the Rosenberg to Victoria line with UP. UP has stated that it is willing to sell the line to Tex Mex and that it agrees that restoration of the line would add useful infrastructure to the Gulf Coast area. Nevertheless, the extreme disparity between the terms proposed by the two parties raises doubts about UP's professed willingness to sell. Therefore, the Consensus Parties believe that an order from the Board requiring such a sale is necessary.[6] As a result, the Consensus Parties requested in their July 8th filing that the STB require UP to sell the line. While requiring a sale of the line would require an order from the Board, no construction authorization would be required to permit Tex Mex to rebuild the line because the line has not been abandoned. *Missouri Central Railroad Company, supra*. Consequently, the requested Board action with respect to the Rosenberg to Victoria line, under §1002.2(f), does not constitute construction of a new line as contemplated in the $48,300 filing fee. The Consensus Parties' proposal for transfer of the UP Rosenberg to Victoria line to Tex Mex must therefore be seen for what it is - an acquisition, not new line

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[6] In addition, unless the parties can come to an agreement on the terms of the sale, an order establishing the terms ultimately may also be necessary.

construction - and the Board accordingly should reimburse the Petitioners[7] the difference between the filing fee paid and the $4,700 filing fee properly applicable under 49 C.F.R. § 1002.2(f)(11)(i) to the Consensus Parties' request that Tex Mex acquire an existing line from UP.

II. THE HOUSTON TO BEAUMONT DOUBLE-TRACKING IN EXCHANGE FOR THE BEAUMONT SUBDIVISION DOES NOT REQUIRE STB CONSTRUCTION AUTHORITY

Point eight of the Consensus Plan seeks authority for Tex Mex to double-track UP's Lafayette Subdivision and then exchange the new second line for title to UP's Beaumont Subdivision. Double-tracking an existing rail line does not require authority from the Board under Section 10901. Therefore, the only part of the transaction proposed which requires Board approval is the transfer of the Beaumont Subdivision to Tex Mex as a line sale of an active rail line. Like the Rosenberg to Victoria line transfer, the appropriate filing fee for such a transaction is $4,700.

For this one request alone, the Board assessed a $48,300 fee against Petitioners on the premise that the proposal to double-track the Lafayette Subdivision was a "construction" application. However, the construction of the double-track within UP's right of way[8] does not require construction authority from the Board. *See City of Detroit v. Canadian National Railway Company, et al.*, 9 I.C.C.2d 1208 (1993), *aff'd sub nom. Detroit/Wayne County Port Authority v.*

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[7] The Petitioners request that the check returning the overpayment of fees to the Petitioners be made payable to Troutman Sanders LLP, which issued the filing fee check for the July 8th filing. Troutman Sanders LLP will be responsible for assuring that the filing fees are returned to the appropriate members of the Consensus Parties.

[8] Even if the double-track were to extend outside UP's existing right-of-way, installing the second track still would be exempt from Board jurisdiction. *See Union Pacific Railroad Company—Petition for Declaratory Order—Rehabilitation of Missouri-Kansas-Texas Railroad Between Jud[illegible] and Ogden Junction, TX*, STB Finance Docket No. 33611, 1998 STB LEXIS 227 (STB served Aug. 21, 1998).

Interstate Commerce Commission, 59 F.3d 1314 (D.C. Cir. 1995) ("*City of Detroit*") and *City of Stafford, Texas v. Southern Pacific Transportation Company*, Finance Docket No. 32395, 1994 ICC LEXIS 216 (ICC served Nov. 8, 1994) ("*City of Stafford*"). As stated succinctly in *City of Detroit*, "Investing in existing systems...was not the kind of activity that Congress sought to regulate in 1920. If anything, Congress sought to encourage railroads to improve existing services before extending a line or constructing a new one." *City of Detroit* at 1216. Since "[d]ouble-tracking is an improvement to an existing rail line," *City of Stafford* at *9, Congress did not intend to regulate the construction of double-track. *City of Detroit* at 1219. *See also City of Stafford* at *8-*9. In fact, finding improvement of an existing facility to constitute "construction" requiring Board authorization under Section 10901 would "afford a rich opportunity for obstruction and delay by carriers that might feel threatened by increased or enhanced competition." *City of Detroit* at 1220. Allowing Tex Mex to construct a new track in UP's Lafayette Subdivision right of way is an improvement to an existing system which is not subject to Board jurisdiction.

Acquiring the Beaumont Subdivision from UP once the double-tracking of the Lafayette Subdivision has been completed also is not subject to Board jurisdiction under Section 10901, but rather falls under Section 11323. First, it is not an extension of Tex Mex's market. Tex Mex already operates over the Beaumont Subdivision, transporting traffic between Houston and Beaumont. More importantly, it is a transfer of a line from one carrier to another in response to a merger application which is subject to Section 11323. Accordingly, on July 8th, the Board correctly applied a $4,700 filing fee to that aspect of the proposed transaction, but in addition to that fee, assessed the $48,300 fee for "construction authority" for double tracking the Houston to

Beaumont line.[9] However, as stated herein, no construction application fee should have been assessed for the double-tracking of the Lafayette Subdivision.

III. REDUCTION IN THE FILING FEES ASSESSED ALSO IS WARRANTED BECAUSE THE CONSENSUS PARTIES' REQUESTS ARE NOT AS COSTLY OR TIME-CONSUMING TO THE BOARD AS REQUESTS FOR CONSTRUCTION AUTHORITY

Consideration of the criteria that the Board uses in establishing its filing fees shows that the filing fees assessed against the Petitioners were not warranted. The Board's filing fees for construction applications and exemptions are based heavily on the costs of environmental review of a proposal. However, the Consensus Parties' proposals for the Rosenberg-Victoria line and the Houston-Beaumont lines do not require environmental review. Therefore, the sizable fees assessed for construction applications should not be applied to the Rosenberg-Victoria and Houston-Beaumont proposals.

The Board's decisions establishing its filing fee system show that the filing fees for construction applications are largely premised on the direct labor cost of environmental review, a cost which will not be incurred by the Board for the Consensus Parties' Rosenberg-Victoria and Houston-Beaumont proposals. The Board's filing fees are based on direct labor costs, augmented by several types of overhead costs. *See generally Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services,* 1 I.C.C.2d 60, 72 (1984), *aff'd in part and rev'd on other grounds sub nom. Central & Southern Motor Freight Tariff Bureau v. Interstate Commerce Commission*, 777 F.2d 722 (D.C. Cir. 1985) [overhead

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[9] The Petitioners also concede that the remainder of the Consensus Plan may be treated as a responsive application, incurring a filing fee of $5,000 under 49 C.F.R. § 1002.2(f)(38)(v). This $5,000 fee, not previously assessed by the Board, would, together with the $4,700 fee due for each of Rosenberg-Victoria and the Beaumont Subdivision acquisitions, yields a total filing fee of $14,400 as the maximum filing fee for the Consensus Plan as opposed to the total of $101,300 which has been paid to date.

percentages are applied to direct labor costs]. Moreover, as the Board explained in *Regulations Governing Fees for Service Performed in Connection with Licensing and Related Services - 1996 Fee Update*, STB Ex Parte No. 542 (STB served April 4, 1996) 1996 STB LEXIS 113 at *4 ("*1996 Update I*"), the high fee for construction applications and exemptions is primarily due to complex environmental reviews required by those sorts of projects. *See also Regulations Governing Fees for Service Performed in Connection with Licensing and Related Services - 1996 Fee Update*, STB Ex Parte No. 542 (STB served Aug. 14, 1996) 1996 STB LEXIS 225 at *8 ["most of the regulatory attention in construction cases involves environmental matters."] ("*1996 Update II*"). Indeed, direct labor costs connected with environmental review were identified as $15,200, while direct labor costs of the staff of the Office of Proceedings were approximated at only $2,000. *1996 Update I at *4*. Thus, over 88% of the direct labor costs (and, consequently, of overhead costs as well) attributable to construction applications are the result of environmental review costs.

The Consensus Parties' proposals for the Rosenberg-Victoria line and for the Lafayette and Beaumont Subdivisions do not require environmental review. The transactions proposed by the Consensus Parties are subject to review under 49 U.S.C. § 11323, not under 49 U.S.C. § 10901. *See* Sections I and II, *supra*. Transactions under Section 11323 involving acquisitions of lines are not subject to environmental review unless the energy use or air pollution thresholds of 49 C.F.R. § 1105.7(e)(4 & 5) (1997) will be exceeded as a result of the transaction. 49 C.F.R. § 1105.6(c)(2)(i) (1997). Those thresholds will not be exceeded as a result of the Consensus Plan. *See* CMA-2, SPI-2, RCT-2, TCC-2, TM-2 & KCS-2, filed July 8, 1998, at 107 - 111.[10]

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[10] To further alleviate any possible concern the Board may have about environmental review, the Petitioners also wish to highlight that the plan to double-track the Lafayette Subdivision does not require double-tracking the bridges along the line, *see* CMA-2, SPI-2, RCT-2, TCC-2, TM-2 &

Accordingly, under the Board's regulations, environmental review of the Consensus Parties' proposals is not required. Consequently, the direct labor costs of an environmental review, which are the basis for nearly 90% of the filing fee for a construction application, will not be incurred by the Board in this proceeding.

While environmental review is reasonably required for new construction, new construction is not proposed by the Consensus Parties. As discussed above, the Rosenberg to Victoria segment remains a rail line that is within the Board's jurisdiction, so construction authority is not needed to restore it to service. In addition, double-tracking the Lafayette Subdivision does not require environmental review because double-tracking a line is not "construction" which requires the Board's approval under 49 U.S.C. § 10901. Thus, the environmental review standards applicable to Section 11323 transactions apply to the Consensus Parties' proposals, and those standards do not require environmental review in this instance because none of the pertinent environmental thresholds will be exceeded. Therefore, the Consensus Parties' proposals do not require environmental review, and the Petitioners should not be required to pay for those services, which the Board does not need to perform.

CONCLUSION

Neither the Consensus Parties' proposal to restore rail service between Rosenberg and Victoria, Texas nor the double-tracking of the Lafayette Subdivision and the subsequent exchange of the double-tracked line for UP's Beaumont Subdivision requires the Board to grant construction authority. Accordingly, the $48,300 fee assessed for each of those proposals is incorrect under the Board's regulations and precedent. The Petitioners therefore submit that they are entitled to be reimbursed at least $86,900 of the $101,300 in filing fees paid for the March

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KCS-2, filed July 8, 1998, at 83, n. 69, avoiding the potential environmental issues that can be involved with construction within a waterway.

30th and July 8th filings, or to have the filing fees for the March 30th and July 8th filings.

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

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the "Petition For The Recalculation And Recovery Of Filing Fees" was served this 4th day of September, 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 known parties of record in the Sub-No. 26 and Sub-No. 30 oversight proceedings.

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

UP/SP-340

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

UNION PACIFIC'S RESPONSES AND OBJECTIONS <u>TO KCS/TEX MEX'S SECOND SET OF DISCOVERY</u>

Union Pacific Railroad Company ("UP") hereby responds to the "Second Set of Discovery Directed to Union Pacific Railroad Company" served by Kansas City Southern Railway Company ("KCS") and Texas Mexican Railway Company ("Tex Mex") (collectively, "KCS/Tex Mex") on April 29, 1998 (TM-11/KCS-12).

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 UP/SP merger.

KCS/Tex Mex should seek information about the Wharton Branch through the negotiating process, not through formal Board discovery. Subject to and without waiver of the foregoing objections, UP states that it has not abandoned the former SP Wharton Branch between SP milepost 2.5, near Rosenberg and McHattie, Texas, and SP milepost 25.8, near Wharton, Texas.

<u>Interrogatory No. 2</u>

"Has the abandonment that has been authorized for the Wharton Branch line between SP milepost 25.8, near Wharton, Texas and SP milepost 87.8 near Victoria, Texas been consummated for any portion of or all of that line? If the answer to this interrogatory is in the affirmative, for each portion for which abandonment was consummated, please describe the portion of the line by listing relevant mileposts, state the date on which the abandonment was consummated, and identify documents sufficient to demonstrate the fact that the abandonment has been consummated."

<u>Response</u>:

<u>See</u> objections stated in Response to Interrogatory No. 1. Subject to and without waiver of the foregoing objections, UP states that it has not abandoned the portion of the former SP Wharton Branch between SP milepost 25.8, near Wharton, Texas and SP milepost 87.8, near Victoria, Texas.

<u>Interrogatory No. 3</u>

"Describe in detail, and identify all documents sufficient to evidence, UP ownership and/or property interests, including, but not limited to easements and covenants, for the land underlying the former SP line called the Wharton Branch between Rosenberg, Texas and Wharton, Texas."

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal hereby certify that on this 14th day of May, 1998, I served a copy of Union Pacific's Responses and Objections to KCS/Tex Mex's Second Set of Discovery by hand on:

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

Michael L. Rosenthal

STB FD 32760 (Sub 26) 9-4-98 I 190976

TROUTMAN SANDERS LLP
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William A. Mullins 202-274-2953

September 4, 1998

HAND DELIVERED
The Honorable Vernon A. Williams
Case Control Unit
ATTN: STB Finance Docket No. 32760 (Sub-No. 26 & 30)
Surface Transportation Board 190976 190977
1925 K Street, N.W., Suite 700
Washington, D.C. 20006

Re: Finance Docket No. 32760 (Sub-No. 26 & 30), *Union Pacific Corporation, et al. - Control & Merger - Southern Pacific Rail Corporation, et al. [Houston Gulf Coast Oversight Proceeding]*

Dear Secretary Williams:

Enclosed for filing in the above captioned proceeding are the original and twenty-six copies of CMA-3/ SPI-3/TCC-3/TM-14/KCS-7, Petition For The Recalculation And Recovery Of Filing Fees.

Please date and time stamp one of the copies enclosed herewith for return to our offices. Included with this filing is a 3.5 inch Word Perfect, Version 5.1 diskette with the text of the pleading.

Sincerely yours,

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

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

CMA-3 SPI-3
TM-14 KCS-7
TCC -3

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

PETITION FOR THE RECALCULATION AND RECOVERY OF FILING FEES

THE CHEMICAL MANUFACTURERS ASSOCIATION

THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

THE TEXAS MEXICAN RAILWAY COMPANY

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

THE TEXAS CHEMICAL COUNCIL

September 4, 1998

CMA-3 SPI-3
TM-14 KCS-7
TCC -3

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 26)
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, SPSCL CORP. AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

HOUSTON/GULF COAST OVERSIGHT PROCEEDING

PETITION FOR THE RECALCULATION AND RECOVERY OF FILING FEES

Pursuant to 49 C.F.R. §1117.1 and 49 C.F.R. §1002.2, the Chemical Manufacturers Association ("CMA"), the Society of the Plastics Industry, Inc. ("SPI"), the Texas Chemical Council ("TCC"), The Texas Mexican Railway Company ("Tex Mex"), and The Kansas City Southern Railway Company ("KCS") (collectively, "Petitioners")[1], hereby request that the Surface Transportation Board ("STB" or "Board") recalculate and repay to the Petitioners a portion of the filing fees that the Board required to be paid as a precondition to acceptance of filings made in this proceeding[2] on March 30th and July 8th by members of the Consensus Parties.

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[1] While The Railroad Commission of Texas (RCT) is a member of the "Consensus Parties" and joined in the July 8th filing, the RCT did not share in the costs of the filing fees associated with the July 8th filing. Accordingly, the RCT does not join in this petition.

[2] "This proceeding" refers to the portion of the UP/SP general oversight proceeding docketed as STB Finance Docket No. 32760 (Sub-No. 21), that was subsequently renumbered as STB Finance Docket No. 32760 (Sub-No. 26) and which now is designated STB Finance Docket No. 32760 (Sub-No. 30).

BACKGROUND

The Petitioners commend the Board's decision to address the consequences of the extremely difficult situation in the Houston/Gulf Coast area by instituting the Houston/Gulf Coast oversight proceeding. The Petitioners are committed to developing and implementing a plan to improve the rail situation in Houston and the surrounding areas. To this end, the Consensus Parties filed their plan on July 8, 1998, as the Board requested in Decision No. 1 served in Finance Docket No. 32760 (Sub-No. 26) on May 19, 1998. In addition to the July 8th filing, on March 30, 1998, Tex Mex and KCS individually filed a plan, which was supplemented and supplanted by the July 8th filing.

As a precondition to accepting the March 30th and July 8th filings, the Board required the filing parties to pay a total of $101,300 in filing fees; specifically, a fee of $48,300 was paid with the March 30th filing and a fee of $53,000 was paid for the July 8th filing. The March 30th fee was assessed by the Board on the premise that it was required under 49 C.F.R. § 1002.2(f)(12)(i) for construction of a rail line. The July 8th fee consisted of two parts: 1) a $48,300 fee, which corresponds to the filing fee for an application for the construction of a rail line under 49 C.F.R. §1002.2(f)(12)(i); and 2) a $4,700 fee under 49 C.F.R. § 1002.2(f)(11)(i) for an application for a certificate authorizing the extension, acquisition or operation of railroad lines.[3] The Petitioners assert that the bases of the Board's fee assessments in this matter are incorrect and that a portion of the fees paid for the March 30th and July 8th filings should be returned to the Petitioners.

SUMMARY OF ARGUMENT

The instant request that the Board relinquish the portion of filing fees which was not properly due is necessary to correct the Board's unintended mischaracterization of the March 30th

[3] The letter transmitting the July 8, 1998 filing noted the incorrect fee requirement and stated that the Consensus Parties would subsequently petition to recover a portion of the filing fees.

and July 8th filings and is warranted by public interest considerations. The $48,300 filing fee for the March 30 filing was assessed on the basis that KCS and Tex Mex sought to construct a new rail line between Rosenberg and Victoria, TX. In fact, however, UP has advised Tex Mex and KCS that although Southern Pacific Transportation Company ("SP") was granted authority to abandon the Rosenberg-Victoria line, that permissive grant was never consummated by SP or UP, and the line accordingly has never been abandoned. Therefore, the Consensus Parties' proposal for Tex Mex to acquire and rehabilitate that line is merely a line acquisition transaction, not a line construction application, warranting a filing fee of only $4,700 rather than the $48,300 assessed by the Board. Similarly, the Consensus Parties' proposal to double-track the Lafayette Subdivision within the existing right-of-way and to exchange the new double-track for the title to UP's Beaumont Subdivision is merely a line acquisition by Tex Mex, since double-tracking a line between markets already served by a carrier is not "construction" subject to the Board's jurisdiction under Section 10901. As for the remainder of the Consensus Parties' proposals, together they constitute an application for relief responsive to the UP/SP merger application, warranting only a $5,000 filing fee.

As a precondition to accepting the March 30th and July 8th filings, the Board assessed the Petitioners total filing fees of $101,300. Properly characterized, the March 30th and July 8th filings warrant filing fees totaling only $14,400; that is, the appropriate fee for two line acquisition applications ($4,700 apiece, per 49 C.F.R. § 1002.2(f)(11)(i)) and the fee for filing an application responsive to the UP/SP merger proposal ($5,000, per 49 C.F.R. § 1002.2(f)(38)(v)). Accordingly, the Petitioners are entitled to, and hereby seek, recovery of at least $86,900 of the filing fees paid in connection with the March 30th and July 8th filings.

ARGUMENT

Among a series of requested conditions, point six of the Consensus Plan requests that the Board direct UP to sell the unused former SP Rosenberg to Victoria, Texas line to Tex Mex, and point eight of the plan requests that UP be required to allow Tex Mex and KCS to double-track UP's existing Lafayette Subdivision. The newly-built double-track line would then be deeded to the UP in exchange for a deed to UP's Beaumont Subdivision.[4] Neither of these proposals constitutes construction of a rail line within the Board's jurisdiction under 49 U.S.C. Section 10901. Accordingly, the filing fees for those applications should be the fees applicable to line acquisitions under Section 10901 - $4700 - not the $48,300 assessed for each application by the Board. Public interest justifications also justify partial or complete waiver of the filing fees.

I. THE ROSENBERG TO VICTORIA LINE HAS NOT BEEN ABANDONED AND IS STILL SUBJECT TO THE BOARD'S JURISDICTION; ACCORDINGLY TEX MEX NEEDS ONLY ACQUISITION, NOT CONSTRUCTION, AUTHORITY

SP was granted abandonment authority for the Rosenberg-Victoria line by the Interstate Commerce Commission ("ICC") in two proceedings, but never exercised that authority. Accordingly, the Rosenberg-Victoria line remains a line of railroad, and its proposed rehabilitation by Tex Mex does not require "construction" approval under Section 10901. Therefore, the Board's assessment of a $48,300 filing fee for a construction application in relation to the Rosenberg-Victoria portion of the Consensus Plan is improper, entitling the Petitioners to recover the $43,600 difference between the amount paid by the Petitioners and the $4,700 they should have had to pay for a line acquisition application.

In *Southern Pacific Transportation Company - Abandonment Exemption - In Jackson, Victoria and Wharton Counties, TX*, Docket No. AB-12 (Sub-No. 162X) (ICC served Nov. 1,

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[4] The Consensus Parties are not seeking transfer of title to UP's real estate, including subsurface rights, as part of the transfer of the Beaumont Subdivision.

1993), a notice of exemption was published for SP's abandonment of the 62 mile portion of the Wharton Branch[5] between Milepost 25.8, near Wharton rail station and Milepost 87.8, near Victoria rail station. In *Southern Pacific Transportation Company - Abandonment Exemption - In Fort Bend and Wharton Counties, TX*, Docket No. AB-12 (Sub-No. 166X) (ICC served March 8, 1995), SP was granted an exemption to abandon certain rail lines, including the 23.3 mile portion of the Wharton Branch extending between Milepost 2.5, west of rail station McHattie to Milepost 25.8, west of and including the Wharton rail station. However, according to UP, neither portion of the Rosenberg to Victoria line has been abandoned. *See Union Pacific's Responses and Objections to KCS/Tex Mex's Second Set of Discovery*, UP/SP-340 at 7, attached as Exhibit 1.

A grant of abandonment authority is permissive, and does not itself terminate the Board's jurisdiction over a rail line. *See Union Pacific Railroad - Abandonment and Discontinuance of Operations - In Canyon and Ada Counties, ID*, Docket No AB-33 (Sub-No. 79) (ICC served Feb. 16, 1995) at *5, n. 6, and *Fox Valley & Western Ltd. - Abandonment Exemption - In Portage and Waupaca Counties, WI*, Docket No. AB-402 (Sub-No. 3X) (STB served March 28, 1996) at *4 and cases cited therein. For the Board to lose jurisdiction over a line, the railroad must have fully exercised the abandonment authority. *Id. See also Birt v. Surface Transportation Board*, 90 F.3d 580, 585-86 (D.C. Cir. 1996) ("*Birt*"). The question of whether abandonment has been consummated is a question of fact based upon an examination of the carrier's intent as ascertained from the carrier's actions and statements with respect to the line. *T and P Railway - Abandonment Exemption - In Shawnee, Jefferson and Atchison Counties, KS*, Docket No. AB-

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[5] SP's name for the Rosenberg-Victoria line.

381 (Sub-No. 1X) (ICC served July 20, 1995) at *10, *petition for reconsideration denied* 1997 STB LEXIS 33 (STB served Feb. 20, 1997) ("*T&P*").

UP's actions and statements with respect to the Rosenberg to Victoria line, show that UP and its predecessor SP have not abandoned that line. UP has stated that it has not abandoned any part of the line. *See* UP/SP-340, *supra*. The fact that UP has removed some of the rail and ties over a portion of the line does not mean that the abandonment was consummated, *see, e.g., T&P* at *10 and *Birt* at 586, particularly when UP has not removed structures such as bridges or culverts along the line. *T&P* at *6.

Restoration of a non-abandoned line to service does not require construction authorization from the Board. *See Missouri Central Railroad Company - Acquisition and Operation Exemption - Lines of Union Pacific Railroad Company, et al.*, Finance Docket No. 33508 (STB served April 28, 1998) at *13-*14 (rehabilitation of a rail line, purchased from another carrier, does not require construction authority). The Board's recent decision in *Union Pacific Railroad Company—Petition for Declaratory Order—Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX*, STB Finance Docket No. 33611 (served Aug. 21, 1998) provides a good example of this principle. In that case, UP asked the Board to determine whether UP was required to seek construction authority under Section 10901 in order to rehabilitate the line formerly operated by the Missouri-Kansas-Texas Railroad Company ("MKT"), which UP received authority to abandon as a part of the UP-MKT merger case. While UP discontinued service over the line in 1989, it claimed, as it likewise does in this proceeding, that it had never consummated the abandonment. Accordingly, when UP sought to reactivate the line in 1998, proposing to replace virtually all of the ties in the line, dump over 1000 tons of ballast per mile and reinstall a number of grade crossings that had been removed, the Board found that UP did not require authority under Section 10901 to rehabilitate the line. Similarly here, a UP predecessor received authority to abandon its line and service was discontinued but, as UP says, the line was not abandoned. Significant portions of the track remain, the subgrade remains in place throughout the route, and the many bridges along the line also remain in place. Small segments at each end of the line continue in use. Accordingly, the Rosenberg-Victoria line has not been abandoned and STB jurisdiction of the line has not been lost, meaning that Tex Mex does not need authority under Section 10901 to construct a line from Rosenberg to Victoria, but needs only authority under Section 11323 to acquire the existing line from UP.

Tex Mex is in the process of trying to negotiate the sale of the Rosenberg to Victoria line with UP. UP has stated that it is willing to sell the line to Tex Mex and that it agrees that restoration of the line would add useful infrastructure to the Gulf Coast area. Nevertheless, the extreme disparity between the terms proposed by the two parties raises doubts about UP's professed willingness to sell. Therefore, the Consensus Parties believe that an order from the Board requiring such a sale is necessary.[6] As a result, the Consensus Parties requested in their July 8th filing that the STB require UP to sell the line. While requiring a sale of the line would require an order from the Board, no construction authorization would be required to permit Tex Mex to rebuild the line because the line has not been abandoned. *Missouri Central Railroad Company, supra*. Consequently, the requested Board action with respect to the Rosenberg to Victoria line, under §1002.2(f), does not constitute construction of a new line as contemplated in the $48,300 filing fee. The Consensus Parties' proposal for transfer of the UP Rosenberg to Victoria line to Tex Mex must therefore be seen for what it is - an acquisition, not new line

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[6] In addition, unless the parties can come to an agreement on the terms of the sale, an order establishing the terms ultimately may also be necessary.

construction - and the Board accordingly should reimburse the Petitioners[7] the difference between the filing fee paid and the $4,700 filing fee properly applicable under 49 C.F.R. § 1002.2(f)(11)(i) to the Consensus Parties' request that Tex Mex acquire an existing line from UP.

II. THE HOUSTON TO BEAUMONT DOUBLE-TRACKING IN EXCHANGE FOR THE BEAUMONT SUBDIVISION DOES NOT REQUIRE STB CONSTRUCTION AUTHORITY

Point eight of the Consensus Plan seeks authority for Tex Mex to double-track UP's Lafayette Subdivision and then exchange the new second line for title to UP's Beaumont Subdivision. Double-tracking an existing rail line does not require authority from the Board under Section 10901. Therefore, the only part of the transaction proposed which requires Board approval is the transfer of the Beaumont Subdivision to Tex Mex as a line sale of an active rail line. Like the Rosenberg to Victoria line transfer, the appropriate filing fee for such a transaction is $4,700.

For this one request alone, the Board assessed a $48,300 fee against Petitioners on the premise that the proposal to double-track the Lafayette Subdivision was a "construction" application. However, the construction of the double-track within UP's right of way[8] does not require construction authority from the Board. *See City of Detroit v. Canadian National Railway Company, et al.*, 9 I.C.C.2d 1208 (1993), *aff'd sub nom. Detroit/Wayne County Port Authority v.*

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[7] The Petitioners request that the check returning the overpayment of fees to the Petitioners be made payable to Troutman Sanders LLP, which issued the filing fee check for the July 8th filing. Troutman Sanders LLP will be responsible for assuring that the filing fees are returned to the appropriate members of the Consensus Parties.

[8] Even if the double-track were to extend outside UP's existing right-of-way, installing the second track still would be exempt from Board jurisdiction. *See Union Pacific Railroad Company—Petition for Declaratory Order—Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX*, STB Finance Docket No. 33611, 1998 STB LEXIS 227 (STB served Aug. 21, 1998).

Interstate Commerce Commission, 59 F.3d 1314 (D.C. Cir. 1995) ("*City of Detroit*") and *City of Stafford, Texas v. Southern Pacific Transportation Company*, Finance Docket No. 32395, 1994 ICC LEXIS 216 (ICC served Nov. 8, 1994) ("*City of Stafford*"). As stated succinctly in *City of Detroit*, "Investing in existing systems...was not the kind of activity that Congress sought to regulate in 1920. If anything, Congress sought to encourage railroads to improve existing services before extending a line or constructing a new one." *City of Detroit* at 1216. Since "[d]ouble-tracking is an improvement to an existing rail line," *City of Stafford* at *9, Congress did not intend to regulate the construction of double-track. *City of Detroit* at 1219. *See also City of Stafford* at *8-*9. In fact, finding improvement of an existing facility to constitute "construction" requiring Board authorization under Section 10901 would "afford a rich opportunity for obstruction and delay by carriers that might feel threatened by increased or enhanced competition." *City of Detroit* at 1220. Allowing Tex Mex to construct a new track in UP's Lafayette Subdivision right of way is an improvement to an existing system which is not subject to Board jurisdiction.

Acquiring the Beaumont Subdivision from UP once the double-tracking of the Lafayette Subdivision has been completed also is not subject to Board jurisdiction under Section 10901, but rather falls under Section 11323. First, it is not an extension of Tex Mex's market. Tex Mex already operates over the Beaumont Subdivision, transporting traffic between Houston and Beaumont. More importantly, it is a transfer of a line from one carrier to another in response to a merger application which is subject to Section 11323. Accordingly, on July 8th, the Board correctly applied a $4,700 filing fee to that aspect of the proposed transaction, but in addition to that fee, assessed the $48,300 fee for "construction authority" for double tracking the Houston to

Beaumont line.[9] However, as stated herein, no construction application fee should have been assessed for the double-tracking of the Lafayette Subdivision.

III. REDUCTION IN THE FILING FEES ASSESSED ALSO IS WARRANTED BECAUSE THE CONSENSUS PARTIES' REQUESTS ARE NOT AS COSTLY OR TIME-CONSUMING TO THE BOARD AS REQUESTS FOR CONSTRUCTION AUTHORITY

Consideration of the criteria that the Board uses in establishing its filing fees shows that the filing fees assessed against the Petitioners were not warranted. The Board's filing fees for construction applications and exemptions are based heavily on the costs of environmental review of a proposal. However, the Consensus Parties' proposals for the Rosenberg-Victoria line and the Houston-Beaumont lines do not require environmental review. Therefore, the sizable fees assessed for construction applications should not be applied to the Rosenberg-Victoria and Houston-Beaumont proposals.

The Board's decisions establishing its filing fee system show that the filing fees for construction applications are largely premised on the direct labor cost of environmental review, a cost which will not be incurred by the Board for the Consensus Parties' Rosenberg-Victoria and Houston-Beaumont proposals. The Board's filing fees are based on direct labor costs, augmented by several types of overhead costs. *See generally Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services*, 1 I.C.C.2d 60, 72 (1984), *aff'd in part and rev'd on other grounds sub nom. Central & Southern Motor Freight Tariff Bureau v. Interstate Commerce Commission*, 777 F.2d 722 (D.C. Cir. 1985) [overhead

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[9] The Petitioners also concede that the remainder of the Consensus Plan may be treated as a responsive application, incurring a filing fee of $5,000 under 49 C.F.R. § 1002.2(f)(38)(v). This $5,000 fee, not previously assessed by the Board, would, together with the $4,700 fee due for each of Rosenberg-Victoria and the Beaumont Subdivision acquisitions, yields a total filing fee of $14,400 as the maximum filing fee for the Consensus Plan as opposed to the total of $101,300 which has been paid to date.

percentages are applied to direct labor costs]. Moreover, as the Board explained in *Regulations Governing Fees for Service Performed in Connection with Licensing and Related Services - 1996 Fee Update*, STB Ex Parte No. 542 (STB served April 4, 1996) 1996 STB LEXIS 113 at *4 ("*1996 Update I*"), the high fee for construction applications and exemptions is primarily due to complex environmental reviews required by those sorts of projects. *See also Regulations Governing Fees for Service Performed in Connection with Licensing and Related Services - 1996 Fee Update*, STB Ex Parte No. 542 (STB served Aug. 14, 1996) 1996 STB LEXIS 225 at *8 ["most of the regulatory attention in construction cases involves environmental matters."] ("*1996 Update II*"). Indeed, direct labor costs connected with environmental review were identified as $15,200, while direct labor costs of the staff of the Office of Proceedings were approximated at only $2,000. *1996 Update I at *4.* Thus, over 88% of the direct labor costs (and, consequently, of overhead costs as well) attributable to construction applications are the result of environmental review costs.

The Consensus Parties' proposals for the Rosenberg-Victoria line and for the Lafayette and Beaumont Subdivisions do not require environmental review. The transactions proposed by the Consensus Parties are subject to review under 49 U.S.C. § 11323, not under 49 U.S.C. § 10901. *See* Sections I and II, *supra*. Transactions under Section 11323 involving acquisitions of lines are not subject to environmental review unless the energy use or air pollution thresholds of 49 C.F.R. § 1105.7(e)(4 & 5) (1997) will be exceeded as a result of the transaction. 49 C.F.R. § 1105.6(c)(2)(i) (1997). Those thresholds will not be exceeded as a result of the Consensus Plan. *See* CMA-2, SPI-2, RCT-2, TCC-2, TM-2 & KCS-2, filed July 8, 1998, at 107 - 111.[10]

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[10] To further alleviate any possible concern the Board may have about environmental review, the Petitioners also wish to highlight that the plan to double-track the Lafayette Subdivision does not require double-tracking the bridges along the line, *see* CMA-2, SPI-2, RCT-2, TCC-2, TM-2 &

Accordingly, under the Board's regulations, environmental review of the Consensus Parties' proposals is not required. Consequently, the direct labor costs of an environmental review, which are the basis for nearly 90% of the filing fee for a construction application, will not be incurred by the Board in this proceeding.

While environmental review is reasonably required for new construction, new construction is not proposed by the Consensus Parties. As discussed above, the Rosenberg to Victoria segment remains a rail line that is within the Board's jurisdiction, so construction authority is not needed to restore it to service. In addition, double-tracking the Lafayette Subdivision does not require environmental review because double-tracking a line is not "construction" which requires the Board's approval under 49 U.S.C. § 10901. Thus, the environmental review standards applicable to Section 11323 transactions apply to the Consensus Parties' proposals, and those standards do not require environmental review in this instance because none of the pertinent environmental thresholds will be exceeded. Therefore, the Consensus Parties' proposals do not require environmental review, and the Petitioners should not be required to pay for those services, which the Board does not need to perform.

CONCLUSION

Neither the Consensus Parties' proposal to restore rail service between Rosenberg and Victoria, Texas nor the double-tracking of the Lafayette Subdivision and the subsequent exchange of the double-tracked line for UP's Beaumont Subdivision requires the Board to grant construction authority. Accordingly, the $48,300 fee assessed for each of those proposals is incorrect under the Board's regulations and precedent. The Petitioners therefore submit that they are entitled to be reimbursed at least $86,900 of the $101,300 in filing fees paid for the March

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KCS-2, filed July 8, 1998, at 83, n. 69, avoiding the potential environmental issues that can be involved with construction within a waterway.

30th and July 8th filings, or to have the filing fees for the March 30th and July 8th filings.

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

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the "Petition For The Recalculation And Recovery Of Filing Fees" was served this 4th day of September, 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 known parties of record in the Sub-No. 26 and Sub-No. 30 oversight proceedings.

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

EXHIBIT 1

UP/SP-340

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

UNION PACIFIC'S RESPONSES AND OBJECTIONS
TO KCS/TEX MEX'S SECOND SET OF DISCOVERY

Union Pacific Railroad Company ("UP") hereby responds to the "Second Set of Discovery Directed to Union Pacific Railroad Company" served by Kansas City Southern Railway Company ("KCS") and Texas Mexican Railway Company ("Tex Mex") (collectively, "KCS/Tex Mex") on April 29, 1998 (TM-11/KCS-12).

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 UP/SP merger.

KCS/Tex Mex should seek information about the Wharton Branch through the negotiating process, not through formal Board discovery. Subject to and without waiver of the foregoing objections, UP states that it has not abandoned the former SP Wharton Branch between SP milepost 2.5, near Rosenberg and McHattie, Texas, and SP milepost 25.8, near Wharton, Texas.

Interrogatory No. 2

"Has the abandonment that has been authorized for the Wharton Branch line between SP milepost 25.8, near Wharton, Texas and SP milepost 87.8 near Victoria, Texas been consummated for any portion of or all of that line? If the answer to this interrogatory is in the affirmative, for each portion for which abandonment was consummated, please describe the portion of the line by listing relevant mileposts, state the date on which the abandonment was consummated, and identify documents sufficient to demonstrate the fact that the abandonment has been consummated."

Response:

See objections stated in Response to Interrogatory No. 1. Subject to and without waiver of the foregoing objections, UP states that it has not abandoned the portion of the former SP Wharton Branch between SP milepost 25.8, near Wharton, Texas and SP milepost 87.8, near Victoria, Texas.

Interrogatory No. 3

"Describe in detail, and identify all documents sufficient to evidence, UP ownership and/or property interests, including, but not limited to easements and covenants. for the land underlying the former SP line called the Wharton Branch between Rosenberg, Texas and Wharton, Texas."

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal hereby certify that on this 14th day of May, 1998, I served a copy of Union Pacific's Responses and Objections to KCS/Tex Mex's Second Set of Discovery by hand on:

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

Michael L. Rosenthal