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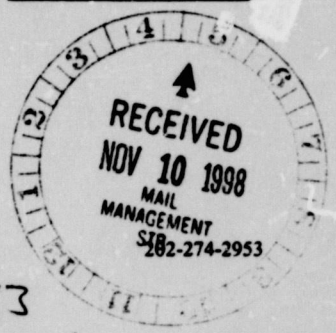

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HAND DELIVERY
The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Room 711
Washington, D.C. 20423

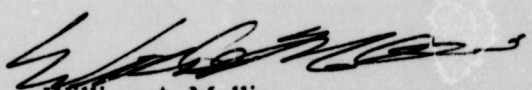
Re: Finance Docket No. 32760 (Sub 26-32)

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,



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

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Public Record

Enclosures

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

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

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 --
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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

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		Origin ations		Termi nations	
		Cars	Tons	Cars	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 ana'ysis 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. **Service Crisis.** 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 mutually 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, Maureen 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

Date: 11/10/98

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

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ATTORNEYS FOR THE SOCIETY OF PLASTICS INDUSTRY, INC.

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 L. Brown
Attorney for The Kansas City Southern
Railway Company

STB FD 32760 (Sub 30) 10-23-98 I 191826

TROUTMAN SANDERS LLP

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William A. Mullins

October 23, 1998

I

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

30

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

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

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

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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 proceeding are 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]

[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 instant 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. I 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.

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 "**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.

David C. Reeves
Attorney for The Kansas City Southern
Railway Company

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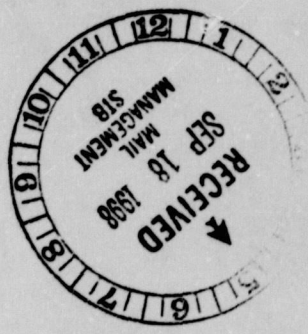
September 18, 1998



VIA HAND DELIVERY

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

Re: STB Finance Docket No. 32760 (Sub-Nos. 26, 30 and 32)

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of The Burlington Northern and Santa Fe Railway Company's Comments, Evidence and Arguments on Requests for New Remedial Conditions in Additional Oversight Proceeding (BNSF-9). Also enclosed is a 3.5-inch disk of the filing in WordPerfect 6.1 format.

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

Sincerely,

Erika Z. Jones/als

Erika Z. Jones

Enclosures

FOR COMPLETE TEXT OF THIS FILING SEE FD-32760 SUB 26 FILING #191216

STB FD 32760 (Sub 30) 9-4-98 I 190977

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Secretary

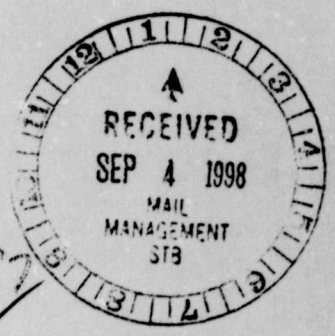
SEP 08 1998

Part of Public Record

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

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-

[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

[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