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# MAYER, BROWN & PLATT

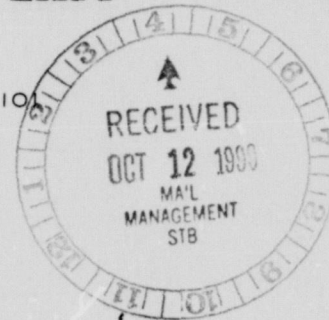
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October 12, 1999

## By Hand

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Room 711  
Washington, DC 20423

*D*

ENTERED  
Office of the Secretary

OCT 13 1999  
Part of  
Public Record

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 proceeding are the original and twenty-five (25) copies of the Reply of The Burlington Northern and Santa Fe Railway Company to Petition of Entergy Services, Inc. and Entergy Arkansas, Inc. for Enforcement of Merger Condition (BNSF-88). Also enclosed is a 3.5 inch disk containing the text of the pleading in WordPerfect 6.1 format.

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

Sincerely,

*Erika Z. Jones/als*  
Erika Z. Jones

Enclosures

cc: All Parties of Record



BNSF-88

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 BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY  
TO PETITION OF ENTERGY SERVICES, INC.  
AND ENTERGY ARKANSAS, INC. FOR  
ENFORCEMENT OF MERGER CONDITION

---

Jeffrey R. Moreland  
Richard E. Weicher  
Michael E. Roper  
Sidney L. Strickland, Jr.

Erika Z. Jones  
Adrian L. Steel, Jr.  
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Attorneys for The Burlington Northern and Santa Fe Railway Company

October 12, 1999



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  
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REPLY OF THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY  
TO PETITION OF ENTERGY SERVICES, INC.  
AND ENTERGY ARKANSAS, INC. FOR  
ENFORCEMENT OF MERGER CONDITION

---

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies to the Petition of Entergy Services, Inc. and Entergy Arkansas, Inc. (collectively referred to as "Entergy") for Enforcement of Merger Condition in this proceeding. In its Petition, Entergy seeks an order from the Board modifying the trackage rights which BNSF received pursuant to the conditions imposed by the Board on its approval of the merger of Union Pacific Railroad Company ("UP") and Southern Pacific Transportation Company ("SP") in Finance Docket No. 32760, Decision No. 44 (served August 12, 1996).

Specifically, Entergy requests that BNSF's trackage rights be modified to enable BNSF to provide service to Entergy's White Bluff Steam Electric Station ("White Bluff Plant") near Redfield, AR, northwest of Pine Bluff, AR. The plant was served prior to the

UP/SP merger only by UP. This service would be provided via a spur to be constructed by Entergy from the plant to a point on a former SP line known as the "Arsenal Lead" that runs near the plant. Entergy bases its Petition on the build-out provision of the Applicants' Settlement Agreement with the Chemical Manufacturers Association ("CMA") which, as modified by the Board, grants trackage rights to BNSF to serve a build-out constructed by any sole-served shipper on UP that had a pre-merger build-out option to SP (and vice versa).

In response to this first occasion when a shipper seeks to utilize the build-in/build-out condition, UP has taken a position<sup>1/</sup> in opposition to the shipper's efforts which not only threatens to undercut the effectiveness of that condition in preserving pre-merger competition, but which is also based on a position directly contrary to Interstate Commerce Commission and STB precedent. Accordingly, as established below, Entergy's Petition should be granted.

## ARGUMENT

### I. The Build-In/Build-Out Condition

On August 12, 1996, the Board approved the proposed merger of UP and SP. In so doing, the Board imposed a number of conditions on the merger, including the April 18, 1996 settlement agreement between UP/SP, BNSF and the CMA, as that agreement was modified by the Board.

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<sup>1/</sup> The descriptions of UP's position with respect to the question of BNSF access to the proposed build-out point are taken from UP's August 31, 1999 Opposition to the separate Petition for Exemption which Entergy filed with respect to the construction of the new spur in Finance Docket No. 33782.



Paragraph 13 of the settlement agreement with CMA (hereinafter referred to as the "CMA Agreement") provides that BNSF will be granted any trackage rights that may be necessary for BNSF to reach a build-in/build-out point. In its decision approving the UP/SP merger, the Board modified paragraph 13 of the CMA Agreement in a number of ways. As modified by the Board, paragraph 13 applies to any situation in which a shipper has a facility that, pre-merger, was solely served by UP but could have built out to a point on SP, and vice versa. The Board stated that:

The CMA agreement provides a post-merger procedure by which a CMA member can raise a claim that the merger deprived it of a build-in/build-out option. We require as a condition that this procedure be modified in two ways: first, by making this procedure applicable to all shippers; second, by removing the time limit to which this procedure is subject. These modifications will allow BNSF to replicate the competitive options now provided by the independent operations of UP and SP. We further clarify that a shipper invoking this procedure need not demonstrate economic feasibility; the only test of feasibility is whether the line is actually constructed. Any technical disputes with respect to the implementation of this build-in/build-out remedy may be resolved either by arbitration or by the Board.

Decision No. 44 at 146.

In a subsequent decision, the Board confirmed that the build-in/build-out condition would enable BNSF to access a shipper which constructed a build-in/build-out to a UP line which is parallel to a SP line (or vice versa) even though BNSF did not have trackage rights over the UP line. Specifically, the Board noted that:

CMA Paragraph 13 provides that BNSF will be granted any trackage rights that may be necessary for BNSF to reach the build-in/build-out point. CMA is therefore wrong in suggesting . . . that a build-in/build-out cannot run to a parallel line over which BNSF does not have trackage rights.

Decision No. 61 at 14 n. 35.

As noted above, the purpose of the build-in/build-out condition was to preserve the indirect competition provided by UP (or SP) to shippers located on the lines of the other merging carrier, and the Board intended for the condition to have a broad application. See Decision No. 44 at 106 (the condition applies "to all shippers with physically feasible [build-in/build-out] connections") (emphasis original). Indeed, during the proceeding, UP represented that it was the intention of the Applicants to preserve all pre-merger competition – both direct and indirect – and that the build-in/build-out condition of the CMA Agreement was designed to help achieve that result. See, e.g., Applicants' Brief (UP/SP-260) at 8 ("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 in preserving competition."). While the Board ultimately determined that the build-in/build-out provision of the CMA Agreement needed to be broadened in order to more completely fulfill that goal, it was the expressed intention of UP and SP that the build-in/build-out condition (as well as all other such competition-preserving conditions) should be interpreted and applied in a manner which would fully and completely enable BNSF to replicate all pre-merger competition. UP should be held to that stated intention.

## II. Application of the Build-in/Build Out Condition to the White Bluff Plant

The dispute between Entergy and UP concerning whether BNSF should be provided with trackage rights to enable it to serve a build-out by Entergy to the Arsenal Lead northwest of Pine Bluff does not turn on the interpretation of the build-in/build-out condition itself. Indeed, both parties are in general agreement with the proposition that BNSF is entitled to whatever trackage rights are necessary to enable BNSF to replicate the



competitive build-in/build-out options provided by SP (or UP) prior to the merger. See Entergy's Petition at 17; UP's Opposition to Construction Petition at 4.

The dispute instead centers on whether before the merger SP could have in fact served a build-out from the White Bluff Plant to the Arsenal Lead. In this regard, UP asserts that SP could not have served a pre-merger Entergy build-out to the Arsenal Lead and therefore that BNSF is not entitled to trackage rights to reach such a build-out now.<sup>2/</sup> UP's position is based primarily on the argument that, in connection with a mid-1980's relocation of SP's line in downtown Pine Bluff in order to relieve traffic congestion and improve safety, SP agreed to restrict its use of the Arsenal Lead to serving existing customers on the Lead. In particular, UP argues that, in return for being allowed to relocate its line in downtown Pine Bluff and to use MP's (now UP's) mainline in downtown Pine Bluff to reach the Arsenal Lead, SP expressly agreed in a 1984 Memorandum of Understanding ("MOU") that it would use the MP line only to serve those customers then being served by SP via the Arsenal Lead.<sup>3/</sup>

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<sup>2/</sup> UP does not contest Entergy's position that Entergy's build-out options are not limited to the twenty-one mile build-out to the former SP Memphis to Houston line that it proposed during the UP/SP merger proceeding, and UP acknowledges the applicability of the general build-in/build-out condition to the White Bluff Plant. UP's Opposition to Construction Petition at 3.

<sup>3/</sup> UP also argues that SP disabled itself from serving a White Bluff Plant build-out to the Arsenal Lead by physically removing a portion of the Lead north of Pine Bluff and by selling a portion of the Lead to a third party. Entergy counters by arguing that, notwithstanding these two actions, SP never applied for abandonment of these two portions of its line, and thus it remained under a certificated common carrier obligation to serve such a build-out point. Other than noting its concurrence with Entergy's argument that, absent abandonment authority, SP remained legally obligated to provide service to any shippers (new or existing) on the Arsenal Lead that desired service (see, e.g., Busboom Grain Co. v. ICC, 830 F.2d 74, 76 (7th Cir. 1987)), BNSF does not address this aspect of the dispute between Entergy and UP further in this Reply.

Entergy argues in response that the only restriction to which SP agreed in the MOU was that SP's ability to serve customers located adjacent to the relocated portion of the Arsenal Lead in downtown Pine Bluff would be restricted to existing customers -- i.e., SP could not serve new customers in downtown Pine Bluff which would be served using SP's trackage rights on the MP line. Thus, Entergy argues that SP could have served a pre-merger White Bluff Plant build-out point on the Arsenal Lead by moving coal on its own lines to Pine Bluff, then operating over MP's line through downtown Pine Bluff, and then moving over the Arsenal Lead to the build-out point.

Both Entergy and UP advance a number of arguments that their interpretation of the MOU is correct. For example, Entergy argues that SP could not have possibly intended to restrict its ability to serve new customers on the Arsenal Lead north of Pine Bluff while UP argues that SP knew exactly what it was doing and gave up the right to serve new customers anywhere on the Arsenal Lead in return for being relieved of the obligation to reconnect and maintain the Arsenal Lead in downtown Pine Bluff.

It is, however, not necessary for the Board to resolve this dispute between Entergy and UP as to the meaning of the "existing shippers" restriction in the MOU. Even if it were to be assumed that UP is correct and that SP intended and agreed to limit its future use of the entire Arsenal Lead (and not just the relocated downtown portion) to only those shippers that it served at the time of the MOU, any such contractual restriction would be void as a matter of law and public policy. Indeed, the ICC specifically held in Finance Docket No. 32248, Hanson Natural Resources Company -- Non-Common Carrier Status -- Petition for a Declaratory Order (decision served December 5, 1994), that:



Any restriction, imposed by any entity, that limits the properties that might be served would be inconsistent with the common carrier obligation that will accompany Santa Fe's hypothetical future common carrier obligations. Santa Fe, once having commenced common carrier operations on the Baca-LRM Line, will have no right to deny service to any shipper. If a complaint regarding such a restriction should arise in the future, we would find the offending restriction void as inconsistent with public policy. . . .

If common carrier service were authorized on the LRM Spur in the future, however, any restrictions limiting the shippers that could be served would, upon challenge, also be found void as contrary to public policy and the common carrier obligation.

Id. at 33-34 (emphasis added). See also United States v. Baltimore & Ohio R.R., 333 U.S. 169, 177-78 (1948) ("B&O") (parties may not enter into trackage rights agreements that abrogate rights and responsibilities under the Interstate Commerce Act).

Thus, contrary to UP's argument, SP could not lawfully agree in the MOU to forego its right to serve new facilities on the Arsenal Lead. Any such shippers had a pre-merger right to require SP to provide them with common carrier service on the Arsenal Lead, and they could have forced SP to do so by bringing an enforcement proceeding before the ICC or STB. That is in fact what happened in the B&O case cited above. Accordingly, UP's argument that SP could not have used MP's mainline track through downtown Pine Bluff before the merger to reach the Arsenal Lead and a build-out point from the White Bluff Plant is without merit.

### III. Construction of a New Crossover

Having established BNSF's right to receive trackage rights over UP which will enable it to serve an Entergy build-out point on the former SP Arsenal Lead,<sup>4/</sup> the issue becomes the routing over which those trackage rights should be awarded. Initially, the Board has made it clear that BNSF is entitled to receive "any trackage rights that may be necessary for BNSF to reach" a build-out point. Decision No. 61 at 14, n. 35. See also CMA Agreement at § 13 (same). The CMA Agreement provides further guidance as to which routing should be selected. It provides that, in making a trackage rights routing determination, the decision maker (either an arbitrator or the Board)<sup>5/</sup> should "seek to minimize the operating inconvenience to UP/SP, consistent with ensuring that BN/Santa Fe can provide competitive service". CMA Agreement at § 13. Here, as is outlined in Entergy's Petition, this standard can best be fulfilled by the construction of a new crossover from UP's mainline to the former SP Arsenal Lead just south and in the opposite direction of the existing crossover between those lines.

To fully understand this conclusion, it is necessary to review the changes in operations which occurred after the 1984 relocation project in downtown Pine Bluff was

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<sup>4/</sup> It should be noted that, under the BNSF Settlement Agreement, BNSF is entitled to serve the U.S. Government's Pine Bluff Arsenal as a "2-to-1" facility at a point listed on Exhibit A to the Agreement. See Section 6c (Second Supplemental Agreement). In addition, under Section 6d of the Second Supplemental Agreement, BNSF can serve the Arsenal directly, and thus BNSF is already entitled to operate over UP's mainline to reach the Arsenal Lead for that purpose.

<sup>5/</sup> In this regard, the CMA Agreement itself provided that any disputes concerning the proper BNSF trackage rights route would be resolved by arbitration. However, the Board in Decision No. 44 stated that any disputes with respect to the implementation of the build-in/build-out condition "may be resolved either by arbitration or by the Board." Decision No. 44 at 146.



completed. Prior to that project, SP reached the Arsenal Lead by simply utilizing its own line through downtown Pine Bluff. However, once SP relocated its line to the MP corridor in downtown Pine Bluff, it was necessary for SP to access the Arsenal Lead by use of another routing. At that time, it was agreed that SP would access its Arsenal Lead trackage (as well as industries on the adjacent, jointly served Gaylord Spur) by operating via trackage rights over the parallel MP line between downtown Pine Bluff and Baldwin. At that point, SP would stop, reverse direction, and shove onto the Arsenal Lead over the existing crossover between Baldwin on MP and Paperton on SP. It would then stop again and reverse direction to pull onto the Arsenal Lead itself. This trackage infrastructure (which is shown on the map submitted herewith as Attachment A) was adequate to accommodate operations involving multiple stops and reversing movements for short trains of cars for local customer setout and pickup.

Now, however, in light of BNSF's right to receive trackage rights to access the Arsenal Lead out of Pine Bluff to reach an Entergy build-out, efficient and competitive operations can best be achieved by the construction of a new crossover which would allow BNSF to directly run its trains onto the Arsenal Lead. Otherwise, BNSF would have to utilize time consuming and inefficient backing and/or run-around movements over the existing crossover with long unit coal trains which could cause unnecessary disruption and inconvenience to residents and traffic in Pine Bluff and the surrounding area. For example, there are several public grade crossings on both SP's former Arsenal Lead as well as the parallel UP line which would be impacted by a prolonged backing or run-around movement using the existing crossover arrangement between UP at Baldwin and the former SP/SSW at Paperton for handling unit coal trains to and from Entergy's White Bluff Plant. Moreover,

as Attachment A reflects, direct access by BNSF to the Arsenal Lead from UP in the direction of the Entergy build-out to the Arsenal Lead would minimize any potential disruption to UP's use of its mainline which might otherwise occur as a result of the time consumed for such backing or run-around movements.

#### CONCLUSION

For the reasons set forth above, Entergy's Petition should be granted. The build-in/build-out condition should be interpreted and applied in a manner which fully preserves all possible pre-merger indirect competition that existed between UP and SP -- a goal to which UP committed itself in its pleadings and testimony before the Board. UP's reliance on the terms of the purportedly restrictive provisions of the MOU between itself and its merger partner not only is in direct contravention of UP's professed willingness to accept full and vigorous competition from BNSF, but the "existing customer" restriction cited by UP is contrary to established ICC and Board precedent and could not have lawfully prevented SP from serving a build-out to the Arsenal Lead before the merger. Accordingly, Entergy's Petition should be granted.



Respectfully submitted,

Erika Z. Jones

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Adrian L. Steel, Jr.  
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Jeffrey R. Moreland  
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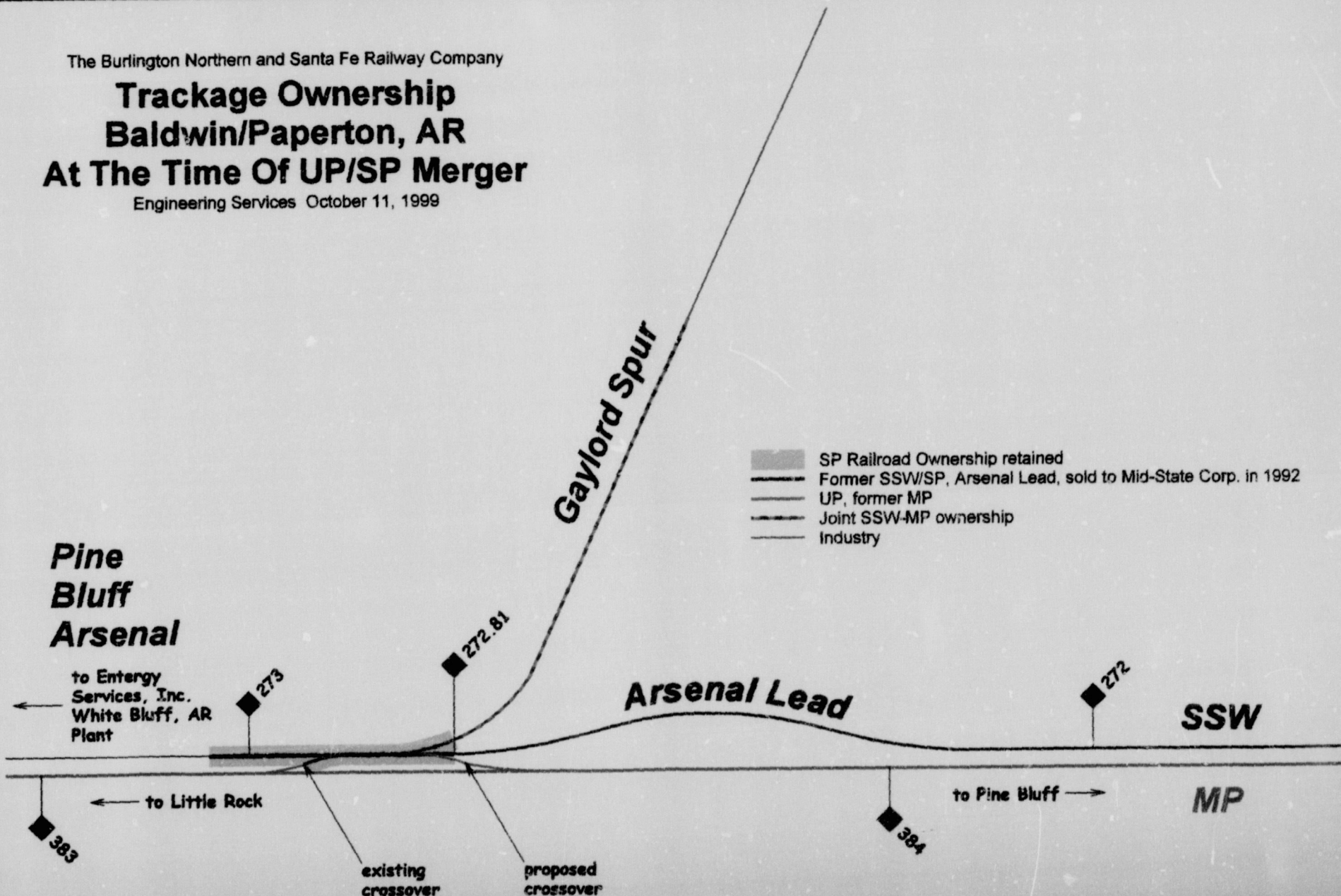
Attorneys for The Burlington Northern and Santa Fe Railway Company

October 12, 1999

The Burlington Northern and Santa Fe Railway Company

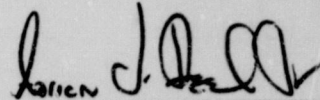
# Trackage Ownership Baldwin/Paperton, AR At The Time Of UP/SP Merger

Engineering Services October 11, 1999



CERTIFICATE OF SERVICE

I hereby certify that copies of the Reply of The Burlington Northern and Santa Fe Railway Company to Petition of Entergy Services, Inc. and Entergy Arkansas, Inc. for Enforcement of Merger Condition (BNSF-88) have been served on all Parties of Record.

  
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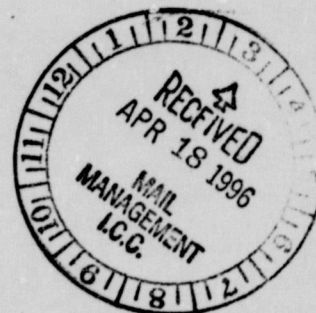
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April 18, 1996

**VIA HAND DELIVERY**

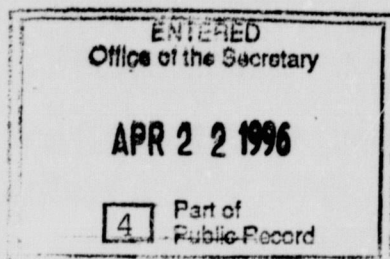
Mr. Vernon A. Williams  
Secretary  
Surface Transportation Board  
Case Control Branch  
Room 1324  
1201 Constitution Avenue, N.W.  
Washington, D.C. 20423



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 Errata to Verified Testimony of Consolidated Rail Corporation, designated as document CR-32. Also enclosed is a 3.5-inch WordPerfect 5.1 disk containing the text of CR-32. Copies of the enclosed document are being served upon all parties of record.

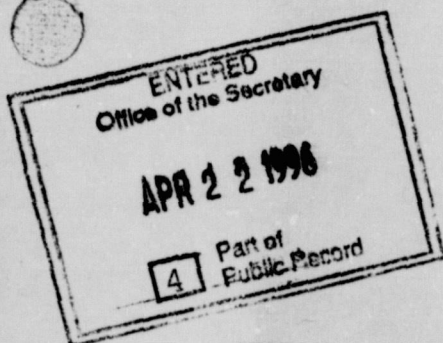


Sincerely,

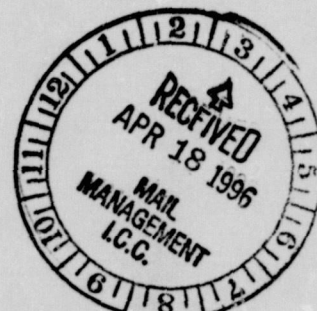
*William J. Kolasky*  
William J. Kolasky

Attorney for Consolidated  
Rail Corporation

Enclosures



**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

\_\_\_\_\_  
**ERRATA TO THE VERIFIED TESTIMONY  
OF CONSOLIDATED RAIL CORPORATION**

\_\_\_\_\_  
Consolidated Rail Corporation hereby submits the  
following errata to its Verified Testimony, contained in Volume  
II of its March 29, 1996 filing (CR-22):

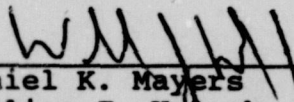
Volume II (CR-22)

Verified Statement of Jerome E. Hass

<u>Page</u>	<u>Line</u>	<u>Change</u>
3	9	Add "(excluding the one-time special charge)" after "share"

Respectfully submitted,

Bruce B. Wilson  
Constance L. Abrams  
Jonathan M. Broder  
Anne E. Treadway  
CONSOLIDATED RAIL CORPORATION  
2001 Market Street  
Philadelphia, PA 19101

  
\_\_\_\_\_  
Daniel K. Mayers  
William J. Kolasky, Jr.  
A. Stephen Hut, Jr.  
WILMER, CUTLER & PICKERING  
2445 M Street, N.W.  
Washington, D.C. 20037

April 18, 1996



**CERTIFICATE OF SERVICE**

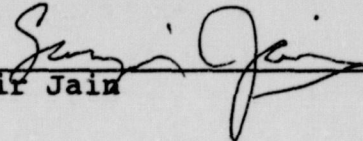
I certify that on this 18th day of April, 1996, a copy of the foregoing Errata to the Verified Testimony of Consolidated Rail Corporation was served by first-class mail, postage pre-paid, to:

Arvid E. Roach II  
S. William Livingston, Jr.  
Michael L. Rosenthal  
Covington & Burling  
1201 Pennsylvania Avenue, N.W.  
P.O. Box 7566  
Washington, D.C. 20044

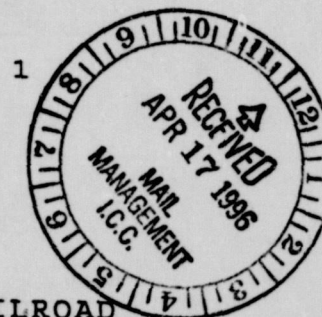
Paul A. Cunningham  
Richard B. Herzog  
James M. Guinivan  
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Erika Z. Jones  
Mayer, Brown and Platt  
2000 Pennsylvania Avenue, N.W.  
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Washington, D.C. 20006

and to all parties of record in Finance Docket No. 32760.

  
\_\_\_\_\_  
Samir Jain

**CERTIFIED COPY**



1                               BEFORE THE  
2                               SURFACE TRANSPORTATION BOARD  
3                               Finance Docket No. 32760  
4       UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD  
5       COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY  
6                               -- CONTROL MERGER --  
7       SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN  
8       PACIFIC TRANSPORTATION COMPANY, ST. LOUIS  
9       SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE  
10       DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

11                               **HIGHLY CONFIDENTIAL**

12                               Washington, D.C.

13                               Wednesday, February 28, 1996

14                               Deposition of RICHARD K. (DICK)

15       DAVIDSON, a witness herein, called for  
16       examination by counsel for the Parties in the  
17       above-entitled matter, pursuant to agreement, the  
18       witness being duly sworn by JAN A. WILLIAMS, RPR,  
19       a Notary Public in and for the District of  
20       Columbia, taken at the offices of Covington &  
21       Burling, 1201 Pennsylvania Avenue, N.W.,  
22       Washington, D.C., 20044, at 10:05 a.m.,  
23       Wednesday, February 28, 1996, and the proceedings  
24       being taken down by Stenotype by JAN A. WILLIAMS,  
25       RPR, and transcribed under her direction.

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPT  
1111 14th ST., N.W., 4th FLOOR / WASHINGTON, D.C., 20005

1 the same time frame?

2 A. Well, in the normal course of business,  
3 I'm sure there were a lot of them. But are you  
4 talking about something specific other than just  
5 running a railroad?

6 Q. I'm talking about something that  
7 involved a possible combination.

8 A. I don't recall anything.

9 Q. Are you familiar with a December 8,  
10 1994, Wall Street Journal article that attempted  
11 to address UP's efforts to acquire SP?

12 MR. ROACH: Object to the form of the  
13 question.

14 THE WITNESS: I don't have it imprinted  
15 in my mind, no. I mean if you have something I  
16 could look at to refresh myself.

17 MS. METALLO: I'd like to enter this as  
18 Davidson Exhibit 1.

19 (Davidson Exhibit No. 1 was  
20 marked for identification.)

21 BY MS. METALLO:

22 Q. I believe, on the second page of the  
23 copy that I passed out, the article quotes you --  
24 not you, I'm sorry. It actually does quote you  
25 as stating that the acquisition of SF positions

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1 us as the strongest railroad in the West, in the  
2 U.S., and maybe the world. Is that statement  
3 accurate or was it accurate at the time that it  
4 was written?

5 A. May I read this, please.

6 Q. Sure.

7 MR. ROACH: I want to state an  
8 objection to the form of the question, I think  
9 it's ambiguous whether the question is is that  
10 statement a true statement or was that a  
11 statement that Mr. Davidson made to the  
12 reporter. But he can answer it if he wishes or  
13 if you wish to clarify it.

14 BY MS. METALLO:

15 Q. Let me clarify. My first question is  
16 does that statement accurately reflect what you  
17 stated for the purpose of this interview?

18 A. You know, you said it was a quote. I  
19 don't know if it's a quote or not, a direct  
20 quote. I did give an interview to Machalaba.

21 And it's certainly within the realm of  
22 likelihood that I did say it, it would make us  
23 the preeminent railroad in the West and possibly  
24 in the entire United States. And, since the  
25 other railroads in the world are mostly

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1 government owned, that's almost a no-brainer, it  
2 goes without saying.

3 Q. So you do recall being interviewed, you  
4 do recall making a statement that is consistent  
5 with this statement?

6 A. I don't know if it's exactly accurate  
7 or not. But certainly I could well have said it  
8 could make us the strongest railroad in the  
9 country.

10 Q. Do you recall what UP's initial offer  
11 for the Santa Fe was in the terms of price?

12 A. Not really. It seems that it was in  
13 the \$17 range or something.

14 Q. Do you recall if that first offer, that  
15 first bid by UP was higher than BN's offer?

16 A. To the best of my recollection, it  
17 was.

18 Q. Do you recall what UP's second offer  
19 was for Santa Fe?

20 MR. ROACH: This is all a matter of  
21 public record. I think it's a waste of this  
22 gentleman's time, but I'll allow him to answer  
23 it.

24 THE WITNESS: I don't really. I mean  
25 we could furnish you that information if you

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1 answer a question based on that issue of the  
2 comments he received from shippers.

3 BY MS. METALLO:

4 Q. Did you receive comments from shippers  
5 regarding their concerns with respect to a UP  
6 combination with SP?

7 A. Well, let me say this, I got a lot of  
8 customer input regarding what would be adequate  
9 competition to remedy those situations where we  
10 had two-to-one reductions, and I think I said  
11 that a minute ago, from major customers in a  
12 number of places.

13 And then it all kind of came to a head  
14 when we had the National Freight Association  
15 meeting at the Greenbriar, where there was a huge  
16 concentration of customers. And I had access to  
17 a lot of them over that weekend or they sought  
18 access with me.

19 As I told you, I came to the conclusion  
20 that the only competitive alternative that was  
21 acceptable to them was the BN/Santa Fe. And that  
22 wasn't even acceptable without some  
23 modification.

24 Q. Did you ever receive information or  
25 inquiry by shippers regarding whether BN/SF would

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1 for a second.

2 (Discussion off the record.)

3 MS. METALLO: I'd just like to note for  
4 the record that I object to the objection and I  
5 believe that the question is properly within the  
6 scope of the line of questioning that Judge  
7 Nelson has permitted the parties to engage in.

8 MR. ROACH: We disagree.

9 MS. METALLO: I have no further  
10 questions.

11 (Discussion off the record.)

12 MR. ROACH: Can I do one redirect.

13 EXAMINATION BY COUNSEL FOR

14 UNION PACIFIC CORPORATION

15 BY MR. ROACH:

16 Q. You said there was a line segment that  
17 was not adequately dealt with by BN/Santa Fe's  
18 existing route structure to satisfy a customer  
19 that spoke with you. What is that line segment?

20 A. It was Houston to Memphis.

21 Q. And is that, in fact, dealt with in the  
22 settlement agreement?

23 A. Yes.

24 MR. ROACH: That's all.

25 (Recess)

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1 EXAMINATION BY COUNSEL FOR THE  
2 CHEMICAL MANUFACTURERS ASSOCIATION

3 BY MR. STONE:

4 Q. Mr. Davidson, again I'm Scott Stone,  
5 I'm with the law firm of Patton Boggs, L.L.P.,  
6 representing The Chemical Manufacturers  
7 Association.

8 I'd like to pick up on the redirect  
9 questions that your counsel asked you concerning  
10 the Houston to Memphis route. Do you have an  
11 understanding why that route was of concern to  
12 whoever expressed the concern to you about it?

13 A. Yes, I do.

14 Q. And what was that, what is your  
15 understanding of that concern?

16 A. It was the efficiency of the route,  
17 that it gave the BN/Santa Fe improved capability.

18 Q. And without that route would, in the  
19 view of the person who talked with you, BN not  
20 have sufficient capacity?

21 A. Excuse me? I didn't understand your  
22 question, sir.

23 Q. I understood your response to my first  
24 question to be that including Houston to Memphis  
25 in the BN agreement solved the problem of the

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1 customer who spoke with you, because that route  
2 is efficient and provides BN with sufficient  
3 capacity.

4 A. I don't quite think that's the right  
5 characterization. I don't think it was so much a  
6 composite issue as it was an expeditious route, a  
7 good direct connection.

8 Q. And, based on your understanding, what  
9 was it an efficient connection to or from?

10 A. Well, it was a good connection from  
11 the -- from that area of the country, of the Gulf  
12 Coast region, to the Memphis gateway.

13 Q. And I gather the concern expressed to  
14 you was that, without that efficient route to the  
15 Memphis gateway, the BN trackage rights was not a  
16 sufficient amelioration of the anticompetitive  
17 effects that might otherwise occur from the  
18 merger; is that correct?

19 A. The conversation really wasn't quite  
20 that clean-cut and crisp. It was more along the  
21 lines that various railroads couldn't perform  
22 required functions to address the competitive  
23 concerns. As an example, KCS or IC didn't have  
24 the competitive reach and breadth of the BN/Santa  
25 Fe. And we actually discussed certain

1 origin/destination pairs.

2 And this was a huge, huge customer that  
3 I was talking with at the time. And he said, as  
4 an example, with BN/Santa Fe, why, they've got  
5 huge reach. They have a disadvantage that we're  
6 interested in, was Houston to Memphis, because  
7 their own route, even though they went from  
8 Houston to Memphis, was circuitous and this was a  
9 nice direct shot that would give them an  
10 excellent service package. So that was sort of  
11 the context of the conversation. Did that answer  
12 your question?

13 Q. I think that helped. Thank you. And,  
14 in response to Mr. Roach's question on redirect,  
15 you responded that you incorporated the Houston  
16 to Memphis route into your agreement with BN as a  
17 result of the concern you've just discussed that  
18 was raised by the huge shipper; is that correct?

19 MR. ROACH: That's not a correct  
20 statement of the question and answer. But he's  
21 free to answer that question.

22 THE WITNESS: Would you ask it again  
23 please, sir.

24 BY MR. STONE:

25 Q. Why did you decide to include the

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1 Houston to Memphis route in the trackage rights  
2 agreement with BN?

3 A. Well, my conversation with the customer  
4 was at least partially responsible for that, but  
5 there were some other issues in our discussion  
6 with BN/Santa Fe that influenced it as well. But  
7 certainly the input from that customer was  
8 important.

9 Q. What were the conversations with the  
10 BN/Santa Fe that you just alluded to in your last  
11 answer?

12 MR. ROACH: I'll instruct the witness  
13 not to answer.

14 BY MR. STONE:

15 Q. Based on your own experience in  
16 railroading, is the provision to the BN/Santa Fe  
17 of rights over the Houston to Memphis route  
18 essential for the BN/Santa Fe to compete for Gulf  
19 Coast chemical traffic moving over Memphis?

20 A. Well, my personal thoughts here is it  
21 makes them more competitive. The BN, in its  
22 previous life before their merger, did have  
23 business moving out of Houston going over the  
24 Memphis gateway. So I mean obviously they were  
25 capable of handling it that way. This is a

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1 far -- this is a better route for them, more  
2 direct.

3 Q. In your own mind, would you say that  
4 you would not have included rights for the  
5 BN/Santa Fe from Houston to Memphis in the  
6 agreement with BN/Santa Fe if you had not  
7 concluded that doing so was essential to  
8 obtaining approval for the merger by the Surface  
9 Transportation Board?

10 A. I couldn't say that definitively, no.

11 Q. Would it be fair to say that granting  
12 those rights to BN/Santa Fe significantly  
13 advantages BN/Santa Fe in its ability, in their  
14 ability; that is, the BN/Santa Fe's ability, to  
15 compete with the Union Pacific and the Union  
16 Pacific/Southern Pacific following the merger?

17 A. I don't know that I could, you know,  
18 quantify the degree of improvement that gives  
19 them. I think it was a substantial improvement.  
20 And, of course, they were already well equipped  
21 to compete effectively against us. But this even  
22 made them a more effective competitor. They're  
23 going to be clearly a very strong competitor, and  
24 this helped.

25 Q. I'd like to turn your attention to

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1 Exhibit 1 and direct your attention to the  
2 paragraph in the second column of the article  
3 that we've been discussing. And, if I may, I'd  
4 simply like to read the relevant paragraph into  
5 the record as a point of reference for my  
6 question. Quote, Union Pacific also looked at  
7 Southern Pacific Rail Corp., financially the  
8 weakest of the four major Western railroads,  
9 Mr. Davidson said. But it decided a merger of  
10 Union Pacific and Southern Pacific would corner  
11 the freight market in Gulf Coast chemicals,  
12 raising competition questions that would be  
13 challenged at the ICC, close quote.

14 Now, Mr. Davidson, did you make a  
15 statement similar to that attributed to you in  
16 this article, that a Union Pacific/Southern  
17 Pacific merger would corner the freight market in  
18 Gulf Coast chemicals?

19 MR. ROACH: I object to the form of the  
20 question. The sentence you're pointing to does  
21 not purport to quote him. But he's free to  
22 answer the question with that qualification.

23 THE WITNESS: I don't remember  
24 precisely what I did say. But, as we said going  
25 into our merger, we knew there were competitive

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1 issues that we would have to address including  
2 the Gulf Coast area of Texas and Louisiana.

3 And I did share that with the reporter,  
4 that we had concerns. In fact, we shared it with  
5 the entire world when we announced our intended  
6 merger with the Southern Pacific, that we had  
7 competitive concerns and that we intended to  
8 address them.

9 I'm happy to say that, from the time we  
10 initially thought about Southern Pacific as a  
11 partner and until we actually did the deal, that,  
12 when you looked at it on a customer-by-customer  
13 basis, the competitive concern wasn't as much as  
14 we initially figured. And, of course, we have  
15 addressed that with the BN/Santa Fe arrangement.

16 BY MR. STONE:

17 Q. Mr. Davidson, to your knowledge does  
18 the Union Pacific have a strategy or policy for  
19 the pricing of service to customers?

20 A. Well, I'm relatively confident we do.  
21 But I would tell you, I'm not an expert on  
22 pricing.

23 Q. Do you think you have a written policy  
24 along these lines?

25 A. If we do, I'm not aware of it.

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1 you try to run a good business to make it  
2 attractive to the shareholder.

3 Q. I'm going to ask that my previous  
4 question be read back because I don't think the  
5 answer was responsive to it.

6 A. I'll try to be responsive. I didn't  
7 mean not to be responsive.

8 THE REPORTER: "Question: Do you  
9 believe you have an obligation to shareholders to  
10 maximize the profits of the corporation?"

11 MR. ROACH: I think he was responsive.  
12 If he has anything he wants to add to his prior  
13 answer, he's free to do so, as always.

14 THE WITNESS: Well, you know, I guess a  
15 real short answer would have been yes, we do have  
16 an obligation to run a profitable company and to  
17 maximize shareholder return. I think I said that  
18 a minute ago, but maybe it wasn't as clear as it  
19 should have been.

20 BY MR. STONE:

21 Q. And would you say that, as part of that  
22 duty, the Union Pacific Railroad Company has a  
23 duty to its shareholders and the ultimate  
24 shareholders of its parent to price its services  
25 so as to obtain the maximum net revenues

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1 consistent with meeting competition from its  
2 competitor railroads and perhaps other forms of  
3 competition?

4 A. Well, competition sets the market  
5 price. I mean it's just that simple. If the  
6 customer can get more cost effective  
7 transportation by using water or truck or some  
8 other form of transportation, they get it. You  
9 don't set prices in a vacuum. Obviously it's a  
10 very competitive world out there.

11 Q. And, so long as the Union Pacific  
12 didn't lose business to a competitor, would you  
13 say that it is part of your obligation to  
14 shareholders to obtain the highest revenues  
15 possible from a given piece of traffic?

16 A. That's just the way business works,  
17 whether it's a chemical company or a railroad.

18 Q. Now, are you aware of whether there are  
19 any differences at present or whether there were  
20 any differences in calendar year '95 between the  
21 pricing policies of the Union Pacific on the one  
22 hand and the Southern Pacific on the other?

23 A. Well, I don't really know in any detail  
24 what the pricing policies of the SP were. In  
25 fact, I don't know in great detail on a

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1           A.    Well, I don't think there's a general  
2           answer on that. The contracts that I'm familiar  
3           with, where we bid against them, we win some and  
4           lose some. As I'm sure you're aware, we had a  
5           number of chemical companies come to us and ask  
6           us to access their plants so that they could get  
7           more effective transportation from their point of  
8           view versus the Southern Pacific.

9           Q.    So would it be your testimony that you  
10          do not believe that the Southern Pacific is --  
11          let me restate that.

12                Do you believe that SP is an aggressive  
13          price competitor?

14          A.    I think the Southern Pacific is an  
15          aggressive competitor and I know that in a number  
16          of cases that they have got business from us  
17          because they priced their service cheaper than we  
18          did.

19          Q.    Do you think there have ever been any  
20          instances in which the Southern Pacific has  
21          priced at less than fully allocated costs in  
22          order to capture a piece of business?

23          A.    I think we have wondered about that at  
24          times, yes.

25          Q.    Could you elaborate on what you have

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1           A.     I don't know that I ever said those  
2     words. I probably have said in some certain  
3     instances that their method of pricing couldn't  
4     be sustained.

5           Q.     And, assuming that you become chairman  
6     of the merged entity, I assume that you would  
7     have some say, direct or indirect, over what SP's  
8     pricing policies might be, correct?

9           MR. ROACH: Object to the form of the  
10    question. There won't be an SP at that point.  
11    But he can answer if he understands the  
12    question.

13           THE WITNESS: I was going to say that  
14    myself, that it will be the Union Pacific. We  
15    actually merged, but we're going to take the  
16    first name of the Union Pacific and the second  
17    name of the Southern Pacific.

18           BY MR. STONE:

19           Q.     Let the record reflect there's laughter  
20    in the room.

21           A.     The fact of the matter is the market  
22    will set price. We don't have unilateral right  
23    to do that.

24           Q.     Mr. Davidson, you said that the term  
25    cash flow pricing had been used by people at the

1 EXAMINATION BY COUNSEL FOR THE  
2 SOCIETY OF THE PLASTICS INDUSTRY, INC.  
3 BY MR. BERCOVICI:

4 Q. Mr. Davidson, good afternoon. Once  
5 again I'm Martin Bercovici, I'm representing The  
6 Society of the Plastics Industry and certain  
7 other chemical companies which I identified this  
8 morning as we went around the room for  
9 introductions.

10 Just to follow up on some questions  
11 you've already been asked today, I'd like to  
12 begin with this issue of cash flow pricing that  
13 Mr. Stone talked about. Do you recall attending  
14 a dinner function of the Chemical Manufacturers  
15 Association on September 25, 1995?

16 A. I know I went to a dinner with CMA. I  
17 couldn't recall the specific date, but that's  
18 probably right. It was here in Washington.

19 Q. Do you recall announcing the agreement  
20 with the BN/SF that was reached that morning to  
21 the CMA?

22 A. Yes.

23 Q. So that would be on September 25; is  
24 that correct?

25 A. Well, once again I don't remember the

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1 exact date of the dinner or the exact date of the  
2 agreement. I think that that was the first group  
3 to become aware of it, of the signing of the  
4 agreement. It probably was September 25, I'm not  
5 disputing that with you, I just don't remember  
6 the date with precision is my point.

7 Q. Assuming that the agreement was signed  
8 on September 25, would the dinner have been on  
9 September 25?

10 A. I believe that's -- well, I mean I'm  
11 just speculating. It was a Monday morning. If  
12 that was a Monday evening, that was probably it.

13 Q. And you announced that you had that  
14 morning, early that morning, reached an agreement  
15 with the BN/SF?

16 A. Right.

17 Q. Would it refresh your recollection if I  
18 were to tell you that there were attendees at  
19 that meeting who recall very specifically your  
20 statement that, if the merger is approved, that  
21 the cash flow pricing of the SP would be  
22 terminated?

23 MR. ROACH: Object to the form of the  
24 question.

25 You may answer.

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1 THE WITNESS: State that again,  
2 please.

3 MR. BERCOVICI: I'll ask the reporter.

4 THE REPORTER: "Question: Would it  
5 refresh your recollection if I were to tell you  
6 that there were attendees at that meeting who  
7 recall very specifically your statement that, if  
8 the merger is approved, that the cash flow  
9 pricing of the SP would be terminated?"

10 THE WITNESS: That could well be  
11 right. But in any event the market will set the  
12 price.

13 BY MR. BERCOVICI:

14 Q. Does the market set a price or does the  
15 market set a range of prices?

16 A. Well, I mean the way it works, I know  
17 you know this, is, when a customer asks a company  
18 to submit a bid, the person that submits the most  
19 attractive bid wins. I mean it's a whole series  
20 of things too, it's not just price, it's service,  
21 it's equipment, it's rates, it's loss and damage,  
22 it's a whole spectrum of things that go into that  
23 contract that determines the successful bidder.

24 Q. So is it correct to say that there was  
25 no single price that's applicable to a given

1 multiple carriers on one route and multiple  
2 carriers serving multiple routes?

3 MR. ROACH: Object to the form of the  
4 question.

5 THE WITNESS: I think it's getting  
6 bit academic here really. The customers wanted a  
7 railroad that could provide competition that was  
8 real meaningful competition. And that's what we  
9 did.

10 BY MR. BERCOVICI:

11 Q. And can you share with us,  
12 Mr. Davidson, who the customer was who expressed  
13 the concern about the Houston to Memphis routing?

14 A. Exxon.

15 Q. Did you advise Exxon that the plan with  
16 regard to the Houston to Memphis or Houston to  
17 St. Louis route would involve directional flow of  
18 traffic?

19 A. I doubt it. I don't think we got into  
20 the operational detail to that depth.

21 Q. Going back to the September 25 meeting  
22 or the meeting in September Monday evening with  
23 the Chemical Manufacturers Association, did you  
24 have any other meetings that day or that evening  
25 I should say?

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1 don't believe -- you know, I've never seen a  
2 representation that I did say that.

3 Q. Are you aware that Mr. Lewis had a  
4 telephone conference the following day, September  
5 26, with financial analysts?

6 A. No, I'm really not. There was a  
7 telephonic conference with analysts at some  
8 point. I don't know if it was the next day or  
9 when and I don't know -- I really don't know that  
10 Mr. Lewis was the one that conducted it. He  
11 might have been on it. Anyway, I mean that's  
12 just a long way of saying no, I don't know.

13 Q. Have you engaged in discussions with  
14 shippers in which you offered contractual  
15 commitments with regard to their movements in  
16 exchange for their support of this merger?

17 A. My answer to that would be I've asked a  
18 lot of shippers to support our merger. Some of  
19 the customers use that opportunity to say they  
20 had a few things they'd like to address while we  
21 were talking about that, yes. On that basis we  
22 have -- I've been involved in several  
23 conversations.

24 Q. Have they said that they would support  
25 the merger if you agreed to certain contractual

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1 commitments?

2 A. I don't know that anything was quite  
3 that cut-and-dried. There have been a number of  
4 customers that have expressed concern about  
5 I guess the unknown and they'd like to have a  
6 sense of what the future held. I mean as an  
7 example, when we went down to talk to Exxon to  
8 ask for their support, they said they had some  
9 concerns about the merger that they would like to  
10 have addressed.

11 Q. When was that meeting with Exxon?

12 A. Well, I don't remember exactly. But,  
13 you know, it was probably a few weeks after that  
14 conversation at the Greenbriar.

15 Q. Could the meeting have been in early  
16 November?

17 A. It well could be, it could well be.

18 Q. Could they have stated demands to UP in  
19 terms of what it would take to achieve their  
20 support for the merger?

21 A. You know, it wasn't quite expressed  
22 like that. They had some issues that they had  
23 questions about. And I'll just run through a  
24 couple of them. They had a plant as an example  
25 that we were building into that had started --

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1 just to serve them at their request because they  
2 were concerned about the long-term viability of  
3 the Southern Pacific. And they were interested  
4 in the timing and how that would all work out.

5 And they were looking for some  
6 assurance that, if, you know, the timing of the  
7 merger affected that build-in some way or  
8 another, that they would not get inferior service  
9 or that we would not meet contract terms that we  
10 had for the build-in. So those were some of the  
11 issues that our people were trying to address.  
12 And there were others, I don't remember all the  
13 details. I only attended the first meeting and  
14 then I dropped out of it.

15 MR. STONE: Could I interject for the  
16 record that, as counsel for CMA, I don't  
17 specifically represent Exxon. But I would note  
18 as a way of at least partly protecting the  
19 general interests of chemical shippers who may  
20 have had discussions that my sitting here and not  
21 objecting on the basis of hearsay is not an  
22 indication that I don't think that the testimony  
23 is hearsay. It is obviously hearsay.

24 And my sitting here and remaining  
25 silent is in no way an acknowledgment of the

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1 truth of anything that Mr. Davidson is recalling  
2 about those conversations.

3 MR. ROACH: If we all objected every  
4 time somebody used hearsay, we would never get  
5 through three or four questions in these  
6 depositions. Our witnesses are constantly asked  
7 questions of the form would it surprise you to  
8 hear that somebody who I will not identify said  
9 to somebody else once that, quote, et cetera.

10 MR. STONE: That's a different issue.  
11 But I just wanted to make it clear that I'm  
12 certainly not acknowledging by my silence the  
13 truth about anything that's said in these  
14 conversations.

15 BY MR. BERCOVICI:

16 Q. With regard to the Exxon build-in, was  
17 that the Mont Belvieu, Texas, plant?

18 A. Yes.

19 Q. You stated that Exxon wanted the UP to  
20 build into Mont Belvieu because of concerns about  
21 the long-term viability of the Southern Pacific;  
22 is that correct?

23 A. Well, I'm certain that was certainly  
24 one of the concerns, yes.

25 Q. Would another concern be that they

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1 simply desired competitive rail service at that  
2 plant?

3 A. It could be.

4 Q. Let's go back to your meeting with  
5 Exxon. Can you tell us who attended that  
6 meeting?

7 A. Well, for the Union Pacific, it was  
8 myself, I think Jim Shattuck, our executive VP of  
9 marketing and sales was there, and Bill Rody, Ed  
10 Simms, perhaps Jim Dolan, I'm not certain about  
11 that, I think perhaps Jim Dolan was there. And  
12 then on Exxon's side was Ken Townsend -- what is  
13 the gentleman's name, is it Tom Campbell?

14 Q. Is it Tom Campbell at Exxon?

15 A. I believe it was Tom. I'm just not  
16 sure about the first name. And then the head --  
17 and this is embarrassing, his name has escaped me  
18 at the moment, but the head of the petroleum side  
19 of transportation, where Ken had the chemical  
20 side, the other gentleman who just has gotten  
21 away from me at the moment who headed the  
22 petroleum side. And a lady lawyer whose name  
23 escapes me at the moment too.

24 Q. Where was this meeting held?

25 A. Their office in Houston.

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1 Q. How is it that you attended this  
2 meeting personally, were you invited by Exxon to  
3 attend?

4 A. I don't remember specifically, but I  
5 mean I was the one that had the conversation with  
6 Ken at the Greenbriar and I like Ken and know him  
7 well and, you know, just as a courtesy I went  
8 along.

9 Q. Did he write you a letter and ask you  
10 to meet?

11 A. I don't recall that. He could have. I  
12 mean I just don't recall.

13 Q. Did you enter into agreements at the  
14 meeting with regard to future rates?

15 A. No. In fact, it was interesting, we  
16 were prepared to offer some sort of a long-term  
17 arrangement, where it would alleviate his concern  
18 or their concern, and they declined because they  
19 said that they were certain, when BN/Santa Fe  
20 came in, that prices would go down instead of  
21 up.

22 Q. Are you aware that there was an  
23 agreement entered into between the UP and Exxon  
24 shortly after that meeting?

25 A. Well, I don't know shortly. I think

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1 there was a series of additional meetings that  
2 transpired of which I didn't attend. But I do  
3 think that we reached agreement, yes.

4 Q. Are you aware that contemporaneously  
5 with that agreement that Exxon gave a statement  
6 of support to the UP for the merger?

7 A. Yes, I know that Exxon supports our  
8 merger.

9 Q. Are you aware that that was done  
10 contemporaneously with entering into an agreement  
11 with the UP?

12 A. I'm not totally familiar with the  
13 timing of it. But I know that they were in close  
14 proximity to each other, yes.

15 Q. I show you Part I of volume 4 of the  
16 merger application, Statements of Shippers,  
17 Public Officials, and Others in Support of the  
18 Application. I'd like you to look at page 162.  
19 Is that the Exxon statement of support?

20 A. Now, what was your question?

21 Q. I asked you if that was the Exxon  
22 statement of support?

23 A. It appears to be the verified statement  
24 of Kenneth Townsend who is with Exxon.

25 Q. And when is that dated?

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1 A. November 14, 1995.

2 MR. BERCOVICI: I'd like the reporter  
3 to mark the following document as Exhibit No. 3.

4 (Davidson Exhibit No. 3 was  
5 marked for identification.)

6 THE WITNESS: Yes, I've read the  
7 document.

8 BY MR. BERCOVICI:

9 Q. Have you seen this document before?

10 A. No.

11 Q. Were you aware of its existence before?

12 A. Oh, I knew that we had reached an  
13 agreement with Exxon and had entered into a  
14 contract that satisfied both parties here.

15 Q. And that this contract was linked to  
16 their support for the merger?

17 A. Well, they were contemporaneous  
18 certainly. My people have told me that this is  
19 something that we would have done anyway, I mean  
20 it was an attractive agreement.

21 Q. How many of your customers have  
22 ten-year commitments that rates will be adjusted  
23 annually by 30 percent of RCAF-U with a 2 percent  
24 maximum increase each year?

25 A. I don't know.

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1 Q. Is that a customary term for contracts?

2 A. I don't know. They all have some sort  
3 of an escalation clause I presume. But I mean I  
4 don't have that much familiarity with what they  
5 are. I will tell you this, as I said earlier,  
6 Exxon felt that rates would go down rather than  
7 up after BN/Santa Fe got these trackage rights.

8 Q. And Exxon requested a long-term  
9 commitment in exchange for its merger support; is  
10 that correct?

11 A. Well, there's more than that too. If I  
12 understand this right, I think that they can also  
13 get out of this agreement under certain  
14 conditions.

15 Q. Is that a unilateral right or a  
16 bilateral right?

17 A. Well, hold on a second.

18 Q. Well, the document speaks for itself.

19 A. Okay.

20 Q. We'll let the document answer that.  
21 I'm sure your counsel will appreciate that.

22 Do you recall a letter from Exxon in  
23 late October asking for long-term agreement in  
24 exchange for its support for the merger?

25 A. I don't recall it. But that doesn't

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1 mean that it doesn't exist. It means I have a  
2 lot of work to do and I don't remember  
3 everything.

4 MR. BERCOVICI: If the reporter would  
5 mark this as Exhibit 4. I'll show you a copy and  
6 your counsel a copy.

7 (Davidson Exhibit No. 4 was  
8 marked for identification.)

9 THE WITNESS: I do remember this now  
10 that I've refreshed my recollection.

11 MR. BERCOVICI: Thank you. I have no  
12 further questions, Mr. Davidson.

13 MR. ROACH: Let's take an hour for  
14 lunch, 2:15.

15 (Whereupon, at 1:15 p.m., the  
16 deposition in the above-entitled matter was  
17 recessed, to reconvene at 2:15 p.m., this same  
18 day.)

19  
20  
21  
22  
23  
24  
25

## 1 AFTERNOON SESSION

2 (2:15 p.m.)

3 Whereupon,

4 RICHARD K. (DICK) DAVIDSON,  
5 the witness on the stand at the time of recess,  
6 having been previously duly sworn, was further  
7 examined and testified as follows:

8 EXAMINATION BY COUNSEL FOR THE NATIONAL  
9 INDUSTRIAL TRANSPORTATION LEAGUE, THE DOW  
10 CHEMICAL COMPANY, KENNECOTT UTAH COPPER  
11 CORPORATION, AND KENNECOTT ENERGY COMPANY

12 BY MR. WOOD:

13 Q. Good afternoon, Mr. Davidson, my name  
14 is Frederic Wood and I think I introduced myself  
15 before as representing several shipper  
16 interests. I'd just like to ask a few  
17 questions.

18 I'd like to ask first, in your  
19 experience as vice president of operations or in  
20 the operating department with Union Pacific and  
21 its predecessors, have you ever had occasion to  
22 negotiate arrangements for operating run-through  
23 trains with connecting railroads?

24 A. Surely.

25 Q. Could you describe what a run-through

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1 train is, please.

2 A. Well, in my mind it's a train that's  
3 preblocked on the home road's line for  
4 destination on someone else's railroad. And you  
5 can give them the train, the connecting line  
6 railroad, the train with the train intact, with  
7 power even sometimes, to change crews and go  
8 right on.

9 Q. A train would arrive at an interchange  
10 point, the train would remain intact possibly  
11 with the same locomotives, and all they would do  
12 is change crews and the train would move on its  
13 way?

14 A. Sometimes, yes, uh-huh.

15 Q. Were there occasions -- you said  
16 sometimes. Are there occasions when that would  
17 not happen?

18 A. Well, what I meant was that that's a  
19 nice goal to have. Sometimes there's not enough  
20 volume of traffic or you're not able to work out  
21 conditions such that you can do it successfully.

22 Q. Well, what I had in mind is when that  
23 happens, when there is a run-through arrangement  
24 in place, all that takes place is at the  
25 interchange point the train stops and the crew

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1 changes and the train goes on its way?

2 A. Well, as far as the train goes. Of  
3 course, there's a lot of paperwork and stuff that  
4 goes along with that behind the scenes. But, as  
5 far as the physical movement of the train, yes.  
6 Many times you have to make an air brake test or  
7 something.

8 Q. Is the operation of a run-through  
9 arrangement fairly widespread in the railroad  
10 industry today?

11 A. It is a technique that people try to  
12 use I would say as much as possible, yes.

13 Q. When did Union Pacific -- strike that.  
14 Before the Union Pacific acquired an  
15 interest in the CNW, Chicago Northwestern, did it  
16 establish run-through arrangements with the CNW?

17 A. Yes, it had a number of run-through  
18 arrangements with Chicago Northwestern.

19 Q. And, after the acquisition of control,  
20 and by that I mean the first step when they  
21 acquired a nonvoting interest, those arrangements  
22 continued?

23 A. Yes, they did.

24 Q. When the CNW and its subsidiary,  
25 Western Railroad Properties, Inc., obtained

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1 access to the Powder River Basin coal line  
2 originally constructed by the Burlington  
3 Northern, did the CNW provide service out of the  
4 basin via connecting line service with the Union  
5 Pacific?

6 A. Yes. Actually WRPI was a joint venture  
7 between -- in a manner of speaking between CNW  
8 and Union Pacific.

9 Q. But was WRPI considered, for purposes  
10 of operational questions, in terms of providing  
11 crews, a separate railroad from Union Pacific?

12 A. The crews that operated on WRPI were  
13 Chicago Northwestern employees.

14 Q. Would the trains transporting coal out  
15 of the Powder River Basin be typically operated  
16 under a run-through arrangement with the Union  
17 Pacific or between Union Pacific and CNW?

18 A. Well, yes. However, there were certain  
19 procedures that had to occur at the interchange  
20 point that it normally wasn't nearly as  
21 expeditious as one would desire.

22 Q. Does the Union Pacific have run-through  
23 arrangements today with the Burlington  
24 Northern/Santa Fe?

25 A. We operate some coal trains on a

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1 run-through basis with BN/Santa Fe. I can't  
2 recollect any manifest freight trains that run  
3 through, although it is possible, because we run  
4 many hundreds of trains a day and things change  
5 and it could be happening and I'm not aware of  
6 it. But we do run through with some coal  
7 business.

8 Q. Do you use run-through arrangements in  
9 operating intermodal trains?

10 A. With the BN/Santa Fe?

11 Q. At this point I'm talking about with  
12 the BN/Santa Fe.

13 A. Well, I'm not aware of any. But we do  
14 have operating people that would probably be able  
15 to lend a lot more knowledge than me to this.  
16 Let me think a minute. I can't think of any off  
17 the top of my head. That doesn't mean it's not  
18 happening, but I can't think of it.

19 Q. Up until the time I guess it was in  
20 1991, when you were promoted from your position  
21 as executive vice president operations, did you  
22 have any run-through arrangements on intermodal  
23 trains with the Burlington Northern before they  
24 were put in place -- before you left that  
25 position?

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# THE WALL STREET JOURNAL

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PRINCETON, NEW JERSEY

EXHIBIT

Davidson-1  
12/28/96 JW

## Mixed Emotions

### Many in Texas Town Want Government Off Their Backs, Kind Of

### While Gripping About Taxes And Waste, They Take What Washington Gives The Case of the Extra Cops

By JAMES M. PERRY

Staff Reporter of THE WALL STREET JOURNAL  
MEXIA, Texas—Whenever Republican Sen. Phil Gramm talks about the federal budget, he thinks about Dicky Flatt of Mexia, a small city in east-central Texas. "I ask myself," he often says, "will the benefits to be derived by spending money on this program be worth taking money away from Dicky Flatt to pay for it?"

There really is a Dicky Flatt; he runs his own stationery store and printing shop here in Mexia (pronounced much HAY-uh and located about 65 miles south of Dallas), and he says he is fed up with high-spending Democratic politicians, the federal government and its bureaucrats. He wants his friend, the powerful Mr. Gramm, who is preparing to seek the GOP presidential nomination in 1996, and the newly triumphant Republican majorities in Congress to get them off his back.

#### A Very Mixed Bag

Yet, a three-day tour of Mexia and surrounding Limestone County hardly uncovers a malevolent federal government crushing these hard-working Texans. It's a lot more complicated than that. The government collects tax money, then shovels much of it back to places such as Mexia and Limestone County. Some of it is wasted and misdirected; some of it, in fact, is just plain silly. But there's lots of it and, silly or not, local officials and local citizens find it difficult to just say no.

For one thing, much of this federal spending does pay for basic needs. Without the millions of dollars the government sends this way, Limestone County would be an economic disaster area.

Sen. Gramm himself says he never has denied that lots of federal money goes into places such as Mexia and Limestone County and that some of it does some good. "But where's the evidence of transformation in Limestone County?" he asks. Taxes are too high and regulations too burdensome, and a program should be reformed, he says, so government is something from their everyday

## What's News—

Business and Finance

ORANGE COUNTY said it would be able to maintain public services for the immediate future. But the California county's bankruptcy filing throws many long-term projects into doubt, including a multibillion-dollar expansion of Disneyland. On Wall Street, brokerage firms are scrambling to sell about \$10 billion of securities held as collateral for loans to the county and its investment fund.

(Articles in Col. 4 and on Pages A3, A12 and A13)

Bankers Trust was hit with another lawsuit over derivatives. The new suit focuses on investments made by the bank's money-management unit, which hasn't been involved in the previous derivatives disputes.

(Article on Page A3)

Continental Airlines and Southwest Airlines both expect to report weaker-than-anticipated fourth-quarter results, with a restructuring effort backfiring at Continental and a fare war taking its toll on Southwest.

(Article on Page A3)

Federal Reserve Chairman Alan Greenspan said there is little evidence of an economic slowdown, an indication that the Fed may not be finished raising short-term interest rates.

(Article on Page A3)

KeyCorp will have a pretax loss of as much as \$100 million spread over the fourth quarter and first quarter of 1995 because of securities and derivatives losses by rising interest rates.

(Article on Page A4)

The Pentagon is close to recommending approval of the proposed merger of Lockheed and Martin Marietta without calling for divestitures that could stall the transaction.

(Article on Page A4)

Big U.S. steelmakers are close to an agreement with GM that will give them price increases of as much as 12% over the next two years.

(Article on Page A3)

World-Wide

GOP LEADERS WORKED on strategies for enacting tax and spending changes.

The new House Appropriations Committee leaders promised to move quickly on a bill to recapture funds previously approved by Democratic congresses. Meanwhile, the new Ways and Means Committee chairman, Archer, is arguing for what could be a massive budget reconciliation bill that would include welfare reform as one source of savings. The chief tax components in the GOP "Contract With America" include a proposed \$500-per-child credit aimed at middle-income families, and a capital gains tax reduction. (Article on Page A3)

Democratic leaders of special interest caucuses, chafing over GOP plans to end taxpayer funding for such groups, accused Republicans of seeking to limit the power of minorities and women.

NATO ACCELERATED its planning for an evacuation of U.N. troops in Bosnia.

Envoys from the 16 NATO nations agreed to ask their governments to give figures on the number of soldiers they could provide for any force sent to assist in a pullout. Western alliance officials acknowledged it was increasingly likely that a U.N. retreat would be in a hostile environment. Meanwhile, the U.N. prepared to withdraw hundreds of Bangladeshi peacekeepers stranded in northwest Bosnia.

The U.N. quietly surrendered a crucial Sarajevo airport road to the Serbs, making it impossible to bring relief supplies from the airport into the city.

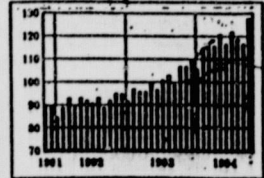
Missouri Democrat Gephardt warned Clinton to proceed carefully in any new trade talks at this weekend's Summit of the Americas, in order to prevent a split in the Democratic Party. The House minority leader, who voted against NAFTA, expressed his concern about the Miami summit in a nine-page letter to the president.

PLO leader Arafat pledged to protect Israelis from militant Islamic terrorists and insisted that all Palestinians on the West Bank and in Gaza respect his legal authority. His assurances, given to Secretary of State Christopher in Gaza City, were designed to hasten Palestinian elections and encourage Israeli troop pullouts.

A federal grand jury charged former White House travel office director, Billy Ray Dale, with embezzling cash and checks from news organizations. The indictment alleged that Dale pocketed tens of thousands of

## Help-Wanted Advertising

Seasonally adjusted, 1987=100



THE HELP-WANTED advertising index rose in October to 128, up from 117 in September, the Conference Board reports.

## Why the Billions Of Christmas Cards? Love and Guilt

### Also, There Is Business to Do: And Customers to Woo; What Ramsays Are Up To

By CLARE ANDREBY

Staff Reporter of THE WALL STREET JOURNAL

Everyone, or so it seems, sends Christmas cards. Even a dog named Iliu, although her list is rather short. There is the immediate family, the next-door neighbors, and Henry, whom she doesn't see as often as she used to. The owner of Iliu, a Lhasa apso, and Henry's owner broke up, but the dogs, who were fast friends, still exchange cards.

"All in all, she gets about a dozen," says Sandra Buchko, Iliu's master, a real-estate executive in McLean, Va. Ms. Buchko—and to a lesser extent Iliu, who considers cards something to chew up—likes getting something other than bills in the mail.

Although the English invented the Christmas card, Americans have elevated it to an obsession, sending out 2.6 billion cards a year—roughly 10.4 for every man, woman and child in the country.

### Loving and Defensive

People send Christmas cards for two main reasons, according to those who have made a study of it: First and sweetly, to convey warm wishes to friends and family. Some old friends communicate but once a year, and the moment is now. The second reason is social piñata, blessedly not a serious disorder. Such Christmas-carders are motivated by guilt or peer pressure, explains Donald Dossey, author of *Old-Fashioned Christmas* and *Old-Fashioned Folklore*. Phobias and Puns.

## Business Bulletin

### A Special Background Report On Trends in Industry And Finance

ALTERNATIVE CHRISTMAS parties revolve around family and philanthropy.

The joint ventures Astra Merck Inc. puts 1,000 middle managers to work assembling dolls that are donated to Endow-A-Home in nearby Philadelphia. On the West Coast, Warner Bros. forgoes gifts to bling and gives \$100,000 or so to a Santa Monica, Calif., clinic for sexually abused children. In Nashville, Tenn., Shoney's Inc. employees fill "wish lists" written by the needy.

In place of lavish office parties, many companies back up their events. At Mattel Inc. in El Segundo, Calif., employees and families meet in the cafeteria to wrap donated toys; workers also get an afternoon off. Alltel Corp. in Little Rock, Ark., holds an open house on Christmas Eve and many staffers "adopt" local families. At Justin Industries Inc. headquarters, Fort Worth, Texas, staffers collect canned goods for a local food bank and hold a simple dinner.

About 10% of polled companies hold two parties—one for adults and one for their children, says the New York search firm Battalia Winston International.

A MALE HANDBAG TEST turned out to be a fine primer on the purpose of purses.

Walk a mile with my handbag, the boss asks the mostly male sales force of Rolfs, a West Bend, Wis., leather-goods maker. Rolfs's Eric Lund asked his 56 person sales team (80% are men) to carry "male bags" for two weeks to get a feel for the new line. Mr. Lund says the bags take "funny packs" to the next level. He wanted staffers to use the product "to have a better understanding of how to market the bag." And, after some grumbling, they did.

Salesman Thomas Milberger, found he no longer had to ask his wife to carry his glasses in her purse. Another staffer toted the bag to an NFL football game. Suggested improvements from the salespeople included streamlining the belt-bag model so that drivers could wear it and sit comfortably behind the wheel. And, since so many used the bag to carry a phone, Rolfs may name a line "The Communicators." About half the men are still using the bags.

PRO SHOPS sharpen their game in an effort to keep sales on course.

The Professional Golfers' Association, a trade group of golf pros, divides the dufler market into seven "clusters" to help fine-tune sales. This scrutiny comes as pro shops fend off competition from mass merchants like Wal-Mart and other off-course stores. About 70% of all golf club sales are made in such off-course stores, says Golf Pro magazine. Law Short of Wilson Sporting Goods

## Local Heroes

### Public Finance Chief Are Often Very Boring That's the Good News

### Many Resist the Pressure To Become Big Shots With Risky Investments

### How to Spell 'Derivative'

A WALL STREET JOURNAL reporter, Charles O'Connell, writes about a public finance chief who, after 24,000, says his office had been doing the past year or so with derivatives. He says: "If I don't understand it, I don't know how it works." (The article is on page A3.)

Agrees David Branner, chief executive officer of the Retirement System of Alabama, that state's pension funds "are no incentive for someone like me to take that kind of risk. It doesn't make any sense. Why should I invest in something I can't even spell?"

Derivatives, have been their top item down on Wall Street, but a larger question is...

## The Financial Outlook

There was more confusion (and nervousness) about the economy than ever before. The Orange County Crisis is a major concern.

page A3, in other

• Municipal bonds held a record...  
• Investors in the market...  
• Funds are urged to hold on...  
• Wall Street firms are...  
• sell about \$10 billion of securities...  
• For Merrill Lynch, there...  
• Lay is a hired hand that wrote the book...  
• municipal bankruptcy law, B.A.

Is: Do they threaten to nation...  
The question is whether...  
County, Calif., has filed for...  
protection after huge losses in...  
ments, including derivatives...  
The answer, based upon it

## CORPORATE FOCUS

# Union Pacific Is On Track to Lock Up Railroad Lead

## Expansion-Minded Company Makes Progress With Santa Fe Proposal

By DANIEL MACHALABA

**Staff Reporter of THE WALL STREET JOURNAL**  
OMAHA, Neb. — On the 12th floor of Union Pacific Railroad Co.'s headquarters building hangs a row of paintings depicting railroads previously acquired, including the Missouri Pacific, Western Pacific and Missouri-Kansas-Texas.

At the end is room for Santa Fe. After a two-month struggle that it initially was given little chance to win, the expansion-minded Union Pacific is on the verge of its latest and biggest conquest — the acquisition of Santa Fe Pacific Corp. for about \$3.16 billion. Santa Fe last week agreed for the first time to discuss the hostile bid from Union Pacific's parent, Union Pacific Corp. of Bethlehem, Pa.

Analysts said that further bolstered Union Pacific's chances and signaled a turn in the previously solid support that Santa Fe management had given to a long friendly bid from Burlington Northern Inc. for about \$3.2 billion. Many analysts say the Union Pacific bid is superior because it would give investors their money sooner.

A combination is still far from certain, but Union Pacific officials can hardly contain their excitement about a linkup, which would cement Union Pacific's position as the nation's largest railroad measured by revenue. Winning Santa Fe, says Union Pacific Corp. President Richard Davidson, "positions us as the strongest railroad in the West, in the U.S. and maybe in the world."

### Hadn't Been in a Hurry

John Rebensdorf, Union Pacific's vice president of strategic planning, says Union Pacific's reason for pursuing Santa Fe is as simple: "We wanted to solidify our franchise in the West, and we concluded Santa Fe was the best way to do this." Last April, Mr. Rebensdorf assembled a group of Union Pacific managers to talk about merging with Santa Fe.

Union Pacific wasn't in any rush to make a bid then because it was too busy with its application to the Interstate Commerce Commission to turn its 30% nonvoting shares of Chicago & North Western Transportation Co. into a voting stake. The Burlington-Santa Fe announcement one day forced us to accelerate what we

## Major Railroad Systems in the U.S.

Figures based on 1993 data

	Revenue (\$ billions)	Operating income (\$ millions)	Assets (\$ billions)	Employees	Stockholders
Union Pacific, Chicago & North Western and Santa Fe Pacific <sup>1</sup>	\$3.10	\$740	\$17.49	50,164	31,708
Burlington Northern	4.70	332	6.61	30,502	22,316
CSX <sup>2</sup>	4.38	308	9.72	29,216	18,779
Marshall Southern	3.75	773	9.82	25,531	14,589
Caltrans	3.35	164	8.32	24,728	11,831
Southern Pacific Rail <sup>3</sup>	2.74	-191	5.44	20,436	14,099

<sup>1</sup>Reflects Union Pacific proposal to control Chicago & North Western and acquire Santa Fe Pacific.

<sup>2</sup>Excludes CSX Intermodal. Includes Denver & Rio Grande Western.

Source: Association of American Railroads statistics.

thought of doing," Mr. Rebensdorf says.

Union Pacific considered other options before it made its Oct. 5 hostile offer for Santa Fe. Union Pacific Chairman Drew Lewis was interested in combining with an Eastern railroad to create the nation's first coast-to-coast rail system, company officials said.

### ICC Challenges

But officials of the company's rail unit feared competitive consequences. "If you tie the knot with one [Eastern railroad], you alienate the other two," says Mr. Davidson, who also is chairman of the company's rail unit.

Union Pacific also looked at Southern Pacific Rail Corp., financially the weakest of the four major Western railroads, Mr. Davidson said. But it decided a merger of Union Pacific and Southern Pacific would corner the freight market in Gulf Coast chemicals, raising competition questions that would be challenged at the ICC.

Union Pacific now must negotiate an agreement with Santa Fe, which will seek a higher price and fewer conditions from Union Pacific. Burlington Northern meanwhile isn't giving up. Tuesday Burlington filed suit in federal court in Philadelphia to prevent Union Pacific from putting Santa Fe in a "voting trust." Union Pacific called the suit "entirely without merit."

Burlington Northern also is expected to be among the loudest voices seeking condi-

tions on a Union Pacific-Santa Fe merger. Burlington may ask the ICC to assure it routes to Southern California and Mexico. ICC reviews take as long as 31 months.

Helping Union Pacific gain credibility with some investors and analysts is its plan to put Santa Fe in trust while the ICC determines whether to let the two companies combine rail operations. The trust puts the risk of regulatory failure on Union Pacific and permits Santa Fe shareholders to get their money up front.

### Not a Spoiler

"At first I thought they were playing spoiler [to derail archival Burlington Northern's bid], but now I am convinced they truly want this railroad," says James Valentine, a Smith Barney Inc. analyst.

Union Pacific officials say that putting their routes together with Santa Fe will greatly expand single-line service, reduce delays where the railroads connect and dissolve capacity constraints.

Santa Fe would give Union Pacific a direct route from Texas to Southern California for containers and chemicals, and a direct route from Colorado to Texas for low-sulfur coal mined in Wyoming's Powder River Basin. Union Pacific would benefit from Santa Fe's Chicago-Los Angeles route, which is important for carrying intermodal shipments of highway trailers and containers on rail flatcars and is at least 10% faster than Union Pacific's own

route between the two cities.

But the proposed takeover still is controversial because it would combine the two top competitors in key Western freight corridors. "The merger would produce market power that borders on the egregious," says Robert Banks, chief executive of R.L. Banks & Associates Inc., a transportation consulting firm in Washington.

Specifically, the merger would eliminate one of three railroads competing for freight between Chicago and Southern California and one of four between Chicago and Texas. Rates for moving freight trailers on rail flatcars from California could rise 10% to 15%, predicts Jay Hirst, senior vice president of Alliance Shippers Inc., a Palos Park, Ill., firm that arranges freight shipments.

"Merging your way to a high-performance rail network is impossible unless you merge everything into one or perhaps two systems in all of North America," says Charles Wilkins, transportation director at Ford Motor Co. Since that isn't going to happen anytime soon, a combination such as the Union Pacific-Santa Fe one "still leaves the bulk of the business handled joint line with other railroads not involved in the merger."

And rancor from the merger fight "can do nothing but hurt" voluntary efforts among railroads to improve service by working together, Mr. Wilkins says.

### Impressive Past Performance

Union Pacific isn't deterred by such criticism, however, and it expects Santa Fe to become another in its series of successful acquisitions. Merger with Missouri Pacific in 1982 gave Union Pacific access to the Gulf Coast, while merger with Western Pacific that year completed Union Pacific's central route to the West Coast. The M-K-T merger in 1988 provided a more direct route between Kansas City, Mo., and Texas. "Union Pacific has demonstrated an astute ability to pick up good rail properties at very reasonable prices," says Michael Lloyd, an analyst at NatWest Securities Corp.

But the bidding war for Santa Fe is extracting a toll. "It is not quite as apparent this one is being acquired at a reasonable price," Mr. Lloyd says. "We'll know in three to five years."

## By Using the Internet, Asians Get the Sweet Taste of Free Speech

Continued From Page B1

July, compared with 38% in the U.S. From Japan, the most wired nation in Asia, to Indonesia, one of the least, Asia now has more than 110,000 computers connected to the Internet, or 3.4% of the world-wide total.

Even China, once known as a place

where it recently came across someone who was criticizing the Thai royal family — a serious taboo. "I wish to kick him hard in the [rear] end!" Mr. Suriyarnorn says.

Others figure that the government is always listening. "The almighty machine that governs this place is vindictive and I, as a businessman, would not want to get on

## FCC Asks for More Data On News Corp.'s Fox Unit

By a WALL STREET JOURNAL Staff Reporter

WASHINGTON — The Federal Communications Commission, in an unusual order that included a strict gag order, said it needs more information before deciding whether News Corp.'s Fox Inc. has violated FCC rules.

As reported, the commission is looking at whether Fox's ownership by News Corp., an Australian company, violates federal ownership rules and whether Fox

## Chatting on Internet Offers Teens Comfort Of Being Anonymous

Continued From Page B1

mix in his electives began changing. Instead of overwhelmingly male computer classes, Mr. Dixon now has majority-female groups. "It's totally social," he says.

Now middle schools have the same





1                               BEFORE THE  
2                               SURFACE TRANSPORTATION BOARD  
3                               Finance Docket No. 32760  
4       UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD  
5       COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY  
6                               -- CONTROL MERGER --

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

11                               HIGHLY CONFIDENTIAL

12                               Washington, D.C.

13                               Thursday, February 1, 1996

14               Deposition of ROBERT WILLIG, a witness  
15       herein, called for examination by counsel for the  
16       Parties in the above-entitled matter, pursuant to  
17       agreement, the witness being duly sworn by JAN A.  
18       WILLIAMS, RPR, a Notary Public in and for the  
19       District of Columbia, taken at the offices of  
20       Covington & Burling, 1201 Pennsylvania Avenue,  
21       N.W., Washington, D.C., 20044, at 10:30 a.m.,  
22       Thursday, February 1, 1996, and the proceedings  
23       being taken down by Stenotype by JAN A. WILLIAMS,  
24       RPR, and transcribed under her direction.

25  
  
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1 We'll find it and come back to that.

2 Without looking at anything in  
3 particular, do you have any concept of what you  
4 meant by the Western market?

5 A. I would really need a context to answer  
6 that question.

7 Q. So we can all and so the Surface  
8 Transportation Board that's considering your  
9 statement in this case can again have a full  
10 understanding of what you did and what you relied  
11 on, did you do any empirical work on your own to  
12 come up with the analysis that's in your opinion  
13 specifically for this case?

14 A. I had the opportunity to speak to a  
15 number of marketing executives from the railroad  
16 to ask them and to engage them in conversation  
17 about the character of the business as they  
18 experience it to help flesh out the facts that I  
19 apply my analysis to.

20 Q. Okay. Anything other than those  
21 conversations?

22 A. And further conversations of that kind  
23 and further conversations with counsel of that  
24 kind.

25 Q. Okay. It would be helpful for us if

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1     you could give us the universe of marketing  
2     executives you talked to. Who did you talk to to  
3     get the type of information you've referred to?

4     A.    I just don't have names.

5     Q.    Well, let's start with how many people  
6     are we talking about?

7     A.    I had conversations extending over a  
8     few days by telephone with individuals and groups  
9     of people involved in marketing to discuss the  
10    character of the business, the factors as they  
11    perceive them that feed into my economic analysis  
12    of the character of competition.

13    Q.    Let me see if I can help you here.  
14    I've got the -- this comes from the Official  
15    Railway Guide. And I've got here some listings  
16    of different departments for UP and Southern  
17    Pacific. And let me start with Union Pacific and  
18    there's a listing of marketing people here. And  
19    let me just see if you had discussions with any  
20    of these folks from the Union Pacific side, Jim  
21    Shattuck?

22    A.    I'm just not going to remember the  
23    names because I know what my memory is like for  
24    names. So you trying to prompt me this way is  
25    not going to help. I just know that as a

1 prediction about my own memory.

2 Q. And can you give us any idea on the  
3 positions that these people held that gave them  
4 the basis to give you information you could rely  
5 on?

6 A. These were folks who represented  
7 themselves to me as being in leadership positions  
8 with respect to the marketing of certain broad  
9 groups of commodities, of lines of business of  
10 the railroad.

11 Q. Do you feel you spoke with the  
12 commodity managers?

13 A. For example, someone who was involved  
14 in the management of intermodal or international  
15 intermodal or modal just as examples.

16 Q. And you refer to some of those  
17 commodities in your statement?

18 A. Yes.

19 Q. And, as with Union Pacific, would your  
20 answer be the same if I showed you a list of  
21 marketing people for Southern Pacific?

22 A. Actually I don't think I had literal  
23 personal conversations with Southern Pacific  
24 marketing people. But again the names of  
25 people --



1 Q. Did you make any notes of the  
2 conversations you had with these folks?

3 A. Well, actually I had a pad in front of  
4 me while I was on the telephone and I doodled and  
5 wrote down some things to prompt myself as I'm  
6 doing today, I wrote your name down. And in that  
7 sense I took notes, but they had no value to me  
8 afterwards, these were just during the course of  
9 the telephone conversation.

10 Q. And those notes, were those turned over  
11 to counsel to be part of your work papers that  
12 have been placed in the depository in this case?

13 A. I don't know about the work paper  
14 categorization, that's something for the lawyers  
15 to worry about.

16 Q. Were the notes turned over to your  
17 counsel?

18 A. I believe they were, yes.'

19 Q. And again, just so the record can be  
20 clear for everybody here and for the board in  
21 this case, those notes were while you were having  
22 conversations with marketing people from the  
23 applicant to gather information to help do your  
24 analysis?

25 MR. MEYER: Object to the form.

1 THE WITNESS: The purpose of the  
2 conversation was for me to flesh out my  
3 understanding of the texture of the way the  
4 business is perceived by the executives who are  
5 involved in it. The purpose of the notes was not  
6 that, it was just a doodle pad.

7 BY MR. LUBEL:

8 Q. And the purpose of getting that  
9 information was what?

10 A. Was to further educate me so I could do  
11 a better job of analyzing the competitive effects  
12 of the merger.

13 Q. And to then reflect that analysis in  
14 your statement in this case?

15 A. Possibly, sure.

16 Q. Did you talk with a Mr. King or  
17 Mr. Ongerth?

18 A. I really don't recall the names of the  
19 people that I spoke to.

20 Q. I know you've referred to  
21 Mr. Peterson's statement a lot in your  
22 statement.

23 A. Right.

24 Q. Don't you think you probably talked to  
25 Mr. Peterson?

1 A. Frankly I don't know.

2 Q. Other than the conversations with the  
3 marketing people that we've been talking about,  
4 did you have other discussions with officials of  
5 Union Pacific or Southern Pacific concerning the  
6 merger?

7 A. No.

8 Q. Did you do anything to investigate the  
9 pricing or bidding conduct of either of the  
10 applicants?

11 MR. MEYER: Object to the form, asked  
12 and answered.

13 BY MR. LUBEL:

14 Q. When he objects, unless he instructs  
15 you not to answer, you can go ahead and answer.

16 A. I was just giving a moment of silence  
17 in respect for his interjection.

18 MR. MEYER: Thank you.

19 THE WITNESS: I did no specific study  
20 of the actual pricing conduct of the railroads  
21 involved in this case. However, it's important  
22 to me that I've been involved in analyzing the  
23 economics of the way pricing and bidding and  
24 competition works in the industry for a very long  
25 time.



1 BY MR. LUBEL:

2 Q. But just so the record can be clear,  
3 you didn't refer to and examine particular bids  
4 by UP or SP in the areas where they compete?

5 A. That's correct.

6 Q. You mentioned your general experience.  
7 Do you know over the years, do you know that UP  
8 or SP pricing is the same as other railroads?

9 MR. MEYER: Object to the form.

10 THE WITNESS: If by pricing you mean  
11 the actual dollars and cents, then I don't know  
12 that. But, if you mean the general way that the  
13 process of competition or bidding on business,  
14 interacting with rivals, interacting with  
15 shippers, my understanding is that there's no  
16 exception in general that applies to UP or SP.

17 BY MR. LUBEL:

18 Q. You've answered two questions there,  
19 that's helpful.

20 A. All right.

21 Q. Other than as reflected in your  
22 statement, have you done any further analysis  
23 relating to this merger?

24 MR. MEYER: Object to the form.

25 BY MR. LUBEL:

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1 sense to what an economist means in the general  
2 category of avoiding double marginalization.  
3 It's not necessarily the same thing, but it's  
4 related.

5 Q. Okay. Now, coming to back to your  
6 service as a deputy A.G. and particularly in  
7 regard to merger analysis, you didn't always  
8 accept the work of the economic staff, did you?  
9 And by that I mean sometimes didn't you disagree  
10 with it?

11 A. Oh, I imagine so. There are some times  
12 when I disagree with almost everybody.

13 Q. And sometimes you would subject the  
14 economic staff's work to your own analysis?

15 A. I would always analyze everything that  
16 I could possibly have time and energy to analyze  
17 including the work of the staff, the work of my  
18 boss, and everybody around.

19 Q. And sometimes you would go back and  
20 certainly, as to your staff, sometimes you would  
21 go back and ask them to do further investigation,  
22 wouldn't you?

23 A. I would imagine so.

24 Q. Sometimes ask them to do, you know,  
25 more fact gathering or empirical work?

1 A. That sounds right.

2 Q. Okay. And, of course, sometimes you  
3 used econometric studies?

4 A. We would attempt to from time to time,  
5 yes.

6 Q. And you would sometimes rely on those  
7 studies in making recommendations?

8 A. Rely is a touchy word. We would  
9 certainly try to adduce useful information from  
10 econometric evidence as best we could.

11 Q. And the same questions in regard to  
12 evidence that might be submitted by an outsider  
13 or parties that were being investigated, like  
14 white papers, things like that, you wouldn't just  
15 always accept those on face value, would you?

16 A. On face value. I would read them and  
17 try to understand what was meaningful about them.

18 Q. Right. But wouldn't you often look  
19 behind them and try to do further investigation  
20 of some of the conclusions that they might reach?

21 A. Depending upon what my reading of the  
22 paper suggested would be a worthwhile subsequent  
23 step, yeah.

24 Q. Depending on what you're reading,  
25 sometimes you would, right, do further



1 investigation?

2 A. Sometimes, sure. And frankly sometimes  
3 a white paper would come in that had so little  
4 value that it wouldn't get a second reading.

5 Q. And, when you would make  
6 recommendations to the assistant attorney general  
7 in your division, were you always equally certain  
8 of the course of action; in other words,  
9 sometimes we are more certain than others?

10 A. That's a good question. I think I was  
11 always equally certain about what it was that I  
12 was saying. But what I was saying would  
13 certainly be different in different situations.

14 Q. Okay. But sometimes wouldn't your  
15 level of certainty about whether or not certain  
16 actions should be taken vary?

17 MR. MEYER: Asked and answered.

18 BY MR. LUBEL:

19 Q. For example, sometimes, you know, some  
20 things may be a clearer case, other times maybe  
21 it was a harder call?

22 MR. MEYER: Object.

23 THE WITNESS: I believe I've said to  
24 people at different times in my life, gee, that's  
25 a close call, or said to people not a close

1 call.

2 BY MR. LUBEL:

3 Q. And that would have included when you  
4 were making recommendations working at the  
5 Department of Justice, correct?

6 A. Yes.

7 Q. And do you think that the division made  
8 any decisions in merger cases that you think were  
9 incorrect; in other words, maybe that they should  
10 have allowed parties to merge where they didn't  
11 allow parties to merge or should have required  
12 some conditions and didn't require conditions?

13 A. That's getting to be a number of years  
14 since the experience, but I wouldn't be surprised  
15 if that were sometimes the case.

16 Q. And coming back now to your opinions in  
17 this case, how strong are your conclusions and  
18 your statement in this case, along with the kind  
19 of continuum you've defined of clear case, maybe  
20 it's not so clear?

21 A. I feel quite strongly about what is  
22 said here in my testimony. I put this forward  
23 with a great deal of confidence about what is  
24 actually here. And I worked very hard to try to  
25 say clearly what it was that I meant.

THE WITNESS: Thank you, it's been a  
2 lovely day.

3 (Recess)

4 EXAMINATION BY COUNSEL FOR  
5 THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

6 BY MR. BERCOVICI:

7 Q. Professor Willig, I'm Martin Bercovici  
8 representing The Society of the Plastics Industry  
9 in this proceeding.

10 A. Glad to meet you, sir.

11 Q. Pleasure to meet you. I'll try to take  
12 a little less time that Mr. Lubel did. I'd like  
13 to focus on pages 618 to 620 of your statement,  
14 where you make specific reference to chemicals  
15 traffic. I understand that that discussion  
16 includes specifically plastics?

17 A. Yes.

18 Q. Is that correct?

19 A. Yes, that's correct.

20 Q. By plastics you mean plastics raw  
21 materials or plastics resins as opposed to  
22 fabricated products; is that correct?

23 A. Yes.

24 Q. Have you done any study of the  
25 transportation market or transportation of



1 plastics?

2 MR. MEYER: Object to the form.

3 THE WITNESS: Pursuant to this case?

4 BY MR. BERCOVICI:

5 Q. Any time.

6 A. I'm hesitating because I was once some  
7 years ago involved in a chlor alkali industry  
8 merger which is not plastics and we did look at  
9 some rail data in that case. And more recently I  
10 was involved in a PVC product merger. And I  
11 believe some transportation data crossed my desk,  
12 but I actually didn't do those studies and I  
13 don't think they're pertinent to my study here.

14 Q. The PVC product merger, was that a PVC  
15 product merger or was it a product supply?

16 A. It was a PVC merger.

17 Q. Of the resins or of the manufactured  
18 product?

19 A. Of the resins.

20 Q. And how recently was that?

21 A. Actually this is one of those cases  
22 that stretched on I believe for some ten years  
23 before the Federal Trade Commission and I was  
24 actually involved in the earlier phase and then I  
25 was not involved for a long time and then I

1 became involved again I think it was a year or  
2 two ago on the aspects of some of the divestiture  
3 proposals that were made by the parties and  
4 trying to understand whether the FTC would accept  
5 those proposals.

6 Q. But in any event you said that you have  
7 not studied the transportation market --

8 A. That wasn't key and it wasn't really  
9 something that relates to this. I just wanted to  
10 be forthcoming in my answer.

11 Q. Thank you. What is the basis for your  
12 understanding about chemicals and plastics  
13 traffic that you testify to on pages 618 to 620  
14 of your statement?

15 A. Yeah, to the extent there are specific  
16 facts here, they really come from my  
17 conversations with businesspeople and also to  
18 some extent from Mr. Peterson's testimony. I'm  
19 not again as I was explaining earlier today --  
20 specifically with regard to the chemicals portion  
21 of the facts presented here, I really am not  
22 putting myself forward as a fact witness but  
23 rather someone who is interpreting these facts  
24 upon which I am relying on others for the truth  
25 of. But I'm analyzing them and trying to

1 understand what they mean for my analysis of  
2 competitive effects.

3 Q. In terms of the businesspeople, those  
4 again are businesspeople at the Union Pacific,  
5 not at the Southern Pacific Railroad; is that  
6 correct?

7 A. The specific conversations that I was  
8 involved with personally involved Union Pacific  
9 marketing executives dealing with chemicals  
10 traffic. And counsel at my request spoke to  
11 people at the Southern Pacific I believe about  
12 chemicals as well, but I can't be totally sure  
13 about that.

14 Q. You're saying counsel at your request  
15 did and counsel conveyed the information to you?

16 A. Yeah.

17 Q. And who was that counsel?

18 A. Mr. Herzog in particular.

19 Q. And you have no idea who Mr. Herzog  
20 spoke with at the Southern Pacific?

21 A. I don't, I don't have those names.

22 Q. Do you recall what he told you that  
23 they had said about the chemicals traffic?

24 A. Yeah, the things that I learned  
25 firsthand and that Mr. Herzog inquired about on



1 arise in conversations with the marketing  
2 people. But that is something that has been my  
3 understanding I think for a long time generally  
4 about the industry.

5 Q. But it could be possible that, within  
6 the plastics industry, that 80 or 90 or more  
7 percent moves under contract; is that possible?

8 A. Yeah, my information here is aggregated  
9 as between other chemicals and plastics.

10 Q. You state on page 618, at the bottom of  
11 the, page continuing to the next page, whenever  
12 possible railroads will attempt to convert these  
13 situations, you're referring to the contract  
14 situations other than what you characterize as  
15 the mega-bids, into multi-lane opportunities by  
16 offering quotes on some broader set of relevant  
17 traffic in addition to the traffic that is the  
18 subject of the initial request. Would you  
19 consider falling into this situation which you  
20 describe a shipper who has one plant exclusively  
21 served by the rail carrier and a second plant  
22 which is competitively served by that carrier and  
23 another carrier?

24 A. I heard what you said, but I don't  
25 exactly understand the question I'm afraid.

1       them and that railroads are quite prepared to be  
2       more aggressive in the terms and the prices and  
3       the service levels that they are able and willing  
4       to offer under circumstances of greater volume.

5               So it would not at all surprise me,  
6       based on general principles and my general  
7       understanding, that a railroad would, other  
8       things equal, be more aggressive for a greater  
9       volume commitment. But there may well be other  
10      considerations in any particular circumstance  
11      that I'm not aware of as I answered your general  
12      question.

13             Q.     But theoretically that's certainly  
14      possible?

15             A.     Certainly possible, yes.

16             Q.     Is it also possible, Professor Willig,  
17      and we're talking theoretical now because we know  
18      that you don't have actual pricing experience,  
19      that the carrier could say to the shipper I'm  
20      going to price your traffic to return so many  
21      dollars of contribution to my railroad. You  
22      generate 10,000 cars, for example, a year between  
23      your two plants and I want \$400 per car  
24      contribution, that's contribution being revenue  
25      above variable costs. I'll be happy to split

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1     that contribution between the two plants or, if  
2     you just want to give me the traffic from that  
3     which we exclusively serve, we can set the rates  
4     with the contribution coming from that traffic  
5     only.

6                 MR. MEYER: Object to the form.

7                 THE WITNESS: And your question, sir,  
8     is whether that's possible?

9                 BY MR. BERCOVICI:

10                Q.     Whether it's possible that the railroad  
11     could price its traffic to the customer in that  
12     fashion?

13                A.     As I sit here, it's always difficult to  
14     rule things out as impossible. But, given the  
15     absence of a context, because I don't understand  
16     what would be the most advantageous or the  
17     circumstances where that would be a natural  
18     outcome, I couldn't sit here and say it was  
19     impossible without knowing the fuller  
20     circumstances.

21                Q.     But you said it could be possible that  
22     a railroad could price to that basis?

23                A.     Well, what I said is I hesitate to say  
24     anything is impossible under oath because who  
25     knows. I don't have the full context before me.

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1 But, just from what you're describing, I don't  
2 really fully understand why that would be a  
3 rationale response by the players to the market  
4 circumstances.

5 Q. Isn't the railroad's objective to  
6 maximize its revenue?

7 A. Well, I'm willing to presume as a  
8 matter of economics that railroads are out to  
9 maximize their profit or their contribution to  
10 their total fixed and common costs which in some  
11 sense amounts to the same thing. So costs do  
12 come into play, not just revenue.

13 Q. In the situation that I hypothesized,  
14 wouldn't the railroad maximize its contribution  
15 or its profit under that scenario?

16 MR. MEYER: Object to the form.

17 THE WITNESS: Not necessarily, not as I  
18 understand the hypothetical that you're painting  
19 for me.

20 BY MR. BERCOVICI:

21 Q. Under what circumstances would that not  
22 lead to the railroad maximizing its  
23 contribution?

24 A. Well, one way to think about a  
25 circumstance like that is that the railroad would

1 be trying to maximize its profit from say the  
2 first plant and then have at least at first a  
3 separated thought process about how to make yet  
4 more contribution, if it could, from offering an  
5 attractive additional part of its service package  
6 for traffic from the second plant and then  
7 perhaps linking the two in a way that would  
8 express the added value that it would receive  
9 from the added volume and share some of that with  
10 the shipper as an inducement.

11 And then maybe too there would be a  
12 cost implication because it may be the equipment  
13 could be shuffled between the plants in a way  
14 that would engender some additional efficiencies  
15 and then those too might be part of the business  
16 thinking of the railroad. I mean there's a lot  
17 of complications that I don't know out of a  
18 particular context.

19 Q. But, if the railroad could offer a  
20 positive incentive as you said before in terms of  
21 a more favorable rate, couldn't it also offer a  
22 negative incentive in terms of a higher rate to  
23 the shipper if it chose to give the railroad  
24 traffic from only one plant and to give the other  
25 railroad traffic from the plant that's

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1 competitively served?

2 MR. MEYER: Object to the form.

3 THE WITNESS: I'm not sure I fully  
4 understand. But my first reaction is I don't see  
5 as a matter of general principle, given what  
6 you're painting, why this would really be profit  
7 enhancing for the railroad. What that would  
8 really be who knows, maybe there are added  
9 factors in reality that would indeed make it a  
10 more rational response, but it's not there as I  
11 understand your question.

12 BY MR. BERCOVICI:

13 Q. Let's move on. You state on page 619,  
14 in the middle of the page, you state that storage  
15 for plastics represents another major dimension  
16 of nonprice competition between railroads, as  
17 plastics generally move from production directly  
18 to railcars are often sold while they are in  
19 storage in railcars. Is this knowledge that you  
20 have yourself or is this information that was  
21 conveyed to you by one or more of the marketing  
22 representatives who you spoke with or from whom  
23 you received information?

24 A. Uh-huh, most directly the latter, most  
25 directly conveyed to me. But I must say that it



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1 BY MR. BERCOVICI:

2 Q. So you don't have expert knowledge with  
3 regard to the issue of the importance of cycle  
4 time to chemical shippers?

5 A. No, that's not what I said, Counselor.

6 Q. Do you have expert knowledge with  
7 regard to the importance of cycle time to  
8 chemical shippers?

9 A. Well, as I explained earlier, I did  
10 learn about that subject as it is reflected in my  
11 testimony. I don't have direct business  
12 knowledge of that nor have I done a personal  
13 study of it. At the same time, it rings true to  
14 me from my experience and understanding the way  
15 railroad operations work and what aspects of  
16 service are important to shippers in different  
17 industries.

18 Q. And you learned about that through  
19 conversations with business representatives and  
20 with counsel for one of the applicants, correct?

21 MR. MEYER: Object to the form.

22 THE WITNESS: The most immediate source  
23 of those sentences in my testimony is  
24 conversation with the businesspeople and further  
25 fact-finding requested of counsel and at the same

1 time against the backdrop of my experience with  
2 the industry generally with which this  
3 proposition is consistent.

4 BY MR. BERCOVICI:

5 Q. Did you ask if that was universally  
6 true for all chemical shippers?

7 A. Actually I didn't ask that question  
8 because I never expect anything to be truly  
9 literally universally true. I'm really  
10 testifying here and was always asking about broad  
11 generalizations rather than true universals.

12 Q. Did you ask whether that was true with  
13 respect to plastics shippers?

14 MR. MEYER: Object to the form.

15 THE WITNESS: This particular  
16 conversation put together as a generalization,  
17 chemicals and plastics traffic, and that's the  
18 way I expressed it.

19 BY MR. BERCOVICI:

20 Q. So the answer is you did not ask  
21 specifically about plastics traffic?

22 A. As distinct from chemicals, that's  
23 correct.

24 MR. BERCOVICI: That's fine. I have no  
25 further questions. Thank you, Professor.





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.

Tuesday, January 24, 1996

Deposition of RICHARD J. BARBER, 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 JAN A. WILLIAMS, RPR, a Notary Public in  
and for the District of Columbia, taken at the  
offices of Covington & Burling, 1201 Pennsylvania  
Avenue, N.W., Washington, D.C., 20044, at  
10:20 a.m., Tuesday, January 24, 1996, and the  
proceedings being taken down by Stenotype by JAN  
A. WILLIAMS, RPR, and transcribed under her  
direction.

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1 Q. They understand that you're correct?

2 A. I'm correct as to how to treat it in  
3 the way that I've done it. Somebody else might  
4 have a different idea as to what to do, but I  
5 believe, as I've explained it here, that this is  
6 a sound way of presenting the data for purposes  
7 of the analysis that I present.

8 Q. Now, you and Mr. Peterson have handled  
9 the category that's defined as plastic flakes  
10 differently. Do you recall that?

11 A. Yes. And I'm I think quite candid in  
12 my testimony as to how to handle this. I did  
13 talk with the people in his staff about what are  
14 plastic flakes. And to me I don't believe you  
15 can be completely comfortable with how to break  
16 that up as among commodity groups. And so I  
17 treated it the way I did.

18 Q. Why did you pick that particular STCC  
19 as one to address?

20 A. It popped up because, in my screening  
21 procedure, it came up as one where the criteria  
22 were satisfied. Therefore, I felt that,  
23 consistent with everything I had done, I should  
24 at least try to look at it. When, in fact, you  
25 look at it, it's such a miscellaneous hodgepodge

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1 I don't think you can make any sense out of it or  
2 draw any inferences about it, which I say in the  
3 text.

4 Q. And you are aware, are you not, that  
5 there is no product called plastic flakes?

6 A. Well, there is a STCC listing for it.  
7 And that's the way I approached it.

8 Q. Are you aware that there's a market for  
9 a product, a single product that is defined by  
10 that STCC code?

11 A. Now, as I understand it and from such  
12 limited discussions I had, there apparently are  
13 some dealers, merchants, who may buy, in effect,  
14 miscellaneous pieces and then try to sort them  
15 for some purpose. I would regard it as kind of  
16 the equivalent of scrap dealers. Who they are  
17 and exactly how they buy such items I have no  
18 idea.

19 Q. So it's your understanding that, to the  
20 extent that there's a market for plastic flakes,  
21 it's in essence a scrap market?

22 A. It is essentially. And maybe there's  
23 some manufacturer who can figure some way of  
24 blending things, but it's essentially that.

25 Q. In your testimony yesterday,



1 of?

2 A. Most polyethylene as far as I'm able to  
3 adduce, and this is reflected in my table, moves  
4 by rail in long haul. Now, the portion that may  
5 moving shorter haul by truck is unknown to me.  
6 What exactly its magnitude is the public data  
7 don't show.

8 Presumably, the companies that we are  
9 concerned with this case, the chemical companies,  
10 may be given an opportunity to provide more  
11 specific information. But there can be shorter  
12 haul truckloads of the product which are not  
13 quantified -- which I cannot quantify by mode  
14 separately.

15 These could include short haul  
16 movements, perhaps up to a couple hundred miles  
17 or more, including just-in-time deliveries for  
18 certain plants which are mentioned in testimony  
19 of some polyethylene producers or movements from  
20 manufacturer operated bagging facilities for  
21 polyethylene transported to docks in the gulf  
22 area for onward movement by water in export  
23 trade.

24 Q. Is it your opinion that there is or is  
25 not meaningful modal competition for long-haul

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1 polyethylene movement?

2 A. I can't draw a firm conclusion on  
3 meaningful. I would say most of it is -- the  
4 long haul is by rail. What I cannot speak to,  
5 however, is the possibility of truck movements  
6 from plants of the product in bagged form to  
7 water. And, if truck movements can be made to  
8 docks for international trade, it is possible,  
9 and I cannot be certain of this, it's possible  
10 that there is some coastal movements. What the  
11 magnitude of that is I will assume we'll try to  
12 adduce from shippers or manufacturers as to  
13 that.

14 There is a role for -- there are what I  
15 call intermodal or business modal moves of  
16 polyethylene which we do know of and which are  
17 reflected in my work papers. In 1994 something  
18 like 769,000 tons of polyethylene moved by truck  
19 to TOFC facilities in the Houston area for onward  
20 shipment by rail. So there was -- and, since the  
21 product would have been moved by truck, it is  
22 possible it could have come from any of a number  
23 of plants producing the product. The plant  
24 identifications, of course, are not known.

25 So there is some truck role here. I

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1 Q. Turning back to page 489, you report  
2 major domestic barge movements of chemicals 1993?

3 A. Yes.

4 Q. Are any of the reported commodities on  
5 this page STCC 282?

6 A. Not STCC 282 dry chemicals.

7 Q. Did the Army --

8 A. Let me just make certain. Notice the  
9 title of the table 12, it says barge movements.  
10 And that's what I just said applies to barge. As  
11 for international, if the talked about water  
12 movements of say plastics, there are water  
13 movements for -- by deep sea vessel say for  
14 export. And that would be included. And that  
15 could include any other water movement in deep  
16 sea vessel. But for barge my answer stands as it  
17 is.

18 Q. Are you aware of any large vessel  
19 movement of plastics for other than export?

20 A. I'm not aware of it.

21 Q. Do you know whether the Army Corps of  
22 Engineers reported barge movements for plastics  
23 STCC 282?

24 A. I don't know -- when you say whether  
25 the Corps of Engineers reported, you mean



1 publicly?

2 Q. Yes, in the report that you  
3 referenced.

4 A. No. In the 282 there may be a few  
5 included in a category called plastic, but it's  
6 trivial.

7 Q. So the domestic barge movements as  
8 reported by the U.S. Corps of Engineers you would  
9 describe as trivial, the amount of movement?

10 A. I can't say that. But you asked  
11 whether Corps data show that and I said that  
12 those data would suggest it's trivial.

13 Q. Flipping back then to page 487, you've  
14 got some statements here about U.S. chemicals and  
15 chemical production?

16 A. Yes.

17 Q. The first bullet point says, and I  
18 quote, U.S. chemicals production is  
19 geographically diffused, close quote?

20 A. Yes.

21 Q. Do you believe that that is also true  
22 for U.S. plastics production?

23 A. It's true -- all of this is based upon  
24 the CMA analysis. For polyethylene I would say  
25 most of that is in the gulf area.

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1     raise its price is restrained to some extent by  
2     the other railroads refusing to follow that price  
3     lead, if you want?

4           A.     Or not even knowing about it or, if I  
5     may just enlarge it, would be by any other  
6     transporter serving any plant, whether the same  
7     plant or different plants, or any other mode such  
8     as barge or truck or whatever it might be in a  
9     given case.

10           Q.     But it works if we strictly -- if each  
11     plant can only be served by railroad?

12           A.     You change the question when you say  
13     can only be served by a railroad. It may not be  
14     served only by rail, it may have say barge  
15     service.

16           Q.     Well, I asked you to assume. You've  
17     got plant A served by railroad X, plant B served  
18     by railroad Q. Is railroad X's ability to  
19     increase its price -- oh, and they're  
20     competitors, the plants are competing.

21           A.     Across the street from one another.

22           Q.     It doesn't matter, they could be down  
23     the road, but they are producing competitive  
24     products. Is the ability of railroad X to raise  
25     its price limited by railroad Y?

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1 A. They are in competition, yes.

2 Q. And that's because railroad X doesn't  
3 want to raise its price to the point where it  
4 prices its customer's product out of the market  
5 with plant B, competition with plant B?

6 A. Yes.

7 MR. ROACH: I have an ongoing objection  
8 to the form of these questions.

9 BY MR. BEHR:

10 Q. Do you know, Mr. Barber, whether the  
11 settlement between the applicants and the BN/SF  
12 addresses itself in any way to situations that  
13 I've just described; that is, where you have  
14 competitive plants served one by the UP and one  
15 by the SP, so there was competition which may no  
16 longer exist?

17 A. It would deal with them in the sense of  
18 a build-in. For example, suppose at plant A in  
19 your example served by railroad X, assume that  
20 railroad Y was an imminent build-in entrant.  
21 This would apply, for example, to the situation  
22 at Mont Belvieu, also known as Cedar Bayou.

23 In that case then, plant location A  
24 using Mont Belvieu as an example would be  
25 regarded as a two-to-one point. And access would

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1 be given to a new railroad, in this case BN/Santa  
2 Fe.

3 Q. But if there was no imminent build-out  
4 situation, has the hypothetical we've been  
5 discussing been addressed by the agreement?

6 A. If these are not two-to-one locations  
7 in the sense that I have described them, it does  
8 not apply other than in the general sense of  
9 improving both railroads -- but including the  
10 competitive railroad's position to market and  
11 transport the product more efficiently over a  
12 wider range of service.

13 For example, assume railroad Y --  
14 assume that X and Y consolidate. Now they are  
15 able to provide better service including  
16 single-line service throughout the western United  
17 States in competition with other railroads,  
18 specifically with BN/Santa Fe. In that sense the  
19 ability post-consolidation of X and Y to compete  
20 with other transporters and other plants served  
21 by those transporters would be enhanced.

22 That I regard as important to  
23 competition, beneficial to competition. But As  
24 you've defined them in your question. These are  
25 not two-to-one locations and would not be

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1     sure I understand the relevance. But, if what  
2     you're saying is there is a two-to-one point  
3     where say we each have a switch engine and we are  
4     discussing a way to trade off switching the  
5     customer through a joint facility agreement, are  
6     some of those situations included in the  
7     two-to-one points? Possibly. But I can't say  
8     for sure. I know we've talked about Little Rock,  
9     I know we've talked about Camden, we've talked  
10    about Pine Bluff. You're talking about this  
11    corridor, I want to give you some flavor.

12           Q.    Let me sharpen my question because I  
13    clearly asked it too broadly. Are you aware of  
14    any shippers who are now exclusively served by UP  
15    or SP as to which the two railroads are currently  
16    discussing possible joint facilities agreements?

17           A.    No, I'm not. And I think that would be  
18    a very -- extremely unusual situation. And  
19    frankly that's an area that I personally am  
20    involved in. And it would be unusual for the  
21    marketing department of one railroad to open up a  
22    customer that it exclusively serves.

23           Q.    Are there ever situations in which a  
24    customer that is at present exclusively served by  
25    one railroad decides that it wants to have a

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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4 Union Pacific Corp., Union \*

5 RR. Co. And Missouri Pacific \*

6 RR Co.-- Control and Merger -- \*

7 Southern Pacific Rail corp., \* Finance Docket No. 32760

8 Southern Pacific Trans. Co., \* HIGHLY CONFIDENTIAL

9 St. Louis Southwestern RW. Co., \*

10 SPCSL Corp. And The Denver and \*

11 The Denver and Rio Grande \*

12 Western Corp. \*

13

14

## ORAL DEPOSITION OF

15

ROLLIN BREDENBERG

16

17

On the 8th day of March, 1996, at 9:00 a.m., the  
oral deposition of the above-named witness was taken at the  
instance of the Kansas City Southern Railway before Susan S.  
Klinger, Certified Shorthand Reporter in and for the State  
of Texas, at the Hyatt Hotel, Dallas Fort Worth  
International Airport in the City of Dallas, County of  
Dallas, State of Texas, pursuant to notice and the agreement  
as stated in the record herein.

25

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- (1) A. Correct.  
 (2) Q. Can we have an understanding if I say the BNSF  
 (3) that is what I'm referring to?  
 (4) A. Yes, I do understand that.  
 (5) Q. And likewise, if I there is a merger proceeding  
 (6) where the Union Pacific is seeking approval for merging with  
 (7) Southern Pacific, can we have an understanding if I say UP  
 (8) and SP I mean those two railroads?  
 (9) A. Understood.  
 (10) Q. And finally, I might mention today what is  
 (11) called the Tex Mex Railway. Can we have an understanding if  
 (12) I say that I'm referring to the Texas Mexican Railway that  
 (13) Mr. Allen represents?  
 (14) A. Understood.  
 (15) Q. Fine. What is your current position with  
 (16) Burlington Northern Santa Fe?  
 (17) A. I'm vice-president, transportation.  
 (18) Q. And can you tell us generally what your  
 (19) responsibilities are for that position?  
 (20) A. I'm responsible for network planning and  
 (21) operations, the freight network for the locomotives, the  
 (22) planning and distribution of locomotives and planning and  
 (23) distribution of crews. The day-to-day dispatching of the  
 (24) network, passenger operations, fuel management, that about  
 (25) covers it. Basically the through freight network and all of

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- (1) the resources it takes to run it.  
 (2) Q. Do your responsibilities include the, anything  
 (3) to do with the systems operations center?  
 (4) A. They do.  
 (5) Q. And what responsibilities do you have in that  
 (6) regard?  
 (7) A. The systems operations center is one of the  
 (8) operations centers that reports to me. The systems  
 (9) operations center controls the over-the-road dispatching and  
 (10) locomotive management on the Santa Fe ATSF. It is located  
 (11) in Schaumburg, Illinois.  
 (12) Q. Is that sometimes referred to by the acronym  
 (13) SOS, excuse me SOC?  
 (14) A. SOC, SOS is sometimes appropriate.  
 (15) Q. And where is your office?  
 (16) A. My office is in Fort Worth.  
 (17) Q. And to whom do you report?  
 (18) A. Don McInnes.  
 (19) Q. And is Mr. McInnes the president of the company?  
 (20) A. No, he is senior vice-president, chief  
 (21) operations officer.  
 (22) Q. And I assume he reported to Mr. Krebs, Mr.  
 (23) Robert Krebs?  
 (24) A. Yes, he does.  
 (25) Q. And Mr. Krebs is, what is his position?

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- (1) A. He is president and chief executive officer.  
 (2) Q. Do you have any reporting relationship to Mr.  
 (3) Krebs either in your general duties or on any particular  
 (4) projects?  
 (5) A. I have no direct reporting relationship to him.  
 (6) Q. How do you report to Mr. Krebs, through Mr.  
 (7) McInnes?  
 (8) A. Correct.  
 (9) Q. And so I can be clear, are there any particular  
 (10) projects that Mr. Krebs has assigned to you that you would  
 (11) report to him on?  
 (12) A. No.  
 (13) Q. Do you have any responsibilities with respect to  
 (14) Mexico?  
 (15) A. I have no formal responsibilities with respect  
 (16) to Mexico.  
 (17) Q. Any informal responsibilities?  
 (18) A. Informally because of my background I'm used by  
 (19) some of the commercial units and as a resource also probably  
 (20) in operations matters. I have more direct contact than is  
 (21) within the experience base of people from the BN or the  
 (22) Santa Fe.  
 (23) Q. And in carrying out your responsibilities,  
 (24) you're responsible in terms of network planning operations,  
 (25) you are responsible for the whole system, the whole BN?

- (1) A. I am.  
 (2) Q. And of course that would include parts of the  
 (3) system that carry traffic down to the Mexican gateways?  
 (4) A. It does include that, yes.  
 (5) Q. And you came from the Santa Fe organization, am  
 (6) I correct before the merger?  
 (7) A. Before the BNSF mergers I was assistant  
 (8) vice-president intermodal operations on the Santa Fe.  
 (9) Q. Was that your position as of August of 1995  
 (10) before the merger?  
 (11) A. Yes, it was.  
 (12) Q. And then after the merger, when did you assume  
 (13) this position as vice-president, transportation?  
 (14) A. Formally? May I ask my -  
 (15) (Discussion between the witness and his  
 (16) attorney.)  
 (17) THE WITNESS: As of the announcement of  
 (18) the merger on September 22nd, I assumed the responsibilities  
 (19) of vice-president, transportation for the merged railroad.  
 (20) BY MR. LUBEL:  
 (21) Q. And after the merger was approved in, I think it  
 (22) was August 22nd or 23rd of 1995, did you begin kind of  
 (23) handling some of those responsibilities? I'm trying to see  
 (24) what you were doing in the time period from, like, August  
 (25) 23rd to September 22nd?

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- (1) A. I did not.  
 (2) Q. And so as of October '95, then, you did hold  
 (3) this position of vice-president, transportation?  
 (4) A. Yes, I did.  
 (5) Q. And in that position you reported to Mr.  
 (6) McInnes?  
 (7) A. Correct.  
 (8) Q. Now, in your job I assume you have, since the  
 (9) merger took place I assume you have had some  
 (10) responsibilities for actually implementing the merger of the  
 (11) Burlington Northern and Santa Fe, would that be fair to say?  
 (12) A. Yes, it would.  
 (13) Q. And also fair to say that that is quite a  
 (14) undertaking?  
 (15) A. Yes, that is fair to say.  
 (16) Q. It takes a lot of management time?  
 (17) A. All I can give it.  
 (18) Q. And not just you but other top management  
 (19) persons?  
 (20) A. That is correct.  
 (21) Q. Also takes resources of the merged Burlington  
 (22) Northern Santa Fe, doesn't it?  
 (23) A. Yes, it does.  
 (24) Q. And are you familiar with the concept of a  
 (25) capital budget?

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- (1) A. Yes.  
 (2) Q. And I assume Burlington Northern Santa Fe has a  
 (3) capital budget?  
 (4) A. Yes.  
 (5) Q. And part of that capital budget is dedicated to  
 (6) helping implement this merger?  
 (7) A. It is.  
 (8) Q. And would you estimate that it might take you at  
 (9) least a year? When I say you I mean Burlington Northern  
 (10) Santa Fe at least a year to absorb and implement the merger  
 (11) of these two carriers?  
 (12) A. To our full functional satisfaction that would  
 (13) be a fair statement.  
 (14) Q. Would it also be fair to say that during this  
 (15) period when you are trying to implement the merger that you  
 (16) don't need any distractions?  
 (17) A. Need any, no, I suppose nobody ever needs any  
 (18) distractions.  
 (19) Q. You have got your hands full trying to merge  
 (20) these two railroads; correct?  
 (21) A. That is part of my duties, yes.  
 (22) Q. Let me ask a very specific question. In terms  
 (23) of rail cars during or since the merger was approved by the  
 (24) then Interstate Commerce Commission now Surface  
 (25) Transportation Board, hasn't there been some directive from

1 Q. And there would be a difference in terms of the  
2 amount of competition it would have at Laredo if it allows  
3 Burlington Northern Santa Fe down to Brownsville as opposed  
4 to allowing Tex Mex to have Houston to Brownsville, isn't  
5 that the logic of what you are saying?

6 A. Yes, there are two different conditions that  
7 would exist there, yes, two different sets of circumstances.

8 Q. What you have said is somewhat consistent with  
9 what Mr. Ice testified to earlier. You know Mr. Carl Ice,  
10 don't you?

11 A. Yes, I do.

12 Q. And he came from the Santa Fe side of the merger  
13 also, didn't he?

14 A. Yes, he did.

15 Q. And he was involved in the negotiation of the  
16 trackage rights agreement, were you aware of that?

17 A. I am aware of that.

18 Q. What communications did you have with Mr. Krebs  
19 or Mr. Ice or really anyone that was involved in the  
20 negotiations of the trackage rights agreement during the  
21 time they were being negotiated and let's say prior to  
22 September 25 the BNSF trackage rights agreement with UP/SP?  
23 What communications did you have with Mr. Krebs, Mr. Ice  
24 anybody else at Burlington Northern Santa Fe while that  
25 agreement was being negotiated about the negotiations?



1 A. Only one time.

2 Q. What was that?

3 A. That was in late summer of '95. There was a  
4 meeting in which Mr. Krebs, Mr. McInnes, Mr. Ice, Mr. Deeley  
5 and I met to discuss what Carl Ice's response should be to  
6 Union Pacific's first proposal as to what BNSF trackage  
7 rights should look like.

8 Q. And when you say late summer, could that have  
9 been September of '95?

10 A. It might have been. My recollection is that it  
11 was late summer. But if it was, it was. I will tell you  
12 this much and it was before we had responded to Union  
13 Pacific's first proposal.

14 Q. And I want to focus on the part of these  
15 discussions that might have included some discussion of  
16 Houston to Brownsville rights?

17 MR. WEICHER: Mr. Lubel, just for the  
18 record you know we object to this. It is my understanding  
19 that Judge Nelson has permitted inquiry into the give and  
20 take of negotiations insofar as it applies to the Houston  
21 Brownsville corridor. And so I want you to judge this  
22 insofar as it relates to that insofar as it doesn't relate  
23 to counsel or in which counsel are involved dealing with  
24 litigation in this connection with the UP/SP transaction.

25 BY MR. LUBEL:

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1 Q. Just so we have the universe of conversations,  
2 you have mentioned that meeting, that was a meeting where  
3 was that as you recall?

4 A. In Schaumburg.

5 Q. Did you get other information, did you have any  
6 other meetings about the negotiations that you can recall?

7 A. No.

8 Q. Did you get information about the negotiations,  
9 like, were you furnished any type of updates on what --

10 A. No.

11 Q. -- Was being proposed?

12 A. No.

13 Q. Did you participate in any telephone  
14 conferences, not necessarily meeting, but any telephone  
15 conference that might have been part of or at the same time  
16 as the negotiations and dealt with the negotiations?

17 A. I did not.

18 Q. Specifically if Mr. Krebs was on a telephone  
19 call to, say, Mr. Rebensdorf or others at UP/SP, were you on  
20 such a call?

21 A. No.

22 Q. Do you recall Mr. Krebs ever coming back, Krebs  
23 or anyone at your company coming back and reporting to you  
24 on such meetings or calls?

25 A. No.

1 Q. And was it your understanding when you were  
2 talking with Mr. Skinner that it was all part of the offer  
3 that Union Pacific/Southern Pacific had made that led to the  
4 agreement?

5 A. That was my working assumption, but I didn't  
6 have any direct knowledge but yes, you could characterize  
7 that as my working assumption.

8 Q. Your working assumption is that it was offered  
9 as a package deal?

10 A. Right.

11 Q. And following along, didn't you indicate to Mr.  
12 Skinner that Burlington Northern Santa Fe had indicated in  
13 the negotiations that it would prefer to have Tex Mex be its  
14 operator from at least Houston to Corpus?

15 A. That conversation predates any discussion of  
16 UP/SP merger and especially predates my knowledge of any  
17 deal with UP or any equity ownership in Tex Mex by another  
18 U.S. railroad. And we have had lots of conversations about  
19 how BN and Santa Fe or how BN itself could most effectively  
20 get to the Tex Mex. But all of that occurred prior to my  
21 understanding that there was going to be a way for BNSF  
22 directly to get to Robstown. So as I say, there have been  
23 lots of conversations about that, but to tie in those  
24 conversations with what we wound up with here is really a  
25 non sequitor.

1 thought that I would be involved in the negotiations. And  
2 if not the negotiations at least internally giving guidance  
3 to Carl Ice or anybody else in senior management about our  
4 direction here. But that turned out to be not the case and  
5 I wondered during that, during the time why I wasn't and  
6 speculated why that might have been. And the fact is that I  
7 wasn't, not only was I in part of the negotiations, I wasn't  
8 consulted internally by the negotiating group.

9 Q. When was it that Mr. Krebs asked you to be his  
10 point person for Mexican matters?

11 A. I asked him who is going to handle now that we  
12 have these trackage rights, who is going to be responsible  
13 for handling how we implement these trackage rights. And I  
14 was not only talking about the UP/SP agreement, but I was  
15 also talking about Eagle Pass. And his response to me was  
16 well, you know more about it than anybody else in the  
17 company because you are the guy. That is not really what I  
18 was looking for. I was really asking him who I should be  
19 going to to get some of the commercial questions answered,  
20 but when Brad asked me the question I told him I said, well,  
21 looks like I'm the guy.

22 Q. So it was sometime prior to the conversation  
23 with Mr. Skinner?

24 A. Yes, that's right.

25 Q. And other than the meeting in Schaumburg that



SP/UP Meyer 1

# CALL REPORT

Getty

① Retype

② Return to me

FROM: BRAD SKINNER  
DATE: OCTOBER 30, 1995  
SUBJECT: CONVERSATION WITH ~~ROLAND~~ BREDENBERG,  
VICE-PRESIDENT TRANSPORTATION BNSANTIA FE

~~ROLAND~~ <sup>Rollin</sup> HAD THE FOLLOWING THINGS TO SAY:

BNSF

WE WOULD LIKE TO MEET WITH TEX-MEX OFFICIALS TO SEE IF ~~WE CAN BE IN SANTA FE~~  
~~CAN BE IN~~ <sup>an</sup> EFFECTIVE RATE <sup>package</sup> OVER THE LAREDO GATEWAY CONNECTING CORPUS  
<sup>can be developed.</sup> TO HOUSTON AND TO BEAUMONT, HE WILL BE THE POINT PERSON FOR THIS ACTIVITY  
AND WE'LL COORDINATE A MEETING WITH GREG SWENTON AND STEVE MARLIER AND  
TEX-MEX OFFICIALS TO EXPLORE THIS OPPORTUNITY, WE SHOULD NOT BE OPTIMISTIC  
BUT IF BN ~~THAT~~ DOES WANTS TO BE A COMPETITOR OF U.P. PERHAPS SOMETHING  
POSITIVE ~~THAT~~ CAN BE WORKED OUT FOR THE LONG RUN, CONNECTING CORPUS TO  
BEAUMONT AND THE KCS SYSTEM AS WELL AS TO THE BN SYSTEM, WE NEED TO KEEP  
AN OPEN MIND ABOUT THIS <sup>option</sup> AND EXPLORE THE OPPORTUNITY.

SECOND THING HE SAID: HE IS THE POINT PERSON FOR MEXICO ROB <sup>Krebs</sup> JUST  
APPOINTED HIM ~~IN THAT CAPACITY~~, D.J. MITCHELL WHO WAS THE POINT PERSON FOR  
~~JERRY GRUNSTEIN~~ <sup>Rollin</sup> WILL BE WORKING FOR ROLAND, ROB WANTED TO MAKE CERTAIN  
THAT WE UNDERSTOOD THAT ~~JERRY GRUNSTEIN~~ DOES NOT SPEAK FOR THE COMPANY.

Bredenbergs

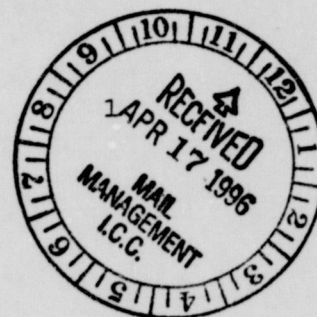
EXHIBIT NO. 1  
DATE: 3-8-96

S. KLINGER

THE FINAL PART OF THE CONVERSATION WAS INTERESTING.

WE TALKED ABOUT MEXICO, <sup>Roll/14</sup> ~~MEXICO~~ <sup>bid</sup> ~~ROBERT~~ TOLD ME THAT THEY ARE NOT INTERESTED IN MEXICO, THEY WILL NOT <sup>bid</sup> ~~MEET~~ IN THE PRIVATIZATION PROCESS, THEY HAVE A LIMITED CAPITAL BUDGET AND DO NOT WANT TO BE DISTRACTED BY <sup>here</sup> ~~ACTIVITIES IN THE PRIVATIZATION OF THE MEXICAN SYSTEM~~. I SAID. - WELL, IF YOU ARE NOT INTERESTED IN MEXICO THEN WHY ~~ON EARTH~~ ARE YOU GOING TO BE HANDLING THE TRACKAGE RIGHTS ALL THE WAY DOWN TO BROWNSVILLE? - HE SAID, BRAD I WAS IN THE CONVERSATION WHEN <sup>the</sup> ~~THIS~~ TRACKAGE RIGHTS WERE AWARDED. <sup>11/2</sup> DICK DAVIDSON SAID THE FOLLOWING: THAT HE WOULD AWARD THE WESTERN TRACKAGE RIGHTS AS LONG AS WE WOULD TAKE ~~ON~~ THE TRACKAGE RIGHTS FROM TEXAS TO NEW ORLEANS, TO MEMPHIS, AND TO BROWNSVILLE. IT WAS A PACKAGE DEAL, <sup>Roll/14</sup> ROB AND ~~ROBERT~~ SAID - WELL, WE WOULD PREFER <sup>that</sup> ~~THE~~ TEX-MEX BE OUR OPERATOR FROM CORPUS TO HOUSTON. DICK'S RESPONSE WAS - AS FOLLOWS: - IT WILL BE A COLD DAY IN HELL BEFORE PEPE SERRANO, ANY MEXICAN OR ANY MEXICAN COMPANY EVER OPERATES ON MY RAILROAD. <sup>connect</sup> I THINK THIS IS ILLUSTRATIVE OF HOW U.P. THINKS, THEY DON'T WANT COMPETITION, THEY ARE CERTAINLY ~~AS~~ XENOPHOBIC, IN THEIR OUTLOOK UPON TRADE, THEY WANT TO CONTROL EVERYTHING, THEY CLEARLY DEFINE HOW THEY ARE NOT GOING EVER BE <sup>to</sup> PARTNERS WITH ANYONE IN THIS COUNTRY, AND IN NO WAY ~~THEY ARE GOING TO BE~~ SUPPORTIVE OF NAFTA. WE'LL TALK ~~MORE~~ ABOUT THIS LATER. *Just an Update.*

**CERTIFIED COPY**



1                               BEFORE THE  
2                               SURFACE TRANSPORTATION BOARD  
3                               Finance Docket No. 32760  
4       UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD  
5       COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY  
6                               -- CONTROL MERGER --  
7       SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN  
8       PACIFIC TRANSPORTATION COMPANY, ST. LOUIS  
9       SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE  
10       DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

11                               HIGHLY CONFIDENTIAL

12                               Washington, D.C.

13                               Tuesday, March 19, 1996

14               Deposition of JAMES S. GEHRING, a  
15       witness herein, called for examination by counsel  
16       for the Parties in the above-entitled matter,  
17       pursuant to agreement, the witness being duly  
18       sworn by JAN A. WILLIAMS, RPR, a Notary Public in  
19       and for the District of Columbia, taken at the  
20       offices of Covington & Burling, 1201 Pennsylvania  
21       Avenue, N.W., Washington, D.C., 20044, at  
22       2:05 p.m., Tuesday, March 19, 1996, and the  
23       proceedings being taken down by Stenotype by JAN  
24       A. WILLIAMS, RPR, and transcribed under her  
25       direction.

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1 A. I can't recall any other facilities.

2 Q. The facility at Pasadena, do you know  
3 what that produces?

4 MR. CUNNINGHAM: Mr. Bercovici, can you  
5 suggest what relationship this has to the area  
6 that Mr. Gehring is being made available for  
7 deposition.

8 MR. BERCOVICI: I'll get to it. It  
9 relates to the OxyChem support statement.

10 MR. CUNNINGHAM: Okay.

11 THE WITNESS: I believe Oxy -- I'm more  
12 familiar with their inbound movements to the  
13 facility. But I generally believe that they  
14 produce plastics at that facility, but I'm not  
15 sure.

16 BY MR. BERCOVICI:

17 Q. How about Gregory, are you familiar  
18 with that facility?

19 A. I'm a little bit more familiar with  
20 Gregory, yes.

21 Q. Can you tell us what they produce at  
22 Gregory?

23 A. Vinylchloride monomers and styrene.

24 Q. Is that facility local to the SP or is  
25 that open to competitive access by other

1 carriers?

2 A. Gregory, Texas, is local on the  
3 Southern Pacific.

4 Q. Is Sinton an open or a closed switching  
5 point?

6 A. Sinton, Texas, is an open interchange  
7 point.

8 Q. Which means that Sinton is available to  
9 competitive service?

10 A. Yes, it is.

11 Q. Does that mean UP/SP?

12 A. Well, let's clarify your question.

13 Q. UP and SP?

14 A. No, it's an interchange point. There's  
15 no production facilities at Sinton, Texas. I'm  
16 not sure which way you're asking the question.

17 Q. So there's no -- it's an interchange  
18 point between the UP and SP; is that correct?

19 A. That is correct.

20 Q. In what way would you characterize it  
21 as an open point?

22 A. Well, you asked the question, I  
23 answered your question. You said is it an open  
24 point and I said yes, it's an open interchange  
25 point, and that was it.

1 Q. It's an open interchange point, but  
2 there is no local service to Sinton; is that what  
3 you're saying?

4 A. No local service to Sinton. I don't  
5 understand your question.

6 Q. You said there are no producers there  
7 so there is no traffic originating or terminating  
8 at Sinton?

9 A. No. Sinton is an interchange point.  
10 We interchange traffic to and from the Gregory  
11 facility of Oxy to the UP at Sinton. We receive  
12 traffic from the UP at Sinton and take it to the  
13 facility.

14 Q. But is there any competitive rail  
15 service to any customer at Sinton?

16 A. There's no customers at Sinton.

17 Q. Does the UP have access to the Gregory  
18 plant via the Sinton junction?

19 A. Yes, they do. No, wait a minute. I  
20 don't think you're -- I'm not following --

21 MR. CUNNINGHAM: Unless you can show  
22 some nexus to the two questions, I'm going to  
23 instruct the witness not to answer. I think this  
24 is totally a waste of time.

25 MR. BERCOVICI: I'm trying to --



1 MR. CUNNINGHAM: Where the factories  
2 are or production facilities has nothing to do  
3 with either shipper support letters and how they  
4 were generated or whether business is being tied  
5 up. And those are the two subjects that are the  
6 basis of inquiry.

7 MR. BERCOVICI: I'm trying to ascertain  
8 what the circumstances were for the letter.

9 MR. CUNNINGHAM: You didn't ask  
10 anything about the circumstances of the letter.

11 MR. BERCOVICI: I'll get to it,  
12 Counsel.

13 MR. CUNNINGHAM: I'll instruct him not  
14 to answer with respect to the geography of the  
15 area. You have a map and you have clients that  
16 know what's going on and he's not here to testify  
17 about those things.

18 BY MR. BERCOVICI:

19 Q. Are you aware that Occidental Chemical  
20 gave a statement of support for the merger?

21 A. Yes, I'm aware that Oxy provided a  
22 statement of support, but it wasn't through  
23 Southern Pacific.

24 Q. Therefore, it was through Union  
25 Pacific?

1 A. I'll have to assume it was.

2 Q. Do you know where Union Pacific serves  
3 Occidental Chemical?

4 MR. CUNNINGHAM: Again I'm going to  
5 instruct him not to answer. The geography is  
6 irrelevant to the statement of support.

7 MR. BERCOVICI: Well, maybe it is and  
8 maybe it isn't.

9 MR. CUNNINGHAM: I'm going to instruct  
10 him not to answer. I don't think that's what the  
11 deposition is for. If you want to ask him about  
12 the statement, if he knows how the statement was  
13 gathered, that's totally fair game. But he's not  
14 here to explain the geography of the railroad.

15 BY MR. BERCOVICI:

16 Q. How are you aware that the Occidental  
17 statement came through the Union Pacific?

18 A. That information would have been  
19 provided to us by Mr. Neal Kuehner who is our  
20 national accounts manager located in Dallas who  
21 calls on Occidental Chemical.

22 Q. Then Mr. Kuehner told you that OxyChem  
23 gave a statement of support to the UP?

24 A. Yes.

25 Q. Do you know if the SP ever requested a

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1 statement of support from Occidental Chemical?

2 A. We would not have requested a statement  
3 of support from Occidental Chemical.

4 Q. Why is that?

5 A. Whether the -- as I understand it, when  
6 the merger support team put together the list of  
7 customers that each company would solicit for  
8 support statements, Occidental Chemical was on  
9 the UP list, not on the SP list.

10 Q. Do you know why that was?

11 A. I have no idea. You would have to ask  
12 the Union Pacific.

13 MR. CUNNINGHAM: Is there any  
14 discussion here that there was a deal made?

15 MR. BERCOVICI: Yes, there is.

16 MR. CUNNINGHAM: Then why don't we get  
17 to that. You can ask him if he knows anything  
18 about a deal being made and he'll give you direct  
19 answers.

20 MR. BERCOVICI: Counsel, if there was a  
21 deal made, the deal may have been made with Union  
22 Pacific.

23 MR. CUNNINGHAM: Then he wouldn't know  
24 anything about it and we're wasting our time. If  
25 you can establish that he knows something about

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1 the Oxy deal --

2 BY MR. BERCOVICI:

3 Q. Let me ask one more question and I'd  
4 like an answer to it, and that is whether Union  
5 Pacific serves Occidental Chemical at the Gregory  
6 plant?

7 A. The Union Pacific does not serve the  
8 Occidental Chemical plant at Gregory, Texas. As  
9 I testified earlier, that is served exclusively  
10 by Southern Pacific.

11 Q. To your knowledge is the Sinton  
12 junction going to be an open junction point after  
13 the merger, if the merger is approved as  
14 proposed?

15 A. I can't answer that question. I have  
16 not read the operating application.

17 Q. Have you had any discussions with  
18 people about what points will be competitively  
19 served?

20 MR. CUNNINGHAM: I'm going to instruct  
21 him not answer this, it has nothing to do with  
22 the two subjects designated by the administrative  
23 law judge.

24 BY MR. BERCOVICI:

25 Q. Were you on the merger support team for

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1           A.     Windy City was a proposal to study a  
2 possible build-in to the Dow facility at  
3 Freeport.

4           Q.     Did this also include accessing  
5 shippers at Chocolate Bayou that were along the  
6 proposed build-in route?

7           A.     The initial engineering study indicated  
8 that that was the most logical route which would  
9 take it right by Chocolate Bayou.

10          Q.     So is it accurate to say that the SP  
11 could fairly easily access the shippers at  
12 Chocolate Bayou from the proposed build-in?

13          A.     No, I wouldn't say that, because the  
14 study was very preliminary. The idea was to try  
15 to access the customers at Chocolate Bayou, but  
16 it was by no means a done deal, it was in the  
17 very, very early stages of development.

18          Q.     Geographically did the proposed  
19 build-in pass within only a few hundred yards of  
20 the Monsanto and Amoco facilities of Chocolate  
21 Bayou?

22                 MS. CORWIN: Can I hear that question  
23 again, please.

24                 BY MR. MORENO:

25          Q.     Geographically is it true that the

1 either a build-in or a rail barge proposal that  
2 was being talked about and considered.

3 Q. Did Dow approach you regarding the  
4 build-in? When I say you, or anyone at the SP  
5 regarding a build-in or did the SP approach Dow?

6 A. My recollection is that in '88, '89,  
7 when we were talking about the rail barge  
8 situation, that Dow approached us.

9 Q. And was it the SP that approached --  
10 excuse me. Let me start over.

11 Was it the SP that brought up the  
12 option of a rail barge operation or was it Dow?

13 A. To my recollection, and this goes back  
14 a long time, is that Dow had an existing barge  
15 that -- or barges that they could use to  
16 transport railcars from Freeport up to the  
17 Houston area, off-load them, and ship them out on  
18 Southern Pacific, bypassing the Union Pacific.

19 Q. Have you heard of a team within the SP  
20 called the SP extension team?

21 A. Yes, I have heard of that team, that's  
22 correct.

23 Q. What was the purpose of this team?

24 A. That team was formulated after the UP  
25 had announced their intention to extend their

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1 line from McNair junction to Mont Belvieu and  
2 Baytown, Texas.

3 Q. And who comprised this team?

4 A. That team was headed by -- if my  
5 recollection is correct, that team was headed by  
6 Larry Ruple.

7 Q. Were there other members?

8 A. Within the marketing organization at  
9 the time, two members of that team that worked  
10 for Larry Ruple were Christina Schultz and Fritz  
11 Rahr, R-a-h-r.

12 Q. And was the purpose of this team to  
13 explore responses by the SP to the UP's build-in  
14 at Mont Belvieu?

15 A. That is correct.

16 Q. And, as part of this exploration, was  
17 the build-in to Freeport considered by the SP?

18 A. That team was -- that team's task was  
19 to identify all potential candidates, whether  
20 they were served by the UP or the Santa Fe or the  
21 BN at the time, to identify candidates where SP  
22 could logically extend or build in to facilities  
23 served by our competitors.

24 Q. Was one of the purposes or one of the  
25 desires of this extension team to hit the UP

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1 where it hurt?

2 A. If you look at all possible line  
3 extensions in Texas which is where this effort  
4 was concentrated initially, it would be fair to  
5 say that the primo territory would be the UP  
6 served facility of Dow Chemical at Freeport,  
7 Texas.

8 Q. Why would Dow be a particularly  
9 attractive target?

10 A. Because it is my understanding that is  
11 probably the largest chemical complex in North  
12 America and possibly the world. So, if you're  
13 going to go after your competitor, you certainly  
14 want to go after his heart.

15 Q. What was your role in the exploration  
16 of the build-in to Freeport?

17 A. My activity with the build-in to  
18 Freeport did not occur until June of 1995. Prior  
19 to that I had no role on that team.

20 Q. Were you familiar with prior  
21 negotiations, negotiations prior to 1995 or  
22 discussions -- let me just make the question  
23 clearer.

24 Were you aware of discussions between  
25 Dow and the SP regarding this proposed build-in

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1 Q. Let me just start all over to keep the  
2 transcript clear here.

3 Do you know whether the study including  
4 the map and the cost study was completed by  
5 February of '95?

6 A. I cannot answer that, no, I do not know  
7 that.

8 Q. Assuming it was complete, why would the  
9 SP continue to pursue this project to at least we  
10 know of a July meeting if it was very preliminary  
11 and appeared to be unfeasible?

12 A. I never said it was unfeasible. We had  
13 an interest in building to the Dow facility at  
14 Freeport, Texas. As I recall, sometime in the  
15 late spring, Dow requested that we express that  
16 interest in writing to them which we did. From  
17 that expressed interest in a letter, the meeting  
18 was set up for July of 1995 to further explore  
19 those interests.

20 Q. I have no more questions on this  
21 exhibit.

22 I'd like to have marked Gehring Exhibit  
23 No. 6.

24 (Gehring Exhibit No. 6 was  
25 marked for identification.)

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1 Q. Correct. So are you saying that there  
2 does appear to be at least one bridge included  
3 here?

4 A. Well, it depends on which document you  
5 look at.

6 Q. Well, I don't want to get bogged down  
7 in this matter. I think the documents speak for  
8 themselves.

9 A. These are not my numbers, I didn't  
10 prepare the engineering study, and I don't  
11 purport to be an engineer.

12 Q. I appreciate that so I won't waste  
13 anymore time going through this in detail. Did  
14 anyone at the SP to your knowledge contact other  
15 shippers who might be served by the proposed  
16 build-in?

17 A. The only conversation I'm aware of is a  
18 conversation between SP and Quantum Chemical who  
19 has a facility at Chocolate Bayou.

20 Q. Are you aware of any discussions with  
21 Amoco at Chocolate Bayou?

22 MR. CUNNINGHAM: I'm going to ask how  
23 this relates to the Freeport build-in?

24 MR. MORENO: The Chocolate Bayou could  
25 be served theoretically by the build-in.

1 MR. CUNNINGHAM: Is the question  
2 whether there were any discussions of the  
3 Freeport build-in with Amoco?

4 BY MR. MORENO:

5 Q. Yes.

6 A. I believe that Mr. Sampson, director of  
7 national accounts in Chicago who calls on Amoco,  
8 may have had some discussions about the  
9 feasibility of SP reaching Chocolate Bayou.

10 Q. Do you know whether presentations  
11 similar to the Carter Burgess study and the map  
12 that we have just looked at were made by the SP  
13 to shippers at Chocolate Bayou?

14 A. I am not aware of any presentations of  
15 any materials given to any of the shippers that  
16 are located at Chocolate Bayou.

17 Q. Do you know how many carloads per year  
18 are generated by shippers at Chocolate Bayou?

19 A. No, I do not.

20 Q. Do you know if any study was conducted  
21 or any inquiry was made as to the number of  
22 carloads generated by Chocolate Bayou shippers  
23 annually?

24 A. Not that I'm aware of.

25 Q. Do you know how much total traffic

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1 Q. If alternative financing by any party  
2 other than the SP could be arranged, would this  
3 build-out project still be of interest?

4 A. Sure. The problem you've got is  
5 I can't -- I'm not General Electric capital,  
6 okay. As Southern Pacific and as my counsel  
7 knows, I can't go into the marketplace and raise  
8 \$100 million. I would get laughed out of there.

9 I can't get \$4 million in my own money  
10 to build to Lyondell Chemical at Channelview,  
11 Texas. There's too many covenants on our  
12 finances in '95, that we got boxed into a corner  
13 with Dow. We wanted to do the project. I would  
14 love to build to my competitors, love to. I  
15 don't have the money to do it.

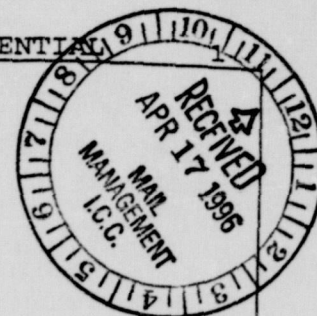
16 And then we have to go back to a  
17 customer like Dow and admit to Dow, say, well,  
18 gee, fellas, while we're handling a large segment  
19 of your business, financially we're not healthy.  
20 Okay. And our service isn't good either, you  
21 know. You don't go and throw your guts in front  
22 of one of your best customers. So there was a  
23 lot of concern internally about how do you  
24 respond to Dow Chemical and let them down easy.

25 Q. Our time is running short, I'll just

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1 UNITED STATES OF AMERICA

2 SURFACE TRANSPORTATION BOARD

3 IN THE MATTER OF:

4 UNION PACIFIC CORPORATION, \*  
5 UNION PACIFIC RAILROAD COMPANY, \*  
6 and MISSOURI PACIFIC RAILROAD \*  
7 COMPANY \*

8 - CONTROL AND MERGER - \*

9 SOUTHERN PACIFIC RAIL CORPORATION, \*  
10 SOUTHERN PACIFIC TRANSPORTATION \*  
11 COMPANY, ST. LOUIS, SOUTHWESTERN \*  
12 RAILWAY COMPANY, SPCSL CORP., \*  
13 AND THE DENVER AND RIO GRANDE \*  
14 WESTERN RAILROAD COMPANY. \*

Finance Docket  
No. 32760

15 ORAL DEPOSITION OF

16 GERALD GRINSTEIN

17 COPY

18 On the 16th day of February, 1996, at 9:00  
19 a.m., the oral deposition of the above-named witness  
20 was taken at the instance of Kansas City Southern,  
21 before Michelle L. Munroe and Donna A. Watkins,  
22 Certified Shorthand Reporters in and for the State of  
23 Texas, at the Law Offices of McDonald Sanders,  
24 777 Main Street, in the City of Fort Worth, County of  
25 Tarrant, State of Texas, pursuant to Notice and the  
agreements hereinafter set forth.

1 A. I never thought about it.

2 Q. Just so I understand, you had no expectation  
3 that they would be kept confident and no expectation  
4 that they might be published?

5 A. Well, I knew that whatever I said might be  
6 published.

7 Q. Were any questions submitted to you in  
8 advance of the actual interview?

9 A. No.

10 Q. After you gave the interview but prior to  
11 when the article was published, were you given the  
12 opportunity to review the article?

13 A. No.

14 Q. After the article was published, did you  
15 have an opportunity or did you take an opportunity to  
16 actually read it?

17 A. I read it.

18 Q. Once you read it, did you have any concerns  
19 that the article inaccurately represented anything  
20 that you might have stated?

21 A. Much to my surprise, I don't think it did.

22 Q. So then I take it -- well, let me just ask  
23 you: Did you attempt to contact anyone at Forbes to  
24 make any changes or to try to have anything retracted?

25 A. No.

1 achieved by intermodal coordination of services?

2 A. Tell me what those efficiencies are.

3 Q. The efficiencies that the applicants are  
4 claiming they're going to be able to say the overhead,  
5 the -- I'm not sure I quite understand what those  
6 efficiencies are either but -- well, let me back up.

7 MR. HEMMER: Objection to counsel's  
8 comments. I don't think we need --

9 MR. McGEORGE: Let me ask a clarifying  
10 question too. Did you say intermodal or interline?

11 MS. METALLO: Excuse me. Interline.

12 Q. Let me back up.

13 MS. JONES: You haven't laid any  
14 foundation.

15 MS. METALLO: Excuse me. I apologize.

16 Q. Are you familiar with what the applicants  
17 are claiming are their efficiencies?

18 A. No.

19 Q. No, you're not. In your view, do you think  
20 that UP/SP merger should be approved?

21 A. No.

22 Q. Can you explain why?

23 A. Yeah. I said part of it in this article and  
24 I think it will have a triggering effect. It's an  
25 overlapping merger, and I think it will set a



1 precedent that it could be followed by the -- whatever  
2 the new organization is called in approving other  
3 mergers. And I think that the SP is not a failing  
4 company and need not fail; and, therefore, I don't  
5 think it would need to be approved.

6 Q. That's all the questions I have about the  
7 article. I'd like to just explore a little bit more  
8 with you the issue of the BNSF settlement negotiations  
9 with UP/SP. I understand from your responses to some  
10 of Mr. McGeorge's questions that you did not have a  
11 direct role in those negotiations.

12 A. That's correct.

13 Q. Can you tell us when the UP/SP settlement  
14 negotiations with BNSF actually began?

15 A. No.

16 Q. Could you tell us who in the organization in  
17 BNSF might actually know that?

18 A. Mr. Krebs.

19 Q. When did you first become aware of the BNSF  
20 UP/SP negotiations?

21 A. I can't give you an exact date. I was aware  
22 of it when it began, but I just don't know exactly  
23 what that date was.

24 Q. Summer of '95?

25 A. What was the date of the announcement

1 MR. BRIGANCE: We can go ahead and mark  
2 it. Why don't we do that. Is this Exhibit 2?

3 THE COURT REPORTER: Yes.

4 (Exhibit Number 2 marked.)

5 A. Put your question to me. Did I know that  
6 the UP/SP was upset?

7 Q. Yes.

8 A. No, I didn't know that.

9 Q. So you had no discussions with a  
10 representative of the Union Pacific or the Southern  
11 Pacific that --

12 A. No.

13 Q. -- expressed disappointment in your  
14 comments?

15 A. No.

16 Q. What about from the BNSF? Did anybody from  
17 the BNSF contact you?

18 A. Splendid silence.

19 MR. BRIGANCE: Can we go off the record  
20 for a minute?

21 (Off the record.)

22 MR. WEICHER: Back on the record.

23 FURTHER EXAMINATION

24 BY MR. McGEORGE:

25 Q. Would problems arising for a railroad that

1 is providing -- I'll put a quotation around this --  
2 "service with a disability," when operating via  
3 trackage rights, affect shippers as well?

4 A. Could.

5 Q. I'm going to ask you to put yourself in the  
6 position of a shipper, at least for a moment. If you  
7 had the option of either of two railroads that would  
8 gain access to your facilities and to your traffic,  
9 one of which operated over trackage rights over the  
10 relevant track and the other operated over a line that  
11 it had purchased, which would you choose, all other  
12 factors being equal?

13 A. Let me ask you what you mean by "all other  
14 factors." Rates are exactly the same?

15 Q. No. Let's assume you don't know what rates  
16 are going to be because that will occur in the  
17 future.

18 A. Well, if I were a shipper, I would go -- I'd  
19 have to -- I mean, rate is going to be a significant  
20 part of it, and I'd go to the shipper who is not going  
21 over his own line and ask -- I mean, go to the carrier  
22 not going over his own line and ask, how can you  
23 enforce the service that I'm asking you to give me?  
24 In other words, what leverage have you got to make  
25 sure that I get that reliability, and I would also go



1 to the shipper who owns his own line and check the  
2 quality and condition of that line and his financial  
3 ability to maintain it.

4 Q. Okay. Just to make it clear, I'm talking  
5 about the shipper who purchased this line from one of  
6 the two merged railroads?

7 MS. JONES: A shipper who purchased --

8 Q. Excuse me, a carrier. A railroad that --

9 A. Yeah.

10 Q. Maybe we should go back. I'll put it in  
11 context. Let's assume there's a merger proceeding.

12 A. Right.

13 Q. And you're a shipper located at a two-to-one  
14 point, and you know that the merged railroads are  
15 going to have to provide access to your facilities to  
16 some railroad. And in this hypothetical situation,  
17 you got the option somehow, you've got the option to  
18 choose one of two railroads, one of which will provide  
19 service from/to your plant via trackage rights, that  
20 it acquires from the merged railroad. The other  
21 option is to obtain service from a railroad that is  
22 willing to buy track from the merged railroad. This  
23 is my hypothetical. My second hypothetical, just so  
24 we can isolate some factors, is to assume all other  
25 factors being equal it's between two railroads that

1       could be in a position to serve your plant after the  
2       merger. I think I finished with my hypothetical, and  
3       now I'm asking you as a shipper, which would you  
4       prefer?

5           A. Well, I would go to the carrier that's  
6       acquired the trackage rights and say to that carrier,  
7       what assurance can you give me that you'll make your  
8       service commitments. And if you can't get either a  
9       financial guarantee or some certainty about the  
10      service, then you might well prefer the other, but,  
11      you know, we're talking rates out of it.

12          Q. And I am taking rates out of it, because you  
13      wouldn't know, I assume, which rates either of the two  
14      railroads would charge in the future. But I do not  
15      want to limit you. If you're thinking of a way that  
16      you can put rates into the picture, I'd like to hear  
17      your views.

18          A. If you were a smart shipper, you'd go to the  
19      carrier that served you directly and say what rate are  
20      you going to charge me, and then you'd go to the other  
21      one and find out that rate. But you would need  
22      assurance from that carrier that you're going to be  
23      able to get a level of service that allows you, as a  
24      business owner, to be competitive in your relevant  
25      marketplace.

1 A. No.

2 Q. And was that matter resolved relatively  
3 quickly with CNW?

4 A. No.

5 Q. Were you able to reach a resolution with  
6 CNW?

7 A. No. It was still hanging fire until the UP  
8 bought the CNW.

9 Q. Once the UP bought the CNW, was the matter  
10 resolved to both parties' satisfaction?

11 A. Well, I think that it was. I don't know  
12 that the UP was totally satisfied with it, but it  
13 became a dormant issue.

14 Q. Is Burlington Northern -- has Burlington  
15 Northern been an effective competitor for traffic to  
16 and from Houston and Galveston?

17 A. We've had severe service disability in the  
18 Houston market, and so I would say we're not -- I  
19 would not claim that we were as good a competitor as  
20 we should be.

21 Q. Are those service disabilities in the  
22 Houston area?

23 A. Yes.

24 Q. Has BN's ability to compete for traffic to  
25 and from Houston been adversely affected by trackage



# Can Drew Lewis drive the golden nail?

By Christopher Palmeri and Ann Marsh



With little opposition, merger after merger has reduced the number of first-class railroads from 40 to 10. So why is the proposed Union Pacific-Southern Pacific deal stirring up such a fuss?

ONE HUNDRED and twenty-six years ago representatives of the Union Pacific and Central Pacific railroads finally tied America together physically by driving the golden spike at Promontory Point, Utah. Rail lines now stretched coast to coast in an unbroken line. But for more than a century railroading remained a fragmented industry.

In the past two decades, however, it has been slowly consolidating. Since the industry was deregulated with the 1980 Staggers Rail Act, the number of large, Class 1 railroads has gone from 40 to 10. Railroad mergers have worked well. Better financed—and thus better able to make capital improvements—and less regulated, the once bankruptcy-stricken industry is prospering (*see table, p. 64*). The U.S. system delivers more cargo with a third less equipment, is twice as profitable and pays its remaining employees twice as much as was the case 15 years ago.

At the same time a great many customers are getting better service and lower rates. The railroad industry's average revenue per ton-mile, a

Union Pacific Chairman Drew Lewis. Friend of Ronald Reagan, active Republican, he'll need all his political skills to pull off the Southern Pacific merger.

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## Railroad mergers

proxy for freight rates, is half of what it was in 1980 after adjusting for inflation. After decades of losing ground to trucks, railroads are now taking back business over longer hauls.

The urge to merge is still, therefore, strong. After a bitter four-month battle with the Union Pacific over the Santa Fe Corp., Burlington Northern is now digesting that acquisition, which became official in September. Management says it can save more than \$560 million a year in costs by merging the two railroads.

Having lost the Santa Fe, Union Pacific's Chairman Drew Lewis is determined not to lose his other prospective partner, the strategic but financially weak Southern Pacific. If the acquisition goes through, it will change the nation's railroad landscape. Between them, the Burlington Northern Santa Fe and the Union

**While mergers may make for more efficient and profitable railroads, at what point do they harm the interests of the public?**

Pacific/Southern Pacific will control more than 90% of all car loadings west of the Mississippi, and nearly 60% of all railroad revenues in the country.

Perhaps most important, by winning the Southern Pacific Lewis will prevent easterners like Conrail, Norfolk Southern or CSX from coming in, grabbing the Southern Pacific and creating the first transcontinental railroad.

Given the efficiencies to be gained, Lewis figured the merger would be a sure thing. The ancient and creaking Interstate Commerce Commission, which oversees the railroads, will go out of business by the end of the year, to be replaced by a group within the Department of Transportation. The old ICC slowed mergers by habit, but the new group is expected to handle this merger on a fast track.

Nevertheless, Drew Lewis will have some persuading to do. There are end-to-end mergers and side-by-side mergers. The former involves putting together railroads that connect rather than compete. Side-by-sides put together railroads that tend to compete.

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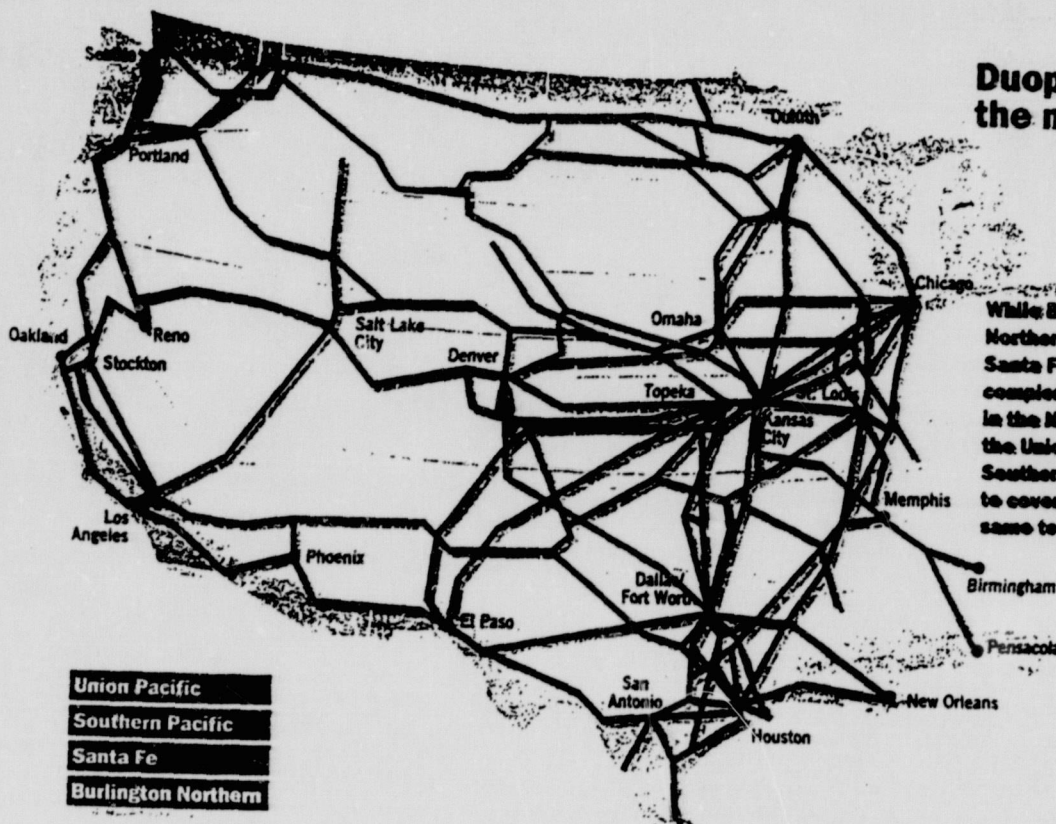


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## Duopoly in the making?

While Burlington Northern and the Santa Fe seem to complement each other in the North and South, the Union Pacific and Southern Pacific seem to cover much of the same terrain.

Unlike the Burlington Northern and Santa Fe, the Union Pacific and Southern Pacific have many tracks that run parallel, more than 4,000 miles, or 11% of the combined system. In addition, a merged UP/SP would control as much as 70% of the petrochemical shipments from the Texas Gulf Coast and 90% of train traffic with Mexico. Cities like San Antonio and Little Rock would be left with only one railroad.

Goaded by union leaders who want to save jobs and rival railroads who are afraid of the Union Pacific's heft, strong opposition to the UP/SP deal has emerged. Kansas City Southern, a rival railroad that runs north-south from Kansas City to the Gulf of Mexico, has helped form the Coalition for Competitive Rail Transportation. Its mission: to derail or significantly alter the UP/SP merger. Big companies like Baker Hughes, Huntsman Chemical, Shell Chemical and Quaker State have signed on.

Offers for pieces of the Southern Pacific systems have poured in from the Kansas City Southern, the Illinois Central, Conrail and Texas Rail Link,

a consortium sponsored by Dallas short-line co-owner Roy Coffee.

To make matters worse for Lewis, the Union Pacific is having a great deal of trouble integrating its acquisition of the Chicago & North Western railroad, completed earlier this year. The Union Pacific Railroad's president, Ronald Burns, took the unpleasant step of apologizing to customers in a letter, widely circulated, in early November. He called the railroad's service problems "unprecedented." Which is true: UP has a reputation for good service. But the troubles with integrating the merger came at an embarrassing time.

But the bigger question is this: While mergers may make for more efficient and profitable railroads, at what point do they harm the interests of the public?

Frederick Palmer is the chief executive of the Western Fuels Association, a cooperative that buys coal for a number of smaller utilities. Western has an ax to grind: It operates two short-line railroads and would like more access to Union Pacific tracks. But Palmer summarized the feelings

of a lot of small shippers in mid-November when he testified before a joint hearing of the House and Senate on the effect of railroad mergers on small business. "Those shippers who have the means of securing competitive bids among railroads are paying less and less," Palmer said. "Those of us who are captive shippers are paying more and more."

The issue of captive shippers has haunted the railroads for years, but when the industry gets down to just two railroads in the West, the problem becomes more acute. Montana has been served by only the Burlington Northern for 20 years. Montana shippers argue that they pay the highest freight rates in the country. Montana farmers and grain elevator operators maintain that it costs as much to ship grain from Montana to Portland, Ore. as it does to ship from Nebraska to Portland, even though the distance is 900 miles less. Burlington Northern disputes the comparison. Montana freight rates have been the subject of a long-running court battle.

Phillip Hoffman runs Hoffman & Reed, a small grain elevator in Tren-

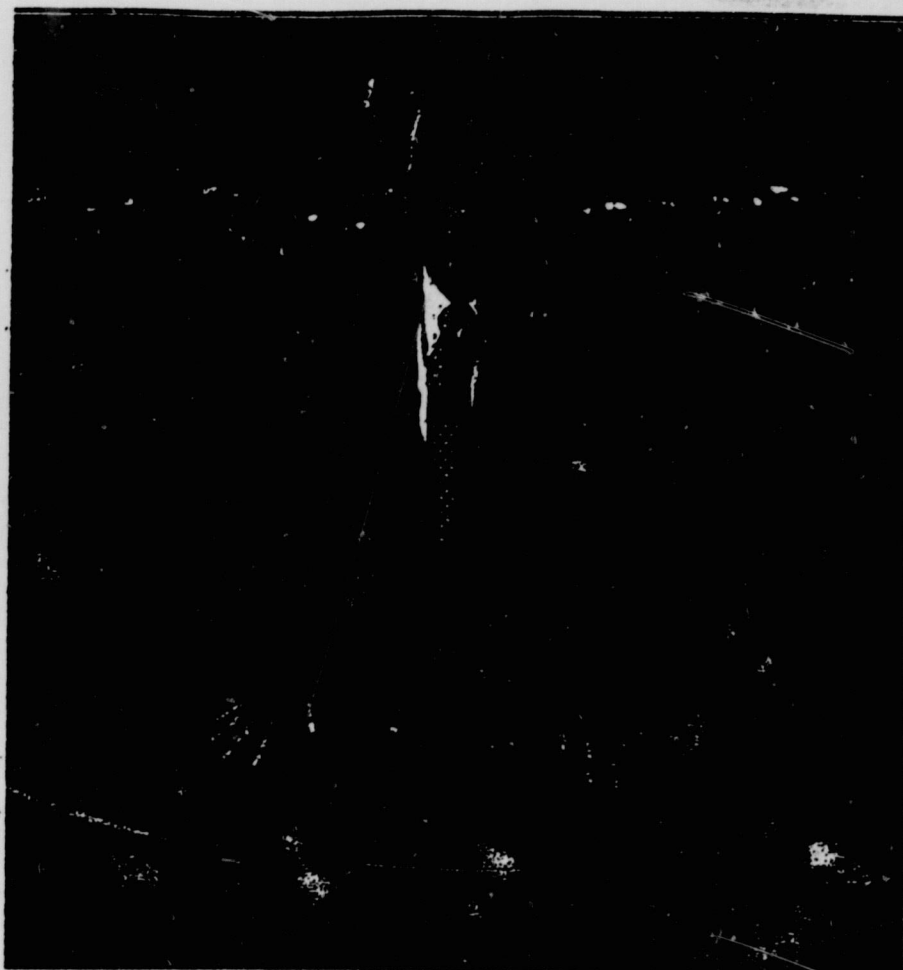


## Railroad mergers

Burlington Northern Santa Fe  
Chairman Gerald Grinstein

**"If you run into a situation where Congress might want to reregulate the industry, I don't think that's to anyone's advantage."**

A Santa Fe rail line  
**Jerry Grinstein's last big move.**



ton, Mo. He also testified before Congress. Even though he is situated right on a Union Pacific line, the railroad told him recently that it will no longer stop for his smaller loads. Now Hoffman trucks his wheat to a larger elevator, where it is transferred to trains. Because it takes four trucks to equal one railcar, Hoffman's costs are up, and he wonders who will pay for the wear and tear on the roads. The trains still roll by his elevator, however. "They wave as they go by," he says.

Drew Lewis had hoped to assuage a lot of customers' fears by signing in late September an agreement that opened up a great deal of the Union Pacific and Southern Pacific's track to Burlington Northern trains. The largest such "trackage rights" agreement in history would in theory allow Burlington Northern to compete for customers right in the heart of UP territory—thus assuring competition. But

suspicious shippers muttered that the Union Pacific and Burlington Northern were carving up the West in a duopolistic power play.

The complainers point to the Kansas City Southern, which has an agreement with the Union Pacific to haul grain from three Midwestern states to Kansas City. In reality, the grain often sits there for weeks while the Union Pacific carries only its own customers' grain. The Union Pacific maintains the lines are often congested, and its own trains are held up as well.

In late November FORBES interviewed Burlington Northern Santa Fe Chairman Gerald Grinstein in the company's new Network Operations Center, a kind of Mission Control that will consolidate dispatching and maintenance across the Fort Worth-based company's 31,000-mile system. Burlington's chief executive since 1989, Grinstein has had a tough

time getting the railroad in shape. For a while it looked as if Burlington was falling behind (FORBES, Mar. 15, 1993), but that underestimated Grinstein. He slowly turned the company around and completed the merger with Santa Fe.

Grinstein is expected soon to announce his retirement. Perhaps because he is at the end of his career, Grinstein was especially candid with FORBES.

What does he think of the UP/SF merger? "I look at the merger as a trigger," Grinstein says. "Because there is so much overlap if they allow them to merge that it encourages other mergers. When you get down to just two railroads in the country, then you run into a situation where Congress might want to reregulate the industry, and I don't think that's to anyone's advantage."

Although Burlington Northern

Benefits of consolidation										
Railroad	Sales 1995E (\$ mil)	Income 1995E (\$ mil)	Market value (\$ mil)	Debt as % of equity	5-year annual return	Recent price	Earnings per share 1995	Earnings per share 1996 (estimated)	P/E	Yield
Burlington Northern Santa Fe	\$6,232	\$620	\$7,227	76%	30.3%	80	\$5.80	\$6.25	14	2.2%
Conrail	3,700	435	5,494	66	33.0	69	4.76	5.32	14	2.5
CSX	10,410	720	8,993	70	26.3	85 1/2	6.91	7.71	12	2.3
Illinois Central	650	125	1,651	72	40.7	38 1/2	3.04	3.44	13	2.7
Kansas City Southern	1,254	105	2,002	139	40.1	45 1/2	2.32	3.14	20	0.7
Norfolk Southern	4,729	705	10,451	33	18.0	77 1/2	5.45	5.95	14	3.0
Union Pacific	7,814	665	13,334	80	18.0	65 1/2	4.35	4.90	15	3.0

SOURCE: VALUERS, INC. (NYSE: VLI) VIA ONE SOURCE INFORMATION SERVICES

As mergers have brought costs down, railroad stocks have been a terrific investment over the last five years. Whether or not the big mergers continue will probably have a huge influence on stock prices.

will not oppose the UP/SP merger because of its trackage rights agreement, Grinstein admitted that trackage rights do not necessarily insure unfettered competition. "It's service with some disability," he says. "You've got track maintenance issues and dispatch issues. It's quite different from owning your own track."

Why then did Burlington Northern negotiate the trackage rights and give the Union Pacific its strongest argument that there will be competition in the West? "What choice would you have if you are faced with a merger that could be approved?" he says. "You've got to protect yourself."

Grinstein says he doesn't buy the Union Pacific argument that the financially troubled Southern Pacific couldn't survive on its own. In his

view, the future lies in more coordination of service between railroads and not in outright mergers. "We have long delays in Chicago for cargo going through Conrail to eastern markets," he says. "We need more coordination of information systems, dispatching and traffic. That's the future of our industry."

Reached by telephone just before heading off on a hunting trip with the chairman of Bethlehem Steel, Drew Lewis gave FORBES his side of the story. "The Southern Pacific is a failing railroad; shippers have to be better off with the Union Pacific owning it," he says. "We are going to have fierce competition. We don't have anything to gain by not serving smaller customers as well. They'll just make our life difficult."

The Union Pacific is expected to deliver its proposed plan of acquisition to the Interstate Commerce Commission by Dec. 1. By no means are all the customers opposed. The proposal is expected to include letters of support from more than 1,300 customers, some of whom were offered extended contracts with no rate increases in exchange for their blessing of the merger.

Lewis, a secretary of transportation under President Reagan, knows his way around Washington. Southern Pacific's chairman, billionaire Philip Anschutz, is a major fundraiser for Bob Dole. These guys have clout. They are determined to push their merger through. But there are a lot of people out there who want to stop it.

## Wire me a ton



A Burlington Northern coal train  
More than half the nation's electricity comes from coal.

HAULING COAL is a huge business for the railroads, accounting for as much as 25% of the revenues at our firms like Burlington Northern and Union Pacific. People forget, more than half of all the electricity in the U.S.—50%—is generated by coal-burning plants. While hauling coal creates revenues for railroads, it is a major cost for utilities. No surprise that people like Fairview Heights, Ill.-based Zeigler Coal, one of the nation's largest coal companies, is experimenting with what the industry calls "coal by wire." It works like this: An electric utility could buy coal from Zeigler and have it shipped to the nearest utility with excess generating capacity. That utility could convert the coal to electricity and send it along wires to the utility that needed the power. The transmission line would replace the railroad. No one is predicting the end of coal shipments, but threats like this keep the railroads on their toes. One more example of how deregulation stimulates innovation.

—C.P.

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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 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.

Wednesday, February 14, 1996

Deposition of CARL R. ICE, 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 MARY  
GRACE PRESTO, 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., at 10:00 a.m., Wednesday,  
February 14, 1996, and the proceedings being  
taken down by Stenotype by MARY GRACE PRESTO,  
RPR, and transcribed under her direction.

**ALDERSON REPORTING COMPANY, INC.**

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1 A. We use our own crews to San Antonio.

2 Q. And beyond San Antonio?

3 A. Beyond San Antonio, SP is providing the  
4 crews.

5 Q. How about power?

6 A. That depends. Sometimes it comes out  
7 of San Antonio, sometimes at Eagle Pass, I  
8 believe.

9 Q. Let's go back to the directional flow,  
10 if I may for a moment. You said you are aware of  
11 the directional flows in the Houston-Memphis  
12 corridor, is that correct?

13 A. Yes.

14 Q. When did you become aware of that?

15 A. After UP and SP filed their  
16 application.

17 Q. So you were not aware of it at the time  
18 that the settlement agreement was signed?

19 A. No.

20 Q. Have you been provided a copy of the  
21 application of Union Pacific/Southern Pacific in  
22 this proceeding?

23 A. No.

24 Q. On page 9 of your statement, you state  
25 that Burlington Northern/Santa Fe will be in a

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1 "excellent position to assist in achieving the  
2 free trade promise of NAFTA." Does that include  
3 access to Brownsville?

4 A. Yes.

5 Q. And how many trains does Burlington  
6 Northern/Santa Fe plan on sending to Brownsville  
7 after the merger?

8 A. That would depend on the level of  
9 business that we obtain.

10 Q. At the start are you planning on  
11 running trains under your own crew and power or  
12 using haulage rights?

13 A. Don't know that yet.

14 Q. Have you read the statement of  
15 Mr. Owen?

16 A. Yes.

17 Q. You mean Neal Owen?

18 A. Yes, I have.

19 Q. I'm sorry, Mr. Owen. Did Mr. Owen make  
20 any statements with reference to whether or not  
21 Burlington Northern/Santa Fe plans on running  
22 haulage or trackage or running to Brownsville via  
23 haulage rights or trackage rights?

24 A. May I look at his statement?

25 Q. If you wish. But you don't remember?

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1 A. I would have to look at his statement.

2 Q. Fine.

3 A. His statement says BN/Santa Fe would  
4 operate run-through trains.

5 Q. To Brownsville from Houston?

6 A. Initially we would utilize the UP/SP  
7 trains as provided by the agreement.

8 Q. Have you reviewed the statement of  
9 Mr. Owen before today?

10 A. Yes.

11 Q. Do you remember when you first reviewed  
12 it?

13 A. Around the time that we submitted our  
14 filing.

15 Q. On page 10, you state that based on --  
16 MR. WEICHER: You're referring to  
17 Mr. Ice's statement now?

18 MR. EDWARDS: Yes, I'm sorry.

19 BY MR. EDWARDS:

20 Q. On page 10 of your statement, at the  
21 last paragraph on the page, the second sentence,  
22 you state, Based on my experience, I believe that  
23 the proposed services and operations detailed in  
24 Mr. Owen's statement are feasible.

25 Did you conduct a study or any analysis

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1 to determine whether or not those operations  
2 would be feasible or did you base your statement  
3 there only upon your past experience?

4 A. On my experience.

5 Q. There is no separate study or analysis  
6 that you conducted?

7 A. No.

8 Q. When you entered into -- at the time  
9 that Burlington Northern/Santa Fe entered into  
10 its agreement with the Union Pacific/Southern  
11 Pacific, had there been a study or analysis to  
12 determine whether or not the operations BN/Santa  
13 Fe had -- let me strike that.

14 Are the levels of operations planned  
15 under Mr. Owen's statement essentially equivalent  
16 to those contemplated by the Burlington  
17 Northern/Santa Fe at the time that it entered  
18 into the agreement with Union Pacific/Southern  
19 Pacific.

20 MR. WEICHER: Mr. Edwards, are you  
21 referring to any specific aspect of operations?  
22 Where?

23 MR. EDWARDS: With reference to  
24 the -- globally, with reference to operations  
25 over the trackage rights and sale lines that were

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1 Q. When the UP/SP merger was announced,  
2 did you get out a map and look at the lines and  
3 try to figure out where competitive problems  
4 might arise as a result of the merger?

5 A. I don't remember if I looked at a map  
6 or not.

7 Q. Did you look at any other materials  
8 that might assist you in doing that analysis?

9 A. I don't think so.

10 Q. I think you said that ALK was retained  
11 sometime in mid-August 1995?

12 A. I said I thought that to be the case  
13 but I really don't know specifically.

14 Q. When was the first time you were  
15 contacted by anyone at UP regarding the UP/SP  
16 merger?

17 A. Either at the very end of August or the  
18 first part of September.

19 Q. So the request to have this analysis  
20 performed was done before you were aware of any  
21 interest on the part of the UP in discussing  
22 trackage rights?

23 A. Yes.

24 Q. Apart from any communications you may  
25 have had with UP -- strike that.

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1           Before this initial contact and in late  
2   August to early September, were you aware,  
3   through other sources, that UP was seeking to  
4   negotiate trackage rights agreements in  
5   connection with the UP/SP merger?

6           MR. WEICHER: Excuse me, can you  
7   clarify? Are you talking about with anybody or  
8   with somebody in particular?

9           MR. GOODSON: With anybody.

10          THE WITNESS: I was not specifically  
11   aware. I think I heard people make comments that  
12   there were discussions otherwise. BN or Santa Fe  
13   had discussions with them in that time frame.

14          BY MR. GOODSON:

15          Q. I'm not sure I understand the last part  
16   of that answer. Can you clarify?

17          A. I was concerned when you said any  
18   parties. My discussions with UP were either at  
19   the end of August or the beginning of September,  
20   as I said. Those occurred at the point where we  
21   began to have discussions -- either of us began  
22   to have discussions with UP.

23          Q. Either of us meaning?

24          A. BN or Santa Fe. Actually, at the point  
25   we began to talk with them -- no, I'm sorry, we

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1 A. I believe I did.

2 Q. Prior to that contact, had you  
3 considered initiating a communication with  
4 them -- them meaning UP/SP -- concerning your  
5 approach or response to the merger?

6 MR. WEICHER: I'm going to object to  
7 the extent it requests information on the  
8 company's negotiating strategy with UP.

9 BY MR. GOODSON:

10 Q. Well, I believe that -- I'm not asking  
11 for negotiating strategy per se. All I'm  
12 interested in finding out is whether you had it  
13 in your mind or had discussions with anyone other  
14 than attorneys concerning making a first approach  
15 to UP or SP regarding your response -- Santa Fe's  
16 response to the UP/SP merger.

17 MR. WEICHER: You can answer that from  
18 a business standpoint without getting into legal  
19 strategy in the case and so forth.

20 THE WITNESS: Yes, we considered it but  
21 we had not formulated our strategy.

22 BY MR. GOODSON:

23 Q. Is it fair to say that at the time you  
24 were contacted by Rebensdorf that you were still  
25 considering that strategy?

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1 the last couple of minutes?

2 A. In any of the corridors?

3 Q. Yes. Let's take the Arkansas corridor  
4 first.

5 A. I don't believe there was in what's  
6 defined as the Arkansas corridor. But let me  
7 say, I did not make an effort to specifically  
8 analyze all build-in opportunities.

9 Q. I take it that going into this first  
10 meeting, that one of the things you were looking  
11 at was to obtain trackage rights along these  
12 corridors that you had identified?

13 A. Yes.

14 Q. Did you perform any kind of analysis to  
15 determine what kind of fees would be appropriate  
16 for trackage rights along those corridors?

17 A. Prior to that first meeting?

18 Q. Yes.

19 A. No.

20 Q. Did you do any such analysis subsequent  
21 to that first meeting?

22 A. No.

23 Q. Have you ever done an analysis, such an  
24 analysis?

25 A. For this settlement agreement?

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1 Q. Yes.

2 A. No.

3 Q. So sitting here today, you have not  
4 performed -- and when I say you, maybe that's the  
5 problem. I was using the raw you, meaning you or  
6 anyone on behalf of --

7 A. Everybody does about me.

8 Q. Do I have to go back and ask these  
9 questions again?

10 A. No.

11 Q. Just so I make sure I understand, no  
12 one on behalf of BN or Santa Fe or the merged  
13 BN/Santa Fe has ever analyzed appropriate --  
14 strike that.

15 Has anyone from BN, Santa Fe or  
16 BN/Santa Fe as a merged entity analyzed the rates  
17 that are to be charged under the settlement  
18 agreement?

19 A. I'm sorry but help me with -- when you  
20 say analyzed appropriate rates, what do you mean  
21 by that?

22 Q. Analyze whether those rates would allow  
23 you to provide competitive service along those  
24 segments over which you were granted trackage  
25 rights.

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1 there was a routine established. We had a group  
2 of people that looked at potential responses, as  
3 I mentioned earlier, which we've covered several  
4 times what those were, oppose, settle or look at  
5 other mergers. Once UP contacted us and asked if  
6 we were interested in settlement discussions,  
7 then Mr. Weicher and I worked on -- we had those  
8 negotiations with UP.

9 Q. And so the record is clear, because I'm  
10 not sure if this was established earlier, it was  
11 UP that contacted Burlington Northern/Santa Fe  
12 about some agreement in connection with the UP/SP  
13 merger?

14 A. I believe so, yes.

15 Q. Let me go back a little in history and  
16 try to come through some things chronologically.  
17 What was your position in 1988?

18 A. 1988?

19 Q. Yes.

20 A. I'll have to think about that for a  
21 minute.

22 Q. I've got your statement in front of  
23 me. You could look at page 1 and try to  
24 determine where you fell in there.

25 A. That would be helpful. I think I was

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1 A. Yes.

2 Q. Using your business judgment, do you  
3 believe it would continue to be a vigorous  
4 competitor -- and by it, I mean UP -- in the  
5 absence of a merger with Southern Pacific?

6 A. Yes.

7 Q. I'll switch to SP. In markets served  
8 by both Burlington Northern/Santa Fe and Union  
9 Pacific today, is the Southern Pacific a vigorous  
10 competitor to BN/Santa Fe?

11 A. Perhaps I should have asked this  
12 earlier but would you define vigorous for me?

13 Q. I think that was your term.

14 A. I knew you were going to say that.  
15 Yes, I think they are.

16 Q. And in your business judgment, do you  
17 think Southern Pacific would continue to be a  
18 vigorous competitor even if the merger does not  
19 go through?

20 A. Yes.

21 Q. In fact, isn't the Southern Pacific  
22 generally known as a price cutter in the railroad  
23 industry?

24 A. No, not necessarily.

25 Q. Do they occasionally undercut BN/Santa

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1 consultants, is that correct?

2 A. Yes.

3 Q. Maybe the best way is to just ask it  
4 this way. To your understanding, in their  
5 verified statements, are they telling us what  
6 BN/SF could do with its trackage rights, or are  
7 they telling us what BN/SF's present intentions  
8 are?

9 A. I think some of both. The operating  
10 plan, or the way Mr. Owen describes the plan, is  
11 a way that we can operate. Clearly there are a  
12 lot of details that have to be worked out. In  
13 large part, Mr. Lawrence's testimony shows how  
14 much traffic is available. So that's good, I  
15 think.

16 Q. To the extent they talk about plans as  
17 to how you would provide the service, are they  
18 speaking for BN/Santa Fe as to its present  
19 intentions or are they more in the nature of  
20 telling us what some of your options are or what  
21 you could do?

22 A. I reviewed Mr. Owen's plan and I said I  
23 believed it to be feasible. So absent  
24 improvements on that, we would do something like  
25 that. We will view the locations we get under

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1 this agreement, the ones in appendix A, like any  
2 other point on our system.

3 Q. Have you had any discussions with  
4 Mr. Grinstein concerning operational problems  
5 over trackage rights?

6 A. No.

7 Q. Have you had any discussions with him  
8 concerning the ability of Southern Pacific to  
9 survive if it's not acquired by another railroad?

10 A. I'm sorry, can we back up to the  
11 previous question?

12 Q. Sure.

13 A. Did you mean in terms of our agreement  
14 with UP and SP?

15 Q. I meant it more broadly than that. As  
16 a general matter or --

17 A. There may have been some occasions over  
18 the years that on some trackage rights agreements  
19 that there may have been some discussions about  
20 things that may not have worked properly. I did  
21 not discuss this agreement.

22 Q. I am going to narrow this in the sense  
23 of your discussions with Mr. Grinstein on these  
24 various topics.

25 A. Okay.

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1 question. I had a series of questions for you  
2 concerning whether you thought that BW/Santa Fe  
3 would have the critical mass to provide an  
4 efficient service and similar questions about  
5 directional trains and specialized yards and so  
6 forth. Have you performed any studies or seen  
7 any studies on any of those issues?

8 A. No.

9 MR. MCGEORGE: I think I have no more  
10 questions for you. I thank you very much.

11 (Whereupon, at 6:15 p.m., the taking of  
12 the instant deposition ceased.)

13  
14 \_\_\_\_\_  
15 Signature of the Witness  
16

17 SUBSCRIBED AND SWORN to before me this \_\_\_\_\_  
18 day of \_\_\_\_\_, 19\_\_.

19  
20 \_\_\_\_\_  
21 NOTARY PUBLIC

22 My Commission expires: \_\_\_\_\_  
23  
24  
25

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1                               BEFORE THE  
2                               SURFACE TRANSPORTATION BOARD  
3                               Finance Docket No. 32760  
4       UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD  
5       COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY  
6                               -- CONTROL MERGER --  
7       SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN  
8       PACIFIC TRANSPORTATION COMPANY, ST. LOUIS  
9       SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE  
10       DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY  
11                               HIGHLY CONFIDENTIAL

12                               Washington, D.C.

13                               Monday, March 4, 1996

14               Continued deposition of CARL R. ICE, a  
15       witness herein, called for examination by counsel  
16       for the Parties in the above-entitled matter,  
17       pursuant to agreement, the witness being  
18       previously duly sworn, taken at the offices of  
19       Mayer, Brown & Platt, 2000 Pennsylvania Avenue,  
20       N.W., Washington, D.C., 20006-1882, at 9:35 a.m.,  
21       Monday, March 4, 1996, and the proceedings being  
22       taken down by Stenotype by JAN A. WILLIAMS, RPR,  
23       and transcribed under her direction.

24  
25                               ALDERSON REPORTING COMPANY, INC.

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1 to commencing the rights?

2 Q. Let's start with that, yes, do you need  
3 commitments prior to commencing the rights?

4 A. No.

5 Q. Will you commence operations without  
6 having any new traffic available to serve the  
7 points opened by the agreement?

8 MR. WEICHER: Excuse me. Are you  
9 asking that as a follow-up to your prior question  
10 under commitments?

11 MR. BERCOVICI: The witness stated that  
12 it would not require commitments. So that was a  
13 follow-up question, yes.

14 MR. WEICHER: You can answer it if you  
15 follow it.

16 THE WITNESS: Could you repeat the  
17 question.

18 MR. BERCOVICI: Could you read back the  
19 question, please.

20 THE REPORTER: "Question: Will you  
21 commence operations without having any new  
22 traffic available to serve the points opened by  
23 the agreement?"

24 THE WITNESS: It's possible that we  
25 would reroute some traffic. But obviously we

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1       won't -- we would start operations once we had  
2       customers that wanted to utilize the rights.

3               BY MR. BERCOVICI:

4       Q.     Might it also be necessary for BN/SF to  
5       commit capital to implement the plan described by  
6       Mr. Owen?

7       A.     It might be.

8       Q.     You told us in your prior day of  
9       sitting before us on deposition that neither  
10      Mr. Owen nor Mr. Lawrence is an employee of the  
11      company but rather both are consultants. Does  
12      BN/SF have personnel capable of preparing the  
13      type of plan that Mr. Owen prepared?

14      A.     Yes.

15      Q.     And of conducting the type of analysis  
16      that Mr. Lawrence prepared?

17      A.     I believe some of the information that  
18      Mr. Lawrence looked at would not be available  
19      to -- was highly confidential and, therefore, not  
20      available to an employee of our company.

21      Q.     Can you tell us why the company chose  
22      to offer testimony concerning the operations from  
23      a consultant rather than an employee?

24               MR. WEICHER: I'm directing the witness  
25      not to answer to the extent your answer involves

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1 litigation strategy. He's already answered with  
2 respect to one other aspect I believe.

3 BY MR. BERCOVICI:

4 Q. Can you answer in that context?

5 A. No.

Q. Thank you. You have appended to your  
7 statement the September 25 agreement with the UP  
8 and SP and also you have appended a supplemental  
9 agreement dated November 18, 1995. Are there any  
10 other side or implementing agreements between the  
11 BN/SF and the UP and SP that have come into force  
12 or have been agreed upon yet?

13 A. You mean agreements associated with  
14 these rights?

15 Q. Yes.

16 A. No.

17 Q. Mr. Owen states on page 17 of his  
18 statement, at the bottom of the page, that --  
19 it's five lines from the bottom, there currently  
20 is a major storage in transit yard located just  
21 south of Dayton, Texas, operated by a  
22 contractor. BN/Santa Fe plans to access that  
23 yard, constructing new trackage, if necessary, to  
24 actively participate in the SIT traffic flows it  
25 would then be able to serve.

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1 Q. Are there plans ongoing to implement  
2 Mr. Owen's description?

3 A. I believe I had previously testified  
4 that we were establishing a team that I was  
5 mentoring who would be responsible to develop the  
6 detailed typical trackage rights agreements  
7 associated with the settlement agreement.

8 Q. Does the team have any further  
9 responsibility than simply developing the  
10 trackage rights agreements with the -- which  
11 would be with the UP/SP?

12 A. No. But I'd like to be clear in saying  
13 that, as part of that review, that that would  
14 include some of the decisions that need to be  
15 made for items such as whether we would do  
16 reciprocal switching or provide our own  
17 switching.

18 Q. Let me ask, there are certain  
19 admissions of the BN/Santa Fe, the first of which  
20 we asked for admission that BN/SF does not have  
21 any studies, analyses, reports, or plans  
22 regarding the construction or acquisition of  
23 additional storage capacity for plastics resins  
24 shipments. And the response that we received  
25 after certain objections was the following,

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1 BN/Santa Fe admits that, other than as contained  
2 in the verified statement of Neal D. Owen and in  
3 his related work papers, it has no such specific  
4 studies, analyses, reports, or plans at this time  
5 but that it is currently in the process of  
6 developing such plans.

7 Do you know of any such plans being  
8 developed?

9 A. I believe that references the process I  
10 just described, but I -- I believe we are still  
11 in the process of developing those plans.

12 Q. Does that process specifically address  
13 storage capacity?

14 A. If necessary.

15 Q. Is that in the assignment to the work  
16 team?

17 A. Yes.

18 Q. And who is on that work team?

19 A. As I said I'm the mentor of the team.  
20 I do not know at this point each member that has  
21 been established on the team.

22 Q. Do you know if any work has been done  
23 with regard to addressing the question of  
24 additional storage capacity?

25 A. No, I do not believe that's been done

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1 yet.

2 Q. Would your answer be the same with  
3 regard to plans relating to facilities and  
4 operations necessary to serve the plastics  
5 producers or plants not currently served by the  
6 BN/SF?

7 A. Do you mean beyond what's in Mr. Owen's  
8 testimony?

9 Q. Yes.

10 A. My answer would then be the same.

11 Q. That there are -- you don't believe  
12 that any additional work has been done beyond  
13 that at this point in time?

14 A. That's correct.

15 MR. WEICHER: That wasn't exactly the  
16 witness' answer. I think the question was plans  
17 and then the second question was work been done.  
18 He answered no work has been done, but he had  
19 previously said the process was on its way and  
20 people were working on it as opposed to plans  
21 been done, just to separate the flow of question  
22 and answer there.

23 THE WITNESS: That's correct, I was  
24 answering as to whether plans had been completed.

25 BY MR. BERCOVICI:

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1 Q. Wouldn't that be the first stage of  
2 providing for new service, the planning process?

3 A. Yes. But the planning process itself  
4 requires some preliminary work as well.

5 Q. Of what nature?

6 A. The specific determinations of capacity  
7 and where potential yards -- storage in transit  
8 yards might be appropriate.

9 Q. My last question related to facilities  
10 and operations necessary to serve plastics  
11 producers or plants not currently served by the  
12 BN/SF.

13 A. I'm sorry. The settlement agreement  
14 between Union Pacific/SP and BN/Santa Fe  
15 addresses access to terminals and facilities,  
16 that there will need to be some additional work  
17 done to specifically determine how we receive  
18 some of those services and/or how we provide  
19 them. And that would be the responsibility of  
20 this team as well, but those plans have not yet  
21 been developed.

22 Q. And have there been any studies or  
23 analyses related to developing those plans?

24 A. No, other than what was done in  
25 Mr. Owen's statement.

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1 Q. Are you familiar, Mr. Ice, with the  
2 expansion of the storage capacity at Teague,  
3 Texas?

4 A. I'm aware that the potential of that  
5 expansion has been reviewed. I'm not familiar  
6 with any expansion beyond that.

7 Q. Mr. Owen stated that he understood that  
8 there was a two-phased program for expanding the  
9 storage capacity at Teague. Do you have any  
10 knowledge on that program?

11 A. Not that I recall.

12 Q. Do you know what order of magnitude the  
13 expansion at Teague would consist of?

14 A. No.

15 Q. Does the BN/SF utilize a process which  
16 is fairly common in industry called authorization  
17 for expenditure in terms of evaluating and  
18 approving new capital expenditures?

19 A. We do evaluate and approve capital  
20 expenditures, yes.

21 Q. In terms of expanding the storage  
22 capacity for plastics shippers, would that  
23 require an evaluation under this process?

24 A. The investment would require approval.  
25 I'm not sure what you mean by evaluation.

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1 Q. What does the approval process consist  
2 of?

3 A. It depends on the item.

4 Q. Do you look at the cost?

5 A. Certainly.

6 Q. Do you look at the market opportunity?

7 A. For projects whose purpose is for  
8 market expansion, yes.

9 Q. Do you look at whether or not the  
10 project is projected to return your target  
11 capital?

12 A. Yes.

13 Q. Is there competition for access to  
14 available capital within BN/SF?

15 A. What do you mean by that?

16 Q. Is capital freely available to any  
17 project or do you prioritize projects to which  
18 the railroad commits its capital?

19 A. We don't have unlimited capital, but we  
20 do pursue projects that are justified. And I  
21 believe that in this case we are prepared to make  
22 the investments necessary and that are required  
23 by us under our UP/SP settlement agreement.

24 Q. Would that depend, Mr. Ice, upon your  
25 evaluation of the amount of traffic which would

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1 may have been some telephone conversation.

2 Q. And this would have been between the  
3 time you discussed this morning, when the UP  
4 first approached Mr. Grinstein, and the September  
5 25 date of the agreement; is that correct?

6 A. Yes. I believe I said this morning and  
7 repeated to you I don't recall specifically when  
8 it began, but it would have been in that time  
9 frame.

10 Q. I think you indicated this morning it  
11 was late August or early September.

12 A. Okay. I think I said that was the  
13 right time frame in response to a question.

14 Q. Did the BN/SF have its own wish list of  
15 service opportunities going into that meeting,  
16 the initial meeting?

17 MR. WEICHER: I'm going to ask you to  
18 clarify what you characterize as a wish list, if  
19 you would.

20 BY MR. BERCOVICI:

21 Q. Did the BN/SF have its own list of  
22 service points it desired to access prior to --  
23 scratch the prior to, in terms of initiating the  
24 discussions with the UP and SP?

25 A. We developed a viewpoint as to the

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## 1 AFTERNOON SESSION

2 (1:05 p.m.)

3 Whereupon,

4 CARL R. ICE,

5 the witness on the stand at the time of recess,  
6 having been previously duly sworn, was further  
7 examined and testified as follows:

8 MR. WEICHER: Mr. Wood, before you  
9 begin, there were a couple of things that were  
10 left hanging from this morning. Marty asked that  
11 we look at one more thing. Can we respond  
12 further on that and one other item before you  
13 begin, if that's all right?

14 MR. WOOD: That's fine.

15 MR. WEICHER: Mr. Ice, you were asked  
16 further at the break to look at the agreement and  
17 see if you had anything to add to the earlier  
18 question concerning the situation in your view  
19 that Burlington Northern/Santa Fe would have the  
20 right to utilize trackage at Dayton. And, if you  
21 want to add to that answer, go ahead.

22 THE WITNESS: Certainly. I believe  
23 that section 9 G on page 17 is the clause that  
24 indicates we have rights to facilities such as  
25 Dayton. If you read the last -- after the comma

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1 in the second line, access to such locations  
2 shall include the right to locate and serve new  
3 auto and intermodal facilities at such locations  
4 and to build yards or other support facilities as  
5 per trackage rights operations.

6 The other facilities as far as trackage  
7 rights observations I believe includes the Dayton  
8 facility. So I think this is the clause that  
9 gives us access to Dayton.

10 MR. BERCOVICI: May I ask a follow-up  
11 question.

12 MR. WEICHER: Sure.

13 EXAMINATION BY COUNSEL FOR  
14 THE SOCIETY OF THE PLASTICS  
15 INDUSTRY, INC., et al. -- Resumed  
16 BY MR. BERCOVICI:

17 Q. You said that gives us access to  
18 Dayton. This clause says and to build yards or  
19 other facilities?

20 A. Yes.

21 Q. Does that give you access to the  
22 existing storage track at Dayton?

23 A. Well, it seems to me that, if we have  
24 the right to build a facility, that a third-party  
25 facility that already exists is really

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1 effectively the same as that. So I do think,  
2 even with your comment, that this clause covers  
3 the right to access the existing Dayton facility.

4 Q. If that third-party facility is under  
5 contract from the facility operator to the SP,  
6 does that give you the right to access the SP's  
7 rights and trackage at Dayton?

8 A. No, it would not. If the entire  
9 facility is under contract, then obviously that  
10 facility has been -- the capacity of that  
11 facility has been exhausted and we would have to  
12 pursue other means.

13 Q. Do you have any knowledge as to whether  
14 or not that existing yard is, in fact, committed  
15 or not committed to the SP?

16 A. I don't have specific knowledge. It is  
17 my impression there is some capacity available,  
18 but I don't have specific knowledge.

19 Q. So it's only if the SP is not the  
20 exclusive tenant at that facility now would you  
21 have an opportunity to access that?

22 A. They could be the exclusive tenant as  
23 long as they didn't have contractual rights to  
24 the entire facility. They might be the only one  
25 in there. As long as there's additional capacity

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1 that could be committed by Dayton, then we would  
2 have access to that capacity.

3 Q. You have no knowledge that the operator  
4 has any ability to let you in at this point in  
5 time?

6 A. I have no knowledge as to whether he  
7 has or has not -- does or does not have  
8 capacity.

9 Q. And, if he does not have that right,  
10 then you don't expect to get that right from the  
11 UP/SP?

12 A. I don't think that's covered in the  
13 agreement, no.

14 MR. BERCOVICI: Thank you. That  
15 answers my question.

16 MR. WEICHER: And, if you would bear  
17 with us, Mr. Wood, one more other item.

18 MR. WOOD: I'm not doing anything this  
19 afternoon, I mean anything else.

20 MR. WEICHER: One other answer that we  
21 wanted to clarify, I believe Mr. Ongman asked a  
22 question whether Mr. Ice had any discussions on  
23 the topic of UP/SP negotiations with any third  
24 party during what he had defined as the  
25 settlement period.



1 Q. And how did you respond?

2 A. You're asking that now from Houston to  
3 Brownsville?

4 MR. WEICHER: You may respond insofar  
5 as it involves Houston to Brownsville but not  
6 otherwise.

7 THE WITNESS: I said I was very  
8 interested in Houston to Brownsville.

9 BY MR. McGEORGE:

10 Q. You don't have to tell me your  
11 position, but did you specifically mention  
12 Houston to Brownsville as part of the package  
13 that you were interested in?

14 A. Once again they listed the places they  
15 were willing to contemplate potential rights.  
16 That was one of the places they were willing to  
17 contemplate. And I said we were interested in  
18 Houston to Brownsville.

19 Q. Okay. You don't have to tell me your  
20 position, but did you respond to other points  
21 with a yes, I'm interested, or no, I'm not  
22 interested type response?

23 A. I was interested in everything.

24 Q. Okay. Did you at that point indicate  
25 an interest in having the right to use a

1 contractor to serve the Houston-Brownsville  
2 trackage rights?

3 A. No. It wasn't that detailed of a  
4 discussion at that point. It only related to the  
5 routings they wanted to know we were interested  
6 in.

7 Q. At this point did you indicate that you  
8 wanted to have the option of using a contractor  
9 to provide service over the Houston-Brownsville  
10 route?

11 A. Yes. We said we wanted to use an  
12 agent. I'm not sure if agent and contractor are  
13 the same to you.

14 Q. I'm not sure. I'll use your term.

15 A. Okay.

16 Q. Do you know which at which of these  
17 meetings you expressed that view?

18 A. Not specifically, no.

19 Q. It was not the first meeting; is that  
20 correct?

21 A. It was not the first meeting.

22 Q. And what was their response?

23 A. They were very concerned about that  
24 request. Their view was it caused -- it put them  
25 potentially at a competitive disadvantage, that

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1 we were able to take advantage of using an agent  
2 in that corridor.

3 Q. And why would they be at a competitive  
4 disadvantage?

5 MR. WEICHER: If you know and can  
6 speculate on their motivation.

7 BY MR. McGEORGE:

8 Q. In the first instance, if they  
9 expressed such a view as to why they would be at  
10 a competitive disadvantage?

11 A. I believe their presumption was that we  
12 would use an agent because we thought it would  
13 better our competitive position for whatever  
14 reason that might happen. That being the case,  
15 it was their view that we might be in a position  
16 to take advantage of a better arrangement, better  
17 labor arrangement, whatever it might be that  
18 would then adversely affect them in their ability  
19 to compete against BN/Santa Fe.

20 Q. We'll go to the other side of the  
21 coin. Why did you want to have the right to use  
22 an agent in that corridor?

23 A. We believed we could be competitive  
24 between Houston and Brownsville with trackage  
25 rights as I've said previously in my deposition.

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1 But we did think that there was the potential,  
2 although given we never explored it with anyone  
3 it's not clear that it would have worked out that  
4 way, but that there was the potential that there  
5 might be an arrangement with an agent that would  
6 put us in a better competitive position than we  
7 would otherwise assume with our trackage rights.

8 Q. If you had been able to use Tex-Mex as  
9 your agent between Houston and Brownsville, is it  
10 likely you would have routed traffic over the  
11 Brownsville gateway? And, if I make this a  
12 compound question, I think it will help, or is it  
13 more likely that you would have routed it from  
14 Houston to Corpus Christi and then over Tex-Mex's  
15 tracks from Corpus Christi to Laredo?

16 A. Well, first of all let me say that we  
17 were asking for an agent, viewing that there  
18 might be multiple parties that could be an  
19 appropriate agent. So in no way was there a  
20 presumption on our part that it would  
21 automatically be Tex-Mex. So that makes it  
22 fairly difficult on what I thought was going to  
23 happen with all the routings because we weren't  
24 sure who the agent would be.

25 That being the case, if you're asking

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1                               BEFORE THE  
2                               SURFACE TRANSPORTATION BOARD  
3                               Finance Docket No. 32760  
4       UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD  
5       COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY  
6                               -- CONTROL MERGER --  
7       SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN  
8       PACIFIC TRANSPORTATION COMPANY, ST. LOUIS  
9       SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE  
10       DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

11                           HIGHLY CONFIDENTIAL  
12                           Washington, D.C.  
13                           Friday, February 23, 1996  
14       Deposition of NEAL D. OWEN, a witness  
15       herein, called for examination by counsel for the  
16       Parties in the above-entitled matter, pursuant to  
17       agreement, the witness being duly sworn by JAN A.  
18       WILLIAMS, RPR, a Notary Public in and for the  
19       District of Columbia, taken at the offices of  
20       Mayer, Brown & Platt, 2000 Pennsylvania Avenue,  
21       N.W., Washington, D.C., 20006-1882, at  
22       10:05 a.m., Friday, February 23, 1996, and the  
23       proceedings being taken down by Stenotype by JAN  
24       A. WILLIAMS, RPR, and transcribed under her  
25       direction.

1 language, but I believe, yes, there's provision  
2 to some degree for some latitude in that area.

3 Q. Do you know whether BN/SF has made any  
4 determination to buy any of those line segments  
5 as to which they have rights?

6 A. I don't know if a final determination  
7 has been made or not.

8 Q. When you say that there may be changes  
9 in conditions such that the implementation may  
10 differ from the service outlined in your  
11 statement, do you know of any changes between the  
12 time you executed the statement and now that  
13 causes you to revise any of the descriptions or  
14 projections that you made?

15 A. I know of no such changes.

16 Q. With respect to your understanding that  
17 the BN/SF intends to provide service along the  
18 lines you describe, who at BN/SF told you of any  
19 such attempt?

20 A. I dealt with several BN/SF people  
21 during the course of the preparation of the  
22 description for several reasons, to gain benefit  
23 of their more detailed local knowledge, to gain  
24 benefit of their opinion, if they felt the level  
25 of service would indeed provide the competition

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1 that BN/SF desired to provide, which several  
2 people have dealt with, some of whom I can recall  
3 their names, some of whom I cannot. But it was  
4 in the form of a review of my initial conclusions  
5 as to that level of service, not in the form of a  
6 request as to what service they would suggest.

7 Q. Well, the persons whose names you can  
8 recall whom you spoke with, who, if anybody,  
9 indicated to you that BN/SF intended to provide  
10 service along the lines described or projected  
11 here?

12 A. Well, through my working with the law  
13 departments of BN/SF, I had that continuing  
14 impression it was their full intent to implement  
15 that level of service. Specifically, in  
16 determining whether the proposed levels that I  
17 had drafted were adequate, I dealt with several  
18 people in the executive area of operations  
19 anyway, Mr. Briedenburg, Mr. Dealy, two or three  
20 others at various times.

21 Q. And did either Mr. Briedenburg or  
22 Mr. Dealy tell that you they intended to provide  
23 service along the lines described or projected?

24 A. I don't recall their specific  
25 language. But they endorsed the service levels

1 that I was proposing as being acceptable from  
2 their operating perspective, as being -- as  
3 giving BN/SF the ability to truly provide a  
4 competitive service, and elements like that.

5 Q. Did you go back to the BN/SF operating  
6 plan on which you consulted in connection with  
7 the BN/SF merger and control application to  
8 compare the service there with the service that's  
9 being discussed in your verified statement?

10 A. I'm familiar with that plan and the  
11 BN/SF merger and control application obviously  
12 since I had a major role in preparing it and  
13 occasionally had to use some knowledge acquired  
14 from that role in what I said here. But I didn't  
15 really rely on it extensively because there was  
16 no real need to rely on it.

17 Q. Did you ever look at it in connection  
18 with this engagement?

19 A. In one or two instances, yes.

20 MR. HUT: Let me ask the reporter to  
21 mark as Owen Deposition Exhibit No. 1 an excerpt  
22 that I have put together from portions of volume  
23 2 of the BN control and merger application.

24 MS. KUSSKE: The BN/SF control merger  
25 and application?

1 service as outlined would ensue as volumes grew.  
2 And, by the reference to full service, I take it  
3 you mean the full service that you've described  
4 in the previous pages here; is that right?

5 A. That's correct.

6 Q. Prior to full service, you anticipate a  
7 period of time for temporary operation as  
8 described in the previous sentence, do you not?

9 A. Yes.

10 Q. My question to you is whether you have  
11 some idea of the time frames here, how long would  
12 it be while temporary service is being supplied  
13 before full service was completely implemented?

14 A. We made no estimate of the phasing of  
15 the full service specifically for this  
16 description. As any railroad would do in its  
17 ordinary course of business, you're going to  
18 adjust your train volumes to reflect the  
19 business.

20 And, on the first day of operation, we  
21 would not expect four full trainloads of traffic  
22 in each direction between New Orleans and  
23 Beaumont as an example. And I'm sure that on the  
24 first day of operation we wouldn't be operating  
25 all eight of those trains.

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1 But we made no estimate as to how long  
2 the phasing would be, that would be a function of  
3 a plan that would have to follow subsequently  
4 after individual shippers have been contacted and  
5 after the traffic base is established.

6 Q. So you don't know, do you, when daily  
7 service at least with respect to manifest trains  
8 would be on line?

9 A. I have an opinion that manifest daily  
10 service once a day would begin at the outset, but  
11 not two or three times a day necessarily  
12 depending on the traffic volume because a daily  
13 operation in the event of most manifest shippers  
14 is important, they want once a day service or at  
15 least once per shipping day service.

16 But in this regard we made no specific  
17 implementation plan at the time this was  
18 prepared, knowing that there was -- there would  
19 eventually be contacts with the shippers, there  
20 would eventually be a discussion of shipper needs  
21 which is driving a lot of the implementation of  
22 this plan, the needs of each specific shipper.  
23 So, knowing that that had to occur anyway, we did  
24 not attempt to project a phasing here.

25 Q. When you spoke earlier of reliability

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1           So the entire topic is a very active  
2 topic, it's very much in the mind of BN/Santa Fe  
3 people that deal with it. And, in presenting  
4 this description, I wanted to reflect its  
5 importance to BN/Santa Fe and, therefore, I've  
6 addressed it specifically in here.

7           Q.    Let me follow up and let me ask a few  
8 questions first. Will there be empties that will  
9 be needed to be stored to service the Orange or  
10 Amelia or Beaumont traffic?

11          A.    Conceivably, yes.

12          Q.    Where will they be staged prior to  
13 placement?

14          A.    Again it's a topic that's important,  
15 it's very similar to the loads. We've addressed  
16 that in not only the SIT yards but also in our  
17 talk about facilities, where we're planning that,  
18 for straight set-outs and pickups, where it's  
19 necessary, we would use BN/Santa Fe facilities at  
20 Lafayette as an example and allow UP/SP trains to  
21 do the same.

22               And we would expect that, for a  
23 straight set-out and pickup by road train, that  
24 we could use UP/SP facilities on their line. And  
25 I've stated that, where additional trackage is

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1           In conjunction with this verified  
2       statement, understanding this, I talked about it  
3       again with the BN/Santa Fe operating people who  
4       were reviewing the progress of my work, and that  
5       again goes back to probably the most -- primarily  
6       anyway the dealing with Mr. Dealy and  
7       Mr. Briedenburg as we discussed the one version  
8       of the draft plan.

9           Q.     What are the positions of Mr. Dealy and  
10      Mr. Briedenburg?

11          A.     I'm not exactly sure of their new  
12      titles. Mr. Briedenburg is the vice president in  
13      charge I think of the network operations center  
14      in Fort Worth. And Mr. Dealy is the chief  
15      operating officer of one major corridor portion  
16      of the railroad.

17          Q.     And which corridor portion is that?

18          A.     That as I understand it would be the  
19      corridor that includes the Texas Gulf Coast in  
20      the southern tier.

21          Q.     What do you understand about the  
22      BN/Santa Fe's current capacity with regard to  
23      storage of cars for the plastics industry?

24          A.     I understand dually that it's a live  
25      topic, that they're seeking ways regularly of



1 providing -- or improving their capacity to do  
2 so. I'm fully aware of a major project as I  
3 stated before that BN put in at Teague, Texas, to  
4 increase its storage capacity. I don't know of  
5 any other specific expansion plans that they  
6 currently have.

7 Q. Do you understand that the BN/Santa Fe  
8 currently has excess capacity for storage or is  
9 short on capacity or is simply meeting its  
10 current customer requirements?

11 A. It's my understanding based -- it's a  
12 conclusion I've drawn on my own from some  
13 comments and just general discussions on the  
14 topic that they would like more than they  
15 currently have. And whether or not that  
16 translates to undercapacity or not I don't know.  
17 But I would have to understand -- I would have to  
18 interpret the discussions I've participated in  
19 that they want more.

20 Q. But you said you're not familiar with  
21 whether that more is to serve current customers  
22 or that more is to seek new customers?

23 A. It's my understanding it's both. But I  
24 am not privy to any specific market or operating  
25 plan that they have pointing toward that end.

1 actually hit storage of --

2 A. No, I don't.

3 Q. Any order of magnitude?

4 A. Just hearsay, if you will, but  
5 certainly commodities, I understand the majority  
6 of it will go into storage of certain types of  
7 plastic products. But I don't have specific  
8 knowledge that I can quote numbers or seven digit  
9 STCC codes or anything like that to you.

10 Q. Do you know what those products are, do  
11 you know what those products are?

12 A. It's my understanding that it's a  
13 lightweight plastic product that can be  
14 subsequently formed into any number of consumer  
15 products and it's just produced in bulk and  
16 stored until there's a customer wanting that  
17 product.

18 Q. Do the names polyethylene or  
19 polypropylene mean anything to you in this  
20 context?

21 A. They strike a familiar chord, yes, that  
22 that's the preponderance of what's to be stored.

23 Q. Where is the Teague yard located?

24 A. Teague is a little over 100 miles north  
25 of Houston as I recall, I would have to consult

1 answer.

2 Q. Did it appear from your inspection that  
3 the existing storage yard, storage track, storage  
4 capacity there had been built up over the natural  
5 level of the land?

6 A. Well, yes, I think at just about any  
7 river construction you're going to build the  
8 shoulder; if you're going to build the track,  
9 you're going to build a solid foundation and then  
10 you're going to put your ballasts over that solid  
11 foundation. So yes, there's some elevation  
12 there. I wouldn't call it dramatic elevation,  
13 but I'm not an engineer, civil or uncivil.

14 Q. Do you recall what the elevation was  
15 compared to the track that -- the land that has  
16 not been developed and the land that has been  
17 developed?

18 A. No, I couldn't quote you a number. It  
19 wasn't anything like 30 feet, I know that, but I  
20 couldn't quote you a number.

21 Q. Somewhere in the nature of three feet?

22 A. If I were to have to quote a number, it  
23 would be in that area.

24 Q. You mentioned before that the  
25 availability of storage is a reason why a



1 railroad may gain or lose a plastics customer; is  
2 that correct?

3 A. Yes, that's my experience and  
4 understanding.

5 Q. So storage track availability is a  
6 competitive element between and among railroads  
7 in the Gulf Coast, correct?

8 A. Very definitely.

9 Q. Is there any reason to believe that the  
10 UP/SP would be cooperative and make storage  
11 available at Dayton to the BN/SF if the  
12 transaction is consummated?

13 MS. KUSSKE: Objection to the extent it  
14 calls for a legal conclusion.

15 BY MR. BERCOVICI:

16 Q. I'm asking for a business conclusion.

17 A. I can't answer on behalf of UP/SP.  
18 But, in the event they're not, we do have rights  
19 under the settlement agreement to construct  
20 facilities for such purposes.

21 Q. Let's talk about something else. Let's  
22 talk about your hy-rail trip from New Orleans to  
23 Houston. Did you traverse the entire line  
24 segment between New Orleans and Houston on your  
25 hy-rail trip?

1 Kansas City or some point to get it to  
2 St. Louis.

3 Q. With regard to the Houston to Memphis,  
4 Houston to St. Louis routes, haven't the  
5 applicants treated those routes as two-to-one  
6 points due to the circuitry or inefficiency of the  
7 BN/SF route to those -- between those points?

8 A. That's a little difficult to answer.

9 MS. KUSSKE: I'm going to object to  
10 that question. I think their operating plan and  
11 their application speaks for itself, unless you  
12 want to show him the particular section that  
13 you're referring to.

14 MR. BERCOVICI: We'll save that for  
15 another witness.

16 BY MR. BERCOVICI:

17 Q. You stated to Mr. Hut that you are not  
18 involved in any follow-on implementation planning  
19 with the BN/SF; is that correct?

20 A. That's correct.

21 Q. Are you aware of any such activity  
22 underway at the BN/SF?

23 A. No, I'm not.

24 Q. You had no inquiries from personnel at  
25 BN/SF with regard to your testimony here or your

1 plan, your understandings as to their further  
2 planning efforts?

3 A. I've had one or two occasions just  
4 basically to explain what this plan says. But,  
5 as far as an inquiry to further the plan, no.

6 Q. Page 15 of your statement, Mr. Owen,  
7 the paragraph beginning at the bottom of the  
8 page, you said that BN/Santa Fe plans to provide  
9 a complete southern corridor operation to replace  
10 service competition that would otherwise be lost  
11 as a result of a UP/SP consolidation. Is it  
12 correct to state that the BN/SF would not replace  
13 geographic competition where the UP and SP now  
14 exclusively serve competing shippers?

15 MS. KUSSKE: I'm going to object to  
16 that question as being vague and ambiguous.

17 THE WITNESS: If you're referring to  
18 source competition or an element like that, I'm  
19 really not qualified to speak as an expert on  
20 that subject, I've never studied source  
21 competition. I'm aware of the term and I'm aware  
22 of what it generally means, but I'm not really  
23 qualified to answer that question.

24 MR. BERCOVICI: Thank you. I have no  
25 further questions.





1                               BEFORE THE  
2                               SURFACE TRANSPORTATION BOARD  
3                               Finance Docket No. 32760

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

6                               -- CONTROL MERGER --

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

11                              HIGHLY CONFIDENTIAL

12                              Washington, D.C.

13                              Monday, January 22, 1996

14               Deposition of JOHN H. REBENSdorf, a  
15       witness herein, called for examination by counsel  
16       for the Parties in the above-entitled matter,  
17       pursuant to agreement, the witness being duly  
18       sworn by JAN A. WILLIAMS, RPR, a Notary Public in  
19       and for the District of Columbia, taken at the  
20       offices of Covington & Burling, 1201 Pennsylvania  
21       Avenue, N.W., Washington, D.C., 20044, at  
22       10:15 a.m., Monday, January 22, 1996, and the  
23       proceedings being taken down by Stenotype by JAN  
24       A. WILLIAMS, RPR, and transcribed under her  
25       direction.

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1 Q. At what point in time did you see a  
2 draft?

3 A. I think it was right after Christmas.

4 Q. Did you at the time you negotiated the  
5 BN/SF agreement have any information about the  
6 nature of the service that BN/SF would offer on  
7 the trackage rights lines in question?

8 MR. ROACH: Can I hear the question  
9 back.

10 THE REPORTER: "Question: Did you at  
11 the time you negotiated the BN/SF agreement have  
12 any information about the nature of the service  
13 that BN/SF would offer on the trackage rights  
14 lines in question?"

15 MR. ROACH: I'll let you answer.

16 THE WITNESS: The answer is I did not  
17 have any detailed knowledge of what BN/Santa Fe  
18 was proposing to do, but I was very confident  
19 that this is the biggest, meanest, toughest  
20 competitor we've got in the west and that they  
21 were going to put on a level of service that was  
22 going to give us a run for our money.

23 BY MR. HUT:

24 Q. You didn't know at the time you  
25 negotiated the agreement, did you, for example,

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1 storage facilities to which they will or will not  
2 have access, do you?

3 A. They will not have access to any other  
4 UP served facilities. I am not familiar with  
5 other SP facilities. But, given what was  
6 discussed, I am confident that they have some  
7 plans between the Houston and New Orleans area,  
8 specifically between Iowa junction and Avondale.

9 Q. Did you know then what percentage of  
10 the storage and transit capability or the  
11 capacity in the gulf was available to BN/Santa Fe  
12 as opposed to UP/SP?

13 A. No, I don't. But UP has been the  
14 leader in establishing storage and transit  
15 facilities. So I suspect, if you looked at the  
16 numbers, you would probably find out that UP has  
17 the vast majority of the SIT track capacity  
18 today.

19 Q. With respect to the storage facility  
20 that you mentioned in or around Mt. Belvieu, is  
21 that the Dayton storage facility?

22 A. Yes.

23 Q. And what is the arrangement under which  
24 you understand BN/SF will have access to the  
25 Dayton facility?

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1           A.    My understanding is that they will be  
2   able to come in.  There's considerable room for  
3   expansion in that facility.  And, if they want to  
4   establish SIT track capability, it's run by a  
5   third party, that they will have the right to do  
6   so.

7           Q.    Will they have the right to do so by  
8   building their own access or track in?

9           A.    They already have access, physical  
10   access to the facility.  They will have the right  
11   to build additional capacity if they so desire.

12          Q.    What is the means by which they now  
13   have physical access?

14          A.    They have trackage rights on the line,  
15   it goes right by it.

16          Q.    When you say there is expansion  
17   capability there, do you know whether the --  
18   there was or is an option to acquire additional  
19   land, which option SP owns?

20          A.    I'm not aware of that.

21          Q.    Is that the basis for your conclusion  
22   that there is additional capacity there?

23          A.    No.  I was told by the company that  
24   operates that facility that they have capacity to  
25   expand that facility.

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1 Q. That capacity, however, would have to  
2 be purchased presumably by BN/Santa Fe?

3 A. If the facility is going to be  
4 expanded, yes.

5 Q. When did the operator of the facility  
6 tell you that there was available capacity?

7 A. This was late September.

8 Q. So you don't know whether that's still  
9 true?

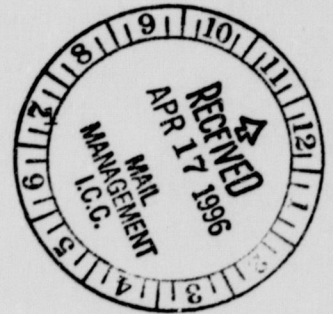
10 A. I don't know whether it's still true or  
11 not. I would find it hard to believe that the  
12 capability to expand that facility has  
13 disappeared in three months.

14 Q. In assessing whether BN/SF will be an  
15 adequate competitive replacement for SP on the  
16 trackage rights lines, did you make any analysis  
17 of the structure of the routes of which these  
18 lines make up a segment or segments?

19 A. As I indicated earlier this morning, we  
20 looked at various corridors in terms of what a  
21 BN/Santa Fe corridor would look like versus  
22 UP/SP. I'm not prepared to say we did that in  
23 every corridor, but we did it in some of the  
24 major corridors. And we walked away convinced  
25 that the BN/Santa Fe alternative was going to be

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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 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.

Monday, February 5, 1996

Deposition of RICHARD B. PETERSON, 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 JAN A. WILLIAMS, RPR, a Notary Public in  
and for the District of Columbia, taken at the  
offices of Covington & Burling, 1201 Pennsylvania  
Avenue, N.W., Washington, D.C., 20044, at  
10:10 a.m., Monday, February 5, 1996, and the  
proceedings being taken down by Stenotype by JAN  
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direction.

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1 believe I recall that the settlement agreement  
2 addressed parallelism?

3 A. Correct.

4 Q. And what is parallelism?

5 A. Well, parallelism the way I was  
6 referring to it was the way where we and SP  
7 served the same markets and where we were the  
8 only two railroads serving those markets.

9 Q. And, as a result of this merger, there  
10 would only be one carrier serving those markets,  
11 is that correct, is my understanding correct?

12 A. Well, not exactly. I mean the UP  
13 announced early on that it expected to address  
14 all of these parallel markets as part of its  
15 merger application. And so that settlement was  
16 struck and, in fact, the settlement, you know, is  
17 part of the overall deal. If you're saying that  
18 a UP/SP merger without any conditions of any  
19 kind, if you're asking me whether that would  
20 create parallelism in certain markets, my answer  
21 would be yes.

22 Q. And, by two carriers merging, where  
23 there is parallelism between those two carriers,  
24 is there any impact on the shippers?

25 A. There may be, there may not be. I mean

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1           A.     I can't really answer that because I  
2     don't know what the attitude of our senior  
3     management in Bethlehem or even in Omaha was. I  
4     think that it's certainly something that we  
5     continually looked at, something that was  
6     important to keep abreast of, and something where  
7     we needed to be able to react when SP came to  
8     us. So that's the way I would characterize our  
9     posture.

10          Q.     What is your opinion with regard to the  
11     BN/Santa Fe or BN agreement if you had merged  
12     prior to Burlington Northern and Santa Fe, would  
13     you have had to grant Burlington Northern the  
14     same rights that you granted in the settlement  
15     agreement?

16          A.     Oh, no, no. It would be a different  
17     series of markets, it wouldn't be quite the same  
18     I don't think. Perhaps much of the two-to-one  
19     part of the -- let me back up. I was thinking  
20     you were talking about UP merging with Santa Fe.

21          Q.     No.

22          A.     Okay. A UP/SP merger that preceded a  
23     BN/Santa Fe merger. Well, we would have  
24     undoubtedly saw a need to address at least many  
25     of the two-to-one situations that we did here.

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1 Maybe we would have been, you know, less  
2 conservative and only identified some of those as  
3 really being competitively impacted. But yes, I  
4 think a settlement would have been required,  
5 whether we did the deal before or after the  
6 BN/Santa Fe.

7 Q. Would that have included the Houston to  
8 St. Louis corridor?

9 A. Houston to St. Louis. Well, the  
10 Houston to St. Louis corridor is part of our  
11 settlement now. But it's sort of a frosting on  
12 the cake for the BN/Santa Fe. The primary market  
13 is Houston to Memphis. And then at Memphis BN  
14 can connect with its St. Louis to Memphis line  
15 and, in fact, improve its St. Louis route  
16 considerably.

17 If, for example, a settlement had been  
18 reached with Santa Fe from Houston to Memphis,  
19 then Santa Fe which does not have a Memphis-St.  
20 Louis route could have worked cooperatively with  
21 BN but wouldn't have had quite the same single  
22 line that you describe from Houston to  
23 St. Louis.

24 Q. Are there any other frostings on the  
25 cake?

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1 more competitive out of the competitively served  
2 Houston chemical plants as well because of the  
3 new route. And that would go on this train as  
4 well.

5 Q. Do you have an understanding of how  
6 many trains or what volume of chemical traffic UP  
7 and SP now handle per day between Houston and  
8 Memphis?

9 A. Between Houston and Memphis. Well, I  
10 don't know exactly. Most of our chemical  
11 business moves on up into the Northeast, a lot  
12 moves through New Orleans to the Southeast. So  
13 Memphis is not as huge a chemical gateway really  
14 as New Orleans and the Illinois gateways are.

15 We have a very large move for Eastman  
16 out of Longview, Texas, that goes to Kingsport,  
17 Tennessee, that you're probably well aware of.  
18 That moves through Memphis. That will now have  
19 single-line service from BN/Santa Fe that has  
20 never existed before for Eastman.

21 But, you know, we run our traffic into  
22 North Little Rock and then switch it and combine  
23 it with other traffic and we run I think three  
24 trains a day over to Memphis. But I would say  
25 only a modest fraction of each of those would be

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1 handling the trains improperly, just a whole host  
2 of things to ensure safety. And that goes along  
3 with service but doesn't necessarily go along  
4 with sheer speed.

5 But as you know there are segments of  
6 the business where service can be less  
7 important. A lot of plastics, one-third for some  
8 shippers, much more than one-third move to  
9 storage in transit tracks after being produced.  
10 Then the cars are released as there's demand for  
11 them and then they're shipped out.

12 The average covered hopper car in  
13 plastics service makes less than four round trips  
14 per year. So that is not a high-speed operation;  
15 although, once the cars are released and once  
16 they're headed for their destination, we want to  
17 move them as fast as possible and maybe more  
18 importantly as reliably as possible so the  
19 receiver doesn't get a bunching of cars and he  
20 can work from a steady flow of raw materials.

21 Q. Other than the Dow movement to Midland,  
22 Michigan, and the Eastman movement from Longview,  
23 Texas, are you aware of any other movements of  
24 chemicals that are particularly time sensitive?

25 A. Well, I mentioned those because they're

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1 to Meridian, Mississippi. And they are becoming  
2 a formidable competitor into the Southeast after  
3 their acquisition of the mid-south route.

4 Q. I'd like to direct you to page 243 of  
5 your testimony. And I'll direct your attention  
6 to the last paragraph at the bottom of the page,  
7 beginning furthermore. If I could just quote  
8 your testimony here for the record, you say,  
9 furthermore, many of the chemicals that we  
10 studied are generic commodities, and UP/SP Gulf  
11 Coast chemical originations must compete with  
12 other sources to supply the needs of receivers,  
13 close quote. Is that an accurate reading of your  
14 testimony, Mr. Peterson?

15 A. Yes.

16 Q. Now, when you say that many of the  
17 chemicals that you studied are generic, can you  
18 tell me which chemicals are and which chemicals  
19 are not generic commodities?

20 A. I believe that the large volume  
21 commodities here are what I would term generic  
22 commodities, polyethylene, polypropylene,  
23 vinylchloride, chlorine, ethylene glycol  
24 certainly, and also the STCC 29's are generic  
25 things such as asphalt, we've got carbon black in

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1 three different general types of polyethylene  
2 that are produced in the United States?

3 A. Yes.

4 Q. Okay. And are you aware of whether  
5 those three different general types of  
6 polyethylene are substitutable for one another?

7 A. Yes, I've got some knowledge of that.

8 Q. Can you tell me whether in general they  
9 are substitutable for each other?

10 A. I think that to a large degree -- well,  
11 let's start with polypropylene. I mean to some  
12 extent polyethylene is substitutable with  
13 polypropylene. And then, within the various  
14 couple hundred formulas of polyethylene, there  
15 can be a great degree of substitution on the end  
16 use.

17 For example, if you're looking at  
18 polyethylene, the primary use is for film  
19 packaging. It's probably -- not probably, I  
20 believe the data will show that that's the  
21 largest single use for both low density and low  
22 density linear polyethylene. Those products are  
23 produced by generally the same producers at the  
24 same plants.

25 Sure, you've got density as a factor,

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1 melting point will be a significant factor for  
2 some receivers, the pellets often have to be  
3 colored or ground to smaller sizes before they  
4 can meet a certain customer's need. But it's --  
5 you know, it's still polyethylene, it's plastic  
6 resins, it's produced at the same plants by the  
7 same producers, it's produced and shipped in the  
8 same freight cars, it's marketed  
9 indistinguishably by railroad marketing people.

10 In fact, railroad marketing usually  
11 does not distinguish between polyethylene,  
12 polypropylene, polyvinylchloride, or  
13 polystyrene. So, as far as we're concerned, it's  
14 the appropriate commodity to analyze.

15 We looked at analyzing it at a level of  
16 just plastics, maybe a five digit level, found  
17 that, when we did that, UP and SP have way below  
18 half the Gulf originations, --there's no  
19 conceivable problem there. So we went to the  
20 finer definition here of seven digits, produced  
21 the report that we did, and feel that that's the  
22 proper level at which to do it.

23 Q. Do you have an opinion about whether,  
24 if I were a producer of chemicals and my customer  
25 ordered high density polyethylene and I shipped

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1 currently ship via water, most can. But I cannot  
2 tell you with any level of precision exactly what  
3 that data is. We looked for that data, found  
4 that the Corps of Engineers data was at a two  
5 digit STCC level. And our SRI consultants had an  
6 incomplete knowledge. And so we did not -- we  
7 did not make any stronger statements than that  
8 here at this time, even though we suspect that  
9 water could play a significant role.

10 Q. So would it be fair to qualify the  
11 statement contained in the second sentence of the  
12 first paragraph on page 111, where you say that  
13 most of the Texas and Louisiana chemical plants,  
14 now I'm skipping a few words, can and do use  
15 low-cost water transportation for their incoming  
16 and outgoing product, and then there are some  
17 more words, would it be fair to say that you  
18 really don't know whether most Texas and  
19 Louisiana chemical plants use water for their  
20 outgoing products?

21 A. You're suggesting that the words  
22 inbound and outbound here are accurate but may  
23 not be accurate if they were changed to say  
24 outbound only?

25 Q. Well, for the sake of avoiding

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1 argument, I'll accept that premise. Do you think  
2 that most Texas and Louisiana chemical plants do  
3 use water for their outgoing product?

4 A. We discussed this with our chemical  
5 marketing people, with the SRI consultants, felt  
6 comfortable with the statement that we made.  
7 I can't tell you, however, at this point without  
8 going back to work papers or thinking about it  
9 whether most chemical plants can and do use water  
10 transportation for their outgoing products.  
11 Certainly they can, but whether most do I cannot  
12 say right at this time with certainty.

13 Q. Now, changing the subject but staying  
14 on the same page, page 111, in the last paragraph  
15 on that page, the second sentence, if you don't  
16 mind, I'll just read for the record, quote, Gulf  
17 Coast producers served by SP and not UP, of which  
18 there are also substantial a substantial number,  
19 will gain single-line access to points such as  
20 Seattle and Spokane, the upper Midwest, and a  
21 wide range of other UP destinations, and will no  
22 longer be dependent on a railroad with service  
23 problems and capital constraints, close quote.  
24 And I'm omitting a footnote reference there. Was  
25 that a fair reading of your testimony,

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1                               BEFORE THE  
2                               SURFACE TRANSPORTATION BOARD  
3                               Finance Docket No. 32760  
4       UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD  
5       COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY  
6                               -- CONTROL MERGER --  
7       SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN  
8       PACIFIC TRANSPORTATION COMPANY, ST. LOUIS  
9       SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE  
10      DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

11                               HIGHLY CONFIDENTIAL

12                               Washington, D.C.

13                               Wednesday, February 7, 1996

14                               Continued deposition of RICHARD B.  
15       PETERSON, a witness herein, called for  
16       examination by counsel for the Parties in the  
17       above-entitled matter, pursuant to agreement, the  
18       witness being previously duly sworn, taken at the  
19       offices of Covington & Burling, 1201 Pennsylvania  
20       Avenue, N.W., Washington, D.C., 20044, at  
21       10:05 a.m., Wednesday, February 7, 1996, and the  
22       proceedings being taken down by Stenotype by JAN  
23       A. WILLIAMS, RPR, and transcribed under her  
24       direction.

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1 Q. And that paragraph reflects your  
2 testimony concerning Southern Pacific's  
3 effectiveness as a competitor at the time the  
4 testimony was given, does it not?

5 A. It lists some of SP's franchise  
6 strengths at that time.

7 Q. And it was your testimony at that time  
8 that SP was not a small, weak, beleaguered  
9 competitor; is that correct?

10 MR. ROACH: Object to the form of the  
11 question.

12 THE WITNESS: Can you quote that for  
13 me. I'm looking for that.

14 BY MR. KOLASKY:

15 Q. Let me direct your attention to the  
16 topic sentence in the paragraph beginning second,  
17 and let me read it into the record, second, SP is  
18 not, underlined, the small, weak, beleaguered  
19 competitor that it paints itself to be. Have I  
20 accurately read that sentence from your  
21 testimony?

22 A. Correct.

23 Q. Thank you. And you gave that testimony  
24 in March 1994; is that correct?

25 A. That's correct.

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1 opportunity to extend our haul.

2           However, we have competition at both  
3 ends with other carriers. So we know two  
4 things. One is that all of the industries in  
5 those cities aren't open to switching or aren't  
6 jointly served and so, if we were to divert  
7 100 percent, that would overstate it.

8           We also know that the other two  
9 carriers have the ability to put in improved  
10 service, make a competitive response, and hold on  
11 to the business that way. And so that further  
12 brings us down to our 50 percent which as you  
13 said is sort of a blend of movements to  
14 industries that are open, industries that are  
15 closed, and I guess it's fair to describe it as  
16 an average.

17           Q. Or a rule of thumb, because it's not a  
18 numerical average, it's not a median or a mean  
19 because that's not how it was computed?

20           A. Well, I don't know that I'd call it a  
21 rule of thumb. But I would say it's a projection  
22 of the expected occurrence in that situation.

23           Q. The actual results can vary  
24 substantially from situation to situation  
25 depending on a number of factors, many of which

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1 you identified in your testimony, correct?

2 A. Correct. As I said one movement may be  
3 to a closed industry and that one would not  
4 divert at all. Another we have strong  
5 relationships with, we would get 100 percent.  
6 Another one is on a neutral switching carrier and  
7 it is, in fact, a toss-up and a 50/50 and, as you  
8 average those out, you come to a 50 percent.

9 Q. And, because you did not use  
10 statistical methods in deriving the 50 percent  
11 diversion rule, I take it you never computed a  
12 standard deviation to measure the extent of those  
13 variances; is that correct?

14 A. That's correct.

15 Q. Let's turn to page 256 of your  
16 testimony please and the paragraph that begins  
17 our traffic study rested on certain basic  
18 assumptions. Do you see that paragraph?

19 A. Yes.

20 Q. Am I correct that that paragraph lays  
21 out the basic assumptions that you used for your  
22 traffic study?

23 A. Yes.

24 Q. And one of those assumptions was that  
25 the existence of a transportation contract would

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1 not preclude diversion of traffic to a different  
2 route; is that correct?

3 A. That's correct.

4 Q. Now, you testified Monday that roughly  
5 two-thirds of Union Pacific's traffic is  
6 currently under contract; is that right?

7 A. That's a gross estimate on my part.  
8 Maybe somewhere in that neighborhood, yes.

9 Q. Again that's not something that you've  
10 looked at to see what the actual statistics are  
11 recently?

12 A. Well, our people have those statistics  
13 and I've been aware of them. The amount moving  
14 under contract has steadily grown from zero in  
15 the early eighties to something between 50 and 70  
16 percent now I believe.

17 Q. And is it continuing to grow?

18 A. I believe it's continuing to grow. The  
19 numbers I'm quoting might include unilateral  
20 marketplace offerings such as letter quotes that  
21 are not tariff rates but don't require a  
22 contractual commitment on the part of the  
23 customer.

24 Q. Do you know whether Union Pacific  
25 currently has underway an effort to place as much



1     sure I understand the relevance. But, if what  
2     you're saying is there is a two-to-one point  
3     where say we each have a switch engine and we are  
4     discussing a way to trade off switching the  
5     customer through a joint facility agreement, are  
6     some of those situations included in the  
7     two-to-one points? Possibly. But I can't say  
8     for sure. I know we've talked about Little Rock,  
9     I know we've talked about Camden, we've talked  
10    about Pine Bluff. You're talking about this  
11    corridor, I want to give you some flavor.

12           Q.     Let me sharpen my question because I  
13    clearly asked it too broadly. Are you aware of  
14    any shippers who are now exclusively served by UP  
15    or SP as to which the two railroads are currently  
16    discussing possible joint facilities agreements?

17           A.     No, I'm not. And I think that would be  
18    a very -- extremely unusual situation. And  
19    frankly that's an area that I personally am  
20    involved in. And it would be unusual for the  
21    marketing department of one railroad to open up a  
22    customer that it exclusively serves.

23           Q.     Are there ever situations in which a  
24    customer that is at present exclusively served by  
25    one railroad decides that it wants to have a

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1 differed.

2 I think we worked separately, he worked  
3 with the data and with the style that he's used  
4 to and we worked with railroad data that is more  
5 the kind of thing that we're used to working with  
6 and we worked independently and we each produced  
7 our reports. I haven't laid them out side by  
8 side to find differences, but I believe we came  
9 to the same conclusions.

10 Q. Now, do you consider plastic flakes to  
11 be an identifiable market?

12 A. Plastic flakes?

13 Q. Yes, the STCC codes for plastic  
14 flakes.

15 A. Well, plastic flakes is a -- what is  
16 it, 3:40 here now. First of all we looked at the  
17 five digit STCC for plastics, 28211. And we then  
18 talked to our chemical marketing people to  
19 determine, you know, what products within there  
20 are shipped by rail and which are distinct  
21 products, because the 28211 level, even these  
22 50/10 screens we ran, we never showed any -- even  
23 any problems there at all.

24 So we said let's look at more detail.  
25 And then, when we started talking to our chemical

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1 people, we realized that, within the plastic  
2 STCC, we've got polyethylene, polypropylene,  
3 polyvinylchloride, polystyrene, and two  
4 commodities, one of which you're referring to,  
5 that we refer to in our write-up as sort of  
6 basket commodities.

7 But they're apparently STCCs that were  
8 created years ago to sort of be catchall  
9 commodities that would allow a shipper to ship  
10 any one of the plastics, but usually polyethylene  
11 or polypropylene, and not actually put that STCC  
12 code on it but put one of the two basket STCCs on  
13 there.

14 And apparently this developed as I say  
15 years ago, when some railroads wanted to price  
16 generally for all plastics and then another  
17 railroad objected to that, and they finally  
18 compromised and agreed that the rate increase  
19 would go in on some of the commodities and not on  
20 others. And so that led to the need I guess for  
21 this generic STCC to be included.

22 So the long answer to your question,  
23 it's a commodity that needs to be then further  
24 analyzed and, to the extent it can be done,  
25 allocated into polyethylene or polypropylene.

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1                               BEFORE THE  
2                       SURFACE TRANSPORTATION BOARD  
3                       Finance Docket No. 32760  
4       UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD  
5       COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY  
6                       -- CONTROL MERGER --  
7       SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN  
8       PACIFIC TRANSPORTATION COMPANY, ST. LOUIS  
9       SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE  
10      DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

11                       HIGHLY CONFIDENTIAL

12                       Washington, D.C.

13                       Saturday, February 10, 1996

14                       Continued deposition of RICHARD B.

15       PETERSON, a witness herein, called for  
16       examination by counsel for the Parties in the  
17       above-entitled matter, pursuant to agreement, the  
18       witness being previously duly sworn, taken at the  
19       offices of Covington & Burling, 1201 Pennsylvania  
20       Avenue, N.W., Washington, D.C., 20044, at  
21       9:05 a.m., Saturday, February 10, 1996, and the  
22       proceedings being taken down by Stenotype by JAN  
23       A. WILLIAMS, RPR, and transcribed under her  
24       direction.

25  
  
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1           A.     Again it's hard to define  
2     profitability. But we tend to find that  
3     intermodal traffic, for example, may have some of  
4     the lowest profits per unit, it's heavily truck  
5     competitive, competitive with other railroads,  
6     the service is expensive to provide with  
7     high-speed trains and so forth.

8                     On the other hand, sometimes in the  
9     intermodal area there is less investment that  
10    needs to be made because the shippers provide the  
11    trailers, often the cars, so that a lower per  
12    unit profitability can still yield a decent rate  
13    of return because the base of investment that  
14    you're applying your per unit what we call  
15    contribution or profit to is smaller, because you  
16    don't have the heavier investments that you do in  
17    other areas.

18                    -     I would say just to generalize that  
19    probably bulk commodities that aren't near water  
20    are the highest profit on the railroad because by  
21    definition there isn't water competition. And  
22    the bulkier the commodities, assuming, you know,  
23    not a short length of haul but a long length of  
24    haul, then the trucks are less effective. And so  
25    you're, you know, more dependent on source and

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1 product competition and so forth in that market  
2 and the rates would tend to be higher.

3 Q. Okay. Is there any type of traffic  
4 which UP doesn't have? You said you have a very  
5 broad base. Is there any type you don't have  
6 that you would want to have?

7 A. Well, some segments have grown much  
8 more rapidly than others. Our basic carload  
9 business, our single-car business has declined as  
10 its percent in total. Our coal business, our  
11 unit train business, unit trains of coal, unit  
12 trains of grain, and our intermodal business have  
13 grown faster than our basic carload business.

14 And I think that that's an area where  
15 we especially want growth, that's traffic moving  
16 in the lumber, forest products, paper, food area,  
17 chemical area, metals area, those areas, to  
18 continue to have a strong product that we can  
19 offer, you know, with frequent trains handling  
20 mixed trains of commodities, not unit trains of  
21 coal or intermodal.

22 Q. Would you expect -- strike that.

23 Does BN/Santa Fe have the same kind of  
24 broad base as you do or do they tend to look to  
25 one kind of traffic more than another than UP?

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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 MERGER --

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

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Washington, D.C.

Tuesday, January 24, 1996

Deposition of RICHARD J. BARBER, 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 JAN A. WILLIAMS, RPR, a Notary Public in  
and for the District of Columbia, taken at the  
offices of Covington & Burling, 1201 Pennsylvania  
Avenue, N.W., Washington, D.C., 20044, at  
10:20 a.m., Tuesday, January 24, 1996, and the  
proceedings being taken down by Stenotype by JAN  
A. WILLIAMS, RPR, and transcribed under her  
direction.

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1 improve its route from Houston up to Memphis. So  
2 those are not just two-to-one remedies, point  
3 remedies, they are designed to ensure that  
4 BN/Santa Fe is able to provide competitive  
5 service in the corridors that I've just  
6 mentioned.

7 Q. Where BN/Santa Fe acquired trackage  
8 rights, it did not acquire the right to serve  
9 every customer located along that rail line, did  
10 it?

11 A. Every two-to-one customer along that  
12 rail line. The rest would be bridge rights as  
13 provided.

14 Q. And only those two-to-one customers?

15 A. Yes, as defined in the settlement.

16 Q. And that again is where UP and SP serve  
17 the customer and no other railroad?

18 A. Correct.

19 Q. What about the situation where SP  
20 serves a customer and UP has a line within five  
21 miles? Is that deemed to be a two-to-one  
22 situation?

23 A. Not for that reason alone. There are,  
24 of the so-called build-in or build-in possibility  
25 cases, as I recall two are taken into account in

1 the settlement, one is Mont Belvieu, also known  
2 as Cedar Bayou, and the other is at Eldon, Texas,  
3 for the Bayer plant. So those are taken into  
4 account. But the mere fact that say a UP line in  
5 your example is X miles, five miles away, does  
6 not make some point a two-to-one point.

7 It would only become a two-to-one point  
8 such as Mont Belvieu or Eldon, where there is the  
9 imminent possibility of a build-in, or more  
10 generally, as I would -- my interpretation would  
11 be, a situation such as was involved at the Red  
12 Rock OG&E plant as considered by the commission  
13 in BN/Santa Fe; that is, where the potential of a  
14 build-in was shown to be financially feasible,  
15 physically feasible as well, and had a real; that  
16 is, a real discernible, demonstrable effect on  
17 the current pricing at the location.

18 Q. What is that real demonstrable effect?

19 A. I would not go beyond and couldn't  
20 provide a better example than what the commission  
21 provided in its opinion in BN/Santa Fe for the  
22 Red Rock plant.

23 Q. And at Mont Belvieu, what did we have?  
24 I believe you used the word immediate  
25 possibility?

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