STB FD 32760 4-1-96 D 62462

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, SPSL CORP. AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

STATEMENT OF JOE N. HAMPTON
ON BEHALF OF
THE OKLAHOMA GRAIN AND FEED ASSOCIATION

My name is Joe N. Hampton and I am the Executive Vice President of the Oklahoma Grain and Feed Association. The Association will hereinafter be named OGFA in this statement. It is an Oklahoma Corporation existing under the laws of Oklahoma with its business address as 2309 N. 10th Street, Suite E, Enid, Oklahoma, 73701, and telephone and fax numbers: (405)233-9516 and (405)237-2131, respectively. The Board of Directors of OGFA have voted to express their concern through this proceeding of the need for effective rail competition for the Oklahoma grain industry.

The OGFA is comprised of about 250 members, including terminal and country grain elevator firms located in the state of Oklahoma. We also have members from other states who do business with our Oklahoma members. Our members are served by the BNSF, UP-MP and short line railroads.

Our members have generally experienced a change in the attitude of rail customer relationships since railroad mergers and bankruptcy have become prevalent after the passage of the "4 -R Act of 1976". For example, at one time Rock Island (the first railroad to serve Oklahoma), the Frisco and Santa Fe were the motivating grain transportation forces in our state. The Rock Island went bankrupt, the Frisco was purchased by the BN. The Rock Island previously had abandoned some branch lines before declaring bankruptcy. The MKT railroad, with the help of the State of Oklahoma, served and established a good relationship with our members located on the old Rock

Island line. The BN, after purchasing the Frisco, did not exhibit the same "grain hauling positive attitude" as the Frisco.

After the UP assumed operation of the old Rock Island line from the MKT, their attitude toward grain shippers became less than what was experienced from the MKT. The Santa Fe then became the most positive customer oriented railroad serving our members. During the ATSF-BN merger, our shippers were led to believe the more grain friendly ATSF grain marketing people would be incorporated into the new system. This has not happened.

Due to the effect upon grain shippers of past rail mergers, bankruptcy's and abandonments, the OGFA urges the Surface Transportation Board to insure adequate rail competition, including rates and service, to the Oklahoma grain industry. We want to make certain that if this merger is approved, the resulting situation of only two major carriers serving our state plus the situation of parallel trackage rights for the UP-SP on north-south routes through Oklahoma will not result in loss of competition. We understand the Kansas City Southern Railway has expressed an interest in serving Oklahoma shippers. We urge your Board to give this concept positive consideration as a means to insure customer oriented service to our state.

It is our member's sincere hope that the final result of this merger will insure adequate and competitive rail service for our members for years to come.

Respectfully submitted,

Joe N. Hampton
Executive Vice President
Oklahoma Grain and Feed Association

I, Joe N. Hampton, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified to make this statement on behalf of the Oklahoma Grain and Feed Association. Executed this 27th day of March, 1996.

Joe N. Hampton

STB FD 32760 4-1-96 D 62460

Item No.________

Page Count___9_____

Apr #-88

SIDMAN & KIDER

ATTORNEYS AT LAW

PROFESSIONAL CORPORATION

1350 NEW YORK AVENUE, N.W. SUITE 800
WASHINGTON, D.C. 20005-4797
(202) 628-2000
TELECOPIER (202) 628-2011

RICHARD J. ANDREANO, JR.
JAMES A. BRODSKY
JO A. DeROCHE
CYNTHIA L. GILMAN
DON J. HALPERN
CHRISTOPHER E. KACZMAREK*
MITCHEL H. KIDER
SHERRI L. LEDNER
PAUL C. OAKLEY*
BRUCE E. PRIDDY*
MARK H. SIDMAN
RUGENIA SILVER
HARVEY E. WEINER
JOSEPH F. YENOUSKAS

*NOT ADMITTED IN D.C.

62460

April 1, 1996

RECEIVED
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MAIL MANAGEMENT I.C.C.

BY HAND DELIVERY

MRL-11

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

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and 20 copies of the Phase 2 Response of Montana Rail Link, Inc. to Applicants' First Set of Interrogatories and Requests for Production of Documents.

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

Very Truly Yours,

Christopher E. Kaczmarek

Christopher E. Kaczmarek

Enclosures

cc: Restricted Service List
93068\003\tcek428.ltr

ENTERED
Office of the Secretary
APR 2 1996
5 Part of Public Record

MRL-11

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

PHASE 2 RESPONSE OF MONTANA RAIL LINK, INC. TO APPLICANTS' FIRST SET OF INTERROGATORIES AND DOCUMENT PRODUCTION REQUESTS

RECEIVED
APR 1 1996
MAIL MANAGEMENT
I.C.C.

Mark H. Sidman
Christopher E. Kaczmarek
Weiner, Brodsky, Sidman &
Kider, P.C.
1350 New York Avenue, N.W.
Suite 800
Washington, D.C. 20005
(202) 628-2000

ATTORNEYS FOR
MONTANA RAIL LINK, INC.

Dated: April 1, 1996

ENTERED
Office of the Secretary
APR 2 1996
5 Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

PHASE 2 RESPONSE OF MONTANA RAIL LINK, INC.
TO APPLICANTS' FIRST SET OF INTERROGATORIES
AND DOCUMENT PRODUCTION REQUESTS

Montana Rail Link, Inc. ("MRL") herewith files its Phase 2 Response to the "First Set of Interrogatories and Document Production Requests" ("Discovery Request") directed to MRL by Applicants UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL and DRGW ("Applicants"). This Phase 2 Response is made pursuant to: (i) the Discovery Guidelines applicable to this proceeding, as adopted by Administrative Law Judge Jerome Nelson ("Judge Nelson") on December 7, 1995; and (ii) Judge Nelson's March 8, 1996, discovery conference rulings with respect to Applicants' Discovery Request.

MRL filed its objections to the Discovery Request on March 4, 1996. On March 8, 1996, a discovery conference was conducted by Judge Nelson. After considering the arguments of counsel, Judge Nelson ruled that responses to certain discovery requests were due on March 12 (Phase 1), that responses to other requests were due on April 1 (Phase 2), and that some requests could be reformulated and re-served on MRL (Phase 3).

In this Phase 2 Response, MRL responds to document request numbers 1, 8, 14, 17, 22 and 26 as modified by Judge Nelson's March 8, 1996, rulings. MRL incorporates and preserves all general and specific objections contained in its March 4, 1996, and March 12, 1996, discovery filings as if set forth in full herein. MRL also incorporates and preserves the reservation of rights contained in its March 12, 1996, discovery filing as if set forth in full herein.

Some documents responsive to these Phase 2 document requests were submitted in connection with MRL's March 29 filing. These documents will be available, in accordance with the Discovery Guidelines, in MRL's document depository. The remaining responsive documents are either being sent to counsel with this Phase 2 Response, or will be sent to counsel as soon as they are received.

RESPONSES

Document Request 1: Produce no later than April 1, 1996 (a) all workpapers underlying any submission that MRL makes on or about March 29, 1996 in this proceeding, and (b) all publications, written testimony and transcripts of any witnesses presenting testimony for MRL on or about March 29, 1996 in this proceeding.

Response: Judge Nelson ruled that MRL should produce in Phase 2 (a) the work papers underlying its submission on March

29, 1996 and (b) written testimony and transcripts of witnesses presenting testimony for MRL on or about March 29, 1996, in this proceeding with respect to railroad matters related to issues in the pending merger proceeding. MRL states that it will place all workpapers underlying its Responsive Application filed March 29, 1996, in its document depository.

Document Request 8: Produce all documents relating to conditions that might be imposed on approval of the UP/SP merger.

Response: Judge Nelson ruled that MRL should produce in Phase 2 documents relating to the specific conditions sought by MRL in the UP/SP merger. See Responses to document request numbers 1, 14 and 22.

Document Request 14: Produce all presentations, solicitation packages, form verified statements, or other materials used to seek support from shippers, public officials, railroads or others for the position of MRL or any other party in this proceeding.

Response: Judge Nelson ruled that MRL should produce materials used to seek support from shippers, nonparty railroads and any nongovernmental or nonpublic nonparty in this proceeding. To the extent that MRL has materials responsive to this request, MRL states that it will produce such materials.

Document Request 17: Produce all documents relating to shipper surveys or interviews concerning (a) the UP/SP merger or any possible conditions to approval of the merger, or (b) the quality of service or competitiveness of any railroad.

Response: Judge Nelson ruled that MRL should produce shipper surveys or interviews concerning the UP/SP merger or any conditions to approval of the merger. MRL states that it has no such responsive documents in its possession, custody or control.

Document Request 22: Produce all presentations to, and minutes of, the board of directors of MRL relating to the UP/SP merger or conditions to be sought by any party in this proceeding.

Response: Judge Nelson ruled that MRL should produce responsive documents relating to the conditions sought by MRL in this proceeding. MRL states that its has a "Unanimous Written Consent of the Board of Directors to Action Without a Meeting" authorizing the preparation and filing of MRL's Responsive Application in its possession, custody or control and that this document will be produced.

Document Request 26: Produce all computerized 100% MRL traffic data for 1994, containing at least the fields listed in Attachment A hereto, a Rule 11 or other rebilling indicator, gross freight revenue, and freight revenue net of allowances, refunds, discounts or other revenue offsets, together with documentation explaining the record layout and the content of the fields. To the extent particular items are unavailable in machine-readable form, (a) provide them in hard-copy form, and (b) provide any similar machine-readable data.

Response: Judge Nelson ruled that MRL should produce responsive documents insofar as those materials pertain to the position MRL is taking in its March 29, 1996, submission. MRL states that the relief sought in MRL's Responsive Application filed March 29, 1996, is the sale of a Central Corridor route to a to-be-formed entity that will be operated independently of MRL. As such, MRL has no responsive documents in its possession, custody or control relating to the impact of the condition sought by MRL in its March 29 filing.

Respectfully submitted,

Mark H. Sidman
Christopher E. Kaczmarek
Weiner, Brodsky, Sidman & Kider, P.C.
1350 New York Ave., N.W.
Suite 800
Washington, D.C. 20005
(202) 628-2000

ATTORNEYS FOR
MONTANA RAIL LINK, INC.

Dated: April 1, 1996

CERTIFICATION OF SERVICE

I hereby certify that on this 1st day of April, 1996, a copy of the foregoing Phase 2 Response of Montana Rail Link, Inc. to Applicants' First Set of Interrogatories and Requests for Production of Documents was served by facsimile and by messenger upon:

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

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

and by first-class mail, postage prepaid, upon all parties appearing on the restricted service list established pursuant to paragraph 9 of the Discovery Guidelines in Finance Docket No. 32760.

Christopher E. Kaczmarek

Christopher E. Kaczmarek

STB FD 32760 4-1-96 D. 62459

62459

Item No.______________

Page Count 9

Adv #87

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

RECEIVED APR 1 1996 MAIL MANAGEMENT I.C.C.

April 1, 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, Union Pacific Railroad Company and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company*

Dear Secretary Williams:

Enclosed for filing in the above-captioned case are an original and twenty (20) copies of THE DOW CHEMICAL COMPANY'S ADDITIONAL RESPONSES TO APPLICANTS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS, designated DOW-13. A 3.5-inch diskette containing this pleading in Word Perfect 5.1 is also enclosed. Additionally, an extra copy of this pleading is enclosed for the purpose of date stamping and returning to our office.

Respectfully submitted,

Nicholas J. DiMichael
Jeffrey O. Moreno
Attorneys for The Dow Chemical Company

Enclosures

1750-020

ENTERED
Office of the Secretary
APR 2 1996
5 Part of Public Record

DOW-13

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

DOW CHEMICAL COMPANY'S ADDITIONAL RESPONSES TO APPLICANTS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Nicholas J. DiMichael
Jeffrey O. Moreno
DONELAN, CLEARY, WOOD & MASER, P.C.
1100 New York Avenue, N.W.
Suite 750
Washington, D.C. 20005-3934
(202) 371-9500

Attorneys for The Dow Chemical Company

April 1, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

— CONTROL AND MERGER —

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

THE DOW CHEMICAL COMPANY'S ADDITIONAL RESPONSES TO APPLICANTS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

The Dow Chemical Company ("Dow") submits the following Additional Responses to the First Set of Interrogatories and Requests for Production of Documents propounded by Applicants on February 27, 1996. On March 4, 1996, Dow submitted Objections to this First Set of Interrogatories and Requests for Production of Documents. On March 8, 1996, in a discovery conference, the Administrative Law Judge ("ALJ") in this proceeding ruled that certain of the discovery propounded by Applicants on February 27, 1996 was appropriate, but that certain of the discovery should be reformulated and resubmitted under an accelerated procedural schedule after the filing of evidence in this proceeding on March 29, 1996.

More specifically, in the March 8 discovery conference, the ALJ ruled that the February 27 discovery should be conducted in two "phases," with "Phase I" discovery to be propounded on March 12, 1996 and on April 1, 1996, and "Phase II" discovery appropriate for resubmission and reformulation in light of the filings on March 29. Dow responded as appropriate to certain Phase I discovery on March 12, 1996, and hereby provides its responses to additional Phase I discovery, as identified by the ALJ to be answered on April 1, 1996.[1]

Dow's Additional Responses

Document Request No. 1

> Produce no later than April 1, 1996 (a) all workpapers underlying any submission that Dow makes on or about March 29, 1996 in this proceeding, and (b) all publications, written testimony and transcripts, without limitation as to date, of any witnesses presenting testimony for Dow on or about March 29, 1996 in this proceeding.

Response

In the discovery conference on March 8, the ALJ ruled that workpapers underlying submissions made in filings on March 29, 1996 should be produced in Phase I discovery and that such documents are due on April 1. The ALJ also ruled on that date that written testimony and transcripts regarding railroad matters related to issues in the pending proceeding should be produced by April 1. Subject to the objections set forth on March 4, 1996, Dow is placing documents responsive to this request in its document depository located in the offices of Donelan, Cleary, Wood and Maser, P.C.

Document Request No. 8

> Produce all documents relating to conditions that might be imposed on approval of the UP/SP merger.

---

1 Dow's March 12, 1996 filing included responses to Applicants' Documents Request Nos. 15, 16, 23, 24, and 26.

Response

In the discovery conference on March 8, the ALJ ruled that documents relating to specific conditions being sought by the particular parties in this proceeding are Phase I discovery that should be produced by April 1. Subject to the objections set forth on March 4, 1996, Dow is placing documents responsive to this request in its document depository located in the offices of Donelan, Cleary, Wood and Maser, P.C.

Document Request No. 14

Produce all presentations, solicitation packages, form verified statements, or other materials used by Dow or its members to seek support from shippers, public officials, railroads or others for the position of Dow or any other party in this proceeding.

Response

In the discovery conference on March 8, the ALJ ruled that presentations, solicitation packages, form verified statements, or other materials used to seek support from shippers or non-party railroads or other non-party non-governmental persons are Phase I discovery that should be produced on April 1. Subject to the objections set forth on March 4, 1996, Dow states that it has no such documents.

Document Request No. 17

Produce all documents relating to shipper surveys or interviews concerning (a) the UP/SP merger or any possible conditions to approval of the merger, or (b) the quality of service or competitiveness of any railroad.

Response

In the discovery conference on March 8, the ALJ ruled that documents relating to shipper surveys or interviews concerning the UP/SP merger or particular conditions are Phase I discovery that should be produced by April 1. Subject to the objections set forth on March 4, 1996, Dow states that it has no such documents.

Document Request No. 22

Produce all presentations to, and minutes of, the boards of directors (or other governing bodies) of Dow relating to the UP/SP merger or conditions to be sought by any party in this proceeding.

Response

In the discovery conference on March 8, the ALJ ruled that presentations to, and minutes of, the boards of directors or other governing bodies relating to the UP/SP merger or particular conditions being sought in this proceeding are Phase I discovery that should be produced by April 1. Subject to the objections set forth on March 4, 1996, Dow states that it has no such documents.

Document Request No. 25

Produce all documents relating to the possibility of a build-in by SP or BN/Santa Fe (or build-out to SP or BN/Santa Fe) at Dow's facility a Freeport, Texas.

Response

Subject to the objections set forth on March 4, 1996, Dow is placing documents responsive to this request in its document depository located in the offices of Donelan, Cleary, Wood and Maser, P.C.

Document Request No. 26

Produce Dow's files regarding the transportation (including transportation by non-rail modes) of all commodities that Dow has moved via UP or SP since January 1, 1996.

Response

At the discovery conference on March 20, 1996, Dow and the Applicants entered a stipulation before the ALJ that Document Request No. 26 would be revised as follows:

> Dow will produce all documents dated January 1, 1993 or later, developed by or in the possession of employees of its Rail Services Procurement Group, that discuss transportation options, or transportation competition or that compare transportation offers, service, or prices, as well as contracts

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ADDITIONAL RESPONSES OF THE DOW CHEMICAL COMPANY TO APPLICANTS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS has been served by First Class Mail, postage prepaid, on all parties on the restricted service list in this proceeding on this 1st day of April 1996, and by facsimile to Washington, D.C. counsel for Applicants.

Kristina L. Troudt

Kristina L. Troudt

STB FD 32760 4-1-96 D 62358

Item No ____________

Page Count 1
Apr #86

62458

DONELAN, 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

April 1, 1996

RECEIVED
APR 1 1996
MAIL MANAGEMENT
I.C.C.

<u>*Via Hand Delivery*</u>
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, Union Pacific Railroad Company and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company*

Dear Secretary Williams:

Enclosed for filing in the above-captioned case are an original and twenty (20) copies of WESTERN RESOURCES, INC.'S ADDITIONAL RESPONSE TO APPLICANTS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS, designated WSTR-12. A 3.5-inch diskette containing this pleading in Word Perfect 5.1 is also enclosed. Additionally, an extra copy of this pleading is enclosed for the purpose of date stamping and returning to our office.

Respectfully submitted,

Thomas W. Wilcox

Thomas W. Wilcox
Attorney for Western Resources, Inc.

Enclosures

3770-130

ENTERED
Office of the Secretary

APR 2 1996

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ENTERED
Office of the Secretary

APR 2 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

WESTERN RESOURCES, INC.'S ADDITIONAL RESPONSE TO APPLICANTS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Western Resources, Inc. ("Western") submits the following Additional Response to the First Set of Interrogatories and Requests for Production of Documents propounded by Applicants on February 27, 1996. On March 4, 1996, Western submitted Objections to this First Set of Interrogatories and Requests for Production of Documents. At that time, Western had not yet decided whether to file comments or a request for conditions on March 29, 1996 in accordance with the schedule in this proceeding. On March 8, 1996, in a discovery conference, the Administrative Law Judge in this proceeding ruled that certain of the discovery propounded by Applicants on February 27, 1996 was appropriate, but that certain of the discovery should be reformulated and resubmitted under an accelerated procedural schedule after the filing of evidence in this proceeding, currently scheduled for March 29, 1996.

In summary, in the March 8 discovery conference, the ALJ ruled that some of the Applicants' discovery requests could be responded to on March 12, 1995, but that the remainder of the discovery responses would be associated with the individual filings parties would make on March 29. As such, the ALJ ordered that additional responses could be made on April 1, 1996 and then on April 16, 1996. Responses on the latter date would be to initial requests which were reformulated and resubmitted to the filing parties April 3, 1996.

On March 12, 1996, Western filed initial responses to the "Phase I" discovery identified by the ALJ to be answered on that date.

Western did not file any comments or requests for conditions on March 29, 1996. Consequently, in light of the ALJ's order in this case, as affirmed by the Decision by the Board served March 26, 1996, Western objects to submitting any further responses to Applicants' initial discovery requests, and objects to any further discovery by Applicants of Western in this proceeding.

Respectfully submitted,

Thomas W. Wilcox

Nicholas J. DiMichael
Thomas W. Wilcox
DONELAN, CLEARY, WOOD & MASER, P.C.
1100 New York Avenue, N.W.
Suite 750
Washington, D.C. 20005-3934
(202) 371-9500

Attorneys for Western Resources, Inc.

April 1, 1996

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ADDITIONAL RESPONSES OF WESTERN RESOURCES, INC. TO APPLICANTS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS has been served by First Class Mail, postage prepaid, on all parties on the restricted service list in this proceeding on this 1st day of April 1996, and by facsimile to Washington, D.C. counsel for Applicants.

Jacqueline A. Spence

Jacqueline A. Spence

STB FD 32760 4-1-96 D 62430

62430

Item No. ______

Page Count 1

Apr #55

ENTERED
Office of the Secretary

APR 2 1996

5 Part of
Public Record

FAX OR MAIL THIS LETTER TODAY

(The deadline for public comment is March 29.)

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12th Street and Constitution Avenue
Washington, D.C. 20423
RE: Finance Docket 32760

FAX TO: (501) 734-4961

MAIL TO: P.O. Box 532
Brinkley, AR 72721

Arkansans for
Competitive Rail Service
James B. Sharp, Treasurer

I believe that the UP/SP merger will reduce competition and believe that an owning railroad is the best choice for Arkansas and for the US

Signature [illegible]

City Camden [illegible] 71701

ENTERED
Office of the Secretary

APR 2 1996

5 Part of
Public Record

ADVISE OF ALL PROCEEDINGS

STB FD 32760 4-1-96 D 62425

Item No.________________

Page Count: 1

Api #50

62425

RECEIVED APR 1 1996 MAIL MANAGEMENT I.C.C.

RY TIMBER, INC.

N. End of Maple Street • PO Drawer P • Townsend, MT 59644-1013 • Phone (406) 266-3111 • Fax (406) 266-[illegible]

FD 32760

Conditioned Statement of Support for the Proposed Merger of Union Pacific Railroad and Southern Pacific Transportation Company

RY Timber, Inc. has learned that en entity controlled by the majority shareholder Montana Rail Link will be filling with the Surface Transportation Board an inconsistent or responsive application in which entity will propose acquiring one of the Union Pacific or Southern Pacific routes between California and Kansas City (the "MRL Proposal"). In our opinion, without the MRL Proposal or a comparable solution, the UP/SP Proposal eliminates rail competition in the Central Corridor of the United States. The trackage rights UP/SP have agreed to grant BNSF are unlikely to result in BNSF's providing meaningful competition in the Central Corridor. It will cost BNSF nothing if it elects not to use those rights. Competition can only be assured with an independent third party owner/operator acquiring one of Union Pacific or Southern Pacific routes between California and the Kansas City area. We, therefore, condition our support of the merger on sale of a Central Corridor route to an independent party that would have to provide competitive service in order to justify its investment in that rail line.

RY Timber, Inc. strongly supports the proposed acquisition of the Union Pacific line between Sliver Bow, Montana and Pocatello, Idaho as a strategic element of the Central Corridor solution. The Silver Bow- Pocatello line ties together the present MRL system with the Central Corridor route at Ogden Utah, providing important traffic to support the new Central Corridor system and affording the economic synergies of tying both systems together. The ("MRL Proposal") will provide routing options on both Union Pacific and Burlington Northern Santa Fe as well as direct routing via the new MRL proposed system.

RY Timber, Inc. annually ships 110 million board feet. This includes lumber, chips, sawdust, and logs. Our major origin/destination pairs are Montana, to the Southwest and Midwest. Our rail carriers currently providing service are Union Pacific and MRL.

There are many benefits to the Union Pacific's proposed merger with Southern Pacific. The MRL Proposal maintains the benefits of both UP/SP merger including the proposed trackage rights agreement with Burlington Northern Santa Fe, and at the same time ensures true competition in the Central Corridor through sale of one of the routes to an independent operator.

Our Company conditions its support of the UP/SP merger application on sale of a Central Corridor route described in the MRL Proposal.

ENTERED
Office of the Secretary
APR 3 1996
5 Part of Public Record

Respectfully,

Lewis W Hagen

Lewis Hagen
General Manager
Montana Operations
RY Timber, Inc.

mrl/LH

ADVISE OF ALL PROCEEDINGS

STB FD 32760 4-1-96 D 62417

Item No. ____________

Page Count 2

Nancy Mof
STATE REPRESENTATIVE
DISTRICT 98

Apr #42

62417

ADVISE OF PROCEEDINGS

COMMITTEES:
ECONOMIC DEVELOPMENT
CIVIL PRACTICES
THE ENERGY COUNCIL
INTERSTATE OIL AND GAS COMPACT COMMISSION

State of Texas
House of Representatives

March 25, 1996

RECEIVED
APR 1 1996
MAIL MANAGEMENT
I.C.C.

The Honorable Vernon A. Williams Secretary
Surface Transportation Board
Washington, D.C. 20423

RE: Finance Docket 32760

Dear Secretary Williams,

I am writing in regard 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 the merger of these two railroads will significantly reduce rail competition in Texas, seriously impacting Texas businesses and our state's economy.

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

A trackage rights agreement, however, simply does not solve the problem. Owners of rail lines have incentives to invest in the track and to work with local communities to attract economic development. Owners have control over the service they provide. This cannot be said about railroads that operate on someone else's tracks, subject to someone else's control.

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.

ENTERED
Office of the Secretary

APR 3 1996

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AUSTIN OFFICE:
P.O. BOX 2910
AUSTIN, TEXAS 78768-2910
512-463-0690
FAX 463-1483

DISTRICT OFFICE:
9 VILLAGE CIRCLE, SUITE 450
WESTLAKE, TEXAS 76262
817-430-4848
FAX 491-9397

For these reasons, 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,

Nancy Moffat
State Representative

cc: The Honorable Carole Keeton Rylander, Chairman
The Honorable Barry Williamson, Commissioner
The Honorable Charles Matthews, Commissioner
Railroad Commission of Texas

STB FD 32760 4-1-96 D 62407

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Apr #32

62407

SALT LAKE CITY CORPORATION

DEEDEE CORRADINI
MAYOR

OFFICE OF THE MAYOR

RECEIVED APR 1 1996 MAIL MANAGEMENT I.C.C.

March 28, 1996

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

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

Dear Secretary Williams:

Enclosed please find the original and twenty copies of our comments on the above procedings.

Sincerely,

Deedee Corradini

Deedee Corradini
Mayor

ENTERED
Office of the Secretary

APR 2 1996

5 Part of Public Record

451 SOUTH STATE STREET, ROOM 306, SALT LAKE CITY, UTAH 84111
TELEPHONE: 801-535-7704 FAX: 801-535-6331

RECYCLED PAPER

DEEDEE CORRADINI
MAYOR

SALT LAKE CITY CORPORATION

OFFICE OF THE MAYOR

RECEIVED
APR 1 1996
MAIL MANAGEMENT
I.C.C.

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

COMMENT

On behalf of Salt Lake City Corporation.

Salt Lake City Corporation supports the proposed merger. The merger offers many benefits to the citizens of Salt Lake City which can be summarized in two major areas:

1. Consolidation of railroad operations within the City,
2. Potential for redevelopment of existing railroad facilities.

Background

Salt Lake City and the Utah Department of Transportation are currently funding a railroad consolidation study for the Gateway area which is an approximately 500 acre industrial area located on the western edge of downtown Salt Lake City. The Gateway area is bordered by 900 South, 300 West, 600 North Streets, and I-15. The purpose of this study is to develop alternatives to improve access and encourage redevelopment of this area. The Gateway area is planned for mixed use development which would include commercial, retail, residential, light industrial and intermodal transportation uses. The redevelopment of this area will improve the link between existing residential

451 SOUTH STATE STREET, ROOM 306, SALT LAKE CITY, UTAH 84111
TELEPHONE: 801-535-7704 FAX: 801-535-6331

neighborhoods and Salt Lake City's downtown. The consolidation of rail lines within this area will improve access by allowing three I-15 freeway ramp viaducts in the area to be shortened by a total of as much as seven city blocks as part of the I-15 reconstruction project currently under design. This has the potential to provide a significant cost savings to the I-15 reconstruction project as well as a dramatic improvement in access within the Gateway area.

Intermodal transportation improvements are an important part of the Gateway plan. The consolidation of rail facilities will allow the development of an intermodal transportation center where Amtrak, inter-city bus service, local bus transit service and potential light rail and commuter rail systems can meet.

The implementation of Salt Lake City's Gateway plan will be greatly facilitated by the proposed merger.

1. Consolidation of railroad operations within Salt Lake City

Both the Union Pacific (UP) and Southern Pacific (SP) have main lines and rail yards located within the Gateway area. Based on our understanding of the merger documents, the SP/UP merger would result in major changes in rail operating patterns in the Salt Lake area. Primarily, the opportunity to send trains over the most direct routing after the combination of the two lines will bring about a decrease in freight train operations in the area. According to merger documents, train operations on the UP Salt Lake Sub are projected to decline from an average of 53 daily trains to 28, on the Caliente Sub from 39 to 22, and on the SP main line to Provo from 24 to 13. This will occur for three major reasons:

- Many former UP freight trains from the San Francisco Bay Area to the east will now go directly through Ogden from the west on the former SP line rather than through Salt Lake City on the former UP line, thence north to Ogden, thence east.
- Many former SP freight trains from the San Francisco Bay Area to the east will now follow the same routing; that is, former SP route Bay Area to Ogden, thence former UP route to the east, avoiding Salt Lake City altogether. At present, these trains operate from the Bay Area to Ogden on SP tracks, then Ogden to Salt Lake using UP track rights, then SP tracks through Provo to Denver and points east.
- Certain former UP freight trains from Los Angeles to the east will no longer operate through Salt Lake, but will use a former SP line far to the south through Arizona, New Mexico, Oklahoma and Kansas.

The proposed merger would result in more efficient rail operations through the Salt Lake City area which in turn would significantly reduce the accident potential at numerous at-grade rail crossings and allow the removal of tracks within the City's Gateway area.

The merger, if approved, will also bring about a change in the use of local facilities in the Salt Lake area. UP proposes to consolidate all local switching activities at the former SP Roper Yard, with intermodal facilities to be consolidated at the former UP North Yard. This will mean changes in local freight and switching operations. The merger would offer opportunities to restructure local operations in a way that could benefit the goal of removing track from the Gateway area.

Regarding competition, the possibility that other carriers may enter the market is recognized. The preference of Salt Lake City, in redeveloping the Gateway area, is that yard operations occur outside the Gateway area.

2. Potential for redevelopment of existing railroad facilities.

As local rail operations are reconfigured, there is the potential for the abandonment of certain switching facilities within Salt Lake City. There are approximately 100 acres of rail yards in the Gateway area that could be redeveloped to serve higher uses.

Additionally, retirement of the 900 South passenger line would significantly reduce impacts to the residential neighborhood adjacent to the Gateway area.

In conclusion, Salt Lake City residents would receive considerable benefit from the proposed merger and we recommend its approval. Thank you for this opportunity to comment.

Dated this 28th day of March, 1996.

Respectfully submitted,
SALT LAKE CITY CORPORATION

By: Deedee Corradini

DEEDEE CORRADINI
Mayor

CERTIFICATE OF SERVICE

I certify that I have this day served copies of this document upon all parties of record in this proceeding, by first class postage paid mail.

Chris Bramhall

CHRISTOPHER E. BRAMHALL
Assistant City Attorney

3/28/96
Date

STB FD 32760 4-1-96 D 62405

Item No ____________

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Apr #30

62405

ADVISE OF ALL PROCEEDINGS

UNIVERSAL FOREST PRODUCTS®, INC.

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Office of the Secretary

APR 3 1996

5 Part of Public Record

March 28, 1996

RECEIVED
APR 1 1996
MAIL MANAGEMENT
I.C.C.

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

RE: UP/SP Merger Application

Dear Secretary Williams: F032766

ADVISE OF ALL PROCEEDINGS

I am Marge Volk, Transportation Manager for Universal Forest Products, Inc. in Grand Rapids, Michigan. I am writing this letter in support of the proposed merger between Union Pacific and Southern Pacific Railroads.

I also want to clarify the fact that Mr. Emmett and the small number of members who crafted the opposition to the proposed UP/SP merger do not speak for the entire population of the National Industrial Transportation League (NITL). Universal Forest Products, Inc. supports the proposed merger and will continue to do so based on benefits outlined in my previous verified statement.

The proposed merger will enhance our operations greatly by opening up new markets to single line service. This will help Universal Forest Products and other lumber shippers provide better service and highly competitive rates to important consuming markets such as Texas, Oklahoma, Arizona, California and other points in the West.

I want to reiterate the fact that I am very disappointed in the actions of Mr. Emmett, and Universal Forest Products is considering withdrawing its membership because NITL actions relative to the UP/SP merger do not represent the best interests of my company.

In summary, the UP/SP merger will provide my company with a valuable marketing capability that currently does not exist. The result will be better service and more competitive prices for our customers.

Corporate Headquarters

2801 East Beltline, NE Grand Rapids, MI 49505-9736 Tel: (616) 364-6161 Fax: (616) 361-7534

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement. Executed on March 28, 1996.

Sincerely,

Marge Volk

Marge A. Volk
Transportation Manager
Universal Forest Products, Inc.

MAV/ksr

STB FD 32760 4-1-96 D 62404

Item No.______________

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Agu #29

OREGON STEEL MILLS

62404

P.O. Box 2760
Portland, Oregon 97208-2760
Phone (503) 286-9651

March 29, 1996

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

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

Dear Secretary Williams:

On November 9, 1995, we submitted a letter of support for the merger proposed in the aforementioned proceeding. This letter is to further clarify our position in this matter.

Oregon Steel Mills, Inc and it's family of companies (CF&I Steel, L.P., Pueblo, Co., Napa Pipe Corporation., Napa, Ca., and Oregon Steel Mills, Portland, Or.) wish to go on record as generally supporting the acquisition of the Southern Pacific Lines by the Union Pacific Railroad. While we believe the trackage right concessions granted in the competitive access agreement reached between the UP-SP and the BNSF do alleviate some of the competitive concerns we have regarding this merger, we are not convinced the trackage rights agreement guarantees the motivated competition that is needed. Our areas of concern are as follows:

Our main concern is the so called "Central Corridor". With the merger of the SP and UP the three main central corridor routes will be under the control of a single carrier. Review of the operating plan under the merged system raises questions about capacities on the affected lines. Under the trackage rights agreement, the BNSF has the right to operate over the Central Corridor, but with the abandonment of one of the lines, the capacity for them to operate over the corridor may be limited. A possible solution to this area of concern is for the Board to require divestiture of one of the lines. We feel that a rail competitive environment must be maintained in the Central Corridor and in the Western United States.

We therefore recommend that the divestiture of one Central Corridor lines be made a condition of this merger.

The other area of concern we have is the terminal operations in the Portland, Oregon area. Portland is presently a railroad interchange nightmare. Some of this is created by how the reciprocal switching charges are structured, but most is the result of inadequate infrastructure to handle current volumes of traffic. A review of the merged company operating plan leads us to believe the merged company has seriously underestimated the future traffic flows in the affected area, and that capital expenditures will need to be increased so that users of rail transportation in the Portland area will receive the rail service they need to sustain their operations.

We therefore recommend that all rail interchanges in Portland be open for all shippers to use, including those shippers located on short lines in existence today, as well as those that may be created in the future. All reciprocal switching charges should be reasonable between all carriers.

The Oregon Steel Mills family of companies shipped over 60,000 railcars in 1995. Reliable and competitive rail service is required for us to accomplish our business plan. We have concerns about the ability of the Southern Pacific Railroad to survive as a stand alone carrier now that the BNSF merger has been approved. We therefore urge the Board to support this application, subject to the condition that the competitive agreement reached between UP/SP and BNSF is included, as well as the two conditions outlined previously in this letter.

Very truly yours,

Fred P. Swanson

Director of Transportation

STB FD 32760 4-1-96 D 62393

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62393

Slover & Loftus

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*ADMITTED IN PENNSYLVANIA ONLY

RECEIVED APR 1 1996 MAIL MANAGEMENT I.C.C.

April 1, 1996

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Office of the Secretary
APR 3 1996
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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:

In accordance with the Board's Decision No. 26 in the above-captioned proceeding, enclosed please find an original and five (5) copies of a Certificate of Service which indicates that service of a list of all numbered pleadings and discovery requests which have been filed or served by Public Service Company of Colorado was served upon all parties of record to the captioned proceeding.

An extra copy of this letter and Certificate of Service is enclosed. Kindly indicate receipt and filing by time-stamping this extra copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

Christopher A. Mills

Christopher A. Mills
An Attorney for Public Service Company
of Colorado

Enclosure

CERTIFICATE OF SERVICE

In accordance with the Board's Decision No. 26 in Finance Docket No. 32760, Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al., the undersigned attorney hereby certifies that on the 1st day of April, 1996, a list of all numbered pleadings and discovery requests which were filed or served on behalf of Public Service Company of Colorado was served via first class mail, postage prepaid, upon all parties of record.

Patricia E. Kolesar

Patricia E. Kolesar

STB FD 32760 3-29-96 62276 1/4

International Paper - 11

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

COMMENTS OF INTERNATIONAL PAPER COMPANY

Edward D. Greenberg
Andrew T. Goodson
John F.C. Luedke
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Canal Square
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Washington, D.C. 20007
(202) 342-5200

Attorneys for International Paper Company

March 29, 1996

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Before the

SURFACE TRANSPORTATION BOARD

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

COMMENTS OF
THE INTERNATIONAL PAPER COMPANY

In accordance with the governing procedural order in this matter, The International Paper Company ("IP") submits the following comments with respect to the important issues raised by the prospective merger between the Union Pacific ("UP") and Southern Pacific ("SP") rail systems.

PREFATORY STATEMENT

As is evident from the attached Verified Statement of Charles E. McHugh ("McHugh Statement"), IP is heavily dependent upon a viable and competitive rail transportation system in several of the regions that are affected by the proposed merger. IP has two mills at Pine Bluff and Camden, Arkansas that currently benefit from head-to-head competition between the UP and SP in the Houston-Memphis corridor. IP also has five other mills that today enjoy intramodal competition in which either the UP or SP is an essential part of the rail movement.

It is undisputed that the proposed merger will combine thousands of miles of virtually parallel track throughout the west. It is also undisputed that as a result, the competition for rail service to hundreds--if not thousands--of shippers across the west will be eliminated. IP is one of those shippers.

In recognition of the anticompetitive consequences of their merger, the Applicants have offered what they claim to be a solution--an alliance with the only remaining major railroad serving the west, the Burlington Northern Santa Fe. On its surface, the UP/SP-BN/SF agreement appears to be a good deal. After all, what railroad is better able to compete with a merged UP/SP than the recently merged BNSF. But upon closer scrutiny, it is plain that the BNSF agreement is not the panacea Applicants claim. Its basic fallacy with the BNSF agreement stems from the Applicant's overly narrow definition of the markets that will be negatively impacted by the merger. Using an "accordion" approach to market definition, they limit the scope of the BNSF remedy to so-called "2 to 1" points, while at the same time espousing the virtues of their merger in the context of broad corridors or regions of competition.

As the following statement demonstrate, Applicants' accordion approach masks the full extent of the anticompetitive effects of their merger. But even more importantly, it undermines the proposed solution for those affects, even for those few shippers whom the Applicants acknowledge will be competitively disadvantaged. The truth is that the BNSF solution will not work, at least in the southwest region where the IP mills at issue are located. If the merger is to be approved, a realistic, effective and far more comprehensive solution must be found to the obvious problems the application presents. Thus, while IP does not necessarily oppose UP's acquisition of the SP, it does believe that the Board's approval cannot be properly granted unless meaningful, effective competition-preserving conditions are imposed.

I. UNLESS PROPERLY CONDITIONED, THE MERGER IS INCONSISTENT WITH THE PUBLIC INTEREST

Throughout his verified statement, the UP's Richard Peterson purports to demonstrate that the merger would intensify, not lessen, western rail competition. That Applicants attempt that showing is not surprising, as the governing statute, 49 U.S.C. §11344, specifically requires, among other things, that the Board ascertain whether a proposed merger would have an adverse affect on regional rail competition. Mr. Peterson opines, for example, that the merger will provide stronger competition in "every state," on all traffic "to and from Canada and Mexico," for "every commodity group," in "every rail corridor," for every "2-to-1" shipper and for all "3-to-2" shippers. Regrettably, that is clearly not the case in the southwest, including the Houston-Memphis corridor.

As the attached statements demonstrate, IP mills in Arkansas, Louisiana and Texas will lose the benefits of two strong competing railroads, in favor of competition between a merged UP/SP and a disadvantaged BNSF, hamstrung by operational difficulties, inadequate traffic volumes and arbitrarily high operating costs. Thus, the Houston-Memphis corridor will similarly suffer an almost total loss of effective rail competition.[1/] The merger also reduces competitive options for shippers moving product into or out of Mexico, and threatens the existence of the Texas Mexican Railway. Competition at the "3-to-2" facilities in the region will also be weaker.[2/] In short, the only location

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1/ Indeed, according to a study commissioned by the BNSF, the merger would yield Applicants 80% of the Arkansas market. See Verified Statement of W. Tye, at 7.

2/ *See* the discussion in *Santa Fe Southern Pacific Corp.--Control--SPT Co.*, ("SF/SP") 2 I.C.C. 2d 709, 792 (1986), aff'd 3 I.C.C. 2d 926, where the ICC concluded that a reduction in the number of competitors from three to two created serious anticompetitive problems in that largely horizontal merger situation, citing D. Tye's Verified Statement in support.

where rail competition would be truly enhanced is in the I-5 corridor, yet IP will be uniquely excluded from those benefits, and will remain subject to the monopolistic control of the UP/SP.

II. THE AGREEMENT BETWEEN APPLICANTS AND BNSF DOES NOT RESTORE EFFECTIVE COMPETITION

The statement of Mr. McHugh vividly illustrates the fundamental importance of competitive rail service to shippers such as IP, who are captive to rail because of the high quantity and long distances of its shipments.[3/] The competitive balance that has historically existed between the UP and SP in the southwest has permitted IP to initiate a variety of programs that have greatly enhanced the efficiency of the rail service it receives, while at the same time reducing both rail costs and rail rates. For example, IP has introduced third-party switching arrangements, required improved car quality, more reliable transit times, and better carrier reporting and responsibility. None of this would have been achieved without competitive rail service. Whatever may be said about its ability to compete elsewhere, in the southwest the SP is an effective, aggressive and viable competitor; indeed, its service is often superior to the UP and its prices are generally lower.[4/]

[3/] The Applicants' witness, Richard J. Barber, concedes that IP and other forest products shippers are tied to rail service. (Barber Dep. Tr., at 379-80.)

[4/] Coincidentally, it was disclosure of the Santa Fe's decision to eliminate the SP's strong price competition that helped persuade the ICC of the patently anticompetitive nature of the proposed SF/SP merger. *See SF/SP*, 2 I.C.C. 2d at 806-7 quoting an internal study prepared by the SFSP's Chief Executive Officer that the SP had "a `strong. . .presence' in intermodal traffic and was identified as having `significantly undercut' existing rates." If approved, this merger would have the same effect of eliminating the SP's "strong presence" in these markets.

A. **<u>There Will Be No Effective Competition Even at "2 to 1" Points</u>**

Knowing from the experience of the *SF/SP* proceeding that a merger cannot be approved if all competition in a region is eliminated,[5] the Applicants offer the BNSF Agreement. Under their theory, the BNSF would be a "stronger" competitor and completely replace the head-to-head competition that previously existed between the UP and SP in this region. The accompanying statements demonstrate that this is not the case.

There are a number of basic factual flaws underlying the Applicants' presentation. First, the application and its supporting statements is intellectually and factually dishonest in dealing with the issue of markets. When they wish to portray rail competition in the west as vigorous and dynamic to show that other competitive sources will constrain the combined market power of the merged company, the market definition is very broad. They reduce the scope of competition, however, whenever they seek to narrow the places at which UP and SP supposedly compete. Dr. Tye refers to this as the "accordion effect," and correctly observes:

> With careful use of the "accordion," UP and SP can be made to appear to compete with everyone but each other.

(Tye Statement, at 7.) This is very reminiscent of the claims made by the Applicants in *SF/SP* that those companies essentially did not compete anywhere, even though their systems virtually overlapped.[6] Here, although both Applicants are obviously parallel throughout the Houston-Memphis corridor, they would have the Board believe that competition would only be impacted at eight points therein.

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[5] *See SF/SP*, 2 I.C.C. 2d at 728.

[6] *Id.*

This is not harmless error. By staking out this position in the Houston-Memphis corridor (and elsewhere), the Applicants have made it impossible for BNSF to be a viable competitor. As Mr. Prescott shows, there simply is not sufficient volume available at the few points BNSF would be permitted to serve to warrant it doing anything more than moving through traffic over the corridor, to the detriment of shippers located at the few "2 to 1" points.

On the other hand, the Applicants do advance rail competition in the broad I-5 corridor as the basis for approving the trackage rights and line sales proposed in that region. Perhaps the broader market definition in the I-5 region was required as a way of coming to terms with the BNSF in this case. We do not know the answer to this, since the Applicants and BNSF categorically refused to permit other parties to inquire into this topic during the discovery process in this proceeding.[7/]

Regardless, it is plain that Applicants' market definition is arbitrarily narrow (except in the I-5 corridor), that this largely parallel merger raises issues of competitive harm throughout the west, and that this problem is not ameliorated in any meaningful way by the BNSF Agreement. Moreover, even assuming BNSF truly intended to provide"stronger" competitive service to shippers in the Houston-Memphis corridor, the operational problems with which it is confronted make that impossible. As the McHugh and Prescott statements demonstrate, the BNSF cannot hope to provide any local service along the SP line, to which its trackage rights are confined, due to the absence of rail facilities, the overwhelming directional flow of the Applicants' intended traffic, the lack of

7/ To the contrary, Applicants and BNSF continually instructed deposition witnesses not to answer any questions that pertained to the so-called settlement negotiations leading to the execution of the Agreement, even though they felt free to selectively testify about the "give-and-take" of those negotiations when deemed to be in their interest. Similarly, they argued before Administrative Law Judge Jerome Nelson that such information was privileged, and succeeded in persuading him to limit any questions in this area.

adequate sidings, the lack of storage facilities required for chemical and plastics traffic, the lack of computerized traffic control, the lack of facilities for crew changes, the lack of car repair facilities, the lack of boxcars, and on and on.[8] The BNSF is a strong and efficient competitor when it wants to be. Yet, it did not even know of these operational problems along the Houston-Memphis corridor until after it signed the Agreement. To this date, the BNSF still does not have any realistic plan for handling traffic at IP's Camden and Pine Bluff mills.

From IP's perspective, this is a serious matter. As Mr. McHugh states, IP has sought responses to these issues ever since the merger was announced, but neither the Applicants nor the BNSF has yet provided any assurance that real competition at these mills would exist after the merger. In the absence of any evidence to the contrary, IP can only assume that the BNSF will not be a real competitor, and that at most its service to these mills would be provided via haulage agreements. This essentially means only UP/SP service--but at higher rates. That is not "stronger" competition; it is not competition at all.

Under these circumstances, the only effective way to replace the competition that will be lost by the demise of the independent SP is to require divestiture. Sufficient trackage and facilities must be in the hands of an independent competitor that would permit it to replicate the service and competitive reach of the SP (or UP) in this region. Dr. Willig claims that the character of

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[8] These factors almost necessarily mean that any trains the BNSF can operate will be subjected to discrimination, an allegation not new to the UP. Indeed, the Applicants' own witness, M.D. Ongerth, testified two years ago that the UP had engaged in "pervasive discrimination" against the SP, that SP trains were subjected to "unpredictable, uncontrollable delays experienced when UP prefers its own traffic at [SP's] expense," and that this was "the direct result of UP policies and management directives of several varieties over a 10-year period." *See* pages 6-18 of the Statement of Mr. Ongerth, dated November 24, 1993, filed in F.D. 32133, *Union Pacific Corporation--Control--Chicago and North Western Transportation Company.*

competition, not the number of competitors, is what counts. In this situation, he was correct. The replacement competitor must have a sufficient traffic base to operate economically and be freed from operational constraints. That is certainly not true with the arrangements to be accorded BNSF. Unless the Applicants can sustain *their* burden of demonstrating that they truly have replaced the lost competition, the application simply cannot be granted.

B. Existing Competition at Other IP Facilities Would End

IP's other facilities in the southwest would face an equally difficult situation. Apparently relying upon the ICC's "neutrality" theory, the Applicants have refused to address the vertical market foreclosure that will take place. IP recognizes that the ICC accepted the so-called "one lump" approach espoused in *BNSF* in the apparent belief that a bottleneck rail carrier will always be able to capture the preponderance of the economic rents of any given move. But the *evidence* here demonstrates that there are plainly exceptions to the "one lump" theory.

Today, the SP is a "friendly connection" with the Kansas City Southern Railroad ("KCS") and the Alabama, Louisiana and Mississippi Railroad ("ALM"). As a consequence, it at least has an equal incentive to treat the KCS and ALM no less favorably than the UP. After the merger, that motivation changes, so that the price and service competition available at IP's four other southwestern mills (namely, S. Texarkana, Mansfield, Pineville and Bastrop) will lose the benefit of rail-to-rail competition.[2/] The "one lump" view of the bottleneck carrier's existing (*i.e.*, pre-merger) power ignores the fact that there is no evidence that the SP has previously exercised this power on its

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[2/] The Commission's discussion of the neutrality on "one lump" issue in *BNSF* (at 70-77) focused only upon prices and whether the bottleneck carrier needed to exert a price squeeze on either of its connections. That analysis ignored, however, the overarching issue of service and the importance it has to shippers.

connections or that it really does have that leverage. To the contrary, the competitive arrangements on service to SP points from those mills are on a par with traffic destined to non-SP points.

The "one lump" approach similarly ignores the *fact* that CNW's introduction into the Powder River Basin had the effect of reducing costs for utilities even at bottleneck points. That would not have been the case if the bottleneck carrier had the actual power which the Commission's discussion in *BNSF* hypothesized. Moreover, it ignores the *fact* that the bottleneck carriers' pricing and service practices may be constrained by outside factors, such as the situation presented at IP's mill in Nacogdoches, Texas, where the SP has a bottleneck for the entire length of haul, yet provides very favorable rates due to outside leverage. Nor does the "one lump" theory address the issue of the fixed or sunk costs of the serving carriers.

If the Board concludes that the "one lump" or neutrality theory is absolute and that the facts present here warrant no exception, it would in effect permit the merged UP/SP to act in any manner it sees fit. If the UP/SP has already effected a perfect price squeeze, it should be indifferent to the identity of the connecting carrier, and KCS and ALM would presumably continue to compete as effectively as they previously had done. In that case, the merger changes nothing and competition protective conditions, while perhaps not necessary, are not harmful to the merging parties. If, however, the Board is wrong, no conditions are imposed, and the KCS or ALM connection is eliminated or those carriers are subjected to a "squeeze," then both IP and those carriers are irretrievably damaged. The KCS and ALM would be unable to replace the traffic, and IP will have lost competitive pricing and service at several important mills. Under that scenario, there is simply no justification for refusing to require conditions that preclude the Applicants from arbitrarily canceling efficient and competitive connections with the KCS and ALM.

III. THE BOARD'S ACTIVE INTERVENTION IS REQUIRED

The Applicants seek to have this latest in a series of major rail mergers, which will reduce the number of major western railroads from three to two, immunized from the antitrust laws. Moreover, they will undoubtedly argue, relying upon the ICC's holding in *BNSF*, that the Board ought not intervene into the privately negotiated trackage rights agreement with the BNSF, or other private merger implementation issues.

It is true that the Commission has in the past generally resisted inquiry into such matters. Here, however, the parties have come forward with arrangements that carve up the entire western United States into spheres of influence, and it is not plain that their private agreements are necessarily entitled to that same presumption of reasonableness. This case raises serious questions as to whether the BNSF can efficiently and effectively operate over the trackage rights being assigned to it. And, one of the fundamental issues is whether the level of compensation and the escalation clause will further impede whatever competitive impulse the BNSF might have. These are public, not private, rights that are being negotiated away, and the Board should look carefully at the underlying Agreement and the compensation methodology and whether it enhances or restricts competition.[10]

Mr. Prescott demonstrates that the trackage rights compensation level would be a serious and immediate impediment to rate competition from the BNSF, and that this problem would be compounded in future years. Rather than leveling the playing field so that a BNSF operation does not contribute to UP/SP profits, the Agreement would serve to ratchet up the prices the railroads

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[10] Compare *Canadian Pacific Ltd.--Pur & Trackage--D&H Ry. Co.*, 7 I.C.C. 2d 95, 118-119 (1990) where the Commission departed from its normal practice of leaving implementing trackage rights agreements to be negotiated by the parties precisely because of the absence of any other meaningful rail competition in the northeast besides Conrail and the D&H.

would charge their customers. For every dollar of extra cost the BNSF sustains, both railroads would be expected to simply raise the price floor--the BNSF because it must, and the UP/SP because it can. This is hardly the "stronger, more vigorous" competition that Applicants have suggested will remain.

IP recognizes that the "public benefits" of a merger are not necessarily translated into freight savings. But, arbitrary increases in rates are not public benefits; to the contrary, they benefit only the monopolist carriers and are prohibited, excessive "private benefits." *BNSF*, at 51.

IV. <u>REALISTIC CONDITIONS MUST BE IMPOSED TO PRESERVE THE COMPETITION THAT WILL BE LOST IN THE MERGER</u>

Throughout their presentation, the Applicants concede that the merger would, unless properly conditioned, result in the loss of essential rail competition in large areas throughout the west. While they argue that the SP is a weak competitor,[11] they nonetheless recognize that the lost head-to-head competition between them must be replaced. That the BNSF cannot fill this void is obvious, as noted above, from the operating constraints and tonnage limitations that have been imposed upon it. If any further evidence of this was necessary, we need look no further than the "competitive" price it offered IP on traffic originating out of the Pine Bluff and Camden mills. It simply cannot be seriously contended that single-line price increases averaging proposed by BNSF would be a competitive alternative. To the contrary, the BNSF is so hamstrung by the restrictions on its ability to be a competitive force in this region that it cannot conceivably provide the competitive alternative which *must* be in place before any approval of this merger can be granted.

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[11] Mr. McHugh notes, however, that the SP is in fact a more effective competitor in the southwest for IP's traffic. Indeed, its service has been substantially superior to the SP, its prices have been lower, and it has continued to capture the predominant portion of the traffic that is available for competitive bids. *See*, also, fn. 6, *supra*.

IP endorses the concept that the SSW line between St. Louis and Houston should be divested to the KCS or some other independent, neutral carrier. Similarly, to ensure that an alternative routing is available to Mexico, the Texas Mexican Railway Company ("TexMex") should be allowed to acquire the SSW line between Corpus Christi and Beaumont, Texas, although the KCS' request to connect directly with the TexMex at Corpus Christi would also ameliorate the adverse effect of reducing the number of competitively served Mexican gateways.

V. CORRECTIVE CONDITIONS MUST BE ADDED IN THE I-5 CORRIDOR

IP recognizes that the Commission will generally not impose conditions in a merger that are not directly required to mitigate the harmful effects resulting directly from the merger. And, one would not normally consider opening new competitive alternatives to shippers in the I-5 corridor to be anticompetitive.

In this case, however, the line sales and trackage rights being exchanged between the Applicants and a non-merging party, the BNSF, dramatically change rail transportation arrangements in that region. Some shippers that are currently local to the BNSF or UP will have new, efficient service alternatives available from both systems and many of them are direct competitors of IP. Yet, IP's mill at Gardiner, Oregon is captive to the SP, whose service and pricing policies in that area have been so poor and misguided as to force the temporary closure of the mill and threaten the viability of the shortline Central Oregon & Pacific ("COPR") with which the SP connects.

This arbitrarily restrictive conduct is made possible by the fact that the SP has precluded the COPR from interchanging directly with the BNSF at Eugene, Oregon, so that traffic moving northward (which is the direction the SP does not favor) is impeded. Similarly, the BNSF can only participate in southbound traffic if it is willing to move IP's commodities in an extremely circuitous direction.

For this reason, the merger should also be conditioned upon permitting a direct interchange between the BNSF and COPR at Eugene, Oregon and by either giving BNSF trackage rights from Chemult to Eugene or by requiring a free interchange between the SP and BNSF at Chemult.

Respectfully submitted,

Edward D. Greenberg
Andrew T. Goodson
John F. C.Luedke

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Attorneys for The International Paper Company

Dated: March 29, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 1996, a copy of the foregoing Comments of International Paper Company was served upon parties of record listed in Decision No. 15, served February 16, 1996 in Finance Docket 32760, as amended by Decision No. 17, who have not signed affidavits for highly confidential status.

John F.C. Luedke

John F.C. Luedke

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

VERIFIED STATEMENT OF CHARLES E. McHUGH

Manager, Transportation Procurement
The International Paper Company

Dated: March 29, 1996

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VERIFIED STATEMENT
OF
CHARLES E. McHUGH

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, SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

VERIFIED STATEMENT OF CHARLES E. McHUGH

My name is Charles E. McHugh. I am Manager, U.S. Distribution Operations for The International Paper Company (referred to here as "IP"). I have occupied this position since January 1991 and have been employed by International Paper Company in the field of logistics since August 1970. My business address is 6400 Poplar Avenue, Memphis, Tennessee 38197.

As Manager, U.S. Distribution Operations for the company, I am responsible for the procurement of transportation services for the inbound movement of all raw and semi-finished materials necessary for the manufacture of our products as well as the outbound delivery of all finished products to our customers throughout North America. This includes the responsibility for negotiating rate and service issues with the various rail and motor carriers serving our facilities. I am familiar with the paper and forest products industry and the various transportation modes employed to move our raw materials and deliver our finished products to market.

IP is the world's largest paper company, conducting operations throughout the United States from over 650 paper and lumber mills, converting plants, warehouses, distribution centers, retail stores and related sales service support offices. International Paper Company's sales for 1995 were approximately $20 billion with international sales amounting to over $7 billion. Our manufacturing facilities in the United States produce paper and paper products including woodpulp, pulpboard, wrapping and printing papers, converted products including corrugated boxes, folding cartons, labels and milk cartons and wood products including lumber, plywood, decorative panels and other specialty products to serve the building trades, as well as chemical products and products serving the imaging industry. We move these products throughout the United States and North America utilizing the services of a number of transportation vendors, including the Applicants to this merger. I represent IP's interests before pertinent government regulatory bodies, and I am authorized by IP to make this statement.

I. SUMMARY OF POSITION

I discuss in detail below the fact that IP is heavily dependent upon a viable and competitive rail transportation system. Of course, my narrative of this issue is really superfluous, since the Applicants themselves recognize--at least, partially--that the merger would have an anticompetitive effect upon shippers such as IP, unless competition is maintained at points presently served by only the UP and SP systems. While the Applicants have not recognized the full extent by which the proposed merger would reduce essential intramodal rail competition to IP, they do at least understand the need to fashion a remedy that will preserve competition for shippers in general at various places in their systems and to IP in particular at the Camden and Pine Bluff mills in the Houston-Memphis corridor.[1]

Whatever issues may adversely affect the SP's ability to serve in other parts of the country, in the Southwest region that carrier has in fact been an efficient and effective competitor, and is heavily relied upon by IP to move substantial volumes of traffic that can only be moved by rail. Indeed, in certain shorter haul markets, SP has also been a competitor for truck transportation. Thus, it is simply not true that the SP is somehow fatally weak such that its loss as a competitor would be largely inconsequential.

Regardless of the rationale for this merger, we do not believe that the Applicants' proposed solution to its anticompetitive effects--*i.e.*, attempting to replace the competitive rail service that would be lost by an unconditioned merger with a limited trackage rights or haulage package to be operated by the BNSF--is realistic, at least with respect to IP's traffic. Simply stated, and notwithstanding BNSF's size and broad geographic reach, IP has come to the conclusion that the BNSF cannot--and will not--provide viable and effective competition to a merged UP/SP, and that it cannot--and will not--replace in any way the vigorous and effective competition between the UP and SP that currently exists for important IP mills in Arkansas, or at the destinations those mills serve. Nor would the settlement agreement address or remedy the fact that IP would lose competition it

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See Verified Statement of Richard J. Barber at 465 ("At locations where shippers are now served by both UP and SP, and by no other railroad, consolidation could clearly be harmful to competition."). And while Mr. Barber qualified that statement where a shipper could look to water or truck transport as alternatives to rail, he testified that IP's paper mills in Pine Bluff and Camden, Arkansas would not have such alternatives. See Barber Dep. Tr. at 371-75. Indeed, Mr. Barber confirms his prior testimony in the Wisconsin Central proceeding that "paper mills in general are geared to the receipt of inputs by rail and that a switch to truck would not be practical as a matter of logistics." Barber Dep. Tr. at 379-382.

currently has at four other southwestern mills (namely, Mansfield, Pineville and Bastrop, LA and S. Texarkana, TX) on traffic that moves to SP destinations.

Conversely, the Applicants have proposed an arrangement with the BNSF in the western "I-5" Corridor that provides new, competitive rail service to most forest products companies in Washington and Idaho--with whom IP competes on traffic destined to California from its mill in Gardiner, Oregon. Unfortunately, these new arrangements leave IP at a competitive disadvantage, since, as opposed to its performance in the southwest, the SP is a big impediment in Oregon from a rate and service standpoint. Moreover, the SP controls access to IP's traffic from Gardiner, and it refuses to permit the BNSF to participate over Eugene in this traffic. Thus, while IP's competitors will benefit from the BNSF's new competitive rail service in this region, IP remains tied to SP's admittedly inferior service.

As soon as the prospective merger was announced and the proposed settlement with the BNSF was made public, IP endeavored to ascertain whether the trackage rights and other conditions offered and exchanged between those parties would do the job Applicants and BNSF have promised. After 4 ½ months of informal discussions with these carriers, and three months of formal efforts through the discovery process, Applicants and the BNSF have totally failed to demonstrate how BNSF could do more than "show the flag" in the southwest. Even at this relatively late date, the BNSF has failed to do much more than profess its good intentions and urge that IP be patient, while at the same time proposing rates far above those currently paid by IP. Regardless of the BNSF's true ntentions, IP cannot afford, nor should it be required, to be patient and trust that there will, *someday*, e a viable and effective competitor to the merged UP/SP.[2]

First, as discussed below and in the accompanying verified statement of Roger Prescott, the ettlement agreement does not provide the BNSF with the tools to become an effective competitor. ven if it had an interest in IP's paper products business (which in and of itself is not clear), the greement does not give the BNSF sufficient traffic to permit it to serve points in the southwest gion (at least points in Arkansas) economically. Moreover, any operations the BNSF may conduct ill be fatally hamstrung by its lack of facilities, and the disadvantageous operating conditions on the P line through that corridor, which would be laughable if they were not so serious.[3] And, in part cause of the high charges it must pay Applicants for the trackage rights, BNSF's cost of service ill be substantially higher than the merged UP/SP, which necessarily means either that it will be able to compete for IP's business, or that the merger will ratchet up the rates IP must pay to obtain service from either the BNSF or the merged UP/SP. Not surprisingly, IP does not see this as a erger benefit.

One illustration of this uncertainty is the "2 to 1" point at Turlock, CA. The settlement reement specifically states that shipments to Turlock "will not be accessible under the trackage ghts and line sales covered by this Agreement" (*see* p.6 of the 11/18/95 Supplemental Agreement), though it suggests that somehow this service will be provided. Yet, Jim Shattuck, the UP's Vice resident, Marketing and Sales, sent me a letter dated February 9, 1996 (Exhibit 1), in which he ates that Turlock "is specifically covered in the BN/SF agreement" and that we can expect service the same way as it is presently conducted. We have not been able to ascertain which statement is orrect, or how the BNSF proposes to conduct this or, for that matter, any other operation.

This assumes that the BNSF is actually *required* to serve via trackage rights wherever "2 to competition is being lost. But we do not read the settlement agreement to actually require the NSF to provide service. Instead, it may opt to simply provide haulage, as it has chosen for Pine luff to Little Rock traffic) or serve locations through reciprocal switching. Or, it may opt not to rve at all.

Secondly, the Board should recognize that the nature of the railroad business has changed dramatically since 1980. The ever larger (and fewer) Class I railroads are no longer restrained by government regulation from taking actions to capture as much traffic as possible, and to do so in ways that often have nothing to do with their relative efficiencies. As the Applicants themselves recognize, the Class I railroads have canceled joint rates and reciprocal switching with their connections, have charged absurd amounts for reciprocal switching, and engaged in a variety of other plainly anticompetitive measures designed to keep shippers captive to their lines.[4] It is likely that the merged UP/SP will do the same so that, for example, the KCS and the Arkansas, Louisiana & Mississippi Railroad ("ALM") will lose their previously "friendly connections" with the SP on traffic they originate at IP mills that is destined to SP points. This important problem is not even addressed by the Applicants.

IP simply cannot afford to trust the good intentions of a monopoly that will be insulated from regulatory and antitrust constraints. It must have and--as conceded by Applicants--is entitled to have, vigorous and viable competitive rail service at every location and across all corridors where competition is being eliminated by the merger.

Accordingly, IP cannot support this merger as presented by the Applicants and BNSF. Instead, IP urges that any approval of the merger be strictly conditioned upon the following:

1. Divestiture of the SSW lines and all related rail facilities between Houston and Memphis, such divestiture to include all property interests currently held by the SP including trackage and/or joint facility rights through KCS' Shreveport yard;

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[4] *See, e.g.*, Verified Statement of Richard Peterson, at 71-71, describing SP's pattern of exorbitant reciprocal switch charges.

2. Assuming KCS is willing to acquire the SSW property noted above, divestiture of the SSW lines and all related rail facilities between Houston and St. Louis to the KCS; alternatively, such divestiture should be in favor of some other neutral carrier;

3. Require the merged UP/SP to maintain and keep open all routes, at competitive rates with service no less favorable than will be accorded UP/SP traffic, via the existing KCS junctions with the SP at Beaumont, Houston, Dallas and Shreveport on traffic to or from competitively served points (including ALM originations and terminations at Bastrop, LA) so as to maintain the friendly connection on traffic destined to or originated at SP-served points;

4. Grant the Texas Mexican Railway's ("TexMex") request to acquire trackage between orpus Christi and Beaumont, Texas or, in the alternative, grant KCS the opportunity to acquire ckage to Corpus Christi;

5. Require the Applicants to permit a direct interchange between the BNSF and the tral Oregon & Pacific Railroad ("COPR") at Eugene, Oregon, and to grant BNSF trackage rights the SP between Eugene and Chemult, Oregon; and

6. Require the Applicants to ensure that a viable, competitive routing exists over the tral corridor.

INTERNATIONAL PAPER'S RAIL REQUIREMENTS

The UP serves all six of IP's major mills in Arkansas, Louisiana and Texas, while the SP es the two Arkansas mills (Camden and Pine Bluff) and the mill at Nacogdoches, Texas. In ion, the SP is the major friendly connection for the KCS, which serves the Louisiana (Mansfield, rop and Pineville) and Texas (S. Texarkana) mills as a competitive alternative to the UP.

Similarly, the SP is the friendly connection for the ALM at Bastrop, LA. IP intentionally located its southwest paper mills (other than Nacogdoches) at points served by two railroads, in order to gain the benefits of competitive rates and service and an assured source of boxcar supply during periods of car shortage.

Each of these mills, other than Nacogdoches, is referred to as a paper mill, as each produces paper or paper-type products such as woodpulp, pulpboard, and printing paper. The Nacogdoches mill produces oriented strand board (a product somewhat like plywood), and is therefore called a wood products mill. Inbound, IP ships a variety of commodities by rail, including clay and chemicals and caustics which (for safety reasons) generally must move by rail. As evidenced by the following table, IP is heavily dependent upon reliable rail service.

TABLE 1

IP RAIL SHIPMENT PROFILE -1995

Mill	Shipments In	Tonnage In	Shipments Out	Tonnage Out
Camden				
Pine Bluff				
S. Texarkana				
Pineville				
Mansfield				
Nacogdoches				
Gardiner				
Bastrop				

Each of our southwestern mills ships by rail to points in Texas, Mexico and the southwest, as well as into the eastern and southeastern parts of the United States. Accordingly, in addition to the rvice of the Applicants, IP's traffic from these locations is interchanged at various gateways with onrail (generally, at E. St. Louis) and CSX and NS (primarily at Memphis and New Orleans, espectively).

IP's Gardiner mill is located near Coos Bay, Oregon, very close to the Pacific coast. That cility is actually located on the Longview, Portland & Northern Railroad ("LP&N"), a short-line wned by IP that operates on a branch off a line previously owned by the SP. The SP sold that line the COPR in late 1994, so that all of IP's traffic moves over the LP&N and COPR before it reaches SP at Eugene. Neither the LP&N nor the COPR have any other rail connections, as the COPR les agreement with SP precludes it from interchanging with the BNSF, even though both those rriers actually traverse the Eugene yard. (The SP held back from providing direct access the last veral hundred yards of track at that yard to COPR in order to keep those two carriers from directly nnecting.) As a result of this captivity, all inbound raw materials originate only at SP service ints; similarly, of the mill's outbound production can only move to SP points in California. noted below, this is often a serious marketing handicap.

In addition, IP ships to a number of destinations in Texas and California that are today garded as "2 to 1" points. These shipments originate at mills that are served by both the UP and (Camden and Pine Bluff), by the UP and KCS (Pineville, Mansfield and Texarkana), by UP or M at Bastrop, or may be served by only 1 origin carrier (Nacogdoches). In each instance, wever, we would be losing competitive destination service, unless the BNSF is in fact able to ovide a viable alternative.

III. IP'S NEED FOR COMPETITIVE RAIL SERVICE

While IP does utilize substantial volumes of truck transportation in short-haul markets, there s virtually no intermodal competition for our inbound and outbound shipments at longer distances.

A. The Predominant Volume of Traffic Moves by Rail

Much of IP's traffic in the under-300 mile block moves by truck, while there is a substantial mount of contestability for traffic moving in the 300 to 700 mile range. However, at distances onger than 700 miles, rail becomes almost the exclusive mode of carriage (except for unusual or mergency type shipments). The reason for this is readily apparent; the economies of scale inherent rail transportation translate into substantial cost differentials favoring rail at the longer distances.

By way of illustration, I have attached Exhibit 2, which compares the transportation costs on tbound printing paper and pulpboard shipments originating from Pine Bluff and Camden to six ual destinations at a variety of mileage blocks ranging from under 300 miles to over 1900 miles. veral things are apparent from this table. First, trucks become totally non-competitive from a pure cing point of view at longer distances. Second, TOFC traffic is competitive only with trucks, so it is also not a price alternative to boxcar movements. Third, the SP is the price leader for this ffic and, by its very existence as a vigorous competitor, has acted to constrain UP's pricing. With acquisition of the SP by the UP, that constraint is lifted -- unless the BNSF can in fact become rce in this market.

This exhibit illustrates another important principle. Normally, we would have expected truck ing to be much lower than rail at the lower (300 mile and under) and competitive at the middle to 500) mileage blocks. Yet, for these movements there is *no* traffic for which truck pricing is er than rail, including the 267 mile route from Camden to Carrollton, and the 334 mile route between Pine Bluff and Carrollton. While this may seem puzzling at first, the explanation is simply that each of these destinations is competitively served by both the UP and SP. In other words, both the origins and destinations are "2 to 1" points. Had we selected single served points for this modal price analysis, the motor carrier pricing would have been more competitive at the lower and middle distances. In other words, competitive rail service is important at both origin *and* destination. Where it exists, there are obvious and substantial benefits to IP. The more competition that is available, the more substantial the benefits.

B. <u>The Tangible Benefits of Rail Competition</u>

Moreover, our modal pricing data reveals the enormous importance of ensuring that some degree of *competitive* rail service remains available. We have analyzed the rail cost differential attributable to having competitive as opposed to single rail carrier service, and the results are astounding, even for a company as large as IP. Our review of this important issue shows that IP's rail cost--for the two mills in the Houston/Memphis corridor--would be expected to increase by approximately over the current rail budget if it lost competitive rail service. That translates to a penalty for being captive to a single railroad. Similarly, the added cost of losing competitive routings to SP points from the four other mills for which KCS or ALM can now compete with the UP (Pineville, Mansfield, Texarkana and Bastrop) would be approximately This would be a increase in rail costs to those points.

But the issue of competition has an effect on far more than rail pricing policy. Without a competitive alternative, a railroad will have little need to be concerned about its adequacy or quality of car supply or the reliability of its switch, local or line-haul service. Yet, as I discuss below, these issues are equally, if not more, important than the price paid for rail service.

In that regard, we note that the merger phenomena and the partial deregulation of the industry resulted, in the 15-year period between 1980 and 1995, in a reduction in both the number of Class [I r]ailroads as well as the boxcar fleet available to rail shippers. During this period, the number of [Cl]ass I railroads declined from 40 to 8, while the boxcar fleet fell from 400,000 to 150,000. [Un]fortunately, the rail industry has not noticeably improved their utilization rates for these cars in this [spa]n, as boxcar cycles were 12 to 13 per year in 1980, and remained at a level of 12.7 per year in [19]95. At the same time, the forest products industry's reliance on rail has grown to represent over [...] of the number of boxcar shipments, so that the issue of car supply has become proportionately [mu]ch more important to IP. Simply stated, our carriers must be able to provide us with a reliable [sup]ply of quality boxcars, or we just cannot operate.[2]

But the number of theoretically available boxcars does not by itself reveal whether a carrier [is a]ble to provide service. From its southwestern and Oregon mills, IP ships commodities generically [ref]erred to as pulpboard, but which includes items such as linerboard and bleached board. These [pro]ducts are used as the outerfacings of cardboard boxes that are often used to hold food and [veg]etables. Or they are used as milk cartons or in frozen food packaging. Accordingly, IP needs [*qua*]*lity* cars, cars that are in good working order and are clean, that are free from nails, snags or [con]taminants, with doors in good working order that are sealable and watertight. For this reason, [IP] has been quite diligent in inspecting cars tendered us by the serving carriers. And, IP has been able

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[2] I am aware that some paper companies do maintain, through ownership or lease, extensive [flee]ts of rail cars as a way of ensuring that they will have adequate boxcar supply. IP has decided, [how]ever, that this is a railroad issue, that it is their role to provide us with boxcars and that it should [not] be necessary for IP to use its capital to cover a service and cost that is properly a railroad [obli]gation. That is especially true since the railroads would then essentially be in a position to control [the] utilization of IP's capital due to their decisions as to where cars should be moved, how quickly [they] can be cycled and how they are treated.

to drastically reduce its car rejection ratio by making a carrier's performance in this category an integral component of our evaluation of how much traffic to award it. Of course, if we have no alternative, if the mill is only served by a single railroad (as is the case, for example, in Gardiner), we have little leverage and the railroad has no incentive to improve the quality of this important service feature.

Another important aspect of service is reliability--*i.e.*, how consistently the railroads meet the promised transit times. In other words, it is far more important to IP and its customers that the carriers be able to honor whatever transit times *they* promise, than it is to have them promise--without any ability to deliver--shorter times. While short transit times are preferred, early and late deliveries wreak havoc with inventory levels, the ability of our customers to operate effectively and the efficient handling of cars. By way of example, if IP is promised a 14-day delivery for cars moving to a destination, and some arrive 4 days early, congestion at that point is likely to result. When that occurs, our customers are then compelled to deal with inequitable demurrage that are really attributable to the railroad's inability to deliver on schedule. Conversely, if they arrive 2 weeks late, production line may be threatened with shutting down. These are not hypothetical examples; indeed even wider divergences of performance actually occur. That is why IP makes anticipated service--and improvements to past performance--an essential part of what we expect from our carriers when we award new business.

Accordingly, we are very serious when we say that service is equally, if not more, important than the price we have to pay to ship our products. We require our serving carriers to provide detailed reports of their service performance, including their current period car rejection percentages and variances from *their* promised delivery schedules. Parenthetically, I continue to emphasize the fact that the promised delivery schedules really emanate from the carriers. *They* tell us what they expect they can do; we do not dictate that. We do believe, however, that once they make that commitment, they should keep it.[6]

But this elaborate system of record-keeping, standards, performance tracking and striving for improvement only works where there is competition, where the carriers know that they will be rewarded with additional business if they do well, and will lose business when they do poorly. Without competitive rail service, it is simply a fact that rates go up and service performance, no matter how measured, disintegrates.

Indeed, part of the problem is the difficulty in measuring performance when a mill is not competitively served. Our experience is that railroads lacking competition generally refuse to participate in providing the data necessary to measure performance. If we are able to get that information, we can perform a "root cause analysis" of service deficiency, devise a corrective action plan and implement, monitor, reassess and change plans based on ongoing data. In other words, we can intervene to compel service improvements where information is available; unfortunately, that does not occur at non-competitive mills.

To ensure that IP receives the benefits of competitive transportation service, a number of years ago we initiated a program of having all prospective carriers, motor as well as rail, bid for the business that was available to and from IP's various paper and board mills. This bid program, which was conducted by sending out form Requests for Proposals ("RFP"), essentially required the rail

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I have attached as Exhibit 3 copies of letters I sent to Messrs. Davidson and Davis, the chief executive officers of the UP and SP, respectively, addressing their companies' past service performance, our continued requests for improvement and accompanying charts showing how their performance compared to the other carriers serving our Southwestern mills.

carriers to bid for the available business by route sets in which they committed to 3 different types of specifications (or "deliverables") we required. As we note in our standard RFP:

> International Paper's quality goal is to work with progressive rail carrier(s) who continuously improve rail transportation performance.

With that goal, the carriers are requested to provide information on the three sets of deliverables we believe are key to providing efficient rail service. A brief description of these deliverables will show the importance to IP of improving rail service.

The first deliverable pertains to the *origin service* that would be provided. Included in this category are the number and types/sizes of cars the carrier will have available for use, their records of quality of cars (the percentage of rejects), whether they are owned or foreign line cars (railroads tend to take better care of their own cars), and the mean time between boxcar failures (*i.e.*, bad orders) for those cars (so that we can look for better quality cars that will move loaded to customers without delay or transit variance due to forecastable bad order incidence). In addition, they are to provide information relative to their switching performance, so that we can be relatively assured that ll outbound cars move on schedule so that uniform transit time can be achieved and meet our equirement to maintain objective statistical consistency in our transit data.

The second deliverable pertains to *in-transit performance*. Here, the carriers are required to oactively measure on-time performance of all cars and produce monthly SQC charts on volumes 10 cars or more moving to the same destination. The purpose of this is to track how they actually nitor their own performance, detect variance from standard and set corrective action in motion en that performance is worsening. We also request information pertaining to their claims incidence and require updates on a quarterly basis.

The third deliverable pertains to the *competitive value* of a given bid. We request pricing by route-sets, seeking mileage scale rates on both single-line and connecting line traffic. As an important part of this, we seek pricing coverage to permit future rail business to grow in all route-sets at competitive prices.

In analyzing the bids, we accord of the weight to our evaluation of the two service deliverables, with the remaining of the weight going to pricing. As rail carriers will generally not permit other carriers to participate in traffic they can handle in single-line service,[7/] all of the single-line rail route-sets are awarded to the carrier serving the destination. On competitive single or joint line traffic, we will award the winning bidder all of the business to the route-sets on which its bids are superior, subject to a possible reduction in the event their service deteriorates.

By way of further explanation, I have attached as my Exhibit 4 the results of the bidding competition between the SP and UP at Camden and Pine Bluff during the past 3 years.[8/] Looking, for example, at the first page of the exhibit, which details statistics for the Pine Bluff mill, in 1994 we awarded the UP and SP, separately, 100% of the business in the listed route sets. But, overall, we awarded the UP of the business as compared to only for the SP. We did so partly due to price, but primarily because the SP's transit reliability for the prior year (*i.e.*, 1993) was only as compared to the UP's on those regional flows.[9/] In other words, because the SP (and its

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I am not aware of any exceptions to this point, regardless of considerations of efficiency.

During the first year shown here (1993), our joint line rail traffic was awarded by regions, rather than route sets, but we now exclusively follow the route-set procedure.

By transit reliability, I am referring to the carriers' consistency to a standard for completing door-to-door service. If the carrier states that it will deliver the car to a given point in 10 days, we add a grace day and consider any delivery in the 9-11 period to be "on time." If the car is delivered earlier or later than that period, that would be a service failure. Parenthetically, in devising these

...ctions) did not perform well on that joint line traffic in 1993, it lost business to the UP in 1994. ...n the SP improved its transit reliability in 1994 to (as compared to a declining UP ...ormance of), it ended up with of the business in 1995, leaving UP with only .[10]

Accordingly, there can be little doubt of the importance of having at least two viable, vigorous ...petitors available to handle rail traffic. In the southwest, it is evident that the SP has in fact been a viable and vigorous competitive alternative to the UP. Generally speaking, its service has been ...uperior and its rate proposals have been equally, if not more, attractive.[11] In the absence of ...ng the SP survive as an independent, competitive carrier, it is obvious--as the Applicants ...tedly concede--that any replacement carrier be willing and able to provide a similarly viable and ...rous competitive alternative to the merged UP/SP.

C. IP Has Made Substantial Investments in Rail Facilities

Since a substantial amount of its traffic must move by rail, IP has made substantial investments ...facilities at each of the locations discussed here. Unless viable competition is maintained, much ...is investment would either be jeopardized or substantially devalued.

...ts, we rely on information provided by the carriers. And, as noted above, they receive the ...mation pertaining to prior service experience as part of the RFP package.

That same analysis is applicable to the remainder of Exhibit 4 both for the other years at Pine ... and with respect to Camden. Although we did not have comprehensive statistics from both ...ers for the transit reliability percentage for prior years, during the bid evaluation for 1993 we ... persuaded that the SP had been a superior performer, service wise, and its pricing was more ...petitive. This explains why the SP was awarded the maximum 100% of the competitive joint line ...ness in 1993 at both mills.

I do not know why the UP's service has been so deficient or why it has been unable to ...ve, unlike the situation with the SP and IP's motor carrier service providers. I have heard the ...mon speculation that the UP has had--and continues to have--great difficulty absorbing the CNW, ... naturally raises concerns about what may happen if it acquires the SP.

For example, both the UP and SP currently maintain yards at Pine Bluff, but use a major itching yard that is actually on IP's property to serve both our mill and General Chemical mpany. In view of the large volumes of rail traffic into and out of our facility, we permitted both roads to locate their joint switching yard on IP property and both so as to ire their unrestricted access. Although we have raised this issue on a number of occasions with the UP and BNSF, as far as we are aware, the BNSF is not going to be given access to this tching yard. Assuming the BNSF actually intended to serve our facility (and that of General mical), the only efficient way to do so is to obtain access to this joint facility yard; but that does seem to be in the plans. Moreover, we understand that the UP intends to use the existing SP-ed yard primarily to block southbound trains. Under that circumstance, it is not plain how the SF would even be able to obtain access to our yard. Accordingly, we assume that the most we expect is that the BNSF would opt not to provide direct service there, but instead only serve the ity through reciprocal switching, which necessarily means that we would receive substantially less ching service from the line haul carriers to this yard.

In addition, we have negotiated arrangements with both the UP and SP by which IP provides wn service from the joint facility yard both to the mill and between the various tracks located e by using an independent third-party switching service provider.[12] If BN does not have access he yard, it is possible that the UP/SP would elect to cancel the third-party switching arrangement, ply because neutral switching could provide some advantage to the BNSF--if it really could

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This is beneficial to the railroads, as it reduces their operating costs by their evidence of ally having to switch the plant. The arrangement benefits the shipper because switching service proved and we can negotiate an allowance by which we share, with the railroad, the savings rated by using this third-party arrangement.

deservice to Pine Bluff. Under those circumstances, we would face the loss of highly efficient party switching and potentially sustain substantially higher switching costs.

A similar situation exists at Camden, where both UP and SP can directly access the mill, but have us actually switch the plant through a third-party switching arrangement. However, if is approved and the BNSF does elect to provide service to this facility, we have no reason that it will do so through any direct service. To the contrary, although as discussed below been seeking definitive information on this point since last November, it appears likely that we could expect would be to have BNSF service through a haulage rights arrangement.[13] the UP/SP would be the only carrier serving the mill, we again fear that it would move to the third-party switching arrangement that we have had in place for a number of years.

Mansfield mill contains another joint facility, since we constructed this mill between the serving carriers--namely, the KCS and the UP. IP actually built the track leads from each main line to the joint facility yard and leased the trackage back to the railroads. In return, paid back for its investment on a lease that expires in the year , by which each s IP an allowance for each car being moved. Once again, if this became a single-served a loss of KCS access on traffic moving to SP destinations), third-party switching service ity might be lost.

ere is another joint facility switching yard at S. Texarkana, but in this instance the KCS and own the yard and their respective leads. Under an agreement we reached with both hen we expanded the mill several years ago, both railroads were obligated to add,

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[13] iscussed below, the idea of BNSF serving this mill via a road crew, as apparently has been by the BNSF's operating witness, Mr. Neal D. Owen, seems impractical, if not impossible.

separately, approximately 6,000 feet of additional track in order to handle the anticipated increased volumes. The KCS completed their promised construction at a cost of approximately   but the UP has reneged on its obligation. This lack of additional trackage has been an impediment to IP expanding the business that has become available since the capacity of the paper machine was rebuilt and upgraded. S. Texarkana is also served by a third-party switching arrangement, the loss of which would be threatened as noted above.

Our Pineville mill is served directly only by the KCS, although the UP is able to obtain access via reciprocal switching from the nearby point of Alexandria, Louisiana (which is approximately two to three miles away). On traffic moving to SP points after the merger, it is possible that the UP/SP might refuse to continue to absorb the cost of KCS switching, thus effectively increasing our rates to those points. If the KCS retaliated by canceling the reciprocal switch service, IP would then be the victim in a typical inter-railroad dispute over how they would like to see the market apportioned.

IP also has a mill at Bastrop served directly by the UP and ALM, which is owned by the Georgia Pacific Company. We understand that Georgia Pacific has been seeking the Applicants' cooperation in having the ALM connect with the BNSF, so that it could retain connections with three different carriers and be able to move traffic via the BN through the Memphis/Houston corridor. At this point, we understand that the Applicants are not willing to make such an accommodation for the ALM, so that the merger would cost that mill the service that has traditionally been available from a third competitive carrier. The merged UP/SP might also leave the mill captive to the UP/SP on traffic moving to SP points, thus creating a situation identical to that faced by the IP's UP/KCS-served mills, where the KCS origin competition would be lost on that traffic.

IV. IP's FAILED ATTEMPT TO INFORMALLY RESOLVE ITS CONCERNS WITH THE PROPOSED MERGER

Following the announcement of the proposed merger in early August 1995, I became oncerned that it would result in a diminution of rail service to the several IP mills discussed above hat are situated in the Houston-Memphis corridor. Some of these mills, specifically those in Camden d Pine Bluff Arkansas, are served only by the UP and the SP. Thus, the merger would completely minate competition for rail service to those mills.

In addition, IP has mills located in S. Texarkana, Texas and in Mansfield and Pineville, uisiana, which are presently served by the KCS in addition to the UP. Because many of the ination points for shipments from those mills are served only by the SP, the KCS must rely on a ndly connection from SP. I was concerned that with the merger of the UP and the SP, those dly connections would be eliminated.

Finally, I felt that the merger would eliminate negotiating leverage that in the past has enabled obtain favorable rail rates and service for mills captive to the SP. For example, IP has a wood cts mill in Nacogdoches, Texas that is served only by the SP. However, IP has been able to use mpetition existing between the UP and the SP at other IP mills such as Camden and Pine Bluff p the rates and services at Nacogdoches at a reasonable level.[14] My concern was that if the tition between the UP and the SP were to be eliminated, IP would lose that leverage.[15]

The presence of a transload facility on the BNSF also helped discipline SP's ability to price onopolist.

By concentrating on these other mills, I do not mean to imply that we are indifferent to the third carrier at Bastrop, as this is of great concern to IP. However, the other adverse effects erger, unless properly conditioned, are far more serious, so that we have concentrated our on the more obvious problems at the other mills.

Accordingly, I began what eventually turned out to be an unsuccessful informal effort to [ ]lve my concerns. On September 20, 1995, I wrote to Mr. Jim Shattuck, UP's Executive Vice [ ]dent, Marketing and Sales. and asked him to explain UP's plans for preserving competitive rail [ ]ce to IP.[16] His answer was that the September 25, 1995 agreement between the Applicants and BNSF would be the savior for shippers such as IP who otherwise would be left with only one rail [ ]er alternative as a result of the UP/SP merger.[17]

I was skeptical that the BNSF agreement would have that salutary effect viz-a-viz IP, for the [ ]wing reasons. First, the BNSF has little or no experience shipping the paper products [ ]ufactured by IP. Second, based on the press release describing the BNSF agreement, I [ ]stand that BNSF would only be permitted access to "2 to 1" shippers, *i.e.*, those shippers [ ]ntly served directly by only the UP and SP. While this might allow the BNSF to serve the IP [ ]n Camden and Pine Bluff, BNSF would not have access to most of the traffic available along [ ]ouston-Memphis corridor. Thus, I was unsure whether BNSF would have enough business to [ ]ively and competitively serve the Camden and Pine Bluff mills. Third, I was troubled by BNSF's [ ]f facilities along the Houston-Memphis corridor. Based on my experience with rail service via [ ]ge rights, unless there are facilities and terminals sufficient to support the operation, trackage [ ]entually devolve to car haulage. Such a result would eliminate BNSF's ability to control the [ ]y of its service, as well as its ability to provide effective competition on rates.

See Exhibit 5.

See October 2, 1995 letter, Exhibit 6.

On October 10, 1995, I sent a letter to Mr. John Hovis, BNSF's Vice President, Forest ts.[18] I expressed my concerns about BNSF's lack of facilities in Arkansas, and requested him vide their plan of operation, what rates they could provide, and what boxcar equipment itments they could make to IP. I attached information regarding IP's shipping levels and tions to assist him in responding to this request. A virtually identical letter was sent to Mr. k.[19]

For over a month, however, I received absolutely no response from Mr. Hovis. On mber 12, 1995 I happened to run into Mr. Fred Malesa, who also works in BNSF's Forest ts division, at a meeting of the National Industrial Transportation League. I briefly discussed oncerns with him, and that Mr. Hovis had not yet responded to my October 10 letter. Mr. sent me a note a few days later stating his concern regarding BNSF's "past responsiveness," at BNSF would "set to work immediately to fix that."[20]

In the meantime, the merger application and the BNSF agreement were filed. My review of pplicants' proposed operating plan, and the BNSF agreement, increased my level of concern. greement provides that BNSF will have trackage rights between Houston and Memphis only SP's line between those points. That line includes an undulating stretch of track called the bit," which lacks computerized traffic control ("CTC") or even block signaling over many hes. It also has long intervals between sidings. In addition, I knew that the SP line has a break hreveport, LA, which requires SP to operate via trackage rights through the KCS yard in

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See Exhibit 7.

See Exhibit 8.

See Exhibit 9.

Shreveport in order to connect its line. To my knowledge, BNSF does not presently have any rights over the KCS line, although I understand a formal request for such rights has been made. These facts, coupled with the Applicants' plan to run directionally southbound on the SP line between Houston and Memphis, raised a substantial question in my mind as to whether the BNSF could run trains northbound along those lines with any consistency of service. Indeed, I began to question whether BNSF had any intent of operating along that corridor, other than perhaps to run overhead trains between Houston and the Memphis and St. Louis gateways.

By November 29, I still had not heard from Mr. Hovis or anyone else at the BNSF. I therefore wrote to Mr. Steven Marlier, who was then the Senior Vice President of BNSF's Consumer Business [21] In that letter, I repeated my concerns, and IP's urgent need to hear about BNSF's plans. A meeting was thereafter scheduled. In preparation for that meeting, I drafted an agenda laying out all the issues I had identified to date, and provided it to the BNSF.[22]

The meeting took place at IP's offices on December 13. I and four other IP employees, and consultant, met with five representatives of the BNSF, who included Messrs. Marlier, Hovis Malesa, along with Mr. Dave Dealy, Vice President, Santa Fe Lines and Mr. Dave Kiehn, an account manager who had been assigned to manage the IP account. During that meeting, which lasted about two and a half hours, it was apparent that none of the BNSF representatives had any idea how the BNSF would or could serve Arkansas shippers. They stated that no plan had been

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See Exhibit 10.

See Exhibit 11.

...d for conducting operations in Arkansas, much less any plan for serving IP.[23] Nor did they ...us with any proposed rates for serving the Camden and Pine Bluff mills. The only thing we ... were their assurances that BNSF could and would adequately serve our needs. However, ... state that they would consider the issues we had identified in the agenda, and we scheduled ...d meeting for January 15, 1996.

The next week, I learned that representatives of the BNSF and the UP met on December 20 ... headquarters in Omaha to discuss how IP's needs could be met. Mr. Shattuck of the UP ...me in a letter written that same day that at that meeting UP and BNSF agreed in principle to ...ting plan at Camden and Pine Bluff, which he said was to be finalized into a more specific ...g plan and presented to us by the BNSF at the scheduled January 15 meeting.[24]

While the January 15 meeting with the BNSF took place as scheduled, we were not provided ...ormal operating plan. Nor were we provided with any verbal report as to how BNSF planned ... the Camden and Pine Bluff mills. The only thing we were told was that a joint facilities team ... established to determine what facilities UP/SP would need to make available to BNSF to ...ent its local service. We also were not provided with any proposed rates. However, Mr. ... instructed Mr. Kiehn at that meeting to provide us by January 26 with proposed freight ... from Pine Bluff and Camden to various points in several route-sets defined in our most recent ...d board bid. To assist that endeavor, we provided Mr. Kiehn with all of the information we

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Indeed, none of those participating on behalf of BNSF were even aware that the UP planned ...te the SP line directionally southbound.

See Exhibit 12.

ly have made available to the UP and SP, so that BNSF could develop an informal, *competitive*

BNSF missed the January 26 deadline, however, and by February 1 we still had not heard em. We therefore wrote to Mr. Kiehn and requested the status of the promised rates.[25/] On y 6, we received a response.[26/] However, Mr. Kiehn did not provide us with rates. Instead, column was left blank, because "[i]t would be interesting to know what rate(s) INTL PAPER want BNSF to establish from the Camden and Pine Bluff mills...." Thus, over four months began our quest for answers, we were still drawing blanks.

We immediately advised Mr. Kiehn that we would not do their work for them, and that we ve an idea of what rates they could offer to see whether there was any possibility that BNSF fectively compete for our business. Finally, on February 15, we received proposed BNSF single-line rates for a number of destinations from the Camden and Pine Bluff mills. Indeed, on 1995 traffic volume from Pine Bluff for the routes priced by BNSF for single line service, proposed rates were on average *higher* than IP's current rates, and would cost IP *an* *al* *annually*. Based on 1995 traffic volume from Pine Bluff and Camden for the nced by BNSF for joint line service, BNSF's proposed rates were on average *higher* s current rates, and would cost IP *an additional* *annually*.

Having failed to receive any assurance from the BNSF that it could replace the competition be lost to IP as a result of the merger, I sent letters to both the UP and the SP and asked

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See Exhibit 13.

See Exhibit 14.

ther we could explore the possibility of settling our concerns.[27] It was my hope to enter into long [illegible] contracts with those railroads with terms that would insulate IP from the potential competitive effects of the proposed merger, effects clearly reflected by the enormous rate increase [illegible] had been proposed by the BNSF. Mr. Shattuck refused to deal directly with me. Instead, [illegible]ning that IP's lawyers had sought discovery about previous attempts to discuss our concerns with UP, which I heartily endorse, he suggested that any such negotiations be handled by the parties' [illegible]pective attorneys.[28] Of course, the UP's counsel had previously suggested that the respective [illegible]cipals deal directly with each other. On the other hand, the SP informed me that it was their [illegible]y not to entertain any commercial or operational considerations in exchange for shipper support [illegible]eutrality, and thus also refused to negotiate with me.[29]

Thus, my informal effort to resolve my concerns regarding the proposed merger was [illegible]ccessful. It is apparent that the BNSF, for the variety of reasons which I shall now set forth in [illegible] simply cannot, under the BNSF agreement, replace the competition in the Houston to Memphis [illegible]dor that will be lost should the UP/SP merger be approved. Moreover, it is also apparent that [illegible] the UP nor the SP are interested in attempting to resolve these concerns informally, and that [illegible]st now seek a formal solution.

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[27] See March 6, 1996 letters to Jim Shattuck and Donald Orris, Exhibits 15 and 16.

[28] See March 11, 1996 letter from Shattuck, Exhibit 17.

[29] See March 8, 1996 letter from Nick Tupper, Exhibit 18. Parenthetically, I have reason to [illegible] that SP has made exceptions to this "policy" for other shippers.

MY ANALYSIS OF APPLICANTS' AND BNSF'S OPERATING PLANS FOR THE HOUSTON TO MEMPHIS CORRIDOR LEADS ME TO CONCLUDE THAT THE BNSF CANNOT BE A VIABLE COMPETITOR UNDER THE BNSF AGREEMENT

As discussed more completely in the Verified Statement of Roger C. Prescott on behalf of IP, are three basic reasons why the BNSF cannot replace the competition that would be lost in the ston-Memphis corridor if the proposed merger is approved. The first is that the BNSF agreement its BNSF access to only eight points along the entire 547 miles of track between Houston and phis. Thus, while approximately 40 million tons of traffic are moved in and out of that corridor ally, BNSF can only hope to move, based on applicants' own formula for calculating diversions BNSF, approximately 875,000 tons of that traffic. Such traffic can only realistically support density of .6 trains/day, far below the four trains per day BNSF projects it will operate. Thus, SF will not be able to come close to replicating the level of service IP currently receives from the petition between the UP and the SP, unless it charges exorbitantly high rates. Indeed, it appears BNSF recognizes its dilemma, since the proposed rates it provided to IP average er than IP's existing rates at Pine Bluff and Camden.

Setting aside this issue, the BNSF's ability to provide competitive service to IP in Camden and Bluff is also severely constrained from an operational perspective by its lack of facilities in the ston-Memphis corridor, the lack of traffic control systems and adequate sidings over large ns of that track, BNSF's lack of access to the KCS yard in Shreveport, and the Applicants' plan the SP line as a primarily southbound line. With respect to the latter, the Applicants' operating tates that the old SSW line formerly used by SP will be used primarily for southbound traffic [1] Thus, northbound BNSF trains from Houston would have to negotiate their way through

[1] See Application, Vol. 3, at 125-26.

nd onslaught of UP/SP trains. For example, IP currently ships substantial tonnage from Pine Bluff to the E. St. Louis gateway with Conrail. When shipped via SP, this traffic th through Brinkley and Fair Oaks. According to the density tables appended to the an, there are presently 11 trains per day between Fair Oaks and Brinkley. Applicants plan is to *double* the train density between those points, with almost all of that traffic to move eover, the southbound density between Brinkley and Pine Bluff will be approximately *28* y, over a train per hour. Thus, a BNSF train picking up an IP shipment at Pine Bluff for ouis gateway would run into an enormous amount of southbound UP/SP trains, wreaking BNSF's ability to provide reliable consistent service to northern and eastern destinations, P ships substantial amounts of traffic.

ther hampering BNSF's ability to provide reliable northbound service is the Applicant's erate the primary Pine Bluff yard as a southbound blocking specialist.[31] The Applicants by using the Pine Bluff yard for southbound blocking only, they can reap enormous s, efficiencies that could not be achieved if the yard were to be used bi-directionally.[32] efits are perceived to be so great that the Applicants have no intent to block any d trains in Pine Bluff.[33]

us, there apparently has been no agreement between Applicants and the BNSF regarding the SSW Pine Bluff yard. Indeed, it appears that the BNSF does not intend to directly

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e Application, Vol. 3 at 46-48, 191-93. The primary yard in Pine Bluff is the old SSW UP has a much smaller yard located on the old MP line. A diagram of the Pine Bluff area und at Application, Vol. 3, at 289

e King/Ongerth Dep. Tr. at 500-01, 516-524.

e King/Ongerth Dep. Tr. at 523-24.

vice local industry in Pine Bluff at all, and instead will rely on Applicants to block and set out cars the BNSF.[34] I do not believe the BNSF can provide reliable service to IP under such a scenario. eover, because BNSF will have to pay the UP for switching services, they will be further lvantaged in their ability to price competitively. In fact, if BNSF's only access to IP traffic is gh the UP, then a bottleneck situation will exist that will allow the UP effectively to raise the service to IP at Pine Bluff to monopolistic levels.

BNSF has also postulated an unrealistic plan for serving IP's Camden facility. BNSF will not ocal switching at Camden. Instead, it claims that it will "service shippers [at Camden] with train service . . . ."[35] Based on my experience, it will be virtually impossible for BNSF to Camden facility in this manner. The IP plant is located off the SSW mainline; thus, BNSF to divert its trains to pick up and set out the IP cars. Moreover, because of its curvature, n the IP facility cannot be accessed by six axle locomotives. Thus, BNSF would have to run gh trains with less powerful four axle locomotives in order to access IP traffic in Camden, highly unlikely.[36]

ut even assuming that BNSF did s the pick up and set out process at Camden would be complex, and require the BNSF train to sit, possibly on the main track, for a substantial ime. In trying to ascertain whether it was possible for BNSF to really switch the mill, we re out how that would have to be accomplished. We believe that the move would require

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Owen Dep. Tr. at 155-56.

ified Statement of Neal Owen at 20.

SF uses six axle locomotives on their through trains, then UP/SP locals will be required hat switching service for BNSF at some cost which will no doubt raise the rates for mden far above competitive levels.

the locomotive and crew to move south of the Camden siding switch with loads and empties for the mill, throw the switch, move forward onto the "paper mill" lead to the exchange tracks, deposit loads and empties, uncouple, back up , throw the switch to line up with the outbound loads and empties, move forward and couple up to these cars, move back to clear the paper mill lead switch, throw that switch to line up with the mainline, move forward to couple with their train on the mainline or go to the passing side or the SSW yard and recouple with their train at that point and resume their movement southbound or northbound. This would necessarily have to take place at least once every day.

I don't believe it is reasonable to expect that the BNSF will be able to perform all this maneuvering efficiently to stay on their own schedule and out of the way of UP/SP through and local ... We expect significant delays and a high degree of variability introduced into the transit time ... the Camden mill to our various customers.

Further compounding the difficulty BNSF will have in providing reliable service to IP is that ... portion of the SP line between Houston and Memphis (the "Rabbit") is "dark territory," *i.e.*, ... no computerized traffic system ("CTS") nor block signals. According to Messrs. King and ... "[m]anual dispatching, coupled with long intervals between sidings (many ranging from 17 ... miles), severely limits the "Rabbit's" capacity when operated bi-directionally."[37] The lack of ... on the Rabbit is apparently of such concern to Applicants that they plan on running ...antly empty trains on that line.[38] It is obvious that a loaded northbound BNSF train would ...move at a very slow and unpredictable pace through this long stretch of track.

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[37] ...Application, Vol. 3, at 44.

[38] ...King/Ongerth Dep. Tr. at 501.

Moreover, as discussed above, SP trains on the Rabbit must pass through the KCS yard in [illegible]eport. According to instructions in the SP timetable, such movements are subject to the control [illegible] KCS yardmaster. BNSF trains operating on this line would be subject to the same [illegible]tion.[39] Thus, the reliability and consistency of BNSF's service will be restrained not only by [illegible]ulty of coordinating movements with southbound UP/SP trains over this unsignaled track, [illegible]o be limited by the necessity of coordinating with the KCS.

[illegible]nother reason the BNSF will not be able to replace the competition eliminated by the [illegible] merger in the Houston-Memphis corridor is that the trackage rights fees it must pay to [illegible] exceed Applicants' cost of operation in that region. As calculated by IP's consultant, [illegible]scott of L. E. Peabody & Associates, Applicants will earn a substantial profit from BNSF's [illegible]ghts operation, in effect a monopoly rent. At best, the effect of this subsidy will be to raise [illegible]vice to IP's mills in Camden and Pine Bluff, an effect already seen in the proposed rates [illegible] BNSF.

[illegible]all of these reasons, it is plain to me that BNSF simply will not be able to replace the [illegible] the Houston-Memphis corridor that will be lost if the merger is approved. I am aware [illegible]SF agreement requires that Applicants provide BNSF's trains with equal dispatch to [illegible] UP/SP trains, but I am skeptical that such equal treatment is possible, given all the [illegible]straints outlined above.[40] Moreover, I note that under the Applicants' operating plan, [illegible] will be no UP/SP train "comparable" to a northbound BNSF train in the Houston-

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[39] [illegible]wen Dep. Tr. at 217-18.

[40] [illegible], I recall that during the UP/CNW merger proceeding, SP accused the UP of [illegible] by dispatching SP traffic moving via trackage rights over UP lines. I don't see any [illegible] the UP to behave any differently *viz-a-viz* the BNSF.

Memphis corridor. But even if equal dispatch were possible, that does not resolve IP's concerns. As discussed, the most important factor to IP in evaluating carriers is reliability of service. Given the operating constraints faced by the BNSF as outlined above, in order to provide equal dispatch the Applicants would have to drag down the level of service of their trains, the result being that IP will suffer the consequences of equally unreliable service from Applicants and BNSF alike.

[illegible]I. THE ANTICOMPETITIVE EFFECTS OF THE MERGER ON IP

That the settlement agreement prevents BNSF from being the "vigorous, stronger competitor" [illegible] IP's traffic in the Houston-Memphis corridor obviously raises issues of great concern. At Pine [illegible]uff and Camden, we have approximately carloads of traffic, costing approximately [illegible] dollars annually, that will be subject to a total loss of effective rail competition. Worse, the [illegible] is not even *required* to provide service via this obviously inadequate trackage rights remedy, [illegible] instead elect, at its option, to serve "2 to 1" shippers and receivers by haulage or reciprocal [illegible]ng agreements. Indeed, as discussed above, that may be how its new allegedly competitive [illegible] would be provided at Camden. Haulage to and from Camden means that the UP/SP will be [illegible] handling all our traffic, with their equipment, boxcars, trains and facilities. Aside from the [illegible]ed questions of what the UP/SP will charge BNSF for this, or how this can possibly [illegible]to competitive rates for IP, haulage necessarily means that the service available to IP will [illegible]. Camden would no longer have two vigorous competitors vying for its business by [illegible] their service in accordance with IP's bid program demands, but would instead be left to [illegible] the merged UP/SP was willing to provide. And, since they intend to reduce cars, equipment, trains, facilities and crews, this also necessarily means that the merged UP/SP would now be providing service, without any competition whatsoever, with less resources.

Another recent example of what the loss of SP competition will do was graphically illustrated recently when we requested price quotes from both UP and SP on a new routing we were trying to establish to accommodate traffic that would move from Camden to Calgary, Alberta. As recently as March 13, 1996, both railroads provided bids for this move, resulting in a situation where the SP's ...e was almost / ton lower (or) than the UP's price. Clearly, the merger would eliminate ...SP as a price leader and totally eliminate any competitive pricing at Camden or Pine Bluff and, ...tially, end IP's ability to effectively compete for this long-haul business from the southwest to ...ern Canada.

There is therefore no question but that our costs will increase and the commensurate service ...eriorate. Those facts simply cannot be doubted, because that is the situation at our single- ...mills--*i.e.*, their rail rates are substantially higher and the service is worse. And, that is so even ...e power of the rail monopolists there is disciplined somewhat by the competitive traffic that ...day at Pine Bluff and Camden. If that competition disappears, we would expect a domino ...n on our single served mills. For example, another single-served mill, Nacogdoches, would ...ously suffer from the loss of direct UP-SP competition at Pine Bluff and Camden. As I ...r, we were able to negotiate very attractive rates on our carloads of oriented strand board ...m that facility to various locations in Texas, Arizona and California even though that mill ... the SP. Without our ability to discipline the SP by taking away tonnage at Pine Bluff and Camden, we would no longer be successful in compelling SP to provide the substantially more attractive rates we now enjoy.[11]

Similarly, because our mills at Pineville, Mansfield and Texarkana are not both directly served by the UP and SP, the BNSF settlement agreement would not be applicable. Once the merger goes into effect, however, the KCS will lose its existing friendly connection with the SP at Shreveport and other points on traffic moving to SP points. Based upon 1995 traffic volumes, this involves tons. Unless prevented from doing so, the UP/SP would regard this as single-line traffic and refuse to provide KCS with reasonable revenue requirements (or proportional rates) that would permit KCS to stay in the market and compete for traffic moving to SP points that are, today, very competitive. This foreclosure would of course mean that those mills would lose the competitive rates and service that are today available. Nonetheless, because the Applicants don't recognize this as a loss of competitive options, it has not been addressed in the settlement agreement. But the Applicants are [illegible], and this foreclosure would benefit no one other than the Applicants.

This is very reminiscent of the situation in the BNSF merger, where a utility that was subject [illegible] rail carrier service both at origin and destination was going to lose competitive alternatives [illegible] traffic between two points in Texas. Recognizing that this was inappropriate, that merger [illegible] conditioned upon granting the SP trackage rights between those two points, so that it could [illegible] the competition that had previously existed.[12] In this case, we are presented with a worse [illegible] since the loss of KCS competition means a great deal more than simply a price increase.

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[11] [illegible] the accompanying Verified Statement of Roger Prescott, who describes the comparative [illegible] IP has been able to negotiate due to the inter-railroad competition that will now be lost.

[12] [illegible] the discussion in F.D. No. 32549, Decision No. 38 served August 23, 1995, at p. 85. [illegible] NITL condition ¶ 1(b)(i) concerning operations between Stratford and Dalhart.

would lose the benefits of KCS' competitive service and all that this entails. For that reason, if merger goes forward, an appropriate condition must be fashioned to preclude the arbitrary mination of that competition.

The situation at Gardiner is different, as that facility is served solely by the SP which has rically acted, and continues to act, in the inefficient manner one would expect of a monopolist.[13] as experienced great difficulties in the recent past with car supply and service, and had to enlist ssistance of the ICC in early 1995. It was only when IP requested the Commission to issue opriate emergency car service and re-route orders that the SP began providing empty cars to e our outbound product. Of course, they refused to accept cars from foreign lines at the same But then, since they have no competition, they did not have to do anything to address the crisis by the mill until the ICC became involved.

The problem of being served solely by the SP in this region has been exacerbated recently, due ge part to the SP's obstinate and continuing refusal to permit other rail carriers to provide service even if the alternative is a mill shutdown. As is common knowledge, the federal government verely restricted timber cutting rights on federal land in Oregon, which has led to a virtual total f the local wood chip supply on which the mill depends. Nonetheless, the SP has refused to attractive joint line rates from more distant wood chip sources that are available on the BNSF locations in Washington, Idaho, Montana and British Columbia, even if that facility would wise be required to shut down--which it has. Precisely why the SP believes it makes sense to

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As noted above, the Gardiner mill is actually served directly by the LP&N, a short-line owned But, the LP&N connects directly with the COPR, which then is permitted (by its agreement e SP) to connect only to the SP. So, the Gardiner mill is therefore at the whim of the SP for ound and outbound rail service originating or terminating beyond the COPR.

do this, since it is obviously losing substantial rail business from this mill, is not clear. But it does demonstrate rather clearly that a monopolist cannot be relied upon to act rationally or efficiently.[14]

Previously, after a lengthy series of negotiations, the SP finally agreed to establish [illegible] on pulpboard outbound from the Gardiner mill for beyond movements with the BNSF at Portland. Accordingly, IP became able, finally, to move this product to BNSF destinations [illegible] Oregon, Idaho, Washington, Montana and British Columbia--*but only to those locations.* The SP refuses to permit IP to ship our outbound pulpboard to midwestern points on the BNSF. And, [illegible] it was essential for IP to ship to midwestern points, the SP pricing was at non-attractive levels. [illegible] were forced to take it, because we had no competitive choice.

Now, other mills in the Pacific Northwest will receive the benefit of service from both the [illegible] UP/SP and the BNSF if the merger is approved. While it will certainly help to be able to [illegible] UP points, IP will remain at a substantial disadvantage to its competitors in this region,[15] [illegible] the [illegible] agreement has been constructed in such a way to essentially strand southern and [illegible] Oregon mills on the COPR line or on the BNSF Williamette Valley line and deprive them of [illegible] non-merger related competition the Applicants and BNSF are planning to offer.

[illegible]ly, the only way to remedy this injury is to grant BNSF trackage rights from Chemult to [illegible]

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[14] [illegible] and its personnel that have been laid off are not alone in being injured by the SP's regressive [illegible] We are advised that the COPR is also in dire financial straits, since it is so heavily [illegible] upon the wood and paper traffic generated by IP and other producers in western Oregon.

[15] [illegible] competitors include Potlach at Lewiston ID; Longview Fibre at Longview, WA; [illegible]ma Kraft at Tacoma, WA; Boise Cascade at Wallula, WA; CPL Paperboard at [illegible] Fletcher Challenge Canada at Campbell River, BC; and Eurocan Pulp & Paper at [illegible] Each of the companies in Idaho and Washington have service from both the BNSF and [illegible] the Canadian companies can access both systems by the CN or barge.

Eugene or require SP to interchange freely at Chemult with BNSF on traffic to or from the BNSF or COPR.

Finally, the Applicants have been very careful to shape the settlement agreement in such a way that, even assuming the BNSF could actually provide a viable competitive service in these various corridors at the narrow "2 to 1" points (*which it cannot*), the "2 to 1" points at which competition is supposedly being preserved are as narrowly drawn as possible. By way of example, a great deal of our outbound product from the southwestern mills is destined to an IP facility at Carrollton, TX. That facility is served directly by the UP, but the UP has *selectively* permitted other carrier access, agreeing to this if that traffic originated at "noncompetitive" (*i.e.*, non-UP) locations. Accordingly, though the BNSF purportedly would have the right to serve IP's Camden and Pine Bluff mills, I was recently advised by the UP that the BNSF would not be permitted to provide a through service to destination (unlike the UP/SP with which it must compete) precisely because that traffic would be--in the UP's jargon--"competitive."[46]

THE ALLEGED PUBLIC BENEFITS OF THE MERGER ARE GREATLY OVERSTATED

From IP's standpoint, the claim that single-line service is always, or even usually, superior to joint-line service is erroneous. The question more properly is: who really benefits by eliminating joint-line service? From our perspective, the primary beneficiaries of eliminating connecting line service are railroads, since they no longer have to compete for business in many regions, corridors

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[46] This advice from UP was contained in a letter to me from Jim Shattuck, the UP's vice president of marketing and sales, dated February 9, 1996. A similar problem occurs at IP's facility at City of Industry, California.

and at various points. Instead, they can cancel routings with their former friendly connections either by using the meat axe approach taken by Conrail in the early 1980s, or by simply refusing to deal with friendly connections once mergers are approved.

From the shipper's perspective, a joint-line service is not inherently less efficient. Often, joint-line routes are less, not more, circuitous. While you do eliminate interchanges between railroads, much of the same switching must still be physically provided so that the benefits of single-line service are not as broad as typically claimed. And, as our bid program demonstrates, we don't find it necessary to have to deal with multiple railroads, since we leave that to the serving carrier. It is their responsibility to put together through pricing and service arrangements so that we are presented with a seamless transportation package.

Similarly, the SP's service problems have been exaggerated. While IP has had--and continues to have--serious service issues with the SP at Gardiner, that is not the case in the southwest. The SP has been a vigorous, dynamic competitor and has provided, generally, superior service than that provided by the UP in this region, particularly since the difficulties experienced by the UP in incorporating the CNW into its system. While I don't pretend to speak for other shippers in this region or elsewhere, we generally have found the SP to be far more responsive than its counterparts at the UP.

CONCLUSION AND REQUESTED REMEDIES

It is therefore obvious that--unless effective competition protective conditions are imposed--merger of the UP and SP will seriously reduce, if not effectively eliminate, our competitive alternatives for traffic moving to and from the six major southwestern mills I have discussed above.

Without a question, this will negatively impact our ability to market our products in the United States, Mexico and Canada. The simple fact is that trackage rights granted to the BNSF in the settlement agreement do not enable that carrier to actually act as a real alternative. Our efforts to ascertain precisely how the BNSF would serve our mills have been continually rebuffed, with both the Applicants and BNSF responding that "something will work out, trust us." With all due respect, there is no reason for IP--or for any other adversely affected shipper--to be subjected to that non-alternative.

These carriers have had a long time to consider the situation and have been well aware of the enormous anti-competitive effect of this parallel merger. And, after all, it is their merger application, not ours. It is their responsibility to ensure that the adverse competitive impact does not outweigh alleged public benefits resulting from this loss of competition, and they just have not done so.

Just looking at the scant information they have provided so far, it is obvious that the BNSF not have the terminals, locomotives, crews, boxcars, etc. to be able to service traffic over ng but limited distances outside its own system. It still doesn't know whether it will provide via trackage rights or haulage rights over major segments of this system. Nor does it even hat it will need to pay for this haulage. We have therefore come to the conclusion that the annot be an effective competitive replacement for an independent SP throughout the 4,000 s of trackage rights/sales involved in their agreement with UP at any time in the foreseeable nd, of major concern to IP, it is plain that will not be the case in the Southwest in general mportant Houston/Memphis corridor in particular.

s has of course not escaped our notice that the SP itself has complained about the trackage dy as being inadequate, when it opposed UP's acquisition of the CNW in F.D. 32133. I recall that it there stated, under oath, that the UP did not grant SP trains equal, non-discriminatory treatment or equal dispatch and that the SP suffered as a result. Now, of course, they say it was all misunderstanding, but that is obviously self-serving. Indeed, even the UP recognizes that trackage rights are inadequate to provide a competitive alternative. Prior to reaching an agreement on this merger the UP declined SP's offer of reciprocal switching as an alternative to UP's building a 10-mile branch to serve several Texas chemical plants, saying "it has to have its own tracks to make best use of its operational effectiveness," as reported in the July 26, 1995 issue of *Chemical Week*. It is precisely for this reason that trackage rights over such a substantial amount of track, involving so many industries and such a huge volume of traffic, hamstrung by severe operational constraints and arbitrarily high operating costs, demonstrates that the settlement agreement with the BNSF cannot--and will not--remedy the anti-competitive effects of the merger.

For these reasons, the merger application should not be granted as presented by the applicants. To do so would plainly eliminate competition in major areas of the country without any assurance whatsoever that the competitive balance would be restored in the foreseeable future. Moreover, we also fear a domino effect on other regional railroads, as the essential service provided by smaller carriers such as the KCS and TexMex would be threatened unless appropriate competition protective conditions are imposed.

With that in mind, we urge the Board to condition any approval of the merger upon the following:

1. Divestiture of the SSW lines and all related rail facilities between Houston and Memphis, such divestiture to include all property interests currently held by the SP including trackage or joint facility rights through KCS' Shreveport yard;

2. Assuming KCS is willing to acquire the SSW property noted above, divestiture of the SSW lines and all related rail facilities between Houston and St. Louis to the KCS; alternatively, such divestiture should be in favor some other neutral carrier;

3. Require the merged UP/SP to maintain and keep open all routes, at competitive rates with service no less favorable than will be accorded UP/SP traffic, via the existing KCS junctions with the SP at Beaumont, Houston, Dallas and Shreveport on traffic to or from competitively served points (including ALM originations and terminations at Bastrop, LA) so as to maintain the KCS' friendly connection on traffic destined to or originated at SP-served points;

4. Grant the Texas Mexican Railway's ("TexMex") request to acquire trackage between Corpus Christi and Beaumont, Texas or, in the alternative, grant KCS the opportunity to acquire trackage to Corpus Christi;

5. Require the Applicants to permit a direct interchange between the BNSF and the Central Oregon & Pacific Railroad ("COPR") at Eugene, Oregon and to grant BNSF trackage rights [illegible] the SP between Eugene and Chemult, Oregon; and

6. Require the Applicants to ensure that a viable, competitive routing exists over the [illegible] corridor.

VERIFICATION

I, Charles E. McHugh, do verify that the foregoing is true and correct to the best knowledge, information and belief.

Charles E McHugh

Charles E. McHugh

OF TENNESSEE)
)ss:
OF SHELBY)

ubscribed and sworn to before me by Charles E. McHugh this 5th day of 996

Judy McKnight

Notary Public

My commission expires: MY COMMISSION EXPIRES JUNE 3, 1998

UNION PACIFIC RAILROAD COMPANY

HATLOCK
EXECUTIVE VICE PRESIDENT
MARKETING AND SALES

ROOM 1130
1416 DODGE STREET
OMAHA, NEBRASKA 68179
402-271-3700
FAX 402-271-3142

February 9, 1996

RECEIVED
FEB 16 1996

Mr. Charlie McHugh
Mgr. U.S. Distribution Operations
International Paper
International Place I
6400 Poplar Avenue
Memphis, TN 38197

Dear Charlie:

In response to your January 24, 1996 letter, the overriding intent of the agreement with BN/SF is to preserve competitive service at industries where two-carrier competition is reduced single-carrier access because of the UP/SP merger. For each of the points below, the agreement ...ically states where there is service today by both UP and SP, competition will be maintained by ...iding access to these same industries to the BN/SF. Where the industry is today served on a local ... by either the UP or SP, that industry will continue to be served on a local basis following the ...ger.

The three following industries were addressed in my December 20, 1995 letter and remain ...ted therein.

International Paper, City of Industry, CA is not open to reciprocal switching and not served jointly by UP/SP and therefore, not impacted by BN/SF agreement or UP/SP merger.

International Paper, Turlock, CA is switched by UP, open to reciprocal switch by SP. Traffic is interchanged with SP at Stockton as there is no physical connection at Turlock, and is expected to be handled in the same fashion following the merger. Turlock is specifically covered in the BN/SF agreement.

International Paper, Carrollton, TX. There will be no change in the way this facility is switched from today, which is by the UP, open to reciprocal switch on non-competitive traffic. Responding to your specific question, an example would be if traffic originates at a local BN served industry or one that UP or SP does not have access via either direct service, reciprocal switch or the capability to interline with another carrier. Carrollton is open to switching. If the traffic moves via a gateway such as Memphis where this traffic is available to UP/SP, Carrollton is not open to reciprocal switching under the UP/SP merger agreement or BN/SF agreement.

Remaining destination points:

- International Paper, San Jose, CA will have access under the BN/SF agreement.

Treasure Chest, W. Sacramento, CA will have access under the BN/SF agreement.

Duro Bag / Pacific Forest Resources / Duro De Rio Bravo, Brownsville, TX will have access under the BN/SF agreement.

Pacific Forest Resources, El Paso, TX is not listed as a UP or SP served industry at this location in our customer master listing.

Gaylord, Container Corp. / Treasure Chest Advertising, San Antonio, TX will have access under the BN / SF agreement.

Bardcor Corp. / Central Texas Corrugated / Lux Packaging, Waco, TX. Bardcor Corporation and Lux Packaging will have access under the BN / SF agreement, but Central Texas Corrugated will not be open.

International Paper, Ysletta, TX will have access under the BN / SF agreement.

Houston, TX. All customers that were served by the SP on a local basis will remain closed. All customers served by the UP local will remain closed. All customers served by the UP and SP and not BN / SF or handled on a reciprocal basis will be open to the BN / SF. All industry located on the HBT and PTRA will have the same access as prior to the UP / SP merger. All customers located on the former GH&H line will also be accessible to BN / SF on the same basis.

I hope this adequately addresses the issues that you have outlined in your letter.

Sincerely,

McHUGH EXHIBIT 2

THIS EXHIBIT REDACTED FROM THIS VERSION

McHUGH EXHIBIT 3

THIS EXHIBIT REDACTED FROM THIS VERSION

McHUGH EXHIBIT 4

THIS EXHIBIT REDACTED FROM THIS VERSION

McHUGH EXHIBIT 5

INTERNATIONAL PAPER

CHARLES E. McHUGH
MANAGER
U.S. DISTRIBUTION OPERATIONS

PHONE (901) 763-6287
FAX (901) 763-7295

September 20, 1995

Mr. Jim Shattuck
Executive Vice President - Marketing & Sales
Union Pacific Railroad Company
1416 Dodge Street (Room 1130)
Omaha, NE 68179

RE: UP/SP Merger - Competitive Service to Common Served Points

Dear Mr. Shattuck:

It's been a little over a month since the Union Pacific and Southern Pacific made the announcement to pursue the potential merger of their two railroads. Brian McDonald made us aware early on that the merging parties were mindful of International Paper's concern about service to our Camden and Pine Bluff, Arkansas paper mills, jointly and directly served by the merging railroads and no other rail carrier. These are substantial origin points for International Paper Company (see attached Mill Traffic Profiles) and have always had direct access to two large Class 1 railroads providing equipment, switching and line haul service as well as confidential pricing programs to various markets throughout North America.

International Paper Company ships via rail to many markets and customers from Camden and Pine Bluff as well as from any of 15 other paper mills in the United States to destinations (see attached destination listing) which are jointly and directly served by the merging railroads, and no other rail carrier. Some common points are reached by reciprocal switching arrangements between the merging carriers. Both Camden and Pine Bluff as major rail origins and these customer destinations served by both your carriers represent a significant volume of business (i.e. over 1,800,000 tons per year) creating over 26,000 carload movements annually.

The consolidation of the two remaining, very large, Western railroad franchises is a cause of great concern to us. The elimination of competitive service options which accompany a merger of this magnitude is a cause for concern to us. The redeployment of rolling stock and assets that inevitably accompany rail mergers is a definite concern to us. Car haulage and reciprocal switching access as replacement options are not omparable or as service effective as the direct service access both merging carriers ow enjoy to many of the locations that now concern us. We are firm believers in the arket effectiveness and efficiency of direct rail-to-rail competition in all long haul arkets where alternative modal competition is not cost efficient. The potential for reclosure of direct rail-to-rail competition at our mills or customers destinations is not welcome event.

ur letter of August 3, 1995 states that the merging carriers will "guarantee that ppers at locations now served by both carriers will continue to enjoy two railroad mpetition by agreeing to conditions giving a second carrier access wherever UP and provide the only rail service to a customer". We are most interested in preserving ourselves and our customers the benefits of direct rail-to-rail competition at origin destination, where we manufacture our products and ship these to market. We ld welcome hearing from you what plans you have developed in this regard, more ifically tailored to our named areas of concern and how you expect to create a parable and viable measure of competitive access at the affected locations.

sponse at your earliest convenience would be most appreciated.

truly yours,

arles E McHugh

es E. McHugh

mat

V.P. Crawford - IP
E.D. Greenberg - Esq.
N.J. Tupper - SP

McHUGH EXHIBIT 6

UN.ON PACIFIC RAILROAD COMPA...

ATTUCK
...TIVE VICE PRESIDENT
...ING AND SALES

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RECEIVED
OCT - 5 1995

October 2, 1995

Mr. Charles E. McHugh
Manager - U.S. Distr. Operations
International Paper Co.
International Place II
6400 Poplar Avenue
Memphis, TN 38197

Dear Mr. McHugh:

Thank you for your letter of September 20, 1995 which expressed your concerns relative to Union Pacific's prospective merger with Southern Pacific.

In all merger proceedings dating back to the UP/MP/WP consolidation, Union Pacific has taken the position that the most valid justification for a rail merger was the improvement and strengthening of rail competition. This principle of enhanced competition is consistent with our strategy for implementing a UP/SP merger. At the outset, we committed to significant trackage rights concessions, line sales, or industry access where rail competition was reduced as a result of the UP/SP consolidation. Last week's agreement with BN/SF preserves and even intensifies rail competition in several key areas. Your mills at Camden and Pine Bluff could benefit in several ways from our agreement with BN/SF. A few examples are:

- Two single line routes in the Southern Corridor to California and Arizona.
- Greater industry access in the Chicago area via two single line routes.
- Significantly shorter route to Kansas City.
- Single line access to all UP, SP, BN, ATSF points in Texas.

In addition, we granted significant access to industries who would see rail access reduced from two carriers to one as a result of the UP/SP merger. Consequently, BN/SF will acquire rights to serve local UP/SP points in Brownsville, Corpus Christi, San Antonio and Waco. In California, we granted similar access in Ontario, Fullerton, San Jose and West Sacramento. The attachment outlines other points affected by the agreement.

It is my understanding that you have had conversations with Brian concerning

BN/SF access to Turlock. We are currently working to expeditiously resolve that issue.

We believe that the UP/SP merger will provide intense rail competition in the West. By allowing BN/SF to access Pine Bluff and Camden, International Paper stands to benefit from the option of two financially strong, geographically diverse carriers.

We hope this addresses your concerns.

Sincerely,

Enclosures

jasa1195.wpd

UP/SP POINTS
GRANTED TO BN/SF

Provo UT
Salt Lake City UT
Ogden UT
Ironton UT
Gatex UT
Pioneer UT
Garfield/Smelter/Magna UT (access to Kennecott private railway)
Geneva UT
Clearfield UT
Woods Cross UT
Relico UT
Evona UT
Little Mountain UT
Weber Industrial Park UT
Points on paired track from Weso NV to Alazon NV
Reno NV (intermodal and automotive only -
BNSF must establish its own automotive facility)
Points between Oakland CA and San Jose CA
San Jose CA
Warm Springs CA
Fremont CA
Points in the Livermore CA area (including Pleasanton CA,
Radum CA, and Trevarno CA)
West Sacramento CA
Melrose Drill Track near Oakland CA

Ontario CA
La Habra CA
Fullerton CA

Brownsville TX
Port of Brownsville TX
Harlingen TX
Corpus Christi TX
Victoria TX
San Antonio TX
Halsted TX (LCRA plant)
Waco TX
Points on Sierra Blanca-El Paso line

Baytown TX
Amelia TX
Orange TX
Mont Belvieu TX

Camden AR
Pine Bluff AR
Fair Oaks AR
Baldwin AR
Little Rock AR
North Little Rock AR
East Little Rock AR
Paragould AR

McHUGH EXHIBIT 7

Via Fed Ex

INTERNATIONAL PAPER

October 10, 1995

INTERNATIONAL PLACE I
6400 POPLAR AVENUE
MEMPHIS, TN 38197
PHONE 901 763-6000

Mr. John Hovis, VP Forest Products
Burlington Northern - Santa Fe Corporation
3400 Continental Plaza
777 Main Street
Fort Worth, TX 76102

RE: BN/SF Trackage Rights on Merged UP/SP

Dear Mr. Hovis:

On September 26th the UP/SP announced that they had reached agreement with your railroad on creating access to locations and customers that will lose the benefits of service by two class 1 railroads upon the implementation of the UP/SP proposed merger.

We have heard from UP/SP in very general terms about the agreement's provisions and have heard nothing, in fact, about how it is supposed to work. As one of those customers with paper mills at Camden and Pine Bluff, AR, and with multiple customers today served by both railroads, we are very much interested in how the BN/SF plans to undertake this service. The trackage rights agreement notice says nothing about acquisition of terminals from which to operate in order to support the proposed service. What about locomotives and crews as well as boxcars? We know nothing about the underlying trackage rights cost to your firm and how that will affect your ability to support competitive rates.

Trackage rights without adequate facilities and terminals devolves to car haulage and an inability to control the quality of service to your customer. Even trackage rights with adequate facilities but not joint control over dispatching hamstrings your control over service levels and does not let you control service as you would on your own trackage. Trackage right costs and charges can present a formidable barrier to the creation and maintenance of competitive rates and prices that you are able to independently set and support.

We need to know a great deal more about your plan of operation. How will you source your locomotives, crews and boxcars, etc.? What facilities and terminals will you require? Attached is a summary breakdown of our inbound/outbound traffic for the two Arkansas mills, as well as a summary on volumes moving today to points jointly served by SP and UP. We need to know what rates you are able to support by route set (list of destinations and serving railroad attached for each mill). What boxcar equipment commitments are you in a position to make? We have enclosed data on boxcar specifications that meet our needs at both Camden and Pine Bluff, AR origins. The annual carload volume provided when divided by the AAR average boxcar turns of 12 per year yields the actual car fleet size to support the business available at these two mills.

The answers to these questions are of vital concern to us and we ask that you give this request for information expedited handling. If there is anything further you need from us, please feel free to contact me directly at (901) 763-6287. Your prompt attention would be most appreciated.

Very truly yours,

Charles E. McHugh

Charles E. McHugh, Manager
U.S. Distribution Operations

CEM/mat

Attachments

cc: W.P. Crawford
E.D. Greenberg, Esq.

trackage

THE REMAINDER OF THIS EXHIBIT

REDACTED FROM THIS VERSION

McHUGH EXHIBIT 8

INTERNATIONAL PAPER

October 11, 1995

INTERNATIONAL PLACE I
6400 POPLAR AVENUE
MEMPHIS, TN 38197
PHONE 901 763-6000

Mr. Jim Shattuck
Executive Vice President - Marketing & Sales
Union Pacific Railroad Company
1416 Dodge Street (Room 1130)
Omaha, NE 68179

RE: UP/SP Merger - Competitive Service From/To Common Served Points

Dear Mr. Shattuck:

Thank you for your response of October 2, 1995

Your commitment to the principle of enhanced rail competition is reassuring and one which we can heartily support. In reviewing the information attached to your October 2nd letter we cannot see where the jointly served points of Bayshore, Carson and City of Industry, CA as well as Carrollton and Houston, TX are included in the BN/SF agreement. Perhaps these will be addressed by other arrangements? Once access to Turlock is resolved, we would like to hear further from you on that location as well.

In addition, as I am sure you are aware, single-line routes are not necessarily a panacea to rail shippers in situations where the merger is both reducing competition and replacing equally or more efficient joint-line routes. For example, I would appreciate an explanation as to how the two single-line routes in the Southern Corridor to California and Arizona will benefit IP's traffic; can we expect to see reduced rates or improved service as a result and is UP willing to make a commitment to that effect? Similarly, how does the "greater industry access in Chicago", "shorter route to Kansas City" and "single-line access to UP, SP, and BN/FS" points in Texas translate into improved service or lower costs to IP? In other words, since you are extolling the virtues of the merger of the two railroads that now compete head to head for IP's traffic, we would appreciate a realistic quantification of those benefits.

We have heard only in very general terms about your BN/SF agreement provisions and have heard little about how it is supposed to work. With paper mills at Camden and Pine Bluff, AR, and with multiple customers today served by both railroads direct, we are very much interested in how the BN/SF can undertake this service. The trackage rights agreement notice says nothing about acquisition of terminals from which the BN/SF cars operate in order to support the proposed service. What about locomotives and crews as well as boxcars? We know nothing about the underlying trackage rights [illegible] to BN/SF and how that will affect their ability to support competitive rates.

Trackage rights without adequate facilities and terminals devolves to car haulage and an inability to control the quality of service to your customer. Even trackage rights with adequate facilities but not joint control over dispatching hamstrings control over service levels and does not let a trackage rights carrier control service as he would on his own trackage. As you are aware, for the past several years IP has instituted a competitive bidding arrangement for outbound traffic from Camden and Pine Bluff that is designed to award our traffic to the various origin and connecting carriers on the basis of both costs and service. This system has worked rather well and has benefited the railroads, IP and IP's customers. Will the BN/SF be in a position to realistically bid for this traffic at origin; will the existing routings on which this traffic moves today continue to exist if the merger is approved; and is the UP willing to commit to that? Moreover, trackage right costs and charges can present a formidable barrier to the creation and maintenance of competitive rates and prices that a competing carrier is able to independently set and support. We need to know a great deal more about your agreement. Will you be transferring locomotives, crews and boxcars, etc.? What facilities and terminals will BN/SF acquire?

The answers to these questions are of vital concern to us and we ask that you give this request for information expedited handling. If there is anything further you need from us, please feel free to contact me directly at (901) 763-6287. Your prompt attention would be most appreciated.

Very truly yours,

Charles E. McHugh

Charles E. McHugh, Manager
U.S. Distribution Operations

CEM/mat

cc: W.P. Crawford
E.D. Greenberg, Esq.
N.J. Tupper - SP

McHUGH EXHIBIT 9

BURLINGTON NORTHERN RAILROAD
3700 GLOBEVILLE RAILROAD
DENVER, COLORADO 80216

FREDERICK R. MALESA

Charlie,

Just wanted you to know how much I appreciate your meeting with me. As we discussed, I'm concerned regarding our past responsive-ness and will set to work immediately to fix that. Dave Klein's assigned direct coverage

But I'm at your disposable.

We'll come down quickly and take a hard look at the operating environment. Thank you for supporting us during this transition period.

See you soon and Thanks!

R~ 11/17/95

RECEIVED
NOV 17 1995

TOTAL P.07

McHUGH EXHIBIT 10

INTERNATIONAL PAPER

CHARLES E. McHUGH
MANAGER
U.S. DISTRIBUTION OPERATIONS

PHONE (901) 763-6287
FAX (901) 763-7295

November 29, 1995

Mr. Steven F. Marlier
Sr. VP - Consumer Business Unit
Burlington Northern Santa Fe Corp
3800 Continental Plaza
777 Main Street
Fort Worth, TX 76102-5384

RE: BNSF Trackage Rights on Merged UP/SP

Dear Mr. Marlier:

International Paper Company has two primary paper mills in Arkansas on trackage over which your firm has acquired limited trackage rights in the event of the UP/SP merger. In early October we wrote to your firm requesting the opportunity to hear from you what your plans were to provide service to these two mills and a host of destinations to which we ship where your firm would now become a serving rail carrier (copy attached).

We have not made any headway in trying to determine your plans, except for the rather cryptic outlines we see through your general releases to the media. I did chance to meet Fred Malesa while at the NIT eague annual meeting in Kansas City on November 12, 1995 and briefly discussed some of our oncerns while asking to hear more about BNSF plans.

onsidering the unprecedented size of the trackage rights involved in your joint agreement with SP/UP, readily understand the magnitude of your proposed undertaking as well as the enormous task you face ombine the existing operations of the two railroads. Our concern is that our operations and our tomers not get lost in the backwaters of your own consolidation activity. We urgently need to hear you about your plans and be able to further elaborate to you our long and short term concerns. Your stance to get this critical activity started would be most appreciated.

truly yours,

Charles E McHugh

s E. McHugh

nat

nent

W.P. Crawford - IP
J. Hovis - BNSF
F. Malesa - BNSF
E.D. Greenberg, Esq.

INTERNATIONAL PLACE II • 6400 POPLAR AVENUE • MEMPHIS, TENNESSEE 38197 • (901) 763-6000

McHUGH EXHIBIT 11

BNSF / IP MEETING
DECEMBER 13, 1995

Topics to be Presented / Reviewed

- BNSF/UPSP Overview

- CA / TX locations now served by both UP and SP

CA	TX
Bayshore	Brownsville (Sec. 4b)
Carson	Carrollton
City of Industry	El Paso (Sec. 4b)
San Jose (Sec. 1b)	Houston
Turlock	San Antonio (Sec. 4b)
W. Sacramento (Sec. 1b)	Waco (Sec. 4b)
	Ysleta (Sec. 4b)

("Underlined" locations not covered by trackage rights agreement?)

- Will BNSF provide service to these locations?
- Operationally, how will BNSF provide service to these locations?
- What will be the frequency of local train (i.e. daily?) and switching service?

- Houston - Memphis Trackage Rights

Fair Oaks, AR	Baldwin, AR
North Little Rock, AR	*Pine Bluff, AR*
Little Rock, AR	*Camden, AR*
East Little Rock, AR	Paragould, AR (Not on Houston - Memphis Line)

- Will BNSF provide service to customers at these locations (IP mills included)?
- Operationally, how will BNSF provide service from/to these locations?
- What will be the frequency of daily local train and switching service?

- What equipment (Type/Number) will be provided?

- Can BN/SF detail the control / measurement processes will be implemented to manage and measure rail service?

► International Paper Specific Concerns in Arkansas

- Third Party Switching at IP's Camden, AR and Pine Bluff, AR mills (Rail Link)

- What level of service (better - same - worse) will IP see resulting from BNSF provided service to Camden and Pine Bluff.

- Trackage Rights Agreements permits BNSF to settle for car haulage in lieu of BNSF operations over trackage rights. Rates for car haulage are not named in Agreement - why?

- If car haulage - when will BNSF commence trackage rights operations?

McHUGH EXHIBIT 12

UNION PACIFIC RAILROAD COMPANY

JIM SHATTUCK
EXECUTIVE VICE PRESIDENT
MARKETING AND SALES

ROOM 1130
1416 DODGE STREET
OMAHA NEBRASKA 68179
402-271-3700
FAX 402-271-3142

December 20, 1995

RECEIVED
DEC 27 1995

Mr. Charlie McHugh
Mgr. U.S. Distribution Operations
International Paper
International Place I
6400 Poplar Avenue
Memphis, TN 38197

Dear Mr. McHugh:

This is in reference to previous correspondence concerning questions regarding the UP/SP merger and the associated BN/SF agreement.

The intent of the agreement with the BN/SF is to preserve competitive service at industries where two-carrier competition is reduced to single-carrier access because of the UP/SP merger. Following is an outline describing how the specific cities referred to in your correspondence would be treated under the BN/SF agreement.

- Carson & Bay Shore, CA are local SP points and the BN/SF agreement does not apply. These facilities will remain local.

- Carrollton, TX is served by the MP and is only open to reciprocal switch on non-competitive traffic. The merger will not affect switching status at this facility.

- UP/SP merger will not affect the status of your facility in City of Commerce, CA.

Houston requires additional information as to specific industries. Export movements would not be affected by the UP/SP merger as much of this export traffic is handled by the Port Terminal Railroad which is accessible to a number of carriers.

Turlock is switched by the UP. Traffic is interchanged with SP at Stockton and we expect to enter into a similar interchange agreement with BN/SF at Stockton. Turlock is specifically covered in the BN/SF agreement.

We believe the two competitive single-line routes in the Southern Corridor to California and Arizona will benefit IP in a number of ways. First, UP's traffic currently routed over Kansas City and North Platte will be routed over the Southern Corridor. The new UP route across the Southern Corridor will relieve congestion and reduce transit distance by approximately 400 miles, which will result in reduced transit time and improved service consistency. This translates into improved equipment utilization and availability and reduced inventory carrying costs for IP.

In addition, we believe that both carriers will be motivated to move boxcars back toward the Pacific Northwest - a boxcar deficit area. Two southern routes will provide you with excellent competitive alternatives.

At this time, we cannot specifically demonstrate quantitative impacts on your rate structures in this lane. We think the factors mentioned above will create an incentive for both carriers to compete vigorously for your traffic. Our merger application demonstrates that in instances where UP and BN compete directly as the sole carriers in key corridors, customers have benefitted from intense price competition.

Our Marketing & Sales and Operating personnel met with their BN counterparts and agreed in principal to the operating plan at Camden and Pine Bluff. This agreement will be finalized into a more specific operating plan which will be presented to you on January 15, 1996.

Union Pacific has committed to an environment where BN/SF can provide strong competition for IP's paper traffic from Pine Bluff and Camden. For many years, UP and BN have shared joint facilities in various areas across the country. Our experience has demonstrated that only through close cooperation and fair and equitable dispatching, can both systems stay fluid. Efforts to undermine one or the other have significant negative implications on both railroads' operations. You have our assurance that those beliefs will be reflected in the operating plan.

I hope I have addressed your major concerns. Gary Kolbe will keep you informed as to our progress relative to the issues addressed in our correspondence.

Sincerely,

Jim Shattuck

McHUGH EXHIBIT 13

INTERNATIONAL PAPER

'2 of 6

INTERNATIONAL PLACE I
6400 POPLAR AVENUE
MEMPHIS, TN 38197
PHONE 901 763-6000

February 1, 1996

Mr. David A. Kiehn
Account Manager Forest Products
Burlington Northern Santa Fe
1255 Lynnfield Road, Suite 205
Memphis, TN 38119

Dear Dave:

At our January 15, 1996 meeting, the BNSF told us they would supply us a sample of freight charges from our Pine Bluff, AR facility to various route-sets defined in our latest Bleached Board bid. We were expecting those on Friday, January 26, 1996. The BNSF has missed that deadline and we would like to know when we can except those.

Mr. Pratt also reminded me that the BNSF would supply us the names of those members on the BNSF UP Joint Facilities Team. We also would like the team's schedule as it pertains to our Arkansas facilities at Pine Bluff and Camden.

Please let me know when International Paper will receive this data.

Sincerely,

Charles Scott

Charles Scott ✓
Buyer Transportation Services

c: Fred Malesa, BNSF - Denver, CO

McHUGH EXHIBIT 14

3/6

FAX MESSAGE

This FAX MESSAGE including cover sheet consists of - 4 - pages

To:	Charlie Scott INTERNATIONAL PAPER Memphis, TN
Date:	02/06/96
Subject:	Camden and Pine Bluff, AR

From:	David A. Kiehn, Account Manager BURLINGTON NORTHERN SANTA FE Forest Products Business Unit 1255 Lynnfield Road - Suite 205 Memphis, TN 38119 - 5143		
	Telephone (901) 682 - 1438	Toll-Free: (800) 234 - 9540	Fax: (901) 761 - 0152

Charlie:

In connection with our telephone conversation this morning, I have reviewed all the data furnished by INTL PAPER with regard to traffic volumes from the Camden and Pine Bluff mills. Should the UP/SP merger be approved and BNSF begin operations over the Arkansas line, we can handle a very large percentage of the traffic originating at either mill.

Again, based on the data furnished, there is approximately 5,820 carload potential for BNSF. Of this total 3,235 cars could be considered as BNSF single line movements and 2,585 cars as gateway traffic.

Charlie Scott
INTERNATIONAL PAPER

Attachment 1 provides the destinations and estimated volume for BNSF single line traffic. Although my copy of Attachment 1 includes the rate levels, I have left the Per Car Rate column blank. It would be interesting to know what rate(s) INTL PAPER would want BNSF to establish from the Camden and Pine Bluff mills to the BNSF single line destinations.

The first part of **Attachment 2** provides data in connection with shipments moving via various gateways. Again, I have identified the volume but would have to refine the data to show specific destinations.

The second part of **Attachment 2** shows selected CSXT or NS destinations in Florida, Georgia and North Carolina which could move via the Memphis, TN or Birmingham, AL gateways. Perhaps you would want to fill in the Per Car Rate column for these destinations.

As information, I am scheduled to meet with Chuck Lajeunesse on Thursday February 8 at 10:00am. If you have a few minutes to spare, would like to further discuss the traffic from Camden and Pine Bluff.

Although I will be out of town on Wednesday February 7, please leave me a message if you have any questions or comments.

Dave Kiehn
Account Manager

5676

INTERNATIONAL PAPER

Camden and Pine Bluff, AR

B N S F Single Line Traffic

Destination City	State	Estimated Cars	Per Car Rate	Estimated Revenue
Mobile	AL	300		
City of Commerce	CA	25		
Pomona	CA	75		
Turlock	CA	500		
Cantonment	FL	25		
Des Moines	IA	50		
Chicago	IL	25		
Kansas City	KS/MO	325		
Wichita	KS	350		
New Orleans	LA	560		
Memphis	TN	650		
Brownsville	TX	100		
Houston	TX	75		
Laredo	TX	175		
		3,235		

WK4

Attachment 2

INTERNATIONAL PAPER

65/16

Camden and Pine Bluff, AR

B N S F Gateway Traffic

Destination City	State	Estimated Cars	Per Car Rate	Estimated Revenue
Chicago	IL	425		
East St. Louis	IL	600		
Kansas City	KS/MO	150		
St. Paul	MN	10		
New Orleans	LA	75		
Tupelo	MS	225		
Memphis	TN	1075		
East Winona	WI	25		
		2,585		

Destination City	State	Estimated Cars	Per Car Rate	Estimated Revenue
Plant City	FL	200		
East Point	GA	100		
Durham	NC	150		
Raleigh	NC	225		
Jackson	TN	200		
		875		

K4

TOTAL P.06

McHUGH EXHIBIT 15

INTERNATIONAL PAPER

March 6, 1996

INTERNATIONAL PLACE I
6400 POPLAR AVENUE
MEMPHIS, TN 38197
PHONE 901 763-6000

Mr. James A. Shattuck
Executive Vice President - Marketing & Sales
Union Pacific Railroad Company
1416 Dodge Street, Room 1130
Omaha, NE 68179

VIA FAX (402) 271-3142

RE: UP/SP Merger

Dear Mr. Shattuck:

Since the publication of the BNSF/UP-SP Agreement on September 25, 1995, and the filing of the merger application on November 30, 1995, International Paper has diligently pursued the involved parties to obtain a clear demonstration of how the merger partners in their application, including the BNSF agreement, shall remedy the anti-competitive effects of this merger. To date, our discovery in this proceeding and our direct inquiries of BNSF have raised more questions than were answered and clearly demonstrates the lack of any plan or desire on the part of BNSF to operate over the Houston to Memphis line.

Because International Paper's interests are manifestly impacted by your application, and there exists the possibility that we might yet be able to settle our concerns with it, we ask you to carefully consider whether you are willing to discuss some form of settlement to our issues.

Time is a pressing issue and we ask you to give this your prompt consideration. We look forward to hearing from you at your earliest convenience.

Very truly yours,

Charles E McHugh

Charles E. McHugh, Manager
Distribution Operations

Mike Kelly - UP (402) 271-5104
Gary L. Kolbe - UP (402) 271-6668

McHUGH EXHIBIT 16

INTERNATIONAL PAPER

March 6, 1996

INTERNATIONAL PLACE I
6400 POPLAR AVENUE
MEMPHIS, TN 38197
PHONE 901 763-6000

Mr. Donald C. Orris, President
Southern Pacific Lines
1860 Lincoln Street
Denver, CO 80295

VIA FAX (303) 812-5097

RE: UP/SP Merger

Dear Mr. Orris:

Since the publication of the BNSF/UP-SP Agreement on September 25, 1995, and the filing of the merger application on November 30, 1995, International Paper has diligently pursued the involved parties to obtain a clear demonstration of how the merger partners in their application, including the BNSF agreement, shall remedy the anti-competitive effects of this merger. To date, our discovery in this proceeding and our direct inquiries of BNSF have raised more questions than were answered and clearly demonstrates the lack of any plan or desire on the part of BNSF to operate over the Houston to Memphis line.

Because International Paper's interests are manifestly impacted by your application, and there exists the possibility that we might yet be able to settle our concerns with it, we ask you to carefully consider whether you are willing to discuss some form of settlement to our issues.

Time is a pressing issue and we ask you to give this your prompt consideration. We can discuss this next week at our meeting on Tuesday, March 12, 1996. Look forward to seeing you then.

Very truly yours,

Charles E. McHugh

Charles E. McHugh, Manager
U.S. Distribution Operations

Peter J. Rickershauser (303) 812-5096
Nicholas J. Tupper (770) 434-7913

McHUGH EXHIBIT 17

JIM SHATTUCK
EXECUTIVE VICE PRESIDENT
MARKETING AND SALES

UNION PACIFIC RAILROAD COMPANY

ROOM 1130
1416 DODGE STREET
OMAHA, NEBRASKA 68179
402 271-3700
FAX: 402-271-3142

March 11, 1996

VIA FAX (901) 763-7295

Mr. Charles E. McHugh, Manager
U.S. Distribution Operations
International Paper
International Place 1
6400 Poplar Avenue
Memphis, TN 38197

Dear Mr. McHugh:

Your letter of March 6 asks whether we are willing to discuss some form of settlement to address the concerns you have expressed about the Union Pacific/ Southern Pacific and our agreement with BNSF. You indicated that your discovery in the merger proceeding in Washington, D.C., and your meetings with BNSF have not satisfied you that BNSF will provide competition for your transportation business.

As I have expressed to you previously, we are convinced that our merger conditioned upon the BNSF agreement will offer shippers like International Paper more rail transportation alternatives than are available today. I believe we tried to explain how Union Pacific would serve your facilities after the merger and implementation of the BNSF agreement. However, after that meeting your attorneys filed a formal discovery request to find out additional information about discussions with BNSF on how your facilities would be served. I understand from talking to our attorneys that after IP had a meeting with BNSF to discuss BNSF rates and service after the UP/SP, your attorneys again filed a discovery request.

We have provided you with information about our merger. You have spoken directly with BNSF. Your attorneys have had an opportunity to review the details of the merger and the BNSF agreement in great detail. Yet you are unconvinced. If, as you suggest, there is a possibility that we might reach a settlement, I must suggest that you convey whatever proposal for settlement you have in mind through your attorneys to our attorneys at Covington & Burling in Washington, D.C. In the alternative, you could send a written proposal directly to me and I will provide it to our attorneys for review.

While I am reluctant to suggest this course of action, I feel it is necessary to do so in view of the discovery requests that always seem to follow efforts to discuss how the merger will be of benefit to IP. I can assure you that we will give prompt and serious consideration to whatever settlement offer you propose. Unfortunately, I do not think a meeting to discuss settlement at this time would be very productive.

Sincerely,

Jim Shattuck

CC: Paul Conley
Mike Kelly
Gary Kolba
Brian McDonald
Ken Morrill

McHUGH EXHIBIT 18

Nicholas J. Tupper, Managing Director, Southeast Sales
Southern Pacific Transportation Company
2690 Cumberland Parkway, Suite 222 Atlanta, GA 30339
Phone: (770) 431-1720 Fax: (770) 434-7913

Friday, March 08, 1996

Mr. Charles E. McHugh, Manager
US Distribution Operations
International Paper
International Place I
6400 Poplar Avenue
Memphis, TN 38197

Dear Charlie,

I am writing on behalf of Mr. Don Orris in response to your letter of March 6th, 1996 to him regarding the UP/SP merger. In your initial paragraph you express concern about the BNSF's commitment to provide effective competition over the Houston to Memphis line. As you are aware, the BNSF/UPSP Agreement that you referred to as well as the UP/SP merger filing provide for the BNSF to gain access to all points that are currently served only by the UP and SP through a number of conventional and effective operating and commercial vehicles used throughout the rail industry including trackage rights and haulage rights. This means that your Pine Bluff and Camden, AR mills will continue to enjoy two-carrier rail competition after the merger. This competition will then be between the BNSF system and the newly formed UPSP system, both of which will be significantly more extensive and effective competitors than your current SP versus UP scenario.

I recently sent you a copy of the video taped presentation of Mr. Rob Krebs, President of the BNSF, filmed during a panel discussion before the Houston Transpor tion Club on February 6th, 1996 wherein he speaks directly to his eagerness and commitment to compete for the new traffic that will become available to his company through the terms of the BNSF Agreement with the UPSP and his confidence in the effectiveness of trackage rights as a competitive mechanism. The BNSF already uses their large Memphis yard as their operational and car supply center for the Arkansas, Tennessee, Mississippi, and Alabama area, and the BNSF Agreement provides for their use of UPSP terminal facilities, either through purchase or lease, to support local customers. The details of exactly how the BNSF plans to operate in Arkansas and serve your mills have yet to be worked out; however, they will be inspecting the SSW lines in Arkansas during the next month to determine which facilities they will require and how they will jointly operate the lines after the merger. According to the BNSF Agreement, the BNSF will have until 45 days prior to the merger to determine whether they will want to serve an industry directly or through reciprocal switch, a decision which will influenced by the volumes that customers make available. I am certain that many of the questions which concern you will be addressed in the coming months as the BNSF puts together its business and operational plan for Arkansas.

It is the Southern Pacific's policy not to entertain any commercial or operational considerations in exchange for shipper support or neutrality in the UP/SP merger case, and thus we cannot and are not interested in responding to International Paper's invitation to consider a settlement of your merger concerns in this manner. If, however, International Paper is contemplating putting its Camden and Pine Bluff business up for bid again pending expiration of our current contracts, we would be pleased to submit a timely bid after we receive your written request for proposal indicating the terms and conditions required as you have [illegible]ne in the past.

I know I speak for Mr. Orris when I say we are looking forward to visiting with you on Tuesday, March 12th in your offices as previously scheduled. We are proud of the progress we have made and the business relationship that we have built up with IP over the last few years and look forward to building on that for the future. We will be happy to provide a merger update and entertain any other questions you may have at that time.

Very truly yours,

Nick

Nick Tupper

cc: Don Orris
Pete Rickershauser

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

Verified Statement
of
Roger C. Prescott
Vice President
L. E. Peabody & Associates, Inc.

On Behalf of
International Paper Company

March 29, 1996

TABLE OF CONTENTS

LIST OF EXHIBITS

EXHIBIT NO. (1)	DESCRIPTION (2)
Appendix A	Statement of Qualifications
Exhibit__(RCP-1)	Schematic of BN Routing Alternatives to St. Louis
Exhibit__(RCP-2)	Summary of Loaded Mileage by Movement to Major IP Destinations and Interchanges (Pine Bluff)
Exhibit__(RCP-3)	Calculation of Variable Cost From Pine Bluff to Various IP Destinations (BNSF Trackage Rights-Equipped Box Cars)
Exhibit__(RCP-4)	Calculation of Variable Cost From Pine Bluff to Various IP Destinations (UP Operation-Equipped Box Cars)
Exhibit__(RCP-5)	Calculation of Variable Cost From Camden to Various IP Destinations (BNSF Trackage Rights-Equipped Box Cars)
Exhibit__(RCP-6)	Calculation of Variable Cost From Camden to Various IP Destinations (UP Operation-Equipped Box Cars)
Exhibit__(RCP-7)	Variable Costs Caused By Running Over UP/SP Tracks
Exhibit__(RCP-8)	Comparison of Annual Percent Change in RCAF with URCS Variable Costs Per GTM Related to Trackage Rights
Exhibit__(RCP-9)	Comparison of Cumulative Percent Change in RCAF with URCS Variable Costs Per GTM Related to Trackage Rights
Exhibit__(RCP-10)	Comparison of BNSF Proposed Rates to IP's Current Rates
Exhibit__(TDC-11)	Calculation of Variable Cost From Eugene to Chemult (BNSF Without Trackage Rights-Equipped Box Cars)

I. INTRODUCTION

My name is Roger C. Prescott. I am an economist and Vice President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1321 Cameron Street, Alexandria, Virginia 22314. My qualifications and experience are attached as Appendix A to this verified statement.

I have been requested by International Paper Company ("IP") to review the Railroad Control and Merger Application filed by the Union Pacific Railroad Company ("UP") and the Southern Pacific Transportation Company ("SP") before the Surface Transportation Board ("STB") in Finance Docket No. 32760. The purpose of my review is to evaluate the impact the proposed merger will have on IP's existing rail transportation competitive options.[1/] I also evaluated the BNSF's[2/] proposed operations over the Houston-Memphis Corridor which could potentially serve IP's Camden, AR and Pine Bluff, AR paper mills.

[1/] My analysis is based on my review of the merger application itself and supporting workpapers, the 1994 Costed Waybill Tape provided to me by the ICC, the workpaper's supporting the BNSF's December 29, 1995 submission in this proceeding, UP/SP responses to interrogatories, depositions of testifying witnesses BNSF responses to interrogatories, and the settlement agreements between UP/SP and several western railroads (including BNSF).

[2/] The BNSF refers to the Burlington Northern Railroad Company and The Atchison, Topeka & Santa Fe Railway Company.

II. SUMMARY AND FINDINGS

Based on my review of the UP/SP merger application as well as the workpapers and data submitted by UP/SP and BNSF, my findings and conclusions are as follows:

1. The UP/SP-BNSF settlement agreement will not provide a replacement for the rail competition currently realized by IP.

2. BNSF will be at an extreme competitive disadvantage to UP/SP in the Houston-Memphis Corridor.

3. The routings from Pine Bluff and Camden over the BNSF to IP's major gateway destinations will be longer than UP/SP service and the BNSF's variable cost of service will be higher. BN's variable costs range between per ton and per ton higher depending upon the location where IP's traffic is shipped.

4. BNSF's compensation to UP/SP for trackage rights (3.0 to 3.48 mills per gross ton-mile) exceeds the UP/SP's costs and provides a profit for the landlord (UP/SP). Trackage rights compensation based on costs should be set at 1.48 mills per gross ton-mile.

5. The adjustment mechanism for the trackage rights compensation in the UP/SP-BNSF settlement agreement, which based on 70% of the change in the Rail Cost Adjustment Factor, excluding productivity ("RCAFU"), exceeds the UP's and SP's actual change in costs and provides a further windfall to UP/SP. The adjustment mechanism which

most closely tracks actual cost changes is the Rail Cost Adjustment Factor, including productivity ("RCAFA").

6. The rates proposed by BNSF to IP exceed IP's current rates in an amount ranging between and percent.

7. The UP/SP merger will eliminate competitive routings for 207,000 tons originating at IP's mills in Pineville, LA; Mansfield, LA;[3] and, Texarkanna, TX which currently can originate on either UP or the Kansas City Southern Railway Company ("KCS"). The UP/SP merger will eliminate competitive routings on 34,000 tons originating at IP's mill at Bastrop, LA which is served by UP and the Arkansas, Louisiana and Mississippi Railroad ("ALM").

8. IP has achieved competitive rates on oriented strand board from its Nacogdoches, TX facility due to competitive leverage which are lower than rates SP charges other shippers for similar moves.

Turlock, CA, a major destination for IP paper products, is not covered by the UP/SP-BNSF settlement agreement. Trackage rights over UP from Stockton to Turlock or Merced to Turlock should be granted to BNSF.

IP's Gardiner mill will be impacted by the UP/SP-BNSF settlement agreement because BNSF's route from Eugene, Oregon to Chemult, Oregon is 317 miles longer than the route over SP's line. BNSF's variable costs over the two routes equals per ton

---

field, LA is also called Bayou Pierre, LA.

via Portland, Oregon versus per ton over SP's line. BNSF should be granted trackage rights over SP's Eugene to Chemult line to maintain competition.

III. BNSF CANNOT REPLACE THE COMPETITION AT PINE BLUFF AND CAMDEN, ARKANSAS THAT WILL BE LOST AS A RESULT OF THE UP/SP MERGER

Rail service to Pine Bluff, AR and Camden, AR is provided only by the UP and SP. Table 1 below summarizes the number of tons of inbound and outbound traffic handled by UP and SP at the two locations.[4]

Table 1
Summary of Tons by Railroad
at Pine Bluff and Camden -- 1994

Item	Tons UP	SP	Total
(1)	(2)	(3)	(4)
1. Pine Bluff			
a. Inbound			
b. Outbound			
c. Total			
d. Distribution			
2. Camden			
a. Inbound			
b. Outbound			
c. Total			
d. Distribution			

Source: ICC's 1994 Waybill Sample.

Pine Bluff shipped and received tons in 1994 (Table 1, Line 1c). Overall, percent of this traffic was handled by UP and percent for SP (Table 1, Line 1d). At

For purposes of this analysis, I have included all traffic to/from Pine Bluff and Camden.

Camden, tons were handled (Table 1, Line 2c) of which percent was handled by UP and percent by SP (Table 1, Line 2d).

The merger of UP and SP will eliminate competition and thus have a substantial impact on Pine Bluff and Camden shippers, in general, and on IP's traffic specifically. Based on my analysis, the BNSF will not be in a position to offer the same level of competition as currently exists between UP and SP in the Houston-Memphis Corridor due to its higher costs, insufficient access to traffic and operational disadvantages.

The key to UP/SP's plan to gain approval of their proposed merger is the settlement agreement with BNSF in which they have attempted to address the obvious anti-competitive components of their proposed merger. This section of my Verified Statement evaluates the UP/SP-BNSF settlement agreement to determine if the access granted to BNSF and the trackage rights compensation allows BNSF to be an effective competitor in the Houston-Memphis Corridor.

My analysis of the potential competitiveness of BNSF in this region is discussed under the ollowing topics:

A. BNSF's Skeptical View of Trackage Rights

B. The Lack of Traffic Available to BNSF Over the Houston-Memphis Corridor

C. BNSF's Operations Over the Houston-Mempnis Corridor Will Be Severely Constrained

D. BNSF Has No Plan for Operations at Pine Bluff

E. BNSF's Proposal for Camden is Unrealistic

F. BNSF's Costs Exceed Those of UP/SP to Major IP Destinations

G. The Compensation for BNSF Trackage Rights is Too High

H. Summary

BNSF'S SKEPTICAL VIEW
OF TRACKAGE RIGHTS

BNSF's witness Ice believes that BNSF will be an aggressive competitor in the markets to ich it will gain access under the UP/SP-BNSF settlement agreement. He states that the terms the agreement will allow BNSF to "offer competitive pricing, comparable to other current ckage rights agreements." (Ice, page 12.)[5]

Ironically, the most recent and notable indictment of trackage rights arrangements comes ctly from the BNSF. In a November 1995 interview by Forbes magazine, former BNSF rman Gerald Grinstein addressed trackage rights as follows:

... Ice does not state that BNSF will be able to compete at the price level comparable with the level of UP nd SP competition.

Although Burlington Northern will not oppose the UP/SP merger because of its trackage rights agreement, Grinstein admitted that trackage rights do not necessarily insure unfettered competition. "It's service with some disability", he says. "You've got track maintenance issues and dispatch issues. It is quite different from owning your own track."[6]

It should be noted that this candid assessment of trackage rights occurred well after the settlement agreement had been signed. Thus, by BNSF's own admission, a proposed trackage rights solution to an otherwise anti-competitive merger should be approached with caution.

THE LACK OF TRAFFIC AVAILABLE TO BNSF OVER HOUSTON-MEMPHIS CORRIDOR

A major, and perhaps overriding, impediment to successful BNSF competition under the reement is the small volume of traffic which BNSF will realistically be able to capture, should merger be approved.[7] According to the Applicants, the anti-competitive aspects of the rger would be cured through the granting of trackage rights to BNSF for 2 to 1 shipper ations. Volume and train frequencies are obviously important elements in the determination the viability of BNSF as a competing entity. Capturable volume will be a major determinant BNSF's infrastructural requirements, operating expenses, and most significantly, its ability price competitively.

Forbes, December 18, 1995, *Can Drew Lewis Drive the Golden Nail*, pages 60 and 64.
As discussed below, another factor weighing against successful BNSF competition for traffic involves the cost of operations.

/SP witness Peterson's methodology to estimate the amount of traffic that would divert SF is based on "90% of each movement that was to or from an exclusive BN/Santa Fe nd 50% of each movement that was to or from a competitive point or gateway." on, page 292.) Movements that were to or from UP/SP locations not served by BNSF ot be diverted to BNSF. The percentage distributions provided by Mr. Peterson are made consideration of BNSF's ability to service the diverted traffic. Additionally, Mr. failed to make any adjustment to reflect the captive nature of any volume under contract P. These analytical deficiencies, if corrected, would reduce substantially Mr. Peterson's n of the volume of UP/SP traffic actually available to BNSF. However, even without n of the deficiencies, and adhering to Mr. Peterson's diversion formula, divertable olumes over many trackage rights lines are substantially below volumes required to e infrastructure investment. This is particularly true in the Houston-Memphis Corridor.

rder to determine the eligibility of traffic for BNSF transport over the Houston - corridor I analyzed each movement from the 1994 ICC Costed Waybill Tape ng or terminating in the Houston and Memphis areas and/or traffic which could qualify head movement over the Corridor (e.g., traffic moving through from Beaumont, Texas ngham, Alabama which could utilize the Houston-Memphis corridor). A schematic of ridor for the UP/SP and BNSF major lines are shown in the schematic included as _(RCP-1).

raffic available to BNSF was placed in 3 categories as depicted in Table 2 below. The egory reflects BNSF originated or terminated traffic which could be rerouted to the

Houston-Memphis corridor ("Reroute of BNSF To Trackage Rights"). This rerouted traffic was determined from a manual review of the origins, destinations and interchange locations. For example, a movement originating on the BNSF in Tenaha, Texas for movement to Birmingham, Alabama could be rerouted by BNSF over the Houston-Memphis corridor (instead of moving through Beaumont and Dallas). However, a movement originating in Houston for movement to Denver would not be subject to rerouting. A movement originating in the Houston area and moving to Chicago could be routed either through Dallas or over the Houston-Memphis Corridor. BNSF's witness Owen, in his deposition, stated that traffic would traverse the "most effective routing" (Dep. Tr. 194). Because of the compensation level and the inherent operational problems on the SP line over which the BNSF is granted trackage rights, the most ffective BNSF routing for traffic in the Houston area to the St. Louis and Chicago gateways ill be routed through Dallas instead of the Houston-Memphis Corridor. In total, my review dicates that BNSF can divert 245,580 tons per year from BNSF lines to the Houston-Memphis rridor.

The second category reflects traffic available to BNSF from "2 to 1" locations which can iverted from UP/SP to BNSF. In order to determine the traffic eligible for diversion, I ified all traffic originating or terminating at 2-to-1 locations on the Houston-Memphis or. I then separated the traffic into three groups:

a. Traffic where UP/SP control the originating and terminating location,

b. Traffic where UP/SP control the 2-to-1 location and BNSF controls the other terminal, and;

c. Traffic where UP/SP control the 2-to-1 location and a carrier other than UP/SP or BNSF controls the other terminal.

Traffic controlled by UP/SP at both ends of the movement was designated as not available to BNSF. Following Mr. Peterson's formula, I have designated 90 percent of traffic which originates or terminates from or to an exclusive BNSF location and 50 percent of traffic to or from a competitive location or gateway as divertible to BNSF. The results of this analysis is shown as "Traffic From "2-to-1 Locations." In total, BNSF can divert 873,803 tons per year.

The final category involves traffic available to BNSF from non-Class I Railroads. The ettlement agreement provides that BNSF will be allowed to interchange with any non-Class I arrier which currently interchanges exclusively with UP and SP. Shortline traffic from the 994 ICC Costed Waybill Tape was analyzed using the same procedures summarized for UP/SP ginations. The result of this analysis is shown as "Traffic from Shortlines." Based on the of the efficient routes, the BNSF will divert traffic only from shortlines it has access to h are on the route between Houston and Memphis (i.e., the Little Rock and Western ay). In total, BNSF can divert 50,940 tons per year.

total, I have calculated that BNSF can divert approximately 1.2 million tons per year of along this corridor. Based on BNSF's average load (74.9 tons) and average cars per train s), Table 2 calculates the number of loaded trains per day that the diverted traffic could over the Houston-Memphis Corridor. The traffic level results in 0.6 loaded trains per ch is significantly below the four trains per day (loaded and empty) BNSF has claimed ill operate.

Table 2
Summary Of Traffic Available To BNSF
(Houston - Memphis Trackage Rights)

	Item (1)	Amount (2)
1.	Annual Tons For Traffic Available To BNSF[1/]	
	a. Reroute Of BNSF To Trackage Rights	245,580
	b. Traffic From "2 to 1" Locations	873,803
	c. Traffic From Shortlines	50,940
	d. Total	1,170,323
2.	Average Tons Per Car	74.9
3.	Average Loaded Cars Per Year (L1d ÷ L2)	15,625
4.	Average Cars Per Train	75
5.	Average Loaded Trains Per Day (L3 ÷ L4 ÷ 365 Days)	0.57

[1/] 1994 ICC Costed Waybill Tape.

BNSF'S OPERATIONS OVER THE HOUSTON-MEMPHIS CORRIDOR WILL BE SEVERELY CONSTRAINED

The UP/SP Operating Plan, which is summarized in Volume 3 of the Application, contains proximately 434 pages of detailed operational descriptions, operating statistics and maps. though the Operating Plan is not all-inclusive and, of necessity, relies upon some estimated a, it provides a competent and relatively complete projection of the consolidated operations UP and SP in the event that the subject merger succeeds. Furthermore, UP/SP have provided thousands of pages of workpapers to support the operating plan. However, notably lacking in the UP/SP Operating Plan is any semblance of a detailed description and rationale of projected BNSF operations over the 3,800 miles of track over which BNSF will theoretically provide competitive service under the settlement agreement. In other words, UP/SP understands how the merger of UP/SP will affect its own operations (including the impact on employment, cycle time, dispatching, etc.), but not the operations of the BNSF.

Although occasional mentions of BNSF operations appear in the verified statements, exhibits and workpapers, these references are usually limited to discussions of reciprocal benefits which the BNSF trackage rights operations provide, rather than detailed explanations of <u>how</u> such operations will be conducted. The only supplemental data regarding how BNSF operations would be conducted over UP/SP lines is contained in <u>BN/Santa Fe's Comments on the Primary Application</u>, filed December 29, 1995, approximately one month after the Primary Application was filed. BNSF Witness Neal D. Owen endeavors to provide a description of BNSF's "proposed customer service and train operations in connection with" the merger Application (Owen, page 2). Mr. Owen's testimony concedes that "a formal traffic study was not performed [illegible] the service planning" outlined in his statement (Owen, page 3). He further states that "This [illegible]cription reflects my judgments based on my research and on site visits, together with input [illegible] experienced BN/Santa Fe traffic and operating officers" (Owen, page 3).[8]

[illegible] balance of Mr. Owen's statement provides a limited description of anticipated BNSF [illegible]ons over six primary trackage rights access and purchased operating routes included in

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[illegible]ponse to interrogatories, BNSF stated that they did not conduct any study of operations.

the settlement agreement. While this description may provide a useful general summary of projected BNSF trackage rights operations, neither it, nor any other source provided by the railroads, has developed a detailed operating plan that would enable the STB to assess the feasibility of the trackage rights operations and, therefore, assess the viability of BNSF as a competitive replacement over the Houston-Memphis Corridor.

BNSF's lack of a detailed operating plan to operate over the Houston-Memphis Corridor becomes more significant in view of three important issues which will impact BNSF's ability to operate efficiently over the Houston-Memphis corridor. First, the UP/SP plans to operate the SP line almost exclusively in a southbound direction, which given that a long stretch of track unsignaled ("dark"), will cause northbound BNSF trains to be at a disadvantage. Second, the NSF will not have trackage rights through Shreveport, LA. Moreover, even if such rights are ained, the BNSF trains will be subject to the control of the KCS, which is not obligated to vide the BNSF with equal dispatch. Finally, the BNSF will not have storage facilities in the as/Louisiana area to support the chemicals industry. Each is discussed below.

1. Directional
<u>Flow Problem</u>

he UP/SP operation plan for the Houston-Memphis Corridor calls for trains on the UP line rate northbound and trains over the SP line to operate southbound (UP/SP, Application, 3, page 43). The flow of traffic is shown in Exhibit__(RCP-1). According to UP/SP's es King and Ongerth, this configuration "suits the operation and suits the terrain and suits ting facilities much better..." (Dep. Tr. 508). Applicants decision to operate this way, according to Mr. Ongerth, is "what I would call a no-brainer..." (Dep. Tr. 509). This mode of operation is intended to free-up capacity on both railroads. UP/SP reaches the conclusion that "...even with BN/Santa Fe's diversions of traffic from UP/SP as the result of our settlement, neither the UP routes nor the SP routes could separately handle the traffic of both roads." (Operating Plan, Page 42).

BNSF trackage rights traffic will use the current SP route for both north and southbound novements. Therefore, the directional operation would result in the northbound loads traveling igainst the combined southbound volume of UP/SP traffic. Although the settlement agreement tates that train dispatching and resulting train superiority will favor neither UP/SP nor BNSF affic, any traffic (whether UP/SP or BNSF) will be disadvantaged when moving against the edominant directional movements. Moreover, it appears that the Applicants' decision to run ectionally southbound on the SP was made after the UP/SP-BNSF settlement agreement was gotiated. Thus, the BNSF agreed to and accepted the concept of "equal dispatch" without the owledge that it would be running against the flow of traffic. (Ice, Dep. Tr. 16.)

Compounding the directional flow problem is the fact that the current SP line between ston and Shreveport is largely dark (unsignaled) and has long intervals between sidings. F in its comments dated December 29, 1995, does not address the impact on its transit time oblems with switching caused by operating against the flow of UP/SP traffic. UP/SP's es King and Ongerth have recognized the problems when operating bi-directionally on ston-Shreveport line (nicknamed the "Rabbit"), stating that:

> Manual dispatching, coupled with long intervals between sidings (many ranging from 17 to 25 miles), severely limits the "Rabbits" capacity when operation bi-directionally. If it could be used in one direction only, trains could be moved continuously, one behind another, at steady speeds, and thus a strong but unimproved line could be converted into a high-capacity line without major capital expenditures for CTC and other improvements that would be required if an independent SP were to seek to enhance this line's capacity. Directional routing will also significantly increase the routing of hazardous material shipments from the Gulf Coast area on block signal-protected line." (King/Ongerth, page 44.)

In addition, BNSF has claimed that it will station crew change locations at Shreveport and Pine Bluff. Because of the distance and train interference, it is unlikely that BNSF can operate between Houston and Shreveport with only one crew. In UP/SP's operating plan, the transit time between Shreveport and Houston equalled 32 hours for trains operating southbound (Operating Plan, Volume 3, page 358). Therefore, based on the maximum hours of service laws of 12 hours, BNSF will need, at a minimum, at least two additional crew change locations between Houston and Shreveport in order to handle traffic over the trackage rights.

2. KCS' Control of Shreveport Will Make "Equal Dispatch" Difficult

It is a well known fact that KCS has mounted strenuous opposition to the UP/SP merger and the attendant settlement agreement. The SP is dependent upon trackage rights over KCS lines at Shreveport, LA (Volume 3, page 292). Without them, there is a break in the SP line. These KCS trackage rights agreements, however, do not transfer to BNSF. The UP/SP Operating Plan and testimony of Mr. Owen assume that the STB will grant trackage rights through the Shreveport yard at a compensation level which will keep BNSF competitive. Yet, even if they did, the BNSF would still be subject to instructions which

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grant the KCS yard dispatching control over BNSF trains attempting to traverse the KCS yard. Thus, whether or not the BNSF is entitled to equal dispatch under the settlement agreement, the KCS controls the dispatching and has no obligation to implement that requirement.

3. BNSF Lack of Adequate <u>Storage Facilities</u>

The storage of commodities for the chemical and plastics industry is integral to the transportation and marketing of these products. Without adequate infrastructure in the Houston area, BNSF will not be able to attract tonnage to move over the Houston-Memphis Corridor. UP/SP Witness Richard B. Peterson acknowledges the importance of storage with his statement that:

> "Shippers of some bulk commodities such as plastic pellets often need in-transit storage of their product in shipper-owned railcars on railroad yard tracks. Storage in transit ("SIT") allows plants to be run at capacity and product to be readily available for prompt movement to various end markets as product price and demand change. The UP/SP merger will make new SIT yard capacity available at UP's Amelia Yard (near Beaumont) and in St. Louis, which will importantly increase the competitiveness of the merged system or these commodities. Also, UP's more extensive Gulf Coast SIT capabilities will be made available to SP shippers." (Application, Vol. 2, Peterson, Page 65)

UP/SP Witness Robert D. Willig further validates the crucial role of storage with the following statement:

> "Storage for plastics represents another major dimension of nonprice competition between railroads as plastics generally move from production directly to rail cars, and are often sold while they are in storage in railcars." (Application, Vol.2, Willig, Page 619)

Although stated for entirely different reasons, this portion of Dr. Willig's testimony puts a fine point on the importance of storage capacity in the determination of the relative viability of carriers competing for chemicals traffic. Again, as is the case with other facets of operations, the Applicants have analyzed UP/SP's capabilities with respect to storage capacity while disregarding the storage capabilities of BNSF. BNSF does not have the storage capacity that is available to UP/SP. While the UP/SP have the massive Dayton yard for storage, BNSF would have to rely on the yard at Teague, Texas. BNSF's witness Owen, in his deposition, discussed BNSF's capabilities to utilize the Teague yard for chemicals traffic (Dep. Tr. 191-193). However, as noted by Mr. Owen, the Teague yard is "a little over 100 miles north of Houston" (Dep. Tr. 193). This will hinder BNSF's ability to compete with UP/SP for the chemicals and plastics traffic in the Houston area.

BNSF HAS NO PLANS
FOR OPERATIONS
AT PINE BLUFF

Several witnesses for UP/SP and BNSF have addressed service at Pine Bluff and Camden. [The] structure of UP/SP's operating plan and BNSF's limited comments cast doubt on BNSF's [abi]lity to provide efficient service to IP at Pine Bluff.

The Pine Bluff yard is SP's primary classification yard on the Houston-Memphis Corridor [(UP/]SP Operating Plan, page 192). After the merger, the Pine Bluff yard will be responsible [for bl]ocking southbound traffic and northbound trains will be blocked at North Little Rock, AR. [UP/S]P projects that an additional 233 cars per day will be switched at Pine Bluff (UP/SP switched at Pine Bluff (UP/SP Operating Plan, page 375). Additionally, UP/SP's witnesses King and Ongerth have stated that the Pine Bluff yard will benefit from being operated as a southbound yard, noting that the Pine Bluff yard "works much better as a southbound yard..." (Dep. Tr. 500). These changes in operations will present severe operating difficulties for BNSF to serve IP's Pine Bluff facilities due to added congestion and differences in the operating flow.

In BNSF's December 29, 1995 comments, BNSF's witness Owen claims that BNSF "would use UP/SP's classification yard for local industry work, Little Rock haulage traffic and other terminal work as may be necessary" (Owen, page 21). No specific description or the handling of IP's traffic is discussed by Mr. Owen. BNSF has not identified which yard facilities will be available for Pine Bluff service. Mr. Owen states that this problem is a "detail that has to be worked out in an implementing agreement for our work in Pine Bluff" (Dep. Tr. 160). The BNSF has not shown that it will be an effective competitor for IP traffic because of the lack of details of the facilities to be used by BNSF and an explanation of how BNSF will operate at Pine Bluff.

Finally, the intra-plant switching at the IP facilities is performed by a third party who does access the UP or SP yard. BNSF has not identified how services will be coordinated with independent switching operation. In fact, BNSF has not shown that it can even access the utilized to place IP's cars. To the contrary, it appears that BNSF will not provide any service, but will instead rely on UP/SP to block and set out cars for BNSF (Owen, Dep. 55-156). Under such a scenario, IP's service from the BNSF will be essentially subject control of the UP/SP, thus resembling a haulage situation.

E. **BNSF'S PROPOSAL FOR OPERATIONS AT CAMDEN IS UNREALISTIC**

The Camden yard supports local switching and interchange between UP and SP and a "five-day road switcher works out of the yard serving local industries," (Operating Plan, page 193). After the merger, UP/SP will reconfigure the operations at Camden but will maintain the "assignment of four four-axle road switcher locomotives" for local service (UP/SP operating plan, page 194). Thus, IP's Camden mill will still receive the necessary local switching from UP/SP.

However, BNSF will not have local switching at Camden. According to BNSF's witness Owen, BNSF will serve shippers with through train service to and from Memphis, St. Louis and Houston (Owen, page 20). This type of service suffers three problems. First, IP's facility is not on the SP main line and, thus, BNSF will have to divert its trains to pickup/set-out IP cars. This is not as efficient as operations from local switchers. Second, BNSF's use of through train service will slow down BNSF through trains, thus hindering BNSF's efficiency for all customers in the Houston-Memphis Corridor. The BNSF through train will occupy the main line (which UP/SP claims will handle 24 trains per day), while the locomotive power performs the switching duties. Third, the track and IP's facilities has curves which prohibit six-axle locomotives from operating on the track; therefore, in order for BNSF to serve Camden, BNSF through trains must use the less powerful four-axle locomotives.

BNSF's COSTS EXCEED THOSE OF THE UP/SP TO

MAJOR IP DESTINATIONS

In order to evaluate the viability of BNSF as a competitor to the merged UP/SP from the Pine Bluff and Camden facilities, I have developed the variable costs for movements to IP's major interchange points and destinations which are impacted by the merger. Specifically, I have developed the variable costs over the BNSF route (including trackage rights) and the variable costs over the UP route for the following points:

1. San Jose, CA
2. Turlock, CA[9]
3. El Paso, TX
4. San Antonio, TX
5. Brownsville, TX
6. Waco, TX
7. Carrollton, TX
8. St. Louis, MO (interchange)
9. New Orleans (interchange)

For each location, I have developed the variable costs following the procedure utilized by P's witness Rebensdorf in this proceeding. The variable costs are based on 1994 URCS ndexed to 4Q95). The variable costs reflect the car type predominately utilized by IP quipped 50-foot box car). The average load, for IP's traffic equals 70.1 tons per car from ne Bluff and 63.3 tons per car from Camden. Empty return is based on system average tors for equipped boxcars (1.71 for BNSF and 1.74 for UP). The tare weight equals the em average value of 36.4 tons. The trackage rights payment equals 3.1 mills per gross ton- for all segments where BNSF operates over UP/SP.

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s discussed below, the UP/SP-BNSF settlement agreement does not address how service to this major IP ility will be provided.

In nearly every instance, the BNSF route is more circuitous than the UP route.[10] In addition, the BNSF will operate over trackage rights ranging from 132 miles to 759 miles to handle IP's traffic. The mileage for each route and railroad is shown in Exhibit__(RCP-2).

Based on the inputs discussed above, I have developed the variable costs for each movement. The details regarding BNSF's variable costs for each move from Pine Bluff over the BNSF are shown in Exhibit__(RCP-3). The details of UP's variable costs for each movement from Pine Bluff are shown in Exhibit__(RCP-4). Table 3 below summarizes the variable cost per ton for BNSF and UP from Pine Bluff.

BNSF route to Brownsville is slightly shorter than UP's route.

Table 3
Comparison of BNSF
and UP Variable Costs--4Q95
(Pine Bluff)

Destination/Interchange (1)	Variable Cost Per Ton: BNSF (2)	Variable Cost Per Ton: UP (3)	Variable Cost Per Ton: Difference[1] (4)
Destinations			
1. San Jose, CA			
2. Turlock, CA			
3. El Paso, TX			
4. San Antonio, TX			
5. Brownsville, TX			
6. Waco, TX			
7. Carrollton, TX			
Interchange			
8. St. Louis, MO			
9. New Orleans, LA			

[1] Column (2) minus Column (3).

The variable costs for movements by BNSF from IP's Pine Bluff facility to the major stinations and interchanges exceed those of UP by amounts ranging from per ton and per ton.

The

The variable costs for movements from Camden are shown in Exhibit__(RCP-5) for BNSF Exhibit__(RCP-6, for UP. Table 4 below summarizes the variable costs for IP's movements Camden.

Table 4
Comparison of BNSF and UP Variable Costs--4Q95
(Camden)

Destination/Interchange (1)	Variable Cost Per Ton: BNSF (2)	Variable Cost Per Ton: UP (3)	Variable Cost Per Ton: Difference[1/] (4)
Destinations			
1. San Jose, CA			
2. Turlock, CA			
3. El Paso, TX			
4. San Antonio, TX			
5. Brownsville, TX			
6. Waco, TX			
7. Carrollton, TX			
Interchange			
8. St. Louis, MO			
9. New Orleans, LA			

[1/] Column (2) minus Column (3).

The BNSF' variable costs from IP's Camden facility exceed the variable costs of UP by mounts ranging between per ton and per ton.

The minimum rate level equals the railroads variable costs. Even if BNSF and UP/SP were compete vigorously, the UP/SP will have little incentive to offer rates below the level that the her cost railroad (i.e, BNSF) can offer. Thus the potential exists for rate increases to IP ply because of the cost structure of BNSF.

G. THE COMPENSATION FOR BNSF TRACKAGE RIGHTS IS TOO HIGH

In the event that the UP/SP merger is consummated, the access provided to the BNSF is intended to do no more than return shippers to the pre-merger competitive status. The UP/SP has acknowledged that the trackage rights compensation was meant to "place both carriers on a level playing field" (Rebensdorf, page 301). Therefore, compensation to the merged UP/SP entity should be limited to the reimbursement of UP/SP's costs, including a return on investment based on the current cost of capital.[11] The use of cost-based trackage rights payments is common in the railroad industry. Also, the proper adjustment mechanism for the compensation should be based on actual cost changes or a method that approximates, as closely as possible, the cost changes.

I conclude that the trackage rights compensation to be paid by BNSF is too high. My analysis is discussed below under the following topics:

1. Compensation in the UP/SP-BNSF Agreement
2. Adjustment Mechanism

1. Compensation in the UP/SP-BNSF Agreement

The level of the trackage rights compensation included in the UP/SP agreement with BNSF provides a substantial profit to UP/SP when the BNSF utilizes the UP/SP's line segments. For purposes of this analysis, profit refers to compensation in excess of UP/SP's operating costs,

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[11] For instances where the BNSF will utilize haulage services, those charges should also be based on variable cost of service (including return based on the current cost of capital). The UP/SP-BNSF settlement agreement does not specify the level of charges for haulage service.

depreciation, rents, and a return on investment at the current cost of capital. Compensation at a level higher than the cost incurred provides UP/SP a monopoly rent. Stated differently, the compensation level stated in the UP/SP-BNSF settlement agreement rewards UP/SP for the problems created by UP's and SP's decision to merge.

In order to avoid providing UP/SP a monopoly rent, variable costs should utilize the original cost less depreciation of the railroads' assets. This is the actual cost incurred by UP/SP. The proper level for determining costs in this proceeding are the combined UP/SP URCS costs for 1994 indexed to fourth quarter 1995 ("4Q95") wage and price levels. Trackage rights at this level reflect a maximum charge because the variable costs do not include the cost savings projected by UP/SP as one of the benefits of the merger.

Trackage rights compensation in the UP/SP-BNSF settlement agreement is based on a yment per gross ton-mile. The payment reflects all gross ton-miles of the tenant (i.e., loaded d empty) and the charge is also applicable to gross ton-miles generated by the locomotives of tenant (BNSF). Table 5 below summarizes the compensation in the UP/SP-BNSF settlement eement.[12]

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e agreement also provides UP/SP trackage rights over selected line segments owned by the BNSF. The pensation for these trackage rights also should be based on BNSF's variable costs.

Table 5
Summary of BNSF
Compensation For Trackage Rights
(Mills Per Gross Ton-Mile)

Traffic (1)	Line Segment: Keddie-Stockton/Richmond (2)	Line Segment: All Other (3)
1. Intermodal	3.48	3.10
2. Carload	3.48	3.10
3. Bulk (67 Cars or move of One Commodity)	3.00	3.00

Based on data provided by UP/SP as part of its application, I have developed the compensation level which covers the UP/SP's costs incurred (including a return on investment). The detailed procedures developing the variable costs caused by BNSF running over UP/SP's tracks are shown on Exhibit__(RCP-7). Because the costs are generated on a gross ton-mile basis, the costs are equal for all line segments and train sizes. Table 6 below summarizes the trackage rights charge restated to reflect UP/SP's costs incurred:

Table 6
Summary of BNSF Trackage Rights
Charges Based on Costs -- 4Q95
(Mills Per Gross Ton-Mile)

Traffic	Line Segment	
	Keddie-Stockton/Richmond	All Other
(1)	(2)	(3)
1. Intermodal	1.48	1.48
2. Carload	1.48	1.48
3. Bulk (67 Cars or move of One Commodity)	1.48	1.48

Source: Exhibit__(RCP-7).

Based on the costs incurred by UP/SP, the proper level of the trackage rights payment should be equal to 1.48 mills per gross ton-mile.

2. Adjustment Mechanism

The UP/SP agreement with BNSF provides for future adjustment to the trackage rights rges. The agreement calls for charges to be adjusted based on a price index reflecting 70 cent of the change in the STB's Rail Cost Adjustment Factor, excluding productivity ("70% AFU"). UP's witness Rebensdorf claims that "the 70% factor shares some productivity gains BN/Santa Fe..." (Rebensdorf, page 308).

The use of 70% RCAFU to adjust trackage rights charges will increase the UP/SP profits over time because the charges are based on a price index, not a cost index. The difference in the two indexes is productivity. The UP/SP will not be "sharing" productivity, but instead, will be increasing profits.

The Interstate Commerce Commission ("ICC") recognized in Ex Parte 290 (Sub-No. 4), Railroad Cost Recovery Procedures - Productivity Adjustment that productivity must be part of the index to adjust rates and charges if cost changes are to be recognized. Specifically the ICC stated:

> We will implement this decision by use of two indices, the RCAF (Unadjusted), an index reflecting input prices which will continue to be filed by the AAR, and the RCAF (Adjusted), an index that reflects output (productivity-adjusted) costs. 5 I.C.C.2d 434,437

The ICC's decision recognized the shippers view on productivity which the ICC summarized as follows:

> These shippers argue that, even during the periods when wages or material prices have been rising, their rise has been moderated or offset by increasing productivity, and that by ignoring the productivity gains, the present input index allows rates to rise faster than the actual cost of providing service. (Decision served November 17, 1988, Unprinted).

To demonstrate how an adjustment mechanism based on 70% RCAFU will overstate cost changes, I have compared the cumulative change in 70% RCAFU with UP and SP's actual costs changes for the 1990-1994 time period.[13] In addition, I have compared the actual cost changes

[13] The cost changes measured here reflect the same components shown in Exhibit__(RCP-7), i.e., the below-the-wheel costs.

to the change in the ICC's Rail Cost Adjustment Factor, including productivity ("RCAFA") over the same 1990-1994 time period.

The changes in the indexes and cost are shown in Exhibit__(RCP-8) and summarized in Table 7 below:

Table 7
Comparison of Change In 70% RCAFU and RCAFA With UP/SP Actual Cost Changes -- 1990-1994

Item (1)	Cumulative Percent Change (2)
1. 70% RCAFU	
2. RCAFA	
3. Actual Cost Change Per Gross Ton-Mile	
a. UP	
b. SP	

Over the 1990 through 1994 time period, 70% RCAFU increased percent (Table 7, Line The RCAFA decreased percent over the 1990 through 1994 time period (Table 7, Line Finally, the UP's and SP's cost per gross ton-mile decreased percent and percent, ectively (Table 7, Line 3). The annual changes in these indexes and UP/SP's costs are hically depicted in Exhibit__(RCP-9).

The only proper measure of the level of the trackage rights compensation is the variable cost of service. The proper measure for the adjustment mechanism is cost changes. The adjustment mechanism applicable to the UP/SP-BNSF settlement agreement, which is calculated annually, should be based on the change in costs following the procedures shown in Exhibit__(RCP-7). The adjustment should reflect a 1-year lag so that the 1997 adjustment would be based on the change in costs between 1995 and 1996. Alternatively, if actual costs are not used, then the adjustment should be based on the changes in the RCAFA.

The recognition of actual cost changes is not uncommon to trackage rights agreements and, in fact, is reflected in the UP/SP-BNSF agreement. Section 12 of the agreement provides that he parties can "review the operations of the adjustment mechanism and renegotiate its pplication every fifth year." The UP/SP and BNSF agreed that the restated trackage rights harges reflect the same "relationship to operating costs as upon execution" of the agreement. my opinion, this further shows that <u>cost changes</u> are the proper measure of the adjustment echanism, not <u>price index changes</u>.

<u>SUMMARY</u>

As shown above, BNSF cannot be an effective competitor at Pine Bluff and Camden for eral reasons. First, BNSF does not have enough traffic available to operate efficiently. ond, BNSF will not have the necessary operations in place to provide the line haul and tching services. Next, BNSF's variable costs are consistently higher than UP's cost of service. Finally, the trackage rights compensation paid by BNSF will serve to provide an increasing level of profit to UP/SP thus further decreasing the ability of BNSF to compete.

IV. BNSF RATE OFFERS ARE NOT COMPETITIVE WITH IP'S CURRENT RATES

IP has met with BNSF to discuss BNSF's ability to serve IP's Pine Bluff and Camden facilities. The BNSF has responded with rate offers to selected destinations. The BNSF provided rates for single line service and joint line movements to destinations on Conrail ("CRC"), Norfolk Southern Corporation ("NS") and CSXT Transportation, Inc. ("CSXT"). I have compared BNSF's offer to IP's current rates for outbound paper products to determine if BNSF can be as effective a competitor as the UP and SP. My analysis in shown in Exhibit__(RCP-10) and summarized in Table 8 below:

Table 8
Comparison of BNSF Rate
Offer to Rates Currently Paid By IP

	Rates Per Car		
Current Origin Railroad	Current Rate	BNSF Offer	Difference[1/]
(1)	(2)	(3)	(4)
Single Line (BNSF Direct)			
1. Pine Bluff			
2. Camden			
Joint Line			
3. Pine Bluff			
4. Camden			

Source: Exhibit__(RCP-10).
[1/] Column (3) minus Column (2).

The BNSF offers are much higher than IP's current rates. For Pine Bluff movement, the SF rate offer equals per carload for service to BNSF destination and per carload for rates utilizing joint line service with NS, CSX or CRC. The current rates to BNSF destinations equal per carload while the current rates for service with NS, CSX and CRC equal per carload. For IP's Camden mill, the BNSF has offered rates to BNSF destinations equalling per carload while movements involving NS, CSX and CRC equal per carload. The current rates on outbound paper products from Camden equal per carload to BNSF destinations and per carload for moves to NS, CSX and CRC locations. The BNSF offer ranges between percent and percent higher than the current UP/SP rates. This further shows that BNSF cannot replace the competition that currently exists at Pine Bluff and Camden.

V. THE MERGER WILL NEGATIVELY IMPACT COMPETITION AT OTHER IP FACILITIES

The UP/SP merger will have a direct impact on several additional IP facilities even though those facilities are not "2-to-1" stations (i.e., served by both UP and SP). My analysis of the impact on other facilities is discussed under the following topics.

A. KCS Served Facilities

B. Bastrop Facility

C. Nacogdoches Facility

D. Turlock Facility

E. Gardiner Facility

A. KCS SERVED FACILITIES

IP has three facilities that are jointly served by UP and the Kansas City Southern Railway Company ("KCS"). The three facilities are located at Pineville[14] and Mansfield, Louisiana[15] and Texarkanna, Texas.

Outbound product moves from these facilities in local and interline service. The SP is an important carrier at the 3 locations for terminating traffic and providing overhead access to western gateways. After the UP/SP merger, KCS will lose the independent service to IP from SP thus reducing competitive alternatives. I have identified, from the 1994 Waybill Tape, the

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[14] The UP's station which serves IP's facility is Alexandria, LA.

[15] Mansfield is also known as Bayou Pierre, Louisiana.

total tonnage shipped by KCS for STCC 24 and STCC 26 from these locations. I have also summarized in Table 9 below the tonnage that utilizes the SP as a delivering or overhead carrier.

Table 9
Summary of Tons Handled By SP
<u>From IP's KCS Served Facilities -- 1994</u>

	Tons		
Facility	KCS Originated	SP Handled	Percent SP
(1)	(2)	(3)	(4)
1. Pineville, LA			
2. Mansfield, LA			
3. Texarkana, TX			
4. Total			

all IP's three UP/KCS served facilities originated tons on the KCS. Of the total KCS originations, tons were handled by SP either to destination or as an overhead carrier. For the three facilities, the percentage of KCS traffic handled by SP ranged from percent to percent. Overall, SP handled percent of the traffic.

The parties have recognized that locations other than "2-to-1" points served by UP and SP can be effected by the merger. The rights granted to BNSF in the I-5 Corridor, which allows BNSF access to California without involving the SP or UP is such a recognition. Specifically, regarding the I-5 Corridor, BNSF's witness Lawrence states that without the UP/SP-BNSF settlement agreement "the UP/SP merger would effectively reduce railroad competition in the Corridor <u>from two carriers to one</u>" (Lawrence, pages 1-9). (emphasis added)

The recognition of the impact of the UP/SP merger on the traffic flowing over a corridor is appropriate. The data on IP's traffic flow shows that the merger will have an anti-competitive effect in the corridors utilizing joint KCS/SP movements because of the reduction of KCS' ability to compete with the merged UP/SP

B. **BASTROP**
FACILITY

A competitive problem exists on IP's Bastrop, Louisiana facility which is comparable to the problem IP experiences at its plants jointly served by KCS and UP. The Bastrop facility is served by the UP and the Arkansas, Louisiana and Mississippi Railroad Company ("ALM").

Based on 1994 costed Waybill data, the ALM originated tons from the Bastrop mill. Of the total tons originated by ALM, tons were handled by the SP (percent of all traffic). For 1994, the UP did not originate any tonnage handled by SP. Like the situation at the KCS/UP facilities, the Bastrop mill will also lose competiive alternatives because of the UP/SP merger.

NACOGDOCHES
FACILITY

IP's facility at Nacogdoches, Texas is solely served by SP. This facility produces oriented ...and board (STCC 24996). However, as discussed in the accompanying statement of Mr. ...Hugh, IP is able to negotiate favorable rates from Nacogdoches because of IP's competitive ...ation at other locations (e.g., Pine Bluff). Based on the 1994 Waybill Tape, I have analyzed the rates from Nacogdoches to California, Arizona and Texas to determine if IP rates, on a ton-mile basis, are lower than other SP rates to comparable destinations. The results of my analysis are summarized in Table 10 below.

Table 10
Comparison of IP's Rates From
Nacogdoches With Comparable SP Rates -- 1994
(STCC 24996)

	Mills Per Ton-Mile		
Destination State (1)	IP's Rates From Nacogdoches, TX (2)	Other SP Rates (3)	Percent Difference[1/] (4)
1. California			
2. Arizona			
3. Texas			

N/A = Not available.
[1/] Column (3) ÷ Column (2).
[2/] From Portland, Oregon.
[3/] From El Paso, Texas.

IP's rates from Nacogdoches, Texas range between mills per ton-mile and mills per ton-mile. SP rates from other origins to the same states served by Nacogdoches, Texas range between mills and mills, or between percent and percent higher than the Nacogdoches rates.

After, the merger of the UP and SP, IP's leverage at Nacogdoches, Texas will be decreased because, as stated above, the BNSF will not be competitive with the UP/SP in the Houston-Memphis Corridor, generally and at Pine Bluff and Camden, specifically.

D. TURLOCK FACILITY

IP ships a significant amount of traffic to Turlock, California. Turlock is named in the UP/SP-BNSF settlement agreement but the basis of the service is not discussed. The BNSF should be granted trackage rights to Turlock from either Stockton or Merced, California.

E. GARDINER FACILITY

IP operates a facility in Gardiner, Oregon on a branch off the rail line of the Central Oregon & Pacific Railroad ("COPR"). All traffic from the Gardiner facility is interchanged with SP at Eugene, Oregon even though both BN and SP serve the Eugene yard. As part of the UP/SP-BNSF settlement agreement, UP/SP and BNSF have reached a marketing agreement for the "I-5" Corridor for traffic moving between the Pacific Northwest and California which in part provides that BNSF will allow UP/SP trackage rights over the Bend, Oregon to Chemult, Oregon line segment.[16] As noted by BNSF's witness Lawrence, without the terms in the settlement agreement, "the UP/SP merger would effectively reduce railroad competition in the I-5 Corridor from two carriers to one" (Lawrence, page 1-9). However, while the I-5 Corridor agreement provides substantial competitive benefits to numerous mills in the Pacific Northwest, IP's facility because of its location will not be able to avail itself of this new competitive environment. The problem is due to the BNSF routing versus the SP routing.

In order for BNSF to compete for Gardiner traffic, assuming BNSF obtains interchange traffic from the COPR, the BNSF would have to route IP's traffic from Eugene, Oregon north

[16] BN will purchase this rail line between Bieber, California and Keddie, California.

to Portland, then east to Oregon Trunk Jct. and then south to Chemult. The total mileage from Eugene to Chemult over the BNSF equals 438.6 miles. The SP route from Eugene to Chemult equals 121.3 miles. In order to quantify the impact of this circuitous routing, I have costed the BNSF over routes following the same procedures identified in Section III above. For the movement over the SP line, I have assumed that BNSF will pay the 3.1 mills per gross ton-mile as shown in the UP/SP-BNSF settlement agreement.[17] The traffic moves in equipped boxcars with an average load of 72.8 tons/car. Table 11 below summarizes the BNSF's variable costs over both routes. The details are shown in Exhibit__(RCP-10).

Table 11
Summary of BNSF Variable Costs
From Eugene to Chemult -- 4Q95

Route (1)	Miles (2)	Variable Cost Per Ton (3)
1. BNSF (through Portland)	438.6	
2. BNSF (utilizing trackage rights over SP)	121.3	

The BNSF variable costs from Eugene to Chemult over BNSF lines equal per ton. If BNSF obtains trackage rights over the SP line between Eugene and Chemult (with the trackage rights compensation in the UP/SP-BNSF settlement agreement), then the variable costs equal per ton.

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[17] As noted above, compensation at this level overstates the cost incurred by the landlord. The proper level of compensation, as described above, equals 1.48 mills per gross ton-mile.

In summary, the efficient use of economic resources and the UP/SP's attempt to provide competitive alternative in the I-5 corridor dictate that the UP/SP-BNSF settlement agreement should be modified to provide BNSF trackage rights over the SP line between Eugene and Chemult.

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

ROGER C. PRESCOTT, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof and that the same are true as stated.

Roger C. Prescott

Roger C. Prescott

Sworn to and subscribed
before me this 28 day
of March, 1996.

Witness my hand and official seal.

[signature] M. Shelton
Alexandria, Virginia
12/31/98

STATEMENT OF QUALIFICATIONS

My name is Roger C. Prescott, I am a Vice President and economist with the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1321 Cameron Street, Alexandria, Virginia 22314.

I am a graduate of the University of Maine from which I obtained a Bachelor's degree in Economics. Since June 1978 I have been employed by L. E. Peabody & Associates, Inc.

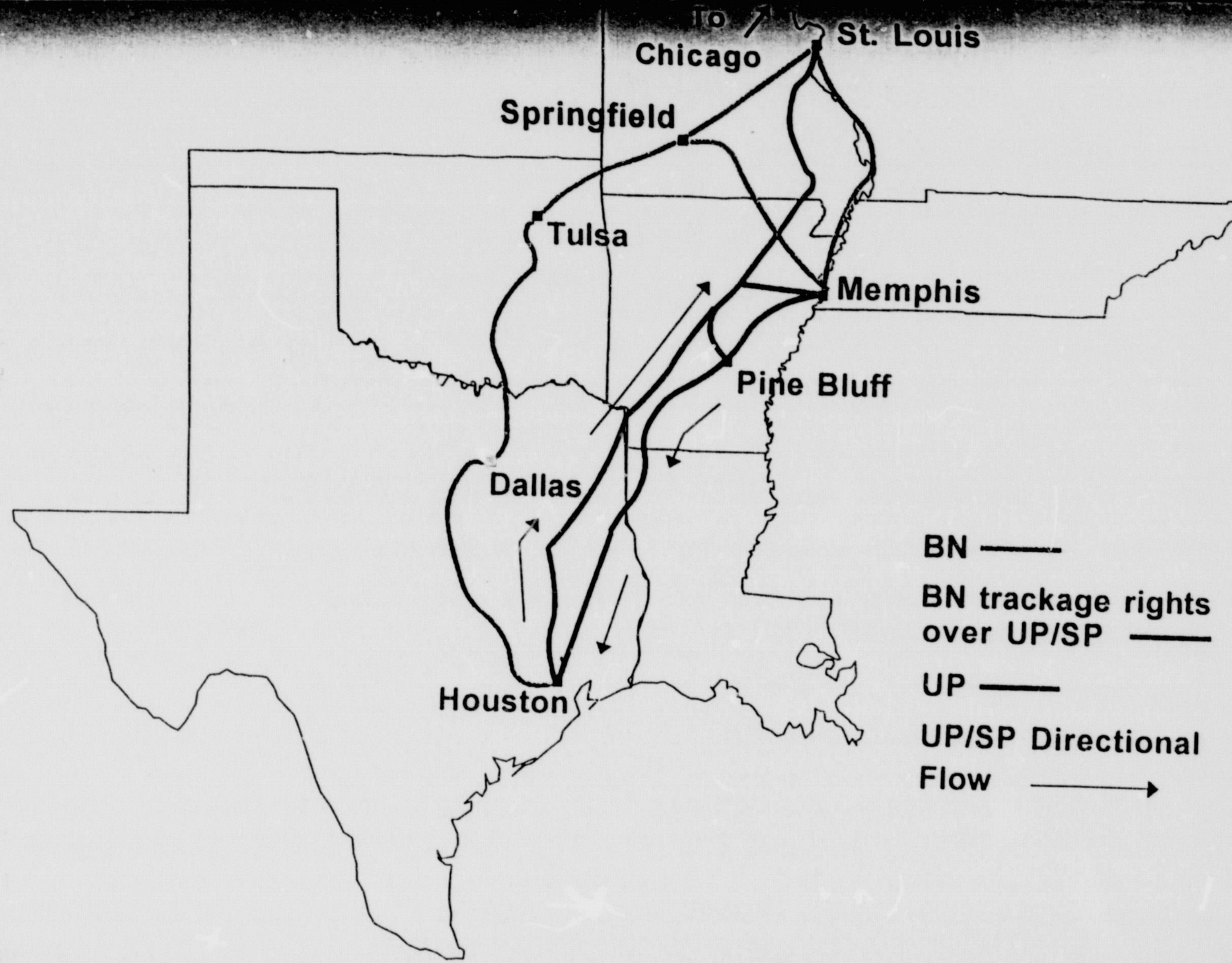
The firm of L. E. Peabody & Associates, Inc., specializes in solving economic, marketing and transportation problems. As an economic consultant, I have participated in the direction and organization of economic studies and prepared reports for railroads, shippers, for shipper associations and for state governments and other public bodies dealing with transportation and related economic problems. Examples of studies which I have participated in organizing and directing include traffic, operational and cost analyses in connection with the transcontinental movement of major commodity groups. I have also been involved with analyzing multiple car movements, unit train operations, divisions of through rail rates and switching operations throughout the United States. The nature of these studies enabled me to become familiar with the operating and accounting procedures utilized by railroads in the normal course of business.

In the course of my work, I have become familiar with the various formulas employed by the Interstate Commerce Commission ("Commission") in the development of variable costs for common carriers with particular emphasis on the basis and use of Rail Form A and its successor, the Uniform Railroad Costing System ("URCS"). In addition, I have participated in the development and analysis of costs for various short-line railroads.

Over the course of the past seventeen years, I have participated in the development of cost of service analyses for the movement of numerous commodities over the major eastern, southern and western railroads. I have conducted on-site studies of switching, detention and line-haul activities relating to the handling of these commodities. I developed the carrier's variable cost of handling various commodities, including coal, in numerous proceedings before the ICC. As part of this testimony I have also developed maximum rates based on ICC procedures. In Finance Docket 32549, Burlington Northern Inc., et al. -- Control and Merger -- Santa Fe Pacific Corporation, et al., I submitted testimony addressing the conditions and proper compensation that should be imposed to preserve competition between the merging railroads. I have also submitted evidence in Ex Parte No. 290 (Sub-No. 2), Railroad Cost Recovery Procedures related to the proper determination of the Rail Cost Adjustment Factor ("RCAF").

As part of the variable cost evidence I have developed and presented to the ICC, I have on many occasions calculated line specific maintenance of way costs based on the Speed Factored Gross Ton ("SFGT") formula. In October 1993, I presented the history and use of the SFGT formula at a conference attended by shippers, railroads, association members and Commission staff. The conference, titled "Maintaining Railway Track-Determining Cost and Allocating Resources," examined the methodologies used to determine maintenance of way costs over freight and passenger rail lines.

In Docket No. R90-1, Postal Rate And Fee Changes, 1990, and Docket No. MC95-1, Mail Classification Schedule, 1995, Classification Reform I, I developed and presented evidence on behalf of third class business mailers to the Postal Rate Commission which critiqued and restated testimony of the United States Postal Service and various intervenors as that testimony related to the development of the proper rate structure for bulk third class mail.



Exhibit_(RCP-1)
Page 1 of 1

L. E. PEABODY & ASSOCIATES, INC.
ECONOMIC CONSULTANTS

Summary of Loaded Mileage By Movement To Major IP Destinations and Interchanges

(Pine Bluff)

Destination / Interchange (1)			BNSF Miles: Trackage Rights Over UP/SP (2)	BNSF Miles: Total (3)	UP (4)
Destinations					
1.	San Jose, CA	1/	426.1	2,406.5	2,252.0
2.	Turlock, CA	2/	401.1	2,293.9	2,231.7
3.	El Paso, TX		600.8	1,355.9	1,031.7
4.	San Antonio, TX	3/	588.1	683.0	606.4
5.	Brownsville, TX		759.1	782.7	885.7
6.	Waco, TX	4/	414.7	586.4	494.3
7.	Carrollton, TX	5/	373.0	627.0	432.9
Interchanges					
8.	St. Louis, MO		131.6	431.0	395.0
9.	New Orleans, LA		316.4	662.3	423.7

1/ Mileage represents movement via Barstow, CA
2/ BNSF settlement agreement does not provide service to Turlock, CA. Assumed trackage rights on UP from Escalon, CA to Turlock.
3/ Mileage represents movement via Sealy.
4/ Mileage represents movement via Temple.
5/ Mileage represents movement via Dallas.

Summary of Loaded Mileage By Movement To Major IP Destinations and Interchanges

(Camden)

Destination / Interchange (1)			BNSF Miles Trackage Rights Over UP/SP (2)	BNSF Miles Total (3)	UP (4)
Destinations					
1.	San Jose, CA	1/	352.7	2,333.1	2,314.3
2.	Turlock, CA	2/	327.7	2,220.5	2,294.0
3.	El Paso, TX		527.4	1,282.5	938.0
4.	San Antonio, TX	3/	514.7	609.6	512.9
5.	Brownsville, TX		685.7	709.3	792.2
6.	Waco, TX	4/	341.3	513.0	400.8
7.	Carrollton, TX	5/	299.6	553.6	339.4
Interchanges					
8.	St. Louis, MO		253.3	552.7	457.3
9.	New Orleans, LA		243.0	588.9	497.8

1/ Mileage represents movement via Barstow, CA
2/ BNSF settlement agreement does not provide service to Turlock, CA. Assumed trackage rights on UP from Escalon, CA to Turlock.
3/ Mileage represents movement via Sealy.
4/ Mileage represents movement via Temple.
5/ Mileage represents movement via Dallas.

EXHIBITS RCP-3 THROUGH RCP-11

REDACTED FROM THIS VERSION

IN THEIR ENTIRETY

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,
SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE
DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

VERIFIED STATEMENT
OF
WILLIAM B. TYE

Brattle/IRI
44 Brattle Street, 3rd Floor
Cambridge, MA 02138-3736

March 29, 1996

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VERIFIED STATEMENT OF
WILLIAM B. TYE

BACKGROUND AND QUALIFICATIONS

I am a Principal at Brattle/IRI Inc., the successor firm to the merger of The Brattle Group with Incentives Research, Inc. I have a BA in economics from Emory University; in 1969 I received a Ph.D. in economics from Harvard University. After receiving my degree I taught economics for three years at the United States Air Force Academy. Since then I have worked as an economic consultant. In 1990, five colleagues and I formed The Brattle Group.

Much of my consulting career has involved regulated industries. I have testified before numerous regulatory agencies and courts involving issues of rates, economics, management, and competition. I have authored or co-authored over 100 papers and publications, including four books on regulated industries. Many of these, including *The Transition to Deregulation: Developing Economic Standards for Public Policies* (New York: Quorum Books, 1991), have addressed issues relating to competition in the railroad industry. I am also the author of *Regulatory Risk* (Boston: Kluwer Academic Publishers, 1993), with A. Lawrence Kolbe and Professor Stewart C. Myers of MIT. My papers have appeared in such publications as *The American Economic Review*, *The Yale Journal on Regulation*, *Energy Law Journal*, *The Rand Journal of Economics*, and *Public Utilities Fortnightly*. I have spoken frequently at seminars and meetings on regulatory issues sponsored by organizations such as the National Association of Regulatory Utility Commissioners, the Federal Energy Bar Association, and the Antitrust Section of the American Bar Association. I have appeared as an expert witness in numerous rail merger proceedings over the past decade and I am a past National President of the Transportation Research Board. My résumé is attached as an Appendix to this statement.

I recently prepared a paper on the proposed merger between the Union Pacific (UP) and Southern Pacific (SP) for the Texas Railroad Commission entitled, "Post-Merger 'Character of Rivalry' in the Proposed 'SOP/UP' Railroad Merger," February 5, 1996. The chief focus of that paper was the anticompetitive effect of the merger in reducing the number of rail carriers from three to two. The present testimony will focus on markets where the number of rail carriers would be reduced from two to one (the "two-to-one" problem) and the consequences for competition in relevant markets..

INTRODUCTION

The Union Pacific (UP) and Southern Pacific (SP) Railroads (herein after, the "Applicants" or "UP/SP") have recently proposed to merge in a transaction[1] that effectively reduces the "Western" United States rail market[2] from three to only two major railroads. The only remaining major Western carrier would be the recently merged Burlington Northern/Santa Fe (BN/SF) system. International Paper ("IP") would be affected by the merger in several ways:

- *"Two-to-one":* IP faces several situations where parallel routes operated by the UP and SP posed effective competition that would be eliminated by the merger. Applicants purport to address the "two-to-one" situations by granting BN/SF certain rights[3] in a negotiated Agreement.[4] However, the proposed remedy is inadequate for preventing competitive harm to IP.

- *Vertical effects:* Several IP plants currently face a "bottleneck," defined as a situation where one leg of the route is served exclusively by one carrier. In each situation the bottleneck railroad connects with other railroads and the remainder of the route is competitive. The merger, however, would threaten competition over the competitive portion of these routes. Applicants have not even addressed the vertical issues, apparently in the belief that the ICC's "neutrality" theory effectively prevents the Surface Transportation Board from even considering the possibility. Nevertheless, IP's plants in Pineville, Mansfield and Bastrop, LA and at S. Texarkana, TX are threatened by the vertical aspects of the merger.

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1 Docket No. 32760, before the Interstate Commerce Commission, *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*, November 30, 1995.

2 In the lexicon of the rail industry, "Western" refers to the territory west of the Mississippi River where eastern and western railroads interchange traffic at the major rail junctions. This, of course, represents more than half of the continental United States.

3 Under a trackage rights agreement, the tenant railroad uses the landlord's tracks for a fee to provide service directly (or via switching or hauling) to the rail shippers adversely affected by the reduction of competition arising from an approved rail merger.

4 As used throughout, the term "Agreement" refers to the Agreement dated September 25, 1995 between the UP and BN/SF as modified and supplemented on November 18, 1995.

SCOPE OF TESTIMONY AND SUMMARY OF CONCLUSIONS

The rights granted to BN/SF by the Agreement provide an inadequate remedy for the competitive harm posed over the "two-to-one" segments. Furthermore, the Applicants' reliance upon the Agreement is inconsistent with their claims elsewhere in this proceeding. First, I note that Applicants claim that the merger is necessary to strengthen a weak SP. Even assuming that Applicants' claims about the SP in this regard are accurate,[3] I note that BN/SF will be a weaker competitor than SP in the Houston-Memphis corridor, and cannot adequately remedy the loss of competition at "two-to-one" segments therein. This decrease in competition will also affect IP's Nacogdoches mill, which is not located on a "two-to-one" segment but has benefitted from the competitive leverage that the IP previously exercised at Camden and Pine Bluff.

Second, I note that the Applicants' arguments with respect to trackage rights rely upon fundamental inconsistencies in market definition. When Applicants discuss the competition facing the merged carriers, they use an expansive geographic definition of transportation markets. However, when they identify areas of potential competitive harm from the merger, such as the "two-to-one" routes, they use an extremely narrow definition of the market. I call this use of alternatively narrow and broad market definitions the "accordion theory." BN/SF trackage rights appear to be the solution only if one relies upon the accordion's narrow definition of the market and ignores the broader definition that Applicants invoke elsewhere. A look at the broader definition relied upon by Applicants suggests that BN/SF will not be in a position to compete effectively under the Agreement.

Third, the Applicants' reliance upon trackage rights to solve competitive problems is fundamentally inconsistent with their analysis of merger benefits. They claim that the merger is necessary to realize efficiency gains that will improve their competitive position, by allowing them to cooperate in a way that they believe would be impossible with contracts only. It is, however, inconsistent to claim that contracts are inadequate for cooperation, while simultaneously claiming that one particular contract, the BN/SF trackage rights agreement, can solve all the competitive problems of the merger.

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[3] According to the verified statement of Charles McHugh, the SP is presently a strong competitor in the Houston-Memphis corridor.

The Applicants' reliance upon trackage rights as the solution for the "two-to-one" problem suffers from far more than logical inconsistencies with their other claims. The Agreement should not be trusted to set trackage right fees at a competitive level. I do not believe that the fees will be set at a level that would allow BN/SF to preserve the benefits of pre-merger competition. This Agreement in particular warrants scrutiny because it is derived between what would become the last two remaining major western rail carriers. I explain the natural economic incentives that the parties will have to set too high a fee. Mr. Prescott's analysis of the actual fee levels in the Agreement provides support for these concerns.

I also address the vertical aspects of the merger. International Paper currently faces situations where there is competition between the UP and KCS for part of the route, while another part is under the "bottleneck" control of the SP. The merger would extend the control of the UP/SP along the entire length of these routes. I explain how these vertical combinations threaten competition by the independent connecting carrier, the KCS, ultimately to the detriment of shippers. Although the "neutrality" theory would suggest that KCS will still be able to compete after the merger, the theory falls apart once the competitive dynamics of the situation are considered. I also point out that Applicants have made numerous arguments in this proceeding that directly contradict the "neutrality" theory. If the Surface Transportation Board invokes the neutrality theory with respect to the vertical aspects of the merger, it must view skeptically Applicants' other arguments that are inconsistent with the theory.

INCONSISTENCIES IN RELYING UPON THE AGREEMENT TO SOLVE THE "TWO-TO-ONE" PROBLEM

Applicants believe that BN/SF, UP, and SP are currently in a struggle for rail markets throughout the West. Their basic rationale for the merger is that it allows UP to fill in its route structure and eliminate circuitous routes in order to compete more effectively with BN/SF. The total number of independent competitors will be reduced in this largely parallel merger,[6] but Applicants claim that competition will be more effective afterwards. A strengthened UP/SP, they argue, will be in a better position to compete with BN/SF. In fact, this is supposed to be a better combination than UP, SP

[6] A "parallel" merger involves one where the two merging carriers currently serve the same routes. A vertical or "end-to-end" merger involves extending the service territory of each to lengthen the haul. Of course, most railroad mergers involve elements of both.

and BN/SF competing separately as they do now in the Western U. S. rail carrier markets, broadly defined. For these claims to be true, BN/SF must be able to provide effective competition after the merger in certain markets with only trackage rights or haulage agreements.[7] Although the SP may be generally strengthened by the merger, the BN/SF promises to become a "weak" competitor in key markets. In fact, BN/SF may well be in even a weaker position than SP was beforehand, because SP had access to its own crews, equipment, switching yards, other facilities and track in these rail service corridors.

The BN/SF Will be Weak in "Two-to-One" Points

The Agreement with BN/SF is designed to solve parallel problems by granting overhead traffic rights to serve all "two-to-one" shippers. However, it does not provide sufficient traffic density for BN/SF to compete effectively. Applicants claim that, absent the merger, SP does not have sufficient traffic density to compete effectively.[8] It appears that, with more limited route access than SP prior to the merger, BN/SF will suffer the same fate.

This fear is borne out in Roger Prescott's analysis of International Paper Company's mills at Camden and Pine Bluff, Arkansas.[9] The elimination of the competition between UP and SP at these facilities is ostensibly remedied by trackage rights or haulage agreements for BN/SF. However, Roger Prescott's analysis shows that there is insufficient traffic volume to sustain economic BN/SF operations over the Houston-to-Memphis corridor where those mills are located at the level and rate of service now provided by the existing competition between UP and SP.

BN/SF's weakness would affect more than just IP's plants located on the "two-to-one" routes themselves. IP's mill in Nacogdoches, Texas would suffer a ripple effect. This mill produces oriented

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7 The Applicants and BN/SF contemplate that in many circumstances, BN/SF will not provide direct service, but merely pay UP/SP to haul the cars on its behalf. Obviously, service competition would be eliminated and BN/SF's ability to compete on price would depend on the terms of the Agreement.

8 Verified Statement of Richard J. Barber, pp. 445-6 ("As a light-density railroad (SP carriers 28 percent fewer revenue ton-miles per mile of road than UP)[footnote omitted] and one that in 1994 continued to operate a large number of short trains... its high costs are a serious problem"). *See also* pp. 442-3 (quoting SP's 1994 S-1 Registration Statement at 42: "SP was burdened with excess, unprofitable and low-density track").

9 Note that if we use witness Barber's assumption at p. 388 that states define a relevant market, UP/SP will have an almost complete monopoly in Arkansas with the possible exception of these rights. See discussion by witness Peterson, p. 92.

strand board (OSB) and is served exclusively by the SP. The majority of this traffic moves westbound in "all door" cars provided by the SP essentially for the exclusive use of IP. Even though the mill is served exclusively by the SP, IP has enjoyed a very favorable rate attributed to: (1) the ability to use trucks to transload to a nearby facility on the Santa Fe, and more importantly (2) the threat of withdrawing traffic from the SP at Pine Bluff and Camden.[10] The rail traffic patterns at these plants illustrate IP's leverage: in 1995 IP moved a total of tons in 1995 in and out of Pine Bluff and Camden by rail, much of which moves to competitive points. It would be a significant loss for SP not to participate in this traffic. By comparison, IP transported only tons by rail at Nacogdoches in 1995. Thus, IP believes that its primary leverage to obtain favorable rates at this smaller location is the threat of diverting substantial business from SP at Pine Bluff and Camden.[11] If BN/SF proves to be a weak competitor on these "two-to-one" routes, then the credibility of IP's threat will diminish and the Nacogdoches plant will suffer as a consequence.

Shifting from Broad to Narrow Market Definitions (the " Accordion Theory")

Applicants use an "accordion theory" to reconcile conflicting claims over competitive consequences of the merger.[12] When attempting to minimize the competition between Applicants that will disappear after the merger, the relevant market[13] is defined very narrowly, such as rail service to a particular plant. If two railroads do not both serve that same shipper with direct service, they are deemed not

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10 Verified Statement of Richard J. Barber, p. 500, treats such leverage as a potent factor in determining rail rates:

> For certain rail traffic—chemicals are a good example—multi-plant shippers (and receivers) are positioned to assert potent leverage that constrains suppositional rail rate increases. This is not just because these customers are big (as they are) or that they have a multiplicity of plants (which many do). Their leverage also stems from situations in which they are exclusively served by one railroad at one plant (perhaps more than one) but by two or more railroads at other of their sites. Through their allocation of traffic at the latter they can discipline rail pricing at their sole-served facilities.

11 See Verified Statement of Charles McHugh.

12 These inconsistencies are part of the larger tension between typical competitive analyses and efficiency arguments. See William B. Tye, "Market Imperfections, Equity, and Efficiency in Antitrust," *The Antitrust Bulletin*, Vol. XXXVII No. 1 (Spring 1992), pp. 1-34.

13 In lay terms, a "relevant market" is a product (or service) and geographic region that is capable of being monopolized. More formally, the *Merger Guidelines* define a relevant market as "a product or group of products and a geographic area... such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price..." Narrowly defined markets tend to minimize the perceived competition between Applicants while broadly defined markets tend to minimize the market share of the merged carrier.

to compete.[14] With careful use of the "accordion," UP and SP can be made to appear to compete with everyone but each other. Indeed, according to their presentation, very little existing competition between UP and SP will disappear.[15]

The accordion expands, however, when the task is to demonstrate that other competitive sources will constrain the UP/SP's market power after the merger[16] or to stress that the merger will create a stronger competitor that can hold its own against other railroads or other modes of transportation.[17] There the relevant market is defined to be all the rail service in a Business Economic Area (BEA), a state, throughout the Western United States, or throughout the entire country—including all other modes of transportation or even railroads in other countries, in this case CN, CP, and the Mexican railroads The BN commissioned a study by ALK, for example, that identified "opportunities" for the BN/SF to mitigate the anticompetitive consequences of the merger. In assessing the prospects for diminished competition, the study defined markets broadly: a "corridor" was defined as one set of BEAs connecting to another, and "point competition" was defined as one BEA connecting to another.[18] For example, the merged UP/SP was judged to obtain an 80% market share in the "Arkansas" corridor. Plant-specific routes were not part of the competitive analysis. Even BN/SF's experts appear to agree that a broader market definition is appropriate for measuring the impact of the merger on competition.

To illustrate the Applicants' use of the accordion, note the narrow market definition behind claims that little traffic will be affected by the "three-to-two" problem, defined as a reduction in the number

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[14] See, for example, Peterson Verified Statement, pp. 191 and 201. Witness Barber, p. 465, claims that "where a location is served only by UP *or* SP, but not both, consolidation cannot directly lessen competition" [footnote omitted].

[15] For example, the accordion at its narrowest would completely exclude the problem at the Nacogdoches plant discussed above because it does not directly lie on a "two-to-one" point.

[16] See Verified Statement of Richard B. Peterson, pp. 8 and 234 ff; Barber Verified Statement, pp. 482 ff.

[17] In his Verified Statement at p. 462, Richard J. Barber uses the entire West when discussing the alleged benefits of strengthening the Applicants. At p. 379, he states that the merger should be evaluated in terms of "today's Western rail market." At p. 411, he invites us with, "Step one is to consider freight traffic within the West. . . ." At p. 421, he looks at corridors as the relevant market.

[18] ALK Associates, Inc. "Preliminary Analysis—Opportunities for Burlington Northern/Santa Fe from the Union Pacific/Southern Pacific Merger" (Aug. 24, 1995), BNSF04184-211 (Ice Dep., Exh. 1).

of competitors from three to two.[19] If the market were defined more broadly as city pairs, the "three-to-two" problem would appear much greater because the merger is "massively parallel."[20] Defining relevant markets as service to an individual shipper's facility obscures the loss of "regional rail competition," the relevant market cited by the *Interstate Commerce Act*.[21] If the market were defined within a broader area such as a BEA, county, state, region, O-D corridor, Western U.S., *etc.* the loss of competition would be more apparent. Applicants do invoke broader market definitions such as regional corridors, but only where they seek to demonstrate merger benefits such as the reduction in route circuity.[22]

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19 Witness Peterson, p. 118, maintains that "much of the carload traffic in these flows is *not* competitive." At p. 122, he claims that "there is very little three-railroad competition in the Pacific Northwest." At pp. 187-188, he claims:

> A review of the actual circumstances with respect to this traffic will reveal that large parts of it are not competitive among three railroads in any meaningful sense.
>
> * * *
>
> . . .[I]t is also useful to understand how relatively little such traffic there is [traffic as *is* truly competitive among three railroads today] and how attenuated the competition is for much of it—and that is the purpose of the discussion that follows.

Note that when the problem is defined as "points" served, as opposed to routes, witness Peterson, p. 189, claims that only 26 points are jointly served by UP, SP, and a third carrier. Little traffic is found to be competitive because the industries are deemed to be "closed" (pp. 191, 201). At p. 581, Professor Willig appears to concur.

20 Peterson testimony, p. 39, provides a list of parallel city pairs that is not complete yet quite significant. See also numerous maps, such as on pp. 128-130, showing corridors where UP, SP, and BN/SF are direct competitors.

21 49 U.S.C. §11344(c) requires the Board to consider "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region." Interestingly, Phillip F. Anschutz, pp. 178-179, views SP as providing service over five major corridors, not simply to points. Its "fine route structure" is its "franchise" (p. 179).

22 The argument that reduced circuity would increase efficiency (Barber Verified Statement, p. 448) and improve the "character of rivalry" by more than enough to offset the loss of a third rail competitor is clearest in regional rail corridors. Witness Peterson claims that "[f]ew matters are more crucial to a railroad's competitiveness than the length of its routes"(Verified Statement, p. 21, *see* p. 22 for claimed benefits). This shows just how parallel the proposed merger really is. Such claims of merger benefits invoke the "Williamsonian Welfare Tradeoff," which is the hope that efficiency gains will more than offset the reduction in competitors (Oliver E. Williamson, "Economics as an Antitrust Defense: The Welfare Tradeoffs," *American Economic Review*, Vol. 58, No. 1 (March 1968), pp. 18-36.) Applicants, however, have completely ignored that the "tradeoff" assumes that the prices to consumers will tend to increase because of greater market concentration. Another difficulty with the "tradeoff" is that welfare gains and losses cannot be accurately measured (Alan A. Fisher and Robert H. Lande, "Efficiency Considerations in Merger Enforcement," *California Law Review*, Vol. 71, No. 6 (December 1983), pp. 1582-1706.) Furthermore, the "tradeoff" accepts wealth transfers from customers to monopolists as long as efficiency is not impaired (Alan A. Fisher, Frederick I. Johnson, and Robert H. Lande, "Price Effects of Horizontal Mergers," *California Law Review*, Vol. 77, No.4 (July 1989), pp. 777-827.) Finally, monopoly prices are inefficient *only* if they deter consumption. Paradoxically, there would be no efficiency losses if the market were so "captive" that consumers still had to purchase the same amount at higher prices (William B. Tye, "On the Application of the 'Williamsonian Welfare Tradeoff' to Rail Mergers," in *The Transition to Deregulation* (New York: Quorum Books, 1991), pp. 311-319.) While this may be attractive to the monopolist, it is not plain that this is a benefit the public would endorse.

The accordion theory is also actively at work when Applicants claim that BN/SF's trackage rights will alleviate anticompetitive consequences. The implicit market definition here is generally a narrow subset of rail origin and delivery points, unless it works to the advantage of Applicants and BN/SF. A broader definition would have granted BN/SF access over more routes. Using the accordion, Applicants attempt to rationalize the limited access they give to the BN/SF under the Agreement. However, by expanding the accordion to look at the broader market, it is apparent that the BN/SF will not have sufficient traffic density to replace successfully the competition that will disappear with the departure of SP, for either the "two-to-one" points or the broader market.

Relying on Contracts In One Area, while Claiming Their Inadequacy In Another

Applicants often attempt to demonstrate that the alleged efficiency benefits of a proposed merger cannot be achieved in any other way. Otherwise, the claimed merger benefits arouse suspicion. If there are such great efficiency benefits to cooperation, why didn't the Applicants simply cooperate through contractual arrangements prior to the merger? Can't the same benefits be achieved without resorting to outright consolidation? Applicants usually respond with the "transaction cost" argument: they emphasize the costs to negotiating and enforcing cooperation through contracts. This indeed is the economists' usual rationale for the entire merger. However, this explanation tends to raise more questions than it answers.

If transaction costs prevent efficient cooperation, how can we trust the Agreement, simply another contract, to prevent the anticompetitive consequences of the merger? How were Applicants able to negotiate a comprehensive solution involving over 4,000 miles of trackage rights?[23] Why should contracts work in one case but not the other?[24] Under the Agreement, won't BN/SF service be handicapped by the same obstacles to cooperation that allegedly plagued UP and SP prior to the merger?[25] Applicants largely ignore the transaction cost issue when addressing trackage rights

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23 For example, witness Peterson at pp. 17 ff discusses the detailed provisions of the Agreement which Applicants characterize as quite extensive.

24 Note, for example, that witness Peterson's claims at p. 67 of benefits of "opportunities to reposition equipment efficiently" seem clearly to be the example of a merger benefit that could have been achieved with voluntary agreements without a merger.

25 Switching gears, Applicants assert that there is no problem with the BN/SF Agreement because "[e]very major railroad in the United States relies substantially on trackage rights to compete." (Peterson Verified Statement, p. (continued...)

agreements. On the other hand, they attempt to justify the merger by stressing the obstacles to independent cooperation. Witness Peterson invokes the transaction costs of contracting in order to establish the benefits of single line service:[26]

> Joint-line service is inferior not just because of the mechanics of interchange, the delays attendant upon negotiations between two companies, and the difficulty of coordinating two billing and customer service functions, but because separate railroads inevitably and inescapably have differing priorities, often based on sharply differing lengths of haul (the so-called "gateway watershed problem"), which prevent them from agreeing on the best rate and service offering for the shipper.
>
> *   *   *
>
> Here, we are dealing with two railroads that have for the most part not cooperated, and the single-line service benefits of this merger are correspondingly greater.
>
> *   *   *
>
> Independent railroads simply do not agree to operate their basic routes and facilities in common. The reasons are the same as those that make joint-line service inferior to single-line service: differing priorities, railroads' desire for control of their separate destinies, and the inherent difficulty in reaching agreement on complex and ever-changing matters. The only way to realize the efficiencies of jointly operating UP's and SP's lines is for the two to merge.
>
> Upon merger, UP/SP will gain in several major corridors the type of route and terminal flexibility that I have described.

Witness Barber, pp. 440-441, echoes this same theme:

> Further, since the transaction contemplates diverting traffic and revenue from what are presently UP's lines to SP's, or vice versa, it can work only if the two are united. For example, traffic that UP now moves between Utah and Oakland will shift to SP's line, while traffic now carried by SP over its circuitous line between Los Angeles and Memphis via San Antonio will be routed over UP east of El Paso. As independent roads, each could be expected to focus on what it would "lose," and hence the publicly-beneficial payoff of readaptation would be foregone. Consolidating UP and SP into a single railroad—with a unified strategic view—is thus indispensable to the realization of the gains achievable through their combination and fundamental reconstitution.

If we turn to the BN/SF Agreement and examine whether they have somehow managed to tackle the challenge of cooperation, we realize several glaring deficiencies at least in the Houston-Memphis corridor. Mr. Prescott's analysis reveals that there is not even a cogent operating plan in place. Moreover, one does not even appear feasible given the traffic control problems. BN/SF would be

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25 (...continued)
168.)

26 Peterson, pp. 42-3, 57.

taking cars in the opposite direction of the UP/SP on a single line of track, which for long stretches is dark and contains inadequate sidings. Moreover, BN/SF would not have access to essential switching yards, nor would it be investing in rail cars, nor crew or repair facilities.

The Applicants cannot have it both ways. If the difficulty of contractual cooperation does indeed justify this merger, then the Board should take a close look at the current Agreement and realize its inadequacies. If the Board declines to scrutinize the Agreement, it cannot also accept the claim that the merger is *required* because cooperation between the UP and SP would otherwise be impossible. The Agreement would be impressive indeed if it could be relied upon for such an ambitious task as preserving competition, while the UP and SP have been unable to even coordinate joint traffic and car routing efficiently.

THE BN/SF AGREEMENT CANNOT BE TRUSTED TO REMEDY COMPETITIVE PROBLEMS

In the past, the ICC tried to avoid involvement in matters of trackage rights agreements consistent with the view that the interests of the tenant railroad can be assumed to protect the public interest. However, an interesting feature of the Agreement is that it admittedly gives BN/SF benefits and rights that go beyond the level necessary to restore competition.[27] This raises the question of what was UP's *quid pro quo*.[28] Certainly, the Commission cannot simply assume that an agreement will serve the public interest when it is signed between what would be the last two remaining major western rail carriers. In fact, the Agreement threatens to facilitate non-competitive results by increasing the communication, coordination, and interdependence of the carriers.

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27 Verified Statement of Richard B. Peterson, pp. 161 ("In agreeing to create a new BN/Santa Fe single-line route via Bieber, the Applicants have gone far beyond any competitive issue"), 165.

28 Witness Peterson, at pp. 16-17, notes that some of the benefits to BN/SF were "not needed to address any loss of competition in the UP/SP merger." What then were the purpose of these concessions by UP to BN/SF? Witness Laurence C. Yarberry, p. 266, notes that SP agreed not to oppose the BN/Santa Fe merger "in the form of private agreements."

The Agreement was Drafted in a Highly Concentrated Market

An agreement signed in the context of a highly concentrated market can lead to noncompetitive outcomes. It is one thing to rely upon contracts between two carriers who are among the seven or eight in the relevant market. Competition from other companies would prevent any non-competitive terms from profiting either of the two parties to the contract. In a concentrated market, however, non-competitive contractual terms can arise naturally from the recognized interdependence of the parties. This is no different than the ability for prices to rise above the competitive level in concentrated markets even absent collusion. Despite the Applicants' use of the accordion theory, there is ample evidence that the merger is occurring in a highly concentrated environment.

In their public statements, Applicants have chosen to focus on the "character of rivalry" between a merged UP/SP and the BN/SF.[29] This discussion is both problematic[30] and ignores the fact that large parts of SP's current route system consists of corridors in which the chief competition currently is between UP and SP. The scope of the Agreement appears to conclude that the competitive problem for these markets exists only at the lowest possible level of aggregation: specific plant sites where both SP and UP serve the shipper directly (or via reciprocal switching). Lost entirely is the possibility that competition of the intramodal, product, and geographic variety[31] is reduced in broad rail transportation corridors; *e.g.*, (1) the Central Corridor from the Bay Area to Kansas City and St. Louis and (2) Gulf Ports to St. Louis and beyond to Chicago, *etc.*, where currently the chief competition is between UP and SP. Using this more inclusive relevant market for examining the current competition between UP and SP implies that the "two-to-one" competitive problem is much greater than the traffic which the Agreement with BN/SF purports to address.

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29 Daniel Machalaba, "Union Pacific Sees Big Savings in Merger Plan," *The Wall Street Journal*, December 1, 1995, p. B10.

30 Witness Willig relies on assertions of excess capacity in the rail industry to maintain that the "character of competition" will intensify as a result of the merger (Willig Verified Statement, pp. 557 and 612). Witness Barber, p. 476, claims that "all major railroads have significant unused resources." These claims are contradicted by the Applicants' claims that they suffer from bottlenecks and capacity shortages that can only be solved via merger. Richard K. Davidson on behalf of the UP claims that "capacity bottlenecks will be eliminated" (p.171) (see also p. 175). John T. Gray on behalf of the SP complains of "route congestion" (p. 236). Witness Peterson, p. 13, claims that the merger will produce "major increases in efficiency and capacity for overloaded rail systems." At p. 55, he states that "SP faces even more serious capacity constraints." Witness Barber, p. 437, claims that "this is a snarl of movements that presently constrain UP and SP."

31 See *Ex Parte* No. 320 (Sub-No. 3), *Product and Geographic Competition*, 2 I.C.C. 2d.1, for discussion of product and geographic competition.

The economic literature on the economics of the rail industry and U.S. industry in general has addressed the issue of competition and concentration on numerous occasions. The consensus can be readily summarized: *Concentration matters and it has an independent elevating effect on price*, apart from the "character of rivalry."[32] There is no question in the literature that having more railroads competing in a market tends to have a major impact on price. For example, Grimm reported:

> . . .increases in concentration in the intermediate ranges [HHI 4500-6500] have perceptibly larger effects on prices. [footnote omitted] . . . It appears that competitive effects of mergers are much more serious when initial concentrations are between 4500 and 6500. . . .[T]ransformations of markets with three firms, not equally sized, to two firms appear to produce the greatest harm.[33]

Although researchers have found "the greatest effect occurred when an additional interline carrier raised the number of interline carriers in the market from one to two," additional carriers also were shown to favorably affect economic welfare.[34] Several empirical studies by James M. MacDonald reached the conclusion that in grain transportation markets: "competition among railroads has a statistically significant, fairly strong effect on rates. More competitors, as measured [in the statistical analysis] are associated with lower rates."[35] Elsewhere, he noted that:

> . . .railroad mergers that increase concentration will lead to rate increases. . . . The analysis shows an important, statistically significant effect of concentration on prices in an industry with high barriers to entry and large capital commitments.[36]

Richard C. Levin confirmed these empirical results with simulations of the results of rail rate deregulation using various assumptions about market structure.[37] His results were that "the degree

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32 See [Redacted] Verified Statement of Robert D. Willig, Docket No. 32760, November 30, 1995.

33 Curtis Grimm, "Horizontal Competitive Effects in Railroad Mergers," *Research in Transportation Economics*, Vol. 2, T. Keeler, ed. (Greenwich, CT: JAI Press, 1985), p. 40.

34 Curtis M. Grimm, *et al.*, "Foreclosure of Railroad Markets: A Test of Chicago Leverage Theory," *The Journal of Law and Economics*, Vol. XXXV (October 1992), pp. 304.

35 "Railroad Deregulation, Innovation, and Competition: Effects of the Staggers Act on Grain Transportation," *Journal of Law and Economics*, Vol. 32, No. 2 (April 1989).

36 James M. MacDonald, "Competition and Rail Rates for the Shipment of Corn, Soybeans, and Wheat," *Rand Journal of Economics*, Vol. 18, No. 1 (Spring 1987), pp. 160 and 162.

37 Richard C. Levin, "Railroad Rates, Profitability and Welfare Under Deregulation," *Bell Journal of Economics*, Vol. 12, No. 1 (Spring 1981), p. 16. See also "Railroad Regulation, Deregulation, and Workable Competition," *American Economic Review*, Vol. 71, No. 2 (May 1981), pp. 394-398.

of interrailroad competition has a powerful influence on the level of rates."[38] In the model, "the degree of competition," *depends on both the number of firms in the industry and the incumbents' beliefs about how rivals will change the level of service in response to their own change in service.*

A large number of studies have looked at the stability of price-fixing agreements in the rail industry. Most of these looked at a market structure prior to the recent wave of mergers and in situations where antitrust laws were inoperative, or regulation was pervasive.[39] These do not necessarily imply that similar findings would hold today, particularly in light of the dramatic reduction in the numbers of competitors that has occurred since 1980.[40] Even so, claims that price fixing agreements are bound to fail in the rail industry ignore two important structural elements. First, higher prices can be expected from increased concentration even in the absence of explicit collusion. Professor F.M. Scherer, a leading authority on industrial organization, notes:[41]

> Any realistic theory of oligopoly must take as a point of departure the fact that when market concentration is high, the pricing decisions of sellers are interdependent and the firms involved can scarcely avoid recognizing their mutual independence. Perceptive managers will recognize that their profits will be higher when cooperative policies are pursued than when each firm looks only after its own narrow self-interest. As a consequence, even in the absence of any formal collusion among firms, we should expect tightly oligopolistic industries to exhibit a tendency toward the maximization of collective profits, perhaps even approaching the pricing outcome associated with pure monopoly.

Second, rail competitors engage in an unusually high degree of communication because of their joint ownership of facilities and joint pricing actions (even in the absence of rate bureau immunity). As

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[38] Levin, "Railroad Rates," p. 6.

[39] See, for example, Glenn Ellison, "Theories of Cartel Stability and the Joint Executive Committee," *Rand Journal of Economics*, Vol. 25, No. 1 (Spring 1994), pp. 37-56, for a recent example and citations of other such studies. See also Chapter 10, "Railroad Freight Rates," in *Concentration and Price*, Leonard W. Weiss, ed. (Cambridge, MA: MIT Press, 1989).

[40] Professor Willig has urged that the Board ignore this research entirely because of alleged flaws in the data and various other objections(Verified Statement, pp. 558-576). My understanding is that Professors Grimm and MacDonald will reply that these objections are not valid because they are based on erroneous beliefs about their research. Moreover, Professor Willig's criticism of Professor MacDonald's use of crop reporting districts, seems peculiar. It is not obvious why the same criticism, if valid, would not apply to Applicants' use of BEAs (Peterson, p. 119), States (Barber, p. 388), *etc.*

[41] F.M. Scherer, *Industrial Market Structure and Economic Performance* (3d. Edition), 1990, p. 226. *See also* Andreu Mas-Colell, Michael D. Whinston, and Jerry R. Green, *Microeconomic Theory* (1995), pp. 389-427 for an analysis of oligopoly behavior.

Professor Scherer observes, cooperation "is much more likely to emerge in oligopoly pricing when rival managers keep one another informed of their plans and activities (if not in smoke-filled rooms, then through the business press)."[42] The present Agreement between BN/SF and UP/SP is a prime example. It stands to facilitate non-competitive pricing by enhancing communication and interdependence among competitors. By resorting to haulage rights on certain routes, for example, the Agreement places the BN/SF directly in reliance upon UP/SP for successful operations.

The important point is that the proposed merger will increase market concentration in an already concentrated environment.[43] Conjectures of the "character of rivalry" are not reliable, especially when economists agree that market concentration does matter. An agreement with the BN/SF signed in this environment simply cannot be relied upon to protect competition. In addition to the possibility that the Agreement may contain non-competitive terms and conditions, it will facilitate non-competitive pricing in the future by increasing the communication and interdependence of the BN/SF and UP/SP.

The Parties Cannot Be Relied Upon to Price Trackage Rights Competitively

If trackage rights are to replace the competition lost by the elimination of SP, the terms and conditions must leave the BN/SF in a position to compete effectively. This means that the BN/SF must be in no worse a competitive position than SP was prior to the merger. The BN/SF must be able to meet the *pre-merger price and service levels in the marketplace*, or shippers will be worse off. The ability of the BN/SF to compete effectively depends on the price it pays for trackage rights. The UP/SP has no incentive voluntarily to set a price for trackage rights that would allow competition at pre-merger levels.

Some economists urge a reliance on private trackage rights agreements because they believe that voluntary negotiations will yield efficient prices.[44] They believe that two merging railroads naturally

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42 Scherer, *supra* at 215.

43 Indeed, while the ICC may have had a somewhat permissive and laissez faire approach toward trackage rights agreements in its BN/SF decision, the structure of the relevant market in this case is more concentrated, and therefore, the trackage rights agreement at issue here requires more scrutiny.

44 For a critique of the views of these economists, see William B. Tye, Preserving Post-Merger Rail Competition (continued...)

have the incentive to set a price for trackage rights that will allow connecting carriers to compete efficiently after the merger. However, the natural incentive of the merging railroads is to preserve the benefits that they stand to gain from increased market power. If the merging railroads are allowed to do as they please, they can be expected to set a price for trackage rights that would merely "cement in" the effects of reduced competition. Even if service via the BN/SF could survive, it will be to no avail in eliminating market power if the price for trackage rights is set too high. Common sense tells us that the controlling railroad would never voluntarily agree to a trackage rights arrangement that undermines the rewards of its increased market power. Only Board-mandated terms to force that result will accomplish that objective.

Mr. Prescott's analysis of the trackage rights compensation issue reveals that the price BN/SF will pay Applicants starts out at too high a level. He estimates the spread between actual operating costs and the RCAF-U, concluding that the cost disparity will grow in later years. Pricing trackage rights compensation above the cost to UP/SP would certainly raise the floor to both the BN/SF and shippers on all rate discussions.

Some have argued that the competitive incentives of the "tenant" railroad may help secure a price for trackage rights that will permit effective competition after the merger. This might be true in some cases, but not necessarily in all. As explained above, the Agreement was signed among two competitors in a highly concentrated market. A duopoly may well realize that it is mutually more profitable to pay and receive high rents, realizing (1) that these high rents will lock in a floor to rates that did not exist prior to the mergers and (2) that the mergers replaced competition from track-owning railroads with competition between tenant and landlord. Perhaps the tenant believes the Board will take a *laissez faire* position. It would therefore be mutually profitable for the tenant and landlord to sign an agreement that "cements in" the post-merger profits of the landlord and the tenant. Perhaps the tenant is itself a merged carrier that succeeded in getting the prospective landlord to overpay in the last merger proceeding and feels it is time to reciprocate. Perhaps the tenant has received a *quid pro quo* as a result of other features of the agreement,[45] and really has no intention

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[44] (...continued)
via the Parity Principle," *Transportation Journal*, Vol. 26, No. 2 (Winter 1986), pp. 39-54.

[45] Witness John H. Rebensdorf, p. 298, candidly admits that KCS and Conrail could not offer "offsetting rights of value to UP/SP."

to compete with the landlord because of the overpriced trackage rights.[46] The only way to ensure that competition has not been sacrificed in the Agreement is for the Board to enforce the ability of the BN/SF to compete at the same level that the SP could prior to the merger.

Finally, Professor Willig's argument concerning the "character of rivalry" assume similar variable and fixed-cost relationships among competitors both before and after the merger. Professor Willig is losing sight of the fact that the BN/SF will have high *variable* costs from paying for trackage rights. Its competition is supposed to replace that of the track-owning SP which had low variable costs but faced high *fixed* costs to using track. Obviously, the price of trackage rights could be set high enough to eliminate the incentive for vigorous competition, even assuming that Professor Willig is otherwise correct in his arguments.

VERTICAL EFFECTS

Summary

Competitive analyses of railroad mergers often distinguish between "horizontal" and "vertical" effects. A merger is said to have a potential "horizontal" effect if it reduces the number of independent carriers that previously competed for service. **Figure 1** shows an example of a horizontal effect: two railroads with parallel routes merge, creating the "two-to-one" problem. Figure 1 also shows the "vertical" effect that applies when, prior to the merger, part of the route is a "bottleneck" controlled by only one carrier. In these situations the merger extends the amount of track controlled by the

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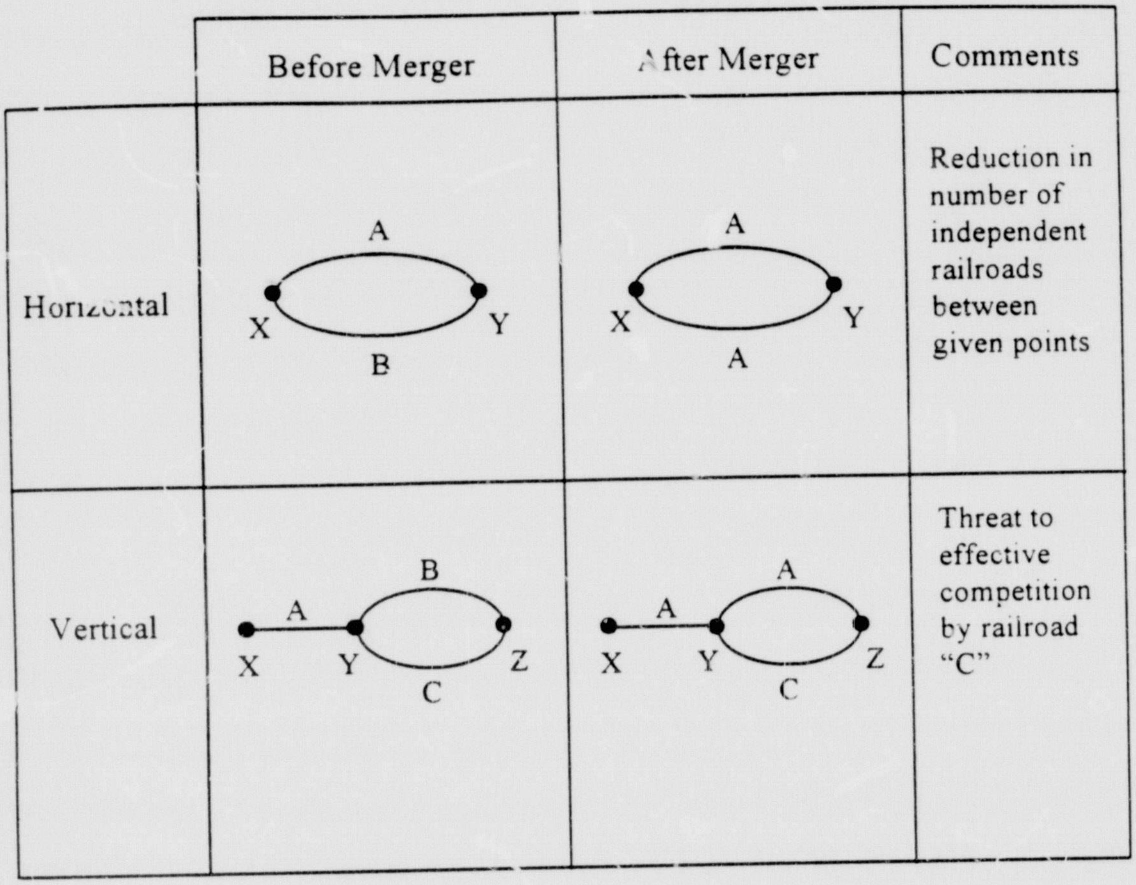
[46] Witness Rebensdorf, p. 295, notes that BN/SF was not provided data on SP's "two-to-one" traffic data that was the subject of the Agreement. Significantly, BN/SF has the option to provide service under "haulage agreements" (p. 312).

FIGURE 1
Horizontal and Vertical Merger Effects



bottleneck carrier, but the bottleneck itself does not change. Because of its shape, the diagram illustrating the vertical effect in Figure 1 has often been described as the "rat tail" problem. IP faces "rat tail" situations at Pineville, Mansfield, Bastrop and Texarkana. The plants have a choice of either the KCS or Missouri Pacific (or at Bastrop, UP or ALM) for the initial leg of west-bound routes, but then encounter a bottleneck for SP destinations. The merger would extend the SP's control along the entire length of these routes.

Applicants in this merger proceeding do not even address vertical issues, apparently in the belief that the ICC's "neutrality" theory effectively prevents the Surface Transportation Board from even considering the possibility. The "neutrality" theory assumes that a bottleneck carrier can already exercise monopoly power over the entire route prior to the merger. Vertical combinations are therefore said to pose no additional anticompetitive impact. Essentially, the theory assumes that it is simply impossible for a merger to make matters any worse. After the merger, the "neutrality" theory also assumes that the independent connecting carrier, in this case the KCS, will still be able to attract traffic from the merged entity, the UP/SP, if it is more efficient.

I believe that the "neutrality" theory's assumptions are not realistic. They imply a static picture of the railroad industry and ignore important competitive dynamics.[47] Prior to the merger, both the shipper and the bottleneck carrier stand to benefit from the competitive dynamics between the two connecting carriers. The competitive pressures that the two connecting carriers exert on each other will tend to constrain prices and improve efficiency and service. After the merger, however, the bottleneck carrier will be threatened by this same dynamic. The bottleneck carrier will be tempted to behave opportunistically toward the independent connecting carrier. Control over the bottleneck will provide a new weapon that neither of the connecting carriers was previously able to use against the other. The shipper will be the ultimate loser as the dynamic benefits of competition are threatened.

In addition to the inherent defects of the "neutrality" theory, I note that Applicants' own arguments directly contradict it. The theory relies upon assumptions of perfect information and costless contracting. These assumptions are contradicted by most all the Applicants' arguments in support of the alleged efficiency benefits from the merger. If information problems and the difficulties of coordination require a UP/SP merger, then these problems would prevent the bottleneck carrier from extracting its full monopoly rent before the merger, and would also handicap the independent connecting carrier's ability to compete after the merger. Most importantly, the independent connecting carrier will be threatened even if it is just as efficient as the bottleneck carrier.

The Problems With the "Neutrality Theory"

The "neutrality" theory paints an alternatively malicious and benign picture of the vertically integrated carrier. Prior to the merger the bottleneck carrier is assumed to have perfectly exploited its market power to the detriment of the shipper and connecting railroads by setting the price of its service at the highest possible level. After the merger, however, the bottleneck carrier is supposed to channel traffic to the independent connecting carrier as long as it is more efficient to do so. This is an

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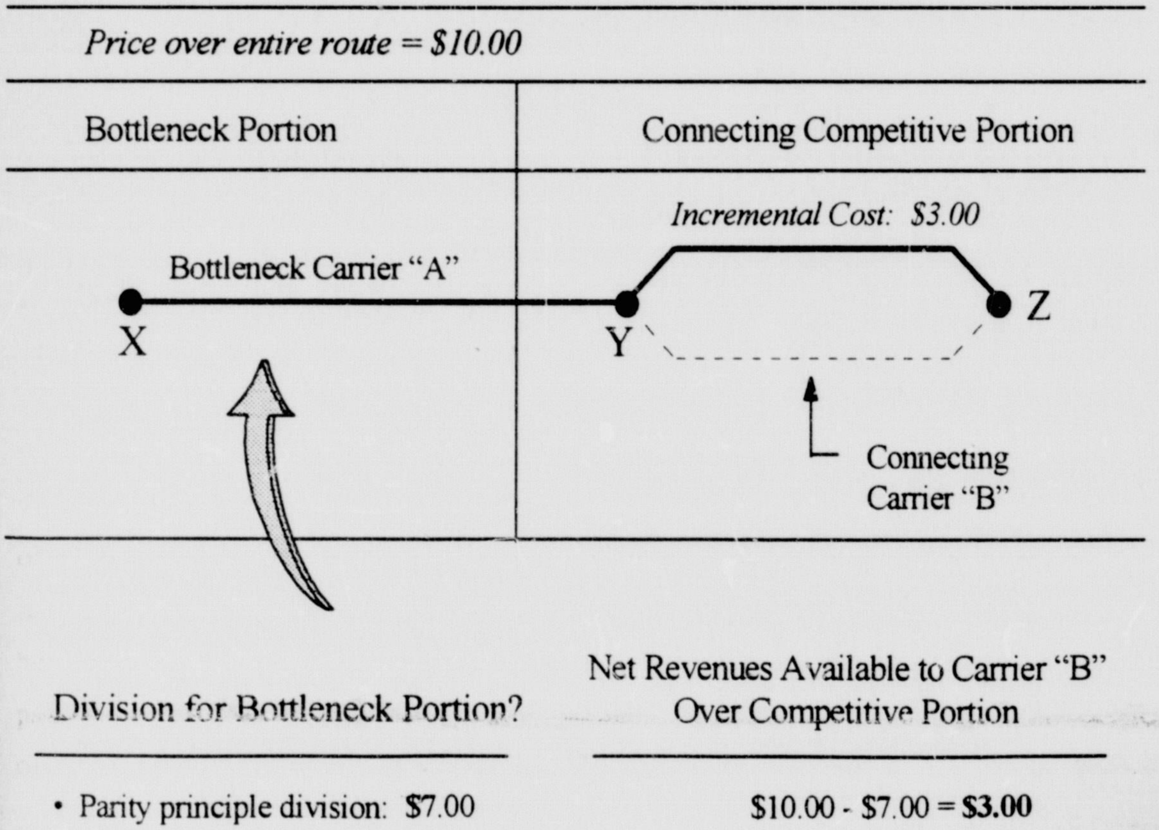
[47] See Louis Kaplow, "Extension of Monopoly Power Through Leverage," 85 *Columbia Law Review* No. 3 (Apr. 1985), 515-556 for an insightful critique of the "neutrality" theory (described as the "fixed sum" argument) as a static analysis that ignores dynamic considerations.

important assumption of the neutrality theory. If the bottleneck carrier were biased towards channeling traffic over its own route, then the shipper would stand to suffer from the possible inefficient rerouting of traffic after the merger. Perhaps the bottleneck carrier would simply refuse to offer joint service with an efficient connecting carrier. However, the neutrality theory predicts that the bottleneck carrier will be motivated to cooperate with independent connecting carriers whenever it is more efficient to do so.

The "parity principle" is the pricing rule that attempts to explain why, after the merger, the bottleneck carrier would be motivated to cooperate on joint traffic with an efficient connecting carrier. **Figure 2** provides an illustrative example. The figure assumes a bottleneck carrier that has already merged to control the entire length of a rou It charges $10 for single-line service. This is assumed to be the profit-maximizing monopoly price, sometimes understood as the "most that the traffic can bear."

FIGURE 2
Applying the Parity Principle to the Railroad Industry



An independent connecting railroad can carry traffic over the competitive portion of the route from points Y to Z. The bottleneck carrier's own incremental costs of moving traffic from Y to Z are assumed to be $3. The theory goes that the bottleneck carrier will have an incentive to offer joint service as long it can charge a high enough rate just for carrying the traffic from point X to the interconnection point Y. The bottleneck carrier's charge for this service is called its "division" for joint traffic. How high a division will secure the cooperation of the bottleneck carrier? The parity principle says that the bottleneck carrier will require $7 or more to induce cooperation. For single-line service the bottleneck carrier can obtain $10 in revenues. Its costs of carrying traffic from Y to Z are $3. The bottleneck carrier can save $3 in costs by limiting its operations just to point Y where the connecting carrier picks up the traffic. A division of $7 will therefore leave the bottleneck carrier no worse off than when it provides single-line service. The general rule is that the bottleneck carrier will take the total price for single-line service and deduct its incremental costs over the competitive route "Y to Z" in setting a division for joint traffic.

The price of $7 for joint-line service is supposed to be efficient because the connecting carrier can afford to pay the division and still turn a profit as long as its own costs from Y to Z are less than those of the bottleneck carrier. The connecting carrier will collect $10 from the customer, pay $7 over to the bottleneck carrier as the division for carrying the traffic to point Y, and have $3 left over to cover its own costs. If the connecting carrier is inefficient, then it will decline the bottleneck carrier's offer to provide joint service.

Perhaps the most serious problem with the parity principle is its failure to consider the problem of fixed and sunk costs. **Figure 3** assumes that investments are required by the merged carrier and the independent connecting carrier to provide service from Y to Z. Both railroads are equally efficient, so they face the same investment costs. After the investments are made, the future incremental costs of carrying the traffic from Y to Z will be minimal. Figure 3 breaks down these costs into fixed and variable components totaling $2. The day before undertaking the investments, the prospective costs of carrying traffic from Y to Z include *both* the required fixed cost of the investment and the subsequent variable costs. The parity principle would therefore mandate a division of $8 for the bottleneck. However, the *day after* investments are made, the fixed costs are "sunk." The only prospective incremental costs will therefore be the variable operating costs of $1. Given a $10 price over the entire route, the bottleneck railroad will not want to provide joint-line service unless it receives a division of $9. The reason is that, by limiting its operations to the interconnection point Y, the bottleneck carrier now only saves the $1 in variable costs.

However, at a bottleneck division of $9, the competing connecting carrier will not be able to recover the cost of its own investment. In essence the bottleneck owner has applied a "price squeeze" prohibiting the connecting carrier from recovering its sunk costs. Anticipating this problem, the connecting carrier would have no incentive to undertake any investments in the first place. Professor Joseph E. Stiglitz has noted that monopolists can exploit this same dynamic process in other industries to exclude potential competitors from markets where fixed investment costs are required to compete.[48] The existence of sunk costs simply tempts the bottleneck carrier to raise the division on joint-line service, preventing any one else from surviving. This is not an efficient outcome. The appropriate price would require a long-term perspective permitting the recovery of all efficient investment costs. However, the bottleneck carrier's incentives inevitably have a short-term aspect that tempt it to maximize the price for joint traffic. Figure 3 therefore illustrates how the existence of fixed and sunk costs creates an inherent conflict between efficiency and the incentives of the bottleneck carrier.

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[48] Joseph E. Stiglitz, "Technological Change, Sunk Costs, and Competition" 3 *Brookings Papers on Economic Activity* 1987, pp. 883-897. His model does not involve a "bottleneck" asset but addresses monopolistic behavior more generally where fixed investment costs are required to compete. Under his model, the incumbent wants to incur fixed investment costs before anyone else does. The monopolist can then threaten to reduce prices to variable costs if anyone dares enter the market. Entrants are deterred because they foresee that they will not be able to recover their fixed investment costs ("By preempting its rival, the incumbent firm deters the entrant from entering and can keep price at the monopoly level," p. 896). Under the parity principle, the prospect that an equally efficient entrant can recover no more than variable cost is automatic.

FIGURE 3

The Parity Principle Will Prevent Effective Competition in the "Contested Area"

Price over entire route = $10.00

Bottleneck Portion	Connecting Competitive Portion

Costs of Bottleneck Carrier
Fixed Cost: $1.00
Variable Cost: $1.00
Total = $2.00

Costs of Connecting Carrier
Fixed Cost: $1.00
Variable Cost: $1.00
Total = $2.00

The Day Before Investments are Made:

Day 1

- Incremental cost =
  Fixed cost of investment + variable cost = $2.00

The Day After Investments are Made:

Day 2

- Fixed investment costs are now sunk.
- Post-investment incremental cost = variable cost = $1.00
- Based on the post-investment cost,
  bottleneck carrier sets the parity principle division at $9.00.

***Result:** Applying the parity principle would force the connecting carrier to lose $1.00 Per unit and, realizing that, the carrier would never undertake investments in the first place.*

Note how the situation has changed because of the merger. If the bottleneck carrier did not also own the competitive portion of the route, its incentives would be different. Prior to the merger, there are two independent connecting railroads and the bottleneck carrier has an incentive in effective competition between them. As they exert competitive pressure on each other and reduce costs or improve service, both customers and the bottleneck carrier are the beneficiaries. There are several reasons why, prior to the merger, the bottleneck carrier would not execute a similar price squeeze as shown in Figure 3. First, by raising the division to $9, it would risk driving *both* connecting carriers from the market. It would not be interested in diminishing the ability or incentives of the connecting carriers to compete successfully. Second, the bottleneck carrier might not have good information about the costs of transportation along the competitive segment. It therefore has less of an ability to identify the maximum level possible for its division.

After the merger, by contrast, the bottleneck carrier loses the incentive in sustained effective competition that was a benefit to the shipper. The pricing policies of the bottleneck carrier will now target the connecting carrier to drive it from the market without harming the bottleneck carrier's own service. Both profit maximization and price squeezing will be facilitated because the bottleneck carrier will have better information as to the costs over the competitive segment. In essence, the merger transforms the dynamics of the situation to one where the bottleneck carrier is better informed and more antagonistic. The independent connecting railroad will therefore be more hesitant to invest.

Professor Louis Kaplow has noted that the "neutrality" theory is inherently inappropriate for addressing monopolistic leverage over "bottlenecks." The "neutrality" theory involves an entirely static picture of efficiency and profit-maximization. By contrast, the monopolistic exploitation over bottlenecks as shown in Figure 3 is inherently a dynamic problem. A static theory simply cannot address a dynamic problem— it just ignores it. Professor Kaplow observes that proponents of the "neutrality" theory "implicitly or explicitly take a static perspective" and

> it is hard to understand why so much of the criticism of leverage theory [concerning the abuse of "bottlenecks" to affect downstream markets] operates primarily in a static framework when even some of the earliest and most unsophisticated statements of the leverage theory were explicitly grounded in a dynamic model. [footnote omitted] For example, statements concerning foreclosure typically look to the long-run effect on the market position of competitors. Arguments

> concerning the erection or maintenance of entry barriers [footnote omitted] also have been grounded explicitly in a dynamic context.[49]

Another problem with the "neutrality" theory involves the evidence on competition in "rat-tail" situations. For example, competition among the parallel connecting carriers of a "rat tail" situation can lower the total price to shippers. The "neutrality" theory, by contrast, predicts that competition would be to no avail in lowering the price, as the bottleneck carrier would perfectly exercise market power and increase its own rate to perfectly offset any reduction along the competitive portion of the route. The failure of this theory to hold would suggest that bottleneck carriers do *not* exercise perfect market power prior to mergers. As explained above, incomplete information can limit the market power of the bottleneck carrier prior to merging with one of the connecting carriers.

An interesting example of this concerns rail rates out of the Powder River Basin. In the 1980s, the Union Pacific and C&NW opened up the Powder River Basin to competition against the Burlington Northern. For many electric utilities, this opened up rail options for transporting coal from the origin, although they still faced a "bottleneck" for the portion of the route that terminated at their plants. Rail rates fell as a result, contradicting the "neutrality" theory.[50] Although some have since attempted to attribute the decline in rail rates to other causes such as changes in the demand for coal,[51] many industry observers at the time believed competition was a key factor.[52] The Interior Department, for

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[49] Kaplow, *supra* at 528, 530.

[50] In the BN/SF merger, Professor Kalt said that routes with single-line service experienced similar price declines as other routes. Routes with single-line service, he reasoned, were comparable to the *post-merger* rat-tail situation discussed above. Because they experienced rate declines, he concluded that these situations did not suffer the competitive harm feared from abuse of the bottleneck. Professor Kalt's analysis, however, only isolated routes where single-line service was available; these routes did not necessarily also have bottlenecks. His analysis therefore did not capture the change in rail costs specifically on bottleneck routes relative to competitive ones. This very issue was treated as a major data problem when Professor Schmalensee critiqued a study by Grimm, et al. (supra note 32). The I.C.C. adopted contradictory positions on the issue by echoing Dr. Schmalensee's critique of the Grimm study while accepting Professor Kalt's analysis without question. (Docket No. 32549, before the Interstate Commerce Commission, *Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger-- Santa Fe Pacific Corporation and the Atchison, Topeka and Santa Fe Railway Company* (Aug. 16, 1995, p. 74, fn. 94, 77).

[51] Professor Kalt argued and the I.C.C. accepted that rail price declines were related to changes in the demand for coal, and not to the competition provided by CN&W/UP (*ibid*).

[52] *See, e.g.*, "BN Losing Ground in Powder River Basin," *Coal Transportation Report* (Jan. 16, 1986), p. 5, "Rail Report Criticizes Transport Rates for Coal by Western Railroads," *Coal Week* (Mar. 17, 1986), p. 7 (BN official cites "head-to-head competition with Chicago & North Western" as responsible for rate reductions), "CNW Presents New Competition," *Coal Transportation Report* (Sept. 16, 1985), p. 9, "C&NW, BN Battle Over

(continued...)

imperfect information, then the merger will increase the ability of the bottleneck carrier to exercise market power to the detriment of shippers.

Applicants also contradict the purely static vision of competition implicit in the "neutrality" theory. Their principal defense of the merger lies in the "character of rivalry" argument, which is entirely dynamic. We are supposed to believe that the SP will become stronger as a result of the merger and therefore intensify competition. Applicants fail to apply the same "character of rivalry" test to the behavior of the post-merger bottleneck carrier. Once the true character of the bottleneck carrier's rivalry is analyzed, the "neutrality" theory falls apart.

CONCLUSION

Applicants have made several inconsistent arguments in this proceeding, alternatively to justify the merger and minimize the adverse consequences for competition. The "accordion theory" produces inconsistent market definitions that obscure both the true threat to competition and the issue of the BN/SF's ability to effectively replace lost competition. Testimony on the inability of the UP and SP to coordinate among themselves without a merger is contradicted both by reliance on the Agreement to solve competitive problems and by the "neutrality" theory's assumption of costless contracting. Dynamic arguments with respect to the "character of rivalry" are in tension with the static assumptions of the "neutrality" theory.

The problems of this merger are several. The merger has horizontal aspects that threaten competition for IP's mills at "two-to-one" points narrowly defined and elsewhere. The Agreement is suspect for several reasons, including the atmosphere of high market concentration in which it was signed, the natural incentives of the UP/SP to set too high a price for trackage rights, and the specific operational problems that have been identified. Evidence suggests that, under the Agreement, the BN/SF will not be in a position to effectively replace lost competition. Furthermore, several IP plants would see the merger extend the control of a "bottleneck" carrier over the entire length of relevant routes. Sustainable competition by the independent connecting carrier, currently the KCS, would be threatened. In addition to its inconsistencies with Applicants' other arguments, the "neutrality" theory simply fails to address this dynamic problem.

VERIFICATION

STATE OF GEORGIA)
) SS.
COUNTY OF BIBB)

I, William B. Tye, being duly sworn, state that I have read the foregoing statement, that I know its contents and that those contents are true as stated to the best of my knowledge and belief.

William B. Tye
WILLIAM B TYE

Subscribed and sworn to before me this 27th day of March, 1996.

Kim Y. Robertson
NOTARY PUBLIC

My commission expires: ____________________

SEAL
KIM Y. ROBERTSON
NOTARY PUBLIC - GEORGIA
MONROE COUNTY
My Commission Expires February 27, 1998

APPENDIX A:

RESUME

OF

WILLIAM B. TYE

WILLIAM B. TYE **Principal**

Dr. William B. Tye received his B.A. in economics from Emory University and his Ph.D. in economics from Harvard University. Upon leaving Harvard, he became assistant professor of economics and management at the U.S. Air Force Academy, holding the rank of Captain. There he taught quantitative economic theory, econometrics, policy issues in contemporary economics and quantitative decision methods. After leaving the service in 1972, he joined Charles River Associates, a Boston research and consulting firm, as a senior research associate and was promoted to program manager for transportation, and later to vice president and a director of the company. He joined Putnam, Hayes & Bartlett, Inc. in 1980 as a Principal. In August 1990 Dr. Tye and six colleagues founded *The Brattle Group*. *The Brattle Group* is the successor firm resulting from the merger of The Brattle Group, Inc. and Incentives Research, Inc., and was known for a year as Brattle/IRI.

RECENT ASSIGNMENTS

Dr. Tye, an expert in economic analysis and public policy, has been an economic consultant for over twenty years. He specializes in regulatory and antitrust issues. His clients have included regulatory bodies, firms in regulated industries and law firms. He has authored or co-authored over one hundred papers and publications, including four books. Some recent consulting assignments include:

- **Estimating Damages:** provided economic analysis of damages in a case involving claims of alleged fraud in franchising and damage claims from alleged overcharges in the retailing of gasoline.

- **Antitrust Analysis:** performed studies of competition in railroading and international telecommunications.

- **Settlement Values and Strategies:** used business decision and planning tools successfully in consultation with attorneys to develop optimal litigation/settlement strategies in several recent cases.

- **Regulatory Economics:** testified on mergers between regulated firms, on the economic aspects of automobile franchise regulation in a case between a dealer and an automobile manufacturer, on cost allocation issues involving different petroleum streams on the Trans Alaska Pipeline (TAPS), and on the cost of capital and proper calculation of avoided costs in the electric utility industry.

- **Management:** provided assistance to senior management of a large utility seeking a successful transition to a more competitive business environment.

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"The Voluntary Negotiations Approach to Rail Competitive Access in the Transition to Deregulation," *Antitrust Bulletin*, Vol. 32, No. 2 (Summer 1987): 415-450.

"Keep Collective Rates Alive," *The Journal of Commerce*, (11 December 1987): 8A.

"The Contestable Market Defense in Freight Antitrust Cases," *Transportation Practitioners Journal*, Vol. 54, No. 2 (Winter 1987): 177-198.

"Toward Achieving Workable Competition in Industries Undergoing a Transition to Deregulation" (with John R. Meyer), *Yale Journal on Regulation*, Vol. 5, No. 2 (Summer 1988): 273-297. Republished in *Public Utilities Law Anthology*, Vol. 11 (1988).

"Pricing Trackage Rights to Preserve Post-Merger Rail Competition," *Logistics and Transportation Review*, Vol 24, No. 4 (1988): 317-348.

"Principles of Public Utilities Rates, by Bonbright, Danielsen and Kamerschen," book review, *Energy Law Journal*, Vol 9 (1988): 511-512.

"Incentive Compatibility of the Revenue/Variable Cost Test for Rail Competitive Access," in *Antitrust Bulletin*, Vol. 34, No. 1 (Spring 1989): 153-184.

"Prudent Investment in Large Complex Projects: The Case of the Trans-Alaska Pipeline System," *Transportation Practitioners Journal*, Vol 57, No. 1 (Fall 1989): 17-49.

"Coal Contract Renegotiations," originally presented at Electric Power Research Institute, Fuel Supply Seminar—1987. *Transportation Practitioners Journal*, Vol. 56, No. 2 (Winter 1989): 114-131.

"Infrastructure Costs and Contestability Theory," *Proceedings of the Fifth World Conference on Transport Research*, Yokohama Japan, July 10-14, 1989, Western Periodicals, Co., 1990.

The Theory of Contestable Markets: Applications to Regulatory and Antitrust Problems in the Rail Industry, New York: Greenwood Press, 1990.

The Transition to Deregulation: Developing Economic Standards for Public Policies, New York: Quorum Books, 1991.

"Competitive Access in the Transition to Deregulation: Lessons from Other Industries," in American Bar Association Conference on Competition and Regulation—Compatible Bedfellows?, Washington, D.C., January 18, 1989.

"Valuation Methodologies for Public Takeovers of Regulated Rail Assets," *Transportation Practitioners Journal*, Vol. 57, No. 4 (Summer 1990): 364-384.

"Regulatory Financial Tests for Rail Abandonment Decisions," *Transportation Practitioners Journal*, Vol. 57, No. 4 (Summer 1990): 385-403.

"The *Duquesne* Opinion: How Much '*Hope*' Is There for Investors in Regulated Firms?" with A. Lawrence Kolbe, *Yale Journal on Regulation*, Vol. 8, No. 1 (Winter 1991): 113-157.

"Optimal Time Structures for Rates in Regulated Industries," with A. Lawrence Kolbe, *Transportation Practitioners Journal*, Vol. 59, No. 2 (Winter 1992): 176-196 (published in *Public Utilities Law Anthology*, Vol. XV [July-December 1992]).

"Practical Implications of the Supreme Court's *Duquesne* Opinion for Regulated Industries," with A. Lawrence Kolbe, *Public Utilities Fortnightly*, August 30, 1990.

"The Fair Allowed Rate of Return with Regulatory Risk," with A. Lawrence Kolbe, *Research in Law and Economics*, Vol. 15 (1992): 129-169.

"The Economics of Public Convenience and Necessity for Regulated Industries," *Transportation Practitioners Journal*, Vol. 60, No. 2 (Winter 1993): 143-159.

"Market Imperfections, Equity and Efficiency in Antitrust," *The Antitrust Bulletin*, Vol. 37, No. 1 (Spring, 1992): 1-34.

"Paradoxes in Recent Applications of Law and Economics to Antitrust," *Antitrust and Trade Regulation Section (ATRS) Report*, Federal Bar Association, Vol. III, No. 1 (Spring 1991): 1, 7-9.

"How to Value a Lost Opportunity," with Stephen H. Kalos and A. Lawrence Kolbe, Section of Antitrust Law, American Bar Association, 1991 Annual Meeting, Atlanta, Georgia, *Defining, Proving, and Measuring Antitrust Damages*, August 13, 1991. *Research in Law and Economics*, Vol. 17 (1995): 83-125.

"Antitrust Damages from Lost Opportunities," with Stephen H. Kalos, forthcoming in *The Antitrust Bulletin*.

Regulatory Risk: Theory with Applications to Natural Gas Pipelines and Other Industries, with Stewart C. Myers and A. Lawrence Kolbe, (Boston: Kluwer Academic Publishers, 1993).

"Environmental Cleanup Liabilities," *Public Utilities Fortnightly*, Vol. 129, No. 1 (January 1, 1992): 18-20.

"Strategic Analysis in Litigation Consulting," *Litigation Management and Economics*, No. 1, Vol. 2 (June 1992): 5-8.

"Pricing Market Access for Regulated Firms," and "Reply," *Logistics and Transportation Review*, Vol. 29, No. 1 (March 1993): 39-68, 75-80.

"Who Pays for Prudence Risk?" with A. Lawrence Kolbe, *Public Utilities Fortnightly*, Vol. 130, No. 3 (August 1, 1992): 13-15.

"The Transition to Deregulation and the Theory of Contestable Markets: Reply," *Journal of Transportation Research Forum*, Vol. 32, No. 2 (November 1992): 425-426.

"Introduction," *Public Utilities Law Anthology*, Vol. XVI (January-June 1993).

"The Pricing of Inputs Sold to Competitors," *Yale Journal on Regulation*, Vol. 11, No. 1 (1994): 203-224.

"The Not-So-Strange Economics of Stranded Investment" (A Reply) with Johannes P. Pfeifenberger, *The Electricity Journal* (November 1994): 3, 80.

"The Economics of Pricing Network Interconnection: Theory and Application to the Market for Telecommunications in New Zealand" with Carlos Lapuerta, forthcoming in *The Yale Journal on Regulation*.

"It Ain't In There: The Cost of Capital Does Not Automatically Compensate for Stranded Cost" with A. Lawrence Kolbe, *Public Utilities Fortnightly*, Vol. 133, No. 10 (May 15, 1995): 26-28.

"Handle with Care: A Primer on Incentive Regulation" with Johannes P. Pfeifenberger, *Energy Policy*, Vol. 23, No. 9 (September 1995): 769-779.

"Response to Book Review," with A. Lawrence Kolbe and Stewart C. Myers, *The Yale Journal on Regulation*, Vol. 13, No. 1 (Winter 1996): 413-417.

"Compensation for the Risk of Stranded Costs," with A. Lawrence Kolbe, working paper in progress.

"A Simplified Procedure for Estimating the Effects of the Financial Risks of Purchased Power Contracts on the Calculation of Avoided Costs," with Marvin A. Hawthorne, working paper in progress.

"The Economics of Negative Barriers to Entry: How to Recover Stranded Costs and Achieve Competition Equal in the Electric Utility Industry," with Frank C. Graves, working paper in progress.

TESTIMONY

Assisted in preparation of expert testimony before the Postal Rate Commission in 1974 and 1976.

Assisted Professor Franklin Fisher in preparation of expert testimony in antitrust litigation (CBS v. ASCAP).

Testimony before the Postal Rate Commission on behalf of United Parcel Service, Docket No. R77-1, filed 14 October 1977.

Direct testimony before the Postal Rate Commission on behalf of United Parcel Service, Docket No. MC78-1, filed 4 April 1979, and supplemental testimony, filed 15 June 1979.

Assisted Professor Stewart C. Myers in the preparation of expert testimony on rate base methodology and rate of return in the oil pipeline industry before the Federal Energy Regulatory Commission, Docket No. OR79-1.

Assisted in the preparation of expert testimony on the subject of profit renegotiation for a government contractor performing trucking services, 1979.

Testimony before the Civil Aeronautics Board on behalf of Eastern Airlines, Miami-London Route Case, Docket No. 36764, 13 December 1979.

Testimony before the Civil Aeronautics Board on behalf of Eastern Airlines, Florida-Mexico City Route Investigation, Docket No. 32820, 16 July 1980.

Testimony before the Postal Rate Commission on behalf of United Parcel Service, Docket No. R80-1, filed 13 August 1980.

Testimony before the Motor Carrier Ratemaking Study Commission on behalf of Motor Common Carrier Associations, 19 March 1982.

Testimony before the ICC on behalf of the National Coal Association, *Coal Rate Guidelines—Nationwide, Ex Parte* No. 347 (Sub-No. 1), 13 April 1982.

Testimony before the ICC on behalf of The Dayton Power and Light Company (v. Louisville and Nashville Railroad Company), Docket No. 38025, 6 April 1982 (direct) and 7 June 1982 (rebuttal).

Statement prepared for the Motor Carrier Ratemaking Study Commission, "Review of Regulatory Reform and the Trucking Industry: An Evaluation of the Motor Carrier Act of 1980,'" May 1982.

Testimony before the ICC on behalf of Niagara Mohawk Power Corporation (v. Conrail *et al.*), Docket No. 38336S, 21 July 1982.

Testimony before the ICC on behalf of Commonwealth Edison *et al.* (v. Aberdeen and Rockfish Railroad Company *et al.*), Docket No. 37891 *et al.*, 9 August 1982, 25 October 1982, and 14 February 1983.

Testimony before the ICC on behalf of Consumers Power Company, Docket No. 37854S *et al.*, 6 October 1982, 28 December 1982, and 1 August 1983; in Docket No. 38181S, 15 October 1982, 31 December 1982, and 2 August 1983; in Docket No. 37853S *et al.*, on 12 November 1982, 13 January 1983, and 29 August 1983; and in Docket No. 37857S *et al.*, on 24 January 1983, 25 March 1983, and 10 January 1985.

Statement prepared for the Motor Carrier Ratemaking Study Commission, "The Motor Carrier Market Place Without Collective Ratemaking," 24 November 1982.

Testimony before the ICC on behalf of Delmarva Power and Light Company, Docket Nos. 38329 and 38330, 31 January 1983.

Testimony before the ICC on behalf of Mobil Chemical Company, Docket No. 37850S, 30 March 1983, and 31 May 1983.

Testimony on behalf of Kansas Gas and Electric Company in Civil Action No. 83-1104, United States District Court for the District of Kansas, 19 April 1983.

Testimony before the ICC on behalf of Consumers Power Company, *Ex Parte* No. 347 (Sub-No. 1), "Coal Rate Guidelines—Nationwide," 28 July 1983.

Testimony before the ICC on behalf of Detroit Edison Company, Docket Nos. 38279S *et al.*, 22 December 1983, 13 February 1984, 14 March 1984, and 5 April 1984.

Testimony before the ICC on behalf of National Coal Association, 14 February 1984, in Finance Docket No. 30300, CSX Corporation—Control—American Commercial Lines, Inc.

Testimony on behalf of MKT Railroad before the ICC, 10 September 1984, 21 November 1984, and 29 May 1985, in Finance Docket No. 30,400 *et al.*, SFSP Merger Proceedings.

Testimony before the ICC, 31 May 1985 and 8 July 1985, *Ex Parte* No. 445 (Sub-No. 1), *Intramodal Rail Competition.*

Testimony on behalf of Presidential Airlines in Docket No. 43825, *Texas Air—Eastern Acquisition Case*, before the Department of Transportation, 13 May 1986.

Panelist in a two-day colloquium on rail costing issues, 18-19 June 1986, before the Railroad Accounting Principles Board.

Deposition in *Farmers Electric Cooperative vs. Arkansas Power and Light Company*, U.S. District Court for the Eastern District of Arkansas, 27 June 1986.

Affidavit before an arbitration panel in the matter of Marilyn Benjamin, Administrator and Traffic Executive Association, Eastern Railroads, 29 May 1986.

Testimony on behalf of Presidential Airlines in Docket No. 44365, *Joint Application of Texas Air Corporation and People Express, Inc.*, merger proceeding before the Department of Transportation, 21 October 1986.

Deposition in City of Austin *et al.* v. Decker Coal Company *et al.*, No. A-85-CA-104, U.S. District Court, Western District of Texas, 2 April 1987.

Testimony before the ICC on behalf of the Commonwealth of Massachusetts in Docket Nos. 31250 and 31259, Conveyance of B&M Corporation Interests in Conn River Line, 13 June 1988 and Reply Testimony on 13 July 1988.

Testimony before the Illinois Commerce Commission on behalf of Mississippi River Transmission in *Application of Illini Carrier*, 13 May 1988.

Testimony before the ICC on behalf of the Commonwealth of Massachusetts in *Ex Parte* No. 274 (Sub-No. 11A), *Abandonment Regulations—Costing*, 8 July 1988.

Deposition in *James River Corporation vs. Northwest Pipeline Corporation*, 13-15 March, 12-14 April 1989.

Testimony before the Missouri Public Service Commission, Application of Missouri Pipeline Company, 10 May 1989 and 30 May 1989.

Testimony before the Public Utilities Commission of California, Application No. 88-07-020 *et al.*, 5 January 1990, on behalf of US Sprint.

Testimony before the ICC on behalf of Rio Grande Industries, Inc., *Finance Docket No. 31505. Rio Grande Industries, Inc. et al.*—Purchase and Related Trackage Rights—Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL, 15 February 1990.

Expert's Report and Deposition, in *Litton Industries et al. v. Chesapeake and Ohio Railway Co. et al.*, Northern District of Ohio, Eastern Division, 11 April 1990.

Testimony before the Michigan Public Service Commission, Application of TNT Holland Motor Express, Inc. for Extension of Operations, 20 July 1990.

Carolina Power & Light Company, Project No. 432, before the Federal Energy Regulatory Commission, 15 March 1991.

Expert's Report and Deposition, *NCEMC v. Carolina Power and Light Company*, 11 March 1992.

Testimony before the Federal Energy Regulatory Commission, on behalf of Amerada Hess Pipeline Corporation, 30 March 1992 and Rebuttal Testimony, 10 August 1992.

Deposition in *Richard Lundgren , Inc. v. American Honda Motor Co., Inc.*, Civil Action No. 92-1091, Commonwealth of Massachusetts, February 5, 1983, and Testimony before the Superior Court of Massachusetts, Worcester, Massachusetts, September 27, 1994.

Deposition in *Empresas Puertorriquenas de Desarrollo, Inc. v. F.W. Woolworth Co.*, United States District Court for the District of Puerto Rico, March 4, 1993.

Testimony before the Interstate Commerce Commission, *Seaboard Air Line Railroad Company—Merger—Atlantic Coast Line Railroad Company: Petition to Remove Traffic Conditions*, Finance Docket No. 21215 (Sub-No.5), March 29, 1993.

Testimony before the Postal Rate Commission, *Bulk Small Parcel Service*, Docket No. MC93-1, April 16, 1993.

Testimony before the Commonwealth of Massachusetts Department of Public Utilities, DPU 93-167, *For the Purpose of Establishing Guidelines and Standards for Acquisitions and Mergers Of Utilities*, February 16, 1994.

Deposition, *Texaco Puerto Rico, Inc., et al., v. Department of Consumer Affairs*, United States District Court for the District of Puerto Rico, April 21, 1994, Expert's Report and Testimony before the Court, August 2, 1994.

"Competition in the Market for Trans-Oceanic Facilities-Based Telecommunications Services," with Hendrik S. Houthakker and Johannes P. Pfeifenberger, before the Federal Communications Commission, June 24, 1994.

Prepared Testimony before the Public Utilities Commission of the State of Hawaii, on behalf of Citizens Utilities Company, Kauai Electric Division, July 21, 1994, and oral testimony, May 1, 1995.

Prepared Rebuttal Testimony on behalf of Hawaiian Electric Light Company (Subject: Risks of Purchased Power Contracts), before the Public Utilities Commission of the State of Hawaii, December, 1994.

Reply Testimony (with A. Lawrence Kolbe) on Behalf of Edison Electric Institute, Docket No. RM94-7-000, before the Federal Energy Regulatory Commission, January 23, 1995.

"The Economics of Pricing Network Access in the Market for Telecommunications in New Zealand" (with Carlos Lapuerta), prepared for the Minister of Commerce and the Minister of Communications on behalf of Clear Communications, Ltd, February 17, 1995.

Prepared Direct Testimony on behalf of the Designated TAPS Carriers, before the Federal Energy Regulatory Commission and Alaska Public Utilities Commission, Docket Nos. IS94-10-002, *et al.* (Phase II), March 14, 1994.

"Damages from Delay of Essex Government Contract," Expert's Report in *Essex Corp. v. Wackenhut Services, Inc.*, in the United States District Court for the District of New Mexico, March 23, 1995, Deposition, April 25, 1995, and Supplemental Report, January 11, 1996.

Testimony before the I.C.C., Finance Docket No. 32549, *Burlington Northern, Inc. and Burlington Northern Railroad Company—Control and Merger—Santa Fe Pacific Corporation and Atchison, Topeka and Santa Fe Railway Company*, May 10, 1995.

Testimony before the U.S. District Court, Southern District of New York, *New York Urban League v. Metropolitan Transportation Authority*, November 2, 1995.

"Post Merger 'Character of Rivalry' in the Proposed 'SOP/UP' Railroad Merger," before the Texas Railroad Commission, February 5, 1996.

SPECIAL CONSULTING ASSIGNMENTS

The Joint Economic Committee, U.S. Congress, working on a project entitled "The Capital Grant as a Subsidy Device: The Case of Urban Mass Transportation." The report on this study was published in 1973.

The Office of the Assistant Secretary for Policy and International Affairs, U.S. Department of Transportation, on the subject of subsidy mechanisms for urban mass transportation. He participated in the drafting of a report to the Congress on the subject.

The Assistant Secretary for Metropolitan Development, U.S. Department of Housing and Urban Development. The work involved experimental design for urban mass transportation demonstrations and an evaluation of the impact of the urban mass transportation capital grant program in nine U.S. cities.

The U.S. Department of Transportation study entitled "Transportation Needs of the Handicapped."

PROFESSIONAL ACTIVITIES

Chairman of a Conference on the Economic Regulation of Urban Transportation in September 1976, sponsored by the Transportation Research Board.

Workshop chairman on market segmentation at the Third International Conference on Behavioral Travel Modelling 1977 in Australia.

Discussion leader at a conference of 150 practitioners of transportation demand analysis sponsored by the U.S. Department of Transportation (Seminar on Emerging Transportation Planning Methods, Daytona Beach, Florida, December 1976). The subject of this session was "Manual Forecasting and Sketch Planning Methods."

Chairman of the workshop on "The Application of Behavioral Travel Demand Models," Second International Conference on Behavioral Travel Demand.

Former Member, Committee on Taxation, Finance and Pricing of the Transportation Research Board.

Attendant at the Fourth International Conference on Behavioral Travel Modelling held in Eibsee, Germany, July 1979.

Former Member, Committee on Pipeline Transportation, of the National Research Council (National Academy of Sciences), Transportation Research Board.

Member, American Economics Association, Econometric Society, Transportation Research Forum, American Bar Association (Associate).

Referee for the *Quarterly Journal of Economics*, the *Journal of Regional Science*, *Transportation Research*, *Transportation*, the *Journal of Industrial Economics*, the *Journal of Policy Analysis & Management*, the *Rand Journal of Economics*, and the *Journal of Law and Economics*.

National President, 1983; Executive Vice President, 1982; and Programs Vice President, 1981; Transportation Research Forum.

Former Member, Editorial Board, *Transportation Antitrust Report*.

Editorial Review Board, *Logistics and Transportation Review*.

Former Council Member, Harvard Graduate Society for Study and Research (Harvard Graduate School of Arts and Sciences).

Member, Committee on Surface Freight Transportation Regulation, Transportation Research Board, National Research Council.

Workshop Chair, "Understanding Competition and Antitrust Behavior," The Second International Conference on Privatization and Deregulation in Passenger Demand, Tampere, Finland, June 1991.

Advisory Committee, *Yale Journal on Regulation*.

Faculty Member, Advanced Regulatory Studies Program, National Association of Regulatory Utility Commissioners, February 16-21, 1992.

Dean's Council, Emory College.

PUBLIC SPEAKING

"Problems Confronting Regulated Industries in a Period of Runaway Inflation," presented to Delta Nu Alpha, transportation fraternity in Boston, Massachusetts, 1975.

"Urban Transportation: Alternatives for Public Policy," presented to Traffic Clubs International in Denver, Colorado, 1971.

"Current Financial Issues in Regulation of Freight Transportation," presented at the Seminar on Freight Policy Analysis at the U.S. Department of Transportation, Transportation Systems Center, 3 April 1980.

"Transportation and Related Industries in the U.S. Economy" (with John R. Meyer), presented at the Transportation Economic Seminar to the senior staff of the U.S. Department of Transportation, Transportation Systems Center, 7 March 1980.

"Competition Between Public and Private Enterprise," presented to Western Carolina University, 15 January 1981.

"Railroad Ratemaking as Influenced by Market Dominance and Antitrust," presented at the Transportation Seminar Series, Princeton University, 14 April 1982.

"Collective Ratemaking and Antitrust in the Motor Carrier Industry," presented to the Wharton Transportation Club, 15 April 1982.

"Market Dominance, Rate Reasonableness, and the Staggers Act," presented at the Center for Transportation Studies, Massachusetts Institute of Technology, 8 October 1982.

"Common Control of Rail and Water Carriers," before the Seminar on Transportation Policies and Demand for Coal, Iron, and Steel, National Coal Association and American Iron and Steel Institute, Louisville, KY, 27 February 1984.

"Obstacles to the Transition to Deregulation in the Rail Industry: Rail Merger Policy," 39th Annual Transportation and Logistics Forum and Exposition, National Transportation Defense Association, 23-26 September 1984, San Francisco.

"Competitive Access: A Comparative Industry Approach to Vertical Foreclosure," Seventh Annual Appalachian Natural Gas Conference, 7-8 May 1987, Pittsburgh, PA.

"Competitive Access," Gas Antitrust '88, sponsored by *Gas Daily*, 17-18 September 1988, Houston, TX.

"Integrating Coal Transportation and Coal Supply Procurement," *Electric Power Research Institute: 1987 Fuel Supply Seminar*, Baltimore, Maryland, 6-8 October 1987.

"Transportation Law Concepts of Interest to Energy Lawyers," Fuel and Energy Industry Subcommittee, American Bar Association, Washington, DC, 26 April 1988.

"Competition and Regulation—Compatible Bedfellows? The Challenge of Regulating a Competitive Energy Industry," American Bar Association, Washington, D.C., 18 January 1989.

"The *Duquesne* Decision: There's Less *Hope* for Investors than We Thought," PHB Utility Discussion Series Dinner, Washington, DC, 12 July 1989 (with A. Lawrence Kolbe).

"Regulatory Risk in a Competitive Environment," *Utilities in the '90s: Strategic Issues*, sponsored by Reid and Priest, November 8, 1989, Washington, D.C.

"Equity and Efficiency Criteria in Litigation," PHB Electric and Gas Utility Discussion Series, Washington, DC, 3 April 1990.

"Regulatory Treatment of Environmental Cleanup Liabilities: Issues and Implications," Edison Electric Institute Economics Committee Meeting, Denver, Colorado, September 20, 1990.

"Risk of the Natural Gas Pipeline Industry," Interstate Natural Gas Association of America, Rate Committee Meeting, Montebello, Quebec, September 10, 1990.

"Defining, Proving, and Measuring Antitrust Damages," American Bar Association, Section of Antitrust Law, 1991 Annual Meeting, Atlanta, Georgia, August 13, 1991.

"Pricing Market Access for Regulated Firms," Royal Commission on National Passenger Transportation, Ottawa, Canada, November 13, 1991.

"Regulatory Risk and *Duquesne*," *NARUC Advanced Regulatory Studies Program*, Williamsburg, Virginia, February 21, 1992.

"Regulatory Risk in the Ratesetting Process," teleconference sponsored by the Electric Power Committee, the ABA Section of Natural Resources, Energy, and Environmental Law, May 28, 1992.

"Environmental Economics: Who Pays for Clean Energy," Federal Energy Bar Association, Annual Meeting, Washington, D.C., May 21, 1992.

"Regulatory Risk and *Duquesne*," *Advanced Workshop in Regulation and Public Utility Economics: Eleventh Annual Conference*, sponsored by Graduate School of Management, Center for Research in Regulated Industries, the State University of New Jersey (Rutgers), Mohonk Mountain House, New Paltz, New York, May 27-29, 1992.

"Rate of Return for the 1990s: Does It Account for Environmental Cleanup Liabilities, Technological Advances, and Incentives?" American Bar Association, Section of Public Utility, Communications and Transportation Law, 1992 Annual Meeting, San Francisco, California, August 10, 1992.

"Incentive Regulation: DOs and DON'Ts," Third Annual Strategic Utility Planning Conference, Denver, Colorado, June 22-23, 1993.

"Proof of Damages," Off-the-Record Club, Boston Bar Association, March 18, 1994.

"Impact Upon LDC's Rate of Return Arising From Newly Imposed Business and Regulatory Risks," *The Changing Environment for the Natural Gas Industry in New England*, sponsored by the New England Gas Association and Federal Energy Bar Association, Boston, Massachusetts, April 6, 1994.

"Economic Issues Relating to Access to Joint Ventures," American Bar Association, Section of Antitrust Law, Washington, D.C., April 8, 1994.

"Strategic Analysis of Litigation: Structuring Your Analysis to Improve Decisions in Complex Litigation" (with Carlos Lapuerta), American Bar Association, Section of Business Law, Annual Meeting, New Orleans, August 9, 1994.

"A Rehabilitation of Fully Allocated Cost: Capacity Utilization, Pumpability, and Rate Design on the Trans Alaska Pipeline System," World Conference on Transport Research, Sidney, Australia, 1995.

"Managing and Valuing the Big Case," sponsored by the Committee on Civil Practice and Procedure, Section of Antitrust Law, Washington, DC, April 7, 1995.

"The Economics of Pricing Network Interconnection in the Market for Telecommunications in New Zealand" (with Carlos Lapuerta), International Telecommunications Society, *Interconnection: The Key to the Network of Networks*, Wellington, New Zealand, April 10-12, 1995.

HONORS

Phi Beta Kappa, Emory University, 1965.

Ford Career Scholar, Emory University, 1964-1965.
Bachelor's degree awarded summa cum laude, 1965.

Woodrow Wilson Fellow, Harvard University, 1965-66.

Office of Metropolitan Development Recognition Award for Meritorious Contributions to Community Development from the U.S. Department of Housing and Urban Development, 1968.

Samuel Andrew Stouffer Fellow at the Joint Center for Urban Studies of the Massachusetts Institute of Technology and Harvard University, 1968-1969.

Air Force Commendation Medal for Meritorious Service, July 1972.

CHARLES RIVER ASSOCIATES REPORTS (WITH OTHERS)

"Forecasting Ocean Freight Shipping Rates," 1974.

"Public Costs of the Goods Movement System: Manhattan Garment Center Urban Goods Movement Study," 1975.

"Forecast of the 1975 Dry Cargo Shipping Market," 1975.

"Disaggregate Travel Demand Models," NCHRP Project 8-13: Phase I Report, 2 Vols., 1976.

"Energy Impact of Federal Capital Grants Programs for Transportation," 1976.

"Potential Fuel Conservation Measures by Regulated Motor Carriers in the Intercity Freight Market," 1977.

"Impacts of Proposals for Reform of Economic Regulation on Small Motor Carriers and Small Shippers," 1977.

"Transportation," in *Regulation and Energy Consumption*, prepared for the Committee on Measurement of Energy Consumption, National Academy of Sciences, August 1977.

"An Analysis of the Impacts of Selected Transportation Issues on National Transportation Goals," Final Report, 1978.

"Disaggregate Travel Demand Models," NCHRP Project 8-13, Phase II Report, May 1978.

"Disaggregate Travel Demand Models," NCHRP Project 8-13, Draft Final Report, November 1980.