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1 between the UP line and the customers located at
2 Mont Belvieu?

3 A. I'm not aware of it. But the operating
4 people no doubt could answer that. There could
5 be something I'm not aware of, but I'm not aware
6 of it.

7 Q. So that's not an actual two-to-one that
8 was there, it was just an imminent possibility,
9 was it not?

10 A. Yes, in the same categories as Red
11 Rock.

12 Q. What does it take in your mind to reach
13 that status, where you can be deemed to have two
14 competitors and not any others? Is it the filing
15 of an application?

16 A. I don't think that necessarily that it
17 would have to be a filing. There had not been
18 any filing in the Red Rock situation as I
19 understand it. The question would be whether the
20 shipper could demonstrate based upon the evidence
21 that rates and/or service quality presumably at
22 the location had been significantly impacted
23 because of the proximity of the -- or possibility
24 of the build-in.

25 Q. And how would a shipper do that?

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1 A. Well, the shipper, OG&E, did that for
2 its Red Rock plant. It showed that, as
3 summarized by the commission, Santa Fe which was
4 apparently the serving railroad, the scle serving
5 railroad, had made rate adjustments or indicated
6 that it was aware of the build-in possibility and
7 reflected that in its pricing.

8 Q. So it's where the rail carrier makes an
9 adjustment based upon some demonstration or
10 threat by the shipper?

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

13 THE WITNESS: By the shipper?

14 BY MR. MOLM:

15 Q. Well, the shipper is the one who would
16 say to the incumbent carrier that the alternative
17 carrier can build in. I'm trying to get at what
18 triggers -- you said it wasn't the application.

19 A. I'll simply refer you back to how the
20 commission approached the matter in the Red Rock
21 case. It says the mere fact that a build-in
22 could be made is not determinant. But the
23 possibility of a build-in could in a given
24 situation have some real impact on the present
25 situation, price situation, and service

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SUPPLEMENT
DEPOSITION EXTRACTS

Richard B. Peterson



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
A. WILLIAMS, RPR, and transcribed under her
direction.

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1 finally we looked for places which are generally
2 pretty well-known, where both UP and SP have a
3 direct rail spur into the shipper. So you
4 don't -- you don't have a joint facility
5 agreement, you don't need reciprocal switching,
6 you just both go to the shipper. And there are a
7 few of those. Not many, but a few.

8 And those created our database which
9 initially was computed so that we could generate
10 volumes of business in a computer format that we
11 then provided to all the numerous parties that we
12 negotiated with, provided the data to KCS and to
13 Montana Rail Link and Wisconsin Central and Utah
14 Railway and BN/Santa Fe and others, RailTex and
15 others. So that has become our database of these
16 two-to-one shippers.

17 And then we looked for two-to-one
18 corridors where you have only two railroads
19 connecting towns that may or may not have more
20 than two railroads. And we found two, we found
21 New Orleans to Houston. New Orleans has a lot of
22 railroads, Houston has a lot of railroads, but we
23 and SP have the only direct routes between the
24 two. KCS as you know can connect them, but they
25 were a little too circuitous so we called that a

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1 two-to-one corridor. We could have argued that,
2 but we didn't.

3 And then New Orleans to Memphis we
4 identified as a two-to-one corridor. BN/Santa Fe
5 serves that corridor and I and others argued
6 internally that that was really a three-to-two
7 corridor. But in the end it was felt that we and
8 SP had the shorter routes and it was identified
9 also as a two-to-one corridor.

10 MR. ROACH: You said New Orleans to
11 Memphis.

12 THE WITNESS: Okay. I always do that.
13 Houston to Memphis, I'm sorry, Houston to
14 Memphis.

15 BY MR. MOLM:

16 Q. I thought that was a whole new area.

17 A. Sorry. And that identified our
18 two-to-one universe. Mr. Barber and others have
19 done a lot of work on source competition and so
20 forth to see if that would enter into the
21 decisions, but we didn't find any problems
22 there. So that created the two-to-one situation
23 which was used by our people that were involved
24 in the negotiations with the various railroads
25 for settlement.

1 Q. And, just as a point of emphasis, is it
2 your testimony that all of West Lake and not just
3 the PPG plant is open to UP?

4 A. I'm not -- I don't know. As far as UP
5 is concerned, there's no significant traffic
6 other than PPG. They're a large shipper, there
7 may be some smaller shippers there. But, when we
8 think of West Lake, we think of PPG.

9 Q. Now, putting aside the question of
10 whether there are any other shippers in West Lake
11 and focusing on PPG now, would the PPG plant be
12 in essentially the same position as the downtown
13 area that we just discussed; that is, because of
14 the KCS service, this would not be considered a
15 two-to-one point and, therefore, would not be
16 served by the BN via trackage rights after the
17 proposed merger; is that correct?

18 A. Yes, this would not be part of the BN
19 service under the settlement. I'd like to just
20 say that most New Orleans business isn't going to
21 New Orleans, it's going beyond New Orleans into
22 the Southeast. And, from both Lake Charles and
23 especially West Lake, of course, KCS has an
24 excellent route to the Southeast by going north
25 to Shreveport and then across the mid-south route

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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 to -- equivalent to the --

2 Q. Page 39 perhaps?

3 A. No, we've got to go to the corridor,
4 we've got to go to the Pacific Northwest to Texas
5 corridor. This one is probably in the nature of
6 250 miles I think. But we might as well check.
7 That one. Well, let's see, it's that part of
8 it. Let me estimate about -- then you save even
9 more by going to Laredo. Probably I'm saying
10 about 300 miles probably.

11 Q. And, for the benefit of the record,
12 could you give me the page number of the map that
13 you're referring to? I'm just asking this for my
14 understanding. And I wanted to ask you whether
15 the difference in the route is what comprises the
16 mileage savings?

17 A. On page 34. The savings comes by
18 utilizing our new route from Green River,
19 Wyoming, and then down through Denver and down
20 through Fort Worth, Texas, and then we would go
21 down to Laredo instead of going over to Kansas
22 City, Missouri, and then down. And I think
23 that's somewhere in the neighborhood of two to
24 300 mile savings. That's right. It's red versus
25 new. 250. I was a little too far off.

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1 Orleans in any case; is that correct?

2 MR. ROACH: Object to the form of the
3 question. He was talking about the Port of Lake
4 Charles.

5 THE WITNESS: I was talking about the
6 Port of Lake Charles.

7 BY MR. STONE:

8 Q. Okay. Let me just move on.

9 A. And I can tell you for a fact that KCS
10 handles no traffic to New Orleans.

11 Q. I'm not surprised. And it's true, is
12 it not, that following the merger, if it occurs,
13 shippers from this downtown area would not have
14 the choice of either UP or SP to move to New
15 Orleans; is that correct?

16 A. They would -- they would have as their
17 only direct route the UP/SP route and a somewhat
18 circuitous KCS -- somewhat circuitous KCS direct
19 route, single-line route.

20 Q. Do you know offhand whether that KCS
21 route is more or less than 150 percent of the
22 length of the UP/SP route to New Orleans?

23 A. It's probably about that. I would have
24 to check.

25 It looks like it's more than that.

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1 Q. Now, am I correct that the Burlington
2 Northern/Santa Fe trackage rights agreement would
3 not provide shippers at this downtown Lake
4 Charles location the ability to use the BN/Santa
5 Fe following the merger?

6 A. Well, they could probably -- they may
7 be able to construct a joint route with the KCS.

8 Q. Do you know of any discussions of any
9 such joint route that may have occurred?

10 A. No.

11 Q. Because I don't have a detailed map of
12 Lake Charles in front of me, let me rely on
13 perhaps your superior expertise and ask you how
14 the KCS would connect with BN and where it would
15 connect with BN if such a route were to be
16 constructed?

17 A. I'm not familiar enough with the
18 agreement to know if during the discussions there
19 was a discussion on this point. But it's not
20 clear to me whether there would or would not be
21 an ability to interchange to BN/Santa Fe there at
22 Lake Charles. The next best option would
23 probably be at Beaumont.

24 Q. Do you have any rough idea of how many
25 miles it is from Lake Charles to Beaumont?

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1 A. Oh, it would be 50 miles, I would say
2 about 50 miles.

3 Q. So, if such a connection were made at
4 Beaumont, the traffic would have to travel 50
5 miles to Beaumont from Lake Charles; and then, to
6 get back to close to the point of origination
7 south of Lake Charles on what would become the BN
8 line, that would be another 50 miles. So about
9 100 miles round trip?

10 A. If there were any traffic, it would
11 have to go an additional 50 miles each way.

12 Q. Now, directing your attention to the
13 third paragraph on page 228, you mention that the
14 third part of the Lake Charles area that you
15 address is called West Lake which is jointly
16 served through a KCS/SP joint facility agreement;
17 is that correct?

18 A. Yes.

19 Q. And I take it that that point which is
20 not now served by both UP and SP would not have
21 BN access via trackage rights following the
22 proposed merger; is that correct?

23 A. Well, it would not have access, but
24 it's not because it's not served by both UP and
25 SP. West Lake is served by UP, KCS, and SP.

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1 about here.

2 So, on the one hand, the number you're
3 talking about is very minor and I can't envision
4 it affecting KCS's capital budget. Secondly, KCS
5 is one of the most profitable railroads in the
6 country. And thirdly, when you do lose business,
7 you adapt. You win some, you lose some. But, if
8 you lose a million dollars in revenue, you may
9 save \$700,000 in costs because you're not running
10 certain locomotives and consuming fuel and paying
11 crews to handle that business. So the net impact
12 here is not of a magnitude even beyond KCS's
13 senior management's radar scope.

14 Q. What if it caused KCS to reduce
15 service? Would that be an effect on competition?

16 A. If KCS's losses were so massive that it
17 actually had to reduce some train service,
18 possibly you could discuss that point further.
19 But these losses in this case are small, they're
20 fragmented, a lot of them are short-haul
21 movements, movements coming out of Lake Charles
22 and Port Arthur, and KCS is handing them off to
23 us or SP up at Shreveport or somewhere.

24 And, you know, keep in mind something,
25 our study was done on 1994 data. And we adjusted

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1 BY MR. MOLM:

2 Q. Was that designed to deal with the
3 issues in this case or were those other issues
4 part of the horse trading?

5 MR. ROACH: That is the question that
6 has been asked and answered. I will allow him to
7 answer it again.

8 THE WITNESS: Yeah, as we said we
9 looked at that corridor, we realized that SP and
10 UP are the only two direct rail lines between
11 Houston and New Orleans. KCS serves New Orleans
12 but does not have significant access into
13 Houston. On the other hand, KCS has a route in
14 conjunction with BN/Santa Fe through the
15 Mid-South route into the Southeast that is highly
16 competitive for much of the traffic that moves
17 through Memphis.

18 So some of us argued that this was not
19 really a two-to-one corridor, it really had three
20 railroads for the bulk of the business that was
21 flowing. Not much of the business actually
22 originates in Houston, it goes to New Orleans and
23 terminates there. But, nonetheless, it was
24 viewed that, well, let's be conservative, if
25 there's an appearance here being a two-to-one

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1 A. Where Tex-Mex crosses, there is no
2 interchange -- I mean, there is no reciprocal
3 switching there. I guess what I'm trying to say
4 is I think there could be two or three reasons
5 why it's not a 2-to-1 point.

6 MR. ROACH: And we have an
7 interrogatory from you which we will be answering
8 shortly on that subject.

9 MR. ALLEN: Okay.

10 BY MR. ALLEN:

11 Q. Under the agreement, Beaumont, Texas is
12 also not named as a 2-to-1 point that BN will get
13 access to. And why is that?

14 A. That's because KCS serves Beaumont as
15 well as UP and SP and BN/Santa Fe.

16 Q. If a shipper in Beaumont wants to send
17 his products to Laredo, how would he get his
18 products to Laredo now?

19 A. Currently?

20 Q. Yes.

21 A. He could ship via UP or SP/Tex-Mex or
22 possible other routes.

23 Q. Could he feasibly ship via KCS to
24 Laredo?

25 A. No.

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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, January 17, 1996

14 Deposition of RICHARD D. SPERO, 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., Wednesday, January 17, 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 data for trucks other than what may be embraced
2 by the statistical handbook.

3 MR. MOLM: Pardon?

4 THE WITNESS: By the statistical
5 handbook.

6 BY MR. WOCHNER:

7 Q. Do you have any breakdown for what
8 portion of that breakdown is packaged or bulk
9 commodities?

10 A. I don't believe that's reported in the
11 statistical handbook.

12 Q. How many shippers have you talked to
13 directly to prepare your statement, Mr. Spero?

14 A. None.

15 Q. Just to restate so there's no mistake,
16 all the information you got regarding shippers
17 has been either provided by the shipper
18 statements which were provided to you or from
19 Union Pacific or Southern Pacific personnel; is
20 that correct?

21 A. Yes, that's correct.

22 Q. Do you know how many chemical shippers
23 are located on the Union Pacific, Mr. Spero?

24 A. No, I do not.

25 Q. Do you know how many chemical shippers

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1 N-a-r-o.

2 Q. Mr. Spero, have you conducted any kind
3 of a study which would indicate the time
4 differences in a statistically valid manner
5 between joint-line and single-line routes?

6 A. I'm sorry, your voice dropped and I
7 didn't hear the question.

8 Q. Have you conducted personally any kind
9 of a study which would be a statistically valid
10 sample of joint-line versus single-line routes as
11 far as transit time is concerned?

12 A. No, I have not conducted any study
13 independently of the information that was
14 provided to me by the applicants.

15 Q. Do you have any independent personal
16 knowledge of the capabilities of the facilities
17 of the Southern Pacific?

18 A. Independent knowledge? Independent
19 of?

20 Q. Your own personal knowledge, do you
21 have personal knowledge of the capacity of SP's
22 facilities?

23 A. Again only what personnel at the SP
24 have told me as well as information provided by
25 the applicants generally I would say.

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1 A. No.

2 Q. Do you know how long that takes?

3 A. No.

4 Q. Throughout your statement you've talked
5 about superior Union Pacific service, is that
6 correct, superior to the SP?

7 A. Okay. If you can give me a reference,
8 it would be helpful.

9 Q. If you look over on page 708, it talks
10 about 3.6 days from Houston to New Orleans over
11 the Union Pacific and 4.5 over SP. There's
12 another one in here over on the next page, 709,
13 which says it takes 18 days from Houston to Los
14 Angeles. And the UP route which is much longer
15 only takes 17 according to your testimony
16 someplace else.

17 A. Okay.

18 Q. Is it fair to infer from that that
19 generally you think UP service is better than SP
20 service?

21 A. Generally, yes.

22 Q. Have you done any studies to confirm
23 that?

24 A. Only as reflected in the discussions I
25 have had with the personnel at the two carriers,

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1 Union Pacific and Southern Pacific, as well as
2 multiple statements on the part of shippers that
3 have been submitted here attesting to the same
4 thing.

5 Q. But no data other than what's in your
6 work papers?

7 A. No.

8 Q. I had another -- I just had a problem
9 with some of your testimony, Mr. Spero. On page
10 706 there you state that -- let me see if I can
11 find it, it's in the second full paragraph in the
12 fifth line, with merger single system moves
13 between Houston and Los Angeles via El Paso on
14 average will require about four days?

15 A. Yes.

16 Q. An average improvement of approximately
17 two weeks; is that correct?

18 A. That's what it says, yes.

19 Q. On page 709, in the first full
20 paragraph, the second full line from the bottom
21 of that, it says --

22 A. I'm sorry, where are we again?

23 Q. Really you need to read the last
24 sentence, two last sentences in the first full
25 paragraph on page 709.

1 Q. Do you have any personal knowledge of
2 where that reduction will come from, Mr. Spero?

3 A. Yes.

4 Q. Can you tell me what it is?

5 A. As explained to me, much of the savings
6 will derive from the preblocking activities which
7 the applicants intend to perform for such traffic
8 which they now do not do.

9 Q. And who provided you that information?

10 A. Mr. Holm.

11 Q. On page 709 you discuss hazardous
12 materials?

13 A. Yes.

14 Q. The first sentence in that section
15 states there is widespread understanding within
16 the industry that most rail hazardous material
17 incidents occur in switching and classification
18 yards?

19 A. Yes.

20 Q. Where are you finding that incident?

21 A. Discovery of a spill or any sort of a
22 piercing of the car, any sort of a switching
23 accident which leads to a derailment which in
24 turn leads to a spillage of some sort. I don't
25 have a precise definition in mind, but I believe

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1 A. Yes.

2 Q. Other than statements contained in this
3 record, do you have any other source for your
4 information regarding these statements?

5 A. Other than statements contained in this
6 record?

7 Q. Verified statements.

8 A. You mean shipper verified statements?

9 Q. Or UP or SP verified statements.

10 A. Yes.

11 Q. Can you tell me what they are?

12 A. Again, going back to the prior footnote
13 that we referenced, the discussions that I had
14 with UP and SP marketing personnel.

15 Q. Which footnote was that?

16 A. Twenty-eight on page 714.

17 Q. Can you tell me which UPN/SP personnel?

18 A. They're in my work papers. There were
19 quite a few of them.

20 Q. So all the information you have
21 regarding these statements is in your work
22 papers?

23 A. Yes.

24 Q. On page 720 you refer to soda ash and
25 soda ash transloading to the BN/Santa Fe?

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1 A. Yes.

2 Q. Are you familiar with those
3 transloading operations?

4 A. Only to the extent that they are
5 referenced in Witness Peterson's verified
6 statement.

7 Q. You have no independent knowledge; is
8 that correct?

9 A. No.

10 MR. WOCHNER: That's all the questions
11 I have right now and I will vacate and allow John
12 to discuss confidential information. Thank you
13 very much, Mr. Spero.

14 EXAMINATION BY COUNSEL FOR THE
15 KANSAS CITY SOUTHERN RAILWAY COMPANY

16 BY MR. MOLM:

17 Q. Do you have your work papers available
18 to you and handy to you?

19 A. Yes, I do. Let me make sure that we
20 know each other. You are?

21 Q. I am John Molm, I am with Troutman
22 Sanders, and I represent Kansas City Southern.

23 A. Okay.

24 Q. Would you go to -- I'm going to sneak a
25 shorthand reference here to page 96 of your work

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1 A. No, not that the schedule can be
2 extended. The two to three days refers to what
3 is the more typical time consumed by that
4 function, in fact, as opposed to per the
5 schedule.

6 Q. Oh, so the schedule shows switching one
7 day?

8 A. Correct.

9 Q. But, in fact, it takes two to three
10 days?

11 A. That is my understanding of what
12 Mr. Gray told me.

13 Q. But you don't know whether that occurs
14 or not?

15 A. I have great confidence in Mr. Gray's
16 knowledge of his railroad. I don't think he
17 would tell me that if he didn't think it were
18 true. And I'm relying on that, yes.

19 Q. You're relying on Mr. Gray?

20 A. Yes.

21 Q. You made no independent verification?

22 A. I did not.

23 Q. And you have no way of doing an
24 independent verification at this time, do you?

25 A. Well, I see no need to. So I haven't

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1 really investigated whether I could do so.

2 Q. If we look at that same schedule, we
3 get a total of nine days, do we not, shown on
4 that --

5 A. Correct.

6 Q. And that includes picking up, the
7 transit time, the switching, and what is the last
8 word written in the last two lines? Is that --

9 A. -- delivery.

10 Q. -- delivery. That includes delivery as
11 well, does it not?

12 A. In each of the last two lines, yes.

13 Q. Now, how do you get from that nine days
14 up to the top line, where you say it's 14 to 18
15 days, to go between Houston and Los Angeles?

16 A. The extra time is embraced in the --
17 according to Mr. Gray, in the items involving
18 switching at Houston and switching in West Colton
19 which may take as much as three days longer in
20 each case -- I'm sorry, which may take as much as
21 three days in each case.

22 Q. All right.

23 A. So that gives -- if you add six days
24 then, three on each switch, to the nine days, you
25 get 15 days which is the midpoint roughly between

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1 Q. And the switching then accounts for the
2 difference between four and nine?

3 A. Correct, as I believe I previously
4 indicated, switching and delivery.

5 Q. Now, do you know what's confidential
6 about this information?

7 A. I did not make those determinations,
8 no.

9 Q. Do you know what's highly confidential
10 about these?

11 A. Same answer.

12 Q. All right. Let's go to page 106.

13 A. Yes.

14 Q. Now, there you reflect a conversation
15 you had with -- would you identify the person?

16 A. Yeah, that's incorrect, it's James
17 Gehring.

18 Q. Oh, it's not Lou Gehrig?

19 A. No, it's not Lou Gehrig, it's James
20 Gehring, wrong name, wrong field. He didn't have
21 his business card with him at the time we started
22 and I neglected to correct it.

23 Q. And he works for whom?

24 A. Southern Pacific.

25 Q. Now, what does that first sentence

1 read, would you read it to me?

2 A. The first sentence or the first line?

3 Q. First line going on to wherever it
4 seems to end.

5 A. Customers' tank cars have said to SP.

6 Q. You're saying customers have said that
7 to SP?

8 A. Correct, customers who own or lease
9 tank cars have said to SP.

10 Q. Now, do you know whether they have said
11 that to Mr. Gehring or to someone else?

12 A. I assume to both.

13 Q. So customers have said this to someone
14 else at SP and as far as you know to Mr. Gehring?

15 A. Correct.

16- Q. Mr. Gehring has no independent
17 knowledge of this?

18 A. I can't speak for Mr. Gehring on that,
19 but I believe he well may.

20 Q. But the way you have indicated is that
21 customers have told him?

22 A. Right. I had asked him the question in
23 that context.

24 Q. You asked him what customers have told
25 you?

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1 A. I asked him what is the typical --
2 what's a typical representative illustration of
3 this issue which is car days, car time, for
4 shippers of chemicals.

5 Q. Did you talk to any of these shippers
6 he was referring to?

7 A. No. But the same conclusion is
8 reflected in many of their verified statements in
9 this application.

10 Q. Now, skipping down to the bottom of
11 that page, you state, do you not, that it's not
12 true for plastics?

13 A. That's what it says, yes.

14 Q. And that they oversize the fleet to
15 store the product in order never to shut down the
16 plant; is that a fair reading?

17 A. Well, it doesn't say in order.

18 Q. All right. With the exception of those
19 words, is that a fair reading?

20 A. It says they oversize fleet to store
21 product, never shut down plant.

22 Q. So is it fair to conclude that, at
23 least for plastic customers, the example we
24 initially talked about does not apply?

25 A. It is not representative of plastics

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1 shippers. The example previously talked about is
2 not representative of plastics shippers. I
3 wouldn't want to say it never applies.

4 Q. Now, did you put anything in your
5 testimony about plastics shippers?

6 A. Yes.

7 Q. And about how they oversize their
8 fleet?

9 A. I don't believe I did, no.

10 Q. So is it fair to conclude that you were
11 selective in what you used from your notes?

12 A. Well, the issue that I was representing
13 here about the investment with respect to cars
14 and the way -- and how it affects transit would
15 have been -- it was specifically related to
16 nonplastics shippers. And I don't believe that I
17 represented that it was true of all shippers. On
18 page 711 I say many chemical shippers.

19 Q. I guess I missed the inference.

20 A. Well, I'm glad we were able to clarify
21 it.

22 Q. Would you go to page 108.

23 A. Yeah.

24 Q. And there we see, do we not, is that a
25 discussion with Mr. Craig Johnson?

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1 present time.

2 Q. Now, the two people you were talking to
3 worked again for Union Pacific?

4 A. Correct.

5 Q. How did they know that Southern Pacific
6 had storage available?

7 A. I don't know. I assume they're close
8 to the market and that through the dialogue with
9 shippers and so forth that they pick up that
10 intelligence.

11 Q. You never talked to SP personnel about
12 that?

13 A. Yes, I did.

14 Q. This specific reference?

15 A. The subject.

16 Q. Did you talk about Southern Pacific
17 having storage available?

18 A. Yes.

19 Q. And did they confirm?

20 A. Yes.

21 Q. Is that in your notes?

22 A. I believe it is.

23 Q. What do the next two lines say?

24 A. Key element in negotiations, how much
25 storage space available.

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1 Q. How does that come up? Is that from a
2 shipper?

3 A. Is what from a shipper?

4 Q. That point in negotiations.

5 A. Yes. Cindy and Tom were indicating to
6 me that the question of how much storage space a
7 carrier has available is a key element in
8 negotiations of plastics traffic contracts and
9 rates.

10 Q. Now, were they talking about
11 negotiations occurring at SP?

12 A. Well, they were talking about their own
13 dealings with shippers at UP. And the
14 presumption was that, if it's an issue with
15 respect to shippers at Union Pacific, it's an
16 issue with respect to whatever carriers the
17 shippers are dealing with.

18 Q. And that they thought or it was their
19 opinion I believe your words were that SP had
20 storage available?

21 A. It was their understanding, yes.

22 Q. All right. Go to page 121 --

23 A. At this time, at the time that the
24 meeting took place which was November 3 of 1995.

25 Q. Have these people changed their mind?

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1 with that.

2 Q. Okay. Thank you. Looking at your
3 testimony, Mr. Spero, page 703, 704, where you
4 refer to the data with regard to middle of the
5 page, the percentage of chemical and allied
6 products tonnage carried by truck?

7 A. Yes. You mean on 703?

8 Q. 703, I'm sorry. Do you have any idea
9 what percentage of plastics resins traffic is
10 carried by truck?

11 A. I don't believe that data was
12 separately published by CMA. And I have not -- I
13 don't believe I've seen anything else from
14 your -- the group that you're representing
15 either.

16 Q. Does the 50 percent in your knowledge
17 bear a -- or the nearly one-half I should say to
18 quote you bear a relationship to the volume of
19 plastics resins tonnage that's carried by truck?

20 A. In certain instances it may, but I have
21 no specific information on that.

22 Q. What instances may that be accurate?

23 A. For particular shippers and particular
24 movements and particular locations.

25 Q. In terms of characterizing the plastics

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1 resins transportation, would that be an accurate
2 statement, nearly 50 percent?

3 A. I have to rely on my prior answer.

4 Q. So you have no knowledge; is that
5 correct?

6 A. Nothing that is available to me in the
7 data that I was looking at here allows me or
8 anyone else I think to do that. I would
9 certainly be interested to see it, though, if you
10 folks have it.

11 Q. You state in that paragraph, the second
12 full paragraph on page 703, that less than a
13 fourth was handled by water carriers and
14 railroads, respectively; and, in the following
15 statement, that just over 37 percent from a cost
16 standpoint is for rail. Does that mean that 34
17 percent of the transportation revenue is for
18 rail?

19 MR. GULLAND: Did you mean 34 or 37
20 percent?

21 BY MR. BERCOVICI:

22 Q. I mean 37.

23 A. It means whatever the Chemical
24 Manufacturers Association means by the word cost,
25 close quote.

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1 Q. I'm sorry?

2 A. Close quote. It's their term, not
3 mine.

4 Q. You said it your statement, Mr. Spero.
5 What significance did you place on that 37
6 percent?

7 A. That it may embrace other
8 transportation outlays aside from modal outlays,
9 that were incidental to the modal outlays, but
10 I can't tell.

11 Q. So you don't know what that 37 percent
12 represents?

13 A. I can't tell from what the CMA
14 published what it embraces beyond a strict cost
15 definition that they have provided which is what
16 I've attempted to reflect here. Again, if they
17 want to come forward with information that would
18 illuminate that issue, I would be very happy to
19 look at it.

20 Q. We're trying to understand what your
21 statement means and what you mean, not what CMA
22 means.

23 A. Well, I didn't want to say anything
24 more than what CMA was representing here.

25 Q. You state on page 704, under the

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1 heading single-line service, that the ability to
2 move traffic over single-line routes created by
3 the merger will produce substantial benefits. Do
4 you have any quantification for those benefits
5 for plastics resins shippers?

6 A. Yes. Oh, single-line shippers, just a
7 second.

8 Q. I'm sorry, did you answer the question?

9 A. Not yet. Could you repeat the
10 question.

11 THE REPORTER: "Question: You state on
12 page 704, under the heading single-line service,
13 that the ability to move traffic over single-line
14 routes created by the merger will produce
15 substantial benefits. Do you have any
16 quantification for those benefits for plastics
17 resins shippers?"

18 THE WITNESS: Some of these shippers
19 may be associated with either the production or
20 the receipt of plastic resins in the products
21 that they ultimately ship. That is not
22 completely clear, but I wouldn't rule it out; for
23 example, in the case that Farstad Oil receives
24 polypropylene or Rexene Corporation with respect
25 to styrene.

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1 More generally, though, plastics resins
2 may be embraced in the paragraph at 706 with
3 respect to what I characterize as nominal UP
4 single-line service between Texas and California
5 today. I do not have any commodity detail with
6 respect to the kinds of chemicals traffic that
7 will benefit from that flow, but we do -- we do
8 know that there are -- that movements of plastics
9 from the gulf coast west is significant.

10 BY MR. BERCOVICI:

11 Q. So the answer to the question is no; is
12 that correct?

13 A. The answer is as I gave it.

14 Q. Can you give us the dollar value of
15 those benefits?

16 A. I don't have a dollar value figure for
17 it, no. They may be deduced from the people who
18 have dealt with the operating plan in conjunction
19 with whatever Mr. Peterson -- whatever light
20 Mr. Peterson could shed on it.

21 Q. But you yourself cannot give us any
22 number or any magnitude of number?

23 A. No, I can't give you a magnitude.

24 Q. Page 705, the first full paragraph, the
25 first customers in Little Rock and other Arkansas

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1 locations who today obtain polyethylene from Lake
2 Charles, Louisiana, in interline rail service
3 will be in a position to utilize the single-line
4 route made possible by the consolidation. Are
5 you referring to consignees or consignors?

6 A. Both.

7 Q. Are the customers in Little Rock and
8 other Arkansas locations, would they be -- are
9 you talking customers of the railroad or
10 customers of -- who receive plastics resins?

11 A. Customers of producers in Lake Charles,
12 receivers of shipments from Lake Charles.

13 Q. Do you know who those parties are in
14 Little Rock and other Arkansas locations?

15 A. I don't believe the data allow me to
16 indicate who they are. I'm sure it doesn't.

17 Q. Do you know who controls the routing of
18 plastics-resins shipments?

19 A. Yes.

20 Q. Who is that?

21 A. The shippers.

22 Q. Who are the shippers?

23 A. I don't know who they are specifically.

24 Q. Are they the producers or are they the
25 receivers of the resins?

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1 A. That could vary with the particular
2 flow and character of the transaction.

3 Q. Is it fair to say that most plastics
4 resins are shipped in producer owned or leased
5 hopper cars?

6 A. That's my understanding.

7 Q. In those cases would the shippers be
8 the producers who own or lease the cars or would
9 the shippers be the consignees who receive the
10 material?

11 A. Well, by shippers we sometimes mean
12 both. But perhaps it's easier to refer -- if we
13 refer to shippers as the place where the traffic
14 originates and receivers as the place where it
15 terminates, it would be a little more helpful.

16 Q. We're trying to get precision here.

17 A. With that in mind, could you restate
18 your question.

19 Q. My question was who would control the
20 movement, the routing of the plastics resins
21 traffic in shipper as you have defined it owned
22 or leased hopper cars?

23 A. My answer would be the same, that it
24 may well depend on the transaction and how the
25 various nuances of the transaction between the

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1 shipper and the receiver are formulated. But
2 either the shipper or the receiver in my
3 terminology would be in a position to designate
4 the routing.

5 Q. Are you personally aware of any
6 circumstances in which the receiver designates
7 the routing for plastics resins?

8 A. I'm not aware of any specific situation
9 of how the designation occurs and the nuances of
10 that designation in terms of the various -- how
11 it might be reflected in various price
12 concessions, no. That's pretty difficult stuff
13 to get ahold of.

14 Q. And you have no personal knowledge
15 of --

16 A. I have personal knowledge that it can
17 take place, but I don't have any specific
18 examples or illustrations.

19 Q. Is that theoretically take place or
20 that it does, in fact, take place in the
21 marketplace?

22 A. Both.

23 Q. Can you tell us the specific examples
24 of where it does take place in the marketplace
25 that you're aware of?

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1 A. I think I've already answered that.
2 I'll refer you back to my prior answer.

3 Q. I regret to say I don't recall your
4 prior answer.

5 A. I said I had no specific examples with
6 respect to this transaction, but I'm aware of the
7 fact that it can happen and that it can be
8 reflected in the various price concessions with
9 certainly agreements that shippers and receivers
10 would construct with one another.

11 Q. So again I will ask you, is that based
12 upon theory or is that based upon your knowledge
13 of specific transactions and producer/customer
14 relationships?

15 A. It's based upon theory and my
16 understanding of how the marketplace can work.

17 Q. But you have no specific knowledge of
18 whether or not the marketplace does work in that
19 fashion with regard to any particular companies;
20 is that right?

21 A. I refer you back to my prior answer.

22 Q. You refer on page 706.--

23 MR. GULLAND: Let me suggest that any
24 appropriate time that we take a lunch break.

25 MR. BERCOVICI: Off the record.

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1 AFTERNOON SESSION

2 (2:05 p.m.)

3 Whereupon,

4 RICHARD D. SPERO,

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 SOCIETY
9 OF THE PLASTICS INDUSTRY, INC. -- Resumed

10 BY MR. BERCOVICI:

11 Q. Mr. Spero, I'd like to refer you back
12 to your work papers, page 110110.

13 A. Yes.

14 Q. I believe, when we were discussing this
15 morning, you said that these notes were a part of
16 the discussion which began -- or your discussion
17 which are reflected from pages 110108 and 109
18 also?

19 A. Correct.

20 Q. And related to potential diversion of
21 traffic from truck to rail as a result of the
22 merger; is that right?

23 A. Well, it was one of many subjects that
24 was discussed, it wasn't the only subject that
25 was discussed.

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1 Q. But that is a subject matter of these
2 notes?

3 A. Yeah, a small portion of them, yeah.

4 Q. On page 110110, four lines down, it
5 says plastics quality issue. What does that
6 mean?

7 A. It means that a concern about barging
8 different types of plastics by quality type and
9 by composition and mixing them in such a way that
10 they can -- it destroys the purity of the
11 specific shipment and why it tends not to be
12 barged for that reason.

13 Q. It relates to barging, not to trucking
14 you're saying?

15 A. Well, yes, because it's part of the
16 discussion at the top there, you see chlorine
17 can't be barged. I think on this page we were
18 talking about water traffic.

19 Q. The next line down -- excuse me, can
20 you read that line to us, please.

21 A. The next line down from what?

22 Q. From the plastics quality issue.

23 A. It refers to Mr. Coalson who is the
24 expert on plastics, Marty Coalson who it was
25 suggested -- and that's his telephone extension,

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1 to the calculation that I'm presenting here.

2 Q. But these aren't your numbers anyway,
3 are they?

4 A. Well, they're in my statement.

5 Q. Didn't you receive the numbers from
6 someone else?

7 A. I obtained the numbers from someone
8 else.

9 Q. Did you independently verify them?

10 A. You mean did I go out into Houston and
11 check -- I don't see how you could, it hasn't
12 happened yet, it's an estimate.

13 Q. Did you do your own independent
14 estimate to verify that these are correct
15 numbers?

16 A. No. I think the people at the railroad
17 are most knowledgeable people about what the
18 benefits are going to be for them.

19 Q. Page 714 of your statement states there
20 are a number of chemical products -- at the top
21 of the page, the number of chemical products
22 handled by the UP and SP, the existence of
23 abundant supplies from alternative sources
24 precludes any lessening of competition as a
25 result of the merger. What do you mean by

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1 abundant?

2 A. Plentiful.

3 Q. Can you give us an order of magnitude
4 from a market share standpoint?

5 A. I think it depends on what we're
6 talking about in any particular situation in
7 terms of commodities and flows and so forth. So
8 the order of magnitude I think would vary from
9 product to product and move to move.

10 Q. So this is a generic statement without
11 reference to any particular chemical product that
12 you've made here; is that correct?

13 A. It's a generic statement with reference
14 to every chemical product of which I am aware as
15 reflected in this testimony.

16 Q. Are you saying that every chemical
17 product there are abundant supplies from
18 alternative sources which precludes lessening of
19 competition as a result of the merger?

20 A. No, I said for a number.

21 Q. Can you delineate which chemical
22 products those are for us?

23 A. I cannot delineate each and every
24 product. But I have provided here a list of
25 representative commodities that generically fall

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1 into this category that I've labeled source
2 competition. It is not to in any way suggest
3 that it is an exclusive list or these are the
4 only commodities.

5 Q. Were these the only commodities for
6 which you had specific examples?

7 A. No.

8 Q. How did you select which ones to
9 include and which ones to exclude?

10 A. Basically the thrust of this section of
11 my testimony was to try to present to the board
12 the way in which competition manifests itself in
13 different types of situations with respect to
14 source competition, with respect to the other
15 modes, with respect to other railroads. And this
16 sorting procedure was one that would illustrate
17 each of those conceptual points with a number of
18 examples without getting tedious about it.

19 Q. Moving along, at pages 717 and 718, you
20 talk about the agreement with BN/Santa Fe, you
21 cite to both polyethylene and polypropylene as
22 being available to non-UP/SP routes. Are you
23 referring particularly there to the BN/Santa Fe?

24 A. Particularly but not exclusively.

25 Q. You have cited in both paragraphs to

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1 the opening of certain plants to the BN/Santa Fe;
2 is that correct?

3 A. I have.

4 Q. Are you aware of what types of
5 facilities other than simply locomotive power and
6 track, operating track that a railroad needs to
7 serve the plastics industry?

8 A. Would you repeat that.

9 THE REPORTER: "Question: Are you
10 aware of what types of facilities other than
11 simply locomotive power and track, operating
12 track that a railroad needs to serve the plastics
13 industry?"

14 THE WITNESS: Well, I'm certainly aware
15 that, in addition to operating track, they need
16 storage track. The number of shippers who I
17 assume are members of your association have made
18 that quite clear.

19 BY MR. BERCOVICI:

20 Q. And storage track then is an essential
21 ingredient for a railroad to effectively serve
22 and compete for plastics resins traffic; is that
23 correct?

24 A. Yes.

25 Q. To what extent does the BN/Santa Fe

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1 A. Yes, and chemicals.

2 Q. I'd like to refer you to page 110112 of
3 your work papers. Below the line it looks like
4 it says under contract; is that correct?

5 A. Yes.

6 Q. Can you tell us what that means?

7 A. These were estimates provided by one or
8 more of the persons named above the line of the
9 amount percentage of traffic under their -- that
10 they handle which is under contract by names of
11 those shippers.

12 Q. Is it the percentage of traffic they
13 handle or the percentage of the customers' rail
14 traffic that's under contract?

15 A. It's the percentage of the traffic that
16 Union Pacific handles. Some of these companies
17 have facilities in Canada which Union Pacific
18 doesn't handle.

19 Q. For example, Du Pont, it says Du Pont
20 100. I take it that means 100 percent?

21 A. Correct.

22 Q. If the Du Pont plant was open to
23 switching from the Southern Pacific, would this
24 number read 100 percent or would that number read
25 something less if the Southern Pacific is

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1 storage will occur I don't know.

2 Q. But Dayton provides an improvement on
3 the prior system; is that the nature of the
4 comment?

5 A. Yes, in Mr. Jara's view, it does.

6 Q. And again which carrier is Mr. Jara
7 with?

8 A. Southern Pacific.

9 Q. Let me direct your attention to page
10 110204.

11 A. All right.

12 Q. Can you tell us the significance of
13 this document?

14 A. It's the work paper that supports on
15 page 718 the data that are reported in the first
16 complete bullet with respect to polypropylene.

17 Q. Where is this data extracted from?

18 A. With the exception of -- you mean the
19 numerical data?

20 Q. The numerical data.

21 A. With exception to the second line from
22 the bottom, the other rail line, the data were
23 from the Witness Peterson and the traffic tapes
24 of the applicants. The exception is from the
25 waybill sample, the 352,780 reported in other

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1 rail.

2 Q. Do you know what plants that material
3 was shipped from, can you tell?

4 A. I'm not sure what you're referencing in
5 your question. Could you restate that question.

6 Q. Certainly. The page shows material, it
7 shows -- the next column is the producer, the
8 next column is the location, and then you show
9 SP/UP tons, combined tons, and other railroad
10 tons.

11 A. Uh-huh.

12 Q. For each of the producer plants, it
13 shows SP/UP volume. For the other rail, that's
14 on a line by itself. Is there any way of
15 identifying what plants --

16 A. You mean the 352,780 tons?

17 Q. Yes.

18 A. Oh. It might be possible to infer it
19 by matching a producer list with the data in the
20 waybill sample. But that's not necessarily
21 conclusive if there's more than one producer at a
22 particular origin in the waybill as we have used
23 it here.

24 So the answer to your question is
25 sometimes you can make a -- I would call an

1 informed estimate. Other times you cannot, at
2 least not with the database that I have here.
3 I guess the only other thing by way of
4 clarification or that I should add to that is,
5 given the geography of the study, the 352,780
6 tons is originated in either Texas or Louisiana
7 only.

8 Q. And that is originated from plants
9 which obviously have access to carriers other
10 than the UP or SP, correct?

11 A. Yes, they're exclusively accessed by
12 carriers other than UP and SP.

13 Q. And, according to this table here,
14 there are eight such plants?

15 A. No. For the 352,000?

16 Q. Yes.

17 A. No, we don't know how many plants,
18 that's what we just --

19 Q. There are eight such candidate plants,
20 possible plants?

21 A. No, that's not correct.

22 Q. How many plants could that tonnage
23 originate at?

24 A. The 352,780?

25 Q. Yes.

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1 A. I don't know. I would have to go back
2 and -- you could try to estimate it from the
3 producer list, not the producer list that's shown
4 here but a list of producers of polypropylene in
5 the gulf coast as I have defined it. In other
6 words, that 352,780 tons originates from
7 producers of polypropylene at locations not
8 identified here, from origins not served by UP or
9 SP.

10 Q. Is it that or is it that the origin
11 carrier is massed by aggregating that data so
12 that you couldn't tell, for example, what the
13 KCS's share of traffic out of Montell's plant at
14 Lake Charles, Louisiana, is as compared with the
15 SP's share of traffic?

16 A. That's a good clarification. If KCS
17 serves the Montell plant, its traffic would be
18 reported in that 352,000. Thank you.

19 Q. So once again there are eight plants
20 that are shown as being dual or multicarriers
21 served?

22 A. Yes. But it's still correct to say
23 that there could be plants other than those eight
24 that contribute to the 352,000 not shown here.
25 If UP -- if neither UP nor SP serves that

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1 particular plant, it would be included in that
2 number as well.

3 Q. But once again for clarification this
4 352,780 would include the eight plants shown in
5 the lower half of the page?

6 A. Well, the easiest way to clarify it is
7 to say this, it includes all of the traffic in
8 this particular commodity shown on the waybill as
9 originating in Texas and Louisiana by carriers
10 other than UP and SP.

11 Q. Is it the position of the applicants in
12 this proceeding that the Southern Pacific
13 provides poor service?

14 A. The position of the applicants is
15 that -- from my perspective is that the Southern
16 Pacific is a weak competitor.

17 Q. Is their service efficient compared to
18 other railroads or is it inefficient?

19 A. According to Mr. Gray, it's not up to
20 standard.

21 Q. Is that compared only with the Union
22 Pacific or also with other carriers?

23 A. His statement speaks for itself.

24 Q. Can you give me your understanding?

25 A. My understanding is that, compared to

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1 other carriers in the west, its weakness is
2 pronounced.

3 Q. If a shipper had the opportunity to use
4 a carrier other than the Southern Pacific and
5 they had an opportunity to use alternative
6 carriers, would the shipper generally want to use
7 that other carrier for its origination movement
8 if that were available do you believe?

9 A. I think that's very difficult to answer
10 that as a general proposition. You need to know
11 a lot more to provide a meaningful answer to that
12 kind of question.

13 Q. From your data on this page, it appears
14 that --

15 A. We're on the same page.

16 Q. Same page, page 204. Approximately
17 half of the tonnage reflected is handled by the
18 UP/SP from plants exclusively served, then about
19 half of the tonnage which is handled by the UP/SP
20 is handled from plants which are competitively
21 served; is that a fair statement?

22 A. Well, I would alter it by saying that
23 they are served by railroads other than UP and
24 SP.

25 Q. Of the grand total --

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1 A. I think they're all in competitive
2 play.

3 Q. Of the grand total of the plastics
4 resins business for polypropylene, less than 10
5 percent according to this document is handled by
6 carriers other than the UP and SP; is that
7 correct?

8 A. In the states of Texas and Louisiana,
9 yes.

10 Q. And that is where the predominant
11 production of this material occurs? You can look
12 at Mr. Peterson's statements, page 312 I believe
13 he talks to that.

14 A. Yes.

15 Q. To page 316.

16 A. The answer to the question is yes.

17 Q. So that, when a shipper/producer such
18 as Montell which is shown on your sheet having
19 two plants, one exclusively served at Bayport by
20 the SP --

21 A. I'm sorry, I have to interrupt. I'm
22 not sure that I may have answered too hastily.
23 My work paper 110212 suggests that there is over
24 a million tons of polypropylene -- are we talking
25 about polypropylene?

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1 Q. Yes.

2 A. -- which is handled outside of Texas
3 and Louisiana by nonapplicant carriers.

4 Q. Are those from producing points?

5 A. Yes.

6 Q. Is that reflected on your work papers
7 110205 through 110211?

8 A. Yes, including the traffic from Canada,
9 the rail traffic from Canada.

10 Q. Looking at your work paper, 110205, are
11 you aware of a polypropylene production plant at
12 Champaign, Illinois?

13 A. Just a second.

14 Q. I'm sorry, I'm on the wrong page. Turn
15 to page 206.

16 A. Yes.

17 Q. Are you aware of a polypropylene
18 production plant at Roanoke, Virginia?

19 A. No, that small amount of traffic does
20 not reflect any production facility in Roanoke
21 that I'm aware of.

22 Q. Charlotte, North Carolina?

23 A. A similar answer for that, modest
24 amount of traffic as well.

25 Q. Greenville, South Carolina?

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1 A. Same answer.

2 Q. Chattanooga, Tennessee?

3 A. Same answer.

4 Q. Memphis, Tennessee?

5 A. Same answer.

6 Q. Columbus, Ohio, looking at the next
7 page, 207?

8 A. Right. Same volume, same answer.

9 Q. Detroit, Michigan?

10 A. Same answer, same volume.

11 Q. Little Rock, Arkansas, page 208?

12 A. I want to go back to Detroit, Michigan,
13 for the moment. Subject to check it's possible
14 that that could reflect some production by
15 Novacor, Huntsman, Maryville, Michigan, depending
16 on how the BEA was drawn there. And I can't
17 speak definitively as to that, but it is a
-18 possibility.

19 Q. Then how much production does your
20 document reflect, what capacity at Maryville,
21 Michigan?

22 A. The document I'm looking at reflects in
23 millions of pounds, 120.

24 Q. And how many pounds were shipped from
25 Detroit, Michigan, according to your waybill

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1 data?

2 A. 22,800 tons.

3 Q. And how many pounds is that?

4 A. Well, you can figure it out by dividing
5 by 2,000 -- multiplying by 2,000.

6 Q. It's nowhere near the capacity of the
7 plant that you've just cited to, is it?

8 A. No. You just asked me about whether
9 there was a production facility there.

10 Q. Right. But these waybill statistics do
11 not reflect operating plant, the output from an
12 operating plant?

13 A. No, the waybill statistics do not
14 reflect output from an operating plant, no.

15 Q. How about Phoenix, Arizona?

16 A. Where are we now?

17 Q. On your work sheet, it's 110211 and you
18 summarize that on 212.

19 A. Again a very small amount of that
20 summarized figure.

21 Q. So this is not necessarily plastic
22 resin production reflected on these waybill data
23 sheets, is it?

24 A. No. It's plastic production shipments
25 by rail.

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1 Q. But that could be, for example,
2 reconsignments, proportional rates, or some other
3 aberration that the traffic originally moved from
4 a production plant in the gulf coast to these
5 locations and was then reconsigned?

6 A. It could be if it was rebilled, yes.
7 It would depend on how the carrier reported it.

8 Q. So this million pounds that you
9 represented before, million tons, I'm sorry,
10 outside the gulf coast is not necessarily
11 production outside the gulf coast?

12 A. It's almost -- the great bulk of it is,
13 since the great bulk of it refers to production
14 at other facilities which you have not named.

15 Q. Philadelphia, Pennsylvania?

16 A. Yes.

17 Q. Whose plant is at Philadelphia?

18 A. Well, it would include -- presumably
19 includes the Epsilon Products facility at Marcus
20 Hook, perhaps the Huntsman plant at Woodbury, New
21 Jersey.

22 Q. Is that within the --

23 A. Depending on how the BEA definition is
24 drawn.

25 Q. You don't know what that is?

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1 A. I didn't look into the details of those
2 data, no.

3 Q. Looking back at your page 110204 once
4 again.

5 A. Just a second. Yes.

6 Q. I believe that you were just looking at
7 a document that showed plastic resins plants and
8 their -- or producers and their production
9 capacities; is that correct?

10 A. Yes.

11 Q. Can you identify that document for us
12 once again.

13 A. It's my work paper N 04110046 and 47
14 which is in the August 1995 polypropylene report
15 in the service called Chemical Products Synopsis
16 published by Mannsville Chemical Products
17 Corporation.

18 Q. And that shows Himont at Bayport,
19 Texas, and Lake Charles, Louisiana, with a
20 capacity of 2,200. And how is that measured?
21 Millions of pounds; is that right?

22 A. Yes.

23 Q. And Himont is now known as Montell; is
24 that correct?

25 A. I believe that's right, yes.

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1 Q. Looking at your document 204, what
2 percentage of the plant capacity is handled by
3 the Southern Pacific from the two Montell
4 plants?

5 A. I haven't made that calculation.

6 Q. Approximately 90 percent; is that
7 right?

8 A. If they're at capacity, yes.

9 Q. About 90 percent of capacity is being
10 handled by the two carriers?

11 A. Uh-huh.

12 Q. And at one plant, Lake Charles, they do
13 have option to use the KCS as their originating
14 carrier; is that correct?

15 A. Yeah.

16 Q. From this data it looks like KCS is
17 getting very little, if any, traffic from
18 Montell; is that a fair conclusion?

19 A. In this year, yes, except to the extent
20 it might be reflected in the 352,000 number.

21 Q. Does the fact that the Southern Pacific
22 or could the fact that the Southern Pacific
23 serves Montell exclusively at Bayport have an
24 influence over the Southern Pacific's ability to
25 gather Montell's traffic at Lake Charles?

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1 A. Oh, I think there are a lot of factors
2 that play. That could be one, but I wouldn't
3 single that out above others. I mean it's just
4 as likely to reflect the competitive interplay
5 between SP and KCS to get a contract to handle
6 the bulk of the contract as anything else.

7 Q. Does KCS exercise any leverage over
8 Montell?

9 A. I don't know.

10 Q. Does it appear from your table that
11 they do?

12 A. I don't think you can say anything
13 about what leverage KCS has from my table with
14 respect to Montell. All I'm suggesting to you is
15 that one of the factors that could account for
16 the fact that SP appears to have the bulk of the
17 traffic in this year from that customer could
18 reflect a competitive contest between SP and KCS
19 for who would handle it.

20 And that the way these contracts are
21 typically written, the bulk of the traffic goes
22 from one carrier or the other. So that, when you
23 look at the statistical data, be careful about
24 what kind of conclusions you draw from it.

25 Q. Didn't you just state before that Du

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1 Pont at Orange, Texas, splits its traffic six
2 months and six months between the UP and SP?

3 A. Yes.

4 Q. Could one of the factors influencing
5 Montell be the fact that they are exclusively
6 served at Bayport and that, by virtue of that
7 exclusive service, a plant that is approximately
8 not quite twice as large as Lake Charles, that
9 they are, in fact, leveraged into dealing with
10 the SP at Lake Charles?

11 A. I have no knowledge of that.

12 Q. Is it possible from your experience in
13 the transportation industry?

14 A. I would say it along with a number of
15 other factors are possible.

16 MR. BERCOVICI: Thank you. I have no
17 further questions.

18 EXAMINATION BY COUNSEL FOR THE
19 CHEMICAL MANUFACTURERS ASSOCIATION
20 BY MR. STONE:

21 Q. Mr. Spero, my name is Scott Stone with
22 the firm of Patton, Boggs, I represent the
23 Chemical Manufacturers Association.

24 Gene, for your benefit I just wanted to
25 say that I may repeat a couple questions that

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SUPPLEMENT
DEPOSITION EXTRACTS

Richard J. Barber
Richard K. Davidson
Richard B. Peterson

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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 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.

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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

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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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

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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 and so on suggest build-ins or suggest the threat
2 of build-ins by our competitors, always trying to
3 use that as a piece of leverage in negotiating
4 freight rates.

5 Build-ins are a serious element of
6 competition in a number of Gulf chemical
7 situations. We face a lot of potential build-ins
8 from Santa Fe given their vast network in the
9 Gulf. I will say that UP in the -- back a few
10 years ago embarked on sort of an overview type
11 study of locations where geographically it would
12 appear that it, you know, could make sense to
13 build in and where there was some substantial
14 traffic.

15 And that was -- analysis was done, it
16 identified areas ranging from Yermo, California,
17 to the Gulf Coast chemical area, it mentioned
18 specifically Mont Belvieu, talked about Bayport,
19 Texas, on the SP and Strang and Pasadena in that
20 area, talked about the Lake Charles area, where
21 we go but we don't serve anything.

22 The study was as I say a preliminary
23 study, it gathered some information on the
24 business, what we might be able to get, what the
25 cost might be, what the feasibility of the

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1 Q. Where is the Union Carbide plant that
2 you mentioned as another build-out that came up
3 at some point?

4 A. The Union Carbide plant is at North
5 Seadrift, Texas, and Union Carbide also has a
6 plant at Taft, Louisiana.

7 Q. And, Mr. Peterson, which plant was the
8 one that was mentioned as a possible
9 build-out/build-in site?

10 A. Well, both plants were considered as
11 within the realm of possibility for a build-out.
12 I believe North Seadrift was ten miles, Taft may
13 be slightly less than that, but I think Taft had
14 some other cost factors, some highways to cross,
15 and things like that. So I think that both were
16 considered as build-out -- having some build-out
17 potential, possibly North Seadrift the most --
18 the more realistic of the two.

19 Q. And who serves the North Seadrift
20 plant?

21 A. That's served by Union Pacific.

22 Q. And who serves the Taft, Louisiana,
23 plant?

24 A. That's served by Union Pacific.

25 Q. And to whom was the build-out proposed

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3 Finance Docket No. 32760
4 UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD
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10 DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

11 HIGHLY CONFIDENTIAL

12 Washington, D.C.

13 Tuesday, January 24, 1996

14 Deposition of RICHARD J. BARBER, 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 10:20 a.m., Tuesday, January 24, 1996, and the
23 proceedings being taken down by Stenotype by JAN
24 A. WILLIAMS, RPR, and transcribed under her
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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?

1 between the UP line and the customers located at
2 Mont Belvieu?

3 A. I'm not aware of it. But the operating
4 people no doubt could answer that. There could
5 be something I'm not aware of, but I'm not aware
6 of it.

7 Q. So that's not an actual two-to-one that
8 was there, it was just an imminent possibility,
9 was it not?

10 A. Yes, in the same categories as Red
11 Rock.

12 Q. What does it take in your mind to reach
13 that status, where you can be deemed to have two
14 competitors and not any others? Is it the filing
15 of an application?

16 A. I don't think that necessarily that it
17 would have to be a filing. There had not been
18 any filing in the Red Rock situation as I
19 understand it. The question would be whether the
20 shipper could demonstrate based upon the evidence
21 that rates and/or service quality presumably at
22 the location had been significantly impacted
23 because of the proximity of the -- or possibility
24 of the build-in.

25 Q. And how would a shipper do that?

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1 A. Well, the shipper, OG&E, did that for
2 its Red Rock plant. It showed that, as
3 summarized by the commission, Santa Fe which was
4 apparently the serving railroad, the sole serving
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6 that it was aware of the build-in possibility and
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8 Q. So it's where the rail carrier makes an
9 adjustment based upon some demonstration or
10 threat by the shipper?

11 MR. ROACH: Object to the form of the
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13 THE WITNESS: By the shipper?

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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 28, 1996

Deposition of RICHARD K. (DICK)

DAVIDSON, 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 10:05 a.m.,
Wednesday, February 28, 1996, and the proceedings
being taken down by Stenotype by JAN A. WILLIAMS,
RPR, and transcribed under her direction.

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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?

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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?

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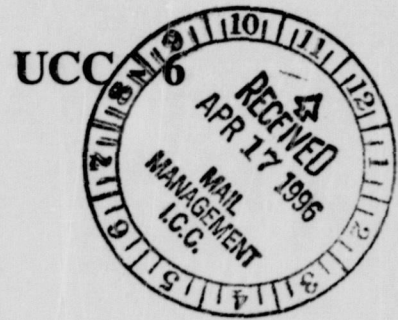
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SUPPLEMENT
DEPOSITION EXTRACTS

Richard J. Barber
Richard K. Davidson
Richard B. Peterson

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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 28, 1996

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SUPPLEMENT
DEPOSITION EXTRACTS

Richard J. Barber
Richard K. Davidson
Richard B. Peterson



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 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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1 between the UP line and the customers located at
2 Mont Belvieu?

3 A. I'm not aware of it. But the operating
4 people no doubt could answer that. There could
5 be something I'm not aware of, but I'm not aware
6 of it.

7 Q. So that's not an actual two-to-one that
8 was there, it was just an imminent possibility,
9 was it not?

10 A. Yes, in the same categories as Red
11 Rock.

12 Q. What does it take in your mind to reach
13 that status, where you can be deemed to have two
14 competitors and not any others? Is it the filing
15 of an application?

16 A. I don't think that necessarily that it
17 would have to be a filing. There had not been
18 any filing in the Red Rock situation as I
19 understand it. The question would be whether the
20 shipper could demonstrate based upon the evidence
21 that rates and/or service quality presumably at
22 the location had been significantly impacted
23 because of the proximity of the -- or possibility
24 of the build-in.

25 Q. And how would a shipper do that?

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1 A. Well, the shipper, OG&E, did that for
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11 MR. ROACH: Object to the form of the
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BEFORE THE
SURFACE TRANSPORTATION BOARD
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UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD
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DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

HIGHLY CONFIDENTIAL

Washington, D.C.
Wednesday, February 7, 1996

Continued 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 previously duly sworn, taken at the
offices of Covington & Burling, 1201 Pennsylvania
Avenue, N.W., Washington, D.C., 20044, at
10:05 a.m., Wednesday, February 7, 1996, and the
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2 of build-ins by our competitors, always trying to
3 use that as a piece of leverage in negotiating
4 freight rates.

5 Build-ins are a serious element of
6 competition in a number of Gulf chemical
7 situations. We face a lot of potential build-ins
8 from Santa Fe given their vast network in the
9 Gulf. I will say that UP in the -- back a few
10 years ago embarked on sort of an overview type
11 study of locations where geographically it would
12 appear that it, you know, could make sense to
13 build in and where there was some substantial
14 traffic.

15 And that was -- analysis was done, it
16 identified areas ranging from Yermo, California,
17 to the Gulf Coast chemical area, it mentioned
18 specifically Mont Belvieu, talked about Bayport,
19 Texas, on the SP and Strang and Pasadena in that
20 area, talked about the Lake Charles area, where
21 we go but we don't serve anything.

22 The study was as I say a preliminary
23 study, it gathered some information on the
24 business, what we might be able to get, what the
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1 Q. Where is the Union Carbide plant that
2 you mentioned as another build-out that came up
3 at some point?

4 A. The Union Carbide plant is at North
5 Seadrift, Texas, and Union Carbide also has a
6 plant at Taft, Louisiana.

7 Q. And, Mr. Peterson, which plant was the
8 one that was mentioned as a possible
9 build-out/build-in site?

10 A. Well, both plants were considered as
11 within the realm of possibility for a build-out.
12 I believe North Seadrift was ten miles, Taft may
13 be slightly less than that, but I think Taft had
14 some other cost factors, some highways to cross,
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16 considered as build-out -- having some build-out
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19 Q. And who serves the North Seadrift
20 plant?

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23 plant?

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25 Q. And to whom was the build-out proposed



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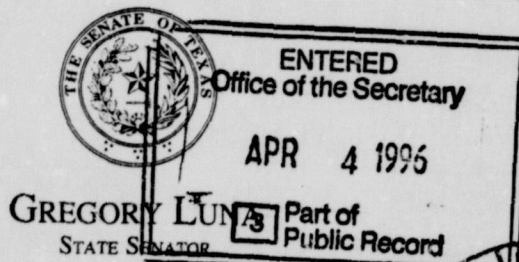
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Page Count 1

Apr #120

P.O. BOX 12068
AUSTIN, TEXAS 78711
512-463-0126
TDD 512-475-3758
FAX 512-463-2114

March 28, 1996



DISTRICT OFFICE:
318 W. HOUSTON, SUITE 302
SAN ANTONIO, TEXAS 78205
210-226-2626
FAX 210-226-0144

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
12 Street and Constitution Avenue
Washington, D.C. 20423

Re: Finance Docket 32760

Dear Secretary Williams:

I am writing in regard to the application that would allow the merger between the Union Pacific Railroad Company (UP) and Southern Pacific Lines (SP). I am concerned that this proposed merger would seriously reduce competition in the rail industry, and as a consequence, adversely affect businesses in Texas, especially businesses in major cities like San Antonio that pay millions of dollars in shipments.

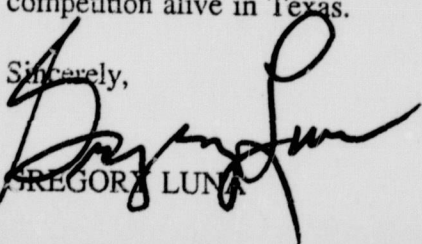
The merger would grant UP control of over 90% of rail traffic into and out of Mexico. With NAFTA in effect, it is vital that competition for transporting goods remain sound. In addition, UP would control 70% of the petrochemical shipments from the Texas Gulf Coast, and 86% of the plastics storage capacity in the Texas/Louisiana Gulf Region.

Union Pacific's remedy to such phenomenal control of the market in the rail industry is to grant trackage rights to the Burlington Northern-Santa Fe railroad. A trackage rights agreement does not solve the problem. Owners clearly have more incentive to invest in the track and to work with local communities to attract economic development. Owners also have total control over the services they provide, such as frequency, reliability, and timeliness. A railroad that operates on another company's tracks would not have these same advantages.

The key to competition is allowing other players to enter the market to provide a service. This proposed merger would not only hinder the ability to allow a new owning railroad into the market, but could eventually drive existing railroads out of the business. A study conducted at the *Center for Economic Development and Research* at the University of North Texas, known as the Weinstein report, concludes that the merger is likely to have a detrimental effect on the State of Texas by reducing competition. UP would be the single owner of numerous parallel tracks that would give them monopolistic shipping rights.

For these reasons, I urge the Board to consider that the merger be conditioned upon UP's divestiture of most of the parallel tracks. A new owning railroad is the only means of keeping competition alive in Texas.

Sincerely,


GREGORY LUNA

**ADVISE OF ALL
PROCEEDINGS**

COMMITTEES:

EDUCATION: Vice Chair, JURISPRUDENCE, STATE AFFAIRS

STB

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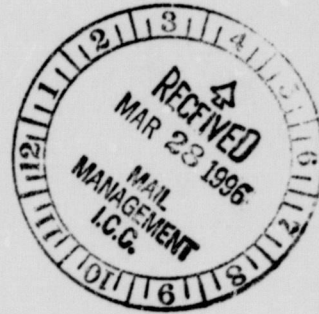
MASCH, MORSE & GARFINKLE, P.C.
ATTORNEYS AT LAW

CHARLES H. WHITE, JR.
DIRECT LINE: (202) 342-6789
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CANAL SQUARE
1054 THIRTY-FIRST STREET, N.W.
WASHINGTON, D.C. 20007-4492
TELEPHONE: (202) 342-5200

March 28, 1996

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



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

Dear Mr. Williams:

Enclosed for filing please find an original and twenty copies of Utah Railway Company's Response In Support of the Utah Railway Company's Settlement Agreement.

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

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

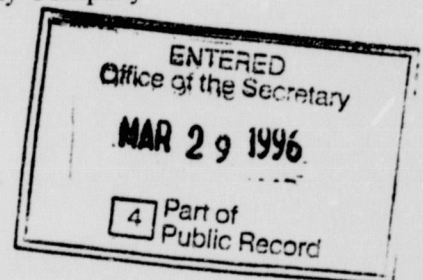
Very truly yours,

A handwritten signature in cursive script, appearing to read "Charles H. White, Jr.".

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

Enclosures

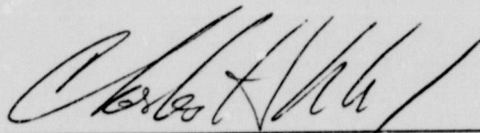
62125



XINJIYUAN-GKMG LAW OFFICE
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No. 23, DONG JIAO MIN XIANG
BEIJING 100006 PEOPLE'S REPUBLIC OF CHINA
TEL: 011-86-1 523-5567 FAX: 011-86-1-523-5569

CERTIFICATE OF SERVICE

I, Charles H. White, Jr. certify that on this the 28th day of March, 1996 I served true copies of Utah Railway Company's Response in Support of the Utah Railway Company's Settlement Agreement on counsel for applicants by hand delivery, and on counsel for parties of record by first class mail, postage prepaid.

A handwritten signature in cursive script, appearing to read 'Charles H. White, Jr.', written over a horizontal line.

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

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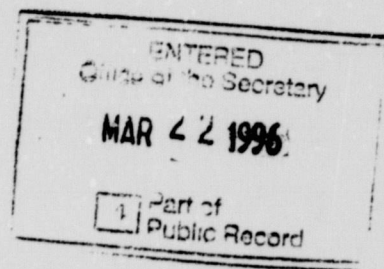
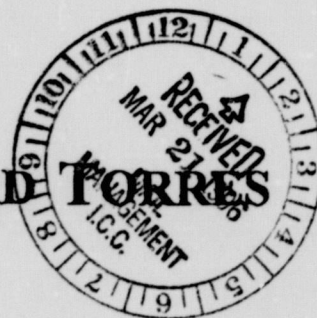
Page Count 2Mar # 384

STATE REPRESENTATIVE GERARD TORRES

DISTRICT OFFICE1026 MERCURY
JACINTO CITY, TEXAS 77029

713-675-8596 TELEPHONE

713-675-8599 FACSIMILE

FACSIMILE COVER SHEET**ADVISE OF ALL**
PROCEEDINGSTO: The Honorable Vernon Williams
202/927-5984FROM: Rep. Torres

NUMBER OF PAGES, INCLUDING COVER SHEET: _____

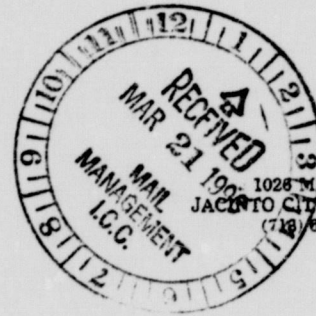
MESSAGE: _____

PLEASE CALL 713-675-8596 IF YOU EXPERIENCE ANY ERRORS IN TRANSMISSION.



GERARD TORRES
STATE REPRESENTATIVE
DISTRICT 143

P.O. BOX 2910
AUSTIN, TEXAS 78768-2910
(512) 463-0814
FAX: (512) 463-6896



March 21, 1996

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
12th Street and Constitution Avenue
Washington, DC 20423

RE: Finance Docket 32760

Dear Secretary Williams:

It is with great concern that I write this letter regarding the proposed merger of the Union Pacific Railroad Company (UP) and Southern Pacific Lines (SP). I am troubled regarding the merger's effect on rail competition in Texas, and the subsequent impact on Texas business and the ensuing repercussions on our state's economy.

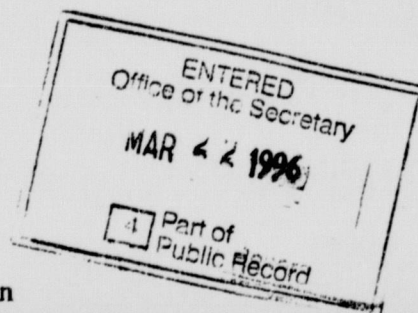
The current merger proposal would grant Union Pacific control over 90% of rail traffic to and from Mexico, as well as 70% of the petrochemical shipments from the Texas Gulf Coast region. Further, the merger would grant Union Pacific 86% of the plastics storage capacity in the Texas and Louisiana Gulf Coast Regions. This sort of monopoly would have an undeniable impact on the businesses and health of the economy in not only the State of Texas, but the entire region.

To ensure effective rail competition, Texas is in need of another owning railroad, not merely another merger. An owning railroad would guarantee long-term investments in our communities therefore benefitting shippers as well as the railroad workers. As it stand, the proposed merger will displace workers and drastically and negatively impact the health of the Texas economy.

Please contact me with your questions or comments regarding my views on the UP/SP merger. I would be pleased to provide you with any further information that you may require, and thank you for your attention.

Sincerely,

Gerard Torres
State Representative



cc: Carole Keeton Rylander, Chairman
Railroad Commission of Texas

STB

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NITL-8
DOW-9
KENN-9
WSTR-11

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, ET AL -
CONTROL AND MERGER--
SOUTHERN PACIFIC RAIL CORPORATION

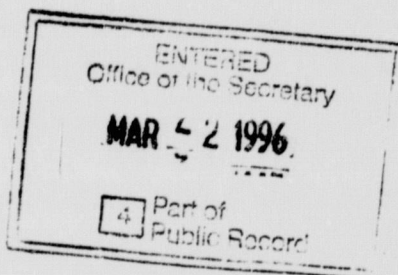


REPLY TO APPLICANTS'
APPEAL FROM ALJ'S ORDER
RESTRICTING APPLICANTS' DISCOVERY

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
THE DOW CHEMICAL COMPANY
KENNECOTT ENERGY COMPANY
KENNECOTT UTAH COPPER CORPORATION
WESTERN RESOURCES, INC.

Nicholas J. DiMichael
Frederic L. Wood
John K. Maser, III
Thomas W. Wilcox
Jeffrey O. Moreno
DONELAN, CLEARY, WOOD AND MASER, P.C.
1100 New York Ave., N.W.
Suite 750
Washington, D.C. 20005



*Attorneys for The National Industrial
Transportation League
The Dow Chemical Company
Kennecott Energy Company
Kennecott Utah Copper Corporation
Western Resources, Inc.*

Due and dated: March 18, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, ET AL --
CONTROL AND MERGER--
SOUTHERN PACIFIC RAIL CORPORATION



**REPLY TO APPLICANTS' APPEAL FROM ALJ'S ORDER
RESTRICTING APPLICANTS' DISCOVERY**

submitted on behalf of

**THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
THE DOW CHEMICAL COMPANY
KENNECOTT ENERGY COMPANY
WESTERN RESOURCES, INC.**

Comes now The National Industrial Transportation League ("League"), the Dow Chemical Company ("Dow"), Kennecott Energy Company and Kennecott Utah Copper Corporation ("Kennecott"), and Western Resources, Inc. ("Western"), and submits this Reply to the Appeal of the Applicants from the order of Administrative Law Judge Jerome Nelson entered on March 8, 1996.

The Applicants' appeal, the second filed in just three days by them, should be promptly denied. In his order of March 8, the ALJ, faced with numerous challenges filed by the League and other shipper and railroad parties to the extraordinarily wide and burdensome discovery filed by the Applicants precisely at a time designed to disrupt the preparation of the Intervenor's case in this proceeding, fashioned a balanced and thoughtful remedy. The ALJ reviewed -- question by question -- the numerous and largely "cookie cutter" interrogatories and document requests propounded by the Applicants to active parties in this case; assessed the burdens and the responsibilities placed upon the parties in the case for each question, and implemented a remedy designed to carefully balance the interests of the Intervenor and the Applicants. The

ALJ conducted this exhaustive, question-by-question review of the Applicants' discovery after they themselves had flatly refused the ALJ's request to even discuss whether even a single question could be limited or deferred.

Far from "preventing the Applicants from conducting timely discovery," as the Applicants argue in their Appeal (Appeal, p. 1), the ALJ permitted certain discovery propounded by the Applicants to go forward immediately; required other discovery to be answered immediately upon filing of the Intervenor's cases on March 29, 1996; and permitted an accelerated discovery process by the Applicants just after the filing of Intervenor's cases at the end of March.

The ALJ thus properly exercised the broad discretion given him by the Board in discovery matters in this proceeding. The Applicants therefore cannot and do not meet the high standard for interlocutory appeals of the orders of the ALJ in this case. Accordingly, his order should be affirmed. Indeed, failure to affirm his order would make it virtually impossible for the Intervenor to file evidence on March 29, as the procedural schedule now requires, and would result in a gross miscarriage of justice.

I. BACKGROUND

At the outset, the League and the other shipper parties joining this Reply strongly contest the accuracy of the "Background" set forth in the Applicants' Appeal. While some latitude is traditionally given to parties to set forth the procedural and substantive history of a question as they see fit consistent with their view of the case, the number and quality of self-serving characterizations in the "Background" section of the Applicants' Appeal appear to go substantially beyond the bounds of traditional practice. That "Background" is thus simply an extension of the Applicants' argument, and should not be relied upon by the Board in understanding the history and context of the question that was presented to the Administrative Law Judge.

A. Events Leading Up the March 8 Discovery Conference

Late in the evening on February 26, 1996, the Applicants served on each of the approximately 35 active parties to this case, including the League and the other shipper parties joining this Reply, a set of Interrogatories and Requests for the Production of Documents. As far as the League and other parties joining this Reply can tell, the first Interrogatory and the first 22 of the Document Requests to each party in the case were, with the exception of the name of the party to whom the discovery was directed, exactly the same. Two other document requests in the series propounded to every party were also exactly the same. Thus, a total of 24 document requests did not vary in the slightest from party to party, regardless of the identity of the party to whom the request was directed; the facts related to that party; or the interest of that party in the case.

The number and substance of most of the remaining questions tended to be largely identical across "categories" of Intervenor. Thus, for example, all utilities and coal producers participating in the case received an additional number of virtually identical questions beyond the 24 identical document requests directed to every party. Finally, there were a very few questions -- generally just two or three of the series of approximately thirty document requests directed to most shipper parties¹ -- that were specific to a particular party.² A copy of the Applicants' discovery was served on the Administrative Law Judge, who thus became aware of the scope and extent of the Applicants' discovery as early as February 27, 1996.

On March 4, 1996, the League and the other shipper parties joining in this Reply filed with the Applicants their Objections to the Applicants' discovery. These Objections

¹ Certain railroad parties apparently received many more document requests. See Applicants' Appeal, p. 4.

² For example, of the twenty-nine document requests directed to The Dow Chemical Company, only two -- Document Requests No. 25 (requesting information as to a build-in to a specified Dow facility) and Document Request No. 27 (requesting information as to studies concerning water transportation to a specified Dow facility) were not the same as questions directed to some or all other parties.

raised individual objections to individual questions on the basis of relevance, burdensomeness, vagueness, etc. To the best of undersigned counsel's knowledge, similar individualized objections were submitted by other parties to whom the Applicants' discovery was directed. These Objections were likewise served on the ALJ, who thus became aware as early as March 4 of the major problems with the discovery.

Also on March 4, 1996, the Western Shippers' Coalition ("WSC"), the League, and other parties filed with the ALJ letters complaining about the chilling effect that certain questions of the Applicants relating to communications with government officials were having on certain parties' communications with such persons, and that certain of the Applicants' questions implicated privileges relating to communications between parties with a common interest in the case. The Department of Justice, among other parties, raised similar concerns. WSC, the League, and others asked the ALJ to address the issue of the chilling effect of certain of this discovery immediately. In a letter dated March 5, 1996, the Applicants replied. The matter was argued to the ALJ on March 6, 1996, who declined to rule on the question on that day.

By that time, however, WSC, the Tex-Mex Railroad, and Conrail had presented to the ALJ issues for resolution relating to the prematurity and burdensomeness of the Applicants' discovery as a whole. Specifically, these parties and others questioned whether any discovery by the Applicants should go forward prior to the filing of the Intervenor's cases on March 29, 1996. Since resolution of that question in favor of the Intervenor's would have mooted the questions raised by WSC regarding the chilling effect of certain questions, it was determined that issues related to the appropriateness of the discovery as a whole would be considered quickly.

Accordingly, at the end of the discovery conference on March 6, the ALJ scheduled another discovery conference for March 8, 1996 to deal with the broader issues. It should be mentioned, however, that in the March 6 discovery conference, the ALJ noted with concern the very broad nature of the discovery propounded by the

Applicants. Transcript of March 6 discovery conference, p. 1852-53. Thus, by the eve of the March 8 discovery conference, all parties were on notice of the Intervenor's claims of burdensomeness, overbreadth, and the like, and were also aware that the ALJ was himself concerned about these matters and would be addressing them on March 8.

On March 7, the League and the other shipper parties joining in this Reply sent a letter to the ALJ that presented their views as to the burden and overbreadth of the Applicants' discovery. That letter detailed the problems presented by the unvarying questions directed to very different parties; the broad scope of the Applicants' discovery; and the fact that while most of the discovery could have been propounded weeks before, it was delayed so that responses to this discovery would have been due just two weeks prior to the due date for Intervenor's filings on March 29. In that letter, the League and other shipper parties joining in this reply noted that:

The combination of the "cookie cutter" nature of the Applicants' discovery, its broad scope, and its pernicious timing plainly reveals what this discovery really is: not an attempt to discover relevant facts, but a means to harass and unreasonably burden intervenors at a critical time in this proceeding.

That March 7 letter specifically asked the ALJ to consider the burdensomeness of the Applicants' discovery in issuing a ruling for the discovery conference scheduled for the next day, March 8, 1996.

Finally, on March 7, the Applicants sent a detailed letter to the ALJ in opposition to the position that the discovery was premature and disclaiming any burden or overbreadth.

B. The March 8 Discovery Conference and the ALJ's Ruling

At the outset of the March 8 discovery conference, Administrative Law Judge Nelson indicated that he had read all of the papers that had been filed regarding the questions that were before him, and that he was prepared to make certain rulings. (Transcript ["Tr."] at 1888-89). At the very outset, he denied the Intervenor's arguments

that no discovery at all should be permitted. (*Id.* at 1919) However, he indicated that some of the Applicants' discovery was clearly premature and overbroad, particularly in view of the fact that it was being propounded before the Intervenor had filed any comments or taken any formal positions in the proceeding. (*Id.* at 1940-41, 1944-45, 47)

Accordingly, ALJ Nelson indicated that the discovery should be broken into two parts: some "that can manageably go on now that is sufficiently specific that something can happen" (*id.* at 1943); and some discovery that would be subject to reformulation and resubmission in light of the Intervenor's actual filings on March 29, but would be subject to a very accelerated response by the Intervenor (*id.* at 1945-1947). He invited the parties to discuss among themselves what discovery should be answered now, and what should be delayed until after the March 29 filings but subject to an accelerated procedural schedule. (*Id.* at 1940-43, 1947-50). The ALJ then recessed the hearing to permit the discussions among the parties. (*Id.* at 1965)

However, instead of constructively attempting to develop focused discovery that could begin immediately while leaving some discovery for resubmission under an accelerated procedural schedule directly after the Intervenor's March 29 filing, the Applicants took the position that the ALJ's ruling should be ignored, and that all discovery should go forward immediately. The Applicants' refusal to compromise in any way was then communicated to the judge. (*Id.* at 1966-67, 1969-71, 2065) (Transcript, p. 1969: "JUDGE NELSON: . . . "Are you prepared to make no agreement, Mr. Livingston?" MR. LIVINGSTON [counsel for Applicants]: . . . "We believe these are all proper discovery requests . . .")

Since the Applicants were clearly not prepared to compromise in any way or to offer the Judge any help at all with regard to the discovery (*id.* at 1969-71), for the balance of the hearing the ALJ proceeded question-by-question through the discovery propounded to Conrail. (*Id.* at 1971-2064) Since much of the discovery was the same to all of the parties, the ALJ also held that his rulings as to Conrail should be applied to

all the other parties in the case that had received discovery requests from the Applicants. However, if there was any confusion as to "non-common" questions, he would be available to resolve the matter on the next business day. (*Id.* at 2025-28, 2063-67)

As a general matter, the ALJ divided the discovery into two types, with three different response dates. The first type involved discovery questions that were sufficiently focused to be answered as formulated, either on March 12 (the original due date for the responses) or if the questions related to specific positions that the parties were to take in their filings on March 29, answers were to be due on April 1, the business day immediately following the filings. For each question that the ALJ held fell into this first type, he specified the appropriate response date (*i.e.*, March 12 or April 1). The second type were questions that were broad and unfocused. For these questions, the ALJ required the Applicants to reformulate them in light of the actual filings on March 29 and resubmit them to the Intervenors. These questions, the ALJ ruled, would be required to be answered by the Intervenors under a super-compressed schedule, by which answers were to be due just 7 days after they would be propounded, with discovery disputes adjudicated just two days later, and final production after adjudication of the disputes just four days after that. (*Id.* at 1945-47)

On March 13, the Applicants filed their Appeal.

II. THE STANDARDS FOR APPEAL OF A DECISION OF THE ALJ ON DISCOVERY MATTERS IN THIS PROCEEDING ARE STRICT

In Decision No. 6 in this proceeding, the Board reiterated what it has called the "stringent standard" governing interlocutory appeals of Administrative Law Judge Nelson: "Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." See, 49 C.F.R. 1115.1(c). The agency has traditionally hewed closely to this rigorous standard. See, *e.g.*, *Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Company and*

Chicago and North Western Railway Company, Finance Docket No. 32133, Decision No. 17, at 9 (ICC served July 11, 1994)(applying the "stringent standard" to an appeal of an ALJ decision in a discovery matter in a merger proceeding). The policies behind the rule are clear and salutary: anything but a "stringent standard" would enmesh the Board in numerous appeals of discovery disputes, a result particularly at odds with the compressed procedural schedule in this complex proceeding; would undermine the authority of the ALJ to fashion workable discovery procedures.

III. THE DISCOVERY PROPOUNDED BY THE APPLICANTS WAS EXTRAORDINARILY BROAD, UNFOCUSED AND BURDENSOME, PARTICULARLY IN LIGHT OF THE FACT THAT THE INTERVENORS HAVE YET SUBMITTED NO COMMENTS OR SOUGHT NO CONDITIONS IN THE PROCEEDING

As noted above, the Applicants, at the very beginning of the discovery conference on March 8, were invited to discuss the content of their discovery with the Intervenor, to determine what questions should be answered immediately; and to determine what questions were better left to be reformulated and answered under a super-compressed discovery schedule after the filing of the Intervenor's comments and evidence on March 29, 1996. Instead of evidencing a willingness to compromise in any way, however, the Applicants adopted a "hard line." All their discovery, they insisted, was without exception proper: See Transcript, p. 1969: "JUDGE NELSON: . . . "Are you prepared to make no agreement, Mr. Livingston?" MR. LIVINGSTON [counsel for Applicants]: . . . "We believe these are all proper discovery requests . . ." None of their discovery, the Applicants claimed, could be focused, improved or specified in more detail in any way.

Having adopted the "hard line" and having refused to compromise in any way, the Applicants left the ALJ with no choice but to review each and every one of their discovery requests, in order to assess -- question by question -- the claims of burdensomeness, overbreadth, and vagueness that had been made by the Intervenor.

This exhaustive, question-by question review by the ALJ revealed much that was wanting in the Applicants' discovery. It gave the lie to the Applicants' proud claims that "these are all proper discovery requests." Even a cursory review of the record before Judge Nelson reveals that the Judge was clearly correct that much of the Applicants' discovery was premature, and that much of it was burdensome.

A. Many of the Discovery Requests by the Applicants Were Extraordinarily Broad, Vague, and Burdensome

Although it would be impossible in this Reply to detail the breadth, vagueness and burdensomeness of all of the discovery questions propounded by the Applicants, even a sampling of the discovery reveals its objectionable nature. Such a sampling also reveals the hollowness of the Applicants' bold claims that their discovery comprised only "categories of documents that should have been located at a few, limited places . . ." (Appeal, p. 4); or that the Applicants focused their requests "narrowly" on the issues in this proceeding (Appeal, p. 4):

- The Document Requests to the National Industrial Transportation League encompassed not only documents in the possession of the League itself, but all documents in the possession of each and every one of the members of the League across the country relating to each and every one of the questions. As this Board well knows, the League has over 600 shipper members located across the country, and indeed, in other countries as well.³ Instead of requesting documents from a "few, limited places," the Applicants discovery required the League to obtain information from literally hundreds, and probably thousands, of sites across the country.

³ Indeed, the Applicants appear serious about this point: in a March 13 letter to the ALJ, they have asked the ALJ to order the League (and many of the other associations participating in this case) to obtain information requested in the discovery from its members, and failing that, to be precluded from filing evidence in this case. As the Board well knows, adoption of such a rule would have the effect of precluding the participation by the League in any adjudicatory proceeding before this Board.

- Document Request No. 26 to Dow required Dow to "produce Dow's files regarding transportation (including the transportation by non-rail modes) of all commodities that Dow has moved via UP or SP since January 1, 1993." Dow produces over 200 products at a single plant in Texas; it has several plants around the country, and indeed has plants around the world. The question, by its terms, required Dow to determine what commodities had been shipped by the UP or SP since January 1, 1993, and then to produce all of its files from around the country and even around the world relating to the transportation of any and all of these commodities by any mode. Thus, under the terms of the question, if Chemical X had moved via the UP or SP at any time over the past three years, then the files concerning any truck movement of Chemical X from from anywhere in the country would have had to have been produced. Indeed, if Chemical X had moved via UP or SP during the last three years, then the discovery on its face would have required Dow to produce its files on the transportation of this commodity from a plant located in a foreign country to a foreign customer.
- The Applicants' massive discovery was directed to Western Resources, Inc., even though Western will probably not be filing comments or evidence in this case at all on March 29, and will not be seeking conditions.
- Document Request No. 28 to Dow requested Dow to produce "all documents relating to (a) the extent to which any particular 7-digit STCC Code within the STCC 28 or 29 ranges includes different commodities that are not substitutable in use . . ." This document request, by its terms, would have required Dow not to search just its transportation files, but the files of all of its technical and research offices around the country and

indeed around the world to see which of the literally hundreds of commodities that fall within STCC numbers 28 and 29 might be "substitutable in use" with any other of the hundreds of commodities within these STCC numbers. "Substitutable," of course, was not defined by the Applicants. Again, far from requesting documents that would be located at a "few, limited places," the Applicants' discovery would have entailed a massive burden of perhaps hundreds of thousands of technical documents from a large and undetermined number of locations.⁴

- The Applicants' Document Request No. 10 to the League broadly and vaguely requested studies or analyses from the League "and its members . . . relating to competition between single-line and interline rail transportation." If this is an example of a request that has been "focus[ed] more narrowly than [it] otherwise could have been . . ." (Appeal, p. 4), the League would be interested in seeing how the Applicants might word a truly broad document request. By its terms, the document request is not limited to documents relating to the UP or SP, or even any of the railroads participating in this case.

Indeed, the Applicants' Appeal appears to concede that much of their discovery, on its face, did appear to be burdensome and broad when they noted that "what may seem like a broad or burdensome request may really be quite narrow when directed to a specific party." (Appeal, p. 18) Their "explanation" for the facial overbreadth of their inquiries rings hollow: broad questions asked of the Applicants, they claim, are burdensome because of the "massive preparation that went into the merger," while similar broad claims asked by Applicants of the Intervenor are not, allegedly because "fewer individuals" or "more easily identifiable locations" will be involved. But as shown above, this "distinction" is nonsense: document requests that seek all of Dow's

⁴ The same question was posed to Kennecott, and it suffers from the same infirmities.

"files regarding the transportation (including the transportation by non-rail modes) of all commodities that Dow has moved . . ." via UP or SP for the last three years, or that seek information from each and every one of over 600 shippers that are members of the League hardly involve "few individuals" or "easily identifiable locations."

B. Much of the Applicants' Discovery Does Not Meet the Test of Relevancy. Since It is Not Directed to An Issue That A Particular Party Will Raise in the Case

At page 9 of their Appeal, the Applicants claim that in framing their discovery requests, they "sought discovery from active parties to this case on matters related to Applicants' merger application that have been placed at issue by the various parties to their discovery requests to Applicants." But this is not correct: or rather, it is correct only in the most disingenuous way. As noted above, twenty four of the approximately 30 document requests were exactly the same to every party to whom discovery was directed. In other words, if one party raised an issue in discovery regarding a particular matter, the Applicants directed broad and unfocused discovery on every party on that same matter. Thus, if Intervenor "A" had asked a question in discovery concerning matter "X", then the Applicants asked Intervenors "B", "C", "D", "E", "F", "G" etc. to produce all documents related to that matter, even though none of the latter intervenors had raised any questions regarding the matter. A few examples will show the overbreadth of the Applicants' approach:

- The Applicants asked Dow to produce all documents related to the Utah Railway Settlement Agreement, (Document Request No. 7 to Dow), even though Dow has made clear during the course of this proceeding that it is interested in competitive issues related to a single chemical plant on the Texas Gulf Coast.
- The Applicants asked for the production of "all documents in the possession of the NIT League or its members" relating to the IC Settlement

Agreement" (Document Request No. 6 to the League) even though the League has not raised any issue on this matter during the course of this proceeding.

- The Applicants asked Kennecott for all studies, etc. related to "the benefits of any prior rail merger or rail mergers generally" (Document Request No. 11 to Kennecott) even though Kennecott has never raised any question regarding prior rail mergers during this proceeding.
- The Applicants asked Western to produce all studies, etc. "relating to collusion among competing railroads or the risk thereof" (Document Request No. 24 to Western), even though Western has raised no such issue, and even though Western is not going to seek conditions in this proceeding at all.

The "cookie cutter" nature of the Applicants' discovery also frequently produced questions that were inexplicable in the context of the party to whom they were directed. For example, Kennecott Utah Copper Corporation and Kennecott Energy Company, a copper producer and coal producer respectively, were asked to "produce all filings made with state utility commissions or state regulatory agencies that discuss sources of fuel." See, Document Request No. 29 to Kennecott Utah Copper Corporation and Kennecott Energy. While this question might make sense when directed to a utility that has "sources of fuel" for the generation of its electricity, it makes no sense in the context of a copper producer and a coal producer, whose "sources of fuel" for conducting copper or coal mining operations do not appear to be at issue in this case and whose "sources of fuel" are not in any event generally regulated by a "state utility commission."⁵

⁵ Another example of the blatantly generic nature of the discovery that led to simple errors is Document Request No. 23 to Western, which is directed to "Western Resources or its members," even though Western is not an association, and has no "members."

Relevance to a case cannot be claimed "in the air." It must be related to a claim that a particular party might make. Otherwise, discovery as to that party becomes unduly burdensome. The Applicants' discovery was infected from the start with internal contradictions, overbreadth, vagueness and burdensomeness that the ALJ quickly uncovered as he proceeded question-by-question through the discovery. The primary source of this infection was the Applicants' failure to focus much of their discovery upon issues related to the factual situations of individual parties, but simply "broadcast" discovery to the world.

C. The Real Purpose of the Applicants' Discovery Was To Harass and Burden Intervenor At a Critical Time in this Proceeding

The oddities, overbreadth and burden of the Applicants' discovery cannot be explained by simply the press of time or by a misunderstanding of the issues. As noted above, most of the discovery propounded had little to do with particularized claims of a party: most of the discovery was made up of "cookie cutter" questions directed to every active party in the case. Indeed, given the fact that so much of it was not connected to the particular claims of any particular party, it seems clear that much of this discovery could have been propounded weeks, if not months, before.

The key to this discovery is not just in its overbreadth, vagueness, and burdensomeness, but in its timing. The discovery was propounded in virtually the last hour before the agreed-to "blackout" period under the Discovery Guidelines for written discovery. Answers would have been due on March 12, 1996, or just two weeks before the Intervenor's comments and evidence are due to be filed. The discovery was clearly intended to divert the attention of the Intervenor from that important task. The Board should also take note of the timing of this discovery in evaluating the overall burden.

IV. THE ALJ CAREFULLY EVALUATED THE BURDENS OF THE DISCOVERY AND THE NEED FOR THE DISCOVERY IN FASHIONING A PROGRAM THAT WOULD BALANCE THE NEEDS OF ALL THE PARTIES.

Faced with the Applicants' "hard line" approach and their refusal to compromise or even discuss potential areas where the discovery propounded by them could be made more focused, and faced with the evident overbreadth, burdensomeness and lack of connection to the conditions to be sought by individual parties, the ALJ's question-by-question review of the Applicants' discovery correctly evaluated the requests and carefully balanced the interests of the parties.

First of all, the ALJ ruled that some discovery could go forward immediately. That discovery was the result of the question-by-question inquiry of the ALJ in which he determined that those questions were sufficiently focused and relevant so as to permit answers either immediately (*i.e.*, as of March 12), or immediately upon the filing of comments, if such questions were directed to the content and scope of the comments to be filed. Other discovery -- that which was broad, vague and unfocused (see, *e.g.*, Document Request No. 10, requesting all studies, etc. "relating to competition between single-line and interline rail transportation") -- would be subject to reformulation and resubmittal under a super-compressed procedural schedule after the filing of comments on April 1.

Such an arrangement appropriately balanced the interests of the Applicants to obtain relevant discovery in a timely manner, and the interests of the Intervenor to appropriately avoid burdensome, vague and unfocused discovery that was unrelated to the actual claims that they might make in the proceeding. Far from "los[ing] sight of the fundamental fact that Applicants are entitled to discovery from parties in order to develop their own case," as the Applicants broadly and unjustifiably charge in their Appeal (p. 23), the ALJ acted according to the highest standards in this complex and extraordinarily difficult case.

The most baseless charge of all is that Judge Nelson had no "consistent, discernible basis" for his decisions. (Appeal, p. 16, et. seq) Throughout the question-by-question review, the ALJ consistently evaluated (a) the burdensomeness of the individual question; (b) the specificity of the question posed; and, (c) the connection of the question to the conditions that might be sought by individual parties on March 29. Specific, non-burdensome inquiries that did not depend on the content of conditions to be sought were required to be answered immediately; specific, non-burdensome questions that were closely linked to the content of conditions to be sought were to be answered on April 1; and generalized, burdensome inquiries related only broadly to the issues in the case were required to be reformulated, resubmitted and answered under a super-compressed procedural schedule beginning on April 1.

V. THE ALJ'S DECISION DOES NOT DEPRIVE THE APPLICANTS OF THEIR ABILITY TO CONDUCT MEANINGFUL DISCOVERY

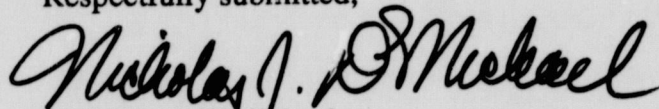
As discussed above, the ALJ's decision does not deprive the Applicants of the ability to conduct meaningful discovery: indeed, it permits them to receive some responses immediately, and to receive responses to discovery propounded after April 1 even more quickly than the original procedural schedule permits.

There is, indeed, one complete answer to the Applicants' contention that Judge Nelson's March 8 decisions denies them the ability to conduct meaningful discovery. Specifically, in the proceeding involving the merger of the Burlington Northern Railway Company and the Atchison, Topeka and Santa Fe Railway Company, counsel for the Applicants in that case did not even FILE discovery on the Intervenors in that case until AFTER the Intervenors had filed comments and sought conditions before the Interstate Commerce Commission. Yet, the BN and the ATSF appeared to be able to present -- judging by the ICC's decision approving the merger -- a compelling case to the agency. The Applicants' problem in this case is not, as they now charge, that they will be unable to conduct meaningful discovery under the ALJ's March 8 ruling. Rather, they have

belatedly "discovered" that the proposed merger indeed raises serious anticompetitive issues, and they are attempting to find additional time in order to shore up an increasingly difficult case to sustain. They cannot have it both ways: to obtain all of the benefits of an accelerated procedural schedule on the basis of the success of the BN/SF merger schedule, but to request time that the Applicants in the BN/SF merger never had in order to benefit their own cause.

The Applicants' appeal should be denied.

Respectfully submitted,



Nicholas J. DiMichael

Frederic L. Wood

John K. Maser, III

Thomas W. Wilcox

Jeffrey O. Moreno

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

1100 New York Ave., N.W.

Suite 750

Washington, D.C. 20005

*Attorneys for The National Industrial
Transportation League*

The Dow Chemical Company

Kennecott Energy Company

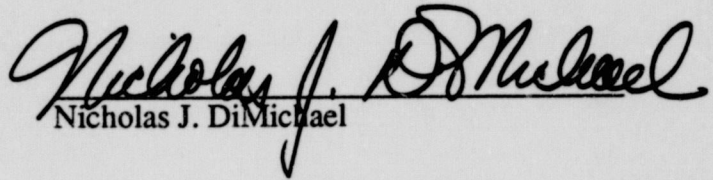
Kennecott Utah Copper Corporation

Western Resources, Inc.

March 18, 1996

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY TO APPLICANTS' APPEAL FROM ALJ'S ORDER RESTRICTING APPLICANTS' DISCOVERY has been served by First Class Mail, postage prepaid, on all parties on the restricted service list in this proceeding on this 18th day of March 1996, and by facsimile to Washington, D.C. counsel for Applicants.


Nicholas J. DiMichael

STB

FD

32760

3-21-96

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61927

MODESTO and EMPIRE TRACTION CO.

Item No. _____

Page Count 2
MAR #397

ET • MODESTO, CALIF. 95353 • PHONE (209) 524-4631 • FAX (209) 529-0336



March 18, 1996



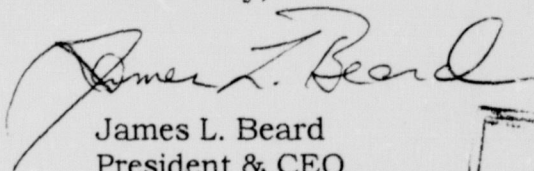
Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12th St. & Constitution Ave. N.W.
Washington, DC 20423

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

Dear Sir:

Attached is my "Verified Statement" which has been made with respect to the proposed merger referenced above. Please do not hesitate to call me if you have any questions regarding my Statement.

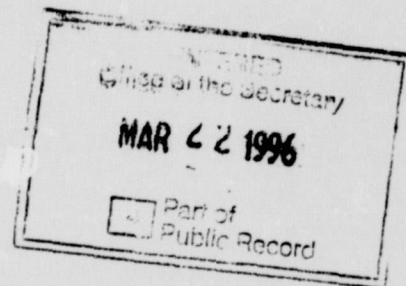
Yours truly,


James L. Beard
President & CEO

JLB/elv

Enclosure

c: Ms. Roberta R. Lund
Special Project Coordinator
Law & Government Affairs Dept.
3800 Continental Plaza
777 Main Street, Suite 3800
Ft. Worth, TX 76102-5384



**ADVISE OF ALL
PROCEEDINGS**

**VERIFIED STATEMENT
OF
JAMES L. BEARD
ON BEHALF OF
MODESTO and EMPIRE TRACTION COMPANY**

My Company is a short line railroad serving the community of Modesto and surrounding areas, all located within Stanislaus County, California. Our railroad connects and interchanges cars with the BN Santa Fe, Union Pacific and Southern Pacific railroads.


As of this date our railroad has taken no position on whether the proposed merger between the Union Pacific and Southern Pacific railroads should be approved. However, if the merger is approved it is our strong position that the agreement reached between BN Santa Fe and UP/SP must be imposed as a condition to the merger.

The BN Santa Fe's agreement with the UP/SP is absolutely essential for preserving competition at locations which are served only by UP and SP today. All, or nearly all, these affected locations include points of origin or destination used by various shippers located on our railroad. In addition, the agreement will enhance competition by opening new single line service options which are to points of origin or destination served with single line service solely by the UP or the SP today.

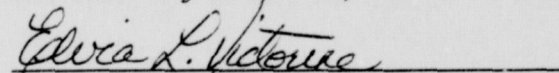
VERIFICATION

State of California)
) ss.
County of Stanislaus)

James L. Beard, being first duly sworn, deposes and says that he has read the foregoing, knows the facts asserted therein, and that the same are true and correct as stated.


James L. Beard
President & CEO

Subscribed and sworn to before me this 18th day of March, 1996.


Elvia L. Victorine, Notary Public

My Commission expires September 30, 1997

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Page Count 2

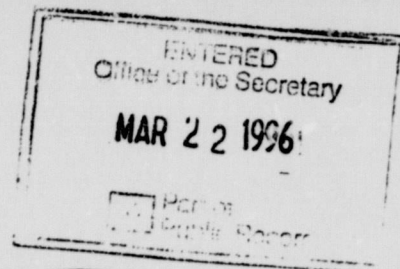
Mar #399

DEPARTMENT OF THE ARMY

VICKSBURG DISTRICT, CORPS OF ENGINEERS
2101 NORTH FRONTAGE ROAD
VICKSBURG, MISSISSIPPI 39180-5191

REPLY TO
ATTENTION OF:

March 15, 1996



Planning Division
Environmental Resources Branch

Ms. Elaine K. Kaiser
UP/SP Environmental Project Director
Section of Environmental Analysis
Surface Transportation Board
12th and Constitution Avenue, Room 3219
Washington, DC 20423-0001



Dear Ms. Kaiser:

I refer to your letter of January 29, 1996, concerning comments on the potential environmental impacts of the control and merger application between the Union Pacific and Southern Pacific Railroads (Finance Docket No. 32760).

Dames and Moore and the Union Pacific Railroad Law Department contacted the U.S. Army Corps of Engineers, Vicksburg District, regarding subject merger. Our comments provided to Dames and Moore dated October 16, November 6, December 6, and December 21, 1995, indicated that the Vicksburg District has no ongoing or proposed activities, including parks or refuges, in proximity to the proposed project. However, if the proposed actions would impact navigable waters or waters of the United States, a permit from the Corps of Engineers would be required. A pamphlet describing the Corps permitting process was provided for their information.

The environmental report (Finance Docket No. 32760) addresses the issues of land use, water, wetlands, biological, cultural resources, transportation, air quality, and noise. Mitigation of each of these issues is addressed primarily by avoiding impacts that would be considered significant. Each issue appears to have been coordinated with the appropriate agencies.

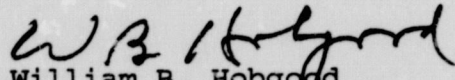
Your letter specifically addresses impacts to the 100-year flood plain. Any proposed construction in a 100-year flood plain should be coordinated with the appropriate office of the local government responsible for issuing development permits to avoid adverse impacts to the 100-year flood plain.

Proposed rail line abandonments should be coordinated with the office responsible for maintenance of drainage. Consideration should be given to removing abandoned rail lines at stream crossings or making arrangements with the office responsible for channel maintenance.

-2-

I trust this information meets your needs. If you have any questions, please contact Mr. Stuart McLean of this office, telephone (601) 631-5965, or write the above address, ATTN: CELMK-PD-Q.

Sincerely,


William B. Hobgood
Chief, Planning Division

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Item No. _____

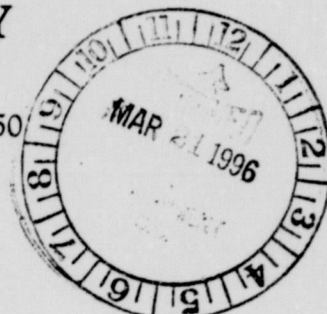
Page Count 1

MAR #400



NEBKOTA RAILWAY

P.O. Box 506
Gordon, Nebraska 69343-0506
(308) 282-1550 • FAX (308) 282-1550
12 March 1996



The Honorable Vernon A. Williams
Secretary
United States Surface Transportation Board
12th & Constitution Ave NW
Washington DC 20423

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

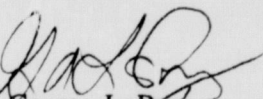
Dear Mr. Williams:

NEBKOTA Railway, Inc. supports the BN/Santa Fe Agreement reached with UP/SP in the above referenced case, we strongly urge the Surface Transportation Board to impose the BN/Santa Fe Agreement as a condition to any UP/SP merger.

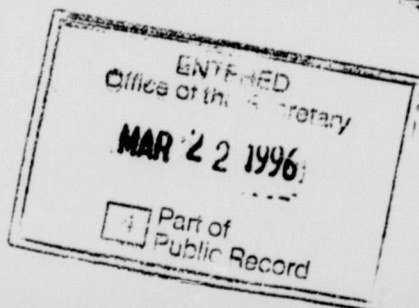
NEBKOTA Railway Inc. (NRI) is a Class III rail common carrier operating 103 miles of rail line between Crawford and Merriman, NE. NRI is primarily an originator of agricultural products. Over 95% of NRI's traffic is interchanged with BN/SF.

STB imposition of the BN/ATSF Agreement on any merger of UP/SP will open additional markets for our NRI originated agricultural products. Most specifically a number of receivers of millet seed located on UP or SP in the Southwest and California would be accessible by direct BNSF routing. These are markets which due to difficulties associated with interline rates and routes are effectively now closed to NRI shippers.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 12th day of March, 1996.


George LaPray,
General Manager

**ADVISE OF ALL
PROCEEDINGS**



STB

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32760

3-21-96

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Item No. _____

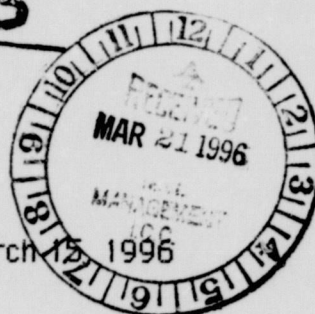
Page Count 1

Mar # 404

PROCEEDINGS

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
12th Street & Constitution Avenue
Washington, DC 20423

Reference: Finance Docket 32760



March 15, 1996

Dear Sir,

I am against the rail merger between the Union Pacific and Southern Pacific railroads. It would eliminate many needed jobs in Texas. My father worked long, hard hours for Houston Belt & Terminal Railroad in Houston, Texas for over 30 years. He worked with rail cars of both railroads. My three sisters and I grew up recognizing the two companies. If these two companies had not done business in Texas and not provided steady employment for my father, I may not have been able to go to private schools and college. Times may have changed, but if jobs can be saved, please do not eliminate them by consolidating the two companies.

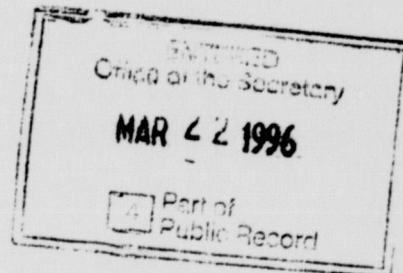
If the merger goes through, it will affect the cost of transportation of goods in Texas and Mexico. It will cut the healthy competition and fair rates we now have. If the cost of transportation through Texas is high, who will want to ship their goods through this state??? If the cost of transportation goes up, one can be sure the final cost of goods will be inflated. And the consumer will be socked with rising costs again!!!

My husband and I have two young adults we are putting through college. I cannot bear any more unnecessary inflation. For our sake, please reconsider the proposal for a merger. For the sake of a healthy economy in Texas, please do not allow the merger to reach completion. For the sake of preserving existing jobs and business, please stop the merger as proposed.

Sincerely,

Margaret N. Dalvi

Margaret N. Dalvi
1521 Skyline
Portland, Texas 78374
home phone: (512)643-5585



cc: Railroad Commission of Texas, P. O. Box 12967, Austin, TX 78711-2967

STB

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3-21-96

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Item No. _____

Page Count 2

Mar # 387

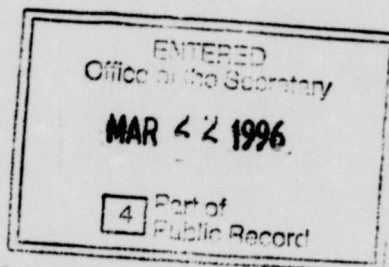
Port Clinton

of the Mayor

Hall - P.O. Box 1
Port Clinton, Ohio 43452
(419) 734-5522



Thomas M. Brown
Mayor



March 15, 1996

The Honorable Vernon A. Williams, Secretary
Interstate Commerce Commission
12th Street and Constitution Avenue
Washington, D.C. 20423

RE: Finance Docket 32760

Dear Secretary Williams:

The City of Port Clinton has carefully evaluated the proposed Union Pacific/Southern Pacific merger, and its effect on this community and the State of Ohio. While there may be benefits to the consolidation between these two railroads, it is important from an economic development standpoint that other options and proposals be weighed and considered before any merger approval is given by the Interstate Commerce Commission (ICC). Further, the City of Port Clinton is not persuaded that the proposed agreement between the Union Pacific and the Burlington Northern/Santa Fe will satisfy our concerns over completion.

Conrail, Inc. has approached the City of Port Clinton with its proposal for acquiring some of the Southern Pacific Eastern lines from Chicago and St. Louis to Texas and Louisiana. This proposal has great benefit for those midwest cities and states eager to encourage economic growth.

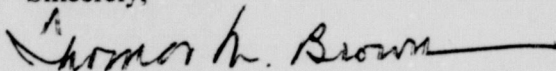
Conrail has been and continues to be a good corporate resident of Port Clinton and its level of service has greatly benefited the manufacturers and shippers in our community. This proposed acquisition by Conrail will only enhance the current service being provided. Economic expansion opportunities will be available to the businesses and industries in our community. In addition, with direct shipments of midwest-made products to new markets in Mexico, the mid-south and Gulf Coast regions, areas currently not easily accessed by midwest shippers, will be opened.

**ADVISE OF ALL
PROCEEDINGS**

For these reasons, the City of Port Clinton strongly supports Conrail's purchase of the Southern Pacific Eastern lines. Without the Conrail proposal being a part of the ICC's approval, the Union Pacific/Southern Pacific merger should not be consummated.

Conrail's ownership of the Southern Pacific Eastern lines is good business sense and brings more corporate responsibility than the lease arrangements as proposed by Burlington Northern/Sante Fe.

Sincerely,

A handwritten signature in dark ink, appearing to read "Thomas M. Brown", with a long horizontal flourish extending to the right.

Thomas M. Brown
Mayor
City of Port Clinton

cc: Mr. David M. LeVan, President & CEO
Consolidated Rail Corporation
2001 Market Street 17th Floor
Philadelphia, PA 19101-1409

STB

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3-21-96

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BRISTOL TOWNSHIP TRUSTEES

61918

Item No. _____

Page Count 1

Mar #389

P.O. Box 254 • Park Drive
Bristolville, Ohio 44402
(216) 889-2575

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12th St. & Constitution Avenue
Washington, D.C. 20423



FD 3760

Dear Secretary Williams:

I am concerned that the proposed Union Pacific-Southern Pacific railroad merger is not in the public interest in Northeast Ohio. We would be far better served if the UP-SP's eastern routes were, as part of the proposed merger, sold to Conrail, not leased to another western railroad.

My reasoning is straightforward. First, our industrial companies, particularly in the booming polymers sector, need direct service to raw materials and markets in the Gulf "chemical coast" region and to Mexico. Second, we believe that an owner-carrier, such as Conrail, would have greater incentive to improve markets along the route. Third, by keeping Conrail strong, we ensure a variety of service options and strong price competition among the major railroads in our region, namely CSX, Norfolk and Southern, and Conrail.

Finally, and most important, we believe the Conrail proposal is in the best interests of the industrial, manufacturing and transportation workers of our region. It combines efficient transportation, economic development, and continued employment opportunities. These are keys to the public interest.

For those reasons I would oppose the proposed merger unless it includes the Conrail purchase of the eastern lines of the old Southern Pacific. Only with the Conrail acquisition will Northeast Ohio economies be maximally served.

Thank you for your consideration.

Sincerely,

BRISTOL TOWNSHIP TRUSTEES

A handwritten signature in cursive script that reads "Ramon W. French".

RAMON W. FRENCH, CHAIRMAN

C:Dr. William Burges, Conrail

STB

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32760

3-21-96

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61917

Item No. _____

Page Count 1

Mar # 390

61917

3/12/96

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
12th Street & Constitution Ave.
Washington, D.C. 20423



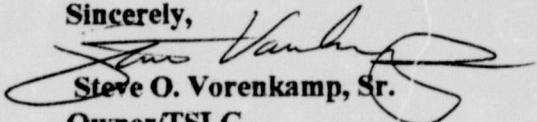
RE: Docket 32760

Dear Sir,

I am writing you based on the proposed merger of Union Pacific and Southern Pacific railroad. I am totally opposed to this for the very simple reason that it is going to limit jobs here in Texas and almost eliminate the possibility for competition. This is bad news for us and anyone moving material through this state.

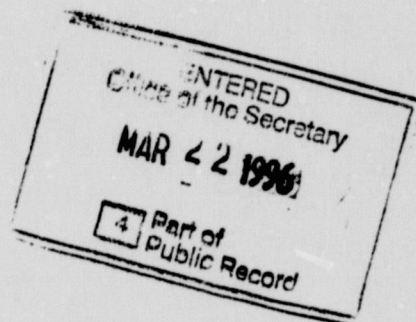
Please do what you can to **stop** this merger from happening.

Sincerely,


Steve O. Vorenkamp, Sr.

Owner/TSLC

file/cc/do
cc/RRCTX



**ADVISE OF ALL
PROCEEDINGS**

STB

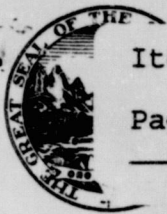
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32760

3-21-96

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Item No. _____

The Big Sky Country

61916

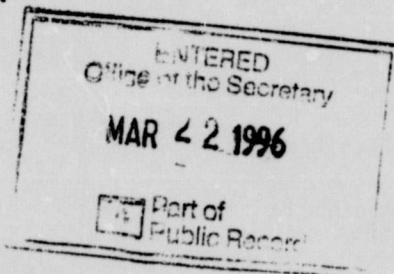
Page Count 2
Mar #391

USE OF REPRESENTATIVES

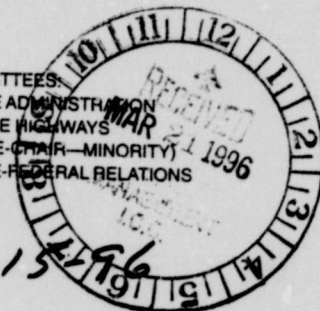
REPRESENTATIVE PATRICK G. 'PAT' GALVIN
HOUSE DISTRICT 48

HELENA ADDRESS:
CAPITOL BUILDING
HELENA, MONTANA 59620-0400
PHONE: (406) 444-4800

HOME ADDRESS:
105 29TH AVENUE NW
GREAT FALLS, MONTANA 59404
PHONE: (406) 453-8464



COMMITTEES:
STATE ADMINISTRATION
HOUSE HIGHWAYS
(VICE-CHAIR—MINORITY)
STATE-FEDERAL RELATIONS



3-15-96

David,
You should have run for Atty. Gen. as a democrat!

Thank you for your two letters with reference to UP-SP merger. Be advised I am between a rock and a hard place on the question. BSN and Rail Link have supported me in the past as have BLE-UTU and Transportation Comm. Union.

I know you understand why I take no position on the question.

Sincerely,
Pat

**ADVISE OF ALL
PROCEEDINGS**

AP

Most support Southern Union
Pacific merger with conditions

By KARYN HUNT
Associated Press Writer

SAN FRANCISCO — Officials from Southern Pacific Rail Corp. and Union Pacific Corp. say their mega-merger will increase competition with railroad companies that have already combined forces.

The balance of competition shifted dramatically when Burlington Northern and Santa Fe merged, creating a dominant rail system in the western United States, the company officials said at a public hearing Wednesday hosted by the California Public Utilities Commission.

Without their own merger, Union Pacific would not be able to compete and Southern Pacific could fold operations entirely, they said.

If the deal goes through, consolidation and additional tracks will enable the companies to offer lower rates, more direct routes and better service to customers, company representatives said. They said merging would free up \$1.2 billion to upgrade lines and rail yards.

The merger will bring to our customers, especially customers in California, enormous benefits," said Dick Davidson, president and chief operating officer of Union Pacific.

The Public Utilities Commission this week is holding workshops on the \$5.4 billion buyout. These could sessions could play a part in deciding whether the biggest rail merger in U.S. history takes place.

The PUC has no say in the matter, but the meetings can help state officials decide whether to send federal regulators an endorsement of the merger.

The power to approve or deny the deal ultimately belongs to the three-member federal Surface Transportation Board, which is expected to issue a ruling Aug. 12.

One of the combined railroad's major competitors, surprisingly, is not opposing the merger. Burlington Northern Santa Fe Corp. negotiated rights to run trains on 3,800 miles of track and to buy 335 miles more if the deal goes through. In return, it promised not to oppose the buyout.

Many short line railroads said they also would benefit because the combined railroad would offer more efficient routes, better equipment, and fewer costly switching fees between tracks.

One railroad that requested unusually demanding conditions was Kansas City Southern. Executive Vice President Fred Simpson said it wants to buy 2,500 miles of track from Kansas City, Mo., to Stockton, Calif., to increase competition in the central corridor.

Unions are divided on the issue. While it could create up to 4,000 jobs, some fear that if the merger doesn't go through, Southern Pacific will go out of business, costing even more jobs.

For that reason and more, the United Transportation Union, which represents 60,000 Southern Pacific and Union Pacific workers, supports it.

The Transportation Communications Union, which represents the railroad's supervisors and clerical workers, opposes the deal. Its leaders worry that office workers will suffer most of the job cuts.

STB

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32760

3-21-96

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Item No. _____

March 8, 1996

Page Count 1

Mar #393

ATTN: F.D. Number NO32760
Office of the Secretary
Room 2215
Surface Transportation Board
1201 Constitution Avenue
NW Washington, DC 20423-0001



To Whom It May Concern:

I am writing this letter in response to the upcoming deadline on voicing my opinion on the proposed Southern Pacific/Union Pacific merger. It is my sincere belief that, should this merger go through, the vast majority of the former Southern Pacific employees will become unemployed. While jobs elsewhere may be saved, Union Pacific has already stated that they do not need the Pine Bluff area yard and crews. They do not care how many jobs are lost, they simply want their company to get ahead even further. They will, in effect, be creating a monopoly by having the largest rail system in this area. While it makes them look good and gives them added revenue, there is also no limit to the power they will exercise over these lines. By charging other companies exorbitant fees for use of these lines they could, eventually, end up causing layoffs at other railroad systems. Not only would the future of the workers here at the Pine Bluff yard be affected, but the futures of workers at all other railroad systems would be affected, and not necessarily in a positive way.

I strongly believe that Union Pacific will say and promise anything to get this merger to go through just so that they can get the status that they want. But while the rich get richer, the government will ultimately foot the bill for making the mistake of approving the merger with Union Pacific instead of letting another smaller company such as Conrail take over. After all, someone has to pay the unemployment to the former Southern Pacific employees when Union Pacific begins to relegate on their promises of keeping jobs in the Pine Bluff area for Southern Pacific employees.

Sincerely,

Delmon Spharler

CARMAN Pine BLUFF ARK. (SP EMPLOYEE)

Delmon Spharler

11801 SULPHUR SPRINGS RD.

Pine BLUFF ARK. 71603

STB

FD

32760

3-21-98

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STATE OF INDIANA
HOUSE OF REPRESENTATIVES

Item No. _____

Page Count 1

Mar #394

ENTERED
Office of the Secretary
MAR 4 1996
Part of
COMMERCE AND ECONOMIC DEVELOPMENT, CHAIRMAN
ENVIRONMENTAL AFFAIRS
PUBLIC SAFETY

61913
L. JACK LUTZ
5070 STONESPRING WAY
ANDERSON, IN 46012

1995-96
COMMITTEES:
ECONOMIC DEVELOPMENT, CHAIRMAN
ENVIRONMENTAL AFFAIRS
PUBLIC SAFETY

The Honorable Vernon A. Williams
Federal Surface Transportation Board
12th Street and Constitution Ave.
Washington, DC 20423

Dear Secretary Williams,

As Chairman of the Indiana House Commerce and Economic Development Committee, I have become increasingly disturbed about the planned acquisition of the Southern Pacific Railroad by the Union Pacific Railroad. Quite simply, I am not convinced that this arrangement will generate productive competition for rail traffic in the Mid-West.

Although I have always been a supporter of business, the recent railroad mergers that have created "mega-railroads" are disturbingly reminiscent of the Gilded Age of the late 19th century. As with any business monopoly, the presumable monopoly of a few giant railroads will only serve to limit competition and productivity. Fair and open competition is the key to efficiency and lower prices.

In my opinion, Conrail's proposal to acquire a share of Southern Pacific's Eastern lines would be more advantageous than U.P.'s offer. From what I understand, Conrail's proposal calls for direct ownership of the lines, rather than the granting of trackage lines. Ownership is far more beneficial because it provides greater economic stake in the development of increased rail activity, as well as guarding against operational controversy. Furthermore, I believe that Conrail's one-line service to the Mid-South and Texas Gulf would provide rapid, uninterrupted service from the Mid-West.

As one with an economic interest in this merger, I am opposed to the U.P. - S.P. proposal unless it is conditioned upon endorsement of Conrail's proposal. Moreover, I thank you for your time and consideration regarding this matter.

Sincerely,

L. Jack Lutz
State Representative

ADVISE OF ALL
PROCEEDINGS

LJL:BSB/mp

STB

FD

32760

3-21-96

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61912

Item No. _____

Page Count 3

Mar #395

AS SENATE

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FAX (512) 463-0346
TDD (512) 475-3758



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GALENA PARK, TEXAS 77547
(713) 678-8600
FAX (713) 678-7080

MARIO GALLEGOS, JR.

FAX
TRANSMITTAL



TO : Hon. Vernon A. Williams
FAX : 202-927-5984
FROM : Senator Mario Gallegos
DATE : March 20, 1996
PAGES : 3 (including cover)
RE : UP/SP Rail Merger

Original in mail.

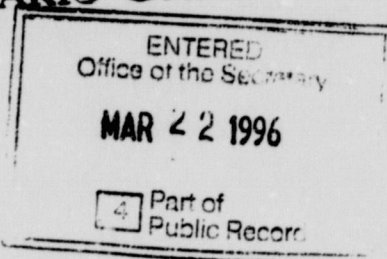
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MARIO GALLEGOS, JR.



March 20, 1996

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

RE: Finance Docket 32760

Dear Secretary Williams:

I am writing to voice my opposition to the proposed merger between the Union Pacific Railroad Company (UP) and Southern Pacific Line (SP), which I believe will be detrimental to the Texas economy.

Specifically, of the anticipated 742 job losses in Texas, the largest loss will be suffered by Houston. Many of the 460 jobs lost in Houston as a direct result of the merger will no doubt impact Hispanic rail workers who work and reside in my district.

Other criticisms of this merger which have frequently been mentioned, but bear repeating are reduced competition and increased shipping costs. This merger will, in effect, create a monopolistic rail system in Texas, which will reduce the number of railroad service providers below levels considered sufficient to maintain adequate competition in thirty-three (33) Texas counties, many of which are located in communities with disproportionate Hispanic populations, i. e. numerous Valley communities. Likewise, less rail competition is expected to lead to higher shipping rates, with shippers losing effective options for transporting goods and products.

COMMITTEES: STATE AFFAIRS ★ INTERGOVERNMENTAL RELATIONS
HEALTH & HUMAN SERVICES ★ INTERNATIONAL RELATIONS, TRADE & TECHNOLOGY
COMMITTEE OF THE WHOLE ON LEGISLATIVE AND CONGRESSIONAL REDISTRICTING
DISTRICT 6

Not printed at state expense


ADVISORY ALL PROCEEDINGS

Honorable Vernon A. Williams
March 20, 1996

Page 2

As State Senator, I am interested in preserving jobs and creating new opportunities. It is also my responsibility to consider the best interest of our State's overall economy. With the high number of lost jobs and the potential for reduced competition and higher shipping rates, this merger represents the wrong direction for Texas and I urge the Surface Transportation Board to decline this merger application.

Sincerely,

A handwritten signature in cursive script that reads "Mario Gallegos, Jr.".

Mario Gallegos, Jr.

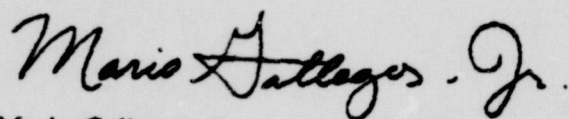
cc: Hon. Carole Keeton
Chair, Texas Railroad Commission

Honorable Vernon A. Williams
March 20, 1996

Page 2

As State Senator, I am interested in preserving jobs and creating new opportunities. It is also my responsibility to consider the best interest of our State's overall economy. With the high number of lost jobs and the potential for reduced competition and higher shipping rates, this merger represents the wrong direction for Texas and I urge the Surface Transportation Board to decline this merger application.

Sincerely,

A handwritten signature in cursive script that reads "Mario Gallegos, Jr.".

Mario Gallegos, Jr.

cc: Hon. Carole Keeton
Chair, Texas Railroad Commission

STB

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3-21-96

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Item No. _____

Page Count 1

Mar #405

JOHN CASTILLO

City of Houston City Councilmember District I



March 20, 1996

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

ADVISE OF ALL PROCEEDINGS

RE: Finance Docket 32760

Dear Secretary Williams:

I am writing to voice my opposition to the proposed merger between the Union Pacific Railroad Company (UP) and Southern Pacific Line (SP), which I believe will be detrimental to the Texas economy.

Specifically because of the anticipated 742 job losses in Texas, the bulk of the net job losses will be incurred in Houston, which is expected to absorb the loss of 460 jobs. Other criticisms of this merger are reduced competition and increased shipping rates. This merger will, in effect, create a monopolistic rail system in Texas, which will reduce the number of railroad service providers below levels considered sufficient to maintain adequate competition in thirty-three (33) Texas counties. Likewise, less rail competition is expected to lead to higher shipping rates, with shippers losing effective options for transporting goods and products.

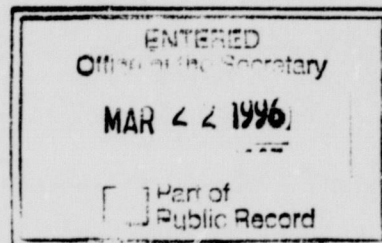
As a Houston City Councilman, I am interested in preserving jobs and creating new opportunities. It is also my responsibility to consider the best interest of our state's overall economy. For all these reasons, I urge the Board, after careful review, to vote no on the proposed UP/SP merger.

Sincerely,

John E. Castillo

John E. Castillo

cc: Hon. Carole Keeton Rylander, Chairman
Railroad Commission of Texas



STB

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3-19-96

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ENTERED
Office of the Secretary
MAR 4 0.1996

UP/SP-184

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

APPLICANTS' REPLY TO MOTION OF
THE CITY OF RENO TO EXTEND TIME

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Railroad Company and Missouri
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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

APPLICANTS' REPLY TO MOTION OF
THE CITY OF RENO TO EXTEND TIME

Union Pacific Corporation ("UPC"), Union Pacific
Railroad Company ("UPRR"), Missouri Pacific Railroad Company
("MPRR")^{1/} Southern Pacific Rail Corporation ("SPR"), Southern
Pacific Transportation Company ("SPT"), St. Louis Southwestern
Railway Company ("SSW"), SPCSL Corp. ("SPCSL"), and The Denver
and Rio Grande Western Railroad Company ("DRGW"),^{2/} hereby reply
to the Motion of the City of Reno to Extend Time, dated March 12,
1996 and served on Applicants on March 14, 1996.

In its Decision No. 6, served October 19, 1995, the ICC
issued a final procedural schedule for this proceeding. The
Commission affirmed that procedural schedule in its Decision

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

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

No. 9, served on December 27, 1995. Under the schedule, comments on the application are due no later than March 29, 1996.

Despite the lengthy advance notice it has had of the due date for comments, the City of Reno now seeks an extension of time "until at least April 29, 1996" (Motion, p. 1) within which to file its comments. There is no basis for the motion, and it should be denied. In the period between issuance of the first notice of the final procedural schedule and the March 29 due date, the City will have had more than five months to develop information and arguments regarding the proposed merger. This is more than enough time for the City to formulate a position and assemble supporting materials for its comments. Indeed, the City does not argue in its motion that it has been unable to develop its case or that it will not be in a position by March 29 to describe fully any concerns it may have about the merger.

The City puts forward two arguments in support of its motion. Neither has merit. First, the City correctly notes that UP is working with the City in an effort to meet its concerns and that an engineering study has been undertaken in connection with that effort.^{3/} However, the fact that UP has undertaken

^{3/} The City implies that UP is undertaking this work because the proposed operations of the merged company "meet or exceed applicable thresholds." (Motion, p. 1.) In fact, Applicants conducted the required environmental study and submitted the results of the study with the merger application. Nevertheless, UP respects the concerns of City officials and is making every effort to cooperate with them and to demonstrate that their concerns are unfounded.

voluntary efforts to allay the City's concerns about the merger is not a reason to compromise the schedule established and confirmed by the Commission.

Second, the City asserts that Applicants and BN/Santa Fe have not filed the appropriate environmental assessment information and that the City should have extra time to address additional environmental information that may be submitted at a later time. In fact, Applicants submitted the required environmental information, including information on proposed operations in the Reno area, in their application. See, e.g., Application, Vol. 6, Pt. 2, pp. 56-58. The City has had over three months to consider that information and to develop comments on it.

In short, there is no reason why the City should not be prepared to express on March 29 any concerns it may have about the merger. Of course, the City may obtain additional relevant information thereafter, either through its joint efforts with Applicants or otherwise. The City will be free to refer to any such additional information as part of its brief, which would not be due until June 3, 1996. Thus, the City will have more than enough time to make use of any new information it may receive. Its motion should be denied.

Respectfully submitted,

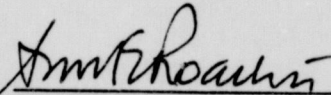
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Corporation, Union Pacific
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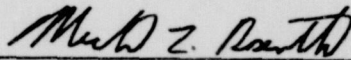
March 19, 1996

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 19th day of March, 1996, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

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

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



Michael L. Rosenthal

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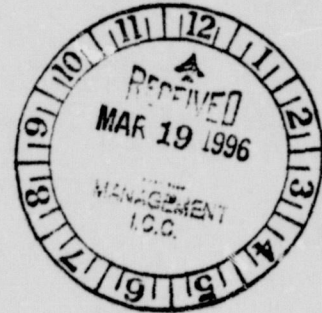
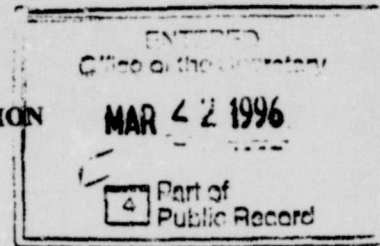
61876 D

OKLAHOMA, KANSAS AND TEXAS RAIL USERS ASSOCIATION
c/o Hampton, Royce, Engleman & Nelson, L.C.

United Building, Ninth Floor
119 West Iron Avenue
P.O. Box 1247

Salina, Kansas 67402-1247
(913) 827-7251 - Telephone
(913) 827-2815 - Telecopier

JAMES K. SMITH, PRESIDENT



March 15, 1996

FD 32760

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Room 1324
12th Street and Constitution Avenue, N.W.
Washington, D.C. 20423

ADVICE OF ALL
PROCEEDINGS

Dear Mr. Williams:

I write to urge your support of the merger between the Union Pacific Railroad Company and the Southern Pacific Railroad Company that is pending before the Surface Transportation Board.

The Oklahoma, Kansas and Texas Rail Users Association ("Association") is a non-profit Kansas corporation formed in 1980 by rail shippers located on the old Rock Island line between Salina, Kansas, and Fort Worth, Texas. When the Rock Island filed bankruptcy, rail freight service on this line of railroad was abandoned. The Association was formed for the express purpose of restoring rail freight service on the line and preserving future service. The Association consists of 49 members, many of which are other rail user groups and located in your state of Oklahoma.

The Association, together with the State of Oklahoma, acquired the line of railroad from the Rock Island trustee in 1982. The Association purchased the Kansas and Texas ends of the line while the State of Oklahoma purchased the line in Oklahoma. Our initial rail carrier on that line was the Oklahoma, Kansas and Texas Railroad Company, a subsidiary of the Missouri-Kansas-Texas Railroad Company ("KATY"). As a result of the 1988 merger between the UP and KATY systems, the Union Pacific Railroad Company is the current owner of the line formerly owned by the Association and provides service on the State of Oklahoma's line under a lease-purchase agreement.

Given the longstanding historical relationship between the Association and the State of Oklahoma, and the fact that many, if not most, of the Association's members are located in Oklahoma, it is fitting that we share with you our support of the UP-SP merger:

Mr. Vernon A. Williams

March 14, 1996

Page 2

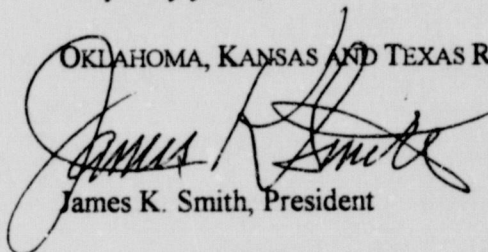
- The merger will secure the long-term objective of the Association; namely, the continuation and preservation of rail freight service on the old Rock Island, or "OKT", line.
- The old "OKT" line will be substantially upgraded, enhancing rail operating efficiency, which should be reflected in more competitive rates.
- The merger secures the long-term viability of the Herington to Whitewater portion of the old "OKT" line in Kansas and, in essence, makes that former potential branch line a main line track under a merged system.
- The merger has those economic benefits listed on the summary position statements developed by the railroads for the states of Oklahoma, Kansas, and Texas.

Our Association was first asked to support the UP-KATY merger, which we did back in 1986. Since we had a great track record and relationship with the KATY railroad system, our members had substantial reservations about dealing with a larger Class I rail line—the Union Pacific after that merger. I can report to you that notwithstanding recurrent issues that exist between any railroad and shipper, such as car supply, rates, and other service issues, we have found the UP to be (a) committed to providing good service, and (b) receptive to discussion, consideration, and resolution of shipper concerns.

Based upon our Association's experience with the UP, our Board of Directors voted to support the merger at our annual meeting held in Oklahoma City this past February. We likewise urge the State of Oklahoma to support that merger.

Very truly yours,

OKLAHOMA, KANSAS AND TEXAS RAIL USERS ASSOCIATION



James K. Smith, President

JSS/cm

Mr. Vernon A. Williams
March 14, 1996
Page 3

cc: Stan Utting, Vice President
Oklahoma, Kansas and Texas Rail Users Association
c/o Tampa Cooperative Association
P. O. Box 25
Tampa, Kansas 67483

Clifton Ruhrup, Secretary
Oklahoma, Kansas and Texas Rail Users Association
c/o The Dolese Company
P. O. Box 677
Oklahoma City, Kansas 73101

Barry Schroeder, Treasurer
Oklahoma, Kansas and Texas Rail Users Association
c/o Schroeder Grain
P. O. Box 728
El Reno, Oklahoma 73036

J. Stan Sexton, Association Counsel
Hampton, Royce, Engleman & Nelson, L.C.
P.O. Box 1247
Salina, Kansas 67402-1247

STB

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3-18-96

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Item No. _____

Page Count _____

Mar #329

CLEARY, WOOD & MASER, P.C.

ATTORNEYS AND COUNSELORS AT LAW

SUITE 750

1100 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3934

OFFICE: (202) 371-9500

TELECOPIER: (202) 371-0900



March 18, 1996

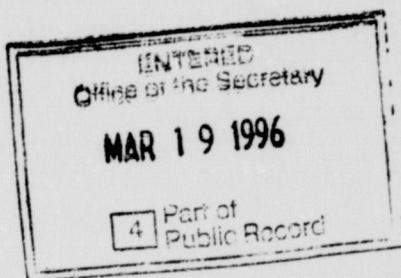
VIA HAND DELIVERY

Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Department of Transportation
Room 1324
12th Street & Constitution Avenue, NW
Washington, DC 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 an original and twenty (20) copies of REPLY TO APPLICANTS' APPEAL FROM ALJ'S ORDER RESTRICTING APPLICANTS' DISCOVERY, designated NITL-8, DOW-9, KENN-9, WSTR-11. Also enclosed is a diskette formatted in WordPerfect 5.1 with a copy of the reply.



Respectfully submitted,

Nicholas J. DiMichael
Frederic L. Wood
John K. Maser, III
Thomas W. Wilcox
Jeffrey O. Moreno
DONELAN, CLEARY, WOOD AND MASER, P.C.
1100 New York Ave., N.W.
Suite 750
Washington, D.C. 20005

*Attorneys for The National Industrial
Transportation League
The Dow Chemical Company
Kennecott Energy Company
Western Resources, Inc.*

cc: Restricted Service List

ENCLOSURES

1750-020
3760-020
3770-130
0124-480

NITL-8
DOW-9
KENN-9
WSTR-11

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, ET AL --
CONTROL AND MERGER--
SOUTHERN PACIFIC RAIL CORPORATION

REPLY TO APPLICANTS'
APPEAL FROM ALJ'S ORDER
RESTRICTING APPLICANTS' DISCOVERY

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
THE DOW CHEMICAL COMPANY
KENNECOTT ENERGY COMPANY
KENNECOTT UTAH COPPER CORPORATION
WESTERN RESOURCES, INC.

Nicholas J. DiMichael
Frederic L. Wood
John K. Maser, III
Thomas W. Wilcox
Jeffrey O. Moreno
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*Attorneys for The National Industrial
Transportation League
The Dow Chemical Company
Kennecott Energy Company
Kennecott Utah Copper Corporation
Western Resources, Inc.*

Due and dated: March 18, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, ET AL --
CONTROL AND MERGER--
SOUTHERN PACIFIC RAIL CORPORATION

**REPLY TO APPLICANTS' APPEAL FROM ALJ'S ORDER
RESTRICTING APPLICANTS' DISCOVERY**

submitted on behalf of

**THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
THE DOW CHEMICAL COMPANY
KENNECOTT ENERGY COMPANY
WESTERN RESOURCES, INC.**

Comes now The National Industrial Transportation League ("League"), the Dow Chemical Company ("Dow"), Kennecott Energy Company and Kennecott Utah Copper Corporation ("Kennecott"), and Western Resources, Inc. ("Western"), and submits this Reply to the Appeal of the Applicants from the order of Administrative Law Judge Jerome Nelson entered on March 8, 1996.

The Applicants' appeal, the second filed in just three days by them, should be promptly denied. In his order of March 8, the ALJ, faced with numerous challenges filed by the League and other shipper and railroad parties to the extraordinarily wide and burdensome discovery filed by the Applicants precisely at a time designed to disrupt the preparation of the Intervenor's case in this proceeding, fashioned a balanced and thoughtful remedy. The ALJ reviewed -- question by question -- the numerous and largely "cookie cutter" interrogatories and document requests propounded by the Applicants to active parties in this case; assessed the burdens and the responsibilities placed upon the parties in the case for each question, and implemented a remedy designed to carefully balance the interests of the Intervenor and the Applicants. The

ALJ conducted this exhaustive, question-by-question review of the Applicants' discovery after they themselves had flatly refused the ALJ's request to even discuss whether even a single question could be limited or deferred.

Far from "preventing the Applicants from conducting timely discovery," as the Applicants argue in their Appeal (Appeal, p. 1), the ALJ permitted certain discovery propounded by the Applicants to go forward immediately; required other discovery to be answered immediately upon filing of the Intervenor's cases on March 29, 1996; and permitted an accelerated discovery process by the Applicants just after the filing of Intervenor's cases at the end of March.

The ALJ thus properly exercised the broad discretion given him by the Board in discovery matters in this proceeding. The Applicants therefore cannot and do not meet the high standard for interlocutory appeals of the orders of the ALJ in this case. Accordingly, his order should be affirmed. Indeed, failure to affirm his order would make it virtually impossible for the Intervenor to file evidence on March 29, as the procedural schedule now requires, and would result in a gross miscarriage of justice.

I. BACKGROUND

At the outset, the League and the other shipper parties joining this Reply strongly contest the accuracy of the "Background" set forth in the Applicants' Appeal. While some latitude is traditionally given to parties to set forth the procedural and substantive history of a question as they see fit consistent with their view of the case, the number and quality of self-serving characterizations in the "Background" section of the Applicants' Appeal appear to go substantially beyond the bounds of traditional practice. That "Background" is thus simply an extension of the Applicants' argument, and should not be relied upon by the Board in understanding the history and context of the question that was presented to the Administrative Law Judge.

A. Events Leading Up the March 8 Discovery Conference

Late in the evening on February 26, 1996, the Applicants served on each of the approximately 35 active parties to this case, including the League and the other shipper parties joining this Reply, a set of Interrogatories and Requests for the Production of Documents. As far as the League and other parties joining this Reply can tell, the first Interrogatory and the first 22 of the Document Requests to each party in the case were, with the exception of the name of the party to whom the discovery was directed, exactly the same. Two other document requests in the series propounded to every party were also exactly the same. Thus, a total of 24 document requests did not vary in the slightest from party to party, regardless of the identity of the party to whom the request was directed; the facts related to that party; or the interest of that party in the case.

The number and substance of most of the remaining questions tended to be largely identical across "categories" of Intervenor. Thus, for example, all utilities and coal producers participating in the case received an additional number of virtually identical questions beyond the 24 identical document requests directed to every party. Finally, there were a very few questions -- generally just two or three of the series of approximately thirty document requests directed to most shipper parties¹ -- that were specific to a particular party.² A copy of the Applicants' discovery was served on the Administrative Law Judge, who thus became aware of the scope and extent of the Applicants' discovery as early as February 27, 1996.

On March 4, 1996, the League and the other shipper parties joining in this Reply filed with the Applicants their Objections to the Applicants' discovery. These Objections

¹ Certain railroad parties apparently received many more document requests. See Applicants' Appeal, p. 4.

² For example, of the twenty-nine document requests directed to The Dow Chemical Company, only two -- Document Requests No. 25 (requesting information as to a build-in to a specified Dow facility) and Document Request No. 27 (requesting information as to studies concerning water transportation to a specified Dow facility) were not the same as questions directed to some or all other parties.

raised individual objections to individual questions on the basis of relevance, burdensomeness, vagueness, etc. To the best of undersigned counsel's knowledge, similar individualized objections were submitted by other parties to whom the Applicants' discovery was directed. These Objections were likewise served on the ALJ, who thus became aware as early as March 4 of the major problems with the discovery.

Also on March 4, 1996, the Western Shippers' Coalition ("WSC"), the League, and other parties filed with the ALJ letters complaining about the chilling effect that certain questions of the Applicants relating to communications with government officials were having on certain parties' communications with such persons, and that certain of the Applicants' questions implicated privileges relating to communications between parties with a common interest in the case. The Department of Justice, among other parties, raised similar concerns. WSC, the League, and others asked the ALJ to address the issue of the chilling effect of certain of this discovery immediately. In a letter dated March 5, 1996, the Applicants replied. The matter was argued to the ALJ on March 6, 1996, who declined to rule on the question on that day.

By that time, however, WSC, the Tex-Mex Railroad, and Conrail had presented to the ALJ issues for resolution relating to the prematurity and burdensomeness of the Applicants' discovery as a whole. Specifically, these parties and others questioned whether any discovery by the Applicants should go forward prior to the filing of the Intervenor's cases on March 29, 1996. Since resolution of that question in favor of the Intervenor's would have mooted the questions raised by WSC regarding the chilling effect of certain questions, it was determined that issues related to the appropriateness of the discovery as a whole would be considered quickly.

Accordingly, at the end of the discovery conference on March 6, the ALJ scheduled another discovery conference for March 8, 1996 to deal with the broader issues. It should be mentioned, however, that in the March 6 discovery conference, the ALJ noted with concern the very broad nature of the discovery propounded by the

Applicants. Transcript of March 6 discovery conference, p. 1852-53. Thus, by the eve of the March 8 discovery conference, all parties were on notice of the Intervenor's claims of burdensomeness, overbreadth, and the like, and were also aware that the ALJ was himself concerned about these matters and would be addressing them on March 8.

On March 7, the League and the other shipper parties joining in this Reply sent a letter to the ALJ that presented their views as to the burden and overbreadth of the Applicants' discovery. That letter detailed the problems presented by the unvarying questions directed to very different parties; the broad scope of the Applicants' discovery; and the fact that while most of the discovery could have been propounded weeks before, it was delayed so that responses to this discovery would have been due just two weeks prior to the due date for Intervenor's filings on March 29. In that letter, the League and other shipper parties joining in this reply noted that:

The combination of the "cookie cutter" nature of the Applicants' discovery, its broad scope, and its pernicious timing plainly reveals what this discovery really is: not an attempt to discover relevant facts, but a means to harass and unreasonably burden intervenors at a critical time in this proceeding.

That March 7 letter specifically asked the ALJ to consider the burdensomeness of the Applicants' discovery in issuing a ruling for the discovery conference scheduled for the next day, March 8, 1996.

Finally, on March 7, the Applicants sent a detailed letter to the ALJ in opposition to the position that the discovery was premature and disclaiming any burden or overbreadth.

B. The March 8 Discovery Conference and the ALJ's Ruling

At the outset of the March 8 discovery conference, Administrative Law Judge Nelson indicated that he had read all of the papers that had been filed regarding the questions that were before him, and that he was prepared to make certain rulings. (Transcript ["Tr."] at 1888-89). At the very outset, he denied the Intervenor's arguments

that no discovery at all should be permitted. (*Id.* at 1919) However, he indicated that some of the Applicants' discovery was clearly premature and overbroad, particularly in view of the fact that it was being propounded before the Intervenor had filed any comments or taken any formal positions in the proceeding. (*Id.* at 1940-41, 1944-45, 47)

Accordingly, ALJ Nelson indicated that the discovery should be broken into two parts: some "that can manageably go on now that is sufficiently specific that something can happen" (*id.* at 1943); and some discovery that would be subject to reformulation and resubmission in light of the Intervenor's actual filings on March 29, but would be subject to a very accelerated response by the Intervenor (*id.* at 1945-1947). He invited the parties to discuss among themselves what discovery should be answered now, and what should be delayed until after the March 29 filings but subject to an accelerated procedural schedule. (*Id.* at 1940-43, 1947-50). The ALJ then recessed the hearing to permit the discussions among the parties. (*Id.* at 1965)

However, instead of constructively attempting to develop focused discovery that could begin immediately while leaving some discovery for resubmission under an accelerated procedural schedule directly after the Intervenor's March 29 filing, the Applicants took the position that the ALJ's ruling should be ignored, and that all discovery should go forward immediately. The Applicants' refusal to compromise in any way was then communicated to the judge. (*Id.* at 1966-67, 1969-71, 2065) (Transcript, p. 1969: "JUDGE NELSON: . . . "Are you prepared to make no agreement, Mr. Livingston?" MR. LIVINGSTON [counsel for Applicants]: . . . "We believe these are all proper discovery requests . . .")

Since the Applicants were clearly not prepared to compromise in any way or to offer the Judge any help at all with regard to the discovery (*id.* at 1969-71), for the balance of the hearing the ALJ proceeded question-by-question through the discovery propounded to Conrail. (*Id.* at 1971-2064) Since much of the discovery was the same to all of the parties, the ALJ also held that his rulings as to Conrail should be applied to

all the other parties in the case that had received discovery requests from the Applicants. However, if there was any confusion as to "non-common" questions, he would be available to resolve the matter on the next business day. (*Id.* at 2025-28, 2063-67)

As a general matter, the ALJ divided the discovery into two types, with three different response dates. The first type involved discovery questions that were sufficiently focused to be answered as formulated, either on March 12 (the original due date for the responses) or if the questions related to specific positions that the parties were to take in their filings on March 29, answers were to be due on April 1, the business day immediately following the filings. For each question that the ALJ held fell into this first type, he specified the appropriate response date (*i.e.*, March 12 or April 1). The second type were questions that were broad and unfocused. For these questions, the ALJ required the Applicants to reformulate them in light of the actual filings on March 29 and resubmit them to the Intervenors. These questions, the ALJ ruled, would be required to be answered by the Intervenors under a super-compressed schedule, by which answers were to be due just 7 days after they would be propounded, with discovery disputes adjudicated just two days later, and final production after adjudication of the disputes just four days after that. (*Id.* at 1945-47)

On March 13, the Applicants filed their Appeal.

II. THE STANDARDS FOR APPEAL OF A DECISION OF THE ALJ ON DISCOVERY MATTERS IN THIS PROCEEDING ARE STRICT

In Decision No. 6 in this proceeding, the Board reiterated what it has called the "stringent standard" governing interlocutory appeals of Administrative Law Judge Nelson: "Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." See, 49 C.F.R. 1115.1(c). The agency has traditionally hewed closely to this rigorous standard. See, *e.g.*, *Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Company and*

This exhaustive, question-by question review by the ALJ revealed much that was wanting in the Applicants' discovery. It gave the lie to the Applicants' proud claims that "these are all proper discovery requests." Even a cursory review of the record before Judge Nelson reveals that the Judge was clearly correct that much of the Applicants' discovery was premature, and that much of it was burdensome.

A. Many of the Discovery Requests by the Applicants Were Extraordinarily Broad, Vague, and Burdensome

Although it would be impossible in this Reply to detail the breadth, vagueness and burdensomeness of all of the discovery questions propounded by the Applicants, even a sampling of the discovery reveals its objectionable nature. Such a sampling also reveals the hollowness of the Applicants' bold claims that their discovery comprised only "categories of documents that should have been located at a few, limited places . . ." (Appeal, p. 4); or that the Applicants focused their requests "narrowly" on the issues in this proceeding (Appeal, p. 4):

- The Document Requests to the National Industrial Transportation League encompassed not only documents in the possession of the League itself, but all documents in the possession of each and every one of the members of the League across the country relating to each and every one of the questions. As this Board well knows, the League has over 600 shipper members located across the country, and indeed, in other countries as well.³ Instead of requesting documents from a "few, limited places," the Applicants discovery required the League to obtain information from literally hundreds, and probably thousands, of sites across the country.

³ Indeed, the Applicants appear serious about this point: in a March 13 letter to the ALJ, they have asked the ALJ to order the League (and many of the other associations participating in this case) to obtain information requested in the discovery from its members, and failing that, to be precluded from filing evidence in this case. As the Board well knows, adoption of such a rule would have the effect of precluding the participation by the League in any adjudicatory proceeding before this Board.

- Document Request No. 26 to Dow required Dow to “produce Dow’s files regarding transportation (including the transportation by non-rail modes) of all commodities that Dow has moved via UP or SP since January 1, 1993.” Dow produces over 200 products at a single plant in Texas; it has several plants around the country, and indeed has plants around the world. The question, by its terms, required Dow to determine what commodities had been shipped by the UP or SP since January 1, 1993, and then to produce all of its files from around the country and even around the world relating to the transportation of any and all of these commodities by any mode. Thus, under the terms of the question, if Chemical X had moved via the UP or SP at any time over the past three years, then the files concerning any truck movement of Chemical X from from anywhere in the country would have had to have been produced. Indeed, if Chemical X had moved via UP or SP during the last three years, then the discovery on its face would have required Dow to produce its files on the transportation of this commodity from a plant located in a foreign country to a foreign customer.
- The Applicants’ massive discovery was directed to Western Resources, Inc., even though Western will probably not be filing comments or evidence in this case at all on March 29, and will not be seeking conditions.
- Document Request No. 28 to Dow requested Dow to produce “all documents relating to (a) the extent to which any particular 7-digit STCC Code within the STCC 28 or 29 ranges includes different commodities that are not substitutable in use . . .” This document request, by its terms, would have required Dow not to search just its transportation files, but the files of all of its technical and research offices around the country and

indeed around the world to see which of the literally hundreds of commodities that fall within STCC numbers 28 and 29 might be "substitutable in use" with any other of the hundreds of commodities within these STCC numbers. "Substitutable," of course, was not defined by the Applicants. Again, far from requesting documents that would be located at a "few, limited places," the Applicants' discovery would have entailed a massive burden of perhaps hundreds of thousands of technical documents from a large and undetermined number of locations.⁴

- The Applicants' Document Request No. 10 to the League broadly and vaguely requested studies or analyses from the League "and its members . . . relating to competition between single-line and interline rail transportation." If this is an example of a request that has been "focus[ed] more narrowly than [it] otherwise could have been . . ." (Appeal, p. 4), the League would be interested in seeing how the Applicants might word a truly broad document request. By its terms, the document request is not limited to documents relating to the UP or SP, or even any of the railroads participating in this case.

Indeed, the Applicants' Appeal appears to concede that much of their discovery, on its face, did appear to be burdensome and broad when they noted that "what may seem like a broad or burdensome request may really be quite narrow when directed to a specific party." (Appeal, p. 18) Their "explanation" for the facial overbreadth of their inquiries rings hollow: broad questions asked of the Applicants, they claim, are burdensome because of the "massive preparation that went into the merger," while similar broad claims asked by Applicants of the Intervenor are not, allegedly because "fewer individuals" or "more easily identifiable locations" will be involved. But as shown above, this "distinction" is nonsense: document requests that seek all of Dow's

⁴ The same question was posed to Kennecott, and it suffers from the same infirmities.

"files regarding the transportation (including the transportation by non-rail modes) of all commodities that Dow has moved . . ." via UP or SP for the last three years, or that seek information from each and every one of over 600 shippers that are members of the League hardly involve "few individuals" or "easily identifiable locations."

B. Much of the Applicants' Discovery Does Not Meet the Test of Relevancy, Since It is Not Directed to An Issue That A Particular Party Will Raise in the Case

At page 9 of their Appeal, the Applicants claim that in framing their discovery requests, they "sought discovery from active parties to this case on matters related to Applicants' merger application that have been placed at issue by the various parties to their discovery requests to Applicants." But this is not correct: or rather, it is correct only in the most disingenuous way. As noted above, twenty four of the approximately 30 document requests were exactly the same to every party to whom discovery was directed. In other words, if one party raised an issue in discovery regarding a particular matter, the Applicants directed broad and unfocused discovery on every party on that same matter. Thus, if Intervenor "A" had asked a question in discovery concerning matter "X", then the Applicants asked Intervenors "B", "C", "D", "E", "F", "G" etc. to produce all documents related to that matter, even though none of the latter intervenors had raised any questions regarding the matter. A few examples will show the overbreadth of the Applicants' approach:

- The Applicants asked Dow to produce all documents related to the Utah Railway Settlement Agreement, (Document Request No. 7 to Dow), even though Dow has made clear during the course of this proceeding that it is interested in competitive issues related to a single chemical plant on the Texas Gulf Coast.
- The Applicants asked for the production of "all documents in the possession of the NIT League or its members" relating to the IC Settlement

Agreement" (Document Request No. 6 to the League) even though the League has not raised any issue on this matter during the course of this proceeding.

- The Applicants asked Kennecott for all studies, etc. related to "the benefits of any prior rail merger or rail mergers generally" (Document Request No. 11 to Kennecott) even though Kennecott has never raised any question regarding prior rail mergers during this proceeding.
- The Applicants asked Western to produce all studies, etc. "relating to collusion among competing railroads or the risk thereof" (Document Request No. 24 to Western), even though Western has raised no such issue, and even though Western is not going to seek conditions in this proceeding at all.

The "cookie cutter" nature of the Applicants' discovery also frequently produced questions that were inexplicable in the context of the party to whom they were directed. For example, Kennecott Utah Copper Corporation and Kennecott Energy Company, a copper producer and coal producer respectively, were asked to "produce all filings made with state utility commissions or state regulatory agencies that discuss sources of fuel." See, Document Request No. 29 to Kennecott Utah Copper Corporation and Kennecott Energy. While this question might make sense when directed to a utility that has "sources of fuel" for the generation of its electricity, it makes no sense in the context of a copper producer and a coal producer, whose "sources of fuel" for conducting copper or coal mining operations do not appear to be at issue in this case and whose "sources of fuel" are not in any event generally regulated by a "state utility commission."⁵

⁵ Another example of the blatantly generic nature of the discovery that led to simple errors is Document Request No. 23 to Western, which is directed to "Western Resources or its members," even though Western is not an association, and has no "members."

Relevance to a case cannot be claimed "in the air." It must be related to a claim that a particular party might make. Otherwise, discovery as to that party becomes unduly burdensome. The Applicants' discovery was infected from the start with internal contradictions, overbreadth, vagueness and burdensomeness that the ALJ quickly uncovered as he proceeded question-by-question through the discovery. The primary source of this infection was the Applicants' failure to focus much of their discovery upon issues related to the factual situations of individual parties, but simply "broadcast" discovery to the world.

C. The Real Purpose of the Applicants' Discovery Was To Harass and Burden Intervenor At a Critical Time in this Proceeding

The oddities, overbreadth and burden of the Applicants' discovery cannot be explained by simply the press of time or by a misunderstanding of the issues. As noted above, most of the discovery propounded had little to do with particularized claims of a party: most of the discovery was made up of "cookie cutter" questions directed to every active party in the case. Indeed, given the fact that so much of it was not connected to the particular claims of any particular party, it seems clear that much of this discovery could have been propounded weeks, if not months, before.

The key to this discovery is not just in its overbreadth, vagueness, and burdensomeness, but in its timing. The discovery was propounded in virtually the last hour before the agreed-to "blackout" period under the Discovery Guidelines for written discovery. Answers would have been due on March 12, 1996, or just two weeks before the Intervenor's comments and evidence are due to be filed. The discovery was clearly intended to divert the attention of the Intervenor from that important task. The Board should also take note of the timing of this discovery in evaluating the overall burden.

IV. THE ALJ CAREFULLY EVALUATED THE BURDENS OF THE DISCOVERY AND THE NEED FOR THE DISCOVERY IN FASHIONING A PROGRAM THAT WOULD BALANCE THE NEEDS OF ALL THE PARTIES.

Faced with the Applicants' "hard line" approach and their refusal to compromise or even discuss potential areas where the discovery propounded by them could be made more focused, and faced with the evident overbreadth, burdensomeness and lack of connection to the conditions to be sought by individual parties, the ALJ's question-by-question review of the Applicants' discovery correctly evaluated the requests and carefully balanced the interests of the parties.

First of all, the ALJ ruled that some discovery could go forward immediately. That discovery was the result of the question-by-question inquiry of the ALJ in which he determined that those questions were sufficiently focused and relevant so as to permit answers either immediately (*i.e.*, as of March 12), or immediately upon the filing of comments, if such questions were directed to the content and scope of the comments to be filed. Other discovery -- that which was broad, vague and unfocused (see, *e.g.*, Document Request No. 10, requesting all studies, etc. "relating to competition between single-line and interline rail transportation") -- would be subject to reformulation and resubmittal under a super-compressed procedural schedule after the filing of comments on April 1.

Such an arrangement appropriately balanced the interests of the Applicants to obtain relevant discovery in a timely manner, and the interests of the Intervenors to appropriately avoid burdensome, vague and unfocused discovery that was unrelated to the actual claims that they might make in the proceeding. Far from "los[ing] sight of the fundamental fact that Applicants are entitled to discovery from parties in order to develop their own case," as the Applicants broadly and unjustifiably charge in their Appeal (p. 23), the ALJ acted according to the highest standards in this complex and extraordinarily difficult case.

The most baseless charge of all is that Judge Nelson had no "consistent, discernible basis" for his decisions. (Appeal, p. 16, et. seq) Throughout the question-by-question review, the ALJ consistently evaluated (a) the burdensomeness of the individual question; (b) the specificity of the question posed; and, (c) the connection of the question to the conditions that might be sought by individual parties on March 29. Specific, non-burdensome inquiries that did not depend on the content of conditions to be sought were required to be answered immediately; specific, non-burdensome questions that were closely linked to the content of conditions to be sought were to be answered on April 1; and generalized, burdensome inquiries related only broadly to the issues in the case were required to be reformulated, resubmitted and answered under a super-compressed procedural schedule beginning on April 1.

V. THE ALJ'S DECISION DOES NOT DEPRIVE THE APPLICANTS OF THEIR ABILITY TO CONDUCT MEANINGFUL DISCOVERY

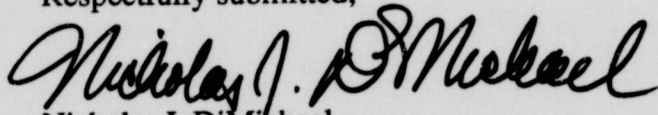
As discussed above, the ALJ's decision does not deprive the Applicants of the ability to conduct meaningful discovery: indeed, it permits them to receive some responses immediately, and to receive responses to discovery propounded after April 1 even more quickly than the original procedural schedule permits.

There is, indeed, one complete answer to the Applicants' contention that Judge Nelson's March 8 decisions denies them the ability to conduct meaningful discovery. Specifically, in the proceeding involving the merger of the Burlington Northern Railway Company and the Atchison, Topeka and Santa Fe Railway Company, counsel for the Applicants in that case did not even FILE discovery on the Intervenor in that case until AFTER the Intervenor had filed comments and sought conditions before the Interstate Commerce Commission. Yet, the BN and the ATSF appeared to be able to present -- judging by the ICC's decision approving the merger -- a compelling case to the agency. The Applicants' problem in this case is not, as they now charge, that they will be unable to conduct meaningful discovery under the ALJ's March 8 ruling. Rather, they have

belatedly "discovered" that the proposed merger indeed raises serious anticompetitive issues, and they are attempting to find additional time in order to shore up an increasingly difficult case to sustain. They cannot have it both ways: to obtain all of the benefits of an accelerated procedural schedule on the basis of the success of the BN/SF merger schedule, but to request time that the Applicants in the BN/SF merger never had in order to benefit their own cause.

The Applicants' appeal should be denied.

Respectfully submitted,



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Western Resources, Inc.

March 18, 1996

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760

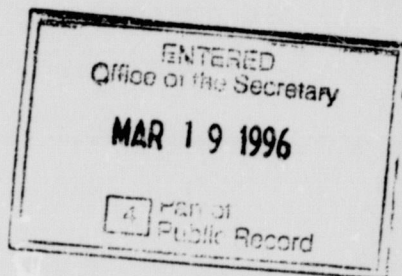


UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY

--CONTROL AND MERGER--

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

REPLY OF THE SOCIETY OF THE PLASTICS INDUSTRY, INC.
AND UNION CARBIDE CORPORATION TO APPLICANTS'
APPEAL FROM ALJ'S ORDER RESTRICTING APPLICANTS' DISCOVERY



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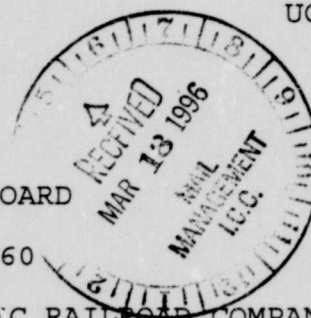
March 18, 1996

SPI - 9
UCC - 5

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 SOCIETY OF THE PLASTICS INDUSTRY, INC.
AND UNION CARBIDE CORPORATION TO APPLICANTS'
APPEAL FROM ALJ'S ORDER RESTRICTING APPLICANTS' DISCOVERY**

The Society of the Plastics Industry, Inc. ("SPI") and Union Carbide Corporation ("Union Carbide"), by and through their undersigned counsel, submit the following Reply to the Appeal of Union Pacific Corporation ("UPC"), Union Pacific Railroad Company ("UPRR"), Missouri Pacific Railroad Company ("MPRR"), Southern Pacific Rail Corporation ("SPR"), Southern Pacific Transportation Company ("SPT"), St. Louis Southwestern Railway Company ("SSW"), SPCSL Corp. ("SPCL") and The Denver and Rio Grande Western Railroad Company ("DRGW") (hereinafter referred to collectively as "Applicants") from the order of Administrative Law Judge Jerome Nelson, entered orally at the March 8, 1996 discovery hearing in this proceeding ("Hearing").

I. PRELIMINARY STATEMENT

This appeal concerns Applicants' discovery (interrogatories and document requests) served on and after February 26, 1996 on numerous interested parties, many of whom, including SPI and Union Carbide, have participated in the deposition and discovery process of a means of testing the merger application in order to ascertain their position, if any, in this proceeding. Conrail, one of the non-Applicants, initially responded to the discovery with a motion for a protective order ("Motion") on the ground that the discovery was premature insofar as Conrail had not yet filed its substantive submission in this proceeding. Conrail based its Motion, among other grounds, on ICC Decision No. 1 entered in this proceeding which clearly contemplates commencement of any discovery by Applicants only after the issues have been joined through the filing of the non-Applicants' substantive submissions. In relevant part, the Decision states:

Discovery on responsive and inconsistent applications, comments, protests, and requests for conditions shall begin immediately upon their filing.

ICC Decision No. 1, at 4 (August 24, 1995) (emphasis added).^{1/}

^{1/} Decision No. 6 repeats this language at p. 16, but references only discovery on responsive and inconsistent applications. There is no explanation that the Board was changing its position from that set forth in Decision No. 1, nor is there any reason to afford Applicants more liberal discovery against potentially commenting parties than against parties filing responsive and inconsistent applications.

At the March 8 Hearing, Judge Nelson heard oral argument on Conrail's Motion.^{2/} Although Judge Nelson ruled that Applicants' could serve discovery, he also ruled that the vast majority of the discovery must be reformulated and better focused in the "context of particular positions taken by particular parties who either are filing other applications . . . or pressing requests for conditions." See Hearing Transcript ("Tr."), p. 1944 attached as Exhibit A to Applicants' Appeal.

After an exacting two-and-one-half hour interrogatory-by-interrogatory and request-by-request analysis with respect to the scope of all of the Applicants' discovery served upon Conrail, see Tr., pp. 1971-2047, Judge Nelson ordered:

- 1) Certain Applicants' discovery is to be answered "as is" by March 12, 1996, that is, in the ordinary course as set out in the Discovery Guidelines;
- 2) Other Applicants' discovery to be answered when (and if) the party files its submission on March 29, 1996; and
- 3) The remainder, and the overwhelming majority, of the discovery may be reformulated and then re-served, if necessary, after March 29, 1996.

^{2/} Before ruling on the Motion, however, Judge Nelson inquired whether there were other parties which had joined the Motion. Counsel for SPI and Union Carbide informed the Court that both SPI and Union Carbide had filed objections to the Applicants' discovery requests on "prematurity" grounds in SPI-7 and UCC-4, respectively. Judge Nelson thereupon included SPI and Union Carbide as parties "joining" Conrail's Motion. See Hearing Transcript, pp. 1950-56. As a result, rulings applicable to the interrogatories and document requests served upon Conrail would apply to the interrogatories and document requests served upon SPI and Union Carbide to the extent they are identical.

The obvious thrust behind Judge Nelson's rulings was, based on considerations of privilege, relevance and burden -- which have governed Judge Nelson's rulings on discovery propounded to Applicants, that each deferred request should be evaluated in light of each particular party's position on the merger, and if still appropriate, re-formed and better focused.

It is respectfully submitted that Applicants' pursuit discovery, and their dispute over Judge Nelson's rulings, does not concern discovery of evidence bearing upon the record before the Board in this proceeding. Contrary to Applicants' representations that the discovery is neither burdensome nor irrelevant, Appeal at pp. 4 and 6, a review of Applicants' discovery propounded to more than 30 parties evidences that the discovery indeed is both burdensome and irrelevant.^{3/} As to relevance, what possible knowledge could Applicants expect that SPI and Union Carbide could have with regard to Applicants' settlement agreements with the Utah Railway and the Illinois Central Railroad (Document Production Request Nos. 6 and 7); and

^{3/} Applicants make the preposterous claim that their discovery "would be relevant even if Conrail filed nothing further in this proceeding." Appeal at p. 6. The thrust of this argument is that the discovery conducted by Conrail and others in and of itself makes Applicants' discovery relevant. This is nonsense: evidence is submitted into the record before the Board only by submission by a party in its evidentiary filing, e.g., the comments and positions to be filed on March 29. See 49 C.F.R. § 1114.28. While the Discovery Guidelines were formulated to avoid duplicative requests upon Applicants by conducting discovery in an open fashion among active parties, that does not conversely make each and every party responsible for the issues raised by each and every party through their discovery.

why would SPI or Union Carbide have an interest in the Utah Railway settlement? Similarly, it is difficult to recognize the relevance of statements being made to others about the merger, outside of the record in this proceeding. Applicants twice cite Judge Nelson's comment that they "are entitled to show the Board that you go around the country making statements that you cannot back up." Appeal at pp. 11 and 22, n. 13. It is inconceivable that Applicants will endeavor to rebut, in their April 29 filing, allegations which are not in the record, or should they attempt to do so, that the Board would find such an argument to be relevant to any issue of decisional significance.

As to burden, Applicants demand documentation in their discovery directed to SPI not only from SPI, which has entered an appearance in this proceeding, but also from "any member of SPI" (Document Production Request Nos. 2-21, 23-24, 26-29). Necessarily, there are inherent issues with regard to the scope of these discovery requests; however, in that SPI is an association of approximately 2,000-member companies, there is no question but that the discovery is, in any sense of the term, burdensome.^{4/}

^{4/} Ignoring their call for document production from SPI's approximately 2,000 members, Applicants argue that while a request to them to produce " 'all documents related to the UP/SP merger' would be an exceedingly broad request ... To ask similar requests of parties opposing the merger is very different because work done in opposition to the merger will very likely be confined to fewer individuals or more easily identifiable locations." Appeal at p. 18.

Applicants argue that they "sought discovery from active parties to this case on matters related to Applicants' merger applications that have been placed at issue by the various parties through their discovery requests to Applicants, depositions of Applicants' witnesses, filings with the Board, and public statements." Appeal at 9-10. This gloss does not withstand scrutiny. The issues relating to the merger have been placed in contention by the merger application itself; the discovery and deposition testimony seek only to test the veracity of Applicants' witnesses, the completeness of their analysis, and their conclusions. Even accepting applicants' contention, arguendo, query the relevance of discovery addressed to SPI and Union Carbide relating to issues such as the Utah Railroad and Illinois Central settlements, collusion among railroads, and numerous other areas upon which SPI and Union Carbide have never addressed in their discovery or deposition questioning.

Applicants' discovery is not about developing relevant information pertaining to the record to be considered by the Board. As reflected above, their argument that they awaited the last day before the onset of the "quiet period" to serve discovery in order to be "able to focus requests" is pure poppycock: Applicants engaged in as broad-brush and burdensome discovery as they could contemplate. Review by the Board of the discovery issued by Applicants to 34 parties will rapidly convince the Board that if Applicants truly expected to receive

responsive information from other parties, that taking into account the response time for the discovery requests^{5/} and the time needed by applicants to review and evaluate the massive amount of data requested would preclude incorporation of said discovery into the Applicants' April 29 rebuttal submission.

The true purpose of Applicants' discovery is to harass and impede interested parties during their time for preparation of their comments and evidence to the Board.^{6/} Not only the substance of the discovery but the timing could not make this clearer. Both the timing, i.e., awaiting the literal "last hour"^{7/} to push the discovery out the door, and the broad scope of this discovery, which is not particularly tailored but rather entails 24 common document production requests (Appeal at p. 16), demonstrate Applicants' motive and purpose. The line up of parties interested in the merger application began to emerge in September with the filing by SPI and other parties of comments on the proposed procedural schedule. It further was flushed out at

^{5/} As reflected in Applicants' responses to interrogatories and document production requests, a substantive response may be that information will be provided; and the actual information may not follow until several weeks or more than a month later.

^{6/} A board ruling granting Applicants' request will only engender more hearings and more disruption of parties' time for preparation of their substantive submissions on the merger by virtue that, as recognized by Judge Nelson in his rulings, there are substantive issues of privilege, burden and relevance with regard to many of the interrogatories, which will need to be addressed for each of the parties.

^{7/} See, infra at Section II.B.

the initial discovery conference held on December 1 and the compilation of the restricted service list flowing from that discovery conference.^{8/} There was absolutely no reason to defer discovery until the very last minute except to divert attention of the active parties from preparation of their comments and evidence to the Board through responding to the discovery, appearances before Judge Nelson at discovery conferences and responding to pleadings such as this filed with the Board.

Particularly telling as to the importance of this discovery to Applicants is the convergence of the factors of (i) the timing, including their ability to receive, digest and utilize the discovery responses, (ii) the scope, and (iii) that regardless of whether they are to receive any information, what information they receive, or when they receive it, Applicants "intend to proceed under the schedule" and file their rebuttal on April 29. Appeal at 24-25. Were Applicants serious about developing factual information from the parties, they would have begun the discovery process far earlier, to allow sufficient time to resolve disputes and to obtain and evaluate information received in similar fashion that SPI and other parties initiated their discovery shortly following the filing of the merger application.

^{8/} Union Carbide filed its Notice of Intent to Participate on December 4, 1995.

In addition to the obvious bad faith of Applicants in engaging in this charade, SPI and Union Carbide oppose Applicants' Appeal on three specific grounds. First, it is respectfully submitted that Judge Nelson erred in denying the prematurity objection. Thus, any discovery accorded to Applicants exceeds that to which they are entitled until comments are filed and facts are placed into contention on March 29. Second, if Applicants' discovery was not premature, Judge Nelson's rulings exemplify the proper exercise of his discretion. Third, SPI and Union Carbide oppose Applicants' Appeal to the extent Applicants seek any additional discovery responses from SPI and Union Carbide by virtue that Applicants' discovery requests are barred due to having been served after the discovery cut-off.

II. ARGUMENT

A. Judge Nelson's Ruling Was Well Within His Discretion, If Applicants' Discovery Was Not Premature.

Applicants claim that Judge Nelson's decision to restrict some of Applicants' discovery was a "clear error of judgment" and demand an order from the Surface Transportation Board that "all parties respond to all of Applicants' requests in two business days." See Applicants' Appeal, p. 25. This position is without merit.

The Commission vested Judge Nelson with broad discretion to rule on discovery issues, and it unquestionably intended that he

would manage the discovery process to effect an efficient compilation of the record in this proceeding, see Decisions No. 4 [assignment to J. Nelson] and 10 and 11 [denials of postponement of the procedural dates]. Accordingly, Judge Nelson has broad discretion in handling discovery matters; and his decision to allow or deny discovery is reviewable only for an abuse of such discretion. See Brune v. I.R.S., 861 F.2d 1284, 1288 (C.A.D.C. 1988). Furthermore, appellate bodies -- in which capacity the Board now sits, when reviewing the trial judge's discovery orders, shall reverse such orders only if they are clearly unreasonable. See In re Sealed Case, 856 F.2d 268, 271 (C.A.D.C. 1988).

Effectively, as the transcript of the March 8 Discovery Conference reflects, Judge Nelson reviewed the common interrogatory and 24-document production requests, in detail, as well as the additional discovery propounded to Conrail. In essence, Judge Nelson ruled on each request from the perspective of privilege, burden and relevance, insofar as those considerations can be determined given that there are no adverse positions yet filed with the Board. Judge Nelson has ruled numerous times since early December with regard to discovery propounded against Applicants on these same, traditional discovery considerations. Any review of Judge Nelson's ruling must consider the discovery requests one-by-one in order to find that he has abused his discretion in his particular rulings, and

Applicants have failed to bring such a showing before the Board for determination.

Applicants argue that Judge Nelson had no discretion other than to order the non-Applicants to respond to all of Applicants' discovery by March 12, 1996, within two business days of the Hearing. Applicants' attitude and the tenor of their appeal is that the non-Applicants deserve whatever discovery they are getting because Applicants have already had to respond to discovery. As Applicants put it, they have given parties "three months of clear sailing" while they themselves were "subjected to a massive discovery campaign." Appeal at p. 3. Applicants, however, have overlooked a critical element distinguishing their last-minute discovery onslaught from the non-Applicants' prior discovery requests.

The purpose for discovery in any proceeding is to elicit facts concerning a party's legal position. Indeed, in this proceeding discovery proceeded only after Applicants filed their application for merger of the Union Pacific and the Southern Pacific.^{2/} The same justification exists for Judge Nelson's decision to defer Applicants' discovery until after the non-

^{2/} Applicants themselves vehemently objected to the timing of Kansas City Southern's ("KCS") discovery requests propounded prior to the Applicants' submission of their merger application. See Applicants' November 15, 1995 letter from Arvid E. Roach, II, Esq. to Hon. Jerome Nelson, appended as Exhibit A. In that letter, Applicants objected to KCS's pre-filing discovery request as "unprecedented," and they further protested that "KCS must be aware that it has interposed these discovery requests at the most critical juncture in the application process." Id.

Applicants file their first substantive submissions. For instance, Applicants emphasize the claim that they need to know right away about the "effectiveness of trackage rights" or "possible build-ins" or "other parties' own analyses of the impact of the proposed merger." See Applicants' Appeal, pp. 10-11. At most, however, these document requests are based on nothing more than prior discovery propounded by various non-Applicants, and thus give rise to no more than pure speculation as to a particular party's position. Indeed, since non-Applicants have not yet taken a formal position in this proceeding, these discovery requests, by definition, cannot be reasonably calculated to lead to admissible evidence. It is entirely possible that certain non-Applicants will take no position or will take a position in this proceeding on March 29, 1996, that has nothing to do with the subject matter of the discovery requests that are the subject of this appeal. In other words, the requests could be moot by March 29, 1996. In any case, barring a position of record, there is no basis to establish that the discovery is likely to produce any information relevant to an issue before the Board.

**B. Applicants Are Not Entitled to Responses to
Their Discovery Since It Was Not Timely Served.**

In the alternative, with respect specifically to SPI and Union Carbide, Judge Nelson did not abuse his discretion in limiting Applicants' discovery since the discovery which is the

subject of this appeal was served on SPI and Union Carbide during the "quiet period" and therefore is barred by ¶ 5 of the Discovery Guidelines.

Contrary to Applicants' repeated assertions that they served their discovery on February 26, the last day before onset of the quiet period, Applicants' discovery was served, by messenger to counsel for SPI and Union Carbide, on the morning of Tuesday, February 27, 1996. See Affidavit of Barbara E. Fitzpatrick attached hereto as Exhibit B. Applicants' discovery to SPI and Union Carbide thus is barred by ¶ 5 of the Discovery Guidelines entered in this proceeding on December 7, 1995: "No written discovery requests shall be served after February 26, 1995 (sic), through March 29, 1995 (sic)."

The Discovery Guidelines specifically require that service shall be "in the most expeditious manner possible, by hand delivery in the Washington, D.C. area and overnight mail outside the Washington, D.C. area, or by facsimile."^{10/} See Discovery Guidelines, ¶ 1. There can be no question but that the requirement for hand service means that delivery must, in fact, be effected on the date of service. This is not a "dispatch" rule where delivery to a courier service at any time during the

^{10/} The quoted text is ambiguous with regard to facsimile service, in that it is not clear whether the facsimile applies to service outside of Washington, D.C., or to service both within and outside of the Washington, D.C. area. In any event, there was no facsimile service upon counsel for SPI and Union Carbide, and no allegation that facsimile service had been effected.

day or night suffices; rather, the rule requires that notice must be received by the party on the day of service, other than for parties outside of Washington, D.C. wherein receipt the following day is acceptable. This is no different than the Board's filing requirements, 49 C.F.R. § 1104.6, wherein documents are timely filed only if they are received at the Board on the due date. "The day of receipt at the [Board], not the date of deposit in the mail, determines the timeliness of filing." The only exception to timely receipt is a filing effected through an express mail service with overnight delivery service to Washington, D.C. where the documents were tendered to the service in ample time for timely receipt by the Board.^{11/}

Clearly, the burden is upon the party effecting service to ensure timely receipt. In this instance, by Applicants' own admission, the attempted service was made by dispatch "after working hours, after close of business hours." Tr. at 1962. Applicants claim that it was "quite possible that the messenger delivered it and they're in a building that wasn't open or, for some other reason, they weren't there to take service"

Id.^{12/} This, however, is no different from dispatching a

^{11/} Thus, tender to an overnight express service at 10 p.m., after the next day's deliveries had been dispatched, would not be considered timely, whereas a tender by the close of business and the delivery service was unable to land in Washington, D.C. due to the airports being closed would constitute a timely filing.

^{12/} The feigned surprise that offices may not be open after normal business hours is disingenuous. Applicants' own counsel certainly
(continued...)

messenger to the Board at 11:59 p.m. and then arguing that since the delivery was dispatched during the due date, it should be construed as received during the due date. Applicants, knowing of SPI and Union Carbide's interest in the proceeding since September and early December, respectively, certainly had ample opportunity to effect service prior to the close of business on February 26.

The "late service" objection was timely noted by SPI and Union Carbide, both in their respective "5-day" objections served by hand on March 4, 1996 (SPI-7; UCC-3) and, subsequently in their respective "15-day" responses to the Applicants' discovery served by hand on March 12, 1996. Nonetheless, to demonstrate good faith, SPI and Union Carbide timely responded to the Applicants' discovery requests, as limited by Judge Nelson.^{13/}

^{12/} (...continued)

recognizes that their office building is closed after normal business hours. Elevator access is available only with the security key, and visitors (e.g., to Applicants' depository) must make prior arrangements for after-hours access.

^{13/} Although the issue of "late service" was not formally submitted to Judge Nelson for a ruling at the March 8 Hearing, Judge Nelson was apprised that this issue was present. See Tr., pp. 1957-1963. Notwithstanding that there was no motion to compel by Applicants directed to SPI and Union Carbide, nor a request that the discovery be quashed due to the late delivery, and notwithstanding that Appellant's counsel described the discussion at the Discovery's conference as "premature" (Tr. at 1961), Judge Nelson appeared to rule on the issue, and he did so without having a full factual record before him with regard to the time of dispatch by Applicants, etc. As noted above, SPI and Union Carbide elected to comply with the limited discovery responses directed by Judge Nelson, and in doing so preserved this issue with regard to any future prosecution of Applicants' discovery served on (continued...)

As to SPI and Union Carbide, Applicants' service during the "quiet period" is dispositive with regard to the appeal of Judge Nelson's March 8 ruling. Applicants themselves argue that "no one had offered a single reason why the procedures established in the Discovery Guidelines should not be followed." Appeal at pp. 8-9. Moreover, Applicants have vigorously rejected discovery requests they had received after February 26, even in one instance entailing a request which was a follow-up to a prior discovery request. See Exhibits C and D. They argue that the period from February 27 through March 29 is intended as a "quiet period" for all parties to prepare their filings to submit to the Board. Consequently, were the Board to agree with Applicants that they have a right to discovery against parties who have participated in the discovery/deposition process to test the application, and that their discovery is timely if served at anytime before onset of the "quiet period," and that the Discovery Guidelines should be literally followed, then Applicants' discovery against SPI and Union Carbide necessarily fails by virtue of their lack of timely service. Accordingly, this constitutes an independent ground to uphold Judge Nelson's

^{13/}(...continued)

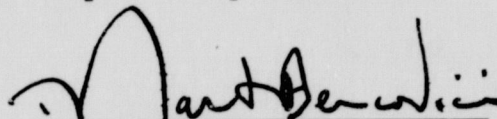
February 27. Given the circumstances, SPI and Union Carbide determined that there was no "case or controversy" to warrant an appeal of Judge Nelson's advisory comments; however, the issue of Applicants' untimely service of discovery nonetheless is germane to this Reply to Applicants' appeal of the March 8 ruling.

discovery ruling to the extent that it applies to SPI and Union Carbide Corporation.

III. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, The Society of the Plastics Industry, Inc. and Union Carbide Corporation respectfully request the Surface Transportation Board deny Applicants' Appeal.

Respectfully submitted,



Martin W. Bercovici
Douglas J. Behr
Arthur S. Garrett III
Leslie E. Silverman

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March 18, 1996

Attorneys for The Society
of the Plastics Industry, Inc.
and Union Carbide Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing The Society of the Plastics Industry, Inc. and Union Carbide Corporation's Reply to Applicants' Appeal and attached affidavit was served this 18th day of March, 1996, by hand-delivery, on Judge Jerome Nelson and on counsel for Applicants as follows:

Honorable Jerome Nelson
Administrative Law Judge
FERC, Room 11F21
888 First Street, NE
Washington, DC 20426

Arvid E. Roach II
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566

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

and, by mail upon the remainder of the Restricted Service List.

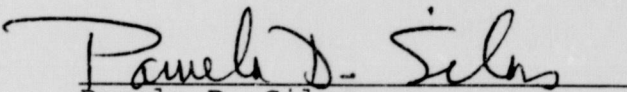

Pamela D. Silas

EXHIBIT A

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BRUSSELS CORRESPONDENT OFFICE

44 AVENUE DES ARTS

BRUSSELS 1040 BELGIUM

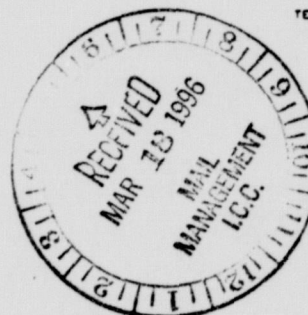
TELEPHONE: 32-2-512-9890

TELEFAX: 32-2-502-1598

November 15, 1995

BY HAND

Honorable Jerome Nelson
Administrative Law Judge
FERC
825 North Capitol Street, N.E.
Washington, D.C. 20426



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

Dear Judge Nelson:

This firm, along with Harkins Cunningham, represents the Applicants in the above-captioned proceeding. The Applicants are currently engaged in the process of preparing their application for filing, which is planned for November 30, 1995.

On November 13, 1995, KCS served the Applicants with KCS' First Set of Interrogatories (KCS-7) and KCS' First Requests for Admission (KCS-8). The requests -- 40 far-reaching interrogatories and document requests and 23 requests for admissions -- purport to require the Applicants to respond literally two days before filing the application. This type of request is completely unprecedented, and would seriously jeopardize the Applicants' ability to file the application on schedule.

The Applicants have made clear their commitment to work with parties in this matter to provide them with relevant information through expedited discovery following the filing of the application, and, to the extent compatible with completing the application, in advance of filing the application. Although there is no precedent to support pre-application requests for discovery, the Applicants have made every effort to accommodate the reasonable requests of parties. To this end, the Applicants have responded to requests from counsel for the Kansas City Southern Railway Company ("KCS"), as well as from other railroads and the U.S.

Honorable Jerome Nelson
November 15, 1995
Page 2

Department of Justice, for tapes containing the 1994 traffic data that the Applicants are using for their Traffic Study and market analyses.

To respond to burdensome requests for information at present, however, is impossible given the demands on the Applicants to prepare the application. With the filing date drawing near, the Applicants daily are dealing with countless tasks involved in completing, printing, serving and filing their application.

KCS must be aware that it has interposed these discovery requests at the most critical juncture in the application process. Counsel for KCS sent the Applicants letters on September 26, 27 and 28, 1995, requesting traffic tapes and certain pre-discovery information, to which Applicants responded on October 4, 1995. Applicants sent KCS the traffic tapes it requested, and explained that they would respond to KCS' other requests as soon as possible. KCS then waited more than five weeks, and submitted the extensive formal requests in KCS-7 and KCS-8 when Applicants were down to the last two weeks for the preparation of their application. Rather than follow up on their earlier requests, KCS has submitted massive new ones evidently timed to disrupt Applicants' preparation of the application.

In contrast to KCS' behavior, the Department of Justice has shared draft information requests with the Applicants, and has offered to work with us on an informal basis, which we are delighted to do.

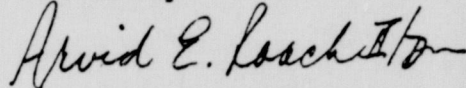
On August 4, 1995, the same day that the Applicants commenced this proceeding with their notice of intent to file the merger application, Applicants petitioned the Commission to enter a set of discovery guidelines, based on those adopted by Administrative Law Judge Jacob Leventhal in the recently completed BN/Santa Fe case, that would expedite and regulate discovery. A copy of that petition, which includes Applicants' proposed guidelines, is attached. The BN/Santa Fe discovery guidelines were for the most part based on agreements among the parties to that case, many of whom, including KCS, are parties to this case. In Decision No. 6, served October 19, 1995, the Commission indicated that discovery could not proceed without your sanction, and directed that these issues be presented to Your Honor at the appropriate time. To that end, the Applicants respectfully request that Your Honor convene a discovery hearing promptly

Honorable Jerome Nelson
November 15, 1995
Page 3

after the application is filed so that discovery guidelines can be adopted.

In the meantime, the Applicants intend to continue their attempts to accommodate reasonable requests for information, and they will respond to KCS' requests by no later than 15 days following the date on which the application is filed. The Applicants' first commitment, however, must be to completing and filing the application.

Sincerely



Arvid E. Roach II

Attachments

cc (w/ attachment):
Paul A. Cunningham
Alan E. Lubel
Hon. Vernon A. Williams
All Counsel of Record

EXHIBIT B

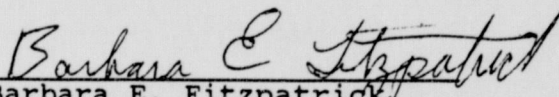
68-3

DECLARATION

I, Barbara E. Fitzpatrick, hereby state that I paralegal employed by the law firm of Keller and He further state that on Tuesday, February 27, 1996, a approximately 9:50 a.m. I witnessed the delivery to the firm's receptionist of a package addressed to Martin W. Bercovici, Esquire, a partner in the law firm. Mr. Bercovici along with Douglas J. Behr and Arthur S. Garrett are representing the Society of the Plastics Industry, Inc. and Union Carbide Corporation in Finance Docket No. 32760, Union Pacific Corporation et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al. before the Surface Transportation Board.

I witnessed the firm's receptionist record the delivery of the package in the firm's receipt log. Afterwards, I hand carried the package and personally delivered it to Mr. Bercovici. I witnessed Mr. Bercovici opening the package and withdrawing documents entitled "Applicants' First Set of Interrogatories and Request for Production of Documents to the Society of the Plastics Industry, Inc.," UP/SP-126, and "Applicants' First Set of Interrogatories and Request for Production of Documents to Union Carbide Corporation," UP/SP-131.

I, Barbara E. Fitzpatrick, declare under penalty of perjury that the foregoing is true and correct.


Barbara E. Fitzpatrick

February 27, 1996

EXHIBIT C

STB

FD

32760

3-18-96

D

61867

Item No. _____

Page Count 22

Mar #331

61867

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L.L.P.

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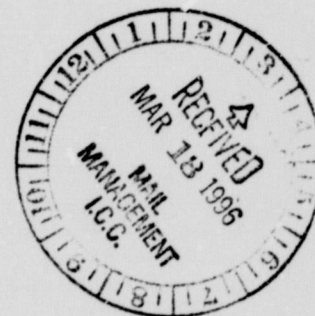
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ALMATY
LONDON
(A LONDON-BASED
MULTINATIONAL PARTNERSHIP)

March 18, 1996

VIA HAND DELIVERY

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
U.S. Department of Transportation
1201 Constitution Avenue, N.W.
Washington, DC 20423



Re: UP/SP Merger, Fiance Docket No. 32760

Dear Secretary Williams:

Enclosed are the original and 20 copies of the "Reply of Western Shippers' Coalition to Appeal from ALJ's Order Limiting Applicants' Discovery at This Time" for filing in the above-referenced proceeding. Also enclosed is a 3.5" diskette containing the Reply text of this pleading in WordPerfect 5.1 format.

Also enclosed are three additional copies for date stamping and return via our messenger.

Very truly yours,

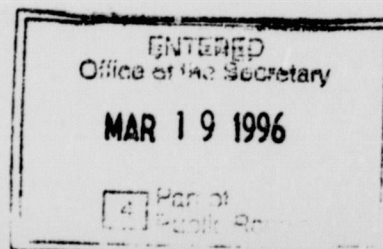
Michael F. McBride

Michael F. McBride

Attorney for Western Shippers'
Coalition

Enclosure

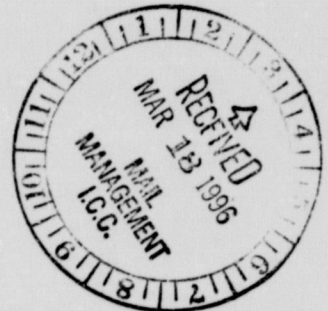
cc: Arvid E. Roach, II, Esq.
Paul A. Cunningham, Esq.
Restricted Service List



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

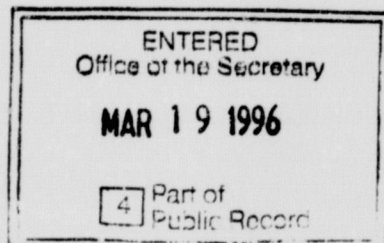


REPLY OF WESTERN SHIPPERS' COALITION TO
APPEAL FROM ALJ'S ORDER LIMITING APPLICANTS' DISCOVERY
AT THIS TIME

"Discovery on responsive and inconsistent applications, comments, protests, and requests for conditions shall begin immediately upon their filing." Decision No. 1 at 4 (emphasis added).

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March 18, 1996

Attorneys for Western
Shippers' Coalition

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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



**REPLY OF WESTERN SHIPPERS' COALITION TO APPEAL FROM
ALJ'S ORDER LIMITING APPLICANTS' DISCOVERY AT THIS TIME**

INTRODUCTION AND SUMMARY

Western Shippers' Coalition ("WSC")¹ hereby replies in opposition to the Applicants' Appeal from Judge Nelson's March 8, 1996 rulings relating to Applicants' discovery requests to WSC and certain other parties of record. Judge Nelson's rulings that certain discovery sought by Applicants is premature and should be made more focused were well-reasoned, balanced, and fair.

¹ WSC consists of over 20 shippers, coal producers, and shipper associations (Utah Mining Association, Western Coal Transportation Association, and Colorado Mining Association, which themselves have many members) who make up most of the shippers or producers on the lines of the SP in its "Central Corridor", from California to Colorado, especially along the lines of the former Denver & Rio Grande Western Railroad Company in Utah and Colorado. Farmland Industries, Inc., a major grain and fertilizer shipper with substantial grain shipments in Colorado and Kansas, among other States, just joined WSC. SP has been aggressively marketing coal and other bulk commodities in its Central Corridor in recent years. WSC is participating in this proceeding to preserve competition in the Central Corridor and east to Kansas City.

Applicants therefore have failed to establish that Judge Nelson's rulings were "clear error[s] in judgement" and have failed to meet the stringent standard of 49 C.F.R. 1115.1(c) under which an appeal can be granted only "in exceptional circumstances."

Indeed, Applicants suffer no prejudice here (because they can submit their discovery requests after March 29, and the issue of whether they may need an extension of the April 29 filing date can be considered then, when it will be presented),² whereas the discovery at issue was timed so as to attempt to cause maximum disruption to the March 29, 1996 filings of WSC and other Intervenor³, or even to intimidate Intervenor³s from making such filings. If nothing were to be filed that day, all of this

² WSC strongly objects to Applicants' assertion that their proposed merger will create \$2 million in public benefits per day. Appeal at 25. The Board has made no such finding. WSC contends that the proposed merger will harm the public unless competition in the Central Corridor is protected. Even if Applicants' claim \$2 million in benefits per day was correct, there is no evidence -- none -- that the benefits inure to the public.

³ Applicants are flatly wrong in their effort at convincing the Board that their discovery requests "asked for categories of documents that should have been located at a few, limited places, and the production of which should not have entailed any substantial burden." Appeal at 4. By letter to Judge Nelson dated March 13, 1996, Applicants separately are arguing before Judge Nelson that WSC, NIT League, Chemical Manufacturers Association, Western Coal Traffic League, and the other "association parties" as they put, must produce documents and information from their members. They have no right to demand that, but they certainly cannot simultaneously make such a demand and tell the Board that the documents they seek should be located "at a few, limited places, . . . the production of which should not have entailed any substantial burden."

discovery would have been unnecessary. On the other hand, if filings are made on that date and discovery with respect to those filings is necessary, Applicants can serve discovery then that is focused narrowly on those filings. Everything else is irrelevant to this proceeding. The only error in Judge Nelson's orders was in requiring discovery responses now, because the ICC's Decisions 1 and 6 in this proceeding specifically contemplated that discovery on those making filings on March 29 could "begin" immediately upon those filings -- not before.⁴

If Applicants are without enough time after March 29 and before April 29 to pursue their discovery, that is a self-inflicted wound, because Applicants were the architects of the schedule in this proceeding, which is far too rushed for such an important matter. But -- since Applicants oppose even one day of delay in the schedule after March 29, and no one is asking for a postponement of the March 29 date -- they cannot (or at least, should not) have it both ways. How the Board handles this controversy will be read by many parties as the clearest sign of whether the Board intends to balance the interests of parties opposing the Applicants with the desires of Applicants. The appearance has already been left of a "rush to judgment" here for the benefit of Applicants, rather than a considered pace that allows other parties a fair opportunity to participate.

⁴ "Discovery on responsive and inconsistent applications, comments, protests, and requests for conditions shall begin immediately upon their filing." Decision 1 at 4 (emphasis added); see also Decision 6 (notes to calendar).

Finally, the challenges brought by WSC and other parties, on Constitutional grounds (see, e.g., Appeal, Exhibit K), to certain of Applicants' discovery requests, were deferred by Judge Nelson, and thus the Board may not, and should not, decide the validity of those challenges now, regardless of its ruling on the prematurity issue.

BACKGROUND

Well after business hours on February 26, 1996, the last possible date for doing so before March 29, 1996, Applicants served WSC and most or all of the other parties (except labor) who had served discovery requests on Applicants with broad and far-ranging discovery requests. Applicants waited until the last possible minute to serve their discovery before a month-long discovery moratorium began to allow WSC and other intervenors to prepare for their March 29, 1996 filings. Applicants served discovery requests only on the parties (except for labor interests) who had served discovery requests on them, rather than applying some judgment as to what discovery was needed or whether, even though a party had not served them with discovery requests, that party might have necessary information for the Board to consider. Thus, the discovery requests are, transparently, an attempt to intimidate, rather than an inquiry into the evidentiary filings and comments of other parties -- after all, no opposing party has yet made such a filing!

On March 4, 1996, pursuant to the Discovery Guidelines in this proceeding, WSC timely filed Objections to Applicants'

discovery requests. Previously, in a conference call between Judge Nelson and counsel, WSC had requested an expedited hearing on its Constitutional challenges, which Judge Nelson granted, setting a hearing for March 6, 1996. WSC objected on the grounds that many of Applicants' requests sought were irrelevant and sought information protected by the common-interest and joint-defense privileges, as well as its other common-law privileges, including the attorney-client privilege and the work-product doctrine. In addition, WSC objected on the grounds that Applicants' requests seeking such things as the identity of financial contributors to WSC violated its First Amendment rights to free speech and association, and that compelling the disclosure of WSC's communications with government officials would infringe on WSC's First Amendment right to petition the government for the redress of grievances, as well as its other First Amendment rights.

In accordance with Judge Nelson's determination to hold an expedited hearing on the Constitutional issues, WSC also filed, on March 4, a motion for an expedited ruling from Judge Nelson that requiring WSC to respond to Applicants' Interrogatories 1 and 5 and Document Requests 13, 14, 15, 16, 17, and 21 would violate the Constitutional rights and common-law privileges of WSC and its members. Appeal, Exhibit K. (The Board should review WSC's March 4 letter to Judge Nelson for all of WSC's arguments, which is also attached to the filed copy with the Board.) WSC explained that the pendency of those requests

was having a "chilling effect" on WSC's Constitutional rights to petition the government for redress of grievances and its rights to free speech and association, as well as various privileges, such as attorney-client, attorney work product, and the "common interest/joint defense."⁵

Among the more outrageous requests were the following:

° In their Interrogatory 5, Applicants demanded to know the financial contributors to WSC, and the amount of those contributions, as if that had anything to do with the issues in this proceeding. Applicants even went so far as to accuse WSC of being a "front organization funded by one or more railroad parties." Appeal, Exhibit L at 3. To the contrary, WSC volunteered that one shortline railroad -- Utah Railway -- had made a contribution in an amount commensurate with that of other members, and had since withdrawn from WSC following its settlement with UP and SP. Otherwise, WSC made clear that it is now funded exclusively by shippers, but by whom and how much is irrelevant, and such contributions constitute protected speech under the First Amendment. E.g., Buckley v. Valeo, 424 U.S. 1, 19 (1976).

° In their Interrogatory 1 and in one or more Document Requests, Applicants demanded to know the contents of every

⁵ The Supreme Court has recognized the obvious -- that discovery requests themselves can violate Constitutional rights, and can "chill" the exercise of such rights. E.g., NAACP v. Alabama, 357 U.S. 449 (1958). That right is not limited to civil rights cases, as Applicants imply in their Appeal (at 21-22).

agreement --' apparently, oral as well as in writing -- between WSC and every other party in this proceeding. WSC explained that many of its members are parties in their own right in this proceeding, and that in any event WSC is entitled to have such arrangements, including with the Department of Justice, which is interested in meeting with WSC on a confidential basis, under the "informer's privilege." WSC's agreements with its members are protected by the First Amendment right of free association, and Applicants belatedly conceded that they should have no right to inquire into communications "within WSC." Appeal, Exhibit L at 5 n. 2 (emphasis in original). But Applicants have been unable to identify any right that they would have to inquire into such communications between WSC and its members who are parties and who Applicants may, or may not, intend now to exclude from their Interrogatory, or what right they have to inquire into such agreements between WSC and other parties who are not members of WSC.

° In Document Requests 15 and 16, Applicants demanded that WSC produce all communications, including notes of confidential meetings, between WSC and public officials, including Legislators, Governors, and Attorneys General. UP and SP were well-aware that WSC had just succeeded in having the Utah Senate enact a resolution opposing this merger (Appeal, Exhibit K, Attachment) and their discovery requests had the effect of chilling communications between WSC and the Governor, Attorney

General, and Legislature of Utah, as well as the Legislatures of other Western States.

° Applicants' other Interrogatories and Document Requests to which WSC raised Constitutional objections are discussed at greater length in WSC's March 4, 1996 letter to Judge Nelson. Numerous other parties support WSC's position, including the Department of Justice, whose March 4, 1996 letter to Judge Nelson was not attached by Applicants to their Appeal, but is attached to the copies of this Reply being filed with the Board.⁶

At the March 6, 1996 hearing, Judge Nelson heard an hour of oral argument on the Constitutional issues, including from the Department of Justice, and he treated the matter as sufficiently important to structure the argument as if it were being presented to "the Court of Appeals". After hearing argument, he deferred his ruling on the Constitutional objections to Applicants' discovery, and informed the parties that he would defer a ruling on WSC's Constitutional objections until after he had ruled on Conrail's motion (Appeal, Exhibit B) that all of Applicants' discovery was premature until the Intervenors had presented evidence in the case.

⁶ The only Attachment to this Reply included with the service copies is Mr. Roach's November 15, 1995 letter, because all parties may not have it. All parties on the Restricted Service List have WSC's March 4, 1996 and March 6, 1996 letters to Judge Nelson, and the DOJ's March 4, 1996 letter.

WSC and numerous other parties (Appeal, Exhibits C-H) joined in Conrail's motion on the ground that Applicants' discovery was premature and irrelevant until -- and if -- WSC and the other parties filed comments and evidence on the proposed merger on March 29, 1996. Appeal, Exhibit G. WSC and the other parties argued that Applicants' discovery requests could not be shown to be relevant without reference to whatever evidence or comments they may file on or about March 29, 1996, and that the requests were therefore premature because those parties had not yet taken a position in this proceeding.

Judge Nelson then held another hearing on March 8, 1996 to consider Conrail's (and others, including WSC's) motion that Applicants' discovery was premature. At the beginning of the hearing, Judge Nelson made certain preliminary rulings. He rejected Conrail's argument that until March 29 all of Applicants' discovery was premature and irrelevant under the Discovery Guidelines for this proceeding. Tr. 1939. Judge Nelson held, however, that certain discovery requests were premature -- those that were overbroad and did not request specific factual information and those that related to the type of comments or conditions that the Intervenors would file on March 29, 1996. Tr. 1939-49.

After his initial rulings, Judge Nelson instructed the parties to attempt to compromise, specifically instructed the parties to divide the Interrogatories and Document Requests into categories, some of which could be answered now and some of which

would be more appropriate after the March 29 filings. Tr. 1940. The Judge told the parties: "The applicants are going to have to ask less than they want. And the intervenors are going to have answer more than they want. Those are my guidelines." Tr. 1942. Specifically, the parties were instructed to divide Applicants discovery requests into two phases: during Phase I Intervenor would be required to answer tailored discovery requests that sought specific and relevant factual information; during Phase II, Intervenor would be required to answer the remaining discovery requests that were more appropriately answered in the context of March 29 filings. Tr. 1943.

Despite Judge Nelson's explicit instructions, Applicants were unwilling to compromise. Tr. 1966-67. Judge Nelson, therefore, was forced to divide the requests himself into those appropriate for discovery before intervenor filings, and those more appropriately delayed until after intervenors had filed their comments and evidence. Tr. 1967-2067. Applicants' refusal to obey Judge Nelson's instruction to attempt a compromise and his order to divide the discovery requests into appropriate "Phases" is, therefore, the root cause of this controversy. The Board should deny Applicants' Appeal solely on the ground that the refusal to obey Judge Nelson was inappropriate. Had they done so, the Board might not have needed to involve itself in this discovery dispute.

Judge Nelson's rulings attempted to address the concerns of all parties and were a balanced and well-reasoned

approach to resolving these discovery disputes (even if he erred by overriding Decisions 1 and 6 in this proceeding by requiring any discovery responses now, a relatively minor matter compared to the breadth of the discovery requests at issue). Accordingly, as discussed below, Applicants' Appeal should be denied.

Argument

I.

The Board May Grant Applicants' Appeal Only If Judge Nelson's Rulings Represent a Clear Error in Judgment and Would Result in Manifest Injustice.

In Decision No. 6, the Commission enunciated the standard of review under the Board's regulations for appeals of discovery rulings by an administrative law judge:

"Any interlocutory appeal to a decision issued by Judge Nelson will be governed by the stringent standard of 49 C.F.R. 1115.1(c): 'Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.'"

(citing Union Pacific Corporation, et al. -- Control -- Chicago and North Western Transportation Company, et al., Finance Docket No. 32133, Decision No. 17, at 9 (served July 11, 1994) (applying the "stringent standard" of 49 C.F.R. 1115.1(c) to an appeal of an interlocutory decision issued by administrative law judge).

II.

Judge Nelson's Rulings That Several of Applicants' Discovery Requests Are Premature and Should Be More Focused Were Well-Reasoned and Judicious.

Judge Nelson's rulings, far from representing a "clear error in judgment," represent a reasonable exercise of judicial

discretion and are consistent with the Decisions and Discovery Guidelines issued in this proceeding, and with the positions taken by the Applicants themselves earlier in the discovery process, when they were confronted with discovery requests.

A. Judge Nelson's Rulings Are a Fair and Reasonable Exercise of Judicial Discretion.

Applicants' appeal would lead the Board to think that Judge Nelson barred all of their discovery. To the contrary, the Judge took a prudent (and hardly erroneous) approach in ruling that certain discovery requests required sharpening and that some discovery was premature. The Judge's decision was in fact a well-reasoned effort to address the concerns of all parties -- exactly the type of exercise that judges are expected to perform. For example, Judge Nelson explained (Tr. 1944):

"Some of the discovery is premature not in the sense that there is a command against doing it now, but in the sense that it would make better allocation of resources to do it later because it will be focused in the context of particular positions taken by particular parties who either are filing other applications or I think in most cases will be pressing requests for conditions. I think I can evaluate all the disputes better in that contexts. And I think some of them may dwindle or go away or at least be reduced in number."

Judge Nelson was respectful of the time constraints imposed by the Board and tried to accommodate both Applicants and Intervenor with respect to the second phase of the discovery. For example, in holding that the Applicants should serve new interrogatories based on the March 29 filings, he specifically noted that Applicants needed time to review the filings and draft

"new sharpened, focused interrogatories" that focused on those filings. Tr. 1946. He also recognized the necessity of staying on schedule and providing the Applicants discovery responses in a timely manner. According to the Judge (Tr. 1946):

"That's the intervenor's price for having pressed the argument about prematurity. Fair is fair. . . . you ladies and gentlemen on the intervenor's side, will have to move somewhat faster to accommodate the applicants. . . ."

Judge Nelson further explained his holdings (Tr. 1949):

"I don't rule out anything so long as it does start giving some discovery now, which I think they're entitled to. The better job they can do on their requests, the more I'm going to be inclined to want to order it. The more they ask for every piece of paper dealing with railroads in America, the less they're going to get from me this time or ever."

These are hardly the words of a Judge that is acting in a "clearly erroneous" manner and doling out manifest injustice. His rulings reflect a classic judicial approach to resolving discovery disputes.

B. Judge Nelson's Rulings Are Consistent with the Decisions Issued in This Case.

In several decisions in this proceeding the Board has explained that "[d]iscovery on responsive and inconsistent application, comments, protests and requests for conditions shall begin immediately upon their filing." See, e.g., Decisions 1 at 4 and Decision 6 at 16. Thus, Judge Nelson was entirely correct in concluding that certain discovery requests propounded on WSC prior to any filing of comments, protests, or inconsistent or responsive application by WSC are premature. In fact, Judge

Nelson did not go far enough in limiting premature discovery requests, given the Commission's language in Decisions 1 and 6.

In a letter to Judge Nelson dated March 6, 1996, WSC explained in detail additional reasons that several of Applicants' discovery requests are premature. See Appeal Exhibit G. WSC respectfully refers the Board to its letter, which it incorporates by reference.⁷

C. Judge Nelson's Rulings Are Consistent With the Discovery Guidelines In This Proceeding.

Contrary to Applicants' unfounded assertion that the Judge's ruling "overrode" the Discovery Guidelines in this proceeding, the Judge's ruling is entirely consistent with those guidelines. Appeal at 2, 13-14. The Guidelines provide that "[u]nless objected to" discovery requests must be answered within fifteen days and that when discovery disputes cannot be resolved by the parties a prehearing discovery conference with the Judge should be scheduled, followed by a hearing if requested. These are precisely the steps that were followed in this proceeding. WSC requested a hearing on several of the discovery requests propounded by the Applicants which were not only irrelevant and burdensome, but infringed upon Constitutional rights and common-law privileges. It was entirely appropriate for WSC to seek a

⁷ Notwithstanding its arguments, WSC has responded to Applicants' discovery requests that do not infringe upon WSC's and its members' Constitutional rights and common-law privileges, even though under the Board's decisions all discovery is arguably premature until and unless WSC files comments and evidence on March 29, 1996.

hearing before Judge Nelson to discuss these serious concerns, as WSC could not compromise its members' Constitutional rights. As noted above, WSC also complied with its obligations under the Discovery Guidelines by filing Objections to specific discovery requests and went beyond its obligations in answering those requests to which it did not object.

Thus, Applicants' assertion that the Judge "jettisoned" the Discovery Guidelines (Appeal at 14) is inaccurate. Under the Applicants' approach, any ruling by Judge Nelson that a discovery request is not appropriate or timely is a departure from the Discovery Guidelines. This cannot be correct.

D. Applicants' Position Is Inconsistent with Their Prior Positions in This Proceeding.

Only four months ago, when the shoe was on the other foot, Applicants took the position that discovery requests they received from Kansas City Southern Railway Company served on November 13, 1996 were premature and should not be permitted until after Applicants had filed their application. In a letter to Judge Nelson (attached hereto), Applicants' counsel explained that the discovery requests "would seriously jeopardize the Applicants' ability to file the application on schedule." See attached letter from Arvid E. Roach II, Esq. dated November 15, 1995. The same of course can be said of Applicants' discovery requests to WSC. WSC must file its comments and evidence in less than two weeks and, therefore, it is inconsistent, if not disingenuous, for Applicants now to argue that the same concerns

do not apply to WSC, Conrail, and other parties to this proceeding. Indeed, Applicants' were highly critical of KCS' approach to discovery, noting that KCS "must be aware that it has interposed these discovery requests at the most critical juncture in the application process." Yet Applicants are taking the same Machiavellian approach they attributed to KCS. Applicants have served discovery only on those parties that served them with requests (except for labor). The discovery at issue was, therefore, motivated by retribution rather than need. Furthermore, by serving broad, irrelevant, and overly burdensome discovery requests at the last possible moment, they are interfering with the ability of WSC and others to file their comments and evidence on March 29, 1996. The Board should deny the appeal for these reasons alone.

Applicants' contention that their requests were filed at the latest possible date to enable them to file narrowly focused requests is absurd, and demonstrates their lack of good faith in this matter. Applicants' discovery requests could hardly be considered narrowly focused, as Judge Nelson has recognized on several occasions. See Appeal at 17 n.8.

III.

Judge Nelson's Ruling with Respect to the Discovery Requests Implicating Constitutional Rights and Common-Law Privileges Was a Proper and Reasonable Exercise of Judicial Discretion.

Judge Nelson's holding that the Applicants' requests that sought broad categories of documents and information about matters that clearly implicated Constitutional rights and common-

law privileges was not clearly erroneous and will not result in manifest injustice. The Judge's ruling, like his other rulings, was well-reasoned and fair. He held (Tr. 1942):

"Those interrogatories and document requests seem to me for present purposes not so pressing as to warrant adjudication of these constitutional issues in what I referred to the other day as the abstract. These if they have to be adjudicated seem to me to make much more sense in light of inconsistent and responsive applications, if there are any, 'comments, protests, requests for conditions, and any other opposition and argument due,' to quote the Commission's language."

Again, this is a well-reasoned holding, clearly within the bounds of judicial discretion and far from a clear error in judgment.

Despite the dismissive air of Applicants' discussion of the Constitutional issues (Appeal at 21-23) as if they were of little or no moment, the issues raised by WSC are substantial, compelling, and remain so as so long as the discovery has not been withdrawn.⁸ Appeal, Exhibit K. An extended discussion of those issues is not necessary here because Judge Nelson did not

⁸ Applicants contend that Judge Nelson's holding resulted in "odd results" with respect to discovery of documents sent to Mexican officials. Appeal at 22. To the contrary, the Judge's holding is well-reasoned. The undersigned counsel carefully explained to Judge Nelson, in response to his solicitation of advice on the Constitutional issues (because the undersigned had argued the matter) of whether the First Amendment right to petition the government for redress of grievances applied in Mexico, that it did not. Tr. 1986. Judge Nelson was correct. Our Constitution protects communications with officials of the United States and the individual States; obviously, it does not protect communications beyond the reach of our borders. This is a good example of the lack of understanding of Applicants of the Constitutional problems with their discovery requests, which lack of understanding has caused them to belittle assertions of important Constitutional rights.

reach those issues, and it would be highly inappropriate for the Board to address them in the first instance.

Suffice it to say, however, that Applicants' Interrogatories 1 and 5 and Document Requests 13-17 and 21 would have the effect of "chilling" WSC's and its members' First Amendment rights to petition the government for redress of grievances, as well as violating the freedoms of speech and association.⁹ The matters are addressed at greater length in WSC's March 4, 1996 letter (Appeal, Exhibit K).¹⁰

At the March 6 hearing, the Judge said he wanted to see (a) documents to which Constitutional rights and common-law privileges are claimed and (b) evidence of fears of retaliation by Applicants against parties who participate in this proceeding, both of which WSC was prepared to provide to Judge Nelson on

⁹ Applicants' assertion that their discovery requests to WSC and other parties are "routine" in "rail merger cases" (Appeal at 22) is both wrong and irrelevant. Applicants fail to cite any ICC or Board authority for such discovery, but rather only that carrier parties have engaged in such discovery before, apparently without Constitutional objections. But the point is that WSC is a group of shippers, not a single party, and as a group has Constitutional rights of association that a single party may not. Moreover, Applicants can cite no authority for asking for WSC's financial contributors or the amounts of their contributions, nor have they cited any authority to justify interfering in WSC's efforts to get the Utah Legislature and other public officials to take a stance in opposition to this merger, or for their other efforts to interfere in WSC's and its members' Constitutional rights. The fact that no one has raised these objections to discovery requests that may have been propounded in prior rail merger cases is of no moment in determining the validity of the objections.

¹⁰ The Justice Department also explained to Judge Nelson that several of Applicants' discovery requests to WSC seek materials that are protected by the "informer's privilege."

March 8, 1996 when he elected to defer a ruling on the Constitutional issues on the grounds that the Interrogatories and Document Requests to which they pertained were encompassed by his determination that much of Applicants' discovery requests are premature. Accordingly, WSC has yet to have an opportunity to present all of its materials substantiating the "chilling" effect of Applicants' discovery requests.¹¹

Conclusion

Judge Nelson's March 8, 1996 rulings were based on sound judicial discretion and should be upheld. Applicants have failed to satisfy the stringent standard for appeals under 49 C.F.R. 1115.1(c).

Respectfully submitted,

Michael F. McBride

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¹¹ In any event, if the Board were to: a) reach out and decide the Constitutional issues in the first instance, which would be improper, for the reasons discussed in text; and b) were to rule against WSC and its members on any of those matters, which would also be improper (for the reasons set out in WSC's March 4 letter, Exhibit K to the Appeal) that might be a final order for purposes of judicial review. Judicial review of the Board's actions at this stage could have the effect of delaying the proceeding, which is the opposite of what the Board and Applicants have stated that they desire.

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Attorneys for Western
Shippers' Coalition

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Page Count 2

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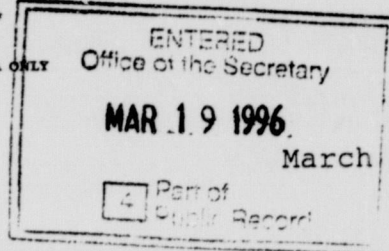
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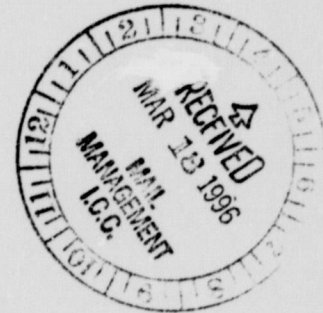
* ADMITTED IN PENNSYLVANIA ONLY



WCTL-10, AEPC-4
TUE-6, ESI-11

BY HAND DELIVERY

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



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

Dear Mr. Secretary:

The Western Coal Traffic League, Arizona Electric Power Cooperative, Inc., Texas Utilities Electric Company, and Entergy Services, Inc. (collectively the "Replying Parties") hereby submit an original and twenty copies of this letter as their Reply in Opposition to the Applicants' March 13, 1996 "Appeal from Administrative Law Judge Jerome Nelson's Order Restricting Applicants' Discovery."

Each of the Replying Parties joined in a consolidated letter dated March 7, 1996 ("Consolidated Letter"), which letter stated that Applicants' requests were premature and burdensome, and which requested that Judge Nelson postpone such discovery at his March 8, 1996 discovery conference. In response to these and other arguments raised at the conference, Judge Nelson: (i) required the Applicants to reformulate a number of their extremely overbroad and burdensome requests; (ii) held that certain other requests were appropriate but need not be answered until April 1, 1996; and (iii) determined that a group of the requests were satisfactory as written and were to be answered by March 12, 1996.

Honorable Jerome Nelson
March 18, 1996
Page 2

Applicants' appeal of this decision does not justify reversal. Specifically, Applicants have failed to demonstrate that review is necessary "to correct a clear error of judgment or to prevent a manifest injustice." See Decision No. 6, served Oct. 19, 1995, at 13; 49 C.F.R. § 1115.1(c). The Applicants served their far-reaching discovery requests at a time that would interfere with the preparation of comments and responsive applications. Judge Nelson did not deny discovery entirely, but instead, categorized the Applicants' discovery on the basis of his detailed review of each individual request. His decision to postpone the due date for certain requests and require Applicants to narrow the focus of certain other overly broad and burdensome requests was an entirely reasonable exercise of his discretion as the Administrative Law Judge presiding over the discovery phase of this proceeding.

For the foregoing reasons, the Board should deny Applicants' Appeal.

Sincerely,

A handwritten signature in cursive script that reads "C. Michael Loftus".

C. Michael Loftus

cc: Arvid E. Roach II, Esq. (via telecopier)
Paul A. Cunningham, Esq. (via telecopier)
Restricted Service List (via telecopier)

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LAW OFFICES

Page Count 5

UTT & RASENBERGER, L.L.P.

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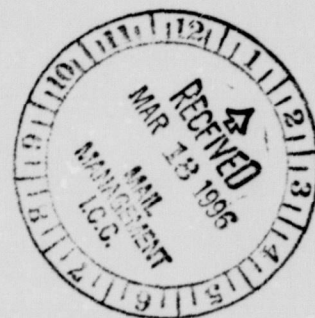
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March 18, 1996

VIA HAND DELIVERY

Vernon A. Williams

Secretary

Surface Transportation Board

Room 2215

12th Street & Constitution Avenue, N.W.

Washington, D.C. 20423

**Re: Union Pacific Corp., Union Pacific RR. Co. and Missouri Pacific RR Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Rv. Co., SPCSL Corp. and The Denver and Rio Grande Western RR Co.,
Finance Docket No. 32760**

Dear Secretary Williams:

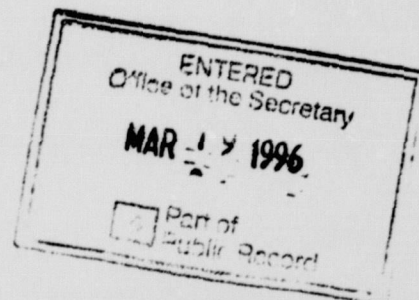
Enclosed are an original and twenty copies of SPP-8, Response of Sierra Pacific Power Company and Idaho Power Company to the Applicants' Appeal from the Administrative Law Judge's Order Restricting Applicants' Discovery. Also enclosed is a 3.5" floppy computer disc containing a copy of the filing in Wordperfect 5.1 format.

Sincerely,

Richard A. Allen
Jennifer P. Oakley

Enclosures

cc: Honorable Jerome Nelson
Restricted Service List



**BEFORE THE
SURFACE TRANSPORTATION BOARD**



Union Pacific Corp., Union Pacific)
 RR. Co. and Missouri Pacific RR Co.)
 -- Control and Merger -- Southern)
 Pacific Rail Corp., Southern)
 Pacific Trans. Co., St. Louis)
 Southwestern Rv. Co., SPCSL Corp.)
 and The Denver and Rio Grande)
 Western Corp.)

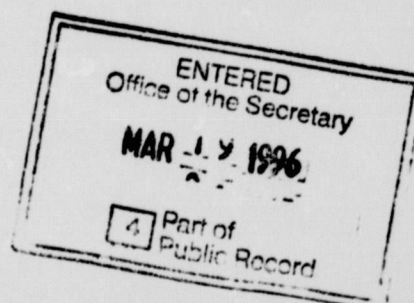
Finance Docket No. 32760

**RESPONSE OF
SIERRA PACIFIC POWER COMPANY AND
IDAHO POWER COMPANY TO THE
APPLICANTS' APPEAL FROM ALJ'S ORDER
RESTRICTING APPLICANTS' DISCOVERY**

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Attorneys for Sierra Pacific Power
 Company and Idaho Power Company

March 18, 1996



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

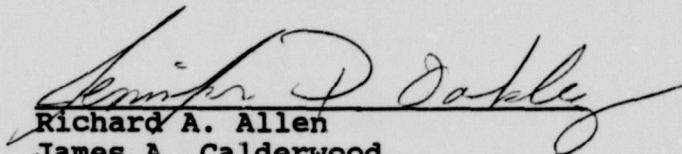
Union Pacific Corp., Union Pacific)
RR. Co. and Missouri Pacific RR Co.))
-- Control and Merger -- Southern)
Pacific Rail Corp., Southern)
Pacific Trans. Co., St. Louis)
Southwestern Rw. Co., SPCSL Corp.)
and The Denver and Rio Grande)
Western Corp.)

Finance Docket No. 32760

**RESPONSE OF
SIERRA PACIFIC POWER COMPANY AND
IDAHO POWER COMPANY TO THE
APPLICANTS' APPEAL FROM ALJ'S ORDER
RESTRICTING APPLICANTS' DISCOVERY**

Sierra Pacific Power Company and Idaho Power Company ("Sierra Pacific") will be impacted by the decision of the Surface Transportation Board ("the Board") to the Applicants' appeal of the Administrative Law Judge's decision restricting Applicants' discovery. Sierra Pacific strongly supports the position of Conrail and the other parties subject to the Applicant's burdensome and premature discovery and asks that any decision rendered by the Board in this matter be applicable to Sierra Pacific.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Jennifer P. Oakley", is written over the printed name.

Richard A. Allen
James A. Calderwood
Jennifer P. Oakley
ZUCKERT, SCOUTT & RASENBERGER, LLP
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006-3939
202/298-8660

Attorneys for Sierra Pacific Power
Company and Idaho Power Company

Dated: March 18, 1996

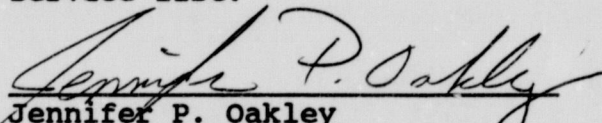
CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing SPP-8, Response of Sierra Pacific Power Company to the Applicants' Appeal from the Administrative Law Judge's Order Restricting Applicants' Discovery, by hand delivery upon the following persons:

Arvid E. Roach II
J. Michael Hemmer
Michael L. Rosenthal
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-7566

Paul A. Cunningham
Richard B. Herzog
James M. Guinivan
Harkins, Cunningham
Suite 600
1300 Nineteenth Street, N.W.
Washington, D.C. 20036

I have also served by facsimile the Honorable Judge Nelson and all persons on the restricted service list.


Jennifer P. Oakley
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W.
Washington, D.C. 20006-3959
(202) 298-8660

Dated: March 18, 1996

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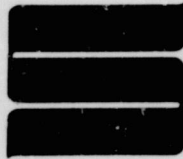
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Item No. _____

Page Count _____

Mar #338

SALES



March 13, 1996



PROCEEDINGS

ADVISE OF ALL

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

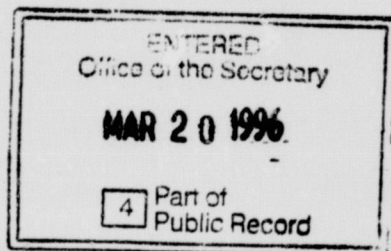
RE: Finance Docket No. 32760, Union Pacific Corporation, et.al., Control and
Merger-Southern Pacific Rail Corporation, et. al.

Dear Mr. Williams:

My name is Stephen R. Miley, and I am Corporate Vice President of Sales for Southdown, Inc., the third largest manufacturer of cement in the United States. I have been employed by Southdown, Inc. for 12 years. Southdown utilizes the Union Pacific, Southern Pacific, the Burlington Northern Santa Fe, and various other Class I carriers for their movements throughout the United States. This letter is to verify that Southdown, Inc. requests that, in the event that the UP/SP merger is approved, the BNSF Agreement with the Union Pacific/Southern Pacific will be a contingent portion of the UP/SP merger. The BNSF Agreement with UP/SP provides for trackage rights and line sales that are instrumental in providing a second alternative and assist in the creation of a competitive factor in the absence of the separated Union Pacific and Southern Pacific rail system. The BNSF Agreement will allow BNSF to transport coal to our Victorville facility, which would not be available in the event that the UP/SP merger was approved without the BNSF Agreement.

In conclusion, Southdown, Inc., the third largest manufacturer of cement in the United States, requests that if the Surface Transportation Board approves the merger and acquisition of the Union Pacific and Southern Pacific that the Agreement, which was previously made between the BNSF and the Union Pacific and Southern Pacific, be made a part and party to the approved merger of the Union Pacific/Southern Pacific.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 13th day of March, 1996.



Sincerely,

Stephen R. Miley
Stephen R. Miley

SRM/daa

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Item No. _____

Page Count 1

Mar #339

112 East Orin
Gordon, NE 69343
(308) 282-0638



13 March 1996

The Honorable Vernon A. Williams
Secretary
United States Surface Transportation Board
12th & Constitution Ave NW
Washington DC 20423

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

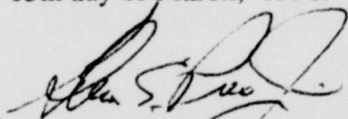
Dear Mr. Williams:

Ag. Pro. Co-op supports the BN/Santa FE Agreement reached with UP/SP in the above referenced case, we strongly urge the Surface Transportation Board to Impose the BN/Santa Fe Agreement as a condition to any UP/SP merger.

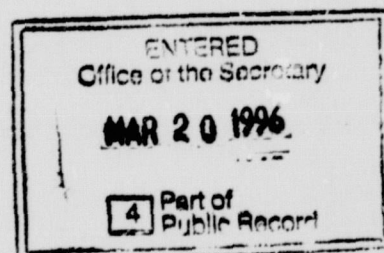
Ag. Pro. Co-op is a producer owned cooperative with over 1,600 members operating a number of facilities originating and terminating carload freight in Northwest Nebraska. All of Ag. Pro's rail facilities are served by NEBKOTA Railway with virtually all of our traffic interchanged to BN/SF. We are an originator of rail grain, and receive shipments of fertilizer, animal feed, and feed ingredients by rail. We are among the largest U.S. originators of millet seed, a specialty grain.

STB imposition of the BN/ATSF Agreement on any merger of UP/SP will open additional markets for our originated agricultural products. Most specifically a number of receivers of millet seed located on UP or SP in the Southwest and California would be accessible by direct BNSF routing. These are markets which due to difficulties associated with interline rates and routes are effectively closed to us now.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 13th day of March, 1996.


Glenn E. Price Jr.
General Manager

**ADVISE OF ALL
PROCEEDINGS**



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Item No. _____

Page Count 1

Mar # 340

ALABAMA RIVER WOODLANDS, Inc.

P.O. BOX 99
PERDUE HILL, ALABAMA 36470



OFFICE 334 743-8222
FAX 334 743-8401

BILLY C BOND
PRESIDENT

March 14, 1996



PROCEEDINGS

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

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

Dear Mr. Williams:

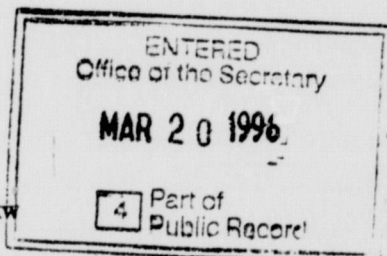
The purpose of this letter is to express my support for the BN/Santa Fe Agreement with UP/SP. My name is Billy C. Bond and I am President of Alabama River Woodlands, Inc., a wholly owned subsidiary of Alabama River Pulp, Inc. I have held this position for the past six years. Previously, I was employed as a corporate vice president of Hammermill Paper Company with duties which included corporate responsibility for Hammermill's transportation functions and holding the position of President of the Allegheny Railroad.

Located in one complex at Claiborne, Alabama, Alabama River Pulp and its affiliated companies use 4.5 million green short tons of wood fiber annually. This fiber is used to produce in excess of 800,000 metric tonnes of pulp and 235,000 metric tonnes of newsprint.

Our site is served by BN/Santa Fe railroad which plays a vital role in wood deliveries and pulp distribution. I believe that BN/Santa Fe is in a position to provide the competition and service needed by shippers who would not have access to a second rail carrier if the UP/SP merger is approved.

In conclusion, I believe that the proposed agreement would benefit my company as well as other companies using rail service in the areas covered by the agreement. Your support of this agreement would be appreciated.

Very truly yours,



BCB:jkw

Before me appeared Billy C. Bond to me personally known as an officer of Alabama River Woodlands, duly authorized to execute legal instruments on its behalf as its legal agent, and that he signed the foregoing certification in his individual capacity and on behalf of Alabama River Woodlands and he acknowledged said certification to be his free act and deed and free act and deed of Alabama River Woodlands.

Witness my hand and official seal this 14th of March 1996.

Julie K. White
Notary Public

My commission expires: My Commission Expires 3-24-98

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Wyoming Stc.

213 State Capitol / Cheyenne, WY

Item No. _____

Page Count 2
Mar #341

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House of Representatives

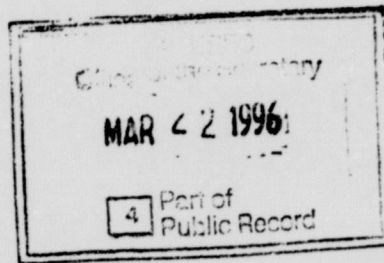
REPRESENTATIVE BILL BENSEL

House District 30 - Sheridan County

962 Emerson

Sheridan, WY 82801

Committee



March 12, 1996

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Twelfth Street & Constitution Avenue, N.W.
Room 1324
Washington, DC 20423

RE: Finance Docket # 32760, Union Pacific Corp., et al.-Control & Merger- Southern Pacific Rail Road Corp., et al.

Dear Secretary Williams:

Regarding the UP/SP merger I have, at best, mixed feelings.

Allowing this mega-merger to occur will certainly benefit the Union Pacific Rail Road Corporation by expanding the market share of areas which they serve. It may very well allow increased shipment of Wyoming products and natural resources to areas beyond the present transportation route served by UP.

However, I fear the even greater monopolization which this merger will promote and the negative impacts attributable to such an action. Burlington Northern and Union Pacific are the only two rails carriers in this western region and Wyoming.

Our coal mining industry has the greatest production in the nation. Transportation of this resource is shared by both UP and BN. Transportation costs required for moving this product to market are staggering and continue to strangle the Wyoming coal mining industry.

The trona industry in southwest Wyoming is growing and the potential for expansion exists. However, Union Pacific has almost total control of the trona/soda ash market transportation. There is only one small trucking firm which moves trona to a Burlington Northern rail head. This is all that stands between a completely captive market and at least a small degree of competition.

While increasing the rail access to new and growing market areas may be an advantage for selling various Wyoming commodities, monopolization by the carrier is not particularly advantageous to state industry, employees or state interests.

ADVISE OF ALL

PROCEEDINGS

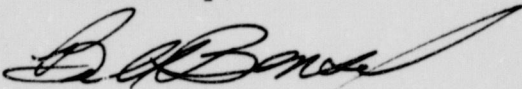
Page Two
March 12, 1996

Our two carriers have continued to reduce forces, re-station, cut and further threaten the status of rail worker employment in Wyoming and the western region. Disregard for employees of our "twin dragons" of the rail industry is increasing with their power in the transportation market. Expansion by these industries into other areas of transportation only further tighten their grasp as monopoly carriers.

The Surface Transportation Board must consider issues of monopolization and market control, displacement and impacts upon regional as well as Wyoming employment, and effects of increased import/export of foreign goods upon the states.

Thank you for the opportunity to comment upon this major decision. I wish you best wishes in serving the best public interest for Wyoming and the west.

Sincerely,

A handwritten signature in dark ink, appearing to read "Bill Benschel", with a long, sweeping horizontal stroke extending to the right.

Bill Benschel

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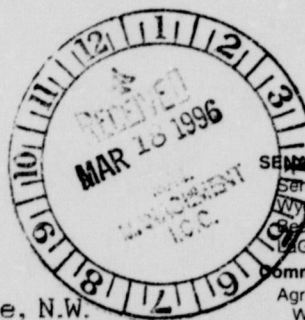
Wyoming State Legislature

213 State Capitol / Cheyenne, Wyoming 82002 / Telephone 307 / 777-7881

Item No. _____

Page Count 1
MAR # 342

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Twelfth Street and Constitution Avenue, N.W.
Room 1324
Washington, D.C. 20423



Senate

SENATOR CURT MEIER

Senate District 3 - Goshen County
Wyross Ranch
Bear Creek Route
LaGrange, Wyoming 82221

Committees:

Agriculture, Public Lands and
Water Resources
Labor, Health and Social Services
State Employee Compensation Commission
Medicaid/Mental Health Commission

RE: Finance Docket No. ~~32670~~ **32760**, Union Pacific Corp., et al. -
Control & Merger - Southern Pacific Rail Corp., et al.

Dear Secretary Williams:

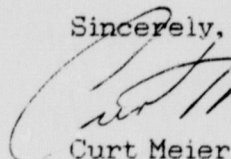
I am submitting this statement in support of the proposed merger of Union Pacific and Southern Pacific Railroads. This merger will directly benefit Wyoming's economy. It will also provide fair competition for the railroad by giving the Union Pacific the opportunity to challenge the markets served by the recent merger of the Burlington Northern and Santa Fe Railroads.

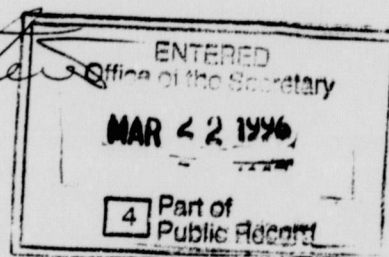
The Union Pacific has played an important role and partnership in the economics of Wyoming. I believe that the approval of the proposed merger will have a significant impact on the ability of Wyoming producers to reach new markets and generate additional economic benefits for the state. Also, the additional traffic on Union Pacific's main line will create additional employment opportunities.

With the recent trackage right agreement between Union Pacific and the BN/Santa Fe, rail competition will be preserved resulting in vigorous efforts for efficiencies and improved service for Wyoming customers such as coal, soda ash, and grain producers.

I strongly urge your prompt approval of this merger.

Sincerely,


Curt Meier



cc: Dick Hartman
(Union Pacific Railroad Company
2424 Pioneer Ave., Ste. 301
Cheyenne, WY 82001)

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Greater He

Chamber of c
HERMISTON
OREGON

Item No. _____

Page Count 1

MAR #343

) 567-6151 FAX (503) 564-9109

415 Southeast 2nd - P.O. Box 185 - Hermiston, OR 97838

March 1, 1996

Honorable Vernon A. Williams, Secretary
Interstate Commerce Commission
Twelfth Street and Constitution Ave., N.W.
Room 2215
Washington, D.C. 20423



RE: ICC Docket No. 32760, Union Pacific/Southern Pacific Merge

Dear Secretary Williams:

The Greater Hermiston Chamber of Commerce recognizes the contribution that Union Pacific Railroad Company makes to Eastern Oregon and specifically the Hermiston area.

We want to voice our support of the application by Union Pacific Railroad and Southern Pacific Railroad to merge operations. We believe this will allow efficiency in service, marketing opportunities and cost effectiveness.

The multiple routes will reduce congestion and improve time sensitive intermodal freight due to shorter routes and single line service, reducing transit times.

We, therefore, urge you to approve this application as soon as you can so that the benefits to the Northwest can be realized.

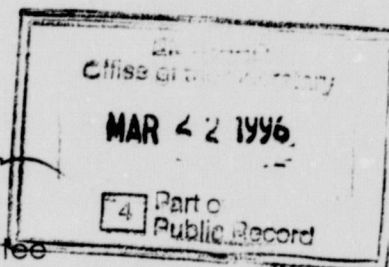
Respectfully,

Phillip W. Houk

Phillip W. Houk
Legislative Committee
Co-Chair

Bob Severson

Bob Severson
Legislative Committee
Co-Chair



**ADVISE OF ALL
PROCEEDINGS**

Our Mission: Business growth, economic diversification and promotion of livability, in the Greater Hermiston Area.

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PAYETTE
& GEI

Item No. _____

Page Count 2

Mar #326

HOM
P.O. BOX 323
PAYETTE, IDAHO 83661
BUSINESS: (208) 642-9433
FAX: (208) 642-9476



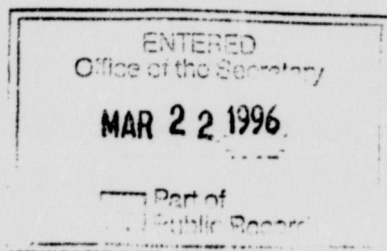
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COMMITTEES

CHAIRMAN
WAYS & MEANS

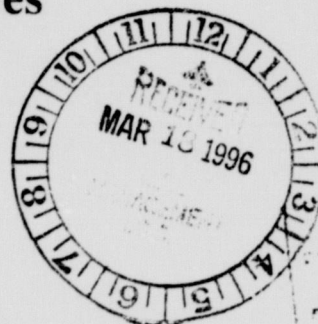
TRANSPORTATION & DEFENSE

REVENUE & TAXATION

JUDICIARY, RULES & ADMINISTRATION



House of Representatives State of Idaho



March 12, 1996

Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Twelfth Street and Constitution Avenue, N.W.
Room 1324
Washington, DC 20423

32760

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

Dear Mr. Williams:

I, Donna Jones, am a member of the House of Representatives, representing Gem, Payette and Washington Counties in the Idaho legislature. I am Chairwoman of the Ways and Means Committee and am a member of the Transportation and Defense Committee. The jurisdiction of the Transportation and Defense Committee includes rail transportation in the State of Idaho.

I support the proposed merger of the Union Pacific Railroad and the Southern Pacific Lines. The merger of the UP and SP will enhance rail competition, strengthen the Idaho transportation system and help fulfill the potential for increased economic development within the State of Idaho.

In particular, this merger will provide faster, more direct and new single-line routes for many of the areas that trade by rail with Idaho. For example, eastern and northern Idaho will obtain much shorter single-line routes to many points in California and Oregon. In addition there will be a new single-line route for the Eastport, Idaho gateway to Mexico and to SP-served points in California, Arizona and Texas, as well as new single-line service from all UP-served points in Idaho to numerous points now served only by SP in Colorado, New Mexico, Louisiana, and the Midwest. Both shippers and receivers in Idaho will benefit from the streamlining.

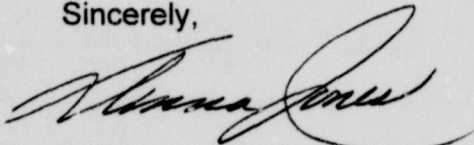
HOUSE OF REPRESENTATIVES
OFFICE OF THE CLERK

Also important is the fact that merger will enable UP to provide a ready supply of railcars, particularly the refrigerated equipment that Idaho shippers need. By making use of backhaul opportunities and taking the best advantage of seasonal patterns, the UP could provide more reefer cars for Idaho potatoes, for example, without any corresponding increase in its fleet and the cost that would entail. In addition, more capital investment for expanded capacity would be possible with the additional cost savings from combining the operations of the two railroads.

A merged UP/SP will strengthen competition with the now-merged BN/Santa Fe and its new single-line routes. It is important to Idaho that UP/SP be permitted to compete by merging because of the benefits outlined above, and so that the UP will remain a financially strong match for BN/Santa Fe in Idaho.

For these reasons, the undersigned fully supports the merger and urges the Surface Transportation Board to approve the merger promptly.

Sincerely,

A handwritten signature in dark ink, appearing to read "Donna Jones", written in a cursive style.

Representative Donna Jones
District 9

DJ/jl

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MAR # 327

BCP

A DELAWARE LIMITED PARTNERSHIP

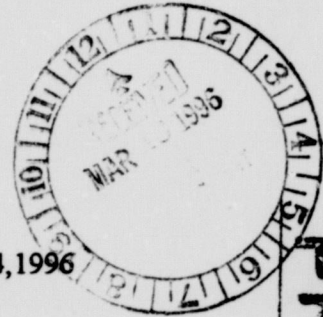
4 Part of
Public Record

BORDEN CHEMICALS and PLASTICS

OPERATING LIMITED PARTNERSHIP
BCP Management, Inc., General Partner

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

March 14, 1996



PROCEEDINGS

ADVISE OF ALL

Re: Finance Docket No. 32760 - UP/SP Merger

Dear Secretary Williams:

I am writing on behalf of Borden Chemicals and Plastics to express our concerns regarding the proposed merger of the Union Pacific and Southern Pacific railroads. We feel that the proposed merger would have a serious negative impact on the competitive structure of the transportation industry, thus leading to increased prices and decreased service quality.

Borden Chemicals and Plastics is a petrochemical company with plants in Geismar, LA, Addis, LA, and Illiopolis, IL. Our Geismar plant is served by the Illinois Central, the Addis plant is served by the Union Pacific and the Illiopolis is served by the Norfolk Southern. From these facilities, we ship approximately 75 rail cars of product every day. At this volume, even the slightest change in rail competition and rail rates will have a large aggregate effect on our company.

Currently, BCP benefits from competition between UP and SP. Although our plants are only served by one railroad, the traffic must be interlined with other railroads in order to reach the final destinations. Often, one interline route will include UP, and the other interline route will include SP. This situation forces UP and SP to compete for the lowest rate in order to win our business. As long as these two railroads are competing for our interline shipments, we know that we are receiving a good rail transportation rate. However, if the merger is approved, many of our shipments will only have one routing option: the proposed UP/SP system. In such a case, we will be forced to accept whatever rate the railroad quotes to us.

Also, we currently are seeking approval for a Kansas City Southern build-in to our Geismar facility. If successful, we would be able to route our commodities to Houston over two routes: (1) KCS to New Orleans, SP to Houston, and (2) KCS to Baton Rouge, UP to Houston. After the proposed merger, both of these routings would travel over UP/SP tracks. Without the competition between UP and SP, we would expect the rate to increase and service quality to decrease.



A DELAWARE LIMITED PARTNERSHIP

BORDEN CHEMICALS and PLASTICS

OPERATING LIMITED PARTNERSHIP

BCP Management, Inc., General Partner

If the merger is approved, and rail rates increase, we will not be able to turn to trucking as a transportation alternative. Due to the length of haul and the size of our shipments, trucking is just too expensive to be considered an option, and the railroads know this.

We do not expect the BN/Santa Fe trackage rights agreement to provide an effective competitor to the proposed UP/SP system. A railroad with trackage rights over a line simply cannot compete with the owner of the line. First, the rates quoted by trackage rights carriers are consistently higher than the owner carrier's rates. Second, because of preferential treatment of the owner railroad's own traffic, the trackage rights carrier often suffers from excessive delays and congestion. Third, trackage rights do not always give a carrier the access to freight it needs to be competitive on the line. For these reasons, we do not believe the BN/Santa Fe, with only trackage rights, would be able to compete with the proposed UP/SP system.

The Surface Transportation Board should carefully examine all of the competitive problems created by the Union Pacific - Southern Pacific merger. Until these issues are addressed and solved, the merger should not be approved.

I certify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement on behalf of Borden Chemicals and Plastics. Executed on March 14, 1996.

Sincerely,

William Talmadge

cc: Senator J. Bennett Johnston
Senator John B. Breaux

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Page Count

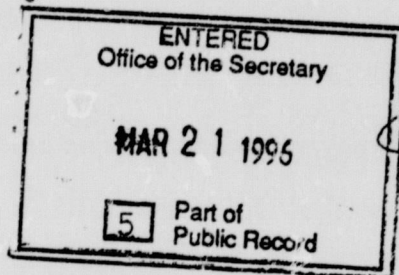
MAR #325

March 13th 1996
MAR 1996

Members of Transportation Surface Board,
FD33760

I have spent twenty nine years and six months working for the Cotton Belt Railroad (S.P. East).

If you allow the merger of U.P. and S.P., my time on the railroad is over. There has never been an instant where one railroad has maintained two main lines. The I.C.C. turned down the Santa Fe and Southern Pacific merger, because it would create a monopoly. The U.P. and S.P. merger is surely a monopoly. They will control the chemical lines into Texas, the lines into Mexico and also the lines to the West Coast. Please take the Con-Rail offer to buy the Cotton Belt before you allow the merger to take place.



Joe M. Lewis

STB

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32760

3-18-96

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Item No. _____

Page Count 2Mar # 344**Debra Danburg**Chair
Committee on Elections
State Affairs

March 18, 1996

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

Sent Via Fax: (202) 927-5984

RE: Finance Docket 32760

Dear Secretary Williams:

I am writing in regards to an application pending before you that seeks approval of a merger between the Union Pacific Railroad Company (UP) and Southern Pacific Lines (SP). I am very concerned that this merger will significantly reduce rail competition in Texas, which will result in a negative impact on Texas businesses and our State's economy.

UP acknowledges that the merger would greatly reduce rail competition and has proposed a trackage rights agreement with Burlington Northern-Santa Fe (BNSF) as the solution. A trackage rights agreement, however, simply does not solve the problem. Texas needs another owning railroad, not another merger, to ensure effective rail competition.

An owning railroad willing to provide quality service and investment is the best solution for shippers, communities and economic development officials. An owning railroad also offers the best opportunity to retain employment for railroad workers who would otherwise be displaced by the proposed merger.

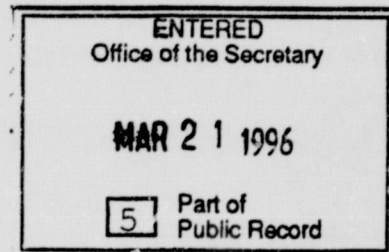
I urge the Board to carefully review the proposed UP/SP merger and to recommend an owning railroad as the only means to ensure adequate rail competition in Texas.

Sincerely,

A handwritten signature in cursive script that reads "Debra Danburg".

Debra Danburg
State Representative

DD/pwc



The Honorable Vernon Williams
March 18, 1996
Page 2

cc: The Honorable Carole Keeton Rylander, Chair, Railroad Commission of Texas
The Honorable Charles R. Matthews, Railroad Commission of Texas
The Honorable Barry Williamson, Railroad Commission of Texas
The Honorable Speaker James E. "Pete" Lancy, Texas House of Representatives
The Honorable John Cook, Texas House of Representatives
The Honorable Robert Junell, Texas House of Representatives
The Honorable Robert Saunders, Texas House of Representatives

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Item No. _____

Page Count 1

Mar #324

City of Wadsworth

120 Maple Street
Wadsworth, Ohio 44281
216-386-1521



Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Washington, D.C. 20423

Dear Secretary Williams:

I am concerned that the proposed Union Pacific-Southern Pacific railroad merger is not in the public interest in Northeast Ohio. We would be far better served if the UP-SP's eastern routes were, as part of the proposed merger, sold to Conrail, not leased to another western railroad.

My reasoning is straightforward. First, our industrial companies, particularly in the booming polymers sector, need direct service to raw materials and markets in the Gulf "chemical coast" region and to Mexico. Second, we believe that an owner-carrier, such as Conrail, would have greater incentive to improve markets along the route. Third, by keeping Conrail strong, we ensure a variety of service options and strong price competition among the major railroads in our region, namely CSX, Norfolk and Southern, and Conrail.

Finally, and most important, we believe the Conrail proposal is in the best interests of the industrial, manufacturing and transportation workers of our region. It combines efficient transportation, economic development, and continued employment opportunities. These are keys to the public interest.

For those reasons I would oppose the proposed merger unless it includes the Conrail purchase of the eastern lines of the old Southern Pacific. Only with the Conrail acquisition will Northeast Ohio economies be maximally served.

Thank you for your consideration.

Sincerely,

Marsha S. Lehman
Ward 2 Councilperson

Marsha Lehman
Ward Four Councilman
City of Wadsworth