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Item No. 83931

Page Count 21
JUN 6, 1996 #12

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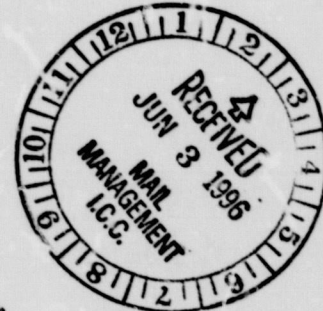
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By Hand

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



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

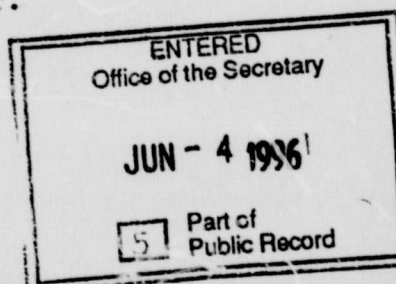
Dear Mr. Williams:

Enclosed for filing on behalf of The International Brotherhood of Teamsters ("IBT") are an original and twenty (20) copies of International Brotherhood of Teamsters' Brief (designated as IBT-14). A disk containing this brief in WordPerfect 5.1 format is also enclosed.

By this letter the undersigned certifies that copies of the brief named above have been served on June 3, 1996, on all parties of record (POR) so designated as of the date of service. Service was made by U.S. Mail, postage pre-paid, except that certain counsel for Applicants have been served by hand (D.C. area).

I enclose an extra copy of this letter and IBT-14 that I ask that you date-stamp and return by our courier.

* Please do not hesitate to contact me should you have any questions about this filing. Thank you for your attention to this matter.



Sincerely,

John W. Butler
John W. Butler

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

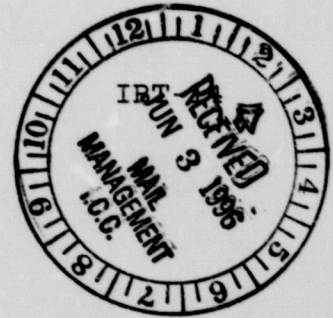
INTERNATIONAL BROTHERHOOD OF TEAMSTERS' BRIEF

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THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Dated: June 3, 1996

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5	Part of Public Record



BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

INTERNATIONAL BROTHERHOOD OF TEAMSTERS' BRIEF

The International Brotherhood of Teamsters ("IBT"), pursuant to the Surface Transportation Board's Decision No. 9, dated December 27, 1995, files this brief in support of the conditions and other relief requested by the IBT in its March 28, 1996, Comments (IBT-12) and Opposition to Applicants' Petition for Exemption (IBT-13).

I. Issues Addressed

In its Comments and Opposition to Applicants' Petition for Exemption, the IBT requested three forms of relief. First, the IBT argued that if the merger is approved, the applicant railroads must be required to divest themselves of their motor carrier subsidiaries. This result is required by statute because the Applicants cannot meet the requirements of 49 U.S.C. § 11344(c), nor can they be exempted from that requirement under 49 U.S.C. § 10505. Second, the IBT requested that New York Dock

labor protections be applied to employees of Union Pacific Motor Freight ("UPMF"). This request for relief is based on two alternative statutory provisions -- the mandatory labor protections prescribed by 49 U.S.C. § 11347 and the Board's discretionary powers under 49 U.S.C. § 11344(c). Finally, the IBT requested that monitoring and reporting requirements be imposed so that the effects of the merger on the motor carrier industry and motor carrier employees can be determined and addressed.

This brief will not repeat arguments made previously, and the IBT respectfully refers the Board to its earlier pleadings, IBT-12 and IBT-13, for a full discussion of those arguments. Rather, the IBT will herein address the brief rebuttal arguments filed by Applicants on April 29, 1996 (UP/SP-230, Vol. 1 at 317-321).

A. If the Merger Is Approved, Applicants Must Divest Themselves of Their Motor Carrier Subsidiaries

49 U.S.C. § 11344(c) states in relevant part:

When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition.

As Applicants acknowledge, they must receive approval under this section, or exemption under 49 U.S.C. § 10505, for the

common control of SP and Overnite, and UP, SPMT, and PMT, respectively.^{1/} Applicants have offered no evidence upon which the Board could conclude that the relevant criteria of 49 U.S.C. § 11344(c) would be met in this case; indeed, they do not argue that they have met those substantive criteria. Instead, Applicants rely entirely on the exemption authority of 49 U.S.C. § 10505.

49 U.S.C. § 10505(a) states that the Board shall exempt a transaction from an otherwise applicable provision of the statute if regulation under such provision:

- (1) is not necessary to carry out the transportation policy of section 10101 or section 10101a of this title; and
- (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

With respect to these threshold requirements, Applicants' most obvious failure to support their position involves subsection (2)(A). The IBT argued that the transaction and the involved service, because they include two Class I railroads and one of the largest motor carriers in the nation

^{1/} IBT uses the abbreviations adopted by Applicants at Vol. 1, pp. xii-xiv, of the Application. Thus, "SP" includes Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad Company; "Overnite" means Overnite Transportation Company; "UP" means Union Pacific Railroad Company and Missouri Pacific Railroad Company; "SPMT" means Southern Pacific Motor Trucking Company; and "PMT" means Pacific Motor Transport Company.

(Overnite), cannot under any standard be said to be of "limited scope." Applicants have not rebutted that argument except to repeat that the transaction involves "an incidental change in ownership resulting from the primary transaction. . . ." ^{2/} UP/SP-230, Vol. 1 at 318. This, of course, is no evidence at all since it addresses only why the transaction is occurring, but says nothing about the size of the transaction or about what impacts it will have on the participants and their competitors and customers. Because the Applicants have the burden of proof on the statutory exemption requirements, ^{3/} their repeated failure to meaningfully address the scope of the transaction requires denial of the exemption petition.

Applicants also claim in their rebuttal that "the petition describes the motor carriers' present operations (SPMT in fact has no present operations), delineates the carriers' relationships to the merging railroads, and explains that the merger will not affect the carriers' operations." UP/SP-230,

^{2/} Applicants' emphasis on the fact that the motor carrier acquisitions are not the "primary" transactions here involved is misplaced. As the IBT stated at IBT-13, p.7 n.12, that a rail/motor transaction covered by section 11344(c) is not the only transaction before the Board has no bearing on the applicability of that section. Section 11344(c) speaks of transactions that "involve[]" a motor carrier. If the statute meant what Applicants would have it mean (i.e., it only applies where the rail/motor transaction is the "primary" transaction), the section would not use the broad and inclusive "involves" language.

^{3/} Finance Docket No. 32760, Decision No. 8 at 8 (November 20, 1995) ("[A]pplicants bear the burden of demonstrating that these exemptions are justified.").

Vol. 1 at 318. To the extent that Applicants have described these elements, they have unequivocally stated with respect to PMT and Overnite that those companies operate independently of their railroad parents, and that they "have no plans to eliminate that independence or otherwise incorporate [those motor carriers] into their operations." UP/SP-26, Vol. 5 at 115, 116. These representations are diametrically contrary to the representations made by UP when it applied for approval of its acquisition of Overnite in Finance Docket No. 31000. As part of that application, UP and Overnite submitted the Verified Statement of Andrew L. Lewis, Jr. In that Verified Statement Mr. Lewis said the following:

By combining rail and truck capabilities under one corporate umbrella and integrating their respective operations into a truly unified service supported by modern computer technology, Union Pacific and Overnite will meet shipper needs and realize efficiencies not otherwise achievable.

* * *

The unvarying objective of both Union Pacific and Overnite under common control will be to provide dependable, flexible and efficient service for every movement, whether it is handled by rail, truck or both, and we will provide the coordinated management, capital investment, and essential computer backup that no two separate transportation companies can provide.

Application in Finance Docket No. 31000, Verified Statement of Mr. Andrew L. Lewis, Jr. at 8-10 (emphasis in original) (copy attached hereto as Exhibit 1). The Interstate Commerce Commission clearly relied on these representations describing closely integrated operations in granting the requested control

approval in Finance Docket No. 31000. In its decision of September 18, 1987, the Commission stated:

The principle public benefit projected from the consolidation will be the creation of an integrated UP/Overnite operation capable of providing improved intermodal and bimodal services to shippers. We agree with Applicants' contention that common ownership of motor and rail entities will enable a degree of coordination, flexibility, and efficiency not attainable through cooperation of independently owned carriers.

Union Pacific & BTMC - Control - Overnite Transp. Co., 4 I.C.C. 2d 36, 49 (1987).

As this review of the prior application indicates, the picture that Applicants now paint of at least Overnite's operations and its relationship to its railroad parent is quite different from that presented to the ICC in the previous proceeding.^{4/} The gross discrepancy between the two applications requires that the Board demand that Applicants provide something more in support of their exemption petition than conclusory statements about the relationships of the applicant railroads and

^{4/} It does not appear to go too far to say that Applicants may be playing fast and loose with the facts in order to argue that they meet the "form over substance" standard under the cases on which they rely. (See pages 7-11, *infra*, for a rebuttal of this so-called standard.) Apparently, when it suits the Applicants' needs and purposes to contend that the operations of UP and Overnite will be closely coordinated and combined under common management, they do so, as evidenced by the statements of Mr. Lewis quoted above. Now, when the Applicants perceive it to be advantageous to contend that UP and Overnite are totally independent, they reverse their representations to the Board without any explanation or mention of their previous position. The Board should not countenance such a cavalier presentation of the "facts."

their motor carrier subsidiaries. The current record as established by Applicants does not fulfill that requirement, and the exemption must be denied on that ground alone.

In addition to failing to meet the threshold exemption criteria under Section 10505(a), the petition for exemption must be denied because of section 10505(g), which states:

The Commission [Board] may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title. .

Section 11344(c) in fact does prohibit common rail/motor ownership unless the Board makes certain specified findings. As is demonstrated in the IBT's Comments (IBT-12 at 4-6) and in Applicants' rebuttal, Applicants do not attempt to show compliance with these requirements. By the plain language of the statute, therefore, no exemption may be granted.

In support of their exemption petition, Applicants rely entirely upon a line of Interstate Commerce Commission decisions that have held that transactions that involve a "change of form rather than of substance" may be exempted under section 10505 notwithstanding the fact that the transaction cannot meet the requirements of section 11344(c). The IBT has argued first that these decisions are inapposite in the current case, see IBT-13 at 10-12, and second that the "form over substance" distinction is

not authorized by the statute in any case.^{5/} Applicants do not in their rebuttal even address the IBT's argument that the "form over substance" cases relied upon by Applicants are distinguishable on their facts from the current exemption request, but simply cite those same cases again in support of the exemption.

Applicants address only the IBT's argument that exemption of rail/motor acquisitions is not authorized by the statute. In this regard, the primary argument that Applicants offer is the observation that the Board earlier in this proceeding declined to reopen a decision granting waiver of the regulations regarding identity of applicants, and in doing so disagreed with the IBT's reading of Regular Common Carrier Conference v. U.S., 820 F.2d 1323 (D.C. Cir. 1987). Finance Docket No. 32760, Decision 8 at 8 (November 22, 1995).

Applicants cite the discussion in Decision No. 8 for the proposition that the Board has "already rejected" the

^{5/} Applicants characterize the IBT's argument that the "form over substance" distinction is not authorized by the statute as a "fallback" position. Although Applicants' attempt to brush off the argument is of no legal significance, the IBT wishes to emphasize that this argument is at the heart of its position. Section 11344(c) contains a "prohibition" as that term is used in section 10505, and that means that section 10505(g) cannot be used to exempt rail/motor acquisitions from review under section 11344(c) -- period. That the IBT chose to address the section 10505(a) and (g) criteria in order of their appearance should not be taken by the Board as an indication that the IBT believes anything other than that the statute requires either that the section 11344(c) findings be made or that the Applicants divest themselves of their motor carrier subsidiaries.

argument that exemption is not available in this case. The Board in fact did not go that far in its earlier ruling. While the Board did disagree with the IBT's reading of Regular Common Carrier, as noted above, it reserved judgement on the issue here presented, i.e., whether an exemption may be granted in this case. The IBT's position that the Regular Common Carrier decision precludes a section 10505 exemption with respect to rail/motor acquisitions has not changed. The IBT does not rely solely on that case, however, but argues primarily that the plain words of the statute and its clear intent to allow rail/motor acquisitions only in carefully prescribed circumstances require denial of the exemption in this case. For a full explanation of the IBT's position, see IBT-13 at 12-18; p. 4 n.2, supra. Applicants have nowhere addressed these statutory arguments.

Applicants contend in support of the "form over substance" distinction that "the relevant question is whether the transaction will change the nature of that service. . . ." Id.^{6/} Applicants reason that if the service will not change, the exemption should be granted. This argument crystallizes the error in Applicants' reading of section 11344(c). In order for a

^{6/} In support of their argument that the subject transactions involve only changes in "form," Applicants take issue with what they say is a statement by the IBT to the effect that the relevant inquiry relates to "the type of service performed before the transaction. . . ." UP/SP-230, Vol. 1 at 319. The IBT never made any such assertion, and does not understand the purpose of Applicants' statement.

rail/motor transaction to be approved under section 11344(c), the Board must find, inter alia, that the rail carrier will use the services of the motor carrier in furtherance of the rail carrier's rail operations. International Brotherhood of Teamsters v. ICC, 801 F.2d 1423 (D.C. Cir. 1986), petitions for review denied, 818 F. 2d 87 (D.C. Cir. 1987). Indeed, as noted above and presumably with this type of requirement in mind, Mr. Lewis' Verified Statement in Finance Docket No. 31000 contended that the motor carrier operations of Overnite would be substantially integrated with UP's rail service. Notwithstanding that earlier contention, Applicants here maintain that the motor carriers now have nothing to do with their parents' rail operations and will have nothing to do with those rail operations after the merger.

In attempting to tailor their petition to the rule of the cases upon which they rely, Applicants have thus offered a set of facts (i.e, complete independence of the rail and motor operations) that absolutely forecloses any finding that the substantive criteria of section 11344(c) have been met. Reduced to its essence, Applicants' argument is that they should be exempted from the requirements of section 11344(c) for the sole reason that they cannot possibly satisfy those same requirements. Seen in this light, it becomes clear that the "form over substance" argument is both aptly named and squarely at odds with the language that Congress enacted into law. Because that

argument is the only one that Applicants offer in support of their exemption petition, the petition must be denied.

B. Union Pacific Motor Freight Employees Should be Granted New York Dock Labor Protections

At pages 6-12 of its Comments (IBT-12), the IBT argues that the employees of Union Pacific Motor Freight ("UPMF") are railroad employees entitled to New York Dock labor protections under 49 U.S.C. § 11347. In the alternative, should the Board decide that UPMF employees are not entitled to mandatory labor protective provisions under section 11347, the IBT presented evidence supporting its request for discretionary labor protective provisions under section 11344(c).

Applicants in their rebuttal address only the mandatory labor protection argument under section 11347, relying on Rives v. ICC, 934 F.2d 1171 (10th Cir. 1991), cert. denied, 503 U.S. 959 (1992). The IBT's arguments for why the Board should instead apply the reasoning of Cosby v. ICC, 741 F.2d 1077 (8th Cir. 1984), cert. denied, 471 U.S. 1110 (1985), are set forth in IBT-12, pp. 6-7, and will not be repeated here. In this regard, however, the IBT does remind the Board that it is not bound to reach the decision upheld in Rives, supra. The Court there found only that the ICC's decision to withhold labor protective provisions under section 11347 was a permissible reading of the statute, not that it was the only permissible reading of the statute. In fact, the Court indicated that it may be more

rational for the analysis to focus on the work performed rather than the identity of the employer. Id. at 1175.

Applicants offer no rebuttal of the IBT's request for the granting of discretionary labor protections for UPMF employees under authority of 49 U.S.C. § 11344(c). Furthermore, Applicants do not address in their rebuttal the fact that they appear to have conceded that the functions of the UPMF workers are characteristic of rail rather than motor carrier employees. See IBT-12, p. 2 n.2 (noting that Applicants have not sought approval of or exemption from review of the common control of UPMF and SP as required by section 11344(c)).

In light of the evidence presented by the IBT demonstrating that the UPMF employees are for all intents and purposes railroad employees, see IBT-12, Exhibit 1, pp. 9-11, and in light of the Applicants' implicit admission of this fact and their failure to rebut the IBT's evidence, the IBT respectfully restates its request that UPMF employees be granted New York Dock labor protective provisions under section 11344(c) if such protections are not granted under section 11347.

C. The Reporting Requirements Requested by the IBT Are Reasonable and Necessary and Should Be Adopted

The IBT has requested that the Board condition any approval of the merger by requiring that Applicants submit semi-annual reports with the Board identifying the volume of and rate-of-return information related to cargoes diverted from truck to

rail. IBT-12 at 11. In response to this request, Applicants have addressed two issues in their rebuttal.

First, in response to concerns regarding predatory pricing of intermodal rail services, Applicants assert that their expert, Mr. Roberts, has stated that there is no incentive for railroads to divert unprofitable traffic. UP/SP-230, Vol. 1 at 320. In the long view, it is difficult to argue with such logic. The concern here, however, is over short-term below-cost pricing designed to cripple over-the-road competition, thus allowing railroads to gain market share that can in turn be used to raise rates. Applicants' other expert in this area, Mr. Ainsworth, acknowledged that some current rail intermodal cargo does not pay its way. IBT-12, Exhibit 1 at 4, and materials cited therein. In light of this admission, Applicants have failed to provide a plausible explanation of why they will not use the dramatic increase in their market share after the merger to expand the below-cost pricing practices in which they undeniably participate today. The evidence therefore demonstrates that such practices will more likely than not continue, and the requested reporting conditions represent the minimum measures necessary to monitor and constrain this sort of unfair competition.

The second issue that Applicants address in their rebuttal of the request for reporting conditions is that of the projected loss of truck driver jobs that will result from diversion of cargo from truck to rail. Here Applicants argue

that if diversions are in fact higher than predicted, that would support rather than argue against approval of the merger. This suggestion misses the point. The concern of the IBT is that, even at the level predicted by the Applicants, the merger-related diversions will cost the nation's truck drivers \$250 million a year in wages. IBT-12, Exhibit 1 at 8. The impact of that loss on the economy as a whole will be multiplied as the direct and indirect economic and social effects of such wage losses reverberate through the economy.

The possibility of predatory pricing and the certainty of large-scale job losses^{7/} are negative impacts that may far outweigh the "public benefits" predicted by the Applicants. The IBT's request for monitoring of these effects provides a means of testing the speculations and assurances provided by the Applicants. Particularly in light of the fact that cargo diversions have been predicted in other mergers (e.g. BN/Santa Fe), but those predictions have never been followed up with concrete observations, this merger, if approved, provides an invaluable opportunity to test the hypotheses that are offered up by merger applicants as "evidence." By adopting the requested reporting requirements, the Board would not only create a mechanism for monitoring the actual, rather than the predicted effects of this largest rail merger in U.S. history, but would

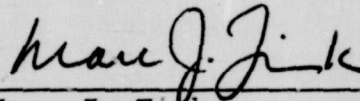
^{7/} Applicants nowhere take issue with the IPT's calculations of the number of truck driver jobs or the amount of wages that will be lost because of the merger.

also create an important collection of information against which to measure future predictions of the same sort.

II. Conclusion

For the reasons stated herein, the IBT respectfully requests that the Applicants' Petition for Exemption with respect to common control of their motor carrier subsidiaries be denied, and that any approval of the merger be conditioned on divestiture of those subsidiaries. The IBT also respectfully requests that the employees of Union Pacific Motor Freight be granted New York Dock labor protections, and that Applicants be required to file semi-annual reports as described in IBT-12.

Respectfully submitted,



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Attorneys for
THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Dated: June 3, 1996

VERIFIED STATEMENT

OF

ANDREW L. LEWIS, Jr.

My name is Drew Lewis. I am President and Chief Operating Officer of Union Pacific Corporation ("UPC"), with offices at 345 Park Avenue in New York City. I joined UPC as a director on January 30, 1986, and I was elected Chairman of Union Pacific Railroad Company ("Union Pacific" or "UP") effective April 1, 1986. I assumed my current responsibilities in October, 1986. I am also a member of the boards of directors of Ford Motor Company, American Express Company, and Smith Kline Beckman Corporation and of the board of trustees of the Committee for Economic Development.

My association with the railroad industry began in 1971 when I became a trustee of the estate of the Reading Railroad, overseeing its reorganization and conveyance to Conrail. From 1981 through 1983, I served as Secretary of Transportation in the Reagan administration, where I had significant involvement with all transportation modes. Following service as Secretary of Transportation, I became

increasing numbers of companies adopt cost-saving integrated manufacturing procedures, they will demand logistics partners who can handle both the truck and rail components of transportation.

The Importance of Overnite for
Union Pacific Operations.

To respond to these changing shipper requirements, UPC must be able to offer a complete and unified transportation system that combines the best of rail and truck service, coordinates the two modes dependably and consistently, and is supported by a modern computerized Logistics system. This integrated transportation service must be able to satisfy all, not merely some, of its shippers' supply and distribution requirements. It must be able to utilize rail where it is most efficient and trucks where they are most efficient. The new transportation service must also be able to eliminate the inefficiencies inherent in most existing intermodal transportation packages that for the most part are loose assemblages of separate rail and motor carrier operations.

By combining rail and truck capabilities under one corporate umbrella and integrating their respective operations into a truly unified service supported by modern computer technology, Union Pacific and Overnite will meet shipper needs and realize efficiencies not otherwise

achievable. The historical antagonism between truckers and railroads that has generally retarded cooperation in the past will be eliminated. Movements will be coordinated from initial pick up to ultimate delivery, improving service while at the same time reducing costs. Through joint planning, UP and Overnite will be able to design facilities, equipment and schedules to maximize total transportation efficiency, not just the efficiency of one mode to the possible detriment of the other. This integrated transportation package can become a part of shippers' and receivers' own operations, thus tying together the supply-manufacturing-distribution cycle in a complete logistics package. These logistics packages will minimize costly inventory and materials handling requirements at shipper facilities and maximize the efficiency of our customer's production-distribution efforts.

What UPC hopes to achieve through the Overnite transaction is not only "one-stop shopping" for two modes of transportation, though there is certainly great shipper demand for this alternative. Rather, our goal is one-source shipping with a single company responsible and accountable for all aspects of transportation, and with the management tools and capacity to do the job well. The unvarying objective of both Union Pacific and Overnite under common control will be to provide dependable, flexible and

efficient service for every movement, whether it is handled by rail, truck or both, and we will provide the coordinated management, capital investment, and essential computer backup that no two separate transportation companies can provide.

Other verified statements explain in detail the improved and new services that UP-Overnite will be able to provide under common ownership. Many larger shippers will benefit from our ability to provide integrated logistics support, handling all aspects of inbound parts deliveries and of outbound goods distribution by rail, truck and inter-modal service, even under the stringent demands of just-in-time production and demand-driven distribution systems. We will therefore reduce shippers' inventory and handling costs, while improving their own ability to respond to their customers' demands.

We will also explore an array of coordinated rail/motor carrier services that are now foregone or underutilized because of lack of common interests. Mr. Rody's and Mr. Schordock's statement describes our ability to provide efficient, computer-supported delivery and reloading of the large flows of steamship containers moving from the West Coast into the eastern half of the country. This program will result in reduced costs for shippers of westbound goods while improving UP and Overnite equipment utilization. Mr.

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MAYER, BROWN & PLATT

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ERIKA Z. JONES
202-778-0642

June 3, 1996



VIA HAND DELIVERY

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

Item No. _____

Page Count 130
JUNE, 1996 # 13

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

Dear Secretary Williams:

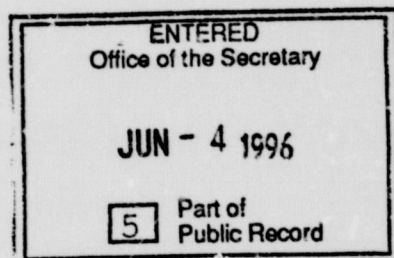
On behalf of the Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company, I enclose for filing an original and twenty (20) copies of the Brief of BN/Santa Fe (BN/SF-59). I am also enclosing a disk containing the text of BN/SF-59 in Wordperfect 5.1 format.

Please contact me if you have any questions.

Sincerely,

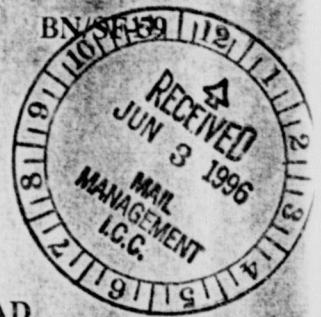
Erika Z. Jones
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Enclosures



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760



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

- CONTROL AND MERGER -

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

BRIEF OF BN/SANTA FE

Jeffrey R. Moreland
Richard E. Weicher
Janice G. Barber
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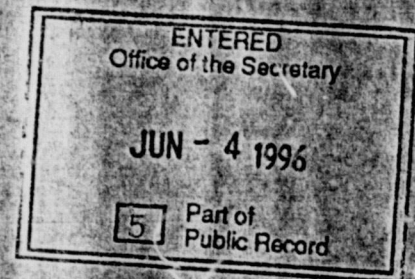
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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 OF BN/SANTA FE

INTRODUCTION AND SUMMARY OF ARGUMENT

The Settlement Agreements among BN/Santa Fe, Union Pacific, and Southern Pacific provide the best solution to the competitive problems that would otherwise be presented by an unconditioned merger between UP and SP. If the Board approves the UP/SP merger, the BN/Santa Fe Agreements should be imposed to address the loss of two-carrier service now available to shippers served by both UP and SP and only by those carriers.

BN/Santa Fe alone offers a network of equivalent breadth to shippers who would otherwise lose a competitive alternative if SP is merged into UP. BN/Santa Fe is committed to offering service that will significantly improve on SP's present service.

BN/Santa Fe is the only appropriate replacement for SP. Access to another carrier would not replace the competitive single-line and routing options that shippers would lose if SP merges with UP. No railroad other than BN/Santa Fe so nearly duplicates the SP and UP networks; the other aspirants would simply provide a second carrier not comparable to SP or to UP/SP and

thus not capable of *replacing* what would be lost. Likewise, no other railroad has the financial strength, operational capabilities, and marketing expertise to serve the long routes in the western United States.

The BN/Santa Fe Agreements also would produce substantial public benefits on their own. They would knit together the extensive BN/Santa Fe route system to produce more options and greater efficiency for shippers to whom BN/Santa Fe would *gain* access, as well as for the many shippers already served by BN/Santa Fe. The BN/Santa Fe Agreements transform the character of the proposed consolidation into a vehicle for expanded and invigorated competition across more than half of the United States.

The doubts expressed by some parties about the competitive effectiveness of the BN/Santa Fe Agreements are unfounded. BN/Santa Fe is confident that the trackage rights granted in the BN/Santa Fe Agreements will preserve effective competition and that BN/Santa Fe will have sufficient density to serve shippers effectively. BN/Santa Fe expects no significant operational obstacles to effective service, and the trackage rights and other compensation terms will allow effective competition. Moreover, BN/Santa Fe is committed to taking the operational steps and making the capital investments necessary to achieve the competitive benefits for shippers under the BN/Santa Fe Agreements.

The alternative proposals contained in responsive applications and requests for conditions fail to address the competitive issues as well as the BN/Santa Fe Agreements do. Further, the alternative proposals do not meet the applicable legal standards for imposition as conditions to this merger. Not only do those proposals fail to provide an effective and equivalent *replacement* to SP competition, but also they lead to a net loss rather than a gain in nationwide rail network

efficiency because they would split up the SP network and reduce density to unsustainable levels by overlaying parts of it with a third carrier.

Under the combination of trackage rights and line sales provided by the BN/Santa Fe Agreements, BN/Santa Fe is able to replicate all of the competitive price and service discipline provided by SP, and more. BN/Santa Fe is committed to competing vigorously for the new market opportunities made available by the BN/Santa Fe Agreements. Divestiture of lines is unwarranted, as is attempting to layer on additional carriers in any of the corridors that would gain BN/Santa Fe access. In fact, forced divestiture and/or attempting to layer additional carriers atop BN/Santa Fe would severely reduce, rather than enhance, the competitive options available to shippers affected by the UP/SP proposal.

I. THE BN/SANTA FE AGREEMENTS PROVIDE THE ONLY ADEQUATE AND APPROPRIATE REMEDY FOR THE ANTICOMPETITIVE EFFECTS OF THE PROPOSED TRANSACTION

The proposed merger between UP and SP, if unconditioned, would present significant competitive problems. The route systems of UP and SP overlap throughout large sections of the United States, and many locations and shippers have been served *only* by UP and SP. UP and SP have competed for traffic in these affected areas as vigorously as SP's cost and service disadvantages would allow. The loss of SP as a competitive force, if unremedied, would leave many shippers at the mercy of the merged carrier.

In such circumstances — when a proposed merger “may produce * * * an anticompetitive reduction of competition in an affected market” — the Board may approve a merger only after imposing conditions to ensure that the benefits of existing competition are not lost. *UP/MP/WP* at 565. Applicants recognize that the imposition of conditions is appropriate and have entered

into the BN/Santa Fe Agreements, which are designed to solve the significant anticompetitive effects that have been identified.

On September 25, 1995, Applicants entered into the Original Agreement with BN/Santa Fe. The parties amended that agreement on November 18, 1995, and further amendments will result from the April 18, 1996, CMA Agreement. The amendments to the Original Agreement implement the intent of the Original Agreement, in some instances clarifying provisions of the Original Agreement, in other instances clarifying that BN/Santa Fe has certain rights that BN/Santa Fe would have received anyway through the implementing process, and in a few other instances giving BN/Santa Fe and shippers additional rights. See Ice 2d V.S. 5-9; see also UP/SP-257, at 4.¹

The essence of the Agreements is that BN/Santa Fe will, if the merger is approved, gain access to *all* "2-to-1" points and corridors, including feasible build-out points, via trackage

¹ CMA witness Speight testified, however, that, although he "can't envision * * * any agreement that would satisfy everybody's concerns," "[t]he agreement that CMA signed with UP/SP satisfied CMA's concerns." Speight Dep. 78. Thus, the CMA Agreement is significant not so much because of the incremental *change* it makes in the Original Agreement as because it *confirms* that a substantial group of rational shippers acting in their own self-interest accept the Agreements as realistically sufficient to preserve competition. As Professor Kalt testified, "It is not plausible * * * that the very kinds of shippers who have the most to lose from approval of a merger with inadequate competition-preserving conditions would have misjudged their interests." Kalt V.S. 16. See UP/MKT at 468.

This point is valid whether or not the CMA Agreement enjoys the support of all CMA members. The Board in this case has recognized that not all members support all actions taken by the groups to which they belong. Decision No. 35, at 4 n.6. Of course, it is not a valid objection to the CMA Agreement that some shippers (those who would lose actual or potential 2-carrier competition if the BN/Santa Fe Agreements did not provide them with a new option) may benefit at the expense of their manufacturing competitors. See BN/Santa Fe at 99; RGI/Soo at 886-887; UP/MKT at 469 (if Board was "obliged to ensure that trackage rights conditions had no subsidiary effects on the relative competitive positions of businesses in other industries, imposition of appropriate conditions on a merger would be impossible").

rights (and in some cases via line sales) at specified trackage rights compensation terms. Original Agreement, *reprinted in* BN/SF-1, Ice 1st V.S. App. 1. The BN/Santa Fe Agreements are described in greater detail in the first and second verified statements of BN/Santa Fe witness Carl R. Ice and the verified statement of BN/Santa Fe witness Joseph P. Kalt.

The CMA Agreement strengthens the statutory oversight authority that the Board has over the implementation of mergers. Section 14 of the Agreement provides that Applicants consent to annual oversight proceedings by the Board for five years, "with the Board to examine whether the BN/Santa Fe Settlement Agreement has effectively addressed the competitive issues it was intended to address," and further provides that "[t]he Board shall have authority to impose additional remedial conditions." UP/SP-219 at 5-6. This means that any shipper, rail carrier, or other interested party can petition the Board at any time during the five-year oversight period to bring to the Board's attention evidence that the BN/Santa Fe Agreements are not working in the pro-competitive way that is intended.

BN/Santa Fe believes that the Board should accept the proposal made by Applicants and CMA. By formalizing its oversight, the Board can remove any speculation from the task of ensuring that the merger (if approved) will not harm competition, and in particular can avoid imposing unjustified conditions (as Tex Mex, among others, requests, see TM-34 at 4, 14) based on the mere *possibility* that the BN/Santa Fe Agreements will turn out to be ineffective.

A. The BN/Santa Fe Agreements Satisfy the Legal Standards for Imposing Conditions and Offer the Best Solution to the Competitive Problems Posed by the UP/SP Merger

The Board and its predecessor long have explicitly "favor[ed] the negotiation of settlements by parties to consolidation proceedings" because those agreements "promote the

expeditious resolution of matters of serious concern" to affected shippers and carriers. *UP/MP/WP* at 601. The Board's position is consistent with, and to some extent driven by, the Rail Transportation Policy, 49 U.S.C. § 10101 (formerly § 10101a): "The 15 elements of that policy set forth in section 10101a, taken as a whole, emphasize reliance on competitive forces, not government regulation, to modernize railroad actions and to promote efficiency." *BN/Santa Fe* at 52.

This policy of favoring free-market remedial arrangements whenever possible extends to the large-scale competitive remedies needed in this case. "If a transaction needs to be restructured in order to make it consistent with the public interest, then such restructuring is best left to the voluntary actions of the parties." *UP/MP/WP* at 565 (emphasis added). The *BN/Santa Fe* Agreements address the competitive impacts for which the Board has consistently required a solution: the elimination of competition between two carriers that alone serve particular points or corridors.² *E.g.*, *BN/Santa Fe* at 55.²

² Although some parties urge that reductions in the number of railroad competitors in several places from three to two present competitive issues that must be addressed by additional conditions, the Board's predecessor generally has held otherwise, and we agree in material part with Applicants' demonstration why such additional conditions are not necessary in this case. Indeed, the Commission held in *UP/MKT* (at 471) that DOJ's "general admonitions * * * about the danger of rail duopoly" did not justify regulatory preservation of three-railroad competition in the face of the market's selection of two of those railroads for survival. Protection of alleged three-carrier "competition" is especially unnecessary if three railroads may be in geographic proximity but in large part compete only one-on-one, or if a significant proportion of the traffic at a general location that is technically served by three carriers is in fact closed to all but one of the carriers. *Id.* at 462. In addition, the Commission has recognized that the merging of a weak carrier with a stronger one can intensify competition, particularly if only one other, strong railroad also serves the market. *NS* at 223; *Guilford/D&H* at 411.

The BN/Santa Fe Agreements meet the stringent criteria that merger conditions must satisfy.³ First, the conditions must address harms to the public interest that the merger otherwise would produce. *BN/Frisco* at 952; *UP/CNW* at 97. Second, the conditions must in fact "ameliorate or eliminate the harmful effects." *UP/MP/WP* at 565. Third, the conditions must be "operationally feasible." *Ibid.* Finally, the conditions must "produce public benefits (through reduction or elimination of the possible harm) that outweigh any reduction to the public benefits that the unconditioned merger would produce." *Ibid.* The BN/Santa Fe Agreements meet those criteria in the best possible way — through privately negotiated agreements that minimize the extent to which the Board must inject government regulatory choices into the railroad network.

The enhancement of competition between the two largest western carriers drives the public interest benefits of this settlement. The standard for evaluating merger conditions largely comes down to whether the pre-merger competition is replicated; there is no basis in the statute or precedents to impose conditions that would "improve" competition within an existing market. *BN/Santa Fe* at 54; *UP/MP/WP* at 562-563. With the lines and rights it will obtain under the BN/Santa Fe Agreements, BN/Santa Fe will provide replacement competition that cannot be matched by any of the proposed alternatives.

³ Indeed, although they may satisfy the same goals of preserving competition, settlement terms to which the primary applicants have agreed generally need not completely satisfy the stringent "criteria for the imposition of involuntary conditions." *UP/MP/WP* at 601-602. Voluntary conditions must be "pro-competitive" and must "ameliorate anticompetitive impacts" of the primary transaction. *BN/Santa Fe* at 83. As shown here, the BN/Santa Fe Agreements do satisfy the Board's requirements for imposition as a condition to solve competitive harms that would otherwise arise from an unconditioned approval of Applicants' proposal.

The *benefits* of the BN/Santa Fe Agreements, however, go far beyond a simple preservation of competition that otherwise would be lost through the UP/SP merger. The BN/Santa Fe Agreements create efficiencies and service improvements in their own right, resulting from end-to-end effects that rival the public benefits of a substantial merger, but without any anticompetitive effects. The BN/Santa Fe Agreements will significantly expand new and competitive single-line service between vast areas of the country, for example between the Pacific Northwest and south and east Texas, Louisiana, and Mexico. Similarly, the northern Plains States will be more thoroughly and efficiently linked with the Central Corridor, Mexico, and the Gulf of Mexico. Current customers of BN/Santa Fe and current customers at UP/SP 2-to-1 points in the Central Corridor and the South Central region will have unprecedented single-line service to each other. These expansions of single-line options provide a substantial benefit to shippers. *BN/Santa Fe* at 65; *UP/MP/WP* at 489; *NS* at 194-195; *CSX* at 553. And where two joint-line movements existed between Los Angeles and Seattle — and UP/SP would have controlled both — there now will be competing single-line service between those points.

The history of the 1920 Transportation Act teaches that rationalization of the national transportation network can provide great benefits to shippers and consumers — by making individual rail networks more efficient — but also teaches that such rationalization is better accomplished by market forces than by government order. The Rail Transportation Policy, 49 U.S.C. § 10101 (formerly § 10101a), is to the same effect. See *NS* at 190 & n.34. Through private accord rather than regulatory fiat, the BN/Santa Fe Agreements provide such desirable, pro-consumer, large-scale rationalization. See *Krebs V.S.* 5-6. The BN/Santa Fe network now stretches from Bieber, California, to Seattle, then eastward to Minnesota, southward through the

Plains States to Texas, westward to Los Angeles, and up to Stockton, California — less than three hundred miles south of Bieber. The I-5 Corridor provisions of the Agreements close the circle, and the Central Corridor provisions fill it in and tie it together, giving shippers far more — and far more efficient — single-line options throughout the West. The BN/Santa Fe system has another gap that is bordered by existing lines that stretch from Beaumont (with a spur up to Longview, Texas), east to Houston, north through eastern Texas and Oklahoma, across southern Missouri, and southeast through Memphis to Pensacola. The Cotton Belt and Southern Corridor provisions of the Agreements bring the BN/Santa Fe network to New Orleans, nearly closing the circle at the south, and fill in the gap by connecting Houston with Memphis (and East St. Louis), and tying in Longview. Here, too, shippers gain extended single-line options rather than being forced to interline across the South Central region (or pass circuitously around it). Like the BN/Santa Fe merger itself, the “extended market coverage” resulting from the BN/Santa Fe Agreements in this case “will result in new competition for other railroads, trucks, and water carriers, and, ultimately, improvements in services and/or decreases in rates” that will benefit hundreds of current and newly served shippers. *BN/Santa Fe* at 59.

B. Criticisms Of The BN/Santa Fe Agreements Are Unfounded

The BN/Santa Fe Agreements provide effective remedies for the competitive “harm that is causally related to the merger,” and thus achieve the goal of merger conditions. *BN/Santa Fe* at 54, 56. In the words of a major Central Corridor and Gulf Coast shipper, the Agreements “sustain competitive options” for shippers. *FMC Corp. Br.* at [3]. There is no merit to the suggestions of certain parties that the BN/Santa Fe Agreements will not effectively replace the competition of the merged-out carrier, SP. To the contrary, the BN/Santa Fe Agreements

accomplish what is needed to redress any competitive "problem arising from the merger." *UP/MP/WP* at 563. That resolves the only question that the Board has to reach in this context: once it confirms that the various criticisms do not, in fact, undermine the conclusion that these privately negotiated Agreements "restor[e]" the competitive "option[s]" that the UP/SP merger otherwise would eliminate (*BN/Santa Fe* at 56), the Board has fulfilled its remediating purpose.

1. *Trackage Rights Work.* Some have criticized the efficacy of the BN/Santa Fe Agreements to address the competitive harms in this proceeding, based on assertions that rail carriers in general do not, and therefore cannot, move substantial traffic over trackage rights lines. *E.g.*, *Hunt/Oderwald V.S.* 5-9; *KCS-33* at 49-54; *MRL-21* at 6-12. The criticisms are unfounded.

As the Board is well aware, many of the principal routes in the national rail transportation system pass over significant trackage rights belonging to direct competitors of the tenants. For example, the competition between BN/Santa Fe and SP for movements to and from the Central Valley of California has flourished although BN/Santa Fe has depended on trackage rights over SP through the Tehachapi Mountains for more than 75 years. *Ice 1st V.S.* 11-12; *ATSF III* at 1. UP likewise reaches Los Angeles only over BN/Santa Fe's Cajon Pass line. See *Peterson R.V.S.* 141; *King R.V.S.* 10. SP's Central Corridor competition — much praised by many of the same commenters who doubt the operational efficacy of trackage rights — relies on trackage rights for almost all of the segment between Pueblo and Chicago. *Kalt V.S.* 59; *Ongerth R.V.S.* 20. And Conrail relies predominantly on trackage rights between Philadelphia and Washington, New York and Boston, and (for a less circuitous alternative) Detroit and

Chicago. These major routes survive as significant competitive forces; operational complaints are usually resolved quickly and efficiently.

The two principal, purported empirical bases for the contentions advanced by critics of trackage rights — the L.E. Peabody & Associates studies and the ALK study — have been exposed as “junk science” of a type probably not even admissible in federal court proceedings, and certainly lacking persuasive force regardless of admissibility. *Kalt V.S.* 61-66 (examining arbitrary and unjustified assumptions, and deeply flawed analytic techniques, of Peabody and ALK studies); *Kent/Klick V.S. passim* (same); *McCarthy/Rao V.S. passim* (same as to ALK only). See *Daubert v. Merrell Dow*, 113 S. Ct. 2786, 2794-2796 (1993).

DOJ's Dr. Majure attempts to build an empirical case when he asserts that the trackage rights obtained by SP and UP in the *BN/Santa Fe* proceeding have not effectively replaced the competition for which they were intended to substitute. Dr. Majure bases that judgment on anecdotes about “what has happened with the trackage rights awarded by BNSF to UP and to SP” in the *BN/Santa Fe* case. *Majure V.S.* 26.

But the full story of “what has happened” with those trackage rights is an impressive testament to their effectiveness. SP moved more than three billion gross ton-miles over its *BN/Santa Fe* trackage rights (and pre-existing rights at similar compensation levels) in the first quarter of 1996. See *Kalt V.S.* 50-52. A specific focus on Superior, Nebraska, and Amarillo, Texas, does nothing to undermine the force of those figures. Wheat — the principal rail commodity at Superior (*BN/Santa Fe* at 63) — is harvested in July and August (see *Hot Weather Is Bringing Up Wheat A Little Fast For Some*, Omaha World-Herald, July 11, 1995, Business, at 14), but UP's rights became effective only upon consummation of common control of BN and

Santa Fe on September 22, 1995, making it difficult for UP to enter the market economically in 1995. UP already has leased most of its lines near Superior to the Kyle Railroad, taking advantage of an efficient short-line feeder operation, and expects its Superior trackage rights to be fully operational in time for this year's harvest. Peterson R.V.S. 141-142. And SP's incipient presence in and around Amarillo has allowed it to carry substantial traffic in wheat and cotton in the first quarter of 1996; SP has solicited traffic from many additional shippers as well. Gray R.V.S. 39-40. In any event, even a few months' delay in full trackage rights operations in isolated markets like Superior and Amarillo should not be allowed to obscure the billions of gross ton-miles SP has already carried pursuant to rights obtained in *BN/Santa Fe*. As Professor Kalt observed (at V.S. 33), "the proof * * * is in the pudding."

2. *BN/Santa Fe's Operations Pursuant to the BN/Santa Fe Agreements Will Have Sufficient Density to Permit Effective Competition.* Several parties (including NITL, IP, KCS, and Conrail) assert that the BN/Santa Fe Agreements do not provide BN/Santa Fe with access to enough traffic to allow it sufficient densities to offer economic, competitive service. These commenters vastly understate the amount of traffic for which BN/Santa Fe will be able to compete, again through methods that do not survive scrutiny (Kalt V.S. 48-50; Kent/Klick V.S. 4-32). These commenters also completely overlook BN/Santa Fe's ability to integrate the new routes into its existing system, rerouting some current traffic to allow it to pursue additional business (and to offer more streamlined service) over its existing lines. Ice 1st V.S. 9-10; Owen 1st V.S. 8-9, 13; Owen 1st Dep. 64-65; Owen 2d Dep. 31-33. The opposing comments and studies also do not take into account the natural growth of BN/Santa Fe traffic once BN/Santa Fe gains access to UP/SP origins under the BN/Santa Fe Agreements and promotes its own

destinations over competing UP/SP destinations. A more inclusive and less biased view of the markets at issue makes it apparent that BN/Santa Fe will have the ability to bid for more than enough traffic to justify aggressive operations in the new corridors to which the BN/Santa Fe Agreements would give it access. Ice 2d V.S. 9; Kalt V.S. 48-50; Kent/Klick V.S. 4-32. That access will be accelerated by the provision of the CMA Agreement that requires Applicants to release shippers at 2-to-1 points in Louisiana and Texas from 50% (or more) of their current contract obligations to UP or SP. Ice 2d V.S. 2; Rose V.S. 3. In addition, BN/Santa Fe's ramping-up expenses are kept low by the usage-variable nature of the trackage rights fee. Finally, the five-year annual oversight proceedings proposed by Applicants and CMA will provide an orderly mechanism for shippers to raise any concerns.

3. *The BN/Santa Fe Agreements Will Present No Significant Operational Obstacles to Fully Competitive Service.* Some commenters (including Conrail, KCS, NITL, and SPI) have claimed that various operational impediments will hinder or prevent BN/Santa Fe from being an effective competitive force on the routes involved in the BN/Santa Fe Agreements. See Kalt V.S. 53 n.58 (listing comments). The supposed obstacles were never, in fact, serious problems, because they were being addressed in the implementation process.⁴ Ice 2d V.S. 9; Clifton V.S. 2-3, 12-13; Owen 2d V.S. 23-24. But the CMA Agreement confirms the resolution of the operating issues most prominently featured by merger opponents — BN/Santa Fe operation

⁴ Various parties (e.g. CR-21 at 62-74) have suggested that BN/Santa Fe will face operational problems in handling traffic efficiently through its Houston hub and in the Houston-Memphis-East St. Louis Corridor. As the Second Verified Statement of Neal D. Owen shows, these assertions are based on misunderstandings both of rail activity in the Houston area generally and of BN/Santa Fe's operations in particular, and accordingly have no merit. Owen 2d V.S. 10-13.

"against the flow" of UP/SP's planned directional operations in the Houston-Memphis Corridor, direct access to East St. Louis for interchanges with eastern carriers, and the supposed risk of discriminatory dispatching by UP/SP. See, *e.g.*, Owen 2d V.S. 3-7, 20-21, 22, 24; Clifton V.S. 5-6; Ice 2d V.S. 2, 4, 9. BN/Santa Fe will have the option of operating "with the flow" in the Houston-Memphis Corridor and will have direct access to East St. Louis over UP/SP lines. Ice 2d V.S. 2. And BN/Santa Fe will agree with UP/SP on a dispatching protocol, including placing a manager in UP/SP's Harriman dispatching facility to provide assurance that BN/Santa Fe trains are treated equally with UP/SP trains of the same priority.⁵ *Id.* at 4.

Some commenters contend that the BN/Santa Fe Agreements should not be imposed as conditions because BN/Santa Fe has not submitted sufficient operating detail. Yet the operating information that has been provided in connection with the BN/Santa Fe Agreements far exceeds in scope and detail any such information provided in previous consolidation proceedings by carriers that were selected to provide competition pursuant to settlement agreements and other actual or proposed conditions. Owen 2d V.S. 2. As the Commission noted, "it is not unusual" for "consolidation proceedings" to involve "proposals, significant elements of which remain to be finalized at the time of decision," but that lack of final details does not preclude the approval of an application. *RGI/Soo* at 877. Here, a condition rather than an application is at issue, and BN/Santa Fe has far exceeded both the Board's requirements and the standard practice of similarly situated parties.

⁵ One factor that may lead the landlord to treat a tenant carrier's trains at an inappropriate priority is the tenant's failure to communicate (or the landlord's failure to note properly) the priority of the tenant's trains, leading to default treatment at the lowest priority. See Tobaben R.V.S. 5; see also *id.* at 3-7; King R.V.S. 7-8. The presence of a BN/Santa Fe manager at UP/SP's dispatching facility should greatly improve communication regarding train priorities.

The Commission has not required minutely detailed operating plans from railroads that, through settlements, proposed to offer competitive service to replace a merged-out railroad. For example, in the *BN/Santa Fe* proceeding, SP — which received 2150 miles of trackage rights (see Gray R.V.S. 36) — filed virtually no operating information. The Commission approved the settlement, and it is working: of the more than three billion gross ton-miles that SP moved over BN/Santa Fe trackage during the first quarter of 1996, more than two billion gross ton-miles moved over the trackage rights obtained in the *BN/Santa Fe* proceeding. See Kalt V.S. 52.⁶

It is particularly ironic that the greatest outcry about the detail with which BN/Santa Fe describes its proposed operations comes from carriers who ask the Board to force the dismemberment of SP for their benefit, without providing more than the slightest hint of how they would operate the vast franchises they would receive. In any event, the Verified Statements of Frank D. Clifton, Matthew K. Rose, and Neal D. Owen in this proceeding outline in detail what BN/Santa Fe plans to do, how it plans to do it, and why its plans will work. As those witnesses explain, BN/Santa Fe has already undertaken significant steps toward addressing all aspects of full implementation of the BN/Santa Fe Agreements. Clifton V.S. *passim*; Rose V.S. 2-3; Owen 2d V.S. 23-24. The BN/Santa Fe implementation team, in conjunction with its counterparts at

⁶ Professor Kalt's Figure 9 identifies 3,196,176,223 GTMs of traffic moved by SP, but 1,133,890,567 of those GTMs were on a BN Kansas City/Chicago route that was relevant for Professor Kalt's purpose (showing that trackage rights with compensation terms similar to those in the present case are effective) but do not pertain to rights SP obtained via settlement in the *BN/Santa Fe* case. See Kalt V.S. 51. With an appropriate reduction for the BN Kansas City/Chicago route, all 2,062,285,656 GTMs remaining moved on 1983 miles of trackage rights that SP obtained from BN and Santa Fe (either to solve competitive problems or as part of business trades) in the settlement agreement in *BN/Santa Fe*.

UP and SP, by mid-May had almost completed on-site inspections of all corridors covered by the BN/Santa Fe Agreements. Clifton Dep. 15. In addition, significant progress has been made in identifying the 2-to-1 stations and shippers, in cataloging mileposts and other physical operating parameters, in determining interim and final operations, and in developing internal plans for operations. Clifton Dep. 91-102. The work of the implementation team is ongoing. For example, issues remaining to be resolved include the resolution of rates to be charged for haulage services, the reciprocal switching charge, the designation of switching limits, and the precise definition of "2-to-1 points." BN/Santa Fe fully expects to have all operational details, including these open issues, worked out in advance of September 12, 1996, the first date on which consummation of the merger of UP and SP is possible under the Board's procedural schedule. Clifton Dep. 33, 53. To the extent there is difficulty in resolving operational doubts in a way that ensures BN/Santa Fe's competitiveness, the five-year oversight provision in the CMA Agreement is available to resolve any such issues.

With some minor modifications and improvements to existing plans, there are no operational or infrastructure problems that would inhibit BN/Santa Fe from providing the customer service and train operations contemplated by the Agreements and described in the first Verified Statement of Neal D. Owen. See Clifton V.S. 12; Owen 2d V.S. 24; Ice 2d V.S. 9, 11-12. To provide immediate service to shippers that want BN/Santa Fe service on Day 1 after UP/SP consummation, BN/Santa Fe intends to use UP/SP to provide haulage services on all corridors covered by the BN/Santa Fe Agreements. Clifton Dep. 82-83. Thereafter, BN/Santa Fe intends to implement trackage rights operations on all areas as quickly as possible, consistent with traffic volumes. *Ibid.* Finally, under the CMA Agreement, BN/Santa Fe, UP, and SP are required

to implement a dispatching protocol. That protocol will eliminate any legitimate concerns about BN/Santa Fe's ability to operate on an equal basis with UP/SP over the trackage rights granted to BN/Santa Fe. Owen 2d V.S. 22; Clifton V.S. 6; Ice 2d V.S. 3-4, 9, 11-12.

The verified statements of Messrs. Owen, Rose, Clifton, and Ice lay the alleged operational concerns to rest. For example, contrary to the persistent suggestion of SPI that there are massive if not insuperable requirements for capital investment in yard and storage-in-transit facilities, BN/Santa Fe already has arranged for ample facilities to begin operations at a substantial volume, and acquiring (or acquiring the use of) additional facilities of this kind is neither logistically challenging nor unduly expensive (see Clifton V.S. 12; Owen 2d V.S. 17-19) — particularly when compared to the massive expenditure that would be required by a carrier intending to *purchase* UP/SP main lines and attendant facilities and equipment. BN/Santa Fe's operational infrastructure over its new routes is positioned to expand with the business — and, as Robert D. Krebs, President and Chief Executive Officer of Burlington Northern Santa Fe Corporation, has testified, the business is contestable and BN/Santa Fe will seek it. Krebs V.S. 3-4, 8, 10.

For the most part, the other doubts expressed by commenters about BN/Santa Fe's operations are no more than vague and unsupported misgivings about operations over trackage rights. The Board should not give those comments credence in light of the industry history of success using trackage rights, including the large-scale trackage rights negotiated in connection with the BN/Santa Fe merger. BN/Santa Fe will be able to operate with sufficient effectiveness to provide shippers with competitive service options that will prevent noncompetitive behavior by

Applicants. That is all that is necessary to remedy the substantial and unacceptable diminution in competition that otherwise would result from the merger.

4. *The Agreed-Upon Trackage Rights Compensation Terms Are Appropriate and Will Not Hinder BN/Santa Fe's Competitive Effectiveness.* The BN/Santa Fe Agreements provide a negotiated trackage rights compensation rate computed on the basis of mills per gross ton-mile.⁷ In addition, UP/SP has extended to BN/Santa Fe the option of replacing the mill rate with a traditional joint facility billing formula. UP/SP-230 at 15-16, 23, 126. The record reflects BN/Santa Fe's confidence that it can compete under the negotiated trackage rights rate. The lower rate that potentially could result from joint facility billing would increase BN/Santa Fe's competitiveness. Ice 2d V.S. 8-9.

Despite the Commission's rejection less than ten months ago in the *BN/Santa Fe* proceeding of similar requests to revise the negotiated trackage rights compensation rates, DOJ and several other parties once again ask the Board to alter the trackage rights compensation rate that was negotiated at arm's length as part of an agreement to preserve competition after a merger. See *BN/Santa Fe* at 88-92 (rejecting request to alter trackage rights compensation terms); see also *UP/MKT* at 468 (same); *UP/MP/WP* at 589 (same). These parties ask the Board to reject the longstanding and clear "preference for privately negotiated terms and conditions of the trackage rights" that the Board may impose as merger conditions. *BN/Santa Fe* at 88. No party has offered a sufficient reason for the Board to diverge from the Commission policy to "approve any reasonable terms agreed to by the parties." *Ibid.* (quoting *UP/MP/WP* at 589).

⁷ Most intermodal and carload traffic would move at a rate of 3.1 mills per gross ton-mile; bulk traffic would move at a rate of 3.0 mills per gross ton-mile.

The Board will recall that many of the same witnesses made the same arguments similar trackage rights compensation rates in the *BN/Santa Fe* proceeding. *BN/Santa Fe* at 90 & n.114 (noting the reliance of DOJ and others on Mr. Crowley's calculations, and rejecting Mr. Crowley's method of valuing railroad assets); *id.* at 91 (same regarding TEP arguments advanced by Mr. Prescott, IP's witness in this proceeding). Yet, despite the predictions in the *BN/Santa Fe* proceeding that the negotiated compensation rates would preclude effective competition, those trackage rights have proven very competitive: SP is moving huge volumes of traffic over the rights obtained in that case.

With good reason (see *Kalt* V.S. 43-44), there is a longstanding policy preference for "parties to set the terms of their trackage rights agreements wherever possible." *UP/MP/WP* at 589. Indeed, the Commission routinely rejected arguments that the compensation rates set by freely negotiated settlement agreements are too high to allow competitive rates for shippers. *E.g.*, *UP/MKT* at 468. This reflects a salutary practice of deferring to market forces in the setting of prices. One additional advantage driving the current policy is that, unlike a system requiring regulatory pre-clearance, it permits "new tenant carriers * * * to plan for and offer new, competitive service immediately after consummation, and [to] implement rate setting strategies reflecting compensation levels that are unlikely to be disturbed." *BN/Santa Fe* at 89. Regulatory intervention would result in endless regulatory proceedings reminiscent of the pre-Staggers Act era -- with accompanying delay and uncertainty impeding market-driven economic activity. Such a result would contravene the free-market preference so strongly expressed in the Rail Transportation Policy, 49 U.S.C. § 10101 (formerly § 10101a), added by the Staggers Act.

In any event, the criticisms of the negotiated compensation terms in this case are quite unsound from an economic point of view. For example, several parties confuse BN/Santa Fe's ability to "compete" with its ability to *defeat* UP/SP in the competition for particular moves. SPI, for example, complains in essence that BN/Santa Fe will have to compete for Gulf Coast chemical traffic, and may not win much traffic if UP/SP lowers prices in response to specific competitive threats. SPI-11 at 24-25. By expressing that apprehension, SPI concedes that BN/Santa Fe's competition is likely to be effective for its intended purpose of constraining monopolistic price behavior. See Kalt V.S. 61. BN/Santa Fe's presence in the market will force UP/SP to behave competitively. BN/Santa Fe can more than fully replace the competitive function of SP by offering better service to shippers and by capturing market share from UP/SP.⁸

Several parties have placed in the record spurious comparisons of BN/Santa Fe's variable costs of the *trackage rights* with, generally, UP/SP's variable costs of the components of a move that correspond to the trackage rights. Such a comparison differs in multiple respects from the economically relevant comparison, which is whether BN/Santa Fe will face lower costs for a *given move* than the costs faced by (or rates charged by) SP, the *merged-out carrier*. See Kalt V.S. 42-43; Majure Dep. 347-348. Application of the correct test — which no merger opponent has even attempted — overwhelmingly supports the reasonableness of the negotiated rates here. See Kent/Klick V.S. 49-54; Kalt V.S. 44-48.

⁸ BN/Santa Fe has every intention and expectation of not just competing for, but actually capturing, substantial market share. Krebs V.S. 2-7, 11; Ice 2d V.S. 7-9, 11; Rose V.S. 3-4. Were that not BN/Santa Fe's expectation, BN/Santa Fe would not have entered into the Agreements in the first place.

Yet another test also confirms the reasonableness of the negotiated rates. When the Board is called on to dictate trackage rights compensation, it uses a three-component formula, regardless of whether the trackage rights involved were imposed in a railroad merger. *BN/Santa Fe* at 89 n.118; *A&M* at 622; *SSW II* at 682-683, 687; *SSW I* at 779-780. The components are:

- (1) the variable cost incurred by the owning carrier as a result of the tenant carrier's operations over the owning carrier's tracks; (2) the tenant carrier's proportionate share of the track's maintenance and operation expenses; and (3) an interest or rental component designed to compensate the owning carrier for the tenant carrier's use of the capital devoted to the track.

Dardanelle & Russellville R.R. at 1-2; *BN/Santa Fe* at 89 n.118. The cost-of-capital element, in turn, is "the product of (a) the valuation base for the line; (b) the interest rental rate; and (c) the proportionate usage of the tenant carrier." *Dardanelle & Russellville R.R.* at 3; *BN/Santa Fe* at 89 n.118. The value of the line "must be *fair market value*" (*BN/Santa Fe* at 89 n.118). Under this approach, if the landlord is a Class I carrier subject to the Uniform System of Accounts, the value of the line would be determined using the Replacement Cost New Less Depreciation (RCNLD) or Capitalized Earnings approaches. See *SSW I* at 786; *ATSF III* at 5. These are methods that can be used to assess the current value of the property. Witnesses Kent and Klick show that trackage rights compensation calculated on this model would approximate the negotiated rates set in the *BN/Santa Fe* Agreements. *Kent/Klick V.S.* 36-43.

Applicants' April 29 rebuttal filing further extends to *BN/Santa Fe* the option of replacing the flat rate base in the *BN/Santa Fe* Agreements with a traditional joint facility billing formula. *UP/SP-230* at 15-16, 23, 126. *BN Santa Fe* will elect whichever compensation formula — that set out in the Agreements, or traditional joint facility billing — yields the lower cost to *BN/San-*

ta Fe in any particular case.⁹ That should allay any remaining concerns about the rate base, while objections that the rate would escalate to uncompetitive levels are no longer tenable now that the 70% RCAF-U adjustment clause has been replaced by an adjustment mechanism based directly on actual changes in UP's costs. See Ice 2d V.S. 3; Kent/Klick V.S. 57-58.

Even SP has competed effectively paying trackage rights compensation rates that are similar to those in the BN/Santa Fe Agreements. BN/Santa Fe will be able — and fully expects — to compete vigorously and effectively under those terms.

II. THE RESPONSIVE APPLICATIONS AND SUGGESTED ALTERNATIVE OR ADDITIONAL CONDITIONS DO NOT SOLVE THE COMPETITIVE PROBLEMS AND DO NOT MEET THE BOARD'S STANDARDS FOR THE IMPOSITION OF CONDITIONS

We have shown above that the BN/Santa Fe Agreements provide full remedies for the “competitive harm [that] is directly and causally related to the merger.” *BN/Santa Fe* at 54. Once that has been established, no additional conditions are appropriate, and the Board's conditioning role is at an end. The Board's “role in merger proceedings is to evaluate carrier-originated proposals to determine whether they are consistent with the public interest.” *UP/MP/WP* at 564. To this end, the Board grants only those conditions that are “narrowly tailored” to ameliorate the direct adverse effects of a merger; once those effects have been

⁹ BN/Santa Fe reads Applicants' April 29 filing not only as providing to BN/Santa Fe a segment-by-segment option to pay the lower of Agreement-based fees and traditional joint facilities billing fees, but also as committing that traditional joint facilities billing calculations will be based on *original* investment cost less depreciation (plus an allocated share of actual roadway maintenance and dispatching expense), as opposed to a book value that may have been adjusted. See UP/SP-230 at 16 n.7 (equating the approach that Applicants are offering BN/Santa Fe as an option with portions of Mr. Crowley's verified statements endorsing an approach based on original investment cost). BN/Santa Fe intends to hold Applicants to those representations, and the Board will have the oversight authority to do so as well.

addressed in the preferred way, by the voluntary action of the applicants (see *id.* at 565), by definition no additional conditions can satisfy the requirement of narrow tailoring. See *BN/Santa Fe* at 56. Once the competition that would be lost through a merger has been replaced, there is no room for other carriers to insist that *more* or *better* competition would ensue if alternative or additional conditions were imposed. *UP/MP/WP* at 562-563; *UP/MKT* at 461-463. Indeed, the Board's predecessor has carefully crafted conditions to *ensure* that the scope of the condition did not exceed the scope of the competitive option lost. *E.g.*, *BN/Santa Fe* at 68.

Because merger conditions tend to decrease both the public and the private benefits of a merger, the Board scrutinizes requests for mandated, involuntary conditions with particular care, and imposes only those that are necessary to ameliorate or eliminate harmful effects to the public interest. See *BN/Santa Fe* at 55; *UP/CNW* at 56; *UP/MP/WP* at 565; 49 C.F.R. § 1180.1(d)(1). In addition, proposed conditions must address merger-related harms to the public interest and must actually remedy those harms. *BN/Santa Fe* at 55-56; *UP/MP/WP* at 565; *BN/Frisco* at 952; *UP/CNW* at 97. The conditions also must be "operationally feasible." *BN/Santa Fe* at 56; *UP/MP/WP* at 565. Finally, the public benefits of the proposed conditions must outweigh the reduction they cause to the public benefits achievable through the merger. *BN/Santa Fe* at 56; *UP/MP/WP* at 565. The Commission repeatedly emphasized that conditions must be "narrowly tailored" to remedy particular adverse effects of a transaction. *BN/Santa Fe* at 56; *UP/CNW* at 97; *Milwaukee II* at 455. "If, for example, the harm to be remedied consists of the loss of a rail option, any conditions should be confined to restoring that option rather than creating a new one." *BN/Santa Fe* at 56.

As we show below, the responsive applications and proposed alternative or additional conditions seeking divestiture or layering on do not satisfy these criteria. In contrast to the BN/Santa Fe Agreements, the opposing requests do not "maximiz[e] efficiency in the allocation of transportation resources" (NS at 216; *Guilford/D&H* at 406), but rather tend to reduce efficiency below current levels by balkanizing large portions of the rail network, by adding additional carriers to existing lines without competitive or economic justification, or both (as MRL proposes). Indeed, shippers have expressed concern that the divestiture proposals, in particular, would eliminate *current* single-line competition. *E.g.*, FMC Corp. Br. at [4]; RD-1; MTN-3; Statement of Riss Intermodal Co. (quoted in *Kalt* V.S. 89, 91-92). Contrary to KCS's representation (KCS-33 at 100), dismembering SP by piecemeal divestiture to railroads with insignificant — or non-existent — western networks is not a "comprehensive * * * solution" to the competitive issues in this case, and would produce none of the benefits to shippers that would result from integrating SP routes into the systems of major western railroads. The fragmentation that KCS and others propose has nothing in common with the integration that would be accomplished by the BN/Santa Fe Agreements together with the UP/SP merger. On the contrary, as one major shipper eloquently put it, the KCS/Conrail/MRL division of western markets would create "a western rail system fractured into an inefficient set of interchanges." FMC Corp. Br. at [4].

Most of the conditions sought in this case (and objections to the BN/Santa Fe Agreements) are nothing but pleas by shippers hoping to extract commercial benefits that are unrelated to the effects of the primary transaction, and opportunistic efforts by railroads to obtain by gov-

ernment order what they could not obtain in the marketplace.¹⁰ As we show below, the criticisms offered against the BN/Santa Fe Agreements, and concomitant condition requests, are unfounded.

These proposals at best "appear to alleviate some of the anticompetitive problems, while continuing or creating others, and rearranging traffic patterns in ways that may have unforeseen consequences." *SFSP I* at 827. The Commission rejected similar condition requests in the past. Such proposals not only fail to address the competitive harms as fully as the BN/Santa Fe Agreements will, but also (as Applicants have explained in greater detail) threaten the public benefits that result from the "efficiency gains" that an "integrated railroad can realize." *BN/Santa Fe* at 51. Furthermore, the proposals that are intended not to supplant the BN/Santa Fe Agreements entirely, but to "layer on" additional carriers, would detract from the efficiency gains that the Agreements would allow BN/Santa Fe to realize. The "layering-on" proposals of Tex Mex and MRL in particular would also "risk diluting the traffic base for all the competitors and jeopardizing the success of the merged system" and its primary competitor, BN/Santa Fe. *SFSP I* at 827.

As a matter of policy, the Board declines to use merger "conditioning powers to make consolidation proceedings vehicles for rail system restructuring." *UP/MP/WP* at 564. Such broad-scale restructuring should be "left primarily to the initiative of the private sector." *UP/MP/WP* at 564. The divestiture requests of Conrail, KCS, and MRL, along with the

¹⁰ Conrail and KCS are more than a little disingenuous in presenting their "auction" ideas as market-based solutions to the competitive problems posed by this merger. The true free-market solution is the one the market came to *without* government intervention — the BN/Santa Fe Agreements, which were entered into after settlement efforts between UP and KCS failed. See *Rebensdorf V.S.* 292-296.

trackage rights application of Tex Mex, "would represent a substantial extension of those carriers' present operations" and thus "are particularly unwarranted." *UP/MKT* at 472. The Commission has "refused to indulge in this sort of restructuring in the past" (*SFSP I* at 827) and the Board should adhere to that policy here.

A. The Divestitures Proposed By KCS And Conrail Are Not Justified

KCS and Conrail each have submitted comprehensive divestiture proposals that effectively would carve SP (or parallel routes of UP) into two or three pieces. Although Conrail and KCS both claim that they favor a Board-run "auction" of some sort, each carrier clearly has suggested a scope of divestiture that would serve its own ambitions for territorial expansion. KCS asks the Board to split off the Cotton Belt (or the parallel UP line), and lines from Houston to New Orleans, Brownsville and San Antonio. KCS also asks the Board to order the divestiture of one of the Central Corridor lines. Conrail, on the other hand, asks the Board to force a sale of the Cotton Belt and the SP's Texas & New Orleans line from El Paso to New Orleans, along with the Eagle Pass branch and other properties attractive to Conrail. Conrail and KCS ask the Board to redraft the railroad map by force, yet each has carefully avoided submitting a responsive application and accompanying operating plan, while nevertheless criticizing BN/Santa Fe for not having provided a full operating plan.

Forced divestiture is an extraordinarily intrusive remedy that is reserved for "an extreme case" (*Wisconsin Central/FV&WI* at 248). In the pre-Staggers era, the Commission recognized that divestiture is a problematic remedy even if the only two carriers in a region are consolidating: such "dismemberment of the merged company's lines" necessarily must "interfere with the merged company's economies, and in general frustrate the overall objectives

of the merger, all to the detriment of the public interest." *Seaboard/ACL* at 187. By contrast, a grant of trackage rights suffices to maintain competition (*id.* at 209) — which now, even more than then, is all that the public interest requires under the circumstances.

Divestiture is particularly inappropriate when the requesting party is "seizing an opportunity to effect a major extension of its system and area of influence" even though the public interest does not require such drastic regulatory action. *Guilford/B&M* at 355. And the Commission was — as the Board should be — particularly suspicious of a carrier that proposes to enter areas that it has never served. The Commission rightly hesitated to use government compulsion to assist a carrier in "an invasion of territory now adequately served by applicants." *Seaboard/ACL* at 187. In this case, the government-dictated "invasion of territory" proposed by Conrail and KCS is completely unjustified.

One serious drawback to the divestiture proposals is the network fragmentation they entail. See *Kalt V.S.* 89-98. Conrail or KCS would make a poor substitute for SP, and the "dismemberment" (*Seaboard/ACL* at 187) of SP (or UP) that they propose would *reduce* single-line service, forcing shippers to deal with multiple interchanges and slow transit. See *FMC Corp. Br.* at [4]. Conrail's proposal is especially striking in this respect: it would break up the SP Sunset Route from New Orleans to California, a fixture in long-haul single-line service for decades.

The Commission recently reaffirmed its recognition of the significant public benefits that result from the elimination of the need to provide interline service. *BN/Santa Fe* at 52. By contrast, Conrail and KCS propose to *create* a need for interline moves for long hauls through large

portions of the United States, eliminating many instances of head-to-head, long-haul, single-line competition from which shippers have long benefited.

Indeed, Conrail and KCS clearly seek mere commercial expansion rather than efficiency or preserved competition. The inability of each of them to claim to *replace* SP in any plausible sense makes that clear enough. It should come as no surprise, then, that in their joint attempts to minimize BN/Santa Fe's ability to provide *competition* in the Gulf Coast markets Conrail and KCS do not calculate BN/Santa Fe's projected traffic as a percentage of the currently *competitive* traffic, but present it as a small fraction of *all* traffic including the *noncompetitive*, *1-to-1* traffic in the region. *E.g.*, Hunt/Oderwald V.S. 10-11. It is that *noncompetitive* traffic that would be the most adversely affected by a divestiture to Conrail or KCS. Like one of KCS's prior requests for extensive trackage rights (which the Commission rejected), this proposal would "produce benefits for KCS far in excess of any harm KCS" — or the public interest — "would suffer as a result of the merger." *ICG/GM&O* at 850.

Conrail and KCS also are plainly inappropriate candidates to replace SP because their route systems offer shippers nothing analogous to the SP system in the West. Conrail, of course, serves markets predominantly located in the Northeast and in no relevant sense offers to replace SP as a competitor in the West; it simply wants to buy a part of SP for its own ends. KCS is predominantly a north-south railroad that would not replace the western rail network of the SP. And, KCS has "provided no basis * * * to find that it could handle the more extensive operations" (*UP/MKT* at 454) that it asks the Board to make available to it.

The KCS and Conrail proposals ask the Board to do exactly what the Board strives to avoid: "broadly restructure the competitive balance among railroads with unpredictable effects."

BN/Santa Fe at 56. That course is especially unwise because, as we have shown above, divestiture is unnecessary to protect competition; the *BN/Santa Fe* Agreements do that better, and the extreme remedy of divestiture should be rejected on that ground alone. But divestiture would be enormously counterproductive, depriving Applicants of many of the benefits and efficiencies of the merger, and depriving *BN/Santa Fe*'s shippers of the efficiencies resulting from the increased rationalization of *BN/Santa Fe*'s network under the *BN/Santa Fe* Agreements. The disadvantages of divestiture far outweigh its highly questionable — and undocumented — benefits in this case. The requests of KCS and Conrail should be denied.

B. The Tex Mex Proposal To Attempt To Layer On A Third Carrier In Southern Texas Is Not Justified

Tex Mex does not propose a divestiture. Instead, Tex Mex asks that the Board, in addition to the *BN/Santa Fe* Agreements, impose as a merger condition trackage rights from Tex Mex to Houston and on to Beaumont, where Tex Mex could connect with its 49% owner, KCS. In large part, Tex Mex's proposal amounts to an alternative path for KCS to link up with the railroad in which it purchased a 49% interest during the pendency of this proceeding. In addition, Tex Mex seeks terminal and yard rights in Houston, which cannot be explained — much less justified — by any competitive effect of the proposed merger.

Tex Mex should have been pleased with the opportunities presented by the *BN/Santa Fe* Agreements. For many years, there have been two — and only two — major railroads along the Texas Gulf Coast between Brownsville and Houston.¹¹ One of those railroads (MP, and

¹¹ In light of this incontestable fact, Tex Mex's claim that its proposal would "preserve" a "third competitive rail alternative" is difficult to understand. Tex Mex simply pursues the impermissible goal of using a Board mandate to put itself "in a better position than it occupied before the consolidation" (*BN/Santa Fe* at 56).

then UP) has had a direct route to Laredo, while Tex Mex has been dependent on the other (SP) as an interchange partner at Corpus Christi/Robstown. BN/Santa Fe already originates more shipments over Laredo using the SP-Tex Mex interline route than SP itself does. See Peterson R.V.S. 124-125. BN/Santa Fe serves many more shippers than SP does, over a far more extensive route structure, and with a far better reputation for swift, effective long-haul service.

To justify its proposal to give a third Class I carrier access to Laredo, Tex Mex advances three meritless arguments. First, it claims that UP/SP merger and the BN/Santa Fe Agreements together reduce the major railroads serving Mexican gateways from 3 to 2, and that this poses an anticompetitive effect warranting a remedy. Ellebracht R.V.S. 4-13; Grimm R.V.S. 2-5. Tex Mex also tried this approach, seeking trackage rights to expand its territory, the last time a proposed merge "threatened" to provide Tex Mex with a larger and more powerful interline partner than it had before. See *SFSP I* at 719. The Commission held that there was no all-Mexican-gateway market, and that Laredo clearly occupied a position of separate and surpassing economic significance. *Ibid.* The Commission further rejected the proposition that a reduction from 3 to 2 major carriers serving Mexico "would seriously reduce the number of competitive rail options at Mexican border crossings. Although the number of major railroads serving these crossings would be reduced from three to two, the crossings do not appear to compete substantially * * *." *SFSP I* at 797.¹²

¹² As a number of Commission decisions recognize, economic analysis of mergers proceeds, as a first step, by identifying "relevant markets." *BN/Santa Fe* at 55 n.74; *SFSP I* at 737-738. Tex Mex's May 14 rebuttal remarkably attempts to portray Mexico as a single "relevant market" in order to portray competition as declining from three to two carriers, yet the effort to portray Mexico as a "market" is both inconsistent with Commission precedent and utter economic nonsense. Tex Mex seeks to portray Mexico as a "market" by misstating BN/Santa Fe's contrary position and then knocking down that straw man. According to Tex Mex, BN/Santa Fe argued

Separate analysis of Laredo, on the other hand, is relevant; Laredo is "by far the most important border-crossing point for railroads" of the United States and Mexico. *UP/MKT* at 472. The Commission recognized as much in *SFSP I* (at 795-801), in which it brushed off concerns that "the number of major railroads serving" all Mexican gateways in the aggregate "would be reduced from three to two" and focused instead on the competition for traffic moving over Laredo. See also Peterson R.V.S. 104 n.24 (citing Tex Mex filing in *UP/MKT*).¹³ BN/Santa Fe, which today does not reach either Laredo or an interchange point with Tex Mex, is never a participant — except in a *three-or-more-carrier* move — in *any* movement involving Laredo. From some origins to Laredo, there is competition between UP and SP/Tex Mex. From other origins, the movement to Laredo is captive to UP or SP/Tex Mex alone. But none of those moves involves competition among UP, SP/Tex Mex, and BN/Santa Fe. The BN/Santa Fe Agreements thus intensify competition at Laredo, adding a "31,000-mile funnel" (Krebs V.S. 4) — and a far more wide-ranging and efficient railroad — to the competitive situation

that there is *no* competition among Mexican gateways. TM-34 at 11; Ellebracht R.V.S. 5. But BN/Santa Fe never made any such contention. There is of course *some* competition among Mexican gateways — just not enough to constrain pricing for movements over Laredo, as Mr. Ellebracht himself admitted. And *that* is the relevant question for purposes of market definition. See BN/SF-54 at 28 n.10.

¹³ Dr. Grimm's attempt to develop a BEA-based analysis to support his conclusion that there is a reduction from three Mexico-serving carriers to two should be disregarded in light of the Commission's criticism of BEA-based economic analysis in *UP/CNW*. There, the Commission disparaged attempts to define geographic markets "in an arbitrary fashion using off-the-shelf geographic units such as BEAs unless solid support for their use may be provided." *Id.* at 78. In particular, the Commission noted that a BEA market "may be either too large or too small" because within some BEAs merging railroads "may be too far apart to compete effectively with each other," while in other situations "important sources of competition may be excluded because they operate in a neighboring BEA." *Ibid.*

there.¹⁴ When this change is coupled with new access to Brownsville and enhanced access to Eagle Pass, it is clear that BN/Santa Fe is poised to become a principal participant in U.S.-Mexico traffic, and that no other carrier would be as well positioned to compete vigorously with the Applicants. There is simply no evidence to support the notion that three rather than two carriers must have access to Laredo in order to restore the pre-merger status quo, in which only two carriers serve Laredo.

Second, Tex Mex falls back on its unsupported assertion that BN/Santa Fe "has * * * clearly indicated that it will not be as committed to promoting" U.S.-Mexico traffic "as SP has been." *Ellebracht R.V.S.* 16. The record conclusively shows the contrary.

BN/Santa Fe's predecessors have striven to gain effective access to Mexico for more than one hundred years, as is demonstrated by Santa Fe's purchases of the Sonora Railway and the Kansas City, Mexico & Orient Railway, Santa Fe's longstanding connections in El Paso and San Ysidro, BN's institution of rail-barge service to Mexico over Galveston (see *Grinstein Dep.* 13-14), and BN/Santa Fe's recent acquisition of haulage rights over Eagle Pass. As the Commission recognized, however, access to Mexico over Laredo is vastly superior to any and all other forms of access, singly or collectively. *SFSP I* at 795-801. BN/Santa Fe's predecessor companies shared this awareness, as demonstrated by Santa Fe's efforts to gain access to Tex Mex in merger proceedings. See, e.g., *UP/MKT* at 423, 424, 473 (ATSF sought trackage to

¹⁴ In order to magnify the supposed inadequacy of the BN/Santa Fe Agreements, Dr. Grimm vastly expands the universe of 2-to-1 shippers *affected* by the UP/SP merger by including eastern shippers to 2-to-1 UP/SP destinations, but does *not* include these shippers in his estimates of the ameliorative effects of the BN/Santa Fe Agreements. The reason for the omission is, like most of Dr. Grimm's statements, transparent: the competitive options of *all* such shippers are fully protected by the Agreements.

San Antonio in conjunction with Tex Mex application for trackage rights to that city from Laredo); *id.* at 473-474 (ATSF sought imposition of joint rates over Laredo from UP); *SFSP I.*

BN/Santa Fe testimony in this proceeding confirms that it remains deeply interested in seeking better access to Mexico. See Krebs V.S. 3-4; Ice 1st Dep. 582-586; Bredenberg Dep. 128-129. BN/Santa Fe's low-key role in the preliminary stages of the privatization of the Mexican railroads is not inconsistent with BN/Santa Fe's well-documented interest in U.S. traffic that is bound to or from Mexico. Indeed, several witnesses pointed out (Kalt V.S. 34-39; Thruston R.V.S. 4; Bredenberg Dep. 13-14) — and Tex Mex witness Skinner agreed (Dep. 56, 73-74) — that United States carriers need not participate in the sale of privatized Mexican railroads, and need not succeed in achieving partial ownership of one or more of those railroads after privatization, in order to ensure access to Mexican railroads after privatization takes place. On the contrary, as Professor Kalt explained at length (V.S. 35-39), the Mexican government is committed to free and non-discriminatory access to the Mexican rail system at United States-Mexico gateways, and to competitive access by at least two major railroads (through trackage rights or otherwise) to all significant Mexican rail destinations. See also Peterson R.V.S. 102.

Likewise, the fact that BN/Santa Fe recently raised rates on the 3-carrier BN/Santa Fe-SP-Tex Mex move does not reflect adversely on BN/Santa Fe's enthusiasm for U.S.-Mexico traffic. First, the higher rate reflects the fact that SP's inefficient operations were detaining the cars for uneconomically long stretches on SP's bridge portion of the move. Kalt V.S. 33-34; Bredenberg Dep. 80-86. Second, the new rate tended to shift traffic to Eagle Pass, where BN/Santa Fe is increasing service over recently obtained haulage rights. Thruston R.V.S. 7. For this proceeding, the significant point is that shippers — more of whom originate SP-Tex

Mex traffic on BN/Santa Fe than on SP — stand to benefit substantially if a former 3-carrier move becomes a 2-carrier move that does not require the participation of a sluggish SP.¹⁵

Tex Mex's proposal is not harmless.¹⁶ It would have real and deleterious effects on the two carriers that would operate in the Houston-Brownsville corridor after the merger and the BN/Santa Fe Agreements went into effect. Tex Mex refuses to recognize (*e.g.*, Ellebracht R.V.S. 16) that the route it requests is more congested than the Houston-Brownsville route

¹⁵ Tex Mex finally and half-heartedly claims that the UP/SP merger, even if conditioned by the BN/Santa Fe Agreements, will result in such vast reductions of traffic moving over Tex Mex to Laredo and into Mexico that Tex Mex's financial viability and continued service may be threatened. This attempt to present an essential services argument is not convincing. No condition may be imposed to preserve essential services unless a merger poses a risk that rail service for which there is a public need and no adequate alternative in fact may be discontinued. *BN/Frisco* at 951; 49 C.F.R. § 1130.1. By contrast, "conditions are not warranted" merely "to offset revenue losses by competitors." *BN/Santa Fe* at 56. Setting aside the mistaken assumptions of the Tex Mex diversion study, under the established standards no threat to essential services is presented. Even if Tex Mex might be forced out of business, the concern in a merger proceeding is "the preservation of essential services, not the survival of particular carriers." *UP/MP/WP* at 546. Thus, if it appears that a carrier provides services needed by the public to which current alternatives are unacceptable, and that the carrier will lose such significant revenue that its survival may be threatened, the analysis simply proceeds to a second step: "whether other carriers would be willing and able to provide the services if those services were discontinued by the carrier currently providing them." *Ibid.* Tex Mex again fails to recognize that, "for virtually all traffic that [it] interlines, adequate alternative transportation is available from UP." *UP/MKT* at 474. And there can be no doubt that, if Tex Mex ceased operations, its assets would be purchased and its services continued either by a short-line operator eager for the Laredo franchise (perhaps BRGI), or by BN/Santa Fe itself, which then could offer shippers through its 31,000-mile route system single-line service over the preferred Mexican gateway. The simple fact is that it is *inconceivable* that Tex Mex's assets would cease operating when they provide such important Mexico access to a Class I carrier that (unlike UP) does not have direct access to Laredo.

¹⁶ Tex Mex repeatedly urges the Board to impose its proposal *not* because it has been shown to be necessary to protect competition, but to *remove all doubt* that competition has been protected. *E.g.*, TM-34 at 4, 14. That concern, however, is properly met through the five-year oversight provision of the CMA Agreement, not by imposing a harmful condition such as the Tex Mex proposal.

obtained by BN/Santa Fe in the Agreements. See Owen 2d V.S. 7-10 (noting that route that Tex Mex requests is also longer). But if Tex Mex were correct that trackage rights would present operational problems when BN/Santa Fe uses them, layering on trackage rights for an additional carrier would only worsen any such problems, particularly in a congested area like that south of Houston.

Ultimately, the Tex Mex proposal does not meet *any* of the governing standards for imposing involuntary merger-related conditions. See *BN/Santa Fe* at 55-56. Adding a third carrier to a route where there were only two carriers pre-merger plainly does not address a merger-related harm, and surely is not “narrowly tailored” to remedy any merger-related effect. *Id.* at 56. If the problem to be solved is the supposed disadvantage BN/Santa Fe will face over its trackage rights between Houston and Robstown, the answer to the competitive problem (if one existed) would have been for Tex Mex to have sought rights to Houston and an interchange with BN/Santa Fe there, where its 31,000-mile network already goes; there is no conceivable merger-related justification for trackage rights to Beaumont. Plainly, Tex Mex’s request is designed not for “restoring [an] option,” but “rather [for] creating a new one” for Tex Mex and its affiliate, KCS. *Id.* at 56. Moreover, it is doubtful that adding a third carrier to the route — and a second carrier to the already-congested SP route near Houston — is “operationally feasible” in any real way. *Ibid.* The Tex Mex trackage rights would “risk diluting the traffic base for all the competitors and jeopardizing the success” of the principal competitor to “the merged system” in this corridor. *SFSP I* at 827.

Still less capable of justification is Tex Mex’s request for direct access to traffic originating in Houston. That request has no relation to any competitive effect of the proposed

merger — and certainly has nothing to do with competitive effects at the Laredo gateway — and therefore should be denied. *BN/Santa Fe* at 56 (requiring that conditions be “narrowly tailored to remedy [adverse] effects” of the primary transaction). Although the Houston condition might provide an increase in Tex Mex’s revenues, that is no basis for regulatory intervention. *Ibid.*¹⁷

The Tex Mex/KCS proposal will have only five clear effects: (1) diversion of much Laredo-bound traffic onto an inefficient three-carrier routing, with (2) a concomitant diversion of more traffic to UP, but (3) enhancement of KCS’s market position for reasons wholly unrelated to this merger, with (4) a diluted traffic base that would exacerbate any density problems in the Houston-Brownsville corridor, and (5) congested routes for Applicants, BN/Santa Fe, and Tex Mex alike. The disadvantages of Tex Mex’s proposal far outweigh any conceivable public benefits. Tex Mex’s responsive application should be denied.

C. MRL’s Proposal To Combine Divestiture And Layering On Weakens Rather Than Strengthens Shipper Options

The MRL responsive application manages to combine the worst of both “remedies,” asking the Board to force Applicants to divest a Central Corridor route to MRL at a price Applicants contend is confiscatorily low, and also proposing to grant trackage rights over the divested lines to both UP/SP and BN/Santa Fe. As USDA in its April 29 submission (with which we otherwise disagree) accurately states (at 3), the MRL application stands for “a third major railroad operating in the Central Corridor,” an unprecedented situation that would exacerbate any density problems that might exist on the Central Corridor (see *Ice* 2d V.S. 10).

¹⁷ Tex Mex appears to be laboring under the misconception that its request for forced entry into Houston is “unopposed.” TM-34 at 18. BN/Santa Fe’s opposition to the request as a whole clearly encompassed its opposition to this element. In any event, the Houston access request is insupportable under the governing standards.

MRL, a regional carrier, has "provided no basis * * * to find that it could handle the more extensive operations" that it asks the Board to bestow on it. *UP/MKT* at 454. MRL acknowledges that, like responsive applicants rejected in prior proceedings, it "owns very little equipment and would require substantial investment to perform the operations it proposes." *Id.* at 479. Indeed, MRL proposes to use equipment that is even *less* current than SP's fading fleet (MRL-21 at 31-32) — a legitimate option for a feeder short line, perhaps, but not for a transcontinental carrier.

In its rebuttal, MRL misunderstands fundamental principles of economics and competition. MRL claims that it is "absurd" to measure the effectiveness of a competitive replacement for SP by showing that BN/Santa Fe's costs are lower than the rates that SP charges. Hall R.V.S. 3. When the Board is assessing the adequacy of BN/Santa Fe as a competitive replacement for SP, it is appropriate to examine whether BN/Santa Fe can compete with as much vigor as SP possesses now. Kalt V.S. 42. The cost analysis criticized by MRL is one of several ways in which the record documents that BN/Santa Fe will replace — or exceed — SP's ability to provide competitive service.

MRL's rebuttal also contains several misconceptions of a more practical, operational nature. For one thing, MRL and witness Hall assume that BN/Santa Fe will operate over the Central Corridor without acquiring additional facilities between its large yards in Denver and Stockton. MRL-21 at 10; Hall V.S. 5. The record shows that BN/Santa Fe will make the necessary investments to operate the trackage rights in a competitive manner (Krebs V.S. 8) — and that appropriate facilities will be available when UP/SP consolidates its Central Corridor operations. Owen 1st V.S. 10-11; Peterson R.V.S. 147. MRL also confuses a benefit

(interchanges by feeder railroads with main lines) with the detriment of interchanges on long main-line movements. MRL-21 at 19-20.

The regional railroad experience that MRL offers cannot match the BN/Santa Fe network efficiency or experience serving the long distance transportation needs of western shippers. In light of these shortcomings, the California Public Utilities Commission, after examining the MRL proposal in depth, endorsed the BN/Santa Fe Agreements as the appropriate competitive remedy for the UP/SP merger (see *California Commission Reaffirms Support*, J. Commerce, May 24, 1996, at B1) — contrary to MRL's premature claim that "CPUC support[s] MRL's proposal" (MRL-21 at 25). The Attorney General of California earlier had come to the same conclusion as the CPUC.

MRL (echoed in this argument by some other parties) contends that it is necessary to put into the Central Corridor a carrier that (like SP) lacks access to PRB coal. Although Applicants contend that Colorado/Utah coal and PRB coal are not competitive with one another — that they are, in economic terms, in different "relevant markets" — MRL and certain other merger opponents argue that Colorado/Utah coal and PRB coal *are* competitive. From that premise, they reach the conclusion that BN/Santa Fe will "favor" its PRB coal sources to the detriment of Colorado/Utah coal and that only a carrier *without* access to the PRB can replicate SP's pre-merger enthusiasm for carrying Colorado/Utah coal.

The assertion that BN/Santa Fe or UP/SP will "favor" PRB coal depends on an assumption of carrier irrationality. To the extent that PRB and Colorado/Utah coals might be competitive, a carrier would leave money on the table, and run the risk of losing business to its

competitor, if it chose to "favor" transportation of the coal that would *less* efficiently serve the customer. There is no reason to expect such irrationality from either UP/SP or BN/Santa Fe.

Furthermore, concerns about the competitive transportation of Colorado/Utah coal must be taken with a healthy grain of salt in light of the support of the Utah Railway for the BN/Santa Fe Agreements. The Utah Railway, the party whose survival depends most on the continued competitive success of Colorado/Utah coal, does not oppose the UP-SP merger or the BN/Santa Fe Agreements, recognizing that the opportunities to market Colorado/Utah coal will increase when the wider networks of BN/Santa Fe and UP come into play. See *UP/MKT* at 467 (support for settlement by short line serving affected quarries outweighs criticisms regarding quality of route and trackage rights compensation terms).

Like the Tex Mex proposal, MRL's divestiture request is a deleterious "solution" in search of a competitive problem. There has never been a need — or an economic justification — for a third carrier on the Central Corridor before, and there is no such need now. Particularly because of MRL's need to interline at both ends of many major movements, its proposed route system would be of use almost exclusively for local traffic. If it were granted, MRL's application could lead only to a wasteful combination of low densities and disproportionate congestion on the Central Corridor. There is no sound reason to mandate that result.

D. Additional Conditions To Add Carriers To Competitive Markets Or To Provide Additional Markets For UP/SP Are Plainly Unwarranted

In addition to the principal requests examined above,¹⁸ several parties have asked that the Board impose additional conditions that would add carriers in parts of the United States that would retain intramodal rail competition after the approval of a UP/SP merger conditioned on the BN/Santa Fe Agreements. Those requests do not address competitive effects that are related to the merger. They accordingly should be denied.

First, KCS and other parties ask the Board to give "a third carrier * * * access to the rights granted to SP in the Burlington Northern/Santa Fe merger in the Central Kansas grain areas, including access to Wichita, Topeka, [and] Hutchinson, and the trackage rights * * * from those areas to Ft. Worth." KCS-33 at 3. See also Enid Board of Trade (Mar. 29, 1996) at 6-7, 9 (identifying KCS as the carrier to receive rights); USDA (Mar. 29, 1996) at 3; KDOT (Mar. 29, 1996) at 11 (asking only for third-carrier access to Wichita). KCS claims that this condition would relate to the "cumulative effects" of the *BN/Santa Fe* proceeding and the current merger proposal. KCS's request lacks merit and is not supported by any evidence. The trackage rights in question were purely commercial aspects of the agreements between SP and the applicants in *BN/Santa Fe*, and were *not* related to any competitive impacts of the BN/Santa Fe consolidation. *BN/Santa Fe* at 83. Accordingly, the Commission did *not* impose those rights as a condition in *BN/Santa Fe* (*id.* at 115-116) — indeed, no party even *asked* that those rights be imposed as a condition. Because those provisions did not *solve* a competitive problem, SP's merger into UP

¹⁸ Several other parties advance divestiture proposals for parts or all of the Central or Houston-St. Louis Corridors. *E.g.*, AEPC-5; IP-10; MFU-1. Those proposals are misguided for the same reasons as those of Conrail, KCS, and MRL (and some of the other proposals, *e.g.*, AEPC-5, would produce additional fragmentation of the national rail network).

cannot *create* a competitive problem; KCS's attempt to avoid that fact through some vague suggestion of "cumulative effects" lacks substance. Similarly, no competitive effects form the basis of the request of the Iowa Department of Transportation that a third Class I carrier be layered on from the Gulf Coast to Iowa (IDOT-2 at 2-4); SP does not serve that State.

Second, the Railroad Commission of Texas asks the Board broadly to restructure the railroads serving Texas by requiring (1) that virtually all SP lines in that State be divested (RCT-4 at 14-18), and (2) that neutral terminal railroads be created to serve six major markets as well as all 1-to-1 shippers (*id.* at 19, 29-30). Both groups of conditions are aimed primarily at 1-to-1 shippers that face no competitive impacts as a result of the UP/SP merger, and should be denied on that ground. In particular, to create the requested system of terminal railroads would require the Board to exercise a central industry planning function that is contrary to its mission in the post-Staggers era.

Finally, interests from Montana and Oregon ask in their March 29 filings that UP/SP *receive* expanded access to markets now served only by BN/Santa Fe. MTGO-5; MWBC-4 at 21-22; MFU-1 at 6-7; Comments by the State of Oregon (Mar. 29, 1996), at 12. These broad requests for restructuring are wholly unrelated to the merger, and should be denied. The UP/SP merger would not affect Montana at all; UP serves only a few stations in southwestern Montana, while SP does not serve any points in Montana. Similarly, the effects of a UP/SP merger provide no basis for opening *BN/Santa Fe* traffic in Eugene and Portland to UP/SP.

These miscellaneous requests for relief unrelated to the merger should be denied.

III. *NEW YORK DOCK* CONDITIONS SHOULD NOT BE IMPOSED ON THE BN/SANTA FE AGREEMENTS

ARU requests that *New York Dock* labor protective conditions (*New York Dock* at 84-90) be imposed on the BN/Santa Fe Agreements. Because the Applicants and BN/Santa Fe have agreed to accept *New York Dock* conditions with respect to the line sales provided for in the Agreements (see UP/SP-26 at 68), the sole effect of ARU's proposal would be to subject the trackage rights provided in the Agreements to *New York Dock* conditions.¹⁹ As ARU recognizes, however, the labor protective conditions generally applicable to trackage rights are the *Norfolk and Western/Mendocino Coast* conditions. See *Norfolk and Western; Mendocino Coast*. ARU has shown no reason why those standard conditions should not be applied here.

First, the Board's predecessor consistently rejected similar efforts by rail labor to require "umbrella" agreements of the kind ARU seeks in connection with line sales and trackage rights transactions. Most recently, in *Wilmington Terminal I*, the Commission refused to require an umbrella implementing agreement in a line-sale transaction, stating that it imposed such a requirement on consolidation transactions because of the melding of work forces that occurs in such transactions. *Wilmington Terminal I* at 815-816. No such melding of work forces will be required here — with respect to either the line sales or the trackage rights — and thus there is

¹⁹ ARU also asserts that *New York Dock* conditions should be applied to all actions taken to implement the Agreements, including but not limited to the trackage rights and line sales. However, ARU advances no arguments to justify any such broad application of labor protective conditions, and the Board itself recognized that ARU's request should be construed as seeking the imposition of *New York Dock* conditions on the trackage rights. See Decision No. 30, at 3.

no need for an umbrella implementing agreement. See also *Minnesota Commercial* at 43-44 (umbrella implementing agreement not required for trackage rights transaction).²⁰

Moreover, contrary to ARU's assertion, imposing *New York Dock* conditions on the trackage rights would adversely affect BN/Santa Fe. Because *New York Dock* would require BN/Santa Fe to complete the labor implementing agreement before operating over the new trackage rights, the commencement of operations could be significantly delayed. That delay would harm the public interest in at least two ways: first, either competitive concerns driving the imposition of the BN/Santa Fe Agreements as conditions would linger unaddressed, or public benefits resulting from implementation of the merger (which could be approved only if the Board found it in the public interest) would be deferred; second, the significant public benefits of the BN/Santa Fe Agreements themselves would be needlessly postponed.

In indistinguishable circumstances, the Commission imposed *Norfolk and Western* labor protective conditions — not *New York Dock* conditions — on the trackage rights granted to SP and other parties in the recent *BN/Santa Fe* proceeding (at 81, 117). The Board should follow the same course here, and accordingly should reject ARU's request to apply *New York Dock* conditions to the trackage rights under the BN/Santa Fe Agreements.

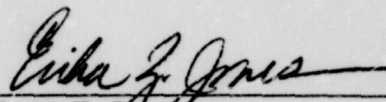
²⁰ The Commission's decision in *Springfield Terminal* does not support the proposition that *New York Dock* applies to trackage rights transactions. As the Commission later explained, *Springfield Terminal* involved a "highly unusual situation," in which the impact of the numerous transactions was very close to that of a merger or consolidation and the carriers' behavior with respect to their obligation to comply with the applicable labor protective conditions "was suspect." *Minnesota Commercial* at 45-46. No such "extraordinary circumstances" exist here. Furthermore, even in *Springfield Terminal*, the Commission refused to impose *New York Dock* conditions. See also *Minnesota Commercial* at 43 (trackage rights agreement does not require *New York Dock* conditions).

CONCLUSION

The BN/Santa Fe Settlement Agreements, particularly with the Board's oversight under Section 14 of the CMA Agreement, will assure that full, vigorous competition remains available to shippers who now can use both UP and SP, but no other carrier. No other railroad — including those seeking relief in this proceeding — has the financial strength, the operational capabilities, the marketing expertise, and the range of origins and destinations necessary to serve the long routes in the western United States as the replacement for SP.

For the foregoing reasons, if the Board approves the UP/SP merger, the BN/Santa Fe Agreements should be imposed as conditions necessary to preserve rail competition in the West. The responsive applications and the unwarranted requests for conditions should be denied.

Respectfully submitted,



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June 3, 1996

CERTIFICATE OF SERVICE

I certify that on this 3rd day of June, 1996, I have caused to be served upon all Parties of Record in Finance Docket No. 52760 by first class mail, postage prepaid, or by a more expeditious manner of delivery, the Brief of BN/Santa Fe (BN/SF-59).

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AI PENDING A

DEPOSITION PAGES CITED IN BRIEF OF BN/SANTA FE

DEPOSITION PAGES CITED IN BRIEF OF BN/SANTA FE

<u>NAME</u>	<u>DATE OF DEPOSITION</u>
Bredenberg, Rollin	03/08/96
Clifton, Frank D.	05/15/96
Grinstein, Gerald	02/16/96
Ice, Carl R.	03/04/96
Majure, W. Robert	04/24/96
Owen, Neal D.	02/23/96
Owen, Neal D.	05/09/96
Skinner, Brad Lee	04/19/96
Speight, George R.	05/14/96

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

ORAL DEPOSITION OF
ROLLIN BREDEMBERG

On the 8th day of March, 1996, at 9:00 a.m., the
oral deposition of the above-named witness was taken at the
instance of the Kansas City Southern Railway before Susan S.
Klinger, Certified Shorthand Reporter in and for the State
of Texas, at the Hyatt Hotel, Dallas Fort Worth
International Airport in the City of Dallas, County of
Dallas, State of Texas, pursuant to notice and the agreement
as stated in the record herein.

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1 top management not to send any rail cars down into Mexico
2 rather, to try to keep your rail cars in your North American
3 operations?

4 A. There has not.

5 Q. I'm not sure if I asked that the right way, let
6 me just try to pursue that a little. Has there been any,
7 that you are aware of, any discussion or policy to try to
8 limit the number of rail cars that might go into Mexico to
9 try to preserve them as part of the fleet north of the
10 border?

11 A. No.

12 Q. Now, you are familiar with the, what I will call
13 the privatization process of the Mexican railroads, are you
14 familiar with that?

15 A. I am familiar.

16 Q. And by that, I mean the fact that the Mexican
17 government is planning to privatize its, at least part of
18 the railroads in Mexico and take bids from companies to
19 purchase those railroads, is that your understanding?

20 A. The extent to which the franchises would include
21 purchase of assets is something that I am not familiar
22 with. And I really don't know exactly what purchase means
23 in that context.

24 Q. And I hesitated before I used that word. What
25 is your understanding of what Mexico is planning to do with

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1 as part of this privatization process?

2 A. My understanding is that Mexico has decided to
3 sell as three separate franchises to operators of those
4 franchises the right to operate parts of the Mexican
5 railroad system or basically Mexico City, northeast Mexico
6 City northwest and then south and east of Mexico City. And
7 I do not recall what the given names of those parts of the
8 railroad have been by the secretary. I know they gave them
9 particular names, but I don't recall them.

10 Q. And you just gave us what you understand to be
11 the three separate franchises?

12 A. I did, that's correct.

13 Q. And is the south of Mexico City considered one
14 franchise?

15 A. Right.

16 Q. And have you traveled to Mexico for either Santa
17 Fe or Burlington Northern Santa Fe with regard to this
18 privatization process?

19 A. Yes.

20 Q. I'm not asking now what you might have said
21 during any such trip, but can you tell us how many times?

22 A. Once.

23 Q. And when was that?

24 A. January of '96.

25 Q. And well, while we're on it, was the purpose of

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1 read it before you --

2 BY MR. LUBEL:

3 Q. My questions are really going to really be the
4 middle to the end of the second page. Mr. Fields says that
5 in April of '95 BNSF raised its tariff rates on grain
6 destined to the Laredo gateway; is that correct?

7 MR. WEICHER: Could you indicate where you
8 are looking at?

9 BY MR. LUBEL:

10 Q. Page 2 is the second full paragraph about
11 halfway down the line in April 1995 and I paraphrased it
12 without some of the descriptive remarks in there, were you
13 aware of that?

14 A. No, let me put it this way. He says BNSF.

15 Q. Yes, at that time?

16 A. That is not a correct statement.

17 Q. Because at that time it would have been
18 Burlington Northern; correct?

19 A. I don't have any knowledge of what Burlington
20 Northern did.

21 Q. Let me rephrase it. In April of '95 was SF
22 handling grain traffic through a connection with Tex Mex,
23 grain traffic to Mexico?

24 A. Yes.

25 Q. In April of '95 were you aware that the Santa Fe

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1 raised its prices?

2 A. Yes.

3 Q. And didn't it keep its prices at the raised
4 level until November of '95?

5 A. I wasn't aware that it dropped them.

6 Q. And isn't it also true that in January of '96
7 now we have got a entity Burlington Northern Santa Fe, don't
8 we?

9 A. Yes.

10 MR. WEICHER: I'm going to ask you to
11 clarify, there is no legal entity BNSF railroad.

12 BY MR. LUBEL:

13 Q. Let me rephrase that again. Still focusing on
14 just on Santa Fe, isn't it true that in January of '96 that
15 Santa Fe increased its tariff rates on grain to the Laredo
16 gateway by approximately \$300 per car?

17 A. I don't know.

18 Q. Do you know there was an increase?

19 A. No.

20 Q. And going back to the April increase which you
21 said you were aware of, do you know the purpose of that?

22 A. Yes.

23 Q. What is your understanding of the purpose of it?

24 A. Well, I have direct knowledge of the purpose of
25 it. The purpose was to keep cars from going down and being

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1 gobbled up in that service and then held off the SP at
2 Caldwell and not getting onto the SP and then finally
3 getting down. And then the SP taking forever to get the
4 cars back to Caldwell. Let me tell you how bad it got.

5 MR. ALLEN: Excuse me, did you say the BN
6 or the Sante Fe?

7 (Record read.)

8 THE WITNESS: We had trains at Caldwell,
9 Temple and back up the line, Fort Worth and even in Pernel,
10 Oklahoma. We had cut the power off and put the power on
11 other uses simply because the SP could not get current
12 moving the cars from Caldwell to Victoria and ultimately to
13 Corpus Christi to the Tex Mex. This was not a congestion
14 problem at the bridge at Laredo, it was not a congestion
15 problem on the Tex Mex.

16 It was simply SP's inability to bridge the
17 traffic from Caldwell to Corpus Christi. As a result of
18 that, we weren't getting turn times on our cars compared to
19 the turn times to the other Gulf destinations. Our
20 customers demands for cars were going unmet because we kept
21 committing cars to the normal flow of traffic into Mexico.
22 And as I believe I told you in partial response to another
23 question at the currently existing rates that traffic became
24 very marginal, traffic simply because of the cost of
25 equipment ownership being much higher than what was assumed

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1 in our original costing of traffic over the Caldwell gateway
2 to get traffic to Corpus Christi to the Tex Mex.

3 Coming back the SP could not get cars directly
4 to us at Caldwell coming back to us. Cars would go to
5 Victoria, they would go into Houston actually be classified
6 in the Englewood yard at Houston, Englewood yard at Houston
7 was not current. Cars were being held out of Englewood
8 before going in and being classified. And then once the
9 trains were made up in Houston for Caldwell set outs we
10 would sometimes take the cars back at Houston.

11 Never mind the fact it was SP's obligation to
12 get them back to us at Caldwell. We were so hungry for
13 those cars we actually took on the additional expense of
14 taking those cars back at Houston. Sometimes the SP in its
15 own self-defense because it was completely congested at
16 Caldwell and at Houston would actually runs trains of
17 empties all the way back to Fort Worth to give the cars back
18 to us in Fort Worth over running, bypassing Caldwell at a
19 greater expense to them simply because they were not able to
20 run a current interchange at Caldwell.

21 To make a long story short, the SP was in a
22 condition and the motive power shortage at that time, that
23 its priority for bridging traffic from Santa Fe to Tex Mex
24 was probably about the lowest priority it had. And
25 eventually we were forced to go to premium rates on that

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1 traffic so that whatever traffic did move on those rates at
2 least could bear the expense of the equipment that was tied
3 up in that service. So yes, I am very aware of that and did
4 not know that those rates had been reduced. And in November
5 --

6 Q. And so when you said that you weren't aware of a
7 rate increase in January of '96, you didn't know that they
8 had ever been dropped from the increase that had been made
9 in April of '95; right?

10 A. You are correct.

11 Q. And the one result of the increase might be just
12 a reduction in level of traffic; isn't that correct?

13 A. That is exactly what I just said. I said
14 whatever traffic did move under the premium rates would at
15 least cover the cost of the equipment.

16 Q. But it was your expectation in raising the rates
17 that there might be less traffic moving?

18 A. Yes.

19 Q. And do you know if there was any interest and
20 this may be connected to this, do you know if there is any
21 interest in, by Santa Fe in sending grain to other markets,
22 other portions of the country?

23 MR. WEICHER: You are asking if as a
24 general question if the company's interested in moving grain
25 to other in the western --

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1 BY MR. LUBEL:

2 Q. Not generally in the context of this increase in
3 the rates going to hookup with Tex Mex, was there a thought
4 well, that we can send this grain elsewhere and it will
5 develop other routes?

6 A. Well, I believe I did say that there was a
7 demand going unfulfilled by customers who needed grain moved
8 to the Gulf and couldn't because we had so many cars tied up
9 in Mexico service.

10 Q. That is the Gulf of Mexico; right?

11 A. Right.

12 Q. Any interest in developing any markets out west
13 or northwest?

14 A. Those markets are, do not remain to be
15 developed. Those are fully developed now as to their
16 capacity elevators in the Pacific northwest right now. BNSF
17 has a fleet of cars sufficient to keep all of the elevators
18 loading ships at full capacity at any one time. We have 800
19 cars more or less and a pipeline going to the Pacific
20 northwest. If the elevators could take them and unload the
21 ships at this rate, we actually put 1,000 cars a day up
22 against the elevators in the Pacific northwest. However,
23 our fleet is a fleet of 28,000 grain cars and you don't need
24 anything like all of that fleet to support the total finite
25 loading capacity of the elevators in the Pacific northwest.

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1 So to the extent that cars don't go to Mexico
2 they don't get added to the Pacific northwest pipeline
3 because there are already more than enough cars in that
4 Pacific northwest pipeline to keep all of the elevators busy
5 full-time, seven days a week.

6 Q. Let me go to another topic now. And I'm not
7 asking you now about any negotiation of the trackage rights
8 agreement, but I am asking about the potential
9 implementation of that agreement and specifically you know
10 Mr. Dave Deeley, don't you?

11 A. Yes.

12 Q. And who is he employed by?

13 A. He's employed by BNSF.

14 Q. And haven't you had discussions with him about
15 the subject of which was service to International Paper
16 mills at Camden and Pine Bluff under rights granted under
17 the settlement agreement?

18 A. He told me that he was having discussions with
19 International Paper and he told me he was going to a meeting
20 with IP. It could have been either him or me, it could have
21 been me because I was a VP, transportation or him because he
22 was VP on part of the railroad that was more closely
23 associated geographically with that part of the country. In
24 other words, it is his part of the Santa Fe operation that
25 goes through Arkansas and he and I both had experience with

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1 Q. When is the last time or when have you met or
2 had any discussions with Mr. Grenstein of Burlington
3 Northern?

4 A. I met Mr. Grenstein at a dinner honoring his
5 involvement with the Boy Scouts in December of '95 after he
6 had announced his retirement from ENSF.

7 Q. Is that the first time you met him directly or
8 had any direct conversation with him?

9 A. The first and only time.

10 Q. Have you had experience in growing traffic to
11 and from Mexico when you were at Southern Pacific?

12 A. Yes.

13 Q. Tell us about that experience?

14 A. In 1991 I was appointed VP Mexico for Southern
15 Pacific to create a department whose effort, whose mission
16 was to increase SP's market share in Mexico over all of the
17 gateways to improve our presence in Mexico or sales
18 infrastructure in Mexico and to effectively compete with the
19 Union Pacific.

20 Q. Were you successful in that effort?

21 A. We did increase market share during that period
22 of time.

23 Q. Do you believe Burlington Northern Santa Fe was
24 interested in the rights it would acquire in the Union
25 Pacific Santa Fe agreement between Houston and Brownsville?

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1 A. Yes, those are some of the most valuable rights
2 that are part of the transaction.

3 Q. Do you believe Burlington Northern Santa Fe is
4 interested in traffic to and from Mexico?

5 A. Absolutely.

6 Q. Do you believe Burlington Northern Santa Fe
7 needs to invest capital in Mexico or in the Mexican
8 privatization process within Mexico to grow its Mexico
9 traffic significantly in the future?

10 A. No.

11 Q. Why not?

12 A. Because we're starting from a point where we
13 have very little market share. And it is quite doable, I
14 won't say easy but it is quite doable to exceed SP's market
15 share over the Laredo and Brownsville gateways within a
16 short period of time.

17 Q. Can I ask you to look at what Mr. Lubel labeled
18 as Exhibit 4 designated verified statement of Larry Fields,
19 Page 2. Was today the first time you saw this statement?

20 A. Yes.

21 Q. Could you look at the first sentence of the
22 second full paragraph, I will read the sentence from Mr.
23 Fields statement. My view is based on, among other things,
24 many experiences clearly indicating that BNSF has little or
25 no interest in providing competitive rail service on U.S.-

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

HIGHLY CONFIDENTIAL

Washington, D.C.

Wednesday, May 15, 1996

Deposition of FRANK D. CLIFTON, a
witness herein, called for examination by counsel
for the Parties in the above-entitled matter,
pursuant to agreement, the witness being duly
sworn by JAN A. WILLIAMS, a Notary Public in and
for the District of Columbia, taken at the
offices of Mayer, Brown & Platt, 2000
Pennsylvania Avenue, N.W., Washington, D.C.,
20006-1882, at 9:30 a.m., Wednesday, May 15,
1996, and the proceedings being taken down by
Stenotype by JAN A. WILLIAMS, RPR, and
transcribed under her direction.

1 have been discovered along that segment?

2 A. No, not off the top of my head, I could
3 not provide that to you.

4 Q. Just so the record can be clear, you
5 don't know if any contaminated areas have been
6 discovered or not?

7 A. No, I don't. But keep in mind that
8 they are just concluding their on-site
9 inspections. So I'm sure there will be a report
10 that will be prepared, but I'm not aware of any
11 issues.

12 Q. We deal with so many theoretical issues
13 in this case and matters of econometrics and
14 everything. I'm really fascinated, when we talk
15 about their inspections, what actually are they
16 doing?

17 A. They're actually going out and
18 physically inspecting the trackage.

19 Q. Walking the tracks?

20 A. In some cases, yes, as a matter of
21 fact.

22 Q. If you know, when is it estimated that
23 the environmental audit will be completed?

24 A. We had a timeline on completing
25 inspections with the engineering department which

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1 doing the on-site inspections. And they were not
2 contentious issues as I saw it; that, within a
3 reasonable amount of time, we would work through
4 those issues.

5 Q. And do you expect those to be worked
6 out by September 1996?

7 A. Absolutely.

8 Q. Going into the next section of your
9 statement on page 3, when you talk about the
10 two-day meeting in Fort Worth, again do you
11 recall when that was?

12 A. It was around the middle of March, I
13 would have to go back and check my records to be
14 precise.

15 Q. Do you recall if it was prior to or
16 after meeting with representatives of Union
17 Pacific and Southern Pacific?

18 A. It was after our initial meeting with
19 the UP and the SP.

20 Q. These bullet points down below that we
21 looked at before, let me ask a couple questions
22 about those. The last point on the page,
23 development of an internal BN/Santa Fe plan for
24 operations, the notes and other work papers that
25 you referred to earlier that you said was kind of

1 Q. And I'm just asking you if you can
2 elaborate on your statement here as to what you
3 mean, that you expect these to be worked out in
4 the near future, what you mean by the near
5 future?

6 A. What I meant by this is nothing more
7 than just minor operating details that we had not
8 had an opportunity to get into, such as what has
9 come up through the field inspections, very minor
10 details that have to be resolved. And really
11 they are unknowns more than anything.

12 But keep in mind, I'll add to that,
13 keep in mind that these are not tremendous
14 issues, these are small minor details as it
15 relates to the operating plan, they're ongoing.
16 I don't see anything that would prohibit us from
17 having everything behind us as far as the
18 operating piece of it and how we can operate
19 across each line segment, having those
20 established very quickly.

21 Q. Can you give us any date for very
22 quickly?

23 A. I think that's unfair. Far in advance
24 of September 12, I can tell you.

25 MR LUBEL: Okay. Why don't we take a

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1 rights in all areas with the exception of the
2 piece between Robstown and Brownsville and
3 between Little Rock and Pine Bluff.

4 Q. And there, in those two areas, you're
5 planning to use haulage rights?

6 A. Initially, yes.

7 Q. Now, are you planning to use haulage
8 rights initially in any of the other areas?

9 A. Yes.

10 Q. What other areas?

11 A. All areas.

12 Q. All areas you're initially planning to
13 use haulage rights?

14 A. Sure, on an interim basis, until we can
15 get up to speed with a full-blown trackage rights
16 operation, that would be the initial way we would
17 handle customers, would be haulage.

18 Q. And now, if I can try to tie this in
19 with a question I asked before, you know, what
20 would be the traffic volume level or other factor
21 that would spur you going to trackage rights from
22 the haulage rights?

23 A. Well, keep in mind the agreement does
24 not allow for us to have long-term haulage
25 rights. We have to have trackage rights. And

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1 there were a couple of examples where we had the
2 option of using haulage, and one them was the one
3 I just depicted, the Pine Bluff-Little Rock, the
4 Houston to Brownsville piece of it.

5 So that's really not a choice. The
6 only thing that's driving right now between
7 haulage and trackage is our ability to get up to
8 speed and get a full-blown operation and a
9 physical presence over these lines.

10 Q. And can you quantify that for us, what
11 you mean by get up to speed and have a full-blown
12 presence?

13 A. Sure. We are not going to make a
14 financial outlay on something that may or may not
15 happen at this point. So obviously we're not
16 going to spend millions of dollars building
17 connections, spend thousands of dollars on
18 training crews for something that may not, in
19 fact, happen.

20 So day one, on September 12, assuming
21 this goes off exactly as what we have outlined in
22 the settlement agreement and no other parties are
23 allowed in on these trackage rights but it is
24 what we have agreed to, then we would initiate
25 the training of people to get us to that point.

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1 points in regard to Houston.

2 A. Houston?

3 Q. Yes.

4 A. Specifically Houston?

5 Q. Yes. My next question is going to be
6 New Orleans.

7 A. Well, it would be a fair assessment to
8 say that they have identified the two-to-ones at
9 Houston, if any. But there again I have not
10 reviewed the list specifically by location to see
11 who those people are or what the numbers of
12 two-to-ones are.

13 Let's see, the identification of
14 mileposts, we have that as it pertains to the
15 boundaries of Houston, where we would initiate
16 trackage rights. Physical operating parameters,
17 we've done some of that of Houston, such as
18 understanding where we would actually get on the
19 SP trackage.

20 Determination of interim temporary
21 operations, I think that would be one and the
22 same in Houston with the exception of the haulage
23 versus crackage full implementation that we had
24 discussed before.

25 Q. Sure.

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1 A. Determination of final ultimate
2 operations, that has not been done yet. We are
3 in an evolving state for obvious reasons as we
4 get this information in, things may change.
5 Formulation of engineering plans for connections,
6 in Houston, exclusive to Houston, the only one
7 that was a concern or was a consideration was the
8 car street connection, tower 26.

9 We did not think that that existed.
10 But, in fact, it does. So that would be an
11 engineering issue that has been resolved. The
12 next one really is covered by my haulage versus
13 trackage transition.

14 Q. That's the explanation you gave us
15 earlier this morning?

16 A. Yes, how you would transition
17 yourself. Development of internal BN/Santa Fe
18 plans for operations, I think that follows right
19 along with Neal, and that is that the HBT would
20 serve as the agent for the BN/SF in doing our
21 classification, car repairs, inspections, train
22 makeups, et cetera.

23 The next bullet point, information
24 system support, that is in place, we currently
25 use the same information with the HBT. There

1 of formal trackage rights, haulage, and line
2 purchase documentation? Not yet?

3 A. Well, not formal, no. Conceptually,
4 yes, and I spoke of one being the San Jose piece
5 of it, where we have indicated we would use a
6 combination of trackage and haulage.

7 Q. Development of internal BN/Santa Fe
8 plans for operations?

9 A. Yes, we have a general overview of what
10 we would like to do there. It is evolving,
11 though.

12 Q. Okay.

13 A. It's a fair assessment to say the joint
14 facilities people are working on the standard
15 agreements that would cover any joint facilities
16 operations in Oakland. Capital investment, yes,
17 that is the one we've talked about on the
18 connection between the Cowpe and the BN/SF
19 trackage.

20 Q. That will require some capital
21 investment?

22 A. It has to be constructed, yes.

23 Q. And the final point, preference for
24 reciprocal or direct switching by customer?

25 A. And I would say yes to a degree, that

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1 has been established. But we are still waiting
2 to get the final version from the marketing
3 department, but that would apply to the San Jose
4 piece I would guess, that we are going to go
5 halfway direct and then go haulage the rest of
6 the way.

7 Q. Okay. I appreciate your doing that.
8 The bottom of page 4 of your statement, where you
9 say the team members are taking into
10 consideration as part of their analysis the
11 recent clarification of the original agreement
12 that's referred to as I think -- I think it's
13 referred to as the CMA agreement, at this time
14 has Burlington Northern/Santa Fe identified
15 additional traffic that you feel you'll gain
16 access to due to that agreement modification?

17 A. It says new. And I guess, in the way
18 that I read this, they don't exist yet. That's
19 something you would have to pose to Matt Rose or
20 marketing guys.

21 Q. Let me just make sure I'm clear on
22 this, apart from the reference to that sentence,
23 have you done any analysis of any additional
24 traffic, additional from the original agreement,
25 additional traffic that you may gain access to

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1 will be a transition as I understand to the
2 previous Santa Fe system, but that's in line with
3 a large ISS undertaking that is separate from
4 this. The accounting piece I could not tell
5 you. I would assume we would just piggyback on
6 the traditional accounting approach we have used
7 in the Houston area.

8 Joint facilities, infrastructure
9 support operations, I don't know that we would
10 need anything on the joint facilities side that
11 would be anything more than what we already have
12 with the joint facilities arrangements with the
13 HBT.

14 Q. How about identification of areas for
15 capital investment?

16 A. I covered that just now I believe in
17 respect that we don't see any since the car
18 street connection was in.

19 Q. And the last point?

20 A. And again that has not been resolved.

21 C. In other words, the preference for
22 reciprocal or direct switching by the customers,
23 that's not been resolved?

24 A. Not until we get a resolution on rates
25 and full identifications with what the customers'

1 requirements may be.

2 Q. Could you go through this same list
3 quickly for New Orleans.

4 A. Avondale or New Orleans?

5 Q. Well, I guess we need to say both.

6 A. I can make it easy on you. I know
7 nothing about New Orleans, okay, at this point.

8 Q. How about Avondale?

9 A. I essentially focused on Avondale,
10 two-to-one shippers I'm sure have been -- that
11 list has been supplied to us. Mileposts and
12 other physical operating parameters, in general
13 we have come to a resolution over the operating
14 parameters that will take place within the
15 Avondale area.

16 There will be some further decisions
17 made next week, we have a team of people that are
18 going out there to specifically look at the
19 milepost locations as to where this will all take
20 place. And I discussed that earlier, indicating
21 that we would have a route on one of the UP main
22 lines on the Huey P. Long Bridge. So there will
23 be some resolution as to precisely where those
24 mile post locations, what geographic area they
25 encompass, that comes next Tuesday.

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1 Determination of interim temporary
2 operations, that has not been completely
3 concluded yet because some of that would depend
4 on what the final agreement is on mechanical
5 facilities and who gains the ownership. And
6 there is some labor impact obviously, some labor
7 issues as to how we transition from -- into
8 ownership I should say.

9 I know there are labor issues, and I'm
10 not a labor expert by any means, but, as I have
11 heard, there have to be some implementing
12 agreements and some things done. So we are
13 certainly not prepared to talk about that
14 transition at this point, but it's certainly
15 something we should have well in advance of
16 September 12.

17 Determination of final and ultimate
18 operations, until we can get a good feel on the
19 customer information, that has not been
20 determined as far as the final. Formulation of
21 engineering plans for connections, we have not
22 progressed to the point of estimating the costs,
23 but we have determined where those would be and
24 have formed I think some very preliminary
25 drawings of what those would be.

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1 Development of formal trackage rights,
2 haulage, and line purchase documentation, I think
3 the line purchase piece of it is more of a legal
4 department issue. I think that there have been
5 some documents that have been sent on sale
6 agreements, but I don't know at what stage we are
7 with this. I do know they're shooting for a
8 June 1 completion date on agreeing to the
9 document itself.

10 Development of internal BN/SF plans for
11 operations, we have a general idea of what we
12 would do there. There are some dependencies
13 there based on volumes. Review and
14 identification of support system, accounting, and
15 joint facilities infrastructure to support
16 operations, there again that's much the same as
17 Houston.

18 Joint facilities would certainly cover
19 where we make the transition from ownership to
20 trackage rights and also have some language as to
21 what degree of control we would share with the
22 UP/SP over dispatching.

23 At one point as well in Avondale, we
24 have to make a connection or build a connection
25 from one of the tracks that we are purchasing to

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1 access the intermodal facility there that we are
2 purchasing as well. That would certainly come
3 back to joint facilities and determination of
4 precisely where that milepost, the geographic
5 milepost location may be.

6 Identification of areas for capital
7 investment, that would be included in those
8 connections we have identified. Other than the
9 connections, there are no major capital outlays,
10 if any at all, in the Avondale area. It's a
11 decent facility.

12 Determination of preference for
13 reciprocal and direct switching by customer. If
14 those customers, and I can't think of any, but I
15 would have to research, would be located directly
16 on newly owned BN/SF property, a reasonable
17 assumption would be is that we're going to switch
18 them. The others that are on UP/SP would have
19 to -- none come to mind as being large
20 customers. We haven't gone deeply into those. I
21 did not make the Avondale inspection myself.

22 Q. Thank you, that has been so helpful.
23 Could I impose on you to answer those same
24 questions for St. Louis. I'll make a deal, if
25 you do St. Louis, I won't ask Oakland. That's

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1 the compromise. Steve may ask Oakland. Can you
2 answer these for St. Louis?

3 A. None of this has been done for
4 St. Louis.

5 Q. How about Oakland?

6 A. In St. Louis now, you mean east of the
7 river or west of the river, there are two
8 St. Louises.

9 Q. Both.

10 A. West of the river and east of the
11 river, I don't see where there would be a lot
12 that we would have to do other than some joint
13 facilities work or interline work as it related
14 to operations with other roads and our terminal
15 associations, some clarification on that. But
16 keep in mind, with the CMA agreement coming in in
17 the middle of our tours all over the United
18 States, we have not been able to get back to and
19 focus on St. Louis deeply yet.

20 Q. Have these tasks in this list here been
21 done for Oakland, some or any of them, Oakland,
22 California?

23 A. Yes.

24 Q. Can you just go through this briefly.

25 A. It's fair to say that all two-to-ones

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1 plans for connections?

2 A. Yes, we have identified a connection
3 that needs to be implemented in order to access
4 our trackage.

5 Q. And where is that?

6 A. That's just east of Richmond, from the
7 SP's Cowpe line back to the former Santa Fe or
8 BN/SF line just east of Richmond.

9 Q. Is there any agreement necessary to be
10 reached to have that connection?

11 MS. KUSSKE: Agreement with whom?

12 BY MR. LUBEL:

13 Q. With anybody. Or is that already
14 provided for?

15 A. As far as with -- yes, there just has
16 to be some agreements reached with a couple of
17 parties at least, because there will be some land
18 acquisitions that will have to take place. And
19 certainly we'll have to reach the joint
20 facilities agreements that will allow us to
21 connect.

22 Q. With which carriers?

23 A. With the UP/SP. And they have said no
24 problem.

25 Q. How about the next point, development

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UNITED STATES OF AMERICA

SURFACE TRANSPORTATION BOARD

IN THE MATTER OF:

UNION PACIFIC CORPORATION,
UNION PACIFIC RAILROAD COMPANY,
and MISSOURI PACIFIC RAILROAD
COMPANY

- CONTROL AND MERGER -

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

Finance Docket
No. 32760

ORAL DEPOSITION OF

GERALD GRINSTEIN

COPY

On the 16th day of February, 1996, at 9:00
a.m., the oral deposition of the above-named witness
was taken at the instance of Kansas City Southern,
before Michelle L. Munroe and Donna A. Watkins,
Certified Shorthand Reporters in and for the State of
Texas, at the Law Offices of McDonald Sanders,
777 Main Street, in the City of Fort Worth, County of
Tarrant, State of Texas, pursuant to Notice and the
agreements hereinafter set forth.

1 MR. McGEORGE: Let me strike that.

2 Q. Is there any reason --

3 MS. JONES: Thank you.

4 Q. Let me amend that just to say is there any
5 reason why you might be unable to give full and candid
6 responses to questions people might ask you at this
7 deposition?

8 A. I can't think of any.

9 Q. Would it be accurate to characterize the
10 Burlington Northern Santa Fe primarily an east-west
11 railroad?

12 A. No, I think that's accurate.

13 Q. And what would you mean by east-west?

14 A. Flowing from either the Midwest to the West
15 Coast or from the West Coast back to the East to the
16 Midwest.

17 Q. I will first ask you about your experience
18 with Burlington Northern before the merger. Could you
19 describe Burlington Northern's service to and from
20 Mexico up until the time of the merger with the
21 Santa Fe?

22 A. Well, we have no direct rail connection with
23 Mexico. We undertook two initiatives. One of those
24 was the South Orient line, which was one that ran
25 through the Presidio/Ojinaga gateway into Chihuahua,

1 and another one was a rail barge rail service that
2 flowed from Galveston down into Mexico via barge and
3 then by rail into Mexico City. And both of those were
4 initiatives that we undertook. Neither one was very
5 successful, but we constantly knocked on that door,
6 and, in fact, one of the reasons for the Santa Fe
7 acquisition was the opportunity to get more into the
8 Mexico trade.

9 Q. Could you give me approximate dates in which
10 you began these initiatives? In fact, I'm going to
11 ask you about -- really implementation. I don't need
12 to go back to when you started thinking about it but
13 in terms of when traffic actually started flowing
14 over, Presidio.

15 A. Presidio?

16 Q. First Presidio and then we'll get --

17 A. I would think it was around 1993. I think
18 that's right on the South Orient line, and I would say
19 approximately the same time for the rail barge rail
20 service.

21 Q. And let's start with Presidio first. Do you
22 have an approximate idea as to how much traffic on a
23 yearly basis was handled over that gateway?

24 A. No. But I'll tell you it's very small. It
25 just didn't -- never panned out in the way we or the

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

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Washington, D.C.

Monday, March 4, 1996

Continued deposition of CARL R. ICE, a
witness herein, called for examination by counsel
for the Parties in the above-entitled matter,
pursuant to agreement, the witness being
previously duly sworn, taken at the offices of
Mayer, Brown & Platt, 2000 Pennsylvania Avenue,
N.W., Washington, D.C., 20006-1882, at 9:35 a.m.,
Monday, March 4, 1996, and the proceedings being
taken down by Stenotype by JAN A. WILLIAMS, RPR,
and transcribed under her direction.

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1 Q. And how did you respond?

2 A. You're asking that now from Houston to
3 Brownsville?

4 MR. WEICHER: You may respond insofar
5 as it involves Houston to Brownsville but not
6 otherwise.

7 THE WITNESS: I said I was very
8 interested in Houston to Brownsville.

9 BY MR. McGEORGE:

10 Q. You don't have to tell me your
11 position, but did you specifically mention
12 Houston to Brownsville as part of the package
13 that you were interested in?

14 A. Once again they listed the places they
15 were willing to contemplate potential rights.
16 That was one of the places they were willing to
17 contemplate. And I said we were interested in
18 Houston to Brownsville.

19 Q. Okay. You don't have to tell me your
20 position, but did you respond to other points
21 with a yes, I'm interested, or no, I'm not
22 interested type response?

23 A. I was interested in everything.

24 Q. Okay. Did you at that point indicate
25 an interest in having the right to use a

1 contractor to serve the Houston-Brownsville
2 trackage rights?

3 A. No. It wasn't that detailed of a
4 discussion at that point. It only related to the
5 routings they wanted to know we were interested
6 in.

7 Q. At this point did you indicate that you
8 wanted to have the option of using a contractor
9 to provide service over the Houston-Brownsville
10 route?

11 A. Yes. We said we wanted to use an
12 agent. I'm not sure if agent and contractor are
13 the same to you.

14 Q. I'm not sure. I'll use your term.

15 A. Okay.

16 Q. Do you know which at which of these
17 meetings you expressed that view?

18 A. Not specifically, no.

19 Q. It was not the first meeting; is that
20 correct?

21 A. It was not the first meeting.

22 Q. And what was their response?

23 A. They were very concerned about that
24 request. Their view was it caused -- it put them
25 potentially at a competitive disadvantage, that

1 we were able to take advantage of using an agent
2 in that corridor.

3 Q. And why would they be at a competitive
4 disadvantage?

5 MR. WEICHER: If you know and can
6 speculate on their motivation.

7 BY MR. McGEORGE:

8 Q. In the first instance, if they
9 expressed such a view as to why they would be at
10 a competitive disadvantage?

11 A. I believe their presumption was that we
12 would use an agent because we thought it would
13 better our competitive position for whatever
14 reason that might happen. That being the case,
15 it was their view that we might be in a position
16 to take advantage of a better arrangement, better
17 labor arrangement, whatever it might be that
18 would then adversely affect them in their ability
19 to compete against BN/Santa Fe.

20 Q. We'll go to the other side of the
21 coin. Why did you want to have the right to use
22 an agent in that corridor?

23 A. We believed we could be competitive
24 between Houston and Brownsville with trackage
25 rights as I've said previously in my deposition.

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1 But we did think that there was the potential,
2 although given we never explored it with anyone
3 it's not clear that it would have worked out that
4 way, but that there was the potential that there
5 might be an arrangement with an agent that would
6 put us in a better competitive position than we
7 would otherwise assume with our trackage rights.

8 Q. If you had been able to use Tex-Mex as
9 your agent between Houston and Brownsville, is it
10 likely you would have routed traffic over the
11 Brownsville gateway? And, if I make this a
12 compound question, I think it will help, or is it
13 more likely that you would have routed it from
14 Houston to Corpus Christi and then over Tex-Mex's
15 tracks from Corpus Christi to Laredo?

16 A. Well, first of all let me say that we
17 were asking for an agent, viewing that there
18 might be multiple parties that could be an
19 appropriate agent. So in no way was there a
20 presumption on our part that it would
21 automatically be Tex-Mex. So that makes it
22 fairly difficult on what I thought was going to
23 happen with all the routings because we weren't
24 sure who the agent would be.

25 That being the case, if you're asking

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1 me hypothetically, I guess I would say that there
2 are probably some shipments and some customers
3 that should logically have their routings over
4 the Brownsville gateway and they would continue
5 to go over that gateway.

6 Q. And would there be shippers and
7 movements that logically would go over the Laredo
8 gateway instead --

9 A. I'm sure that's the case, Laredo is an
10 awfully good gateway.

11 Q. In fact, is it a better gateway for
12 most of the shippers in the interior of Mexico?

13 A. For most shippers Laredo is the
14 preferred gateway, of course, recognizing that we
15 couldn't provide single-line service to Laredo
16 nor could SP today.

17 Q. Do you know whether BN/Santa Fe has
18 announced an intention to bid on the Mexican rail
19 lines or are their assets to be privatized?

20 A. I believe we had asked to be included
21 in the list of bidders, but we have not announced
22 an intention whether we will bid or not.

23 Q. I'm going to move to the trackage
24 rights compensation at this point. First of all
25 a clarification on an answer you gave to Mr. Wood

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL MERGER --

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

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Washington, D.C.

Wednesday, April 24, 1996

Deposition of W. ROBERT MAJURE, a
witness herein, called for examination by counsel
for Applicants in the above-entitled matter,
pursuant to agreement, the witness being duly
sworn by JAN A. WILLIAMS, a Notary Public in and
for the District of Columbia, taken at the
offices of Department of Justice, 325 7th Street,
N.W., 4th Floor, Washington, D.C., 20530, at
9:20 a.m., Wednesday, April 24, 1996, and the
proceedings being taken down by Stenotype by JAN
A. WILLIAMS, RPR, and transcribed under her
direction.

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1 competition, whether that was SP or --

2 MR. BILLIEL: I'm not sure we'd agree
3 that's the ultimate question, but you can use
4 that for purposes of a hypothetical.

5 BY MR. ENGLERT:

6 Q. When economists analyze mergers, and I
7 don't want this to be hypothetical, don't they
8 ask whether there is an adequate replacement for
9 the competitor who has been merged into the
10 merged firm?

11 A. Yes.

12 Q. In this case SP is merging into UP,
13 right?

14 A. Okay.

15 Q. The purpose of the BN/SF settlement
16 agreement is, on the moves that it covers, to
17 tender BN/SF as the competitive replacement,
18 isn't it?

19 A. Yes, as a second competitive
20 alternative.

21 Q. In analyzing the adequacy of that
22 settlement from an economic perspective, don't we
23 want to ask whether BN/SF adequately replaces the
24 lost SP competition?

25 A. Yes.

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1 Q. In answering that question and
2 particularly the trackage rights compensation
3 component of BN/SF's effectiveness, should we
4 look at the costs of the trackage rights segment
5 alone or the costs of an entire move?

6 A. We should look at the marginal costs
7 that BN/SF would face for the entire move, that's
8 right.

9 Q. And, if BN/SF has significantly lower
10 costs on the portion of the move that isn't over
11 trackage rights than SP had premerger, it can
12 make up a significant disadvantage in trackage
13 rights compensation terms to the extent that
14 significant disadvantage comes from focusing on
15 trackage rights segment alone, can't it?

16 A. I think that that's, you know, a
17 mathematical possibility. As you've put it
18 forward, I think that that -- yeah.

19 Q. You haven't analyzed that?

20 A. No.

21 Q. On page 21, near the bottom of the
22 page, you say Rebensdorf's numbers argue,
23 therefore, that the BN/SF would have variable
24 cost as much as 99 percent higher than UP/SP and
25 fixed cost 100 percent lower. Do you see that?

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BEFORE THE
SURFACE TRANSPORTATION BOARD
Finance Docket No. 32760
UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD
COMPANY AND MISSOURI PACIFIC RAILROAD COMPAN.
-- 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
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Washington, D.C.
Friday, February 23, 1996
Deposition of NEAL D. OWEN, a witness
herein, called for examination by counsel for the
Parties in the above-entitled matter, pursuant to
agreement, the witness being duly sworn by JAN A.
WILLIAMS, RPR, a Notary Public in and for the
District of Columbia, taken at the offices of
Mayer, Brown & Platt, 2000 Pennsylvania Avenue,
N.W., Washington, D.C., 20006-1882, at
10:05 a.m., Friday, February 23, 1996, and the
proceedings being taken down by Stenotype by JAN
A. WILLIAMS, RPR, and transcribed under her
direction.

1 So the central corridor would generate
2 3.9 million new train miles and so on. So I've
3 got the I-5 corridor, southern corridor,
4 Houston-St. Louis, and South Texas.

5 Q. Some of these trains, in fact, most of
6 them show less than -- withdrawn.

7 Go ahead.

8 A. So the calculation produced 9.3 million
9 new annual train miles. And I simply divided
10 that into the revenue ton miles that would be
11 generated by the new business. And, if you take
12 the 17,540 number from above and the 9.3 million
13 new train miles, you'll see that it generates
14 1,890 revenue train miles -- revenue ton miles
15 per train mile.

16 Then, on top of that, the calculations
17 at the bottom were from the BN/SF merger database
18 on traffic that would benefit from internal
19 reroutes. And I can't -- it's various traffic
20 flows that were based on the sectoring of the
21 traffic in the BN/SF case. So we're looking at
22 tonnages that were -- that would be internally
23 rerouted.

24 So, where I say over Memphis-St. Louis,
25 I took the historic BN/SF flows that would route

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1 from Houston to Memphis or Houston to St. Louis
2 and calculated the number of tons that
3 represents. And the same thing on the central
4 corridor, I confined my analysis there to just
5 the two major routes where internal reroutes
6 would be also handled.

7 So the Houston-Memphis-St. Louis
8 corridor and the central corridor both produced
9 opportunity for BN/SF to internally reroute some
10 of their existing traffic and reduce the costs on
11 it. And the net result of all of that
12 calculation, when divided by 9.3 million train
13 miles, added 240 more revenue train -- revenue
14 ton miles per train mile.

15 And that gave me a number of 2,130,
16 going back to the center of the page, that our
17 trains would carry on average, a typical train
18 then would carry 2,130 revenue ton miles per
19 train mile. And I simply compared that to Santa
20 Fe's actual experience in revenue ton miles per
21 train mile of 2,150.

22 And that calculation fortunately for my
23 intent indicates that we have provided enough
24 service to handle the business that at least the
25 UP/SP is projecting that we would attract without

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1 BEFORE THE
2 SURFACE TRANSPORTATION BOARD
3 Finance Docket No. 32760
4 Union Pacific CORPORATION, Union Pacific RAILROAD
5 COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

6 -- CONTROL MERGER --

7 Southern Pacific RAIL CORPORATION, SOUTHERN
8 PACIFIC TRANSPORTATION COMPANY, ST. LOUIS
9 SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE
10 DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

11 HIGHLY CONFIDENTIAL

12 Washington, D.C.

13 Thursday, May 9, 1996

14 Deposition of NEAL D. OWEN, a witness
15 herein, called for examination by counsel for the
16 Parties in the above-entitled matter, pursuant to
17 agreement, the witness being duly sworn by ANN L.
18 BLAZEJEWSKI, CM, a Notary Public in and for the
19 District of Columbia, taken at the offices of
20 Mayer, Brown & Platt, 2000 Pennsylvania Avenue,
21 N.W., Washington, D.C., 20006-1882, at
22 11:15 a.m., Thursday, May 9, 1996, and the
23 proceedings being taken down by Stenotype by
24 ANN L. BLAZEJEWSKI, CM, and transcribed under her
25 direction.

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1 previously included in the original agreement."
2 Are you referring there to additional traffic
3 that BN/Santa Fe will get as a result of the CMA
4 agreement?

5 MS. KUSSKE: Could I just object here
6 and try to clarify for the record? You're using
7 the terminology "Will get," and I guess it's a
8 little unclear, are you meaning by that will have
9 access to under the CMA settlement agreement? I
10 presume that's what you're intending to mean by
11 that language.

12 MR. MOLM: Well, will have an
13 opportunity to compete, yes.

14 THE WITNESS: I believe it certainly
15 offers a very significant additional opportunity,
16 yes.

17 BY MR. MOLM:

18 Q. Now, the words "to increase density,"
19 because of the access to East St. Louis, does
20 that mean there will be additional rerouting of
21 traffic to the settlement trackage rights from
22 Houston to now East St. Louis?

23 A. What do you mean by rerouting?

24 Q. Rerouting of internal traffic that now
25 might be handled up through Tulsa, for example?

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1 A. Well, certainly to the extent that
2 traffic moves better over East St. Louis than it
3 would move over Tulsa or St. Louis Lindenwood,
4 that would provide that opportunity, yes, so some
5 traffic might very well be rerouted.

6 Q. When you say better, what do you mean?

7 A. Well, it depends on its ultimate
8 destination. Assuming it's an eastern
9 interchange car, as a generic example, it would
10 move better over East St. Louis and that direct
11 interchange could probably be affected or at
12 least an opportunity be available to effect
13 direct interchange, and if it moves through Tulsa
14 now, it would certainly move via the St. Louis
15 trackage rights under the settlement agreement
16 and the CMA amendment.

17 Q. Do you have any prediction as to how
18 much additional density would be added to the
19 trackage rights?

20 A. The internal reroutes of existing
21 BN/Santa Fe traffic were basically calculated,
22 estimated in my December 29th statement. Over
23 and above that, I don't have an estimate of the
24 precise amount of traffic that may be added in
25 density here. I just believe there's an

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1 opportunity to increase the density that wouldn't
2 be present otherwise.

3 Q. Is the Tulsa route more circuitous than
4 the settlement trackage rights?

5 A. Yes.

6 Q. Do you know how much circuitry is
7 involved?

8 A. I believe I identified that in
9 December, on the order of 125 miles. I believe
10 it's identified in the December statement.

11 Q. Is it correct that BN/Santa Fe will
12 have to make an economic decision as to whether
13 it's more economic to pay the trackage fee over
14 the settlement trackage versus operating over its
15 own line through Tulsa at 125 additional miles?

16 MS. KUSSKE: I'm going to object
17 again. This witness does not have any testimony
18 in here on valuation of economic issues, but --

19 MR. MOLM: Well, I'm trying to follow
20 up on additional opportunities to increase
21 density, what factors go into that. Economics is
22 certainly a driving force.

23 MS. KUSSKE: Well, I think Mr. Owens
24 already answered that question to state that what
25 he's trying to describe here is simply that the

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1 BEFORE THE
2 SURFACE TRANSPORTATION BOARD
3 Finance Docket No. 32760
4 UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD
5 COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY
6 -- CONTROL MERGER --
7 SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN
8 PACIFIC TRANSPORTATION COMPANY, ST. LOUIS
9 SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE
10 DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

11 HIGHLY CONFIDENTIAL

12 Washington, D.C.

13 Friday, April 19, 1996

14 Deposition of BRAD LEE SKINNER, a
15 witness herein, called for examination by counsel
16 for the Parties in the above-entitled matter,
17 pursuant to notice and agreement, the witness
18 being duly sworn by FERNITA R. FINKLEY, RPR, a
19 Notary Public in and for the District of
20 Columbia, taken at the offices of Zuckert, Scoutt
21 & Rasenberger, 888 Seventeenth Street, N.W.,
22 Washington, D.C., 20006, at 2:05 p.m., Friday,
23 April 19, 1996, and the proceedings being taken
24 down by Stenotype by FERNITA R. FINKLEY, RPR, and
25 transcribed under her direction.

1 Q. Is being interested in carrying traffic
2 to Mexico the same thing as being interested in
3 participating in the privatization process?

4 A. No.

5 Q. So we're clear that there are two
6 distinct subjects here, carrying traffic to
7 Mexico and participating in privatization
8 process.

9 A. Yes.

10 Q. Now, is it your view that for a carrier
11 to be interested in carrying traffic to Mexico
12 from U.S. origins, it must participate in the
13 privatization process?

14 A. No.

15 Q. And was the subject of the July 1995
16 meeting the privatization process or carrying
17 traffic to Mexico or was it both?

18 A. The August 7th meeting or 8th,
19 somewhere right there, the purpose was to explore
20 BN's interest in joining us to look at the
21 potential of privatization, to looking at it
22 together. We had these kinds of meetings with
23 all the railroads of this country.

24 Q. And was the other subject, carrying
25 traffic to Mexico from the U.S., not discussed at

1 A. Correct, in Schaumburg, Illinois. So
2 that was one indication at that time that they
3 were going to focus their energies.

4 The most recent indicator is a year
5 later in Pepe Serrano's house where -- were Rob
6 on the privatization issue said that he'll -- we
7 succeeded and he would drive traffic to El Paso
8 and other gateways, that Rob Krebs said he would
9 hope that we would be very successful in the
10 privatization which, again, indicates to me that
11 he's not interested in the Mexican market in
12 terms of competing for it in the privatization
13 process, but would like a user-friendly
14 connection.

15 Q. So let me explore that a little bit.
16 You're suggesting that Mr. Krebs indicated to you
17 that he was not interested in participating in
18 the privatization, but you did not infer from
19 that that he was not interested in carrying
20 traffic to the Mexican border from points in the
21 United States?

22 A. Or to a gateway that could serve.

23 Q. But the record is not quite clear. You
24 are not suggesting that he was not interested in
25 carrying traffic to gateways?

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1 A. Correct.

2 Q. Did you give a speech in Puerto
3 Vallarta recently?

4 A. Uh-huh.

5 Q. When was that?

6 A. March 15th.

7 Q. '96?

8 A. Yes.

9 Q. And did you say in that speech, we
10 believe that if privatization is completed
11 properly, it will result in every city, border,
12 gateway, and port having the choice of at least
13 two railroads?

14 A. In Mexico? In Mexico, yes, I said
15 that.

16 Q. And is that correct?

17 A. Did I say that sentence?

18 Q. No, not did you say that sentence. Is
19 it correct that you believe that if privatization
20 is completed properly, it will result in every
21 city, border, gateway, and port having the choice
22 of at least two railroads?

23 A. And the choice that we describe is very
24 well-defined in terms of total equal access, in
25 terms of modifying the franchise, not with U.S.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL MERGER --

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

HIGHLY CONFIDENTIAL

Washington, D.C.

Tuesday, May 14, 1996

Deposition of GEORGE R. SPEIGHT, JR., a
witness herein, called for examination by counsel
for the Parties in the above-entitled matter,
pursuant to agreement, the witness being duly
sworn by FERNITA R. FINKLEY, RPR, a Notary Public
in and for the District of Columbia, taken at the
offices of Patton, Boggs & Blow, 2550 M Street,
N.W., Washington, D.C. 20044, at 2:30 p.m.,
Tuesday, May 14, 1996, and the proceedings being
taken down by Stenotype by FERNITA R. FINKLEY,
RPR, and transcribed under her direction.

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1 state his opinion, even though it's probably
2 irrelevant, but purporting to get him to state
3 something as an absolute fact certainly can't be
4 done.

5 THE WITNESS: I can't envision an
6 agreement that would satisfy -- any agreement
7 that would satisfy everybody's concerns. The
8 agreement that CMA signed with UP/SP satisfied
9 CMA's concerns.

10 BY MR. MOLM:

11 Q. And are CMA's concerns identified on
12 that Attachment 1, the eight points?

13 A. That's correct.

14 Q. Since the April 16th decision have you
15 heard from CMA members about what they think
16 about the agreement?

17 A. I've heard from a number of members,
18 yes.

19 Q. Some like it?

20 A. Is that a question? Yes, some are very
21 pleased with it.

22 Q. And some members don't like it?

23 A. That's correct.

24 Q. Can you identify those members?

25 MR. STONE: No, he can't. We'll object

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APPENDIX B

**ABBREVIATIONS, ACRONYMS
AND SHORT-FORM CITATIONS TO
DECISIONS, PLEADINGS AND VERIFIED STATEMENTS**

**ABBREVIATIONS, ACRONYMS
AND SHORT-FORM CITATIONS TO
DECISIONS, PLEADINGS AND VERIFIED STATEMENTS**

I. ABBREVIATIONS AND ACRONYMS

ARU	- Allied Rail Unions
B&M	- Boston & Maine Corporation
BN	- Burlington Northern Railroad Company
BN/Santa Fe Agreements or Agreements	- Original Agreement as it will be modified to incorporate the terms of the CMA Agreement
CMA	- Chemical Manufacturers Association
CMA Agreement	- April 18, 1996 Settlement Agreement between CMA and UP/SP and BN/Santa Fe
CNW	- Chicago and North Western Railway Company
Commission	- Interstate Commerce Commission
Conrail	- Consolidated Rail Corporation
CPUC	- California Public Utilities Commission
CSX	- CSX Transportation, Inc.
DOJ	- United States Department of Justice
ICC	- Interstate Commerce Commission
IP	- International Paper Company
KCS	- Kansas City Southern Railway Company
KDOT	- Kansas Department of Transportation
Kyle	- Kyle Railroad Company
MRL	- Montana Rail Link, Inc.
NITL	- National Industrial Transportation League
NS	- Norfolk Southern Railway Company
Original Agreement	- September 25, 1995 Settlement Agreement between UP/SP and BN/Santa Fe, as supplemented by the November 18, 1995 Supplemental Agreement between UP/SP and BN/Santa Fe
PRB	- Powder River Basin
RGI	- Rio Grande Industries, Inc.
Santa Fe	- The Atchison, Topeka and Santa Fe Railway Company
SCRRA	- Southern California Regional Rail Authority
Soo	- Soo Line Railroad Company

Southern Pacific or SP

SPI

STB or Board

Tex Mex

Union Pacific or UP

USDA

Utah Railway

WP

WSC

- Southern Pacific Rail Corporation ("SPR") and Southern Pacific Transportation Company ("SPT"), St. Louis Southwestern Railway Company ("SSW"), SPCSL Corp. and The Denver and Rio Grande Western Railroad Company ("DRGW")
- The Society of the Plastics Industry, Inc.
- Surface Transportation Board or its predecessor the Interstate Commerce Commission
- The Texas Mexican Railway Company
- Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company, including the former CNW
- United States Department of Agriculture
- Utah Railway Company
- Western Pacific Railroad Company
- Western Shippers Coalition

II. SHORT-FORM CITATIONS TO DECISIONS

<i>A&M</i>	<i>Arkansas & Missouri R.R. v. Missouri Pacific R.R.</i> , 6 I.C.C.2d 619 (1990)
<i>ATSF III</i>	<i>Atchison, Topeka & Santa Fe Ry. — Operating Agreement — Southern Pacific Co.</i> , F.D. No. 22218 (served March 26, 1993)
<i>BN/Frisco</i>	<i>Burlington Northern, Inc. — Control & Merger — St. Louis-San Francisco Ry.</i> , 360 I.C.C. 784 (1980), <i>aff'd sub nom. Missouri-Kansas-Texas R.R. v. United States</i> , 632 F.2d 392 (5th Cir. 1980), <i>cert. denied</i> , 451 U.S. 1017 (1981)
<i>BN/Santa Fe</i>	<i>Burlington Northern Inc. and Burlington Northern R.R. — Control & Merger — Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Ry. Co.</i> , F.D. No. 32549 (served August 23, 1995)
<i>CSX</i>	<i>CSX Corp. — Control — Chessie System, Inc. & Seaboard Coast Line Industries, Inc.</i> , 363 I.C.C. 521 (1980), <i>aff'd sub nom. Brotherhood of Maintenance of Way Employees v. ICC</i> , 698 F.2d 315 (7th Cir. 1983)
<i>Dardanelle & Russellville</i>	<i>Dardanelle & Russellville R.R. Co. — Trackage Rights Compensation — Arkansas Midland R.R. Co.</i> , F.D. 32625 (served June 22, 1995)
<i>Guilford/B&M</i>	<i>Guilford Transportation Industries, Inc. — Control — Boston and Maine Corp.</i> , 366 I.C.C. 294 (1982)
<i>Guilford/D&H</i>	<i>Guilford Transportation Co. — Control — Delaware & Hudson R.R.</i> , 366 I.C.C. 396 (1982), <i>modified sub nom. Lamoille Valley R.R. v. ICC</i> , 711 F.2d 311 (D.C. Cir. 1983)
<i>ICG/GM&O</i>	<i>Illinois Central Gulf R.R. Co. — Acquisition — Gulf, Mobile & Ohio R.R. Co.</i> , 338 I.C.C. 805 (1971)
<i>Mendocino Coast</i>	<i>Mendocino Coast Ry. Inc. — Lease and Operate</i> , 354 I.C.C. 732 (1978)

Milwaukee II

Chicago, Milwaukee, St. Paul & Pacific R.R. — Reorganization — Acquisition by Grand Trunk Corp., 2 I.C.C.2d 427 (1985), appeal dismissed *sub nom. In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 799 F.2d 317 (7th Cir. 1986), cert. denied, 481 U.S. 1068 (1987)

Minnesota Commercial

Minnesota Commercial Ry. — Trackage Rights Exemption — Burlington Northern R.R. Co.

Norfolk & Western

Norfolk and Western Ry. Co. — Trackage Rights — Burlington Northern R.R. Co., 354 I.C.C. 605 (1978)

New York Dock

New York Dock Ry. — Control — Brooklyn Eastern District Terminal, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979)

NS

Norfolk Southern Corp. — Control — Norfolk & Western Ry., 366 I.C.C. 171 (1982)

RGI/Soo

Rio Grande Industries, Inc., et al. — Purchase and Related Trackage Rights — Soo Line R.R., 6 I.C.C.2d 854 (1990)

Seaboard/ACL

Seaboard Air Line R.R. — Merger — Atlantic Coast Line R.R., F.D. No. 21215 (Sub-No. 5) (served March 27, 1995)

SFSP I

Santa Fe Southern Pacific Corp. — Control — Southern Pacific Transportation Co., 2 I.C.C.2d 709 (1986)

Springfield Terminal

Delaware and Hudson Ry. — Lease and Trackage Rights Exemption — Springfield Terminal Ry., 4 I.C.C.2d 322 (1988)

SSW I

St. Louis Southwestern Ry. — Trackage Rights Over Missouri Pacific R.R. — Kansas City to St. Louis, 1 I.C.C.2d 776 (1984), *aff'd mem.*, *Union Pacific Corp. v. ICC*, 978 F.2d 745 (D.C. Cir. 1992) (table), cert. denied, 113 S. Ct. 2442 (1993)

SSW II

St. Louis Southwestern Ry. — Trackage Rights Over Missouri Pacific R.R. — Kansas City to St. Louis, 4 I.C.C.2d 668 (1987)

UP/CNW

Union Pacific Corp., et al. — Control — Chicago & North Western Transportation Co., et al., F.D. No. 32133 (served March 7, 1995)

UP/MKT

Union Pacific Corp., et al. — Control — Missouri-Kansas-Texas R.R., et al., 4 I.C.C.2d 409 (1982), petition for review dismissed *sub nom. RLEA v. ICC*, 883 F.2d 1079 (1989), modified, 929 F.2d 742 (D.C. Cir. 1991)

UP/MP/WP

Union Pacific Corp., et al. — Control — Missouri Pacific Corp., et al., 366 I.C.C. 459, 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), modified, 4 I.C.C.2d 668 (1987)

Wilmington Terminal I

Wilmington Terminal R.R. — Purchase and Lease — CSX Transportation, Inc., 6 I.C.C.2d 799 (1990)

Wisconsin Central/FV&W I

Wisconsin Central Transportation Corp., et al. — Continuance in Control — Fox Valley & Western Ltd., 9 I.C.C. 2d 233 (1992)

III. SHORT-FORM CITATIONS TO PLEADINGS AND VERIFIED STATEMENTS

A. *Pleadings Cited*

AEPC-5	—	Arizona Electric Power Cooperative, Inc. (March 29, 1996)
BN/SF-1	—	BN/Santa Fe's Comments on the Primary Application (December 29, 1995)
BN/SF-54 & BN/SF-55	—	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 (April 29, 1996)
CR-21 & CR-22	—	Comments and Verified Testimony of Consolidated Rail Corporation In Opposition to the Merger (March 29, 1996)
DOJ-8	—	Comments of the United States Department of Justice (April 12, 1996)
FMC Corp. Br.	—	Brief of FMC Corporation (May 29, 1996)
IDOT-2	—	Comments of the Iowa Department of Transportation (March 27, 1996)
IP-10	—	Comments of International Paper Company (March 29, 1996)
KCS-33	—	Comments of the Kansas City Southern Railway Company and Request for Conditions (March 29, 1996)
MFU-1	—	Comments, Conditioned Statement of Support Submitted On Behalf of the Montana Farmers Union (March 27, 1996)
MRL-21	—	Montana Rail Link, Inc.'s Rebuttal In Support of Responsive Application (May 14, 1996)
MTGO-5	—	Request for Conditions and Comments Submitted On Behalf of the State of Montana, Office of Governor Marc Racicot (March 28, 1996)
MTN-3	—	Brief of Mountain Coal Company (May 22, 1996)
MWBC-4	—	Request for Conditions, and Comments Submitted On Behalf of the Montana Wheat and Barley Committee (May 28, 1996)

- RCT-4 — Comments in Opposition to Merger Evidence and Argument Submitted By The Railroad Commission of Texas on Behalf of The State of Texas (March 29, 1996)
- RD-1 — Response of Redland Stone Products Company to Comments Seeking Divestiture of Southern Pacific Lines Between San Antonio and Houston, Texas (April 29, 1996)
- SPI-11 — Comments of The Society of the Plastics Industry, Inc. (March 29, 1996)
- TM-34 — Rebuttal In Support of the Responsive Application of The Texas Mexican Railway Company (May 14, 1996)
- UP/SP-22 — Applicants' Railroad Merger Application (November 30, 1995)
- UP/SP-26 — Applicants' Related Applications, Petition for Exemption, and Notices of Exemptions (November 30, 1995)
- UP/SP-219 — Applicants' Submission of Settlement Agreement With CMA (April 19, 1996)
- UP/SP-230 & UP/SP-231 & UP/SP 232 — Applicants' Rebuttal (April 29, 1996)

B. Verified Statements Cited

- Clifton V.S. — Verified Statement of Frank D. Clifton found in BN/SF-54
- Ellebracht R.V.S. — Rebuttal Verified Statement of Joseph F. Ellebracht found in TM-34
- Gray R.V.S. — Rebuttal Verified Statement of John T. Gray found in UP/SP-231
- Grimm R.V.S. — Rebuttal Verified Statement of Curtis M. Grimm found in TM-34
- Hall R.V.S. — Rebuttal Verified Statement of John Hall found in MRL-21
- Hunt/Oderwald V.S. — Verified Statement of David T. Hunt and William H. Oderwald found in CR-22
- Ice 1st V.S. — First Verified Statement of Carl R. Ice found in BN/SF-1

Ice 2d V.S.	—	Second Verified Statement of Carl R. Ice found in BN/SF-54
Kalt V.S.	—	Verified Statement of Joseph P. Kalt found in BN/SF-55
Kent/Klick V.S.	—	Verified Statement of Christopher D. Kent and John C. Klick found in BN/SF-55
King R.V.S.	—	Rebuttal Verified Statement of R. Bradley King found in UP/SP-232
Krebs V.S.	—	Verified Statement of Robert D. Krebs found in BN/SF-54
Majure V.S.	—	Verified Statement of W. Robert Majure found in DOJ-8
McCarthy/Rao V.S.	—	Verified Statement of Roger L. McCarthy and Geetha L. Rao found in BN/SF-55
Ongerth R.V.S.	—	Rebuttal Verified Statement of Michael D. Ongerth found in UP/SP-232
Owen 1st V.S.	—	First Verified Statement of Neal D. Owen found in BN/SF-1
Owen 2d V.S.	—	Second Verified Statement of Neal D. Owen found in BN/SF-54
Petersen V.S.	—	Rebuttal Verified Statement of Richard B. Peterson found in UP/SP-231
Rebensdorf V.S.	—	Verified Statement of John H. Rebensdorf found in UP/SP-22
Rose V.S.	—	Verified Statement of Matthew K. Rose found in BN/SF-54
Thruston R.V.S.	—	Rebuttal Verified Statement of Robert G. Thruston found in UP/SP-231
Tobaben R.V.S.	—	Rebuttal Verified Statement of Douglas K. Tobaben found in UP/SP-232