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mitigate adverse environmental impacts, the merger should be denied.

The Town of Pernley (Pernley), which notes that the SP line runs the length of the town and that there are only two crossings in the town, indicates that it would like to be included in consultations and negotiations involving the UP/SP merger.

The City of Winnemucca (Winnemucca) and the County of Humboldt (Humboldt), which fear that the anticipated increase in train movements on the SP line through Winnemucca will result in increased delays at crossing gates, increased potential for pedestrian injury, increased air pollution, and increased noise pollution, have suggested two mitigation alternatives:

(1) construction of a grade separation at Bridge Street, the street that intersects with SP in downtown Winnemucca; or

(2) rerouting of traffic from the SP line (which bisects the central core of Winnemucca) to the UP line (which skirts the northern edge of the city), which would require a new UP-SP connection near Rose Creek.

Ransas. The Kansas Department of Transportation (Ra/DOT) supports the merger, provided that certain problems can be resolved. (1) To ensure that rail service will remain available on the Pueblo-Herington line, Ka/DOT would support a lease or sale of this line to another Class I railroad. In the event the line is sold or leased to a shortline, Ka/DOT asks that we ensure that the new operator has a good operating history and that it has competitive access to Class I connections and markets in Salina, Hutchinson, and Wichita. (2) Because Wichita will suffer a 3-to-2 reduction in rail competition, Ka/DOT requests that a third Class I railroad be brought into the Wichita market.

(3) Ka/DOT, which fears that increased UP/SP traffic density will worsen historic problems with rail crossings in Wichita, requests that we attempt to craft a solution to this problem.

Sedgwick County (Sedgwick) and the City of Wichita (Wichita) fear that UP/SP will reroute trains via the north-south line through Sedgwick/Wichita, thus increasing the occasions on which highway traffic is blocked at 26 grade crossings on busy arterial streets in Sedgwick County, and particularly in Purley, Kechi, Wichita, and Haysville. Sedgwick/Wichita, which claims that the cost of constructing over/under-passes is prohibitive and which asks that we impose a condition barring any increase in the number of trains operating daily through Sedgwick/Wichita, suggests two alternative routings that UP/SP could utilize. One alternative would require UP/SP to secure trackage rights over BNSF's Topeka-Mellington (via Emporia, Ellinor, El Dorado, and Mulvane) line, which connects with UP at Topeka and Mellington but which bypasses Purley, Kechi, Michita, and Haysville. A second alternative would require UP/SP to continue to route UP's trains via Kansas City, thereby avoiding Sedgwick/Wichita

The City of Abilene (Abilene) is concerned that it will be negatively impacted by an anticipated post-merger increase in UP train traffic passing through Abilene.

Minnesota. The Minnesota Department of Transportation (Mm/DOT) supports the merger provided that UP provides assurances: (1) that the car supply to shippers on UP lines and shortlines in Minnesota will be improved and given special consideration during each harvest season; (2) that switching at Minona, MM, will be improved, preferably by giving DMAE switching rights or the right to buy the trackage to serve the Minona grain elevators; (3) that certain geographic restrictions on traffic in

Arkansas. Attorney General Bryant is concerned that Arkansas will emperience competitive problems due to a 2-to-1 reduction in the number of Class I railroads serving the vast majority of the state, and also will lose jobs on account of the shutdown of redundant lines, reductions in service on other lines, and the closing of machine shope, yards, and car and locomotive facilities. The Attorney General, arguing that the BNSF agreement does not solve the competitive problems that the merger would create, contends that UP/SP should be required either to divest certain lines, particularly the line between Chicago and Texas, or to reach another arrangement whereby a competing Class I railroad will have access to those lines.

Mashington. The Mashington Department of Transportation (Ma/DOT) is skeptical that BMSF will be a viable competitor in the Central Corridor, and contends that acquisition of a Central Corridor line by a regional or a shortline may produce more effective competition, prevent abandonments, and offer Mashington shippers an alternative route. Ma/DOT therefore suggests that we consider a conditional grant of the BMSF agreement's Central Corridor trackage rights, and that we retain jurisdiction to order divestiture, joint ownership, or third carrier trackage rights if BMSF fails to provide adequate competition.

Iowa. The lowe Department of Transportation (Ia/DOT) fears that there will be a reduction in competition in the corridor connecting lows to Gulf Coast ports and Maxican gateways, and claims that, even with the EMSF and IC agreements, UP/SP will still dominate the corridor for many types of freight movements important to lows. Ia/DOT therefore supports the marger provided that conditions are imposed requiring the grant of further trackage rights or line sales to a third Class I carrier to reduce potential UP/SP market dominance in that corridor.

Utah. Governor Leavitt supports the marger but seeks certain conditions: (1) to create a competitive environment, a reduction in the BMSF trackage rights fee from 3.0 mills to 2.5 mills; (2) to emulate (or provide a surrogate for) a competitive environment, a requirement that there be an annual audit, paid for by UP/SF, of rail rates in similar rail markets that enjoy the benefits of intramodal competition (it being understood that, if the audit reveals that rates charged shippers in similar markets are higher than UP/SF rates charged Utah shippers, UP/SP would be required to provide refunds to affected Utah shippers); and (3) to preserve our jurisdiction in this matter, the establishment of oversight for at least 15 years.

LABOR FARTIES. Statements respecting the proposed merger have been filed by various labor parties.

Allied Rail Unions. The American Train Dispatchers Department (ATDD), \*\* the Brotherhood of Maintenance of May Employees (BMKE), and the Brotherhood of Railroad Signalmen (BRS), participating collectively as the Allied Rail Unions (ARU), contend that the merger should be rejected for a variety

<sup>\*</sup> ATDD is a Department of the Brotherhood of Locomotive Engineers (SLE).

Finance Docket No. 32760 of reasons: because thousands of jobs will be lost; because applicants intend to abrogate or modify existing collective bargaining agreements (CBAs), and thereby to effect massive changes in the rules and working conditions of UP/SP employees, by bypessing the procedures required by the Railway Labor Act (RLA); because the merger will reduce competition, and allow UP/SP and BNSF to engage in collusive behavior, throughout the West: and because, given the impact on workers and on competition, SP's financial problems do not justify approval. ARU asks that we condition any approval of the merger by imposing both the conditions set forth in New York Dock, 360 I.C.C. at 84-90, and the additional conditions described below. Conditions Requested: Scope of 49 U.S.C. 11341(a). ARU asks us to hold that the scope of the immunity applicable to the merger is limited to actions taken to actually consummate the financial aspects of the merger (the acquisition of control of SP, the common control of UP and SP, and the merger of UP and SP), and that Article I, Section 2 of the New York Dock conditions will prevent UP/SP from using 49 U.S.C. 11341(a) to abrogate, modify, or "rationalize" existing CBAs. Alternatively, ARU asks us to hold that the scope of the immunity applicable to the merger is limited to actions specifically set forth in the application and the proposed operating plan. In either instance, ARU also asks us to state specifically that approval of the merger does not amount to approval of applicants' plans to merger does not amount to approval of applicants' plans to abrogate, modify, or 'rationalize' existing CBAs. Conditions Requested: Cherry-Picking. ARU suggests that, if we believe that "rationalization" of CRAs is inherently a part of our approval of the merger, we should order that any such "rationalization" should be accomplished by allowing UP/SP's unions to "cherry-pick" from existing UP or SP agreements (i.e., by allowing the unions to select from among the provisions in the CRAs now in effect on the railroads involved in the merger). Conditions Requested: Reimbursements To SP Employees. noting that between 1991 and 1995 various SP unions made wage concessions in connection with SP's financial difficulties, and further noting that SP wages did not return to the national levels until after 1995, maintains that, if shareholders are to be rewarded for their investments in SP, it is only fair that union members should similarly benefit from the merger at least to the extent of repayment of their investments (their forgone lump sum payments and their deferred wage increases). Conditions Requested: Pre-Implementation Agreement. viewing the BMSF agreement as a part of the merger, contends that we should require BMSF to be made a co-applicant in the Finance Docket No. 32760 lead proceeding, or, in the alternative, that we should impose the Mew York Dock conditions on the trackage rights provided for in the BMSF agreement. ARU insists that only imposition of the Mew York Dock conditions on the trackage rights provided for in the BMSF agreement will provide full protection for employees, by allowing for a comprehensive implementing arrangement prior to implementation of the trackage rights. 11 Conditions Requested: Hiring Preference. ARU suggests that, if we do not impose the New York Dock conditions on the In Decision No. 30 (served Apr. 18, 1996), we denied ARU's ARU-8 motion seeking the designation of EMSF as a co-applicant, but without prejudice to ARU's right to continue to argue that the New York Dock conditions should be imposed on the trackage rights provided for in the ENSF agreement. - 85 -

Finance Docket No. 32760 trackage rights provided for in-the BNSF agreement, we should at least modify the hiring preference provision in the BMSF agreement (which provides for a form of hiring preference for work on, or related to, the trackage rights lines and the acquired lines). The modifications ARU has in mind would be patterned upon the New York Dock conditions, and would make the preference mandatory and subject to negotiations with the unions. Conditions Requested: Contracting Out. ARU also asks that we require UP/SP and BNSF to utilize bargaining unit maintenance of way employees and signalmen for all merger-related track, right-of-way, and signal construction and rehabilitation work. This is work, ARU claims, that employees represented by BMME and BRS historically have done and that they are fully capable of doing; but ARU fears that, although such work is required to be done by such employees under their scope rules and past practice, applicants may nevertheless attempt to contract out such work. Conditions Requested: Annual Reports. ARU, noting that applicants claim that the merger will generate public benefits, asks that we require UP/SP to submit annual reports demonstrating how the forecast benefits in the area of cost-savings (including labor costs) are utilized, and how much is either (a) passed on to shippers through rate reductions or deferred rate increases, (b) reinvested, (c) distributed to shareholders, (d) paid in executive salaries and bonuses, or (e) shared with employees. International Brotherhood of Tounsters. IST requests that any approval of the merger be conditioned by requiring UP/SP to divest three subsidiaries, to grant New York Dock protection to the employees of a fourth subsidiary, and to file semi-annual reports regarding diversion of truck cargoes. Overnite Transportation Company, Pacific Motor Transport Company, and Southern Pacific Motor Trucking Company. IET notes that 49 U.S.C. 11344(c) provides, in part, that we can approve a 49 U.S.C. 11343 transaction in which a railroad or an affiliate is an applicant and in which a motor carrier is involved only if, among other things, the transaction will enable the rail carrier to use motor carrier transportation to public advantage in its operations. IBT therefore contends that we cannot approve common control of UP/SP and the three motor carrier subsidiaries because applicants, having indicated that they intend to keep Overnite and PMT independent and SPMT inactive, have made clear that they will not use these motor carriers in furtherance of UP/SP's rail operations. IBT adds that, because such common control cannot be approved under 49 U.S.C. 11344, it certainly cannot be exampted under 49 U.S.C. 10505; 49 U.S.C. 10505(g), IBT notes, provides that the 49 U.S.C. 10505 examption authority cannot be used to authorize intermodal ownership that is otherwise prohibited. IBT therefore concludes that we must either disapprove the UP/SP merger or order the pre-merger divestiture of the three motor carriers (although IBT allows that, inasmuch as SPMT is currently inactive, we could condition UP/SPMT common control by requiring that any future SPMT operations be auxiliary to UP/SP rail operations). is an applicant and in which a motor carrier is involved only if. operations) . Union Pacific Motor Freight Corporation. IST, noting that applicants have not sought authorization for common control of SP and Union Pacific Motor Preight Corporation (UPMP, an MPRR and Union Pacific Motor Freight Corporation (UPMF, an MPMR subsidiary), concludes that applicants must believe that UPMF is a railroad company rather than a motor carrier company, which would mean (IST indicates) that UPMF employees would be entitled to mandatory labor protection under 49 U.S.C. 11347. UPMF employees, IST adds, should be entitled to mandatory labor protection because they are engaged almost exclusively in - 86 -

Tinance Docket No. 32760

Totective conditions that go beyond New York Dock.

Is, we should not allow applicants to abrocate or

employees protective conditions that go beyond New York Dock.
And, TTD adds, we should not allow applicants to abrogate or modify CBAs through the misapplication of 49 U.S.C. 11341(a).
That, TTD maintains, would amount to a seizure of private contract rights under the pretense that CBAs are an impediment to the successful consummation of an approved railroad transaction.

Union Locals. John D. Pitsgerald, a United Transportation Union (UTU) general chairman for certain BM lines, opposes the merger movement in the Western District (the consolidation of the four major carriers into two, BMSF and UP/SP), and urges us to consider the UP/SP merger on a consolidated basis with a reopened BM/SF merger proceeding. Mr. Pitsgerald also opposes the provision in the BMSF agreement in the present proceeding that involves the grant to UP/SP of trackage rights between Saunders, MI, and Superior, MI (overhead rights only, with access to MERC Dock in Superior), and over the Pokegama connection at Saunders. These rights, Mr. Pitsgerald fears, will enable UP/SP to divert traffic from BMSF, and will therefore adversely affect BM employees; and he therefore requests that BM employees adversely affected by the Sub-No. 1 trackage rights receive full New York Dock protection, including an implementing agreement with UP/SP and its employee organizations.

Charles W. Downey, a JTU general chairman for lines of SPCSL and GMMR. If fears that the agreement applicants entered into with GMMR, by altering radically the present work arrangements applicable to SPCSL and GMMR operations, will wreak havor upon the rights of persons employed by SPCSL and GMMR in the Chicago-St. Louis territory of the former Chicago, Missouri & Mestern Railway Company (CMM). Mr. Downey, fearing that certain work now performed by SPCSL employees will be transferred to GMMR, insists that fairness to employees of both carriers requires that an implementing agreement be arrived at for the GMMR agreement prior to consummation of the UP/SP merger, and that the GMMR agreement be subject to the full reach of the New York Dock conditions.

Mr. Downey's late-filed statement was accompanied by his CMD-1 petition for leave to intervene and to become a party of record. The petition will be granted.

O Mr. Downey contends, among other things, that the present work arrangements were "passed upon" by the ICC in its decision in Rio Grande Industries. Inc. et al. -- Purchase and Trackage Rights-- Chicago. Missouri & Mestern Railway Commany Line Retween St. Louis. MO and Chicago. II., Finance Docket Mo. 31522 (ICC served Oct. 31, 1989) (slip op. at 2-3). "Passed upon" is not an accurate characterisation; the ICC simply noted that certain arrangements were consistent with the conditions it had imposed in approving the acquisition, by SPCSL, of CM's Chicago-St. Louis line.

In their UP/SP-250 response to Mr. Downey's comments, applicants contend: that nothing in the GMMR agreement alters the allocation of switching responsibility between GMMR and SPCSL in the Granite City, IL, area; that the GMMR agreement does not transfer to GMMR responsibility for serving the Alton Branch, but merely commits the parties to evaluate such a transfer, and that SPCSL personnel affected by any such future transfer will receive labor protection; and that the GMMR agreement merely breserves the status quo by mullifying a provision of the 1989 GMMR/SPCSL arrangement under which operating responsibilities would change if GMMR were acquired by a Class I railroad. With respect to (continued...)

Clarence R. Ponsler, a UTU general chairman for the Alton & Southern, fearing that the operations envisioned by applicants would create havoc for personnel employed by the A&S, urges the denial of the merger and the Sub-No. 3 petition.

Joseph C. Szabo, UTU's Illinois legislative director, urges denial of the three proposed Illinois abandonments.

Dan Potoshnik, the secretary of BLE's Division 892 (UP lines in the Seattle area), fears that, in connection with the merger, work that could be done by Division 892's members will be diverted to BNSF.

FEDERAL PARTIES. DOJ. DOT. DOD. USDA, and DOL have submitted comments in this proceeding.

United States Department of Justice. DOJ contends that the merger would have 3-to-2 or 2-to-1 impacts in hundreds of traffic corridors throughout the Mest, involving such commodities as wood products, intermodal freight, agricultural products, iron and steel, and plastics. The BNSF agreement, DOJ notes, will not remedy the loss of competition in any 3-to-2 market, and, DOJ adds, for various reasons (including an excessive cumpensation rate, inadequate guarantees to ensure service quality, and other factors that reduce BNSF's incentive to compete using the trackage rights provided for in the BNSF agreement), BNSF is unlikely to be an effective competitor even in the 2-to-1

United States Department of Justice. DOJ contends that the merger would have 3-to-2 or 2-to-1 impacts in hundreds of traffic corridors throughout the Mest, involving such commodities as wood products, intermodal freight, agricultural products, iron and steel, and plastics. The ENSF agreement, DOJ notes, will not remedy the loss of competition in any 3-to-2 market, and, DOJ adds, for various reasons (including an excessive compensation rate, inadequate guarantees to ensure service quality, and other factors that reduce ENSF's incentive to compete using the trackage rights provided for in the ENSF agreement), ENSF is unlikely to be an effective competitor even in the 2-to-1 corridors. The ENSF agreement, DOJ insists, is simply an inadequate remedy, and its flaws cannot be corrected by imposing oversight conditions or monitoring. And the merger-related efficiencies claimed by applicants, DOJ adds, are vastly overstated, and, in any event, are not enough to outweigh the probable anticompetitive effects of the merger. The claims that an independent SP would not be a viable competitor, DOJ argues, are unfounded. SP, DOJ claims, is not a failing firm within the well-established antitrust definition; it has successfully raised capital in recent years; its operations have already shown some improvement; and, absent a merger, it is likely to have other sources of funding for capital expenditures, including improved cash flow from operations, potential additional borrowing and lease financing, and additional real estate sales proceeds. And, DOJ adds, there are alternatives to the proposed merger that SP has not even emplored, including a sale of itself in whole or in pieces to a company other than UP. DOJ therefore concludes that the merger should be denied.

DOJ asserts that, if the merger is approved, the competitive problems that will result can be adequately remedied only with extensive divestitures that will allow a new competitor access to markets where shippers would otherwise face a monopoly or a duopoly. DOJ insists that the divestitures must include, at the very least: (1) one of the two parallel north/south routes from

Mr. Downey's request that we require that an implementing agreement be arrived at for the GMMR agreement prior to consummation of the UP/SP merger, applicants contend that no implementing agreement is needed at all because nothing in the GMMR agreement will change existing operations. And, with respect to Mr. Downey's request that New York Dock be applied to the GMMR agreement, applicants contend that, if any of the operating changes that concern Mr. Downey are ever implemented, adversely affected SPCSL employees will be fully covered pursuant to the standard labor protective conditions that applicants expect will be imposed in this proceeding.

the Gulf Coast to the eastern gateways, specifically the routes radiating from Houston, north through Little Rock and Memphis to St. Louis; east to New Orleans; west to San Antonio; and south to Brownsville; (2) one of the two Central Corridor routes from Oakland through Jalt Lake City and Denver to Ransas City; and (3) sufficient lines to preserve a third independent competitor between Los Angeles and the eastern gateways, particularly Chicago. And, DOJ adds, all of these divestitures must be to a carrier other than BMSF, which otherwise would be the only competitor of the merged UP/SP throughout the West.

United States Department of Transportation. DOT believes that the largely 'parallel' UP/SP merger will substantially reduce competition in large regions of the country. DOT's concern, however, is not with anticompetitive harms of the 3-to-2 variety; two independent railroads, DOT believes, are usually sufficient to maintain vigorous competition. DOT's concern, rather, is with anticompetitive harms of the 2-to-1 variety. The BMSF agreement, DOT concedes, addresses such harms, but DOT contends that the agreement is flaved because the trackage rights provided for in the agreement will not allow BMSF to conduct a completely independent operation on an equal footing. Trackage rights, DOT acknowledges, may allow for two-railroad competition in other circumstances (if traffic volumes are lower and distances are shorter, and if there are, ultimately, other suitable railroads), but DOT insists that, in the circumstances of this case (where the traffic volumes are huge and the distances involved are enormous, and where there is no other remotely comparable railroad in the West), the trackage rights provided for in the BMSF agreement are simply inadequate. And, DOT adds. BMSF's stance in this proceeding raises questions about the seriousness of its intentions to compete aggressively. DOT therefore opposes the marger unless we impose conditions to require: in the Texas Corridors (from Houston west to Eagle Pass, north to Nemphis, east to New Orleans, and south to Brownsville; and from Dallas south to Sen Antonio), that one of the parallel lines be divested." DOT's preferred colution in the Central Corridor (from the Sen Antonio) that one of the parallel lines be divested." DOT's preferred colution in the Central Corridor (from the BMSF trackage rights rather than requiring divestiture of one of the parallel lines."

The divestiture DOT envisions will require that UP/SP retain access from San Antonio to Eagle Pass through haulage or trackage rights and, on the Placedo-Brownsville segment, will require only the transfer of SP's trackage rights.

Of contends that divestiture is not the optimal solution in the Central Corridor principally because the segment from the Bay Area to Salt Lake City generates relatively little traffic of its own, and is thus dependent on overhead freight. DOT argues that only applicants and BMSF, and not MRL, have sufficient gathering lines to operate as effective Central Corridor competitors. DOT therefore argues against Central Corridor divestiture and urges that, if the marger is approved, the BMSF Central Corridor trackage rights be strengthened in a fashion that will make BMSF less of a "tenant" and more of a "landlord." DOT suggests, in particular, that the BMSF trackage rights be modified by: establishing a two-tier trackage rights fee, with both an up-front "fixed fee" (for fixed costs) and a usage fee (for variable costs); preserving build-in/build-out and transloading options along the entire stretch of trackage rights without time limit; and requiring UP/SP to open its contracts with Cantral Corridor shippers at 2-to-1 points until BMSF has access to 50% of the traffic. DOT also suggests that we should (continued...)

United States Department of Defense. DOD notes that the American rail network is an important element of the national defense transportation infrastructure, and that UP and SP (which together serve 46 DOD facilities) are two of the railroads whose lines have been included in the Strategic Rail Corridor Metwork (the network of commercial rail lines that have been deemed important to national defense). DOD, noting that UP/SP would continue to provide rail service to these DOD facilities, indicates that the merger would therefore be compatible with a strong national defense transportation infrastructure. DOD further indicates that the proposed abandonments would not adversely impact either specific DOD installations or the Strategic Rail Corridor Metwork. DOD, however, is concerned about the 2-to-1 impact at six DOD installations: Fine Bluff Arsenal, at Fine Bluff, AR; Red River Army Depot, at Defense, TX; Lone Star Army Ammunition Flant, at Defense, TX; Sierra Army Depot, at Herlong, CA; Sharpe Army Depot, at Lyoth, CA; and Defense Depot Tracy, at Lathrop, CA. DOD concedes that the BMSF agreement provides that BMSF will be able to provide competitive service to all 2-to-1 customers, via either trackage rights, haulage, ratemaking authority, or other mutually acceptable means, and DOD further concedes that the BMSF agreement allows BMSF to serve the Pine Bluff Arsenal. DOD claims, however, that the BMSF agreement specifically pracludes BMSF access via trackage rights to Defense, TX, and Herlong, CA, and that the agreement appears not to include the trackage rights necessary for BMSF to serve Sharpe Army Depot and Defense Repot Tracy. DOD adds that it has not yet worked out with UP/SP the specifics of how BMSF (or another railroad) will actually provide competitive access at the five installations not provided for in the BMSF agreement. Such specifics, DOD insists, should be in place prior to approval of the merger.

United States Department of Agriculture. USDA is concerned that the merger will allow UP/SP and EMSF to dominate the West, and is concerned in particular that these two railroads will control all movements of wheat from the Lower Plains States (Kansas, Oklahoma, and Texas) to Gulf ports and Mexican gateways. The EM/SF merger, USDA claims, reduced competition for many shippers in the Lower Plains, and USDA fears that a UP/SP merger also will reduce competitive options and alternatives for many shippers in this region. A UP/SP merger, USDA adds, also has the potential to affect adversely U.S. competitiveness in foreign trade, particularly to export points on the Gulf, Pacific Coast, and Mexican gateways. USDA therefore opposes the merger.

United States Department of Labor. Preserving competition in the already concentrated rail industry, DOL indicates, is vital to businesses and communities and ensures continued job opportunities for railroad employees, and DOL therefore urges us to examine the impact that the merger will have on rail, motor, and other employees and on the communities in which they live.

ARABOGERAT FILTIES NOT PREVIOUSLY REFERENCED. We turn now to filings not previously referenced respecting the 17 line segments for which applicants seek abandonment (in some instances, abandonment and discontinuance) authorization.

establish in advance formal annual procedures to review the effectiveness of the trackage rights so modified, and be prepared to order divestiture or transfer of the modified trackage rights to another railroad.

General Comments: RTC. Rails to Trails Conservancy (RTC) ask: that we impose: conditions to maximize opportunities to preserve rail corridors for rail banking, interim trail use, and other compatible public uses; and appropriate public interest, public use, environmental, and historic preservation conditions as well. Without such conditions, RTC warns, approval of the merger would constitute a major federal action with significant adverse environmental impacts, and would therefore require the preparation of an environmental impact statement (EIS). RTC also suggests that, because operations are likely to continue for some time on many of the lines for which abandonment authorization has been sought, it would be prudent to issue CITUs and HITUs (Certificates and Notices of Interim Trail Use or Ahandonment) not for the customary 180 days (subject to extension) but instead for a 2-year period. RTC therefore requests that we impose on all merger-related abandonments two conditions, each effective for a period of 180 days following the date UP/SP actually ceases to use the relevant line and otherwise consummates an abandonment: (1) a condition preserving our jurisdiction to issue rail banking or other appropriate orders; and (2) a condition barring UP/SP from disposing of or otherwise transferring (other than for public use) any real estate interests, bridges, culverts, or similar structures."

General Comments: Applicants. With respect to the Colorado abandonments, applicants state that they are willing to negotiate trail use (i) with the State of Colorado or its designees, and (ii) with any other parties that have filed trail use requests, so long as the State of Colorado is agreeable to negotiations with such parties. With respect to the non-Colorado abandonments, applicants state that they are willing to negotiate trail use for all of the lines covered by trail use requests with any or all of the parties that have made the requests.

Colorado Abandonments. Statements respecting the Towner-NA Junction. Sage-Malta-Leadville, and Malta-Cañon City abandonments have been submitted by various parties. The City of Florence, the Transportation Committee of Colorado Counties, Inc., and CLUB 20 (a Western Colorado coalition of counties, communities, businesses, and individuals) claim that these abandonments would have a devastating impact in an area that relies heavily on rail. The City of Florence therefore requests that we condition any approval of the wayer by requiring:

(1) that the transcontinental main line through this corridor be retained (perhaps by divestiture to another railroad); (2) that UP/SP provide a 24-month period following final marger approval to allow state, local, and private entities to formulate a plan for the corridor and to secure financing for the purchase of the track and improvements; and (3) that UP/SP grant the State of Colorado or its subdivisions a right of first refusal for the purchase of the corridor. The City of Fruits, which is concerned that the abandonments will result in a massive loss of railroad and related jobs now based out of Grand Junction, asks that we reject the marger unless UP/SP retains all existing jobs and rail service in the Mess County/Grand Junction area. The Colorado Rail Passenger Association supports the marger but opposes the Colorado abandonments, and asks that we require UP/SP to sell the abandonment-lines to interested buyers.

A statement respecting the three Colorado abandonments was submitted jointly by the U.S. Department of Agriculture, Rocky Mountain Region, and the U.S. Department of the Interior, Bureau

<sup>&</sup>quot; Medison County Transit (MCT) supports the two public interest conditions requested by RTC.

of Land Management, Colorado State Office (collectively, the Agencies). The Agencies note that, upon abandonment, the United States will acquire, by reversion, much of the right-of-way of the three Colorado lines. The Agencies therefore request that as impose on these abandonments certain conditions requiring the Railroad: (1) to resolve title encumbrances (i.e., clouds on title) unacceptable to the United States; (2) to inventory all utilities, fiber optic cables, and other linear uses within the rights-of-way, and to notify the owners/managers of these uses that they must apply for authorization for any portion of the right-of-way crossing National Forest System lands or Public Lands; (3) to assess and remediate hazardous materials and toxic spills along the three corridors, as necessary; (4) to clear the rights-of-way of any trash and discarded or abandoned equipment, including railroad ties, lights, and switches; (5) to inventory and classify, in consultation with the Agencies, all bridges, crossings, and culverts for retention for public use or removal by the Railroad; (6) to include a statement in any deed or transfer does not include any lands or interest in lands owned by the United States; and (7) to obtain concurrence from the State Historic Preservation Officer or provide a formal Determination of Eligibility for historic site evaluation.

Towner-NA Junction Line (Colorado). Of all the abandonments proposed in this proceeding, the Towner-NA Junction abandonment has generated by far the most intense opposition, and the intensity of this opposition has been greatest in Kiowa County. Statements protesting the Towner-NA Junction abandonment have been filed by, among others, the Kiowa County Board of County Commissioners, Kiowa School District No. Re-2, the Town of Eads, the Town of Haswell, and numerous individuals, including, but by no means limited to, many members of Kiowa County WIFZ (Momen Involved in Farm Economics) Chapter \$124. The abandonment, it is argued, will have a devastating effect on economic activity in Kiowa County because farmers and grain elevators rely entirely upon this line for shipment of grain to market. The direct loss of tax revenue, it is further argued, will severely cripple all local government operations, including the schools (Plainview School, for example, which is one of only two schools in Kiowa County and which has an enrollment, for kindergarten through 12th grade, of approximately 86 students, stands to lose \$75,288 annually if the Towner-NA Junction Line is abandoned). Roughly 20t of Kiowa County's tax revenue is derived from the rail line and rail usage, and other local governments within the County also are funded, in some measure, by the rail line (the Town of Haswell, for example, which has an annual budget of \$35,000, fears the loss of its \$1,000 annual rail assessment). Parties in Kiowa County generally urge the denial of both the merger and the abandonment, although a few ask, in the alternative, that the abandonment, if approved, be delayed to allow local communities time to respond to the loss of rail service and tax revenue.

Opposition to the Towner-NA Junction abandonment also has been expressed by parties based in Crowley County, including the Crowley County Board of County Commissioners and the Towns of Crowley and Olney Springs. These parties argue that the abandonment will have a devastating economic impact in Crowley County, both in terms of rail service (because local feedyards depend on rail) and in terms of tax revenue (Crowley County fears the loss of the roughly 15% of its tax revenue that is derived from this line; the Town of Crowley fears the loss of 36% of its own tax base). Opposition to the Towner-NA Junction abandonment also has been expressed by parties based outside of Kiowa and Crowley Counties, including the Prowers County Board of County Commissioners, which maintains that the rail line is a vital

Pinance Docket No. 32760 economic link for all of Southeast Colorado. The abandonment of the line, it is argued, will lead to a decline in economic activity, which will cause at least some local businesses to close and some local residents to leave, and the loss of even a part of the tax base may cause a deterioration of the services provided by local governments at all levels. Trails Act statements\*\* respecting the Towner-NA Junction Line have been filed by RTC and by the State of Colorado, acting by and through its Parks and Recreation Department. Tennessee Pass Line (Colorado). Applicants generally address the Sage-Malta-Leadville and Malta-Cañon City Lines separately (and have filed a petition respecting the former and an application respecting the latter), but numerous parties have addressed them as a package. As previously noted, we refer to the two lines collectively as the Tennessee Pass Line. The Town of Avon insists: that the Tennessee Pass Line is a single continuous line; that segmentation of the administrative process into a petition and an application is artificial and serves only to subject the Sage-Malta-Leadville abandonment to less vigorous scrutiny than the Malta-Cañon City abandonment; and that less vigorous scrutiny of the former is not in the public interest because that segment is the more environmentally sensitive of the two. The Town of Avon further insists that parties: should be permitted to produce evidence concerning the impact on state and local highways and roads that will result from rail-to-truck diversions caused by the Sage-Malta-Leadville abandonment; and should be afforded the opportunity to contravene the claims made by SFT and DRGW that the Sage-Malta-Leadville Line is economically non-viable. The Town of Avon therefore urges that the Sage-Malta-Leadville petition be denied, that the Tennessee Pass Line by treated as the single entity that it is, and that the entire like be the subject of the application heretofore filed with respect to the Malta-Cañon City segment. The Town of Avon insists: that the Tennessee Pass Line is a The Upper Arkansas Area Council of Governments, composed of Chaffee, Lake, Fremont, and Custer Counties and all local municipalities, opposes the Tennessee Pass abandonment and asks that we condition any approval thereof by requiring UP/SP: to offer the entire line for sale as a unit; if negotiations for sale are unsuccessful, to rail bank the line; and to leave the track in place (on the Tennessee Pass Line and also on the Towner-MA Junction Line) for 24 months after approval of the merger. Similar positions have been taken separately by Fremont and Chaffee Counties, although Chaffee County also has requested: if the Tennessee Pass Line is either abandoned or rail banked, that UP/SP be required to perform an Environmental Assessment and to implement a plan for removal of all hazardous waste, and that bonding be required in connection therewith; and, in order to replace lost property taxes, that UP/SP be required to establish a trust fund of not less than \$1,750,000, with the revenue therefrom to be apportioned to Chaffee County, the Town of Buena Vista, the City of Salida, and all affected special districts. Abendomment of the Tennessee Pass Line is opposed also by various additional parties, including E.R. Jacobson (co-owner of the family ranching enterprise known as Deep Creek Ranch) and AASI Limited Liability Company, who contend that local traffic does in fact move on the Tennessee Pass Line and that, an " A "Trails Act statement" is a 49 CFR 1152.29 statement of willingness to assume financial responsibility for interim trail use. - 94 -

Finance Docket No. 32760 abandonment will therefore hurt local shippers. The Tennessee Pass abandonment is opposed also by E.W. Wotipka, who concedes that local traffic is probably insufficient to justify the line's continued existence but who contends that it is unwise to destroy continued existence but who contends that it is unwise to destroy a viable alternative main line on short-term grounds in the face of rapidly changing and unpredictable economic conditions. The Tennessee Pass Line, he argues, is a well-maintained, fully-signalled, CTC controlled main line that has operated, 3% grade and all, in competition with UPRR for more than a century. Eagle County, Lake County, and the Towns of Red Cliff, Minturn, Vail, Avon, Eagle, and Gypsum state that they will make an Offer of Financial Assistance (OFA) to purchase the Tennessee Pass Line. RTC notes that there are two Superfund sites along or near the Sage-Malta-Leadville Line (the California Gulch Superfund Site in Leadville, and the Eagle Mine Superfund Site in Minturn) and another Superfund site along or near the Malta-Cason City Line (the Smeltertown Superfund Site in Salida). RTC further notes that UP/SP will own an interest in certain slag piles at Leadville which may contain toxic material, and that some material from the slag piles may have been used as ballast on the line. RTC maintains that, because the presence of Superfund sites or known toxic contamination can be detrimental (in terms of the legal implications) to all parties in the context of an abandonment proceeding, some baseline information is vital to ensure that a timely rail banking arrangement can be reached. RTC therefore requests the issuance of a condition to require that UP/SP, within 180 days of abandonment authorization, provide the State of Colorado and RTC a Phase I environmental survey (prepared by an independent third entity) identifying all possible toxic contamination on the corridor. RTC adds that, should the Phase I survey report indicate potential problems, further site-specific sampling may be necessary to characterize such problems as exist or to verify that no problems exist. The Colorado Department of Public Health and Environment (CDPHE) and the United States Environmental Protection Agency, Region VIII (Region VIII or EPA Region VIII), which, like RTC, are interested in Tennessee Pass environmental matters, request that UP/SP be required to perform, prior to approval of the abandonment, a "remedial investigation" to determine the nature and extent of contamination at and emanating from the line along the entire Tennessee Pass corridor. The Leadville Coalition, representing the Lake County Board of Commissioners, the City of Leadville, and various other local interests, has indicated its concerns regarding the California Gulch Superfund Site and other sites as well. The Coalition, believing that further risk assessment addressing contemplated uses of the Tennessee Pass Line is necessary, asks that we defer a decision on the merger and the abandonments until a complete Consent Decree and a Final Record of Decision are entered by the Environmental Protection Agency (EPA). Sage-Malta-Leadville Line (Colorado). Trails Act (tatements respecting the Sage-Malta-Leadville Line have been filed by RTC and by the State of Colorado, acting by and through its Parks and Recreation Department. Vail Associates, Inc. (Vail), which operates ski resorts in the vicinity of the Sage-Malta-Leadville Line, envisions that the line might be used, in whole or in part, for passenger service and/or as a trail; and, to this end, Vail has filed a Trails Act statement and also has indicated an intent to acquire the line, in whole or in part, under OFA procedures. Viacom International Inc. (Viacom) indicates that it is performing an environmental cleanup at the Eagle Mine site, - 95 -

Finance Docket No. 32760 Several portions of which are adjacent to the Sage-MaltaLeadville Line. Because of the proximity of the line to the
site, and Viacom's need to use and/or cross DRGM/SFT property to
access the site. Viacom requests that certain conditions be
imposed on any abandonment or discontinuance (and also on any
divestiture or sale to another railroad). (1) Viacom indicates
that any action we take must be conditioned to preserve Viacom's
access to the Eagle Mine site as well as its ability to perform
required sampling and monitoring. Viacom also requests the
opportunity to participate in any discussions concerning the
final disposition of the railroad property in the area of the
Eagle Mine site. (2) Viacom believes that any trail use in the
Eagle Mine site area must be conditioned so that the ramedial
actions that have been accomplished at that site are protected
from public interference. There are, Viacom notes, numerous
pumps, culverts, and other water management facilities located in
the Eagle River Canyon in and near Belden, and it is critically
important that these facilities not be disturbed or interfered
with by curious hikers. The most practical solution, Viacom
indicates, would be to avoid placing a public access trail along
the right-of-way in the canyon. several portions of which are adjacent to the Sage-Malta-Malta-Caffon City Line (Colorado). The Malta-Caffon City abandonment has been protested by Colorado State Rep. Ken Chlouber, who fears that this abandonment will have an adverse impact on the economy in the region as well as in the State of Colorado as a whole. Rep. Chlouber indicates that the rail line provides the only practical means for transporting ore out of the mountains; the local two-lane highway, he adds, is not large enough to accommodate truckloads of ore; and the abandonment of this line will thus cripple the local mining industry. Royal Gorge Scenic Railway, a narrow gauge tourist railway, has indicated its interest in running a tourist railway, has indicated its interest in running a tourist railroad along the 10-mile route from Caffon City through the Royal Gorge to the Parkdale Siding. Trails Act statements respecting the Malta-Caffon City Line have been filed by RTC and by the State of Colorado, acting by and through its Parks and Recreation Department. Department. Hope-Bridgeport Line (Kansas). The Hope-Bridgeport abandonment has been protested by William Schwarz, who asks that a public hearing be held in the Salina area, and who notes that, if the line is abandoned, farmers will no longer be able to ship by rail from the local elevator. Trails Act statements respecting the Hope-Bridgeport Line have been filed by RTC and by the Serenata Farms Equestrian Therapy Foundation (SFETF). Berr-Girard Line (Illinois). The Barr-Girard abandonment has been protested by COGA Industries, L.L.C. (COGA), the Economic Development Council for Greater Springfield (EDC), Central Illinois Public Service Company (CIPSC), and Freeman United Coal Mining Company (Preeman). COGA indicates that it is developing a coal gasification agricultural chemical processing facility on the line, in the Girard area; that the facility will create 1,300 permanent jobs; that, although the area is served also by another railroad, the two railroads are not redundant for COGA's purposes; and that the continued operation of the line may well be critical in encouraging the introduction of coal gasification/chemicals technology to the region. EDC claims that the abandonment would cause negative economic impacts for any business that relies heavily on rail service, and would have a negative impact on future economic growth; and EDC suggests that, if rail service is discontinued, UP/SP should compensate firms which are affected negatively, and should allow other rail service providers a chance to operate the line economically. CIPSC contends that abandonment of the Barr-Girard Line would - 96 -

Finance Docket No. 32760 potentially affect the employment base in the territory adjacent to the line. The Illinois Department of Transportation, which also has addressed the Barr-Girard abandonment, concedes that traffic volumes are probably not large enough to warrant continued operation of the line. A 180-day public use condition respecting the Barr-Girard Line has been requested by the City of Springfield. Trails Act statements respecting the Barr-Girard Line have been filed by the City of Springfield and by RTC. Gurdon-Camden Line (Arkansas). The Gurdon-Camden abandonment has been protested by Reader Industries, Inc., which indicates that it is served by Reader Railroad, which connects to the line at Reader, AR, between MPs 435 and 4366. Reader Industries notes that, on or about June 30, 1995, it received a shipment over this line, and adds that it expects to continue to use this line on a more frequent basis in the future. Iowa Junction-Manchester Line (Louisiana). The Calcasieu Parish Police Jury has requested a 180-day public use condition and also has filed a Trails Act statement. Wendel-Alturas Line (California). The Feather River Rail Society submitted a statement indicating that it favors retention Society submitted a Statement indicating that it favors retention of the track and roadbed on this historically significant and scenic line, which has the potential to be developed into an operation for tourism, directly benefitting the cities of Alturas and Susanville as well as Lassen and Modoc Counties. A 180-day public use condition respecting the Wendel-Alturas Line has been requested by the United States Department of the Interior, Bureau of Land Management, or simply the Bureau). Trails Act statements respecting the Wendel-Alturas Line have been filed by the Bureau and by RTC. and by RTC. Suman-Bryan Line (a portion) (Texas). The City of College Station submitted a statement indicating that the Suman-Bryan abandonment will have a negative impact on economic activity in Brazos County. A 90-day public use condition respecting the Suman-Bryan Line has been requested by the Texas Department of Transportation and the Texas Parks and Wildlife Department. Edwardsville-Madison Line (Illinois). A 180-day public use condition respecting the Edwardsville-Madison Line has been requested by the Village of Glen Carbon. Trails Act statements respecting the Edwardsville-Madison Line have been filed by the Village of Glen Carbon and by Madison County Transit (MCT, a local government agency in Madison County). RTC filed a statement indicating that it supports the issuance of a NITU to MCT. Hewton-Whitewater Line (Ransas). The Newton-Whitewater comment between MP 485.0 near Newton (in Harvey County) and abandonment between MP 485.0 near Newton (in Harvey County) and MP 476.0 near Whitewater (in Butler County) has been protested (in part) by the Harvey County Board of County Commissioners, which indicates that: at MP 485.0 near Newton, the line ends in an industrial area; that the Greater Newton Chamber of Commerce is marketing an industrial park in this area; that this park is already partially occupied, and that rail spur access is an important tool in developing the remaining sites; that the park would have no rail access if the line were abandoned; that growth is expected to extend at least to MP 482, which is near a road that connects to a nearby interstate highway interchange; and that the line should therefore be kept intact at least to MP 483. The Harvey County Board, which refers to MP 483 and MP 482 almost interchangeably, protests the abandonment of the line between interchangeably, protests the abandonment of the line between MP 485 and MP 482. The Newton-Whitewater abandonment also has - 97 -

Pinance Docket No. 32760 been protested by the Harvey County Jobs Development Council. Inc. (HCJDC) and by Kansas State Rep. Garry Boston, for reasons much the same as those advanced by the Harvey County Board. HCJDC protests the abandonment of the line between ND 485 and MP 482. Rep. Boston, without specifying a milepost, suggests that the park should be allowed leeway for future growth." Troup-Whitehouse Line (Texas). A 90-day public use condition respecting the Troup-Whitehouse Line has been requested by the Texas Department of Transportation and the Texas Parks and Wildlife Department. Seabrook-San Leon Line (Texas). A 90-day public use condition respecting the Seabrook-San Leon Line has been requested by the Texas Department of Transportation and the Texas Parks and Wildlife Department. Magnolia Tower-Melrose Line (California). Respecting that portion of the Magnolia Tower-Melrose Line that lies between MPs 7.6 and 7.1 (this portion, which is roughly 2,400 feet in length, extends between 5th Avenue and Oak Street in the City of Oakland, and includes the rail bridge crossing the Lake Merritt Channel), a 180-day public use condition has been requested by the City of Oakland and the San Francisco Bay Trail Project, and a Trails Act statement has been filed by the City of Oakland. DeCamp-Edwardsville Line (Illinois). A Trails Act statement respecting the DeCamp-Edwardsville Line has been filed by Madison County Transit (MCT). RTC filed a statement indicating that it supports the issuance of a NITU to MCT. Little Mountain Junction-Little Mountain Line (Utah). The Weber County Commission has requested a 180-day public use condition and also has filed a Trails Act statement. APPLICABLE STANDARDS We turn first to the decisional standards under which we must judge the control application and the many conditions requested by parties. provisions are codified at 49 U.S.C. 11341-51." "The Act's single and essential standard of approval is that the [Board] find the [transaction] to be 'consistent with the public interest." Missouri-Essas-Texas R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980), Cart. denied, 451 U.S. 1017 (1981). Accord Penn-Central Merver and N & W Inclusion Cases, 389 U.S. 486, 4/8-99 (1968) (Penn-Central Merger Cases). To determine the Fublic interest, we balance the benefits of the The milepost references used by MCJDC suggest that the Harvey County Board's references to MP 483 were meant to be references to MP 482. These provisions have been recodified as 49 U.S.C.

11321-27. A new factor has been added requiring us to consider whether the transaction will have an adverse impact upon competition 'in the national rail system.' 49 U.S.C.

11324 (b) (5). Although this post-application amendment technically does not apply to this case, the ICC long considered this issue to be an important part of its analysis in consolidation cases, and the Board continues to apply the legal precedents of the ICC consistent with the Act. - 98 -

Finance Docket No. 32760 merger against any competitive harm that cannot be mitigated by conditions. Section 11344(b)(1) provides that, in a proceeding involving the merger or control of at least two Class I railroads, five the merger or control of at least two Class I Tallroads, tive factors must be considered: (1) the effect of the proposed transaction on the adequacy of transportation to the public: (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed include, other rail carriers in the area involved in the proposed transaction; (3) the total fixed charges that result from the proposed transaction; (4) the interest of carrier employees affected by the proposed transaction; and (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region. Public Benefits. Section 11344 (b) (1) (A) requires that, in determining whether a proposed transaction is consistent with the public interest, we must examine its effect on the adequacy of transportation to the public. This necessarily involves an examination of the public benefits that will result from the transaction. Public benefits may be defined as efficiency gains such as cost reductions, cost savings, and service improvements. Cost reductions are public benefits because they permit a railroad to provide the same level of rail services with fewer resources or a greater level of rail services with the same resources. An integrated railroad can realize additional benefits by capitalizing on the economies of scale, scope, and density which stem from expanded operations. Cost savings in rail consolidations can come from a variety of sources, including elimination of interchanges, internal resources, more efficient movements between the two merging parties, reduced overhead, and elimination of redundant facilities. These benefits, in varying degrees depending on competitive conditions, are passed on to most shippers as reduced rates and/or improved services. When cost reductions from the merger are passed on to shippers, public benefits are extended and shipper benefits are increased. Benefits to the combining carriers that are the result of increased market power, such as the ability to increase rates at the same or reduced service levels, are exclusively private benefits that detract from any public benefits associated with a control transaction. Res CSX Corp. --Control-Chessie and Seaboard C.L.I., 363 I.C.C. 518, 551-52 (1980) (CSX Control): Union Pacific-Control-Missouri Pacific: Mestern Pacific, 366 I.C.C. 462, 487-88 (1982) (UP/MP/MP): Union Pacific Corp. et al. Public benefits may be defined as efficiency gains such as Union Pacific -- Control -- Missouri Pacific: Mestern Pacific, 366

I.C.C. 462, 467-89 (1982) (DP/MP/NP); Union Pacific Corp. et al.
-- Cont. -- MO-RS-TX Co. et al., 4 I.C.C.2d 409, 428-29 (1988)
(UP/MKT); and Rio Grande Industries. et al. -- Control -- SPT Co.
AL., 4 I.C.C.2d 834, 875 (1988) (DRGM/SP). Competitive Effects. Section 11344(b)(1)(E), dealing with competitive effects on other railroads, was added by section 228(a)(2) of the Staggers Rail Act of 1980, Pub. L. No. 96-448 (Staggers Act). In evaluating "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region," 49 U.S.C. 11344(b)(1)(E), we do not limit our consideration of competition to rail carriers alone. limit our consideration of competition to rail carriers alone, but examine the total transportation market(e)." We are also guided by the rail transportation policy, 49 U.S.C. 10101a, added by the Staggers Act. See Morfolk Southern Corp. -- Control -- Norfolk & W. Ry Co., 366 I.C.C. 171, 190 (1982) See Central Vermont Rv. v. ICC, 711 F.2d 331, 335-37 (D.C. Cir. 1983). - 99 -

Finance Docket No. 32760 (MS Control). The 15 elements of that policy set forth in section 10101a, taken as a whole, emphasize reliance on competitive forces, not government regulation, to modernize railroad operations and to promote efficiency. H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 88 (1980), reprinted in 1980 U.S.C.C.A.M. 4110, 4119. Competitive Narm. Competitive harm results from a merger to the extent the merging parties gain sufficient market power to raise rates or reduce service (or both), and to do so profitably, relative to premerger levels. In evaluating whether a merger is in the public interest, we seek to determine what competitive harm is directly and causally related to the merger and to distinguish that harm from any pre-existing, anticompetitive condition or disadvantage that other railroads, shippers, or communities may have been experiencing. We attempt to ameliorate harm that is caused by the merger with conditions. We examine several criteria in assessing whether markets served by the merging parties will suffer competitive harm. The commodity in question and length of haul provide an indication of the effectiveness of truck competition. The reduction in independent rail routings or the increase in concentration or shares of relevant traffic flows indicate to some extent the likelihood of adverse change in page accepts many. Where shares of relevant traffic flows indicate to some extent the likelihood of adverse change in post-merger market power. Where most or all of the firms in the market have sufficient capacity to serve a significant amount of the total market without any significant disadvantage, the analysis considers the number of competitors rather than their market shares. The determination of competitive harm is more evident where the possible routing options on a rail-bound commodity drop from two originating or terminating railroads to one. Even in these situations, geographic or product competition may be sufficient to act as a constraint to prevent competitive harm. We evaluate whether effects are horisontal or vertical in nature or whether both types of effects are present. Morisontal effects occur where applicant carriers currently offer competing service within a defined market. These effects can range from loss of direct, head-to-head competition between two railroads serving the same origin/destination pair to loss of geographic competition between railroads, as would occur if each of the merging parties exclusively serves a different competing port from the same origin. Vertical effects occur where the merging parties connect end-to-end or form alternative routings for interline movements in which a single railroad controls a "bottleneck" at origin or destination. The key test for competitive harm remains the same for both horisontal and vertical effects: will the merger result in increased rates or deteriorated service or both? Special Public Interest Factors. The Board is also required by 49 U.S.C. 11344(c) to make special, narrowly focused public interest findings (where applicable) on the following aspects of any major rail consolidation: (1) a guaranty or assumption of the payment of dividends or of fixed charges, or an increase of total fixed charges (the transaction may be approved only if we find that the guaranty, assumption, or increase is consistent with the public interest); (2) rail acquisitions of motor carriers (the transaction may be approved only if we find, among other things, that the transaction will enable the rail carrier to use motor carrier transportation to public advantage in its The situation where the merger would greate a bottleneck properly is treated as a horizontal issue. - 100 -

Finance Docket No. 32760 the antitrust laws provide guidance, but are not determinative. As the Supreme Court noted in McLean Trucking Co. v. United States, 321 U.S. 67, 87-88 (1944): In short, the [Board] must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operations, lower costs, etc., to determine whether the consolidation will assist in affectuating the curvail proposed consolidation will assist in effectuating the overall transportation policy . "The wisdom and experience of that [Board]," not of the courts, must determine whether the proposed consolidation is "consistent with the public interest. . (%) Thus, we can disapprove transactions that would not violate the antitrust laws and approve transactions even if they

otherwise would violate the antitrust laws. Northern Lines Mercer Cases, 396 U.S. at 511-14. Moreover, because of our broad conditioning power and our continuing oversight, it is possible for us to approve transactions with conditions in cases where the antitrust enforcement agencies would either disapprove or approve only following substantial divestiture.

## DISCUSSION AND CONCLUSIONS

OVERVIEW. By purchasing approximately \$1 billion of SPR common stock," UP Acquisition Corporation initiated this transaction that will result in the nation's largest rail merger in geographic scope, encompassing the western two-thirds of the United States. Like the SF/SP merger that the ICC disapproved in 1986," this merger contains areas where the service provided by one of the merging carriers, UP, now overlaps with that provided by the other, SP. Unlike that case, where those applicants had initially maintained that imposition of any substantial

<sup>&</sup>quot;1 (...continued) antitrust enforcers be required to give greater weight to arguments that cost savings justify mergers that otherwise might be viewed as anticompetitive. Under this proposal, companies would have more incentive to seek combinations that offer production, distribution, promotion, and other efficiencies that reduce prices to consumers.

FTC Chairman Robert Pitofsky said, in an interview, that antitrust enforcers must be more willing to consider when the cost savings of a merger, even in a highly concentrated industry, can increase competition and benefit consumers. Mall Street Journal, June 3, 1996, at A3.

Accord Minnespolis & St. L. Rv. Co. v. United States,
361 U.S. 173 (1959); Roman Transportation v. Arkaness-Rest
Freight, 419 U.S. 281, 298 (1974); Port of Portland v. United
States, 408 U.S. 811, 841 (1972); United States v. Interstate
Commerce Comm'n, 396 U.S. 491, 514 (1970) (Morthern Lines Merger
Cases); Denver & R.G.W.R. Co. v. United States, 387 U.S. 485 (1967) .

The stock is being held in a voting trust. .

Santa Pe Southern Pacific Corp. -- Control -- SPT Co., 2 I.C.C.2d 709 (1986), and 3 I.C.C.2d 926 (1987) (reopening denied) (SF/SP).

Finance Docket No. 32760 conditions aimed at mitigating competitive harm would frustrate the transaction, applicants here have offered approximately 4,000 miles of trackage rights, and will sell about 330 miles of trackage, to their most able and aggressive competitor, BMSF, in an attempt to redress competitive problem areas. In a nutshell, this includes trackage rights over the Central Corridor in the West; Houston to St. Louis via Memphis; Houston to New Orleans; and Houston to Browneyille. and Houston to Brownsville. A number of parties have presented evidence and arguments as to those rail movements that this merger might subject to competitive harm. Only DOJ has attempted to quantify the overall harm, claiming that the merger will result in over \$800 million per year in harm to shippers due to increased rail rates for shippers who depend solely on UP and \$9 for actual or potential rail service (2-to-1 shippers) and shippers who depend on UP. Sp rail service (2-to-1 shippers) and shippers who depend on UP, SP, and one other rail carrier for actual or potential rail service (3-to-2 shippers). DOJ's claim of harm is totally without foundation, as we will explain. Harm to 2-to-1 shippers from the merger as conditioned will be negligible. The BNSF agreement permits BNSF to serve.all shippers who would otherwise go from two directly serving carriers to one. In essence, the BNSF agreement will permit BNSF to replace, to a large extent, the competitive service that is lost when SP is absorbed into UP. DOJ's projection of harm for 2-to-1 shippers is based on the premise that BNSF will not have any competitive impact on rates charged these shippers. But, with certain exceptions that we have remedied with additional conditions, the BMSF agreement will effectively replace the competition that would otherwise be lost." As many parties have noted, the BNSF agreement does not address competition lost by 3-to-2 shippers. We find, however that parties have greatly overstated the harm that would be that parties have greatly overstated the harm that would be experienced by shippers in 3-to-2 markets." For example, by DOJ's calculation, over half of the 3-to-2 traffic affected by this merger is intermodal, while almost a quarter of it is automotive traffic. Shippers moving this intermodal and automotive traffic, for which there is strong motor competition, have universally supported the merger. They believe that competition will be stronger after the merger, and that service will be better. In addition, DOJ's primary economic study, on which it bases its estimate of harm to 3-to-2 shippers, is deeply flawed. DOJ's study is based solely on grain traffic even though Some of the key issues that we have examined in reaching our conclusion include whether the BMSF agreement really allows BMSF to serve all shippers whose direct access to rail service has gone from two railroads to one; whether competition is lost by shippers that now have only a direct connection with either UP or SP, but who benefit from having the other carrier nearby to provide the potential for transloading, build-ins, or build-outs; whether shippers suffer a significant loss of geographic or source competition due to the loss of SP as an independent carrier; and whether any other party has offered a solution that better serves the public interest. Some of the key issues that we have examined in reaching our conclusion include whether shippers at points that go from three to two directly serving railroads suffer a substantial loss of competition as a result of losing their SP option; and whether the public interest is harmed by the fact that there would be only two major Class I railroads, rather than three, serving the western half of the country. - 103 -

grain represents only a tiny portion of the 3-to-2 traffic at issue. Because grain has unique transportation characteristics, we find that DOJ's application of its "grain" study to other commodities is inappropriate. Moreover, we also find that the study is not reliable even for grain traffic because, as explained below, it is based in part upon a crucial, incorrect assumption that there tend to be fewer rail carriers near navigable waterways.

Any competitive harms will be heavily outweighed by the broad-based, positive effects of the merger as conditioned. Many of these benefits will be passed through to shippers in terms of lower rates and better service. The merger will achieve quantifiable cost savings of approximately \$627 million per year. There are also other major public interest benefits, which, although not so readily quantifiable, are just as important. Some of the more significant benefits include substantially shorter and more efficient, single-line routes between many city pairs for major traffic flows, especially over the Central Corridor; increased capacity and capital investment to upgrade facilities, more direct routes, new terminals and yards, and improved service; directional running of the lines between Houston and Memphis/St. Louis; two new single-line routes on the west coast I-5 Corridor from Canada to Mexico; access for BNSF to New Orleans, and reduced mileage between major points that BNSF serves in single-line service; and a solution for the problem long posed to the public interest by the service decline and capital inadequacy of SP.

With regard to SP, we agree with applicants that western rail service is a rapidly evolving market, not a static one. As detailed below, SP has been declining for over a decade; it is not able to generate sufficient capital to invest in the quality service desired by many of its shippers. UP and SP face increasing pressure from a newly merged, more efficient BMSF, which has been investing substantial capital into improving its service. We think that a revitalized UP/SP will be in a much improved position to compete aggressively with BMSF to provide better, more efficient service to shippers in the West. See Guilford Transportation Industries. Inc.--Control--Delaware and Hudson Railway Company, 366 I.C.C. 396, 411 (1982) (DEH); NS Control, 366 I.C.C. at 233. Although the number of major carriers will be lower, sufficient competitive pressure will remain to ensure that the quality of service they provide will be improved. DEH, 366 I.C.C. at 400-01, 410.

The efficiency savings of the merger are very substantial, and the clear trend since 1960 has been that when railroads have reduced their costs through mergers or otherwise, those savings have largely been passed on to their shippers in terms of lower rates and improved service. Rail rates have decreased remarkably since 1980, despite the fact that most shippers are served by a single rail carrier, and few are served by three. Because of the several major mergers since that time, and due to the formation of Conrail as the single Class I carrier in the Mortheast, large regions of the country are now served by a single major rail carrier or by two such carriers. Even with this structure, rail competition has thrived, and shippers have continued to enjoy increasingly lower rates. Since 1980, the number of Class I railroads has decreased from 26 to 10, while the average rail rate per ton has declined more than 37t on an inflation-adjusted basis from its peak in 1981 through 1993."

<sup>&</sup>quot; ICC, Office of Economic and Environmental Analysis, Rail Rates Continue Multi-Year Decline, 1995.

Several parties, including NITL, SPI, RCS, Conrail, DOJ, DOT, and USDA, have expressed concerns regarding alleged problems with the BMSF trackage rights agreement as it was originally proposed in the application. These parties claim that the terms of the trackage rights agreement will not permit BMSF to compete effectively; that BMSF will lack sufficient traffic density and face other operational obstacles that will keep it from competing effectively; that trackage rights are inherently inferior to outright ownership; that BMSF is not really interested in providing service in these markets; that the agreement is not broad enough to remedy all competitive harms.

We have carefully reviewed each of these allegations, and, after analyzing the record and hearing the parties' oral arguments presented on July 1, 1996, we believe that the proposed merger, subject to certain mitigating conditions that we are imposing, will be in the public interest, and that any competitive harm will be heavily outweighed by the positive effects and benefits of the merger as conditioned. Contrary to the assertions of these parties, trackage rights have been a widely used and time-tested means of assuring against a threatened loss of competition in rail merger proceedings. Moreover, a trackage rights remedy seems particularly appropriate here to preserve competition now being offered by SP that, in many instances, has been made possible through trackage rights, not outright ownership, in the first place.

Applicants have effectively addressed ramy of the particular problems raised by protestants in their set:lement agreement with CMA, and additional concessions made in their rebuttal statement and brief. These modifications have substantially improved the original BNSF settlement agreement, and have removed many problems that might otherwise have hindered the effectiveness of these trackage rights. For example, trackage rights have been granted over both UP and SP lines between Houston and St. Louis, permitting BNSF to operate with the primarily unidirectional flow of UP/SP traffic; an arbitration procedure has been devised for CMA members to permit build-outs under the same principles we applied in the BM/SF merger; a dispatching protocol has been arranged to protect BMSF's service; BMSF has been given the right to serve all new industries on the SP segments over which it is obtaining trackage rights; half of the volume of shipments under contract at 2-to-1 points in Louisians and Texas will be opened up to BMSF; BMSF has been given the option to pay compensation under a formula similar to the method set out in SEM Compensation. Only more favorable to it; SP reciprocal switching charges have been reduced substantially to \$130 per car to ensure that shippers who reach BMSF at 2-to-1 points by reciprocal switching will have meaningful access; and applicants have consented to 5 years of oversight by the Board to ensure that these trackage rights work, and have conceded that we will retain authority to impose additional remedial conditions, including divestiture.

SP now operates over trackage rights from Fort Worth to Pueblo and Kansas City, between Topeka and St. Louis, between Kansas City and Chicago, and between Pueblo and Kansas City.

Rights, 1 I.C.C.2d 776 (1984), 4 I.C.C.2d 668 (1988), 5 I.C.C.2d 525 (1989), 8 I.C.C.2d 80 (1991), 8 I.C.C.2d 213 (1991), aff'd without opinion, 978 F.2d 745 (D.C. Cir. 1992), cert. denied, 508 U.S. 951 (1993) (the SSM Compensation cases).

But, even though applicants have met many of their critics' objections in the CMA Agreement, we recognize that some areas of objection remain. As DOJ and DOT correctly point out, EMSF's trackage rights will permit it to serve only certain specified points, those at which a shipper goes from two to one directly serving carrier. The merger would reduce competition where a shipper, at what applicants call a "1-to-1" point, had a competitive option of building out or building in to or from either SP or UP to put pressure on the single carrier serving it. Similarly, where a shipper served only by UP or SP could have transloaded shipments to the other carrier, that option would not be replaced by the terms of the CMA agreement.

The potential for exercising such options does give shippers competitive leverage, though clearly not as much as if they had two carriers serving them directly. After all, a shipper would have to undergo some additional cost to take advantage of these options before the merger. A build-in or build-out could cost millions of dollars even for a relatively short segment, as testimony in both this case and in <u>RN/SF</u> demonstrates. Transloading also results in additional costs, as freight is first loaded into a truck, and then reloaded into a freight car, or the reverse. Mometheless, we believe that maintaining these options is important to shippers who use them as leverage in their negotiations with carriers.

Rather than redefining 2-to-1 points as those within some arbitrary proximity to two rail carriers (a REA or 4-digit SPLC). The and thus treating direct and indirect rail competition as equivalent, as DOJ, RCS, and others have suggested, we have devised specific conditions directly addressing both the competitive problems that have been raised with the BMSF sgreement and the CMA agreement and concerns about whether BMSF will have sufficient traffic to compete effectively. We will require as conditions, which we will discuss in detail below, that the 'new facility' provision of the CMA agreement be extended to require applicants to permit BMSF to serve any new facility at any point on any SF or UP segment over which it has been granted trackage rights; that the term 'new facility' include new transload facilities, and that applicants make available all points on their lines (over which BMSF receives trackage rights) to transload facilities, wherever BMSF or some third party chooses to establish them; that applicants extend the build-out and build-in provision contained in the CMA agreement to all shippers with physically feasible connections and remove the time limitation contained in the provision; and that applicants expand Paragraph 1 of the CMA agreement to make immediately available to BMSF at least 50t of the volume under contract at 2-to-1 points on all of the BMSF trackage rights corridors (not limited to just Texas and Louisiana).

grouping established by the Bureau of Economic Area, a location grouping established by the Bureau of Economic Analysis of the U.S. Department of Commerce for statistical reporting of regional economic activity. BEAs are collections of counties that may be as large as two-thirds or more of the area of some western states.

<sup>&</sup>quot;SPLC" refers to the Standard Point Location Code, a code used on all interline freight accounting forms to identify all U.S. points served by rail or motor carriers. It may have up to six position numbers, identifying a geographic area in the first position, the state in the second position, the county in the third and fourth positions, and the station in the city or town in the fifth and sixth positions.

Finance Docket No. 32760 We also will impose as a condition the 5-year oversight period to examine whether the conditions we have imposed have effectively addressed the competitive issues they were intended to remedy. We will impose a common carrier obligation on BNSF to provide service to the shippers to which it has been given access under the BNSF agreement. Applicants and BNSF will be required to submit progress reports and implementing/operating plans, as discussed in more detail later in this decision. Unless circumstances warrant otherwise, we will plan to initiate a proceeding on or about October 1,,1997, to seek comments from interested parties on the effects of the merger and implementation of the conditions. In addition to the broad remedies, we have also crafted specific remedies addressing particular problems raised by various parties. In the South Central/Gulf Coast region, these remedies include trackage rights for the Tex Mex from Corpus Christi to Beaumont to ensure that this small carrier can continue to play its important role in international service. We also have expanded BNSF's access to SIT facilities necessary to serve plastics shippers, have removed restrictions on the service BNSF can provide to shippers in the Lake Charles area and eliminated a fee that BNSF otherwise would have had to pay to gain access to this traffic, and have confirmed the availability of build-out options for Dow and UCC, and the continued availability of two independent and efficient PRB routings for TUE. In the Central Corridor, these remedies include imposing the URC agreement which would give Utah coal producers important new rail access to midwestern and eastern markets, and retaining the Tennessee Pass Line as an alternative to the Moffat Tunnel Line to ensure that this route does not become overly congested. Although certain protestants have also claimed that the Although certain protestants have also claimed that the merger will create a rail transportation duopoly in the West, leading to tacit collusion and higher prices, we do not believe this will be the case. As DOT explains, "the competitive outcome of duopoly is indeterminate. In principle, competition can lead to a wide range of outcomes from prices that maximize the joint profits of the duopolists to a competitive equilibrium." DOT-4 at 22. Experience with rail mergers since 1980 indicates that carriers have not colluded in two-railroad markets. After carefully examining this issue, we have determined that rivalry, not tacit collusion, is the likely outcome here. Moreover, we will be carefully monitoring the situation to ensure that this is 80. Some opponents contend that, even with the remedies offered by applicants, trackage rights are simply not enough, and that divestiture is required. We disagree. Ordering divestiture of any of the major components of SP that have been sought by the various parties would be a substantial overreach and would destroy important efficiency benefits of the merger. As we explain below, only part of the traffic on these routes would be directly affected by the merger even if ENSF were not given any trackage rights. This is so because most of the shippers are now either solely served by UP or solely served by SP. Giving another carrier direct access to this traffic would unnecessarily affect a great deal of traffic not harmed by the merger. Divestiture of the "offending assets" is promoted by DOJ and others as a neat and clean solution that does not require the setting of trackage rights compensation or oversight to ensure - 107 -

that shippers are effectively protected from competitive harm. Although divestiture may have a surface appeal, it also entails substantial regulatory intervention in supervising the sale of rail lines. Mand it would likely lead to serious additional problems here. Divestiture could destroy major parts of the efficiency benefits of the merger, especially a Central Corridor divestiture. Moreover, divestitures could cause this deal to become uneconomical for UP and destroy the merger. After all, the corridors that form the central focus of divestiture proposals generate a very substantial volume of traffic. Frustration of the merger would leave the SP problem unresolved, leading to the breakup of that company, or a substantial retrenching of its service. It might ultimately preclude the solution that we have before us, one that allows the network efficiencies of the SP system to be preserved, with tremendous public interest benefits. If SP were sold in pieces, shippers, labor, and SP shareholders would all be adversely affected.
Substantial divestitures would almost surely destroy the BMSF agreement, which has its own substantial pro-competitive features and efficiency gains.

In sum, the merger benefits here outweigh any competitive harms of the transaction, and the public interest requires that we approve it. The conditions we are imposing will effectively mitigate the competitive harms of the merger, while preserving its benefits. We will turn now to a more detailed discussion of the various merger benefits and competitive issues that we have examined in carrying out our balancing of interests under the statute.

FUBLIC BENEFITS OF THE MEMGER. Despite significant parallel aspects examined below, the memger as conditioned clearly will be pro-competitive in the sense that it will stimulate price and service competition in markets served by the merged carriers. The merger will create a more efficient and competitive UP/SP system competing head-to-head throughout the West with ENSF, whose efficiency was greatly enhanced by its recent merger. UP/SP customers will benefit from tremendous service improvements brought about by reductions in route mileage, extended single-line service, enhanced equipment supply, better service reliability, and new operating efficiencies. Similarly, ENSF shippers will receive substantial benefits from the improved service efficiency of that carrier as a result of the merger conditions that we are imposing. Shippers now served by SP, whose service is threatened by that carrier's decline, will now be assured of quality service by UP/SP or EMSF.

Quantifiable Public Benefits. Applicants argue that the merger will yield about \$752 million in quantifiable public benefits in a normal year, including just over \$550 million in operating efficiencies and cost savings, 100 \$76 million in net revenues from diverted traffic, and \$93 million in shipper logistics savings. We have excluded the \$76 million related to net diversion gains and \$47.2 million in net trackage rights proceeds from BMSF that should not be included as quantifiable public interest gains. This still leaves \$627 million of quantifiable benefits per year, as follows:

Unlike DOJ, we have the capacity for continuing regulatory oversight under the statute we administer.

DOJ also recognizes this problem. See DOJ-14 at 3.

Applicants have withdrawn a benefit claim of \$1.7 million in the procurement area. See UP/SP-230 at 69 n.25.

## Applicants' Projected Annual Efficiencies and Cost Savings (in 5 millions)

OPERATING BENEFITS	
Labor Savings	261.2
Car Use	12.7
Communications/Computers	14.2
Operations. General/Administrative.	116.5
Subtotal (Operating Benefits)	129.7
SHIPPER LOGISTICS SAVINGS\$	93.1
TOTAL BENEFITS	627.4

Thus, we find that applicants should realize public benefits from more efficient operations of \$534.3 million per year. These savings would reduce the combined UP/SP operating ratio by four or five points. RNSF's costs will fall further as well, as a result of the trackage rights. UP/SP will: (a) streamline and consolidate operations at major common terminals; (b) combine terminal and station facilities at a number of common points; (c) istablish new blocks and new trains to improve service and insolidations of transportation, mechanical, engineering, information, purchasing, customer service, and other operating and marketing functions and activities. In addition, traffic will be handled more efficiently, in many instances by using shorter, faster routes. The combined car fleet will be managed on a coordinated basis to reduce empty movements and improve equipment use. Economies 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.

Several parties, notably DOJ and RCS, challenge applicants' calculation of quantifiable benefits. However, we find, in particular, the testimony of DOJ's witness Christensen to lack credibility. In the recently completed BM/SF merger proceeding, only one expert witness, Christensen, mounted a detailed challenge to the cost savings estimates in the application. Christensen, then representing selected utilities, claimed that the BM/SF merger would produce few quantifiable efficiency benefits. He asserted that the economic literature contained no evidence indicating efficiency gains through end-to-end mergers. Because that merger was largely end-to-end, he argued that it could not plausibly be expected to yield significant cost savings. The ICC rejected that position, "" and subsequent

This pessimistic vision was not shared by Woodward, DOJ's economic witness in that proceeding, who explained:

It is likely a merger of two railroads having combined revenues of \$7 billion would create significant efficiencies . . . In general, efficiencies could have a downward effect on the prices charged by the merging railroads.

BN/SF, DOJ-2, VS Woodward, at 1 n.1.

Finance Docket No. 32760 events confirm that the ICC's decision in <u>BW/SF</u> was correct and that Christensen significantly erred in his predictions. <u>BMSF's originally projected merger-related savings were too low</u>, and not, as Christensen had alleged in that proceeding, too high.<sup>160</sup> The UP/SP merger is of the same order of magnitude as <u>RM/SP</u>, and with far more overlapping routes that presumably would permit applicants to take full advantage of the economies of scale, scope and density commonly found in railroading. Nevertheless, Christensen testifies that this merger will produce quantifiable public benefits as low as \$73 million, 100 which we simply do not find credible. Christensen's critique is not based on objections to applicants' detailed operating plan, which he admits that he has not examined, 100 but rather upon largely theoretical concerns. Christensen makes three broad-based claims: (1) many of the operational efficiencies projected by applicants could be achieved by voluntary cooperation short of merger and should not be considered merger-related benefits; (2) much of applicants' projected benefits will actually result, whether or not the merger takes place, from ongoing, favorable industry productivity trends brought about by Staggers Act deregulation; and (3) certain of the public benefits claimed by applicants are actually transfers from various parties to applicants and, as 107 (...continued) BMSF, slip op. at 65-66. 200 At the July 1, 1996 oral argument in this proceeding. BNSF's counsel confirmed that annual benefits, which BMSF had projected would be \$560 million, are now believed to exceed a billion dollars a year. She emplained that some of the unanticipated savings resulted from combined management having the ability to apply "best practices" from each railroad to the new operations. Jones, Oral Arg. TR at 118-19. This is consistent with a recent trade press article published subsequent to the consummation of the BM/SF merger, which reported that: New York last Tuesday that the company had identified \$400 million to \$500 million in annual savings on top of the \$560 million in annual savings projected in their 1996 merger application. That disclosure, plus the banner earnings, helped push BMSF stock up \$5.875 for the day to close at \$82.75 in heavy trading. That price, a \$2-week high, represents a \$20 per-share gain since July 1. Traffic Morld, October 30, 1995, at 37. the Christensen concedes that the quantifiable benefits may be as high as \$500 million, but he (and DOJ) focus their assessments on the lower end (\$73 million) of his projected 110 See UP/SP-230 at 61 (citing Christensen Dep., Apr. 23, 1996, at 27). - 110 -

such, represent private, not public, benefits of the merger. 111 We will discuss each of these arguments in turn.

One of the major problems with Christensen's analysis is that he assumes that major service coordinations of the scale that will take place here can be accomplished through voluntary trackage rights and other joint agreements without the stimulus of a merger. Indeed, DCJ has aven gone so far as to suggest that applicants have the burden of proving the negative proposition that the merger benefits cannot be obtained through any means short of merger. DOJ cites no precedent or statutory basis for this novel approach. Moreover, DOJ's approach goes against the grain of our statute, which assumes that carriers will take the initiative in proposing rail consolidations that permit railroads to create superior networks, to provide better service, and to operate more efficiently. The ICC consistently rejected claims that coordination of benefits can be achieved voluntarily on the grounds that it is up to rail management, not the agency, to determine how such efficiencies can be achieved. For example, in SF/SP, a merger proposal that was ultimately denied because of competitive concerns, the ICC explained:

Applicants sought to neutralize the assertion that many of the claimed merger benefits could be achieved by SPT and ATSF by cooperative efforts short of merger. Applicants explored in detail the non-merger mechanisms suggested by DOJ in a manner which convinces us that there are practical, legal and competitive problems which would substantially lessen the effectiveness of such arrangements. It seems clear to us that without the unified management resulting from the merger, few if any of the operating ecor-mies projected under the Operating Plan are attainable.

SF/SP, 2 I.C.C. at 872. We continue to believe this is a correct analysis, and one that fits the facts of this case just as well. Moreover, Christensen's premise is not only unproven, it is implausible; if UP and SP have not yet been able to coordinate the core operations of their competing systems outside of the merger context, it is not realistic to suppose that they could

Christensen also disputes applicants' claim that SP's service problems will be remedied by the merger. He suggests that UP's admittedly rocky experience in initially absorbing CNW demonstrates that, at least in the short term, SP's service may worsen.

Applicants have shown that they have overcome their problems integrating CMW into UP. And the record here shows that many shippers located on SP lines expect to see improvements in SP's deteriorating system quickly because of UP's plans to invest \$1.3 billion, which in large part would go toward upgrading that system.

This sharply contrasts with DOJ witness Majure's assumption that trackage rights are essentially worthless.

<sup>&</sup>quot;Efficiencies Should Be Merger-Specific But Parties Meed Not Prove That The Merger Is The Least Restrictive Way Of Achieving Efficiencies," pp. 29-31. Moreover, as we already have noted, the FTC recommends revising the merger guidelines used by FTC and DOJ in a manner that would make their antitrust enforcement more consistent with our approach to judging rail mergers.

Finance Docket No. 32760 easily do so, especially without the antitrust immunity that our approval confers. Christensen also asserts that many of applicants' projected benefits, whatever they are, would actually be the result of ongoing, favorable industry productivity trends brought about by Staggers Act deregulation. Latin Christensen explains his basis for reducing applicants' projected labor savings by stating: The ability to achieve labor savings without merger is borne out in the statistics for class 1 railroads over the five-year period 1989-1994, when merger activity was relatively quiet. DOJ-8 at 9. Applicants have effectively rebutted this by explaining that the UP/MKT and the SP/DRGW mergers were implemented in their entirety in 1989 and later, and that efficiency enhancing effects of earlier rail mergers (UP/MP/MP, NS, CSX, and probably the formation of Conrail) continued into the 1989-1994 period. Thus, Christensen's rail productivity study necessarily includes, rather than excludes, merger-related productivity gains. More importantly, applicants' efficiency benefits are not based upon the expected yields from industry-wide trends, but on particular savings made possible under their detailed post-merger operating plan. Christensen has presented no reason for us to doubt these particular savings, which would be over and above any savings yielded by general non-merger-related productivity trends. Applicants have included two items that we believe should be Applicants have included two items that we believe should be excluded from quantifiable benefits. Applicants have included 576 million in projected net revenue gains from traffic shifts in their calculation of merger-related public benefits, as well as \$47.2 million in net trackage rights fees from BNSF. The ICC has explained that many merger-related traffic gains just represent neutral revenue transfers from other carriers: Traffic diversions, as such, are not public benefits; only the service improvements and cost savings associated with traffic diversions can be counted as public benefits. UP/CNW, slip op. at 67. Applicants acknowledge that the ICC did not agree that rail-to-rail traffic shifts should be viewed as public benefits. Monetheless, they claim that the nat revenue gains they have projected here serve as a reasonable proxy for the public benefits. Although we have eliminated the 576 million in net traffic diversions in our restatement of applicants' projections of quantifiable public benefits, we have recognized the important efficiencies leading to these traffic shifts below. Similarly, our restatement excludes applicants' projected receipt of \$47.2 million in net trackage rights fees from EMSF. The Mhile Christensen's testimony appears to apply this analysis only to applicants' projected \$261 million in labor savings, DOJ in its Brief takes the concept a step farther in an effort to dispute all of applicants' benefit claims. DOJ-14 at Christer sen makes one other claim with respect to labor savings that we summarily reject. He claims that applicants' projected savings in this area should be reduced by at least 8t, the minimal amount that he asserts unionized rail employees are overpaid relative to their next best alternative. See DOJ-8, VS Christensen, at 11-12. - 112 -

Finance Docket No. 32760 largest portion of this is simply a transfer from BNSF resulting from the grant of trackage rights to preserve the competitive status quo. Finally, we reject Christensen's assertion that applicants' projected \$102.9 million in procurement savings (from combined purchasing) is a private transfer from suppliers to UP/SP because applicants have not shown that these savings will result from applicants have not shown that these savings will result from efficiencies achieved by suppliers, rather than by UP/SP's combined purchasing power. Applicants explain that the ICC regularly accepted as public benefits "lower materials costs resulting from purchasing efficiencies." <u>BN/SF</u>, slip op. at 64. In accepting these, the ICC never required merger applicants to audit the production activities and pricing decisions of their suppliers, and this proprietary information would generally not have been available. We accept applicants' projected procurement savings and incorporate them in our restatement of quantifiable public benefits. KCS witnesses O'Connor and Darling claim that past rail mergers have produced few efficiency gains or other cost savings. Nonetheless, they conclude that there are \$434.8 million in supportable normal year recurrent savings. See KCS-33 (Vol. 1), VS O'Connor/Darling, at 343. Applicants explain that O'Connor and Darling are in error in Applicants explain that O'Connor and Darling are in error in concentrating on the huge decline in UP performance in 1983, the first year after the UP/MP/WP merger, in judging that merger a failure. For all practical purposes, that merger was not implemented in 1983, but in 1984-86, after labor agreements were reached and the WP rebuilding project was completed. Applicants also have shown numerous other errors in the O'Connor/Darling statement, and have effectively rebutted claims by the KCS witnesses that applicants have improperly calculated merger benefits in those benefit categories that we have accepted. See UP/SP-230 at 70-73. Unquentified Benefits. More Efficient Routes/Single-Line Service. In prior mergers, the ICC placed substantial weight on evidence that a proposal presented "opportunities for significantly improved routings." See, e.g., NS Control, 366 I.C.C. at 173, 175, 196-200. The ICC also consistently recognized the substantial public benefits that can be derived through creating new single-line services. CSX Control, 363 I.C.C. at 553. Applicants have shown evidence of unprecedented opportunities for improved routings and new single-line routes here. A combined UP/SP system will provide shippers with the combined UP/SP system will be combined up to the combined UP/SP system will be combined up to the combined UP/SP system will be combined up to the combined UP/SP system will be combined up to the combined UP/SP system will be combined up to the combined UP/SP system will be combined up to the combined UP/SP system will be combined up to the combined UP/SP system will be combined up to th shorter, more efficient routes throughout the West. Similarly, the trackage rights and line sales provided in the BNSF agreement will greatly improve BNSF's western route system. A brief summary of these improvements is set forth in Appendix D at 1 (Improved Routings) . As a result of this merger, every shipper served by UP. but not by SP, will gain single-line service to all SP points, and vice versa. More than 350,000 cars, trailers, and containers, carrying 26 million tons of freight, will gain single-line service each year. The BNSF agreement will add single-line service for another 120,000 cars a year. See Appendix D at 2 (Expanded Single-Line Service). Moreover, the expanded coverage that common control promises will have numerous beneficial impacts on many marketsinternational, intermodal, food products, forest products, autos, - 113 -

Finance Docket No. 32760 chemicals, grain, coal, metal and minerals. See Appendix D at 3 (Expanded Market Coverage). Applicants will reduce SP's high reciprocal switching charges of almost \$500 per car. SP's charges have been criticised by many shippers as reducing their competitive options at commonly served points, and have prompted SP's interchange partners to increase their switching charges when dealing with SP. Applicants will reduce these charges pursuant to the CMA agreement. The making available to shippers many routings that were previously uneconomical. Increased Capacity and Capital Investment. UP/SP plans to spend approximately \$1.3 billion over the next 4 years to upgrade SP facilities, assemble more direct routes, build new terminals and yards, and improve service. These werger-related investments will improve rail service and strengthen competition. Many of these investments will go toward updating the inadequate SP system, investments that SP does not have the capital to make on its own. 117 These improvements will include more than a quarter of a billion dollars in new intermodal facilities. UP/SP will build a new intermodal terminal in the "Inland Empire," the east end of the Los Angeles Basin where BNSF's state-of-the-art facility at San Bernardino gives it an advantage today. It will build a new facility at Kansas City, and others at points in Texas; expand intermodal facilities such as SP's Long Beach intermodal facility and UP's Chicago facilities; and add substantial capacity to intermodal terminals at Seattle, Portland, Salt Lake City, Denver, and St. Louis. UP/SP also will invest millions of dollars in new and improved freight yards, repair shops, and other facilities. Improvement of the Declining SP Service. A major benefit of the merger is that it would permit the financially weak SP to become a part of a large, healthy rail system with the financial wherewithal to sustain efficient operations and maintain a viable In UP/SP-266, applicants acknowledge their modified agreement to provide reciprocal switching charges to BMSF at 2-to-1 points as well as non-2-to-1 points at a rate no higher than \$130 per car, adjusted over time for costs. At other points, UP/SP will cap its reciprocal switching charges with all other railroads at \$150 per car, subject to the same adjustments, with further reductions possible through bilateral negotiation. over 100 miles of double track to the Sunset Route to improve train speeds and reliability; \$145.8 million to make the SP Tucumcari Line a high-speed intermodal link between the Midwest and Southern California; and \$125.4 million to upgrade UP's Texas & Pacific line to connect with the Sunset Route to provide direct service between Hemphis and California. The merged system will clear tunnel restrictions that block SP from competing for most doublestack traffic in the I-5 and Central Corridors. Shippers will benefit from all of these investments. Roseville Yard. UP/SP's \$38.2 million commitment will allow Roseville to reduce transit times and improve blocking for traffic from Los Angeles to Seattle, and as far east as Chicago. Further south in California, UP/SP will build a new \$24 million repair facility at West Colton, which will complement \$40 million of other investments to ensure equipment reliability. - 114 -

plant investment. There may be theoretical alternatives for SP to explore a merger with some company other than UP, but no such buyer has come forward with an offer to buy the whole SP system, even though the filing of this merger application was public notice that prospective offerors needed to file such an inconsistent application under the timeframes established for this proceeding. And, the retention of the SP system in one piece permits network efficiencies (efficient single-line service for numerous shippers) that are clearly in the public interest.

DOJ, KCS, and Conrail contend that SP is, and can continue to be, an effective competitor, but the facts suggest otherwise. DOJ's witness Zimmar contends that SP has begun to be profitable since its new management took over in 1993, and she contends that a positive income of \$61 million would have resulted in the absence of special charges during 1995. Zimmer also notes that SP's operating income and net income improved substantially in 1994 over 1993. During that period, \$F raised \$886 million through the sale of common stock and \$375 million through issuance of senior notes. Zimmer argues that \$F can generate funds from operations to support additional capital investments as well as using other financing options. She assumes the availability of a \$300 million credit line, and \$F's continuing ability to sell real estate as a means of financing what she accepts would be \$F's necessary capital expenditures of \$1 billion over the next 4 years.

Applicants, the State of California, 117 and UTU, however, have submitted convincing evidence that SP's competitive position is eroding, and will continue to do so, because of its inability to generate sufficient capital to provide quality service. Other than in one unrepresentative year, 1994, SP has historically been financially weak and unprofitable, relying heavily on large real estate sales to generate necessary cash flows. SP cannot continue to generate funds from this source, however, because it has a dwindling amount of marketable real estate available for sale. 126 As applicants note, SP's unsecured credit now has "junk bend status," and it is unable to secure additional funds from its lenders because it cannot meet the earnings tests of its loan covenants. Issuance of additional stock does not seem to be an option because it would further dilute the low value of existing shares without yielding any substantial additional

California appear in this record in support of applicants' proposed merger. Their statements stress the benefits that will result from a financially revived SP, and strongly dispute protestants' claims of competitive harm for traffic moving into or out of the State. 282, 2.5. Conlon, Oral Arg. Tr. at 468-478.

previously been sold; in 1995, it took 400 separate transactions to sell \$49 million worth of property. UP/SP-230, VS Yarberry, at 3.

UTU has corroborated this, explaining:

As far as UTU is concerned, there just isn't enough real estate left . . . for the SP to continue to offset its net operating losses from rail operations by selling the real estate that it does have left. That has been . . . the modus operandi of SP for quite some time.

Miller, Oral Arg. TR at 507-08.

Finance Docket No. 32760 funds. Thus, even if the optimistic income projections of Zimmer are borne out, and we think that is unlikely, 121 SP would still lack the funds to halt its competitive slide. Based on our examination of the record, and SP's Annual Reports, we conclude that SP is, and will continue to be, weaker Reports, we conclude that SP is, and will continue to be, weaker than its principal competitors in the Mest (BMSF and UP). Although SP could remain in operation as an independent carrier for some time absent the merger, its inability to generate adequate cash flow from operations, and limitations on its ability to borrow or to sell stock, will preclude it from being a strong competitor to UP or BMSF. The level of service now offered by SP is below that offered by its competitors, and declining; it is essentially a single-track, low-density, high-cost railroad. Purther, if SP continues to operate as an independent carrier, its relative position will worsen. Absent a merger, SP projects that it would spend less than \$100 million a year for improvements, while BMSF and UP each plan to invest billions of dollars in maintaining existing facilities and upgrading plant and equipment. With the merger, however, it is undisputed that UP will have adequate financial resources to supply the SP system the capital that it needs to provide truly comparitive services the capital that it needs to provide truly competitive service over SP's routes. COMPETITIVE EARM. The Staggers Act granted railroads freedom from an overly restrictive and burdensome regulatory regime, enabling them to compete more effectively with each other and with other transportation modes, most notably motor carriers and barge lines. This competition has provided an important spur to more efficient operations, including efficiencies gained through merger and consolidation, while ensuring that these efficiency gains have been equitably shared by railroads and their customers. The competitive process unleashed by the Staggers Act has been one of the most significant public policy successes of this century. One of our most important roles is to ensure that this process continues.

As with our determination of the merger's expected public benefits, our assessment of the potential for merger-related competitive harms takes into account the effects of the BMSF agreement. As explained below, subject to that agreement and certain conditions that we are imposing, we find that the merger as conditioned is unlikely to lead to any significant competitive harms. The BMSF agreement is intended to permit BMSF to replace the competition that will be lost when SP is absorbed into UP. Our assessment of the effectiveness of the agreement at preserving this competition begins with an examination of the manner in which UP/SP and BMSF will compete after the merger.

Merger Will Result in Rivalry, Not Collusion. DOJ and others have argued that, because the settlement agreement here results in trackage rights for BMSP, already UP's largest rival in the West, it is inherently flawed. These parties claim that duopoly in the West will lead to market splitting and collusion between these two major carriers. When the ICC turned down

in 1995. Indeed, SP incurred a net operating loss of \$24 million

Not all parties calling for some form of divestiture base their requests on fear of market splitting and collusion among BNSF and applicants. For example, DOT and SPI state that (continued...)

an eleventh hour effort to formulate ameliorative conditions in the <a href="mailto:sF/SP">SF/SP</a> merger it expressed similar concerns:

We are disinclined to risk the possibility of collusion and market splitting that might result from such an artificial, settlement induced rationalization of the western rail system.

SF/SP, 3 I.C.C.2d at 935.

In refusing to reopen the record there to permit examination of the remedies that were proposed, the ICC expressed dissatisfaction that applicants in that case were dilatory in bringing forth their proposal for conditions and disingenuous in agreeing to accept conditions that they had categorized for well over a year as "deal breakers":

We choose not to allow merger applicants an opportunity to, in effect, seek consolidation twice: first by taking a hard-line preliminary approach toward the issues of competition and acceptable conditions, then falling back on a more conciliatory approach if the initial approach is unsuccessful.

Id. at 933. Here, in contrast, applicants presented their plan for addressing competitive harms at the outset. This permitted us to examine the plan in detail in light of numerous comments. The agency also has the benefit of nine years of additional experience with decreasing rates in two-carrier rail markets under Staggers Act deregulation. We now believe that rail carriers can and do compete effectively with each other in two-carrier markets. We also think that the fact that applicants and BNSF have granted access to each other's markets is not a splitting of markets, but a pro-competitive action that promotes the public interest.

As DOT has pointed out, the outcome where just two companies offer the only significant competitive alternatives in a market may range all the way from intense rivalry to collusion, depending on the circumstances of the industry. DA After thoroughly examining the economic analyses submitted by various parties, we have concluded that tacit collusion is an unlikely outcome here.

DOJ and others define tacit collusion as a situation where firms in a market have a mutual understanding, not directly communicated, permitting rate or service offerings to be set at non-competitive levels. DOJ correctly notes that, as the number of firms declines, it becomes easier to understand and to follow the actions of the other firms. Conversely, additional participants in a market cloud the picture, and possible reactions of different parties to a rate or service offering become harder to predict.

BNSF would be an acceptable purchaser of the lines they request that we order applicants to divest.

<sup>123</sup> DOT-4 at 22.

Our analyses of the economic witnesses' testimonies concerning this issue are set forth in Appendix E. We agree with DOT that these studies are inconclusive.

Finance Docket No. 32760 In prior mergers, the ICC often permitted the number of railroads offering service in a given market to decrease to two railroads. Indeed, it approved mergers resulting in only two major railroads serving large portions of the East. The two railroads, CSX and MS, have competed effectively in these markets. As has been true for the nation's rail system as a whole since the Staggers Act, competitive pressures have been sufficient to spur railroads to enhance productivity by adopting efficient operating and management systems, and their costs have gone down each year because of significant productivity gains. Competitive pressures have ensured that the preponderance of those gains have been passed along to shippers in the form of lower rates and better and more responsive service. There is no evidence that railroads have colluded, overtly or tacitly, to maintain inefficient operations, unresponsive service, or above-market rate levels. In prior mergers, the ICC often permitted the number of market rate levels. Another example of effective competition in a two-carrier market is in the Powder River Basin, where BNSF and UP offer vigorous competition to PRB coal shippers who have seen rates continuously decline. At oral argument, DOJ stated: . . . the Powder River Basin precedent is too small; and too narrow, and too recent to be applied to the facts of this case. I am not actually familiar with the prices in the East . . . Bingaman, Oral Arg. TR at 143. In response to being asked whether DOJ could provide any evidence of collusive behavior between railroads in two-railroad markets in the past, DOJ responded: We have evidence of collusive behavior in many industries. . . I don't know if there is a railroad case specifically, but it is a fundamental tenet of merger law that collusion, where there are only two parties, is much more possible. Id. at 144. However, at oral argument, DOT argued that two-railroad markets result in rivalry rather than collusion, and that the conclusions of DOJ and other protesting parties concerning 3-to-2 competitive harm were incorrect: rail rates at all. Your own precedent in the BN/Santa Fe and UP/Katy indicate your belief that two independent, unconstrained railroads can and do supply vigorous competition. . . (W) e concluded that is indeed the case. Smith, Oral Arg. TR at 173-74. Based on our experience with railroad mergers, and the lack of railroad-specific evidence presented by DOJ in support of its position, we find DOJ's arguments to be unconvincing. We conclude that steps taken by applicants here to avert anticompetitive impacts (through the EMST agreement), combined with the additional conditions we are imposing, will safeguard against tacit collusion. We believe that EMST will aggressively compete with UP/SP where it can obtain profitable traffic under the EMST agreement. Therefore the empire conditions are the empire of the BMSF agreement. Further, the monitoring condition we are imposing will deter collusion and enable us to take any necessary corrective action. We note that the antitrust immunity incorporated in our approval of the merger in no way extends to any collusive pricing action. - 118 -

Competition at 3-to-2 Points Not Diminished. We have examined in detail the nature of the 3-to-2 traffic at issue, and have determined that it presents little potential for significant, merger-related competitive harm. Most of this traffic is either intermodal or automotive traffic that enjoys vigorous motor carrier competition. 125

As we have previously explained, numerous mergers since 1980 have sharply reduced the number of major railroads. During that time; the ICC's policy focused usually on preserving two-railroad competition, not on preserving three-railroad competition. Overall, however, railroad costs and rates have declined a great deal, with the average inflation-adjusted rail rate per ton declining by 37.7% from its 1981 peak to year-end 1993. Even so, because pervasive reduction of the major rail carriers across the West from three to two carriers could be grounds for concern, we have carefully examined the circumstances surrounding this case. We have concluded that no corrective action beyond the conditions we are imposing here is necessary.

Our analysis of the various empirical studies in this record attempting to measure 3-to-2 rail pricing effects is set forth in Appendix E. Studies from the academic literature 124 and from original or updated work done for this proceeding were presented by various witnesses, including MacDonald and Grimm for KCS, Majure for DOJ, Kwoka for Dow, Ploth for KCS, and Peterson and Bernheim for applicants. We agree with DOT's overall assessment that these studies are inconclusive. According to DOT:

Opponents' positions on the instant merger are drawn from theory and models of firm behavior that lack empirical support. They support their statements with reference to a body of literature on industrial organization, showing that concentration at some point leads to higher prices. However, only a very few of these studies address the railroad industry, and their credibility has been seriously challenged.

Applicants and DOJ agree that the largest 3-to-2 traffic flow is Los Angeles-Chicago intermodal traffic. DOJ's numbers confirm that BNSF's premium service currently dominates these movements. BNSF's share of intermodal rail traffic in this corridor is over 50%. We believe applicants' plan to assign most expedited, service sensitive intermodal and automotive traffic to SP's Tucumcari Line and most slower manifest traffic to UP's Central Corridor Line will provide more effective competition to BNSF for all traffic moving between Los Angeles and the St. Louis and Chicago gateways. Shippers and numerous other affected California parties agree. Remarkably, DOJ, alone among the major parties, has concluded that competitive harm to this traffic is so significant that it can only be cured by divestiture of one of applicants' Los Angeles to Chicago routings. We strongly disagree.

Mergers, "Research in Transportation Economics, Vol. 2, T. Keeler (ed.), JAI Press, 1985, pp. 27-53; J.M. MacDonald, "Competition and Rail Rates for the Shipment of Corn, Soybeans, and Wheat," Rand Journal of Economics 18:1 (Spring 1987); J.M. MacDonald, "Railroad Deregulation, Innovation, and Competition: Effects of the Staggers Act on Grain Transportation," Journal of Law and Economics 32:2 (April 1989); and C. Winston, T. Corsi, C. Grimm and C. Evens, The Economic Effects of Surface Freight Deregulation, Brookings, 1990.

Finance Docket No. 32760 DOT-4 at 22. After briefly discussing the various studies, DOT concludes that: [Mone] of the foregoing analyses, examining both sides of the duopoly issue, leads to a firm conclusion on the competitive outcome in markets in which the number of railroads goes from three to two . . . DOT recommends that the Board refrain from remedial action to maintain three railroad service in these markets. Id. at 24. A number of protestants' studies do specifically address railroad pricing. They attempt to estimate any enhanced ability of railroads to raise rates above costs by taking advantage of the reduction, by one, in the number of post-merger rail carriers. The studies compare rates in markets served by three railroads with rates in markets served by two. One common problem with these studies is the use of a static context to problem with these studies is the use of a static context to project rate increases in rail markets after the merger. Protestants neglect to account for a key dynamic element of this merger, the dramatic cost reductions it will make possible. They generally fail to acknowledge that any limited ability this merger creates to raise rates over costs will be offset to the extent that the merger results in significant reductions in applicants' costs. Another dynamic element of this merger is the deteriorating condition of SP, and the effect this would have on rail pricing. Majure's study for DOJ is particularly flawed. His study estimates that the merger will result in a rate increase of 10.9% for \$4.751 billion in 3-to-2 traffic flows. Majure's large for \$4.751 billion in 3-to-2 traffic flows. Majure's large pricing effects are derived entirely from studies of grain, a commodity with very different transportation characteristics from the commodities that make up most of the 3-to-2 traffic here. We do not think it is valid to apply rate projections based on grain traffic to other categories of 3-to-2 traffic that have markedly different transportation characteristics, as Majure has done. This is especially true because more than 70% of the 3-to-2 traffic is made up of commodities that are clearly much more truck-competitive than grain, and whose shippers strongly support the merger. the merger. Moreover, as detailed in Appendix E. Majure's study is not even valid for grain because he fails to include a variable to account for the distance of the shipper from nearby waterways. Barges, where they are available, are a particularly important factor in grain transport. Further, the nearer a shipper is to a waterway, the more likely that more than one rail carrier will be available, rather than less likely, as Majure speculates. Finally, Majure's study is suspect to the extent that he uses one geographic definition, a 6-digit SPLC, in estimating 2-to-1 and 3-to-2 rate impacts, while using much broader geographic definitions. BEAs or 4-digit SPLC's, to define the universe of traffic that supposedly would suffer the rate increases he predicts. This mix-and-match approach is inherently suspect and thus cannot be given substantial weight. In summary, Majure's use of SEAs and SPLCs to measure traffic flows leads to an overestimate of the amount of traffic that would face the loss of one of three direct rail competitors. His use of grain rate data makes it inappropriate to apply his results to other commodities that do not share grain's unique transportation characteristics. His data limitations and measurement errors significantly increase the upward bias in his - 120 -

Finance Docket No. 32760 estimates of merger-related competitive harm. And he has failed to account for any offsetting effects from the dramatic mergerrelated reduction in applicants' costs. Nonetheless, we have used his study to provide an upper bound to the potential competitive harm faced by 3-to-2 shippers. Even if DOJ's estimate of \$1.4 billion of non-intermodal, nonautomotive 3-to-2 traffic were accurate, which we do not believe it is, and its projected post-merger rate increase for that traffic of 10.9% were valid as well, which we believe is overstated, it would produce a rate increase of \$152 million for that traffic. We consider this at best an outside estimate of harm for shippers in 3-to-2 markets. Even if this assessment of harm were accurate, this amount is heavily outweighed by the substantial public benefits that will result from this merger as conditioned. Another key factor in our analysis is the limited role now played by SP as the third carrier in these markets. As we explain elsewhere in this decision, SP's poor financial condition has limited its access to capital necessary to renovate its plant and equipment so as to match the service quality and cost of service of its competitors. Thus, SP is a constrained, not a full competitor, with limited impact on the pricing actions of other western carriers. As a result, SP's role, particularly with regard to the very service-sensitive automotive and intermodal traffic that makes up a large part of the 3-to-2 traffic, has diminished. (According to applicants, SP now handles only 20% of 3-to-2 traffic.) Two decades ago, for example, SP was the dominant automotive carrier in the West, with direct service to and from four automobile assembly plants in California. Since then, as a result of the closure of three of these four plants and SP's decline in service. SP has fallen to a very small share (less than 10% in 1994) of the automobile business handled by the western railroads. SP has been unable to make necessary investments in new automobile facilities and auto-handling freight cars. For all of these reasons, we believe that protestants have overstated harm in 3-to-2 markets and that corrective action in 3-to-2 markets is not required. Competition at 2-to-1 Points Not Diminished. UP and SP directly compete for the business of a small number of shippers whose plants have direct access to both railroads. They also compete for the traffic of a larger group of shippers with plants located on the line of one of the two railroads, but who can reach a nearby line of the other through a reciprocal switching arrangement. When no third carrier is present, applicants have designated plants with access to both UP and SP, either directly or through reciprocal switching, as 2-to-1 points, and have granted BMSF access to those plants via trackage rights, as a replacement carrier for SP. Applicants have also agreed to continue to offer reciprocal switching at these plants vis-à-vis BMSF at a charge not to exceed \$130 per car, adjusted upward or downward each year on the basis of 50% of the RCAF, unadjusted for productivity. for productivity. To identify points to be covered by corrective trackage rights, applicants have identified 2-to-1 points as those that can be served directly, or through reciprocal switching, by UP - 121 -

and SP but by no other Class I railroad. Applicants have also identified a category of 2-to-1 corridor flows, where only UP and SP offer competitive alternatives: Houston-New Orleans; Houston-Memphis; Lake Charles/West Lake-New Orleans/Mexico; Texarkans-Memphis; and Shreveport-Memphis. Under the ENSF agreement, ENSF would be given overhead trackage rights over those corridors, but it would only have authority to serve shippers at 2-to-1 points.

Protestants argue that applicants' approach is too restrictive because many shippers benefit from UP-SP competition in ways other than having both of those carriers physically reach their sidings. Protestants argue that other forms of competition--transloading, build-ins or build-outs, close market competition and plant switching, and location of new sites--can all be effective in bringing pressure on each carrier's rates. 125

Protestants argue that the correct measure of competitive impact must center around flows between origin-destination pairs, and they evaluate origin-destination flows by commodity. They also use broader geographic areas than "points" in an attempt to estimate the potential for such options as build-ins and transloading that result from carriers being near each other. They argue that all shippers who have such competitive options before the merger need to be protected with direct access to another carrier.

Protestants use various geographic units to estimate situations where rail carriers are close enough together that loss of one of the two merging carriers should be considered a full 2-to-1 impact. Under this approach, the broader the geographic unit chosen, the greater the likelihood that points applicants treat as 1-to-1 will be identified by protestants as 2-to-1, 3-to-2, or even 4-to-3. This accounts for much of the discrepancy in the parties' estimates of the volume of traffic that will be affected by the merger. Applicants' analysis translates readily into conclusions as to what points trackage rights must serve. In contrast, protestants' analysis leads to differentiation at each point depending on the commodity and origin-destination flow.

Applicants contend that they carefully checked actual accessibility. They added points on shortline railroads reachable by connections to UP and SP, but by no other Class I railroad. Further, they added any point that had what they considered to be a bona fide build-in, build-out, or transload option prior to the merger.

The ultimate eastern origins or destinations for interterritorial traffic are not considered, only the eastern gateways for such traffic.

<sup>129</sup> KCS-33 (Vol. 1), VS Grimm, at 163-180.

KCS studied flows between BEAs, 130 based on a commodity breakdown at the 5-digit STCC level. 131 KCS estimates total revenues for 2-to-1 traffic, based on this broad definition and using the 1994 100% traffic data base, to be \$2.04 billion. DOJ, in its study, uses various broad geographic units depending on the type of commodity to estimate the volume of affected traffic (i.e., BEAs for manufactured products; and 4-digit SPLCs for "low-valued" (per weight unit) freight, for which it alleges that extensive truck hauls to a reload point would not be feasible 133), and excludes all traffic it considers truck competitive for the entire movement from origin to destination based on distance (up to 500 miles for BEA commodities and 100 miles for 4-digit SPLC commodities). Using the 1994 Waybill Sample, DOJ estimates revenues for 2-to-1 markets at \$1.5 billion. NITL's study, using 1994 Waybill Sample data at a 6-digit SPLC level, 133 estimates revenues for 2-to-1 traffic to be \$2.58 billion. Applicants identify \$1,002 million of traffic at 2-to-1 points. 134 Protestants imply that the BNSF trackage rights are inadequate to the extent that they do not serve all shippers that experience some competitive harm, however indirect.

In essence, the problem with protestants' 2-to-1 analysis is that they aggregate traffic that will experience various types of competitive problems that we think are readily susceptible to different types of remedies. Although divestiture of parallel lines could address harms discussed here, there are less intrusive ways and more focused ways of achieving that result, which are adopted here.

We agree with protestants that applicants have not gone far enough in addressing certain adverse competitive effects.

[t]he traffic flows between BEA areas in some instances, such as the Los Angeles BEA, include rail traffic not affected by changes in the levels of competition resulting from the proposed merger. For example, in the Los Angeles BEA, traffic terminated at Needles, CA, on the ATSF would not be affected because it is a point exclusive to ATSF at the present time and, in fact, is near the Arizona border.

## SF/SP. 2 I.C.C.2d at 768.

The ICC has found that BEA-to-BEA rail traffic flows are often far too broad to measure accurately potential merger-related competitive harm:

<sup>&</sup>quot;STCC" refers to the Standard Transportation Commodity Code developed by the Association of American Railroads (AAR) in the early 1960s. This code, adopted for reporting commodity statistics to the ICC, was patterned after the U.S. Government's Standard Industrial Classification Code.

Inexplicably, as noted earlier, Majure uses 6-digit SPLCs to perform his rate study.

of freight stations. By using that level, NITL approximates applicants' standard of seeking points with direct access to UP and SP. Applicants, however, note that NITL did not check actual access.

The number would be \$795 million if applicants were to leave out 2-to-1 traffic solely served by UP or SP at one end of the movement.

Finance Docket No. 32760 Applicants, for example, address the loss of transloading options Applicants, for example, address the loss of transloading options by allowing BNSF to locate transloading centers only at 2-to-1 points. Applicants maintain that truck movements to new BNSF transloading centers at 2-to-1 points or to centers on BNSF's own lines, would be sufficient to ensure that no shipper previously enjoying such options would be hampered by this limitation. But today UP or SP may locate transloading facilities anywhere on their lines to reach shippers on the other carrier. We believe that allowing BNSF or third parties to locate transloading that allowing BNSF or third parties to locate transloading facilities anywhere on the lines where BNSF will receive trackage rights will preserve that competition. The same is true with respect to accommodating build-in or build-out options. If a UP shipper undertakes a build-out option, for example, to reach SP. SP need not subject the shipper to a feasibility test. It can simply negotiate a contract rate with that shipper that goes into effect if the shipper or the carrier that wants to obtain its business actually constructs a connection. Allowing BNSF to do the same is a more appropriate means of rectifying what would otherwise be adverse competitive impacts brought about by loss of build-out options. Shippers of chemicals and plastics that are served by just one railroad have noted that they also benefit from pressure brought on by competitive rates that nearby competing shippers having access to two rail carriers can obtain. These shippers will continue to benefit from ample geographic competition of this type, as we explain elsewhere in this decision. Location of new facilities provides competitive pressure, and this issue was partially resolved in the CMA agreement, as BNSF will be authorized to serve all new shippers that choose to locate on the SP lines over which BNSF is obtaining trackage rights. We will broaden that provision also to permit BNSF to serve new facilities that locate on UP lines over which BNSF has been given trackage rights. With the conditions we are imposing, we find that BNSF will be an effective replacement for SP at these 2-to-1 points and affected 1-to-1 points. Although various protestants have argued that the compensation terms and other conditions of the trackage rights arrangement may not allow BNSF to replace the competition that will be lost when SP is absorbed into UP, those arguments are without merit, as discussed in detail below. Source And Other Indirect Competition Not Impaired. A number of parties (particularly DOJ, DOT, and RCS) note that UP and SP often restrain each other's rates and service levels even and SP often restrain each other's rates and service levels even where the shipper has access to only one rail carrier. This indirect competition can take two forms. First, as discussed in detail above, when UP or SP lines run near the plant of an exclusively served shipper, the ability of that shipper to transload or build out to a second carrier can provide important leverage in rate and service negotiations with the carrier providing direct service to the plant, and the conditions which we are imposing reflect the importance of this arrangement. Second, UP and SP can compete indirectly through source or geographic competition when their exclusively served shippers are transporting relatively homogeneous products. We explain below why the merger will not diminish source competition for the main products for which this issue has been raised: plastic and chemical products moving out of the Gulf area; coal moving out of the (SP-served) Uinta Basin and (UP-served) PRB and Hanna Basin; and for grain and lumber moving throughout the West. - 124 -

plastics and Other Chemicals. Protestants express concern that the merger will permit UP/SP to exercise increased market power over shippers of plastics and other chemicals. We find power over shippers of plastics and other chemicals. We find that, with the addition of Lertain conditions discussed below, these concerns have been shown to be groundless. Applicants studies of Gulf Coast plastic and chemical traffic have shown that source competition will remain powerful, and in some respects will be magnified, following the merger. Applicants exercise any additional market power over shipments of any of shipments will continue to be available to non-UP/SF rail and non-rail transport alternatives.

The settlements that UP/SP have crafted with BMSF and CMA The settlements that UP/SP have crafted with BMSF and CMA will enhance competition for the large number of plastic and chemical shippers whose plants are now served by UP, SP, and no other railroad. Indeed, CMA, which accounts for 90% of the mation's basic industrial chemical productive capacity, has steps taken by applicants to meet the concerns of its

BNSF will now be able to serve every plastic and chemical shipper currently served by UP and SP and no other railroad. For those 2-to-1 shippers, competition will be expanded to the extent that BNSF will provide a more effective alternative than SP has been able to provide at those points. The prospects for BNSF are good because it can provide direct, single-line service to much of the West, and can provide efficient access to major gateways for movements to the rest of North America. Moreover, carriers other than UP/SP, including BNSF, KCS, and IC.

For plants served by a single railroad, source competition can be an effective competitive restraint on rail rates when sources of supply are numerous, cost conditions of alternative alternative sources are similar, delivered products are close substitutes, and the share of transport costs in the delivered price of the product is high. Especially for plastics, as SPI-11 at 14; VS Ruple at 9; and VS Bowles at 2. We note that these factors will continue after the merger. The record shows identical plastic resins in the Gulf region alone. In the delivered costs. The railroads are well aware that, if plastics shippers do not receive transportation rates comparable to those their ability to compete in marketing their products, and the serving carrier will lose traffic.

SPI asserts that UP/SP would have access to 90% of the plastics movements, with a post-merger market share of about 63%. SPI's concern is that the merger would permit UP/SP to dominate the transportation of plastics, but we think that is unlikely to

CM-12 at 4-5.

Capacity, although primarily located in the Gulf Coast, is sufficiently dispersed throughout Texas and Louisiana, so as not to be under the control of any one railroad. Other plants are located in the Midwest, East, and Canada.

Finance Docket No. 32760 occur because many plastics shippers continue to have rail transport options with carriers other than UP or SP, and about transport options with carriers other than UP or SP, and about 15t of the plastics traffic is shipped by truck and intermodal transport. After accounting for the BNSF agreement, UP/SP's exclusive originations will remain less than 40t of plastics production in the Gulf. Even at points where UP/SP is the only serving rail carrier, it will not be able to increase its rates without weighing the possibility that the shipper will lose its business to one of its many nearby competitors served by other carriers. We conclude that there will continue to be sufficient source competition to suppress UP/SP's exercise of additional market power at plants where it is the only rail carrier. Further, applicants explain that most chemical traffic, other than plastics, moves predominately by truck and barge, "" in addition to moving by rail. The preconditions for source competition will continue to be present for these nonplastic

chemicals as well. The customers producing these products are large firms, many of which are multinational, and all of which are sophisticated in effective negotiations with carriers. Continued source competition should preclude the exercise of market power at nonplastic chemical plants served by a single

Despite these facts indicating that effective source competition will continue, merger opponents continue to allege that UP/SP will be able to exercise new-found market power and thus "control" a large portion of the Gulf Coast shipments of plastics and chemicals. Protestants argue that UP/SP will have "control" over large percentages of Gulf Coast plastic and chemical originations. They also argue that the amount of plastic and chemical traffic that will go from 2-to-1 or 3-to-2 is far larger than applicants concede. is far larger than applicants concede.

We agree, however, with applicants' witnesses Barber, Spero, and Peterman that protestants' contentions are flawed because of the continued availability of source competition to prevent the abuse of market power. Moreover, applicants show that protestants have overstated the traffic that will be exclusively served by UP/SP. They show that half of the shipments of any specific plastic or chemical commodity moved in volume would be available to non-UP/SP rail or other non-rail transport alternatives. Protestants originally asserted that UP/SP would control 63% of Gulf Coast originations for plastic resins, but the settlement agreement with CMA will reduce UP/SP exclusive service to less than 40% of production capacity in the Gulf. In addition, any new plants producing these products will be able to receive service from both UP/SP and BMSF, depending on where they locate. locate.

Coal. A number of utilities and some shipper organizations have submitted comments addressing coal issues. These parties primarily argue that the merger will diminish existing source competition among different coal origins served by UP and SP. Most notably; opponents allege that UP/SP will not have the incentive to promote SP's Colorado/Utah coal business, and will suppress that business in order to isvor UP's PRB coal origins. This allegation is also the focus of MEL's responsive application.

<sup>137</sup> UP/SP-23 (Vol. 2), VS Barber, at 487.

The only exception is adipic acid.

But, as explained below, applicants demonstrate that there is little meaningful source competition between UP and SP for coal because each originates coal that typically serves different markets. UP: coal competition is BNSF, not SP.

UP's coal business is based overwhelmingly on movements out of the PRB in Myoming, whereas SP originates coal only out of the Uinta Basin in Colorado and Utah. Those coals are fundamentally distinct in terms of price and physical characteristics. PRB coal is lower-cost, lower-ETU coal that invariably offers a lower delivered cost than Colorado/Utah coal, with the exception of minemouth coal-burning operations or for utilities with significantly shorter rail hauls from the Uinta Basin than the PRB. This means that plants that can burn PRB coal will typically not burn Colorado/Utah coal except if needed for blending purposes or other technical requirements not related to the relative prices of the two coals. On the other hand, those plants (especially in the Midwest and East) that cannot burn lower-BTU PRB coal will instead look to Colorado/Utah coal and other higher-BTU coals in the East and West, and not PRB coal, as their competing alternative sources.

Thus, UP competes intensively, head-to-head, against BNSF for originations of PRB coal, and not against SP movements of higher-priced Colorado/Utah coal movements is with other high-BTU coals, especially from the Appelachian and midwestern coal regions that supply high-BTU coal to eastern and midwestern utilities.

In addition to its heavy volume of PRB priginations, UP also

In addition to its heavy volume of PRB priginations, UP also moves a small amount of coal from the Hanna Basin and other coal regions in Southern Wyoming. The demand for Hanna Basin and other Southern Wyoming coal has declined because, while it is lower in BTU content than the high-BTU coals, it is significantly higher in price than the low-BTU coal of the PRB. Most of the coal opponents do not even mention Hanna Basin coal as a significant competitive factor. Applicants have shown that Hanna Basin coal has deficiencies in both BTU content and price, in a way that makes it largely non-competitive for new coal business.

Once the proper marketplace dynamics are taken into account, it becomes clear that the coal opponents have predicated their opposition to this merger on a fundamentally mistaken premise. Virtually every coal opponent claims that there is extensive, head-to-head competition between UP and SP that will be "extinguished" or "lost" or "destroyed" as a result of the merger. See, e.g., MSC-11 at 1-3, 22; MCTL-11 at 21; MPL-5 at 6. But, drawing on aggregate industry trends as well as plant-by-plant detail, applicants' witnesses Sharp and Sansom show that there is little meaningful competition today between PRS and Colorado/Utah coals.

As a result, we find that there is no substance to the coal opponents' arguments based on a supposed "western coal market." See, e.g., WCTL-11 at 11. Various experts engage in market share or concentration analyses of this "market." But, all of this falls apart once it is recognized that there is no single "western coal market." SP's Colorado and Utah coals are

<sup>139</sup> See, e.g., WPL-5, VS Crowley, at 7-9; WCTL-11, TS Weishaar, at 1.-23. WCTL asserts that three railroads now priginate 96.44 of all rail movements in the western coal market: BNSF (57.74); UP (30.34); and SP (8.44). Others talk about "collusive behavior" or a "duopoly" in this supposed "market." See, e.g., WCTL-11, VS Borts, at 3-16; WPL-5, VS Weishaar, at 15.

Finance Docket No. 32760 competing principally against eastern and midwestern coals, for the business of utilities that need to buy high-BTU coal for at least a portion of their coal burn. Opponents err by defining a "market" for SP's Uinta Basin coal originations that incorrectly includes OP's PRB coal originations and incorrectly excludes originations from high-BTU eastern and midwestern coal regions. This misses the real competition for SP's Colorado/Utah coal business. 146 Many of the coal opponents assert that UP will suppress rather than build SP's Colorado/Utah business, or that UP will lack "incentive" to build upon SP's coal business. For example, MRL asserts: The potential for neglect of Western Bituminous coal transportation initiatives following the UP/SP merger is high. . . . UP/SP would be able to effectively choke off Western Bituminous coal growth in favor of its preferred PRB mines. MRL-10 at 30 and 36. We reject the notion that UP is likely deliberately to undermine and weaken the Colorado/Utah coal business, rather than developing it. We find applicants' claim far more credible: that UP would not ignore a core element of SP's rail franchise, forgoing the benefits that will flow to the merged system from greater efficiencies and operational capabilities. Applicants explain that a central benefit of this merger is market expansion - building on the strengths of the separate railroads by delivering rail services more efficiently than either UP or SP can accomplish separately. UP's PRB business and SP's Colorado/Utah business are complementary. Both businesses can grow at the same time. The coal opponents are simply wrong in claiming that UP would compete against itself." WSC-11 at 42, if it sought to build the Colorado/Utah business. Applicants' witness Nock explains why the Colorado/Utah business is a major new business opportunity for UP. For the first time, UP will have access to extensive originations of first time, UP will have access to extensive originations of high-BTU coal--originations that present new market opportunities for UP in competing against eastern and midwestern high-BTU coals, and in competing for export business. UP states its firm intentions to build the Colorado/Utah coal business aggressively. RVS Nock at 9. Precisely because the merged system will be more efficient and cost-effective, UP/SP plans to expand the market reach for SP's Colorado/Utah business. Single-line access to more destinations, upgrading of key routes, the svailability of Gertain utilities whose coal fired generating plants are served exclusively at destination by UP or SP have requested that we grant trackage rights for a second carrier to serve the plant to make up for any lost source competition between SP-served Uinta Basin mines and UP-served PRB mines. For example, this argument forms the basis for WEPCO's requested relief at its Oak Creek Power Plant. These parties have not met the ICC's standard for relief under these circumstances, which we affirm and apply here. The record must clearly show, first, that prior to the merger the benefits of origin competition flowed through to the utility and were not captured by the destination monopoly carrier, and, second, that the competitive flow through will be significantly curtailed by the merger. See BN/SF, slip op. at - 128 -

Finance Docket No. 32760 shorter routes, and operating efficiencies will all sharpen the competitiveness of Colorado/Utah coal. This directly contradicts the suggestion of various coal opponents that UP will downplay SP's Colorado/Utah business. UP has competed aggressively to build its coal business, not just its PRB coal business, but also its Hanna Basin and other Southern Wyoming coal business. RVS Nock at 5-8. This has included 'backhauls' and 'aggressive pricing.' RVS Sansom at 67-69; RVS Sharp at 56-65. In the aggregate, UP's coal rates have been lower than SP's. RVS Sharp at 58-60; RVS Nock at 18.141 A number of opponents point to the declining presence of Hanna Basin coal as supposed evidence that UP will not pay adequate attention to SP's Colorado/Utah business. But, as noted, Hanna Basin coal has confronted fundamental problems in the marketplace, such as significantly higher cost than PRB coal, but lower quality than Colorado/Utah coal. Applicants' witness Sansom explains why these marketplace dynamics -- and not any inattention by UP -- have caused the relative demise of Hanna Basin coal. UP/SP-230, RVS Sansom, at 12-17. Nock notes that UP has sought for years to build the Hanna Basin business through aggressive rates and other marketing efforts that have not borne fruit. UP/SP-230, RVS Nock, at 7-8. In contrast, Nock's statement addresses the reasons that the merged system will be able to expand SP's Colorado/Utah coal business significantly. Unlike Hanna Basin coal, which has not responded to UP's best efforts. Colorado/Utah coal is wellpositioned to intensify competition against other high-BTU coals, particularly eastern and midwestern coals where Hanna Basin coal has not proven to be competitive. We also find that competition among high-BTU coals will be stimulated by applicants' settlements with the URC and BNSF. Utah producers will gain important new rail access to midwestern and eastern markets, which will add a further stimulus to competition between UP and BNSF. RVS Nock at 18-20. While we have explained why we find little credibility in opponents' claims that UP will deliberately choose to neglect or otherwise degrade SP's Colorado/Utah coal business, we note that opponents' concerns will be monitored through the oversight process. MRL has asserted that, even if there is limited Uinta Basin versus PRB competition for coal movements to utilities' existing versus PRE competition for coal movements to utilities' existing power generating plants, the merger presents a threat to exante source competition for coal. This refers to competition that derives from a utility's ability to choose from among various alternatives while selecting a site for a new plant or rebuilding an existing one. 14 Our assessment is that this argument also lacks merit. As MRL acknowledges, before a utility plant has been sited and designed, competition take; place between coal sources, transportation modes, boiler designs, and individual carriers. Utilities at this stage-before they have sited a plant, chosen a boiler design and coal source, or negotiated with coal mines and transportation firms-will not be competitively harmed because they will retain adequate transportation and coal harmed because they will retain adequate transportation and coal We agree with applicants that the rate comparisons presented by WCTL (WCTL-11, VS Crowley, at 16-19) are not reliable. RVS Sansom at 78-79; 89-91. 142 See MRL-26 at 18. - 129 -

Finance Docker No. 32760 sourcing options. After the merger, shippers will generally be able to site or configure new plant investments in such a way as to take advantage of several transportation options, including several major railroads, barge transport, or some combination of Grain and Lumber. Grain and lumber are among the most important commodities carried by western railroads. Although submissions by states, shipper associations, and community groups allege competitive problems associated with grain and lumber, they afford no comprehensive market analysis and the evidence presented on their behalf is quite limited. Grain and lumber are rail-oriented commodities, especially beyond certain distances, and both are marked by very strong geographic competition.

Shippers of both commodities raise concerns, recapitulated by USDA, about the vulnerability of small, rural shippers and shortline railroads to merger-related rate restructuring and car supply actions of the major railroads. As we will explain, these and other concerns raised by protestants are misplaced here. To begin with, SP now plays only a minor role in grain transportation. We over recent decades the number of primary grain-hauling railroads in the West declined both because of mergers and bankruptcy. Except for areas served by the CP Rail System/Soo Line Railroad Company and KCS, the competitive battleground for western grain has come to be occupied almost entirely by BNSF and UP.

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Montana grain interests and Oregon lumber interests, among others, essentially have complained that they are unable to take advantage of the PRA between UP and BNSF for Pacific Northwest traffic routed over the Portland gateway. This agreement opens California for the first time to single-line competition between UP and BNSF from origins to the north and to the west of Portland -- a remarkably pro-competitive development. As a result of this agreement, shippers in this corridor will now experience more intense geographic competition than before.

Nevertheless. Montana interests claim they are harmed because the BNSF PRA does not extend to the eastern part of Montana. See MMBC-4 at 13. We will not impose a condition just Montana. See MMSC-4 at 13. We will not impose a condition just because one group of shippers obtains pro-competitive merger benefits that other shippers do not enjoy. 145 In any event, to the extent that some shippers benefit by receiving improved competitive options, the more intensive geographic competition that results should keep rates for other shippers in check.

Among the shipper associations concerned with grain are Mountain-Plains Communities & Shippers Coalition, Montana Wheat and Barley Committee, Montana Farmers Union, and Colorado Wheat Administrative Committee. The State of Montana underscored grain issues, while Or/DOT underscored lumber.

According to the AAR's 1995 Annual Summaries of Weekly Railroad Traffic, SP handled only approximately 4% of all western grain carloads in 1995.

<sup>145</sup> See BN/SF, slip op. at 99: "We realize that the SP settlement agreement, by providing increased rail options for [the shipper's] competitors but not for [the shipper], may work to [the shipper's] disadvantage. But that is not the kind of harm that we should rectify under our conditioning power."

Colorado wheat growers' concerns center around abandonment of part of the Dotsero to Towner line. They argue the abandonment is an attempt by applicants to ensure that no one else uses the assets in question. They claim that the current dearth of rail traffic on the line results from poor car service and disadvantageous rates, and argue that farmers expend greater resources driving trucks, especially during critical harvest times, when they are delayed for long periods of time awaiting unloading. But applicants correctly explain that the use of semi-trailers to haul grain long distances, which did not begin in earnest until the late 1980s, now provides effective truck competition directly from farm to market or to terminal points served by several railroads via unit trains. And, if the shippers desire to keep this line open, they can purchase it under 49 U.S.C. 10905 (now 49 U.S.C. 10904).

Arguments by other Kansas growers, and KCS, center on the Wichita to Fort Worth corridor, over which SP, as a result of a voluntary settlement agreement with BNSF in the BN/SF proceeding, gained rights to provide service (which we note are rights that the ICC did not impose as a condition of approval of the BN/SF merger). The current merger would reduce the number of carriers serving that corridor to two, UP/SP and BNSF. Although USDA joins in the request to restore a third carrier to replace SP, it acknowledges SP's minor role in this market so far. "SP uses a shortline operator, SKOL, to exercise the trackage rights, and it is not expected to improve on the service BN provided over this corridor prior to its merger, using a fragile branch line from eastern Kansas. UP/SP-23, VS Peterson, at 219-220. In sum, SP's presence has been minimal here, and the presence of two strong competitors here makes it unnecessary for us to impose a third. ""

The most direct competitive effect of the merger on lumber concerns the aggressive transloading program UP has conducted reaching into SP's southern Oregon area to draw freight to Portland from shippers located on lines served exclusively by SP. 147 Comments of Or/DOT, Mar. 29, 1995, at 13. Because BN also conducts transloading operations directed at SP below Portland, this situation can be regarded as 3-to-2, although BN was less active in this regard. Oregon lumber interests seek to expand the BNSF PRA to open Eugene for lumber traffic flowing east and to open SP-restricted short lines to interchange with BNSF. Id. at 4 (Boise Cascade letter).

The new competitive options that these shippers seek have nothing to do with competitive harm caused by the merger, and

Arguments raised by Kansas wheat growers on the Pueblo-Herington line are similarly without merit.

<sup>147</sup> Comments of USDA, Mar. 29, 1996, at 5.

In any event, as applicants indicate, the relevant wheat market is broader, including such options as barge transportation from Kansas City to the Gulf. Applicants also expect added competition from upgrading of the OKT line and use of combined UP and SP lines in Texas to move heavier-loading cars of wheat for export.

lumber from Pacific Northwest to Chicago running an average of 11.8 days compared with UP's average of 7.5 days, SP's traffic was vulnerable to competitive inroads through transloading. UP/SP-22, VS Gray, at 216.

Finance Docket No. 32760 competition in this market will remain strong after the merger.

Lumber shippers in Oregon are subject to both source competition and destination competition. When Oregon lumber moves to eastern markets it faces competition from Canadian, other Pacific Northwest, and Southeast origins. UP/SP-23, VS Peterson, at 101-102. When Oregon lumber moves south to California, competition from Canadian competition for the porth has been limited because accesses to from origins to the north has been limited because access to California required interline arrangement with SP. The BNSF PRA opens that access, thereby intensifying source competition. From the standpoint of destination competition, an Oregon shipper has the choice of directing lumber either to eastern markets or to California depending on product market conditions and transportation options. These forms of geographic competition were highly effective pre-merger and, with the BNSF PRA, will improve post-merger. TRACRAGE RIGHTS ISSUES AND ALTERNATIVES. parties, most notably Conrail and KCS, have argued that BNSF will face crippling operational obstacles in providing service over these trackage rights. They argue that BNSF's service will be subject to dispatching discrimination by applicants, that it will be hampered by going against the flow of the directional running of certain lines, that BNSF will lack sufficient SIT and other facilities to provide quality service, and that BNSF will lack the traffic density or sufficient incentive to operate these lines competitively. We believe that the CMA settlement agreement and other conditions that we have devised have effectively addressed the objections raised by those parties. The dispatching protocol, additional trackage rights permitting pages to participate in directional trackage rights permitting BNSF to participate in directional running, the availability of additional SIT facilities, and BNSF's ability to access additional traffic now under contract to UP or SP and to obtain transload and build-out traffic combine to ensure that these trackage rights will be a successful remedy. We agree that the landlord's power to control dispatching is an important one, and we might have been reluctant to rely on trackage rights to solve a competitive problem over such a large area without assurances that dispatching would be conducted without discrimination against the tenant carrier. Applicants and BNSF, however, have agreed upon a detailed written trackage rights protocol that should ensure equal treatment of all trains without regard to ownership. Applicants note that the protocol ensures that each railroad can monitor in real time the handling of its trains by the other; stations tenant supervisory employees at the landlord's dispatching center; and, if a dispute arises, provides for dispute resolution procedures, prompt arbitration and sanctions. This protocol, together with our continuing oversight, should ensure that dispatching discrimination does not Concerns raised by KCS, Conrail and others that BNSF service will be going "against the flow" and will be using an inferior route from Houston to St. Louis are now moot due to applicants' agreement to give BMSF additional trackage rights to permit it to take advantage of the same directional running that applicants plan to use on parallel UP and SP lines between these points. Applicants have partially addressed concerns about the sufficiency of BMSF's SIT facilities by making available a large facility pear leavement. The and by agreeing to make other facility near Baytown, TX, and by agreeing to make other facilities available as necessary. We will impose an additional condition, discussed in detail below, requiring applicants to give BNSF access to all facilities formerly used by SP. BNSF also will have its own SIT facilities at Lafayette Yard in Louisiana, and at Cleveland and Silsbee, TX. Further, we note - 132 -

Finance Docket No. 32760 that BNSF has an outstanding rail network in the West, which fits very well with the additional service it will provide under these trackage rights. BNSF should be able to provide the necessary infrastructure to provide quality service--terminals, repair facilities, and information systems--at a reasonable cost. Several parties have argued that BMSF will not be able to achieve sufficient traffic density to make these operations efficient, in part, because BMSF is only obtaining authority to serve 2-to-1 points, which, as we have explained, provide only a fraction of the total traffic on these lines. Despite this limitation, however, applicants have demonstrated that BNSF will be in a position to compete for a substantial amount of traffic, and BNSF has corroborated this. Overall, the BNSF agreement will permit BNSF to compete for \$1.9 billion worth of traffic, much of which is unrelated to the particular competitive problems at issue. Of this total, BNSF will be able to compete for \$795 million of traffic at points applicants identify as 2-to-1. Given all of the protections set forth in the BMSF agreement (particularly the terms of the CMA agreement) and the additional conditions we are imposing, we believe that BMSF will be able to compete efficiently for this traffic. The As discussed the terms of the protection of the BMSF agreement (particularly agreement) and the BMSF agreement (particularly agreement) and the additional conditions are protection of the BMSF agreement (particularly agreement) and the additional conditions we are imposing the protections are protected agreement. compete efficiently for this traffic. As discussed, elsewhere, some of these additional conditions expand the terms of the CMA agreement. For example, the CMA agreement requires applicants to open at least 50% of existing contract volume at 2-to-1 points in Texas and Louisiana to BNSF, and we will require that UP/SP similarly open at least 50% of existing contract volume at all other 2-to-1 points served by BNSF's trackage rights. Likewise, we are expanding the new facilities and transloading provisions. Even without our new conditions, applicants estimate that BNSF will be able to compete for nearly three-fourths of the 2-to-1 traffic now, and nine-tenths of it three-fourths of the 2-to-1 traffic now, and nine-tenths of it within a year of consummation. UP/SP-231, RVS Peterson, at 191-94 . As applicants note, BMSF has no sunk cost in these lines. and will share in the cost only to the extent of its usage. In this regard, the structure of the trackage rights fees is this regard, the structure of the trackage rights rees is advantageous to a carrier attempting to gain a foothold in a new market. Also, where BMSF is replacing service formerly provided by UP or SP via reciprocal switching, it will only have to pay \$130 per switch, or, if it prefers, it can provide the switching service itself. We conclude that all of these factors taken together should result in BMSF having sufficient traffic to make these operations run efficiently. Many protestants have claimed that BNSF is generally unwilling or otherwise uninterested in providing all the service contemplated in the trackage rights arrangement. BNSF's counsel addressed this issue at oral argument, saying that "we also want to assure you that BN/Santa Fe is willing, able, and anxious to compete for this traffic to which it will gain access under these rights." Jones, Oral Arg. TR at 99. BNSF's counsel also explained that: [W] e put in substantial evidence showing that we think the densities are sufficient to permit the building of 130 Conrail's attempt to use the ALK diversion model to prove that BMSF will not have adequate traffic density is inherently flawed. Conrail applied an arbitrary penalty to traffic moving under trackage rights, which naturally resulted in less traffic being shown as divertible to BMSF. That study can be given no weight here. - 133 -

Finance Docket No. 32760 trains that will meet the customers' needs . . operating problems are actually quite manageable, and we are confident that we can compete for this traffic and that we can do so with very strong, vigorous competition. Id. at 106. We agree with BMSF that it should have sufficient traffic for efficient operations and that it should have every incentive to take advantage of this new opportunity. Nevertheless, as parties such as DOJ, DOT, and RCT<sup>MA</sup> have pointed out, because so much depends upon BMSF's performance, we are imposing special conditions directed to this issue. As an initial matter, we expect BMSF to compete vigorously for the traffic opened up to it in this proceeding. Indeed, we will impose upon BMSF a common carrier obligation with respect to this traffic, including traffic that is handled under haulage rights rather than trackage rights. Various parties have expressed concerns that BMSF may not immediately commence the trackage rights operations at issue. There are some indications that a start-up of all of these trackage rights operations on the date of consummation may not be physically possible. Nonetheless, we expect that as soon as reasonably practicable ENSF will begin trackage rights operations over the key corridors between Houston and New Orleans, between Houston and Memphis, and in the Central Corridor. A failure to conduct trackage rights operations in these corridors could result in termination of BMSF's trackage rights, and substitution of another carrier, or in divestiture. BMSF will be required to submit a report on its progress in meeting these requirements and an operating plan on or before October 1, 1996, and further progress reports on a quarterly basis thereafter. DOJ has predicted that our course of imposing trackage rights with monitoring rather than requiring divestiture will involve the Board deeply in further regulation of this matter. We are confident, however, that this will not be the case, and we are imposing these monitoring conditions to ensure that the conditions we are imposing to address competitive harm do so effectively. Moreover, as discussed elsewhere in our decision, divestiture certainly would involve the Board and the parties in further extensive regulatory proceedings. We have examined the various major corridors over which BMSF will be providing service as a replacement for SP. As noted below, the operations that BNSF will undertake appear reasonable to meet its common carrier obligations. It also appears that BNSF should be able to attract sufficient traffic to provide efficient operations. Houston to New Orleans. In the Houston-New Orleans corridor, BMSF plans to operate by exercising its option to acquire from applicants the line between lows Junction and 161 RCT's representative noted at oral argument that "[i]f BNSF fails to seriously and immediately compete on any of these trackage routes in Texas, damaging loss of competition will result. Williamson, Oral Arg. TR at 464. - 134 -

Finance Docket No. 32760 Avondale, LA, 183 and by using trackage rights between Iowa Junction and Houston and within the New Orleans Terminal. intends to provide new service for overhead expedited traffic, as well as for manifest traffic originating and terminating on the acquired segments. BNSF proposes to schedule and operate eight regular trains (four in each direction). One intermodal train pair will operate between California and New Orleans, accessing BNSF's newly acquired route near Beaumont. BNSF also will extend to New Orleans its existing train service that now terminates at Houston. One daily manifest train pair will be scheduled between Temple, TX, and New Orleans handling through California traffic in both directions and bypassing the Houston terminal by using BNSF's Conroe Subdivision. This train also will connect with other trains handling Intermountain and Pacific Morthwest traffic via the Fort Worth, TX, gateway. BNSF's new route between New Orleans and West Coast locations, of which the New Orleans to Houston segment will be a vital link, will provide service that is competitive with the routes of UP/SP. In addition, these through trains will provide a significant benefit by enabling traffic originating or terminating at numerous points in Texas to receive this competitive service alternative. A second manifest train will operate between Houston and New Orleans, allowing interchange of South Texas/Mexican traffic at Houston. In addition, BNSF will handle traffic to and from Houston. In addition, BMSF will handle traffic to and from Lafayette, LA, and other intermediate points. Extra manifest and unit trains will be operated as needed, including trains that will be assembled at BMSF's yards at Temple and Teague, TX. RCT and other parties, relying on analysis by Crowley, allege that BMSF will be unable to attract sufficient traffic for efficient operations in the Houston/Gulf Coast area. Those computations ignore BMSF's current traffic base in the region. Where BMSF has had access to plastic and chemical shippers in the Houston region, it has been able to develop a 50t share of this business. BM/SF-54, VS Rose, at 4. But BMSF has been limited in its absence of direct and efficient routes to key interchange points with the eastern railroads. With the trackage rights and points with the eastern railroads. With the trackage rights and purchase agreements included as part of this merger, EMSF now possesses the necessary direct routes to the eastern connections to allow it to be competitive for an even larger share of this market. Overall, the operations contemplated by EMSF should be sufficient to meet the needs of the shippers it will be serving in this corridor. Houston to Memphis/St. Louis. BMSF will operate trackage rights over the Houston to Memphis/St. Louis route. The CMA agreement permitted two major improvements in BMSF's operations by allowing for BMSF trackage rights over applicants' lines between Houston and East St. Louis, and by permitting BMSF trains to operate along the same directional lines as applicants' In UP/SP-266, applicants indicate that SMSP has concerns about this line it will purchase, and that applicants and BMSP will inspect the line prior to the closing of the sale and, if necessary, place \$10.5 million of the purchase price in escrow pending arbitration regarding the condition of the line. The funds will be used to improve the line, if necessary, to bring it into compliance. UP/SP-266 at 7. - 135 -

Finance Docket No. 32760 trains. 164 Thus, BMSF will be able to route its northbound trains over the UP lines, and its southbound trains over the SP lines. 155 BNSF plans to run four trains daily (two in each direction) between Houston and Memphis/St. Louis. One pair would be scheduled between St. Louis and Houston for carload traffic. A second train pair would operate between Memphis and Houston for that traffic. These trains would connect with existing UNSF service at intermediate points such as Cleveland, TX, and Tenaha, TX, and to new service at Pine Bluff, AR. Crowley (for NITL and other protestants) calculates that BMSF will have a market share of only 17.3% of the traffic at the 2-to-1 points that it will serve in this corridor, which we 2-to-1 points that it will serve in this corridor, which we believe grossly understates the traffic that EMSF will attract. Crowley's calculation is based upon the unsupported and erroneous assumption that all traffic that originates and terminates on the new UP/SP merged system is simply "unavailable" to EMSF. Consequently, Crowley eliminates from consideration over two-thirds of the traffic at these 2-to-1 points. There is no reason for us to think that EMSF is going to be able only to compete for less than a third of the available traffic, when it has a route structure in the West comparable to UP/SP's, and when it has improved and comparable routings for connections to eastern railroads. Where EMSF has had access to markets in the Gulf railroads. Where BNSF has had access to markets in the Gulf region, it has been able to carve out a significant share of the available traffic, and we think that it will continue to do so under the broad trackage rights granted here. Evidence of the importance placed by shippers on the quality of service in selecting a railroad is offered by IPC. IPC-10, VS McHugh, at 11-14. IPC states that reliability of service is equal to, if not more important than, the rate. Elements of service such as percentage of freight cars rejected for loading, provision of adequate freight cars, and variances from promised delivery dates are used by shippers to evaluate the quality of a railroad's service. The trackage rights and routes opened to BNSF will permit that carrier to provide quality service competition in these markets. IPC has raised concerns that trains carrying its products would have to travel over an extremely circuitous route due to the directional running of the Houston-Memphis lines. This is incorrect. BNSF will have access to IPC at Camden and Pine Bluff through haulage agreements with applicants, permitting efficient movement of northbound BNSF traffic from these points to North Originally, the BNSF settlement agreement provided that BNSF would operate all of its trains on the SP line between Fair Oaks, AR, and Houston. This arrangement would have caused northbound BNSF trains to meet applicants' southbound flow of 23 daily trains, which would have caused substantial delays to BNSF traffic. Extending BNSF's trackage rights from Memphis to East St. Louis has eased concerns of certain protestants over ensuring BNSF an efficient connection with Conrail at St. Louis. Memphis, BMSF will shorten that route by 462 miles, and its route between Houston and St. Louis by 125 miles. BM/SF-1, VS Owen, at 19. - 136 -

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Little Rock for placement in BNSF trains for movements to eastern connections as well as to other points on the BNSF system. 154

Houston to Brownsville. BNSF will operate its Houston to Brownsville trackage rights to maintain competitive service to important stations such as Corpus Christi, Harlingen, and Brownsville, including interchange with Mexican carriers at Brownsville and interchange at Robstown with Tex Mex, for Mexican traffic via the Laredo gateway.

BNSF proposes to operate one through train daily between Houston and Robstown with a run-through block of Mexican traffic via Laredo, and a block of traffic to and from Corpus Christi. To effect efficient interchange with Tex Mex. a new connection will be required at Robstown. For traffic between Houston and Brownsville, BNSF will initially move traffic via haulage rights on UP/SP trains as provided for in the BNSF agreement.

KCS and Tex Max have alleged that BNSF is uninterested in, or will be incapable of, providing competitive interline service for movements into Mexico over the Laredo gateway. Laredo is the principal rail gateway between the United States and Mexico. In 1994, 55% of the total U.S.-Mexican rail tonnage moved through Laredo. This is due to its superior infrastructure, especially customs inspection facilities, and its location on the shortest route between many U.S. and Mexican origins and destinations.

Significant volumes of grain and other agricultural products, minerals, woodpulp, paper products, automobiles and auto parts, and other metals all move through the Laredo gateway. Much of this is bulk traffic moving long distances, and thus dependent on rail for competitive transport options.

Laredo is served directly by UP and by Tex Mex, a small railroad operator originally chartered in 1875. Tex Mex's 157-mile line runs from Laredo to Corpus Christi, where it connects with SP. 188 Tex Mex and SP together now provide the only competition to UP for traffic moving through Laredo. While UP has recently been carrying more than 75t of the Laredo traffic, the record shows that Tex Mex's presence has been effective in constraining UP's rates and service through this important international gateway.

see, generally, UP/SP-266.

As applicants explained at oral argument, this traffic would move promptly to North Little Rock in local trains. Roach, Oral Arg. TR at 74. The record shows that the routes between Camden and Pine Bluff and between Pine Bluff and North Little Rock are both in good condition, both have centralized traffic control, and both have ample sidings that will allow for efficient and timely movements for this shipper even in the face of train neets from the predominantly southbound traffic flow.

Tex Mex states that the seven other gateways are at Calexico, Naco, Nogales, El Paso, Presidio, Eagle Pass, and Brownsville. Brownsville, Eagle Pass, and El Paso together handled over 40% of 1994 U.S.-Mexican rail tonnage.

According to Tex Mex, almost three-quarters of its traffic in 1994 was bridge traffic (26,240 carloads) between points in the U.S. and Mexico handled through its connection with SP, and the remainder was derived from service provided to more than 30 shippers located on its line.

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One element of the BNSF agreement is to preserve the competition to UP now offered by the Tex Mex/SP connection at Corpus Christi. BNSF's trackage and haulage rights over the UP line running from Houston to Brownsville will permit BMSF to serve all 2-to-1 points along that line, including a connection with Tex Mex near Corpus Christi (at Robstown).

While we have some reservations about BMSF's willingness and ability to attract sufficient traffic over the Laredo gateway, we have remedied this problem by giving Tex Mex trackage rights to permit it to gain additional traffic, as discussed below.

Houston to San Antonio/Eagle Page. The BMSF agreement provides BMSF with trackage rights over UP's line between Waco and Smithville, TX (with a connection to the GTRR at Kerr, TX), confecting at Smithville with trackage rights over UP's line between Sealy and San Antonio. This upgrades BMSF's access to Eagle Page, which has been via haulage rights on the SP route from San Antonio, obtained in a settlement in the BM/SF merger.

BNSF proposes to operate four through trains daily (two in each direction) in this corridor. One expedited train pair would be scheduled between Kansas City, MO, and Eagle Pass using trackage rights south of Temple, TX, handling traffic to and from San Antonio. A second train pair would be scheduled to operate between Houston and San Antonio carrying Eagle Pass traffic to connect with the Kansas City-Eagle Pass train at Smithville (or at an alternate location between Smithville and San Antonio). Unit trains, including GTRR aggregate trains and Lower Colorado River Authority (LCRA) coal trains would operate also over these lines as traffic develops.

Overall, this operating proposal appears reasonable, although some concerns have been raised about whether there will be sufficient traffic density to allow efficient service. This depends largely on whether shippers will be willing to use a Mexican gateway other than Laredo or Brownsville to move significant volumes of Mexican import/export traffic.

Central Corridor. Several parties have expressed concerns about the competitive effectiveness of BMSF service under the BMSF agreement over the Central Corridor. They argue that BMSF will lack the incentive to provide effective competition, and will not have sufficient traffic density to provide efficient service over this line. Specifically, these parties argue that, because BMSF already has its own transcontinental routes (the Northern and Southern Corridors) BMSF will lack the incentive to provide vigorous competition with UP/SP in the Central Corridor. They also contend that BMSF's route will be an inferior one. None of these arguments has merit. As we will explain, the BMSF agreement makes possible a very efficient and much improved route for BMSF, and with the additional conditions that we are imposing, BMSF should have more than enough traffic to provide efficient service.

Although BNSF does have other transcontinental routes, this new route will provide it important new efficiency advantages. BNSF's new route, the well-maintained Amtrak route from Chicago to Oakland, will be substantially better than the SP route it replaces. It includes: (1) BNSF's high-speed mainline from Chicago to Denver; (2) the SP (DRGW) Moffat Tunnel route through the Rockies, which is much faster than SP's Tennessee Pass route; and (3) the most direct route from Salt Lake City to Oakland. BNSF will eas\_ly improve on SP's current transit times, while providing essential competitive service to intermediate points such as URC coal interchanges, Provo. Salt Lake City, and Reno.

Despite these efficiencies, Crowley argues that BNSF will move only 29,699 loaded cars a year, enough to justify only 1.08 loaded trains per day. We believe, however, that BNSF's estimate of 90,619 loaded cars a year and two to five through trains per day is more accurate. As BNSF explains, its traffic will be made up of several different components, including traffic at 2-to-1 points, existing BNSF traffic that will be shifted to improved routings made possible by the trackage rights segments, and new overhead business made possible by these routes as well. Applicants point out that Crowley's diversion estimates exclude substantial amounts of 2-to-1 traffic that will in fact be available to BNSF, while ignoring new traffic opportunities made possible by these new routes or BNSF's recent merger.

A basic deficiency in Crowley's study is that he treated much of applicants' existing traffic as captive and not available to BNSF, even though it moves to competitive points. Applicants explain that Crowley fails to adjust for the fact that the Maybill Sample reflects certain traffic to be originated or terminated by UP or SP when it was actually rebilled over a gateway or moving to a transit point. Applicants note that BNSF will be able to compete for all of this traffic. 150

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Applicants correctly note that Crowley failed to consider BNSF's opportunities to capture traffic that moves to or from points that both BNSF and UP or SP serve today. Protestants also left out large volumes of Chicago-Bsy Area conventional intermodal traffic that BNSF will handle over its Denver-Oakland rights (BNSF already runs two trains per day of this traffic from Chicago to Denver, and will extend those trains to Oakland).

Protestants also understate the effects of BNSF's rerouting and new marketing opportunities. Crowley predicts only 2,864 loaded cars per year, but applicants' estimate of 6,676 seems more plausible. BNSF also will be able to compete for \$994 million of new traffic. 161

Some of the biggest movements originating and terminating at 2-to-1 points in the Central Corridor involve traffic where eastern and western carriers separately bill their customers. Because the Waybill Sample divides these movements, Crowley mistakenly reflects these highly competitive movements to and from the Northeast as originated or terminated by UP and SP at gateways such as Chicago, and not divertible to BMSF.

traffic flows to and from Omaha, Denver, and the Twin Cities, and for Western Nebraska grain, and South Dakota bentonite. BNSF will save substantial mileage on movements of forest products from Morthern California and Southern Oregon to the Midwest, on movements of beer from its exclusively served Coors facility in Golden, CO, to California distributors, and for movements of wine from Modesto to the Twin Cities. BNSF will save approximately 350 miles for numerous Morthern California movements to and from Colorado and nearby states now moving via BNSF's Southern Corridor mainline.

This includes Nebraska grain moving to feedlots in California: South Dakota and Wyoming bentonite moving to the West Coast: Southern California-New Orleans intermodal traffic and intermodal traffic moving between points like Omaha or the Twin Cities and Morthern California. For example, UP grain marketing personnel projected that BMSF would be able to ship 1,500 cars per year of Nebraska grain to Central California receivers. BMSF (continued...)

In sum, BNSF will gain a very efficient and much improved route in the Central Corridor and, along with conditions we are imposing, should have the incentive to compete vigorously with UP/SP. Moreover, BNSF's operations should have sufficient density to permit effective competition in the Central Corridor. Protestants have vastly understated the traffic for which BNSF will be able to compete, and have overlooked BNSF's ability to integrate the new routes into its existing system. A realistic view of the markets at issue makes it apparent that BNSF will be able to bid for more than enough traffic to justify aggressive operations in the new corridors to which the BNSF agreement would give it access. Finally, the 5-year annual oversight by the Board will provide an orderly mechanism for shippers to raise any concerns.

Trackage Rights Compensation Is Reasonable. Numerous protestants have argued that the trackage rights compensation to be paid by BNSF to UP/SP is too high to allow BNSF effectively to replace the competition that will be lost at 2-to-1 points after SP is absorbed into UP. After thoroughly examining these rates, we find that applicants' fees of 3.0 to 3.1 mills<sup>162</sup> per gross ton-mile are well within a reasonable level. 163 DOJ's argument that the compensation should be restructured so that part of it is paid by BNSF as a capital contribution, rather than a return on value, is also without merit.

The Level of the Payments. We will not disapprove trackage rights agreements negotiated in the merger settlement context unless their terms are shown to be unreasonable. Where compensation terms are seriously challenged, as here, we will examine them in light of the principles in SSW Compensation. Trackage rights fees set under that method have included three components: (1) the variable costs to the landlord resulting from the tenant's use of the track; (2) a portion of the maintenance and operating costs on the relevant rail properties based on usage; and (3) a return element on the value of the rail properties based on usage. We have thoroughly examined the trackage rights compensation levels challinged here, and we conclude that, because the agreed levels are lower than we would set under SSW Compensation, they are reasonable.

has numerous grain unit-train loading sites in Nebraska, often near UP's lines. Given that all grain is trucked to rail loading points, and at destination is trucked from unloading points to poultry feedlots, UP projected that BNSF will be able to develop a presence in this market, even though the 1994 Waybill Sample shows similar grain movements as moving between exclusively-served UP/SP points at both ends.

A fee of 3.48 mills will apply to one high-maintenance cost segment between Keddie/Stockton and Richmond, CA, for intermodal and carload traffic.

Under new 49 U.S.C. 11324(c), the Board is required to approve the operating terms and level of compensation for trackage rights imposed in the merger context. Although that post-application statutory amendment is not technically applicable here, it would not change the outcome because the operating terms and fees here are clearly reasonable.

As a threshold matter, Crowley argues that a trackage rights tenant should not have to pay any return element on the rail property used, but should be charged no more than the landlord's "below the wheel" variable costs. He calculates this level to be 1.48 mills per gross ton-mile. We will adhere to the ICC's consistent position in <u>SSW Compensation</u>, which has been affirmed by the D.C. Circuit Court of Appeals, that trackage rights fees will allow landlord and tenant to compete on an equal basis only where the tenant is allocated an appropriate share, based on usage, of the total costs. <u>See</u>, <u>R.G.</u>, <u>RM/Santa Fe</u>, slip op. at 90-91.

Recognizing that our well-established standards require inclusion of a return element based on market value, Crowley also develops a fee of 1.8 mills per gross ton-mile based on the fair market value of SP's roadway assets. Although Crowley's method is similar to our capitalized earnings method, there are several significant errors in his approach that make his calculation totally unreliable. Because there is no recent purchase price to establish UP's market value, he has used the purchase price of SP alone to calculate a value for both UP's and SP's lines. But this significantly understates the value of the investment base because a substantial portion of the trackage rights at issue run over UP's lines. Which tend to be in much better-maintained condition, and of higher value, than SP's lines. Next, Crowley computes the present value of the track investment base as depreciated to zero over 32 years. This too understates the real costs because UP/SP will be required constantly to replace capital as its lines deteriorate. Finally, Crowley uses the wrong interest rate, an after-tax cost of capital, despite the fact that the ICC consistently found that the pre-tax cost of capital should be used to reflect the cost of income taxes. These errors result in a substantial understatement of the investment base, and thus of the return element.

Applicants demonstrate that, if Crowley's errors (other than his use of just SP property) were corrected, the capitalized earnings method would yield a rate of 3.84 mills per gross ton-mile. This includes a return element of 2.40 mills per gross ton-mile, which would be the correct number if all the properties were the less expensive SP properties, rather than a mix of SP and UP properties. Applicants correctly use URCS to develop UP/SP's system average operating and maintenance costs, which they calculate to be 1.44 mills per gross ton-mile. This would yield total compensation of 3.84 mills (2.40 mills + 1.44

Although for convenience we will refer to Crowley's testimumy on behalf of WCTL, our discussion responds to comments he has submitted on behalf of numerous parties.

Crowley's computation of the operating and maintenance cost portion of the formula is also wrong because Crowley includes only the tenant's share of the <u>variable</u> portion of operating and maintenance costs rather than its share of those full costs.

Under the original BMSF agreement, BMSF would operate over approximately 1.727 miles of trackage rights over UP lines, and 2.241 miles over SP lines.

URCS costs will understate the actual maintenance expenses UP/SP will incur on the SP lines. Because URCS is derived from historical costs for 1990 through 1994, it reflects the relatively lower maintenance activity by SP.

Finance Docket No. 32760 mills) per gross ton-mile, which is substantially higher than the 1.8 mills Crowley developed, and, more importantly, much higher than the 3.0 to 3.1 mills per gross ton-mile that BNSF has agreed to pay. 160 In addition, UP/SP has agreed to allow BMSF an option to elect to use, a formula under which BMSF would pay a share, based on usage, of UP/SP's actual total maintenance and operating expenses, taxes, and an interest rental based on depreciated book value of the segment used times the current pre-tax cost of capital. That alternative approach, which is similar to SSM Company to the tenant may result in Compensation, though more generous to the tenant, may result in even lower fees to BMSF. The availability of this option provides additional assurance that the fees are not unreasonably high, and that they will permit BMSF to compete effectively. 170 Structure of the Payments. DOJ again argues, as it did in BN/SF, that, because the fees are 100t variable, BNSF will be constrained in its ability to compete with UP/SP. DOJ claims BNSF are excessive when compared to those in other agreements between UP and SP. We agree with applicants that none of these agreements is comparable. See UP/SP 231, RVS Rebensdorf, at 14-30. For example, one of the compared agreements required a capital contribution by the tenant, which this one does not. Others pertained to switching and terminal operations and industrial spurs, operations generally unlike those at issue here. Applicants' witness Kauders also demonstrates that total compensation per gross ton-mile would be 8.32 mills under the annuity method and 9.05 mills under the replacement cost new less depreciation method, the two alternatives to capitalized earnings under the SSW Compensation standard that are used when fair market value is not available. Applicants have also improved the method by which the charges are updated each year. Originally, the index was to be 70% of the RCAF, unadjusted for productivity. Certain protestants wanted to use the RCAF, adjusted for productivity. UP/SP has agreed to use actual maintenance related expenses, rather than using an index at all. This reflects costs more accurately. switching charges at certain origin or destination points for Spserved shippers. But the number of situations where switching is
required will not increase, and may decrease. Moreover, SP's
level of reciprocal switching charges will fall significantly.
Amendments to the operating agreements now allow BMSF to select:
(1) switching by UP at a maximum switching charge of \$130
(reduced from approximately \$495) at both 2-to-1 points and non2-to-1 points; or (2) direct service by BMSF, or a third party
with UP/SP's concurrence. KCS also argues that BMSF's costs should be increased by 77% for "additional charges" it assumes will be assessed by UP/SP, but applicants have shown that there will be no additional charges to BMSF other than those specified in the BMSF agreement. We note that these charges pertain to the first of the three components of trackage rights fees discussed in <u>SSM Componentation</u>. 171 DOT and MRL also raise this argument, although to a lesser extent. - 142 -

Finance Docket No. 32760 that competition will force rates down to variable cost levels, and that, because UP/SP's variable cos s will always be much lower than BNSF's, it will always be able to offer lower rates and obtain all of the traffic. DOJ's argument reflects a basic misunderstanding of the relative importance of trackage rights feer in BNSF's overall cost of service, and of rail pricing in As the ICC explained in rejecting DOJ's approach in BN/SF. slip op. at 90-91: Placing the tenant in the same economic position as the landlord suggests that it might be appropriate to break up the rental charge into similar constant and variable components, or to ask the tenant to make a lump sum contribution to capital. But potential tenants may have difficulty in making such capital contributions, and a 100% variable rental charge reduces risks for the tenant railroad, which may not have experience participating in that market . . . . As is true of any investment, no prospective trackage rights tenant would agree to make a contral contribution unless it believed it could recover that cost through the rates it charges to shippers on that line. No railroad would invest in rail properties, through trackage rights or through purchase of divested rail lines, if it anticipated revenue that only covered its variable costs. 172 Only by pricing above their variable (or marginal) costs can railroads recover all their costs and achieve adequate revenues. 173

The only markets in which railroads tend to price their services down to their total variable costs are those where motor carriage is extremely competitive. Those markets are not of concern in the rail merger context because rail competition is relatively unimportant in such markets in comparison to the overall competitive picture. And because railroads need to return their joint and common costs to replace their road bed and track structure as these items deteriorate, they cannot long continue to provide service in such markets. The issue of how the fees are structured is ultimately a red herring because railroads generally must price significantly above their variable costs in order to return their joint and common costs and continue to compete.

Even if we were to assume that variable cost is the only relevant cost for rail ratemaking purposes, protestants still have not shown that BNSF would be at a disadvantage here. Protestants compare BNSF's trackage rights fee with the lower "below the wheel" variable costs that UP/SP will experience, and they argue this proves BNSF will have a substantial variable cost disadvantage. This comparison is extremely misleading because the costs protestants focus on are just a small portion of the total variable costs that BNSF will experience for any particular movement. Overall, BMSF's variable costs are likely to be lower

Railroading exhibits economies of scale, scope, and density that lead to declining average cost levels, so that costs attributable to any movement are below average costs,

<sup>173</sup> See, generally, Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 526-528 (1985), aff'd sub nom, Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3rd Cir. 1987).

than were SP's, and certainly low enough to allow it to compete effectively with UP/SP. 174

Couditions Imposed. Criteria for Imposing Conditions. The various conditions requested by parties involve the exercise of our conditioning power under section 11344(c) as part of any approval of the application. 178 Section 11344(c) gives us broad authority to impose conditions governing railroad consolidations. Because conditions generally tend to reduce the benefits of a

consolidation, they will be imposed only where certain criteria are met. UP/MKT, 4 I.C.C.2d at 437.

operationally feasible, and produce net public benefits. We are also disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects. See, e.g., SF/SP, 2 I.C.C.2d at 827, 3 I.C.C.2d at 928; and UP/MKT, 4 I.C.C.2d at 437.

The "below the wheel" variable costs included in the trackage rights fees relate only to the expense of ownership and maintenance of running track and structures. These costs account, on average, for only about 17% of the total variable costs of western railroads. Thus, at most, a small component of BNSF's total variable costs will be higher than SP's for the trackage rights portion of a given movement. But BNSF is a very efficient carrier, and its remaining variable costs of operating its trains over the trackage rights segment should be lower than SP's comparable costs.

Moreover, BNSF will be operating over its own lines for a substantial portion of any given movement from origin to destination, and for that portion of the movement, trackage rights fees are irrelevant. For those portions of the movements, BNSF's variable costs will also tend to be lower than were SP's. We conclude that, even if we viewed this issue from the perspective of variable costs alone, BNSF would likely be in a better position to compete than was SP. See UP/SP-260 at 26-27.

DOJ asserts that applicants' focus on a comparison of ENSF's and SP's total operating costs is misplaced, claiming:

In effect, Applicants argue that the Board may impose a tax --in the form of higher trackage rights fees than necessary to reimburse the landlord for the trackage costs-on any replacement railroad whose current operating costs are lower than SP's current operating costs.

DOJ-14 at 31. "Imposing a tax" is an odd phrase to use to describe a compensation arrangement that has been mutually agreed to by applicants and BMSF, and which we have found to be lower than the compensation we would have set if the parties had not come to an agreement. This beneficial arrangement can hardly be called a tax on BMSF's efficiency.

<sup>176</sup> The responsive applications filed by CMTA, MRL, Entergy. Tex Mex, WEPCO, and MCC's rail affiliates are not independent applications.

Finance Docket No. 32760 A condition must address an effect of the transaction. We will not impose conditions "to ameliorate longstanding problems which were not created by the merger," nor will we impose conditions that "are in no way related either directly or indirectly to the involved merger." <u>Burlington Northern. Inc.--Control & Merger--St. L.</u>, 360 I.C.C. 788, 952 (footnote omitted) (BN/Frisco); see also <u>UP/CNW</u>, slip op. at 97. While showing that a condition addresses adverse effects of the transaction is necessary to gain our approval for imposition of a condition, it is by no means sufficient. The condition must also be narrowly tailored to remedy those effects. He will not ordinarily impose a condition that would put its proponent in a better position than it occupied before the consolidation. See DP/CNW, slip. op. at 97; Milwaukee--Reorganization--Acquisition by GTC, 2 I.C.C.2d 427, 455 (1985) (Soo/Milwaukee II).176 RNSF agreement. For many shippers throughout the West, the various rights provided for in the BNSF agreement will ameliorate the competitive harms that would be generated by an unconditioned merger. We therefore impose as a condition the terms of the BNSF agreement, by which we mean the agreement dated September 25, 1995, as modified by the supplemental agreement dated. November 18, 1995, and as further modified by the second supplemental agreement dated June 27, 1996.17 CMA agreement. Although applicants have not asked that approval of the merger be made subject to the CMA agreement, because we find that the CMA agreement is largely tied to the BNSF agreement and its provisions are necessary to ameliorate competitive harm, we impose as a condition the terms of the CMA agreement. Many of the pro-competitive provisions of the CMA agreement require amendments to the BNSF agreement, and are reflected in the second supplemental agreement dated June 27th; other such provisions do not require amendments to the BNSF agreement. Broad-based Conditions. As we have previously discussed, we are imposing a number of broad-based conditions that augment the BNSF agreement to help ensure that the BNSF trackage rights will allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP. New facilities and transloading facilities. The BNSF agreement, as amended by the CMA agreement, grants BMSF the right to serve any new facilities located post-merger on any SP-owned 176 If, for example, the harm to be remedied consists of the loss of a rail option, any conditions should be confined to restoring that option rather than creating new ones. See Soo/Milwaukee II, 2 I.C.C.2d at 455; UP/MP/WP, 366 I.C.C. at 564. Moreover, conditions are not warranted to offset competitors' revenue losses. BN/Frisco, 360 I.C.C. at 951. 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). - 145 -

Finance Docket No. 32760 line over which BNSF receives trackage rights in the BNSF agreement. The BNSF agreement further provides, however, that the term "new facilities" does not include expansions of or additions to existing facilities or load-outs or transload facilities. We require as a condition that this provision be modified in two respects: first, by requiring that BNSF he granted the right to serve new facilities on both SP-owned and UP-owned track over which BNSF will receive trackage rights; second, by requiring that the term "new facilities" shall include transload facilities, including those owned or operated by BNSF. <u>Build-in/build-out options</u>. The CMA agreement provides a post-merger procedure by which a CMA member can raise a claim that the merger deprived it of a build-in/build-out option. We require as a condition that this procedure be modified in two ways: first, by making this procedure applicable to all shippers; second, by removing the time limit to which this procedure is subject. These modifications will allow AMSF to replicate the competitive options now provided by the independent operations of UP and SP. We further clarify that a shipper invoking this procedure need not demonstrate economic feasibility; the only test of feasibility is whether the line is actually constructed. Any technical disputes with respect to the implementation of this build-in/build-out remedy may be resolved either by arbitration or by the Board. either by arbitration or by the Board. Opening contracts at 2-to-1 points. The CMA agreement provides that, immediately upon consummation of the merger, applicants must modify any contracts with shippers at 2-to-1 points in Texas and Louisians to allow BNSF access to at least 50t of the volume. We require as a condition that this provision be modified by extending it to shippers at all 2-to-1 points in Texas and Louisians. The extension of this provision to all 2-to-1 points will help ensure that BNSF has immediate access to a traffic hase sufficient to support effective trackage rights a traffic base sufficient to support effective trackage rights operations. Oversight. We impose as a condition to approval of this merger oversight for 5 years to examine whether the conditions we have imposed have effectively addressed the competitive issues they were intended to remedy. We retain 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. We require as a condition that applicants submit on or before October 1, 1996, a progress report and implementing plan regarding their compliance with the conditions to this merger, and further progress reports on a quarterly basis. As we have discussed earlier, we expect that BMSF will compete vigorously for the traffic opened up to it by the BMSF agreement and have imposed upon BMSF a common carrier obligation with respect to this traffic. The We further require that BMSF submit a progress report and an operating plan on or before 170 Again, we emphasize that BMSF, as soon as reasonably practicable, must begin trackage rights operations over the key corridors between Houston and New Orleans, between Houston and Meraphis, and in the Central Corridor. A failure to conduct trackage rights operations in these corridors could result in termination of BMSF's trackage rights, and substitution of another carrier, or in divestiture. - 146 -

October 1st of this year, and further progress reports on a quarterly basis thereafter.

We plan to initiate a proceeding at the end of the first year, on or about October 1, 1997, seeking comments from interested parties on the effects of the merger and implementation of the conditions. The competition provided by BNSF will be one of the key matters to be considered in the oversight proceeding. If circumstances warrant, a proceeding may be held prior to October 1, 1997. Subsequent proceedings will be scheduled as needed.

South Central Lines/SP East.

NAFTA/Grain: Tex Mex. We are particularly sensitive to our responsibility to ensure that this merger will foster the goal of North American economic integration embodied in NAFTA. After all, our regulatory powers are derived from the "Commerce Clause" of our nation's constitution, "" which, in a very real sense, has resulted in the creation of a "free trade zone" within these United States, leading to our emergence in this century as an economic superpower.

NAFTA now has the potential to contribute to the economic growth and prosperity of the United States, Mexico, and Canada. Mexico, in particular, holds great promise as a market for our agricultural and other products. As USDA explained, "[u] nder NAFTA, Mexico is expected to be an important growth market, especially for grains and oil seeds produced in the midwest and plains states. Affordable rail rates and access to service are critical."

The BNSF agreement should preserve shippers' competitive alternatives at the Brownsville border crossing, and should enhance them at Eagle Pass by upgrading BNSF's access from haulage to trackage rights. But Tex Mex and its supporters have raised legitimate concerns that, absent a grant of Tex Mex's responsive application, the merger could result in a reduction in competition at Laredo, the most important U.S.-Mexican rail gateway.

Specifically, Tex Mex has proposed that we grant it trackage rights that would permit it to connect with KCS at Beaumont via Houston. Tex Mex notes that, except for a small segment of UP track running from Robstown to Placedo, the routing proposed by Tex Mex would not overlap with BNSF's trackage and haulage rights from Houston to Brownsville, and thus it would not unduly interfere with BNSF's new operations. Tex Mex envisions its proposed trackage rights as an addition to those competitive safeguards contained in the BMSF agreement, and not as a replacement.

Tex Mex has offered a number of arguments in favor of its proposal. First, it suggests that all the U.S.-Mexican gateways should be viewed as a single market now served by UP, SP, and BNSF, and that the reduction from three railroads to two brought about by the merger is an unacceptable loss of competition that

<sup>179</sup> Article I, Section 8, states in part:

The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . .

Dunn, Oral Arg. TR at 240.

Finance Docket No. 32760 cannot be remedied through any condition relying on BNSF, which is one of the three. We must reject this argument. In <u>SF/SP</u>, the ICC determined that there was no all-Mexican-gateway market, and that Laredo clearly occupied a position of separate and surpassing economic significance. <u>SF/SP</u>, 2 I.C.C.2d at 797. We reaffirm that finding here, but also acknowledge that, as BMSF has explained, this does not mean that the Mexican gateways are completely independent. BM/SF-12 at 21 2.12 independent. BN/SF-59 at 31 n.12. Purther, Tex Mex acknowledges that, in 1994, BMSF handled only 3t of all U.S.-Mexican rail traffic at the border. MI TM-39 at 36. Even if there were a single market for U.S.-Mexican movements by rail, BMSP's extremely limited presence prior to this merger would hardly make this a 3-to-2 situation, much less one that calls for remedial conditions. 303 Tex Mex has raised other arguments that we find more persuasive. It is concerned that the merger will diminish its traffic base to the point where it is unable effectively to preserve a second competitive routing at Laredo, and that the merger might endanger the essential service it provides to the more than 30 shippers located on its line. The 8.8% of current Tex Mex traffic originated at points served exclusively by SP is likely to shift to the new and efficient UP/SP single-line route into Laredo created by this merger. Another 31% of Tex Mex traffic now originates at or moves through 2-to-1 points on SP. BNSF will have access to this traffic via the BNSF agreement. Applicants' traffic study shows all this traffic moving via a BNSF/Tex Mex routing into Laredo. As we have explained elsewhere, the BNSF agreement will permit BNSF effectively to replace the competition that will be lost when SP is absorbed into UP, and thus protect shippers at 2-to-1 points from facing higher prices or deteriorated service. This does not mean that BNSF will be able to retain all the traffic now carried by SP when BNSF's competition is the newly merged and now carried by SP when BNSF's competition is the newly merged and more efficient UP/SP, which may choose to offer shippers lower rates or better service than offered by either UP or SP today. Further, for this 2-to-1 traffic, and for the 34.2% of 1994 Tex Mex traffic carried via a Tex Mex/SP/BM or SF interline This market share will likely rise. The BMSF agreement will extend BMSF's presence for handling Mexican traffic. Its haulage rights to Eagle Pass will be converted into trackage rights, and, as noted previously, it will have now trackage and haulage rights over the UP line into Brownsville. corroborated by the testimony of Tex Mex's own witness, Grimm, who argues that this would remain a 2-to-1 situation even after implementation of the BMSF agreement: In the market for rail transportation between the United States and Mexico, therefore, the effects of the merger will be much closer to a 2-to-1 reduction than a 3-to-2 reduction. Although BMSF will be a theosetical competitor, it will be a very minor and ineffective one. TM-23 at 122. - 148 -

Finance Docket No. 32760 movement. 103 the BNSF agreement has created a new potential single-line movement for BNSF into Mexico via Eagle Pass. As RCT explains: [W] ere it not for the fact that Laredo currently enjoys a competitive advantage over the other gateways to Mexico because there is a larger infrastructure of customs brokers located at Laredo than at the other gateways, there would be little or no incentive for BN/SF to route traffic via TexMex. Certainly, there is no reason to assume that BN/SF would deliberately route no reason to assume that sm/sr would deliberately route unit trains of grain in joint-line service with TexMex via Laredo when it will have a comparatively direct shot in single-line service at Eagle Pass. Given the admitted concentration of BN/SF's traffic from the grain belt and the Pacific Northwest and the industrial Midwest, it is only logical to assume that BM/SF would favor the less circuitous, single-line routing via Eagle Pass. RCT-7 at 22-23. We are persuaded that a partial grant of Tex Mex's responsive application is required to ensure the continuation of an effective competitive alternative to UP's routing into the border crossing at Laredo. Further, as noted by Volkswagen of America: [E] conomical access to international trade routes should not be jeopardized when the future prosperity of both countries depends so strongly on international trade. TM-39 at 15. Tex Mex has offered an effective rebuttal to applicants' and BNSF's claims that the BNSF agreement is sufficient to preserve competition at Laredo: If Applicants are right that BMSF will be better for Tex Mex than SP and that the route Tex Mex seeks will be inferior to RNSF's route, then granting Tex Mex's application would have little adverse impact on Applicants or BNSF, because little traffic would move over Tex Mex's trackage rights. TM-39 at 5. Finally, we note that applicants and BMSF have raised legitimate concerns over Tex Mex's request that it have unrestricted access to interline with other carriers along its trackage rights route. Tex Mex has conceded this point, explaining: An incidental competitive benefit of granting the rights Tex Mex seeks is that Tex Mex could carry some Tex Mex notes that nearly all of the 1994 traffic it received in interline movements with BN or SF has disappeared because of a \$100 per car surcharge imposed by BN and SF (and continued by BNSF) on all grain cars originating on BNSF destined for Laredo. TM-39 at 9. BNSF has explained that this was due to service problems and poor turnaround times for these cars by SP, which would be eliminated with the rights it receives under the BNSF agreement. - 149 -

date. If the terms of compensation have not been resolved prior to the effective date, compensation will accrue from the actual date of the start of trackage rights operations, and will be payable after terms have been established. We note that, if we are required to prescribe compensation terms, we will apply the principles for compensation in condemnation proceedings.

49 U.S.C. 11103(a) (third sentence); <u>UP/MP/WP</u>, 366 I.C.C. at 576 n.114.

Plastics/Chemicals: SIT/Lake Charles/Dov/UCC. Plastic and chemical shippers located in the Gulf Coast area have raised a number of legitimate concerns over merger-related competitive harm that would not be effectively remedied by the BNSF agreement. Accordingly, we are imposing additional conditions to address these concerns. For example, we are imposing a condition that will broaden BNSF's access to SIT facilities in the area. For shippers located near Lake Charles, LA, we have crafted conditions that will permit RCS to offer an interline routing into St. Louis independent of applicants, and that will eliminate the restrictive destination conditions and "phantom" haulage charges that together would have unduly inhibited BNSF's ability to offer direct, competitive service to those shippers. Finally, we have ensured the continued availability of competitive build-out options for Dow at Freeport, TX, and UCC at Seadrift, TX, which are discussed in detail below under conditions requested by individual parties. Preserving the Dow build-out opportunity also will benefit numerous plastic and chemical shippers located along the Gulf Coast between Freeport and Texas City, TX, such as Ouantum's plant at Chocolate Bayou.

Storage-in-Transit (SIT) Facilities. There is widespread agreement among the parties that SIT capacity is a critical element in service to the plastics industry. The use of railcars for storage allows plants to run at capacity and product to be readily available for prompt movement to various markets as market price and demand change. It has also proven to be a cost effective alternative to investing in multiple silos as a means of storing up to 50 products while avoiding any possible problems with contamination. SPI's witness Ruple notes that "(w)hile the percentage of resins utilizing storage varies, in general between 10% and 50% require storage." Id.

Prior to the merger, SP undertook a comprehensive analysis of storage requirements for plastics shippers in the Gulf Coast. According to SP:

Plastic storage in the Gulf Coast impacts operations more than any other normal operating condition, with the only possible exceptions being locomotive/crew availability and scheduled track maintenance.

See SPI-11, Exhibit 14. Two-thirds of the plastics hopper cars require storage, and the mean storage duration at the time of the analysis was 45 days. Id.

. ...

Our pledge to apply condemnation principles in setting compensation fulfills the alternative requirement in the fourth sentence of 49 U.S.C. 11103(a) that compensation be "adequately secured" before commencement of terminal trackage rights operations.

Ruple, at 15-17. SPI-11, VS Bowles, at 3-4; and SPI-11, VS

Finance Docket No. 32760 UP and SP currently enjoy 84% of the plastics hopper car storage capacity in the Gulf Coast. 167 To meet customer needs, SP committed to a new 3,000-car storage yard at Dayton, TX, strategically located near plastics resins production facilities. The CMA settlement has made provision for BMSF access to Dayton Yard to supply some of the needed additional storage capacity. That agreement indicates that BMSF will have equal access to that facility. It also states that applicants will work with BMSF to locate additional facilities on the trackage rights lines as necessary. These provisions are somewhat ambiguous, and various parties have criticized them as inadequate. We think that these provisions should be clarified and strengthened. We are therefore imposing the additional condition that the BMSF agreement be modified to require that BMSF shall have access to all SP Gulf Coast SIT facilities on economic terms no less for storage in favorable than the terms of UP/SP's access, for storage in transit of traffic handled by BNSF under the terms of the BNSF agreement. Lake Charles, LA. A number of plastic and chemical, shippers, including Montell, Olin, and PPG, operate plants located at three rail stations (Lake Charles, West Lake, and West Lake Charles) in the Lake Charles area of Louisiana. The Take Charles area of Louisiana. plants have access to SP and KCS, and some have access to UP as well via haulage or reciprocal switching. But KCS must interline with UP or SP to provide efficient routings to the New Orleans, Houston, and St. Louis gateways. Thus, while these shippers now benefit from direct rail competition, an unconditioned merger would place all their efficient rail routings under applicants' Paragraph 8 of the CMA Agreement amended the original BMSF settlement agreement to give BMSF the right to handle traffic of Lake Charles and West Lake shippers open to all of UP, SP, and KCS for traffic moving (a) from, to, and via New Orleans and (b) to or from points in Mexico via the Texas border crossings at Eagle Pass, Laredo, or Brownsville. On brief, applicants extended this relief to incorporate West Lake Charles traffic open to SP and KCS. 169 We believe this to be an inadequate solution for these shippers. Any KCS routing to and from St. Louis or Chicago must still include a connection with applicants at Shreveport or Texarkana, giving applicants control of a "bottleneck" for these movements. Moreover, the key role of SIT facilities for plastics shippers further complicates this situation: 107 SPI witness Ruple identifies the following Gulf Coast SIT sites of UP, SP, and BMSF, respectively: UP, in Spring, TX (1520 spots), in Addis, TX (550 spots), and in Avendale, LA (350 spots); SP, in Dayton, TX (3000 spots), in East Baytown, TX (1200 spots), and in Beaument, TX (250 spots); and BMSF, in Casey, TX (720 spots), and in Teague, TX (550 spots). In addition, he identifies the following non-Gulf SIT facilities: UP, in McGehee, AR (380 spots), and in Dupo, IL (350 spots); SP, in Pine Bluff, AR (250 spots), and in East St. Louis, IL (100 spots). See FPI-11, VS Ruple, at 15, and Exhibits 8, 14, and 18. See UP/SP-260 at 23, n.9. - 152 -

Finance Docket No. 32760 As much as 70% of a plant's output may be assigned initially to storage. . . Generally, it is only after the car has been in storage that its contents are sold and a delivery destination determined. MONT-9 at 12. Because BMSF would only be able to handle shipments routed to certain destinations, and because the destinations are not known when the product moves to the storage point, a shipper could be forced to order a rail car returned from a storage point to its facility so that it could be transported by a different carrier. To preserve existing competitive alternatives for shippers in the Lake Charles area, we will require applicants to modify the BNSF agreement in two ways. First, BMSF must be able to use the BNSF agreement in two ways. First, BNSF must be able to use its Houston-to-Memphis trackage rights to interline with KCS at Shreveport and Texarkana. This will have the principal effect of substituting a KCS-BNSF joint-line routing via Texarkana and Shreveport for the existing KCS-UP joint-line movement via Texarkana. Second, applicants must remove the (New Orleans and Mexico) geographic restrictions on direct BNSF service to Lake Charles, West Lake, and West Lake Charles shippers and permit BNSF to serve all destinations from these points. This will permit BNSF to offer SIT facilities for a full range of destinations. destinations, without which shippers might be hesitant to use BNSF services for any shipments requiring SIT. Furthermore, we have one additional concern with the arrangements under which BNSF service will preserve competition for Lake Charles area shippers. Section 5b of the original BNSF settlement agreement, as amended by Section 4b of the second supplemental agreement dated June 27, 1996, reads in part as follows: In addition to all other charges to be paid by BNSF to UP/SP herein, at West Lake and West Lake Charles, BNSF shall also be required to pay a fee to UP/SP equal to the fee that UP pays KCS as of the date of this Agreement to access the traffic at West Lake, adjusted upwards or downwards in accordance with Section 12 of this Agreement. Protestants have referred to this as a "phantom haulage fee." It appears to us that applicants are intending to charge BNSF a fee to access traffic at West Lake Charles, even though this location is not presently open to UP under haulage or switching and is served only by KCS and SP via jointly owned track. Further, the fee that UP currently pays to KCS at West Lake is compansation for reciprocal switching or haulage service performed by KCS. Elsewhere in the BMSF agreement, the parties have made arrangements for reciprocal switching and haulage charges. If applicants perform any switching or haulage in the Lake Charles region, then these are appropriate charges that should be assessed BMSF. It appears, however, that BMSF will have direct access to West Lake shippers when it begins to operate under its trackage rights arrangement, so that UP/SP may not be performing any switching or haulage service for BMSF in this area. Under these circumstances, we find it is unreasonable for applicants to impose any charge to BMSF at West Lake over and above the compensation for trackage rights unless they are performing an additional service. It is even more unreasonable for applicants to expand the scope of this fee to include West Lake Charles, which represents 93% of the Lake Charles - 153 -

Finance Docket No. 32760 area's rail traffic. 100 and where no switching or haulage is now performed and no fee is assessed. We will require applicants to modify the BNSF agreement to remove this fee. Coal: Entersy/CPSE/TUE. We are imposing specific conditions crafted to preserve existing competitive alternatives for three coal shippers located along applicants' South Central lines. The details of each are discussed elsewhere under conditions requested by individual parties. First, we have ensured the continued availability of a competitive build-out option for Entergy's White Bluff plant near Redfield. AR, which is now served exclusively by UP. BMSF will be permitted to substitute for SP if a connection is ever built linking the plant to a nearby SP line at Pine Bluff. (BMSF will be operating over this SP line via the trackage rights it will receive under the BMSF agreement.) Entergy will thus continue to have the option of building out to an independent carrier and will continue to be able to use this option in its negotiations with applicants. with applicants. Second, we are imposing a condition to maintain the premerger competitive status quo at CPSB's two plants at Elmendorf.

TX. While these plants receive rail service at destination via a line owned by SP. UP is permitted to deliver coal to CPSB under trackage rights that have been granted by SP to CPSB. EMSF will be permitted to substitute for UP by using the CPSB trackage rights to deliver shipments to the plants. Finally, we are imposing a condition to maintain the availability of two independent and efficient PRB routings to TUE's Martin Lake plant near Henderson, TX. This plant is now exclusively served by BNSF, and its most efficient PRB route is an interline movement involving both KCS and a short SP line segment. (Interline movements do not significantly detract from the efficiencies of run-through coal unit trains.) TUE has plans, however, to build a 6-mile spur to connect to UP and gain a second independent routing into the plant. We will require that the BNSF agreement be amended to permit BMSF and KCS to provide an efficient PRB joint-line movement into Martin Lake as an independent competitive alternative to the UP/SP single-line an independent competitive alternative to the UP/SP single-line routing it will gain access to once the spur is completed. Central Corridor.

Chal: URC agreement/Tennesses Pass. As we explain below, we are imposing two conditions to ensure that this merger does not result in competitive harm to Central Corridor coal shippers. First, we are imposing the URC agreement to preserve the existing level of rail competition for those few western coal shippers dependent on originations of Utah/Colorado coal. Second, we are granting discontinuance authority rather than full abandonment authority for applicants' Tennessee Pass Line to ensure that the merger does not result in service degradation for Central Corridor coal (and other) movements. URC agreement. Under the URC agreement, URC will receive access to additional coal sources in Utah and overhead trackage 194 See SPI-21 at 35. degradation of Central Corridor service as concerns over potential competitive harm. As noted above, merger-related competitive harm results when the merging parties gain sufficient market power profitably to raise rates and/or reduce service. - 154 -

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rights between Utah Railway Junction. UT, and Grand Junction, CO. BMSF, via the trackage rights it will receive under the BMSF agreement, will be able to move URC-originated coal to destination points west of Provo, UT, and east of Grand Junction. URC has explained that its agreement with applicants "will provide the market discipline to assure competitive rates for coal customers in the western region by means of its cost efficient operations and access to Utah coal acting either in conjunction with the BMSF or with UPSP." As discussed elsewhere in this decision, the URC agreement is an especially important competitive safeguard for those few western coal shippers, such as the SPP/IDPC jointly owned Morth Valmy Station plant, that are dependent on originations of Utah/Colorado coal. We therefore impose as a condition the terms of the URC agreement.

Tennessee Pass Line. Applicants seek to abandon a portion of the Tennessee Pass Line between Malta and Cañon City, CO, 193 and to route traffic over more efficient routes post-merger. Several parties have raised concerns that the Moffat Tunnel Line between Dotsero and Denver, CO, will lack the capacity to handle overhead traffic rerouted from the Tennessee Pass Line.

Parties have requested that we consider alternative conditions designed to ensure that shippers do not suffer a degradation of the level of service now provided by SP as a result of the merger. One such condition would require UP/SP to maintain service on SP's (DRGW's) Tennessee Pass Line between Dotsero and Pueblo, Colorado. An alternative condition would permit UP/SP to discontinue service on, but not physically abandon, the Tennessee Pass Line. If the Moffat Tunnel Line cannot handle the increased traffic, we could then take steps necessary to enable UP/SP to restore the prior level of service over the Tennessee Pass Line. In addition, opponents argue that the Tennessee Pass Line is an important alternate route in the event of a derailment or congestion on the Moffat Tunnel Line.

Applicants assert that, in the 1970s, DRGW operated as many as 25 to 30 trains per day through the Moffat Tunnel, which indicates that this line should be able to handle the projected increase in traffic volume, and that additional capacity improvements on this line could be made if they prove necessary. Nevertheless, opponents point out that the traffic mix has changed considerably since the 1970s. DRGW's operations consisted mostly of short mixed-freight trains, whereas today SP operates longer trains, including heavy unit trains transporting coal. Opponents are concerned that, if SP has difficulty meeting contracted delivery schedules now, shifting more traffic to the Moffat Tunnel Line will cause additional capacity and service problems. Such a degradation in service could increase cycle times for unit trains of shipper-owned cars, and thus require shippers to purchase more cars to receive the same level of service.

Applicants assert that the Tennessee Pass Line is the least efficient link for an overhead route across the Central Corridor;

<sup>192</sup> UTAH-6 at 19.

Specifically, applicants seek by petitions for exemption in Docket Nos. AB-8 (Sub-No. 36%) and AB-12 (Sub-No. 189%) for SPT to abandon, and DRGW to discontinue operations over, SP's Sage-Malta-Leadville line; and by applications in Docket Mos. AB-8 (Sub-No. 39) and AB-12 (Sub-No. 188) for SPT to abandon, and DRGW to discontinue operations over, SP's Malta-Cañon City line.

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and that the merger will open new, more efficient routes for the present traffic flows. Given the UP/SP and ENSF options that will become available after the merger, applicants claim that routing via Pueblo and the Tennessee Pass Line is an inferior choice.

We acknowledge that applicants have taken the railroad capacity concern seriously and recognize that the inefficient Tennessee Pass Line might need to be retained just in case the Moffat Tunnel Line is overwhelmed. Applicants provided assurances that no action will be taken precipitously to abandon the line, and that overhead traffic flows will leave that line only as their new routes become fully prepared to take them efficiently. Motwithstanding these reassurances, we will grant discontinuance authority rather than full abandonment authority because of the crucial nature of this through route. This will preserve the line intact until applicants demonstrate that overhead traffic over the Tennessee Pass Line has been successfully rerouted.

Related procedural aspects. Consistent with the Board's policy to promote private-sector solutions to disputes, we encourage parties to this proceeding to make their best efforts to resolve among themselves any disputes that may arise concerning the meaning or applicability of any of the terms or conditions imposed or approved before resorting to the Board for resolution. Use of arbitration to resolve disputes can result in resource and time savings for all concerned. If parties choose to use arbitration in the first instance, the Board will entertain appeals from arbitral decisions using the standards in Lace Curtain set forth for review of arbitral decisions under our labor conditions, unless the parties agree otherwise.

We Divestiture Meeded. A number of parties have called on us to impose certain broad-based remedies to supplement or replace the BNSF agreement. Most notably, a number of parties request that we impose some version of MRL's plan for divestiture of certain Central Corridor lines and/or some version of KCS' and Conrail's plans for divestiture of certain lines running from St. Louis to the Gulf Coast region.

Applicants note that double-stack traffic is transcontinental traffic that can easily be rerouted to shorter routes through Myoming or New Mexico and by-pass Colorado completely. Applicants state that the Tennessee Pass Line would be the shorter post-marger route only for coal moving to West Texas, New Mexico, and Arizona. The volume of this coal, applicants assert, currently amounts to about one train per week. UP/SP-232 (Vol. 3), VS Ongerth, at 47-48.

According to applicants, existing service to overhead shippers will be protected until superior options are in place, and the track itself will be left in place for a set period of time in accordance with assurances made to the Governor of Colorado. These include a commitment to maintain service on the line for at least 6 months following consummation of the merger, and to leave track in place until upgrades are completed on the new routes and at Roseville Yard in California, which, could take several years. UP/SP-232 (Vol. 3), VS Ongerth, at 49.

Chicago & N.M. Transp. Co. -- Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd, International Bhd. of Elec. Norkers V. ICC. 862 F.2d 330 (D.C. Cir. 1988).

Finance Docket No. 32760 As we have explained above, the merger, subject to the conditions we are imposing, including an oversight condition, will be consistent with the public interest. These conditions are narrowly tailored to ensure that they effectively remedy all significant merger-related competitive harms without unduly limiting the merger's substantial public benefits. Therefore, no other broad-based remedy is required for our approval. Further, as we explain below, while divestiture of certain of applicants' lines may have a surface appeal, it also entails its own very substantial problems in this proceeding. South Central Lines/SP East. Various parties, including Conrail, KCS, NITL, RCT, the Arkanses Attorney General, DCT, and DCJ argue for a condition requiring divestiture of extensive UP or SP lines in the South Central region. Conrail and RCS put forth requests involving forced divestiture of specific SP line segments. While these proposals all differ somewhat in their particulars, they are all quite similar. The Conrail proposal envisions a larger divestiture of SP's assets than the RCS plan, but both these and the others would entail removing the core of what would be the UP/SP South Central network. Divestiture in the rail industry, with its network . economies, is a requirement, to be imposed only inter extreme conditions, when no other less intrusive remed, would suffice. Here, divestiture would be greatly inferior to the remedy we have chosen. Divestiture would be an over-reaching solution, especially in light of the agreements that applicants have reached with various parties and the additional conditions we are imposing. Because the competitive justifications that would be the basis for compelling divestiture have been mooted, we will deny the requested conditions calling for divestiture of South Central lines. As we already have discussed, BNSF, through the agreements applicants have arranged and the additional conditions we are imposing, will be more than sufficient as a replacement competitor in these corridors. All the parties' competitive concerns have been effectively addressed. In these circumstances, we need not resort to the significantly more intrusive divestiture remedy. As for potential purchasers, both Conrail and KCS suffer from deficiencies. Despite their attacks on the adequacy of BMSF's service plans, neither Conrail nor KCS utilized existing Board procedures to submit responsive applications in support of their sweeping proposals. They have provided no traffic studies, no operating plans, and no pro forms financial statements to reveal the full effects of their proposals. They have provided no traffic studies, no operating plans, and no pro forms financial statements to reveal the full effects of their proposals. They have provided no traffic studies, no operating plans, and no pro forms financial statements to reveal the full effects of their proposals. They have provided no traffic studies, no operating plans, and no pro forms financial statements to reveal the full effects of their proposals. applicants have arranged and the additional conditions we are MITL's divestiture proposal (MITL-9 at 5-6, 56-57) is equally unsupported. It offers no justification to support its request for additional requirements that (a) SP's Houston-Flatonia-Placedo line be sold, yielding a Houston-Corpus Christi-Brownsville route distinctly inferior to the one BMSF would have under the BMSF agreement, and (b) SP's Flatonia-Eagle Pass line be sold subject to BMSF's present haulage rights, thus yielding weaker competition at Eagle Pass than would the BMSF agreement. The proposal of the Arkansas Attorney General to, turn SP lines into public highways is vague, unprecedented, and unpredictable, and thus we cannot judge its impacts. RCT suggests a specific overreaching addition to the Conrail and RCS proposals that would require the insertion of a second railroad at CPAL's Coleto Creek plant. RCT-4 at 17. - 157 -

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railroads with unpredictable effects, which is what divestiture to KCS or Conrail would result in here.

Divestiture would introduce a distinctly weaker competitor than BNSF at 2-co-1 points and a distinctly weaker competitor than UP/SP at exclusively served (1-to-1) points. Meither KCS nor Conrail (nor any other purchaser other than BNSF, for that matter) could offer the array of service and single-line coverage that both the merged system and BMSF will offer to their shippers. A KCS purchase would raise the most new competitive concerns, as the KCS system itself is mostly within these corridors. As such, there would be many of the same problems with parallelism as with the UP/SP merger, but without the competitive solutions we now have before us. There is evidence that Conrail is a much higher cost railroad than BMSF, and thus there are serious questions as to its ability to be a competitive force in these corridors. UP/SP-231, RVS Whitehurst, at 21.

At points that will continue to be served by multiple railroads after the merger, such as Dallas (which will be served by BNSF, UP/SP, KCS, South Orient Railroad Company as well as other shortlines) and Houston (which will be served by BNSF, UP/SP, KCS for grain, and Tex Mex for Mexican traffic over the trackage rights we are granting here, and neutral terminal roads), divestiture would add an additional railroad, reducing volume efficiencies, despite the fact that the merger as conditioned will not result in competitive harm. And divestiture will be a significant overreach because it would transfer large volumes of business at exclusively served points to the acquirer, without any competitive justification.

These divestiture proposals would also take the railroad system backwards by destroying, rather than creating, single-line service. \*\*Many shippers who would have received new single-line service, or who would see existing single-line service eliminated, would no longer share in the merger's benefits. It is true that the loss of new UP/SP single-line routings could be reduced somewhat by a grant back of trackage rights from the carrier chosen for divestiture to UP/SP, as variously suggested by NITL and MRL. But many shippers on the divested segments would lose single-line service because the overhead trackage rights would not permit local service. Monetheless, single-line service over BMSF in the South Central Corridor, to and from the Pacific Northwest, to and from the Upper Midwest, and to and from

<sup>100</sup> For example, applicants' witness Peterson shows that the Conrail proposal would compel the merged system to convey lines to Conrail that accounted for 265,000 carloads of exclusively served SP traffic in 1994, compared to only 90,000 carloads of 2-to-1 traffic. UP/SP-231, RVS Peterson, at 195.

Peterson details how the Conrail and KCS divestiture proposals would cause very large and unnecessary traffic losses to UP/SP (i.e., \$924 million in annual gross revenues in the case of the Conrail proposal and \$874 million in annual gross revenues in the case of the KCS proposal). Such losses would adversely affect the economics of the merger. Id. at 196-201.

Peterson also shows that the Conrail and RCS divestiture proposals would eliminate single-line service for 357,000 units of traffic per year-even more than the volume of traffic that will gain new single-line service as a result of the merger. Offsetting this in the case of Conrail (but not RCS) would be the creation of new single-line service for a smaller volume of traffic that moves to Conrail points. Id. at 201-08.

Finance Docket No. 32760 the PRB for major coal utilities, would all be adversely Further, the quality of UP/SP service in the Chicago-St. Louis-Memphis-Texas corridor would be adversely affected by these proposals. Applicants note that a study performed for Conrail graphically demonstrates the improved transit times that will result from directional running. UP/SP-232, RVS Salzman, at 23. Even more seriously, loss of SP's Pine Bluff Yard would destroy the UP/SP blocking plan, overload UP's North Little Rock Yard, and require extra switching throughout the South Central UP/SP region. Id. at 17-20. UP/SP would lose the ability to make many blocks at Arkansas yards, requiring additional switching at other congested yards. Id. Conrail points out in detail how each additional switch increases transit time, increases damages, and increases safety risks. CR-22, VS increases damages, and increases safety risks. CR-22, VS Carey/Ratcliffe/Shepard, at 13-15. We note that these problems are inherent in Conrail's own proposal. UP/SP would lose the ability to build run-through trains for NS via St. Louis. It would be unable to block for Conrail's Buckeye Yard. Blocking for many smaller yards in Texas and Louisians would be eliminated. UP/SP-232, RVS Salzman, 'at 17-19. Almost every new block proposed in the UP/SP Operating Plan for the South Central corridor would have to be eliminated, and those that remain would displace existing blocks. Id. In exchange, shippers would gain no discernable service benefits. Conrail witnesses acknowledge that the service plan to which Conrail is committed calls for no changes in SP's existing train schedules. UP/SP-232, RVS King, at 26-27. ECS has not disclosed its plans, but we assess that ECS could not offer significantly improved train schedules because its route network is too constrained. Applicants' witness King asserts that the UP-Conrail "Salem Gateway" service, which provides the best service between the Northeast and the South Central region, would be degraded if Conrail were to acquire the SP lines it seeks. If Conrail is the acquirer, applicants assert it will have no incentive to help its competitor, UP/SP, maintain that gateway, or vice versa. As a result, service would decline and cars would likely be rerouted via urban St. Louis, absorbing additional delay. UP/SP-232, RVS King, at 29-30. UP/SP also asserts that there is a significant risk that current SP-NS and SP-CSX services would also be undermined because Conrail would have sharply reduced incentives to work with its competitors in the East, and vice versa. Id. at 30-31. The economic benefits of the merger would also be undermined by these divestiture proposals. Applicants have shown that claims by some parties, especially Conrail, that the UP/SP savings are all in the West are erroneous. UP/SP-232, RVS... Salsman, at 14 & Ex. DMS-1. Although many of the benefits from the merger scrue in other areas, divestiture would mean that the new system would still lose well over \$100 million per year of labor, operating, and other benefits of the merger. UP/SP would also be forced to spend huge sums for increased capacity without the use of its parallel lines for directional running. Applicants have explained that the increased burden caused by focusing more traffic on the UP lines in Afkansas and Texas would require UP to invest over \$220 million to create new capacity on "? segments, and to implement capacity-enhancement plans that the merger would have svoided. UP/SP-232, RVS King, at 31. KCS, Conrail, and RCT all recognize that UP/SP probably - 159 -

Finance Docket No. 32760 would have to incur the tremendous expense of double-tracking the would have to incur the tremendous expense of double-tracking the UP Houston-Memphis route, and a number of UP lines in Texas would also be affected. RCS-33 (Vol. 2), VS Rees, at 228; CR-22, VS Carey/Ratcliffe/Sheppard, at 78-79; RCT-4 at 15, 40-41. Increased switching burdens on already-taxed UP yards would likely require UP/SP to construct a new switching yard at a cost of up to \$100 million, although no location would be as well suited as the existing Pine Bluff and Little Rock facilities. UP/SP-232, RVS King, at 32. Applicants explain that the expenditures would be vastly greater, with even greater loss of service quality and efficiency, if Conrail were to acquire SP's El Paso line. Id. at 33-34. The net effect of this further Conrail overreach would be to divert transcontinental traffic between California and New Orleans/Houston/San Antonio/Laredo from an SP line that has excess capacity to UP lines that have no extra capacity. Again, UP/SP would be forced to spend \$160 million, if not more, and service quality would still decline as most traffic flows would be concentrated on a single, overburdened line and forced through the congested Ft. Worth terminal. Id. Applicants assert that the congested Pt. Worth terminal. Id. Applicants assert that these unnecessary capital outlays would make it impossible for it to make other vital investments, such as developing new intermodal terminals and services. See Comments of Riss Intermodal, Mar. 29, 1996. A forced South Central divestiture is incompatible with the trackage rights and line sales provided for in the BMSF agreement, and could cause the entire agreement to collapse. Nothing remotely comparable in its benefits would be available. Even if some other competitive agreement or agreements could be pieced together, shippers would lose the intense, comprehensive competition offered by the BMSF agreement, and all the added competition that agreement brings. For example, instead of gaining access to two railroads in place of one and single-line service to points all across both the UP/SF and BMSF networks, shippers on SP's Southern Louisiana line would be exclusively served by the forced acquirer and would lack single-line service to any UP/SP or BMSF point. We also believe that a divestiture requirement along the We also believe that a divestiture requirement along the lines advocated by Conrail and RCS might dissolve the merger, leaving SP to retrench its services or possibly to dismember itself. We do not believe that dismemberment of SP through forced divestiture is in the best interest of shippers and the public. Essential services would irretrievably be lost, the quality of services that are preserved would be greatly degraded, and the significant benefits of the UP/SP merger and the EMSF agreement would likely be lost. Central Corridor. Several parties, including DOJ and MRL, argue that competition in the Central Corridor can be preserved only through divestiture. DOT states that circumstances unique to the Central Corridor militate against divestiture of that line, but it urges conditions to strengthen significantly the trackage rights proposed in the Central Corridor. MRL, acting on behalf of its owner, Dennis Washington, seeks the divestiture of all DRGW lines; extensive UP and SP lines in Mevada, California, and Oregon; UP's line to Silver Bow, MT, with trackage rights to This would be the result both because of the reduction in marger benefits, which RCS and Conrail could not replicate, and because, as can be seen from Conrail's bidding and from RCS' claim that UP overpaid for SP, the price that would be offered is likely to be inadequate. UP/SP-231, RVS Rebensdorf, at 30-32. - 160 -

connect it to the Central Corridor; trackage rights on UP in Kansas to reach a variety of grain gathering points; and unilateral authority to set rates to and from all SP points in California and Oregon, with revenues pro-rated by mileage.

We have rejected already the arguments that form the basis for this extraordinary relief. We balieve BNSF will be an effective competitor as a tenant over UP/SP lines, 201 as discussed more fully above. We also have rejected the argument that, given the high-quality, low-cost routes that BNSF operates between the Midwest and the West Coast, BNSF will have no incentive to operate via its trackage rights in the Central Corridor.

Even if we were to find that there was some predicate for

Even if we were to find that there was some predicate for divestiture, we would have serious reservations concerning the ability of MRL's newly formed affiliate to provide adequate, competitive service. As noted by DOT, MRL itself does not appear to possess an adequate network, particularly in California, to gather traffic that would flow over the corridor. MRL may also be disadvantaged in competing against two carriers in the West that could offer single-line service to the major midwestern gateways. A probable result would be the rerouting of the overhead traffic on the Central Corridor to the other single-line carriers, jeopardizing the viability of competitive service on that corridor.

MRL's divestiture proposal would eliminate significant amounts of existing single-line service, as well as the new single-line service and improved routings created by the merger. MRL proposes to purchase approximately 350 miles of UP's lines north of Pocatello, ID, including the mainline to Silver Bow, a number of connecting branch lines, and an important connection to UP's spin-off, Eastern Idaho Railroad, at Idaho Falls, ID, which will affect over 40,000 annual carloads of UP traffic and 590 million in annual UP revenues. While a grant back of overhead trackage rights to UP/SP and EMSF, as MRL proposes, could ameliorate these losses somewhat, they would still be substantial. 2007 As a result of MRL's proposal, numerous shippers located on this trackage in Idaho would no longer have access to UP's single-line routes to important UP points such as

<sup>201</sup> As counsel for CPUC explained at the oral argument:

<sup>(</sup>T) he proposed divestiture of one of the two lines in the Central Corridor is not a good idea for California.

. . . We concluded that the BM/Santa Fe, through its trackage rights, will provide the kind of Central Corridor service and competition that will be best for California.

Conlon, Oral Arg. Tr. at 470.

As DOT's counsel explained at the oral argument:

<sup>(</sup>O) ther than the applicants, only the BW/Santa Pe has the gathering lines that can supply the volume of overhead traffic necessary to maintain competition throughout the Central Corridor between the West Coast and the Midwestern gateways.

Smith, Oral Arg. Tr. at 156.

It is not clear whether three railroads could operate efficiently over this segment.

Chicago, St. Louis, Memphis and Dallas. These shippers would be left either with a very inefficient route over the new MRL affiliate via Salt Lake City to Kansas City, or with having to move their traffic north to the Montana Western Railway, which would hand it off to MRL, and then to BNST.

Large volumes of agricultural commodities, such as potatoes and grain, would be adversely affected by a divestiture to MRL. This business is intensely truck competitive and diversion to the highways will occur as transit times deteriorate under the MRL proposal. Potatoes originate on this UP Northern Idaho network, destined to the population centers of the South and East; grain, primarily wheat, barley, and malt, moves mainly east and to the Portland srea for export. Grain and lumber is trucked from origins on BNSF and MRL to Silver Bow for handling by UP to a variety of markets. MRL's purchase of this line could make rail service uncompetitive in these markets.

Under the BNSF agreement, intermodal and automotive customers at Salt Lake City and Reno will gain new single-line access from the numerous and substantial intermodal terminals throughout the BNSF system, especially in the East (Chicago, Twin Cities, Memphis, Kansas City, Denver, St. Louis, Omaha and Dallas) and the West (Richmond, Stockton, Modesto and Fresno). MRL would only reach Kansas City and Denver on the east and Stockton on the west. Moreover, even at these few locations, intermodal shippers would not have access to BNSF's facilities. MRL's new affiliate would only possess facilities initially at Denver that it would acquire as part of the divestiture. Most of the existing intermodal and automotive volumes to or from Salt Lake City and Reno would lose the benefit of a second competitive single-line route.

As part of the BNSF agreement, UP/SP will obtain new, shorter routes by gaining trackage rights over BNSF from Bend to Chemult, OR, and between Barstow and Mojave, CA. The MRL proposal could undermine the BNSF agreement, and with it the significant mileage savings associated with these trackage rights.

As already discussed, both UP and SP now operate over more circuitous routes than the efficient single-line routes the merger will create. The merger will reduce UP's mileage between Oakland and Chicago by 189 miles and SP's by 388 miles. Prom Oakland to Kansas City and St. Louis, the reductions will be 189 miles for UP and 143 miles for SP. Between Los Angeles and Memphis, the savings will be 283 miles over SP's present route and 580 miles over UP's non-competitive Central Corridor route. These mileage reductions will make the merged system more competitive with BMSF, the service leader for Bay Area-Midwest traffic.<sup>286</sup>

Upon merger, UP/SP will gain route and terminal flexibility in several major corridors including Los Angeles-Chicago, Bay Area-Utah, and San Antonio-Houston-Dallas-Hemphis-St. Louis-Chicago. Between Los Angeles and Chicago, expedited intermodal and auto traffic will be concentrated on the Tucumcari line and slower manifest traffic on UP's Central Corridor line, adding to the total capacity of both. Between the Bay Area and Utah, expedited traffic will move via SP's Donner Pass line, and slower bulk traffic will move via UP's Feather River line. The merger will also alleviate congestion in Utah by eliminating the conflicting and inefficient movements of UP and SP traffic between Salt Lake City and Ogden which add unnecessary miles and (continued...)

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Divestiture would jeopardize the ability of the merged company to ensure long-term, high-quality rail service to shippers who are dependent presently on SP throughout the West. SP's transcontinental service time will be reduced from weeks to days; service in coal, automobile, and other markets will similarly improve; reliability will be vastly increased; and cars will be available. This improvement in competition will mean that, for the first time in many years, rail transportation will be a real competitor for these shippers' business.

Divestiture would also impede applicants from using the combined facilities of UP and SP in this corridor, and thus limit the merged company's ability to resolve problems of route congestion (particularly between Ogden and Salt Lake City, and between Pueblo and Herington), circuity and altitude, which have contributed to the irregularities that make SP's services less competitive. The new plan will svoid or cure tunnel clearance problems on SP's routes through the Rockies (Moffat Tunnel) and the Sierras. Yard expansion or pre-blocking of larger volumes of combined traffic to bypass yards will alleviate delays for traffic that moves through the Roseville yard'and other rehandling yards in California, as well as at Ransas City. The resulting service improvements will provide consistent transit times--better by many days than what SP offers now--that can more effectively compete with the offerings of BNSF for food products, forest products and coal moving in this corridor.

In sum, we believe that the service that will be provided by BNSF over trackage rights is an appropriate replacement for the service formerly provided by SP. Divestiture to another carrier would not replace the competitive single-line and routing options that shippers will lose when SP merges with UP. No railroad other than BNSF so nearly duplicates the SP and UP networks. Likewise, no other railroad has the financial strength, operational capabilities, and marketing expertise to serve the long routes in the Western United States. The BNSF agreement grants BNSF trackage rights between Denver and Oakland, with

hours to every UP and SP train that crosses the Central Corridor. Most UP/SP Northern California trains will be operated straight through at Ogden, and BNSF trains will be operated straight through at Salt Lake City.

shippers local to its lines in California and food products shippers local to its lines in California and Oregon who have endured 2- or 3-week delivery times to the Midwest, cars lost and untraceable in terminals, inaccurate bills, and unavailable equipment. Some have limited or eliminated their carload rail shipments and are paying more to move their goods by truck or BNSF intermodal or transload service—and would return their traffic to rail if SP could provide adequate service.

SP has two transcontinental routes, the Central Corridor and the Southern Corridor, both of which are largely single-track, difficult to operate, and costly to maintain. The distribution of its traffic is such that it cannot eliminate either of those routes without losing more than it would gain. Clearance problems and mountainous operating conditions across the Central Corridor route cause SP to move even more traffic over its Tucumcari route, notwithstanding congestion. SP's yards are clogged and need capital investments that SP has not been able to fit within its constrained capital budgets.

Finance Docket No. 32760 access to all 2-to-1 shippers in Utah, Nevada, and Northern California (there are no 2-to-1 points in Colorado). We find that divestiture in the Central Corridor lacks We find that divestiture in the Central Corridor lacks competitive justification, and that MRL's proposed divestiture is overbroad and overreaching. Divestiture of the Central Corridor would eliminate single-line service, degrade service quality. increase transit times, restrain efficiencies, and undermine the merged system's ability to fund new capital projects as proposed by applicants. The MRL proposal would force a sale of lines accounting for approximately 350,000 carloads of exclusively served traffic in 1994, compared to only 75,000 carloads of SP's 2-to-1 traffic. Applicants predict that MRL's divestiture proposal would result in \$631.3 million in annual revenue losses to UP/SP, involving five areas: carload diversions, losses to UP/SP, involving five areas: carload diversions, losses resulting from MRL's proposed PRA, intermodal traffic, automotive traffic, and losses of new UP/SP marketing opportunities for carload traffic. UP/SP-231, RVS Peterson, at 210-213. A Central Corridor divestiture is not in the best interest of shippers or the public. We believe that BNSF will be an effective competitor as a tenant over UP/SP lines. We believe that the broad-based conditions that we are imposing will sufficiently augment the BNSF trackage rights agreement to preserve competition over the Central Corridor. 367 EXCERCED CASES AND RELATED MATTERS. We are exempting, in the Sub-No. 1 docket, the trackage rights provided for in the BNSF agreement and included in the Sub-No. 1 notice filed BNSF agreement and included in the Sub-No. 1 notice filed November 30, 1995, but we are requiring the filing of additional notices covering both the BNSF trackage rights provided for in the CMA agreement and the URC trackage rights provided for in the URC agreement. We are exempting, in the Sub-No. 2 docket, the line sales provided for in the BNSF agreement. We are exempting, in the Sub-No. 3, 4, 5, 6, and 7 dockets, the terminal railroad control transactions proposed therein. We are exempting, in the Sub-No. 8 docket, common control of UP and the two motor carriers controlled by SP, and common control of SP and the one motor carrier controlled by UP. Finally, we are granting, in the Sub-No. 9 docket, the terminal trackage rights application filed therein. therein. Trackage Rights. We are exempting, in the Sub-No. 1 docket, the trackage rights provided for in the BNSF agreement and included in the Sub-No. 1 notice filed November 30, 1995. These trackage rights are essential to the competitive service that BNSF will provide under the BNSF agreement, and we believe that the trackage rights class exemption codified at 49 CFR 1180.2(d) (7) (1995) can be invoked with respect to trackage rights provided for in a settlement agreement.<sup>266</sup> We are directing applicants and BNSF to file, no later than 7 calendar days prior to the effective date of this decision, an additional class exemption notice covering the trackage rights added to the BMSF agreement in accordance with the amendments required by the CMA agreement. These trackage rights are also 207 As noted, DOT advocates augmented trackage rights as the preferred remedy in the Central Corridor. DOT-4 at 39. DOT's recommendations have been addressed elsewhere. we will not publish the Sub-No. 1 notice in the <u>Federal Register</u>. Sufficient notice of the Sub-No. 1 trackage rights was provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995). - 164 -

vital to the competitive service that BNSF will provide under the BNSF agreement, but were not included in the Sub-No. 1 notice

We are directing applicants and URC to file, no later than class exemption project to the effective date of this decision.

We are directing applicants and URC to file, no later than 7 calendar days prior to the effective date of this decision, a class exemption notice covering the trackage rights provided for in the URC agreement. As explained elsewhere in this decision we are imposing the URC agreement as a condition to approval of the merger; and the URC trackage rights are vital to the competitive service that URC will provide under the URC agreement. Trackage rights imposed as a condition in favor of a named railroad do not ordinarily require any approval beyond the approval implicit in (carryover paragraph), and therefore do not ordinarily require a for all trackage rights imposed as conditions in this proceeding, we are directing applicants and URC to invoke the trackage rights class exemption.

Lime Sales. We are exempting, in the Sub-No. 2 docket, the three line sales provided for in the BNSF agreement. These line sales would ordinarily require approval under 49 U.S.C. '11344; but, under 49 U.S.C. 10505, we must exempt these sales from regulation if we find that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. We are of the opinion that regulation is not necessary to carry out the rail transportation policy; the Sub-No. 2 exemption will allow competition and the demand for services to establish reasonable rates for rail transportation, 49 U.S.C. 10101a(1), will minimize the continuation of a sound rail transportation system with effective competition among rail carriers, 49 U.S.C. 10101a(2), will ensure effective competition among rail carriers, 49 U.S.C. 10101a(4), and will ensure effective competition between rail carriers, policy will not be adversely affected. We are also of the opinion that regulation is not necessary to protect shippers from the abuse of market power. The very purpose of most of the arrangements provided for in the BNSF agreement, including the that would otherwise be lost with the merger. The arrangements provided for in the BNSF agreement, including the that would otherwise be lost with the merger.

Terminal Railroad Control Transactions. We are exempting, in the Sub-No. 3, 4, 5, 6, and 7 dockets, control by UP/SP of five terminal and/or switching railroads (ALS, CCT, OURD, PTRR,

The notice with respect to the additional BMSF trackage rights will be published in the <u>Federal Register</u> in due course. Notice of the additional BMSF trackage rights was not provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

be published in the <u>Federal Register</u> in due course. Motice of the URC trackage rights will the URC trackage rights was not provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

the Federal Register. Sufficient notice of the Sub-No. 2 exemption in sales was provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

and PTRC, respectively) in which UP and SP presently have non-controlling interests. Control of these railroads by UP/SP would ordinarily require approval under 49 U.S.C. 11344; but, under 49 U.S.C. 10505, we must exempt these control transactions from regulation if we find that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and (2) either (a) the transaction or service is of limited impe, or (b) regulation is not necessary to protect shippers from the abuse of market power. We are of the opinion that regulation is not necessary to carry out the rail transportation policy. The sought exemptions will allow competition to establish reasonable rates, promote an efficient rail transportation, and encourage honest and efficient railroad management, 49 U.S.C. 10101a(1), (3), (5), and (10); and other aspects of the rail transportation policy will not be adversely affected. We are also of the opinion that the ALS, CCT, CURD, PTRR, and PTRC control transactions are of limited scope, because four of these railroads conduct local operations only and because the fifth is currently inactive. We are of the further opinion that regulation is not necessary to protect shippers from abuse of market power, because these control transactions are related to, and will facilitate, common control of UP and SP, which we have found to be consistent with the public interest. 313

Motor Carrier Control Transactions. We are exempting, in the Sub-No. 8 docket, (i) common control of UP and the two motor carriers controlled by SP (PMT and SPMT), and (ii) common control of SP and the one motor carrier controlled by UP (Overnite).

Overnite, which provides both less-than-truckload and truckload service on a nationwide basis, is operated independently of UP, and applicants have indicated that they have no plans to eliminate that independence or otherwise incorporate Overnite into UP/SP's operations. PMT, which provides nationwide general commodity trucking service and which specializes in truckload freight movement, both over-the-highway and via TOFC, is operated independently of SP, and applicants have indicated that they have no plans to eliminate that independence or otherwise incorporate PMT into UP/SP's operations. SPMT, which formerly transported motor vehicles and also formerly specialized in the ramping and deramping of TOFC and COFC for SPT, has not conducted operations for more than 2 years, and applicants have indicated that they have no plans to resume SPMT's operations.

The Sub-No. 8 motor carrier control transactions would ordinarily require approval under 49 U.S.C. 11344; but, under 49 U.S.C. 10505, we must exempt these transactions from regulation if we find that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. We are of the opinion that regulation is not necessary to carry out the rail transportation policy. The sought exemption will further the goals of ensuring an efficient, economical, and competitive rail transportation system, thereby meeting the needs of shippers, 49 U.S.C. 10101s(4) and (5); and other aspects of the rail transportation policy will not be adversely affected. We are

we will not publish notice of the Sub-No. 3, 4, 5, 6, and 7 exemptions in the <u>Federal Register</u>. Sufficient notice of the ALS, CCT, DURD, PTRR, and PTRC control transactions was provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

Finance Docket No. 32760 also of the opinion that the Sub-No. 8 control transactions are of limited scope, because they involve merely changes in formal ownership and control, rather than substantive changes in formal affect the operations and service provided by the motor carriers. We are of the further opinion that regulation is not necessary to protect shippers from the abuse of market power, because the operations of Overnite and PMT will not change as a consequence of the common control for which the full mot change as a consequence of the common control for which the Sub-No. 8 exemption is sought, and because SPMT has no operations. Shippers have pre-merger, and will continue to have post-merger, numerous motor carriage services available to them at all locations served by Overnite and PMT. IBT contends that the exemption sought in the Sub-No. 8 docket is barred by the interplay of 49 U.S.C. 11344(c) (fourth sentence) and 49 U.S.C. 10505(g)'(1). The fourth sentence of 49 U.S.C. 11344(c) provides that a railroad can be authorized to acquire control of a motor carrier only if the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition; 49 U.S.C. 10505(g)(1) provides that a 49 U.S.C. 10505 exemption cannot authorize intermodal ownership that is otherwise. 49 U.S.C. 10505(g)(1) provides that a 49 U.S.C. 10505 exemption cannot authorize intermodal ownership that is otherwise. pronibited under 49 U.S.C., Subtitle IV (wherein 49 U.S.C. 11344 is located); and IBT therefore contends that we cannot grant the Sub-No. 8 exemption because applicants, having indicated that they intend to keep Overnite and PMT independent and SPMT inactive, have made clear that they will not use these motor carriers in furtherance of UP/SP's rail operations. The fourth sentence of 49 U.S.C. 11344(c), however, is not applicable to a transaction that involves only a change of form, not of substance, in the transportation service. DRGM/SP, 4 I.C.C.2d at 945-51; UP/MKT, 4 I.C.C.2d at 485. Here, the common control (1) of UP and PMT and SPMT, and (ii) of SP and Overnite, is merely an incidental change in ownership resulting from the primary merger transaction. Each of the motor carriers is today commonly controlled with a rail company, so the Sub-No. 8 transactions will not create intermodal ownership where there was none. And, because motor carrier operations will not change as a result of the common control, the Sub-No. 8 transactions will merely serve to bring the motor carriers under a broader merely serve to bring the motor carriers under a broader corporate umbrella.233

Terminal Trackage Rights. We are granting, in the Sub-No. 9 docket, the application filed by applicants and BNSF for an order permitting RMSF to use two small segments of RCS track in Shreveport and one small segment of RCS track in Beaumont. These rights are important to BMSF's ability to conduct operations over the segments between Houston and Memphis and between Houston and New Orleans because RCS solely owns certain rail lines through Shreveport and Beaumont, which form essential parts of those routes. RCS has longstanding trackage rights agreements over the relevant segments with SP at Shreveport, and with SP and UP at Beaumont, but RCS is unwilling to grant trackage rights to BMSF. Under applicants' and BMSF's proposal, BMSF would be able to avail itself of similar trackage rights arrangements.

Under 49 U.S.C. 11103, we may require terminal facilities owned by one railroad to be used by another if the use is practicable and in the public interest, and will not

<sup>213</sup> We will not publish notice of the Sub-No. 8 exemption in the <u>Federal Register</u>. Sufficient notice of the Sub-Mo. 8 transactions was provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

Finance Docket No. 32760 substantially impair the ability of the owning carrier to handle its own traffic. We find that the three KCS segments at issue are terminal facilities, that use of such segments by BNSF is practicable and in the public interest, and that use of such segments by BNSF will not substantially impair KCS' ability to handle its own traffic. Terminal Pacilities. The three KCS segments are "terminal facilities" under 49 U.S.C. 11103 because each lies in the middle of a city, and each is used for switching and interchange movements as well as for line-haul movements through the terminal. The precise use to be made of these segments by BNSF is not crucial; 49 U.S.C. 11103 "is not necessarily limited to benefitting the rail service in the relevant terminal area."

Southern Pacific Transp. Co. v. ICC, 736 F.2d 708, 723 (D.C. Cir. 1984) (SPT v. ICC) (citing with approval ICC decisions ordering "bridge the gap" terminal trackage rights under 49 U.S.C. 11103). Owner Not Substantially Impaired. Use by BMSF of the three KCS segments will not substantially impair KCS' ability to handle its own traffic. For the most part, BMSF trains will be using track capacity freed up by UP/SP, so that KCS' track will not be subjected to greater use by other railroads than it was 'previously. We believe that the traffic handled by BMSF will replace traffic now handled by SP, although various parties, including KCS, have argued that BNSF will not be able to achieve even those traffic levels. Use Is Practicable. Use by BNSF of the three KCS segments is practicable. We realize that the terminal trackage rights we are approving may make operations at Shreveport slightly more complicated than they are now because three carriers will be operating over them rather than two, but this will simply "require coordination of operations between the parties." <a href="http://www.np.nc.nc.nc.">wp/mp/wp</a>, 366 I.C.C. at 576. Moreover, applicants' directional running plan, which will be available to ENSF for its new Houston-Memphis movement, could result in less interference with KCS' traffic at Shreveport. At Beaumont, BNSF service is merely replacing that now provided over trackage rights by SP, and thus it will clearly be practicable. A Grant is in the Public Interest. To ameliorate certain anticompetitive consequences of the 1982 UP/MP/WP merger, the ICC imposed a condition granting DRGW trackage rights over a line between Pueblo and Kansas City, part of which was owned by a non-applicant, SF. <u>UP/MP/WP</u>, 366 I.C.C. at 572. The ICC used its 49 U.S.C. 11103 power to grant terminal trackage rights. Applying this provision, the ICC determined that grass course to this line to make the agency's overall merger conditions effective would be in the public interest. <u>UP/MP/MP</u>, 366 I.C.C. at 574-76. The Court of Appeals affirmed. <u>SPT v. ICC</u>, 736 F.2d at 722-24. We think that the terminal trackage rights sought here fall squarely within that precedent. here fall squarely within that precedent. Use by EMSF of the three KCS segments is in the public interest because it is essential to the merger conditions permitting EMSF to provide a competitive alternative in the Houston-Memphis and Houston-New Orleans corridors. See UP/MP/MP, 366 I.C.C. at 576. See also SPT v. ICC, 736 F.2d at 723 (approving determination that terminal trackage rights were in public interest because they allowed ICC to greate Central public interest because they allowed ICC to create Central Corridor competitive alternative to the merged carrier). Nevertheless, KCS contends that the terminal trackage rights here cannot be considered to be in the public interest as construed in Midtec Paper Corporation v. CNW et al., 3 I.C.C.2d - 168 -

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171 (1986) (Midter). In Midter, the ICC said that it would not grant terminal trackage rights under section 11103 unless they were necessary to remedy or prevent an anticompetitive act by the coming carrier. KCS is arguing that in Midter the ICC replaced the flexible public interest standard of UP/MP/WP with a much narrower standard.

Whether the ICC ever applied its relatively exacting Midter precedent in the context of a merger is a matter of some debate. In any event, we believe that it is inappropriate to do so here, and, to the extent that ICC cases suggest otherwise, we specifically overrule them. Instead, we will apply the broad "public interest" standard that is in section 11103(a) itself. Congress gave us broad authority in both the public interest standard in section 11103 and in the public interest standard of section 11343. Thus, we believe that it is appropriate for us to retain the flexibility to use the terminal trackage rights provision to prevent carriers opposing a merger from blocking our ability to craft merger conditions that are clearly in the public interest as the ICC did in the past.

Conditions and Commensation. Section 11103(a) provides that the carriers are responsible for establishing the conditions and compensation applicable to terminal trackage rights awarded under 49 U.S.C. 11103, and we will therefore allow BMSF and KCS an opportunity to reach an agreement respecting such matters. Because the terminal trackage rights are crucial to the competitive role that BMSF will play in the Houston-Memphis and Houston-New Orleans corridors, we will make them effective on the effective date of this decision. To resolve as many details as possible prior to that date, we will require BMSF and KCS to submit, within 10 days of the date of service of this decision, either agreed-upon terms respecting implementation or separate proposals respecting such implementation. We realize that 10 days is a short time frame, but it will enable us promptly to set the terms. Even if certain compensations details have not yet been resolved, the Sub-No. 9 terminal trackage rights will become effective on the effective date of this decision.

49 U.S.C. 11341(a). The underlying contractual agreements pursuant to which SP has trackage rights over the two Shreveport segments, and pursuant to which MPRR (UP) and SP have trackage rights over the one Beaumont segment, arguably preclude

Missouri-Kansas-Texas RR Co. v. St. Louis SW Rv. Co., Finance
Docket No. 30759 (ICC served Jan. 9, 1987) (not applying Midtec);
Rio Grande Industries. Inc., et al.--Pur. & Track.--CMW Rv. Co.,
5 I.C.C.2d 952 (1989) (SP/CMW) (not applying Midtec); Rio Grande
Industries. et al.--Purchase and Related Trackage Rights--Soo
Line Bailroad Company Line Between Kansas City. MO and Chicago.
IL. Finance Docket Mo. 31505 (ICC served Nov. 15, 1989) (SP/Soo
Decision No. 6) (indicating that the Midtec standard would apply
if applicant were to be given terminal trackage rights).

Compensation will accrue from the actual date of the start of trackage rights operations; and will be psyable after the terms have been established. We realize that 49 U.S.C. 11103(a) provides that the compensation for terminal trackage rights "shall be paid or adequately secured" before a carrier may begin to use trackage rights awarded under 49 U.S.C. 11103. We therefore pledge that, if BMSF and KCS cannot reach agreement respecting compensation terms, we will set appropriate terms under condemnation principles. See UP/MP/MP, 366 I.C.C. at 576 n.114; SPT v. ICC, 736 F.2d at 723.

conveyance of such rights to other carriers without RCS' consent. The 49 U.S.C. 11341(a) immunity provision provides that a carrier, corporation, or person participating in a transaction approved under 49 U.S.C. 11344 is "exempt from the antitrust laws and from all other law, including state and municipal law, as necessary to let that person carry out the transaction . . . (emphasis added). In Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117 (1991) (Dispatchers), the Supreme Court held that the immunity provision extends not only to laws but also to contracts.

Applicants have requested that we hold that, under the circumstances of this case, the immunity provision permits BMSF to use the three line segments at issue. UP/SP-26 at 123; UP/SP-272, Tab F at 12. KCS' affiliate, Tex Mex, has acknowledged that we would have the authority to override an identical antisubstitution provision in its own terminal trackage rights application over HB&T in this proceeding. 200

Applicants have requested that we hold that, under the circumstances of this case, the immunity provision permits RNSF to use the three line segments at issue. UP/SP-26 at 123; UP/SP-232, Tab F at 12. KCS' affiliate, Tex Mex, has acknowledged that we would have the authority to override an identical antisubstitution provision in its own terminal trackage rights application over HB&T in this proceeding. We think that an override of the restrictions in KCS' trackage rights agreements would be necessary to carry out the merger here if section 11103 were unavailable. Similarly, an override for Tex Mex to permit it to operate over HB&T's trackage in the Houston terminal would be necessary to carry out the merger as well.) Because we are granting the section 11103 application, however, no override of these contractual provisions is necessary.

LABOR IMPACTS. Our public interest analysis includes consideration of the interests of carrier employees affected by the proposed transaction. 49 U.S.C. 11364(b)(1)(D); Dispatchers, 499 U.S. at 120.

Union Support. The merger is supported by seven unions representing approximately 55% of the union-represented employees on the combined UP and SP systems: the United Transportation Union; the Brotherhood of Locomotive Engineers; the International Association of Machinists and Aerospace Workers; the International Brotherhood of Electrical Workers; the International Brotherhood of Soilermakers and Blacksmiths; the Sheet and Metal Workers International Association; and the International Brotherhood of Firemen and Oilers. The UP/SP merger is the first major merger since the Staggers Act that has received widespread union support, and applicants are correct in their assessment that such extensive "labor support in a major rail merger case is unheard of in recent years, and stands as a testament to the compelling benefits of this merger." UP/SP-232, Tab D at 1.

Applicants indicate that UP did not execute written agreements with the seven unions; rather, UP exchanged with each

<sup>214</sup> KCS also acknowledges (KCS-60 at 43) that we have the authority under section 11341(a) to override contractual provisions prohibiting substitution of carriers in a trackage rights agreement if the criteria of section 11103 are met.

the immunity provision cannot override a consent requirement in a joint facility contract. Res SP/CMM, \$ I.C.C.2d at 979 (ICC held that it could not compel the assignment of trackage rights); and SP/Soo Decision No. 4, slip op. at 8 (ICC indicated that there were "substantial questions" as to its power to override a trackage rights contract). These precedents, however, did not survive the Subreme Court's 1991 Dispatchers decision, which made clear that the immunity provision may override contractual obligations.

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of these unions, in writing, certain commitments that form the basis of a partnership within which the parties commit to cooperate in implementing the merger. UP, applicants indicate, has gone beyond New York Dock conditions by committing to processes, more advantageous to the employees, by which the New York Dock conditions will be administered; these processes, applicants claim, give assurances to unions and employees alike that application of the protective benefits will not be fraught with delays and adversarial proceedings, and that the protective benefits will be administered fairly and expeditiously. The unions, applicants add, have committed to reach, voluntarily, agreements implementing the operating plan accompanying the primary application.

UTU, the largest union in the rail industry, indicates, in its comments dated March 29, 1996, that it supports the merger for two reasons: first, because UP has agreed to a number of conditions that will help mitigate the impact of job loss on UTU's members; and second, because UTU believes that the merger, by allowing UP and SP to form a strong competitor to BMSF, is in the best interest of rail labor in the future. UTU adds that UP's commitments include the following: (la) that automatic certification as adversely affected by the merger will be's accorded (i) to the 1,409 train service employees, the 85 UTU-represented yardmasters, and the 17 UTU-represented hostlers projected to be adversely affected in applicants' Labor Impact Study. (ii) to all other train service employees and UTU-represented yardmasters and hostlers identified in any merger notice served after Board approval, and (iii) to any engineers adversely affected by the merger who are working on properties where engineers are represented by UTU; (lb) that UP will supply UTU with the names and test period averages of such employees as sony merger notice served after Board approval, applicants will seek only those changes in existing CBAs that are necessary to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on that UTU contends that UP's application of New York Dock is inconsistent with the above-mentioned conditions, UTU and UP personnel will meet within 5 days of notice from the UTU International President or his designated representative and agree to expedited arbitration with a written agreement within 10 days after the initial meeting if the matter is not resolved, which will contain, among other things, the full description for neutral selection, timing of hearing, and time for issuance of the award(s); and (4) that, in the event UP uses a lease arrangement to complete the merger of the various SP properties and publicable.

Protective Conditions: New York Book. Applicants, as previously noted, project that the total labor impact of the merger will be 4,909 jobs abolished, 2,132 jobs transferred, and 1,522 jobs created. ARU and TCU, which regard these projections as a minimum, estimate that the number of UP/SP employees furloughed or transferred will be far greater than applicants have projected; and TCU warms that these job impacts will fall most heavily on certain crafts and in certain geographic locations. We believe that applicants have submitted reasonable

UTU, in its comments dated March 29, 1996, asked that we approve the merger and note the commitments that UP had made. Furthermore, while we are not imposing these commitments as an actual condition, we expect UP to abide by its commitments here.

estimates of job dislocations from common control, although actual job dislocations could end up being greater than projected by applicants. Neither the dislocations themselves, however, nor their concentration by craft or location, pose a barrier to our approval of the UP/SP merger transaction. Mergers of necessity involve employee dislocations, and the labor protective conditions that we impose are to mitigate these dislocations.

The basic framework for mitigating the labor impacts of rail mergers is embodied in the New York Dock conditions, which have been held to satisfy the statutory requirements of As II s. C.

The basic framework for mitigating the labor impacts of rail mergers is embodied in the New York Dock conditions, which have been held to satisfy the statutory requirements of 49 U.S.C. 11347, New York Dock Rv. v. United States, 609 F.2d 83 (2d Cir. 1979). See New York Dock, 360 I.C.C. at 84-90. The New York Dock conditions provide both substantive benefits for affected employees (dismissal allowances, displacement allowances, and the like) and procedures (negotiation, if possible; arbitration, if necessary) for resolving disputes regarding implementation of particular transactions. We may tailor employee protective conditions to the special circumstances of a particular case; but we will adhere to the practice which the ICC adopted in Railroad Consolidation Procedures, 363 I.C.C. at 793, and to which it consistently adhered. See, S.G., EN/SF, slip op. at 79-81; UP/CNM, slip op. at 94-96, that employees are to be provided the protections mandated by 49 U.S.C. 11347 unless it can be shown that, because of unusual circumstances, more stringent protection is necessary.

We find that the statutory protections provided in New York Dock are appropriate to protect employees affected by the merger, the lines sales, and the terminal railroad control transactions, and we further find that, subject to such protections, approval of the merger (in the lead docket), the lines sales (in the Sub-No. 2 docket), and the terminal railroad control transactions (in the Sub-No. 3, 4, 5, 6, and 7 dockets) will be consistent with the public interest insofar as carrier employees are concerned. Mo unusual circumstances have been shown in this case to justify additional protection. 315

Protective Conditions: Morfolk and Western. In accordance with the "usual practice" followed by the ICC, <u>RN/SF</u>, slip op. at 81, we will impose the <u>Norfolk and Western</u> conditions in the Sub-No. 1 docket with respect to the trackage rights provided for in the BNSF agreement. 220

We will deny the requests made by ARU and Mr. Fitzgerald that we impose the <u>Maw York Dock</u> conditions, and not the <u>Morfolk and Western</u> conditions, on the trackage rights provided for in the <u>BNSF</u> agreement. The <u>Morfolk and Mestern</u> conditions, which have traditionally provided the basic framework for mitigating the labor impacts of trackage rights transactions, have been held to satisfy the statutory requirements of 49 U.S.C. 11347 in that context. <u>BLEA v. ICC</u>, 675 F.2d 1246 (D.C. Cir. 1982). The benefits provided by the <u>Morfolk and Western</u> conditions are identical to the benefits provided by the <u>Maw York Dock</u> conditions; the two sets of conditions differ only in matters of procedure. The <u>Morfolk and Western</u> conditions, on the one hand,

The New York Dock protections will be available to adversely affected employees whenever they are adversely affected, and whether or not it was anticipated that pheir positions would be affected.

We will also impose the <u>Morfolk and Western</u> conditions in the Sub-No. 13 docket with respect to the Tex Nex trackage rights approved therein.

allow implementation immediately upon completion of a defined negotiation period, even if management and labor have not yet achieved an agreement or gone to arbitration; the New York Dock conditions, on the other hand, require agreement or arbitration prior to implementation; and, for this reason, application of the New York Dock conditions to the BMSF trackage rights would have a severe short-term impact on BMSF's ability to provide competitive service under the trackage rights provided for in the BMSF

Protective Conditions: Oregon Short Line. We will impose the Oregon Short Line conditions on each of the authorised abandonments and discontinuances. The Oregon Short Line conditions are similar to the New York Dock conditions, but are applied in the abandonment/discontinuances context. The imposition of the Oregon Short Line conditions here is a matter of consistency but has little practical significance, because all affected employees will also be covered by the New York Dock conditions imposed on the merger. See UP/MKT, 4 I.C.C.2d at 513.

The Immunity Provision. An arbitrator acting under Article I, Section 4 of the New York Dock conditions imposed in the lead docket, the Sub-No. 2 docket, and the Sub-No. 3, 4, 5, 6, and 7 dockets will have the authority to override CRAs and RLA rights, as necessary to effect, respectively, the merger in the lead docket, the line sales in the Sub-No. 2 docket, and the terminal railroad control transactions in the Sub-No. 3, 4, 5, 6, and 7 dockets. This authority derives ultimately from 49 U.S.C. 11341(a), the "immunity" provision.

An arbitrator acting under Article I. Section 4 of the Norfolk and Western conditions imposed in the Sub-No. 1 docket will likewise have the authority to override CBAs and RLA rights, as necessary to effect the Sub-No. 1 trackage rights. This authority, like its New York Dock counterpart, also derives ultimately from 49 U.S.C. 11341(a).

The immunizing power of section 11341(a) is not limited to the financial and corporate aspects of an approved transaction but reaches, in addition to the financial and corporate aspects, all changes that logically flow from the transaction. Parties seeking approval of a transaction, whether by application or by exemption, have never been required to identify all anticipated changes that might affect CBAs or RLA rights. Such a requirement could negate many benefits from changes whose necessity only becomes apparent after consummation. Moreover, there is no legal requirement for identification because 49 U.S.C. 11341(a) is "self-executing," that is, its immunizing power is effective when necessary to permit the carrying out of a project. American Train Dispatchers Ass'n v. ICC. 26 F.3d 1157 (D.C. Cir. 1994); UP/CNM, slip op. at 101; EN/SF, slip op. at 82. Thus, it would be inappropriate and inconsistent with the statutory scheme to limit the use of the 49 U.S.C. 11341(a) immunity provision by declaring that it is available only in circumstances identified prior to approval.

Finance Docket No. 32760 Certain Requests Denied. We will not impose several additional labor-related conditions that have been requested by parties to this proceeding. 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). Reimbursements. We will deny ARU's request that we require UP/SP to repay SP employees their forgone lump sum payments and their deferred wage increases. SP has already "paid" its employees for their wage concessions by giving up productivity concessions achieved by the nation's other railroads. UP/SP-230 at 316-17; UP/SP-232, Tab D at 8-9. Hiring Preference. We will deny ARU's request that we modify the hiring preference provision in the BNSF agreement.

This is a matter committed to the Article I, Section 4 implementing agreement procedures both with respect to UP/SP (see New York Dock, 360 I.C.C. at 85) and also with respect to BNSF (see Norfolk and Western, 354 I.C.C. at 610-11). Contracting Out. We will deny ARU's request that we require UP/SP and BNSF to use bargaining unit maintenance of way employees and signalmen for all merger-related track, right-of-way, and signal construction and rehabilitation work, including items mentioned in the application, the operating plan, and the BNSF agreement. This is a matter committed to the Article I, Section 4 implementing agreement procedures both with respect to UP/SP (see New York Dock, 360 I.C.C. at 85) and also with respect to BNSF (see Norfolk and Western, 354 I.C.C. at 610-11). We would also observe that "ctitracting out" is a matter that may be covered by provisions of existing CBAs. See UP/SP-230 at 315. Annual Reports. We will deny ARU's request that we require UP/SP to submit annual reports demonstrating how the forecast benefits in the area of cost-savings have been used. Isolating merger benefits from other changes as they are experienced would be inordinately costly, and there is no reason to saddle UP/SP with reporting obligations that have been imposed on no prior Diversion Reports. We will deny IBT's request that we require UP/SP to file semi-annual reports indicating the volume of traffic diverted from truck carriage and the rate of return of traffic diverted from truck carriage and the rate of return for such cargo. The merger-related diversion of traffic from motor to rail is properly regarded as a benefit that weighs in favor of approval of the merger, not a harm that must be mitigated or monitored. And IBT's suggestion that motor-to-rail diversions may reflect predatory rail pricing makes no sense at all. Indeed, as the recently enacted ICC Termination Act of 1995 (Pub. L. Mo. 104-88) demonstrates, Congress was obviously not persuaded by arguments of this type because it went so far as to eliminate regulatory jurisdiction over the issue of whether rail rates are too low. Union Pacific Motor Preight Corporation. We will deny IBT's request that we impose New York Dock protection in favor of UPMF 221 (...continued) Finance Docket No. 30965 (Sub-Nos. 1 and 2) (ICC served Apr. 21, 1993) (at 2 n.4). - 174 -

Finance Docket No. 32760 employees. Mandatory labor protection for UPMF employees is not warranted. See Garv W. McPherson v. Union Pacific Motor Preight Company. et al., Finance Docket No. 30000 (Sub-No. 45) (ICC served Apr. 20, 1989) ("Only individuals directly employed by a rail carrier are entitled to protection under section 11347. This excludes the complainants, who were employed by non-rail subsidiaries of the rail carrier.") (slip ep. at 3; footnote omitted), affid Rives v. ICC. 934 F.2d 1171 (10th Cir. 1991). Discretionary labor protection is not warranted either; IST has not demonstrated that UPMF employees possess skills that are not generally marketable outside the railroad industry, and that they would therefore have difficulty finding comparable employment elsewhere. Takings Claims. TTD's contention that a CBA override effected under the auspices of the immunity provision amounts to a "seizure" of private contract rights appears to be a variation on the familiar argument that any such CBA override amounts to a "taking" of private property in violation of the Fifth Amendment. A definitive answer to this argument cannot be provided in this proceeding or by this Board. See RLFA v. United States, 987 F.2d 806, 815-16 (D.C. Cir. 1993) (takings claims can be adjudicated only in the Federal Claims Court or, in certain limited circumstances, in a Federal District Court). We would note, however, that this statutory scheme is longstanding, and predates the relevant contracts. We think that a finding of a taking under the circumstances would be extremely unlikely. Takings Claims. TTD's contention that a CBA override Consolidated Proceedings. We will deny the request made by Mr. Fitzgerald that we consider the UP/SP merger on a consolidated basis with a reopened BN/SF proceeding. The evidence of record does not warrant the reopening of the BN/SF proceeding. GWWR Agreement. We will deny the requests made by Mr. Downey. The arrangements provided for in the GWWR agreement are non-jurisdictional, which necessarily means that there is no basis for imposing labor protection with respect to GMMR employees; and the New York Dock conditions will adequately protect SPCSL employees from any merger-related adverse impacts. 322 Alton & Southern. We think it appropriate to note, with respect to the concerns raised by Mr. Ponsler, that A&S employees adversely affected by the Sub-No. 3 control transaction will be adequately protected by the New York Dock conditions imposed in the Sub-No. 3 docket. Division 892 Diversions. We think it appropriate to note, with respect to the concerns raised by Mr. Potoshnik, that UP employees adversely affected by the UP/SP merger will be adequately protected by the New York Dock conditions imposed in the lead docket. PINANCIAL MATTERS. The evidence demonstrates that the entity resulting from the UPC/SPR merger will be financially sound, that UP's assumption of the payment of SP's fixed charges When we say that the arrangements provided for in the GNNR agreement are "non-jurisdictional," we mean that such arrangements do not require our approval. Labor protection benefits are intended to protect only employees of the carriers participating in the 49 U.S.C. 21343 transaction, and are not intended to protect employees of carriers not participating in that transaction. See, 8.8., UP/CNN. slip op. at 96. - 175 -

and the increase in total fixed charges will be consistent with the public interest, and that the terms of the UPC/SPR merger transaction are just and reasonable.

Financial Condition. We believe that, despite acquisition expenditures of approximately \$1.576 billion, 33 the financial condition of the merged entity will be favorable, because substantial earnings gains will result from increased revenues and cost savings attributable to implementation of the post-merger UP/SP operating plan.

Applicants submitted pro forms financial statements showing consolidated data of the merged UPC/SPR, based on 1994 data (for a base year) and for each of the first 5 years after consumericants.

Applicants submitted pro forma financial statements showing consolidated data of the merged UPC/SPR, based on 1994 data (for a base year) and for each of the first 5 years after consummation of the merger. These statements reflect the anticipated benefits of the merger and resulting changes in various revenue and expense accounts. Applicants also submitted financial statements for a "normal" year (a year after the fifth post-merger year) depicting the total benefits of the merger and any normalized additional debt and interest expenses that will be incurred.<sup>224</sup>

Applicants expect the merger to produce in a normal year, giving effect to full implementation of their operating plan, \$76 million in net revenue gains from diverted traffic and \$583.1 million in operating efficiencies and cost savings. Net revenue gains are expected to total \$22.8 million in the first year, growing to \$60.8 million in the third year, and reaching \$76 million in the fifth year. Almost all of the anticipated normalized annual operating benefits of \$583.1 million are expected to be realized by the end of the third year, with benefits of \$235 million in the first year (40% of the normalized amount), \$449.1 million during the second year (77% of the normalized amount), and \$546.2 million by the third year (94% of the normalized amount). The \$583.1 million annual savings are anticipated to be reached by year five. Thus, over the first years, operating benefits of well over \$2 billion are

Table 1 in Appendix F shows various financial data for a post-merger UPC/SPR. These data include balance sheet and income statement figures from applicants' pro forma financial statements and selected financial ratios developed from these statements for the base year (1994 data), each of the first 5 years after the merger, and a normal year. We have reached the following conclusions based on an analysis of these data.

The consolidated pro forms income before fixed charges exceeds fixed charges (interest payments for long-term debt) by margins that gradually rise from a low of 2.6 times during the first year after the merger to 3.1 times during the fifth year.

UPC acquired, on September 15, 1995, an approximately 25t interest in SPR at a cost of approximately \$976 million, and will, if the merger is consummated, acquire an additional approximately 15t interest in SPR at a cost of an additional approximately \$600 million. It should be noted that, if the merger is consummated, UPC will also acquire the remaining approximately 60t interest in SPR, but that such acquisition will entail an exchange of stock, not a cash expenditure.

Applicants' financial statements reflect, among other things, merger-related private benefits, including net revenues from diverted traffic and net receipts from trackage rights, which, as noted elsewhere in this decision, are properly counted as transfers but not recognized as public benefits.

Finance Docket No. 32760 The fixed charge coverage for the base year is 3.0 times and for the normal year is projected to be 3.2 times. The pro forms cash throw-off-to-debt ratios, which measure the ability to generate sufficient cash flows from operations to repay long-term debt maturing during the year, are favorable. During the base year, cash flow from operations exceeds maturing long-term debt by 3.2 times. The pro forma ratios show a steady improvement from 3.1 times during the first year to 3.8 times by the fifth year (as well as for the normal year). The operating ratio (the ratio of operating expenses to operating revenues) for the consolidated company is projected to improve (i.e., favorably decline) each year, moving from 82.9t during the base year to 78.9t for the fifth year and normal year. This signifies a steady improvement in operating efficiency as a result of the merger. Consolidated net income is projected to increase significantly, from \$704 million during the first year to over \$967 million for the normal year. As a result of this anticipated improvement in net income, UPC/SPR's return on equity is projected to improve from 9.5% for the first year to 11.8% for years 3, 4, and 5, as well as for the normal year. Also, because of these gains in net income, along with repayment of long-term debt, the ratio of long-term debt to debt plus shareholders' equity is projected to improve from over 51% in the first year to less than 46% by the normal year. The pro forms data indicate that a combined UPC/SPR will possess considerable financial strength and earning power. possess considerable financial strength and earning power. Furthermore, the merged system's income projections may be understated because they do not take into account revenue and income growth beyond what is directly anticipated from the merger, such as normal business growth, increased traffic from an improved economy, and cost savings resulting from improved technology. We conclude that a merged UPC/SPR will be financially sound. Taking into account projected revenue gains and cost savings resulting from the merger, UPC/SPR should generate sufficient cash flow to service its debt and make necessary capital outlays to maintain its plant investment. necessary capital outlays to maintain its plant investment. Fixed Charges. We are required to consider the total fixed charges resulting from the merger, 49 U.S.C. 11344(b)(1)(C), as well as any assumption of payment of fixed charges and any increase of total fixed charges, 49 U.S.C. 11344(c). There will be a merger released in the constant of be a manageable marger-related increase in fixed charges due to the issuance of additional debt and the assumption of obligations. The evidence demonstrates, however, that this increase will not have a significant impact on the financial condition of the marged entity. The financial soundness of the merged entity supports a finding that UP's assumption of SP's fixed charges and the increase in total fixed charges will be consistent with the multiplication of the marged entity of the marger and the increase in total fixed charges will be consistent with the public interest. Fairness Determination. Section 11344(c) directs us to approve any transaction referred to in 49 U.S.C. 11343 when we find that the transaction is consistent with the public interest, provided that the terms and conditions thereof are just and reasonable. The "just and reasonable" standard requires, among other things, that we determine, in an appropriate case, that the transaction is just and reasonable with respect to minority stockholders. See Schwahacher, 334 U.S. at 198-99; and UP/MET, 4 I.C.C.2d at 515-16. - 177 -

UPC already owns approximately 25% of the SPR common stock; there shares, which have been held in a voting trust pending the

there shares, which have been held in a voting trust pending the outcome of this proceeding, were acquired on September 15, 1995, for a cash price of \$25.00 per share. The UPC/SPR Merger Agreement provides that, upon the satisfaction of certain conditions, including regulatory approval, a wholly owned UPC subsidiary will acquire the approximately 75% of SPR common stock not held in the voting trust (the stock not held in the voting trust is hereinafter referred to as the outstanding stock). The Merger Agreement further provides that approximately one-fifth of the outstanding stock will be acquired for cash (at a cash price of \$3\$.00 per share) and that approximately four-fifths of the outstanding stock will be acquired in exchange for UPC common stock (at a ratio of 0.4065 shares of UPC common stock per share).

The cash price and the exchange ratio were derived by arm's-length negotiations between UPC and SPR and have been approved by the respective boards of directors and by substantial majorities of the stockholders of the two corporations. No stockholder of either company has challenged the fairness of either the cash price or the exchange ratio. All parties directly affected, having been afforded an opportunity to evaluate the Merger Agreement in light of their respective interests, are apparently satisfied with its terms, which is a strong indication that the terms are just and reasonable to the stockholders of UPC and also to the stockholders of SPR. We also find persuasive the evidence submitted by applicants' financial advisors (CS First Boston Corporation for UPC: Morgan Stanley & Co. Incorporated for SPR), who have expertise in the valuation of businesses and their securities in connection with mergers and acquisitions. See UP/SP-22 at 487-517. The evidence amply supports a finding that the terms of the Merger Agreement, including without limitation both the cash price (\$25.00 per share) and the exchange ratio (0.4065 shares of UPC common stock per share), are just and reasonable both to the stockholders of UPC and to the stockholders of SPR.

CONDITIONS REQUESTED. We impose conditions only when we find both that a rail merger will harm the public interest and that a proposed condition will lessen or eliminate such harm, is operationally feasible, and will produce public benefits. The fact that a requested condition pertains to or involves one of the applicants is not enough to classify it as relevant to the proposed common control transaction. There must be a nexus between the merger and the alleged harm for which the proposed condition would act as a remedy. The fact that a condition would benefit the party seeking it does not justify its imposition.

We will discuss in this part of the decision all the conditions that have been requested in this proceeding, except the following which are discussed elsewhere: the conditions

RCS claims that the terms of the transaction are not fair to the minority stockholders of SPR because SP's value would increase if it were broken up and sold in pieces. RCS-60 at 47-48. We are doubtful that RCS has standing to assert a Schwabacher interest. In any event, the fact that RCS' Schwabacher claim has not been made by any bona fide SPR stockholder is a good indication that the argument is wrong. There is no reason to believe that the sum of the values of the parts exceeds the value of the whole. Indeed, there is good reason to believe that the solution proposed by the parties is likely to be the one that will produce the greatest value to SPR's stockholders.

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sought by Tex Mex; the conditions sought by labor interests; the conditions sought with respect to the proposed abandonments; 246 and the environmental conditions sought by various parties.

Broad Conditions Requested. We will discuss first the various broad conditions that have been requested by multiple parties.

South Central/SP Fast Divestiture Conditions. Several parties have asked that we condition the merger by requiring the divestiture of parallel lines in the South Central/SP East region. The many South Central/SP East divestiture conditions almost uniformly envision the divestiture of parallel lines in the Houston-Eagle Pass, Houston-Brownsville, Houston-New Orleans, and Houston-Memphis corridors, but differ widely with respect to various details. We are denying all South Central/SP East divestiture conditions because, as emplained in greater detail above, we believe that the conditions we have imposed (primarily the BNSF and CMA agreements, and the various conditions designed to strengthen the BNSF trackage rights) will adequately preserve existing rail competition in the South Central/SP East region. 17

Central Corridor Divestiture Conditions. Several parties have asked that we condition the merger by requiring the divestiture of parallel lines in the Central Corridor. The many Central Corridor divestiture conditions differ in various respects, but generally envision (1) the divestiture of UP and/or SP lines between the San Francisco Bay area in the West and the Salt Lake City area in the East, and/or (2) (a) the divestiture of SP lines between the Salt Lake City area in the West and Denver and Pueblo in the East, and (b) if the divested lines are acquired by a carrier other than BNSF, the divestiture of SP lines and/or trackage rights between Pueblo and Kansas City. Some parties seeking a Central Corridor divestiture seek, in the alternative, a grant of unrestricted Central Corridor trackage rights in favor of an independent railroad such as WC or MRL. We are denying all Central Corridor divestiture conditions because, as explained in greater detail above, we believe that the conditions we have imposed (primarily the BNSF and CMA agreements, and the various conditions designed to strengthen the BNSF trackage rights) will adequately preserve rail competition in the Central Corridor.

Central Kansas-To-Texas Conditions. Several parties have asked that we condition the merger by inserting a third carrier into the Lower Plains States. The conditions sought by these parties differ in various details, but generally envision that a third carrier (such as RCS) would be given access to the

We are discussing in this part of the decision, however, one abandonment matter: with respect to the Barr-Girard abandonment in Docket No. AB-33 (Sub-No. 96), SPBC's procedural argument respecting lack of evidence of IAM trackage rights.

South Central/SP East divestiture conditions have been sought by Conrail, RCS, NITL, SPI, CCRT, MCC, Dow, PPG, Monsanto, SCC, IPC, Meyerhaeuser, RCT, Texas State Rep. Junell, Texas State Rep. Cook, Texas State Rep. Saunders, Arkansas Attorney General Bryant, Ia/DOT, DOJ, and DOT.

De Central Corridor divestiture conditions have been sought by KCS, MRL, NITL, WCTL, WEC, MPCSC, JSC, CCRT, MFU, CMAC, HCC, KCOSA, WP4L, WPS, AEPCO, PSCO, ILP, Monsanto, IPC, Weyerhaeuser, IBC/IWC, and DOJ.

Central Kansas-to-Texas rights that SP obtained in a settlement agreement in connection with the BN/SF merger. We did not impose those rights as a condition to the merger. We will deny the various Central Kansas-to-Texas conditions because we believe that the conditions we have imposed will adequately preserve, and that the merger itself should enhance, rail competition in the Lower Plains States in general and for wheat traffic moving from Central Kansas to Texas in particular. BMSF and UP are currently the main competitors for this wheat flow, while SP plays a small role. A post-merger UP/SP will be a stronger competitor vis-à-vis BMSF because the merger will allow UP/SP to upgrade lines and to use combined UP and SP lines in Texas to move heavier-loading cars of wheat to the export market.

Strengthen BNSF Trackage Rights Conditions. Several parties have asked, generally in the alternative, that we condition the merger by strengthening the trackage rights provided for in the BNSF agreement. We have strengthened the BNSF trackage rights in several important ways, and we believe that the conditions we have imposed will adequately preserve rail competition throughout the West. We are therefore denying any conditions that would strengthen the BNSF and URC trackage rights to any greater degree. 21c

Uinta Basin vs. PRB/Hanna Basin Conditions. Several parties, fearful that the merger will eliminate source competition between coal originated by UP (in the PRB and the Hanna Basin) and coal originated by SP (in the Uinta Basin), have asked that we impose conditions protecting this source competition. We are denying all such conditions because, as explained in greater detail above, we believe that: (1) the asserted source competition does not exist to any appreciable degree; (2) a merged UP/SP will take advantage of all reasonable opportunities to market the transportation of Uinta Basin coal; and (3) the conditions we have imposed (primarily the URC and BNSF agreements, and the various conditions designed to strengthen the BNSF trackage rights) should intensify competitive options for Uinta Basin coal shippers. 221

Trackage Rights Compensation Conditions. Several parties, fearful that the trackage rights compensation arrangements provided for in the BNSF and URC agreements will restrict BNSF and URC in their efforts to provide competitive operations, have asked that we require either that the trackage rights fee be reduced or that the compensation arrangements be restructured. We are denying all trackage rights compensation conditions because, as explained in greater detail above, we believe that the compensation arrangements provided for in the BMSF and URC agreements are reasonable and will permit BNSF to compete effectively. 333

<sup>239</sup> Central Kansas-to-Texas conditions have been sought by KCS. JSC. CCRT. HCC. EBT. KCOSA, and Ka/DOT.

Conditions designed to strengthen the BMSF trackage rights further have been sought, generally in the alternative, by SPI, WCTL, WSC, Cargill, CRA, and DOT.

Uinta Basin vs. PRB/Hanna Basin conditions have been sought by WCTL, MSC, WP&L, MPS, 'AEPCO, MEPCO, PSCo, ILP, PSCM, AGNC, and MRL.

Trackage rights compensation conditions have been sought by WCTL, WSC. Entergy, CPSB. TUE, IPC, Cargill, CRA, PSCM. Governor Leavitt, DOT, and DOJ.

pp/SP Integration Prohibition Conditions. Several parties have asked that we condition the merger with 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 months, with its service commitments under its coal transportation contracts. We will deny these conditions because they would require, in essence, that we monitor UP's compliance with its contractual service commitments. We do not believe that it would be appropriate for us to do so. Under the statute, the exclusive remedy for an alleged breach of a coal transportation contract is an action in an appropriate state court or United States district court, unless the parties have agreed otherwise. Old 49 U.S.C. 10713(i) (2); new 49 U.S.C. 10709(c) (2). We do not think that hampering the merged carriers' ability to realize merger gains hampering the merged carriers' ability to realize merger gains through consolidation of operations is a logical or correct way to enforce contract commitments.

Conditions Requested by Individual Parties. We will now discuss any additional conditions and arguments of various individual parties not discussed elsewhere.

Railroad Parties.

Consolidated Rail Corporation. We will deny Conrail's request that the Finance Docket No. 12760 (Sub-No. 1) class exemption be revoked because we believe, as did the ICC, that the trackage rights class exemption can be invoked in connection with trackage rights provided for in merger-related settlement agreements. See BN/SF, slip op. at 87 n.116. We will similarly deny Conrail's related request that the Finance Docket Mo. 32760 (Sub-No. 2) petition for exemption be denied; exemption by petition of the Sub-No. 2 line sales is no more inappropriate than exemption by notice of the Sub-No. 1 trackage rights.

Kansas City Southern Railway Commany. We reject KCS' various challenges to our jurisdiction and to the manner in which this proceeding has been conducted. Our jurisdiction extends to rail traffic moving in foreign commerce. See old 49 U.S.C. 10501(a) (2) (G) (jurisdiction extends to transportation in the United States between a place in the United States and a place in a foreign country) and new 49 U.S.C. 10501(a) (2) (F) (same). KCS' basic arguments respecting the protective order have already been answered. See Decision Mo. 2 (served Sept. 1, 1995). KCS had the right to challenge applicants' use of the 'highly confidential' designation with respect to any particular item so designated; the challenge would have been heard first by the Administrative Law Judge (ALJ) and, on appeal, by us; and the fact that KCS made such challenges only rarely suggests that the 'highly confidential' designation did not much impede KCS' ability to litigate this case. KCS' constitutional

 $<sup>{\</sup>it UP/SP}$  integration prohibition conditions have been sought by WCTL, WPSL, and WPS.

We will not discuss the arguments raised by those parties not requesting conditions, including: TPAW, SCREA, NCGA, ISRI, CP&L, IPA, LCRA/Austin, IES, Geon, USDA, and DOL.

See also Decision No. 5 (served Oct. 27, 1995) (upholding the "highly confidential" provision of the protective order against challenges made by other parties).

<sup>236</sup> Cf. Decision No. 39 (served May 31, 1996) (the ALT, on KCS' request, ordered public release of a passage from a UPC (continued...)

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arguments, to the effect that the "highly confidential" provision of the protective order worked a violation of due process rights under the Fifth Amendment and/or the right to petition for a redress of grievances under the First Amendment, are close to frivolous. As to KCS' arguments to the effect that applicants have not provided sufficient discovery, we note that KCS has not raised these arguments in the proper fashion (these arguments should have been raised first with the ALJ and, upon an unfavorable order, should have been brought to us).

We agree with XCS that the present decision has no retroactive effect, and therefore cannot insulate any pre-merger antitrust violations; but we will decline KCS' invitation to reopen the record in the <a href="Ministrum">MINIST MERGET PROCEEDING DECIME KCS has presented no evidence that such proceeding was tainted by anticompetitive behavior.</a>

Because Longhorn does not have, and because its predecessors never had, two-carrier competition at the McNeil interchange, the mergar will have no impact on the present or future competitive options available to Longhorn or to Giddings-Llano shippers. Pre-merger, their only Class I connection is UP at McNeil; post-merger, their only Class I connection will be UP/SP'at McNeil; nothing will have changed. And the passenger service conditions sought by CMTA are not necessary to mitigate merger-related impacts because the merger will have no impact at all on CMTA's future passenger operations; any disruption to CMTA's future passenger operations will be caused by the revival at Giddings (or at Elgin) of the additional Class I connection formerly provided at Giddings by SP.

We will, however, preserve the existing potential competition by providing Giddings-Llano shippers a Class I connection at Giddings. Pre-merger, Longhorn, by reactivating operations over the Smoot-Giddings segment, could achieve a second Class I connection (SP at Giddings). Me will preserve this potential competition by providing that the operator of the Giddings-Llano line is to be regarded as a 2-to-1 shortline for purposes of Section 8: of the BNSF agreement (which provides, among other things, that BNSF shall have the right to interchange with any shortline which, prior to September 25, 1995, could interchange with both UP and SP and no other railroad).

Section 4b of the BNSF agreement, as amended by Section 3b of the second supplemental agreement dated June 27, 1996, provides that BNSF shall have the right to interchange at Elgin with the operator of the Giddings-Llano line, should service be reinstituted on that line to Elgin. ONTA has disparaged a connection at Elgin vis-à-vis a connection at McMeil (CMTA's brief at 19-22), but CMTA might prefer a connection at Elgin vis-à-vis a connection at Giddings. CMTA has a right to a connection with BMSF either at Giddings (because we will require such a connection) or at Elgin (because we will hold applicants to their representation that they will allow such a connection); but CMTA has no right to have two such connections because the potential competition that we seek to preserve is based upon a single connection. CMTA will therefore be required to choose between Giddings and Elgin, unless the parties agree otherwise.

Board of Directors' presentation that applicants had designated "highly confidential"; applicants appealed; we upheld the ALJ's order).

Finance Docket No. 32760 We will allow the interested parties (CMTA, Longhorn, UP/SP. and BNSF) an opportunity to reach a negotiated settlement and ENSY) an opportunity to reach a negotiated settlement respecting the precise details of the condition we are imposing. We note, however, that one such detail (the choice between Giddings and Elgin) can be decided unilaterally by OMTA. Because time is not of the essence, we will allow the parties 120 days from the date of service of this decision to submit agreed-upon terms respecting implementation of the condition we have imposed. If the parties are unable to agree to such terms, they shall appears to the condition we have imposed. submit, by such date, separate proposals respecting implementation, and we will establish the terms. Macma Copper Company's Rail Affiliates. We will deny the conditions sought by MCC. MCC is captive to SP; that captivity predates the merger and will not be exacerbated by it; and MCC's end-to-end foreclosure argument (to the effect that the merger will eliminate potential competition in the form of interline alternatives) has no evidentiary support. Yolo Shortline Railroad Company. We will deny the conditions sought by Yolo. Pre-merger, Yolo has only one mean:ngful Class I connection (UP) and no prospect that it will ever have a second meaningful Class I connection (SP). Post-merger, Yolo will have only one meaningful Class I connection (UP/SP) and no prospect that it will ever have a second meaningful Class I connection (SNSF). The conditions sought by Yolo will not rectify any merger-related competitive harms because the merger will inflict no such harms upon Yolo. Nor will the conditions sought by Yolo rectify any operational harms attributable either to the merger or to the BNSF agreement because neither the merger nor the agreement will reduce the because neither the merger nor the agreement will reduce the efficiency of operations in the West Sacramento area. KJRY and PRC. We will not impose the conditions requested by KJRY and PRC because vo think that the purposes that would be served thereby can be better served by holding applicants to their representation that UP/SP will accept the terms of the settlement agreement entered into by SP in the BM/SF merger proceeding. See UP/SP-230 at 291. Shipper Organizations. Corn Refiners Association. We will deny the conditions sought by CRA because we believe that the conditions we have imposed will adequately preserve the rail competition that exists today in areas served by UP and SP. We note, however, that an element of CRA's second condition is reflected in our oversight condition. MMRC. MFU. and Governor Racicor. We will deny the various conditions sought by MMBC. MFU, and Governor Racicot, most of which seek to broaden the reach, in one fashion or another, of the competitive options created by the BMSF PRA. We realize that the BMSF PRA, by providing increased rail options for some shippers but not for all, may work to the disadvantage of those for whom increased options have not been provided. That, however, is not be the kind of harm that should be rectified under the conditioning power, which was not used by the ICC and will not be used by us to equalize rates and service among competing shippers. MMBC, MFU, and Governor Racicot are not concerned that certain shippers are losing a transportation option, but that their competitors are gaining one. Given this context, a condition requiring that a settlement agreement be changed to improve the competitive situation of particular shippers is not proper. Ass BM/SF, slip op. at 99 (Bunge). We also add that there is no reason to believe that the BMSF PRA will undermine use of the Silver Bow gateway for movements for - 183 -

Finance Docket No. 32760 which it provides the shortest and most efficient route, that which it provides the shortest and most efficient route, that there is no merger-related justification for requiring UP/SP to guarantee its service intentions on the Pocatello-Silver Bow Line for 20 years, that there is likewise no merger-related justification for requiring that the Pocatello-Silver Bow Line be sold to MRL, and that the oversight condition we have imposed is not intended to protect "the last vestiges of intramodal competition in Montana" because neither the UP/SP merger, nor the BNSF agreement in general, nor the BNSF pRA in particular, will adversely affect UP vs. BN (or UP/SP vs. BNSF) competition in Montana. Rather, they will improve it. Save The Rock Island Committee. We will deny the condition sought by STRICT. It is true, as STRICT alleges, that the ICC, in its 1980 decision allowing SP to acquire the Rock Island line, intended that SP would rehabilitate that line; and it is true that the ICC intended that a rehabilitated Rock Island line would provide competition to MPRR's parallel Kansas City-St. Louis line. This market, 363 I.C.C. at 327. STRICT neglects to mention, however, that the ICC, in its 1982 decision granting SP trackage rights over MPRR's parallel line, intended that these trackage rights would allow SP not to rehabilitate the Rock Island line. UP/MP/WP, 365 I.C.C. at 547 and 588 (approval of the trackage rights was intended to save SP the \$100 million cost of rehabilitation). The 1980 This market decision was reversed by the 1982 UP/MP/WP decision (the ICC, upon examining a new and updated record, changed its mind). The UP/SP marger will not harm competition between the MPRR line and the Rock Island line; no such competition has existed for almost two decades, and there is no reasonable prospect that such competition will ever exist again. Nor will the marger harm competition in the corridor linking Kansas City and St. Louis; ENSF, MS, and GMMR also operate in that corridor. Hoisington Chamber of Commerce. We will deny the labor protection conditions sought by HCC. The standard labor protection conditions that we have imposed fully satisfy the statutory requirements of 49 U.S.C. 11347. Farmers Elevator Association of Minnesors. We will deny the conditions sought by FEAM. The first condition (that UP demonstrate its ability to operate its existing system) is fulfilled; after an admittedly problematic start, UP has demonstrated its ability to operate the UP/CMM system. The second condition (that UP develop an operating plan to address service problems on the former CMM) has no connection to the UP/SP merger. South Sen Antonio Chamber of Commerce. We will deny the various conditions sought by SSACC; these conditions are not directed to any problems even arguably caused by the UP/SP merger. 237 The conditions sought by MMSC, MFU, and Governor Racicot The conditions sought by MMSC, MFU, and Governor Racicot will not alleviate competitive harms caused by the merger because the merger will not cause competitive harms in Montana; UP, as previously noted, has only a limited presence in Montana, and SP has no presence at all. The sought conditions are designed, for the most part, to alleviate the indirect effects of the BMSF PRA, but such indirect effects (in essence, the creation of new competitive options for some but not all shippers) are not among the kinds of competitive harms that our conditioning power is used to alleviate. - 184 -

Finance Docket No. 32760 Enteroy/Arkansas Pal/Gulf States Utilities. We will grant the build-out relief sought by Entergy vis-à-vis its White Bluff plant, and thereby preserve the White Bluff build-out status quo, by requiring that the BNSF agreement be amended to allow BNSF to transport coal trains to and from White Bluff vin the White Bluff-Pine Bluff build-out line, if and when that line is ever constructed by any entity other than UP/SP. See BN/SF, slip op. at 68 (OG&E) and 98 (PPC). Because applicants have made the BNSF agreement the vehicle for resolving merger-related competitive harms, there is no reason to require the negotiation of a separate trackage rights agreement for the White Bluff build-out. We note, however, that we are not imposing the trackage rights compensation terms advocated by Entergy; we believe that the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition. We will deny the relief sought by Entergy vis-à-vis its Nelson plant. Pre-merger (but taking the soon-to-be-completed Nelson plant. Pre-merger (but taking the soon-to-be-completed SGR line into account), Nelson has two destination carriers (SP and KCS), neither of which can offer single-line service from the PRB. Post-merger (and also taking the soon-to-be-completed SGR line into account), Nelson will still have two destination carriers (UP/SP and KCS), but one of them will be able to offer single-line service from the PRB. Post-merger, Nelson will have two entirely practicable routings (UP/SP single-line and BNSF-KCS joint-line). While Nelson will be losing the pre-merger BNSF vs. UP competition between the PRB and Fort Worth and also between the PRB and Kansas City, Nelson will be gaining a UP/SP single-line option; and there is no reason to conclude that the loss will be appreciably greater than the gain. loss will be appreciably greater than the gain. City Public Service Board of San Antonio. (i) We will hold applicants to their representation that the BMSF agreement will be amended to clarify that Elmendorf is a covered point. See UP/SP-230 at 257. See also Section 4a of the BMSF agreement, as amended by Section 3a of the second supplemental agreement dated June 27, 1996 (providing that BMSF can serve SP's line between MP 0 and MP 12.6 for the sole purpose of serving the CPSB plants at Elmendorf; we are unable to ascertain, however, whether BMSF has also received trackage rights over the appropriate UP line between San Antonio and Ajax). (ii) One of the conditions we have imposed in this decision confirms that BNSF will be allowed to serve all new facilities (not including expansions of or additions to existing facilities) located along the SP (and UP) lines over which BMSF receives trackage rights. (iii) We will impose a condition to the effect that BMSF will be allowed to serve CPSB's Elmendorf Station, at CPSB's will be allowed to serve CPSB's Elmendorf Station, at CPSB's option, via CPSB's existing trackage rights agreement with SP. Pre-merger: SP owns the Elmendorf Line and can thereby provide service; CPSB has trackage rights over the Elmendorf Line, and UP can thereby provide service; and BMSF has hawlage rights. Post-merger, but without CPSB's third condition: UP/SP will own the Elmendorf Line, and will thereby to able to provide service; BMSF will have, by virtue of the BMSF agreement, trackage rights over the Elmendorf Line, and it too will be able to provide service; but CPSB will have effectively lost its own trackage rights over the line, and, for this reason, BMSF will not be able to use the CPSB trackage rights in its operations over the line. It is not entirely clear why the CPSB trackage rights are important to CPSB, but to preserve the pre-merger status quo visimportant to CPSB, but to preserve the pre-merger status quo visimportant to CPSB, but to preserve the pre-merger status quo visimportant to CPSB, but to preserve the pre-merger status quo visimportant to CPSB, but to preserve the pre-merger status quo visimportant to CPSB, but to preserve the pre-merger status quo visimportant to CPSB, but to preserve the pre-merger status quo visimportant to CPSB, the pre-merger status quo visimportant to CPSB the - 185 -

Finance Docket No. 32760 to operate under such trackage rights over the 12-mile segment between SP Junction (Tower 112) and Elmendorf. (iv) We conclude that CPSB is not a "2-to-1" shipper for purposes of the conditions imposed in this proceeding. We realize that an argument can be made that CPSB is really a 3-to-1 shipper because the BMSF agreement provides for the termination of the haulage rights by which the third carrier (BMSF) can now serve CPSB; and one could reasonably conclude that a 3-to-1 shipper ought to have access to the remedies available to a 2-to-1 shipper. But we think that CPSB is best regarded as a 3-to-2 shipper because the SMSF agreement replaces BMSF's haulage rights with trackage rights. (v) We will not impose the compensation terms advocated by CPSB. We believe that the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition. (vi) Because we are not certain whether anything more needs to be done with respect to condition (i) or whether time is of the essence with respect to conditions (i) and (iii), we think that the best course would be to assume, unless told otherwise, that more needs to be done and that time is of the essence. We will therefore require the interested parties (CPSS, UP/SP, and BNSF) to submit, within 10 days of the date of service of this decision, either agreed-upon terms respecting implementation of conditions (i) and (iii) or separate proposals respecting such implementation. We realize that 10 days is a short time frame, but it will enable us, if necessary, to choose the better of the offered alternatives, or some variation thereof, in time for conditions (i) and (iii) to be effective when this decision is effective (on the 30th day after the date of service). 330 Texas Utilities Electric Company. We will require that the BNSF agreement be amended to permit KCS and BNSF to interchange BNSF agreement be amended to permit KCS and BNSF to interchange TUE coal trains: (a) at Shreveport, for movement by BMSF over SP's line between Shreveport and Tenaha; and (b) at Texarkana, for movement by BMSF over UP's line between Texarkana and Longview. Without this condition, all but one of TUE's PRB routings would involve UP/SP, and the one that would not would be excessively circuitous. We add that, although TUE sought only a Shreveport interchange, we are allowing a Texarkana interchange as well, to allow BMSF's routings of TUE coal trains to connect with the additional BMSF trackage rights provided for in the CMA agreement. This also will facilitate BMSF's directional running of these trains. We note, however, that we are not imposing the compensation terms advocated by TUE because the terms of the BMSF agreement will allow BMSF to compete effectively. We will allow the interested parties (TUE, UP/SP, BMSF, and KCS) an opportunity to reach a negotiated settlement respecting the precise details of the condition we are imposing; and, because time is not of the essence, we will allow the parties 120 days from the date of service of this decision to submit agreed-upon terms respecting implementation of the condition we have imposed. If the parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation, and we will establish the terms. 236 If nothing more needs to be done with respect to condition (i) and time is not of the essence with respect to conditions (i) and (iii), on or before the 10th day after the date of service of this decision. UP/SP and CPSB may jointly request an extension of the 10-day deadline, and we will extend that deadline to a later date. - 186 -

Finance Docket No. 32760 Sierra Pacific Power/Idaho Power Company. We will deny the condition sought by SPP/IDPC. Post-merger, NVS will have, in addition to a UP/SP single-line option, two BNSF options:

(1) a URC-BNSF joint-line haul, sourced from mines open to URC; and (2) a truck-BNSF joint-line haul, sourced from load-outs either at Provo or at other Utah points opened to BNSF under the transloading condition we have imposed. It is true, of course, that, post-merger, SPP/IDPC will have only one single-line option (UP/SP) whereas now it has two (UP and SP); but the difference between single-line service and joint-line service is less important in the coal unit train context; and the URC-BNSF joint-line routing should be quite competitive, especially in consideration of the new coal sources opened to URC under the URC agreement. Arizona Electric Power Cooperative. We will deny AEPCO's condition #1 (the request that AEPCO be given the right to obtain, and to contest the reasonableness of, a UP/SP rate for the Deming-Cochise segment) and its condition #4 (the request for clarification of the implications of the short-haul defense). clarification of the implications of the short-haul defense).

APPCO's basic problem is that, at Cochise, it is captive to SP pre-merger and will be captive to UP/SP post-merger; but this problem is not a consequence of the merger and will not be exacerbated thereby. APPCO's preferred solution, of course, is the prescription of a proportional rate over the Deming-Cochise segment; but this proceeding is not the proper forum for considering the merits of that solution. We affirm what the ICC said in this regard in the BN/SF decision: "A number of utility parties have cases pending before us requesting prescription of a proportional rate over the destination bottleneck segment of their coal movements, and we are not prejudging those cases here. We note, however, that approval of this merger is not intended to foreclose any shipper's right to maximum rate relief." BN/SF, slip op. at 76. We think it appropriate to add that, should we choose, we could eventually grant the relief requested by AEPCO by reopening the UP/SP merger proceeding and imposing that relief as a condition, even if the statutory long-haul/short-haul provision or other statutory provisions would otherwise preclude such relief. We note, with respect to the other conditions requested by AEPCO: that AEPCO's condition \$2 (either divest SP's Colorado lines or grant trackage rights over such lines) is both a Central Corridor divestiture condition and a Uinta Basin vs. PRB condition, and will therefore be denied for reasons previously discussed; and that AEPCO's condition #3 (disapprove the Tennessee Pass abandonments) will be granted in part (we are disapproving the abandonments but approving the discontinuances) for reasons also previously discussed. Public Service Comment of Colorado. PSCo's bifurcated condition respecting divestiture and trackage rights is both a Central Corridor divestiture condition and a Uinta Basin vs. PRB condition, and will therefore be denied for reasons previously discussed. PSCo's alternative conditions respecting the Tennessee Pass Line will be granted in part (we are disapproving the Tennessee Pass abandonments but are approving the discontinuances) for reasons also previously discussed. Rio Bravo Poso/Rio Bravo Jasmin. We will deny the conditions sought by Rio Bravo. Rio Bravo is either paptive to BNSF at destination (insofar as Rio Bravo's coal simply must be unloaded at the Masco facility) or it is not (insofar as Rio Bravo's coal can be unloaded at a facility on the mearby SP line). If, on the one hand, Rio Bravo is captive to BMSF today, the merger will have no effect at all on Rio Bravo's competitive - 187 -

Finance Docket No. 32760 options. See BN/SF, slip op. at 70-78 (extensive discussion of vertical effects). If, on the other hand, Rio Bravo is not captive to BMSF today, the merger, as conditioned by the BMSF and URC agreements, will preserve Rio Bravo's competitive options; post-merger, Rio Bravo will have access to a UP/SP single-line haul and a URC-BMSF joint-line haul. Shippers: Plastics and Chemicals.

Dow Chemical Company. Dow is located on a UP line, but claims to have pre-merger build-out/build-in options to both BMSF and SP. The BMSF option will survive the merger; the SP option Dow's primary request has a familiar flaw: it would move the build-out point (both for BMSF and for the SP substitute) much closer to Dow (from a point in the vicinity of Taxas City to a point in the vicinity of Anglaton). This would greatly improve, rather than preserve, the pre-merger build-out/build-in status quo vis-à-vis both BMSF and the SP substitute; and Dow's claim that the benefits of a Texas City build-out to SP exceed the benefits of a Texas City build-out to SP exceed not justified by the evidence of record. We will therefore deny Dow's primary request. Dow's alternative request cures the familiar flaw by keeping the build-out point for the SP substitute in the vicinity of the build-out point for the SP substitute in the vicinity of Texas City, but overreaches by asking that the SP substitute be given trackage rights to New Orleans and Memphis. The preservation of Dow's SP build-out option requires only that trackage rights run from the build-out point to a connection with an independent Class I carrier. We will therefore grant a modified version of Dow's alternative request, and condition the merger, by requiring that UP/SP grant trackage rights to a carrier to be named by Dow, subject to our approval, over UP's line from Texas City to Houston and over UP's or SP's line from Houston to connections with KCS and BMSF at Beaumont, with the right to connect to the build-out line in the vicinity of Texas City in order to serve Dow at Freeport and any other shippers located on the build-out line. Montell USA Inc./Olin Corporation. The fourth and fifth sentences of Section 5b of the ENSF agreement, as amended by Section 4b of the second supplemental agreement dated June 27, 1996, read as follows (italics and underlining added): BNST shall also have the right to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles and West Lake, LA, and traffic of shippers open to SP and KCS at West Lake Charles, LA; the foregoing rights at Lake Charles, West Lake, and West Lake Charles, LA shall be limited to traffic (x) to, from and via New Orleans, and (y) to and from points in Mexico, with rourings via Eagle Pass, Laredo (through interchange with Pex-Mex at Corpus Christi or Robstown), or Brownsville; TX. In addition to all other charges to be paid by BMSF to UP/SP herein, at West Lake and West Lake Charles, BMSF shall also be required to pay a fas to UP/SP equal to the fee that UP pays KCS as of the date of this Agreement to access the traffic at West Lake, adjusted upwards or downwards in accordance with Section 12 of this Agreement. Elsewhere in this decision we have effectively granted all of the conditions requested by Montell and Olin by requiring: (1) that the italicised limitations in the fourth sentence be disregarded (the principal effect will be to allow BMSF to handle, via - 188 -

Finance Docket No. 32760 single-line service, traffic moving to Houston and to other points on BNSF); (2) that KCS be allowed to interchange with BNSF, at Shreveport and Texarkana, traffic that was originated by KCS at or that will be delivered by KCS to shippers at Lake Charles. West Lake, or West Lake Charles (the principal effect will be to substitute a post-merger KCS-BNSF joint-line routing via Texarkana and Shreveport for the pre-merger KCS-UP joint-line routing via Texarkana); and (3) that the BNSF agreement be modified to eliminate the underlined fee in the fifth sentence. Overtum Chemical Corporation. (1) We will deny QCC's Chocolate Bayou conditions because these conditions would give QCC competitive options far in excess of those it has today. We note, however, that this denial is without prejudice to QCC's assertion of its rights under the build-out/build-in condition we are imposing upon the merger. (2) We will deny QCC's Williams' condition. QCC's claim that relief is necessary to preserve competition between its UP-exclusive Chocolate Bayou facility and its SP-exclusive Williams facility is misleading because QCC has neglected to mention that its La Porte, TX, facility (served by BNSF) has more than twice the polyethylene capacity of its Chocolate Bayou facility, and that its Morris, IL, facility (served by CSX and EJE) has even greater capacity than its La Porte facility. See UP/SP-230 at 159. (3) QCC's Baytown condition has been satisfied by applicants' representation, which is consistent with our reading of Section Sb of the BNSF agreement, that the Seapac facility at Baytown will be served by BNSF. See UP/SP-230 at 136. (4) We will deny QCC's Strang condition. The two-railroad post-merger competition that will Quantum Chemical Corporation. (1) We will deny QCC's condition. The two-railroad post-merger competition that will exist at Strang should suffice for QCC's purposes. Union Carbide Corporation. We will deny UCC's first condition because BMSF trackage rights over the UP line would vastly improve (and not merely preserve) the build-out status auo. We will grant UCC's second condition because BMSF trackage rights over the SP line will preserve the build-out status quo, as applicants themselves now appear to recognize. See UP/SP-230 at 19-20. See also Section 4a of the BMSF agreement, as amended by Section 3a of the second supplemental agreement dated June 27, 1996 (providing that BMSF will have trackage rights over SP's Port Lavaca Branch). Enterprise Products Company. We will deny EPC's condition #1, but without prejudice to EPC's right to invoke the build-out/build-in condition we have imposed on the merger. Condition #1 would require UP/SP to build the Mont Belview Branch proposed by UP; any such requirement would far exceed the relief heretofore afforded in the build-out context; and the excess is underscored by the fact that, as EPC itself concedes, the Mont Belview Branch, as initially proposed by UP, would not even have reached EPC. We will also deny EPC's condition #2 (in essence, the insertion of a second carrier on SP's Baytown Branch). Condition #2 is not necessary to alleviate merger-caused competitive harms and would vastly improve EPC's competitive options. Pre-merger, EPC is rail-served solely by SP; post-merger, EPC will be rail-served solely by UP/SP; the merger will not result in a reduction of EPC's competitive alternatives. Pormose Plastics Corporation. USA. We will deny FPC's "evenhandedness" condition. We realize that the conditions we have imposed, which may enable Dow, QCC, and UCC (and perhaps - 189 -

Finance Docket No. 32760 others) to attain increased competitive options via build-outs. may work to FPC's disadvantage. But that provides no "evenhanded" justification either for denying the relief awarded to Dow, OCC, and UCC or for granting matching relief to FPC. The harm that may befall FPC is not the kind of harm that the conditioning power was meant to rectify; we do not have a mandate to equalize the competitive situation among the industries served by rail carriers. FPC, after all, is not concerned that it is losing a transportation option, but that its competitors may be gaining one. Ci. BN/SF, slip op. at 99 (Bunge). <u>PPG Industries Inc.</u> We will deny PPG's requests respecting the WT6J, the WVRR, and the WLPRR; the competitive situations at Bacon, Lebanon, and Corvallis, respectively, will not be affected by the merger. Huntsman Corporation. As HC believed was required, DOJ has conducted a complete review of the impacts of the merger and we carefully have considered its comments. The conditions we have imposed ensure that UP/SP will not achieve, by virtue of the merger, sole supplier status or unacceptable market power at any significant point or in any significant corridor. Moreover, the proceedural schedule under which this proceeding has been handled procedural schedule under which this proceeding has been handled has allowed ample time for all concerned. Arizons Chemical Company. We will deny the conditions sought by ACC. ACC is not a 2-to-1 shipper (its Springhill plant is served solely by KCS); and the competition formerly provided by UP and SP past Shreveport will henceforth be provided by UP/SP and BNSF past various gateways. Monsanto Company. We will deny Monsanto's condition #1.

Monsanto has specifically referenced only two of its plants: its
plant at Luling (served by both UP and SP); and its plant at
Chocolate Bayou (served only by UP, but with access to SP via
either barge or a truck transload). Monsanto's competitive options at Luling will not be affected by the merger because the Luling plant is on the Avondale Line to be sold to BMSF (over which UP/SP will retain local trackage rights). Monsanto's competitive options at Chocolate Bayou will not be affected either because BNSF will have (under the transload condition we have imposed) the right to operate new transload facilities on the nearby SP line. We will also deny Monsanto's condition #4, which is not justified as a remedy to any particular competitive harm.

[1] new 49 U.S.C. 10701(d)(3) (directing us to complete the non-coal rate guidelines proceeding by January 1, 1997). 339 Shell Chemical Company. We will deny the conditions sought by SCC. The market dominance condition has no particular connection to the market dominance condition has no particular connection to the marger; and, in any event, we note that a shipper with access to two railroads is not captive to either, and that many shippers served by UP/SP or AMSF exclusively are adequately protected by intermodal or geographic competition. The divestiture condition is a variation on the South Central/SP East divestiture theme. Springfield Plastics/Brandt Consolidated. We reject SPBC's procedural argument respecting lack of evidence of the IAM trackage rights. As discussed elsewhere in this decision we are We are also denying Monsanto's conditions #2 and #3 (South Central/SP East and Central Corridor divestitures, respectively) . - 190 -

Finance Docket No. 32760 approving the Barr-Girard abandonment in its entirety; but we do so with the understanding that the line will be abandoned only if UP/SP first acquires the related trackage rights over IAM. The fact that such trackage rights have not yet been acquired (this appears to be the reason that evidence respecting such trackage rights has not been entered into the record) is not important; the fact that evidence respecting such trackage rights has not been entered into the record is likewise not important; what is important is that, as a very practical matter, the Barr-Girard abandonment cannot be consummated unless UP/SP has first acquired trackage rights over I&M. Shippers: Other. International Paper Commany. (1) We will deny IPC's condition #1 (a variation on the South Central/SP East divestiture theme). (2) We will deny IPC's condition #2. Conditions intended to keep open existing junctions are overly intrusive and could delay, in certain respects, implementation of the increased efficiencies expected from the merger, and would dear implementation of the increased efficiencies expected from the merger, and would dear implementation of the increased efficiencies expected from the merger. deny UP/SP the freedom to adapt to new developments. See Traffic Protective Conditions, 366 I.C.C. 112 (1982), aff'd in relevant part Detroit. T. & I.R.R. v. United States, 725 F.2d 47 (6th Cir. Dark Detroit. T. & I.R.R. V. United States, 725 F.2d 47 (6th Cir. 1984). (3) Our action with respect to the conditions requested by Tex Mex largely satisfies IPC's condition #3. (4) We will deny IPC's condition #4. IPC is alleging (a) that COAPR is captive to SP pre-merger and will be captive to UP/SP post-merger, and (b) that IPC's COAPR-served (via LPAN) Gardiner plant will not benefit from the pro-competitive provisions of the BNSF agreement. We note, however, (a) that the COAPR problem predates will not benefit from the pro-competitive provisions of the BNSF agreement. We note, however, (a) that the COSPR problem predates the merger and will not be exacerbated thereby, and (b) that IPC's claim of competitive harm does not warrant regulatory relief. See BN/SF, slip op. at 99 (Bunge). (5) We will deny IPC's condition #5 (a variation on the Central Corridor divestiture theme). (6) We note that Turlock is a 2-to-1 point explicitly provided for in Section 8: of the BMSF agreement (the omnibus clause), and that applicants have represented that BNSF will serve 2-to-1 shippers at Turlock via haulage from Stockton. UP/SP-230 at 136 n.53; UP/SP-231, Part B, Tab 17 at 29. United States Gypsum Company. Empire, NV. We will deny USG's Empire condition because the merger will have no appreciable impact at Empire. Pre-merger, USG is rail-served solely by UP; post-merger, USG will be rail-served solely by UP/SP; nothing will have changed. We add that the service problems of concern to USG are not really merger-related, but that, in any event, UP has made a commitment to stop one of its trains daily to pick up USG cars. UP/SP-230 at 307-08; UP/SP-232, Tab A at 39-40. Plaster City, CA. We will deny USG's Plaster City condition #1 because the merger will have no appreciable impact at Plaster City. Pre-merger, USG is rail-served solely by SP; post-merger, USG will be rail-served solely by UP/SP; nothing will have changed. We add that the pre-existing service problems of concern to USG are not merger-related, that there is no reason to expect that service will deteriorate post-merger, and that USG's claim of expectitive harm (vis-A-vis its Nevada-based commetitors) dots not warrant regular may relief. See BW/ST clim competitors) does not warrant regulatory relief. Rea RN/SF, slip op. at 99 (Bunge). We will also deny USG's Plaster City condition #2, both for the reasons prompting our denial of its Plaster City condition #1 and also because we have no authority to impose conditions (a) on non-terminal trackage of a nonapplicant carrier, and (b) on a carrier with respect to track located in Mexico. - 191 -

Finance Docket No. 32760 Southard, OK. We will deny USG's Southard condition, which is an attempt to solve a variation of a problem that surfaced last year in BN/SF, slip op. at 94-95; this time, however, a feasible solution cannot be found. Once again, the 3-to-2 reduction in competitive alternatives faced by GNBC (BNSF, UP, and SP, pre-merger; BNSF and UP/SP, post-merger) is in reality more complicated than a simple 3-to-2 description would indicate. Because of the blocking provision, the reduction in competitive alternatives faced by GNBC can more accurately be described as going from three (two of which can handle only such traffic as BN itself could not have handled) to two (one of which can handle only such traffic as BN itself could not have handled). GNBC, that is to say, will not really be left with two unrestricted competitive alternatives. BN/SF, slip op. at 94. In BN/SF, the ICC solved the problem by allowing SP to replace SF as a competitive alternative for GNBC. This time, however, the problem cannot be solved because the suggested substitute (CSX) is some 425 miles away; and we cannot imagine that the traffic Southerd, OK. We will deny USG's Southerd condition, which is some 425 miles away; and we cannot imagine that the traffic available to GMBC will suffice to lure CSX into establishing an available to GMBC will suffice to life tax into establishing as \$50-mile round-trip connection. We generally resolve feasibility questions (as in the build-out context) by assuming feasibility and allowing the market to make the final determination; but this is not necessary when our clear assessment is that the condition sought (here, a GNBC-CSX routing) is utterly impractical. Fort Dodge, IA. We will deny USG's Fort Dodge conditions because the merger will have no appreciable impact at Fort Dodge. Pre-merger, Fort Dodge is served by UP (formerly CNW) and IC (formerly CCLP); post-merger, Fort Dodge will be served by UP/SP and IC; and the competition that existed pre-merger will continue to exist post-merger. We add that, although UP admits that its service at Fort Dodge has been inadequate (UP/SP-232, Tab A at 39), this service problem is not merger-related. North American Logistic Services. Section 1b of the ENSF agreement as amended by Section 1b of the second supplemental agreement dated June 27, 1996, provides that ENSF shall receive access to any existing or future transloading facility at points listed on Exhibit A to the ENSF agreement. Reno (this has reference to the point on the SP line) is listed in Exhibit A, but, prior to the second supplemental agreement, the Reno listing was qualified by the phrase "intermodal and automotive only." Section 10s of the second supplemental agreement dated June 27, 1996, changes the Reno listing in Exhibit A; the Reno listing is 1996. changes the Reno listing in Exhibit A; the Reno listing is now qualified by the phrase "only intermodal, automotive, [BNSF must establish its own automobile facility], transloading, and new shipper facilities located on the SP line." We interpret this to mean that, even aside from the transloading condition we have imposed on the merger, Section 1b of the ENSF agreement allows ENSF to establish a transloading operation at Reno (on the SP line). Applicants apparently agree: "ENSF will be entitled under the agreement to set up a transload and serve new industries at Reno, Nevada." UP/SP-230 at 294. We add that we understand that BNSF will have, at Reno, the reciprocal switching rights (if any) that UP had prior to the merger. Because, for Kal Kan's purposes, BMSF is replacing UP as a competitive possibility at Reno, it only makes sense that BMSF should be given, to the maximum extent possible, the rights formerly held at Reno by UP. We will otherwise deny the conditions requested by KALS. The first condition (granting BNSF local trackage rights access to Wunotoo) is not necessary to preserve existing competition because UP presently has no such access to Wunotoo. The second condition (granting BNSF local trackage rights access to Reno - 192 -

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Finance Docket No. 32760 over the UP line) is unnecessary in view of BNSF's local trackage rights access to Reno over the SP line; there is no indication that the UP line is in any way superior to the SP line for that purpose. ASARCO. The merger will not have the competitive impacts feared by ASARCO. ASARCO's El Paso copper smelter will have access to two carriers (UP/SP and BNSF); ASARCO's Hayden copper smelter will be no more captive to UP/SP than it now is to SP; Section 4b of the BNSF agreement, as amended by Section 3b of the second supplemental agreement dated June 27, 1996, provides that BNSF's access and interchange rights at Corpus Christi shall be at least as favorable as the rights SP has currently; and competition for traffic moving from/to Mexico will remain vigorous. CIC International Corporation. We will deny the conditions sought by CIC. (1) Class III railroads and their customers that rely on the Houston-Fair Oaks line are rail-served exclusively by SP pre-merger, and will be rail-served exclusively by UP/SP post-merger; the merger will change nothing in this respect, and there is no reason to believe that new post-merger traffic flows will cause service problems. Direct access to BNSF, as sought by CIC, would vastly improve, not merely preserve, the competitive status quo. (2) CIC now has two reload options (UP at Palestine; BNSF at Cleveland), but the BNSF reload at Cleveland has clearly been the preferred option. See UP/SP-230 at 287 (the BNSF reload received 93.4t of CIC's reload business between January and October 1995). CIC's claim that the BNSF reload may be. eliminated as a post-merger competitive alternative in the wake of the various realignments triggered by the BNSF agreement is unjustified; if anything, this reload operation will be strengthened because of BNSF's ability to route reload traffic over UP/SP's Houston-Memphis lines. Weverhaeuser Company. We will deny Weyerhaeuser's conditions #1 and #2 (variations on the Central Corridor and South Central/SP East divestiture themes, respectively). We note, however, that, with our grant of trackage rights to Tex Mex, we have effectively granted Weyerhaeuser's condition #3. We will deny Weyerhaeuser's condition #4, which is akin to IPC's condition #4 (discussed above). Weyerhaeuser is not alleging merger-related competitive harms; what Weyerhaeuser is alleging is either (a) that COEPR is captive to SP pre-merger and will be captive to UP/SP post-merger, and/or (b) that Weyerhaeuser's COEPR-served plants will not benefit from the pro-competitive provisions of the BNSF agreement. We note, however, (a) that the COAPR problem predates the merger and will not be exacerbated thereby, and (b) that Weyerhaeuser's claim of competitive harm does not warrant regulatory relief. See BN/SF, slip op. at 99 (Bunge). With respect to Weyerhaeuser's condition #5, we note that, in approving the merger, we have imposed several conditions, included among which are the provisions in the SMSF agreement that enhance rail-to-rail competition in the Pacific Coast Corridor. Cargill. We will deny the conditions sought by Cargill: the compensation arrangements provided for in the BMSF agreement will allow for sufficient competition; the reciprocal switching, rate guidelines, and open gateways conditions are, for the most part, not even merger-related, are overly intrusive, and could delay, in certain respects, implementation of the increased efficiencies expected from the merger, and would deny UP/SP the - 193 -

Finance Docket No. 32760 freedom to adapt to new developments; and the condition respecting private rail cars "is certainly not merger-related." <a href="https://example.com/merger-related.">mrsp.</a>, slip op. at 100. ISP. Inc. The conditions sought by ISP are directed to harms assertedly caused by the UP/CRW merger, not to harms that might be caused by the UP/SP merger. We will therefore deny the conditions sought by IBP. Oragon Steel Mills. Inc. We will deny the conditions requested by OSM. These conditions are, by and large, directed to problems not caused by the merger, and, furthermore, are overly intrusive and could delay, in certain respects, implementation of the increased efficiencies expected from the merger, and would deny UP/SP the freedom to adapt to new Stimeon Lumber Company. We will deny the conditions sought by SLC. Conditions #1 and #3 do not address merger-related competitive harms because SLC will not experience a merger-related reduction in competitive options. Yes UP/SP-230 at 297 (SLC's relevant facilities are located on a shortline that at 297 (SLC's relevant facilities are located on a shortline the connects only to SP). Condition \$2 is overly intrusive, and, besides, UP/SP will have every incentive to use its yards so as to maximize its competitiveness in moving Pacific Northwest lumber. Condition \$4 is also overly intrusive, and, in any event, addresses a "problem" that is not merger-related; and, besides, applicants have committed to reducing the high reciprocal switch charges now imposed by SP. See UP/SP-230 at State and Local Interests.

Texas: RCT. (1) We note, with respect to RCT's Condition Texas: RCT. (1) We note, with respect to RCT's Condition #1, that Tex Mex is being granted Corpus Christi-Beaumont trackage rights, and will therefore have a connection with RCS. (2) We will deny RCT's condition #2 (a variation on the South Central/SP East divestiture theme). (3) We will deny RCT's condition #3. The neutral terminal railroad proposal is a solution either to a problem that does not exist (because the conditions we have imposed will adequately preserve the rail competition that exists today in Texas) or to a problem that is not a consequence of the merger (because these neutral terminal railroads would create new rail competition far beyond that which exists today). (4) We will deny RCT's condition #4. This condition is unnecessary because the law we administer already provides numerous protections regarding abandonments. IDP/CRM, slip op. at 101. We note, with respect to RCT's conditions #5 and #6, that we are imposing the following environmental mitigation conditions indicated in Appendix G: mitigation conditions #3, #4, #5, #6, #7, #15, #16, and #18. Texas: Other Perties. The Port of Corpus Christi. (1) We are imposing the BMSF agreement as a condition. (2) We note that the trackage rights granted to Tex Mex will, as a practical matter, allow RCS' affiliate, Tex Mex, to access Corpus Christi. Texas State Representatives Robert Junell, John R. Cook, and Robert Saunders. (1) We will deny condition \$1 (a variation on the South Central/SP East divestiture theme). (2) We, are granting Tex Mex most of the rights sought in condition \$2. (3) We note that the responsive application filed by Cen-Tex (the South Orient affiliate) was rejected as incomplete, and that its request for conditions was stricken from the record on account of its failure to comply with its discovery obligations. We add - 194 -

Finance Docket No. 32760 that the conditions we have imposed will adequately preserve the rail competition that exists today in Texas. (4) Condition 84 has been addressed in our discussion of the conditions sought by Texas State Representative John R. Cook. We wil' deny Rep. Cook's request for a declaratory order respecting excursion trains. Whatever the merits of Rep. Cook's arguments respecting excursion train liability law, the subject has no connection at all to the merger. California: CPUC. (la) We will deny CPUC's "perpetual term" condition. The 99-year term provided by Section 8i of the BNSF agreement should suffice; a perpetual term hardly seems necessary. We note also that, under current law, a carrier necessary. We note also that, under current law, a carrier conducting trackage rights operations that are subject to our jurisdiction can discontinue such operations only with our approval, ase new 49 U.S.C. 10903(a)(1), even if the agreement providing for such trackage rights contains an expiration date. See Arkansas & Missouri R. Co. v. Missouri Pacific R. Co. 6 I.C.C.2d 619, 622 (1990). See also Dallas Area Rapid Transit Property Acquisition Corporation-Acquisition and Operation Exemption-Rail Lines of Southern Pacific Transportation Company. St. Louis Southwestern Railway Company, and Dallas Terminal Railway and Union Depot Company, Finance Docket Mo. 31786 (ICC served Feb. 20, 1991) (similar holding); Thompson v. Texas Mexican Rv., 328 U.S. 134 (1946) (ICC can impose terms to ensure that existing trackage rights agreements are not frustrated). (1b) We note that, by virtue of the oversight condition we have imposed, we will have sufficient power to take corrective action if we conclude that the BNSF agreement has not effectively addressed the competitive issues it was intended to address. (2) We think it appropriate to none that, pursuant to the conditions we have imposed on the merger, BMSF will have access to all new facilities (including transload facilities) located post-merger on any UP/SP-owned line tver which BMSF receives trackage rights in the BMSF agreement. (3) We believe that BNSF is committed to providing adequate competition in the Central Corridor. (4) We will deny CPUC's condition #4. The Keddie-Stockton Line is the trackage rights segment of BMSF's new I-5 Corridor route (i.e., the segment over which BMSF will operate pursuant to trackage rights provided for in the BMSF agreement), and condition #4 is apparently intended to ensure that BMSF will have the wherewithal to operate that route even in the teeth of UP/SP recalcitrance. The conditions we have imposed, however, address discrimination (Paragraph 9 of the CMA agreement provides that UP/SP shall agree with BMSF on a dispatching protocol) and maintenance (Section 9d of the BMSF agreement provides that the trackage rights lines shall be maintained at no less than a certain level), and applicants have represented that BMSF has the power under the settlement agreement to obtain any capital improvements it wants. UP/SP-230 at 270. (5) We will deny CPUC's Modoc Line condition. A requirement of continued operation of the Modoc Line would be inconsistent with our approval of the abandonment of the Mendel-Alturas segment thereof. (6) We will deny CPUC's NCRA condition. With or without the 140-mile Willits-Lombard line, NCRA connects solely to SP pre-merger and will connect solely to UP/SP post-merger; and - 195 -

Finance Docket No. 32760 CPUC's NCRA condition is therefore unrelated to any merger-caused (7) We note that, as a matter of general corporate law, UP/SP will succeed to SP's obligations respecting the Capitol Corridor and the Alameda Corridor. See UP/SP-230 at 271-72 (acknowledgment that UP/SP will succeed to "all valid contractual obligations of SP"). (8) We note that UP/SP has indicated that it intends to develop the Calexico gateway. UP/SP-230 at 272. (9) We will deny CFUC's labor protection proposal, which "implicates a matter better dealt with under the labor protective conditions" imposed in this proceeding. RM/SF, slip op. at 101. California: Other Parties. The City of Industry. We will deny the conditions requested by IUDA. Although IUDA's two parcels are "2-to-1" in an academic sense, the record does not indicate that there are any shippers on these parcels currently benefiting from direct competition between UP and SP. County of Modoc and City of Alturas. With respect to the environmental issue raised by Modoc and Alturas, we will impose the various environmental mitigation conditions indicated in Appendix G, including specific mitigation condition #45 (an abandonment-specific condition relative to the Wendel-Alturas abandonment). With respect to the "return the gift" issue raised by Modoc and Alturas, we note that real property ownership questions are generally a matter of state law. County of Placer. With respect to the concerns raised by Placer, we will impose the various environmental mitigation conditions indicated in Appendix G. including the specific mitigation condition relative to Placer (mitigation condition East Bay District. With respect to the concerns raised by East Bay District, we will impose the various environmental mitigation conditions indicated in Appendix G, including the specific mitigation condition relative to East Bay District (mitigation condition #19). City of Secremento. With respect to the concerns raised by Sacramento, we will impose the various environmental mitigation conditions indicated in Appendix G. Areson: Or/DOT. With respect to Or/DOT's first condition (monitor competition in the Central Corridor), we note that the oversight condition we have imposed will allow us to do just that. With respect to Or/DOT's second condition (commence an investigation respecting open access), we note that this is not a margar-related issue. Idaho: IBC/IWC. Pre-merger, much of Idaho is rail-served exclusively by UP; post-merger, much of Idaho will be rail-served exclusively by UP/SP. We are therefore confident that the merger will not cause competitive harms in Idaho. The BMSF PRA, we realize, may cause indirect harms to those Idaho shippers now rail-served exclusively by UP; but such indirect harms (in essence, the creation of new competitive options for shippers now rail-served exclusively by BMSF but not for shippers now rail-served exclusively by UP) are not among the kinds of competitive harms that our conditioning power is intended to alleviate. We will therefore deny IBC/IMC's conditions #1 and #2 condition #1 would require approval of the MRL application and - 196 -

Finance Docket No. 32760 related relief; condition #2 would require that BNSF be granted access to shippers now rail-served exclusively by UP). We will also deny IBC/IMC's condition #3 (long-term oversight vis-à-vis captive shippers and UP/SP grain movements). The problems that condition #3 are intended to remedy (in essence, the problems of shippers now captive to UP) are not merger-related; neither the merger nor the BNSF agreement in general nor the BNSF PRA in particular will deprive any shipper of competitive options available to that shipper today. available to that shipper today. Nevada. We will deny PSCN's conditions #1 and #3; these "open access" conditions provide a solution either to a problem that does not exist (because the conditions we have imposed will adequately preserve the rail competition that exists today in Nevada) or to a problem that is not a consequence of the merger Nevada) or to a problem that is not a consequence of the merger nevada. (because these conditions would create new rail competition far beyond that which exists today). We will deny PSCN's condition #2; the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition. We will deny PSCN's condition #4a: providing timely responses to inquiries might be a good business practice, but it has no connection to the merger. With respect to PSCN's conditions #4b and #5, and also with respect to the concerns raised by Reno, Fernley, and Winnemucca/Humboldt, we will impose the following environmental mitigation conditions indicated in Appendix G: mitigation conditions #3, #4, #5, #7, #8, #12, #15, #16, #17, #18, and #22. Kansas. We note, with respect to Ka/DOT's condition \$1, that UP has represented that it may lease, but does not intend to sell, the Pueblo line, and that, if either a lease or a sale is considered, it will work with Kansas to ensure quality service. UP/SP-230 at 273. We will deny Ka/DOT's condition \$2. Post-merger, Wichita will benefit from vigorous competition between UP/SP and BNSF. With respect to Ka/DOT's condition #3, and also with respect to the concerns raised by Sedgwick/Wichita, we will impose the following environmental mitigation conditions indicated in Appendix G: mitigation conditions #18 and #23. With respect to the concerns raised by Abilene, we will impose the following environmental mitigation conditions indicated in Appendix G: mitigation condition #18. Minnesota: Mm/DOT. We will deny Mm/DOT's conditions #1, #2, and #3; the problems these conditions seek to solve are not merger-related. We will deny Mm/DOT's condition #4; we believe that the conditions we have imposed (which will strengthen, to some extent, the BMSF trackage rights) will adequately preserve the rail competition that exists today in the South Central/SP East region and in the Central Corridor, and throughout the West. We will also deny Mn/DOT's condition #5; the applicable law "already provides numerous protections regarding abandonments and line sales," <u>BN/SP</u>, slip op. at 101; and condition #5, insofar as it relates to labor protection, implicates a matter better dealt with under the labor protective conditions imposed in this proceeding. Washington: Wa/DOT. We think it appropriate to note that the oversight condition we have imposed is akin to the condition sought by Wa/DOT. - 197 -

covered by Section 8i of the BNSF agreement (the omnibus clause); and that applicants have indicated that BNSF plans to serve Herlong via trackage rights, directly picking up and setting out Herlong traffic as an adjunct to its Oakland-Denver operations. UP/SP-230 at 136. With respect to Sharpe Army Depot and Defense Depot Tracy, we note that Lyoth and Lathrop, respectively, are listed in Section 8i of the BNSF agreement (the omnibus clause) as amended by Section 6a of the second supplemental agreement dated June 27, 1996.

ARANDOMENTS AND DISCONTINUANCES. As indicated earlier, applicants seek authorization to abandon, or to abandon and to discontinue operations over, 17 line segments that total approximately 584 miles. MPRR seeks to abandon 122.4 miles in Colorado, 40.24 miles in Kansas, 28.7 miles in Arkansas, 8.5 miles in Louisians, and 7.5 miles in Texas. UPRR seeks to abandon 67.98 miles in Illinois, 12 miles in Dtah, and 10.08 miles in California. SPT seeks to abandon 178.1 miles in Colorado, 85.5 miles in California, and 23.03 miles in Texas.

Public notice was properly given and, in Decision No. 9, served December 27, 1995, the ICC accepted the abandonment requests for consideration and adopted a procedural schedule in this proceeding. Because the abandonment proposals were conditioned on consummation of the merger, the ICC stated in Decision No. 9 that the abandonment requests would be processed in accordance with the overall merger procedural schedule rather than the deadlines established in section 10904 and in our regulations. Decision No. 9, slip op. at 9-10; Res UP/MKT, 4 I.C.C.2d at 486 n.73. The records are complete and we will now consider the merits of each proposal under the applicable standards. Labor and environmental conditions are discussed elsewhere in the decision.

Applicants contend that the lines sought to be abandoned are presently used primarily (in a few instances, exclusively) for overhead traffic, and applicants insist, with respect to each line, that this overhead traffic will be rerouted by a commonly controlled UP/SP. Applicants add that the local traffic generated by these lines is minimal (in a few instances, non-existent), and they maintain that these lines simply cannot be sustained by the limited amounts of local traffic they generate.

As described below, we will publish all seven notices of exemption, grant all four requests for discontinuance, and grant five of six abandonment petitions and three of four abandonment applications. We are denying the petition and application relating to the abandonment of the Tennessee Pass Line for the reasons stated earlier in our discussion of conditions imposed directed to the Central Corridor and as set forth in our

Merlong was listed as a 2-to-1 point in Section &i of the BMSF agreement dated Sept. 25, 1995, but is not listed as a 2-to-1 point in Section &i, as amended by Section &c of the supplemental agreement dated Nov. 18, 1995, and as further amended by Section &a of the second supplemental agreement dated June 27, 1996. We expect, however, that applicants will adhere to their representation that Sierra Army Depot is covered by Section &i.

To the extent necessary, these abandonment proceedings are deemed to be investigations under 49 U.S.C. 10904 and 49 CFR 1152, or exemption proceedings under 49 U.S.C. 10505 and 49 CFR 1121 or 1152, as applicable.

Finance Docket Mo. 32760 following discussion of specific abandonment authority being sought by applicants. Motices of Ememption. As noted, applicants have filed seven abandonment notices of exemption<sup>362</sup> under 49 CFR 1152 Subpart F. The notices seek to invoke the 2-year out-of-service class exemption codified at 49 CFR 1152.50, pursuant to which an abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years, that any overhead traffic on the line can be rerouted over other lines, and that no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period. No individual findings under 49 U.S.C. 10505 are necessary as to these seven notices because these lines fall within the class of lines exempted by 49 CFR 1152 Subpart F. According to applicants, there has been no local traffic on the lines for 2 years and any overhead traffic on the line can be rerouted over other lines. Only one of the notices, Docket No. AB-3 (Sub-No. 132X), has Only one of the notices, Docket No. AB-3 (Sub-No. 132X), has received any protests. The Harvey County Board of Commissioners, the HCJDC, and Rep. Boston submitted comments in opposition, alleging that the abandonment of the Whitewater-Newton line in Kansas will have adverse economic consequences. Protestants did not contradict MPRR's contention that the line has had no local traffic for 2 years and that the line in all other respects qualifies for the class exemption. Nor did they address the revocation criteria in section 10505. These exemptions will be effective on September 11, 1996 (unless stayed pending reconsideration). Petitions to stay and formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2) must be filed by August 22, 1996, and petitions to reopen must be filed by September 3, 1996. Because the notices were previously conditioned on the merger, which has now been approved, we will, consistent with our regulations, publish notice in the Federal Register. Petitions for Exemption. As noted, applicants have filed six abandonment petitions for exemption. Our denial of the MPRR has filed two notices of exemption: Docket Nos. AB-3 (Sub-No. 132X) (Newton-Whitewater, KS); and AB-3 (Sub-No. 134X) (Troupe-Whitehouse, TX). UPRR has filed four notices of exemption: Docket Nos. AB-33 (Sub-No. 93X) (Whittier Junction-Colima Junction, CA); AB-33 (Sub-No. 94X) (Magnolia Tower-Melrose, CA); AB-33 (Sub-No. 97X) (DeCamp-Edwardsville, IL); and AB-33 (Sub-No. 99X) (Little Mountain Junction-Little Mountain, UT). SPT has filed one notice of exemption: Docket No. AB-12 (Sub-No. 187X) (Seabrook-San Leon, TX). MI MPRR has filed two abandonment petitions: Docket No. AB-3 (Sub-No. 129%) (Gurdon-Camden, AR); and Docket No. AB-3 (Sub-No. 133%) (Iowa Junction-Manchester, LA). SPT has filed three abandonment petitions: Docket No. AB-12 (Sub-No. 189%) (Sage-Leadville, CO) and Docket No. AB-8 (Sub-No. 36%) (related discontinuance); Docket No. AB-12 (Sub-No. 184%) (Wendel-Alturas, CA); and Docket No. AB-12 (Sub-No. 185%) (Suman-Bryan (Benzhley), TX). UPRR has filed one abandonment petition: Docket No. AB-33 (Sub-No. 98%) (Edwardsville-Madison, IL). - 200 -

petition in Docket No. AB-12 (Sub-No. 189X) will be addressed in our discussion with the abandonment application below regarding the Tennessee Pass Line. We will grant the other five abandonment petitions for exemptions.

Under 49 U.S.C. 10903-04, a rail line may not be abandoned without prior approval. Under 49 U.S.C. 10505, however, we must exempt a transaction from regulation when we find that:
(1) application of the statutory abandonment provisions is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the particular abandonment or discontinuance is of limited scope, or (b) the application of the statutory abandonment provisions is not needed to protect shippers from the abuse of market power.

Detailed scrutiny is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of filing abandonment applications, these exemptions will expedite regulatory decisions and reduce regulatory barriers to exit. 49 U.S.C. 10101a(2) and (7). By allowing applicants to avoid the expense of retaining and maintaining lines that generate little or no traffic and to apply their assets more productively elsewhere on the system, these exemptions will foster sound economic conditions and encourage efficient management. 49 U.S.C. 10101a(3), (5), and (10). Other aspects of the rail transportation policy are not affected adversely.

Regulation is not necessary to protect shippers from an abuse of market power because all overhead traffic will be rerouted, and recurring traffic will have viable alternative transportation options available. Only one of these proceedings, Docket No. AB-3 (Sub-No. 129X), received a protest, which was filed by a shipper who had made only one shipment in the last 5 years, and who, applicants contend, has a transportation alternative available to it. No shippers are opposing the other abandonment petitions.

Given our findings regarding the probable effect of the transactions on market power, we need not determine whether the transactions are of limited scope. Nevertheless, we note that four of these five proposed abandonments involve rail lines ranging from 8.5 miles to 28.7 miles in a single state with

The Reader Railroad, a noncommon carrier tourist railroad, objected to the abandonment. According to applicants, however, it has made only one shipment (a steam locomotive on a flatcar) in the last 5 years; and this is the only local traffic that moved on the line. Applicants submit that such occasional movements of railroad equipment can be handled by "lowboy" trucks.

In Docket Mo. AB-12 (Sub-No. 185X), the City of College Station raised concerns about negative impacts the proposed abandonment could have on northwestern Brazos County and the City of Bryan. Its opposition focuses only on general allegations of possible harm to the local area.

In Docket No. AB-12 (Sub-Mo. 184X), CPUC, Or/DOT, Lassen, Susanville, Modoc, and Alturas oppose the proposed abandonment of the Modoc Line. As applicants point out, however, no shippers that use this line to originate or terminate traffic have opposed the abandonment. Also, applicants are not proporing to abandon in Alturas (the abandonment limit is about 10 miles south of the area) and the concerns about the Sierra Army Depot at Herlong are unfounded because Herlong is not within the abandonment limits.

Finance Docker No. 32760 little local traffic, and the fifth one involves 85.5 miles of rail line in a single state with no recurring local traffic. These exemptions will be effective on September 11, 1996 (unless stayed pending reconsideration). Petitions to stay and formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c) (2) must be filed by August 22, 1996, and petitions to reopen must be filed by September 3, 1996. Applications. Four formal abandonment applications have been filed to become effective contingent upon approval of the merger. Three have been filed by UP\*\* and one has been filed by SP.\*\* Our denial of the application in Docket No. AB-12 (Sub-No. 188) will be discussed in the Tennessee Pass Line section, below. We will grant the other three abandonment applications, each of which has received some form of opposition. The statutory standard governing an abandonment, under 49 U.S.C. 10903, is whether the present or future public 49 U.S.C. 10903, is whether the present or future public convenience and necessity require or permit the proposed abandonment. If the abandonment is unopposed, 49 U.S.C. 10904(b) requires that we make an affirmative finding and issue a certificate permitting the abandonment. Otherwise, we must weigh the potential harm to affected shippers and communities against the present and future burden that continued operation could impose on the railroad and on interstate commerce. Colorado v. United States, 271 U.S. 153 (1926). Essentially, this involves a question of whether, and to what degree, the shippers will be harmed if rail service is no longer available. For an abandonment application to be denied, protestants must show that the harm to shippers and communities outweighs the demonstrated harm to applicants and interstate commerce by continued operation of the line. Cartersville Elevator. Inc. v. ICC, 724 F.2d 668, affid on rahid on hanc. 735 F.2d 1059 (8th Cir. 1984). In determining whether to grant or deny an abandonment application, we consider a number of factors, including operating profit or loss, other costs the carrier may experience (including opportunity/economic cost), and the effect or shippers and communities. No one factor is conclusive. Id. Hope-Bridgeport Line (Kansas). In Docket No. AB-3 (Sub-No. 131), MPRR seeks by application to abandon its 31.25-mile Hope-Bridgeport Line. In the embraced Docket No. AB-8 (Sub-No. 37), DRGW seeks to discontinue its trackage rights operations over the line. We will grant the abandonment and the discontinuance. We will issue a certificate of interim trail use if no offer of financial assistance is timely made. Train operations. Prior to October 16, 1995, the Hope-Bridgeport Line had local train service, including three cycles (SIX one-way trips) per week. The train originated at Herington, MPRR and DRGW filed two applications to abandon and discontinue service, respectively, in Docket No. AB-3 (Sub-No. 130) (Towner-NA Junction, CO) and Docket No. AB-8 (Sub-No. 38) (related discontinuance); and Docket No. AB-3 (Sub-No. 131) (Mope-Bridgeport, RS) and Docket No. AB-8 (Sub-No. 37) (related discontinuance). UPRR filed an abandonment application in Docket No. AB-33 (Sub-No. 96) (Barr-Girard, IL). 31' SPT and DRGW filed an application to abandon and discontinue service, respectively, in Docket No. AB-12 (Sub-No. 188) (Malta-Cañon City, CO) and Docket No. AB-8 (Sub-No. 39) (related discontinuance). - 202 -

Avoidable Costs. Applicants' revenue and cost estimates are based on a service frequency averaging one cycle per week. Total on-branch costs are estimated to be \$219,915, consisting primarily of maintenance-of-way and structure costs of \$185,890. With respect to track maintenance costs, applicants estimate a normalized annual expenditure of \$5,950 per main track mile to maintain the track at Federal Railroad Administration (FRA) class 1 standards, excluding maintenance costs associated with overhead traffic.

Opportunity Costs. Return on value is the opportunity cost of the resources committed by the railroad to provide service over the line subject to abandonment. Opportunity costs are estimated to be \$581,921, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.3% by the valuation of road property (\$3,044,544) dedicated to the train operations conducted over the line and adjusting for a holding loss of \$24,769.

Board's 1995 cost of capital determination, which results in a (continued...)

Shipper and community interests. Applicants contend that this line is an insignificant part of the transportation network in the area. According to applicants, wheat is the only agricultural commodity produced in the area that moves on the line, and only about 4t or 5t of the area's wheat is transported on this line. The line's principal shipper, Agri-Producers, filed a notice of intent to participate without expressing a position on the abandonment, and it filed no evidence. The other shipper on the line, North Central Kansas Coop, did not file an individual statement, but it is a member of the Mountain-Plains Communities and Shippers Coalition which opposes the abandonment. Only one individual, Mr. Schwarz, alleges that crops would no longer be shipped by rail from his local elevator but would be moved at higher costs by motor carriers.

responses that the trucking companies it has used are too

numerous to list.

Discussion and conclusions. The applicable criteris weigh heavily in favor of abandonment and discontinuance. The line is unprofitable and is incurring substantial opportunity costs. There is an illegation of increased shipping costs, but shippers are using truck transport now, suggesting it is economical. Even if shippers incur some inconvenience and added expense, that by itself would be insufficient to outweigh the detriment to the public interest of uneconomic and excess facilities. We find that, on balance, the burden of operating this unprefitable line outweighs any inconvenience and the unspecified additional expense to shippers for using alternative transportation.

Towner-NA Junction Line (Colorado). In Docket No. AB-3 (Sub-No. 130), MPRR seeks to abandon its 122.4-mile Towner-NA Junction Line. In the embraced Docket No. AB-8 (Sub-No. 38), DRGW seeks to discontinue its overhead trackage rights operations over the line. As noted earlier, this abandonment generated intense opposition, although relatively few of the opponents, applicants point out, are shippers who actually use the line. We will grant the abandonment and the discontinuance. We will issue a certificate of interim trail use if no offer of financial assistance is timely made.

Train operations. For the past 2 years, local train service on the Towner-MA Junction Line has consisted of local trains operating three cycles (six one-way trips) per week. The trains originated at Pueblo, operated over the subject line to Horace, RS, and returned to Pueblo the following day. Local service trains are operated with one locomotive, a practice applicants anticipate will continue. In accordance with Decision No. 3, applicants provided the revenue and cost information in the application relating only to local train service by MPRR.

DRGW does not originate or terminate traffic on the line.

me (...continued) pre-tax cost of capital of 17.5t, produces a return on value of

Finance Docket No. 32760 Wheat and barley are the principal commodities shipped over the line. The total carloads shipped, for the five shippers on the subject line, in 1993 and 1994 were 164 and 142 carloads, respectively. For the most current partial year available (January 1, 1995, through June 30, 1995), a total of only 30 carloads of wheat were shipped by MPRR. Applicants' projected forecast year traffic is 238 cars. Revenue and cost data. As shown in the following table, applicants estimate that for the forecast year November 1, 1995, through October 31, 1996, local traffic on the line will generate avoidable losses that can be svoided by abandonment and cessation of operations. Applicants' cost estimates, including return on value, are not contested. We summarize them as follows: (Forecast Year) Total Revenue Total On-Branch Costs \$237,676 \$922,012 Total Off-Branch Costs
Total Avoidable Costs
Avoidable Loss, Excluding 127.068 1.049.080 Return on Value 811,404 Return on Value Avoidable Loss, Including Return on Value 1.867.795 \$2.679.199 Revenues. Total revenues for the forecast year are projected at \$237,676 based on the movement of 238 cars. Protestants argue that there is a much higher demand for local services than current traffic indicates. Citing a Colorado Department of Transportation study, protestants aver that potential traffic on the line could exceed 4,000 cars per year compared to the 238 cars projected. Absent specific commitments from other shippers for traffic over the line, we believe the higher 4,000 car estimate to be speculative. Applicants' revenue estimate is reasonable, and we have no basis on which to restate Avoidable Costs. Applicants' cost estimates are based on a service frequency averaging one cycle per week. Total on-branch costs are estimated to be \$922.012, consisting primarily of maintenance-of-way and structure costs of \$613,650 and property taxes of \$195,578. Because the line is classified at a level higher than FRA class 1, the line requires no rehabilitation. Opportunity Costs. Opportunity costs are estimated to be \$1,867,795, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.34 by the valuation of road property (\$10,177,042) dedicated to the train operations conducted over the line and adjusting for a holding loss of \$5,396. The greater part of the property value committed to the operation of the line is the net salvage value of track structure, which is estimated to be \$9,811,169. Land is valued at \$450,955. Projected Losses. Applicants project an avoidable loss, excluding return on value, of \$811,404. Including return on A restatement of these numbers to take into account the Board's 1995 cost of capital determination, which results in a pre-tax cost of capital of 17.5t, produces an opportunity cost of - 205 -

Finance Docket No. 32760 value, losses are projected to be approximately \$2.6 million in the forecast year. Alternative transportation. Applicants indicate that there is adequate alternative rail and motor transportation available to shippers after abandonment. An alternate UP line (the "Kansas-Pacific" line) runs parallel to this line to the north. Running parallel to the line to the south is the BMSF line through Prowers County. According to applicants, shippers who responded to discovery requests indicated that the motor carriers they were using were too numerous to list. Shipper and community interests. As described previously, this application was vigorously opposed by shippers, individuals, and communities. Opponents argue that the abandonment of the line would have a devastating economic effect based on lost rail service and lost tax revenues. Applicants argue, preliminarily, that the concerns of shipper and community interests have been addressed in an agreement between the State of Colorado and UP. As we have noted earlier, a letter of intent was signed by Governor Roy Romer of Colorado and Richard K. Davidson, Chairman of UP, in which UP agreed to serve active shippers on both the Tennessee Pass and Towner-NA Junction Lines for at least 6 months after the merger, and, in any case, until improvements described in the Operating Plan are completed on UP's "KP" line east of Denver to avoid congestion on the Moffat Tunnel line. Rail lines will be left in place for at least a year after the merger while other rail options are explored. This schedule can be modified by mutual agreement between Colorado and UP. For a year after merger, UP will sell the route to a new entity at net liquidation value if a viable rail option develops. Applicants also argue that the abandonment will have little impact on shippers served by the line. They contend that most of the elevators mentioned in the submissions by farmers are not on the line, and, in any event, abandonment will cause no elevator to close. Applicants contend that there will be only a. 0.750 increase in heavy truck traffic. Finally, applicants argue that most of the tax revenue losses are not tax savings to UP because UP will be reallocating tax payments to other Colorado counties and other states. In any event, the ICC has held that the loss of taxes otherwise collectible from a line proposed for abandonment has no bearing on the public need for the line. See Burlington Northern Railroad Company - Abandonment - In Persus, Judith Basin and Chouteau Counties, MT. Docket No. AB-6 (Sub-No. 175) (ICC served July 30, 1884). July 30, 1984). Discussion and conclusions. The line is incurring substantial losses and opportunity costs. We conclude that the burden on shippers and communities resulting from the abandonment is outweighed by the burden imposed on MPRR and DRGM and on interstate commerce by the financial losses that would result if the carriers were required to continue to operate this line. Given the magnitude of these losses, we conclude that the line is a burden on interstate commerce, and we will grant the abandonment. Rarr-Girard Line (Illinois). In Docket No. AB-33 (Sub-No. 96), UPRR seeks to abandon its 38.4-mile Barr-Girard Line. As noted, protestants request that this abandonment be denied in its entirety, or, in the alternative, that the abandonment be denied as to the 26.7-mile Barr-Compro segment. According to - 206 -

Finance Docket No. 32760 protestants, by using the Barr-Compro segment a carrier could obtain 100% of the traffic and revenues on the Barr-Girard Line while maintaining and operating only about 70t of the line. We will deny SPBC's alternative request for a partial abandonment, and we will grant applicants' abandonment application. We will impose the requested 180-day public use condition. We will issue a certificate of interim trail use if no offer of financial assistance is timely made. Train operations. The Barr-Girard Line is part of the former CNM's route from Chicago to St. Louis. As a result of the UP/CNM consolidation and the UP/SP consolidation, the merged system will have three Chicago-St. Louis through routes. As system will have three Chicago-St. Louis through routes. As noted, the proposed abandonment results from a decision to reroute all Chicago-St. Louis traffic from the former CMM route to an allegedly superior UP/SP north-south route. Once this through traffic is rerouted, applicants believe that continued operation of the Barr-Girard Line for only local traffic would be uneconomical. Rerouting will be effected by exiting at Barr and operating under a trackage rights agreement over the IAM line from Barr to Springfield, then operating over the SP line from Springfield to St. Louis Springfield to St. Louis. Local train service on the Barr-Girard Line over the past 2 years has been provided by through trains operating daily in both directions. Due to the very low volume of local traffic generated by the line, applicants believe a service frequency of one cycle per week would be adequate if the line were operated solely for local traffic. In accordance with Decision No. 3, applicants provided the revenue and cost information in the application relating only to local train service by UPRR. A joint protest by Springfield Plastic, Inc. (SpP1) and Brandt Consolidated, Inc. (SCI) (again, collectively, SPBC) contests applicants' forecast year traffic estimates. Applicants claim that forecast year traffic will be the same as 1994 traffic on the line: 40 carloads of polyethylene received by SpP1 and 3 carloads of anhydrous ammonia received by Brandt. SpP1 claims forecast year traffic will amount to 46 carloads, and BCI submits that traffic will amount to 7 carloads. In applicants' rebuttal statement. UP revises its forecast to accept BCI's claim of 7 carloads, but UP maintains its projection of 40 carloads for statement. UP revises its forecast to accept BCI's claim of 7 carloads, but UP maintains its projection of 40 carloads for SpPl. SpPl states that 18 carloads have been received in the first 4 months of the forecast year for an average of 4 carloads per month. Applying that average to the final 8 months of the forecast year, skipping a month to account for an inventory buildup, SpPl adds an additional projected 28 carloads to the 18 already received to arrive at 46 carloads. UP contends that inventory buildup periods are followed by downturns in activity that are more substantial than calculated by SpPl. UP examined SpPl's traffic statistics for the period 1994 through February 1996 to determine if there were other 7-month periods in which waybilled traffic totaled at least 28 cars (the amount projected by SpPl). For each of the 8-month periods following those examined, waybillings totaled just 20 cars. Therefore UP added the projected 20 carloads to the 18 already received to arrive at 38, substantiating their original projection of 40 carloads for 18. Substantiating their original projection of 40 carloads for SpPl. We accept UP's analysis because it more accurately reflects actual carload volume in the recent past. Revenue and cost data. The following table reflects operations over the Barr-Compro segment, the scenario most favorable to protestants. Applicants' estimates are shown in the first column of figures. Our restatement, based on arguments raised by protestants, is shown in the second column of figures. Applicants estimate that for the forecast year November 1, 1995, - 207 -

Finance Docket No. 32760 through October 31, 1996, local traffic on the subject line will generate loses which can be avoided by abandonment and cessation of operations. Applicants' cost estimates are based on a service frequency of only 40 cycles per year from South Pekin-Compro and siso,074. Total avoidable costs are estimated at \$289,076 (including off-branch costs of \$50,446). Total return on value is estimated at \$803,300. Applicants' Estimates for Restated Porecast Year Porecast Year Total Revenue Total Cn-Branch Costs
Total Off-Branch Costs
Total Avoidable Costs
Avoidable Loss, Excluding
Return on Value \$180,074 \$191,676 \$238,630 \$170,075 50.446 282.076 54.790 224.865 Return on Value 109,002 Avoidable Loss, Including Return on Value 33,189 543.383 \$912.302 \$576.572 As discussed below, applicants' estimates of revenues and costs for the forecast year require restatement in light of arguments raised by protestants. Revenues. Protestants claim that total SpP1 revenues, based on 95-ton minimum rates, were understated for the forecast year by 52,040. Applicants agree with protestants but believe, on further analysis, that the understatement in revenue is 52,358. For the additional traffic (10 carloads—6 for SpP1 and 4 for SCI) that protestants estimate will be moved over the line. A protestants calculate additional revenues of \$42,270, based on average revenues per car of \$4,227. As indicated above, we do applicants '40 carload figure is appropriate. While accepting using an average for both commodities instead of an average for both commodities instead of an average for halph. Applicants 'analysis represents a more refined approach than \$ppl-BCI's use of broad averages. Applicants have developed \$29.63/tom. Applying the additional traffic of four BCI carloads we agree with applicants computed additional revenues of \$9,244. The forecast year revenues would then be \$191,676 (\$180,074 traffic + \$2,358 adjustment for \$ppl traffic based on 95-ton the above tuble. Avoidable Costs. Applicants' cost estimates are based on a service frequency averaging 40 cycles per year. Total on-branch costs are estimated to be \$239,630, commisting primarily of transportation costs of \$30,192. Protestants argue that transportation costs have been overstated because of an incorrect at the FRA class 1 speed limit of 10 mph. Protestants contend track (40 mph). Applicants have permitted for FRA class 3 subject line cannot be operated at the higher speed. It is also unreasonable to assume that the crews would be required to - 208 -

operate at less than optimum operating speeds. We agree with protestants. At the higher speed, locomotive hours of operation would decrease from 228 hours to 72 locomotive hours. This would decrease transportation costs by \$5,794, maintenance costs by \$750, and return on investment (ROI) expense for locomotives by \$2,088.

With respect to track maintenance costs, applicants' estimate of \$202.581 is comprised of \$119.936 for nonprogram maintenance for the Barr-Compro segment, \$65,263 for program maintenance for the Barr-Compro segment, and \$13.382 for nonprogram maintenance on the Compro-Girard segment. Protestants argue that the Compro-Girard maintenance (\$13.382) should be eliminated because that segment would be abandoned even if abandonment of the Barr-Compro program maintenance (\$69,263) should be eliminated since the line is now classified at the FRA class 3 level and should be allowed to evolve to FRA class 1 by eliminating maintenance. The nonprogram maintenance losts of \$119,936 are not contested and appear to be reasonable. We agree with protestants that the Compro-Girard non-program maintenance (\$13.382) should be eliminated. In their rebuttal statement, applicants contend that UFRR would incur an absolute minimum of (versus applicants' program maintenance estimate of \$69,263). We agree with applicants' revised lower maintenance cost estimate. Accordingly, the revised maintenance cost for the Barr-Compro maintenance and \$22,722 for program maintenance cost for the Barr-Compro maintenance and \$22,722 for program maintenance). This would be S142,658 annually (\$119,936 for nonprogram maintenance and \$22,722 for program maintenance). This would be Because the line is classified at a level higher than FRA class 1, the line requires no rehabilitation.

Protestants argue that trackage rights payments to IAM should be treated as an offset to avoidable costs because such payments reduce the amount that would be saved as a result of the abandonment. Trackage rights compensation to IAM, however, concerns the movement of rerouted overhead traffic, which is irrelevant to our analysis. As we have discussed, in Decision No. 3 we waived the filing of revenues and costs associated with overhead traffic. Even if we were to consider the trackage rights payment, for a complete analysis we would also have to consider the revenues generated by the overhead traffic and other costs incurred in moving this traffic, such as fuel and crew wages. In other words, the amount saved by abandonment might not be reduced if both the revenues and costs associated with overhead traffic and trackage rights were considered.

We have restated total avoidable costs to reflect the adjustments to transportation costs and maintenance-of-way costs discussed above. These adjustments reduce forecast year onbranch svoidable costs from \$238,630 to \$170,075. Off-branch avoidable costs are increased to \$54,790 for the forecast year to reflect costs associated with the forecasted additional carboads.

Opportunity Costs. Opportunity costs are estimated by applicants to be \$803,300, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.3% by the valuation of road property (\$4,155,9%6) dedicated to the train operations conducted over the line and adjusting for a holding loss of \$42,755.200 The greater part of the property value

Applicants used the ICC's 1994 cost of capital because it was the most current return when the application was prepared. (continued...)

committed to the operation of the line is the net salvage value of track structure, which UPRR estimates to be \$2,761,100. Another component is land, which applicants value at \$1,490,000. Below we discuss these two components.

Net salvage - Protestants argue that the net salvage value of almost 32 million for the Barr-Compro segment would be more than offset by the \$2.6 million cost UPRR would incur to upgrade existing connections and crossings to allow implementation of UPRR trackage rights from Barr to Springfield as a result of the abandonment. If this offset is not applied, SPBC argues that net salvage for the Barr-Compro segment should be calculated by multiplying applicants' net salvage value for the line by 0.6953 (26.7 miles from Barr to Compro - 38.4 miles from Barr to Girard). We believe that costs associated with upgrading existing connections should not be included in the net salvage calculations because the through traffic will be rerouted regardless of whether the line is abandoned. Moreover, if we were to consider construction costs for rerouting through traffic, it would also be necessary to consider the savings achieved by rerouting. We agree with protestants that net salvage should be prorated to take into account that no. maintenance is required for the line segment between Compro and Girard. The resulting restated net salvage for the Barr-Compro line segment is \$1,919,827 (\$2,761,100 x 0.6953).

Land value - Applicants estimate land value for the Barr-Girard Line to be \$1,490,000. Protestants argue that, because UPRR did not furnish property deeds, it has failed to prove the quality of its title. Furthermore, protestants say that, if land value is not set at zero, it should be prorated using mileage, as was done for net salvage. Protestants failed to identify specific deeds to which UPRR incorrectly claimed fee title or to provide alternative property values. Because applicants' acreage calculations and unit values appear to be reasonable, we accept applicants' land value. Furthermore, we accept protestants' method of prorating the Barr-Compro land value because applicants did not provide a separate land value for that segment. The Barr-Compro segment will be valued at \$1,036,016 (\$1,490,000 x 0.6953).

The sum of the restated net salvage value and land value is net liquidation value (\$2.955,843). Total valuation of property is the sum of working capital (\$3,996), income tax consequences (negative \$99,112) and net liquidation value. Based on this total property valuation (\$2,860,729), the nominal return on value is \$500,628 (computed by multiplying property valuation by the 1995 pre-tax cost of capital rate of 17.58). This is adjusted by a holding loss of \$42,755 to produce a total return on value shown in the second column of the table of \$542,383.

Projected Losses. Applicants project an avoidable loss, excluding return on value, of \$109,002. Including return on value, losses are projected to be \$912,302 in the forecast year. A restatement of these numbers using the Board's 1995 cost of capital determination and changes resulting from arguments raised by protestants produces the following numbers: an avoidable loss, excluding opportunity costs, of \$33,189 and losses, including opportunity costs, of \$576,572 in the forecast year.

Since that time, the Board has made its 1995 cost of capital determination.

Finance Docket No. 32760 operations over, two segments of the Tennessee Pass Line. We will grant the applications and petitions for exemption to the extent to allow for discontinuance, but will deny the application and petition for abandonment authority. Because we are granting discontinuance authority, we will not consider trail use requests or impose public use conditions. We will discuss the discontinuance issues before addressing the abandonment requests. Discontinuences granted: 10505 petitions. To the extent that SPT seeks to discontinue service in Docket No. AB-12 (Sub-No. 189%) and DRGW seeks to discontinue service in AB-6 (Sub-No. 36%), we find that SPT and DRGW have met the criteria for discontinuance exemptions. Detailed scrutiny is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of filing discontinuance applications, these exemptions will expedite regulatory decisions and reduce regulatory barriers to exit. 49 U.S.C. 10101a(2) and (7). These exemptions will foster sound economic conditions and encourage efficient management by allowing the carriers to discontinue uneconomic service on the line. 49 U.S.C. 10101a(3), (5), and (10). Other aspects of the rail transportation policy are not affected adversely. Regulation is not necessary to protest shippers from an abuse of market power. No shipper that actually uses the line to originate or terminate traffic has opposed the discontinuances. Applicants claim that the major recurring source of local traffic on the line has been salvaged rolling stock and cargo from train accidents. No local traffic is expected to be generated on the line in the future. Given our findings regarding the probable effect of the transactions on market power, we need not determine whether the transactions are of limited scope. Nevertheless, we note that the transactions involve 69.1 miles of line in a single state. Under 49 U.S.C. 10505, we will exempt from the prior approval requirements of 49 U.S.C. 10903-04, the discontinuance by both SP and DRGW of operations on the Sage-Malta-Leadville Line. Discontinuances granted: applications. To the extent that SPT seeks to discontinue service in Docket No. AB-12 (Sub-No. 188) and DRGM seeks to discontinue service in AB-8 (Sub-No. 39), we find that SPT and DRGM have met the criteria for discontinuance. Most of the opposition to the abandonment and discontinuance applications for the Malta-Cañon City Line are from interested parties concerned about the rerouting of traffic. Also, the major shipper on the line, ASARCO, has expressed concern about the applications. The statutory standard governing a discontinuance under 49 U.S.C. 10903 is whether the present or future public convenience and necessity require or permit the proposed discontinuance. As in abandonment proceedings, we must weigh the potential harm to affected shippers and communities against the present or future burden that continued operation could impose on the railroad and on interstate commerce. Colorado v. United MI SPT and DRGM, respectively, filed applications in Docket Nos. AB-12 (Sub-Mo. 188) and AB-8 (Sub-Mo. 19), for the abandonment and discontinuance of service over the 109-mile Malta-Cañon City, CO line; and petitions for exemptions in Docket Nos. AB-12 (Sub-Mo. 189%) and AB-8 (Sub-Mo. 36%), for the abandonment and discontinuance of service over the 69.1-mile Sage-Malta-Leadville, CO line. - 212 -

Finance Docket No. 32760 States, 271 U.S. 153 (1926). In this proceeding, the record indicates that the Malta-Caffon City Line is incurring significant losses, described below. Train operations. Pursuant to Decision No. 3, applicants provided information relating only to local train service. Service to shippers is usually provided by through trains operating 7 days per week. Minerals, chemicals, and scrap metal are the principal commodities shipped over the line. Due to the very low volume of local traffic generated by the line, a service frequency of one cycle per week would be adequate if the line were operated solely for local traffic. The total carloads shipped for the nine significant shipper/receivers on the subject line in 1993 and 1994 were \$74 and \$28, respectively. For the most current partial year available (January 1, 1995, through June 30, 1995), a total of 258 carloads (predominantly minerals) were shipped. Applicants' projected forecast year traffic of 492 cars is not challenged. Revenue and cost data. As shown in the following table, applicants estimate that for the forecast year November 1, 1995, through October 31, 1996, local traffic on the line will generate avoidable losses that can be avoided by abandonment and cessation of operations. Applicants' cost estimates, including return on value, are not contested. We summarize them as follows: (Forecast Year) Total Revenue Total On-Branch Costs \$1,286,649 \$891,239 915,777 Total Off-Branch Costs Total Avoidable Costs Avoidable Loss, Excluding Return on Value 1.807.016 520.367 Return on Value .259.808 Avoidable Loss, Including Return on Value \$1.780.175 Revenues. Total revenues for the forecast year are projected to be \$1.286,649. This is based on the movement of 492 Cars. Avoidable Costs. Total on-branch costs are estimated to be \$891,239, consisting largely of maintenance-of-way and structure costs, estimated by applicants to be \$555,114. With respect to these track maintenance costs, applicants estimate a normalized annual expenditure of \$5,093 per main track mile to maintain the track at FRA class 1 standards, excluding maintenance costs associated with overhead traffic. Because the line is classified at a level higher than FRA class 1, no rehabilitation is required. Review of applicants' calculations indicates that the maintenance estimate of \$555.114, and the quantities and unit costs used to develop the estimate, appear to be reasonable. Opportunity Costs. Opportunity costs are estimated to be \$1,259,808, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.3% by the valuation of road property (\$6,809,017) dedicated to the train operations conducted over the line, and adjusting for a holding loss of \$13,758. The majority of the property value committed to the operation of the line is the net salvage value of track structure, which is estimated to be \$7,079,625. Land is valued at \$378,000. - 213 -

Finance Locket No. 32760 Projected Losses and Estimated Subsidy. Applicants project Projected Losses and Estimated Subsidy. Applicants project an avoidable loss, excluding opportunity costs, of \$520,367. Including opportunity costs, losses are projected to be almost \$1.8 million in the forecast year. A restatement of these numbers to take into account our 1995 cost of capital determination, which results in a pre-tax cost of capital of 17.5%, produces opportunity costs of \$1,295,336. Losses, including opportunity costs, would be approximately \$1.73 Alternative transportation. The main shipper served by the line is ASARCO, whose traffic accounts for 477 of the 492 carloads of lead and sine ore projected for the forecast year. ASARCO and SFT have discussed building a new transload facility at a site in the Cañon City area where ASARCO could truck the ore following an abandonment or discontinuance of service. ASARCO does not claim transloading is infeasible or that its mine would not be able to operate. It does suggest, however, that the new arrangements would not be as satisfactory as the current one. No other customers who receive or ship traffic on the line filed comments. Applicants contend that trucking of ore was common when the area was much more heavily mined, and that it should not be difficult to build a transloading facility in Cañon City comparable to the one in Malta. comparable to the one in Malta. Shipper and community interests. As noted, no shippers besides ASARCO filed comments. CMAC argues that there is a much higher demand for local shipping than current traffic indicates. Applicants claim that the projected traffic is unrealistic, arguing that some of the movements are being shipped by truck and that some of the movements originate or terminate at Florence, CO, which is not on the line. Discussion and conclusions. The applicable criteria weigh in favor of discontinuance. The line is incurring heavy operating losses and claims of significantly increased traffic have not been substantiated. Accordingly, the potential harm to shippers and communities from discontinuance of service is cutweighed by the burden on the carriers and on interstate commerce from continued operations. Both SPT and DRGW may discontinue service over the subject line. Abandonments not granted. In most situations, the lack of shipper opposition, little local traffic, and significant losses over the Malta-Cañon City Line, discussed above, would also support a grant of the petition and the application to allow for abandonment. Here, however, there is a significant factor that militates against granting abandonment: indications in the record that the Moffst Tunnel Line may lack the capacity to handle overhead traffic resoured from the Tennessee Pass Line. We have discussed this issue earlier. It is clear that, because of the importance of this through route, permitting abandonment now would be inconsistent with the rail transportation policy. We will accordingly deny the petition for exemption to the extent it seeks abandonment authority. Moreover, because of questions raised about the ability of the Moffat Tunnel Line to handle the rerouted overhead traffic, we cannot find that the present or future public convenience and necessity permit the abandonment of the Malta-Cañon City Line. We will therefore deny the abandonment application to the extent it seeks abandonment authority. it seeks abandonment authority. - 214 -

Public Interest Conditions.

Trail Use. Requests for issuance of certificates or notices of interm trail use (CITUS or NITUS) to acquire rights-of-way under the National Trails System Act, 16 U.S.C. 1247(d), were filed in 10 proceedings: Docket Nos. AB-3 (Sub-No. 130, 131, and 133X), AB-33 (Sub-Nos. 96, 97X, 98X, and 99X), and AB-12 (Sub-No. 184X, 188, and 189X). We will not issue a CITU or NITU in the two Tennessee Pass Line proceedings, Docket Nos. AB-12 (Sub-Nos. 188 and 189X), because we are denying the requested abandonments and are issuing only discontinuance authority. No trail use or public use conditions may be imposed where only discontinuances are being granted. Southern Pacific Transportation Company-Discontinuance of Service Exemption--In Ventura County. CA. Docket No. AB-12 (Sub-No. 143X) (ICC served Nov. 20, 1992).

We will issue a CITU or NITU in the other eight proceedings. The criteria for imposing trail use and rail banking have been met. The parties have submitted statements of willingness to assume financial responsibility for the rights-of-way and acknowledged that use of the rights-of-way are subject to future reactivation for rail service in compliance with 49 CFR 1152.29. Applicants have indicated their willingness to negotiate trail use agreements. The other results and the service in compliance with 49 CFR 1152.29.

The parties may negotiate an agreement during the 180-period prescribed below. If the parties reach a mutually acceptable final agreement, further Board approval is not necessary. If no agreement is reached within 180 days, applicants may fully abandon the line, provided the conditions imposed in the applicable proceeding are met. 49 CFR 1152.29(c) and (d). Use of the rights-of-way for trail purposes is subject to restoration for railroad purposes.

Our issuance of the NITUs does not preclude other parties from filing interim trail use requests within 10 days after publication of the notice of exemption in the <u>Federal Register</u>. If, within the 10-day period following publication of the notices of exemption, additional trail use requests are filed, applicants are directed to respond to them within 10 days.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10905. As stated in Rail Abandonments--Use of Rights-of-Wave as Trails, 2 I.C.C.2d 591 (1986) (Trails), offers of financial assistance (OFAs) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and

The CITUS will be issued within 45 days of the service of this decision if no offer of financial assistance is timely made. The NITUS are being issued as part of this decision.

Applicants state that, for non-Colorado lines proposed for abandonment, they are willing to negotiate trail use with any or all of the parties that have made requests. For Colorado abandonments, applicants are willing to negotiate trail use with the State or any of its designees. They are also willing to negotiate with other parties requesting trail use for Colorado abandonments so long as the State of Colorado is agreeable. Applicants have also submitted letters in various proceedings indicating their willingness to negotiate trail use.

Finance Docket No. 32760 public use. Accordingly, the effective date of the decisions may be postponed during the OFA process. See 49 CFR 1152.27(c), (e) and (f). Finally, if the line is sold under the OFA procedures, the abandonment application or the petition for abandonment exemption will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed. Public Use. Various parties in eight proceedings have sought public use conditions under 49 U.S.C. 10906. They have met the criteria for imposing a public use condition by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the time period. 49 CFR 1152.28(a)(2). Accordingly, a 180-day public use condition will be imposed in Docket Mos. AB-3 (Sub-Mo. 133X), AB-12 (Sub-Mos. 184X), and AB-33 (Sub-Mos. 96, 98X, and 99X). A poly public use condition, as parties have requested, will be issued in Docket Mos. AB-3 (Sub-Mo. 134X) and AB-12 (Sub-Mos. Madison County Transit and RTC ask that we impose Trails Act and public use conditions for a period of 180 days after the carrier consummates the abandonment. We will deny these requests. In issuing the NITUs and CITUs and imposing the public use conditions, we will follow our usual practice and have the 180-day Trails Act period run from the service date of the decision, while the public use condition will run from the effective date of the decision. Continued operation of the line will not preclude the negotiation of an agreement for interim trail use. Our jurisdiction to issue rail banking or other appropriate orders will not terminate until an abandonment has finally been consummated. The maximum period that a public use condition can extend under 49 U.S.C. 10906 is 180 days from the effective date of the order authorizing abandonment. Even if applicants continue to operate during that 180-day period, this will not preclude a public use agreement from being negotiated and finalized during that statutory period. Persons may file for both trail use and public use conditions. If a trail use agreement is reached on a portion of the right-of-way, applicants must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, applicants are not required to deal exclusively with parties who have filed requests but may engage in negotiations with other interested persons. Additional public use requests are unnecessary where the full 180-day period has been imposed. Other Conditions Requested. We now turn to other conditions requested in the various abandonments proceedings. The statement in <u>Trails</u> that section 10905 does not apply to abandonment exemptions has since been superseded by adoption of rules allowing for the use of OFAs in exemption proceedings. See 49 CFR 1152.27. - 216 -

Finance Docket No. 32760 The City of Florence, CO. We are denying the requested conditions. The first condition sought by the City of Florence is a variation on the Central Corridor divestiture theme. We believe that the conditions we are imposing will adequately preserve the rail competition that exists today in the Central Corridor. Concerning the other two conditions Florence seeks, there is no statutory authority for imposition of a 24-month stand-still condition or a right-of-first-refusal condition. any event, UP has made various commitments to the State of Colorado that address at least some of the concerns expressed by the City of Florence. See UP/SP-232, Tab G at 7-8. The City of Fruits, CO. We are denying the requested condition as it pertains to labor-related impacts because it implicates a matter better dealt with under the labor protective conditions' imposed in this proceeding. <u>BM/SF</u>, slip op. at 101. Insofar as it pertains to continued rail service, it fails because the City of Fruita has demonstrated neither (a) that the because the City of Fruita has demonstrated neither (a) that the merger will cause competitive harms that should be ameliorated, nor (b) that local traffic on the Colorado lines targeted for abandonment is sufficient to sustain these lines once overhead traffic has been rerouted. The U.S. Department of Agriculture, Rocky Mountain Region, and the U.S. Department of the Interior, Bureau of Land Management, Colorado State Office. With respect to conditions (1), (2), and (6), we are denying the conditions because there is no statutory authority for their imposition. Environmental conditions (3), (4), (5), and (7), insofar as they pertain to the Sage-Malta-Leadville and Malta-Cañon City Lines, are most because we are denying the abandonments. With respect to conditions (3), (4), (5), and (7), insofar as they pertain to the Towner-NA Junction Line, we are imposing environmental mitigation conditions that should alleviate concerns expressed. These are indicated in Appendix G: general environmental mitigation conditions #26, #27, #28, #32, and #37, and specific environmental mitigation conditions #47 and #48. Towner-NA Junction Parties. We are denying the condition sought because there is no statutory authority for a stand-still condition. We note, however, that the concerns raised by these parties have been addressed, to some extent, by the various commitments UP has made to the State of Colorado. See UP/SP-232, Tab G at 7-8. The Town of Avon. We note that, as a practical matter, the two segments of the Tennessee Pass Line have been treated as a single entity in this proceeding, and that there is no reason to believe that the outcome of this proceeding would have been in any way different had applicants filed a single application with respect to the entire Tennessee Pass Line. The Upper Arkansas Area Council of Governments. We are denying these conditions, and note that many of these conditions have been mosted by the denial of the Tennessee Pass abandonments. Moreover, there is no statutory authority for imposition of 24-month stand-still condition or a replace-lost-taxes trust fund condition, although commitments UP has made to the State of Colorado address at least some of the concerns to which these conditions are directed, and UP/SP-232, Tab G at 7-8. The Colorado Department of Public Health and Environment and the United States Environmental Protection Agency, Region VIII; RTC; and the Leadville Coalition. With the denial of the Tennessee Pass abandonments, these various Tennessee Pass environmental conditions are moot. - 217 -

Viacom International Inc. (1) We are imposing, as indicated in Appendix G. specific environmental mitigation condition 846 to provide continued access for Viacom to the Eagle Mine site.

(2) Viacom's second condition has been mosted by the denial of the Tennessee Pass abandonments.

Environmental Policy Act (MEPA) and related environmental laws. The environmental effects of the merger and the ancillary abandonment and construction projects that were proposed by applicants must be considered, and we have thoroughly done so. Our environmental staff, the Section of Environmental Analysis (SEA), conducted various public outreach activities to inform the public about the proposed merger and to encourage and facilitate public participation in the environmental review process. 26

As part of its environmental review, SEA prepared detailed analyses not only of the systemwide effects of the proposed merger, but also of particular merger-related activities that would affect individual rail line segments, rail yards, and intermodal facilities to a degree that would meet or exceed our thresholds<sup>36</sup> for environmental analysis. See 49 CFR 1105.7(e)(5)(i) and (ii). SEA conducted a thorough independent analysis, which included verifying projected rail operations; verifying and estimating noise level impacts; estimating increases in air emissions; assessing potential impacts on safety; and performing land use, habitat, surface water and wetlands surveys, ground water analyses, and historic and cultural resource surveys.

Based on the information provided by the parties and other agencies. SEA issued a comprehensive Environmental Assessment (EA) on April 12, 1996. SEA received approximately 160 comments following issuance of the EA. To address those comments and the other environmental comments received throughout the environmental review process (approximately 400 in total), SEA undertook additional environmental analysis, which culminated in the issuance of a detailed Post Environmental Assessment (Post EA) on June 24, 1996, refining some of the discussion and mitigation recommended in the EA.

various agencies seeking their comments. In addition, SEA consulted with federal, state, and local agencies, affected communities, UP and SP, and UP/SP's environmental consultants to gather and disseminate information about the proposal, identify potential environmental impacts, and develop appropriate multigation measures.

These thresholds ensure that those rail line segments and facilities that would experience a substantial increase in traffic as a result of the transaction are thoroughly analyzed for potential air quality, noise, transportation, and mafety impacts.

BY SEA and its independent third-party consultant conducted approximately 150 site visits. They also analyzed UP/SP's Environmental Report, operating plan, Preliminary Draft Environmental Assessment and other pleadings, all of the settlement agreements entered into during the environmental review process, and technical studies.

As a result of its investigation, SEA concluded that the merger would result in several environmental benefits, including a systemwide net reduction of 35 million gallons of diesel fuel consumption (based on 1994 figures) from rail operations and truck-to-rail operations, systemwide improvements to air quality from reduced fuel use, and a reduction in long-haul truck miles, highway congestion and maintenance, and motor vehicle accidents.

SEA also concluded that the merger and related rail abandonments and constructions could have potential environmental effects regarding safety, air quality, noise, and transportation, including the transportation of hazardous materials, and, in the EA. SEA proposed mitigation measures addressing the environmental concerns that were raised. In the Post EA, based on further analysis and review of the environmental comments, SEA developed more comprehensive and specifically tailored mitigation recommendations. As a result of consultations with SEA, UP/SP agreed to undertake particular mitigation measures. In addition, several local communities negotiated memoranda of understanding with UP/SP to implement mitigation measures and take other appropriate actions to address their particular environmental concerns.

SEA concluded that, with the Post EA mitigation measures, the proposed merger would not significantly affect the quality of the human environment on a systemwide, regional, or local basis. We agree that the conditions recommended in the Post EA will adequately mitigate the potential environmental impacts identified during the course of the environmental review, and we will impose those conditions here (see Appendix G). Me also adopt SEA's environmental analysis and the conclusions reached in the EA and the Post EA.

No Need for Environmental Impact Statement. We have considered the arguments of some parties that an environmental impact statement (EIS) is required here, but do not believe that one is needed. An EIS is required only for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). 200 Under our environmental rules, 49 CFR 1105.6(b)(4), an EA is normally sufficient environmental documentation in rail merger cases to allow us to take the requisite "hard look" at the proposed action. 200

for two proposed abandonments in Colorado (Sage to Leadville and Malta to Cañon City) has been modified to reflect our decision to permit only discontinuance of rail service, and not abandonment, at this time. Other clarifying changes have been made as well.

The identification of such actions is a matter for the agency to determine, as long as the determination is not arbitrary or capricious. See Goos v. ICC, 911 f.2d 1283, 1292 (8th Cir. 1990), citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989).

Other merger proposals that have come before our predecessor agency, the ICC, that does not mean that the qualitative environmental effects of this merger are greater (or different) than those of the other railroad mergers that have been considered. Similarly, the extensive trackage rights that we are granting in this decision to preserve competition generally will not create additional traffic (or potentially significant environmental impacts). Traffic that can be efficiently handled (continued...)

Moreover, interested parties received essentially the same benefits they would have received with an EIS. As the EA and Post EA show, SEA conducted a thorough and comprehensive environmental review. There was extensive notice and opportunity for input from the public and appropriate agencies throughout the process. In addition to the EA, SEA issued a detailed Post EA which contains SEA's individual responses to the comments on the EA and thus reflects not only the work of SEA but also the critical views of interested parties and agencies.

Finally, the environmental mitigation we are imposing here is tar reaching and comprehensive. Mr. As appropriate, it addresses impacts on a variety of levels: systemwide, rail corridor-specific, and local. There is mitigation for particular rail line segments, rail yards, intermodal facilities, and rail abandonments and constructions. In short, no EIS is required because our environmental mitigation conditions specifically address the potential environmental impacts associated with the effects. Mr.

Reno and Wichita. As discussed in the Post EA, in developing mitigation for two cities, Reno, MV, and Wichita, KS, SEA concluded that further, more focused mitigation studies are warranted, notwithstanding the extensive analysis (including site visits and meetings with city officials, emergency response cone to identify environmental concerns and arrive at appropriate mitigation for these two communities. Mothing in the record of the merger in Reno or Wichita are so severe that implementation of the merger should not proceed prior to the completion of the studies. To the contrary, in both Reno and

by train would be handled by train whether or not the trackage rights at issue here were granted.

includes more frequent track and train car inspections, signs on grade crossings identifying toll free numbers to call in the event of a signal malfunction, and a requirement that UP/SP provide emergency response personnel with information regarding anticipated train movements and work with communities to develop plans to deal with the transportation of hazardous materials, emergencies, and the upgrading of grade crossing signals. In addition, UP/SP will be required to equip certain trains carrying hazardous materials with two-way end-of-train devices to enhance braking capabilities on particular line segments. In response to concerns involving air pollution, UP/SP will have to reduce more efficient locomotives, close box car doors on empty cars, and use more efficient locomotives when the equipment becomes available.

Cir. 1985); Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982).

We note that the Supreme Court has rejected arguments that NEPA demands the formulation and adoption of a plan that will fully mitigate environmental harm before an agency can act. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352-53 mitigation steps until more detailed information is available is embraced in the procedures promulgated under NEPA. See Public (continued...)

Wichita the environmental impacts are limited to the effects of an increase in traffic on existing rail lines. Also, the mitigation conditions that we are imposing now assure that, while SEA conducts these studies, the environmental status quo will essentially be preserved in Reno and Wichita.

As the EA and Post EA show, SEA already has carefully assessed the impact of the merger on Reno and Wichita and identified its likely environmental effects. Based on its analysis, SEA concluded that, with the systemwide and corridor-specific mitigation already imposed and the conditions to be arrived at following the independent mitigation studies, there will be no significant environmental impacts to Reno and Wichita, and we agree.

The sole purpose of the mitigation studies will be to arrive at specifically tailored mitigation plans that will ensure that localized environmental issues unique to these two communities are effectively addressed. For example, with respect to vehicular and pedestrian safety, SEA has determined that separated grade crossings and pedestrian overpasses and/or underpasses will be needed to address safety concerns on the existing rail lines in Reno and Wichita. Accordingly, the studies will identify the appropriate number and precise location of highway/rail grade separations and rail/pedestrian grade separations in Reno and Wichita. With respect to air quality, we have imposed mitigation measures that reduce locomotive fuel consumption and air pollution, call for more efficient railroad equipment and operating practices, and require consultation with air quality officials. As further insurance, the studies will consider additional mitigation to address the air quality effects unique to Reno and Wichita. In this merger, noise impacts would result from more frequent exposure to horn noise rather than greater intensity of sound. No additional types of noise would be introduced. To address noise impacts, we are requiring UP/SP to consult with affected counties to develop focused noise abatement plans. As the Post EA notes, however, safety dictates that railroads sound their horns at grade crossings. Any attempt significantly to reduce noise levels

Unities Comm'n of California v. PERC, 900 F.2d 269, 282-3 (D.C. Cir. 1990). NEPA "does not require agencies to adopt any particular internal decisionmaking structure." Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 100 (1983). It is well settled that NEPA does not repeal other statutes by implication and that if the agency meets NEPA's basic requirements, it may fashion its own procedural rules to discharge its multitudinous duties. Vermont Yankee v. NRDC, 435 U.S. 519 (1978); United States v. SCRAP, 412 U.S. 669, 694 (1973).

The courts have recognised that there is no violation of NEPA where proposed actions will not effect a change in the status quo. See Sierra Club v. FERC, 754 F.2d 1506, 1509-10 (9th Cir. 1985).

Because trains are mobile, rather than stationary sources, air quality impacts associated with locomotive emissions are spread over a large area. Therefore, the impacts at any individual location are typically relatively minor.

SEA indicates that FRA has been directed by the Swift Act generally to require that horns be sounded at all grade crossings.

at grade crossings would jeopardize safety, which we consider to be of paramount importance.

The studies will be conducted by SEA with the assistance of an independent third party contractor. Although retained by UP/SP, SEA will select the contractor. The contractor will work under the sole supervision, direction, and control of SEA.

The mitigation studies will include consultations with the second state of the contractor will work the mitigation studies will include consultations and the second state of the contractor will work the mitigation studies will include consultations and the second state of the contractor will work the mitigation studies will include consultations and the second state of the second state

The mitigation studies will include consultations with the affected communities, counties, and states, Mative American tribes, the FRA, and other appropriate agencies, as well as UP/SP. There will be public notice and participation. The public will be consulted regarding the range of additional mitigation to most effectively address increased rail traffic on the existing rail lines in Reno and Wichita. SEA will prepare draft mitigation studies and make them available to the public for review and comment. After SEA assesses the comments, it will design the most effective mitigation for these particular communities to add to the mitigation that has already been imposed.

SEA's final mitigation studies and its recommended, mitigation plans for Reno and Wichita will be made available to the public and will be submitted to us for our review and approval. We will then issue a decision imposing specific mitigation measures. This entire process will be completed within 18 months of consummation of the merger.

In the meantime, as explained in the Post EA, during the 18-month study period UP/SP will be permitted to add only an average of two additional freight trains per day to the affected rail line segments (Chickasha, OK, to Michita and Roseville, CA, to Sparks, NV), 25° which is below the threshold level for environmental analysis. 360 UP/SP will be prohibited from increasing traffic to the levels they projected under the merger (11.3 daily trains for Reno and 7.4 trains for Michita) without our approval. 360 Thus, there will be no significant adverse environmental impacts to these communities while SEA, the Board,

For nonattainment areas such as Reno. our rules permit railroads to operate up to three additional trains per day. The threshold for attainment areas such as Wichita is normally an increase of eight trains or more a day. Here, we are taking a more conservative approach and will permit for Wichita only an average increase of two trains per day. In short, these limited increases for Reno and Wichita are at or below the threshold levels, and the environmental status quo will essentially be maintained. This addition of an average of two trains a day includes EMSF trains but does not include Amtrak trains, which are unrelated to the merger.

We note that an existing railroad can increase its level of operations without coming to us, and without limitation. Thus, if UP and SP had not proposed this merger, SP on its own could have increased the number of trains on its line in Reno to any level it considered appropriate. Allowing an increase of up to two trains per day during the interim period takes into account that the number of trains going through Reno and Wichita might have been increased even without the merger.

station passing reports of train movements for Reno and Wichita on a monthly basis with SEA for the duration of the study period. We will review them to ensure compliance.

Finance Docket No. 32760 and the parties work to arrive at additional tailored mitigation for those cities. It should be noted that the studies will focus only on the mitigation of the environmental effects of additional rail traffic through Reno and Wichita resulting from the merger. Mitigation of conditions resulting from the preexisting development of hotels, casinos, and other tourist-oriented businesses on both sides of the existing SP rail line in Reno, or the preexisting switching operations that are a primary source of the congestion associated with the existing UP line in Wichita, are not within the scope of the studies. Similarly, the are not within the scope of the studies. Similarly, the construction of a new rail line now under consideration by Reno is too preliminary to be assessed now.270 The studies will carefully examine private and public funding options, as we believe that the cost of mitigation for Reno and Wichita should be shared. Finally, the studies will provide the parties with additional time to pursue and agree to independent and innovative mitigation plans (such as the memorandum of understanding executed by UP/SP and Truckee, CA, whereby UP/SP will share in the cost of an underpass construction project and contribute to a fund to buy back obsolete wood burning stoves). In sum, pending determination of the exact mitigation measures to be required for Reno and Wichita, UP/SP will be subject to a traffic cap on the affected rail lines to ensure that no adverse effects to the environment will occur and existing environmental conditions will essentially remain unchanged. Because we already know the nature and general parameters of the appropriate mitigation measures for Reno and Wichita, based on our analysis of the environmental impacts and imposition of systemwide and regional mitigation, we find that, with the more specific mitigation that will be developed, the merger will not significantly affect the quality of the environment in those two locations. Comments of EPA. On July 12, 1996, we received comments from the United States Environmental Protection Agency (EPA) on various aspects of the EA and the Post EA.<sup>271</sup> EPA notes that, in analyzing air quality, the EA failed specifically to identify "maintenance" areas.<sup>272</sup> which it believes may have caused air Plans for such a line are only in the development stage. SEA indicates that such a project could take up to 10 years to finalize. If the contemplated construction reaches the stage of an actual proposal requiring our appropriate environmental document at that posset. See Elephe v. Sierra Club, 427 U.S. 390, 410 n.20 (1976); Crounse Corp. v. ICC. 781 F.2d 1176, 1193-96 (6th Cir. 1986). 371 SEA agreed to EPA's request for an extension of time to comment on the Post EA. We welcome EPA's input after reviewing our environmental analysis, since, as EPA notes, it generally does not comment on EAs. There are three classifications for air quality: attainment areas, in which levels of certain pollutants are considered equal to or better than federal and state ambient air quality standards; nonattainment areas, in which levels of one or more pollutants do not meet federal and state ambient air quality standards; and maintenance areas, which were at one time nonattainment areas but have subsequently improved their air quality and are now in attainment for the relevant pollutant(s). - 223 -

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quality concerns to be overlooked. But maintenance areas were not ignored in SEA's analysis. For those areas that were not classified as nonattainment. SEA applied the EPA conformity emission threshold levels applicable to maintenance areas. This means that SEA analyzed both attainment and maintenance areas under the more rigorous standards applicable to maintenance areas under the more rigorous standards applicable to maintenance areas areas, and that, if anything, the anticipated effects of the proposed merger on air quality are conservative. We believe that air quality has been thoroughly analyzed, and that the mitigation we are imposing here, along with the more specific measures which will be arrived at in the further mitigation studies for Reno and Michita. Adequately mitigates any potential adverse air impacts.

EPA further states that the EA used the terms NO, and NO, incorrectly. We recognize that NO, is not a criteria pollutant under EPA and state ambient air quality standards. In assessing air quality emissions, SEA looked at emission factors applicable to NO, instead of NO, because NO, emission factors are readily available through EPA documents and other sources, while NO, emissions are not. SEA based its calculations on the conservative assumption that all NO, emissions are composed of NO,. This conservative approach, which is widely accepted, ensured that the criteria pollutant NO, was adequately assessed in SEA's analysis. Moreover, by using this approach, SEA used higher NO, emissions than would actually be emitted.

EPA also expressed some difficulty understanding SEA's estimates of the projected net increase and decrease in air emissions with the mitigation measures we are imposing. While we believe that the text of the Post EA adequately explains the data in Tables 3-5 and 4-4, we have generated and attached as Appendix H an additional table to further clarify the net emissions reflecting mitigation.

EPA notes that some of the proposed rail line abandonments in Colorado run through or near EPA-designated Superfund sites. EPA is troubled that soil in and around the railroad lines could require remediation, that UP/SP might not be obligated to honor a consent decree, and that possible future trail use could expose the public to hazardous substances. These concerns are premature because, as discussed above, we are permitting only the discontinuance of rail service, and not abandonment of the involved lines. Thus there will be no salvage of these lines or opportunity for trail use unless and until UP/SP obtains our authority to abandon these lines.

determination that the proposed merger is not subject to EPA's regulations entitled "Determining Conformity of General Federal Actions to State or Federal Implementation Plans" (General Conformity). The General Conformity criteria do not apply directly to railroad operations, except for future locomotive emission standards. SEA properly concluded that the proposed merger does not meet the definitions in the General Conformity regulations at 40 CFR 51.852 because, as a regulatory agency, the Board does not maintain program control over railroad emissions as part of its continuing responsibilities.

sea will take into account EPA's concerns and consult with them in conducting its mitigation studies for Reno and Wichita.

<sup>276</sup> At that point, we will analyze the potential environmental impacts of the proposed abandonments.

Finance Docket No. 32760 While trail use requests can be made if the abandonments are granted, any trail arrangement would not supersede the requirements of the specific laws that govern Superfund sites. 374 Nor would we thereby become involved in negotiating or enforcing consent decrees involving remediation of those sites. EPA does not view requiring UP/SP to comply with existing federal, state, and local regulation as mitigation. We believe, however, that requiring compliance with other laws and regulations, such as FRA's safety regulations, can assist in reducing the potential environmental impacts of the actions before us. If the railroad fails to comply with conditions that we have imposed, parties can notify us and request that we (as well as the agency that has promulgated the regulation) take appropriate action. In any event, the mitigation we are imposing here goes well In any event, the mitigation we are imposing here goes well beyond requiring compliance with other laws and regulations. For example, it includes more frequent track and train car inspections to reduce anticipated safety impacts and reduced idling of locomotives and the use of more efficient locomotives to offset air pollution emissions associated with the marger. Moreover, to enhance safety, UP/SP will be required to equip certain trains carrying hazardous materials with two-way end-of-train devices to improve braking capabilities on particular line segments. EPA suggests that we failed to discuss the environmental impacts associated with the handling and disposal of waste materials for the proposed abandonments and constructions. But we have included detailed mitigation for these actions. See Appendix G. including conditions #26, #27, #62 and #63. EPA questions whether SEA considered all the settlement agreements reached with competing railroads and trade associations. SEA specifically took all settlement agreements into account in its analysis, as the EA and Post EA show. Finally, we disagree with EPA's suggestion that SEA should revisit its consultation efforts with Native American tribes. SEA's efforts to contact and consult with Native American tribes have been extensive. As pert of its outreach activities, SEA contacted approximately 11 area offices of the Bureau of Indian Affairs to inform them about the proposed merger; three offices commented and provided the names of tribes that should be contacted. Both the EA and Post EA were distributed to 31 American Indian tribes. In addition, there was newspaper and Federal Register notice to inform all affected tribes and communities about the proposed merger and how they could participate. To ensure continued participation, SEA will contact the affected Native American tribes when initiating its Finally, we disagree with EPA's suggestion that SEA should the affected Mative American tribes when initiating its matigation studies for Reno and Wichita and invite them to participate. FINDINGS In Finance Docket No. 32760, we find: (a) that the acquisition by UPC, UPRR, and MPRR of control of SPR, SPT, SSW, SPCSL, and DRGW through the proposed transaction, as conditioned herein, is within the scope of 49 U.S.C. 11343 and is consistent ID. Docket No. AB-33 (Sub-No. 70) (ICC served Dec. 2, 1994). - 225 -

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with the public interest; (b) that the transaction will not adversely affect the adequacy of transportation to the public; (c) that no other railroad in the area involved in the transaction has requested inclusion in the transaction, and that failure to include any such railroad will not adversely affect the public interest; (d) that the transaction will not result in any guarantee or assumption of payment of dividends or of fixed charges, or any increase in total fixed charges, except as specifically approved herein; (e) that the interests of employees affected by the proposed transaction does not make such transaction inconsistent with the public interest, and any adverse effect will be adequately addressed by the conditions imposed herein; (f) that the transaction, as conditioned herein, will not significantly reduce competition in any market; and (g) that the terms of the transaction are just, fair, and reasonable. We further find that the competitive conditions imposed in Finance Docket No. 12760, including but not limited to those embraced in the BNSF, "CMA, and URC agreements, and further including but not limited to the various modifications we have required with respect to the terms of the BNSF and CMA agreements (particularly with respect to new facilities, transloading facilities, bild-out/build-in options, contracts at 2-to-1 points, and STT facilities), are consistent with the public interest. We further find that the oversight condition imposed in Finance Docket No. 12760 is consistent with the public interest. We further find that any rail employees of applicants or their rail carrier affiliates affected by the transaction authorized in Finance Docket No. 12760 should be protected by the conditions set forth in New York Dock Rv. --Control-Brooklym Conditions are provided for in a labor agreement entered into Docket No. 12760, in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees. with the public interest; (b) that the transaction will not

In Finance Docket No. 32760 (Sub-No. 1), we find that the trackage rights provided for in the BMSF agreement and included in the Sub-No. 1 motice filed November 30, 1995, are exempt from prior review and approval pursuant to 49 CFR 1180.2(d) (7). We further find that any rail employees of applicants or their rail carrier affiliates or of BMSF or its rail carrier affiliates affected by the transaction authorized in Finance Docket No. 32760 (Sub-No. 1) should be protected by the conditions set forth in Norfolk and Nestern Rv. Co.--Trackage Rights--BM, 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Rv. Inc.--Lease and Operate, 360 I.C.C. 653, 664 (1980), unless different conditions are provided for in a labor agreement entered into prior to consummation of the transaction authorized In Finance Docket No. 32760 (Sub-No. 1), we find that the

Again, by BMSF 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 BMSF 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; agg also UP/SP-260 at 8-9, summarizing the clarifications and amendments described in the April 29th reputtal filings); (3) the June 3rd brief (UP/SP-260) April 29th reputtal 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).

Finance Docket No. 32760 in Finance Docket No. 32760 (Sub-No. 1), in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees. In Finance Docket No. 32760 (Sub-No. 2), we find that the three line sales provided for in the BMSF agreement, and operation by BMSF of these lines, are exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a or to protect shippers from the abuse of market power. We further find that any rail employees of applicants or their rail carrier affiliates or of BMSF or its rail carrier affiliates affected by the transaction authorized in Finance Docket No. 32760 (Sub-No. 2) should be protected by the conditions set forth in New York Dock Ry..-Control--Brooklyn Eastern Dist. 360 I.C.C. 60, 84-90 (1979), unless different conditions are provided for in a labor agreement entered into prior to consummation of the transaction authorized in Finance Docket No. 32760 (Sub-No. 2), in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees. In Finance Docket No. 32760 (Sub-Nos. 3, 4, 5, 6, and 7), we find that acquisition and exercise of control of A&S, CCT, OURD, PTRR, and PTRC, respectively, by applicants is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because each such control transaction is limited in scope, and because, in each instance, review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a or to protect shippers from the abuse of market power. We further find that any rail employees of applicants or their rail carrier affiliates affected by the transactions authorized in Finance Docket No. 32760 (Sub-Nos. 3, 4, 5, 6, and 7) should be protected by the conditions set forth in New York Dock Ry. -- Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979), unless different conditions are provided for in a labor agreement entered into prior to consummation of the transactions authorized in Pinance Docket No. 32760 (Sub-Nos. 3, 4, 5, 6, and 7), in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees. In Finance Docket No. 32760 (Sub-No. 8), we find that
(i) common control of UP and the two motor carriers controlled by
SP, and (ii) common control of SP and the one motor carrier
controlled by UP, is exempt from prior review and approval
pursuant to 49 U.S.C. 10505 because each such control transaction
is limited in scope, and because, in each instance, review is not
necessary to carry out the transportation policy of 49 U.S.C.
10101a or to protect shippers from the abuse of market power. In Finance Docket No. 32760 (Sub-No. 9), we find that the terminal area truckage rights sought therein are practicable and in the public interest and will not substantially impair the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business. In Pinance Docket No. 32760 (Sub-No. 10), we find that the responsive application filed by CMTA is not consistent with the public interest. In Finance Docket No. 32760 (Sub-No. 11), we find that the responsive application filed by MRL is not consistent with the public interest. In Finance Docket No. 32760 (Sub-No. 12), we find that the responsive application filed by Entergy is consistent with the - 227 -

Finance Docket No. 32760 The property may be suitable for recreational use as an extension of a trail. However, we note that no party has requested a public use condition, and we will not impose one at this time. In Docket No. AB-3 (Sub-No. 132X), we find that the abandonment by MPRR of railroad lines between MP 485.0 near Newton, KS, and MP 476.0 near Whitewater, KS, is exempt from prior review and approval pursuant to 49 CFR 1152.50. In Docket No. AB-3 (Sub-No. 133X), we find that the abandonment by MPRR of railroad lines between MP 680.0 near lows Junction, LA, and MP 688.5 near Manchester, LA, is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power. In Docket No. AB-3 (Sub-No. 134X), we find that the abandonment by MFRR of railroad lines between MP 0.50 near Troup, TX, and MP 8.0 near Whitehouse, TX, is exempt from prior review and approval pursuant to 49 CFR 1152.50. In Docket Nos. AB-8 (Sub-No. 36%) and AB-12 (Sub-No. 189%), we find that the discontinuance by DRGW and SPT, respectively, of operations on railroad lines (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, is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is necessary to carry out the transportation melicy of 49 U.S.C. and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power. In Docket No. AB-12 (Sub-No. 189X), however, we further find that the abandonment by SPT of railroad lines (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, is not exempt from prior review and approval because review is necessary to carry out the transportation policy of 49 U.S.C. 10101a. In Docket Nos. AB-8 (Sub-No. 39) and AB-12 (Sub-No. 188), we find that the discontinuance by DRGW and SPT, respectively, of operations on railroad lines between MP 271.0 near Malta, CO, and MP 162.0 near Cafon City, CO, is permitted by the present or future public convenience and necessity and will not have a continue adverse impact on Tural and community development. In serious adverse impact on rural and community development. In Docket No. AB-12 (Sub-No. 188), however, we further find that the abandonment by SFT of railroad lines between MP 271.0 near Malta, CO, and MP 162.0 near Cañon City, CO, is not permitted by the present or future public convenience and necessity. In Docket No. AB-12 (Sub-No. 184%), we find that the abandonment by SPT of railroad lines between MP 360.1 near Mendel, CA, and MP 445.6 near Alturas, CA, is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power. In Docket No. AB-12 (Sub-No. 185%), we find that the abandonment by SPT of railroad lines between NP 117.6 near Suman, TX, and MP 105.07 near Benchley, TX, is exampt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power. abuse of market power. - 229 -

Finance Docket No. 32760 In Docket No. AB-12 (Sub-No. 187X), we find that the abandonment by SPT of railroad lines between MP 30.0 near Seabrook, TX, and MP 40.5 near San Leon, TX, is exempt from prior review and approval pursuant to 49 CFR 1152.50. In Docket No. AB-33 (Sub-No. 93%), we find that the abandonment by UPRR of railroad lines between MP 0.0 near Mhittier Junction, CA, and MP 5.18 near Colima Junction, CA, is exempt from prior review and approval pursuant to 49 CFR 1152.50. In Docket No. AB-33 (Sub-No. 94%), we find that the abandonment by UFRR of railroad lines between MP 5.8 near Magnolia Tower, CA, and MP 10.7 near Melrose, CA, is exempt from prior review and approval pursuant to 49 CFR 1152.50. In Docket No. AB-33 (Sub-No. 96), we find that the abandonment by UPRR of railroad lines between MP \$1.0 near Barr, IL, and MP 89.4 near Girard, IL, is permitted by the present or future public convenience and necessity and will not have a serious adverse impact on rural and community development. In Docket No. AB-33 (Sub-No. 97%), we find that the abandonment by UPRR of railroad lines between MP 119.2 near DeCamp, IL, and MP 133.8 near Edwardsville, IL, is exempt from prior review and approval pursuant to 49 CFR 1152.50. In Docket No. AB-33 (Sub-No. 98X), we find that the abandonment by UPRR of railroad lines between MP 133.8 near Edwardsville. IL, and MP 148.78 near Madison, IL; is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power. In Docket Mo. AB-33 (Sub-Mo. 99%), we find that the abandonment by UPRR of railroad lines between MP 0.0 near Little Mountain Junction, UT, and MP 12.0 near Little Mountain, UT, is exempt from prior review and approval pursuant to 49 CFR 1152.50. In Docket Mos. AB-3 (Sub-Nos. 129X, 130, 131, 132X, 133X, and 134X). AB-8 (Sub-Nos. 16X, 37, 36, and 39), AB-12 (Sub-Nos. 184X, 185X, 187X, 188, and 189X), and AB-33 (Sub-Mos. 93X, 94X, 96, 97X, 98X, and 99X), we further find that any employees affected by the abandonments and discontinuances authorized therein should be protected pursuant to Orason Short Line R. Co.-Abandonment-Goshen, 360 I.C.C. 91, 98-103 (1979), unless different conditions are provided for in a labor agreement entered into prior to consummation of the relevant abandonment or discontinuance, in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees. We further find that this action, as conditioned by the environmental mitigation conditions set forth in Appendix G, will not significantly affect the quality of the human environment or the conservation of energy resources. We further find that all conditions requested by any party to this proceeding but not granted herein are not in the public interest and should not be imposed. - 230 -

Finance Docket No. 32760 It is ordered: 1. The UP/SP-262 motion to strike (and request for sanctions) is denied. 2. The BN/SF-61 motion to strike is denied. 3. BNSF's request (BM/SF-54 at 32-33) that a certain document relied upon by KCS (KCS-33 at 72) be stricken from the 4. The EBT/KCOSA joint motion dated May 10, 1996, is granted, and the new evidence tendered therewith is made part of the record in this proceeding. 5. Charles W. Downey is permitted to intervene in this proceeding and to become a party of record. 6. In Finance Docket No. 32760, the application filed by UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL, and DRGW is approved, subject to the imposition of the conditions discussed in this decision. Such conditions include but are not limited to those embraced in the BNSF, CMA, and URC agreements, and further include but are not limited to the various modifications we have required with respect to the terms of the BMSF and CMA agreements required with respect to the terms of the BNSF and CMA agreements (particularly with respect to new facilities, transloading facilities, build-out/build-in options, contracts at 2-to-1 points, and SIT facilities). The Board expressly reserves jurisdiction over the Finance Docket No. 32760 proceeding and all embraced proceedings in order to implement the oversight condition imposed in this decision and, if necessary, to impose further conditions or to take such other action, including the ordering of divestiture, as may be warranted. 7. If applicants consummate the approved transaction, they shall confirm in writing to the Board, within 15 days after consummation, the date of consummation. Where appropriate, applicants shall submit to the Board three copies of the journal entries recording consummation of the transaction. 8. All notices to the Board as a result of any authorization shall refer to this decision by date and docket 9. No change or modification shall be made in the terms and conditions approved in the authorized application without the prior approval of the Board. 10. Applicants are hereby directed to file a progress report and an implementing plan on or before October 1, 1996, as discussed in this decision, and to file further progress reports on a quarterly basis thereafter. 11. BMSF is hereby directed to file a progress report and an operating plan on or before October 1, 1996, as discussed in this decision, and to file further progress reports on a quarterly basis thereafter. 12. In Finance Docket No. 32760 (Sub-No. 1), the trackage rights referenced in the Sub-No. 1 notice filed Movember 30, 1995, are exempted pursuant to 49 CFR 1180.2(d) (7). 13. Applicants and BMSF are hereby directed to file, no later than September 4, 1996, a 49 CFR 1180.2(d) (7) class exemption notice covering the trackage rights added to the - 231 -

Finance Docket No. 32760 BNSF agreement in accordance with the amendments required by the 14. Applicants and URC are hereby directed to file. no later than September 4, 1996, a 49 CFR 1180.2(d)(7) class exemption notice covering the trackage rights provided for in the 15. In Pinance Docket No. 32760 (Sub-No. 2), the petition for exemption is granted. 16. In Finance Docket No. 32760 (Sub-No. 3), the petition for exemption is granted. 17. In Finance Docket No. 32760 (Sub-No. 4), the petition for exemption is granted. 18. In Finance Docket No. 32760 (Sub-No. 5), the petition for exemption is granted. 19. In Finance Docket No. 32760 (Sub-No. 6), the petition for exemption is granted. 20. In Finance Docket No. 32760 (Sub-No. 7), the petition for exemption is granted. 21. In Pinance Docket No. 32760 (Sub-No. 8), the petition for exemption is granted. 22. In Finance Docket No. 32760 (Sub-No. 9), the application for terminal area trackage rights is approved. BMSF and KCS shall jointly submit, by August 22, 1996, the agreed-upon terms respecting implementation of the Sub-No. 9 terminal trackage rights. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such terminal trackage rights. The Board will then choose the better of the proposals, or some variation thereof, and make it effective on September 11, 1996. 23. In Finance Docket No. 32760 (Sub-No. 10), the responsive application filed by CMTA is denied. 24. In Finance Docket No. 32760 (Sub-No. 11), the responsive application filed MRL is denied. 25. In Finance Docket No. 32760 (Sub-No. 12), the responsive application filed by Entergy is approved to the extent the application seeks to require that the BMSF agreement be amended to allow BMSF to transport coal to and from White Bluff via the White Bluff-Pine Bluff build-out line. In all other respects, the Sub-Mr. 12 responsive application is denied. 26. In Finance Docket No. 32760 (Sub-No. 13), the responsive application filed by Tex Mex is approved, subject to this restriction: all freight handled by Tex Mex pursuant to its Sub-No. 13 trackage rights must have a prior or subsequent movement on the Laredo-Robetown-Corpus Christi line. Tex Mex and UP/SP shall jointly submit, by August 22, 1996, the agreed-upon terms respecting implementation of the Bub-No. 13 trackage rights. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such trackage rights. The Board will then choose the better of the proposals, or some variation thereof, and make it effective on September 11, 1996. - 232 -

Finance Docket No. 32760 27. In Finance Docket No. 32760 (Sub-No. 14), the terminal 27. In Finance Docket No. 32760 (Sub-No. 14), the terminal trackage rights application filed by Tex Mex is approved, subject to this restriction: all freight handled by Tex Mex pursuant to its Sub-No. 14 terminal trackage rights must have a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. Tex Mex and HB&T shall jointly submit, by August 22, 1996, the agreed-upon terms respecting implementation of the Sub-No. 14 terminal trackage rights. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such terminal trackage rights. The Board will then choose the better of the proposals, or some variation thereof, and make it effective on September 11, 1996. 28. In Finance Docket No. 32760 (Sub-No. 16), the responsive application filed by WEPCO is denied. 29. In Finance Docket No. 32760 (Sub-No. 17), the responsive application filed by MCC and its rail affiliates is denied. 30. With respect to the conditions imposed in this decision respecting CPSB, the interested parties (CPSB, UP/SP, and BMSF) shall jointly submit, by August 22, 1996, the agreed-upon terms respecting implementation of such conditions. In the event and to the extent these parties are unable to agree to such terms,

- they shall submit, by such date, separate proposals respecting implementation of such conditions. The Board will then choose the better of the proposals, or some variation thereof, and make it effective on September 11, 1996.
- 31. With respect to the condition imposed in this decision respecting CMTA, the interested parties (CMTA, Longhorn, UP/SP, and BNSF) shall jointly submit, by December 10, 1996, agreed-upon terms respecting implementation of such condition. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such condition.
- 32. With respect to the condition imposed in this decision respecting TUE, the interested parties (TUE, UP/SP, ENSF, and KCS) shall jointly submit, by December 10, 1996, agreed-upon terms respecting implementation of such condition. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such condition.
- 33. In Docket No. AB-3 (Sub-No. 129%), the petition for exemption is granted.
- 34. In Docket Nos. AB-3 (Sub-No. 130) and AB-8 (Sub-No. 38), . the application is granted.
  - 35. In Docket Nos. AB-3 (Sub-No. 131) and AB-8 (Sub-No. 37), the application is granted.
  - 36. In Docket No. AB-3 (Sub-No. 132X), the notice is accepted.
  - 37. In Docket No. AS-3 (Sub-No. 133%), the petition for exemption is granted, and an NITU is hereby issued.

hy August 22nd, an extension of the August 22nd deadline.

Finance Docket No. 32760 38. In Docket No. AB-3 (Sub-No. 134%), the notice is accepted. 39. In Docket No. AB-8 (Sub-No. 36X), the petition for exemption is granted. In Docket No. AB-12 (Sub-No. 189X), the petition for exemption is granted in part (discontinuance authority is granted) and denied in part (abandonment authority is denied). 40. In Docket No. AB-8 (Sub-No. 39), the application is granted. In Docket No. AB-12 (Sub-No. 188), the application is granted in part (discontinuance authority is granted) and denied in part (abandonment authority is denied).

- 41. In Docket No. AB-12 (Sub-No. 184X), the petition for exemption is granted, and an NITU is hereby issued.
- 42. In Docket No. AB-12 (Sub-No. 185%), the petition for exemption is granted.
- 43. In Docket No. AB-12 (Sub-No. 187X), the notice is
- 44. In Docket No. AB-33 (Sub-No. 93X), the notice is accepted.
- 45. In Docket No. AB-33 (Sub-No. 94X), the notice is accepted.
- 46. In Docket No. AB-33 (Sub-No. 96), the application is granted.
- 47. In Docket Mo. AB-33 (Sub-No. 97%), the notice is accepted, and an NITU is hereby issued.
- 48. In Docket No. AB-33 (Sub-No. 98%), the petition for exemption is granted, and an NITU is hereby issued.
- 49. In Docket No. AB-33 (Sub-No. 99%), the notice is accepted, and an NITU is hereby issued.
- 50. In Docket Nos. AB-3 (Sub-Nos. 132% and 134%), AB-12 (Sub-No. 187%), and AB-33 (Sub-Nos. 93%, 94%, 97%, and 99%), notice will be published in the <u>Federal Register</u> on August 12, 1996. In these proceedings:
  - (a) Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, the exemptions will be effective on September 11, 1996, unless stayed pending reconsideration.
  - (b) Petitions to stay, formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2), and trail use/rail banking requests under 49 CFR 1152.29\*\*\* must be filed by August 22, 1996.
  - (c) Petitions to reopen must be filed by September 3, 1996. Except in Docket No. AB-33 (Sub-Nos. 94%, 97%, and 99%), requests for public use conditions must be filed by September 3, 1996.

The Board will accept late-filed trail use requests so long as the abandonment has not been consummated and the abandoning railroad is willing to negotiate an agreement.

Finance Docket No. 32760 (d) In Docket Nos. AB-33 (Sub-Nos. 94X, 97X, and 99X). spplicants shall leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 180 days from the effective date of this decision to enable any state or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use. (e) In Docket Nos. AB-3 (Sub-No. 134X) and AB-12 (Sub-No. 187X), applicants shall leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 90 days from the effective date of this decision to enable any state or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use. 51. In Docket Nos. AB-3 (Sub-Nos. 129% and 133%), AB-6 (Sub-No. 36%), AB-12 (Sub-Nos. 184%, 185%, and 189%), and AB-33 (Sub-No. 98%), notice will be published in the <u>Federal Register</u> on August 12, 1996. In these proceedings: (a) Provided no formal expression of intent to file an OFA has been received, the exemptions will be effective on September 11, 1996, unless stayed pending reconsideration. (b) Petitions to stay, formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2), and (except in Docket Nos. AB-8 (Sub-No. 36X) and AB-12 (Sub-No. 189X)) trail use/rail banking requests under 49 CFR 1152.29 (c) Petitions to reopen must be filed by September 3, In Docket Nos. AB-3 (Sub-No. 129%) and AB-12 (Sub-No. 185%), requests for public use conditions must be filed by September 3, 1996. (d) In Docket Nos. AB-3 (Sub-No. 133X), AB-12 (Sub-No. 184X), and AB-33 (Sub-No. 98X), applicants shall leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 180 days from the effective date of this decision to enable any State or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use. (e) In Docket No. AB-12 (Sub-No. 185X), applicants shall leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 90 days from the effective date of this decision to enable any State or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use. 52. In Docket Mos. AB-3 (Sub-Mos. 130 and 131) and AB-33 (Sub-Mo. 96), notice of the findings made with respect to the abandonment authorizations sought therein will be published in the <u>Federal Escister</u> on August 12, 1996. In these proceedings: (a) An OFA to allow rail service to continue must be received by the railroad and the Board by August 22, 1996. The Board will accept late-filed trail use requests so long as the abandonment has not been consummated and the abandoning railroad is willing to negotiate an agreement. - 235 -

Finance Docket No. 32760 The offeror must comply with 49 U.S.C. 10905 and 49 CFR 1152.27(c)(1). (b) OFAs and related correspondence to the Board must refer to the appropriate abandonment proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "Office of Proceedings, AB-OTA. (c) Subject to any conditions set forth and provided no offer for continued rail operations is received, an appropriate certificate will be issued. An abandonment may not be effected prior to the effective date of the certificate. (d) In Docket No. AB-33 (Sub-No. 96), applicants shall leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 180 days from the effective date of this decision to enable any State or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use. (e) In Docket No. AB-3 (Sub-Nos. 130 and 131), requests for public use conditions must be filed by September 3, 1996. 53. In Docket Nos. AB-8 (Sub-Nos. 37, 38, and 39) and AB-12 (Sub-No. 188), notice of the findings made with respect to the discontinuance authorizations sought therein will be published in the <u>Federal Register</u> on August 12, 1996. In these proceedings: (a) An OFA to allow rail service to continue must be received by the railroad and the Board by August 22, 1996. The offeror must comply with 49 U.S.C. 10905 and 49 CFR 1152.27(c)(1). (b) OFAs and related correspondence to the Board must refer to the appropriate abandonment proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "Office of Proceedings. AB-OFA." (c) Subject to any conditions set forth and provided no offer to subsidize continued rail operations is received, an appropriate certificate will be issued. Discontinuance may not be effected prior to the effective date of the certificate. 54. In Docket Nos. AB-3 (Sub-No. 133X), AB-33 (Sub-Nos. 96, 97X, 98X, and 99X), and AB-12 (Sub-No. 184X), the exemption authority granted is subject to the additional condition that the carrier(s) comply with the following terms and conditions for implementing trail use/rail banking: (d): If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad from any potential liability), and the payment of any and all taxes that may be levied or assessed against the right-of-way. (b) Interim trail use/rail banking is subject to the future restoration of rail service and to the user's - 236 -

Finance Docket No. 32760 64. This decision shall be effective on September 11, 1996. 65. With respect to the proceedings docketed in Finance Docket Nos. 32760 and 32760 (Sub-Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, and 17): The requirement of an initial decision is waived pursuant to 49 U.S.C. 11345(f). The decisions embraced herein are final decisions within the meaning of 49 U.S.C. 10327. Any administrative appeal will be entertained only under 49 U.S.C. 10327(g), which permits appeal only on the basis of material error, new evidence, or substantially changed circumstances. By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen. Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen commented with separate expressions. Vernon A. Williams Secretary CHAIRMAN MORGAN, commenting: Introduction The proposed merger of the Union Pacific (UP) and the Southern Pacific (SP) railroad systems -- creating the Mation's largest rail system -- stands as a true test of the Statutory authority of the Surface Transportation Board (Board) to permit transportation-related transactions that are in the public interest. In determining the public interest in a rail merger case, the Board must carefully belance the benefits flowing from the consolidation against the anticompetitive consequences that may result. In his case, the transportation benefits are clear. And although the anticompetitive effects of approving this merger without conditions could be significant, the Board, through the conditioning authority granted by Congress, can and has imposed conditions to address the potentially significant adverse consequences of the merger. Throughout this merger proceeding, the Board has heard from a broad cross-section of interests about the potential impacts, both positive and negative, associated with this merger. We have heard from shippers who support the merger and shippers who oppose the merger. We have heard from railroads that are for the merger and railroads that are against it. We have heard from some state and other governmental officials who are for it and some who are against it. We have heard from employees who support it and employees who do not. The Board's challenge has been to weigh all of the extensive evidence and to arrive at a balanced decision that addresses the potentially significant harm while preserving the significant transportation benefits that this merger will produce. I believe that the Board has met that challenge in this decision. Outright Denis! Some parties have argued that this case should be easy to decide: if there is a competitive problem, you "just say no" and deny the whole application, leaving it to the private parties to attempt to work out a solution more acceptable to the government. With all due respect, while that may be the easy answer here, particularly given the opposition. I do not believe that it is - 236 -

Finance Docket No. 32760 the right answer in this case. Government's role in today's world, in my view, should be to work in partnership with industry to empower it to take the steps necessary to compete. When private industry comes forward in good faith with what it believes to be a stimulus for economic growth and development, we should not presume collusion in the first instance and dismiss the proposal altogether. Rather, we must attempt to craft a response that balances the many competing interests. There are clear and real pluses to this merger. Pirst, the merger permits UP and SP to realize tremendous transportation efficiencies and other benefits. History has shown that restructuring in the rail industry has strengthened the rail transportation system in the form of better service and lower rates, and this merger should be no exception. Second, the merger ensures that shippers on the SP system will continue to receive competitive service. Some parties have argued that we should not be concerned about SP's financial argued that we knowle not be concerned about SP's linancial condition. However, the State of California, on behalf of its shippers, and the United Transportation Union, on behalf of its employee members, are worried, and the record, as discussed in our decision, supports their concerns. Denying the merger and risking a downsized SP or an SP broken up into pieces is not what they want. And it is not a risk that we, as guardians of the public interest under our statute, should be willing to take. Rather, consistent with the statute, the Board should strive to allow the far-reaching benefits promised by this merger and to save the SP system as a viable competitive force. Divestiture Some parties have argued that there is another simple, cuick, and obvious way to fix the potentially significant competitive problems associated with this merger: divestiture. Divestiture may be an obvious fix to some, but it is not an obvious fix for me in this case. First, as presented, it would be a drastic solution in this case, and one that we should pursue only if there is clearly no other viable alternative. Railroads, with their network economies, are different from other industries, and taking away part of their network takes away part of their economies of operation. As the Board's decision demonstrates, there is clear evidence on this record that divestiture of the sort suggested by some of the parties would significantly undercut the transportation benefits and efficiencies associated with this merger. Moreover, the divestiture proposals discussed in this case are far-reaching, with one proposal even suggesting the divestiture of 1200 miles. This remedy goes beyond the harm to be addressed, and it does not distinguish between those shippers that will lose direct and indirect competition and those whose competitive position will not be substantially affected by the merger. Government remedies, under our statute or any other law, should not overreach and must be specifically tailored to the identifiable harm. identifiable harm. Furthermore, divestiture is not necessarily simple and quick. To the contrary, it could lead to more government intrusion, more regulatory oversight, and, ultimately, more litigation when the unsuccessful suitors seek relief. This is particularly true given the fact that certain divestiture proposals were not even formally presented in the record of this proceeding. Divestiture here could mean another proceeding and more delay, creating the type of uncertainty and unpredictability - 239 -

Finance Docket No. 32760 for business that the government of today, and certainly this Board, are trying to avoid. In short, divestiture poses substantial problems of its own in this case. Appropriate Conditions Divestiture, with all of these potential problems, might be more palatable if there were no other way to fix the competitive harm in this case. However, there are other ways. The applicants admit that there is much overlapping track, and they have sought to address this competitive issue by providing a private sector solution through the granting to providing a private sector solution through the granting to Burlington Northern Santa Fe (BNSF) of extensive trackage rights. Parties have complained that those trackage rights will not produce as much competition as an independent SP. I disagree. BNSF is a strong competitor that wants to compete and that knows how to compete. Trackage rights are used successfully throughout the industry, and there is no evidence that, because of their nature and scope, the trackage rights here would not be an effective competitive alternative. Furthermore, as the record shows, the trackage rights agreement provides significant shows, the trackage rights agreement provides significant transportation benefits of its own. If managed properly -- and the Board has the means and the mandate to make sure that they are -- these trackage rights can replicate SP's existing competitive presence and can provide market discipline for the merged UP/SP system. The BNSF agreement is clearly strengthened by the privately negotiated agreement with the Chemical Manufacturers Association (CMA). However, the Board has concluded, and rightly so, that (CMA). However, the Board has concluded, and rightly so, that more is needed to address the potential competitive harm. The Board has augmented conditions in the important areas of buildins and build-outs, transloads, new facilities, storage-intransit facilities, and contract service. We have responded to the concerns of various shipper groups and specific shippers, particularly western coal interests, plastic and chemical shippers, and grain and other NAFTA trade. Our conditions are carefully crafted to preserve competitive alternatives existing today without undermining the benefits of the merger. We also provide for 5 years of oversight. Parties have attacked oversight on the one hand as a meaningless gesture. On attacked oversight on the one hand as a meaningless gesture. On the other hand, they have criticized oversight as burdensome overregulation. Which is it? The answer is that it is neither. The conditions that the Board has imposed require the applicants and BNSF to report periodically to demonstrate to the Board that the protective conditions are in fact working. The Board will not depend upon shippers and affected parties to do its monitoring. If competitive harm becomes a problem, we can and will act. The divestiture option will remain available during the entire oversight period. The Board has taken this case very seriously from the beginning and will continue to do so. Closing I believe that our decision is a balanced one that recognizes the many competing issues in this case. It preserves the transportation benefits of the transaction, benefits that the Board has a mandate not to ignore. It ensures a strong and effective competitive alternative for shippers and communities served by SP -- we owe them no less. It recognizes the importance of the transaction to the employees, for it is they who have much at stake. It mitigates as appropriate the - 240 -

Finance Docket No. 32760 along on the strength of their traditional commodities of coal, lumber, grain, automobiles, etc., and have increases in revenues and profits, they need new sources of traffic and revenues in order to grow and attract capital. Intermodalism is that source. Granted, there are no large profits in intermodal service, but that will change as the traffic increases and railroads become expert and efficient in delivering this type of service. In order for the benefits of intermodalism to realize their full potential, this merger should be approved. Simply offering single-line service, however, is not enough in the long run to attract and hold intermodal traffic. Intermodal transportation requires substantial capital investments to operate efficiently, including large funds for clearances, double-tracking, constant maintenance of track, modernization of yards, and labor improvements, all to move this traffic at top-notch speed. The Board's analysis places emphasis on the important role this merger would play in advancing those goals of promoting intermodalism. As railroads increasingly attract this traffic, there will be less highway congestion, improvements in air quality, reduction in accidents, and better time management, as workers spend less time in costly highway tie-ups. Intermodalism requires capacity and infrastructure. The Intermodalism requires capacity and intrastructure. The UPSP merger will provide synergies, network efficiencies, and financial capability that are necessary to develop intermodal service. A combined UPSP will have thousands of route miles that could be exploited for high quality intermodal service. Recognizing that intermodalism is the key for future growth, applicants have committed to invest \$250 million in intermodal terminals, and \$500 million to upgrade key routes for intermodal movements: the Sunset, Texas and Pacific, and Tucumcari routes. lagree with the applicants' insistence that their market coverage is incomplete. As a result of the merger, however, UPSP will have improved and shorter routes throughout the West, and will operate on a level playing field equal to ENSF. The railroad will be able to reduce hundreds of miles in travel time in such areas as California's I-5 corridor, SP's Chicago-Southern California Tours and Co. Co. California route, and so on. UPSP makes much of the fact that the catalyst for this merger was the consolidation of the Burlington Northern and the merger was the consolidation of the Burlington Northern and the Santa Fe. Indeed, I tend to agree that the BMSF merger was the event that altered the competitive situation of the rail industry in the West. It particularly changed conditions for SP as that carrier was not fully positioned to deal with the competitive impacts of the BMSF. SP can continue the current situation, but given the low mosts and operating ratios of BMSF and UP, the old strategy developed by SP cannot achieve the intended results and keep pace with the BMSF. It cannot just cut rates to maintain existing traffic or attract new traffic, that strategy would only further cause SP's deterioration. SP would continue to exist, but for the most part, it would effectively be eliminated as a market force, and would no longer be a significant player in the market. UP and BMSF, because of their sheer sizes, will continue to lower costs, attract traffic and investment, while SP will simply fall further behind. Parties opposing the merger argue that SP does not need this merger to survive, that it can continue to operate on a stand alone basis and attract the necessary capital to prosper. In order to remain a stand alone railroad, however, SP would probably abandon those areas where SP has little to no negotiating leverage and focus on areas where the carrier can make a return decent enough to satisfy investors, that is in those areas where SP is the dominant or sole carrier, and need not compete as vigorously. This strategy, while economically - 242 -

Finance Docket No. 32760 sound, would only further marginalize SP and prevent it from being a competitive market force in the territories it serves. SP could provide service in a few narrowly defined markets, and not play much of a competitive role in the broader markets of the West. The restructuring of the SP would mean less competition in some markets, and the possibility of abandonment of marginal Some of the opponents are calling for divestiture of key SP routes as a way to satisfy competitive problems. Conrail, Kansas City Southern, National Industrial Traffic League (NITL), Montana Rail Link, and others seek divestiture of various SP routes. Rail Link, and others seek divestiture of various SP routes. History reflects that the ICC has never used divestiture of portions of an existing network as a method to preserve competition. This is so, in part, because experience shows that divestiture is not a proper remedy in the context of the rail industry. Divestiture has been ordered in other industries, where the merging partners are generally required to divest themselves of a subsidiary or some other business not necessary for the operation of the core business. Here, by contrast, proponents of divestiture seek to destroy a unified SP system consisting of routes and corridors that are vital to its core business of providing railroad transportation. I have strong reservations against such a divestiture here, as it would cause more problems than it would actually solve. Specifically, the SP's value is as a single system, and because of the value of what is referred to as system integration, a break up of SP would not make sense. Purthermore, on the whole, divestiture would not benefit shippers, inasmuch as many current single-line moves would become two-line or three-line moves, wiping out the efficiencies of single-line service. With a merger, shippers will have the option of using two financially sound rail systems, UPSP and BMSP. I am confident that the two mega systems will compete fiercely. One only need look for evidence in the Powder River Basin and the intermodal business from the Pacific Northwest to Chicago. The competition to serve automobile plants is a constant battle between rail carriers. Western shippers can best benefit from two railroads with equal ability, resources, geographic coverage and reach, as opposed to a weak SP, whose competitiveness in the future is doubtful. In my view, the proponents of divestiture have imprudently and irresponsibly narrowed their focus on the preservation of competition. But in so doing, they have ignored the special role overall that healthy railroads play in promoting the public interest. This perhaps can be said of no other industry. Indeed, the surface transportation industry case law, agency precedent, and common experience, requires that no one, including Federal regulators, should exalt or substitute the preservation of competition, just for the sake of having it, over the combination of other factors contributing to the public interest. We should not forget that with respect to this industry, the Mation's antitrust laws do no more then help form the debate. They do not control the debate, as the public interest standard is much broader. See Morthern Mercer Lines Case, 396 U.S. 491, at 596-516 (1970). Indeed, it is well settled that federal regulators can approve rail consolidations that violate the antitrust laws. See generally United States V. L.C.C., 361 U.S. 491 (1970). Mo one should be that alarmed or dismayed that the marger may produce a lessening of competition, as some lessening of competition is a logical and natural consequence of any marger. However, as history has shown, the primary concern of this federal body must be the effects of the rail consolidation on the adequacy of transportation services available to the public. Thus, since modern times the agency has been encouraged to favor - 243 -

Finance Docket No. 32760 mergers, consolidations, and joint use of facilities that tend to rationalize and improve the Mation's rail system. See Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 396 (5th Cir. In this case, competition will be preserved with the settlement agreements and the additional conditions recommended by this Board. Burlington Northern Santa Fe has the ability to offer vigorous competition to shippers at 2-to-1 points. Thus, I find arguments that trackage rights cannot work as a substitute for real competition extremely unpersuasive. Properly structured and their terms reviewed by the Board, trackage rights can provide effective competition. Both history and common experience upholds this position. Nevertheless, opponents imprudently argue that trackage rights here will not be feasible and that the competition offered thereby is illusory, because of the so-called unprecedented length in miles involved in the trackage rights. Such arguments not only defy good business logic, they also miss the pro-competitive public benefits to be derived from such trackage rights. Here, the trackage rights will not just allow BNSF to compete with the merged carriers for local traffic, they will also allow BNSF to fill links within its own system and provide it with the opportunity to add SP served shippers on to its existing houls. To the contrary, some parties argue trackage rights compensation here is set so high that BMSF will become less then enthusiastic, and as such, it will not truly offer competitive alternatives to the merged UPSP. Whether that is so remains to be seen. But agency policy has always been to encourage parties to voluntarily negotiate compensation. It is difficult to accept the notion that BMSF would have agreed to a level of compensation high enough so as to effectively cut-off its competitive options and additional sources of revenue. Why agree to the deal? BMSF could have joined others in protesting the merger and as such been a formidable foe. Because of its financial strengths and routes, BMSF is the best choice to serve those shippers in the 2-to-1 markets. If UPSF wanted little to no competition, it could have chosen weaker carriers with limited geographic reach. The Department of Justice is concerned that the trackage rights compensation is based on usage, and would rather see EMSF make a substantial payment up-front to serve as an inducement to vigorously compete in order to recoup its investment. While initially a provocative idea, I see no need to worry under these circumstances about EMSF competing. It should be noted that EMSF has substantial fixed and common costs on its own system. That system will connect or fill in the gaps with the trackage rights, and hence additional traffic will help defray EMSF's existing costs. Merger opponents also insist that there is not sufficient density for BMSF to compete. Again, I reject this assertion. In their rebuttal, applicants thoroughly demolish this argument by demonstrating that opponents presented flawed studies to prove their point with regard to traffic density. For example, they exclude all intermedal, grain and coal traffic from the study. Besides being misleading on available commodities, the opponents also impose geographic restrictions, failing to include local traffic flowing within Texas, Arkansas, and Leuisiana. Furthermore, as UPSF point out, protestants to the merger exclude all traffic between Mexico and Texas, Louisiana, Arkansas, as well as all traffic between Mexico or those States and points in the Mestern United States and Canada. BMSF could use a lot of this traffic in conjunction with the western portion of its rail - 244 -

Finance Docket No. 32760 network, but the opponents' study excludes all of this traffic from their calculations. All in all, the handicaps cited -- trackage rights compensation and lack of sufficient traffic -- have not been validated. Opponents assert that EMSF will be unable to develop significant market shares, which will render it unable to develop the volumes necessary to achieve economies of density and scale. It is my view that the opposition ignores what I view as a crucial point: whether EMSF will be able to be at least as competitive as SP is on those routes. According to the best evidence of record, where there are parallel lines, and UP and SP compete head-to-head, SP has the low market share. EMSF, which has lower costs than SP, could garner at least the same amount of traffic as SP. With EMSF's larger system, financial strength, and market share, EMSF has the ability to develop even greater market share than SP currently possesses. Nevertheless, in keeping with the congressional mandates of past and present, to ensure that competition is meaningful, the Board will actively monitor the transaction for the next five years. I want the applicants, BMSF, and all shippers to know that we are very serious about monitoring. This Board is prepared to take further action should the BMSF not live up to its common carrier obligation to effectively compete or if UPSP undertakes actions that impede BMSF's ability to compete. Overall, the positions of DOJ and other commenting federal regulators appear to be based on the following premise: prices become higher as the number of competitors decrease. But as aforementioned, this premise is predicated on theories that do not readily apply to the railroad industry. The evidence is conclusive, that although the number of Class I railroads have fallen, prices, for the most part have declined since enactment of the Staggers Act. There is no clearer an example of this point than the healthy competitive environment in the Southeast, where there are only two Class I railroads. By contrast, for the West, UPSP and the State of California have presented persuasive evidence (much of which concurs with the Board's own tracking over the years) that SP is the 3rd place rail carrier in many markets, and as such it contributes very little to the level of competition in those markets where it is the third carrier. Similarly, much as been made of the fact that Southern Pacific is not a "failing firm". Whether it is a failing firm or not, SP is certainly a very weak competitor. It cannot come near to investing the huge sums UP and BMSP will spend on capital expenditures. Without investments in plant and equipment, SP will continue to fall further behind its competitors. There is evidence that in many markets where SP competes with BMSF and UP, it is simply a marginal player. Not only are SP's shippers threatened with continuing poor Service, but its thousands of employees risk losing their jobs. That possibility is why SP unionised employees support this merger. Shipper testimony confirms that in many markets, SP is unable to meet the service demands of shippers. This merger will produce efficiencies that would increase the competitive significance of SP's assets in the marketplace. This point is key to understanding what drives this merger and the strong shipper support. Undoubtedly, SP has very attractive assets and key routes, that with shrinking capital and the intense competition offered by BNSF (as witnessed by the number of SP shippers BNSF has acquired since its merger), the current management is not in a position to fully exploit. To let SP - 245 -

linger and hope for better times to appear, I believe, weakens the carrier further, and as traffic patterns adjust or alter as a consequence of BNSF and UP's relentless competitive activity at the expense of SP, the value of its assets would greatly diminish. DOJ claims that SP can continue to offer the same price-quality combinations it offers now, and that SP's position relative to the two other carriers would not change if we deny the merger. However, logic dictates that without substantial infusion of capital, SP will be unable to continue to provide those services in the few markets it has been able to do so. A rational SP would concentrate on those markets and routes where it has a competitive advantage and limit espital spending, while BMSF grows even more efficient.

Lastly, I believe that the transaction will strengthen the country's national defense. The Department of Defense supports the merger realizing that it will result in the creation of a strong rail network whose key routes will remain intact. Because of its weak financial condition over the last few years, SP has been an unreliable provider of rail service for DOD. A lack of capital investments have hampered SP's ability to provide efficient and timely service to the military. The merger will improve quality while also offering an alternative to the service of the BMSF.

In sum, I believe that this marger will result in tremendous benefits and enhancements to the Nation's economy. The founders of the Nation's railroads were individuals of vision. Because of their foresight, the country went on to greate the world's most efficient transportation system, which in turn helped to create the world's most powerful industrial base and strong agricultural economy. This merger will continue to advance our strong manufacturing and agriculture sectors, and strengthen this nation's competitiveness in the global economy. The benefits enunciated are real and will produce shorter routes, new services, lower costs, better car supply, and more efficient operations. Farmers served by UP will find new markets for their wheat. Coal producers in Utah and Colorado will be able to market their coal to utilities because the SP has already invested heavily in expanding the market for western coal, and UP will not do anything to jeopardize that success, especially since a substantial amount of that coal goes to Asian markets. Chemical and plastic shippers faced with the loss of a competitive alternative, will have the services of BMSF through the settlement agreement. Although many of those manufacturers fear the consequences of the merger, BMSF will want to provide service just to increase its own market share and revenues. Besides, these captive shippers have the added protection of being able to file a rate complaint against the UPSP with the Board. Add that to the fact that the Board will monitor the transaction for the next five years to determine if BMSF is offering viable competition.

Finally, I want to personally commend the applicants here in an additional area. Specifically, I am confident that in the future we will look back at this entire episode -- at the continued advancement of the surface transportation industry -- as a sterling example of a moment in time where railroads, shippers, and labor met at the conference table beforehand.

commendation here. Labor should take special pride in the level of commitment it exacted from UPSP in reconciling competing interests. The level of commitment made by the railroads to Labor is a credit to Labor's diligent efforts in striking a proper balance between its interests and the overall compelling public benefits of the merger. History will show that here, (continued...)

and forged a marvelous market based private solution to further the industrial interests of this nation. That, coupled with the very special measured expertise of the dedicated staff of a beleaguered but valiant Federal agency, has produced an excellent result that will benefit the public for decades to come.

### COMMISSIONER OWEN, commenting:

Since passage of the Transportation Act, 1920, it has been the public policy of the United States to encourage railroad mergers and consolidations that are in the public interest. The 1920 congressional directive was restated by the Transportation Act of 1940, which provided that railroad mergers and consolidations be "consistent" with the public interest. The 1976, Congress encouraged "efforts to restructure the Irail) system on a more economically justified basis, including . . . an expedited procedure for mergers and consolidations. The Interstate Commerce Act the provision that mergers and consolidations among two or more Class I railroads "shall" be approved if they are found by the Surface Transportation Board to be "consistent with the public interest.

The recurring term 'public interest' may be found in the National Transportation Policy, which instructs the Surface Transportation Board to promote safe and efficient rail transportation and to foster sound economic conditions. The Supreme Court has held: 207

The term public interest . . . is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service . . . [and to] best use of transportation facilities . . .

Congress provides us with additional direction -- specifically, that five factors be considered when reviewing railroad merger and consolidation applications:200

labor's participation in the debate resulted in a win-win situation for everybody.

<sup>262</sup> Transportation Act. 1920, 41 Stat. 456 (1920).

<sup>303</sup> Transportation Act of 1940, 54 Stat. 899, 905 (1940).

Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, 90 Stat. 31 (1976) at Section 101(a)(2). See also Report of the Committee on Conference on S. 2718, S. Rep. No. 94-595, 94th Cong., 2d Sess., January 27, 1976, at 34.

Termination Act of 1995, 109 Stat. 1895 (1980), and ICC Termination Act of 1995, 109 Stat. 803 (1995), now codified at 49 U.S.C. 11324(c).

<sup>206 49</sup> U.S.C. 10101.

<sup>18&#</sup>x27; New York Central Securities v. United States, 287 U.S. 12, 25 (1932).

<sup>49</sup> U.S.C. 11324 (b) .

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1) The effect of the proposed transaction on the adequacy of transportation to the public; 2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; 3) the total fixed charges resulting from the proposed transaction; 4) the interest of rail carrier employees affected by the proposed transaction, and; 5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.

Railroads were the first major industry where merger and consolidation was promoted by the federal government. Noted Justice Brandeis as to the reason:

The new purpose was expressed in unequivocal language . . . to secure a fair return on capital devoted to the transportation service.

The Court later held: 300

Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern.

Moreover, Congress repeatedly has directed that railroad merger and consolidation applications be measured by a different standard than is used by the Justice Department. As the Supreme Court explained: 251

[T]here can be little doubt that the [Surface Transportation Board] is not to measure proposals for all-rail or all-motor [mergers and consolidations] by the standards of the antitrust laws. Congress authorized such [mergers and] consolidations because it recognized that in some circumstances they were appropriate for effectuation of the Mational Transportation Policy.

With regard to this alternative test for railroad mergers and consolidations, the Court observed: 352

(The Surface Transportation Board) must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy.

Indeed, the Supreme Court repeatedly has instructed the Justice Department to leave to the Interstate Commerce Commission and its successor Surface Transportation Board the complex and specialized task of weighing the public benefit of railroad

<sup>200</sup> May England Divisions, 261 U.S. 184, 189 (1923).

<sup>(1946).</sup> Seaboard Air Line R. Co. v. Daniel, 333 U.S. 118, 124

<sup>(1944).</sup> McLean Trucking Co. v. United States, 321 U.S. 67, 84-85

<sup>202</sup> Id., at 87.

Finance Docket No. 32760 mergers and consolidations against the competitive harm. For example, in 1965 the Court ruled:300 It matters not that the merger might otherwise violate the antitrust laws; the [Interstate Commerce] Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria . . . that such a merger would be 'consistent with the public interest. Again in 1970 the Court held:300 We do not enquire whether the merger satisfies our own conception of the public interest. Determination of the factors relevant to the public interest is entrusted by the law primarily to the (Interstate Commerce) Commission, subject to the standards of the governing statute. In fact, twice in recent years -- in 1980 and again in 1995 -- Congress rejected suggestions that it shift to the Justice Department regulatory authority over railroad mergers and consolidations. \*\* In rejecting Justice Department oversight in 1980, Congress agreed with the Senate Commerce Committee's former chief counsel who had become chairman of the Interstate Commerce Commission, A. Daniel O'Neal: \*\*\* [The Justice Department approach] would likely be quite different, as it probably would assume that (more railroads) produces the railroads rather than fewer railroads) produces the best service for users. This is not always true. In some rail markets there may not be sufficient traffic to support multiple carriers, in which case service to all shippers may suffer. The Supreme Court agrees that railroad mergers and consolidations be approved not just to protect financially weak railroads, but to make rail operations more efficient and more competitive with trucks and barges. As the Court observed in 1970, rail mergers and consolidations are not to be confined "to combinations by which the strong rescue the halt and the lame," adding: (A) rail merger that furthers the development of a more efficient transportation unit and one that results in the joining of a 'sick' with a strong carrier serve equally to promote the long-range objectives of Congress . . . When railroad operations can be made more efficient and less costly, the savings are shared through lower freight rates -- or 363 Seaboard Air Line R. Co. v. United States, 382 U.S. 154. 156-157 (1965) 200 - Penn-Central Merger and NEW Inclusion Cases, 389 U.S. 486, 498-499 (1968). "Administration's Rail Merger Position Hit by AAR, ICC in Senate Hearing." Traffic World, June 25, 1379, at 10; and "DOT Says Justice Should Review Rail Mergers," Traffic Morld, January 30, 1995, at 10. "Administration's Rail Merger Position Hit by AAR, ICC in Senate Hearing," <u>Traffic Morld</u>, June 25, 1979, at 10. Northern Lines Merger Cases, 396 U.S. 491, 508 (1970). - 249 -

Finance Docket No. 32760 a forbearance to raise those rates -- which are reflected in lower consumer prices for everything from electricity to automobiles to food to clothing. These public benefits, however, must be balanced against competitive harm, and the Surface Transportation Board has the authority to mitigate competitive harm by imposing a broad range of reasonable conditions, such as trackage rights. In this decision, the Surface Transportation Board has balanced the verifiable public benefits of the proposed transaction against the potential competitive harm; and while determining that the competitive harm is outweighed by the public benefits has nonetheless addressed each allegation of competitive harm and imposed conditions to mitigate that harm. Overwhelming evidence was presented that this merger will result in broad public benefits such as substantial operating cost savings, improved rail service, renewed financial strength for Southern Pacific and more effective rail competition. This is important to existing and future customers of these railroads as well as the ultimate consumers of the products hauled who will reap the lower consumer prices stemming from transportation-cost savings. More efficient, lower-cost railroads also make American industry more competitive in world markets and make American jobs more secure. Purthérmore, efficient railroads attract freight from the highway, relieve traffic congestion, reduce highway accidents, save lives, decrease pavement damage caused by heavy trucks, conserve fuel and improve the environment. Each is a worthy public goal.

Nonetheless, this agency is obliged to consider the likelihood of competitive harm. Indeed, competitive harm is likely to be substantial in certain important markets. Therefore, we imposed extensive conditions to mitigate that competitive harm. Among the conditions is a five-year oversight provision and a requirement that both the merged railroads as well as Burlington Mortnern Sants Fe - which is being given extensive trackage rights -- make periodic progress reports to this agency. During this oversight period we have authority to impose additional conditions and we will be an alert and aggressive policeman. aggressive policeman.

With regard to oversight, there are two specific issues that are perennial problems in the railroad industry and that I do not intend to treat lightly if they recur as a result of this merger. One is the freight railroads' treatment of Amtrak passenger trains; the other is the railroads' respect for their unionized

I remind the applicants that the Rail Passenger Service Act of 1970 requires that Amtrak trains have preference over freight traffic and that the conditions we have imposed temporarily limiting rail traffic in certain corridors applies to freight trains only and not to Amtrak passenger trains.<sup>200</sup>

Purthermore, I remind the applicants' of their assurances given during oral argument that their merged railroad will move immediately to correct persistent Amtrak service problems on Southern Pacific lines. I encourage Amtrak to keep this agency

<sup>200 49</sup> U.S.C. 11324(c).

The requirement that Amtrak passenger trains receive priority handling by freight railroads is found at Rail Passenger Service Act of 1970, 84 Stat. 1327, as amended through 1982, Section 402(e)(1).

Finance Docket No. 32760 aware of every failure on the part of the applicants to translate those words into deeds. With regard to labor relations, I note that this is the only railroad merger in recent history to receive widespread labor. America, often stretching tens of thousands of miles. The existence of a well-trained, motivated and loyal workforce is essential to safe and efficient train operations. Employee support of this transaction will be a crucial factor in its economic success. The applicants are to be applauded for their sincere efforts at reaching out toward their employees and years, labor relations in the railroad industry have been unnecessarily acrimonious. The applicants entered into a number of good-faith agreements with their dedicated employees in which both sides vowed to cooperate in implementing this merger. Specific pledges were made in a series of letters exchanged between the applicants and their unions. Among those pledges is that the applicants will use the immunity provision of 49 U.S.C. 11341(a), now 49 U.S.C. 11321(a), only to seek those changes in collective bargaining agreements that are actually "necessary" -- and I read the word "necessary" to mean "required" -- to implement the transaction and not merely as a convenient means of achieving cost savings or, as a federal appeals court noted, "merely to transfer wealth from employees to their employer." The very fact that the applicants addressed this matter positively in their agreement with the United Transportation Union is evidence that the issue has merit. The purpose of implementing agreements is to permit consummation of a merger or consolidation, not to achieve other objectives properly handled through collective bargaining under the Railway Labor Act. Finally, there is an interest group that rarely is recognized but is essential to making our capitalist system function. They are the investors who make possible more efficient transportation, American competitiveness in world markets and more secure jobs. It is the investors who spend less than they earn and lend the difference -- their savings -- to companies such as railroads so that they might build, renew and expand and become more In recent months, Union Pacific stockholders repeatedly have been asked to give up portions of the projected merger savings -- to share them with shippers, unionised employees and communities. Union Pacific has negotiated in good faith and entered into concessionary agreements. They have gone the extra mile with regard to environmental concerns. The stockholders and management of Union Pacific -- the capitalists -- are to be congratulated. Capitalism is about building and creating. It always has been; it always will be. Dnited States, 987 F.2d 806, 814, 815 (D.C. Cir. 1993). The D.C. Circuit held (at 814) that, "at a minimum," an arrangement cannot be considered fair if it modifies a collective bargaining agreement more than is necessary to effectuate the transaction. - 251 -

# APPENDIZ A: MORRACED PROCEEDINGS

This decision covers both the Finance Docket No. 32760 lead proceeding and the following embraced proceedings: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southern Pacific Transportation Company, St. Louis Southern Railway Company, St. Louis SPCSI Corp. and The Denver and Rio Grande Mestern Railroad Company -- Trackage Rights Examption -- Burlington Northern Railroad Company and The Archison Topaka and Santa Fe Railway Company; Finance Docket Mo. 32760 (Sub-Mo. 3), Burlington Northern Railroad Company and The Atchison Topaka and Santa Fe Railway Company -- Petition for Examption -- Acquisition and Governing of Trackage in California Texas, and Louisiana; Finance Docket No. 32760 (Sub-Mo. 3), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation Southern Pacific Transportation

Pacific Rail Corporation Southern Pacific Transportation

Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denvey and Rio Grande Mestern Railroad Company, Control SPCSL Corp., and The Denver and Rio Grande Mestern Railroad Company St. Louis Southwestern Railvay Company SPCSL Corp. at The Denver and Rio Grande Mestern Railroad Company Control Exemption - The Alton & Southern Railway Company; Finance Docket No. 32760 (Sub-No. 4), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation

Company, St. Louis Southwestern Railway Company, SPCSL Corp. At The Denvey and Rio Grande Mestern Railroad Company - Control The Denvey and Rio Grande Mestern Railroad Company - Control Research Control Company - Control Research Control Co perion - Control California Traction Company; Finance Docket 32760 (Sub-No. 5), Union Pacific Corporation, Union Pacific Iroad Company, Missouri Pacific Bailroad Company, Southern Pacific Rail Corporation. Southern Preific Transportation Company, St. Louis Southwestern Reilway Company, SPCSL Corp. The Denver and Rio Grande Hestern Reilroad Company-Control prion -- The Orden Union Reilway & Denot Company; Finance Docket Mo. 32760 (Sub-Mo. 6), Union Pacific Corporation, Union Pacific Reilroad Company, Missouri Pacific Bailroad Company, Missouri Pacific Bailroad Company, Southern Pacific Bail Corporation, Southern Pacific Bail Corporation, Southern Pacific Reil Corporation, Southern Pacific Bail Corporation, Southern Pacific Bailroad Company, St. Louis Southwestern Railway Company, St. Louis Company, St. Louis Company, St. Louis Company, St. Louis Compa SPCSL CORD. and The Denver and Rio Grande Negtern Railroad Company -- Control Examption -- Portland Terminal Railroad Comp Finance Docket Mo. 32760 (Sub-No. 7), Union Pacific Corporation Dation Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company
SPCSI Corp., and The Denver and Rio Grande Western Railway Company
Company.-Control Exemption.-Portland Traction Company; Finance
Docket No. 32760 (Sub-No. 8), Union Pacific Corporation, Union
Pacific Railroad Company, Missouri Pacific Railroad Company,
Southern Pacific Rail Corporation, Southern Pacific
Transportation Company Transportation Company, St. Louis Southwestern Bailway Company, SPCSL Corp., and The Denver and Rio Grande Hestern Bailway canve-Control Exemption-Overnite Transportation Com Commany - Control Examption - Overnice Transportation Commany - Couthern Pacific Motor Trucking Company, and Pacific Motor Transport Commany; Finance Docket No. 32760 (Sub-No. 3); Burlington Morthern Railroad Commany and The Atchison, Topeka at Couthern Railway Commany: Docket No. AB-3 (Sub-No. 129%); Missouri Pacific Railroad Commany: Docket No. AB-3 (Sub-No. 129%); Missouri Pacific Railroad Commany: Abandonment Examption: perion-Camben Line In Clark Nevada, and Quachica Counties AR; cocket No. AB-3 (Sub-No. 130), Missouri Pacific Reilroad Counties AR; content - Towner-NA Junction Line In Figure Crowley. Company-Abandoment -- Towner-MA Junction Line In Riche. Crowley.
and Pueblo Counties. CO: Docket No. AB-3 (Sub-No. 131), Missouri
Pacific Reilroad Company--Abandoment -- Hope-Bridgeport Line In
Dickinson and Saline Counties. KS: Docket No. AB-3 (SubNo. 132X), Missouri Pacific Railroad Company--Abandoment
Examption-- Mhitavater-Hewton Line In Butler and Navyew Counties.
KS: Docket No. AB-3 (Sub-No. 133X), Missouri Pacific Railroad
Company--Abandoment Examption-- Iowa Junction-Hanchester Line In
Lefferson Davis and Calcanies Davishes. LA: Docket No. AB-3 (Sub-Jefferson Davis and Calcaster Parishes LA: Docket Mo. AB-) (Sub-No. 134%), Missouri Pacific Railroad Company--Abandonment

Exemption--Troup-Whitehouse line In Smith County TX: Docket No. AB-8 (Sub-No. 36%), The Fanyer and Rio Grande Western Railroad Company--Discontinual Ca Exemption--Sage-Leadville L. In Fagle and Lake Counties. (C. Docket No. AB-8 (Sub-No. 37), The Denver and Rio Grande Mestern Railroad Company--Discontinuance of Trackage Rights--Hope-Bridgeport Line In Dickinson and Saline Counties, KS; Docket No. AB-8 (Sub-No. 38), The Denver and Rio Grande Western Railroad Company -- Discontinuance of Trackage Rights -- Towner - NA Junction Line In Kiowa. Crowley. and Pueblo Counties. CO; Docket No. AB-8 (Sub-No. 39), The Denver and Rio Grande Western Railroad Company --Discontinuance -- Malta-Cafon City Line In Lake, Chaffee and Fremont Counties, CO; Docket No. AB-12 (Sub-No. 184X), Southern Pacific Transportation Company -- Abandonment Exemption -- Wendel-Alturas Line In Modoc and Lassen Counties, CA; Docket No. AB-12 (Sub-No. 185X), Southern Pacific Transportation Company--Abandonment Exemption--Suman-Bryan Line In Brazos and Robertson Counties. TX: Docket No. AB-12 (Sub-No. 187X), Southern Pacific Transportation Company-Abandonment Exemption--Seabrook-San Leon Line In Galveston and Harris Counties. TX: Seabrook-San Leon Line In Galveston and Harris Counties. TX:
Docket No. AB-12 (Sub-No. 188), Southern Pacific Transportation
Company-Abandonment -- Malta-Cañon City Line In Lake, Chafee, and
Framont Counties. Cf. Docket No. AB-12 (Sub-No. 189X), Southern
Pacific Transportation Company-Abandonment Premption--SageLeadville Line In Eagle and Lake Counties. CO; Docket No. AB-33
(Sub-No. 93X), Union Pacific Railroad Company--Abandonment
Examption--Whittier Junction-Colima Junction Line In Los Angeles Exemption--Whittier Junction-Colima Junction Line In Los Angeles
County. CA; Docket No. AB-33 (Sub-No. 94X), Union Pacific
Railroad Company--Abandonment Exemption--Magnolia Tower-Melrose
Line In Alameda County. CA; Docket No. 28-33 (Sub-No. 96),
Union Pacific Railroad Company--Abandonment--Barr-Girard Line In
Menard. Sangamon. and Macoupin Counties. IL; Docket No. AB-33
(Sub-No. 97X), Union Pacific Railroad Company--Abandonment
Exemption--DeCamp-Edvardsville Line In Madison County, IL; Docket
No. 13-13 (Sub-No. 98X) No. AB-33 (Sub-No. 98X), Union Pacific Reilroad Company-Abandonment Exemption--Edwardsville-Madison Line In Madison
County, IL: Docket No. AB-33 (Sub-No. 99X), Union Pacific
Railroad Commany--Abandonment Exemption--Little Mountain Jet. Little Mountain Line In Box Elder and Meber Counties, UT; Finance Little Mountain Line In Box Elder and Weber Counties. UT; Finance Docket No. 32760 (Sub-No. 10), Responsive Application -- Capital Metropolitan Transportation Authority; Finance Docket No. 32760 (Sub-No. 11), Responsive Application -- Montana Rail Link Inc.; Finance Docket No. 32760 (Sub-No. 12), Responsive Application -- Enterpy Services Inc., Arkansas Power & Light Company, and Gulf States Utility Company; Finance Docket No. 32760 (Sub-No. 13), Responsive Application -- The Texas Mexican Railway Company; Finance Docket No. 32760 (Sub-No. 13), Responsive Application -- The Texas Mexican Railway Company; Responsive Application-The Texas Mexican Railway Company;
Finance Docket No. 32760 (Sub-No. 14), Application for Terminal
Trackage Rights Over Lines of The Houston Relt & Terminal Railway
Company--The Texas Mexican Railway Company; Finance Docket
No. 32760 (Sub-No. 15), Responsive Application--Cen-Tex Rail
Link, Ltd./South Orient Railroad Company, Ltd.; 101 Finance
Docket No. 32760 (Sub-No. 16), Responsive Application--Wisconsin
Electric Power Company; and Finance Docket No. 32760 (Sub-No. 17), Responsive Application--Memora Company. The Magma
Arizona Railroad Company, and The San Manuel Arizona Road
Company. DADY.

In Decision No. 29 (served April 12, 1996), the responsive application filed by Cen-Tex Rail Link, Ltd./South Orient Railroad Company, Ltd. was rejected as incomplete.

#### APPENDIX B: ABBREVIATIONS

. APPENDIX BY ABBREVIATIONS	
AAR The Alton & Southern Railway Company	
AAR Association of American Railway Company ACC Association of American Railroads	
ACC Association of American Railroads Acquisition Arizona Chemical Company	
Acquisition UP Acquisition Corporation	
AFFCO Arizona Electric Power Cooperative	
AGNC Industrial Organizations	20 SE
	1 amada
ALK ALK Associates, Inc.	101400
APEL Arkansas Power & Light Company ARU Allied Reil Unions	
ASARCO	
AUGM Austin Railroad Company, d/b/a Austin 1	BLE
Delland Company, G/D/a Austin	Horthwest
BC Rail 2C Pail ted	
SCI Byunde Connelland	
BY Brotherhood of Maintenance of May Emplo	
Buss Burlington Northern Railroad Company	Acce
Board Surface Transportation Board	
The Stownsville and Bio Grande towns	ional
BRS Sees head and and and	
Cargill Cargill, Incorporated	
CBRY Collective Bargaining Agreement	
CERY Copper Basin Railway Company CCLP Chicago Central & Pacific Railroad Company CCRT Coalition for Company	
CCLP Chicago Central & Parisis Data	
CCRT Consistion for Competitive Rail Transport	any
The state of Bullio Wester	
Con-Tex Reil Link, Ltd., and Court Con-	
The state of the s	
CMA Chemical Manufactus Irail Use or Aban	donment
CMTA Capital Manager Association	
CMW Chicago Missessi Itansportation Auth	ority
CM Kallas Comp	ANY .
CAW Chicago and Morrh Mosen and	
COMPT Chirage and North Western Railway Compan	Y
COLPR Central Oregon and Pacific Railroad	company
COGA COGA Industries, L.L.C.	
Conrail Consolidated Rail Corporation	
CP Canadian Pacific Limited	
CPAL Central Power & Light Company	
CPUC City Public Service Board of San Antonio	
Commission of the State	20
CRA The Comp Rediscret	
CRD Crop Reporting District	
CONTROL CONTROL CONTROL CON Transporter	
Intermodal, Inc., and Sea-Land Service	, CSX
CVAC Centralized Traffic Control	e. inc.
DAKOTA Dakota, Minnesota & Eastery Reilroed Corp	-
DOD United States Department of Defense	-146700
DOJ United States Department of Defense	
DOJ United States Department of Labor	
DOW United States Department of Justice Dow The Dow Chemical Company	
The Dow Chemical Company	

DRGW	. The Denver and Rio Grande Western Railroad
	Company
EA	. Environmental Assessment
EET	. The Enid Board of Trade
EDC	. Economic Development Council for Greater
	Springfield
EJE	. Elgin, Joliet and Eastern Railway
EIS	. Environmental impact Statement
Entergy	. ESI, APEL, and GSU
EPA	
EPA Region VIII	. United States Environmental Protection Agency.
EPC	Region VIII
ESI	. Enterprise Products Company
PCP	
	. Ferrocarriles Nacionales de Mexico - Region
PEAM	
FERC	
PNM	
FPC	Pormosa Plastics Corporation, USA
PPP	. Fayette Power Project
FRA	. Federal Railroad Administration
Freeman	. Freeman United Coal Mining Company
FTC	. Pederal Trade Commission
Geon	. The Geon Company
GNBC	. Grainbelt Corporation .
GSU	. Gulf States Utilities Company
GTRR	. Georgetown Railroad Company
GTW	Grand Trunk Western Railroad
GWAR	
HB4T	Houston Belt & Terminal Railway
HC	Huntsman Corporation
HCC	
HCJDC	
Ia/DOT	
IBC/IWC	
IBP	Idaho Barley Commission/Idaho Whest Commission ISP, Inc.
IBT	
IC	International Brotherhood of Teamsters Illinois Central Railroad Company
ICC	Interstate Commerce Commission
ICTF	Intermodal Container Transfer Facility
IDPC	Idaho Power Company
IES	IES Utilities
ILP	Illinois Power Company
IPA	Intermountain Power Agency
IPC	The International Paper Company
ISRI	The Institute of Scrap Recycling Industries. Inc.
IUDA	IDGUSTRY Urban-Development Agency
	Joint Intermodal Terminal
JSC	Joint Shippers Coelition
Ka/DOT	Kansas Department of Transportation
Kel Kan	Kal Kan Foods, Inc.
KCS	Kansas-Colorado-Oklahoma Shippers Association
RCS1	The Kansas City Southern Railway Company
EJRY	Kansas City Southern Industries, Inc. Keokuk Junction Railway
L&D	Louisians and Delta Railroad
LCRA/Austin	Lower Colorado River Authority and the City of
	Austin, TX
Longhorn	Central of Tennessee Railway & Mavigation Company
	Incorporated, d/b/a Longhorn Railway Company
LP&N	Longview, Portland & Northern Railroad
MAA	Magma Arisona Railroad Company
Mars	Mars. Incorporated
MCC	Magma Copper Company
MCT	Madison County Transit
MCT	Madison County Transit Montana Farmers Union
MCT	Madison County Transit

#### Finance Docket No. 32760

Mn/DOT	. Minnesota Department of Transportation
	· Poneseto Combany
Montell	. Montell USA Inc
MP	. Milenost
MPCSC	. Mountain-Plaine Commission & Chicago Continue
MPRR, MP	. Missouri Pacific Railroad Company
MORL	. Montana Rail Link, Inc.
MRLAC	. MRL's Acquisition Company
MORC	. Montane Wheat and Barley Committee
NAPTA	. North American Free Trade Agreement
MALE	. North American Logistic Services
MCGA	. Mational Corn Growers Association
MCBA	. Mational Corn Grovers Association
MEGA	. North Coast Railroad Authority
19749	. Mational Environmental Policy Act
M7497	. The Mational Industrial Transportation League
MASO	. Notice of Interim Trail Use or Abandonment
NS	. Morfolk Southern Corporation
NVS	North Valmy Station
OFA	Offer of Pinancial Assistance
OKT	Oklahoma-Kansas-Texas Railroad Company
U118	Olin Corporation
OT/DOT	Oregon Department of Transportation
USH	Oregon Steel Mille
0000	The Orden Union Railway & Dence Company
CASENTES	Overnice Transportation Company
PE	Polyethylene
PMT	Pacific Motor Transport Company
POSE EA	Post Environmental Assessment
PP	Polypropylene
PPG	PPG Industrias. Toe
PRA	Proportional Rate Agreement
PRS	Powder River Basin
PRC	Pioneer Railcorn
PSCN	Public Service Compiggion of the Space of Wante
	PUBLIC SERVICE COMPANY of Coleman
FARA	POTE TOTAL DAILMAN ADDRESS OF THE
****	POTELANG Traction Company
PIRR	Portland Terminal Railroad Company
Occ	Quantum Chemical Corporation
RCAF	Rail Cost Adjustment Pactor
KCT	Railroad Commission of Towns
RIO Bravo	RÍO BERVO Poso and Río Bravo Jamia
RUA	Railway Labor Act
Rock Island	Chicago, Rock Island and Pacific Pailmand Company
nos	Keturn on Investment
RTC	Rails to Trails Conservancy
SCC	Shell Chemical Company
SCHOOL	Southern California Perional Pail Authorise
	SER Diego & Imperial Valley Bailmood
3EA	SECTION of Environmental Analysis
SF	The Atchison, Topoka and Comes to Pailway Company
SPEAR	Serenata Parms Equestrian Therapy Poundation
847 · · · · · · · · · · · · · · · · · · ·	Storage-In-Transit
SLC	Stimson Lumber Company
<b>80</b> 0	San Manuel Arizona Railroad Company
<b>500</b>	Soo Line Railroad Company
Southern Pacific	SPR. SPT. SSN, SPCSL, and DRGM
<b>SF</b>	SPT. SSW. EDCSL. and DRCM
2p91	Springfield Plastics, Inc.
S79C	Springfield Plastics, Inc. and Brandt
	Consolidated. Inc.
SPCSL	SPCSL Corn.
SPI	The Society of the Plantical Industry Ton
	PLANGATO POINT LOCATION COME
SPHT	Southern Pacific Motor Trucking Company
577	Sierra Pacific Power Company
SPP/IDPC	SPP and IDPC
SPR	Southern Pacific Rail Composition
SPRB	Southern Powder River Basin

## Finance Docket No. 32760

SSACC Southern Pacific Transportation Company
STRICT Save the Rock Island Committee, Inc.
TCSC Texas Crushed Stone Company
Tex Mex The Texas Mexican Railway Company
IVEN Toledo Boorie & Massam a
TRA Trackage Rights Agreement
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TOTAL TOTAL TOTAL UP 1 199100 Mining Comment
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Onson Pacific UPC. UPER. and Mann
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UPC Union Pacific Company
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Will Wisconsin Boson & Tiche Comme
TOWN WICKIPS TITION . Vach
Trous trees and
Yolo Yolo Shortline Railroad Company
the same watered company

Pinance Docket No. 32760 APPENDIX C: SUS-NO. 1 TRACEAGE RIGHTS Ine trackage rights provided for in the BMSF agreement (not including the additional trackage rights provided for in the CMA agreement) are covered by the notice of exemption filed in Finance Docket No. 12760 (Sub-No.-1), and are divided into six categories: Western Trackage Rights; Bouth Texas Trackage Rights; Eastern Texas/Louisiana Trackage Rights; Houston, TX, to Memphis, TM, Trackage Rights; St. Louis Area Coordinations; and Trackage Rights Grants to UP/SP. Mestern Trackage Rights. EMSF will receive trackage rights over UP: between Salt Lake City, UT, and Ogden, UT: between Salt Lake City, UT, and Ogden, UT: between Salt Lake City, UT, and Alason, MV; between Risero, MV; and Meso, MV; between Meso, MV, and Stockton, CA; between Riverside, CA, and Ontario, CA; and between Basta, CA, and Fullerton and La Habra, CA. EMSF will receive trackage rights over SP: between Denver, CO, and Salt Lake City, UT; between Ogden, UT, and Little Mountain, UT; between Alason, MV, and Meso, MV; between Meso, MV, and Oakland, CA (via the "Call-P" line between Sacramento and Oakland); and between Oakland, CA, and San Jose, CA. The trackage rights specified in this paragraph are bridge rights for the movement of overhead traffic only, except for local access to industries served by UP and SP and no other railroad at the following points: Provo, UT; Salt Lake City, UT; Ogden, UT; Ironton, UT; Gatex, UT; Pioneer, UT; Garfield/Smelter/Magna, UT (access to Rennecott private railway); Geneva, UT; Clearfield, UT; Moods Cross, UT; Relico, UT; Evona, UT; Little Mountain, UT; Meber Industrial Park, UT; points on paired track between Meso, MV, and Alazon, MV; Reno, MV (intermodal and automotive only); Merlong, CA; Johnson Industrial Park at Sacramento, CA; Farmers Rice at West Sacramento, CA; Fort of Sacramento, CA; Port of Sacramento, CA; Points between Oakland, CA, and San Jose, CA (including Marm Springs, CA, Fremont, CA, Shinn, CA, Challand Joint Intermodal Terminal (JTT), or similar public intermodal facility, at such time as the JTT is built.

South Texas Trackage Rights. EMSF will receive trackage South Texas Trackage Rights. BMSF will receive trackage rights over UP: between Ajax, TX, and San Antonio, TX; between Rouston (Algoa), TX, and Brownsville, TX; between Odem, TX, and Corpus Christi, TX; between Ajax, TX, and Sealy, TX; between Rerr, TX, and Taylor, TX; between Temple, TX, and Waco, TX; between Temple, TX, and Waco, TX; between Temple, TX, and Baylor, TX; and between Taylor, TX, and Smithville, TX. BMSF will receive trackage rights over SP; between San Antonio, TX, and Eagle Pass, TX; and between El Paso, TX, and Sierra Blanca, TX. The trackage rights specified in this paragraph are bridge rights for the movement of overhead traffic only, except for local access to industries served by UP and SP and no other railroad at the following points: Brownsville, TX; Fort of Brownsville, TX; Marlingen, TX; Compus Christi, TX; Fort of Corpus Christi, TX; Sinton, TX; San Antonio, TX; Malsted, TX (LCRA plant): Waco, TX; and points on the Sierra Plasca, TX - El Paso, TX, line. Pastern Texas/Louisiana Trackage Rights. BMSF will receive trackage rights over UP: between Avendale, LA, and West Bridge Jct., LA; and between West Bridge Jct., LA (MP 10.2), and the Westwego, LA, intermodal facility (MP 9.2). BMSF will receive trackage rights over SP: between Houston, TX; and lowe Jct., LA; between Deyton, TX, and Beytown, TX; between Avendale, LA (MP 16.9), and West Bridge Jct., LA (MP 10.5); and over Bridge No. 5-A at Houston, TX. The trackage rights specified in this paragraph are bridge rights for the movement of overhead traffic only, except for local access to industries served by UP and SP - 258 -

and no other railroad at the following points: Baytown, TX; Amelia, TX; Orange, TX; Mont Belvieu, TX (Amoco, Exxon, and Chevron plants); Eldon, TX (Bayer plant); and Harbor, LA.

Houston, TX, to Memphis, TN, Trackage Rights. BMSF will receive trackage rights over UP: between Pair Oaks, AR, and Bridge Jet., AR; and between Morth Little Rock, AR, and Pine Bluff, AR. BMSF will receive trackage rights over SP: between Houston, TX, and Pair Oaks, AR (via Cleveland, TX, and Pine Bluff, AR); and between Brinkley, AR, and Briark, AR. The trackage rights specified in this paragraph are bridge rights for the movement of overhead traffic only, except for local access to industries served by UP and SP and no other railroad the following points: Camden, AR; Pine Bluff, AR; Fair Oaks, AR; Baldwin, AR; Little Rock, AR; North Little Rock, AR; East Little Rock, AR; and Forrest City, AR.

St. Louis Area Coordinations. BMSF will receive overhead trackage rights over UP in St. Louis, MO (between Grand Avenue and Gratiot Street).

Trackage Rights Grants to UP/SP. UP/SP will receive trackage rights over BNSF: between Chemult, OR, and Bend, OR (overhead rights only); between Barstow, CA, and Mojave, CA (overhead rights only); between Mest Memphis-Presley Jct., AR (overhead rights only); between Saunders, MI, and Superior, WI (overhead rights only); with access to MERC Dock in Superior); and over the Pokegama connection at Saunders, MI (i.e., the southwest quadrant connection at Saunders, including the track between BM MP's 10.43 and 11.14). UP/SP will retain trackage rights over BNSF: at Keddie, CA (MP 0 to MP 2; to turn equipment; UP/SP will retain trackage rights between these mileposts over the Bieber-Keddie Line to be sold to BNSF); between Dallas, TX, and Waxahachie, TX (overhead rights and exclusive right to serve local industries; UP/SP will retain trackage rights after sale of the Crillas Line to BNSF); and between Iowa Jct., LA, and Averagale, LA (overhead rights and the right to serve all local industries, with right for Louisiana and Delta Railroad to serve as UP/SP's agent between Iowa Jct. and points served by L4D; UP/SP will retain trackage rights after sale of the Avondale Line to BNSF).

the Sub-No. 1 notice filed by applicants refers to "local access to industries served by UP/SP and no other railroad." Ass UP/SP-26 at 004-005 and 060-061 (italics added). The context, however, indicates, and all concerned have understood, that the reference was intended to be to local access to industries served by UP and SP and no other railroad, ass. 2.5., UP/SP-22 at 325.

As respects the Houston, TX, to Memphis, TM, trackage rights, the Sub-No. 1 notice filed by applicants refers to 'local access to industries served by UP/SP and no other railroad," and UP/SP-2f at 005 and 061 (italics added). The context, however, industries, and all concerned have understood, that the reference was intended to be to local access to industries served by UP and SP and no other railroad, and all., UP/SP-22 at 327.

Pinance Docket No. 12760 APPENDIX D: DETAILS OF FURLIC RESEPTITS Aumery. As explained below, the merger will result in clear transportation benefits that will ensure competitive rail service for commodities that are sensitive to intermodal competition, and improved service to all the commodities affected by the merger. 1. Improved Routings:

California-Dellas-Memphis. UP/SP will be able to assemble segments of UP and SP lines via El Paso to create the shortest route from Los Angeles to Memphis, as well as fully competitive routes from Oakland and Stockton to the South Central region, in competition with EMSP, which previously had the best routes in those corridors. Morthern California-Midwest. SP has the most direct route between Morthern California and Ogden, UT, while UP has the most direct routes from Ogden to the Midwest. The merged system will assemble these segments into a through route 180 miles shorter than either existing route, permitting UP/SP to match BMSF's nowdominant intermodal service. BMSF will gain a new trunk line traversing the Central Corridor between Morthern California and Denver, providing access to western natural resources industries and shippers to and from Hevada and Utah, and routing flexibility for intermodal and other traffic between California and the Midwest. Southern California-Midwest. The merger will make SP's route between Southern California and the Midwest more competitive. Between Los Angeles and El Paso, SP's current route is severely congested, and SP has not been able to provide adequate capacity to meet its shippers' needs. From El Paso into Kansas, SP's route lacks Centralized Traffic Control and adequate sidings. To upgrade the entire route, UP/SP will spend more than \$360 million-funds that SP has not generated, and cannot generate, on its own. Pacific Northwest-Texas. BNSF now has the only direct route between the Pacific Northwest and Texas. The merged carrier will link the UP and SP route networks in Texas with SP's route from Ft. Worth to Denver and UP's routes from Denver to Utah, Idaho, Montana. Oregon and Washington. This will make UP/SP a real competitor for this traffic and provide entirely new single-line services to shippers in the Intermountain West. Colorado/Utah Coal Route. SP carries growing volumes of coal from Colorado and Utah to the Midwest on two alternate circuitous routes. One route climbs Tennessee Pass, the nation's steepest main line grade, while the other uses a crowded joint line with BMSF along the Front Range of the Rockies. Both routes require helper locomotives. UP/SP will be able to reroute this traffic directly east from Denver to Kansas City. Keneas City Bypess. UP currently must handle increasing volumes of FRB coal and heavy grain unit trains through the congested Keneas City terminal area. By using an SP line in Central Keneas and upgrading UP's OKT line from north of Wichita to Pt. Worth, UP/SP can reroute this traffic out of Keneas City and speed shipments, not only for coal and grain shippers, but also for other shippers now using the Keneas City gateway. California-Laredo. Trade between California and Mexico offers great promise under NAFTA. UP's route from California to Laredo, the premier Mexican gateway, via Utah and Wyoming can be reduced by 1,000 miles. SP does not reach Laredo and had tried. ineffectively, to move intermodal traffic by truck from San - 260 -

Finance Docket No. 32760 rights, efficiently linking Eagle Pass with all points on the BMSF system, including New Orleans. BMSF will also serve San Antonio en route to Eagle Pass, which will allow it to mount a more effective operation. 3. Expanded Market Coverage
The expanded coverage that common control promises will have numerous beneficial impacts. International Markets. The UP/SP merger transaction will foster the goal of North American economic integration embodied in the NAFTA agreement by greatly strengthening competition for traffic to and from both Canada and Mexico. The proportional rate arrangement will allow UP/SP to compete via Portland for traffic to and from BMSF's Mestern Canada gateways, including lumber originating on BC Rail and Alberta grain and chemicals originating on CM. There will be stronger rail competition at every UP and SP gateway to Mexico as a result of the merger and the BMSF agreement, and the Tex Mex trackage rights we have imposed. Overall, BMSF's much-expanded access to Mexico, as well as within Texas and at New Orleans, will bring greater balance to the competition for Mexican rail traffic, which at present is largely handled by SP to and from points to the west and UP to and from points to the north and east. The more efficient Mexican routings for both UP/SP and BMST The more efficient Mexican routings for both UP/SP and BMSF will help improve the rail share of traffic to and from Mexico. Today, trucks dominate this traffic. Even at Laredo, the most efficient Mexican rail gateway, trucks handle approximately 86% of the cross-border traffic. Upgrading the Southern Corridor lines, instituting new Laredo-California intermodal service, and greatly improving the efficiency of operations in the Laredo-Memphis-St. Louis-Chicago corridor will give rail a much better ability to capture a larger share of this market. Intermodal. The merger and the BMSF agreement will create competitive benefits for intermodal shippers: third-morning services that will for the first time challenge BMSF's dominance in the Midwest-California markets; the ability of both UF/SF and BMSF to link all the West Coast ports with short, fast routes to all the midcontinent gateways from Chicago to Mew Orleans; construction of a new Inland Empire terminal east of Los Angeles; two new, truck-competitive, single-line services in the I-5 Corridor from Seattle/Tacoma to Los Angeles, where nome exists now; new Pacific Morthwest-Phoenix-El Paso-Texas service, made possible in part by the ability to support train connections at the new Inland Empire terminal near Colton rather than at Los Angeles; better terminal access for UF/SF in Chicago, Portland and Seattle, and for BMSF in Oakland and Los Angeles; better equipment availability, thanks to new repositioning capability and other efficiencies; new California-Larado service; muchimproved Twin Cities-Kansas City-Texas service; new Upper Midwest-Phoenix service; faster and more frequent Los Angeles-Dallas and Los Angeles-Memphis service; higher-quality service in many lanes as a result of combining and improving UP and SP terminals; and improved schedules, train frequency, and reliability in virtually every rail corridor in the Mest. Intermodal is perhaps the area where 2M and SF gained their greatest competitive advantage by merging, and where a UP/SP merger is most needed to meet the competitive challenge of the new ENSF system. By merging, EMSF created a rail system that serves all major West Coast ports, with superior service to Chicago, Kansas City, St. Louis, Nemphis, Dallas and Houston, new single-line service to Birmingham, outstanding terminals at all of those points (e.g., the new SF Alliance terminal near Dallas/Fort Worth), and the financial strength to invest in further technological and service improvements. - 262 -

Finance Docket No. 32760 SP is especially vulnerable in this area. Because of its SP is especially vulnerable in this area. Because of its service weaknesses, it has been unable to compete for high-end transcontinental intermodal traffic. In part because of the advantageous location of its ICTF facility in Los Angeles, SP has held on to a large share of its international container business, particularly in the Southern Corridor, but now major shipping companies have created, or are in the process of creating, ondock loading capability at the Ports of Los Angeles and Long Beach, which will undercut the advantage that the well-located, state-of-the-art ICTF facility has conferred on SP since it opened in 1984. Products. Competition will be stronger for food products shipments throughout the West. California and Pacific Northwest perishables, frezen foods, canned goods and other food products will move over shorter, faster routes to the Midwest, and on new north-south single-line routes in the I-5 Corridor. Equipment supply, which is crucial to food products shippers, will be greatly improved. With the rectification of SP's inadequate service and the institution of new carload train services such as a new direct Roseville-Chicago carload train and a second daily North Platte-Conrail run-through train, large volumes of food products will return to boxcar handling on the merged system. Upper Midwest food products producers will gain single-line access to SP markets in the West and Southwest, and to additional Mexican gateways. And, BMSF, which is already a very strong competitor for this traffic, will be even stronger after the settlement, with new I-5 and Central Corridor routes. Forest Products. Lumber and wood products originate primarily in the Pacific Morthwest and Western Canada, and in the Southeast. Canadian products, handled to the Midwest by CM, CP and BMSF, have increasingly been eclipsing Pacific Morthwest products. South Central and Southeastern output has also been making inroads against the Pacific Morthwest. SP's service in Oregon and Northern California has deteriorated, and much SP volume has been lost to reload centers and trucks. The merger will greatly benefit lumber and wood products producers. SP Pacific Northwest producers will gain much shorter routes to the Midwest and the South Central region, and single-line service to UP destinations in the Midwest and elsewhere. UP Pacific Northwest producers will gain new access to California and Arizona, a shorter route to Texas, Louisiana and Eastern Mexico, and single-line access to SP receivers. and Arizona, a shorter route to Texas, Louisians and Eastern Mexico, and single-line access to SP receivers. SP's poor service and equipment supply problems will be remedied, enabling lumber shippers to avoid the added expense of truck-rail reload programs. South Central and Southeastern producers will gain shorter routes to Southern California, better service in the Houston-Nemphis-St. Louis-Chicago corridor, better equipment supply, and wider access to end markets. The BM/SF merger is further strengthening BNSF's already very strong position as a competitor for lumber and wood products traffic, and the efficiencies of the merged UP/SP will enable it to meet that competitive challenge. competitive challenge. There will be a similar enhancement of competition for paper and paper products traffic. New paper production tends to be concentrated in the South Central and Southeast regions (where concentrated in the South Central and Southeast regions (where KCS, IC and BMSF, among others, are strong competitors) and in the Upper Midwest and Canada. South Central and Southeastern paper mills will enjoy the same service and equipment benefits as lumber producers in those regions, and 2-to-1, mills will receive stronger competition from UP/SP and BMSF as a result of the settlement. Upper Midwest paper producers will have shorter, faster routes to Northern California and better service to the South Central region. Scrap paper moves in a variety of markets, and will benefit from the elimination of interchanges between UP and SP and better equipment supply. and SP and better equipment supply. - 263 -

Pinance Docket No. 32760 Autos. Two decades ago. SP was the dominant automotive carrier in the West, with large volumes to Portland, the Bay Area. Los Angeles, Phoenix, and Texas, and direct service to and from four automobile assembly plants in California. Since then, SP has fallen to a very small share of western rail-handled auto movements (less than 10% of automotive business handled by western railroads in 1994) as a result of the closure of three of the four California plants, deregulation (which has allowed for more creative contracting by the auto companies), the general decline in SP's service levels, and its financial inability to make major investments in new auto facilities and auto-handling freight cars. freight cars. As in the intermodal arena, the UP/SP marger will create a real competitive contest of equals for automotive traffic, rather than one in which ERSF is dominant and SP is a weak third. UP/SP will be able to tie points such as Seattle and Phoenix into an efficient, comprehensive transportation network for auto shippers, as ERSF already can. Shorter routes and expanded single-line service will speed the handling of motor vehicles, yielding major savings in inventory and equipment costs. For example, UP/SP will run a new through 70-hour auto train from Chicago to the merged system's Milpitas facility in the Bay Area, with blocks of automobile-carrying freight cars for Denver, Salt Lake City, Martinez (to serve the Benicia facility) and Milpitas, and a similar through train from Ransas City to the Bay Area. The upgrading of the Tucumcari line, and of the Colton-El Paso line, will make UP/SP more competitive in the key Kansas City-Los Angeles corridor, with new through auto trains both from Kansas City to Southern California and from Chicago to Southern California. There will also be dedicated auto trains from Dallas/Fort Worth to Conrail destinations; from Chicago to San Antonio. including Mexican business; and from GTW at Chicago to the major auto facilities at Reisor, Louisiana, and Arlington, The merged system will be able to offer the combined strengths of UP's and SP's auto ramps, and will have the financial wherewithal to make improvements in those ramps and to invest in new ones. The merged system will be better able to invest in improved bi-level and other specialized cars, and to reduce shippers' equipment costs by improving cycle times and efficiently repositioning equipment. Service to and from Mexico, where many of the auto companies have located manufacturing facilities, will be improved and, under the BMSF agreement and Tex Mex trackage rights, competition for Mexican traffic will be strengthened. Shipper concerns about the quality of SP service will be overcome. Chemicals/Plastics. The merger and the BMSF agreement will greatly increase UP/SP competitiveness for chemical and plastic traffic, both in the Gulf Coast and elsewhere, enhancing the position of UP/SP-served chemical and plastic producers in their end markets. A particular concentration of chemical and plastic production is on the Texas/Louisiana Gulf Coast, where UP and SP. as well as EMSF, KCS and IC, each serve numerous plants. Most of the Texas and Louisiana plants are located on water, and can and do use low-cost water transportation for their incoming and outgoing product in lieu of rail if rail is not fully competitive. Both UP and SP producers will gain greatly improved operations, including new run-through operations to eastern roads in the Houston-Memphis-St. Louis-Chicago corridor, shorter routes to the Pacific Northwest, faster turn times on costly, shipper-owned equipment, and additional SIT yard opportunities. Gulf Coast shippers will save a day in transit time to and from both the Memphis/St. Louis/Chicago gateways and the Mest Coast. Also, - 264 -

Finance Docket No. 32760 under the BNSF agreement and additional conditions we have imposed. BNSF will be a much stronger competitor for Gulf Coast traffic with new access to major chemical and plastic plants at, among other locations, Mont Belvieu, Eldon, Bayport, Corpus Christi, Orange, and Amelia, TX, and Lake Charles, LA; new single-line access to New Orleans; a new direct route to Memphis; and shorter routes to the key gateways of St. Louis and Chicago. Chemical producers elsewhere also will benefit competitively. For example, Myoming soda ash producers will gain shorter routes to Northern California markets, Texas and Louisiana markets, and new single-line service to Arizona, New Mexico, SP-served Mexican gateways, and other SP destinations not served by UP. Grain. UP is a major originator of wheat, corn, barley and other grains, whereas SP, which originates very little grain, serves major end markets for grain that UP cannot reach. Among these are the feeder markets in California's San Joaquin and Imperial Valleys, Arisons, the Texas Panhandle, and Mexico. BMSF Imperial Valleys, Arisona, the Texas Panhandle, and Mexico. BMSI is a major grain originator and serves all of these end markets. Thus, the merger will create new single-line service opportunities for UP grain producers and SP grain consumers, and will provide stronger competition to BMSF in grain markets it already serves on a single-line basis. The merger also will create a new capability to move 286,000-lb. cars of wheat and feed grains to Houston and other ports for export, another capability that BMSF already has. Coal. The merger, by creating new single-line routing opportunities and operating efficiencies, will benefit producers and consumers of both the Utah and Colorado coals that SP originates and the PRB coal that UP originates. Utah and Colorado coal will particularly benefit. Smoother operations in Utah and a direct single-line route to the Ports of Los Angeles and Long Beach will promote Utah and Colorado coal exports to Pacific Rim countries. There will also be a much shorter single-line route from Utah to domestic coal users in Southern Nevada and Southern California. Single-line access to UP-served consumers in the Midwest and South Central regions and to Mississippi River barge terminals will promote additional domestic and export opportunities. Handling of eastbound movements of Utah and Colorado coal via Denver, and thence on either UP's "RP" line across Kansas or the UP mainline from North movements of Utan and Colorado coal via Denver, and thence on either UP's "RP" line across Kansas or the UP mainline from North Platte to Chicago, will provide much better service than SP's current route via Pueblo. Topeks. and Kansas City, which is mountainous, slow, and congested. Also, coal producers on the URC will have access to BMSF, which will open up new domestic and export opportunities. PRB coal users will benefit also from the new Kansas City bypass and from other efficiencies that will shorten cycle times and increase reliability. Metals and Minerals. Metals and minerals producers throughout the West will enjoy more competitive rail service as a result of the merger. The Arizona and New Mexico copper industry will benefit from the upgrading of the Colton-El Paso and El Paso-Dallas lines and shorter routes to Memphis and the Southeast. The varied minerals producers in Myoming, Utah and Nevada will benefit from improved operations of the merged system across the Central Corridor, and in other ways as well. Nevada barites producers and Utah and Nevada copper producers will be served by both UP/SP and BRSF, opening up new single-line opportunities for their production and inputs. Midwest steel producers will benefit from shorter routes to Morthern California and improved service to the South Central region. Traders and consumers of metal scrap will gain a multiplicity of new single-- 265 -

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line service opportunities. SP metals shippers will benefit from access to UP's gondols fleet. More metals and minerals will move at lower cost as a result of the merged system's expanded triangulation and backhaul opportunities.

#### APPENDIE 2: DUOPOLY ISSUES

#### CARRAIEM

It is true that tacit collusion is more likely in two-firm markets, where one firm can anticipate the other's response, than in multi-firm markets. Multi-market contact, which will take place here, can also facilitate tacit collusion. Mevertheless, other important factors indicate that these carriers are more likely to compete than tacitly collude. One significant factor here is the heterogeneity of rail service. Which would make it very difficult to maintain a tacitly agreed rate level.

Another factor making tacit collusion unlikely is the secrecy about rail price and service offerings that now characterizes the rail industry. Contracts between railroads and shippers for major movements are now the rule, and railroads are no longer required to file public tariffs for the remainder of their traffic. Contracts often incorporate detailed specifications for a wide variety of service aspects. Confidentiality clauses in those contracts effectively deter collusive action because information about these competitive actions is shielded from competitors.

The significant economies of density and of scope exhibited by railroads also make tacit collusion less likely. A given increment of traffic represents not only the contribution to be earned from that increment, but additional contribution on other traffic, whose average costs are reduced. These economies create strong incentives for railroads to compete for all profitable volumes, rather than tacitly agreeing to an above-market rate level that restricts service. Given all these factors, we do not think that tacit collusion is a likely outcome for this traffic.

We do not believe that trackage rights agreements tend to facilitate collusion either. Although the landlord is in a position to be somewhat better informed than it might otherwise be--it knows the tenant's capacity limitations and some elements of its cost structure, and it can more readily observe its market participation--trackage rights tenants and landlords do keep secret many aspects of service from each other in bidding for traffic. We do not believe that trackage rights, even on the scale involved here, will damper competition.

#### EMPIRICAL RATE STUDIES

Studies Aimed At Measuring 3-te-2 Effects. Here we assess a number of studies submitted by parties and aimed at estimating whether shippers whose rail alternatives are reduced from three to two by this merger are likely to face increased rates. In general, the studies compare rates in markets served by three railroads with rates in markets served by two. One common problem with these studies is the use of a static context to project post-merger rate increases. Protestants' studies neglect to account for a key dynamic element of this merger, the dramatic cost reductions it will make possible. They generally fail to acknowledge that any limited ability this merger creates to raise

schedules, terminal support, and car repositioning for customers. The various dimensions of service constitute Mifferent avenues of response available to rivals, complicating any one firm's efforts at inflicting retaliatory losses on the other to enforce non-competitive rate levels.

Indeed, this is the main reason for the protective orders that we have entered in this proceeding.

rates over costs will be offset to the extent the merger results in significant reductions in applicants' costs. Another dynamic element of this merger, the deteriorating condition of SP and the effect this has on rail pricing, is discussed in a separate section.

As we explain below, each study also suffers from specific infirmities. McDonald's study (for RCS) has limited utility because it is based solely on rail grain movements. Even for that cosmodity, certain data limitations have led to an upward bias in its 1-to-2 rate projections. Majure's study (for DOJ) updates certain of McDonald's results for western whest originations. This study is so inherently flawed that it cannot be given much substantial weight. RCS witness Grimm's 1992 study does not present sufficient information for us to use its results to measure merger-related competitive harm in this proceeding. Further, it contains key findings that were recently rejected by the ICC in 2M/SF, slip. op. at 73 n.94. And Kwoka's study (for Dow) must be given little weight because it is not based on rail industry data.

a. NacDonald. FCS witness MacDonald analyzed rail movements of wheat, corn, and soybeans. His analysis resulted in estimates of rate differentials between markets served by three carriers and markets served by two carriers of 6.7% for corn, 10.9% for wheat, and intermediate results for soybeans. To put these numbers in perspective, we note that, even under DOJ's broad definition, there would be only \$129 million of 3-to-2 wheat traffic, and \$50 million of 3-to-2 corn traffic that could be affected by this merger.

MacDonald used 1983 ICC Waybill Sample data for one study, and 1981-85 data for another. The origin areas were Crop Reporting Districts (CRDs), criticized by applicants as unrealistically large. MacDonald's objective was to determine the statistical relationship between the number of origin rail carriers and rates. Another important feature of his analysis was the use of a variable representing distance from waterways.

MacDonald's use of the Waybill Sample was proper, despite strong criticism on this point from applicants. Which of somewhat greater concern is his use of CRDs, which may be so large that where MacDonald counts them as two railroad areas, they may be closer to one railroad area. This would tend toward overstatement of 3-to-2 effects.

One charge was that MacDonald ignored this agency's guidelines respecting level of detail at which inferences can be drawn given sample variability. MacDonald replies, correctly, that his statistical analysis took proper cogmisance of this in performing significance tests. The other was that waybill data mask true contract movement revenues. MacDonald not only replied, again correctly, that his data came from years when this was not a problem, but also performed special tests to verify lack of masking.

An empirical analysis that overstates the geographic scope of rail markets understates the true level of concentration affecting rates. The way this bias affects estimates of rate changes in going from three to two railroads is as follows: the analysis classifies some markets as having three railroads when the underlying structure is that of two railroads; likewise, it classifies some markets as duopolies when the true underlying structure is monopoly. Then, rather than estimating the change from three to two railroads, as intended, the analysis actually measures a change from, say, 2.5 to 1.5 railroads. All the studies presented in this record indicate that 2-to-1 price (continued...)

Another error that could result in overstatement of impacts on rates is his failure adequately to account for transit movements. In such movements, a first waybill is cut, based on a local rate that is normally relatively high on a per-mile basis, for the movement to the transit point. Because the destination has not yet been determined, it is impossible to determine what through rate might be applicable. When the grain is shipped from the transit point to its ultimate destination, the movement is rebilled, usually at a lower rate per mile, as a through movement from origin to destination. When the second bill of lading is cut, only the transit balance, the difference between the original local rate and the ultimate through rate, is shown on the bill. This balance may be very low, and in some cases will be negative. And as applicants point out, there tend to be more railroads providing service associated with these movements from transit points, that are in turn attributed with deceptively low transit balance rates. The net effect is to accord too strong a rate effect to a reduction in the number of participating railroads. It also should be kept in mind that MacDonald's study is only useful for analyzing grain transportation markets.

b. Majure. Although Majure predicts more than \$800 million of competitive harm from the merger, his study contains major conceptual errors that make it totally unreliable. Majure derives his estimate by predicting a 19.4% rate increase estimate for \$1.5 billion of 3-to-1 traffic, and by predicting a 10.9% increase for \$4.75 billion of 3-to-2 traffic. Even if we assume that those projected increases correctly predict the price effects of going from 2-to-1 and 3-to-2, and that DOJ has correctly measured the amount of 2-to-1 and 3-to-2 traffic at risk, there are still major problems with Majure's calculations. A basic flaw is that the \$291 million rate increase predicted for 2-to-1 traffic presumes either total ineffectiveness of BMSF service under trackage rights or full collusion between UP/SP and BMSF, allowing both carriers to implement pure monopoly pricing. Because the conditions we are imposing will ensure that BMSF will be an effective replacement for SP with respect to this traffic, we cannot give any weight to Majure's estimate of 2-to-1 harm.

Concerning 3-to-2 traffic, we would begin by removing from the traffic base that Majure assumes will be affected the intermodal and automotive traffic, comprising over 70% of the total 3-to-2 traffic by DOJ's estimates. Shippers moving this traffic, which enjoys vigorous motor competition, 100 uniformly support the merger. There is simply no basis for assuming that these shippers will be charged higher rates after the merger.

We also reject Majure's application of the updated MacDonald study results, which were based only on wheat and corn traffic, to 3-to-2 traffic with markedly different transportation

offects are much larger than 3-to-2. For this reason, overstating the geographic scope of rail markets will tend to overstate 3-to-2 pricing effects.

Pridence submitted by DOT shows why DOJ's assumption that trucks do not compete with rails at distances exceeding 500 miles even for truck-competitive intermodal traffic is incorrect:

A well-received 1990 study commissioned by DOT's Federal Railroad Administration determined that this (rail intermodal) service does not begin to compete with trucks (on a cost basis) until the rail linehaul exceeds 730 miles, and that assumes a dray of only 30 miles at either end of the move.

DOT-4 at 17 n.17.

characteristics. The geographic market definition that is selected for a particular study strongly influences its estimated pricing results. Although applicants' definition focuses on carriers to which shippers have direct access. Majure and other protestants advocated a broader geographic definition intended to reflect distances that shippers can truck to competing railroads. In the case of corn and wheat, we agree that the broader definition more accurately reflects the grain shippers' transportation options. (For some unemplained reason, however, in his own study Majure did not use the broad definition he advocates, but used a narrow definition, the 6-digit SPLC, in deriving his rate projections.)

Almost all grain is trucked from the farm to grain elevators on rail sidings or to waterways for barge transport. This means that, within certain limits, a farmer can ordinarily truck the grain to whatever available carrier offers the price and service that it desires. If there are three railroads in a particular geographic area, it is likely that, all things being equal, they will compate on an equal basis for grain traffic. Although almost all grain shipments originate with a truck movement, truck movements of grain do not tend to be competitive over very long distances, and barge and rail options usually have a significant advantage for long hauls. The transportation market for other 3-to-2 commodities is very different from that for grain, and price effects derived from 3-to-2 grain studies will dramatically overstate 3-to-2 price effects for other commodities. As we have noted, some of these commodities are extremely truck competitive. In those cases, the number of available railroads is a much less important variable in the pricing equation, and any 3-to-2 pricing effect will be negligible. Further, for movements that are not truck competitive, the number of nearby railroads will provide far less effective competition, primarily via potential build-outs or transloading operations, than is the case for grain. In such situations, any 3-to-2 pricing impact derived from grain studies will again dramatically overstate the likely 3-to-2 price effect.

Majure merely updated MacDonald's study of western wheat originations, using 6-digit SPLCs rather than CRDs. He was unable to incorporate an explanatory variable for distance from waterways, as MacDonald did. He ran tests with data from those railroads that do not mask contract rate information. His estimate of percentage rate impact of going from 1-to-2 railroads is 10.9%. Majure's study is undermined by his omission of a factor adjusting for distance from waterways. This omission results in an overstatement of 1-to-2 impacts. Mearby waterways significantly lower grain transportation rates. Majure has speculated that fewer railroads operate near waterways, since "whenever water transportation is in the market, fewer railroads could afford the fixed costs of perticipating in that market." DOJ-8 at 34 m.33. But, applicants have shown that areas near waterways are served by a greater number of railroads. Majure has failed to recognize that much of our nation's early urban growth centered on the confluence of rail and water transportation. UP/SP-231, VS Caren, at 3-5. Thus, the lower rail rates Majure ascribes to the presence of nearby barge competition. In sum, there are many reasons to conclude that his entire 3-to-2 traffic analysis is imberently flawed.

Protestants have used the available geographic standards for collecting and disseminating relevant data (BEAs. SPLCs, or CRDs) that they believe most accurately reflect the ability of shippers to reach alternative carriers.

The railroads that mask their data by reporting coded contract revenues are CDM, Conrail, MS, CBX, and UP.

- C. Grimm. Some of RCS Witness Grimm's studies come under attack for relying on pre-Staggers Act data, but he has also conducted studies using post-Staggers Act data. Unlike MacDonald's study, Grimm's studies are not limited to grain. They use the number of independent routings between origin and destination as an explanatory variable. His 1952 published study was based on rate data obtained from railroads directly rather than from the Maybill Sample. He concluded that the number of independent routings affects rail rates. The study does not present sufficient information for us to use its results to measure merger-related competitive harm in this proceeding. Further, it contains key findings that were recently rejected by the ICC in EN/SF, slip. op. at 71 n.94.
- d. Petersem. Applicants' witness Peterson contributes a study based on a 100% UP traffic data base. It compares UP's average revenue per ton-mile where (1) UP is the sole carrier serving; (2) UP and one other carrier serve; and (3) UP and two other carriers serve. The greatest differential, as expected, is between the one and two-railroad categories. But from 3-to-2 the differential was minimal: less than 1%. This result is not surprising to us. If a shipper has direct access to three railroads and must go down to two, it still has alternative rail service to which it can switch at low (if any) cost.
- e. Rwoka. Dow's witness Kwoka reported on a 1979 crossindustry study showing that the market share of the top two firms
  better explains price/cost margins than more commonly used
  concentration measures such as the MMI. To Kwoka this
  underscores the need to inject a third mid-ranked firm more
  likely to compete than coordinate with the other two. Because
  Kwoka's approach is outside the realm of the rail industry, we
  find it difficult to make relevant inferences. The focus in this
  case is effects of fewer rail participants in individual markets,
  not of higher concentration across whole industries.

Studies about The Role Of SP In The Pricing Equation.
Though all the foregoing studies bear on the question of 3-to-2 pricing impacts generally, others focus on SP's role in particular 3-to-2 markets. This is of special interest because it is SP's competitive presence that is being lost. There is much discussion in the record as to how aggressive a

The studies by Peterson and by Majure discussed above do include an ancillary analysis of the difference made by SP. Peterson breaks down his 3-to-1 category of traffic (from the 100t UP 1994 traffic data) into a UP/SP category and a UP and one other railroad category. The category involving SP as the second competitor has a revenue per ton-mile that is higher than the category involving other carriers (UP/SP-231, RVS Peterson, at 92): A caveat to this analysis is that it does not correct for movement characteristics that might affect the level of rates but might differ between SP and other railroads (e.g., commodity, costs, length of haul, etc.).

Majure included SP's identity as originating carrier as an explanatory variable in his analysis. He found essentially that SP was a less effective competitive restraint in two carrier markets than other carriers. (DOJ-8, VS Majure, at 36 n.37).

Applicants' witness Bernheim has explained that any lower prices offered by SP are likely due to its inferior service. He also notes that Majure's estimating equations contain a variable to adjust for cost differences among carriers. He asserts that this means that Majure has merely estimated that SP's rates would be lower than those other carriers if its costs were the same as the costs of other carriers. But, its costs are about 20% higher. UP/SP-260 (App. 2), Bernheim Dep., at 139-42.

Finance Docket No. 32760 competitor SP is today. Applicants view SP as a constrained competitor, one unable to replicate the quality levels of competing railroads and whose effectiveness is further hampered by the higher cost structure associated with an antiquated plant. Protestants describe SP as a maverick, aggressively offering rate reductions in markets that would otherwise be much less competitive. We agree with applicants and interpret lower rate levels offered by SP in certain examples as indicative of the lower quality product it has been constrained to offer. Moreover, SP cannot continue to maintain its existing competitive presence in the long run because the revenues generated from its current pricing structure are not sufficient for it to maintain or replace its capital. or replace its capital. a. Pleth. A study was submitted by Ploth for KCS concerning military traffic, on which very detailed bidding information is accessible where similar information from the private sector is highly secretive. Ploth used a DOD data base concerning its movements, which showed rail transport bids of various competing carriers. Ploth shows point-to-point summaries of pricing bids and routings. He finds SP to rank highest in average savings per bid. These results are not surprising, because, as applicants point out, special circumstances govern DOD procurement. DOD must award contracts to the lowest bidder. For repetitive business, however, the procedure is to line up back-up providers that can keep supplying if the initial provider fails to deliver. This happens often with SP; it runs out of equipment for a move, and other carriers are relied on for the balance of the business (UP/SP-231, RVS Gassetta, at 11). Bernheim for applicants criticizes Floth's data. He argues that the number of independent routes, not the number of bids, should be the prime emplanatory variable (to allow for potential as well as actual bids). In general, Bernheim's results show that rates are nearly 30t lower where there are two fully independent routes rather than just one. Beyond that, especially with inclusion of SP, Bernheim notes, the effect is negligible. The results do not show aggressive pricing on the part of SP. Bernheim's results appear in line with the general pattern we discern of SP as working under constraints making it unable to exert significant competitive pressure on other participants in the same market. the same market. b. Bernheim. In addition to assessing other parties' rate studies, Bernheim also submitted, on behalf of applicants, a study that focuses on 3-to-2 impacts on automotive traffic, with special focus on SP's competitive influence. He used UP's 1994 100% traffic data base to explain the effects on UP's revenue per tom-mile of various categories of market participation. Bernheim found that the 2-to-1 differential is much greater when UP competes against a carrier other than SP. Where SP appears as a third competitor, rates are on average higher than when UP competes with a second carrier only, not SP (24%). Bernheim infers that three carrier markets likely involve dilution of density and higher unit costs and that SP's presence, again, is ineffective in pressuring rates down. This study seems to indicate that the loss of SP's competitive presence in 1-to-2 markets is relatively unimportant because of SP's poor service quality and high cost levels. c. Commail. Commail adduces specific rate comparisons to demonstrate that SP is an aggressive competitor (CR-22, VS Bridges, at 2-3; CR-22, VS McNeil, at 5-6), It reports from the vantage point of a co-bidder on joint movements, where shippers receive bids for individual logs of the movements. The focus is on international container traffic from Southern California, through the Southwest, to the East Coast (land bridge movements) and automotive traffic moving Nest Coast to Midwest and Midwest to Mexico. Contail claims SP has the best routes for - 272 -

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such traffic and that its lower bids do put pressure on others, specifically. UP, to come up with lower bids than otherwise. Conrail's anecdotal evidence here is not very persuasive, especially when compared to applicants' rate study of all its 1-to-2 automotive traffic, which reaches the contrary result.

Finance Docket No. 32760 APPENDIX 7: FIRMCIAL BATTOS Pro Perms Frank Charge Coverage Res 1. Installe Ave. \$1,700.0 777.1 \$2,275.0 744.9 2375 2275 A 724 ). Times Freed Charge Coverage (LIA2) 3.0 24 2.7 29 20 II. Pro Ferms Cast Throw-Off-To-Date Rese 918 9 247.5 (84.6) 945.5 945.5 292.5 (64.2) 764 764 103 999.2 283.2 994.2 997.3 239.4 233 9 19.1 3073 1 1,785.8 1,997.5 2184.6 2141.6 2191.9 181.7 301.7 7 Cash Throw-Off-To-Date Rass (LSA4) 17 12 \$10,429.1 \$10,791.4 \$16.838.6 8.361.7 10.001.0 .... 2344.6 22.99 2.7 77.2% 79.00 70 004 5704 0 7,383 4 2023.7 7,443.0 9922.4 7,793.1 7,575.2 7,414.9 7.423.4 ¥3385 ) Rosen on Bourn (LI/L2) 10 01 . 11.00 11.5% 11.5% 11.5% 1 Long-Torm Date Due After One Year 2 Shareholden' Squay \$7,487 5 7,423 4 57.902.1 7.383.4 57.262.2 7.991.2 57.934.0 57.462.4 7.792.1 54,504.5 8,216.3 7,614.9 3 Total Date Plus Source 15.537.8 LEATES 152774 15,102.5 Rano of Date to Date Plus Squay (L1/L3) 50 19 51 79 52 00 51.0% 45.44 NOTES TO TABLE 1 Sources of Data The data in this table were derived and computed from information contained in the following submissions by applicants: (1) Volume 1 of the Application, Appendix 8 (pro forms balance sheets for the base year, the first 5 years after the merger, and the normal year); and (2) Volume 1 of the Application, Appendix C (pro forms income statements for the base year, the first 5 years after the merger, and the normal year). Base Year Date The data shown in this table for the base year are from the 1994 10-K Annual Reports for UPC, CMMT, and SPR. These data were adjusted to account for the UP/CMM merger, which occurred during 1995. They were also adjusted to record after-tax losses and benefits associated with the BM/SF merger, elimination of CMMT's 1994 special charges, elimination of losses from discontinued operations associated with UPC's waste management operation (sold at year-end 1994), recordation of the spin-off of Union Pacific Resources, elimination of SP's after-tax gains on property sales, and elimination of the cumulative effect of accounting changes recorded by SPR in 1994. - 274 -

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### Data Subsequent to Base Year

Data subsequent to the base year (i.e., data for the first 5 years after the merger and the normal year) give effect to the estimated benefits from the merged operations, including net revenues from diverted traffic and net receipts from trackage rights which, while not recognized as public benefits, are private benefits realizeable from the merger. These data also incorporate changes to equipment costs, debt and interest expense, deferred income taxes, revenues, expenses, and income resulting from the merger.

inance Docket No. 32760 UP/SP shall comply with all applicable FRA rules and regulations in conducting rail operations on the merged system. CORRIDOR MITIGATION . The following mitigation conditions apply to the Central. Southern, Northern, Illinois-Gulf Coast, and Pacific Coast (I-5) Corridors. UP/SP shall implement the draft emissions standards for diesel-electric railroad locomotives that the Environmental Protection Agency (EPA) has developed. It is the Board's understanding that public comment in December 1996. Under these standards, UP/SP shall utilize newly manufactured or re-built locomotives that are more fuel efficient and produce less emissions. When this equipment becomes available, UP/SP shall assign these locomotives on a priority basis to the corridors or portions thereof specified helow: · Southern Corridor: - Fort Worth, TX, to West Colton, CA. · Central Corridor: Cheyenne, WY, to Hinkle, OR. Chicago, IL, to Fremont, NE. Ogden, UT, to Roseville, CA. Denver, CO, to Grand Junction, CO. · Pacific Coast (I-5) Corridor: Seattle, MA, to West Colton, CA. Sacramento, CA, to Bakersfield, CA. To further facilitate the improvement of air quality for specific locations, UP/SP shall consult with appropriate state and local air quality officials in the States of Arizona. California, Colorado, Illinois, Nevada, Oregon, Texas, Mashington, and Myoming, through which the Pacific (I-5), Southern, Central, and Northern Corridors extend in part. UP/SP shall advise SEA as to the status and the results of these consultations. To address noise impacts, UP/SP shall consult with the affected To address noise impacts, UP/SP shall consult with the affected counties that have communities that would experience an increase of 3 dBA or more as a result of the increased rail traffic over rail lines in the States of California, Colorado, Illinois, Kansas, Louisiana, Nebraska, Nevada, Oklahoma, and Texas. If appropriate, UP/SP shall develop a noise abatement plan. UP/SP shall submit the result of these consultations to SEA who will review these findings with FRA. The following mitigation conditions apply to specific rail line ments within the Central, Southern, and Illinois-Gulf Coast Corridors. UP/SP shall give priority to equipping key trains, as defined by Union Pacific Railroad Form \$620, on the corridor segments listed below with two-way end of train devices. This requirement also applies to BMSF key trains operating between Iowa Junction, LA, and Avondale, LA. · Contral Corridor Morth Platte, NE, to Oakland, CA (UP and SP). Cheyenne, WY, to Denver, CO (UP). - 277 -

Finance Docket No. 32760 · Southern Corridor Houseon, TX, to Avendale (New Orleans), LA (SP). Ioua Junction, LA, to Avendale, LA, via Kinder and Livenia Houston, TX, to West Colton, CA (SP). · Illinois-Gulf Coast Corridor St. Louis, MO, and East St. Louis/Salem, IL, to Houston, TX, and Avendale, LA (UP and SP). BAIL LINE SECREDIT MITIGATION General
The following mitigation conditions apply to all of the rail line segments in the states identified below. 18. UP/SP shall consult with the states and appropriate local officials as well as FRA to develop a priority list for upgrading grade crossing signals, where necessary, due to increases in rail traffic resulting from the proposed merger. This process shall be undertaken for all rail line segments in the States of Arkansas, California, Colorado, Kansas, Nevada, Oregon, and Texas. UP/SP shall advise SEA as to the status and the results of these consultations. American The following detailed mitigation conditions apply to the specific rail line segments and/or locations identified below. Martines, CA, to Oakland, CA, East Bay Regional Park District UP/SP shall comply with the terms of the Memorandum of Understanding executed with the East Bay Regional Park District and UP/SP. Receville, CA, to Sparks, MV: Town of Truckee UP/SP shall comply with the terms of the Memorandum of Understanding executed with the Town of Truckee and UP/SP. Placer County
UP/SP shall comply with the terms of the Memorandum of
Understanding executed with Placer County and UP/SP. City of Reno

22a. UP/SP shall operate no more than a daily average count of 14.7
freight trains per day through the City of Reno. (This reflects
the Base Year daily average of 13.8 trains -- 12.7 freight trains
and 1.1 passenger trains -- plus 2 additional freight trains.) The
addition of two freight trains per day does not exceed the Board's
threshold for environmental analysis at 49 CFR 1105.7(e) (5) (ii).
The 14.7 average freight train count per day does not include the
following types of movements: (1) maintenance-of-way trains,
(2) light locomotive movements, (3) local and industry switching
train movements, (4) emergency trains operated under detour
authority, for snow removal, for fire or other natural disaster
purposes, and wreck removal purposes. This condition will be
effective upon consummation of the merger and will continue in
effect for 18 calendar months in total. - 278 -

22c. UP/SP, in consultation with and subject to the approval of NEA, shall retain an independent, third-party consultant to prepare a specific mitigation study to address the environmental effects on the City of Reno of the additional rail freight traffic projected as a result of the proposed marger. This study shall be prepared under the sole direction and supervision of SEA. It shall include a final mitigation plan based on a further study of the railway, highway, and pedestrian traffic flows and associated environmental effects on the City of Reno. This study would tailor mitigation to address environmental effects such as safety, hazardous materials transport, air quality, noise and water quality. UP/SP shall comply with the final mitigation plan developed under this study.

The study, which shall be completed within 18 months from the date of consummation of the merger, shall include the following:

• Projected post-merger increases in rail freight traffic on the Sparks to Roseville line segment.

• Consultations with the City of Reno, Washoe County, the Federal Railroad Administration, affected Native American Tribes, and other appropriate Federal, state and local agencies, and other interested parties.

• Consultations with UP/SP.

Review of all existing information and studies including those prepared by the City of Reno, Washoe County and UP/SP.
 Independent analyses.

With respect to vehicular and pedestrian safety, mitigation measures that identify the number and location of highway/rail grade separations and rail/pedestrian grade separations in

· Funding options.

Submission of a draft study to the public for review and comment and then issuance of a final mitigation study.

22d. SEA will submit the final mitigation study and its recommendations to the Board, which shall then issue a decision imposing mitigation. In the event UP/SP and the City of Reno and other appropriate parties reach agreement on a final mitigation plan, UP/SP and the City of Reno shall immediately notify SEA, and the Board will take appropriate action consistent with such an

Chickasha, OR, to Wichita, ES:

City of Wichita. Kansas

23a. UP/SP shall operate no more than a daily average count of 6.4

trains per day through the City of Wichita. (This reflects the
Base Year daily average of 4.4 trains plus 2 additional trains.)

The addition of two trains per day essentially maintains the
environmental status quo. The 6.4 average train count per day
does not include the following types of movements:

(1) maintenance-of-way trains, (2) light locomotive movements,

(3) local and industry switching train movements, (4) emergency
trains operated under detour authority, for snow removal, for fire
or other natural disaster purposes, and wreck removal purposes.

This condition will be effective upon consummation of the marger
and will continue in effect for 18 calendar months in total. City of Wichita. Kansas

Pinance Docket No. 32760 23b. For the purpose of monitoring the preceding condition, UP/SP shall file on a monthly basis with the Board verified copies of station passing reports of train movements through Wichita, KS, for each day of each preceding month in the specified 18-month period. These reports shall also identify those train movements, specified in the above condition, that are excluded from the 6.4 trains per 23c. UP/SP, in consultation with and subject to the approval of SEA, shall retain an independent, third-party consultant to prepare a specific mitigation study to address the potential environmental effects on the City of Wichita of the additional rail freight traffic projected as a result of the proposed merger. This study shall be prepared under the sole direction and supervision of SEA. It shall include a final mitigation plan based on a study of the railway, highway, and pedestrian traffic flows and associated environmental effects on the City of Wichita. This study would tailor mitigation to address environmental effects such as safety, hasardous materials transport, air quality, and noise. UP/SP shall comply with the final mitigation plan developed under this study. study. The study, which shall be completed within 18 months from the date of consummation of the merger, shall include the following:

Projected post-merger increases in rail freight traffic on the Chickasha to Wichita line segment.

Consultations with the City of Wichita, Sedgwick County, the Federal Railroad Administration, affected Native American Tribes, and other appropriate Federal, state and local agencies, and other interested parties.

Consultations with UP/SP.

Review of all existing information and studies including those prepared by the City of Wichita, Sedgwick County and UP/SP.

Feasibility of a bypass route.

With respect to vehicular and pedestrian safety, mitigation measures that identify the number and location of highway/rail grade separations in Wichita.

Funding options.

Submission of a draft study to the public for review and comment and then issuance of a final mitigation study. and then issuance of a final mitigation study. 23d. SEA will submit the final mitigation study and its recommendations to the Board, which shall then issue a decision imposing mitigation. In the event UP/SP and the City of Wichita and other appropriate parties reach agreement on a final mitigation plan, UP/SP and the City of Wichita shall immediately notify SEA, and the Board will take appropriate action consistent with such an RAIL YARDS AND INTERMEDIAL PACILITIES D. UP/SP shall consult with appropriate state and local agencies to develop noise Abstement plans for rail yards in the following cities: Herington, KS; Salem, IL; and Bellmead, TX. UP/SP shall advise SEA of the results of these consultations and provide SEA with a copy of any resulting noise abstement plans. 24. 25. To further facilitate the improvement of air quality in the States of California and Illinois, UP/SP shall consult with appropriate state and local air quality officials concerning the intermodal facilities in East Los Angeles, CA, and the Global II and Canal Street intermodal facilities in Chicago, IL. UP/SP shall advise SEA as to the status and the results of these consultations. - 280 -

Finance Docket No. 32760 ARAMDOMODETS ' The following 15 abandonments and two related discontinuances are subject to the mitigation conditions specified below: • Gurdon to Camden, AR (UP) - Docket No. AB-3 (Sub-No. 129%). • Whittier Junction to Colima Junction, CA (UP) - Docket No. AB-33 (Sub-No. 93X) . Magnolia Tower to Melrose, CA (UP) - Docket No. AS-33 (Sub-No. 94X).

• Alturas to Mendel, CA (SP) - Docket No. AB-12 (Sub-No. 184X). · Towner to MA Junction, CO (UP): - Docket No. AB-3 (Sub-No. 130) - UP Abandonment. - Docket No. AB-8 (Sub-No. 38) - Discontinuance of Service by SP • Edwardsville to Madison, IL (UP) - Docket No. AB-33 (Sub-No. 98X).
• DeCamp to Edwardsville, IL (UP) - Docket No. AB-33 (Sub-No. 97X).
• Barr to Girard, IL (UP) - Docket No. AB-33 (Sub-No. 96).
• Whitewater to Newton, KS (UF) - Docket No. AB-3 (Sub-No. 132X). Hope to Bridgeport, RS (UP):
 Docket No. AB-3 (Sub-No. 131) - UP Abandonment.
 Docket No. AB-8 (Sub-No. 37) - Discontinuance of Service by SP. · Iowa Junction to Manchester, LA (UP) - Docket No. AB-1 (Sub-No. 133X).

• Seabrook to San Leon, TX (SP) - Docket No. AB-12 (Sub-No. 187X).

• Suman to Benchley, TX (SP) - Docket No. AB-12 (Sub-No. 185X).

• Troup to Whitehouse, TX (UP) - Docket No. AB-3 (Sub-No. 134X).

• Little Mountain Junction to Little Mountain, UT (UP) - Docket No. AB-33 (Sub-No. 99X). General At all abandonment locations, the general mitigation conditions listed below apply to reduce or avoid potential environmental impacts. UP/SP shall observe all applicable Federal, state, and local regulations regarding handling and disposal of any waste materials, including hazardous waste, encountered or generated during salvage of the proposed rail line. UP/SP shall dispose of all materials that cannot be reused in accordance with state and local solid waste management regulations. UP/SP shall restore any adjacent properties that are disturbed during right-of-way salvaging activities to pre-salvaging conditions. Before undertaking any salvage activities. UP/SP shall consult with any potentially affected American Indian Tribes adjacent to, or having a potential interest in, the right-of-way. 30. UP/SP shall use Best Management Practices to encourage regrowth in disturbed areas and to stabilize disturbed soils. UP/SP shall use appropriate signs and barricades to control traffic disruptions during salvage operations at or near grade crossings. 32. -UP/SP shall restore roads disturbed during salvage activities to conditions as required by state or local jurisdictions. 33. UP/SP shall comply with all applicable Federal, state, and local regulations regarding the control of fugitive dust. Fugitive dust emissions created during salvage operations shall be minimised by using such control methods as water spraying, installation of wind barriers, and chemical treatment during salvaging. - 281 -

- 34. UP/SP shall control temporary noise from salvage equipment through the use of work hour controls and maintenance of muffler systems
- 35. If previously unknown archaeological remains are found during salvage operations, UP/SP shall cease work in the area and immediately contact the appropriate State Historic Preservation Officer.
- 36. As appropriate, UP/SP shall use appropriate technologies, such as silt screens, to minimize soil erosion during salvaging. UP/SP shall disturb the smallest area possible around streams and tributaries and shall revegetate disturbed areas immediately following salvage operations.
- 37. As appropriate, UP/SP shall transport all hazardous materials generated by salvage activities in compliance with U.S. Department of Transportation Hazardous Materials Regulations (49 CFR parts
- 38. As appropriate, UP/SP shall assure that all culverts are clear from debris to avoid potential flooding and stream flow alteration, in accordance with Federal, state and local regulations.
- 39. As appropriate, UP/SP shall obtain all necessary Federal, state, and local permits if salvaging activities require the alteration of wetlands, ponds, lakes, streams, or rivers, or if these activities would cause soil or other materials to wash into these water resources. UP/SP shall use appropriate techniques to minimize impacts to water bodies and wetlands, such as positioning salvaging equipment on barges, matting, or skids.

Specific The following mitigation conditions specifically apply to the abandonment under which they appear.

Gurden to Canden, AR (UP) Docket No. AB-3 (Sub-No. 1292)

- 40. UP/SP shall limit salvage activities within 1,000 feet of residences to daytime hours to miligate noise impacts on nearby
- 41. To further assess the potential occurrence of threatened and endangered plants, UP/SP shall coordinate with U.S. Fish & Wildlife Service and the Arkansas Department of Game and Fish, prior to salvage activities, to determine whether surveys of vegetation types in areas of potential disturbance due to salvage activities are needed and shall conduct any such surveys during an appropriate time of year.
- 42. UP/SP shall retain its interest in and take no steps to alter the through-plate girder bridge at MP 436.70, until the Section 106 process of the Mational Historic Preservation Act (16 USC 4705, as amended) has been completed for this structure.
- 43. Prior to the start of salvage operations in the vicinity of the three Emergency Response Motification System (hazardous waste) spill sites, UP/SP shall contact the Arkansas Pollution Control and Ecology Department, Hazardous Waste Division, to confirm that remediation has been completed to agency satisfaction.

Whittier Jumetica to Colina Jumetica, CA (UP) Docket No. AB-33 (Sub-No. 932)

No specific mitigation is imposed.

Magnelia Tower to Helrese, CA (UP) Docket Mo. AB-33 (Sub-No. 942)

44. UP/SP shall retain its interest in and take no steps to alter the Magnolia Tower or WP Oakland Depot until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for these structures.

Alturas to Wendel, CA (SP) Docket No. AB-12 (Sub-No. 1842)

45. UP/SP shall retain its interest in and take no steps to alter the integrity of the 9 eligible and 11 potentially eligible process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for these sites.

Sage to Leadville, CO (SP)
Pocket No. AB-8 (Sub-No. 36%) - Discontinuance of Service by

46. UP/SP shall provide continued access for Viacom International, Inc. to the Eagle Mine site to facilitate ongoing remediation activities.

Melta to Cason City, CO (SP)
Docket No. AB-8 (Sub-No. 39) - Discontinuance of Service by

No specific mitigation is imposed.

Towner to NA Junction, CO (UP)
Docket No. AB-3 (Sub-No. 130) - Abandonment by UP
Docket No. AB-8 (Sub-No. 38) - Discontinuance of Service by
SP

- 47. To further assess the potential occurrence of the seven threatened and endangered species of plants and animals, UP/SP shall coordinate with U.S. Fish & Wildlife Service and the Colorado of potential disturbance due to determine if surveys in areas shall conduct any such surveys during an appropriate time of the year.
- 48. UP/SP shall consult with the Colorado Department of Public Health and Environment to confirm that assessment and remediation has been completed to the agency's satisfaction.

Edwardsville to Madison, IL (UP) Docket No. AB-33 (Sub-No. 98%)

49. Prior to the start of abandonment activities in the vicinity of any known hazardous waste sites, UP/SP shall consult with the Illinois Environmental Protection Agency to assess procedures necessary to address issues related to the sites.

DeCamp to Edwardsville, IL (UP) Decket No. AB-33 (Sub-No. 97E)

50. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the one historic bridge until the Section 106 process of the Mational Historic Preservation Act (16 U.S.C. 4701, as amended) is completed.

Arkansas - Pine Bluff (Bast)

79. Prior to construction. UP/SP shall provide final plans to the Arkansas DOT and appropriate local agencies for review.

Arkaness - Pine Bluff (West)

80. Prior to construction, UP/SP shall provide final plans to the Arkansas DOT and appropriate local agencies for review.

Arkansas - Taxarkana

81. Prior to construction, UP/SP shall provide final plans to the Arkansas DOT and appropriate local agencies for review.

California - Lathrop

82. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the Sharpe Army Depot, until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 4701, as amended) has been completed for this property.

California - Stockton (El Pifal)

83. UP/SP shall monitor noise resulting from train operations over the connection and implement mitigation measures to control excessive wheel squeal.

California - West Colton (UP to EP)

No specific mitigation is imposed.

California - West Colton (SP to UP)

No specific mitigation is imposed.

Colorado - Denver (Utah Jet.)

84. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the North Yard water tower, until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for this property.

Colorado - Denver

- 85. In and near the South Platte River and associated wetland areas, UP/SP shall restrict mechanized equipment to the area required to complete construction activities.
- 86. UP/SP shall perform hydrologic and hydraulic analyses for any modifications to the South Platte River bridge, to ensure the changes would have no effect on the 100-year floodplain.
- 87. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Mater Act.

Illimote - Girard

- 88. UP/SP shall consult with the District Soil Scientist of the U.S. Department of Agriculture, Natural Resources Conservation Service, for recommendations to reduce impacts to prime farmland soils.
- 89. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.

Finance Docket No. 32760 Illinois - Sales Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act. Kansas - Kope Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act. Louisians - Kinder In and near the areas of Kinder Ditch and the fringe wetlands, UP/SP shall restrict mechanized equipment to the area required to complete construction activities. UP/SP shall design all drainage structures to maintain existing flows for the Kinder Ditch. Louisiana - Shroveport UP/SP shall coordinate the design and construction of the U.S. Highway I-71 overpass pier replacement with the Louisiana Department of Transportation and the Louisiana Division of the Federal Highway Administration. UP/SP shall monitor noise resulting from trains operating over the curved section of the connection and implement mitigation measures to control excessive wheel squeal. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act. Missouri - Dester Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act. In and near the two small wetland areas, UP/SP shall restrict mechanized equipment to the area required to complete construction activities. Missouri - Parent 99. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act. 100. In and near the wetland areas, UP/SP shall restrict mechanized equipment to the upland areas to complete construction activities. 101. UP/SP shall coordinate with the Missouri Department of Conservation prior to final design of the project to avoid adverse impacts to the state-endangered gold-striped darter. UP/SP shall not conduct in-stream construction activities during the breeding season of this species. Tomas - Carrellton 102. UP/SP shall monitor noise from train operations over the new connection and implement mitigation measures to control excessive - 288 -

- 58. UP/SP shall continue Section 106 consultation with the Texas State Ristoric Preservation Officer to determine the need and extent of a recovery and treatment program for the known archaeological
- 59. Prior to the start of abandonment activities in the areas containing copper slag ballast, UP/SP shall contact the Texas Matural Resources Conservation Commission, Maste Management Office, as required to assess procedures necessary to address issues related to the sites.
- 60. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the three deck plate girder bridges at MPs 109.73, 112.96, and 117.55, until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for these structures.

Troup to Whitehouse, TZ (UP) Docket No. AB-3 (Sub-No. 134Z)

61. Prior to the start of abandonment activities in the vicinity of any known hazardous waste sites, UP/SP shall contact the Texas Natural Resources Conservation Commission, Waste Management Division, and other appropriate agencies as necessary to assess procedures for addressing issues related to the sites.

Little Mountain Junction to Little Mountain, UT (UP) Docket No. AD-33 (Sub-No. 992)

No specific mitigation is imposed.

#### 7. CONSTRUCTION PROJECTS

Ameral
The following mitigation conditions apply to all new construction sites not on existing right-of-way and also apply to the new construction projects that result from the BMSF agreement.

- 62. UP/SP shall observe all applicable Federal, state, and local regulations regarding handling and disposal of any waste materials, including hazardous waste, encountered or generated during construction of the proposed rail line connection.
- 63. UP/SP shall dispose of all materials that cannot be reused in accordance with state and local solid waste management regulations.
- 64. UP/SP shall consult with the appropriate Federal, state and local agencies if hazardous waste and/or materials are discovered at the site.
- UP/SP shall transport all hazardous materials in compliance with U.S. Department of Transportation Mazardous Materials Regulations (49 CFR parts 171 to 180). UP/SP shall provide, upon request, local emergency management organizations with copies of all applicable Emergency Response Plans and participate in the training of local emergency staff for coordinated responses to incidents. In the case of a hazardous material incident, UP/SP shall follow appropriate emergency response procedures contained in-its Emergency Response Plans.
- 66. UP/SP shall use appropriate signs and barricades to control traffic disruptions during construction.
- 67. UP/SP shall restore roads disturbed during construction to conditions as required by state or local jurisdictions.

Finance Docket No. 32760 68. UP/SP shall obtain all necessary Pederal, state, and local permits if construction activities require the alteration of wetlands. ponds, lakes, streams, or rivers, or if these activities would cause soil or other materials to wash into these water resources. UP/SP shall use appropriate techniques to minimize impacts to water bodies and wetlands. 69. UP/SP shall use Best Management Practices to control erosion, runoff, and surface instability during construction, including seeding, fiber mats, straw mulch, plastic liners, slope drains, and other erosion control devices. Once the track is constructed. UP/SP shall establish vegetation on the embankment slope to provide permanent cover and prevent potential erosion. If erosion develops, UP/SP shall take steps to develop other appropriate erosion control procedures. UP/SP shall use Best Management Practices to encourage regrowth in disturbed areas and to stabilize disturbed soils. 70. UP/SP shall use only EPA-approved herbicides and qualified contractors for application of right-of-way maintenance herbicides, and shall limit such application to the extent necessary for rail operations. 71. UP/SP shall comply with all applicable Federal, state, and local regulations regarding the control of fugitive dust. Pugitive dust emissions created during construction shall be minimized by using such control methods as water spraying, installation of wind barriers, and chemical treatment. 72. UP/SP shall control temporary noise from construction equipment through the use of work hour controls and maintenance of muffler systems on machinery. 73. UP/SP shall restore any adjacent properties that are disturbed during construction activities to their pre-construction conditions. 74. Before undertaking any construction activities, UP/SP shall consult with any potentially affected American Indian Tribes adjacent to, or having a potential interest in, the right-of-way. If previously undiscovered archaeological remains are found during construction. UP/SP shall cease work and immediately contact the State Historic Preservation Officer to initiate the appropriate Section 106 process. Enecific The following mitigation conditions apply to the specific construction sites identified below. Arkansas - Candon UP/SP shall restrict mechanized equipment to upland areas to complete construction activities. UP/SP shall obtain and comply with all applicable permits for any construction activity within streams or wetlands. Also, UP/SP shall submit its final construction plans to appropriate state and local agencies for review. 77. Prior to construction. UP/SP shall provide final plans to the Arkansas Department of Transportation (Arkansas DOT) and appropriate local agencies for review. Arkansas - Pair Oaks Prior to construction, UP/SP shall provide final plans to the Arkansas DOT and appropriate local agencies for review. - 286 -

Temas - West Point

No specific mitigation is imposed.

Texas - Houston (Tower 26)

103. UP/SP shall monitor noise resulting from train operations over the new connection and implement mitigation measures to control excessive wheel squeal.

Texas - Bouston (Tower 87)

- .104. UP/SP shall store all construction equipment, petroleum products, and other hazardous materials outside the area of the 100-year floodplain.
- 105. Prior to construction. UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.

Taxas - Bouston (SP to UP)

106. UP/SP shall monitor noise resulting from train operations over the new connection and implement mitigation measures to control excessive wheel squeal.

Texas - Fost Worth (Ney Yard)

107. UP/SP shall monitor noise resulting from train operations over the new connection and implement mitigation measures to control excessive wheel squeal.

Turns - Port Worth (UP to SP)

108. UP/SP shall monitor noise resulting from train operations over the new connection and implement appropriate mitigation measures to control excessive wheel squeal.

Constructions That Result from the BMSP Agreement

Richard, Ch

No specific mitigation is imposed.

Stockton, Ch.

No specific mitigation is imposed.

Robstone, TI

No specific mitigation is imposed.

## APPENDIX E: MET ENISSIONS (AIR QUALITY)

## MET ENISSIONS CONSIDERING MITTERTION MEASURES

AQC		NC				PH-10
50		10.17	Name and Address of the Party o			24.76
502	AZ Pime	15.31	52.99 71.35			COMPANY OF THE PARK OF THE PAR
503		10.89	64.29	143.86		
501		11.41	62.65	151.93		
24		13.21	65.40	MINISTER STREET, AND ADDRESS OF THE PARTY OF		7.32
27	CA Mortheast Plateau	-4.30	80.34 -5.39			MINISTRAL AND
28	CA Secremento Valley	-10 22	-39.90			
30	CA San Francisco Bay Area	10.78	39.39			
31		12.69	124.73			9.85
508		37.83	180.82	CONTROL OF THE PARTY OF THE PAR		CONTRACTOR STREET
34	CO Commenche	-3.07	-9.54		28.72	-1.55
25		-80.91	-195.49	-2084.93	-106.04	-39.31
36	Control of the Contro	41.51	148.26	877.82	76.60	22.14
37	CO Yearns	22.61	70.29	\$26.11 275.03 - 1337.25	38.12	11.43
**		-35.68	76.06	- 1337.25	16.13	8.75
91	IA Southeast Iova	-5.43	4.82	-204.60	2.61	-14.2C -2.15
93	IA Southwest Iowa	-37.70	102.52	-1669.40	55.60	-13.08
65	IL Burlington-Reokuk	-4.93	-15.33	STREET, sandards district	-8.31	-2.49
67	IL Metropolitan Chicago	2.26	38.12	285.34	20.60	6.19
69	IL Metropolitan Quad Cities	-28.46	29.78	-508.98	12.22	-11.16
70	IL Metropolitan St. Louis IL Morth Central Illinois	-2.64	-1.11	-142.00	-11.41	0.82
71	IL North Central Illinois IL Rockford-Janesville-Beliot IL Southeast Illinois	-9.39	23.57	-408.83	12.79	-3.31
74	IL Southeast Illinois	-7.48	32.22	-373.86	17.47	-2.27
94	IL Southeast Illinois RS Metropolitan Kansas City	39.20	-114.95	-990.68	62.48	18.69
95	KS Northeast Kansas	-64.72	-201.23	-1506.28	-72.86	-17.68
96	KS Northeast Kanses KS North Central Kanses KS Northwest Kanses	-28.66	-09.11	-667.05	-48.33	-14.46
97	KS Northwest Kansas KS South Central Kansas	3.00	9.33	69.81	5.06	1.51
100	RS Southwest Kansas	57.98 -42.10	100.28	1349.43	97.78	29.26
138			-130.90	198.55	-71.00 14.39	-21.24
85	WE Metro Omaha-Council Bluffs	-19.99	-15.28	-634.30	-0.29	-0.82
145			5.38	40.05	2.90	0.87
12	ME Mebraska MM New Mexico Southern Border	58.10	211.58	1240.49	114.76	30.15
154	MM Morthoastern Plaine	11 00	36.94	485.37	79.88	16.37
155	IM Pecos-Permian Basin	7.64	23.75	276.50	20.04	3.05
147	NV Nevada	-22.61	152.07	-1330.41	82.92	-5.27
184	MV Northwest Nevada OK Central Oklahoma	-10.17	0.83	-353.66	0.45	-4.25
185	OK Merth Central Oklahoma	34.84	106.31	810.77	8.75	17.55
187	OK MOLEUMSEGIR OKTSTOWS	13.39	41.64	\$17.32 311.72	37.49	6.76
189	OK Southwestern Oklahome	20.69	64.32	462.44	34.89	10.44
190	OR Central Oregon	13.59	48.21	294.93	26.15	7.02
191	OR Eastern Oregon OR Portland	-50.35	42.63	-1889.72	33.73	20.02
22	TX Shreveport-Texarkane-Tyler	36.77	139.61	679.92	59.05	22.25
106	TX So. Louisiana-SE Texas	18.90	58.75	439.80	83.60	9.53
153	TX El Paso-Les Cruces-Almagordo	13.78	122.61	33.33	66.50	9.11
210	TX Abilemo-Wichita Falls	45.00	194.89	849.01	108.71	24.19
211	TX Amerillo-Lubbock TX Austin-Naco	39.51	122.05	\$29.59	66.63	19.94
215	TE Morrosolitan Dallag-Pt. Morth	-27.02	-64.00	-628.74	-45.56	-13.63
217	TX Netropolitan Dellas-Pt. Worth TX Netropolitan San Antonio TX Hidland-Odessa-San Angelo	-43.63	-131.00	-360.23 -1067.91	-70.12	-0.14
218	TX Midland-Odessa-San Angelo	28.03	159.27	392.38	06.29	16.09
219	UT Viah UT Massich Front	18.97	108.60	159.18	58.91	9.65
228	MA Olympic-Morthwest Machington	-05.51	-257.43	-2020.39		-42.92
229	WA Puget Sound	4.58	19.99	15.03 67.60	1.86	3.12
239	WI Southeastern Wisconsin	0.81	2.51	10.62	7.25	0.41
242	WI MOTIODOLLTON Chevenne	8.09	110.02'	-69.92	59.68	6.72
243	MY Myoming	-27.81	158.91	-1531.43	96.19	-7.35

NEW YORK DOCK CONDITIONS Finance Docket No. 28250 APPENDIX III Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. (formerly Sections 5(2) and 5(3) of the Interstate Commerce Act), except for trackage rights and lease proposals which are being considered elsewhere, are as follows: Definitions .- (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed. (b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions. (c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the resuit of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction. (d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for s longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of Section 7(b) of the Washington Job Protection Agreement of May 1936. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continua-tion 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. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which

such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this Appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employse is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement. Notice and Agreement or Decision .- (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days' written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner. Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this Section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures: (1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint (2) No later that twenty (20) days after a referee has been designated a bearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute. (4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall Se paid by the party incurring them. (b) No change in operations; services, facilities or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered. Displacement allowances .- (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced. Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases. If a displaced erployee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained (b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline. . - 2 -

.. (c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause. Dismissal allowances. -(a) A dismissed employee shall be paid s monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to onetwelfth of the compensation received-by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases. (b) The dismissal allowance of any, dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of Section 5. " (c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received. (d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, fallure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement. Separation Allowance. - A dismissed employee entitled to protection under this appendix, may at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump-sum payment computed in accordance with Section 9 of the Washington Job Protection Agreement of May 1936. 8. Fringe benefits. - No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transporta-tion, hospitalization, pensions, reliefs, et cetera, under the same con-ditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which

- Moving expenses. Any employee retained in the service of the reilroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working cays, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 80 days after the date on which the expenses were incurred.
- 10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.
- 11. Arbitration of disputes. -(a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except Sections 4 and 12 of this Article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refor a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party falls to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization repre-(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed. (d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them. (e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee. 12. Losses from home removal. -(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move (1) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person. (ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract. (III) If the employee holds an unexpired lease of a dwelling occupled by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lesse. (b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this Sec-

(c) No claim for loss shall be paid under the provisions of this Section unless such claim is presented to the railroad within 1 year after the date the employee is required to move. (d) Should a - controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these metters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real extate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endesver by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and falling such agreement, either party may request the National Mediation Board to designate within 10 days a third appraisar whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appreiser selected by such party. ARTICLE H Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee. If such a terminated or furloughed employee who had made a request under Sections 1 or 2 of the Article II falls without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfait all rights and benefits under this appendix. ARTICLE III Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad

and employees of any other enterprise within the definition of common carrier by railroad in Section 1(3) of Part I of the Interstate Commerce Act, as amended, in which reliroed has an interest, to which reliroed provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning cerrier and each using cerrier; provided that said cerriers shall establish one convenient central location for each terminal or other enterprise for receipt of one such application which will be effective as to all said carriers and railroad: shall notify such employees of this requirement and of the location for receipt of the application. employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accor-ARTICLE IV Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and In the event any dispute or controversy arises between the relirond and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration. ARTICLE V It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 USC 11347 before February 5, 1976, and under Section 565 of Title 45. In so doing, changes in wording and organization from arrangements earlier

- developed under those sections have been necessary to make such benefits applicable to transactions as defined in Article I of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 USC 11347 before February 5, 1976 and under Section 565 of Title 45.
- In the event any provision of this appendix is held to be invalid or otherwise unenforcesble under applicable law, the remaining provisions of this appendix shall not be affected.

#### 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.

#### IT IS AGREED:

#### ARTICLE 1 - ELECTION OF BENEFITS

The labor Protective Conditions as set forth in the <u>New York Dock Conditions</u> 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 <u>New York Dock Conditions</u> and other agreements or protective arrangements, such employee shall be furnished their <u>New York Dock Conditions</u> 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 thifty (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).

Employes 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.