STB FD-32760 6-3-96 E 83999 4 OF 4

shippers wouldn't know that during the pendency of this proceeding?

A. Probably not. We've made the announcement that we are going to roll back the SP reciprocal switch rates.

MR. ROACH: This matter is addressed further by Witness Peterson and there are work papers related to it as well.

BY MR. McBRIDE:

Q. Is it your testimony that the costs of handling minerals in bulk traffic out of such places at Utah, Colorado, and Nevada is different than or approximately the same as Texas gulf petrochemicals?

A. Well, the cost of moving something is a function of a lot of variables like train size, tonnage per train, power units on the train. That question can't be answered.

Q. Do you have an opinion whether those --

A. Unless you were to cite to me a specific case in both Utah, California, and the Texas gulf coast, no, I wouldn't even want to venture an opinion.

I mean anyone that knows anything about railroad costing knows that the cost to handle something is a function of the number of locomotives you've got on the train, it's a function of the cars on the train, it's a function of the tonnage on the train, it's a function of the speed of the train, it's a function of where you have to handle that train, the number of switches that have to be made, its a function of empty return of the equipment, I mean the list just goes on and on.

Q. And, given the proximity of 3.0 and 3.1 mills rates under the agreement with BN/SF, I take it that, for purposes of the agreement, the treatment of those costs was that they were relatively equal on a per unit basis?

A. Again what costs are you talking about?

Q. The costs I just asked you about, the costs for the bulk minerals, other bulk traffic out of the central corridor region versus the gulf coast.

A. The agreement is what it is. I mean it's 3.1 mills per ton mile on nonbulk, 3.0 on bulk except between Keddie and Stockton, where it's 3.48.

Q. Is the UP/SP operating plan for the

central corridor in your judgment an integral part of the application?

MR. ROACH: Object to the form of the question. I really don't understand it at all. Are you talking about volume 3, the operating plan in volume 3?

BY MR. McBRIDE:

Q. Yes. Is that an integral part of the application in your judgment, sir?

A. It clearly is an integral part of the application.

Q. And so, in other words is it something that you think that the board could enforce?

MR. ROACH: Well, I object to that question. First you're asking him a question of law. Second, we've answered this question specifically in response to several discovery requests.

MR. McBRIDE: And what was your response?

MR. ROACH: Paraphrasing it, and I urge you to read the latest response to RLEA yesterday, the operating plan is a current best estimate based on the data that was used which is 1994 traffic data, the latest available operating statistics.

And, when people implement a merger, they are not only free but are encouraged to do better and to discover things as they do so and achieve greater benefits. It is not a binding document, that's been litigated with rail labor on many occasions.

BY MR. McBRIDE:

Q. Do you know whether UP and SP are willing to negotiate long-term contracts with shippers in Utah, Colorado, and the Nevada regions prior to the consummation of the merger?

A. I can't speak for Southern Pacific on that point. So far as Union Pacific is concerned, we're going about our business to look after the best interests of the Union Pacific as it exists today. And, if that means that we can negotiate a long-term contract to secure business, we will do that with or without this merger.

Q. Your folks have been rather busy and some of our folks have been having trouble getting ahold of them. Who would be the best person to call to make those kinds of arrangements?

merger with Southern Pacific.

Q. Okay. How would this affect your minimum return on investment analysis?

A. The strategic considerations would weigh very heavily. The Southern Pacific merger in terms of our evaluation to adjust for the risk would probably be more reflected in how we looked at either the cost reduction opportunities as we were doing our analysis or the potential traffic growth opportunities again as we were doing our analysis.

Q. Okay. I'd like you to compare the current state of rivalry, comparing first Union Pacific versus Southern Pacific and then comparing that to Union Pacific versus BN/Santa Fe. Which is overall your greater rival?

A. What's the first situation?

Q. UP versus SP compared to UP versus Burlington Northern/Santa Fe.

A. I think UP and BN/Santa Fe -- well, BN/Santa Fe is our major rival in the West, no question about that.

Q. I'm going to have to paraphrase what I think I heard you say and see if I've gotten the sense of this. I think you indicated that obtaining access to essential Southern Pacific lines through trackage agreements or some other contractual agreement short of a merger was a nonstarter. Is that fairly accurate characterization of your previous testimony?

A. I believe what I said was that no one, and in this case Southern Pacific, would grant you trackage rights into the heart of their system. And I believe I did use the term that it was a nonstarter to be asking for trackage rights into the heart of the SP system.

Q. Okay. Was this based upon an assumption that no amount of money would induce SP to give Union Pacific trackage rights over the heart of its system?

A. I'm not sure I understand your question.

Q. My question is was there an assumption that no amount of money that UP could have possibly offered would have induced SP to grant those trackage rights?

A. When you say no amount of money, to have granted trackage rights into the heart of the Southern Pacific system would have severely diminished the value of the Southern Pacific franchise in my estimation which would have severely diminished what the rest of the railroad potentially would have been worth.

Q. Let me use a number then. At $4 billion, do you think you could have bought trackage rights from SP across the heart of its system?

A. I can't answer that, I don't know.

Q. Why do you think that SP would have -- that the value of its entire system would have suffered if UP had been able to get trackage rights into the heart of its system?

A. Because of the head-to-head competition from a much stronger Union Pacific that had much greater financial resources than the Southern Pacific. And I think the other factor that's got to be considered there is to some extent the interdependency of the traffic flows on the Southern Pacific and what UP access could do in terms of -- on trackage rights, taking away the business of the existing Southern Pacific franchise.

Q. Let me turn it around a little bit. Did you consider a proposal by which Union Pacific would have purchased whatever lines it needed from Southern Pacific and then granted trackage rights back to Southern Pacific so that it could continue to compete for all the traffic in its current franchise?

A. No, we did not consider that.

Q. I'll first ask you, from the SP perspective, would you have any different answer as to how SP would have reacted in your opinion than the answer you just gave me for the earlier trackage rights question?

A. I don't know how they would have reacted.

Q. What about from the UP side? I mean SP I would think would have some price where it could be induced to sell its track, especially in return for trackage rights back. What about from the UP side, could that have given you substantially what you would get out of the merger, if you could have found a mutually agreeable price?

A. No.

Q. Why not?

A. And the reason for that is first off, if you look at the operating plan and things like the bidirectional running which probably could not be achieved, the common use of the terminals, the ability to take the combined volumes of the two railroads and build more detailed source blocking at terminals like Houston and run solid trains with the combined volumes of both railroads deep into the Southeast and into the Northeast, you would not be able to do that.

The other thing that you would not be able to do would be to expand into some of the newer markets; for example, Pacific Northwest to Texas that we're talking about, Denver to New Orleans. The other thing, though, that you would also have still left is the Southern Pacific without the financial resources to reinvest in its railroad and to be fully competitive then with a UP system or with a giant BN system.

Q. Okay. Let me move on to a different question. Is it true that, at least upon occasion, railroads will set prices at amounts that just barely cover their incremental costs of providing the service and make a small contribution to fixed costs, if that's what it takes to get the traffic?

A. I don't know whether that is true. But, as railroads become more and more capacity two major markets that we compete in over trackage rights.

And ~~The Burlington Northern~~ with Santa Fe, our access to the Los Angeles basin was over trackage rights. And I can't recall where we have had major disputes in terms of Seattle-Tacoma or in terms of getting into Southern California.

And here we're running over trackage rights over our major competitors in both markets. I mean as I've already said the simple fact of the matter is without trackage rights there would not be a national railroad network in this country today. Every railroad in the country has significant stretches where they're operating over trackage rights.

Q. I'm going to take you back to -- I kind of hate to do it, but I'm going to take you back to this transcript of the telephone conference. What I will do, however, is call your attention to page 8. And I will ask you to your recollection. If this helps you with your recollection, fine, if it doesn't, that's okay too.

And I'll tell you, here is the lines

page 29 were the corrections that he indicated should be made. Do you have that understanding now?

A. I have seen what is identified here as revised pages 306, 307, and 310. I have not seen all of the work papers.

Q. Fair enough. I'm not going to ask you about the underlying work papers, I just have a couple questions which Mr. Kauders expressly deferred to you.

Turning to the second page of this exhibit, page 307, the middle of the page there, he corrected, after doing the costing corrections, the ratio for the trackage rights fee to expense, increased it from 75 percent to 90 percent in one case and 77 percent to 93 percent in another case. Do you see that correction?

A. Yes.

Q. And immediately following that there was some testimony that you made, where you say I believe these rates will be sufficient, but only marginally so, for UP/SP to receive a sufficient return. Do you still believe the phrase only marginally so should be included there in light of the correction?

A. Absolutely.

Q. Pardon me?

A. Absolutely.

Q. What do you base that conclusion on?

A. I'm not covering my fully allocated costs which means at this point I am not earning my fully allocated costs which means that I am not earning my cost of capital even on the book value of the -- 100 percent of the book value of the investment that I have in the line that BN/Santa Fe is going to be using.

Q. In looking at the footnote on page 307, where the ratio coverage for the 3.48 mill per ton mile rate is now at 104 percent, would you still adhere to that conclusion with respect to that rate?

A. I would still adhere to it. But keep in mind, the 3.48 mills only applies between Keddie and Stockton and Oakland in the I-5 corridor which was not a competitive issue to begin with. That was one of the trades that we made with BN/Santa Fe to enhance competition in the I-5 corridor.

Also I would point out that the 104

again is based on the book value of assets involved. It is not based on the economic cost of replacing those assets with a current cost of capital.

Q. Is it your understanding that these cost calculations do not use the current cost of capital?

A. It does use the current cost capital. It does not use a replacement value of the assets.

MR. WOOD: I'd like to have another exhibit marked, please.

(Rebensdorf Exhibit No. 21 was marked for identification.)

BY MR. WOOD:

Q. What has been marked as Exhibit 21 is identified as having been placed in the applicants' depository identified as document page No. C18-000001 through 15. Have you ever seen this document before, Mr. Rebensdorf?

A. I don't immediately recall having seen it. It's dated Octobe 31, that's sometime ago.

Q. I'm sorry, I didn't hear you.

A. It's dated October 31, 1995. That's

Mr. Peterson persuasively demonstrates the extent to which seeming three-to-two situations turn out on further examination not to satisfy one or more of the above conditions.

A. Right.

Q. We're on the same page there. What I'm saying is, other than relying on Mr. Peterson for that, did you do anything to test that conclusion by him?

A. No.

Q. Okay. Did you do any investigation or analysis to assure yourself that the factual statements he was making were valid?

A. Not in any probing way, I'm really not here to be a fact witness.

Q. And, when you say not in any probing way, you qualify that by probing way, to what extent?

A. Well, I've been involved in matters concerning the railroad industry since 1978 or so on a wide variety of bases, I've kept track of the ~~kept track the~~ academic literature and I've been involved in lots of disputes before the ICC and a lot of thought processes involving competition in the industry, as well as regulation, so I have a long

A. Not in a quantitative sense, no.

Q. And you've said that a study of that type might be valuable to some person for some purpose. Why didn't you do this type of study?

MR. MEYER: Object to the form.

THE WITNESS: Frankly it didn't occur to me as something that I needed for the analysis that I did that is reflected in my statement.

BY MR. LUBEL:

Q. Did you do anything to investigate if certain shippers might use one railroad rather than another because that railroad is better suited for a certain type of commodity?

MR. MEYER: Object to the form.

BY MR. LUBEL:

Q. And again I'm not asking you whether that's true in a general sense, I'm just asking whether you did any investigation of that in regard to this statement, this merger?

MR. MEYER: Same objection.

THE WITNESS: I read lots and lots and lots of different shipper statements in this record, both before and after I wrote my testimony ~~testimony, on where those~~ shippers are explaining above their own signatures their choices of compound.

BY MR. LUBEL:

Q. And, just for efficiency's sake, I'm asking that all at once, aren't those the types of things that a landlord might know about the tenant's traffic?

MR. MEYER: Just for efficiency's sake, I'm objecting all at once.

THE WITNESS: The best I can do for you is to return to the characterization of responsibility for logistics. And it wouldn't surprise me if some things related to the categories that you're mentioning were indeed necessary for the landlord to fulfill its responsibility for orderly and safe movements.

BY MR. LUBEL:

Q. And, from that operational information and from the contact they would have on that, wouldn't there be opportunities, in implementing the trackage rights agreement like is being proposed in this case, wouldn't there be opportunities for the two carriers to have contact with each other, their employees to have contact?

MR. MEYER: Object to the form.

THE WITNESS: It's probably not a wise matter to joke about and talk about contact of the trains being avoided so I won't venture into those waters at all.

BY MR. LUBEL:

Q. I didn't mean that.

A. It would be beyond my expertise to speculate on exactly what sort of logistical information transfer would make sense in this context to make sure that trains don't come into undue physical ~~undo physical~~ contact with each other.

Q. Okay. I didn't mean physical contact of the trains. Doesn't the implementation of such an agreement cause there to be dealings between the two railroads, and what I'm leading to, which would give opportunities for information exchange, information about prices, about markets, contracts, any of those things?

MR. MEYER: I'm sorry. Could you read back that question?

THE REPORTER: "Question: Okay. I didn't mean physical contact of the trains. Doesn't the implementation of such an agreement cause there to be dealings between the two railroads, and what I'm leading to, which would you characterized the problems with the waybill data as arising from the fact that the ICC had invited railroads to alter the contract data they submitted; is that right?

A. Yes. Maybe adjust is the right word.

Q. Adjust, that's fine. Do you know whether all railroads that submit data do alter their contract data?

A. No, I don't know.

Q. Did you have any discussions with anyone at UP or SP about the way they did or did not alter their contract data?

A. No.

Q. Do you have any information about the methodologies that railroads use to alter their contract data?

A. No.

MR. HERZOG: Object, lack of foundation.

THE WITNESS: I'm sorry.

THE WITNESS: I have no specific information about what methods railroads do employ to adjust their data.

BY MR. BILLIEL:

Q. I'd like to refer you now to your

Yarberry Tr. at 15
Redacted

Yarberry Tr. at 27
Redacted

Yarberry Tr. at 109-116
Redacted

Yarberry Tr. at 119-121
Redacted

EXHIBITS

EXHIBIT 1

Procter&Gamble

The Procter & Gamble Company
Ivorydale Technical Center
5299 Spring Grove Avenue, Cincinnati, Ohio 45217-1087

Mr. Vernon A. Williams
Secretary, Surface Transportation Board
Department of Transportation
1201 Constitution Ave., N.W., Room 4126
Washington, DC 20423

March 22, 1996

RE: Docket #32760

Dear Secretary Williams:

Procter and Gamble is a major manufacturer of consumer products that are distributed worldwide with sales exceeding $33 Billion annually. Rail is the key mode of transportation for our inbound and interplant materials. We make over 26,000 carload shipments annually. Much of that volume originates or is destined for points West of the Mississippi River. We have operations in 21 states including California, Iowa, Kansas, Louisiana, Missouri, Texas, and Mexico City, Mex. Our major suppliers of raw material also reside in the states listed above as well as Wyoming, Idaho, and Nevada.

Procter and Gamble is concerned about inherent loss of competition the proposed acquisition of the Southern Pacific by the Union Pacific will have on our business over the long term. We continue to be a major proponent of deregulation and the resulting competitive environment which that legislation has enabled. Huge amounts of waste and inefficiency have been eliminated while service and productivity have been rewarded. We believe the merger in question runs contrary to the competitive marketplace which deregulation has brought us.

We do not believe the proposed trackage rights identified as part of the agreement with the BN/SF is sufficient and substantial enough to sustain its intended purpose. In respect to cost and service the broad scope of the haulage agreement will not provide the delivery performance which our current and future business environment demands. We must also question the UP's capacity to assume the volume and complexity of the Southern Pacific's traffic evident by their problems in absorbing the CNW.

The overall reduction from 3 to 2 carriers for our Sacramento, CA, Kansas City, KS and St. Louis, MO operations, as well as our numerous raw material supply points in the Texas Gulf region, will escalate cost effecting our competitiveness. Our experience has shown the Southern Pacific presence in these traffic lanes has helped maintain a competitive price structure. Industries served today by a single carrier, have the opportunity to load truck and transload to rail at nearby SP stations. This is a competitive alternative we have used which will be eliminated by the merger.

The Mexico market provides great potential for the expansion of Procter and Gamble's products. Again, the reduction in available carriers into and out of Mexico does not fit with this emerging opportunity. We therefore recommend the Surface Transportation Board reject the Union Pacific's acquisition request stated in Docket #32760.

In the event the Surface Transportation Board finds it appropriate to grant the Union Pacific's proposal, we would strongly recommend to include in your ruling a divestiture for lines currently in operation from Chicago to Houston, Laredo, and along the Texas Gulf Coast. While not the total answer, this action would substantially reestablish a true competitive environment in the Texas Gulf region and into Mexico. Establishing an ownership position versus trackage rights provides a long term competitive option in this vital and expanding business area.

STATEMENT
I, Charles R. Feldman, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified to file this statement on behalf of Procter and Gamble. Executed on March 20, 1996.

Charles R. Feldman

EXHIBIT 2

KCS-12

[illegible]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Finance Docket No. [illegible] (Sub-No. [illegible])

APPLICATION OF

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

AND LOUISIANA & ARKANSAS RAILWAY COMPANY

FOR INDEPENDENT RATEMAKING [illegible]

TRACKAGE RIGHTS [illegible]

VERIFIED STATEMENT

[illegible]

Dated: [illegible]

VERIFIED STATEMENT

OF

RICHARD C. LEVIN

I. Statement of Qualifications

My name is Richard C. Levin. I am a Professor of Economics and Management at Yale University, 37 Hillhouse Avenue, New Haven, Connecticut. I received a B.A. degree from Stanford University in 1968, a B.Litt. from Oxford University in 1971, and a Ph.D. in economics from Yale University in 1974. Since 1974 I have been on the faculty of the Department of Economics at Yale, and since July, 1980 I have also been a member of the faculty of the Yale School of Organization and Management. At Yale I have taught undergraduate and graduate courses in microeconomics, industrial organization, antitrust, and regulation.

Transportation economics, and especially economic analysis of the railroad industry, has been a major focus of my research efforts. I have published papers on the effects of railroad rate regulation, on the consequences of end-to-end and parallel railroad mergers, on the impact of abandonment regulation on railroad profitability and investment incentives, and on the expected consequences of railroad rate deregulation.

rights and, second, the relative merits of the KCS and the UP proposals for remedying the anticompetitive consequences of the merger.

Before proceeding to a discussion of these issues, however one additional procompetitive consequence of the KCS proposal should be noted. The SPSF merger would not directly affect the number of competitors serving the transcontinental Central Corridor; an SP-DRGW-SP routing would remain directly competitive with a routing over the consolidated UP system. The DRGW, however, is concerned that an SPSF merger would enhance SP's ability to direct traffic to and from Northern California over the newly monopolized Southern Corridor. The proposed IRMA, by holding Southern Corridor rates to reasonable levels, would tend to reduce the SP's incentives to divert to the Southern Corridor traffic that could be more efficiently carried over the Central Corridor. Thus, the IRMA would tend to encourage the SPSF to continue SP's cooperation with the DRGW.

IRMA v. Long-Haul Trackage Rights

An obvious alternative to independent ratemaking authority for the KCS would be trackage rights extending from Beaumont or from Dallas all the way to California. As a remedy for the competition lost in the present case, trackage rights offer the clear advantage of providing otherwise captive shippers with direct access to the trains of a competing carrier. Moreover, trackage rights have been widely and successfully used in U.S. railroading. There are hundreds, if not thousands, of active trackage rights agreements -- most voluntarily negotiated by landlord and tenant, some imposed by the Commission or Congress.

There is a substantial body of opinion, however, that the disadvantages of trackage rights multiply as their distance is increased. The operating difficulties associated with long-haul trackage rights render them less suitable than the IRMA as a remedy for anticompetitive impact in this case for two principal reasons. First, trackage rights would impose a greater burden on the SPSF and would present greater obstacles to the achievement of merger-related efficiences. Second, it is by no means clear that KCS would provide better service as a long-haul trackage rights tenant than it could under the IRMA.

Consider the relative burdens imposed on the landlord. Under the IRMA, the proposed operating plans of the Primary Applicants would scarcely be altered. For the most part, cars for KCS' account would be handled as if they were SPSF's cars. They would move, with minor exception, in the same trains over the same routes. The economies envisioned in the SPSF operating plan could therefore be realized in full. On the other hand, trackage rights for KCS' trains would be costly from a public interest standpoint. Even if the landlord were fully compensated for the additional burdens of scheduling, traffic control, and monitoring, these extra resources, unnecessary under the IRMA, could be more productively employed elsewhere. The costs of scheduling, control, and monitoring are clearly associated with distance. Greater distances mean more train meets, hence more attention to scheduling, more delays, and more potential operating problems. From the tenant's perspective, long-haul trackage rights would require investment in facilities along the route to service the trains and to accommodate crews and crew changes. From labor's perspective, worker displacement would occur to the extent that traffic moves in the tenant's trains; in this case, the SPSF would have to lay off crews and the KCS would have to add crews.

One might expect that direct access to shippers with its own trains would permit the KCS to offer better service than it could provide under the IRMA. This is not at all clear. The greater the distance over which trackage rights extend, the greater the opportunity for the landlord to give preference to the movement of its own trains. The incentives to engage in such discrimination would not arise if KCS' cars were hauled in the landlord's trains.

EXHIBIT 3

96 06 1923

RECD S.E.C.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K 405

[X] ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 1995

OR

[ ] TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from ____________________ to ____________________

Commission file number 1-12166

SOUTHERN PACIFIC RAIL CORPORATION

(Exact name of registrant as specified in its charter)

PROCESSED BY
272-29 SS (+)
MAR 29 1996
DISCLOSURE INC.
LYN

Delaware (State or other jurisdiction of incorporation or organization)	84-1092402 (I.R.S. employer identification no.)
Southern Pacific Building One Market Plaza San Francisco, CA (Address of principal executive offices)	94105 (Zip Code) (415) 541-1000 (Registrant's telephone number, including area code)

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Name of each exchange on which registered
Common Stock (Par Value $.001 per share)	New York Stock Exchange

Securities registered pursuant to Section 12(g) of the Act:
None

Indicate by checkmark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15 (d) of the Securities Exchange Act of 1934 during the preceding 12 months, and (2) has been subject to such filing requirements for the past 90 days. Yes X No __

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. X

As of March 15, 1996, the aggregate market value of the registrant's Common Stock held by non-affiliates (using the New York Stock Exchange closing price) was approximately $1.7 billion.

The number of shares outstanding of the registrant's Common Stock as of March 15, 1996 was 156,164,839.

Portions of the following documents are incorporated by reference into this Report: (1) registrant's Annual Report to Stockholders for the year ended December 31, 1995 (Part II); and (2) registrant's definitive Proxy Statement for the annual meeting of stockholders to be held on May 1, 1996, (Part III).

PAGE 1 8

Capital Expenditures and Maintenance. Improvement and on-going maintenance of roadway, ctures and equipment are essential components of the Company's efforts to improve service and reduce ating costs. The Company faces large capital investment requirements in order to meet the challenges of major competitors, particularly as a result of the recent BN/ATSF merger. The increasing service petition that has developed and will be accelerating will require substantial additional capital expenditures additional equipment, track improvements and other new facilities and technology. See "Competition".

Over the past five years, the Company made the following railroad capital expenditures in order to tain and improve train service (in millions of dollars):

Railroad Capital Expenditures

	Year Ended December 31,				
	1995	1994	1993(1)	1992	1991
Roadway and structures	$ 352.1	$ 217.5	$ 209.5	$ 263.4	$ 231.5
Railroad Equipment:					
Locomotives	30.0	69.9	21.1	70.4	45.2
Freight cars	23.9	6.4	6.5	0.2	2.4
Other	5.3	5.2	7.3	4.9	8.9
Total	$ 411.3	$ 299.0	$ 244.4	$ 338.9	$ 288.0
Capitalized leases	$ 522.3	$ 265.2	$ 57.0	$ -	$ -

---

Excludes equipment previously under operating leases purchased with $65.3 million of the proceeds from certain securities offerings ($30.1 million for locomotives and $35.2 million for freight cars).

Roadway and structures capital expenditures for 1995 increased substantially over prior year amounts to a number of factors including expenditures for main line double tracking in Arizona, various yard city improvements including new track connections to facilitate train movement over BN/ATSF trackage s, an accelerated capital maintenance plan and the purchase of an intermodal facility in Chicago.

The Company's capital expenditures for railroad operations for 1996 are expected to be approximately ' million (exclusive of capital leases), including $312 million for roadway and structures and $25 million for ad equipment and other items. The Company plans on completing the acquisition of approximately 500 nditioned freight cars by May 1996 for an estimated $14.1 million in capitalized lease obligations.

The following table shows the Company's expenses for on-going maintenance and repairs of roadway structures and railroad equipment (including administrative and inspection costs) for the periods indicated illions of dollars):.

Maintenance Expenditures

	Year Ended December 31,				
	1995	1994	1993	1992	1991
Roadway and structures	$ 174.8	$ 202.8	$ 247.1	$ 282.4	$ 297.2
Railroad Equipment:					
Locomotives	244.3	236.0	240.9	228.5	202.8
Freight cars	140.8	133.7	127.4	149.3	154.1
Other	1.4	(0.6)	3.6	7.6	8.3
Total	$ 561.3	$ 571.9	$ 619.0	$ 667.8	$ 662.4

8

Consolidated Statements of Cash Flows

(In millions)

	Year Ended December 31, 1995	1994	1993
Cash Flows From Operating Activities			
Net income (loss)	$ (3.4)	$ 241.8	$ (149.1)
Adjustments to net income (loss)			
Depreciation and amortization	161.3	139.8	133.2
Deferred income taxes	4.2	153.2	(94.6)
Gains from sales of property and real estate	(30.7)	(262.4)	(25.1)
Special charge (Note 2)	64.6	-	-
Cumulative effect of change in accounting for post-employment benefits in 1994 and post-retirement benefits in 1993	-	9.8	168.5
Changes in:			
Receivables	(20.6)	(105.2)	(18.4)
Materials and supplies	(4.2)	(14.8)	(3.1)
Taxes payable	6.3	(0.1)	(13.9)
Other current and noncurrent assets	5.4	5.3	23.5
Other current and noncurrent liabilities	(58.8)	60.8	(126.4)
Total Adjustments	127.5	(13.6)	43.7
Net Cash Provided By (Used For) Operating Activities	124.1	228.2	(105.4)
Cash Flows From Investing Activities			
Capital expenditures	(412.4)	(300.5)	(311.2)
Property sold and retired	48.7	343.4	53.8
Change in short-term investments	95.0	(95.0)	-
Change in notes receivable and other investments, net	21.5	(11.8)	(2.9)
Net Cash Used For Investing Activities	(247.2)	(63.9)	(260.3)
Cash Flows From Financing Activities			
Proceeds from issuance of debt, net of costs	225.0	55.6	796.6
Debt and revolver repayment	(139.8)	(641.5)	(734.5)
Proceeds from issuance of common stock, net of costs	-	503.6	390.7
Redemption of preferred stock	-	-	(75.0)
Dividends paid	-	-	(5.8)
Redeemable preference shares repayment	(1.9)	(1.9)	(2.1)
Net Cash Provided By (Used For) Financing Activities	83.3	(84.2)	369.9
Net Change in Cash and Cash Equivalents	(39.8)	80.1	4.2
Cash and Cash Equivalents - Beginning of Year	145.6	65.5	61.3
Cash and Cash Equivalents - End of Year	$ 105.8	$ 145.6	$ 65.5

See accompanying notes to consolidated financial statements.

To Angela Hughes From: Eileen Zimmer

Notes to Consolidated Financial Statements

2. Special Charge

In June 1995, the Board of Directors approved plans aimed at reducing future operating costs and increasing productivity which resulted in a $64.6 million pretax charge. The charge includes $41 million for severance payments to be made for approximately 582 employees (both management and labor), 64 of whom were terminated in 1995 with the remainder planned for termination before the end of 1996, approximately $4 million of the charge is related to costs associated with terminating certain leased facilities, and approximately $20 million is for the expected loss associated with the sale, lease or abandonment of 600 miles of light density rail lines. Current liabilities, non-current liabilities and accumulated depreciation at June 30, 1995 were increased by approximately $28 million, $17 million and $20 million, respectively, as a result of this charge. As part of the plans to increase productivity, the Company also approved the relocation and training of up to 300 employees for which future expected costs of approximately $8 million will be expensed as incurred under current accounting principles. As of December 31, 1995, 64 employees have been terminated and $2.0 million has been charged to the reserve. The Company continues to evaluate the costs and benefits of the plans approved by the Board in June 1995.

3. Proposed Merger with Union Pacific

On August 3, 1995, the Board of Directors of SPRC approved an agreement providing for the merger of SPRC and the Union Pacific Railroad Company ("UPRR"), a wholly-owned subsidiary of Union Pacific Corporation ("UP"). Under the terms of the agreement, a subsidiary of UP acquired 25% of the common stock of SPRC at a price of $25.00 per share pursuant to a tender offer. The merger requires approval by the Surface Transportation Board ("STB") of the Department of Transportation (successor to the Interstate Commerce Commission ("ICC")). Based on the 255 day procedural schedule adopted by the ICC, the earliest a decision can be expected is August 1996. The shares purchased in the tender offer are held in a voting trust pending a decision by the STB. Following receipt of STB approval and the satisfaction of other conditions, SPRC (and the UP subsidiary that purchased SPRC stock in the cash tender offer) would be merged into UPRR. In the merger, each share of SPRC stock would be converted, at the holder's election (subject to proration), into the right to receive $25.00 in cash or 0.4065 shares of UP common stock. Of the shares of SPRC common stock outstanding immediately prior to the merger (other than the shares previously acquired by UP in the tender offer), 20% would be acquired for cash and 80% would be acquired in exchange for shares of UP common stock. In accordance with the provisions of the UP merger agreement, all 28 executives covered by the Equity Incentive Plan (see Note 12) waived their rights under that plan.

The merger agreement provides that prior to completion of the merger, or termination of the merger agreement if that occurs before the merger is completed, the business of the Company and its subsidiaries generally will be conducted in the ordinary course of business consistent with past practice, or pursuant to "customary actions". Customary actions are defined as actions in the ordinary course of a person's business where the action is generally recognized as being customary and prudent for other major enterprises in the person's line of business. The merger agreement may be terminated by the Board of Directors of either the Company or UP if the merger has not occurred on or prior to March 31, 1997. The agreement restricts the Company, with certain exceptions, from amending its articles or bylaws, paying dividends, issuing stock, redeeming or repurchasing shares of its stock, making compensation changes, making loans, advances, capital contributions or investments (except for railroad and real estate joint ventures and certain other transactions) and engaging in transactions with affiliates. In addition, among other things, the agreement restricts the Company from incurring debt other than pursuant to arrangements existing on the date of the merger agreement (the Company's $450 million of bank credit facilities and replacements therefore and refinancings thereof, and capital leases to finance the rebuilding of freight cars and purchase of equipment under existing commitments), plus borrowing not to exceed $12.5 million in the fiscal year ended December 31, 1995, $25 million in the fiscal year ending December 31, 1996 and $12.5 million in the fiscal quarter ending March 31, 1997.

On November 30, 1995, UPRR and SPRC filed an application for the proposed merger with the ICC and the application process is ongoing. The earliest closing of the transaction, if approved, would be September 1996.

On January 17, 1996 at a special meeting called to consider the proposed merger, the stockholders of SPRC voted to proceed with the transaction.

The Company incurred expenses of $8.1 million associated with the proposed merger during 1995 and, if the merger is completed, has committed to continuity, severance and transaction expenses of up to an additional $45 million.

4. Sale of Receivables

In November 1995, a special purpose subsidiary of SPRC transferred net railroad freight and other receivables (including interline accounts) with limited recourse to an accounts receivable master trust and sold certificates of interest in the master trust to special purpose commercial paper issuers associated with major banking institutions. The sale price for the receivables sold is based upon the face amount of the receivables and is reduced by discounts for expected defaults, servicing costs and anticipated collection periods. A maximum aggregate certificate amount of $400 million may be outstanding at any time. The proceeds from this sale were used to replace the previous agreements relating to railroad receivables.

EXHIBIT 4

Despite lousy weather, analysts leaning toward slower economy as culprit driving down rail traffic

by Jack Burke

Only the U.S. operations of Canadian National and CP Rail and a surprising Southern Pacific have bucked the trend in declining traffic, and those three have managed to post gains in both carload traffic and intermodal.

Chicago

Conrail last week announced a $200 "incentive refund" for every boxcar load of canned goods shipped to the Northeast.

The railroad said it was "making this refund available for a limited time to demonstrate that Conrail boxcar transportation continues to offer a smart balance of price and service."

The Conrail rebate offer struck some rail observers as evidence that it is a slumping economy and not simply rough winter weather that has sent traffic figures for the entire rail industry into a tailspin.

"The rebate speaks volumes," said PaineWebber rail analyst Scott Flower. "This is truck competitive business. Conrail's core group has had real problems."

"It could be a reaction to weak business," said Merrill Lynch's Michael Lloyd. "But Conrail has said that their food group would attempt to regain lost market share through pricing and service improvement. They might be doing this even if the economy were strong."

Conrail itself said that planning for the rebate began about a month ago. Bruce Kozak, manager of field sales for Conrail's food and agriculture group, said the rebate was part of an overall corporate strategy to build traffic. The refund, he said, was related to the state of the economy only in the sense that "there is plenty of aggressive truck competition out there."

Truck competition in the Northeast has made it economical recently for canned goods shippers to move traffic from Washington, Oregon and California by boxcar to Chicago for transloading to truck for final delivery to points as far east as Pennsylvania. Kozak said the $200-per-car rebate, which went into effect Feb. 15, and will be available until May 15, would on average amount to about 3 percent of a freight bill from the West Coast, but would be a "substantial" portion of Conrail's share of the revenue on such a move. He also said another such rebate offer for a different commodity is under study.

> **"It's pretty bad out there, but how much is the weather and how much is the general economy? It's pretty clear that the economy is not humming along."**
>
> – Paine Webber's Flower

Overall traffic figures for Conrail for the first five weeks of 1996 show the railroad down 10.4 percent compared with the same period of 1995, though the railroad's intermodal traffic has eked out a slight three-tenths of 1 percent gain. The entire industry has seen carload traffic decline 11.9 percent and intermodal drop 3.4 percent. The drop-off is all but universal. Only the U.S. operations of Canadian National and CP Rail and a surprising Southern Pacific have bucked the trend, and those three have managed to post gains in both carload traffic and intermodal. Norfolk Southern is the only other railroad with a positive comparison, a 6.1 percent gain in intermodal.

"The first quarter is always a little fluky," said Merrill Lynch's Lloyd. "Taking coal and grain out of the traffic mix, volumes were off 3 percent in November, 3 percent in December, and 4 percent in January, but fell 7 percent the first week in February. Much of the decline in January had to do with the weather, but February could be a different story."

Railroads have had to weather the Northeast blizzard and subsequent flooding. Bitter cold in the Midwest has meant shorter trains and coal frozen in hoppers, delaying the return of cars to the Wyoming and Colorado coal mines. A Burlington Northern Santa Fe derailment on Cajon Pass on Feb. 1, brought rail traffic to a halt temporarily in much of Southern California, but a less publicized BNSF derailment in Wyoming the same week helped reduce coal loadings for both Union Pacific and BNSF by a combined 20,000 carloads, compared with loadings the same week in 1995. Finally — or so they hope — railroads were inundated by flooding in the Pacific Northwest.

"It's pretty bad out there, but how much is the weather and how much is the general economy?" wondered Flower. "It's pretty clear that the economy is not humming along."

"What strength there is in the economy seems to be more on the service side than on the manufacturing side," observed Harvey Levine, chief economist for the Association of American Railroads. "And its not the service sector that provides railroads their traffic."

"We are concerned that the weakness in railroad traffic is being blamed mostly on the weather, when in reality it is as much the result of a slowing economy," wrote Salomon Bros. analyst James Valentine in a recent recommendation. "Weaker traffic is causing us to lower our 1996 earnings estimates for all of the U.S. railroads."

Valentine, too, noted that economically sensitive rail traffic was down 4.5 percent for the first five weeks of 1996 and 7.2 percent in the fifth week. "Railroad traffic has not been this negative since the 1990-1991 recession," he emphasized. Valentine estimated that half of the traffic decline could be related to weather and should be recaptured, but "potentially half of the lost traffic is gone forever."

Valentine reduced his recommendations on BNSF from a "strong buy" to a "buy" and on UP from a "buy" to "hold." Lloyd recently reduced his intermediate or 12-month ratings on UP, Conrail and NS from above average to hold and from buy to above average for Illinois Central. Flower has not changed his rating on individual railroads since downgrading several in the later stages of 1995.

All three analysts agreed that railroads with cost-cutting opportunities remain attractive investments, the basis on which all three give favorable ratings to the newly merged BNSF. ■

Hub Group making another run at public offering

Chicago

The Hub Group, the largest intermodal marketing company, is making a second effort to go public, after scrubbing an initial public offering in the spring of 1995.

Hub's registration statement, filed Feb. 6, contemplates an offering of 3,575,000 Class A common shares by the company with an additional one million shares to be sold by the Francis T. Marino Trust. Last year's proposal called for a slightly larger number of shares to be sold, but the anticipated per-share price remains $15. Net proceeds to the company from an offering at that price would be slightly more than $48 million.

The bulk of those funds will be used to restructure Hub, which now consists of 28 separate Hub S Corporations. Members of Hub founder Phillip Yeager's family, the Marino Trust, initial investors in Hub and the principals of each of the Hub S Corporations are the majority owners of each of those 28 corporations. Immediately prior to the closing of the offering, each Hub S Corporation will declare a dividend equal to its retained earnings, common stock and paid-in capital. These dividends will aggregate $22.8 million, $10.8 million of which will be paid to the shareholders in cash and the remainder in five-year notes. The dividend is worth just under $2 million for Phillip Yeager and $1 million for his son David Yeager, vice chairman of Hub.

Funds from the public offering will used to begin the process of buying out that ownership, with Hub Chicago, itself a subsidiary of Hub Group Inc., becoming the owner. The offering contemplated completion of the buyout of the separate Hubs only at the time the principal ceases employment with the company.

The buyouts from the fund derived from the initial public offering will result in Phillip Yeager receiving $3.5 million, his son and David Yeager $4.3 million. A second son, Mark Yeager, will receive $3.4 million and son-in-law Robert J. Jensen will receive $3.7 million. Hub President Thomas Hardin is slated to receive $2.1 million.

The offering also calls for the senior Yeager and his family to retain control of the company through the issuance to them of 662,300 Class B shares, each of which will command 20 votes to the single vote attached to each Class A share. The Yeager family will thus retain 74 percent of the voting control over Hub. Class B shares will revert to Class A status should they be sold to a non-family member.

The registration statement disclosed that for the first nine months of 1995, Hub had pro forma net income of $3.8 million on revenue of $519 million. ■

Mass. passes doublestack clearance bill

Chicago

The Massachusetts legislature last Wednesday enacted its Seaport Improvement Bond Bill, calling for the state to invest $110 million in doublestack clearances and about $60 million in dredging Boston Harbor.

Conrail will invest $23 million in its own funds in clearing its route from Boston, through Worcester, Springfield and Pittsfield, as well as $4 million in New York for full doublestack clearances through to Albany. The bill also provides funding for clearance projects on Guilford Industries' Boston & Maine track and on the Providence & Worcester. P&W has said it will spend the $5.5 million required of it to clear its route, but Guilford has not guaranteed that it would invest the $25 million it would have to invest to guarantee state funding.

Conrail President and CEO David LeVan said the vote would mean "Massachusetts will have a modern port linked to a modern transportation network, which will lead to economic development and job creation." ■

EXHIBIT 5

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PUBLIC DOCUMENT COUNT: 3
CONFORMED PERIOD OF REPORT: 19960331
FILED AS OF DATE: 19960515
SROS: NYSE

FILER:

COMPANY DATA:
COMPANY CONFORMED NAME: SOUTHERN PACIFIC RAIL CORP
CENTRAL INDEX KEY: 0000904691
STANDARD INDUSTRIAL CLASSIFICATION: RAILROADS, LINE-HAUL OPERATI
IRS NUMBER: 841092482
STATE OF INCORPORATION: DE
FISCAL YEAR END: 1231

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SEC ACT: 1934 Act
SEC FILE NUMBER: 001-12166
FILM NUMBER: 96566254

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 10-Q

[X] QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934

For the quarterly period ended March 31, 1996

 http://www.sec.gov/Archi...0000929624-96-000035.txt

OR

[ ] TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from ________________ to ________________

Commission file number 32-62756

SOUTHERN PACIFIC RAIL CORPORATION
(Exact name of registrant as specified in its charter)

Delaware	84-1092482
(State or other jurisdiction of organization)	(I.R.S. employer identification no.)

Southern Pacific Building
One Market Plaza
San Francisco, CA 94105
Telephone Number (415) 541-1000

Indicate by checkmark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15 (d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes X No
--- ---

Indicate the number of shares outstanding of each of the issuer's classes of common stock, as of the latest practicable date.

Class	Outstanding at April 30, 1996
Common stock, $.001 par value per share	156,154,639 shares

<PAGE>

PART 1 - FINANCIAL INFORMATION

ITEM 1. FINANCIAL STATEMENTS

SOUTHERN PACIFIC RAIL CORPORATION AND SUBSIDIARY COMPANIES
CONSOLIDATED CONDENSED BALANCE SHEETS
(Unaudited)

<TABLE>
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	March 31, 1996	December 1995
	(in millions)	
ASSETS	<C>	<C>
<S>		
CURRENT ASSETS		
Cash and cash equivalents............................	$ 51.1	$ 10[illegible]
Accounts and notes receivable, net of allowance for doubtful accounts....................	116.8	10[illegible]

(6) COMMITMENTS AND CONTINGENCIES

The Company is subject to Federal, state and local environmental laws and regulations and is currently participating in the investigation and remediation of numerous sites. Where the

<PAGE>

remediation costs can be reasonably determined, and where such remediation is probable, the Company has recorded a liability. It is possible that additional losses will be incurred, but such amounts cannot be reasonably estimated. The Company does not believe that disposition of environmental matters known to the Company will have a material adverse effect on the Company's financial condition or liquidity; however, there can be no assurance that the impact of these matters on its results of operations for any given reporting period will not be material.

ITEM 2. MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

Results of Operations

Three Months Ended March 31, 1996 Compared to Three Months Ended March 31, 1995

The Company had net income of $6.1 million ($.04 per share) for the first quarter of 1996 compared to net income of $16.5 million ($.11 per share) for the first quarter of 1995. The Company had operating income of $53.2 million for the first quarter of 1996 compared to $56.7 million for the 1995 quarter. For the first quarter of 1996, railroad operating revenues increased 2.6% and railroad operating expenses increased 3.3% over the 1995 period. The adverse net income variance from the first quarter 1995 was caused primarily by increased depreciation and interest expenses related to locomotive acquisitions completed in 1995.

Operating Revenues. In the first quarter of 1996, railroad operating revenues increased $19.1 million, or 2.6%, compared to the first quarter of 1995. Railroad freight operating revenues increased $26.2 million, or 3.7%, due to stable or increased shipments of all commodities with the exception of coal shipments which decreased 2.9% due primarily to a mine closure and temporary downtime at two other mines. The improvement in railroad freight operating revenues in 1996 is in part due to comparison to a weak performance as a result of bad weather in the first quarter of 1995. Other railroad revenues (primarily demurrage and incidental) decreased $7.1 million during the first quarter of 1996 compared to the 1995 quarter. For the first quarter of 1996, carloads increased 4.5% and revenue ton-miles increased 8.6% compared to the same period in 1995. The average net freight revenue per ton-mile for the first quarter of 1996 declined by 4.6% compared to the first quarter of 1995 due principally to an increase in traffic volume for commodities that generate lower revenue per ton-mile (e.g., iron ore and aggregates traffic).

The following table compares traffic volume (in carloads), gross freight revenues (before contract allowances and adjustments) and gross freight revenue per carload by commodity group for the three months ended March 31, 1996 and 1995.

<PAGE>

Carload and Gross Freight Revenue Comparison
Three Months Ended March 31, 1996 and 1995

<TABLE>
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Commodity Group	Carloads 1996	Carloads 1995	Carloads % Change	Gross Freight Rev 1996	Gross Freight Rev 1995	%
	(in thousands)			(dollars in millic		
<S>	<C>	<C>	<C>	<C>	<C>	<C
Intermodal	177.1	172.8	2.5%	$208.6	$205.1	
Chemical and petroleum products	84.6	77.3	9.4	148.4	142.4	
Coal	84.5	87.0	(2.9)	81.1	82.9	
Food and agricultural products	57.2	57.0	0.4	102.7	96.8	
Forest products	54.3	51.9	4.6	103.1	101.1	
Metals and ores	49.5	49.1	0.8	73.2	71.7	
Construction materials and minerals	49.5	41.0	20.7	46.2	40.3	1
Automotive	23.0	18.8	22.3	52.8	44.4	1
Total	579.7	554.9	4.5%	$816.1	$784.7	

</TABLE>

o Intermodal carloads and revenue increased for the first quarter of 1996 compared to the same period in 1995 due to increased container-on-flatcar ("COFC") traffic, primarily from steamship customers. Trailer-on-flatcar ("TOFC") carloads and revenue declined due to industry-wide reduction in volumes, changes in customer distribution and shipping patterns and increases in service competition from major competitors.

o Chemical and petroleum products carloads and revenues increased during the first quarter of 1996 compared to the same period in 1995 due to increased traffic in environmental wastes as well as reduced 1995 shipments attributable to severe weather during the first quarter of 1995, strong crude oil shipments compared to a 1995 quarter that included a prolonged maintenance shutdown for a primary crude oil customer and growth in the first quarter of 1996 in shipments of plastics, liquified petroleum gas, soda ash and ethanol. Revenue per carload decreased for the 1996 quarter from the 1995 quarter due primarily to changes in the commodity and customer mix.

o Coal carloads and revenues decreased for the 1996 period due to a mine closure and temporary downtime at two mines during 1996 as well as to reduced shipments for certain customers that are drawing down large stockpiles or had spot moves in 1995 that did not repeat. Revenue per carload remained relatively stable between periods.

o Food and agricultural products carloads remained stable for the 1996 quarter compared to the 1995 quarter while revenue and revenue per carload increased due to increased length of haul for grain traffic and growth in higher revenue per car canned food shipments. Shipments of sugar beets, temperature controlled traffic and grain products decreased during the 1996 quarter compared to the same period in 1995.

o Forest products carloads and revenue increased during the first quarter of 1996 due to increased shipments of paperboard, scrap paper and wood chips attributable primarily to incremental volumes from existing customers as well as to reduced 1995 carloads and revenue. The weakness in the first quarter of 1995 was caused by severe weather and

WASHINGTON, D.C. 20549

FORM 10-Q

(Mark One)
[X] QUARTERLY REPORT PURSUANT TO SECTION 13 or 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the quarterly period ended March 31, 1996

OR

[ ] TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from to
Commission file number 1-8159

BURLINGTON NORTHERN INC.
(Exact name of registrant as specified in its charter)

Delaware	41-1400580
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)

3800 Continental Plaza, 777 Main St. Fort Worth, Texas	76102-5384
(Address of principal executive offices)	(Zip Code)

(817) 333-2000
(Registrant's telephone number, including area code)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes__X__ No______

Indicate the number of shares outstanding of each of the issuer's classes of common stock, as of the latest practicable date.

Class	Shares Outstanding as of April 30, 1996
Common stock, $1.00 par value*	2,007 shares

*Burlington Northern Inc. is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation and there is no market data with respect to such shares.

Registrant meets the conditions set forth in General Instruction H(1)(a) and (b) of Form 10-Q and is therefore filing this Form 10-Q with the reduced disclosure format permitted by General Instruction H(2).

<PAGE>

 http://www.sec.gov/Archi...0000351979-96-000003.txt

PART I FINANCIAL INFORMATION

ITEM 1. FINANCIAL STATEMENTS

BURLINGTON NORTHERN INC. AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF INCOME
(DOLLARS IN MILLIONS)
(UNAUDITED)

<TABLE>
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	Three Months Ended March 31, 1996	Three Months Ended March 31, 1995
<S>	<C>	<C>
Revenues	$1,321	$1,347
Operating expenses:		
Compensation and benefits	455	483
Purchased services	99	113
Depreciation and amortization	104	107
Equipment rents	124	116
Fuel	106	98
Materials and other	180	193
Merger, severance and asset charge	-	32
Total operating expenses	1,068	1,142
Operating income	253	205
Equity in earnings of SFP	11	-
Interest expense	41	43
Other income (expense), net	1	3
Income before income taxes	224	165
Income tax expense	82	64
Income before cumulative effect of change in accounting method	142	101
Cumulative effect of change in accounting method, net of tax	-	(100)
Net income	$ 142	$ 1

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See accompanying notes to consolidated financial statements.

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BURLINGTON NORTHERN INC. AND SUBSIDIARIES

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FILED AS OF DATE: 19960515
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CENTRAL INDEX KEY: 0000100885
STANDARD INDUSTRIAL CLASSIFICATION: RAILROADS, LINE-HAUL OPERATIN
IRS NUMBER: 132626465
STATE OF INCORPORATION: UT
FISCAL YEAR END: 1231

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SEC ACT: 1934 Act
SEC FILE NUMBER: 001-06075
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STREET 2: EIGHTH AND EATON AVES
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FORM 10-Q

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549-1004

(Mark One)

[X] QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the quarterly period ended March 31, 1996

OR

[ ] TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from ____________________ to ____________________

Commission file number 1-6075

UNION PACIFIC CORPORATION
(Exact name of registrant as specified in its charter)

UTAH
(State or other jurisdiction of incorporation or organization)

13-2626465
(I.R.S. Employer Identification No.)

Martin Tower, Eighth and Eaton Avenues, Bethlehem, Pennsylvania
(Address of principal executive offices)

18018
(Zip Code)

(610) 861-3200
(Registrant's telephone number, including area code)

Indicate by check mark whether the Registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the Registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

YES X NO

As of April 30, 1996, there were 205,818,473 shares of the Registrant's Common Stock outstanding.

<PAGE>

UNION PACIFIC CORPORATION

INDEX

PART I. FINANCIAL INFORMATION

Should the STB not approve the acquisition or should UPC elect not to complete the acquisition because the STB imposes onerous conditions which prevent UPC from realizing the economic benefits of the acquisition, a subsequent disposition of the Southern Pacific shares owned by the Corporation could result in a significant loss. However, UPC continues to believe that the Southern Pacific acquisition will be approved without onerous conditions.

CONSOLIDATED - The Corporation reported net income of $156 million or $0.76 per share for the first quarter of 1996, compared to 1995 net income of $191 million or $0.93 per share. Results for 1996 included the effects of the acquisition of CNW and, as a result of the Resources' IPO, reflected 83% of Resources' net income in discontinued operations.

RESULTS OF CONTINUING OPERATIONS - Income from continuing operations declined $23 million (18%) to $107 million ($0.52 per share) for the first quarter of 1996, as severe winter weather, Pacific Northwest flooding, and the 17-day General Motors brake plant strike (the GM Strike) more than offset the positive impact of the CNW integration at the Railroad, while severe weather conditions and an unfavorable pricing environment reduced earnings at Overnite Transportation Company (Overnite).

Consolidated operating revenues grew 18% to $1.97 billion from $1.66 billion in 1995, resulting primarily from increased carloadings--reflecting the acquisition of CNW offset in part by the GM Strike and severe winter weather--and higher average revenue per car at the Railroad, reflecting the CNW integration.

Consolidated operating expenses rose $318 million (23%) to $1.70 billion. The addition of CNW volumes, weather-related traffic interruptions, rail traffic congestion and inflation were the primary reasons for increases in salaries, wages and employee benefits ($117 million), equipment and other rents ($64 million), materials and supplies ($28 million), personal injury expense ($8 million), other taxes ($11 million) and third-party transportation costs ($12 million). Fuel and utility costs increased $38 million, reflecting increased fuel prices, incremental CNW volumes and weather-related inefficiencies.

<PAGE> 11

Depreciation charges rose $34 million--the result of UPC's continued reinvestment in its equipment and rail infrastructure and the addition of CNW properties.

Consolidated operating income declined $14 million (5%) to $265 million for the period. Interest expense increased $26 million, principally from higher debt levels associated with the CNW acquisition and the Southern Pacific first-step cash tender offer. Other income decreased $31 million, reflecting reduced real estate sales activity at the Railroad.

Railroad - The Railroad earned $166 million for the quarter, a 15% decline from $195 million in 1995. Earnings reductions reflected the current period's severe winter weather, Pacific Northwest flooding, and the GM Strike. Results in 1996 also included a $33 million after-tax increase in interest costs, primarily related to financing the CNW acquisition and Southern Pacific first-step cash tender offer, and lower year-over-year real estate sales ($31 million). The negative impact of these factors was somewhat countered by the acquisition of CNW and a favorable IRS tax settlement ($20 million). The CNW acquisition added roughly $10 million to the Railroad's first quarter 1996 net income.

Operating revenues improved $297 million (22%) to $1.68 billion, as CNW volumes combined with a 9% increase in average commodity revenue per car, reflecting longer average length of haul, favorable traffic mix shifts and pricing improvements. Carloadings grew 10% (122,000 cars) detailed as follows:

Energy: Energy carloadings declined 4% as weather-related inefficiencies and a

EXHIBIT 8

REDACTED

EXHIBIT 9

REDACTED

EXHIBIT 10

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EXHIBIT 11

FEBRUARY 1996

UNITED STATES
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Railroads

Salomon Brothers

Fourth-Quarter Railroad Review and Outlook

James J. Valentine, CFA
212-783-5569
jvalentine@sbi.com

Jeffrey G. Kanter
212-783-0631
jkanter@sbi.com

Brian P. McGough
bmcgough@sbi.com

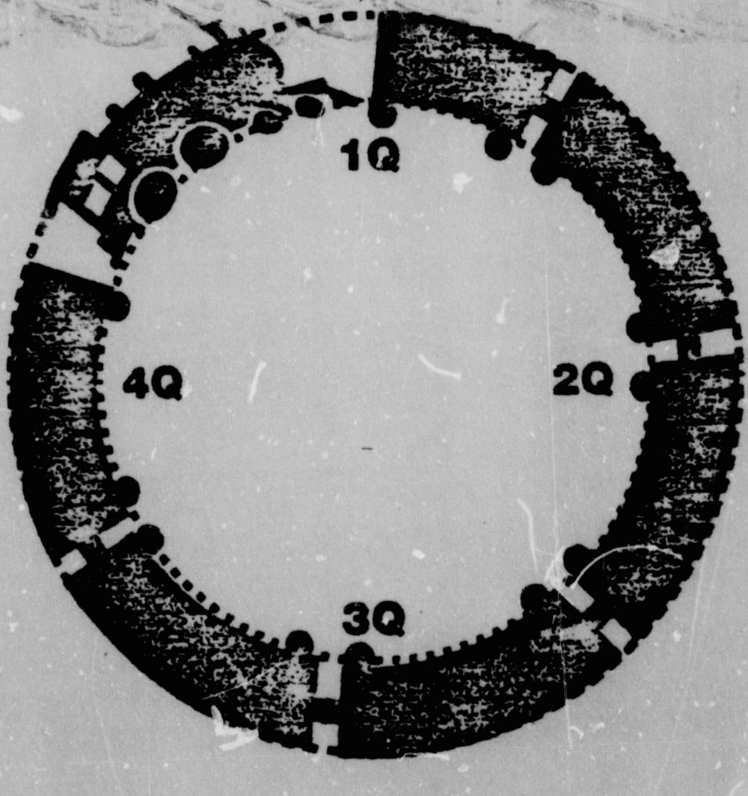

Figure 65. Southern Pacific — Statistical Abstract

Ticker Exchange	RSP NYSE	Dividend	$0.00
Price (1 Feb 96)	$23[illegible]	Yield	0%
52-Week Price Range	$25[illegible]-$14[illegible]	Book Value Per Share	$[illegible]
Previous Investment Code	Hold	Shares Outstanding (Fully-Diluted)	[illegible] Million
		Market Capitalization (in Millions)	$3,565

	EPS Current	EPS Previous	Operating Ratio	P/E	Relative P/E
1992	$0.24		96.2%		
1993	(0.45)		96.5		
1994	0.86		89.0		
1995A	0.24				
1996E	0.65	$0.75		36.2	240%
1997E	$1.00			23.5	175

E Salomon Brothers Inc estimates

Southern Pacific reported fourth-quarter 1995 earnings of $0.02 per share compared with $0.22 last year, below both our estimate of $0.05 and the Street forecast of $0.04. There were a multiple of one-time items that decreased operating expenses for the quarter, but were offset by a one-time accounting write-down of real estate property and, therefore, the adjustments did not impact earnings per share. Adjusting for the one-time charges, the operating ratio increased 4.9 points, from 89.9% in the fourth quarter of 1994 to 94.7% this quarter.

Although the lower-than-expected earnings are a disappointment, they did not come as a complete surprise. Deteriorating employee morale due to the pending merger negotiations with Union Pacific made it difficult for management to aggressively increase service to optimal levels. However, on-time performance for both its intermodal trains and its manifest trains are currently at the highest levels over the past three months, both at approximately 60%, which we believe can be sustained into 1996.

Over the past year, it appears that RSP has done a good job of attracting business, but unfortunately, it either was not priced properly or the railroad's cost containment initiatives proved unattainable. As a result of these lingering difficulties and the loss of some high margin service sensitive businesses, we are lowering our 1996 earnings per share estimate from $0.75 to $0.65.

Highlights of the Quarter

Although total revenue was essentially flat, up 0.4% for the quarter (due to high contract allowances and adjustments), gross freight revenue improved 1.2%, to $818 million, on a 4.5% increase in volume. Chemicals, coal and automotive contributed to much of the yield decline.

Coal revenue increased 21.2% to $91.5 million on a 30% increase in volume. Although the company has been benefiting from new coal moves throughout the year, the decrease in yields reflect shorter lengths of haul. Intermodal revenue finished down 3.6%, to $206 million, on a 2.6% decrease in volume. The company's trailer on flat car volume was down over 10% for the quarter, driven by service-related problems and the loss of UPS and Schneider National business. Chemicals finished down 3.3% for the quarter, to $144 million, on a 3% increase in volume. The weakness in rates were primarily due to a soft plastic market.

Figure 76 Southern Pacific — Cash Flow Statement and Balance Sheet, 1991-97E (Dollars in Millions)

SOUTHERN PACIFIC	1991	1992	1993	1994	1995A	1996E	1997E
Additions to PP&E							
Cash additions						350	350
Lease additions						40	40
Total Annual Additions						**390**	**390**
Cash Flow Statement							
Cash beginning of period	89	53	61	66	146	11	13
Cash From Operations							
RSP Recorded net income	-176	33	-149	242	3	102	157
Noncash items							
Depreciation	125	139	133	140	151	167	169
Deferred Taxes	-107	23	-95	153	-2	57	87
Gains from Property Sales	0	-119	-25	-262	-31	-40	-50
All Other Operating Adjustments	114	31	30	-44	-1	-2	27
Total Cash From Operations	-45	107	-105	**228**	**124**	**284**	**390**
Cash From Investing							
Capital expenditures	-305	-341	-311	-301	-412	-350	-350
Property Sold and Retired	517	362	54	343	49	80	100
Other Cash from Investing	8	-24	-3	-107	22	-10	-5
Total Cash From Investing	**220**	**-2**	**-260**	**-64**	**-342**	**-280**	**-255**
Cash From Financing							
Change in Borrowing	-194	-86	62	-586	85	0	0
Proceeds from Common Stock	0	0	391	504	0	0	0
Other Cash from Financing	-17	-11	-83	-2	-2	-2	3
Total Cash From Financing	**-211**	**-97**	**370**	**-84**	**83**	**-2**	**3**
Change in cash	-36	8	4	80	-135	2	138
Cash, end of period	**53**	**61**	**66**	**146**	**11**	**13**	**151**
Balance Sheet							
Cash		61	66	[illegible]	106	13	151
All other current assets		266	289	527	452	480	490
Total current assets		328	354	673	558	493	641
Real Estate Held for Sale		374	363	361	342	342	342
Property and equipt., net		2,319	2,532	2,929	3,689	3,872	4,042
Other assets		184	185	189	161	161	161
Total Assets		**3,205**	**3,434**	**4,152**	**4,749**	**4,867**	**5,186**
Current maturity of LT debt		154	67	60	59	53	58
All other current liabilities		929	850	956	962	864	882
Total current liabilities		1,083	916	1,016	750	917	940
Long-term debt		1,176	1,408	1,089	1,699	1,745	1,780
Deferred income taxes		163	68	223	219	275	363
Other LT liabilities		860	729	765	750	768	784
Total Liabilities		**3,281**	**3,122**	**3,093**	**3,689**	**3,705**	**3,867**
Shareholders' Equity		**-77**	**313**	**1,059**	**1,061**	**1,163**	**1,319**
Total Liabilities and Shareholders' Equity		**3,205**	**3,434**	**4,152**	**4,749**	**4,867**	**5,186**

Source: Salomon Brothers Inc

EXHIBIT 12

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EXHIBIT 13

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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

BRIEF FOR CONSOLIDATED RAIL CORPORATION

Bruce B. Wilson
Constance L. Abrams
Jonathan M. Broder
Anne E. Treadway
CONSOLIDATED RAIL CORPORATION
2001 Market Street
Philadelphia, PA 19101
(215) 209-2000

Daniel K. Mayers
William J. Kolasky, Jr.
A. Stephen Hut, Jr.
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Consolidated Rail Corporation

June 3, 1996

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS, SHORT CASE CITATIONS, AND RECORD-CITATION CONVENTIONS

I. Abbreviations

A&S	The Alton & Southern Railway Company
ALK	ALK Associates, Inc.
Applicants	UP and SP
BNSF	The Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company
BNSF I	The September 25, 1995 Agreement between Applicants and BNSF
BNSF II	The November 18, 1995 Supplemental Agreement between Applicants and BNSF
BNSF III	The April 18, 1996 Agreement between Applicants, CMA, and BNSF (also cited as "CMA Agreement")
CMA	Chemical Manufacturers Association
CMA Agreement	The April 18, 1996 Agreement between Applicants, CMA, and BNSF (also cited as "BNSF III")
CNW	Chicago and North Western Railway Company
Conrail	Consolidated Rail Corporation
CSX	CSX Transportation, Inc.
DRGW	The Denver and Rio Grande Western Railroad Company
HBT	Houston Belt & Terminal Railway Company
ICC	The former Interstate Commerce Commission
IP	International Paper Company
KCS	The Kansas City Southern Railway Company
MKT	Missouri-Kansas-Texas Railroad Company

MP	Missouri Pacific Railroad Company
NIT League	National Industrial Transportation League
PTRA	Port Terminal Railroad Association
RSI	Rail Sciences, Inc.
SP	Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp, and The Denver and Rio Grande Western Railroad Company
SP East	The SP lines, facilities, and other assets in the region defined in Conrail's March 29, 1996 filing, specifically in the Verified Statement of Ronald J. Conway, Lester M. Passa, and John P. Sammon, CR-22, at 6
SP West	The SP lines, facilities, and assets other than SP East
SPI	The Society of the Plastics Industry, Inc.
Tex-Mex	The Texas Mexican Railway Company
UP	Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company
WP	Western Pacific Railroad Company

II. Short Form Case Citations

BN/SF	Burlington Northern, Inc. and Burlington Northern R.R. -- Control and Merger -- Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry., Finance Docket No. 32549, 1995 WL 528184 (August 16, 1995)
BN/St. Louis	Burlington Northern -- Control and Merger -- St. Louis -San Francisco Railway Co., 360 I.C.C. 788 (1980)
CSX/Chessie	CSX Corp. -- Control -- Chessie System, Inc. and Seaboard Coast Line Indus., 363 I.C.C. 521 (1980)
DRG/SPT	Rio Grande Industries, Inc., SPTC Holding, Inc., and The Denver and Rio Grande Western Railroad Company -- Control -- Southern Pacific Transportation Company, 4 I.C.C.2d 834 (1988)
Grand Trunk	Chicago, Milwaukee, St. Paul and Pacific Railroad Co. -- Reorganization -- Acquisition by Grand Trunk Corp., 2 I.C.C.2d 161, (1904)
N&W/DT&I	Norfolk and Western Railway Co. and Baltimore and Ohio Railway Co. -- Control -- Detroit, Toledo, and Ironton Railroad Co., 360 I.C.C. 498 (1979)
RGI/Soo	Rio Grande Industries, Inc. -- Purchase and Related Trackage Rights -- Soo Line Railroad Co., Finance Docket No. 31505 (Dec. 11, 1989)
SF/SP	Santa Fe Southern Pac. Corp. -- Control -- SPT Co., 2 I.C.C. 2d 709 (1986)
SP/WP	Southern Pacific Co. -- Control -- Western Pacific R.R., 327 I.C.C. 387 (1965)
UP/CNW	Union Pacific Corp., Union Pacific R.R. and Missouri Pacific R.R. -- Control -- Chicago and North Western Transportation Co. and Chicago & North Western Ry., 1995 WL 141757 (March 7, 1995)

UP/MKT | Union Pacific Corp., Union Pacific R.R. and Missouri Pacific R.R. -- Control -- Missouri-Kansas-Texas R.R., 4 I.C.C.2d 409 (1988), petition for review dismissed sub nom., Railway Labor Executives Ass'n v. ICC, 883 F.2d 1079 (D.C. Cir. 1989)

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

III. Record-Citation Conventions

BNSF Reply	Reply to Petition of Consolidated Rail Corporation for Revocation of Settlement-Related Trackage Rights Class Exemption, BN/SF-53 (April 18, 1996)
BNSF Response	BN/Santa Fe's Response to Inconsistent And Responsive Applications; Response to Comments, Protests, Requested Conditions and Other Opposition; and Rebuttal in Support of Related Applications to Which BN/Santa Fe Is a Party, BN/SF-54, Volume I (April 29, 1996)
Conrail Comments	Comments of Consolidated Rail Corporation in Opposition to the Merger; Petition for Revocation of Settlement-Related Trackage Rights Class Exemption; Opposition to Petition for Exemption for Settlement-Related Line Sales; Shipper, Government, and Other Statements, Volumes I, II, and III, CR-21, CR-22, and CR-23 (March 29, 1996)
__ Dep. Tr.	Deposition transcripts in this proceeding. Where a deponent testified on more than one day, the date precedes the citation. (E.g., 5/9/96 Salzman Dep. Tr. 31-32.)
Narrative	Applicants Rebuttal, Volume I -- Narrative, UPSP-230 (April 29, 1996)
R.V.S.	Rebuttal Verified Statements submitted on or before April 29, 1996
V.S.	Verified Statements submitted with the Application or by Conrail and other parties on or before March 29, 1996 filings

All other comments and evidence are cited to the numbers of the filing. (E.g., "SPI-11.")

Introduction and Summary

Pending before the Surface Transportation Board ("Board") is the largest rail merger in history. Parties on both sides agree that it is a watershed event, and, if approved, would change permanently -- for good or ill -- the freight railroad industry in the United States. Because the merger, if consummated as proposed, would significantly reduce competition in the SP East region,[1] Consolidated Rail Corporation ("Conrail"), like many others, believes that the change bodes ill. Because the trackage rights agreements between Applicants and BNSF would not remedy these competitive harms, and because such harms are not outweighed by countervailing benefits, the merger is not consistent with the public interest. Accordingly, Conrail respectfully urges the Board to disapprove the merger, unless it is conditioned on divestiture of the SP East lines.

Opposition to the merger spawned by the demonstrated and unremedied competitive harms in the SP East region comes from a broad array of interests -- the United States Department of Justice; major shipper groups (including the National Industrial Transportation League, the Society of the Plastics Industry, Inc., and the Louisiana Chemical Association); most major agricultural groups; significant individual rail users, including Chrysler Corporation, Dow Chemical Company, International Paper

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[1] The SP East region is defined in Conrail's March 29, 1996 filing in V.S. Conway/Passa/Sammon, at 6-7. (Record-citation conventions are set out in the Table of Abbreviations, Short Case Citations, and Record-Citation Conventions that precedes this Brief.)

Company, Phillips Petroleum Company, Procter & Gamble, Shell Chemical Company, and Union Carbide Corporation; and public officials including the Railroad Commission of Texas, the Attorneys General of Texas, Louisiana, Arkansas, and Missouri, and the Governors of Louisiana, Missouri, and Ohio.

Their evidence shows that, in addition to the substantial competitive harms that Applicants acknowledge, there are equally substantial unacknowledged harms. It shows that Applicants seriously understate the competitive role that SP plays today and would play in the future. Moreover, it shows that, while Applicants describe the BNSF trackage rights as a time-tested remedy, such rights would, in fact, be unprecedented, and, more importantly, ineffective. "Tweaking" the BNSF trackage rights, see Traffic World, Apr. 22, 1996, at 36 (quoting UP's Richard Davidson), has not helped, and will not.

Finally, the evidence shows that Applicants seriously overstate the public benefits of the merger. Insofar as any theme pervades the Applicants' filings, it is UP's conviction that the merger is in the public interest because it would allow UP to be the largest, richest, and most dominant railroad. UP treats this objective -- pursued through successive combinations with MP, WP, MKT, and CNW -- as though it has an entitlement to it (accusing opponents of "temerity" in raising objections, Narrative, p. 124). UP never says that, without SP, it could not prosper, or compete effectively. It says only that it fears it may not be as rich as BNSF, nor as large. Perhaps so, perhaps not. But UP's view of its manifest destiny is not enshrined in law.

Rather, the governing statute puts competition at the center of the inquiry in recognition of the central role it plays as the driving force of our economy. Competition creates incentives to innovate, provide new services, cut costs, and pass on such benefits to consumers. (V.S. Schmalensee at 37-41.) This merger would indisputably diminish competition in the SP East region. But Applicants neither demonstrate public benefits that outweigh the harms there, nor devise an effective replacement for the lost competition.

Divestiture of the SP East lines would restore that competition. No one disagrees. No one disputes that it is a well-established remedy, widely and successfully applied. No one disputes the Board's power to order divestiture, under conditioning authority that SP recognizes as "broad."[2] While Applicants of course dispute its benefits, they base their arguments on the diminution of private benefits to UP.

For these reasons, Conrail believes -- and it respectfully urges the Board to conclude -- that the record

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[2]
> Although the Commission does not initiate proposals for structural change . . . once an Application is before it, the Commission is not a "passive arbiter." It has an affirmative obligation to protect the public interest, and it must use its broad conditioning authority to that end.

Opening Brief of Southern Pacific Lines in UP/CNW ("SP UP/CNW Br.") at 23; see also id. at 24.

evidence compels rejection of the proposed merger unless it is conditioned on divestiture of SP East.

I. BECAUSE MERGER-SPECIFIC PUBLIC BENEFITS DO NOT OUTWEIGH COMPETITIVE HARMS, THE INTERSTATE COMMERCE ACT REQUIRES DISAPPROVAL OF THE MERGER AS PROPOSED.

Under the Interstate Commerce Act, a railroad merger may not be approved unless it is "consistent with the public interest."[3] To make this determination, the Board will balance the public costs -- including prominently any loss of competition -- against the public benefits that might result. SF/SP, 2 I.C.C.2d 709, 723 (1986); accord BN/SF, slip op. at 54-55, 1995 WL 528184, at *45 (Aug. 16, 1995).

Although Applicants try to make it appear that the balancing test embodies a presumption in favor of rail mergers and that competition policy is secondary (e.g., Narrative, pp. 33, 36-37), nothing could be farther from the truth: "The effect of a transaction on competition is a critical factor in [the Board's] consideration of the public interest."[4] In fact, the deregulation effected by the Staggers Act requires that "the anticompetitive effects of a consolidation be examined even more

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[3] See 49 U.S.C. § 11344(c) (now § 11324(c)). Under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, the merger is governed by the standards applicable prior to January 1, 1996. For convenience, we cite both the former and newly codified sections of the governing statute.

[4] SF/SP, 2 I.C.C.2d at 726; see 49 U.S.C. § 11344(b)(1)(E) (now § 11324(b)(1)(E)); accord Railroad Consolidation Procedures, 363 I.C.C. 784, 786-87 (1981).

carefully then in the past," SF/SP, 2 I.C.C.2d at 727, and that the Board "take even greater care to identify harmful competitive effects and to mitigate those effects where possible." UP/MP/WP, 366 I.C.C. 459, 502 (1982).

Consistent with these policies, the presumptions run in the opposite direction from what Applicants assert: "The burden of demonstrating that [a parallel] merger is in the public interest is a heavy one, and must be borne on the shoulders of substantial evidence."[5] As Conrail develops in Part II, Applicants make no serious effort to dispute the anticompetitive effects of the proposed merger, at least at 2-to-1 points, which, even as they define them, generate $739 million in traffic each year. Applicants try to minimize the effects of these competitive harms, but their self-serving disparagement of SP's current competitive role (and its ability to continue to play that role) is simply wrong.

The law also places on Applicants the burden of demonstrating that the proposed BNSF trackage rights would ameliorate the competitive harms of the merger.[6] As Conrail

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[5] SF/SP, 2 I.C.C.2d at 833. SP's own words (SP UP/CNW Br. at 4) have special resonance:

> There is no presumption that control transactions involving two or more Class I railroads are in the public interest. Rather, Applicants must affirmatively demonstrate that the public benefits . . . outweigh the public costs.

[6] See SF/SP, 2 I.C.C.2d at 714; see also CSX Corp./Chessie, 363 I.C.C. 521, 600 (1980) (concurring opinion).

shows in Part III, Applicants do not -- and cannot -- carry this burden either. Even as amended by the belated agreement with CMA, the BNSF trackage rights are plagued by fundamental disabilities; they do not and cannot restore the competitive status quo ante.

The applicable legal standards also make clear that, to be counted in the cost/benefit calculus, claimed benefits must be public, merger-specific, and not achievable in a less anticompetitive fashion. 49 C.F.R. § 1180.1(a); SP/WP, 327 I.C.C. 387, 404-05 (1965). Although Applicants proclaim at length on the merger's purported benefits, which, with characteristic rhetorical excess, they describe as "revolutionary" and "once-in-a-lifetime" (Narrative, pp. 4, 52), Conrail demonstrates in Part IV that their showing fails to justify the merger.

Applicants thus fail to meet the requirements of the law: The merger has significant anticompetitive effects; they are not outweighed by public benefits; and they are not remedied by the BNSF trackage rights. SF/SP teaches that, in such circumstances, the Board has no choice but to reject the merger (2 I.C.C.2d at 726), or to impose a condition that works -- in this case, divestiture.

As Conrail demonstrates in Part V, the Board has unquestioned authority to impose a divestiture condition (as it has noted in this very proceeding);[7] and the scope of the divestiture is squarely within its expertise.[8] Only recently, Congress reaffirmed and "elaborate[d] on the [ICC's] existing power to impose conditions" by "explicitly" authorizing the use of divestiture.[9] Moreover, divestiture meets the Board's test for imposition of conditions: It remedies the competitive harms; is operationally feasible; and provides net public benefits. See, e.g., UP/MKT, 4 I.C.C.2d 409, 437 (1988); UP/MP/WP, 366 I.C.C. 459, 562-65 (1982).

II. APPLICANTS ACKNOWLEDGE -- BUT SERIOUSLY UNDERSTATE -- THE COMPETITIVE HARMS OF THE MERGER IN THE SP EAST REGION.

Applicants effectively concede the merger's adverse impact on competition in the SP East region. They could hardly

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[7] Decision No. 22 (Mar. 19, 1996), slip op. at 2 ("[w]e already have all the authority needed . . . to require divestiture of . . . some or all of the lines operated by DRGW . . . .") See also CSX/Chessie, 363 I.C.C. at 573 ("We are empowered to impose appropriate conditions, such as requiring the divestiture of certain properties, as a condition to the authorization of a consolidation."); SF/SP, 2 I.C.C.2d at 834 (citing Supreme Court precedent).

[8] The ICC has ordered divestiture where necessary to remedy competitive harm. See, e.g., N&W/DT&I, 360 I.C.C. 498, 524 (1979) (requiring divestiture of one-half interest in a particular route if applicant could not reach agreement to acquire the other one-half interest).

[9] See H.R. Conf. Rep. No. 104-422, 104th Cong., 1st Sess. 191 (1995); 49 U.S.C. § 11324(c).

do otherwise given the prior statements of their senior officers,[10] the testimony of their witnesses,[11] and their repeated attempts to fix the harm through agreements with BNSF and no fewer than five other railroads.[12]

A. The Scope of the Competitive Harms Is Substantial.

Two-to-One Points. The most obvious (and uncontested) anticompetitive effects are at "2-to-1" points. Even by Applicants' own admission, the traffic just at the 2-to-1 points to which BNSF would receive access generates $739 million a year in rail revenues (Narrative, p. 110) -- comparable to the SF/SP merger (see V.S. Grimm at 158-59, KCS-33), which the ICC disapproved because of its anticompetitive effects. But the evidence shows that the Applicants vastly underestimate the

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10/ UP Chairman Davidson, for example, told the Wall Street Journal in December 1994 that a merger with SP would "corner the freight market in Gulf Coast chemicals . . . ." "Union Pacific is on Track to Lock Up Railroad Lead," Wall Street Journal, Dec. 8, 1994, at B4. UP Chief Financial Officer Matthews stated that one objective of the UP-SP merger was to "Maintain Dominance in the West." (HC33-000004, Rebensdorf Dep. Tr., Ex. 14.); cited deposition excerpts and exhibits are reproduced in the Appendix to this Brief.

11/ See, e.g., V.S. Barber at 465 ("[a]t locations where shippers are now served by both UP and SP, and by no other railroad, consolidation could clearly be harmful to competition").

12/ See UP/SP-74 (Feb. 2, 1996) (Utah Railway and IC); UP/SP-204 (April 8, 1996) (Gateway Western and WC); UP/SP-238 (May 1, 1996) (CSX).

2-to-1 effects.[13] And in the SP East region alone, the merger would effectively eliminate rail competition over three important traffic corridors: Houston-Memphis-St. Louis, Houston-New Orleans, and Houston-Brownsville.[14]

Other Competitive Harms. The merger would lessen competition in the SP East region in at least two other important respects. First, it would reduce source competition, which constrains prices to exclusively served UP or SP shippers. Applicants acknowledge the importance of source competition (see Discovery Hearing Tr. 704-05), but do nothing to address its loss. Second, the merger would lessen potential competition provided by build-in/build-out and transloading opportunities.[15] Again, Applicants acknowledge the importance of such competition, but do not remedy its loss.[16]

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[13] See, e.g., NITL-10 at 24 (2-to-1 points cover $2.6 billion of traffic); DOJ-8, V.S. Majure at 8 (over $1.5 billion); KCS-33 at 34 (over [redacted] billion).

[14] V.S. Peterson at 160, 165. Applicants' domination of chemicals traffic in this region (their combined shares exceed [redacted] for eight major chemicals see HC01-005686, Ex. 15 to Peterson Deposition) is of particular concern since the Gulf Coast comprises the largest petrochemical-producing region in the U.S. (V.S. Spero at 703.)

[15] Applicants try to minimize the role of build-ins by focusing on specific instances (Narrative, pp. 150-64), which they try to show are not feasible or have not been sought by the customer. Yet lost competition is not limited to particular build-ins, let alone ones already at issue, since the need for, and economics of, such opportunities can and do change rapidly.

[16] See Narrative, p. 147 ("build-in opportunities create competition"). After claiming in the Application that they accounted for all build-ins, Applicants in effect concede the (continued...)

B. SP Is and Can Remain an Effective Competitor.

Applicants try at length to minimize the importance of this lost competition by painting SP as a weak and declining competitor. This is the same story SP has tried unsuccessfully to sell the ICC in virtually every western rail merger proceeding in the last decade. The Board should reject it now for the same reason the ICC did in the past -- it is not true.

1. SP Plays a Crucial Price-Disciplinary Role.

SP's constraint on UP's (and other railroads') prices is not subject to serious dispute. As UP Chairman Davidson observes, SP "is an aggressive competitor and . . . they have got business from us because they priced their service cheaper . . . ." (Davidson Dep. Tr. 81.) Likewise, BNSF's immediate past Chairman Grinstein says that SP "is quite aggressive in their pricing . . . ." (Grinstein Dep. Tr. 45.)

Conrail and others presented testimony corroborating and adding specificity to this testimony.[17] IP, for example, showed that, almost without exception, SP's rates at IP's Arkansas plants are substantially lower than UP's. (IP-10, V.S.

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[16] (...continued)
opposite by providing for additional build-ins, but for CMA members only (id. at 20) -- and then for only one year, and only if they initiate arbitration proceedings. (Id.)

[17] See, e.g., V.S. Good at 2-4; V.S. Bridges at 3; Consolidated Rail Corporation's Responses and Objections to Applicants' Sixth Set of Interrogatories and Requests for Production of Documents, CR-30, at 5-6.

McHugh, Ex. 2). IP concludes that "the merger would eliminate the SP as a price leader."[18]

Applicants attempt to rebut this detailed testimony with two carefully constructed, but unpersuasive, studies comparing UP revenues at points where it competes with SP with its revenues where it competes with other carriers. (R.V.S. Bernheim at 13-21; R.V.S. Peterson at 90-93.) But by examining only UP revenues, the studies fail to examine the through rate actually paid by shippers. UP's ability to force an interline partner to lower its price to meet SP hardly refutes SP's price leadership.[19] By contrast, Conrail compared through rail rates for polyethylene plastics traffic moving from origins in Texas to points in New Jersey via Conrail. The rates are substantially lower whenever SP is a competitive option.[20]

In short, SP plays a unique price-constraining role -- a role no one claims BNSF would replicate. Indeed, IP notes that

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[18] Id. at 34; see also WSC-11, V.S. Vainetti at 27-31 ("document[ing] 16 instances in which SP's aggressive pricing policy has been very successful in competing with UP").

[19] In addition, the Bernheim study focuses solely on automotive traffic, and a study limited to such traffic could not refute SP's price-constraining role. As the testimony of SP's John Gray reflects (V.S. Gray at 203), Applicants compete for such traffic overwhelmingly on the basis of service quality, not price; and SP's share of automotive traffic is, according to Applicants, "very small" -- less than [redacted] (V.S. Peterson at 107).

[20] The weighted average price when UP and BNSF are the only rail competitors was 30% higher than when UP and SP are rivals and 48% higher than when all three carriers compete. The average price where UP is the only rail competitor was 51% higher than when UP competes with SP. (Bernheim Dep. Tr. Proposed Exh. 1, p. CR610183.)

BNSF quoted prices [redacted] percent higher than what IP now pays for SP service. (IP-10, V.S. McHugh at 26.) Similarly, BNSF quoted prices to Phillips Petroleum Company [redacted] percent greater than the higher of the bids received from UP and SP. (SPI-11 at 55.)

2. SP Will Be an Effective Competitor for the Foreseeable Future.

Unable to diminish SP's current competitive importance, Applicants downplay SP's future competitive role by raising questions about its long-term viability and elevating "poor-mouthing" to an art. Contrary to SP's statements to investors before the merger agreement was signed, Applicants now argue that SP is on the road to ruin and that its management is powerless to prevent this. But Applicants fail to refute the conclusion both of neutral analysts, and the ICC in prior proceedings, that SP can remain an effective long-term competitor.[21]

Applicants acknowledge that their argument is essentially a restatement of the "weakened competitor" defense,[22] which SP has stuck to -- albeit unsuccessfully -- in virtually every merger proceeding in which it has participated.

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[21] In its March 1995 UP/CNW decision, 1995 WL 141757 at *100 n.74, the ICC rejected "the notion that a railroad cannot be an effective competitor if it is operating . . . at something less than its theoretical maximum effectiveness." It found that "SP is an effective competitor for substantial volumes of . . . traffic. It may not be as efficient as UP [or] . . . as it could be . . . but it is an effective competitor nevertheless." Id.

[22] See Applicants' Responses to DOJ's Interrogatory No. 9, UP/SP-32 (Dec. 15, 1995), at 11-12.

Each time, the ICC correctly (and presciently) found the claim unsubstantiated. See, e.g., SF/SP, 2 I.C.C.2d at 828-33; UP/CNW, 1995 WL 141757 at *11, *43, *83.

In SF/SP, the ICC concluded that the weak financial condition of a merging firm cannot, by itself, justify an otherwise anticompetitive merger: "[Our] cases stand for the proposition that . . . financial weakness may make a merger of less competitive concern when the market is already competitive and moving away from concentration [fn. omitted]. Neither of these propositions is applicable to the facts of this case." SF/SP, 2 I.C.C.2d at 833.[23] They are equally inapplicable today, in the face of a merger that would reduce to two the number of Class I railroads serving much of the West.

If anything, SP's claims of financial weakness and inevitable competitive decline are even less true today than they were at the time of the proposed SF/SP merger. Then, SP's operating ratios for the previous three years had been 101.4%, 99.3%, and 100.5%. SF/SP, 2 I.C.C.2d at 848 (dissenting opinion). Today, SP's operating ratios (for the previous three years) are 96.5%, 89.0%, and 95.3%. (1995 Annual Report at 10.)

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[23] The ICC's skeptical attitude is supported by antitrust commentators who scorn the defense as "extreme" and "perverse." William F. Baxter, Remarks: The Failing Firm Doctrine, 50 Antitrust L.J. 247, 252 (1981); Ky P. Ewing Jr., Merger Law: Whence it Came and Where It's Going, Address Before the Westchester Fairfield Corporate Counsel Association (Nov. 1, 1979).

Then, SP had a "dwindling traffic base." SF/SP, 2 I.C.C.2d at 847 (dissenting opinion). Today, in the SP East region, SP is a strong second to UP in market share,[24] and its share of the SP East-originated traffic moving to or via Conrail has increased slightly in the last two years. (V.S. Malan at 10.) SP is the only Class I railroad to gain in carload market share during 1996.[25] One analyst labels its recent volume performance the "best in [the] industry."[26]

Net income data confirm SP's increasing competitive strength. For 1994, SP reported net income of $248 million. While SP's 1995 net income was off substantially, that appears to be the result of nonrecurring events; even then, SP earned a small profit before extraordinary items.[27] The consensus among

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[24] According to Applicants' own data, in 1994 SP had a [redacted] share of rail traffic along the Memphis-Houston corridor (versus UP's [redacted] share) (V.S. Peterson at 307); a [redacted] share of rail traffic between Houston and New Orleans/Southeast (versus UP's [redacted]); and a [redacted] share of rail traffic between Houston and St. Louis/Northeast (compared to UP's [redacted]). (Id.)

[25] Railshare Railfax, Association of American Railroads, May 9, 1996. SP's operating revenues for the first quarter of 1996 were up 2.4% over 1995 and its carload traffic volume for the same period rose by 4.5%. "Southern Pacific Rail Corp. Reports 1996 First Quarter Financial Results," Business Wire, Apr. 25, 1996. SP enjoyed a 5% gain in carload traffic in 1995. "Only Chemicals, Cars and Coal Grow in Quarter," Journal of Commerce, Jan. 11, 1996, at 2B.

[26] PaineWebber Railroad Research, "1Q Preview: Weather Impacts Expenses and Volumes; Expect Industry EPS Flat," Apr. 1, 1996, at 2.

[27] V.S. Hass at 3, as modified by Errata to the Verified Testimony of Consolidated Rail Corp. at 1, CR-32. At least one event was a pretax expense of $65 million to reduce future

(continued...)

analysts is that SP's 1996 operating results will be substantially improved over 1995, and that its financial performance will continue to improve.[28]

SP's claims that it is unable to raise the additional capital it needs to continue to compete effectively are therefore difficult to credit.[29] Conrail's expert witness Jerome Hass, Professor of Finance and Business Strategy at Cornell, examined the sources of capital available to SP and found them sufficient to generate needed investments.[30] (V.S. Hass at 13-21.) The

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[27] (...continued)
operating costs by reducing employee rolls, lease terminations, and sale or abandonment of light density lines. Professors Hass and Schmalensee note these investments in the future should pay dividends later. (Id.; V.S. Schmalensee at 21.)

[28] Value Line forecasts SP annual net income of $75 million in 1996, $125 million in 1997, and $285 million in 1999-2001. (V.S. Hass at 4.) SP's own forecast for 1996 is [redacted] million. (See HC20-001893, Ex. 16 to Anschutz Deposition).

[29] The ICC has declined even to consider such speculative claims for two reasons, both equally applicable here. First, "any level of capital expenditures . . . could, if absolutely required, be reduced because these expenditures are ultimately discretionary." DRG/SPT, 4 I.C.C.2d 834, 939-40 (1988). Second, "[t]he statute does not require us to make a finding of long-term financial viability and any long-term quantitative projections would be highly speculative and of little value. We will not attempt them." Id. at 942.

[30] Applicants say that Dr. Hass erred in deciding that SP would not have to pay the [redacted] million in "Other Current Liabilities" contained in SP's business plan. (R.V.S. Yarberry at 18.) However, as Dr. Hass made clear in both his Verified Statement (at 12) and his deposition (Hass Dep. Tr. 46-47), he made no such claim. Rather, he pointed out that, because this reduction in "Other Current Liabilities" is not recurring, a realistic appraisal of SP's likely operating income in future years should not include this payment.

Department of Justice financial analyst, Eileen Zimmer, reached the same conclusion.[31]

Applicants' attempts to discredit this testimony are unpersuasive. First, they inexplicably insinuate that the proceeds from real estate sales may not be re-invested in the railroad (R.V.S. Yarberry at 12-13), although they never made this suggestion in the Application, during discovery, or in any of their business plans and forecasts (which all include real estate sales as a source of cash for the railroad).[32] Second, they argue about the likely price of any common or preferred stock that SP might sell, but do not say why SP would be unable to raise capital through a stock offering. Third, they do not dispute that SP could obtain capital lease financing at rates comparable to those of other railroads (including BNSF), nor that such financing would allow SP to procure any needed computers, rolling stock, and locomotives. (See V.S. Hass at 19-20.)

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[31] Among other things, Ms. Zimmer finds that, based on "the most conservative set of financial projections available in these proceedings," SP will generate a positive cash flow each year after 1996 even after accounting for the additional $500 million in capital expenditures SP claims it must spend annually. (V.S. Zimmer at 9-12.)

[32] In support, Applicants claim that SP's current owners were foolish to plow proceeds from real estate sales back into the railroad. As Forrest Gump would say, "stupid is as stupid does." If this merger were approved, Mr. Anschutz would receive [redacted] billion for his 1984 investment of $90 million (Anschutz Dep. Tr. 20, 31), an annualized rate of return of nearly [redacted], qualifying him for the Wall Street Journal's "Pantheon of Great Investors." See John R. Dorfman, Warren Buffett and How He Does It: Who's Number One?, Aug. 18, 1995, at C1.

SP's remaining arguments are equally hollow. It alludes to "structural disadvantages" that allegedly undermine its future performance. (R.V.S. Scheffman at 13-14.) But in 1994 SP told investors that its "franchise is strong" and it had an "unmatched route structure." (Anschutz Dep. Ex. 6 at 0691-92.) Board precedent sensibly accords little weight to statements made after the signing of a merger agreement that contradict a party's previous position. <u>SF/SP</u>, 2 I.C.C.2d at 829-30. Nor does the BNSF merger render SP unable to compete. Nearly ___ <u>percent</u> of SP revenue from traffic between the Gulf states and Eastern gateways derives from SP-exclusive points, where BNSF does not pose a threat. (R.V.S. Gray at 20.)

In rebuttal, and for the first time, SP in effect threatens to take its marbles and go home if the merger is not approved, claiming that it would cut service and raise prices. (R.V.S. Gray at 25-36; R.V.S. Yarberry at 44-45.) If, by this statement, SP means only that it will "refocus its business on its most profitable activities" (R.V.S. Lincoln at 32), then its position is neither unusual, nor harmful,[33] nor a justification for the merger. If SP is suggesting that it would stop providing even profitable service in a fit of pique if the merger is

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[33] <u>See</u> <u>Chesapeake & Ohio Ry. Co. v. United States</u>, 704 F.2d 373, 377 (7th Cir. 1983) ("[T]he fact that a railroad discontinues a particular service . . . is not necessarily a sign of diminished competition from a broad consumer-welfare standpoint.").

disapproved, the threat borders on extortion -- and the Board should, of course, ignore it.

III. APPLICANTS HAVE NOT CARRIED THEIR BURDEN OF DEMONSTRATING THAT BNSF COULD REPLACE THE COMPETITION PROVIDED TODAY BY AN INDEPENDENT SP.

In amending the BNSF trackage rights deal through agreement with CMA, Applicants and BNSF effectively concede that the first two versions -- the original ("BNSF I") and the supplemental ("BNSF II") -- did not do the job. The CMA Agreement ("BNSF III") also does not solve the serious operating problems that BNSF would face on the trackage rights lines in the SP East region. BNSF III would not restore the competitive status quo and would, on the whole, leave shippers worse off -- in many cases, significantly worse off -- than they are today.

A. The Record -- Including BNSF III -- Provides No Answers to the Operating Disabilities Identified by Conrail and Others.

In its March 29 Comments, Conrail demonstrated that BNSF I and II would not permit BNSF to replicate the competitive role that SP plays in the SP East region today.

First, BNSF would lack critical infrastructure -- yards, terminals, storage-in-transit ("SIT") facilities -- on which to predicate and sustain traffic growth. Second, lack of traffic mass would disable BNSF from building blocks of cars sufficient to bypass the Houston terminal and to provide run-through service at St. Louis. Instead, third-party carriers would re-handle all BNSF traffic moving via Houston and again at interchange in East St. Louis. This is costly, time-consuming, and competitively disadvantageous, since UP and SP today bypass Houston for much traffic and run through St. Louis to interchange with eastern carriers. As the unrebutted computer simulation by Conrail's independent expert demonstrates, BNSF northbound traffic, from arrival at Houston to interchange with Conrail in East St. Louis, would take up to 30 percent longer than BNSF says is needed in order to compete. Finally, longer transit times, more crews, higher mileage, and switching charges mean higher costs.

Despite its volume, the Applicants' and BNSF's rebuttal refutes none of these points.

1. BNSF's Operating Plans Lack Even the Most Elementary Detail.

Notwithstanding numerous complaints about the lack of detail from BNSF, BNSF's rebuttal remains bereft of concrete operating information.[34/] The same questions raised in March

[34/] As Conrail showed in its Comments, at 10-11, 90-94, BNSF should be required to file a responsive application presenting far more detail about the trackage rights. Trackage rights grants to a specific railroad are "affirmative relief" that requires an application to be filed, 49 C.F.R. § 1180.3(h). BNSF and the Applicants invoked the settlement-related trackage rights class exemption to avoid scrutiny of BNSF's proposed operations. But this exemption was not intended to permit parties to escape a thorough examination of the proposed remedy for the competitive consequences of a merger. Accordingly, Conrail petitioned the Board to revoke the trackage rights exemption and opposed the exemption sought for line sales. (continued...)

remain unanswered today. BNSF admits it had nothing to do with the negotiation of BNSF III (R.V.S. Ice at 1); its implementation committee has not yet even fully looked at it. (Clifton Dep. Tr. 44.) All BNSF can say for sure is that the committee has assembled and set a schedule for itself -- a schedule that will allow it to conclude its work two months <u>after</u> the merger is decided. (Clifton Dep. Tr. Ex. 2.) BNSF's filing is thus notable for the continuing void at its center.

BNSF's Assistant Vice President-Operations concedes that "details" still need to be worked out, including: "reciprocal switching arrangements and rates, haulage arrangements and rates, the determination of reasonable switching limits, yard configurations and operations at various locations, as well as other issues." (R.V.S. Clifton at 2.) The 2-to-1 points themselves still remain to be defined. (Clifton Dep. Tr. 35-36.) BNSF disclosed at deposition that <u>all</u> operations over the trackage rights would, at least initially, be via haulage (<u>id</u>. at 82) -- presumably because no BNSF operating plan is even

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34/ (...continued)

The responses by Applicants (Narrative, p. 322 n.118) and BNSF (<u>see</u> BNSF Reply at 2-5) wholly miss the mark. <u>First</u>, the petition to revoke is not premature under 49 C.F.R. § 1121.4(i); unscrambling an approved merger after <u>ex post</u> examination of the trackage rights whose effectiveness is indispensable to merger approval in the first place is difficult and illogical. <u>Second</u>, the <u>BN/SF</u> merger decision on which Applicants and BNSF rely is distinguishable, as Conrail previously showed, <u>see</u> Conrail Comments at 94 n.50, CR-21. <u>Third</u>, the review to which the BNSF trackage rights deal may be subject would not be as thorough or informed as it would be if Applicants and BNSF were unable to hide behind an exemption.

scheduled to be in place when a decision on the merger is reached. Similarly, BNSF speaks generally about needed investments (R.V.S. Rose at 5), but provides no details. BNSF's recumbent posture on these issues cannot form the basis for approval of a merger with this trackage rights deal at its heart.

2. BNSF III Provides No Solutions for BNSF Operating Problems.

The key disabilities in BNSF operations in the SP East region identified by Conrail and others -- relating to service at Houston, between Houston and St. Louis, and at St. Louis, and as to available infrastructure -- are either unremedied or actually worsened by BNSF III. Problems relating to service between Houston and New Orleans and at Mexican gateways likewise remain unremedied.

a. Houston. Houston is the anchor of SP East operations (R.V.S. Ongerth at 61), but BNSF's Houston service faces problems that would prevent BNSF from replicating SP competition there. BNSF's Mr. Grinstein puts it more pointedly: BNSF's operations in Houston are burdened by a "severe service disability" that impedes its ability to be "as good a competitor as [it] should be." (Grinstein Dep. Tr. 161.) Applicants and BNSF ignore Mr. Grinstein. But they can neither make his words go away nor refute them.

Instead, they erect a series of straw men. For example, Conrail never "assume[d] that all UP and SP cars for Eastern destinations currently bypass Houston," as BNSF asserts. (R.V.S. Owen at 11.) What Conrail said is that much SP traffic bypasses classification in Houston, saving time, cost, and handling.[35] Applicants do not refute this, and BNSF reaffirms that it would not bypass Houston. (R.V.S. Owen at 12; R.V.S. Clifton at 9.) It is no answer to say (as Applicants patronizingly do) that eastern railroad personnel do not know about western rail operations (Narrative, p. 98). An experienced Western railroader, Mr. Grinstein, agrees that BNSF has a "severe service disability" in Houston.[36]

b. Houston to St. Louis. BNSF III -- touted as the answer to criticism of the earlier deals by allowing BNSF the option of running with the primarily directional UP/SP flows

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[35] See V.S. Carey/Ratcliffe/Sheppard at 13-14. If SP traffic does not bypass Houston in significant quantity, Applicants -- who have the burden of proving that BNSF can adequately replace SP -- would doubtless have said so and quantified the volume. Instead, Applicants raise another straw man by talking about UP and SP traffic originating in Houston on the PTRA. (R.V.S. King at 12-13.) While traffic originating or terminating on the PTRA does not, by definition, bypass Houston, Applicants neglect to mention that BNSF traffic originating or terminating on the PTRA would also be handled by HBT at New South Yard, creating additional interchanges, time, and cost. (R.V.S. Owen at 12.)

[36] Neither Applicants nor BNSF contests Conrail testimony detailing BNSF transit-time disadvantages compared to SP today. Rather, they attempt to obscure them by comparing the data to numbers measuring wholly different things. BNSF for example, compares the 52 hours it takes from shipper dock to exit from Houston to the 11.5 hours BNSF traffic spends in the Houston terminal (R.V.S. Owen at 12) -- a small subset of the former.

between Houston and St. Louis -- would actually make matters worse. BNSF acknowledges that it would have a variety of routing options: its existing route via Tulsa; the continuing option under BNSF I and BNSF II to run against the flow over trackage rights on SP to Memphis, and then on BNSF's own lines to St. Louis; and the further routing alternatives that BNSF III supplies. (R.V.S. Owen at 19-20; R.V.S. Clifton at 9.)

Splitting BNSF's admittedly modest traffic among at least three routes guarantees that BNSF would be unable to build run-through trains or pre-block for interchange with eastern carriers. Even if traffic predictions for BNSF were as large as Applicants claim, BNSF would gain only 71,000 carloads (R.V.S. Peterson at 173) -- two trains per day. Especially when split among multiple routes, this means no economies of scale; no traffic density, no predicate for investment in infrastructure; and slow, costly, unreliable service. These are all self-perpetuating problems. Moreover, each of the three routing options has fundamental operational drawbacks.

(i) <u>Via Tulsa</u>. BNSF's current route between Houston and St. Louis via Tulsa is more circuitous than SP's current routes, meaning more transit time and cost. But BNSF apparently does not intend to forgo this route. (<u>See</u> Owen Dep. Tr. 32.) Accordingly, BNSF faces a Hobson's choice: it can route the traffic circuitously, or it can divert traffic to another line, depriving the Tulsa route of density and causing service to deteriorate.

(ii) Via Memphis. Under BNSF I and II, BNSF could move Houston-St. Louis traffic via trackage rights over SP to Memphis and then via its own line to St. Louis. This involves operating against the UP/SP primarily directional flow (and requires improvement to connecting track near Memphis that BNSF has not yet committed to (R.V.S. Owen at 18; R.V.S. Clifton at 8)). The route suffers from all the disabilities that led to BNSF III.

The operating simulation performed by Rail Sciences, Inc. ("RSI") for Conrail (described in V.S. Carey/Ratcliffe/ Sheppard at 19-28) demonstrates that BNSF traffic routed that way would require at least a 40-hour schedule just to achieve an expected on-time performance in the 75 percent range. This is 30 percent longer than what BNSF says would be competitive. (V.S. Owen at 32.) The most predictable interruptions add at least eight more hours -- and these are "best case" simulations. (V.S. Carey/Ratcliffe/Sheppard at 21.)

Applicants agree that the RSI computer-simulation methodology is "respected" (Narrative, p. 81), and that "other than a few trivial errors, and the mishandling of BN/Santa Fe train priorities . . . the RSI simulations appear to be reasonable." (R.V.S. Salzman at 23.) This disposes of the points made by BNSF's Mr. Owen, which in any event border on, and sometimes cross the line into, the frivolous.[37]

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[37] Thus: (1) Mr. Owen claims that the RSI simulation supports BNSF's position because it shows that BNSF trains would be able to reach their destinations (R.V.S. Owen at 4); their (continued...)

Complaints that the RSI simulations accord BNSF trains incorrect priorities are meritless. (See R.V.S. Owen at 5; R.V.S. King at 14-15.) The simulation gave BNSF merchandise trains the same priority as UP and SP merchandise trains. BNSF now says the trains would be "chemical trains" (R.V.S. Owen at 5), entitled to "higher" priority (R.V.S. King at 15). But it manufactured this proposition on rebuttal, and it does not explain what would make such merchandise trains "chemical trains."[38] If BNSF's northbound trains were given a higher

[37] (...continued)
eventual arrival was never at issue. (2) Mr. Owen points out that Conrail's calculations support his December 29 estimate of a 31-hour southbound (i.e., with the flow) schedule (id. at 4 n.5) -- another point never contested. (3) Although Mr. Owen professes to adhere to his 31-hour transit time projections (id. at 7), they are undercut by BNSF's own workpapers showing a 39-hour "Service Schedule required" from Houston to St. Louis (BN/SF-09971, contained in the Appendix to this Brief.). (4) Mr. Owen claims that the RSI simulations overestimated the number of UP/SP trains on the line (id. at 5). But RSI relied on schedules taken directly from the Applicants' workpapers, which show an average of 26 southbound trains per day over the southbound lines (V.S. Carey/Ratcliffe/Sheppard at 19-20) -- not counting BNSF's own southbound trains. (5) Mr. Owen suggests that the simulations should have taken into account possible capital improvements on the SP line (R.V.S. Owen at 6), but no such improvements have been specified by BNSF or by Applicants -- who claim directional running would avoid the need for such capital expenditures (V.S. King/Ongerth at 44).

[38] Would all manifest trains from Houston be chemical trains -- a self-defeating proposition that would give them all the "higher" priority? Would such a designation require a specific number of cars devoted to chemical traffic? How many? Does a "chemical train" have higher priority than other high priority trains -- intermodal, for example?

In fact, in Mr. Owen's December testimony comparing Houston-St. Louis service to SP's BTASQ train (V.S. Owen at 32), there is no indication that BTASQ is a "chemical train."

dispatching priority than all UP/SP trains (an improbable notion), it would wreak havoc on UP/SP's southbound fleet.

In any event, Applicants or BNSF -- who regularly use this kind of line simulation (e.g., R.V.S. Owen at 7) -- could have contested Conrail's evidence with their own. The obvious conclusion is that they -- who bear the burden of proving the adequacy of BNSF trackage rights -- did not do so because the results would not have changed. The RSI simulation remains the only empirical analysis of BNSF's proposed operations in this record.

From Memphis, BNSF would, under BNSF I and II, use its own Memphis-St. Louis route. This relies on a flood-prone line to arrive on the west side of the river in St. Louis.[39] There, the services of a terminal carrier would be required to traverse a congested city just to reach another yard on the east side. BNSF access to allegedly shorter routing via A&S and MacArthur Bridge (R.V.S. King at 14; Narrative, p. 99) does not cure the problem, which is not the few miles through the city, but the need to rely on terminal carriers just to get to eastern connections in the first place.

(iii) BNSF III Routings. BNSF III provides routing options from Houston to East St. Louis, via UP's current route or via SP's current route (or combinations thereof). Apart from the

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[39] BNSF now acknowledges this is a problem; Mr. Owen says that BNSF III-based access to the east side of the river in St. Louis would be a "major service improvemen[t]." (R.V.S. Owen at 20.)

inevitable insufficient density problems created by this multiplicity of options, each option has problems all its own. The SP route to Memphis would, as noted, necessitate "against the flow" operation. But if BNSF selects the UP line (via Palestine, TX and North Little Rock, AR) instead, it would strand shippers on the SP line south of Pine Bluff, AR. The traffic of these "wrong-way" shippers could be diverted as far south as Houston before turning around to move northbound.

Moreover, BNSF III (¶1) prohibits BNSF from using either route for traffic originating south and east of Memphis. That traffic would have to use BNSF's own line between Memphis and St. Louis -- with all its disabilities -- diminishing whatever efficiencies BNSF might have expected from consolidating available traffic.

c. St. Louis. BNSF admits that it has yet to turn its attention to St. Louis. (Clifton Dep. Tr. 98.) This is understandable. Even if sufficient traffic density were available to pre-block, classify, and operate run-through service at St. Louis -- and it is not -- BNSF would get only to Gateway Yard (R.V.S. King at 6); it would not have the direct access to eastern carriers at St. Louis that SP has today. BNSF's rejoinder -- that this routing through the city is shorter than routes involving other terminal carriers -- ignores the point.

d. Insufficient Yard and Storage-in-Transit Capacity. BNSF III does not remedy the problems of insufficient switching and classification yard capacity and insufficient SIT capacity for Gulf-origin traffic. As to the former, Applicants and BNSF do not dispute that BNSF would have only about one-quarter of what SP uses now (V.S. Brown at 6), an amount insufficient to handle even the small volume of traffic that BNSF projects (and a shortage that would discourage new customers).[40]

Applicants and BNSF do not dispute that SP today utilizes about three times the SIT capacity that would be available to BNSF. (V.S. Brown at 8.) The only potential site for additional SIT capacity identified in BNSF III (¶5) is Dayton Yard. But, to say the least, the provision on the point is unclear: What capacity is available there? When? At what price? For how long? BNSF acknowledges that these "details" have yet to be resolved. (Rose Dep. Tr. 101-02.)

e. Other Unremedied Problems. BNSF III does not address capacity problems faced by BNSF on the Houston-New Orleans corridor. BNSF says only that the problem would not prevent initial operation (R.V.S. Owen at 10) -- cold comfort to shippers who need a long-term competitive solution.[41]

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[40] Id. The only additional yard space contemplated by BNSF III (¶11) is a small yard at Brownsville, in poor condition, which would add only nominally to BNSF capacity.

[41] The notion that the need for investment to alleviate capacity problems on the line would arise only at some distant future point is belied by BNSF workpapers: "[T]here is somewhere between $10 and $15 million that needs to be spent, on that line, immediately." (BN/SF-09912, contained in Conrail's Appendix.) The record contains no indication when or whether such investment would be forthcoming.

(continued...)

Nor does BNSF III address repeated questions raised about BNSF's commitment to Mexico traffic. BNSF describes the need for a direct connection to Tex-Mex for interchange of traffic moving to/from the Laredo gateway (R.V.S. Clifton at 6), but it has not discussed the issue with Tex-Mex, and has no cost or time estimates for the construction. (Clifton Dep. Tr. 105-06.)

B. BNSF III Does Not Address (or Cure) Problems of Trackage Rights on the Scale Proposed.

Applicants concede that the BNSF trackage rights cover nearly twice as many miles as any other trackage rights agreement. (1/22/96 Rebensdorf Dep. Tr. 177.) Given this unprecedented scale, the assertion that trackage rights are common (and have been used as remedies in prior merger cases) misses the point.[42]

When a carrier operates via trackage rights it loses control over its service and subjects itself to whatever problems affect the owning carrier's operation. When the owner's operations go awry for any reason, the tenant's operations do,

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[41] (...continued)

Moreover, the UP/SP Operating Plan assumes UP/SP will put its higher priority intermodal trains on the BNSF line between Iowa Junction and New Orleans (V.S. King/Ongerth at 49-50), thereby compromising BNSF's manifest service through Louisiana.

[42] In fact, Montana Rail Link demonstrates that none of the trackage rights arrangements pointed to by Applicants is comparable to the proposed BNSF rights. (MRL-21, at 7-8.)

too; unlike the owner, however, the tenant is almost powerless to do anything about it, or prevent its recurrence. (V.S. Conway/Passa/Sammon at 35.) Moreover, a tenant is unable to control decisions about improvements on the line and may be reluctant to make its own investments. (Id. at 37-38.) The tenant's operations face cascading delays when (as here) the rights do not include access (or at least proximity) to serving yards and storage facilities. (Id. at 35-36.) Capacity constraints would exacerbate these problems. (Id. at 37.) To return again to Mr. Grinstein: trackage rights -- indeed, the very trackage rights at issue here -- are "service with a disability;" "it is quite different from using your own track." (Forbes, Dec. 18, 1995, at 64.)

Moreover, trackage rights create significant transactions costs that, as Professor Schmalensee says, "limit the competitive effectiveness of the tenant railroad" and give rise to "disagreement, friction, and dispute." (V.S. Schmalensee at 24-25.) Applicants' expert, Professor Willig, acknowledges that railroads compete effectively only if "neither is subject to any artificial restrictions." (V.S. Willig at 580.) The BNSF trackage rights impose significant restrictions that would greatly limit BNSF's "incentive and ability to maintain competition at its pre-merger level." (V.S. Schmalensee at 14.)

C. Independent Experts Confirm That BNSF Would Not Be Able To Match SP's Current Competitive Role.

Analyses by ALK and Conrail consultant John Hitchcock confirm what Professor Schmalensee and the operating evidence show: BNSF would be unable to replicate SP's competitive role.

ALK Projections. ALK reported two important findings: first, historical data show that operations involving trackage rights for large percentages of a route are not competitively successful; and second, that the BNSF trackage rights proposed here would not be successful. (V.S. Hunt/Oderwald at 5-11.) Specifically, the ALK diversion model predicted a less than four percentage point traffic gain for BNSF between Texas, Louisiana, and Arkansas (on the one hand) and the eastern United States (on the other); a one-half of one percentage point gain for traffic originating at the same points and moving to or beyond St. Louis; and a three percentage point gain between the principal Mexican gateways and the Eastern U.S. (Id. at 11.)

Applicants and BNSF understandably devote much rebuttal testimony to criticism of the ALK analysis, which clearly demonstrates the inadequacy of the BNSF trackage rights as effective competition. Applicants and BNSF principally complain about the recalibration of the ALK diversion model to reflect historical data with respect to trackage/haulage operations. Since the recalibration is based on actual Waybill data compared to what the ALK model had predicted for such operations, Applicants and BNSF must be contending that more accurate predictions should not be used.

But even if this complaint were appropriate, it would be moot. In testimony submitted on April 29, ALK removed the trackage/haulage recalibration from the model, and obtained virtually the same diversion results. In no case did ALK's findings change by more than 1.2 percentage points.[43]

The experts retained by BNSF and Applicants demanded and received access to all software and data used by ALK in this case. As the parties with the burden of proof, they presumably intended to re-run the ALK study with whatever adjustments they preferred. Their failure to do so (or at least their failure to report the results of any study they may have run) confirms the accuracy of the ALK conclusion that BNSF traffic gains under the SP East trackage rights would be trivial.

Applicants also err when they argue that routing options under BNSF III would change the ALK results. ALK re-ran its diversion study to take account of BNSF III (id. at 3-4), and again, the changes in result were trivial.[44]

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[43] Further Verified Statement of David T. Hunt and William H. Oderwald, at 5, Tab A to Further Comments of Consolidated Rail Corporation in Response to the "CMA Settlement Agreement," CR-37.

[44] Efforts by UP's Mr. Peterson (R.V.S. at 185-91) to show that the ALK model sometimes predicts unusual traffic patterns are unpersuasive. Any modeling effort will sometimes do so in isolated instances like those described by Mr. Peterson, but a few isolated instances in no way cast doubt on the model's overall validity.

Hitchcock Analysis. Conrail consultant John Hitchcock showed that Applicants' MultiRail Model relies on incomplete data, understates capacity demand, train "meets," and delays, and thereby generates data inadequate to the needs of an operating plan. Moreover, Mr. Hitchcock demonstrated that the Model shows only minimal traffic diversions to BNSF. (V.S. Hitchcock at 3-7.) Applicants admit that Mr. Hitchcock "understands the model" and that his observations are "generally correct."[45] (Narrative, p. 79.)

IV. APPLICANTS HAVE NOT CARRIED THEIR BURDEN OF DEMONSTRATING THAT MERGER-SPECIFIC, PUBLIC BENEFITS IN THE SP EAST REGION OUTWEIGH COMPETITIVE HARMS THERE.

Applicants' initial evidence revealed that only a small fraction of the projected merger benefits would arise in the SP East region; their rebuttal evidence confirms the fact. As SPI (representing many of the largest users of the SP East system) says, "the overwhelming interest of the plastics industry lies in

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[45] Applicants do note that their model inputs included traffic diversion estimates (Narrative, p. 109 n.33), but Mr. Hitchcock did not contend otherwise. He observed that these inputs to the Model were different from the traffic diversion estimates in the Application. (V.S. Hitchcock at 18-23.)

NIT League witness Crowley goes further than Mr. Hitchcock, concluding that BNSF would not garner enough volume to run even one daily loaded train in the Houston-Memphis corridor. (See V.S. Crowley at 40-46, NITL-10.) Because Mr. Hitchcock and Mr. Crowley considered all traffic from all 2-to-1 points in the SP East region to which BNSF would gain access, any additional access provided in BNSF III would not undercut their findings.

transportation corridors and service which will escape the major claimed benefits of the proposed merger." (SPI-11 at 19.)

A. Applicants' Rebuttal Reaffirms That the Vast Majority of the Merger Benefits Are in the West.

Applicants claim the merger would result in more direct routes in the West and Intermountain Regions but acknowledge that the SP East lines would not fill a single UP routing gap. Applicants extol the benefits of new single-line service between the Midwest and the West Coast, but offer SP East shippers a directional flow plan that would either increase circuity or require shipments to move against the flow of traffic. Applicants claim the merger is necessary to compete against BNSF in the West, but offer no such rationale for SP East. Applicants point to a $1.3 billion capital investment plan, but target only a minuscule portion for SP East projects. Capital savings are similarly trivial in the SP East area.[46]

Applicants' rebuttal reinforces this point. It concludes that Applicants would realize more than 80 percent of the total merger benefits if the Board ordered divestiture of SP East. (*See* 5/9/96 Salzman Dep. Tr. Ex. 1; R.V.S. Salzman at 14.)

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[46] Thus: (1) a mere 4% of the total projected route mile savings arise in the SP East; (2) at least 80% of the car utilization savings would arise from more efficient use of car types that seldom traverse SP East routes; (3) less than 2% of the estimated post-merger annual operating benefits would result from facility consolidations in the SP East region; and (4) only 11% of the miles identified for abandonment are in the SP East. (V.S. Carey/Ratcliffe/Sheppard at 68-76.)

Sale of SP East would reduce the $750 million in claimed merger benefits by less than $150 million. (Id.; 5/9/96 Salzman Dep. Tr. 31-32.)

Even this modest allocation of benefits to the SP East is overstated. For several categories of potential savings -- including closure of office facilities and reduction in finance, human resources, and legal expenses -- Applicants assumed that, because SP East constitutes roughly 33 percent of SP route miles, 33 percent of the savings could be assigned to SP East. (Id. at 18, 21-23.) This is more simple than accurate[47] -- especially since SP East does not represent 33 percent of the combined UP/SP.[48]

B. The Benefits Claimed for the SP East Region Could Be Achieved Without the Merger.

Investment in UP's eastern network could achieve the principal benefits that Applicants claim for the SP East region -- alleviation of capacity constraints -- and would do so more

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[47] For example, Applicants' "Summary of Benefits" workpapers listed savings from the closure of six offices. (See C04-300006, 5/9/96 Salzman Dep. Tr. Exh. 3.) Although only 8% of these savings would arise in the SP East region, the Salzman study attributed 33 percent of them to SP East. (5/9/96 Salzman Dep. Tr. Exh. 1; id at 22-23.)

[48] Repeatedly, Applicants assert that the Board must approve the merger so as to assure UP's ability to compete head-to-head with BNSF. (E.g., Narrative, p. 3.) But they cannot justify the merger on this basis: "Competition policy is not a matter of regulators handicapping . . . competitors in order to create an evenly matched contest." Midtec Paper Corp. v. United States, 857 F.2d 1487, 1503 (D.C. Cir. 1988).

cost-effectively than acquisition of SP lines and without competitive harm. (V.S. Carey/Ratcliffe/Sheppard at 78-79.) UP confirms that Applicants could complete all necessary improvements in UP lines in the SP East region, and all new terminal construction and expansion projects, for less than one-third of Conrail's $1.5 billion offer for SP East. (See R.V.S. Salzman at 15-19.) Such investment would also enable Applicants to avoid the substantial, long-term maintenance, repair, and labor costs of operating parallel lines.

C. Many Claimed Benefits Are Private, Not Public, and Are in Any Event Overstated.

Finally, as the Justice Department shows, many of the benefits Applicants claim are in no sense "public:"

- Net revenue gain projections largely reflect revenue transfers from other carriers. (V.S. Christensen at 26-31, DOJ-8.) The ICC has consistently held that these are not public benefits. UP/MP/WP, 366 I.C.C. at 488; UP/CNW, 1995 WL 141757 at *48.

- The $47.2 million in expected trackage rights fees from BNSF is similarly not a "public benefit;" it is merely a transfer payment from one carrier to another in an attempt to preserve competition otherwise lost to the merger. (V.S. Christensen at 20, DOJ-8.)

In other respects, Applicants inflate claimed benefits:

- Applicants failed to adjust projected labor savings to account for the significant industry decline in labor expenses since 1980. (Id. at 8-13.) Estimated labor savings (including fringe benefits) in a "normal year" are overstated by at least $5 million. (V.S. O'Connor/Darling at 33, KCS-33.) Nowhere in the record are the terms of the understandings reached by Applicants and certain labor interests (in order to win the latter's support). Nor have the financial effects of those agreements been subtracted from the labor benefits claimed.

- Applicants fail to provide evidence of more than $100 million in claimed savings on contracts with outside vendors; in fact, they concede that such estimates are erroneous. (Narrative, p. 69 n.25.)

V. DIVESTITURE OF SP EAST -- AND ONLY DIVESTITURE -- WILL REMEDY THE COMPETITIVE HARMS OF THE MERGER WHILE PRESERVING ITS BENEFITS.

Divestiture in UP-SP merger cases has a pedigree. In 1912, the Supreme Court, in United States v. Union Pacific R.R. Co., 226 U.S. 61 (1912), held that UP's acquisition of SP violated the antitrust laws.[49] Both companies were smaller then, and their systems overlapped less. The competitive harms of the merger were, therefore, fewer than the harms of the merger before the Board today. Nonetheless, the Court ruled the merger unlawful "because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates [and] . . . less . . . efficient service . . . " Id. at 88. The remedy ordered: divestiture. Id. at 97.

The more things change, the more they remain the same. The UP-SP merger proposed at the end of the century is no more

[49] The Board necessarily looks to the antitrust laws for guidance in applying the statutory public interest test: "[a] long line of cases require us to consider the policies embodied in the antitrust laws . . . ." Grand Trunk, 2 I.C.C.2d 161, 209 (1984); accord BN/St. Louis, 360 I.C.C. 788, 932 (1980) ("Highly pertinent to our examination of the public interest under the statute are the policies embodied in the antitrust laws.").

consistent with the public interest than the merger found unlawful at the beginning. Since the competitive harms in the SP East region are neither remedied nor outweighed by public benefits there, the only alternative to outright rejection of the merger is divestiture of SP East. Divestiture remedies the competitive harms and preserves the claimed benefits of the merger.

A. Divestiture Is the Usual Remedy for Competitive Harms Like Those Threatened Here.

Divestiture is the customary remedy used by regulatory agencies and courts for mergers that have anticompetitive effects in some markets, while producing public benefits in others. (V.S. Schmalensee at 35-36.) This Board likewise has unquestioned authority to order divestiture. See Part I supra.

In deciding whether to exercise this authority, the Board applies the same well-known four-part test that it applies in imposing remedial conditions generally. See e.g., UP/MKT, 4 I.C.C.2d at 437; UP/MP/WP, 366 I.C.C. at 562-65. Under that test, the Board will impose a condition if: (1) the merger as proposed would produce competitive harms in an affected market; (2) the condition would remedy those harms; (3) the condition is operationally feasible; and (4) the condition would produce public benefits (including elimination of the competitive harms) that outweigh any reduction it may cause in public benefits created by the merger.

It is undisputed that SP East divestiture meets three of these criteria. Competitive harm in the SP East region is acknowledged; divestiture of the SP East lines would remedy those harms <u>and</u> the unacknowledged harms (set out in Part II <u>supra</u>); and no one claims it would be operationally infeasible. While Applicants do claim that a divestiture would take more benefits from the merger than it would produce, the overwhelming evidence of record is to the contrary.[50]

B. <u>Divestiture of SP East Is Well-Tailored To Remedy the Competitive Harms of the Merger in That Region.</u>

As Professor Schmalensee notes, divestiture is a particularly "logical method of remedying such anticompetitive effects . . . in industries like railroads where physical plant is both durable and very important to competitive success." (V.S. Schmalensee at 37.) Here, divestiture of the SP East lines specifically addresses the 2-to-1 points where harm is acknowledged; the loss of source or potential competition; and

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[50] Applicants also argue, albeit half-heartedly and incorrectly, that parties proposing divestiture as a remedy here are required to file responsive applications. We emphasize again -- <u>see</u> Conrail Comments, CR-21, at 9 -- that Conrail does <u>not</u> seek an order directing divestiture relief <u>in its favor</u>. Rather, Conrail requests the Board to require divestiture and let the marketplace devise an auction-type process in which any party would be free to bid, with subsequent Board approval of the selected carrier. Thus, the two cases cited by the Applicants (Narrative, p. 46) are inapposite. <u>BN/SF</u>, Dec. No. 16, 1995 WL 232781 at *8-*9 (1995) (requiring responsive application for grant of trackage rights <u>to a specific commenter</u>); <u>RGI/Soo</u>, Dec. No. 8, 1989 WL 246976 at *1-*2 (Dec. 11, 1989) (same).

the "corridors" where the overwhelmingly parallel effects of the merger are obvious: Houston-Memphis-St. Louis; Houston-New Orleans; and Houston-Brownsville.

BNSF's extraordinary assertion that divestiture is not appropriate in "network" industries ignores the success of the AT&T divestiture in the archetypal network industry -- telecommunications.[51] In fact, divestiture decrees are common in network industries,[52] and nothing in the literature suggests that their administration poses particular problems.

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[51] United States v. American Telephone & Telegraph Co., 552 F.Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). Applicants' economic expert, Professor Willig, acknowledges the success of the AT&T divestiture. See Katz & Willig, "The Case for Freeing AT&T," Regulation 43-49 (July/August 1983) (divestiture provision of AT&T Consent Decree should "strengthen" industry competition).

[52] E.g., In re Phillips Petroleum Co. and Enron Corp., F.T.C. File No. 957-0037 (July 1995) (gas pipelines); In re ARKLA, Inc., 112 F.T.C. 509 (Oct. 10, 1989) (same); In re Tele-Communication, Inc., F.T.C. File No. 941-0132 (Jan. 18, 1995) (cable television).

BNSF quotes out of context from an article co-authored by one of Conrail counsel to the effect that divestiture may not always be "simple, relatively easy to administer, and sure." BNSF Response at 19, quoting Kolasky, Proger and Englert, Anticompetitive Mergers: Prevention and Cure in Antitrust and Regulation: Essays in Memory of John J. McGowan 49, 56 (F. Fisher ed. 1985). The portion of the article from which BNSF quotes concerns the efficacy of divestiture well after consummation of a merger, when the scrambling of assets may complicate the process. Unaccountably (since one of BNSF counsel is also a co-author), BNSF fails to disclose the article's central conclusion: divestiture orders entered before a merger is consummated are "a practical, efficient and effective tool to remedy the anticompetitive aspects of a proposed merger . . . ." Id. at 59.

Applicants' assertion that divestiture of SP East is less surgical than trackage rights (Narrative, p. 234) is equally without merit. It misses the two essential points: First, the BNSF trackage rights are not an effective remedy for the competitive harms created by the merger in the SP East region. The Board must, therefore, either select a remedy that does work, or reject the merger outright.

Second, that the SP East lines proposed for divestiture embrace exclusively served shippers (in addition to 2-to-1 shippers) does not mean that divestiture is overbroad. Exclusively served shippers are the ones most likely to suffer from the merger-produced loss of source and potential competition. Moreover, Applicants themselves repeatedly describe SP East lines as "2-to-1 corridors." (V.S. Peterson at 165; R.V.S. Peterson at 137-38) (emphasis added.) That nomenclature, and Conrail's proposal for divestiture of the lines serving those 2-to-1 corridors, reflect the obvious realities of the railroad business. A requirement that divestiture be limited to 2-to-1 points rather than corridors would be impossible to implement; would not yield competitively viable rail service and thus not remedy the merger's competitive harms; and would impermissibly read divestiture out of the Board's panoply of statutory remedies.

C. Divestiture Will Preserve the Public Benefits of the Proposed Merger.

Because the vast majority of the benefits claimed for the merger are in the western portion of the post-merger UP/SP network (see Part IV supra), they would not be lost if an SP East divestiture were ordered. Applicants themselves say 80 percent of the benefits would be retained if such a divestiture occurred, including all the gap-filling benefits in UP's route structure, and all the enhancements in UP's ability to compete with BNSF. Applicants similarly acknowledge that capital savings and capital investments are almost exclusively SP West phenomena. And Conrail's verified testimony explains why divestiture bidders can be expected to provide assurances that the UP-SP West system would realize its public benefits and efficiencies. (V.S. Conway/Passa/Sammon at 15.)

Applicants' contrary claim that the consequences of divestiture would be harmful confuses their interests with those of the public. Most notable among Applicants' concerns is the asserted shrinkage in the overall size and dollar value of their proposed deal (e.g., R.V.S. Barber at 90-92) and, therefore, of the merged railroad. Plainly, such concerns do not implicate the public interest. To the extent Applicants focus on "public" benefits at all, the only ones they identify as potentially forgone are not.

Single-Line Service. UP's Mr. Peterson claims that divestiture would cause a net loss of single-line service, but conceded at deposition that his calculation included an unquantified number of lines on which there would still be at least one single-line service option available. (5/8/96 Peterson Dep. Tr. 115-25.) Correcting this error alone might well change Mr. Peterson's calculated net loss into a net gain, since, by Mr. Peterson's own count, a divestiture to Conrail would create new single-line service for 237,000 units of traffic. (R.V.S. Peterson at 206.)

Joint-Line Service. Eschewing consistency, Mr. Peterson claims that another benefit assertedly lost as a result of divestiture would be the UP-Conrail "highly-developed joint-line service" at the Salem, IL gateway. (Id. at 207, emphasis added.) Of course, there is no reason to assume that this efficient joint-line service would be lost.[53] And if it were, it would be replaced by new single-line service. If Mr. Peterson's real point is -- as it seems to be -- that efficient service can be provided either way, then a primary justification for the merger disappears.

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[53] The Verified Statement of Messrs. Conway, Passa, and Sammon (at 33, 49-50) explains why carriers have every incentive to route efficiently and affirms Conrail's intention to keep major gateways open (and non-discriminatorily priced) in the event Conrail acquires the SP East lines. Applicants' witness Barber claims that UP would, of course, adhere to such a promise, but that Conrail might not. (R.V.S. Barber at 83.) This inexplicable (and unexplained) proposition is matched by Mr. Barber's pointless observation that single-line service would be lost because "Conrail . . . do[es] not . . . even operate in . . . the west." (Id. at 81.) But every railroad ends somewhere; thus, UP cannot offer single-line service to points Conrail serves.

Primarily Directional Running and Directional Blocking. While Applicants complain that divestiture would preclude the proposed directional running scheme between Houston and St. Louis, directional running is at best a mixed blessing. (See V.S. Carey/Ratcliffe/Sheppard at 80-81.) For shippers on a "primarily directional" line that do not wish to transport goods in the "primary" direction, directional routing introduces delay and circuity. More basically, directional running is not the only (or even the best) solution to the capacity-constraint problem to which it is addressed. (Id. at 78-81.) Capacity could be increased (without competitive harm) by double-tracking the Houston-St. Louis line and constructing additional sidings (V.S. Carey/Ratcliffe/Sheppard at 78-79), just as Applicants intend to do elsewhere. (V.S. King/Ongerth at 23.)

In short, the public benefits Applicants claim would be lost are either not benefits, not public, or are achievable in other ways. Divestiture would not constitute "re-balkanization" of the rail industry (no matter how many times Applicants say it would), via loss of single-line service, creation of a new carrier, or otherwise. Nor would it lead to any restructuring of the industry or to unknown or unknowable consequences. To the contrary, divestiture is the only way to preserve existing competition while letting the merger go forward; its consequences are readily foreseeable and uniformly beneficial.[54] That is why so many SP East shippers, receivers, and elected officials support it.[55]

D. Divestiture Requires Far Less Regulatory Oversight Than Applicants' Proposal.

Applicants and BNSF speculate about "regulatory nightmares" for the Board in framing a divestiture order and "overseeing" its implementation. (E.g., Narrative, p. 31.) But identifying the SP East lines to be divested is not complex. It

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[54] Because Conrail has emphasized from the beginning of this proceeding that it does not seek divestiture specifically to it, the testimony of William Whitehurst regarding Conrail costs is plainly irrelevant. The testimony -- in which Mr. Whitehurst compares Conrail costs per gross ton-mile unfavorably to SP's and BNSF's -- is also without probative value. Calculations based on gross ton-miles inevitably disfavor a railroad like Conrail with a shorter network and lighter-weight traffic. There are many available cost comparisons that show Conrail's costs to be lower than those of both BNSF and SP. For example, publicly available operating ratio comparisons for 1994 (Mr. Whitehurst's selected year) are: Conrail - 81.5%; BN - 83%; ATSF - 84%; SP - 89%.

[55] In disregard of the record, Applicants suggest that Conrail and KCS offer "little support" for the divestiture of SP East from "actually-affected rail users" in the region. (Narrative, p. 232.) In fact, it is the merger that, as the Railroad Commission of Texas ("RCT") notes, suffers from "minuscule" Texas support. (RCT-4, at 33.) By contrast, many shipper associations, individual shippers, receivers with facilities in the SP East region, and governmental entities and officials there support divestiture, including: the NIT League (a 1,400 member organization) (NITL-10); SPI (consisting of more than 2,000 companies) (SPI-11); the Louisiana Chemical Association; IP (IP-10); Shell Oil Company (SHL-3); Procter & Gamble (V.S. Conway/Passa/Sammon, Att. 2); Weyerhaeuser; Chrysler Corporation; Corning, Inc.; and scores of Texas-based companies (CR-23); the Governors and/or Attorneys General of Arkansas, Louisiana, Missouri, and Texas, and the RCT; and numerous other federal, state, and local elected representatives (CR-23).

is appropriate to start with the consensus divestiture proposal depicted on the following map.[56] The Board would then decide whether, for the reasons offered by Conrail (V.S. Conway/Passa/Sammon at 2-8), additional lines should be divested to insure that divestiture would be competitively and operationally effective.[57] It was precisely to exercise such informed expertise that the Board was created.[58]

There is no merit to Applicants' assertion that ordering divestiture would involve the Board in prolonged

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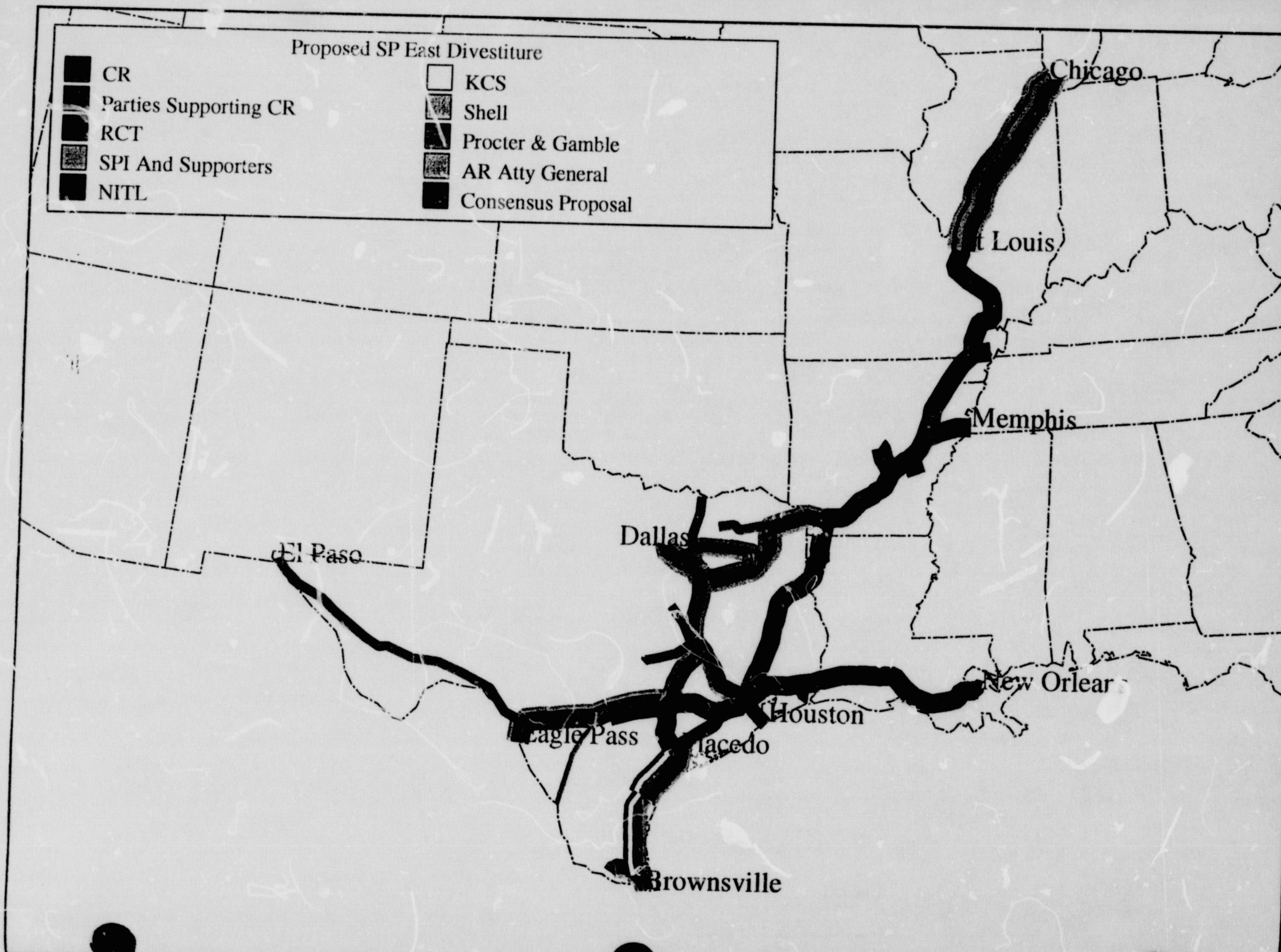
[56] The wide blue line on the map represents the SP East routes that all parties proposing divestiture there agree should be divested. (The term "all parties" as used on the map includes the parties on the legend, and the Attorney General of Louisiana, Weyerhaeuser, and IP.) "Parties supporting CR" include those who do so expressly (including, but not limited to, Corning, Chrysler, the Governor of Ohio, and the New Jersey Department of Transportation) and parties such as PPG which have expressed their support for divestiture of the same lines as Conrail, but without identifying Conrail by name. "SPI and Supporters" include Condea Vista Company; Dow Chemical; Fina Oil and Chemical Co.; The Geon Co.; Montell USA, Inc.; Olin Corporation; Phillips Petroleum Co.; and Union Carbide Corp.

[57] Kolasky, Proger, and Englert, <u>Anticompetitive Mergers: Prevention and Cure</u>, <u>supra</u>, at 62: An agency ordering divestiture must "determine whether [the divested] assets are part of a larger whole, some or all of which should also be required to be divested in order to ensure that the entity acquiring them becomes a more meaningful competitive factor."

[58] <u>See</u>, <u>e.g.</u>, <u>Midtec Paper Corp.</u>, 857 F.2d at 1497 ("Congress wisely entrusted administration of the national rail transportation policy to the Commission . . . . [I]t relied upon the cumulative experience and expertise of that body",; <u>Southern Pacific Transp. Co. v. ICC</u>, 736 F.2d 708, 721 (D.C. Cir. 1984) (per curiam) <u>cert. denied</u>, 469 U.S. 1208 (1985) (ICC has "extraordinarily broad discretion to impose protective conditions . . . and courts have appropriately given the Commission's selection of such conditions great deference").



Proposed SP East Divestiture
CR
Parties Supporting CR
RCT
SPI And Supporters
NITL
KCS
Shell
Procter & Gamble
AR Atty General
Consensus Proposal
Chicago
St Louis
Memphis
Dallas
El Paso
Eagle Pass
Houston
New Orleans
Brownsville

administrative proceedings. (Narrative, p. 31.)[59] Here, Applicants confuse divestiture with their own heavily regulatory trackage rights monitoring proposal. (See Narrative, p. 21; BNSF III ¶14.) Apart from issuance of the order identifying the lines to be divested, the Board's participation would be minimal since the divestiture process would be a market-driven auction, as UP has recently acknowledged (see Traffic World, May 27, 1996, at 25).

The subsequent approval proceeding would be far less complex than the current one, and can be completed even more quickly. It would surely be less intrusive than Applicants' proposal for five years of Board oversight hearings to review the operating details, competitive efficacy, geographic scope, and general fairness of Applicants' (and BNSF's) implementation of their trackage rights proposals.

Conclusion

Because the comments and evidence in this proceeding show that the merger as proposed is not consistent with the

---

[59] To the contrary, "[d]ivestiture is a simple remedy that need not involve ongoing regulatory supervision, with its well-known distortions, delays and inefficiencies." (V.S. Schmalensee at 39.)

public interest, Conrail respectfully asks the Board to disapprove it unless conditioned on divestiture of SP East lines and assets.

Respectfully submitted,

A. Stephen Hut, Jr.

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

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

Counsel for Consolidated Rail Corporation

June 3, 1996

CERTIFICATE OF SERVICE

I certify that on this 3rd day of June, 1996, a copy of the foregoing Brief for Consolidated Rail Corporation and The Appendix to Brief for Consolidated Rail Corporation was served by hand delivery to:

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

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

and served by first-class mail, postage pre-paid, to all parties of record.

Alex E. Rogers

Alex E. Rogers

STB FD 32760 6-3-96 E 83992

83992

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Jim Ryan
ATTORNEY GENERAL

RECEIVED JUN 3 1996 MAIL MANAGEMENT I.C.C.

June 3, 1996

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1201 Constitution Ave., N.W.
Washington, DC 20423

Item No. ____

Page Count 12
JUNE 1996 #63

Attn: Case Control Branch, Finance Docket No. 32760

Dear Mr. Williams:

Enclosed for filing in Finance Docket No. 32760 are an original and twenty copies of the Brief of the People of the State of Illinois ex rel. James E. Ryan, Attorney General of Illinois (IL AG-3).

Copies of the brief have been served this date upon all parties of record as indicated in the Certificate of Service attached to the brief.

ENTERED
Office of the Secretary
JUN 04 1996
5 Part of Public Record

Sincerely,

Carole R. Doris
Chief,
Public Interest Litigation Division

cc: All Parties

Certificate of Service

I hereby certify that copies of the Brief of the People of the State of Illinois (IL AG-3) were served upon all parties of record on June 3, 1996 by U.S. Mail, postage prepaid from Chicago, Illinois 60601.

Carole R. Doris
Chief, Public Interest Litigation Division
Office of the Attorney General
100 W. Randolph St. - 12th Fl.
Chicago, IL 60601

IL AG-3

Before The

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

BRIEF OF THE
PEOPLE OF THE STATE OF ILLINOIS

The People of the State of Illinois, *ex rel.* James E. Ryan, Attorney General of the State of Illinois, ("Illinois Attorney General" or "IL AG"), submit the following Brief in Finance Docket No. 32760.

Statement of Position

On behalf of the People of the State of Illinois, the Illinois Attorney General supports the merger of Union Pacific and Southern Pacific as proposed, conditioned on retention of jurisdiction by the Surface Transportation Board and subsequent oversight and monitoring of the adequacy of competitive conditions proposed by the applicants.[1] The merger, as conditioned, would be consistent with the public interest within the meaning of former Section 11344 of the Interstate Commerce Act.[2]

This position of support by the Illinois Attorney General is fundamentally similar to that stated by the Governor of Illinois, Jim Edgar,[3] and the Illinois Department of Transportation.[4] State of Illinois interests are uniform in their expectation of improved transportation services to and from and within Illinois as the result of the merger.

Benefits, Shipper Support, & Competition

The application, supporting documents, and testimony filed by UP/SP indicate that the impact on Illinois transportation service

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[1] The additional condition is part of the Chemical Manufacturers Assn, ("CMA"), settlement agreement. UP/SP -230, Attachment, Par. 14.

[2] Applicable under Section 204(b)(1) of the ICC Termination Act of 1995.

[3] Letter to Mr. Vernon Williams, Secretary, Surface Transportation Board, dated March 22, 1996.

[4] Verified Comments of Kirk Brown, Secretary of the Illinois Department of Transportation. IDOT-2. March 28, 1996.

will be quite positive in terms of expected improvements in service to and from and within Illinois, including single line service, expanded and shorter direct routes, improved transit times, and better equipment availability. Shipper support for the merger includes 59 Illinois-based companies and 103 companies with one or more company facilities in Illinois.[5]

Significantly, there is no reduction of the availability of competitive rail lines from two to one or from three to two within Illinois. Essentially, shippers located within Illinois will not be affected by a reduction of effective competition at their stations as a result of the merger.[6]

Beyond Illinois, various parties have contended that effective rail competition will be impaired by the consolidation of UP/SP lines elsewhere in the Gulf and western regions and that the substitution of BN/Santa Fe trackage rights would not alleviate a claimed, potential exercise of market power by applicants.[7] As noted, the significant support for the merger

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[5] UP/SP-25; 36; 188; 195; 233; 235.

[6] Under these circumstances there are no proposed trackage rights for BN/Santa Fe within Illinois.

[7] *E.g.*, U.S. Department of Justice, Statement of W. Robert Majure, DOJ-8; Railroad Commission of Texas, Comments in Opposition, RCT-4; National Industrial Traffic League, NITL-9;

from Illinois shippers indicates to us that competitive concerns regarding the impact of the merger upon shippers in Illinois are comparatively minor[8] and do not outweigh the large operating and service benefits to shippers and the public.

From the perspective of the Illinois Attorney General, it also appears that the implementation of the BN/Santa Fe trackage rights agreement, as modified, and other related conditions are likely to be sufficient to assure effective, substantial competition in other regions.[9] Certainly, applicants and supporting shippers have established a strong presumption that the conditions should be adequate.[10]

Western Coal Traffic League, WCTL-12; Kansas City Southern, KCS-33; Conrail, CR-21.

[8] *Contra*, Illinois Power ("IP"), a large coal shipper from Utah origins on Southern Pacific to electric utility plants in Illinois, projects a diminution of competition and a potential escalation of shipping rates after 1999. ILP-6. UP/SP argue that IP will suffer no loss of competition on its Utah shipments. UP/SP-230, pp. 259-260.

[9] UP/SP rebuttal testimony contains persuasive opinion that trackage rights will establish effective price and service competition. Rebuttal Verified Statement of John T. Gray, UP/SP -231, pp. 36-47 and other rebuttal statements referenced therein. The settlement agreement with the Chemical Manufacturers Association modifying the BN/Santa Fe agreement, UP/SP-230 Attachment, further enhances the workability of the agreement.

[10] Approximately 450 shippers oppose the several divestiture proposals. UP/SP-233, pp. 1-651.

However, that presumption has not been tested. Significant dispute from government authorities, railroads, and shippers as to the actual impact of the proposed merger conditions on competition raises questions which cannot be definitively answered since they involve judgment and probability forecasts about competition which could be tested only *after* the merger is implemented.

On balance, in order to ameliorate potential competitive problems should they arise in other regions as a result of the merger, it would be appropriate for the Surface Transportation Board specifically to retain jurisdiction over the merger and the merged entity for the purpose of post-merger monitoring and examination of the adequacy of the applicants' competitive conditions.[11] Continued jurisdiction would be largely remedial

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[11] The retention of jurisdiction was initially proposed as a condition by the California PUC in the context of evaluating the impact of the BN/Santa Fe agreement on competition and a possible later divestiture. UP/SP contended that such "a 'contingent' divestiture condition would be inconsistent with Commission precedent and should not be imposed." UP/SP -230, pp. 269-270. However, in the CMA Agreement the applicants now agree to such continued STB jurisdiction and review for five years. Clearly, the language of Section 11344(c) concerning conditions encompasses such a condition. Although there is continuing jurisdiction under Section 11351, oversight conditions concerning competition have been required under Section 11344(c) where appropriate See, Wisconsin Central Transportation Corporation, et al. -- Continuance In Control -- Fox Valley Western Ltd.,

involving *post hoc* assessments for a reasonable period of time of the actual implementation of the merger, trackage rights, and conditions.[12] Under such a retention of jurisdiction, the merger should be allowed to proceed as proposed by applicants, subject to future relief if warranted.

Southern Pacific Chicago - St. Louis Line

Support of the UP/SP merger by Illinois government agencies is also predicated on an expansion of the viability of the existing Southern Pacific line between Chicago and St. Louis and the responsibility of the merged company for $ 36 million of debt related to the line owed by SPSCL Corp. to agencies of the State of Illinois.

In 1989, SPCSL Corp. acquired the Chicago - St. Louis line of the bankrupt Chicago, Missouri & Western Railway Company pursuant to I.C.C. authorization in Rio Grande Industries, Et Al.- Purchase and Trackage Rights - CMW Ry. Co., 5 I.C.C.2nd 952

Finance Docket 32036,(February 11, 1993) 1993 ICC LEXIS 24.

[12] In Wisconsin Central the Commission's order directed a 5 year oversight plan including notice to shippers of formal annual proceedings, reporting by applicants, and proceedings addressed to whether substantial competitive harm has resulted from the transaction and, if so, whether appropriate and workable conditions can be formulated, and issuance of an evaluative Staff report.

(September, 1989) and U.S. Bankruptcy Court order (November, 1989). Continued freight and Amtrak passenger service on this line was tentatively found to be in the public interest and the transaction was approved under Section 11344(d). *Id.* at 968, 978. The Commission also concluded "The State has made a substantial investment in the line. Sale to the RGI system will secure this investment." *Id.* at 978.[13]

The People of the State of Illinois and Illinois agencies now support the UP/SP merger to further secure the state's investment in the line, which currently exceeds $ 36 million.[14] The continued viability of the Chicago - St. Louis line is significantly more important than it was in September, 1989, as evidenced in part by continued state investment.

Whether Southern Pacific could become an effective independent carrier in the markets it now serves, as contended by

---

[13] The substantial Illinois investment referenced as of the date of the ICC order totaled $ 7 million in loans to CMW, portions of which were to be assumed by SPSCL. 5 I.C.C.2d 958-959.

[14] The statement of Kirk Brown, IDOT - 2, p. 2, indicates $ 40 million in IDOT resources have been dedicated to the line. Although not specifically defined, Illinois agency loans to SPCSL total $ 36 million.

the Department of Justice,[15] rather than continuing as a marginal carrier, is more than doubtful[16] and such an attempt would carry considerable risk to the shipping public. Certainly, Southern Pacific itself indicates that its alternative to merger would involve a radical restructuring of operations and withdrawal from various markets.[17] The record herein does not identify how such a restructuring would impact the Chicago - St. Louis line, but it is a reasonable inference that the line could ultimately be adversely impacted as part of a downsized overall SP network or SP financial difficulty.

Paramount among the concerns of the State of Illinois are for the improved prospects for the Chicago - St. Louis route under merger as part of a highly competitive railroad network.[18] The People of the State of Illinois and Illinois agencies will be better protected with the certainty and security of a strong, merged company repaying debt than by a marginal carrier. Once it

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[15] Statement of Elaine Zimmer. DOJ-8.

[16] Verified Statement of Lloyd Leviton, submitted by the California Attorney General. CA AG-2.

[17] Rebuttal Verified Statement of Jerry R. Davis, UP/SP-231, pp. 17-21; Rebuttal Verified Statement of John T. Gray, UP/SP-231, pp. 25-35.

[18] Verified Statement of Kirk Brown, IDOT-2, p. 2.

is a main line of a merged UP/SP there will be an opportunity for larger scale use of the line as part of an expanded network.

An alternative concerning this line is contained in Conrail's proposed divestiture and acquisition of Southern Pacific "East lines," including the Chicago - St. Louis route. Although Conrail may not intend to revise operations on the route, the lack of an application for authority to acquire the SP lines prevents any testing of assumptions in its proposal. Absent an application, the Conrail proposal cannot be evaluated as to the ultimate operating and competitive impact of Conrail ownership of the St. Louis- Chicago line and whether it could be acceptable to Illinois interests.

Similarly, the Kansas City Southern application offers no viable alternative concerning the Chicago - St. Louis line since KCS does not propose to acquire that portion of Southern Pacific, indicating the line would continue as an SP line by itself or be an appendage of Union Pacific.

Under the circumstances the UP/SP merger is the only apparent and reasonable assurance for Illinois interests in the Chicago-St. Louis line.

Conclusion

For the reasons stated, the Surface Transportation Board should approve the Union Pacific/Southern Pacific merger subject to the condition that the Board retain jurisdiction over the merger for purposes of considering whether further relief is required as future post-merger evaluation and circumstances as to competition may warrant.

Respectfully submitted,

People of the State of Illinois

James E. Ryan
Attorney General of Illinois

Carole R. Doris
Chief
Public Interest Litigation Division

Christine H. Rosso
Chief
Antitrust Bureau

100 W. Randolph St. - 12th Fl.
Chicago, IL 60601
(312) 814-4499

Dated: June 3, 1996

STB FD 32760 6-3-96 83989 E

83489

EXHIBIT 2

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 3276Q

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

BRIEF OF STATE OF COLORADO

The State of Colorado submits this brief in support of the merger proposed by Union Pacific and Southern Pacific for the following reasons:

1. As Governor, I have the primary responsiblity for the State of Colorado in these matters.

2. The State of Colorado is served by both carriers. The two railroads employ 2,900 Coloradans and operate more than 1,600 miles of track. Competitive service is critical to the State of Colorado's business community, particularly in manufacturing, agricultural and coal production. After reviewing the service proposed after the merger, the State of Colorado believes the combined UP-SP line will be in the best interest of the State and these industries. .

3. Conrail, The Kansas City Southern, The Montana Rail Link or other reported providers of service have not presented the State of Colorado with any fully developed proposals to provide alternative service for Colorado shippers in lieu of the proposed merger.

4. The State of Colorado supports the merger application based upon the terms and agreements reached with the UP and SP, which are described in the State's March submission to the Board and urges the Surface Transportation Board to approve the merger and the BN/Santa Fe settlement agreement.

Respectfully submitted,

ENTERED
Office of the Secretary

JUN 0 4 1996

5 Part of Public Record

Roy Romer

Roy Romer, Governor
State of Colorado
Executive Chambers
136 State Capitol
Denver, Colorado 80203-1792
(303) 866-2471

Dated: 6-2-96

EXHIBIT 3

CERTIFICATE OF SERVICE

I certify that on this 2nd day of June 1996, copies of the Petition of the State of Colorado to Intervene, for Leave to File Brief and to Become Party of Record and the Brief of the State of Colorado were served on all parties of record by first class mail, postage prepaid.

(Name of person arranging for service)

STB FD 32760 6-3-96 E 83975

83975

1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3919
(202) 789-3400
FAX (202) 789-1158

KECK, MAHIN & CATE

FILE NUMBER 48189-001

DIRECT DIAL 202-789-8931

June 3, 1996

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JUN 3 1996
MAIL MANAGEMENT
I.C.C.

Honorable Vernon A. Williams
Secretary
Room 2223
Surface Transportation Board
1201 Constitution Ave., N.W.
Washington, D.C. 20423

Re: F.D. No. 32760 UPSP Merger
(1) Oral Argument Request (Reno-6)
(2) Brief (Reno-7)

Dear Mr. Williams:

Enclosed please find the following items:

(1) An Errata letter dated May 24, 1996 here identified as (Reno-6) requesting participation in oral argument. The original letter filed May 24, failed to carry the (Reno-6) designation. That letter has been, and this letter will be served upon parties of record.

(2) Original and twenty (20) copies of the Brief of the City of Reno (Reno-7) together with proof of service.

Very truly yours,

Paul H. Lamboley

Enclosure

PHL/dph

Item No.________

Page Count ~~2~~ 2
Jun 4 65

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1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3919
(202) 789-3400
FAX (202) 789-1158

KECK, MAHIN & CATE

FILE NUMBER 48189-001

DIRECT DIAL 202-789-8931

May 24, 1996

Honorable Vernon A. Williams
Secretary
Room 2223
Surface Transportation Board
1201 Constitution Ave., N.W.
Washington, D.C. 20423

Re: F.D. No. 32760 UP/SP Merger
(Oral Argument)

Dear Mr. Secretary:

In accordance with Decision No. 36, served May 9, 1996, the City of Reno here requests opportunity to participate in oral argument, now scheduled for July 1, 1996.

The City of Reno takes no position on the merits of the merger, but wishes to address (1) the significant adverse impact that the proposed merger operations will have on the public health, safety and environment of the City its citizens, and the Reno/Sparks/Truckee Meadows Basin, (2) why an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) and a "conformity determination" under the Clean Air Act (CAA) are essential and required, and (3) what mitigation measures are appropriate.

The City requests not more than five (5) minutes time for presentation.

Very truly yours,

Paul H. Lamboley

PHL/dph

STB FD 32760 6-3-96 83973

83973

RENO-7

UNITED STATES OF AMERICA

BEFORE THE SURFACE TRANSPORTATION BOARD

F.D. No. 32760

Union Pacific Corporation et al. --
Control and Merger -- Southern Pacific Corporation et al.

BRIEF

OF

CITY OF RENO

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4 Part of Public Record

Paul H. Lamboley
Keck, Mahin & Cate
1201 New York Ave., N.W.
Washington, D.C. 20005
Phone: (202) 789-8931
Fax: (202) 789-1158

Patricia A. Lynch
City Attorney
Michael K. Halley
Deputy City Attorney
Reno City Hall
490 So. Center Street
Room 204
Phone (701) 334-2050

Counsel for City of Reno

Dated June 3, 1996

Item No.______

Page Count 22

Jun #64

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BRIEF OF THE CITY OF RENO

1. OVERVIEW.

The City of Reno submits this brief to support its position that the acknowledged significant, adverse impacts on public health, safety and environment that will result from the proposed merged operations of the Applicants Union Pacific Corp. (UP) and Southern Pacific Rail Corp. (SP), including those under the UP/SP agreement with the BN Santa Fe (BNSF), require an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), 42 USC 4321 et seq., and a conformity determination under the Clean Air Act (CAA), 42 USC 7401 et seq., for the City of Reno and the Reno/Spark/Truckee Meadows Basin.

It is the City's view that because of inadequacies in the environmental documentation process to date, the substantive determination of the environmental assessment (EA) issued April 12, 1996 that "as currently proposed, the proposed merger and related construction and abandonment proposals will not significantly effect the quality of the human environment" (FONSI), and is therefore, "the environmental impact statement process is unnecessary in this proceeding," is unfounded and unreasonable, arbitrary and capricious.

The City believes that investigation and evaluation of proposed mitigation measures for the acknowledged significant, adverse environmental consequences of the railroad merger proposed by the applicants, including the BNSF Agreement can only be accomplished through An EIS process for the City of Reno and the Reno/Sparks/Truckee Meadows Basin. It is the further contention of the City that all reasonable, adequate and viable mitigation of the demonstrably significant adverse environmental consequences have not been fully or fairly evaluated as required.

2. <u>NATURE OF THE PROCEEDINGS</u>.

This case involves the application of the Union Pacific Corp., and the Southern Pacific Rail Corp. (UP/SP) for approval of the UP's control and merger of the SP, and related transactions, as well as approval of the agreement between the merger applicants and the BN Santa Fe (BNSF) granting trackage, haulage and other access rights over the merged system if approved.

(a) <u>Primary factors</u>.

(1) <u>Corridor</u>.

The route known as the "Central Corridor", between Northern California and the Midwest, is the center piece of the merger transaction - saving some 400 miles distance, thereby offering substantial efficiencies in transit time, energy consumption, equipment and personnel utilization.

The SP line segment between Sparks NV and Roseville CA lies at the heart of these Central Corridor efficiencies. With the removal of the physical constraints in the Sierra Nevada's some 190 miles may be eliminated from the more circuitous UP route making a more accessible, competitive routing for intermodal, automotive and merchandise/manifest traffic for the merger applicants UP/SP and the BNSF.

(2) Parties.

For the purposes of documenting significant environmental impact issues, the principal parties are the City of Reno and the geographic surroundings area referred to as the Reno/Sparks/Truckee Basin, the applicants UP and SP, as well as their agreement party BNSF.

The City of Reno, situated on the Sparks-Roseville line segment, has a resident population 283,000 and an annual visitor population of some 4.8 million. In addition, the University of Nevada Reno Campus has some 12,000 students.

The City's principal commerce is tourism and the hotel/casino industry which operates on a 24 hour, never-close basis. The City's hotel/casino industry employs over 100,00 employees on a 3 shift per day basis. The residents, visitors and employees travel throughout the City's downtown business as pedestrian or vehicular traffic, utilizing public or private transportation.

The Sparks-Roseville line segment bisects the center of the City's downtown business district as well as adjacent commercial and residential areas. City hospitals, university and schools are presently impacted by the rail operations and will be more so in the future as a result of the proposed post merger operations. (Reno-4, pp. 4-5)

(3) Operations.

(i) Train Density.

Using 1994 for base year statistics, the UP/SP applicants initially projected that present train frequencies of 13 or 13.6 trains per day would increase to (a) 20 trains per day (UPSP-27 Vol. 3, p. 385) or (b) 22.6 trains per day (UPSP-27, Vol. 6, p. 12). Later in March 29, 1996, the applicants projected train frequency to increase from 13.8 trains per day to 25.1 trains per day. (UPSP-194, p. 7).

Earlier in December 1995, BNSF stated it anticipated at least 6 trains per day on the line segment. (BNSF-1) (Owens). More recently, on April 29, UP/SP conceded that BNSF would operate at least 2-5 loaded trains per day over the line segment. (RVS Ongerth and Peterson, Vol. 2 and 3)

By contrast, the City of Reno submits that train frequency will increase from present levels to 38 trains per day based on current operations reported and apportioned as follows:

22- historical freight trains per day assumed to be an accurate baseline condition.
6- Western Pacific freight trains per day.
6- Burlington Northern BNSF settlement agreement trains per day
2- Amtrak trains per day
2- Local movement trains per day.

(ii) Train Length.

Train length statements vary between 5,000 to 8,000 feet. Eight thousand feet being UP standard train length. City of Reno uses 6,500 feet as in evaluating impact thresholds.

(iii) Tonnage.

Tonnage volume is projected to increase somewhere between 79 to 83%.

(b) Environmental Thresholds Exceeded.

Notwithstanding dispute over the specific details concerning train frequency, the applicants acknowledge, and the environmental assessment (EA) issued by the Section of Environmental analysis (SEA) confirms, that environmental thresholds for air quality and noise are exceeded by the applicant's proposed post-merger operations.

Further, it is not disputed that the Reno/Sparks/Truckee Meadows Basin is a non-attainment area for air quality pollutants PM_{10}, CO and O_3.

3. ISSUES.

There are two basic issues this brief will address:

(a) whether an environmental impact statement (EIS) is required in the circumstance of this case under the National Environmental Policies Act (NEPA) 42 USC 4321 et seq., specifically Section 4332 (2)(C), and

(b) whether a conformity determination is required under the Clean Air Act (CAA), 42 USC 7401 et seq., specifically Section 7506(c)(1).

The City views the appropriate mitigation issue as being subsumed in the EIS environmental documentation process, but has already submitted its recommendations in its comments on the application (Reno-4) and on the EA (Reno-5).

This brief will emphasize that mitigation measures are essential elements of an EIS.

4. **DISCUSSION**.

(a) An Environmental Impact Statement (EIS) Is Required.

An environmental impact statement (EIS) is an appropriate follow-on to the environmental assessment (EA) issued April 12, and is required by the circumstances of this case under applicable law.

The statutory framework of the National Environmental Policy Act (NEPA), 42 USC Sections 4321 et seq., and the regulations issued by the Council on Environmental Quality (CEQ) set out in 40 CFR Parts 1500-1508, provide the governing policies and principles for evaluation and mitigation of significant environmental impacts of any "major Federal action," such as the regulatory approval of railroad control and merger transactions here proposed by the application filed November 30, 1995 before the Interstate Commerce Commission (ICC).

The ICC Termination Act of 1995 (ICCTA), public law PL 104-88, 109 Stat. 803, effective January 1, 1996, abolish the ICC and establish the Surface Transportation Board (STB or Board) as well as its jurisdiction over rail merger approval functions. The Board was also authorized to continue ICC regulations applicable to the regulatory functions retained in the Board. As a result of ICCTA, the STB is the lead agency for regulatory approval of the rail merger proposed. The regulations in 49 CFR Part 1105, Procedures for Implementation of Environmental Laws, represent the lead agency's protocol to insure compliance with its responsibility under NEPA.

The STB regulations in turn impose obligations on the applicants seeking regulatory approval to initially provide an environmental report (ER) sufficient to inform the agency and public of the proposed action, environmental consequence of the proposal and the present appropriate mitigation measures. 49 CFR 1105.7

The UP/SP application was accompanied by an ER (UPSP-27 Volume 6, Parts I-6). Later, as a result of an inquiry by the City of Reno to the SEA, the UP/SP was requested to submit a supplemental ER related to the BNSF agreement. This was done by the applicants on March 29, 1996 (UPSP-194) the same date the City of Reno and all other public comments were due on the application.

Despite the acknowledgement that environmental thresholds for air quality and noise were exceeded, the applicants treated environmental impacts benignly as "systemwide" or as "offset" elsewhere or by other benefits, and suggested the transaction had no significant impact on the quality of human environment, and thus no specific mitigation measures were presented. (UPSP 27, Vol. 6, pp. 1-3, 26-30.)

The applicants' initial and supplemental ER was the basis of the environmental assessment (EA) issued April 12 by the SEA. The EA concludes that "based on analysis of all available information, subject to the recommended mitigation measures, the proposed merger of the Union Pacific and Southern Pacific Railroads, if approved, would not significantly affect the quality of human environment," and therefore, "the preparation of environmental impact statement is not necessary." Environmental Assessment, Vol. 1, Guide to the Environmental Assessment, Conclusion, ES.8 Conclusion, p. ES-19).

The EA's proposed mitigation in general are (1) consultation with the appropriate agency and (2) compliance with the applicable law (EA Volume 1, Chap. 6, p. 6-1). Specifically for the City of Reno, similar recommendations are to consult and comply, as well as to cooperate in developing the final plan and agreement within 1.5 years of negotiation. If no solutions are mutually reached, the SEA concludes the UPSP shall construct a minimum of three (3) "highway/railroad grade separations."

In previous comments on the EA the City of Reno addresses in detail the procedural flaws and the lack of factual foundation for the EA findings, its conclusions and mitigation proposals. The inadequacies of the investigation process and substantive product require completion of an EIS.

In companion cases regarding EIS documents the Supreme Court in 1989 outlined out NEPA policy requirements in Robertson v. Methow Valley Citizen's Council, 490 U.S. 332, and Marsh v. Oregon Natural Resources Council, 490 U.S. 360.

In Robertson the Court stated (citations omitted):

> Section 101 of NEPA declares a broad national commitment for protecting and promoting environmental quality. To ensure that this commitment is "infused into the ongoing programs and actions of the Federal Government, the act also establishes some important "action forcing" procedures". Section 102 thus, among other measures "directs that, to the fullest extent possible ... all agencies of the Federal Government shall --

(C) include in every recommendation or report on proposals for legislation and other major Federal action significantly affecting the quality of human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action
(ii) any adverse environmental impacts which cannot be avoided should the proposal be implemented
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented".

The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA "action-forcing" purposes in 2 important respects. It ensures that the agency in reaching its decision, will have available and will carefully considered, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will also be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision.

Simply by forcing the agency's attention on the environmental consequences of the proposed project, NEPA ensures that important affects will not be overlooked or underestimated only be discovered after resources have been committed or the dye otherwise case.

Publication of an EIS, both in draft and final form, also serves a larger information role. It gives the public the assurance that the agency "has indeed considered environmental concerns in its decision-making process, and, perhaps more significantly, provides a spring board for public comment.

The sweeping goals announced in Section 101 of NEPA are thus realized through a set of "action-forcing procedures" that require agency take a "hard look" at environmental consequences, and that provide for broad dissemination of relevant environmental information. Although these procedures are almost certain to affect the agency substantive decision is now well settled that

> NEPA itself does not mandate particular results, but simply prescribes the necessary process.

Finally the Court in <u>Robertson</u> stated:

> To be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences. The requirement that an EIS contain a detailed statement of possible mitigation measures flows both from the language of the Act and, more expressly, from CEQ's implementing regulations. Implicit in NEPA's demand that an agency prepared a detailed statement on "any adverse environmental affects which cannot be avoided should the proposal be implemented," is an understanding that an EIS will discuss the extent to which adverse affects can be avoided.
>
> More generally, omission of a reasonably complete discussion of possible mitigation measures would undermine the "action-forcing" function of NEPA. Without such a discussion, neither the agency nor the interested groups or individuals can properly evaluate the severity of the adverse affects.

And as applicable here, the Court noted:

> An adverse affect that can be fully remedied by, for example an inconsequential public expenditures is certainly not as serious as a similar affect that can only be modestly ameliorated through commitment of vast public and private resources. Recognizing the importance of such discussion in guaranteeing that the agency has taken a hard look at the environmental consequences of proposed federal action. CEQ regulations require that an agency discuss possible mitigation and defining scope of the EIS, in discussing alternatives to opposed action, and consequences of that action, and explaining its ultimate decision. 490 U.S. at 347-351.

<u>Robertson</u> makes clear that CEQ regulations are entitled to substantial deference. Those regulations are set out in 40 CFR Parts 1500 to 1508.

In <u>Marsh</u>, the Court made clear that "NEPA cases have generally required agencies to file environmental impact statements when the .. governmental action would be environmentally significant". 490

U.S. at 372.

Marsh also reinforces the Robertson view that CEQ regulations "which we have held are entitled to substantial deference, impose a duty on all federal agencies to prepare supplements to either draft or final EISs ... if there remains 'major Federal action' to occur, and if the new information is sufficient to show that the remaining action will affect the quality of human environment in a significant manner or to a significant extent not already considered." Id. at 372, 374. CEQ regulations define "significant." 40 CFR 1508-27. The Court noted that "the decision whether to prepare a supplemental EIS is similar to the decision to prepare an EIS in the first instance." Id. at 374.

Recently the United States Court of Appeals for the D.C. Circuit in a ICC related case stated "in reviewing the Commission failure to prepare an EIS, we consider four criteria:

> (1) whether the agency took a "hard look at the problem;
> (2) whether the agency identified the relevant areas of environmental concern;
> (3) as to the problems studied and identified, where the agency made a convincing case that the impact was insignificant;
> (4) there was impact of true significance, where the agency convincingly established the changes in the project sufficiently reduced it to a minimum.

State of Idaho v. ICC., 35 F.3d 585, 595 (1994).

In remanding the matter to the ICC, the Court found:

> Instead of taking its own hard look the Commission deferred to the scrutiny of others by authorizing salvage subject to conditions that require Union Pacific to consult with the various federal and state agencies about the specific environmental impacts that fall in their

jurisdiction. Id.

The Court expressly held "an agency cannot delegate its NEPA responsibilities in this manner." Citing precedent, Court said "we found this attempt to rely entirely on the environmental judgments of other agencies in fundamental conflict with the basic purpose of NEPA":

> NEPA mandates a case by case balancing judgments on the part of federal agencies. In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values .... The point of individualized balancing analysis is to ensure that with possible alterations, the optimally beneficial is finally taken.
>
> Certification by another agency that it's own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibilities for the particular federal action in question, attend only one aspect of the problem, ... Certifying agencies do not attempt to weigh [environmental] damage against the opposing benefits. Thus the balancing analysis remains to be done.
>
> The Court concluded that without "without the requisite hard look, we cannot determine whether Commission made a convincing case that the impact was significant "whether it convincingly established that changes in the project minimized in the impact."

Id at 596.

Perhaps the tension between the environmental responsibilities of an agency primarily responsible for economic regulation like the ICC is best captured in a case entitled <u>Harlem Valley Transportation Association v. Stafford</u> 500 F2d 328 (2nd Cir. 1974).

In Harlem Valley, the ICC and Chairman George Stafford were preliminarily enjoined by the Court to require the Commission to prepare an environmental impact statement in connection with railroad abandonment.

Although coming early in the development of NEPA and companion CEQ regulations, the discussion in the case evidence the reluctance of an economic regulatory agency to fully appreciate or implement NEPA policy requirements in order to avoid responsibilities for preparing an environmental impact statement. The City of Reno suggests that such problems continue in circumstances of this case.

In Harlem Valley, the Court pointed out that there must be a determination at the outset whether an impact statement is required by the agency in a manner that avoids "the dangers that an agency will rely on self serving statements by an applicant will place the burden of analyzing environmental issues upon intervenors, apply with equal force ..., even though there may be some initial doubt as to whether an impact statement is required." Id at 335.

The Court noted that the ICC has an "affirmative duty under NEPA is to evaluate environmental issues." But that in the circumstances of Harlem Valley the Court found:

> "the steps however, the ICC has chosen to take in implementing NEPA just do not meet the burden imposed by this affirmative duty. The ICC is apparently content to place the burden on intervenors whose resources might be limited to challenge any environmental statement the railroads might make in their applications for abandonment. If the intervenors do not challenge these statements, they may be accepted as true. This passive approach by the Commission shifts to the intervenors a large part of the burden of evaluating environmental issues which Congress placed on the agencies of the government such as the ICC when it passed NEPA.

Id. at 336.

Finally the Court noted there was no conflict between NEPA and Interstate Commerce Act, stating "while NEPA only supplements the Interstate Commerce Act, it does not repeal any part of it, noting in the Act prohibits the ICC ... staff from investigating environmental matters and preparing a draft impact statement, if needed prior to any public hearings." Id.

A fair reading of the initial and supplemental environmental reports (ERs) submitted by the applicants, and the EA issued by the STB, suggest that the burden has been shifted and the affirmative duty of the agency has not been satisfied by its reliance on the railroad's ER. So far, the STB has shifted the burden analyzing environmental issues intervenors such as the City of Reno.

Other circuits have upheld NEPA requirements for EIS. See Missouri Mining, Inc. v. ICC, 33 F.3d 980, 983, (8th Cir. 1994) ("NEPA requires federal agencies to prepare an EIS for major Federal actions significantly affecting the quality of human environment". Hughes River Watershed Conservancy v. Glickman, 81 F3d 437, 443 (4th Cir. 1996) ("Central to NEPA's procedural focus is a requirement that federal agencies prepare EISs to be included in every recommendation or report of proposal for major Federal actions significantly affecting the quality of the human environment.") City of New York v. ICC, 4 F3d 181, 182 (2nd Cir. 1993)("NEPA directs that 'to the fullest extent possible'; all federal agencies shall include in every recommendation or report on ... major Federal actions significantly affecting the quality of human environment a detailed statement ... on (i) the environmental impact of the proposed action.") see also Alaska Wilderness Recreation & Tourism v. Morrison, 67 F3d 723, 724 (9th Cir. 1995) California Trout v. Schaefer, 58 F3d 469, 472 (9th Cir. 1995) Laguna Greenbelt, Inc., v. U.S. Dept. of Transp., 42 F3d 517, 523 (9th Cir. 1994); Greenpeace Action v. Franklin, 14 F3d 1324, 1332 (9th Cir. 1992) Catron County v. U.S. Fish & Wildlife, 75 F3d 1429, 1437 (10th Cir. 1996)

It is important to note that an essential ingredient in an EIS is discussion of the steps that can be taken to mitigate adverse environmental consequences. Marsh,490 U.S. at 359, Catron County, 75 F3d at 1437.

Environmental documentation must also review potentials for growth on market demands, as well as "cumulative" and "connected" impacts. See Alaska Wilderness, 67 F3d at 780; California Trout, 58 F3d at 474-475; Laguna Greenbelt, 42 F3d at 525; Shoshone-Paiute Tribe v. U.S., 889 F.Supp. 1308-1310 (D. Idaho 1994).

The UP/SP-BNSF agreement provides potential for growth, cumulative and connected affects which require proper evaluation.

"The existence of a viable, but unexamined alternative renders an environmental impact statement inadequate." Thus, "an agency must look at every reasonable alternative within the range dictated by nature and scope of the proposed action, and sufficient to permit a reasoned choice." Alaska Wilderness, 67 F3d at 729. Consideration of alternatives is at the core of environmental impact statements.

This case does not involve "categorical exclusion" (CE) as in City of New York the ICC, 4 F3d at 183, nor a circumstance of "waiver" as in Missouri Mine and Inc. v. ICC, 33 F3d at 983.

In the final analysis environmental documentation seeks to promote and ensure that agency decisions are founded on "reasoned evaluation of relevant factors." Marsh 490 U.S. at 378. To determine whether an EIS is necessary, the agency first prepares an EA, which briefly describes the need for, alternatives to, and environmental impacts of the proposed federal action. If the agency determines in the NEA that federal action will not significantly affect the environment, it makes a finding of no significant impact (FONSI) and its NEPA review ends. However, if the agency determines that the proposed action will significantly affect the environment, then it prepares a more thorough EIS concerning the project." California Trout, 58 F3d at 472.

A federal agency could not know potential alternatives to a proposed federal action until it complies with NEPA and prepares at least an EA." Catron County, 75 F3d at 1437. But to interpret NEPA as "merely requiring an assessment of detrimental impacts upon the environment would significantly diminish the Act's fundamental purpose -- to help public officials make decisions that are based on understanding environmental consequences, and take actions that protect, restore and enhance the environment." Id. And although it may be true that after complying with NEPA's documentation requirement, the agency may nonetheless may adhere to [its proposal]. Regardless, NEPA is clear "to the fullest extent possible, federal agencies must comply with the Act and prepare an impact statement for major Federal actions significantly affecting the quality of human environment." Id. at 1438.

It should be noted the existence of public controversy over the scope, extent and merits of the potential adverse affect mandates the preparation of EIS. The Federal action in this case is controversial and the dispute substantial as to size, nature and effect on the City of Reno. Greenpeace Action, 14 F3d at 1333.

Finally, this is not a question of factual dispute as much as it is a legal question over the proper application of NEPA statutes and CEQ regulations to the undisputed environmental impacts acknowledged by both the applicants and the STB in connection with this proposed major federal action. It is simply a legal question of whether it is reasonable in the admitted circumstances of this case to defer to the FONSI conclusion of the EA, and corollary that environmental impact statement is not necessary. The City of Reno contends it is not.

(b) A Conformity Determination Is Required.

Conformity provisions of the Clean Air Act (CAA) seek to control concentration and promote the attainment of different levels of criteria pollutants within air quality control regions (ACQRs) under maximum concentrations acceptable to the National Ambient Air Quality Standards (NAAQS) established by the Environmental Protection Agency (EPA) to protect public health. Reno/Sparks/Truckee/Meadow area is a non-attainment area for 3 air quality pollutants, PM_{10}, CO and O_3.

The City of Reno contends that the CAA, 49 USC 7401 et seq, and specifically Section 7506(c)(1) requires the STB to undertake a conformity determination prior to any approval of the merger application.

Section 7506(C)(1), clearly states that "no ... agency shall ... approve any activity which does not conform to an implementation plan after it has been approved or promulgated under Section 7410 of this title." Section 7410 refers to state implementation plans (SIPs) for national primary and secondary ambient air quality standards.

Conformity means that "an activity will not cause new violations, increase the frequency or severity of violations or delay attainment of various standards, requirements and milestones." Conservation Law Foundation, Inc. v. Busey, 79 F3d. 1250, 1257 (1st Cir. 1996).

The City of Reno has demonstrated the need for a conformity determination in its comment in the EA (Reno-5). The CAA leaves the STB little discretion in the issue to ensure conformity with Nevada's SIP for the Reno/Sparks/Truckee Meadows Basin.

5. CONCLUSION

Based on the comment submitted in the application (RENO-4), comments on the agency's Environmental Assessment (EA) (RENO-5) and the foregoing Brief on Applicable Law (reno-7) the City of Reno submits that it has presented both federal and legal justification requiring (1) an EIS environmental documentation and (2) conformity determination regarding the significant, adverse impacts on public health, safety and environment for the City of Reno, and the Reno/Sparks/Truckee Meadows Basin. As a result of the proposed merger.

Respectfully submitted June 3, 1996

By______________________________
Paul H. Lamboley
KECK, MAHIN & CATE
1201 New York Ave., N.W.
Suite PH
Washington, D.C. 2005-3919

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Comment of the City of Reno (RENO-7) on Arvid E. Roach, II and Paul A. Cunningham, Esq. by messenger and on all other parties of record on the service list in this proceeding by first class mail, postage prepaid, this 3rd day of June 1996.

Paul H. Lamboley

STB FD 32760 6-3-96 E 83971

83971

COALITION FOR COMPETITIVE RAIL TRANSPORTATION

MOBILIZATION OFFICE
1029 North Royal Street
Suite 400
Alexandria, Va. 22314

Office: (800) 814-3531 Fax: (800) 641-2255

Item No.

Page Count 26

June, 1996 #67

June 3, 1996

RECEIVED JUN 3 1996 MAIL MANAGEMENT S.C.

Via Hand Delivery
Honorable Vernon A. Williams
Secretary
The Surface Transportation Board
1201 Constitution Avenue, N.W.
Washington, D.C. 20423

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned case are an original and twenty copies of the Coalition for Competitive Rail Transportation's Brief identified as CCRT-11.

Also enclosed is a 3.5 inch Word Perfect diskette containing the text of CCRT-11.

Respectfully Submitted,

John T. Estes
Executive Director

ENTERED
Office of the Secretary
JUN 0 4 1996
4 Part of Public Record

ORIGINAL

CCRT-11

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

BRIEF OF
THE COALITION FOR COMPETITIVE RAILROAD TRANSPORTATION
IN OPPOSITION OR ALTERNATIVELY
IMPOSITION OF CONDITIONS

John T. Estes
Executive Director
Coalition for Competitive Rail Transportation
1029 North Royal Street, Suite 400
Alexandria, Va 22314
(800) 814-3531

CCRT-11

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

RECEIVED
JUN 3 1996
MAIL MANAGEMENT
I.C.C.

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

**BRIEF OF
THE COALITION FOR COMPETITIVE RAILROAD TRANSPORTATION
IN OPPOSITION OR ALTERNATIVELY
IMPOSITION OF CONDITIONS**

John T. Estes
Executive Director
Coalition for Competitive Rail Transportation
1029 North Royal Street, Suite 400
Alexandria, Va 22314
(800) 814-3531

June 3, 1996

I. Introduction and Summary

The Coalition for Competitive Rail Transportation (hereinafter referred to as CCRT) respectfully submits these comments in opposition to the application of the Union Pacific Corporation (UP) et al. and the Southern Pacific Rail Corporation (SP), et al., (hereinafter UP/SP or Applicants) seeking Board approval to merge in the above captioned matter. CCRT urges the Board to deny the application because of the extensive anti competitive harm that will be irrevocably caused to shippers. Alternatively, the Board should require various divestitures which have been advanced by other parties to this proceeding, which CCRT endorses as more fully set forth below, and which are essential to the preservation of a competitive shipping environment. Applicants proposal for the Board to exercise oversight responsibility for a limited period to monitor the impact of any potential anti competitive activity by the Applicants will not solve anti competitive problems that would result from approval of the merger conditioned on the BN/Santa Fe Agreement.. (As used herein the "BN/Santa Fe Agreement" refers to the September 25, 1995 Agreement between Applicants and BN/Santa Fe together with the November 18, 1995 supplement both of which were included with the Application, Vol I, pp 318-359 and the subsequent amendment resulting from the April 18, 1996 Agreement among the Applicants, BN/Santa Fe and the Chemical Manufacturers Association (the CMA Agreement)). As discussed below, such a provision would be of little or no value to shippers and would only serve to relieve the Board from exercising its immediate responsibility and meeting head on and definitively the issue presented by the Applicants and the objections raised by the opponents.

II. The Interest of CCRT

The membership of CCRT is unique. It consists of those shippers and shipper organizations who have independently and voluntarily come together as a result of apprehension about the future of their businesses resulting solely from the proposed merger as modified by the BN/Santa Fe Agreement. It has no other agenda.

A number of other established and reputable shipper organizations have filed comments with the Board urging various remedies in the form of conditions to the application in an effort to mitigate the otherwise serious adverse consequences that the merger would create for their membership e.g., The National Industrial Transportation League, The Society of the Plastics Industry, Mountain Plains Communities Shippers Association, Western Coal Traffic League and Western Shippers' Coalition. Other organizations, including many in the agricultural sector, have joined CCRT in urging an outright rejection of the merger application. CCRT joins this chorus of shipper concern.

Rather than address the concerns of the CCRT shippers, the Applicants chose unsuccessfully to resort in the discovery process to impugning the motives of CCRT shippers by alleging that one or more railroads were financing the activities and participation of CCRT in this proceeding. Although irrelevant in its view, CCRT readily conceded it is engaged in a wide ranging and broad based program to solicit support from shippers - not railroads. The Applicants have chosen to cower behind inflammatory, erroneous and unfounded allegations that CCRT shippers are engaged in some form of conspiratorial chicanery with disaffected railroads in an effort to mislead the Board. Meritorious shipper concerns should be addressed and not ridiculed. But no substantive effort has been made by Applicants to cope with shipper apprehensions raised by CCRT. There has been no meaningful analysis by the Applicants of the CCRT shipper fears as outlined in detail in the March 29, 1996 CCRT submission to the Board. (CCRT - 4 and CCRT - 5). Nevertheless Applicants tactics are regrettable and disclose a motive to prevail in this proceeding rooted in self interest and not the public interest. Self confident Applicants would not behave in this manner. Such behavior only serves to confirm the post merger fears of shippers. CCRT shippers are primarily concerned about one major aspect of this Proceeding: competitive access to rail transportation to preserve the viability of their businesses. Any doubt about their motives is easily removed by a review of the shipper statements included in the CCRT March 29th filing. (CCRT - 4). But Applicants tactics have backfired. Their motives should be questioned by the Board rather than those of many small shippers concerned solely with their economic survival which they believe is jeopardized by the merger.

III. Oversight Board Monitoring of an Approved Merger For Anti Competitive Behavior by Applicants is A Recipe for Potential Shipper Disaster

An illusory remedy has been advanced in the hope of attracting those with a pro merger bias to condition approval of the merger with a stipulation the Board retain jurisdiction for a period and monitor market place behavior of the

Applicants and the BN/Santa Fe. Theoretically it is contended this would discourage potential anti competitive action by the Applicants or, if necessary permit expeditious restructuring to correct any unforeseen competitive or other (including environmental) flaws.

Only those unfamiliar with the rapidity of reactions and the unforgiving nature of decisions in a free market would endorse this proposal. Only those would adopt such an approach who are insensitive to the management of an enterprise which is coping with limited working capital resources and contemporaneously shackled with recurring fixed payroll and other operating expenses in a struggle to survive in a competitive market. This suggestion would be rejected by anyone who has suffered through a missed shipment because of unavailability of rail cars (and lost a customer as a result) or who has incurred a loss on a commercial transaction because of unforeseen transportation costs (when rail transportation represents the difference between a profit and a loss). For small business shippers with such difficulties there is no tomorrow. Larger businesses may have a certain economic momentum solely by virtue of their size allowing the luxury of absorbing such interruptions and resulting financial setbacks as merely annoying inconveniences. Many others - some of whom submitted statements contained in the CCRT March 29th filing - cannot. When the UP/SP train rolls down the tracks ignoring a scheduled stop for the small grain elevator in Oklahoma or Colorado or the plastics or chemical plant in Louisiana or Texas leaving desperately required raw materials undelivered or a shipment unloaded, what is the small shipper to do? Unfortunately, some might very well go under. Board assurances of oversight coupled with the time and expense (under proposed Broad rules that expense is significant) that it would take for the shipper to get involved and for the Board to address the misdeeds of the Applicants is a meaningless remedy. These are the hard realities of the competitive commercial world...beyond the Beltway. There are literally hundreds of small and medium size shippers clustered along the right of way of the Applicants and of other parties to this Proceeding for whom continued Board monitoring would be an empty promise in the harsh competitive world in which they exist. Such an approach may have some benefit for the Applicants or for other railroads seeking to divide up the spoils, but it will not help shippers. Such a tidy arrangement for the railroads will be of no value for any party to this proceeding - including the Applicants - if in the process shippers have been effectively crippled. For many shippers there will be no tomorrow or a second chance when confronted with the monopolistic behavior of the Applicants. The Applicants may suggest that Board monitoring of the Wisconsin Central merger should serve as a precedent; however, that proceeding does not approach the scope of the current merger application, and was vigorously opposed by the CNW (which is now a part of Applicants' Union Pacific). In addition some reports indicate the Board's budget appears to be stretched to the limit without the added burden of monitoring the largest rail merger in history. The practical question then arises - will the Board have the personnel and resources available to adequately monitor this continued Proceeding in the year 2000?

The Board should not take refuge in an erroneous assumption that shippers would be protected from monopolistic activity by continued oversight. Oversight is not a remedy for a misguided Board decision and will not assist a shipper who has lost a customer through a missed shipment or delinquent delivery...a shipper fighting the threat of bankruptcy could not rely on Board promises of oversight.

IV. Shipper Opposition to the Merger is Intensifying and Increasing

As shippers have individually evaluated the potential impact of the merger on their separate businesses, an increasing sense of alarm has developed. When CCRT was first formed in late 1995, three or four companies reached out to others in the shipping community in an effort to determine the extent of the apprehension generated throughout the country by the merger proposal. The Applicants would have the Board believe this opposition is limited in quantity, low in quality, narrow in scope and economically insignificant. The Applicants would point instead to shippers locked into their existing trackage network who unquestionably fear retaliation if opposition is voiced to the merger proposal. The Board has evidence before it of the widespread potentially harmful competitive effect of the proposed merger. The impact of such evidence cannot be diminished by the touting of Applicants that a portion of their current customer base supports them. Of course they would! That is not and should not be the test. The test is where is there likely to be competitive harm if the merger is authorized and how will it be mitigated.

Some shippers believe such harm is so pervasive it cannot be mitigated. For example, the following agricultural organizations, representing thousands of shippers have requested Members of Congress to urge the Board to reject the merger out of hand:

American Farm Bureau Federation

American Corn Growers Association

Agricultural Retailers Association

Interstate Agricultural Grain Marketing Commission

National Association of Wheat Growers

National Farmers Union

National Grange

National Cotton Council of America

USA Rice Federation

National Soy Bean Association

As of this writing other national agricultural groups are considering similar action. The widespread concern throughout the country by shippers in many different sectors of the economy creates for the Board an exceptionally difficult problem: how can it fulfill its statutory responsibility and rule that this application is "consistent with the public interest" (49 U. S. C. Sec. 11344(c))? How can the merger be in the public interest in view of such unimpeachable and widespread evidence of alarm from shippers? As noted above, it is not sufficient for the Applicants to endeavor to rebut such evidence and urge the Board to rely on statements from customers who may fear retaliation unless they dance to the

UP/SP tune. CCRT shippers on the other hand are an independent ad hoc group unencumbered by such commercial threats of transportation reliability from any party to this proceeding.

V. Two Critical Shipping Crucibles: The Central Corridor and Oklahoma-Texas-Louisiana (with Related Lines) Are Essential Clues for an Effective Competitive Analysis

If an accurate competitive analysis were made of only these areas, the merger should fail. The national economic importance of commercial activity undertaken in these six or seven states and the negative impact of reduced rail transportation options for shipments to and from this area must be carefully evaluated by the Board. This represents the "hot box" of the geographically merged area. The concerns of the shipping community in these critical areas that are heavily impacted by the merger are unmistakable. The statements submitted and action taken by public officials from these states mirror the depth and sincerity of the shipping community reaction.

In Oklahoma, Members of Congress (including both U.S. Senators), the State legislature and the Governor have gone on record expressing reservations or requesting Board mandated conditions to the application. The Railroad Commission of Texas unanimously urged rejection of the application as currently proposed as have a number of Members of the Texas Legislature and of the Texas Congressional delegation. In Louisiana similar reaction has been expressed to the Board by both U.S. Senators. In the Central Corridor the problems that shippers will encounter are documented for the Board in both the March 29,1996 filing of CCRT and in evidence submitted by other parties.

In spite of such overwhelming opposition to the merger, it is not sufficient for the Board to total the "for" and "against" positions of officials and shippers from this highly significant geographical area (or from any other area for that matter) and reach a conclusion about the merger based on such a superficial analysis. Rather, the Board is urged to carefully evaluate the basis for the views that are advanced in arriving at the statutorily required decision of whether the merger meets the public interest test. There is obviously wide latitude in defining "public interest". Such an interest can be local and narrow or it can encompass states, regions and corridors. In any event the evidence before the Board sustains the conclusion that neither the application nor the BN/Santa Fe Agreement justifies any conclusion other than that the anti competitive impact of the merger at a minimum requires significant divestiture conditions.

VI. If the Board Approves the Merger, It Should Be Conditioned Upon Divestiture of Various Lines

Other parties have briefed the Board on its authority to impose divestiture conditions and the necessity of such action when the application would not be in the public interest and that the trackage rights granted under the BN/Santa Fe Agreement will not provide true competitive options for shippers. Clearly the potential harm to shippers who are represented by CCRT will not be outweighed by the application as amended by the BN/Santa Fe Agreement. CCRT strongly advocates denial of the application. The failing company doctrine advanced by the Applicants with respect to the Southern Pacific is as revealed in evidence before the Board without merit. If the Board fails to reject the application and authorizes the merger with conditions, CCRT urges the following mitigating action:

A - The Board must address the significant anti competitive results in the New Orleans to Houston and Houston to St. Louis corridors by ordering divestiture;

B - Divestiture should also be ordered in the critical area from Houston to the Brownsville/Mexican Border gateway;

C - In the Central Corridor, the Board should order divestiture of the line running between Stockton/Oakland, CA and Denver/Pueblo, CO and provide for the transfer of SP's trackage rights from Kansas City to Herrington;

D - Provision should be made for the existence of a third independent competitively viable line in the Oklahoma region; and

F - As appropriate, all divestiture conditions should include associated yards and facilities.

Whether or not divestiture has been a commonly imposed condition in the past in merger proceedings is irrelevant. As often stated, not only is this the largest merger in the history of the nation, but it is the latest in an epidemic of railroad mergers. This development alone renders moot any precedent that may in the past have been relied upon in assessing appropriate merger conditions, including divestiture. In addition the Board should be guided by policy articulated by Congress in the ICC Termination Act, 49 U.S.C. Sec. 11124 (c), which explicitly provides that the Board may condition approval upon divestiture of parallel tracks.

Finally, CCRT urges a broad divestiture remedy in spite of the reliance by the Applicants on the BN/Santa Fe Agreement. That agreement leaves much to be desired because it fails to address the ability or interest of BN/Santa Fe to serve the affected shippers and the investment that would be required by BN/Santa Fe to accomplish that and the new investment required to serve those shippers in competition with that currently in place by the Applicants. Furthermore there is no assurance that BN/Santa Fe would follow through and make such an investment. The BN/Santa Fe Agreement granting trackage rights is no substitute for an independent railroad operating its own facilities. The Board is well aware of the fact that a landlord tenant relationship is no substitute for that of an owner. In addition, for the BN/Santa Fe to provide competition on these routes, the charges by Applicants to BN/Santa Fe must be sufficiently low to enable the BN/Santa Fe to generate a profit if it is to be a realistic competitor.

VII. A Thorough Environmental Impact Statement Is Essential

CCRT continues to urge the Board to require an environmental impact statement. A proforma assessment of the environmental issues raised by the merger is not appropriate given the magnitude and complexity of the transaction. Too often economic consequences of proposed action overshadow other statutory obligations of regulatory agencies. One of those obligations is the impact on the environment. Unless the Board revisits this issue it is respectfully submitted that these proceedings could be fatally flawed.

VIII. Conclusion

In an effort to assist the Board in meeting its obligation to determine whether this merger is in the public interest, attached as Exhibit A is a partial index of public officials, organizations and others who either oppose the merger under any conditions or who have expressed opposition unless significant anti competitive adjustments are ordered. A number of major organizations are included on this list representing literally thousands of merger opponents. We recognize that in all probability no referendum was conducted by these groups, but we also note that they are authorized to speak for their membership. CCRT points this out not to stress the number of shippers and others who have directly or indirectly spoken out against the application (although that is impressive), but with the hope and expectation the Board will take judicial notice of the widespread opposition to the merger in nearly all sectors of the economy.

In summary: Shippers, key elected officials and the public oppose this merger. It is not in the public interest and should not be authorized.

Respectfully submitted,

John T. Estes
Executive Director,
Coalition for Competitive Rail Transportation

June 3, 1996

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Exhibit A

Federal, State & Local Agencies & Officials, Shippers, Shippers' Associations, & Others Who Either Oppose the UP/SP Merger or Have Filed Concerns About It.

Federal Agencies

- The United States Department of Agriculture
- The United States Department of Justice

State Government

- Kirk Fordice, Governor of Mississippi
- Frank Keating, Governor of Oklahoma
- M.J. "Mike" Foster, Jr., Governor of Louisiana
- Jim Edgar, Governor of Illinois
- Bill Graves, Governor of Kansas
- Mel Carnahan, Governor of Missouri
- Dan Morales, Attorney General of Texas
- Winston Bryant, Attorney General of Arkansas
- Richard P. Ieyoub, Attorney General of Louisiana
- Jeremiah W. Nixon, Attorney General of Missouri
- Frankie Sue Del Papa, Attorney General of Nevada
- Oklahoma State Legislature
- Louisiana State Legislature
- State of Washington
- The Iowa Department of Transportation

- The Kansas Department of Transportation
- The Minnesota Department of Transportation
- The Texas Railroad Commission
- Public Service Company of Colorado
- Public Utilities Commission of the State of California
- Tennessee Valley Authority
- Sen. J.E. "Buster" Brown (TX)
- Rep. John R. Cook (TX)
- Rep. Rob Junell (TX)

City and County Government

- Chaffee County Board of Commissioners, Chafee County, CO
- Enid Board of Trade
- Fremont County Board of Commissioners, Fremont County, CO
- Lower Colorado River Authority and City of Austin, Texas
- City of Susanville, California
- Lassen County, California
- Modoc County, California
- City of Alturas, California
- City of Florence, Colorado
- City of Fruita, Colorado
- City of Hoisington/Hoisington Chamber of Commerce, Hoisington, Kansas
- City of Reno, Nevada
- City Public Service Board of San Antonio

- City of Winnemucca and County of Humboldt
- Tyler, Texas Chamber of Commerce
- County of Placer, California
- Port of Corpus Christi
- Sedgwick County, Kansas/Wichita, Kansas

United States Senate

- Sen. Christopher (Kit) Bond (R-MO)
- Sen. John Breaux (D-LA)
- Sen. Byron L. Dorgan (D-ND)
- Sen. Charles E. Grassley (R-IA)
- Sen. Tom Harkin (D-IA)
- Sen. James M. Inhofe (R-OK)
- Sen. J. Bennett Johnston (D-LA)
- Sen Nancy Kassebaum (R-KA)
- Sen. Don Nickles (R-OK)

United States House of Representatives

- Rep. Xavier Bercerra (D-CA)
- Rep. Robert A. Borski (D-PA)
- Rep. George Brown (D-CA)
- Rep. John Bryant (D-TX)
- Rep. Jim Chapman (D-TX)
- Rep. James E. Clyburn (D-SC)
- Rep. Ronald Dellums (D-CA)

- Rep. Julian Dixon (D-CA)
- Rep. Lloyd Doggett (D-TX)
- Rep. Chaka Fattah (D-PA)
- Rep. Henry B. Gonzalez (D-TX)
- Rep. Gene Green (D-TX)
- Rep. Tim Holden (D-PA)
- Rep. John Hostettler (R-IN)
- Rep. Tim Johnson (D-SD)
- Rep. Paul Kanjorski (D-PA)
- Rep. Tom Lantos (D-CA)
- Rep. Sheila Jackson Lee (D-TX)
- Rep. Ron Lewis (R-KY)
- Rep. Zoe Lofgren (D-CA)
- Rep. Frank Lucas (R-OK)
- Rep. Matthew Martinez (D-CA)
- Rep. Paul McHale (D-PA)
- Rep. George Miller (D-CA)
- Rep. David Minge (D-MN)
- Rep. Nancy Pelosi (D-CA)
- Rep. Earl Pomeroy (D-ND)
- Rep. Pat Roberts (R-KS)
- Rep. Lucille Roybal-Allard (D-CA)
- Rep. Fortney Pete Stark (D-CA)

- Rep. Charles Stenholm (D-TX)
- Rep. Billy Tauzin (R-LA)
- Rep. Frank Tejada (D-TX)
- Rep. Esteban Torres (D-CA)
- Rep. Charles Wilson (D-TX)
- Rep. Lynn Woolsey (D-CA)
- Rep. Harold Volkmer (D-MO)

Agriculture & Trade Groups

- Agricultural Retailers Association
- American Corn Growers Association
- American Farm Bureau Federation
- Arizona Electric Power Cooperative, Inc.
- Colorado Association of Wheat Growers
- Colorado Corn Administrative Committee
- Colorado Wheat Administrative Committee
- Colorado Farm Bureau
- Corn Refiners Association, Inc.
- Idaho Barley Commission
- Idaho Wheat Commission
- Interstate Agricultural Grain Marketing Commission
- Kansas Farm Bureau
- Kansas Grain and Feed Association
- Missouri Corn Growers Association

- Montana Farmers Union
- Montana Wheat and Barley Committee
- National Association of Wheat Growers
- National Cotton Council of America
- National Farmers Union
- National Grange
- North Dakota Farm Growers Association
- Oklahoma Grain & Feed Association
- Rocky Mountain Farmers Union
- Save the Rock Island Committee, Inc.
- Texas Farm Bureau
- Texas Wheat Producers
- USA Rice Federation
- Western Coal Traffic League
- Wisconsin Public Service Corporation

Major Shippers in Key Locations

- AA#1 Limited Liability Company
- American Compressed Steel
- American Suzuki Motor Corporation
- Arizona Chemical and Quantum Chemicals
- Asarco Incorporated
- BXB Corporation
- Cargill, Incorporated

- Central Power and Light Company
- Certain Teed Corporation
- Chrysler Corporation
- Darling International Inc.
- Dow Chemical
- Entergy
- Enterprise Products Company, Houston, TX
- Farmland Industries
- FINA Oil and Chemical
- Formosa Plastics
- Geon Company
- Huntsman
- Hydro West, Inc.
- IBP, Inc.
- IES Utilities Inc.
- Illinois Power Company
- Industry Urban-Development Agency
- International Paper
- Kennecott Energy Company
- Kimberly Clarke Corporation
- Magma Copper Company
- Monsanto
- Montana Rail Link, Inc. Missoula, MT

- Montell USA, Inc. and Olin Corporation
- North American Logistic Services, A Division of Mars, Incorporated
- Phillips Petroleum
- Procter & Gamble
- Quantum Chemical Corporation
- Rio Bravo Poso and Rio Bravo Jasmin
- Sierra Pacific Power Company and Idaho Power Company
- Shell Chemical
- Society of Plastics Industries, Inc.
- Springfield Plastics, Inc. and Brandt Consolidated, Inc.
- Stimson Lumber Company
- Texas Utilities Electric Company
- Union Carbide Corporation
- United States Gypsum Company
- Viacom Inc.
- Weldwood of Canada Ltd.
- Weyerhauser Company
- Wisconsin Electric Power Company
- Wisconsin Power & Light Company and Wisconsin Public Service Corporation

National Labor Unions

- Allied Rail Unions
- American Train Dispatchers
- International Brotherhood of Teamsters

- The Brotherhood of Maintenance of Way
- The Brotherhood of Railroad Signalmen
- Transportation Trades Department, AFL-CIO
- Transportation Communications International Union

National & Regional Shipper Organizations

- Coalition for Competitive Rail Transportation, with more than 165 members
- Joint Shippers'
- Kansas-Colorado-Oklahoma Shippers Association
- Mountain Plains Shippers Coalition
- National Industrial Transportation League, with more than 1400 members
- Texans for Competitive Rail
- Western Shippers Coalition

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing brief have been served on June 3, 1996 by hand delivery on the Applicants and by hand delivery or first class prepaid mail on all other parties of record.

John T. Estes
Executive Director

June 3, 1996

STB FD 32760 6-3-96 E 83966

83966

REDACTED - To be filed on the public record TM-39

Item No.________________

Page Count 59

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.

Finance Docket No. 32760, Sub No. 14

THE TEXAS MEXICAN RAILWAY COMPANY
-- TERMINAL TRACKAGE RIGHTS OVER LINES OF
THE HOUSTON BELT & TERMINAL RAILWAY CO.

BRIEF OF
THE TEXAS MEXICAN RAILWAY COMPANY

ORIGINAL

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

June 3, 1996

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888 17th Street, N.W., Suite 600
Washington, D.C. 20006-3939
(202) 298-8660
Attorneys for The Texas
Mexican Railway Company

June 3, 1996

TABLE OF CONTENTS

LIST OF ABBREVIATIONS AND DEFINED TERMS

Applicants	Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corporation, and The Denver and Rio Grande Western Railroad Company
ATSF	The Atchison, Topeka and Santa Fe Railway Company
BNSF	Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company
BNSF Settlement	The agreement between the Applicants and BN/Santa Fe dated September 25, 1995 as supplemented by the Supplemental Agreement between the Applicants and BN/Santa Fe dated November 18, 1995, both appearing in Volume I of the Applicants' Railroad Merger Application, UP/SP-22
Board	The Surface Transportation Board
CMA	Chemical Manufacturers' Association
CMA Agreement	The agreement between the Applicants, BN/Santa Fe, and the Chemical Manufacturers' Association dated April 18, 1996, as submitted to the Board by the Applicants in UP/SP-219
Conrail	The Consolidated Rail Corporation
DOA	U.S. Department of Agriculture
DOJ	U.S. Department of Justice
DOT	U.S. Department of Transportation
FNM	Ferrocariles Nacionale de Mexico
HB&T	Houston Belt & Terminal Railway Company

KCS	Kansas City Southern Railway Company
KCSI	Kansas City Southern Industries
Mexrail	Mexrail, Inc.
NAFTA	The North American Free Trade Agreement
NITL	The National Industrial Transportation League
PTRA	Port Terminal Railway Association
SP	Southern Pacific Transportation Company
STB	The Surface Transportation Board
Tex Mex	The Texas Mexican Railway Company
TMM	Transportacion Maritima Mexicana S.A. de C.V.
TRC	The Texas Railroad Commission
UP	Union Pacific Railroad Company
UPSP	The railroad Applicants contemplate as a result of the proposed merger

TABLE OF AUTHORITIES

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

BRIEF OF THE TEXAS MEXICAN RAILWAY COMPANY

INTRODUCTION AND SUMMARY

The Texas Mexican Railway ("Tex Mex"), chartered in 1875, is one of the oldest railroad companies in the United States. It owns and operates 157 miles of railroad between Corpus Christi, Texas on the Gulf of Mexico and Laredo, Texas on the Rio Grande. Tex Mex and UP are the two U.S. railroads serving Laredo. Laredo is the main rail gateway between the United States and Mexico; in 1994 Laredo handled 55% of the total tonnage moving by rail between the two countries.

Tex Mex connects with SP at Corpus Christi. Tex Mex and SP together provide the only competition to UP for traffic moving through Laredo. Although UP carries most of that traffic, the competition from Tex Mex and SP has been very effective in keeping UP's rates and service reasonable.

Tex Mex believes that the merger of UP and SP (collectively "Applicants"), as proposed by Applicants, will greatly lessen rail competition in the markets served by Tex Mex. Tex Mex also believes that the merger will very likely divert so much traffic away from Tex Mex as to make the operation of its line not viable, with the result that a number of Tex Mex's local shippers will lose essential rail service for which they will have no feasible transportation alternatives.

For reasons detailed at length in Tex Mex's responsive application and Tex Mex's rebuttal, Tex Mex submits that the competitive solution proffered by Applicants -- service by BNSF via trackage or haulage rights to a connection with Tex Mex at Robstown, Texas (a place near Corpus Christi where the Tex Mex line intersects the UP line) -- falls far short of preserving the competition that now exists in the markets served by Tex Mex. Applicants' claims to the contrary notwithstanding, Applicants' settlement with BNSF will not make BNSF an adequate competitive substitute for SP in those markets. Furthermore, even if it did, the resulting reduction in the number of Class I railroads serving the U.S.-Mexican market from three to two would still reduce competition in that market to an unacceptable degree.

Accordingly, on March 29, 1996 Tex Mex filed a responsive application (TM-23) requesting the Board to condition any approval of the merger of UP and SP upon the Applicants' granting Tex Mex trackage rights over certain UP and SP lines in Texas from Robstown and Corpus Christi to Houston and from Houston to a connection with KCS in Beaumont.[1/] Tex Mex also filed an application under former 49 U.S.C. § 11103 for terminal trackage rights over two short segments of the Houston Belt & Terminal Railway Company's ("HB&T") terminal trackage in Houston in order to facilitate Tex Mex's efficient operation through Houston and Tex Mex's interchange with other railroads in Houston.

Tex Mex seeks these rights as a supplement to, not in lieu of, the rights of BNSF under its settlement with Applicants. Although Tex Mex submits that the BNSF Settlement falls far short of restoring the competition that will be lost from the merger, it does not oppose the BNSF Settlement. Rather, Tex Mex submits that additional competitive alternatives are needed in order to come close to preserving the competition that currently exists. Tex Mex believes that the rights it seeks are needed for two reasons: (1) to preserve for shippers of goods between the United States and Mexico a third independent route for that transportation, and (2) to free Tex Mex and its shippers from

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1/ These lines are described in detail at pages 3-5 of TM-23. Except for the segment between Robstown and Placedo, the route sought by Tex Mex between Robstown and Houston is different from the route BNSF would use under the BNSF Settlement. BNSF would operate over the UP line along the Gulf Coast between Robstown and Algoa (where the UP line connects to a BNSF line), whereas Tex Mex seeks rights to operate over the SP's present route from Placedo north to Flatonia and east from Flatonia to Houston.

With limited exceptions, Tex Mex seeks overhead rights only. It does not seek the right to serve any shippers currently served only by UP or SP. It does seek the right to serve any shippers currently capable of receiving service from both UP and SP, directly or through reciprocal switching, and it seeks the right to interchange traffic with UP, SP or any other railroad at any interchange point on the trackage rights lines.

having to depend completely on a very doubtful connection with BNSF at Robstown.

Many other parties have concluded that the merger as proposed by Applicants will have severe anticompetitive consequences throughout the western United States, including in the markets served by Tex Mex. Most importantly, the submission of the United States Department of Justice provides compelling evidence of the unprecedented degree of harm to competition that the merger will cause, which will not be alleviated by the BNSF Settlement. With respect specifically to U.S.-Mexican transportation, the Department of Agriculture has advised the Board of the importance of the Mexican market to U.S. farmers and is urging the Board to ensure the preservation of a third alternative to a merged UPSP and BNSF in that market for agricultural shippers. Similarly, all of the relevant agencies of the State of Texas -- the Texas Railroad Commission, the Texas Department of Transportation and the Texas Attorney General -- are urging the Board to disapprove the merger as too anticompetitive or to impose conditions, including those sought by Tex Mex, to mitigate its anticompetitive effects. These views are echoed by many shippers and shipper associations, including the National Industrial Transportation League.

Applicants have made a number of arguments in response to Tex Mex's responsive application. Their two main arguments are, first, that BNSF will be a much stronger competitor to a merged UPSP for U.S.-Mexican traffic through its connection with Tex Mex at Robstown than SP is today, notwithstanding the contrary conclusion of Tex Mex, the Department of Justice, the Department of Agriculture, the State of Texas, NITL and many other parties. Second, Applicants contend that the rights sought by Tex Mex will be over a route that is inferior and will be less attractive to shippers than the route BNSF will be getting from Houston to Robstown. In short, they claim that BNSF will be good for Tex Mex and what Tex Mex seeks will not.

Applicants' contentions are not correct for reasons that will be discussed in greater detail in this brief. An equally important point that should be stressed, however, is that Applicants' arguments, even if accepted, provide no persuasive reasons for denying Tex Mex's responsive application. If Applicants are right that BNSF will be better for Tex Mex than SP and that the route Tex Mex seeks will be inferior to BNSF's route, then granting Tex Mex's application would have little adverse impact on Applicants or BNSF, because little traffic would move over Tex Mex's trackage rights.

However, if Applicants are not correct, and if Tex Mex, DOJ, Texas and others are right about the major anticompetitive consequences of the merger, then <u>not</u> granting the rights sought by Tex Mex would have very serious consequences for competition. It would deprive shippers of an important competitive alternative to a merged UPSP. That alternative, even if a shipper did not use it, would impose a significant restraint on UPSP's rates and a substantial spur to the quality of its services.

For these reasons, any uncertainties about the competitive effects of the merger as proposed by Applicants should be resolved in favor of granting the rights sought by Tex Mex. Given the conclusions of the federal and state agencies with primary responsibilities for protecting competition that this merger will have profound anticompetitive effects, conditions designed to mitigate some of those effects should not be rejected by this Board unless there is compelling evidence that those conditions will substantially harm Applicants or reduce the public benefits of the transaction. There is no such evidence in this case; indeed, Applicants have made no such claim.

STATEMENT OF FACTS

1. The Texas Mexican Railway

As described in greater detail in the verified statement of Tex Mex's president, Larry Fields (TM-23 at 36-43), Tex Mex is a Class II railroad that has been providing service since 1875 over its 157-mile line between Laredo and Corpus Christi, Texas. Tex Mex has 159 employees, 20 locomotives and 950 rail cars. Tex Mex connects and interchanges traffic with (1) the Mexican state railroad, Ferrocarriles Nacionale de Mexico ("FNM") at the International Bridge between Laredo and Nuevo Laredo, Mexico, (2) SP at Corpus Christi,[2/] and (3) UP at Robstown, 13 miles west

2/ As can be seen on the map, SP reaches Corpus Christi from Houston and points north and west of Houston via its line from Flatonia south to Placedo and via trackage rights over the UP's line from Placedo to Corpus Christi.

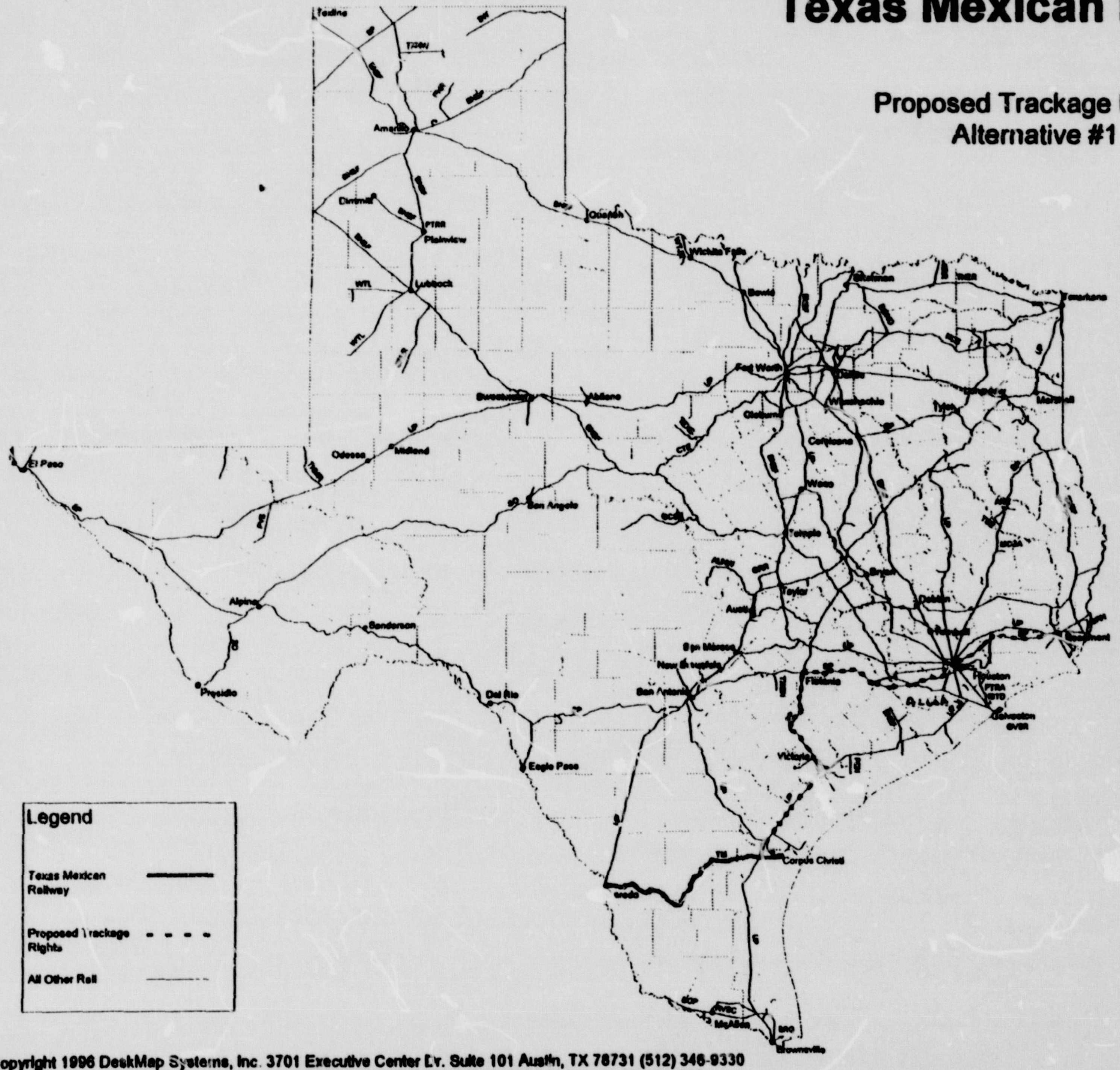
of Corpus Christi where Tex Mex's line crosses the UP's so-called Brownsville Line along the Gulf Coast between Algoa and Brownsville, Texas. These lines and the trackage rights sought by Tex Mex are shown on the map on the following page.

Almost three-quarters of Tex Mex's traffic in 1994 was bridge traffic between points in Mexico and points in the United States. This traffic amounted to 26,420 carloads. Tex Mex interchanged this traffic with FNM at the International Bridge and with SP and UP at Corpus Christi and Robstown. Because UP has its own route to Laredo through San Antonio, less than five percent of the cars that Tex Mex interchanged at Corpus Christi and Robstown in 1994 were interchanged with UP; more than 95 percent were interchanged with SP.

Tex Mex also provides rail services to more than 30 shippers located on its line. As shown in letters they have submitted to the Board (some of which are reproduced in TM-23, Exhibit 25), many of these shippers depend on Tex Mex's rail service and would be seriously harmed if Tex Mex went out of business. For example, Dempsey Barr, the President of Barr Iron & Metal Company of Alice, Texas, submitted a letter to the Board in this proceeding in which he described the company as "depend[ent] solely on Tex Mex as our only ways of transportation into Mexico for scrap steel and other salvage products." For Barr Iron & Metal, there is no alternative: "There is no way to truck our salvage to and from various points with Tex Mex not being here." According to Mr. Barr, the loss of the Tex Mex as a result of the

Texas Mexican Railw[illegible]

Proposed Trackage Rights
Alternative #1



Reporting	Name
ANR	Angelina & Neches River
AUNW	Austin & Northwestern
BNSF	Burlington Northern & Santa Fe
BOP	Border Pacific
BRG	Brownsville & Rio Grande International
CCTA	Corpus Christi Terminal Assoc
CTE	Cen-Tex
DART	Dallas Area Rapid Transit
DGNO	Dallas, Garland & Northeastern
FWDB	Fort Worth & Dallas Belt
FWDR	Fort Worth & Dallas
FWWR	Fort Worth Western
GCSR	Gulf Colorado & San Saba
GRR	Georgetown
GVSR	Galveston
HBTD	Houston Belt & Terminal
KCS	Kansas City Southern
KRR	Kiamichi
LSRR	Lone Star
MCSA	Moscow, Camden & San Augustine
PCN	Point Comfort & Northern
PNR	Panhandle Northern
PTRA	Port Terminal RR Assoc
PTRR	Plainview Terminal Railroad
PVS	Pecos Valley Southern
RSS	Rockdale, Sandow & Southern
RVSC	Rio Valley Switching Company
SO	South Orient
SP	Southern Pacific
SPLR	Southern Plains Lamesa
SRN	Sabine River & Northern
SW	Southwestern
TCT	Texas City Terminal
TM	Texas Mexican Rwy
TN	Texas Northern
TNER	Texas Northeastern
TNMR	Texas-New Mexico
TSE	Texas South-Eastern
TXEC	Texas Central
TXGN	Texas, Gonzales & Northern
TXNW	Texas North Western
TXOR	Texas & Oklahoma
TXTC	Texas Transportation
UP	Union Pacific
WRRC	Western
WTJR	Wichita, Tillman & Jackson
WTL	West Texas & Lubbock

merger "would probably close our operations down." Mr. Barr lists eleven other companies in Alice, TX that similarly depend on Tex Mex.

Corpus Christi Grain Co. is also dependent on Tex Mex's rail service for its grain exports to Mexico. Its President, William E. Bailey, has submitted a statement explaining that neither trucking nor UP are feasible alternatives for this traffic. He states that his company's "success as a grain elevator is reliant on the Tex Mex Railway being a strong and viable railroad." According to Mr. Bailey:

> If the Tex Mex is not a viable railroad, we will not be able to compete with rail grain to Mexico because the UP is not an alternative for us. The UP has proven over the past 18 years that they are more interested in a $2400 dollar long haul to Laredo (approximately 900 miles) than a $700 dollar short haul to Laredo (150 miles).
>
> UP will not offer Corpus Christi Grain Co. a competitive alternative route to Mexico in the absence of the Tex Mex Railway.

Similarly, Abel Gonzalez, Jr. of Global Grain Co., has submitted a statement attesting that "[t]he only rail alternative available for the South Texas shipper is the Tex Mex Railroad," which is "totally committed in supplying cars from the Corpus Christi-Laredo grain belt area to Mexico," as opposed to UP and SP which, due to the short distance to Mexico relative to their Midwestern shippers, "refuse to service their own line elevators with rail cars during harvest and Mexican peak buying season."

As Mr. Fields documents, Tex Mex has made great improvements in recent years in efficiency, productivity and safety. Fields

VS, TM-23 at 38-39. It has also increased its local traffic substantially, particularly in the last 12 months. However, it has experienced a sharp dropoff in interline traffic from SP, which became progressively worse since March, 1995 (which happens to be when UP and SP began merger discussions). Part of this decline is the result of actions by the BN and Santa Fe before the consummation of their merger in September, 1995 and by BNSF after that date in imposing a $300 per car surcharge on all grain cars originating on the BNSF system destined for Laredo. Historically, Tex Mex had received substantial numbers of grain cars from SP at Corpus Christi which had originated on BN or Santa Fe (in 1994, for example), but these actions have cut that traffic completely. Id. at 40-41.[3/]

As explained in the verified statement of Brad L. Skinner, TM-23 at 142 to 156), for most of this century, Tex Mex was a subsidiary of FNM. In 1982 all of Tex Mex's stock was purchased by Mexrail, Inc., a Delaware corporation that was then a wholly-owned subsidiary of Transportacion Maritima Mexicana ("TMM"), a transportation company headquartered in Mexico City. TMM recently formed a joint venture with Kansas City Southern

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3/ Mr. Fields also states of these actions: "I understand that BNSF attributes these actions to its frustrations with SP's poor service. In my opinion, however, these actions also indicate that BNSF has neither the interest nor the incentive to compete as aggressively with UP for traffic to Mexico as SP had, at least before it began discussing merger with UP." As we discuss in the Argument, these actions by BNSF also give Tex Mex substantial reasons to be skeptical of the claims of Applicants and BNSF that BNSF will prove to be a strong connection to Tex Mex for U.S.-Mexican traffic.

Industries, Inc. ("KCSI"), which controls KCS, to bid on rail lines or concessions (e.g., trackage rights) in Mexico that will be sold later this year as part of the privatization of Mexico's rail system, and to operate any lines or concessions acquired. In November, 1995 KCSI also purchased 49 percent of the stock of Mexrail from TMM.

2. Laredo and the Other U.S.-Mexican Rail Gateways

As noted, Tex Mex serves Laredo, where it interchanges traffic with FNM. The only other U.S. railroad serving Laredo is UP, which serves it via a line running south from San Antonio.

Laredo is the principal rail gateway between the United States and Mexico. In 1994, 55 percent of the total tonnage moving by rail through the eight U.S.-Mexico gateways moved through Laredo.4/ This fact is due to its superior infrastructure and its location on the shortest route between many U.S. and Mexican origins and destinations. TM-34, Ellebracht RVS at 5.

Significant volumes of grain and other agricultural products, minerals, woodpulp, paper products, automobiles and automobile parts, and other metals flow through the Laredo gateway. Ellebracht VS, TM-23 at 91. Much of this is bulk traffic that moves long distances and for which truck transport is not a viable alternative. Id. at 92.

4/ The other seven gateways are: Calexico, Naco, Nogales, El Paso, Presidio, Eagle Pass and Brownsville.

Although UP traditionally has handled most of the freight that moves over the Laredo gateway, the SP-Tex Mex route has accounted for a substantial amount of that traffic and offers "customers an alternative . . . of significant value." Id. at 67-68. In fact, for shipments originating on other railroads not including UP, the SP-Tex Mex route has been the overwhelming choice of those railroads and shippers for traffic moving to Laredo. Id. at 66. As we discuss more fully in the Argument, the Tex Mex-SP route has provided the only competition to UP for traffic through the Laredo gateway and the principal competition for UP for U.S.-Mexican traffic in general.

Although Laredo is the preferred rail gateway to Mexico and has a number of advantages, other gateways also handle a substantial amount of U.S.-Mexican rail traffic, and, as we will discuss further in the Argument, serve as alternative routes for many movements. The significant gateways for rail traffic to and from the industrial centers of Mexico are, in order of volume, Laredo, El Paso, Brownsville and Eagle Pass.[5/] UP currently serves Laredo, El Paso and Brownsville. SP serves Laredo (with Tex Mex), El Paso and Eagle Pass. BNSF serves El Paso; since the

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5/ Presidio, the fifth Texas gateway, is served by BNSF and the South Orient Railroad.

The three non-Texas gateways are all served by SP and will be served by UPSP following the merger. The BNSF Settlement does not grant BNSF access to any non-Texas gateways.

BNSF merger, it also serves Eagle Pass via haulage rights over SP's line and will obtain trackage rights to Eagle Pass and Brownsville under the BNSF settlement. In 1994, UP and SP together accounted for percent of the rail tonnage between the U.S. and Mexico via all gateways. Ellebracht VS, TM-23 at 77, as corrected by TM-28, errata filed April 12, 1996.[6]

ARGUMENT

I. TEX MEX IS A VITAL LINK IN MAINTAINING COMPETITIVE RAIL SERVICE BETWEEN THE UNITED STATES AND MEXICO.

As noted in the Statement of facts, the SP-Tex Mex route provides the only competition today to UP for rail traffic moving between the United States and Mexico via Laredo and provides the principal competition to UP for U.S.-Mexican traffic moving via all gateways. That competition is substantial and extremely important in keeping the rates for that traffic down and the quality of service up.

As Mr. Ellebracht discusses, although UP has carried most of the freight over the Laredo gateway, for traffic where the shipper at origin has a choice of routings "the SP-Tex Mex route has a respectable market share." Ellebracht VS, TM-23 at 67. Indeed, his analysis of traffic data shows that "neutral origins

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[6] This percentage figure includes traffic that SP moved to and from Mexico with Tex Mex but does not include traffic that Tex Mex moved to and from Mexico without SP -- i.e., Mexican traffic to or from Tex Mex's local customers, like Corpus Christi Grain Company. This "Tex Mex-only" traffic accounted for percent of the total U.S.-Mexican rail tonnage in 1994 and percent of the U.S.-Mexican rail tonnage moving through Laredo.

such as those on ATSF, BN and KCS strongly preferred the SP-Tex Mex route. That route handled a weighted average of 73.4% of the carload traffic originated by ATSF, BN and KCS destined to Laredo." Id. at 66. Mr. Ellebracht credits the competitiveness of the Tex Mex-SP route to the fact that SP has devoted substantial efforts and resources in recent years to developing business to and from Mexico. Among other things, "SP has a substantial sales force in Mexico, far surpassing BNSF's efforts, and rivalling UP's." Id. at 72. In addition SP, like UP, has "fostered close relationships with the management of [FNM] and [has] made substantial investments in Mexico to improve business opportunities." Id. at 67. Tex Mex, although with far less resources, has worked closely with SP to develop business to and from Mexico, by, among other things, establishing a "despacho previo" service and a car hire reclaim service." Id. at 74.[7]

Mr. Ellebracht's conclusions are echoed in the statements of many shippers that have been submitted in support of Tex Mex's responsive application. Exhibit 24 of TM-23 includes verified statements submitted by 16 shippers in support, and Exhibit 25 includes supporting letters of an additional 83 shippers. Tex

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[7] Based on his 14 years' experience at SP, Mr. Ellebracht's strongly disputes Applicants' claims that SP has become much less competitive, as reflected by a recent period of particularly bad service. Mr. Ellebracht points out that "ATSF, BN and UP have also experienced periods of particularly bad service", and notes recent reports that SP's traffic is increasing, counter to the industry's trend. Id. at 73. Mr. Ellebracht concludes: "In fact, it seems clear to me that one of the reasons that UP is acquiring SP is because SP is too effective a competitor." Id. at 72.

Mex submitted eight more verified statements in TM-26. These statements show the critical importance of the competitive alternative provided by Tex Mex and SP to shippers of goods between the United States and Mexico. The following statements are illustrative:

> 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. * * * 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. . . . We are also concerned that the combined UP-SP will concentrate only on the larger customers, leaving smaller customers (many of whom we also represent) without competitive rates or service to continue their import and export activity. TM-26, Daniel B. Hastings, Jr. VS.

> For years the UP and SP have competed for [Degussa Corporation's] Mexico business. As a result our company has benefitted from lower rates and has been successful in penetrating the Mexico market. * * * We are very concerned that the UP/SP merger will eliminate rail competition that current 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. * * * We believe that [BNSF] will not be competitive from a rate or service standpoint. TM-26, Andrew J. Polo VS.

> Annually, [Georgia-Pacific Corporation] ship over one hundred thousand tons of pulp and paper into Mexico by rail through the Eagle Pass and Laredo gateways. * * * The merger of Union Pacific and Southern Pacific, as currently proposed will reduce, if not eliminate, our competitive alternatives via the Laredo gateway. * * * 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. TM-26, Clark D. Handy VS.

> James River [Corporation] is a leading marketer and manufacturer [that] ships more than 300 carloads of product annually to and from Mexico via Laredo. * * * 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. * * * 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. * * * [W]e fear that the loss of rail competition could prompt truckers to raise their rates. TM-26, Tommy A. Turner VS.

[Wilbur-Ellis Company's fertilizer and agricultural chemical] Mexican shipments primarily go through Laredo with occasional loads going through Brownsville and El Paso. * * * Our shipments through Laredo originate from fertilizer plants served by the Union Pacific as well as from other plants served by Southern Pacific, ATSF and other rail lines. * * * In the past, freight rates over either the Union Pacific system or the Southern Pacific/TexMex system have been competitive. I am concerned that a merger of Union Pacific and Southern Pacific will seriously reduce, if not eliminate, our competitive alternatives via the Laredo gateway. TM-24, Letter of Jim Hoffman, Wilbur-Ellis Corporation, to Secretary Williams, dated December 6, 1995.

Our company depends on competition to keep prices down. For many years the Union Pacific and Southern Pacific have competed for our traffic via Laredo, resulting in substantial cost savings and a number of service innovations. * * * We believe that a merger of the Union Pacific and Southern Pacific may seriously reduce our competitive alternatives via the Laredo gateway. * * * [W]e are uncertain that the BNSF . . . will be an effective competitive replacement for an independent Southern Pacific on this important route. * * * Volkswagen of America strongly urges the Interstate Commerce Commission to address this competition issue in the proposed UP/SP merger by granting TexMex trackage rights allowing them to service Houston. * * * The TexMex puts it best when they say that economical access to international trade routes should not be jeopardized when the future prosperity of both countries depends so strongly on international trade. TM-24, Letter of Kenneth S. Fletcher, Volkswagen of America, to Secretary Williams, dated October 31, 1995.

Applicants have not disputed that the competitive alternative provided by SP and Tex Mex has benefitted shippers substantially; indeed, the fact that they have proffered the BNSF

Settlement as a competitive remedy reflects Applicants' recognition of that fact. Although the Mexican rail system is currently state owned, Mr. Ellebracht explains that, for many reasons, rates for the Mexican portion of international moves are, in the vast majority of cases, established without regard to the rates established for the U.S. portion of the moves. Rates for most Mexican moves are established according to a distance-based formula, and through international rates are rare. Ellebracht VS, TM-23 at 78-79. Accordingly, he concludes, "the vigorous competition that now exists between U.S. railroads for that traffic directly benefits the shippers, and any reduction in that competition will harm them." Id. at 79. Applicants have not disputed this.

In this regard, it is also important to stress that ensuring the most vigorous competition for the transportation of goods between the United States and Mexico is clearly consistent with the national policies of both nations as reflected in the North American Free Trade Agreement ("NAFTA"). The central purpose of NAFTA is to promote trade between the two countries. Strong competition among transportation providers is a tremendous stimulus to trade, just as lack of competition suppresses it.[8/]

8/ A number of the statements and letters submitted in support of Tex Mex's responsive application have noted that NAFTA provides a great potential for expanding their businesses which they belief would be seriously threatened by the reduction in the number of railroads serving the U.S.-Mexico market. See, e.g., Feldman VS at 1, TM-23 Ex. 24.

For that reason, NAFTA contains provisions specifically designed to increase competition in cross border transportation services.[9] As former Secretary of Transportation Andrew Card stated, the purpose of these provisions is to "ensure that the increased trade resulting from the agreement can be carried across the border efficiently and competitively."[10] The same policy, Tex Mex submits, requires this Board to give heightened scrutiny to transactions within its jurisdiction that present a danger of diminishing competition for transportation of U.S.-Mexican traffic. Cf. McAllen, TX Commercial Zone -- Passenger Operations, Ex Parte No. MC-37 (Sub No. 43) (served Oct. 24, 1995) (ICC should exercise its discretion consistently with the policies of NAFTA).[11]

9/ Section 1202 of NAFTA and Annex II- Mexico. While most of these pertain to motor carriers, according to the Department of Transportation NAFTA also "opens the Mexican market for U.S. railroads and intermodal companies" and

> "affirms the market-oriented reforms already undertaken by the Mexican government which allow U.S. railroads and intermodal companies to:
> -- Market their services directly to customers;
> -- Carry cargoes directly to Mexican destinations using their own equipment;
> -- Own and operate terminals and other facilities; and
> -- Finance the building of tracks and other rail infrastructure."

DOT News Release 71-92, "Transportation Facts," p. 2 (August 12, 1992).

10/ Remarks of Secretary Card as reported in DOT Release 71-92, issued August 12, 1992.

11/ As we discuss in Part V, below, granting the rights sought by Tex Mex will provide a strong competitive alternative to a merged UPSP and to BNSF for U.S.-Mexican traffic by linking Tex Mex with the KCS system and with KCS's eastern railroad

II. **<u>THE MERGER PROPOSED BY APPLICANTS WILL CAUSE A SUBSTANTIAL LOSS OF COMPETITION IN THE MARKETS SERVED BY TEX MEX</u>**

Applicants have not disputed that their merger, without any conditions, would result in a serious loss of competition in many markets, including the markets served by Tex Mex. Their contention is that their settlement with BNSF, as modified recently by their settlement with CMA, will rectify that loss of competition.

There are two reasons why the BNSF Settlement will not rectify that loss of competition, certainly not in the markets served by Tex Mex at any rate. First, contrary to Applicants' assertions and BNSF's professed intentions, there are many reasons to believe that BNSF will not be as effective a competitor as SP is now for traffic between the U.S. and Mexico. These are discussed at pages 31-37, below. Second, even if BNSF proved to be as vigorous and effective a competitor as Applicants and BNSF predict, a more fundamental problem would remain: shippers in this market will still lose one of the three Class I railroads serving the U.S.-Mexican market. We address this more fundamental problem first and explain why the result will inevitably be an unacceptable loss of competition.

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connections. If, in addition, Tex Mex's and KCS's parent corporations are successful in acquiring the Mexican line from Laredo to central Mexico, or a concession over that line, they would be able to establish an integrated rail network between central Mexico and the midwestern United States that would be an extremely strong competitor in that market.

A. Reducing the Class I Railroads Serving Gateways from Three to Two Will Substantially Reduce Competition For U.S.-Mexico Traffic

As discussed in the Statement of Facts, there are eight rail gateways between the United States and Mexico. Four of those gateways in Texas -- Laredo, Brownsville, Eagle Pass and El Paso -- handled over 97 percent of the rail tonnage moving between the two countries in 1994 12/ Today, only three Class I railroads serve the U.S.-Mexican gateways, UP, SP (with Tex Mex) and BNSF. As Larry Fields notes in his verified statement:

> Today shippers in Denver, Dallas, St. Louis, Kansas City, Chicago and many other places can ask three railroads to offer them rates directly to one or more Mexican gateways. After the merger, those shippers will have only two.

Fields VS, TM-23 at 50. That fact alone, Tex Mex submits, will constitute an unacceptable loss of competition.

The ICC noted in many recent merger cases that reducing the number of railroads in a market from three to two "can result in significant anticompetitive behavior, such as collusion and mutual forbearance." Santa Fe Southern Pacific Corporation -- Control -- Southern Pacific Transportation Company, 2 I.C.C.2d 709, 791, n.72 (1986). In that case the ICC went on to state:

> Reduction in the number of competitors from two to one, where the merging carriers have been the only competitors, creates the obvious problem of monopoly. However, the mere reduction rather than elimination of

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12/ The fifth Texas gateway, at Presidio, is served by a short line, the South Orient Railroad, which has connections with SP and BNSF. This gateway accounts for an insignificant amount of traffic.

competitors, e.g., from three to two, may create serious anticompetitive problems as well.

Id. at 792 (emphasis supplied).[13]

There is also abundant evidence in the economic literature and in this proceeding that reducing the number of major railroads serving a market from three to two will usually reduce competition substantially. Much of this evidence is discussed and presented by Tex Mex's witness Curtis M. Grimm, Professor of Transportation, Business and Policy at the University of Maryland's College of Business and Management. Grimm VS, TM-23 at 116-120. Among the studies and literature cited by Professor Grimm is a statement by Applicants' own principal economic witness, Robert Willig, who wrote in a 1983 article: "The view that a reduction in the number of firms facilitates coordinated use of assets among the incumbent firms is a rock upon which much of industrial economics has been built."[14] Professor Grimm

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13/ See also, Burlington Northern, Inc. and Burlington Northern Railroad Co. -- Control and Merger -- Santa Fe Pacific Corp. and the Atchison, Topeka and Santa Fe Railway Co., slip op. at 55 (August 23, 1995); Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific Railroad Co. - Control - Missouri Pacific Corp. and Missouri Pacific Railroad Co., 366 I.C.C. 462, 531 (1982); Norfolk Southern Corp. -- Control -- Norfolk & W. Ry. and Southern Ry., 366 I.C.C. 173, 193 (1982).

14/ J. Ordover and R. Willig, "The 1982 Department of Justice Merger Guidelines: An Economic Assessment," 71 Cal. L. Rev. 535, 552 (1983). With regard to the subject of this article, Professor Grimm also notes in his statement that "the Department of Justice's Merger Guidelines, which are applied to consolidations of virtually every other industry in the country, recognize that reducing the number of firms in a market from three to two will generally result in substantial and unacceptable loss of competition." Grimm VS, TM-23 at 116-117.

also notes the analysis by KCS witness I. William Ploth of actual bid prices submitted to the Department of Defense by railroads competing for DOD transportation contracts, including UP, SP, BN and ATSF, and the actual rates paid by DOD to the winning carriers. As Professor Grimm states, this analysis "shows in the most concrete and dramatic fashion the benefits of having three independent railroads -- UP, SP and BNSF -- competing for a shipper's traffic, and . . . shows exactly how much more DOD would have had to pay for rail transportation if SP had not been an independent competitor." Grimm VS, TM-23 at 117.

Professor Grimm's views are strongly supported by the evidence presented by the Department of Justice and its economist, Dr. W. Robert Majure. Dr. Majure concludes:

> [T]he facts of this merger support generally accepted economic theories that predict significant harm to shippers resulting from a reduction in competition in three-to-two markets. In addition, empirical studies of three-to-two effects in railroad markets, including a study that I performed using recent (1994) data, consistently support a strong presumption that this merger will likely lead to higher rates in the three-to-two markets affected here.

DOJ-8, Majure VS at 29. Like Dr. Grimm, Dr. Majure notes "many empirical studies in a number of industries that have demonstrated a positive relationship between higher concentration and higher prices," including studies specifically of rail markets." Id. at 33-34 (footnotes and citations omitted). Dr. Majure's own study of 1994 rail data found that

> for all of the tests I ran, concentration was a significant determinant of the rates both

> statistically and economically. The estimated price effect of going from three railroads to an equivalent market with only two railroads was 10.9% and the smallest estimate in the robustness tests was still a 9.17% price increase.

Id. at 35.

Dr. Majure acknowledges that empirical studies such as his merely support a strong presumption that markets going from three to two railroads are likely to suffer a substantial loss of competition. Such evidence "by itself is not sufficient to draw a conclusion in a particular merger" and cannot serve as "a complete substitute for close examination of the business facts" related to a particular merger." Id. at 37. However, he also cites and discusses at length the facts about this particular merger that strongly reinforce the presumption and indicate that shippers currently served by UP, SP and BNSF are very likely to enjoy less competition and experience higher rates by the merger of UP and SP. Id. at 38-48. Thus, he explains that the highly differentiated prices and services offered today by the three railroads and the variations among the shippers they serve make it very likely that the loss of one of those three as an independent competitor will greatly reduce the competitive alternatives available to shippers even without tacit or conscious coordination among the remaining two. Id. at 38-41. In addition, the merger will greatly increase the opportunities for tacit collusion among the remaining two firms to the detriment of their customers.

A specific and extremely revealing example of such tacit collusion among UP and BN in actual operation is reflected in an internal UP e-mail message in May, 1995 cited by Dr. Majure. Id. at 42. In that message, a UP marketing official explains a UP decision to route a certain shipper's traffic via BN-UP rather than SP-UP as being appropriate to "appease" BN for an earlier action in which UP captured a certain movement from BN. He states: "This may keep BN from retaliating later if we throw them a bone now."[15]

Given this attitude, there can be little doubt that the opportunities for mutual "appeasement" to avoid "retaliation" from one's competitor will increase enormously -- all to the detriment of the shippers -- in markets that will be going from three rail competitors to only two. Furthermore, any tendency on the part of a given railroad to compete less aggressively with the other to avoid "retaliation" (i.e., a strong competitive response) from the other railroad will obviously be greatest in markets where the first railroad is weakest and least concentrated.

The experience of two other Tex Mex witnesses, Larry Fields and Joseph Ellebracht, confirms the anticompetitive effects likely to result in three-to-two markets in this case. Mr. Fields states:

> Economists can argue about what their studies and statistics show, but any shipper with common sense will tell you that he would much

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[15] HC91-1000002.

> rather have three railroads fighting for his business than two. And I can tell you from my 31 years in the railroad business that I would much rather have one than two other railroads bidding against me for a shipper's business.

Fields VS, TM-23 at 48-49. Similarly, based on his 19 years' experience marketing railroad services (the last 14 of which were with SP), Mr. Ellebracht explains that, with only one competitor, railroad marketers will try to figure out that competitor's pricing and marketing strategies and bid for business accordingly. With a third competitor in the market, however, "strategic bidding is much less likely to be successful, and bids must be more aggressive." Ellebracht VS, TM-23 at 82.

Mr. Ellebracht also explains that the UP/SP merger will increase the likelihood of price coordination between the merged UPSP and BNSF through price signalling. Price signalling, he notes, is common in the rail industry because commodity marketing groups within each railroad will typically decide each year "how much of a price change to try to make, on average, for shipments that were handled last year and will be handled this year." Id. at 83. Once this number, or percentage, is determined, it becomes known to many people, including other railroads, through word of mouth, the railroad's newsletters and occasionally the trade press. The likelihood of other railroads in the market matching any such attempted price increase, thereby permitting it to take effect, becomes much greater when there are only two railroads in the market. Mr. Ellebracht states:

> With three independent railroads, each with a different corporate agenda, the chance of two railroads following an announced increase is far less than the probability of a single railroad doing so.

Id. at 84.[16]

In sum, the evidence in this proceeding is clear and convincing that reducing the number of Class I railroads serving numerous rail transportation markets throughout the West from three to two will cause an unacceptable loss of competition. That conclusion is fully applicable to the market for transporting goods between the United States and Mexico.[17] Thus, even if the BNSF Settlement enables BNSF to compete as effectively as SP does now (but see Part IIC, below), it would still not preserve the competition that exists today.

Applicants dispute but have not rebutted the conclusion that the loss of one of the three Class I railroads serving many

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[16] Although Applicants' witness John Gray disagrees with Mr. Ellebracht's views on price coordination, Mr. Gray's criticisms are insubstantial. As Mr. Ellebracht discusses at pages 13-16 of his rebuttal statement in TM-34, Mr. Gray's belief that one railroad's decision regarding desired price increases will not usually become known to its competitor "ignores the realities of the marketplace." Id. at 15. Also, his observation that price information can also be circulated in multi-competitor markets misses the main point: with only two competitors, the likelihood that a price increase attempted by one of them will stick goes way up. Id. at 14.

[17] As we discuss in Part IIB, below, for purposes of competitive analysis a rail market is properly defined in terms of specific commodities transported between specific origin-destination pairs. Accordingly, terms such as "the market for the transportation of goods between the United States and Mexico", or the "U.S.-Mexico market" actually refer to many different markets. These markets share important characteristics and, for convenience, are usually referred to collectively in this brief by such terms.

markets throughout the West will cause a substantial loss of competition. With respect to the economic literature and empirical studies showing the competitive harms and price increases that such a loss in the number of competitors will generally have, Applicants rely primarily on the opinions of Professor Robert Willig, who claims that all of the literature and studies are based on invalid data and/or inadequate control variables. These criticisms are insubstantial, for the reasons discussed in great detail in the verified statements and rebuttal verified statements of Dr. Grimm, Dr. Majure and other economic witnesses for other parties.[18/] We will not review that debate here, but will note the general point made by Dr. Grimm that all of the studies criticized by Dr. Willig "were published in highly reputable academic journals or as monographs and went through refereeing procedures designed to address just the types of issues raised by Willig. To believe his criticisms . . . one would have to believe that the refereeing process failed in each of these instances." TM-34, Grimm RVS at 8.

Applicants also rely on the conclusions drawn by Dr. B. Douglas Bernheim from his analysis of certain UP automobile shipments in 1994 and on Dr. Bernheim's critique of Mr. Ploth study of Department of Defense shipments, referred to earlier. UP/SP-231, Bernheim VS at 10-12. Mr. Ellebracht, in his rebuttal statement, points out some significant errors in Dr. Bernheim's

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18/ See, Grimm VS in TM-23 at 117-120; Grimm RVS in TM-34 at 6-8; Grimm VS in KCS-33 at 203-205; Majure VS in DOJ-8 at 36; James MacDonald VS in KCS-33 at 158-164.

analysis of UP automobile data, including manifestly incorrect assumptions about how many rail competitors there were for the various shipments analyzed. TM-34, Ellebracht RVS at 11-12. Dr. Bernheim's critique of Mr. Ploth's DOD study simply fails to refute Mr. Ploth's essential findings: that of UP, BNSF and SP, "SP is, by far, the most aggressive bidder" and that "when UP competes against SP, its ability to raise its price and still win the bid is, at best, marginal. When UP competes against BNSF, however, there is tremendous room to raise its rates and still win the bid."[19/] Ploth VS, KCS-33, Vol II, at 47.

B. There Is No Merit to BNSF's Claim That the Only Relevant Market For U.S.-Mexico Traffic Is Laredo.

BNSF disputes Tex Mex's concerns about loss of a third competitor in the market served by Tex Mex on the additional ground -- not asserted by Applicants -- that the relevant market served by Tex Mex consists solely of rail transportation through Laredo. Relying on its witness Joseph Kalt and citing Mr. Ellebracht's deposition testimony, BN/Santa Fe states:

> [I]t is not accurate to view all Mexican gateways as being in the same market. Rather the advantages of the Laredo gateway are so great that it constitutes a relevant market

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[19/] In fact, Dr. Bernheim's comments recognize that Mr. Ploth was able to show that when SP chose to bid for DOD shipments, it often won that bid, and that when it did not, it's bid was within a reasonable range of the bid that did win. His attempts to recast these results do not refute the basic facts that Mr. Ploth reports. UP/SP-231, Bernheim VS at 11 (when SP won a bid, "SP tended to win by a large margin" and when SP lost a bid, "overall SP left the <u>lowest</u> average margin of victory") (emphasis in the original).

> unto itself. It is therefore the diminution and restoration of competition <u>at</u> <u>Laredo</u> -- not for all Mexico-bound traffic -- that requires analysis.

BN/SF-54 at 28 (emphasis in original) (footnotes omitted.) BNSF appears to argue that BNSF's transportation through other Mexican gateways does not compete with UP's and SP's transportation through Laredo and should not be considered in the competitive analysis.

There is no merit to BNSF's contention. As Mr. Ellebracht states in his rebuttal verified statement:

> Neither I in my deposition testimony nor Dr. Kalt in his verified statement suggested that Laredo constituted a "relevant market unto itself." In fact, it seems obvious to me that relevant transportation markets are properly defined by commodity types and origins and destinations, not by where particular rail lines cross the border.

Ellebracht RVS at 5. Mr. Ellebracht's view of the proper way to define transportation markets is shared by Applicants' witness Dr. Willig[20/] as well as Tex Mex's Dr. Grimm (TM-34, Grimm RVS at 3.)

Mr. Ellebracht also explains that, although Laredo is certainly the principal rail gateway to Mexico and has significant advantages over other gateways, there "is substantial evidence that for many traffic flows transportation served by

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20/ Mr. Willig, in discussing the factors that he believes are relevant to evaluating the proposed merger's impact on competition discusses "the possible increase in concentration in some potential markets -- <u>i.e.</u>, a reduction in the number of railroads from three to two at some points and in some corridors. . . ." UP/SP-23, Willig VS at 580.

BNSF, particularly Eagle Pass and, to a lesser extent, El Paso, provides important competition for transportation through Laredo." TM-34, Ellebracht RVS at 5-6. Among other evidence, Mr. Ellebracht cites statements by Dr. Kalt and by Rollin Bredenberg, BNSF's Vice President for Transportation showing that BNSF views itself as an important competitor over its El Paso and Eagle Pass gateways, and statements by UP's witness Richard Peterson to the same effect. Id. at 6-7.

Dr. Grimm reaches the same conclusion in his rebuttal statement. He states:

> [F]rom the data described in Mr. Ellebracht's rebuttal verified statement regarding traffic from the 10 largest U.S. origin BEAs to the five largest Mexican rail import destinations I conclude that all of these market pairs are almost certainly serve by three U.S. carriers today. For some specific origin-destination pairs, BN/Santa Fe will be a weaker competitor than their overall average market share of traffic between the U.S. and Mexico would otherwise indicate; of course, for some, they will be stronger. But clearly, an inference that a 3-to-2 situation exists in major U.S.-Mexico markets is warranted.

TM-34, Grimm RVS at 4.

Farmland Industries and the Kansas, Colorado and Oklahoma Shippers Association also provide concrete examples of the competition provided by BNSF through other gateways. Frederic Schrodt, Vice-President of Transportation for Farmland Industries, explains in his verified statement that "Although [Farmland uses] the Laredo gateway to a much greater degree than any other Eastern Mexico gateway, our use of the Burlington Northern Santa Fe through El Paso for the same traffic has increased." Schrodt VS at 2. Similarly, James Irlandi, representative of the Kansas, Colorado and Oklahoma Shippers Association, states that "The bottom line is that the grain shippers in the Midwest presently have three alternatives over the Eastern Mexico rail gateways that they can use to move their grain to Monterrey, Mexico City and other destinations within Mexico [and if] the merger is approved, they will only have two. . . ." Irlandi VS at 2.

In sum, as Mr. Ellebracht concludes:

> Although BNSF is not and will not be as strong a competitor as SP for many reasons, including the superiority of the Laredo gateway, BNSF's and Applicants' witnesses themselves show that competition from BNSF from other gateways is nevertheless significant for shippers of goods between the United States and Mexico.

Ellebracht RVS at 9-10.[21/]

21/ BNSF mistakenly relies on a statement in Mr. Ellebracht's deposition to the effect that, in his opinion, if UP were the only railroad serving Laredo, it would probably be able to effect and maintain a small increase in rates to that gateway. Citing the definition of relevant markets in the Department of Justice Merger Guidelines § 1.0, BNSF argues that this shows that the "Laredo gateway . . . constitutes a relevant market unto itself." The flaw in BNSF's argument is that relevant transportation markets are, as Drs. Willig and Grimm agree, properly defined in terms of origin-destination pairs, not the particular route employed. Under the logic of BNSF's argument, one railroad's acquisition of another railroad that provides competing service between the same origin and destination but by different routes would never cause a competitive harm worthy of concern if one carrier's route had cost or other advantages over the other route that would permit it to charge rates yielding a higher profit than the other carrier could earn on its route. Under BNSF's arguments, those railroads would not be in the same relevant market even though their routes clearly compete with each other.

Accordingly, the merger as proposed by Applicants will eliminate one of the three Class I railroads serving vital transportation markets as an independent competitor, and there will be substantially less competition in those markets as a result.

C. BNSF Will Not Be Nearly As Effective A Competitor In the Markets Served By Tex Mex As SP Has Been.

Applicants' argue that SP has in fact been a weak competitor in the West and that BNSF, being a much larger and financially stronger railroad, will be a much stronger competitor to a merged UPSP under the BNSF Settlement than SP has been to UP. These claims are not true, at least with respect to the markets served by Tex Mex.

As to Applicants' claims about SP's competitive ineffectiveness, other parties, including DOJ, NITL and KCS, have addressed these in greater detail. However, we suggest that the views of Mr. Ellebracht on this subject, based on his 14 years' experience with SP, also merit the Board's consideration. In his verified statement, he enumerates many specific reasons why SP has been and will be a highly effective competitor to UP, particularly with respect to U.S.-Mexico traffic, and why he believes that "one of the reasons UP is acquiring SP is because SP is too effective a competitor." Ellebracht VS, TM-23 at 72-73. As the brief filed by the State of Texas aptly puts it: "Indeed, while it is accurate to say BNSF is UP's biggest competitor in certain geographic areas, in these two economically indispensable Texas locales [the Gulf Coast and the Texas-Mexican gateways], UP is buying up its most aggressive competition." STTX-7 at 21.

As to BNSF, despite its larger size and stronger financial condition, there are many reasons to conclude that it will not be as effective a competitor under the BNSF Settlement in the markets served by Tex Mex as SP has been, at least before UP and SP began merger discussions in March, 1995. These reasons are detailed in the verified statements of Mr. Fields, Mr. Ellebracht, Dr. Grimm, Mr. Skinner and Mr. Allen Haley. They include the following:

First, BNSF's access to many 2-to-1 shippers will be inferior to SP's access to those shippers today. For example, SP today serves many customers in Houston directly. After the merger, BNSF's access to those customers will be through reciprocal switching provided by UPSP, which adds an additional cost as well as another carrier to the route, slowing down service and making it less reliable.22/ Similarly, for many KCS shippers of goods to Mexico, the least circuitous route today is via Shreveport, where KCS can interchange with UP or SP. The BNSF Settlement, however, does not give BNSF access to Shreveport; any of those shippers desiring to use BNSF must use a

22/ Mr. Ellebracht notes that "although direct service [by BNSF] is a theoretical possibility with the UPSP-BNSF settlement agreement, it is highly unlikely except for a few very large shippers." Ellebracht VS, TM-23 at 85.

more circuitous route through Beaumont.[23] In addition, for movements between Laredo and most of the eastern U.S., BNSF will be operating via trackage rights for almost all of its route, whereas SP today carries that traffic on its own lines for almost all of its route. This also will "significantly reduce [BNSF's ability to be competitive on shipments to and from the eastern U.S." Ellebracht VS, TM-23 at 85-85.

Second, BNSF's route to Corpus Christi will be inferior in several respects to SP's current route. For many movements, a BNSF-Tex Mex route would be significantly longer than the current SP-Tex Mex route. Id. at 87. Also, as the chief negotiator of the BNSF Settlement for UP acknowledged in his deposition, the route by which BNSF will reach Corpus Christi is extremely congested, "particularly on the line between Angleton and Houston." Rebensdorf Dep. of 1/22/96 at 243-244. Tex Mex's witness, Allen Haley, who worked for many years as a train dispatcher on the Houston Division of SP, confirms Mr. Rebensdorf's statement. Mr. Haley performed has provided a detailed analysis of the physical characteristics of this route and the centralized traffic control data for this route for three

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23/ In Applicants' Rebuttal, their witness Richard Peterson erroneously assailed this point as inconsistent with Mr. Ellebracht's support of Tex Mex's remedy, which would only give Tex Mex access to those shippers at Beaumont. As Mr. Ellebracht stated in his rebuttal statement, it is true that a KCS-Beaumont-Tex Mex route would also be more circuitous than SP's current route, but it will nevertheless help to alleviate the loss of routing choices by giving those shippers a third potential bidder for their traffic, thereby "substitut[ing] more competition for stronger competition." TM-34, Ellebracht RVS at 23.

sample months in 1995. Haley VS, TM-23 at 199-216. Mr. Haley's analysis reveals that the northern part of this route, between Algoa and Bay City, is already so congested that it is at "jam capacity" even before the addition of any new BNSF traffic. Id. at 208-211. "Jam capacity" is the "theoretical upper limit on [a] line's capacity," at which traffic levels "delays would be so great that nearly all train crews would be expected to exceed their hours of service limitations . . . [thereby] trigger[ing] a 'domino' effect resulting in a complete shutdown of the rail line." Id. at 208 (quoting from E.R. Kraft, "Jam Capacity of Single Track Rail Lines" (Transportation Research Forum Proceedings, Vol. 23, No. 1, 1982)). Mr. Haley concludes:

> Again, this argues against BNSF being able to be an effective competitor over this section. On the other hand, the Houston-Flatonia-Placedo route [sought by Tex Mex] will not be at jam capacity, even with the projected Tex Mex traffic.

Id. at 209.

Applicants' witness R. Bradley King and BNSF's witness Neal Owen critique Mr. Haley's study on several grounds, but their criticisms are completely unfounded, as Mr. Haley shows in his rebuttal statement. Their claim that Mr. Haley overlooked UP's Angleton freight yard is simply incorrect. Mr. Haley did consider that yard but concluded that it would provide no relief for congestion on the line. On the contrary, "[i]f anything, rather than providing room for meeting and passing of trains, the operations at the busy Angleton yard serve to worsen congestion on the main track." TM-34, Haley RVS at 3. He also shows that their criticisms of the route sought by Tex Mex are similarly unfounded. Id. at 6-8.

In addition to the inferiority of BNSF's access to many shippers (in comparison to SP's access) and the inferiority of its route, there are other reasons to believe that BNSF will simply not, despite its declarations to the contrary, make the kind of commitment and investment of resources that SP has made and that are necessary to compete effectively for U.S.-Mexico traffic. As Mr. Ellebracht notes, SP has a large sales force in Mexico; BNSF has virtually none. He also notes that, whereas developing business in less stable markets like Mexico requires patience and perseverance, "BN has a history of switching its attention to the markets most profitable at the moment, and abandoning markets that are less profitable." Ellebracht VS, TM-23 at 76. An example of that tendency cited by Mr. Ellebracht was BN's establishing a rail-barge service between Houston and the Mexican port of Coatzacoalcos several years ago which it subsequently abandoned when projected profits failed to emerge. An even more pertinent example for Tex Mex occurred last year when BNSF imposed a surcharge on grain cars destined to Laredo because, as BNSF's witness Rollin Bredenberg acknowledged, "we weren't getting turn times on our cars compared to turn times to other Gulf destinations." Bredenberg Dep. of 3/8/96 at 82. As noted earlier, that action completely stopped that flow of traffic to Tex Mex, and as Mr. Ellebracht observed in his rebuttal statement, "[t]hat experience is not one to give Tex Mex enormous confidence in Applicant's and BNSF's declarations about what a strong and reliable connection BNSF will be for Tex Mex at Robstown." TM-34, Ellebracht RVS at 25.

Another reason to doubt that BNSF will be a comparable competitive substitute for SP with respect to U.S-Mexico traffic is that even under the rosiest projections, its share of that market is likely to be much smaller than SP's share. In 1994 SP handled 35 percent of the rail tonnage between the U.S. and Mexico and BNSF handled three percent. Ellebracht VS, TM-24 at 77, as corrected by TM-28. While the additional rights BNSF will acquire under the BNSF Settlement may increase BNSF's share somewhat, it will still be only a fraction of SP's share. As Grimm states:

> In any market so largely dominated by one railroad -- in this case UPSP -- it is very doubtful that BNSF would invest the resources in terms of equipment, marketing personnel and infrastructure sufficient to make it a significant competitive restraint on the dominant firm.

Grimm VS, TM-23 at 122. Moreover, such an unbalanced market structure greatly increases the likelihood of the kind of coordinated behavior described by Dr. Majure -- i.e., that the subordinate firm will follow rather than challenge the actions of the dominant firm in order to avoid retaliation in markets where it has more at stake. In this regard, both Mr. Ellebracht and Dr. Grimm regard the fact that the BNSF Settlement gives BNSF the right to serve Corpus Christi and Brownsville by haulage rights instead of trackage rights as a significant indication that BNSF "is preparing for very light traffic with Tex Mex." TM-34, Ellebracht RVS at 26.[24]

All of these circumstances provide ample grounds to conclude that BNSF will not be nearly as effective a competitor to a merged UPSP in the markets served by Tex Mex as SP is to UP today, and that Tex Mex therefore has good reason to be extremely concerned with the prospect of having BNSF as its only "friendly" connection to the rest of the United States. This is not to say that we believe that BNSF will provide no traffic at all to Tex Mex or no competition whatever to a merged UPSP. We believe it is clear, however, that BNSF will fall far short of providing an adequate competitive substitute for SP in those markets and that more is needed.

III. THE MERGER PROPOSED BY APPLICANTS IS LIKELY TO PUT TEX MEX OUT OF BUSINESS AND DEPRIVE ITS SHIPPERS OF ESSENTIAL RAIL SERVICES.

Tex Mex is unlikely to survive the merger if it is conditioned only by the Applicants' settlement with BNSF. Mr. Ellebracht has performed a traffic study of the probable impacts of the merger with the BNSF Settlement on Tex Mex's traffic and revenues. He concludes that, based on 1994 traffic data adjusted for the probable effects of various mergers and other developments since 1994, Tex Mex would have annual revenues of

[24] See also Grimm VS, TM-23 at 123. Mr. Ellebracht notes that one of SP's own witnesses, Michael Ongerth, stated that "a railroad will often prefer haulage rights over either trackage rights or ownership of the line if it expects that the traffic involved will be too small for the railroad to put together whole trains of its own." Ongerth RVS, UP/SP-232, Tab B at 24, n.2.

$19.92 million in the absence of the UP/SP merger. With the UP/SP merger and the BNSF Settlement, he concludes that Tex Mex's revenues would be $13.24 million, or 34 percent less. Ellebracht VS, TM-23 at 98-106.

Based on Mr. Ellebracht's traffic and revenue projections, Tex Mex witness Patrick Krick conducted a financial analysis of the impact of the merger, both as conditioned by the BNSF Settlement and as conditioned by the BNSF Settlement and the rights Tex Mex requests, on Tex Mex's net income. Mr. Krick's analysis shows that a post-merger Tex Mex would immediately go from profitability to unacceptably heavy losses, and he quite simply concludes that Tex Mex "would not survive the UP/SP merger if it is not conditioned by the rights [Tex Mex] requests in its responsive application." Krick VS, TM-23 at 190. On the other hand, Mr. Krick concludes that if Tex Mex is granted the trackage rights it seeks, Tex Mex would remain a viable railroad. Id. at 193.

If Tex Mex did not survive, many of its shippers would lose essential rail service for which they have no feasible transportation alternatives. As described in the Statement of Facts, Tex Mex local shippers like Barr Iron and Metal Co., Corpus Christi Grain Co., and Global Grain Co. have shown that they depend on Tex Mex to transport their products to their markets and that neither trucks nor other railroads are practical alternatives. For example, to ship grain from Corpus Christi to Mexico City or other points in central Mexico, trucks are obviously not feasible and any rail routing other than Tex Mex would have to go through San Antonio, at least doubling the distance to Laredo and drastically increasing the costs. Furthermore, UP and SP have shown no interest in providing reasonable or reliable service to those shippers. See statements of William E. Bailey and Abel Gonzalez, Jr., TM-23, Ex. 24.

Applicants' chief response to Tex Mex's "loss of essential services" showing is to dispute Mr. Ellebracht's diversion study and claim that Tex Mex will be healthier, rather than gravely damaged, by the merger and Applicants' settlement with BNSF. Applicants do not address or refute Mr. Krick's showing that Tex Mex cannot sustain operations with the loss of traffic that Mr. Ellebracht projects that the merger will cause to Tex Mex.

The criticisms of Mr. Ellebracht's traffic study by Applicants' traffic witness, Richard Peterson, are completely unfounded. First, as Mr. Ellebracht shows in his rebuttal statement, Mr. Peterson's very rosy forecasts about the additional traffic BNSF will supposedly bring to Tex Mex at Robstown are highly improbable on their face. Since Tex Mex already gets 73% of the traffic originated by BNSF destined for Laredo and 99% of the Laredo-bound traffic originated by SP, even if BNSF post merger funneled <u>all</u> of its remaining traffic to Tex Mex, that would not nearly make up for the SP traffic Tex Mex is almost certain to lose. TM-34, Ellebracht RVS at 26-27. Furthermore, it is highly unlikely that BNSF will funnel all of its remaining traffic to Tex Mex after the merger. Indeed, since the BNSF Settlement will give BNSF trackage rights to Eagle Pass in place of BNSF's current haulage rights and since Eagle Pass is a shorter route for many BNSF moves from western origins than a BN-Tex Mex-Laredo route, it is quite likely that Tex Mex will lose much of the traffic it could expect to receive from BNSF origins in the absence of the merger. Id. at 27.

Mr. Peterson also disparages some of the adjustments Mr. Ellebracht made to Tex Mex's 1994 traffic based on the BNSF merger and other developments since 1994 as "inventing" traffic. Such adjustments, however, are inherent in the methodology used by both Mr. Peterson and Mr. Ellebracht and are common in traffic studies. Mr. Ellebracht's adjustments are no more "invention" than the many adjustments Mr. Peterson made in his traffic study, such as his projections of additional traffic for UP and SP as a result of the UP/CNW and BNSF mergers. Furthermore, Mr. Ellebracht explains in detail why the assailed adjustments are "well founded and entirely reasonable." Id. at 28-29.

In contrast, some of the major assumptions Mr. Peterson made about Tex Mex's post merger traffic are patently unrealistic. Of particular note is Mr. Peterson's assumption that half of the traffic from SP origins that are now routed SP-Tex Mex will continue to be routed to Tex Mex after the merger. This is fanciful. As Mr. Ellebracht noted in his verified statement: "Today there is a tiny trickle of UP-Tex Mex traffic through Robstown to Laredo for which there is a competing UP direct route through San Antonio to Laredo." Ellebracht VS, TM-23 at 105-106.

It would be naive to believe that a merged UPSP would route any more traffic to Tex Mex at Robstown when it could route it instead to Laredo via San Antonio.

Apart from his unfounded attacks on Mr. Ellebracht's traffic study, Mr. Peterson makes the conclusory assertion that it is implausible to conclude that Tex Mex's route between Corpus Christi and Laredo would be "left to rust" if Tex Mex was forced to close. Mr. Peterson offers no evidence to support this opinion and there is no basis for it. On the contrary, Mr. Krick explained in his verified statement that Tex Mex is an extremely efficient operator over this line, but he demonstrated that even such an operator at peak efficiency would go out of business if faced with the traffic diversions predicted by Mr. Ellebracht. There is no reason to believe that any other operator of this line could operate it at a profit with the traffic levels projected by Mr. Ellebracht.

Mr. Peterson's further claim that Tex Mex's shippers can find alternate means to move traffic is also unsupported and does not refute the verified statements of Mr. Barr, Mr. Bailey and Mr. Gonzales attesting that such alternate means do not exist.

In short, Applicants have not rebutted Tex Mex's showing that the merger with the BNSF Settlement is likely to put Tex Mex out of business and that Tex Mex shippers will lose essential rail services as a result.

IV. THE TRACKAGE RIGHTS SOUGHT BY TEX MEX WOULD PRESERVE THE COMPETITION THAT WOULD OTHERWISE BE LOST AND WOULD PREVENT THE LOSS OF ESSENTIAL RAIL SERVICES.

The trackage rights sought by Tex Mex would preserve for shippers of goods between the United States and Mexico a third competitive alternative to a merged UPSP and to BNSF that would otherwise be lost. That alternative would be a strong and effective one. In would enable Tex Mex to connect directly with KCS, thereby providing efficient service directly to FNM at Laredo to shippers on the KCS system and to KCS's eastern railroad connections.[25]

Such a connection would also make it possible for Tex Mex, KCS and their corporate parents to forge an extremely efficient and competitive rail network between central Mexico and the central United States if TMM and KCSI succeed in the ongoing Mexican privatization in acquiring operating rights over the line from central Mexico to Laredo, as they expect to do. See Skinner VS, TM-23 at 148-150. The map on the following page shows the KCS system, Tex Mex's line and the FNM system, and indicates the scope of the network that could thus be created. Without the trackage rights sought b_ Tex Mex, such a network would not be

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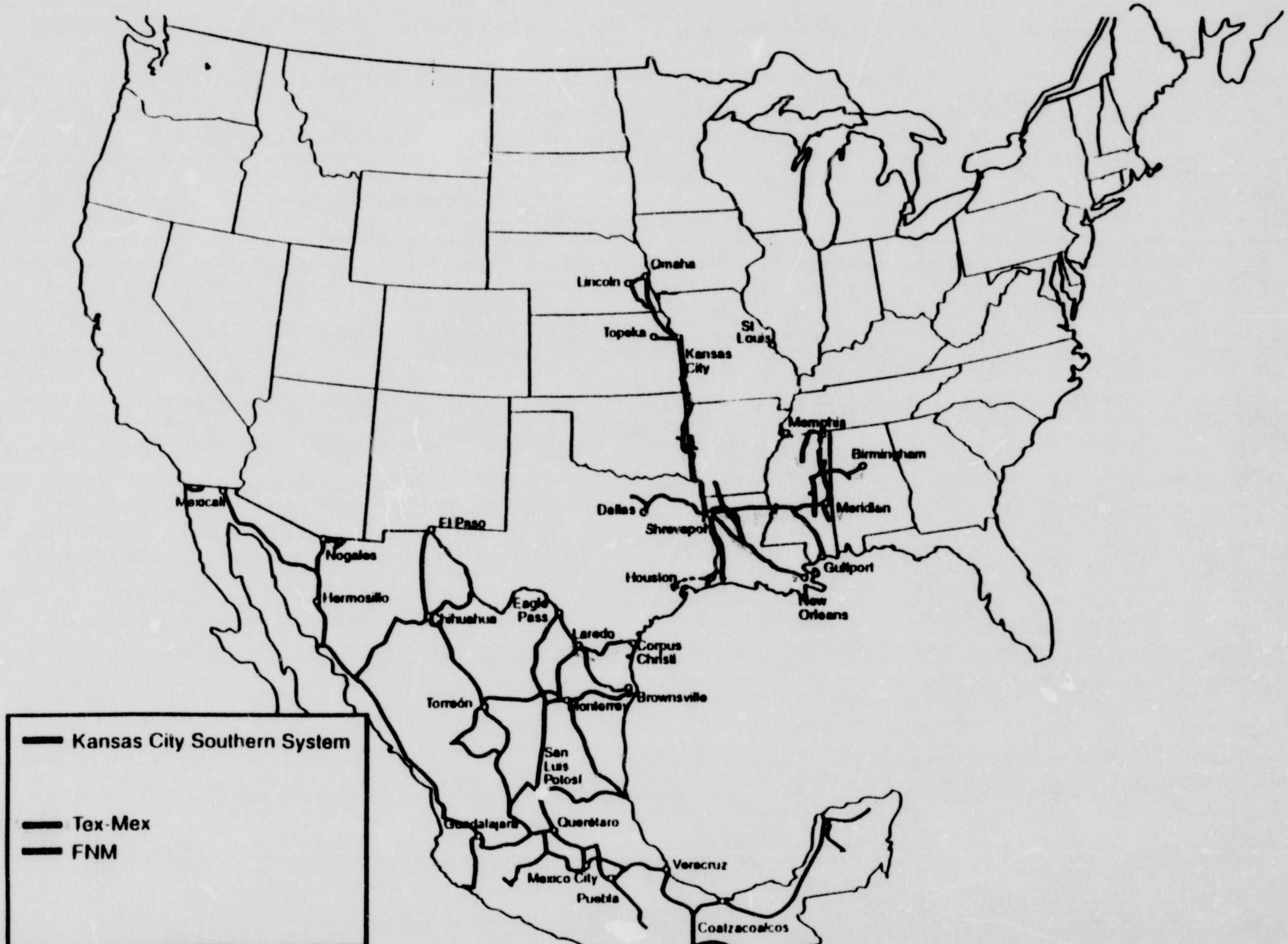
25/ There is no basis for Applicants' suggestion that the major purpose of Tex Mex's responsive application is not to preserve competition in the markets served by Tex Mex but is merely to benefit KCS by giving KCS access to shippers in Houston via Tex Mex. As noted in Tex Mex's rebuttal, KCS already has direct access to Houston for grain traffic via a haulage agreement with UP and can also serve shippers in Houston via interline service with UP, SP, HBT and PTRA. TM-34 at 6.

KCS, TEX MEX and FNM SYSTEMS



possible, and transportation between the United States and Mexico would be dominated entirely by a merged UPSP.

The trackage rights sought by Tex Mex will also ensure that Tex Mex and its shippers will not be completely dependent on a connection with BNSF which, for the reasons discussed, is extremely doubtful. As shown by Mr. Ellebracht and Mr. Krick, these rights are likely to generate sufficient traffic and revenues to permit Tex Mex to remain viable and thus to continue providing essential rail services to its shippers.

CONCLUSION

The Board should grant the responsive application and the application for terminal trackage rights of the Texas Mexican Railway Company in this proceeding.

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

Attorneys for Texas Mexican Railway Company

Dated: June 3, 1996

APPENDIX

COPIES OF DEPOSITION TRANSCRIPT PAGES CITED IN THE BRIEF

MR. ROACH: I've gotten behind the curve here on instructing the witness. I thought the last question did not have to do with the settlement negotiations but had to do with consideration as to UP's position.

To the extent he's asking you to describe the settlement negotiations, I have to instruct you not to answer.

BY MR. ALLEN:

Q. Well, the question I asked was what consideration, if any, did UP give to alternative routes. And I believe you answered that, that you started out with a different route, that you had considered giving BN or whoever a different route.

A. That's correct.

Q. And what route was that that you considered?

A. It was the same route that we offered to KCS.

Q. Which route was that?

A. Which is to go from Placedo up to West Point and on in through Sealy to Houston.

Q. Okay. Is that a preferable route from UP's point of view to the one that you ultimately gave?

A. It's a preferable route from our point of view in that it is the route that the Southern Pacific currently operates on between --

Q. Why is that --

A. It's because of the business and congestion particularly on the line from Angleton into Houston.

Q. I'm sorry, I don't see Angleton on the map.

A. (Witness indicates.)

Q. Okay. So the route through from Placedo to West Point is preferable from the UP's perspective because it's not as congested as the other route?

A. That's correct. Plus it's the route Southern Pacific is on today. Southern Pacific goes -- let me correct that. Southern Pacific goes to Flatonia and then comes back over on their own railroad.

Q. So did you offer the KCS the route east from Flatonia or east from West Point?

A. East from West Point.

Q. And why does the fact that the Southern Pacific operates that route make it preferable

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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

BRIEF COMMENTS OF THE

SECRETARY OF AGRICULTURE

Dan Glickman
Secretary

U.S. Department of Agriculture
Washington, D.C. 20250

Date: June 3, 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

BRIEF COMMENTS OF THE

SECRETARY OF AGRICULTURE

These comments of the Secretary of the U.S. Department of Agriculture (USDA) are filed in the above proceeding in accordance with the Interstate Commerce Commission's decision served December 27, 1995, setting forth the procedural schedule for this control and merger proceeding between the Union Pacific (UP) and the Southern Pacific (SP) railroads. We have noted USDA's authority and interest in this proceeding in comments filed previously.

As Secretary of Agriculture, I am charged with the responsibility under the Agricultural Adjustment Act of 1938 (7 U.S.C. 1291) and the Agricultural Marketing Act of 1946 (7 U.S.C. 1622 (j)), as amended, to represent the interest of agricultural shippers and producers in improving transportation services and facilities, by among other things, initiating and participating in STB proceedings involving rates, charges, tariffs, practices, and services.

USDA filed comments in this proceeding on March 29, 1996, and April 29, 1996. We highlighted the importance of competitive rail service for agricultural producers and shippers and the entire rural economy as well as the adverse effects of continuing consolidation and concentration in the railroad industry. As a result, USDA recommended, among other things, that the STB require a third Class I railroad to operate in the corridor between the Lower Plains States and Gulf Coast and Mexico, as well as in the Central Corridor between Kansas City, Missouri, and the West Coast.

The UP has made attempts to alleviate competitive concerns of shippers in the Gulf Coast region. However, USDA's principal concerns regarding decreased competitiveness have not been resolved because no lines have been divested to additional Class I carriers. Accordingly, USDA opposes the proposed merger.

If approved, the proposed UP-SP merger would result in only two Class I railroads serving the vast grain and oilseed production area between the Mississippi River and the Pacific Ocean. This would reduce the number of competing railroads from two to one in a large number of transportation corridors, and it will remove one of only three competing railroads in many more corridors.

Statements entered in this proceeding provide strong evidence that rail rates are likely to increase as the number of competing railroads declines, and strongly suggest that the proposed merger will significantly increase rail rates for shippers. USDA is particularly concerned because much of the empirical evidence links the amount of competition to rail rates for carrying grain.

Moreover, in much of the geographic area that would be served by the proposed merger, there is no economically feasible alternative mode for shipping grains, oilseeds, and other bulk agricultural products. Similarly, agriculture depends on railroads for delivery of crucial agricultural inputs. Higher rates would reduce farm income because farmers would receive lower prices for their output and pay higher prices for their inputs. Persistently lower net returns to agriculture would reduce the value of farm assets, including land.

The proposed merger also has the potential to affect adversely U.S. competitiveness in foreign trade. Affordable service to export points on the Gulf, the Pacific, and gateways to Mexico is essential if the United States is to reap fully the benefits of trade liberalization. Furthermore, we believe that world agricultural markets are in a period of sustained growth characterized by strong demand. As our April 29, 1996 Responsive Comments indicated, the 1996 Farm Bill gave U.S. farmers the flexibility to respond to these market signals. However, farmers will not be able to take full advantage of that flexibility if increased shipping costs reduce their net returns, or if our National reputation as a reliable supplier is tainted as a result of undependable domestic transportation service.

CONCLUSION

Efficient, affordable transportation service is essential to the well being of U.S. agriculture and rural America. The proposed merger will reduce the already limited number of competing transport options for grain and food products shippers in the Southern and Central Plains, including the Central Corridor, the Lower Plains, and the north-south corridor between Kansas City, Wichita, and Forth Worth, Texas to Gulf Ports and Mexico. The proposed merger, with its inadequate mitigating measures, is likely to increase rates and could reduce the quality of service for many shippers in a large part of the United States. The proposed merger also has the potential to affect adversely U.S. competitiveness in foreign trade particularly to export points on the Gulf, Pacific Coast, and Mexican Gateways.

In the Burlington Northern Railroad and Atchison, Topeka, and Santa Fe Railway merger case USDA asked that the Interstate Commerce Commission make every effort to assure that an adequate level of competition was maintained in those markets and on those routes where competition would suffer as a result of that merger. With the approval of that merger, competition was reduced for many shippers in the Lower Plains. This latest merger proposal of the UP and SP would again reduce competitive options and alternatives for many shippers in the same region. For this reason and those already stated, USDA opposes the proposed merger of the UP and SP railroads.

Respectively submitted,

Dan Glickman

Dan Glickman
Secretary

U.S. Department of Agriculture
Washington, D.C. 20250

CERTIFICATE OF SERVICE

I, Eileen S. Stommes, certify that, on this 3rd day of June, 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

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

Eileen S. Stommes

Eileen S. Stommes