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MAYER, BROWN & PLATT

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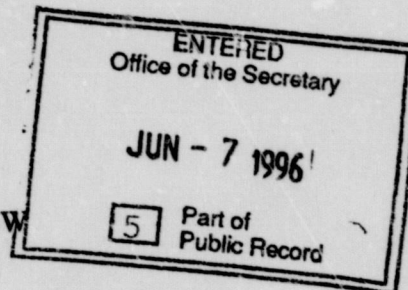
202-463-2000
TELEX 892603
FACSIMILE
202-861-0473

ERIKA Z. JONES
202-778-0342

June 6, 1996

VIA HAND DELIVERY

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



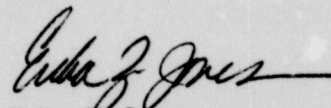
Re: Finance Docket No. 32760, Union Pacific Corp., et al. --
Control and Merger -- Southern Pacific Rail Corp., et al.

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket are the original and twenty (20) copies of Response of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company to The Kansas City Southern Railway Company's Appeal from ALJ's Order Denying KCS's Renewed Request to Compel Burlington Northern/Santa Fe to Produce Certain Documents (BN/SF-60) and five (5) copies of a "Highly Confidential" appendix of deposition excerpts cited in BN/SF-60. Also enclosed is a 3.5-inch disk containing the text of BN/SF-60 in Wordperfect 5.1 format.

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

Sincerely,

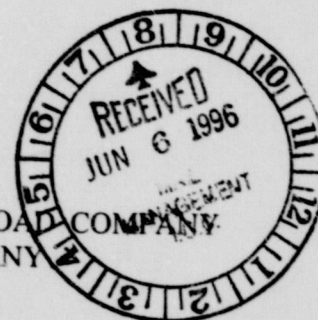

Erika Z. Jones

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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



-- CONTROL AND MERGER --

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

RESPONSE OF BURLINGTON NORTHERN RAILROAD COMPANY AND THE
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY TO THE
KANSAS CITY SOUTHERN RAILWAY COMPANY'S APPEAL FROM ALJ'S ORDER
DENYING KCS'S RENEWED REQUEST TO COMPEL BURLINGTON
NORTHERN/SANTA FE TO PRODUCE CERTAIN DOCUMENTS

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and The Atchison, Topeka and Santa Fe Railway Company

June 6, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

RESPONSE OF BURLINGTON NORTHERN RAILROAD COMPANY AND THE
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY TO THE
KANSAS CITY SOUTHERN RAILWAY COMPANY'S APPEAL FROM ALJ'S ORDER
DENYING KCS'S RENEWED REQUEST TO COMPEL BURLINGTON
NORTHERN/SANTA FE TO PRODUCE CERTAIN DOCUMENTS

Burlington Northern Railroad Company ("BN") and The Atchison,
Topeka and Santa Fe Railway Company ("Santa Fe") (collectively,
"BN/Santa Fe") hereby respond in opposition to the Kansas City
Southern Railway Company's ("KCS") Appeal From ALJ's Order Denying
KCS's Renewed Request To Compel BN/Santa Fe to Produce Certain
Documents ("KCS-61"). The order of Administrative Law Judge Jerome
Nelson was correctly decided, and the Appeal of KCS should be
denied.

As the Board has repeatedly held, parties appealing a
discovery order must meet a "strict" standard under 49 C.F.R.

§ 1115.1 See, e.g., Decision No. 39, slip op. at 2 (served May 31, 1996). "Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." 49 C.F.R. § 1115.1. As we show below, Judge Nelson's ruling was clearly warranted for multiple reasons -- because the evidentiary record has closed, because KCS is attempting to relitigate an issue it lost (and did not appeal) some three months ago, because the five- and six-year-old documents at issue are stale and irrelevant, and because KCS has no legitimate need for these studies -- and his ruling will not work an injustice of any kind upon KCS. Hence, KCS has not cleared the high hurdle needed to prevail on an appeal under Section 1115.1.

I. KCS's Attempt To Obtain Production Of The Documents Is Untimely

A. The Evidentiary Record Has Closed And The Time For Written Discovery Is Over

Under the procedural schedule established by the Board in this proceeding, the evidentiary record closed on May 14, 1996. See Decision No. 9, at 13 (served December 27, 1995). Although BN/Santa Fe has **always** taken the position that the McKinsey studies are irrelevant to this proceeding and will not be produced in the absence of an order, KCS failed to obtain a ruling on its renewed request for the studies at issue here until May 30th, well after the close of the evidentiary record.^{1/} Hence, KCS is precluded

^{1/} This is the second time that KCS has sought to require BN/Santa Fe to produce strategic studies undertaken in 1990 and 1991 by McKinsey & Company. The first such attempt was denied by Judge Nelson on March 8, 1996. See March 8, 1996 Discovery Conference (continued...)

from obtaining further evidence through written discovery and demands for document production in this proceeding.

Twice in recent weeks, the Board has rejected KCS's arguments that it should be permitted to engage in further written discovery. See Decision No. 35 (served May 9, 1996); Decision No. 38 (served May 31, 1996). Nevertheless, KCS argues that Decision No. 37 (served May 21, 1996) allows it to serve new discovery to obtain new documentary evidence based on subjects discussed during rebuttal depositions and that these studies fall within that class of evidence. KCS-61 at 11.

KCS's argument is flatly wrong -- it is based on a misreading of the Board's decisions in this proceeding. In recently denying KCS's motion to take further discovery (which in any event was limited to issues relating to the Chemical Manufacturers Association Settlement Agreement), the Board indicated that the time for conducting written discovery in this proceeding has concluded. Decision No. 35 (served May 9, 1996). The Board reiterated this position in Decision Nos. 37 (served May 22, 1996) and 38 (served May 31, 1996). In these decisions, the Board stated that cross-examination of rebuttal witnesses (and the use of information gained thereby) is permitted, but denied KCS's request to take further written discovery. The distinction between rebuttal deposition testimony and written discovery reflects a fair

1/(...continued)

Tr. 1891 (copies of cited discovery conference transcript excerpts are attached hereto as Exhibit A). KCS did not appeal that ruling.

accommodation of the need for cross-examination of rebuttal witnesses and the Board's responsibility to set and maintain a firm deadline for the completion of document discovery.

As KCS admits, the "opportunity for interested parties to provide written comments on the contents of these studies may have passed." KCS-61 at 11 n.5. Thus, under the current procedural schedule, KCS recognizes that it could not use the McKinsey & Company studies in this proceeding even if they were now produced. Accordingly, KCS proposes, in the same footnote, that the Board reopen the record of this proceeding: "Alternatively, the Board, in its discretion, can allow interested parties the opportunity to supplement their written comments." *Ibid.* It is apparent that KCS is seeking a way to reopen the record and prolong the proceedings. This effort should not be condoned.

B. KCS Is Attempting To Relitigate An Issue It Lost Previously

As noted (*supra* note 1), this is not the first time KCS has taken the issue of the strategic studies to Judge Nelson. In March, having elicited deposition testimony that described the studies and indicated that one of them had been shared, KCS sought an order requiring production of the studies. At that time, Judge Nelson ruled that the studies were too remote in time and subject matter from the issues in this proceeding, and that production would be too burdensome for BN/Santa Fe. March 8, 1996 Discovery Conference Tr. 1891. Had it appealed that decision, KCS could have obtained a ruling on the studies from the Board -- in March.

KCS explains its failure to appeal by reference to its uncertainty about the merits of such an appeal because it had never "seen these studies or * * * received any testimony about their content." KCS-61 at 13. But not having seen particular documents is hardly a justification for not appealing the order that prevented their production. And, contrary to its representation about deposition testimony, KCS **had** received extensive testimony about the McKinsey studies from Carl R. Ice (2/14/96 Ice Dep. 132-138) and Larry M. Lawrence (Lawrence Dep. 64-70), and to a lesser extent from Gerald Grinstein (Grinstein Dep. 106-107). All of those depositions were taken in February, before Judge Nelson's first ruling. In each case, BN/Santa Fe preserved its objections to the relevance of any such McKinsey studies to this proceeding, but nonetheless permitted KCS to cross-examine the witnesses about the McKinsey work. 2/14/96 Ice Dep. 137; Lawrence Dep. 45; Grinstein Dep. 110.

Thus, Judge Nelson is due even more than the usual deference, because the ruling at issue is not a new ruling on the merits, but a mere denial of **reconsideration** of a prior ruling that KCS did not appeal. KCS's prior failure to appeal should be deemed a waiver of its right to bring this issue before the Board at all, especially at this late date, but in any event KCS cannot show that Judge Nelson's denial of reconsideration meets the Board's stringent standards for appeal.

II. The Studies Are Irrelevant To This Proceeding Because They Are Stale And Do Not Constitute Evidence Of Anticompetitive Conduct By BN/Santa Fe

A. In His First Decision On The Studies, Judge Nelson Correctly Found The Studies Too Remote To Be Relevant To This Proceeding

As noted above, on March 8, 1996, Judge Nelson refused to order discovery of the McKinsey & Company studies, finding them too remote in time and subject matter from the issues in this proceeding. March 8, 1996 Discovery Conference Tr. 1891. As KCS concedes in its appeal brief (KCS-61 at 1), the studies at issue here were prepared in the course of strategic deliberations undertaken by Santa Fe some five to six years ago. As the Board well knows, today's rail environment is very different from what it was six years ago. Studies of strategic options undertaken in the context of a different Western rail configuration are irrelevant to this proceeding, which concerns whether the proposed combination of UP and SP is in the public interest in **today's** rail and market environment.

KCS has not shown **how** the failure to compel production of the five- and six-year-old studies could conceivably prevent the Board from fulfilling its statutory duties to weigh the competitive effects of the UP/SP merger in light of the current rail environment. KCS likewise does not explain how such five- and six-year-old studies of a possible SP break-up scenario are probative of even **past** collusion at all. It cannot be evidence of improper "collusion" to discuss joint acquisition strategies with a potential joint acquirer, or no joint acquisitions would ever

occur. No SP break-up transaction was carried out in any event. And KCS completely fails to show how such outdated studies could be relevant to establishing the existence of any **present or future** collusion that could conceivably be relevant to the UP/SP merger.

KCS also argues that the material might show the feasibility of divestiture proposals made by parties to this proceeding.^{2/} But such proposals must be evaluated on their own merits as conditions for restoring competition otherwise lessened by a UP/SP merger, not based on what Santa Fe -- not a primary Applicant in this proceeding -- might have considered as a business matter five or six years ago. Moreover, a study of a possible division of SP routes among major Class I Western railroads that was **not** pursued is not relevant to the proper conditioning of the transaction here.

Thus, Judge Nelson was clearly correct in ruling that the studies were "too long ago, too old, too far afield," to justify an order compelling their production. March 8, 1996 Discovery Conference Tr. 1891.

^{2/} KCS claims that Judge Nelson made findings at the May 30th Conference relating to "newly learned facts pertaining to the SF studies at issue" (KCS-61 at 4), among which were that "one of the studies described in the Krebs deposition corroborates the divestiture conditions being sought in the UP/SP merger application" (KCS-61 at 5). There were, however, no such findings. The record clearly shows that the Judge -- properly -- **assumed**, solely for purposes of ruling on KCS's request, the truth of KCS's various assertions, deciding that, even if true, those assertions would not justify production of the studies. Throughout the hearing, Judge Nelson merely repeated and sought to clarify KCS counsel's allegations. May 30, 1996 Discovery Conference Tr. 3387, 3389-3393, 3396-3398. But Judge Nelson made no findings on, nor did he "acknowledge[]" (KCS-61 at 4) the supposed truth of, those claims, and KCS misrepresents the record to the extent it is claiming that he did.

B. Judge Nelson's Decision Is Consistent With Commission Precedent

Commission precedent supports the conclusion that the McKinsey & Company studies are irrelevant to this proceeding. In Union Pac. Corp., et al. -- Control -- Missouri Pac. Corp., et al., Finance Docket 30,000, Decision on Discovery Appeals (Decided April 22, 1981) ("UP-MP Discovery Appeals") (copy attached hereto as Exhibit B), the Commission affirmed the ALJ's denial of a motion to compel production of documents referring or relating to other transactions contemplated by UP. The Commission held that "[t]he fact that Union Pacific may have considered other possible transactions is not likely to assist the Commission in determining the effect of the transaction ultimately proposed." Slip op. at 12. The Commission also held that UP should not be compelled to produce **any** studies that had been prepared more than five years before the decision, because such material "is too remote to be relevant in this proceeding." Slip op. at 3. The material sought by KCS does not concern -- and is even further afield from -- the merger at issue in this proceeding and is as stale as the material at issue in UP-MP Discovery Appeals.

C. Judge Nelson's Decision Is Also Consistent With the Practice In This Case

The parties to this case, **including KCS**, have consistently refused to their produce strategic planning studies. KCS refused to produce its "business plans or strategic plans," objecting, in pertinent part, that the request for such materials is "overbroad and unduly burdensome in that it seeks information **that is neither**

relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence." Kansas City Southern Railway Company's Objections To Applicants' First Set Of Interrogatories And Requests For Production Of Documents at 20 (responding to Request No. 27) (emphasis added) (copy attached hereto as Exhibit C).

In December 1995, Judge Nelson rejected KCS's motion to compel the Applicants in this proceeding to produce strategic and competitive analyses of another merger -- in that case, the BN/Santa Fe merger. See December 20, 1995 Discovery Conference Tr. 200. Thus, Judge Nelson's two rulings on the McKinsey & Company studies are entirely consistent with the positions of the parties -- including KCS when its strategic plans were being sought -- and with the practice in this case.

III. KCS Has Shown No Need For The Studies

In his most recent (May 30th) ruling, Judge Nelson held that KCS had failed to establish any reason to reopen his earlier denial of the request on relevance grounds. What counsel for KCS described as the "new evidence that comes from the deposition of Mr. Krebs" (May 30, 1996 Discovery Conference Tr. 3385) was not persuasive to Judge Nelson and should not be persuasive to the Board.

As noted above, KCS did not in fact learn anything new from the Krebs deposition that it did not already know from the

Grinstein, Ice, and Lawrence depositions.^{3/} Mr. Grinstein, in particular, had testified, in February, about a plan to break up SP among other railroads, and he testified that he was aware of that plan. Grinstein Dep. 106-107. KCS cited that very deposition testimony in its March 29th Comments. KCS-33 at 73-74.^{4/}

Judge Nelson correctly concluded that KCS could make its arguments without having the studies themselves. May 30, 1996 Discovery Conference Tr. 3411. Thus, KCS was not harmed by the denial of

^{3/} KCS misleadingly argues that BN/Santa Fe "placed in issue" the contents of the studies through Mr. Krebs's testimony in his Verified Statement that he had never seen or shared a plan for duopoly in the West. KCS-61 at 12. In fact, Mr. Krebs's testimony directly and narrowly responded to allegations made by KCS concerning the sharing of a supposed plan for a duopoly in the West. KCS-33 at 73-74. KCS, not BN/Santa Fe, "placed" the studies "in issue" by making assertions in its March 29 Comments about the content of the documents. Hence, KCS's argument would have the absurd effect of allowing a party to obtain discovery of irrelevant documents merely by making groundless allegations, which would have to be either conceded by silence or denied (thus "plac[ing] in issue" the material sought to be discovered). Furthermore, there is not the slightest substance to KCS's claim (KCS-61 at 5, 11-12) that there is an inconsistency between Mr. Krebs's deposition testimony and his Verified Statement; both were to the effect that any documents Mr. Krebs shared with competitors were not, as KCS had claimed (KCS-33 at 73), any kind of "blueprint" for "duopoly."

^{4/} KCS wrongly contends that the record shows that BN/Santa Fe "possesses" and shared more than one study with competitors (KCS-61 at 1, 3, 4, 11, 12), even going so far as to assert that six to twelve strategic studies were shared (KCS-61 at 12). In making this mistaken claim, KCS appears to be confusing Larry M. Lawrence's testimony, concerning the universe of studies done by McKinsey & Company for Santa Fe in the 1990-1991 period (Lawrence Dep. 66-68). Mr. Lawrence, the McKinsey & Company engagement manager overseeing the preparation of studies for Santa Fe, testified to the preparation by McKinsey & Company of about half a dozen studies for Santa Fe in the 1990-1991 period, nearly all of which addressed specific topics other than acquisition strategies. Lawrence Dep. 66-68. There is nothing in the record to suggest that any of these other studies was shared with anyone outside Santa Fe. KCS's contentions to the contrary misrepresent the record.

its belated request for the studies. KCS examined a number of BN/Santa Fe witnesses concerning the studies and was able to construct an elaborate, if misguided, analysis of the relevance of the studies to this proceeding.

Finally, there is no basis for even a suspicion that the sharing of the SP break-up study was improper. Mr. Krebs's deposition testimony shows that he inquired about a consensual, joint acquisition of SP lines in order to gauge interest in such a transaction. There is nothing untoward, from an antitrust perspective or any other, about bringing a study concerning a possible transaction to the attention of possible participants in the transaction. That is especially so in the railroad context because, if the parties had decided to go forward with an acquisition, the Interstate Commerce Commission would have reviewed whether the transaction was anticompetitive in any respect; the parties could accomplish nothing without full regulatory review. Of course, the transaction was **not** pursued. A possible transaction was discussed **five to six years ago** with some of those who might have participated. The discussions went nowhere and, in any event, have nothing to do with the application now pending before the Board.

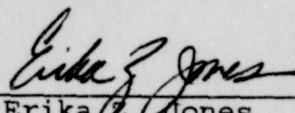
IV. CONCLUSION

KCS has failed to show that Judge Nelson made a "clear error of judgment" in denying reconsideration of his three-month-old discovery ruling, or that his decision not to reconsider "will result in manifest injustice." Decision No. 39, slip op. at 2

(served May 31, 1996). Judge Nelson was correct on March 8 when he ruled that the McKinsey studies were not relevant to this proceeding. He was also correct on May 30 when he ruled that KCS had not shown sufficient basis to reconsider that earlier ruling, particularly since KCS did not show a need to obtain the McKinsey studies themselves. Judge Nelson correctly exercised his discretion in addressing the KCS requests, and his decisions should be upheld.

For the foregoing reasons, the Board should deny KCS's Appeal.

Respectfully submitted,



Erika L. Jones
Adrian L. Steel, Jr.
Roy T. Englert, Jr.
Kathryn A. Kusske

Jeffrey R. Moreland
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(847) 995-6887

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

June 6, 1996

CERTIFICATE OF SERVICE

I hereby certify that copies of Response of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company to The Kansas City Southern Railway Company's Appeal from ALJ's Order Denying KCS's Renewed Request to Compel Burlington Northern/Santa Fe to Produce Certain Documents (BN/SF-60) have been served this 6th day of June, 1996, by first-class mail, postage prepaid on all Parties on the Restricted Service List in Finance Docket No. 32760 and by fax and hand-delivery on counsel for The Kansas City Southern Railway Company.

Kelley E. O'Brien

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UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION

+ + + + +

DISCOVERY CONFERENCE

-----X
IN THE MATTER OF: :

UNION PACIFIC CORPORATION, :
UNION PACIFIC RAILROAD COMPANY, :
and MISSOURI PACIFIC RAILROAD : Finance Docket
COMPANY : No. 32760
:

- 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. :
-----X

Wednesday, December 20, 1995

Federal Energy Regulatory
Commission
Hearing Room 3
Second Floor
888 First Street, N.E.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

THE HONORABLE JEROME NELSON
Administrative Law Judge

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 It seems to me a whole collateral inquiry into some
2 other proposal that failed, and I'm just not going to
3 get us down that one. Now as to (c), you want to use
4 this case, Mr. Lubel, to find out everything the
5 applicants had to say in the other merger?

6 MR. LUBEL: No, no. We're saying that if
7 these applicants have studies or analysis of the
8 competitive impact of the Burlington Northern/Santa Fe
9 merger, we think that's fair game under the statements
10 from the Commission that I mentioned at the beginning
11 of this.

12 JUDGE NELSON: I'm going to deny that
13 one. Too far afield. 14(a), seems to me, right in
14 the ballpark, and we're back to the question of the
15 privilege. Is there a question here?

16 MR. MILLS: May I inquire about 14(a)?

17 JUDGE NELSON: Haven't ruled on 14(a).

18 MR. MILLS: Oh, you haven't?

19 JUDGE NELSON: No, sir. Doesn't 14(a) get
20 you in the same privilege question that we discussed
21 before?

22 MR. ROACH: I think 14(a) is just the
23 U.P.-S.P. merger, and as to that, I think we discussed
24 it in connection with 4(a).

25 JUDGE NELSON: Let me see if I understand

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WASHINGTON, D.C. 20005

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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DISCOVERY CONFERENCE

-----X
IN THE MATTER OF: :

UNION PACIFIC CORPORATION, :
UNION PACIFIC RAILROAD COMPANY, :
and MISSOURI PACIFIC RAILROAD : Finance Docket
COMPANY : No. 32760
:

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SOUTHERN PACIFIC TRANSPORTATION :
COMPANY, ST. LOUIS, SOUTHWESTERN :
RAILWAY COMPANY, SPCSL CORP., :
AND THE DENVER AND RIO GRANDE :
WESTERN RAILROAD COMPANY. :
-----X

Friday, March 8, 1996

Federal Energy Regulatory
Commission
Hearing Room 3
Second Floor
888 First Street, N.E.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 2:00 p.m.

BEFORE:

THE HONORABLE JEROME NELSON
Administrative Law Judge

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

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WASHINGTON, D.C. 20005

1 are some factors there. I am going to ask you, Ms.
2 Metallo, to see if you can't address those.

3 With regard to the McKinsey study, I am
4 denying that discovery. It seems to me too long ago,
5 too old, too far afield, gets us into a collateral
6 dispute, and seemingly involves some burden that goes
7 beyond the slides and actually extends the production
8 of the documents.

9 So, Ms. Metallo, you have won as to
10 Matthews with regard to the speech made at the
11 meeting. And I may give you Krebs, but I need to know
12 somewhat more than I've gotten on the papers. I don't
13 have a confidence either way with regard to Mr. Krebs.

14 Why don't you address now why you need Mr.
15 Krebs with particular reference to the test set out on
16 Page 2 of Ms. Jones' letter? See on Page 2 the
17 paragraph that begins, "Moreover"? She refers to the
18 liberal standards of the federal rules, and she says
19 that "The CEO of a corporation normally may be deposed
20 only where the party seeking the deposition
21 demonstrates that the executive has unique or superior
22 personal knowledge of particular material

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WASHINGTON, D.C. 20006

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

+ + + + +

DISCOVERY CONFERENCE

-----X
IN THE MATTER OF: :

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

Thursday, May 30, 1996

Federal Energy Regulatory
Commission
Hearing Room 7
Second Floor
888 First Street, N.E.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

THE HONORABLE JEROME NELSON
Administrative Law Judge

NEAL R. GROSS

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WASHINGTON, D.C. 20005-3701

1 JUDGE NELSON: It looked like a collateral
2 injury.

3 MR. LUBEL: Okay. We now have -- are
4 revisiting this issue in a different way because we
5 have new evidence that comes from the deposition of
6 Mr. Krebs, and it's -- it's -- I have four reasons why
7 we think they should be made now -- we're asking that
8 they be made to produce this.

9 And the -- if I might briefly go through
10 those. Before I do, let me indicate I've given Your
11 Honor two aids. The first is -- actually, the back is
12 the actually his deposition, the Krebs deposition,
13 where he talks about this, certainly page 85 and 86.

14 The second is a chart, and I'll -- I'll
15 try to get to that as quickly as possible. What he
16 basically said in his deposition, Your Honor, is he
17 admitted, yes, there was a McKinsey study.

18 In fact, he said there were a couple of
19 studies. But we tried to focus on one aspect of these
20 studies.

21 And he said, "Yes, there was a study done
22 in that '90, '91 time frame, that it talked about

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1 we've got it confirmed by the man who had it done and
2 who used it. And there are two key points --

3 JUDGE NELSON: And he says they used it --

4 MR. LUBEL: Well --

5 JUDGE NELSON: -- to suggest the division
6 of the marketplace?

7 MR. LUBEL: Yes, and that's what my chart
8 involves. And that's our first argument. Our first
9 argument is, Your Honor, that the division that he
10 suggested is exactly or almost exactly what some of
11 the opposition, including my client, are suggesting be
12 done here as to the division of this measure. And
13 that makes it a relevant document.

14 Because it's evidence that -- that the
15 major players in this considered this very type of
16 division and considered it feasible back in '90. And
17 that makes it timely --

18 JUDGE NELSON: Say that again.

19 MR. LUBEL: Okay, and I'll show you -- let
20 me show you by the map. A picture is worth a thousand
21 words, Your Honor. Take the hard copy called the
22 McKinsey study --

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1 called the Gulf Coast, or the Cotton Belt Line, we
2 considered taking that to Santa Fe. And then the
3 line, the southern route from Houston to Los Angeles,
4 we considered UP taking that."

5 Now, that's his testimony as to what the
6 McKinsey study in general --

7 JUDGE NELSON: That did not happen.

8 MR. LUBEL: So -- it has not happened yet.
9 But look, Your Honor, now if you put the overlay, the
10 overlay is what we, the opponents, have proposed doing
11 in this case. We have proposed almost the same thing,
12 Your Honor.

13 We have proposed the blue line is the
14 Montana Railway --

15 JUDGE NELSON: I have it. The McKinsey
16 study corroborates or bolsters the conditions you seek
17 to have imposed.

18 MR. LUBEL: That's our first argument.

19 JUDGE NELSON: So, you would say there's
20 more to our conditions than just self-interest.
21 Although they happen to be self-interest, they're also
22 good ones.

1 MR. LUBEL: McKinsey thought about that.

2 JUDGE NELSON: McKinsey or Mr. Krebs
3 thought of that.

4 MR. LUBEL: And he went around and talked
5 to the people about it. And just to see there, the --
6 the blue line is the Montana Railway. In this case --

7 JUDGE NELSON: But you already know
8 everything you've told me. Why can't you just say
9 what you just said?

10 MR. LUBEL: Well, we can, Your Honor, but
11 the study --

12 JUDGE NELSON: What do you need?

13 MR. LUBEL: Well, because the study would
14 embellish that and would provide, you know, the
15 reasons -- we don't have the reasons why it was a good
16 idea, why dividing up the SP is a good idea. That's
17 what will be in the study.

18 But you -- so I can leave this, Your Honor
19 I think has the point here that the blue line is what
20 Montana Rail Link is proposing to buy.

21 The red line down below is what my client
22 and Conrail are proposing to take from SP, just as

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1 Santa Fe would take it. And then --

2 JUDGE NELSON: So this is your main point,
3 that the -- that the study --

4 MR. LUBEL: Yes, corroborates.

5 JUDGE NELSON: -- validates your own
6 request for conditions.

7 MR. LUBEL: Right.

8 JUDGE NELSON: This matter of Krebs
9 running around seeking to divide the railroads, that
10 seems to me --

11 MR. LUBEL: He was thinking it was a good
12 idea then. And we're saying, it's a good idea now.
13 We're saying corroborate before.

14 The second reason, Your Honor --

15 JUDGE NELSON: Well, what about the fact
16 that dividing up the marketplace is not what
17 competitors are supposed to be doing?

18 MR. LUBEL: That leads to my second point,
19 that this is -- the McKinsey study, what they were
20 proposing to do in '90 and what they went and talked
21 to their competitors on, I'm not saying they did
22 anything wrong, but it certainly raises a question as

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1 to whether there was some improper conduct in 1990
2 that now has been brought forth and --

3 JUDGE NELSON: And I support your argument
4 is that that's new. That wasn't before us when I last
5 ruled on this point.

6 MR. LUBEL: That's right. We only got it
7 when we took his deposition, which was -- you know,
8 just a few weeks ago. We got this revelation.

9 MS. JONES: May ninth.

10 MR. LUBEL: It was May ninth that we got
11 confirmed that the study exists and then what it -- in
12 general what it says. And then the fact that --

13 JUDGE NELSON: The fact that it exists is
14 not new.

15 MR. LUBEL: Right.

16 JUDGE NELSON: The fact that he went to
17 other competitors to discuss allocations of markets is
18 new. And how about the fact that it corroborates your
19 conditions? Is that new?

20 MR. LUBEL: Yes, Your Honor, because
21 although we thought it did something like that in
22 general, we didn't have any --

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1 JUDGE NELSON: It came out of the mouth of
2 Krebs to confirm that?

3 MR. LUBEL: It did. It did, Your Honor.
4 And we made -- and another point, Your Honor -- as I
5 said, I have four points.

6 One of my points, my third point, is that
7 in terms of its relevance in his -- they say, "Well,
8 this is old. You don't need to look at it."

9 In his rebuttal statement, Mr. Krebs'
10 rebuttal statement, he said -- he tried to respond --
11 you know, we made the allegation that there was this
12 study and they considered it a blueprint to divide up
13 the west.

14 In his rebuttal statement, he said, "There
15 was never any such a study that was a -- no blueprint
16 duopoly that I ever shared with any competitors."

17 Now, I think Mr. Krebs is an honest man,
18 but I think he was trying to cut things a little too
19 finely there. But the point is in his rebuttal
20 statement, he denied that there was ever --

21 JUDGE NELSON: So there's inconsistency
22 between his rebuttal statement --

1 If they -- and we'll hear from them on
2 that. But my point here is they placed it in issue by
3 trying to deny that he ever did anything like that,
4 including the inconsistency.

5 The point is, Your Honor --

6 JUDGE NELSON: In this array of arguments,
7 all of them can be proved without the study with the
8 exception of the extent to which the study
9 corroborates or validates or parallels your own
10 request of conditions.

11 MR. LUBEL: With this exception, Your
12 Honor. The study could say -- the study could have
13 been very aggressive, and the study could have said,
14 "If you do this, if you have it divided up like this,
15 you all will be able to, as a group, dominate the
16 market," et cetera, et cetera.

17 In other words, it may have had
18 embellishment and reasons and because, you know --
19 that are in more detail --

20 JUDGE NELSON: It may say that if you --
21 if you do what your conditions would do, you will
22 dominate the market?

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1 MR. LUBEL: Well, if they had done that in
2 '90 --

3 JUDGE NELSON: How does that help you get
4 the conditions?

5 MR. LUBEL: With -- with -- well, it
6 wouldn't help on the conditions because we're dealing
7 with different players.

8 JUDGE NELSON: You want certain
9 conditions.

10 MR. LUBEL: We want --

11 JUDGE NELSON: But you say the case for
12 those conditions is bolstered by the McKinsey report,
13 as far as you can tell.

14 MR. LUBEL: Right.

15 JUDGE NELSON: I understand that. Now,
16 you say the McKinsey report may contain in it
17 something about these conditions creating an anti-
18 competitive situation.

19 MR. LUBEL: No, it would be if they had
20 done it. If those railroads had done it, those large
21 railroads: Burlington Northern, Santa Fe and UP had
22 done it.

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1 JUDGE NELSON: Had done what they are now
2 doing.

3 MR. LUBEL: Right. If they had done -- in
4 effect, they are now doing it because Burlington
5 Northern will be able to go over these routes through
6 trackage rights.

7 What -- what I'm saying is it would relate
8 not to the issue of corroborating that carving up the
9 SP is viable, which is what our position is. But
10 we're saying we're a smaller railroad. For us to take
11 it, it doesn't create any --

12 JUDGE NELSON: Okay, so -- so --

13 MR. LUBEL: But with the study in mind,
14 Your Honor, the study in mind --

15 JUDGE NELSON: The claim is that Mr. Krebs
16 has brought the study back into the case and that it
17 could lead to the discovery of admissible stuff and
18 might well corroborate your case for conditions?

19 MR. LUBEL: Yes. And if I might make a
20 final point, Your Honor, they have said that the
21 record is closed and that we couldn't put this in
22 anyway.

1 JUDGE NELSON: I'm going to deny this
2 request. First, it seems to me to be a long time
3 since the deposition was taken until today and that is
4 something that could have moved more quickly.

5 Secondly, there's at least a question, a
6 significant question, about whether on the
7 Commission's procedures, more discovery of this nature
8 is now authorized.

9 Third, I think you can prove everything
10 you told me anyway with what you already have. It
11 would simply be gilding the lily to get the study.
12 And for those reasons, at this stage, and those
13 circumstances, I'm going to deny the request.

14 That concludes this morning's session.
15 We're going to reconvene this afternoon. Are we?

16 MR. LUBEL: Your Honor, I -- yes, at 3:00
17 with Mr. Stone. But could I revisit one issue on the
18 maintain market dominance remark and --

19 JUDGE NELSON: With reference to the 4:30
20 release?

21 MR. LUBEL: Yes, because -- yes, and I
22 just throw this out.

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INTERSTATE COMMERCE COMMISSION

DECISION

SERVICE DATE

APR 27 1981

Finance Docket No. 30,000^{1/}

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
- CONTROL - MISSOURI PACIFIC CORPORATION AND MISSOURI
PACIFIC RAILROAD COMPANY

DECISION ON DISCOVERY APPEALS

Decided April 22, 1981

On March 10, 1981, Southern Pacific Transportation Company and its affiliate St. Louis Southwestern Railway Company (collectively SPT) filed interlocutory appeals to four rulings of Administrative Law Judge Paul Cross denying various SPT discovery requests. Applicants (collectively UP) replied on March 12, 1981. Our jurisdiction to hear this appeal was established in the decision served October 15, 1980 in this proceeding.

SPT has appealed the following four specific rulings made on March 3, 1981:

(1) denial of SPT's oral motion to compel production of pre-1979 documents pertaining to internal discussions or analyses of the possibility or desirability of a Union Pacific/Missouri Pacific consolidation;

(2) denial of SPT's oral motion to compel production of certain studies prepared prior to consideration of the Union Pacific/Missouri Pacific consolidations by the Union Pacific board of directors;

(3) denial of SPT's Motion to Compel Answers to Interrogatories and Production of Documents (SPT-19) dated February 2, 1981; and

(4) denial of SPT's Motion to Compel Production of Requested Data and Documents (SPT-20) dated February 6, 1981.

We will address each request in turn.

Oral Motion to Compel Production
of pre-1979 Documents

By oral motion on March 3, 1981, SPT sought production of internal discussions or analyses by Union Pacific staff

^{1/} Enbraces F.D. No. 30,000 (Sub-Nos. 1-10, 14-17) and Nos. MC-F-14448 and MC-F-14449.

of the possibility or desirability of a Union Pacific/ Missouri Pacific consolidation. The Judge denied the motion.

SPT based its request on the alleged representation of applicants' counsel that no such discussions had taken place prior to January 1, 1979.^{2/} In reliance upon this representation SPT states that it restricted the scope of its discovery to the time period after January 1, 1979.

Upon cross examination of Mr. William S. Cook on March 3, 1981, it was discovered that, while discussions of the present proposal of consolidation of Union Pacific and Missouri Pacific had commenced in 1979, the possibility of such a consolidation had been considered much earlier. On at least two prior occasions Missouri Pacific had approached Union Pacific on the possibility of a merger and Union Pacific had concluded that it was not the right time to pursue such a consolidation.^{3/}

Upon learning of these pre-1979 contacts, counsel for SPT moved for production of documents related to consideration of the earlier proposals. SPT now argues that it was improper for the Judge to deny its motion.

Applicants argue in reply that the earlier consideration of possible mergers is irrelevant to consideration of the proposed transaction which was not negotiated until late 1979. Moreover, applicants find "specious" SPT's allegation that it was misled by the representation that no negotiations occurred prior to January 1, 1979.^{4/} Applicants allege that all railroads have studied restructuring possibilities in recent years, especially after the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4R Act).

^{2/} By letter dated October 2, 1980, counsel for applicants stated:

The time period governing all searches and production shall be January 1, 1979, to ... date In this connection, applicants now state ... that no discussions - either between officers of the applicants or among officers of any individual applicant - pertaining to the transactions that are the subject of the above proceedings occurred prior to January 1, 1979.

^{3/} Transcript p. 267-269.

^{4/} Applicants cite the language of the letter of October 2, 1980 stating that there were no internal discussions prior to January 1, 1979, "pertaining to the transactions that are the subject of these proceedings."

Discussion of possible consolidation of Union Pacific and Missouri Pacific prior to 1979 technically may not pertain to the development of the specific consolidation proposal before us. Nonetheless, consideration of merger with the same partner, a very short period of time prior to the actual consolidation proposal, must necessarily have provided background for negotiating the final proposal. Discovery of documents related to these discussions or analyses may very well lead to introduction of evidence relevant to the Commission's consideration of the public interest in this proceeding, particularly in the area of expected benefits of the transactions.

For this reason we believe SPT's oral motion to compel production of pre-1979 documents pertaining to internal discussions or analyses of the possibility or desirability of a Union Pacific/Missouri Pacific consolidation should have been granted. We will grant the appeal, but limit discovery of such material to the time period after January 1, 1976. Material prior to this time is too remote to be relevant in this proceeding.^{5/}

Oral Motion to Compel
Production of Certain Studies

The testimony of Mr. Cook also revealed the existence of certain studies on potential consolidations prepared by Union Pacific prior to consideration of the consolidations by its board of directors. SPT argues that such studies are relevant to the development of the proposed transaction and should be produced. While applicants noted that they would not object to production of parts of the studies,^{6/} they argued that the studies were dated, of little usefulness and that portions of the studies dealt with sensitive considerations of possible mergers with railroads other than Missouri Pacific and should not be subject to discovery in this proceeding.

The Judge denied SPT's motion.

For the reasons discussed above regarding production of pre-1979 documents, we believe the portions of the post January 1, 1976 studies specifically dealing with Missouri Pacific should be made available to SPT.^{7/} We

^{5/} In addition, materials prepared before 1976 would not reflect the effectiveness of the 4R Act. See also transcript page 273.

^{6/} Transcript p. 315-316 and 848-849.

^{7/} The interlocutory appeal did not request material for other than Missouri Pacific.

agree with applicants that material not related specifically to Missouri Pacific may be sensitive and need not be revealed in this proceeding.

SPT's motion should have been granted to the extent described above. SPT's appeal is granted.

Motion to Compel Production of
Requested Data and Documents (SPT-20)

SPT-20 was filed on February 6, 1981. In this motion, SPT sought orders compelling applicants to respond to, and to produce, the documents requested in several outstanding discovery requests. Some of the items remained in dispute at the commencement of hearings on March 3, 1981, when the Judge denied the motion. We will address each item raised in SPT's appeal.

SPT First Set of Interrogatories, Requests 12 and 13: ^{8/} These requests deal with material submitted to or used in any presentation made to the various boards of directors of applicants. Applicants allege in their reply that they have produced all materials covered by these requests. Accordingly, SPT's appeal with regard to these requests is moot.

SPT Request for Drafts of Verified Statements: By letter dated January 27, 1981, counsel for SPT requested a copy of the initial drafts of each verified statement for each witness sponsored by applicants, since all of the applicants' top officers and policy witnesses have no underlying work papers supporting their testimony. In this context, SPT alleges, the drafts are necessary for adequate cross examination of these witnesses.^{9/}

In reply applicants cite the decision in this proceeding served December 10, 1980, in which draft verified statements were denied the Missouri-Kansas-Texas Railroad Company, and the decision in Finance Docket No. 28799 (Sub-No. 1), St. Louis Southwestern Railway Company - Purchase (Portion) (not printed) (October 12, 1979) barring discovery of draft verified statements.

^{8/} "12. Identify and produce all documents submitted to the Board of Directors of each applicant herein referring or relating to the transaction proposed herein."

"13. Identify and produce all documents used in connection with any presentation made to the Board of Directors of each applicant herein concerning the proposed transaction."

^{9/} If the request is denied SPT seeks, "at the very least," that the Judge conduct an in camera inspection to determine whether the drafts should be protected. The request for in camera inspection will be discussed infra.

Draft verified statements, whether written originally by the witnesses or by an attorney, are refined and focused by the interaction of the witness and the attorney. As such the drafts are indicative of the process followed by the attorney in preparation for litigation and deserve protection under the work product doctrine. See United States v. Nobles, 422 U.S. 225, 238-39 (1975), and Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

Moreover, the absence of work papers and unavailability of draft verified statements do not preclude SPT's cross examination of each witness based upon the submitted statements.

The Judge did not abuse his discretion in denying the motion, and SPT's appeal seeking draft verified statements will be denied.

SPT's Ninth Set of Discovery Requests, February 2, 1981: SPT's Ninth Set of Discovery Requests is set forth in Appendix A. It calls for production of all correspondence and other materials exchanged between and among the top executive officers within each of the three carrier applicants and their respective parent organizations concerning the proposed transactions. SPT states in its appeal that the purpose of these discovery requests was to obtain any documents or correspondence sent to or received by these executives. SPT cites the lack of any work papers describing the evolution of the verified statements of applicants' executives as justifying the need for discovery of these items. SPT alleges that compliance with its request would require a search only of the files of seven top executives of applicants.

In reply applicants offer the following points. First, the requests are extremely broad. Second, SPT has allegedly already discovered against applicants with regard to Union Pacific's proposed acquisitions of both Missouri Pacific and Western Pacific.^{10/} Third, applicants allege that compliance with SPT's request would require a search of the files of 48 executives, including all the vice-presidents set forth in the request.

The verified statements with which SPT is concerned were filed along with the primary applications in these

^{10/} Requests 15 and 16 of SPT's First Set of Discovery Requests called for "all documents which refer or relate to the possible acquisition or control of MP (and WP) by UP or merger or consolidation of UP and MP (or WP)." See also Requests 12 and 13 (documents used in connection with presentation to applicants' Boards of Directors regarding the transactions) and Request 21 (documents generated by UP in connection with its review of the business or property of MP and WP) in SPT's First Set of Interrogatories and Requests for Production.

proceedings on September 15, 1980. The statements have been available to SPT for 6 months. Additionally, SPT has discovered numerous documents related to consideration of the proposed consolidation by applicants' witnesses pursuant to its other discovery requests. While applicants did not keep files by individual witnesses, they did categorize working papers and material by subject matter and an extensive index in this form was made available to SPT.^{11/}

We do not believe further discovery is necessary to allow SPT to cross examine applicants' witnesses effectively. The Judge was within his discretion to deny the motion and the appeal will be denied.

Motion to Compel Answers to Interrogatories and
the Production of Documents (SPT-19)

SPT-19 was filed on February 2, 1981. In its motion SPT sought orders compelling production of a number of disputed documents as well as answers to described interrogatories. The motion was denied by the Judge on March 3, 1981. We will address each item raised in SPT's appeal.

Specific Documents: Since the time SPT-19 was filed applicants have produced a number of documents to SPT. There remain 58 documents which have not been produced.^{12/}

In denying SPT's motion to produce these documents, the Judge cited the reasoning set forth by applicants in their reply to the motion.^{13/}

Applicants rely on three grounds to justify their withholding of the remaining documents: (1) attorney-client privilege, (2) the work product doctrine, and (3) confidentiality.

The disputed documents include 44 for which the attorney client privilege is invoked to preclude

^{11/} Transcript, January 6, 1981, page 124-25.

^{12/} The documents are described by affidavits of counsel which are Attachments F, G and H to UP-42, applicants' reply to SPT-19. Sixty-two documents are described. Three were ordered produced by the Judge on March 3, 1981 (F-16 and 34, and G-2) and one (F-53) has since been voluntarily produced by applicants. See UP-57, Applicants' Reply to Interlocutory Appeal, at page 22, footnote 4. Document G-2 was ordered produced by the Judge after counsel for MP volunteered to make it available. See Transcript page 230.

^{13/} Transcript page 171.

discovery.^{14/} The work product doctrine is invoked to protect 40 documents, 32 of which are also included under attorney-client privilege.^{15/} The work product doctrine without the attorney-client privilege is invoked to protect 8 documents.^{16/} Applicants continue to withhold 11 documents because of their confidential nature.^{17/} Of these, nine are commercially sensitive^{18/} and two^{19/} relate to confidential settlement negotiations.^{19/}

(1) The Attorney-Client Privilege.

The attorney client privilege exists "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests and the observance of law and the administration of justice."

Upjohn Co. v. United States, 66 L. Ed.

2nd 584, 591 (1981). Our rules comprehend privileged material at 49 C.F.R. 1100.55.^{20/} The Supreme Court in Upjohn, *supra*, recently noted that "the privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice." 66 L.Ed. 2d. at 592.

SPT argues that the attorney client privilege does not apply to a lawyer acting outside of his responsibilities as a lawyer, and that in this proceeding applicants' counsel may have been evaluating the information in the withheld documents in a business rather than legal sense.

^{14/} Documents F-1-11, 14, 15, 17-21, 30-33, 35-46 and 48-52; G-1; and H-1-4.

^{15/} Documents F-1-11, 14, 15, 17-21, 30-33, 35, 48-52; G-1; and H-2-4.

^{16/} Documents F-12, 13 and 25-29.

^{17/} Documents F-22-28, 52, 54 and 55; and H-5.

^{18/} Documents F-22-28, and 52; and H-5.

^{19/} Documents F-54, 55.

^{20/} See General Rules of Practice, 346 I.C.C. 603 (1974).

We find this argument unconvincing. The affidavits produced by applicants describe in detail the nature of the documents involved. It appears unmistakable that they relate to the preparation, filing and prosecution of the application in this proceeding. The factual nature of some documents does nothing to affect the privilege.^{21/}

The Judge did not abuse his discretion in denying discovery of those items allegedly protected by the attorney client privilege.

(2) The Work Product Doctrine.

The work product doctrine is a long recognized rule protecting work done in anticipation of litigation.^{22/} The doctrine is presently codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, which allows a qualified protection to documents "... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer or agent) ...". Such documents are discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Mental impressions, conclusions, opinion, or legal theories of "an attorney or other representative of a party concerning the litigation" are not to be disclosed.

SPT argues that our rules do not specifically apply the work product doctrine to Commission proceedings. Moreover, it argues, application of the work product doctrine in administrative proceedings is not justified and would result in all workpapers related to Commission applications being shielded from discovery.

We disagree. While our rules do not specifically adopt the work product doctrine, it has been previously applied in administrative proceedings.^{23/} We are specifically charged

21/ See Upjohn, *supra*, at 592 where the Supreme Court cites ABA Code of Professional Responsibility, Ethical Consideration 4 - 1.

22/ Hickman v. Taylor, 329 U.S. 495 (1947).

23/ See Natta v. Hogan, 392 F.2d 686, 693 (10th Cir. 1968) (patent interference proceedings); Upjohn, *supra* (administrative subpoena); and Finance Docket No. 30,000, Union Pacific Corp. v. Control (decision served December 10, 1980).

with conforming our rules and procedures as nearly as possible to those in use in the courts of the United States, General Rules of Practice, 346 i.C.C. 603, 619 (1974). There is no reason the work product doctrine should not apply to Commission proceedings, and we see no need for the dire consequences predicted by SPT to flow from its application. However, following the Supreme Court's example in Upjohn, 66 L.Ed. at 591, we will not "lay down a broad rule or series of rules to govern all conceivable future questions" in the area of privilege. The work product doctrine can be applied on a case by case basis in Commission proceedings.

The documents withheld by applicants pursuant to the work product doctrine appear properly withheld. One document (P-47) reflects the legal opinions of applicants' counsel. The remaining documents are summaries of specific shippers' volumes which do not appear necessary to SPT's case in light of the voluminous materials otherwise provided regarding traffic.

The Judge did not abuse his discretion regarding those items protected by the work product doctrine.

(3) Confidentiality.

Confidential business information is not discoverable unless the relevancy of the information is sufficient to outweigh its commercial sensitivity. Confidential business matters are similar to trade secrets and the courts are loath to order their disclosure absent a clear showing of immediate need for the information requested, Duplan Corp. v. Derring Millikin, Inc., 397 F. Supp. 1146, 1185 (D.S.C. 1975). The Duplan court went on to say "[o]nce the [trade secrets] privilege is asserted . . . the party seeking discovery must make a clear showing that the documents are relevant to the issues involved in the litigation. In doubtful situations production will not be ordered." 397 F. Supp. at 1185, emphasis in original.

SPT in its appeal does not address the specific relevance of the confidential documents withheld. Instead it argues that applicants should have the burden of showing the need for protection of the documents under 49 C.F.R. 1100.55(c).^{24/}

^{24/} SPT seems to argue that Requests 12 and 13 and Item 12 of its First Set of Interrogatories require production. These items seem unrelated to confidentiality. Requests 12 and 13 are discussed, supra.

We disagree. The determination of whether or not to allow or require discovery of confidential material requires a balancing of interest. While SPT's discovery of the withheld UP documents may have been useful, in either a tactical or commercial sense, it does not appear necessary in light of the materials already made available to SPT.^{25/}

Confidential material related to settlement negotiations clearly should not be discoverable in order to encourage private settlement of disputes. See Reichenbach v. Smith, 528 F. 2d. 1072 (5th Cir. 1976).

The Judge did not abuse his discretion in denying the motion regarding confidential documents.

(4) In camera inspection.

SPT has requested generally that all documents withheld by applicants be subject to an in camera inspection to determine whether applicant's characterization of the documents is correct and whether the documents should be protected. While in camera inspection is occasionally a useful tool, we do not believe it is necessary for these documents. Applicants have provided a sworn description of each withheld document and both parties have thoroughly argued the issues related to their discovery in motions, appeals and replies. This is sufficient information to determine the discoverability of the disputed documents without an in camera inspection. See Dura Corporation v. Milwaukee Hydraulic Products, Inc., 37 F.R.D. 470 (1965).

Moreover, an inspection places an additional burden upon the Commission's resources in this proceeding which is not justified by the circumstances. This proceeding is governed by the strict time limits of 49 U.S.C. 11345; additional adjudicative burdens, which may affect the schedule of hearings, will not be placed on Commission resources without good cause.

In light of the material already discovered in this proceeding, the sworn description by applicants of the withheld documents, the discernable relation of the documents to the various privileges claimed, and the alternative sources for much of the protected information (such as traffic studies), the Judge did not abuse his discretion and the appeal is denied with respect to all of the specific documents.

^{25/} SPT alleges that an inconsistency exists regarding the production of document G-2 and the withholding of other documents. We find no inconsistency since document G-2 was voluntarily produced by applicants after discussion with the Judge, transcript page 230, and with certain confidential material masked, transcript page 1548-9.

Documents Referring to Other Possible Mergers Involving
UP: In SPT-19, SPT sought an order compelling applicants' response to Request 17 of SPT's First Set of Discovery Requests.^{26/} SPT renews its request on appeal, alleging that discovery of Union Pacific's plans regarding other railroads is necessary to allow SPT to present the antitrust issues involved in this proceeding.

Applicants argue that, by definition, this request focuses on matters outside the scope of this proceeding and seeks documents not "relevant to the subject matter of the pending proceeding" within the meaning of 49 C.F.R. 1100.55(a).

SPT states that this argument by UP is inconsistent with what Union Pacific argued in support of its Motion for Dismissal in Southern Pacific Transportation Company v. Union Pacific Corporation, Civil Action No. 80-5281 MRP (Tx), Central District of California, filed November 25, 1980.^{27/}

Applicants respond that there is no justification for SPT's attempt to bootstrap support for its discovery request in this proceeding by reference to its District Court antitrust action against applicants. The antitrust action, like this proceeding, addresses the proposed consolidation of Union Pacific, Missouri Pacific and Western Pacific. It does not address the potential acquisition of some other railroad company.

SPT makes no effort to show how the information requested would support its allegations of monopolization, particularly regarding carriers other than those involved in this proceeding, since no discussions of these possible consolidations ever reached the point of negotiations.^{28/} Moreover, any consolidation of other carriers would require Commission approval, and in the proceeding to obtain such approval the Commission would carefully review the transaction to determine its competitive effect.

To the extent the request indirectly seeks information about how the proposed consolidations might weaken other carriers (so that those carriers were susceptible to takeover), the Commission and the parties have already endeavored to obtain more direct and probative evidence. Indeed the Commission's intent to focus on the impact of the

^{26/} "17. Identify and produce all documents referring and relating to the possible acquisition of control by UP or merger or consolidation with UP of any other railroad company or company owning or controlling a railroad company. As used in this interrogatory the term "UP" refers to Union Pacific Railroad Company or its parent subsidiary."

^{27/} UP argued that matters raised in the District Court antitrust proceeding were within the primary and exclusive jurisdiction of the Commission and should be considered in this proceeding.

^{28/} Transcript pages 265-9.

proposed transaction on competition among carriers has been made clear from the very first decisions in this proceeding. See decision of August 25, 1980. Thus, if the proposed acquisitions were found likely to monopolize the transcontinental movement of freight, the Commission would carefully examine the transaction to determine whether there is any counterbalancing public interest. See McLean Trucking Co. v. United States, 321 U.S. 67 (1944). Should the Commission approve the transaction despite any perceived monopolization, the applicants' consummation of the transaction as approved by the Commission would be exempt from the operation of the antitrust laws. See 49 U.S.C. 11341(a) and Minneapolis & St. L. Ry. Co. v. United States, 361 U.S. 173 (1959), reh. den. 361 U.S. 945 (1960).

In making its inquiry on the competitive effect of a transaction, the Commission focuses its attention on the particular transaction in issue. The fact that Union Pacific may have considered other possible transactions is not likely to assist the Commission in determining the effect of the transaction ultimately proposed. The discovery request seeks documents not relevant to the subject matter of this proceeding and, therefore, is not proper discovery under 49 C.F.R. 1100.55(a).^{29/}

The Judge did not abuse his discretion in denying this motion, and the appeal is denied.

Oral Communications Concerning the Proposed Merger: In SPT-19 an order was sought compelling applicants' response to request 18 of SPT's First Set of Discovery Requests.^{30/}

^{29/} The Judge did allow cross examination on these matters.

^{30/} "18. Identify each communication, meeting, conference, discussion, or telephone conversation wherein the possible or proposed merger, consolidation or control of UP, MP and/or WP was discussed by any officer or employee of applicants. For each such discussion state: (a) the participants; (b) the date and time of discussion; (c) the subject of the discussion; and (d) a description or summary of the contents of the discussion."

SPT argues that this information is made necessary by applicants' instructions to its personnel not to prepare written memoranda of meetings involving the consolidation.^{31/}

Applicants objected to the request, alleging it to be unreasonably broad, burdensome and vague. Applicants state that complying with this request would be overwhelming, for each of applicants' officers may have had thousands of oral communications regarding the consolidation.

Because of the volume of material already made available to SPT and the extraordinary difficulty of complying with the request, the motion was properly denied by the Judge. The appeal is denied.

Request 47 of SPT's First Set of Discovery Requests: By this request SPT seeks to compel production by UP of all documents concerning Union Pacific's relationship with Chicago and North Western Transportation Company (CNW).^{32/} The requested information is allegedly necessary to determine the status of CNW as a friendly connection if SPT's request for trackage rights over Union Pacific is granted. Additionally, SPT argues the discovery request is relevant to whether CNW will continue to function if the merger is approved, to CNW's role as a coal carrier, and to the present ability of Union Pacific and CNW to conduct coordinated operations short of merger. Finally, SPT argues this information is relevant to its antitrust claim against Union Pacific.

^{31/} SPT's reference is to a document obtained in discovery entitled "Procedures for Handling Confidential Materials" attached as Exhibit F to SPT-19. The document sets forth procedures for controlling written material; it notes that "memoranda containing speculative personal opinions or memorializing meetings often cannot be protected from discovery and may confuse issues in the ICC proceedings." The document appears to be an appropriate guide to preparation of materials related to this proceeding.

^{32/} SPT defines "relationship" as:

- (a) Ownership or purchase by UP of stock of CNW; ownership or purchase by any other applicant of the stock of CNW;
- (b) intention of any applicant to purchase or otherwise acquire any ownership interest in CNW stock or assets of any kind;
- (c) any loan or advance of funds or planned or possible loan or advance of funds by any applicant to CNW;
- (d) any discussions with CNW officers or employees concerning the use of federal funds by CNW for improvements; and
- (e) any dealings or plans concerning the Powder River Basin.

Applicants argue that the request focuses exclusively on matters outside the scope of this proceeding.

We agree that the request exceeds the scope of this proceeding. A separate consolidation proceeding would be required to approve any acquisition of CNW. No matter what security interest in CNW properties, Union Pacific might obtain, UP cannot lawfully take possession of or operate any segment of CNW's rail line without Commission approval. Separate proceedings are presently ongoing regarding CNW's role in the Powder River Basin.^{33/} Moreover, SPT has already discovered against applicants with regard to the effect of the proposed transaction on CNW.^{34/} Applicants also have provided, in response to the Commission's information requests, detailed information regarding the effect of the merger on the ability of CNW to provide essential services.^{35/} Applicants' traffic diversion studies and underlying work papers address in detail the impact of the proposed transaction on CNW.

The ability of Union Pacific and CNW to closely coordinate their operations is a matter properly explored in this proceeding as it may reflect on the potential benefits of the transaction. See Ex Parte No. 282 (Sub-No. 6), Railroad

Consolidation Procedures - General Policy Statement,

367 U.S. 784 (1981). However, the discovery requests are much broader than operating relationships and entail a much greater burden. Accordingly, the Judge did not abuse his discretion in denying the motion.

Requests 3 and 4 of SPT's Third Set of Discovery Requests: In its Third Set of Discovery Requests, SPT sought production of documents related to applicants' Responses to Requests for Additional Information.^{36/} SPT argues that these requests may produce material which may be inconsistent with applicant's responses.

^{33/} Finance Docket Nos. 28934 and 29066.

^{34/} Request 45 of SPT's First Set of Discovery Requests.

^{35/} Applicants' Responses to Request for Additional Information, UP-19A/MP-18A/WP-16A. SPT alleges the request for additional information regarding the merger's impact on CNW's continued ability to provide essential service necessarily makes inquiry into existing or planned relations between CNW and Union Pacific relevant to this proceeding. We do not agree.

^{36/} "3. Identify and produce all documents in the possession of applicants referring or relating to the said Responses, any related material or any part hereof.

"4. Identify and produce all documents in the possession of applicants referring to or relating to the Order of the Commission served August 15, 1980, in these proceedings which required the filing of the said Responses by applicants."

Applicants reply that these requests are burdensome, and, in light of the voluminous material already produced to SPT, unnecessary.

We agree. SPT's requests represent a classic "fishing expedition." The Judge properly denied the motion. The appeal will also be denied.

Summary. We have discussed each of the four SPT motions ruled upon by the Judge on March 3, 1981. Upon reconsideration, we will grant the appeal from each of the denials of the oral motions, to compel production of pre-1979 documents pertaining to internal discussions or analyses of the possibility or desirability of the proposed consolidation and to compel production of certain studies prepared prior to consideration of the consolidation by the Union Pacific board of directors, with both limited in time to the period after January 1, 1976. We will deny the appeal from the denials of SPT-19 and SPT-20.

It is ordered:

(1) The interlocutory appeal of Southern Pacific Transportation Company is granted to the extent set forth above.

(2) This decision is effective upon service.

By the Commission, Division 2, Commissioners Gresham, Trantum and Alexis. Commissioner Trantum was absent and did not participate.

(SEAL)

AGATHA L. MERGENOVICH
Secretary

ORIGINAL

KCS-24

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
OBJECTIONS TO APPLICANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS

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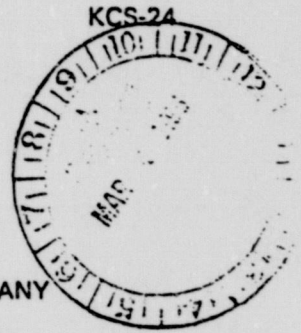
Attorneys for The Kansas City Southern
Railway Company

March 4, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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



KANSAS CITY SOUTHERN RAILWAY COMPANY'S
OBJECTIONS TO APPLICANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS

The Kansas City Southern Railway Company, Inc. ("KCS") hereby serves its Objections to Applicants' First Set of Interrogatories and Requests for Production of Documents to Kansas City Southern Railway Company pursuant to paragraph 1 of the Discovery Guidelines adopted by the Commission on December 5, 1995.

GENERAL OBJECTIONS

The following general objections are made with respect to all of the interrogatories and document requests. Any additional specific objections are stated as to each interrogatory.

1. KCS objects to Applicants' First Interrogatories and Requests for Production individually and collectively in that the majority of said discovery requests seek information or documents that have no relevance to the pending Application or seek information relevant to KCS's filing, which is not due until March 29, 1996. Said interrogatories and document requests also are overly broad, burdensome and apparently propounded in an attempt to harass KCS and divert its resources from preparation of its filing due on March 29, 1996.

2. KCS objects to Applicants' interrogatories and document requests to the extent they attempt to require production of documents prior to the time set forth in the Discovery Guidelines or in a more expeditious manner than Applicants.

3. KCS objects to the extent the interrogatories and document requests seek documents or information prior to January 1, 1993.

4. KCS objects to production of, and is not producing, documents or information subject to the attorney-client privilege.

5. KCS objects to production of, and is not producing, documents or information subject to the work product doctrine.

6. KCS objects to production of public documents that are readily available, including but not limited to documents on public file at the STB or the Securities and Exchange Commission or clippings from newspapers or other public media.

7. KCS objects to the production of, and is not producing, draft verified statements and documents related thereto. In this and in prior railroad consolidation proceedings, such documents have been treated by the parties as protected from production.

8. KCS objects to the extent that the interrogatories and document requests seek highly confidential or sensitive commercial information (including, *inter alia*, contracts containing confidentiality clauses prohibiting disclosure of their terms) that is of insufficient relevance to warrant production even under a protective order.

9. KCS objects to the interrogatories and document requests to the extent that they call for the preparation of special studies not already in existence.

10. KCS objects to Paragraph XIII of the Definitions and Instructions insofar as it requests that responsive documents be sent to Applicants' attorneys rather than put in KCS's Document Depository.

11. KCS objects to Paragraph XXXII of the Definitions and Instructions to the extent that it seeks to impose any duty or obligation upon KCS that exceeds the practice of Applicants

in this proceeding. Accordingly, KCS will produce a log of privileged documents in the same manner and within the same time limits as established by Applicants.

12. KCS objects to Paragraph XXXIII of the Definitions and Instructions in that inclusion of "affiliates, subsidiaries, officers, directors, employees, attorneys, agents and representatives" in the definition of railroads, shippers, consultants or companies is unduly vague, overbroad and not susceptible of meaningful application in the context of many of the interrogatories and document requests.

SPECIFIC OBJECTIONS

KCS incorporates by reference the General Objections set forth above as to each interrogatory and document request. In addition, KCS objects to individual interrogatories and document requests as follows:

Interrogatory No. 1: Identify and describe in detail any agreements that KCS has with any other party to this proceeding regarding positions or actions to be taken in this proceeding. Routine procedural agreements, such as agreements concerning the order of questioning at depositions or the avoidance of duplicative discovery, need not be identified. If KCS contends that any such agreement is privileged, state the parties to, date of, and general subject of the agreement.

Objection: KCS objects to this interrogatory as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this interrogatory to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Interrogatory No. 2: In connection with the reported acquisition by Kansas City Southern Industries, Inc., of a 49% interest in Mexrail, Inc., and any related transactions, do

either or both of KCS or Tex Mex or their parents or affiliates intend to apply to the Board for (a) control authority under 49 U.S.C. § 11323 (formerly 11343), (b) a declaration that there is not a control relationship between KCS and Tex Mex requiring control authority under 49 U.S.C. § 11323 (formerly 11343), or (c) any other Board action? If so, when will this application be filed? If not, explain why not.

Objection: No further objection.

Interrogatory No. 3: Identify each of rail line where KCS owns the track and another railroad has trackage rights, or where KCS operates over another railroad on trackage rights, in each instance identifying the other railroad. Production of the trackage rights agreements will suffice as an answer. With respect to each segment where KCS owns the track and another railroad has trackage rights, identify each instance in which KCS has taken any actions, or failed to take any action, resulting in interference with or limitation on the ability of the tenant railroad to compete effectively with KCS or any other transportation company or to operate its trains as it would if it owned such track segment.

Objection: KCS objects to this interrogatory as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Interrogatory No. 4: Does KCS discriminate against trackage rights tenants in the dispatching and other service that it provides where other railroads operate over KCS lines? Have any such allegations been made? If so, were they well-founded?

Objection: KCS objects to this interrogatory as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not

due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Interrogatory No. 5.: The Verified Statement of Curtis M. Grimm submitted with KCS-3 contains the following assertions at page 4: "[B]ased on 1993 data, there are 164 BEA origin-destinations with traffic greater than \$2 million that will go from 2-1 independent alternatives. 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." Were these calculations based on Waybill Sample data? If not, what data were used? How were the number of "independent alternatives" in a BEA pair determined? Was all traffic in a BEA pair, regardless of how many railroads served either end of any particular movement, included in the revenue calculations if the BEA pair was deemed "2-1" or "3-2"? Have any similar calculations been done based on 1994 data or that reflect the BN/Santa Fe Settlement Agreement?

Objection: No further objection.

Interrogatory No. 6.: The Verified Statement of Curtis M. Grimm submitted with KCS-3 contains the following statements at page 4, footnote 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." Was this calculation based on Waybill Sample data? If not, what data were used? How were the number of "independent alternatives" in a BEA pair determined? Was all traffic in a BEA pair, regardless of how many railroads served either end of any particular movement, included in the revenue calculations if the BEA pair was deemed "2-1" or "3-2"? Does the calculation for BN/Santa Fe merger reflect the various settlements entered into by the applicants in that case?

Objection: No further objection.

Interrogatory No. 7: The Verified Statement of Curtis M. Grimm submitted with KCS-3 contains the following statements at page 5: "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." Were these calculations based on Waybill Sample data? If not, what data were used? How was traffic originating on non-Class I railroads handled in the calculations? Have any similar calculations been done based on 1994 data or that reflect the BN/Santa Fe Settlement Agreement? Define the word "duopoly" as it is used here.

Objection: No further objection.

Interrogatory No. 8: The Verified Statement of Curtis M. Grimm submitted with KCS-6 in the BN/Santa Fe case (Finance Docket No. 32549) contains the following statements at page 6: "Based on Class 1 railroad originations by BEA, the BN/SF and the combined UP/SP will have fully 100% market share in 58 Western BEA's. The two systems will have 90-99% market share in an additional 10 BEA's, 70-89% market share in an additional 8 BEA's and 50-69% market share in another 8 BEA's." Were these calculations based on Waybill Sample data? If not, what data were used? What year's data were used for the calculations? How was traffic originating on non-Class I railroads handled in the calculations? Why do these figures differ from those in Interrogatory No. 7?

Objection: No further objection.

Interrogatory No. 9: Does KCS contend that any of the lines over which trackage rights are sought in Finance Docket No. 32760 (Sub-No. 9) are not "terminal facilities, including main line track for a reasonable distance outside of a terminal" (former 49 U.S.C. § 11103)? If so, identify each such trackage rights segment and explain the bases for KCS' contention.

Objection: KCS objects to this interrogatory as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Interrogatory No. 10: Does KCS contend that any of the trackage rights sought in Finance Docket No. 32760 (Sub-No. 9) are not essential in order to implement the settlement agreement among UP, SP and BN/Santa Fe? If so, identify each such trackage rights segment and explain the bases for KCS' contention.

Objection: KCS objects to this interrogatory as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Interrogatory No. 11: Does KCS contend that any of the trackage rights sought in Finance Docket No. 32760 (Sub-No. 9) will substantially interfere with the ability of KCS to handle its own business? If so, identify each such trackage rights segment and explain the bases for KCS' contention.

Objection: KCS objects to this interrogatory as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Interrogatory No. 12.: Does KCS contend that the primarily directional operations identified in the UP/SP Operating Plan will have any adverse impact on KCS' operations in the Shreveport terminal or at any other location? If so, identify each such location and explain the bases for KCS' contention.

Objection: KCS objects to this interrogatory as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Interrogatory No. 13.: Explain why, if KCS were to purchase SP lines between St. Louis/Memphis and Texas, KCS would provide superior service, greater transportation efficiency or other larger public benefits than would Conrail as purchaser of those lines.

Objection: KCS objects to this interrogatory in that it requires speculation on the part of KCS and the question is premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Interrogatory No. 14.: Does KCS have a specific proposal for line sales or trackage rights in its favor as a condition to the UP/SP merger? If so, (a) describe that proposal, (b) state whether KCS has conducted a market analysis with respect to the proposal, (c) state whether KCS has prepared an operating plan with respect to the proposal, and (d) state whether KCS has prepared pro forma financial statements with respect to the proposal.

Objection: KCS objects to this interrogatory as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this interrogatory to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Interrogatory No. 15.: Has KCS advised shippers, public officials and others whose support it has solicited in connection with this proceeding that it has determined not to submit a responsive application in this proceeding?

Objection: No further objection.

Interrogatory No. 16.: KCS President and Chief Executive Officer Haverty is quoted in Traffic World, Dec. 18/25, 1995, p. 32, as stating that Conrail President LeVan "told me what his plan was and I told him what our plan was," and that "[w.]e have never, ever had discussions about a joint plan." Describe in detail the discussions referred to between Messrs. Haverty and LeVan. Describe in detail any other discussions, whether occurring before or after Mr. Haverty's statement, between representatives of KCS and Conrail about separate or joint plans.

Objection: KCS objects to this interrogatory as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this interrogatory to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Interrogatory No. 17.: The Verified Statement of Curtis M. Grimm submitted with KCS-6 in the BN/Santa Fe case (Finance Docket No. 32549) contains the following statements at page 10, footnote 11: "For traffic originating in the Dallas-Fort Worth BEA and terminating in the Houston BEA, the SP, BN, UP and SF single-line routes have the following 1993 market

shares: [citing percentages, which are redacted in public version]." Were these calculations based on Waybill Sample data? If not, what data were used? Explain in detail how these "market shares" were calculated.

Objection: No further objection.

Interrogatory No. 18: Has KCS represented to shippers that the UP/SP merger will impair KCS' ability to provide rail service? If so, describe in detail each such communication and state all facts supporting such representations.

Objection: KCS objects to this interrogatory in that it is vague and ambiguous and incapable of a meaningful response. KCS further objects to this interrogatory as overbroad and unduly burdensome.

Interrogatory No. 19: A "Dear Transportation Professional" letter from KCS President and Chief Executive Officer Haverty dated December 5, 1995 states, at page 1, that the UP/SP merger "would give the new rail combination pervasive control over almost \$3 billion of North American petro-chemical traffic." Explain in detail the basis for this calculation. Does this calculation assume that UP/SP will "control" all traffic that either UP or SP originated or terminated in 1994? Does the calculation take account of the BN/Santa Fe Settlement Agreement? If so, how?

Objection: KCS objects to this interrogatory as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this interrogatory to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Interrogatory No. 20: Mr. Haverty's December 5 "Dear Transportation Professional" letter asserts, at page 2, that the "UP/SP system would control over 75% of the international rail traffic between the United States and Mexico," and that BN/Santa Fe "will control an

additional 13% of that traffic." Explain in detail the basis for these calculations. How is rail traffic assigned to carriers in the calculations? Do the calculations take account of the BN/Santa Fe Settlement Agreement? If so, how?

Objection: KCS objects to this interrogatory as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this interrogatory to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Interrogatory No. 21.: Where KCS and one other railroad serve a shipper, does KCS collude with the other railroad to raise prices or degrade service?

Objection: KCS objects to this interrogatory as being inflammatory and designed solely to harass KCS.

Interrogatory No. 22.: Identify the current number of KCS (including MidSouth) movements per day over each of the KCS track segments in Shreveport and Beaumont over which terminal trackage rights are sought in Finance Docket No. 32760 (Sub-No. 9). Please subdivide the total for each segment into types of movement, such as through trains, locals, and switching moves.

Objection: KCS objects to this interrogatory as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

DOCUMENT REQUESTS

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

Objection: KCS objects to this request to the extent it attempts to impose a duty upon KCS that exceeds those set forth in the Discovery Guidelines or to comply with the Discovery Guidelines in a more expeditious manner than Applicants. KCS further objects to this request as being overly broad and burdensome in that it seeks "all publications, written testimony and transcripts, without limitation to date" and apparently without limitation to subject matter. KCS further objects to this request to the extent it seeks testimony and transcripts (1) that are subject to a protective order, (2) that are subject to the attorney client or work product privilege in this or any other proceeding or (3) that are equally or more accessible to Applicants than to KCS.

Request No. 2.: Produce all documents relating to benefits or efficiencies that will result from the UP/SP merger.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 3.: Produce all documents relating to potential traffic impacts of the UP/SP merger.

Objection: KCS objects to this request as being vague, ambiguous, overly broad and unduly burdensome. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 4.: Produce all documents relating to competitive impacts of the UP/SP merger, including but not limited to effects on (a) market shares, (b) source or destination competition, (c) transloading options, or (d) build-in options.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 5.: Produce all documents relating to the BN/Santa Fe Settlement Agreement.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 6.: Produce all documents relating to the IC Settlement Agreement.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to

this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 7.: Produce all documents relating to the Utah Railway Settlement Agreement.

Objection: KCS objects to this request in that it is vague and would require speculation on the part of KCS. KCS further objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 8.: Produce all documents relating to conditions that might be imposed on approval of the UP/SP merger.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 9.: Produce all studies, reports or analyses relating to actual or potential competition between UP and SP.

Objection: KCS objects to this request as being vague, ambiguous and incapable of a meaningful response. KCS further objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS

further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 10.: Produce all studies, reports or analyses relating to competition between single-line and interline rail transportation.

Objection: KCS objects to this request as being vague, ambiguous, overly broad and unduly burdensome. KCS further objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 11.: Produce all studies, reports or analyses relating to the benefits of any prior rail merger or rail mergers generally.

Objection: KCS objects to this request as being vague, ambiguous, overly broad and unduly burdensome. KCS further objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 12.: Produce all studies, reports or analyses relating to the financial position or prospects of SP.

Objection: KCS objects to this request as being vague, ambiguous, overly broad and unduly burdensome. KCS further objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS

further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 13.: Produce all communications with other parties to this proceeding relating to the UP/SP merger or the BN/Santa Fe Settlement Agreement, and all documents relating to such communications. This request excludes documents already served on Applicants.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 14.: Produce all presentations, solicitation packages, form verified statements, or other materials used to seek support from shippers, public officials, railroads or others for the position of KCS or any other party in this proceeding.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 15.: Produce: all presentations, letters, memoranda, white papers or other documents sent or given to DOJ, DOT, any state Governor's, Attorney General's or Public Utilities Commission's (or similar agency's) office, any Mexican government official, any other government official, any security analyst, any bond rating agency, any consultant, any financial advisor or analyst, any investment banker, any chamber of commerce, or any shipper or trade organization relating to the UP/SP merger.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead

to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 16.: Produce all notes of, or memoranda relating to, any meetings with DOJ, DOT, any state Governor's, Attorney General's or Public Utilities Commission's (or similar agency's) office, any Mexican government official, any other government official, any security analyst, any bond rating agency, any consultant, any financial advisor or analyst, any investment banker, any chamber of commerce, or any shipper or trade organization relating to the UP/SP merger.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 17.: Produce all documents relating to shipper surveys or interviews concerning (a) the UP/SP merger or any possible conditions to approval of the merger, or (b) the quality of service or competitiveness of any railroad.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 18.: Produce all documents relating to the price to be paid for, or the value of, any UP or SP lines that might be sold as a condition to approval of, or otherwise in connection with, the UP/SP merger.

Objection: KCS objects to this request in that it is vague and ambiguous and incapable of a meaningful response. KCS further objects to this request in that it appears to request documents that are more accessible to Applicants than to KCS.

Request No. 19.: Produce all documents relating to trackage rights compensation for any of the BN/Santa Fe Settlement Agreement Lines or any other line of UP or SP that might be the subject of a proposed trackage rights condition in this proceeding.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 20.: Produce all documents relating to actual or estimated maintenance-and-operating costs, taxes and return-to-capital costs with respect to any of the BN/Santa Fe Settlement Agreement Lines or any other line of UP or SP that might be the subject of a proposed trackage rights condition in this proceeding.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 21.: Produce all documents relating to any agreement or understanding that KCS has with any other party to this proceeding regarding positions or actions to be taken in this proceeding. Documents relating to routine procedural agreements,

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such as agreements concerning the order of questioning at depositions or the avoidance of duplicative discovery, need not be produced.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 22.: Produce all presentations to, and minutes of, the board of directors of Kansas City Southern Industries relating to the UP/SP merger or conditions to be sought by any party in this proceeding.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 23.: Produce all studies, reports or analyses relating to collusion among competing railroads or the risk thereof.

Objection: To the extent this request refers to KCS, KCS objects to this request as being inflammatory and designed solely to harass KCS.

Request No. 24.: Produce all studies, reports or analyses relating to the terms for or effectiveness of trackage rights.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 25.: Produce the files for KCS' 25 largest Kansas grain shippers and 10 largest plastics shippers.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 26.: Produce all publications, written testimony and transcripts of Curtis M. Grimm, Thomas O'Connor and Joseph Plaistow, and all merger analyses that have been conducted by Snavely, King & Associates, without limitation as to date.

Objection: KCS objects to this request as being overly broad and burdensome in that it seeks "all publications, written testimony and transcripts," without limitation to date and apparently without limitation to subject matter. KCS further objects to this request to the extent it requests documents readily available to the public, such as published materials. KCS further objects to this request to the extent it seeks materials subject to the attorney client or work product privilege in this or any other proceeding and to the extent it seeks testimony and transcripts (1) that are subject to a protective order or (2) that are equally or more accessible to Applicants than to KCS.

Request No. 27.: Produce all KCS business plans or strategic plans.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 28.: Produce all computerized 100% KCS traffic data for 1994, containing at least the fields listed in Attachment A hereto, a Rule 11 or other rebilling indicator, gross freight revenue, and freight revenue net of allowances, refunds, discounts or other revenue offsets, together with documentation explaining the record layout and the

content of the fields. To the extent particular items are unavailable in machine-readable form, (a) provide them in hard-copy form, and (b) provide any similar machine-readable data.

Objection: No further objection.

Request No. 29.: Produce all communications with Richard C. Levin, Curtis M. Grimm, James M. MacDonald, Clifford M. Winston, Thomas M. Corsi, Carol A. Evans or Steven Salop concerning econometric analyses of rail pricing, and all documents relating to such communications.

Objection: KCS objects to this request in that all such communications, to the extent they exist, are subject to the work product privilege.

Request No. 30.: Produce all studies, reports or analyses relating to competition for traffic to or from Mexico (including but not limited to truck competition) or competition among Mexican gateways.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 31.: Produce all documents, other than the study itself, relating to the January 1996 study by The Perryman Group entitled, "The Impact of the Proposed Union Pacific-Southern Pacific Merger on Business Activity in Texas."

Objection: KCS objects to this request in that all such documents, to the extent they exist, are subject to the work product or attorney client privilege.

Request No. 32.: Produce all documents relating to KCS' financial support for, establishment of, participation in, or relationship with the "Coalition for Competitive Rail Transportation."

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 33.: Produce all documents relating to the reported acquisition by Kansas City Southern Industries, Inc., of a 49% interest in Mexrail, Inc., and any related transactions, including but not limited to all agreements between KCS and Tex Mex or their parents or affiliates and any regulatory filings made by KCS or Tex Mex or their parents or affiliates.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 34.: Produce all documents relating to discussions between KCS and Applicants in August or September 1995 concerning possible line sales, trackage rights or other agreements in regard to this proceeding. Except to the extent that Applicants may be required to do so, KCS need not produce documents depicting the back-and-forth of negotiations.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 35.: Produce all documents relating to the decision by KCS not to submit a responsive application in this proceeding, including but not limited to documents relating to whether KCS would be subject to conditions imposed by the Board to address anticompetitive consequences of any such responsive application if it did so.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 36.: Produce all public statements by KCS' President or other top executives relating to the UP/SP merger.

Objection: KCS objects to this request as vague, overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 37.: Produce all documents relating to the acquisition by any person of all or any portion of SP or KCS' interest in such an acquisition.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 38.: Produce all documents relating to possible operations by KCS over, or capital investments by KCS in, lines of UP or SP.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not

due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 39. : Produce each current haulage or trackage rights agreement in effect between KCS and any other railroad.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 40. : Produce all studies, reports or analyses relating to competition in freight transportation services for shipments to or from West Coast ports.

Objection: KCS objects to this request as being vague, ambiguous, overly broad and unduly burdensome. KCS further objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 41. : Produce all studies, reports or analyses relating to (a) transport pricing or competition for chemicals or petrochemicals (i.e., any STCC 28 or STCC 29 commodity, or such commodities generally), (b) the handling of such commodities by railroads, (c) the handling of such commodities by other modes, (d) storage-in-transit of such commodities, or (e) source or destination competition, shifting of production or shipments among facilities, "swapping" of product, modal alternatives, or shipper leverage as constraints on rail rates or service for such commodities.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 42.: The Verified Statement of Curtis M. Grimm submitted with KCS-3 contains the following statements at page 4: "[B]ased on 1993 data, there are 164 BEA origin-destinations with traffic greater than \$2 million that will go from 2-1 independent alternatives. 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." Produce all documents relating to these calculations and all documents relating to any similar calculations that have been done based on 1994 data or that reflect the BN/Santa Fe Settlement Agreement.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 43.: The Verified Statement of Curtis M. Grimm submitted with KCS-3 contains the following statements at page 4, footnote 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." Produce all documents relating to these calculations.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 44.: The Verified Statement of Curtis M. Grimm submitted with KCS-3 contains the following statements at page 5: "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." Produce all documents relating to these calculations and all documents relating to any similar calculations that have been done based on 1994 data or that reflect the BN/Santa Fe Settlement Agreement.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 45.: Produce KCS' annual reports to stockholders for years 1991 through 1995.

Objection: No further objection.

Request No. 46.: Produce all documents relating to any possible sale, acquisition, breakup, bankruptcy or other disposition of SP or any portion of SP.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments,

Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 47. : Produce all instructions, guidelines or policies issued to or by train dispatchers or dispatching supervisors relating to dispatching of trains operated by any other railroad or railroads over trackage rights on KCS, including but not limited to any instructions, guidelines or policies relating to how such trains should be handled in relation or comparison to KCS trains, the priorities to be accorded to such trains, and any requirement to provide non-discriminatory or equal dispatch.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 48. : Produce all documents reflecting the types or levels of priority or ranking assigned by KCS to its trains or trains of other railroads where other railroads have trackage rights over KCS, including but not limited to definitions or lists of such priorities or rankings and priorities or rankings assigned to individual trains.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 49. : Produce all documents relating to KCS' reasons for opposing the UP/SP merger or seeking to acquire any portion of SP in connection with the UP/SP merger.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments,

Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 50. : Produce all analyses, studies, reports or plans relating to implementation of trackage rights or haulage rights obtained by KCS from BN and Santa Fe in connection with the BN/Santa Fe consolidation.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 51. : Produce all communications between KCS and BN/Santa Fe relating to complaints about the handling of KCS trains or shipments under trackage rights or haulage obtained by KCS from BN and Santa Fe in connection with the BN/Santa Fe consolidation.

Objection: KCS objects to this request as overbroad and unduly burdensome in that it seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 52. : If KCS has a specific proposal for line sales or trackage rights in its favor as a condition to the UP/SP merger, produce all documents relating to that proposal, including but not limited to (a) documents describing the proposal, (b) any market analysis with respect to the proposal, (c) any operating plan with respect to the proposal, and (d) any pro forma financial statements with respect to the proposal.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not

due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 53. : The Verified Statement of Curtis M. Grimm submitted with KCS-6 in the BN/Santa Fe case (Finance Docket No. 32549) contains the following statements at page 6: "Based on Class 1 railroad originations by BEA, the BN/SF and the combined UP/SP will have fully 100% market share in 58 Western BEA's. The two systems will have 90-99% market share in an additional 10 BEA's, 70-89% market share in an additional 8 BEA's and 50-69% market share in another 8 BEA's." Produce all documents relating to these calculations.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 54. : The Verified Statement of Curtis M. Grimm submitted with KCS-6 in the BN/Santa Fe case (Finance Docket No. 32549) contains the following statements at page 10, footnote 11: "For traffic originating in the Dallas-Fort Worth BEA and terminating in the Houston BEA, the SP, BN, UP and SF single-line routes have the following 1993 market shares: [citing percentages, which are redacted in the public version]." Produce all documents relating to these calculations.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to

this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 55. : Produce all documents in which KCS has represented to shippers that the UP/SP merger will impair KCS' ability to provide rail service.

Objection: KCS objects to this request in that it is vague and ambiguous and incapable of a meaningful response. KCS further objects to this request as overbroad and unduly burdensome.

Request No. 56. : Produce all documents relating to the value or profitability of SSW.

Objection: KCS objects to this request in that it is vague and ambiguous and incapable of a meaningful response. KCS further objects to this request in that it appears to request documents that are more accessible to Applicants than to KCS.

Request No. 57. : Produce all communications between KCS and any investment banker relating to the purchase of all or any part of SP.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 58. : A "Dear Transportation Professional" letter from KCS President and Chief Executive Officer Haverty dated December 5, 1995 states, at page 1, that the UP/SP merger "would give the new rail combination pervasive control over almost \$3 billion of North American petro-chemical traffic." Produce all documents relating to this calculation.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not

due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 59. : Mr. Haverty's December 5 "Dear Transportation Professional" letter asserts, at page 2, that the "UP/SP system would control over 75% of the international rail traffic between the United States and Mexico," and that BN/Santa Fe "will control an additional 13% of that traffic." Produce all documents relating to these calculations.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 60. : Produce all documents relating to Figure I in Mr. Haverty's December 5 "Dear Transportation Professional" letter.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 61. : Produce all documents relating to Figure II in Mr. Haverty's December 5 "Dear Transportation Professional" letter.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not

due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 62. : Produce all documents relating to Figure III in Mr. Haverty's December 5 "Dear Transportation Professional" letter.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

Request No. 63. : Produce all studies, reports, analyses, compilations, calculations or evaluations of market or competitive impacts of the UP/SP merger or the BN/Santa Fe Settlement Agreement or of trackage rights compensation under the BN/Santa Fe Settlement prepared by Curtis M. Grimm, ALK Associates or Snively, King & Associates, and all workpapers or other documents relating thereto.

Objection: KCS objects to this request as being premature. Pursuant to the Procedural Schedule in this proceeding, Inconsistent and Responsive Applications, Comments, Protests, Requests for Conditions and any other opposition evidence and arguments are not due to be filed until March 29, 1996. (Decision 6, October 19, 1995) KCS further objects to this request to the extent that it seeks production of documents subject to the attorney-client or work product privilege.

This 4th day of March, 1996.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "Kansas City Southern Railway Company's Objections to Applicants' First Set of Interrogatories and Requests for Production of Documents" was served this 4th day of March, 1996, on all parties of record in this proceeding by depositing a copy in the United States mail in a properly addressed envelope with adequate postage thereon.

Alan E. Lubel
Attorney for The Kansas City Southern
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STB

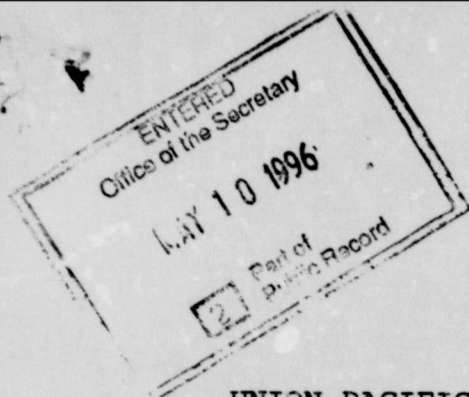
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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --

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

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ADDITIONAL ERRATA TO REBUTTAL FILING

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May 10, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

ADDITIONAL ERRATA TO REBUTTAL FILING

<u>Page</u>	<u>Line</u>	<u>Change</u>
<u>Volume 1 (UP/SP-230)</u>		
56	19	Delete previous errata
73	4	Delete previous errata
86	8	Delete previous errata
99	5	Delete previous errata
110	8	Change "\$796" to "\$795" (modifying previous errata)
114	23	Change "Wecker" to "Willig"
139	15	Change "\$945.3" to to "\$1,001.8"
139	20 & 22	Change "\$738.8" to "\$795.3"
279	20	Change "RTC" to "RCT"

Volume 2 (UP/SP-231)

Part B

Rebuttal Verified Statement of Richard B. Peterson

Chart following p. 23	Change ".7" to ".8"; change "18" to "18.1"
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Chart following p. 26		Change "514.9" to "534.4"; change "223.9" to "260.9"; change "738.8" to "795.3"
27	1	Change "\$945.3" to "\$1,001.8"
27	7	Change "\$738.8" to "\$795.3"
131	10	Insert "and" between "gateway" and "Tex Mex's"
140	8	Change "well over \$1.7 billion" to "over \$1.9 billion"
Chart following p. 162		Change "796" to "795"; change "1,919" to "1,918" (modifying previous errata)
168	22	Change "\$796" to "\$795" (modifying previous errata)
169		In footnote added in previous errata, change "\$796" to \$795"
195	20	Change "systemn" to "system"

Volume 2, Part C (UP/SP-231)

Rebuttal Verified Statement of William W. Whitehurst

12		See replacement Table 4 following errata list
13	4	Change "For only one movement" to "For no movements"
	5-6	Delete ", and there the BN/Santa Fe variable cost disadvantage is only 13%"
16	20	Change "Peterson's" to "Gray's"

Respectfully submitted,

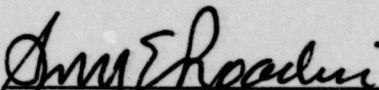
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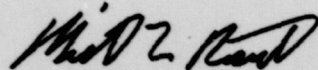
May 10, 1996

CERTIFICATE OF SERVICE

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

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Premarmer Notification Office
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Michael L. Rosenthal

Table 4

BN/Santa Fe (Merged) Cost per Car
Including Trackage Rights Compensation to UP/SP
Compared to SP
for Representative Traffic Movements

Move No.	Movement Identification		VARIABLE COST PER CAR (URCS 1994 unit costs)		BN/Santa Fe Over/(Under) SP	
	Origin-Destination (1)	Commodity (2)	via SP (3)	via BN/ Santa Fe (4)	Amount (5) (4) - (3)	Percent (6) (5) / (3)
a	Chicago-Oakland	TOFC	\$ 2,399	\$ 1,890	(509)	- 21%
b	Chicago-Salt Lake City	Auto	2,615	2,251	(364)	- 14 %
c	Oakland-Salt Lake City	TOFC	814	752	(62)	- 8 %
d	Provo-Valmy	Coal	528	516	(12)	- 2 %
e	Houston-Brownsville	Plastics	698	614	(84)	- 12 %
f	Kansas City-Brownsville	Grain	1,806	1,647	(159)	- 9 %
g	Eagle Pass-New Orleans	Auto	1,102	1,199	97	9 %
h	Kerr-Houston	Crushed Stone	279	268	(11)	- 4 %
i	Chicago-Eagle Pass	Auto Parts	1,381	1,299	(82)	- 6 %
j	Houston-E St Louis	Chemicals	1,409	1,557	148	10 %
k	Houston-Memphis	Plastics	1,264	918	(346)	- 27%
l	Pine Bluff-San Jose	Paperboard	3,617	3,826	209	6 %
m	Camden-Brownsville	Paperboard	1,298	1,235	(63)	-5 %
n	Little Rock-Lafayette	Cotton	1,237	1,170	(67)	-5 %
o	San Antonio-St Louis	TOFC	1,004	905	(98)	-10 %
p	Dayton-New Orleans	Plastics	622	592	(30)	-5 %
q	Baytown-Los Angeles	Plastics	2,258	2,166	(92)	-4 %
r	New Orleans-Los Angeles	TOFC	1,672	1,493	(179)	- 11 %

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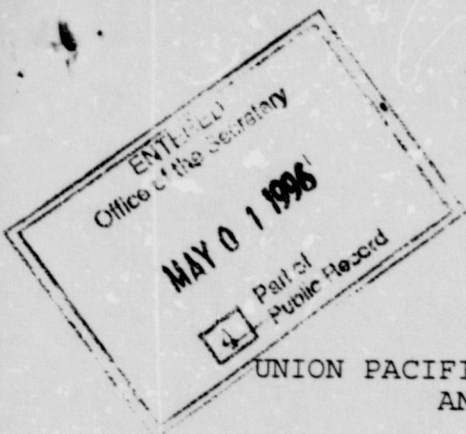
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UP/SP-237



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

APPLICANTS' REPLY TO KCS' MOTION TO REQUIRE
AMENDMENT TO APPLICATION OR ADDITIONAL DISCOVERY

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April 30, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

APPLICANTS' REPLY TO KCS' MOTION TO REQUIRE
AMENDMENT TO APPLICATION OR ADDITIONAL DISCOVERY

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 KCS'
"Motion to Require Amendment to Application or in the
Alternative to Allow Parties to Conduct Discovery and Submit
Evidence Relating to Applicants' Settlement Agreement With
CMA" (KCS-49).

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."

KCS has repeatedly tried, without success, to delay this proceeding, and this is its latest attempt. See KCS-3, filed Sept. 18, 1995, p. 7 (arguing for a two-and-a-half year schedule); KCS-17, filed Jan. 24, 1996 (supporting motion of Western Shippers Coalition to enlarge the procedural schedule); Decision No. 6, served Oct. 19, 1995 (setting procedural schedule); Decision No. 10, served Jan. 25, 1996 (denying request for delay and affirming original procedural schedule). This attempt, like the others, should be rejected.

Unlike KCS and some of the other strident opponents of the merger, the Chemical Manufacturers Association ("CMA") indicated in its March 29, 1996 filing that it would no longer oppose the UP/SP merger if the concerns it laid out in that filing were met. Applicants worked hard to meet those concerns, and succeeded in doing so in a settlement agreement executed on April 18. See UP/SP-219. This mooted a long list of issues put forward not just by CMA, but by opponents like KCS and Conrail.

The mooted of these concerns through settlement may displease KCS, but it does not mean that the Board has been presented with a new "transaction," or that KCS needs more discovery or another round of evidence. Rather, the settlement with CMA addresses the precise issues on which KCS and a variety of other parties had months of discovery and submitted extensive evidence on March 29, 1996. The

settlement raises no new issues for decision by the Board; instead, it eliminates issues.

For example:

- KCS, Conrail and others argued that BN/Santa Fe would be hampered in competing because it would operate "against the flow" of traffic on UP/SP lines to be operated directionally. They deposed many of Applicants' and BN/Santa Fe's witnesses on this issue,³ and they filed evidence addressing it on March 29. The CMA settlement eliminates the issue as a concern by granting BN/Santa Fe the right to operate "with the flow" of traffic, and the additional trackage rights necessary to do so.

- Various opponents of the merger, including Conrail, argued that BN/Santa Fe would be at a disadvantage in competing for Houston-St. Louis traffic because its own line from Memphis to St. Louis is circuitous and does not allow it to reach Eastern carriers at St. Louis as efficiently as UP/SP will. Conrail and other parties deposed Applicants' witnesses on this issue and filed evidence addressing it on March 29. The CMA settlement eliminates the issue as a concern by extending BN/Santa Fe's Houston-Memphis trackage rights to St.

³ KCS' statement that "relatively few depositions were taken" (p. 2) is amusing. No fewer than 30 of Applicants' and BN/Santa Fe's witnesses were deposed, consuming a total of 45 deposition days. Only KCS, which demanded that depositions "grow geometrically" (Letter from A. Lubel to A. Roach, Jan. 25, 1996), could consider this "relatively few."

Louis, and putting BN/Santa Fe on a par with UP/SP at St. Louis.

- Various merger opponents criticized the trackage rights compensation fees provided for in the BN/Santa Fe settlement agreement, arguing that they exceeded UP/SP costs and that the adjustment mechanism (70% of RCAF(U)) would render BN/Santa Fe non-competitive over time. Parties pursued extensive discovery on these issues, including depositions of Applicants' witnesses. The CMA settlement eliminates these issues as concerns by granting BN/Santa Fe the option of using traditional joint facility billing, under which it would pay UP/SP a usage-based share of actual M&O costs, taxes and interest rental (calculated as depreciated book value times the current cost of capital), and by substituting for the prior adjustment mechanism a mechanism based on actual year-to-year changes in the relevant UP/SP cost components.

- Various merger opponents claimed that UP/SP would "discriminate" against BN/Santa Fe in dispatching BN/Santa Fe's trackage rights trains. They pursued extensive discovery on this issue. The CMA settlement eliminates it as a concern by providing for the adoption of a detailed written protocol to govern the dispatching of BN/Santa Fe trains.

These are only examples. Full details of the steps that Applicants agreed to in their settlement with CMA, as well as of other steps that Applicants have taken to address

issues raised by various parties (e.g., extending to BN/Santa Fe the right to build in to a Union Carbide facility at North Seadrift, Texas, thereby addressing the issue raised by Union Carbide in its March 29 comments), and of how these steps address issues raised by merger opponents, are set forth at pages 12-21 of the Narrative portion of Applicants' April 29 Rebuttal (UP/SP-230), and in a number of the verified statements in that Rebuttal filing (see UP/SP-231 and 232, passim). The pertinent point is that parties like KCS have had very extensive discovery on these issues, and have submitted evidence very fully addressing them.

KCS' argument implies that whenever, in the course of a merger proceeding, the applicants arrive at settlements to resolve issues of concern raised by parties to the case, the applicants in effect must submit an entire new application, the clock on the proceeding must be set back, and there must be renewed discovery and additional rounds of evidence. It is hard to imagine a process that would more effectively discourage settlements. The policy of the ICC, and thus of its successor, this Board, is to the contrary. That policy is to "encourage agreements between parties to a consolidation proceeding in order to encourage expeditious resolution of matters of serious concern." Norfolk Southern Corp. -- Control -- Norfolk & Western Ry. & Southern Ry., 366 I.C.C. 171, 240 (1982) ("Norfolk Southern") (emphasis added); Union

Pacific Corp., Pacific Rail System, Inc. & Union Pacific R.R. -- Control -- Missouri Pacific Corp. & Missouri Pacific R.R., 366 I.C.C. 459, 601 (1982), aff'd in part & remanded in part sub nom. Southern Pacific Transportation Co. v. ICC, 736 F.2d 708 (D.C. 1984), cert. denied, 469 U.S. 1208 (1985) ("UP/MP/WP").

KCS does not point to any specific matter in the CMA settlement on which it needs more information, either by way of a substantially amended application or by way of renewed discovery. It simply lists all the topics that are to be addressed in a merger application (pp. 4-5). But every issue treated in the CMA settlement was addressed in the application, and in discovery, and in the March 29 filings. KCS' motion seeks delay for delay's sake.

Certainly there are details of the application that might have been different had the terms of the CMA settlement been in place before the application was prepared. But KCS makes no showing that those details are so fundamental as to require the filing of a completely new or amended application. The thrust of the CMA settlement is to confirm that BN/Santa Fe will be a fully effective competitor using the trackage rights and other rights agreed to in Applicants' settlement with BN/Santa Fe. That is what the application already assumed, so it can hardly be argued that the CMA settlement fundamentally changes the parameters of the application. Any

issues that remain are ones the parties have already addressed in their prior filings.

Moreover, as the Board is aware, a number of parties have had no difficulty in providing comments on the CMA settlement without the need for refileing of the application, pursuit of new discovery, or the opportunity to file a new round of evidence. On April 29, Applicants were served with a number of comments on the CMA settlement, including filings by Dow, SPI, Conrail, and others. See Comments of Arizona Chemical Company, filed Apr. 29, 1996; Further Comments of Consolidated Rail Corporation in Response to the "CMA Settlement Agreement," CR-37; Comments on the Applicants' Settlement Agreement with the Chemical Manufacturers' Association Submitted on Behalf of the Dow Company, DOW-19; Further Comments of Montell USA, Inc., MONT-5; Verified Statement of Thomas L. Moranz, QCC-4; Further Comments of the Society of the Plastics Industry, Inc., SPI-16. KCS was equally capable of commenting on the settlement without imposing further delay.

This is not, as KCS weakly claims, the UP/CNW case, where the Commission called for a supplemental filing to clarify whether major developments -- the sale of a controlling interest in CNW stock by Blackstone, the investment bank that then controlled CNW -- mooted a hotly-contested dispute over whether any concrete "transaction" was

presented for decision at all. See Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control -- Chicago & North Western Holdings Corp. & Chicago & North Western Transportation Co., 9 I.C.C.2d 939 (1993). Rather, the settlement with CMA is like important settlements entered into during the course of many prior merger cases, which resolved particular competitive or other issues that parties had raised in the course of the proceeding, and which did not precipitate any requirement that the applicants re-file their application or that there be new rounds of discovery and evidence. See, e.g., Finance Docket No. 32549, Burlington Northern Inc. & Burlington Northern R.R. -- Control & Merger -- Santa Fe Pacific Corp. & The Atchison, Topeka & Santa Fe Ry., Decision served Aug. 23, 1995, pp. 88-92 (settlements with SP, UP and others); Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control -- Missouri-Kansas-Texas R.R., 4 I.C.C.2d 409, 480 (1988), petition for review dismissed sub nom. RLEA v. ICC, 883 F.2d 1079 (D.C. Cir. 1989) (settlement with SP); UP/MP/WP, 366 I.C.C. at 601 (settlement with CNW); Norfolk Southern, 366 I.C.C. at 240 (settlement with Conrail, MKT and others).

Applicants fully address the CMA settlement in their April 29 Rebuttal, and BN/Santa Fe also addresses that settlement in its April 29 submission. To the extent cross-examination may be needed to resolve material issues of

disputed fact, as KCS suggests, KCS is free to depose all the Applicant witnesses and BN/Santa Fe witnesses who address the CMA settlement. In addition, it is free to advance in its June 3 brief any arguments it may have about that settlement. Requiring a resubmission or amendment of the application, or authorizing renewed discovery at this late stage of this

expedited proceeding, would serve no purpose except KCS' purpose -- delay. The KCS motion should be denied.

Respectfully submitted,

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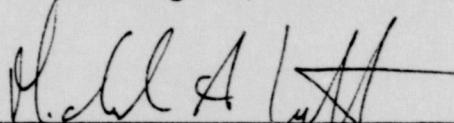
April 30, 1996

CERTIFICATE OF SERVICE

I, Michael A. Listgarten, certify that, on this 30th day of April 1996, I caused a copy of Applicants' Reply to KCS' Motion to Require Amendment to Application or Additional Discovery (UP/SP-237) to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

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Antitrust Division
Room 9104-TEA
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Premarmer Notification Office
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Federal Trade Commission
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Michael A. Listgarten

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

*Union Pacific Corporation, Union Pacific Railroad Company
And Missouri Pacific Railroad Company*

— Control And Merger —

*Southern Pacific Rail Corporation,
Southern Pacific Transportation Company, St. Louis
Southwestern Railway Company, SPCSL Corp. And The
Denver And Rio Grande Western Railroad Company*

COMMENTS IN SUPPORT OF
THE RESPONSIVE APPLICATION OF
MONTANA RAIL LINK, INC.

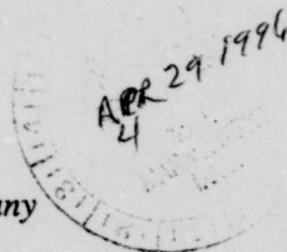
submitted on behalf of

KENNECOTT ENERGY COMPANY

John K. Maser III
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April 29, 1996



Kennecott filed comments on the proposed merger and consolidation of the Union Pacific Railroad ("UP")¹ and the Southern Pacific Lines ("SP")² (collectively referred to as "Applicants") on March 29, 1996 (KENN-10). In those comments, Kennecott sought, *inter alia*, the imposition of conditions upon the proposed merger to protect the benefits of geographic competition currently experienced by Kennecott between Colorado and Powder River Basin ("PRB") coals.

Kennecott did not ask for divestiture in its March 29th comments because it believes that the *benefits* of geographic competition that Kennecott currently enjoys can be preserved to Kennecott by the conditions proposed in those comments.³ However, the only means to preserve *actual* geographic competition is to divest the SP's Colorado lines to a non-PRB serving carrier. If the Board pursues this remedy, Kennecott supports the responsive application of MRL.

As Kennecott demonstrated in its March 29th comments, Colorado coal competes directly with PRB coal in midwestern and southwestern utility markets. In particular, Kennecott, working in cooperation with the SP, has successfully been awarded contracts for Colorado coal from Kennecott's Colowyo mine where the competition was PRB coal. Because the SP originates only Colorado coal and because Colorado coal has a higher minehead cost than PRB coal, the SP has aggressively priced its transportation rates in conjunction with aggressive coal pricing by Colorado producers, such as Kennecott, in order to render Colorado

¹ All references to the "UP" include Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company.

² All references to the "SP" include Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company.

³ The proposed conditions in KENN-10 will replicate the effects of geographic competition but will not restore true geographic competition.

coal competitive with PRB coal on a delivered cost basis. This strategy is succeeding.

After the merger, a combined UP/SP will not have the incentive to continue this aggressive competitive pricing because the merged carrier will serve both Colorado and PRB origins and, therefore, will not compete against itself. Divestiture of the central corridor to MRL will restore the geographic competition that would be lost in the merger by allowing an independent non-PRB serving carrier to serve the Colorado coal origins. This independent carrier would have the same incentives as the SP currently has to aggressively price the transportation of Colorado coal in order to compete effectively against PRB coal for market share.

Although the Applicants have granted trackage rights to BNSF over the Central Corridor, those rights will have absolutely no effect upon geographic competition between Colorado and PRB coal. This is because BNSF has not been granted access to any Colorado coal mines, such as Kennecott's Colowyo mine. However, even if BNSF were to be granted access to Colorado coal sources, this would not restore geographic competition.

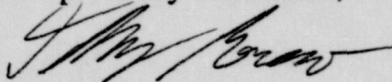
BNSF access to Colorado coal sources would be deficient in several respects. First, BNSF suffers from the same conflict of interest as a combined UP/SP because both carriers extensively serve PRB origins and, therefore, will not have the incentive to price Colorado coal transportation at a competitive level. Second, the trackage rights compensation level in the BNSF Settlement Agreement is too high to allow BNSF to aggressively price its coal transportation service at the same level as the SP has been pricing its service. Third, the overhead nature of most of BNSF's trackage rights will not provide sufficient traffic density to entice BNSF to operate as a tenant carrier over hundreds of miles of rail. Fourth, because BNSF pays only for its actual use of trackage

rights, there will be no cost to BNSF to exit the market if it chooses not to exercise its trackage rights. In contrast, the SP will incur extensive costs by walking away from the Central Corridor. This provides SP with much greater incentive to expand its markets over this line. This latter point illustrates why the only way to truly restore actual geographic competition may be through divestiture.

MRL has the characteristics required to restore geographic competition between Colorado and PRB coals. Principally, it is an independent carrier without a vested interest in the PRB. As a result, MRL will be in a position comparable to the SP today and, by owning the Central Corridor, will have all the same incentives as the SP to aggressively market Colorado coal. Furthermore, MRL's responsive application will preserve the benefits of the merger to both the UP/SP and to BNSF by permitting both carriers to operate via trackage rights over the Central Corridor.

WHEREFORE, Kennecott respectfully requests that the Board grant the responsive application of MRL, if the Board concludes that divestiture of the central corridor is in the public interest.

Respectfully submitted,



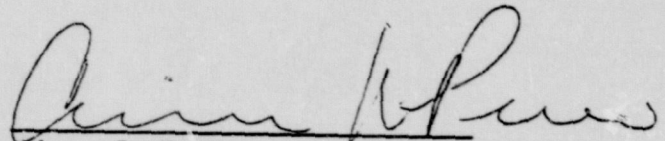
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April 29, 1996

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing COMMENTS IN SUPPORT OF THE RESPONSIVE APPLICATION OF MONTANA RAIL LINK, INC. has been served via regular first class mail upon all parties of record in this proceeding on the 29th day of April, 1996, and by facsimile to Washington, D.C. counsel for Applicants.



Aimee L. DePew

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REDACTED
(To be Filed in the Public Record)

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

*Union Pacific Corporation, Union Pacific Railroad Company
And Missouri Pacific Railroad Company*

— Control And Merger —

*Southern Pacific Rail Corporation,
Southern Pacific Transportation Company, St. Louis
Southwestern Railway Company, SPCSL Corp. And The
Denver And Rio Grande Western Railroad Company*

COMMENTS ON THE APPLICANTS'
SETTLEMENT AGREEMENT WITH THE
CHEMICAL MANUFACTURERS' ASSOCIATION

submitted on behalf of

THE DOW CHEMICAL COMPANY

Office of the Secretary

APR 30 1996

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April 29, 1996

Dow's Prior Comments To The Board On the Proposed Merger

Dow has filed two sets of comments with the Board regarding the proposed merger, one related to potential anticompetitive effects of the proposed merger on the chemical and plastics industry and in the region of Texas and Louisiana, and the other set of comments related to Dow's specific situation with respect to its plant at Freeport, Texas.

With respect to potential industry- and region-wide anticompetitive effects, on March 15, 1996 Dow submitted a statement to the Board (DOW-10) stating that Dow had concerns about the anticompetitive aspects of the proposed transaction on the chemical industry. Dow noted that the announced UP/SP merger would result in the establishment of one rail carrier that would transport 35 percent of all U.S. chemical rail tonnage and about 50 percent of chemical rail tonnage originating in the Texas/Louisiana region, and that the proposed merger would involve substantial parallel effects, particularly in the Gulf Coast petrochemical belt. Additionally, Dow stated that trackage rights alone would not be an adequate substitute for two independent competing railroads, and that a more effective solution would be for the parallel rail lines in the region of Texas and Louisiana and to the midwest to be purchased by a viable, independent third rail carrier, such as Conrail among others. This would offer a better assurance that a reasonable level of competition could be realized.

With respect to its specific situation, in its March 29, 1996 comments, Dow showed how the proposed merger would result in the loss of a build-out option at its Freeport, Texas facility. Dow urged the Board to impose conditions on the merger to rectify the loss of that build-out option. (DOW-11)

These two filings address separate aspects of the anticompetitive effects of the proposed merger: the March 15 filing (DOW-10) on a region-wide and plant-specific level, and the March 29 filing on a plant-specific level (DOW-11).

They are, therefore, complementary. Indeed, the conditions requested in these two separate submissions are mutually exclusive because a grant of one will not obviate the need for the other.¹

Dow's Comments On the CMA Settlement Agreement

Dow believes that nothing that has been filed in this proceeding to date, including the Applicants' filing on April 19 of the CMA Settlement Agreement, has altered its views regarding the anticompetitive effects of the proposed merger on a region- and industry-wide basis. As noted above, Dow's March 15 letter to the Board identified serious concerns regarding the dominance of the chemical and plastics industry in Texas and Louisiana by a merged UP/SP; potential duopoly effects; and the ineffectiveness of trackage rights under the BNSF settlement agreement. In Dow's view, the CMA Settlement Agreement does not fully cure these concerns.

Moreover, nothing that has been filed in this proceeding to date, including the Applicants' filing of the CMA Settlement Agreement, has altered Dow's views as set forth in the filings described above concerning the necessary relief that should be granted by the Board to remedy the anticompetitive effects of the proposed merger on the chemical and plastics industry and in the Gulf Coast petrochemical belt.

On a plant-specific level, Dow's concerns regarding its Freeport facility, which are addressed in its March 29th comments, are not satisfied at all by the CMA Settlement Agreement. Dow has requested conditions to preserve a build-out option from its Freeport, Texas facilities to the SP. Dow notes that the matter of the potential Dow build-out was also addressed in the comments of the

¹ The reason why this is true is summarized in Dow's March 29th Comments (DOW-11) at pp. 37-38 of the Presentation of Comments and Evidence (Tab A) and at pp. 31-32 of the Verified Statement of William L. Gebo (Tab B).

Department of Justice on April 12, 1996,

. See

Comments of the United States Department of Justice, Verified Statement of W. Robert Majure, p. 15-18 (DOJ-8).

Although Dow theoretically could request arbitration of its build-out claim under the CMA Settlement Agreement in order to get access for the BNSF to the build-out point on the SP line, this right is of no use to Dow, a matter which is discussed in Dow's March 29 comments.²

. The combination of these factors makes Dow a clear example of a build-out situation that does not appear to benefit from the CMA Settlement Agreement.

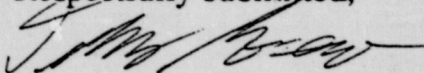
Furthermore, the CMA Settlement Agreement, which does not provide any actual relief for shippers who will lose build-outs as a result of the merger, suffers from several general deficiencies. The Agreement is unclear as to what is to be arbitrated. It identifies as the arbitration standards or "principles" the standards identified in Finance Docket No. 32549 or standards or "principles" that may be articulated by the Board in this proceeding. However, in numerous discovery conferences in this proceeding, the Applicants have already raised

² Pursuant to Section 15 of the CMA Agreement, Dow is not obligated to pursue merger-related conditions under the Agreement and the Agreement is without prejudice to Dow's rights to seek alternative or additional relief in this proceeding.

substantial disagreements over the meaning of the agency's decision in Finance Docket No. 32549 regarding build-outs, and such arguments certainly will continue to be made in any arbitration proceeding. Finally, and most importantly, the CMA Settlement Agreement grants BNSF the exclusive franchise to be the build-out carrier, a fact that already makes the CMA Settlement Agreement inconsistent with existing precedent regarding a build-out.³

WHEREFORE, Dow believes that the Board should not treat the CMA Settlement Agreement as a complete cure for the broad or plant-specific anticompetitive problems of the merger as set forth in the prior comments of Dow. Dow reiterates its request for (1) divestiture of parallel lines in Texas and Louisiana and parallel lines to the midwest, and (2) for conditions that will preserve an economically viable build-out option at Freeport.

Respectfully submitted,



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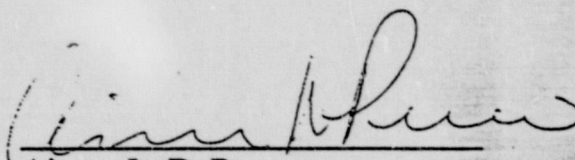
April 29, 1996

Attorneys for The Dow Chemical Company

³ In Finance Docket No. 32549 [Decision No. 38] at 63, the Board, in order to preserve a build-out option to Oklahoma Gas & Electric Company, expressly stated, "We will allow OG&E (not applicants) to choose the carrier that is to receive the trackage rights."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing COMMENTS ON THE APPLICANTS' SETTLEMENT AGREEMENT WITH THE CHEMICAL MANUFACTURERS' ASSOCIATION has been served via regular first class mail upon all parties of record in this proceeding on the 29th day of April, 1996, and by facsimile to Washington, D.C. counsel for Applicants.



Aimee L. DePew

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760



UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --

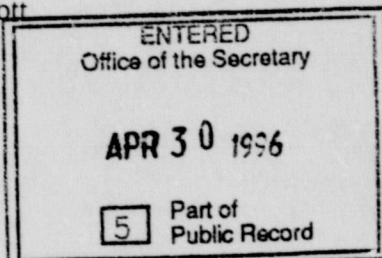
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
MOTION TO REQUIRE AMENDMENT TO APPLICATION
OR IN THE ALTERNATIVE TO ALLOW PARTIES TO CONDUCT DISCOVERY
AND SUBMIT EVIDENCE RELATING TO APPLICANTS' SETTLEMENT
AGREEMENT WITH CMA (UP/SP-219)

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April 29, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
MOTION TO REQUIRE AMENDMENT TO APPLICATION
OR IN THE ALTERNATIVE TO ALLOW PARTIES TO CONDUCT DISCOVERY
AND SUBMIT EVIDENCE RELATING TO APPLICANTS' SETTLEMENT
AGREEMENT WITH CMA (UP/SP-219)

On November 30, 1995, Applicants filed their Application for Control and Merger.¹ Recognizing that the merger would create substantial anticompetitive conditions, Applicants entered into an Agreement with Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company ("BN/Santa Fe") dated September 25, 1995, and amended on November 18, 1995 (hereinafter collectively referred to as "the Agreement"). The Agreement granted to BN/Santa Fe close to 4,000 miles of trackage rights, which Applicants have characterized as ameliorating the competitive harms that would result from an unconditional merger of these two railroads. Applicants' reliance upon the Agreement as

¹ The Application was supplemented on December 21, 1995. Collectively these documents are referred to as "the Application."

providing a solution to the competitive harms resulting from the merger permeates their Application and the Verified Statements submitted in support of the Application.

Numerous parties, including The Kansas City Southern Railway Company ("KCS"), were quick to notice that on its face the Agreement is deficient in several respects and that it provides no true solution at all, contrary to the assertions contained in the Application and supporting statements. Discovery was undertaken, and the terms and efficacy of the Agreement as a solution to the competitive problems was explored in depth. In light of the condensed procedural schedule established by the Commission, relatively few depositions were taken; however, in most of the depositions, the terms or efficacy of the Agreement was explored.

On March 29, 1996, approximately 150 parties submitted comments, protests, requests for conditions or inconsistent or responsive applications. These filings were made based upon the Application, the Verified Statements submitted with the Application, and the discovery conducted by a host of interested parties as to the Application, including the Agreement. Of significance to this motion, the majority of these filings discussed the effect of the Agreement on the "proposed transaction."

Subsequently, on April 18, 1996, Applicants entered into a Agreement with the Chemical Manufacturers Association ("CMA") and BN/Santa Fe (the "CMA Agreement"), which amended the Agreement in numerous ways. The CMA Agreement extends BN/Santa Fe's overhead trackage rights over three routes; it allows BN/Santa Fe access to new facilities; it will modify contracts with shippers at 2-to-1 points in Texas and Louisiana (as the term "2-to-1" is defined by Applicants); it will cap reciprocal switch charges at 2-to-1

points at \$130, subject to annual adjustment; it purports to provide BN/Santa Fe with equal access to Dayton Yard; it provides for maintenance and improvements of lines to be paid from BN/Santa Fe trackage rights fees; it provides for adjustment of trackage rights fees based on the cost of maintenance and operating costs; it gives BN/Santa Fe the right to handle traffic open to all of UP, SP and KCS at Lake Charles and West Lake, Louisiana and at Texarkana, Texas/Arkansas and Shreveport, Louisiana to and from the Memphis BEA, with certain limitations; it provides for a dispatching protocol for trackage rights; it allows BN/Santa Fe access between Houston and Memphis on either the UP line or the SP line; it deals with access to Mexican border points and BN/Santa Fe's purchase of a yard at Brownsville; it allows BN/Santa Fe service to all shippers previously served only by both UP and SP, regardless of whether the shipper had ever shipped by either UP or SP and grants BN/Santa Fe service to new facilities located within the geographic boundaries of the 2-to-1 points (as defined in the original Agreement); and it deals with topics such as arbitration, STB oversight and CMA's withdrawal of its opposition to the merger.²

These sweeping changes in effect result in an entirely new agreement between Applicants and BN/Santa Fe and drastically change the character of the transaction described

² The extent to which these changes will actually alleviate the admitted anticompetitive effects of the proposed transaction is precisely the issue. Applicants have stated that they will rely on the proposed changes in their April 29th filing. (UP/SP-219 at 1). Of course until such a filing is made, KCS cannot determine the extent to which Applicants will claim the CMA Agreement alleviates the anticompetitive problems nor the precise extent to which the CMA Agreement changes the parameters of the "transaction" as set forth in the Application. Accordingly, as set forth later in this motion, all parties should be given the right to conduct discovery and comment on the CMA Agreement. However, regardless of the efficacy of the CMA Agreement in resolving the anticompetitive problems, the CMA Agreement does significantly change the "transaction" which Applicants had set forth in their Application.

in the Application. Accordingly, the Board has before it an Application that relates to the transaction as originally contemplated by Applicants, but it does not, however, have an Application that incorporates the effects of the CMA Agreement, which is a totally changed transaction.

49 U.S.C. § 11343 sets forth the "transactions" that must be approved by the Commission (now the STB), and section 11344(b)(1) sets forth the criteria the Board must use in determining whether such a "transaction" is in the public interest. Pursuant to those statutory standards, the rules of the STB require that an Application include numerous exhibits, some of which are particularly significant to the Commission's assessment of the effect of the CMA Agreement on the transaction described in the Application. For instance, 49 CFR § 1180.6(a)(2)(i) requires Applicants to describe the effect of the transaction on inter- and intramodal competition, including a description of the relevant markets. Section 1180.6(a)(2)(ii) requires a description of the financial consideration involved in the proposed transaction on any economies to be effected in operations and any increase in traffic revenues, earnings available for fixed charges, and net earnings, expected to result from the consummation of the proposed transaction, and the effect of the increase, if any of total fixed charges resulting from the proposed transaction. Applicants also are required by Section 1180.6(a)(2)(iv) to describe the effect of the proposed transaction upon the adequacy of transportation service to the public, as measured by the continuation of essential transportation services by applicants and other carriers.

Labor considerations are covered by Section 1180.6(a)(2)(v), which requires a description of the effect of the proposed transaction upon applicant carriers' employees (by

class or craft), the geographic points where the impact will occur, the timeframe of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached. The Application also must disclose the effect of inclusion (or lack of inclusion) in the proposed transaction of other railroads in the territory under 48 U.S.C. 11344. (Section 1180.6(a)(2)(vi).)

Additionally, Board rules provide for submission of information and data with respect to environmental matters prepared in accordance with 49 C.F.R. Part 1105. In *major* and *significant* transactions, applicants shall, as soon as possible, and no later than the filing of a notice of intent, consult with the Commission's Energy and Environment Branch for proper format of the environmental report (49 C.F.R. Section 1180.6(a)(8)).³ The rules also require that Applicants file analyses of the impacts of the proposed transaction - both adverse and beneficial on intermodal and intramodal competition for freight surface transportation in the regions affected by the transaction and on the provision of essential services by applicants and other carriers, and a detailed Operating Plan must be submitted (49 C.F.R. Sections 1180.7 and 1180.8).

³ The Environmental Report submitted with the Application was based upon inadequate and incorrect information. The Environmental Report ("ER") was then used to prepare a Preliminary Draft Environmental Assessment ("PDEA"), and eventually the Environmental Assessment ("EA") itself. Thus, in the end, the STB is relying upon only an inadequate and incorrect environmental analysis of the merger as originally proposed. The insufficiencies of the ER, PDEA and EA are exacerbated by introduction of even more trackage rights' being granted to BN/Santa Fe under the CMA Agreement.

The Application included these required filings.⁴ In fact, as Applicants' counsel stated in a hearing before Administrative Law Judge Nelson,

All of the issues that these folks say are so thorny and difficult are addressed very extensively in the application. We went the extra mile on that. We didn't leave things for rebuttal. Any issue that anyone raised with us in discussions, we addressed in the application.

December 1, 1995 hearing, Tr. p. 53.

However, the "transaction" described in the Application and explored by the parties in discovery is a distant cousin to the transaction that is currently before the Board. Indeed, the "proposed transaction" so often referred to in section 11344(b)(1)(A)-(E) is no longer the "proposed transaction" set forth in the Application and in which over 150 parties submitted comments about on March 29th. The Operating Plan, as originally submitted, is now obsolete. The Market Impact Analysis performed by Messrs. Peterson and Barber was premised on the Agreement, and does not consider the impacts of the CMA Agreement on competition. Likewise the revenues, benefits, traffic projections and operating economies, so succinctly summarized in the Summary of Benefits (Appendix A to Application), are no longer accurate. Further, the financial terms of the CMA Agreement are not fully disclosed, e.g., paragraph 5, deals with equal access to Dayton Yard, on economic terms no less favorable than the terms of UP/SP's access, for storage-in-transit of traffic handled by BN/Santa Fe pursuant to the Agreement," and paragraph 6 provides for UP/SP to place 100% of trackage rights fees into a segregated fund to be spent on maintenance, capital

⁴ The Application also included a notice of exemption for settlement related trackage rights pursuant to the Agreement together with petitions for exemption related to acquisition and operation of trackage in the states of California, Texas and Louisiana and several other related applications (Finance Docket No. 32760, Sub. No. 1, 2, 3, 4, 5, 6, 7, 8, and 9).

improvements, etc. The Application, is thus quite simply inadequate to accurately reflect the "proposed transaction" now being put forth by Applicants. Accordingly, Applicants should be required to submit an amended application to present to the Board the information that the STB is required to examine in analyzing the public interest of a "proposed transaction."

Upon Applicants' filing of their amended application, parties should be afforded the opportunity to "test the Amended Application" by conducting discovery as to the issues raised in the Amended Application. KCS recognizes that Applicants would object to discovery as to any issues not raised for the first time in the Amended Application, and KCS's request is limited to discovery as to new data presented for the first time in the Amended Application.

Authority for requiring Applicants to furnish the Board with impact analyses of the CMA Agreement is established in 49 C.F.R. Section 1180.7: "The Commission may identify particular markets and issues that it believes warrant further study." Further, in this proceeding the Commission specifically reserved "the right to require the filing of supplemental information from applicants or any other party or individual, as necessary to complete the record in this matter." (Decision No. 9, p. 9.) Additionally, the Administrative Procedure Act, 5 U.S.C. § 556(d), provides that "[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

The authority for the Board's ability to issue an order requiring amendment of the Application therefore cannot be questioned. Indeed, in similar circumstances, the

Commission has required Applicants of a merger transaction to submit an amended application and allowed for additional comments on such new information. In 1993, Applicant UP filed an application to acquire control of Chicago and North Western Holdings Corporation and Chicago and North Western Transportation Company ("CNW"), Docket No. 32133. Shortly before oral argument on a Motion to Dismiss, Applicants filed an S-3 draft prospectus with the SEC for sale of CNW stock. The stock sale and related events were described by the Commission as having "considerable importance" to the application. Despite the Commission's finding that the original application presented a prima facie case as required by 49 CFR § 1180.4(c)(8), it also noted that presentation of a prima facie case "does not bind the Commission in its determination of the application on its merits." *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control -- Chicago and North Western Holdings Corporation and Chicago and North Western Transportation Company*, 9 ICC 2d 939, 1993 ICC Lexis 183 (September 17, 1993) at *25. The Commission therefore required Applicants to supplement their Application

Because of the stock sale and related events, there is now a specific transaction that we can analyze, and it is now necessary for applicants to supplement their application with evidence that will conform to the actual transaction we will be scrutinizing.

Id at *27. The CMA Agreement is described by Applicants as an "important settlement." (UP/SP-219, p.1). The significance of the CMA Agreement thus warrants "the filing of supplemental information from applicants . . . necessary to complete the record in this matter." (Decision No. 9, p. 9)

Plainly, the issue of the competitive impact of this merger is the central issue in this case. Just as plainly, reliance by the Board on the CMA Agreement as having any weight as a solution to the anticompetitive effects of the merger without requiring the statutory disclosures and permitting discovery, cross-examination, or rebuttal could render the Board's decision reversible. In *People of State of Illinois v. United States*, 666 F.2d 1066 (7th Cir. 1981), the Court found that the opposing parties in an abandonment proceeding should have been afforded the right of cross-examination with regard to supplementary evidence filed by the railroad applying for abandonment. The court began by quoting long-established precedent:

"[T]he more liberal the practice in admitting testimony, the more imperative the obligation to present the essential rules of evidence by which rights are asserted or defended All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the findings"

666 F.2d 1066 at 1082 (quoting *I.C.C. v. Louisville & Nashville R.R.*, 227 U.S. 88, 93 (1913)). Then, the Court pointed out that (1) the test is whether material facts are in dispute and whether verified statements provide an adequate basis for resolution of the disputed factual questions, and (2) that a prior history of cross-examination is very significant, particularly where it shows that "the opportunity for cross-examination was critical in achieving an accurate determination of the facts." 666 F.2d at 1082-83.

This rationale is especially true in this proceeding where neither the Application, the witness testimony nor discovery dealt with the efficacy of the trackage rights dealt with in the CMA Settlement. Thus, without disclosure by Applicants of the prerequisite data

required by the statute and the regulations as enumerated above and the opportunity to conduct discovery, the Board should not consider the CMA Agreement in making its determination as to the appropriate solutions for the anticompetitive effects of this merger.

There are fundamental issues of material fact in dispute with respect to the CMA Settlement, including whether it resolves any adverse competitive consequences of the merger. Further, there are no verified statements supporting the claim that the CMA Agreement solves all competitive impact issues. Indeed, of the 13 issues relating to the anticompetitive concerns identified by CMA in its March 29, 1996 comments (CMA-7), the CMA Agreement resolves only 3, and it does not even purport to resolve competitive issues raised by other parties.

If the Board does not require Applicants to submit an Amended Application, KCS shows that at a bare minimum, all parties of record should be allowed to conduct discovery as to the effect of the CMA Agreement and to present evidence on this issue. Nonapplicant parties are entitled to explore the alleged benefits and synergies that Applicants claim will result from the CMA Agreement in order to provide the Board with a complete record upon which it can base its decision in this the largest rail merger to face the Board.

Applicants state that the CMA Agreement will be addressed in its rebuttal filing (UP/SP-219, p.1); however, at that stage of the proceedings the parties will have no opportunity to present further evidence that may illustrate the inadequacy of the CMA Agreement. In *Pittsburgh and Lake Erie Railroad Co. v. I.C.C.*, 796 F.2d 1534 (D.C. Cir. 1986), the Circuit Court affirmed the Commission's striking of "a completely new efficiency study" because it was introduced in rebuttal "at a stage in the proceeding at which the

opposing party will not have an opportunity to respond" 796 F.2d at 1544. See also, *Arizona Electric Power Cooperative Inc. v. Atchison, Topeka and Santa Fe Ry.*, Docket No. 37437 (May 22, 1987) at pp 2-3. Accordingly, the Commission should allow parties discovery as to the CMA Agreement or disregard it entirely.

Under the APA (5 U.S.C. § 556(e)), the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision" (Emphasis added). The courts of appeals have uniformly insisted that decisions be made on the adversarial record, e.g., *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519, 534-36 (D.C. Cir. 1978) (absence of adversarial comment by parties created barrier to effective judicial review); *American Iron and Steel Institute v. Environmental Protection Agency*, 568 F.2d 284, 296-97 (D.C. Cir. 1977) ("touchstone" of review is administrative record rather than "post hoc rationalizations of counsel or even agency members"); *Portland Cement Ass'n* ("critical defect" in agency decisionmaking process when comments not received from all pertinent parties); *Dry Color Manufacturers' Ass'n, Inc. v. Oil, Chemical and Atomic Workers Int'l Union*, 486 F.2d. 98, 103-4 (3d Cir. 1973) (Department relied on report found not part of the record); and, *Department of Public Service Regulation, Public Service Commission, State of Montana v. United States*, 344 F. Supp. 1386, 1389-90 (D. Mon. 1972) (ICC order granting certificate of abandonment annulled, set aside and permanently enjoined when plaintiffs established prejudice because ICC considered effect of merger outside the record). Accordingly, if Applicants are not required to amend their Application to support the claimed benefits of the CMA Agreement, the parties should be allowed to pierce the *ipse dixit* claims made by Applicants regarding the effect of the CMA Agreement upon competition by conducting discovery as to the effect of the CMA Agreement.

CONCLUSION

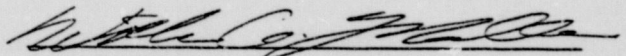
Throughout this proceeding Applicants have claimed that the original trackage rights Agreement with BN/Santa Fe resolved all the 2-to-1 problems occasioned by the merger. After months of discovery and review of the comments submitted by approximately 150 parties, Applicants now appear to admit that, after five months of vigorous defense of the original Agreement, the Agreement that formed the cornerstone of their Application was insufficient. Applicants would now have the Board accept their unsupported position that the "New and Improved Agreement" in fact solves the competitive problems that the "Original Formula" did not. Like the original Agreement, the CMA Agreement should be supported by an Amended Application with an opportunity for the parties to explore Applicants' positions through discovery. Alternatively, parties should be allowed discovery as to the CMA Agreement and to present evidence on this issue.

Respectfully Submitted,

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April 29, 1996


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Attorneys for The Kansas City
Southern Railway Company

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "The Kansas City Southern Railway Company's Motion to Require Amendment to Application or in the Alternative to Allow Parties to Conduct Discovery and Submit Evidence Relating to Applicants' Settlement Agreement with CMA (UP/SP-219)" was served this 29th day of April, 1996, by hand delivery to counsel for Applicants and by hand delivering or depositing a copy in the United States mail in a properly addressed envelope with adequate postage thereon addressed to each other party of record.


Attorney for The Kansas City Southern
Railway Company

STB

FD

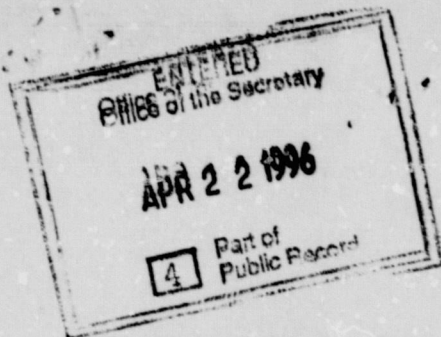
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HARKINS CUNNINGHAM

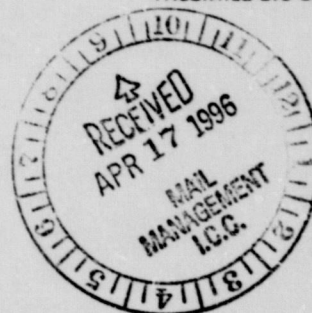
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April 17, 1996



HAND DELIVERED

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

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

Dear Mr. Williams:

Enclosed for filing in the above-captioned proceeding
are an original and 20 copies of a document designated as UP/SP-
218, Applicants' Fourteenth Set of Discovery Requests.

Yours truly,

Gerald P. Norton

cc: The Honorable Jerome Nelson
Restricted Service List

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

APPLICANTS' FOURTEENTH SET OF DISCOVERY REQUESTS

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April 17, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

APPLICANTS' FOURTEENTH SET OF DISCOVERY REQUESTS

Pursuant to 49 C.F.R. §§ 1114.21 et seq., and the Discovery Guidelines entered in this proceeding on December 7, 1995, and the rulings of Judge Nelson on March 8, 1996 ("March 8 rulings"), Applicants UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL and DRGW direct the following interrogatories and document requests to each party ("you") who made a filing on or about March 29, 1995, and is listed in the Appendix. You should respond to those requests designated for response by you.

Responses should be delivered as soon as possible, and in no event later than 5:00 p.m. on the sixth calendar day from the date of service hereof (see March 8 rulings, Tr. 2061). According to Judge Nelson, claims of undue burden must "be detailed as to time, money, physical limitations, geography, or any other factors making the alleged burden" (id., Tr. 2061), and you must bring documents for which claims of irrelevance or privilege are made to a hearing, for review by the Administrative Law Judge and immediate production (id., Tr. 2056). You are

requested to contact the undersigned promptly to discuss any objections or questions regarding these requests with a view to resolving any disputes or issues of interpretation informally and expeditiously.

DEFINITIONS AND INSTRUCTIONS

Applicants incorporate by reference the definitions and instructions in their first set of interrogatories and requests for production of documents. [A copy of those definitions and instructions is enclosed for parties not served with a first set.]

"March 29 filings" means any filing due March 29, 1996, that you made or served in response to the Application, including documents that were put or due to be put in a document depository on or about April 1, 1996, in conjunction with those filings, pursuant to the March 8 rulings, or in response to the first set of discovery requests.

INTERROGATORY

1. State the approximate number of shippers you contacted about providing a statement opposing the UP/SP merger in whole or in part or supporting the position you have stated.
[CR, KCS, MRL, Tex-Mex]

DOCUMENT REQUEST

1. Produce documents sufficient to identify the shippers you contacted about providing a statement opposing the

UP/SP merger in whole or in part or supporting the position you have stated. [CR, KCS, MRL, Tex-Mex]

Respectfully submitted,

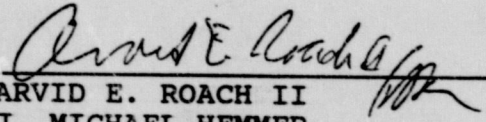
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April 17, 1996

Finance Docket No. 32760

Appendix to Applicants' Fourteenth Set of Discovery Requests

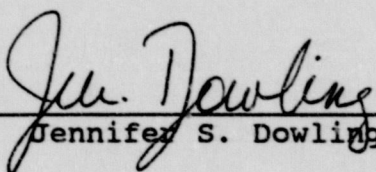
Party	Interrogatory	Document Request
Conrail	1	1
KCS	1	1
MRL	1	1
Tex-Mex	1	1

CERTIFICATE OF SERVICE

I, Jennifer S. Dowling, certify that, on this 17th day of April, 1996, I caused a copy of the foregoing document to be served by hand or facsimile transmission on all parties to whom it is directed so as to be received by 5:00 p.m., and by first-class mail, postage prepaid, or a more expeditious form of delivery, on all other parties of record appearing on the restricted service list in Finance Docket No. 32760, and on

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

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


Jennifer S. Dowling

STB

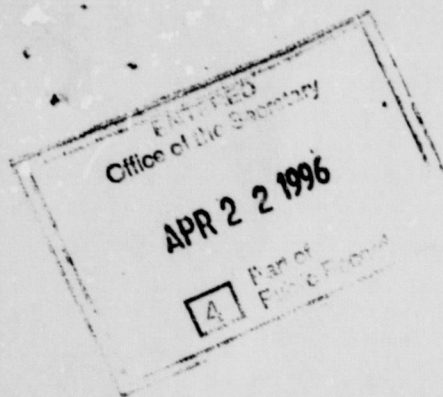
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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760



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

THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S RESPONSES TO
APPLICANTS' FOURTH SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS

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Attorneys for The Kansas City Southern
Railway Company

April 15, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S RESPONSES TO
APPLICANTS' FOURTH SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS

The Kansas City Southern Railway Company ("KCS") responds to Applicants' Fourth Set of Interrogatories and Requests for Production of Documents as follows:

KCS reasserts and incorporates by reference, its General Objections to Applicants' discovery requests as set forth in KCS-28, paragraphs 3 through 13. Subject to these objections and to prior rulings by Administrative Law Judge Nelson, KCS responds to Applicants' individual interrogatories as follows:

13. With respect to the transcript cited at KCS-33, p.48, (a) who prepared it; (b) was it prepared from a recording (if so, produce it); (c) are there any notes (if so, produce them); (d) who provided it to KCS; (e) is KCS aware of any alterations from what was in

fact said on the conference call, inserted by anyone; (f) if so, identify same and who inserted them; (g) state fully KCS' knowledge, or lack of knowledge, as to the accuracy of the transcript. [KCS]

Response:

- (a) James H. Sullivan of James H. Sullivan Research.
- (b) Yes. KCS does not have within its possession, custody or control the actual recording.
- (c) If such notes exist, they are not in the possession, custody or control of KCS.
- (d) James H. Sullivan
- (e) Yes.
- (f) Pg. 10, line 42, the words "BYE BYE esp to Mike H-" were inserted by Mr. Sullivan.
- (g) Based upon the representation of Mr. Sullivan, KCS believes the transcript to be an accurate reflection of the September 26, 1995 Union Pacific Teleconference with analysts.

This 15th day of April, 1996.

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Attorneys for The Kansas City Southern
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "The Kansas City Southern Railway Company's Responses to Applicants' Fourth Set of Interrogatories and Requests for Production of Documents" was served this 15th day of April, 1996, by hand delivery to Applicants and upon the restricted service list by U.S. mail.

Alan E. Tubel

Attorney for The Kansas City Southern
Railway Company

STB

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ENTERED
Office of the Secretary

APR 19 1996

3 Part of
Public Record

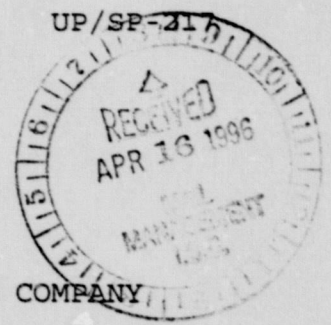
BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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



APPLICANTS' TWELFTH SET OF DISCOVERY REQUESTS

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Pacific Railroad Company

April 16, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

APPLICANTS' TWELFTH SET OF DISCOVERY REQUESTS

Pursuant to 49 C.F.R. §§ 1114.21 et seq., and the Discovery Guidelines entered in this proceeding on December 7, 1995, and the rulings of Judge Nelson on March 8, 1996 ("March 8 rulings"), Applicants UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL and DRGW direct the following interrogatories and document requests to each party ("you") who made a filing on or about March 29, 1996, and is listed in the Appendix. You should respond to those requests designated for response by you.

Responses should be delivered as soon as possible, and in no event later than 5:00 p.m. on the sixth calendar day from the date of service hereof (see March 8 rulings, Tr. 2061). According to Judge Nelson, claims of undue burden must "be detailed as to time, money, physical limitations, geography, or any other factors making the alleged burden" (id., Tr. 2061), and you must bring documents for which claims of irrelevance or privilege are made to a hearing, for review by the Administrative Law Judge and immediate production (id., Tr. 2056). You are requested to contact the undersigned promptly to discuss any objections or questions regarding these requests with a view to

resolving any disputes or issues of interpretation informally and expeditiously.

DEFINITIONS AND INSTRUCTIONS

Applicants incorporate by reference the definitions and instructions in their first set of interrogatories and requests for production of documents. [A copy of those definitions and instructions is enclosed for parties not served with a first set.]

"March 29 filings" means any filing due March 29, 1996, that you made or served in response to the Application, including documents that were put or due to be put in a document depository on or about April 1, 1996, in conjunction with those filings, pursuant to the March 8 rulings, or in response to the first set of discovery requests.

INTERROGATORY

1. With respect to the statement at footnote 5 of Mr. Crowley's Verified Statement that rates developed from the Waybill data "are higher than the actual rates paid by Sierra/Idaho," state (a) the actual rates paid by Sierra/Idaho, (b) the differences between the actual rates and the rates developed from the Waybill data, and (c) the reasons for the differences between the actual rates and the Waybill data. (SPP)

2. With respect to Table 7 of Mr. Crowley's Verified Statement, for each move summarized in the table state (a) the total tonnage of the movement or contract, (b) the duration of the movement or contract, (c) whether the movement is in rail-

owned or customer-owned equipment, (d) the date (or, at least, year) of the contract governing the movement, and (e) the identity of the destination customer. (SPP)

3. With respect to Exhibit TDC-4, showing "transportation rates" for UP coal movements from Uinta, Hanna and Green River Basins for 1994, provide the same information with respect to UP coal movements from the Powder River Basin. (SPP)

4. With respect to Exhibit TDC-7, provide data showing average revenue per ton-mile for each year 1984 through 1994 for each of the four railroads included in that exhibit. (WCTL, WP&L, WPS)

5. With respect to Table 7 of Mr. Crowley's Verified Statement, for each move summarized in the table state (a) the total tonnage of the movement or contract, (b) the duration of the movement or contract, (c) whether the movement is in rail-owned or customer-owned equipment, (d) the date (or, at least, year) of the contract governing the movement, and (e) the identity of the destination customer. (WCTL, WP&L, WPS)

6. With respect to Exhibit TDC-8, showing "transportation rates" for UP coal movements from Uinta, Hanna and Green River Basins for 1994, provide the same information for UP coal movements from the Powder River Basin. (WCTL, WP&L, WPS)

7. With respect to TU's August 1994 "Martin Lake Fuel Study," provide in tabular form the forecasted underlying fuel price data by year for each lignite source, the PRB source, and

natural gas, in nominal dollars and with assumed inflation rates identified for each source. Identify and show the principal components of each delivered price (i.e., assumed rail rates, railcars, gas transportation, minehead prices and wellhead prices). (TUE)

8. State the average haul distance by truck and rail for each lignite mine serving Martin Lake. Identify for each mine (a) the average production cost including capital recovery/debt service, taxes and royalties, (b) the reserves available, (c) the coal quality, (d) the major items of capital equipment employed, (e) the strip ratio and (f) the seams mined. (TUE)

9. Identify all lignite reserves adjacent to or within 50 miles of the Martin Lake plant or rail facilities, including without limitation the South Henderson reserve, and provide the following information for each:

- (a) Estimated recoverable coal quantities;
- (b) Strip ratio;
- (c) Estimated mining costs;
- (d) Royalties;
- (e) Ownership, mineral and surface; and
- (f) Any estimate by TU of cost of this coal (i) at the mine level and (ii) delivered to Martin Lake, whether mined by TU or by a third party. (TUE)

10. State the projected cost of any acquisition that TU has considered of advanced gas turbines (defined as CCGT with

heat rates less than 8,000 Btu/Kwh), and specify the assumed delivered and wellhead gas price. (TUE)

11. With respect to Exhibit TDC-2 to Mr. Crowley's Verified Statement, state (a) which movements have been included in this exhibit, (b) whether this exhibit is meant to reflect all single-line UP coal movements from the PRB to any destination, (c) whether any single-line UP coal movements from the PRB have been excluded from the exhibit and, if so, which ones, and (d) the percentage of total UP coal movements from the PRB represented by the movements in the exhibit. (KENN)

12. With respect to Exhibit TDC-4 to Mr. Crowley's Verified Statement, state (a) which movements have been included in this exhibit, (b) whether this exhibit is meant to reflect all single-line SP coal movements from Colorado and Utah to any destination, (c) whether any single-line SP coal movements from Colorado and Utah have been excluded from the exhibit and, if so, which ones, and (d) the percentage of total SP coal movements from Colorado and Utah represented by the movements in the exhibit. (KENN)

13. With respect to Table 1, at page 9 of Mr. Crowley's verified statement, provide information comparable to this table but expressed in terms of average revenue per ton-mile, average cost per ton-mile, and average profit per ton-mile. (KENN)

DOCUMENT REQUEST

1. Produce any filings with regulatory commissions or any other public submissions or public statements relating to competition or substitution between coal and lignite. (TUE)

2. Produce any studies, surveys or analyses of competition or substitution between TU's lignite reserves and PRB coal. (TUE)

3. Produce any studies, surveys or analyses of the relationship between TU's lignite reserves and mining capability, and its purchases of PRB coal. (TUE)

4. Produce all bids by third parties received since 1990 to supply lignite to TU's Martin Lake plant.

5. Produce all studies, surveys and analyses, including without limitation submissions to the PUCT, on the acquisition by TU of advanced gas turbines (defined at CCGT with heat rates less than 8,000 Btu/Kwh). (TUE)

6. Produce all studies, surveys and analyses of TU's use of PRB coal or lignite alternatives at the Big Brown plant. (TUE)

7. Produce the actual Waybill data used by Mr. Crowley in preparing the calculations included in his verified statement and exhibits. (SPP, WCTL, WP&L, WPS, TUE, KENN)

Respectfully submitted,

CANNON Y. HARVEY
LOUIS P. WARCHOT
CAROL A. HARRIS
Southern Pacific
Transportation Company
One Market Plaza
San Francisco, California 94105
(415) 541-1000

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Southern Pacific Transportation
Company, St. Louis Southwestern
Railway Company, SPCSL Corp. and
The Denver and Rio Grande
Western Railroad Company

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

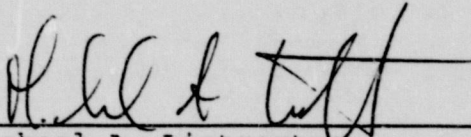
April 16, 1996

CERTIFICATE OF SERVICE

I, Michael A. Listgarten, certify that, on this 16th day of April, 1996, I caused a copy of the foregoing document to be served by hand or facsimile transmission on all parties to whom it is directed, and by first-class mail, postage prepaid, or a more expeditious form of delivery, on all other parties of record appearing on the restricted service list in Finance Docket No. 32760, and on

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

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



Michael A. Listgarten

STB

FD

32760

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81334 D
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



April 12, 1996

Via Hand Delivery

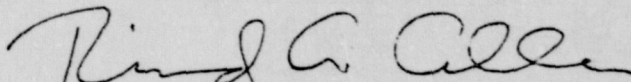
Vernon A. Williams
Secretary
Surface Transportation Board
Room 2215
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

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

Dear Secretary Williams:

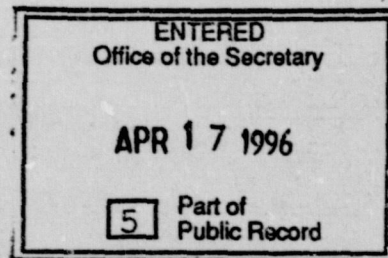
Enclosed for filing are an original and twenty copies of TM-26, the Supplemental Comments of Shippers in Support of the Responsive Application of The Texas Mexican Railway Company. Also enclosed is a 3.5" floppy computer disc containing a copy of each of the filings in Wordperfect 5.1 format.

Sincerely,


Richard A. Allen

Enclosures

cc: All parties of record



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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, Sub No. 13

THE TEXAS MEXICAN RAILWAY CO.

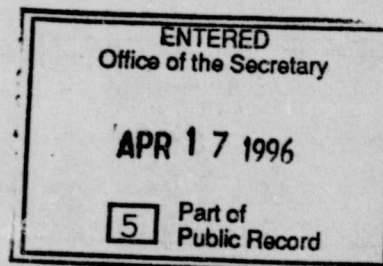
-- TRACKAGE RIGHTS OVER LINES OF

THE UNION PACIFIC RR. CO. AND SOUTHERN PACIFIC TRANS. CO.

SUPPLEMENTAL COMMENTS OF SHIPPERS
IN SUPPORT OF THE RESPONSIVE APPLICATION OF
THE TEXAS MEXICAN RAILWAY COMPANY

Richard A. Allen
Andrew R. Plump
John V. Edwards
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W., Suite 600
Washington, D.C. 20006-3939
(202) 298-8660
Attorneys for The Texas
Mexican Railway Company

April 12, 1996



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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, Sub No. 13

THE TEXAS MEXICAN RAILWAY CO.
-- TRACKAGE RIGHTS OVER LINES OF
THE UNION PACIFIC RR. CO. AND SOUTHERN PACIFIC TRANS. CO.

SUPPLEMENTAL COMMENTS OF SHIPPERS
IN SUPPORT OF THE RESPONSIVE APPLICATION OF
THE TEXAS MEXICAN RAILWAY COMPANY

The Texas Mexican Railway Company makes this supplemental filing to submit additional verified statements of shippers in support of the Responsive Application of the Texas Mexican Railway Company. These statements are attached. The parties registering their support for the merger are listed on the enclosed table of contents.

Respectfully submitted,

Richard A. Allen
Andrew R. Plump
John V. Edwards
ZUCKERT, SCOUTT & RASENBERGER, LLP
888 Seventeenth Street, NW
Suite 600
Washington, DC 20006-3939
(202) 298-8660

April 12, 1996

Attorneys for Texas Mexican
Railway Company

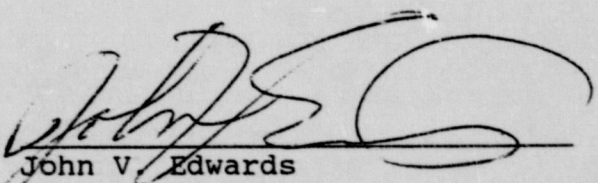
CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of April, I have caused to be served TM-26, Supplemental Comments of Shippers in Support of the Responsive Application of the Texas Mexican Railway Company, by hand delivery upon the following persons:

Arvid E. Roach II
J. Michael Hemmer
Michael L. Rosenthal
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-7566

Paul A. Cunningham
Richard B. Herzog
James M. Guinivan
Harkins, Cunningham
Suite 600
1300 Nineteenth Street, N.W.
Washington, D.C. 20036

I have also caused the foregoing to be served by first-class mail, postage pre-paid, or by a more expeditious manner of delivery, on all parties of record in Finance Docket No. 32760.



John V. Edwards
Zuckert, Scoutt
& Rasenberger, L.L.P.
Brawner Building
888 17th Street, N.W.
Washington, D.C. 20006-3959
(202) 298-8660

Dated: April 12, 1996

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CONTINENTAL PAPER GRADING CO.

PAPER MILL SUPPLIES

1638 LUMBER ST.
CHICAGO, ILLINOIS 60616

March 22, 1996

Mr. Vernon Williams
Surface Transportation Board
Room 3315
12th and Constitution, N.W.
Washington, D.C. 20423-0001

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

I have held the position of Transportation Manager at Continental Paper Grading for three years. Continental Paper Grading is a major national scrap paper broker. Our company ships more than 200 carloads of scrap paper annually from all over the country in to Mexico via Laredo, Texas.

Our company has been a major user of rail service for transportation between the United States and Mexico. Continental Paper Grading has a strong interest in competitive rail transportation between the United States and Mexico. The Laredo / Nuevo Laredo gateway is the primary route for shipments between the two countries for the majority of international traffic. This gateway possesses the strongest infrastructure of customs brokers. It also provides the shortest routing between major Mexican industrial and population centers and the Midwest and Eastern United States.

Our company depends on competition to keep prices down and to spur improvements in products and services. For many years Union Pacific and Southern Pacific have competed for our traffic via Laredo, resulting in substantial cost savings and a number of service innovations. TexMex has been Southern Pacific's partner in reaching Laredo in competition with Union Pacific, as Southern Pacific does not reach Laredo directly.

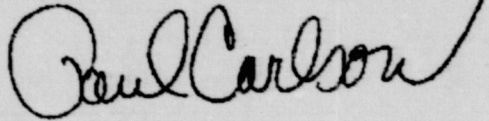
A merger of Union Pacific and Southern Pacific will seriously reduce, if not eliminate, our competitive alternatives via the Laredo gateway. Although these railroads have recently agreed to give certain trackage rights to the new Burlington Northern Santa Fe Railroad, we do not believe the BNSF, as the only other major rail system remaining in the Western United States, will be an effective competitive replacement for an independent Southern Pacific on this important route.

I understand there is an alternative that will preserve effective competition for my traffic. TexMes has indicated a willingness to connect with other carriers via trackage rights to provide efficient competitive routes. Trackage rights operating in such a way as to allow TexMex to be truly competitive are essential to maintain the competition at Laredo that would otherwise be lost in the merger. Thus I urge the Surface Transportation Board to correct this loss of competition by conditioning this merger with a grant of trackage rights via efficient routes between Corpus Christi and these connecting railroads.

Economical access to international trade routes should not be jeopardized when the future prosperity of both countries depends so strongly on international trade.

Yours truly,

CONTINENTAL PAPER GRADING COMPANY



Paul Carlson

cc: Texas Mexican Railway Co.

Verified Statement
of
Daniel B. Hastings, Jr.
On behalf of
Daniel B. Hastings, Inc.

My name is Daniel B. Hastings, Jr., President of Daniel B. Hastings, Inc. Our company acts as an agent to represent many Fortune 500 companies that use rail transportation service between the United States and Mexico. We are involved in expediting thousands of rail cars annually moving via the Laredo gateway.

This high volume gateway is important because of the strong infrastructure of customs brokers, warehousing, transportation and distribution centers located there to support importers, and exporters. Laredo also provides the shortest and most direct route for shipments moving between the Midwestern and Eastern United States and the major industrial centers in Mexico. Use of this gateway versus other border crossings translates into major financial savings each year to the Fortune 500 companies we represent. We anticipate a 20% annual growth in the business we handle over the Laredo gateway.

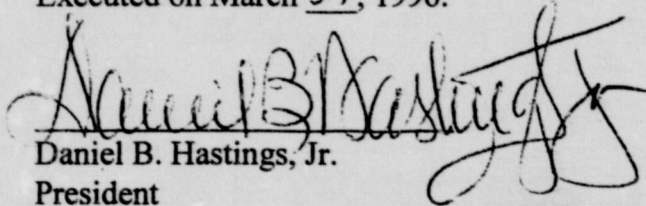
The majority of the business we handle involves shipments for the steel, automobile and minerals industries. We are very concerned about the loss of business that could occur at Laredo if the UP-SP merger is approved. From our perspective, the UP and SP-TexMex have competed strongly for business moving in this corridor. This competition has produced lower rates and better service over Laredo which has contributed to the tremendous growth in business moving over this gateway. We believe that a loss of competition in this corridor will decrease our ability to handle import and export traffic in the future.

We are also concerned that the combined UP-SP will concentrate only on the larger customers, leaving smaller shippers (many of whom we also represent) without competitive rates or service to continue their import and export activity. This would result in lost business for smaller shippers and for us at the Laredo border crossing. We understand that the TexMex Railroad is asking for trackage rights as a condition of the UP-SP merger. A stronger TexMex Railroad operating between Laredo and Houston and Beaumont would continue to provide rail shippers with a competitive option to move traffic over the Laredo gateway. We support the TexMex in this effort. Therefore, we ask the Surface Transportation Board to strongly consider granting the trackage rights to the TexMex Railroad.

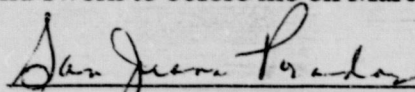
VERIFICATION

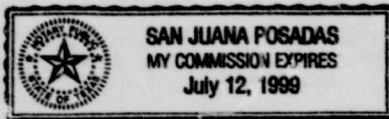
I, Daniel B. Hastings, Jr., declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on March 27, 1996.


Daniel B. Hastings, Jr.
President

Subscribed and sworn to before me on March ____, 1996.


Notary Public



VERIFIED STATEMENT
of Andrew J. Polo
on behalf of Degussa Corporation

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

I am Andrew J. Polo, Distribution Manager, Chemical Group of Degussa Corporation. Degussa Corporation manufactures and distributes various products from three U.S. plants to many destinations, including Mexico. Below is a summary of our plant locations, the serving railroad, and the products shipped.

<u>Location</u>	<u>Serving Railroad</u>	<u>Products</u>
Theodore, AL	CSX	Peroxide and feed supplements
Ivanhoe, LA	SP	Carbon blacks
Anzas, TX	SP	Carbon blacks

Degussa leases a substantial number of rail cars to move product. Our fleet currently consists of 200 tank cars and 600 covered hopper cars. We also truck a significant amount of business, including bagged product into Mexico.

Currently we ship less than 100 carloads annually into Mexico. Most of the traffic is routed via SP-Corpus Christi, TX-TexMex. For years the UP and SP have competed for our Mexico business. As a result our company has benefited from lower rates and has been successful in penetrating the Mexico market. In fact we are working with our Mexican company (Degussa of Mexico) to expand our business there. We plan to open a transload and repackaging plant, and are considering locating it at Pantaco, Mexico. Overall we believe that the option to truck product to this market will not play a significant role in our plant expansion project due to somewhat high truck rates.

Our plans to expand our business in Mexico will be difficult without competitive rail rates and service to move our product. We are very concerned that the UP/SP merger will eliminate rail competition that currently exists in south Texas. An absence of competition could translate into higher rates and slower service. Higher rates would make our delivered price noncompetitive in the export market. Higher transit times would require us to maintain a larger inventory and would delay payments.

We are very satisfied shipping into Mexico via Laredo. First of all, this gateway provides the shortest routing between our three plants and the markets we serve in Mexico. Secondly, the concentration of customs brokers there serves to expedite our

Degussa

Degussa
Corporation

shipments. Finally, Degussa of Mexico holds transportation contracts from Laredo to destinations in Mexico. In sum, the Laredo gateway will work for our expansion project as long as we continue to have competitive rail rates that will get us there.

To date, the BNSF has not expressed an interest in our Mexico traffic. We believe that the route they negotiated with the UP will be circuitous and therefore probably will not be competitive from a rate or service standpoint. Also, the BNSF does not have representation in Mexico. In contrast, the SP and TexMex, who have bid aggressively for our Mexico business, do have representation there.

Therefore, we urge the Surface Transportation Board to grant the trackage rights that the TexMex is seeking. We believe that this action will preserve the rail competition in the south Texas corridor that exists today.

VERIFICATION

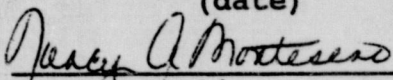
I, Andrew J. Polo, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on March 28, 1996
(date)



Andrew J. Polo

Subscribed and sworn to before me on March 28, 1996
(date)



Notary Public

NANCY A. MONTESANO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Oct. 3, 1999

VERIFIED STATEMENT
OF
FRED SCHRODT
ON BEHALF OF
FARMLAND INDUSTRIES, INC.

My name is Frederic E. Schrodt, Vice President of Transportation at Farmland Industries, Inc. My company is involved in the distribution of grain, feed, tallow and dical to the Mexico market. Business levels into Mexico have continued to grow since the passage of NAFTA. In fact, we ship a high volume of business into Mexico. Trucks cannot effectively handle this volume, particularly to destinations farther south in Mexico. Thus, we rely on rail movement to keep product flowing into the Mexican markets we serve.

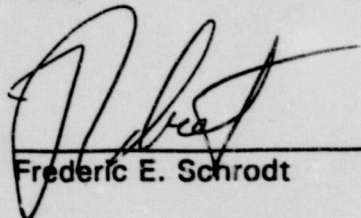
Farmland is interested in retaining viable rail options to move our products into Mexico. In the past, the TexMex has provided a viable alternative for rail movement to Laredo. We believe that this alternative will disappear if the UP-SP merger is approved. For years the UP and SP-TexMex have competed for our Mexico business, particularly in instances where both railroads serve the origination point. Our company has benefited from this competition by using the lowest cost and most beneficial method to transport our products to Mexican markets. Without competition in south Texas to Laredo, rail rates are sure to increase.

This loss of competition for our business could be remedied with a grant of trackage rights to the TexMex from Corpus Christi to Beaumont, TX. We believe that a TexMex operating from Houston and Beaumont in conjunction with other rail carriers could provide effective competition to the combined UP-SP by connecting with an independent Class I carrier.

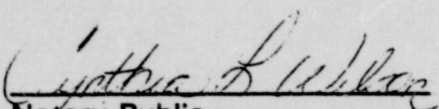
The BNSF has at times not shown much interest in our Mexican shipments. The BNSF's decision to get involved with this aspect of our business is driven by their hopper car needs for the U.S. market. The BNSF is competitive for our Mexico business only when demand for rail cars weakens. The TexMex, on the other hand, has always had a strong commitment to moving traffic into Mexico. That is why they must be given the opportunity to remain a viable carrier serving south Texas.

In view of the foregoing, Farmland strongly supports the granting of trackage rights to the TexMex from Corpus Christi to Beaumont so that the TexMex will be able to provide effective competition for our rail shipments to Laredo.

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


Frederic E. Schrod

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


Notary Public

CYNTHIA L. WILSON
NOTARY PUBLIC STATE OF MISSOURI
JACKSON COUNTY
MY COMMISSION EXP. SEPT 6, 1998



Georgia-Pacific Corporation

133 Peachtree Street NE (30303)
P.O. Box 105605
Atlanta, Georgia 30348-5605
Telephone (404) 652-4000

March 26, 1996

Mr. Vernon Williams
Surface Transportation Board
Room 3315
12TH and Constitution, N.W.
Washington, D.C. 20423-001

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

Dear Mr. Williams:

My name is Clark Handy, and I am Sr. Manager-Transportation Negotiations for Georgia-Pacific Corporation. In this capacity, I negotiate rail transportation for G-P's 14 papermills and 39 boxplants. Georgia-Pacific is one of the world's largest forest products companies with annual revenues of over 13 billion dollars. Annually, we ship over one hundred thousand tons of pulp and paper into Mexico by rail through the Eagle Pass and Laredo gateways.

Georgia-Pacific Corporation has a strong interest in competitive rail transportation between the United States and Mexico. The Laredo/Nuevo Laredo gateway is the primary route for shipments between the two countries for the majority of international traffic. This gateway possesses the strongest infrastructure of customs brokers. It also provides the shortest routing between major Mexican industrial and population centers and the Midwest and Eastern United States.

Our company depends on competition to keep prices down and to spur improvements in products and services. For many years Union Pacific and Southern Pacific have competed for our traffic via Laredo, resulting in substantial cost savings and a number of service innovations. TexMex has been Southern Pacific's partner in reaching Laredo in competition with Union Pacific, as Southern Pacific does not reach Laredo directly.

The merger of Union Pacific and Southern Pacific, as currently proposed will reduce, if not eliminate, our competitive alternatives via the Laredo gateway. Although these railroads have recently agreed to give certain trackage rights to the new Burlington Northern Santa Fe Railroad, we do not believe the BNSF, as the only other

To:
Tish
Fitzsimmons
(708) 256 2863
From: Clark Handy

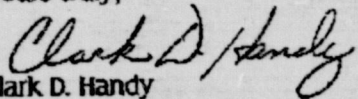
Mr. Vernon Williams
March 26, 1996
Page 2

major rail system remaining in the Western United States, will be a competitive alternative on this important route.

I understand there is an alternative that will preserve effective competition for my traffic. TexMex has indicated a willingness to connect with other carriers via trackage rights to provide efficient competitive routes. Trackage rights operating in such a way as to allow TexMex to be truly competitive are essential to maintain the competition at Laredo that would be lost in the current merger proposal. Thus I urge the Surface Transportation Board to alter the current merger proposal with a grant of trackage rights via efficient routes between Corpus Christi and these connecting railroads.

Economical access to international trade routes should not be jeopardized when the future prosperity of both countries depends so strongly on international trade.

Yours truly,


Clark D. Handy
Senior Manager, Transportation Negotiations
Pulp & Paper Logistics

cc: The Texas Mexican Railway Company

CRUSHED LIMESTONE BASE • RAILROAD BALLAST • CHEMICAL STONE • LIMESTONE PRODUCTS

**GULF COAST LIMESTONE, INC.**

P.O. Box 66, Seabrook, Texas 77586

Office (713) 474-4124

Fax (713) 474-3829

March 25, 1996

Mr. Vernon Williams
Surface Transportation Board
Room 3315
12th and Constitution, N.W.
Washington, D.C. 20423-0001

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

Dear Mr. Williams:

I have held the position of Vice President at Gulf Coast Limestone, Inc. for 10 years. G.C.L. is a major retailer of limestone and other road materials. Our products are used by general industry in a wide variety of projects. Currently, our company ships more than 10,000 carloads of material annually from central Texas to various destinations in Texas. We are always open to new marketing opportunities which may include Mexico.

Gulf Coast Limestone has a strong interest in competitive rail transportation between the United States and Mexico. The Laredo/ Nuevo Laredo gateway is the primary route for shipments between the two countries for the majority of international traffic. This gateway possesses the strongest infrastructure of customs brokers. It also provides the shortest routing between major Mexican industrial and population centers and the Midwest and Eastern United States.

Our company depends on competition to keep prices down and to spur improvements in products and services. For many years Union Pacific and Southern Pacific have competed for our traffic, resulting in substantial cost savings and a number of service innovations. TexMex has been Southern Pacific's partner in reaching Laredo in competition with Union Pacific, as Southern Pacific does not reach Laredo directly.

A merger of Union Pacific and Southern Pacific will seriously reduce, if not eliminate, competitive alternatives via the Laredo gateway. Although these railroads have recently agreed to give certain trackage rights to the new Burlington Northern Santa Fe Railroad, we do not believe the BNSF, as the only other major rail system remaining in the Western United States, will be an effective competitive replacement for an independent Southern Pacific on this important route.

I understand there is an alternative that will preserve effective competition. TexMex has indicated a willingness to connect with other carriers via trackage rights to provide efficient competitive routes. Trackage rights operating in such a way as to allow TexMex to be truly competitive are essential to maintain the competition at Laredo that would otherwise be lost in the merger. Thus I urge the Surface Transportation Board to correct this loss of competition by conditioning this merger with a grant to trackage rights via efficient routes between Corpus Christi and these connecting railroads.

Economical access to international trade routes should not be jeopardized when the future prosperity of both countries depends so strongly on international trade.

Yours truly,



Robert R. Robinson

cc: The Texas Mexican Railway Company C/O Central Business Services

Verified Statement
of
TOMMIE A. TURNER
on behalf of
JAMES RIVER CORPORATION

Surface Transportation Board
Finance Docket No. 32760

My name is Tommie A. Turner. I have been in Transportation and General Traffic Management for over thirty years. My current position is Manager of Rail Transportation at James River Corporation.

James River is a leading marketer and manufacturer of Consumer Products, Food and Consumer Packaging, and Communication Papers, with 116 manufacturing facilities in North America and Europe.

Our company ships more than 300 carloads of product annually to and from Mexico via Laredo. With the recent acquisition of additional sourcing facilities in Mexico, we plan a 25% increase in our business to and from Mexico in the next two years. A summary of our Mexico business is as follows:

PRODUCTS

<u>Facility</u>	<u>Inbound</u>	<u>Outbound</u>	<u>Route</u>
Portland, OR	Tissue stock	Finished paper towels	SP-TM and reverse
Berlin, NH	Printing paper	Finished products	CN-NS-New Orl-SP-TM and reverse
St. Francisville, LA	Printing paper, Pulpboard	Finished products	IC-New Orl-SP-TM and reverse
Pennington, AL	Tissue stock, Woodpulp	Finished products	MB-NS-New Orl-SP-TM and reverse

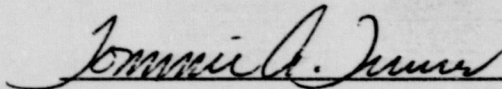
The Southern Pacific and TexMex have provided very competitive rates and service to and from Mexico. Their willingness to compete for our business has contributed to our success in accessing the Mexican market. Aggressive bidding for our traffic in the future will be necessary for us to accomplish our expansion goals.

The Laredo gateway has proved to be most efficient for the movement of our products between the U.S. and Mexico. This gateway possesses a strong infrastructure of customs brokers. Also, our Mexico receivers hold contract rates to move product from Laredo to destinations in Mexico. Our expansion in Mexico will depend on continued use of this gateway.

We are very concerned about the loss of competition that will occur in south Texas if the UP/SP merger is approved. Without the TexMex to bid on our business, we do not foresee any rail competition in this corridor in the future. The BNSF has not approached our company about handling our Mexico business and we would not consider the circuitous route on which they will be operating to Laredo in the future. While we move product to Mexico via trucks today, we fear that the loss of rail competition could prompt truckers to raise their rates.

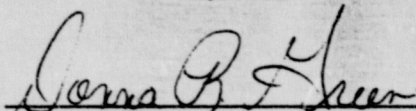
We understand that the TexMex is asking the Surface Transportation Board for trackage rights from Corpus Christi to Houston and Beaumont, TX as a condition of the UP/SP merger. We support the TexMex in this effort. We believe the trackage rights will allow the TexMex to continue to be competitive to Laredo if the merger is approved.

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



Tommie A. Turner
Manager of Rail Transportation

Subscribed and sworn to
before me on March 28, 1996



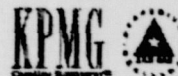
Notary Public

My Commission Expires June 30, 1997



Certified Quality System

March 25, 1996



Mr. Vernon Williams
Interstate Commerce Commission
Room 3315
12th and Constitution, N. W.
Washington, D.C. 20423-001

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

Dear Mr. Williams:

Sheffield Steel Corporation is a privately owned domestic steel producer with facilities located at Sand Springs, Oklahoma as well as three other locations and is part of the beleaguered U.S. Steel Industry. The Sand Springs plant provides stable and satisfying employment for approximately 500 people. I have functioned as Traffic Manager for Sheffield Steel for the past 8 years and as such, am familiar with it's transportation requirements.

Our company has been a major user of rail service for transportation between the United States and Mexico. Sheffield Steel has a strong interest in competitive rail transportation between the United States and Mexico. The Laredo / Nuevo Laredo gateway is the primary route for shipments between the two countries for the majority of international traffic. This gateway possess the strongest infrastructure of customs brokers. It also provides the shortest routing between major Mexican industrial and population centers and the Midwest and Eastern United States.

Our company depends on competition to keep prices down and to spur improvements in products and services. For many years Union Pacific and Southern Pacific have competed for our traffic via Laredo, resulting in substantial cost savings and a number of service innovations. TexMex has been Southern Pacific's partner in reaching Laredo in competition with Union Pacific, as Southern Pacific does not reach Laredo directly.

A merger of Union Pacific and Southern Pacific will seriously reduce, if not eliminate, our competitive alternatives via the Laredo gateway. Although these railroads have recently agreed to give certain trackage rights to the new Burlington Northern Santa Fe Railroad, we do not believe the BNSF, as the only other major rail system remaining in the Western United States, will be an

Mr. Vernon Williams
March 25, 1996
Page 2

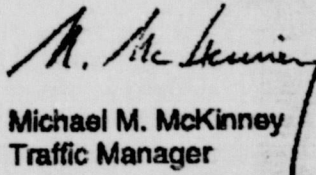
effective competitive replacement for an independent Southern Pacific on this important route.

I understand there is an alternative that will preserve effective competition for my traffic. TexMex has indicated a willingness to connect with other carriers via trackage rights to provide efficient competitive routes. Trackage rights operating in such a way as to allow TexMex to be truly competitive are essential to maintain the competition at Laredo that would otherwise be lost in the merger. Thus, I urge the Surface Transportation Board to correct this loss of competition by conditioning this merger with a grant of trackage rights via efficient routes between Corpus Christi and these connecting railroads.

Economical access to international trade routes should not be jeopardized when the future prosperity of both countries depends so strongly on international trade.

Very Truly Yours,

SHEFFIELD STEEL CORPORATION


Michael M. McKinney
Traffic Manager

MMM:srj

STB

FD

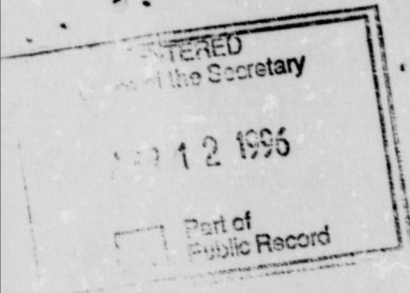
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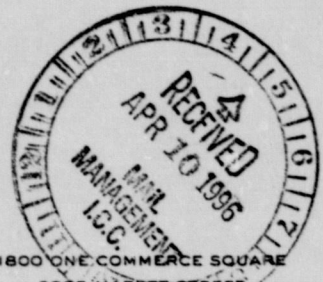
82724

82721



HARKINS CUNNINGHAM

ATTORNEYS AT LAW
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1300 NINETEENTH STREET, N.W.
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WRITER'S DIRECT DIAL

(202) 973-7605

April 10, 1996

HAND DELIVERED

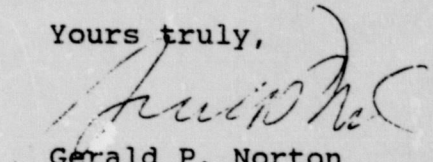
Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1201 Constitution Avenue, N.W., Room 1324
Washington, D.C. 20423

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

Dear Mr. Williams:

Enclosed for filing in the above-captioned proceeding
are an original and 20 copies of a document designated as UP/SP-
211, Applicants' Seventh Set of Discovery Requests.

Yours truly,


Gerald P. Norton

cc: The Honorable Jerome Nelson
Restricted Service List

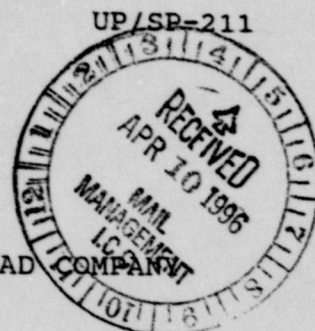
BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD
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' SEVENTH SET OF DISCOVERY REQUESTS

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CAROL A. HARRIS
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(415) 541-1000

PAUL A. CUNNINGHAM
RICHARD B. HERZOG
JAMES M. GUINIVAN
Harkins Cunningham
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 973-7601

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Southern Pacific Transportation
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Railway Company, SPCSL Corp. and
The Denver and Rio Grande
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ARVID E. ROACH II
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MICHAEL L. ROSENTHAL
Covington & Burling
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Washington, D.C. 20044-7566
(202) 662-5388

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

April 10, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

APPLICANTS' SEVENTH SET OF DISCOVERY REQUESTS

Pursuant to 49 C.F.R. §§ 1114.21 et seq., and the Discovery Guidelines entered in this proceeding on December 7, 1995, and the rulings of Judge Nelson on March 8, 1996 ("March 8 rulings"), Applicants UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL and DRGW direct the following interrogatories and document requests to each party ("you") who made a filing on or about March 29, 1995, and is listed in the Appendix. You should respond to those requests designated for response by you.

Responses should be delivered as soon as possible, and in no event later than 5:00 p.m. on the sixth calendar day from the date of service hereof (see March 8 rulings, Tr. 2061). According to Judge Nelson, claims of undue burden must "be detailed as to time, money, physical limitations, geography, or any other factors making the alleged burden" (id., Tr. 2061), and you must bring documents for which claims of irrelevance or privilege are made to a hearing on or about April 12, 1996, for review by the Administrative Law Judge and immediate production

(id., Tr. 2056). You are requested to contact the undersigned promptly to discuss any objections or questions regarding these requests with a view to resolving any disputes or issues of interpretation informally and expeditiously.

DEFINITIONS AND INSTRUCTIONS

Applicants incorporate by reference the definitions and instructions in their first set of interrogatories and requests for production of documents. [A copy of those definitions and instructions is enclosed for parties not served with a first set.]

"March 29 filings" means any filing due March 29, 1996, that you made or served in response to the Application, including documents that were put or due to put in a document depository on or about April 1, 1996, in conjunction with those filings, pursuant to the March 8 rulings, or in response to the first set of discovery requests.

ADMISSIONS

Applicants request that you admit the truth of the following matters:

1. A trackage rights agreement dated May 8, 1933, between The Yazoo and Mississippi Valley Railroad Company and the Houston & Shreveport Railroad Company, joined by its lessee, the Texas and New Orleans Railroad Company, covering tracks from about 596 feet south of Jordan Avenue to a connection with SSW in the vicinity of Commerce Street in Shreveport, Louisiana ("the

Jordan Ave. trackage rights agreement"), provides in Section 3 as follows:

All rules, regulations or orders with respect to the movement of engines, cars and trains, and the switching of cars on the Track, or to the maintenance, operation and use of the Track, or governing the conduct of employees, shall be reasonable and fair, and without any unreasonable preference or discrimination in favor of or against either party hereto; provided, however, that in the movement of trains, engines and cars upon and over the Track, those of the same class shall be accorded equal rights, while those of a superior class shall have preference over those of an inferior class. [KCS]

2. KCS and its affiliates are bound by the Jordan Ave. trackage rights agreement. [KCS]

3. KCS and its affiliates intend to comply with the terms of the Jordan Ave. trackage rights agreement, including the language quoted above in Request No. 1. [KCS]

4. A trackage rights agreement dated December 13, 1980, between the Kansas City Southern Railway Company and the Louisiana & Arkansas Railway Company and Southern Pacific Transportation Company and St. Louis-Southwestern Railway Company covering KCS' line of railroad from its Harriet Street Yard at Shreveport, Louisiana, southeasterly to Red Junction ("Red Junction trackage rights agreement") provides in Section 5 as follows:

All passenger trains shall be given preference over other trains and road trains shall be given equal dispatch according to their class. All operations upon and over the Red Line shall be conducted with due

regard to and without reasonable interference with rights of all users.

[KCS]

5. KCS and its affiliates are bound by the Red Junction trackage rights agreement. [KCS]

6. KCS and its affiliates intend to comply with the terms of the Red Junction trackage rights agreement, including the language quoted above in Request No. 4. [KCS]

7. A January 1, 1937, agreement between the Kansas City Southern Railway Company and Texas and Fort Smith Railway Company, on the one hand, and Guy A. Thompson, Trustee, on the other, relating to joint use of tracks between De Quincy, Louisiana and Beaumont, Texas ("Beaumont trackage rights agreement"), provides in Section 13 as follows:

[A]ll time cards, rules, regulations or orders for the movement of trains upon the Joint Line, issued by the Southern Company, shall be reasonable, just and fair to the Trustee, without preference for or discrimination in favor of the Southern Company.

All passenger trains upon the Joint Line shall be given preference over other trains, and the trains of the parties hereto shall be given equal dispatch, according to their class.

[KCS]

8. KCS and its affiliates are bound by the Beaumont trackage rights agreement. [KCS]

9. KCS and its affiliates intend to comply with the terms of the Beaumont trackage rights agreement, including the language quoted above in Request No. 4. [KCS]

INTERROGATORIES

1. If the answer to any Request for Admission is other than an unqualified "Yes," state every respect in which you disagree with the request. [KCS]

Respectfully submitted,

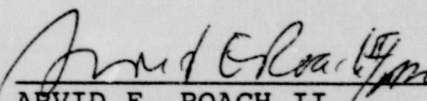
CANNON Y. HARVEY
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Southern Pacific Transportation
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Railway Company, SPCSL Corp. and
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Attorneys for Union Pacific
Corporation, Union Pacific
Railroad Company and Missouri
Pacific Railroad Company

April 10, 1996

Finance Docket No. 32760

Appendix to Applicants' Seventh Set of Discovery Requests

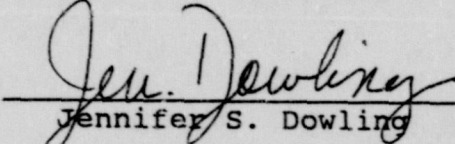
Party	Admissions	Interrogatory
KCS	1-9	1

CERTIFICATE OF SERVICE

I, Jennifer S. Dowling, certify that, on this 10th day of April, 1996, I caused a copy of the foregoing document to be served by hand or facsimile transmission on all parties to whom it is directed so as to be received by 5:00 p.m., and by first-class mail, postage prepaid, or a more expeditious form of delivery, on all other parties of record appearing on the restricted service list in Finance Docket No. 32760, and on

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

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


Jennifer S. Dowling

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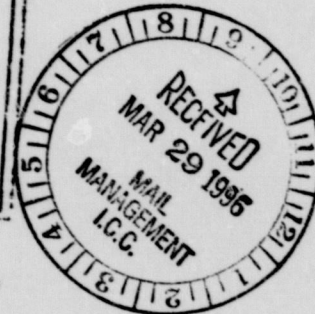
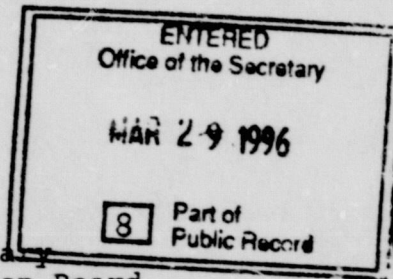
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CHAMBER OF COMMERCE

March 28, 1996

Mr. Vernon Williams
Office of the Secretary
Surface Transportation Board
U.S. Department of Transportation
1201 Constitution Avenue, N.W., Room 2215
Washington, D.C. 20423-0001



Fax: 202/927-5984

**Subject: Proposed Union Pacific/Southern Pacific Railroad
Merger - Finance Docket #32760**

Dear Secretary Williams:

On behalf of the Alice Chamber of Commerce, we would like to submit our written comments in support of the Texas Mexican Railway Company's (Tex Mex) petition to obtain trackage rights from Corpus Christi, Texas, to Beaumont and Houston, Texas, in order to connect with Tex Mex's new partner, Kansas City Southern Railway. We understand that the Surface Transportation Board (STB) will be considering granting of these trackage rights as a condition of the proposed Union Pacific/Southern Pacific Railroad merger. Tex Mex is Alice's only railroad carrier and we believe that if the UP/SP merger is approved, granting of these trackage rights is essential for Tex Mex to continue as a competitive, regional South Texas railroad providing service from Laredo through Alice to the Port of Corpus Christi, and to other regions of the country.

Tex Mex has served Alice and South Texas for more than 125 years, and has been Alice's only railroad since Southern Pacific abandoned their tracks and rights-of-way through Alice in the 1980's. If the UP/SP merger is approved and the trackage rights requested by Tex Mex are not granted, we are concerned that rail freight service for our local businesses will not be available at reasonable, competitive rates, and that the long-term, economic viability of Tex Mex may be threatened.

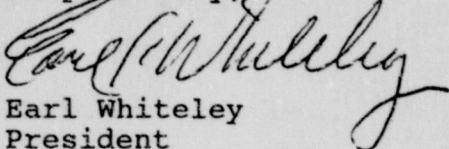
Alice - The Hub City of South Texas

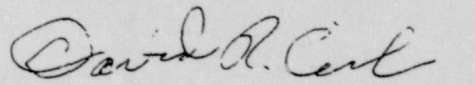
We are also concerned regarding the potential impact of the proposed UP/SP merger on the Port of Corpus Christi. The Port has been a major, regional ally in support of our transportation and economic development initiatives. We ask that provisions also be included as conditions to merger approval which will insure that competitive options will be available for shippers requiring rail service connecting with the Port of Corpus Christi.

In summary, we support Tex Mex's petition for trackage rights, and the inclusion of provisions to insure competitive options for shippers utilizing the Port of Corpus Christi as conditions for approval of the proposed UP/SP merger. Approval of these conditions will provide continued, uninterrupted rail service at competitive rates for present and future shippers in the Alice area, and for shippers requiring rail service connecting with the Port of Corpus Christi.

We appreciate your consideration of our written comments and recommendations. Please contact us if you require any additional information.

Respectfully,


Earl Whiteley
President


David R. Cich
Executive Vice President

STB

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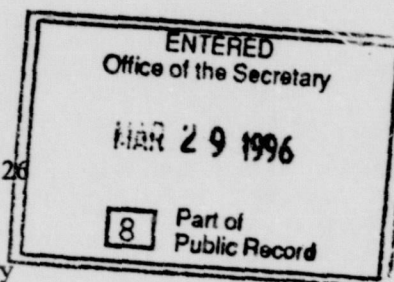
Monsanto

The Chemical Group
800 N. Lindbergh Boulevard
St. Louis, Missouri 63167
Phone: (314) 694-1000

March 26, 1996

Ms. Linda J. Morgan, Chair
Surface Transportation Board
Department of Transportation
1201 Constitution Ave., Room 4126
Washington, D.C. 20423

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



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

Dear Ms. Morgan & Mr. Williams:

This is Monsanto's verified statement submitted because of our concern that the UP/SP merger will significantly reduce rail competition. This statement will identify Monsanto as a rail user, provide the writers credibility to comment, highlight why this merger is important, offer opinions on what is believed to be wrong with the merger, and last of all recommend possible remedies.

Monsanto is a global company producing chemicals, fibers, consumer lawn care products, food additives, agricultural chemicals, agricultural seed, pharmaceutical, and specialty products. Monsanto has production facilities throughout the United States and Ex USA. Domestically we purchase numerous raw materials from vendors numbering in the thousands, and use rail transportation service in all of the continental US states as well as into and out of Canada and Mexico.

My name is David A. Pins. I am Manager Rail Transportation. A Monsanto employee for twenty three (23) years, with experience in all modes of transportation. Prior to employment with Monsanto I was employed with Missouri Pacific Railroad for approximately three (3) years in a Management Trainee and ultimately a sales capacity. I have experience with rail service, operations, and economics prior to and after passage of the Staggers Act of 1980.

The UP/SP merger is important to Monsanto, and the entire shipping public, because it is the "mother of all rail mergers". This isn't the Burlington Northern merging with the SantaFe, or Southern merging with the Norfolk Western, or SCL merging with the CO/BO. The UP/SP merger is essentially parallel track coverage. Currently, Monsanto benefits from competition between UP and SP for our rail movements.

For example, our facility in Luling, Louisiana is served by both the UP and SP for inbound and outbound shipments. We use competitive service and pricing to award business to the carrier who offers the best package for our needs. Vigorous competition between UP and SP results in a competitive, fair economics and customer responsive service to move our raw materials and finished goods to customers. When not satisfied with the economics or service we currently receive from one of these two carriers, we have the ability to switch carriers (or merely threaten to switch carriers) in order to secure improvements. Another example is Monsanto's Chocolate Bayou facility which is captive to the UP; however SP lines are nearby. For shipments out of Chocolate Bayou, we currently can choose to load directly to the UP, or transload by barge to railcar or truck to railcar at nearby SP lines. Competition between UP and SP for these movements prevents monopoly pricing strategies and tactics while assuring competitive service. If the merger is approved by the Surface Transportation Board, Monsanto will lose the benefit of competition between UP and SP, along with a competitive bidding process and the ability to threaten switching carriers.

Monsanto is concerned that the BNSF trackage rights agreement may not cure the lack of competition created if the BNSF chooses not to operate or is slow to startup operations over the trackage rights it stands to gain. The question of dispatching priorities for through train service, crewing issues, or too high of rates for the trackage rights all come together and could result in the BNSF choosing not to exercise its option to operate under the trackage rights. The disadvantaged railroad could fail to quote a transportation price to a prospective shipper. The scenario starts with a shipper calling the tenant railroad for a price and service quote, and the railroad taking an inordinate time to respond. The long response time is a not so subtle way a railroad has of communicating that they just don't want the business. It may be that the BNSF, because of digesting the merger with ATSF, is at risk of not being in a position to pursue business over the trackage rights in question, potentially for a long time to come.

Monsanto urges the Surface Transportation Board to give due diligence to maintaining competition and balance in an industry where large railroads have concentrated monopoly power over huge geographical locations and numerous shippers of varying sizes. Why would a non revenue adequate railroad want to merge with another non-revenue adequate railroad? The reason must be the measure for revenue adequacy cannot be right. I think the Surface Transportation Board, prior to allowing any further reduction in an otherwise minimal head-to-head rail competitive market place, should make a special effort to survey only captive shippers of the subject railroads in order to determine the railroads business practices with these captive shippers. If history shows captive shipper abuse in terms of service or economics it would suggest future railroad behavior. History, if ignored, will repeat itself.

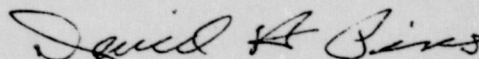
Since the reduction of rail competition beginning in the early 1980's, it has become clear that being captive can lead to higher costs and sometimes worse service. I know of no examples where merging railroads have shared cost reduction efficiencies with captive customers. Although railroads always claim that a merger is the only way to achieve efficiency, that is simply not the case as proven by the "Great Midwest Flood of 1993". Railroads often complain about interchange from one railroad to another. Service at interchange points is always poor, often taking an inordinately long time and sometimes even misroute of the car. During the "Great Flood of 1993" midwest railroads demonstrated what they are capable of doing through unprecedented cooperation in the areas of interchange, crews, equipment, communications, and service in general. There were less service difficulties during this flood than there have been with the merger of the UP/CNW. The 1993 midwest flood validates that bigger is not always better, or the only answer, and that railroad mergers or not the only way to achieve operating efficiencies.

Monsanto supports the following remedies as conditions to be met in order for any further rail mergers to occur:

- Support of the Chemical Manufacturers Association comments as they relate to the Louisiana and Texas Gulf Coast area.
- If BNSF fails to exercise its trackage rights within ninety (90) days, from the effective date of granting of the rights, then there should be a track sale of Houston, Tx. to St. Louis, Mo.; Houston, Tx. to Eagle Pass, Tx.; Houston, Tx. to New Orleans, La.
- Track sale should be granted in the Central Corridor between Oakland through Salt Lake City and onto Pueblo, Co. Trackage rights should be granted to shortline and connecting lines along this Corridor route in order to bring head-to-head rail competition to as many shippers as possible.
- ExParte 347 (sub No.2) rate reasonableness for non-coal traffic using simplified methodology, as proposed by several shipper groups and trade associations, should be adopted and made effective by the Surface Transportation Board prior to any granting of track sales, trackage rights, or any additional mergers.

I certify under the penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement on behalf of Monsanto, executed on March 25, 1996.

Sincerely,



David A. Pins
Manager, Rail Transportation

cc: K. J. Wulfert, Monsanto
T. J. Zuerlein, Monsanto
W. D. Lambert, Monsanto
D. A. Samford, Monsanto
G. E. Dewel, Monsanto
G. L. Brasier, Monsanto
T. L. Clark, Monsanto
C. M. McCullough, Monsanto

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760



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

--CONTROL AND MERGER--

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

COMMENTS AND REQUEST FOR CONDITIONS
OF
UNION CARBIDE CORPORATION

Stephen J. Murray
Group Counsel

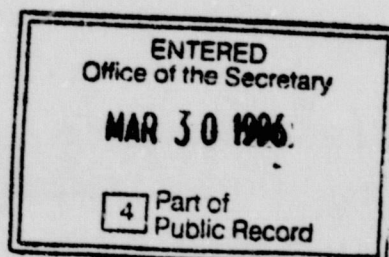
Martin W. Bercovici
Arthur S. Garrett, III

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Law Department
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Danbury, CT 06817
Tel: (203) 794-6288
Fax: (203) 794-6269

KELLER AND HECKMAN
1001 G Street, N. W.
Suite 500 West
Washington, D.C. 20001
Tel: (202) 434-4100
Fax: (202) 434-4646

Attorneys for
Union Carbide Corporation

March 29, 1996



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760

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

COMMENTS AND REQUEST FOR CONDITIONS
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UNION CARBIDE CORPORATION

Stephen J. Murray
Group Counsel

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March 29, 1996

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VERIFIED STATEMENT OF LAWRENCE A. FORCHIA

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

COMMENTS AND REQUEST FOR CONDITIONS
OF
UNION CARBIDE CORPORATION

Union Carbide Corporation ("Union Carbide"), by and through
its undersigned counsel, submits the following Comments and
Request for Conditions with respect to the proposed merger
between Applicants Union Pacific Corporation ("UPC"), Union
Pacific Railroad Company ("UPRR"), Missouri Pacific Railroad
Company ("MPRR") and Southern Pacific Rail Corporation ("SPR"),
Southern Pacific Transportation Company ("SPT"), St. Louis
Southwestern Railway Company ("SSW"), SPCSL Corp. ("SPCL") and
The Denver and Rio Grande Western Railroad Company ("DRGW")
(collectively referred to as the "Applicants").

I. INTRODUCTION AND SUMMARY OF RELIEF REQUESTED

Union Carbide owns and operates some of the most cost-
efficient, large-scale chemicals and plastics production
facilities in the world. Verified Statement of Robert H. Baxter,

¶ 5 attached hereto (hereinafter referred to as "Baxter V.S. at ___"). Important chemicals that Union Carbide produces are ethylene, propylene, polyethylene (the world's most widely used plastic); ethylene oxide/glycol and derivatives for surfactants, polyester fiber, resin and film, and automobile antifreeze, and one of the industry's broadest lines of plastics resins. Id.

Union Carbide's Seadrift, Texas manufacturing plant produces in excess of _____ of chemicals and plastics a year, a very significant portion of Union Carbide's overall chemicals and plastics production. Id. at ¶ 6. It also produces a predominant portion of the United States' requirements for ethanolamines and butyl cellosolve®. Id. Almost all of the chemicals and plastics produced at Seadrift are shipped to Union Carbide's customers via rail, and the sole rail carrier serving the Seadrift Plant is the Union Pacific ("UP"). Id. at ¶¶ 7 & 8.

The Southern Pacific operates a rail line within ten (10) miles of the Seadrift plant. Union Carbide has determined that a build-out to the SP line is feasible, and Union Carbide used the build-out position in negotiating its current rail services contract with the UP.

The proposed merger of the Applicants, if approved, would reduce Union Carbide's rail options from two rail carriers (the Union Pacific and Southern Pacific) to just one (the UP/SP post-merger rail entity). Thus, the merger of the UP and SP would

eliminate present competition between rail carriers at Union Carbide's Seadrift, Texas plant.

Union Carbide respectfully requests that the Surface Transportation Board ("Board"), should it ultimately approve the UP/SP merger, act pursuant to its authority under 49 U.S.C. § 11344(c) of the Interstate Commerce Act to preserve current competition by imposing conditions governing the proposed merger to require the Applicants to grant trackage rights to the Burlington Northern/Santa Fe ("BNSF") to allow BNSF to serve Union Carbide's Seadrift, Texas plant.^{1/} The requested conditions, and the reasons why such conditions must be imposed, are specified in detail in this submittal.

II. STATEMENT OF FACTS

A. Union Carbide's Seadrift, Texas Plant.

Union Carbide's Seadrift manufacturing plant is located approximately 120 miles southwest of Houston, Texas, close to the

^{1/} The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 ("Act"), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Board. Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This control and merger relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to sections 11323-25 of the Act. Therefore, the Board shall apply the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

coast of the Gulf of Mexico (hereinafter referred to as "Seadrift"). Baxter V.S. at ¶ 7. The plastics and chemicals produced at Seadrift are shipped to other Union Carbide facilities in the United States for further processing or are shipped to various customers near major population centers in the Midwest, Northeast, Southeast and Western regions of the United States. Id.

B. Seadrift's Reliance on Rail.

plan
UP A significant portion of Seadrift's production is plastics resins, STCC 28211; and due to the nature of Union Carbide's operations at Seadrift, almost all of Seadrift's plastics production, as well as a significant portion of its chemicals production, is transported via rail pursuant to Union Carbide's operational and customers' requirements. Baxter V.S. at ¶ 7. Carb As a result, Union Carbide has made significant economic investments in a sizable fleet of special purpose plastics and chemical rail cars. Id. at ¶ 9.

plan The convenience of the rail hopper car as a "package," its function to provide storage of plastics, and the maintenance of product quality that the rail hopper car allows dictate the use of rail as the predominant mode for the transportation of plastics resins. Id. at ¶ 10. The hopper car represents the established vehicle for receiving plastics resins and contains

enough volume (approximately 180,000 lbs) to support most customers' extrusions and molding operations. Id. at ¶¶ 8 & 10. This minimizes the customer costs of handling the resin and provides a storage vehicle from which customers can feed their production lines. Id. at ¶ 10.

C. Seadrift's Potential Build-out to the Southern Pacific Rail Line.

At present, only one rail carrier serves the Seadrift plant -- the Union Pacific Railroad ("UP"). Baxter V.S. at ¶ 8. UP owns and operates the only rail tracks leading in and out of the Seadrift plant. Id.

In late 1988/early 1989, Union Carbide undertook a project which it termed "Project COMPAC," an acronym which denotes "Competitive Access." Id. at ¶ 11. The project sought to determine the economics of building rail track from Union Carbide's Seadrift plant to the Southern Pacific ("SP") line between Victoria and Port Lavaca, Texas. Union Carbide's intent was to create competing rail carrier service at the Seadrift plant. Id.

As part of Project COMPAC, Union Carbide commissioned the engineering firm of Stone & Webster, at considerable cost, to perform a study to determine the physical viability and economic feasibility of a railroad routing connecting the Seadrift plant to the SP's main line at Kamey, Texas, near Port Lavaca

("Study"). Id. at ¶ 12. The Study demonstrates that a build-out is indeed feasible. Id. at ¶ 13.

Union Carbide's Seadrift plant sits only approximately ten miles from SP's Victoria/Port Lavaca, Texas line. Id. at ¶ 14. The proposed build-out, as engineered, runs from the Seadrift plant and intercepts the SP's line at a point near the town of Kamey, Texas, approximately six miles due south of the town of Placedo, Texas. Id.; see map of potential build-out attached to the Baxter Verified Statement as Exhibit A.

Contemporaneously with the Study, Union Carbide approached the SP in 1989 in a good-faith attempt to do business with the SP and hopefully achieve better rates than its captive rail costs with the UP. Baxter V.S. at ¶ 15. SP reviewed the economics of the build-out project; and after a number of meetings between Union Carbide and SP, SP confirmed its interest in Union Carbide's build-out option. Id. Indeed, negotiations had progressed so far that SP offered Union Carbide very attractive discounts off of its standard rail rates. Id. These rates offered by the SP to Union Carbide were memorialized in a letter executed by SP. That letter, dated July 21, 1989, is attached to Baxter V.S. as Exhibit B.²

Continuing in its effort to make the build-out possibility a reality, Union Carbide, at considerable expense

Highly Confidential information has been redacted from public file copy of this document.

proceeded to purchase the land rights-of-way for the approximate 10 miles of track necessary to reach the SP line. Id. at ¶ 16. Union Carbide's interest in the easements are good Id.

By this point, with the determination that the build-out was feasible, the attractive rate offer from the SP, and the purchase of the necessary land, the build-out was no longer just a possibility -- it was close to being a reality. However, before finally committing to the expense of constructing an actual build-out, Union Carbide undertook to first explore with the UP what it now would be willing to offer in light of Union Carbide's build-out potential to the SP. Id. at ¶ 17.

D. Union Carbide Negotiated With the UP For Competitively Based Rail Service.

In 1989, Union Carbide was participating in negotiations with the UP seeking to consolidate a wide variety of separate contracts and rate agreements. Baxter V.S. at ¶ 18. During these negotiations, Union Carbide informed the UP that, on the basis of a study that had been performed, Union Carbide had a viable rail competition option, in the form of a build-out from its Seadrift plant to the SP and that Union Carbide intended to undertake a similar study of its Taft, Louisiana plant. Id. As turned out, UP subsequently offered Union Carbide

Id. The imminent possibility of routing Union Carbide's traffic via the build-out to the SP was the single critical factor in these favorable negotiations. Id. at ¶ 19. Union Carbide ultimately accepted the UP offer and entered into a major contract with the UP, effective July 1, 1991. Id. at ¶ 20.

E. Union Carbide's Rail Contract with UP

The July 1, 1991 contract, referred to as the "COMPAC" contract, Baxter V.S. at ¶ 20. At the end of the term, Union Carbide's options on the land necessary to build-out to the SP still will be in effect. The contract, however, contains both

Id.

Subsequent to the execution of COMPAC, Union Carbide has had discussions with the SP about the build-out to its Victoria/Port Lavaca line. Id. at ¶ 21. Indeed, as recent as October, 1994, the SP initiated discussions with Union Carbide to attain Union Carbide's business out of Seadrift via a build-out to its line. The SP even offered to finance the construction of the new rail spur. Baxter V.S. at ¶ 21 and see Exhibit C to Baxter V.S. (October 3, 1994 Southern Pacific Memorandum). Union Carbide, however, was not in a position to go forward in light of its

obligation under the COMPAC contract to use the UP, and thus could not respond affirmatively to the SP's interest. Baxter v.S. at ¶ 21.

III. THE MERGER STANDARD

The Board's single and essential standard for approval is that the merger of two class I railroads be "consistent with the public interest." 49 U.S.C. § 11344(c). Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981); see also Penn Central Merger Cases, 389 U.S. 486, 498-499 (1968).^{3/}

In determining what is consistent with the public interest, 49 U.S.C. § 11344(b)(1) requires consideration of at least the following five factors: (1) the effect of the proposed transaction on the adequacy of transportation to the public; (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; (3) the total fixed charges that result from the proposed transaction; (4) the interest of carrier employees affected by the proposed transaction; and (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.^{4/}

See fn. 1, infra.

The fifth factor, Section 11344(b)(1)(E), dealing with competitive effects on other railroads, was added by section 3(2) of the Staggers Rail Act of 1980, Pub. L. No. 96-448

In addition to these explicit statutory considerations, the Board is also required by the Supreme Court's decision in McLean Trucking Co. v. United States, 321 U.S. 67 (1944) to weigh the policies embodied in the antitrust laws disfavoring diminution in competition resulting from a proposed rail merger.^{2/} See 49 C.F.R. § 1180.1(c)(2). As the Supreme Court has observed, the antitrust laws give "understandable content to the broad statutory concept of 'the public interest,'" FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 244 (1968). In McLean Trucking, the Supreme Court noted the proper weight to be accorded to antitrust policy in carrier control proceedings:

In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operations, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy. . . . 'The wisdom and experience of that Commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.'

McLean Trucking, 321 U.S. at 87-88; accord Bowman Transportation
Arkansas-Best Freight, 419 U.S. 281, 298 (1974); Port of
Portland v. United States, 408 U.S. 811, 841 (1972); Northern
Lines Merger Cases, 396 U.S. 491, 514 (1970); Denver & R. G. W.
Co. v. United States, 387 U.S. 485 (1967).

Aggers Act).

Under 49 U.S.C. 11341(a), transactions approved by the Board exempt from the antitrust laws, and all other laws, as necessary to effect the transactions. Northern Lines Merger
g, 396 U.S. 491, 504 (1970).

The Railroad Consolidation Procedures, 49 C.F.R. §§ 1180.0-1180.9 ("Rules"), sets forth the numerous elements of the public interest that the Board is to consider in evaluating specific merger proposals by performing a balancing test weighing "the potential benefits to the Applicants and the public against the potential harm to the public." Id. at § 1180.1(c).^{6/} The Rules specifically note that:

If two carriers serving the same market consolidate, the result would be the elimination of the competition between the two. . . . a lessening of competition resulting from the elimination of a competitor may be contrary to the public interest. . . .

C.F.R. § 1180.1(c). Moreover, the Interstate Commerce Commission ("ICC") emphasized that "the effect of a transaction on competition is a critical factor in our consideration of the public interest. . . ." Santa Fe Southern Pacific Corp. -- Control -- SPT Co., 2 I.C.C.2d 709, 726 (1986) (SF/SP) (emphasis

The Board is also guided by the rail transportation policy, 49 U.S.C. § 10101a, added by the Staggers Act. See Norfolk & Western Corp. -- Control -- Norfolk & W. Ry Co., 366 I.C.C. 171, 190 (1985) (NS Control). The 15 elements of that policy set forth in 49 U.S.C. § 10101a, taken as a whole, emphasize reliance on competitive forces to modernize railroad actions and to promote efficiency. H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 88 (1979), reprinted in 1980 U.S.C.C.A.N. 4110, 4119. Element 5 states that it is the policy of the United States to "foster economic conditions in transportation and to ensure competition and coordination between rail carriers" and "prohibits 'predatory pricing and practices, to avoid concentrations of market power.'" 49 U.S.C. § 10101a (5) &

Under the Interstate Commerce Act, the Board's power to attach conditions to its approval of a major rail merger is unqualified. When it is claimed that the proposed transaction will have a direct effect on competition, by eliminating competitive alternatives to the public, such as here, the Commission has imposed conditions in certain instances. Specifically, the Commission imposed conditions, if they were feasible, to eliminate the harm threatened by the transaction, assuming such conditions were of greater benefit to the public than they were detrimental to the transaction. See Union Pacific Corp., Pacific Rail System, Inc. and Union Pacific Railroad Company-Control - Missouri Pacific Corporation and Missouri Pacific Railroad Company, 366 I.C.C. 462, 484 (1982) (UP/MP).

In light of the merger standard and the evidence presented herein demonstrating the proposed merger's elimination of what is today competition at Seadrift, it is imperative that the protective conditions that Union Carbide requests be imposed on the merger, if consummated.

Board
IV. PROPOSED MERGER'S ANTICOMPETITIVE EFFECTS ON
UNION CARBIDE CORPORATION.

A. The Proposed Merger Will Eliminate Parallel Competition at Union Carbide Corporation's N. Seadrift, Texas Plant.

The proposed merger will eliminate a competitor for Union Carbide's Seadrift traffic. As the merger between SP and UP is structured, including the September 25, 1995,

trackage rights agreement between UP/SP and the BNSF ("BNSF Agreement"), when the COMPAC contract expires or may be terminated,

Union

Carbide would have no build-out option; and the negotiating leverage that the possibility of a build-out has and would have meant in future negotiations with the UP would irretrievably be lost. Consequently, Union Carbide will be captive to the UP for virtually almost all of its transportation needs. See Baxter V.S. at ¶¶ 21 & 22.

An examination of competitive constraints upon market power requires consideration of both actual and potential competition. The fact that a shipper is currently served by only a single rail carrier does not automatically mean that the shipper is captive to that carrier. If a second carrier operates nearby with the capability of extending its track to the shipper, that carrier can be just as effective a competitor as if it actually did serve the shipper directly. Union Pacific Corp.-Control- Missouri-Kansas-Texas Railroad Co., 4 I.C.C. 2d 409, 476-77 (1988). The Board must consider a potential build-out to be an effective competitive threat when it is physically and economically feasible. See Burlington Northern Inc. -- Control and Merger -- Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Railway Company, I.C.C. Finance Docket No. 32549, Dec. No. 38, 68 & 98 (Aug. 16, 1995) (BN/SF) (Commission's discussion of

Oklahoma Gas & Electric and Phillips Petroleum Company's potential build-outs as feasible).

The existence of a practical route to connect the shipper with the competing carrier is evidence of physical feasibility, while a long-term contract with the existing carrier containing much lower rates than previously available is compelling evidence of economic feasibility. BN/SF, I.C.C. Finance Docket No. 32549, pp. 36 & 68 (describing Oklahoma Gas & Electric situation at Sooner Station in Red Rock, Oklahoma).

Under currently existing competitive conditions, Union Carbide's traffic originating at Seadrift is subject to potential competition. Although Seadrift currently is served exclusively by the UP, the fact that a feasible build-out exists to the SP-operated line from Victoria, Texas to Port Lavaca, Texas, only approximately 10 miles north of the Seadrift plant, exerts competitive pressure on the UP and has prevented the UP from exercising market power as a monopoly carrier over the origin of all Seadrift outbound routes.

1. A Build-out to the Southern Pacific line from Union Carbide Corporation's Seadrift, Texas Plant is Feasible.

As mentioned above, Union Carbide, in late 1988/early 1989, undertook to determine the viability of a build-out from its Seadrift plant to the SP line in order to afford Seadrift access to two rail carriers and allow for healthy competition between

the SP and UP to serve the transportation needs of Union Carbide. The engineering firm of Stone & Webster conducted a study and determined that a railroad routing connecting the Seadrift plant to SP's Victoria/Port Lavaca main line at a point near Kamey, Texas, was feasible ("Study"). Baxter V.S. at ¶ 13. Indeed, in 1989, the SP reviewed the Study and confirmed the feasibility of the build-out itself, ultimately offering Union Carbide very attractive discounts off its standard rail rates. Id. at ¶ 15; see Exhibit B attached to Baxter V.S. Making substantial progress toward its build-out objective, Union Carbide, at considerable cost, proceeded to purchase the land rights-of-way necessary to lay the track to reach the SP's line. Id. at ¶ 16.

The build-out is no less feasible today. Union Carbide still owns the land and has the rights-of-way upon which to lay the track for the build-out.⁷ In addition, the portion of SP's Victoria/Port Lavaca line proposed to be utilized from Kamey, Texas northward to Victoria is in "fair to good condition" and can support Union Carbide's rail traffic without the need for any significant modifications or repairs. Verified Statement of Lawrence A. Forchia, ¶6, attached hereto.

Perhaps the best evidence of the current feasibility of the build-out is SP's recent, and very serious, attempt to obtain Union Carbide's business out of Seadrift by reinitiating

The rights-of-way are good
Baxter V.S. at ¶ 16.

discussions of access to the plant via the proposed build-out route. Baxter V.S. at ¶ 21. The SP was so anxious to compete with the UP for Union Carbide's business that it was willing to provide the financial backing for the build-out project. Id. at Exhibit C.

2. Union Pacific Recognizes a Build-out to the Southern Pacific line from Union Carbide Corporation's Seadrift, Texas Plant is Feasible.

During negotiations with the UP in 1989 relating to the possible consolidation of a wide variety of separate contracts and rate agreements that Union Carbide had with the UP, Union Carbide informed the UP of its viable rail competition option in the form of a build-out from its Seadrift plant. Baxter V.S. at ¶ 18. Eventually, Union Carbide and UP reached an agreement on a

The potential to route Union Carbide's traffic via the SP played a critical role in achieving the current contract terms. Id. at ¶ 19. Moreover, the very title used by the UP, as well as Union Carbide, to designate the new contract, "COMPAC," as alluded to above, is an acronym for Competitive Access, good evidence that the UP perceives the build-out to be a very real possibility.

Perhaps the best evidence, however, of the UP's perception of the feasibility of Union Carbide's build-out

See Exhibit 1 attached hereto.^{8/}

See Exhibit 1 at p. 4. Clearly, the UP recognizes that the build-out to SP is feasible, and consequently that the SP is a competitive reality to which the UP must pay attention when negotiating rates with Union Carbide.

This is a "Highly Confidential" document from UP's files developed in discovery and tendered into evidence pursuant to 49 C.F.R. § 1114.28. A copy of the document is associated only with the Highly Confidential version of these Comments.

B. No Effective Transportation Competition Exists for Union Carbide Corporation's Traffic out of its Seadrift, Texas Plant.

There can be no serious contention that there is effective intramodal competition for Union Carbide's plastics and chemical traffic. Inherently, this traffic flows in great volumes, at heavy loadings and over long distances. The dependence on rail serves to exclude serious modal competition for this traffic.

See Exhibit 1 at p. 4.^{2/}

In the absence of preservation of Union Carbide's build-out option, it is clear that the merged SP/UP entity inevitably will increase Union Carbide's rail rates. Indeed, soon after the announcement of the UP/SP merger, Richard Davidson, President of UP, explained that following consummation of the proposed merger, SP's "cash flow pricing" would be terminated. See Verified Statement of Parry N. Johnson attached hereto. Mr. Davidson has already acknowledged in his deposition that he viewed "cash flow pricing" as a technique to attract business at an unacceptable rate level and that the UP has an obligation to price traffic to obtain the highest revenues possible without possible loss of business to a competitor. See Deposition of Richard Davidson, pp. 78-79, 81. The implications are obvious: Customers formerly served by the SP, and those served by the UP whose rates were

Further discussion of the rail dependence of this traffic may be found in the Comments of The Society of the Plastics Industry, Inc. being contemporaneously filed.

market driven by SP competition, such as Union Carbide, will see unchecked rate increases if the merger is allowed to occur.

C. The Commission's Prior Decisions and the Treatment of Similarly Situated Plants in the BNSF Settlement Agreement Dictate That Union Carbide's Seadrift Plant Be Treated as a 2-to-1 Point.

1. The Commission's 1995 BN/SF Decision.

In the recent BN/SF control and merger proceeding, the Commission had occasion to address two "2-to-1" situations at shippers' plants virtually identical to the situation discussed herein with regard to Union Carbide's Seadrift plant. BN/SF, I.C.C. Finance Docket No. 32549, pp. 68 & 98. One situation concerned Oklahoma Gas & Electric's Sooner Station in Red Rock, Oklahoma ("OG&E"), and the other was Phillips Petroleum Company in Borger, Texas ("PPC").

Prior to the BN/SF Merger in 1995, one of OG&E's coal-fired generating complexes burning substantial tonnage of coal was served exclusively by Santa Fe. Id. at 36. About five years prior to the proposed merger, OG&E had identified a feasible "13-mile rail spur 'build-out' option from Sooner Station to the BN Line." Id. OG&E used the potential build-out in contract renewal negotiations with the Santa Fe to reach a rate agreement containing much lower rates than previously available to OG&E. Id. at 68.

The Commission recognized that the negotiating leverage provided to OG&E by the BN build-out option would disappear with

the merger, and took steps in its decision, through imposition of conditions on the post-merger BN/SF entity, to preserve rail competition at Sooner Station. Id.

Similarly, PPC presented to the Commission its petrochemical refinery at Borger, Texas that was served exclusively by the Santa Fe, but "could obtain independent access to the Burlington Northern through a viable build-out option." Id. at 37. Since rail was the only viable transportation option for PPC at its Borger plant, the Commission deemed PPC's potential build-out to the BN as critical to maintain competition. Id. at 37 & 98. It is important to note that the Commission deemed the build-out option feasible notwithstanding the likely need to rehabilitate the nineteen (19) miles of track along an "abandoned Rock Island right-of-way," a factor not present here. Id. at 37. Because the merger of the BN and Santa Fe would have eliminated PPC's build-out option, the Commission addressed the situation by imposing conditions to maintain competition. Id. at 98.

2. The UP/SP's 1995 Settlement Agreement With BNSF.

See Richard Peterson Deposition, pp. 83 & 514. To that end, the Applicants have treated shippers' plants in situations identical to that of Union Carbide's Seadrift plant, i.e., where there is an "imminent possibility of a build-in," as two-to-one points in

the BNSF Settlement Agreement. See also Richard Barber Deposition, p. 63.

For instance, the Applicants treat Mt. Belvieu, Texas (Exxon, Amoco and Chevron plants) and the Eldon, Texas (Bayer Corporation) plants as two-to-one points by virtue of the fact that, while the SP currently exclusively serves those areas, there was the "imminent possibility" of a build-in or build-out to the UP line. See BNSF Settlement Agreement (9/25/95), ¶ 5(b) and Exhibit A attached thereto (Mt. Belvieu) and see Supplemental BNSF Settlement Agreement (11/18/95), ¶ 9(c) (Eldon), UP/SP-22 at pp. 318-359.^{10/}

Applicants concede that a situation such as that "involved at the Red Rock OG&E plant as considered by the commission (sic) in BN/Santa Fe" is the best example of a "build-in or build-out possibility case." See Barber Deposition, pp. 62, 63, 66, and 67. Applicants explain that a shipper's plant would be considered a 2-to-1 location if, like the situation in Red Rock, the "sole serving railroad had made rate adjustments or indicated that it was aware of the build-in possibility and reflected that in its pricing." Id. at 66-67.

Section 8(i) of the BNSF Settlement Agreement, the "catchall" or "omnibus" clause, provides, inter alia, that UP/SP will agree to grant BNSF trackage rights to provide competitive service to any 2-to-1 customers that are not expressly referred in the BNSF Agreement. Needless to say, Union Carbide's Padgett plant is not included nor referred to in the BNSF Settlement Agreement.

At a minimum, the situation at Seadrift is directly analogous to the Red Rock situation. Like Red Rock, prior to the merger, Seadrift is served by only one railroad (UP). Like Red Rock, there is a feasible build-out option to a competing railroad (SP). Like Red Rock, the railroad currently serving Seadrift has made "rate adjustments" in light of the build-out threat as evidenced by the COMPAC contract; and by its July 19, 1995 internal memo, UP has explicitly "indicated that it [is] aware of the build-in possibility." See Section IV.A.2., infra.

V. THE SURFACE TRANSPORTATION BOARD MUST GRANT UNION CARBIDE CORPORATION'S REQUEST FOR CONDITIONS TO ELIMINATE THE ANTICOMPETITIVE EFFECTS OF THE PROPOSED MERGER.

The anticompetitive effects of the merger on Union Carbide's Seadrift traffic can be ameliorated with the imposition of a protective condition upon the merger. The necessary conditions are as follows:

- 1) The merged carrier must grant trackage rights to the BNSF at competitive costs to serve Union Carbide's Seadrift plant over the existing rail line owned by the UP between Seadrift, Texas and Bloomington, Texas; or, in the alternative,
- 2) The merged carrier must grant trackage rights, and concomitant "stop-off" rights, to the BNSF at competitive costs over a portion of the existing Victoria/Port Lavaca SP Line between the UP main line and a point near Kamey, Texas that would allow BNSF access to Union Carbide's Seadrift plant via the potential build-out route.^{11'}

"Stop-off" rights are required because while the BNSF settlement agreement does include overhead trackage rights for BNSF from Houston to Brownsville on the UP line, it does not

These conditions are necessary to restore Union Carbide to its current competitive position by eliminating the adverse horizontal effects of the merger. These conditions are especially critical to Union Carbide in order to afford it a competitive transportation option in light of the fact that

Baxter V.S. at ¶ 20.

VI. A RESPONSIVE APPLICATION IS NOT REQUIRED IN ORDER FOR A NONRAILROAD TO SEEK A TRACKAGE RIGHTS CONDITION.

Under the Railroad Consolidation Procedures (49 C.F.R. Part 1180), a request for trackage rights may be properly maintained as a request for protective conditions and need not be asserted in a responsive application. The procedure for filing responsive applications, and any other application related to the Railroad Consolidation Procedures, applies only to railroads and not to shippers or members of the general public who may comment or seek protective conditions as a result of a proposed merger. The statutory authority for the Railroad Consolidation Procedures arises from sections 11343-11345 of the Interstate Commerce Act. See 49 U.S.C. §§ 11343-11345. These provisions pertain only to railroads and not to shippers. Indeed, the Railroad Consolidation Rules specifically provide a procedure for non-railroad parties to respond to merger applications by permitting

allow for the BNSF to "stop-off" along the route to serve local traffic other than at specifically identified points.

such parties to file written comments, which shall contain "[a]n initial list of specific protective conditions" if the proceeding involved a major or significant transaction. 49 C.F.R.

§ 1180.4(d)(1)(iii)(H). The Commission's rules do not define or limit what may be requested as a protective condition.

Accordingly, based upon the Interstate Commerce Act and the Railroad Consolidation Procedures, and based upon precedent such as the recent BN/SF merger decision, it is clear that a non-railroad party need not file a responsive application in order to request trackage rights, but may assert such a request as a protective condition.

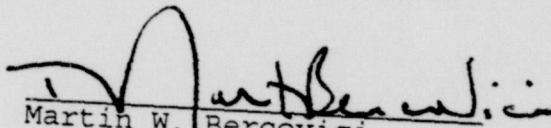
VII. CONCLUSION

If the Commission were to approve the UP/SP merger as proposed, competition for Union Carbide's Seadrift plant traffic will be extinguished. The Interstate Commerce Act and case precedent prohibit such a result. Accordingly, Union Carbide Corporation respectfully requests the Surface Transportation Board, if it approves the merger as proposed, to impose the following as a condition on the merger of the Applicant carriers:

- a) The merged carrier must grant trackage rights to the BNSF at competitive costs to serve Union Carbide's Seadrift plant over the existing rail line owned by the UP between Seadrift, Texas and Bloomington, Texas; or, in the alternative,

- b) The merged carrier must grant trackage rights, and concomitant "stop-off" rights, to the BNSF over a portion of the existing Victoria/Port Lavaca SP Line between the UP main line and a point near Kamey, Texas that would allow BNSF access to Union Carbide's Seadrift plant via the potential build-out route.

Respectfully submitted,


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Attorneys for Union Carbide
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March 29, 1996

EXHIBIT 1

(HIGHLY CONFIDENTIAL DOCUMENT)

VERIFIED STATEMENTS

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760

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

--CONTROL AND MERGER--

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

VERIFIED STATEMENT OF ROBERT H. BAXTER
IN SUPPORT OF UNION CARBIDE CORPORATION'S
COMMENTS AND REQUEST FOR CONDITIONS

1. My name is Robert H. Baxter. I am employed by the Union Carbide Corporation ("Union Carbide") as its Manager of Overland/Air Transportation Purchasing in the Corporate Purchasing Department.

2. I have been employed by Union Carbide for 20 years, and during that time I have held positions of increasing importance in procurement management at Union Carbide's various facilities and manufacturing plants across the United States and at Union Carbide World Headquarters in Danbury, Connecticut.

3. Since I assumed my current position in 1995, my responsibilities include procurement management of rail, motor and air transportation, as well as negotiating rail freight rates for both inbound and outbound traffic.

4. I hold a Bachelor of Science Degree in Mathematics from Arkansas State University and a Master of Science Degree in Industrial Engineering from the University of Arkansas.

Union Carbide Corporation

5. Union Carbide owns and operates some of the most cost-efficient, large-scale chemicals and plastics production facilities in the world. Important chemicals that Union Carbide produces are ethylene, propylene, polyethylene (the world's most widely used plastic); ethylene oxide/glycol and derivatives for surfactants, polyester fiber, resin and film, and automobile antifreeze, and one of the industry's broadest lines of plastic resins, intermediates, emulsions and additives for the paints and coatings, cosmetics and personal care, adhesives, household, pharmaceutical, fuel and lube oil additives markets.

6. Union Carbide's Seadrift, Texas manufacturing plant ("Seadrift") produces _____ of chemicals and plastics a year. The Seadrift facility accounts for a significant portion of Union Carbide's overall chemicals and plastics production, and for the predominant portion of the United States requirements for ethanolamines and butyl cellosolve®.

Seadrift, Texas Plant Relies on Rail

7. Union Carbide's Seadrift plant is located about 120 miles southwest of Houston, Texas, close to the coast of the Gulf

of Mexico. The chemicals and plastics produced at Seadrift are shipped to other Union Carbide facilities in the United States for further processing or are shipped to various customers near major population centers in the Midwest, Northeast, Southeast and Western regions of the United States. In excess of Seadrift's production is plastics; and due to the nature of Union Carbide's operations at Seadrift, almost all of Seadrift's plastics production is transported to our customers via rail, as well as a significant portion of its chemicals production. In addition, Seadrift receives significant quantities of chemicals by rail.

8. Union Carbide relies on rail carriage to transport in excess of 90% of its plastics production to its customers. At present, only one rail carrier serves the Seadrift plant -- the Union Pacific Railroad ("UP"). The UP owns the only rail tracks leading in and out of the Seadrift Plant and hauls in excess of of plastics (180,000 lbs. per shipment) and shipments of chemicals (170,000 lbs.) annually.

9. Almost all plastics customers require receipt of plastics products by rail as do many chemical customers. As a result, Union Carbide has made significant economic investments in a sizable fleet of special purpose rail cars to transport our plastics and chemicals production.

10. The convenience of the rail hopper car, its function to provide storage of plastics, and the maintenance of quality that the hopper car allows are critical to the distribution process.

The hopper car represents to customers the established vehicle for receiving plastics resins and contains enough volume to support most customers' extrusions and molding operations for a reasonable amount of time. This minimizes the customers' cost of handling the resin and provides a storage vehicle from which customers can feed their production lines. The rail car has become the accepted "package" size by customers who convert plastics resins into fabricated products.

Seadrift's Build-out Potential

11. In late 1988/early 1989, Union Carbide undertook a project which it termed "Project COMPAC," an acronym which denotes "Competitive Access". The project sought to determine the physical viability and economic feasibility of building rail track from Union Carbide's Seadrift plant to the still existing rail track of the Southern Pacific ("SP"), which would result in creating competing rail carrier service to the UP. This project would afford Union Carbide access at its Seadrift facility to two rail carriers and would otherwise allow for healthy competition between the SP and UP to serve the transportation needs of Union Carbide.

12. In furtherance of its build-out project, in 1989, Union Carbide, at considerable cost, commissioned the engineering firm of Stone & Webster to perform a routing and construction cost study to determine the most economic railroad routing to connect the Seadrift plant to SP's line near Port Lavaca ("Study").

13. The Study demonstrated that a build-out was feasible.

14. The Seadrift plant is located only approximately ten miles from SP's Victoria/Port Lavaca, Texas line. The build-out project would run from the Seadrift plant and intercept the SP's line near the town of Kamey, Texas, approximately six miles due south of the City of Placedo, Texas. A map of the build-out project is attached hereto as Exhibit A.

15. Contemporaneously with the Study, Union Carbide approached the SP in 1989 in a good-faith attempt to do business with the SP and hopefully reduce its captive rail costs with the UP. SP reviewed the economics of the build-out project and, after a number of meetings between Union Carbide and SP, SP confirmed its interest in Union Carbide's build-out plans. Indeed, negotiations had progressed so far that SP offered Union Carbide very attractive discounts off of its standard rail rates. These rates offered by the SP to Union Carbide are memorialized in a July 21, 1989 letter executed by SP and attached hereto as Exhibit B.

16. Continuing its effort to make the build-out possibility a reality, Union Carbide, at a cost of proceeded to purchase the land rights-of-way necessary to reach the SP line. The rights-of-way are good for

17. However, before proceeding and committing to the expense of constructing the actual build-out, Union Carbide decided to first explore with the UP what it would now be willing

to offer in light of Union Carbide's build-out potential to the SP.

Union Carbide Has Negotiated For Competitively Based Rail Service

18. At this time, Union Carbide was already participating in negotiations with the UP seeking to renew and consolidate a wide variety of separate contracts and rate agreements. During the negotiations, Union Carbide informed the UP that, on the basis of a study that Union Carbide had performed, Union Carbide had a viable competition option, in the form of a build-out from its Seadrift plant to the SP and that Union Carbide intended to undertake a similar study of its Taft, Louisiana plant. As it turned out, without any mention of the rates the SP had previously offered Union Carbide, UP subsequently proposed to Union Carbide a package from Seadrift that was significantly more attractive than the SP's best package. In addition, the UP's offer was a comprehensive proposal

19. The imminent possibility of routing our traffic via the build-out to the SP was the single critical element in our negotiations with the UP.

20. Union Carbide thoroughly analyzed the two competing proposals and ultimately accepted the UP offer, resulting in a major contract with the UP, effective July 1, 1991. The contract term is years; however, the contract contains

This contract is referred to as the "COMPAC" contract.

Continued Competitive Interest

21. As recently as 1994, the SP was interested in attaining Union Carbide's business out of Seadrift via the build-out to its line, even offering to finance the construction of the new rail spur. See October 3, 1994 Southern Pacific Memorandum attached hereto as Exhibit C. Union Carbide then was obligated under COMPAC to use the UP, and consequently declined the SP's interest.

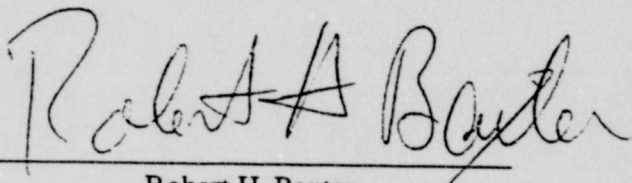
Captivity of Seadrift to the Post-Merger Entity

22. As the merger between SP and UP presently is structured, including the trackage rights agreement with the BNSF, when the Union Carbide-UP contract expires

Union Carbide will have lost its build-out option and the competitive opportunities that presents. Union Carbide then would be captive to the UP for its transportation needs.

I, Robert H. Baxter, declare under penalty of perjury, that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this verified statement, executed on the
25th day of March, 1996.



Robert H. Baxter

EXHIBIT A

N



Victoria, Tx.



SOUTHERN PACIFIC Track

Placedo, Tx.

UNION PACIFIC Mainline

Bloomington, Tx.

To Angleton / Houston, Tx.

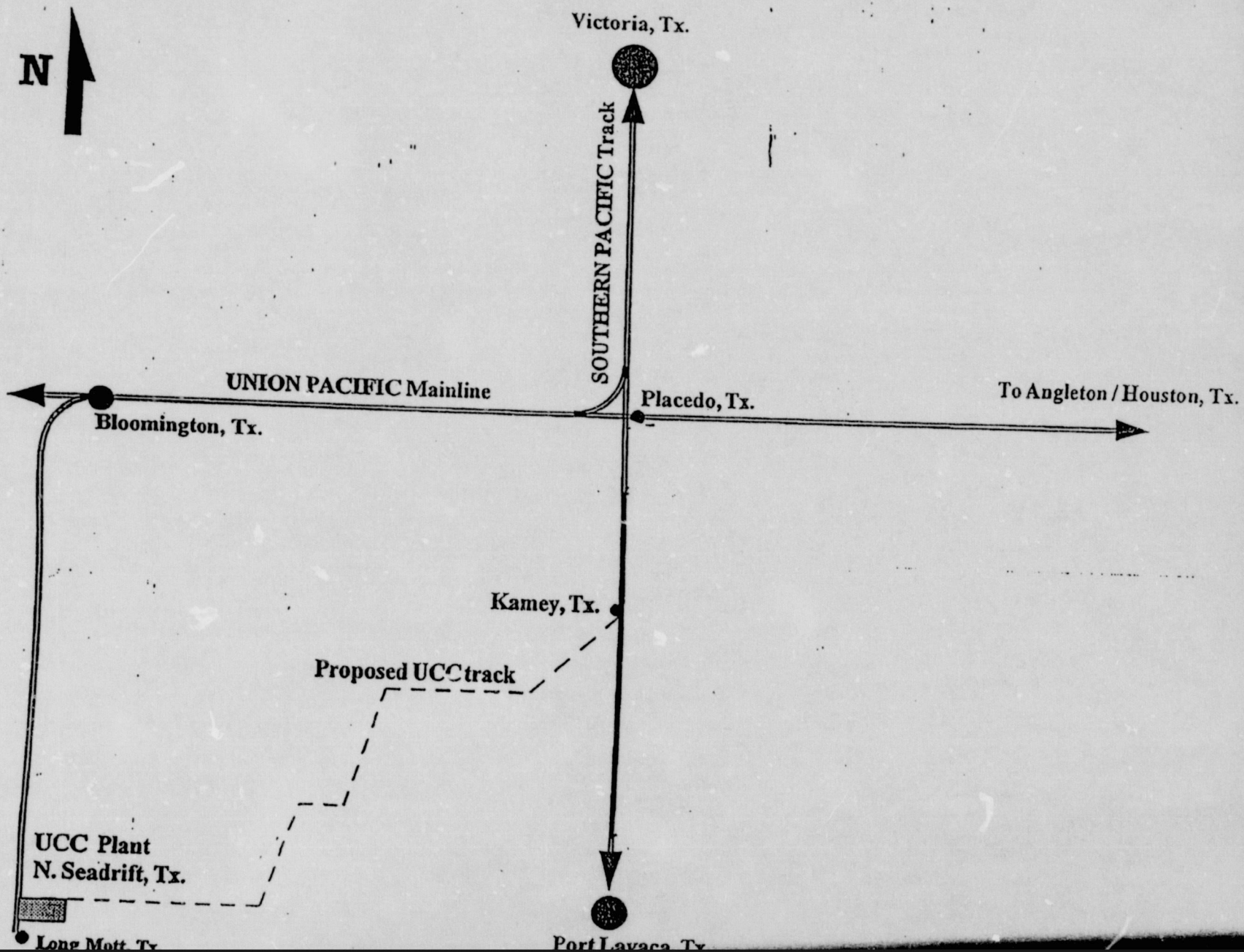
Kamey, Tx.

Proposed UCC track

UCC Plant
N. Seadrift, Tx.

Long Mott, Tx.

Port Lavaca, Tx.



E X H I B I T B

(HIGHLY CONFIDENTIAL DOCUMENT)

E X H I B I T C

(HIGHLY CONFIDENTIAL DOCUMENT)

VERIFIED STATEMENT
OF
PARRY N. JOHNSON

I am Parry N. Johnson. I am the Manager, Rail Operations, within the Marine & Rail Operations Department of Union Carbide Corporation.

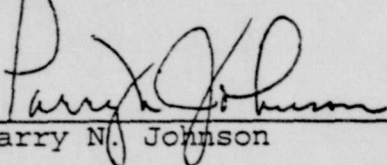
On the evening of Monday, September 25, 1995, I attended a dinner meeting of the Chemical Manufacturers Association at the ANA Hotel in Washington, D.C. The featured event at that meeting was a presentation by Richard Davidson, President of the Union Pacific Railroad, concerning the proposed merger of the Union Pacific and Southern Pacific Railroads.

At that dinner, Mr. Davidson announced the agreement entered into with the BNSF that morning for trackage rights for the "2-to-1" points. During the course of his remarks, Mr. Davidson commented that upon achieving control of the Southern Pacific, the UP would terminate the SP's "cash flow pricing."

It is well-known that the SP prices aggressively (generally at a lower level than the UP), whether as suggested in some corridors to compensate for the service problems they have experienced in the past and/or whether as a marketing tactic to secure customers at competitively-served points. In the context of his remarks, and based upon my ten years of experience in the transportation industry, the intent of Mr. Davidson's remarks was clear: rates for plastics and chemicals shippers which are

below the UP's benchmark level, whether those rates were for SP customers or for UP customers, driven in the latter case by SP competition, will be increased to the UP level if the merger is approved.

I, Parry N. Johnson, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement, executed on this 25 day of March, 1996.



Parry N. Johnson

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760

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

--CONTROL AND MERGER--

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

VERIFIED STATEMENT OF LAWRENCE A. FORCHIA
IN SUPPORT OF UNION CARBIDE CORPORATION'S
COMMENTS AND REQUEST FOR CONDITIONS

1. My name is Lawrence A. Forchia. I am employed by the Union Carbide Corporation ("Union Carbide") as a principal engineer in the Seadrift, Texas distribution department.

2. I have been employed by Union Carbide for 28 years. Currently, my main responsibilities are in distribution, including management of the Seadrift rail system, including about 30 miles of track and four switch engines at the plant site.

3. On February 26, 1996, at the request of Ralph Brechter, I had occasion to inspect the condition of the Southern Pacific's ("SP") rail line between Victoria and Port Lavaca.

4. The track from Victoria to Port Lavaca is constructed of continuous welded rail, which appears to be of 130 lbs or heavier gauge. The track, rock ballast, and cross ties all

appear to be in fair to good condition, and capable of supporting rail traffic. Observations of new ballast rock and the overall condition of the rail and ties from Victoria to south of Placedo, Texas indicate that the track is being maintained. The continuation to Port Lavaca appears serviceable but at a lesser level of operation and maintenance.

5. It appears from the condition of the track that traffic is currently moving between Victoria and Placedo, Texas. There is a minimal amount of rust on the line; however, this is consistent with the high humidity in the area and light or moderate rail operations. There is also indication of recent light rail traffic just south of Placedo. That area appears to be in use for short term rail car storage.

6. In my opinion, the portion of the SP's line from Kamey, Texas northward all the way to Victoria is in fair to good condition and could support Union Carbide's rail traffic, via a buildout, without the need for any significant modifications or repairs to the SP line.

I, Lawrence A. Forchia, declare under penalty of perjury
that the foregoing is true and correct. Further, I certify that
I am qualified and authorized to file this Verified Statement.

Executed on this the 26th day of March, 1996.


Lawrence A. Forchia

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Union Carbide Corporation's Request for Conditions and Comments (and attached Exhibit and Verified Statements) was served this 29th day of March, 1996, by hand-delivery, on counsel for Applicants, as follows:

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and, by mail upon the remainder of the Restricted Service List.


Arthur S. Garrett III

STB

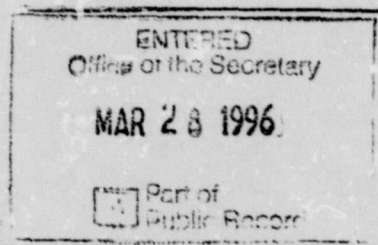
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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 3276



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' OPPOSITION TO KCS' "MOTION FOR AN ORDER
REQUIRING THE SUBMISSION OF A PRELIMINARY
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March 27, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

APPLICANTS' OPPOSITION TO KCS' "MOTION FOR AN ORDER
REQUIRING THE SUBMISSION OF A PRELIMINARY
DRAFT ENVIRONMENTAL ASSESSMENT"

Applicants Union Pacific Corporation ("UPC"), Union Pacific Railroad Company ("UPRR"), Missouri Pacific Railroad Company ("MPRR"), Southern Pacific Rail Corporation ("SPR"), Southern Pacific Transportation Company ("SPT"), St. Louis Southwestern Railway Company ("SSW"), SPCSL Corp. ("SPCSL"), and The Denver and Rio Grande Western Railroad Company ("DRGW"),^{1/} hereby oppose Kansas City Southern Railway Company's ("KCS") "Motion for an Order Requiring the Submission of a Preliminary Draft Environmental Assessment" (KCS-31), dated March 22, 1996.

KCS requests that the Board find that the environmental report that was submitted with the merger application was "inadequate." On the basis of such a finding, they also ask the

^{1/} 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."

Board to require Applicants and BN/Santa Fe to submit a preliminary draft environmental assessment ("PDEA") or comparable environmental report in connection with trackage rights, terminal rights and line sales arising out of the settlement agreement between Applicants and BN/Santa Fe.

KCS' motion is completely without merit, both legally and factually, and should be denied.

I. THERE IS NO LEGAL BASIS FOR KCS' ASSERTION THAT APPLICANTS' ENVIRONMENTAL REPORT WAS NOT ADEQUATE.

Although the Board's environmental regulations generally require merger applicants to submit an environmental report with or prior to their application, this requirement does not apply in cases where the applicants hire a third-party consultant "to prepare any necessary environmental documentation," so long as the consultant is approved by and works under the supervision of the Board's Section of Environmental Analysis ("SEA"). See 49 C.F.R. §§ 1105.7(a), 1105.10(d). "In such a case, the consultant acts on behalf of the [Board], working under SEA's direction to collect the needed environmental information and compile it into a draft EA or draft EIS, which is then submitted to SEA for its review, verification, and approval." 49 C.F.R. § 1105.10(d). The use of third-party consultants is specifically "encourage[d]" by the Board. Id.

In this case, Applicants hired a third-party consultant pursuant to 49 C.F.R. § 1105.10(d), and the consultant is currently working under the supervision of SEA. Accordingly,

Applicants were exempt from the requirement to file an environmental report with or prior to their application.

KCS' motion simply ignores the exemption in Section 1105.10(d). The motion refers to Board Decisions Nos. 6 and 12 in this proceeding (KCS Mem., pp. 12-14), but those decisions did not address Section 1105.10(d), and instead were discussing a different issue involving the requirements for parties filing inconsistent and responsive applications.

In fact, Applicants did submit an environmental report with the merger application in order to provide the maximum possible assistance to SEA and its third-party consultant in their analysis of environmental issues. Applicants were not, however, legally required to submit this report. KCS' contention that Applicants' environmental report was inadequate necessarily assumes that Applicants were legally required to submit such a report. As explained above, that assumption is legally unfounded and thus KCS' contention must be rejected and its motion denied.

II. APPLICANTS PRESENTED A FULLY ADEQUATE ENVIRONMENTAL REPORT.

KCS contends that the environmental report submitted on November 30, 1995 with the merger application was inadequate because it did not address the effects of the BN/Santa Fe settlement. In fact, the report contained a comprehensive analysis of environmental issues related to the merger as well as to Applicants' estimates of the effects of the BN/Santa Fe

settlement agreement, which had been entered into more than two months prior to the filing of the merger application.

The Traffic Study that was developed for and presented in the merger application took into account Applicants' estimates of the traffic impacts of the BN/Santa Fe settlement, and the Operating Plan presented in the application was based on the assumption that BN/Santa Fe would be operating pursuant to the settlement. The environmental report was based on the Traffic Study and Operating Plan, supplemented by Applicants' projections of BN/Santa Fe traffic and operations on UP/SP facilities. In short, contrary to KCS' contention, Applicants' environmental report did take account of possible environmental impacts relating to the BN/Santa Fe settlement.

KCS is also incorrect in suggesting that the environmental report did not adequately or comprehensively address the pertinent environmental issues. In fact, the multi-volume report analyzed all of the issues specified in the regulation which governs the content of environmental reports, 49 C.F.R. § 1105.7. The report considered all relevant factors, including possible effects on air quality, water resources, biological resources, energy consumption, land use, safety and noise levels. The report analyzed construction projects and proposed abandonments, and suggested proposed mitigation activities.

KCS contends that the report should have been based on estimates prepared by BN/Santa Fe, rather than the Applicants, of

the effect of the settlement on traffic and operations. There is no legal support for this contention. There is nothing in the Board's regulations or orders in this case that suggests that it was necessary for the report to be based on operating and traffic projections prepared by BN/Santa Fe as opposed to Applicants.

In any event, it is too late now for KCS to assert its complaints about the environmental report. The report was submitted nearly four months ago. The Board in Decision No. 9, served on December 27, 1995, formally accepted the merger application, which included the report. If there had been any deficiency in the format or completeness of the environmental report, the Board would have insisted on additional information, yet it did not do so. KCS' delay in making its assertions and its failure to seek reconsideration of the decision accepting the application bar it from now asserting that the scope of the report was too narrow, that the report was incomplete, or that the report should have been based on traffic and operating estimates prepared by BN/Santa Fe rather than Applicants.

III. KCS' MOTION IS INCONSISTENT WITH THE PROCEDURES ESTABLISHED BY THE BOARD AND BY SEA.

The Board has specifically delegated to SEA the responsibility "to provide interpretations of the [Board's] NEPA process" and "to recommend rejection of environmental reports not in compliance" with the Board's rules. 49 C.F.R. § 1105.2. SEA has been actively involved in analysis of the merger, and has not advised Applicants that they have failed to comply with the NEPA

process, nor has it recommended rejection of Applicants' environmental report. Moreover, SEA has already established its own procedures for obtaining additional environmental information relating to the BN/Santa Fe settlement.

By letter dated March 5, 1996, SEA requested Applicants to submit, on or prior to March 29, 1996, a PDEA for settlement agreements that involve either substantive operational changes or rail line abandonments or construction. In response to this request, Applicants are planning on March 29, 1996, to submit a PDEA concerning the BN/Santa Fe settlement. The PDEA will address, inter alia, certain construction projects that BN/Santa Fe has said that it intends to undertake as a result of the settlement. These projects were described after the filing of Applicants' environmental report, and are set forth in BN/Santa Fe's comments, submitted on December 29, 1995. See BN/SF-1, Verified Statement of Neal D. Owen, pp. 28-29. These comments also included BN/Santa Fe's estimates of the number of trains that it expects to operate on the UP/SP system as a result of the settlement and the merger. The PDEA will also address, inter alia and to the extent appropriate, environmental issues arising from BN/Santa Fe's estimates of train counts.

KCS' motion ignores and is inconsistent with the procedures established by SEA for submitting environmental information concerning settlements. For this reason as well, the motion should be rejected.

IV. IF KCS WISHES TO RAISE ENVIRONMENTAL CONCERNS, IT SHOULD FOLLOW THE PROCEDURE ESTABLISHED BY THE BOARD FOR THE SUBMISSION OF ENVIRONMENTAL COMMENTS.

The environmental report submitted by Applicants and the PDEA to be submitted on March 29 are intended to benefit SEA in exercising its responsibility to prepare an Environmental Assessment. See 49 C.F.R. § 1105.10(b). They are not prepared for KCS' benefit, and it is doubtful that KCS even has standing to raise questions about them.

SEA and the third-party consultant are preparing an Environmental Assessment, which is expected to be issued in April. Interested parties will then have 20 days to submit comments. See Decision No. 9, p. 13. If KCS wishes to raise environmental issues, it should do so in comments filed with SEA.

The Board's Decision No. 21 in this proceeding, served March 20, 1996, rejected a motion by the City of Reno, which also had argued that Applicants had failed to submit adequate information on the potential environmental effects of the BN/Santa Fe settlement. The Board noted that the parties could address environmental matters in comments in response to the Environmental Assessment which SEA expects to issue in April. The same reasoning applies to KCS -- if it has environmental issues that it wishes to raise (and has standing to raise), it should do so in comments in response to the Environmental Assessment.

CONCLUSION

KCS does not assert that the merger or the BN/Santa Fe settlement will cause any environmental injury to KCS, and it is obvious that it has filed its motion for tactical litigation purposes, not out of any concern for the environment. The motion has no legal or factual basis, and should be denied.

Respectfully submitted,

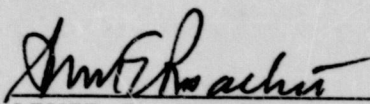
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Railway Company, SPCSL Corp. and
The Denver and Rio Grande
Western Railroad Company

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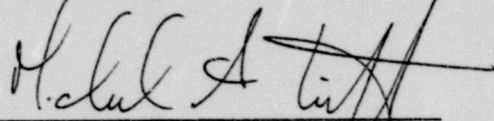
March 27, 1996

CERTIFICATE OF SERVICE

I, Michael A. Listgarten, certify that, on this 27th day of March 1996, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

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

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

A handwritten signature in dark ink, appearing to read "Michael A. Listgarten", is written over a horizontal line.

Michael A. Listgarten

STB

FD

32760

3-26-96

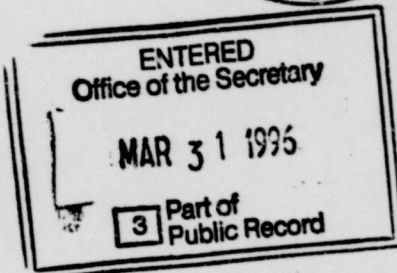
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620042

*

March 18, 1996

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



62042 D

Bellingham Cold Storage Company
2825 Roeder Ave.
P.O. Box 895
Bellingham, Washington 98227-0895
(360) 733-1640
FAX (360) 671-1259

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

Dear Mr. Williams:

I have been in the cold storage business for the past 30 years and currently am President and CEO of Bellingham Cold Storage, Bellingham, Washington. Our company will complete its 50th year in business this month. We have seen many changes since we started. We had a choice of three railroads to ship product on when we first went into business and now are served only by the Burlington Northern. We have also seen the service change in respect to not having the cars when we need them to not being able to have direct routes to California points. We have had to rely on trucking in order to make sure customers to the south were taken care of.

In review of the docket No. 32760 I find that if the approval goes as presented it will greatly give us the ability to improve our service to California points. It will also give us the ability to get refrigerated cars back to the Northwest more quickly and therefore give our customers a choice on how product is shipped.

Currently in order to get enough refrigerated cars to satisfy our customers needs it is necessary for Bellingham Cold Storage to pre-trip cars that have come into our plant loaded. We have made arrangements with the Burlington Northern RR to service these cars so we may reuse them. This is a temporary measure that could be eliminated if we were able to use cars that come directly from California.

Again I urge you to favor the agreement reached by BN/Santa Fe and UP/SP in regard to various routes, and this must be imposed as a condition to the merger. We need to have strong competition and this would be one way of insuring this would happen.

**ADVISE OF ALL
PROCEEDINGS**

"Only Your Product Gets An Icy Reception"

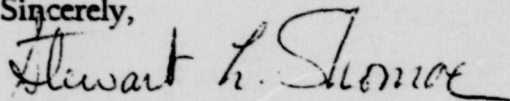
Page 2

Honorable Vernon A. Williams

Thank you again for your help in this matter.

"I declare under penalty of perjury that the forgoing is true and correct. Executed this 19th day of March, 1966.

Sincerely,

A handwritten signature in cursive script, reading "Stewart L. Thomas". The signature is written in dark ink and is positioned above the printed name.

Stewart L. Thomas, President

STB

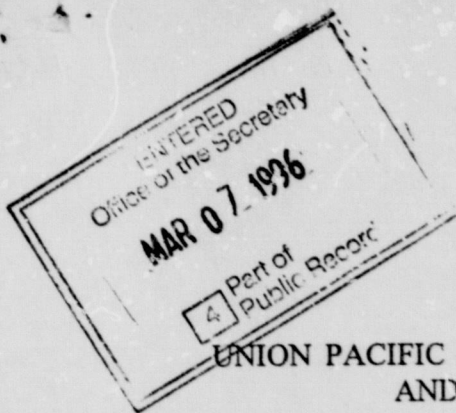
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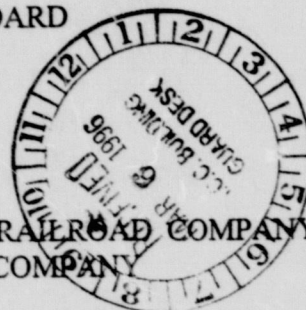
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61658
BN/SF-45

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760



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

-- CONTROL AND MERGER --

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

RESPONSES AND OBJECTIONS OF BURLINGTON NORTHERN RAILROAD
COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
TO BROWNSVILLE AND RIO GRANDE INTERNATIONAL'S FIRST SET OF
INTERROGATORIES AND INFORMAL REQUESTS FOR PRODUCTION OF
DOCUMENTS TO THE BURLINGTON NORTHERN RAILROAD COMPANY AND
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ("BNSF")

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(202) 463-2000

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

March 6, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

RESPONSES AND OBJECTIONS OF BURLINGTON NORTHERN RAILROAD
COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
TO BROWNSVILLE AND RIO GRANDE INTERNATIONAL'S FIRST SET OF
INTERROGATORIES AND INFORMAL REQUESTS FOR PRODUCTION OF
DOCUMENTS TO THE BURLINGTON NORTHERN RAILROAD COMPANY AND
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ("BNSF")

Burlington Northern Railroad Company ("BN") and The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") (collectively "BN/Santa Fe") answer and object as follows to Brownsville and Rio Grande International's ("BRGI") "First Set of Interrogatories and Informal Requests For Production of Documents." These responses and objections are being served pursuant to the Discovery Guidelines Order entered by the Administrative Law Judge in this proceeding on December 5, 1995 ("Discovery Guidelines").

Subject to the objections set forth below, BN/Santa Fe will produce non-privileged documents responsive to BRGI's First Set of Interrogatories and Informal Request For Production of Documents. If necessary, BN/Santa Fe is prepared to meet with counsel for BRGI at a mutually convenient time and place to discuss informally resolving these objections.

Consistent with prior practice, BN/Santa Fe has not secured verifications for the interrogatory responses herein, but is willing to discuss with counsel for BRGI any particular response in this regard.

GENERAL OBJECTIONS

BN/Santa Fe objects to BRGI's First Set of Interrogatories and Informal Request For Production of Documents on the following grounds:

1. Privilege. BN/Santa Fe objects to BRGI's First Set of Interrogatories and Informal Request For Production of Documents to the extent that they call for information or documents subject to the attorney work product doctrine, the attorney-client privilege or any other legal privilege.
2. Relevance/Burden. BN/Santa Fe objects to BRGI's First Set of Interrogatories and Informal Request For Production of Documents to the extent that they seek information or documents that are not directly relevant to this proceeding and to the extent that a response would impose an unreasonable burden on BN/Santa Fe.
3. Settlement Negotiations. BN/Santa Fe objects to BRGI's First Set of Interrogatories and Informal Request For Production of Documents to the extent that they seek information or documents prepared in connection with, or related to, the negotiations

leading to the Agreement entered into on September 25, 1995, by BN/Santa Fe with Union Pacific and Southern Pacific, as supplemented on November 18, 1995.

4. Scope. BN/Santa Fe objects to BRGI's First Set of Interrogatories and Informal Request For Production of Documents to the extent that they attempt to impose any obligation on BN/Santa Fe beyond those imposed by the General Rules of Practice of the Interstate Commerce Commission ("Commission"), 49 C.F.R. § 1114.21-31, the Commission's scheduling orders in this proceeding, or the Administrative Law Judge assigned to this case.

5. Definitions. BN/Santa Fe makes the following objections to BRGI's definitions:

11. "Document" means any writing or other compilation of information, whether printed, typed, handwritten, recorded, or produced or reproduced by any other process, including: intracompany communications; electronic mail; correspondence; telegrams; memoranda; contracts; instruments; studies; projections; forecasts; summaries, notes, or records of conversations or interviews; minutes, summaries, notes, or records of conferences or interviews; minutes, summaries, notes, or records of conferences or meetings; record or reports of negotiations; diaries; calendars; photographs; maps; tape recordings; computer tapes; computer disks; other computer storage devices; computer programs; computer printouts; models; statistical statements; graphs; charts; diagrams, plans; drawings; brochures; pamphlets; news articles; reports; advertisements; circulars; trade letters; press releases; invoices; receipts; financial statements; accounting records; and workpapers and worksheets. Further, the term "document" includes:

- (a) both basis records and summaries of such records (including computer runs);
- (b) both original versions and copies that differ in any respect from original versions, including notes; and
- (c) both documents in the possession, custody, or control of BNSF and documents in the possession, custody, or control of consultants or others who have assisted BNSF in connection with this proceeding.

BN/Santa Fe objects to the definition of "Document" as overly broad and unduly burdensome to the extent that it calls for the production of materials and documents that are as readily, or more readily, available to BRGI as to BN/Santa Fe.

18. "Relating to" a subject means making a statement about, referring to, or discussing, the subject, including, as to actions, any decisions to take, not take, defer, or defer decision on the action.

BN/Santa Fe objects to the definition of "Relating to" in that it requires subjective judgment to determine what is requested and, further, that it potentially calls for the production of documents that are not directly relevant to this proceeding. Notwithstanding this objection, BN/Santa Fe will, for the purposes of responding to BRGI's interrogatories, construe "Relating to" to mean "make reference to" or "mention".

22. "Studies, analyses, and reports" include studies, analyses, and reports in whatever form, including letters, memoranda, tabulations, and computer printouts of data selected from a database.

BN/Santa Fe objects to the definition of "Studies, analyses, and reports" in that it requires subjective judgment to determine what is requested and, further, it is overly broad and unduly burdensome. Notwithstanding this objection, BN/Santa Fe will, for the purposes of responding to BRGI's requests, construe "Studies, analyses, and reports" to mean analyses, studies or evaluations in whatever form.

RESPONSES AND OBJECTIONS TO INTERROGATORIES

1. Has BNSF committed to institute competitive rail service to and from Brownsville, TX, and the Port of Brownsville in the event that the UP/SP merger as proposed in Finance Docket 32760 is approved and consummated?

Response: Subject to and without waiving the General Objections stated above, BN/Santa Fe responds as follows: Assuming that Interrogatory No. 1 seeks information beyond that contained in BN/Santa Fe's Comments on the Primary Application (BN/SF-1), filed December 29, 1995, and in workpapers in BN/Santa Fe's document depository, BN/Santa Fe objects to Interrogatory No. 1 to the extent that it is vague and is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. BN/Santa Fe further objects to Interrogatory No. 1 to the extent that it calls for a legal conclusion.

Subject to and without waiving the foregoing objections, BN/Santa Fe states that, as reflected in BN/SF-1, it intends to provide competitive rail service to points and locations as set forth in the Settlement Agreement, including Brownsville, TX and the Port of Brownsville, TX.

2. If so, by what means will such service be accomplished (trackage rights/hauling rights or other arrangement)?

Response: See Response to Interrogatory No. 1. Further, subject to and without waiving the General Objections stated above, in particular the burden and scope objections, BN/Santa Fe objects to Interrogatory No. 2 to the extent that it would require BN/Santa Fe to speculate as to how, were the proposed consolidation of Union Pacific and Southern Pacific approved and the Settlement Agreement imposed as a condition to such approval.

Subject to and without waiving the foregoing objections, BN/Santa Fe states that, as set forth in the Verified Statement of Neal D. Owen (page 23), BN/Santa Fe traffic between Houston and Brownsville would initially move via haulage in UP/SP trains.

3. Specify the terms, conditions (duration) and any territories on trackage rights, haulage rights or other arrangement pursuant to which BNSF would be available to provide competitive rail service to and from Brownsville, TX, and the Port of Brownsville in the event the UP/SP merger is approved and consummated.

Response: Subject to and without waiving the General Objections stated above, in particular the burden and scope objections, BN/Santa Fe objects to Interrogatory No. 3 to the extent that it is vague and neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. BN/Santa Fe further objects to Interrogatory No. 3 to the extent that it would require BN/Santa Fe to speculate as to how, were the proposed consolidation of Union Pacific and Southern Pacific approved and the Settlement Agreement imposed as a condition to such approval.

Subject to and without waiving the foregoing objections, BN/Santa Fe states that the Settlement Agreement describes all such described terms, conditions and territories.

4. Will BNSF have the right to interchange traffic with BRGI under trackage rights, haulage rights or other arrangement pursuant to which it would be enabled to provide competitive rail service to and from Brownsville and the Port of Brownsville in the event the UP/SP merger is approved and consummated?

Response: Subject to and without waiving the General Objections stated above, in particular the burden and scope objections, BN/Santa Fe objects to Interrogatory No. 4 to the extent that it is vague and neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. BN/Santa Fe further objects to Interrogatory No. 4 to the extent that it would require BN/Santa Fe to speculate as to how, were the proposed

extent that it would require BN/Santa Fe to speculate as to how, were the proposed consolidation of Union Pacific and Southern Pacific approved and the Settlement Agreement imposed as a condition to such approval.

Subject to and without waiving the foregoing objections, BN/Santa Fe states that, since it will initially serve Brownsville and the Port of Brownsville via haulage, it does not intend initially to establish or maintain any terminal facilities at or near Brownsville.

7. Has BNSF committed to station personnel at Brownsville to promote competitive rail service and to service customer accounts in the event competitive rail service is instituted upon approval and consummation of the UP/SP merger.

Response: Subject to and without waiving the General Objections stated above, BN/Santa Fe responds as follows: Assuming that Interrogatory No. 7 seeks information beyond that contained in BN/Santa Fe's Comments on the Primary Application (BN/SF-1), filed December 29, 1995, and in workpapers in BN/Santa Fe's document depository, BN/Santa Fe objects to Interrogatory No. 7 to the extent that it is vague and is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, BN/Santa Fe states that, since it will initially serve Brownsville and the Port of Brownsville via haulage, it does not intend initially to station personnel at or near Brownsville.

8. If BNSF has determined to institute competitive rail service for Brownsville and the Port of Brownsville through haulage rights arrangements with UP/SP, will BNSF undertake to ensure that such rights can be assigned to BRGI should BNSF subsequently decide not to continue haulage rights service to and from Brownsville and the Port of Brownsville?

Response: Subject to and without waiving the General Objections stated above, in particular the burden, privilege and scope objections, BN/Santa Fe objects to Interrogatory

2. Identify and provide copies of any documents which constitute and/or discuss direct access for BNSF to the Mexican border crossing at Brownsville and rights to interchange traffic with FNM at Brownsville (Matamoros, Mexico).

Response: Subject to and without waiving the General Objections stated above, in particular the scope and settlement negotiations objections, BN/Santa Fe responds as follows: Assuming that Request No. 2 seeks information beyond that contained in BN/Santa Fe's Comments on the Primary Application (BN/SF-1), filed December 29, 1995, and in workpapers in BN/Santa Fe's document depository, BN/Santa Fe objects to Request No. 2 to the extent that it is vague, overly broad and unduly burdensome.

Subject to and without waiving the foregoing objections, BN/Santa Fe states that, other than the Settlement Agreement, no responsive documents have been identified.

3. Identify and provide copies of any documents that constitute or discuss BNSF commitment to provide competitive rail service to and from Brownsville and the Port of Brownsville upon approval of appropriate trackage rights agreements.

Response: Subject to and without waiving the General Objections stated above, in particular the burden, scope, privilege and settlement objections, BN/Santa Fe objects to Request No. 3 to the extent that it is overly broad and unduly burdensome and uses terms such as "appropriate trackage rights agreement" which are vague. BN/Santa Fe further objects to Request No. 3 on the grounds that it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, BN/Santa Fe states that, other than BN/SF-1 and the Settlement Agreement, no responsive documents have been identified.

4. Identify and provide copies of any documents that discuss trackage and/or haulage rights options through which BNSF would be able to provide competitive rail service to and from Brownsville and the Port of Brownsville.

Response: Subject to and without waiving the General Objections stated above, BN/Santa Fe objects to Request No. 4 to the extent that it is vague, overly broad, unduly burdensome and calls for speculation. BN/Santa Fe further objects to Request No. 4 on the grounds that it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, BN/Santa Fe states that responsive, non-privileged documents, if any, will be produced in accordance with the Discovery Guidelines.

5. Produce all written discovery responses provided by applicants to any person in connection with the subject proceeding (whether such responses were provided formally or informally, and whether offered in the form of a pleading, a letter or otherwise), and copies of all documents provided by Applicants to any person in connection with this proceeding. This is a continuing request and is effective throughout the pendency of this proceeding.

Response: Subject to and without waiving the General Objections stated above, BN/Santa Fe objects to Request No. 5 to the extent that it requests information of Applicants, and, as such, is more appropriately directed to Applicants than to BN/Santa Fe. BN/Santa Fe further objects to Request No. 5 on the grounds that it is overly broad and unduly burdensome.

Subject to and without waiving the foregoing objections, BN/Santa Fe states that the written discovery responses it has provided in connection with this proceeding have been served upon counsel identified on the Restricted Service List, including counsel for BRGI, and have been placed in BN/Santa Fe's document depository.

Respectfully submitted,

Erika Z. Jones ^{KEO}

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(708) 995-6887

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

March 6, 1996

CERTIFICATE OF SERVICE

I hereby certify that copies of Responses and Objections of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company to Brownsville and Rio Grande International's First Set of Interrogatories and Informal Requests for Production of Documents to the Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company ("BNSF") (BN/SF-45) have been served this 6th day of March, 1996, by first-class mail, postage prepaid on all persons on the Restricted Service List in Finance Docket No. 32760 and by fax and hand-delivery on counsel for Brownsville and Rio Grande International.

Kelley E. O'Brien

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