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• 32760

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Mountain Coal Comp

P.O. Box 591
Somerset, CO 81434
Telephone 970 929 5015

Item No. _____

Page Count 1

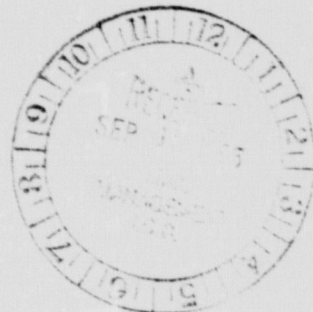
Sept 14 1995

60083



September 14, 1995

Office of the Secretary
Case Control Branch
Attn: Finance Docket No. 32760
Interstate Commerce Commission
1201 Constitution Avenue, N.W.
Washington, DC 20423



Re: **ICC Finance Docket 32760**

Commissioners:

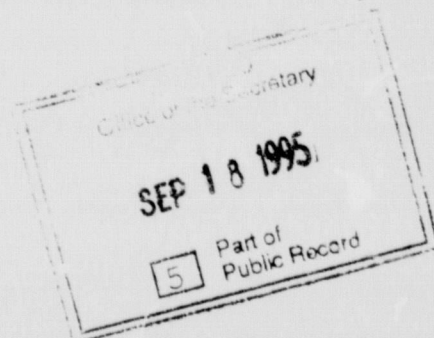
Mountain Coal Company is the owner and operator of the West Elk Mine, a coal mine located in Western Colorado which produces 5-6 million tons each year for domestic and export sale. All shipments originate on the Southern Pacific, although dual destination shippers are available in most sales instances. Mountain Coal Company is very concerned that the proposed merger may be substantially anti-competitive. Mountain Coal Company has every reason to believe that the application will be complex, massive and will contain a significant level of detailed matter requiring extensive analysis and thought to properly understand and evaluate. In Mountain Coal Company's view, the proposed schedule is insufficient to provide Mountain Coal Company and other interested parties a meaningful opportunity to comment on what is likely to be one of the most significant mergers in the entire railroad history of the United States.

Under the Commissioner's Order of August 24, 1995, the commission is proposing to reduce the 90-day period for comments and indicated that comments would be due 30 days after acceptance of the primary application. Mountain Coal Company believes this is entirely too short to digest and understand the implications of this historic merger.

Mountain Coal Company accordingly protests Union Pacific's proposed procedural schedule as Mountain Coal Company is likely to be substantially and adversely affected (indeed the Union Pacific has already indicated it intends to abandon a line now critical to Mountain Coal Company and its customers). Mountain Coal Company asks that the comment period be extended to a minimum of 120 days following the filing of the application and a minimum of 60 days after acceptance, whichever is later.

Very truly yours,

Gene E. DiClaudio
Gene E. DiClaudio
President



STB

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32760

9-18-95

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60082



Item No. _____

Responsible Care®
A Public Commitment

Page Count 3

Sept #53

September 15, 1995

Office of the Secretary
Case Control Branch
Finance Docket No. 32760
Interstate Commerce Commission
1201 Constitution Avenue, N.W.
Washington, DC 20423

Dear Madam/Sir:

Please find enclosed the original and 20 copies of my comments regarding
Finance Docket No. 32760.

Sincerely yours,

Robert L. Evans

RLE/aed/enclosures

ENTERED
Office of the Secretary

SEP 18 1995

3 Part of
Public Record



Occidental Chemical Corporation
Corporate Office
Occidental Tower, 5005 LBJ Freeway
P.O. Box 809050, Dallas, TX 75380-9050
214/404-3800



BEFORE THE
INTERSTATE COMMERCE COMMISSION



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

I am Robert L. Evans, Corporate Manager - Rail Transportation, for Occidental Chemical Corporation (OxyChem). OxyChem is the sixth largest chemical corporation in the USA. OxyChem operates a fleet of 10,500 railcars and has 35 manufacturing plant sites with locations on each of the major Class I railroads. OxyChem's annual sales approximate \$5 billion and we ship over 100,000 bulk rail carloads annually, plus 2,000 intermodal shipments.

Thank you for the opportunity to comment on the proposed procedural schedule submitted by Union Pacific Corporation and Southern Pacific Rail Corporation.

OxyChem is analyzing the effects of this proposed merger as our business must continue to have rail-to-rail competition. Each time Class I carriers merge, competition is reduced for the shippers. The transportation characteristics of our products in the markets served do not allow adequate competition for rail movements from other modes (trucks, vessels or barges). Our manufacturing plants and customers are not all located on water, and trucks cannot handle the volume since many of our moves are transported by rail between 2,000 and 3,000 miles. Also, some of our products cannot effectively move over the highways due to hazardous material classification and routing restrictions.

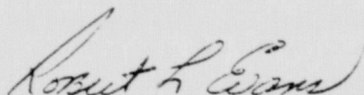
The proposed merger of the UPC/SPC is very significant to OxyChem. The combined annual traffic handled by the UPC/SPC represents about 20% of OxyChem's rail freight.

ENTERED	
Office of the Secretary	
SEP 18 1995	
3	Part of Public Report

Since this merger impacts a huge amount of OxyChem's shipments (20,000+), the approval of a shortened response period would severely comprise our ability to diligently and effectively analyze the impact of this merger and furnish proper input to the ICC. We believe adequate time should be provided, particularly in light of the recent BNSF merger and the Kansas City Southern Railway's petition to reopen the proceedings. The potential anticompetitive issues raised by this second major western railroad consolidation has the potential for a much greater impact because of the earlier merger, particularly to the chemicals and plastics industry which will have over 65% of its capacity sole served by this proposed new merged railroad.

OxyChem requests the ICC not allow any expedited process in this merger application and allow the shipper and railroad industry the normal time permitted for a merger application of this magnitude.

Respectfully submitted,

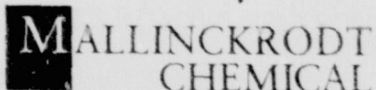


Robert L. Evans
Corporate Manager Rail Transportation
OCCIDENTAL CHEMICAL CORPORATION
P. O. Box 809050
Dallas, TX 75380

Item No. _____

Page Count 1

Sept #51



Mallinckrodt Chemical Inc.
16305 Swingle Ridge Drive
Chesterfield, Missouri 63017-1777
Telephone (314) 530-2000

September 14, 1995

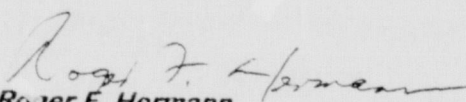
**Office of the Secretary
Case Control Branch
Finance Docket No. 32760
Interstate Commerce Commission
1201 Constitution Avenue, NW
Washington, DC 20423**

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

Mallinckrodt Chemical Inc. objects to the Interstate Commerce Commission's proposal to expedite the procedural schedule for the Union Pacific Corporation's control and merger application regarding the Southern Pacific Rail Corporation.

The proposed transaction would have a major impact on rail shippers, particularly for chemical and plastic companies located in Texas and Louisiana. We need the time allotted under standard procedure to determine the impact of the proposed merger.

Yours very truly,


**Roger F. Hermann
Director of Transportation
& Distribution**

**cc: Arvid E. Roach, II, Esq.
Covington & Burling
1201 Pennsylvania Ave., NW
PO Box 7556
Washington, DC 20044**

**Paul A. Cunningham, Esq.
Harkins Cunningham
1300 Nineteenth Street, NW
Washington, DC 20036**

**RECEIVED
Office of the Secretary**

SEP 18 1995

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OxyChem®

Item No. _____

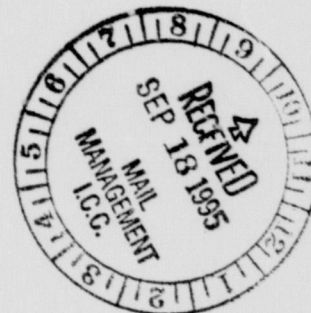
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Page Count 3

Sept #53

September 15, 1995



Office of the Secretary
Case Control Branch
Finance Docket No. 32760
Interstate Commerce Commission
1201 Constitution Avenue, N.W.
Washington, DC 20423

Dear Madam/Sir:

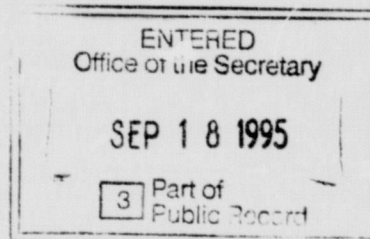
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Sincerely yours,

Robert L. Evans

Robert L. Evans

RLE/aed/enclosures



Occidental Chemical Corporation
Corporate Office
Occidental Tower, 5005 LBJ Freeway
P.O. Box 809050, Dallas, TX 75380-9050
214/404-3800



BEFORE THE
INTERSTATE COMMERCE COMMISSION



Finance Docket No. 32760

Union Pacific Corporation, Union Pacific Railroad Company and
Missouri Pacific Railroad Company - Control and Merger - Southern
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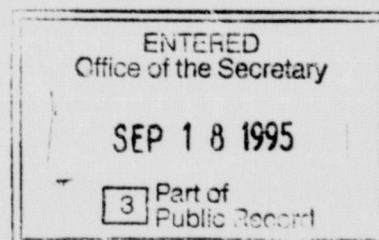
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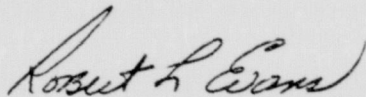
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OxyChem requests the ICC not allow any expedited process in this merger application and allow the shipper and railroad industry the normal time permitted for a merger application of this magnitude.

Respectfully submitted,



Robert L. Evans
Corporate Manager Rail Transportation
OCCIDENTAL CHEMICAL CORPORATION
P. O. Box 809050
Dallas, TX 75380

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9-18-95

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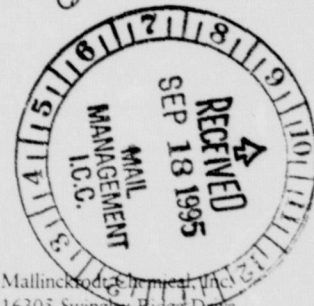
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Item No. _____

Page Count 1

Sept. #51

**MALLINCKRODT
CHEMICAL**



Mallinckrodt Chemical, Inc.
16305 Swingley Ridge Drive
Chesterfield, Missouri 63017-1777

Telephone (314) 530-2000

September 14, 1995

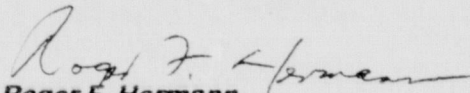
**Office of the Secretary
Case Control Branch
Finance Docket No. 32760
Interstate Commerce Commission
1201 Constitution Avenue, NW
Washington, DC 20423**

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

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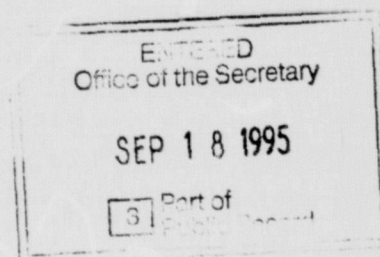
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Yours very truly,


**Roger F. Hermann
Director of Transportation
& Distribution**

**cc: Arvid E. Roach, II, Esq.
Covington & Burling
1201 Pennsylvania Ave., NW
PO Box 7566
Washington, DC 20044**

**Paul A. Cunningham, Esq.
Harkins Cunningham
1300 Nineteenth Street, NW
Washington, DC 20036**



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9-18-95

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Item No. _____

Page Count 15

Sept # 48

SLOVER & LOFTUS

ATTORNEYS AT LAW

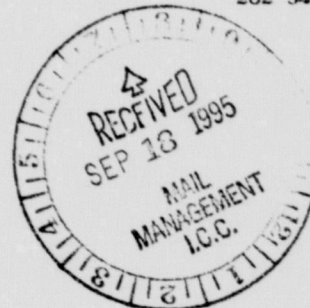
1224 SEVENTEENTH STREET, N.W.
WASHINGTON, D. C. 20036

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS*
FRANK J. PERGOLIZZI
ANDREW B. KOLES R III
PATRICIA E. DIETRICH

* ADMITTED IN ILLINOIS ONLY

September 18, 1995

202 347-7170



VIA HAND DELIVERY

The Hon. Vernon A. Williams
Secretary
Interstate Commerce Commission
12th & 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 Railroad Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPSCL Corp. and The Denver and Rio Grande Western Railroad Company

Dear Secretary Williams:

Enclosed for filing in the captioned proceeding please find an original and twenty (20) copies of the Comments of the Western Coal Traffic League on Applicants' Proposed Procedural Schedule (WCTL-1). In accordance with Commission order, we have also enclosed a Word Perfect 5.1 diskette containing the aforementioned filing.

Sincerely,

A handwritten signature in cursive script that reads "C. Michael Loftus".

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

CML:raw
Enclosures

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

Office of the Secretary

SEP 19 1995

3 Part of
Public Record

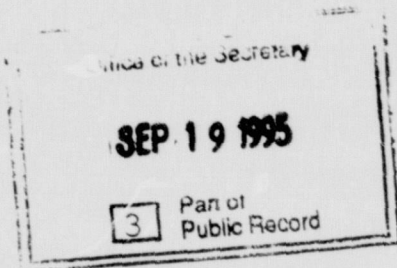
BEFORE THE
INTERSTATE COMMERCE COMMISSION

WCTL-1

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

COMMENTS OF THE
WESTERN COAL TRAFFIC LEAGUE ON
APPLICANTS' PROPOSED PROCEDURAL SCHEDULE



By: William L. Slover
C. Michael Loftus
John H. Leseur
Patricia E. Dietrich
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

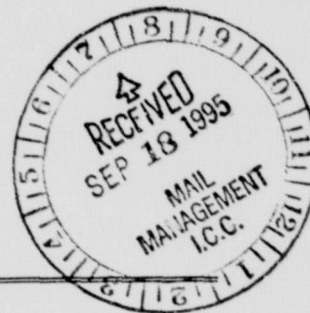
OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: September 18, 1995

Attorneys for the Western
Coal Traffic League

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)

Finance Docket No. 32760

COMMENTS OF THE
WESTERN COAL TRAFFIC LEAGUE ON
APPLICANTS' PROPOSED PROCEDURAL SCHEDULE

The Western Coal Traffic League ("WCTL") strongly opposes the expedited procedural schedule proposed by the Applicants for the consideration of their forthcoming merger proposal. Applicants' proposed schedule was noticed for comments by the Commission in Decision No. 1 for this proceeding on September 1, 1995. Applicants' proposed schedule is more unworkable than the schedule that was followed in the recent BN/Santa Fe merger proceeding.¹ In that regard, the Commission's experience with the cursory, rushed pace of the BN/Santa Fe merger proceeding should lead it to conclude that

¹ See Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Decision served August 23, 1995 ("BN/Santa Fe").

more time is needed to permit development of the evidence by the parties, to analyze the issues and evidence and to issue a well-considered decision.

Accordingly, in lieu of Applicants' proposed schedule, and if the Commission intends to establish a schedule prior to the filing of Applicants' primary application, WCTL herein requests that the Commission adopt WCTL's proposed procedural schedule set forth in Attachment 1 to these Comments. If the Commission should decide to adopt a schedule of the length proposed by Applicants, WCTL urges the Commission not to reduce the time period allowed for the filings scheduled under the Applicants' proposal for F+60 and F+90.

In support of these Comments, WCTL states as follows:

I

IDENTITY AND INTEREST

WCTL is a voluntary association formed in 1976. Its regular membership is composed of shippers and receivers of coal mined west of the Mississippi River.² Each WCTL member is a

² WCTL members include: Arizona Electric Power Cooperative, Inc.; Cajun Electric Power Cooperative, Inc.; Central Louisiana Electric Company, Inc.; Central Power & Light Company; City of Colorado Springs, Colorado; City Public Service Board of San Antonio; Fayette Power Project, Austin, Texas; Houston Industries, Inc.; Kansas City Power & Light Company; Midwest Power; Minnesota Power; Nebraska Public Power District; Omaha Public Power District; Public Service of Oklahoma; Southwestern Electric Power Company; TUCO, Inc.; Unitrain, Inc.; West Texas Utilities Co.; Western Resources, Inc.; and Wisconsin Public Service Corporation.

major consumer of western coal, and each moves substantially all of its coal by rail. WCTL is the only association composed exclusively of those who ship, receive, and pay the applicable charges on high-volume movements of western coal. Presently, WCTL members ship in excess of 93 million tons of coal per year.

WCTL members include utilities that ship their coals by both Applicants and Applicants' current competitors. WCTL is concerned about the consequences of the proposed application and its potential effect on the competitive balance in the coal transportation market.

II

APPLICANTS' PROPOSED SCHEDULE IS CONTRARY TO ESTABLISHED COMMISSION REGULATIONS AND PRECEDENT

Commission regulations governing the processing of railroad merger proceedings are set forth at 49 C.F.R. § 1180. Applicants wish to diverge from these regulations and rely instead upon the Commission's proposed rulemaking in Ex Parte No. 282 (Sub-No. 19),³ which fueled the six-month schedule in BN/Santa Fe, as support for their 195-day schedule. However, the proposed schedule in Ex Parte No. 282 (Sub-No. 19) has not been adopted as a final rule by the Commission, and there is no good reason now to stray from the existing regulations, especially

³ New Procedures in Rail Acquisitions, Mergers & Consolidation, Ex Parte No. 282 (Sub-No. 19), served January 26, 1995.

since the BN/Santa Fe proceeding highlights the ineffectiveness of a rushed consideration of railroad mergers.

Prior to the BN/Santa Fe merger, railroad consolidations have been subjected to intense scrutiny. For example, the recently concluded CNW/UP Control Case,⁴ initially envisioned a schedule which called for evidentiary proceedings and argument to be completed in approximately one (1) year. Instead, however, the Commission did not issue a decision in the CNW/UP proceeding until more than two (2) years after the initial filing.⁵ The procedural schedule in the Santa Fe/Southern Pacific Control Case⁶ extended over a 28-month period.⁷ Moreover, none of these recent merger and control cases involved transactions anywhere near the size and scope of either the BN/Santa Fe merger or the instant UP/SP proceeding which seeks to

⁴ Finance Docket No. 32133, Union Pacific Corp., Union Pacific R.R. and Missouri Pacific R.R. -- Control -- Chicago and North Western Holdings Corp. and Chicago and North Western Transp. Co., Decision served March 7, 1995.

⁵ The CNW and UP filed their primary application on January 29, 1993, and the Commission's decision was not served until March 7, 1995, and the transaction itself was not consummated until April 25, 1995.

⁶ Finance Docket No. 30400, Santa Fe Southern Pacific Corporation -- Control -- Southern Pacific Transportation Company, 2 I.C.C. 2d 709 (1986), 3 I.C.C. 2d 926 (1987).

⁷ Finance Docket No. 30800, Union Pacific Corp., et al. - - Control -- Missouri-Kansas-Texas R.R., Decision served October 22, 1986 (unprinted).

create the largest rail carrier in the nation.⁸ Approximately one year ago, under similar circumstances in the BN/Santa Fe proceeding, WCTL noted that the BN/Santa Fe merger dwarfed its predecessor mergers in size and complexity. The proposed UP/SP merger is even larger. WCTL submits that the sheer size of the transaction demands heightened scrutiny, and at the very least, requires that the transaction proceed on a schedule which appreciates the significance of the transaction.

III

THE ANTI-COMPETITIVE EFFECT
OF CUMULATIVE RAILROAD MERGERS
CANNOT BE CAREFULLY REVIEWED UNDER
APPLICANTS' PROPOSED EXPEDITED SCHEDULE

Applicants have requested that the Commission adopt an expedited, 195-day procedural schedule for their proposed merger, similar to that of the BN/Santa Fe merger proceeding. See BN/Santa Fe, supra, Decision served March 7, 1995, at Appendix A. In support of the proposed schedule, Applicants' claim that "the strikingly successful experience with this schedule in BN/Santa Fe demonstrated that the schedule provides all parties with a fair opportunity to be heard while accommodating the primary applicants' interest in obtaining an expeditious decision on an

⁸ Together, Applicants' combined system will operate 35,000 miles of rail track, operate in 25 states, and have annual revenue of approximately \$9.5 billion. Union Pacific to Acquire Southern Pacific in a Cash-Stock Pact Totaling \$3.9 Billion, Wall St. J., August 4, 1995, at A3.

important rail restructuring initiative." Applicants' Petition to Establish Procedural Schedule, at 3-4 (dated August 4, 1995). WCTL differs strongly with Applicants' view that BN/Santa Fe merger schedule was "strikingly successful."

In fact, WCTL believes that the BN/Santa Fe schedule was a striking disaster. The BN/Santa Fe schedule failed to provide adequate time for a meaningful review and consideration of affected parties' interests. The Commission's rush to judgment in BN/Santa Fe clearly accommodated BN/Santa Fe's interest in avoiding close scrutiny by the Commission of the anti-competitive effects resulting from their merger. Opponents of the BN/Santa Fe merger had their arguments summarily discounted for the sake of that expediency.

Even if the schedule in the BN/Santa Fe proceeding is viewed as having been adequate, there are good reasons to allow a longer schedule for this proceeding. The BN/Santa Fe's notice of intent to merge was filed eight months prior, and their application for control and merger was filed five months prior to, the establishment of a truncated procedural schedule.⁹ During the eight months prior to the adoption of the six-month schedule, the involved parties had time to identify the anti-competitive effects of the merger, time to examine their options, time to

⁹ In BN/Santa Fe, the notice of intent to file was filed on July 8, 1994; the application was filed on October 13, 1994; and the six-month procedural schedule was not adopted until March 7, 1995.

formulate their opposition, and time to explore settlement with the applicants.

In this proceeding, the Commission is being asked to approve the merger of the nation's second largest railroad (Union Pacific) with the sixth largest railroad (Southern Pacific). The proposed UP/SP merger will create a railroad even larger than that created by the BN/Santa Fe merger. There is absolutely no convincing rationale why two such large mergers should be pushed through the Commission at break-neck speed. The overall scale of the UP/SP merger, in conjunction with the BN/Santa Fe merger, is all the more reason for the Commission to follow its well-developed policy of reviewing this merger according to established regulations, as discussed above.

Furthermore, WCTL strenuously argued to the Commission in BN/Santa Fe that the reduction in the number of railroads in the west from four to three would seriously jeopardize its member utilities' ability to receive competitive rail service. Now, if the UP/SP merger is approved, the number of railroads serving the western United States will be reduced to two. The prospect of two powerful railroads effectively controlling all the western railroad traffic demands careful and thorough evaluation. The cumulative anti-competitive effect of these two, back-to-back, enormous mergers must not be treated lightly.

Another reason the Commission should not rely on the schedule for the BN/Santa Fe proceeding as being appropriate here is that the Commission's resources will not be, during the

conduct of this proceeding, at the same level as they were during the BN/Santa Fe merger. Although the details of the elements of the Commission's jurisdiction and authority that will be preserved and the details of the transition from the Commission to its successor are still unknown, it seems clear that during the pendency of this proceeding major changes of this nature will occur. It cannot seriously be questioned that such changes will impact the efficiency of the Commission and its successor. The Commission should take these facts into account in establishing a fair and reasonable schedule.

IV

WCTL'S PROPOSED ALTERNATIVE SCHEDULE IS REASONABLE

WCTL submits that the specific parameters of the procedural schedule, including a discovery timetable, should be established after the Applicants have filed their control and merger application. This approach would permit both the parties and the Commission to review the application and set a schedule that is tailored to address specifically the issues raised in the application. This approach is consistent with the Commission's procedural rules. See 49 C.F.R. § 1180.4(e) (providing that the Commission establish procedures for evidentiary proceedings in a merger case after receipt of written comments on the merger application).

If the Commission decides to issue a schedule now, however, WCTL requests that it adopt the schedule set forth here in Attachment 1. WCTL's schedule contemplates a 365-day schedule. This schedule is considerably shorter than the one that the Commission initially intended to follow in the BN/Santa Fe proceeding. See BN/Santa Fe, Decision served October 5, 1994.¹⁰

With respect to the Commission's request for comments on shortening the time for the filing of inconsistent and responsive applications, comments, protests, requests for conditions, and other opposition evidence and arguments to 30 days after the Commission's acceptance of the primary application, WCTL submits that such a time frame would be very unreasonable. Allowing only 90 days from the date of acceptance of the primary application for opposition filings was wholly insufficient in BN/Santa Fe. The time period proposed by Applicants for these filings is not too long, it is too brief.

WCTL's proposed schedule is both reasonable and realistic, and is one which should give all parties sufficient time to speak with Applicants about settlement options, and alternatively, to prepare and present to the Commission their

¹⁰ At that time, BN/Santa Fe had proposed a 430 day schedule, but the Commission felt that 430 days was not enough time. The Commission stated: "[A]pplicants' proposed procedural schedule would not provide sufficient time to handle a proceeding of this magnitude but that the substantially longer schedule proposed by protestants would unnecessarily delay resolution of the matter." Id. at 3.

positions in this most consequential proceeding. The schedule also fully complies with the statutory deadline for completion of the evidentiary phase of this proceeding,¹¹ while giving the Administrative Law Judge or the Commission sufficient flexibility to grant extensions, if necessary.

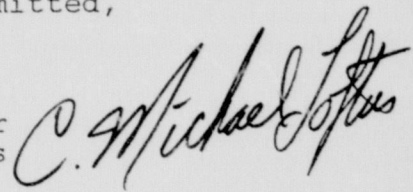
V

CONCLUSION

For the all the reasons set forth above, WCTL respectfully requests that the Commission adopt the proposed schedule set forth in Attachment 1 hereto.

Respectfully submitted,

By: William L. Slover
C. Michael Loftus
John H. LeSeur
Patricia E. Dietrich
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170



OF COUNSEL:

Slover & Loftus
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Attorneys for the Western Coal
Traffic League

Dated: September 18, 1995

¹¹ See 42 U.S.C. § 11345(b)(3) (evidentiary proceedings for major transactions to be completed approximately 720 days after acceptance of the primary application).

UP/SP PROPOSED PROCEDURAL SCHEDULE

- F Primary application and related applications filed.
(Notice of intent to abandon will be filed within 30 days prior to the filing of applications for abandonment; notices of intent will not be filed as to petitions for exemption.)
- F+30 Commission notice of acceptance of primary application and related applications published.
- F+60 Description of anticipated inconsistent and responsive applications due; petitions for waiver or clarification due with regard to such applications due.
- F+150 Inconsistent and responsive applications due. All comments, requests for conditions, and any other opposition evidence and arguments due. DOJ and DOT comments due.
- F+165 Commission notice of acceptance (if required) of responsive applications published in the Federal Register.
- F+225 Response to inconsistent and responsive applications due. Response to comments, protests, requested conditions, and other opposition due. Rebuttal in support of primary application and related applications due.
- F+275 Rebuttal in support of inconsistent and responsive applications due.
- F+305 Briefs due, all parties (not to exceed 50 pages).
- F+320 Oral argument.
- F+330 Voting conference.
- F+365 Final decision.

Under the proposal, immediately upon each evidentiary filing, the filing party will place all documents relevant to the filing (other than documents that are privileged or otherwise protected from discovery) in a depository open to all parties. Access to documents subject to protective order will be appropriately restricted. Depositions of witnesses and party employees and document production requests authorized under Rule 1114.21(b)(2), on notice and without individual showing of good cause in each instance, with arrangements made by agreement.

Relevant excerpts of transcripts will be received in lieu of cross-examination at the hearing, unless cross-examination is needed to resolve material issues of disputed fact. Discovery on responsive applications will begin immediately upon their filing. The Chief Administrative Law Judge will have the authority: (1) to revise the schedule as may appear necessary; and (2) initially to resolve any discovery disputes.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 1995, copies of the foregoing Comments of the Western Coal Traffic League on Applicants' Proposed Procedural Schedule was served via first-class United States mail, postage prepaid on all persons on the service list for Finance Docket No. 32760.

Patricia E. Dietrich

Patricia E. Dietrich

STB

FD

32760

9-18-95

D

60078

Item No. _____

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Sept. # 49

60078

DOJ-1

BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.



UNION PACIFIC CORP., UNION PACIFIC)
RAILROAD CO. AND MISSOURI PACIFIC)
RAILROAD CO.-- CONTROL AND MERGER --)
SOUTHERN PACIFIC RAIL CORP., SOUTHERN) FINANCE DOCKET
PACIFIC TRANSPORTATION CO., ST. LOUIS) NO. 32760
SOUTHWESTERN RAILWAY CO., SPCSL CORP.)
AND THE DENVER AND RIO GRANDE WESTERN)
RAILROAD CO.)

COMMENTS BY THE DEPARTMENT OF JUSTICE
ON PROPOSED PROCEDURAL SCHEDULE

Communications with respect to this document should be addressed
to:

Roger W. Fones, Chief
Donna N. Kooperstein, Assistant Chief

Robert L. McGeorge
Joan S. Huggler
Michael D. Billiel
Attorneys

Transportation, Energy &
Agriculture Section
Antitrust Division
U.S. Department of Justice
555 4th Street, N.W.
Washington, D. C. 20001

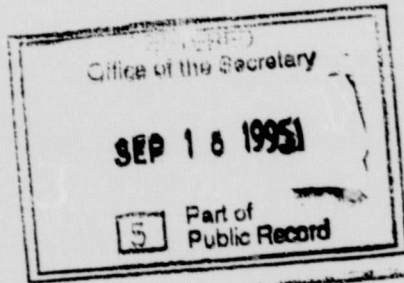
202-307-6456

September 18, 1995



U. S. Department of Justice

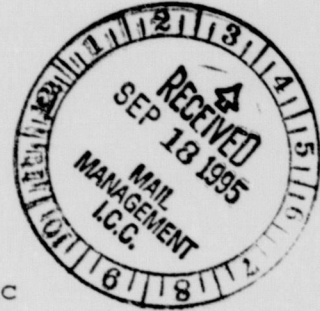
Antitrust Division



555 4th Street, N.W.
Washington, DC 20001

September 18, 1995

Honorable Vernon A. Williams, Secretary
Interstate Commerce Commission
12th Street and Constitution Avenue, N.W.
Room 2215
Washington, D. C. 20423



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

Dear Mr. Williams:

Enclosed for filing in the captioned docket are the original and twenty copies of Comments by the Department of Justice On Proposed Procedural Schedule. Please have the extra copy of this filing date-stamped and return it to the messenger for our files.

In accordance with the Commission's request contained in Decision No. 1 issued in this proceeding, we also enclose a copy of this document on a 3.5 inch floppy diskette formatted for Word Perfect 5.1.

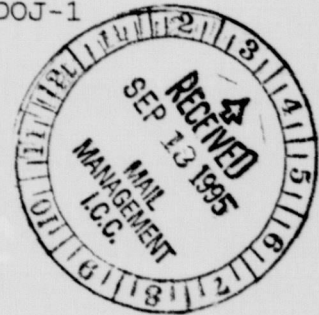
Sincerely yours,

Joan S. Huggler
Attorney
Transportation, Energy and
Agriculture Section

CC: Hon. Jerome Nelson
Arvid E. Roach II, Esq.
Paul A. Cunningham, Esq.
All Parties of Record

BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.

DOJ-1



UNION PACIFIC CORP., UNION PACIFIC)
RAILROAD CO. AND MISSOURI PACIFIC)
RAILROAD CO.-- CONTROL AND MERGER --)
SOUTHERN PACIFIC RAIL CORP., SOUTHERN) FINANCE DOCKET
PACIFIC TRANSPORTATION CO., ST. LOUIS) NO. 32760
SOUTHWESTERN RAILWAY CO., SPCSL CORP.)
AND THE DENVER AND RIO GRANDE WESTERN)
RAILROAD CO.)

COMMENTS BY THE DEPARTMENT OF JUSTICE
ON PROPOSED PROCEDURAL SCHEDULE

The Department of Justice ("Department") hereby submits Comments in response to the September 1, 1995 Decision of the Commission (Decision No. 1) on the procedural schedule to be adopted in this proceeding.

On August 4, 1995, the Applicants¹ notified the Commission of their intent to file an application seeking authority under 49 U.S.C. §§ 11343-45 to accomplish the merger of the Union Pacific and the Southern Pacific. On the same date, Applicants filed a

¹ Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) are collectively referred to as "the Applicants." UPC, UPRR, and MPRR are referred to collectively as "Union Pacific"; UPRR and MPRR are referred to collectively as "UP." SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as "Southern Pacific"; SPT, SSW, SPCSL and DRGW are referred to collectively as "SP."

petition (UP/SP-4) to establish a proposed procedural schedule in this proceeding.

The Commission has requested comments from the public on the Applicants' proposed schedule and the Commission's own variation of that schedule.

POSITION OF THE DEPARTMENT OF JUSTICE

The Department urges the Commission to modify the Applicants' proposed schedule to allow more time for the Department and other interested parties to develop fully the evidence on the competitive effects of the proposed merger of UP and SP -- two of the remaining three Class I railroads operating in the western United States. Attached to these Comments is an alternative proposed schedule that provides for the minimum amount of time necessary adequately to develop this evidence.

The proposed merger of the UP and the SP is beyond doubt a major transaction that is likely to have significant competitive consequences in dozens, if not hundreds, of distinct transportation markets. Though parts of the UP and SP systems will join end to end, large segments of the carriers' lines are parallel to each other. As a result, many shippers would lose their only competitive alternative as a result of the proposed merger. There also appear to be a significant number of locations where shipper rail options would decrease from three to

two, potentially resulting in substantial competitive harm.² In addition to the numerous and potentially complex competitive issues raised by this transaction, the parties have stated that they plan to demonstrate by substantial evidence the efficiencies and benefits they contend will result from the merger. (See, e.g., UP/SP-6 at 4, 6)

The procedural schedule must provide interested parties with sufficient time to investigate the transaction's competitive effects and the efficiency claims of the parties, and to prepare and present evidence that will illuminate the record and inform the Commission's ultimate decision. The period between the filing of the Primary Application and the filing of responsive and inconsistent applications, comments, protests and requests for conditions is a crucial time in this regard. Applicants have proposed a period of 90 days for that part of the schedule; the Commission suggests that 60 days may be sufficient. The Department strongly urges the Commission to widen that window to 120 days.

Because this transaction raises far more competitive concerns than the merger of the BN and the Santa Fe, which was

² There is a significant body of economic empirical work on the effects of a reduction in rail competition from three to two carriers on market prices. See, e.g., R. Levin, "Railroad Rates, Profitability and Welfare Under Deregulation," *Bell Journal of Economics* 12:1 (Spring 1981), p. 1-26; J.M. MacDonald, "Competition and Rail Rates for the Shipment of Corn, Soybeans, and Wheat," *RAND Journal of Economics* 18:1 (Spring 1987), p. 151-163; J.M. MacDonald, "Railroad Deregulation, Innovation, and Competition: Effects of the Staggers Act on Grain Transportation," *Journal of Law and Economics* 32:2 (April 1989).

primarily end to end, the schedule used here should be expanded beyond the time made available in that proceeding.³ Widening the time between filings by the Applicants and protestants will allow interested parties to develop and pursue all their discovery options -- depositions, interrogatories and document requests -- and to resolve discovery disputes that are certain to arise, even as they prepare their own respective filings. Compulsory third-party discovery may play a more important role in this proceeding than it has in the past. These activities are time-consuming in any event, but are likely to be made more difficult given the time frame of this proceeding. Since the Applicants intend to file the Primary Application in November (and by December 1 at the latest), much of the development of evidence will occur in the traditional holiday time of December and early January. This is likely to make it harder for parties to work within the professional and personal schedules of potential witnesses and to conduct a thorough review of the evidence in the application.

THE DEPARTMENT'S PROPOSED SCHEDULE

The Department's modification of the Applicants' proposed schedule provides somewhat longer periods of time for certain key

³ There, if the Decision Date of March 7, 1995 is used as proxy for the filing of the Primary Application, commenters had about 60 days to engage in discovery and to prepare their filings. There, however, Applicants had filed the Primary Application months before (in October 1994) and the voluminous filing had been available to many participants for a long time. Even with that advantage, parties were required to accomplish discovery while also preparing their filings. While the accelerated schedule worked well there, it is not at all clear the same results would follow in this more complicated matter.

elements of the proceeding. Even with these modifications, the proceeding will proceed with unprecedented speed for a transaction of this nature and magnitude. The first, as discussed above, widens the window available for discovery for the government parties as well as for parties interested in developing responsive or inconsistent applications, or requesting conditions that they believe would ameliorate competitive harms. Our proposal that the government and other parties file their submissions with the Commission on day F+120 rests on a realistic assessment of the time required to investigate a great many markets that could be affected by the transaction. For the Department, this allocation of time to investigate thoroughly is of crucial importance. Yet the additional time it would entail in the overall schedule would be small in relation to the benefits gained from thorough development of the record.

Other portions of the proposed schedule should be expanded as well to allow all participants to develop the record. To give Applicants and others additional time for their discovery once the comments and protests are filed, we propose that responses to comments and all submissions from the Applicants and any other party, including the Department, not be due until at least day F+160. Rebuttal in support of responsive and inconsistent applications could then be due on day F+185. To the extent that commenters such as the Department need to provide rebuttal evidence, the schedule should clearly include them as well as propounders of responsive and inconsistent applications.

Additional time also should be provided for the preparation of briefs, especially in view of the Commission's preference for dispensing with reply briefs. We propose that briefs be due on day F+215, and that Oral Argument (to be held at the discretion of the Commission) take place on day F+225. A voting conference would be held on day F+226 and the date for service of the Final Decision would be day F+270. Should the Applicants file their Primary Application on December 1, 1995, the proceeding would be completed by September 1996. This schedule falls well within the maximum period provided in 49 U.S.C. § 11345 (b).⁴

CONCLUSION

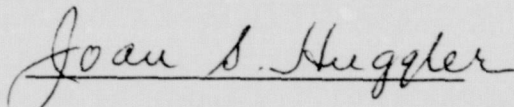
It is essential that sufficient time be provided for interested parties in this important proceeding to contribute to the development of a complete record. The Department's proposed schedule would add about two months to the schedule proposed by the Applicants. By all measures it still would be an expedited schedule, much shorter than the two plus years now allowed by the

⁴ Indeed, the final schedule adopted by the Commission could be extended to accommodate an oral hearing and still remain well within the statutory maximum period.

Interstate Commerce Act. We urge the Commission to adopt an expanded schedule in the interests of a full and complete evidentiary proceeding on the likely competitive effects of this highly significant transaction.

Respectfully submitted,

Roger W. Fones, Chief
Donna N. Kooperstein,
Assistant Chief
Transportation, Energy
and Agriculture Section



Robert L. McGeorge
Joan S. Huggler
Michael D. Billiel

Attorneys

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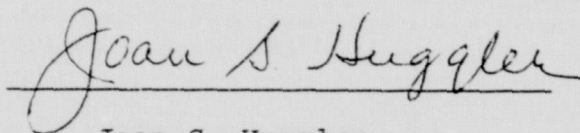
September 18, 1995

APPENDIX
Proposed Revised, Expedited Procedural Schedule

- F Date of Filing of primary application by Applicants.
- F+30 Commission notice of acceptance of primary application and related applications published.
- F+75 Description of anticipated inconsistent and responsive applications due; petitions for waiver or clarification with regard to such applications due.
- F+120 Inconsistent and responsive applications due. All comments, protests, requests for conditions, and any other opposition evidence and arguments due. DOJ and DOT comments due.
- F+135 Notice of acceptance (if required) of inconsistent and responsive applications published in the Federal Register.
- F+160 Response to inconsistent and responsive applications and to comments, protests, requested conditions, and other oppositions due by all parties including government parties. Rebuttal in support of primary and related applications due.
- F+185 Rebuttal in support of inconsistent and responsive applications and comments and protest due.
- F+215 Briefs due, all parties (not to exceed 50 pages).
- F+225 Oral Argument (optional).
- F+226 Voting Conference.
- F+270 Date for service of final decision.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September 1995 I caused to be served, by hand or by first class mail, postage prepaid, copies of the foregoing Comments of the Department of Justice on Proposed Procedural Schedule in Finance Docket No. 32760 on attorneys for the Applicants, the Hon. Jerome Nelson, and all known parties of record in this proceeding.


Joan S. Huggler

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32760

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Sept # 46

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*NOT ADMITTED IN D.C.
RESIDENT BRUSSELS

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WRITERS DIRECT DIAL NUMBER

September 18, 1995

(202) 434-4144

Office of the Secretary
Case Control Branch
Interstate Commerce Commission
Attention: Finance Docket No. 32760
1201 Constitution Avenue, N.W.
Washington, D.C. 20423

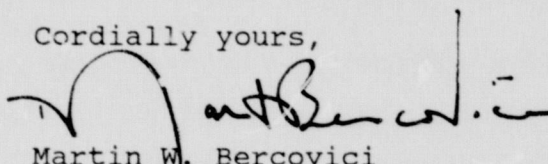


Re: UP/SP Merger; Finance Docket No. 32760

Dear Secretary Williams:

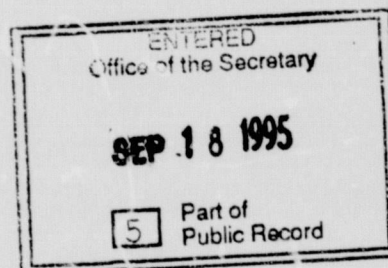
Enclosed, please find an original and twenty (20) copies of comments filed on behalf of The Society of the Plastics Industry, Inc. in reference to Finance Docket No. 32760. Also enclosed is a 3.5" diskette containing SPI's comments. Additionally, a copy of these comments has been sent to each of the applicants' representatives, as prescribed in Decision No. 1, dated September 1, 1995.

Cordially yours,


Martin W. Bercovici

Enclosures

cc: (with enclosure)
Arvid E. Roach, Esquire
Paul A. Cunningham, Esquire



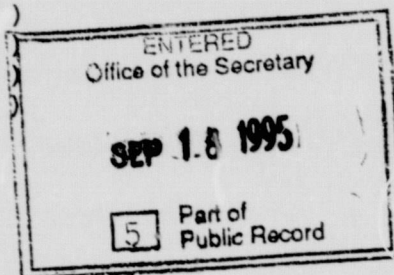
BEFORE THE
Interstate Commerce Commission

WASHINGTON, D.C. 20423



In the Matter of)
)
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



To: The Commission

COMMENTS
OF
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

The Society of the Plastics Industry, Inc. ("SPI") respectfully herewith submits its Comments in response to Decision No. 1 issued by the Commission in the Union Pacific/Southern Pacific ("UP/SP") merger proceeding relating to the proposed procedural schedule for handling of the merger.¹

I. INTRODUCTION

SPI is the major trade association of the plastics industry. Its members consist of more than 2000 companies

¹ 60 Fed. Reg. 45737 (Sept. 1, 1995).

which supply raw materials, process or manufacture plastics and plastics products, and engage in the manufacture of machinery used to make plastic products or materials of all types. Its members are responsible for an estimated 75% of total sales of plastics materials and plastic products in this country.

Plastics resins, STCC 28211, the primary material of interest to SPI in this proceeding, constitute approximately 60 billion pounds of railroad traffic, amounting to more than 347,000 carloads of traffic and \$1.1 billion in freight revenue.² The overwhelming majority of plastics resins production occurs in the Gulf Coast region, and the two primary railroads which handle plastics resins at origin are the Union Pacific and the Southern Pacific. SPI's member companies thereby have a substantial interest in the proposed merger of the UP and SP, and SPI intends to be an active participant in this merger proceeding.

II. COMMENTS

The UP/SP merger is a substantially different transaction from the merger of the Burlington Northern and

² *Freight Commodities Statistics, 1993*, Transportation Data Division, Economics and Finance Department, Association of American Railroads, STCC No. 282.

Santa Fe Railroads. The UP, with its recent acquisition of the Chicago & Northwestern ("CNW"), constitutes the largest western railroad, with 1994 tonnage of 436 million tons carried.³ The merger of the BN and Santa Fe will create a railroad of comparable size, with 1994 combined tonnage of 450.7 million tons.⁴ To combine the SP with the UP/CNW system will create a railroad which, based upon 1994 data, would reflect a volume of 551 million tons,⁵ more than 22% larger than the combined BN/Santa Fe. Accordingly, the proposed merger of the UP and SP reflects a new dimension from the standpoint of size alone.

Second, whereas the BN/Santa Fe merger largely was an end-to-end merger with some pockets of overlapping service, a merger of the UP and Santa Fe will entail approximately equivalent portions of horizontal and vertical combination.⁶ The principal area of duplication is the Gulf Coast petrochemical belt which is the heart of plastics resins production, with overlapping routes running from the plastics production centers in the Gulf Coast to the

³ *Rail Price Advisor*, Vol. 4, No. 3 at p. 2 (3d Quarter 1995).

⁴ Id.

⁵ Id.

⁶ See, Exhibit 1, a merger map distributed by the UP/SP "merger team."

California and Oregon markets and to the New Orleans, St. Louis, Memphis and Chicago gateways to the southern and eastern markets. This merger thus is substantially different from that of the BN and Santa Fe.

Third, the merger of the UP and SP will create a true duopoly in the west. Based upon 1994 data, the BN/Santa Fe and the UP/CNW/SP together would control more than 53% of the revenues of the Class I freight railroads nationwide.⁷ The remaining western railroads combined would amount to only 45% of the smaller of the combined behemoths on a revenue basis and only 65% on a tonnage basis.⁸ Viewed strictly from the standpoint of the western carriers, the combined BN/Santa Fe and UP/CNW/SP systems would control more than 75% of western carrier tonnage and more than 85% of western railroad revenues.

Considering that the proposed merger of the UP/CNW with the SP is a much different transaction than the BN/Santa Fe or the UP/CNW mergers, SPI respectfully submits that the Commission must take these differences into account in setting the procedural schedule. Moreover, there is another factor which must be taken into account. With the

⁷ Rail Price Advisor, supra, at p. 3.

⁸ This evidences that the remaining railroads are less profitable on a per-ton of revenue basis, and thus less able to compete, whether individually or collectively, with combined BN/Santa Fe and UP/CNW/SP systems.

transportation appropriations bills of both the Senate and the House providing for sunset of the Interstate Commerce Commission effective December 31, 1995, this merger likely will be heard and decided by a successor agency. Sunset of the Commission undoubtedly also will bring disruptions with regard to continuity of staff who are familiar with rail merger cases. While any schedule set by the Commission may not necessarily be binding upon a successor agency, it likely would be viewed as "operative"; and accordingly, the Commission must take into account the impact upon a new agency inheriting this procedural schedule.

In consideration of the foregoing, SPI respectfully submits that (i) the schedule proposed by the UP and SP is inadequate, and necessarily therefore, (ii) the alternative schedule suggested by the Commission is totally inappropriate.

Proposed Alternative Schedule

With regard to the Commission's alternative schedule, it would be highly inappropriate and prejudicial to shippers and other parties for the Commission to shorten the time available to conduct analysis and discovery and for preparation of comments, protests, requests for conditions, inconsistent and responsive applications and any other evidence and arguments appropriate to the merger application. A minimum of ninety (90) days will be required

to conduct discovery and prepare comments, oppositions and requests for conditions.

The Commission states that it intends to put the thirty (30) days it proposes to delete from responsive comments and oppositions back in the schedule; however, the Commission does not indicate where that time would be allowed. It is evident, from a review of the schedule, that the Commission intends to insert the 30 days between the due date for briefs and the date of oral argument. SPI concurs that 15 days from the close of the record is not sufficient time for staff and decision-makers to analyze the record in a \$5+ billion merger and supports the expansion of time for analysis and preparation for a final decision. On the other hand, there is nothing sacrosanct about a six-month merger schedule.⁹ Adequacy of process, not an arbitrary date for issuance of a decision (except as prescribed by statute), must govern. SPI respectfully urges the Commission to provide sufficient analytical time for the decision-making agency, but to do so by extending the overall schedule without prejudicing the rights and opportunity to participate of the shipping public.

⁹ The Department of Justice, in conducting reviews of complex mergers under the Hart-Scott-Rodino Act, frequently requires more than six (6) months; and the DOJ process does not entail the public participation and formal filing schedule prescribed by the Interstate Commerce Act.

Proposed Procedural Schedule

With regard to the proposed schedule itself, SPI notes that there is no opportunity for reply to the applicants' responses to comments, protests and requested conditions. As reflected above, this proceeding is significantly different from the BN/Santa Fe merger, and undoubtedly will generate a much more substantial record and many more issues of contested fact. In order to provide for a full and complete record, SPI respectfully urges the Commission to provide a full opportunity for all parties to reply to the applicants' response to comments, protests, etc..¹⁰

The proposed schedule contemplates rebuttal (in support of inconsistent and responsive applications) ten (10) days following applicants' responses. In allowing all parties a rebuttal opportunity, this period should be expanded to allow not only for analysis and response, but also for discovery regarding the applicants' responsive statements. At least forty-five (45) days should be allowed between the applicants' response and rebuttal.

One other element that likely will be important in this merger proceeding is an oral hearing. Undoubtedly, there will be highly contested issues of fact in this proceeding; and considering the large degree of horizontal merger impact

¹⁰ SPI has no objection should the Commission also allow sur-rebuttal by applicants.

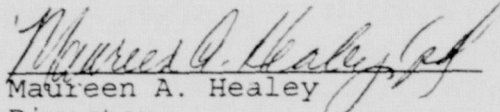
of the contemplated transaction, it is essential that the reviewing agency have a full and complete record. Accordingly, SPI respectfully urges the Commission to provide an opportunity to request and obtain oral hearing before the presiding officer, on issues identified by the parties, in order that contested issues of fact may be addressed so that an appropriate decisional framework may be established. Thereafter, following close of the evidentiary record, no less than twenty (20) days should be provided for the submission of final briefs. The ten (10) days suggested in the proposed schedule is insufficient.

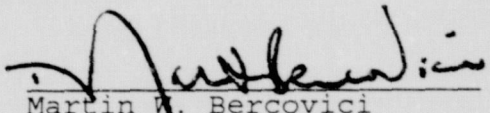
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The shrinkage of the rail transportation industry to a handful of carriers having enormous power over the producer and manufacturing segments of the United States threatens serious economic consequences to U.S. industry and its ability to be profitable and competitive in the global economy. The Commission must recognize the differences between carriers and the effects of merging of these carriers, and avoid any rush to judgment in the merger proposed by the Union Pacific and Southern Pacific Railroads which likely will have substantial and lasting impacts upon the industries served by the UP and SP.

WHEREFORE, THE PREMISES CONSIDERED, The Society of the
Plastics Industry, Inc., respectfully urges the Interstate
Commerce Commission to adopt a schedule governing
consideration of the merger of the Union Pacific and
Southern Pacific Railroads in accordance with the timetable
set forth above.

Respectfully submitted,


Maureen A. Healey
Director
Federal Environment and
Transportation Issues
The Society of the
Plastics Industry, Inc.
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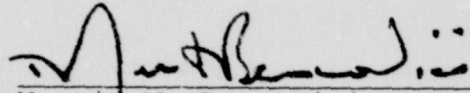
Date: September 18, 1995

CERTIFICATE OF SERVICE

I, Martin W. Bercovici, hereby certify that the foregoing Comments of The Society of the Plastics Industry, Inc., were mailed, United States first-class, postage prepaid, this 18th day of September, 1995, to the following parties:

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Martin W. Bercovici

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Item No. _____

Page Count 18

Sept. # 47

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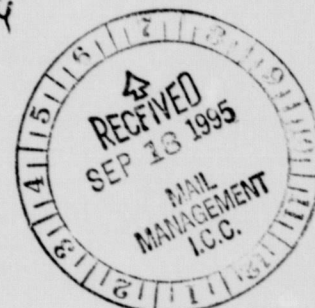
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September 18, 1995

GERALD E. JESSUP
(1911-1994)

Mr. Vernon A. Williams
Secretary
Interstate Commerce Commission
12th & Constitution Ave., N.W.
Washington, DC 20423

HAND-DELIVERED

Re: Union Pacific Corp., Union Pacific
Railroad Co., and Missouri Pacific
Railroad Co.--Control and Merger--
Southern Pacific Rail Corp., Southern
Pacific Transportation Co., St. Louis
Southwestern Railway Co., SPCSL Corp.
and The Denver and Rio Grande Western
Railroad Co.

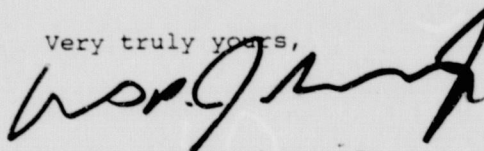
Finance Docket No. 32760

Dear Mr. Williams:

Enclosed for filing in the referenced proceeding are the original and 20 copies of STRC-5, the Comments of Save the Rock Island Committee, Inc., on Proposed Procedural Schedule. The certificate of service indicates service upon the required parties. Also enclosed is a 3.5-inch disk containing the text of the comments in WordPerfect 5.1 format.

Please acknowledge the receipt and filing of the enclosed Comments by receipt stamping the copy of this letter and the extra copy of the Comments enclosed for that purpose and returning them to the undersigned in the enclosed pre-addressed, postage paid envelope.

Very truly yours,

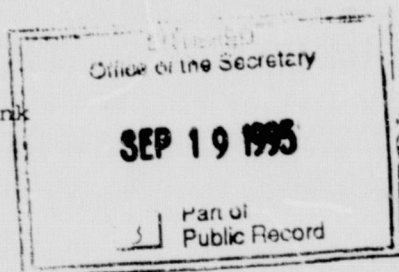


William P. Jackson, Jr.

WPJ/jmb

Enclosures

cc: Mr. Jim Link



STRC-5

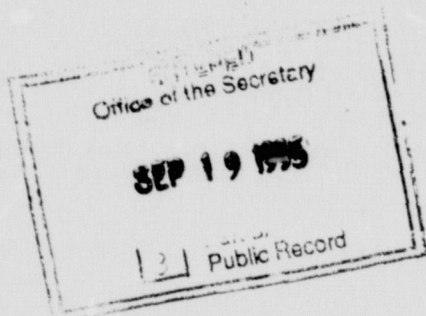
BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.



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

: Finance Docket No. 32760

COMMENTS OF SAVE THE ROCK
ISLAND COMMITTEE, INC., ON
PROPOSED PROCEDURAL SCHEDULE



William P. Jackson, Jr.
John T. Sullivan
Attorneys for Save the Rock
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OF COUNSEL:

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Post Office Box 1240
Arlington, VA 22210
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Due and Dated: September 18, 1995

BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.

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

COMMENTS OF SAVE THE ROCK
ISLAND COMMITTEE, INC., ON
PROPOSED PROCEDURAL SCHEDULE

Save the Rock Island Committee, Inc. ("STRICT"), submits these comments on the two procedural schedules proposed in the Commission's Decision No. 1 in this proceeding, served September 1, 1995. STRICT previously filed its Reply in Opposition to the Petition to Establish Procedural Schedule (STRC-2), dated August 24, 1995, and is appreciative that the Commission has seen fit to follow its suggestion to seek public comment on the procedural schedule for perhaps the most important railroad merger case in this century.

BACKGROUND

On August 4, 1995, Union Pacific Corporation ("UPC"), Union Pacific Railroad Company ("UPRR"), Missouri Pacific Railroad Company ("MPRR"), Southern Pacific Rail Corporation ("SPR"), Southern Pacific Transportation Company ("SPT"), St. Louis Southwestern Railway Company ("SSW"), SPCSL Corp. ("SPCSL"), and The Denver and Rio Grande Western Railroad Company ("DRGW") (collectively "Applicants")¹ notified the Commission of their intention to

¹ Those rail carriers presently affiliated with UPC will be referred to herein as "UP" while those rail carriers affiliated with SPR will be referred to herein as "SP."

file by December 1, 1995, an application seeking Commission authorization under 49 U.S.C. Sections 11343-11345 for the acquisition of control of SPR by UP Acquisition, an indirect wholly-owned subsidiary of UPC, the merger of SPR into UPRR, and the resulting common control of UPRR, MPRR, SPT, SSW, SPCSL, and DRGW by UPC. In connection therewith, Applicants filed UP/SP-4, their Petition to Establish Procedural Schedule (hereinafter "Petition"). The Commission has now requested public comment on the procedural schedule proposed by Applicants as well as on a "variation" of that schedule suggested by the Commission. For the reasons stated in this pleading, modification of either proposed procedural schedule should take place so that the public interest may be more adequately considered.

INTEREST OF STRICT

STRICT's interest in this proceeding is set forth in detail in STRC-1, its Reply in Opposition to Petition for Waiver of or Exemption From 49 U.S.C. Section 10904(e)(3) and 49 C.F.R. Section 1152.13(d), filed August 24, 1995. In the interest of brevity it will not be restated here. Despite STRICT's undeniable interest in this proceeding, Applicants have taken issue with STRICT's participation in it, claiming that STRICT's motivation for so doing is improper.²

Even a cursory reading of some of the prior Commission control proceedings that involved the Applicants establishes the necessity for STRICT's participation in this proceeding. Misrepresentations have abounded,

² See Applicants' Reply to STRICT's Opposition to Petition for Waiver or Clarification (UP/SP-9), dated August 29, 1995; Applicants' Reply to STRICT's Opposition to Petition to Establish Procedural Schedule (UP/SP-10), dated August 29, 1995; Applicants' Reply to STRICT's Motion to Reject Impermissible Pleadings (UP/SP-12), dated September 7, 1995.

and the public has been bamboozled, particularly the members of STRICT. At the appropriate time, STRICT intends to cite chapter and verse, to the extent relevant in this merger proceeding. This is a proceeding in which the Commission can take action to rectify past missteps.

STRICT is committed to preserving and reinstituting operations over the former Chicago, Rock Island and Pacific Railroad Company ("Rock Island") line between Kansas City and St. Louis, MO. now owned by SSW. This commitment extends to seeking to have the line operated by one entity as a unit. The involved line was sought by both SSW and MPRR in St. Louis Southwestern Railway Co.--Purchase (Portion)--William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Co., Debtor, 363 I.C.C. 323 (1980) (hereinafter "Tucumcari"), and thus was again an issue in Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific Railroad Co.--Control--Missouri Pacific Corp. and Missouri Pacific Railroad Co., 366 I.C.C. 462 (1982), aff'd in part and remanded in part sub nom. Southern Pacific Transportation Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985) (hereinafter "UP/MP/WP"), in which the Commission approved the consolidation of MPRR, UPRR and The Western Pacific Railroad Company (hereinafter "the UP-MP-WP merger").³ Because the merger proposed by Applicants will negate many of the Commission's findings and conclusions in those proceedings with respect to the former Rock Island line, STRICT intends to participate in this proceeding to protect the interests of its members, who

³ Indeed, currently pending before the Commission is STRICT's petition to reopen the latter proceeding in order that the Commission may revoke trackage rights SSW was granted over MPRR lines in Missouri in that proceeding as a condition to Commission approval of the UP-MP-WP merger. STRICT's motivation for so requesting was that such action by the Commission would require SSW to do what it represented it would do when it acquired the line: operate it. Consolidation of that request with the proposed merger application would be appropriate, so that all issues could be disposed of at once, instead of piecemeal.

include the governing bodies and citizens of the many communities through which the former Rock Island line runs.

The Applicants have already indicated in this proceeding that the issues raised by STRICT may cause one or more of them discomfort, and so they should in view of the past history of perfidy that accompanies the SSW line between St. Louis and Kansas City. This will not deter STRICT from bringing to the Commission's attention those issues and their clear relevance to the disposition of this proceeding.

DISCUSSION

In requesting comments the Commission acknowledged that the schedule suggested by the Applicants is substantially similar to the schedule adopted in Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern Railroad Co.--Control and Merger--Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Railway Co. (hereinafter "BN/Santa Fe") (not printed), served March 7, 1995. In turn, the schedule adopted in BN/Santa Fe was based on the procedural schedule for major and significant rail combinations suggested by the Commission in a pending notice of proposed rulemaking. See Ex Parte No. 282 (Sub-No. 19), New Procedures in Rail Acquisitions, Mergers & Consolidations (not printed), served January 26, 1995 (hereinafter "New Procedures"). Applicants urge adoption of an almost identical schedule in this proceeding on the ground that it has been "demonstrated that schedule provides all parties with a fair opportunity to be heard while accommodating the primary applicants' interest in obtaining an expeditious decision on an important rail restructuring initiative." Petition at 3-4.

STRICT did not participate in BN/Santa Fe, so, unlike the Applicants, it will not presume to speak for "all parties" that were involved in that

proceeding.⁴ From the Commission's recently issued decision in BN/Santa Fe, however, it is clear that the scope of that proceeding will hardly serve as a model for the scope of this proceeding.

First of all, in BN/Santa Fe, primarily an end-to-end merger was at issue. BN/Santa Fe, slip. op. served August 23, 1995, at 64, appeal filed sub nom. Western Resources, Inc. v. ICC, No. 95-1435 (D.C. Cir.). Because of that, the scope of the issues raised by the proposed merger, and thus the opposition to the merger, was relatively limited. The Commission, employing its years of expertise in how the markets for surface transportation work in this country, no doubt foresaw the course of the BN/Santa Fe proceeding and tailored the procedural schedule accordingly.

The merger proposed by Applicants, however, is a very different creature. Unlike in BN/Santa Fe, where the applicant carriers competed against each other in only a few separate markets, the rail systems of the Applicants, which are the first and third largest in the western two-thirds of the United States, run parallel to each other for hundreds of miles, not only across multiple states but on an inter-regional basis as well.⁵

⁴ It should be noted that all of the Applicants reached settlement agreements with the applicants in BN/Santa Fe well before the date comments, requested conditions, and responsive and inconsistent applications were due in that proceeding, so they are hardly in a position to accurately comment on how well the schedule worked in that proceeding.

⁵ The Applicants attempt to claim that their "proposed transaction and the one in BN/Santa Fe are no different in kind" because both involve parallel and end-to-end aspects. Applicants' Reply to KCS' Comments on Proposed Procedural Schedule and Discovery Guidelines (UP/SP-6), dated August 18, 1995, at 6. Under Applicants' reasoning, a proposed merger that is 99 percent parallel and one percent end-to-end should be treated the same as a merger that is 99 percent end-to-end and one percent parallel. Such logic has no place in a proceeding of this magnitude.

While there are many examples of markets in which the Applicants are the only competitors for rail traffic, the Central Corridor from the West Coast to the important gateways of Kansas City and St. Louis is a prime example. In every proposed rail merger in the 1980's and 1990's which involved any of the Applicants, competition in the Central Corridor among and between many of the constituent UP and SP carriers was a primary issue in the merger proceeding that resulted from the proposal. Indeed, the Commission's latest detailed findings regarding the Central Corridor concluded that UP and SP are the only rail systems that can serve the Central Corridor on a transcontinental basis. See Rio Grande Industries, Inc., SPTC Holding, Inc., and The Denver and Rio Grande Western Railroad Co.--Control--Southern Pacific Transportation Co., 4 I.C.C.2d 834, 890-909 (1988), aff'd sub nom. Kansas City Southern Industries, Inc. v. ICC, 902 F.2d 423 (5th Cir. 1990) (hereinafter "RGI"). Many if not all of the Applicants themselves have also expressly stated so in Commission proceedings over the past year. See, e.g., Finance Docket No. 32133, Union Pacific Corp., Union Pacific Railroad Co. and Missouri Pacific Railroad Co.--Control--Chicago and Northwestern Transportation Co. and Chicago and North Western Railway Co. (hereinafter ("UP/CNW"), slip. op. served March 7, 1995, at 15.⁶ A review of the Commission's decision in BN/Santa Fe reveals no issue approaching the importance of the issue of maintaining competition in the

⁶ Applicants are already distancing themselves from positions they took less than a year ago regarding competition in the Central Corridor, distorting Commission statements in the UP/CNW decision on the various rail routes between the West Coast and Chicago into a finding that carriers other than the Applicants provide competition in the Central Corridor. See Applicants' Reply to STRICT's Opposition to Petition to Establish Procedural Schedule (UP/SP-10) at 6. Such inconsistencies do not bode well for a proceeding that all, including STRICT, hope will be less contentious than the last merger proceeding in which the Applicants were actively involved, UP/CNW.

Central Corridor, so that proceeding provides a poor model for crafting a schedule in this proceeding.

The issue of competition in the Central Corridor also raises the specter that the Commission, if it is to diligently do its duty, will be forced to confront extensive cumulative and crossover effects in this proceeding. For years, the Commission has adhered to its "one-case-at-a-time" policy, refusing to take into account in ongoing merger proceedings the impact of later-proposed and possible mergers. The Commission's stated policy is to instead address the competitive issues raised by the cumulative and crossover effects of more than one merger in the later merger proceeding. See Railroad Consolidation Procedures, General Policy Statement, 363 I.C.C. 242, 243 (1980). We are now in such a proceeding.

While there was little concern in the Commission's decision in BN/Santa Fe with such effects, the potential is much greater with the transaction proposed by Applicants. What Applicants are proposing is one final merger, at least in the western United States, involving two rail systems cobbled out of a number of smaller carriers over the past 15 years. The UP rail system is the result of the transactions the Commission approved in UP/MP/WP, UP/CNW and BN/Santa Fe, as well as in Union Pacific Corp., Union Pacific Railroad Co. and Missouri Pacific Railroad Co.--Control--Missouri-Kansas-Texas Railroad Co., 4 I.C.C.2d 409 (1988), petition for review dismissed sub nom. Railway Labor Executives Association v. ICC, 883 F.2d 1079 (D.C. Cir. 1989) (hereinafter "UP/MKT"). The SP rail system is the result of Commission approved transactions in Tucumcari, UP/MP/WP, RGI and BN/Santa Fe, as well as in Rio Grande Industries, Inc., et al.--Purchase and Trackage Rights--Chicago, Missouri & Western Railway Co. Line Between St. Louis, MO, and Chicago, IL, 5 I.C.C.2d 952 (1989), and Finance Docket No. 31730, Rio Grande Industries,

Inc., et al.--Trackage Rights--Burlington Northern Railroad Co. Lines Between Kansas City, MO, and Chicago, IL (not printed), served November 9, 1990.

Neither of the applicant carriers in BN/Santa Fe could claim to be of such a recent and extensive lineage, so the Commission did not face the prospect of addressing cumulative effects in that proceeding. In this proceeding, however, the Commission will not be able to properly avoid reexamining issues raised in previous mergers, such as competition in the Central Corridor.⁷ Any schedule adopted by the Commission in this proceeding should therefore be crafted to accommodate the thoughtful consideration of cumulative effects. In short, the Commission should not paint itself or its successor into a procedural corner of its own making.

In addition, crossover effects were minimal in BN/Santa Fe, as that proceeding predated the Applicants' merger proposal. In contrast, the potential for crossover effects in this proceeding is so substantial that one of the Class I carriers that reached a settlement agreement with the applicants in BN/Santa Fe, Kansas City Southern Railway Company ("KCS"), filed petitions with the Commission on September 5, 1995, to both stay the Commission's decision approving that merger proposal and to reopen the proceeding so that it might be considered in tandem with this proceeding. Not having participated in the BN/Santa Fe proceeding, STRICT has no position on KCS' petitions. However, the unprecedented nature of KCS' action, as well as the serious questions KCS has raised and the drastic remedy it seeks, speaks

⁷ The former Rock Island line between Kansas City and St. Louis provides another prime example. In Tucumcari, the Commission expressly held not only that SSW should be permitted to acquire the line, but that MPRR, which had filed an inconsistent application to purchase the line, should not be permitted to acquire the line. Tucumcari, 363 I.C.C.2d at 404-07. Approval of the merger proposed by Applicants will have the effect of defeating the Commission's latter decision. Clearly, the Commission will have to address this issue in this proceeding.

volumes regarding the need for crossover issues to be addressed in this proceeding.

The Commission need not agree with each and every one of the KCS claims to recognize that at some point the Commission needs to address the effect of a duopoly in rail competition in the western United States, which is what will result if Applicants' merger proposal is granted. There can be no denying that if such is going to occur, it is this proceeding in which it must take place, as the instant proceeding is clearly the final step in the consolidation of the major railroads serving the western United States.⁸ The schedule for this proceeding should therefore be tailored to accommodate both an evidentiary phase sufficient to develop a complete record on the duopoly issue and adequate time for the Commission and its staff to consider whether and to what extent the proposed duopoly will be allowed to exist.

In light of the foregoing, it is clear that the schedule followed in BN/Santa Fe, and urged upon the Commission by Applicants, is woefully inadequate for a proceeding of the scope of this one. Applicants can point to no merger proceeding of a similar nature that was completed in 180 days, as,

⁸ SP recently took a similar position when UP was attempting to displace BN as Santa Fe's merger partner. In UP/CNW, SP filed a Petition to Stay Oral Argument and Hold Status Conference (SP-49), dated October 31, 1994. Therein, SP quoted the Commission's decision in 1980 regarding its one-case-at-a-time policy, and stated that:

Many of the consolidations and control proposals then anticipated by the Commission, however, have already been completed. Railroad maps redrawn as a result of the realignments now reveal far fewer and, in some cases, far more dominant railroads. It is considerably more important to predict the effects of further proposed consolidations in this more-concentrated environment, where the economic stakes are so much higher and the possible competitive ramifications so much greater. With the number of major railroads so diminished, the opportunities for offsetting mergers are greatly reduced; the effects a given merger can be irreversible.

Id. at 6.

indeed, there never before has been a merger like the one proposed by Applicants.

The Commission's proposal in New Procedures provides no support for the schedule suggested by Applicants, as it, too, fails to take into account the complexity of the unique issues that must be addressed during the course of this proceeding. In addition, the Commission's proposal in New Procedures has been overwhelmingly rejected on both policy and legal grounds,⁹ not only by large shipper organizations but also by many of the Class I carriers, including by the Applicants.

Indeed, UP's comments on the Commission's proposal in New Procedures are most telling. Submitted at a time when it was not in the position of petitioning the Commission to set a merger proceeding schedule, UP, citing its past experience in control proceedings, stated that under the six-month schedule proposed in New Procedures, "discovery will have to be curtailed; indeed, our experience indicates that protestants will essentially have to plan on preparing their case without meaningful discovery. . . . Parties' responses to successive evidentiary filings will necessarily rely on broader analyses that lack detailed facts and data." New Procedures, UP's Comments on Proposed Rulemaking, dated March 2, 1995, at 2.¹⁰

⁹ A review of the comments submitted in New Procedures indicates that almost all of the parties that submitted substantive comments opposed one or more aspects of the Commission's proposal. The only comments in support were short statements of support, clearly solicited by the applicants in BN/Santa Fe, from shippers which do not actively participate in control proceedings, as well as brief comments submitted by the Association of American Railroads, another non-participant in control proceedings.

¹⁰ SP also opposed the schedule for control proceedings proposed in New Procedures, but on the ground that the Commission lacks the authority to use its exemption powers to avoid application of the provisions of 49 U.S.C. Section 11345, which grants longer periods of time for parties to prepare submissions in control proceedings. New
(continued...)

In light of such criticism, the Commission is undoubtedly having second thoughts about its proposal in New Procedures. Clearly, a Commission capable of handling the BN/Santa Fe proceeding in six months would have by now adopted the schedule proposed in New Procedures if it believed that schedule would be reasonable in all proceedings. As shown hereinbefore, the schedule clearly is not sufficient for the transaction proposed by the Applicants.

The schedules proposed by Applicants and in New Procedures are also inconsistent with pending legislation designed to sunset the Commission and transfer its functions elsewhere. That legislation, which is the best evidence of the procedural schedule Congress feels is appropriate to a control proceeding as significant as this one is, provides for an eight-month evidentiary phase in merger proceedings involving two or more Class I railroads once notice of acceptance of the merger application has been published, and then gives the Commission's successor agency an additional 90 days for briefing and issuance of a decision. See S. 1140, 104 Cong., 1st Sess. § 376 (1995). Such a schedule is much more in keeping with the scope and importance of this proceeding than the inadequate time schedule suggested by Applicants.¹¹

It is clear that an eight-month evidentiary schedule will, more likely than not, allow parties to conduct adequate discovery and to submit a second list of protective conditions. Such occurred in those merger proceedings

¹⁰(...continued)
Procedures, Comments of Southern Pacific Lines on Proposed Rules, dated March 2, 1995, at 2-8.

¹¹ Moreover, such a legislatively prescribed schedule is directory rather than mandatory, and so the Commission or a successor agency may justifiably extend schedules in any manner required by the exigencies of the situation. The District of Columbia Circuit recently held as much in Brotherhood of Railway Carmen Division v. Peña, Nos. 94-1156 & 95-1169 (D.C. Cir. September 1, 1995).

prior to BN/Santa Fe, such as UP/CNW,¹² and would address two concerns of UP in the comments it submitted opposing the Commission's proposal in New Procedures.¹³ In addition, the parallel nature of the proposed merger is sure to engender a great many more inconsistent and responsive applications than in BN/Santa Fe, so extra time will be needed for those applications to be adequately explored by the parties in their evidentiary submissions.

The 90-day period after the evidentiary phase will also give the Commission or its successor a more realistic amount of time to accept briefs, hear argument, consider the case, hold an open voting conference, and issue a final decision, not just on the primary, inconsistent and responsive applications, but also on the many related applications that Applicants have indicated they will be submitting. The number of construction applications or exemptions Applicants will file is unknown at this time, but from the System

¹² A review of prior Commission merger proceedings reveals that it is not the length of the initial schedule which delays the resolution of the proceeding, but parties' repeated requests during the proceeding for additional time. If the Commission is resolute in denying such requests, as it proved it could be in BN/Santa Fe, schedules such as those adopted in UP/CNW can prove to be both expeditious and fair.

Indeed, in both UP/CNW and UP/MKT, the Commission originally adopted schedules of approximately one year in length. See New Procedures, UP's Comments on Proposed Rulemaking at 1. STRICT cannot help but note that at least in UP/CNW, the Applicants herein prolonged that proceeding. See, e.g., UP/CNW, Decision No. 15, served May 17, 1994 (granting SP's request for 3-month extension to file rebuttal evidence in support of conditions and responsive application); Decision of Chief Administrative Law Judge Paul S. Cross, served February 25, 1994 (granting UP's request for extension to reply to requested conditions and responsive applications). If for no other reason, the Commission should refuse to grant Applicants' request for an unduly curtailed procedural schedule so as to not reward them for their conduct in recent Commission control proceedings.

¹³ Permitting a second list of protective conditions should actually expedite this proceeding, as it will permit parties to drop conditions from their initial list once all parties have learned exactly what conditions other parties are requesting. This is an important benefit, given the geographical scope of the proposed transaction.

Diagram Maps and related documents Applicants filed with the Commission on September 1, 1995, Applicants have indicated their intent to file applications or exemptions covering the abandonment of or discontinuance of service over 24 rail line segments totaling over 900 miles in length. While the Commission has already stated that it may not be able to issue decisions on all of those related applications concurrent with the primary application, see Decision No. 3, served September 5, 1995, at 10 & n. 25, the Commission would be more likely to do so under a schedule approximately 11 months long than under the schedule proposed by Applicants.

Such a schedule would also relieve the Commission's concern, implicit in its request for comments on a "variation" of Applicants' proposed schedule, that the Applicants' proposed schedule does not allow the Commission sufficient time in which to reach and issue a decision. While the Commission's proposed remedy is to reduce even further the amount of time allotted to the evidentiary phase of the proceeding, from the foregoing discussion it is clear that such would not be a wise move. Moreover, a rush to do drumhead justice in its last major proceeding would not read well as the Commission's epitaph.

STRICT believes that this proceeding is too important to simply serve as a "demonstration project" of the Commission's efficiency; rather, the procedural schedule which should govern the proposed merger of two of the three remaining major rail systems in the western United States should have as its primary concern the extent to which the merger could adversely impact the public interest. As discussed hereinbefore, it cannot be denied that decisions made in this proceeding will be for all intents and purposes irrevocable with respect to the structure of the major rail systems serving the western United States. Thus, the public interest in this proceeding is

much better served by wisdom than by a rush to judgment. The Commission has already demonstrated that it can approve a major merger application within six months, so it need not do so again. It should therefore reject both the Applicants' proposed schedule and the suggested variation.

To do otherwise and adopt either of the schedules suggested in the request for public comment would only later invite the temptation to rubber-stamp the Applicants' proposal in order to meet artificially imposed deadlines. Moreover, the deadlines imposed by an expedited schedule can be used by the Applicants as a weapon to deprive parties of substantive rights under the Interstate Commerce Act and thereby put them at a severe negotiating disadvantage which they would not face under a more measured pace. One result of the schedule in BN/Santa Fe that cannot be ignored was that relatively few settlement agreements were reached with individual shippers and short line railroads, while three of the four Class 1 carriers that initially opposed aspects of that merger quickly entered into settlement agreements.

There is one additional factor that the Commission should not ignore when setting the schedule in this proceeding. H. R. 2002, the Transportation Appropriations Act for Fiscal Year 1996, as passed by the Senate on August 10, 1995, provides for termination of the Commission no later than December 31, 1995, and for only 51 successor employees in whatever agency is designated as the Commission's successor. If that appropriation is not materially increased, it is clear that reasoned action will be impeded by a lack of personnel, not to mention the chaos generally attendant upon a reorganization such as is contemplated.¹⁴ While the Commission is to be lauded for

¹⁴ Because, as discussed hereinbefore, the many previous transactions involving the Applicants will be quite relevant to the issues in this proceeding, all parties will need ready access to the evidentiary submissions in those prior proceedings. Given that the Commission may
(continued...)

expressing its intention to step up to the challenge presented by this major rail merger application, it simply cannot justify setting an overly ambitious procedural schedule for a successor agency that will probably have far less extensive resources than the Commission presently has.

CONCLUSION

WHEREFORE, the foregoing considered, STRICT requests the Commission to reject both the Applicants' proposed schedule and the variation of it set forth in the Commission's request for comments. STRICT urges that the Commission instead adopt a procedural schedule consistent with those adopted in merger proceedings predating BN/Santa Fe but limited to an eight-month evidentiary phase and an additional 90-day time limit for a Commission decision.

Respectfully submitted,

SAVE THE ROCK ISLAND COMMITTEE, INC.

By 

William P. Jackson, Jr.

John T. Sullivan

Its Attorneys

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¹⁴(...continued)

soon be succeeded by another agency, it needs to make arrangements so that those submissions can be easily accessible before, during and after the transition period, especially if the Applicants' proposed schedule or the Commission's suggested variation is adopted. Documents retained in a general government warehouse miles from Commission headquarters will be of little use to the parties in this proceeding.

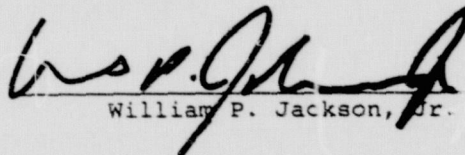
CERTIFICATE OF SERVICE

I, William P. Jackson, Jr., hereby certify that on this 18th day of September, 1995, I have served one copy of the foregoing Comments of Save the Rock Island Committee, Inc., on Proposed Procedural Schedule, upon the following parties by first class mail, postage prepaid, or as otherwise indicated:

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Item No. _____

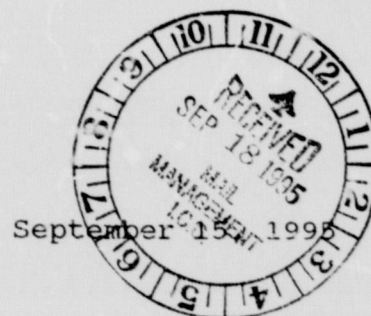
Page Count 1

Sept #45

60074
DuPont Sourcing
Wilmington, DE 19898



DuPont Sourcing



Office of the Secretary
Case Control Branch
Attn: **Finance Docket No. 32760**
Interstate Commerce Commission
1201 Constitution Avenue, N.W.
Washington, DC 20423

The purpose of this letter is to express the DuPont Company's objection to the proposal to expedite the procedural schedule for the Union Pacific Corporation's (UPC) control and merger application regarding the Southern Pacific Rail Corporation (SPC). This transaction will have a major impact on the level of competition in U.S. rail transportation.

DuPont is a major exporter from the U.S. Any merger that potentially reduces the level of competition in the rail industry threatens our ability to compete in the world markets. The majority of our rail shipments originate in the gulf coast states, a region that is greatly impacted by the proposed merger. We need time to assess the full impact of this merger.

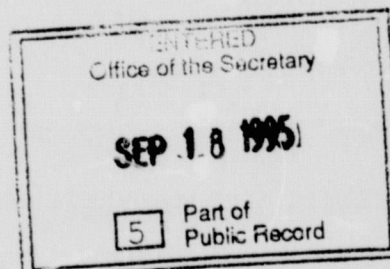
We respectfully request that the Interstate Commerce Commission retain the original proposed schedule submitted in the UPC Petition.

Sincerely,

Charles N. Beirkampen
Director - Global Distribution

cc: Arvid E. Roach, II, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, DC 20044

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



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D. •

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Page Count 2

Sept # 43

1,0072

EADS CONSUMERS SUPPLY CO., INC.

FARM SUPPLY CENTER

HASWELL ELEVATOR

P. O. BOX 98

P. O. BOX 207

EADS, COLORADO 81036

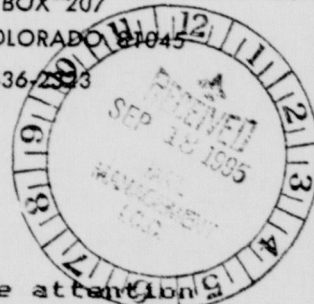
HASWELL, COLORADO 81045

303-438-2201

303-436-2523

SEP 18 1995

Part of
Public Record



Please be advised that recently it came to the attention of the Board of Directors of Eads Consumers Supply Co. Inc. of Eads and Haswell Colorado in Kiowa County that a petition or application was recently filed before the Interstate Commerce Commission in Washington, D.C. by Union Pacific Railroad Company and its affiliate, Missouri Pacific Railroad Company and Southern Pacific Transportation Company and its affiliate, St. Louis Southwestern Railroad Company, in ICC Finance Docket No. 32760.

Of particular concern to our county is that notice has been published in our local newspaper as well as newspapers in surrounding counties, publishing notice of an abandonment of the railroad line commencing at a point in western Kansas and continuing westward in and throughout Kiowa County, through Crowley County and ending in Pueblo County, Colorado.

The impact of abandoning the entire and only railroad line in Kiowa County would be absolutely devastating to our County for several reasons. In as much as Kiowa County is a great wheat and other feed grain producing County, our farmers and grain elevators rely entirely upon the rails for shipment of our grains to market. To take away our rail shipment would add substantial costs in trucking costs to our area farmers and elevators in comparison to farmers and elevator in surrounding areas. Using the figure of 3,000,000 bushels of wheat in elevators in the county to determine trucking, you would place about 33,000 additional semi tractor-trailer rigs onto heavily damaged state highways just to freight out of the region. The trucking rate would then be passed on in decreased cash price to the local farmers.

Devaluation of tax basis on the elevator after recently upgrading to high speed elevators and load outs would be major impacts to our business. The resale value of the elevator would be greatly decreased, income would decrease because of loss of rail markets in Saline, Kansas City, Wichita, Coffeerville flour mills, Enid, all Gulf markets and so forth. The tax revenue to the county would decrease by 20% or more from 1994 base from discontinued rail traffic.

Given our sparse population in Southeast Colorado to abandon this railroad line could have the potential of laying off approximately 125 rail employees as well as a myriad of related employees in spin-off and service or support industries.



EADS CONSUMERS SUPPLY CO., INC.

FARM SUPPLY CENTER

P. O. BOX 98

EADS, COLORADO 81036

303-438-2201

HASWELL ELEVATOR

P. O. BOX 207

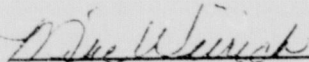
HASWELL, COLORADO 81045

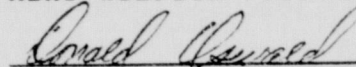
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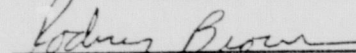
Clearly, given the damaging effect such a proposal would present to our County, farmers, grain elevators, rail employees and the general taxpayers, any help you could extend to us on this matter would be greatly appreciated.


If you have any questions or comments on this matter please feel free to contact us.

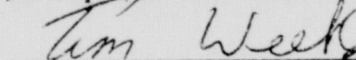
Sincerely,


Mike Weirich-President


Donald Oswald-Vice President


Rodney Brown-Director


Randy Larrew-Director


Tim Weeks-Secretary

STB

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9-18-95

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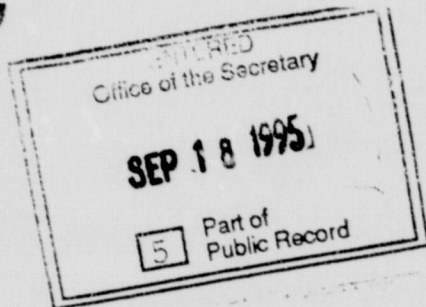
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Page Count 5

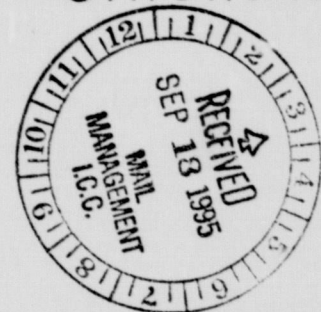
Sept #42

60071

ORIGINAL



LAW OFFICES
FRITZ R. KAHN, P.C.
SUITE 750 WEST
1100 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3934
(202) 371-8037
FAX (202) 371-0900



September 18, 1995

Hon. Vernon A. Williams
Secretary
Interstate Commerce Commission
Washington, DC 20423

Dear Secretary Williams:

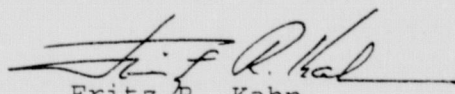
Enclosed for filing in Finance Docket No. 32760, Union Pacific Corporation, etc., are the original and twenty copies of the Comments of Georgetown Railroad Company and Texas Crushed Stone Company.

Extra copies of the Comments and of this letter are enclosed for you to stamp to acknowledge your receipt of them and to return to me.

By copy of this letter, service is being effected upon counsel for the Applicants, the Attorney General, the Secretary of Transportation and ALJ Nelson.

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

Sincerely yours,

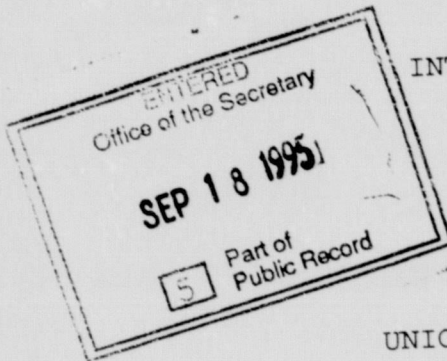

Fritz R. Kahn

enc.

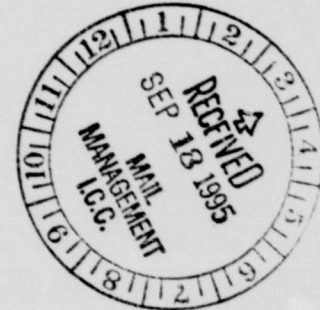
cc: Arvid E. Roach II, Esq.
Paul A. Cunningham, Esq.
Hon. Federico F. Pena
Hon. Anne K. Bingaman
Hon. Jerome Nelson
Mr. Charles R. Turner
Mr. W. B. Snead

ORIGINAL

GRR-1



BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D. C. 20423



Finance Docket No. 32760

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

COMMENTS
OF
GEORGETOWN RAILROAD COMPANY and
TEXAS CRUSHED STONE COMPANY

Protestants, Georgetown Railroad Company of Georgetown, Texas ("GRR"), and Texas Crushed Stone Company of Georgetown, Texas, respond in opposition to the schedule proposed by the Commission's decision, served September 1, 1995, Decision No. 1, as follows:

1. The foremost consideration whether a proposed merger of two Class I railroads should be authorized by the Commission, pursuant to the provisions of 49 U.S.C. 11344(b)(1), is whether the transaction would have an adverse effect on competition among rail carriers in the affected region.

2. As portrayed by the Applicants themselves, no proposed railroad merger potentially will be as anticompetitive as that of the UP and SP; unless the Applicants were to make significant concessions not yet disclosed or the Commission were to impose meaningful conditions unlike those recently attached, the UP will

control the only railroad routes along the Gulf Coast, between Corpus Christi and New Orleans, the only railroad routes along the Pacific Coast, between Seattle and San Diego, and the only central corridor routes, between Denver and San Francisco.

3. A transaction as destructive of railroad competition as the proposed merger promises to be does not warrant the rush to judgment that the Applicants' suggested procedural schedule would effect and that the Commission's further abbreviation of it would exacerbate. It is one thing for the Commission to have taken twelve years to decide the Rock Island case -- a procedural disaster that obviously continues to haunt the Commission; it is an altogether different thing for the Commission to commit itself, as well as whatever agency will succeed it at year's end, to resolve in approximately six months' time the many difficult issues posed by the Applicants' proposal. The timetable is simply too short.

4. The statute, 49 U.S.C. 11345(b), permits parties, such as Protestants, 45 days after Federal Register publication to submit their comments on the Application and 90 days to file their inconsistent applications, if any. Applicants and presumably the Commission would not provide for the filing of comments at all; indeed, the Commission didn't see fit to allow the filing of comments in the recent BN/ATSF proceeding. Applicants at least recognize that the statute provides a 90-day period for opposition parties to file their inconsistent applications; the Commission proposes to reduce the filing time to 30 days. Presumably the Commission believes it can do so by the incantation of the section

10505 findings, but how the Commission can conclude, as it conveniently did in its decision of September 5, 1995, Decision No. 3, that in the context of this proceeding its modification of the procedural requirements that otherwise would obtain is of limited scope is unfathomable.

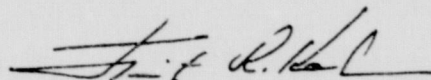
5. The Commission's rules, 49 C.F.R 1180.0, et seq., set out a carefully crafted timetable for processing an application in a major transaction as Applicants' proposed merger obviously is, and the Applicants have failed to make a showing of good cause why it should be shortened, as they have suggested. The BN/ATSE proceeding, contrary to Applicants' assertion, does not establish a precedent, for that transaction could not be consummated until the Commission had acted. In contrast, UP's tender offer has been successfully completed, and UP now holds 25 percent of the SP's stock, albeit in a voting trust pending the Commission's conclusion of the case. SP lacks neither the management nor the resources to continue to be able to operate successfully in the meantime. In the circumstances, the rights of opposing parties should not be trampled in the stampede to approve the Applicants' proposal.

WHEREFORE, Protestants, Georgetown Railroad Company and Texas Crushed Stone Company, oppose the procedural schedule the Applicants have proposed and its abbreviation by the Commission.

Respectfully submitted,

GEORGETOWN RAILROAD COMPANY
TEXAS CRUSHED STONE COMPANY

By their attorney,



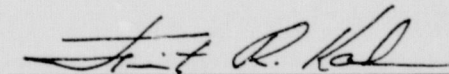
Fritz R. Kahn
Fritz R. Kahn, P.C.
Suite 750 West
1100 New York Avenue, NW
Washington, DC 20005-3934
Tel.: (202) 371-8037

Dated: September 18, 1995

CERTIFICATE OF SERVICE

Copies of the foregoing Comments this day were served by me by mailing copies thereof, with first-class postage prepaid, to counsel for each of the Applicants, the Attorney General, the Secretary of Transportation and ALJ Nelson.

Dated at Washington, DC, this 18th day of September 1995.


Fritz R. Kahn

STB

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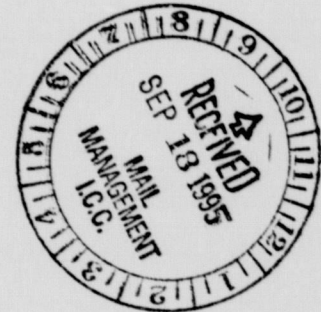
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HILBURN, CALHOON, HARPER, PRUNISKI & CALHOUN, LTD.
ATTORNEYS AT LAW

7TH FLOOR — THE TWIN CITY BANK BUILDING
ONE RIVERFRONT PLACE
POST OFFICE BOX 5551
NORTH LITTLE ROCK, ARKANSAS 72119

TELEPHONE: (501) 372-0110
TELECOPIER: (501) 372-2029



September 15, 1995

AM HILBURN
EN F. CALHOON
ERNEST H. HARPER, JR.
JOHN E. PRUNISKI, III
JOHN C. CALHOON, JR.
DAVID M. FUQUA
JAMES M. MCHANEY, JR.
PHIL CAMPBELL
J. MAURICE ROGERS
PAULA JAMELL STOREYGARD
SCOTT E. DANIEL
CARROLD E. RAY
SCOTT T. VAUGHN
SUSAN GORDON GUNTER
JAMES D. LAWSON
DORCY KYLE CORBIN
GRAHAM F. SLOAN
MARK K. HALTER
MICHAEL E. HARTJE,
DEAN L. WORLEY
BRUCE D. EDDY
PAMELA A. MOSELEY
RANDY L. GRICE
H. JOHN CHAKALES

Item No. _____
Page Count 5
Sept. # 41

Office of the Secretary
Case Control Branch
Attn: Finance Docket No. 32760
Interstate Commerce Commission
1201 Constitution Ave. N.W.
Washington, D.C. 20423

VIA FEDERAL EXPRESS

Re: ICC Finance Docket No. 32760, Union Pacific - Control and Merger -
Southern Pacific Rail Corp.
Comments on Proposed Procedural Schedule

Dear Sir/Madam:

Enclosed you will find a original and twenty-one (21) copies of Gulf Rice Arkansas, Inc.'s Written Comments on Proposed Procedural Schedule for filing in the above-referenced matter. Please return any extra file-marked copies of the enclosed document to me in a self-addressed, stamped envelope which I have enclosed for your convenience.

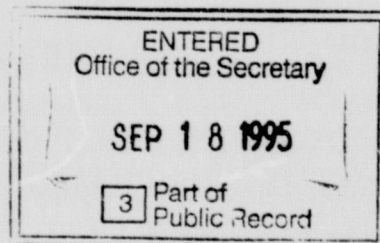
Thank you for your prompt attention to this matter. If you have any questions or comments, please do not hesitate to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read "DLW".

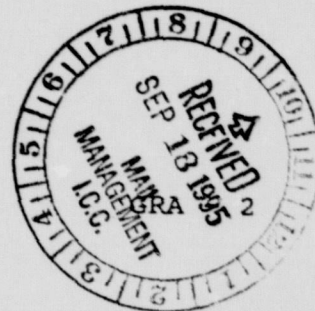
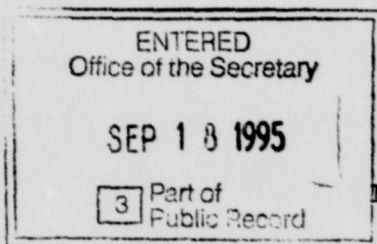
Dean L. Worley

DLW:tss
Enclosures



HILBURN, CALHOON, HARPER, PRUNISKI & CALHOUN, LTD.

cc: Administrative Law Judge Jerome Nelson (via federal express)
Arvid E. Roach, II, Esq. (via federal express)
Paul A. Cunningham, Esq. (via federal express)
Cannon Y. Harvey, Esq. (via federal express)
Carl W. Von Bernuth, Esq. (via federal express)
James V. Dolan, Esq. (via federal express)



BEFORE THE
INTERSTATE COMMERCE COMMISSION

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

GULF RICE ARKANSAS, INC.'S
WRITTEN COMMENTS ON PROPOSED PROCEDURAL SCHEDULE

DEAN L. WORLEY
HILBURN, CALHOON, HARPER
PRUNISKI & CALHOUN, LTD.
EIGHTH FLOOR - THE TWIN CITY BANK BUILDING
ONE RIVERFRONT PLACE
POST OFFICE BOX 5551
NORTH LITTLE ROCK, ARKANSAS 72119

ATTORNEYS FOR GULF RICE ARKANSAS, INC.

The time for filing comments, protests and other opposition evidence and arguments due should be extended to one hundred twenty (120) days after any abandonment application is filed. Gulf Rice anticipates that it, and other parties adversely affected by the abandonment of the UP line between Jonesboro and Cherry Valley, Arkansas, will file (among other things) economic impact statements in support of their protests. However, such statements cannot be ordered until the application for abandonment, and related data provided by Applicants pursuant to 49 C.F.R. § 1152.22 (e), is

reviewed. 49 C.F.R. § 1152.25(a)(2) allows the submission of evidence concerning the impact on rural and community development. The proposed abandonment will have a devastating effect on the rural community of Harrisburg, Arkansas, as well as other local communities serviced by the UP line. It is unlikely, however, that all evidence to be submitted will be prepared within ninety (90) days.

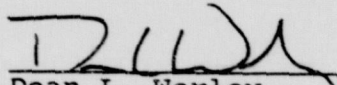
Gulf Rice requests that the Commission's alternate proposal, which would require all evidence to be submitted within sixty (60) days of the filing of an application for abandonment, be rejected. Gulf Rice and other interested parties in the Craighead, Poinsett and Cross County areas cannot gather the evidence necessary to oppose the proposed abandonment within sixty (60) days of the filing of an application for abandonment.

The proposed procedural schedule does not provide a time frame for investigations pursuant to 49 C.F.R. § 1152.25. However it appears that each protest to a proposed abandonment will be investigated. Gulf Rice requests clarification of whether investigation of all abandonment protests will be made through oral hearing.

At this early stage, the undersigned has been contacted by representatives of the City of Harrisburg, Arkansas, the County of Poinsett, Arkansas, as well as financial institutions, school district authorities, members of various agricultural groups, as well as private citizens, seeking to become involved in opposition to the proposed abandonment between Jonesboro, Arkansas and Cherry Valley, Arkansas. In order to prepare and submit these party's

pertinent information, shortening of applicable deadlines should not be approved by the Commission.


Respectfully submitted,


Dean L. Worley

Hilburn, Calhoon, Harper,
Pruniski & Calhoun, Ltd.
One Riverfront Place
8th Floor-Twin City Bank Bldg.
Post Office Box 5551
North Little Rock, AR 72119
Attorneys for Gulf Rice Arkansas,
Inc.

CERTIFICATE OF SERVICE

I, Dean L. Worley, do hereby certify that a true and correct copy of the foregoing document was sent by Federal Express, postage prepaid, to Administrative Law Judge Jerome Nelson, FERC, 825 N. Capitol St. N.E., Washington, D.C. 20426, Arvid E. Roach, II, Covington & Burling, 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, D.C. 20044, Paul A. Cunningham, Harkins Cunningham, 1300 Nineteenth Street, N.W., Washington, D.C. 20036, Cannon Y. Harvey, Southern Pacific Transportation Company, One Market Plaza, San Francisco, California 94105, Carl W. Von Bernuth, Union Pacific Corporation, Martin Tower, Eighth and Eaton Avenues, Bethlehem, Pennsylvania 18018, and James V. Dolan, Law Department, Union Pacific Railroad Company, Missouri Pacific Railroad Company, 1416 Dodge Street, Omaha, Nebraska 68179 this 15th day of September, 1995.


Dean L. Worley

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• 32760

9-18-95

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• 60069

Item No. _____

Page Count _____

Sept # 40

OUTMAN SANDERS

ATTORNEYS AT LAW
MEMBERSHIP INCLUDING PROFESSIONAL CORPORATIONS

601 PENNSYLVANIA AVENUE, N.W.
SUITE 640
NORTH BUILDING
WASHINGTON, D.C. 20004
TELEPHONE: 202-274-2950
FACSIMILE: 202-274-2994

WILLIAM A. MULLINS

DIRECT: 202-274-2953

September 18, 1995



Mr. Vernon A. Williams
Secretary
Interstate Commerce Commission
Room 1324
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 are the original and twenty-one copies of the
Comments of The Kansas City Southern Railway Company on Proposed
Procedural Schedule, designated KCS-3. Also enclosed is a
diskette of this document. Please date and time stamp one copy
and return to the courier for our files.

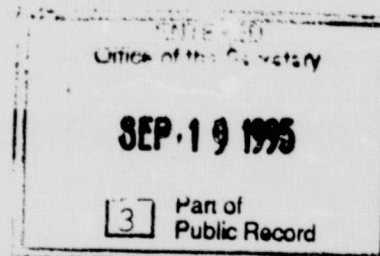
No filing fee is required. See 49 C.F.R. Part 1002.2(f).
Copies have been served on all known parties of record.

Very truly yours,


William A. Mullins

Enclosures

cc: Parties of Record
Robert K. Dreiling, Esquire



KCS-3

BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 32760



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

--CONTROL AND MERGER --

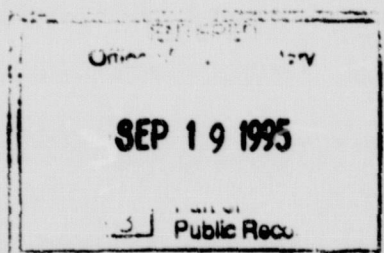
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER
AND RIO GRANDE WESTERN RAILROAD COMPANY

COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY
ON PROPOSED PROCEDURAL SCHEDULE

Richard P. Bruening
W. James Wochner
Robert K. Dreiling
The Kansas City Southern
Railway Company
114 West 11th Street
Kansas City, Missouri 64105
Tel: (816) 556-0392
Fax: (816) 556-0227

John R. Molm
William A. Mullins
Troutman Sanders
601 Pennsylvania Ave. N.W.
Suite 640 - North Building
Washington, D.C. 20004-2608
Tel: (202) 274-2950
Fax: (202) 274-2994

September 18, 1995



Attorneys for The Kansas City
Southern Railway Company

**BEFORE THE
INTERSTATE COMMERCE COMMISSION**

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 THE KANSAS CITY SOUTHERN RAILWAY COMPANY
ON PROPOSED PROCEDURAL SCHEDULE**

On August 4, 1995, Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, collectively, "Applicants," filed a "Petition to Establish Procedural Schedule" and attached as Appendix A to that petition "Proposed Discovery Guidelines." On August 14, The Kansas City Southern Railway Company ("KCS") filed comments on the proposed procedural schedule and the proposed discovery guidelines (KCS-1). By decision served September 1 (Decision No. 1), the Commission requested comments on Applicants' proposed procedural schedule. The Commission also requested comments on a proposed modification to the Applicants' procedural schedule. In response to Decision No. 1, KCS hereby files these comments.

I. APPLICANTS HAVE NOT PROVIDED THE COMMISSION WITH AN ADEQUATE BASIS FOR DEPARTING FROM THE PROCEDURAL REQUIREMENTS SET FORTH IN THE STATUTE AND THE REGULATIONS

Under § 1180.4(f)(5) of the Commission's regulations, Applicants must provide an independent basis for departing from the regulations and "give the specific reasons" why waiver is necessary. 49 C.F.R. § 1180.4(f)(5). While the proposed procedural schedule is modelled after that followed by the Commission in *Burlington Northern Inc. & Burlington Northern R.R. -- Control and Merger -- Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry.*, Finance Docket No. 32549 (ICC served Mar. 7, 1995) ("BN/Santa Fe or BN/SF"), Applicants have not presented any legal or policy justifications for adopting the BN/Santa Fe procedural schedule in this proceeding. Applicants' only justification for their proposed schedule is to point to the BN/Santa Fe proceeding and the Commission's proposed Ex Parte No. 282 (Sub-No. 19)¹ rules and claim "me too." However, pursuant to the rules for granting waivers of the regulations, Applicants' simply pointing to the BN/Santa Fe proceeding as a reason for automatically adopting Applicants' proposed schedule is insufficient. In fact, the Commission has stated that the waiver process should be used "so that applications can be tailored to specific factual circumstances."² However, rather than tailoring its proposed schedule to the specific factual circumstances of this proceeding, Applicants have simply urged the Commission to adopt a cookie cutter approach.

¹ *New Procedures in Rail Acquisitions, Mergers & Consolidation*, Ex Parte No. 282 (Sub-No. 19) (ICC served Jan. 26, 1995).

² *Railroad Consolidation Procedures*, 366 I.C.C. 75 at 80 (1982) (Ex Parte No. 282 (Sub-No. 3)).

Applicants must present "the specific reasons" for their request. Applicants point to the Commission's Notice of Proposed Rulemaking in Ex Parte No. 282 (ICC served Jan. 26, 1995) as justification for their request. Yet nothing in that rulemaking or in their petition points to a sufficient legal reason to modify the current procedural timeframes set forth at § 1180.4. The Commission has never adopted, as final rules, the proposed schedule contained in Ex Parte No. 282 (Sub-No. 19), and, until the Commission adopts that proposal as final rules, the current regulations governing the processing of merger proceedings apply. The Applicants and the Commission must provide a sufficient legal basis for changing those time frames already adopted by the Commission and set forth in the regulations. None has yet been provided.

The Commission's existing procedures for major transactions were adopted pursuant to Congressional action, and consistent with that intent, have proven to be an adequate process for dealing with the myriad of issues presented by the many previous complex merger and consolidation proceedings. The first Railroad Consolidation Procedures³ originally were adopted pursuant to the statutory directives of the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210 (the "4R Act"). The 4R Act contained specific procedural provisions, now codified at 49 U.S.C. § 11345, for processing merger applications. Since that time, these procedural provisions have not been modified significantly.

³ *Railroad Consolidation Procedures*, Ex Parte No. 282 (Sub-No. 1) (ICC served Jan. 28, 1977) (Final Rules). These procedures, including various amendments to them, are currently codified at 49 C.F.R. Part 1180.

Specifically, the 4R Act required the Commission to conclude evidentiary proceedings on any merger involving two class I carriers within 24 months from the date of the filing of the application. The Commission then had another 6 months to issue a final decision on the application. This 2½ year time limit for the Commission to issue a decision was considered a significant advancement from the previous procedures, which provided no time limit at all. Indeed, a two and one-half year process was considered "swift" action.

It is generally agreed that there is a great need for swifter merger action by the Commission. Between the years 1955 and 1970, there were 59 merger applications presented to the ICC. . . Of the 59 mergers, . . . 22 took more than 1 year; 12 took more than 2 years; 8 took more than 3 years; 6 took more than 4 years; 4 took more than 5 years; 3 took more than 6 years; 2 took more than 7 years; and 1 took more than 8 years to decide. . . the proposed Rock Island-Union Pacific Railroad merger . . . lasted more than 10 years.

S. Rep. No. 94-499, 94th Congress, 2nd Sess., *reprinted in* 1976 U.S.C.C.A.N. (90 Stat.)

31. As noted, the Commission then adopted the original Ex Parte No. 282 implementing regulations that prescribed the time framework for conducting the merger proceeding.

Congress could have adopted shorter time frames, but specifically declined to do so. The adopted time frame was considered an expedited merger process, and while imposing a cap of 2½ years, the time frames established within the "cap" were considered the minimum times necessary to provide parties the opportunity to develop their evidentiary case. The Commission itself commented that the time frames adopted under the 4R Act constituted "rigorous," "stringent," and "expedited" time frames for completing a merger proceeding. *Railroad Consolidation Procedures*, Ex Parte 282 (Sub-No. 1) at 787, 791, and 797, respectively. The Commission believed it would have to do all that it could to "eliminate all

sources of potentially undue delay" in order to meet the time deadlines. *Railroad Consolidation Procedures*, Ex Parte 282 (Sub-No. 1) at 787.

The time periods between the various filings as proposed by Applicants stand in stark contrast to those adopted in other proceedings and those intended by Congress and contained at 49 C.F.R. § 1180.4. The Applicants have failed to provide any evidence that the proposed time periods would be adequate for this proceeding. For example, the schedule proposes 10 days between the time the evidentiary record closes and the time briefs are due; 15 days between the filing of the briefs and oral argument; and 40 days between oral argument and a final decision by the Commission. In *UP/CNW*,⁴ the Commission adopted 30, 35, and 80 days, respectively, finding that such periods, representing extensions from those requested, were necessary to properly analyze the competitive issues. *UP/CNW*, Decision No. 4, 1993 ICC LEXIS 11, * 7. In *MKT*,⁵ the Commission adopted such respective time frames of 45 days, extended from 30, and 60 days, extended from 30. Because of uncertainties in the *MKT* proceeding, the Commission did not establish a specific time period for issuance of a final decision. *MKT*, March 16, 1987 decision, 1987 ICC I EXIS 402, * 5.

⁴ *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control -- Chicago and North Western Holdings Transportation Company and Chicago and North Western Railway Company*, Finance Docket No. 32133 (ICC decided Feb. 21, 1995)("UP/CNW").

⁵ *Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control -- Missouri-Kansas-Texas R.R.*, 4 I.C.C.2d 409 (1988)("MKT").

There is no basis for the Commission now to adopt shorter dates for all future mergers when it has recently rejected such shorter periods in numerous cases that were far less complex than this one. This circumstance is especially troublesome given that the proposed schedule does not provide a mechanism by which an ALJ could extend the time periods if necessary. There is no rational basis for changing the current regulations and adopting a shortened process with no flexibility to change the time periods.

In a number of cases, the Commission has adopted procedural schedules significantly shorter than those in the statute and the regulations,⁶ but it should not do so here. The proposed procedural schedule, if adopted, would eliminate any flexibility for adjustment, contrary to past precedent. For example, when the Commission has adopted shorter procedural schedules than that provided by the regulations, the Commission has consistently delegated to the Administrative Law Judge ("ALJ") the authority to extend, revise, or otherwise modify the procedural schedule.⁷ In at least two of the most recent major merger

⁶ See *Rio Grande Indus. Inc., SPTC Holding, Inc., & The Denver & Rio Grande Western R.R. Co. -- Control -- Southern Pacific Transp. Co.*, 4 I.C.C.2d 834 (1988) (6 months from filing to decision); *Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control -- Missouri-Kansas-Texas R.R.*, 4 I.C.C.2d 409, 419 (1988) (18 months from filing to decision); *Norfolk Southern Corp. -- Control -- Norfolk & Western Ry. Co., & Southern Ry. Co.*, 366 I.C.C. 173, 177 (1982) (15 months from filing to decision). Cf. *Rio Grande Indus. Inc. -- Purchase & Related Trackage Rights -- Soo Line R.R. Line Between Kansas City, MO & Chicago, IL*, 6 I.C.C.2d 854 (1990) (10 months from filing to decision); *Chicago, Milwaukee, St. Paul & Pacific R.R. -- Reorganization -- Acquisition by Grand Trunk Corp.*, 2 I.C.C.2d 161 (1984) (7 months from filing to decision).

⁷ See *Union Pacific Corp., Union Pacific R.R. Co. & Missouri Pacific R.R. Co. -- Control -- Missouri-Kansas-Texas R.R. Co.*, Finance Docket No. 30800, 1987 ICC LEXIS 402 at *7 (We agree with the CALJ's recommendation to authorize him to make revisions in the schedule); *Union Pacific Corp., Union Pacific R.R. Co. & Missouri Pacific R.R. Co. --*

cases, the Commission adopted schedules of approximately one year in length, but due to the fact that these schedules did not provide enough time, the ALJ extended the schedules. In both instances, the ultimate time from the filing of the application to the final decision was significantly longer than was initially anticipated.⁸

In prior cases, as long as the ALJ did not exceed the regulatory and statutory time limits, the ALJ had both the flexibility and the legal authority to adjust the schedule. Because the initial time frames were shorter than those provided by the regulations, parties were unable to argue that an extension of those time frames violated the regulations, the statute, or their due process rights under the Administrative Procedure Act. Thus, where necessary, the Commission utilized its powers under 49 U.S.C. § 10505 to adjust such time periods. *See RGI, 1988 ICC LEXIS 2 *6.*

As set forth below and in the Verified Statements filed contemporaneously herewith, it appears that the full time provided in the statute will be necessary due to the complexity of the issues. If, during the course of the proceeding, it appears appropriate to adjust those time periods, including shortening procedural deadlines, the ALJ should have this authority. As a result, no party would be deprived of its full procedural rights without first having an

*Control -- Chicago and North Western Holdings Co. and Chicago and North Western Transportation Co., Finance Docket No. 32133, Decision No. 4, 1993 ICC LEXIS 11 at *1 (The CALJ would have authority to revise the schedule as necessary); and Burlington Northern Inc. and Burlington Northern R.R. Co. -- Control and Merger -- Santa Fe Pacific Corp. and The Atchison, Topeka, and Santa Fe Railway Co., Finance Docket No. 32549, Decision No. 4 at 6 (ICC served Oct. 5, 1994)(The ALJ assigned to this proceeding will have the authority to revise the schedule as may appear necessary).*

⁸ *See MKT and UP/CNW.* Yet, in none of these cases did the procedural schedule exceed the 2½ year statutory deadline.

opportunity to present its views to an ALJ. Adopting a different procedural schedule than that contained in the regulations without a full understanding of the issues involved, as the Applicants propose, would eliminate any flexibility and deprive the public of its full procedural rights as currently set forth in the regulations. Granting the ALJ the flexibility to adjust the schedule, is the best legal means by which the Commission can control its own procedural rules and yet relax them when warranted. *See American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 538, 539 (1970). The current method is also the best means for the agency to control its own calendar and establish timely procedures. *See City of San Antonio v. CAB*, 374 F.2d 326, 329 (D.C. Cir. 1967).

Furthermore, other more specific problems exist in the proposed schedule. Applicants proposing to merge or consolidate are required to fully develop their railroad merger application, consisting of operating plans, market impact analyses, financial projections, and labor and administrative impacts. The proposed schedule does not contemplate imposing a page limitation on this application itself, only on those desiring to oppose such an application. Given the geographic sweep of the proposed merger, the number of affected commodities, origins and destinations, and the existing complex interrelationships among those markets, the analytical task confronting a prospective respondent in filing either comments in opposition or a responsive application is daunting. The number of possible combinations and permutations of protective conditions that may be proposed grows geometrically with the geographic size and traffic base of the applicants. The volume of traffic and operating data and shipper support statements that must be

obtained, digested, and presented to the Commission realistically cannot be accomplished within the proposed page limitations, especially when the applicants themselves were not subject to the same limitations. This inequitable treatment is wholly without support in the statute or the regulations, and such page limitations should be rejected.

The proposed schedule also does not contemplate the filing of reply briefs. The failure to include time for the filing of reply briefs is in contrast to all previous class I merger proceedings, with the sole exception of the *RGI* divestiture proceeding. The failure to allow filing of reply briefs will deprive the parties and the Commission of the opportunity to narrow the issues in dispute. As noted above, the amount of information filed in support of a responsive application can be enormous--especially in light of the fact that the Commission must consider whether shippers would be abused absent the imposition of ameliorative conditions. Reply briefs allow the parties an opportunity to review all parties' case-in-chief and then narrow the scope of disputes. Reply briefs thus provide a valuable tool for assisting the Commission in focusing on those areas where true regulatory relief is required. In short, the schedule, as proposed, does not comport with congressional intent, past precedent, or the standards of equitable treatment, and it should be rejected.

II. THE SIZE AND SCOPE OF THIS TRANSACTION REQUIRE THAT THE PROCEDURAL SCHEDULE PROVIDED FOR IN 49 C.F.R. § 1180.4 BE FOLLOWED

KCS has serious concerns regarding its, and the public's, ability to conduct adequate discovery and sufficiently analyze the competitive concerns within the time frames proposed by the Applicants. In making its ruling in this case, the Commission must evaluate the

public interest standards set forth in 49 U.S.C. § 11344(b)(1). The Commission is also charged with evaluating the anti-competitive effects of the merger, and making public interest findings. At the same time, the Commission must evaluate environmental and energy factors that have a bearing on the public interest.

As an initial matter, the Commission must examine the effect of this merger on the adequacy of transportation to shippers. Further, 49 C.F.R. § 1180.1(e) requires that the effect of reduced competition be balanced against the interest of a financially strong competitor. In evaluating the competitive effects, the Commission traditionally defines existing markets and measures the anticipated effects on those markets to determine whether the effects are substantial. *Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company - Control - Missouri Pacific Corporation and Missouri Pacific Railroad Company*, 366 I.C.C. 459, 512 (1982). This extensive analysis will be virtually impossible to perform in a proceeding of this magnitude in only 6 months.

The modern proceeding that most closely compares to the proceeding currently before the Commission was *Santa Fe Southern Pacific Corporation -- Control-- Southern Pacific Transportation Company*, 2 I.C.C.2d 709 (1986) ("SFSP"), Where the Commission denied the merger which was denied after the full 2½ year analysis provided in 49 U.S.C. § 11345. In SFSP the Commission found that the merged carriers' market share of Pacific Coast rail traffic would exceed 90%. Further, the merged carrier would enjoy an absolute monopoly over the southern corridor from Southern California through the southwest to Texas and the Gulf and an 85% share of the San Francisco Bay area. The railroads operated in 9 common

states, with ATSF operating over 12,319 miles of railroad in 13 total states and SPT operating over 13,270 of railroad in 14 total states.

In addition to the applicants, SFSP involved various railroads who sought various trackage rights or purchase and rulemaking conditions. Also, the Departments of Justice and Transportation appeared as well as other federal agencies, individual states and state agencies, labor organizations, shippers and other railroads, who filed briefs, comments or verified statements. The transcript alone consisted of approximately 20,000 pages. By contrast, the instant proceeding promises to be equally contested, and will likely exceed the scope of the SFSP proceeding.

While it does not appear that the parties in the SFSP proceeding identified the exact number of shippers who would experience a diminished number of carriers from whom to choose,⁹ the number of shippers who will have their choice of carriers reduced to fewer than three or to only one in this proceeding will far exceed that number.

In this proceeding UP and SP operate in 25 common states, with UP operating over 17,800 miles of railroad in 23 total states and SP operating over 14,100 miles of railroad in 15 total states. Additionally, like the carriers in SFSP, UP and SP are already the exclusive class I line-haul railroads in several large geographic areas. The Applicants' combined system would have 35,000 miles of track, operate in 25 states, and have annual revenue from rail operations of \$9.5 billion. *Union Pacific to Acquire Southern Pacific In a Cash-Stock*

⁹ The Commission identified only four in its final decision, *i.e.*, American President Lines, National Piggyback Services, Inc., Sunkist Growers, Inc., and Calcot, Ltd. *SPSF*, 2 I.C.C.2d at 744-50.

Pact Totaling \$3.9 Billion, Wall Street Journal, August 4, 1995, A3. If UP and SP are allowed to merge, based upon 1993 data, there will be 164 BEA origin-destinations with traffic greater than \$2 million that will go from 2 to 1 independent rail alternatives--the merged UP/SP.¹⁰ This equates to over \$1.65 billion in gross revenues that, absent some other relief, will no longer be subject to competition. This is over 17% of the revenue markets. Verified Statement of Dr. Curtis Grimm attached as Exhibit B at 5 ("V.S. Grimm"). Clearly, the competitive effects of this merger are enormous.

The SFSP proceeding is anticipated to be dwarfed in comparison with the instant merger. As noted above, the SFSP proceeding was conducted over 2½ years; yet, the applicants herein propose to consummate this merger in one-fifth that time. Six months is clearly not enough time to perform a complete and thorough evaluation of this proposed merger's effect on competition or to determine whether it is in the public interest. Further, to curtail discovery may have the effect of preventing the parties from uncovering potentially relevant evidence. For instance, in *SFSP*, the Commission relied heavily on a document uncovered by KCS in discovery, 2 I.C.C.2d at 805. It is quite likely that the document at issue would not have been uncovered if that case had been on the "fast track" discovery schedule proposed herein. Accordingly, all interested parties should be afforded the opportunity to develop the record in this proceeding as completely and thoroughly as

¹⁰ A similar calculation of the competitive harm from 2-1 reduction in independent rail alternatives has been performed for BN-Santa Fe and SP-Santa Fe, based on 1993 waybill data. The revenues in traffic for these BEA corridors are \$165 million for BN-Santa Fe and \$921 million for SP-Santa Fe. V.S. Grimm at 5, n. 3.

Congress intended when implementing the 2½ year time period for consummating a merger, especially in light of the size and complexity of this proceeding.

In recent articles and testimony, the Commission has made a point of distinguishing its procedures under the Interstate Commerce Act ("ICA") from those procedures utilized by the Department of Justice under the Sherman and Clayton Acts.¹¹ In fact, an important component of the Commission's process is the open process whereby all affected parties -- unions, railroads, shippers, states, and communities -- have an opportunity to participate in the process. The Commission's decisions are thus based upon a public record developed through participation of all and open to review by all.

The need for a full and open process was recently reiterated by Commissioner Owen:¹²

Admittedly, the ICA approach may at times be more complex than that used by DOJ. Under the Administrative Procedure Act, a full and detailed examination of a public record debating tradeoffs between efficiency gains and competitive harm is required. Under the ICA process, the public benefits and the competitive consequences of mergers are quantified and compared, and when appropriate, specific remedies are crafted to protect shippers from abuse.

Clearly the advantages of the ICC process are highly dependent upon providing all parties with reasonable time to develop and submit their positions. Testimony of railroads,

¹¹ See "Statement of the Honorable Gail McDonald, Chairman of the Interstate Commerce Commission," Hearings before the Railroad Subcommittee, Committee on Transportation and Infrastructure, January 26, 1995; and "Blueprint for Further Deregulation of the Surface Transportation Industry," Commissioner Gus A. Owen, Interstate Commerce Commission, January 31, 1995.

¹² "Blueprint for Further Deregulation of the Surface Transportation Industry", Commissioner Gus A. Owen, Interstate Commerce Commission, January 31, 1995 at 4,5.

shippers, and state and federal public agencies is critical to developing a full record in the case, identifying potential public harms from the merger, and providing alternative conditions which might ameliorate such harms. Under the proposed schedule, a party, whether it be a competing carrier, a shipper, or a governmental body, would not be able to participate in a meaningful because the schedule would not provide commenting parties with an adequate opportunity for discovery of the facts critical to the filing of inconsistent or responsive applications.¹³

- It is well settled that, "in administrative proceedings of a quasijudicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play." *Morgan v. United States*, 304 U.S. 1, 14-15 (1938). There is no question that significant property interests, whether they be those of shippers or carriers, are at stake in the instant proceeding. The parties to this proceeding thus are entitled to a fair and complete hearing as to all issues. In a case of this size and complexity the opportunity to conduct a complete analysis of the effect of the proposed merger will be seriously eroded by the time restraints proposed. "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Id.* at 18. The proposed expedited schedule will not afford the participants a "reasonable opportunity" to evaluate the impact of the proposed merger and to request appropriate relief.

¹³ See verified statements contained herein.

Although 49 U.S.C. § 11345 does not provide that a decision may not issue prior to the 2½ year time limit, the drafters of the statute most certainly would not have anticipated that a proceeding of this complexity would be conducted in only one-fifth that time. The Commission's discretion to establish a procedural schedule is not unlimited. "True it is that administrative convenience or even necessity cannot override the constitutional requirements of due process." *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 304 (1937). Accordingly, in formulating a schedule for proceedings, the Commission should "adapt to the peculiarities of this business." *Hill v. Federal Power Commission*, 335 F.2d 355, 365 (5th Cir. 1964). The parties are entitled to a "meaningful opportunity" to develop their best case. *Id.* Considerations appropriate for one proceeding may not apply in other proceedings. Similarly, the time necessary to develop the vast record that will be necessary in this proceeding to afford the parties and the Commission a reasonable opportunity to evaluate the effect of the merger on the public interest and on competition will not be necessary in every case.

In *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), the Fifth Circuit Court of Appeals set forth guidelines for consideration of proceedings before an administrative agency:

Although strict adherence to the common law rules of evidence at the hearing is not required, the parties must generally be allowed an opportunity to know the claims of the opposing party, to present evidence to support their contentions and to cross-examine witnesses for the other side.

326 F.2d at 608 (citations omitted). The procedural schedule proposed will hamper the Commission's ability to formulate a decision supported by complete findings after a "full hearing." A "full hearing" is

one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law of the step asked to be taken.

New England Div. Case, Akron, Co & Y. R. v. United States, 261 U.S. 184, 200 (1923).

The necessity for a "full hearing" is especially acute in a proceeding such as this that presents antitrust concerns. *Marine Space Enclosures, Inc.*, 420 F.2d 577, 585 (D.C. Cir. 1969).

In fact, if the Commission is to avoid reversal by the circuit court in the event of an appeal of its decision, the decision must be "based upon adequate findings founded on substantial evidence or [be] a rational conclusion of the matter involved based upon a consideration of the entire record." *E. Brooke Matclack, Inc. v. United States*, 119 F. Supp. 617, 619 (E.D.Pa. 1954)(emphasis added). Thus, while the circuit court will not evaluate the evidence in its review of an agency decision, it will "look to see whether the Commission has fulfilled the obligations imposed upon it by the Congress of the United States." *Id.* at 620. In *E. Brooke Matclack, Inc., supra*, for instance, the circuit court was dissatisfied with the adequacy of the record upon which the Commission based its decision. "A review of the record leads, in some instances at least, to considerable difficulty in understanding the basis upon which the specific points to which transportation of certain products is to be limited were decided upon." *Id.* Accordingly to adopt the proposed procedural schedule would be to the detriment of the Commission as well as to the parties.

III. THE PROPOSED SCHEDULE DOES NOT PROVIDE AN ADEQUATE OPPORTUNITY FOR COMPLETE DISCOVERY

If the "test" for opposing adoption of the 195 day time frame is to identify any discovery KCS will be unable to complete in the allocated time periods, KCS is prepared to so demonstrate. Attached to these comments are two verified statements by widely acknowledged experts in ICC merger proceedings: Dr. Curtis Grimm and Mr. Joe Plaistow. A short listing of some of their comments establishes that a 195 day time frame is simply insufficient for adequate discovery and the formulation of adequate conditions to alleviate competitive harm.

The proposed 165 day schedule . . . clearly prevents public agencies, shippers, and railroads from participating in any meaningful way. V.S. Grimm at 6.

I strongly support extending the proposed 165 day schedule for the instant transaction. V.S. Grimm at 3.

Clearly the advantages of the ICC process are highly dependent upon providing all parties with reasonable time to develop and submit their positions. Testimony of railroads, shippers, and state and federal public agencies is critical to developing a full record in the case, identifying potential public harms from the merger, and fully documenting a case for denial of the merger or providing alternative conditions that might ameliorate such harms. V.S. Grimm at 4.

Given the geographic sweep of the proposed merger, the number of affected commodities, origins and destinations, and the existing complex interrelationships among those markets, the analytical task confronting the prospective respondent desiring to file a responsive application in this case is daunting. The number of possible combinations and permutations of protective conditions that have to be considered by the prospective respondent grows geometrically with the geographic size and traffic base of the applicants. The volume of traffic and operating data that must be obtained and digested simply to define the problem is enormous and cannot realistically be accomplished within the limits of an administratively foreshortened schedule. *Verified Statement of Mr. Joe Plaistow at 10-11. ("V.S. Plaistow" attached as Exhibit B).*

The procedural time frame now being proposed is far too short for the most complicated and extensive parallel merger even considered by the commission. Equitable treatment of shippers and competitors requires a substantially longer time frame than 195 days. V.S. Plaistow at 9.

The fact that Applicants will establish a document depository does not alleviate these concerns. The primary objective of Dr. Grimm and Mr. Plaistow in this proceeding is to determine, through analysis of various documents and train operations, whether the price, service, and product quality of some shippers will be harmed by this transaction, information that is solely in the possession of Applicants. Those shippers who are most likely to be harmed by this transaction are the same shippers least likely to be described or represented in the Applicants' document depository. As a result, most of the information necessary to uncover those instances where shippers will be disadvantaged through price increases or service deterioration will have to be developed through interrogatories, document production, and depositions. Once this information is obtained, it must be analyzed and then followed-up by further discovery requests. As noted in the verified statements, the proposed process is simply inadequate to allow for the development and analysis of the data upon which Applicants relied in submitting their Application.

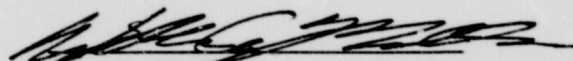
CONCLUSION

Although the Commission in its discretion may alter the procedural schedule set forth at 49 C.F.R. § 1180.4, the primary concern must be development of a record sufficient to establish that the final decision issued by the Commission is in the public interest. This proceeding is potentially the largest merger to face the Commission to date, and the full statutory time period should therefore be established. The ALJ who was appointed to

administer discovery, Judge Nelson, should also be given the authority to adjust the procedural schedule as circumstances dictate.

Respectfully submitted,

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VERIFIED STATEMENT OF CURTIS M. GRIMM

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

I. Introduction

My name is Curtis M. Grimm, and I am Professor and Chair of Transportation, Business and Public Policy, College of Business and Management, University of Maryland at College Park. I have been a member of this College since 1983. I received my B.A. in economics from the University of Wisconsin-Madison in 1975 and my Ph.D. in economics from the University of California-Berkeley in 1983. My Ph.D. dissertation investigated competitive impacts of railroad mergers.

My background includes extensive exposure to public policy issues regarding transportation, including Interstate Commerce Commission ("ICC") merger adjudication. I have previously been employed by the Wisconsin Department of Transportation, the ICC, and the Australian Bureau of Transport and Communication Economics, and I have provided consulting services to several other government agencies and private firms regarding transportation issues. I served as Assistant to the Chief of Intercity Transport Development, Planning Division, Wisconsin Department of Transportation on two separate occasions between 1975 and 1978, with a focus on rail policy issues such as abandonments and the creation of shortline railroads. I also worked on a consolidation that involved competing bids from Burlington Northern and the Soo

of Management Journal, Management Science, Strategic Management Journal, and Journal of Management. More than two dozen of my publications have dealt specifically with the railroad industry, mainly on deregulation, mergers, and competition issues. I have also co-authored four monographs.

In summary, I have had extensive experience conducting and evaluating research regarding railroad mergers and direct exposure to ICC merger analysis. Based on this experience and an examination of the relevant issues, I strongly support extending the proposed 165 day schedule for the instant transaction. I will detail the basis for this position in the remainder of the statement.

II. 165 days is insufficient time to develop and analyze evidence regarding the far-reaching competitive impacts of this merger.

The starting point for my position is the ICC's own arguments regarding retention of rail merger authority. The Commission has argued that current Interstate Commerce Act procedures provide an open process, with full input from all parties. Importantly, the Commission has a range of available options, including conditioning transactions to ameliorate anticipated competitive harms. As discussed in the recent statement of Commissioner Owen:

In contrast, under the ICA, rates can be regulated, ameliorating conditions can be imposed, antitrust immunity is imposed, and past merger decisions can be reopened to remedy unforeseen anti-competitive consequences. Consequently, the ICA offers a broader array of conditions that ensure society of both the benefits of efficient consolidations and protection from egregious anti-competitive effects. For example, the trackage rights conditions imposed on the Union Pacific-Missouri Pacific-Western Pacific merger have, under continuing ICC oversight, permitted the merging carriers to achieve significant efficiency gains while rail shippers have retained two competitive rail alternatives for transcontinental movements using the central corridor.

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Admittedly, the ICA approach may at times be more complex than that used by DOJ. Under the Administrative Procedures Act, a full and detailed examination of a public record debating tradeoffs between efficiency gains and competitive harm is required. Under the ICA process, the public benefits and the competitive consequences of mergers

are quantified and compared, and when appropriate, specific remedies are crafted to protect shippers from abuse.

Blueprint for Further Deregulation of the Surface Transportation Industry, Commissioner Gus A. Owen, Interstate Commerce Commission, January 31, 1995, at 4,5.

Clearly the advantages of the ICC process are highly dependent upon providing all parties with reasonable time to develop and submit their positions. Testimony of railroads, shippers, and state and federal public agencies is critical to developing a full record in the case, identifying potential public harms from the merger, and fully documenting a case for denial of the merger or providing alternative conditions that might ameliorate competitive harms.

Allowing ample time is particularly critical in that the proposed UP/SP merger has unprecedented competitive impacts. These impacts are far greater than for the BN/Santa Fe and are in fact greater than the impacts in the SP/Santa Fe proposed merger, which the Commission denied. KCS has initiated efforts to perform a full and complete analysis of the competitive harms of the instant transaction. This initial review of the impacts reveals far-reaching reductions in competition. For example, based on 1993 data, there are 164 BEA origin-destinations with traffic greater than \$2 million that will go from 2-1 independent rail alternatives.³ The traffic in revenues in these 2-1 corridors exceeds \$1.65 billion. There are another \$3.93 billion in revenues in BEA origin-destinations that would fall from 3-2 independent alternatives if merger is approved. Indeed shippers across the entire Western United States will at best be served by only two railroads if both the BN-Santa Fe and UP-SP are approved. The degree to which the BN/Santa Fe and UP/SP systems would dominate rail

³ A similar calculation of the competitive harm from 2-1 reduction in independent rail alternatives has been performed for BN-Santa Fe and SP-Santa Fe, based on 1993 waybill data. The revenues in traffic for these BEA corridors are \$165 million for BN-Santa Fe and \$921 million for SP-Santa Fe.

transportation over a large region of the country is reflected in Figure 1. Based on Class 1 railroad originations by BEA, the BN/UP duopoly will have fully 100% market share in 37 Western BEA's. The two systems will have 90-99% market share in an additional 8 BEA's, 70-89% market share in an additional 4 BEA's and 50-69% market share in another 4 BEA's.

The profound competitive impacts of the UP-SP merger will not be easily addressed via negotiated settlements. The ICC likely will be faced with far greater burdens of evaluating evidence than in previous cases because an unprecedented degree of participation from shippers and public officials is expected, which will result in a voluminous record. The Commission will need to face complex issues as to whether any set of proposed conditions ameliorates the competitive harms present in the merger or whether, as in SP-Santa Fe, denial of the merger is the appropriate course of action.

III. Conclusion

The proposed 165 day schedule, under which these parties would have a scant one month to develop their positions and only one more month to submit their full testimony, clearly prevents public agencies, shippers and railroads from participating in any meaningful way. In order for the participants to conduct discovery and prepare testimony upon which the Commission could render an informed decision, the full time allowed by statute should be utilized in this proceeding.

VERIFICATION

DISTRICT OF COLUMBIA

Curtis M. Grimm, being first duly sworn, disposes and says that he has read the foregoing statement, knows the facts asserted therein are true, and that the same are true as stated.

Curtis M. Grimm
Curtis M. Grimm

Subscribed and sworn to before me this 18 day of Sept., 1995.

Jannie A. Finch
Notary Public

My Commission Expires:

November 14 1999
JANNIE A. FINCH
Notary Public, District of Columbia
My Commission Expires November 14, 1999

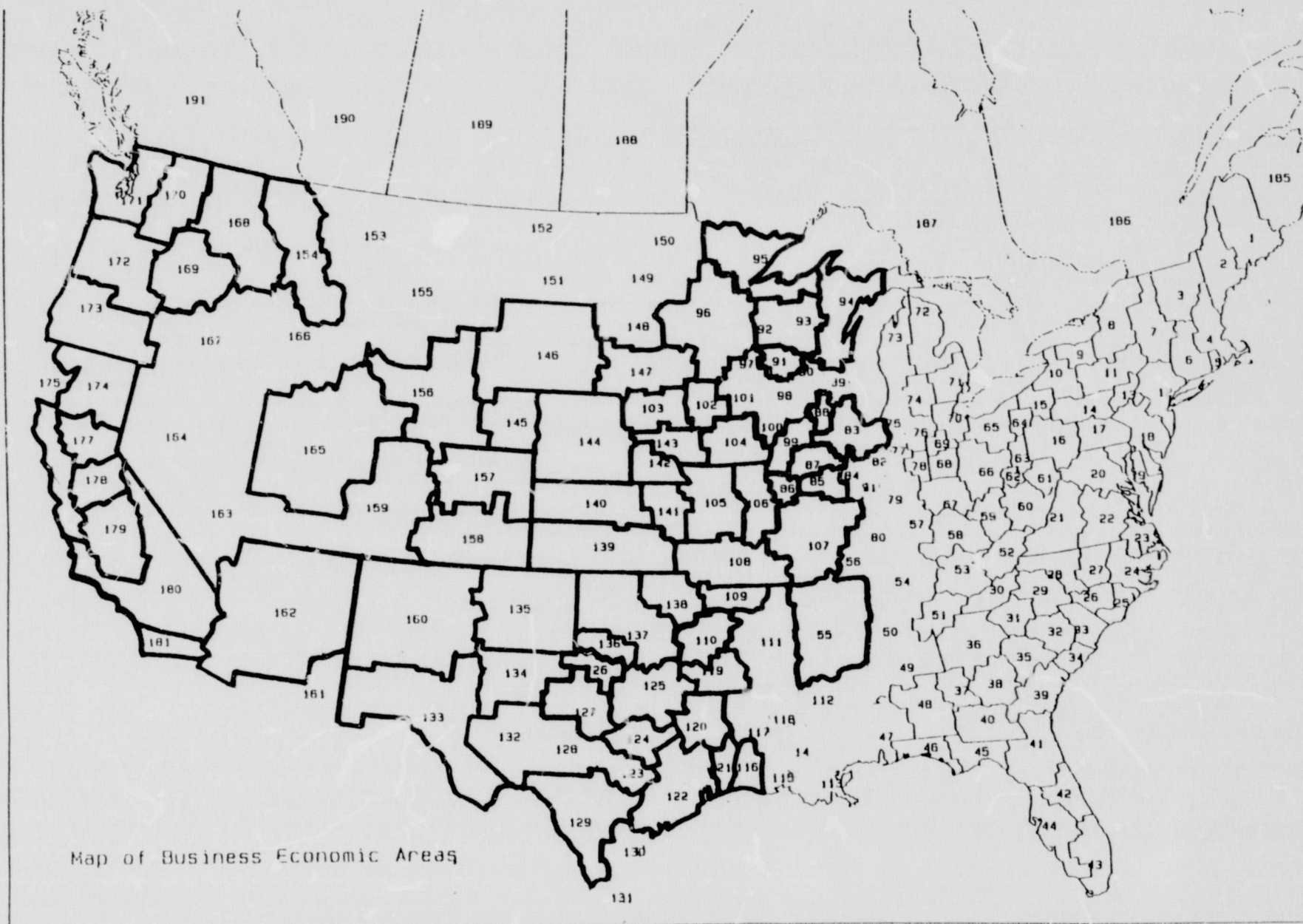


Figure 1
BEA Overlap of UP-SF and BN-SF Railroads

VERIFIED STATEMENT OF JOSEPH J. PLAISTOW

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

Background

I have been asked by The Kansas City Southern Railway Company (hereinafter "KCS") to comment on the proposed procedural time scheduled requested by the Applicants in the proposed merger of Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company (hereinafter "Union Pacific" or "UP") and Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company (hereinafter "Southern Pacific" or "SP").¹ In a petition dated August 4, 1995, UP/SP requested that the Interstate Commerce Commission (hereinafter "the Commission") adopt a procedural time schedule requiring service of the Commission's final decision 195 days after UP/SP file their primary Application.

¹ Union Pacific and Southern Pacific may hereinafter be referred to as "applicants" or UP/SP.

UP/SP claim that 195 days is an adequate time period since a similar, shortened time frame was used in ICC Finance Docket No. 32549, *Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and the Atchison, Topeka and Santa Fe Railway Company* (hereinafter "Burlington Northern - Santa Fe" or "BN/SF"). KCS shows that this proposed, parallel UP/SP merger is not analogous to the BN/SF merger proceeding, which was largely an end-to-end merger with significant, though geographically limited, competitive harm. The competitive effects of the proposed UP/SP merger are far more extensive and will be contested far more vigorously than BN/SF. It appears that the parallel UP/SP merger will cause more competitive damage than the parallel merger proposed and rejected in *Santa Fe Southern Pacific Corporation -- Control -- Southern Pacific Transportation Company; Merger - The Atchison, Topeka and Santa Fe Railway Company and Southern Pacific Transportation Company*, ICC Finance Docket No. 30400 hereinafter "Santa Fe - Southern Pacific merger" or "SF/SP merger").

Qualifications to Comment on Merger Proceeding Time Requirements

My name is Joseph J. Plaistow, and I am Senior Consultant with Snavelly, King & Associates, Inc. with offices at 1220 L St., N.W., Washington, D.C., 20005. I graduated with honors in 1967 from Michigan Technological University with a Bachelors Degree in Metallurgical Engineering. In 1972 I graduated with honors from the University of Minnesota with a Masters Degree in Business Administration. I am President of the Washington Chapter of Transportation Research Forum and a member of the Association for Transportation Law, Logistics and Policy. In 1976 I was admitted to practice before the Interstate Commerce Commission as a non-attorney practitioner.

I was employed by Burlington Northern for 15 years as Director of Costs and Economic Analyses in the Finance Department and as Director of Equipment and Service and Director Planning and Equipment in the Food and Manufactured Products Business Unit of the Marketing Department.

I am familiar with practice before the ICC and with the detailed, and often painstaking analysis required to support a position successfully before the Commission. I am experienced with the delays inherent to Commission proceedings, and especially with those involving substantial discovery and data gathering. I am also familiar with the amount of information required to support merger analyses, including the specific service characteristics at shipping and receiving industries.

I appeared on behalf of KCS in this same capacity in BN/SF. In every dimension, this UP/SP merger is more like the SF/SP proposed, and ICC rejected, merger than it is like the BN/SF merger.

My Assignment in this Proceeding

KCS has retained Snavelly, King & Associates (hereinafter "SKA") to assist Dr. Curtis Grimm, Professor and Chair of Transportation, Business and Public Policy, College of Business and Management, University of Maryland at College Park, who is also filing a statement evaluating the competitive effects of the merger. SKA provides data and analytical support for Dr. Grimm.

Completion of the competitive analyses, will involve substantial data analysis of waybill and other traffic flow data as well as other types of data from Union Pacific and Southern Pacific sources. Conclusions drawn from the investigative work we have begun in this regard

will be enhanced when we are provided the evidence KCS will seek in discovery -- evidence possessed only by Union Pacific and/or Southern Pacific.

In providing advice to Dr. Grimm and KCS, SKA will supplement its conclusions drawn from our analysis of waybill historical traffic movement data by summarily reviewing and marking for copying thousands of documents that Union Pacific - Southern Pacific will make available to us and will most likely place in a document depository. Most of the material placed in the depository will support Union Pacific - Southern Pacific's written testimony, and it is unlikely that much of it will be related in any way to competitive harm from the merger. Because UP/SP unjustifiably minimizes their proposed merger's harm to competition, it will be our job to determine whether the proposed UP/SP merger will be as damaging to competition as it first appears.

One might assume this to be a simple task since:

1. SF/SP was rejected because of its harm to competition,
2. UP/SP causes greater harm to competition than did SF/SP, and
3. The railroad industry is far more concentrated today than it was on July 24, 1986, the date of the Commission decision rejecting as anti-competitive the proposed SF/SP merger.

As stated by Dr. Grimm, if the Commission approves the UP/SP merger, the western half of the United States will be subjected to the duopolistic forces of the UP/SP and BN/SF systems,² and many shippers and entire routes will be subjected to monopolistic forces, monopolistic rate making practices and resulting monopoly prices.

² See the verified statement of Dr. Curtis Grimm filed September 5, 1995 in the BN/SF merger proceeding, ICC Finance Docket No. 32549.

Quantifying and Comparing the Competitive Effect of the UP/SP Merger with the BN/SF and SF/SP Mergers

The Commission is most concerned about the creation of railroad monopolies. In these circumstances, the number of independent competing routes from which shippers may select goes from 2 to 1. That is, prior to the merger 2 railroads (UP and SP) serve the shippers, while subsequent to the merger only 1 (UP) serves the shipper.

To compare the three mergers -- UP/SP, BN/SF, SFSP -- on an equal footing, I used the 1993 Waybill sample and identified origin - destination pairs which had two independent routing alternatives prior to the merger and only 1 after the merger. Origins and destinations were defined by the Business Economic Area (BEA) in which they fell geographically. The dollars of revenues effected over these routings is used as the comparative parameter in Figure 1, attached to the end of this verified statement.

Figure 1 compares the \$1.65 billion affected in the UP/SP merger to the revenue affected in the BN/SF merger. The UP/SP merger has 10 times the competitive effect of the BN/SF merger (\$1.65 billion vs. \$0.16 billion). Even more importantly, UP/SP's competitive effects are 179% greater than those of the SF/SP merger (\$1.65 billion vs. \$0.92 billion), and that merger was rejected by this Commission.³

³ SF/SP competitive effects were quantified as if the Santa Fe/Southern Pacific merger took place after 1993. Merger effects were quantified using the 1993 waybill sample. This procedure permitted comparison of the SF/SP merger and the UP/SP and BN/SF mergers on like bases. Between 1988 (the year the Commission rejected the Santa Fe/Southern Pacific merger) and the waybill year 1993, the following mergers took place; 1) DRGW - SP; 2) UP-C&NW; and 3) UP-MKT. Simulating railroad traffic flows as if these mergers had not taken place would be problematical and subjective, so it was not done. In any event, reversing the effects of these mergers would have relatively minor effects on the \$0.92 billion and could not have made up the difference between the \$1.65 billion of the UP/SP merger and the \$0.92 billion of the SF/SP merger.

The Union Pacific - Southern Pacific Proposed Merger is not Pro-Competitive.

There is a chasm separating UP/SP's conclusions on the competitive effect of the proposed UP/SP merger and reality. UP/SP claim that their proposed merger is pro-competitive.⁴ In KCS's view the proposed merger would irreparably damage the competitive balance in the United States west of the Mississippi (unless the Interstate Commerce Commission extensively conditions the proposed merger so as to allow shippers to retain competitive alternatives).

Gulf Coast chemical shippers should side with the KCS in seeking to condition the proposed merger. The Texas Railroad Commission believes that 70% of the chemical traffic between Beaumont and Brownsville will be at the mercy of the Union Pacific, and it plans to give the UP/SP merger closer scrutiny than they gave BN/SF.⁵ Shippers in California, Nevada and Utah also will be especially hard hit by their loss of competitive alternatives. Shippers to and from Mexico will be virtually captive to the UP/SP juggernaut. All these shippers, and many more, will be losing the benefits of competition between Southern Pacific and Union Pacific.

Today, Southern Pacific vigorously competes against Union Pacific on both service and price. Incontrovertibly, Southern Pacific's vigorous competitive efforts keep transportation rates lower for shippers served by both SP and UP than they would be without Southern Pacific's competition. The extent to which shippers will be losing the benefits of Southern Pacific's

⁴ "Union Pacific, Omaha and yellow: but a host of other questions remain", Traffic World, August 14, 1995, pp. 20-21.

⁵ Ibid, page 20.

vigorous competition in this proposed UP/SP merger dwarf the competitive losses in the BN/SF merger.

Equity requires that affected shippers and KCS be given a fair chance to establish their positions before this Commission. However, Kansas City Southern suffers two serious disadvantages. UP/SP have all the data since they are the only two railroads serving all the shippers that suffer the greatest loss of competition -- going from 2 to 1, that is, being served by 2 railroads (UP and SP) before the merger and only 1 (UP) after the merger. UP/SP have the further advantage that they have already been studying their combination for two years.⁶

The amount of time required to deal with competitive effects is proportional to the number of circumstances for which remedies must be sought and resolved. At the conclusion of BN/SF, all 2 to 1's had been resolved in one of two ways:

1. Through the settlement agreements negotiated between the merger partners and potential alternative transportation providers such as Kansas City Southern, Southern Pacific and Union Pacific; and
2. The proposed UP/SP merger requires far more 2 to 1 resolutions than did BN/SF since there are far more of them.

It is clear that Kansas City Southern will need much additional material from Union Pacific - Southern Pacific to investigate further facets of the proposed merger's anti-competitive effects. Conclusions regarding competitive effects drawn from more public sources can be supplemented and thus more fully understood with information that can only be obtained from the railroads involved. KCS intends to develop a competitive effects picture from the viewpoint of the

⁶ "UP, SP in the works for two years, but BN-Santa Fe dealings set the pace ", Traffic World, August 21, 1995, pages 27 and 28.

shipper, which will be particularly time consuming even after being granted access to Union Pacific - Southern Pacific materials.

Discovery is the Primary Tool for Acquiring the Necessary Evidence.

I am familiar with the discovery process and difficulties that parties endure to produce responsive evidence. Responding to discovery requests must be carried out by railroad employees who have seen their workloads steadily increase as the railroads have dramatically cut their workforces. The person responding to discovery requests has to fit that added duty in with other duties. While Union Pacific would have this Commission believe that respondent discovery-related efforts take no time at all, I can attest on the basis of past and current, first-hand experience that parties requesting discovery frequently do not get the documents they request even after months of repeating those requests.

In this Union Pacific - Southern Pacific merger proceeding we will be dealing with discovery requests involving hundreds of both Union Pacific and Southern Pacific shippers. KCS will seek discovery from Union Pacific and Southern Pacific as to facts that only they possess and which aid us in identifying those shippers adversely affected by decreased competition. Based upon my experience in this type of proceeding, these shippers are least likely to be described or represented in the Union Pacific document depository.

The Issues in this Proceeding Involve Far More Extensive Competitive Effects than in the BN/SF Proceeding:

The procedural time frame now being proposed is far too short for the most complicated and extensive and parallel merger ever considered by the Commission. Equitable treatment of

shippers and competitors will require a substantially longer time frame than 195 days. The data that UP/SP had only to retrieve from their respective files to evaluate their positions can only be obtained by Kansas City Southern and affected shippers through the discovery process. Discovery does not take place in a perfect world with the unlimited resources needed to reduce the required time frame to the extent that Union Pacific claims is fair. SKA will undertake to do the best possible job expeditiously, but we believe that the 195 day proposed schedule is fundamentally unfair to KCS and to shippers suffering competitive harm as a result of the merger.

As a party dependent upon documents produced by UP and SP, the most equitable procedure would compute time from the day that Union Pacific - Southern Pacific responds to KCS's discovery requests satisfactorily. An Administrative Law Judge also should be assigned to this proceeding to determine the sufficiency of the parties' responses to discovery requests.

The Scope of the Transaction Has a Direct Impact on the Time Required to Evaluate the Fact Circumstances and Prepare a Reasoned Response

Any analysis in this proceeding is expanded by the sheer volume of information that must be processed. The procedural timeframe must allow time for parties to evaluate fully and pursue all potential remedies for the negative impacts of the proposed merger. To prosecute a merger proceeding and prepare a responsive proposal a party must submit evidence before this Commission covering a broad range of railroad operations and analysis. It must:

1. Evaluate each fact circumstance;
2. Consider the alternative forms of operational responses;
3. Develop the requisite evidence for the selected operational plan; and

4. Present its position to this Commission in a convincing manner supported by factual documentation.

Union Pacific - Southern Pacific will be required to fully develop their Railroad Control and Merger Application consisting of operating plans, market impact analyses, financial projections, and labor and administrative impacts. They have no time limit for submitting their application. In fact, they already have considered their alternative merger plans for at least two (2) years before submitting their application. The law does not allow other parties equal time; however, KCS does seek a reasonable procedural time frame allowing it and other prospective respondents to consider their alternatives.

Given the geographic sweep of the proposed merger, the number of affected commodities, origins and destinations, and the existing complex interrelationships among those markets, the analytical task confronting the prospective respondent desiring to file a responsive application in this case is daunting. The number of possible combinations and permutations of protective conditions that have to be considered by prospective respondents grows geometrically with the geographic size and traffic base of the applicants. The volume of traffic and operating data that must be obtained and digested simply to define the problem is enormous and cannot realistically be accomplished within the limits of an administratively foreshortened schedule.

Discovery in any major transaction has historically been a long process. Both definition and conduct of discovery are adversely impacted by the size of the merger applicants. Definition of discovery is impacted by the need to identify and quantify corollary effects of the merger, effects which compound with size. The time required to complete discovery is in direct proportion to the volume of data sought, which, in turn, is determined by the size of the applicants.

The sheer size of the respondent's data requirements imposes lengthy data collection, processing and analytical requirements on all parties, and the opportunity for loss of data integrity is pervasive. The opportunities for and possibility of erroneous data obligates the respondents to undertake lengthy data validation and integrity tests. These are clearly not calculations and can, or should, be undertaken in haste.

Additionally, a reasonable procedural timeframe must permit prospective respondents adequate time to quantify the effects of numerous possible protective conditions. To accomplish this, the respondent must hypothesize, economically model and test numerous alternative operating plans. The number of such operating plans to be tested grows geometrically with the geographic sizes and traffic bases of the applicants. The data needed to design and test such hypothetical operating scenarios is enormous since the number of variables that affect the analysis has grown to embrace all of the physical and seasonal differences that affect the markets, revenues and costs of each such hypothetical.

Further, the dominance of either or both applicant in any particular market and the combined effects after the merger raises the specter that, like no case ever before, there are profound opportunities for significant dislocations and realignments of entire markets. To assess the opportunity for and effects of such market changes, the discovery task has to be expanded to include general and specific economic indicators of the conditions of the various industrial or agricultural sectors and related markets that may be impacted by the merger. The difficulty of this task is inordinately compounded by the need for the thorough investigator to anticipate what actions may be taken by the affected markets in response to the perceived threats imputed to the merger and then to determine what effects such reactions may have on the respondent. In short, whether the information being sought is traffic, operating, geographic, seasonal or economic,

the sheer volume of data and other documentation required, requires that the maximum time allowed by law be allowed in this proceeding.

Analysis of Possible Protective Conditions.

In general there are only two types of protective conditions that can be sought under these conditions. These would be either (a) to seek the imposition of an obligation on the applicants to act (or not act) in some particular manner on behalf of the respondent following the merger or (b) to seek the imposition of a right for the respondent to use the resources of the applicants to act on its own behalf. In either event, it is the respondent's obligation to determine what specific relief is to be sought. That choice must be an informed decision made by the respondent based on the best information available.

Another problem for the prospective respondent is the time requirement to adequately evaluate the enormous diversity of possible operating plans. The operating plan must consider not only possible routes but also operating conditions, schedules, crew requirements, motive power and equipment investment, operating costs, and a myriad of other factors that all affect economic returns, competition and market position.

Notwithstanding all of the foregoing obstacles, even after all the data is collected and the postulated operating plans or requirements are specified, there remains the task of measuring effectiveness of each such plan. Customary cost finding principles are predicated on an assumption that the underlying cost structure is not affected either by time or by the change that is being measured. Arguably, in this case, responsive projections of the probable economic effects of the merger must be made over a long period of time and will require application of simulation analytical techniques rather than traditional cost modeling if the most effective

protective conditions are to be identified. This is clearly a time consuming effort that cannot be rushed through.

Application and Rebuttal.

A respondent's successful evidentiary submission before the Commission will incorporate a strong integration of all the evidence. A reasonable procedural time frame must allow a prospective respondent to reflect evidence developed from a myriad of sources including (a) the operating plans and materials covered in the previous section; (b) the processed waybill data; (c) material gleaned from discovery; (d) internal railroad supporting evidence; and (e) corroborating shipper statements.

The respondent's position must be presented clearly and precisely to the Commission. In this case, given the volume of data that must be analyzed, the complexity of possible effects, and the diversity of possible responses, the "technical" support for the respondent's position must be particularly well articulated. If the Commission does not understand the relief sought, or misunderstands it, then the Commission cannot give adequate consideration to the relief sought. Careful exposition takes time and usually requires the support of additional analysis as the expository logic is shaped and formed.

In addition, the applicants' response to a responsive application is certain to attempt to discredit the responsive application and to persuade the Commission to impose no protection or merger conditions whatsoever. The respondent's rebuttal to the applicant's response will require time for analysis and exposition for which the Commission's schedule does not adequately provide.

Conclusion

UP/SP have been evaluating their positions for more than two years and now request that the Commission rush to a decision within 195 days to allow UP/SP stockholders to begin reaping the financial benefits UP/SP claim will flow to this group. UP/SP's one-sided perspective ignores the other components of the public interest argument who also have rights -- the shipping public suffering tremendous losses of competitive alternatives and the rights of competing railroads who seek to step in and serve these shippers otherwise competitively damaged.

Most of the evidence outlined above did not have to be developed in the BN/SF merger because the 2 to 1's were resolved even before inconsistent and responsive applications had to be submitted. It is unlikely that UP/SP will be able to resolve the 2 to 1's at such an early stage, if at all. Many 2 to 1's are likely to be resolved before the Interstate Commerce Commission. This by itself markedly distinguishes UP/SP from BN/SF and makes the BN/SF time frame inappropriate for UP/SP. The geographic breadth of competitive effects and their sheer magnitude as measured by the number of shippers affected together with the transportation revenues involved additionally distinguishes the two proceedings. Because of the complexity of this proceeding, 195 days is clearly insufficient for the various parties to develop their positions adequately.

VERIFICATION

DISTRICT OF COLUMBIA

Joseph J. Plaistow, being first duly sworn, disposes and says that he has read the foregoing statement, knows the facts asserted therein are true, and that the same are true as stated.

Joseph J. Plaistow
Joseph J. Plaistow

Subscribed and sworn to before me this 18th day of September, 1995.

Jannie A. Finch
Notary Public

My Commission Expires:
Notary Public, District of Columbia
My Commission Expires November 14, 1999

Quantifying Competitive Effects
UP/SP Merger vs. BN/SF and SF/SP
Competing Route Alternatives Decreasing from
2 to 1
Revenue Effected (\$'s in Billions)

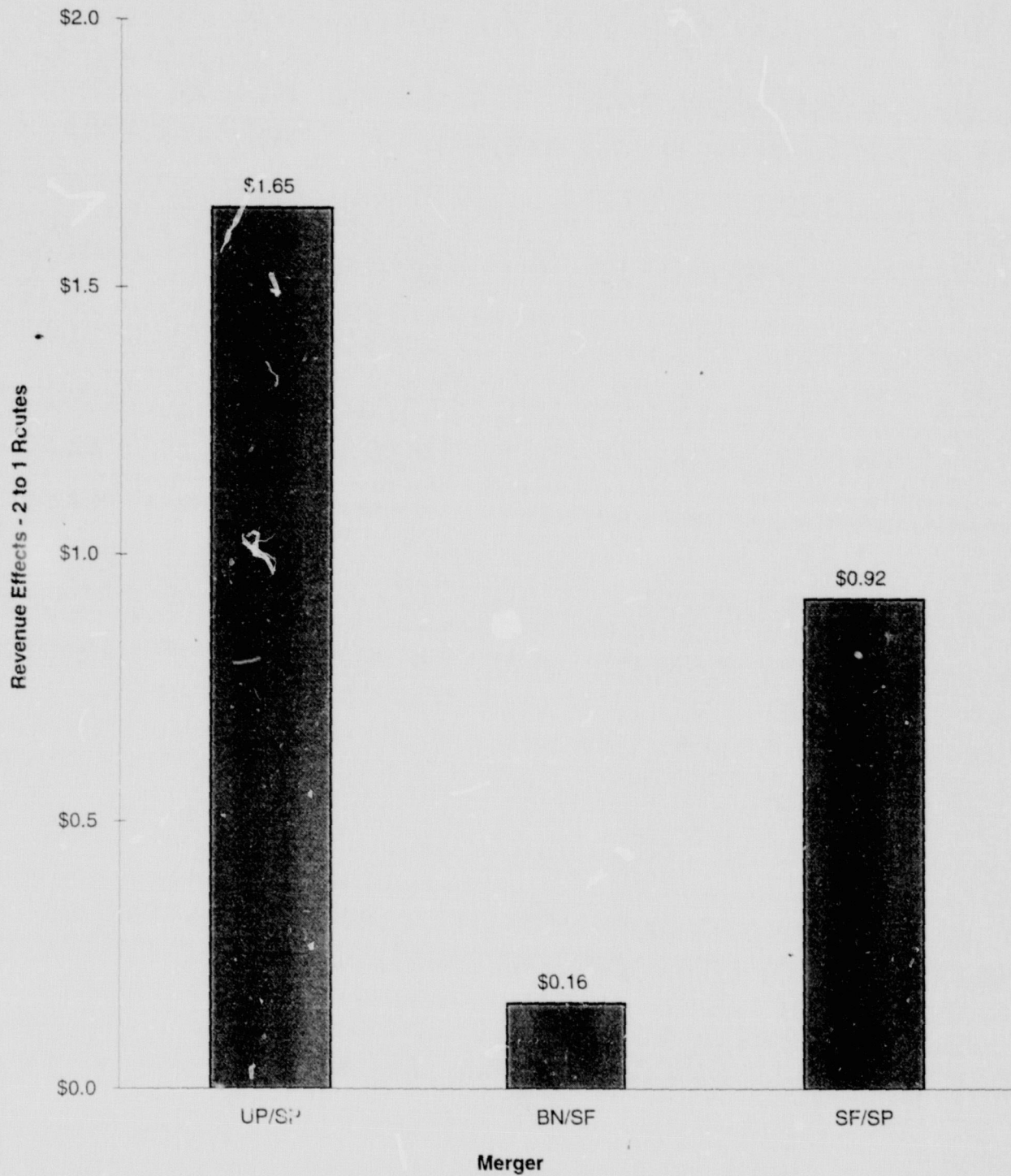


Figure 1

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY ON PROPOSED PROCEDURAL SCHEDULE" was served this 18th day of September, 1995, by hand-delivery, facsimile, overnight delivery, or first-class mail, postage prepaid, on counsel for all known parties of record.



William A. Mullins

Attorney for The Kansas City
Southern Railway Company

STB

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• 32760

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Item No. _____

Page Count 11

Sept # 39

60068

TM-2



BEFORE THE
INTERSTATE COMMERCE COMMISSION

Union Pacific Corp., Union Pacific)
RR. Co. and Missouri Pacific RR Co.)
-- Control and Merger -- Southern)
Pacific Rail Corp., Southern)
Pacific Trans. Co., St. Louis)
Southwestern Rw. Co., SPCSL Corp.)
and The Denver and Rio Grande)
Western Corp.)

Finance Docket No. 32760

COMMENTS OF THE TEXAS MEXICAN RAILWAY
COMPANY IN OPPOSITION TO THE
PROPOSED PROCEDURAL SCHEDULE

Office of the Secretary

SEP 19 1995

3

Part of
Public Record

Richard A. Allen
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BEFORE THE
INTERSTATE COMMERCE COMMISSION

TM-2

Union Pacific Corp., et al.)
-- Control and Merger -- Southern)
Pacific Rail Corp., et al.)

Fiance Docket No. 32760

COMMENTS OF THE TEXAS MEXICAN RAILWAY
COMPANY IN OPPOSITION TO THE
PROPOSED PROCEDURAL SCHEDULE

The Texas Mexican Railway Company ("Tex-Mex"), by its undersigned attorneys, hereby submits its comments in opposition to the Petition to Establish a Procedural Schedule, UP/SP-4, ("Petition") filed August 4, 1995 by the primary applicants ("Petitioners") in the Union Pacific/Southern Pacific control proceeding captioned above. Tex-Mex even more strenuously opposes the variation the Commission set forth in Decision No. 1, served September 1, 1995. Tex-Mex is both uniquely situated to evaluate, and suffer, the effects of the proposed merger on international traffic. Neither UP/SP's proposed procedural schedule nor the Commission's proposed variation permit Tex-Mex adequate time to properly evaluate and present its comments and responsive application. Nor would they permit the Commission adequate time to responsibly consider all of the parties' evidence.

Petitioners have not established that the proposed waiver of the existing procedural schedule will "preserve the opportunity for: (1) affected persons and the public at large to participate effectively in the process; (2) reasoned consideration of the

arguments for and against the application; and (3) consideration of competing application, proposed conditions, and amendments offered by the applicants to meet objections to proposed transactions." Ex Part No. 282 (Sub-No. 19), New Procedures in Rail Acquisitions, Mergers and Consolidations, Notice of Proposed Rulemaking, 60 Fed. Reg. 5890 (January 31, 1995).

Petitioners declare that (1) their "interest in obtaining an expeditious decision on an important rail restructuring initiative" supports imposition of the proposed procedural schedule;^{1/} and (2) experience has shown that the proposed procedural schedule "provides all parties with a fair opportunity to be heard" with respect to their merger proposal. Petition at 4.

The interest of Petitioners, however, does not justify undue haste in this matter. The Commission is the guardian of the public interest, and the public interest requires that the important issues at stake in this case be fully developed and considered. Petitioners want the Commission to approve the

^{1/} Petitioners assert that the Commission must act quickly because only a combined UP and SP can "offer[] a true competitive alternative to the BN/Santa Fe system." The Commission, of course, approved the BN/Santa Fe combination without consideration of a proposed UP/SP combination, Finance Docket No. 32549, Burlington Northern, Inc. and Burlington Northern R. Co. - Control and Merger -- Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Railway Co., Decision No. 38, served August 23, 1995, slip op. at 58, and found that as conditioned the BN/Santa Fe combination would not be anticompetitive. Id., slip op. at 114. Therefore, the Commission should not credit Petitioners' assertion that only a combined UP/SP can compete with a combined BN/ATSF. UP/SP-6, Applicants' Reply to KCS' Comments on Proposed Procedural Schedule and Discovery Guidelines, filed August 21, 1995, ("Reply to KCS") at 4.

merger of two of the largest remaining rail systems in the United States. There is good reason to believe that the anticompetitive effects of this merger will dwarf those of the recent BN/ATSF merger and will exceed even those of the SP/ATSF merger that the Commission disapproved.

Furthermore, if it approves the merger, the Commission will determine who will dominate six of the seven rail gateways to the Mexican Rail system.^{2/} The Commission thus faces a case with significant international ramifications.^{3/}

As one of two railroads serving the Laredo gateway (the other being an applicant), Tex-Mex is uniquely positioned to address the competitive impacts of the proposed merger on U.S./Mexican commerce. The procedural schedule proposed by the applicants, however, simply will not provide Tex-Mex sufficient time to properly analyze the potential impacts on competition, on both the domestic and international levels, of the combination of these two massive transportation systems, and to suggest

^{2/} Those gateways and the present major carriers serving those gateways are: 1) Mexicali - SP; 2) Nogales - SP; 3) El Paso - SP and BN/ATSF; 4) Presidio - SP through the South Orient; 5) Eagle Pass - SP; 6) Laredo - UP; and 7) Brownsville - UP.

^{3/} Petitioners thus incorrectly equate the issues in the UP/SP combination case with those involved in the BN/ATSF merger case. See Reply to KCS at 3 and at 6; see also, UP/SP-10, Applicants' Reply to STRICT's Opposition to Petition to Establish Procedural Schedule, filed August 29, 1995, ("Reply to STRICT") at 6. The international issues alone prove Petitioners wrong when they declare that the "proposed transaction contains no issues that are especially contentious or complex," Reply to STRICT, at 7.

reasonable conditions.^{4/} As such, neither provides Tex-Mex an adequate opportunity to meaningfully and effectively participate in the process. The Commission cannot engage in a reasoned consideration of the arguments for and against Petitioners' merger application if it deprived of Tex-Mex's reasoned consideration and information.

Even if Tex-Mex and other parties were able to respond in the short time proposed, the proposed procedural schedules allow the Commission only 15 days to consider the briefs of the parties and only one day to make a decision on the case (oral arguments would be scheduled for F+155 and the voting conference would be scheduled for F+156).^{5/} This falls far short of the time that will be needed to adequately consider the many difficult and important issues presented by this merger.

The Commission's abbreviated alternative to Petitioners' suggested procedural schedule, whereby the parties must produce all "inconsistent and responsive applications, comments, protests, requests for conditions, and other opposition evidence

^{4/} The UP/SP's proposed procedural schedule calls for Tex-Mex to identify, study, evaluate, and present evidence concerning not only the domestic and international anticompetitive effects of the merger, but also concerning possible conditions which might ameliorate the competitive harms it has identified, all within a period of 90 days. The Commission's alternative would provide only 60 days for this evaluation.

^{5/} If Petitioners file their primary application on December 1, 1995, however, then the proposed procedural schedule calls for oral arguments on Saturday, May 4, 1996 and a voting conference to be held on Sunday, May 5, 1996. According to Commission rules concerning deadlines falling on Saturdays, Sundays or holidays, therefore, both the oral argument and the voting conference would be scheduled for Monday, May 6, 1996.

and argument" within 60 days of the filing of the primary application, is even worse. If the Commission were to adopt such a procedural schedule, Tex-Mex seriously questions whether any party could adequately address the issues in this case. The record will be woefully inadequate and the Commission simply cannot make a reasoned analysis on an inadequate record. Farrell Lines, Inc. v. Dole, 619 F. Supp. 298, 309 (D.C.D.C. 1985) ("sound principles of administrative decision making require that important actions be taken only after the agency compiles an adequate record").

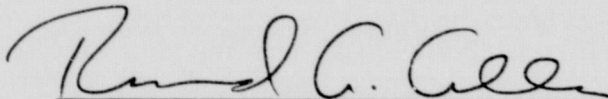
Petitioners assert that an "extended proceeding would only delay implementation of the very substantial public benefits that the UP/SP merger will provide." Reply to KCS at 4. If the proposed merger will provide these benefits -- a question the Commission has yet to decide -- then they can wait. Precipitous and ill-advised approval by the Commission, however, cannot be later undone.

Others have addressed Petitioners' erroneous assertion that the procedural schedule is the same as that adopted in BN/ATSF. See TCU/UTU/IAM-1, Transportation Unions' Opposition to Applicants' Proposed Procedural Schedule and Comments, filed September 1, 1995, at 4. In that case, the parties had five additional months to evaluate and prepare their cases.

If Petitioners truly believe that the BN/ATSF case reflects the proper procedural schedule, the timetable in that case, including the extra five months, should be adopted. For the

reasons described herein, the Commission should reject the
Petition to Establish a Procedural Schedule, and should reject as
well the variation proposed in its Decision No. 1.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Richard A. Allen". The signature is fluid and cursive, with the first name "Richard" being more prominent than the last name "Allen".

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Attorneys for Texas Mexican Railway

Dated: September 18, 1995

CERTIFICATE OF SERVICE

I certify that this day I have sent a complete and accurate copy of the Comments of the Texas Mexican Railway Company in Opposition to the Proposed Procedural Schedule by first class postage prepaid United States mail to the following individuals:

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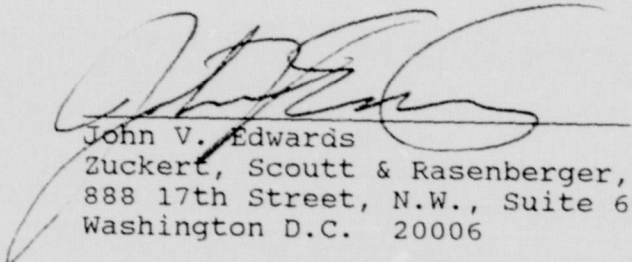
Cannon Y. Harvey
Louis P. Warchot
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September 18, 1995



John V. Edwards
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W., Suite 600
Washington D.C. 20006

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Item No. _____

Page Count 6

Sept #38

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U.S. Department of
Transportation

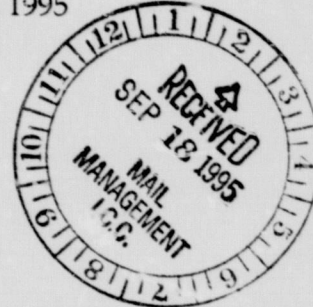
Office of the Secretary
of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

September 18, 1995

Vernon A. Williams, Secretary
Room 2223
Interstate Commerce Commission
1201 Constitution Ave., N.W.
Washington, D.C. 20423



Re: 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

Dear Mr. Williams:

Enclosed are the original and twenty copies of the comments of the United States Department of Transportation in response to Decision No. 1 in the above-referenced proceeding. A computer diskette in WordPerfect 5.1 format containing these comments is also provided. As directed by Decision No. 1, I am serving copies of these comments on counsel for the Applicants.

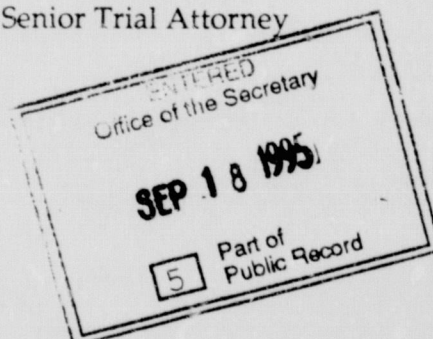
I have also enclosed two additional copies that I request be date-stamped and returned with the messenger.

Respectfully submitted,

Paul Samuel Smith
Senior Trial Attorney

Enclosures

cc: Counsel for Applicants





U.S. Department of
Transportation
Office of the Secretary
of Transportation

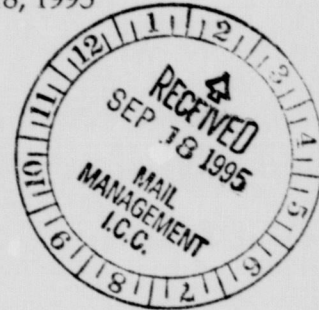
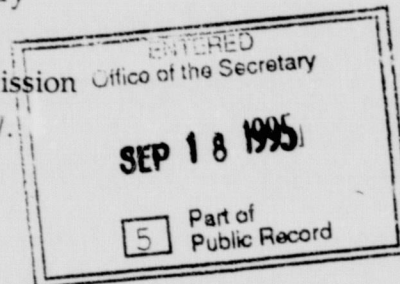
ORIGINAL

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

September 18, 1995

Vernon A. Williams, Secretary
Room 2223
Interstate Commerce Commission
1201 Constitution Ave., N.W.
Washington, D.C. 20423



Re: 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

Dear Mr. Williams:

On August 4, 1995, the Union Pacific and Southern Pacific railroads filed with the Interstate Commerce Commission ("ICC" or "Commission") a notice of intent to seek approval of their merger. If approved, this transaction would create the largest railroad in the United States. On September 1, 1995, the ICC issued Decision No. 1 in this docket. 60 Fed. Reg. 45737 (September 1, 1995). Decision No. 1 proposes two alternative procedural schedules for this proceeding and asks for public comment on those schedules. The U.S. Department of Transportation ("DOT" or "Department") hereby submits its comments.

Each of the proposed schedules would require the Commission to decide the proposed merger on an accelerated basis. The first proposed schedule would provide 195 days between the date of submission of the primary application and

related applications and the final decision. It would provide 90 days from the primary application date for parties to prepare and submit what amounts to evidence in opposition to the transaction (including inconsistent and responsive applications, requests for conditions, etc.). Applicants and other parties would then have 30 days to prepare and submit rebuttal evidence, opponents would have 10 days to respond, and briefs would be due in another 10 days. The ICC notes that this is "substantially similar" to the schedule adopted in the recently-completed merger of the Burlington Northern Railroad Co. and the Atchison, Topeka and Santa Fe Railway Co. Finance Docket No. 32549, Slip Opinion served August 23, 1995 ("BN/SF"). The second potential schedule is similar, but reduces the time allowed for preparation of initial opposition evidence even further -- from 90 days to 60 days. Decision No. 1 states that if this course is followed the 30 day difference from the first proposal "would be inserted later in the schedule." 60 Fed. Reg. at 45738.

The Commission proved in the BN/SF proceeding that in the right circumstances it could effectively review and decide whether to approve a major rail consolidation in approximately six months. The ICC's efficient processing of that case and the substantial effort that expedited processing required on the part of the ICC staff should be applauded. DOT submits, however, that the expedited BN/SF procedural model may be inappropriate for this case.

First, the truly accelerated portion of the BN/SF proceeding was adopted only some five months after the massive primary application was originally filed.¹ Ultimately, parties had until May 10, 1995, in which to prepare substantive evidence in support of inconsistent or responsive applications, conditions, etc. -- a total of 209 days from the date of the primary application. Only for subsequent submissions of evidence and briefs did the BN/SF schedule resemble that proposed in this case.

¹/ The primary application was filed on October 13, 1994. The first procedural schedule encompassed 535 days. Finance Docket No. 32549, Decision Nos. 4 and 5 (served October 10 and November 11, respectively). On March 7, 1995 the ICC decided upon a 167 day schedule. Decision No. 10.

Second, unlike the consideration of merger proposals by the Department of Justice under Hart-Scott-Rodino procedures, the Commission employs formal adversarial, adjudicative procedures in railroad consolidations. The attendant rights and responsibilities these engender, such as discovery and the formulation of individual requests for conditions, as well as the repeated opportunities for rebuttal, consume more time. The Department is concerned that the time periods suggested in the proposed schedules -- particularly the total of 50 days allotted to prepare rebuttal evidence and argument, responsive evidence and argument, and briefs -- may be inadequate. So long as the present procedures apply, they must allow for a thorough consideration of the issues raised by the proposed transaction.

Third, while the BN/SF merger raised difficult issues, it was nonetheless clear from the outset that the proceeding involved a "primarily end-to-end" merger, with comparatively small potential for significant reductions in competition. BN/SF Slip Op. at 64. This circumstance allowed parties to focus their attention fairly quickly on those problems that become evident and better enabled them to meet tight deadlines. The instant transaction, by contrast, would appear to present a more complex situation. Reference to railroad route maps suggests that the applicants may compete "head-to-head" over very large areas. Such cases have in the past presented comparatively greater prospects for competitive injury. See Santa Fe Southern Pacific Corp. - Control - SPT Co., 2 I.C.C.2d 709 (1986). Rigorous analysis of traffic flows and the multiple markets potentially affected will be critical, and will require adequate time.

Fourth, the applicants in BN/SF reached agreements with other railroads and assented to the imposition of conditions to cure most of the competitive problems their merger occasioned. BN/SF Slip Op. at 82-88. This reduced the range of issues that the parties needed to address before the ICC in full adversarial posture. Although the applicants in the instant proceeding are reportedly taking similar steps, there can be no guarantee that they will be successful. Even if they ultimately are, an analysis of the agreements reached would predictably be more complex. In the event that curative agreements are inadequate, competitive issues will necessarily continue to require strict attention. DOT believes that the

time and resources required to present the parties' varied positions to the Commission would likely exceed that needed in BN/SF.

Finally, *whatever* the procedural schedule adopted in this matter, any accelerated review can only take place if the ICC issues a definitive service list early in the case to ensure timely receipt of the evolving record. Such a list was not forthcoming in BN/SF until late in the proceeding – after descriptions and evidence in support of inconsistent or responsive applications, etc. had been filed. Finance Docket No. 32549, Decision Nos. 28 and 30 (served May 19 and June 2, respectively). Because pleadings are not generally circulated among the parties to a proceeding in the absence of such a list, DOT (and possibly other parties) lost valuable time trying to secure copies of evidentiary filings from large numbers of participants, which made it more difficult to meet subsequent deadlines.

In sum, the Department is concerned that this proceeding may not present a case that can effectively be decided in a proceeding that is as expedited as BN/SF. The little information now available suggests that more, rather than less, time may be necessary to present and analyze evidence. Therefore, DOT proposes that the Commission provide for an additional 30 days between the initial submission of opposition evidence and arguments and responses thereto,² an additional 30 days between the filing of these responses and rebuttal evidence in support of inconsistent and responsive applications,³ and another 20 days between the filing of final evidence and arguments in support of inconsistent or responsive applications and the due date for briefs.⁴ If the ICC adopted its

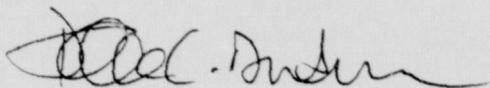
²/ The proposed schedule now allows 30 days, from "F + 90" to "F + 120." 60 Fed. Reg. 45737-38.

³/ The proposed schedule now allows a 10 day period, from "F + 120" to "F + 130." Id.

⁴/ The proposed schedule now allows a 10 day period, from "F + 130" to "F + 140." Id.

alternative schedule and "inserted" at one of these points the 30 days withdrawn from the period for preparation of initial opposition evidence, the total time to complete this proceeding would expand by only 50 days. The main point is that parties must have adequate time in which to analyze and prepare substantive portions of the record in this case, and the addition of 50 or 80 days to the proposed schedule would in DOT's view facilitate a thoroughly developed record.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Dale C. Andrews", with a stylized, flowing script.

Dale C. Andrews
Deputy Assistant General Counsel
for Litigation

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Item No. _____

Page Count 1

Sept #37

Olin CHEMICALS

120 LONG RIDGE ROAD, P.O. BOX 1355, STAMFORD, CT 06904-1355

September 15, 1995

Honorable Vernon A. Williams
Secretary
Interstate Commerce Commission
Room 2215
12th Street & Constitution Avenue, N.W.
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, SPCSI
Corp. and the Denver and Rio Grande
Western Railroad Company

Dear Mr. Williams:

The purpose of this letter is to express Olin Corporation's objection to the Interstate Commerce Commission's (ICC) proposal to expedite the proposed schedule for the Union Pacific Corporation's (UPC) control and merger application regarding the Southern Pacific Rail Corporation (SPC). As the ICC indicated in 60 FR 45737, this is a major transaction which will have a significant impact on U.S. rail transportation.

Olin Corporation is a diversified fortune 500 company who is generally supportive of railroad mergers that add an increased level of safety as well as maintain or enhance competition. However this merger would affect a significant portion of Olin Corporation's rail activities for our facilities inbound as well as outbound. Olin Corporation does not feel the acceleration of this proposed schedule would be in the best interest of the industrial community as we have not had sufficient time to fully analyze the impact of such a merger. We also feel that this action may result in fewer comments to the ICC. We therefore request the ICC retain the original proposed schedule submitted in the UPC Petition.

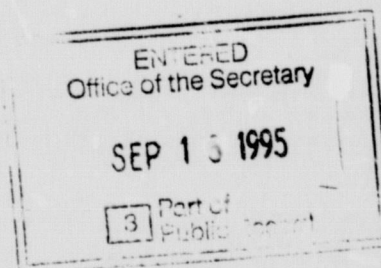
Thank you for the opportunity to comment on these issues.

Sincerely,

Donald W. Griffin

Donald W. Griffin
President, Chief Operating Officer
Olin Corporation

Cc: J. Badger, P. Craney, P. Davey



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ARCO Chemical Company

3801 West Chester Pike
Newtown Square, Pennsylvania 19073-3280
Telephone 610 354 2000

60065



Item No. _____

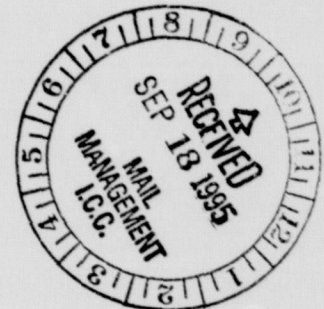
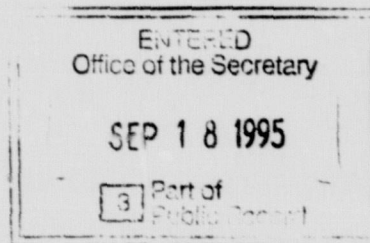
Page Count 2

Sept #36

September 15, 1995

VIA FEDERAL EXPRESS

Mr. Vernon A. Williams
Secretary
Case Control Branch
Interstate Commerce Commission
1201 Constitution Avenue, N.W.
Washington, DC 20423



Attn: Finance Docket No. 32760/ Proposed Merger of Union Pacific Railroad and Southern Pacific Railroad

Dear Secretary Williams:

ARCO Chemical Company ("ARCO Chemical") submits this letter in response to the Interstate Commerce Commission's (the "Commission") invitation for comments on the proposed procedural schedule submitted by the applicants in connection with the merger of Union Pacific Railroad ("Union Pacific") and Southern Pacific Railroad ("Southern Pacific").

ARCO Chemical respectfully requests the Commission to deny the applicants' request to expedite the time period for interested parties to comment on the proposed transaction. In light of the magnitude and complexity of the proposed transaction, as well as the potentially severe financial implications for shippers in the affected areas, ARCO Chemical will require at least 60 days from the Commission's notice of acceptance of the primary application to assess fully the changes in railroad operations and the resulting impact on companies using rail services.

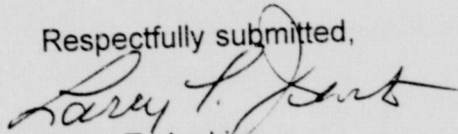
ARCO Chemical's two major plants are located in the Houston, Texas area. Union Pacific currently ships propylene oxide from one of these plants and Southern Pacific ships propylene oxide from the other plant. The proposed transaction, as presently structured, raises significant concerns about the anticompetitive impact that may result from the consolidation of two rail lines into one in the southwestern United States, and in the Houston area in particular.

We believe that shortening the period for review and comment will impede significantly our ability to analyze the proposed transaction in an effective manner. Shippers will require sufficient time to consider alternatives and the appropriateness of any conditions that may mitigate the impact of a consolidated rail system on operations. Therefore, we request that the Commission maintain the procedural schedule under

which, all inconsistent and responsive applications, comments, protests, requested conditions and other opposition evidence would be due at least 60 days after the Commission's notice of acceptance of the primary application (and at least 90 days from the date of filing).

Please do not hesitate to call Larry T. Jenkins, Manager, Land Transportation, at 610-359-5662, if you have any questions about this matter.

Respectfully submitted,



Larry T. Jenkins
Manager, Land Transportation

cc: Beryl Gordon
Interstate Commerce Commission
Arvid E. Roach II, Esq.
Covington & Burling
Paul A. Cunningham, Esq.
Harkins Cunningham

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Item No. _____

Page Count 5

Sept #35

HER & BLACKWELL

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*ADMITTED IN CA ONLY

*ADMITTED IN MD ONLY

September 18, 1995

By Hand

Vernon A. Williams

Secretary

Case Control Branch, Attn: Finance Docket No. 32760

Interstate Commerce Commission

12th and Constitution Avenue, N.W.

Room 2215

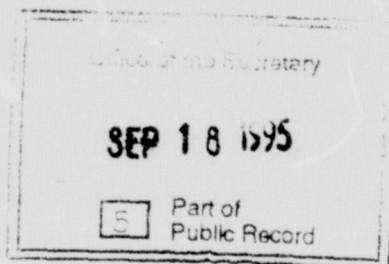
Washington, DC 20423

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

Dear Mr. Williams:

Enclosed herewith please find an original and twenty (20) copies of the International Brotherhood of Teamsters' comments in the above-referenced matter. An additional copy of the comments has also been served on each of the Applicants' representatives.

Kindly acknowledgment receipt of this filing by date stamping the additional copy of this letter and returning it to the messenger.



Sincerely,

Marc J. Fink
Counsel to the International
Brotherhood of Teamsters

CC: Arvid E. Roach II, Esq.
Paul A. Cunningham, Esq.



Before the
Interstate Commerce Commission

Office of the Secretary

SEP 18 1995

5 Part of
Public Record

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

COMMENTS OF THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS



On September 1, 1995, the Interstate Commerce Commission ("Commission" or "ICC") issued a Notice of Prefiling Notification ("Decision No. 1") requesting comments on a proposed procedural schedule concerning the acquisition of control of Southern Pacific Rail Corporation ("SPR") by Union Pacific Acquisition Corporation ("Acquisition"), the merger of SPR into Union Pacific Railroad Company ("UPRR"), and the resulting common control of UPRR, Missouri Pacific Railroad Company ("MPRR"), SPCSL Corp. ("SPCSL") and the Denver and Rio Grande Western Railroad Company ("DRGW") by Union Pacific Corporation ("UPC").^{1/} 60 Fed. Reg. 45737 (September 1, 1995). Decision

^{1/} UPC, UPRR, MPRR, SPR, SPT, SPW, SPCSL, and DRGW are herein collectively referred to as "Applicants". The Applicants' proposal to merge and consolidate their various operations is
(continued...)

No. 1 was issued in response to the Applicants' Petition to Establish a Procedural Schedule filed August 4, 1995 with the Commission. Applicants have proposed a schedule that would require service of the ICC's final decision on their Application within 195 days of the Applicants filing their primary application with the ICC. The Commission in turn has proposed to adopt this schedule, although it may reduce by 30 days the time period within which interested parties would prepare their responsive submissions. For the reasons discussed below, the International Brotherhood of Teamsters ("IBT") files theses comments in opposition to both the Applicants' and the ICC's proposed procedural schedules.

The IBT is a labor organization representing approximately 1.4 million members. Its members make their living primarily in transportation, including the trucking and railroad industries. The IBT represents approximately 2,000 employees of UPC in 14 cities across the nation. In addition, the IBT represents approximately 3,000 employees of Overnite Transportation Company, a subsidiary of UPC, and approximately 200 employees of Pacific Motor Transport Company and Southern Pacific Motor Trucking Company, both motor carrier subsidiaries of SPR. The UPC employees represented by the IBT are involved

1/ (...continued)
herein referred to as the "Application".

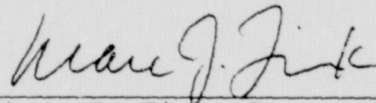
in the loading and unloading of containers and trailers, the transportation of trailers and containers within and between rail yards and other locations. The IBT is concerned that neither the Applicants' nor the ICC's expedited procedural schedules provide sufficient opportunity for interested parties to respond to the Application. In addition the IBT does not believe that the Commission can satisfy its statutory obligation to ensure that the transaction is in the public interest (see 49 U.S.C. §§ 11344 and 11345) in light of the limited time that will be devoted to the investigation and review of the transaction.

As the Commission has acknowledged, the Application is a major transaction. 60 Fed. Reg. at 45737. The magnitude of the transaction cannot be overlooked or minimized as it would create a railroad with 35,000 miles of track, operating in 25 states with an annual revenue of \$9.5 billion dollars. The size and scope of the proposed transaction entails a serious threat, not only to competition within the railroad industry but to other alternative modes of transportation as well. Without question, this transaction can have a significant nation-wide impact on this country's economy and, in particular, on various modes of transportation. Nevertheless, the Applicants and the ICC have proposed expedited schedules that would require a decision within 195 days. To accommodate this "rush to judgment" the Applicants and the ICC have proposed to seriously limit the opportunity that interested parties have to respond to the Application: the

Applicants' propose 90 days after the Application is filed, while the ICC suggests only 60 days. A 90-day period to review, investigate and respond to the Application is hardly adequate; a 60-day period is simply nonsensical.

A far more sensible procedural schedule, which seeks to expedite prompt action on the Application while, at the same time, affording interested parties a meaningful opportunity to review the specifics of the proposed transaction, gather relevant information and prepare comments which will assist the Commission's deliberations, has been proposed by the Railroad Labor Executive Association ("RLEA") in comments filed on this date. The IBT has had an opportunity to review the RLEA's comments on the proposed schedule and fully supports the schedule proposed therein. The IBT urges the Commission to adopt that schedule.

Respectfully submitted,



Marc J. Fink, Esq.
Torbjörn B. Sjögren, Esq.
SHER & BLACKWELL
2000 L Street, N.W.
Suite 612
Washington, D.C. 20036
(202) 463-2500

Attorneys for the International
Brotherhood of Teamsters

Dated: September 18, 1995

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Item No. _____

Page Count 2

Sept # 33

Town of Eads

Box 8 - 110 W. 13th Street

Eads, CO 81036

(719) 438-5590

FAX (719) 438-5652



Mayor:

Lester Williams

Trustees:

Pamela L. Batterton

Janice M. King

Terry L. Laird

Larry D. Michael

John Philpy

Christopher M. Sorenson

Director of Public Works:

Van H. Brown, Jr.

Town Clerk:

Dora B. Pearcey

Secretary of the Secretary

SEP 18 1995

Part of
Public Record

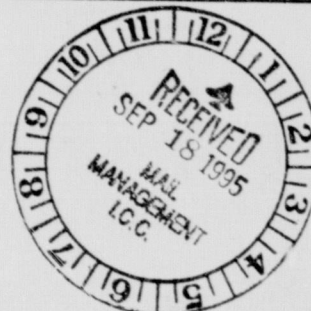
September 13, 1995

Honorable Vernon Williams

ICC

12th & Constitution Avenue, N.W.

Washington, D. C. 20423



Recently it came to the attention of the Mayor and Board of Trustees of the Town of Eads, Colorado, by a notice published in our local newspaper that a petition or application was recently filed before the Interstate Commerce Commission in Washington, D. C. by Union Pacific Railroad Company and its rail affiliate, Missouri Pacific Railroad Company, and Southern Pacific Transportation Company and its affiliate, St. Louis Southwestern Railway Company, SPCSL Corporation and the Denver and Rio Grande Western Railroad Company, in ICC Finance Docket No. 327.60, to abandon the Railroad thru Eads, Colorado. We understand that this abandonment will commence at a point in Western Kansas and continue westward into and throughout Kiowa County, through Crowley County and ending in Pueblo County, CO.

This abandonment affects everyone in Kiowa County. It is the only rail line thru Kiowa County and it will be absolutely devastating to our Town and County. Our economy is extremely low in this area now from hail, drought, and deteriorating cattle prices. Farming and ranching are the two main incomes in Kiowa County and if they have to truck all of their products for longer distances, it will cut their profits, if there are any left. Also losing approximately twenty percent of our taxes which are derived from our railroad lines and usage will severely cripple our Town, County, and local School Districts.

This proposal to abandon the railroad would have very damaging effects on our County, farmers, grain elevators, rail employees, Town, and the taxpayers. Any help you can give us in this matter will be greatly appreciated.

If further information is needed, please advise.

Sincerely,

TOWN OF EADS MAYOR AND BOARD OF TRUSTEES

Lester Williams

Lester Williams
Mayor

Larry D. Michael

Larry D. Michael
Mayor Pro Tem

Janice M. King

Janice M. King
Trustee

Honorable Vernon Williams - 2 -

September 13, 1995

Pamela Batterton

Pamela Batterton
Trustee

Terry L. Laird

Terry L. Laird
Trustee

John Philpy

John Philpy
Trustee

Christopher Sorensen

Christopher Sorensen
Trustee

STB

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CONRAIL

60042

SEP 8 1995

Item No. _____

Page Count 3

Sept # 13

September 7, 1995
BY UPS OVERNITE



Honorable Vernon A. Williams
Secretary
Interstate Commerce Commission
12th & Constitution Ave., N.W.
Washington, D.C. 20423

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

Dear Secretary Williams:

Enclosed are the original and 20 copies of the Notice of Appearance of Consolidated Rail Corporation (CR-1) for filing in this proceeding. A copy of the Notice has been sent to Applicants. This formal Notice replaces the informal request filed by Conrail in a letter of August 30, 1995 to you for service of future decisions. Also enclosed is a 3.5-inch disk containing the text of this Notice in WordPerfect 5.1 format.

Thank you very much for your attention to this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Anne E. Treadway".

Anne E. Treadway
Associate General Counsel
(215) 209-5015

cc: Arvid E. Roach, II
James V. Dolan
Carl W. Von Bernuth
Paul A. Cunningham
Cannon Y. Harvey

BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 32760

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



SEP 9 1975

NOTICE OF APPEARANCE OF
CONSOLIDATED RAIL CORPORATION

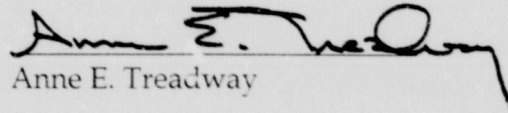
Consolidated Rail Corporation ("CR") intends to participate in this proceeding as a party of record. Please enter the appearances of the attorneys on behalf of CR listed below and include them on the service list to be prepared. Copies of all pleadings, notices, orders and decisions should be served upon:

Constance L. Abrams
Jonathan M. Broder
Edward B. Hymson
Anne E. Treadway
Consolidated Rail Corporation
2001 Market Street, 16-A
Philadelphia, PA 19101-1416
(215) 209-5032

Daniel K. Mayers
A. Stephen Hut, Jr.
Michael Bressman
Ali M. Stoeppelwerth
Wilmer, Cutler & Pickering
2445 M. Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

A copy of this Notice has been served upon counsel for Applicants.

Respectfully submitted,



Anne E. Treadway

I certify that a copy of the foregoing Notice (CR-1) was served on the following parties via overnight mail:

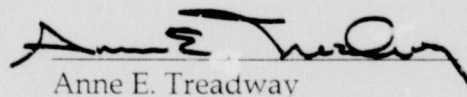
Paul A. Cunningham
Richard B. Herzog
James M. Guinivar
Harkins Cunningham
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Washington, D.C. 20036

Cannon Y. Harvey
Louis P. Warchot
Carol A. Harris
Southern Pacific Transp. Co.
One Market Plaza
San Francisco, CA 94105

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

Carl W. Von Bernuth
Richard J. Ressler
Union Pacific Corp.
Martin Tower
Eighth and Eaton Aves.
Bethlehem, PA 18018

James V. Dolan
Paul A. Conley, Jr.
Louise A. Rinn
Law Department
Union Pacific Railroad Co.
1416 Dodge St.
Omaha, NE 68179



Anne E. Treadway

September 7, 1995

STB

FD

• 32760

9-7-95

D

• 60037

Item No. _____

Page Count 9

Sept # 8

VINGTON & BURLING

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WASHINGTON, D.C. 20044-7566

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MICHAEL L. ROSENTHAL

DIRECT DIAL NUMBER

(202) 662-5448

DIRECT TELEFAX NUMBER

(202) 778-5448

LECONFIELD HOUSE

CURZON STREET

LONDON W1Y 8AS

ENGLAND

TELEPHONE 44-(71)-495-5655

TELEFAX 44-(71)-495-3101

BRUSSELS CORRESPONDENT OFFICE

44 AVENUE DES ARTS

BRUSSELS 1040 BELGIUM

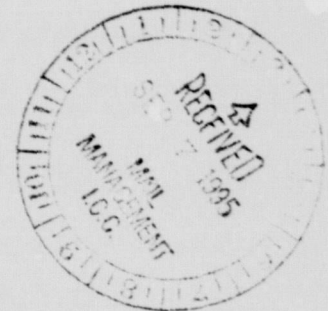
TELEPHONE 32-2-512-9890

TELEFAX 32-2-502-1598

September 7, 1995

BY HAND

Honorable Vernon A. Williams
Secretary
Interstate Commerce Commission
Twelfth Street and Constitution Avenue, N.W.
Room 2215
Washington, D.C. 20423



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

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket are the original and twenty copies of Applicants' Reply to STRICT's "Motion to Reject Impermissible Pleadings" (UP/SP-12). Also enclosed is a 3.5-inc disk containing the text of this pleading in WordPerfect 5.1 format.

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

Sincerely,

Michael L. Rosenthal

Michael L. Rosenthal

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

SEP 8 1995

3

Patent Record

Enclosures

SEP 4 8 1995

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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 COMPANYAPPLICANTS' REPLY TO STRICT'S "MOTION
TO REJECT IMPERMISSIBLE PLEADINGS"CANNON Y. HARVEY
LOUIS P. WARCHOT
CAROL A. HARRIS
Southern Pacific
Transportation Company
One Market Plaza
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(415) 541-1000PAUL A. CUNNINGHAM
RICHARD B. HERZOG
JAMES M. GUINIVAN
Harkins Cunningham
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 973-7601Attorneys for Southern
Pacific Rail Corporation,
Southern Pacific Transportation
Company, St. Louis Southwestern
Railway Company, SPCSL Corp.,
and The Denver and Rio Grande
Western Railroad CompanyCARL W. VON BERNUTH
RICHARD J. RESSLER
Union Pacific Corporation
Martin Tower
Eighth and Eaton Avenues
Bethlehem, Pennsylvania 18018
(610) 861-3290JAMES V. DOLAN
PAUL A. CONLEY, JR.
LOUISE A. RINN
Law Department
Union Pacific Railroad Company
Missouri Pacific Railroad Company
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Omaha, Nebraska 68179
(402) 271-5000ARVID E. ROACH II
J. MICHAEL HEMMER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5388Attorneys for Union Pacific
Corporation, Union Pacific
Railroad Company and Missouri
Pacific Railroad Company

September 7, 1995

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

APPLICANTS' REPLY TO STRICT'S "MOTION
TO REJECT IMPERMISSIBLE PLEADINGS"

Union Pacific Corporation ("UPC"), Union Pacific
Railroad Company ("UPRR"), Missouri Pacific Railroad Company
("MPRR"),^{1/} Southern Pacific Rail Corporation ("SPR"),
Southern Pacific Transportation Company ("SPT"), St. Louis
Southwestern Railway Company ("SSW"), SPCSL Corp. ("SPCSL"),
and The Denver and Rio Grande Western Railroad Company
("DRGW"),^{2/} collectively, "Applicants," hereby reply to the
"Motion of Save the Rock Island Committee, Inc., to Reject
Impermissible Pleadings" (STRC-4).

STRICT's request (p. 1) that the Commission strike
Applicants' replies (UP/SP-9 & UP/SP-10) to two prior STRICT

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

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

pleadings (STRC-1 & STRC-2) ignores the nature of these proceedings and clear Commission precedent. STRICT's request can only be seen as a sign that STRICT intends to persist in its attempts to bog down these proceedings until STRICT's demands in an unrelated matter are met. See STRC-1, p. 2 n.3; UP/SP-9, pp. 3-4.

In fact, the Commission has recognized that it is appropriate for Applicants to have an opportunity to reply. In its order submitting Applicants' proposed procedural schedule for public comment, the Commission has explicitly provided the Applicants with the opportunity to respond to the comments on the schedule. See UP/SP, Decision served Sept. 1, 1995, p. 5. Moreover, in its order granting Applicants' various requests for waiver or clarification, the Commission cited the very pleadings to which STRICT objects. See UP/SP, Decision served Sept. 5, 1995, p. 10. These actions confirm that in a proceeding of this scope, where Applicants bear the burden of proof, Applicants should be entitled to close the record on affirmative requests for relief such as those discussed in the pleadings at issue.^{1/}

^{1/} Cf. Finance Docket No. 32133, Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control -- Chicago & North Western Transportation Co. & Chicago & North Western Ry., Decision served July 11, 1994, p. 9; Finance Docket No. 32549, Burlington Northern, Inc., & Burlington Northern R.R. - - Control & Merger -- Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry., Decision served June 23, 1995, p. 3; Finance Docket No. 28583 (Sub-No. 24), Burlington Northern,
(continued...)

STRICT's request is inappropriate for a second reason. As STRICT should well be aware, where a pleading includes a request for Commission action, a reply to that pleading is permissible, even if the pleading is itself titled a "reply." See Docket No. AB-39 (Sub-No. 18X), St. Louis Southwestern Ry. -- Abandonment Exemption -- In Gasconade, Maries, Osage, Miller, Cole, Morgan, Benton, Pettis, Henry, Johnson, Cass & Jackson Counties, MO, Decision served July 19, 1994, p. 1 n.2 (rejecting SSW's contention that STRICT's reply should be stricken because STRICT's reply addressed affirmative relief sought by SSW in its reply to a STRICT pleading); Docket No. 40131 (Sub-No. 1), Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., Decision served Apr. 21, 1995, p. 3 (allowing reply because pleading to which it responded was not a reply, but rather a motion seeking relief). In both of the STRICT pleadings to which Applicants replied, STRICT did more than reply to Applicants' requests -- STRICT advanced its own requests for Commission action. For example, STRICT did not merely respond to Applicants' petition for waiver or clarification. Rather STRICT asked (STRC-1, pp. 11-13) the Commission to impose three types of additional requirements with respect to Applicants' abandonment

²⁷(...continued)

Inc. -- Control & Merger -- St. Louis-San Francisco Ry., Decision served June 23, 1988, p. 1; Docket No. AB-303 (Sub-No. 2X), Wisconsin Central Ltd. -- Abandonment Exemption -- In Winnebago County, WI, Decision served Mar. 9, 1990, p. 1 n.1.

proceedings. Similarly, STRICT did not merely comment on Applicants' procedural schedule; in fact, it did not even urge the Commission to reject the schedule. Instead, STRICT requested (STRC-2, pp. 7-8) that the Commission invite public comment on the schedule. As STRICT points out (p. 1), it does not matter that it called its pleadings "replies"; because STRICT submitted its own requests for Commission action, Applicants had a right to reply.

Furthermore, STRICT ignores the fact that the information contained in Applicants' replies is necessary to provide the Commission with comprehensive and complete information to allow for a just and speedy determination by the Commission of the issues addressed in the pleadings. Even in cases other than Class I mergers, the Commission has regularly allowed replies to replies where they provide the type of information that will assist the Commission in making a more informed decision. See, e.g., Docket No. AB-307 (Sub-No. 2X), Wyoming & Colorado R.R. -- Abandonment Exemption -- Jackson County, CO, Decision served Feb. 17, 1994, p. 1 n.1; Finance Docket No. 31545, Clyde S. & Sandra Forbes & CSF Acquisition, Inc. -- Control Exemption -- Lamoille Valley R.R. & Twin State R.R., Decision served Oct. 8, 1991, p. 6 n.14. Here, for example, Applicants provided the Commission with a full picture of STRICT's interest in this proceeding (UP/SP-9, pp. 3-4) -- something that Applicants obviously could not have

been expected to address in their initial petitions. Applicants also provided the Commission with more recent, more complete information about Applicants' intentions regarding proposed merger-related abandonments (UP/SP-9, pp. 2-3). Applicants informed the Commission of their intention to publish information relating to proposed abandonments much sooner than they had anticipated in their initial petition for waiver or clarification. This new information affected both Applicants' petition for waiver or clarification and their petition to establish a procedural schedule, and was cited by the Commission in its September 5 Order. Additionally, Applicants provided the Commission with more specific information related to the extent of Applicants' merger-related abandonments. It is clearly well within the Commission's discretion to consider Applicants' replies. See 49 C.F.R. § 1100.3.

Finally, STRICT's request (p. 2) that the Commission issue a broad instruction prohibiting "replies to replies" should be rejected. The Commission's rules already contain such a general prohibition, but, as numerous Commission decisions make clear, whether it applies to a particular pleading depends on the particular surrounding facts. A further, general Commission directive in this case would either be redundant or unduly restrictive.

Applicants' replies to STRICT's pleadings were appropriate in the context of this proceeding, in light of the content of STRICT's pleadings, and in light of the information provided. STRICT's motion to reject these replies, and to bar all future replies to replies, should be denied.

Respectfully submitted,

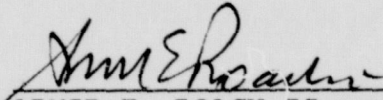
CANNON Y. HARVEY
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Attorneys for Union Pacific
Corporation, Union Pacific
Railroad Company and Missouri
Pacific Railroad Company

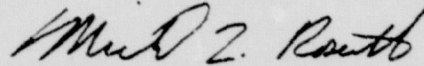
September 7, 1995

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 7th day of September, 1995, I cause a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

Director of Operations
Antitrust Division
Room 9104-TEA
Department of Justice
Washington, D.C. 20530

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



Michael L. Rosenthal

STB

FD

32760

8-31-95

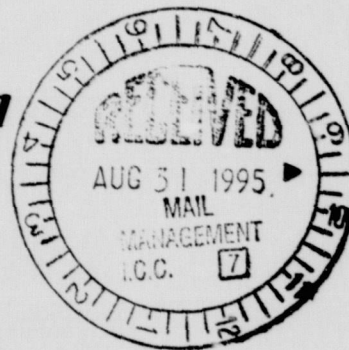
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united transportation union

August 30, 1995

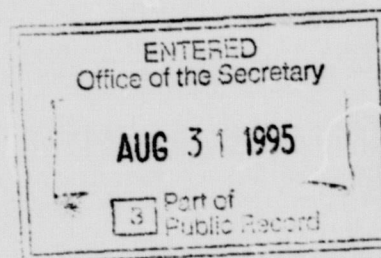


VIA FEDERAL EXPRESS Airbill # 3065957020

Ms. Ellen Keys
Office of the Secretary
Interstate Commerce Commission
1201 Constitution Avenue, N.W., Room 2209
Washington, DC 20423-0001

Dear Ms. Keys:

Please arrange to make and list:



***United Transportation Union, Local 1918
12401 Hidden Sun Court
El Paso, Texas 79938***

as a party of record and active participant in the proceedings before the Interstate Commerce Commission in Finance Docket 32760, involving the proposed merger between the Union Pacific and the Southern Pacific railroads.

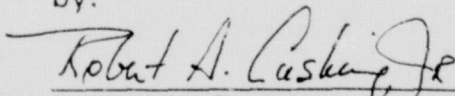
Thanking you in advance for your assistance and cooperation in this matter, we remain,

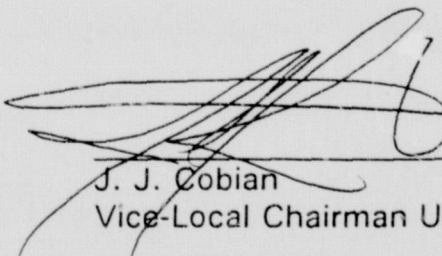
Sincerely yours,

United Transportation Union, Local 1918

Item No. _____
Page Count _____
Aug #37

by:


Robert A. Cushing, Jr.
Legislative Representative


J. J. Cobian
Vice-Local Chairman UTU-S

STB

FD

• 32760

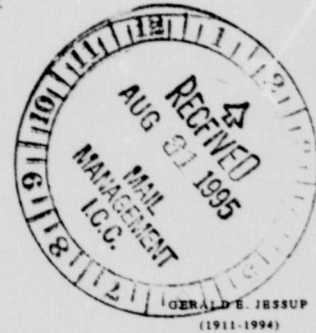
8-31-95

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• 60027

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(703) 525-4050
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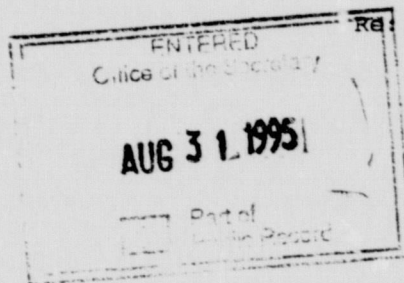
WILLIAM P. JACKSON, JR.
DAVID C. REEVES
JOHN T. SULLIVAN
JOHN R. COPLEY

August 31, 1995

Mr. Vernon A. Williams
Secretary
Interstate Commerce Commission
12th & Constitution Ave., N.W.
Washington, DC 20423

Item No. _____

Page Count 10
Aug #36



Re: Union Pacific Corp., Union Pacific Railroad Co., and Missouri Pacific Railroad Co.--Control and Merger--Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp. and The Denver and Rio Grande Western Railroad Co.

Finance Docket No. 32760

Dear Mr. Williams:

Enclosed for filing in the referenced proceeding are the original and 20 copies of STRC-3, the Reply in Opposition of Save the Rock Island Committee, Inc., to Petition for Waiver of 49 C.F.R. Section 1152.22(d). Also enclosed for filing are the original and 20 copies of STRC-4, the Motion of Save the Rock Island Committee, Inc., to Reject Impermissible Pleadings. A 3.5-inch disk containing the text of both pleadings is also enclosed.

Please acknowledge the receipt and filing of the enclosed Reply and Motion by receipt stamping the copy of this letter, the extra copy of the Reply and the extra copy of the Motion enclosed for that purpose and returning them to the undersigned in the enclosed pre-addressed, postage paid envelope.

Very truly yours,

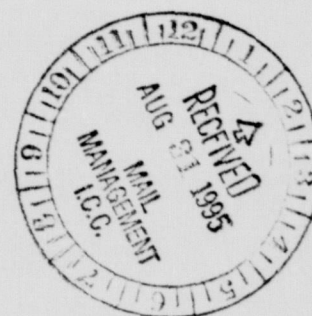
William P. Jackson, Jr.

WPJ/jmb

Enclosures

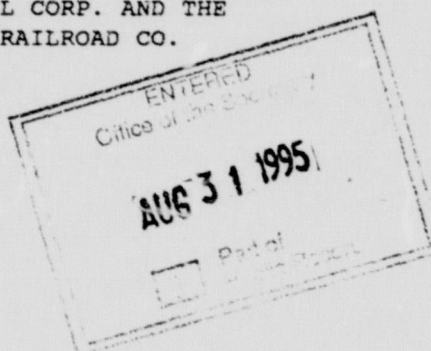
cc: Mr. Jim Link

BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.



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

: Finance Docket No. 32760



REPLY IN OPPOSITION OF SAVE THE ROCK ISLAND
COMMITTEE, INC., TO PETITION FOR WAIVER
OF 49 C.F.R. SECTION 1152.22(d)

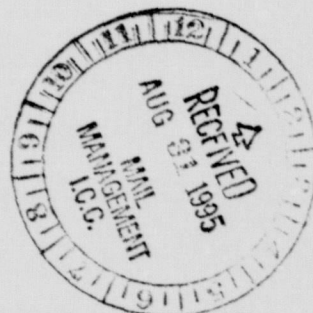
William P. Jackson, Jr.
John T. Sullivan
Attorneys for Save the Rock
Island Committee, Inc.

OF COUNSEL:

JACKSON & JESSUP, P.C.
Post Office Box 1240
Arlington, VA 22210
(703) 525-4050

Dated: August 31, 1995
Due: September 11, 1995

BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.



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

: Finance Docket No. 32760

REPLY IN OPPOSITION OF SAVE THE ROCK ISLAND
COMMITTEE, INC., TO PETITION FOR WAIVER
OF 49 C.F.R. SECTION 1152.22(d)

Save the Rock Island Committee, Inc. ("STRICT"), submits this reply in opposition to the request of Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (collectively "Applicants"), for waiver of certain of the requirements of 49 C.F.R. Section 1152.22(d) in this proceeding. That request is contained within Applicants' Supplement to Petition for Waiver or Clarification of Railroad Consolidation Procedures, and Related Relief (UP/SP-8), filed August 22, 1995 (hereinafter "Supplemental Petition for Waiver"). STRICT's interest in this proceeding is set forth in its Reply in Opposition to Petition for Waiver of or Exemption From 49 U.S.C. Section 10904(e)(3) and 49 C.F.R. Section 1152.13(d) (STRC-1), filed August 24, 1995 (hereinafter "STRICT Reply to Applicants' Petition for Waiver"),¹ which was filed in response to one

¹ Therein, STRICT explained that there is nothing in the Commission's regulations to prevent a party from filing in opposition to a request for waiver of the Commission's abandonment regulations, even if the request concerns merger-related abandonments. See STRICT Reply to Applicants' Petition for Waiver at 1 n.1.

aspect of Applicants' original Petition for Waiver or Clarification of Railroad Consolidation Procedures, and Related Relief (UP/SP-3), filed August 4, 1995 (hereinafter "Petition for Waiver").

BACKGROUND

Applicants' request for waiver of 49 C.F.R. Section 1152.22(d) contained in its Supplemental Petition for Waiver is related to its original Petition for Waiver to the extent that Applicants seek additional relief from the Commission's abandonment regulations. Specifically, "Applicants request clarification (or, if necessary, a waiver) that they are permitted to report costs on a pro forma consolidated post-merger basis, using the same consolidated cost data that are to be used in the operating plan and in other parts of the application." Supplemental Petition for Waiver at 3. Applicants go on to claim that it "makes sense" to report costs in the abandonment applications on a pro forma basis not only for the post-merger forecast year, but also for the pre-merger base year and other historical years. Supplemental Petition for Waiver at 3-4. Applicants state that "use of the same consolidated data for the abandonment applications as will be used in the merger application will simplify the process of preparing the abandonment applications." Supplemental Petition for Waiver at 4.

STRICT urges the Commission to deny the Supplemental Petition for Waiver to the extent it requests a waiver of the requirements of 49 C.F.R. Section 1152.22(d). The information that Applicants seek to avoid including in their abandonment applications has been found by the Commission to be a necessary component of abandonment applications. Because Applicants can give no reason, other than purported convenience, for the waiver they seek, their request should be summarily denied.

ARGUMENT

As explained in detail in the STRICT Reply to Applicants' Petition for Waiver, any request by Applicants in this proceeding for waiver of the abandonment statutes or regulations should be considered by the Commission not just in the context of Applicants' merger proposal, but also in the context of the distinct possibility that Applicants could submit multiple abandonment applications for long stretches of main line track related to their merger application. Applicants have already admitted that such is possible in their initial submissions in this proceeding. See Petition for Waiver at 19. Given the previous and present importance of the rail lines to which any request by Applicants for waiver of an abandonment authorization requirement could potentially apply, the Commission should not take lightly the relief Applicants seek from the abandonment authorization requirements.

That is especially so with respect to the relief Applicants seek in the Supplemental Petition for Waiver regarding the requirement of 49 C.F.R. Section 1152.22(d) that Applicants submit actual cost data. While under that provision the Commission requires abandonment applicants to submit actual cost data for a base year and two historical years, if Applicants' request is granted by the Commission, Applicants will not have to submit any actual cost data for the rail lines that are the respective subjects of their abandonment applications. Instead, Applicants would report such costs on a pro forma basis, creating cost data as if the Applicants had merged prior to the historical and base year periods. Supplemental Petition for Waiver at 4.

Applicants' request should be denied by the Commission for a number of reasons. First of all, Applicants cite no precedent for restating "historical" cost data on a post-merger consolidated basis. While as part of their merger application merger applicants are required to assume the approval

and eventual consummation of the merger proposed for the base year and forecast years and consequently provide income and balance sheet data on a pro forma basis for those years, in a major transaction such as this the Commission also requires the submission of base year and historical data for the individual applicants in the form of required annual reports, which, while not part of the merger application, are incorporated by reference. See 49 C.F.R. § 1180.9(e); Railroad Consolidation Procedures, 363 I.C.C. 200, 215 (1980). There is no analogous source for the actual cost data that would normally be included in Applicants' abandonment applications.²

The importance of that data in an abandonment application is plain. Perhaps most significantly, without it the accuracy of Applicants' pro forma cost data cannot be confidently tested. Instead of the Commission receiving, as in the standard abandonment application, at least three years of actual cost data, along with one year of projected costs, Applicants' abandonment applications would contain no actual cost data with their entirely pro forma cost evidence. In short, Applicants would be requesting the Commission to act on abandonment applications supported by entirely theoretical cost data.

Such a result is contrary to established Commission practice. While the Commission, in response to a recommendation by the Railroad Accounting Principles Board, now emphasizes the "forward looking" nature of abandonments,

² The possibility that the actual cost data can be provided as part of the merger proceeding discovery process is not a satisfactory answer to STRICT's concerns. Parties interested in an individual abandonment should not be put to the expense and effort of requesting information that would be part of any abandonment application that is not merger-related. The Commission has stated that the merger application process should not unduly burden those parties interested in participating, especially when the information those parties seek can be included in the merger application. See Railroad Consolidation Procedures, 366 I.C.C. 75, 86 (1982). A similar rule should apply to merger-related abandonment applications.

it has continued to require evidence of past operating results, including actual cost data. See Abandonment Regulations--Costing (Implementation of the Railroad Accounting Principles Board Findings), 5 I.C.C.2d 123 (1988). Applicants' Supplemental Petition for Waiver is devoid of any reason for overturning such a well-established Commission practice.

There is nothing in the Commission's abandonment regulations to prevent Applicants from including restated historical and base year cost data in their abandonment applications if they believe such information would allow the Commission to better compare that data with the forecast year cost data. See Union Pacific Corp., Union Pacific Railroad Co. and Missouri Pacific Railroad Co.--Control--Missouri-Kansas-Texas Railroad Co., 4 I.C.C.2d 409, 492-93 (1988), petition for review dismissed sub nom. Railway Labor Executives Association v. ICC, 883 F.2d 1079 (D.C. Cir. 1989). That does not mean, however, that Applicants should be excused from providing the required actual cost data. After all, the pro forma cost data would be in large part based on the actual cost data. The Commission and the public should thus be provided that information in the abandonment application.³

Because Applicants would most likely use actual cost data in preparing their pro forma cost data, little credence should be given to their statement that "use of the same consolidated data for the abandonment applications as will be used in the merger applications will simplify the process of preparing the abandonment applications." See Supplemental Petition for Waiver at 4. If anything, it is Applicants who would complicate the process by including in

³ A comparison of the actual cost data with the pro forma cost data would also be useful in measuring the efficiencies that Applicants project will result from the merger. If Applicants' projections are accurate, the actual cost data should provide further support for their merger proposal.

their abandonment applications pro forma cost data but not the actual data on which that data is based, when the latter is readily available.

As explained in the STRICT Reply to Applicants' Petition for Waiver, the fact that Applicants have alerted the Commission to the possibility that they may be filing abandonment applications for main line track hundreds of miles in length is ample reason for the Commission to deny any request for waiver of its abandonment regulations. The fact that the abandonments are merger-related does nothing to decrease the importance of those abandonments to shippers who depend on the lines proposed for abandonment for local rail service.⁴

At the least, the Commission should notify the public regarding the abandonment authorization requirement waivers that the Applicants seek, both in the Petition for Waiver and the Supplemental Petition for Waiver. The abandonment proposals to which the requested waivers would apply are too potentially significant for the interested public to be excluded at this stage. In addition, a public airing of the procedural issues now would decrease the likelihood of a later dispute which could disrupt the orderly processing of the merger application.

CONCLUSION

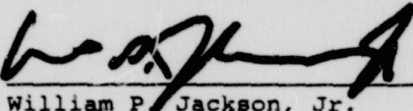
WHEREFORE, the foregoing considered, STRICT requests the Commission to deny Applicants' petition for waiver of 49 C.F.R. Section 1152.22(d). STRICT

⁴ Actual cost data is not only information the Commission needs to have to decide an abandonment application, but is also important information for parties interested in filing offers of financial assistance pursuant to 49 U.S.C. Section 10905. Such a consideration takes on added significance if, as Applicants have warned, it is main line track that is to be abandoned.

also requests that the Commission grant STRICT such other and further relief as may be warranted in these circumstances.

Respectfully submitted,

SAVE THE ROCK ISLAND COMMITTEE, INC.

By 
William P. Jackson, Jr.
John T. Sullivan
Its Attorneys

OF COUNSEL:

JACKSON & JESSUP, P.C.
Post Office Box 1240
Arlington, VA 22210
+ (703) 525-4050

CERTIFICATE OF SERVICE

I, William P. Jackson, Jr., hereby certify that on this 31st day of August, 1995, I have served one copy of the foregoing Reply in Opposition of Save the Rock Island Committee, Inc., to Petition for Waiver of 49 C.F.R. Section 1152.22(d) upon the following parties of record in this proceeding, by first class mail, postage prepaid, or as otherwise indicated:

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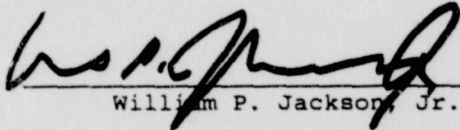
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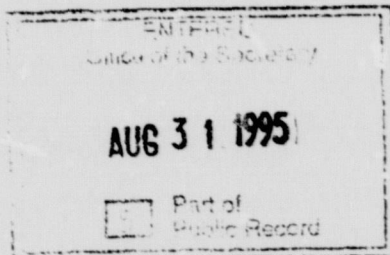
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U. S. Department of Justice

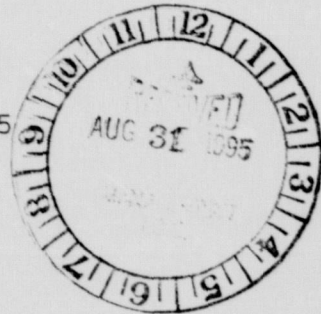
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Antitrust Division



555 4th Street, N.W.
Washington, DC 20001

August 29, 1995



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

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

Dear Mr. Williams:

Please place on the Service List in this proceeding the following persons from the United States Department of Justice:

Robert L. McGeorge
Michael D. Billiel
Joan S. Huggler

Item No. _____
Page Count 1
Aug # 34

The address for each person is:

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United States Department of Justice
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Thank you for your assistance in this matter.

Sincerely yours,

Joan S. Huggler

Joan S. Huggler
Attorney
Transportation, Energy and
Agriculture Section

cc: Arvid Roach II, Esq.
Paul Cunningham, Esq.

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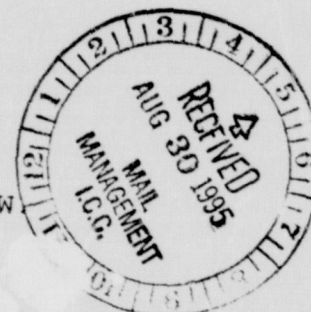
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August 30, 1995

BY HAND

Honorable Vernon A. Williams
Secretary
Interstate Commerce Commission
Twelfth Street and Constitution Avenue, N.W.
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Re: Finance Docket No. 32760, Union Pacific
Corp., et al. -- Control & Merger -- Southern
Pacific Rail Corp., et al.

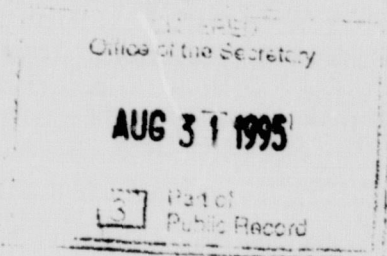
Dear Secretary Williams:

Enclosed for filing in the above-captioned docket
are the original and twenty copies of Applicants' Reply to
TCU/UTU's Petition to Clarify Information Required Pursuant to
49 C.F.R. 1180.6(a)(2)(v) (UP/SP-11). Also enclosed is a 3.5-
inch disk containing the text of this pleading in WordPerfect
5.1 format.

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

Sincerely,

Michael L. Rosenthal
Michael L. Rosenthal



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

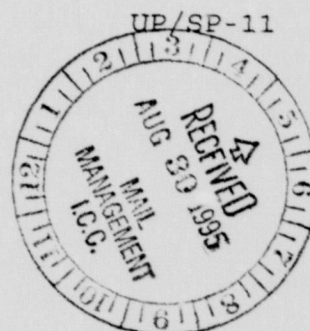
Enclosures

Item No. _____

Page Count 7

AUG 31 1995

BEFORE THE
INTERSTATE COMMERCE COMMISSION



Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

APPLICANTS' REPLY TCU/UTU'S PETITION TO CLARIFY
INFORMATION REQUIRED PURSUANT TO 49 C.F.R. 1180.6(a)(2)(v)

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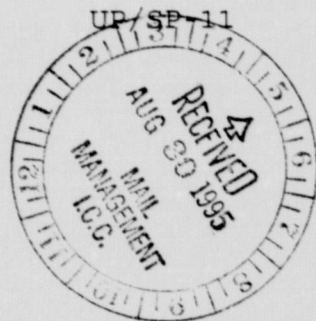
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Record

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BEFORE THE
INTERSTATE COMMERCE COMMISSION



Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

APPLICANTS' REPLY TCU/UTU'S PETITION TO CLARIFY
INFORMATION REQUIRED PURSUANT TO 49 C.F.R. 1180.6(a)(2)(v)

Union Pacific Corporation ("UPC"), Union Pacific
Railroad Company ("UPRR"), Missouri Pacific Railroad Company
("MPRR"),^{1/} Southern Pacific Rail Corporation ("SPR"),
Southern Pacific Transportation Company ("SPT"), St. Louis
Southwestern Railway Company ("SSW"), SPCSL Corp. ("SPCSL"),
and The Denver and Rio Grande Western Railroad Company
("DRGW"),^{2/} collectively, "Applicants," hereby reply to the
"Transportation Communications International Union and United
Transportation Union's Petition to Clarify Information
Required Pursuant to 49 C.F.R. 1180.6(a)(2)(v)" (TCU/UTU-1).

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

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

Applicants have requested (UP/SP-3, pp. 9-10) clarification of the supporting information that they are required to provide regarding the impact of the transaction on labor, pursuant to 49 C.F.R. § 1180.6(a)(2)(v). Applicants have submitted (UP/SP-3 App. B) a proposed method for providing the labor impact information required by the Commission's rules.

TCU/UTU's request (TCU/UTU-1, p. 1) that the Commission "clarify" the labor impact information that Applicants are required to supply is clearly improper. The Commission's rules explicitly provide that replies to petitions for waiver or clarification are not permitted. 49 C.F.R. § 1180.4(f)(3).

In any event, TCU/UTU's request should be rejected. TCU/UTU are asking that Applicants provide information that simply cannot be known until after the case is decided. Carrier-specific labor impacts at common points can only be determined through the Commission's New York Dock process. That process resolves such complicated issues as the integration of seniority at affected locations, and other labor contract issues, that will ultimately determine how many employees of each carrier will be affected by the transaction.

Finally, TCU/UTU's request is contrary to Commission precedent. As Applicants have previously explained (UP/SP-3, p. 10 n.12), Applicants have proposed to submit labor impact

information in a form similar to that used in prior rail merger cases. Never in a prior case has the Commission required that labor impact information be presented in the form that TCU/UTU request.

Respectfully submitted,

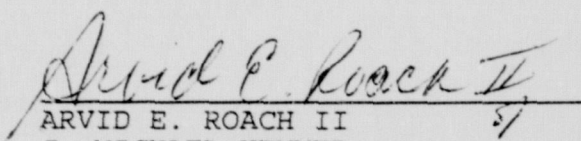
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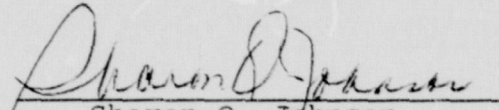
August 30, 1995

CERTIFICATE OF SERVICE

I, Sharon Q. Johnson, certify that, on this 30th day of August, 1995, I cause a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

Director of Operations
Antitrust Division
Room 9104
Department of Justice
Washington, D.C. 20530

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


Sharon Q. Johnson

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Page Count 8

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August 29, 1995

BY HAND

Honorable Vernon A. Williams

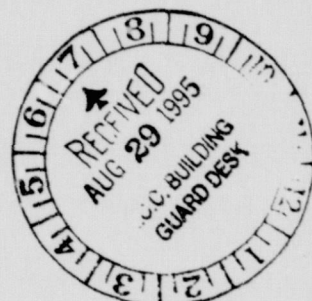
Secretary

Interstate Commerce Commission

Twelfth Street and Constitution Avenue, N.W.

Room 2215

Washington, D.C. 20423



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

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket are the original and twenty copies of Applicants' Reply to STRICT's Opposition to Petition for Waiver or Clarification (UP/SP-9) and the original and twenty copies of Applicants' Reply to STRICT's Opposition to Petition to Establish Procedural Schedule (UP/SP-10). Also enclosed is a 3.5-inch disk containing the text of both pleadings in WordPerfect 5.1 format.

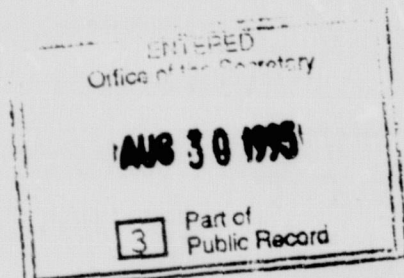
I would appreciate it if you would date-stamp the enclosed extra copy of each of the pleadings and return them to the messenger for our files.

Sincerely,

Michael L. Rosenthal

Michael L. Rosenthal

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



Enclosures

BEFORE THE
INTERSTATE COMMERCE COMMISSION


Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

APPLICANTS' REPLY TO STRICT'S OPPOSITION
TO PETITION TO ESTABLISH PROCEDURAL SCHEDULE



Union Pacific Corporation ("UPC"), Union Pacific
Railroad Company ("UPRR"), Missouri Pacific Railroad Company
("MPRR"),^{1/} Southern Pacific Rail Corporation ("SPR"),
Southern Pacific Transportation Company ("SPT"), St. Louis
Southwestern Railway Company ("SSW") SPCSL Corp. ("SPCSL"),
and The Denver and Rio Grande Western Railroad Company
("DRGW"),^{2/} collectively, "Applicants," hereby reply to the
"Reply in Opposition of Save the Rock Island Committee, Inc.,
to Petition to Establish Procedural Schedule" (STRC-2).

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

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

As Applicants have explained elsewhere (UP/SP-9, pp. 2-4), STRICT's actions in this proceeding are nothing more than attempts to interfere in a case in which STRICT has no valid interest. STRICT's stated goal of "securing adequate rail service . . . over the entire SSW rail line that runs between Kansas City and St. Louis" (STRC-1, p. 2) will in no way be affected by this proceeding. See UP/SP-9, pp. 1-2. The only reason that STRICT has entered this proceeding, as it has admitted (STRC-1, p. 2 n.3), is to gain leverage in its negotiations regarding that line with SP. This constitutes clear misuse of the Commission's processes.

Applicants have proposed a six-month schedule that is consistent with both the schedule adopted by the Commission in BN/Santa Fe and the Commission's expressed intent to use a similar schedule in future rail merger proceedings of this magnitude. See Finance Docket No. 32549, Burlington Northern, Inc., & Burlington Northern R.R. -- Control & Merger -- Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry., Decision served Mar. 7, 1995, App. A; BN/Santa Fe, Voting Conference Transcript, July 20, 1995, p. 5 (ICC is committed "to considering . . . future mergers within six months") (remarks of Chairman Morgan); Ex Parte No. 282 (Sub-No. 19), New Procedures in Rail Acquisitions, Mergers & Consolidations, Decision served Jan. 26, 1995 (proposing a six-month schedule to govern future major rail combination cases).

STRICT argues (p. 3) that the Commission should not establish a procedural schedule until the ultimate effect of the transaction can be determined. STRICT contends that it is too early to tell what measures Applicants will take to resolve competitive issues presented by the proposed merger. But the Commission rejected these very same arguments in BN/Santa Fe, and explicitly decided to issue a procedural schedule before the applicants filed their primary application. BN/Santa Fe, Decision served Oct. 5, 1994, p. 3. As the Commission explained, "establishing a schedule ahead of time provides interested parties with early and ample notice, minimizes procedural disputes, and enables the parties more efficiently to plan their discovery efforts and evidentiary presentations." Id. Furthermore, Applicants have clearly stated their commitment to resolving competitive issues the same way that BN/Santa Fe did. They have publicly and repeatedly described the type of conditions they will accept and, if possible, negotiate. And Applicants are, in fact, already discussing with other railroads and shippers how best to preserve rail competition where shippers would lose a second rail alternative in a UP/SP merger.^{3/}

^{3/} STRICT questions (p. 8 n.3) whether Applicants are discussing with shippers as well as railroads how best to preserve rail competition in light of the proposed merger. In fact, Applicants are engaged in discussions with both shippers and railroads.

STRICT misleadingly states (p. 6) that the schedule in BN/Santa Fe was not adopted until five months after the merger application was filed, at which point the Commission could more clearly assess the consequences of the proposed transaction. As STRICT should well know, however, the Commission issued its initial procedural schedule much earlier. See BN/Santa Fe, Decision served Oct. 5, 1994, pp. 5-6. The Commission did not issue its final schedule until five months after the application was filed because it had suspended the entire proceeding. See BN/Santa Fe, Decision served December 5, 1994, p. 3. In any event, both the Commission's initial procedural schedule and its final schedule were issued well before BN/Santa Fe had announced any agreements to resolve competitive concerns. In fact, the applicants in BN/Santa Fe began to enter into settlements only days before the procedural schedule required submission of anticipated inconsistent and responsive applications, and they did not enter into their most extensive settlement agreement until three days after that filing date. See Agreement between BN/Santa Fe and SP, Apr. 13, 1995.

STRICT also argues (p. 4) that the Commission should not establish a procedural schedule because Applicants have not yet made final decisions as to their abandonment plans. In fact, Applicants will file amended System Diagram Maps with the Commission on or about Friday, September 1. See UP/SP-9,

p. 2. As Applicants have explained (UP/SP-9, pp. 4-5), abandonments will occur only where there is no local traffic or de minimis local traffic. Overhead traffic on lines to be abandoned will be rerouted to the new, more efficient routes that will be created as a result of the merger. Thus, STRICT's speculation that abandonments will have a major impact on shippers because of loss of mainline routes is nothing but a red herring. Very few local shippers will lose service, and overhead shippers will enjoy more efficient routings. Applicants' proposed abandonments will in fact benefit the vast majority of shippers who use the lines to be abandoned.

STRICT's argument is a recipe for delay. STRICT goes so far as to argue (pp. 4-5) that the Commission's procedural schedule should be determined by the number of "inconsistent applications, and responsive applications, as well as requested conditions." But it must be obvious even to STRICT that these facts will not be clear until well into the schedule. Applicants are working to resolve all of the competitive issues prior to submitting their application, but if they do not, the situation will be no different than it was in BN/Santa Fe.

STRICT claims (p. 5) that the BN/Santa Fe schedule is not an appropriate model for this proceeding because there are substantial differences between the two transactions.

This is simply incorrect. Applicants' situation does not differ in any material respect from that in BN/Santa Fe. The size of the two combinations is comparable. Both combinations are partly parallel and partly end-to-end, and while the UP/SP merger is more parallel, each transaction involves both significant parallel and significant end-to-end aspects. The issues involved in the two transactions are largely the same. In fact, if there is any difference, it is that Applicants will demonstrate benefits that exceed those produced by the BN/Santa Fe merger.

The issues in this proceeding will be no more complex than those the Commission faced in BN/Santa Fe. Contrary to STRICT's claims (p. 5) there is no basis for making competition in the "Central Corridor" a central issue in this proceeding. As the Commission clearly recognized in Finance Docket No. 32133, Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control -- Chicago & North Western Transportation Co. & Chicago & North Western Ry., Decision served Mar. 7, 1995, p. 71, Santa Fe competes with UP and SP for northern California transcontinental traffic, and BN competes with UP and SP for Oregon transcontinental traffic. In fact, Santa Fe and BN are the leaders in these markets. As a result of the BN/Santa Fe and UP/SP mergers, there will be two stronger competitors in these markets.

STRICT's argument that Applicants' proposed merger-related abandonments make this proceeding significantly more complicated is belied by the facts. Although STRICT cites three cases that did not involve merger-related abandonments, the majority of the Commission's recent merger cases have involved merger-related abandonments. See, e.g., Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control -- Missouri-Kansas-Texas R.R., 4 I.C.C.2d 409, 418 (1988), petition for review dismissed sub nom. Railway Labor Executives Association v. ICC, 883 F.2d 1079 (D.C. Cir. 1989); Santa Fe Southern Pacific Corp. -- Control -- Southern Pacific Transportation Co., 2 I.C.C.2d 709, 716 (1986); Norfolk Southern Corp. -- Control -- Norfolk & Western Ry. & Southern Ry., 366 I.C.C. 171, 177 (1982); CSX Corp. -- Control -- Chessie System, Inc., & Seaboard Coast Line Industries, Inc., 363 I.C.C. 518, 529 (1980), aff'd sub nom. Brotherhood of Maintenance of Way Employees v. ICC, 698 F.2d 315 (7th Cir. 1983). Furthermore, Applicants' proposed procedural schedule is completely consistent with the statutory time limits placed on the Commission in abandonment cases. See 49 U.S.C. § 10904(b).

Applicants' proposed transaction contains no issues that are especially contentious or complex -- nothing that indicates that the six-month proceeding used in BN/Santa Fe

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Item No. 60023
Page Count 1
Aug #32

August 28, 1995



The Honorable Vernon A. Williams
Secretary
Interstate Commerce Commission
Room 2215
12th Street and Constitution
Avenue, N.W.
Washington, D.C. 20423

RE: Finance Bocket 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 Mr. Williams:

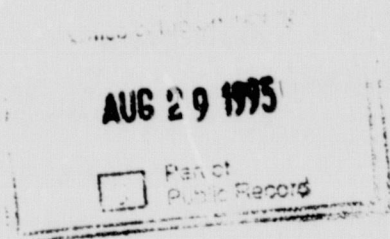
I, Dennis R. Svetlich, intend to participate in this proceeding
as a party of record. Please include my name on the service list
to be prepared, so that I may receive copies of all filings,
pleadings and decisions pertaining to Finance Docket 32760.

Sincerely,

Dennis R. Svetlich

Dennis Svetlich
Rural Route #1
Box 361
Brumley, Missouri 65017-9803

(314) 348-3571
(314) 348-2959 FAX



STB

FD

• 32760

8-29-95

D

• 60022

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Item No. 60022

Page Count 12

A49 #32

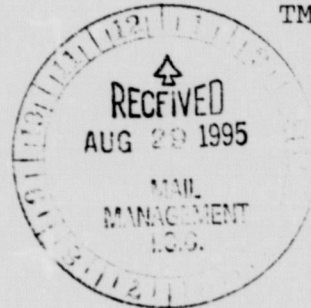
JOHN V. EDWARDS

August 29, 1995

TM-1

Via Hand Delivery

Vernon A. Williams
Secretary
Interstate Commerce Commission
Room 2215
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423



Re: Union Pacific Corp., Union Pacific RR. Co. and Missouri Pacific RR Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Rw. Co., SPCSL Corp. and The Denver and Rio Grande Western RR Co.,
Finance Docket No. 32760

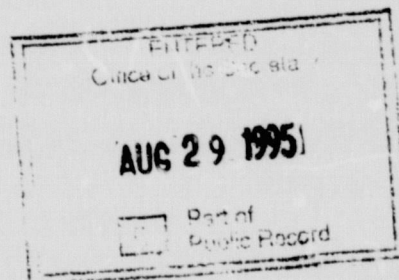
Dear Secretary Williams:

Enclosed are the twenty copies of TM-1, the appearance of the Texas Mexican Railway Company and its representatives, inadvertently omitted from yesterday's submission.

Sincerely,

A large, stylized handwritten signature in dark ink, appearing to read "John V. Edwards".

John V. Edwards



LAW OFFICES

ZUCKERT, SCOUTT & RASENBERGER, L.L.P.

888 SEVENTEENTH STREET, N.W.

WASHINGTON, D.C. 20006-3939

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(202) 342-1316

JOHN V. EDWARDS

August 29, 1995

TM-1

Via Hand Delivery

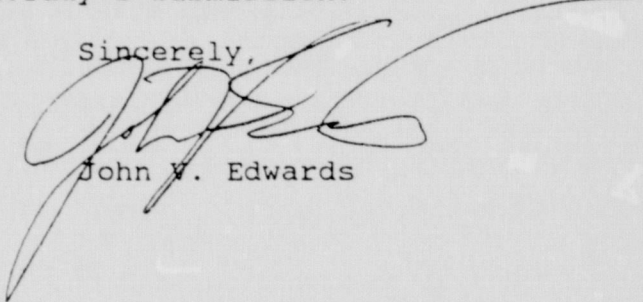
Vernon A. Williams
Secretary
Interstate Commerce Commission
Room 2215
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

- Re: Union Pacific Corp., Union Pacific RR. Co. and Missouri Pacific RR Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Rw. Co., SPCSL Corp. and The Denver and Rio Grande Western RR Co.,
Finance Docket No. 32760

Dear Secretary Williams:

Enclosed are the twenty copies of TM-1, the appearance of the Texas Mexican Railway Company and its representatives, inadvertently omitted from yesterday's submission.

Sincerely,


John V. Edwards

AUG 29 1995

**BEFORE THE
INTERSTATE COMMERCE COMMISSION**

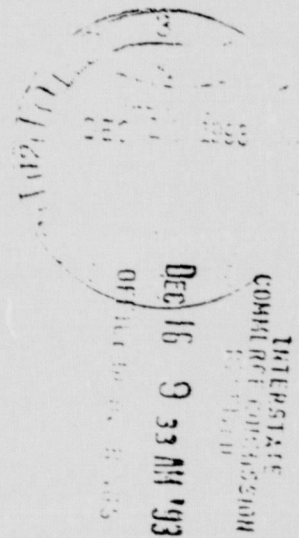
Finance Docket No. 32133 Sub No. 1

**APPLICATION OF
THE KANSAS CITY SOUTHERN RAILWAY COMPANY
FOR RENOVATION OF CURRENT HAULAGE RIGHTS
OVER THE LINES OF
UNION PACIFIC RAILROAD COMPANY
AND FOR ADDITIONAL HAULAGE AND LOCAL SERVICE RIGHTS
OVER THE LINES OF
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY**

**STIPULATION AND ORDER REGARDING KCS' PRODUCTION OF
CONFIDENTIAL DOCUMENTS TO UPC, UPRR, MPRR, HOLDINGS, AND CNW**

WHEREAS, The Kansas City Southern Railway Company ("KCS") is willing to make available certain documents ("the Documents") that it considers to contain highly sensitive confidential proprietary information, the disclosure of which would harm its competitive position, and

WHEREAS, Union Pacific Corporation ("UPC"), Union Pacific Railroad Company ("UPRR"), Missouri Pacific Railroad Company ("MPRR"), Chicago and North Western Holdings Corp. ("Holdings"), and Chicago and North Western Transportation Company



("CNW") (collectively the "Primary Applicants") have sought disclosure of the Documents through discovery in this proceeding, and the Primary Applicants and all individuals named in this protective order understand and have promised strict compliance with all terms of this Stipulation and Order:

I hereby enter the following order:

1. All Documents provided hereunder to the Primary Applicants, or anyone acting on their behalf, and all notes and other documents relating in any way to any of the Documents that are developed by any individual having access to such documents (the "Notes"), shall be used solely for the purposes of the above-captioned proceeding or any appeals or related proceedings taken or filed in connection therewith ("the Proceedings"), and shall not be used for any other purpose, whether commercial, competitive or otherwise.

2. Any Documents provided hereunder and stamped "CONFIDENTIAL" and any data contained therein, shall not be disclosed in any way to any person not authorized under paragraph 7. hereof to receive access to such Documents unless such disclosure is preceded by the prior written consent of KCS or an Order of the Commission or the Administrative Law Judge in the above-captioned proceedings.

3. Any Documents provided hereunder and stamped "CONFIDENTIAL--OUTSIDE COUNSEL/EXPERTS ONLY" and any data contained therein shall not be disclosed in any way to any person not authorized under paragraph 8. hereof to receive access to such Documents unless such disclosure is preceded by the prior written consent of KCS or an order of the Commission or the Administrative Law Judge in the above-captioned proceedings.

4. All Documents provided hereunder, and all Notes, shall be destroyed at the

completion of the Proceedings, and written notice of such destruction shall be provided to KCS Counsel.

5. Insofar as the Primary Applicants intend to use the Documents or any portion thereof, or any data contained therein, in any way at the hearings, in written testimony, on brief in the Proceedings, or in any other submission, the Primary Applicants either (a) shall give Counsel for KCS sufficient advance written notice of the fact that they intend to use the Documents or any portions thereof or information contained therein, in sufficient detail to enable Counsel for KCS to petition the Administrative Law Judge for an order (i) restricting attendance at the hearings during discussion of the Documents and their contents, or (ii) restricting access to the portion of the record or briefs reflecting discussion of the Documents or their contents, or (b) in the event the notice described in (a) hereof is not given, shall give prior notices of such intended use (with such notice to be given, if practicable, at least 48 hours in advance) and will not oppose such a petition.


6. All filings containing information from any Documents stamped "CONFIDENTIAL" or "CONFIDENTIAL -- OUTSIDE COUNSEL/ EXPERTS ONLY" shall be filed under seal. Publicly available filings shall have had all such information redacted.

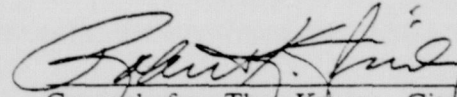
7. All Documents which are provided to the Primary Applicants by KCS and which are stamped "CONFIDENTIAL", and any data contained therein, shall be restricted to access by only the following named individuals, each of whom shall sign the Undertaking attached as Exhibit A to this order:

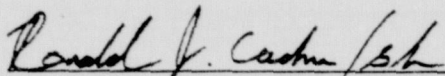
and by any other person, including assistants, analysts, secretaries and attorneys, who, in advance of receiving access to the Documents or the data contained therein, shall read this Order and shall sign and deliver to KCS an Undertaking in the precise form attached to the Order. To the extent practicable, the Undertaking shall be delivered to KCS prior to receipt of access to the Documents by the individual named in the Undertaking, and if not, shall be delivered to KCS as soon as possible thereafter.

8. All Documents which are provided the Primary Applicants by KCS and which are stamped "CONFIDENTIAL -- OUTSIDE COUNSEL/EXPERTS ONLY", and any data contained therein, shall be restricted to access by only the following named individuals, each of whom shall sign the Undertaking attached as Exhibit B to this Order:

and by any other outside counsel or consultant for the Primary Applicants who, in advance of receiving access to the Documents or the data contained therein, shall read the Order and shall sign and deliver to KCS an Undertaking in the precise form attached to this Order. To the extent practicable, this Undertaking shall be delivered to KCS prior to receipt of access to the Documents by the individual named in the Undertaking, and if not, shall be delivered to KCS as soon as possible thereafter.


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


Counsel for The Kansas City Southern
Railway Company


Counsel for Chicago and North Western
Holdings Corp. and Chicago and North
Western Transportation Company

The foregoing Stipulation is approved
and so ordered.

Dated: 12-16 -, 1993



Administrative Law Judge

EXHIBIT A
UNDERTAKING

I, _____, have read the foregoing "STIPULATION AND ORDER REGARDING KCS' PRODUCTION OF CONFIDENTIAL DOCUMENTS TO UPC, UPRR, MPRR, HOLDINGS, AND CNW" entered into between the Primary Applicants and KCS in ICC Finance Docket No. 32133 Sub No. 1, understand the same, and agree to be bound by its terms. I agree not to use any Documents obtained under this Stipulation and Order and stamped "CONFIDENTIAL", or any data or information derived therefrom, for any purpose not related to the Primary Applicants' participation in Finance Docket 32133, and related dockets, or any appeals or related proceedings taken or filed in connection therewith (the "Proceedings"), or to use any techniques disclosed or information learned as a result of receiving this data or information for any purpose not related to the Primary Applicants' participation in the Proceedings. I recognize that I may be held personally liable for any damages that KCS may suffer as a result of my use or disclosure in violation of the Stipulation and Order of any confidential information supplied as a result of the Stipulation and Order.

Typed Name

Dated: _____

EXHIBIT B
UNDERTAKING

I, _____, have read the foregoing "STIPULATION AND ORDER REGARDING KCS' PRODUCTION OF CONFIDENTIAL DOCUMENTS TO UPC, UPRR, MPRR, HOLDINGS, AND CNW" entered into between the Primary Applicants and KCS in ICC Finance Docket No. 32133 Sub No. 1, understand the same, and agree to be bound by its terms. I agree not to use any Documents obtained under this Stipulation and Order and stamped "CONFIDENTIAL -- OUTSIDE COUNSEL/EXPERTS ONLY", or any data or information derived therefrom, for any purpose not related to the Primary Applicants' participation in Finance Docket 32133, and related dockets, or any appeals or related proceedings taken or filed in connection therewith (the "Proceedings"), or to use any techniques disclosed or information learned as a result of receiving this data or information for any purpose not related to the Primary Applicants' participation in the Proceedings. I recognize that I may be held personally liable for any damages that KCS may suffer as a result of my use or disclosure in violation of the Stipulation and Order of any confidential information supplied as a result of the Stipulation and Order.

Typed Name

Dated: _____

approves the application, allowing competitors access to commercially sensitive information will always have long-term consequences. It is this concern that has routinely led parties in these cases to request establishment of a "highly confidential" category of information.

In-house counsel for non-applicant parties have no compelling need for access to competitively sensitive data. Outside counsel (and KCS has outside counsel who are experienced in railroad control proceedings) can adequately protect their clients' interests in these proceedings without expanding competitors' potential access to commercially sensitive data. This is the same resolution the Commission adopted in BN/Santa Fe. Also, while there is no reason to believe that parties will not act in good faith when designating information "highly confidential," if, after reviewing material designated as "highly confidential," outside counsel for a party believes that the information has been improperly classified, that party remains free to challenge the classification -- as was the case in BN/Santa Fe.

BN/Santa Fe demonstrated the value of resolving procedural issues at the threshold of the proceeding in order to avoid later delay. In particular, BN/Santa Fe demonstrated the effectiveness of the protective order that Applicants have proposed in avoiding disputes that might otherwise delay the

discovery process and the Commission's review of the proposed transaction. KCS' Opposition ignores the historical use of protective orders, but even more important, it ignores the lessons of BN/Santa Fe, and thus it should be rejected.

Respectfully submitted,

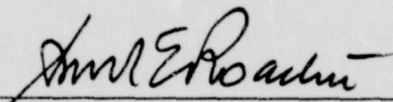
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LOUIS P. WARCHOT
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(415) 541-1000

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Railway Company, SPCSL Corp.,
and The Denver and Rio Grande
Western Railroad Company

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PAUL A. CONLEY, JR.
LOUISE A. RINN
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Missouri Pacific Railroad Company
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MICHAEL L. ROSENTHAL
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(202) 662-5388

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

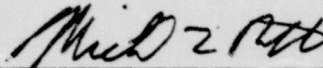
August 18, 1995

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 18th day of August, 1995, I cause a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

Director of Operations
Antitrust Division
Room 3218
Department of Justice
Washington, D.C. 20530

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



Michael L. Rosenthal

STB

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LAW OFFICES

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888 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20006-3939
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(202) 342-1316



RICHARD A. ALLEN

August 28, 1995

Via Hand Delivery

Vernon A. Williams
Secretary
Interstate Commerce Commission
Room 2215
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

AUG 28 1995

Re: Union Pacific Corp., Union Pacific RR. Co. and Missouri Pacific RR Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern R.W. Co., SPCSL Corp. and The Denver and Rio Grande Western RR Co.,
Finance Docket No. 32760

Dear Secretary Williams:

Please place the Texas Mexican Railway Company ("Tex-Mex") and its representatives indicated below on the list of all parties of record prepared and issued under the provision of 49 C.F.R. § 1180.4(a)(4). Tex-Mex intends to participate in this proceeding as an active party. In accordance with 49 C.F.R. § 1180.4(a)(2), Tex-Mex selects the acronym "TM" for identifying all documents and pleadings it submits.

Richard A. Allen
Andrew R. Plump
John V. Edwards
Zuckert, Scoutt & Rasenberger, L.L.P.
Suite 600
388 17th Street, N.W.
Washington, D.C. 20006-3939

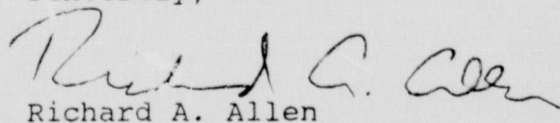
Copies of this letter are being served on all the representatives of all persons who have filed appearances in this proceeding, including the applicants' representatives.

Item No. _____

Page Count 1

Aug # 28

Sincerely,


Richard A. Allen

LAW OFFICES
ZUCKERT, SCOUTT & RASENBERGER, L.L.P.

888 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20006-3939

TELEPHONE: (202) 298-8660

FACSIMILES: (202) 342-0683
(202) 342-1316



RICHARD A. ALLEN

August 28, 1995

Via Hand Delivery

Vernon A. Williams
Secretary
Interstate Commerce Commission
Room 2215
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Union Pacific Corp., Union Pacific RR. Co. and Missouri
Pacific RR Co. -- Control and Merger -- Southern
Pacific Rail Corp., Southern Pacific Transp. Co.,
St. Louis Southwestern R.W. Co., SPCSL Corp. and The
Denver and Rio Grande Western RR Co.,
Finance Docket No. 32760

Dear Secretary Williams:

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Richard A. Allen
Andrew R. Plump
John V. Edwards
Zuckert, Scoutt & Rasenberger, L.L.P.
Suite 600
888 17th Street, N.W.
Washington, D.C. 20006-3939

Copies of this letter are being served on all the representatives of all persons who have filed appearances in this proceeding, including the applicants' representatives.

Sincerely,

Richard A. Allen

STB

FD

32760

8-24-95

D

60013

60013

LAW OFFICES
JACKSON & JESSUP, P.C.

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(703) 525-4050

TELECOPIER

(703) 525-4054

INTERNET

TRANSIAW@DGS.DCSYS.COM



WILLIAM P. JACKSON, JR.
DAVID C. REEVES
JOHN T. SULLIVAN
JOHN R. COPLEY

GERALD E. JESSUP
(1911-1994)

August 24, 1995

Mr. Vernon A. Williams
Secretary
Interstate Commerce Commission
12th & Constitution Ave., N.W.
Washington, DC 20423

FD-32760

Re: Union Pacific Corp., Union Pacific
Railroad Co., and Missouri Pacific
Railroad Co.--Control and Merger--
Southern Pacific Rail Corp., Southern
Pacific Transportation Co., St. Louis
Southwestern Railway Co., SPUSL Corp.
and The Denver and Rio Grande Western
Railroad Co.

Dear Mr. Williams:

Enclosed for filing in the referenced proceedings are the original and 20 copies of STRC-1, the Reply in Opposition of Save the Rock Island Committee, Inc., to Petition for Waiver of or Exemption from 49 U.S.C. Section 10904(e)(3) and 49 C.F.R. Section 1152.13(d). Also enclosed for filing are the original and 20 copies of STRC-2, the Reply in Opposition of Save the Rock Island Committee, Inc., to Petition to Establish Procedural Schedule. Also enclosed is a 3.5-inch disk containing the text of both pleadings.

Please acknowledge the receipt and filing of the enclosed Replies by receipt stamping the copy of this letter and the extra copies of the Replies enclosed for that purpose and returning them to the undersigned in the enclosed pre-addressed, postage paid envelope.

Very truly yours,

Item No. _____

Page Count 16

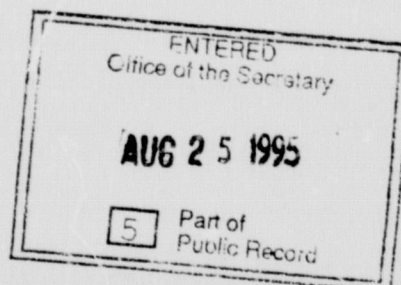
AUG 23

William P. Jackson, Jr.

WPJ/jmb

Enclosures

cc: Mr. Jim Link

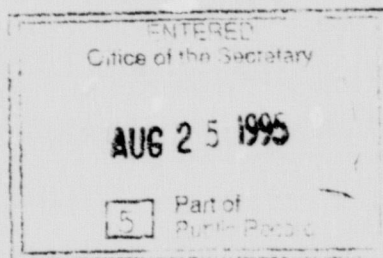


BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.

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

: Finance Docket No. 32760

REPLY IN OPPOSITION OF SAVE THE ROCK ISLAND
COMMITTEE, INC., TO PETITION FOR WAIVER OF OR
EXEMPTION FROM 49 U.S.C. SECTION 10904(e)(3)
AND 49 C.F.R. SECTION 1152.13(d)



William P. Jackson, Jr.
Attorney for Save the Rock
Island Committee, Inc.

OF COUNSEL:

JACKSON & JESSUP, P.C.
Post Office Box 1240
Arlington, VA 22210
(703) 525-4050

Due and Dated: August 24, 1995

BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.

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

REPLY IN OPPOSITION OF SAVE THE ROCK ISLAND
COMMITTEE, INC., TO PETITION FOR WAIVER OF OR
EXEMPTION FROM 49 U.S.C. SECTION 10904(e)(3)
AND 49 C.F.R. SECTION 1152.13(d)

Save the Rock Island Committee, Inc. ("STRICT"), submits this reply in opposition to the request of Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company ("MPRR"), Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company ("SSW"), SPCSL Corp., and The Denver and Rio Grande Western Railway Company (collectively "Applicants"), for waiver of or exemption from 49 U.S.C. Section 10904(e)(3) and 49 C.F.R. Section 1152.13(d). That request is contained within Applicants' Petition for Waiver or Clarification of Railroad Consolidation Procedures, and Related Relief (UP/SP-3), filed August 4, 1995 (hereinafter "Petition for Waiver").¹

¹ 49 C.F.R. Section 1180.4(f)(3) generally prohibits replies to petitions for waivers filed under 49 C.F.R. Section 1180.4(f)(1), pursuant to which prospective merger applicants can request waiver of the Commission's merger regulations. This Reply, however, is limited to the Applicants' request for waiver of or exemption from certain of the Commission's abandonment regulations. In fact, Applicants expressly state that their waiver request is pursuant to 49 C.F.R. Section 1152.24(e)(5), which does not prohibit replies. Moreover, Applicants' alternate request for relief is for exemption from certain of the Commission's abandonment regulations, pursuant to 49 U.S.C. Section 10505. The Commission's regulations expressly permit responses to exemption petitions. See 49 C.F.R. § 1121.4(b).

As the Commission and Applicants are aware, STRICT is a not-for-profit Missouri corporation created in January of 1994 for the express purpose of securing adequate rail service by SSW or some other carrier over the entire SSW rail line that runs between Kansas City and St. Louis, MO. The group took its name from the fact that the involved line was a part of the bankrupt Chicago, Rock Island & Pacific Railroad's main line, purchased by SSW on the promise that it would be activated. STRICT is composed of rail shippers, potential rail shippers, and local and regional governmental bodies and agencies through whose territories the SSW line runs

STRICT has taken the position in a number of Commission proceedings that SSW is attempting, in contravention of the public interest, to abandon its line between Kansas City and St. Louis in segments and thereby prevent it from being used for providing service to, from and between those two important gateways.² Since the fall of 1994, STRICT and SSW have agreed to defer taking any further action in consolidated abandonment and complaint proceedings while they negotiate a settlement of their differences.

While STRICT remains hopeful that those differences will soon be resolved,³ SSW has yet to agree to a solution which would allow many of the

² See Docket No. AB-39 (Sub-No. 18X), The St. Louis Southwestern Railway Company--Abandonment Exemption--In Gasconade, Maries, Osage, Miller, Cole, Morgan, Benton, Pettis, Henry, Johnson, Cass, and Jackson Counties, MO; No. 41195, Save the Rock Island Committee, Inc., and MFA Incorporated v. The St. Louis Southwestern Railway Company.

³ Prior to announcement of the UP-SP merger, it appeared that an agreement in principle was near for purchase of a portion of the involved line and trackage rights over the remaining portion, so as to allow service between Kansas City and St. Louis. The proposed purchaser will be a subsidiary (or other nominee) of General Railway Corporation. The proposed agreement in principle was forwarded to SP on June 16, 1995, following weeks of generally amicable negotiations, but consideration by SP's senior management apparently became stalled as a result of the merger talks. Only today was a response received, which is being evaluated, but which has deficiencies. Prompt
(continued...)

rail shippers along the line in question to receive single-line service to St. Louis or Kansas City. Because the communities and shippers STRICT represents have been victimized before by SSW's neglect and abuse of the Commission's abandonment jurisdiction, STRICT is filing this response in opposition to Applicants' request for waiver of or exemption from certain abandonment provisions of the Interstate Commerce Act and the Commission's regulations.

BACKGROUND

With respect to Applicants' request for waiver of or exemption from certain abandonment authorization requirements, Applicants state that they "anticipate that there may be some merger-related abandonments for which they will seek either exemption or approval in connection with the control application." Petition at 15. Later, Applicants admit that "[m]uch of the trackage that could be the subject of Applicants' abandonment applications is mainline track." Petition at 19.

Nevertheless, one of Applicants' requests is for waiver of or exemption from "the requirement in 49 U.S.C. § 10904(e) and 49 C.F.R. § 1152.13(d) that a line for which abandonment approval is sought be identified in Category 1 on the abandoning railroad's System Diagram Map at least four months prior to the filing of the abandonment application." Petition at 15-16. The reason Applicants give is that:

[I]t will not be possible to identify these abandonments and the extent to which approvals, as

³(...continued)

acceptance of the proposed agreement in principle or one similar to it allowing purchase of the entire SSW line between Kansas City and St. Louis with multiple rail connections at each end, followed by definitive contracts, would allow STRICT to achieve its objective of causing operations over that line to begin again without needing to become further mired in this proceeding.

distinguished from exemptions, will be sought for them until the process of preparing the merger application is further along toward completion. It will thus not be possible, if the abandonment applications are to be filed with the control application on or before December 1, to comply with the [four-month system diagram map notice requirement].

Id. December 1, 1995, is the date by which Applicants project their application will be filed with the Commission.

In support of its request for waiver of the aforementioned system diagram map requirement, Applicants compare their waiver request with their earlier request for waiver from certain notice requirements for merger-related rail construction projects. Petition at 16. In support of their alternative request for an exemption from the system diagram map requirements in this instance, Applicants claim that "the four-month requirement of 49 U.S.C. § 10904(e) and 49 C.F.R. § 1152.13(d) will interfere unnecessarily with the expeditious processing of this case," that "[t]he rail transportation policy will thus be furthered by establishing a timely procedure for this proceeding," and that "the four-month requirement, in the context of this proceeding, is of limited scope." Petition at 16.

In partial atonement for the audacity of their request, Applicants state that they "are prepared to identify and include in Category 1 on their System Diagram Maps by no later than September 18, 1995 all proposed merger-related abandonments for which approval will be sought," which thus "will give at least two months' notice of these proposed abandonments prior to the filing of the control application." Petition at 16-17. Applicants claim that such notice, "together with the six-month schedule that Applicants are proposing contemporaneously herewith for the control proceeding, will give affected shippers ample opportunity to formulate and submit comments on any proposed

abandonments as part of the principal proceedings." Petition at 17.

STRICT urges the Commission to deny Applicants' request for waiver or exemption. Considering the purpose of the statute Applicants are attempting to avoid complying with in this case, and the type of abandonments to which it would apply, Applicants' request is profoundly disturbing. Even Applicants cannot, at this time, define the scope of the request. In a major proceeding such as this, failure to deny such an open-ended waiver request would raise many serious questions.

ARGUMENT

I. THE COMMISSION SHOULD NOT GRANT
APPLICANTS WAIVER OF OR EXEMPTION
FROM 49 U.S.C. SECTION 10904(e)(3)
AND 49 C.F.R SECTION 1152(d)

49 C.F.R. Section 1152.13(d) provides that:

Under 49 U.S.C. 10904, the Commission is precluded from issuing a certificate of abandonment or discontinuance if the abandonment or discontinuance application is opposed by a significant user, a State, or a political subdivision of a State unless the line is identified and described on the system diagram map for at least 4 months prior to the filing of such application. The 4-month minimum notice period of section 10904(e)(3) will be deemed to have commenced only for a line or portion of a line which is designated on the carrier's system diagram map as a line in category 1 (§1152.10(b)(1)).

As stated, that regulation is derived from 49 U.S.C. Section 10904(e)(3), which provides that in the case of an opposed abandonment:

[T]he Commission may issue a certificate under section 10903 of this title only if the railroad line has been identified and described in the diagram or amendment to the diagram of the rail carrier that was submitted to the Commission at least 4 months before the date on which the application was filed, except that the

requirement of such description or identification in such diagram may be waived by the Commission if the application was approved by the Secretary of Transportation as part of a plan or proposal under section 333(a)-(d) of this title, or the application is filed by a railroad in bankruptcy.

There is little argument over the purpose of these provisions. The legislative history is clear that the statutory system diagram map requirements, including the four-month notice requirement, are designed "to facilitate timely notice that service on any individual line may be in jeopardy." S. Conf. Rep. No. 94-595. 94th Cong., 2d Sess. 133, 142, reprinted in 1976 U.C.C.A.N. 148, 157. see also Illinois v. ICC, 615 F.2d 743, 747 n.7 (7th Cir. 1980). The Commission has expanded on this by stating that:

The purpose of requiring a public notice of lines "potentially subject to abandonment" is, as we conceive it, two fold. First, it is to give notice to the users of the service provided over light-density branch lines, and the communities served by such lines, that they are likely to face an attempt by the carriers to abandon service. Second, it is to give the Commission, other Federal agencies, the States, local communities, rail service users, and the carriers themselves an opportunity to plan intelligently and effectively to develop and maintain an integrated transportation system.

Abandonment of Railroad Lines and Discontinuance of Service, 354 I.C.C. 129, 136-37 (1976) (emphasis added), partially remanded on other grounds sub nom. Chicago & North Western Transportation Co. v. United States, 582 F.2d 1043 (7th Cir.), cert. denied, 439 U.S. 1039 (1978). The system diagram map requirements were part of a comprehensive revision of the Commission's abandonment authorization powers in the Railroad Revitalization and Regulatory Reform Act of 1976, which included the original enactment of what is now 49 U.S.C. Section 10905. That statute is intended to facilitate the preservation

of rail service on rail lines which would otherwise be abandoned. Abandonment of Railroad Lines and Discontinuance of Service, 354 I.C.C. at 131.

It cannot be denied that Congress believes that branch line abandonments are so significant as to warrant the four-month time period between amendment of a carrier's system diagram map and the filing of an abandonment application. In this proceeding, Applicants are requesting not only that such a time period be halved, but that the truncated period be applied to abandonments of main lines that are presently dense with traffic. Such a plainly drastic departure from Commission practice should be emphatically denied as contrary to both applicable law and the public interest.

Applicants' request for waiver from the requirements of 49 U.S.C. Section 10904(e) and 49 C.F.R. Section 1152.13(d) is fundamentally flawed in many respects. Most significantly, Applicants make no attempt to address the fact that 49 U.S.C. Section 10904(e)(3) clearly limits the Commission's authority to waive compliance with the requirements of that provision. Because Applicants' merger and abandonment plans have not been approved pursuant to 49 U.S.C. Section 333, and because none of the Applicants are in bankruptcy, the Commission simply cannot - and should not if it could - waive compliance with 49 U.S.C. Section 10904(e)(3) in this instance.

The Applicants' only argument in support of their waiver request is to compare that request with their earlier request that the Commission waive compliance with the requirement of 49 C.F.R. 1150.1(b) that six months advance notice be provided to the Commission's Section of Environmental Analysis regarding merger-related rail construction projects. See Petition at 13-15. That regulation, however, is designed to assist Commission staff in its review of the construction projects. If the Commission allows an abbreviated pre-filing notice period for construction applications, the only effect will be on

the period of time Commission staff have to conduct initial environmental reviews of the construction applications. Clearly, the Commission has the discretion to determine how long it will take to conduct such reviews.

In contrast, the four-month requirement of 49 U.S.C. Section 10904(e)(3) is designed to provide adequate public notice of abandonment applications. Congress imposed the requirement because it was concerned that shippers and communities need sufficient time to act to preserve rail service on a line proposed for abandonment, both to prepare their case opposing abandonment and to attempt to arrange for an alternate operator of the line if abandonment authorization is granted.⁴ Applicants make no attempt to justify their waiver request in light of the foregoing, other than to make the unsupported assertion that two months' notice of an intent to abandon is sufficient in this case.

If anything, greater notice of an intent to abandon would be appropriate in this proceeding, because Applicants are projecting that they will be requesting authority to abandon main lines rendered redundant, in their view at least, by the merger. A cursory look at a rail map of the western two-thirds of the United States reveals that Applicants could very well be referring to lines that stretch for hundreds of miles. Because merger-related abandonments of such lines are virtually unprecedented in recent Commission history,⁵ the waiver Applicants seek should be summarily denied.

⁴ What has occurred to date regarding the SSW line between Kansas City and St. Louis is instructive as to the time required to put a transaction together. It has taken ten weeks for an offeror to get a response to a proposed agreement in principle, following several months of negotiations. Dealing with a large railroad in many respects is like dealing with a large government bureaucracy; under the best of conditions, things tend to move very slowly.

⁵ The longest line abandoned as part of a recent merger proceeding was a 123.6-mile segment of an MPRR subdivision in Oklahoma. See Union
(continued...)

The length of the lines that would be adversely affected by Applicants' request also prevents the Commission from making the required findings under 49 U.S.C. Section 10505 for an exemption in this instance. The Commission's statutory exemption authority permits exemption only:

when the Commission finds that the application of a provision of this subtitle--

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10505(a). An abandonment of a line hundreds of miles in length cannot be described as a transaction of "limited scope," and Applicants make no attempt to argue the point. Instead, Applicants state that "the four-month requirement, in the context of this proceeding, is of limited scope." Petition at 16.

Applicants provide no support for such an assertion, as they have none. In essence, they want the Commission to sign a blank check. Applicants admit that they have no idea presently which and how many of their respective lines will be the subject of merger-related abandonment proposals. Petition at 15. Because the Commission is unable to determine at this time the extent of merger-related abandonments in this proceeding, it cannot make the findings required by 49 U.S.C. Section 10505, and so the exemption request must be

⁵(...continued)

Pacific Corp., Union Pacific Railroad Co. and Missouri Pacific Railroad Co.--Control--Missouri-Kansas-Texas Railroad Co., 4 I.C.C.2d 409, 490-92 (1988). The merger Applicants propose holds out the prospect of abandonments of lines much greater in length.

denied.⁶

In addition, Applicants fail to establish that the requested exemption is consistent with the National Rail Transportation Policy ("N RTP"), set forth at 49 U.S.C. Section 10101a. Applicants' only claim is that "the four-month requirement of 49 U.S.C. § 10904(e) and 49 C.F.R. §1152.13(d) will interfere unnecessarily with the expeditious processing of this case," in contravention of the N RTP. Petition at 16.

Applicants' assertion is entirely unfounded. First of all, there is no requirement that abandonment applications be filed simultaneously with the merger applications to which they are related, or that the Commission decide such applications simultaneously. In fact, a merger-related abandonment application by definition is contingent upon approval of the merger application to which it is related, so a Commission decision on the former can only be made after a Commission decision on the latter. Moreover, there is nothing preventing Applicants from filing abandonment applications after the merger application is acted upon.

In addition, if Applicants do amend their respective system diagram maps by September 18, 1995, they can still file abandonment applications as early as January 18, 1996, a scant seven weeks after the targeted filing date for

⁶ Contrary to Applicants' claims, the Commission's pending proposal to significantly curtail the length of merger proceedings provides no support for the exemption Applicants seek in this instance. See Petition at 16. The Commission's preliminary findings of limited scope concerned specific time limits for various filings in merger proceedings contained in the statute which governs the schedule in merger proceedings, 49 U.S.C. Section 11345. See Ex Parte No. 282 (Sub-No. 19), New Procedures in Rail Acquisitions, Mergers & Consolidations (not printed), at 6, served January 26, 1995. In this proceeding, Applicants are requesting the Commission to significantly revise statutory abandonment authorization requirements in order to expedite a merger. There is no support in the Interstate Commerce Act for subordinating the Commission's abandonment jurisdiction to its control jurisdiction, and most assuredly not on the open-ended basis proposed by Applicants.

their merger application. It is quite possible under such a scenario that the Commission could still issue simultaneous merger and abandonment decisions, although there is no pressing reason why the decisions could not come later. Indeed, the very mechanics of an abandonment are such that abandonment authority is frequently not exercised for months after it becomes effective in the average case.

It is undeniable that Applicants' request to avoid application of the four-month notice period is driven by their unrealistic request that the Commission issue a decision not only on their merger application within six months, but on all related, inconsistent and responsive applications as well. STRICT will not address the merits of that request here, but instead has concurrently filed a reply to Applicants' Petition to Establish Procedural Schedule, filed August 4, 1995 (UP/SP-4). Clearly, however, the Commission needs to consider Applicants' proposed schedule request in tandem with the requested abandonment exemptions.

II. THE COMMISSION SHOULD IMPOSE
ADDITIONAL ABANDONMENT AUTHORIZATION
REQUIREMENTS IN THIS PROCEEDING TO
ADEQUATELY PROTECT THE PUBLIC INTEREST

Because what Applicants may propose in the way of abandonments is unprecedented, the Commission should carefully follow its abandonment regulations. In addition, because Applicants are suggesting that main lines may be abandoned, additional requirements should be imposed with respect to those abandonments.

First, Applicants should be required to file their respective amended system diagram maps in this proceeding, and make them available to all parties that request them, as the Commission requires of any submission in a merger proceeding. See 49 C.F.R. § 1180.4(a)(3). If main line abandonment proposals

are to be part of this proceeding, the first public notice of those proposals should be as widely disseminated as possible.

Secondly, Applicants should not be permitted to request exempt abandonment of any main line in this proceeding. A main line abandonment almost by definition is not of "limited scope;" to hold that it is would be tantamount to saying anything less than global is of "limited scope." It therefore cannot properly be subject to exemption under 49 U.S.C. Section 10505.

Requiring Applicants to file a separate abandonment application for each main line they wish to abandon would also aid interested parties in purchasing such lines pursuant to 49 U.S.C. Section 10905, at least for those lines for which abandonment approval is obtained. Unlike exemption petitions or notices, abandonment applications contain much of the information that is needed for an offer of financial assistance ("OFA") pursuant to 49 U.S.C. Section 10905. See generally 49 C.F.R. Section 1152.27.

Disclosure of such information at the outset of the abandonment process will actually expedite the OFA process, and thus not interfere with Applicants' goal of an expedited merger proceeding. But what Applicants have proposed would do violence to the public interest, and could also be inextricably intertwined with motivations of suppressing competition. These demand close examination, even at the cost of more time to process abandonment requests.

Finally, Applicants should be required to show on the system diagram maps that they file in advance of their merger and abandonment applications not only those lines for which abandonment applications will be filed, but also those lines for which abandonment exemptions will be sought. Applicants suggest in their Petition for Waiver that the amended system diagram maps will

only show those lines for which abandonment "approval" will be sought. Petition at 16. Earlier, Applicants define lines for which abandonment "approval" will be sought by contrasting them with lines for which exemption authority will be sought. Petition at 15. If Applicants will know by September 18, 1995, which lines they will propose to abandon as part of the merger proceeding, they should be required to disclose all such lines at that time, instead of providing advance abandonment proposal notice only of those lines that will be the subject of abandonment applications at that time, and waiting until they file their merger application before disclosing the identity of the lines for which they will seek abandonment exemption authority.

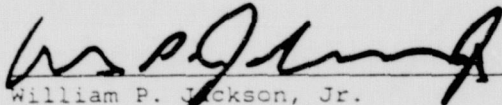
CONCLUSION

WHEREFORE, the foregoing considered, STRICT requests the Commission to deny Applicants' request for waiver of or exemption from 49 U.S.C. Section 10904(e)(3) and 49 C.F.R. Section 1152.13(d). STRICT also requests that the Commission by order impose the additional abandonment authorization requirements upon Applicants discussed herein, and grant STRICT such other and further relief as may be warranted in these circumstances.

Respectfully submitted,

SAVE THE ROCK ISLAND COMMITTEE, INC.,

By


William P. Jackson, Jr.
Its Attorney

OF COUNSEL:

JACKSON & JESSUP, P.C.
Post Office Box 1240
Arlington, VA 22210
(703) 525-4050

CERTIFICATE OF SERVICE

I, William P. Jackson, Jr., hereby certify that on this 24th day of August, 1995, I have served one copy of the foregoing Reply in Opposition of Save the Rock Island Committee, Inc., to Petition for Waiver of or Exemption from 49 U.S.C. Section 10904(e)(3) and 49 C.F.R. Section 1152.13(d), upon the following parties of record in this proceeding, by first class mail, postage prepaid, or as otherwise indicated:

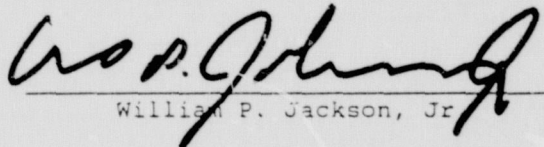
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William P. Jackson, Jr.

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U. S. Department of Justice

Antitrust Division

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Office of the SecretaryENTERED
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Washington, DC 20001

August 23, 1995

Honorable Vernon A. Williams
Secretary
Interstate Commerce Commission
Room 2215
Twelfth Street & Constitution Avenue, N.W.
Washington, DC 20423



Re: Finance Docket No. 32760; Comments on Union Pacific
Request for Informal Opinion -- Voting Trust Agreement

Dear Secretary Williams:

On August 4, 1995, the Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), and Missouri Pacific Railroad Company (MPRR) (collectively referred to as "Union Pacific") filed a notice of their intent to acquire the Southern Pacific Rail Corporation ("Southern Pacific"), the parent holding company of Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company. On that date, Union Pacific also requested an informal opinion from the Commission's staff stating that its Voting Trust Agreement, and the arrangements prescribed by that agreement, would insulate it from any violation of the control provisions of the Interstate Commerce Act.

The Department is concerned with the potentially lengthy time periods associated with the divestiture of stock upon abandonment or disapproval of the merger application. The use of voting trusts in railroad merger proceedings -- no matter how carefully constructed -- cannot create conditions that preserve existing competition pending a Commission decision on the merits of a control application. Even if a voting trust precludes the acquiring railroad (also the settlor of the trust) from controlling the competitor's business activities through the exercise of its shareholder voting rights, the railroad retains an interest in the financial health of the acquired railroad as long as it remains a beneficial owner of its stock. When the acquiring railroad is the beneficial owner of a substantial share of the acquired railroad's stock, its incentive to maximize its own profits without regard to the target's interests inevitably will be compromised. Competitive strategies that reduce the target's profits also reduce the acquiring railroad's dividends, and the amount that it will receive for the stock if forced to sell the stock in the future upon the Commission's disapproval of the control application.

Item No. _____

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Moreover, voting trust or related agreements typically restrict the target railroad from making substantial new investments (as is the case in Section 5.1(g) of the Union Pacific/Southern Pacific Agreement and Plan of Merger). As demonstrated by the controversial Santa Fe/Southern Pacific voting trust arrangements, a railroad that does not invest in the assets needed to keep pace with competitors who are adapting to changes in the railroad industry can emerge from an unsuccessful merger proceeding in a very weak condition.

Notwithstanding these dangers to competition, the Commission has permitted voting trusts in situations where the underlying transaction raises significant competitive issues. If in this case the Commission again permits a voting trust in a case where there are clear competitive issues raised, it should also be careful not to prolong needlessly the harms to competition that flow from such trusts.

If the Commission were to disapprove the merger, or the parties were to abandon the transaction, the provisions of Section 8(c) give the Union Pacific two years to find a buyer of its choice (subject to Commission oversight), and the trustee an additional two plus years if Union Pacific does not sell the stock.¹ This prolongs the competitive problems inherent in any voting trust arrangement for an unjustifiably long period.² In other industries, even firms that acquire commercial

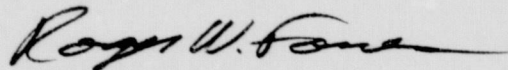
¹The agreement also gives UP the option of receiving the stock itself. That action is within the domain of the antitrust laws. If the Commission issued a declaratory order indicating that the Union Pacific's retention of a 25% interest in Southern Pacific did not constitute control for purposes of § 11343, however, that order would not insulate Union Pacific from the Clayton Act. The Commission's procedures for issuing declaratory orders do not include the competitive analyses that must be undertaken before granting antitrust immunity; and its issuance of the requested order would not relieve Union Pacific of its notification obligations under the Hart-Scott-Rodino Act. As noted by the Supreme Court in *The Denver & Rio Grande R.R. Co. v. United States*, 387 U.S. 485, 500 (1967): "A company need not acquire control of another company in order to violate the Clayton Act."

²Assuming that Union Pacific files its application on December 1, 1995, and the Commission adopts its proposed procedural schedule: (a) the Commission would publish its decision on the merger application by June 14, 1996; (b) if the Commission disapproved the merger, Union Pacific would have until June 14, 1998 to find a buyer of its choice; and (c) if Union Pacific failed to sell the stock, the trustee would have until August 3, 2000 (the expiration date of the trust under Section 8(d) of the Voting Trust Agreement) to sell it. Thus, Union Pacific proposes

assets which are less liquid than stock in violation of the Clayton Act typically are given no more than a few months to divest those assets under the terms of consent decrees.

In sum, the purpose of approved voting trust agreements is to hold stock acquired by a carrier only during the pendency of a merger application. Accordingly, the voting trust should be amended to provide for the prompt sale of Southern Pacific stock to unrelated parties before the staff issues any opinion that the Voting Trust Agreement insulates Union Pacific from control within the meaning of the Act.

Sincerely,



Roger W. Fones
Chief, Transportation, Energy
and Agriculture Section

cc: Arvid E. Roach, II
(Counsel for Union Pacific)
Beryl Gordon (Deputy Director,
Section of Legal Counsel I,
Office of Proceedings)

a six month schedule for deciding the merits of its merger application, and a fifty month schedule (from June 1, 1996 to August 3, 2000) to sell the stock if the Commission disapproves the merger.

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Item No. 60067

Page Count 12

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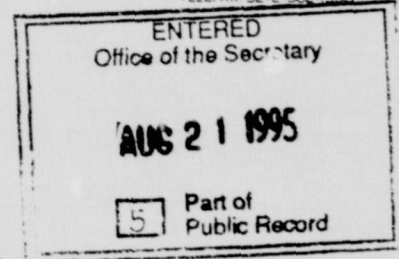
TELEPHONE: 32-2-512-9890

TELEFAX: 32-2-502-1898

August 18, 1995

BY HAND

Honorable Vernon A. Williams
Secretary
Interstate Commerce Commission
Twelfth Street and Constitution Avenue, N.W.
Room 2215
Washington, D.C. 20423



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

Dear Secretary Williams:

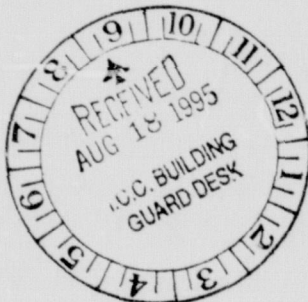
Enclosed for filing in the above-captioned docket are the original and twenty copies of Applicants' Reply to KCS' Comments on Proposed Procedural Schedule and Discovery Guidelines (UP/SP-6) and the original and twenty copies of Applicants' Reply to KCS' Opposition to Proposed Protective Order (UP/SP-7). Also enclosed is a 3.5-inch disk containing the text of both pleadings in WordPerfect 5.1 format.

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

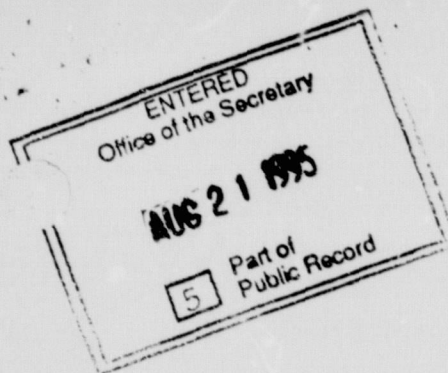
Sincerely,

Michael L. Rosenthal
Michael L. Rosenthal

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



Enclosures



UP/SP-6

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

APPLICANTS' REPLY TO KCS' COMMENTS
ON PROPOSED PROCEDURAL SCHEDULE AND DISCOVERY GUIDELINES

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August 18, 1995

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

APPLICANTS' REPLY TO KCS' COMMENTS
ON PROPOSED PROCEDURAL SCHEDULE AND DISCOVERY GUIDELINES

Union Pacific Corporation ("UPC"), Union Pacific
Railroad Company ("UPRR"), Missouri Pacific Railroad Company
("MPRR"),^{1/} Southern Pacific Rail Corporation ("SPR"),
Southern Pacific Transportation Company ("SPT"), St. Louis
Southwestern Railway Company ("SSW"), SPCSL Corp. ("SPCSL"),
and The Denver and Rio Grande Western Railroad Company
("DRGW"),^{2/} collectively, "Applicants," hereby reply to the
Comments of the Kansas City Southern Railway Company on
Proposed Procedural Schedule and Discovery Guidelines (KCS-1).

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

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

Proposed Procedural Schedule

Applicants have proposed a schedule to govern proceedings in this matter (UP/SP-4) that is modelled closely upon that followed by the Commission in its recent, very successful expeditious handling of the control application in BN/Santa Fe. See Finance Locket No. 32549, Burlington Northern, Inc., & Burlington Northern R.R. -- Control & Merger -- Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry., Decision served Mar. 7, 1995, App. A. Applicants' proposal is also consistent with the procedures to govern major rail combinations proposed by the Commission for public comment in Ex Parte No. 282 (Sub-No. 19), New Procedures in Rail Acquisitions, Mergers & Consolidations, Decision served Jan. 26, 1995. And the proposed schedule responds to the Commission's express commitment "to consider . . . future mergers within six months." See BN/Santa Fe, Voting Conference Transcript, July 20, 1995, p. 5 (remarks of Chairman Morgan).

In its Comments, however, KCS objects to Applicants' proposed schedule. KCS acknowledges (p. 1) that the schedule is essentially identical to the one the Commission adopted in BN/Santa Fe, but it argues (p. 2) that the Commission's use of that schedule in BN/Santa Fe and the Commission's express desire to conduct future merger proceedings in six months provide no justification for adopting Applicants' proposed

schedule. In fact, the BN/Santa Fe experience, and the Commission's policy of continuing the commitment to expedition it made in that case, are precisely the most compelling reasons for adoption of a six-month schedule. It is only logical that the UP/SP case be handled using the same schedule that worked so well in BN/Santa Fe -- just as increasingly-expedited schedules in past cases have on several occasions served as the basis for similar, if not even more, expedited schedules in subsequent cases.

As Chairman Morgan recognized at the Commission's voting conference in BN/Santa Fe, that case demonstrated that a merger of this magnitude could proceed successfully on an expedited schedule. See Voting Conference Transcript, p. 5. Not so terribly long ago, parties believed that the new statutory maximum two-and-a-half-year schedule under the Staggers Act was all the improvement that they could hope for after the disastrous 14-year proceeding in Rock Island. But BN/Santa Fe "proved . . . that [the Commission] can get the job done" in a six-month timeframe, see Voting Conference Transcript, p. 74 (comments of Commissioner Simmons), and that even the two-year and one-year proceedings of the latter part of the 1980s unnecessarily delayed implementation of the public benefits associated with rail mergers.

It is especially important that the Commission adhere to its commitment to expedited, six-month handling of

merger cases in the wake of BN/Santa Fe. The BN/Santa Fe transaction, which is on track to be consummated in late September, presents UP and SP with new challenges that they must confront in order to continue to provide competitive, high-quality service to shippers. As Philip Anschutz, Chairman of Southern Pacific Rail Corporation, has explained (e.g., Traffic World, Aug. 14, 1995, p. 8), this is not a challenge that SP can meet on its own; nor can UP alone hope to match the new services, shorter routes, and sheer scope and size of BN/Santa Fe. Applicants' proposed transaction is a vital step toward creating a railroad that offers a true competitive alternative to the BN/Santa Fe system.

An extended proceeding would only delay implementation of the very substantial public benefits the UP/SP merger will provide. These benefits, which Applicants expect will exceed those offered by any prior rail merger, include extensive new single-line service, entirely new services that neither UP nor SP can offer on its own, dramatic mileage savings in many corridors, faster and more reliable service, elimination of capacity bottlenecks, much more effective application of capital dollars to add capacity and improve operations, and major improvements in equipment supply. Further, Applicants will demonstrate that this transaction, with the conditions Applicants are prepared to accept to preserve rail competition for all customers served

by only UP and SP, will strengthen competition in all affected markets.

KCS also argues (pp. 2-3) that it is inappropriate for the Commission to adopt Applicants' proposed schedule without requesting public comment. But as KCS points out, the Commission adopted the six-month schedule in BN/Santa Fe after receiving extensive public comment. The very fact that there was such a comment period in BN/Santa Fe makes it unnecessary and wasteful to repeat the process again. KCS had ample opportunity to comment on the schedule at that time. In fact, KCS submitted a lengthy opposition. See Comments of the Kansas City Southern Railway Company on Proposed Revision of Procedural Schedule (KCS-3), Feb. 21, 1995. But KCS' position was rejected. KCS' claim that the schedule "would not provide commenting parties with an adequate opportunity for discovery," id., p. 5, was proved wrong, and no party in BN/Santa Fe contended that the procedures deprived it of a full and fair opportunity to litigate the case.

Not only KCS, but all railroads, shippers and other parties that have an interest in this proceeding have had ample opportunity to comment on the Commission's use of expedited procedural schedules in merger cases, both in BN/Santa Fe and through the Commission's request for comments in Ex Parte No. 282 (Sub-No. 19). A further comment period would only serve to delay this proceeding and the ultimate

realization of the substantial public benefits of this transaction.

KCS' suggestion (pp. 4) that a six-month schedule is inappropriate because Applicants' proposed transaction is substantively different from BN/Santa Fe is also meritless. Applicants' proposed transaction and the one in BN/Santa Fe are no different in kind. The size of the two combinations is comparable. Both combinations are partly parallel and partly end-to-end, and while the UP/SP merger is more parallel, each transaction involves both significant parallel and significant end-to-end aspects. The issues involved in the two transactions are largely the same. In fact, if there is any difference, it is that Applicants believe they will demonstrate benefits that exceed those produced by the BN/Santa Fe merger. Applicants' are committed to resolving competitive issues the same way that BN/Santa Fe did, and are, in fact, already discussing with other railroads how best to preserve rail competition where shippers would lose a second rail alternative in a UP/SP merger.

KCS' complaint (p. 4) that Applicants' proposed schedule will not permit KCS adequate time to address the issues involved in this transaction is simply not credible. KCS has a great deal of experience with cases of this kind. It has evaluated traffic data and prepared experts in many cases, including in BN/Santa Fe (before it settled with the

applicants), in UP/MP/WP, in UP/MKT, and, of special note, in SP/DRGW, which served as the model for the Commission's six-month schedule in BN/Santa Fe. In fact, KCS was a very active party in SP/DRGW: it submitted an inconsistent application to acquire SP and prepared and litigated its own large and complex case, as well as opposing the primary application, within the six-month schedule. See Rio Grande Industries, Inc., SPTC Holding, Inc. & The Denver & Rio Grande Western R.R. -- Control -- Southern Pacific Transportation Co., 4 I.C.C.2d 834 (1988).

KCS' position is nothing more than a delaying tactic that the Commission should not countenance. KCS does not propose an alternative schedule, or even explain its concerns in a single particular. KCS pleads (p. 4) that it needs more time to develop its position on the schedule. But KCS has already opposed the six-month schedule in BN/Santa Fe, and it has nothing new to offer -- nothing to suggest that its or anyone else's opportunity to participate in that proceeding was handicapped by the schedule, and no new arguments why a six-month schedule is unworkable. KCS offers nothing new because it cannot -- BN/Santa Fe demonstrated conclusively that a six-month schedule provides more than adequate time for full participation by all interested parties.

KCS states (p. 5) that, in any event, providing an opportunity for public comment on the procedural schedule will

do no harm. However, the lesson from BN/Santa Fe is clear: the earlier the Commission resolves procedural matters, the more notice all parties have and the fewer excuses there are for later delay. Delays of this sort must be avoided in order for the public to have the opportunity to receive the full benefit of the competition to BN/Santa Fe and the exciting new service benefits that this transaction offers. And it is this type of delay the Commission must avoid if it wishes to stand by its commitment to expedite consideration of rail mergers.

Discovery Guidelines

KCS' opposition to Applicants' proposed discovery guidelines relies on the same upside-down arguments as KCS' opposition to the proposed procedural schedule. Although, as KCS acknowledges (p. 6), Applicants' proposed discovery guidelines parallel the guidelines adopted in BN/Santa Fe, KCS argues (p. 5) that it should have the opportunity to replay the sequence of events that led to the adoption of those guidelines so that it can participate in the development of the guidelines all over again. But, KCS did participate, very actively, in the development of these guidelines, as it admits. In fact, KCS agrees (p. 6) that the process "worked well."

In challenging Applicants' proposed discovery guidelines, KCS seeks only delay. KCS has had plenty of time to reflect on the effectiveness of the guidelines and observe

them in action in BN/Santa Fe, and offers not a single specific reason why the guidelines should not be adopted in this proceeding. It cannot. The discovery guidelines have been tested under fire and proved successful in BN/Santa Fe in preventing disputes and eliminating delaying tactics. Adoption of these guidelines will ensure that all parties have a fair opportunity to participate in this case and that the Commission will be able to adhere to its commitment to a delay-free six-month schedule.

* * *

KCS asks the Commission (p. 6) to be consistent with past precedent. Applicants ask the same thing. The precedent that is directly on point is BN/Santa Fe. Applicants have submitted a procedural schedule and discovery guidelines on all fours with those adopted in BN/Santa Fe, and KCS has offered no reason to suggest that they will not work as effectively here as they did in BN/Santa Fe. Both the Applicants' proposed six-month procedural schedule and the proposed discovery guidelines were tested in BN/Santa Fe and proved to work. The Commission's early adoption of the proposed schedule and discovery guidelines will have a substantial impact on the fair and expeditious handling of this case.

Respectfully submitted,

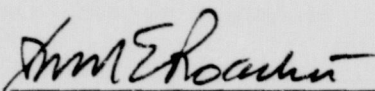
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