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October 11, 1996

BY HAND

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Twelfth Street and Constitution Avenue, N.W.
Room 2215
Washington, D.C. 20423

Re: Finance Docket No. 32760, Union Pacific Corp., et al. -- Control & Merger -- Southern Pacific Rail Corp., et al.

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket are the original and twenty copies of Applicants' Reply to LCRA's Petition for Clarification (UP/SP-288). Also enclosed is a 3.5-inch disk containing the text of this pleading in WordPerfect 5.1 format.

Please note that Applicants' Reply has two versions: one, which is being served on all parties of record, contains appendix material that is redacted for the public file, and the other contains appendix material that includes "Highly Confidential" information. The "Highly Confidential" version is clearly marked and is being separately filed with the Board under seal. The Board is being provided with 20 copies of both versions. The "Highly Confidential" version is also being served on parties on the Restricted Service List that have indicated that they will adhere to the restrictions of the protective order.

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

Sincerely,

Michael L. Rosenthal

Enclosures

STB FD 32760 10-10-96 D 86722

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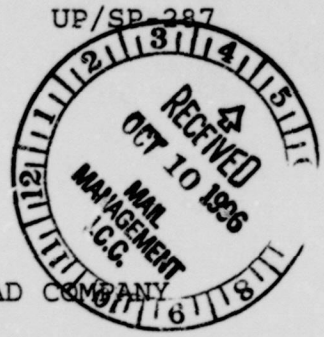
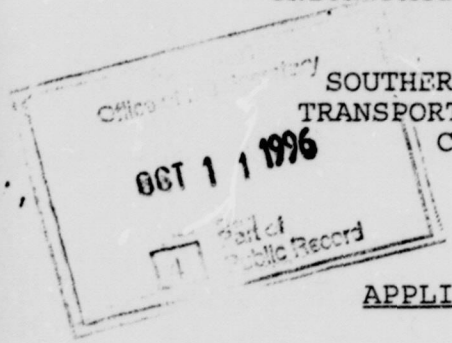
UP/SP-287



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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



APPLICANTS' REPLY TO RAILCO'S CONDITION REQUEST

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Attorneys for Applicants

October 10, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

APPLICANTS' REPLY TO RAILCO'S CONDITION REQUEST

The primary applicants, UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL and DRGW,[1/] hereby reply to "Railco, Inc.'s Reply in Support of Its Request for Clarification or Modification," dated September 20, 1996.[2/] Railco's submission fails both procedurally and on its merits, and should be rejected.

In its submission, Railco argues that because Applicants' January, 17, 1996 settlement with Utah Railway ("URC") grants URC "the right in common with UP/SP to serve the [formerly SP-exclusive] Savage Industries, Inc. Savage Coal Terminal coal loading facility located on the so-called CV Spur near Price, Utah," the Board should grant Railco, which also operates an SP-exclusive coal loading facility near Price, Utah, access to URC. Railco is incorrect in its

---

1/ The acronyms used herein are the same as those in Appendix B to Decision No. 44.

2/ Although Railco calls its submission a "reply," it is not a reply to any of Applicants' filings and thus Applicants do not believe it is necessary to seek permission to file this reply.

assertion (p. 5) that Applicants do not oppose this request. The present submission is Railco's first filing that has called for any substantive response by Applicants,[3/] and Applicants vigorously oppose Railco's condition request.

3/ On March 21, 1996, eight days before the March 29 deadline for submitting of requests for conditions, Railco filed a "Notice of Opposition to Merger and Intent to Participate in Proceedings." See Exhibit A. In its Notice, Railco indicated that it was opposed to the merger because Applicants' settlement agreement with URC granted URC the right to serve the Savage Coal Terminal near Price, Utah, but not Railco's nearby facilities. Railco "request[ed] that its opposition [to the merger] be noted." Because Railco sought no condition, Applicants had no occasion to respond to Railco in their rebuttal filing on April 29 or in their June brief.

Railco made no further submissions related to the merger until almost one month after the Board's voting conference. Then, in a letter to the Board and others dated July 29, Railco asked the Board to amend the URC settlement agreement to require that URC be granted the same access to Railco's loadout facility as it received to Savage's facility. See Exhibit B. In an August 7 letter to the Secretary, Applicants indicated that they did not intend to respond to Railco's request because it was clearly out of time and any request to reopen the Board's decision should be made after the written decision was served. See Exhibit C.

In a letter to the Board and others dated August 21, counsel for Railco complained that he had not "received [any] reply" to his July 29 letter, and asked the Board for "written confirmation" that the merger would not "affect Railco's access to coal markets." See Exhibit D. Counsel's complaint that he had received no reply to his July 29 letter was misguided. In Decision No. 44, served August 12, the Board had noted that several parties had improperly submitted various requests for reconsideration or clarification after the voting conference but before the written decision had been issued. The Board explained that those parties were required to await the written decision before seeking clarification or other forms of relief. Decision No. 44, p. 13 n.18.

Finally, on September 20, Railco filed the present submission.

Railco's submission is a request for a condition that should have been filed on March 29, 1996. See Decision No. 9, p. 15 (procedural schedule). Railco was clearly aware of Applicants' settlement with URC well before the March 29 deadline. In fact, on March 21 Railco filed a "Notice of Opposition to Merger and Intent to Participate in Proceedings," in which it complained that the URC settlement was unfair to Railco. However, Railco never asked the Board to condition the merger on Applicants' granting URC access to Railco; Railco simply "request[ed] that its opposition [to the merger] be noted." Railco took no further steps to protect its interests.

Railco's attempt to seek a condition, more than a month after the Board has issued its final decision approving the merger, comes far to late. Railco offers no excuse for its delay, and its request should be denied on that basis alone.

If Railco's submission is viewed as a petition to reopen, it is out of time. The deadline for such petitions was September 3, seventeen days before Railco's filing. 49 C.F.R. § 1115.3(e).

Further, even if it had been timely, Railco's submission would not come close to satisfying the Board's rigorous standards for reopening a final decision. Petitions to reopen are granted "only in the most extraordinary

circumstances." Docket No. AB-33 (Sub-No. 55), Union Pacific R.R. -- Abandonment -- Between Echo & Park City & Between Keetley Junction & Phoston, In Summit & Wasatch Counties, UT, Decision served July 11, 1990, p. 2. The Board will reconsider a final decision only upon a showing of material error, new evidence or changed circumstances. 49 C.F.R. § 1115.3(b). Railco does not attempt to allege material error, new evidence or changed circumstances, and Railco's submission should be denied on this ground alone. See Finance Docket No. 31231, IC Industries, Inc. -- Securities Notice of Exemption Under 49 CFR 1175, Decision served Apr. 3, 1989, p. 1 n.3.

In particular, Railco cannot properly claim that the Board committed material error in failing to grant a condition Railco never requested. Railco's submission presents the Board with nothing more than arguments Railco could have made but failed to make earlier in the proceeding -- clearly not the sort of new evidence or changed circumstances required to support reopening. See 49 C.F.R. § 1115.3(c); see also, e.g., Docket No. AB-3 (Sub-No. 56), Missouri Pacific R.R. -- Abandonment -- In Atchison, Jackson, Nemaha, & Marshall Counties, KS, Decision served June 30, 1989, p. 2.

Railco's request also fails on its merits. Railco's complaint is that Applicants' settlement agreement with URC will give Railco's competitor, Savage, a new rail

transportation option that Railco will not have.[4/] But the Board has consistently rejected such claims for relief. Board and ICC precedent clearly establish that where a shipper's concern is not that it is losing a transportation option, but that its competitor is gaining one, "a condition requiring that a settlement agreement be changed to improve a particular shipper's competitive situation is not proper." Finance Docket No. 32549, Burlington Northern, Inc., & Burlington Northern R.R. - Control & Merger -- Santa Fe Pacific Corp & Atchison, Topeka & Santa Fe Ry., Decision served Aug. 23, 1995, p. 99.

The Board consistently relied upon this principle in Decision No. 44 to deny relief to parties complaining that, as a result of the merger and settlement agreements, they would be disadvantaged by the improved transportation options their competitors would gain. See Decision No. 44, pp. 183 (denying requests by MWBC, MFU and Montana's Governor Racicot to broaden the reach of the competitive options created by the

---

4/ Railco's submission (p. 2 n.1, p. 5) includes the inflammatory charge that Applicants made "knowingly false representations" and "submitted false testimony to the Board" concerning the Savage loadout. Applicants consider this a very serious accusation, and thus undertook a comprehensive review of the pleadings to determine the basis for Railco's charge -- since counsel could not recall any testimony or representations along the lines challenged by Railco. Because Applicants were unable to identify any such statement, we contacted Railco's counsel, who acknowledged that his accusation was in error and that Applicants in fact made no such statement. Railco has agreed to withdraw its accusation that Applicants mispresented the facts.

BNSF proportional rate agreement, even though "the proportional rate agreement, 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"), 190 (rejecting FPC's request because FPC "is not concerned that it is losing a transportation option, but that its competitors may be gaining one"), 191 ("USG's claim of competitive harm (vis-a-vis its Nevada-based competitors) does not warrant regulatory relief"), 193 (denying Weyerhaeuser's request for relief where claim was that certain facilities would not benefit from the pro-competitive provisions of the BNSF agreement).

Moreover, contrary to Railco's suggestion (pp. 2-3), Applicants' settlement with URC was not intended to address any competitive issues raised by the UP/SP merger. As Applicants explained in filing the URC settlement on February 2, they entered into that settlement to resolve a dispute about Applicants' ability to grant trackage rights to BNSF over a segment of joint SP/URC track. See UP/SP-74, pp. 1-2. Applicants' decision to resolve this contract dispute by granting URC access to additional Utah coal was a business decision, although it was unquestionably pro-competitive from the point of view of coal producers and consumers. Indeed, a witness for Kennecott Energy, a Colorado coal producer, testified that with URC's access to the Savage loadout

facility, "I can't think of any mine [in Utah] that couldn't truck to the Utah Railway and have two-for-one access." McFarlen Dep., Apr. 10, 1996, p. 80.

Finally, Railco's claim that it will be disadvantaged by the increased transportation options made available to its competitors makes no sense even on its own terms. Railco claims that it competes with Savage to load coal that is trucked to the loading facilities from nearby mines. Railco is apparently concerned about its ability to attract coal producers to truck coal to its facilities. But UP/SP will have no interest in allowing URC to capture all the area coal traffic at the Savage facilities. To the contrary, UP/SP will have every incentive to encourage area producers to truck their product to Railco. Railco's fears are unfounded.

Respectfully submitted,

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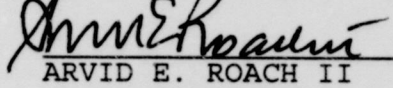

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Attorneys for Applicants

October 10, 1996

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 10th day of October, 1996, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

Director of Operations
Antitrust Division
Suite 500
Department of Justice
Washington, D.C. 20530

Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

Michael L. Rosenthal

EXHIBIT A

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760

UNION PACIFIC CORPORATION, et al.

NOTICE OF OPPOSITION TO MERGER AND
INTENT TO PARTICIPATE IN PROCEEDINGS

Please take notice that Railco, Inc., a Utah corporation engaged in loading coal from Utah coal mines onto the rail at a location in Carbon County, Utah, opposes the proposed merger of Union Pacific Railroad with Southern Pacific Railroad and intends to participate in these proceedings. Railco opposes the proposed merger because the merger as presently contemplated will substantially reduce competition among coal load out facilities in the Carbon and Emery County area and will unlawfully and unfairly discriminate against Railco.

Railco, Inc. is an independent load out operation situated on real property contiguous to the Savage Coal Terminal, near Price, Utah. Savage uses the same rail spur as Railco, Inc. and both companies compete for the privilege of loading coal for rail shipment from the surrounding coal mines. Union Pacific recently reached an agreement with Utah Railway Company that would allow Utah Railway access to the Savage Coal Terminal but will not allow Utah Railway access to Railco's facility, even though it is right next to Savage. Coal contracts between producers and users typically specify that

the coal will be shipped via a particular railroad. Because of this disparate treatment, Railco will be precluded from obtaining any loading contracts from coal producers that specify shipment of their coal via Utah Railway. Such discriminatory treatment will eliminate fair competition and should not be condoned.

In addition, Railco is advised that Union Pacific has also made concessions regarding price and shipping terms of coal to some coal producers in the Carbon and Emery County area, but will not grant these same terms and concessions to other coal producers. Such favorable terms and concessions made to only some producers will discriminate unfairly among the coal producers and will reduce or eliminate fair competition in the market. Any such unfair treatment among Railco's customers that adversely affect that customer's ability to compete in the market place, will also adversely affect Railco.

Railco requests that its opposition be noted and that counsel be advised at the address below, of all further proceedings in this matter.

Dated this 21 day of March, 1996.

Carl E. Kingston
3212 South State Street
Salt Lake City, Utah 84115
Phone: (801) 486-1458

Counsel for Railco, Inc.

EXHIBIT B

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JUL 30 1996

ADMITTED TO PRACTICE IN UTAH, ARIZONA, COLORADO AND NEVADA.

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July 29, 1996

Surface Transportation Board
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Washington, D.C. 20423-0001

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U.S. Department of Justice
Antitrust Division, Transportation Section
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The Honorable Robert Bennett
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The Honorable James V. Hansen
2466 Rayburn House Office Building
Washington, D.C. 20510

The Honorable Enid Greene
515 Cannon Building
Washington, D.C. 20510

The Honorable William H. Orton
440 Cannon Building
Washington, D.C. 20510

RE: Pending UP/SP merger -- anticompetitive impact on Railco, Inc.

Ladies and gentlemen:

I represent Railco, Inc. Railco owns and operates a coal loadout facility just south of Price, Carbon County, Utah. Railco's loadout is on the same railroad spur and within shouting distance of a similar loadout owned by Savage Industries, Inc.

On January 17, 1996, Union Pacific, Southern Pacific and Utah Railway entered into a Settlement Agreement (the Utah Railway Agreement), which provided in part:

I. Trackage Rights

c) UTAH shall have the right in common with UP/SP to serve the Savage Industries, Inc. Savage Coal Terminal coal loading facility located on the so-called CV Spur near Price, Utah.

2. Additional Coal Mine Access

a) In addition to the coal mine access granted in Section 1.c), UP/SP also grant UTAH access to Cyprus Amax' Willow Creek Mine adjacent to the SP main line near Castle Gate, Utah ....

4. Term

... the grants of rights under Sections 1 and 2 shall be effective only upon UP's acquisition of control of SP.

On its face the Utah Railway Agreement gives Utah Railway access rights to the Savage loadout but not to the Railco loadout. This would give Savage a virtual monopoly for the business of all coal producers using Utah Railway. This competitive advantage could eventually lead to Railco's demise.

By letter dated March 12, 1996, counsel for Railco notified Union Pacific of this concern, and asked that the Utah Railway Agreement be modified to allow Utah Railway access to the loadout facilities of both Savage and Railco. Union Pacific did not respond. On or about March 21, 1996, Railco filed and served its Notice of Opposition to Merger and Intent to Participate in Proceedings (attached and incorporated here by reference). Railco was not advised of further proceedings as requested, and its concerns were apparently not addressed by the Surface Transportation Board.

At the July 3 voting conference on the proposed UP/SP merger, the Surface Transportation Board voted to approve the merger, subject to a list of 35 recommended conditions including the following:

> (11) We recommend that the Board impose as a condition the terms of the Utah Railway agreement. This recommendation reflects our view that, for certain coal shippers, the rights provided for in the Utah Railway agreement will ameliorate the competitive harm that would be generated by an unconditioned merger.
>
> (35) Finally, we recommend that the Board deny all requests for conditions except those we have specifically indicated should be granted in whole or part.

One of the major concerns raised throughout by opponents of the merger, including the Department of Justice and the Department of Transportation, was the possible antitrust and other anticompetitive consequences. Those consequences remain very much a reality for Railco. Unless the present state of affairs changes, upon final approval of the merger Savage will be granted an effective monopoly over Utah Railway business for which Railco is now able to compete.

Railco respectfully requests that the Utah Railway Agreement be amended to include, and that the Surface Transportation Board include in its final approval, a condition that Utah Railway be granted the same access to Railco's loadout facility as it is given to Savage's loadout facility. I look forward to your reply.

Sincerely,

F. Mark Hansen

2361-4.001

EXHIBIT C

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August 7, 1996

BY HAND

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Room 2215
12th St. & Constitution Ave., N.W.
Washington, D.C. 20423

Re: Finance Docket No. 32760, Union Pacific Corp., et al. -- Control & Merger -- Southern Pacific Corp., et al.

Dear Secretary Williams:

The Applicants are in receipt of a July 30 letter to Chairman Morgan from Dow, and an August 2 letter, corrected August 5, from KCS to Chairman Morgan replying to Dow. Dow's letter reargues a request for various trackage rights in association with a right to build in to Dow's facility at Freeport, Texas, which the Board voted on July 3 to grant in part and deny in part. We repeat what we have said in response to similar submissions by Wichita and Amtrak: The record is closed; the Board has not yet issued its written decision memorializing the matters it voted upon on July 3; and this is not the time to be seeking to reargue, change or "clarify" a Board decision that has not yet been issued. While the Applicants strongly disagree with Dow's arguments, we do not propose to respond unless requested to do so by the Board.

The Applicants are also in receipt of a July 29 letter from Railco, Inc., to the Board, the Applicants, Utah Railway, DOJ and various Members of Congress asking that the Applicants' settlement agreement with Utah Railway (filed in this proceeding on February 2) be changed to allow Utah Railway to serve a Railco loadout facility at Savage, Utah, that is solely served by SP. Railco was an active party to the case, and made no such request in the comments it filed on March 21, which simply opposed the merger. This was no inadvertent omission on Railco's part, since it advised UP in a letter dated March 22 that it would withdraw its opposition if UP gave it the relief it is now asking the Board to grant. Railco's request should be denied as clearly out of time. It

should also be denied because, among other reasons, it is simply one more of a large number of requests by shippers -- all of which the Board voted on July 3 to reject -- which seek to add competition that does not exist now rather than to rectify any loss of competition that the merger would cause.

Sincerely,

Arvid E. Roach II

cc: All Parties of Record

EXHIBIT D

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August 21, 1996

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The Honorable William H. Orton
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RE: Pending UP/SP merger -- anticompetitive impact on Railco, Inc.

Ladies and gentlemen:

I received no reply to my July 29, 1996 letter. I attach a copy of that letter for your review. On August 12, 1996 the Surface Transportation Board has issued its written opinion approving the merger between Union Pacific Railroad Company and Southern Pacific Transportation Company, apparently without addressing Railco's concerns.

Railco respectfully requests written confirmation that the merger will not affect Railco's access to coal markets, and that Utah Railway will continue to have the same access to Railco's loadout facility as it has to Railco's competitors including Savage's loadout facility. If Railco is unable to obtain written confirmation to that effect, it may be necessary for Railco to file suit for declaratory and other relief. However, Railco would greatly prefer to resolve this matter outside of the court system. I look forward to your reply.

Sincerely,

F. Mark Hansen

2341-1.002

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July 29, 1996

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The Honorable Robert Bennett
431 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable James V. Hansen
2466 Rayburn House Office Building
Washington, D.C. 20510

The Honorable Enid Greene
515 Cannon Building
Washington, D.C. 20510

The Honorable William H. Orton
440 Cannon Building
Washington, D.C. 20510

RE: Pending UP/SP merger -- anticompetitive impact on Railco, Inc.

Ladies and gentlemen:

I represent Railco, Inc. Railco owns and operates a coal loadout facility just south of Price, Carbon County, Utah. Railco's loadout is on the same railroad spur and within shouting distance of a similar loadout owned by Savage Industries, Inc.

On January 17, 1996, Union Pacific, Southern Pacific and Utah Railway entered into a Settlement Agreement (the Utah Railway Agreement), which provided in part:

> I. **Trackage Rights**
> c) UTAH shall have the right in common with UP/SP to serve the Savage Industries, Inc. Savage Coal Terminal coal loading facility located on the so-called CV Spur near Price, Utah.

2. **Additional Coal Mine Access**

a) In addition to the coal mine access granted in Section 1.c), UP/SP also grant UTAH access to Cyprus Amax' Willow Creek Mine adjacent to the SP main line near Castle Gate, Utah ....

4. **Term**

... the grants of rights under Sections 1 and 2 shall be effective only upon UP's acquisition of control of SP.

On its face the Utah Railway Agreement gives Utah Railway access rights to the Savage loadout but not to the Railco loadout. This would give Savage a virtual monopoly for the business of all coal producers using Utah Railway. This competitive advantage could eventually lead to Railco's demise.

By letter dated March 12, 1996, counsel for Railco notified Union Pacific of this concern, and asked that the Utah Railway Agreement be modified to allow Utah Railway access to the loadout facilities of both Savage and Railco. Union Pacific did not respond. On or about March 21, 1996, Railco filed and served its Notice of Opposition to Merger and Intent to Participate in Proceedings (attached and incorporated here by reference). Railco was not advised of further proceedings as requested, and its concerns were apparently not addressed by the Surface Transportation Board.

At the July 3 voting conference on the proposed UP/SP merger, the Surface Transportation Board voted to approve the merger, subject to a list of 35 recommended conditions including the following:

> (11) We recommend that the Board impose as a condition the terms of the Utah Railway agreement. This recommendation reflects our view that, for certain coal shippers, the rights provided for in the Utah Railway agreement will ameliorate the competitive harm that would be generated by an unconditioned merger.
>
> (35) Finally, we recommend that the Board deny all requests for conditions except those we have specifically indicated should be granted in whole or part.

One of the major concerns raised throughout by opponents of the merger, including the Department of Justice and the Department of Transportation, was the possible antitrust and other anticompetitive consequences. Those consequences remain very much a reality for Railco. Unless the present state of affairs changes, upon final approval of the merger Savage will be granted an effective monopoly over Utah Railway business for which Railco is now able to compete.

Railco respectfully requests that the Utah Railway Agreement be amended to include, and that the Surface Transportation Board include in its final approval, a condition that Utah Railway be granted the same access to Railco's loadout facility as it is given to Savage's loadout facility. I look forward to your reply.

Sincerely,

F. Mark Hansen

STB FD 32760 10-9-96 D 86731

8C731

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ERIKA Z. JONES
202-778-0642

October 9, 1996

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12th Street & Constitution Ave., NW
Room 2215
Washington, DC 20423

Re: Finance Docket No. 32760, Union Pacific Corp., et al.. -- Control and Merger -- Southern Pacific Rail Corp., et al.

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty (20) copies of Reply of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company to Applicants' Motion For Leave to File Reply to the Submissions in Opposition to Applicants' Petition For Clarification (BN/SF-71). Also enclosed is a 3.5-inch disk containing the text of BN/SF-71 in Wordperfect 5.1 format.

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

Sincerely,

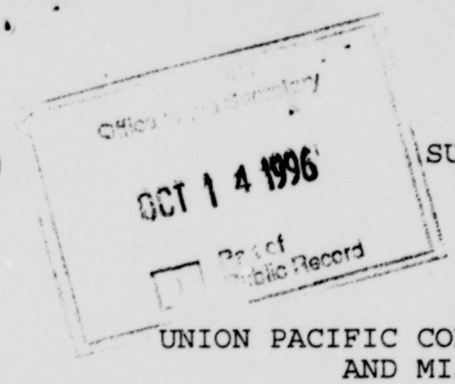
Erika Z. Jones

Erika Z. Jones

Enclosures

ORIGINAL

BN/SF 71



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY

-- CONTROL AND MERGER --

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

REPLY OF BURLINGTON NORTHERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY TO APPLICANTS' MOTION FOR LEAVE TO FILE REPLY TO THE SUBMISSIONS IN OPPOSITION TO APPLICANTS' PETITION FOR CLARIFICATION

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October 9, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

REPLY OF BURLINGTON NORTHERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY TO APPLICANTS' MOTION FOR LEAVE TO FILE REPLY TO THE SUBMISSIONS IN OPPOSITION TO APPLICANTS' PETITION FOR CLARIFICATION

Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (collectively, "BN/Santa Fe")[1] submit the following Reply to Applicants' Motion for Leave to File Reply to the Submissions of BNSF, Dow, IPC, NITL, QCC, SPP and WCTL in Opposition to Applicants' Petition for Clarification (UP/SP-285).

BN/Santa Fe agrees, in general, with the observations of the National Industrial Transportation League, which has already filed its own opposition to Applicants' motion (NITL-24). BN/Santa Fe will not repeat NITL's arguments but will highlight the following points:

- In UP/SP-275, Applicants purported to be seeking clarification of the Board's decision. Applicants' tactic of seeking reopening in the guise of clarification, however, was transparent even then, as

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[1] The acronyms used herein for references to other parties are the same as those in Appendix B to Decision No. 44.

Applicants freely admitted that Decision No. 44, "read literally," contradicted their position. UP/SP-275 at 3.

- In the Reply that they now seek leave to file, Applicants stray even further from any serious pretense at seeking true clarification of the Board's decision. They protest that "the transloading condition, read literally, will create extensive new competition" (UP/SP-285 at 3-4) -- an argument for reopening, not clarification.

- As NITL explains, the tendered Reply does not even seek the same relief as the petition for "clarification" that it purports to support. Instead of the simple but misguided "clarification" that they previously sought, which would have denied shippers on the trackage rights lines the right to transload to BN/Santa Fe, Applicants now propose only a distance-based test that would apply to a category that Applicants call "off-line" shippers.

- By changing the relief requested, Applicants have gone far beyond completing the record in a manner that might be appropriate for an otherwise-unauthorized reply to a reply. Instead, they have entirely altered the focus of their request and sought to have the last word on their altered request, after numerous parties had properly shown the flaws in their prior request.

- In any event, as NITL explains, Applicants' distance criterion should not be imposed on its merits. The imposition of such a formula would inevitably give rise to disputes -- between shippers and Applicants, and between BN/Santa Fe and Applicants -- which the Board would have to spend its limited resources resolving, and which would create marketplace uncertainty pending resolution, to the benefit of UP/SP but to the detriment of competition. Furthermore, although the general proposition that the Board should not condition mergers in a way the creates new competition is sound, Applicants fail to recognize that the Board's "broad-based" conditions were deemed necessary to assure BN/Santa Fe sufficient density to replicate existing competition over vast expanses of trackage rights. It is entirely inappropriate to focus the microscope on a few shippers who might obtain benefits from the Board's conditions -- as Applicants seek to do -- when the Board's point was to protect the mass of shippers by giving BN/Santa Fe broad rights.

Accordingly, BN/Santa Fe supports the arguments advanced in NITL-24 and respectfully urges the Board to reject UP/SP's

continuing attempt to chip away at the transloading condition the Board soundly imposed in its decision.

Respectfully submitted,

Erika Z. Jones /KEO

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Attorneys for Burlington Northern Railroad Company
and The Atchison, Topeka and Santa Fe Railway Company

October 9, 1996

CERTIFICATE OF SERVICE

I hereby certify that copies of Reply of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company to Applicants' Motion For Leave to File Reply to the Submissions in Opposition to Applicants' Petition For Clarification (BN/SF-71) have been served this 9th day of October, 1996, by first-class mail, postage prepaid on all Parties of Record in Finance Docket No. 32760.

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STB FD 32760 10-9-96 D . 86704

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October 9, 1996

86704

Via Hand Delivery
Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Branch
1201 Constitution Ave., N.W.
Washington, DC 20423

Re: *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company Control and Merger* Finance Docket No. 32760

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter is an original and twenty (20) copies of the REPLY TO PETITION OF UP/SP FOR LEAVE TO FILE REPLY TO THE SUBMISSIONS IN OPPOSITION TO APPLICANTS' PETITION FOR CLARIFICATION, along with a copy on disc. Additionally, an extra copy of this pleading is enclosed for the purpose of date stamping and returning to our office.

Respectfully submitted,

Frederic L Wood

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Enclosures

0124-480

NITL-24

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

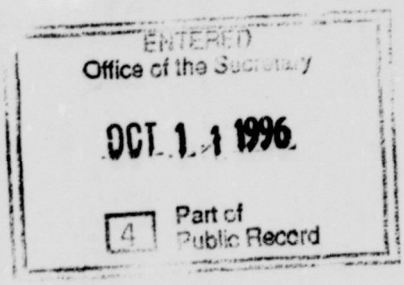
— CONTROL AND MERGER —

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

REPLY TO PETITION OF UP/SP FOR LEAVE TO FILE REPLY TO THE SUBMISSIONS IN OPPOSITION TO APPLICANTS' PETITION FOR CLARIFICATION

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE



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Attorneys for The National Industrial Transportation League

October 9, 1996

NITL-24

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

— CONTROL AND MERGER —

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

REPLY TO PETITION OF UP/SP FOR LEAVE TO FILE REPLY TO THE SUBMISSIONS IN OPPOSITION TO APPLICANTS' PETITION FOR CLARIFICATION

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("League") hereby submits its Reply to the motion (UP/SP-285) filed on October 4, 1996, in this proceeding by the Applicants[1] seeking leave to file a reply to the submissions of several parties (including the League in NITL-22) that responded to Applicants' petition

[1] Unless otherwise specified, abbreviations are the same as set out in Appendix B at page 254 of Decision 44 in this proceeding, served on August 23, 1996. "Applicants" is defined in Decision 44, at 7, note 3 .

for clarification (UP/SP-275).[2] The Applicants originally sought clarification of the provisions of paragraph no. 6 of the order included in Decision No. 44. The specific provisions at issue involve the interpretation and application of the Board's requirement that BNSF must be given the right to serve new facilities located on both UP-owned and SP-owned track over which BNSF receives trackage rights, and that new facilities includes new transload facilities, including those owned and operated by BNSF. Decision 44 at 146. Now the Applicants seek leave to file a reply which significantly modifies both the nature and the scope of the relief sought in UP/SP-275. The League urges the Board to deny the leave for a reply sought by Applicants.

I. BACKGROUND

The circumstances that led the Board to establish the condition to approval of Applicants' merger that requires BNSF to have access to new transloading facilities at any point on a line of the Applicants where BNSF has trackage rights has already been clearly set forth in the League's reply and will not be repeated here. NITL-22 at 2-5. In their original petition, Applicants sought clarification of the scope of this modification of the agreement between Applicants and CMA imposed by the Board.[3] The clarification they sought would have limited the application of the condition granting BNSF access to new transloading facilities "only to shippers trucking traffic between a point on one of the merging railroads and a new BNSF transloading facility on the other merging railroad." UP/SP-

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2 The motion for leave included the tendered reply as an attachment, but Applicants did not apply a document designation. References to the tendered reply will be to "UP/SP Reply."

3 Applicants framed their request for relief as a request for clarification of Decision 44. As demonstrated in NITL-22 the Board clearly and correctly expanded the scope of BNSF's ability to provide service on the trackage rights received from both Applicants to new transload facilities. Perhaps recognizing that they were seeking more than just "clarification," Applicants also made an alternative request for reopening of Decision 44 on the grounds of material error. UP/SP-275 at 1, n.2. The League also urged that this request be denied.

275 at 5.[4] Applicants also suggested that, if the Board's broadening of the scope of BNSF's access to transloading facilities was to provide competitive relief by "preserving transloading options for off-rail shippers" (UP/SP-275 at 6, n.10; emphasis in original), then it should specify that the shipper must be at least as far away from the transloading facility served by BNSF on trackage rights on one Applicant as it would have been from the facility that might have been located on the other Applicant. *Id.*

Now the Applicants say that this suggestion meant something very different. Instead of applying only to "off-rail" shippers (a term used by Applicants), they propose that this suggestion should also be applied to what they now call "off-line" shippers (i.e., shippers located on the line of one of the merger parties where BNSF has trackage rights that, before the merger, had the potential of using a transload facility on the other merger partner's line). UP/SP Reply at 3. Applicants claim that they need to file the reply tendered with their motion because they did not specifically address certain "particular factual circumstances." UP/SP-285 at 1. The only factual circumstances they failed to address was their failure to recognize the proper scope of the conditions imposed by the Board, as the League has already pointed out in NITL-22.

II NO GROUNDS EXIST FOR GRANTING APPLICANTS LEAVE TO FILE THE TENDERED REPLY

What the Applicants fail to recognize is that the Board was concerned about replicating all of the forms of competition between UP and SP that existed before the merger occurred. The Board correctly found that it was necessary to modify

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[4] In its reply, the League pointed out that this "clarification," if applied, would have allowed Applicants to avoid complying with their commitment to allow BNSF unrestricted access to any new transloading facility located within the geographical limits of a 2-to-1 point, as defined in the BNSF agreement. NITL-22 at 5-7. Applicants have now implicitly conceded that they must allow unrestricted access to any shipper by BNSF at any transload facility located at a 2-to-1 point on a line where BNSF has trackage rights. UP/SP Reply at 1, 5 and 6.

the Applicants' agreement with BNSF, as modified by the agreement with CMA and otherwise, in order 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." Decision 44 at 145. The Board modified the basic arrangement with BNSF in order to address two important concerns:

> [W]e have devised specific conditions directly addressing both the competitive problems that have been raised with the BNSF agreement and the CMA agreement and concerns about whether BNSF will have sufficient traffic to compete effectively.

Id. at 106.

Having belatedly recognized the true scope of the relief justifiably provided by the Board against the competitive harm caused by the merger, as well as how the "clarification" they proposed in UP/SP-275 would have seriously undermined the efficacy of that relief, Applicants now seek to escape their dilemma by seeking leave to file a reply that changes the relief they previously sought. For there is no doubt that Applicants now seek a different form of relief than they sought in UP/SP-275. Their original clarification would have deprived *any* shipper located on a line where BNSF obtained new trackage rights (even those located within the limits of 2-to-1 points) of the ability to use transloading facilities as a competitive tool against the merged UP/SP. But this kind of competitive leverage is clearly among the forms of competition between UP and SP that the Board sought to protect by broadening the scope of the BNSF and CMA agreements involving the actual or potential use of transloading facilities. This allows a shipper that only has direct access to one rail carrier to bring a degree of competitive leverage to bear on that carrier in order to obtain reasonable rates and terms of service. Decision 44 at 106, 122, 145-146.

Now the Applicants would only allow shippers located on the lines where BNSF obtains trackage rights to have BNSF serve transloading facilities "at least

as distant as sites they might have used pre-merger." UP/SP-285 at 3. This is not a clarification; this is a modification of the condition imposed by the Board.

Apart from the impropriety of injecting this modified request for relief at this late date, it is also wholly insupportable on its merits. By imposing geographic restrictions on the availability of indirect competition through transload facilities, it would deprive shippers of a degree of competitive leverage that the Board clearly intended that they should retain. Applicants seem to be unable or unwilling to accept the fact that the Board imposed "a number of broad-based conditions that augment the BNSF agreement ...." Decision 44 at 145. In addition, the implementation and application of the Applicants' latest modification would be fruitful source of disputes between BNSF and UP/SP, with shippers seeking to use the forces of competition caught in the middle. For example, how would the distances be determined? Who would make the determination? How would disagreements be resolved; would the Board have to be continuously involved in resolving disputes, with the attendant delay? Certainly the UP/SP's ready propensity to try and chip away at the relief provided by the Board in order to shackle BNSF is clear evidence that disputes are likely.

Moreover, the Applicants' request for the Board to provide a different "clarification" in the transparent guise of seeking leave to file a reply to several replies to their original petition,[5] should also be rejected by the Board for other reasons. It clearly involves an improper effort to broaden the issues. *Georgia Great Southern Div. — Abandonment and Discontinuance Exemption* Docket No. AB-389 (Sub-No. 1X) (served August 16, 1996) at n. 4. Granting leave to UP/SP to file this reply would also be prejudicial because it would deprive opposing parties of a fair opportunity to respond to the new request for relief made by

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[5] A pleading that is explicitly prohibited by the Board's Rules of Practice, 49 C.F.R. §1104.13(c).

Applicants. *Wilmington Term. RR. Inc.--Pur. & Lease--CSX Transp., Inc.*, 7 I.C.C.2d 60, 61 at n.2 (1990). Finally, this effort to modify the relief sought by seeking to file a reply to the replies is likely to cause a delay in the Board's resolution of the issues presented, and should not be permitted. *Western Resources, Inc. v. The Atchison, T. & S. F. Ry. Co.*, Docket No. 41604 (served May 17, 1996) slip op. at n. 3. In NITL-22, the League has already urged the Board to resolve the issues raised by UP/SP-275 by October 11, 1996. The Applicants are clearly trying to prevent a clear and prompt resolution of this important issue by providing a "moving target" for the Board and the parties.

III. CONCLUSION

The Applicants' request for leave to file a reply to the replies to their petition for clarification (or reopening) should be denied. Given the critical nature of prompt and immediate implementation of the conditions imposed by the Board (Decision 44 at 134 and 146), it is essential that the Board act expeditiously on this matter. The League again requests that the Board serve its decision not later than October 11, 1996.

Respectfully submitted,

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(202) 371-9500

Attorneys for The National Industrial Transportation League

October 9, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of October, 1996, served a copy of the foregoing Reply submitted on behalf of The National Industrial Transportation League on all parties of record, by first-class mail, postage prepaid, in accordance with Rules of Practice.

FREDERIC L. WOOD

STB FD 32760 9-23-96 D 86274

86274

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September 23, 1996

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 32760, Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al.

Dear Mr. Secretary:

Enclosed for filing in the above-referenced proceeding please find an original and twenty (20) copies of the "Reply of the Western Coal Traffic League in in Support of BNSF's Petition for Clarification" **(WCTL-25)**. In accordance with prior orders in this proceeding, we have also enclosed a Wordperfect 5.1 diskette containing this Reply.

We have also enclosed an extra copy of this document. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

C. Michael Loftus

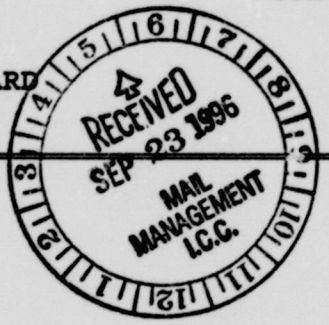
C. Michael Loftus
An Attorney for the Western Coal Traffic League

CML:raw
Enclosures

cc: Arvid E. Roach II, Esq.
Paul A. Cunningham, Esq.
Parties of Record

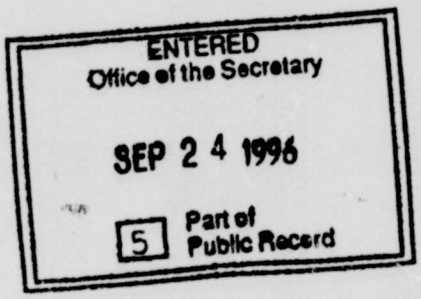
WCTL-25

BEFORE THE
SURFACE TRANSPORTATION BOARD



UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760

REPLY OF THE WESTERN COAL TRAFFIC LEAGUE IN SUPPORT OF BNSF'S PETITION FOR CLARIFICATION



WESTERN COAL TRAFFIC LEAGUE

By: C. Michael Loftus
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Attorneys for the Western Coal Traffic League

OF COUNSEL:

Slover & Loftus
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Dated: September 23, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760

REPLY OF THE WESTERN COAL TRAFFIC LEAGUE IN SUPPORT OF BNSF'S PETITION FOR CLARIFICATION

Pursuant to 49 C.F.R. § 1104.13, the Western Coal Traffic League ("WCTL") hereby replies in support of BNSF's Petition for Clarification of Decision No. 44 (hereinafter "BNSF Petition"). Specifically, WCTL submits that granting the requested clarifications is required in order to advance the Board's objective of assuring BNSF access to sufficient traffic density to compete with the Applicants. These clarifications, which encompass a variety of details regarding the implementation of the CMA Agreement's § 3, would prevent the Applicants from placing BNSF at an unfair disadvantage in purportedly "competitive" bidding situations.

In Decision No. 44, the Board emphasized that its effort to foster competition between the two remaining western

carriers depends to a very large extent upon BNSF's ability to develop and maintain a traffic base of sufficient magnitude to generate economies of scale. See Decision No. 44 at 102 ("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."); id. at 116 ("The BNSF agreement is intended to permit BNSF to replace the competition that will be lost when SP is absorbed into UP."); id. at 134 ("[B]ecause so much depends upon BNSF's performance, we are imposing special conditions directed to this issue."). In other words, the Board understood that the facilitation of BNSF's economic interests in marketing trackage rights service was essential to realizing the Board's vision of two giant western carriers competing against each other.

In its Petition, however, BNSF chronicles a number of methods that the Applicants could use to deprive BNSF from access to fifty percent of traffic volumes through indirect means. WCTL supports BNSF's Petition and, in particular, the need to ensure that contracts with rail shippers at "2-to-1" points are modified in a manner that truly permits BNSF to compete. Where such contracts contain rate incentives for achieving certain volume levels, those volume levels must be reduced so that the incentive rates that would have applied to the shipper's traffic if no modification had occurred, would still apply to volumes shippped under the contract if BNSF were successful in capturing a portion (at least up to 50%) of the traffic.

For the foregoing reasons, WCTL respectfully requests that the Board grant BNSF's Petition for Clarification.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE

By: C. Michael Loftus

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Dated: September 23, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of September, 1996, caused the foregoing document to be served by hand upon Applicants' counsel:

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Paul A. Cunningham, Esq.
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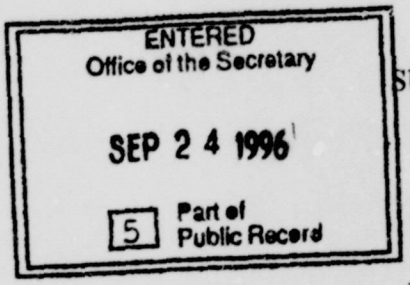
and by first class mail, postage prepaid, on all other parties of record in Finance Docket No. 32760.

Andrew B. Kolesar III

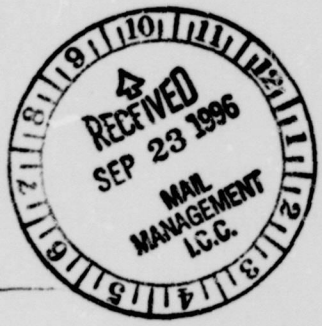
STB FD 32760 9-23-96 D 86267

86267 ORIGINAL

BN/SF-67
KCS-67



BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 32760
and
Finance Docket No. 32760 (Sub. No. 9)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

-- CONTROL AND MERGER --

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

BURLINGTON NORTHERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY'S AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S REQUEST FOR EXTENSION OF TIME TO REACH AGREEMENT ON COMPENSATION ISSUE

Burlington Northern Railroad Company ("BN") and The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") (collectively, "BN/Santa Fe") and The Kansas City Southern Railway Company ("KCS") hereby request a 30-day extension of time to reach a negotiated agreement on the rates to be paid for the terminal trackage rights awarded to

BN/Santa Fe in ordering paragraph 22 of Decision No. 44 in this proceeding. In support of their motion, BN/Santa Fe and KCS state the following:

1. In Decision No. 44 of this proceeding, the Board granted BN/Santa Fe's application for terminal trackage rights to use two segments of KCS track in Shreveport and one segment of KCS track in Beaumont.

2. The Board required BN/Santa Fe and KCS to submit, by August 22, 1996, either agreed upon terms or separate proposals regarding implementation of those terminal trackage rights.

3. On August 22, 1996, BN/Santa Fe and KCS filed a Joint Status Report on the Terms Respecting Implementation of Terminal Trackage Rights and Request for Extension of Time To Reach Agreement on Compensation Issues (BN/SF-62; KCS-64). In that pleading, BN/Santa Fe and KCS advised the Board that they have reached agreement on all details regarding implementation of the terminal trackage rights granted to BN/Santa Fe by the Board in the above-captioned proceeding, with the exception of the compensation to be paid for such terminal trackage rights. BN/Santa Fe and KCS requested a 30-day extension to reach a negotiated agreement regarding the rates to be paid for the terminal trackage rights.

4. On August 23, 1996, in Decision No. 45, the Board granted BN/Santa Fe and KCS' request for an extension of time. Specifically, the Board modified ordering paragraph no. 22 of Decision No. 44 to extend the submission deadline for terms regarding implementation of the terminal trackage rights to September 23, 1996.

5. BN/Santa Fe and KCS have been unable to reach final agreement regarding compensation to be paid for the terminal trackage rights. BN/Santa Fe and KCS therefore request an additional thirty (30) days to reach agreement on such terms.

6. By making this submission, BN/Santa Fe and KCS reserve all rights to request clarification, reconsideration, or reopening of any decision in this proceeding. BN/Santa Fe and KCS also reserve all other rights to any relief before the Board, the Courts of Appeal, or any other tribunal with jurisdiction over aspects of this proceeding.

WHEREFORE, BN/Santa Fe requests that the Board grant an additional 30 days until October 23, 1996, to reach an agreement respecting the implementation of the terminal trackage rights.

Respectfully submitted,

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Topeka and Santa Fe Railway Company

September 23, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September, 1996, I caused to be served via First Class Mail a copy of BN/SF-67/KCS-67 on all parties of record in Finance Docket No. 32760.

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STB FD 32760 9-23-96 D 86263

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September 23, 1996

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 32760, Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al.

Dear Mr. Secretary:

Enclosed for filing in the above-referenced proceeding please find an original and twenty (20) copies of the "Reply of the Western Coal Traffic League in Opposition to Applicants' Petition for Clarification" **(WCTL-24)**. In accordance with prior orders in this proceeding, we have also enclosed a Wordperfect 5.1 diskette containing this Reply.

We have also enclosed an extra copy of this document. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

C. Michael Loftus

C. Michael Loftus
An Attorney for the Western Coal Traffic League

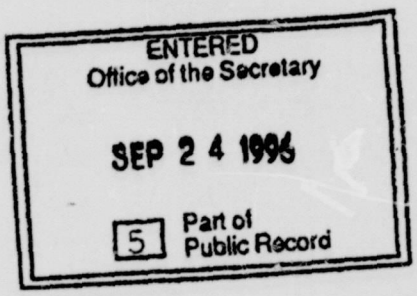
CML:raw
Enclosures

cc: Arvid E. Roach II, Esq.
Paul A. Cunningham, Esq.
Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760

REPLY OF THE WESTERN COAL TRAFFIC LEAGUE IN OPPOSITION TO APPLICANTS' PETITION FOR CLARIFICATION



WESTERN COAL TRAFFIC LEAGUE

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Dated: September 23, 1996

WCTL-24

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760

REPLY OF THE WESTERN COAL TRAFFIC LEAGUE IN OPPOSITION TO APPLICANTS' PETITION FOR CLARIFICATION

Pursuant to 49 C.F.R. §§ 1104.13 and 1115.3(e), the Western Coal Traffic League ("WCTL")[1] hereby replies in opposition to Applicants' August 29, 1996 Petition for Clarification of Decision No. 44 (hereinafter "Petition").[2] In their Petition, Applicants seek clarification of Decision No. 44 in two respects. First, they contend that the Board either inadvertently or erroneously formulated a condition regarding access to transloading facilities, which condition, when read in its literal form,

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[1] The acronyms used herein are the same as those in Appendix B to Decision No. 44.

[2] Although Applicants have labeled their submission as a "Petition for Clarification," Applicants nevertheless acknowledge that "[s]hould [they] be mistaken as to the intent of [Decision No. 44], Applicants respectfully request that this petition be treated as a petition to reopen pursuant to 49 C.F.R. § 1115.3 on the grounds of material error. Petition, at 1 n.2.

would foster excessive competition between the Applicants and BNSF. Second, Applicants contend that BNSF's right to serve new facilities on the trackage rights lines should not apply to UP's line between Placedo and Harlingen, Texas, because SP operates over that line via overhead trackage rights only and cannot presently serve shippers along that line (or to other line segments where BNSF was given trackage rights solely for operating convenience).

With respect to the transloading condition, WCTL respectfully submits that this condition, as described in Decision No. 44: (i) requires no additional clarification because it accurately reflects the Board's frequently stated concerns regarding both the anticompetitive impact of the merger and the need to facilitate adequate BNSF traffic density; and (ii) fails to constitute material error because -- as a limited measure of relief from the merger's anticompetitive impact -- it falls easily within the Board's broad discretion to impose conditions in reviewing merger applications.[3]

With respect to BNSF's right to serve new facilities on the Placedo-Harlingen line, WCTL submits that the same logic that militates against Applicants' attempt to narrow the transloading condition also applies to their attempt to eliminate BNSF service to new facilities on this line. Moreover, Applicant's petition conveniently overlooks the fact that SP-served shippers

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[3] WCTL's opposition to the Applicants' Petition should in no way be construed as an intention to waive or otherwise forego its right to seek judicial review of Decision No. 44.

have competitive options involving UP at points on that line -- such as where a shipper presently served exclusively by SP at a point near the Placedo-Harlingen line desires to construct a new facility (or a build-out) to obtain service from UP via that line. The fact that SP presently has overhead rights only over the Placedo-Harlingen line has nothing to do with the competitive options of SP (as opposed to UP) shippers, and the Board should be careful to preserve such options in ruling on this aspect of Applicants' petition for clarification.

I. Governing Standard

Although there is no specific standard to guide the Board's review of petitions for clarification, the Board's regulations do indicate that petitions to reopen must "state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances." See 49 C.F.R. § 1152.25(e)(6). See Docket No. AB-6 (Sub-No. 268), Burlington Northern R.R. -- Abandonment -- In Spokane County, WA, Decision served December 16, 1985, at 2; accord Docket No. AB-338 (Sub-No. 1X), Oregon, California & Eastern Ry. -- Abandonment Exemption -- In Klamath County, OR, Decision served April 14, 1992, at 5. The Board, however, has considerable latitude in the imposition of conditions to ameliorate the harmful, anticompetitive effects of a merger. See Decision, at 144 ("Section 11344(c) gives us broad authority to impose conditions governing railroad acquisitions."). Consequently, to the extent that the challenged, literal reading of the Board's

transloading condition is consistent with the Board's intentions, the Board should only grant the Applicants' Petition if it is satisfied that its own discretionary action was materially erroneous. See Petition at 1 n.2.

II. The Board's New Facilities and Transloading Condition

On April 18, 1996, the Applicants entered into a settlement agreement with both the Chemical Manufacturers Association and BNSF ("CMA Agreement"), which agreement made certain modifications to the Applicants' prior settlement agreement with BNSF. Specifically, the CMA Agreement provided that "the BNSF agreement shall be subject to certain amendments, including amendments: . . . (2) to grant BNSF access to any new facilities (not including expansions of or additions to existing facilities or load-outs or transload facilities) located post-merger on any SP-owned line over which BNSF receives trackage rights . . . ." Id. at 18.[4]

In Decision No. 44, however, the Board found that the various settlement agreements failed to remediate the competitive harm of the merger, and therefore extended the "new facilities" definition of the CMA agreement to include transloading facilities located on any UP or SP line over which BNSF obtained trackage rights from the Applicants:

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[4] The CMA Agreement also established a post-merger procedure by which a CMA member could raise a claim, within certain prescribed time limits, that the merger deprived it of a build-in/build-out option. Id., Section 13.

> *New facilities and transloading facilities*. The BNSF agreement, as amended by the CMA agreement, grants BNSF the right to serve any new facilities located post-merger on any SP-owned 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 be 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.

Id. at 145-46. The Board also expanded the CMA Agreement's build-in/build-out option by making it applicable to all shippers and by removing the time limits and prior demonstration of feasibility to which it was subject. Id. at 146.

Notwithstanding the Board's clear and unequivocal intent to permit BNSF to serve new (and transloading) facilities at any point on any line where BNSF will receive trackage rights in order to remedy the merger's anticompetitive impacts (Id.; see, also, Decision No. 44 at 123-24), Applicants are now seeking to avoid having to compete with BNSF wherever they can concoct a seemingly plausible excuse to do so. In essence, Applicants' petition for clarification seeks to enhance the benefits of the merger to them, at the expense of effective competition. Applicants' attempt to circumvent the plain language and meaning of the new facilities/transloading condition is patently self-serving, and it should not be countenanced by the Board.

III. Decision No. 44 Reflects the Board's View that the Involvement of BNSF is Critical to Ameliorate the Competitive Harm of the Merger

In Decision No. 44, the Board specifically acknowledged that the merger of UP and SP raised significant concerns regarding competition. In this regard, the Board compared the subject merger to the proposed SF/SP consolidation. Id. at 102 ("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."). The Board added, however, that "[u]nlike that case, where those applicants had initially maintained that imposition of any substantial 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, BNSF, in an attempt to redress competitive problem areas." Id. at 102-103. In other words, the Board concluded that the effective competition of BNSF was essential to realizing the Board's vision of two giant western carriers competing against each other. Id. at 116 ("The BNSF agreement is intended to permit BNSF to replace the competition that will be lost when SP is absorbed into UP.").

In order to make BNSF's trackage rights meaningful, however, the Board sought to ensure that BNSF would have both the opportunity and the incentive to compete effectively with the Applicants. Chief among the Board's tasks in this regard was the

Applicants insist that the literal (and clearly intended) language of the condition runs counter to the Board's underlying rationale to initiate post-merger competition only at the specific points at which approval would eliminate pre-merger competition. Petition at 4 ("[T]he transloading condition, read in this literal fashion, would come very close to opening all the exclusively-served shippers on the overhead trackage rights lines to a second railroad -- which the Board found to be unjustified when it rejected the divestiture proposals advanced by various parties."). Applicants urge the Board to address this perceived discrepancy by "clarifying that the condition applies only to shippers trucking traffic between a point on one of the merging railroads and a new BNSF transloading facility at a point on the other merging railroad."). Petition, at 6.[5]

While only the Board itself can confirm that the literal reading of the transloading condition accurately corresponds with the underlying intent, a great deal of language from the decision suggests that such a literal reading is consistent with the Board's overall approach to the merger and with the specific need to foster adequate BNSF traffic density.

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[5] The Applicants add that "if the Board wishes to extend the condition to off-rail shippers, it should specify that the condition applies to such a shipper only if the distance from the shipper to a new BNSF-served transloading facility on one of the merging railroads is at least as great as the distance from the shipper to the nearest point on the other merging railroad." Petition, at 6 n.10. In Decision No. 44, however, the Board specifically rejected distance-based solutions to the transloading problem. See Decision, at 106.

need to guarantee that BNSF would secure and maintain sufficient traffic density on the trackage rights lines to support efficient operations and merit the carrier's continuing competitive involvement. Although, as indicated above, the Board applauded the Applicants' initiative in settling with their chief rival in a timely fashion (i.e. unlike SF/SP), the Board nevertheless found that the BNSF and CMA settlement agreements failed to ensure that BNSF would be in a position to compete effectively with the Applicants. Consequently, the Board modified these agreements in a number of respects,[6] including a broadened transloading condition, to allow BNSF to develop sufficient traffic density:

> We agree with protestants that applicants have not gone far enough in addressing certain adverse competitive effects. 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 facilities anywhere on the lines where BNSF will receive trackage rights will preserve that competition.

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[6] See id. at 145 ("[W]e 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.").

Id. at 123-24 (emphasis added); id. at 134 ("[B]ecause so much depends upon BNSF's performance, we are imposing special conditions directed to this issue.").[7] It is evident from Decision No. 44 that the Board considered and rejected the possibility that the existing settlement agreements would provide a sufficient traffic base to BNSF to justify its expense in attempting to provide service over the particular trackage rights lines.[8] Cognizant of the Board's "BNSF-centered" approach to addressing the competitive problems of this merger, it is reasonable to conclude that in using the phrase "anywhere on the lines where BNSF will receive trackage rights," the Board understood and intended the necessary implications of this straightforward language. It is therefore also reasonable to conclude that the Applicants' proffered interpretation of the Board's transloading condition finds no support in the Board's language and would simply fail to generate sufficient traffic density to allow BNSF to break the Applicants' control of the subject lines.

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[7] The Board added that it was "appropriate to note that, pursuant to the conditions [it had] imposed on the merger, BNSF will have access to all new facilities (including transload facilities) located post-merger on any UP/SP-owned line over which BNSF receives trackage rights in the BNSF agreement." Id. at 195.

[8] See id. at 133 (" . . . [W]e are expanding the new facilities and transloading provisions."); id. ("We conclude that all of these factors taken together should result in BNSF having sufficient traffic to make these operations run efficiently.").

IV. The Board's Transloading Condition is Carefully Drawn to Remedy the Harm Identified by the Board

While it would undoubtedly help to foster BNSF traffic density, the Board's transloading condition would not upset the competitive balance between the two western carriers in the manner that the Applicants' Petition implies. See Petition, at 4 ("[T]he transloading condition, read in [a] literal fashion, would come very close to opening all the exclusively-served shippers on the overhead trackage rights lines to a second railroad . . ."). In fact, the Board has already explicitly stated that the transloading condition would fall far short of opening up shippers to two-carrier access:

> The potential for exercising [build-out and transloading] 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 BN/SF 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.

Id. at 106; cf. id. at 240 ("Our conditions are carefully crafted to preserve the competitive alternatives existing today without undermining the benefits of the merger." (Chairman Morgan, commenting)). In this regard, WCTL respectfully submits that the Applicants' evident concern regarding the threat of competition from BNSF-service to or from new transloading facilities, which

service would, of course, suffer from the competitive disadvantage of significant construction and trucking expenses (as well as the applicable trackage rights fee), speaks volumes regarding the Applicants' expectations as to future rate demands.

V. Applicants' Attempt to Eliminate BNSF Competition On the Placedo-Harlingen Line Is Both Misguided and Misleading

The same considerations that dictate denial of Applicants' request to narrow the applicability of the transloading condition also require rejection of their attempt to eliminate BNSF competition to new facilities at points on the Placedo-Harlingen line.

Again, the restriction suggested by Applicants is contrary to the plain language of the new-facilities condition, and constitutes a blatant attempt to restrict post-merger competition. The application of the condition to all points on all of the lines over which BNSF will receive trackage rights was intentional, and it ensures that all possible competitive options are preserved rather than allowing Applicants to be the arbiters of when and where potential competition is "effective."

Applicants' attempted elimination of BNSF competition on the Placedo-Harlingen should be rejected for the additional reason that it would restrict the traffic volume available for movement via BNSF over this line -- thereby inhibiting BNSF's ability to operate efficiently (and compete effectively) on this important trackage rights line which is necessary for BNSF access

to Mexican traffic.[9] Again, Applicants' suggested clarification would nullify this important purpose of the new facilities, transload and build-in/build-out conditions.

Applicants' petition for clarification with respect to the Placedo-Harlingen line is also very misleading, because it refers only to competitive options for UP shippers along the line -- and ignores the fact that nearby SP shippers also have competitive options that involve this line. The Placedo-Harlingen line is owned by UP, and SP operates on the line via overhead trackage rights (which enabled SP to abandon its own parallel trackage between these points many years ago). Although SP may be restricted from serving shippers at points along the line, who are now served only by UP, this does not tell the whole story. It omits any mention of SP-served shippers on nearby SP lines who have new-facility or build-in/build-out options to obtain service from UP at points on this line. There is no logical reason why BNSF should be precluded from serving new facilities or build-outs constructed on the Placedo-Harlingen line by such SP shippers.

SP lines intersect with the Placedo-Harlingen line at either end, including the Flatonia-Placedo line. Shippers exclusively served by SP but located near Placedo (for example) have options (in terms of potential service from UP) that may serve as a competitive constraint on SP. The fact that SP cannot

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[9] The Placedo-Harlingen line is part of UP's (and SP's) principal route between Houston and Brownsville, and thus to the Mexican border.

directly serve industries on UP's Placedo-Harlingen line has nothing to do with whether other shippers, served by SP, have competitive options that involve potential UP service.

Applicants' argument that BNSF should not be able to serve shippers on the Placedo-Harlingen line is couched in terms of the lack of UP shippers' ability to obtain competitive service from SP. It completely overlooks the fact that SP shippers at nearby points may have competitive options that will be adversely affected by the merger, not UP shippers on the Placedo-Harlingen line itself. SP-served shippers who desire to avail themselves of competition from UP at a point on this line (whether in the form of a new facility, a transloading facility or a build-out) warrant preservation of their competitive options in the same manner as any other shipper served by one of the merger applicants but who has a competitive option involving the other.

VI. Conclusion

The literal reading of the new facilities, transloading and build-in/build-out conditions accurately reflects the Board's frequently referenced desire to preserve all competitive options available to shippers on or near the trackage rights lines, as well as its concern that BNSF develop sufficient traffic density to compete with the Applicants in an effective fashion. Consequently, "clarification" of the nature that the Applicants suggest would be both unnecessary and inappropriate. Because the conditions are carefully crafted to foster the competitive

balance that the Board has sought to create, they do not constitute material error.

In any event, the Board should expressly confirm that BNSF is entitled to use its trackage rights over the Placedo-Harlingen line to serve shippers who are presently served by SP and who may desire to obtain UP service at a point on that line via a new or transloading facility or a build-in/build-out. This will preserve competitive options to obtain two-carrier service that such shippers clearly would have absent the merger.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE

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Attorneys for the Western Coal Traffic League

OF COUNSEL:

Slover & Loftus
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Dated: September 23, 1996

CERTIFICATE OF SERVICE

I certify that I have this 23rd day of September, 1996, served copies of the foregoing Reply of the Western Coal Traffic League In Opposition to Applicants' Petition for Clarification by hand upon Applicants' counsel:

Arvid E. Roach II, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Paul A. Cunningham, Esq.
Harkins Cunningham
1300 Nineteenth Street, N.W.
Washington, D.C. 20036

and by first class mail, postage prepaid on all other parties of record in Finance Docket No. 32760.

Andrew B. Kolesar III

STB FD 32760 9-23-96 D 86261

84261

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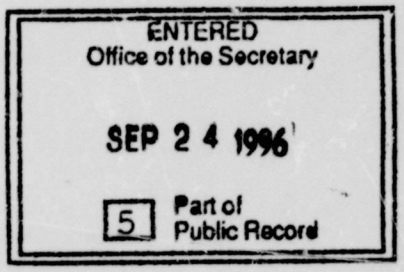
September 23, 1996



BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 32760, Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al.

Dear Mr. Secretary:

Enclosed for filing in the above-referenced proceeding please find a separately packaged original and twenty (20) copies of the HIGHLY CONFIDENTIAL VERSION of the Petition for Clarification of the Lower Colorado River Authority and the City of Austin, Texas **(LCRA-4)**, which Petition is being filed under seal in accordance with the procedure set forth at C.F.R. § 1104.14. In addition, please find an original and twenty (20) copies of the REDACTED, PUBLIC VERSION of the Petition for Clarification **(LCRA-5)**. We have served these documents upon parties of record in the manner described in the Certificate of Service attached to each. In accordance with prior orders in this proceeding, we have also enclosed a Wordperfect 5.1 diskette containing the HIGHLY CONFIDENTIAL VERSION of the Petition.

Extra copies of these filings are enclosed. Kindly indicate receipt and filing by time-stamping these copies and returning them to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

C. Michael Loftus

C. Michael Loftus
An Attorney for the Lower Colorado River
Authority and the City of Austin, Texas

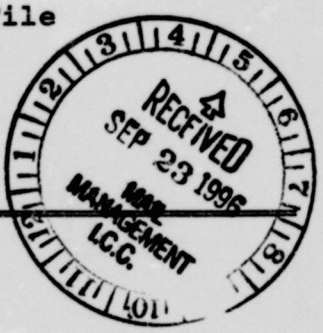
Enclosures

cc: Arvid E. Roach II, Esq.
Paul A. Cunningham, Esq.
Parties of Record

LCRA-5

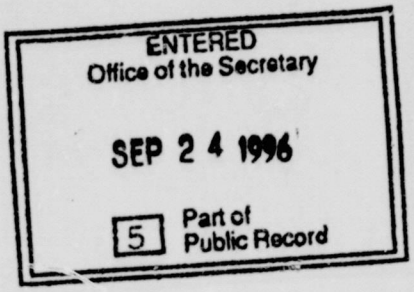
REDACTED -- To Be Placed On Public File

BEFORE THE
SURFACE TRANSPORTATION BOARD



UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760

PETITION FOR CLARIFICATION OF
THE LOWER COLORADO RIVER AUTHORITY
AND THE CITY OF AUSTIN, TEXAS



THE LOWER COLORADO RIVER AUTHORITY
AND THE CITY OF AUSTIN, TEXAS

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Dated: September 23, 1996

LCRA-5

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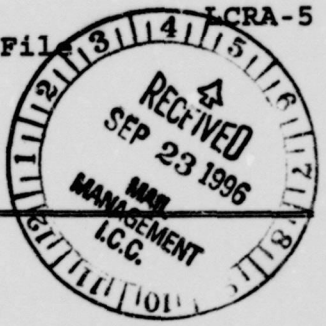

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760

PETITION FOR CLARIFICATION OF
THE LOWER COLORADO RIVER AUTHORITY
AND THE CITY OF AUSTIN, TEXAS

Pursuant to 49 C.F.R. § 1117.1, the Lower Colorado River Authority ("LCRA") and the City of Austin, Texas ("Austin") (jointly, "LCRA/Austin") hereby petition for clarification of Decision No. 44 in two respects. First, LCRA/Austin request confirmation of their status as a shipper at a "2-to-1" point on a BNSF trackage rights line, with the present entitlement to receive BNSF service and with the option to reduce the minimum annual volume commitment of their contract with UP by fifty percent. Second, LCRA/Austin request clarification that, with the benefit of such status, they may elect to reduce the volume incentive rate threshold under their contract with UP by fifty percent to facilitate the "opening up" of their traffic to BNSF.

IDENTITY AND INTEREST

LCRA is a conservation and reclamation district of the State of Texas, and Austin is a municipal corporation, existing under its home rule charter and the laws of the State of Texas. LCRA/Austin are joint owners of the Fayette Power Project ("FPP"), a coal-fired electric generating station located at Halsted, Texas. FPP consumes approximately 6 million tons per year of low-sulfur coal from the Powder River Basin ("PRB") of Wyoming, which is transported in unit train service to Texas.

Currently, coal is transported to FPP under a rail transportation contract (ICC-WRPI-C-0036), executed in 1988, between LCRA/Austin and Applicants UP and Missouri Pacific Railroad Company ("MP") and Western Railroad Properties, Incorporated. In conjunction with entering that contract and the settlement of certain litigation, LCRA/Austin entered a separate Trackage Rights Agreement ("TRA") with the Missouri-Kansas-Texas Railroad Company ("MKT"). This TRA provides access effective over 18 miles of track between Halsted, Texas (the site of FPP) and West Point, Texas, which is a junction point between the MKT line (now owned by Applicant MP) serving FPP and a line of Applicant SP.

The purpose of the TRA was to protect LCRA/Austin's interests in obtaining competitive rail transportation service and rates for coal moving to FPP. The trackage rights provided LCRA/Austin access to SP which could (in combination with the Burlington Northern Railroad Company) provide service from origin

coal fields in the PRB, as well as from other possible origins such as ports, in competition with UP and its connections.

Recognizing that their merger would deprive LCRA/Austin of this competition, the Applicants, in their Settlement Agreement with BNSF, included LCRA/Austin's plant at Halsted, Texas as a designated 2-to-1 point entitled to receive service from BNSF. However, for purposes of applying the condition imposed by the Board in Decision No. 44 that UP/SP modify their contracts with shippers at 2-to-1 points to free up at least 50% of the traffic for competition from BNSF, the Applicants claim that LCRA/Austin should not be deemed a shipper at a 2-to-1 point. See R.V.S. Peterson; UP/SP-230 at 193 n.63.[1] Mindful of the Board's admonition in Decision No. 44 (at 156), LCRA/Austin have endeavored to resolve this problem through discussions with Applicants but have been unable to do so.

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[1] In his Rebuttal Verified Statement, the Applicants' M Peterson commented as follows:

Id.

I. LCRA/Austin Should be Regarded as a Shipper at a 2-to-1 Point with the Present Options to Utilize BNSF Service and to Reduce its Minimum Volume Commitment by Fifty Percent

A. LCRA/Austin's Status[2]

Decision No. 44, which conditions approval of the subject merger application upon both the BNSF and CMA Agreements, provides that shippers at 2-to-1 points shall be entitled to receive BNSF service via trackage rights and shall be entitled to reduce their contractual minimum volume obligations by fifty percent. See Decision No. 44 at 145. By the Applicants' own admission, LCRA/Austin meet the Board's definition of a shipper at a 2-to-1 point. See BNSF Agreement at 4b and Exhibit A; UP/SP-22 at 323 and 342 (listing the "LCRA plant" at Halsted, Texas as a 2-to-1 point). In particular, LCRA/Austin's plant is located on the lines of UP and enjoys contractual rights to receive SP service via trackage rights. Consequently, LCRA/Austin are entitled to receive the ameliorative benefits afforded to this category of shippers.

Notwithstanding the treatment of LCRA/Austin under the BNSF Agreement as a shipper at a 2-to-1 point, the Applicants have taken the position that LCRA/Austin are not entitled to a modification of their contract pursuant to the condition imposed by the Board. Presumably motivated by a desire to maintain control over LCRA/Austin's substantial traffic, the Applicants

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[2] The end of the Board's discussion of LCRA/Austin on page 63 of the decision lacks either a period or additional text. See UP/SP-275, at 8 n.6.

have advised LCRA/Austin that they are not covered by the condition because prior to the merger, LCRA/Austin could only access the SP's lines at a future time, i.e.

However, as Applicants have previously admitted, and as the rationale for the Board's imposition of the contract modification condition dictates, this fact is essentially irrelevant. Mr. John H. Rebensdorf, Applicants' chief negotiator for the BNSF Agreement, confirmed during his January 23, 1996 deposition that, notwithstanding the timing of its contractual entitlement to SP service, LCRA/Austin qualified as a shipper at a 2-to-1 point.

> Q. . . . Mr. Rebensdorf, I'd like to direct your attention to page 359 [the BNSF Agreement]. One of the points referred to in section B listed on page 359 is Halsted, Texas, LCRA plant. Do you see that sir?
>
> A. Yes.
>
> Q. Is it your intention that LCRA be treated as a two-to-one point?
>
> A. Halsted is a two-to-one point.
>
> Q. And that is true regardless of whether it is currently served by both the UP and the SP, correct?
>
> A. SP has the right to serve that plant as I understand it at such time as the current contract expires.
>
> Q. That's correct. But the language of 8i says presently served by both UP and SP and so does 4b. And I just want it clear that it's covered even whether it's presently served or not?
>
> A. In this particular case, we knew that Southern Pacific had the right to come into that plant. We made the judgment that that would qualify in this particular case as a two-to-one point.
>
> Q. Okay. So it's the intention of the parties to this agreement that it be covered regardless of whether it

satisfies the technical definition of being presently served by both UP and SP?

A. In the case of the Halsted plant, it is the intention of the parties that Halsted is a two-to-one point.

Q. On page 324, in section 4d -- I'll get to that, one other question on that. Those trackage rights are exercisable by BN for the Halsted plant immediately after the merger takes effect, correct?

A. That is correct.

Deposition of John H. Rebensdorf, January 23, 1996, at 344-45.

The Board's decision to extend the contract modification condition in the CMA Settlement to all 2-to-1 points was based on the Board's valid concerns about the sufficiency of BNSF's traffic density over the trackage rights lines:

> The extension of this provision to all 2-to-1 points will help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations.

Decision No. 44 at 146.[3] The availability of 50% of the substantial volume of coal traffic moving to LCRA/Austin each year would provide a strong economic incentive for BNSF to persevere in its efforts to provide effective competition, and BNSF has expressed strong interest in competing for this traffic.[4] As indicated above, LCRA/Austin routinely ship approximately six million tons of PRB coal per year.

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[3] See also id. at 134 ("[B]ecause so much depends upon BNSF's performance, we are imposing special conditions directed to this issue.").

[4] LCRA/Austin are currently involved in discussions with BNSF regarding possible service.

The fact that LCRA/Austin would otherwise lack access to a second carrier at the present time should in no way be viewed as a bar to complete 2-to-1 status. To the contrary, it was precisely the recognition that a great number of shippers would not immediately enjoy the ability to switch from their existing transportation service to another carrier that provided the basis for conditioning the merger upon a broad application of Section 3 of the CMA. Any shipper in need of relief under this section necessarily otherwise lacks the present ability to divert its traffic from its current carrier. The Board's treatment of LCRA/Austin, particularly in light of the Applicants' prior representations, should be no different than the treatment of other shippers at 2-to-1 points.

It should be noted that under the terms of the BNSF Agreement, BNSF's trackage rights to serve the LCRA/Austin plant at Halsted, Texas are effective immediately. There is no provision made in that agreement, as originally executed, or as subsequently amended, for delayed implementation of BNSF's trackage rights to serve Halsted. In fact, the Applicants' Mr. Rebensdorf confirmed this upon deposition. (See last question and answer of passage from deposition quoted at page 5-6.)

B. Methodology Regarding the Implementation of Section 3 of the CMA Agreement

LCRA/Austin respectfully submit that the Board should grant affected shippers the option to reduce their contracts' minimum volume obligations (as stated on either a simple tonnage

or percentage basis) by fifty percent as a means to fulfill Section 3 of the CMA. While other methodologies may be theoretically possible (i.e. such as basing the reduction on some measure of past annual volume levels or estimates of future volumes, rather than on stated contractual minimums), LCRA/Austin believe that an approach of this nature might needlessly embroil the Board in a lengthy analysis of historical or future events.

II. Allowing LCRA/Austin to Reduce its Volume Incentive Threshold by Fifty Percent is Necessary to Ensure the Effectiveness of the Contract Modification Condition

As the Board has recognized, BNSF's traffic density over the various trackage rights lines will determine whether the Board's "competition-based" approach to resolving the disputed issues of this merger will succeed. With this in mind, a number of parties have already filed petitions for clarification of Decision No. 44, which petitions address the possibility that the Applicants could effectively frustrate BNSF's ability to compete for traffic. In particular, BNSF, Geneva Steel, and Entergy Services, Inc. have each described problems regarding the implementation of the Board's contract modification condition. As BNSF outlines in its Petition (see BNSF-65 at 5-6), absent a commensurate reduction in the level of so-called "volume incentive provisions," BNSF would be at a severe competitive disadvantage for a shipper's traffic. Specifically, BNSF could only hope to compete against the Applicants in such a scenario if it underbid them by an amount more than sufficient to offset the

penalty that necessarily would apply as a result of the decreased use of the Applicants' service.

LCRA/Austin are subject to this type of volume incentive provision which, unless modified, would frustrate the effectiveness of the Board's contract modification condition. Specifically, Section 4 of LCRA/Austin's contract with UP, (ICC-WRPI-C-0036), as amended, provides that for any given contract year in which the total tonnage transported exceeds million tons, UP will charge approximately per ton less than the rate that will apply if the total tonnage is less than million tons. Significantly, this lower rate applies to all tons transported during the particular year, not merely to the incremental tons in excess of million. Conversely, if the million to threshold is not met, the higher rate applies to all tons moved.

Given LCRA/Austin's typical annual volume levels of six million tons and the contract's effective penalty of approximately for lower volume levels,[5] BNSF would be required to underbid UP by $ million just to level the competitive playing field (i.e. the 3 million tons still shipped under the UP contract would pay a rate higher). This is a major penalty that would obviously place BNSF at a serious competitive disadvantage for the 50% of LCRA/Austin's traffic that would supposedly be open to competitive bidding. Needless to say, a shipper's right to divert at least fifty percent of its traffic

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[5] By shipping 50% of its annual traffic via BNSF, LCRA/Austin would necessarily incur this penalty.

to BNSF would be of little value if the Applicants are able to ensure that BNSF is foreclosed from competing on even terms.

If the Applicants are successful in implementing this type of strategy with respect to a significant portion of the tonnage moving over the trackage rights lines, BNSF may well not be able to achieve traffic densities over those lines that would enable it to offer truly competitive service and rates. Therefore, in order for a modification of the contract (under CMA § 3) to be effective in terms of making fifty percent of LCRA/Austin's volume available (at LCRA/Austin's option) for movement by BNSF, it is necessary to reduce the tonnage threshold in Section 4 of LCRA/Austin's contract with UP by fifty percent.

III. Conclusion

For the foregoing reasons, LCRA/Austin respectfully request that the Board clarify that: (i) as a shipper at a 2-to-1 point, LCRA/Austin are presently entitled to secure BNSF service and to receive the benefits of the Board's condition requiring modification of contracts with shippers at 2-to-1 points (i.e. may elect to reduce their stated contractual minimum volume commitments by fifty percent); and (ii) in order to level the competitive playing field between the Applicants and BNSF,

LCRA/Austin may elect to reduce the volume incentive threshold under their contract with UP by fifty percent as well.

Respectfully submitted,

THE LOWER COLORADO RIVER AUTHORITY
AND THE CITY OF AUSTIN, TEXAS

C. Michael Loftus

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OF COUNSEL:

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Dated: September 23, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of September, 1996, caused the foregoing **Redacted, Public** version of this petition **(LCRA-5)** to be served by first class mail, postage prepaid, on all parties of record in Finance Docket No. 32760.

Andrew B. Kolesar III

Andrew B. Kolesar III

STB FD 32760 9-23-96 D 86260

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September 23, 1996

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Interstate Commerce Commission Building
12th Street and Constitution Avenue, N.W.
Washington, D.C. 20423

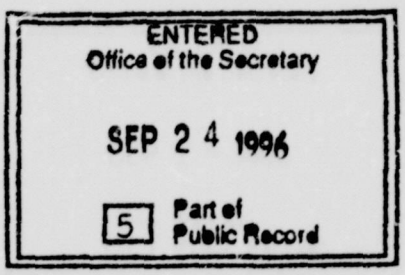
Re: Finance Docket No. 32760, Union Pacific Corp. et. al. --Control and Merger --Southern Pacific Rail Corp., et. al.

Dear Mr. Williams:

Enclosed for filing please find an original and twenty copies of Response of Utah Railway Company to Applicants' and BNSF's Petitions for Clarification.

I have mailed true copies of the foregoing to counsel for parties of record by first-class mail, postage prepaid.

Will you kindly stamp and return the enclosed copy of this service letter when the documents are filed.



Very truly yours,

Charles H. White, Jr.
Counsel for Utah Railway Company

Enclosures

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UTAH-7

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

--CONTROL AND MERGER--

SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORPORATION, AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

RESPONSE OF UTAH RAILWAY COMPANY TO APPLICANTS' AND BNSF'S PETITIONS FOR CLARIFICATION

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Date: September 23, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

--CONTROL AND MERGER--

SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORPORATION, AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

RESPONSE OF UTAH RAILWAY COMPANY
TO APPLICANTS' AND BNSF'S
PETITIONS FOR CLARIFICATION

STATEMENT

Utah Railway Company ("UTAH") occupies a unique position in these proceedings. Like BNSF, the Primary Applicants granted UTAH trackage rights pursuant to a settlement agreement ("UTAH Settlement Agreement"). Similarly, UTAH granted BNSF trackage rights over its property to accommodate the BNSF Settlement Agreement. Both the UTAH and BNSF Settlement Agreements were confirmed by the Board in approving the UP-SP merger petition. In short, UTAH

is both a recipient and grantor of trackage rights which have been incorporated into the underlying transaction approved by the Board.

However, the Board's action expanding and transplanting the CMA Agreement -- which was originally negotiated and designed to fit a far different competitive environment and geographic area -- to the Central Corridor is silent as to the impact on UTAH's rights in that Corridor. Moreover, given the seeming ambiguities which have driven UTAH's only two connections, UPSP and BNSF, to seek clarification, the Board's silence as to UTAH's position is doubly troubling. In this light we respond to our connecting carriers' petitions, and respectfully request the Board to declare UTAH's rights under its Decision No. 44.

I. UTAH'S POSITION

UTAH's position in these proceedings can be succinctly restated. In order to accommodate BNSF's Settlement Agreement on the Central Corridor, UTAH -- which has an intertwined ownership and trackage rights relationship with SP over a critical segment of the Corridor -- granted BNSF trackage rights on its property. In turn, UTAH was granted trackage rights over another segment of the SP line significantly expanding its reach eastward.

A. Provo to Utah Railway Junction

The history of UTAH's intertwined ownership rights in this segment is outlined in "Utah Railway Company -- An Abridged History" at UTAH-3. See also "Operating and Trackage Agreement between the Denver and Rio Grande Railroad Company and Utah Railway Company" and the UTAH Settlement Agreement at Appendices A and C of Barker, V.S., Id.

B. Utah Railway Junction to Grand Junction, Colorado

The trackage rights granted to UTAH are summarized in the UTAH Settlement Agreement, supra, and more particularly described in Finance Docket No. 32760 (Sub No. 18) Notice of Exemption for Trackage Rights.

C. Cyprus Amax and ECDC-Environmental

As part of the UTAH Settlement Agreement, UTAH received, with full agreement of the shipper, sole access to the new Cyprus Amax Willow Creek coal loading facility near Castle Gate, Utah. See para. 2 of Agreement. Also, following the negotiation of the UTAH Settlement Agreement, ECDC-Environmental, an important receiver of municipal waste at a major materials landfill in Utah, approached the Applicants and separately negotiated access to UTAH. This traffic flow holds strong potential as a backhaul competition enhancement. See Affidavit of John West attached hereto. See also West V.S., UTAH-5, p. 4. In addition to ECDC, Moroni Feed, a cooperative of approximately 100 family farms in Central Utah, also sought and obtained UTAH access. Id. Thus, both ECDC and Moroni Feed independently changed a one-to-one service pattern at a specific location into a new two-to-one situation before the Board entered its Decision.[1/] This change is important given the articulated rationale of Decision 44.

In summary, UTAH extended its reach and broadened shipper access by virtue of its Settlement Agreement and market place negotiations before the Board entered its Decision. It also granted BNSF trackage rights over its property to accommodate BNSF's Settlement Agreement.

1/ While negotiating this new UTAH access, thus turning heretofore single carrier access into two carrier access, each shipper claimed broader two-to-one status by virtue of the fact that they had other facilities in Utah on the SP and UP.

II. RESPONSE AND REQUEST FOR CLARIFICATION

Reflecting its awkward position while its two new connections, UPSP and BNSF, seek clarification, UTAH has objectively reviewed Decision No. 44. In light of the Decision's silence as to UTAH's rights on the Central Corridor pursuant to the UTAH, BNSF, and CMA Settlement Agreements, UTAH would suggest the following declarations vis-a-vis the Central Corridor:

A. Transload Condition

Upon review of Applicants' Petition, and of Decision No. 44, it appears that Applicants' view is logical. As the Board explained, the transload condition allowing "BNSF or third parties to locate transloading facilities anywhere on the lines where BNSF will receive trackage rights" will preserve specifically described competition, i.e., competition "today [i.e., before the Decision] [whereby] UP or SP may locate transloading facilities anywhere on their lines to reach shippers on the other carrier." Decision at 124. In this light, Applicants' reading of the transloading provision as intending to preserve the "ability of UP-served shippers to transload to SP points, and vice versa" (UP/SP-275, at 5) seems reasonable. The question remains, however, whether BNSF can serve a transload facility established on UTAH property over which it has obtained trackage rights.

B. Applicability to UTAH Trackage

As pointed out above, and on the record before the Board, UTAH granted BNSF trackage rights on its property in the Provo-Utah Railway Junction segment of the Central Corridor to make the BNSF Settlement Agreement workable. The Decision is silent as to BNSF's rights under the CMA Agreement augmentation on this part of the Central Corridor. However, it clearly states that BNSF/CMA's "new facility" language will apply "at any SP or UP segment over which it has been granted trackage rights." Id. at 106 [emphasis in the original]. See also p. 124.

Under an expressio unius canon, it would appear that this aspect of CMA would not apply to BNSF trackage rights over UTAH property. The matter needs clarification and, as we will show below, should be consistent with UTAH's trackage rights granted by Applicants under the UTAH Settlement Agreement.

C. Specific Shipper Access

As pointed out above, UTAH negotiated sole access to Cyprus which was fully supported by the shipper and the Applicants. See UTAH Settlement Agreement, supra. Moreover, by their initiative, shippers ECDC and Moroni Feed negotiated UTAH access thereby changing their specific location service patterns from one-to-one to two-to-one. These negotiations were embodied in agreements with the Applicants.

We believe it clear that these specific agreements protect and insulate UTAH's rights from BNSF/CMA access. "Congress did not issue the [Board] a hunting license for . . . contracts that limit a railroad's efficiency unless those . . . contracts interfere[] with carrying out an approved merger." City of Palestine, Texas v. United States, 559 F.2d 408, 414 U.S.C.A., 5th Cir. 1977; cert. denied, 435 U.S. 950 (1978). Moreover, the new two-to-one competitive situations are beyond the rationale of imposing the CMA-enhanced BNSF Agreement, i.e., to make BNSF "an effective replacement for UP at these two-to-one points and affected one-to-one points." Decision, p. 124.

* * *

In summary, although the Decision is silent, it appears that the "new facility" CMA access does not apply to BNSF's trackage rights over UTAH, nor does it apply to contract grounded

exclusive or new two-to-one shipper relationships (i.e., where UTAH is the second carrier) enjoyed by UTAH.

III. ALTERNATIVE DECLARATORY RELIEF

A real anomaly will occur if the Board clarifies its Decision by stating that BNSF's CMA-enhanced status will apply to the trackage rights granted by UTAH to BNSF over UTAH's property, while at the same time denying such status to UTAH vis-a-vis trackage rights granted it by Applicants in the Central Corridor. We respectfully submit that this situation would create serious problems on judicial review.

If the Board chooses on clarification to make BNSF's trackage rights over UTAH subject to CMA enhancement, we submit that it should similarly define UTAH's trackage rights, granted by Applicants over SP along the Central Corridor. See Verified Statement of John West attached hereto. While this balancing approach is equitable and logical, UTAH also continues to believe that the individual shipper actions outlined above (i.e., choosing and confirming UTAH as sole originating carrier at a new facility, or initiating agreements with the Applicants to add UTAH service in new two-to-one situations) protects those shipper choices from a CMA override.

CONCLUSION

The Board should clarify UTAH's position on the Central Corridor by making its trackage rights consistent with BNSF's. At the same time, the Board should recognize the specific shipper choices previously made and submitted for the record.

Respectfully submitted,

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Galland, Kharasch, Morse
& Garfinkle, P.C.
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 342-6789

Counsel for Utah Railway Company

Date: September 23, 1996

VERIFIED STATEMENT
OF
JOHN E. WEST, III

My name is John E. West, and I am Executive Vice President of Utah Railway Company ("UTAH"). I previously submitted verified statements in this proceeding in Response in Support of the Utah Railway Company's Settlement Agreement, UTAH-3 and in UTAH-5 Response to Inconsistent Applications and in Support of Utah Railway Company's Settlement Agreement.

UTAH seeks clarification and a remedy to what we feel was an inadvertent dilution of our negotiated Settlement Agreement between UTAH and UP/SP. When UTAH negotiated its Settlement Agreement it did so with the best available knowledge at the time as it relates to the BNSF Settlement Agreement in order to continue to compete on a level playing field in the Central Corridor. Most of the terms and conditions of the UTAH Settlement Agreement mirrored the terms and conditions in the previously filed BNSF Settlement Agreement including the millage rate, etc. in an effort to provide customers with competitive options along our small, but important segment of the Central Corridor.

The Surface Transportation Board ("STB") in its Decision No. 44 in Finance Docket No. 32760 served August 12, 1996 gave BNSF, as a condition of the merger, build-in, build-out

rights at all locations where BNSF gained trackage rights. ECDC Environmental, L.C. ("ECDC"), an operator of a large landfill in Utah, had negotiated with UP for the rights to gain UTAH direct service by building a facility near the Savage Coal Terminal at which UTAH, in its Settlement Agreement, gained competitive access. Now, as we read the decision, a literal reading of the build-in and build-out conditions for transloading, expanded to all areas of BNSF's trackage rights, ECDC could chose to locate a new facility somewhere along the SP mainline where both UTAH and BNSF have trackage rights but only BNSF would have the option to build-in or build-out leaving UTAH at a competitive disadvantage.

As I testified in my verified statement in UTAH-5, ECDC access is an important part of plans for the future to help ensure continued competition in our area of the Central Corridor. In addition to providing the opportunity for providing inbound service to its facility, access provides an important marketing tool for coal moves using ECDC's open-top hopper fleet for inbound waste and outbound low sulphur coal.

We are sure the STB did not mean to dilute UTAH's agreement and we respectfully request that, should the CMA conditions be upheld to apply in all areas, the same conditions should apply to UTAH. In UTAH's case it covers only 179 miles of the Central Corridor on newly acquired trackage rights plus the existing 72 miles of joint track

territory over which UTAH has operated since its operations commenced in 1913. The vast majority of the route is sparsely populated with little or no likelihood of development by shippers. UTAH should be afforded the same competitive advantages at those few locations conducive to potential installation of new facilities as is afforded UP-SP and BNSF.

VERIFICATION

State of Utah)
)
County of Carbon)

John E. West, III, being duly sworn, deposes and says that he has read the foregoing statement, and that the contents thereof are true and correct to the best of his knowledge and belief.

John E. West, III

Subscribed and sworn to before me on this the 19th day of September, 1996.

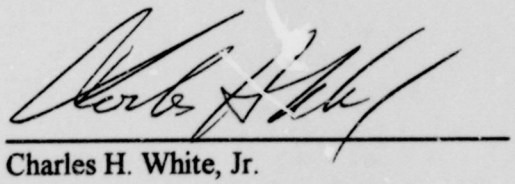
Diana B. Houghton
Notary Public

My commission expires 8/14/97.

DIANA B. HOUGHTON
NOTARY PUBLIC - STATE of UTAH
1401 WEST 2060 NORTH
HELPER, UTAH 84526
COMM. EXP. 8-14-97

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September, 1996, a copy of the foregoing Response of Utah Railway Company to Applicants' and BNSF's Petitions for Clarification was served, via first-class mail upon all parties of record in Finance Docket 32760.



Charles H. White, Jr.

STB FD 32760 9-23-96 D 86258

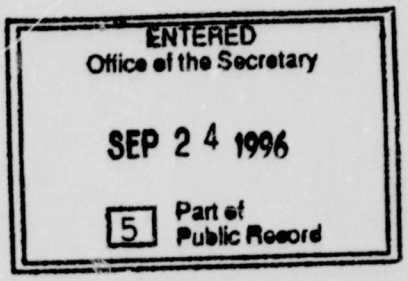
86258

GPTC-2

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	)	Finance Docket No. 32760

REQUEST FOR CLARIFICATION AND COMMENTS
OF THE GLASS PRODUCERS TRANSPORTATION COUNCIL



Michael M. Briley
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1000 Jackson St.
Toledo, Ohio 43624-1573
(419) 241-9000

Attorney and Practitioner

Dated: September 23, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	)	Finance Docket No. 32760

REQUEST FOR CLARIFICATION AND COMMENTS
OF THE GLASS PRODUCERS TRANSPORTATION COUNCIL

The Glass Producers Transportation Council ("GPTC") is a national trade association comprised of 30 companies that manufacture glass products and their suppliers. A list of the GPTC individual member companies is attached hereto as Appendix A. GPTC and its member companies hereby petition the Board for clarification of Decision No. 44 in this proceeding served August 12, 1996 ("Decision"), approving the common control and merger of Union Pacific Railroad Company and its rail affiliates ("UP") and Southern Pacific Transportation Company and its rail affiliates ("SP") (collectively "applicants"), subject to certain conditions.

One of the conditions imposed by the Board in granting the merger application requires UP and SP to modify any contracts with shippers at 2-to-1 points incorporated within the BN/SF agreement.

Essentially, GPTC endorses and adopts the comments of the BN/SF (BN/SF - 65) previously filed in this proceeding to the effect that if this provision is not clarified by the Board, its implementation by the Applicants may lead to substantially serious and unintended anti-competitive consequences. As presently worded, for example, should Applicants choose not to modify volume incentives in current contracts, the realistic effect may be to eliminate the ability of BN/SF to bid for service opportunities under currently contracted service. Moreover, the possibility that Applicants could choose affected traffic (rather than the shippers) may result in that traffic which needs most to be opened to BN/SF remaining closed to competition, thus precluding the access intended by the Order.

Accordingly, GPTC requests the Board to clarify this condition to state that Applicants must open 100% of contract volumes effected to competition from BN/SF and to allow affected shippers to determine (not applicants) those contracts to be so opened on a shipper-by-shipper, contract-by-contract basis. Regardless of the percent adopted by the Board, however, at the very least it should be made clear that whatever contract volumes are subject to the condition, those volumes that are opened to BN/SF competition should be relieved of pre-existing volume

incentives or, alternatively, such incentives should be pro-rated in order to make competitive bidding a realistic (and not theoretical) option. Finally, the Board should allow BN/SF to bid for any volume covered by affected contracts to the extent that Applicant's offer to modify the contractual terms applying to those volumes in response to this provision.

In summary, shippers should not be harmed by this condition which is intended to facilitate competition. For these reasons, the Board should clarify that meaningful competitive access will be afforded to BN/SF on the affected volumes.

Respectfully submitted,

Michael M. Briley

Michael M. Briley
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(419) 241-9000

Dated: September 23, 1996

Attorney for The Glass Producers Transportation Council

CERTIFICATE OF SERVICE

I hereby certify that on this 23th day of September, 1996, copies of the foregoing PETITION TO INTERVENE AND REQUEST FOR CLARIFICATION AND COMMENTS were served upon Administrative Law Judge Jerome Nelson, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, Arvid E. Road, II, Esquire, Covington & Burling, 1201 Pennsylvania Avenue., N.W., P.O. Box 7566, Washington, D.C. 20044, and Paul A. Cummingham, 1300 19th Street, N.W., Washington, D.C. 20036, by telecopy, and upon other known parties of record by first-class mail, postage prepaid, in accordance with the rules of the Surface Transportation Board.

Michael M. Briley

Michael M. Briley

APPENDIX A

GLASS PACKAGING TRANSPORTATION COUNCIL MEMBERSHIP

FMC Corporation
Chemical Products Group
1735 Market Street
Philadelphia, PA 19103

Spartan Minerals Corp.
P.O. Box 520
Pacolet, South Carolina 29372

Elf Atochem North America, Inc.
2000 Market St.
Philadelphia, PA 19103-3222

PPG Industries, Inc.
One PPG Place
Pittsburgh, PA 15272

Thomson Consumer Electronics
24200 U.S. Route 23, South
Circleville, Ohio 43113

Ball-Foster Glass Container Co.
1509 South Macedonia Ave.
Muncie, Indiana 47302-3664

Alex Trading, Inc.
77 St. Anne's Place
Pawleys Island, SC 29585

Franklin Industrial Minerals
612 Tenth Ave., North
Nashville, TN 37203

Techneglas, Inc.
707 E. Jenkins Ave.
Columbus, Ohio 43207

General Chemical Corporation
90 East Halsey Rd.
P. O. Box 394
Parsippany, NJ 07944

Wheaton Industries
1101 Wheaton Ave.
Millville, New Jersey 08332

AFG Industries, Inc.
1400 Lincoln Avenue
P.O. Box 929
Kingsport, TN 37662

Feldspar Corporation
1040 Crown Pointe Parkway
Suite 270
Atlanta, Georgia 30338

Cardinal Float
2200 Parkway Dr.
Menominee, Wisconsin 54751

Anchor Glass Container
4343 Anchor Plaza Parkway
Tampa, Florida 33634

Owens-Brockway Glass Container, Inc.
One Seagate
25th Floor
Toledo, Ohio 43666

Unimin Corporation
258 Elm St.
New Canaan, CT 06840

North American Chemical Company
8300 College Boulevard
Overland Park, Kansas 66210

Libbey, Inc.
940 Ash Street
Toledo, Ohio 43611

Wedron Silica Company
P. O. Box 119
Wedron, Illinois 60557

Guardian Industries
14600 Romine Road
Carleton, MI 48117

Libbey-Owens-Ford Co.
811 Madison Avenue
P.O. Box 799
Toledo, Ohio 43695-0799

OCI Chemical Corp.
One Corporate Drive
P.O. Box 902
Shelton, Connecticut 06484

U.S. Silica Corp.
P. O. Box 187
Berkeley Springs, WV 25411

TG Soda Ash, Inc.
P. O. Box 30321
Raleigh, NC 27622-0321

Unimin Canada, Ltd.
5343 Dundas St. - West
Suite 400
Etobicoke, Ontario M9B-6K5

The Morie Company, Inc.
1201 N. High Street
Millville, NJ 08332

Mississippi Lime Company
7 Alby Street
P.O. Box 2247
Alton, IL 62002-2247

Marcona Ocean Industries, Ltd.
2170 West S.R. 434
Suite 420
Longwood, Florida 32779

Solvay Minerals
P.O. Box 27328
Houston, TX 77227-7328

STB FD 32760 9-23-96 D 86254

84254

NITL-21

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

— CONTROL AND MERGER —

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

REPLY TO PETITION OF BN/SANTA FE FOR CLARIFICATION

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

Nicholas J. DiMichael
Frederic L. Wood
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Suite 750
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(202) 371-9500

Attorneys for The National Industrial Transportation League

September 23, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

— CONTROL AND MERGER —

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

REPLY TO PETITION OF BN/SANTA FE FOR CLARIFICATION

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("League") hereby submits its Reply to the petition (BN/SF-65) filed on September 3, 1996, in this proceeding, by the BNSF[1] seeking clarification of the provisions of paragraph no. 6 of the order included in Decision No. 44, at 231. The specific provisions at issue involve the interpretation and application of the Board's requirement that, immediately upon consummation of the merger, Applicants must modify any contracts with shippers at all 2-to-1 points incorporated within the BNSF

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1 Unless otherwise specified, abbreviations are the same as set out in Appendix B at page 254 of Decision 44 in this proceeding, served on August 23, 1996. "Applicants" is defined in Decision 44, at 7, note 3 .

agreement to allow BNSF access to at least 50% of the volume. Decision 44 at 146. The League urges the Board to grant the clarifications sought by BNSF.

This proceeding is one in which Applicants sought and obtained from the STB authorization under 49 U.S.C. §§11343-45 and the Railroad Consolidation Procedures, 49 C.F.R. Part 1180, for the merger of the SPR into the UPC and the consolidation of the rail operations of the UP and SP. However, the Board imposed a number of conditions, some of which were explicitly made very broad, to mitigate the admittedly anti-competitive effects of this merger. The merger was consummated on September 11, 1996 (UP/SP-277). Therefore, Applicants are committed to complying with the Board's conditions.

I. BACKGROUND

The Board was clearly concerned that the merger of UP/SP could have broad anti-competitive effects that were not mitigated by the agreements with BNSF and CMA.[2] The Applicants proposed to mitigate competitive harm caused by the merger by allowing BNSF to have access via trackage rights over some of the parallel lines involved, but only to serve those shippers "that can be served directly, or through reciprocal switching, by UP and SP but by no other Class I railroad." Decision 44 at 121-122 (emphasis in original; footnote omitted). In other words, Applicants were providing relief only to 2-to-1 shippers and not to 2-to-1 points. But as the Board specifically noted: "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 ... can all be effective in bringing pressure on each carrier's rates." *Id.* at 122 (footnote

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[2] Consistent with the Board's intentions, references to the BNSF and CMA agreements includes all the applicants' commitments to the amendments, clarifications, modifications, and extensions described in the Board's decision. Decision 44 at 9, 12, n. 15, 145, n.177 and 226, n. 277.

> [W]e have have devised specific conditions directly addressing both the competitive problems that have been raised with the BNSF agreement and the CMA agreement and concerns about whether BNSF will have sufficient traffic to compete effectively.

Id. at 106.

First, the Board broadened the scope of the application of the BNSF agreement in order to allow the BNSF to replicate throughout the affected region the various kinds of indirect competition being provided by SP to the UP. For example, it broadened the definition and scope of new facilities and transload facilities that BNSF could serve on the trackage rights that it received as a condition of the Board's approval. The Board also broadened the application and availability of the right of the BNSF to serve new track connections built into or out of shipper facilities. *Id.* at 145-46.

Second, the Board took steps to "help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations." It did so by, among other things, requiring Applicants to modify any contracts with shippers at all 2-to-1 points incorporated within the BNSF agreement to allow BNSF access to 50% of the volume. *Id.* at 146. In other words, the Board wanted to make certain, in response to the concerns of the League and other shippers, that the trackage rights granted to BNSF as a condition on approval of the merger would be operated "under economic conditions comparable" to those of the UP. *St. Louis Southwestern Ry. Co. Compensation — Trackage Rights,* 8 I.C.C.2d 80, 81, n.3 (1991) (quoting from *Union Pacific Corp. et al , — Control — Missouri Pacific Corp., et al.,* 366 I.C.C. 462, 590 (1982). If BNSF's operations over the trackage rights obtained from the Applicants are not economically viable, BNSF will not be able to replace both the direct and the indirect competition provided by SP that would lost as a result of the merger with UP. Decision 44 at 118 ("We believe that that BNSF will aggressively compete

with UP/SP *where it can obtain profitable traffic under the BNSF agreement."* [emphasis added]).

As the Board stated: "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." Decision 44 at 180 (emphasis added). The Board should emphatically reject any efforts by the Applicants to circumscribe, limit or otherwise endanger the justifiable efforts by the Board to ensure that UP/SP does not place BNSF in the position of being a second-class competitor. UP/SP took great pride in claiming that it had brought in its "biggest, meanest, toughest competitor," BNSF, to replace the competition from the SP. Rebensdorf Dep. Tr. at 151, 158, 402, 755-756.[3] *See also* UP/SP-230 at 11. The Applicants should not now be permitted to put that meanest competitor in a cage.

II BN/SF MUST HAVE ACCESS TO THE BROADEST POSSIBLE BASE OF TRAFFIC PRESENTLY UNDER CONTRACT TO THE APPLICANTS

The BNSF petition for clarification describes in detail the concerns and problems created by the generality of the wording of the provisions of paragraph 3 of the CMA agreement (as broadened in scope by the Board) which has been or could be interpreted by Applicants in such a way as to frustrate the desired effect of the Board's imposition of that condition. As the petition notes, some of the possible interpretations or actions that Applicants could take would "deny BN/Santa Fe sufficient density to become a cost-effective competitor ...."

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[3] As UP witness Rebensdorf put it at his deposition (Dep. Tr. 756):

> Q. *** Of all of the possible railroads to whom trackage rights could have been granted, is BN/Santa Fe your biggest, meanest, toughest competitor in each and every corridor?
> A. Absolutely.

BN/SF-65 at 8. The problems created by Applicants' interpretation and application are not an abstract one, as shown by two specific petitions for clarification on the same issue filed by two shippers: Geneva Steel Company (GS-4) and Entergy Services, Inc., et al. (ESI-27).[4] There may well be other situations where the efforts of Applicants to interpret and apply this condition narrowly have come into play. Certainly, such occurrences are likely to increase now that Decision 44 has become effective and common control of UP and SP has been consummated. UP/SP-277.

This issue of the traffic base available to BN/SF was clearly a matter of considerable concern to the Board, as indicated in the discussion above. Indeed, as even BN/SF now implicitly acknowledges, this was an issue that was quite properly raised by the League in its evidence and comments, because of the need for BN/SF to have sufficient density to conduct competitive operations over the trackage rights lines. NITL-19 at 23-25. In its petition, BN/SF has suggested that the evidence from the Applicants relied on by the Board in dismissing the League's concerns (see Decision 44 at 136, 139) "was misleading at best." BN/SF-65 at 2. It now appears that the efforts, now and in the future, by the Applicants to adopt and implement a narrow interpretation of this important condition, would provide a basis for concluding that the League's concerns were indeed well-founded.

Moreover, the Applicants themselves made efforts to reassure protestants and the Board that the traffic nominally open to access by BNSF was not "locked up in long-term contracts." UP/SP-230 at 117-118. This statement was premised on the claims by both UP and SP witnesses that significant percentages of the Applicants' contracts with shippers at 2-to-1 points would be available within the

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[4] A letter-petition dated September 10, 1996, was also filed by the Railroad Commission of Texas seeking clarification of the same condition. RCT-8.

III. CONCLUSION

The BN/SF request for clarification by the Board of the condition imposed by ordering paragraph 6 in Decision 44 should be granted. Given the critical nature of prompt and immediate implementation of the conditions imposed by the Board (Decision 44 at 134 and 146), it is essential that the Board act expeditiously on this matter. The League requests that the Board serve its decision not later than October 11,1996.

Respectfully submitted,

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(202) 371-9500

Attorneys for The National Industrial Transportation League

September 23, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of September, 1996, served a copy of the foregoing Reply submitted on behalf of The National Industrial Transportation League on all parties of record, by first-class mail, postage prepaid, in accordance with Rules of Practice.

FREDERIC L. WOOD

STB FD 32760 9-23-96 D 86250

86250

NITL-22

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

— CONTROL AND MERGER —

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

REPLY TO PETITION OF UP/SP FOR CLARIFICATION

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Attorneys for The National Industrial Transportation League

September 23, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

— CONTROL AND MERGER —

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

REPLY TO PETITION OF UP/SP FOR CLARIFICATION

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("League") hereby submits its Reply to the petition (UP/SP-275) filed on August 29, 1996, in this proceeding by the Applicants[1] seeking clarification of the provisions of paragraph no. 6 of the order included in Decision No. 44. The specific provisions at issue involve the interpretation and application of the Board's requirement that BNSF must be given the right to serve new facilities located on both UP-owned and SP-owned track over which BNSF receives trackage rights, and that new facilities includes

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[1] Unless otherwise specified, abbreviations are the same as set out in Appendix B at page 254 of Decision 44 in this proceeding, served on August 23, 1996. "Applicants" is defined in Decision 44, at 7, note 3 .

new transload facilities, including those owned and operated by BNSF. Decision 44 at 146. The League urges the Board to deny the clarification sought by Applicants.[2]

This proceeding is one in which Applicants sought and obtained from the STB authorization under 49 U.S.C. §§11343-45 and the Railroad Consolidation Procedures, 49 C.F.R. Part 1180, for the merger of the SPR into the UPC and the consolidation of the rail operations of the UP and SP. However, the Board imposed a number of conditions, some of which were explicitly made very broad, to mitigate the admittedly anti-competitive effects of this merger. The merger was consummated on September 11, 1996 (UP/SP-277). Therefore, Applicants are committed to complying with the Board's conditions.

I. BACKGROUND

The Board was clearly concerned that the merger of UP/SP could have broad anti-competitive effects that were not mitigated by the agreements with BNSF and CMA.[3] The Applicants proposed to mitigate competitive harm caused by the merger by allowing BNSF to have access via trackage rights over some of the parallel lines involved, but only to serve those shippers "that can be served directly, or through reciprocal switching, by UP and SP but by no other Class I railroad." Decision 44 at 121-122 [emphasis in original; footnote omitted]. In other words, Applicants were providing relief only to 2-to-1 shippers and not to

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[2] Applicants frame their request for relief as a request for clarification of Decision 44. As demonstrated in this reply, the Board clearly and correctly expanded the scope of BNSF's ability to provide service on the trackage rights received from both Applicants to new transload facilities. Perhaps recognizing that "clarification" was not required, Applicants also make an alternative request for reopening of Decision 44 on the grounds of material error. UP/SP-275 at 1, n.2. That request should also be denied.

[3] Consistent with the Board's intentions, references to the BNSF and CMA agreements includes all the applicants' commitments to the amendments, clarifications, modifications, and extensions described in the Board's decision. Decision 44 at 9, 12, n. 15, 145, n.177 and 226, n. 277.

2-to-1 points. But as the Board specifically noted: "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 ... can all be effective in bringing pressure on each carrier's rates." *Id.* at 122 [footnote omitted]. The Board then concluded: "We agree with protestants that Applicants have not gone far enough in addressing certain adverse competitive effects." *Id.* at 123. This action to protect as many forms of competition as possible from the adverse impacts of a transaction of the scope of the UP/SP merger was clearly consistent with the Board's obligation under the Interstate Commerce Act to consider "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). The Board is also required "to allow, *to the maximum extent possible,* competition ... to establish reasonable rates for transportation by rail." 49 U.S.C. §10101(a)(1) [emphasis added].

The League and other parties contended, for a variety of reasons, that the trackage rights granted to BNSF, even as modified by the CMA agreement, would not be effective in replacing all of the competition provided by SP to UP. Therefore, the League, and others, had requested the Board to condition the merger on divestiture by the merged UP and SP of various parallel lines. *See, e.g.,* NITL Brief NITL-19, at 17-35. Obviously, the Board declined to impose that condition, because it found that "there are less intrusive ways and more focused ways of achieving that result ...." Decision 44 at 123. The remedy that the Board chose to impose as a condition was based on the trackage rights granted in the Applicants' agreement with BNSF. *Id.* at 145.

Nonetheless, the Board correctly found that it was necessary to modify the Applicants' agreement with BNSF, as modified by the agreement with CMA and

otherwise, in order 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." *Id.* The Board modified the basic arrangement with BNSF in order to address two important concerns:

> [W]e have devised specific conditions directly addressing both the competitive problems that have been raised with the BNSF agreement and the CMA agreement and concerns about whether BNSF will have sufficient traffic to compete effectively.

Id. at 106.

First, the Board broadened the scope of the application of the BNSF agreement in order to allow the BNSF to replicate throughout the affected region the various kinds of indirect competition being provided by SP to the UP. For example, it broadened the definition and scope of new facilities and transload facilities that BNSF could serve on the trackage rights that it received as a condition of the Board's approval. The Board also broadened the application and availability of the right of the BNSF to serve new track connections built into or out of shipper facilities. *Id.* at 145-46.

Second, the Board took steps to "help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations." It did so by, among other things, requiring Applicants to modify any contracts with shippers at all 2-to-1 points incorporated within the BNSF agreement to allow BNSF access to 50% of the volume. *Id.* at 146. In other words, the Board wanted to make certain, in response to the concerns of the League and other shippers, that the trackage rights granted to BNSF as a condition on approval of the merger would be operated "under economic conditions comparable" to those of the UP. *St. Louis Southwestern Ry. Co. Compensation — Trackage Rights,* 8 I.C.C.2d 80, 81, n.3 (1991) (quoting from *Union Pacific Corp. et al., — Control — Missouri Pacific Corp., et al.,* 366 I.C.C. 462, 590 (1982)). If BNSF's

operations over the trackage rights obtained from the Applicants are not economically viable, BNSF will not be able to replace both the direct and the indirect competition provided by SP that would lost as a result of the merger with UP. Decision 44 at 118 ("We believe that BNSF will aggressively compete with UP/SP *where it can obtain profitable traffic under the BNSF agreement.*" [emphasis added]).

As the Board stated: "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." Decision 44 at 180 [emphasis added]. The Board should emphatically reject any efforts by the Applicants to circumscribe, limit or otherwise endanger the justifiable efforts by the Board to ensure that UP/SP does not place BNSF in the position of being a second-class competitor. UP/SP took great pride in claiming that it had brought in its "biggest, meanest, toughest competitor," BNSF, to replace the competition from the SP. Rebensdorf Dep. Tr. at 151, 158, 402, 755-756.[4] *See also* UP/SP-230 at 11. The Applicants should not now be permitted to put that meanest competitor in a cage.

II BN/SF MUST BE ABLE TO REPLICATE ALL FORMS OF COMPETITION LOST BECAUSE OF THE MERGER, INCLUDING THE RIGHT TO SERVE TRANSLOADING FACILITIES

At the outset, it is surprising the Applicants' have alleged that it is necessary to obtain such a broad clarification of the Board's action on giving BNSF the right to serve new transloading facilities. For the Applicants have

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4 As UP witness Rebensdorf put it at his deposition (Dep. Tr. 756):

> Q. *** Of all of the possible railroads to whom trackage rights could have been granted, is BN/Santa Fe your biggest, meanest, toughest competitor in each and every corridor?
> A. Absolutely.

already agreed to allow BNSF to serve, without limitation, *any* new transloading facility located *within* the geographical limits of the 2-to-1 points specified in the BNSF agreement. In their rebuttal, Applicants stated:

> [B]ecause some parties say they are unclear on the point, Applicants will amend the BN/Santa Fe settlement agreement to make it absolutely clear that BN/Santa Fe is entitled to serve existing transloading facilities at all "2-to-1" points *and to establish new transloading facilities at such points.*

UP/SP-230 at 21 [emphasis added]. This is one of the "commitments" for clarification that the Board bound the Applicants to comply with as a condition of approval. *Supra* note 3. It is also important to note that this clarification was made independently of the CMA agreement. UP/SP-230 at 21. This is confirmed by the amendments to the BNSF agreement that were submitted by Applicants the last business day before the Board's oral argument. In that submission, Applicants described a group of amendments as "Unilateral Changes to Address Shipper Concerns." UP/SP-266 at 5. The very first item on that list was a change that confirmed "that BN/Santa Fe will have access to any existing or *future* transloading facility at '2-to-1' points." *Id.* [emphasis added].[5] The Board specifically recognized Applicants' commitment allowing BNSF to locate transloading facilities at 2-to-1 points. Decision 44 at 124.

Thus, Applicants, by consummating their merger, have already committed to providing access to BNSF at any future transloading facilities constructed to serve any shipper, as long as it is located within the specified geographic limits. There is nothing in the BNSF agreement provisions referred to above that restricts the shippers that BNSF can serve through such a future transloading

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[5] Changes were made in the BNSF agreement to authorizing BNSF to have access, without limitation, to "any existing or future transloading facility at points listed in Exhibit A to this Agreement." Changes were also made to define specifically the geographical limits "within which ... future transloading facilities shall be open to BNSF service ...." *See, e.g.*, UP/SP-266, Ex. A at 2-4.

facility only to shippers that happen to be located on the line of the merger partner that is not providing trackage rights to BNSF.[6]

In short, there is no need for clarification of BNSF's right to serve future transloading facilities located within the limits of the 2-to-1 points. If any clarification is needed in this circumstance, it is only for the Board to make it clear that Applicants are required to adhere to their commitments that BNSF has unrestricted access to serve any shipper who utilizes future transloading facilities within 2-to-1 points, regardless of whether either: (1) the shipper being served through the transload facility; or (2) the trackage rights used by BNSF to serve the 2-to-1 point, is located on a UP-owned line or an SP-owned line.

If any clarification is needed at all (a matter of severe doubt, since the Applicants themselves concede that, "read literally," the transload condition actually set forth in Decision 44 would encompass the broad meaning that they now wish to restrict, *see* UP/SP-275 at 3), it is only whether or not the Board intended to (or should have, if the Applicants are considered to be seeking reopening on this point) allowed BNSF to use the trackage rights lines to serve future transloading facilities located *outside* of the defined limits of the 2-to-1 points. In other words, can and should BNSF be able to utilize its right to operate over the trackage rights lines obtained from the Applicants to serve a future transloading facility located anywhere along those lines, even if the future transloading facility is located outside a 2-to-1 point, and even if the shippers served through that transloading facility are located on or near the line of either the UP or the SP? The answer is yes, because the Board clearly imposed "broad-

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6 This analysis highlights the critical distinction (implicitly recognized by the Board at page 106 of Decision 44) in the BNSF agreement between "2-to-1 shipper facilities" and "2-to-1 points." The former refers only to *existing* shippers that could receive service from both UP and SP. The latter refers to a geographic area without limiting the present or future facilities that might be used by shippers that are included. *See* UP/SP-266, Ex. A at 2 and 3-4, amending Sections 1b and 1c of the BNSF agreement.

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." Decision 44 at 145 [emphasis added].

What Applicants would have the Board ignore is the essential nature of competition involving the use of transloading facilities. When UP and SP, before the merger, were providing indirect competition to each other by holding out the possibility of serving a new transloading facility, such a facility could be sited at *any* appropriate location along the line of the competing carrier that provided the most efficient and convenient service to the shipper seeking the benefits of such competition. Obviously, the most ideal location might be as close as possible to the shipper's facility, but the ideal might not be feasible, for any number of reasons. Nonetheless, the shipper and the competing railroad, if the potential economic benefits were sufficient to justify the cost, might have chosen to commit, or threaten to commit, the necessary resources to establish a transloading facility at a less ideal location in order to obtain the benefits of vigorous competition.

As the Board correctly recognized, either the actual establishment or the threat of establishment of transloading facilities has provided an element of competition between UP and SP throughout the region that they have served. Decision 44 at 122. That competition has been bilateral. Transload facilities located on the UP would provide competition to the SP; and transload facilities located on the SP would provide competition to the UP. As the Board correctly recognized: "[T]oday UP or SP may locate transloading facilities *anywhere on their lines* to reach shippers on the other carrier." *Id.* at 124 [emphasis added]. In either case, the benefits of such competition to shippers are obvious.

The Board clearly desired to make sure that the benefits of such competition were not lost: "The potential for exercising such options [as

transloading shipments] does give shippers competitive leverage, though clearly not as much as if they had two carriers serving them directly. *** Nonetheless, *we believe that maintaining these options is important to shippers* who use them as leverage in their negotiations with carriers." Decision 44 at 106 [emphasis added]. But because the Board has decided to give BNSF trackage rights over certain lines (rather than ordering the divestiture of parallel lines in the affected areas), replication of the competition, potential or actual, from transloading facilities can *only* be accomplished by interpreting the BNSF's trackage rights to allow it to serve a transloading facility that can be used by a shipper located before the merger on *either* the UP *or* the SP. The Board correctly concluded that: "We believe that allowing BNSF or third parties to locate transloading facilities *anywhere* on the lines where BNSF will receive trackage rights will preserve that competition. " *Id.* at 124 [emphasis added]. *See also id.* at 179.

A simple example will make the point obvious. Before the merger, a shipper is located on a line of the SP at a point that is not within the definition of 2-to-1 points covered by the BNSF agreement. Nevertheless, there is a UP line in the vicinity where a transload facility could be constructed and used by the shipper. Before the merger, the shipper had the benefit of whatever competitive leverage resulted from the threat of using the potential transload facility. After the merger, as part of the conditions imposed, BNSF has the right to conduct trackage rights operations only over the SP line.

The shipper, in this example, can no longer use, against the combined UP/SP, the competitive leverage provided by the threat of using a transload facility unless the facility can be served by BNSF, the only possible competitor, and the competitor named by the Board to replicate the competition lost between UP and SP as a result of the merger. In order to replicate that competition, the shipper must be able to use, and the BNSF to serve, a transload facility located on

the former SP line -- the line after the merger over which the BNSF has been granted trackage rights. But the "clarification" sought by the Applicants would *eliminate* that competition, leaving the shipper worse off than before the merger.

The Board clearly and correctly intended that the BNSF have the right to serve such a transload facility for another reason. In order to allay concerns that BNSF would not have a sufficient traffic base to economically and efficiently provide competitive service that would replicate that lost because of the merger, the Board relied on, among other things, the expanded access to transload facilities that BNSF would receive. Decision 44 at 133. The Applicants' requests for limitations on the BNSF's ability to include traffic derived from new transload facilities in its traffic base would jeopardize the efforts of the Board to provide protection for the competitive structure existing before the merger.

III. CONCLUSION

The Applicants' request for clarification (or reopening) by the Board of the condition imposed by ordering paragraph 6 in Decision 44 should be denied. Given the critical nature of prompt and immediate implementation of the conditions imposed by the Board (Decision 44 at 134 and 146), it is essential that the Board act expeditiously on this matter. The League requests that the Board serve its decision not later than October 11,1996.

Respectfully submitted,

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September 23, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of September, 1996, served a copy of the foregoing Reply submitted on behalf of The National Industrial Transportation League on all parties of record, by first-class mail, postage prepaid, in accordance with Rules of Practice.

FREDERIC L. WOOD

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September 23, 1996

VIA MESSENGER

Mr. Vernon A. Williams
Surface Transportation Board
Case Control Branch
Room 1324
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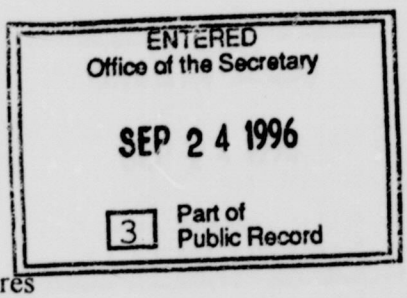
Washington, D.C. 20423

Re: Finance Docket No. 32760, Union Pacific Corporation, et al.
-- Control and Merger -- Southern Pacific Corporation, et al.

Dear Secretary Williams:

Enclosed for filing in the above-captioned case is one original and twenty copies of the Reply of The International Paper Company, designated as document IP-17. We have also enclosed an additional copy to be date-stamped when filed and returned to us.

Also enclosed is a 3.5" WordPerfect 5.1 disk containing the text of IP-17.



Very truly yours,

John F. Luedke

Edward D. Greenberg
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Attorneys for The International Paper Company

Enclosures

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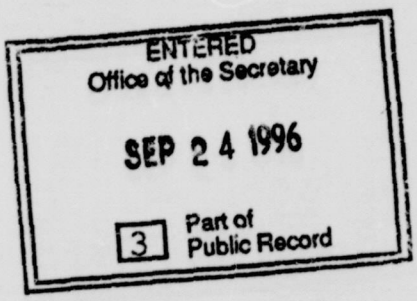
BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

REPLY OF THE INTERNATIONAL PAPER COMPANY TO APPLICANTS' PETITION FOR CLARIFICATION



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BEFORE THE
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Finance Docket No. 32760

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

REPLY OF THE INTERNATIONAL PAPER COMPANY
TO APPLICANTS' PETITION FOR CLARIFICATION

The International Paper Company, ("IP") submits the following reply to Applicant's Petition for Clarification, filed August 29, 1996 in this proceeding. Contrary to the assertions of Applicants, there is nothing which needs to be clarified. The conditions imposed by the Surface Transportation Board ("STB") in its August 6, 1996, Decision No. 44 approving the proposed merger are clear and unambiguous. Simply stated, BNSF was given the right to serve new facilities and transload facilities on the lines over which it has trackage rights. Decision No. 44 at 106.

Throughout the application and approval process, IP has expressed its concern about the anti-competitive effects the merger would have on rail transportation in general, and shippers such as IP specifically. See IP-10, Verified Statement of Charles E. McHugh (hereinafter "McHugh") at 28-33; Verified Statement of Roger C. Prescott (hereinafter "Prescott") at 8-12, 17, 20. IP was particularly

concerned that the "solutions" proposed in the BNSF settlement would not be sufficient to ameliorate the anti-competitive effects of the merger, (1) that there was insufficient traffic available to BNSF to justify the alternative service being offered as a substitute for the head-to-head competition of the UP and SP, and (2) that BNSF would not be able to get access to all traffic that previously had competitive options.

The Board recognized the anti-competitive potential of the merger. In fact, the trackage rights and other agreements intended to preserve competition are what saved this merger from the disapproval which befell a merger similar in scope, the SF/SP merger, which the ICC disapproved in 1986. See Decision No. 44, at 102-103. To implement those agreements and other pro-competitive proposals, the Board approved the merger subject to competition protective conditions, each of which was acceptable to Applicants when they sought the Board's approval. Decision No. 44, at 144-145.

Now, through their petition for "clarification," Applicants are backpedaling by attempting to construe the conditions imposed so as to limit the traffic that will be available to BNSF. Applicants are asking the Board to reverse its "careful and extensive consideration." Burke, Appeal-Proof Decision?, Traffic World, Aug. 19, 1996, at 47 (quoting UP Chairman Drew Lewis). The Board properly conditioned approval of the merger on several conditions imposed to preserve competition, including permitting "BNSF to serve any new facility at any point on any SP 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 BNSF receives trackage rights) to transload facilities, wherever BNSF or some third party chooses to establish them." Decision No. 44, at 106 (emphasis in original).

Applicants are now asking the Board to disregard what it clearly stated and intended. As the purpose of the conditions was to preserve competition, the Board should reject Applicants' suggestions, and, as it recently did in Decision No. 47 in this proceeding, served September 10, 1996, construe the conditions to maintain competition.

Applicants' Requested "Clarification"
Would Hinder, Not Foster, Competition

In their petition, Applicants state that they have not identified any shipper which would lose a transload option if the condition were interpreted as they request. UP/SP-275, Verified Statement of Richard B. Peterson at 2. IP's Nacogdoches, Texas plant, however, is just such a point. Because Nacogdoches was served solely by SP before the merger, it is not a "2-to-1" point and therefore BNSF does not receive the right to serve it directly under the BNSF Settlement Agreement even though it will be operating over that line pursuant to the trackage rights it ws awarded. However, Nacogdoches had a viable transload option with UP prior to the merger. Under Applicants's requested "clarified" definition of the transload condition, BNSF would not be allowed to compete for the transload traffic, because the transload was to a line owned by UP over which BNSF does not enjoy trackage rights. Thus, if Applicants get their way, the transload option at Nacogdoches will be lost.

With the conditions imposed as clearly stated by the Board in Decision No. 44, this will not happen. As the Board ruled, "BNSF [shall] be granted the right to serve new facilities on both SP-owned and UP-owned track over which BNSF will receive trackage rights; . . .[and] the term 'new facilities' shall include transload facilities, including those owned or operated by BNSF." Decision No. 44, at 146. It is plain that the Board has already made clear exactly the issue Applicants wish it to "clarify."

Applicants contrive to show how the Board's clearly stated condition would create new competition, not preserve existing competition. UP/SP-275 at 3-4. This is inaccurate. As the situation at IP's Nacogdoches plant demonstrates, unless BNSF has the right, as stated in Decision No. 44, to serve new transload facilities on both UP and SP-owned lines, an existing competitive option will be eliminated.

Under the BNSF Settlement Agreement, BNSF was granted overhead trackage rights on the SP line, but not the right to serve the IP plant, as it was not a 2-to-1 point within the narrow meaning of the BNSF Settlement Agreement. Thus, after the merger as Applicants would have it, IP would lose a competitive option. The Board recognized, in granting BNSF access to this "new facility" traffic, that unless BNSF is granted the right to serve a "new facility," such as a transloading facility, on the SP line over which it has trackage rights, IP would be losing competitive service.

Recently, in Decision No. 47 in this proceeding, served September 10, 1996, the Board addressed a request by Applicants to restrict competition by narrowly construing a pro-competitive condition imposed as a prerequisite to approval. See Decision 47 at 15-16. Applicants sought to have the Board "reconsider" its position so as to allow Tex Mex only overhead trackage rights, rather than the right to serve local shippers which the Board had unambiguously granted in the interest of preserving competition. Decision No. 47 at 15-16. The Board appropriately refused to do so. The conditions were imposed both to preserve competition and to preserve the essential service of Tex Mex.

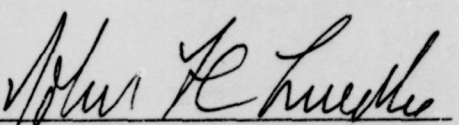
Just as the Board found it in the interest of competition to construe the Tex Mex trackage rights broadly in the interest of preserving rail competition, it should do the same here. The "clarification" requested by Applicants would narrow the rights granted to BNSF to such an extent as to eliminate competition for a great deal of transload and new facility traffic, and at the same time seriously erode

the traffic base BNSF must have to provide a true competitive service along the lines where it has been awarded trackage rights. Though this may be the result Applicants now desire, it is not the result the Board intended.

Conclusion

The Board premised its approval of the merger on the very clear and specific conditions contained in Decision No. 44, each of which were carefully crafted to preserve competition in the face of the otherwise anti-competitive merger. Contrary to Applicants' requested "clarification," the conditions must be read as broadly as reasonable to preserve meaningful rail competition in these regions. That is the basic premise underlying all of the conditions to the merger, and Applicants should not be allowed to go back and dismantle them piece-by-piece. In the interest of continued competition in the rail industry, the "clarification" requested by Applicants should be rejected.

Respectfully submitted,



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Date: September 23, 1996

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 23, 1996, a true and correct copy of the foregoing Reply of The International Paper Company was served, via first class mail, upon all parties of record in Finance Docket No. 32760.

John F.C. Luedke

STB FD 32760 9-23-96 D 86239

86239

76 PRODUCTS COMPANY

September 18, 1996

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12 th Street and Constitution Avenue, N.W.
Room 2215
Washington, D.C. 20423

RE: ***FINANCE DOCKET 32760***

Dear Mr. Secretary:

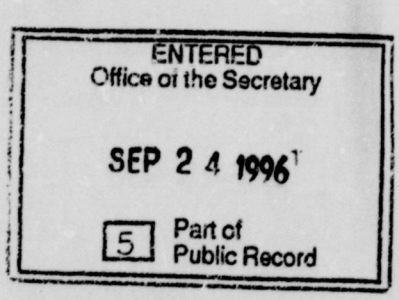
Unocal, 76 Products Company is a shipper, and receiver of petroleum products. We have facilities in California, and Oregon. Unocal conducts extensive business in the area served in this proceeding. Our purpose in writing you is to support the Burlington Northern Santa Fe's position in this proceeding.

This is to declare the support of Unocal to the BNSF petition for the clarification of the Surface Transportation Boards decision to modify any contracts UPSP has with shippers at 2-1 points. We also take the position that the UPSP petition to limit shippers protections regarding new facilities and transload facilities should be denied on the basis they limit competition.

Sincerely,

John M. Hunter

John M. Hunter
Supervisor, Rail Operations



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September 23, 1996

Vernon A. Williams
Secretary
Surface Transportation Board
Room 2215
1201 Constitution Avenue, NW
Washington, DC 20423

Re: Finance Docket No. 32760, Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Corporation, et al.

Dear Mr. Williams:

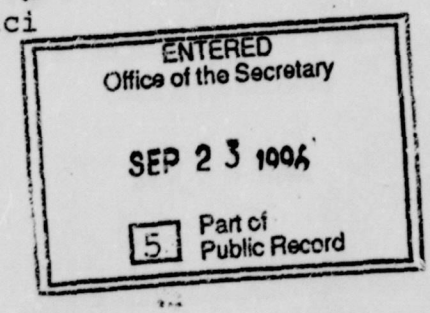
Enclosed for filing in the above-captioned docket proceeding, please find an original and twenty (20) copies of the Reply of The Society of the Plastics Industry, Inc. to Petitions for Clarification and Reconsideration (SPI-26). Also enclosed is a 3.5" disk containing the text of the pleading in Word Perfect 5.1.

Copies of the enclosed Reply are being served on All Parties of Record.

Very truly yours,

Martin W. Bercovici

Enclosures



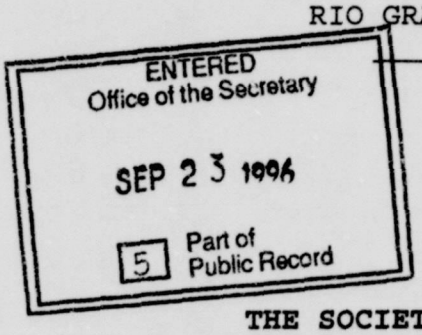
BEFORE THE

Surface Transportation Board

WASHINGTON, D.C. 20423

FINANCE DOCKET NO. 32760

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



REPLY OF
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.
TO PETITIONS FOR CLARIFICATION AND RECONSIDERATION

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September 23, 1996

BEFORE THE

Surface Transportation Board

WASHINGTON, D.C. 20423

FINANCE DOCKET NO. 32760

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

REPLY OF
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.
TO PETITIONS FOR CLARIFICATION AND RECONSIDERATION

The Society of the Plastics Industry, Inc. (hereinafter generally referred to as "SPI"), respectfully submits this Reply to petitions submitted to the Board for clarification and reconsideration of the decision approving, with conditions, merger of the Union Pacific and Southern Pacific railroads, STB Decision No. 44, served August 12, 1996. This Reply is submitted pursuant to the provisions of Section 1104.13(a) of the Board's Regulations. In this Reply, SPI addresses the petitions for clarification submitted by the Burlington Northern Railroad Company and the Atchison, Topeka and Santa Fe Railway Company ("BNSF"), BN/SF-65, Geneva Steel Company, GS-3, the Railroad Commission of Texas, RTC-8, and Applicants Union Pacific and Southern Pacific railroads, UP/SP-275, and the petition to reopen filed by the Texas Mexican Railway Company ("TexMex"), TM-44.

In Decision No. 44, the Board found that merger of the UP and SP, absent protective conditions, would have significant anticompetitive effects. The Board found that certain of the anticompetitive effects were ameliorated by the agreements voluntarily entered into by Applicants with BNSF and the Chemical Manufacturers Association ("CMA"), and the Board imposed those agreements as conditions for approval of the merger. The Board further found, however, that the voluntary agreements did not resolve all competitive problems posed by the merger; and the Board consequently imposed additional conditions, including those granting certain rights to TexMex and those designed to expand upon the BNSF and CMA agreements.

The conditions imposed by the Board are intended to provide that competition lost through merger of the SP into the UP is effectively replaced by the BNSF, as contemplated by the agreement between Applicants and the BNSF granting BNSF access to 2-to-1 points and to 2-to-1 shippers, and granting BNSF trackage rights along corridors dominated by the UP and SP. Substantial issues were raised during this proceeding concerning the BNSF's ability to provide effective replacement competition based upon a variety of factors, including whether the BNSF would have effective access to customers due to Applicants' having locked up traffic at 2-to-1 points prior to the merger and whether BNSF would be able to generate sufficient traffic density to warrant effective, competitive operations. Consequently, among the conditions imposed were requirements that (i) Applicants reopen

contracts with shippers at all 2-to-1 points to allow BNSF access to at least 50% of the volume, and (ii) Applicants allow BNSF the right to serve new facilities, including transload facilities, on the lines over which BNSF receive trackage rights. Additionally, the Board granted TexMex trackage rights over UP/SP lines from Robstown and Corpus Christi to Houston and onward to a connection with KCS at Beaumont, and also terminal trackage rights on the Houston Port Terminal Railway for operation in conjunction with the trackage rights granted over the UP/SP lines. The Board, however, has limited the TexMex to use of its trackage rights only where there is a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line.

BNSF has petitioned for clarification of the 50% contract reopening provision. Similar requests have been submitted to the Board by Geneva Steel Company and the Railroad Commission of Texas. Secondly, Applicants have petitioned for clarification of the condition relating to BNSF's rights to serve transloads and new facilities. The third item of interest to SPI is the petition to reopen filed by TexMex regarding the limitation that the trackage rights granted may be utilized only where there is a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line.

I. Contract Reopening

BNSF, Geneva Steel Company and the Railroad Commission of Texas have requested the Board to interpret the contract

reopening condition in such a manner as to assure that BNSF has a fair and realistic opportunity to compete for traffic, consistent with the Board's intentions and expectation that BNSF will be an effective competitor in the Gulf Coast and Central Corridor on the trackage rights lines. The issues concerning the contract reopening condition include the following:

- Whether, in releasing shippers from volume commitments, UP/SP must scale back penalties for failing to achieve, and incentives for exceeding, minimum volume commitments in order to enable BNSF an opportunity to compete effectively?
- Whether the requirement that "at least" 50% of contract volumes be opened to BNSF requires that BNSF be afforded the opportunity to compete for any and all volumes on which UP/SP offers to revise contract terms and conditions?[1/]
- Whether shippers, not UP/SP, are entitled to choose and designate which portion of any traffic under contract is open to BNSF competition?
- Whether the contract reopener may be exercised at any time throughout the duration of the contract, without time constraints.

[1/] The issue presented is whether UP/SP may link adjustment of contract terms for traffic not open to BNSF competition to retention of traffic that is open to BNSF, or alternatively whether any such condition either is unenforceable or opens the additional traffic to solicitation by BNSF.

The principle underlying the foregoing issues concerns whether BNSF will have a true opportunity to compete for trackage rights traffic. It was established during the proceeding that the UP/SP had undertaken to lock in traffic at 2-to-1 points in advance of the merger.[2/] Moreover, as illustrated by the plastics traffic, the UP/SP has a substantial base of captive traffic in contrast to the very small captive base of the BNSF.[3/] Thus, BNSF must have effective access to the trackage rights traffic to achieve the necessary densities to support competitive operations if BNSF is to have the opportunity to compete effectively from the inception of the merger. To achieve such a result, all of the questions posed above must be answered in the affirmative.

This issue of whether BNSF will have fair access to reopened contracts is not new. Concerns about the meaning of the contract reopening provision were raised by SPI in its Further Comments, SPI-16 at p. 6 (April 29, 1996), concerning the CMA settlement. Moreover, this issue was addressed to BNSF on deposition; and BNSF's executive responsible for chemicals marketing, Matthew Rose, reflected his interpretation, albeit not confirmed with UP/SP, that the reopening of contracts would be free of bias which would preclude BNSF from effectively competing for the

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2/ See SPI-11 at pp. 24-25.

3/ See SPI-11, Verified Statement of Larry D. Ruple.

subject traffic.[4/] While BNSF did not confirm its interpretation in formal filings before the Board, neither did Applicants, upon hearing BNSF's interpretation of the contract reopening provision,[5/] repudiate BNSF's interpretation, either on brief or otherwise, in order to inform BNSF, other parties and the Board of the manner in which they intended the competitive environment would function following merger consummation. Rather, UP/SP stated on brief:

> The steps agreed upon with CMA, together with other steps taken by Applicants, resolve any conceivable question as to the effectiveness of the BN/Santa Fe settlement is preserving and enhancing competition. These steps include:
>
> * * *
>
> - Releasing shippers from contractual commitment so that BN/Santa Fe will have quick access to nearly all the traffic at "2-to-1" points.

UP/SP-260 at pp. 8-9.[6/]

Having heard BNSF's interpretation of the CMA settlement agreement, and themselves relying upon BNSF as the fix to the anticompetitive problems posed by the merger, Applicants now

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[4/] The deposition testimony is recited in the Geneva Steel Petition for Clarification, GS-3 at pp. 6-7.

[5/] Applicants' counsel was present at the Rose deposition. See Exhibit 1 hereto.

[6/] See also Rebuttal Verified Statement of Richard B. Peterson at p. 194: "Moreover, the settlement with CMA will release each shipper in Texas and Louisiana from UP/SP contractual commitments as to half the shipper's volume. BN/Santa Fe will have access to this traffic immediately, constituting thousands of carloads of chemicals and other traffic." UP/SP 231 (Tab 17).

cannot be heard to argue that BNSF should be handicapped in its opportunities to obtain traffic from 2-to-1 shippers in order to achieve the densities necessary to render efficient, competitive service. Whatever Applicants' rationale for their narrow interpretation may be, it must be subrogated to facilitation of competition between UP/SP and BNSF.[7] Competition in the Gulf Coast must be real, not hypothetical and illusory, in order to assure that the Board's reliance upon BNSF as the competitive fix, as postured by Applicants, is not--in BNSF's terms--a "virtual sham."[8]

The Board must be mindful that the required reopening of contracts poses potential implementation issues; and SPI urges the Board in disposing of these petitions to affirm its willingness to resolve any future conflicts between shippers and UP/SP.[9] Virtually all rail transportation agreements have confidentiality provisions. Necessarily, BNSF will not have access to those contracts in dealing with potential customers;

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[7] If Applicants' interpretation is based on the economic relationship between the rates provided in the contracts and the volumes committed, according to their own testimony UP/SP will have the opportunity to reprice the traffic shortly, based on their study that "approximately 90 percent will expire within one year of consummation of the merger." Rebuttal V.S. of John T. Gray at pp. 41-43, UP/SP-231 (Tab 9).

[8] See letter from BNSF counsel to counsel to Geneva Steel, Exhibit B, p. 2, GS-3.

[9] Notwithstanding 49 U.S.C. § 10709(c), the Board's ability to interpret contracts and enforce the reopener provision is not at issue. This power arises out of the merger and the STB's power to impose conditions on merger approval, which conditions have been accepted by Applicants in consummating the merger.

and shippers will be constrained, both contractually and ethically, from disclosing contract terms to BNSF. Nonetheless, BNSF has become aware that it currently is unable to compete due to contract terms ancillary to volume requirements which UP/SP is or may be unwilling to modify and/or Applicants' tactics in linking contract incentives on traffic open to BNSF bidding to contract incentives on traffic not released for BNSF competition. The Board must advise shippers that if they feel constrained by UP/SP's interpretation as to which terms of the contract are subject to modification in allowing for competitive bidding by BNSF, that shippers may obtain an *in camera* review and an interpretation from the Board *on an expedited basis* as to whether UP/SP is complying with the contract reopener condition of Decision No. 44. Prompt disposition of these issues is necessary inasmuch as the commercial window of opportunity often is short, and protraction of proceedings to obtain an interpretation from the Board not only will chill BNSF's opportunities but may moot the opportunity for shippers to obtain competitive quotations from the BNSF. Confidentiality will be maintained by Board review of contract disputes under the protective order entered in this proceeding.

II. Transloads and New Facilities

UP/SP requests the Board to clarify the condition relating to BNSF access to transloads and new facilities. UP/SP asks the Board to limit BNSF's access to transloads to "handling traffic

transloaded to or from points on the other merging railroad," i.e., from shippers on the line over which the BNSF has no access. UP/SP-275 at p. 1 (emphasis in the original). UP/SP further asks the Board to clarify that BNSF access to serve new facilities on UP lines does not extend to the track segment between Placedo and Harlingen, Texas, and segments where BNSF was given trackage rights "solely for operating convenience," i.e., the UP lines in the Houston-St. Louis corridor where BNSF otherwise would be operating against the flow of the UP/SP directional flow of traffic.

To achieve the competitive environment intended by the merger conditions, the Board must DENY the interpretations requested by UP/SP. In the Gulf Coast, and also in the Central Corridor, the Union Pacific and Southern Pacific dominated the relevant traffic lanes. With particular reference to the Gulf Coast, in which SPI's interests predominate, the BNSF is a minor player due to its route structure, its lack of infrastructure and its very small base of points closed to service by other railroads. Substitution of BNSF as the competitive alternative presented a number of deficiencies acknowledged by Applicants and/or by the Board through the course of the proceeding, including (i) loss of competition for 2-to-1 shippers and points, (ii) loss of competition in 2-to-1 corridors, (iii) operational problems under the BNSF Agreement, e.g., those arising out of the contemplated directional flow of Applicants in the Houston-Memphis corridor, (iv) lack of infrastructure by BNSF necessary

to serve the Gulf Coast industry, and (v) lack of traffic density necessary to provide competitive operations. The first two factors were intended to be addressed by Applicants through the BNSF Agreement, and the third and fourth factors through the CMA agreement. The Board, however, recognized that the measures voluntarily undertaken by Applicants did not serve to ameliorate the loss of competition posed by the merger; and the Board consequently imposed additional conditions intended to enable the BNSF the opportunity to meaningfully offer competitive service, particularly including the opportunity to realize sufficient traffic densities in order to provide not simply the appearance of competition but rather actual competition.

Paragraph 2 of the CMA agreement affords BNSF the opportunity to serve any "new shipper facility" located subsequent to merger consummation on any SP-owned line over which BNSF receives trackage rights. Excluded from this provision are transloads and load-outs. The only explanation of the intent underlying this provision is the summary comment by CMA that "This will, over time, open additional traffic to BNSF and increase its traffic density." CMA Brief, CMA-12 at p. 2. From a current standpoint, however, the new facilities clause offers BNSF no opportunity to realize adequate densities of traffic to operate efficiently and competitively. Addressing the legitimate concerns as to whether BNSF would have sufficient traffic densities to enable it to fulfill its assigned competitive role, the Board devised additional conditions. See Decision No. 44 at

p. 106. Among the conditions imposed, the Board construed "new facilities" also to include transloads--which inherently are new physical facilities. This is specifically designed to maintain effective corridor competition and provide BNSF with the opportunity to realize sufficient traffic densities to operate on a competitive basis. Id. The interpretation requested by Applicants would nullify the Board's intent.[10/]

There is another circumstance which supports literal application of the transload condition, contrary to that requested by UP/SP. There is massive parallelism between the lines of the UP and those of the SP in the affected regions. Much of the trackage rights accorded to the BNSF is over the line of one or the other of the merging carriers. Where the shipper's facility is served over that line, the shipper nonetheless would have the opportunity to construct a transload to the other of the merging carriers. Changes over time, whether economic, engineering, product handling or otherwise, may warrant construction of such a transload, where perhaps today that transload would not be justified. Accord, Decision No. 44 at p. 106. This is the very same situation recognized by the Board in striking the limitations in the CMA agreement on build-in/out opportunities, where the Board noted that removal of those restrictions is necessary "to replicate the competitive options

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[10/] The "omnibus" clause of the BNSF Agreement, paragraph 8(i), otherwise would cover transloads under the interpretation requested by UP/SP, rendering the Board's condition merely cumulative.

now provided by the independent operations of UP and SP." Decision No. 44 at p. 146.

Regarding UP/SP's argument concerning BNSF's rights to serve new facilities on lines where BNSF was given trackage rights "solely for operating convenience," SPI submits that Applicants' characterization of the purpose of the trackage rights is misplaced. With particular reference to the UP lines between Houston and Valley Junction, Illinois, including the line between Fair Oaks and Bald Knob, Arkansas, BNSF was granted trackage rights not for BNSF's convenience, but rather to cure the operating barrier to BNSF competitiveness posed by UP/SP's intended directional flow of traffic in the Houston-Memphis corridor. Accord, Rebuttal Verified Statement of John H. Rebensdorf at p. 7, UP/SP-231 (Tab 18). Operation with the flow of traffic is essential to BNSF train operations. The Board's rationale for expansion of the "new facilities" term, including the opportunity for BNSF to achieve an adequate density of traffic to warrant competitive operations, therefore equally supports application of the new facilities condition to these lines.

Finally, SPI directs the Board's attention to the UP/SP Petition where it defines transloading as involving "the movement of a shipper's goods by truck between the shipper's facility and a transloading facility, where the goods are transferred between the truck and a rail car." UP/SP-275 at p. 2. SPI requests the Board to clarify that the foregoing is an *illustration* of

transloading, and is not the exclusive definition of transloading. Transloading may be, and is, achieved through product transfer between rail cars; and it may be achieved through product transfer in other circumstances, involving, for example, barges or intermodal containers. Considering Applicants' preference for narrow interpretation of the conditions imposed by the Board, SPI urges the Board to take the opportunity of ruling on the transloading issue to assure clarification that the term "transload" itself, as well as the condition imposed, is broadly construed.

III. TexMex Conditions

Third, SPI supports the Petition of the Texas Mexican Railway to reconsider the limitation imposed upon the trackage rights granted to the TexMex. Plastics, as the Board recognizes in Decision No. 44, are a key component of the Houston area transportation market. As demonstrated by SPI, 15.6% of the Gulf Coast plastics market is served via the PTRA, the traffic to which the TexMex would gain access as a result of the trackage rights granted to that carrier by the Board.

SPI concurs with TexMex concerning the need to preserve competition in the Houston market. SPI further respectfully submits that the limitation that TexMex may serve trackage rights traffic only if there is a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line has been held by the Board in this proceeding as inconsistent with service to the plastics

industry and therefore would frustrate TexMex's use of the trackage rights authority. This results, as recognized by the Board, from the production cycle whereby plastics resins primarily move from production into rail cars which move to storage prior to being identified to a particular customer. Decision No. 44 at p. 151. Consequently, the Board struck routing limitations set forth in the CMA agreement with regard to BNSF's access to the Lake Charles area traffic, acknowledging that shippers require "a full range of destinations, without which shippers may be hesitant to use BNSF services for any shipments requiring SIT." Id. at 153; see generally Decision No. 44 at pp. 152-153. The Board's reasoning applies equally to shipper use of TexMex service.

The Board appreciates in Decision No. 44 that the extensive parallelism between the UP and the SP systems requires ameliorating conditions. The Board further holds that the TexMex connection to Mexico is important and must be preserved. Such preservation requires that shippers have a routing option independent of Applicants and BNSF. Without debating whether the Houston market is a 3-to-2 or a 2-to-1 market, TexMex must be given the opportunity to succeed in its assigned mission.[11/]

[11/] However one characterizes the Houston market, the Board has gone to substantial lengths to preserve competition in the Gulf Coast, including the access afforded to BNSF, the imposition of common carrier responsibilities on BNSF, and subjecting BNSF to oversight as part of the merger approval conditions. These conditions evidence that the Board recognizes the potential tenuousness of BNSF's competition in the Gulf Coast. BNSF itself so acknowledges, stating in its Petition for Clarification that (continued...)

Conflict between principles and practicalities, to the extent they exist, must be resolved in favor of affording the trackage rights operations the full opportunity to achieve the intended purpose, rather than giving pre-eminence to the principle that the Board will not preserve three-carrier competition at the potential expense of the opportunity of the TexMex to succeed and even survive.[12/]

WHEREFORE, THE PREMISES CONSIDERED, The Society of the Plastics Industry, Inc., respectfully urges the Surface Transportation Board to affirm that the conditions imposed in Decision No. 44 are intended to facilitate the maintenance of competition in a post UP/SP merger environment and therefore to rule favorably on the Petitions for Clarification of the BNSF, Geneva Steel and the Railroad Commission of Texas, to grant the Petition to Reopen of TexMex and remove the restriction upon operation under the trackage rights granted to that carrier, and to deny the Request for Clarification sought by Applicants and,

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[11/](...continued)
"Even moderate risk aversion [by shippers] could forestall the advent of open competitive bidding indefinitely, if not forever." BN/SF-65 at p. 7.

[12/] While SPI fully supports TexMex in its Petition to Reopen, SPI further observes that the volume of traffic potentially subject to diversion by unrestricted TexMex access to the Houston market may be limited, as evidenced by the Petition for Reconsideration of the Dow Chemical Company, wherein Dow seeks trackage rights between its build-out point at Texas City and either New Orleans and Memphis or Baton Rouge in lieu of a connection with KCS at Beaumont. See DOW-27.

in doing so, to clarify that "transloads" can take effect in circumstances other than a rail/truck transfer.

Respectfully submitted,

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(202) 434-4646 (FAX)

Attorneys for The Society of the Plastics Industry, Inc.

September 23, 1996

BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

-- CONTROL MERGER --

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

HIGHLY CONFIDENTIAL

Washington, D.C.

Friday, May 10, 1996

Deposition of MATTHEW K. ROSE, a witness herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witness being duly sworn by FERNITA R. FINKLEY, RPR, a Notary Public in and for the District of Columbia, taken at the offices of Mayer, Brown & Platt, 2000 Pennsylvania Avenue, N.W., Washington, D.C., 20006-1882, at 9:10 a.m., Friday, May 10, 1996, and the proceedings being taken down by Stenotype by FERNITA R. FINKLEY, RPR, and transcribed under her direction.

APPEARANCES:

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and

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STB FD 32760 9-23-96 D 86238

86238

ASBURY
FOUNDED 1895

September 20, 1996

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12th Street and Constitution Avenue, N.W.
Room 2215
Washington, D.C. 20423

Re: Finance Docket 32760

Dear Mr. Secretary:

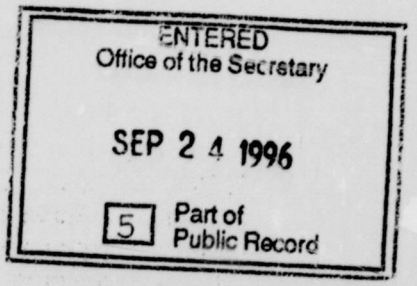
ASBURY is a shipper and receiver of petroleum coke in BCH. We have facilities in Rodeo, California; Garland, Utah; and Clearfield, Utah. Our purpose in writing you is to support Burlington Northern Santa Fe's position in this proceeding.

In order to preserve the competitive balance for customers who will be going from 2-1 rail carriers we believe it to be important that 100% of volume on 2-1 point contracts be opened. If 100% of the contracts are not opened without the burden of existing penalties or those economic penalties that may be imposed or removed it may be impossible for BNSF to stay a viable alternative. We must maintain alternatives and removal of preconditions in existing contracts will allow us to make choices that will include BNSF as a viable competitor at 2-1 points. If something less than 100% is decided then we ask that it be conditioned with a provision that shippers have the right to solicit competitive bids from BNSF if UPSP offers to modify the terms of a contract. It is our view that the shipper not the applicants should control and designate which portion of our business should be open to competition.

On the issue of UPSP petitioning to limit the access of BNSF on transloading and new facilities. We would oppose such conditions being imposed. Competitive access and the ability to have competitive means to move our products are the issues here. If we lose the right to alternative means to transport goods real or implied we will lose a valuable tool in our negotiations with the carriers. Therefore we would ask that the Board deny this petition.

ASBURY GRAPHITE INC. OF CALIFORNIA
ASBURY FLUXMASTER OF UTAH

Richard Cameron
Sales Coordinator and Manager



Asbury Graphite Inc. of California / Asbury Fluxmaster of Utah Inc.
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STB FD 32760 9-23-96 D 86237

86237

MERIDIAN
Aggregates Company

September 18, 1996

Honorable Vernon A. Williams, Secretary
Surface Transportation Board
12th Street & Constitution Ave. NW, Room 2215
Washington, DC 20423

Attention: Finance Docket 32760

Dear Sir:

As a rail shipper on both the BNSF and UP/SP railways, I am interested in seeing that fair and equitable competition is fostered. I, therefore, respectfully request that the Surface Transportation Board clarify the manner by which the two railroads must deal with customers affected by 2:1 points of competition. It is vitally important that all parties concerned completely understand the contract-reopener condition whereby the UP/SP must allow BNSF access to at least 50% of the freight volume currently under contract between the customer and UP/SP. I believe it behooves the Board to better define existing ambiguities regarding this condition.

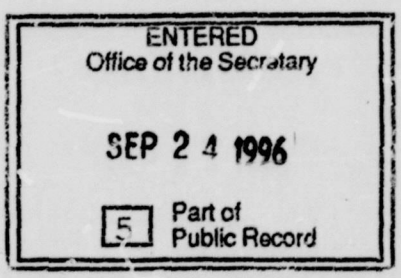
I also believe that the Board should deny UP/SP's proposal that BNSF be denied the right to serve any new facilities, including new transloading facilities which are located on any UP or SP line over which BNSF has reserved trackage rights as a result of the UP/SP merger. Such restriction is not in the best interest of sound competition available to the consumer.

Sincerely yours,

John C. Genova
Vice President, Marketing

JCG/cm

cc: Matthew K. Rose, BNSF
Dewey Williams, BNSF



5575 DTC Parkway, Suite 325
Englewood, Colorado 80111
303 · 694 · 3030
FAX: 303 · 694 · 4220

STB FD 32760 9-23-96 D 86236

86236

CT SERVICES, INC.

#1 REPURCHASE TEAM - SERVING THE AUTOMOTIVE INDUSTRY NATIONWIDE

September 13, 1996

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12th St. & Constitution Ave. NW
Room 2215
Washington, D.C. 20423

Dear Sir:

Attention: Finance Docket 32760

I am writing in regard to the Union Pacific/Southern Pacific merger and how it may affect and limit competition for traffic. As a shipper of many years on the Union Pacific, Burlington Northern, ATSF, etc. I urge you and the Surface Transportation Board to clarify the Board's decision that shippers must be protected by the contract-reopener condition and, also to deny UP/SP's effort to limit shippers' protections regarding new shipping facilities, including new transload facilities.

Please support shipper rights.

Yours truly,

Robert C. Chambers
President

RCC:lls

LIN\BNSF\UP_COMPE.TIO

HEADQUARTERS: 27650 FRANKLIN ROAD, SOUTHFIELD, MICHIGAN 48034
PHONE (810) 351-9550 • FAX (810) 351-9556

STB FD 32760 9-23-96 D 86235

86235

Rayonier

Transportation and Distribution

September 18, 1996

Honorable Vernon A . Williams
Secretary
Surface Transportation Board
12th Street and Constitution Avenue , NW
Room 2215
Washington , D.C. 20423

Re: Finance Docket 32760

Dear Sir:

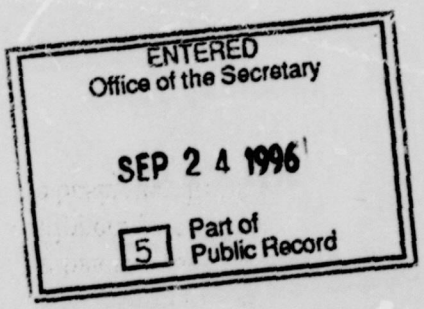
Rayonier is a shipper of Forest Products. Our purpose in writing you is to support Burlington Northern Santa Fe 's position in this proceeding .

This is declare the support of Rayonier, Inc. to the BNSF petition for clarification of the Surface Transportation Boards decision to modify any contracts UPSP has with shippers at 2-1 points . We also take the position that the UPSP petition to limit shippers protections regarding new facilities and transload facilities should be denied on the basis they limit competition.

We need to enhance competition whenever and wherever possible.

Sincerely,

Terry L. Bunch
Director of Transportation and Distribution



4470 Savannah Highway • P. O. Box 2070 • Jesup, GA 31545-2070
Telephone (912) 427-5000 • Fax (912) 427-5045

86234

GIANT
REFINING CO.

23733 North Scottsdale Road
Scottsdale, Arizona 85255

P.O. Box 12999
Scottsdale, Arizona 85267

602-585-8888

TWX 910-951-

September 20, 1996

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12th Street and Constitution Avenue, N.W.
Room 2215
Washington, D.C. 20423

RE: Finance Docket 32760

Dear Mr. Secretary:

Giant Refining Company, a division of Giant Industries Arizona, Inc. is a shipper of Ethanol, MTBE, Toluene and Natural Gas Liquids. We conduct business in the area served in this proceeding. Our purpose in writing you is to support Burlington Northern Santa Fe's position in this proceeding.

Giant believes that in order to maintain a competitive environment subsequent to the UPSP merger that UPSP must open 100% of contract volumes at 2-1 points to BNSF. The conditions outlined of allowing Shippers to make the decisions on whether to forego contract provisions on volume incentives/penalties will allow us to make decisions on a competitive basis. Without this modification we could see little economic value on our behalf to award business as volume penalties or incentives might cause BNSF not to have any possibility of overcoming such provisions. Secondly we support the provision to solicit a competitive bid from BNSF in cases where UPSP offers to modify terms of a contract with a 2-1 shipper. This will allow us to negotiate in a competitive environment. We also believe it should be the shipper not the carriers that decide what business we choose to offer under any opening of contract provisions in order to maintain our ability to get the most competitive offer.

On the issue of the UPSP request to limit the access of BNSF on transloading and new facilities, we would oppose such conditions being imposed. Competitive access and the ability to have competitive means to move our products are the issues here. If we lose the right to alternative means to transport goods real or implied we will lose a valuable tool in our negotiations with the carriers. Therefore we would ask that the Board deny this petition.

Sincerely,

George M. Seitts
Manager,
Corporate Government and Public Affairs

GMS/mmn

STB FD 32760 9-23-96 D 86233

86,233

Commercial Metals Company P.O. Box 1046 Dallas, Texas 75221-1046

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12th Street and Constition Avenue, N.W.
Room 2215
Washington, D.C. 20423

Re: Finance Docket 32760

Dear Mr. Secretary:

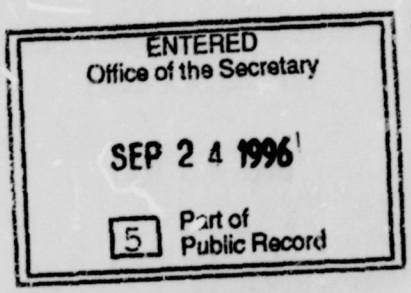
Commercial Metals Company and subsidiaries manufacture, recycle and market steel and metal products and related materials through a network of over 90 locations in the United States, many of which are in the area served in this proceeding.

Our company is in full support of the Burlington Northern Santa Fe's position in this proceeding. We urge the Surface Transportation Board to (1) clarify that shippers must be protected by the contract-reopener condition and (2) deny UP/SP's effort to limit shippers' protections regarding new shipping facilities, including new transload facilities.

Sincerely yours,

R. W. Bird

R. W. Bird
Corporate Traffic Manager
Commercial Metals Company



7800 Stemmons Fwy. Telephone: 214-689-4300 W.U. Telex: 73-2264 Fax: 214-689-4320

STB FD 32760 9-23-96 D 86232

86232

CENTEX AMERICAN GYPSUM COMPANY

DAVID EMANUEL
VICE PRESIDENT OF MARKETING
AND SALES

September 17, 1996

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12th Street and Constitution Avenue, N.W.
Room 2215
Washington, DC 20423

RE: Finance Docket ~~28423~~ 32760

Dear Mr. Secretary:

Centex American Gypsum Company is a shipper of gypsum wallboard. We conduct business in the area served in this proceeding. Our purpose in writing you is to support Burlington Northern Santa Fe's position in this proceeding.

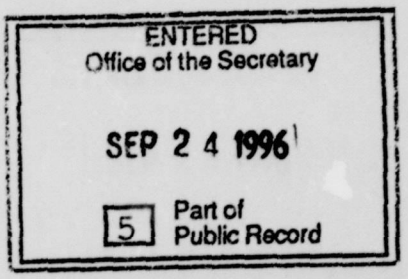
In order to maintain a competitive environment for customers who will be going from 2-1 rail carriers, we believe it to be crucial that 100% of volume on 2-1 point contracts be opened. If 100% of the contracts are not opened without the burden of existing penalties or those economic penalties that may be imposed removed, it may be impossible for BNSF to stay a viable alternative. We must maintain alternatives and removal of preconditions in existing contracts will allow us to make choices that will include BNSF as a viable competitor at 2-1 points. If something less than 100% is decided, then we ask that it be conditioned with a provision that shippers have the right to solicit competitive bids from BNSF if UPSP offers to modify the terms of a contract. It is our view that the shipper not the applicants should control and designate which portion of our business should be open to competition.

On the issue of UPSP petitioning to limit the access of BNSF on transloading and new facilities, we would oppose such conditions being imposed. Competitive access and the ability to have competitive means to move our products are the issues here. If we lose the right to alternative means to transport goods, real or implied, we will lose a valuable tool in our negotiations with the carriers. Therefore, we would ask that the Board deny this petition.

Sincerely,

David Emanuel
Vice President, Marketing & Distribution

DE/gj



STB FD 32760 9-23-96 D 86231

84231

Westlake Polymers Corporation

Westlake Center
2801 Post Oak Blvd.
Houston, Texas 77056
Tel: 713/960-9111
FAX: 713/960-8761
Marketing Division

September 20, 1996

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
12th Street & Constitution Ave. N.W.
Washington, D.C.

FD32760

Dear Secretary Williams,

Westlake Polymers Corp. is a manufacturer of Polymer resins in Sulphur/Lake Charles, La. We depend, totally, on rail transportation for our product shipments and for this reason are very sensitive to actions which impact this, our second largest corporate expense.

We are writing in opposition to the KCS railroad's petition to reopen/reconsider the STB's ruling concerning BN/SantaFe's service access to shippers in the Lake Charles, La. area. We have previously written to you noting our concern over efforts to restrict competition and narrow the field of service suppliers in the Gulf Coast area. We can think of no compelling reason to limit BN/Santa Fe's access to these shippers, short of simply restricting competition. Surprisingly, even the KCS has been a strong advocate of the idea that competition is healthy and proper in this or any other industry.

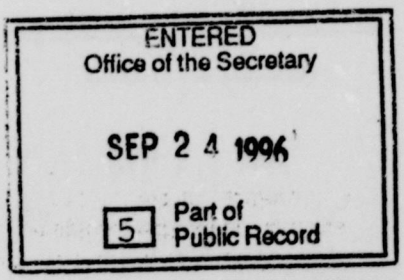
We strongly urge you to let your original ruling stand and in effect to "let the market work". To do otherwise will adversely affect our ability to negotiate efficient transportation options with all our carriers to the many destinations we serve. The restrictions proposed by KCS would so limit the destinations available for negotiation, as to make them unimportant as bargaining volumes.

We therefore urge you to deny the KCS petition to reopen/reconsider .

Respectfully,

Jack Spittler

Jack Spittler
Traffic Mgr.



STB FD 32760 9-23-96 D 86226

86226

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JOSEPH E. KELLER (1907-1994)
JEROME H. HECKMAN
WILLIAM H. BORGHESANI, JR.
MALCOLM D. MACARTHUR
WAYNE V. BLACK
TERRENCE D. JONES
MARTIN W. BERCOVICI
JOHN S. ELDRED
RICHARD J. LEIGHTON
ALFRED S. REGNERY
WILLIAM L. KOVACS
DOUGLAS J. BEHR
RAYMOND A. KOWALSKI*
SHIRLEY A. COFFIELD
MICHAEL F. MORRONE
JOHN B. RICHARDS
JEAN SAVIGNY*◇
JOHN B. DUBECK
PETER L. DE LA CRUZ
MELVIN S. DROZEN
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RALPH A. SIMMONS
RICHARD F. MANN
C. DOUGLAS JARRETT
SHEILA A. MILLAR
GEORGE G. MISKO
STEPHAN E. BECKER
GAREN E. DODGE
PATRICK J. HURD
MARK A. SIEVERS
JEAN-PHILIPPE MONTFORT*◇
DAVID G. SARVADI
JONATHAN R. SPENCER
CATHERINE R. NIELSEN
SUSAN M. HAFELI*
AMY N. RODGERS
ELLIOT BELILOS
MARK L. ITZKOFF
ROSEMARIE A. KELLEY
BRIAN T. ASHBY
T. PHILLIPS BECK
ARTHUR S. GARRETT III
LESLIE E. SILVERMAN
ELIZABETH N. HARRISON
ROBERT H. G. LOCKWOOD
CAROL MOORS TOTH
JOAN C. SYLVAIN
MARTHA E. MARRAPESE
DONALD T. WURTH
DAVID B. BERRY
NICOLE B. DONATH
S. DEBORAH ROSEN
DAVID R. JOY
FREDERICK A. STEARNS
TONYE RUSSELL EPPS*
THOMAS C. BERGER
JOHN F. FOLEY
ALEXANDRE MENCIK von ZEBINSKY*◇
PHILIP H. ANDREWS*◇
JENNIFER A. BONANNO*
JOHN REARDON*
PATRICK W. RATKOWSKI*
MARA A. MICHAELS*
PAULA DEZA*
JOHNS W. HOPKINS, JR.*
SUSAN L. CHENAULT*
JOHN B. O'LOUGHLIN, JR.*

*NOT ADMITTED IN D.C.
◇RESIDENT BRUSSELS

SCIENTIFIC STAFF
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CHARLES V. BREDER, PH. D.
ROBERT A. MATHEWS, PH. D., D.A.B.T.
JOHN P. MODDERMAN, PH. D.
HOLLY HUTMIRE FOLEY
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JANETTE HOUK, PH. D.
LESTER BORODINSKY, PH. D.
THOMAS C. BROWN◇
MICHAEL T. FLOOD, PH. D.
ANDREW P. JOVANOVICH, PH. D.

TELECOMMUNICATIONS ENGINEER
RANDALL D. YOUNG

WRITER'S DIRECT DIAL NUMBER

September 23, 1996

(202) 434-4144

Vernon A. Williams
Secretary
Surface Transportation Board
Room 2215
1201 Constitution Avenue, NW
Washington, DC 20423

Re: Finance Docket No. 32760, Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Corporation, et al.

Dear Mr. Williams:

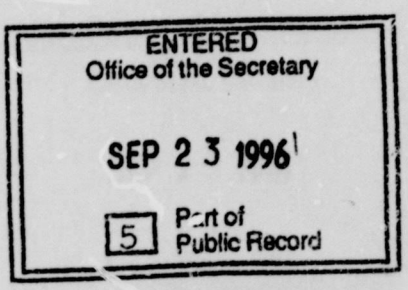
Enclosed for filing in the above-captioned docket proceeding, please find an original and twenty (20) copies of Quantum Chemical Corporation's Comments in Response to Petitions for Clarification and Reconsideration (QCC-7).

Copies of the enclosed Response are being served on All Parties of Record.

Very truly yours,

Martin W. Bercovici

Enclosures



QCC-7

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

QUANTUM CHEMICAL CORPORATION'S
COMMENTS IN RESPONSE TO
PETITIONS FOR CLARIFICATION AND RECONSIDERATION

Quantum Chemical Corporation ("Quantum") submits its comments in this response to the petitions for clarification filed by Applicants (UP/SP-275) and the Burlington Northern/Santa Fe ("BNSF") (BN/SF-65).

Summary of Quantum's Position

Quantum, along with many others, contributed to the record in this proceeding (QCC-2 - QCC-6) by expressing its concern over issues of diminished competition, especially in the Gulf Coast region of Texas, if the merger were approved without countervailing conditions and recommending certain conditions to be imposed upon the merger in order to preserve the pre-merger level of competition. In Decision No. 44, the Board approved the Applicants' merger with conditions after carefully balancing the interests of the Applicants with the interests of rail shippers and the need for vigorous competition amongst rail carriers. The Board-imposed conditions provided a replacement class I rail competitor, BNSF, where competition would have been impaired, then assured that BNSF would have access to and sufficient incentives to compete

for traffic in the areas affected by the merger. Those conditions included adoption of the trackage rights agreement between the Applicants and BNSF and the settlement agreement between the Applicants and the Chemical Manufacturers Association ("CMA"). The Board then went further and expanded upon the CMA settlement by opening "at least 50%" of Applicants' contract traffic to the BNSF at all 2-to-1 points. In addition, the Board gave the BNSF access to new industries along its trackage rights and to traffic moving to and from BNSF by means of build-ins/build-outs and transloading points.

The Applicants, BNSF and others now ask the Board to clarify and reconsider some of the conditions it imposed upon the merger. Given the scope and significance of the Board's decision, it is understandable that questions regarding operation and interpretation of the conditions should arise. However, the Board should be vigilant and not allow any party to undo or subvert under the guise of clarification or reconsideration the fundamental thrust of its conditions in preserving and encouraging rail-to-rail competition after the merger, or, specifically, to dilute the access and incentives which the Board has granted to BNSF to compete for traffic where rail-to-rail competition would otherwise have been lost. The Board should reject all attempts to roll-back the conditions it imposed.

Quantum wishes to comment specifically on the following points:

- Applicants' request to interpret the BNSF right to serve new transloading facilities located on UP or SP lines over which BNSF will have overhead trackage rights as meaning for the purpose of handling traffic transloaded to or from points on the other merging railroad and not for the purpose of accessing exclusively-served shippers of the merging railroad over which the BNSF has overhead rights; and

- BNSF's request that the condition giving it access to at least 50% of contract volumes for 2-to-1 points be clarified and expanded.

Quantum's position on these points can be briefly stated as follows:

- Quantum believes the Board's language pertaining to trackage rights is clear and unambiguous and that the Board should reject Applicants' request that the traffic available to BNSF from new transloading facilities be restricted; and

- Quantum supports the petition of BNSF, but only as to the portion that would give shippers the responsibility for designating which portion of "at least 50%" of their contract traffic is opened to BNSF. Quantum opposes any clarification which applies the "at least 50%" condition on a contract-by-contract basis or is excessively complex and prescriptive, or intrudes upon the shipper's ability to contract or to ship its goods as it see fit.

Quantum's position on these points is set forth in more detail below.

I. BNSF's Access to New Transload Facilities Should Not Be Restricted.

In its approval of the merger, the Board imposed conditions which assure BNSF will have access to new facilities on the trackage rights it secured from the Applicants, including new transloading facilities. Dec. No. 44 at 145-46. These conditions are intended to have BNSF replace the competitor which was lost with the merger of the SP into the UP. Id. at 145.

The central thrust of the Board's conditions upon the merger is to preserve meaningful rail-to-rail competition following the merger. Where shippers faced the loss of the SP as a competitor to the UP, or vice versa, the Board allowed BNSF to fill the void. Competition between the UP and the SP for a shipper's traffic could have take the form of head-to-head competition for the traffic where both carriers had access to the shipper's facility, or it could have take the form of build-in/build-outs from the shipper's facility to the competing carrier's line, or it could take have the form of transloading goods from the shipper's facility to a transloading facility on the competing carrier's line. The Board's decision sought to preserve all of these competitive options for shippers.

The record in this proceeding makes it clear that the Board intended for BNSF to compete for traffic where it was given trackage rights and that the Applicants expected BNSF to be a vigorous and viable competitor. The Board's decision indicates that the Applicants did not go far enough in addressing certain adverse competitive effects of the merger through the agreements it negotiated with BNSF and CMA. Hence, the Board expanded the agreements which the Applicants negotiated in order to assure that the trackage rights granted to BNSF were meaningful and provided sufficient traffic density to make BNSF's exercise of those rights attractive.

The restriction of BNSF's access to new traffic and its trackage rights via transload facilities would diminish the competitive value of those rights. BNSF was not given trackage rights over the entire merged system, nor over the all the lines affected by the merger. In some instances where the SP and UP had parallel lines, trackage rights are granted over one but not the other parallel line. Under the Applicants' requested interpretation of the "new facilities" condition, the fact that a solely-served shipper happens to be on a line over which BNSF has trackage rights (rather than a parallel line where BNSF does not have trackage rights) would have the effect of depriving that shipper of one or more of the competitive options available to it prior to the merger. The simplest and most effective manner in which to assure that pre-merger competition is replicated is to allow BNSF to serve new transloading facilities that would be open to any traffic, including traffic originating from the lines over which the BNSF has trackage rights.

II. Shippers Should be Allowed to Determine the 50% of Contract Traffic Open to BNSF.

Quantum supports the interpretation advanced by BNSF, CMA and others that the portion of each 2-to-1 shipper's traffic which must be opened to competition by BNSF should be

determined by the shipper itself. The alternative interpretations would interject complexity and circumscribe shippers' ability to choose among competitive options.

BNSF presents credible evidence that the "at least 50%" condition could be utilized by the Applicants in an anti-competitive manner if they are allowed to manipulate which portions of shippers' contract volume is open for competition. Manipulation of which portion of shippers' contract traffic is subject to the "at least 50%" condition by Applicants would diminish BNSF's incentive to bid on this traffic and thus reduce the traffic densities available to make this condition commercially meaningful.

Likewise, Applicants' interpretation that the "at least 50%" condition must be applied on a contract-by-contract basis must be rejected. The contract traffic to be opened to BNSF should be the aggregate volume shipped from any origin, or to any destination, regardless of the number of existing contracts involved. To open at least 50% of the volume to BNSF on a contract-by-contract basis may not provide sufficient traffic density for BNSF to find such business attractive and so not bid on it. Also, such an interpretation deprives the shipper of the ability to competitively leverage segments of traffic, whether by commodity, destination or other distinction, from a single location in a manner which both serves its needs and makes both competitors interested in bidding.

On the other hand, the detailed rules suggested by BNSF, which in effect would throw open all 2-to-1 contract volume to bidding, intrude on shippers' rights to freely contract and may serve to deprive shippers of benefits obtained in previous negotiations. The prorating of volume commitments or incentives would likely create more controversies than it resolves. BNSF's alternative, to simply open up 100% of contract volume for 2-to-1 shippers to bid, ignores the

fact that benefits and concessions in those contracts may be lost without any say by the shipper which negotiated them. Both extremes do not achieve one of the objectives of the CMA settlement, which was to leave the details of contract negotiations to the parties themselves. Allowing either competitor to impose a competitive disadvantage on the other by means of cumbersome, detailed rules for allocating the volume to be opened for bidding under the "at least 50%" condition would not be equitable nor preserve competition.

Quantum believes that it would be far simpler and more effective to leave to each shipper the decision about what portion of its contract traffic, if any, to open to the BNSF. Allowing shippers to choose which traffic to open to BNSF's bid would ensure that BNSF has an opportunity compete for traffic that BNSF could profitably serve to the benefit of the shipper.

III. Conclusion.

Quantum believes that the clarification and interpretation of these two conditions that provide the greatest opportunity for meaningful competition and the development of significant traffic density for BNSF is most appropriate for a merger of this magnitude and importance. Quantum asks the Board to reject the Applicants' position on new facilities, including transload facilities, and that the Board provide clarification of the "at least 50%" condition for 2-to-1 contracts which places allocation of the traffic volume to be open to BNSF in the hands of the shipper.

Respectfully submitted,

Michael P. Ferro
Quantum Chemical Corporation
11500 Northlake Drive
Cincinnati, Ohio 45249
(513) 530-6808
Attorney for Quantum Chemical Corporation

Martin W. Bercovici
Keller & Heckman
1001 G. Street, N.W.
Suite 500 West
Washington, DC 20001
(202) 434-4100
Of Counsel for Quantum Chemical Corporation

September 20, 1996

I declare under penalty of perjury that the foregoing is true and correct. Executed this 20th day of September, 1996 at Cincinnati, Ohio.

Michael P. Ferro, *Attorney*

STB FD 32700 9-23-96 D 86225

86225

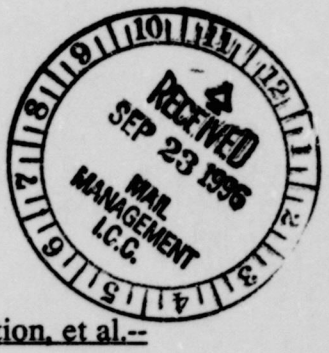
BARNES & THORNBURG

Franklin Tower
Suite 500
1401 Eye Street, N.W.
Washington, D.C. 20005
(202) 289-1313

Fax (202) 289-1330

September 23, 1996

Vernon Williams, Secretary
Office of the Secretary
Case Control Branch
Attn: Finance Docket No. 32760
Surface Transportation Board
1201 Constitution Avenue, N.W.
Washington, D.C. 20423



Re: Finance Docket No. 32760 - Union Pacific Corporation, et al.--
Control--Southern Pacific Rail Corporation, et al.

Dear Secretary Williams:

Enclosed is the original and twenty (20) copies of the Response in Support of the Petition to Reopen Decision No. 44 filed by the Texas Mexican Railway Company (TM-44) in Finance Docket No. 32760, Union Pacific Corporation, et al., along with two (2) additional copies to be date-stamped and returned to the undersigned.

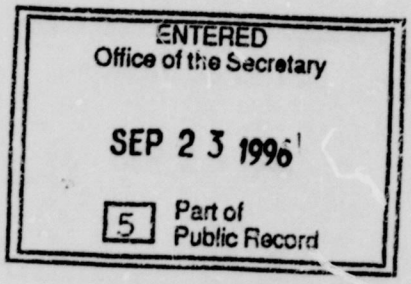
Thank you for your assistance in this matter. If you have any questions, please feel free to contact me.

Very truly yours,

Richard H. Streeter

Richard H. Streeter

RHS:kd
Enclosures



RHS 10622

RAILROAD COMMISSION OF TEXAS
OFFICE OF GENERAL COUNSEL

September 20, 1996

RCT-9

The Honorable Linda J. Morgan
Chairman
Surface Transportation Board
Washington, D.C.

The Honorable J.J. Simmons, III
Vice Chairman
Surface Transportation Board
Washington, D.C.

The Honorable Gus A. Owen
Commissioner
Surface Transportation Board
Washington, D.C.

Re: Response in Support of the Petition to Reopen Decision No. 44 filed by the Texas Mexican Railway Company (TM-44) in Finance Docket No. 32760, Union Pacific Corporation, et al.

Dear Commissioners Morgan, Simmons, and Owen:

By this response, the Railroad Commission of Texas (the "RCT") reaffirms its support of the Texas Mexican Railway Company's ("Tex Mex") need for significant trackage rights between Corpus Christi, Texas and Beaumont, Texas.

On March 26, 1996, the RCT unanimously adopted a suggested condition to the rail merger between the Union Pacific and Southern Pacific railroads, if approved, that the interests of the Tex Mex be protected through trackage rights. The proposed condition was incorporated in the RCT's Comments dated March 29, 1996 (RCT-4) and in the RCT's Brief dated June 3, 1996 (RCT-7). In particular, the RCT recommended that the Tex Mex be granted trackage rights between its Corpus Christi-Laredo line, on the one hand, and Beaumont, Texas, on the other hand. This would permit Tex Mex to interline with its corporate affiliate thereby enhancing competition in the South Texas market.

1701 NORTH CONGRESS AVENUE ★ POST OFFICE BOX 12967 ★ AUSTIN, TEXAS 78711-2967 ★ PHONE: 512/463-6715 FAX: 512/463-6989

TDD 800-735-2989 OR TDY 512-463-7284 AN EQUAL OPPORTUNITY EMPLOYER

While Decision No. 44 of the Surface Transportation Board (the "STB") does in fact grant trackage rights to Tex Mex to connect to Beaumont, Texas, it also contains a substantial restriction limiting access to Tex Mex's trackage rights to shipments which are subject to prior or subsequent movement over its Corpus Christi-Laredo line (the "Restriction"). The RCT is concerned that the Restriction will preclude the ability of Tex Mex to achieve sufficient traffic density to remain a viable competitive force.

Rather than imposing the Restriction, the RCT suggests that the STB consider providing the Tex Mex with access to all shippers in the Houston area located on Union Pacific and Southern Pacific trackage, and on trackage operated by the Port Terminal Railroad Association and the Houston Belt & Terminal Railroad Company, and allowing Tex Mex to haul traffic to and from those shippers in Tex Mex trains operating between Houston and Beaumont on Tex Mex's trackage rights over UP/SP lines, with the right to interchange that traffic with Kansas City Southern at Beaumont.

Therefore, the RCT concurs in the request of Tex Mex to remove the Restriction as is more fully set forth in the petition filed by Tex Mex as TM-44.

Very truly yours,

Lindil C. Fowler, Jr.
General Counsel

Certificate of Service

I hereby certify that on this 23rd day of September, 1996, a true and correct copy of the foregoing letter from the Railroad Commission of Texas (RCT-9) was served on each party of record in Finance Docket No. 32760 via first class mail postage prepaid.

Kim Dang

Kim Dang, Secretary to
Richard H. Streeter, Esq.

STB FD 32760 9-23-96 D 86223

86223

PEPPER, HAMILTON & SCHEETZ

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September 23, 1996

Via Hand-Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1201 Constitution Avenue, N.W.
Washington, D.C. 20549

Re: Finance Docket No. 32760

Dear Mr. Williams:

Enclosed for filing in the above referenced proceeding are the original and 20 copies of Reply of Geneva Steel Company to Applicants' Petition for Clarification (GS-5) and the original and 20 copies of Reply of Geneva Steel Company to BNSF'S Petition For Clarification (GS-6). Also, enclosed is a 3.5 inch diskette containing these pleadings in WordPerfect 5.1.

An extra copy of each pleading is also enclosed. Please date stamp these additional copies and return them to our messenger.

Thank you for your assistance.

Sincerely,

Michelle J. Morris

Michelle J. Morris

cc: All parties of record

Enclosure

GS-6

BEFORE THE

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

-- CONTROL AND MERGER --

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

REPLY OF GENEVA STEEL COMPANY TO
BNSF'S PETITION FOR CLARIFICATION

The Surface Transportation Board's ("STB") proceedings are not "purely adversary contests." Chesapeake & O. Ry. Co. v. United States, 704 F.2d 373, 379 (7th Cir. 1983) (Posner J.). Instead, the STB "is supposed to protect the public interest, not just umpire disputes." Id. This is especially true in a massive proceeding such as the UP/SP merger where members of the shipping public "might not have the resources or the incentives to challenge" the Applicants' case in an exhaustive way.[1] Id. Ultimately, only the STB can protect the public interest.[2]

---

1. As Judge Posner noted in Chesapeake & O. Ry. Co., particular members of the shipping public may not provide the STB with an exhaustive record for a host of reasons. For example, various shippers may have explicit or de facto confidentiality provisions or undertakings not to be active in opposing the merger as a result of negotiating rail transportation contracts or other arrangements with Applicants. Nonetheless, the STB has the duty to protect the general public interest with a contract modification clause that structurally protects competition in all circumstances. 704 F.2d at 379. Indeed, Chairman Morgan has flatly stated that the "Board will not depend upon shippers and affected parties to do its monitoring." Statement of Chairman Morgan, Decision No. 44 at 240.

2. See Statement of Vice Chairman Simmons, Decision No. 44 at 241: "Here as in similar cases, the analysis must be -- what as

(continued...)

It is crystal clear that each member of the STB fully understands their duty to vindicate the public interest:

> Chairman Morgan: "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 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 Board has taken this case very seriously from the beginning and will continue to do so." Decision No. 44, Statement of Chairman Morgan, at 240.

> Vice Chairman Simmons: "In this case, competition will be preserved with the settlement agreement 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. . . . I want applicants, BNSF, and all shippers to know that we are very serious about monitoring. This Board is prepared to take further action . . . if UPSP undertakes actions that impede BNSF's ability to compete." Decision No. 44, Statement of Vice Chairman Simmons, at 244, 245.

> Commissioner Owen: "During this oversight period we have authority to impose additional conditions and we will be an alert and aggressive policeman." Decision No. 44, Statement of Commissioner Owen.

In its Petition for Clarification, BNSF calls upon the STB to discharge that duty. Based on its dealings with shippers since the issuance of Decision No. 44, BNSF -- through the verified statement of its Senior Vice President Matthew Rose -- puts forward the evidentiary proposition that Applicants are

---

2. (...continued)
a whole is in the public interest. It is this analysis and none other that controls the debate."

taking actions vis-a-vis the CMA Settlement Agreement and the contract modification condition that "defeats their purpose and renders them virtual shams." BNSF Petition at 10.

The Applicants have been frank to concede that the UP/SP merger would result in an unacceptable diminution of rail competition in the Central Corridor unless another carrier is granted adequate operating rights in the Corridor.[3] Over the course of this proceeding, BNSF has been identified as that other carrier. BNSF likewise has recognized that the UP/SP merger would violate the statutory standard unless effective rail competition is preserved in the Central Corridor. (Ice Dep. at 34, 291, 298).

Accordingly, the Applicants and BNSF both agree that a "competitive fix" is necessary in the Central Corridor to prevent major reductions in competition for 2 to 1 shippers.[4] In fact, the Applicants and BNSF have specifically recognized that a cure is necessary for the specific competitive problems that will exist at Geneva if the merger is consummated without effective conditions to mitigate anticompetitive impacts.[5] The competitive fix and cure as they have evolved in this proceeding

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3. UP/SP-22, Davidson V.S. at 172-73; Rebensdorf V.S. at 296, 315, 582; UP/SP-23, Peterson V.S. at 14; Barber V.S. at 465; Peterson Dep. at 686, Rebensdorf Dep. at 64; Sharp Dep. at 17.

4. Rebensdorf Dep. 67, 266, 433, 543; Peterson Dep. at 689; Gray Dep. at 61, 330; Ice Dep. at 292.

5. Rebensdorf Dep. at 514, Exhibit 9 at 100011; Gray Dep. at 51; Ice Dep. at 297; Peterson Dep. at 698, 759; Sharp Dep. at 17.

are the BNSF operations in the Central Corridor which have been imposed as conditions to the STB's approval of the UP/SP merger.

What the BNSF's petition for clarification demonstrates is that the public interest requires that the CMA settlement agreement and the contract modification condition be clarified to grant BNSF meaningful access to any shipments under contract at 2-to-1 points. It does not require the STB to revisit its entire approach to the competitive issues in this case.

In its Petition, BNSF suggests two constructions to create meaningful access. Geneva's interest in this matter is to ensure that the construction chosen by the STB has the three attributes specified in Geneva's own Petition for Clarification. So long as the STB chooses a reasoned construction with these attributes, the STB may select the particular construction of the contract modification condition needed to provide meaningful access.

Respectfully submitted,

John Will Ongman
Marc D. Machlin
Michelle J. Morris
PEPPER, HAMILTON & SCHEETZ
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200

Counsel for Geneva Steel Company

Date: September 23, 1996

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply of Geneva Steel Company to BNSF's Petition For Clarification was served on the following parties via hand delivery this 23rd day of September, 1996:

Paul A. Cunningham
Richard B. Herzog
James M. Guinivan
HARKINS CUNNINGHAM
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Washington, D.C. 20036

Arvid E. Roach, II
J. Michael Hemmer
Michael L. Rosenthal
COVINGTON & BURLING
1201 Pennsylvania Ave. N.W.
Washington, D.C. 20044

Judge Jerome Nelson
Administrative Law Judge
FEDERAL ENERGY REGULATORY COMMISSION
825 North Capitol Street, N.E.
Washington, D.C. 20426

Erika Z. Jones
Adrian L. Steel, Jr.
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

A copy of the foregoing pleading was also sent by first class mail to all parties of record.

Michelle J. Morris

STB FD 32760 9-23-96 D 86222

86222

ORIGINAL

LAW OFFICES
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September 20, 1996

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
Washington, DC 20423

Dear Secretary Williams:

Enclosed for filing in Finance Docket No. 32760, Union Pacifc Corp., et al.--Control and Merger--Southern Pacifc Rail Corp., et al., are the original and twenty copies of the Comments of Shintech, Inc., SHIN-3.

Extra copies of the Comments and of this letter are enclosed for you to stamp to acknowledge your receipt of them and to return to me in the enclosed self-addressed, stamped envelope.

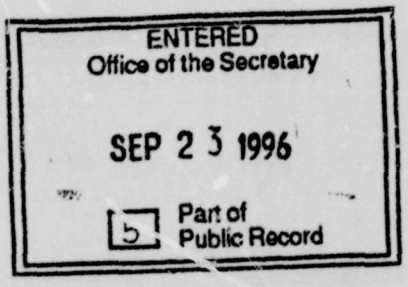
By copy of this letter, service is being effected upon counsel for each of the parties.

If you have any question concerning this filing or if I otherwise can be of assistance, please let me know.

Sincerely yours,

Fritz R. Kahn

enc.
cc: Mr. Y. Saitoh



ORIGINAL

SHIN-3

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

Finance Docket No. 32760

UNION PACIFIC CORPORATION, et al.,
--CONTROL AND MERGER--
SOUTHERN PACIFIC RAIL CORPORATION, et al.

COMMENTS
OF
SHINTECH INCORPORATED

Shintech Incorporated of Houston, Texas ("Shintech"), pursuant to 49 C.F.R. 1104.13(a), responds to the Applicants' Petition for Clarification, UP/SP-275, filed August 29, 1996, as follows:

1. Shintech is the Nation's largest producer of polyvinyl chloride ("PVC") resin. Shintech's entire existing PVC production emanates from a single facility, situated in Freeport, Texas, served by the Union Pacific Railroad Company ("UP"). Shintech has a present production capacity of 2,800 billion pounds of PVC resin a year and tenders for railroad transportation by UP the preponderance of its PVC resin production annually.

2. Shintech supported UP's acquisition of the Southern Pacific Transportation Company ("SP"), and its statement of support was included among the shipper support statements filed by the Applicants in their Application, filed November 30, 1995.

3. UP's acquisition of SP, however, does not alleviate the captivity of Shintech at its Freeport facility. While Shintech has no doubt that UP's acquisition of SP will achieve certain service improvements which will inure to the benefit of Shintech, Shintech, nevertheless, is persuaded that the best guarantor of responsive railroad service and reasonable railroad rates is competition between the carriers themselves.

4. Shintech, accordingly, was heartened by the Board's decision, Decision No. 44, served August 12, 1996, and the enlargement of the trackage rights grant to which the Applicants had agreed with the Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (together "BNSF"). Specifically, Shintech welcomed the Board's assertion, at page 46 of its unprinted decision:

> We require as a condition that this provision [in the BNSF agreement] be modified in two respects: first, by requiring that BNSF be 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.

5. The Board's condition would appear to be unambiguous and in need of no clarification.

6. UP purports not to read the condition that way. As UP reads the condition, there would have been no need for the Board to enlarge the trackage rights grant.

7. In the opinion of Shintech, the enlargement of the trackage rights grant which the Board ordered as a condition of its approval of the UP's acquisition of the SP was an appropriate

response to the concerns which many trade associations, individual shippers and governmental bodies expressed about the loss of competition that the railroads' proposal would occasion, and the condition should not revoked.

WHEREFORE, Shintech Incorporated asks that the Applicants' Petition for Clarification be denied.

Respectfully submitted,

SHINTECH INCORPORATED

By its attorney,

Fritz R. Kahn
Fritz R. Kahn, P.C.
Suite 750 West
1100 New York Avenue, NW
Washington, DC 20005-3934
Tel.: (202) 371 8037

Due and dated: September 20, 1996

CERTIFICATE OF SERVICE

Copies of the foregoing pleading this day were served by me by mailing copies thereof, with first-class postage prepaid, to counsel for each of the parties.

Dated at Washington, DC, this 20th day of September 1996.

Fritz R. Kahn

STB FD 32760 9-23-96 D 86251

86251

DONELAN, CLEARY, WOOD & MASER, P.C.

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September 23, 1996

Via Hand Delivery
Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1201 Constitution Avenue, N.W.
Washington, D.C. 20549

Re: Finance Docket No. 32760, Union Pacific Corporation, et al. - Control and Merger - Southern Pacific Rail Corporation, et al.

Dear Secretary Williams:

Please find enclosed for filing in the above-reference proceeding the executed original and twenty (20) copies of Kennecott Utah Cooper Corporation's Reply to Petitions for Clarification. This is designated: KENN-22. Also enclosed is a 3.5 inch diskette containing the enclosed document in Word Perfect 5.1. As indicated in the attached Certificate of Service, copies of this document are being served upon all parties of record.

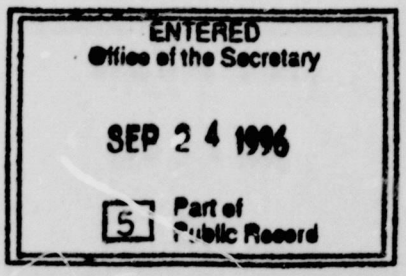
Thank you for your cooperation and assistance. Should you have any questions, please do not hesitate to contact the undersigned.

Sincerely yours,

John K. Maser III
Attorney for *Kennecott Utah Copper Corporation*

cc: All parties of record (w/encl)

3760-020



ORIGINAL

KENN - 22

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

--Control and Merger--

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

REPLY OF KENNECOTT UTAH COPPER CORPORATION TO PETITIONS FOR CLARIFICATION

Kennecott Utah Copper Corporation ("KUC"), a party of record, hereby submits, through counsel[1], its reply to recent petitions for clarification. Specifically, KUC here replies to the following petitions: (1) Petition for Clarification of Geneva Steel Company (GS-3) (hereinafter "Geneva Petition"), (2) Petition of Burlington Northern Railroad Company and The Atchison, Topeka and

[1] On June 3, 1996, the undersigned withdrew as counsel of record for KUC (KENN-20). However, KUC has again retained the undersigned as its outside counsel of record in this proceeding, and the Board and parties are requested to revise their service lists accordingly.

Santa Fe Railway Company for Clarification of Decision No. 44 (BN/SF-65) (hereinafter "BN/SF Petition"), (3) Petition for Clarification of Entergy Services, Inc., Arkansas Power & Light Company and Gulf States Utilities Company (ESI-27) (hereinafter "Entergy Petition"), all dated September 3, 1996, (4) Applicants' Petition for Clarification (UP/SP-275) (hereinafter "UP/SP Petition") dated August 29, 1996, and (5) Letter-Petition of Railroad Commission of Texas (RCT-8) (hereinafter "RCT Petition"), dated September 10, 1996.

All of these petitions request the Board to clarify a number of important conditions imposed by the Board in its Decision No. 44 in this proceeding served August 12, 1996. The Geneva Petition, BN/SF Petition, the Entergy Petition and the RCT Petition address the condition set forth on page 146 of Decision No. 44, whereby the Applicants are required to modify contracts with shippers at 2-to-1 points to allow BN/SF access to at least 50% of the volume, hereinafter referred to as the "contract modification condition."[2] The UP/SP Petition addresses certain aspects of Decision No. 44 pertaining to BN/SF's right to serve new facilities and transload facilities located on the UP or SP lines on which BN/SF will have overhead trackage rights, hereinafter referred to as the "new facilities condition."[3]

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2 The contract modification condition is described by the Board at page 146 of Decision No. 44 in the following terms:

> 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 Louisiana to allow BNSF access to at least 50% of the volume. We require as a condition that this provision be modified by extending it to shippers at all 2-to-1 points incorporated within the BNSF agreement, not just 2-to-1 in Texas and Louisiana. The extension of this provision to all 2-to-1 points will help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations.

3 The new facilities condition is set forth at pages 145-146 of Decision No. 44, as follows:

> New facilities and transloading facilities. The BNSF agreement, as amended by the CMA agreement, grants BNSF the right to serve any new facilities located post-merger on any SP-owned line over which BNSF receives trackage rights in the BNSF agreement. The BNSF agreement further provides, however, that the term "new facilities' does not

(continued . . .)

Identification And Interest Of Kennecott Utah Copper Corporation

KUC is an integrated mining, smelting, and refining company that produces refined copper cathode, copper concentrates, copper matte and sulphuric acid, among other commodities. KUC's headquarters and primary place of business are located at Magna, Utah, which is located near Salt Lake City, Utah. KUC's Magna facility is heavily dependent upon rail service for the receipt of inbound raw materials and the shipment of its outbound products. KUC's Magna facility is served directly from UP's yard at Garfield, Utah, and SP's yard at Magna, Utah. Thus, KUC is a "2-to-1 shipper" which is located at a "2-to-1 point" as that phrase is used in Decision No. 44. Consequently, BN/SF will have access to KUC's Magna facility by virtue of the conditions imposed by the Board in Decision No. 44.

The continuation of true, meaningful competitive rail service by the UP/SP system and the BN/SF system following consummation of the subject merger is critical to KUC, just as the pre-merger competition between UP and SP was critical to KUC. KUC and UP have had a long and mutually beneficial business relationship in the past, and KUC anticipates that this salutary relationship will continue into the future. Indeed, KUC has an overall interest in a healthy and viable UP/SP system so that it can continue to meet KUC's essential transportation needs. At the same time, however, KUC also has a compelling interest in a strong and viable competitive BN/SF system with respect to its operations in the Central

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(. . .continued)

include expansions of or additions to existing facilities or load-outs or transload facilities. We require as a condition that this provisions be modified in two respects: first, by requiring that BNSF be 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.

Corridor so that it can indeed replace and replicate the competitive services previously provided by the SP.

In Decision No. 44 the Board approved the proposed merger of UP and SP subject to certain important conditions designed to ameliorate anti-competitive effects that would otherwise occur as a result of the proposed merger. Operation by BN/SF in the Central Corridor pursuant to trackage rights clearly is one of the essential conditions imposed by the Board. Moreover, the effectiveness of the BN/SF trackage rights is dependent in large measure on the contract modification condition and the new facility condition, also imposed by the Board. As the Board stated with respect to the contract modification condition, for example, extending the 50% reopener provision to all 2-to-1 points ". . . will help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations."(Decision No. 44, at page 146). In KUC's view, all affected parties, UP/SP, BN/SF, affected shippers, and the Board itself, have a common interest in facilitating real competition in the region. While there can be no guarantee that BN/SF will in fact be competitive with UP/SP, the BN/SF must at least be in a position to have an opportunity to compete in a meaningful way. The pending petitions for clarification all address this important issue, either directly or indirectly.

The Board Should Clarify What Is Meant By The Phrase "50% Of The Volume."

The RCT Petition raises the important, threshold question of what the Board meant by "50% of the volume" as used in the condition imposed at page 146 of Decision No. 44. The term "volume" is not defined in Decision No. 44 or otherwise explained in the record in this proceeding. As the RCT Petition points out, page 2 thereof, without a clarification and a well-defined mechanism for determining how BN/SF can be assured of access to at least 50% of the volume, the Board's contract modification condition may be rendered unworkable. KUC

shares this concern. Thus, KUC urges the Board to answer the questions posed by the RCT Petition: is it 50% of the number of contracts, 50% of the total revenue, 50% of total carloads, or 50% of total tonnage?

In KUC's considered judgment, the term "volume" should be construed as broadly as necessary to carry out the Board's objective. It is important to bear in mind in this respect that the condition is designed, as earlier emphasized, to provide a traffic base sufficient to support effective trackage rights operations by BN/SF. Decision 44 at 146. There should be no arbitrary exclusion of traffic by an unduly narrow or constrained definition of the term "volume." KUC, therefore, suggests that one approach would be to clarify that the term "volume" has the same meaning as used by UP/SP and affected shippers in their contracts. Under this approach, if a particular contract defines "volume" in terms of tonnage, then tonnage would be the appropriate definition for purposes of that particular contract. If the term "volume" is defined in terms of "revenues," "carloads," or other measures, then those measurements would be the appropriate definitions for those particular contracts. The important point, in short, is to define the term so as to make the potential traffic base available to BN/SF as large as necessary to help ensure that operations under the trackage rights arrangement can indeed commence immediately and continue on a long-term basis.

There is an additional important point that should be emphasized here. The term "volume" should be clarified by the Board to make it clear that BN/SF has access to at least 50% of a shipper's aggregate volume currently under UP/SP contract in 2-to-1 locations, as opposed to defining volume more narrowly, such as restricting volume to specific origin-destination pairs. The Board should guard against an unduly narrow and restricted interpretation of what is meant by the term volume. Rather, the Board should clarify and confirm in no uncertain terms that volume is an aggregate concept, embracing all of a shipper's traffic under contract

with UP/SP even if the contract involves multiple origin-destination pairs. Any other, more narrow interpretation would impair BN/SF's ability to compete for a shipper's traffic in a meaningful and realistic way. Moreover, as discussed hereinafter, it should be the shipper's choice as to what specific traffic out of the aggregate volume available will qualify for the "50% of volume" to which BN/SF will have access.

The Board Should Clarify That It Is The Shipper's Choice As To What Specific Traffic Will Constitute The Volumes Available To BN/SF And When That Traffic Will Be Available To BN/SF.

A number of the pending petitions for clarification address issues relating to the shipper's right to choose what specific traffic will be made available to BN/SF and when that traffic will be made available to BN/SF. The Geneva Petition requests clarification, in this respect at page 2 thereof, as follows: "a shipper must be free to specify which portion of its contract volume, up to 50 percent of its total rail traffic will be granted to BNSF" and, further, that "a shipper must be free to specify when the bid proposal from BNSF may be entertained."

Similarly, the BN/SF Petition requests clarification, inter alia that "shippers- not applicants- are entitled to choose and to designate (on a shipper-by-shipper, contract-by-contract basis) the 50% of their traffic that is open to BN/Santa Fe competition, if in fact no more than 50% of the traffic is to be opened." (BN/SF Petition, page 3) The Entergy Petition likewise requests clarification, among other things, that "50% of the contract volume of each shipper at any 2-to-1 point must be opened to BNSF, and not merely 50% of the aggregate contract volume of all shippers collectively, at a 2-to-1 point." (Entergy Petition, page 2)

KUC agrees with the general thrust of these petitions for clarification on this point since they are clearly in keeping with the letter and the spirit of the broad-based conditions imposed by the Board in Decision No. 44 which are intended to

be implemented "to replicate the competition that would otherwise be lost when SP is absorbed into UP." (Decision No. 44, at 145).

As the Geneva Petition argues forcefully, at pages 10-11, to replicate the competitive environment, the contract modification condition should permit the shipper-rather than UP- to specify which portion of at least 50% of its traffic volume will be available to BN/SF. Similarly, as Geneva observes, in order to replicate competition, the shipper must have the right to entertain a bid from the BN/SF at any time until the termination date of the contract under which the traffic volume would otherwise move.

In short, it is important that the Board clarify that the "50% of volume" option is in place until expiration of existing contracts between UP/SP and the shippers, without regard to the length of time involved. Further, as emphasized earlier, the Board should clarify that BN/SF has access to at least 50% of a shipper's aggregate volume currently under contract with UP/SP at 2-to-1 locations. As a corollary to this requested clarification, the Board should further clarify that BN/SF may gain 100% of the volume of traffic with respect to any particular destination or destinations, so long as the total volume directed to BN/SF does not exceed 50% of the shipper's aggregate volume currently under contract with UP/SP at 2-to-1 origin locations.

The Board Should Clarify That A Shipper Will Not Be Precluded From Exercising Its Rights Under The Contract Modification Condition Because Of Volume Incentive Or Other Conditions In Existing Contracts With UP/SP

A number of the pending petitions for clarification address this very important issue. See, e.g., Geneva Petition, pages 9-10, and BN/SF Petition, pages 9-10. KUC agrees that the Board should exercise special care in this area in order to ensure that shippers will not be precluded by virtue of volume incentive price and service conditions, negative incentive terms, or similar contract conditions

from exercising their rights under the 50% of volume contract modification condition. If the Board fails to provide clarification in this area, there is a real danger that the pro-competitive goals embodied in this important condition may be seriously undercut.

KUC also urges the Board to clarify that all non-volume commitment provisions, such as performance commitments, in existing, affected contracts will remain in place, so long as the shipper does not redirect more than 50% of volume to BN/SF. Moreover, the Board should clarify that if any such volumes are redirected to BN/SF the "percentage of volume" commitments in existing contracts will continue to apply to the volume of traffic that would remain available to UP/SP. With the requested clarifications, BN/SF will have the opportunity to compete for 50% of the volume under existing contracts, thereby providing it with the opportunity to provide viable trackage rights operations as envisioned by the Board.

The Board Should Clarify That, In Addition To Existing Facilities At 2-to-1 Points, The BN/SF Also Has The Right To Serve New Facilities On Both SP-Owned And UP-Owned Track Over Which BN/SF Received Trackage Rights Under Decision No. 44

In the UP/SP Petition the Applicants raise a number of issues that impact the Board's new facilities condition set forth at pages 145-146 of Decision No. 44. In KUC's view the language used by the Board with respect to the new facilities condition is clear and unambiguous. The Board required that "BNSF be granted the right to serve new facilities on both SP-owned and UP-owned track over which BNSF will receive trackage rights" and that the "term 'new facilities' shall include transload facilities, including those owned or operated by BNSF." The Board should strongly reconfirm this new facilities condition and its intended scope and reach as to new facilities, including transload facilities to be located on lines over which BN/SF will receive trackage rights, whether UP-owned or SP-owned. To

the extent that the Applicants' petition for clarification seeks to narrow the scope of this condition, such petition should be denied by the Board. It must be remembered that the Board's purpose in imposing the new facilities condition was to preserve competition and to provide sufficient traffic density on the trackage rights lines to enable BN/SF to compete effectively. The Board should make sure that these important goals are not frustrated by an overly narrow interpretation of these broad-based conditions.

Conclusion

Kennecott Utah Copper Corporation respectfully requests the Board to address these important issues and to make the clarifications as requested above. These clarifications are necessary to implement the conditions imposed by the Board so as to create a level playing field between UP/SP and BN/SF so that BN/SF will be able to compete for at least 50% of the volume currently under contract with UP/SP and otherwise to become a viable long-term competitor in the region. The conditions imposed by the Board in its Decision No. 44 are designed to achieve this result, and the Board should take steps to make certain that these goals can be reached and that competition can take place.

Respectfully submitted,

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(202) 371-9500

Attorney for Kennecott Utah Copper Corporation

September 23, 1996

Certificate of Service

I hereby certify that I have this 23rd day of September, 1996, served a copy of the foregoing Reply submitted on behalf of Kennecott Utah Copper Corporation on all parties of record, by first-class mail, postage prepaid, in accordance with Rules of Practice.

John K. Maser III

STB FD 32760 9-23-96 D 86220

86220

United States Gypsum Company
P. O. Box 806278
Chicago, IL 60680-4124
312 606-4000 Fax: 312 606-4093

USG

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1201 Constitution Avenue, N.W.
Washington, D.C. 20423

USG - 4
September 19, 1996

RE: **Finance Docket 32760**
Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad Company.

Mr Williams,

The Union Pacific - Southern Pacific's (UP-SP) and Burlington Northern Santa Fe Railroad (BNSF) have both sought the Surface Transportation Board (STB) to clarify or reopen parts of STB Decision Number 44. The BNSF's petition BNSF-65 requests clarification as it relates to the UP-SP opening up contracts at points served by both the UP and SP (identified as 2 to 1 points) to BNSF via trackage rights. The UP-SP's petition UP-SP 275 requests clarification on access to new facilities and/or new transload sites on the merged UP-SP lines that the BNSF would have access to via trackage rights. United States Gypsum (USG), as a shipper with 2 to 1 point plants, and, with interests in developing new facilities and new transload options on the UP-SP, urges the STB to immediately clarify Decision Number 44. USG as a participant and party of record in the merger proceedings submits these comments related to the above two petitions.

125 South Franklin Street
Chicago, IL 60606-4678

Petition BNSF-65

The basis on which UP-SP contracts should be opened to BNSF is best determined by shippers who know what unique, dedicated or shipper controlled equipment requirements, specific service commitments, volume requirements, pricing tie-ins, etc. are or may be needed in current UP-SP contracts. Shippers, not the UP-SP or BNSF, are in the best position to decide on the application of BNSF's use at 2 to 1 points through direct discussions with the BNSF about all such opportunities and whether the UP-SP contract warrants opening up to the BNSF.

The UP-SP's narrow interpretation of the STB's decision on opening 2 to 1 point shippers contracts to BNSF according to UP-SP's decisions will not result in shippers using the BNSF if the BNSF cannot be competitive on price, equipment, service, etc. A blanket opening of all 2 to 1 point contract is also not appropriate due to limitations as mentioned above and due to the potential changes in pricing, equipment access, service and other terms in long term contracts that may have a negative effect on shipper business handled under long term contracts.

Shippers use of the BNSF trackage rights agreement will be the clearest and most unimpeachable gauge of whether or not the BNSF should retain trackage rights, or if another railroad should be substituted for BNSF's trackage rights, or if UP-SP track divestiture best meets the STB's merger conditions for competitive rail access. It will be in the BNSF's best interests to work with shippers to uncover and develop sufficient freight to and from 2 to 1 points that will justify the BNSF's continued access to trackage rights over the UP-SP.

Petition UP-SP 275

USG also would like to address UP-SP's request for clarification on BNSF serving new facilities or new transload sites that may be locating on the merged UP-SP lines where BNSF would have trackage rights. STB's Decision Number 44 clearly does not limit BNSF from serving new facilities or new transloading operations locating on the merged UP-SP lines that are covered by BNSF trackage rights. In the third paragraph on page 106 of Decision Number 44 it is stated that "(STB) will require as conditions ... that the 'new facility' provision of the CMA agreement be extended to require applicants to permit BNSF to serve any new facility at any point on any SP or UP segment over which (BNSF) has been granted trackage rights; that the term 'new facility' include new transload facilities..." The STB decision is very clear

as to the BNSF's access to business locating on the UP-SP where BNSF would have trackage rights access.

USG, as a shipper with 2 to 1 point plants and with interests in developing new facilities and new transload options on the UP-SP urges the STB to immediately clarify Decision Number 44 by; 1) establishing the shipper as the decision maker in opening contracts at 2 to 1 points, 2) establishing the broadest interpretation as it relates to accessing contract freight, equipment supply, service, shipper needs, etc., in contracts openable to the BNSF, and 3) not limit BNSF access to new facilities or new transload sites that may locate on the merged UP-SP lines. STB's prompt clarification of Decision Number 44 issues under the guidelines above will preserve the intended competition between the UP-SP and BNSF.

Sincerely,

Alex J. Pavin
Director, Global Logistics
USG Interiors
United States Gypsum Company

cc. All Parties of Record.

85976

PHILLIPS PETROLEUM COMPANY
BARTLESVILLE, OKLAHOMA 74004 918 661-6600

TRANSPORTATION SERVICES

September 4, 1996

Mr. Vernon A. Williams
Secretary, Surface Transportation Board
12th Street & Constitution Ave., N.W.
Washington, D.C. 20423

Subject: Finance Docket No. 32760

Dear Secretary Williams:

My company is writing in response to the recent decision by the Surface Transportation Board approving, with conditions, the Union Pacific-Southern Pacific merger. Phillips Petroleum Company has strong shipping interests in the Houston area with rail freight moving in all directions. Competitive rail service is essential for us to remain a viable supplier in the global markets which we compete.

One of the conditions contained in the recent STB merger decision granted trackage rights to the Texas Mexican Railway (Tex Mex) between Corpus Christi and Beaumont, but with restricted access at Houston. Phillips supports the Tex Mex request for the service restrictions to be lifted so full local Houston area service can be offer by Tex Mex. Without the lifting of the service restrictions, the Tex Mex trackage rights will be of minimal value to hundreds of shippers, small and large alike.

Respectfully,

Fred E. Watson

Fred E. Watson
328 Adams Bldg.
Bartlesville, Ok. 74004

Item No. 1

Page Count

May 1996 # 126

83097

TUE-15 NITL- 18
WPL-10 DOW-22
CPSB-6 WPS-10
KCS-55 KENN-19
ARU-15 ESI-22
MLR-20 STTX-7
MONT-7 DOJ-13
UCC-12 SPI-19
TM-36 WCTL-20
KCS-55 CCRT-11
SP-15 STRC-11
International Paper-15 RCT-7

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

RESPONSE OF INTERESTED PARTIES
TO
MOTION OF WESTERN SHIPPERS COALITION FOR
CLARIFICATION OR RECONSIDERATION OF DECISION NO. 36

The National Industrial Transportation League
The Society of the Plastics Industry, Inc.
Coalition for Competitive Rail Transportation
The Dow Chemical Company
Kennecott Energy Company
International Paper Company
Sierra Pacific Power Company
Idaho Power Company
Western Coal Traffic League
Entergy Services, *et al.*
City Public Service Board of San Antonio
Texas Utilities Electric, Inc.
Wisconsin Power and Light Company
Wisconsin Public Service Corporation
Allied Rail Unions
The Attorney General of the State of Texas
The Texas Railroad Commission
The Kansas City Southern Railway Company
Texas Mexican Railway Company
Montana Rail Link, Inc.
The United States Department of Justice

May 21, 1996

126

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

RESPONSE OF INTERESTED PARTIES
TO
MOTION OF WESTERN SHIPPERS COALITION FOR
CLARIFICATION OR RECONSIDERATION OF DECISION NO. 36

The parties whose names appear on the cover of this Response ("Interested Parties"), by their attorneys (whose names appear on the signature page of this filing), submit this Response to the Motion of the Western Shippers' Coalition ("WSC") for Clarification or Reconsideration of Decision No. 36. These Interested Parties support the principal aspect of WSC's Motion -- to make clear that the currently-scheduled 240 minutes of oral argument will be divided between proponents and opponents of the primary Application ("Application") -- and urge the Board to decide that issue promptly. However, these Interested Parties strongly urge the Board not to decide the portion of WSC's Motion dealing with the allocation of oral argument time until: (1) all parties file on May 24 their statement regarding oral argument; and, (2) these Interested Parties (and perhaps others) can report to the Board (on or before June 7, 1996) on efforts to develop an agreed allocation of oral argument time by the opponents of the Application.

DISCUSSION

In Decision No. 36, the Board directed all parties to submit a statement to the Office of the Secretary by May 24, 1996 identifying the issue or issues they wish to

address in oral argument; whether they support or oppose the Application, responsive applications, and requests for conditions; and their desired argument time. The Board encouraged parties to coordinate their presentations. The Board's decision indicated that the oral argument time would be divided between "the primary applicants (including Burlington Northern Railroad Company and The Atchison, Topeka, and Santa Fe Railway Company), on the one hand, and all other participants on the other."

In its Motion, WSC asks the Board to clarify Decision No. 36 to make clear that the currently-scheduled 240 minutes for oral argument be divided between proponents and opponents of the Application. These Interested Parties strongly support WSC's request for such clarification. These Interested Parties strongly agree with WSC that parties who support the primary application (such as Utah Railway, Canadian National, and others) and who wish to participate in oral argument should be included in the oral argument time block set aside for the primary Applicants and the BNSF.

Clarification of this matter now is particularly important in attempting to coordinate presentations for oral argument. Until this matter is clarified, it is impossible for parties opposing the Application in whole or in part to attempt to agree upon an allocation of oral argument time, since it is impossible to know how many parties will be counted in the time currently set aside in Decision No. 36 for "all other participants." Thus, the Board should clarify this matter promptly.

However, these Interested Parties urge the Board *not* to decide the second issue raised in WSC's motion, namely, the "general approach to allocating the two hours of those opposed to the primary Application (in whole or in part)." WSC Motion, p. 2. These interested parties believe that a decision on this matter by the Board would be premature, for two reasons.

First, these Interested Parties believe that the Board should wait until after May 24, when all parties desiring to participate in oral argument must notify the Board of the time that they desire and their position. At that time, the Board and the parties to the case will know which parties desire to participate in oral argument, and (if the Board

clarifies Decision No. 36 as requested above and by WSC) on which "side" of the oral argument "ledger" they will be placed. At that time, a more informed decision regarding oral argument allocation can be made.[1]

Second, these Interested Parties desire to inform the Board that they have already met to attempt to coordinate oral argument presentations, and have agreed to meet again after all parties have filed their requests for oral argument on May 24. At that time, these Interested Parties will attempt to develop an agreed allocation of oral argument time among themselves and hopefully with other parties who oppose the primary Application, who will by then have indicated a desire to participate in oral argument. These Interested Parties will inform the Board of the results of these discussions on or before June 7, 1996, so that the Board will have ample time to issue an oral argument schedule. Thus, these Interested Parties urge the Board not to allocate oral argument time until after June 7, 1996.[2]

CONCLUSION

For the foregoing reasons, these Interested Parties respectfully request the Board to clarify Decision No. 36 to the effect that oral argument time will be divided between, on the one hand, Applicants, BNSF, and proponents of the Application, and, on the other hand, all parties opposing the Application in whole or in part. In addition, these

---

[1] These Interested Parties would note that they do not believe that a "corridor" approach to oral argument, as suggested by WSC, would necessarily be the most helpful or appropriate. However, the precise allocation of oral argument time can best be decided after all parties have indicated their desire to participate in oral argument on May 24.

[2] A response to WSC's motion has already been filed by Consolidated Rail Corporation (Conrail). However, Conrail has indicated that it supports the matters addressed in this Response, which is consistent with it's own response.

Interested Parties urge the Board to deny as premature WSC's request to allocate oral argument time.

Respectfully Submitted.

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May 21, 1996

STB FD 32760 5-20-96 D 83594

83594

Item No. _____

Page Count 5

May 1996 # 112

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May 20, 1996

RECEIVED
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MAIL MANAGEMENT I.C.C.

VIA HAND DELIVERY

Mr. Vernon A. Williams
Surface Transportation Board
Case Control Branch
Room 1324
1201 Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 32760, Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al.

Dear Secretary Williams:

Enclosed for filing in the above-captioned case are one original and twenty copies of Consolidated Rail Corporation's Response to the Motion of Western Shippers' Coalition for Clarification or Reconsideration of Decision No. 36, designated as document CR-38.

Also enclosed is a 3.5-inch WordPerfect 5.1 disk containing the text of CR-38.

Sincerely,

A. Stephen Hut Jr. aep

A. Stephen Hut, Jr.

Attorney for Consolidated Rail Corporation

Enclosures

cc: All parties of record

ENTERED
Office of the Secretary
MAY 21 1996
5 Part of Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

CONSOLIDATED RAIL CORPORATION'S RESPONSE
TO THE MOTION OF WESTERN SHIPPERS' COALITION
FOR CLARIFICATION OR RECONSIDERATION OF DECISION NO. 36

Consolidated Rail Corporation ("Conrail") strongly supports the principal aspect of the motion of the Western Shippers' Coalition ("WSC"), but, for now at least, opposes a portion of WSC's request as well.

Conrail supports the WSC request that, if necessary, Decision No. 36 (May 9, 1996) be clarified to make clear that the scheduled 240 minutes for oral argument will be evenly divided between proponents and opponents of the primary Application ("Application"). Principles of fairness and due process require such an equal allocation of time -- namely, 120 minutes collectively to Applicants, Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company, and to all

other aligned parties in support of the Application, and 120 minutes collectively for all parties opposed in whole or in part to the Application. Absent this equitable division of time, the numerous opponents would be forced to share their limited time with parties who support the Applicants and BNSF.

Conrail, however, opposes as at least premature (and in fact unsound) WSC's proposal that the Board act now to divide the opponents' 120 minutes for oral argument according to the geographic region (or regions) to which their comments or responsive applications are addressed. In Decision No. 36 (May 9, 1996), the Board sensibly directed all parties to submit a statement to the Office of the Secretary, on or before May 24, 1996, identifying (a) the issue or issues they wish to address at oral argument; (b) whether they support or oppose the Application, responsive applications, and requests for conditions; and (c) their desired argument time. See Decision No. 36 at 1-2. The Board further encouraged parties to coordinate their presentations. Id. at 2. As WSC notes (Motion at 3), certain parties opposing the merger (in whole or in part) plan to meet to discuss such coordination.

Thus, before it has the benefit of this specific requested information from all parties -- and whatever coordinated understandings the parties themselves consensually reach regarding time allocation -- the Board should not attempt to allocate the opponents' 120 minutes. To do so now would be to act on the basis of what may be mere surmise. After all, the May

24 submissions to the Office of the Secretary may well suggest that requests for argument time do not divide easily between corridors. There is time after the May 24 submissions for the Board to make an appropriate allocation, after the parties have crystallized the issues for oral argument in their May 24 submissions (after meeting and coordinating among themselves).

Conclusion

For the foregoing reasons, Conrail respectfully requests the Board to affirm equal allocation of speaking time between, on the one hand, Applicants, BNSF, and proponents of the primary Application, and, on the other hand, all opponents of the Application. In addition, Conrail at this stage urges the Board to deny as premature WSC's request to divide up the opponents' total argument time by geographic corridor.

Respectfully submitted,

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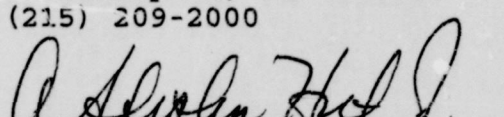

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May 20, 1996

CERTIFICATE OF SERVICE

I certify that on this 20th day of May, 1996, a copy of the foregoing Consolidated Rail Corporation's Response to the Motion of Western Shippers' Coalition ("WSC") For Clarification or Reconsideration of Decision No. 36 was served by hand delivery to:

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and served by first-class mail, postage pre-paid, to all other parties of record on the official service list.

Alex E. Rogers

STB FD 32760 5-17-96 D 83542

Item No. _____

Page Count 4

May 1996 #101

83542

FD-SP-251

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

REPLY TO WSC'S MOTION CONCERNING ORAL ARGUMENT

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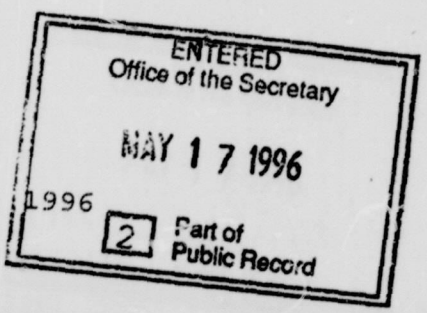

May 17, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

REPLY TO WSC'S MOTION CONCERNING ORAL ARGUMENT

Union Pacific Corporation ("UPC"), Union Pacific Railroad Company ("UPRR"), Missouri Pacific Railroad Company ("MPRR"),[1/] Southern Pacific Rail Corporation ("SPR"), Southern Pacific Transportation Company ("SPT"), St. Louis Southwestern Railway Company ("SSW"), SPCSL Corp. ("SPCSL"), and The Denver and Rio Grande Western Railroad Company ("DRGW"),[2/] collectively, "Applicants," submit this reply to the Motion of Western Shippers' Coalition for Clarification or Reconsideration of Decision No. 36.

The allocation of time at oral argument is a matter for the Board's discretion. We would note, however, that many parties proposing conditions support the merger itself, and that if a substantial number of such parties express an interest in participating in oral argument, taking their time

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1/ UPC, UPRR and MPRR are referred to collectively as "Union Pacific." UPRR and MPRR are referred to collectively as "UP."

2/ SPR, SPT, SSW, SPCSL and DRGW are referred to collectively as "Southern Pacific." SPT, SSW, SPCSL and DRGW are referred to collectively as "SP."

from the time available to the Applicants could cause an imbalance in the argument. Thus, Applicants believe that the allocation of time provided for in Decision No. 36, which the Board will no doubt refine in response to the expressions of interest in participating in oral argument that are filed, is reasonable.

Respectfully submitted,

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May 17, 1996

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 17th day of May, 1996, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

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Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

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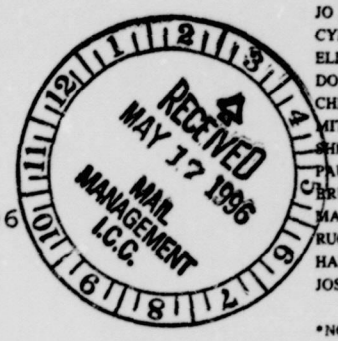
Item No. _____

Page Count 1

16 May 1996 # 103



May 17, 1996

BY HAND DELIVERY

MRL-22

Vernon A. Williams
Secretary
Surface Transportation Board
12th and Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company

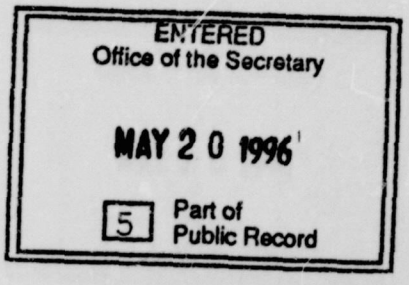
Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and 20 copies of Montana Rail Link's Letter in Support of Motion of Western Shippers' Coalition for Clarification or Reconsideration of Decision No. 36.

Please acknowledge receipt and filing of this filing by date-stamping the enclosed acknowledgment copy of this letter and return it to our messenger.

Very truly yours,

Paul C. Oakley



Enclosure

103

STB FD 32760 5-16-96 D 83808

Item No. _____

Page Count 3

May # 99

83808

United States Senate

WASHINGTON, DC 20510-3405

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ENERGY & NATURAL RESOURCES
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May 14, 1996

ENTERED
Office of the Secretary
MAY 29 1996
5 Part of Public Record

OFFICE OF CHAIRMAN MORGAN

RECEIVED
'96 4 29 PM
SURFACE TRANSPORTATION BOARD

Linda Morgan, Chairwoman
U.S. Surface Transportation Board
1201 Constitution Avenue, N.W.
Washington, D.C. 20423

Dear Madam Chairwoman:

I am writing to you about an application pending before the Surface Transportation Board (STB) that seeks approval of a merger between the Union Pacific Railroad Company (UP) and Southern Pacific Lines (SP). I am very concerned about the impact that this proposed merger would have on rail competition and the likely consequence of higher rates for shippers and consumers as well as job losses for rail labor.

As proposed, the merger would grant UP control over a reported 90% of rail traffic into and out of Mexico, 70% of the petrochemical shipments from the Texas Gulf Coast, and 86% of the plastics storage capacity in the Texas/Louisiana Gulf region. UP acknowledges that the merger would greatly reduce rail competition and has proposed a trackage rights agreement with Burlington Northern/Santa Fe (BNSF) as the solution.

A trackage rights agreement, however, does not solve the problem in my judgement. Owners of rail lines have incentives to invest in track and to work with local communities to attract economic development. Owners have control over the service they provide -- its frequency, it reliability, its timeliness. Similar circumstances do not exist for railroads that merely operate over someone else's tracks, subject to someone else's control. It seems to me that affected shippers, communities, and consumers are best served by a railroad that owns its track. An owning railroad also offers the best opportunity to retain employment for railroad workers who would be otherwise be displaced by the proposed merger.

It is my understanding that other railroad companies have submitted proposals to purchase some of the lines that raise competitive issues and with which the merger application proposes to lease lines to BNSF. It seems to me that where serious competition issues surround specific aspects of the merger proposal, the best solution would be to ensure that a competing railroad that owns the lines in question would provide the best assurances to shippers and consumers.

I urge the STB to oppose the proposed UP/SP merger in its present form unless it is conditioned on a divestiture that ensures adequate competition. I urge you to give serious consideration to alternative solutions proposed to the STB by other railroad companies that seek to provide competitive service in areas where the merger proposal raises competitive concerns.

Thank you for your consideration.

Sincerely,

Byron

Byron L. Dorgan
U.S. Senate

BLD:glr

Thank you!

Surface Transportation Board
Washington, D.C. 20423-0001

Office of the Chairman

File in Docket FD-32760

May 24, 1996

The Honorable Byron Dorgan
United States Senate
Washington, D.C. 20510

Dear Senator Dorgan:

Thank you for your recent letter regarding the proposed merger of the Union Pacific (UP) and Southern Pacific (SP) railroad systems. You express concern over the impact that the proposed merger would have on rail competition and rates for shippers, and on rail labor.

As you know, the UP-SP merger application is pending before the Surface Transportation Board (Board), docketed as Finance Docket No. 32760. Because the matter is currently pending, it would be inappropriate for me to comment on the merits of the case. I can, however, assure you that the Board is committed to fostering an efficient and competitive rail industry, and that the Board will give careful scrutiny to competitive issues raised in the merger proceeding. The Board also will thoroughly consider the effect of the proposed merger on rail employees and, as appropriate, will afford affected employees the level of labor protection to which they are entitled by statute. I anticipate a final decision in the merger proceeding by August 12, 1996.

I am having your letter made a part of the public record and am having your name added to the service list, which will ensure that you receive all future Board decisions in the merger proceeding. I appreciate your interest in this matter. If I may be of further assistance, please do not hesitate to contact me.

Sincerely,

Linda J. Morgan

Linda J. Morgan

STB FD 32760 5-15-96 D 83485

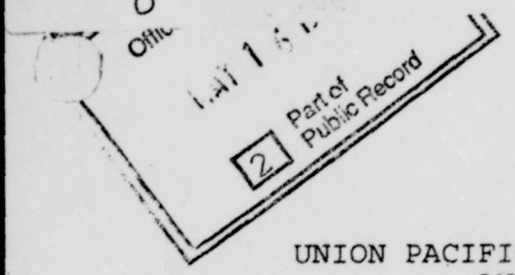
Item No. _____

Page Count 6

May #95

83485

UP/SP-250



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

APPLICANTS' RESPONSE TO PETITION
OF CHARLES W. DOWNEY
TO INTERVENE AND FILE COMMENTS

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Pacific Railroad Company

ORIGINAL

May 15, 1996

UP/SP-250

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

APPLICANTS' RESPONSE TO PETITION
OF CHARLES W. DOWNEY
TO INTERVENE AND FILE COMMENTS

Applicants Union Pacific Corporation ("UPC"), Union Pacific Railroad Company ("UPRR"), Missouri Pacific Railroad Company ("MPRR"), Southern Pacific Rail Corporation ("SPR"), Southern Pacific Transportation Company ("SPT"), Southwestern Railway Company ("SSW"), SPCSL Corp. ("SPCSL") and The Denver and Rio Grande Western Railroad Company ("DRGW") hereby respond to the "Petition to Intervene and to File Comments in Response to Settlement Agreement" (CWD-1) of Charles W. Downey, General Chairman for UTU on SPCSL, Gateway Western and IC. Under all the circumstances described by Mr. Downey, Applicants do not oppose the petition. If Mr. Downey's comments are considered, however, Applicants request that this response be considered as well.

1. Mr. Downey appears to believe that the Gateway Western settlement will alter the allocation of switching services in the Granite City, Illinois, area, that was noted

CERTIFICATE OF SERVICE

I, J. Michael Hemmer, certify that, on this 15th day of May, 1996, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

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Suite 500
Department of Justice
Washington, D.C. 20530

Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

J. Michael Hemmer

5. Finally, Mr. Downey calls for application of New York Dock to the settlement agreement. If any of the operating changes about which Mr. Downey speculates are implemented in the future, adversely affected SPCSL employees would be fully covered pursuant to the Applicants' acceptance of standard labor protective conditions.

Respectfully submitted,

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Attorneys for Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company

May 15, 1996

Board would have jurisdiction over that transaction and could impose any appropriate labor protection.

4. Mr. Downey argues that an implementing agreement should be developed for the UP/SP-Gateway Western settlement "prior to consummation of the UP/SP transaction." CWD-1, p. 4. In other words, Mr. Downey wants the entire UP/SP merger to be held in abeyance pending consent by employees of Gateway Western and SPCSL. This request is inappropriate for several reasons:

First, the request is entirely inconsistent with New York Dock procedures. Under New York Dock, a merger is consummated first. The new company then serves notices on organized labor of its intent to implement operating changes. The parties then negotiate or arbitrate to reach an implementing agreement. Only then are the resulting changes implemented. There is no reason to depart from that standard procedure and similar procedures applicable to trackage rights.

Second, no implementing agreement is needed at all. As noted above, the UP/SP settlement does not change existing operations.

Third, it obviously would be inappropriate to allow groups of employees in the St. Louis area, who themselves have potentially conflicting interests, to hold the entire merger hostage, especially when it is unclear whether any changes in operations will be made.

in the ICC's 1989 decision in Finance Docket No. 31522.[1/] Mr. Downey is incorrect. Nothing in the UP/SP-Gateway Western settlement agreement alters the allocation of switching responsibility between Gateway Western and SPCSL in that area. UP/SP-204, Ex. A, ¶ 3.

2. Mr. Downey also asserts that the UP/SP-Gateway Western settlement agreement will cause Gateway Western or an affiliate to assume responsibility for serving the Alton Branch. CWD-1, p. 3. No such agreement has been reached. The parties merely agreed to evaluate whether, at some point in the future, Gateway Western should perform the switching on that line. UP/SP-204, Ex. 1, ¶ 4. Mr. Downey's concerns therefore are speculative. If such changes are made in the future, labor protection will be available to any adversely affected SPCSL personnel, exactly as Mr. Downey requests.

3. As Mr. Downey recognizes, the 1989 arrangement between Gateway Western and SPCSL contains a condition under which operating responsibilities would change if Gateway Western were acquired by a Class I railroad. The settlement agreement nullifies that provision. Id., ¶ 1. It therefore has the effects of preserving existing operating arrangements and avoiding any adverse affect on employees. Employees do not need protection from the status quo. If, in the future, Gateway Western were to be acquired by another railroad, the

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1/ In that decision, the ICC did not approve or prescribe any pattern of rail service. It merely concluded that no regulatory action was necessary.

STB FD 32760 5-14-96 D 83461

Item No. _____

Page Count 14

May #86

83461

NCFO-2

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

NOTICE OF FILING OF SIGNED NATIONAL COUNCIL OF FIREMEN AND OILERS, SEIU RESPONSE TO MONTANA RAIL LINK RESPONSIVE APPLICATION

Because of an error by an overnight delivery company, the signed original of The National Council of Firemen and Oilers, SEIU Response To Montana Rail Link Responsive Application was not received in time for filing on April 29, 1996, so a facsimile copy was filed. The signed original of the NCFO filing is being filed with this notice.

Respectfully submitted,

George Francisco (JSE)

George Francisco, Jr.
Vice President
The National Council of
Firemen & Oilers, SEIU

Dated: May 14, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing Notice Of Filing Of Signed National Council Of Firemen And Oilers, SEIU Response To Montana Rail Link Responsive Application, by first-class mail, postage prepaid, to all parties of record on the attached service list.

Dated at Washington, D.C. this 14th day of May, 1996.

Richard S. Edelman

BEFORE THE
SURFACE TRANSPORTATION BOARD

NCFO-1

Finance Docket No. 32760

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

THE NATIONAL CONFERENCE OF FIREMEN AND OILERS', SEIU RESPONSE TO MONTANA RAIL LINK RESPONSIVE APPLICATION

The National Conference Of Firemen And Oilers, SEIU ("NCFO") hereby informs the Surface Transportation Board that it is opposed to the Responsive Application filed by Montana Rail Link, Inc. in the above-captioned proceedings. NCFO concurs in, and adopts as its own, the Responsive Comments of the Allied Rail Unions ("ARU") to the Montana Rail Link Responsive Application. NCFO respectfully refers the Board to the ARU filing for its statement of reasons for its opposition to the Montana Rail Link Responsive Application.

Respectfully submitted,

George J. Francisco Jr.

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