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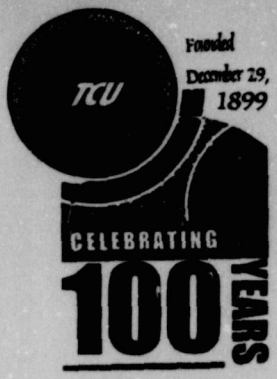
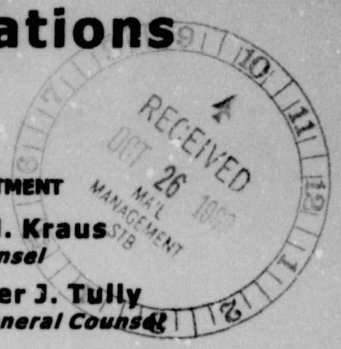


Challenging the future with a century of pride!

Transportation Communications International Union

Robert A. Scardelletti
International President

LEGAL DEPARTMENT
Mitchell M. Kraus
General Counsel
Christopher J. Tully
Assistant General Counsel



October 26, 1999

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By Messenger

Office of the Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

RE: PETITION FOR ENFORCEMENT OF ARBITRATION AWARD
Transportation•Communications International Union and Southern Pacific Railway Lines (SSW), Union Pacific Railroad Company
STB Finance Docket No. 32760 Sub 36

To Whom It May Concern:

Enclosed please find an original and ten copies of the Transportation•Communications International Union's ('TCU') Petition for Enforcement of an Article I, Section 11 Arbitration Award and for an Order to Cease and Desist in the above-referenced matter. Also enclosed, pursuant to the 49 C.F.R. §1115.8, are eleven copies of Exhibits to the Petition and the record materials submitted to the arbitrator by the parties.

TCU is serving a copy of this Petition and the accompanying materials upon counsel for the Carrier today. Thank you for your attention to this matter.

Very truly yours,

Mitchell M. Kraus

Mitchell M. Kraus
General Counsel

MMK:fm
Enclosures

3 Research Place ◆ Rockville, Maryland 20850 ◆ Phone—301-948-4910 ◆ FAX—301-330-7662

195938

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 32760 Sub 36

TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION
and
SOUTHERN PACIFIC RAILWAY LINES (SSW)
UNION PACIFIC RAILROAD COMPANY

PETITION FOR ENFORCEMENT OF AN ARTICLE I, SECTION 11 ARBITRATION AWARD AND FOR AN ORDER TO CEASE AND DESIST

Mitchell M. Kraus
General Counsel
Christopher Tully
Assistant General Counsel
Transportation•Communications International Union
3 Research Place
Rockville, Maryland 20850
(301) 948-4910

Date: October 25, 1999

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 32760

TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION
and
SOUTHERN PACIFIC RAILWAY LINES (SSW)
UNION PACIFIC RAILROAD COMPANY

**PETITION FOR ENFORCEMENT OF
AN ARTICLE I, SECTION 11 ARBITRATION AWARD AND FOR
AN ORDER TO CEASE AND DESIST**

INTRODUCTION

The Transportation•Communications International Union ("TCU") seeks the enforcement of an arbitration award recently issued under Article I, Section 11 of the New York Dock conditions.

In a decision issued October 22, 1999 (TCU Exhibit 1) ("O'Brien Award"), Arbitrator Robert O'Brien rejected UP's claim that it had authority to consolidate crew hauling work under the UP collective bargaining agreement, holding that such consolidation could take place only under the SP collective bargaining agreement – and particularly, that said agreement's wage rates, prohibition on subcontracting, and extra board rules were to be applicable. We will demonstrate that UP began the consolidation of crew hauling work while this issue was pending before Arbitrator O'Brien and that, in spite of its efforts to withdraw the notice giving rise to the

O'Brien Award, it remains obligated to abide by that award. We seek the enforcement of that award, and an order directing the UP to cease and desist from implementing a new notice in contradiction of the O'Brien Award.

FACTS

A. Procedural History

By decision dated August 6, 1996, the STB approved the acquisition and control of the Southern Pacific Railroad by the Union Pacific Railroad and imposed the New York Dock conditions (Finance Docket 32760, Decision No. 44, at pages 171-72). Pursuant to Article I, Section 4 of these conditions, UP, SP and TCU entered into a master implementing agreement, designated as NYD-217 (TCU Exhibit 2).

By letter dated June 11, 1998, UP advised that, pursuant to Article II of NYD-217, it was providing notice of its intent to "consolidate all clerical work associated with the Southern Pacific (Armourdale Yard) facility located in Kansas City, KS, with that of the Union Pacific facility located in Kansas City, MO." (TCU Exhibit 3) The notice further provided that the Carrier intended to "eliminate all of the clerical positions currently assigned to the SP Armourdale Yard operations and transfer all of this work to clerical positions to be established under the Union Pacific/TCU Collective Bargaining Agreement." The SP's Armourdale Yard and the Union Pacific facility in Kansas City ("Neff Yard") are 10 miles apart.

The union raised a number of objections regarding this notice. By letter dated September 11, 1998 (TCU Exhibit 4), UP agreed to submit these issues to expedited arbitration, delaying implementation until issuance of the award. Pursuant to Article I, Section 11 of the New York

Dock conditions, these issues were presented to Arbitrator Robert O'Brien, who issued his proposed decision on March 25, 1999 (TCU Exhibit 5) ("O'Brien Proposed Award"), holding that the June 11, 1998 notice lacked the specificity required by Article II of NYD-217. In addition, he concluded that, as to intermodal and certain office clerical work, the notice did "not constitute a coordination under the NYD conditions or a rearrangement and coordination of work and/or positions pursuant to Article II of NYD-217." Therefore, there is no "transaction involving these positions." (O'Brien Proposed Award, pp. 11-12.)

However, he found, as conceded by TCU, that, to the extent that the June 11, 1998, notice involved crew hauling work, it did involve a transaction under NYD-217. The arbitrator then went on to determine whether the UP or SP collective bargaining agreement should be applicable to the consolidated crew hauling work. Mr. O'Brien rejected UP's contention that NYD-217 gave it the unrestricted right to place the involved clerical employees under the UP collective bargaining agreement, finding that there was not a "scintilla of evidence" to support UP's position. (O'Brien Proposed Award, p. 17.) He held that, in the absence of explicit language providing UP with the exclusive right of selection, the limitations on arbitrators' override authority under Article I, Section 4 were applicable. (Ibid., p. 19.) Relying on this Board's decisions in the Carmen Trilogy[1] as well as its decisions affirming two Article I, Section 4 arbitration decisions, CSX Corp.–Control–Chessie System, Inc. and Seaboard C.L.I., STB Fin. Docket No. 28905 (Sub-No. 26) (April 15, 1996); CSX Corp., STB Fin. Docket No. 28905 (Sub-

[1] The Carmen Trilogy includes the following cases: CSX Corp.–Control–Chessie and Seaboard C.L.I., 4 I.C.C.2d 641 (1988) ("Carmen I"); CSX Corp.–Control–Chessie and Seaboard C.L.I., 6 I.C.C.2d 715 (1990) ("Carmen II"); and CSX and Seaboard Coast Line, STB Fin. Docket No. 28905 (Sub-No. 22) and Norfolk Southern Corp. and Southern Ry. Co., STB Fin. Docket No. 29430 (Sub-No.20) (jointly issued September 22, 1998) ("Carmen III")

No. 27) (November 22, 1995) (involving an appeal from a decision issued by Mr. O'Brien), he found that UP had failed to convince him that it was necessary "to override the SP rates of pay, rules and working conditions to achieve the operational efficiency attendant to the consolidation of crew hauling at the Kansas City Terminal." Rather, he found that this same transportation benefit could be attained by placing the Armourdale Yard positions under the UP agreement, except that "SP rates of pay, prohibitions against subcontracting and guaranteed extra board will apply to the employees affected by this transaction." (O'Brien Proposed Award, p. 19)

UP requested an executive session,[2] and by letter dated May 18, 1999 (TCU Exhibit 6), advised Arbitrator O'Brien that it had canceled its notice of June 11, 1998, and that the issues addressed in the proposed award were now moot. Simply stated, it was UP's view that there was no longer any dispute, and, therefore, there should be no arbitration award. TCU argued to the contrary that, even though UP had canceled its June 11, 1998 notice, the matter before Arbitrator O'Brien was not moot. By letter dated August 25, 1999, Arbitrator O'Brien rejected UP's claims, holding that the notice cancellation did not render his award moot. He then reissued his original award, advising that the parties could contact him if they wished to meet further in executive session. (TCU Exhibit 7)

By letters dated August 30, 1999 (TCU Exhibit 8), UP issued notices under NYD-217 covering clerical employees at Armourdale Yard. The notices advised of UP's intent to abolish twelve positions at that location. Each of these twelve positions was listed on the June 11, 1998 notice, which UP had canceled and each is responsible for crew hauling work. However, the August 30, 1999 notices, unlike the June 11, 1998 notice, do not advise of UP's intent to

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[2]The date of the executive session was delayed at UP's request until June 2, 1999.

consolidate the crew hauling work, nor do they provide for the creation of new positions. Rather, the August 30, 1999 notices state that "any remaining duties and responsibilities of these positions will be absorbed by remaining clerical forces at Armourdale Yard, Kansas City, Kansas."

TCU responded by letters dated August 30 and September 3, 1999 (TCU Exhibits 9 and 10, respectively), objecting to the August 30, 1999 notices, asserting that they failed to provide the union with a list of duties and responsibilities to be absorbed by the remaining clerical forces in Kansas City, as required by NYD-217; that said notices involved the same positions as the June 11, 1998 notice which gave rise to the O'Brien Proposed Award; that these notices each involved the consolidation of clerical work in Kansas City; and that the August 30, 1999 notices, unlike the June 11, 1998 notice, neither stated that affected SP employees would be permitted to follow their work that was being consolidated with UP'S Neff Yard, nor did they state carrier's intent to apply the SP rate of pay, guaranteed extra board and prohibition on subcontracting as required by the O'Brien Proposed Award. TCU demanded that UP abide by the O'Brien Proposed Award, noting that, in the absence of a commitment to do so, the union would take appropriate action to enforce the award.

UP responded by letter of September 8, 1999 (TCU Exhibit 11), indicating that it had requested another executive session, that UP did not agree with TCU's interpretation of the O'Brien Proposed Award, and that the carrier was not creating any positions on the UP side of the operation at Kansas City. UP maintained that the only way that affected SP clerical employees could move "to the UP side of the operation" would be if they would replace existing UP clerical employees. UP's August 30, 1999 notices abolishing the twelve clerical positions,

which were also subject to the June 11, 1998 notice giving rise to the O'Brien decision, will become effective on October 29, 1999.

By decision dated October 22, 1999, Arbitrator O'Brien issued his final decision in this matter (TCU Exhibit 1). Mr. O'Brien modified the proposed award, at UP's request, to provide that the consolidated crew hauling work was to be governed by a single collective bargaining agreement. However, he rejected UP's position that it be the UP-CBA, finding that the consolidated work is to be placed under the SP Agreement because of its higher wage rates, superior extra board rules, and subcontracting prohibition.

B. UP's Consolidation of Crew Hauling Work

Notwithstanding the arbitration then pending or the representations made in its September 11, 1998 letter that it would delay implementation of its June 11, 1998 notice, UP has been consolidating the crew hauling work between Kansas City and points on former SP lines and UP lines since January 1, 1999. Between January and July of this year – i.e., while this arbitration and award were pending – UP issued three notices to the labor organizations representing its operating craft employees working on the former SP's Jefferson City, Fort Madison, and Herington lines. These notices, dated January 1, January 16, and July 5, 1999, respectively, changed the reporting points for these operating employees from Armourdale Yard to Neff. (Unrein Dec., Exhibits 2, 3, and 4) These employees continue, however, to board their trains at the same locations they did prior to the change in reporting points. (Unrein Dec., ¶9; Beebe Dec. ¶5) Beginning in January 1999, as crew hauling commenced to be consolidated, UP has utilized

an independent contractor to perform line haul[3] work from both Neff and Armourdale Yards in violation of the SP rules prohibiting subcontracting.[4] UP has in fact consolidated all crew hauling work in Kansas City under the terms of the UP-CBA, and has failed to comply with the terms of the O'Brien Award. Specifically, UP has (1) paid crew haulers in Kansas City the significantly lower utility clerk's daily rate of pay set forth in the UP-CBA, rather than the higher rate of pay of the SP-CBA; and (2) used independent contractors to perform work in violation of the SP-CBA

In spite of UP's reservation of its right to cancel its original notice and to reissue a new one, the August 30, 1999 notices and its prior conduct are in violation of the O'Brien Award. By letter dated September 11, 1998, UP agreed to TCU's request that it delay implementation of the June 11, 1998 notice, reserving

> the right to immediately effect the changes outlined in the original notice upon receipt of the Arbitrator's Award in the event a decision favorable to the Carrier is rendered without further notice (i.e., a new 60 day notice) to the Organization. Additionally, in the event circumstances change, the Carrier reserves the right to cancel the original notice at any time prior to or after the arbitration Award is rendered, canceling all assignment and option forms and serving a new 60 day notice, which, if necessary, would not be placed into effect until after a decision is rendered by the Referee.

(TCU Exhibit 4)

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[3]"Line haul" work, for purposes of this petition, refers to crew hauling work performed between a rail yard and various points on a rail line (also known as "deadhead" and relief runs), such as is necessary to ensure the carrier complies with federal Hours of Service Laws.

[4]UP has also utilized an independent contractor to haul crews between the Neff Yard and area hotels, we submit, in violation of both the UP and SP-CBA. Grievances filed under the UP-CBA are currently pending.

This reservation of rights to cancel the June 1998 notice does not give UP the authority to begin the implementation of the notice by consolidating crew hauling in Kansas City before the arbitration hearing is even held; complete the consolidation of crew hauling work in Kansas City after the cancellation of the notice; and then issue new notices involving the same twelve positions from its original June 11, 1998 notice, identified by the O'Brien Award as performing crew hauling duties. This bizarre chronology of events is summarized below:

Chronology of Events in Kansas City

June 11, 1998	UP issues a notice, pursuant to NYD-217, of the Carrier's intent to consolidate clerical work at the former SP's Armourdale Yard in Kansas City, KS, with work at UP's Neff Yard in Kansas City, MO.
September 11, 1998	UP sends a letter to TCU agreeing to expedited arbitration, and further agrees not to implement the transaction until a decision is rendered by the arbitrator.
January 1, 1999	UP changes reporting points (from Armourdale Yard to Neff) for former SP crews working on the Jefferson City line; UP also begins subcontracting crew hauling between Kansas City and points on the Jefferson City line.
January 6, 1999	Arbitration hearing over the 6/11/98 notice is held before Arbitrator Robert O'Brien in Boston, MA.
January 16, 1999	UP changes reporting points (from Armourdale to Neff) for former SP crews working on the Fort Madison line; UP also begins subcontracting crew hauling between Kansas City and points on the Fort Madison line.
March 25, 1999	Arbitrator O'Brien issues his proposed award. UP requests Executive Session and states it cannot meet until June 2, 1999, at the earliest.
May 18, 1999	UP notifies Arbitrator O'Brien and the TCU that it is cancelling the 6/11/98 notice, and argues that no arbitration award should issue because the dispute is now moot.

June 2, 1999	Executive session held. UP argues award now moot.
July 5, 1999	UP changes reporting points from Armourdale to Neff for former SP crews working on the Herington line; UP also begins subcontracting crew hauling between Kansas City and points on the Herington line.
August 25, 1999	Arbitrator O'Brien finds that the dispute is not moot, and issues his award, which reaffirms the positions taken in his 3/25/99 proposed award.
August 30, 1999	UP issues two new notices, abolishing twelve SP clerical positions at Armourdale. Each performed crew hauling as part of its duties.
September 8, 1999	UP requests another executive session.
October 15, 1999	Executive session held.
October 22, 1999	Final Award issues.

We submit that UP has engaged in a subterfuge designed to avoid the effect of the O'Brien Award. For the reasons set forth below, it should be directed to comply with that award and cease the implementation of its August 30 notices.

Specifically, TCU requests that the Board order the UP to comply with the O'Brien Award by ceasing and desisting from (1) paying employees performing the crew hauling work in Kansas City daily wages lower than those set forth in the SP-CBA for employees performing such work; and (2) using independent contractors to perform crew hauling work in Kansas City. Further, TCU requests that the Board order UP to cancel its August 30, 1999 notices; preserve the status quo by keeping the twelve SP clerks on active duty; and remand to the parties, under Arbitrator O'Brien's continuing jurisdiction, the determination of the selection and assignment of forces to perform the consolidated crew hauling work under the SP agreement.

As we demonstrate below, this relief is warranted in this matter because: (1) the O'Brien Award demonstrates the merits of TCU's case; (2) failure to issue such an order will cause irreparable harm both to the jurisdiction of the Board and to the involved employees; (3) UP will not suffer substantial harm as a result of such an order; and (4) the public interest is served by preventing the UP from openly defying the substance of the arbitrator's award.

I. The Board Should Order UP to Comply With the O'Brien Proposed Award.

Arbitration awards issued pursuant to Article I, Section 11 of New York Dock are presumptively valid, Chicago and North Western Transp. Co.–Abandonment–Near Dubuque and Oelwein, IA, 3 I.C.C.2d 729, 736 (1987) ("Lace Curtain") (arbitrators granted substantial deference by the Board in reviewing New York Dock arbitrations), and are enforceable as orders of the Board. 49 C.F.R. §1115.8 (arbitration award is not automatically stayed by the timely filing of an appeal; separate request for a stay is required); 49 C.F.R. §1115.2 (arbitration awards which are not effectively appealed "shall become the action of the Board"). Thus, a party's failure or refusal to comply with a Section 11 award effectively constitutes a violation of a Board order.

Arbitrator O'Brien has issued his award, finding that the crew hauling work in Kansas City must be performed subject to the terms of the SP-CBA, including the applicable wage rates, subcontracting prohibition, and extra board rules. That Award is valid unless reversed by the Board consistent with the procedures set forth in 49 C.F.R. §1115.8 and Lace Curtain. Even if UP petitions the STB to review the Award, it may not simply ignore the Award and continue

implementing its notice pending the outcome of such a petition. UP is required to comply with the Award, unless and until it is modified.

We would further request that the Board affirmatively adopt Arbitrator O'Brien's reasoning on the selection of the CBA applicable to the consolidated crew hauling work. In Carmen III this Board has established the standards for arbitrators to apply when considering the override of CBA's. In this case, Arbitrator O'Brien has applied those standards to a situation where the CBA selected by the carrier was demonstrably inferior in certain critical respects – wage rates, subcontracting, and extra board rules. The importance of this issue, we submit, warrants a full Board review; and to assist the Board in this regard, we are submitting the parties' briefs and the full record.

With respect to crew hauling functions in the Kansas City metropolitan area, the UP's June 11, 1998 notice (upon which the O'Brien Award is based) covers the same positions as the August 30, 1999 notices. However, as noted above, UP began the actual consolidation of crew hauling in January of 1999 and completed that process in July 1999.

Soon after Arbitrator O'Brien issued his proposed award on March 25, 1999, UP withdrew the June 11 notice with full knowledge that it had already begun consolidating this crew hauling work. While UP sought an executive session for the ostensible purpose of arguing that the withdrawal of the June 11 notice rendered the proposed award moot, UP continued to take steps to implement the transaction contemplated in the notice. On July 5, 1999, less than two months after supposedly cancelling this notice, UP changed the reporting point for former SP crews working on the Herington line from Armourdale to Neff, once again placing the work of hauling those crews under the terms of the UP-CBA. Following the issuance of Arbitrator

O'Brien's August 25, 1999 decision rejecting UP's mootness arguments, the UP issued notices dated August 30, 1999, abolishing the positions of twelve SP clerks with crew hauling duties, effective October 29, 1999, thereby consolidating crew hauling work in Kansas City, as called for by the original June 11, 1998 notice.

This chronology of events clearly demonstrates UP's effort to circumvent the arbitrator's (and, consequently, the Board's) authority. While the UP had reserved the right to cancel its June 1998 notice, it should not be permitted to cancel that notice after it had already begun its implementation and then issue a new notice after it had completed the consolidation of crew hauling work in Kansas City. We submit that, against this background, UP should now be required to comply with the O'Brien Award. That Award sets forth that UP may only consolidate crew hauling work by applying the SP-CBA to employees performing this work. Despite the award's terms, the crews are now being hauled by lower-paid UP utility clerks and independent contractors, both practices that violate the O'Brien Award. Absent the Board's issuance of an order to comply with the award, twelve positions with crew hauling duties at Armourdale will be abolished.

The UP's violation of the O'Brien Proposed Award amounts to a violation of a Board order. TCU respectfully requests that the Board direct UP to cease such a flagrant violation of the New York Dock conditions.

II. The Board Should Order the UP to Cancel Its August 30, 1999, Notice, and to Preserve the Status Quo.

In addition to enforcing the O'Brien Proposed Award, TCU requests that the Board order the UP to cancel its notices of August 30, 1999, in which it states that it will abolish the positions of twelve (12) SP clerks at the Armourdale Yard; preserve the status quo for the affected employees by not otherwise laying them off; and that the questions of the selection and assignment of forces be remanded to the parties, with Arbitrator O'Brien maintaining continuing jurisdiction over this issue. Failure to issue such an order will do irreparable harm both to the twelve affected employees and to the Board's own jurisdiction. UP can show no comparable harm to be suffered from the issuance of such an order. Finally, issuing such an order will clearly serve the public interest by preserving the Board's jurisdiction and authority to interpret and enforce the New York Dock Conditions.

To justify the issuance of such an order, TCU must demonstrate: (1) it is likely to prevail on the merits of the underlying dispute; (2) failure to issue the order will result in irreparable harm; (3) such irreparable harm outweighs any harm the issuance of the order would inflict upon the party against whom it is sought; and (4) issuing the order serves the public interest. Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977); Delaware & Hudson Co.--Lease and Trackage Rights--Springfield Terminal Ry. Co., STB Fin. Docket No. 30965 (Sub-No. 4)(October 30, 1995), at *1. For the reasons set forth below, TCU respectfully submits that a cease and desist order is warranted in this matter under the Holiday Tours standard.

A. TCU Is Likely to Prevail on the Merits.

TCU has already prevailed on the merits in this matter. The O'Brien Award clearly states that any consolidation of SP and UP crew hauling work must be done pursuant to the SP Agreement. The issue before this Board is whether the UP can circumvent that award by implementing its consolidation, cancelling the original June 11, 1998 notice, and then, after the consolidation has been completed, issuing a new notice. For the reasons set forth above, we submit that UP should not be permitted to do so. The first step in securing compliance with the award is ordering the cancellation of the August 30 notices.

B. Failure to Issue a Cease and Desist Order Against UP Will Cause Irreparable Harm

Failure to issue a cease and desist order in this matter will also cause irreparable harm to the jurisdiction and authority of the Board, as well as to the affected SP employees.

The UP's effort to consolidate the crew hauling work formerly performed by the SP clerks at Armourdale to the UP-CBA, while at the same time abolishing the SP clerical positions, strikes directly at the heart of the negotiation and arbitration processes contemplated in New York Dock. In its July 20, 1998 decision in CSX/NS--Control and Operating Leases/Agreements--Conrail, STB Fin. Docket No. 33388 (Decision No. 89) ("Conrail"), the Board emphasized its reliance upon and deference to these procedures:

> In approving a rail merger or consolidation such as this, we have never made specific findings in the first instance regarding any CBA changes that might be necessary to carry out a transaction, and we will not do so here. ***Those details are best left to the process of negotiation and, if necessary, arbitration under the New York Dock procedures.*** For us to make determination on those issues now would be premature. We will resolve them only as a last resort, giving deference

> to the arbitrator. ***Specifically, this means that our approval of this transaction does not indicate approval or disapproval of any of the CBA overrides that applicants have argued are necessary to carry out the transaction; the arbitrators are free to make whatever findings and conclusions they deem appropriate with respect to CBA overrides under the law.***

Conrail, at 126-27 (emphasis added; internal citations and footnotes omitted). The Board has also emphasized the importance of good faith negotiations in its recent decision in Canadian National Ry. Co., Grand Trunk W.R. Corp., Grand Trunk W.R. Inc.–Control–Illinois Central Corp., Illinois Central R. Co., Chicago, Central and Pacific R. Co., and Cedar River R. Co., STB Fin. Docket 33556 (Decision No. 37) (May 21, 1999) (CN/IC):

> We admonish the parties to bargain in good faith to embody implementing agreements in CBAs rather than having such agreements arbitrally imposed. Good faith bargaining has always been an integral component of the New York Dock process. Applicants conceded at oral argument that the arbitrator, and the Board, if necessary, could properly take notice of any abuse of process in their deliberations.

CN/IC, at 42; see also September 28, 1999, Testimony of STB Chair Linda Morgan before the Senate Commerce, Science and Transportation Committee, at 16, 17 (citing Conrail and CN/IC).

The Board's ability to rely upon an effective and good faith negotiation process for enforcing New York Dock is undermined by the UP's actions in this matter. The chronology of UP's notice, implementation, cancellation, and issuance of a new notice demonstrate its intent to circumvent the arbitration process. The Board should not countenance the undermining of arbitral procedures central to the enforcement of the New York Dock conditions. Allowing UP to violate the O'Brien Proposed Award with impunity would do irreparable harm to the Board's statutory authority under 49 U.S.C. §11326.

Failure to impose a cease and desist order will also visit irreparable harm on the affected employees. One of the central tenets of New York Dock precedent is that affected employees are provided the opportunity to follow their work when it is consolidated. UP, however, has taken the position that the affected employees have no work to follow. However, as we noted above, much of the crew hauling work is being performed by an independent contractor, in violation of the SP-CBA. Whether new positions will be needed once subcontracting is terminated, and the selection and assignment of forces as well as seniority rights of the affected employees must be resolved before these positions can be abolished. To do otherwise will irreparably harm the prescribed New York Dock bargaining process, as well as the affected employees.

C. UP Will Not Suffer Substantial Harm As a Result of the Issuance of an Order to Cancel the Notice and Preserve the Status Quo.

Issuance of an order to cease and desist from implementing the August 30 notice and to preserve the status quo in this matter will not impose any substantial harm upon UP. Requiring UP to comply with this Award (and, therefore, with an order of the Board) cannot be reasonably construed as imposing harm on UP – such an order merely ensures that UP meets its legal obligations under New York Dock.

D. Enforcing the O'Brien Award and Imposing a Stay on the August 30 Notices Serves the Public Interest.

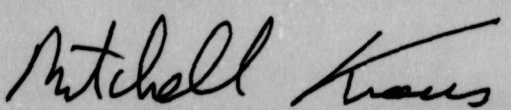
The public interest is also served by issuance of such an order. The Board has expressly relied upon the good faith negotiation and arbitration processes in order to facilitate the New York Dock conditions. See Conrail, at 126-27; CN/IC, at 42. As noted above, issuance of a

cease and desist order here advances the public's interest in ensuring that these procedures play the central role envisioned by the Board. No public purpose is served by allowing a carrier to impose its own interpretation of New York Dock on violation of an arbitrator's decision.

III. Conclusion

For the reasons stated above, TCU asks that the Board order UP to comply with the O'Brien Proposed Award in its entirety and, specifically, those portions (1) prohibiting the UP from using contractors to perform crew hauling work, and (2) requiring that said work be performed under the pay rates set forth in the SP-CBA. TCU also asks that the Board order the UP to (1) cancel its August 30, 1999 notices abolishing the positions of those twelve (12) SP clerks; (2) preserve the status quo regarding the employment status of these individuals; and (3) remand to the parties, under Arbitrator O'Brien's jurisdiction, all issues pertaining to selection and assignment of forces, including the seniority rights of affected employees.

Respectfully submitted,



Mitchell M. Kraus
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Rockville, Maryland 20850
(301) 948-4910

Date: October 25, 1999

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Enforcement of an Article I, Section 11 Arbitration Award and for an Order to Cease and Desist was served this 25th day of October, 1999, via first-class mail, postage prepaid, upon:

Brenda J. Council, Esquire
Kutak Rock
1650 Farnam Street
Omaha, NE 66102-2186

Mitchell M. Kraus

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

- - - - - - - - - - - - - - -

STB Finance Docket No. 32760

TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION
and
SOUTHERN PACIFIC RAILWAY LINES (SSW)
UNION PACIFIC RAILROAD COMPANY

- - - - - - - - - - - - - - -

DECLARATION OF PHILIP A. BEEBE

- - - - - - - - - - - - - - -

1. I am the Chairman of the Protective Committee for Transportation• Communications International Union District 284. I have served as District Chairman since 1998, and previously as Chairman of the Protective Committee for TCU Local 284 (District 284's predecessor entity) since 1993.

2. As District Chairman (and Local Chairman before that), I represent those employees of the Union Pacific Railroad ("UP") employed in the clerical craft and class who work in the Kansas City Metropolitan Area. Specifically, I represent these members with respect to grievances raised under the applicable collective bargaining agreement ("UP-CBA"), including those provisions of the UP-CBA that relate to the exclusive rights of UP clerical employees to perform certain types of work in the Kansas City Metropolitan area.

3. Under the UP-CBA, UP utility clerks represented by District 284 have the exclusive right to haul UP crews to all points within a thirty (30) mile radius of the UP's Neff Yard, in Kansas City, MO.

4. Between January and July of 1999, UP changed the reporting points for the crews working on the former SP's Jefferson City, Fort Madison, and Herington lines. Prior to the effective dates of these notices, these crews reported to the former SP's Armourdale Yard; currently, these crews report to the UP's Neff Yard.

5. Despite this change in reporting points, these former SP crews continue to board their trains for service at the same locations they did prior to the effective dates of these notices. UP utility clerks generally haul these crews between the Neff Yard office and their trains, whether at Armourdale or elsewhere.

6. Since the change in reporting points, the UP utility clerks have been responsible (pursuant to the UP utility clerks collective bargaining agreement) for performing crew hauls between the Neff Yard and those points on the former SP lines within the metropolitan Kansas City area. UP utility clerks have not performed any crew hauls between Neff Yard and points on the former SP lines that extend beyond the 30 mile jurisdictional limit.

7. Since the UP changed these reporting points for former SP crews, the railroad has used independent contractors to perform crew hauls between Kansas City and those points on the former SP lines which fall outside of District 284's exclusive jurisdiction (i.e., more than 30 mile radius).

I declare under penalty of perjury that the foregoing to be true and accurate to the best of knowledge and recollection.

Philip A. Becbe

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 32760

TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION
and
SOUTHERN PACIFIC RAILWAY LINES (SSW)
UNION PACIFIC RAILROAD COMPANY

DECLARATION OF LESLIE J. UNREIN

---

1. I am the Chairman of the Protective Committee for Transportation• Communications International Union District 150. I have served as District Chairman since 1993.

2. As District Chairman, I represent those employees of the former Southern Pacific Railway ("SP") employed in the clerical craft and class who work in the Kansas City Metropolitan Area. Specifically, I represent these members with respect to grievances raised under the applicable collective bargaining agreement ("SP-CBA"), including those provisions of the SP-CBA that relate to the exclusive rights of SP clerical employees to perform certain types of work in the Kansas City Metropolitan area.

3. Since 1980, SP clerical employees (working out of SP's Armourdale Yard in Kansas City, KS) held the exclusive right to haul SP crews within the Armourdale Yard and between Kansas City and all points on SP lines as far west as (but not including) Topeka, KS, and as far east as Lees Summit, MO. In addition, SP clerical employees at Armourdale had the exclusive right to haul SP operating crews to and from foreign carrier lines (e.g., Norfolk

Southern Ry.) within this defined geographic radius.

4. The Jefferson City, Fort Madison, and Herington rail lines are former SP lines upon which former SP crews continue to operate. Crew hauling between Kansas City and points on these lines (between Topeka and Lee's Summit, MO) are within the SP clerks' exclusive scope rights under the SP-CBA.

5. Under the SP-CBA, crew hauling within the Armourdale Yard also falls within the exclusive scope rights of the SP clerks.

6. Between January and July of 1999, UP issued three bulletins to change reporting points for the former SP crews on the Jefferson City, Fort Madison and Herington lines. The first bulletin, effective January 1, 1999, changed the reporting point for former SP crews working on the Jefferson City line from the Armourdale Yard to the UP's Neff Yard in Kansas City, MO. Attached as Exhibit 1 to this declaration is a copy of the January 1 notice.

7. The second bulletin, effective January 16, 1999, changed the reporting point for former SP crews working on the Fort Madison line from the Armourdale Yard to the Neff Yard. Attached as Exhibit 2 to this declaration is a copy of the January 16 notice.

8. The third bulletin, effective July 5, 1999, changed the reporting point for former SP crews working on the Herington line from Armourdale Yard to Neff Yard. Attached as Exhibit 3 to this declaration is a copy of the July 5 notice.

9. Despite this change in reporting points, nothing has changed with respect to the locations where these former SP crews board their respective trains to commence service, and UP utility clerks generally haul these crews between the Neff Yard office and their trains, in violation of the rights of SP clerks to haul SP crews both inside and outside of the Armourdale Yard.

10. Since the issuance of these bulletins, the SP clerks stationed at Armourdale are no longer hauling former SP crews between Armourdale and points on SP and foreign lines.

I declare under penalty of perjury that the foregoing to be true and accurate to the best of knowledge and recollection.

Leslie J. Unrein

~~Lester~~ J. Unrein
LESLIE

1J11 15:32 99/004 U3702 PE62100 .ON N5807 BY TCS FROM HB91491 (=ON) OSUN186

UNION PACIFIC RAILROAD COMPANY
TYPE: GENERAL ORDER SUPERINTENDENT BULLETIN X ORD/BULLTN # 00107
CAD OFFICE BULLETIN DIGICON OFFICE BULLETIN
S 'ICE UNIT(S): 05

SUBDIVISION:
SERVICE CLASS: TEY MOFW MECH DISP ALL X
EFFECTIVE DATE: 01/01/99 00:01
CANCELLATION DATE: 12/31/99 23:59
SIGNATURE: R M SCOGGINS
SIGNATURE TITLE: SUPERINTENDENT

SUBJECT TITLE: 106-ON/OFF DUTY POINTS, L

----------DOCUMENT TEXT----------

UNION PACIFIC RAIL ROAD
KANSAS CITY SUPERINTENDENT BULLETIN NO. 106

PURPOSE:
ON/OFF DUTY POINTS, LODGING

THE PURPOSE OF THIS NOTICE IS TO CHANGE ON DUTY/OFF DUTY AND LODGING FOR FORMER SP/SSW CREWS WORKING IN AND OUT OF KANSAS CITY FROM JEFF CITY.

EFFECTIVE: 0001, JANUARY 01, 1999

CANCELLATIONS:

SPECIFIC WORDING: THE ON DUTY AND OFF DUTY POINT FOR ALL FORMER SP/SSW ENGINEERS & CONDUCTORS WORKING IN & OUT OF KANSAS CITY FROM JEFF CITY IS CHANGED TO 6400 MARTIN AVENUE, NEFF YARD, KANSAS CITY, MO. THE DESIGNATED LODGING PLACE AT KANSAS CITY WILL BE THE HAMPTON INN, 1051 N. CAMBRIDGE KANSAS CITY, MO.

EOM

EXH. 1

1J11 15:45 99/014 U5495 PE62100 .ON N7906 BY TUX FROM Q133133 (=ON) IRAD024

UNION PACIFIC RAILROAD COMPANY
TYPE: GENERAL ORDER SUPERINTENDENT BULLETIN X ORD/BULLTN # 00220
CAD OFFICE BULLETIN DIGICON OFFICE BULLETIN
SERVICE UNIT(S): 05

SUBDIVISION:
SERVICE CLASS: TEY MOFW MECH DISP ALL X
EFFECTIVE DATE: 01/16/99 00:01
CANCELLATION DATE: 12/31/99 23:59
SIGNATURE: R M SCOGGINS
SIGNATURE TITLE: SUPERINTENDENT

SUBJECT TITLE: 120-CHANGE ON DUTY/OFF DU

----------DOCUMENT TEXT----------

UNION PACIFIC RAIL ROAD
KANSAS CITY SUPERINTENDENT BULLETIN NO. 120

PURPOSE:
CHANGE ON DUTY/OFF DUTY POINT/ROAD CREWS WORKING IN AND OUT OF KANSAS CITY FROM FORT MADISON.

THE PURPOSE OF THIS NOTICE IS TO ADVISE CREWS THAT THE ON DUTY/OFF DUTY POINT HAS BEEN CHANGED FOR ROAD CREWS WORKING IN AND OUT OF KANSAS CITY FROM FORT MADISON.

EFFECTIVE: 0001, JANUARY 16, 1999

CANCELLATIONS:

THE ON DUTY AND OFF DUTY POINT FOR ENGINEERS AND CONDUCTORS WORKING IN AND OUT OF KANSAS CITY FROM FORT MADISON IS CHANGED TO 6400 MARTIN AVENUE, NFFF YARD, KANSAS CITY, MO.

EOM

EXH. 2

UNION PACIFIC RAILROAD COMPANY

----------DOCUMENT TEXT----------

UNION PACIFIC RAILROAD
KANSAS CITY SUPERINTENDENT BULLETIN NO. 144

PURPOSE:
TO CHANGE ON DUTY / OFF DUTY POINT FOR ROAD CREWS WORKING IN AND OUT OF KANSAS CITY FROM HERINGTON, KS.

EFFECTIVE: 0001, JULY 05, 1999

CANCELLATIONS:

EFFECTIVE JULY 5, 1999 THE ON DUTY AND OFF DUTY POINT FOR ENGINEERS AND CONDUCTORS WORKING IN AND OUT OF KANSAS CITY FROM HERINGTON, KS. IS CHANGED TO 6400 MARTIN AVENUE, NEFF YARD, KANSAS CITY, MO.

SIGNATURE: R M SCOGGINS
SIGNATURE TITLE: SUPERINTENDENT

EOM

Exh. 3

195938 V2

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 32760 Sub 36

TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION
and
SOUTHERN PACIFIC RAILWAY LINES (SSW)
UNION PACIFIC RAILROAD COMPANY

I

EXHIBITS TO PETITION FOR ENFORCEMENT OF AN ARTICLE I, SECTION 11 ARBITRATION AWARD AND FOR AN ORDER TO CEASE AND DESIST

Mitchell M. Kraus
General Counsel
Christopher Tully
Assistant General Counsel
Transportation•Communications International Union
3 Research Place
Rockville, Maryland 20850
(301) 948-4910

TCU Exhibit 1

ROBERT M. O'BRIEN
ATTORNEY AT LAW
16 FOX HILL LANE
MILTON, MA 02186
(617) 696-0835

October 21, 1999

Dean D. Matter, General Director – Labor Relations
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179

-and-

Robert F. Davis, President
ASD/TCU
53 W. Seegers Road
Arlington Heights, IL 60005

RE: **SECTION 11 NEW YORK ARBITRATION**
(Consolidation at Kansas City Terminal)

Gentlemen:

I am enclosing herewith an executed copy of my Award in the above-referenced matter. Based on the arguments advanced at the October 15, 1999 executive session, I have made changes to the draft Award that I forwarded you on March 25, 1999 on page 12 and pages 20 through 22. On page 12 a new paragraph was added before Question #2. The changes on pages 20 through 22 should be self-explanatory. Other than these changes the draft Award has not been altered. If you have any questions, please feel free to contact me.

Very truly yours,

Robert M. O'Brien

Robert M. O'Brien
New York Dock Arbitrator

RMO'B/amm
enclosures

**ARBITRATION COMMITTEE ESTABLISHED
PURSUANT TO ARTICLE I, SECTION 11,
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS**

In the matter of arbitration between:

**Transportation Communications
International Union**

-and-

Union Pacific Railroad Company

STATEMENT OF THE ISSUE

After carefully reviewing the extensive record submitted to this Committee, we submit that the following accurately reflects the questions that must be decided in this arbitration:

Question #1

Does the Carrier's Notice of June 11, 1998, involving positions located at Armourdale, Kansas and Kansas City, Missouri, contemplate a "transaction" pursuant to the parties' December 16, 1996 Implementing Agreement and the New York Dock Conditions?

Question #2

If the answer to Question No. 1 is in the affirmative should the UP/TCU Collective Bargaining Agreement or the SP/TCU Collective Bargaining Agreement apply to those employees affected by the "transaction"?

BACKGROUND

On November 30, 1995, the Union Pacific Corporation (hereinafter referred to as the Carrier or the UP) filed application with the Interstate Commerce Commission (ICC)

seeking approval to obtain common control and to merge the rail carriers controlled by the UP (Union Pacific Railroad Company and Missouri Pacific Railroad Company) with the rail carriers controlled by the Southern Pacific Rail Corporation (Southern Pacific Transportation Company-Eastern and Western Lines, St. Louis Southwestern Railway Company, SPCSL Corporation, and the Denver & Rio Grande Western Railroad Company). In its application, the Carrier declared that significant economies and efficiencies could be achieved by the merger of these railroads which would provide a transportation benefit to the public. Following extensive hearings and testimony, the Surface Transportation Board (hereinafter referred to as the STP or the Board,), successor to the ICC, approved the Carrier's application on August 6, 1996 in Finance Docket No. 32760. In approving this merger, the STB imposed the New York Dock Conditions adopted by the ICC in Finance Docket No. 28250, 360 ICC 60 (1979).

In accordance with the requirements of the New York Dock Conditions, on September 16, 1996, the Carrier served notice on the Allied Services Division of the Transportation Communications Union (hereinafter referred to as the TCU or the Organization) of its intent to consolidate clerical forces throughout the merged Union Pacific-Southern Pacific Transportation Company (hereinafter referred to as the Southern Pacific or the SP) system. The parties entered into negotiations and signed Implementing Agreement No. NYD-217 (hereinafter referred to as NYD-217) on December 18, 1996.

NYD-217 provides, in pertinent part, as follows:

> . . . **WHEREAS**, pursuant to Article I, Section 4 of the New York Dock Conditions, the following Agreement is made to cover the general rearrangement of functions throughout the UP and the SP, and this rearrangement is made to effect the merger of the UP and SP properties. It is expected that the completion of this rearrangement will

involve all areas of the merged railroad's organizational structure.

UP and SP expect that the rearrangement will be implemented in several stages. The Company anticipates that at least 1,800 clerical employees will be affected. These employees are now positioned at various locations across the UP and SP.

The rearrangement of employees and/or work will commence after the effective date of this Agreement. . . .

ARTICLE II – TRANSACTIONS

After the effective date of this Agreement, the Company will commence rearrangement and consolidation of work and positions from locations throughout SP and UP.

The Company will provide the Organization with a detailed plan by location of transactions to take place and distribution of remaining work. The plan will include a listing of the jobs to be abolished and the incumbents; the jobs to be created, the approximate date(s) of transfer; a description of the work to be transferred and the disposition of work to remain, if any. If the transfer of employees or the abolishment of jobs is involved, the plan for each location may be implemented sixty (60) days or later after issuance. It is understood that the sixty (60) days contemplates five (5) days or more notice to the Organization, twenty (20) days for employees to make election, five (5) days for the Carrier to award employee options, and thirty (30) days to prepare for and complete the move. If the plan involves only the transfer of work, such transfer may occur thirty (30) days or later after issuance.

After notifying the Organization of the plan to transfer work and/or employees, the General Chairman may request a meeting to discuss the Carrier's plan. A request for a meeting from the involved General Chairman must be made within five (5) days after the Carrier's plan notice is received by the Union, and said meeting must be held within ten (10) days after the Union's request is received by the Carrier. . . .

The parties also agreed to numerous Letters of Understanding that were appended to NYD-217. Letter of Understanding No. 5 addresses the procedure for bulleting positions that will be established as a result of the transfer of work pursuant to the Implementing Agreement. Letter of Understanding No. 18 provides that SP employees transferring to the UP and UP employees transferring to the SP will have certain rates of pay protected. The protected rates are enumerated in the Letter of Understanding.

Immediately following the signing of NYD-217, the Carrier began preparing Notices pursuant to Article II of that Agreement advising the Organization of its intent to consolidate SP clerical work with UP clerical work. The first such Notice was served on December 31, 1996. To date, the Carrier has served over 130 Notices which have resulted in the consolidation of SP clerical work throughout the merged UP-SP system.

On June 11, 1998, the Carrier served the TCU with Notice of its intent to consolidate clerical work at the Neff Yard and Armourdale Yard in the Kansas City Terminal. The Neff Yard(s) is a UP facility in Kansas City, Missouri. The Armourdale Yard is a former SP facility in Kansas City, Kansas. The two yards are approximately 10 miles apart. Clerical employees at Neff Yard work under a Union Pacific Collective Bargaining Agreement (hereinafter referred to as the UPCBA) whereas clerical employees at the Armourdale Yard work under a SP Collective Bargaining Agreement (hereinafter referred to as the SPCBA). [The Agreement is actually a former St. Louis Southwestern Railway Company Agreement.]

The June 11, 1998 Notice stated that the Carrier intended to eliminate all of the clerical positions currently assigned to the SP Armourdale Yard operations and transfer

all of this work to clerical positions to be established under the Union Pacific/TCU Collective Bargaining Agreement. The Carrier amended this Notice on June 24, 1998.

On or around June 11, 1998, when the Notice was served on the Organization, there were 43 clerical jobs filled by 42 employees at the UP Neff Yard. At the same time, there were 21 clerical positions filled by 19 employees at the former SP Armourdale Yard. For many of these positions, the UP rate of pay is lower than the applicable SP rate of pay. The work performed by the SP clerical employees was to be transferred to 15 Utility Clerk positions and six (6) Ramp Clerk positions under the UPCBA, according to the June 11, 1998 Notice.

Prior to the merger of the UP and SP in 1996, there was an intermodal facility at both the Neff Yard and Armourdale Yard. At the Armourdale intermodal ramp, loading and unloading functions are performed by an independent contractor while the remaining clerical ramp functions are performed by UP clerical employees. At present, the clerical functions, as well as the loading, unloading and tie-down functions at the Neff Intermodal Ramp are performed by an independent contractor.

Crew hauling operations at Neff Yard are divided pursuant to a 1991 agreement between the UP and TCU. Under this agreement, crew hauling within the Neff Yard itself and between the yard and local hotels where operating craft employees lodge between runs are performed under the UP Agreement. All crew hauling runs made from Neff Yard to other points outside the facility are performed by an independent contractor.

Crew hauling at the Armourdale Yard, both within the yard and to points outside the yard, is performed under the SP Agreement. Further, pursuant to a 1980 Total Operating Procedures System (TOPS) Agreement applicable to the Armourdale Yard,

all of this work to clerical positions to be established under the Union Pacific/TCU Collective Bargaining Agreement. The Carrier amended this Notice on June 24, 1998.

On or around June 11, 1998, when the Notice was served on the Organization, there were 43 clerical jobs filled by 42 employees at the UP Neff Yard. At the same time, there were 21 clerical positions filled by 19 employees at the former SP Armourdale Yard. For many of these positions, the UP rate of pay is lower than the applicable SP rate of pay. The work performed by the SP clerical employees was to be transferred to 15 Utility Clerk positions and six (6) Ramp Clerk positions under the UPCBA, according to the June 11, 1998 Notice.

Prior to the merger of the UP and SP in 1996, there was an intermodal facility at both the Neff Yard and Armourdale Yard. At the Armourdale intermodal ramp, loading and unloading functions are performed by an independent contractor while the remaining clerical ramp functions are performed by UP clerical employees. At present, the clerical functions, as well as the loading, unloading and tie-down functions at the Neff Intermodal Ramp are performed by an independent contractor.

Crew hauling operations at Neff Yard are divided pursuant to a 1991 agreement between the UP and TCU. Under this agreement, crew hauling within the Neff Yard itself and between the yard and local hotels where operating craft employees lodge between runs are performed under the UP Agreement. All crew hauling runs made from Neff Yard to other points outside the facility are performed by an independent contractor.

Crew hauling at the Armourdale Yard, both within the yard and to points outside the yard, is performed under the SP Agreement. Further, pursuant to a 1980 Total Operating Procedures System (TOPS) Agreement applicable to the Armourdale Yard,

the Carrier is precluded from contracting out clerical work. The Scope Rule of the TOPS Agreement prohibits the Carrier from removing work from TCU's jurisdiction. There is no such restriction under the UPCBA, however, for ramp work at Neff Yard.

Pursuant to a longstanding TOPS Agreement on the Armourdale property, the Carrier is required to maintain a guaranteed extra board consisting of a minimum of fifteen percent (15%) of permanent employees. The corresponding UP Agreement at Neff Yard requires a minimum extra board of ten percent (10%) of permanent employees.

The seven ramp positions which the Carrier proposes to rebulletin at Armourdale Yard under the UP Agreement will be paid at a daily rate of $120.61. This is $9.05, or 7%, less than the current rate under the SP Agreement for ramp clerks at Armourdale Yard. These newly bulletined positions will be roughly equivalent to the current position of ramp clerk at the Armourdale Yard, according to the Organization. The newly created crew hauling positions at both Neff Yard and Amourdale Yard will pay a rate of pay lower than the rate of the SP positions being abolished. The Organization contends the rate will be between 34% and 36% lower than the present SP rates.

The Carrier's June 11 Notice proposes to abolish the following positions under the SP Agreement at the Armourdale Yard: one Chief Clerk; two Assistant Chief Clerks; seven General Clerks; three Clerk/Telegraphers; one Janitor; and one Extra Board position. In lieu of these positions, the Carrier intends to bulletin twelve "Utility Clerk" positions and four Extra Board clerical positions. Of these twelve Utility Clerk positions, six will be posted at Neff Yard, three will be posted at Armourdale Yard and the remaining three will be assigned three days a week to Neff Yard and two days a week to Armourdale Yard. All four Extra Board positions will be bulletined at Neff Yard.

Under the Scope Rule of the SP Agreement, crew hauling at the Armourdale Yard may not be contracted out. Under the UP Agreement, crew hauling within the confines of the Neff Yard is performed by UP employees represented by TCU. However, the UP Agreement permits the Carrier to contract out crew hauling involving the pick up and delivery of crews outside the Neff Yard.

On July 30, 1998, the TCU responded to the June 11, 1998 Notice. The Organization claimed that the Notice was inappropriate and not in accordance with the spirit and intent of NYD-217. Moreover, it would place the clerical employees at Armourdale under an inferior collective bargaining agreement, according to the Organization, since their rates of pay would be reduced considerably; clerical employees could have their work contracted out; and the Extra Board Agreement at Neff Yard is inferior to the Extra Board TOPS Agreement at Armourdale. The Union requested the Carrier to withdraw the Notice.

On September 11, 1998, the Carrier responded to the Organization's July 30, 1998, letter. The Carrier insisted that the June 11, 1998 Notice and the changes proposed therein embraced the spirit and intent of NYD-217. Nevertheless, it was willing to submit the issue to final and binding arbitration if no agreement could be reached. UP agreed to delay implementation of the changes proposed by the Notice pending the outcome of arbitration subject to conditions set forth in its September 11, 1998, letter.

The parties subsequently established this Arbitration Committee under Article I, Section 11, of the New York Dock Conditions. They submitted extensive evidence and arguments in support of their respective positions in pre-hearing submissions. An arbitration hearing was held on January 6, 1999, in Boston, Massachusetts. The Union

and the Carrier also submitted post-hearing statements summarizing their respective contentions.

It is the Organization's position that no bona fide transaction is even contemplated by the Carrier's June 11, 1998 Notice since, save for crew hauling, no rearrangement of forces will actually take place between Armourdale Yard and Neff Yard. Rather, the ramp work and office work will remain distinct at each facility. Indeed, there is no ramp work performed by UP clerks at Neff Yard. To the extent that the Carrier proposes to remove certain outside of yard crew hauling work from Armourdale Yard, the Organization contends that inasmuch as that work may be subcontracted, it does not constitute a transaction. Therefore, since no work will be coordinated between Armourdale Yard and Neff Yard, the Notice is simply a device to impose a collective bargaining agreement with lower rates of pay and less favorable rules upon the employees at Armourdale Yard, according to the TCU.

Assuming, arguendo, that a transaction is found to exist, only those positions whose work is actually being coordinated should be subject to the Carrier's June 11, 1998 Notice, in the Organization's view. If this Committee concludes that a transaction exists as to certain positions and/or work being transferred to the Neff Yard, then the Carrier should not be permitted to override the SPCBA rates of pay, subcontracting restrictions and guaranteed extra board rules since there is no necessity for such an override, in the Organization's opinion.

The Carrier maintains that it intends to transfer customers and workloads between the TFC Ramp at Armourdale and the Intermodal Ramp at Neff Yard. Such a commingling of work could not have occurred without the merger between the UP and

the SP, the Carrier avers. Indeed, the whole Kansas City Terminal is being consolidated. Therefore, this consolidation constitutes a "transaction" under both New York Dock and NYD-217, according to the Carrier.

It is the Carrier's position that the UPCBA at Neff Yard is not inferior to the SPCBA at Armourdale Yard as claimed by the Organization. And in any event, it contends that NYD-217 gave it the unrestricted right to select what collective bargaining agreement shall apply to employees whose work and/or positions are commingled.

Inasmuch as the preponderance (72%) of clerical positions at Kansas City fall under the UPCBA, it is logical to place all clerical employees under this Agreement, in the Carrier's opinion. Moreover, Kansas City is going to be a pure UP Terminal with all employees there working under UP collective bargaining agreements. Since the efficiency of operations that will result from this transaction will provide a benefit to the public, it is consistent with STB requirements, according to the Carrier.

FINDINGS AND OPINION

Question #1

> Does the Carrier's Notice of June 11, 1998 contemplate a "transaction" pursuant to the parties' December 16, 1996 Implementing Agreement and the New York Dock Conditions?

The Organization concedes that the June 11, 1998 Notice regarding crew hauling work constitutes a "transaction" under Article II of NYD-217 and the New York Dock Conditions. The work of transporting all crews, both UP and former SP, is to be commingled at the Kansas City Terminal. This commingling of work now performed

separately at the Neff Yard and Armourdale Yale does indeed constitute a transaction under both the New York Dock Conditions and NYD-217.

However, the Organization contends that since the ramp work and office work is not being transferred between Armourdale Yard and Neff Yard there is no transaction involving clerical employees working on the ramp and in the office at Armourdale Yard. Abolishing positions and rebulleting them at the same location is not a transaction under New York Dock or NYD-217, in the Organization's opinion.

Article II of NYD-217 allows the Carrier to rearrange and consolidate work and positions from locations throughout the merged SP & UP property. The Carrier contends that it plans to transfer customers and workloads between the TFC Ramp at Armourdale Yard and UP's Intermodal Ramp at Neff Yard. But for the SP and UP merger this rearrangement of work would not be possible, the Carrier maintains. Accordingly, the transfer of this work between the UP Neff Yard and the erstwhile SP Armourdale Yard constitutes a transaction under NYD-217 and the New York Dock Conditions, the Carrier insists.

This Committee is constrained to conclude that the Carrier's June 11, 1998 Notice lacks the specificity mandated by Article II of NYD-217. Article II requires the Carrier to provide the Organization with a detailed plan by location of transactions to take place and distribution of the remaining work. The plan will include:

- A listing of the jobs to be abolished and the incumbents
- The jobs to be created
- The approximate date(s) of transfer
- A description of the work to be transferred and the disposition of work to remain, if any

The June 11, 1998 Notice does not provide the TCU with the detailed plan mandated by Article II regarding the ramp work and office work allegedly to be rearranged and consolidated at Neff Yard and Armourdale Yard in Kansas City, in the opinion of this Committee. Moreover, the Carrier did not explain who would service the Intermodal Ramp at Neff Yard subsequent to a consolidation and rearrangement of this work. Currently, that ramp work is performed by an independent contractor, not by clerical employees represented by the TCU. It appears that no intermodal work is being transferred from Neff Yard to Armourdale Yard. And it is unclear from the June 11, 1998 Notice what ramp work and/or positions are being transferred from Armourdale Yard to Neff Yard and from Neff Yard to Armourdale Yard, if any.

Until the detailed plan required by Article II of NYD-217 is provided the Organization this Committee cannot determine whether there is going to be a rearrangement and consolidation of clerical ramp work and/or positions at Armourdale Yard and Neff Yard in Kansas City pursuant to that Implementing Agreement. The Carrier's June 11, 1998 Notice involving crew hauling work and positions at these two facilities does constitute a transaction, however.

Save for crew hauling, the June 11, 1998 Notice does not appear to coordinate separate railroad facilities as contemplated by the ICC when it adopted the New York Dock Conditions. There does not appear to be a coordination or rearrangement of ramp work or positions at the Carrier's Kansas City Terminal. According to the Notice, ten (10) clerical positions are being abolished and rebulletined at the same location. This does not constitute a coordination of separate railroad facilities under New York Dock or

a rearrangement and coordination of work and/or positions pursuant to Article II of NYD-217. Therefore, there is no "transaction" involving these positions.

The Carrier contends that this Committee exceeded its jurisdiction by finding part of the June 11, 1998 Notice improper under NYD-217 while finding the remainder of the Notice an appropriate notice under NYD-217. The Carrier maintains that the Notice must be considered proper in its entirety or improper in its entirety. However, this Committee respectfully disagrees with the Carrier's contention.

It must be emphasized that the June 11, 1998 Notice addressed three (3) distinct functions performed by clerical employees at the Kansas City Terminal:

(1) office work
(2) ramp work
(3) crew hauling

Since the Notice embodied these three discrete job activities performed by clerical positions at Neff Yard and Armourdale Yard, this Committee had the right to decide whether there was a "rearrangement and consolidation of work and positions" in each instance. Concluding that office work and ramp work was not being rearranged or consolidated at the Kansas City Terminal but crew hauling was being rearranged and consolidated was entirely appropriate, in our view.

Question #2

> If the answer to Question No. 1 is in the affirmative, should the UP/TCU Collective Bargaining Agreement or the SP/TCU Collective Bargaining Agreement apply to those employees affected by the "transaction"?

In Norfolk & Western Rwy. v. American Train Dispatchers Assn. 499 U.S. 117, 133 (1991), the United States Supreme Court held that the so-called immunity provision

in the Interstate Commerce Act [49 U.S. C. 11341(a)] which immunized an approved transaction from "antitrust laws and from all other law," included the obligations imposed by the terms of a collective bargaining agreement. However, the Court ruled that the immunity provision does not exempt carriers from all law but rather only from laws "*necessary to carry out an approved transaction.*" In Norfolk & Western Rwy., the Supreme Court affirmed decisions rendered by the ICC in the so-called Carmen I case, 4 I.C.C. 2nd (1988) and Dispatchers I, 4 I.C.C. 2nd.

In Carmen I, the ICC declared that:

> " [T]he carrier is permitted to carry out and fully implement (a transaction the Commission has authorized) despite potential impediments in existing agreements upon compliance with the provisions for the protection of the rights of employees contained in New York Dock or imposed by the Commission upon the involved transaction. As the committee found, and we agree, it has the authority to override these obstacles in the implementing agreement it will fashion."

In Carmen II [CSX Corp – Contro] – Chessie and Seaboard Coast Line Industries, Inc. 6 I.C.C. 2nd (1990)] the ICC emphasized that collective bargaining agreements and the Railway Labor Act should not be overridden simply to facilitate a transaction but should be required to yield only when and to the extent necessary to permit the approved transaction to proceed (emphasis added). Carmen II defined the scope of arbitrators' authority to modify collective bargaining agreements under Article I, Section 4, of New York Dock by reference to the arbitral practice between 1940 and 1980, a period of labor peace involving rail mergers and consolidations. The ICC did not elaborate on the foregoing "necessity" standard in Carmen II, however.

Carmen I and Carmen II were remanded to the ICC by the D.C. Circuit for reconsideration in light of the Supreme Court decision in Norfolk & Western Rwy. v. American Train Dispatchers Assn. That remand led to Carmen III.

In its 1998 Carmen III decision [Finance Docket No. 28905 and 29430] the ICC imposed further limitations on an arbitrator's authority under Article I, Section 4, of the New York Dock Conditions to override pre-existing collective bargaining agreements. Although this proceeding involves arbitration under Article I, Section 11, of the New York Dock Conditions, not arbitration under Article I, Section 4, nevertheless the limitations imposed by the ICC in Carmen III are equally applicable to this Section11 arbitration, in our opinion.

Carmen III affirmed the findings of the ICC in Carmen I and Carmen II. However, the STB imposed three additional limitations on an arbitrator's authority to override collective bargaining agreements under Article I, Section 4, of New York Dock. Those limitations were:

(1) the transaction must be one that has been approved by the STB;

(2) the modification cannot reach collective bargaining rights, privileges and benefits protected by Article I, Section 2, of the New York Dock Conditions;

(3) the modification must be necessary to the implementation of the approved transaction.

Article I, Section 2, of New York Dock provides for the preservation of collective bargaining rights. It states:

> " The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws

and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

The Board defined "rights, privileges and benefits" as the *"so-called incidents of employment or fringe benefits."* Scope rules and seniority rules were specifically excluded from this definition. "Rights, privileges and benefits" are not involved in this arbitration. However, "rates of pay, rules and working conditions" are since the Carrier proposed to change the rates of pay of certain clerical positions at Armourdale Yard. It also proposes to eliminate the former SP Scope Rule and the guaranteed extra board agreement currently in effect at this facility.

Based on the Board's 1998 Carmen III decision, it is now clear that a collective bargaining agreement can be overridden in an Article I, Section 4, New York Dock arbitration only if this is necessary to effectuate the transaction approved by the STB. The STB summarized the necessity standard by quoting from its decision in Fox Valley:

> *"Arbitrators should also be aware that in [RLEA] the court admonished us to identify which changes in pre-transaction labor arrangements are necessary to secure the public benefits of the transaction and which are not. We have generally delegated to arbitrators the task of determining the particular changes that are and are not necessary to carry out the purposes of the transaction, subject only to review under our Lace Curtain standards. . . Arbitrators should discuss the necessity of modifications to pre-transaction labor arrangements, taking care to reconcile the operational needs of the transaction with the need to preserve pre-transaction arrangements. Arbitrators should not require the carrier to bear a heavy burden (for example, through detailed operational studies) in justifying operational and related work assignment and employment level changes that are clearly necessary to make the merged entity operate efficiently as a unified system rather than as two separate entities, if these changes are identified with reasonable particularity. But arbitrators should not assume that all pre-transaction labor arrangements, no*

> *matter how remotely they are connected with operational efficiency or other public benefits of the transaction, must be modified to carry out the purposes of a transaction."*

RLEA refers to RLEA vs. ICC, 987 F. 2nd 806, 814 (1993) where the Court of Appeals for the D.C. Circuit ruled that a "necessity" standard must include a finding of public transportation benefits from the underlying transaction which cannot be effectuated if the only benefit derives from the CBA modification itself (emphasis added). The Court stated that " *merely to transfer wealth from employees to their employer*" does not effectuate the purpose of the transaction. The Surface Transportation Board has adopted this standard.

A review of the Carmen Trilogy reveals that the STB relied on the "necessity" standard to restrict an arbitrator's authority to override collective bargaining agreements under New York Dock. Such authority is not to be used simply to "facilitate" a transaction, according to the STB. Rather, arbitrators are to look to the precedent from 1940 to 1980 as guidance and they must reconcile the operational necessities of the merged carrier with the need to preserve pre-transaction labor agreements.

On November 22, 1995, the STB rendered a decision upholding an award rendered by this Arbitrator in an Article I, Section 4, New York Dock arbitration between the United Transportation Union/Brotherhood of Locomotives Engineers and CSX Transportation, Inc. In its decision, the Board made the following observation:

> *"... To determine which changes are permissible, the court in RLEA established the following standard (987 F. 2nd at 814-15): ... it is clear that the Commission may not modify a CBA willy-nilly: 11347 requires that the Commission provide a 'fair arrangement.' The Commission itself has stated that it may modify a collective bargaining agreement under 11347 only as 'necessary' to effectuate a covered transaction ... We look therefore to the purpose for which*

the ICC has been given this authority [to approve consolidations]. That purpose is presumably to secure to the public some transportation benefit that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer. . . In other words, the court's standard is whether the change is (a) necessary to effect a public benefit of the transaction or (b) merely a transfer of wealth from employees to their employer. . . ."

The Board reiterated these standards in a June 26, 1997 review of an Article I, Section 4, New York Dock award rendered by Arbitrator James E. Yost. The STB stated that :

". . . In RLEA, supra, the court admonished the ICC to refrain from approving modifications that are not necessary for realization of the public benefits of the consolidation but are merely devices to transfer wealth from the employees to their employer. In its appeal, UTU made no effort to show that the UP Eastern District collective bargaining agreement is inferior to the collective bargaining agreements that it replaced. This is not a situation where the carrier is using New York dock as a pretext to apply a new, uniform collective bargaining agreement that is inferior in matters such as wages levels, and working conditions. . . ."

As observed heretofore, the Carrier intends to eliminate all of the clerical positions currently assigned to the SP Armourdale Yard and create new clerical positions under the UP/TCU Collective Bargaining Agreement. These positions currently work under a SP Collective Bargaining Agreement, i.e. a former St. Louis Southwestern Railway Company Agreement. The Carrier would override this SPCBA and replace it with the UPCBA currently in effect for clerical employees at the Neff Yard.

The Carrier maintains that NYD-217 gives it the unrestricted right to place these clerical employees under the UP Agreement but this Committee respectfully disagrees.

NYD-217 does not expressly address what collective bargaining agreement will apply when clerical positions being rearranged and/or consolidated are governed by different agreements. Nor is such an unrestricted right implied in NYD-217.

There is no persuasive evidence in the record that the TCU granted the UP the unrestricted right to override collective bargaining agreements and select which agreement will apply to a transaction under NYD-217 when it entered into this Implementing Agreement. It is undisputed that the Carrier has served approximately 130 notices under NYD-217 consolidating or rearranging clerical functions since the merger. However, the TCU did not protest any of those 130 notices. The Organization's acquiescence in these notices was not an admission that the UP has the unilateral right under NYD-217 to select what collective bargaining agreement will be applicable to transactions under that Implementing Agreement.

The Carrier argues that when Letter of Understanding No. 5 and Letter of Understanding No. 18 are juxtaposed with the provisions of NYD-217 it becomes clear that it has the unrestricted right to place clerical employees under the UPCBA in transactions pursuant to Article II of NYD-217. Again, this Arbitrator respectfully disagrees with the Carrier's contention.

The Carrier argues that Letter of Understanding No. 5 supports its contention that work and positions may be transferred from one CBA to another without further negotiations. Letter of Understanding No. 5 explains how clerical positions established as a result of the transfer of work under NYD-217 are to be bulletined. If anything, Letter of Understanding No. 5 contemplates that both the UP and SP collective bargaining agreements will remain in effect since it provides that "[A]ny positions that

remain unfilled will be bulletined in accordance with the working Agreement on the property (UP or SP) to which the work is being transferred" (underlining added). Letter of Understanding No. 5 does not imply that the Carrier shall have the unrestricted right to determine what agreement will apply to a transaction under NYD-217 when more than one agreement applies to positions being rearranged and consolidated.

Nor does Letter of Understanding No. 18 expressly or implicitly provide that the Carrier has the unrestricted right to place employees under the UPCBA when their positions and/or work are being rearranged or coordinated pursuant to NYD-217. Rather, Letter of Understanding No. 18 merely preserves certain enumerated rates of pay when SP employees transfer to the UP or when UP employees transfer to the SP as was done at Denver.

Inasmuch as crew hauling is being consolidated at Neff Yard and Armourdale Yard this Committee agrees with the Carrier that in order to achieve the operational efficiencies contemplated by this consolidation a single collective bargaining agreement should apply to those employees engaged in crew hauling operations at the Kansas City Terminal.

For the reasons expressed above, this Committee concludes that NYD-217 does not grant the Carrier the unqualified right to place clerical positions under the UPCBA when these positions are rearranged and/or consolidated in a transaction under Article II of that Implementing Agreement. Accordingly, in determining whether the Carrier has the right to override the SPCBA governing those clerical employees engaged in crew hauling operations at the Kansas City Terminal, the limitations imposed on New York Dock arbitrators by the STB must be strictly observed.

As noted heretofore, the STB has sanctioned the override of collective bargaining agreements only if this is necessary to effectuate the transaction. Moreover, there must be a public transportation benefit from the transaction before a collective bargaining agreement may be overridden. The Board has instructed New York Dock arbitrators to reconcile the operational needs of the transaction with the need to preserve pre-transaction arrangements. Additionally, the STB has ruled that rail carriers bear the burden of establishing that the proposed change is necessary to effectuate a transaction. In the instant case, the Carrier has not sustained that burden, in the opinion of this Committee.

The Carrier's proposal would reduce the wage rates of the SP clerical positions being eliminated and rebulletined as Utility Clerk positions by between 34% and 36% of the current SP rates. The prohibition against subcontracting in the SPCBA would also be eliminated. And the SP guaranteed extra board at Armourdale Yard would be reduced from 15% of the permanent clerical positions to 10% of the permanent positions.

In this Committee's opinion, the aforementioned changes in the SP rates of pay, rules and working conditions are not necessary to effectuate the consolidation and rearrangement of crew hauling at the Kansas City Terminal. No public transportation benefit will be achieved by overriding the SPCBA, in our judgment. The efficiencies of operation that will result from coordinating the crew hauling functions at the Kansas City Terminal can just as easily be attained by placing all positions involved in crew hauling under the SPCBA. This will result in only one collective bargaining agreement governing the positions performing crew hauling while avoiding overriding the SP Agreement.

As explained above, the STB requires New York Dock arbitrators to reconcile the need to preserve pre-transaction labor arrangements with the operational needs of the transaction. The Carrier has not persuaded this Committee that it is necessary to override SP rates of pay, rules and working conditions to achieve the operational efficiency attendant the consolidation of crew hauling at the Kansas City Terminal. The same public transportation benefit can be attained by placing positions involved in crew hauling under the SPCBA. Therefore, the Carrier has not demonstrated any "necessity" to override the SP Agreement to effectuate the rearrangement and coordination of crew hauling work at the Kansas City Terminal.

Were this an Article I, Section 4, New York Dock arbitration, the SPCBA could not be overridden. Therefore, it cannot be overridden under NYD-217 in this Article I, Section 11, New York Dock arbitration, in the opinion of this Committee. To the extent that work and positions are being transferred and commingled between Armourdale Yard and Neff Yard in accordance with NYD-217, the SP Collective Bargaining Agreement cannot be overridden for all the reasons set forth above.

Finally, this Committee recognizes that it is the Carrier's intent to consolidate the Kansas City Terminal into a "UP" terminal under "UP" collective bargaining agreements and that this Award may hinder that goal. Nevertheless, as an adjunct of the Surface Transportation Board we are obliged to strictly comply with the limitations imposed by the STB in Carmen III. In accordance with those limitations, we found no necessity to override the SPCBA in effect for clerical employees involved in crew hauling at the Kansas City Terminal.

AWARD

The Carrier's Notice of June 11, 1988, involving positions located at Armourdale, Kansas and Kansas City, Missouri contemplates a "transaction" for employees engaged in crew hauling only pursuant to the parties' December 16, 1996 Implementing Agreement and the New York Dock Conditions.

The Southern Pacific Collective Bargaining Agreement will apply to the clerical employees involved in crew hauling at the Kansas City Terminal.

Robert M. O'Brien, Arbitrator

Dated: October 22, 1999

TCU Exhibit 2

IMPLEMENTING AGREEMENT NO. NYD-217

BETWEEN

SOUTHERN PACIFIC TRANSPORTATION COMPANY
UNION PACIFIC RAILROAD COMPANY

AND

ALLIED SERVICES DIVISION/ TCU
TRANSPORTATION COMMUNICATIONS UNION

WHEREAS, Union Pacific Railroad Company (UP) petitioned the Interstate Commerce Commission (now the Surface Transportation Board [STB]) to merge with Southern Pacific Transportation Company (SP) and consolidate operations, and

WHEREAS, the STB granted merger of the UP and SP pursuant to decision rendered under Finance Docket No. 32760, and

WHEREAS, the STB imposed the New York Dock Ry. - Control - Brooklyn Eastern District Terminal, 360 ICC 60 (1979) employee labor protective conditions (hereinafter referred to as "New York Dock Conditions"); and

WHEREAS, pursuant to Article I, Section 4 of the New York Dock Conditions, the following Agreement is made to cover the general rearrangement and selection of forces in connection with the consolidation and rearrangement of functions throughout the UP and the SP, and this rearrangement is made to effect the merger of the UP and SP properties. It is expected that the completion of this rearrangement will involve all areas of the merged railroad's organizational structure.

UP and SP expect that the rearrangement will be implemented in several stages. The Company anticipates that at least 1,800 clerical employees will be affected. These employees are now positioned at various locations across the UP and SP.

The rearrangement of employees and/ or work will commence after the effective date of this Agreement.

EMPLOYEES' EXHIBIT
PAGE 1

IT IS AGREED:

ARTICLE I - ELECTION OF BENEFITS

The labor Protective Conditions as set forth in the New York Dock Conditions which, by reference hereto, are incorporated herein and made a part of this Agreement shall be applicable to this transaction.

Employees affected as a result of the transaction pursuant to this Agreement will be provided an election of available employee protective benefits as set forth in Article I, Section 2 of New York Dock Conditions.

There shall be no duplication of benefits receivable by an employee under this Agreement and any other agreement or protective arrangement. In the event an employee is eligible for protection under the New York Dock Conditions and other agreements or protective arrangements, such employee shall be furnished their New York Dock Conditions test period earnings and shall within thirty (30) days thereafter with copy to the General Chairman, make an election in writing as to whether they desire to retain the protective benefits available under any other agreements or protective arrangements or receive the protective benefits provided under the provisions of this Agreement. In the event the employee fails to make such election within the said thirty (30) day period, the employee shall be deemed to have elected the protection benefits provided under this Agreement to the exclusion of protective benefits under any other agreement or arrangement.

Employees affected as a result of the transaction covered by this Agreement and who elect to accept work at another location, will be provided with protective benefits as set forth in Article I, Sections 2, 9 and 12 of New York Dock Conditions, or the moving benefits outlined in Attachment "B".

An affected employee's test period average (TPA) shall be determined pursuant to Article I, Section 5 of the New York Dock Conditions. (See Side Letter No. 14)

Employees referred to in this Article who elect the New York Dock Conditions protection and benefits prescribed under this Agreement shall, at the expiration of their New York Dock Conditions protective period, be entitled to such protective benefits under applicable protective agreements provided they thereafter continue to maintain their responsibilities and obligations under applicable protective agreements and arrangements.

ARTICLE II - TRANSACTIONS

After the effective date of this Agreement, the Company will commence rearrangement and consolidation of work and positions from locations throughout SP and UP.

The Company will provide the Organization with a detailed plan by location of transactions to take place and distribution of remaining work. The plan will include a listing of the jobs to be abolished and the incumbents; the jobs to be created; the approximate date(s) of transfer; a description of the work to be transferred and the disposition of work to remain, if any. If the transfer of employees or the abolishment of jobs is involved, the plan for each location may be implemented sixty (60) days or later after issuance. It is understood that the sixty (60) days contemplates five (5) days or more notice to the Organization, twenty (20) days for employees to make election, five (5) days for the Carrier to award employee options, and thirty (30) days to prepare for and complete the move. If the plan involves only the transfer of work, such transfer may occur thirty (30) days or later after issuance.

After notifying the Organization of the plan to transfer work and/ or employees, the General Chairman may request a meeting to discuss the Carrier's plan. A request for a meeting from the involved General Chairman must be made within five (5) days after the Carrier's plan notice is received by the Union, and said meeting must be held within ten (10) days after the Union's request is received by the Carrier.

ARTICLE III - SELECTION OF FORCES AND ALLOCATION OF SENIORITY

Section 1. Employees transferring under this Agreement will relinquish seniority on their former seniority district(s) or zone(s) on the effective date their assignment is relocated and will have their earliest clerical seniority date dovetailed into the seniority district or zone (including Master Roster 250) to which transferred. If a transferring employee has the same date as an employee on the seniority district or zone (including Master Roster 250) to which transferring, his/ her ranking on that district or zone will be determined by date of birth, the oldest being ranked first, and, if this fails, by alphabetical order of last names.

Section 2. Employees transferring under this Agreement shall retain a protected status under this Agreement for a period of six (6) years or length of service, whichever is less, and be credited with prior service for vacation, personal leave, sick leave, entry rates,

and all of the benefits which are granted on the basis of qualifying years of service in the same manner as though all such time spent had been in the service of the railroad to which transferred.

Section 3. The Carrier will determine the number of positions to be relocated or abolished at a given location as the result of the implementation of a transaction. Advertised positions to be established at the new location will be awarded in accordance with Letter of Understanding No. 5.

Employees on the affected roster/ zone will be given the simultaneous options of:

A. Receiving severance under the separation program (Attachment "A").
B. Exercising seniority.
C. Relocating to accept a clerical position at a new location.
D. Entering voluntary furlough status (benefits suspended).

Employees will be asked to rank each option in order of preference. The option of each employee will be honored in seniority order until all the relocated positions have been filled or there are no surplus employees on the roster/ zone available to fill the relocated positions. Employees receiving options must select said options within twenty (20) days from the date notice of the transaction is posted. Failure to make an election will be considered as electing to exercise seniority or in the event an employee cannot hold a position in the exercise of seniority, failure to make an election shall be considered as electing voluntary furlough status (benefits suspended). Election or assignment of benefits shall be irrevocable.

Section 4. Assignments will be made thirty (30) days prior to the effective date of the transaction. After assignment is made, the employee will not be subject to displacement from the new position. Said protection from displacement extends only from date assigned until position is occupied, after which time normal seniority rules shall prevail.

On the effective date of the assignment, employees will forfeit all seniority on their current district(s) or zone and establish a dovetailed date on the new district or zone. Accordingly, employees assigned positions on said bulletin will have no seniority right to continue to hold positions on the old district or zone after the effective date of the new assignment.

Agreement and which carries a rate of pay and compensation equal to or exceeding the employee's protected rate, or shall thereafter be treated for the purposes of this Section as occupying the position elected to decline until a position of equal or higher rate is acquired.

Section 3. If an employee is absent from service on the effective date of this Agreement, such employee will be entitled to the benefits as provided in Article I when available for service, if eligible.

Section 4. If an employee who has been notified that his/her position will be affected desires to accept severance and resigns or relocates prior to the expiration of the 30-day notice, he/she may do so dependent upon the requirements of the service and without penalty to the employee or the Carrier.

Section 5. In connection with the application of this Agreement, the parties have agreed without prejudice to either party's position in any other case that positions established will not be counted as TOPS overbase credits, nor will positions abolished or individuals accepting separation allowances as a result of this transaction be counted as TOPS attrition credits.

Where there is sufficient work in a department to require supplementing the assigned work force on a regular basis, a position will be properly bulletined and established.

Section 6. In order for employees who transfer under the terms of this Agreement to acquire training and gain necessary experience, the Carrier agrees to provide paid job-related training for up to eight (8) weeks. The training will begin upon an employee's assignment and may include on-the-job training, classroom instruction, and testing. Typing courses as well as other job-related fundamentals, may be offered in order to develop necessary skill levels. The length of the training period may vary based upon the previous experience, training, skills of each employee as well as the prerequisites of the job and department. An employee afforded training as provided herein will be given full cooperation during the training period. Failure to make satisfactory progress in training will be sufficient grounds for disqualification. Any employee so disqualified will be required to exercise his seniority rights at the location to which transferred in accordance with the applicable rule(s) of the Agreement.

The training period will not exceed eight (8) hours per day, forty (40) hours per work week (Monday through Sunday). However, if training is required in excess of the hours specified, such training will be compensated at the overtime rate.

ARTICLE VI - EFFECTIVE DATE

This Agreement shall become effective on the date signed, and constitutes an Implementing Agreement fulfilling the requirements of Article I, Section 4, stipulated in the New York Dock Conditions imposed by the STB in FD 32760.

Signed this 18th day of December, 1996.

FOR THE ORGANIZATION:

R. F. Davis
President, ASD/ TCU

J. L. Quilty
General Chairman, TCU

M. L. Scroggins
General Chairman, TCU

FOR THE COMPANY:

D. D. Matter
Sr. Director Labor Relations/ Non-Ops

R. L. Camp
Manager Labor Relations

APPROVED:

J. P. Condo
International Vice President, TCU

J. L. Gobel
International Vice President, TCU

EMPLOYEES' EXHIBIT
PAGE 6

ATTACHMENT "A"

SEPARATION/DISMISSAL PAY

In recognition of the anticipated number of changes associated with the merger of the railroads and in an effort to provide alternatives to the clerical employees represented by the Allied Services Division/TCU and the Transportation Communications Union, the Carrier agrees to offer the following options to Southern Pacific Lines and Union Pacific Railroad employees.

Section 1.

Upon the effective date of the Implementing Agreement, the Carriers will be permitted to post a twenty (20) day advance notice at specific locations offering the following separation amounts on a seniority basis:

YEARS OF SERVICE	AMOUNT
30 and Over	$95,000
25, Less than 30	$85,000
20, Less than 25	$75,000
15, Less than 20	$65,000
6, Less than 15	$60,000
Less than 6	$25,000

In calculating an employee's seniority, the earliest continuous seniority date shall apply. The employee's years of service shall be calculated as of the date the notice of separation is posted.

Section 2.

(a) In lieu of the lump sum payments indicated above, employees may elect to accept a dismissal allowance payable in equal monthly installments. Employees electing this option will be entitled to the amount indicated, given their number of years seniority less $500 for every month which the payments are extended for continuation of health and welfare benefits. Payments may be extended for a period not to exceed three (3) years (36 months from date monthly dismissal payments are initiated).

(b) Employees electing Option contained in Section 2(a) above shall be relieved from duty, but considered in active service until the expiration of the last monthly installment at which time their service and seniority shall be terminated. Compensation paid in these monthly installments will be considered the same as regular compensation insofar as taxation and hospital dues deductions are concerned. However, this compensation will not be considered as qualifying payments for the purpose of applying the National Vacation Agreement nor will this extended time allow such employees any other compensation benefits under the Basic or National Agreement. It is understood that all health and welfare benefits as well as all contributions toward Railroad Retirement Tax shall be continued during the period that the monthly installments are in effect.

Section 3.

(a) In lieu of the lump sum payments indicated above, employees may elect to accept a dismissal allowance payable in equal monthly installments. Employees electing this option will be entitled to the amount indicated, given their number of years seniority. Payment may be extended for a period not to exceed three (3) years (36 months from date monthly separation payments are initiated).

(b) Employees electing Option contained in Section 3(a) above shall be relieved from duty, but considered in active service until the expiration of the last monthly installment at which time their service and seniority shall be terminated. Compensation paid in these monthly installments will be considered the same as regular compensation insofar as taxation is concerned. However, this compensation will not be considered as qualifying payments for the purpose of applying the National Vacation Agreement nor will this extended time allow such employees any other compensation benefits under the Basic or National Agreement. Additionally, employees will not be eligible for any health and welfare benefits. It is understood that all contributions toward Railroad Retirement Tax shall be continued during the period that the monthly installments are in effect.

Section 4.

(a) Except as otherwise provided, employees submitting requests for the options contained herein must, on the date notice is posted, be actively employed and/or receiving compensation from the Carrier either on a regular assigned clerical position, extra board or as a furloughed protected employee.

(b) A clerical employee who is on a leave of absence at the time the notice is posted at a location will be considered an eligible employee upon returning to active service at such location if such employee returns within six (6) months of the date of the notice.

(c) Employees entitled to the lump sum separation will be paid within one week of the last day worked. Employees entitled to the dismissal allowance will be paid monthly beginning within thirty (30) days of the last day worked.

(d) Deductions for income tax, railroad retirement tax, and union dues and assessments will be made.

(e) The Company reserves the right, dependent upon the needs of the service, to limit the number of clerical employees receiving separation or dismissal allowances. Furthermore, employees electing these options need not be immediately released and the separation or dismissal options elected may be deferred up to three (3) months from date the employee is notified of acceptance. Any deferment beyond three (3) months must be by mutual agreement between the parties.

(f) Only the prescribed Request Form may be used. Any other methods of requesting options received from employees other than this prescribed form will not be considered as a valid request. In addition to forwarding the Request Form to the designated Center official, interested applicants must also submit completed copies to the individuals listed on the form. In the case of a dispute as to whether the form was submitted on time, etc., the deciding factor will be receipt of the Request Forms to all concerned and absent such receipt may result in having the Request Form considered as invalid.

(g) Each applicant applying for options provided in this Agreement will be notified in writing of their acceptance or rejection no later than thirty-five (35) days after the posting of the notice. A copy of the results will be forwarded to the General Chairman. It is understood the release date of an employee awarded a separation or dismissal allowance pursuant to this Attachment "A" shall be determined by the Company. However, no employee will have their election option deferred beyond three (3) months from the date notified of acceptance.

(h) The applicable union dues and assessment deduction will be at the prevailing rate in effect at the time election of such option is made. This deduction will be made on the following basis:

Eligible Amount	Deduction
$95,000.00	46 months
$85,000.00	41 months
$75,000.00	36 months
$65,000.00	31 months
$60,000.00	28 months
$55,000.00	0

Furthermore, this one-time deduction as set forth in the extended payments will be applied on the initial payment or installment.

(f) It is understood that an employee who accepts the separation/ dismissal amounts set forth herein will also be compensated at the time of separation/ dismissal (lump sum or first monthly installment), any other compensation that may also be applicable to an eligible employee under the National Vacation or the Sick Leave Allowance of the Basic Agreement.

(g) Employees awarded lump sum separations set forth herein will be considered to have resigned from service, terminating all seniority rights with the Southern Pacific/ Union Pacific Railroad Company except where the separation date is extended due to operation requirements.

MOVING EXPENSES AND RELATED BENEFITS

Section 1.

(a) An employee who is required to change place of residence, as defined below, in the exercise of seniority as a result of a transaction under this Agreement who, on the date notice of transaction is issued, owns their home or is under a contract to purchase a home, shall be afforded one of the following options which must be exercised within fifteen (15) days from the date affected or assigned to a position at the new work location:

Option 1: Accept the moving expense and protection from loss in sale of home benefits provided by the terms of the New York Dock Conditions and Section 2 or, in lieu thereof, any property protection agreement or arrangement.

Option 2: Accept a lump sum transfer allowance of $20,000.00 in lieu of any and all other moving expense benefits and allowances provided under terms of the New York Dock Conditions and this Attachment "B".

NOTE: A "change in residence" as used in this Agreement shall only be considered "required" if the reporting point of the affected employee would be more than thirty (30) normal route miles from the employee point of employment at the time affected.

(b) An employee referred to above who does not own a home or is not obligated under contract to purchase a home shall be afforded one of the following options which must be exercised within fifteen (15) days from date affected or assigned to a position at the new work location:

Option 1: Accept the moving expense benefits provided by the terms of the New York Dock Conditions and Section 2 or, in lieu thereof, any property protection agreement or arrangement.

Option 2: Accept a lump sum transfer allowance of $10,000.00 in lieu of any and all other moving expense benefits and allowances provided under terms of the New York Dock Conditions and this Attachment "B".

(c) If an employee holds an unexpired lease of a dwelling occupied as his/her home, the Carrier shall protect such employee for all loss and cost of securing the cancellation of said lease as provided in Sections 10 and 11 of Washington Job Protection Agreement in addition to the benefits provided under this Section.

Section 2.

An employee electing the moving expense benefits under the New York Dock Conditions shall receive a transfer allowance of Two Thousand Five Hundred Dollars ($2,500.00). In addition, the provisions of Section 9, Moving Expenses, of the New York Dock Conditions which provides "not to exceed 3 working days" will be increased to "not to exceed 5 working days."

Section 3.

An employee who voluntarily transfers under terms of this Agreement, and who is required to change place of residence and elects the lump sum transfer allowance in lieu of any and all other moving expense benefits and allowances, shall be accorded on assignment a special transfer allowance of $5,000.00 in consideration of travel and temporary living expenses while undergoing the relocation. However, such employee will not be permitted to voluntarily exercise seniority on a position which again will require a change of residence outside the new point of employment for a period of twelve (12) months from date of assignment, except in cases of documented hardship and then only by written agreement between Labor Relations and the respective General Chairman/President.

TCU Exhibit 3

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

June 11, 1998

NYD-217

Mr. R. F. Davis
President ASD/TCU
53 W. Seegers Road
Arlington Heights, IL 60005

Mr. J. L. Quilty
General Chairman, TCU
2820 South 87th Avenue
Omaha, NE 68124

Gentlemen:

Pursuant to Article II - TRANSACTIONS of Implementing Agreement No. NYD-217, notice is hereby given of Carrier's intent to implement the transaction outlined in the attached document and consolidate all clerical work associated with the Southern Pacific (Armourdale Yard) facility located in Kansas City, KS, with that of the Union Pacific facility located in Kansas City, MO.

As outlined in the attachment, it is the Carrier's intent to eliminate all of the clerical positions currently assigned to the SP Armourdale Yard operations and transfer all of this work to clerical positions to be established under the Union Pacific/TCU Collective Bargaining Agreement, effective on or after August 10, 1998.

Please contact my office if you have any questions regarding this transaction.

Yours truly,

D. D. Matter
Gen. Director Labor Relations

cc: Mr. J. P. Condo
International Vice President, TCU
53 W. Seegers Road
Arlington Heights, IL 60005

Mr. J. L. Gobel
International Vice President, TCU
4189 North Road
Moose Lake, MN 55767

h:\sp\data\armdale.ntc

EMI
PAG

ARMOURDALE CLERICAL ASSIGNMENTS

Position	Incumbent	Seniority Date
Chief Clerk - 020	L. L. Seymour	10-15-52
General Clerk - 009	B. L. Wilson	09-25-57
TFC Clerk - 004	C. E. Sawyer	09-29-57
TFC Clerk - 002	D. E. Earnheart	06-15-60
Clk/Telegrapher - 006	R. A. Nisser	06-29-60
Mgr/Telegrapher - 021	L. J. Unrein	01-11-61
Extra Board	B. D. Beall	02-02-62
Relief Clerk - 019	G. A. Cox	05-22-63
TFC Clerk - 001	D. J. Ellis	06-11-64
Asst. Chf. Clerk - 014	G. J. Wilber	12-21-67
Relief Clerk - 001	C. W. Hicks	11-07-73
TFC Clerk - 005	D. M. Colvert	06-24-83
Asst. Chf. Clerk - 007	E. G. Koder	09-06-83
Relief Clerk - 008	J. E. Ellison	09-25-83
Clk/Telegrapher - 004	D. A. Thompson	01-12-84
Extra Board	B. R. Jones	09-15-89
TFC Rlf. Clerk - 701	R. E. Henley	02-19-91
Relief Clerk - 011	F. R. Moore	03-19-91
TFC Clerk - 003	C. J. Williams	05-01-97
General Clerk - 018	Vacant	
General Clerk - 017	Vacant	

Work of the above positions will be transferred to fifteen (15) Utility Clerk positions and six (6) Ramp Clerk positions to be established under the Union Pacific/TCU Collective Bargaining Agreement.

TCU Exhibit 4

UNION PACIFIC RAILROAD COMPANY

D D MATTER
General Director
Labor Relations-NON-OPS

September 11, 1998
NYD-217

Mr. R. F. Davis
President ASD/TCU
53 W. Seegers Road
Arlington Heights, IL 60005

Mr. J. L. Quilty
General Chairman, TCU
2820 South 87th Avenue
Omaha, NE 68124

Gentlemen:

This has reference to my letter dated June 11, 1998, serving notice under the auspices of NYD-217 advising that the Carrier intended to consolidate all clerical work from the Southern Pacific (Armourdale Yard) with that of the Union Pacific Facility at Kansas City and place that work and employees under the Union Pacific/TCU Collective Bargaining Agreement. In accordance with that notice, the Carrier bulletined jobs to be transferred to SP employees with an effective date of September 17, 1998.

By letter dated July 30, 1998, Mr. Davis advised the Carrier that it was the Union's position the notice of June 11, 1998 was inappropriate and not in accordance with the spirit and intent of NYD-217. Moreover, Mr. Davis stated that if the Carrier did not agree with his position he would demand that the issue be submitted to arbitration. Finally, Mr. Davis requested that if the Carrier wished to arbitrate the issue, then the notice not be effectuated until a decision had been rendered by the arbitrator.

First, the Carrier does not agree that the notice issued on June 11, 1998 was inappropriate. Moreover, it is the Carrier's position that the notice and the proposed changes embrace the spirit and intent of NYD-217. In view of this fact, the Carrier is agreeable to submitting this issue to final and binding arbitration on an expedited basis. I will be contacting you in the near future to begin the Referee selection process. Secondly, with regard to your request to delay the implementation of the proposed transaction, the Carrier is reluctantly agreeable to honoring that request with certain reservations. The Carrier reserves the right to immediately effect the changes outlined in the original notice upon receipt of the Arbitrator's Award in the event a decision favorable to the Carrier is rendered without further notice (i.e., a new 60-day notice) to the Organization. Additionally, in the event circumstances change, the Carrier reserves the right to cancel the original notice at any time prior to or after the arbitration Award is rendered, cancelling all assignments and option forms and serving a new 60-day notice, which, if necessary, would not be placed into effect until after a decision rendered by the Referee. Of course, it is understood that the Carrier's decision to grant the Organization's request concerning this delay in implementing the transaction is made without prejudice to the Carrier's position regarding this issue.

Yours truly,

D. D. Matter

cc: Mr. J. P. Condo
International Vice President, TCU
53 W. Seegers Road
Arlington Heights, IL 60005

Mr. J. L. Gobel
International Vice Presi
4189 North Road
Moose Lake, MN 5576

EMPLOYEES' EXHIBIT
PAGE 1

TCU Exhibit 5

ROBERT M. O'BRIEN
ATTORNEY AT LAW
16 FOX HILL LANE
MILTON, MA 02186
(617) 696-0835

March 25, 1999

Joel M. Parker
International Vice President
Transportation Communications International Union
3 Research Place
Rockville, MD 20850

Dean D. Matter
General Director Labor Relations
Union Pacific Railroad
1416 Dodge Street
Omaha, NE 68179

Re: TCIU and Union Pacific Railroad
(Section 11, New York Dock Arbitration
involving the Kansas City Terminal)

Gentlemen:

I am enclosing herewith a copy of my proposed decision in the above-referenced matter with a bill for my services. Please contact me if you wish to convene an executive session to discuss the proposed decision.

Very truly yours,

Robert M. O'Brien, Arbitrator

RMO'B/amm
cc: Robert F. Davis
enclosures

ARBITRATION COMMITTEE ESTABLISHED
PURSUANT TO ARTICLE I, SECTION 11,
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS

In the matter of arbitration between:

Transportation Communications
International Union

-and-

Union Pacific Railroad Company

STATEMENT OF THE ISSUE

After carefully reviewing the extensive record submitted to this Committee, we submit that the following accurately reflects the questions that must be decided in this arbitration:

Question #1

Does the Carrier's Notice of June 11, 1998, involving positions located at Armourdale, Kansas and Kansas City, Missouri, contemplate a "transaction" pursuant to the parties' December 16, 1996 Implementing Agreement and the New York Dock Conditions?

Question #2

If the answer to Question No. 1 is in the affirmative should the UP/TCU Collective Bargaining Agreement or the SP/TCU Collective Bargaining Agreement apply to those employees affected by the "transaction"?

BACKGROUND

On November 30, 1995, the Union Pacific Corporation (hereinafter referred to as the Carrier or the UP) filed application with the Interstate Commerce Commission (ICC)

seeking approval to obtain common control and to merge the rail carriers controlled by the UP (Union Pacific Railroad Company and Missouri Pacific Railroad Company) with the rail carriers controlled by the Southern Pacific Rail Corporation (Southern Pacific Transportation Company-Eastern and Western Lines, St. Louis Southwestern Railway Company, SPCSL Corporation, and the Denver & Rio Grande Western Railroad Company). In its application, the Carrier declared that significant economies and efficiencies could be achieved by the merger of these railroads which would provide a transportation benefit to the public. Following extensive hearings and testimony, the Surface Transportation Board (hereinafter referred to as the STP or the Board,), successor to the ICC, approved the Carrier's application on August 6, 1996 in Finance Docket No. 32760. In approving this merger, the STB imposed the New York Dock Conditions adopted by the ICC in Finance Docket No. 28250, 360 ICC 60 (1979).

In accordance with the requirements of the New York Dock Conditions, on September 16, 1996, the Carrier served notice on the Allied Services Division of the Transportation Communications Union (hereinafter referred to as the TCU or the Organization) of its intent to consolidate clerical forces throughout the merged Union Pacific-Southern Pacific Transportation Company (hereinafter referred to as the Southern Pacific or the SP) system. The parties entered into negotiations and signed Implementing Agreement No. NYD-217 (hereinafter referred to as NYD-217) on December 18, 1996.

NYD-217 provides, in pertinent part, as follows:

> . . . **WHEREAS**, pursuant to Article I, Section 4 of the New York Dock Conditions, the following Agreement is made to cover the general rearrangement of functions throughout the UP and the SP, and this rearrangement is made to effect the merger of the UP and SP properties. It is expected that the completion of this rearrangement will

involve all areas of the merged railroad's organizational structure.

UP and SP expect that the rearrangement will be implemented in several stages. The Company anticipates that at least 1,800 clerical employees will be affected. These employees are now positioned at various locations across the UP and SP.

The rearrangement of employees and/or work will commence after the effective date of this Agreement. . . .

ARTICLE II – TRANSACTIONS

After the effective date of this Agreement, the Company will commence rearrangement and consolidation of work and positions from locations throughout SP and UP.

The Company will provide the Organization with a detailed plan by location of transactions to take place and distribution of remaining work. The plan will include a listing of the jobs to be abolished and the incumbents; the jobs to be created, the approximate date(s) of transfer; a description of the work to be transferred and the disposition of work to remain, if any. If the transfer of employees or the abolishment of jobs is involved, the plan for each location may be implemented sixty (60) days or later after issuance. It is understood that the sixty (60) days contemplates five (5) days or more notice to the Organization, twenty (20) days for employees to make election, five (5) days for the Carrier to award employee options, and thirty (30) days to prepare for and complete the move. If the plan involves only the transfer of work, such transfer may occur thirty (30) days or later after issuance.

After notifying the Organization of the plan to transfer work and/or employees, the General Chairman may request a meeting to discuss the Carrier's plan. A request for a meeting from the involved General Chairman must be made within five (5) days after the Carrier's plan notice is received by the Union, and said meeting must be held within ten (10) days after the Union's request is received by the Carrier. . . .

The parties also agreed to numerous Letters of Understanding that were appended to NYD-217. Letter of Understanding No. 5 addresses the procedure for bulleting positions that will be established as a result of the transfer of work pursuant to the Implementing Agreement. Letter of Understanding No. 18 provides that SP employees transferring to the UP and UP employees transferring to the SP will have certain rates of pay protected. The protected rates are enumerated in the Letter of Understanding.

Immediately following the signing of NYD-217, the Carrier began preparing Notices pursuant to Article II of that Agreement advising the Organization of its intent to consolidate SP clerical work with UP clerical work. The first such Notice was served on December 31, 1996. To date, the Carrier has served over 130 Notices which have resulted in the consolidation of SP clerical work throughout the merged UP-SP system.

On June 11, 1998, the Carrier served the TCU with Notice of its intent to consolidate clerical work at the Neff Yard and Armourdale Yard in the Kansas City Terminal. The Neff Yard(s) is a UP facility in Kansas City, Missouri. The Armourdale Yard is a former SP facility in Kansas City, Kansas. The two yards are approximately 10 miles apart. Clerical employees at Neff Yard work under a Union Pacific Collective Bargaining Agreement (hereinafter referred to as the UPCBA) whereas clerical employees at the Armourdale Yard work under a SP Collective Bargaining Agreement (hereinafter referred to as the SPCBA). [The Agreement is actually a former St. Louis Southwestern Railway Company Agreement.]

The June 11, 1998 Notice stated that the Carrier intended to eliminate all of the clerical positions currently assigned to the SP Armourdale Yard operations and transfer

all of this work to clerical positions to be established under the Union Pacific/TCU Collective Bargaining Agreement. The Carrier amended this Notice on June 24, 1998.

On or around June 11, 1998, when the Notice was served on the Organization, there were 43 clerical jobs filled by 42 employees at the UP Neff Yard. At the same time, there were 21 clerical positions filled by 19 employees at the former SP Armourdale Yard. For many of these positions, the UP rate of pay is lower than the applicable SP rate of pay. The work performed by the SP clerical employees was to be transferred to 15 Utility Clerk positions and six (6) Ramp Clerk positions under the UPCBA, according to the June 11, 1998 Notice.

Prior to the merger of the UP and SP in 1996, there was an intermodal facility at both the Neff Yard and Armourdale Yard. At the Armourdale intermodal ramp, loading and unloading functions are performed by an independent contractor while the remaining clerical ramp functions are performed by UP clerical employees. At present, the clerical functions, as well as the loading, unloading and tie-down functions at the Neff Intermodal Ramp are performed by an independent contractor.

Crew hauling operations at Neff Yard are divided pursuant to a 1991 agreement between the UP and TCU. Under this agreement, crew hauling within the Neff Yard itself and between the yard and local hotels where operating craft employees lodge between runs are performed under the UP Agreement. All crew hauling runs made from Neff Yard to other points outside the facility are performed by an independent contractor.

Crew hauling at the Armourdale Yard, both within the yard and to points outside the yard, is performed under the SP Agreement. Further, pursuant to a 1980 Total Operating Procedures System (TOPS) Agreement applicable to the Armourdale Yard,

the Carrier is precluded from contracting out clerical work. The Scope Rule of the TOPS Agreement prohibits the Carrier from removing work from TCU's jurisdiction. There is no such restriction under the UPCBA, however, for ramp work at Neff Yard.

Pursuant to a longstanding TOPS Agreement on the Armourdale property, the Carrier is required to maintain a guaranteed extra board consisting of a minimum of fifteen percent (15%) of permanent employees. The corresponding UP Agreement at Neff Yard requires a minimum extra board of ten percent (10%) of permanent employees.

The seven ramp positions which the Carrier proposes to rebulletin at Armourdale Yard under the UP Agreement will be paid at a daily rate of $120.61. This is $9.05, or 7%, less than the current rate under the SP Agreement for ramp clerks at Armourdale Yard. These newly bulletined positions will be roughly equivalent to the current position of ramp clerk at the Armourdale Yard, according to the Organization. The newly created crew hauling positions at both Neff Yard and Amourdale Yard will pay a rate of pay lower than the rate of the SP positions being abolished. The Organization contends the rate will be between 34% and 36% lower than the present SP rates.

The Carrier's June 11 Notice proposes to abolish the following positions under the SP Agreement at the Armourdale Yard: one Chief Clerk; two Assistant Chief Clerks; seven General Clerks; three Clerk/Telegraphers; one Janitor; and one Extra Board position. In lieu of these positions, the Carrier intends to bulletin twelve "Utility Clerk" positions and four Extra Board clerical positions. Of these twelve Utility Clerk positions, six will be posted at Neff Yard, three will be posted at Armourdale Yard and the remaining three will be assigned three days a week to Neff Yard and two days a week to Armourdale Yard. All four Extra Board positions will be bulletined at Neff Yard.

Under the Scope Rule of the SP Agreement, crew hauling at the Armourdale Yard may not be contracted out. Under the UP Agreement, crew hauling within the confines of the Neff Yard is performed by UP employees represented by TCU. However, the UP Agreement permits the Carrier to contract out crew hauling involving the pick up and delivery of crews outside the Neff Yard.

On July 30, 1998, the TCU responded to the June 11, 1998 Notice. The Organization claimed that the Notice was inappropriate and not in accordance with the spirit and intent of NYD-21*7*. Moreover, it would place the clerical employees at Armourdale under an inferior collective bargaining agreement, according to the Organization, since their rates of pay would be reduced considerably; clerical employees could have their work contracted out; and the Extra Board Agreement at Neff Yard is inferior to the Extra Board TOPS Agreement at Armourdale. The Union requested the Carrier to withdraw the Notice.

On September 11, 1998, the Carrier responded to the Organization's July 30, 1998, letter. The Carrier insisted that the June 11, 1998 Notice and the changes proposed therein embraced the spirit and intent of NYD-217. Nevertheless, it was willing to submit the issue to final and binding arbitration if no agreement could be reached. UP agreed to delay implementation of the changes proposed by the Notice pending the outcome of arbitration subject to conditions set forth in its September 11, 1998, letter.

The parties subsequently established this Arbitration Committee under Article I, Section 11, of the New York Dock Conditions. They submitted extensive evidence and arguments in support of their respective positions in pre-hearing submissions. An arbitration hearing was held on January 6, 1999, in Boston, Massachusetts. The Union

and the Carrier also submitted post-hearing statements summarizing their respective contentions.

It is the Organization's position that no bona fide transaction is even contemplated by the Carrier's June 11, 1998 Notice since, save for crew hauling, no rearrangement of forces will actually take place between Armourdale Yard and Neff Yard. Rather, the ramp work and office work will remain distinct at each facility. Indeed, there is no ramp work performed by UP clerks at Neff Yard. To the extent that the Carrier proposes to remove certain outside of yard crew hauling work from Armourdale Yard, the Organization contends that inasmuch as that work may be subcontracted, it does not constitute a transaction. Therefore, since no work will be coordinated between Armourdale Yard and Neff Yard, the Notice is simply a device to impose a collective bargaining agreement with lower rates of pay and less favorable rules upon the employees at Armourdale Yard, according to the TCU.

Assuming, arguendo, that a transaction is found to exist, only those positions whose work is actually being coordinated should be subject to the Carrier's June 11, 1998 Notice, in the Organization's view. If this Committee concludes that a transaction exists as to certain positions and/or work being transferred to the Neff Yard, then the Carrier should not be permitted to override the SPCBA rates of pay, subcontracting restrictions and guaranteed extra board rules since there is no necessity for such an override, in the Organization's opinion.

The Carrier maintains that it intends to transfer customers and workloads between the TFC Ramp at Armourdale and the Intermodal Ramp at Neff Yard. Such a commingling of work could not have occurred without the merger between the UP and

the SP, the Carrier avers. Indeed, the whole Kansas City Terminal is being consolidated. Therefore, this consolidation constitutes a "transaction" under both New York Dock and NYD-217, according to the Carrier.

It is the Carrier's position that the UPCBA at Neff Yard is not inferior to the SPCBA at Armourdale Yard as claimed by the Organization. And in any event, it contends that NYD-217 gave it the unrestricted right to select what collective bargaining agreement shall apply to employees whose work and/or positions are commingled.

Inasmuch as the preponderance (72%) of clerical positions at Kansas City fall under the UPCBA, it is logical to place all clerical employees under this Agreement, in the Carrier's opinion. Moreover, Kansas City is going to be a pure UP Terminal with all employees there working under UP collective bargaining agreements. Since the efficiency of operations that will result from this transaction will provide a benefit to the public, it is consistent with STB requirements, according to the Carrier.

FINDINGS AND OPINION

Question #1

> Does the Carrier's Notice of June 11, 1998 contemplate a "transaction" pursuant to the parties' December 16, 1996 Implementing Agreement and the New York Dock Conditions?

The Organization concedes that the June 11, 1998 Notice regarding crew hauling work constitutes a "transaction" under Article II of NYD-217 and the New York Dock Conditions. The work of transporting all crews, both UP and former SP, is to be commingled at the Kansas City Terminal. This commingling of work now performed

separately at the Neff Yard and Armourdale Yale does indeed constitute a transaction under both the New York Dock Conditions and NYD-217.

However, the Organization contends that since the ramp work and office work is not being transferred between Armourdale Yard and Neff Yard there is no transaction involving clerical employees working on the ramp and in the office at Armourdale Yard. Abolishing positions and rebulleting them at the same location is not a transaction under New York Dock or NYD-217, in the Organization's opinion.

Article II of NYD-217 allows the Carrier to rearrange and consolidate work and positions from locations throughout the merged SP & UP property. The Carrier contends that it plans to transfer customers and workloads between the TFC Ramp at Armourdale Yard and UP's Intermodal Ramp at Neff Yard. But for the SP and UP merger this rearrangement of work would not be possible, the Carrier maintains. Accordingly, the transfer of this work between the UP Neff Yard and the erstwhile SP Armourdale Yard constitutes a transaction under NYD-217 and the New York Dock Conditions, the Carrier insists.

This Committee is constrained to conclude that the Carrier's June 11, 1998 Notice lacks the specificity mandated by Article II of NYD-217. Article II requires the Carrier to provide the Organization with a detailed plan by location of transactions to take place and distribution of the remaining work. The plan will include:

- A listing of the jobs to be abolished and the incumbents
- The jobs to be created
- The approximate date(s) of transfer
- A description of the work to be transferred and the disposition of work to remain, if any

The June 11, 1998 Notice does not provide the TCU with the detailed plan mandated by Article II regarding the ramp work and office work allegedly to be rearranged and consolidated at Neff Yard and Armourdale Yard in Kansas City, in the opinion of this Committee. Moreover, the Carrier did not explain who would service the Intermodal Ramp at Neff Yard subsequent to a consolidation and rearrangement of this work. Currently, that ramp work is performed by an independent contractor, not by clerical employees represented by the TCU. It appears that no intermodal work is being transferred from Neff Yard to Armourdale Yard. And it is unclear from the June 11, 1998 Notice what ramp work and/or positions are being transferred from Armourdale Yard to Neff Yard and from Neff Yard to Armourdale Yard, if any.

Until the detailed plan required by Article II of NYD-217 is provided the Organization this Committee cannot determine whether there is going to be a rearrangement and consolidation of clerical ramp work and/or positions at Armourdale Yard and Neff Yard in Kansas City pursuant to that Implementing Agreement. The Carrier's June 11, 1998 Notice involving crew hauling work and positions at these two facilities does constitute a transaction, however.

Save for crew hauling, the June 11, 1998 Notice does not appear to coordinate separate railroad facilities as contemplated by the ICC when it adopted the New York Dock Conditions. There does not appear to be a coordination or rearrangement of ramp work or positions at the Carrier's Kansas City Terminal. According to the Notice, ten (10) clerical positions are being abolished and rebulletined at the same location. This does not constitute a coordination of separate railroad facilities under New York Dock or

a rearrangement and coordination of work and/or positions pursuant to Article II of NYD-217. Therefore, there is no "transaction" involving these positions.

Question #2

> If the answer to Question No. 1 is in the affirmative, should the UP/TCU Collective Bargaining Agreement or the SP/TCU Collective Bargaining Agreement apply to those employees affected by the "transaction"?

In Norfolk & Western Rwy. v. American Train Dispatchers Assn. 499 U.S. 117, 133 (1991), the United States Supreme Court held that the so-called immunity provision in the Interstate Commerce Act [49 U.S. C. 11341(a)] which immunized an approved transaction from "antitrust laws and from all other law," included the obligations imposed by the terms of a collective bargaining agreement. However, the Court ruled that the immunity provision does not exempt carriers from all law but rather only from laws "*necessary to carry out an approved transaction.*" In Norfolk & Western Rwy., the Supreme Court affirmed decisions rendered by the ICC in the so-called Carmen I case, 4 I.C.C. 2nd (1988) and Dispatchers I, 4 I.C.C. 2nd.

In Carmen I, the ICC declared that:

> " [T]he carrier is permitted to carry out and fully implement (a transaction the Commission has authorized) despite potential impediments in existing agreements upon compliance with the provisions for the protection of the rights of employees contained in New York Dock or imposed by the Commission upon the involved transaction. As the committee found, and we agree, it has the authority to override these obstacles in the implementing agreement it will fashion."

In Carmen II [CSX Corp – Control – Chessie and Seaboard Coast Line Industries, Inc. 6 I.C.C. 2nd (1990)] the ICC emphasized that collective bargaining

agreements and the Railway Labor Act should not be overridden simply to facilitate a transaction but should be required to yield only when and to the extent necessary to permit the approved transaction to proceed (emphasis added). Carmen II defined the scope of arbitrators' authority to modify collective bargaining agreements under Article I, Section 4, of New York Dock by reference to the arbitral practice between 1940 and 1980, a period of labor peace involving rail mergers and consolidations. The ICC did not elaborate on the foregoing "necessity" standard in Carmen II, however.

Carmen I and Carmen II were remanded to the ICC by the D.C. Circuit for reconsideration in light of the Supreme Court decision in Norfolk & Western Rwy. v. American Train Dispatchers Assn. That remand led to Carmen III.

In its 1998 Carmen III decision [Finance Docket No. 28905 and 29430] the ICC imposed further limitations on an arbitrator's authority under Article I, Section 4, of the New York Dock Conditions to override pre-existing collective bargaining agreements. Although this proceeding involves arbitration under Article I, Section 11, of the New York Dock Conditions, not arbitration under Article I, Section 4, nevertheless the limitations imposed by the ICC in Carmen III are equally applicable to this Section11 arbitration, in our opinion.

Carmen III affirmed the findings of the ICC in Carmen I and Carmen II. However, the STB imposed three additional limitations on an arbitrator's authority to override collective bargaining agreements under Article I, Section 4, of New York Dock. Those limitations were:

(1) the transaction must be one that has been approved by the STB;

(2) the modification cannot reach collective bargaining rights, privileges and benefits protected by Article I, Section 2, of the New York Dock Conditions;

(3) the modification must be necessary to the implementation of the approved transaction.

Article I, Section 2, of New York Dock provides for the preservation of collective bargaining rights. It states:

> " The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

The Board defined "rights, privileges and benefits" as the *"so called incidents of employment or fringe benefits."* Scope rules and seniority rules were specifically excluded from this definition. "Rights, privileges and benefits" are not involved in this arbitration. However, "rates of pay, rules and working conditions" are since the Carrier proposed to change the rates of pay of certain clerical positions at Armourdale Yard. It also proposes to eliminate the former SP Scope Rule and the guaranteed extra board agreement currently in effect at this facility.

Based on the Board's 1998 Carmen III decision, it is now clear that a collective bargaining agreement can be overridden in an Article I, Section 4, New York Dock arbitration only if this is necessary to effectuate the transaction approved by the STB. The STB summarized the necessity standard by quoting from its decision in Fox Valley:

> *"Arbitrators should also be aware that in [RLEA] the court admonished us to identify which changes in pre-transaction labor arrangements are necessary to secure the public benefits of the transaction and which are not. We have generally delegated to arbitrators the task of determining*

the particular changes that are and are not necessary to carry out the purposes of the transaction, subject only to review under our Lace Curtain standards. . . Arbitrators should discuss the necessity of modifications to pre-transaction labor arrangements, taking care to reconcile the operational needs of the transaction with the need to preserve pre-transaction arrangements. Arbitrators should not require the carrier to bear a heavy burden (for example, through detailed operational studies) in justifying operational and related work assignment and employment level changes that are clearly necessary to make the merged entity operate efficiently as a unified system rather than as two separate entities, if these changes are identified with reasonable particularity. But arbitrators should not assume that all pre-transaction labor arrangements, no matter how remotely they are connected with operational efficiency or other public benefits of the transaction, must be modified to carry out the purposes of a transaction."

RLEA refers to RLEA vs. ICC, 987 F. 2nd 806, 814 (1993) where the Court of Appeals for the D.C. Circuit ruled that a "necessity" standard must include a finding of public transportation benefits from the underlying transaction which cannot be effectuated if the only benefit derives from the CBA modification itself (emphasis added). The Court stated that " *merely to transfer wealth from employees to their employer*" does not effectuate the purpose of the transaction. The Surface Transportation Board has adopted this standard.

A review of the Carmen Trilogy reveals that the STB relied on the "necessity" standard to restrict an arbitrator's authority to override collective bargaining agreements under New York Dock. Such authority is not to be used simply to "facilitate" a transaction, according to the STB. Rather, arbitrators are to look to the precedent from 1940 to 1980 as guidance and they must reconcile the operational necessities of the merged carrier with the need to preserve pre-transaction labor agreements.

On November 22, 1995, the STB rendered a decision upholding an award rendered by this Arbitrator in an Article I, Section 4, New York Dock arbitration between the United Transportation Union/Brotherhood of Locomotives Engineers and CSX Transportation, Inc. In its decision, the Board made the following observation:

> *". . . To determine which changes are permissible, the court in RLEA established the following standard (987 F. 2nd at 814-15): . . . it is clear that the Commission may not modify a CBA willy-nilly: 11347 requires that the Commission provide a 'fair arrangement.' The Commission itself has stated that it may modify a collective bargaining agreement under 11347 only as 'necessary' to effectuate a covered transaction . . . We look therefore to the purpose for which the ICC has been given this authority [to approve consolidations]. That purpose is presumably to secure to the public some transportation benefit that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer. . . In other words, the court's standard is whether the change is (a) necessary to effect a public benefit of the transaction or (b) merely a transfer of wealth from employees to their employer. . . ."*

The Board reiterated these standards in a June 26, 1997 review of an Article I, Section 4, New York Dock award rendered by Arbitrator James E. Yost. The STB stated that :

> *". . . In RLEA, supra, the court admonished the ICC to refrain from approving modifications that are not necessary for realization of the public benefits of the consolidation but are merely devices to transfer wealth from the employees to their employer. In its appeal, UTU made no effort to show that the UP Eastern District collective bargaining agreement is inferior to the collective bargaining agreements that it replaced. This is not a situation where the carrier is using New York dock as a pretext to apply a new, uniform collective bargaining agreement that is inferior in matters such as wages levels, and working conditions. . . ."*

As observed heretofore, the Carrier intends to eliminate all of the clerical positions currently assigned to the SP Armourdale Yard and create new clerical positions under the UP/TCU Collective Bargaining Agreement. These positions currently work under a SP Collective Bargaining Agreement, i.e. a former St. Louis Southwestern Railway Company Agreement. The Carrier would override this SPCBA and replace it with the UPCBA currently in effect for clerical employees at the Neff Yard.

The Carrier maintains that NYD-217 gives it the unrestricted right to place these clerical employees under the UP Agreement but this Committee respectfully disagrees. NYD-217 does not expressly address what collective bargaining agreement will apply when clerical positions being rearranged and/or consolidated are governed by different agreements. Nor is such an unrestricted right implied in NYD-217.

There is not a scintilla of evidence in the record before this Committee that this subject was discussed during the negotiations preceding adoption of NYD-217. Nor is there any persuasive evidence in the record that the TCU granted the UP the unrestricted right to override collective bargaining agreements and select which agreement will apply to a transaction under NYD-217 when it entered into this Implementing Agreement.

The Carrier argues that when Letter of Understanding No. 5 and Letter of Understanding No. 18 are juxtaposed with the provisions of NYD-217 it becomes clear that it has the unrestricted right to place clerical employees under the UPCBA in transactions pursuant to Article II of NYD-217. Again, this Arbitrator respectfully disagrees with the Carrier's contention.

The Carrier argues that Letter of Understanding No. 5 supports its contention that work and positions may be transferred from one CBA to another without further

negotiations. Letter of Understanding No. 5 explains how clerical positions established as a result of the transfer of work under NYD-217 are to be bulletined. If anything, Letter of Understanding No. 5 contemplates that both the UP and SP collective bargaining agreements will remain in effect since it provides that "[A]ny positions that remain unfilled will be bulletined in accordance with the working Agreement on the property (UP or SP) to which the work is being transferred (underlining added). Letter of Understanding No. 5 does not imply that the Carrier shall have the unrestricted right to determine what agreement will apply to a transaction under NYD-217 when more than one agreement applies to positions being rearranged and consolidated.

Nor does Letter of Understanding No. 18 expressly or implicitly provide that the Carrier has the unrestricted right to place employees under the UPCBA when their positions and/or work are being rearranged or coordinated pursuant to NYD-217. Rather, Letter of Understanding No. 18 merely preserves certain enumerated rates of pay when SP employees transfer to the UP or when UP employees transfer to the SP as was done at Denver.

Inasmuch as crew hauling is being consolidated at Neff Yard and Armourdale Yard this Committee agrees with the Carrier that in order to achieve the operational efficiencies contemplated by this consolidation a single collective bargaining agreement should apply to those employees engaged in crew hauling operations at the Kansas City Terminal.

For the reasons expressed above, this Committee concludes that NYD-217 does not grant the Carrier the unqualified right to place clerical positions under the UPCBA when these positions are rearranged and/or consolidated in a transaction under Article II

of that Implementing Agreement. Accordingly, in determining whether the Carrier has the right to override the SPCBA governing those clerical employees engaged in crew hauling operations at the Kansas City Terminal, the limitations imposed on New York Dock arbitrators by the STB must be strictly observed.

As noted heretofore, the STB has sanctioned the override of collective bargaining agreements only if this is necessary to effectuate the transaction. Moreover, there must be a public transportation benefit from the transaction before a collective bargaining agreement may be overridden. The Board has instructed New York Dock arbitrators to reconcile the operational needs of the transaction with the need to preserve pre-transaction arrangements. Additionally, the STB has ruled that rail carriers bear the burden of establishing that the proposed change is necessary to effectuate a transaction. In the instant case, the Carrier has not sustained that burden, in the opinion of this Committee.

The Carrier's proposal would reduce the wage rates of the SP clerical positions being eliminated and rebulletined as Utility Clerk positions by between 34% and 36% of the current SP rates. The prohibition against subcontracting in the SPCBA would also be eliminated. And the SP guaranteed extra board at Armourdale Yard would be reduced from 15% of the permanent clerical positions to 10% of the permanent positions.

In this Committee's opinion, the aforementioned changes in the SP rates of pay, rules and working conditions are not necessary to effectuate the consolidation and rearrangement of crew hauling at the Kansas City Terminal. No public transportation benefit will be achieved by overriding the SPCBA, in our judgment.

The efficiencies of operation that will result from coordinating the crew hauling functions at the Kansas City Terminal can just as easily be attained by placing these positions under the UPCBA with the SP rates of pay, prohibition against subcontracting and guaranteed extra board rules incorporated into the UPCBA. This will result in only one collective bargaining agreement governing the positions performing crew hauling while avoiding overriding the SP Agreement. This is what Arbitrator Peter Meyers did in an Article I, Section 4, New York Dock arbitration involving maintenance of way employees on the Union Pacific.

As explained above, the STB requires New York Dock arbitrators to reconcile the need to preserve pre-transaction labor arrangements with the operational needs of the transaction. The Carrier has not persuaded this Committee that it is necessary to override SP rates of pay, rules and working conditions to achieve the operational efficiency attendant the consolidation of crew hauling at the Kansas City Terminal. The same public transportation benefit can be attained by placing the Armourdale Yard positions under the UP Agreement and incorporating the SP rates of pay, prohibition against subcontracting and guaranteed extra board agreement into the UP Agreement for these employees. Therefore, the Carrier has not demonstrated the "necessity" to override the SP Agreement to effectuate the rearrangement and coordination of crew hauling work and positions at the Kansas City Terminal.

Were this an Article I, Section 4, New York Dock arbitration, the SPCBA could not be overridden. Therefore, it cannot be overridden under NYD-217 in this Article I, Section 11, New York Dock arbitration, in the opinion of this Committee. To the extent that work and positions are being transferred and commingled between Armourdale Yard

and Neff Yard in accordance with NYD-217, the SP Collective Bargaining Agreement cannot be overridden for all the reasons set forth above.

AWARD

The Carrier's Notice of June 11, 1988, involving positions located at Armourdale, Kansas and Kansas City, Missouri contemplates a "transaction" for employees engaged in crew hauling only pursuant to the parties' December 16, 1996 Implementing Agreement and the New York Dock Conditions.

The Union Pacific Collective Bargaining Agreement as modified to include the Southern Pacific rates of pay, prohibition against subcontracting and guaranteed extra board will apply to the employees affected by this "transaction."

Robert M. O'Brien

Robert M. O'Brien, Arbitrator

Dated: 3/26/99

TCU Exhibit 6

D. D. MATTER
General Director
Labor Relations-NON-OPS

UNION PACIFIC RAILROAD COMPANY

1416 Dodge Street
Omaha, Nebraska 68179

May 18, 1999
NYD-217

Mr. Robert M. O'Brien
16 Fox Hill Lane
Milton, MA 02186

Dear Sir:

This refers to the proposed New York Dock Arbitration Award involving the TCU and Union Pacific concerning consolidation of forces and work at Kansas City Terminal. As you know, the parties have a session scheduled for June 2, 1999, to review that proposed Award.

Effective today, the Carrier has exercised its right to cancel the Notice dated June 11, 1998. That Notice was the basis for the dispute. (A copy of the cancellation Notice is attached.) The Carrier's right to cancel the June 11, 1998 Notice was preserved in my letter of September 11, 1998. (A copy of that letter is attached and it also appeared as Exhibit "6" in our Submission.) In addition, the Carrier has an established practice of unilaterally cancelling NYD-217 Notices.

Since the June 11, 1998 Notice has been cancelled, it is Union Pacific's position the Questions at Issue in the above-referenced proposed Arbitration Award are now moot. It is further Union Pacific's position that an Arbitration Award is now neither necessary nor appropriate and that there is no need to convene the review session on June 2. These positions are consistent with the proposition that where there is no dispute, there should be no Arbitration Award.

I believe this puts this dispute to rest. However, should you wish to discuss this matter, please give me a call (402) 271-4947.

Yours truly,

D. D. Matter

cc: Mr. J. Parker
International Vice President, TCU
3 Research Place
Rockville, MD 20850

✓Mr. R. F. Davis
President, ASD/TCU
53 W. Seegers Road
Arlington Heights, IL 60005

UNION PACIFIC RAILROAD COMPANY

1416 Dodge Street
Omaha, Nebraska 68179

May 18, 1999
NYD-217

Mr. R. F. Davis
President ASD/TCU
53 W. Seegers Road
Arlington Heights, IL 60005

Mr. J. L. Quilty
General Chairman, TCU
2820 South 87th Avenue
Omaha, NE 68124

Gentlemen:

This has reference to my letter dated June 11, 1998, served pursuant to Article II -TRANSACTIONS of Implementing Agreement No. NYD-217, as amended, advising that the Carrier intended to consolidate all clerical work from the Southern Pacific (Armourdale Yard) with that of the Union Pacific Facility at Kansas City and place that work and employees under the Union Pacific/TCU Collective Bargaining Agreement.

Please accept this letter as notification of Union Pacific's decision to cancel the June 11, 1998 Notice effective immediately.

Yours truly,

D. D. Matter

D. D. MATTER
Gen. Director Labor Relations/Non-Ops

cc: Mr. J. P. Condo
International Vice President, TCU
53 W. Seegers Road
Arlington Heights, IL 60005

Mr. J. L. Gobel
International Vice President, TCU
4189 North Road
Moose Lake, MN 55767

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TCU Exhibit 7

ROBERT M. O'BRIEN
ATTORNEY AT LAW
16 FOX HILL LANE
MILTON, MA 02186
(617) 696-0835

August 25, 1999

Dean D. Matter, General Director – Labor Relations
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179

-and-

Robert F. Davis, President
ASD/TCU
53 W. Seegers Road
Arlington Heights, IL 60005

RE: **SECTION 11 NEW YORK ARBITRATION**
(Consolidation at Kansas City Terminal)

Gentlemen:

I am enclosing herewith a signed copy of my Award in the above-referenced matter since I do not consider the dispute that led to the Award moot notwithstanding the Carrier's contention.

It is undisputed that the Carrier reserved the right to cancel the June 21, 1998 Notice to consolidate certain work and clerical employees at its Kansas City Terminal at any time, including prior to and subsequent to the issuance of a New York Dock Arbitration Award. However, this preservation of rights does not render the decision I forwarded you on March 25, 1999, moot, in my opinion.

It is noteworthy that the Carrier has expressly reserved the right to issue a new Notice pursuant to NYD-217 consolidating clerical forces and work at Neff Yard and Armourdale Yard in Kansas City. If the Carrier exercises this prerogative many of the issues that have been addressed in my Award may recur. Rather that relitigate those issue anew my Award may offer some guidance to help resolve them. In the light of these circumstances, the underlying dispute involving the consolidation of work and clerical employees at Kansas City is not moot.

Contrary to the Carrier's assertion, this Arbitrator is not issuing a declaratory order. Rather, the Award I am rendering addresses issues that are still viable since the Carrier has

preserved its right to serve a new Notice under NYD-217 to consolidate clerical work and employees at its Kansas City Terminal. As noted above, the Award may help resolve some of the issues attendant such a consolidation.

Please advise if you wish to meet in executive session to discuss the Award that I am enclosing herewith.

Very truly yours,

Robert M. O'Brien

Robert M. O'Brien
New York Dock Arbitrator

RMO'B/amm
enclosure

ARBITRATION COMMITTEE ESTABLISHED
PURSUANT TO ARTICLE I, SECTION 11,
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS

In the matter of arbitration between:

Transportation Communications
International Union

-and-

Union Pacific Railroad Company

STATEMENT OF THE ISSUE

After carefully reviewing the extensive record submitted to this Committee, we submit that the following accurately reflects the questions that must be decided in this arbitration:

Question #1

Does the Carrier's Notice of June 11, 1998, involving positions located at Armourdale, Kansas and Kansas City, Missouri, contemplate a "transaction" pursuant to the parties' December 16, 1996 Implementing Agreement and the New York Dock Conditions?

Question #2

If the answer to Question No. 1 is in the affirmative should the UP/TCU Collective Bargaining Agreement or the SP/TCU Collective Bargaining Agreement apply to those employees affected by the "transaction"?

BACKGROUND

On November 30, 1995, the Union Pacific Corporation (hereinafter referred to as the Carrier or the UP) filed application with the Interstate Commerce Commission (ICC)

seeking approval to obtain common control and to merge the rail carriers controlled by the UP (Union Pacific Railroad Company and Missouri Pacific Railroad Company) with the rail carriers controlled by the Southern Pacific Rail Corporation (Southern Pacific Transportation Company-Eastern and Western Lines, St. Louis Southwestern Railway Company, SPCSL Corporation, and the Denver & Rio Grande Western Railroad Company). In its application, the Carrier declared that significant economies and efficiencies could be achieved by the merger of these railroads which would provide a transportation benefit to the public. Following extensive hearings and testimony, the Surface Transportation Board (hereinafter referred to as the STP or the Board,), successor to the ICC, approved the Carrier's application on August 6, 1996 in Finance Docket No. 32760. In approving this merger, the STB imposed the New York Dock Conditions adopted by the ICC in Finance Docket No. 28250, 360 ICC 60 (1979).

In accordance with the requirements of the New York Dock Conditions, on September 16, 1996, the Carrier served notice on the Allied Services Division of the Transportation Communications Union (hereinafter referred to as the TCU or the Organization) of its intent to consolidate clerical forces throughout the merged Union Pacific-Southern Pacific Transportation Company (hereinafter referred to as the Southern Pacific or the SP) system. The parties entered into negotiations and signed Implementing Agreement No. NYD-217 (hereinafter referred to as NYD-217) on December 18, 1996.

NYD-217 provides, in pertinent part, as follows:

> . . . **WHEREAS**, pursuant to Article I, Section 4 of the New York Dock Conditions, the following Agreement is made to cover the general rearrangement of functions throughout the UP and the SP, and this rearrangement is made to effect the merger of the UP and SP properties. It is expected that the completion of this rearrangement will

involve all areas of the merged railroad's organizational structure.

UP and SP expect that the rearrangement will be implemented in several stages. The Company anticipates that at least 1,800 clerical employees will be affected. These employees are now positioned at various locations across the UP and SP.

The rearrangement of employees and/or work will commence after the effective date of this Agreement. . . .

ARTICLE II – TRANSACTIONS

After the effective date of this Agreement, the Company will commence rearrangement and consolidation of work and positions from locations throughout SP and UP.

The Company will provide the Organization with a detailed plan by location of transactions to take place and distribution of remaining work. The plan will include a listing of the jobs to be abolished and the incumbents; the jobs to be created, the approximate date(s) of transfer; a description of the work to be transferred and the disposition of work to remain, if any. If the transfer of employees or the abolishment of jobs is involved, the plan for each location may be implemented sixty (60) days or later after issuance. It is understood that the sixty (60) days contemplates five (5) days or more notice to the Organization, twenty (20) days for employees to make election, five (5) days for the Carrier to award employee options, and thirty (30) days to prepare for and complete the move. If the plan involves only the transfer of work, such transfer may occur thirty (30) days or later after issuance.

After notifying the Organization of the plan to transfer work and/or employees, the General Chairman may request a meeting to discuss the Carrier's plan. A request for a meeting from the involved General Chairman must be made within five (5) days after the Carrier's plan notice is received by the Union, and said meeting must be held within ten (10) days after the Union's request is received by the Carrier. . . .

The parties also agreed to numerous Letters of Understanding that were appended to NYD-217. Letter of Understanding No. 5 addresses the procedure for bulleting positions that will be established as a result of the transfer of work pursuant to the Implementing Agreement. Letter of Understanding No. 18 provides that SP employees transferring to the UP and UP employees transferring to the SP will have certain rates of pay protected. The protected rates are enumerated in the Letter of Understanding.

Immediately following the signing of NYD-217, the Carrier began preparing Notices pursuant to Article II of that Agreement advising the Organization of its intent to consolidate SP clerical work with UP clerical work. The first such Notice was served on December 31, 1996. To date, the Carrier has served over 130 Notices which have resulted in the consolidation of SP clerical work throughout the merged UP-SP system.

On June 11, 1998, the Carrier served the TCU with Notice of its intent to consolidate clerical work at the Neff Yard and Armourdale Yard in the Kansas City Terminal. The Neff Yard(s) is a UP facility in Kansas City, Missouri. The Armourdale Yard is a former SP facility in Kansas City, Kansas. The two yards are approximately 10 miles apart. Clerical employees at Neff Yard work under a Union Pacific Collective Bargaining Agreement (hereinafter referred to as the UPCBA) whereas clerical employees at the Armourdale Yard work under a SP Collective Bargaining Agreement (hereinafter referred to as the SPCBA). [The Agreement is actually a former St. Louis Southwestern Railway Company Agreement.]

The June 11, 1998 Notice stated that the Carrier intended to eliminate all of the clerical positions currently assigned to the SP Armourdale Yard operations and transfer

all of this work to clerical positions to be established under the Union Pacific/TCU Collective Bargaining Agreement. The Carrier amended this Notice on June 24, 1998.

On or around June 11, 1998, when the Notice was served on the Organization, there were 43 clerical jobs filled by 42 employees at the UP Neff Yard. At the same time, there were 21 clerical positions filled by 19 employees at the former SP Armourdale Yard. For many of these positions, the UP rate of pay is lower than the applicable SP rate of pay. The work performed by the SP clerical employees was to be transferred to 15 Utility Clerk positions and six (6) Ramp Clerk positions under the UPCBA, according to the June 11, 1998 Notice.

Prior to the merger of the UP and SP in 1996, there was an intermodal facility at both the Neff Yard and Armourdale Yard. At the Armourdale intermodal ramp, loading and unloading functions are performed by an independent contractor while the remaining clerical ramp functions are performed by UP clerical employees. At present, the clerical functions, as well as the loading, unloading and tie-down functions at the Neff Intermodal Ramp are performed by an independent contractor.

Crew hauling operations at Neff Yard are divided pursuant to a 1991 agreement between the UP and TCU. Under this agreement, crew hauling within the Neff Yard itself and between the yard and local hotels where operating craft employees lodge between runs are performed under the UP Agreement. All crew hauling runs made from Neff Yard to other points outside the facility are performed by an independent contractor.

Crew hauling at the Armourdale Yard, both within the yard and to points outside the yard, is performed under the SP Agreement. Further, pursuant to a 1980 Total Operating Procedures System (TOPS) Agreement applicable to the Armourdale Yard,

the Carrier is precluded from contracting out clerical work. The Scope Rule of the TOPS Agreement prohibits the Carrier from removing work from TCU's jurisdiction. There is no such restriction under the UPCBA, however, for ramp work at Neff Yard.

Pursuant to a longstanding TOPS Agreement on the Armourdale property, the Carrier is required to maintain a guaranteed extra board consisting of a minimum of fifteen percent (15%) of permanent employees. The corresponding UP Agreement at Neff Yard requires a minimum extra board of ten percent (10%) of permanent employees.

The seven ramp positions which the Carrier proposes to rebulletin at Armourdale Yard under the UP Agreement will be paid at a daily rate of $120.61. This is $9.05, or 7%, less than the current rate under the SP Agreement for ramp clerks at Armourdale Yard. These newly bulletined positions will be roughly equivalent to the current position of ramp clerk at the Armourdale Yard, according to the Organization. The newly created crew hauling positions at both Neff Yard and Amourdale Yard will pay a rate of pay lower than the rate of the SP positions being abolished. The Organization contends the rate will be between 34% and 36% lower than the present SP rates.

The Carrier's June 11 Notice proposes to abolish the following positions under the SP Agreement at the Armourdale Yard: one Chief Clerk; two Assistant Chief Clerks; seven General Clerks; three Clerk/Telegraphers; one Janitor; and one Extra Board position. In lieu of these positions, the Carrier intends to bulletin twelve "Utility Clerk" positions and four Extra Board clerical positions. Of these twelve Utility Clerk positions, six will be posted at Neff Yard, three will be posted at Armourdale Yard and the remaining three will be assigned three days a week to Neff Yard and two days a week to Armourdale Yard. All four Extra Board positions will be bulletined at Neff Yard.

Under the Scope Rule of the SP Agreement, crew hauling at the Armourdale Yard may not be contracted out. Under the UP Agreement, crew hauling within the confines of the Neff Yard is performed by UP employees represented by TCU. However, the UP Agreement permits the Carrier to contract out crew hauling involving the pick up and delivery of crews outside the Neff Yard.

On July 30, 1998, the TCU responded to the June 11, 1998 Notice. The Organization claimed that the Notice was inappropriate and not in accordance with the spirit and intent of NYD-217. Moreover, it would place the clerical employees at Armourdale under an inferior collective bargaining agreement, according to the Organization, since their rates of pay would be reduced considerably; clerical employees could have their work contracted out; and the Extra Board Agreement at Neff Yard is inferior to the Extra Board TOPS Agreement at Armourdale. The Union requested the Carrier to withdraw the Notice.

On September 11, 1998, the Carrier responded to the Organization's July 30, 1998, letter. The Carrier insisted that the June 11, 1998 Notice and the changes proposed therein embraced the spirit and intent of NYD-217. Nevertheless, it was willing to submit the issue to final and binding arbitration if no agreement could be reached. UP agreed to delay implementation of the changes proposed by the Notice pending the outcome of arbitration subject to conditions set forth in its September 11, 1998, letter.

The parties subsequently established this Arbitration Committee under Article I, Section 11, of the New York Dock Conditions. They submitted extensive evidence and arguments in support of their respective positions in pre-hearing submissions. An arbitration hearing was held on January 6, 1999, in Boston, Massachusetts. The Union

and the Carrier also submitted post-hearing statements summarizing their respective contentions.

It is the Organization's position that no bona fide transaction is even contemplated by the Carrier's June 11, 1998 Notice since, save for crew hauling, no rearrangement of forces will actually take place between Armourdale Yard and Neff Yard. Rather, the ramp work and office work will remain distinct at each facility. Indeed, there is no ramp work performed by UP clerks at Neff Yard. To the extent that the Carrier proposes to remove certain outside of yard crew hauling work from Armourdale Yard, the Organization contends that inasmuch as that work may be subcontracted, it does not constitute a transaction. Therefore, since no work will be coordinated between Armourdale Yard and Neff Yard, the Notice is simply a device to impose a collective bargaining agreement with lower rates of pay and less favorable rules upon the employees at Armourdale Yard, according to the TCU.

Assuming, arguendo, that a transaction is found to exist, only those positions whose work is actually being coordinated should be subject to the Carrier's June 11, 1998 Notice, in the Organization's view. If this Committee concludes that a transaction exists as to certain positions and/or work being transferred to the Neff Yard, then the Carrier should not be permitted to override the SPCBA rates of pay, subcontracting restrictions and guaranteed extra board rules since there is no necessity for such an override, in the Organization's opinion.

The Carrier maintains that it intends to transfer customers and workloads between the TFC Ramp at Armourdale and the Intermodal Ramp at Neff Yard. Such a commingling of work could not have occurred without the merger between the UP and

the SP, the Carrier avers. Indeed, the whole Kansas City Terminal is being consolidated. Therefore, this consolidation constitutes a "transaction" under both New York Dock and NYD-217, according to the Carrier.

It is the Carrier's position that the UPCBA at Neff Yard is not inferior to the SPCBA at Armourdale Yard as claimed by the Organization. And in any event, it contends that NYD-217 gave it the unrestricted right to select what collective bargaining agreement shall apply to employees whose work and/or positions are commingled.

Inasmuch as the preponderance (72%) of clerical positions at Kansas City fall under the UPCBA, it is logical to place all clerical employees under this Agreement, in the Carrier's opinion. Moreover, Kansas City is going to be a pure UP Terminal with all employees there working under UP collective bargaining agreements. Since the efficiency of operations that will result from this transaction will provide a benefit to the public, it is consistent with STB requirements, according to the Carrier.

FINDINGS AND OPINION

Question #1

> Does the Carrier's Notice of June 11, 1998 contemplate a "transaction" pursuant to the parties' December 16, 1996 Implementing Agreement and the New York Dock Conditions?

The Organization concedes that the June 11, 1998 Notice regarding crew hauling work constitutes a "transaction" under Article II of NYD-217 and the New York Dock Conditions. The work of transporting all crews; both UP and former SP, is to be commingled at the Kansas City Terminal. This commingling of work now performed

separately at the Neff Yard and Armourdale Yale does indeed constitute a transaction under both the New York Dock Conditions and NYD-217.

However, the Organization contends that since the ramp work and office work is not being transferred between Armourdale Yard and Neff Yard there is no transaction involving clerical employees working on the ramp and in the office at Armourdale Yard. Abolishing positions and rebulleting them at the same location is not a transaction under New York Dock or NYD-217, in the Organization's opinion.

Article II of NYD-217 allows the Carrier to rearrange and consolidate work and positions from locations throughout the merged SP & UP property. The Carrier contends that it plans to transfer customers and workloads between the TFC Ramp at Armourdale Yard and UP's Intermodal Ramp at Neff Yard. But for the SP and UP merger this rearrangement of work would not be possible, the Carrier maintains. Accordingly, the transfer of this work between the UP Neff Yard and the erstwhile SP Armourdale Yard constitutes a transaction under NYD-217 and the New York Dock Conditions, the Carrier insists.

This Committee is constrained to conclude that the Carrier's June 11, 1998 Notice lacks the specificity mandated by Article II of NYD-217. Article II requires the Carrier to provide the Organization with a detailed plan by location of transactions to take place and distribution of the remaining work. The plan will include:

- A listing of the jobs to be abolished and the incumbents
- The jobs to be created
- The approximate date(s) of transfer
- A description of the work to be transferred and the disposition of work to remain, if any

The June 11, 1998 Notice does not provide the TCU with the detailed plan mandated by Article II regarding the ramp work and office work allegedly to be rearranged and consolidated at Neff Yard and Armourdale Yard in Kansas City, in the opinion of this Committee. Moreover, the Carrier did not explain who would service the Intermodal Ramp at Neff Yard subsequent to a consolidation and rearrangement of this work. Currently, that ramp work is performed by an independent contractor, not by clerical employees represented by the TCU. It appears that no intermodal work is being transferred from Neff Yard to Armourdale Yard. And it is unclear from the June 11, 1998 Notice what ramp work and/or positions are being transferred from Armourdale Yard to Neff Yard and from Neff Yard to Armourdale Yard, if any.

Until the detailed plan required by Article II of NYD-217 is provided the Organization this Committee cannot determine whether there is going to be a rearrangement and consolidation of clerical ramp work and/or positions at Armourdale Yard and Neff Yard in Kansas City pursuant to that Implementing Agreement. The Carrier's June 11, 1998 Notice involving crew hauling work and positions at these two facilities does constitute a transaction, however.

Save for crew hauling, the June 11, 1998 Notice does not appear to coordinate separate railroad facilities as contemplated by the ICC when it adopted the New York Dock Conditions. There does not appear to be a coordination or rearrangement of ramp work or positions at the Carrier's Kansas City Terminal. According to the Notice, ten (10) clerical positions are being abolished and rebulletined at the same location. This does not constitute a coordination of separate railroad facilities under New York Dock or

a rearrangement and coordination of work and/or positions pursuant to Article II of NYD-217. Therefore, there is no "transaction" involving these positions.

Question #2

> If the answer to Question No. 1 is in the affirmative, should the UP/TCU Collective Bargaining Agreement or the SP/TCU Collective Bargaining Agreement apply to those employees affected by the "transaction"?

In Norfolk & Western Rwy. v. American Train Dispatchers Assn. 499 U.S. 117, 133 (1991), the United States Supreme Court held that the so-called immunity provision in the Interstate Commerce Act [49 U.S. C. 11341(a)] which immunized an approved transaction from "antitrust laws and from all other law," included the obligations imposed by the terms of a collective bargaining agreement. However, the Court ruled that the immunity provision does not exempt carriers from all law but rather only from laws "*necessary to carry out an approved transaction.*" In Norfolk & Western Rwy., the Supreme Court affirmed decisions rendered by the ICC in the so-called Carmen I case, 4 I.C.C. 2nd (1988) and Dispatchers I, 4 I.C.C. 2nd.

In Carmen I, the ICC declared that:

> " [T]he carrier is permitted to carry out and fully implement (a transaction the Commission has authorized) despite potential impediments in existing agreements upon compliance with the provisions for the protection of the rights of employees contained in New York Dock or imposed by the Commission upon the involved transaction. As the committee found, and we agree, it has the authority to override these obstacles in the implementing agreement it will fashion."

In Carmen II [CSX Corp – Control – Chessie and Seaboard Coast Line Industries, Inc. 6 I.C.C. 2nd (1990)] the ICC emphasized that collective bargaining

agreements and the Railway Labor Act should not be overridden simply to facilitate a transaction but should be required to yield only when and to the extent necessary to permit the approved transaction to proceed (emphasis added). Carmen II defined the scope of arbitrators' authority to modify collective bargaining agreements under Article I, Section 4, of New York Dock by reference to the arbitral practice between 1940 and 1980, a period of labor peace involving rail mergers and consolidations. The ICC did not elaborate on the foregoing "necessity" standard in Carmen II, however.

Carmen I and Carmen II were remanded to the ICC by the D.C. Circuit for reconsideration in light of the Supreme Court decision in Norfolk & Western Rwy. v. American Train Dispatchers Assn. That remand led to Carmen III.

In its 1998 Carmen III decision [Finance Docket No. 28905 and 29430] the ICC imposed further limitations on an arbitrator's authority under Article I, Section 4, of the New York Dock Conditions to override pre-existing collective bargaining agreements. Although this proceeding involves arbitration under Article I, Section 11, of the New York Dock Conditions, not arbitration under Article I, Section 4, nevertheless the limitations imposed by the ICC in Carmen III are equally applicable to this Section11 arbitration, in our opinion.

Carmen III affirmed the findings of the ICC in Carmen I and Carmen II. However, the STB imposed three additional limitations on an arbitrator's authority to override collective bargaining agreements under Article I, Section 4, of New York Dock. Those limitations were:

(1) the transaction must be one that has been approved by the STB;

(2) the modification cannot reach collective bargaining rights, privileges and benefits protected by Article I, Section 2, of the New York Dock Conditions;

(3) the modification must be necessary to the implementation of the approved transaction.

Article I, Section 2, of New York Dock provides for the preservation of collective bargaining rights. It states:

> " The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

The Board defined "rights, privileges and benefits" as the *"so-called incidents of employment or fringe benefits."* Scope rules and seniority rules were specifically excluded from this definition. "Rights, privileges and benefits" are not involved in this arbitration. However, "rates of pay, rules and working conditions" are since the Carrier proposed to change the rates of pay of certain clerical positions at Armourdale Yard. It also proposes to eliminate the former SP Scope Rule and the guaranteed extra board agreement currently in effect at this facility.

Based on the Board's 1998 Carmen III decision, it is now clear that a collective bargaining agreement can be overridden in an Article I, Section 4, New York Dock arbitration only if this is necessary to effectuate the transaction approved by the STB. The STB summarized the necessity standard by quoting from its decision in Fox Valley:

> *"Arbitrators should also be aware that in [RLEA] the court admonished us to identify which changes in pre-transaction labor arrangements are necessary to secure the public benefits of the transaction and which are not. We have generally delegated to arbitrators the task of determining*

the particular changes that are and are not necessary to carry out the purposes of the transaction, subject only to review under our Lace Curtain standards. . . Arbitrators should discuss the necessity of modifications to pre-transaction labor arrangements, taking care to reconcile the operational needs of the transaction with the need to preserve pre-transaction arrangements. Arbitrators should not require the carrier to bear a heavy burden (for example, through detailed operational studies) in justifying operational and related work assignment and employment level changes that are clearly necessary to make the merged entity operate efficiently as a unified system rather than as two separate entities, if these changes are identified with reasonable particularity. But arbitrators should not assume that all pre-transaction labor arrangements, no matter how remotely they are connected with operational efficiency or other public benefits of the transaction, must be modified to carry out the purposes of a transaction."

RLEA refers to RLEA vs. ICC, 987 F. 2nd 806, 814 (1993) where the Court of Appeals for the D.C. Circuit ruled that a "necessity" standard must include a finding of public transportation benefits from the underlying transaction which cannot be effectuated if the only benefit derives from the CBA modification itself (emphasis added). The Court stated that " *merely to transfer wealth from employees to their employer*" does not effectuate the purpose of the transaction. The Surface Transportation Board has adopted this standard.

A review of the Carmen Trilogy reveals that the STB relied on the "necessity" standard to restrict an arbitrator's authority to override collective bargaining agreements under New York Dock. Such authority is not to be used simply to "facilitate" a transaction, according to the STB. Rather, arbitrators are to look to the precedent from 1940 to 1980 as guidance and they must reconcile the operational necessities of the merged carrier with the need to preserve pre-transaction labor agreements.

On November 22, 1995, the STB rendered a decision upholding an award rendered by this Arbitrator in an Article I, Section 4, New York Dock arbitration between the United Transportation Union/Brotherhood of Locomotives Engineers and CSX Transportation, Inc. In its decision, the Board made the following observation:

> *". . . To determine which changes are permissible, the court in RLEA established the following standard (987 F. 2nd at 814-15): . . . it is clear that the Commission may not modify a CBA willy-nilly: 11347 requires that the Commission provide a 'fair arrangement.' The Commission itself has stated that it may modify a collective bargaining agreement under 11347 only as 'necessary' to effectuate a covered transaction . . . We look therefore to the purpose for which the ICC has been given this authority [to approve consolidations]. That purpose is presumably to secure to the public some transportation benefit that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer. . . In other words, the court's standard is whether the change is (a) necessary to effect a public benefit of the transaction or (b) merely a transfer of wealth from employees to their employer. . . ."*

The Board reiterated these standards in a June 26, 1997 review of an Article I, Section 4, New York Dock award rendered by Arbitrator James E. Yost. The STB stated that :

> *". . . In RLEA, supra, the court admonished the ICC to refrain from approving modifications that are not necessary for realization of the public benefits of the consolidation but are merely devices to transfer wealth from the employees to their employer. In its appeal, UTU made no effort to show that the UP Eastern District collective bargaining agreement is inferior to the collective bargaining agreements that it replaced. This is not a situation where the carrier is using New York dock as a pretext to apply a new, uniform collective bargaining agreement that is inferior in matters such as wages levels, and working conditions. . . ."*

As observed heretofore, the Carrier intends to eliminate all of the clerical positions currently assigned to the SP Armourdale Yard and create new clerical positions under the UP/TCU Collective Bargaining Agreement. These positions currently work under a SP Collective Bargaining Agreement, i.e. a former St. Louis Southwestern Railway Company Agreement. The Carrier would override this SPCBA and replace it with the UPCBA currently in effect for clerical employees at the Neff Yard.

The Carrier maintains that NYD-217 gives it the unrestricted right to place these clerical employees under the UP Agreement but this Committee respectfully disagrees. NYD-217 does not expressly address what collective bargaining agreement will apply when clerical positions being rearranged and/or consolidated are governed by different agreements. Nor is such an unrestricted right implied in NYD-217.

There is not a scintilla of evidence in the record before this Committee that this subject was discussed during the negotiations preceding adoption of NYD-217. Nor is there any persuasive evidence in the record that the TCU granted the UP the unrestricted right to override collective bargaining agreements and select which agreement will apply to a transaction under NYD-217 when it entered into this Implementing Agreement.

The Carrier argues that when Letter of Understanding No. 5 and Letter of Understanding No. 18 are juxtaposed with the provisions of NYD-217 it becomes clear that it has the unrestricted right to place clerical employees under the UPCBA in transactions pursuant to Article II of NYD-217. Again, this Arbitrator respectfully disagrees with the Carrier's contention.

The Carrier argues that Letter of Understanding No. 5 supports its contention that work and positions may be transferred from one CBA to another without further

negotiations. Letter of Understanding No. 5 explains how clerical positions established as a result of the transfer of work under NYD-217 are to be bulletined. If anything, Letter of Understanding No. 5 contemplates that both the UP and SP collective bargaining agreements will remain in effect since it provides that "[A]ny positions that remain unfilled will be bulletined in accordance with the working Agreement on the property (UP or SP) to which the work is being transferred (underlining added). Letter of Understanding No. 5 does not imply that the Carrier shall have the unrestricted right to determine what agreement will apply to a transaction under NYD-217 when more than one agreement applies to positions being rearranged and consolidated.

Nor does Letter of Understanding No. 18 expressly or implicitly provide that the Carrier has the unrestricted right to place employees under the UPCBA when their positions and/or work are being rearranged or coordinated pursuant to NYD-217. Rather, Letter of Understanding No. 18 merely preserves certain enumerated rates of pay when SP employees transfer to the UP or when UP employees transfer to the SP as was done at Denver.

Inasmuch as crew hauling is being consolidated at Neff Yard and Armourdale Yard this Committee agrees with the Carrier that in order to achieve the operational efficiencies contemplated by this consolidation a single collective bargaining agreement should apply to those employees engaged in crew hauling operations at the Kansas City Terminal.

For the reasons expressed above, this Committee concludes that NYD-217 does not grant the Carrier the unqualified right to place clerical positions under the UPCBA when these positions are rearranged and/or consolidated in a transaction under Article II

of that Implementing Agreement. Accordingly, in determining whether the Carrier has the right to override the SPCBA governing those clerical employees engaged in crew hauling operations at the Kansas City Terminal, the limitations imposed on New York Dock arbitrators by the STB must be strictly observed.

As noted heretofore, the STB has sanctioned the override of collective bargaining agreements only if this is necessary to effectuate the transaction. Moreover, there must be a public transportation benefit from the transaction before a collective bargaining agreement may be overridden. The Board has instructed New York Dock arbitrators to reconcile the operational needs of the transaction with the need to preserve pre-transaction arrangements. Additionally, the STB has ruled that rail carriers bear the burden of establishing that the proposed change is necessary to effectuate a transaction. In the instant case, the Carrier has not sustained that burden, in the opinion of this Committee.

The Carrier's proposal would reduce the wage rates of the SP clerical positions being eliminated and rebulletined as Utility Clerk positions by between 34% and 36% of the current SP rates. The prohibition against subcontracting in the SPCBA would also be eliminated. And the SP guaranteed extra board at Armourdale Yard would be reduced from 15% of the permanent clerical positions to 10% of the permanent positions.

In this Committee's opinion, the aforementioned changes in the SP rates of pay, rules and working conditions are not necessary to effectuate the consolidation and rearrangement of crew hauling at the Kansas City Terminal. No public transportation benefit will be achieved by overriding the SPCBA, in our judgment.

The efficiencies of operation that will result from coordinating the crew hauling functions at the Kansas City Terminal can just as easily be attained by placing these positions under the UPCBA with the SP rates of pay, prohibition against subcontracting and guaranteed extra board rules incorporated into the UPCBA. This will result in only one collective bargaining agreement governing the positions performing crew hauling while avoiding overriding the SP Agreement. This is what Arbitrator Peter Meyers did in an Article I, Section 4, New York Dock arbitration involving maintenance of way employees on the Union Pacific.

As explained above, the STB requires New York Dock arbitrators to reconcile the need to preserve pre-transaction labor arrangements with the operational needs of the transaction. The Carrier has not persuaded this Committee that it is necessary to override SP rates of pay, rules and working conditions to achieve the operational efficiency attendant the consolidation of crew hauling at the Kansas City Terminal. The same public transportation benefit can be attained by placing the Armourdale Yard positions under the UP Agreement and incorporating the SP rates of pay, prohibition against subcontracting and guaranteed extra board agreement into the UP Agreement for these employees. Therefore, the Carrier has not demonstrated the "necessity" to override the SP Agreement to effectuate the rearrangement and coordination of crew hauling work and positions at the Kansas City Terminal.

Were this an Article I, Section 4, New York Dock arbitration, the SPCBA could not be overridden. Therefore, it cannot be overridden under NYD-217 in this Article I, Section 11, New York Dock arbitration, in the opinion of this Committee. To the extent that work and positions are being transferred and commingled between Armourdale Yard

and Neff Yard in accordance with NYD-217, the SP Collective Bargaining Agreement cannot be overridden for all the reasons set forth above.

AWARD

The Carrier's Notice of June 11, 1988, involving positions located at Armourdale, Kansas and Kansas City, Missouri contemplates a "transaction" for employees engaged in crew hauling only pursuant to the parties' December 16, 1996 Implementing Agreement and the New York Dock Conditions.

The Union Pacific Collective Bargaining Agreement as modified to include the Southern Pacific rates of pay, prohibition against subcontracting and guaranteed extra board will apply to the employees affected by this "transaction."

Robert M. O'Brien

Robert M. O'Brien, Arbitrator

Dated: August 25, 1999

TCU Exhibit 8

UNION PACIFIC RAILROAD COMPANY

1416 Dodge Street
Omaha, Nebraska 68179

August 30, 1999
NYD-217

Mr. R. F. Davis
President ASD/TCU
53 W. Seegers Road
Arlington Heights, IL 60005

Mr. J. L. Quilty
General Chairman, TCU
2820 South 87th Avenue
Omaha, NE 68124

Gentlemen:

Pursuant to Article II - Transactions of New York Dock Implementing Agreement No. NYD-217, notice is hereby given of the Carrier's intent to abolish the positions listed below at Armourdale Yard, Kansas City, Kansas, on or after October 29, 1999:

POSITION NO.	INCUMBENT
020	L. L. Seymour
018	B. D. Beall
021	L. J. Unrein
014	E. G. Koder
006	R. A. Nisser
007	T. M. Ludwig
004	D. A. Thompson
001	G. A. Cox
008	J. E. Ellison
011	F. R. Moore

Any remaining duties and responsibilities of these positions will be absorbed by remaining clerical forces at Armourdale Yard, Kansas City, Kansas.

If you have any questions regarding this transaction, please contact my office.

Yours truly,

D. D. Matter

D. D. Matter
Gen. Director Labor Relations/TCU

cc: Mr. J. P. Condo
International Vice President, TCU
53 W. Seegers Road
Arlington Heights, IL 60005

Mr. J. L. Gobel
International Vice President, TCU
4189 North Road
Moose Lake, MN 55767

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UNION PACIFIC RAILROAD COMPANY

1416 Dodge Street
Omaha, Nebraska 68179

August 30, 1999
NYD-217

Mr. R. F. Davis
President ASD/TCU
53 W. Seegers Road
Arlington Heights, IL 60005

Mr. J. L. Quilty
General Chairman, TCU
2820 South 87th Avenue
Omaha, NE 68124

Gentlemen:

Reference my Notice also of today's date advising of the Carrier's intent to abolish certain positions at Armourdale Yard, Kansas City, Kansas, on or after October 29, 1999. The following relief positions were inadvertently omitted from that Notice:

POSITION NO.	INCUMBENT
001	C. W. Hicks
701	R. E. Henley

These positions will also be abolished on or after October 29, 1999. Accordingly, please consider this an amendment to the above-referenced Notice. Copies of this amendment will be furnished to all affected incumbents.

If you have any questions regarding this transaction, please contact my office.

Yours truly,

D. D. Matter
Gen. Director Labor Relations/TCU

cc: Mr. J. P. Condo
International Vice President, TCU
53 W. Seegers Road
Arlington Heights, IL 60005

Mr. J. L. Gobel
International Vice President, TCU
4189 North Road
Moose Lake, MN 55767

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TCU Exhibit 9

ALLIED SERVICES DIVISION

Transportation • Communications International Union – AFL-CIO, CLC

ROBERT F. DAVIS
President

TED P. STAFFORD
General Secretary-Treasurer

August 30, 1999

File: 235-100

Mr. D. D. Matter, Senior Director
Labor Relations -- Non-Ops.
Union Pacific Railroad
1416 Dodge Street
Omaha, NE 68179

Dear Sir:

This will have reference to the carrier's notice of August 30, 1999, involving Kansas City, Kansas, wherein you advise that the carrier intends to abolish ten (10) clerical positions on or after October 29, 1999.

Please be advised that the Union takes exception to this notice as not meeting the requirements of NYD-217. The carrier has not notified the Union as to what duties and responsibilities will be absorbed by the remaining clerical forces in Kansas City.

In view of the fact that this notice does not meet the specificity required by NYD-217, I hereby request that this notice be withdrawn and canceled.

Kindly advise.

Yours truly,

Robert F. Davis, President

cc: J. L. Quilty, GC
S. R. Steeves, VP
P. T. Trittel, ATP
L. Unrein, DC

3 W. Seegers Road • Arlington Heights, Illinois 60005 • 847-981-1290 • Fax 847-981-1890

TCU Exhibit 10

Transportation Communications International Union

Robert A. Scardelletti
International President

Challenging the future with a century of pride!

September 3, 1999

Mr. D. D. Matter, Senior Director
Labor Relations - Non-Ops
Union Pacific Railroad
1416 Dodge Street
Omaha, NE 68179

Dear Mr. Matter:

This is in further response to UP's notice of August 30, 1999, involving ten positions at the Armourdale Yard in Kansas City, Kansas.

Arbitrator O'Brien issued his proposed decision involving this same facility on March 25, 1999, and rejected UP's claim that the award was moot by letter dated August 25, 1999. There has been no request for further executive sessions, and this award is now in effect.

A review of UP's notice of June 11, 1998, that was the subject of the O'Brien Award, and your current notice reveals that both notices involve the exact same positions. While your current notice states that the duties and responsibilities of the abolished positions will be "absorbed" by the clerical forces at Armourdale Yard, the June 11, 1998, notice states that the abolished positions were to be "transferred", and UP's brief repeatedly noted that the June 11, 1998, notice was served "to consolidate the SP and UP clerical work at Kansas City."

It is clear beyond any doubt that both the June 11, 1998, and the current notice involved the consolidation of clerical work in Kansas City. The O'Brien Award should now be implemented. Specifically, the award calls for the consolidated work to be covered by a single agreement -- namely, the UP agreement, except that said agreement is to incorporate SP rates of pay, prohibition against subcontracting, and guaranteed extra board.

3 Research Place ◆ Rockville, Maryland 20850 ◆ Phone—301-948-4910 ◆

Accordingly, UP should immediately apply the three SP rules cited above to the consolidated clerical work as required by the O'Brien Award. Further, the incumbents of the abolished positions should be afforded the opportunity to follow their work. That work -- particularly crew hauling -- has already been transferred from Armourdale to Neff Yard. Clearly, the employees whose jobs are now being abolished as a result of this consolidation have first rights to perform this work over new hires. Finally, we reserve the right to subsequently deal with the retroactive application of these rules and the TPA of affected SP employees who have ben denied the opportunity to follow their work.

If the carrier fails to abide by the March 25 O'Brien Award by September 17, 1999, we will take all appropriate action to enforce the award.

Very truly yours,

Robert F. Davis
International Vice President

TCU Exhibit 11

UNION PACIFIC RAILROAD COMPANY

D. D. MATTER
General Director
Labor Relations-NON-OPS

1416 Dodge Street
Omaha, Nebraska 68179

September 8, 1999
NYD-217

VIA UPS NEXT DAY AIR **J029 071 743 0**

Mr. R. F. Davis
International Vice President, TCU
3 Research Place
Rockville, MD 20850

Dear Sir:

This has reference to your letter dated September 3, 1999, concerning the UP's Notice of August 30, 1999, involving ten (10) positions at the Armourdale Yard at Kansas City, Kansas.

Your letter states, "There has been no request for further executive sessions, and this Award is now in effect." This statement is incorrect. Upon receipt of the Award on August 30, the Carrier called your office and advised of its intent to request an Executive Session to discuss the Award. I advised you that I would be calling Mr. O'Brien that afternoon. I attempted to reach Mr. O'Brien by telephone at least three (3) times during the week of August 30. Failing to reach him by telephone, I wrote him on September 3, 1999 formally requesting an Executive Session which, if you will recall, Mr. O'Brien specifically stated he would grant if requested by either party. Accordingly, your statement that the Award is now in effect is incorrect.

As I explained to you on Monday, August 30, the Carrier was not creating any positions on the UP side of the operation at Kansas City. The only way SP employees could move to the UP side of the operation would be if they would replace existing UP clerical employees. Again, I'm certain this was not the intent of Mr. O'Brien's Award. Moreover, the Notice dated August 30, 1999, does not take effect for sixty (60) days from the date of the Notice. Consequently, your letter is premature.

Finally, with regard to the other issues raised in your letter, the Carrier does not agree with your "interpretation" of Mr. O'Brien's Award. This is precisely why an Executive Session was requested.

Yours truly,

D.D. Matter

CC: Mr. Robert M. O'Brien
16 Fox Hill Ln
Milton, MA 02186

VIA UPS NEXT DAY AIR

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BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 32760 Sub 36

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TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION
and
SOUTHERN PACIFIC RAILWAY LINES (SSW)
UNION PACIFIC RAILROAD COMPANY

THE RECORD (UP'S SUBMISSION) OF THE ARBITRATION SUBJECT TO PETITION FOR ENFORCEMENT OF AN ARTICLE I, SECTION 11 ARBITRATION AWARD AND FOR AN ORDER TO CEASE AND DESIST

Mitchell M. Kraus
General Counsel
Christopher Tully
Assistant General Counsel
Transportation•Communications International Union
3 Research Place
Rockville, Maryland 20850
(301) 948-4910

CARRIER'S SUBMISSION

IN THE MATTER OF ARBITRATION

BETWEEN THE

ALLIED SERVICES DIVISION

TRANSPORTATION COMMUNICATIONS UNION

AND THE

UNION PACIFIC RAILROAD COMPANY

CARRIER'S QUESTIONS AT ISSUE:

"1) Does Carrier's Notice of June 11, 1998, involving positions located at Armourdale, Kansas and Kansas City, Missouri, contemplate a transaction pursuant to the parties' December 16, 1996 Implementing Agreement and the New York Dock conditions?

2) If the answer to Question No. 1 is in the affirmative, should the UP/TCU Collective Bargaining Agreement apply at that location?"

CARRIER'S STATEMENT OF THE ISSUES:

The Board will note that the Carrier's Questions at Issue are similar to the Organization's Questions. In the Carrier's estimation, however, the Organization's Questions are overly specific. In simple and general terms, the Carrier is attempting to effect a transaction involving UP and SP clerical forces at Kansas City pursuant to Finance Docket No. 32760, the New York Dock conditions and Implementing Agreement No. NYD-217 (NYD-217). The purpose of this effort is to achieve the economies and efficiencies (the public transportation benefit) which the Surface Transportation Board (STB) envisioned when it approved the underlying rail consolidation of the SP into the Union Pacific.

As will be explained later in this submission, the Organization contends the Carrier does not intend to implement any transactions pursuant to the New York Dock conditions. The Organization alleges that no transaction is contemplated by the Carrier and that the sole reason the Carrier is taking this action is to abrogate the SP Collective Bargaining Agreement. As a "hedge" the Organization is asking the Board to consider this argument as it applies to several different clerical functions performed at Kansas City.

With regard to the Second Question, again, in very simple and general terms, the Carrier is asking which Collective Bargaining Agreement should be applicable to the transaction. The Organization, on the other hand, is asking which provisions of the SP Collective Bargaining Agreement should be overridden and, presumably in the alternative, which provisions of the SP Collective Bargaining Agreement should continue to apply at Kansas City.

The Carrier believes that its simple, more general Questions at Issue capture the entire essence of this dispute.

INTRODUCTION:

On November 30, 1995, application was filed with the Interstate Commerce Commission (ICC) by Union Pacific Corporation (UPC) seeking to obtain common control

and to merge the rail carriers controlled by UPC (Union Pacific Railroad Company and Missouri Pacific Railroad Company) with the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company-Eastern and Western Lines, St. Louis Southwestern Railway Company, SPCSL Corporation, and The Denver & Rio Grande Western Railroad Company). In this application, the Carriers sought to establish that significant economies and efficiencies could be achieved by the merger of these railroads and thereby provide a transportation benefit to the public.

Following extensive hearings and testimony, the STB, successor to the ICC, approved this application in Finance Docket No. 32760, which is attached as Carrier's Exhibit "1".

With regard to the economies and efficiencies to be achieved by its approval of the merger, the STB noted at Page 109 of its decision:

> "...we find that applicants should realize public benefits from more efficient operations of $534.3 million per year...UP/SP will: (a) streamline and consolidate operations at major common terminals; (b) combine terminal and station facilities at a number of common points;...(d) pursue numerous coordinations and consolidations of transportation, mechanical, engineering, information, purchasing, customer service, and other operating and marketing functions and activities... Ecomonies will also be achieved in applicant carriers' administrative functions by combining SP and UP departments to permit more efficient use of existing personnel and reduce overall staff and office space."

Also, in approving this merger, the STB imposed the New York Dock employee protective conditions (NYD) which are attached as Carrier's Exhibit "2".

Pursuant to the requirements of NYD, the Carrier served notice by letter dated September 16, 1996 of its intent to consolidate clerical forces throughout the UP/SP system. Negotiations commenced immediately and a Master Merger Implementing Agreement was signed on December 18, 1996. A copy of Implementing Agreement No. NYD-217 is attached as Carrier's Exhibit "3". As noted in the preamble, the Agreement

provided for "the general rearrangement and selection of forces in connection with the consolidation and rearrangement of functions throughout the UP and SP,...to effect the merger of the UP and SP properties." The Agreement also noted that, "...this rearrangement will involve all areas of the merged railroads' organizational structure."

Immediately following the signing of NYD-217, the Carrier began preparing Notices pursuant to Article II - Transactions of that Agreement advising the Organization of its intent to consolidate SP clerical work with UP clerical work. As information, the first such Notice was served on December 31, 1996. To date, the Carrier has served over 130 Notices which have resulted in the consolidation of SP clerical work throughout the system with similar work being performed by UP clerical employees.

BACKGROUND:

On June 11, 1998, the Carrier served Notice on TCU pursuant to Article II - Transactions of the Implementing Agreement No. NYD-217 of its intent to consolidate all clerical work associated with the SP facility at Kansas City, Kansas, with that of the UP facility located in Kansas City, Missouri. By letter dated June 24, 1998, the Carrier amended its original Notice of June 11, 1998. A copy of the original and amended Notices are attached as Carrier's Exhibit "4".

On July 30, 1998, the Organization wrote the Carrier, taking exception to the Notices advising of the Carrier's intent to consolidate clerical work at Kansas City. The Organization stated that a transaction was not taking place at Kansas City and that the Carrier was merely attempting to "transfer wealth from employees to the employer." A copy of the Organization's letter dated July 30, 1998 is attached as Carrier's Exhibit "5".

On September 11, 1998, the Carrier advised the Organization that it did not agree with its position regarding this issue. Further, the Carrier agreed to submit the issue to arbitration. A copy of the Carrier's September 11, 1998 letter is attached as Carrier's Exhibit "6".

CARRIER'S STATEMENT OF FACTS:

These are the facts as they existed at Kansas City as of May 31, 1998 (several weeks prior to the Carrier's Notice of its intent to consolidate the SP work with the UP work at that location pursuant to NYD-217). On the Union Pacific Railroad there were forty-three (43) UP clerical jobs involved in yard operations at Kansas City. These positions were filled by forty-two (42) UP clerical employees (Relief Position 767 was listed as being "open" on the date the information was developed). In addition, the following UP employees were involved in performing other clerical duties at Kansas City, as follows:

Supply Operations

Name	Position
R. L. Solomon	Material Supervisor
R. B. Horton	Material Clerk
G. K. Coats	Material Clerk
R. J. Reynolds	Material Clerk
L. R. Moulder	Material Handler
C. L. Young	Material Handler

Superintendent's Staff

Name	Position
S. P. Stine	Sr. Administrations Clerk Maintenance Operation
P. A. Beall	Sr. Admin. Clerk
B. W. Atchison	EDCS Administration
B. A. Graves-Tillman	Supervisor Administration Processes (1e)

All totaled, the UP had fifty-three (53) jobs filled by fifty-two (52) employees immediately prior to the serving of the Notice dated June 11, 1998.

On that same date, the record reflects that the SP had twenty-one (21) clerical jobs filled by nineteen (19) employees. A list of all the UP and SP clerical employees filling yard positions at Kansas City as of May 31, 1998, is attached as Carrier's Exhibit "7".

The Board's attention is called to the fact that nine (9) of the UP clerical positions at Kansas City were "Guaranteed Extra Board positions". This represents almost a 17% ratio of Extra Board positions to regular assignments. Of the seventy-four (74) clerical positions at Kansas City, only twenty-one (21) of those positions, or slightly over 28%, fell under the SP/TCU Collective Bargaining Agreement.

The above figures represent the TCU workforce for both the UP and SP immediately prior to the serving of the NYD-217 Notice. Since May of 1998, the figures have changed slightly, certain employees have changed positions and several new employees have been added to the seniority rosters. However, the preponderance of clerical employees at Kansas City are covered under the UP/TCU Collective Bargaining Agreement.

At this point, the Board's attention is called to several other facts involving the Kansas City Terminal. First, all System Gangs operating on the Carriers' consolidated property at Kansas City are covered under the UP/BMWE Collective Bargaining Agreement. On January 1, 1998, all System Gang operations on the UP and SP as well as the WPRR (Western Pacific Railroad) and DRGW (Denver and Rio Grande Western) were consolidated and combined under the UP/BMWE Collective Bargaining Agreement. In other words, all System Gang work performed at Kansas City on either the UP or SP is performed by BMWE employees under the UP/BMWE Collective Bargaining Agreement.

A copy of the Implementing Agreement and the Article I, Section 4 Award adopting that Agreement providing for the consolidation of System Maintenance of Way work under the UP/BMWE Collective Bargaining Agreement is attached as Carrier's Exhibit "8".

Not only have the Maintenance of Way System Gangs been consolidated into one Collective Bargaining Agreement, all Maintenance of Way work at Kansas City has been merged and is currently being performed under the UP/BMWE Collective Bargaining Agreement. This merger-related transaction became effective November 1, 1997. A copy

of the Implementing Agreement placing all the Maintenance of Way forces, including the Southern Pacific and St. Louis Southwestern Railroad Company (SSW) employees under the Collective Bargaining Agreement between the Union Pacific Railroad Company and the Brotherhood of Maintenance of Way employees is attached as Carrier's Exhibit "9". As noted in Section 1 of that Agreement, all Collective Bargaining Agreements between the various roads, including the SP and the SSW, were abrogated immediately prior to the implementation of the Agreement (see Page 1 of Carrier's Exhibit "9"). As indicated on Page 5 of Carrier's Exhibit "9", all of the tracks at Armourdale Yard at Kansas City and all other tracks maintained by former SP/SSW Maintenance of Way employees were included in this consolidation. Pages 14 and 15 of Carrier's Exhibit "9" further describes the consolidated territory in the Kansas City area. As information, the Carrier implemented this Agreement on January 1, 1998.

Also, effective January 1, 1998, the Carrier merged all of its Maintenance Operations forces at Kansas City under one Collective Bargaining Agreement. An Agreement providing for the consolidation of the Carmen forces at Kansas City is attached as Carrier's Exhibit "10". As noted in the second paragraph of Section 1(a), the Carmen forces at Kansas City were dovetailed into one roster and placed under one Collective Bargaining Agreement. Similar Agreements were signed with all other Shop Craft Organizations, including Electricians (IBEW), Machinists (IAM), Foremen (ARASA), Laborers (F&O), Sheetmetal Workers and Boilermakers/Blacksmiths. All Mechanical Forces at Kansas City are now working under one Collective Bargaining Agreement for their respective crafts at that location.

On January 15, 1999, the Carrier intends to implement the provisions of the Kansas City Hub Agreement with the United Transportation Union (UTU). Concurrent with that implementation, the Carrier intends to implement the Kansas City Hub Agreement with the Brotherhood of Locomotive Engineers (BLE) on the same date. A copy of the signed UTU Agreement and the initialed BLE Agreement are attached as Carrier's Exhibits "11" and "12", respectively.

The Board's attention is called to several provisions found in both Agreements. At Page 21 of the UTU Agreement (Page 19 of the BLE Agreement) the parties have agreed that all UTU and BLE work will be performed under the "Collective Bargaining Agreement currently in effect between the Union Pacific Railroad Company" and the Organization. In other words, on the date these Agreements go into effect, there will be no more SP/SSW Trainmen working in the Kansas City Terminal. The facility will become a pure UP Terminal governed under the terms of the UP/UTU and UP/BLE Collective Bargaining Agreements. Side Letter of Understanding No. 15 and Side Letter of Understanding No. 16 of UTU and BLE Agreements respectively, address the issue of on-duty points at the Kansas City Hub. The Board's attention is called to the fact that Train and Engine Crews will be able to go on duty at any location within the Kansas City Hub. The Kansas City Hub comprises all former UP/SP/MP/CNW/MKT/SSW tracks in the Kansas City, Kansas/Kansas City, Missouri area. As noted in these Letters of Understanding, the Kansas City Hub consists of a "25 mile zone". Finally, in the "Questions and Answers - Kansas City Hub" section of the two Implementing Agreements, Question No. 1 (see Page 70 of the UTU Agreement and Page 75 of the BLE Agreement) states that in the consolidated terminal crews, "can receive/leave their trains at any location within the boundaries of the new Kansas City (consolidated) Terminal and may perform work anywhere within those boundaries pursuant to the applicable Collective Bargaining Agreement."

It is a fact that after January 15, 1999, the entire operations at Kansas City will be consolidated under the UP/UTU and UP/BLE Collective Bargaining Agreements.

It is with these facts in mind that the Carrier served Notice on TCU to consolidate the SP and UP clerical work at Kansas City. As noted above, the Organization has challenged the Carrier's decision and requested the matter be submitted to arbitration. Because the parties were unable to resolve this dispute on the property, the Questions at Issue are now properly before this Board.

CARRIER'S POSITION:

It is the Carrier's position that the proposed consolidation of the clerical workforce at Kansas City is a transaction as that term is defined in the NYD employee protective conditions and that the Carrier's action is being taken in order to achieve the economies and efficiencies of the merger approved in FD No. 32760. Accordingly, the answer to Question at Issue No. 1 should be answered in the affirmative.

Moreover, under the circumstances, the Carrier's decision to select the UP/TCU Collective Bargaining Agreement is supported by Arbitration Awards, past practices, NYD-217 and plain old common sense.

As noted in the background information provided in this submission, the Organization has taken the position that the Carrier does not intend to transfer clerical work or employees at Kansas City. Apparently, the Organization is stating that there will be no commingling of UP clerical work with SP clerical work. Moreover, the Organization alleges that the only reason the Carrier served its notice of June 11, 1998, was to "cherry pick" the Agreements, place SP clerical employees under an inferior UP clerical Agreement and transfer wealth from employees to the employer.

The problem with this position is that Kansas City will shortly be a "pure UP Terminal". Maintenance of Way and Mechanical forces are already working under a consolidated Agreement. In other words, there are no SP tracks at Kansas City for all intents and purposes since all track maintenance is performed by UP Maintenance of Way employees under a UP Maintenance of Way Agreement. There are no SP Mechanical Forces at Kansas City. All locomotive and car repair work performed at Kansas City is done under a consolidated Agreement.

On January 15, 1999, there will be no SP Train and Engine Crews at Kansas City. Armourdale Yard (the former SP Yard) will lose its SP identity and the Yard will, in effect, become a UP facility (the tracks at that Yard are already maintained by UP employees). UP Train and Engine Crews may go on duty or off duty at any location in the 25-mile Kansas City Yard.

The consolidation of the operations at Kansas City will most assuredly have a significant impact on the method by which the Carrier hauls Crews at that location. It would be virtually impossible and certainly impractical to attempt to maintain an SP clerical presence to only haul UP Train and Engine Crews who, prior to the consolidation, held seniority as an SP or SSW Trainman or Engineer. Under this scenario, if a UP Conductor was working with a UP Engineer who had SP seniority prior to the consolidation, two (2) crew buses would be needed to deliver the Crew to its train. As noted in the UTU and BLE Implementing Agreements, Train and Engine Crews may go on duty at one location in the Kansas City Terminal, report to their train at another location at the Kansas City Hub, deliver their train to yet another location at Kansas City and "tie-up" at a completely different location in the Terminal. Any attempt to maintain articulated SP crew hauling work separate and distinct from UP crew hauling work would be an exercise in futility.

Even without the Operating Crafts being merged at Kansas City, the Carrier is receiving claims for crew hauling from SP clerical employees at that location. Attached and identified as Carrier's Exhibit "13" are nine (9) claim files involving crew hauling at Kansas City. These nine claims are merely a representative sampling of the many claims filed at Kansas City concerning this issue. Carrier's Exhibit "13" contains claims which allege a violation of the SP Collective Bargaining Agreement because:

1. A Manager of Train Operations (MTO) transported an Engineer to a train from a hotel.

2. An outside contractor hauled a Crew from a hotel in Independence, Missouri (a UP lodging facility) to the Amtrak Station at Kansas City, Missouri.

3. A UP Crew Hauler (clerical employee) hauled a Crew from Neff Yard (a UP Yard) to a lodging facility.

4. A UP Crew Hauler (clerical employee) hauled a Crew from a lodging facility to Neff Yard (a UP Yard).

5. A contractor hauled a Crew from Armourdale Yard Office to Bonner Springs, Kansas, a location on the Union Pacific Railroad mainline.

6. An outside contractor hauled a Crew from Armourdale Yard Office to Rock Creek (a UP facility) in Independence, Missouri.

7. An MTO transported a Crew from 18th Street UP Yard to Armourdale Yard.

8. A UP Crew Hauler (clerical employee) hauled a Crew from 18th Street UP Yard to Armourdale.

9. A UP Crew Hauler (clerical employee) hauled a Crew from Armourdale to 18th Street UP Yard.

The above-listed claims appear in the same order in Carrier's Exhibit "13". Again, Carrier's Exhibit "13" demonstrates the variations on the claims being made by TCU by presenting one representative claim for each different type of alleged crew hauling violation.

Once the SP designation applicable to Armourdale Yard at Kansas City disappears, the crew hauling issues will only be more complex, making the application of any commitment for crew hauling under the SP/TCU Collective Bargaining Agreement impossible to meet. Of course, a simple solution would be to say that SP clerical employees only have a right to haul SP Train and Engine Crews. After January 15, 1999, there will be no SP Train and Engine Crews and, therefore, there would be no crew hauling work for those employees to perform and all the work would be considered UP/TCU work. If the Carrier were to use this logic, there would undoubtedly be an adverse impact on SP clerical employees. Those employees, and undoubtedly TCU, would insist that New York Dock protection should apply. Of course, New York Dock protection isn't applicable unless the Carrier takes an action pursuant to the STB's approval of the UP/SP merger which, as evidenced in Carrier's Exhibit "4", TCU contends is not the case.

The fact of the matter is, Kansas City will become a completely consolidated Terminal on January 15, 1999, with the sole exception of the clerical forces. Failure to

consolidate the clerical forces will result in increased time claims, added expense to the Carrier and a reduced efficiency in the operation. In fact, it is doubtful that the Carrier could operate with two (2) separate clerical Collective Bargaining Agreements in effect at a single location, let alone achieve the synergies, efficiencies and economies contemplated by the STB when the merger was approved.

Regarding the TFC Ramp (an SP facility), that facility will also become a Union Pacific Railroad facility serviced by Union Pacific Train and Engine Crews on December 15, 1999. It is the Carrier's plan to begin transferring customers and workloads between the TFC Ramp and the UP's Intermodal Ramp at Neff Yard. A commingling of this work will result in business levels at each facility being affected. Of course, such a commingling could not have taken place except for the fact that the STB gave the UP and SP permission to merge.

Finally, regarding Chief Clerks, Telegraphers and other assignments, it would be virtually impossible to separate the support functions performed by these clerical positions at the consolidated facility and leave that work under the Scope of the SP/TCU Agreement. The entire Kansas City Terminal is under the jurisdiction of a UP Superintendent, all clerical timekeeping functions for all employees are performed by UP clerical employees at Omaha, all crew calling work is performed by UP clerical employees at Omaha, most customer service work is performed by UP clerical employees at St. Louis and the residual administrative functions at Kansas City (such as dispatching crew buses, regulating clerical Extra Boards, ordering supplies and materials, generating consolidated reports for the Terminal and other miscellaneous assignments) can be consolidated and performed in a more efficient and economical manner by placing that work under one Collective Bargaining Agreement.

In a New York Dock arbitration case involving the UP and the Brotherhood of Railroad Signalmen (BRS), Referee Edwin Benn addressed the issue of the burden borne by the Carrier to prove the changes requested as "necessary" to effectuate the merger. His comments are well worth noting and are as follows:

"In this case, the Carrier therefore must show that its actions will result in a transportation benefit in furtherance of the STB's order. As just discussed, that benefit to the public could be efficiency of operations.

"The Carrier's burden is not a heavy one. This Board's role and the Carrier's burden in these cases were discussed in Finance Docket No. 32032 (1995) at 3:

> '...Arbitrators should discuss the necessity of modifications to pre-transaction labor arrangements, taking care to reconcile the operational needs of the transaction with the need to preserve pre-transaction arrangements. Arbitrators should not require the carrier to bear a heavy burden (for example through detailed operational studies) to justify operational and related work assignment and employment level changes that are clearly necessary to make the merged entity operate efficiently as a unified system rather than as two separate entities, if these changes are identified with reasonable particularity...'"
>
> * * *
>
> "In sum then, the Carrier has shown that by combining the forces as planned, the result will be the ability to use these individuals on a system wide basis without having the boundary restrictions that might exist by keeping the former SP and UP employees in these categories separate. **The bottom line is therefore more efficient operations. The Carrier has sufficiently shown a transportation benefit. The treatment of these employees as contemplated by the Carrier will thus be in furtherance of the STB's order concerning this merger.**: (emphasis added)

A copy of Referee Benn's Award is attached as Carrier's Exhibit "14". In the instant case, the Carrier is merely seeking the ability to use clerical employees at the 25-mile Kansas City Terminal without having the boundary restrictions that might exist by keeping the

former SP and UP employees in separate categories. As in the above-cited Award, the bottom line in this case is a more efficient operation.

It is beyond comprehension that the Organization could claim that no transaction is taking place at Kansas City. If there ever was a location affected by a full blown transaction resulting in a complete consolidation of two (2) facilities (including the consolidation of Supervisory, Mechanical, Maintenance of Way and Operating work), Kansas City is that location. The Carrier is doing precisely what it told the STB it would do by consolidating the Kansas City Terminal. Other crafts at Kansas City, either through voluntary Agreements or Agreements imposed by Referees are being consolidated at that location. Any attempt to leave the Clerks out of this consolidation would only result in more confusion, time claims and grievances and further disputes.

There can be no question that the Carrier's Notice of June 11, 1998 involving positions located at Armourdale, Kansas and Kansas City, Missouri, contemplates a transaction pursuant to NYD-217, and the New York Dock conditions. Accordingly, both the Carrier's Question at Issue No. 1 and the Organization's Question at Issue No. 1 should be answered in the affirmative. Moreover, the Organization's attempt to piecemeal and carve certain clerical functions including minor administrative clerical duties out of the overall consolidation of the Terminal should be rejected by this Board. The answer to the Organization's Question at Issue 1(a), 1(b) and 1(c) should be in the affirmative.

Having established the fact that the Carrier's Notice of June 11, 1998, does contemplate a transaction pursuant to NYD-217 and the New York Dock conditions, it is necessary to move to Question at Issue No. 2. Should the UP/TCU Collective Bargaining Agreement apply to clerical employees at Kansas City?

In the instant case, the Carrier has "selected" the UP/TCU Agreement to be the controlling Agreement at the consolidated Kansas City Terminal. Referees have consistently recognized the right of Carriers in such merger transactions to select the Collective Bargaining Agreement to be applicable at merged facilities. In a New York Dock

arbitration case involving the Union Pacific/Missouri Pacific Railroad Companies and the Railroad Yardmasters of America, Referee Seidenberg held:

> "We find that the ICC has declared in Finance Docket 30,000 that the controlling carrier concept shall be applicable, when it held that Omaha/Council Bluffs yards were to be operated by Union Pacific as a Union Pacific single controlled terminal, as a consolidated common point. This concept is not now open to question or contest by the Organization. We find further that, consonant with this concept, is this single terminal can be operated under Union Pacific wage rates and schedule rules. Also consonant with this concept is that Missouri Pacific Yardmasters may be transferred to the Union Pacific RR and function under the Union Pacific Schedule Agreement and wage rates."

A copy of Referee Seidenberg's Yardmaster decision is attached as Carrier's Exhibit "15".

More recently, in a New York Dock Award involving the UTU and the UP, Referee James E. Yost noted as follows:

> "One of the key areas of dispute deals with what is 'necessary' to accomplish the merger. In reviewing previous mergers and the need to coordinate employees and operations at common points and over parallel operations, it is proper to unify the employees and operations under a single collective bargaining agreement and single seniority system in each of the two Hubs. This does not mean the Carrier has authority to write a new agreement, but the Carrier's selection of one of the existing collective bargaining agreements to apply to all those involved in a Hub as proposed in this case is appropriate."

A copy of Referee Yost's decision is attached as Carrier's Exhibit "16". In line with Referee Yost's decision, the Carrier in this instant case has appropriately selected one of the existing Collective Bargaining Agreements at that location to apply to all those involved in the consolidated Terminal. In this case, that is the UP/TCU Collective Bargaining Agreement.

Finally, in another case directly on point with the instant case, Referee Peter R. Meyers held in a New York Dock Arbitration Hearing involving the Brotherhood of Maintenance of Way Employees and the Union Pacific Railroad:

> "It is not possible to properly implement a system operation, and achieve the economies and efficiencies associated with such a consolidation, if a carrier and organization attempt to continue to operate under several collective bargaining agreements. Conflicting contractual provisions, differences in work rules, and basic problems of coordination between and across several collective bargaining agreements inevitably will cut into, and perhaps completely destroy, any possibility of achieving the efficient coordinated, economical operation promised by a rail consolidation. If the Carrier's maintenance of way work is to be consolidated into a more efficient, economical system operation, as is necessary to achieve the purposes of the approved merger, then it is necessary for the parties to operate under a single collective bargaining agreement.
>
> "As is its right, the Carrier has chosen to adopt the provisions of the collective bargaining agreement between the UP and BMWE to govern its maintenance of way operations in the western portion of the combined system. The Organization has not argued that one of the other relevant contracts should be adopted instead of the one chosen by the Carrier. The Carrier's election means that the relevant SP and DRGW system production gang agreements are effectively abrogated. There is no legitimate basis for insisting that the parties attempt to operate under several collective bargaining agreements, when it is abundantly clear that the post-merger consolidated rail operation can exist and do business most efficiently if the maintenance of way employees in the expansive western territory of the consolidated system are working under a single set of contractual provisions, seniority protections, and work rules. One can understand the frustration felt by the Union after having negotiated collective bargaining agreements that are now abrogated by the current law in this area. However, in answer to the second Question at Issue Proposed by the Organization, this Arbitrator finds that

> it is necessary to abrogate the SP and DRGW system production gang agreements and Article XVI of the September 26, 1996, BMWE-NCCC agreement, as well as to modify the UP system production gang agreements, in order to most efficiently and economically carry out the transaction."

A copy of Referee Meyers' Award has previously been attached and identified as Carrier's Exhibit "8". The language found in this Award is directly applicable to this case. By replacing the phrase "system operation" with the phrase "terminal operation" this Award is directly on point. Moreover, Referee Meyers notes that it is the right of the Carrier to adopt the provisions of the UP's Collective Bargaining Agreements to be applicable at the merged facilities.

In this instant case, the Union Pacific Railroad, as the controlling carrier, has selected the Union Pacific/TCU Agreement to be applicable at the merged Kansas City Hub Facility. The Carrier's right to select this Agreement and abrogate the SP/TCU Agreement has been upheld by numerous New York Dock Arbitration Awards.

What is particularly baffling about the Organization's position in this specific case is the fact that to date, 139 merger-related transaction notices have been served under the provisions of Implementing Agreement No. NYD-217. Only one of those transactions involved the movement of UP work to the SP. In that lone exception, work was moved to a location where there were no UP/TCU employees. In every other instance, work was moved from the SP to the UP without complaint from the Organization.

Many of the Notices served under NYD-217 did not involve the movement of work to the centralized locations of Omaha or St. Louis. For example, the Carrier issued the following Notices:

1. Notice moving the work of an SP clerical employee at Denver to existing UP clerical positions at Cheyenne.

2. Notice moving SP clerical work in the Engineering Departments at various locations on the SP to UP

clerical positions located at various locations throughout the UP system.

3. Notice moving SP Engineering Department clerical work to the UP under the provisions of the UP/TCU Agreement. The Board's attention is called to the fact that under this particular Notice, an SP position at West Colton was abolished and a UP position at West Colton was created to perform the transferred work.

4. Notice moving certain Operating clerical work from the SP at Houston to existing UP clerical positions at various locations on the UP system.

5. Notice moving one SP clerical position from the Hardy Street Locomotive Plant at Houston, Texas, to the UP Locomotive Diesel Facility at Houston, Texas. Note that the SP position was abolished and UP position was created to perform this transferred work. As information, the Hardy Street Locomotive Plant and the Settegast Locomotive Diesel Facility are less than two (2) miles apart.

6. Notice advising the Carrier's intent to abolish ten (10) clerical positions at Englewood Yard at Houston, Texas. As information, the work was absorbed by UP clerical employees.

7. Notice moving an additional SP clerical position from the Hardy Street Locomotive Plant at Houston to the UP Locomotive Diesel Facility at Settegast Yard. Again, one new UP position was created to absorb this work.

8. Notice moving the work of three (3) SP clerical employees at the Hardy Street Locomotive Facility to existing UP clerical assignments at the Settegast Diesel Facility.

All eight (8) of these transactions involved the movement of SP clerical work from an SP facility to a UP facility which were, in some instances, at the same location or only a very few miles apart. Copies of the above-cited Notices are attached as Carrier's Exhibit "17".

Clearly, the 138 Notices served pursuant to NYD-217 to move SP clerical work to the Union Pacific Railroad without the Organization taking exception to these Notices serves as a clear past practice and a persuasive argument that the Carrier's actions in the instant case have, in the past, been accepted as appropriate by the Organization. For the Organization to take exception to the Carrier's application of NYD-217 at this late date makes little sense and is clearly inappropriate.

Perhaps the most compelling argument the Carrier can present with regard to the decision to place the SP clerical employees at Kansas City under the UP/TCU Collective Bargaining Agreement is the fact that NYD-217 permits the Carrier to do this. NYD-217 is a superior Agreement providing benefits far in excess of the New York Dock employee protective conditions. Separation allowances of up to $95,000 are available to employees who do not wish to transfer. While not applicable in this case, the Agreement provides for enhanced moving benefits. As in most Agreements, seniority is dovetailed and employees can retain existing health and welfare benefits or opt to be covered under the health and welfare benefits applicable on the property to which transferred. Moreover, Letter of Understanding No. 18 of NYD-217 permits an SP employee transferring to the UP to retain the higher of their TOPS protected rate (the SP lifetime protection arrangement) or the rate of the position to which transferred on the UP as their UP February 7, 1965 job stabilization rate. This means that not only would an SP employee be entitled to six (6) years of New York Dock protection, but that employee would also be able to retain their SP lifetime protection rate on the UP if that rate was higher than the job to which they had transferred on the UP. In all, NYD-217 provides superior protection for TCU employees affected as a result of the UP/SP merger.

In return for this augmented level of protection, the Carrier was given the latitude to serve Notices and move SP work to the UP without restriction. NYD-217 gives the Carrier the authority to rearrange and consolidate work and positions at locations throughout the SP and UP (see the first paragraph of Article II - Transactions of NYD-217 - Carrier's Exhibit "3"). NYD-217 gives the authority to transfer work and positions from one Collective

Bargaining Agreement to another. Moreover, NYD-217 does not specify which Agreement the Carrier is required to select at specific locations. Accordingly, the Carrier is free to select which of the Collective Bargaining Agreements (SP or UP) will apply at a specific location. With one exception, the Carrier has consistently opted to transfer SP work and positions to the Union Pacific, placing those positions under the UP/TCU Collective Bargaining Agreement. NYD-217 gives the Carrier the latitude to select the Agreement which will apply at a merged facility without restriction. In other words, the Carrier has Agreement support for the decision to place the SP work and positions at Kansas City under the UP/TCU Collective Bargaining Agreement.

In view of the above-cited Awards, the past practice of transferring SP clerical work and positions to coverage under the UP/TCU Agreement and the specific language of NYD-217 permitting the Carrier to select the UP/TCU Collective Bargaining Agreement as the controlling Agreement at a merged facility, it is the Carrier's position that Carrier's Question at Issue No. 2 should be answered in the affirmative.

Regarding the Organization's Question at Issue No. 2, it is apparent that TCU wants to "cherry pick" applicable Agreement rules. The Question itself which asks "which provisions of the SP Collective Bargaining Agreement, if any, should be overridden?" clearly indicates that TCU is attempting to retain certain SP Agreement provisions. Moreover, when the Organization's Question at Issue No. 1 is read in conjunction with Organization Question at Issue No. 2, it is apparent that TCU is attempting to apply these "cherry picked Agreement provisions" to only a portion of the SP clerical employees at the merged facility. TCU is, in effect, saying that if this Board does determine a transaction has taken place at Kansas City, only a select number of clerical employees should be declared "affected" and those employees should receive full merger benefits in addition to retaining SP Collective Bargaining Agreement provisions most favorable to the employees after they are transferred to the UP. This, to the Carrier's view, is the definition of "cherry picking". The STB specifically rejected a request to allow "cherry picking" in Finance Docket No. 32760. At Page 174 of that Docket (see Carrier's Exhibit "1") the Board stated:

> *"Cherry-Picking.* We will deny ARU's request that we order that any CBA 'rationalization' be accomplished by allowing UP/SP's unions to 'cherry-pick' from existing UP or SP agreements. This is a matter committed to the implementing agreement procedures established by the New York Dock conditions. See New York Dock, 360 I.C.C. at 85 (Article I, Section 4)."

In view of this STB ruling, the Board should respond to the Organization's Question at Issue No. 2 by ruling that all of the provisions of the SP Collective Bargaining Agreement should be overridden.

Before commenting on the Board's authority to override Collective Bargaining Agreements in merger-related transactions, the Carrier would like to address the allegation that the UP/TCU Collective Bargaining Agreement is inferior to the SP/TCU Collective Bargaining Agreement and that SP employees will be disadvantaged as a result of being placed under the UP/TCU Agreement.

The Organization has alleged that the 15% Extra Board provision in the SP Agreement makes that Agreement superior to the UP Collective Bargaining Agreement. The fact is, a 15% ratio of Extra Board positions to regular positions is a relatively small ratio. As noted earlier, the UP maintains an Extra Board equivalent to 17% of all UP clerical positions at Kansas City. When the Board considers the fact that the Supply Department positions and the positions in the Superintendent's Office are not protected by the Extra Board, the ratio of Extra Board positions to regularly assigned positions which are covered by that Extra Board becomes even greater. In other words, the 15% Extra Board ratio found in the SP Agreement is a "non issue".

With regard to wages, again, it should be noted that this has never been an issue in any of the other transactions which have taken place to date on the Union Pacific Railroad. It is true that certain positions on the Union Pacific Railroad pay considerably less than similar positions on the SP. However, SP employees transferring to the UP will enjoy six (6) years of wage protection under the New York Dock employee protective

conditions and, after that expires, those employees will have lifetime protection at a rate of pay equal to the TOPS protected rate they enjoyed on the SP Railroad. In other words, the employees should not be significantly affected by any reduction in the rate of the position to which transferred.

Without going into a great amount of detail, it should be noted that the UP/TCU Collective Bargaining Agreement contains many provisions which will benefit SP employees once they have transferred to coverage under that Agreement. For example, the sick leave buy back provisions on the UP is at a rate of 75% instead of the 50% buy back rate in effect on the SP. The UP's February 7, 1965 Job Stabilization Agreement includes a provision which allows employees to remain at their home location if in furloughed status and enjoy the Agreement's protective benefits. Moreover, an enhanced separation provision was recently added to the UP Job Stabilization Agreement.

While a detailed comparison of Agreement provisions should not be a part of this Board's deliberations, the Carrier felt it was important to emphasize that the Organization's characterization of the UP/TCU Collective Bargaining Agreement as being inferior is without foundation.

One final note concerning the Organization's position with regard to the selection of the applicable Agreement provisions at this merged facility. The preponderance of employees at Kansas City are currently covered under the UP/TCU Collective Bargaining Agreement. As noted earlier, only 28% of employees at that location are covered under the SP Collective Bargaining Agreement. Placing UP employees under an SP Agreement would be like having the "tail wag the dog." Moreover, UP employees transferring to the SP would lose a lifetime level of protection under the National Salary Plan referred to as the employee maintenance rate (EMR). This protection is not calculated in New York Dock test period averages. Loss of an EMR would result in most Union Pacific employees transferring to the SP losing a substantial amount of income.

Most mergers result in disruption for the employees. It should be the Carrier's and Organization's goal to minimize that disruption on employees. In the instant case, the least

disruptive way to achieve the economies and efficiencies of the merger is to place the SP employees under the UP/TCU Collective Bargaining Agreement, thereby minimizing the number of employees affected.

While the issue has not been raised, the Carrier believes a comment on the Board's plenary authority to abrogate Collective Bargaining Agreements in order to effect a STB-approved merger consolidation would be in order at this point. An Arbitrator's authority in such cases is described in a New York Dock Arbitration Award involving the United Transportation Union and the Brotherhood of Locomotive Engineers and CSX Transportation, Inc. (Referee Robert M. O'Brien). In that Award, Referee O'Brien stated:

> "It is a universally accepted principle that Arbitrators appointed pursuant to Article I, Section 4, of the New York Dock Conditions serve as an extension of the ICC. Since these Arbitrators derive their authority from the ICC, they are duty bound to follow decisions and rulings promulgated by the ICC. The ICC has suggested that New York Dock Arbitrators should initially decide all issues submitted to them, including issues that might not otherwise be arbitrable, subject, of course, to ICC review. Consistent with that mission, the undersigned Arbitrator hereinafter addresses the issues advanced by the UTU and BLE."

A copy of the Award rendered by Referee O'Brien is attached as Carrier's Exhibit "18". This Board has the authority to override Collective Bargaining Agreements in order the facilitate an STB-approved merger-related transaction.

One final note concerning this particular Arbitration Award, the first challenge made the by Organizations and Referee O'Brien's answer have direct applicability to this case. The challenge and the answer are as follows:

> "Has CSXT presented a 'transaction' as defined in Article I, Section 1(a) of the New York Dock Conditions?"
>
> "In this Arbitrator's opinion, the operational changes proposed by the Carrier in its January 10, 1994 notice directly related to

> and flowed from the aforementioned transactions that were authorized by the ICC. Were it not for the ICC permission in those Finance Dockets, CSXT would have no authority to merge the B&O, C&O, WM and RF&P territories into a single, discrete rail freight operation. To this Arbitrator, there is a direct causal relation between the mergers and coordinations sanctioned by the ICC in the Finance Dockets cited in the Carrier's January 10, 1994, notice and the operational changes it sought to implement on the former B&O, C&O, WM and RF&P properties. Accordingly, that proposal constituted a 'transaction' as defined in Article I, Section 1(a), of the New York Dock Conditions."

In the instant case, as in the case considered in the above-cited Award, the Carrier is attempting to place into effect a merger-related transaction and, as noted by Referee O'Brien, this Board has the authority to override Collective Bargaining Agreements to permit that to happen.

CONCLUSION:

The STB in Finance Docket No. 32760 gave the UP and the SP authority to merge operations in order to benefit UP/SP customers. It was contemplated that this benefit would come through economies and efficiencies achieved through consolidations. The STB specifically noted that consolidations at common terminals would be a part of the merger plan. In late 1997, the UP and SP began implementing its plan to consolidate operations at Kansas City, Kansas and Kansas City, Missouri (a major common terminal for the SP/UP). Maintenance of Way and Mechanical Operations were the first to be merged at that location. As indicated by the Carrier, Train and Engine Crews will shortly be consolidated and the Kansas City Hub will become entirely a UP facility. In concert with these consolidations of the various crafts, the Carrier served notice on TCU advising that the SP clerical workforce would also be consolidated under the UP/TCU Collective Bargaining Agreement at Kansas City.

Because TCU has challenged the Carrier, stating that the consolidation is not the result of a merger-related transaction, the issue has been brought before this Arbitration Panel.

In its submission, the Carrier has clearly demonstrated that a consolidation of clerical forces at Kansas City is necessary in order to achieve the economies and efficiencies contemplated by the STB when approving the UP/SP merger. For example, consolidating the crew hauling work is absolutely necessary in view of the fact that Train and Engine Crews will now be permitted to work anywhere within the 25-mile Kansas City Hub without restrictions. Moreover, the Carrier will be able to commingle intermodal and ramp business between the UP and SP facilities at that location. Finally, further consolidation of the administrative support functions performed by other clerical employees can be achieved by combining the SP clerical workforce with the UP clerical workforce. Flexibility in utilizing all the clerical employees at the Kansas City Hub facility can only be accomplished by placing all those employees under one Collective Bargaining Agreement. In other words, the Carrier's Notice of June 11, 1998, does contemplate a transaction pursuant to the UP/SP merger.

The Carrier's decision to place all clerical employees at Kansas City under the UP/TCU Agreement achieves the desired affect of economy, efficiency and flexibility in the operations. As noted in this submission, the Carrier has the right to select the UP/TCU Agreement as the controlling Agreement. This right is supported by Arbitration Awards, past practice and Implementing Agreement No. NYD-217. Moreover, common sense dictates that selection of the UP/TCU Agreement for the consolidated operation is appropriate in view of the fact that the selection of this Agreement creates less disruption for all clerical employees at that location.

Finally, this Board has the authority to abrogate Collective Bargaining Agreements in order to facilitate merger-related transactions such as the one contemplated by the Carrier in this instant case.

In view of the above, the Carrier requests that the Board answer the Carrier's Questions at Issue 1 and 2 in the affirmative. Moreover, the Carrier requests the Board to answer the Organization's Question at Issue No. 1(a), 1(b) and 1(c) in the affirmative, and Organization's Question at Issue No. 2 by responding that all of the provisions of the SP Agreement should be overridden.

D. D. Matter
General Director Labor Relations/Non-Ops

December 30, 1998

CARRIER'S EXHIBITS

1	August 12, 1996 STB Decision (FD No. 32760)
2	New York Dock Conditions
3	Implementing Agreement No. NYD-217
4	June 11, 1998 Notice advising of intent to consolidate at Kansas City and June 24, 1998 amendment
5	July 30, 1998 Organization letter opposing consolidate at Kansas City
6	September 11, 1998 Carrier letter agreeing to NYD Arbitration
7	List of UP/SP clerical yard positions as of May 31, 1998
8	UP/BMWE NYD Award (Peter Meyers) October 15, 1997
9	UP/BMWE Agreement effective November 1, 1997
10	UP/BRC Agreement effective January 16, 1997
11	UP/UTU Agreement signed July 30, 1998
12	UP/BLE Agreement initialed July 2, 1998
13	Kansas City crew hauling claims (9)
14	UP/BRS NYD Award (Edwin Benn) August 20, 1997
15	UP/RYA NYD Award (Jacob Seidenberg) May 18, 1983
16	UP/UTU NYD Award (James Yost) April 14, 1997
17	Various NYD-217 Notices (8)
18	CSX/UTU BLE NYD Award (Robert O'Brien) April 24, 1995

20247

This decision will be included in the bound volumes of the STB printed reports at a later date.

SERVICE DATE
AUG 12 1996

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

Decision No. 44[1]

Decided: August 6, 1996

The Board approves, with certain conditions, the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company).[2]

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[1] This decision covers the Finance Docket No. 32760 lead proceeding and the embraced proceedings listed in Appendix A.

[2] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), enacted December 29, 1995, and effective January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC at the time of its termination that involve functions transferred to the Board pursuant to the Act shall be decided (1) by the Board, and (2) under the law in effect prior to January 1, 1996. The Finance Docket No. 32760 lead proceeding, the Finance Docket No. 32760 (Sub-Nos. 1 to 9) embraced proceedings, and the 17 embraced abandonment and 4 embraced discontinuance proceedings were pending with the ICC at the time of its termination. The Finance Docket No. 32760 (Sub-Nos. 10, 11, 12, 13, 14, 16, and 17) embraced proceedings were not then pending but will be considered as if they had been because responsive applications that seek to invoke the conditioning power of old 49 U.S.C. 11344(c) have never been regarded as independent applications. See Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, Decision No. 38 (ICC served Aug. 23, 1995) (BN/SF) (slip op. at 55 n.76). Except as noted in the next two paragraphs, all of the proceedings addressed in this decision involve functions that are subject to our jurisdiction pursuant to new 49 U.S.C. 11323-27 (control/merger transactions), new 49 U.S.C. 11102 (terminal facilities), and new 49 U.S.C. 10903-05 (abandonments), and we will therefore decide these proceedings under the law in effect prior to January 1, 1996.

The Finance Docket No. 32760 (Sub-No. 8) proceeding, wherein applicants seek an exemption from the trucking company acquisition requirements of old 49 U.S.C. 11343-44, involves a

(continued...)

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[3] (...continued)
effect on and after January 1, 1996. We will nevertheless decide this proceeding, and decide it under the law in effect prior to January 1, 1996, in accordance with the special transition rule provided by section 204(b)(3)(C) of the Act (any proceeding involving the "merger" of a motor carrier of property, that was pending before the ICC at the time of its termination, shall be decided by the Board under the law in effect prior to January 1, 1996). The transactions at issue in Finance Docket No. 32760 (Sub-No. 8) are not, in the technical sense, mergers, but prior practice suggests that the word "merger," as used in section 204(b)(3)(C), should be read broadly. See, e.g., Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Company and Chicago and North Western Railway Company, Finance Docket No. 32133, Decision No. 25 (ICC served Mar. 7, 1995) (UP/CNW) (slip op. at 56 n.52) (in the context of old 49 U.S.C. 11343-44, the words "merger" and "transaction" have been used almost interchangeably).

Section 204(b)(3)(A) of the Act provides, in general, that in the case of a proceeding under a provision of law repealed and not reenacted by the Act, such proceeding shall be terminated. The Finance Docket No. 32760 lead proceeding includes, among other things, a request that certain securities matters be approved under or exempted from the requirements of old 49 U.S.C. 11301. Because the referenced securities requirements were repealed and not reenacted, the described portion of the Finance Docket No. 32760 lead proceeding was terminated, by force of law, effective January 1, 1996.

As used in this decision, the term "new law" refers to the law in effect on and after January 1, 1996, and the term "old law" refers to the law in effect prior to January 1, 1996. All further references in this decision, except as otherwise specifically indicated, will be to the applicable provisions of the old law.

INTRODUCTION

Applicants. By application filed November 30, 1995, Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW)[3] seek approval under 49 U.S.C. 11343-45 for:[4] the

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[3] UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as applicants. UPC, UPRR, and MPRR are referred to collectively as Union Pacific. UPRR and MPRR are referred to collectively as UP. SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as Southern Pacific. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP. These and other abbreviations frequently used in this decision are listed in Appendix B.

[4] The application filed November 30, 1995 (UP/SP-22, -23, -24, -25, -26, -27, and -28), as supplemented on December 21, 1995 (UP/SP-36), March 26, 1996 (UP/SP-188), and March 29, 1996 (UP/SP-194 and -195), consists of the primary application (which seeks approval for the common control and merger of UP and SP, and which was filed in Finance Docket No. 32760) and various

(continued...)

acquisition of control of SPR by a wholly owned UPC subsidiary; the resulting common control of UP and SP by UPC; and the consolidation of the rail operations of UP and SP.[3]

The UPC/SPR Merger Agreement, dated August 3, 1995, provides that, upon the satisfaction of certain conditions, including regulatory approval, a wholly owned UPC subsidiary will acquire all of SPR's common stock and SPR will be merged into UPRR. Applicants note, however, that UP/SP common control may be effected by other means, including, for example, the merger of SPR into MPRR or the lease of all SP properties to UPRR and/or MPRR. Applicants add that they intend to merge SPT, SSW, SPCSL, and DRGW into UPRR, although they also add that these SPR subsidiaries may retain their separate existence for some time and that other means may be used to consolidate these subsidiaries into the merged system. Applicants ask, citing Schwabacher v. United States, 334 U.S. 182 (1948), that we determine that the Merger Agreement's terms for the purchase of the SPR common stock are fair both to the stockholders of UPC and to the stockholders of SPR.[4]

Applicants also have filed related applications, petitions, and notices. These include a notice of exemption for settlement-

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[3](...continued)
ancillary applications, petitions, and notices (which seek approval for or exemption of various merger-related matters).

[3] UPRR and MPRR are wholly owned subsidiaries of UPC. SPT, SPCSL, and DRGW are wholly owned subsidiaries of SPR; SSW is a 99.9%-owned subsidiary of SPR.

[4] On August 9, 1995, UP Acquisition Corporation (Acquisition), a wholly owned UPC subsidiary that was later merged into UPRR, see UP/SP-269, tendered for up to 25% of SPR common stock at $25.00 per share in cash; on September 7, 1995, the tender offer was completed for 39,034,471 shares; and, on September 15, 1995, Acquisition purchased these shares for approximately $976 million (the shares are being held in a voting trust pending approval of the merger). Applicants indicate that, upon satisfaction of all conditions to the merger, each of SPR's stockholders will have the right to specify the number of shares that such stockholder wishes to have converted into (a) 0.4065 shares of UPC common stock per share, and (b) the right to receive $25.00 per share in cash, without interest. The aggregate number of shares to be converted into cash at the time of the merger, together with shares tendered in the tender offer, will be equal as nearly as practicable to 40% of all shares outstanding as of the date immediately prior to the date on which the merger becomes effective. To the extent that SPR stockholders elect in the aggregate to receive either cash consideration in excess of 40% or stock consideration in excess of 60%, the Merger Agreement requires the cash or stock component to be prorated in order to achieve the specified proportions.

Applicants note that SSW has a small number of minority equity holders, and that the Federal Railroad Administration also holds certain SSW redeemable preference shares. Applicants indicate that they are not now requesting a Schwabacher determination with respect to the compensation that might be paid to SSW security holders in connection with a merger of SSW into UPRR or MPRR. Applicants add that, should they determine to carry out such a merger, they will request either a Schwabacher determination respecting the terms or a declaratory order that no such determination is required.

related trackage rights, a petition for exemption for settlement-related line sales, five petitions for exemption for control of terminal railroads, a petition for exemption for control of three motor carriers, an application for terminal trackage rights, and several abandonment and discontinuance applications, petitions, and notices.

Settlement Agreements: In General. Settlement agreements have been entered into by applicants and: Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF);[3] Utah Railway Company (URC); Illinois Central Railroad Company (IC); Wisconsin Central Ltd. (WC); The Brownsville and Rio Grande International Railroad (BRGI); Gateway Western Railway Company (GWWR); and CSX Corporation, CSX Transportation, Inc., CSX Intermodal, Inc., and Sea-Land Service, Inc. (collectively, CSX).[4] Applicants acknowledge that the BNSF agreement is intended (in large measure, though not in its entirety) to address competitive issues raised by the merger, and they have therefore requested that the terms of this agreement be imposed as a condition to approval of the merger. Applicants maintain, however, that the agreements entered into with URC, IC, WC, BRGI, GWWR, and CSX are not intended to address merger-related competitive issues, and they have therefore not requested the imposition of the terms of these agreements.

BNSF Agreement. At the time the primary application was filed (November 30, 1995), the agreement that applicants entered into with BNSF consisted of an agreement dated September 25, 1995 (UP/SP-22 at 318-347) and a supplemental agreement dated November 18, 1995 (UP/SP-22 at 348-359), and these two agreements were generally referred to in the singular as the BNSF agreement. On April 18, 1996, applicants entered into an additional settlement agreement with BNSF and the Chemical Manufacturers Association (CMA), referred to as the CMA agreement, requiring, among other things, that certain amendments be made to the BNSF agreement. See UP/SP-219.. On April 29, 1996, applicants, in their rebuttal filings, represented that they would make various clarifications and amendments to the BNSF agreement. See UP/SP-230 at 12-21; UP/SP-231, Part C, Tab 18 at 5-11. See also UP/SP-260 at 8-9 (summary of clarifications and amendments). On June 3, 1996, applicants, in their brief, represented that they would make an additional amendment to the BNSF agreement. See UP/SP-260 at 23 n.9 (referencing West Lake Charles, LA). On June 27, 1996, applicants and BNSF entered into a second supplemental agreement to the BNSF agreement. See UP/SP-266, Exhibit A. This second supplemental agreement purports to reflect the various commitments made subsequent to execution of the agreement dated September 25, 1995 and the supplemental agreement dated November 18, 1995. See UP/SP-266, Exhibit A at 1 (3rd and 4th paragraphs). On June 28, 1996, applicants, in the filing that accompanied the second supplemental agreement, made at least one additional commitment. See UP/SP-266 at 3 (referencing UP/SP-BNSF reciprocal switch charges at points other than 2-to-1 points).

Protestants: Railroads. Submissions opposing the merger and/or urging the imposition of conditions have been filed by Consolidated Rail Corporation (Conrail), The Kansas City Southern Railway Company (KCS), Montana Rail Link, Inc. (MRL), The Texas

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[3] BN and SF are referred to collectively as BNSF.

[4] See UP/SP-74 (URC and IC agreements), UP/SP-204 (WC and GWWR agreements), BRGI-3 (BRGI agreement), and UP/SP-238 (CSX agreement).

Mexican Railway Company (Tex Mex), Capital Metropolitan Transportation Authority (CMTA), The Magma Arizona Railroad Company (MAA), the San Manuel Arizona Railroad Company (SMA),[9] and The Yolo Shortline Railroad Company (Yolo). Other submissions have been filed by Keokuk Junction Railway (KJRY) and its corporate parent, Pioneer Railcorp (PRC), by Toledo, Peoria & Western Railway Corporation (TP&W), by the Southern California Regional Rail Authority (SCRRA), and by Georgetown Railroad Company (GTRR) and its corporate affiliate, Texas Crushed Stone Company (TCSC).[10] A submission also has been filed by the San Diego & Imperial Valley Railroad (SDIV) (in opposition to one of the conditions requested by United States Gypsum Company).

Protestants: Shipper Organizations. Submissions opposing the merger and/or urging the imposition of conditions have been filed by The National Industrial Transportation League (NITL), The Society of the Plastics Industry, Inc. (SPI), The Western Coal Traffic League (WCTL), the Western Shippers Coalition (WSC), the Mountain-Plains Communities & Shippers Coalition (MPCSC), the Coalition for Competitive Rail Transportation (CCRT), The Corn Refiners Association, Inc. (CRA), the National Corn Growers Association (NCGA), the Montana Wheat and Barley Committee (MWBC), the Montana Farmers Union (MFU), Save the Rock Island Committee, Inc. (STRICT), the Colorado Wheat Administrative Committee (CWAC), the Hoisington Chamber of Commerce (HCC), The Enid Board of Trade (EBT), the Kansas-Colorado-Oklahoma Shippers Association (KCOSA), the Farmers Elevator Association of Minnesota (FEAM), and the South San Antonio Chamber of Commerce (SSACC). A submission also has been filed by The Institute of Scrap Recycling Industries, Inc. (ISRI).

Protestants: Coal Shippers. Submissions opposing the merger and/or urging the imposition of conditions have been filed by Wisconsin Power & Light Company (WP&L), Wisconsin Public Service Corporation (WPS), Entergy Services, Inc. (ESI), Arkansas Power & Light Company (AP&L), Gulf States Utilities Company (GSU),[11] the City Public Service Board of San Antonio (CPSB), Texas Utilities Electric Company (TUE), Sierra Pacific Power Company (SPP), Idaho Power Company (IDPC),[12] Arizona Electric Power Cooperative (AEPCO), Wisconsin Electric Power Company (WEPCO), Public Service Company of Colorado (PSCo), Illinois Power Company (ILP), Central Power & Light Company (CP&L), Intermountain Power Agency (IPA), Lower Colorado River Authority and the City of Austin, TX (referred to collectively as

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[9] MAA and SMA are wholly owned rail subsidiaries of Magma Copper Company (MCC).

[10] Affiliated carriers Cen-Tex Rail Link, Ltd., and South Orient Railroad Company, Ltd. (referred to collectively as Cen-Tex) filed a request for conditions opposing the merger unless approval thereof was conditioned by requiring applicants to negotiate certain trackage rights. Because Cen-Tex docketed its request for conditions in the manner of a responsive application, we treated it as a responsive application, and we rejected it as incomplete. See Decision No. 29 (served Apr. 12, 1996). Because Cen-Tex also had failed to comply with the discovery obligations to which it was subject, we ordered that its request for conditions be stricken from the record. See Decision No. 30 (served Apr. 18, 1996).

[11] ESI, AP&L, and GSU are referred to collectively as Entergy.

[12] SPP and IDPC are referred to collectively as SPP/IDPC.

LCRA/Austin), Rio Bravo Poso and Rio Bravo Jasmin (referred to collectively as Rio Bravo), and IES Utilities (IES).

Protestants: Plastic and Chemical Shippers. Submissions opposing the merger and/or urging the imposition of conditions have been filed by The Dow Chemical Company (Dow), Montell USA Inc. (Montell), Olin Corporation (Olin), Quantum Chemical Corporation (QCC), Union Carbide Corporation (UCC), Enterprise Products Company (EPC), Formosa Plastics Corporation, USA (FPC), The Geon Company (Geon), PPG Industries, Inc. (PPG), Huntsman Corporation (HC), Arizona Chemical Company (ACC), Monsanto Company (Monsanto), and Shell Chemical Company (SCC). A submission also has been filed by Springfield Plastics, Inc. and Brandt Consolidated, Inc. (collectively, SPBC) (in opposition to the Barr-Girard abandonment).

Protestants: Other Shippers. Submissions opposing the merger and/or urging the imposition of conditions have been filed by The International Paper Company (IPC), United States Gypsum Company (USG), North American Logistic Services (NALS), ASARCO Incorporated (ASARCO), Champion International Corporation (CIC), Weyerhaeuser Company (Weyerhaeuser), Cargill, Incorporated (Cargill), IBP, Inc. (IBP), Oregon Steel Mills (OSM), and Stimson Lumber Company (SLC).

State/Local Governments and Related Interests. Submissions respecting the merger have been filed by various state and local governments and related interests, including the Railroad Commission of Texas (RCT), the Public Utilities Commission of the State of California (CPUC), the Oregon Department of Transportation (Or/DOT), the Idaho Barley Commission and the Idaho Wheat Commission (IBC/IWC), the Public Service Commission of the State of Nevada (PSCN), the Kansas Department of Transportation (Ka/DOT), the Minnesota Department of Transportation (Mn/DOT), and the Iowa Department of Transportation (Ia/DOT).

Labor Parties. Submissions respecting the merger have been filed by various labor parties, including the Allied Rail Unions (ARU), the International Brotherhood of Teamsters (IBT), the Transportation•Communications International Union (TCU), the Transportation Trades Department (TTD), the United Transportation Union (UTU), and the Brotherhood of Locomotive Engineers (BLE).[13]

Federal Parties. Submissions also have been filed by the United States Department of Justice (DOJ), the United States Department of Transportation (DOT), the United States Department of Defense (DOD), the United States Department of Agriculture (USDA), and the United States Department of Labor (DOL).

Additional Parties. Numerous additional parties, including elected officials, government agencies, shippers, shortline railroads, and labor organizations, have participated in this proceeding. Their submissions have generally been limited to expressions of either support for or opposition to: the UP/SP merger; the trackage rights and line sales provided for in the BNSF agreement; the conditions requested by one or more of the parties urging the imposition of conditions upon any approval of the merger; and/or the abandonment/discontinuance authorizations sought by applicants.

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[13] TTD is a department of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).

Summary of Decision. In this decision, we are taking the following action: (1) we are approving common control and merger of UP and SP as proposed in the primary application;[14] (2) we are exempting the transactions at issue in the Sub-Nos. 1, 2, 3, 4, 5, 6, 7, and 8 dockets; (3) we are granting the terminal trackage rights application in the Sub-No. 9 docket; (4) we are directing that class exemption notices covering the trackage rights provided for in the CMA and URC agreements be filed, no later than 7 calendar days prior to the effective date of this decision, (a) by applicants and BNSF, and (b) by applicants and URC, respectively; (5) we are imposing as conditions (a) the terms of the BNSF agreement,[15] (b) the terms of the CMA agreement, and (c) the terms of the URC agreement;[16] (6) we are requiring certain modifications to the terms of the BNSF and CMA agreements, particularly respecting new facilities, transloading facilities, build-out/build-in options, contracts at 2-to-1 points, and storage-in-transit (SIT) facilities; (7) we are expanding BNSF's access to certain traffic moving from and to Lake Charles, West Lake Charles, and West Lake, both in single-line service (by removing a proviso restricting BNSF to traffic moving from, to, and via New Orleans, and from and to points in Mexico via certain border crossings, and by eliminating a fee

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[14] During the course of this proceeding, applicants have made numerous representations to the effect that certain points will be covered, certain services will be provided, and so on. Some of these representations relate to the terms of the BNSF agreement; others do not. Applicants must adhere to all of their representations.

[15] By BNSF agreement, we mean the agreement dated September 25, 1995 (UP/SP-22 at 318-347), as modified by the supplemental agreement dated November 18, 1995 (UP/SP-22 at 348-359), and as further modified by the second supplemental agreement dated June 27, 1996 (UP/SP-266, Exhibit A). We wish to clarify, however, that in imposing the BNSF agreement as a condition to this merger, we will require applicants to honor all of the amendments, clarifications, modifications, and extensions thereof described in: (1) the April 18th CMA agreement (UP/SP-219); (2) the April 29th rebuttal filings (UP/SP-230 at 12-21; UP/SP-231, Part C, Tab 18 at 5-11; see also UP/SP-260 at 8-9, summarizing the clarifications and amendments described in the April 29th rebuttal filings); (3) the June 3rd brief (UP/SP-260 at 23 n.9); and (4) the June 28th filing that accompanied the second supplemental agreement (UP/SP-266 at 3).

Section 17 of the BNSF agreement appears to be a standard "no third party beneficiaries" provision; it provides that nothing in the BNSF agreement is intended to give any person other than the signatories any legal or equitable right, remedy or claim. This provision may be standard but it is clearly at odds with the logic of the BNSF agreement, and we therefore wish to clarify that we understand that the BNSF agreement does provide rights and claims (and, by implication, remedies) to persons other than the signatories. We note, by way of illustration, that a shipper at a point opened up to BNSF under the BNSF agreement is such a person; a subsequent UP/SP-BNSF arrangement restricting BNSF's ability to serve that shipper would, among other things, violate that shipper's rights under the BNSF agreement.

[16] What we have said with respect to the "no third party beneficiaries" provision contained in the BNSF agreement applies with equal force to the similar provision set forth in Section 9 of the URC agreement.

that BNSF otherwise would have had to pay to gain access to much of this traffic) and in joint-line service (by allowing BNSF to interchange this traffic at Shreveport and Texarkana with KCS); (8) we are granting Tex Mex the trackage rights sought in its Sub-No. 13 responsive application and the terminal trackage rights sought in its Sub-No. 14 terminal trackage rights application, but we are restricting these trackage rights to traffic having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line; (9) we are imposing certain conditions with respect to CMTA, Entergy, CPSB, TUE, Dow, and UCC; (10) we are imposing upon BNSF a common carrier obligation with respect to the traffic opened up to it by the BNSF agreement, and we are requiring that BNSF submit a progress report and an operating plan on or before October 1, 1996, and further progress reports on a quarterly basis thereafter; (11) we are requiring that applicants submit a progress report and an implementing plan on or before October 1, 1996, and further progress reports on a quarterly basis thereafter; (12) we are establishing oversight for 5 years to examine whether the various conditions we have imposed have effectively addressed the competitive issues they were intended to address, and we are retaining jurisdiction to impose additional remedial conditions if, and to the extent, we determine that the conditions already imposed have not effectively addressed the competitive harms caused by the merger; (13) with respect to the abandonment/discontinuance requests vis-à-vis the two segments of the Tennessee Pass Line, we are denying the abandonments but granting the discontinuances; (14) we are approving all other abandonment/discontinuance requests filed by applicants; (15) we are imposing the standard labor protective conditions;[17] (16) we are imposing certain environmental mitigating conditions; and (17) we are denying all other conditions sought by the various parties in this proceeding.[18]

Preliminary Matter: UP/SP-262. In UP/SP-262, applicants move to strike (and, in one instance, seek other sanctions respecting) material that they regard as "new evidence" that was submitted by certain parties in their briefs. The parties

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[17] With respect to the merger, the line sales, and the terminal railroad control transactions, the standard labor protective conditions are those established in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock). With respect to the trackage rights provided for in the BNSF, CMA, and URC agreements, and with respect to any additional trackage rights imposed as conditions, the standard labor protective conditions are those established in Norfolk and Western Ry. Co.--Trackage Rights--BN, 354 I.C.C. 605, 610-615 (1978), as modified in Mendocino Coast Ry., Inc.--Lease and Operate, 360 I.C.C. 653, 664 (1980) (Norfolk and Western). With respect to the abandonments and the discontinuances, the standard labor protective conditions are those established in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91, 98-103 (1979).

[18] Several parties submitted, after the voting conference held July 3, 1996, requests seeking "clarification" of determinations made at that conference. Nothing in our schedule for this proceeding, our procedural regulations, or our precedents authorizes parties to submit post-voting conference requests for clarification with respect to matters that will or may be discussed in our written decision. We therefore will not address the post-voting conference clarification requests heretofore submitted in this proceeding. Parties must await our written decision before seeking clarification or other forms of appellate relief.

(Conrail, KCS, SPP/IDPC, OCC, and DOJ) have replied to the motion (CR-43, KCS-63, SPP-17, OCC-7, and DOJ-16, respectively). We will deny the motion to strike and the request for sanctions. We find no basis for sanctions, and if any of the material assailed by applicants is new evidence, we consider it to be of *de minimis* effect against the background of the enormous evidentiary record previously compiled.

Preliminary Matter: BN/SF-61. In BN/SF-61, BNSF moves to strike from the transcript of the oral argument held July 1, 1996, certain allegedly inflammatory comments made by counsel for SPI to the effect that BNSF (or its officers or executives) "lied" (in written or deposition testimony, public statements, or written discovery) about BNSF's ongoing implementation process with respect to SIT facilities. SPI (SPI-25) stands by the comments of its counsel, and insists that a certain statement made by BNSF in its discovery submission served February 20, 1996, was "erroneous," SPI-25 at 3. We will deny the motion to strike, but we wish to emphasize that we are not deciding the truth or falsity of the subject of the comments made by SPI's counsel.

THE RECORD

The evidence and arguments submitted in this proceeding are extensive, and are summarized for the most part in the briefs. Apart from setting forth the basic aspects of applicants' position, we have chosen not to summarize or otherwise address in this part of our decision the extensive evidence submitted by parties urging approval of the UP/SP merger application. Instead, we have chosen to summarize the essential aspects of the evidence, arguments, and any related requests for affirmative relief submitted primarily by parties opposed in whole or in part to the proposed merger.[19]

APPLICANTS. UPRR/MPRR. (1) UPRR operates approximately 13,646 miles of main line and branch line in the West. The main lines run from the Pacific Coast ports/terminals of Seattle, WA, Portland, OR, Oakland, CA, and Los Angeles, CA, to Chicago, IL, and Missouri River gateways including Kansas City, MO, and Omaha, NE/Council Bluffs, IA. Routes over main lines extend from the Pacific Northwest through Washington, Oregon, Idaho, and Utah to Ogden/Salt Lake City, UT, from Northern California through Nevada and Utah to Ogden/Salt Lake City, and from Southern California through Nevada and Utah to Ogden/Salt Lake City. UPRR's double-track main line connects Ogden/Salt Lake City at the west with Omaha/Council Bluffs at the east, and runs through Utah, Wyoming, Colorado, and Nebraska. With the recent merger of the Chicago and North Western Railway Company (CNW) into UPRR, UPRR's lines also run from Chicago to Milwaukee, WI, and then to Winona, MN, and (via trackage rights over WC) to Duluth, MN/Superior, WI, and (via trackage rights over BN) from Duluth/Superior to Minneapolis/St. Paul, MN, and then to Des Moines, IA, and Kansas City. In addition, from the Southern Powder River Basin in Wyoming (PRB and SPRB are the acronyms for the Powder River Basin and the Southern Powder River Basin, respectively), UPRR transports low-sulfur coal principally to

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[19] Thus, for example, our summary of the record does not include UTU's strong support for the merger, and sets forth at length the affirmative relief sought by California parties while merely noting their support in passing. In addition, applicants list the numerous shippers, public officials, railroads, unions and others that have submitted support statements in Appendix C to their brief. See UP/SP-260, Appendix C, at 1-103.

electric generating plants in the Southwest and Midwest. A UPRR line extends from a point near Green Bay, WI, to Ishpeming and Escanaba, MI, while UPRR's Milwaukee-to-St. Louis line passes through Chicago. UPRR also has a network of branch lines in Iowa and Southern Minnesota. (2) MPRR operates approximately 8,361 miles of main line and branch line in the Midwest and the Southwest. While UPRR's lines principally form east-west routes, MPRR's lines principally form north-south routes. MPRR's lines connect the major midwest gateways of Chicago, Omaha, St. Louis, MO, Memphis, TN, and Kansas City with the principal ports and the terminals of New Orleans and Lake Charles, LA, and Galveston, Houston, Beaumont, Corpus Christi, Brownsville, and Laredo, TX. MPRR also serves interior Texas points, including Dallas, Fort Worth, San Antonio, Austin, Midland/Odessa, and El Paso. Its lines extend into the grain producing regions of Kansas and Nebraska and as far west as Pueblo, CO.

SPT/SSW/SPCSL/DRGW. (1) SPT operates approximately 11,000 miles of main line and branch line in the West. The main lines run from Portland via Oakland to Los Angeles, and then to San Antonio, Houston, and New Orleans, including physical interchanges at five gateways to Mexico. SPT lines extend from San Antonio and Houston to Fort Worth, with operations over trackage rights from Fort Worth to Pueblo and Kansas City. The Fort Worth-Pueblo line connects with SSW at Stratford and Dalhart, TX, and with DRGW at Pueblo. The Fort Worth-Kansas City line connects with SSW at Kansas City and Hutchinson, KS. SPT's Central Corridor main line runs from Northern California to Ogden, where it connects with DRGW. (2) SSW operates approximately 2,200 miles of main line and branch line in the Central United States. SSW's main line runs from Santa Rosa, NM, to Kansas City and St. Louis. Operations between Topeka, KS, and St. Louis are over trackage rights on UP. SSW main lines extend from St. Louis south to Shreveport, LA, and Corsicana, TX. SSW's lines connect with SPT in Corsicana, Dalhart, and Stratford, TX, Hutchinson and Kansas City, KS, Shreveport, LA, and Santa Rosa, NM, with DRGW at Herington, KS, and with SPCSL at Kansas City, MO, and East St. Louis, IL. At East St. Louis, Memphis, and Kansas City, SSW connects with major eastern rail carriers. (3) SPCSL, SP's link to Chicago, operates roughly 1,200 miles of main line in Illinois, Iowa, and Missouri, between St. Louis, Chicago, and Kansas City; this mileage includes trackage rights between Kansas City and Chicago on BNSF. (4) DRGW operates roughly 2,300 miles of main line and branch line in Colorado, Utah, and Kansas. The main line runs from Ogden, where it connects with SPT, eastward through Denver and Pueblo, CO, and on to Herington, KS, where it connects with SSW. DRGW has rights to operate between Herington and Kansas City over SSW and UP; and operations between Pueblo and Herington are over UP. DRGW also connects with SPT at Pueblo.

Public Interest Justifications. Applicants claim that the merger will generate annual quantified public benefits in excess of $750 million, and that a merged UP/SP will be more competitive and efficient, and better able to compete with BNSF. Applicants indicate that the merger will allow UP/SP: to combine the separate routes of UP and SP and to create new routes;[20] to

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[20] Applicants plan to offer UP/SP combined routes between Chicago and Oakland, between Chicago and Los Angeles, and between Memphis and the West Coast via Dallas/Ft. Worth. Applicants plan to form the first direct single-line route between Seattle and Los Angeles, and have agreed to grant BNSF the rights necessary to create a second such route. Applicants indicate that UP/SP

(continued...)

improve operations through terminals, and to avoid delay by eliminating interchanges and combining traffic volumes into new trains and new blocks; to improve service, particularly SP service, through technological support and access to capital; to improve equipment utilization and availability; and to consolidate yards and functions. Applicants expect annual benefits, in a normal year, of $659.1 million, as a result of new traffic ($76.0 million) and efficiencies and cost reductions ($583.1 million). Applicants also expect annual shipper logistics savings of $93.1 million.

Applicants claim that the merger, as conditioned by the BNSF agreement, will greatly intensify rail competition in the West; the BNSF agreement, applicants contend, will substitute a stronger competitor (BNSF) for a weaker one (SP), and will create, in some markets, entirely new competition; and only with a merger, applicants insist, will UP and SP be able to provide genuine competition to BNSF. Applicants add that a merger will increase SP's competitiveness by overcoming its service problems and capital constraints and by assuring long-term, high-quality rail service. After the merger, applicants maintain, competition will be stronger not only for shippers who now have rail service from UP and SP and no other railroad (2-to-1 shippers) but also for all other shippers, especially those who go from three serving railroads to two as a result of the merger (3-to-2 shippers).

Labor Impact. Applicants project that the total labor impact of the merger will be 4,909 jobs abolished, 2,132 jobs transferred, and 1,522 jobs created. See UP/SP-22 at 34-35; UP/SP-24 at 407-422. Applicants add that other jobs in Denver, Omaha, and St. Louis may be transferred, but that no decision has yet been made regarding these transfers. See UP/SP-24 at 422 (these contingent transfers affect 387 non-agreement dispatchers, 1,823 clerks, and 2,637 non-agreement personnel other than dispatchers).

BNSF Agreement. Applicants claim that their basic purpose in entering into the BNSF agreement was to preserve competitive rail service for all 2-to-1 customers of UP and SP. Applicants indicate that, to preserve competitive options for such shippers, they identified all 2-to-1 points (i.e., all points at which service is provided by UP and by SP, but by no other railroad) and then negotiated trackage rights and line sales with BNSF that would provide service to as many of these shippers as possible. Applicants concede that a few 2-to-1 points are not covered by the trackage rights and line sales provided for in the BNSF agreement, but they insist that these points are covered by the agreement's "omnibus" clause (Section 8i), which, they maintain, represents a commitment by UP/SP to enter into arrangements with BNSF under which, "through trackage rights, haulage, ratemaking authority or other mutually acceptable means," BNSF will be able to provide competitive service to all 2-to-1 shippers not covered by the trackage rights and line sales provided for in the agreement. Applicants indicate that the BNSF agreement, in addition to preserving competition for all 2-to-1 customers, also preserves a two-railroad interchange with all shortlines that interchanged with both UP and SP and no other railroad prior to

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[20] (...continued)
will institute directional running on parallel routes in Arkansas and Texas, and will assign most intermodal traffic to one Chicago-Southern California route and most manifest traffic (i.e., traffic in a scheduled train, usually of manufactured commodities) to another, thereby improving the handling of both.

the merger. Applicants note that the BNSF agreement includes, in addition to the rights which address competition at 2-to-1 points, an exchange of various other rights between UP/SP and BNSF. The exchange of these rights, applicants claim, resulted from demands by BNSF that, in the view of applicants, were not justified by competitive concerns. In those instances, applicants suggest, they negotiated on a quid pro quo basis for something in return. Applicants contend, however, that these "trades" will improve the competitiveness and efficiency of both carriers and will therefore create even more intense competition than exists today.

Trackage Rights. Under the BNSF agreement, BNSF will receive approximately 3,968 miles of trackage rights over UP/SP (1,727 miles on UP and 2,241 miles on SP)[21] and UP/SP will receive or retain approximately 376 miles of trackage rights over BNSF. The trackage rights that BNSF will receive include rights extending between Oakland, CA, and Denver, CO, between Houston (Algoa), TX, and Brownsville, TX, between Houston, TX, and Iowa Junction, LA, and between Houston, TX, and Bridge Jct., AR (just west of Memphis, TN). The trackage rights that UP/SP will receive or retain include rights extending between Bend, OR, and Chemult, OR, between Mojave, CA, and Barstow, CA, and between Iowa Jct., LA, and Avondale, LA. The trackage rights that BNSF will receive and that UP/SP will receive or retain are more fully described in Appendix C.[22]

Line Sales. Under the BNSF agreement, BNSF will purchase: (1) UP's Keddie Line (in California) between Keddie, CA, at MP 0 and Bieber, CA, at MP 111.8, including both legs of the wye at Keddie; (2) UP's Dallas Line (in Texas) between Dallas, TX, at MP 768.9 and Waxahachie, TX, at MP 798.03; and (3) SP's Avondale Line (in Louisiana) between Avondale, LA, at MP 16.9 and Iowa Junction, LA, at MP 205.3.[23]

Proportional Rate Agreement. The BNSF agreement includes, among other things, a proportional rate agreement over the Portland gateway (hereinafter referred to as the BNSF PRA) that will allow UP/SP to participate in joint rates with BNSF for traffic moving between points in an area north of Portland, OR, and west of Billings and Havre, MT, on the one hand, and, on the other, points in an area extending from Oregon to West Texas. The points in the area north of Portland and west of Billings and Havre are more particularly described as: Canadian interchanges in the Vancouver area; points north of Seattle and west of the Cascades; points south of and including Seattle and west of the Cascades; Washington points east of the Cascades and west of and including Spokane; and points east of Spokane and west of Billings and Havre. The points in the area from Oregon to West Texas are more particularly described as: points in Oregon, California, Nevada, Utah, Colorado, Arizona, and New Mexico;

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[21] These mileage calculations do not include the additional trackage rights provided for in the CMA agreement.

[22] In Finance Docket No. 32760 (Sub-No. 1), applicants have filed a notice of exemption that covers the trackage rights provided for in the BNSF agreement (not including the additional trackage rights provided for in the CMA agreement). This notice invokes the trackage rights class exemption codified at 49 CFR 1180.2(d)(7).

[23] In Finance Docket No. 32760 (Sub-No. 2), applicants have filed a petition for exemption that covers the three line sales provided for in the BNSF agreement.

points in Texas west of Monahans and Sanderson; and connections to Mexico at El Paso and to the west.

CMA Agreement. The CMA agreement provides, among other things, that the BNSF agreement shall be subject to certain amendments, including amendments: (1) to give BNSF overhead trackage rights (for traffic moving from/to points south of Bald Knob and Brinkley, AR) (a) over UP's line between Houston, TX, and Valley Junction, IL, via Palestine, TX, (b) over SP's line between Pair Oaks, AR, and Valley Junction, IL, and (c) over UP's line between Pair Oaks and Bald Knob, AR; (2) to grant BNSF access to any new facilities (not including expansions of or additions to existing facilities or load-outs or transload facilities) located post-merger on any SP-owned line over which BNSF receives trackage rights; (3) to provide BNSF equal access to SP's Dayton Yard (near Baytown, TX) for storage in transit of traffic handled pursuant to the BNSF agreement; (4) to provide that BNSF's trackage rights fees shall be adjusted each year by the difference between that year and the preceding year in UP/SP's system average Uniform Railroad Costing System (URCS) costs for the maintenance and operating costs categories; (5) to give BNSF the right to serve shippers at Lake Charles and West Lake, LA, open to all of UP, SP, and KCS[34] (a) to, from, and via New Orleans, and (b) to and from points in Mexico, with routings via Eagle Pass, Laredo (through interchange with Tex Mex at Corpus Christi or Robstown), or Brownsville, TX; and (6) to specify that, in the Houston-Memphis-St. Louis corridor, BNSF can utilize either the UP line or the SP line, at its discretion, for operating convenience. The CMA agreement further provides, among other things, that applicants will state, in a submission to the Board, that they are agreeable to annual Board oversight proceedings for 5 years, with the Board to examine whether the BNSF agreement has effectively addressed the competitive issues it was intended to address.[35]

URC Agreement. Under the URC agreement, URC will receive access to additional coal sources in Utah and overhead trackage rights between Utah Railway Junction, UT, and Grand Junction, CO. The expanded access to Utah coal consists of joint access with UP/SP to the Savage Coal Terminal coal loading facility located on the CV spur near Price, UT (this is a loadout facility, UP/SP-230 at 166), and exclusive access to the Willow Creek Mine located adjacent to the SP main line near Castle Gate, UT; and this expanded access, combined with URC's present access to coal mines on its own line between Utah Railway Junction and Mohrland, will give URC access to nearly a third of total Utah/Colorado coal production, UP/SP-260 at 39. Applicants insist that they entered into the URC agreement merely to resolve a dispute respecting their ability to grant trackage rights to BNSF over the joint SP/URC track that forms a portion of the SP main line between Salt Lake City and Denver, but they add that the URC agreement will enhance competition by expanding the coal sources

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[34] Applicants have further indicated that this aspect of the CMA agreement will be extended to shippers at West Lake Charles, LA, served by SP and KCS. UP/SP-260 at 23 n.9.

[35] Applicants have made the required submission, see UP/SP-230 at 21, and CMA has withdrawn its opposition to the merger in reliance upon (1) our adoption of the BNSF and CMA agreements, (2) BNSF's assurances that it will enter the markets opened up under the BNSF agreement, and compete vigorously for the traffic of CMA members, and (3) our agreement to institute annual oversight proceedings to examine the effects of the merger on competition, see CMA-12 at 4-5.

available to BNSF through interchange with URC (under the BNSF agreement, BNSF, which will have the right to interchange with URC at Provo, Utah Railway Junction, and Grand Junction, will be able to move URC-originated coal both to end markets west of Provo and also to end markets east of Grand Junction).

Terminal/Switching Railroads. A combined UP/SP will control five terminal and/or switching railroads in which UP and SP presently have non-controlling interests: The Alton & Southern Railway Company (A&S), Central California Traction Company (CCT), The Ogden Union Railway & Depot Company (OURD), Portland Terminal Railroad Company (PTRR), and Portland Traction Company (PTRC). In Finance Docket No. 32760 (Sub-Nos. 3, 4, 5, 6, and 7), applicants have filed petitions to exempt their control of A&S, CCT, OURD, PTRR, and PTRC, respectively.[36]

Motor Carriers. UPC holds a 100% stock interest in motor carrier Overnite Transportation Company (Overnite); SPT holds a 100% stock interest in both Pacific Motor Transport Company (PMT) and Southern Pacific Motor Trucking Company (SPMT); and a UP/SP merger will therefore result in (1) common control of SP and Overnite and (2) common control of UP and PMT/SPMT. In Finance Docket No. 32760 (Sub-No. 8), applicants have filed a petition to exempt this common control.

Terminal Trackage Rights. In Finance Docket No. 32760 (Sub-No. 9), applicants and BNSF have filed an application for an order under 49 U.S.C. 11103 permitting BNSF to use two segments of KCS track in Shreveport, LA, and one segment of KCS track in Beaumont, TX. Applicants contend that the use of these segments is necessary for BNSF to provide, under the BNSF agreement, stronger competition to UP/SP in the Houston-Memphis and Houston-New Orleans corridors. Applicants indicate that, although SP has trackage rights over the three segments and MPRR has trackage rights over the Beaumont segment, they have filed their Sub-No. 9 application because the underlying trackage rights agreements "arguably" require consent by KCS to the use of the trackage rights by BNSF."[37] The Shreveport trackage (two segments totaling 3.52 miles in length) is a portion of SP's Houston-Memphis route, and applicants claim that the two segments are used also for interchange with connecting railroads and for

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[36] A&S, which owns some 33 miles of main line track and 108 miles of yard track in the St. Louis area, is owned by MPRR and SSW, each holding a 50% stock interest therein. CCT, which owns some 45 miles of track between Stockton and Polk, CA, and between Lodi and Lodi Junction, CA, is owned by UPRR, SPT, and BNSF, each holding a one-third stock interest therein. OURD, a terminal carrier located in Ogden, is owned by UPRR and SPT, each holding a 50% stock interest therein. PTRR, which operates over some 58 miles of track in Portland, is owned by UPRR (40% stock interest), SPT (20% stock interest), and BNSF (40% stock interest), each of which has two members on PTRR's six-member board. PTRC, an inactive entity with neither employees nor facilities, is owned by UPRR and SPT, each holding a 50% stock interest therein.

[37] Applicants, citing 49 U.S.C. 11341(a), claim that approval of the merger, conditioned by the BNSF agreement, should give BNSF authority to use the subject tracks with or without the consent of KCS. Applicants indicate, however, that they have filed their Sub-No. 9 application because there is ICC precedent to the effect that 49 U.S.C. 11341(a) might not achieve an override of a consent requirement in a joint facility agreement. See UP/SP-26 at 123 n.2.

access to a nearby industrial area jointly served by SP, UP, and KCS.[28] The Beaumont trackage (roughly 1.8 miles between KCS MP's 764.9 and 766.7, including the Neches River Bridge, KCS-32 at 1) is a portion of separate UP and SP Houston-New Orleans routes, and applicants claim that this trackage also is used for switching and interchange purposes and for access to facilities of the Port of Beaumont.[29]

Abandonments And Discontinuances. Applicants seek authorization to abandon, or to abandon and to discontinue operations over, 17 line segments that total approximately 584 miles. Authorization is sought by application, by petition, and by notice.[30]

The Towner-NA Junction Line (Colorado). In Docket Nos. AB-3 (Sub-No. 130) and AB-8 (Sub-No. 38), respectively, MPRR seeks by application approval to abandon, and DRGW seeks by application approval to discontinue its overhead trackage rights operations over, MPRR's Towner-NA Junction Line, which extends between MP 747.0 near Towner, CO, and MP 869.4 near NA (North Avondale) Junction, CO, a distance of approximately 122.4 miles in Pueblo, Crowley, and Kiowa Counties, CO. The abandonment/discontinuance does not include active industries at NA Junction or at Towner.

The Sage-Malta-Leadville Line (Colorado). In Docket Nos. AB-8 (Sub-No. 36X) and AB-12 (Sub-No. 189X), respectively, DRGW seeks by petition to exempt its discontinuance of operations over, and SPT seeks by petition to exempt its abandonment of, SP's Sage-Malta-Leadville Line, which extends a distance of approximately 69.1 miles in Eagle and Lake Counties, CO, (1) between MP 335.0 near Sage, CO, and MP 271.0 near Malta, CO, and (2) between MP 271.0 near Malta, CO, and MP 276.1 near Leadville, CO.

The Malta-Cañon City Line (Colorado). In Docket Nos. AB-8 (Sub-No. 39) and AB-12 (Sub-No. 188), respectively, DRGW seeks by application approval to discontinue its operations over, and SPT seeks by application approval to abandon, SP's Malta-Cañon City Line, which extends between MP 271.0 near Malta, CO, and MP 162.0 near Cañon City, CO, a distance of approximately 109.0 miles in Lake, Chaffee, and Fremont Counties, CO.[31]

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[28] SP has rights to use this trackage under agreements with KCS and a predecessor dated May 8, 1933, and December 17, 1980. The 1933 agreement covers a 1.32-mile segment of track between engineering stations 8872+81 and 8941+24 (no mileposts have been assigned). The 1980 agreement covers approximately 2.2 miles of track between KCS MP's 559 and 671.2 (or, by KCS' calculations, approximately 2.1 miles of track between KCS MP's 559 and 561.2, see KCS-32 at 1).

[29] MPRR and SP obtained rights to use this trackage pursuant to an agreement dated July 1, 1965, among KCS, MPRR, SP, SF, and the City of Beaumont. SF, however, did not acquire, under the 1965 agreement, the rights sought in the Sub-No. 9 application.

[30] Of the 17 lines for which abandonment authorizations are sought, 4 lines involve both abandonment by one carrier (either MPRR or SPT) and discontinuance by another carrier (DRGW).

[31] The Sage-Malta-Leadville Line connects with the Malta-Cañon City Line at Malta. We shall on occasion refer to the two lines collectively as the Tennessee Pass Line.

The Hope-Bridgeport Line (Kansas). In Docket Nos. AB-3 (Sub-No. 131) and AB-8 (Sub-No. 37), respectively, MPRR seeks by application approval to abandon, and DRGW seeks by application approval to discontinue its overhead trackage rights operations over, MPRR's Hope-Bridgeport Line, which extends between MP 459.20 near Hope, KS, and MP 491.20 near Bridgeport, KS, a distance of approximately 31.24 miles in Dickinson and Saline Counties, KS (MP 478.05 - MP 478.81; see UP/SP-26 at 208). The abandonment and discontinuance do not include active industries at Hope and Bridgeport.

The Barr-Girard Line (Illinois). In Docket No. AB-33 (Sub-No. 96), UPRR seeks by application approval to abandon its Barr-Girard Line, which extends between MP 51.0 near Barr, IL, and MP 89.4 near Girard, IL, a distance of approximately 38.4 miles in Menard, Sangamon, and Macoupin Counties, IL. The abandonment does not include active industries at Barr and Girard. UPRR indicates that a superior post-merger route will be achieved by exiting this line at Barr, operating over the Illinois & Midland line (formerly the Chicago & Illinois Midland line) from Barr to Springfield, and then operating over the SP line from Springfield to St. Louis; and UPRR therefore notes that this abandonment is contingent upon acquisition of trackage rights over the Illinois & Midland (I&M) line.

The Gurdon-Camden Line (Arkansas). In Docket No. AB-3 (Sub-No. 129X), MPRR seeks by petition to exempt the abandonment of its Gurdon-Camden Line between MP 428.3 near Gurdon, AR, and MP 457.0 near Camden, AR, a distance of approximately 28.7 miles in Clark, Nevada, and Ouachita Counties, AR. The abandonment does not include active industries at Gurdon or Camden.

The Iowa Junction-Manchester Line (Louisiana). In Docket No. AB-3 (Sub-No. 133X), MPRR seeks by petition to exempt the abandonment of its Iowa Junction-Manchester Line between MP 680.0 near Iowa Junction, LA, and MP 688.5 near Manchester, LA, a distance of approximately 8.5 miles in Jefferson Davis and Calcasieu Parishes, LA.

The Wendel-Alturas Line (California). In Docket No. AB-12 (Sub-No. 184X), SPT seeks by petition to exempt the abandonment of its Wendel-Alturas Line between MP 360.1 near Wendel, CA, and MP 445.6 near Alturas, CA, a distance of approximately 85.5 miles in Modoc and Lassen Counties, CA.

The Suman-Bryan Line (a portion) (Texas). In Docket No. AB-12 (Sub-No. 185X), SPT seeks by petition to exempt the abandonment of the portion of its Suman-Bryan Line that lies between MP 117.6 near Suman, TX, and MP 105.07 near Benchley, TX, a distance of approximately 12.53 miles in Robertson County, TX.[28]

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[28] SPT originally petitioned to abandon the entire Suman-Bryan Line, between MP 117.6 near Suman, TX, and MP 101.4 near Bryan, TX, a distance of approximately 16.2 miles in Brazos and Robertson Counties, TX. See UP/SP-26 at 362-371. SPT later modified the petition by excluding the segment between MP 101.4 and MP 105.07 from the scope of the abandonment, noting that VTI Industries, the sole shipper on the line (located near MP 104.5), will continue to be served by UP/SP. SPT now seeks to abandon only the portion of the line between MP 117.6 near Suman and MP 105.07 near Benchley, which it calculated to be a distance of approximately 13.1 miles. See UP/SP-57. The distance between MP's 117.6 and 104.5 (where VTI Industries is located) is

(continued...)

The Edwardsville-Madison Line (Illinois). In Docket No. AB-33 (Sub-No. 98X), UPRR seeks by petition to exempt the abandonment of its Edwardsville-Madison Line between MP 133.8 near Edwardsville, IL, and MP 148.78 near Madison, IL, a distance of approximately 14.98 miles in Madison County, IL. The abandonment does not include active industries at Madison.

The Newton-Whitewater Line (Kansas). In Docket No. AB-3 (Sub-No. 132X), MPRR seeks by notice to exempt the abandonment of its Newton-Whitewater Line between MP 485.0 near Newton, KS, and MP 476.0 near Whitewater, KS, a distance of approximately 9.0 miles in Butler and Harvey Counties, KS. The abandonment does not include active industries at Newton or Whitewater.

The Troup-Whitehouse Line (Texas). In Docket No. AB-3 (Sub-No. 134X), MPRR seeks by notice to exempt the abandonment of its Troup-Whitehouse Line between MP 0.50 near Troup, TX, and MP 8.0 near Whitehouse, TX, a distance of approximately 7.5 miles in Smith County, TX. The abandonment does not include active industries at Troup or Whitehouse.

The Seabrook-San Leon Line (Texas). In Docket No. AB-12 (Sub-No. 187X), SPT seeks by notice to exempt the abandonment of its Seabrook-San Leon Line between MP 30.0 near Seabrook, TX, and MP 40.5 near San Leon, TX, a distance of approximately 10.5 miles in Galveston and Harris Counties, TX.

The Whittier Junction-Colima Junction Line (California). In Docket No. AB-33 (Sub-No. 93X), UPRR seeks by notice to exempt the abandonment of its Whittier Junction-Colima Junction Line between MP 0.0 near Whittier Junction, CA, and MP 5.18 near Colima Junction, CA, a distance of approximately 5.18 miles in Los Angeles County, CA. The abandonment does not include active industries at Whittier Junction or Colima Junction.

The Magnolia Tower-Melrose Line (California). In Docket No. AB-33 (Sub-No. 94X), UPRR seeks by notice to exempt the abandonment of its Magnolia Tower-Melrose Line between MP 5.8 near Magnolia Tower, CA, and MP 10.7 near Melrose, CA, a distance of approximately 4.9 miles in Alameda County, CA. The abandonment does not include active industries at Magnolia Tower or Melrose.

The DeCamp-Edwardsville Line (Illinois). In Docket No. AB-33 (Sub-No. 97X), UPRR seeks by notice to exempt the abandonment of its DeCamp-Edwardsville Line between MP 119.2 near DeCamp, IL, and MP 133.8 near Edwardsville, IL, a distance of approximately 14.6 miles in Madison County, IL. The abandonment does not include active industries at DeCamp or Edwardsville.

The Little Mountain Junction-Little Mountain Line (Utah). In Docket No. AB-33 (Sub-No. 99X), UPRR seeks by notice to exempt the abandonment of its Little Mountain Junction-Little Mountain Line between MP 0.0 near Little Mountain Junction, UT, and MP 12.0 near Little Mountain, UT, a distance of approximately 12.0 miles in Box Elder and Weber Counties, UT. The abandonment does not include active industries at Little Mountain Junction or Little Mountain.

BNSF. BNSF takes no position on the merger, but insists that it is the only railroad that can ensure strong competition

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[32](...continued)
13.1 miles; however, by our calculations, the distance between MP's 117.6 and 105.07 is approximately 11.53 miles.

to a merged UP/SP because no other railroad has the financial strength, operational capabilities, marketing expertise, and range of origins and destinations to serve the long routes in the Western United States. The BNSF agreement, BNSF contends, will preserve effective competition for shippers served only by UP and SP today, and BNSF therefore argues that, if the merger is approved, the BNSF agreement must be imposed as a condition. BNSF insists that it will receive, under the BNSF agreement, adequate access to regions, routes, and stations on appropriate terms and conditions, including compensation levels, that will allow it to compete vigorously. Recognizing that most of its operations under the agreement will be conducted pursuant to trackage rights, BNSF notes that the agreement requires that BNSF's trains be given equal dispatch without any discrimination in favor of comparable UP/SP trains, and BNSF insists that it will accept nothing less.

RAILROAD PROTESTANTS. Concerns that a UP/SP merger would have anticompetitive impacts in the transportation marketplace have been expressed by several railroad protestants.

Consolidated Rail Corporation. Conrail urges us to deny the merger unless conditioned on divestiture of what Conrail calls the "SP East":[33] (1) SP's lines from Chicago and St. Louis to Galveston, TX, and Brownsville, TX, and from New Orleans to Spofford, TX, Eagle Pass, TX, and El Paso, TX, including all connecting trackage and spur lines serving Alton, IL, New Madrid, MO, Memphis, TN, Little Rock, AR, Indiana, AR, Breaux Bridge, LA, and all intermediate Texas points; (2) all trackage, haulage, and access rights associated with these lines and SP's ownership of, and rights in, the jointly used UP-SP line extending from East St. Louis to Jonesboro, AR; (3) SP's interest in the A&S, the Terminal Railroad Association of St. Louis (TRRA), and any other terminal railroad serving traffic originating/terminating on the acquired lines; (4) SP's interest in various bridge companies necessary to the effective operation of the acquired lines; and (5) all other assets (including yards, storage facilities, and sidings), options for same, or other facilities used or held by SP or its affiliates for the maintenance, operation, and efficient use of the acquired lines and assets. Conrail also asks that the Finance Docket No. 32760 (Sub-No. 1) class exemption be revoked (the request for revocation is referred to as a "petition," CR-21 at 10-11), and that the Finance Docket No. 32760 (Sub-No. 2) petition for exemption be denied. The trackage rights and line sales provided for in the BNSF agreement, Conrail insists, require a responsive application to allow us to determine whether these trackage rights and line sales cure the anticompetitive harms threatened by the merger.[34]

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[33] Conrail uses the terms "SP East" or "SP East lines" to mean SP's properties in Texas, Louisiana, and Arkansas, SP's eastern main line in Missouri and Illinois, all access rights associated with these lines, and all other assets held by SP or its affiliates that are used or useful for the maintenance and operation of these lines. Conrail uses the terms "SP West" or "SP West lines" to mean all other SP lines and facilities. As Conrail uses these terms, the region where SP East operates is the SP East region and the region where SP West operates is the SP West region.

[34] In its BN/SF-53 reply to Conrail's "petition" for revocation of the Sub-No. 1 class exemption, BNSF contends that Conrail's "petition" is premature (because the class exemption has not yet become effective with respect to the trackage

(continued...)

Competitive Harm in the SP East Region. Conrail claims that, in the SP East region, the trackage rights provided in the BNSF agreement will not avert the anticompetitive harms threatened by what is essentially a parallel merger. The problems with these trackage rights, Conrail asserts, cannot be remedied; their flaws relate primarily to the physical route structure and infrastructure available to BNSF in the SP East region. By Conrail's calculations, BNSF would capture only a trivial share (less than 4%) of new traffic originating or terminating in Texas, Louisiana, and Arkansas and moving over major SP East corridors from/to the North or Northeast or Mexico, and Conrail insists that this small market share would prevent BNSF from attaining economies of density and scale comparable to UP/SP's. Conrail concedes that the BNSF agreement attempts to address competition at 2-to-1 points (i.e., points at which shippers now have access to both UP and SP and to no other railroad), but claims that the agreement does not address either the loss of potential competition provided by build-ins or transloads or the loss of source competition. And Conrail insists that SP could continue to compete effectively as an independent railroad; SP, Conrail argues, has the financial resources to make the investments that would enable it to keep pace with the other western railroads.

Houston. In Houston, Conrail claims, BNSF would generally be required to use one (and sometimes two) terminal carriers, thereby adding cost and time to a BNSF haul as compared to a pre-merger SP haul and a post-merger UP/SP haul. All BNSF traffic to the East and Northeast, Conrail indicates, would be delivered to the New South Yard of the Houston Belt & Terminal Railway (HB&T), and would exit the Houston switching district via the HB&T. Some BNSF traffic, Conrail adds, also would be switched via the Port Terminal Railway Association (PTRA).

South Texas/Gulf Coast-St. Louis. Conrail claims that, for 2-to-1 shippers in the SP East region, most traffic goes north to the St. Louis gateway (or gateways in Southern Illinois) for a further haul by an eastern railroad to its ultimate destination. BNSF, Conrail contends, would face obstacles that SP generally does not face pre-merger and that UP/SP would not face post-merger; and this, Conrail adds, would be true whether this traffic is routed (1) via BNSF's Houston-Memphis trackage rights, and then via BNSF's own Memphis-St. Louis track, or (2) via BNSF's own Houston-Tulsa-St. Louis track. Conrail notes, with respect to the routing via Memphis, that SP's Houston-Shreveport "Rabbit" line is single-track, undulates, lacks Centralized Traffic Control (CTC), has a 49 mile-per-hour speed limit, and has few sidings. Conrail concedes that SP offers service on this line but notes that SP developed that service over a long history, and argues that BNSF would lack SP's knowledge of the line and its customer base. And, Conrail asserts, BNSF service on the Houston-Memphis line also would be disadvantaged by UP/SP's "primarily directional" southbound routings. The routing via Tulsa, Conrail concedes, would fix these problems, but only at the expense of added circuity. Besides, Conrail argues, via either routing BNSF would have to travel across the Mississippi River and through St. Louis from the west to connect with eastern railroads in East St. Louis or farther east in Southern Illinois; and, in St. Louis, BNSF would require switching service from TRRA.

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[36](...continued)
rights), at odds with our regulations (because the trackage rights have not been sought in a responsive application), and inconsistent with ICC practice. BN/SF, slip op. at 87 n.116.

Houston-New Orleans. Conrail claims that BNSF recognizes that the Houston-New Orleans corridor is the one corridor provided for in the BNSF agreement in which traffic density may increase, and this, Conrail adds, may explain why BNSF has proposed to provide service in this corridor through a combination of trackage rights and, at its election, acquisition of a portion of the line. Conrail indicates, however, that BNSF has not analyzed the cost of required capacity-related improvements or the lead time needed to construct such improvements.

Mexican Gateway Traffic. Conrail notes that UP and SP currently compete head-to-head at El Paso, Laredo, and Brownsville, the principal eastern gateways into Mexico. The BNSF agreement purports to allow BNSF to replicate this competition, with access to Eagle Pass (via trackage rights that would replace the haulage rights it has now), to Laredo (via trackage rights to Robstown, and via a junction at Robstown with Tex Mex), and to Brownsville (via trackage rights).[25] Conrail contends that shippers fear that BNSF will not be able to use these trackage rights effectively, and that BNSF's actions suggest that it is not interested in developing Mexican traffic.

BNSF Options. Under the BNSF agreement, Conrail notes, BNSF must choose whether to provide service by means of direct service, switching, or use of a third carrier for local service; and, under the agreement, once it makes that election, it can change only once, and then cannot change for 5 years. Therefore, Conrail asserts, if BNSF, a newcomer to the 2-to-1 shippers, makes a choice that is uneconomic, operationally infeasible, or competitively unattractive, 5 years would pass before its competitive disadvantage could be rectified.

BNSF Access to Necessary Facilities. Conrail asserts that, after the merger, BNSF would have access to only 12% of the switching and classification yard facilities in the Texas-Louisiana Gulf Coast. And, Conrail adds, BNSF would have access to only 16% of SIT capacity in the Texas-Louisiana Gulf Coast; but SIT capacity, Conrail notes, is vital to providing competitive rail service to plastics shippers.

Other Considerations. Conrail contends that the BNSF agreement does not embody an enforceable commitment to provide competitive service, although Conrail concedes that the imposition of the agreement as a condition will create a common carrier obligation. Conrail claims, however, that there would still be uncertainties as to the extent of BNSF's obligations because, among other things, BNSF has not provided: details about local service; the costs of providing such service, whether direct, by switch, or by third carrier; specific schedules for through trains; specific information about yard capacity available for BNSF operations; details about costs, delays, and extra handlings involved in relying on terminal carriers; specific plans for capacity improvements on the trackage rights lines; and specific plans for provision of SIT capacity.

Benefits of the Proposed Merger. Conrail insists that the primary efficiencies claimed for the merger, including line consolidations, reduced circuity, and increased direct and single-line service, are in the West; the SP East region accounts for less than 5% of the total projected merger-related route mile savings. Conrail further insists that the public benefits of the

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[25] Conrail notes that BNSF already has access to El Paso, but from the north and west, not from the east.

merger (an improved competitive posture vis-à-vis BNSF) and the principal investments that would be made by UP/SP after the merger (corridor upgrades, terminal improvements, improved track connections, and intermodal terminals) are likewise in the West. And, Conrail asserts, the claimed public benefits in the SP East region (e.g., alleviation of capacity constraints through directional routing and increased blocking and classifying) could be achieved without a merger.

Benefits of Divestiture. Divestiture, Conrail argues, would solve the anticompetitive harms threatened by the merger, and would be, for various reasons, preferable to trackage rights. An owner, Conrail insists, has economic incentives that a tenant lacks; trackage rights do not always assure the tenant access to the yards, storage facilities, and infrastructure necessary to assure on-time, consistent, and reliable service; a landlord may discriminate against a tenant; and, when the landlord's operations encounter problems, the tenant's operations go awry as well. Conrail envisions that divestiture would be accomplished in an auction-like process. Each bid would reflect the value of the lines to the bidder (Conrail has stated in the record that it is willing to pay $2.5 billion for the SP East properties);[*] each carrier would attempt to demonstrate how its bid would maximize the public benefits of the divestiture operation; and each also could demonstrate how its bid would allow the benefits of the UP/SP West consolidation to be realized. And, Conrail contends, there would be a substantial benefit in the divestiture of SP East lines to an eastern railroad; a Conrail-SP East system, by way of example, would be an end-to-end combination yielding new single-line opportunities, faster transit times, lower costs, fewer handlings, and generally better service.

CMA Agreement. The CMA agreement, Conrail insists, does not remedy merger-related competitive harms in the SP East region. Conrail claims that the BNSF agreement, even as modified by the amendments required by the CMA agreement, still does not address the service problems that will impede BNSF's operations in Houston; still does not address the problems created by BNSF's access to a mere 12% of the switching and classification yard facilities in the Texas-Louisiana Gulf Coast; does not meaningfully address the problems created by BNSF's access to a mere 16% of SIT capacity in the Texas-Louisiana Gulf Coast; and does nothing to alter the traffic predicted to be available to BNSF. Conrail concedes that the BNSF agreement, as modified by the amendments required by the CMA agreement, provides BNSF access to any new facility located on any SP-owned line over which BNSF receives trackage rights. Conrail claims, however, that this is largely illusory because "new facility" is narrowly defined to exclude "expansions of or additions to existing facilities," and also because BNSF, if it elects to serve a new facility, is required to share equally "in any capital investment necessary to provide rail service to the facility" (irrespective of the amount of traffic it may be able to capture).

Kansas City Southern Railway Company. KCS contends that the merger will cause unprecedented competitive harm and should therefore be denied, and asks, in the alternative, that we order divestiture of parallel lines and duplicate facilities, including: (1) lines between St. Louis and Memphis, on the one hand, and, on the other, Houston; (2) SP's Houston-New Orleans

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[*] We note that press reports have indicated that Conrail has increased the amount it is willing to pay to $1.9 billion. Wall Street Journal, June 6, 1996, at B10; Traffic World, June 17, 1996, at 40.

line; and (3) SP's Houston-Brownsville line. KCS adds that, where UP and SP now share lines and facilities, divestiture should consist of a grant of trackage rights over such lines and access rights to such facilities. KCS adds that, to remedy cumulative effects of the BN/SF merger and the proposed merger, a third carrier should be given access to the Central Kansas rights granted to SF in connection with the BN/SF merger, including access to Wichita, Topeka, and Hutchinson, and the trackage rights over BNSF to Ft. Worth. And, KCS concludes, we should order a Central Corridor divestiture similar to the one proposed by MRL.

The BNSF Agreement; Discovery; Due Process; and the First Amendment. KCS contends that the BNSF agreement will not solve the competitive problems the proposed merger would cause, and that we cannot fully evaluate the agreement's competitive impact because applicants have refused to disclose critical aspects of its negotiation. KCS also contends that applicants have abused the discovery process, and it maintains that their abuse of that process should not be condoned. KCS-33 at 117-124. KCS further contends that applicants, by their overuse of the "Highly Confidential" designation, have hindered participation in this proceeding by opponents of the merger, have violated opponents' procedural due process rights (because certain matters could not be discussed with inside counsel), and have even violated opponents' First Amendment right to "petition the government for a redress of grievances" (because opponents and inside counsel, were unable to look at material stamped "Highly Confidential"). KCS also contends, among other things, that because the merger involves commerce to and through Mexico and would have a substantial impact on American foreign policy, there is some doubt as to our jurisdiction in this matter. KCS-33 at 83-84.

2-to-1 Shippers. KCS notes that, under the BNSF agreement, only 2-to-1 shippers at points served by UP and SP and no other carrier will gain access to BNSF. KCS argues, however, that there are other 2-to-1 shippers as well. (1) Applicants, KCS claims, did not consider a shipper to be a 2-to-1 shipper if that shipper had access, either directly or via reciprocal switching, to two carriers, the first being either UP or SP and the second being another Class I carrier (such as KCS or BNSF). KCS maintains, however, that any such shipper should qualify as a 2-to-1 shipper if, by way of example, it can presently route a shipment either joint-line by KCS-UP or single-line by SP; post-merger, KCS asserts, there will no longer be two independent routing alternatives. (2) KCS also asserts that the BNSF agreement provides no relief to a shipper that has a plant served both by UP and SP, either directly or via reciprocal switching, and also by another Class I carrier (such as KCS). KCS claims, however, that any such shipper should qualify as a 2-to-1 shipper if that shipper can presently route either single-line by UP or single-line by SP, but cannot route single-line by KCS because KCS does not serve the destination. (3) KCS further asserts that the BNSF agreement provides no relief to a shipper that has a plant served exclusively by SP, where the shipper can route a shipment either single-line by SP or joint-line by SP-UP. That shipper, KCS claims, may have sufficient leverage to "short haul" SP by using SP as a switch carrier to switch the traffic to UP.

2-to-1 Corridors. KCS warns that shippers located in 2-to-1 corridors will suffer reduced competition because, for most UP or SP shippers in a given corridor who are not directly served by both carriers, the presence of the other carrier nevertheless provides a competitive restraint. That restraint, which would be eliminated by the merger, takes many forms: potential build-outs or build-ins; the potential to truck transload; the potential to

use joint truck/rail or barge/rail movements; the ability to shift production among numerous plants located on UP and SP; the ability to relocate plant facilities; the ability to play UP and SP against each other in deciding where to locate new facilities; the use of package bidding; and source and product competition between shippers located on UP and shippers located on SP.

Trackage Rights; Package Deal; Operating Costs. Trackage rights, KCS claims, inherently present many problems involving labor, equipment, dispatching, maintenance, and derailments; a landlord, KCS contends, has no incentive to provide essential maintenance to tracks used primarily by a tenant. The BNSF agreement, KCS further contends, was a package deal, and BNSF had to accept trackage rights it did not want in order to obtain those that it did, primarily in the West.[37] BNSF's lack of interest, KCS claims, is reflected in its failure to provide operating details, management plans, diversion studies, market analyses, financial information, or environmental documentation with respect to the line sales and trackage rights provided for in the BNSF agreement. KCS argues that BNSF's operating costs will be significantly higher than UP/SP's and, as a result, BNSF will not be an effective competitor. KCS therefore argues that the trackage rights fees provided for in the agreement must be adjusted to provide competitive relief.

Antitrust Violations. KCS, arguing that, in recent years, BN, SF, UP, and SP may have cooperated in violation of the antitrust laws and that this cooperation may have produced the BNSF agreement, requests that we "establish" that our rulings in this proceeding neither condone nor insulate violations of the antitrust laws. KCS-33 at 82. KCS adds that, because some form of anticompetitive behavior may have occurred between BN, SF, UP, and SP during the BN/SF merger proceeding, we should consider reopening the record in that proceeding in order to fully analyze the trackage rights given in that proceeding. KCS-33 at 82 n.41.

Terminal Trackage Rights. KCS claims that, even if we impose the BNSF agreement as a condition, BNSF will not be able to implement its trackage rights absent approval of the Finance Docket No. 32760 (Sub-No. 9) terminal trackage rights application. KCS, urging denial of that application, contends that the relevant rail segments are not terminal facilities within the meaning of 49 U.S.C. 11103(a). KCS claims that the two agreements applicable to the Shreveport trackage are standard trackage rights agreements, confining SP's use of the trackage to main-line, through-train operations, and that the agreement applicable to the Beaumont trackage prohibits terminal activities on the trackage. And, KCS contends, the requested trackage rights are not practicable and would interfere with the operations of the current users of the lines.

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[37] KCS, citing a document submitted under seal, claims, among other things, that BNSF, despite its lack of interest in Mexico, had no choice but to accept South Texas trackage rights as part of a package. KCS-33 at 72. BNSF insists that the confidential document upon which KCS has relied lacks probative value, is not admissible in evidence, and should be stricken from the record. BN/SF-84 at 32-33. KCS, responding to BNSF's request to strike, maintains that there is no basis not to consider this document, which, KCS adds, provides a glimpse at the motivations of applicants and BNSF in regard to South Texas. KCS-52 at 2. We think that the document relied upon by KCS has been properly introduced into evidence, and we will therefore deny BNSF's request that it be stricken.

Montana Rail Link. MRL, a regional carrier that has filed a responsive application in Finance Docket No. 32760 (Sub-No. 11), operates a 632-mile main line between Laurel, MT, and Sandpoint, ID, with trackage rights on BN between Sandpoint, ID, and Spokane, WA, and with 200 miles of branch lines in Montana. MRL insists that the trackage rights provided for in the BNSF agreement will not preserve or promote competition in the Central Corridor because: BNSF will have no investment in that corridor, and will pay fees for the trackage rights only to the extent that it uses them; BNSF does not need these trackage rights to protect any of its existing long-haul traffic, or to enhance service to its existing customers; the trackage rights do not provide BNSF with access to any significant new markets, given the narrow definition of 2-to-1 shippers; the requirement that BNSF share Central Corridor capital expenditures, based upon its relative use of that route, will operate as a disincentive to BNSF usage of the trackage rights; and it is unlikely that BNSF would make much use of a lengthy route over which it would be subject to the dispatching and operational priorities of UP/SP.

Coal. Bituminous coal, MRL notes, is mined in Southern Wyoming, the Central Rockies, Four Corners, and Raton; subbituminous coal is mined in the PRB. The four bituminous reserves are served predominantly by three railroads: Southern Wyoming by UP, the Central Rockies by SP, and Four Corners and Raton by BNSF; UP handles 21% of the rail transportation market for western bituminous coal, SP handles 42%, and BNSF handles 25% (and URC handles the remaining 12%). The PRB subbituminous coal reserves are served by two railroads: UP and BNSF. SP's share of the transportation market for shipments to traditional customers of western bituminous coal, MRL indicates, has held steady at about 45% since 1989. MRL adds, however, that, as to new markets, SP's share has grown from 7% in 1989 to 64% in 1995, due to aggressive pricing and innovative marketing practices. UP's market share for emerging and new markets of bituminous coal, MRL claims, has declined to 18%, and MRL claims that the decline in UP's share of the emerging markets for western bituminous coal may reflect UP's dedication to developing the growth of PRB coal. MRL notes that SP, with no access to PRB coal, has had to focus its efforts on developing western bituminous coal, particularly from the SP-served Central Rockies mines; and MRL fears that a combined UP/SP will neglect bituminous coal in favor of PRB coal.

Relief Requested: In General. MRL suggests that, to mitigate the adverse consequences of the merger in the Central Corridor, we should authorize a to-be-formed affiliate (Acquisition Company, hereinafter referred to as MRLAC) to acquire certain Central Corridor rail lines and incidental trackage rights. MRLAC, MRL insists, would compete vigorously for traffic (overhead and local) in the Central Corridor because the value of its franchise would depend on its capturing a share of this market. MRLAC, MRL adds, would grant overhead trackage rights to UP/SP and BNSF over the lines it acquires, to address capacity concerns that may arise in the future and to allow UP/SP to achieve many of the operating efficiencies tied to the merger. And, MRL adds, the proposed acquisitions would advance the public interest by preserving existing routes in the Central Corridor, thereby forestalling five of the abandonments proposed by applicants (respecting the Wendel-Alturas Line, the Sage-Malta-

Leadville Line, the Malta-Cañon City Line, the Towner-NA Junction Line, and the Hope-Bridgeport Line).[30]

Relief Requested: Line Sales. MRLAC would acquire: (1) the UP lines in California from Stockton through Sacramento to Marysville, along with the branch lines to Read and Sutter, north through Keddie, CA, to Flanigan, NV, including the branch line from Reno Junction, CA, south to Reno, NV, and the branch line from Hawley, CA, to Loyalton, CA; (2) the SP line running north from Flanigan, NV, to Alturas, CA, and then northwest to Klamath Falls, OR (the Modoc Line); (3) the UP route from Flanigan, NV, to Winnemucca, NV, and the SP route from Winnemucca, NV, to Wells, NV, and Ogden, UT; (4) from Ogden, all of the DRGW lines, and their contiguous branches, to Salt Lake City, UT, and on to Provo, UT, and then east on DRGW to Denver, CO, including the branches to Potash, Sunnyside, Clear Creek, Copperton, and Garfield, UT; (5) all of the DRGW lines in Colorado, from the Utah border east to Dotsero, including the branches to Montrose, Oliver, and Woody Creek, and, from Dotsero, the line northeast to Denver (including the branches to Craig and Energy Fuels via Steamboat Springs) and the line southeast to Pueblo (the Tennessee Pass Line); (6) the DRGW line between Denver and Pueblo, extending south of Pueblo to Antonito, CO, including the branch line to Creede, CO, and DRGW's rights, if any, to Trinidad, CO; (7) east of Pueblo, the rights and ownership of the former MPRR line between Pueblo, CO, and Herington, KS; (8) SP's ownership in and access to the Kansas City Terminal; and (9) the UP line from Silver Bow, MT, to Pocatello, ID, and the contiguous branches to Arco, Aberdeen, and Gay, ID.

Relief Requested: Equipment; Trackage Rights; Interchange Rights; Proportional Rate Agreement. MRLAC also would acquire all the rolling stock and equipment owned and leased by UP/SP, including locomotives, cars, cabooses and equipment, roadway maintenance equipment, and other vehicles currently used on the subject lines. MRLAC also would acquire certain trackage rights: (1) overhead trackage rights on the UP line between Pocatello, ID, and Ogden, UT; (2) overhead trackage rights on the UP line between Lindsborg, KS, and Salina, KS, and between Salina and Solomon, KS, with access to a direct interchange with Kyle Railways at Solomon; (3) local trackage rights on the SSW line between Herington, KS, and Topeka, KS; (4) overhead trackage rights on the UP line between Topeka and Kansas City; and (5) SP's rights on the BNSF line between Topeka and Kansas City. MRLAC would be entitled to full access to interchange with connecting carriers (including shortlines) at all common points, and would be entitled also to quote rates to and from SP stations in California and Oregon for traffic moving, respectively, via Stockton, CA, and Klamath Falls, OR.

Texas Mexican Railway Company. Tex Mex, which operates over its 157-mile Laredo-Robstown-Corpus Christi line, indicates that Laredo, the principal gateway for rail traffic between Mexico and the United States, is served by two railroads on the American side of the International Bridge (UP via its Laredo-San Antonio line, and Tex Mex via its Laredo-Robstown-Corpus Christi

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[30] MRLAC would be controlled by MRL's majority shareholder. MRL indicates that it has proposed to pay $615,115,059 for the property to be acquired by MRLAC.

line).[39] Tex Mex adds that UP's Brownsville line runs along the Gulf of Mexico from Algon (just south of Houston) to Brownsville (another, but less important, gateway into Mexico); that UP connects with Tex Mex at Robstown (on the Brownsville line) and at Corpus Christi (on the Odem-Corpus Christi branch line); that SP connects with Tex Mex at Corpus Christi, via trackage rights over portions of UP's Brownsville line and the related Odem-Corpus Christi branch line; but that, although Tex Mex can interchange traffic with both UP and SP, very little traffic has been interchanged with UP either at Robstown or at Corpus Christi, and nearly all of the traffic that Tex Mex has interchanged at either point has been interchanged at Corpus Christi with SP. Tex Mex asserts that, for international rail traffic moving over the Laredo gateway, the SP-Tex Mex routing via Corpus Christi has provided the alternative to UP's San Antonio-Laredo routing.

The BNSF agreement, Tex Mex claims, does not preserve the existing competition for rail movements between the United States and Mexico. Tex Mex insists that, even if BNSF would be as effective a competitor for that traffic as SP is today, a 3-to-2 reduction in the number of Class I carriers providing rail service to Mexican gateways would amount to an unacceptable reduction in competition. Tex Mex asserts that, in any event, BNSF's probable share of the market for U.S.-Mexico traffic would be so small that BNSF would not devote the resources necessary to compete effectively, so that most shippers would end up having no choice but to ship via the UP/SP routing. The loss of competition for U.S.-Mexico traffic, Tex Mex warns, will undermine the anticipated benefits of the North American Free Trade Agreement (NAFTA), and also may undermine Mexico's efforts to make its rail system more efficient and competitive through privatization.[40] Tex Mex also argues that the merger, minus the conditions sought by Tex Mex, will thwart the efforts that Tex Mex's ultimate parent, Transportacion Maritima Mexicana (TMM), is making, in partnership with Kansas City Southern Industries, Inc. (KCSI), to create a rail network between central Mexico and the Central United States that will provide a strong alternative to a merged UP/SP for rail traffic between Mexico and the United States and between Mexico and Canada.[41]

Tex Mex also claims that it simply cannot survive the merger as currently structured. Tex Mex alleges that the merger, even as conditioned by the BNSF agreement, would result in a 34% decline in Tex Mex's revenues. Tex Mex insists that it currently is operating at close to maximum efficiency and that revenue losses of the projected magnitude could not be absorbed

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[39] On the Mexican side of the International Bridge, service is provided by the state-owned railroad, Ferrocarriles Nacionale de Mexico (FNM). Tex Mex insists, however, that FNM sets its rates for the Mexican portion of an international movement without regard to the rates for the American portion, and that, in consequence, the vigorous competition that now exists for the American portion of the movement directly benefits shippers.

[40] Efforts are underway to privatize FNM. See TM-23 at 148-150.

[41] Tex Mex is a wholly owned subsidiary of Mexrail, Inc., which is itself owned 51% by TMM (a Mexican company that intends to participate in the Mexican rail privatization process) and 49% by KCSI (the corporate parent of KCS). The strong competitive alternative that Tex Mex has in mind would involve a TMM-Tex Mex-KCS routing.

without significant service reductions; Tex Mex is adamant that it could not survive solely on the traffic of its local shippers; and Tex Mex adds that, if it were unable to continue operating, a number of its shippers would be significantly harmed because they are dependent on Tex Mex for their transportation needs and cannot practically use other modes of transport.

Relief Requested: In General. Tex Mex requests certain rights that it insists are necessary both to address the competitive problems not remedied by the BNSF agreement and to permit Tex Mex to survive and to provide shippers on its line access to the essential services that would otherwise be lost. In Finance Docket No. 32760 (Sub-No. 13), Tex Mex seeks trackage rights over UP/SP lines from Robstown and Corpus Christi to Houston, and on to a connection with KCS at Beaumont. The sought trackage rights would allow Tex Mex both to transport overhead traffic and to serve all local shippers currently capable of receiving service from both UP and SP, directly or through reciprocal switching.[42] The sought trackage rights also would include full rights to interchange traffic at Houston (with UP/SP, BNSF, MB&T, and PTRA) and at Beaumont (with UP/SP, BNSF, and KCS). In Finance Docket No. 32760 (Sub-No. 14), Tex Mex, invoking 49 U.S.C. 11103, seeks related terminal trackage rights on MB&T. Tex Mex claims that the rights it seeks would free it from dependence on a doubtful connection with BNSF, and would enable Tex Mex, in conjunction with KCS, to offer shippers served by KCS or KCS' eastern connections a third alternative for traffic from/to Mexico and southeast Texas.[43]

Relief Requested: Main Line Trackage Rights. Tex Mex requests trackage rights over: (1) the UP line between Robstown and Placedo; (2) the UP line between Corpus Christi and Odem, via Savage Lane to Viola Yard; (3) the SP line between Placedo and Victoria;[44] (4) the SP line between Victoria and Flatonia; (5) the SP line between Flatonia and West Junction; (6) either (a) the UP line from Gulf Coast Junction through Settegast Junction to Amelia (the "UP main line option"), or (b) the SP line from Tower 87 to Amelia (the "SP main line option");[45] and (7) the joint UP/SP line from Amelia to Beaumont, and the connection with KCS at the Neches River Draw Bridge in Beaumont.[46]

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[42] Tex Mex concedes that, in certain markets, the local trackage rights it seeks would introduce added competition. TM-34 at 7. Tex Mex insists, however, that it does not support or endorse any limitation of the trackage rights sought in its responsive application. TM-35 at 1-2.

[43] Tex Mex indicates that, if we approve its Sub-No. 13 responsive application and its Sub-No. 14 terminal trackage rights application, it will file a construction application seeking the right to construct improved connections at Robstown and Flatonia.

[44] Tex Mex seeks, in the alternative, to purchase the Placedo-Victoria line, if (a) we approve its responsive application, but (b) UP/SP chooses to divest the Placedo-Victoria line and retain the Bloomington-Victoria line.

[45] Tex Mex requests that UP/SP be required to elect which option it would prefer Tex Mex to operate.

[46] All points referenced in this paragraph are in Texas.

Relief Requested: Houston Trackage Rights On SP. Tex Mex requests trackage rights in Houston over: (1) the SP line from West Junction through Bellaire Junction to Eureka at SP MP 5.37 (Chaney Junction); (2) the SP line from SP MP 5.37 to SP MP 360.7 near Tower 26 via the Houston Passenger station; (3) the SP line from SP MP 5.37 to SP MP 360.7 near Tower 26 via the Hardy Street yard; (4) if the UP main line option is elected, the SP line from SP MP 360.7 near Tower 26 to the connection with MB&T at Quitman Street near SP MP 1.5; (5) if the SP main line option is elected, the SP line from Tower 26 through Tower 87 to the SP main line to Amelia; and (6) the SP line from West Junction to the connection with PTRA at Katy Neck (GH&N Junction), by way of Pierce Junction.

Relief Requested: Terminal Trackage Rights On MB&T. In Finance Docket No. 32760 (Sub-No. 14), Tex Mex requests terminal trackage rights over the following terminal tracks of MB&T in Houston: (1) if the UP main line option is elected, the MB&T line from the Quitman Street connection with SP to the Gulf Coast Junction connection with UP, a distance of 2.1 miles; and (2) the MB&T line from its connection with SP at T. & N.O. Junction (Tower 81) to its connection with UP at Settegast Junction, a distance of 13.4 miles. Tex Mex indicates that the sought rights: (a) will bridge a gap between the Corpus Christi/Robstown-Houston trackage rights and the Houston-Beaumont trackage rights; (b) will provide an alternative route through Houston in the event of congestion on the main east-west SP route through Houston (over which Tex Mex is seeking trackage rights); and (c) will permit Tex Mex to utilize MB&T as its switching carrier in Houston and to gain access to MB&T's New South yard.[47]

Relief Requested: Terminal Facilities In Houston. Tex Mex requests the right to use the following yards and other terminal facilities of SP, UP, and MB&T: (1) SP's Glidden Yard; (2) interchanges with PTRA at the North Yard, Manchester Yard, and Pasadena Yard; and (3) interchanges with MB&T at MB&T's New South Yard.

Relief Requested: Trackage Rights Compensation. Tex Mex requests that the sought trackage rights be granted at the compensation level provided for in the BNSF agreement, with one exception: that compensation level, Tex Mex insists, should be subject to quarterly adjustments for changes in railroad productivity. Tex Mex further notes that, although 49 U.S.C. 11103 provides that compensation is to be paid or secured before terminal trackage rights operations start, it is asking that we not require that the compensation terms be established before Tex Mex begins use of the MB&T track; such a requirement, Tex Mex claims, would simply delay the pro-competitive public benefits of the conditions Tex Mex seeks. Tex Mex agrees, however, that any compensation later established either by agreement of the parties or by order of the Board will accrue from the initiation of operations over the terminal trackage, and will be payable after final determination of the terms thereof. TM-24 at 5-6.

Capital Metropolitan Transportation Authority. CMTA holds a mass transit easement over a segment of the 162-mile Giddings-Llano line, which runs in a generally east-west direction from

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[47] Tex Mex, which claims that, under 49 U.S.C. 11341, approval of its responsive application should enable it to use the described MB&T tracks with or without the consent of MB&T, indicates that it filed its Sub-No. 14 terminal trackage rights application out of an abundance of caution. TM-24 at 2-3.

Llano (in the west) to Giddings (in the east)."[46] The line, which in 1996 was acquired by the City of Austin from SPT (SPT retained a 20-year trackage rights option over the Manor-Giddings portion), is currently divided into three segments: a western segment between Llano and Scobee; a middle segment between Scobee and Smoot; and an eastern segment between Smoot and Giddings (included within which is the Manor-Giddings portion). The former operator of the line, Austin Railroad Company d/b/a Austin Northwest Railroad (ADNW), discontinued service on the Llano-Scobee and Smoot-Giddings segments in February 1994 and May 1995, respectively; service has continued to be provided on the Scobee-Smoot segment; and, in April 1996, we granted a new operator, Central of Tennessee Railway & Navigation Company Incorporated, d/b/a The Longhorn Railway Company (Longhorn), an exemption from the prior approval requirements otherwise applicable to its operation of the line. CMTA, which plans to purchase the line by year's end, anticipates that service will soon be restored by Longhorn on the two segments over which service was discontinued by ADNW.

Because the line has two Class I connections (UP at McNeil and Elgin, and SP at Giddings), the proposed merger will effect a 2-to-1 reduction in the line's "potential" Class I connections. At the present time, the line's only Class I connection is with UP at McNeil; Elgin and Giddings are located on the Smoot-Giddings segment over which service has been discontinued."[47] CMTA contends that we should nevertheless regard this as a 2-to-1 situation, (a) because shippers on the line have traditionally had access to both UP and SP, (b) because SP has an option to exercise trackage rights on the Manor-Giddings portion, and (c) because Longhorn plans to reopen the Smoot-Giddings segment as soon as reasonably practicable. CMTA notes that the BNSF trackage rights provided for in the BNSF agreement (to Kerr, via Round Rock; and to Elgin) will not enable BNSF to access the Giddings-Llano line. Round Rock, CMTA notes, is located 4.4 miles north of McNeil; and Elgin is located on the Smoot-Giddings segment over which service has been discontinued (and, CMTA adds, the BNSF agreement does not grant interchange rights for BNSF at Elgin). And CMTA's interests are not limited to freight service but include passenger service as well; CMTA notes that its plans include passenger operations over much of the Scobee-Smoot segment, and that the most active segment of its planned passenger rail system will be east of McNeil.

Relief Requested. In Finance Docket No. 32760 (Sub-No. 10), CMTA seeks, on behalf of an unnamed rail carrier unaffiliated with applicants, trackage rights over UP's track between McNeil and Kerr, with interchange rights with BNSF either at McNeil or at Kerr, as appropriate. CMTA also requests that we direct applicants to cooperate in good faith with CMTA in all phases of the development of its passenger rail service, with particular emphasis on accommodating freight and passenger traffic at the McNeil interchange, and that we retain jurisdiction over these matters (CMTA envisions that we would exercise this retained

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[46] All points referenced in connection with the Giddings-Llano line are in Texas.

[47] SP, as previously noted, also has a trackage rights option on the Manor-Giddings portion, which would allow SP to move its connection as far west as Manor; but SP has not exercised this option.

jurisdiction in the event CMTA and UP/SP were unable to resolve these matters on their own).[50]

CMTA intends that the recipient of the trackage rights would be either BNSF, Longhorn, or Georgetown Railroad (GTRR). BNSF could extend its Taylor-Kerr trackage rights south from Round Rock to McNeil (a distance of 4.4 miles); Longhorn could obtain rights from McNeil north to Kerr (a distance of 6.4 miles), with an interchange with BNSF at Kerr (a Round Rock interchange would not be practical); and GTRR, which operates between Kerr and Granger, could obtain trackage rights between Kerr and McNeil, and could interchange with Giddings-Llano shippers at McNeil and with BNSF at Kerr. CMTA emphasizes that the competitive alternative it seeks should be provided at McNeil, not at Elgin or Giddings. The McNeil interchange, CMTA contends, would provide an adequate competitive alternative, and, more to the point, would restrict most freight traffic on the line to the portion of the line west of McNeil. CMTA indicates that, to minimize the interactions between freight trains and passenger trains, it is important to minimize the mileage that freight traffic must travel on the Giddings-Llano line. And, CMTA adds, because 80% of Giddings-Llano freight traffic originates west of McNeil whereas the most active segment of CMTA's planned passenger rail system will be east of McNeil, the best approach would be to route freight traffic north at McNeil.

Response by Georgetown Railroad Company and Texas Crushed Stone Company. GTRR originates crushed stone shipments, most of which are produced by its corporate affiliate, TCSC. GTRR and TCSC contend that CMTA's responsive application should be denied because, among other reasons, no matter where the interchange occurs, the additional traffic generated by the Giddings-Llano line would impose an intolerable burden on the already taxed track between McNeil and Round Rock and would occasion delays for the traffic entering or leaving Kerr.

Magma Copper Company's Rail Affiliates. The Magma Arizona Railroad Company (MAA) and the San Manuel Arizona Railroad Company (SMA) are rail subsidiaries of Magma Copper Company (MCC). MAA operates a line between Superior, AZ, and Magma, AZ; this line serves one of MCC's mines, apparently located in the vicinity of Superior; and traffic moving from this mine is routed MAA-SP (the MAA-SP junction is at Magma). SMA operates a line between San Manuel, AZ, and Hayden, AZ; this line serves MCC's only plant, which is located at San Manuel; and traffic moving from/to this plant is routed SMA-CBRY-SP (CBRY, the Copper Basin Railway Company, is a switching carrier for SP and operates a line between Hayden and Magma; the SMA-CBRY junction is at Hayden, and the CBRY-SP junction is at Magma). MCC indicates that its MAA-served mine and its SMA-served plant are currently captive to SP; no railroad other than SP (other than its switching carrier, CBRY) connects with MAA or SMA; and MCC is therefore dependent on SP for its transportation needs respecting bulk commodities. MCC contends that SP has taken advantage of MCC's captivity: (a) by holding on to all shipments which it was capable of handling, either all the way to destination (if the destinations were SP stations) or to the most distant junctions

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[50] CMTA insists that its negotiations with UP are currently at a standstill, perhaps because UP has an interest in offering its own commuter operations in the Austin metropolitan area. And, CMTA adds, if a contract to operate a passenger rail service is ever put out for bidding, the merger of UP and SP will mean that UP/SP will submit only one bid (and not the two competitive bids that might well have been submitted absent the merger).

with connecting carriers (if delivery of the shipments required interlining); and (b) by allowing service to deteriorate. MCC fears that the merger will exacerbate this situation. MCC indicates that shipments moving beyond Portland and Denver can be routed either SP-UP or SP-BNSF; but MCC fears that this choice will disappear with the merger, and that its shipments will then be captive to UP/SP from origin to destination. MCC also fears that UP/SP pricing practices will continue to be a problem because UP/SP will have even less incentive than SP to price its services aggressively.

Relief Requested. MCC seeks overhead trackage rights over SP lines: (1) for MAA, between Magma, on the one hand, and, on the other, Phoenix and Nogales, AZ; and (2) for SMA, between Hayden, on the one hand, and, on the other, Phoenix and Nogales. MCC indicates that the trackage rights would be for a distance of approximately 36 miles to Phoenix and approximately 142 miles to Nogales. The requested trackage rights, MCC notes, would give MAA and SMA direct access to BNSF at Phoenix and to Ferrocarriles Nacionales de Mexico - Region Pacifico (FCP) at Nogales; and MAA and SMA would continue to have access to SP (now UP/SP) at Magma.

Yolo Shortline Railroad Company. Yolo, a shortline located near Sacramento, CA, with two branch lines that it purchased from UP, interchanges all of its traffic with UP in UP's West Sacramento yard; although it shares trackage rights in the yard with SP, its agreement with UP prevents Yolo from interchanging directly with SP; thus, to use SP routes, Yolo must, at a minimum, use a UP switch to move cars within the yard from the Yolo track to the SP track, and must pay the corresponding switch fee; and this, Yolo alleges, has been uneconomic and inefficient. Yolo, noting that SP has superior routes to various points, supports the merger, but adds that the benefits of the merger would be enhanced by granting BNSF access to Yolo, which, Yolo indicates, would place Yolo in the same position as other West Sacramento customers that provide carloads to UP and that will gain access to BNSF under the BNSF agreement. Yolo further adds that, to increase efficiencies and cut costs, it has offered to provide service on branch lines in areas jointly served by UP and SP, but it claims that UP and SP could never agree on how to arrange for the transfer of the trackage and service. Yolo alleges that it could provide better service to West Sacramento switching area customers while interchanging with the Class I carriers at convenient points on their main lines; and, Yolo believes that this would alleviate congestion in the yard and switching area. Yolo therefore requests that we impose these conditions: (1) to provide Yolo and its customers competitive access to alternative carriers, a condition granting Yolo the right to interchange with UP/SP, BNSF, and any other carrier that has access to customers in the West Sacramento area; and (2) to create a safer, more efficient, and more economical means of serving customers in the West Sacramento area, a condition requiring UP/SP and BNSF (and any other carrier with access to that area as a result of the merger) to enter into good faith negotiations with Yolo with the object of allowing Yolo to operate the West Sacramento area.

Keokuk Junction Railway and Pioneer Railcorp. KJRY operates between Keokuk, IA, where KJRY connects with BNSF, and La Harpe, IL, where KJRY connects with the Toledo, Peoria & Western Railway (TP&W). TP&W's line, as relevant, extends from Lomax, IL, on the west (the connection with the former SF Chicago-Kansas City main line), southeast to La Harpe, and then east to Bushnell, IL (the connection with the former BN Chicago-Kansas City main line); and, at Bushnell, TP&W can interchange with SP, which conducts trackage rights operations over the former BN Chicago-Kansas City

main line.[81] Prior to the BN/SF merger, shippers in the Keokuk area had access to two Class I carriers: BN (via BN's line through Keokuk); and SF (via a KJRY-TP&W-SF routing; KJRY moved the traffic from Keokuk to La Harpe, and TP&W moved the traffic from La Harpe to Lomax on its own line and then from Lomax to Fort Madison, IA, via trackage rights on the SF line; the TP&W-SF connection was at Fort Madison). In the BN/SF merger proceeding, the ICC, in denying certain condition sought by KJRY, indicated that, because TP&W was gaining the right to interchange with SF at Bushnell, the BN/SF merger would not eliminate intramodal competition at Keokuk, and KJRY would not experience any appreciable traffic diversions; the existing competitive situation, the ICC found, would be preserved. Post-merger, the ICC indicated, Keokuk shippers would still have two alternative western routings: BNSF single-line and KJRY-TP&W-SF joint-line. SF, the ICC reasoned, would simply replace SF as part of the KJRY joint-line routing, and the KJRY-TP&W joint-line routing would remain an important competitive factor in Keokuk.

In its comments filed in the UP/SP proceeding, KJRY, now joined by its corporate parent, Pioneer Railcorp (PRC), which recently acquired control of KJRY, indicates that it would still be pessimistic but for three recent developments: (1) the acquisition of KJRY by PRC because PRC, the owner of nine shortlines, has bargaining power with the Class I railroads; (2) the acquisition of TP&W by Delaware Otsego Corp. (DO) because this acquisition will likewise give TP&W strengths it did not have as an independent railroad; and (3) the proposed UP/SP merger, which, by providing SP with resources it currently lacks, changes the prospects for competitive rail service in many markets, perhaps including Keokuk. KJRY insists, however, that UP must assume SP's obligations to serve the Bushnell interchange with TP&W, must continue to use the SP trackage rights through Bushnell to interchange with TP&W (and KJRY), and must aggressively price and market Keokuk traffic. KJRY and PRC therefore request that we condition the UP/SP merger: (1) upon UP/SP's acceptance of the terms of the settlement agreement entered into by SP in the BN/SF merger proceeding; (2) upon continued use by UP/SP of the SP trackage rights through Bushnell for the purpose of interchange with TP&W (and KJRY); and (3) upon UP/SP's willingness to price and market a competitive service to Keokuk area shippers.

Toledo, Peoria, & Western Railway Corporation. TP&W, a regional railroad of 284 route miles extending from Fort Madison, IA, in the west, to Logansport, IN, in the east, interchanges with BNSF, UP, SP, IC, Conrail, CSX, and Norfolk Southern Corporation (NS), and with regional carriers as well, and thereby provides traffic moving between the western and eastern regions of the country a way to bypass Chicago and St. Louis. TP&W indicates that the recent UP/CNW and BN/SF mergers, and the proposed UP/SP merger, have affected the future of its connections with applicants. Before the BN/SF merger, TP&W's only interchange with SP was with SP's Chicago-St. Louis line at Chenoa, IL. In the BN/SF proceeding, however, TP&W gained

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[81] Prior to the BN/SF merger, SP held only overhead trackage rights through Bushnell over the former BN Chicago-Kansas City main line; but, in agreements BNSF entered into with NITL and SP in connection with the BN/SF merger proceeding, SP gained the right to interchange traffic at Bushnell with TP&W.

connections with SP at Bushnell, IL, and Lomax, IL,[82] to offset the anticompetitive consequences that would have resulted from an unconditioned merger. TP&W claims, however, that the anticipated competitive benefits of the Bushnell interchange have not been realized. TP&W expected that the Bushnell interchange would enable it to continue, and even to increase, its participation in traffic originating at Keokuk and destined to Kansas City and beyond. TP&W reports, however, that Bushnell is not a priority stop for SP's fast, heavy tonnage trains; for operational reasons, these trains usually make only a single stop in the area, and this is normally at Galesburg, IL; and thus, TP&W states, for traffic moving from/to Keokuk, the KJRY-TP&W-SP routing is simply not competitive with the BNSF routing. The UP/SP merger, TP&W adds, comes at a time when TP&W is beginning to experience traffic losses to BNSF that cannot be offset by the competitive options created by the agreements endorsed in the BN/SF proceeding. TP&W indicates that it has arranged to confer with UP so that it might propose areas where TP&W's ability to offer cooperative routing would be enhanced by minor commitments from UP; and TP&W further indicates that it supports the UP/SP merger based on its expectation that applicants will negotiate in good faith to achieve the cooperative arrangements that will enable TP&W to maintain its role as an effective participant in joint routes with UP/SP and its competitors.

Southern California Regional Rail Authority. SCRRA, a joint powers authority comprised of five members (each member is an agency of a local county), administers the "Metrolink" rail passenger service in Southern California. SCRRA indicates that, in the early 1990s, its member agencies acquired property or rights to use property from UP, SP, and SF; that these carriers (now UP, SP, and BNSF) and SCRRA's member agencies now operate jointly over specific lines; and that agreements with each carrier govern the operations and priorities of freight and passenger service over each line. SCRRA indicates that the merger will affect freight traffic moving over lines now operated jointly by SCRRA's member agencies, on the one hand, and, on the other, UP or SP; and, for this reason, SCRRA is concerned that the merger may have an adverse impact on the commuter operations SCRRA administers. SCRRA also indicates, however, that, although applicants have been forthcoming in providing details on their post-merger operations, SCRRA does not now have sufficient information to conclude that its operations will not be adversely impacted by the merger. SCRRA therefore indicates that it reserves the right to reopen this proceeding to request conditions or other appropriate relief if and when it determines that the UP/SP merger is adversely impacting the provision of commuter service in Southern California.

SHIPPER ORGANIZATIONS. Concerns that a UP/SP merger would have anticompetitive impacts in the transportation marketplace have been expressed by several shipper organizations.

National Industrial Transportation League. NITL, an organization of shippers conducting industrial and/or commercial enterprises, fears that a UP/SP merger would have broad anticompetitive effects. UP and SP, NITL relates, compete across important corridors (particularly the corridor between southern Texas/Louisiana and key Midwest gateways, and the California-Kansas Central Corridor), and NITL warns that, post-merger, many points served by both carriers will be captive to the merged

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[82] The TP&W-SP interchange at Lomax applies only to high speed automotive and intermodal trains, BN/SF, slip op. at 121, and therefore does not allow a KJRY-TP&W-SP routing via Lomax.

carrier, and numerous competitive rail routings will disappear. And the "problem areas," NITL adds, involve many commodities that are clearly rail-dependent (such commodities as bituminous coal, plastic resins, lumber, and crushed stone).

BNSF Agreement. NITL contends that the BNSF agreement simply will not permit BNSF to be an effective competitor. NITL claims that BNSF, in conducting operations over UP/SP's lines, will incur costs significantly higher than those incurred by UP/SP in conducting its own operations over these lines. By NITL's calculations: on the Houston-Memphis route, BNSF's cost will be $13.69 per ton, whereas UP/SP's cost will be only $11.57 per ton; and, in the Central Corridor, BNSF's cost will be $23.62 per ton, whereas UP/SP's cost will be only $20.09 per ton.[53] NITL further claims that BNSF will be unable to achieve the traffic densities required for competitive operations. BNSF, NITL calculates, will have competitive access to a mere $258 million in traffic (NITL-10 at 35), not the "well over $1 billion" in traffic asserted by applicants (UP/SP-22 at 20), and certainly not the $1.8 billion in traffic asserted by BNSF itself (BN/SF-1, VS Lawrence, at 3-5). NITL also claims that BNSF's competitive efforts will be seriously impaired by various operational barriers, including UP/SP's directional routing on its Houston-Memphis lines. NITL asserts that BNSF's competitive efforts will be further impaired by a need for substantial investment in infrastructure that the traffic densities will be unable to justify. By NITL's calculations, BNSF would have to make a $97,500,000 infrastructure investment to operate over the Houston-Memphis route, and an additional $183,000,000 infrastructure investment to operate over the Central Corridor. The traffic levels available to BNSF, NITL insists, are simply not sufficient to justify infrastructure investments of these magnitudes. NITL further argues that a merger conditioned by that agreement alone would allow UP/SP and BNSF to dominate the market for rail transportation in the Western United States.

2-to-1 Shippers. NITL claims that the 2-to-1 shipper concept, as provided for in the BNSF agreement, is exceedingly narrow; even though the merger might cause a 2-to-1 reduction in the number of rail carriers at a particular point (e.g., San Antonio), the 2-to-1 shippers protected by the BNSF agreement include only those shippers presently receiving service from both UP and SP (and no other carrier). NITL further claims that, although the agreement was supposedly intended to preserve two-railroad competition for all 2-to-1 customers, there are 25 stations listed in the Standard Point Location Code (SPLC) data that were not specifically addressed in the agreement. NITL adds that the agreement identifies 23 rail stations which are 2-to-1 locations for which BNSF is not provided trackage rights.[54]

CMA Agreement. The CMA agreement, NITL argues, fails to cure the problems inherent in the BNSF agreement. (1) NITL

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[53] NITL adds that these cost handicaps will be exacerbated as time goes by because the adjustment procedures provided for in the BNSF agreement (which are based on 70% of the Rail Cost Adjustment Factor, unadjusted for productivity) fail to track the gains in productivity that will be experienced by UP/SP.

[54] NITL concedes that the agreement indicates that UP/SP and BNSF will provide for customers located at 2-to-1 points that are not specifically referred to, and that "alternative arrangements" will be provided at the 23 stations. NITL contends, however, that UP/SP and BNSF should be required to address these matters now.

concedes that the CMA agreement, by granting BNSF the right to operate with the primary traffic flows in the Houston-Memphis corridor, solves the key operational problem previously inherent in the BNSF agreement. NITL claims, however, that this solution exacerbates the problem created by BNSF's lack of access to sufficient traffic. Under the CMA agreement, NITL contends, BNSF's traffic will be divided between two lines, necessitating increased investments on both lines (e.g., fueling facilities on both lines) for the same amount of traffic. (2) NITL claims that the CMA agreement, by allowing BNSF access to St. Louis via trackage rights over the UP line, will require BNSF to incur additional infrastructure costs at St. Louis; all of BNSF's existing terminal facilities in St. Louis, NITL contends, are on the west side of the Mississippi River, whereas the trackage rights line lies on the east side of the river. (3) NITL insists that the provision in the CMA Agreement requiring UP/SP to modify contracts with 2-to-1 chemical shippers in Texas and Louisiana so that at least 50% of the volume is open to BNSF does nothing to cure the cost disadvantage under which BNSF will operate as a result of the trackage rights fee. (4) NITL claims that several provisions in the CMA agreement accomplish little or nothing of substance. The provision requiring applicants to accept oversight, NITL claims, is meaningless, because the Board has, as a matter of law, continuing jurisdiction over its decisions approving or conditioning a merger. And, NITL adds, with or without the provision requiring that the trackage rights fees be placed in segregated funds, such fees will still be excessive.

Relief Requested. NITL contends that the merger should be denied, and asks that any approval be conditioned by requiring: (A) the divestiture of SP's lines (1) between Houston and New Orleans (including the Iowa Jct.-Avondale segment, and also including access to related terminal facilities in the New Orleans area), (2) between Houston and St. Louis (this would include SP's Houston-Memphis and Brinkley-North Jct. lines, and its North Jct.-East St. Louis trackage rights), and (3) between Houston and Brownsville (this would include SP's Houston-Placedo line via Flatonia, its Placedo-Brownsville trackage rights, and its Flatonia-Eagle Pass line, with BNSF retaining its haulage rights to Eagle Pass); (B) the divestiture of SP's lines between Stockton/Oakland and Denver/Pueblo, including its Kansas City-Pueblo (via Herington) track or trackage rights; and (C) the retention by UP/SP of (1) overhead trackage rights over all divested lines, and (2) full service trackage rights at any point where UP or SP and the acquiring carrier both can serve existing shippers or could serve new shippers.

Society Of The Plastics Industry. SPI, the major trade association of the plastics industry, claims that plastics resins[66] are transported mainly by rail for several reasons: the integration of the hopper car with the shipper's production feeding lines; the volume of resin production (36 billion pounds in 1994); the average length of haul (approximately 1,000 miles); the cost advantage of rail vs. truck; and the need to maintain product integrity. The proposed merger, SPI maintains, is of great interest to the plastics industry because a large majority of plastics resins production occurs in the Texas/Louisiana Gulf Coast "petrochemical belt" between Galveston, TX, and Baton Rouge/New Orleans, LA, and because UP and SP, which operate parallel lines throughout the belt, are the main railroads

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[66] Plastics resins (STCC 28211), as SPI uses the term, means polyethylene (PE) and polypropylene (PP), the two resins that constitute the majority of the production of plastics resins, other than liquid.

connecting production facilities in the belt with markets in the Northeast, Midwest, and Southeast through the Chicago, St. Louis, Memphis, and New Orleans gateways.

SPI asserts that UP and SP dominate the plastics resins transportation market today. According to SPI, in excess of 92% of all domestic PE and PP production occurs in the Texas Gulf Coast region; UP and SP have access to nearly 90% of Gulf Coast plastics resins production capability; 64% of the plastics resins market for PE and PP is served exclusively by UP and/or SP, and no other carrier; the combined shares of UP and SP of the Gulf Coast PE/PP markets are 71% and 74%, respectively; and UP and SP dominate the principal transportation corridors for plastics traffic (Houston-Memphis/St. Louis and Houston-New Orleans). SPI claims that, even with the BNSF agreement, a combined UP/SP, by virtue of pre-merger exclusive service arrangements, would control almost 40% of plastics resins production capacity without facing potential BNSF competition. The BNSF agreement, SPI notes, gives BNSF access to specified plants only (increasing its market access from 23% to 47% of Gulf Coast producers), but does not reduce UP/SP's access. The merger, SPI warns, would result in a loss of existing competition at currently served 2-to-1 points; it would result in a loss of the potential competition posed by build-in/build-out opportunities; and it would result in the loss of geographic or source competition (to the extent that UP and SP now serve different customers). And BNSF, SPI argues, would not be an effective competitor in any event: BNSF would lack the necessary physical capacity (i.e., infrastructure); it would face material market barriers (including long-term contracts, renewal options, and tying arrangements) in competing for plastics traffic, and particularly in competing for traffic newly opened by virtue of the agreement; and it would not have a corporate commitment to compete. SPI adds that BNSF also would suffer additional handicaps: the traffic base available to BNSF under the agreement would be inadequate to enable BNSF to achieve a critical mass for efficient operations; BNSF would be handicapped in the Houston-Memphis/St. Louis corridor by virtue of UP/SP's intentions with respect to directional flow in that corridor; and the trackage rights fee provided for in the agreement will place BNSF at a cost disadvantage as compared to UP/SP. SPI adds that, to the extent BNSF elects to utilize UP/SP for switching or haulage, it will have relegated itself to second class status by yielding both operational and economic control over its customer service.

Relief Requested. SPI asks that the merger be denied, and that any approval be conditioned by requiring that UP/SP divest one of the two parallel networks serving Texas and Louisiana industries, which SPI takes to mean the UP/SP tracks running from the border points at Eagle Pass, Laredo, and Brownsville, through Houston and Ft. Worth, to New Orleans, Memphis, St. Louis, and Chicago. All extant trackage rights, SPI adds, should be preserved and either honored or transferred. The railroad acquiring this network, SPI suggests, should be either Conrail, KCS, IC, or BNSF.[84] SPI adds that a less desirable alternative would be to condition the merger on a strengthening of BNSF's rights under the BNSF agreement, including: (1) increasing BNSF's service opportunities by opening additional points, and (2) rendering voidable, at the shipper's option, any contractually based market foreclosure tactics (such as long-term

[84] SPI indicates that divestiture would resolve the deficiencies in the BNSF agreement because divestiture would entail storage tracks and other infrastructure and would make the purchaser an owner rather than a tenant.

contracts) employed by applicants. SPI suggests, however, that we should adopt this alternative only if we are presented with evidence that BNSF will in fact undertake the necessary capital investments and commit to full and vigorous competition.

CMA Agreement. SPI insists that plastics and chemicals are separate product groups, that the constituencies represented by SPI and CMA overlap only in part, and that, for the shippers represented by SPI, the CMA agreement does not change the basic anticompetitive implications of the merger. The CMA agreement, SPI argues, contains provisions that appear to be beneficial but that are largely illusory. (1) The CMA agreement provides that UP/SP shall modify contracts with shippers at Texas/Louisiana 2-to-1 points so that at least 50% of the volume is open to BNSF. SPI insists, however, that the extent to which this will provide BNSF with market opportunities is unknown. (2) The CMA agreement provides that BNSF shall have equal access to SP's Dayton Yard for storage in transit of traffic handled by BNSF. SPI notes, however, that whereas UP/SP will have access to six Gulf Coast storage locations, BNSF will have access only to one. (3) The CMA agreement allows BNSF to move its traffic in the Houston-Memphis-St. Louis corridor over either the UP line or the SP line. SPI insists, however, that the impact on BNSF of dual track operations and the effects on fueling, maintenance, crewing and other facilities, training, etc., have not been evaluated. (4) The CMA agreement provides that UP/SP shall place the fees received with respect to lines in Texas, Louisiana, Arkansas, and Missouri in a segregated fund, and also provides that BNSF's trackage rights fees shall be adjusted each year by the difference between that year and the preceding year in UP/SP's system average URCS maintenance/operating costs. SPI insists, however, that a segregated fund changes nothing, and that, besides, the fund would accrue to UP/SP to the extent used to offset depreciation costs. And the change in the escalation feature, SPI adds, does not change the fee itself. (5) The CMA agreement provides a limited cure respecting build-out options that might otherwise be lost with the merger. SPI insists, however, that this cure is quite limited because, among other things, it applies to CMA members only.

Western Coal Traffic League. WCTL, an association of shippers and receivers of coal mined west of the Mississippi River, contends that the UP/SP merger must be considered in the context of the recent BN/SF merger. The BN/SF merger reduced the number of western coal railroads from four to three; a UP/SP merger would reduce that number to two; and the cumulative effects, WCTL warns, would threaten the foundations of the competitive forces affecting western coal transportation. The pre-merger western coal transportation market, WCTL argues, is extremely concentrated: three railroads originate 96.4% of all coal moved in that market (BNSF, 57.7%; UP, 30.3%; SP, 8.4%), and the pre-merger Herfindahl-Hirschman Index (HHI) is 4322. The post-merger market, WCTL notes, would be even more concentrated (two railroads would control 96.4% of all western coal traffic), and the post-merger HHI would be 4831 (an increase of 509 index points). Such an enormous increase in concentration in an already highly concentrated market, WCTL contends, is a matter of great concern because increases in concentration in highly concentrated markets are likely to lead to anticompetitive price increases. WCTL fears that, after the merger, UP/SP and BNSF will reduce the level of competition between them in order to extract the maximum possible profit, and that each will be comfortable in the knowledge that the lack of competitive alternatives assures their mutual success. WCTL maintains that, because so much information regarding electric utilities is publicly available at the Federal Energy Regulatory Commission

(FERC), coal-hauling railroads like UP/SP and BNSF can engage in something akin to parallel pricing. They can do this, WCTL continues, by "market-probing" (raising rates on a case-by-case basis, to see what the market will bear).

Source Competition. SP, WCTL claims, controls most of the coal originating in Utah and Colorado; UP controls at least half (with BNSF controlling the other half) of the coal originating at jointly-served mines in the SPRB of Wyoming; but, because many utilities are capable of burning either Utah/Colorado coal or SPRB coal, UP and SP have been forced to compete, to the benefit of utilities able to burn both Utah/Colorado coal and SPRB coal. WCTL further asserts that SP has aggressively pursued its Utah/Colorado coal traffic opportunities, and has even established a "reload" or "backhaul" program in order to keep its rates for Utah/Colorado coal transportation competitive with SPRB rates. The benefits of this source competition, WCTL argues, will disappear post-merger because UP/SP would lack the incentive to replicate the UP vs. SP competition between Utah/Colorado coals and SPRB coals, and, to maximize its revenues, would favor SPRB coal origins over Utah/Colorado coal origins because transportation costs for SPRB coal origins are lower.

SP's Aggressive Pricing; Its Financial Soundness; UP's Service Problems. WCTL claims that SPRB vs. Utah/Colorado source competition has fostered aggressive pricing by SP for the transportation of Utah/Colorado coals, and has thereby served to regulate rail rates for western coal traffic. WCTL claims that SP is viable, competitive, and financially sound; that, in recent years, SP's competitive strength has been increasing; that, in future years, an independent SP would be a viable competitor for western coal traffic; and that an independent SP could survive. WCTL also fears that the merger, in addition to eliminating Utah/Colorado vs. SPRB source competition, will increase UP's Central Corridor service and operating problems. That corridor, WCTL contends, is already congested, and more traffic can only make matters worse.

BNSF Agreement. WCTL contends that the BNSF agreement is deficient in at least two respects: the trackage rights compensation for unit-train coal traffic is excessive; and shippers who currently are served by either UP or SP and are in a position to build out to the other, but whose potential build-outs are not "active" or "on-going," are not afforded protected 2-to-1 status. (1) WCTL contends that the trackage rights compensation level set in the BNSF agreement does not ensure that the anticompetitive effects of the merger will be alleviated. WCTL argues that, because the trackage rights fee is so high, and because UP/SP will have knowledge of BNSF's costs for the traffic, UP/SP will be able to raise its rates for the traffic to a level which reflects the resulting higher cost of the service for BNSF. Trackage rights fees intended to enable a tenant railroad to compete on equal terms, WCTL contends, should cover the landlord carrier's "below-the-wheel" costs (i.e., maintenance of way, dispatching, and return on road investment), and WCTL insists that the unit-train coal fee provided for in the agreement (3.0 mills per gross ton-mile, or 5.0 mills per revenue or net ton-mile) is far in excess of UP/SP's below-the-wheel costs. WCTL adds that, in addition to the excessive base fee for the trackage rights, the adjustment mechanism will increase UP/SP's profits over time. (2) WCTL claims that, in general, the BNSF agreement does not protect shippers who, absent the UP/SP merger, could build out to either UP or SP to obtain competitive rail options. WCTL maintains that 2-to-1 status has been conferred only on a very limited subset of shippers with build-out options.

Relief Requested. WCTL urges the denial of the merger, but asks, in the alternative, that any approval be subject to these conditions: (1) divestiture (to a railroad other than BNSF) of SP's lines from Provo, serving coal mines in Utah and Colorado, through Pueblo to Kansas City, and either its lines from Kansas City through St. Louis to Chicago, or its trackage rights over BNSF from Kansas City to Chicago; (2) in lieu of divestiture of these lines, a grant of unrestricted trackage rights in favor of a railroad such as WC or MRL; (3) a prohibition against the integration of UP and SP Central Corridor rail operations until UP can certify that it has been in full compliance, for a period of 12 consecutive months, with its service commitments under its coal transportation contracts; (4) the imposition of a trackage rights compensation fee for unit-train coal traffic under the BNSF agreement in the amount of 1.48 mills per gross ton-mile (or, in the alternative, 1.8 mills per ton-mile);[87] (5) the inclusion of shippers with build-out options as protected 2-to-1 shippers under the BNSF agreement; and (6) the extension of the CMA agreement's arbitration remedy to non-CMA members with build-out options, provided that a shipper need make only a reasonable prima facie showing of feasibility.

Western Shippers' Coalition. WSC, a coalition of shippers on UP and SP lines in Nevada, Utah, Colorado, and other Western States, fears that the proposed merger will allow UP/SP to dominate the Central Corridor (effectively controlling nearly 80% of the traffic in Nevada, Utah, and Colorado), and will eliminate the competition that has developed between SP- and UP-origin coals, competition that (in WSC's view) has placed a cap on the price UP can charge for coal from its PRB origins in Wyoming. WSC therefore opposes the merger unless MRL or another carrier not affiliated with applicants is awarded divestiture of (or, though less preferable, trackage rights over) (a) one of UP/SP's lines between Oakland/Stockton and Ogden/Salt Lake City, (b) all of DRGW's lines, and (c) one of UP/SP's lines between Denver/Pueblo and Kansas City. WSC claims that divestiture (or, to a lesser extent, trackage rights) would maintain the balance between SP- and UP-origin coals and would eliminate the detrimental impact of the merger in the Central Corridor. In the event we impose neither of these conditions, WSC asks that we alter the terms of the BNSF agreement (a) to allow BNSF additional access points (perhaps by expanding the concept of a 2-to-1 shipper), (b) to reduce the trackage rights fee to 2.0 mills or less per gross ton-mile, and (c) to adopt certain other conditions, including a requirement that BNSF pay an annual upfront fee for use of the Central Corridor, a mechanism for imposing penalties on UP/SP upon failure to maintain appropriate service standards, and a reduction in the trackage rights fees provided for in the URC agreement.

Western coal, WSC notes, involves two major types of low-sulfur coal: subbituminous (8,000 to 9,500 BTU/lb.) and bituminous (in excess of 10,000 BTU/lb.). WSC indicates that subbituminous coal is mined mostly in the PRB, which is served by both UP and BNSF, and that bituminous coal is mined mostly in four regions: the Southern Wyoming region, served by UP; the

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[87] WCTL indicates that its calculations rely upon a fair market valuation of SP road property investment derived from UP's acquisition cost. WCTL suggests that, because there is no comparable basis for estimating fair market value for the UP lines covered by the agreement, 1.8 mills per gross ton-mile should be applied to all the trackage rights lines, although WCTL would permit UP to challenge this calculation with evidence as to its actual costs and fair market value.

Utah/Colorado Uinta Basin, served largely by SP; the Raton Basin in Southeast Colorado and Northeast New Mexico, served by BNSF; and the Four Corners region in Southwest Colorado and Northern Arizona, served by BNSF. WSC maintains that the heating value, ash, and sulfur content of coal largely determines its value (coals with high heat content and low ash and sulfur contents command the highest value), and that, in general, Raton Basin coal is the most highly valued, followed in order by Uinta Basin coal, Southern Wyoming coal, and Four Corners coal. WSC insists, however, that all western coal constitutes one integrated product market because the different coals can be used interchangeably, to a greater or lesser extent, by many electric utilities. A UP/SP merger, in WSC's view, would allow UP/SP to dominate the western bituminous coal industry (the UP/SP market share for western bituminous coal would exceed 63%, but UP/SP's effective control would be even greater, due to limitations in URC's trackage and interconnection options and in the production capacity of BNSF-served mines). WSC claims that BNSF will not be an effective competitor in the Central Corridor because its access to shippers in that corridor will be severely limited, it will have no investment or presence in that corridor, its trackage rights fees will be too high, it would lack control over dispatching and switching, and, in any event, operational changes envisioned by applicants will alter the economics of east-bound coal shipments in such a way as to make it impossible for BNSF to offer the competitive rates offered by an independent SP.

Mountain-Plains Communities & Shippers Coalition. MPCSC, an association of shippers, counties, municipalities, and others located in the area of MPRR's Pueblo-Herington Line, opposes the proposed merger unless conditioned as requested by MRL. MPCSC, claiming that the proposed BNSF Oakland-Denver trackage rights do not resolve the threatened anticompetitive impacts, contends: that BNSF's interests would best be served by routing traffic onto its own Southern Corridor and Northern Corridor routes; that BNSF would be more likely to join with UP/SP in exploiting their duopoly, and less likely to compete with UP/SP for Central Corridor traffic; and that even if BNSF were motivated to compete, the cost and service impediments associated with trackage rights would prevent it from doing so. MPCSC argues that, to alleviate the threatened anticompetitive impacts, an independent carrier like MRL should be allowed to provide a competitive alternative in the Central Corridor. MPCSC adds that another public interest benefit favoring MRL is the superior local service that MRL would provide for shippers located on, or in the territory adjacent to, MPRR's Pueblo-Herington Line. MRL's independent status and route structure, MPCSC claims, would provide maximum opportunity for grain to flow freely either (1) west to Stockton, or to Pacific Northwest ports for export via Klamath Falls, or (2) south to Gulf ports for export via coordinated service with KCS, or (3) east to Kansas flour mills or to points beyond Kansas City via other friendly connections. MPCSC also opposes the abandonment of any segment of the old WPRR/DRGW/MPRR transcontinental route via Salt Lake City and Pueblo (this has reference to the Tennessee Pass Line west of Pueblo and the Towner-MA Junction and Hope-Bridgeport Lines east of Pueblo). This route, MPCSC argues, should be preserved, not broken up by abandonments; and the acquisition sought by MRL would preserve the route and moot the abandonments. MPCSC adds that such factors as operating losses or opportunity costs that might warrant abandonment of a branch line should not be dispositive of abandonment of segments of a transcontinental main line.

WSC/MPCSC Joint Shippers' Statement. A pleading referred to as the "joint shippers' statement" was submitted jointly by

Western Shippers' Coalition, Mountain-Plains Communities & Shippers Coalition, the South Dakota Wheat Growers Association, and nine individual shippers, all of whom shall be referred to collectively as the Joint Shippers Coalition (JSC). JSC contends that there is a broad public consensus that the proposed merger should be denied as anticompetitive in the Central Corridor unless it is conditioned as proposed by MRL. JSC adds that it also supports the conditions sought by KCS that would further the effectiveness of competition via the Central Corridor.

Coalition For Competitive Rail Transportation. CCRT, a shipper organization created to oppose the merger, claims that shippers throughout the country fear that a UP/SP merger will have anticompetitive effects. A UP/SP merger, CCRT indicates, would occur in an environment already characterized by shrinking shipping alternatives and a narrow concentration of economic power. Shippers large and small, CCRT contends, benefit from competition between UP and SP, and CCRT warns that, if the merger is approved, shippers will no longer experience UP vs. SP competition, which will inevitably lead to increased costs and decreased service quality. CCRT therefore urges that the merger be denied, and that any approval be conditioned by divestiture of lines in the Houston-St. Louis, Houston-New Orleans, Houston-Brownsville, and Stockton/Oakland-Denver/Pueblo corridors, and by providing for a third independent line in the Oklahoma region.

Adverse Impacts. The anticompetitive impact feared by CCRT is clear enough for 2-to-1 shippers, but, in CCRT's view, 3-to-2 shippers and even 1-to-1 shippers also will experience such impacts. With respect to 3-to-2 shippers, CCRT contends that, in many cases, UP, SP, and BNSF compete for shipper traffic, and that the elimination of SP (which, in CCRT's view, is usually the low cost competitor) will make prices increase and service quality decline. With respect to 1-to-1 shippers, CCRT contends that even though a shipper may be captive to either UP or SP, the shipper may be able to transload (or threaten to transload) or build out (or threaten to build out) to the other railroad, and a multi-facility shipper may be able to switch production (or threaten to switch production) from a UP-served facility to an SP-served facility. CCRT also fears that many localities will lose millions in tax revenues, both directly (abandoned lines) and indirectly (shippers whose operations decline because a loss of rail competition makes their products less competitive). CCRT warns that job losses among UP/SP employees will run in the thousands, and that, in future years, a merged UP/SP will abandon many redundant local lines. CCRT adds that, in certain areas where rail tracks cross highways at grade level, rail traffic increases will disrupt highway traffic.

BNSF Agreement; Duopoly. CCRT claims that a trackage rights tenant cannot be a true competitor of the trackage rights landlord. The landlord, by discriminating in favor of itself, will guarantee that its own cars receive priority in movement; the landlord can set the trackage rights fee so high that the tenant cannot compete effectively; the tenant is not always given full access to service shippers and industries; and, because trackage rights must actually be exercised in order to provide a second carrier, disinterest or inability on the part of the tenant means that the trackage rights will do little to preserve competition. CCRT fears that, as a practical matter, UP/SP and BNSF will be less likely to compete effectively against each other and more likely to work together to divide up all rail traffic in the Western United States (and thereby to reap the benefits of a duopoly).

Corn Refiners Association. CRA, the national trade association for the corn wet milling industry, indicates that this industry's inbound corn and outbound processed corn products travel mostly by rail to/from the 25 plants operated by CRA's members. CRA asserts that, with the proposed merger, competitive rail service will be lost by 2-to-1 shippers in various areas, including the San Francisco Bay area and the Los Angeles area. CRA argues that the trackage rights provided for in the BNSF agreement may not provide an adequate solution because BNSF may be unwilling and/or unable to provide competitive service at some locations. CRA accordingly requests: (1) that we compel UP/SP and the recipients of trackage rights over UP/SP to justify the economic viability of their trackage rights arrangements; (2) that we retain jurisdiction to ensure the competitiveness of trackage rights service through regular periodic oversight of the rates the trackage rights tenants must pay; and (3) in instances where the number of carriers available to a shipper would drop from two to one, either directly (if no trackage rights are provided for) or indirectly (if the rental rate charged the trackage rights tenant is too high), (a) that we grant reciprocal switching rights to the nearest available competitor, or (b) alternatively, wherever another competitor has requested trackage rights, that we grant such additional trackage rights, or (c) alternatively, that we impose special rate caps to offset the harm caused by such a significant reduction in competition.

National Corn Growers Association. NCGA, which fears that the increasing consolidation of America's railroads has resulted in higher shipping prices and decreased availability of adequate service to grain producing areas, asks that we closely examine the repercussions that the proposed merger and any future mergers will have on the economics of the agricultural sector and on that sector's ability to meet global market demands for high-quality American agricultural products.

Institute of Scrap Recycling Industries. ISRI, whose member companies process, broker, and consume recyclable materials, warns that SP's ability to compete effectively has declined drastically over the last few years. Its services, ISRI claims, have become unreliable; its ability to supply rail equipment has been questionable; and its responsiveness to needed capital improvements on its system has been ineffective. The decline, ISRI claims, has become more noticeable in the wake of the BN/SF merger, and ISRI has concluded that something must be done before SP suffers a total collapse. ISRI therefore supports the proposed UP/SP merger as conditioned by the BNSF agreement. ISRI adds, however, that its support for the merger is contingent upon a determination (which ISRI has asked us to make) that BNSF will be allowed to compete freely and effectively with UP/SP in all regions and markets opened to BNSF under the BNSF agreement.

Montana Wheat and Barley Committee. Montana wheat and barley producers, MWBC claims, are today captive to BNSF (BNSF and MRL, MWBC notes, move more than 98% of all Montana wheat shipments),[50] and the proposed merger, MWBC warns, will further exacerbate the captive shipper status of Montana farmers. MWBC's concern, however, is focused less on the merger itself (UP has only a limited presence in Montana, and SP has no presence at all) and more on the BNSF FRA that, MWBC fears, by altering

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[50] MRL is included in this calculation, MWBC indicates, in view of MRL's inability to reach any market for Montana grain without BNSF participation. UP, MWBC concedes, can provide some competition via the Pocatello-Silver Bow Line, but this competition, MWBC adds, benefits only a limited region.

existing competitive relationships between Montana and nearby jurisdictions, could further increase BNSP's monopoly power in Montana. Montana grain, MWBC indicates, is marketed entirely to the west or the south (and, because Montana grain is marketed principally to the Pacific Northwest markets, its pricing is determined on the Portland Grain Exchange), and MWBC warns that the BNSF FRA, because it does not apply to points east of Billings and Havre, will have an anticompetitive impact on Montana farmers located east of the Billings-Havre line. Farmers with access to BNSF stations located in or west of Billings and Havre (including such farmers in Western Montana, Northern Idaho, Washington, and Western Canada) will have access to UP/SP service under the BNSF FRA; but farmers located too far to the east of Billings and Havre will have no such access to UP/SP service, and they will therefore be, as MWBC sees matters, relatively worse off than they are today. The BNSF FRA, MWBC adds, has other defects as well. The establishment of Portland as the only gateway, MWBC insists, is artificial because it requires excessive circuity for Montana traffic; for traffic originating in Montana, the Silver Bow gateway provides, to destinations in California and Arizona, much shorter distances, which are more in line with the distances for traffic originating in Washington and Northern Idaho. MWBC asserts that Montana farmers should be allowed to utilize the Portland gateway for grain moving to Portland itself, and that access to local markets might offset the anticompetitive impact of the excessive circuity required by the Portland gateway. The BNSF FRA, MWBC further contends, should be extended to all agricultural commodities; an arbitrary commodity limitation, MWBC warns, would disrupt established traffic patterns."

Relief Requested. MWBC requests that the BNSF FRA be modified by adding Silver Bow as an alternative gateway (in addition to Portland) and by requiring UP/SP to guarantee its service intentions on the Pocatello-Silver Bow Line for 20 years. MWBC also requests that we retain oversight of the UP/SP merger for 20 years, in order to protect the last vestiges of intramodal competition in Montana. MWBC further requests, as an alternative to the two previous requests, that the Pocatello-Silver Bow Line be sold to MRL, subject to an MRL-BNSF FRA (similar to the UP/SP-BNSF FRA) for all traffic moving over Silver Bow from all Montana origins to Portland and to points south of Portland. MWBC further requests that the BNSF FRA be modified: to allow UP/SP access to all traffic (not limited by commodity description) originating in Montana; to allow UP/SP access to traffic originating at all points in Montana (not just points west of Billings and Havre); and to allow UP/SP access to traffic originating in Montana and destined to Portland.

Montana Farmers Union. MFU, which represents agricultural producers and other rural residents of Montana, argues that the merger will further exacerbate the captive shipper status of Montana farm producers. In Montana today, MFU contends, there is one major railroad (BNSF) that monopolizes the transportation of bulk commodities, and the BNSF FRA will further disadvantage Montana producers vis-à-vis producers in Oregon, Western Canada,

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" MWBC is under the impression that the BNSF FRA does not apply: (1) to traffic moving from points in Western Montana to Portland; and (2) to certain commodities. These impressions, however, may not even be correct. See, e.g., UP/SP-22 at 343 (indicating that the traffic covered by the FRA includes traffic moving between points in Western Montana, on the one hand, and, on the other, points in Oregon; and all commodities (carload, intermodal, and bulk) moving both southbound and northbound).

Washington, and Northern Idaho. MFU indicates that, by artificially establishing Portland as the only gateway, and by requiring Montana shipments to travel 40+% more mileage than is necessary, the BNSF PRA will effectively preclude Montana producers from participating in the markets they participate in today. MFU therefore urges that we consider the development of an alternative gateway at Silver Bow, both to shorten the distances to California and Arizona markets for Montana farm producers and to equalize farm producers in Montana vis-à-vis farm producers in Washington and Northern Idaho. MFU requests conditions similar to those requested by MWRC, with two notable exceptions: MFU requests that the Salt Lake City-Silver Bow Line (not merely the Pocatello-Silver Bow Line) be sold to MRL; and MFU further requests that the Stockton-Kansas City Line also be sold to MRL.

Save The Rock Island Committee. STRICT, which represents rail shippers, potential rail shippers, and local governments located in central Missouri in the Kansas City-St. Louis corridor, has an interest in the Kansas City-St. Louis line (hereinafter referred to as the Rock Island line) now owned by SSW but formerly owned by the now defunct Chicago, Rock Island and Pacific Railroad Company (Rock Island). The Rock Island line was the eastern segment of Rock Island's Tucumcari line, which extended from Santa Rosa, NM, through Kansas City to St. Louis; the ICC, in approving (in 1980) SSW's acquisition of the Tucumcari line, noted that this acquisition would enable affiliated carriers SSW and SPT to provide single-system service from Southern California to Kansas City and St. Louis; SP, however, never upgraded the Rock Island line to operating condition; and when the ICC, in approving (in 1982) the UP/SP/MP merger, awarded SSW trackage rights over MPRR's parallel Kansas City-St. Louis line, SP lost all interest in rehabilitating the Rock Island line. STRICT claims, however, that SP, though it has had no interest in operating the line itself, has been determined to prevent operation by anyone else, and has therefore engaged in a scheme to segment the line, providing service over short segments at both ends (or at least over a short segment at the eastern end) but discontinuing service over the middle segment.[40] The proposed merger will adversely affect competition in the Kansas City-St. Louis corridor, STRICT maintains, because UP and SP have parallel lines in that corridor. UP (i.e., MPRR) has a line between Kansas City and St. Louis, and SP conducts its overhead trackage rights operations over this line. But SP, STRICT notes, also has a line of its own between Kansas City and St. Louis (the Rock Island line), and, in STRICT's view, it is the common ownership of the MPRR line and the Rock Island line that would adversely affect competition. STRICT proposes to restore competition in the Kansas City-St. Louis corridor by transferring the Rock Island line to a new operator.[41]

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[40] Related matters, which have been held in abeyance pending negotiations between STRICT and SP, are pending in Finance Docket No. 30000 (Sub-No. 16) (STRICT's petition to revoke SSW's trackage rights over MPRR's Kansas City-St. Louis line), Docket No. AB-39 (Sub-No. 18X) (SSW's petition to exempt the abandonment of a portion of the Rock Island line), and Nos. 41195 and 41195 (Sub-No. 1) (STRICT's bifurcated complaint respecting SP's failure to operate the Rock Island line).

[41] Common ownership of the two parallel Kansas City-St. Louis lines, STRICT maintains, would be blatantly anticompetitive and would therefore require divestiture of one (continued...)

Relief Requested. STRICT asks that any approval of the merger be conditioned upon divestiture of the entire Rock Island line, including appurtenant real estate, between Leeds Junction (at or near MP 288.3) and Rock Island Junction (at or near MP 10.3), at a price to be mutually agreed, failing which it will be set by the Board; that divestiture must be to a single entity unaffiliated with applicants which certifies in writing that it intends to reactivate rail service with a single operator providing local service over the entire line within 3 years of taking possession, and that, prior to an abandonment or sale (except in connection with a financing transaction) of less than the entire line, it will attempt for a reasonable period of time to sell the entire line as a single unit and assign to the purchaser thereof any trackage rights acquired in connection with ownership of the line; and that divestiture must include an assignment of all of SSW's rights under agreements granting to SSW or any predecessor trackage and similar rights that have been, are, or could be used by a rail carrier in connection with the operation of any part of the line.

Colorado Wheat Administrative Committee. CWAC, a marketing order representing Colorado wheat producers, opposes the proposed merger unless conditioned upon a divestiture to a major carrier (such as MRL) qualified to provide for Central Corridor transcontinental traffic. CWAC warns that the proposed merger and the incidental abandonment of the Towner-KA Junction Line would reduce the options available to Colorado wheat producers for transporting their product to market. The impact, CWAC adds, would be substantial, both for Colorado wheat producers and for the State's diversified economy; CWAC calculates that 12.6 million bushels of wheat are potentially affected by the closure of the Towner-KA Junction Line. The Tennessee Pass Line and the Towner-KA Junction Line, CWAC insists, do not need to be abandoned; there is a much higher demand for local shipping services on these lines than current traffic indicates;[62]

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[61](...continued)
line or the other. And STRICT contends that, because this very issue has already been decided by the ICC, the doctrines of res judicata and collateral estoppel are applicable. STRICT cites the ICC's 1980 decision approving SSW's Tucumcari purchase, in the course of which the ICC, in denying MPRR's inconsistent application to purchase the Rock Island line, noted:

> MP's proposal is clearly anticompetitive. MP already has excellent lines between Kansas City and St. Louis. MP's lines, along with those of BN and Norfolk & Western Railway Company (N&W), are the best lines between those cities. The corridor also is served by four other carriers (excluding RI), but their routes are more circuitous and less competitive. The removal of a rehabilitated RI route would thus result in the elimination of a potentially competitive route.

St. Louis S. W. Ry.--Pur.--Rock Island (Tucumcari), 363 I.C.C. 323, 327 (1980).

[62] By CWAC's calculations: on the KA Junction-Towner Line, potential revenue per year over and above operating costs is $435,500; on the Haswell-Towner segment of the KA Junction-Towner Line (Haswell lies about half way between KA Junction and Towner), potential revenue per year over and above operating costs is $928,000; and, on the Tennessee Pass (Sage-Malta-Cañon City) Line, potential revenue per year over and above
(continued...)

traffic on the Towner-MA Junction Line, CWAC claims, is low because UP has chosen to keep it that way. CWAC adds that the interest shown by potential carriers seeking to operate in the Central Corridor is strong testimony to the economic viability and potential of the Towner-MA Junction Line."[63]

Hoisington Chamber of Commerce. HCC contends that the proposed merger will have a dramatic impact on the Hoisington community, particularly given the cumulative impact and crossover effects of the 1982 UP/MP/WP merger. In that merger, HCC notes, the ICC, seeking to preserve competition in the Central Corridor, awarded DRGW trackage rights over MPRR's Pueblo-Kansas City Line. It was anticipated at the time, HCC indicates, that DRGW would implement these trackage rights in the usual manner, using its own crews and its own equipment. Such implementation, by HCC's calculations, would have created 108 positions in Hoisington and 70 positions in Osawatomie (and HCC claims that the jobs that would have been created in Hoisington would have generated between $40,000,000 and $50,000,000 to the local economy). These jobs, however, were never created because DRGW and UP entered into an agreement that lasted until 1995 pursuant to which DRGW used UP crews and UP equipment between Pueblo and Kansas City. In June 1995, HCC continues, it was announced that DRGW would finally commence its own trackage rights operations on the Pueblo-Herington Line.

HCC warns that the adverse consequences of the merger and the related Colorado/Kansas abandonments will be staggering. The long-awaited utilization of DRGW crews and DRGW equipment in the DRGW trackage rights operations will never occur; all of the crew positions used to perform the DRGW trackage rights operations will be abolished; Hoisington will lose 70 jobs, with an annual payroll of approximately $3,000,000; the school district will sustain an annual loss of approximately $300,000; farmers will find their transportation options reduced; local communities on the Pueblo-Herington Line will experience losses in property tax revenues and sales tax revenues; and the Central Corridor will be obliterated by selective abandonments. HCC therefore opposes the merger, and supports KCS, NRL, WSC, and MPCSC in their efforts to retain a competitive third carrier in the Central Corridor and elsewhere. HCC further insists that, to preclude any sweetheart deals, any transactions necessary to implement divestiture and trackage rights requirements should be entered into openly and at arm's length. HCC also asks that all MPRR employee positions, that were used for 13 years to carry out the DRGW trackage rights across the MPRR line, be integrated into the UP system.

Enid Board of Trade. EBT is concerned with the lack of rail-to-rail competition that exists in Oklahoma today, and fears that the proposed merger can only make matters worse. The service provided by BNSF, EBT claims, has deteriorated since the BN/SF merger, and EBT fears that the service provided by UP/SP will deteriorate in the wake of the proposed merger. A big railroad, EBT maintains, gives priority to coal and intermodal,

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[62](...continued)
operating costs is $2,993,000. And these revenue estimates, CWAC notes, do not include possible income from bridge traffic, scenic rail, or commuter rail.

[63] The arguments advanced by CWAC are supported by the Colorado Farm Bureau, the Rocky Mountain Farmers Union, the Colorado Association of Wheat Growers, the Colorado Corn Administrative Committee, and the Kiowa County Farm Service Agency, and by several wheat producers, farmers, and ranchers.

but takes grain for granted. KBT opposes the merger, and urges that any approval thereof be conditioned by allowing KCS to operate: over BNSF's Fort Worth-Herington line; over BNSF's Enid-Perry line (Perry is on the Fort Worth-Herington line); and over the Genesee-Wichita line (in Kansas). Operation by KCS over these lines, KBT indicates, would provide additional competition in both Kansas and Oklahoma.

Kansas-Colorado-Oklahoma Shippers Association. KCOSA is concerned by, among other things, the grant of extensive trackage rights to BNSF; its members, KCOSA notes, opposed the BN/SF merger; and KCOSA fears that the BNSF trackage rights provided for in the BNSF agreement will narrow the competitiveness of KCOSA's members (by broadening the competitiveness of the shippers that can benefit from the BNSF trackage rights). KCOSA adds that its members located on UP or SSW are opposed to the UP car ordering system, and fear the loss of local service. Its members located on shortlines, KCOSA indicates, are concerned that the UP/SP merger, like the BN/SF merger before it, will lead to equipment shortages. KCS, KCOSA contends, should be allowed to operate in the North-South Corridor (as a replacement for SP). KCOSA also would support alternative purchase plans, including the purchase by KCS of BNSF's line between Wichita, KS, and Joplin, MO. KCOSA is particularly concerned by the 3-to-2 reduction in the number of railroads at Hutchinson and Wichita, and it adds that, at Enid, the problem is that two railroads can provide service but that only one railroad actually does. KCOSA urges that we either provide for added competition in Kansas, Colorado, and Oklahoma, or, in the alternative, deny the merger.[44]

Farmers Elevator Association of Minnesota. FEAM, which indicates that its misgivings respecting the proposed merger reflect the difficulties its members experienced in the wake of the UP/CNW merger, suggests that UP should be required (1) to demonstrate its ability to operate the system it already has before it is allowed to expand, and (2) to develop an operating plan to address service problems on the former CNW.

South San Antonio Chamber of Commerce. SSACC, to further San Antonio's development, seeks commitments addressing: the construction of an intermodal facility with emphasis on its connection to the redevelopment of Kelly Air Force Base; the development of an enhanced commuter/freight rail linkage in the San Antonio-Austin corridor; the removal of existing rail lines from the central business district; the relocation of the staging area to San Antonio to facilitate an efficient flow of traffic between Mexico and the United States; and a grant to BNSF of trackage rights from San Antonio to the CPS plant at Calaveras Lake, to allow for future competition in the transportation of coal.

SHIPPERS: COAL. Denial of the merger and/or the imposition of conditions have been sought by a number of coal shippers.

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[44] By joint motion dated May 10, 1996, KBT and KCOSA ask that we accept as new evidence Central Kansas Railway Tariff 8000-A and Santa Fe Rate Book 4100-B. The new evidence, KBT and KCOSA indicate, substantiates their argument that merged railroads like UP/SP and BNSF control the destiny of small shippers located on shortlines by publishing non-competitive through rates. Applicants, in their UP/SP-248 reply, contend that the tendered new evidence is, at best, cumulative, and, in any event, has no probative value. We will grant the motion filed by KBT and KCOSA, and accept the tendered new evidence.

Wisconsin Power & Light/Wisconsin Public Service Corp. WP&L and WPS contend that the merger should be disapproved, and that any approval should be subject to: (1) divestiture of SP's lines from Provo, serving coal mines in Colorado and Utah, to Kansas City, and either its lines from Kansas City through St. Louis to Chicago, or its trackage rights over BNSF from Kansas City to Chicago, to a carrier other than BNSF, or, alternatively, a requirement that applicants grant unrestricted trackage rights over such lines to such a carrier; and (2) a prohibition of UP/SP's consolidation of or changes in the present UP and SP rail operations over their central east-west lines until they have certified their full compliance, for a period of 12 consecutive months, with all service standards or similar provisions contained in contracts to which either is a party that apply to the transportation of coal for the account of an electric utility or seller of coal.

Wisconsin Power & Light Company. WP&L operates four coal-fired power plants: the Rock River Station near Beloit, WI; the Columbia Energy Center at Portage, WI; the Edgewater Station near Sheboygan, WI; and the Nelson Dewey Station at Cassville, WI. (1) Since 1993, Rock River Station has blended compliance sulphur subbituminous western coals (secured from a mine in Montana) with low fusion, higher BTU bituminous coals from midwestern and western sources (secured from various sources, including mines in Illinois, Indiana, and Utah). The coal is originated by BNSF, IC, UP, and SP, depending on the source; it is interchanged to CP[45] at various points; and it is delivered by CP (only CP serves Rock River Station).[46] (2) Units 1 and 2 of the Columbia Energy Center burn low sulphur, subbituminous PRB coal originated in Montana (by BNSF) and Wyoming (by BNSF or UP), and delivered by CP (only CP serves Columbia Energy Center). (3) Edgewater Station includes three coal-fired units, two running on blends of bituminous and subbituminous coals, and one running on low sulphur subbituminous coal only. Bituminous coal sources include mines in Illinois, Indiana, Utah, and the Hanna Basin in Wyoming; subbituminous coal sources are located in the SPRB of Wyoming. Edgewater Station coal is originated by UP (in the SPRB), CP (in Indiana), IC (in Illinois), and SP (in Utah), and is delivered by UP (only UP serves Edgewater Station). (4) Nelson Dewey Station, which burns a blend of bituminous and subbituminous coals, receives coal via barge, usually transloaded through East Dubuque, IA, or Kellogg, IL. Montana PRB coal is hauled by BNSF to Omaha, for movement by CC&P to the river. Wyoming PRB coal is hauled either via the BNSF-CC&P routing (over Omaha) or via a UP-CC&P routing (over Council Bluffs), which is used also for Hanna Basin blend coals. Midwestern bituminous coal also is hauled by UP to the river for transloading.

Impacts of UP/SP Merger. WP&L fears that the loss of an independent SP will reduce competition in the bituminous coal market, and may reduce the competitive pressure otherwise felt by all participants in the utility coal market. WP&L argues that, although Utah and Colorado are farther from Wisconsin than

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[45] Canadian Pacific Limited and its subsidiaries, including Soo Line Railroad Company (Soo), are referred to collectively as CP.

[46] The Rock River Station coal originated by SP is Utah coal that is hauled in cars that otherwise would move empty eastbound, after unloading iron ore at Geneva Steel's facility near Provo. WP&L indicates that this backhaul arrangement has allowed SP to establish eastbound rates which make Utah bituminous coals competitive with midwestern bituminous coals.

Illinois is, SP's backhaul rates have made these sources competitive with midwestern coal. WP&L indicates that, in contrast to SP, UP coal sources include not only the subbituminous reserves in the SPRB but also higher BTU coals in Wyoming's Hanna Basin. WP&L contends that these latter coals compete directly with Utah and midwestern bituminous coals in meeting WP&L's needs for Rock River Station and Edgewater Station, and WP&L fears that a combined UP/SP will favor the sources in which it has the largest investments. WP&L is skeptical that the BNSF trackage rights will alleviate coal source competition problems. These rights, WP&L notes, do not give BNSF direct access to any SP-served mines in Utah and Colorado; BNSF would be able to carry that coal only after an origin movement over either UP/SP or URC. Besides, WP&L adds, even if BNSF could reach the SP mines, it, much like UP, has large investments in facilities serving other coal sources; and WP&L also questions whether the trackage rights compensation levels provided for in the BNSF agreement will allow BNSF to offer competitive rates. WP&L also fears that the operating changes envisioned by applicants (in particular, the shift of some SP coal traffic to the UP main line) will worsen service problems that have already affected operations at Columbia Energy Center and Edgewater Station.

Wisconsin Public Service Corporation. WPS has two multi-unit electric generating stations: the Weston Generating Station near Wausau, WI, and the Pulliam Station in Green Bay, WI. (1) Weston Generating Station has three coal-fired generating units. The two older units have converted from midwestern bituminous coal to western low-sulphur subbituminous coal; Unit No. 3 has always burned 100% PRB coal. Coal delivered to Weston Generating Station can be originated either by UP or by BNSF, although the preponderance of this coal has been hauled either UP-WC or UP-CP. (2) By 1995, Pulliam Station had been converted entirely to western subbituminous coal, which is (WPS indicates) the current and forecasted fuel of choice. Depending upon price and quality factors, however, Pulliam Station remains capable of using coal from several different producing regions, including Appalachia, the Illinois Basin, and the Uinta and Raton Basins. In 1995, all Pulliam Station coal was obtained from sources in the Wyoming SPRB, and was hauled UP-WC.

Impacts of UP/SP Merger. WPS alleges that during the past 18-24 months the service provided by UP has not allowed WPS to move all of its scheduled tonnage with its existing railcar fleet, and that WPS has therefore been forced to lease additional trainsets to meet its coal inventory targets. Further, according to WPS, UP has not shown signs of significant improvement in 1996. WPS fears that, if the post-merger traffic routing shifts envisioned by applicants are implemented, WPS will suffer continued or additional slowdowns and service quality reductions along the UP east-west corridor.

Entergy/Arkansas P&L/Gulf States Utilities. Entergy Services, Inc. (ESI) and its affiliates Arkansas Power & Light Company (AP&L) and Gulf States Utilities Company (GSU)[67] fear that the merger will eliminate UP vs. SP competition for the movement of coal to AP&L's White Bluff Steam Electric Station near Redfield, AR (White Bluff) and to GSU's Roy S. Nelson

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[67] ESI is a fuel procurement company; AP&L and GSU are electric utilities; and ESI, AP&L, and GSU are referred to collectively as Entergy. AP&L's and GSU's names have recently been changed, but, to avoid confusion, we will use the old names.

Generating Station near Mossville, LA (Nelson), both of which use coal originated at SPRB mines served by both UP and BNSF.

White Bluff Station. White Bluff, located on UP's line between North Little Rock and Pine Bluff, is presently served exclusively by UP, which hauls coal to White Bluff via a single-line routing from the SPRB. Entergy insists, however, that White Bluff is a 2-to-1 point because a build-out to a nearby SP line, located about 21 miles away at Pine Bluff, would enable White Bluff to enjoy a BNSF-SP routing from the SPRB.

Nelson Station. Nelson, located on a KCS line about 6 miles northwest of Lake Charles, is presently served exclusively by KCS, which hauls SPRB coal to Nelson in a joint-line BNSF-KCS routing (via Kansas City). Entergy insists, however, that Nelson will soon not be captive to KCS because a build-out to a nearby SP line, located about 4 miles away, is now under construction; and completion of the "Nelson spur" build-out by the Southern Gulf Railway Company (SGR), a GSU subsidiary, is scheduled for October 1996. With the Nelson spur, Entergy notes, Nelson hoped to enjoy both the origin competition that already existed (between UP and BN in the SPRB) and the destination competition that had not previously existed (between SP and KCS at Mossville). Entergy concedes that, even with the merger, the Nelson spur will allow Nelson to enjoy destination competition (between UP/SP and KCS), but Nelson fears that most of the competitive benefits it would have obtained from the Nelson spur will vanish with the merger. Entergy notes that, rather than having four routings (four, because both UP and BNSF can reach both Fort Worth and Kansas City), it will have only two routings (BNSF-KCS via Kansas City and UP/SP single-line via Fort Worth). These will be the only practicable routings, Entergy maintains, because UP/SP will favor a UP/SP single-line routing in preference to an interline routing either with BNSF via Fort Worth (with UP/SP the destination carrier) or with KCS via Kansas City (with UP/SP the originating carrier).

Relief Requested: White Bluff. Entergy insists that the pre-merger status quo at White Bluff can be preserved only by granting trackage rights to BNSF (or another independent carrier) over SP's line between Pine Bluff (the point of connection with a White Bluff build-out) and West Memphis, AR (the point of connection with BNSF's own line), limited to the transportation of coal trains to/from White Bluff via the White Bluff-Pine Bluff build-out line.

Relief Requested: Nelson. Entergy insists that, because the pre-merger status quo at Nelson cannot survive a UP/SP merger, Entergy's interests can best be protected by granting trackage rights to BNSF (or another independent carrier) over SP's line between Beaumont and the point of connection with SGR near Lake Charles, limited to the movement of coal trains to/from Nelson via the SGR line. The pre-merger status quo cannot be preserved, Entergy claims, because the merger will effectively eliminate the BNSF-SP routing (via Fort Worth) and the UP-KCS routing (via Kansas City). The trackage rights sought by Entergy, would, in Entergy's view, level the playing field and preserve the efficient BNSF-SP (via Fort Worth) routing by creating a BNSF single-line routing to match the UP/SP single-line routing. And, Entergy notes, even with these trackage rights there would still be only two practicable routings, apparently because, in Entergy's view, the trackage rights it seeks would effectively eliminate the BNSF-KCS joint-line routing. Entergy adds that a less preferable alternative for the trackage rights it seeks would be a requirement that UP/SP establish a Fort Worth-Nelson proportional rate (at an initial

level set by a bid made by SP in August 1995) that could be used in conjunction with any future BNSF rate from the SPRB to Fort Worth. Entergy suggests that another alternative would be a requirement that UP/SP offer the same rate per ton-mile from Fort Worth to Nelson that it offers for its single-line route.

Relief Requested: BNSF Agreement. The BNSF agreement, Entergy suggests, is the best vehicle for the trackage rights Entergy seeks because the agreement provides BNSF with overhead trackage rights over the very lines that Entergy's trackage rights would run over. Entergy therefore suggests that we require that the BNSF agreement be amended to permit BNSF to serve White Bluff and Nelson via their respective build-outs (if and when completed) rather than requiring the negotiation of separate trackage rights agreements. Entergy adds, however, that we should require the compensation terms of the BNSF agreement to be amended, insofar as they would apply to Entergy's traffic, to approximate more closely UP/SP's relevant costs incurred with respect to BNSF operations over the relevant line segments. Entergy argues that, to put the tenant in the same position as the landlord, trackage rights compensation should reflect the landlord's variable costs, and, as respects Entergy's traffic, should be set at 1.48 mills per gross ton-mile. Entergy adds that, if we set compensation by reference to the fair market value of the SP roadway assets, the compensation respecting Entergy's traffic should be set at 1.8 mills per gross ton-mile.

The City Public Service Board of San Antonio. CPSB's two plants in Elmendorf, TX, are served by a single rail line, owned by SP. CPSB began receiving coal at Elmendorf in 1975, and, for some years thereafter, all Elmendorf coal was originated by BN and delivered by SP. In the mid-1980s, following the entry of CNW into the PRB, CPSB solicited competitive bids from two carrier pairs: CNW and UP, on the one hand; and BN and SP, on the other hand. CNW and UP won the competition, and CPSB then executed a long-term (through 2004) contract with CNW and UP covering transportation of most (though not all) of its coal receipts at Elmendorf. As noted, however, the line into Elmendorf is owned by SP, and CPSB therefore found it necessary to enter into an agreement with SP, pursuant to which SP granted CPSB trackage rights over SP's Elmendorf Line (approximately 12 miles in length) between Elmendorf and a nearby UP-SP junction known as "SP Junction (Tower 112);" and the agreement also provides that CPSB can permit UP and other third-party carriers to use the Elmendorf Line provided that CPSB makes specified payments to SP. CPSB notes that, as a result of these trackage rights, CPSB now has destination competition at Elmendorf: SP can deliver coal via the SP-owned Elmendorf Line; and UP can deliver coal via CPSB's trackage rights over the SP-owned Elmendorf Line.

CPSB adds that, in the SP settlement agreement entered into in connection with the BN/SF merger, SP agreed to provide haulage services to BNSF (1) between Caldwell, TX, and Eagle Pass, and (2) between Caldwell and Elmendorf. CPSB suggests that the Elmendorf haulage rights, which have never been used by BNSF, were designed to permit BNSF to transport coal to Elmendorf (moving via BNSF's own lines to Caldwell, and then via BNSF's haulage rights over SP's lines to Elmendorf). CPSB notes that, in the BNSF agreement entered into in connection with the UP/SP proceeding, section 4a provides BNSF with trackage rights over SP's line between San Antonio and Eagle Pass, and section 4b provides that upon the effectiveness of those trackage rights the Eagle Pass haulage rights granted to BNSF in the BN/SF proceeding shall no longer apply. CPSB alleges that it has been advised by applicants that section 4a is intended to allow BNSF to serve

CPSB's Elmendorf Station. The BNSF trackage rights envisioned by applicants, CPSB indicates, will originate at the BNSF-UP interchange at Temple, TX, and will terminate on SP's line at Elmendorf. CPSB further alleges that applicants have represented that BNSF will be entitled to serve the Elmendorf facilities directly, using its own trains, and subject to the compensation terms set forth in the agreement.

BNSF Agreement: Its Deficiencies. CPSB claims that, whatever applicants may intend, the trackage rights provided for in the BNSF agreement will not permit BNSF to access Elmendorf because two line segments are missing: (1) UP's line from Ajax to SP Junction (Tower 112);[68] and (2) SP's line from SP Junction (Tower 112) to Elmendorf. CPSB also claims that the BNSF agreement contains trackage rights fee payments that vastly exceed UP/SP's service costs. CPSB further claims that the BNSF agreement does not even preserve CPSB's existing trackage rights over the Elmendorf Line, which, in CPSB's view, is critical because CPSB predicts that the fees required by CPSB's existing trackage rights should be lower than the fees required by the BNSF agreement. CPSB notes, in addition, that its agreement with SP allows third-party carriers to serve other CPSB facilities that may be built along the Elmendorf Line, a right which BNSF does not receive under the BNSF agreement.

Relief Requested. CPSB requests that, if the merger is approved, we require that UP/SP provide, either by amendments to the BNSF agreement or otherwise: (i) that BNSF can serve CPSB's Elmendorf Station via trackage rights over UP/SP lines between Temple and Elmendorf; (ii) that BNSF can serve any new CPSB facilities located along SP lines over which BNSF obtains trackage rights in this proceeding;[69] (iii) that BNSF can serve CPSB's Elmendorf Station, at CPSB's option, via CPSB's existing trackage rights agreement with SP;[70] (iv) that CPSB shall be deemed a "2-to-1" shipper;[71] and (v) that the trackage rights

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[68] The trackage rights provided for in the BNSF agreement include trackage rights over UP's line between San Antonio and Ajax. It so happens, however, that UP has two lines between San Antonio and Ajax, and the trackage rights provided for in the agreement appear to run over the wrong (from CPSB's view) line.

[69] The context indicates that the only SP line referenced in condition (ii) is the Elmendorf Line.

[70] CPSB envisions that conditions (i) and (iii), taken together, will allow BNSF to operate between Elmendorf and SP Junction (Tower 112) using either its own trackage rights (provided for in this proceeding) or CPSB's trackage rights (provided for in CPSB's 1985 agreement with SP). Between Temple and SP Junction (Tower 112), however, BNSF would operate pursuant to the trackage rights provided for in this proceeding.

[71] CPSB claims that it has 2-to-1 status because it can now be served by both UP and SP. Applicants have suggested that CPSB also has access to BNSF, which can access Elmendorf via the haulage rights acquired in the BN/SF merger proceeding. The three-carrier approach might make CPSB a 3-to-1 shipper (because the haulage rights are being terminated), but CPSB, which notes that it is "presently served by both UP and SP and no other railroad" (BNSF agreement, section 8i) and that the haulage rights have never been exercised, insists that it should be accorded 2-to-1 status for purposes of, among other things, paragraph 3 of the CMA agreement (which provides that, effective

(continued...)

compensation BNSF must pay UP/SP shall be set at the levels requested by WCTL. CPSB further requests that we order that these conditions be implemented under the 10/30-days implementation procedure provided for in BN/SF, slip op. at 95 and 95 n.128.

Texas Utilities Electric Company. The generating units at TUE's Martin Lake Station near Henderson, TX, are currently fueled by lignite mined nearby and hauled to Martin Lake over a private rail line operated by an affiliate, Texas Utilities Mining Company (TUMC), and the merger will have no impact on the transportation of this lignite. TUE notes, however, that, in the year 2000, it will begin to supplement lignite receipts with Wyoming PRB coal receipts, with Wyoming PRB coal receipts to continue over the remaining 20-year life of Martin Lake. TUE envisions that this coal will be delivered to Martin Lake by BNSF (which can access Martin Lake today) and by UP (which will be able to access Martin Lake with the construction of a 6-mile connection between the UP line at Henderson and the TUMC line), and TUE claims to have identified two efficient routings: a 1,510-mile UP single-line routing (via Kansas City and Little Rock); and a 1,480-mile BNSF-KCS-SP-BNSF joint-line routing (with a BNSF-KCS junction at Kansas City, a KCS-SP junction at Shreveport, and an SP-BNSF junction at Tenaha). TUE fears, however, that the merger will eliminate the BNSF-KCS-SP-BNSF joint-line routing as a competitive alternative because UP/SP will exercise bottleneck power over the Shreveport-Tenaha segment. TUE concedes that there are two other possible routings (a 1,749-mile BNSF single-line routing via Denver, Fort Worth, Silsbee, and Tenaha, and a 1,721-mile BNSF-SP-BNSF joint-line routing via Memphis and Tenaha), but maintains that these routings are extremely circuitous and, therefore, substantially more expensive. And, TUE adds, the merger will in any event effectively eliminate the BNSF-SP-BNSF joint-line routing as a competitive alternative because UP/SP will exercise bottleneck power over the Memphis-Tenaha segment. TUE therefore concludes that, post-merger, its only real competitive options will be the 1,510-mile UP single-line routing and the substantially more expensive 1,749-mile BNSF single-line routing.

Relief Requested. TUE contends that the merger should be denied unless the following conditions are imposed: (1) the BNSF agreement, as amended in the manner requested by TUE, should be imposed as a condition; (2) the BNSF agreement should be amended to permit KCS to interchange TUE trains at Shreveport with BNSF, for movement by BNSF over SP's line between Shreveport and Tenaha; and (3) the trackage rights compensation provided for in the BNSF agreement should be reduced to the 1.48 mills per gross ton-mile level advocated by WCTL.

Sierra Pacific Power/Idaho Power Company. SPP and IDPC (referred to collectively as SPP/IDPC) jointly own the North Valmy Station (NVS), a generating plant located between the UP and SP lines between Winnemucca and Battle Mountain, NV. NVS, SPP/IDPC notes, has access to mines in the Colorado/Utah Uinta Basin (low-sulphur high-BTU coal is the primary fuel burned at NVS) and also to mines in the southern Wyoming Hanna Basin (Hanna Basin coal is also within the design parameters of the boilers at NVS). Coal from New Mexico and PRB mines, SPP/IDPC further notes, is incompatible with the NVS boilers, and, in any event,

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[71] (...continued)
upon consummation of the merger, UP/SP shall modify any contracts with shippers at 2-to-1 points in Texas and Louisiana so that at least 50% of the volume is open to BNSF).

the distance from those mines makes use of their coal impracticable. The merger, SPP/IDPC warns, will eliminate the intramodal competition on which it has long relied.

The BNSF Agreement. SPP/IDPC contends that the BNSF agreement will not preserve UP vs. SP competition at NVS. SPP/IDPC concedes that the agreement allows BNSF to serve NVS via trackage rights, but notes that the agreement does not grant BNSF access to the SP-served mines in the Uinta Basin. SPP/IDPC concedes that, under the agreement, it will have access to a URC-BNSF joint-line routing, but maintains that this routing, which will be limited to the few mines directly served by URC and which will entail a two-carrier haul, will not amount to a meaningful option. SPP/IDPC concedes that BNSF can itself originate coal, but maintains that BNSF's own coal origins are too far away to allow BNSF to provide competitive service to NVS, and notes that, in any event, the quality of most coal originated by BNSF is incompatible with the NVS boilers. SPP/IDPC also argues: that the Central Corridor traffic available to BNSF (less than one loaded train per day, by SPP/IDPC's calculations) is too limited to support a viable operation; that BNSF will be disadvantaged by UP/SP's ability to control operations over the trackage rights line, and will lack the infrastructure to operate successfully over the Central Corridor; and that the excessive trackage rights compensation provided for in the BNSF agreement will raise the floor for establishing rates.

The URC Agreement. SPP/IDPC also maintains that the rail competition available to NVS will not be preserved by the URC agreement, the benefits of which, SPP/IDPC contends, are limited in three respects. First, a URC-BNSF routing is only as good as its weakest link, and the weak link here, SPP/IDPC maintains, is BNSF (not enough traffic and not enough infrastructure). Second, whereas NVS currently can obtain coal from 25 mines in the Uinta and Hanna Basins,[72] a URC-BNSF routing would access only 5 mines not under the exclusive control of UP/SP;[73] and this, SPP/IDPC insists, would be devastating to its ability to transport competitive coal to NVS. Third, because the rates for a URC-BNSF routing would necessarily reflect the cost/profit expectations of URC and BNSF, the rates required by a URC-BNSF routing would likely be higher than the rates required by a UP/SP single-line routing, which would almost guarantee that the rates presently available to SPP/IDPC will be increased.

Relief Requested. SPP/IDPC requests that we require UP/SP to provide another rail carrier (to be selected by SPP/IDPC) with trackage rights enabling that carrier to transport coal to NVS in single-line service from all mines in Colorado and Utah now served by SP for compensation no greater than 1.48 mills per gross ton-mile, adjusted quarterly beginning in the first quarter of 1996 based on changes in the Rail Cost Adjustment Factor (RCAF), adjusted for productivity, from and after that time.

Arizona Electric Power Cooperative. The coal burned by AEPCO at its SP-served Apache Generating Station near Cochise,

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[72] A few of these mines are actually located in the Wyoming/Colorado Green River Basin. SPP-10, VS Crowley, at 45.

[73] SPP/IDPC insists that a URC-BNSF routing would have access only to five mines not under the exclusive control of UP/SP. See SPP-10 at 21; SPP-10, VS Hill, at 16; and SPP-10, VS Crowley, at 45. But see SPP-10, VS Hill, at 5 n.5 (URC presently has exclusive access to three mines, and, under the URC agreement, will receive access to four additional mines).

AZ, is currently purchased from the BNSF-served McKinley Mine near Gallup, NM, and is transported via a BNSF-SP routing that is captive to BNSF at origin and to SP at destination. AEPCO contends, however, that Apache Station could be modified to burn coal originated at other sources (including Colorado, Utah, and, especially, the PRB), and AEPCO insists that, in spite of SP's destination monopoly, competition between coal suppliers and/or rail carriers can have some impact on AEPCO's delivered cost. AEPCO fears, however, that a merged UP/SP, as a destination monopolist able to originate PRB coal, would be able to exclude BNSF from participating in PRB movements to AEPCO. Currently, either UP or BNSF could originate PRB coal for AEPCO (UP-SP via Denver; BNSF-SP via Deming, NM), but AEPCO fears that a merged UP/SP would decline to accept traffic in interchange with BNSF at Deming. Rate reasonableness litigation, AEPCO notes, is a key part of its efforts to obtain the benefits of competition, but the prospects for such litigation are clearer when SP cannot originate the traffic. With the merger, AEPCO notes, AEPCO's existing destination monopolist would gain the ability to originate PRB traffic, potentially affecting the outcome of rate reasonableness litigation (because UP/SP, AEPCO fears, would raise "short-haul" arguments to thwart any complaint seeking a rate for the movement of coal between Deming and Apache Station).

AEPCO also fears that, with the merger, it will lose the benefit of source competition between Uinta Basin coal (originated by SP) and PRB coal (originated by UP and BNSF). A combined UP/SP, AEPCO warns, would have direct control over Uinta Basin coal (because only UP/SP could originate that coal) and indirect control over PRB coal (because UP/SP could use its destination monopoly to exclude BNSF from originating PRB coal bound to AEPCO), and AEPCO fears that UP/SP would be able to appropriate the savings generated by producer competition in a way that SP alone cannot. AEPCO also fears that approval of the merger will lead to excessive congestion on the Moffat Tunnel Line through Colorado, which provides the routing for a large portion of coal from western Colorado mines. Traffic over the Moffat Tunnel Line, AEPCO warns, will double if the merger is approved (because UP/SP will abandon the Tennessee Pass Line and divert traffic to the Moffat Tunnel Line, and because BNSF will add its own trains to the Moffat Tunnel Line), but applicants have not committed to add capacity to the line, and the terrain in the area may render such improvements infeasible.

Relief Requested. AEPCO, which adopts WCTL's comments, requests that the merger not be approved. If the merger is approved, AEPCO recommends: (1) that we impose a condition granting AEPCO the right to obtain, and to contest the reasonableness of, a UP/SP rate for the movement of unit trains from Deming to Apache Station, for coal originated on another carrier; (2) that we require the divestiture of most of SP's Colorado lines (Grand Junction-Dotsero; Dotsero-Denver; Dotsero-Pueblo; Denver-Pueblo; and the branch lines to the Craig and Montrose coal areas); or, in the alternative, that we require a grant of trackage rights over those lines to an independent carrier; (3) that we disapprove the abandonment of the Tennessee Pass Line; and (4) that we clarify that the "short-haul" defense neither removes a carrier's obligation to quote rates over bottleneck segments nor prohibits rate reasonableness litigation pertaining to such rates.

Wisconsin Electric Power Company. WEPCO contends that bituminous coal from Uinta Basin mines served by SP is competitive with subbituminous coal from PRB mines jointly served by UP and BNSF; WEPCO alleges that it has benefitted from Uinta Basin vs. PRB competition by virtue of actual receipt of Uinta

Basin coal or its prominence in the bidding process; and WEPCO therefore fears that the merger will have an adverse impact at WEPCO's UP-served Oak Creek Power Plant at Oak Creek, WI. WEPCO concedes that it has most recently burned bituminous coal from the BNSF-served Raton Basin in New Mexico, but alleges that this coal is virtually the same quality as Uinta Basin coal, and that Uinta and Raton coals compete directly on a delivered price basis into midwestern and eastern markets. WEPCO warns that a combined UP/SP would control virtually all western low-sulfur bituminous coal and about 50% of all western subbituminous coal, and therefore would control about 75% of the coals that are the probable future sources for Oak Creek. UP/SP, WEPCO argues, would be the dominant rail carrier at origin and the sole rail carrier at destination, and would therefore be able to use its market power to determine the origin from which WEPCO would be able to receive coal.

Relief Requested. As a condition to merger approval, WEPCO seeks a grant of overhead trackage rights on behalf of WC or CP over UP's lines: (1) between Chicago, IL, Milwaukee, WI, and Cleveland, WI, on the one hand, and on the other, WEPCO's Oak Creek Power Plant at Oak Creek, WI;[74] (2) between the Oak Creek Power Plant and Cudahy Shop, Inc., a railcar repair facility located at Cudahy, WI; and (3) in the terminal areas of Chicago and Milwaukee, as may be necessary or desirable to implement the operations described in (1) and (2) above. WEPCO indicates that these trackage rights would offset the 2-to-1 reduction in rail carrier competition at the origin coal mines with a 1-to-2 increase in rail carrier competition at the destination power plant, by allowing WC or CP, in addition to UP, to provide rail service to the Oak Creek Power Plant and to the Cudahy car repair shop. WEPCO emphasizes that, because it is requesting a trackage rights carrier that does not serve origin coal mines, UP would continue to be the only carrier that could transport coal to Oak Creek in single-line service.

Public Service Company of Colorado. Three coal-fired power plants (Cherokee, Arapaho, and Valmont) operated by PSCo in the Denver area presently burn SP-originated Colorado coal hauled over SP's Moffat Tunnel Line. Cherokee is served exclusively by SP; Arapaho is served exclusively by BNSF, but is within the Denver switching limits; and Valmont is served by UP and BNSF. PSCo notes that, although the three plants now burn only Uinta Basin coal, they were designed to burn a variety of coals, and PSCo adds that it has already begun evaluating PRB coal, which can be originated either by UP or by BNSF. PSCo maintains that an independent SP has a strong incentive to promote the use of Uinta Basin coal, the only coal that SP can originate, and PSCo therefore fears that the merger could reduce competition between Uinta Basin coal originated by SP and PRB coal originated by UP and BNSF. A combined UP/SP, PSCo fears, would prefer to increase business for its more profitable PRB service, thus causing PSCo to lose the benefits of source competition between the two coal regions. PSCo also fears that the merger will result in a deterioration in the quality of the service it receives for the movement of western Colorado coal to Denver via SP's Moffat Tunnel Line. PSCo fears a merger-related doubling of daily train movements over this line, and insists that the Moffat Tunnel Line lacks the capacity to absorb this increased traffic volume.

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[74] WEPCO indicates that it has requested trackage rights from Chicago, Milwaukee, and Cleveland because it does not know the precise routing that WC or CP would utilize.

Relief Requested. PSCo argues that, if the merger is approved, it should be conditioned either upon divestiture to an independent carrier of the SP lines necessary to transport western Colorado coal to the Denver/Pueblo area (Grand Junction-Dotsero, Dotsero-Denver, Dotsero-Pueblo, Denver-Pueblo, and the Craig and Montrose/Oliver branch lines) or upon a grant to an independent carrier of trackage rights over these lines. Either such condition, PSCo claims, would maintain existing competitive options for the transportation of Colorado coal. PSCo suggests, alternatively, two conditions designed to ensure that coal shippers do not suffer a merger-related deterioration in the level of service provided by SP: (1) that UP/SP be prohibited from abandoning, or discontinuing service on, any portion of the Tennessee Pass Line (Dotsero-Pueblo); or (2) that, for 3 years after the merger is consummated, UP/SP be permitted to discontinue service on, but not to abandon, the Tennessee Pass Line. The second alternative, PSCo adds, would provide shippers an opportunity to determine whether UP/SP is able to provide, using the Moffat Tunnel Line only, the level of service that SP provided in 1995 with respect to Colorado coal tonnage.

Illinois Power Company. The high-BTU, low-sulphur coal burned at ILP's Wood River and Havana power plants is transported by SP from Uinta Basin mines to Illinois, and, at each plant, the final leg of the haul is made either by another railroad or by barge. ILP indicates that the coal it currently purchases is transported by SP as part of a backhaul arrangement whereby SP transports taconite from the midwest to Geneva Steel and then backhauls coal to ILP. Destination competition, ILP notes, is not now a problem because each plant can receive coal both by barge and by rail; and origin competition, ILP adds, is not now a problem either because coal with the characteristics ILP requires can be originated both in the Uinta Basin (served by SP and URC) and in the Hanna Basin (served by UP). ILP fears, however, that the merger threatens this origin competition, which, ILP insists, cannot be replaced by competition from other origins: PRB coal cannot be used by ILP because the lower BTU content would require expensive plant modifications; and eastern coal cannot be used either because, at current prices, it is not an option. And, though URC has access to some Uinta Basin mines, ILP notes: that coal from these mines may not be available, or, if available, may not be competitively priced; that, under the terms of the BNSF agreement, BNSF cannot offer competitive rates; and that BNSF, without access to appropriate backhaul shippers, may not be able to offer competitive backhaul rates.

Relief Requested. ILP requests that the merger be denied unless conditions are imposed to maintain effective competition for the movement of coal from western mines to ILP's plants. ILP suggests three conditions: (1) a grant to BNSF of trackage rights to appropriate western mines currently served directly by UP and/or SP, with compensation set at a level that would enable BNSF to offer competitive rates for coal moving to ILP and for any traffic moving to Geneva Steel or any other backhaul shipper; (2) a grant to another carrier of ownership of, or trackage rights over, Central Corridor lines from the appropriate mines to the current SP destinations, with access to a suitable backhaul shipper and with compensation set at a level that would enable the new carrier to offer competitive rates for coal moving to ILP; and (3) a grant to ILP of an option, exercisable at ILP's discretion, to have coal move at current backhaul rates (adjusted by a suitable index and with the same service provisions) for the years 2000-2020 (the current SP contract goes through 1999; the useful lives of the two relevant plants will end about 2020).

Central Power & Light Company. CP&L's SP-served Coleto Creek Station near Fannin, TX, has historically burned Colorado coal originated by SP but can now burn PRB coal originated by UP or by BNSF. CP&L notes that it supports WCTL's comments, but adds that its principal interest vis-à-vis the UP/SP merger arises from its concern that the merger might impact, in a negative way, its pending rate litigation, wherein it is seeking the prescription of a maximum reasonable rate for the 16-mile SP movement between Victoria (an SPT/MPRR junction) and Coleto Creek. See Central Power & Light Company v. Southern Pacific Transportation Company, No. 41242 (ICC served Apr. 21, 1994) (notice of complaint). CP&L anticipates that, if the outcome of the litigation is favorable, it will have two options for PRB coal movements: a UP-SP routing, with the SP move between Victoria and Coleto Creek subject to the prescribed rate; and a BNSF-SP routing. CP&L indicates that its concerns relative to the No. 41242 litigation have been addressed by applicants, who have agreed that the merger will neither moot the litigation, nor allow applicants to assert therein defenses that would not exist in the absence of the merger, nor otherwise influence the outcome of the litigation; and CP&L adds that it has been assured by applicants that, if the litigation results in a Victoria-Coleto Creek rate, CP&L will be regarded, under the BNSF agreement, as a 2-to-1 shipper.

Intermountain Power Agency. IPA's plant at Lynndyl, UT, burns Utah coal transported by three carriers: DRGW, which transports coal from DRGW sources to Provo; URC, which transports coal from URC sources to Provo; and UP, which transports coal from Provo to Lynndyl. The merger, IPA warns, will impact its present arrangements: pre-merger, neither DRGW nor URC can provide single-line service; post-merger, however, DRGW (i.e., UP/SP) will be able to provide single-line service; and this, IPA fears, will tilt the balance in favor of UP/SP, and will give UP/SP an incentive to price movements from DRGW coal sources more favorably than movements from URC coal sources. IPA indicates, however, that, because the URC agreement resolves some of IPA's competitive concerns (by providing URC access to additional sources of coal), IPA will not object to the merger, provided that the URC agreement is not challenged and that the rights granted to URC thereunder are not adversely affected by a grant of any of the responsive applications. IPA adds, however, that it reserves the right to reopen this proceeding and to request conditions if and when it determines that the merger is adversely impacting competition and that the URC agreement has failed to ameliorate IPA's competitive concerns.

Lower Colorado River Authority/City of Austin. LCRA and the City of Austin (referred to collectively as LCRA/Austin) are joint owners of the Fayette Power Project (FPP), a coal-fired station at Halsted, TX, that burns PRB coal transported by UP in a single-line haul. When it entered into its present contract with UP, LCRA/Austin also entered into a separate trackage rights agreement (TRA) with UP's MKT predecessor that provides future access over 18 miles of track between Halsted (the location of the FPP) and West Point (the location of a nearby SP-UP junction). One of the purposes of the TRA, LCRA/Austin indicates, was to allow LCRA/Austin to receive coal from the PRB via a BN-SP routing. LCRA/Austin notes that it supports WCTL's comments, but adds that its principal interest vis-à-vis the UP/SP merger arises from its concern that the merger might effectively nullify the trackage rights provided for in the TRA. LCRA/Austin adds, however, that the BNSF agreement should effectively preserve these trackage rights (section 4b allows BNSF to serve FPP), assuming that BNSF is able to operate efficiently and economically over the trackage rights lines

Rio Bravo Poso/Rio Bravo Jasmin. The coal burned at Rio Bravo's two cogeneration plants near Bakersfield, CA, is originated in Utah and transported by rail to an unloading facility in Wasco, CA. The coal can be originated by SP and URC; from Provo, the coal can be routed either UP-BNSF (via Barstow, CA) or SP-BNSF (via Stockton, CA); and, although BNSF is a necessary part of each routing (apparently because only BNSF has access to the Wasco unloading facility), Rio Bravo insists that the existence of UP vs. SP competitive alternatives keeps rail rates down. Rio Bravo, warning that UP vs. SP competition will cease with the merger, and fearing that the current level of competition will not be preserved by the BNSF and URC agreements, opposes the merger unless the current level of rail competition at its two plants can be maintained.

IES Utilities. IES, an Iowa utility company with interests in five coal-fired generating stations, opposes the merger. IES indicates that roughly 90% of the fossil fuel it burns originates in the PRB, and that its two primary carriers are therefore UP and BNSF. IES further indicates, however, that it is potentially interested in coal originated by SP in Utah and Colorado, and IES fears that a combined UP/SP will favor coal originated by UP in the PRB and the Hanna River Basin. IES adds that its three UP-served coal-fired stations suffered significant increases in cycle times during 1995, and IES fears that, if Utah/Colorado coal is shifted to UP's main west-east corridor, service to these plants will continue to deteriorate.

SHIPPERS: PLASTICS AND CHEMICALS. Denial of the merger and/or the imposition of conditions have been sought by a number of plastic and chemical shippers.

Dow Chemical Company. Dow, which manufactures chemicals, plastics, and hydrocarbons, fears that the merger will adversely impact competition along the Texas Gulf Coast and, in particular, will eliminate a build-in opportunity currently available to Dow at its chemical/plastics production facility at Freeport, TX. The Freeport facility is rail-served solely by UP, which accesses the facility via a 10-mile branch line that connects with the UP main line at Angleton, TX. Dow notes, however, that both BNSF and SP operate lines between Houston and Galveston; that these lines pass through Texas City; that, at their closest points, these lines are only 35-40 miles from Freeport; and that the merger will therefore eliminate horizontal competition (a prospective build-in from SP) for Dow traffic at Freeport.[75]

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[75] Information respecting a potential connection between Dow at Freeport and either BNSF or SP at Texas City was submitted, for the most part, under seal. By and large, this information relates to confidential business matters and therefore was properly redacted from the public record. We find, however, that at least some of this information should have been submitted on the public record, and, in discussing this information, we have had to put on the public record certain details that were submitted under seal. We see no justification for redacting from the public record the facts that BNSF and SP operate lines between Houston and Galveston via Texas City, and that these lines, at their closest points, are only 35-40 miles from Freeport. DOW-12 (Tab A) at 5. Although Dow may have been trying to keep confidential the fact that it has contemplated a Freeport-Texas City connection, we cannot both discuss, in a comprehensible manner, the conditions requested by Dow and keep this particular fact out of our discussion.

Freeport, Dow concedes, has the appearance of a 3-to-2 situation because a UP/SP merger, though it would eliminate the SP build-in option, would appear to leave the BNSF build-in option intact. Dow argues, however, that, as a practical matter, Freeport is more akin to a 2-to-1 situation. Economic research, Dow claims, teaches that a 3-to-2 reduction in the number of competitors often represents the threshold at which the surviving firms can exercise market power; and Dow adds that, in any event, of the three carriers that can now compete for chemicals/plastics traffic on the Texas Gulf Coast, the two most aggressive competitors have been UP and SP, and, as between SP and BNSF, the carrier that could conceivably terminate more Dow traffic and obtain more Dow long-hauls is SP. Intermodal competition, Dow contends, cannot replace the competitive constraint now provided by SP (trucks, Dow insists, cannot compete for the majority of Dow traffic; barge and ocean transport can impact only a small fraction of Dow's rail traffic lanes; and a roll-on, roll-off barge service is simply not a competitive option at Freeport). Source competition, Dow adds, is likewise not an effective substitute for intramodal competition. A fundamental lack of fungibility, Dow contends, renders a seven digit Standard Transportation Commodity Code (STCC) analysis meaningless; a further limitation upon source competition is production capacity constraints because chemicals/plastics producers generally operate close to capacity; and product swapping among competitors raises significant concerns (including the need for long term commitments, the need to agree on contractual liability issues, and the need to resolve potential antitrust implications) that make it a less than ideal competitive alternative.

Relief Requested. To ameliorate the anticompetitive effects of the merger upon Dow's Freeport facility (effects, Dow claims, that are not ameliorated at all by the arrangements provided for in the CMA agreement), Dow asks that we impose either the conditions contained in its Primary Request or, in the alternative and at the very least, the conditions contained in its Alternative Request."[76]

Relief Requested: Primary Request. Dow seeks trackage rights: (1) for BNSF, over UP's line between Algoa and Angleton, with the right to connect to new line construction to serve Dow at Freeport and any other shippers located along the new line; and (2) for a second carrier (to be determined by Dow) (a) over SP's line between Houston and New Orleans, (b) over SP's line between Houston and Memphis, (c) over UP's line between Houston and Algoa (including the portion of the BNSF line over which UP now operates pursuant to trackage rights), and (d) over UP's line between Algoa and Angleton, with the right to connect to new line construction to serve Dow at Freeport and any other shippers located along the new line. The new line referenced in this paragraph would run between Freeport and a point, not yet determined, on UP's Angleton-Algoa line. Dow contends that the conditions contained in its Primary Request would simply restore the pre-merger status quo. Dow now has potential build-in options to BNSF and SP; with these conditions, Dow would still have potential build-in options to BNSF and a second carrier (e.g., IC or KCS); and, because the benefits of a Texas City build-in to SP exceed the benefits of a Texas City build-in to

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[76] Certain aspects of these conditions, which we have put on the public record, were submitted under seal. See DOW-12 (Tab A) at 3-4 and at 36-37. Dow also has requested, with respect to potential industry-wide and region-wide anticompetitive effects, the divestiture of parallel lines in Texas and Louisiana and parallel lines to the Midwest.

any other carrier, the status quo can best be preserved by minimizing the costs of the build-in, which can be done by moving the build-in connection southwest towards Angleton.

Relief Requested: Alternative Request. Dow seeks trackage rights for a carrier other than BNSF, to be named by Dow, (a) over SP's line between Houston and New Orleans, (b) over SP's line between Houston and Memphis, and (c) over UP's line between Houston and Texas City, with the right to connect to new line construction in the vicinity of Texas City in order to serve Dow at Freeport and any other shippers located along the new line. The new line referenced in this paragraph would run between Freeport and a point in the vicinity of Texas City. Dow contends that, at the very least, it is entitled to the conditions contained in its Alternative Request, which will allow a second carrier to connect to a build-in in exactly the same area as the formerly possible SP build-in. The only variation is that trackage rights are requested over UP's Houston-Texas City line in view of the proposed abandonment of a portion of SP's Houston-Texas City line.

Montell USA Inc./Olin Corporation. At separate plants in the West Lake Charles, LA, area, Montell produces primarily polypropylene and polyethylene, and Olin produces a variety of chemical products. Both companies rely almost exclusively on rail to ship their products to market, both rely on rail for the storage of their products, and both rely on rail for the receipt of raw materials. Both ship most of their outbound freight to points in the Eastern United States via four "Eastern Gateways" (Chicago, St. Louis, Memphis, and New Orleans). In addition, Montell ships some of its outbound freight to Houston, and Olin expects that it will have shipments to Mexico as business develops in response to NAFTA.

Montell's plant is currently served by an SP single-line routing (to the Eastern Gateways and Houston) and a KCS-UP joint-line routing (KCS offers single-line service to New Orleans by an indirect route, but can provide competitive routings to the Eastern Gateways and Houston with a KCS-UP joint-line routing via DeQuincy to Houston and New Orleans, and via Texarkana to Chicago, St. Louis, and Memphis). Olin's plant is currently served by UP (via KCS tracks, under a long-standing contractual agreement) and SP; both UP and SP offer single-line competitive service to New Orleans and St. Louis; and KCS (which offers single-line service to New Orleans by an indirect route, and which, due to contractual limitations, cannot interchange Olin's freight with UP) is simply not a significant competitive factor. Both Montell and Olin fear that the UP vs. SP competition that exists today for traffic moving to, from, or via the four Eastern Gateways and Houston (including traffic moving to Mexico) will cease to exist post-merger, leaving them captive to UP/SP. They note that the BNSF agreement does not provide for BNSF interchange line haul rights at West Lake Charles, and they add that the KCS-BNSF joint-line routings that exist today are too circuitous to provide effective competition to the single-line routings of a merged UP/SP.

Montell and Olin therefore request that we condition the merger by requiring UP/SP (1) to grant interchange rights at West Lake Charles to BNSF (or to whichever carrier obtains trackage rights over SP's Houston-New Orleans line),[7] and

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[7] Montell indicates that the interchange line haul traffic rights it seeks at West Lake Charles would allow a "KCS/BNSF interline interexchange at Lake Charles." MONT-9 at 2.

(2) to grant interchange rights with KCS at Shreveport to BNSF (or to whichever carrier obtains trackage rights over SP's Houston-Memphis line). The first condition would allow BNSF (or the alternate carrier) to compete with UP/SP for Montell's and Olin's traffic moving in the Houston-New Orleans corridor. The second condition, which has reference to traffic moving to, from, or via Chicago, St. Louis, and Memphis, would allow BNSF (or the alternate carrier) and KCS to create joint-line routings via Shreveport that would replace the present KCS-UP joint-line routings via Texarkana.

Montell notes that the CMA agreement purports to address competitive problems in the Lake Charles area, but insists that the CMA solution is deficient: (a) BNSF is granted access to shippers at Lake Charles and West Lake, but not to Montell at West Lake Charles; (b) BNSF is granted access only to facilities now open to three carriers (UP, SP, and KCS), whereas Montell's facility is now open only to two carriers (SP and KCS); (c) BNSF is allowed to handle traffic moving between the covered points, on the one hand, and, on the other, New Orleans or the Mexican border, but is not allowed to handle traffic that now moves KCS-UP from/to Houston, Chicago, St. Louis, or Memphis; and (d) for some traffic (traffic at West Lake), BNSF is subject to an "access fee" that appears to amount to a "phantom" charge that would apply even if BNSF were to provide direct service. Montell adds, in its brief, that we should at the very least condition the merger by granting BNSF a right of access to Montell's West Lake Charles plant similar to that offered shippers in West Lake and Lake Charles, with the further condition that BNSF be allowed to deliver Montell's traffic to Houston.

Quantum Chemical Corporation. QCC, which manufactures polyolefin resins and petrochemicals, fears that the proposed merger will have negative effects (not fully addressed by the CMA agreement) with respect to traffic at Chocolate Bayou, Williams, Baytown, and Strang, TX. (1) QCC's Chocolate Bayou plant is served solely by UP, but QCC indicates that prior to the announcement of the merger it had discussed with SP a Galveston-Chocolate Bayou build-out, which would have served the Chocolate Bayou facilities of QCC and Amoco as well as the Freeport facilities of Dow. QCC fears that the competition represented by the build-out will vanish with the merger because BNSF sees exercise of its trackage rights under the BNSF agreement as a cost-effective alternative to the construction of new rail lines. (2) QCC's Chocolate Bayou plant, which produces polyethylene products, is served solely by UP; its Williams plant, which produces similar products, is served solely by SP; and QCC indicates that, by leveraging its ability to swing production capacity between the two plants, it has been able to take advantage of UP vs. SP competition, which, of course, will cease with the merger. (3) QCC indicates that certain facilities at Baytown now have access both to UP (which serves these facilities directly) and SP (which serves these facilities via Econorail, a captive switching carrier). One such Baytown facility is Seapac, a commercial warehouse used by QCC. QCC notes that the UP vs. SP competition now available to QCC's Seapac traffic will end with the merger, and QCC fears that Seapac (in essence, a 2-to-1 point) may not be covered by the BNSF agreement. (4) Prior to 1995, QCC's Strang facility (in the Houston area) had access to four Class I railroads: BN, SF, UP, and SP. The BN/SF merger, QCC notes, reduced the number of railroads to three, and the UP/SP merger will reduce the number to two. QCC claims that, in the wake of the BN/SF merger, BNSF's rates tended to increase, and it fears that UP/SP's rates will likewise tend to increase in the wake of a UP/SP merger.

Requested Relief. OCC suggests four conditions: (1) that Chocolate Bayou be opened to access by a competing Class I rail carrier (e.g., BNSF or IC), or, in the alternative, that the BNSF agreement be modified to allow BNSF trackage rights access to Chocolate Bayou; (2) that Williams be opened to access by a competing Class I rail carrier; (3) that Baytown industries, specifically Seapac, be opened to access by another Class I carrier, or, in the alternative, that the BNSF agreement be clarified with respect to granting access rights to BNSF for service to Seapac and Econorail; and (4) that another Class I rail carrier (such as IC) be granted access to Strang.

Union Carbide Corporation. UCC's chemicals/plastics plant at Seadrift, TX, is rail-served solely by UP, but UCC claims that it determined in the late 1980s that a build-out to SP's Victoria-Port Lavaca line at Kamey (within 10 miles of the plant) would be feasible. UCC indicates that SP agreed and, in 1989, offered UCC attractive discounts off of its standard rates (contingent upon construction of the build-out); and UCC claims that, with this build-out threat, it was able to negotiate its current contract with UP. The merger, UCC warns, would eliminate its build-out potential, and would thereby eliminate present competition by reducing UCC's rail options from two to one. The effects might not be felt during the life of the present UCC-UP contract, but the important point, UCC claims, is that the leverage provided by the build-out would be gone, and UCC would be captive to UP. UCC therefore requests that we preserve the status quo by requiring UP/SP to allow BNSF to serve UCC's Seadrift plant either (1) by trackage rights at competitive costs over UP's Bloomington-Seadrift line (this would allow BNSF to serve Seadrift via the existing UP line), or (2) by trackage rights (and concomitant stop-off rights) at competitive costs over SP's Victoria-Port Lavaca line between the UP main line and a point near Kamey (this would allow BNSF to serve Seadrift via the potential build-out route).

Enterprise Products Company. EPC, which produces hydrocarbon products at its Mont Belvieu, TX, facilities, concedes that Mont Belvieu has heretofore been rail-served solely by SP (via its Baytown Branch), but notes that, in 1995, UP announced the construction of a new Mont Belvieu Branch, which would extend 10½ miles from the UP line at McNair and would directly serve several major plastics and petrochemicals plants on SP's Baytown Branch. EPC concedes that the Mont Belvieu Branch was not proposed to serve EPC initially, but maintains that, because the Exxon plant that the Mont Belvieu Branch would serve is less than a mile from EPC's facilities, the short extension that would be needed to reach EPC could be justified on economic grounds at an early date. EPC contends that the merger should be denied because the merger will eliminate the competitive option that the Mont Belvieu Branch would have created. EPC further contends that, if the merger is approved, it should be conditioned by requiring that UP/SP either (1) build the Mont Belvieu Branch as proposed and grant trackage rights upon it to a competing carrier (BNSF) with no limitations on providing service to additional customers at Mont Belvieu, or (2) authorize a shortline to operate the Baytown Branch and grant trackage rights for multiple railroads to access it at Dayton along the SP Houston-New Orleans main line and through the interchange point with the UP line at the southern terminus.

Formosa Plastics Corporation, USA. At its facility at Point Comfort, TX (rail-served only by UP, off of UP's Houston-Brownsville line), FPC manufactures plastics components for shipment to various western points, including three California points (Stockton, City of Commerce, and Lindsay) served by three

carriers (UP, SP, and BNSF). FPC concedes that it is captive to UP at origin, but claims that the existence of competitive routes to California enables FPC to bargain more effectively for rates (because FPC can deny UP its long-haul). The merger, FPC fears, will eliminate the competition that exists today because the merged system will control FPC's traffic at origin and/or at destination. FPC concedes that its Baton Rouge facility is served by three railroads (UP, IC, and KCS), but claims that Baton Rouge is not a competitive alternative to Point Comfort on plastics components moving to California, either because most such components are not manufactured in Baton Rouge or because only limited quantities of the one that is manufactured are available for shipment to points west. FPC notes that several of its competitors (Dow at Freeport, OCC at Chocolate Bayou, and UCC at Seadrift) are, like FPC, captive to UP's Houston-Brownsville line, and FPC supports the pro-competitive solutions urged by its competitors. FPC adds, however, that pro-competitive relief should not be granted selectively, and it contends that, if we condition the merger by requiring new competitive service at points in Texas originating or terminating plastics/chemical traffic, we should do so evenhandedly with respect to all shippers in the same industries.

The Geon Company. Geon, which produces vinyl products, fears that the merger would adversely impact its facilities at LaPorte, TX (served by PTRA and accessible by SP), at Deer Park, TX (served only by PTRA), at Plaquemine, LA (served only by UP), and at Long Beach, CA (served only by SP). Two years ago, Geon notes, four railroads (BN, SF, UP, and SP) were available to it at LaPorte and Deer Park (either directly or via PTRA). Approval of the pending merger, Geon adds, will reduce that number to two, and Geon fears that, as the number of competitors decreases, rates rise and service deteriorates. Geon argues that an SP break-up solution dictated by the marketplace would be preferable to the anticompetitive consequences of the merger, and Geon therefore urges the denial of the merger.

PPG Industries Inc. PPG, which manufactures chemicals, fears that the proposed merger would adversely impact its Westlake, LA, facility, which is served by three railroads (SP and KCS directly, and UP by reciprocal switch). Post-merger, PPG warns, only UP/SP and KCS would serve Westlake, but, due to the limitations of the KCS route structure, much traffic at Westlake would be captive to UP/SP. The BNSF agreement, PPG adds, is not a satisfactory solution to this problem (PPG claims to have heard that BNSF will not serve PPG's Westlake plant). Shipments from/to Mexico, PPG also warns, would be monopolized by a merged UP/SP, thus jeopardizing the existence of the Tex Mex. PPG therefore suggests that the merger should be denied, or, alternatively, that we should order a divestiture of parallel lines in Texas and Louisiana and allow Tex Mex to connect with other railroads. PPG also asks that we consider requiring additional interchanges at certain other points. In Texas, PPG mentions its plant at Bacon, which is currently served by the Wichita, Tillman & Jackson Railway (WT&J). Service to that plant, PPG indicates, is restricted to a WT&J-UP interchange, even though BNSF has a physical connection with the WT&J. In Oregon, PPG mentions two customers, one located at Lebanon and served by the Willamette Valley Railroad (WVRR), and the other located at Corvallis and served by the Willamette Pacific Railroad (WLPRR). Service to the two customers, PPG indicates, is limited to a WVRR-SP interchange and a WLPRR-SP interchange, respectively, even though BNSF has physical connections with WVRR and WLPRR.

Eastman Corporation. EC, which produces chemicals and plastics, fears that the merger will result in a loss of rail-to-rail competition at three of its Texas facilities: its Longview facility, which is now served by a UP single-line routing and a BNSF-SP joint-line routing (via a junction at Tenaha); its Laredo facility, which can now access both a UP single-line routing and a Tex Mex-SP joint-line routing; and its Brownsville facility, which now has access to both UP and SP. EC recommends: (1) that DOJ conduct a complete review of the anticompetitive impacts of the merger; (2) that UP/SP be required to divest itself of rail segments over which it would have sole supplier status or unacceptable market power; and (3) that the merger review process provide ample time for all shippers, state governments, and the Congress to determine fully the impact of this merger.

Arizona Chemical Company. ACC, which operates a chemical plant in Springhill, LA, served exclusively by KCS, fears that the merger will eliminate UP vs. SP competition it now enjoys. ACC notes that, for traffic moving to Houston, Mexico, and the Western United States, KCS interchanges with both UP and SP at Shreveport; ACC adds that it now has annual contracts with both UP and SP for the portion of the haul beyond Shreveport; and ACC fears that the merger will end the competition now provided by UP and SP at Shreveport. ACC insists, for this reason, that it is a 2-to-1 shipper, but it notes that its interests have not been provided for in the BNSF agreement and, for the most part, have not been provided for in the CMA agreement either. ACC therefore asks that the BNSF agreement be modified as urged by CMA prior to execution of the CMA agreement, by: (1) giving BNSF access to all 2-to-1 points regardless of whether any traffic has moved from/to these points in the past; (2) giving BNSF access to all 3-to-2 points for which, on a "defined" route to/from a particular destination/origin, there would be no alternative other than UP/SP; (3) giving BNSF access to Brownsville/Laredo on the same terms that SP currently has; (4) giving BNSF access to all new (post-merger) facilities built on the lines over which BNSF will have trackage rights; (5) providing detailed assurances and supporting operating and capital investment plans for the services that BNSF will provide under its trackage rights; (6) providing a detailed plan to ensure equal dispatching of trains; (7) renegotiating (lower) the trackage rights fees or establishing a trust fund to provide for shared maintenance costs, rather than subsidization of UP/SP's operations; and (8) providing BNSF the right to operate its trains in the same direction as UP/SP's trains over UP/SP tracks wherever UP/SP has or may have instituted directional operations (for the same length of time provided for in the agreement).

Monsanto Company. Monsanto, which produces chemicals, fibers, and food additives, fears that the merger will have serious anticompetitive effects. Monsanto notes, by way of example, that its Luling, LA, facility is served by both UP and SP, and Monsanto claims that the BNSF agreement will not cure the loss of competition if BNSF chooses not to operate or is slow to start up its operations. Monsanto therefore supports certain conditions: (1) the conditions formerly requested by CMA; (2) a condition that would require a sale of UP/SP's Houston-St. Louis, Houston-New Orleans, and Houston-Eagle Pass lines if BNSF fails to exercise its trackage rights within 90 days; (3) a condition that would require a divestiture of UP/SP's Oakland-Pueblo Central Corridor; and (4) a condition that would require the adoption of a non-coal rate reasonableness methodology prior to any granting of track sales or trackage rights, or any additional mergers.

Shell Chemical Company. SCC fears that the merger would reduce its rail alternatives because UP/SP would control over 70% of Gulf Coast petrochemical shipments, over 85% of Gulf Coast plastics shipments, and over 90% of shipments from/to Mexico. The BNSF agreement, SCC claims, does not resolve SCC's concerns; with trackage rights, SCC notes, the owning railroad establishes the charges and controls track access and dispatching, which hampers the tenant's ability to compete. SCC therefore urges that we reject the merger or, in the alternative, impose a market dominance condition (SCC seeks a finding of market dominance for all locations served only by UP/SP and/or BNSF) and/or a divestiture condition (SCC seeks the divestiture to a third carrier of SP's Chicago-St. Louis, Houston-St. Louis, Houston-Memphis, Houston-New Orleans, and Houston-Corpus Christi lines).

Springfield Plastics/Brandt Consolidated. The only shippers located on the Barr-Girard Line are two affiliates, Springfield Plastics, Inc. and Brandt Consolidated, Inc. (collectively, SPBC), which receive inbound rail shipments of plastic pellets and fertilizer at their Compro, IL, facilities, and which fear added annual transportation costs of more than $110,000 if they must utilize substitute truck-rail service. SPBC urges that the Barr-Girard abandonment be denied in its entirety, or, in the alternative, that the abandonment be denied as to the 26.7-mile Barr-Compro segment. (1) *Procedural Argument.* SPBC contends that the abandonment must be denied because there is no evidence of record, and none has been made available in discovery, that UP has acquired trackage rights over I&M between Barr and Springfield (and because, without such trackage rights, UP cannot divert overhead traffic off the Barr-Girard Line). Because evidence of such trackage rights, SPBC adds, should have been submitted as part of UP's case-in-chief, the time for submitting such evidence has come and gone. (2) *Alternative Approach.* SPBC contends that the Barr-Girard Line should be segmented, and that the 26.7-mile Barr-Compro segment should be kept in service. Aside from the procedural argument respecting the I&M trackage rights, SPBC does not contest the abandonment of the 11.7-mile Compro-Girard segment.[79] (3) *SPBC's Calculations.* With respect to the Barr-Compro segment, SPBC claims: that forecast year operation would result in an operating profit greater than $20,334 (the exact amount would depend on UP's trackage rights payment for the Barr-Springfield operation over I&M); that no track rehabilitation cost is required (because the line is in much better condition than required by the forecast year traffic volume); and that no opportunity cost would be involved in continued operation (because the cost to upgrade track connections with I&M exceeds the value of track materials in the line, and because the land is not entitled to valuation due to UP's failure to prove marketable title or to independently establish any value assuming good title).

SHIPPERS: OTHER. Shippers of a wide range of commodities, including grain, forest products, food products, and minerals, have asked that we either deny the merger or impose conditions.

International Paper Company. IPC, which manufactures paper and paper products, fears that the merger would adversely affect

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[79] The Barr-Compro segment is more than twice as long as the Compro-Girard segment. Nevertheless, because UP has proposed to abandon other tracks south of Girard (in particular, the DeCamp-Edwardsville and Edwardsville-Madison Lines), SPBC would prefer to be served from the 26.7-mile Barr-Compro segment to the north, and would not dispute UP's abandonment of the 11.7-mile Compro-Girard segment to the south.

competition at eight of its plants. Seven of these plants, located in the Arkansas/Louisiana/East Texas "southwest" region, are the plants at Pine Bluff and Camden, AR, Mansfield, Pineville, and Bastrop, LA, and S. Texarkana and Nacogdoches, TX. The Pine Bluff plant is served by UP and SP; the Camden plant is likewise served by UP and SP; the Mansfield plant is served by UP and KCS; the Pineville plant is served by UP (via reciprocal switch) and KCS; the Bastrop plant is served by UP and the Alabama, Louisiana and Mississippi Railroad (AL&M); the S. Texarkana plant is served by UP and KCS; and the Nacogdoches plant is served by SP. IPC indicates that the Pine Bluff and Camden plants benefit from head-to-head competition between UP and SP in the Houston-Memphis corridor, and that the Mansfield, Pineville, Bastrop, S. Texarkana, and Nacogdoches plants also benefit from competition because, in each instance, either UP or SP is an essential part of the rail movement; SP, IPC notes, is today a friendly connection for KCS for traffic at Mansfield, Pineville, and S. Texarkana, and for AL&M for traffic at Bastrop. IPC's eighth plant, located at Gardiner, OR, is served by the Longview, Portland & Northern Railroad (LP&N), an IPC-owned shortline that connects with the Central Oregon & Pacific Railroad (CO&PR), which in turn connects with SP. This, IPC claims, is not entirely satisfactory: at Gardiner, all traffic originating or terminating beyond CO&PR moves at SP's whim.

Adverse Impacts Post-Merger: Trackage Rights Compensation. IPC contends that the compensation arrangement applicable to the trackage rights provided for in the BNSF agreement would defeat any competitive alternative that BNSF might otherwise present. The trackage rights compensation level, IPC claims, would be a serious and immediate impediment to rate competition from BNSF, and this problem, IPC adds, would be compounded in future years.

Adverse Impacts Post-Merger: Pine Bluff and Camden. IPC fears that its plants in Arkansas, Louisiana and Texas will lose the benefits now provided by two strong competing railroads, and will have to rely on competition between a merged UP/SP and a disadvantaged BNSF, which would be hamstrung by operational difficulties, inadequate traffic volumes, and arbitrarily high operating costs. Competition at points opened to BNSF will be weaker than it is today, IPC contends, because there will not be sufficient volume available at the few points that BNSF will be permitted to serve to warrant it doing anything more than moving through traffic over the corridor. And, IPC adds, even if there were sufficient volumes at these points, any BNSF operation on SP's Houston-Memphis line would suffer from an absence of rail facilities, an overwhelming directional flow of UP/SP's traffic, a lack of adequate sidings, a lack of storage facilities required for plastic and chemical traffic, a lack of computerized traffic control, a lack of facilities for crew changes, a lack of car repair facilities, a lack of boxcars, and so on. IPC maintains that, at best, BNSF service at Pine Bluff and Camden will be provided via haulage agreements; and this, IPC claims, would amount to UP/SP service at higher rates.

Adverse Impacts Post-Merger: Mansfield, Pineville, Bastrop, S. Texarkana, and Nacogdoches. IPC indicates that, because SP is today a friendly connection for KCS and AL&M, SP has no incentive to treat KCS and AL&M less favorably than UP. The merger, IPC fears, will alter this incentive; a merged UP/SP will have an incentive to treat KCS and AL&M less favorably than itself. Traffic at Mansfield, Pineville, S. Texarkana, and Bastrop, IPC warns, will therefore lose the benefit of UP vs. SP competition. IPC, which recognizes that the vertical market foreclosure it fears is at odds with the "one-lump" approach long accepted by the ICC, insists that the one-lump approach is simply wrong (or

at the very least inapplicable here). That theory, IPC contends, does not address the issue of the fixed or sunk costs of the serving carriers, and ignores the fact that a bottleneck carrier's pricing and service practices may be constrained by outside factors, which necessarily means that a bottleneck rail carrier will not always be able to capture the preponderance of the economic rents of any given move. There is no evidence, IPC argues, that SP has ever exercised "one-lump" power on its connections.

Adverse Impacts Post-Merger: Gardiner. The BNSF agreement, IPC notes, will allow both UP/SP and BNSF to provide new service alternatives in the I-5 corridor. The problem here, from IPC's perspective, is that although some shippers (including certain IPC competitors) currently local either to BNSF or UP will have access to these new alternatives, IPC (which is captive at Gardiner to SP, via CO&PR) will not.

Relief Requested. IPC opposes the merger and urges that any approval be conditioned by requirements: (1) that UP/SP divest (to a neutral carrier) SP's Houston-St. Louis lines and related facilities; (2) that UP/SP keep open all routes, at competitive rates with service no less favorable than will be accorded UP/SP traffic, via the existing KCS-SP junctions at Beaumont, Houston, Dallas, and Shreveport, on traffic to/from competitively served points (including AL&M originations/terminations at Bastrop), so as to maintain the friendly connection on traffic destined to or originated at SP-served points; (3) that UP/SP grant Tex Mex "trackage" between Corpus Christi and Beaumont, or, in the alternative, grant KCS the opportunity to acquire trackage to Corpus Christi; (4) that UP/SP permit a direct interchange between BNSF and CO&PR at Eugene; and, to allow BNSF to handle IPC's southbound traffic, that UP/SP either grant BNSF trackage rights between Eugene and Chemult or allow a free interchange between SP and BNSF at Chemult; (5) that UP/SP ensure that a viable, competitive routing exists over the Central Corridor; and (6) that UP/SP grant BNSF trackage rights to Turlock, CA (a major destination for IPC paper products) from either Stockton or Merced, CA.

United States Gypsum Company. USG, which produces gypsum wallboard products, gypsum rock and plasters, joint compounds, and gypsum board paper, fears that the merger will have serious impacts with respect to traffic involving its plants at Empire, NV, Plaster City, CA, Southard, OK, and Fort Dodge, IA.

Empire, NV. USG's Empire plant manufactures gypsum wallboard, etc., for shipment by rail to various points, one of which is USG's Fremont, CA, wallboard plant. Traffic moving outbound from the Empire plant is handled by UP from its Gerlach, NV, station, but service, USG reports, has been poor, and, on occasion, delays in the Gerlach-Fremont haul have forced the Fremont plant to shut down. The problem, in USG's view, is that UP's westbound manifest trains ordinarily "fill up" prior to reaching Gerlach, forcing USG's shipments to wait while full UP trains run past Gerlach. The merger, USG asserts, will only make matters worse if UP/SP implements its plans to run fewer trains past Gerlach and/or if BNSF uses UP/SP crews to move its own trains past Gerlach. USG therefore urges us to require that the BNSF agreement be amended to allow BNSF access to serve and switch USG's rail movements from and to the Gerlach station.

Plaster City, CA. USG's Plaster City plant (served and switched solely by SP) manufactures gypsum wallboard, etc., for shipment by rail to various points, one of which is USG's Santa Fe Springs, CA, plant (served by SP's Los Nietos station).

SP service, USG reports, has been poor; delayed shipments have resulted in shutdowns and slowdowns at Santa Fe Springs. There is presently no rail competition at Plaster City (only SP provides service). Although a line, which is now operated by the San Diego & Imperial Valley Railroad (SDIV), runs west from Plaster City and (after passing through Mexico between Division, CA, and San Ysidro, CA) connects with BNSF in the San Diego area, since 1976 this line has been out of service for some distance west of Plaster City, and it will not return to service until certain repairs can be made. USG fears that, lacking rail-to-rail competition, UP/SP service at Plaster City can only get worse, as new traffic flows result in even greater congestion on SP lines. The merger, USG adds, also threatens to worsen USG's standing vis-à-vis its competitors in current Plaster City rail-served markets, due to the opening of single-line rail routings from multiple competitor locations. USG therefore urges us to require (1) that BNSF be granted haulage rights to serve and switch USG's rail movements (a) between Plaster City and Santa Fe Springs, on SP's route via Niland, City of Industry, Bartolo, and Los Nietos, and (b) between Plaster City and the UP/SP-BNSF junction at West Colton, on SP's route via Niland, and (2) that BNSF be granted trackage rights over SDIV between Plaster City and the BNSF-SDIV interchange in San Diego."

Southard, OK. USG's Southard plant manufactures gypsum wallboard, etc., for shipment by rail throughout the United States. Rail service at Southard is provided by Grainbelt Corporation (GNBC), which accesses BNSF and UP (at Enid, OK) and SP (at Quanah, TX). USG notes that, prior to the BN/SF merger, GNBC had access to BN, SF, and UP, and that the ICC, in its decision approving the BN/SF merger, granted GNBC access to SP at Quanah so that GNBC would continue to have three Class I connections. The merger would reduce GNBC's Class I connections from three to two, and USG maintains that we should follow the ICC's lead and impose a condition granting GNBC a third Class I connection. USG therefore urges us to require that CSX be granted overhead trackage rights, terminal trackage rights, and/or reciprocal switching trackage rights over UP/SP between Enid and St. Louis, for USG's loaded or empty rail movements originating or terminating on GNBC.

Fort Dodge, IA. USG's Fort Dodge plant manufactures gypsum wallboard, etc., for shipment by rail to various destinations, and receives by rail limestone from Illinois. Fort Dodge is switched and served by UP (formerly CNW) and by the Chicago Central & Pacific Railroad Company (CC&P). USG indicates that, prior to the UP/CNW merger, Fort Dodge could access BN, SF, and UP, and all other Class I railroads via both CNW and CC&P. The UP/CNW merger, USG contends, changed matters for the worse. The service provided by UP has been poor, and the balance of rail competition has been skewed by having UP single-line routings in competition with CC&P-BNSF joint-line routings; a two-line haul, USG suggests, is necessarily inferior to a single-line haul. USG is particularly concerned by the settlement agreement entered into by applicants and IC (the IC agreement). For one thing, references in the IC agreement to IC, USG suggests, may mean either IC or IC/CC&P (we recently approved an IC/CC&P merger), and USG indicates that this uncertainty clouds its ability to

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" SDIV urges the denial of USG's second Plaster City condition. SDIV notes, among other things, that we lack authority to impose conditions on a non-applicant carrier (except in connection with terminal trackage, which SDIV's 129.61-mile line, SDIV insists, is not) and that we likewise lack authority to impose conditions respecting track located in Mexico.

analyze the combined impact of the UP/SP merger, the IC/CC&P merger, and the IC agreement. For another thing, USG is alarmed by the provision in the IC agreement that makes IC UP/SP's first negotiating partner respecting imposed conditions in addition to or in lieu of the BNSF agreement. This provision, USG claims, effectively limits rail competition at Fort Dodge, and would reduce rail access at Fort Dodge from two railroads (UP and CC&P) to one (UP). USG therefore urges us to require that BNSF be granted haulage rights to serve and switch USG's freight from/to Fort Dodge over the UP and former CNW track between USG's Fort Dodge plant, on the one hand, and, on the other, the BNSF yards in Minneapolis, MN (via Mason City, IA), Council Bluffs, IA, and Sioux City, IA. USG further urges us to require that the IC agreement be clarified with respect to USG's Fort Dodge plant, and that the IC agreement's anticompetitive impact vis-à-vis competitive rail access at Fort Dodge be eliminated.

North American Logistic Services. NALS, a Division of Mars, Incorporated (Mars), arranges transportation at various Mars production units, one of which (Kal Kan Foods, Inc., known as Kal Kan) will begin operations at a new SP-served plant at Wunotoo, NV, later this year. The pet food produced at this plant will be trucked outbound, but the grain and animal by-products used at this plant will be hauled inbound by rail. NALS notes that, although its inbound traffic can be terminated only by SP, it can be originated by other railroads (in particular, UP and BNSF), and NALS intends that, at least initially, its grain will be originated either by UP or by BNSF. And, NALS adds, although only SP can serve the plant, UP can serve Reno (30 miles away), and inbound freight can be trucked from Reno to the plant. The merger, NALS warns, will destroy competition both at destination (because there will no longer be a UP/truck option) and at origin (because, once any existing contracts expire, a merged UP/SP is unlikely to participate with BNSF in a joint rate that would allow a BNSF-UP/SP joint-line haul to compete with a UP/SP single-line haul). NALS insists that the 2-to-1 provisions of the BNSF agreement will not protect Kal Kan: although Kal Kan is clearly (as NALS sees matters) a 2-to-1 shipper, nothing in the agreement would allow BNSF to handle traffic destined to Wunotoo. Reno, NALS indicates, is provided for in the agreement, but the rights granted to BNSF at Reno, NALS insists, will not allow BNSF to provide the rail/motor service required to serve Kal Kan. NALS therefore asks that UP/SP be required to grant BNSF trackage rights either (1) over the SP line serving the Kal Kan plant (along with all necessary stop-off and switching rights), or (2) over the UP line at Reno (and, if trackage rights are granted over the UP line at Reno and if the Kal Kan plant is included within the Reno switching district, NALS also asks that UP/SP be required to grant BNSF reciprocal switching rights into the plant).

ASARCO Incorporated. ASARCO, which produces nonferrous and precious metals, opposes the merger out of fear that there will be serious anticompetitive impacts at its facilities at El Paso, TX, Hayden, AZ, Corpus Christi, TX, and Leadville, CO, and also with respect to traffic moving from/to Mexico. (1) ASARCO's El Paso copper smelter is currently served by three carriers: SP; BNSF; and UP (via a reciprocal switch over BNSF). ASARCO indicates, however, that, due to the nature of ASARCO's customer base and the circuity of a BNSF haul, two carriers (SP and UP) handle almost all of ASARCO's El Paso traffic. The merger, ASARCO therefore fears, will effectively leave ASARCO with but a single carrier at El Paso. (2) ASARCO's Hayden copper smelter is captive to SP, which accesses Hayden via CBRY (the Copper Basin Railway Company). ASARCO claims, however, that it has packaged its captive Hayden traffic with its competitive El Paso traffic

to secure competitive rates for both, and ASARCO therefore fears that the 3-to-2 reduction at El Paso will impact its competitive options at Hayden. (3) At Corpus Christi, ASARCO's Encycle subsidiary is served by UP but is open to reciprocal switching by SP, and ASARCO therefore fears that Encycle will experience a 2-to-1 reduction in competitive options; and, ASARCO adds, the Port of Corpus Christi, through which ASARCO imports on a spot basis, also will experience a 2-to-1 competitive reduction. ASARCO recognizes that these impacts might be alleviated by the BNSF agreement, but claims that the charges provided for in that agreement are such that BNSF will not be competitive. (4) ASARCO's Leadville lead/zinc mine is served by SP at Malta (via a 7-mile truck haul), which means that the Tennessee Pass abandonment will force ASARCO to set up another loading site, probably over 100 miles from the mine. Applicants, ASARCO claims, have given no indication how ASARCO's increased costs might be handled. (5) ASARCO, which has in the past bid its Mexican traffic between the different border crossings, warns that the impacts of the merger include a reduction in the number of railroads serving these border crossings.

CIC International Corporation. CIC, which produces paper, plywood, lumber, and forest products, has four East Texas plants (at Corrigan, Sheldon, Camden, and Herty) that rely, either directly or via a shortline connection, on SP's Houston, TX-Fair Oaks, AR line. In recent years, CIC indicates, SP's service has been inadequate, and CIC allows that the merger may result in improved service. CIC adds, however, that the merger may also cause certain problems: service on the Houston-Fair Oaks line may deteriorate further, if applicants use that line for southbound traffic and if BNSF puts its own overhead trains on that line; and the merger also endangers intramodal competition now provided via both a UP reload at Palestine, TX (which will clearly be eliminated as a post-merger alternative) and a BNSF reload at Cleveland, TX (which may be eliminated as a post-merger alternative in the wake of the various realignments triggered by the BNSF agreement). CIC therefore requests that we condition the merger (1) by granting BNSF access to all Class III railroads and their customers who are dependent on the Houston-Fair Oaks line (to counterbalance the service problems that will accrue from added traffic), and (2) by preserving the pre-merger competitive status quo vis-à-vis CIC's customers in Arizona, California, Colorado, Missouri, Nebraska, New Mexico, Nevada, Oregon, Washington, and Wyoming (to ensure that the competitive alternatives created by existing reload operations are not eliminated by the merger).

Weyerhaeuser Company. Weyerhaeuser, a forest products company, fears that the merger will adversely impact the transportation of all goods across North America, and it therefore urges denial; healthy competition, Weyerhaeuser claims, requires a minimum of three rail carriers. Weyerhaeuser adds that, in any event, because the trackage rights provided for in the BNSF agreement will not give BNSF a real competitive opportunity, BNSF will be unable to provide a real competitive choice even in the limited 2-to-1 context. Weyerhaeuser urges that we condition any approval of the merger on: (1) divestiture to create a three-railroad option in the Central Corridor; (2) divestiture to create a three-railroad option in the Texas Gulf Coast region (from the Gulf Coast to Memphis and St. Louis); (3) trackage rights to provide a third rail carrier option from/to Mexico; (4) trackage rights (or a similar arrangement) that would allow MRL to access the Eugene, OR, market by operating between Klamath Falls and Eugene, OR, and open interchange with the Central Oregon and Pacific Railroad (CO&PR, which serves two Weyerhaeuser facilities in Oregon); and

(5) competitive conditions in the Pacific Coast Corridor (Weyerhaeuser supports the provisions in the BNSF agreement that enhance rail-to-rail competition in that corridor).

Cargill. Cargill, which merchandises agricultural and other bulk commodities, contends that the merger threatens to create significant competitive pitfalls, and therefore urges that if we approve the merger: (1) to ensure that the trackage rights provided for in the BNSF agreement will allow effective competition, we should examine the costs that BNSF will incur; (2) to ensure reasonable access to competitive rail options, we should require that all UP/SP stations/junctions be open to reciprocal switching; (3) to preserve pre-merger joint-line movements, we should establish a rate guideline making presumptively unreasonable the increase of any UP/SP segment of a joint movement to a rate (revenue-variable cost) exceeding 180%; (4) to ensure that gateways now open remain open, we should order that no gateways now open can be closed by UP/SP post-merger; and (5) to ensure that UP/SP does not unreasonably refuse access to privately owned cars, we should require that UP/SP maintain the present status of private cars on UP and SP.

IBP, Inc. IBP, a meat packing company with shipping origins in Iowa and Nebraska formerly served by CNW, claims that service declined and rates increased after the UP/CNW merger. The CNW lines serving these points, IBP claims, have been marginalized by UP; these lines, IBP suggests, were significant to CNW but are not significant to UP given UP's emphasis on long-haul, bulk-loading, multiple-car traffic. IBP fears that, because similar problems will follow a UP/SP merger, that merger will lessen the adequacy of transportation to the public at IBP shipping origins in Iowa and Nebraska. IBP therefore requests that we grant CC&P reciprocal switching rights at six IBP shipping origins in Iowa and Nebraska located on former CNW lines.

Oregon Steel Mills, Inc. OSM, which contends that, due to inadequate infrastructure and the way reciprocal switching charges are structured, Portland, OR, is a railroad interchange nightmare, urges that we require (1) that all rail interchanges in Portland be open to all shippers (including shippers located on shortlines) and (2) that all reciprocal switching charges be reasonable between all carriers.

Stimson Lumber Company. SLC, which manufactures lumber, plywood, and hardboard products in Oregon and Montana, seeks to establish a competitive rail environment that will benefit the forest products industry and the Pacific Northwest, and therefore urges us to require: (1) that UP/SP ensure the competitive posture of Portland area (north of Eugene) shippers relative to pricing; (2) that UP/SP not immediately abandon or downsize any yard that currently offers a means of flexibility; (3) that the BNSF agreement be expanded to include open interchange for traffic moving from origins served by SP (either directly or via a shortline) to destinations served by BNSF; and (4) that UP/SP continue UP's reasonable switching agreement with BNSF.

STATE & LOCAL GOVERNMENTS AND RELATED INTERESTS. Pleadings have been filed by a number of state and local governments and related interests.

Texas. Attorney General Morales requests that the merger be denied, and contends: that only three Class I railroads serve the majority of Texas, which has more shippers captive to rail than any other state affected by the merger, and also has more shippers served exclusively by either UP or SP; and that the merger would reduce (either 3-to-2 or 2-to-1) Class I railroad

competition for a significant volume of traffic involving origins and destinations in Texas and at the Texas-Mexico gateways. Texas, the Attorney General claims, has more 2-to-1 customers than any other state, and the Attorney General insists that applicants' definition of 2-to-1 shippers, using points rather than areas, is too restrictive. The Attorney General asserts, however, that economic studies suggest that competitive harm exists even in 3-to-2 markets. The Attorney General argues that combining the monopoly customers of SP with those of UP will eliminate the potential competition that often exists between nearby railroads, and he also argues that intermodal and source competition are unlikely to be effective checks on a merged UP/SP. The Attorney General contends that the BNSF agreement does not address the competitive problems that the merger will create, and he suggests that BNSF, as a tenant railroad, would be at a competitive disadvantage and would be further hampered by operational difficulties.

The Railroad Commission of Texas (RCT), which claims that the BNSF agreement does not protect competition in parallel UP/SP Texas markets, recommends that we deny the merger and asks that, if the merger is approved, we: (1) grant to Tex Mex Corpus Christi-Beaumont trackage rights to allow it to connect with KCS; (2) order (a) the divestiture of SP lines in the Houston to Chicago, St. Louis, and Memphis corridor, the Dallas/Fort Worth to Chicago, St. Louis, and Memphis corridor, the Dallas/Fort Worth to Houston and South Texas corridor, and the New Orleans to Houston, San Antonio, and Eagle Pass corridor, and (b) the divestiture of related SP terminals, yards, and other facilities; (3) require that UP/SP agree to the creation of neutral terminal railroads serving Houston, Corpus Christi, Beaumont/Port Arthur/Orange, Dallas/Fort Worth, El Paso, and the Rio Grande Valley; and (4) require that UP/SP, if it proposes a post-merger Texas abandonment, include all trackage necessary to ensure the acquiring entity access to rail junction points. RCT, which also is concerned that increases in rail traffic may impact public safety, requests that a merged UP/SP be required (5) to confer with law enforcement officials, traffic engineers, and public officials in cities and counties that experience a substantial increase in the number of daily trains, and (6) to install flashers, bells, and gates at all grade crossings where the maximum train speed is great enough to present a hazard to motorists.

The Port of Corpus Christi, noting that UP and SP account for 80% of the Port's rail business and that the SP-Tex Mex routing (via Corpus Christi) is competitive with the UP single-line routing for traffic moving over the Laredo gateway, supports the merger but requests: (1) that we impose the BNSF agreement as a condition; and (2) that, if we determine that the BNSF agreement does not adequately resolve competitive issues, we grant a third Class I carrier access to Corpus Christi, including access to Tex Mex and the Port.

Texas State Representatives Robert Junell, John R. Cook, and Robert Saunders, believing that the merger will reduce rail competition in Texas and fearing that the BNSF agreement does not adequately address this competitive harm, oppose the merger unless certain conditions are imposed: (1) divestiture, to an unnamed rail carrier(s) unaffiliated with applicants, of numerous SP lines, including SP's Houston-Memphis, Houston-New Orleans, Houston-Eagle Pass, and Fort Worth-Galveston lines; (2) trackage rights, marketing rights, and divestiture of certain UP/SP Corpus Christi-Beaumont lines on behalf of Tex Mex; (3) trackage rights on certain UP lines on behalf of South Orient Railroad Company; and (4) the conditions requested by RCT.

Texas State Representative John R. Cook, claiming that UP has ignored a recently enacted Texas statute limiting certain liabilities that might arise in connection with excursion train operations, requests that we: (1) affirm that Texas has jurisdiction to limit the liability of railroads operating in Texas; and (2) require UP, SP, and BNSF to remove, from any trackage rights agreement with an excursion train operator certified under Texas law, any provision requiring the maintenance of liability insurance in excess of the amount specified by Texas law.

California. *The Public Utilities Commission of the State of California (CPUC)* supports the merger but asks that we require: (1a) that the term of the BNSF agreement be perpetual; (1b) that, upon a finding that BNSF has provided inadequate competition in any corridor or at any California station, the Board will be empowered to order appropriate corrective action; (2) that BNSF receive access to all future industries located on the lines which the BNSF agreement permits it to serve; (3) that there be either a finding that BNSF is committed to providing adequate competition in the Central Corridor, or an order requiring UP/SP to divest a Central Corridor route, facilities, trackage, and traffic base to a carrier other than BNSF (although CPUC, in its brief, appears to have withdrawn its divestiture alternative); (4) that BNSF be granted a perpetual option to acquire UP's Keddie-Stockton Line, exercisable upon a finding that UP has failed to provide on that line either (a) nondiscriminatory dispatching or (b) adequate roadway maintenance or capital improvements; (5) that UP/SP (or, at UP/SP's option, another operator) be required to operate the entire Modoc Line (Klamath Falls, OR, to Flanigan, NV) for at least 5 years, without any traffic surcharges, with any financial losses paid for by UP/SP, and with full and unrestricted interchange rights with BNSF at Klamath Falls, at Flanigan, and at such other locations as the carrier may elect (CPUC, though it concedes that local traffic on the Wendel-Alturas portion of the Modoc Line is presently negligible, claims that the line serves as an important resource for attracting new industry, and therefore opposes the Wendel-Alturas abandonment); and (6) that the North Coast Railroad Authority (NCRA), which now operates the 160-mile North Coast Railroad between the Eureka-Arcata-Korbel area and Willits and which has recently negotiated the purchase of an additional 140-mile line between Willits and Lombard, be granted competitive access to BNSF via bridge trackage rights over UP/SP lines between Lombard and either Suisun-Fairfield or Richmond, under terms identical to those in the BNSF agreement. CPUC further requests: (7) that we require UP/SP to assume SP's obligations respecting (a) rail passenger service in the Capitol Corridor between San Jose and Sacramento, and (b) the construction and operation of the Alameda Corridor between the Ports of Los Angeles and Long Beach; (8) that we stress the importance of developing the Calexico-Mexicali gateway to its fullest potential, and urge UP/SP either to develop this gateway or to divest it to another carrier; and (9) that we require UP/SP (a) to offer fair settlement amounts to employees who choose not to relocate, and (b) to provide job training and outplacement programs for employees whose jobs are abolished or transferred.

The City of Industry, through the Industry Urban-Development Agency (IUDA), claiming that two contiguous parcels owned by IUDA and located between UP and SP main line tracks should have 2-to-1 status, requests that we condition the merger by requiring (1) that the two parcels be regarded as a 2-to-1 customer, or, alternatively, (2) that, within 90 days after approval of the merger, UP/SP grant BNSF trackage rights to the two parcels.

The City of Susanville (Susanville) and *the County of Lassen (Lassen)* oppose the merger and the Wendel-Alturas abandonment and support the MRL responsive application, and contend that the Modoc Line (of which the Wendel-Alturas Line is a portion), though underused, is an important part of the national rail system. Susanville and Lassen indicate that, after the Base Realignment and Closure Commission realigned (in 1995) the Sierra Army Depot, which is located in Herlong (in Lassen County), by removing one of its missions, a local reuse committee was established to investigate potential reuses for the depot. Susanville and Lassen fear that the work of the reuse committee could be hindered by the proposed abandonment.

The County of Modoc (Modoc) and *the City of Alturas (Alturas)* also oppose the merger and the Wendel-Alturas abandonment. They state that Modoc and Alturas are currently under consideration as a location for several plants, but that the plants will be located elsewhere if rail service is discontinued. Further, Modoc and Alturas state that, in 1917, Alturas "gifted" several blocks of land in the center of the city to the N.C.O. railroad, subsequently SP. Noting that the site was used as a maintenance/repair facility and is now on California's hazardous sites list, Modoc and Alturas request that, if the Modoc Line is abandoned, the land be remediated for hazardous waste and returned to the city for redevelopment.

The County of Placer (Placer), which is concerned that increased train traffic on the Roseville-Sparks and Roseville-Marysville routes will generate various adverse impacts (including at-grade crossing delays, air pollution, increased transport of hazardous materials, and an increase in the number of "transient" criminals), asks that we consider these impacts and require mitigating conditions on any approval of the merger.

The East Bay Regional Park District (East Bay District), which maintains parks and trails within Alameda and Contra Costa Counties, fears that increased train traffic on adjacent UP/SP lines will generate various adverse impacts (including increased obstructions at crossings, increased noise, and increased air pollution), and asks that we impose conditions requiring: a grade separation at Ferry Street (Martinez), and the implementation of dispatching procedures to reduce obstructions at the Ferry Street crossing; overhead crossings at Wilson Point (Pinole), Gately (Pinole), Lone Tree Point (Rodeo), and City Cemetery/Nejedly Staging Area (Martinez), and at-grade crossings at Eckley, White's Resort, and Port Costa; an at-grade trail crossing for Nerely Road (Oakley); appropriate conditions such as crossings (either grade separated or at-grade) and/or lateral encroachments, if any of the District's paved trails are affected by the merger; and noise abatement conditions, particularly in the Pinole area.

The City of Sacramento (Sacramento) has indicated concern respecting UP's 19th Street Line, which bisects Sacramento and which will be opened up to BNSF under the BNSF agreement. Sacramento, which alleges that UP's heavy use of the line has impacted daily traffic movements and has forced the city to maintain emergency services on both sides of the line, and which therefore wishes to transfer UP (and BNSF) freight trains to alternative trackage, has an alternative in mind: SP's Elvas Line, which, Sacramento indicates, runs parallel to the 19th Street Line but is more removed from the central part of the city. Sacramento therefore requests that we impose a condition that will assure that Sacramento will be able to conduct negotiations with UP/SP and BNSF regarding the abatement of traffic on the 19th Street Line.

Oregon. *The Oregon Department of Transportation (Or/DOT)* supports the merger but asks that we monitor Central Corridor competition, and suggests that, at the end of this proceeding, we commence an investigation respecting open access (Or/DOT has in mind that all Oregon shippers should have access to both BNSF and UP/SP). Or/DOT apparently continues to oppose the Wendel-Alturas abandonment, which, Or/DOT fears, may harm Southern Oregon shippers by reducing their ability to compete effectively in eastern markets (Or/DOT fears that the alternative route, via Roseville, CA, may not be a competitive alternative for many Southern Oregon shippers). Or/DOT adds that the Wendel-Alturas Line should be retained at least until UP/SP has had a chance to implement infrastructure and operating improvements needed to serve all customers in a competitive manner.

Montana. *Governor Racicot*, noting that BNSF monopolizes the transportation of bulk commodities from Montana farms to market, fears that the BNSF PRA, which will be limited to traffic moving from/to points west of the Billings-Havre line, will have an anticompetitive impact on farmers located east of the Billings-Havre line (who account for 45% of all Montana grain). Governor Racicot therefore requests: (1) the modification of the BNSF PRA to allow UP to handle (a) all commodities originating in Montana, and not just a limited number of commodities, and (b) traffic moving from/to all points in Montana, and not just points in the western half of the state; (2) the expansion of the BNSF PRA, as thus modified, to allow UP to handle all Montana traffic via the Silver Bow gateway (which provides a much shorter route to the Southwest and the Central West), and not just via the Portland gateway; and (3) either (a) a guarantee by UP of the continued integrity and operation of the Butte-Pocatello Line, with 20-year Board oversight to ensure that the guarantee is honored and that UP's competitive position is adequately maintained, or (b) the sale of the Silver Bow-Pocatello line to MRL, together with a PRA (similar to the BNSF PRA) for all traffic moving over Silver Bow from all Montana origins, with the same guarantee of continued service.

Idaho. *The Idaho Barley Commission and the Idaho Wheat Commission (IBC/IWC)*, noting that UP handles the major portion of outbound Idaho rail freight, fears that the merger will worsen the captive shipper status of Idaho farmers by increasing the monopolistic control UP already has in Southern Idaho. IBC/IWC asserts that, under the BNSF PRA, grain producers in other states will receive access to competitive rail service, but most Idaho grain producers will not (the BNSF PRA will benefit only those Idaho grain producers with access to BNSF points in Northern Idaho). IBC/IWC asserts that the BNSF PRA will create a more competitive rate structure for Canadian grain moving to Portland than is available for Southern Idaho grain moving to Portland, and may result in increased north-south traffic to the detriment of Idaho's east-west traffic. IBC/IWC adds that, because Idaho grain shippers have no alternative rail options, UP/SP may switch hopper cars to accommodate north-south grain movements at the expense of Idaho's traditional east-west grain movements. IBC/IWC therefore urges: (1) that we grant the MRL responsive application, including the sale of the Pocatello-Silver Bow line, and impose a PRA (similar to the BNSF PRA) for all traffic moving from all Idaho origins to Portland and points south of Portland; (2) that we grant BNSF trackage rights to haul, under a competitive PRA, all traffic originated in Idaho; and (3) that, to monitor long-term anticompetitive effects on captive shippers, particularly regarding car supply and rates, we retain oversight of the merger, and require UP/SP to report grain movements from/to Canada and Mexico, for 20 years.

Colorado. *Governor Romer* supports the merger, and indicates that UP has made commitments respecting: employee impact; the timing for actual discontinuance of service on Colorado lines targeted for abandonment; the timing for removal of abandoned track; the sale, to Colorado or its designee, of part or all of the abandoned track for its net liquidation value within the first 12 months after the merger; the possible conversion of abandoned corridors to trails; and the identification of environmental issues in the corridors targeted for abandonment.

The City of Pueblo (Pueblo) opposes the three proposed Colorado abandonments (Sage-Malta-Leadville, Malta-Cañon City, and Towner-MA Junction) which, it fears, would deprive Pueblo of access to transcontinental rail service, would increase truck traffic on roads serving Pueblo and neighboring communities, would result in the elimination or transfer of 139 full-time jobs in the Pueblo area, and could place Pueblo at a disadvantage in competing for future industrial development projects because of the loss of access to direct east-west service via SP's line. Pueblo asks that we condition any approval of the merger by requiring UP/SP to sell SP's east-west route to MRL for continued freight operations.

The Associated Governments of Northwest Colorado (AGNC), composed of Moffat, Routt, Rio Blanco, Garfield, and Mesa Counties, fears that the merger, by allowing UP/SP to favor PRB coal vis-à-vis Northwest Colorado coal, will jeopardize the economic underpinnings of Northwest Colorado. AGNC therefore opposes the merger unless UP/SP makes a commitment to maintain competitive coal hauling rates for Colorado coal.

Nevada. *The Public Service Commission of the State of Nevada (PSCN)*, concerned that Nevada utilities will not benefit from, and indeed may be negatively impacted by, the merger and the related BNSF and URC agreements, contends that the merger should be conditioned (1) with "open access" provisions that would require UP/SP to grant to third-party railroads such as URC trackage rights to provide single-line service to existing and new utility stations. PSCN, noting that the BNSF agreement will allow BNSF to interchange with the Nevada Northern Railway near Shafter, insists (2) that UP/SP should not be allowed to charge trackage rights compensation fees that would inhibit competition for the interchange traffic. PSCN maintains that Nevada shippers on lines served by both UP/SP and BNSF should be able to access either railroad, and PSCN therefore suggests (3) that, after operating experience has been gained with the BNSF agreement, but in no more than 3 years, we examine the competitive access issue to ascertain the level of shipper interest and evaluate the prospect of expanding competitive opportunities through trackage rights agreements. PSCN also suggests (4) that UP/SP should be required (a) to establish systems to provide timely responses to inquiries from shippers, local governments, and the general public, and (b) to provide, to local governments and local emergency response agencies, information and response plans pertaining to hazardous materials incidents. PSCN also requests (5) that we impose conditions to mitigate the impact of increased rail traffic through Reno, Lovelock, Winnemucca, Carlin, Elko, and Wells.

The City of Reno (Reno), which fears that the merger will result in a substantial increase in traffic on the SP line through Reno and will therefore have substantial adverse impacts on Reno (including highway delays, noise pollution, effects on air and water quality, and increased potential for pedestrian accidents), contends that, without specific conditions to