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November 10 1998

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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,

ENTERED
Office of the Secretary

NOV 12 1998

Part of
Public Record

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

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

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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		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 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. **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 aproximately 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

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October 23, 1998

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Washington, D.C. 20006

I 31

RECEIVED
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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

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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 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. 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.

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.

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William A. Mullins

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August 17, 1998

HAND DELIVERY:
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Surface Transportation Board
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ENTERED
Office of the Secretary

AUG 18 1998

Part of
Public Record

RE: Finance Docket No. 32760 (Sub-No. 31),
Union Pacific Corp., et al. – Control & Merger – Southern Pacific Rail Corp., et al. – Houston/Gulf Coast Oversight

Dear Secretary Willliams:

Enclosed for filing in above captioned proceeding are an original and twenty-six copies of TM-1/KCS-1, Petition For Reconsideration And Motion To Dismiss The Application Filed By Houston And Gulf Coast Railroad.

Please date and time stamp one copy of the Petition 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,

William A. Mullins/IH

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

cc: Parties of Record
Houston and Gulf Coast Railroad

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AUG 18 1998

SURFACE
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SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub No. 31)

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 RECONSIDERATION AND MOTION TO DISMISS THE APPLICATION FILED BY HOUSTON AND GULF COAST RAILROAD

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Attorneys for The Kansas City Southern Railway Company

August 17, 1998

TM-1
KCS-1

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

Finance Docket No. 32760 (Sub No. 31)

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 RECONSIDERATION AND MOTION TO DISMISS THE APPLICATION FILED BY HOUSTON AND GULF COAST RAILROAD

This petition addresses the application by Kenneth B. Cotton on behalf of the Houston and Gulf Coast Railroad ("H&GC" and also the "Applicant") filed August 3, 1998 (the "Application") for trackage rights over, and forced line sales of, various Union Pacific Railroad ("UP") lines in the Houston/Gulf Coast area.

BACKGROUND

In Decision No. 1 of the Houston/Gulf Oversight Proceeding, the Board asked parties to submit by June 8 (later extended to July 8) requests for, and evidence supporting, new remedial conditions to the UP/SP merger regarding the Houston/Gulf Coast area. The Board specifically stated that it would not impose conditions that would substantially change the configuration and operations of UP/SP's existing network in the region "in the absence of the type of presentation

and evidence required for 'inconsistent applications' in a merger proceeding; *i.e.* parties must present probative evidence that discloses the 'full effects of their proposals.'"[1]

On August 3, 1998, Kenneth B. Cotton filed a late application on behalf of H&GC, a small Class III carrier. While the Application contained requests for additional remedial conditions to be granted to H&GC, it contained little else. In Decision No. 6 (STB served August 4, 1998) the Board accepted the Application.

The Texas Mexican Railway Company ("Tex Mex") and The Kansas City Southern Railway Company ("KCS") (collectively, "KCS/Tex Mex") ask that the Board reconsider its decision to "accept and consider" the Application. In the alternative, KCS/Tex Mex ask the Board to dismiss the Application for failure to establish a prima facie case and failure to present even the basic facts which could support its case.[2]

ARGUMENT

KCS/Tex Mex are sympathetic to the fact that full compliance with the Board's consolidation procedures (49 C.F.R. Part 1180) would be particularly difficult for a small railroad such as the H&GC.[3] The Application, however, makes no attempt to provide the Board

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[1] Decision No. 1 (STB served May 19, 1997) at 5. In Decision No. 6 of the Houston/Gulf Coast Oversight Proceeding (STB served August 4, 1998), the Board again referred to the need to file the type of evidence required for inconsistent applications in merger proceedings if a party was going to request a condition that would substantially change UP/SP's existing configuration and operations in the region.

[2] In *Farmland Industries, Inc. v. Gulf Central Pipeline Company, et al.*, (ICC served December 27, 1993)("*Farmland*"), the ICC stated that although its rules of practice did not specifically provide for motions to dismiss (for jurisdictional or other reasons including the failure to establish a prima facie case), it had entertained these types of motions in the past under the miscellaneous relief section 49 C.F.R. § 1117.1.

[3] Indeed, KCS/Tex Mex support the Board's decision to waive the filing fee requirement for Mr. Cotton's filing. They agree that parties of limited financial means otherwise would be denied access to relief afforded by the Board's exercise of its statutory jurisdiction and, thus, due process of law. However, KCS/Tex Mex also urges the Board to give consideration to their due process rights with respect to Mr. Cotton's filing.

(or other parties which could be affected by the requested conditions) information sufficient to permit even the most superficial review of the H&GC requests.

The Application is technically deficient in the following respects:

- The provisions of 49 C.F.R. § 1180.6(a)(1) and (7) require a description of the proposed transaction to be included in all applications. The Application does not contain any of the descriptive elements required by Section 1180.6(a)(1) and (7).
- The provisions of 49 C.F.R. 1180.6(a)(2) require applicants to set forth a detailed discussion of the public interest justifications underlying the proposed transaction. This includes a discussion of the following: (i) the effect of the transaction on competition, (ii) the financial consideration involved, (iii) the effect of the increase, if any, of total fixed charges resulting from the transaction, (iv) the effect of the transaction upon the adequacy of transportation service to the public, (v) the effect of inclusion (or lack of inclusion) in the proposed transaction of other railroads in the territory. The Application contains a few vague and conclusory allegations about the public interest justifications in favor of the Board granting the Application but leaves the Board with no basis for accepting these general allegations. In view of the fact that H&GC's request for rights on the Rosenberg-Victoria line is inconsistent with the Consensus Parties' proposal that UP sell that line to Tex Mex and the public interest justifications supporting that sale, it is essential for the Board to balance the public interest justifications underlying the two inconsistent applications. However, without a discussion of the public interest justifications from H&GC, the Board cannot perform this balancing inquiry.

- The provisions of 49 C.F.R. 1180.7 require the applicant to submit an analysis of the impacts of the transaction – both adverse and beneficial – on competition and on the provision of essential services by applicants and other carriers. The impact analysis must include underlying data, a study of the implications of that data and a description of the resulting likely effects of the transaction on transportation alternatives available to the shipping public. The Application contains no impact analysis whatsoever.
- The provisions of 49 C.F.R. § 1180.8 require the applicant to submit an operating plan which, based on the impact analysis, is a summary of the operational changes that will result from the transaction and the anticipated timing of such operational changes. Because H&GC seeks rights over the same route which KCS/Tex Mex seek to purchase from UP (the "Rosenberg-Victoria line"), KCS/Tex Mex are entitled to H&GC's projections of the manner in which the operations it proposes would impact KCS/Tex Mex's proposed operations over the route. The Board's acceptance of the Application without any semblance of an operating plan deprives KCS/Tex Mex of an opportunity to identify the manner and extent to which H&GC's operations would interfere with KCS/Tex Mex operations over the Rosenberg-Victoria line.
- The provisions of 49 C.F.R. § 1104.6 require all documents to be received for filing at the Board's offices within the time limits set for filing. In Decision No. 5 of the Houston/Gulf Coast Oversight Proceeding, the Board set the deadline for all applicants filing for remedial conditions to the UP/SP merger at July 8, 1998. Despite this deadline, H&GC did not file its Application until August 3, 1998, almost a full month after the deadline. The Board has uniformly denied requests for leave to file

out of time in cases where the late filing would: (i) seriously undermine the Board's management of the proceeding, and (ii) diminish the meaning of deadlines by leading other parties to believe that that they can file submissions out of time with impunity.[4] In this instance, assuming Mr. Cotton could revise and resubmit the Application under 49 C.F.R. § 1180.4(c)(7)(ii), the Board's management of the proceeding would be undermined because it would be required to readjust the procedural schedule to afford all parties of record additional time to prepare comments, evidence and argument opposing the Application. Under these circumstances, the Board should not have accepted the late-filed Application. Furthermore, H&GC's out of time filing, coupled with its failure to serve other parties, have further undermined the Board's management of the proceeding.

- The Board's rules permit it to reject the Application either for being incomplete or for failure to present a prima facie case. 49 C.F.R. § 1180.4(c)(7)(ii); 49 C.F.R. § 1180.4(c)(7) & (8). To establish a prima facie case, the applicant must disclose facts that, even if construed in their most favorable light, are sufficient to support a finding that the proposal is consistent with the public interest. 49 C.F.R. § 1180.4(c)(8).[5] H&GC has failed to disclose such evidence by omitting to explain

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[4] *See, e.g., CSX Corp. et al. – Control and Operating Leases/Agreements – Conrail Inc. et al.*, Finance Docket No. 33388, Decision No. 56 (STB served November 28, 1997) at 7 (the "*Conrail Control Proceeding*") which applied a three-part test for determining whether a petition for leave to file out of time ought to be denied. The Board said it would deny such a petition where: (i) it was filed too long after the filing deadline has already passed, (ii) the petitioner's reasons for asking the Board to accept the late petition were not exceptional or compelling, and (iii) acceptance of the petition would seriously undermine the Board's management of the proceeding and diminish the meaning of deadlines in the proceeding.

[5] *See* Decision No. 14 (STB served July 28, 1997), *Conrail Control Proceeding*; *Union Pacific Corporation et al. – Control – Chicago and Northwestern Holdings Corp. et al.*, (ICC served September 17, 1993); *Rio Grande Industries, Inc., et al. – Purchase and Related Trackage Rights*

how its requests would resolve congestion in the Gulf Coast area. It has failed to explain what competitive problems it seeks to address. H&GC has not even attempted to show that it would be able to operate over the lines it seeks to operate or would have the financial backing to purchase the line it seeks to acquire. In fact, H&GC has failed to even identify itself or the shipper(s) it serves and the routes over which it operates. In sum, H&GC has provided the Board virtually no information upon which the Board could find that H&GC's proposals are consistent with the public interest. By definition then, H&GC has failed to present a prima facie case.

If the Board fails to dismiss the Application for being incomplete or failing to establish a prima facie case, KCS/Tex Mex and other parties will be prejudiced seriously and denied due process of law. Certain of the additional remedial conditions sought by H&GC involve rights over UP's out-of-service line between Rosenberg and Victoria, Texas; a line which the Consensus Parties, in their application, seek to acquire. Thus, as concerns future ownership and operation of the Rosenberg-Victoria line, H&GC's Application is inconsistent with the Consensus Parties' application.

Further, the Board should not order H&GC to supplement its request for conditions with additional information instead of dismissing its Application. H&GC was a month late submitting its requests, substantially reducing the time allowed for analyzing its application. Even if there was any indication that H&GC could respond to reasonable discovery concerning its requests -- and there is no such indication -- KCS/Tex Mex and other parties would not be able to conduct that discovery and evaluate the requested conditions in the time left before comments are due on September 18.

– *Soo Line Railroad Company Line*, Finance Docket No. 31505, Decision No. 6 (ICC served March 30, 1990).

In short, H&GC has given the Board no facts to evaluate the relief it seeks, no idea of how it would implement the rights it seeks to be granted, no clue as to where it would obtain financing to purchase the line it seeks to acquire, and no idea of how the relief would affect other carriers or shippers. Without this information, it is impossible for the Board and other parties to meaningfully evaluate the Applicant's proposal. However, the Board accepted the late-filed Application, acknowledged that it was deficient, but failed to do any of the following: (i) allow affected parties to respond to H&GC's motion to file late, (ii) explain why it was going against settled precedent requiring such motions to be denied, and (iii) give reasons for accepting the late-filed Application notwithstanding its recognition that the Application was deficient. Under these circumstances, the Board should reconsider and reverse its decision to accept the application. In the alternative, the Board should dismiss the H&GC Application for its failure to present a prima facie case.[6]

Conclusion

H&GC asks for several sets of trackage rights and for a forced divestiture of an active rail line, but it presents absolutely no evidence supporting the grant of those requests, the feasibility of its operations over the subject lines, or the effect of the grant of those requests on other carriers in the area. By accepting the Application for consideration, the Board has placed an impossible burden on other parties to meaningfully analyze and respond to an application that includes literally no facts or evidence. The Board should reconsider and reverse its decision accepting H&GC Application, or, in the alternative, dismiss the Application for failure to establish a prima facie case.

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[6] *See* 49 C.F.R. 1180.4(c)(8). *See also* Decision No. 14 (STB served July 28, 1997), *Conrail Acquisition Proceeding; Union Pacific Corporation et al. – Control – Chicago and Northwestern Holdings Corp. et al.*, (ICC served September 17, 1993); *Rio Grande Industries, Inc., et al. –*

Respectfully submitted, this 17th day of August, 1998.

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Purchase and Related Trackage Rights – Soo Line Railroad Company Line, Finance Docket No. 31505, Decision No. 6 (ICC served March 30, 1990).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "Petition for Reconsideration and Motion to Dismiss The Application Filed By Houston and Gulf Coast Railroad" (TM/KCS-1) was served this 17th day of August, 1998, by hand delivery to Applicants' representatives and to Judge Grossman, and by first class mail to all parties of record in this proceeding.

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Southern Railway Company