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ALSO PRESENT:

W. ROBERT MAJURE
U.S. Department of Justice

REDACTED

C O N T E N T S

REDACTED

REDACTED

REDACTED

Whereupon,

RICHARD PETERSON,

was called as a witness by counsel for the Parties, and having been previously duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR
THE CHEMICAL MANUFACTURERS ASSOCIATION
BY MR. STONE:

Q. Mr. Peterson, on page 155 of your testimony, you discuss the Chicago-Houston line and in about the middle of that paragraph wnere you discuss that corridor, you refer to, "BN's temporary strategic retreat from that market." Could you provide some more details on what that strategic retreat entailed and what the situation is today in terms of BN's position in that market?

A. Yes, I would be glad to. The full context of the sentence is that BN/Santa Fe has made clear that it intends to compete aggressively in the Texas intermodal market, semicolon, the low combined 1994 BN and Santa Fe traffic share reflects BN's temporary strategic

retreat from that market, unquote. That market refers to the Texas intermodal market. BN has continued to become a stronger and stronger competitor for car load business, including chemical business in the gulf and we certainly weren't referring to that.

However, BN, I believe approximately two years ago, did make a strategic decision to demarket, temporarily, I believe, as they put it at the time, their intermodal service into their ramps at Houston and Dallas/Fort Worth from Chicago and the Midwest. They did, I believe, continue to serve Texas from the pacific northwest. And the reasons given by BN included an extraordinary demand for intermodal rail service and the need to deploy their locomotives and other assets in their primary east west lanes, especially between Chicago and the pacific northwest.

They, I believe, did leave their terminal in Amarillo, Texas open. That's been a very successful ramp for them. And since that time, they have not been a factor in the Chicago/Texas market. However, we had heard that they -- on more than one occasion that they

planned to reenter that market but now with their merger with Santa Fe, of course they will be reentering the market, which Santa Fe never left, and they will just bring the strength of BN to the merged system.

Q. Does this example reflect in part that railroads sometimes may decide, in assessing whether to serve a particular market, that their opportunity costs associated with diversion of equipment from other more profitable markets might be a factor?

A. Could you repeat that question, please? That was too long for me, I'm sorry.

THE REPORTER: "Question: Does this example reflect in part that railroads sometimes may decide, in assessing whether to serve a particular market, that their opportunity costs associated with diversion of equipment from other more profitable markets might be a factor?"

THE WITNESS: The answer to that is that the opportunity costs of diversion of equipment from another market might be a factor. The opportunity costs associated with diversion of equipment might be a factor. I'm not sure exactly what you mean by diversion of equipment,

first of all.

BY MR. STONE:

Q. Let me try to rephrase the question. In assessing whether to serve a particular market in your experience, do railroads ever consider whether serving that market might require them to use equipment or facilities that might more profitably be used to serve another market?

A. That is a consideration, can be a consideration.

Q. I would like to refer generally to your testimony yesterday, Mr. Peterson, about the study that UP did on build-ins. And using that general area of testimony as a point of departure, could you tell me, in your experience, whether shippers are ever successful in using the threat of a build-in to obtain a lower rate on UP or any other railroad?

A. Yes, they are.

Q. Have they sometimes been successful in using that threat to obtain a lower rate on the UP?

A. Yes.

Q. Have they been successful in obtaining such lower rates, notwithstanding UP's study that

build-ins were not economically feasible? And I don't mean to do anything other than attempt to paraphrase your testimony. Your testimony is what it is on that subject.

A. Would you repeat that question, please?

Q. Yes. Have shippers on the UP used the threat of build-ins to negotiate lower rates, notwithstanding that UP's own internal analysis showed that build-ins in most circumstances were not economically feasible?

A. I'll try to restate your question a little more clearly. I'm not -- I don't think any UP study, general studies of build-outs are relevant to the first part of your question. As far as specific build-outs, typically if a build-out is feasible or might be feasible, then certainly UP will consider that in its decision making. However, it's UP's own assessment as to whether or not the build-in, that specific build-in is feasible, whether it has any likelihood of taking place as to whether or not UP factors that into its decision making.

Q. Just so the record is clear, have any shippers used the threat of build-ins or

And that's the basis for this statement. I know in our specific work, we came across a lot of shippers that are shipping very small volumes. However, they're in the switching tariff, they're open to two railroads and we considered them competitive with two considers but they may ship a trivial amount of traffic by rail but, nonetheless, we've included those as 2-to-1 shippers.

Q. Forgive me if I'm going over your testimony yesterday but my understanding of your testimony yesterday was that you had included as 2-to-1 points all points that could be served by both UP and SP and no other railroads prior to the merger, regardless of whether or not there was any traffic actually shipped by one or both of those carriers. Is my understanding correct or not correct?

A. Your understanding is correct, that as far as 2-to-1 points, 2-to-1 locations, we included all such locations. It's I think an unprecedented step. I don't recall any prior merger where all 2-to-1 points were opened to a new competitor but we've done that.

Q. Since we're on this subject, I would

like to have marked as an exhibit a list which I prepared and is so marked at the bottom.

(Peterson Exhibit No. 1 was marked for identification.)

BY MR. STONE:

Q. Now, for the record, I will say that this list is a list -- and let me just distribute copies to the others, and first to your counsel, Mr. Peterson.

This is a list that was prepared for my client and it, to my understanding, is derived from both publicly available sources of stations and SPLCs and to some extent perhaps confirmed by the UP and SP traffic tapes in this proceeding. Could I just ask you to go down the list here, and let me say further, because I perhaps didn't, we believe that these are 2-to-1 points, that is, these SPLCs are served by both the UP and the SP and no other railroad currently.

Could you go down the list and tell me whether you've considered these points and made any determination about whether they are or should be 2-to-1 points?

A. Okay. First, let me indicate our process for identifying 2-to-1 points and I think

that will help the explanation as we go along. We looked first for all of these six-digit SPLCs where both UP and SP were present and then present with no other railroad. So you're correct, this is a good jumping off point to the analysis. This is the first of many steps required to identify customers that are actually 2-to-1 customers. Could take -- well, Woodland, California is a good example. I could take several others.

We would look at Woodland, California, that SPLC would show both UP and SP. Actually, it would show now probably an SP shortline serving Woodland and a spinoff from SP. And then we would embark on the real essence of our study and that is to determine competitively served customers. And those customers could be served in a number of ways. They could be served by TOFC/COFC service and would determine that Woodland is near ramps of UP and SP and Santa Fe so it's not 2-to-1 in that regard.

For automotive traffic, auto ramps could be located at nearby points and cover a town of this size. And then you turn to the car load traffic. And I think, as we discussed

yesterday, car load business can be served to reciprocal switching, it can be served through a joint facility agreement or, in fact, it can be a case where an industry has direct industry spurs from both carriers.

The situation at Woodland is that there is no physical track connection between UP, and again, it's a UP shortline, which is another reason this wouldn't be a 2-to-1 point because that shortline will be able to connect to BN/Santa Fe at west Sacramento following the settlement.

Q. You referred to a UP shortline and previously you referred to an SP shortline.

A. Right.

Q. Did you mean UP shortline?

A. Yes. Woodland is actually on the north California railroad, which is an SP shortline, and the Yolo shortline, which is a UP spinoff. But Yolo I believe will be free to interchange with BN/Santa Fe at west Sacramento, California after the settlement.

But leaving those factors aside, there is no physical track connection at Woodland. There is a highway between them. In fact, a

quick store has been built between our track and the SP's and along with some other things, would make it impossible to build a track connection, so that none of the industries have the benefit of reciprocal switching because there is no interchange there.

We then checked the joint facility agreements to see if perhaps some industries were covered by an agreement where SP would switch our cars and deliver them to us at some point but no such agreement exists and there are no industries that have direct spurs from both UP and SP. So there are no 2-to-1 customers at Woodland. I believe the similar explanation would apply to most of these points.

Most of these are -- many of these are points where there is no rail traffic. I'm looking at the second to the last City of Industry, California is a place where there is a lot of rail traffic. Again, there is no physical track connection between UP and SP, no interchange takes place, no jointly served industries of any kind.

Texarkana, I believe that's an error. KCS serves Texarkana. I would be glad to take

through interrogatory?

MR. ROACH: I think that might be best, then everyone can have our response on each of these in an orderly fashion.

BY MR. STONE:

Q. Let me ask you a few questions, though, about your protocol, Mr. Peterson. You just mentioned with respect to Austin that Austin is served by a shortline that connects with SP but hasn't operated for many years. Has there been a formal abandonment of that shortline?

A. I don't know whether there has but actually, there has been a total abandonment of service on that shortline because the -- I believe because the shortline operator that was operating it under contract for the city is no longer doing so and they're endeavoring to find a new operator.

Q. To your knowledge, has there been an ICC-approved embargo on service on the line?

A. There has been in effect an embargo, whether it's been formal or informal, in that there has been no service over the track. And of course the track is impassable. But I don't know whether the railroad has filed a formal embargo

sure about the exact chemicals. There are companies that have I believe one plant exclusively served by UP and another exclusively served by SP but I don't know if they produce the same products.

Q. On page 242 of your statement, you state in the first full paragraph, and again, if you'll just permit me, I'll read the first two sentences of that paragraph. "Another constraint on UP/SP real rates is export by tanker. The U.S. is a significant exporter of chemicals, and for gulf coast producers, the option to send their product overseas provides a potential response to arise in rail rates."

You don't provide any examples here, Mr. Peterson, do you, of this point?

A. I believe we do in the appendix.

Q. Do you recall offhand any examples in which gulf coast chemical producers have responded to higher rail rates or threatened a response to higher rail rates by shipping their product overseas?

MR. ROACH: I want to state an objection to this question, as well as belatedly to the prior question about which plants, which

get that traffic on to rail. And I believe that project is still in the works.

Q. Let me ask you a question going back to the BN/Santa Fe settlement agreement, which I know you testified that you were not directly involved in but let me ask you this. Did anybody at UP or BN/SF ever indicate to you that BN/SF was not interested in trackage rights from Houston to Brownsville because of capital budget limitations and that BN/SF subjected that UP instead give that to -- give those trackage rights to Tex-Mex?

A. I've never heard of anything to that effect.

Q. Now let me show you what we'll mark as Peterson Exhibit 7.

(Peterson Exhibit No. 7 was marked for identification.)

BY MR. ALLEN:

Q. Which is, I believe, from your work papers. And it's Bates stamped market HC 01-005599 through 005613 and it's a series of handwritten notes. And let me ask you, are these your notes or do you know whose they are?

A. These are not my notes but I'm quite

sure that they are the notes of a fellow named John Ransom, R-a-n-s-o-m, and he's on our merger group and part of my staff and has been working on merger studies for almost as long as I have.

Q. Up at the top, the initials A.E.R., does that ring a bell? Do you know what that is?

A. Yes. That's Mr. Arvid E. Roach, II.

Q. So are these Mr. Roach's notes?

A. No.

Q. Why would his initials be on there, do you know?

A. Probably for discussion with him or a copy going to him.

Q. The first page of this, are these notes, as far as you can tell, of a discussion that Mr. Ransom had with you?

A. Well, this was going to take awhile for me to read through this but I think generally these are notes of his discussions with the business units as part of our process for developing the new marketing opportunities section of our traffic diversion study.

Q. Well, I don't want to take a lot of time asking you about notes that are not yours but on the first page in the second line, it

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.

Friday, May 10, 1996

Deposition of MATTHEW K. ROSE, 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 Mayer, Brown & Platt, 2000 Pennsylvania Avenue, N.W., Washington, D.C., 20006-1882, at 9:10 a.m., Friday, May 10, 1996, and the proceedings being taken down by Stenotype by FERNITA R. FINKLEY, RPR, and transcribed under her direction.

determination yet as to whether it will do -- it will provide service through reciprocal switching or through third-party switching service or through even direct access?

MR. WEICHER: Are you -- excuse me. Are you talking in general or in specific or --

BY MR. MOLM:

Q. Well, in your discussions with these shippers, have you identified the way in which service will be provided?

A. We have -- every plant site is really a different location, a different type of situation, and to give you a for instance, we have had very intense negotiations with Exxon down on the Dayton sub, Baytown, and we have developed a plan that we feel would best serve that plant.

HC

Once the merger -- if the merger is approved, then we will get with the Union Pacific/Southern Pacific and implement that type of arrangement, but what -- the type of arrangement that we do, either direct access, may not be the specific type of arrangement that we do at a different plant. It will be a combination of third-party, direct access, and

reciprocal switching.

Q. At the Exxon plant?

A. No, at all of the different plants.

Q. Specifically, what at the Exxon plant are you planning to do?

A. At the Exxon plant we would like to see a third-party switching service put in there, and that obviously will be something that will have to be negotiated with the UP/SP, that those loads would be brought up to the Dayton storage-in-transit yard and, then we would take them from there on.

Q. And what is the reasoning behind your preference for third-party switching?

A. We believe that that Dayton sub is fairly congested, and instead of having two locomotives, two railroads down there switching the same plant, we feel like it will be a more efficient and lower-cost option to have only one railroad out there.

Q. And that would be this third-party carrier?

A. Correct.

Q. And who would pay for the service rendered by the third-party carrier?

situation and we will understand the customer requirements, understand what the physical plant capabilities are, and then make a determination which would be the -- provide the most optimum service.

Q. When you said that you will come to an agreement with Union Pacific somewhere down the road or sometime in the future, when do you anticipate that occurring?

A. Well, we would think that right after the -- if the merger is to be completed, that right after the merger is completed that we would then get together with them and finalize how we view each of these plants being provided the local service that it will require.

Q. But you have talked to the shipper in this case? Let's stay with Exxon for a moment.

A. Yes, we have.

Q. Have they expressed a preference about how they would like service provided into their facility?

A. They -- to clarify, the Exxon facility is actually switched by a third-party carrier already, so that will continue on. It's simply providing the line haul from the Exxon plant

destination receiver -- that's why we call it storage-in-transit -- and at some point in time, then a final order will come in for that load of plastics, and it will then move out of that storage-in-transit yard.

Q. Does Exxon lease all of the capacity or most of the capacity at that transit yard?

A. It's my understanding that the shippers, which Exxon is one of them, does not lease that property, that it is actually leased by Southern Pacific railroad, in this case we're talking about, the Dayton storage-in-transit yard.

Q. What amount of the 30 to 40,000 additional carloads that will be open to BN/Santa Fe result from the original BN/SF UP settlement agreement?

A. We believe that in that range of 30 to 40,000 carloads that that was the result of the original settlement agreement.

Q. So with regard to this specific plant, the CMA agreement did not add any carloads?

A. What the CMA plan did was accelerate the opportunity to handle those carloads.

Q. What do you mean by the words

accelerate the opportunity?

A. Typically in this line of business railroads and shippers make contracts for some period of time, typically two years, sometimes as far out as three years. And so without the CMA agreement, some of the -- it would have been an issue of timing that these contracts are always coming up for expiration during their period. With the CMA agreement, we will have access to more of the freight sooner rather than waiting until the contracts expire through their normal periods of time.

Q. Correct me if I'm wrong, but I thought the CMA agreement opened up contracts, if you will, for those shippers who had signed agreements in anticipation of the Union Pacific and Southern Pacific merger?

A. I agree with your first part. I don't agree with your second part. The CMA agreement opens up contracts for shippers that are shipping out of this location. The part you said about in anticipation, that shippers were signing up agreements in anticipation of the merger, I don't know anything about that.

Q. You have reviewed the CMA agreement?

negotiating with CMA. I don't think he was.

Q. So again, it's those doggone lawyers. On the next -- or the last paragraph on that page you state that, We anticipate our competitive price in service capabilities to be sufficient for BN/SF to capture at least 25 percent and up to 50 percent over time.

What is it about competition that affects the price?

A. I don't understand your question.

Q. How does competition come into play in determining an appropriate price level?

A. Well, what we're seeing here is that when we negotiate with a shipper at a plant site, that we are now going to have access for the first time. We have to negotiate on two levels. One is the service package that would move a carload from point A to point B and the price that we can charge to do that, and that's all we're saying, that both of those have to be agreeable to the customer.

Q. Does competition play a factor in determining the price level?

A. Yes. All competition of -- whether it be what your truck competition is going to be,

what the water barge competition is going to be, what your other rail competitors' competition is going to be, what the intermodal option is going to be. All of those market factors eventually set what we refer to as a market price.

Q. Have you discussed with any particular shipper the service and pricing arrangements that you would be willing to negotiate?

A. Yes, we have.

Q. Has any shipper indicated that he might be concerned about your ability to provide responsive line haul service in light of the fact that you will be operating pursuant to a trackage rights agreement?

A. Could you define the word responsive.

Q. Has any shipper indicated -- raised that as an issue, how are you going to provide the service over a line that you're operating over under a trackage rights agreement?

A. I think there's been a number of shippers that have expressed that concern, and to reply to that, we have had a number of shippers into our Fort Worth office over the last several months. We're doing it again next week where we're explaining to them exactly how we operate

A. Yes.

Q. And am I correct that you have to have emergency response plans in place?

A. Yes, we do.

Q. Do you have any concerns about the quality of the Southern Pacific track where you might be handling hazardous commodities?

A. I am not familiar with the condition of the Southern Pacific track that will be handling hazardous commodities over at -- right now.

Q. Someone is at Burlington Northern/Santa Fe, I presume?

A. Someone is familiar with that, yes. As we're making our inspection trips, they're understanding that.

Q. Have you heard anything from those people who are inspecting the track about the quality of the Southern Pacific track?

A. Only that it meets FRA standards. If it didn't, we wouldn't -- Southern Pacific would not be operating on it.

Q. Let's go back to historic margins for a minute. When you introduce a vigorous, tough competitor like BN/Santa Fe to capture this business, will that have a tendency to drive the

price down?

A. It depends on what the price is now compared to what the market rate should be.

Q. Excuse me. What do you mean by that?

A. Well, Burlington Northern/Santa Fe is going to price to what the market rate or market price should be. I don't know what Southern Pacific or Union Pacific is currently charging those shippers, so I couldn't comment on whether or not the prices will go down or they'll go up. It's -- I just -- we don't -- I don't know.

Q. How do you assess or test or verify the market rate? Is that the rates you charge other shippers that are similarly situated?

A. That's one of them, one of the ways. The other ways are to understand what the alternative means of transportation are, whether it be water, intermodal, truck, transload. The other way to test it is to -- see, once you submit a price to a shipper, and if he tells you, you don't get the business --

Q. Bid too high?

A. Bid too high. That's the market.

Q. Oops. How long have you had experience in working in the chemical and plastics area? Is

Q. But at any one location, a producer that provides the same product as another producer, his prices for transportation service may be higher or lower than the next guy?

A. It could be, but again, if the market is very far out of bounds, you won't allow that plant or that producer to be able to be successful in selling his product. So that is one element again of how the market price is established.

Q. So that's another factor you consider, is whether the producer will be able to sell to his customers?

A. One of the pieces is to understand what cost of transportation is to that product going to what market, and we will look at specific markets to make sure that we will -- that our plant -- that that plant that we serve is able to continue to grow and flourish in his market.

Q. Well, if the producer can demonstrate to you that he is operating on very thin margins, that plays into your calculation of what the market price should be. does it not?

A. What plays in again is what the competitive transportation -- what our

competitors are charging, what the alternative modes of transportation are, whether it be water barge, alternative rail truck, intermodal, where it is that we are trying to price specific equipment to and from. So there are a number of different issues that we look at; depends on whether or not the equipment that is being provided is railroad-owned or owned by the shipper. So there's a number of different issues that are looked at.

Q. I believe as -- well, I'd like to show you -- I believe this was a work paper of both Mr. Rose and Mr. Ice.

MR. WEICHER: I recognize his work paper of Mr. Rose. I'm not disputing what you're saying.

BY MR. MOLM:

Q. Do you recognize this?

A. Yes.

Q. Could your counsel provide a copy of it to you?

MR. WEICHER: You want us to find another one. Just a moment.

MR. MOLM: These depositions are running right on top of each other.

we're going to operate, where we're going to base crews, how many locomotives we're going to need, things like that, then the plan will change as new customers come on, new services are offered, things of this nature.

Q. Going back one more time to this Executive Summary -- just hold that there -- but the Executive Summary here, the bottom of page 3 and the top of page 4, it states BN/SF is taking delivery of 87 new locomotives in 1996 at a cost of over 135 million.

When were those locomotives ordered?

A. I don't know, I assume in late '95. The second piece of that, that we will be seeking board approval to acquire an additional 150 locomotives, we have done that and we have placed orders for those.

Q. Now, was 150 new locomotives ordered specifically for the purpose of the BN/SF settlement agreement with UP/SP?

A. No, not specifically for, but understanding that we're taking on an additional 4,000 miles of trackage rights, that was one of the justifications for that.

Q. Was that also a justification with

respect to the 87 locomotives?

A. These aren't sequenced. They're not additive, and to this point, until we complete our negotiation with the customers, we don't know exactly the specific number of locomotives that will be required. What we are demonstrating here is that there continues to be enormous investment put into Burlington Northern/Santa Fe.

We will have a record capital investment this year of approximately $1.9 billion, and it's a demonstration that as we have done with -- the way we have grown our companies, former BN and former Santa Fe, jointly over the last five or ten years, that as business opportunities arise that we meet customer commitments in terms of service and rate, that we have the capital to invest in locomotives and that we will do that, and we are in advance putting additional locomotives in the fleet to be able to handle opportunities.

Q. I just need some explanation of the latter part of this document starting at page 9997 through the end, I believe. If you go to the page designated as 9998, I see the first list. What do you call it, sort of a schedule

Q. When you say covenants, what do you mean?

A. Well, like the reciprocal switch agreement, that would be under the joint facilities agreement. We have -- through the CMA agreement, we have reached agreement, the UP/SP has reached agreement with the CMA that gives a cap of how much a recip switch charge would go for, but those negotiations are ongoing because what the CMA agreement did was put a limit on it, if you will, and through the joint facilities agreement we will continue to negotiate with UP/SP to negotiate that rate. Same thing with the haulage rate.

Q. In fact, I believe the level of the switch charge is still being negotiated?

A. That's exactly what I'm referring to.

Q. You have not agreed to the cap level established by CMA?

A. It's my understanding that we've agreed to the cap level. We have not agreed to the --

Q. Precise level?

A. To the precise level.

Q. Next line I want to ask you about is 27, where it reads: Permanent trackage rights,

Q. Was that cap resolved on 3/22?

A. No, it was not either. It was resolved through the CMA settlement.

Q. So when was the cap resolved?

A. Whatever the date of the CMA settlement agreement was.

Q. But you had that as an issue on the table in implementing this?

A. Yes.

Q. Did you have communications with CMA about the cap level you would be willing to accept?

A. I did not have direct communications with CMA concerning that, no, and I don't know how that communication took place. It was from my perception more of a UP/SP negotiation with CMA and then brought back to us for approval, if you will.

Q. Do you know that SP didn't sign the CMA agreement?

A. No, I do not.

Q. Would it surprise you if only UP signed the agreement?

A. I hadn't thought through who's actually negotiating this. I assumed that everything is

serves all these facilities on the PTRA and the TCT, so we come in and connect two railroads, PTRA railroads, and then they serve all these plants.

Q. But the trackage that connects to the PTRA tracks is owned by BN/Santa Fe, correct?

A. The initial track out of Houston, yes, that's correct.

Q. And so of the 90,000 carloads of traffic that is currently available to BN/SF, do I correctly understand your testimony to be that BN/Santa Fe's current market share of that traffic is approximately 50 percent?

A. Yes, approximately.

Q. And that BN/Santa Fe does not serve any of that traffic over trackage rights?

A. No, that would not be true because we do serve -- we run over -- trackage rights over all parts of our railroad and so there are loads that originate on the PTRA, hook into BN/Santa Fe direct-owned track and then on down the road, go across trackage rights.

Q. So over some portion of the route they may run over trackage rights?

A. Correct.

Q. But they do not run over trackage rights over the entire route?

A. Correct.

Q. Turning back to the work paper entitled Gulf Coast Overview, UP/SP and BN/SF Implementation Plan Phase I, if your counsel could put a copy in front of you, turn if you would to page 09993. In the middle paragraph, third line, there's a statement: As shown in the table above, the initial projections for traffic to be generated total approximately 12,000 cars for the first annual period of operations. Do you see that statement?

A. Yes.

Q. Where is the table to which this document refers at that point?

A. I assume it's back to the table that we just looked at a minute ago.

Q. That would be the table at page 24563?

A. Yes, yes, but again, I want to reiterate this is dated since the CMA agreement.

MR. KOLASKY: I have no further questions. Thank you.

EXAMINATION BY COUNSEL FOR THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

A. Predominantly, yes.

Q. Do all plastics traffic go into storage?

A. No.

Q. How is it determined what goes into storage and what gets shipped to the customer?

A. How good business is.

Q. What's the relationship between how good business is and whether the cars go to storage or go to a customer locations?

A. Well, preferably the plastics customers, if they haven't -- I mean if they have an order, it's going to come out of the facility and go directly to the destination, but with the cyclicalness of the industry it tends to -- the demand levels go up and down, so they use this storage-in-transit yard as their inventory staging facility, but I guess -- I haven't had the specific conversation with some of your clients, but I assume that they would rather everything come out of the plant and go direct to their end customer if they can provide, match that demand cycle up.

Q. Is that ever a realistic situation in the plastics industry, that all product be

shipped directly to customer?

A. My personal opinion, I don't think so, the characteristics of the industry.

Q. Is that because the industry manufactures on a cycle basis on particular characteristics of product and they may be manufacturing today for meeting anticipated customer requirements six months from now before we switch to a different product composition?

A. That, as well as the demand for plastics goes up and down quite a bit, and instead of taking a plant down when times are slow they continue to produce and they put what doesn't get shipped to customers in the storage-in-transit yards.

Q. So the requirement for storage-in-transit varies, depending upon industry cycle; is that correct?

A. Yes.

Q. Let me start again. Discussing with Mr. Molm about the option to use a third-party switcher or to utilize reciprocal switching from the UP/SP, and you referred to that specifically in terms of moving, I believe, Exxon to Dayton; is that correct?

A. There's that potential if you like. For instance, in Fort Worth when we began to open up our operation in Fort Worth as a storage yard, Fort Worth is kind of a crossroads of directions out of Houston, so it wouldn't be backtracking, it would be more -- there's going to be more miles involved with the shipment. But typically if a plant site was on the Dayton sub and they just didn't know where these loads were going to go, destined, we would want to keep those as close to home as possible.

Q. Would the location for storage also be a relevant factor in determining whether or not you would use the trackage rights with regard to cars destined to the eastern gateways?

A. Yes, it would. For instance, we wouldn't store cars in Fort Worth and use the trackage rights out of Houston. We would store cars in Dayton and use the trackage rights out of Houston.

Q. Do you understand what the BN/SF's access to Dayton yard will be under the CMA settlement?

A. Generally, yes.

Q. Can you explain that to us, please.

A. It's my understanding that we will have access to 50 percent of the storage capability at Dayton upon the same financial terms that the Southern Pacific currently pays.

Q. How will that be made available to -- will be made available all at once, piecemeal, as you need it?

A. I have not seen the detail of that, of how that would, but I would assume again, thinking through what is being stored at Dayton right now is traditionally the business on that Dayton sub.

BN/Santa Fe we're not talking about additional plastics cars coming out of Dayton, we're talking about a realignment of being hauled by the SP to being hauled by the BN/Santa Fe, so as our need for storage goes up, UP/SP's needs for storage at that Dayton yard specifically goes down, but I have not seen the details of exactly when those spots would be made available to us. Again, that will be something discovered under the joint facilities.

Q. If you received a contract from -- pick a name out of the air, Exxon -- and Exxon, I believe you said before, was in fair proximity to

the Dayton yard; is that correct?

A. Correct.

Q. Do you have any knowledge today that Exxon cars are being stored at Dayton as contrasted with being stored at one of the other locations where the Southern Pacific may be storing Exxon cars on its system?

A. It's my understanding that the Exxon plant at Mont Belvieu is using Dayton storage transit yard to store their cars.

Q. Is that by contract or is that by SP convenience?

A. I don't know.

Q. Would you need to know where the cars are being stored in terms of whether or not you will get access to storage on a customer-by-customer basis as you pick up contracts that the UP or SP, particularly the SP, is servicing today?

A. Well, again, the CMA, my understanding is that the CMA agreement on this storage -- there's a couple of things that have yet to be nailed down on the CMA agreement. This is one of them.

My interpretation of what it would be

is that we would come up with some reasonable time period that when we say in August we needed 500 spots at Dayton, if they had them we would get them, if they don't have them we would give UP/SP some reasonable time, 30 days or 60 days, and then that within that period of time they would have to move their cars off that Dayton facility and give us access, fulfilling the terms of what the CMA agreement says. I think that would be a reasonable approach.

Q. Is it your understanding that the Southern Pacific has a long-term contract for lease of the entire Dayton yard that's currently developed for storage?

A. That's my understanding.

Q. Would you expect when car spots are made available at Dayton that you would pick up the balance of the lease term or that you would -- or alternatively, would you expect that you would pick them up on a sublease for a period of time?

A. My understanding was it would be a sublease.

Q. Would the sublease be a term unit of month by month or six months or a year, for

example, or would the sublease be sublease for the balance of the Dayton lease for that portion of the cars?

A. Again, my understanding of the CMA agreement, that issue has not been worked out, but I think reasonably an expectation would be, is that we would state to -- if the Dayton yard had 500 spaces available, we would state to them, to say we need, we want 300 of those, or if they had 500 spaces available and 100 came up, we would say we want 50 of those for the duration of the contract, we want the other 50 for a year period, but that issue to my understanding has not been resolved.

Q. Once again, how is it that the 100 car spaces would come up?

A. Well, again going back to my hypothetical example, there's 100 cars available right now at Dayton yard. We would have the right to go in and say we want 50 of them for long term and we want 50 of them for a period of one year. If there were not the -- the 100 cars were not available right now and we needed 100 cars, we would give UP/SP some reasonable period of time, 30 days, 60 days, and tell them that in

two months we're going to need 100 car spaces and according to the terms of the CMA agreement you're going to have to move the equivalent of 100 cars out of there to another location.

Q. But as you -- are you aware of any discussions with UP/SP on the means of implementation of this provision?

A. Only that again this implementation team that we have formed and the joint facilities people will -- that's where that issue will be resolved, they will work the details, from my impression, that that's where that will be worked through.

Q. Have they begun to work those details, do you know?

A. I don't know if they've started on that specific Dayton yard.

Q. Who would be responsible, which individual by name?

A. Dave Clifton will have oversight of that and he will have ultimate responsibility for that. Those, you know, again, there's --

MR. WEICHER: Let him pose a question.

BY MR. BERCOVICI:

Q. Is it possible, Mr. Rose, that when the

CMA settlement says that BN/Santa Fe shall have equal access to Dayton yard, that that means when 100 car spots come available, that BN/Santa Fe would have access to 50 and that UP would have a right to retain access to the other 50? Is that possible?

MR. WEICHER: I'm going to object if you're asking for a legal conclusion. If you're asking for a sense of the agreement, you can answer.

MR. BERCOVICI: I'm certainly asking for sense of the agreement.

THE WITNESS: I would certainly hope that would not be the case. I would hope that -- again, my impression of the agreement that was struck was that Dayton yard, if there's a full capacity, if there's total capacity of 500 spaces, that we would have access to 250, and the means of resolving of the timing of moving those cars out for BN/Santa Fe has yet to be resolved.

BY MR. BERCOVICI:

Q. Is it a reasonable interpretation that the UP/SP could say to you that as of day one the effective date of the merger, assuming it's approved, that they are making available to you

50 percent of the Dayton yard for the balance of the leased term and your option is to either take it or leave it?

A. Again, from a business perspective, understanding what the UP has said about wanting to allow us to have competitive access on this, I think that would be taken out of context. I would not expect that position from the UP/SP.

Q. Is it possible that that could be their position?

A. Anything is possible.

Q. The agreement to your understanding would not preclude such an approach?

A. Again, I assume that anything is possible, but I think it's again back to a reasonable interpretation of the agreement from a business context and I would not assume that that would be the direction. I would be disappointed if it was, but --

Q. Go ahead, please tell us your "but." But certainly that provision of the agreement is not clear and definitive in terms of what your rights are and what your access is to Dayton yard; is that correct?

A. I think that certainly there are

more -- there's details to be worked out on it.

Q. With regard to the CMA agreement, you state that you were not the point person for BN/SF. Can you tell us who was the point person for BN/SF?

A. All my dealings were through Mr. Weicher's office.

Q. I believe you stated to Mr. Molm that the negotiations were between CMA and the UP/SP and that the agreement was brought back to BN/SF for approval; is that correct?

A. The only clarification -- I don't know what negotiation SP had. I know just from hearing the process, my interpretation was that it was between CMA and UP, and again, don't know how much SP had in the negotiation and they would bring items back to BN/Santa Fe.

Q. Were these brought back on an individual basis or were these brought back in terms -- was the entire agreement brought back as a total unit and said here's what we've negotiated?

A. What I saw from Mr. Weicher's office was more of a package.

Q. More of a package. Is that a package

or does that indicate that there was a cluster of units being brought back for your review?

A. Well, it was the units that are pretty similar to what was in the agreement, the finalized agreement, the issue of the contracts being opened up, the issue of the Dayton yard, the issue of bi-directional movement, the issue of CMA oversight for five years, the issue of RCAF-U, and the new cost indexing, so all those units, all those things pretty much stayed the same.

Q. But my question is when that was brought, when you saw that, were those brought back as a set of provisions or were those brought back individually on a one-by-one basis?

A. As a set.

Q. As a set, were there any that you saw that were brought back individually?

A. No.

Q. Can you tell me when you saw this set of conditions brought back to you for the first time?

A. No, I can't.

Q. Can you give us an approximate time frame?

Q. From your perspective, is there any substantive difference in terms of the transportation requirements of those that have West Lake Charles to whom you don't have access and those at Lake Charles and West Lake to whom you do have access?

A. Is there any substantive difference in transportation?

Q. In the transportation for those producers.

A. No.

Q. But there is a very substantive difference in terms of the traffic available between the points that you can access and the points that you cannot access; is that correct?

A. That is correct.

Q. By your calculations here, it's about a 13-to-one ratio; is that right?

A. That's correct.

Q. And the 13 being the traffic that's unavailable to you and the one being the traffic that is available to you, so you have got access to about 7 percent of the traffic; is that correct?

A. That's correct.

with high costs due to the risk profile. Does that also apply to the plastics traffic?

A. There are not as many operational requirements in serving the plastics as there are in the chemical side.

Q. The cost would not be as high in serving the plastics traffic; is that correct?

A. Correct.

Q. With regard to the opening of the contracts by the UP/SP, do you have any idea of what methodology they will use to select contracts or contract volumes to open to BN/SF bidding?

A. No, I don't. Again, I think a reasonable business approach would be to allow the customers to make that determination of what contracts will be open, and that's what I'm assuming is inherent in that agreement.

Q. Could your ability to compete for traffic be impeded if there are volume incentives in the UP or SP agreements with their customers?

A. If those volume incentives were not released or relinquished, yes.

Q. Do you have any understanding with regard -- from UP/SP as to how they may treat any

volume incentives which may exist in these contracts?

A. No, I don't have any understanding. But again, my business understanding of the conceptual framework of the agreement says that they would be relinquishing those customers from those incentives.

Q. But that's your interpretation, you don't get that from any discussion --

A. That's correct.

Q. Based upon discussions with UP/SP personnel?

A. That's correct.

Q. Have you had any discussions or understandings with regard to the concessions made in the UP/SP rebuttal about opening the -- opening BN/SF access to Seadrift facilities and to the Channelview, Texas facilities?

A. Restate your question. Have I had any --

Q. Understandings, discussions or understandings with the UP/SP with regard to your potential access to build in to Seadrift, Texas, which is a Union Carbide facility, or Channelview or Lyondell and ARCO plants?

agreement covered.

BY MR. BERCOVICI:

Q. Have you identified other facilities beyond Seadrift and Channelview where you may have build-in opportunities?

A. Yes.

Q. Can you tell us how many there you've identified?

A. We've identified five to seven build-in opportunities that we think are reasonable to approach.

Q. Have you talked with those customers?

A. We have talked with the vast majority of them.

Q. Are they all CMA members?

A. No.

Q. Can you identify those opportunities for us, please.

A. I would really like to have my notes but --

MR. WEICHER: Explain to the extent you remember.

BY MR. BERCOVICI:

Q. Take your best recollection.

A. Dow at Freeport-Chocolate Bayou

Shintech, Lyondell of the Sheldon branch, Seadrift, Carbide, Oxy at Sinton over the Gregory gateway, Channelview and Mont Belvieu, the gas racks at Mont Belvieu.

Q. Do you believe that you have the right in each of these cases to effect a build-in and serve those customers off the trackage rights lines?

A. I think we have the right off the agreement that we struck with the UP/SP and our settlement agreement to do that. The only question is like the Mont Belvieu gas racks, and I don't know if we have that right or not.

Q. And why would that be?

A. Because it was not part -- my interpretation of the agreement, it was not part of the agreement that Exxon, Chevron and Amoco negotiated with UP to build into Mont Belvieu, and I'm just not sure if we would have that right, so we're looking at other alternatives there.

Q. Such as?

A. Locating a new gas station and pipelining it.

Q. You state in your written testimony

that you -- on page 3, we also understand that after one year, second full paragraph, we also understand that after one year, bidding will be opened on the business of any customer in an area covered by the BN/Santa Fe agreements who signed a contract with UP or SP in anticipation of the UP/SP merger.

What's your basis for that understanding?

A. Only that there were some contracts that UP or SP tried to tie up long term before this merger process or during this merger process and that this -- that would open those types of contracts back up.

Q. What do you consider long term?

A. Anything in excess of three years.

Q. What's your basis for the understanding that UP/SP tried to tie up contracts long term?

A. Customers told me they did.

Q. Is there any provision that those contracts will be opened in point of fact?

A. I'm sorry, I don't understand your question.

Q. In fact, you said -- this says you understand that bidding would be open on such

MR. WEICHER: If you know.

THE WITNESS: I'm not aware that it has been.

BY MR. BERCOVICI:

Q. You state on page 3 in the paragraph that begins under the assumptions, the second sentence, you anticipate or we anticipate our competitive price and service capabilities to be sufficient for BN/Santa Fe to capture at least 25 percent initially. What do you mean by initially?

A. Within the first year as we begin to build volume on these lanes.

Q. And you continue to say and up to 50 percent over time. How long do you think you'll need to capture up to 50 percent of the traffic?

A. Up to three years.

Q. In terms of the plastics customers, would it therefore be important that your option to access Dayton be available for up to three years?

A. Yes.

Q. You state on page 5, the paragraph beginning with respect to SIT facilities, that BN/Santa Fe is willing to invest 10 to 15 million

in additional SIT capacity other than Dayton if required to provide the service expected by our customers.

Do you know how many car spots the 10 to $15 million would purchase under today's --

A. I think about 800. Depends on the price of the land. Obviously order of magnitude, 800, maybe up to 1,000.

Q. Where is this willingness reflected other than in your testimony? Is there a -- strike that. Other than in your testimony, is there a provision for this 10 to $15 million in your capital outlays plans for the railroad?

A. Not for the 1996 capital. Again, we brought many shippers into Fort Worth and talked to them about what the requirements would be. And again, I know the marketplace wants a lot of definition about this, but we really -- the way most of this stuff happens is that once an opportunity surfaces from a customer, we will take that and bid on that, and if we receive a bid, we will put the capital against that project.

Q. Do you understand the marketplace is nervous about the effect of this merger upon

their service and their rates?

A. I understand that there's -- that there are some concerns about it. I don't think that the marketplace is giving BN/Santa Fe credit specifically for, you know, the $1.9 billion in capital that we're spending in 1996, and we're going to come back with another large capital in 1997, and that if you look at a 10 to $15 million investment or 15 to $30 million investment, it's a very small amount of money in relation to the overall capital investment.

Q. Is that 1.9 billion that you mentioned targeted to the Gulf Coast?

A. Portions of it, yes.

Q. Can you tell us how much of that is?

A. I do not know. Again, the capital is kind of split between physical plant, engines, locomotives, and I don't -- I just don't know what that split would be.

Q. Are you familiar with the letter that Phillips Petroleum, Fred Watson of Phillips Petroleum, wrote to the Surface Transportation Board?

A. Yes.

Q. Were you involved in the bidding

process?

A. Yes, I was.

Q. Can you describe that process for us?

A. Sure. Phillips offered, tendered a bid opportunity, to my understanding, is three railroads -- BN/Santa Fe, Union Pacific and Southern Pacific -- and we found out that our idea of market rates were a little too high.

Q. Did you consider your bid to them a preliminary bid?

A. Yes.

Q. Did you think that you were going to have an opportunity to come back, rebid on that movement at some point before the contract was finalized?

A. Not really. We put in a bid and we thought we knew that -- where the market target rate was. We didn't, obviously, because we didn't get that segment. We did get approximately 20 percent of the business, but the lane that Mr. Watson specifically refers to, Houston/New Orleans, we were not successful in that bid.

Q. I just asked you if you thought the bid was preliminary. You said yes. What did you

mean by preliminary? What was your interpretation of that?

A. Well, because we were bidding preliminary on the fact that we didn't have actual rights to operate because the merger wasn't even finalized yet, so I mean we told Phillips all along that this would all be contingent upon UP/SP and that otherwise we would not be able to provide that service because we wouldn't really have that gateway.

Q. That's obvious because, as you say, serving that lane was contingent upon the merger, and you've gained rights to New Orleans but you didn't think at that time you'd have another chance to come back and revise your bid, did you?

A. No.

MR. BERCOVICI: I have no further questions. I thank you very much for your --

MR. ROSENTHAL: I'm going to have two questions.

MR. WEICHER: Go ahead, make it very brief.

MR. ROSENTHAL: Two quick questions.

MS. JONES: If he misses his plane, it will be your fault, Mike.

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.

BY MR. MOLM:

Q. I repeat, did your committee take a vote with regard to entering into the agreement with the lawyers for the applicants?

A. Yes, they did.

Q. And when was that vote?

A. The vote was April 16th.

Q. Did any other committees review this document, executive committee?

MR. STONE: Objection, form.

BY MR. MOLM:

Q. Did the executive committee review this agreement following your vote?

A. No, they did not.

Q. Did the board of directors discuss and vote on whether the agreement should be entered into?

A. No, they did not.

Q. Did you have standing authority from the board to enter into this agreement?

A. The distribution committee had authority from CMA's executive committee representing the board to review the agreement proposed by the UP/SP and either accept it or reject it.

Q. And that was done sometime prior to April 16th?

MR. STONE: Objection to form. Don't know what the word "that" means.

BY MR. MOLM:

Q. Did the executive committee's authorization to the distribution committee occur prior to April 16th?

A. Yes, it did.

Q. Can you tell me what date that was or approximately what date that was?

A. That occurred on March 5th.

Q. With a view toward March 5th, is it correct or do I understand it correctly that you commenced negotiations with UP and SP prior to the filing made on March 29th?

MR. STONE: Objection. Who do you mean by you?

MR. MOLM: Mr. Speight.

THE WITNESS: I did not -- I was not involved in negotiations. Counsel performed the negotiations on behalf of CMA.

BY MR. MOLM:

Q. Did they bring back to you the give and take and here's the latest offer on the table?

MR. STONE: Well, I object. The testimony is the distribution committee is not Mr. Speight's distribution committee. It is CMA's distribution committee.

THE WITNESS: Please.

BY MR. MOLM:

Q. Pardon me?

A. Please repeat the question.

Q. Did the committee or you ask Mr. Crowley to review the proposed settlement agreement?

A. No, I don't believe we did.

Q. Is there within CMA a rail task group?

A. Yes, there is.

Q. Is that separate from the distribution committee?

A. It is a separate group from the distribution committee but it reports to the distribution committee.

Q. Are the members on the rail task group also members of the distribution committee?

A. No, they are not.

Q. Do you work with this group in addition to your duties with respect to the distribution committee?

A. On occasion people will participate by phone, yes.

Q. Was the CMA agreement ranked fairly importantly on the distribution committee's agenda?

A. Yes, it was.

Q. Did all members of the committee come to Washington then to discuss --

A. No, they did not.

Q. Some participated by phone?

A. Some participated by -- there were members that were there -- some members participated by phone, as I recall, and some members participated by -- in writing.

Q. In writing, what do you mean?

A. By ballot.

Q. By ballot. So am I to take it from that that votes are taken by ballot?

A. On rare exceptions.

Q. This particular matter was taken by ballot?

A. Yes, it was. There were -- there were -- I don't recall the number. There were a few that were by ballot.

Q. Did all members vote?

A. All except one.

Q. Did that person participate by phone?

A. No, that person did not. That person was out of the country.

Q. Stepping back for a moment, what does a distribution committee do about conflicts between members on its committee?

MR. STONE: I don't understand the question. Perhaps you could clarify so I can know whether to object to it or not.

BY MR. MOLM:

Q. Well, are some of your members in competition with other members that sit on the distribution committee?

MR. STONE: I wish you can clarify the question because it may be objectionable.

BY MR. MOLM:

Q. Do they sell products in competition with each other?

A. Yes, they do.

Q. Is there a policy at CMA that attempts to screen out conflicts?

MR. STONE: I object on the predicate that there are conflicts just because members of CMA compete with one another. I'd ask you to

Q. So hypothetically, if one of your members got a real deal on a barge method of distributing his product, he's not going to go reveal that to his competitor, is he?

A. I would suppose not, certainly not during a CMA meeting.

Q. I'm not asking you to - I wouldn't suggest, whatever occasion, any conduct that unbecoming or unlawful --

Without identifying them, do you have a lot of members that have facilities in the Gulf Coast?

A. Yes, we do.

Q. And do some of those members compete with each other?

A. Yes.

Q. Does the CMA agreement address concerns of all of your members in the Gulf Coast?

MR. STONE: Well, are you asking for Mr. Speight's opinion about whether it addresses all the concerns?

MR. MOLM: I'm asking him whether it does. Does he know that it addresses all like situated competitors in the Gulf Coast region?

MR. STONE: I guess he's entitled to

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

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

BY MR. MOLM:

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

A. That's correct.

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

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

Q. Some like it?

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

Q. And some members don't like it?

A. That's correct.

Q. Can you identify those members?

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

communications to Mr. Webber?

MR. STONE: Again I'm going to object to any details. We can -- I'll let the witness answer about the general nature of comments if he knows.

THE WITNESS: Yes, I believe some of those were to express support for the agreement, some to express concerns regarding the agreement.

BY MR. MOLM:

Q. Do you ever have full membership meetings annually?

A. We have meetings on occasion that we refer to as open meetings and which the entire membership is invited, yes.

Q. Did you have any of those open meetings, if you will, in which the CMA agreement was discussed?

A. We had a number of meetings of our rail task group that was open to any of the members that expressed an interest, yes.

Q. And is that announced to the membership in general, saying there will be a rail task force meeting?

A. No. These were not.

Q. How about your distribution committee

meetings, any of those open?

A. Those are the annual meetings that are open generally. We have one or two of those open meetings per year. The distribution committee meetings that we held in conjunction with this merger activity were not opened to the membership -- or I shouldn't say were not opened. They were not advertised, and nonmembers of the committee weren't openly invited.

Q. You wouldn't have shut the door on them if they tried --

A. Probably not, no.

Q. But they weren't advertised?

A. The distribution committee meetings, no, no, they were not, although the meeting -- the dates of the meetings are often published in our newsletters, but the specific agendas are not.

Q. Is there a distribution committee newsletter or is it a CMA newsletter?

A. There is a CMA contribution newsletter and there are also other forms of communication for different areas, communications to our executive contacts.

Q. And what is the nature of those

REDACTED

Q. Have you heard from any member since the execution of the agreement, that that member believes he will be hurt by the agreement competitively or otherwise?

MR. STONE: Asked and answered, I believe.

MR. MOLM: Not that specific question.

MR. STONE: Okay, go ahead.

THE WITNESS: I have had communications from the -- of some members that don't agree and feel that their competitive position may be somewhat lessened, details of which I --

You stated that you're the staff executive to the distribution committee. What responsibilities does that position entail?

A. Coordinating with activities of the committee, working with the chairman to establish -- or to develop agendas, providing minutes for the meeting, ensuring that CMA's procedures are followed, the antitrust guidelines are followed, and generally that CMA's policies regarding meetings are adhered to.

Q. I take it that CMA has written antitrust policies; is that correct?

A. CMA has written antitrust guidelines, very clear guidelines on the committee's operation, that's correct.

Q. Are you the principal party responsible for assuring adherence to those guidelines with regard to the distribution of committee activities?

A. Together with the advice of counsel, that's correct.

Q. How many members are there in CMA?

A. Honestly, I couldn't tell you today. The number changes from time to time.

Q. Order of magnitude, please.

A. I would guess in the order of 180, 185 members.

Q. You stated that the distribution committee is comprised of 16 members. Is the membership for the committee limited to 16 members?

A. Yes, that's correct.

Q. And how are those members selected?

A. The members are nominated by CMA's executive contacts. CMA's distribution committee planning task group reviews the nominations that come in each year.

A planning task group is a group within the distribution committee, ~~proposes~~ composed of the leadership of the distribution committee. They review the nominations to try to ensure balance across the association and will make recommendations up the line to CMA.

Among the things that the distribution committee planning task group looks for is company size, types of products, geographic location, new members versus experienced members, new companies versus companies that have been previously represented on the distribution committee.

They look for that balance, those recommendations are made to CMA staff by that planning task group. The planning task group takes that recommendation -- I'm sorry, I take that recommendation into the senior management at CMA, the senior management at CMA then presents it to the CMA officers and then those nominations are reviewed and approved by CMA's board of directors.

Q. Are there any guidelines with regard to serving on the committee as to who or what interest the member represents in voting on matters before the committee?

MR. STONE: When you say interest, could you clarify that. That's a somewhat loaded term.

MR. BERCOVICI: I'll restate the question.

BY MR. BERCOVICI:

Q. A member of the distribution committee, in voting on a matter before the committee, does that member vote what that member believes is best for the industry or does that member vote what that member believes is best for that member's company? My predicate to that was are

there any guidelines in telling the member what -- how to be guided --

A. Offhand, I can't recall as to whether or not there are guidelines specifically directing the member how to vote, nor would I presume to judge how a member votes. One hopes that the member would vote for the good of the industry; however, it's up to that individual member to judge.

If I may elaborate just for a brief moment, that is one of the reasons the distribution committee looks for balance across the membership on the distribution committee, to ensure that even if they do vote their own individual desires, that a balance will still -- there will still be a balance represented in any committee vote.

Q. So there's nothing to preclude a member from voting their own commercial interest when they sit on the committee in terms of CMA policy; is that correct?

A. Nothing to prevent -- I'm not sure how one would prevent that. The member votes, the member votes.

Q. There's nothing to -- there's no

steering group also reviewed the documents, made its recommendations to the distribution committee, then the distribution committee based on those recommendations made its decision.

Q. And the distribution committee was the body that had the final say, correct?

A. That's correct.

Q. In the vote of the distribution committee, was a simple majority vote required to carry a motion to approve and accept the settlement agreement?

A. The distribution committee followed the guidelines in this particular decision as it would in any issue. This was no different.

Q. What do those guidelines provide with regard to votes?

A. That a quorum is required and that a majority of those participating will decide.

Q. So if you had 15 of the 16 members participating, that the vote of eight of those 15 would be sufficient to accept the settlement agreement; is that correct?

A. Yeah, that would do it, but it doesn't necessarily -- yes, that would -- you know, that would also do it. That would also make the

decision.

Q. That would also. Is there something else that would make the decision?

A. A quorum of the committee is required to participate. A decision is made by the majority of those that do participate in the vote. There is a possibility that all that -- not all the members choose to participate in the vote.

Q. How does one choose not to participate in the vote?

A. Presumably one could abstain or just choose -- well, abstain, choose not to vote.

Q. If a member votes to abstain, is that considered not voting or is that considered as a vote that is not in favor of the agreement?

A. I would have to go back and check the bylaws or the guidelines, but I would venture to guess that that would simply be a vote not to participate or that that particular member had no opinion.

Q. For example, if you had 15 members voting and four abstained, therefore, 11 parties voted yea or nay, are you telling us you believe that six members of the committee would control

the outcome of the vote?

A. They could, yes.

Q. Do you know whether some members did abstain from the vote in this case?

A. The --

MR. STONE: I will instruct the witness not to answer on the basis of getting into the particulars of the voting on this occasion which we assert is protected by the associational privilege.

MR. BERCOVICI: I'm not inquiring into what members or how many. I just asked if the -- as a matter of function in this case, there were abstentions.

MR. STONE: Could I get your assurance that you're not going to ask about the particular vote count?

MR. BERCOVICI: I will not get into the vote count.

MR. STONE: You can answer that one question.

THE WITNESS: Can I ask you a question.

(Discussion off the record.)

THE WITNESS: As I recall, your

question was whether or not some members did abstain.

BY MR. BERCOVICI:

Q. Yes.

A. And the answer is yes.

Q. You stated that the distribution committee considered whether the UP settlement offer met the eight points, the eight points you discussed with Mr. Molm set forth in Attachment A to the CMA comments.

Did the CMA distribution committee consider whether or not the eight points, whether it should -- did they consider whether they should -- whether they should take into account anything other than the eight points?

A. Did the distribution committee when they looked at the agreement?

Q. When they looked at the agreement and decided whether or not to accept the agreement, did they decide whether or not they should take into account any elements other than the eight points?

A. No.

Q. Or -- so they were limited solely to the eight points?

Q. Were they told that the only thing, the only issue before them was whether or not the settlement offer satisfied the eight points?

A. They were told in reviewing the settlement decision that the only thing that they could compare it with, against, was the eight points that were handed down by the executive committee.

Q. You stated that the vote took place on April 16th. Is that the date that a decision was made on whether to accept the settlement offer?

A. The distribution -- this will get into -- Counsel --

(Discussion off the record.)

MR. STONE: I'm going to let the witness address something that again goes to the contours of the settlement process. I continue the objection to talking about the details of settlement and the details of the committee discussion, but I will allow the witness to answer on this one point.

THE WITNESS: The committee reviewed the position put forward by the UP/SP and voted to accept the offer that was presented to them at that April 16th meeting, provided certain

that there were eight points, and if those eight points were met in the negotiations with the UP/SP, we could support the merger.

Q. Did you at any time advise the executive contacts of the other parties' positions in the merger case following the March 29 filing date?

A. The other parties?

Q. Yes. Did you advise your executive contacts that other -- that following the March 29th filing of the substance, nature or identification of other parties who had filed comments with the Surface Transportation Board?

A. No. Again, that information would have been made available to the members. As I said, we provided the contacts at CMA, if these people chose to contact CMA, again me or my staff, and we would share that information with them.

There were, as you well know, there were a lot of parties involved, and to the extent that we had knowledge we would have been happy to share that, but we did not go out with the communication detailing anybody's position of course other than CMA's.

Q. And I take it that similarly you did

REDACTED

Q. Did CMA seek to have the applicants provide BN/SF access to individual shipping points in the Lake Charles area?

MR. STONE: Just a second. I'm going to object on the basis of settlement privilege, regardless of what the answer might be, and on the basis of work product and attorney/client privilege.

THE WITNESS: If I could extend that break just about another minute, if you could excuse me for just a second.

(Recess.)

BY MR. BERCOVICI:

Q. Mr. Speight, is there anything in the CMA eight points we've been talking about this afternoon that refers to opening BN/SF access to the Lake Charles area shipping points?

A. No, I don't believe there is specifically to the Lake Charles area, I don't

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.

Thursday, May 9, 1996

Deposition of ROBERT D. KREBS, 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 11:05 a.m., Thursday, May 9, 1996, and the proceedings being taken down by Stenotype by JAN A. WILLIAMS, RPR, and transcribed under her direction.

& Company, don't you?

A. Yes.

Q. And you've dealt with them over the years?

A. Yes.

Q. Specifically when you were at Santa Fe, you had them do studies for you?

MS. JONES: I'm going to object at this point. The issue of the McKenzie studies has been brought to the judge, he has ruled it to be stale and outside the scope of appropriate discovery in this case. We'll permit certain factual inquiries as you've started to here, but we are not going to be permitting any questioning on prior strategic planning of Santa Fe that are not directly related to this case as the judge has already ruled.

MR. LUBEL: Let me make my proffer and see if we can get some answers here.

BY MR. LUBEL:

Q. In the 1990, 1991 time frame, did you have a study done by McKenzie & Company that related to options of potential acquisitions that might involve Santa Fe and other Western railroads?

MS. JONES: We'll permit a yes/no answer to that question.

THE WITNESS: Yes.

BY MR. LUBEL:

Q. And did you share that study with any other railroads, share a copy of it with any other railroads?

MS. JONES: We are not going permit an answer to that question, that's outside the scope of this testimony.

MR. LUBEL: Just so the record is clear and just so the Surface Transportation Board can understand, it's your position that you will not let the witness deny that he provided a copy, as an executive of Santa Fe, he provided a copy of such a study to executives at other railroads?

MS. JONES: So the record is very clear, Mr. Lubel, my position is the same as Judge Nelson has ruled, that the prior strategic plans of Santa Fe that have been acknowledged to have been performed with the assistance of McKenzie & Company is outside the scope of this case, irrelevant to this case, and need not be explored in a deposition.

MR. LUBEL: Could you help me. I know

MS. JONES: You may answer that question.

THE WITNESS: Here's where I think -- what we were trying to say here and what I am saying here is, okay, first of all, yes, we had studies, more than one study made about where Santa Fe would end up eventually in the Western rail system. We never had any studies made that considered there would be two railroads left in the United States or that it was desirable for that to happen.

BY MR. LUBEL:

Q. How about that considered having two major railroads in the Western United States?

A. That's what I mean, in the Western United States, we have never considered that as an alternative.

Q. Okay. Did the study suggest that as an alternative?

A. No.

Q. Did it suggest having three major railroads in the West?

A. Well, again we had a number of studies made. And some of them had three, some of them had four.

or know where a copy is?

A. No.

Q. Have you made any effort to find one?

MS. JONES: I object to that question as both irrelevant and unnecessary. In any event this has been ruled on by the judge already.

MR. LUBEL: Well, I'm not answering you each time you say that, but we do feel that this has opened up the door to that, opened up the door to the inquiry.

BY MR. LUBEL:

Q. Did the study you're thinking of or the studies you're thinking of include the possibility of a carve-up of the Southern Pacific routes?

MS. JONES: You may answer that question.

THE WITNESS: Yes.

BY MR. LUBEL:

Q. And can you elaborate on how or what options were considered?

MS. JONES: Again to the best of the witness' recollection on a very old, stale project.

THE WITNESS: The northern part of the

SP central corridor, the Gulf Coast, and Cotton Belt and the other lines, the line across from Houston to Los Angeles and Southern California were considered as three separate alternatives, three separate pieces.

BY MR. LUBEL:

Q. And the study you're thinking of, who was suggested or considered as acquiring those pieces?

A. Do you want me to answer that?

MS. JONES: Yes, you may answer that.

THE WITNESS: It seemed to me that the logical carriers were Santa Fe for the Gulf Coast and Cotton Belt, the Union Pacific across to Southern California, and Burlington Northern across to Northern California and up to the Pacific Northwest.

BY MR. LUBEL:

Q. Now, did you ever become aware that Mr. Anschutz became aware of this study you're talking about?

MS. JONES: Let me go off the record for just a moment to consult with my cocounsel, not the witness I want the record to reflect.

(Discussion off the record.)

MS. JONES: Back on the record.
The witness may answer the question.
THE WITNESS: Yes.
BY MR. LUBEL:
Q. He was pretty pissed about it, wasn't he?
A. No. I explained it to him.
Q. Excuse me. He was upset about the prospect of carving up his railroad, wasn't he, or that somebody had done a study considering that?
A. Well, at that point in time which was right after he bought the Southern Pacific and was putting it together with the Rio Grande, his number one objective was to run it as a combined single service or single network.
Q. And he talked to you about his knowledge that you had had this study done?
A. I went to see him and I showed him the study.
Q. So you're at Santa Fe, you're an executive at Santa Fe at the time, what's your position?
MS. JONES: I'm going to object again for the record, this is far afield of this case,

Q. My question was whether Union Pacific was proposing or saying it would be willing to make such a change?

A. No, I don't believe they were.

Q. When you say that Mr. Davidson was talking to you about modifications like the CMA agreement, what do you mean, what do you recall?

A. Well, I think they were things like doing something to alleviate the concerns about the UP's bidirectional operation up to Memphis and St. Louis. To me that was -- I mean it was pretty much chemical industry related.

MR. LUBEL: Okay. I think that's all we have. I thank you very much. So sorry we got into squabbling here. I didn't mean to prolong things.

MS. JONES: Before we adjourn I have one question on redirect.

EXAMINATION BY COUNSEL FOR BURLINGTON NORTHERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

BY MS. JONES:

Q. Mr. Krebs, I would ask you to clarify that, in response to questions from Mr. Lubel regarding your discussion with Mr. Anschutz and a

discussion with the Burlington Northern regarding a study that was done, were you referring to the McKenzie work done for Santa Fe by McKenzie?

A. Yes.

MS. JONES: That's all I have.

(Thereupon, at 1:15 p.m., the taking of the instant deposition ceased.)

_____

Signature of the Witness

SUBSCRIBED AND SWORN to before me this _____ day of

_____, 19__.

_____

NOTARY PUBLIC

My Commission Expires

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.

Monday, April 22, 1996

Deposition of THOMAS D. CROWLEY, 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 ANN L. BLAZEJEWSKI, a Notary Public in and for the District of Columbia, taken at the offices of Donelan, Cleary, Wood & Maser, 1100 New York Avenue, N.W., Washington, D.C., at 9:00 a.m., Monday, April 22, 1996, and the proceedings being taken down by Stenotype by ANN L. BLAZEJEWSKI, RPR, CM, and transcribed under her direction.

Q. So you did not consider them in your testimony about Larry Lawrence's conclusions?

A. That's correct.

MR. SLOANE: I have no further questions.

MR. DiMICHAEL: I think we would like to just take a minute or two to see if we have anything.

MR. SLOANE: Absolutely.

(Recess.)

MR. DiMICHAEL: We've got a few questions.

EXAMINATION BY COUNSEL FOR THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE, ET AL.

BY MR. DiMICHAEL:

Q. Mr. Crowley, earlier in the questioning by Mr. Sloane you were asked about a series of hypotheticals that Mr. Sloane presented to you. Do you recall that?

A. Yes.

Q. It was a number of these things, and let me go through at least a couple here. You were asked one hypothetical in which UP and SP served both the origin and the destination today. Do you recall that?

A. Yes.

Q. Maybe we will term that a 2-to-1/2-to-1 point, okay?

A. Okay.

Q. You were asked another hypothetical where there was a 2-to-1 point at one end and the other end was served by the UP or the SP and another carrier. Do you recall that?

A. Yes.

Q. Maybe what we'll do is we'll term that a 2-to-1 point to a 3-to-2 point.

A. Okay.

Q. Then you were asked a hypothetical where UP or SP served the origin, a 2-to-1 point, and then at destination a UP and SP served it as well as the BNSF. Do you recall that?

A. Yes.

Q. Maybe what we'll do is we'll term that a 2-to-2 point.

A. Okay.

Q. Now, you indicated, I believe, that in each of those hypotheticals you would assume in developing the numbers that you see in your verified statement on behalf of the NITLeague that BN would not divert any of the traffic in

developing the calculations for the number of trains per day, et cetera. Is that right?

A. That's correct.

Q. Now, can you explain why you came to the conclusion that traffic would not be divertible to the BNSF in that particular case. Was there any one reason or a series of reasons?

MR. SLOANE: Objection. I don't understand which particular case you're referring to. You're referring to all three?

MR. DiMICHAEL: We're referring to all three, yes.

THE WITNESS: There were a number of reasons. One of our basic premises was that any traffic that UP or SP originated and/or terminated before the merger, they would control after the merger. We took this position for a number of reasons.

The reasons include traffic under contracts, a lot of this traffic moves under contract. Although it's based on the information available in the record it's not possible to determine the amount of traffic that is under contract, but our position is that any traffic that is under contract is not divertible.

The second reason would involve the security of the movement or movements that would take place if BNSF were to handle the traffic. We looked at a number of instances and found that they had a circuity disadvantage. In other words they had to travel a lot further to get between the two points than the incumbent.

The third was an issue of compensation. The problem running over the contractor's lines is documented in my statement along with the other problems that we identified associated with BNSF accessing the central corridors, the so-called operational and infrastructure problems.

The third or the fourth or fifth reason that we excluded BN Santa Fe was the identification and availability of traffic at the terminal areas as Mr. Lawrence identified them. If you recall earlier in my direct testimony today we talked about some differences in Mr. Lawrence's approach versus our approach. Mr. Lawrence used a city approach to identifying traffic.

When we looked at those cities from an STLC standpoint, from the standard point location

standpoint, we found that there were a number of SPLC locations within these major geographic areas, these major city areas that BNSF did not get access to, so we were faced with an overstatement problem at that point.

The last point for why we did not include this traffic was that again in these cities where Mr. Lawrence identified available traffic, even within the split locations there are terminals that BNSF would not have access to. Mr. Lawrence recognized this at the 2-to-1 locations by developing a 0.74 factor to recognize by I believe what he called the open access stations.

At these other cities that we're talking about, there was no such factor developed, and we were unable to determine how much within a split would be available.

Q. Okay. Now, looking at that fourth point, then, the business about the BN access being overstated, just to be clear on that in other words, Mr. Lawrence looked at city-wide points; is that right?

A. Yes. For example, he would have looked at Chicago area.

Q. Okay. And then you would have said, well, just because BN serves some points in Chicago doesn't necessarily mean that BN serves the precise point that UP/SP serves within that geographic area?

A. We looked at some of these areas and determined that that in fact was the case.

Q. I see. Okay. Now, let me just maybe, just to maybe make this a little more clear, could we take perhaps an example. I see you have a map here.

Now, Mr. Crowley, I would direct your attention to, let's say, the point of Salt Lake City as an origin point. Do you see that there?

A. Yes. That would be a 2-to-1 location.

Q. That's a 2-to-1 location. In other words UP and SP presently serve Salt Lake City, and assuming that the BNSF access agreement is approved by the board, then after the merger, the merged UP/SP will serve that point as well as the BNSF; is that correct?

A. That's correct.

Q. Now if we take that as a 2-to-1 point, and then let's look at the point Daggett, California. You see that down there right in the

southern part of California? It's kind of small on this map.

A. Yes, I see it.

Q. The map that we're looking at is a map that was included in the -- in the application map number 2, settlement with BN/Santa Fe. Now, you see that Daggett is a point that is currently served by the UP/SP, and it will -- and it is also currently served by the BNSF, right?

A. Right, the Santa Fe.

Q. Now, if you were going to be having traffic that would be moving from Salt Lake City, Utah to Daggett, California via the UP/SP, after the merger how would that traffic go?

A. That traffic would most probably move in a southwesterly direction through Las Vegas on a UP line.

Q. Now, that seems to me, just looking at the map, a very direct route; is that right?

A. That's correct.

Q. Now, if BNSF was going to serve that point, excuse me, serve both the origin and take traffic from that origin to the destination at Daggett, in other words run from Salt Lake City to Daggett, would the BNSF have a similarly

direct move?

A. No. Both options that I would identify as being available to the BNSF would be considerably more circuitous.

Q. How would that run?

A. We could assume they would handle it in one of two ways from Salt Lake City. They could move over the trackage rights in a westerly direction into the Sacramento area, and then in a southerly to southeasterly direction to Daggett, which would be considerably longer than the direct UP line from Salt Lake City.

Q. What would be the other option that BNSF would have?

A. The second option would be to take the traffic in an easterly direction over the trackage rights to Denver, and then follow the Denver line south into New Mexico and follow the old Santa Fe line in a westerly direction to Daggett. That would also be considerably more circuitous than the direct UP line.

Q. So if you -- simply, then -- strike that.

Simply then assuming that BNSF could serve after the merger this 2-to-1 point and take

the traffic at a 2-to-2 point without looking at all these variables, that would not be correct in your view. Is that fair?

A. That's correct.

MR. DiMICHAEL: I think that's all the questions.

MR. SLOANE: If you don't mind, could we take just a couple minutes?

MR. DiMICHAEL: Sure.

MR. SLOANE: I promise you it will be short.

(Recess.)

MR. SLOANE: If we can go back on, mercifully we have just one question.

FURTHER EXAMINATION BY COUNSEL FOR
BURLINGTON NORTHERN RAILROAD COMPANY
AND THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY

BY MR. SLOANE:

Q. That question is do you have any work papers supporting the circuity disadvantage to which you just referred earlier in response to one of Mr. DiMichael's questions?

A. I could look. I don't -- none come to mind right now, but I would be happy to look.

APPENDIX 4

DOCUMENTARY EVIDENCE - REDACTED

STB FD 32760 6-3-98 E 83998

BEFORE THE
SURFACE TRANSPORTATION BOARD

ARU-17

Finance Docket No. 32760

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

BRIEF OF THE ALLIED RAIL UNIONS

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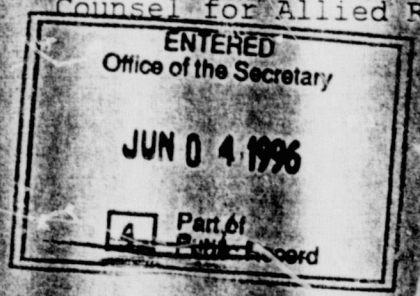

Dated: June 3, 1996

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BRIEF OF THE ALLIED RAIL UNIONS

This brief is submitted by the labor organizations participating in these proceedings as the "Allied Rail Unions" or "ARU"[1]. The ARU oppose the common control and merger of the UP and SP families of railroads; alternatively, they submit that the Transaction should be conditioned as is set forth in the Comments filed by the ARU on March 29, 1996.[2]

I. THE APPLICATION SHOULD BE REJECTED

In their Comments the ARU fully set forth their reasons for rejection of the Application which included the likely impact of the Transaction on railroad workers, Railway Labor Act ("RLA") concerns, the appropriate response to the asserted weakness of SP, and the anti-competitive effects of the Transaction especially in combination with the UP/SP--BNSF deal. The ARU will not repeat those arguments here, particularly since other parties have already provided the Board with even more detailed analyses of the SP's circumstances and the anti-competitive effects of the

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[1] The American Train Dispatchers Department/BLE ("ATDD"), Brotherhood of Maintenance of Way Employes ("BMWE") and Brotherhood of Railroad Signalmen ("BRS"). Since there is no entity known as the ARU and the acronym used as a convenient description of several unions, references to the ARU will be in the plural form.

[2] For the purpose of filings in this proceeding, the ARU adopt the abbreviation system set forth in Applicants' Table of Abbreviations in Volume 1 of their Railroad Merger Application filed on November 30, 1995. Additionally, references to "Applicants" will be to UP, SP and the their parent corporations; "UP/SP" will refer to the proposed combined UP and SP, "Application" will refer to the November 30, 1995 Railroad Merger Application, and "Transaction" will refer to the common control and merger of UP and SP and other related transactions described in the Application.

Transaction. Instead, the ARU will discuss several points which militate against approval of the Transaction which the ARU believe have not been, and will not be, adequately addressed by other parties. The ARU do not intend thereby, to waive or diminish the importance of any components of their Comments that are not discussed in this brief; and they expressly incorporate herein all of the arguments set forth in their Comments.

A. The Impact Of The Transaction On Employees Of UP And SP And Of Other Railroads Militates Against Approval Of The Transaction

Section 11344(b)(1)(D) of the Interstate Commerce Act ("ICA") requires that the Board consider "the interests of carrier employees affected by a proposed transaction" in deciding whether to approve a transaction. In their Comments the ARU demonstrated that the large reductions in employment identified by the Applicants as likely results of approval of the Transaction actually understate the impact of the Transaction on UP and SP employees and on employees of other railroads. This likely effect of the transaction on railroad employees militates against approval of the Transaction under Section 11344(b)(1)(D).

Applicants have not refuted the ARU assertion that the impact of the Transaction on employees would exceed Applicants' projections, and they have not given any assurances that those impacts will be limited to, or even close to those described in the Application. Indeed, given the Commission's holdings that consolidations and reductions in work forces may occur even many

years after a transaction[3], it necessarily follows that the job reductions which will occur in this Transaction will be greater than the Applicants have represented in their Application.

Applicants' only response on this point is to take issue with the ARU reliance on calculations of reductions in employment after the UP-MP-WP transaction and the UP-MKT Transaction (ARU Comments at 31 n.16), asserting that the ARU had counted all job losses as Transaction related, and noting that there could be other reasons for the gross reductions in employment cited by the ARU, such as changes in shipping patterns and changes in collective bargaining agreements. Hartman Rebuttal Verified Statement ("R.V.S.") at 8. However, even if the job losses were attributable in part to factors other than the transactions, the disparities between the projected merger-related job losses and the actual jobs lost were so great that, even if not all of the job losses were Transaction related, it is clear that the pre-Transaction projections were well below any reasonable calculation of the actual post-consummation transaction-related job losses. Applicants cannot possibly demonstrate that only 235 of the 11,762 jobs lost in the several years after the UP-MP-WP trans-

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[3] *See e.g., CSX Transportation--Control--Chessie and Seaboard System Railroads*, F.D. 28905 Sub No. 27 (Served December 7, 1995) ("*O'Brien Review Decision*"), affirming an employee protective conditions arbitration award ("*O'Brien Award*") under the *New York Dock* conditions (*New York Dock Ry.--Control Brooklyn Eastern District Terminal*, 360 ICC 60 (1979). *See also* Applicants' Narrative Rebuttal at 74, acknowledging that merger related reductions in employment continued years after the NS, CSX and UP/MP/WP mergers.

action were merger related, or that only 1,120 of the 7,506 jobs lost in the several years after the UP-MKT transaction were merger related. Even if the job reductions attributable to the mergers were only half of the actual post-consummation job reductions, it is clear that the pre-consummation projections were far below the actual transaction related job losses.

Moreover, Applicants have contradicted their own assertions in this regard in defending their estimates of likely job reductions against DOJ's claim that the amount of job reductions is overstated. In response to the DOJ's expert, Applicants have argued with a great specificity that the productivity gains and reductions in employment in the railroad industry in the last fifteen years were inextricably related to the mergers that have occurred during that period. Rebuttal Narrative at 71-75, Hartman R.V.S. at 12-15, Salzman R.V.S. at 2-20; *see* e.pecially Rebuttal Narrative at 74. The claim that industry-wide reductions in employment were integrally related to the mergers in the 1980s is simply contrary to Applicants' assertions that UP-WP-MP and UP-MKT mergers were not substantial causes for the job reductions on those carrier in the several years after those transactions.

Additionally, Applicants have not responded to the ARU showing that the impact on employees of the BNSF transaction is clearly going to be far greater than predicted; and significantly, BNSF has not challenged the ARU on this point. Applicants have also failed to acknowledge that the impact of the UP--CNW

transaction is already greater than advertised. *See* UTU and BLE appeals from the implementing arrangement awards of arbitrator John Mikrut in Finance Docket No. 32133 Sub-No. 4 ("*Mikrut Award*") which involved changes in collective bargaining agreements ("CBAs"), and rules and rates of pay for hundreds of operating craft employees shortly after consummation of the UP-CNW transaction which was projected to have only minimal effects on operating employees. *See also O'Brien Award* which involved changes in CBAs and rules and rates of pay for hundreds of operating craft employees many years after ICC approval of the formation of CSXT.

Thus, the ARU submit that the actual record of carrier actions over the last fifteen years and Applicants' own specific evidence and arguments support the ARU assertion that the job losses and other impacts on employees which would flow from this Transaction would significantly exceed those predicted by the Applicants. Accordingly, Section 11344(b)(1(D) militates against approval of this transaction.

B. The Railway Labor Act Militates Against Approval Of The Transaction

Applicants have not refuted the ARU arguments (Comments at 33-35) that the Board is required to consider the commands and policies of other federal laws in considering approval of a transaction under Sections 11343 and 11344 and that it must therefore consider commands and policies of the RLA in these proceedings. The ARU have shown that Applicants' plans after

consummation and their specific requests for Board sanction of those plans will result in a number of actions which are clearly contrary to the commands and policies of the RLA and that consideration of the RLA therefore supports rejection of the Application. *Id.*

Applicants' only responses to these arguments are assertions that evisceration of the RLA should be of no concern to the Board because Section 11341(a) can override the RLA, that they would not be acting unilaterally because their planned changes would be sanctioned by a *New York Dock* arbitrator and that the ARU' position is hypocritical because the ARU have asked for conditions which would potentially impinge on Applicants' RLA rights. Hartman R.V.S. at 5-6; Narrative Rebuttal at 315-316, *citing Norfolk & Western Ry. v. American Train Dispatchers Association*, 499 U.S. 117 (1991) ("*Dispatchers*"), the *UP/CNW* March 7, 1995 decision at 94-96 and the *BN/Santa Fe* August 23, 1995 decision at 79-82). None of these responsive arguments have merit.

Applicants' citation of Section 11341(a) and the Supreme Court's decision in *Dispatchers* does not refute these ARU arguments since the ARU argument on this point is that *because* approval of the transaction may permit Applicants to ignore their CBA obligations pursuant to Section 11341(a) and *Dispatchers*, and to do so on a massive scale, the Board should not approve the Application. The fact that an approval may have the effect of gutting CBAs and negating the collective bargaining process does not

refute an argument that the possibility of such results should be a basis for rejection of the Application. Cf. *MacLean Trucking Co. v. U.S.*, 321 U.S. 67, 80 (1944); *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 172-174 (1962).

Applicants are simply wrong in asserting that possible arbitral sanction of their plans for their workers negates all RLA concerns about the Transaction. One of the key aspects of the RLA was the Congressional rejection of third party resolution of collective bargaining disputes in favor of bilateral resolutions, even if that meant possible interruptions in commerce and union resistance to actions which carriers perceived as promoting efficiency. *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 148-149 (1969). Ironically, while trumpeting the benefits of deregulation of the railroad industry, the carriers have become advocates of STB regulation of railroad industry labor relations: Congress rejected such a scheme many years before it deregulated the railroads, and governmental control of labor relations should not be imported into the railroad industry under the guise of deregulation of the railroads.

Additionally, there is no basis for the assertion that the *Dispatchers* decision supports a claim that *New York Dock* arbitration is a permissible replacement for the RLA.[4] The Supreme Court specifically stated that it limited its decision to the ap-

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[4] Significantly, this argument was advanced by UP's Employee Relations Director Hartman, and not UP/SP's counsel; who presumably would have been more circumspect in describing the Court's decision.

plication of Section 11341(a), and that it assumed for purposes of that decision that there were no *New York Dock* issues to be resolved; although the Court discussed the *New York Dock* process, it did not interpret, apply or rule on any *New York Dock* issue. 499 U.S. at 121, 127-28, 134.

The ARU also note that all of the ICC decisions on this subject are on appeal or on apparently indefinite remand to the Commission/Board following several year old decisions on appeal. As the Board is well aware, rail labor has contested each of those decisions and the Commission's dilatory approach toward the courts' remand orders. Accordingly, the ARU will not repeat those arguments here but will merely note for the record that the Commission's decisions do not add force to Applicants' arguments because those Commission decisions are clearly erroneous.

Applicants' brazen charges of ARU "hypocrisy" concerning the RLA are specious and would be laughable but for the seriousness of the subject for railroad workers. Indeed, it is the Applicants who are the hypocrites. They seek sanction to ignore the RLA and their solemnly undertaken contractual commitments under cover of a decision which would generally approve the Transaction without establishing or defining the actual methods, scope or timing of its implementation; they also plan to cite such a decision as authorizing substantial changes in existing CBAs, even changes not presented in the Application. But having sought Board approval of their own major changes in particular agreements and open-ended authority for other changes, they have re-

sisted ARU requests for certain specific conditions such as limits of the use of outside contractors, a requirement that Transaction related construction work be done with bargaining unit employees, and a requirement that any larger, uniform CBAs created through *New York Dock* processes be derived from union "cherry-picking" from existing UP and SP agreements. Ironically, the basis for Applicants' resistance to such conditions is the claim that such conditions would impinge on Applicants' RLA rights.

However, the ARU have sought these conditions only in the alternative: if the Commission approves the transaction, sanctions the plans presented by the Applicants for alteration of the RLA and CBA rights of their workers, and/or refuses to limit the scope of application of Section 11341(a) in this case, then the ARU ask for imposition of certain limited obligations on the Applicants. Although the RLA would otherwise allow the Applicants to resist these new obligations, the ARU submit that if the Board plans to allow Applicants to toss the RLA aside virtually at will, then it is reasonable to ignore Applicants' RLA based objections to the conditions sought by the ARU. **However, to be absolutely clear on this point, the ARU state that if the Applicants are willing to renounce any effort to use the Board's decision to negate or limit the RLA or any CBA, the ARU are certainly willing to renounce any condition that they have sought which would contravene the RLA.**

C. SP's Problems Do Not Militate In Favor Of Approval Of The Application

In their Application UP and SP relied heavily on SP's current and projected future problems with making capital improvements and in competing with BNSF as supporting approval of the Application. In essence they argued that SP's problems are such that the only solution is merger of SP into UP, regardless of the consequences for competition in the west, regardless of the possibilities for coordination between UP/SP and BNSF and regardless of the impact of such a transaction on the employees of the carriers and the communities in which those employees live. These arguments were reiterated in Applicants' rebuttal filings and they were supplemented by contentions that the only alternative to the Transaction is "downsizing" of SP with reductions in service, elimination of lines and reductions in employment. *See e.g.* Narrative Rebuttal at 40-43, Davis R.V.S. at 18-21, Gray R.V.S. at 25-36, Lincoln R.V.S. at 32-33. However, Applicants did not attempt to refute or even address the ARU discussion (Comments at 6-13, 45-52) of how SP came to be in this situation, and what that history suggests as a remedy for the problems that Applicants have identified.[5]

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[5] The ARU submit that the statements offered by Applicants in their rebuttal as to the likely actions of SP if the Board rejects the Application should be stricken or afforded no weight because the unions repeatedly asked Applicants in interrogatories and in depositions of key witnesses whether SP had any alternative plans in the event of rejection of the Application; Applicants repeatedly responded that SP had no alternative plans or that SP had only focussed on the Transaction. *See* answer to RLEA interrogatory no. 37 (ARU Ex. 8) and RLEA Interrogatory No. 76

As the ARU have shown (Comments at 6-13, 45-52), SP's problems are largely the result of a series of transactions in the 1980s which left the SP undercapitalized and at a competitive disadvantage *vis a vis* its competitors. Applicants did not refute this assertion, and indeed the Application is premised in part on the assertions of UP and SP officers, and retained expert witnesses, that SP came out of the SFSP voting trust in a weakened and undercapitalized condition and that SP cannot continue to compete against the other western railroads after the UP-CNW and BNSF transactions. However, Applicants have not acknowledged that many of the same carrier officers and expert witnesses who have offered testimony in this proceeding, offered testimony in the 1980s transactions. Those carrier officers and expert witnesses stated that those transactions were in the public interest, that the transactions would not reduce competition and that SP would not be seriously harmed. And the Commission's decisions approving those transactions relied on that testimony and the ar-

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(ARU Ex. 11). However, Applicants' rebuttal is rife with descriptions of contingency plans in the event of a rejection of the Application; indeed these plans were offered as substantially bolstering the case for approval. *See* citations in text above. Applicants should not be allowed to deny the existence of any alternative plans in February and March but to rely on such plans in April. The ARU recognize that the Board has previously rejected other challenges to the scope of rebuttal testimony based on Applicants assertions that they could not anticipate the arguments that would be made by opponents of the Transaction. However, the rebuttal testimony in dispute here is different in that 1) it should have been obvious that the alternatives available to SP would be made an issue in these proceedings given Applicants' heavy reliance on SP's problems, and 2) the unions expressly and repeatedly requested this information in their discovery requests.

guments of counsel based on that testimony. This raises two points. First, if SP is in a difficult situation because of transactions which the testifying officers and experts previously said would not damage SP or competitive rail service, then those same officers and experts should not be viewed as credible witnesses in this case. Second, that if the asserted public benefit justification for the Transaction is to respond to SP's problems, the Board should bolster SP, not sanction its elimination. The remedy for the public concerns as to a weak competitor providing less than optimal service is not to reduce the number of competitors, but to strengthen the weak competitor. This can be done by reopening the BNSF and UP-CNW transactions to provide SP with increased access to markets and better routings.

Applicants and BNSF will surely object to this approach as a regulatory solution rather than a market-based solution. However, UP and BNSF must recognize that they have benefitted from regulatory approvals of their transactions which surely would not have passed muster in a market regime subject to anti-trust laws. UP and BNSF owe their current existence to the ICC approvals of past transactions which were premised in part upon assurances of UP and BNSF witnesses that those transactions would have positive public impacts; if those projections were as substantially incorrect as is now suggested by Applicants' current filings, then UP and BNSF can have no objection to corrective action by the Board to protect the public's interest in adequate and competitive rail service options by reopening prior proceedings to ameliorate the

anti-competitive effects of the prior transactions as illustrated by the current circumstances of the SP. A leveling of the playing field will not only aid SP but also those who have relied on SP as a competitive alternative in the west, but who suffered when prior ICC actions benefitted SP's competitors. In other words, if SP is broken, it should be fixed, not eliminated.

D. Applicants' Potential Use Of Section 11341(a) Militates Against Approval Of The Transaction On Anti-trust Grounds

Although the Board is not an anti-trust tribunal, it is required to consider the policies and commands of the anti-trust laws in deciding whether to approve the Application. *MacLean Trucking, supra.*, 321 U.S. at 86-88. Many parties have focussed on the anti-competitive aspects of the proposed Transaction, particularly when combined with the UP/SP--BNSF agreement. Applicants have responded by asserting that such fears are misplaced and that neither UP/SP market dominance, nor UP/SP--BNSF collusion is possible, relying on the testimony of Professor Willig and Mr. Barber. Applicants again minimized these concerns in their rebuttal papers including the rebuttal statements of Mr. Barber and Professor Willig. However, neither Applicants, nor any of the other Transaction opponents, have addressed the potential impact of application of Section 11341(a) in this area.

While rail labor has engaged in a decade-long debate with rail management and the Commission over the application of Section 11341(a) to the RLA and CBAs, it is certainly beyond dispute that Section 11341(a), by its express terms, applies to the anti-

trust laws. Additionally, a significant development which has had a major impact on rail labor, but which has been ignored by other parties because only labor was immediately effected, is that the Commission has greatly expanded the scope of application of Section 11341(a). In recent decisions on this subject, the Commission held that the Section 11341(a) immunity from the anti-trust laws and other laws applies to anything that might be perceived as contributing to the type of efficiencies that were envisioned, but were not specifically discussed, by applicants in their filings in support of an approved transaction. *See e.g. O'Brien Review Decision* at 3, 8-10, 12-13. In the anti-trust context this would mean that any actions taken by Applicants after STB approval of the Transaction which Applicants could claim to be arguably related to the type of efficiencies envisioned when the Transaction was proposed would be immunized from challenge under the anti-trust laws.

In particular, challenges to joint actions by UP/SP and BNSF could be immune from an anti-trust challenge since the UP/SP--BNSF settlement was made a part of the Application and was a key component of Applicants' arguments in favor of approval of the Application. Significantly, UP/SP and BNSF have entered agreements which, among other things, provide for monitoring and consultations concerning the trackage rights arrangements and of dispatching on both carriers (Narrative Rebuttal at 16,21); the possibilities for coordinated activities in such a relationship are readily apparent, and anything done in the context of such

monitoring and consultations could be subject to a claim of Section 11341(a) immunity.

The potential scope of Application of Section 11341(a) to carrier actions allegedly in implementation of the Transaction also refutes the arguments of Mr. Barber and Professor Willig that anti-trust concerns are not a significant factor in this case. Simply put, the impediment to collusion presented by potential enforcement of the anti-trust laws and treble damages is simply not meaningful if the parties involved have anti-trust immunity.[6]

The ARU therefore submit that the potential for significant anti-trust abuses which could be granted immunity from anti-trust enforcement militates strongly against approval of the Application unless the scope of the immunity is substantially limited by the Board.

E. The Support Offered The Application By Some Rail Unions Does Not Militate In Favor Of Approval Of The Application

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[6] As is shown in the ARU Comments (at 42), Mr. Barber and Professor Willig seemed unaware of the effect of Section 11341(a) on their rather academic expositions on the anti-trust concerns raised by this Transaction. And neither of these witnesses addressed this point in his rebuttal statement. Professor Willig did make reference to several exchanges with his "interlocutors" at his deposition (Willig R.V.S. at 32 n. 14), however, despite the ARU Comments on his testimony and his exchange with the unions' counsel regarding Section 11341(a), Professor Willig did not discuss the effect of Section 11341(a) in his Rebuttal Verified Statement and apparently did not even bother to read Section 11341(a) after claiming at his deposition that he was unfamiliar with that provision. *See* Willig Deposition Transcript at 281-290.

In their rebuttal filings, Applicants have relied heavily on the fact that several of the rail unions have announced their support for the Transaction after entering settlements with the Applicants. However, several major unions including the ARU unions (the American Train Dispatchers Department/BLE, the Brotherhood of Maintenance of Way Employes and the Brotherhood of Railroad Signalmen), as well as the Transportation Communications Union ("TCU") continue to oppose the Application. Significantly, these unions are the ones whose members will face the greatest adverse effects if the Application is approved. Review of the Applicants' Labor Impact Exhibit shows that these unions will suffer disproportionately larger job losses than the unions which entered settlements with UP/SP. Additionally, unlike the unions which settled, the unions which remain in opposition have seen exactly what Applicants plan to do to their members in terms of changes in their seniority districts and changes in agreements. *See* Operating Plan Exhibit A and the Labor Impact Exhibit. And whereas Applicants offered the unions which settled the possibility of input into those decisions, Applicants provided a detailed statement as to their plans for the members of the unions who are opposed to the Transaction, and Applicants have remained steadfast in their insistence on proceeding as is described in the Operating Plan and the Labor Impact Exhibit.

The ARU also note that only one union which supports the merger (the United Transportation Union) offered any explanation for its position; the other unions which support the Transaction

either offered nothing besides their statement of support, or offered only the conclusory assertion that they believed the Transaction to be the result that would be in best interest of their members. The UTU's statement relied heavily on a concern that SP's financial situation was so precarious that the Transaction presented the best alternative for its members. As is already demonstrated above, the ARU respectfully disagree with that assessment; and their concerns about the Transaction are amplified by the transaction related changes that Applicants have already said that they plan to implement for employees in the ARU unions. The ARU also note that some of the unions which settled have had to contend with recent implementing arrangement arbitrations and ICC decisions (*i.e. the O'Brien Award*, the *Mikrut Award* and the *O'Brien Review Decision*) which the rail unions believe improperly deprived members of those unions of substantial RLA and CBA rights; and it was against that background that the unions considered Applicants' settlement offers. Beyond this observation, the ARU have no basis for describing the reasons for the other unions' settlements with Applicants, and they will not speculate further; they simply reiterate that they continue to oppose the Application, that the settlements entered by the other unions do not resolve the issues raised by the ARU, and that they do not believe that the settlements entered by the other unions provide a basis for the Board to conclude that railroad worker interests support approval of the Application.

II. IF THE APPLICATION IS APPROVED IT SHOULD BE SUBJECT TO THE CONDITIONS REQUESTED BY THE ARU

The ARU submit that if the Board is considering approval of the Application, it should do so only if it imposes not just the *New York Dock* conditions, but also the conditions requested by the ARU in its Comments filed on March 29 and as is set forth below.

Before discussing particular conditions requested by the ARU, the ARU will initially address Applicants' contention that no such conditions are necessary or appropriate because the *New York Dock* conditions are the only conditions which should be imposed for the protection of employee interests, and that the monetary benefits of the *New York Dock* conditions are the *quid pro quo* for all of the actions that UP/SP will take that will adversely affect railroad workers, including changes in CBA terms pursuant to Art. I §4 of the conditions, such that no additional protections should be imposed. Narrative Rebuttal at 34, 65, 315-316; Hartman R.V.S. at 3-5.

First, it must be recognized that the *New York Dock* conditions are the minimum, not the maximum, conditions which may be imposed in connection with approval of a Section 11343 transaction. See 49 U.S.C. §11347. Consequently, the Board has discretion consistent with its assessment of the public interest to impose additional protections for employees as a condition of approval of such a transaction. *Id.; United States v. Lowden,*

308 U.S. 225 (1939); *Railway Labor Exec.s Ass'n. v. ICC*, 958 F.2d 252, 257 (9th Cir. 1991).

Second, there is no basis for the assertion that because a carrier is obligated to provide monetary benefits for employees who lose work or compensation as a result of a transaction, the carrier should therefore have the right to take any actions which might affect its employees, including wholesale changes in CBAs under Art. I §4, without any additional obligations to those employees. Art. I §4 is not a *quid pro quo* for the obligations to pay monetary benefits to affected rail workers. The obligation to share with employees, for a limited period of time, a relatively small part of the savings realized from the displacement and dismissal of those employees is the *quid pro quo* for the carrier and public benefits which flow from an approved Transaction.[1] *U.S. v. Lowden, supra.*, 308 U.S. at 233-236. The protective benefits are not a right granted to employees in return for elimination or modification of CBAs, rather they are an obligation placed on a carrier in return for permission to take an action which will benefit the carrier and hopefully promote

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[1] Significantly, Applicants now concede that the cost of employee protection is not as great as carriers have asserted in recent years. The Hartman R.V.S. states that many position are actually eliminated through attrition, and that between separation allowances, seniority bumping which results in dismissals of junior employees who are not entitled to a full six years of protection, and recalls to fill vacant positions, few employees actually collect benefits for extended periods of time. Hartman R.V.S. at 17.

the public transportation interests, but will reduce employment. *Id.*

Additionally, the recently developed notion that the protective benefits are a *quid pro quo* for the ability of a carrier to alter agreements is at odds with the provisions of Art. I §2 of the conditions which requires that such agreements be preserved. But, even if the Board persists in the Commission's views regarding Art. I §2, the argument that employees are compensated for the carrier's ability to make CBA changes under Art. I §4 would nonetheless lack merit because it ignores the history of Art. I §4.

The implementing arrangement negotiation/arbitration provision was made an express provision of the protective conditions in *Southern Ry.--Control--Central of Georgia, Ry.*, 331 ICC 151 (1967), to guarantee affected rail employees a fair and equitable arrangement for the assignment of work and selection of forces after a control or merger transaction. *Id.* at 166, 171-176, 185-186. The Commission specifically stated that Art. I §4 was added to the conditions pursuant to a review of extensive findings of carrier abuses in the selection of forces and assignment of work after consummation of the *Southern--Central* transaction. *Id.* at 185-186. Nothing in that decision states or implies that Art. I §4 was added to provide some benefit to carriers as a form of compensation for their financial obligations to their employees under the protections. As is noted above, it was recognized that a carrier participating in an approved transaction has obtained a

benefit from consummation of the transaction; compensation was therefore afforded to affected employees. Art. I §4 was another protection for **employees** based on findings supporting the need for such protection.

The ARU also note that Applicants have not refuted or even responded to the ARU showing that Applicants' own calculations of the savings that they anticipate from reductions in number of workers will far exceed their total employee protection obligations a mere two years after consummation of the transaction[8]. Nor have Applicants refuted the ARU argument that Applicants' calculation of labor savings from the Transaction includes only reductions in employment, not savings from changes in agreements. Thus Applicants will reap substantial savings from their workers on top of the hundreds of millions of dollars per year saved by reductions in employment. And significantly, losses of CBA rights (such as elimination of favorable work rules or safety rules, or procedural rules) create no right to monetary compensation under the protective conditions. These facts demonstrate that there is no basis for an argument that the protective benefits will constitute an equal and complete trade-off to the rail workers for the savings from labor to be obtained by the Applicants as a result of the Transaction.

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[8] *See* ARU Comments at 25-26--Applicants estimate their total employee protection obligations at $264 million, and estimate their total labor savings after the second year after consummation at $313 million and then over $255 million per year thereafter.

Accordingly, there is no basis for any argument that conditions for the protection of employee interests beyond those set forth in the *New York Dock* protections are improper, inappropriate, unnecessary or effectively duplicative of the *New York Dock* benefits. With these points in mind, the ARU will proceed to their discussion of the conditions which they believe must be imposed if the Board approves the Application.

A. The Scope Of Any Section 11341(a) Immunity Conferred On The Applicants Should Be Limited To Items Set Forth In The Application And Proposed Operating Plan

The ARU will not repeat here their arguments at pp. 52-58 of their Comments that the effect of Section 11341(a) is necessarily limited to actions to actually carry out approved transactions themselves (*e.g.* completion of the actual mergers or acquisitions of control) and that any Section 11341(a) immunity is limited in effect as to rail labor by Art. I §2 of the protective conditions. Rather, ARU will incorporate those arguments herein by reference and will proceed to their alternative argument that any Section 11341(a) exemption from other law should be limited in scope to actions set forth in the Application or specifically in the proposed Operating Plan.

The ARU respectfully submit that the scope of any Section 11341(a) immunity which might be applicable to an approval of this Application must be limited in scope to actions set forth in the Application or specifically in the proposed Operating Plan because failure to so limit the immunity would mean that Applic-

ants would obtain an exemption from anti-trust laws and other laws, including the RLA, for actions which were not even placed before the Board or contemplated by the Applicants. The ARU submit that an inherent predicate for the ability of a carrier to claim immunity from the anti-trust laws and other laws in connection with actions implementing an STB-approved transaction is that the STB has actually considered the carrier's implementation plans. Section 11344 and regulations under that provision provide for a very particularized and detailed STB assessment of the proposed transactions under specific as well as general public interest criteria; persons seeking approval of Section 11343 transactions therefore submit to the STB the type of detailed application and proposed Operating Plan submitted by UP and SP in this proceeding. If a carrier is to claim an exemption from the anti-trust laws and other laws for actions which it has placed before the Board in seeking its approval of a transaction, it may at least claim that the agency with jurisdiction over the transaction has sanctioned its plans for which immunity is invoked. However, if the Board accepts the ability of a carrier to claim an exemption from other law for an action which was never even presented to the Board, then operation of such an exemption would be nothing less than officially sanctioned lawlessness.

Such an outcome would be officially sanctioned lawlessness in that actions which otherwise would be violative of duly enacted laws, or subject to certain legal rights and obligations devised by the federal or state governments would become nonethe-

less permissible and free from any obligations without the STB or any other government body ever actually approving the carrier's action. It is wholly improper for the STB prospectively to deprive a person of a right or remedy under law without having actually considered and approved the action which gives rise to the person's claim.

Applicants have responded to this argument by asserting that the ARU seeks to upset settled law. Hartman R.V.S. at 5-6. However, the key Supreme Court and appellate decisions concerning Section 11341(a) do not support the view that the scope of Section 11341(a) extends to actions not actually put before the Board. *Dispatchers* concerned only the limited question of whether Section 11341(a) applies to CBAs(499 U.S. at 127); *Schwabacher v. U.S.*, 334 U.S. 182, 188-202 (1948) concerned an application of the immunity to a stock valuation, and the Court held that once the valuation was specifically approved by the Commission, it was immune from challenge under state law; and *Missouri Pacific R.R. Co. v. United Transportation Union*, 708 F.2d 107, 109 (8th Cir. 1986) concerned application of the immunity to a trackage rights-related crewing arrangement which was specifically approved by the Commission. And no Court has accepted the Commission's recent breathtakingly expansive view that the immunity applies to any action which can be said to promote efficiencies which are of the type that were unspecified but anticipated as the sort of efficiency which could be achieved

through the transaction. *O'Brien Review Decision* at 3, 8-10, 12-13.

The ARU recognize that the Commission has recently held in the UP/CNW Decision that the immunity could properly apply to actions not identified in an application because the immunity is self-executing. However, even if that holding is correct, it is one thing for the immunity granted as a result of approval of a transaction to be **self-executing** as to actions actually described to the Board, it is quite another for the immunity to be **self-granting**, whereby the carrier can arrogate to itself the ability to be free from various legal obligations as to actions never put before the Board. The ARU respectfully submit that for the reasons set forth above, the Board should reconsider the view of the statute expressed in the UP-CNW case.

Applicants have also asserted that a restriction on the scope of the immunity would be irrational and prevent UP/SP from responding to changing conditions, and that UP/SP must be able to respond to BNSF actions. Hartman R.V.S. at 6. However, Applicants have failed to explain why they believe that it would be irrational for the immunity to apply only to actions actually set forth in their filings to the Board, when such a limitation appears eminently reasonable on its face, as well as far more consistent with accepted notions of law than is an unlimited, self-granting release from all legal obligations. Nor have Applicants explained how such a limitation on the immunity would prevent them from responding to changed conditions or actions of their competitors; the absence of the immunity would not prevent Appli-

cants from taking any action, it would only mean that they would have to comply with applicable laws when their response involved an action not presented to the Board.

Applicants' complaints that they should not be required to be "omniscient" as to future contingencies, and that they might be "pinned down" to their proposed Operating Plan (Hartman R.V.S. at 6, King R.V.S. at 3) also lack force. The ARU do not seek the ability to compel Applicants to take every action that they have outlined in their proposed Operating Plan. Obviously, Applicants would be free to refrain from taking actions that they have suggested they might take in implementing the Transaction; the ARU merely seek to preclude them from claiming immunity from other laws in connection with actions which were never put before the Board. And Applicants' complaint that acceptance of the ARU position would require them to be omniscient is just foolishness. The ARU rational and logical view of the statue would only mean that if an applicant seeks self-executing immunity from other laws with respect to implementation of a transaction, it would have to place before the Board the actions for which it seeks immunity. An applicant should have no legitimate expectation of an STB grant of immunity for actions which it never presents to the STB.

Finally, in this regard the ARU note that although the recent litigation concerning Section 113.1(a) has centered around labor relations issues, the language of that provision expressly applies to anti-trust laws and **all** other laws. If the Board does

not limit the scope of application of Section 11341(a) to matters within the Application and proposed Operating Plan, then Applicants will be granted the right to relieve themselves of obligations under the anti-trust laws and all other laws, and to assert immunity against enforcement of such laws as to any action which they can relate to implementation of the Transaction. In the instant case this would mean, among other things, that various consolidations of UP and SP territories, "rationalizations" of service, and coordinations with BNSF could all be immune from the anti-trust laws. Furthermore, under the expansive view of the immunity applied by the Commission in labor cases, this would mean that the immunity would apply to any law that anyone could seek to apply to any action that Applicants could characterize as designed to realize the type of efficiencies envisioned when the Transaction was proposed, regardless of whether the particular action was actually presented to the Board. The Board should turn away from this path which leads to officially sanctioned lawlessness and hold that any Section 11341(a) immunity afforded to Applicants as the result of an approval of the Transaction would be limited in scope to actions set forth in the Application or specifically in the proposed Operating Plan.

B. *New York Dock* Protections Should Be Imposed On The UP/SP--BNSF Settlement

Neither Applicants nor BNSF disputes the fact that the September 25, 1995 deal between them is unprecedented; that BNSF will benefit substantially from UP/SP's decision to ameliorate

the anti-competitive effects of the Transaction by allowing BNSF access to markets which it could not have obtained but for the need to respond to competition concerns; that the BNSF settlement is a key component of the Application; and that UP/SP and BNSF have already devised a bilateral arrangement for a form of hiring preference for employees affected by the Transaction or the settlement. The ARU submit that all of these factors militate strongly in favor of imposition of *New York Dock* conditions on all aspects of the settlement.

The key element of such an order would be that UP/SP and BNSF would be required to enter umbrella-type implementing arrangements which would insure the ability of affected employees to follow their work under enforceable, negotiated or arbitrated arrangements rather than an unenforceable arrangement devised bilaterally by UP/SP and BNSF. Neither UP/SP nor BNSF has offered any reason why the settlement or their operations would be in any way impeded or even inconvenienced by such a requirement. Nor have they offered any reason why they should be able to act bilaterally under any criteria that they may choose, especially given the extraordinary circumstances outlined above.

UP/SP and BNSF have relied on the fact that *New York Dock* conditions are not normally imposed in trackage rights arrangements (BNSF Response at 45, UP/SP Narrative Rebuttal at 316). However, historically when a merger also included trackage rights transactions, the Commission imposed the merger protections on all transactions related to the merger. Furthermore, the track-

age rights situation presented here is so dramatically different from the normal trackage rights situation that mere citation to normal practice in trackage rights cases is of no value whatsoever. Indeed, when the Commission was faced with unusual circumstances it responded by altering the usual practice as to the protections imposed. Thus in the Springfield Terminal case, *Delaware and Hudson--Lease--Springfield Terminal Ry.*, F.D. No. 30965, (served February 25, 1988) the Commission imposed modified *New York Dock* type protections rather than *Mendocino Coast* protections in a lease situation in order to insure the ability of employees to follow their work. BNSF has objected that this situation is unlike the Springfield Terminal situation which involved a number of abuses of employee rights. BNSF Rebuttal at 44 n.24. The ARU recognize this point of difference, but they submit that it does not blunt the force of reliance on the Commission's approach in the ST case. The Commission did not state that the requirement for an umbrella-type implementing arrangement was to punish ST for its wrongdoing; rather it was to protect the rights of affected employees to follow their work. *Delaware & Hudson, supra.*, at 8-10. As is discussed above, this was the same rationale for the express inclusion of Art. I §4 in the *Southern--Central* case, to provide for a fair arrangement to allow affected employees to follow their work to the new carrier. The ARU submit that similar considerations support imposition of *New York Dock* protections on the UP/SP--BNSF settlement.

BNSF has relied on the Commission's decision in *Wilmington Terminal R.R., Inc.--Pur. & Lease--CSX Transp. Inc.*, 6 ICC 2d 799 (1990) and 7 ICC 2d 60 (1990), and *Minnesota Commercial Ry.--Trackage Rights Exemption--Burlington N. R.R.*, 8 ICC 2d 31 (1991) as refuting the ARU request for imposition of *New York Dock* conditions on the UP/SP--BNSF settlement. BNSF Response at 44-45.

In *Wilmington Terminal* and *Minnesota Commercial*, the Commission did hold that pure, merger/consolidation-type *New York Dock* conditions were not required in simple line sales and trackage rights transactions which involved transfers of short portions of lines or operating rights on short portions of lines to small carriers on the basis that the absence of a "melding" of work forces meant that an umbrella-type implementing arrangement, with a requirement that employees be able to follow their work, was not necessary in such situations. But the fact that *New York Dock* conditions (and specifically pure *New York Dock* conditions) are not *required* in trackage rights transactions and line sales does not refute the ARU argument that the Board *should* impose such conditions on the UP/SP trackage rights arrangements and line sales under the September 25, 1995 settlement. The ARU submit that although the Commission held that pure *New York Dock* conditions are not legally mandated, they should nonetheless be imposed as a matter of discretion given the unique circumstances of the UP/SP--BNSF deal which are described above.

Additionally, it must be recognized that the UP/SP--BNSF deal differs significantly from the transactions in *Wilmington Terminal* and *Minnesota Commercial* where large carriers sold short segments of lines or granted operating rights over short segments, to small rail carriers which would have no significant ongoing relationship with the sellers/granters, and no hiring preference arrangements at all. The lines sales/trackage rights arrangements here are substantially different since: 1) the sales/arrangements are between two giant rail carriers; 2) the two carriers will have ongoing relations concerning the track in question, including joint consultations on operations, monitoring of dispatching and, cooperative construction, rehabilitation and upgrade projects; 3) employees of UP/SP may be utilized to perform construction rehabilitation and upgrade work on track to be utilized solely or primarily by BNSF; 4) the parties have already entered a form of preferential hiring arrangement; and 5) upon consummation of the Transaction, hundreds of UP/SP employees represented by the ARU, and thousands of other UP/SP workers will be furloughed from UP/SP with no likelihood of finding work on UP/SP, while BNSF will have the need for work in the very territories where the furloughed employees formerly worked for UP or SP. These circumstances differ greatly from the circumstances in *Wilmington Terminal* and *Minnesota Commercial*, so the considerations which the Commission viewed as not mandating imposition of pure *New York Dock* conditions in those cases are inapplicable to the ARU request for discretionary imposition of pure *New York*

Dock conditions on the trackage rights and lines sales under the *UP/SP--BNSF* settlement.

The strongest objection of Applicants and BNSF to imposition of *New York Dock* conditions is that they fear that the *New York Dock* requirement for 90 days' notice and completion of an implementing arrangement prior to any change in operations would unacceptably interfere with timely start-up of the trackage rights operations. BNSF Response at 45; UP/SP Narrative Rebuttal at 316. This argument is a red herring. First, Applicants and BNSF have not shown that they would truly be harmed by a 90 day delay. Second, even if such harm could be shown, it has been held that a carrier may serve a *New York Dock* notice before it actually obtains approval of a transaction (*United Transportation Union v. Norfolk & Western Ry.*, 822 F. 2d 1114, 1117 (D.C. Cir. 1987), so the 90 day notice and completion of the arrangement requirement of the *New York Dock* conditions would pose no obstacle to timely implementation of the trackage rights operations. Finally, if this was deemed a valid concern, the Commission could impose hybrid *Norfolk & Western-New York Dock* conditions, using the *Norfolk & Western* time line, but the *New York Dock* requirement for umbrella type arrangements for selection of forces and assignment of work.

Given the unique circumstances of the UP/SP--BNSF arrangement, there is simply no principled basis for Applicants and BNSF to oppose a requirement for a negotiated/arbitrated, enforceable

arrangement which would allow affected employees to follow their work, and there is no reason for the Board to reject such a requirement. The ARU therefore respectfully request that if the Board approves the Application, the *New York Dock* conditions should be imposed on the UP/SP--BNSF settlement.

C. If The Board Sanctions Applicants' Plans To Alter CBAs It Should Also Sanction Formation Of The New CBAs By Union Cherry-Picking From Among Existing UP And SP CBAs

In Exhibit A to their proposed Operating Plan Applicants have set out their plans to establish larger seniority districts for maintenance of way and signal employees which would cover consolidated territories of various parts of the pre-merger railroads. Applicants would establish uniform agreements covering all employees working in the new larger territories, regardless of the differing agreements which currently apply to the different portions of those territories, and to designate particular current UP and SP agreements which Applicants will extend to cover the new territories. According to Applicants, the creation of the new larger districts with uniform agreements is necessary for them to realize the benefits of the Transaction, and they plan to attain such uniform agreements under New York Dock Art. I§4 processes and/or Section 11341(a). Operating Plan, Application Vol. 3 at 241, 245-248, 254-265; Applicants Answers to RLEA Interrogatories Nos. 6-8, 14, 17, 20, 23, 26, 35, 36, 61 and 68. (ARU Exhibits 8 and 11.)

The ARU submit that the Board should specifically state that it does not sanction Applicants' plans regarding the creation of uniform agreements; this would prevent Applicants from claiming that the Board approved their plans. The ARU further submit that if the Board does not specifically disassociate itself from Applicants' plans in this regard, it should state that any STB approval of creation of uniform agreements under *New York Dock* Art. I§4 processes and/or Section 11341(a) would be subject to the requirement that the uniform agreements be created by union cherry-picking from among existing UP and SP agreements.

Applicants have responded to the ARU position on this point by accusing the ARU of hypocrisy because the ARU have argued for a specific reaffirmation of the requirement for preservation of existing agreements. However, as is explained above, it is the Applicants who are the hypocrites in this regard. It is the Applicants, not the ARU who seek to subvert the sanctity of solemnly negotiated agreements through government intervention. The ARU only ask that if the STB grants Applicants the benefit of obtaining uniform agreements over larger territories covering lines of the formerly separate railroads, then the unions should be given the concomitant benefit of picking the terms of the new agreement from among the provisions of the existing UP and SP agreements. **If Applicants will withdraw the parts of the Application, and proposed Operating Plan that discuss changes in existing agreements, and will forswear any intention of using STB processes to achieve that end, then the ARU will gladly withdraw**

its request for the concomitant benefit of union picking of the new terms. Applicants will surely refuse to withdraw and the true hypocrites will be revealed.

The Applicants have also referred to the ARU cherry-picking proposal as "pick[ing] UP/SP's pockets". Hartman R.V.S. at 7. While this phrase may have sounded compelling to Mr. Hartman and Applicants' counsel when it was written, it is a propagandistic distortion of the truth. It is Applicaints who seek to use an STB order to eliminate or modify rights that were obtained by the unions in the give and take of collective bargaining over many years without any compensation for the taking of those rights. It is Applicants who state that they will obtain over $313 million in savings from labor in just two years after consummation of the Transaction and over $255 million a year from labor thereafter against a total employee protection obligation of $263 million. And these savings to be obtained from labor do not even include the savings to be realized by the creation of new larger seniority districts under uniform agreements; nor do they include savings to be realized by the likely elimination of certain rules and rates of pay which are advantageous to employees. This background shows the pocket-picking charge to be not only false and insulting, but also a blame the victim argument. All the ARU seek here is balance, if Applicants are to have the benefit of an STB order granting them the advantage of uniform agreements over larger territories covering lines of the formerly separate railroads, then the unions should be able to pick the terms of the

new agreement from among the provisions of the existing UP and SP agreements.

Applicants have also raised the specter of higher cost agreements and "inefficiencies" if the unions are allowed to cherry-pick, but they have failed to substantiate that claim. The most specific support for that claim is Mr. Hartman's assertion that the unions would pick the supposedly "productivity limiting" provisions of the SP agreement and the "higher wage rates of the UP agreements". Hartman R.V.S. at 7. However, Mr. Hartman failed to identify any alleged "productivity limiting provisions", or the actual costs that such provisions would impose on UP/SP. And significantly, Applicants have never asserted that SP's work rules have been a factor in its problems. In their Narrative Rebuttal, Applicants have offered the apocalyptic argument that if the ARU condition were adopted it "would destroy the ability to implement the merger on an economically rational basis". *Id.* at 316. However, the only support for that wild claim is the citation to Mr. Hartman's unsubstantiated speculations. *Id.* Another problem with this argument is that Applicants have never argued that specific changes in agreement terms were integral or even significant with respect to their ability to realize the asserted benefits of the Transaction. Indeed, Applicants have specifically disclaimed any reliance changes in rules as an element of their calculation of the alleged benefits of the Transaction, and they have declined to identify particular rules that they believe must be changed for the benefits of the

Transaction to be realized. Applicants Answers to RLEA Interrogatories Nos. 61, 65, 74 and 75 (ARU Ex. 11). While Applicants have asserted that they need uniform agreements to help obtain the alleged benefits of the Transaction (Application Vol. 3 at 259-265, Applicants' Answers to RLEA Interrogatories Nos. 70 and 71), they have never explained why uniform agreements composed of rules picked by the unions from among rules already in force on various components of the Applicants would have a significant impact on their ability to effectively implement the transaction. The charge that the ARU proposal would "destroy" Applicants ability to implement the Transaction "on an economically rational basis" is just empty hyperbole.

Furthermore, even if Applicants are correct that their overall labor costs would be higher under agreements formed by picking SP rules and UP rates, such an argument begs the ultimate question here. The ARU submit that it is fair and reasonable for the STB to subject Applicants' ability to obtain the economic benefits of STB directed reductions in labor costs through the creation of uniform agreements covering larger territories to a condition that the unions would determine the provisions of the uniform agreements by selecting from among existing contract provisions. If the total labor costs of the new uniform agreements are actually higher, they will surely be offset just by the savings realized by Applicants having uniform agreements covering larger territories; certainly Applicants have not even attempted to show or even seriously argue, that their potential increased

labor costs under union cherry-picked agreements will overwhelm the savings they will obtain from having uniform agreements covering larger territories. And they have not shown, and certainly cannot show that any additional costs from union cherry-picked agreements will seriously reduce the $255 million per year savings from labor which will be obtained without any offset beginning two years after consummation of the Transaction.

Thus the ARU respectfully request that the Board specifically state that it does not sanction Applicants' plans regarding the creation of uniform agreements, but that if the Board declines to do so, it should state that an approval of creation of uniform agreements under *New York Dock* Art. I§4 processes and/or Section 11341(a) would be subject to the requirement that the uniform agreements be created by union cherry-picking from among existing UP and SP agreements.

D. If The Application Is Approved, The Board Should Require That Transaction Related Track, Right Of Way And Signal Work Be Done By BMWE And BRS Represented Employees

Applicants have repeatedly trumpeted the construction, rehabilitation and upgrade projects set forth in their proposed Operating Plan as a major public transportation benefit of the Transaction, and this line or argument is repeated in their rebuttal filings. *E.g.*, Narrative Rebuttal at 6, 57-59. However, despite the plans for this huge amount of track, right of way and signal work, Applicants project that 298 maintenance of way employees and 47 signalmen jobs will be eliminated after

the Transaction is consummated. The ARU submit that it is unconscionable that these employees would be furloughed when there is so much work that they could be doing. In their Comments, the ARU demonstrated that the potentially furloughed BMWE and BRS members would be fully capable of doing this work; none of Applicants' rebuttal papers even attempted to refute this point. Nor did Applicants even assert that a requirement that they use their own employees to do this work would somehow interfere with or impede their ability to do the work which they have planned.

The ARU also demonstrated that Applicants had made no arrangements which might otherwise preclude the use of BMWE or BRS members to do the construction, rehabilitation and upgrade work. Indeed, in deposition testimony, Applicants witnesses indicated a willingness to consider using union-represented workers, although they would not commit to do so; and Mr Anschutz, stated that as a UP/SP Board member he would recommend the use of UP and SP maintenance of way and signal workers for the Transaction related projects. *See* ARU Comments at 71-73. No rebuttal witness of the Applicants has contradicted or explained away the deposition testimony cited by the ARU. And Applicants have not even asserted that the costs of doing this work "in-house" would exceed the cost of contracting-out, or would increase it to a level that Applicants would deem unacceptable. Indeed, having asserted that Applicants would save money by using their own employees to do work which SP now contracts out (Application Vol. 3 at 246-247),

Applicants would have little credibility is asserting that the costs of using their own employees would be unacceptably high.

Applicants only response on this point was to accuse the ARU of contradicting its position in opposition to STB mandated changes in CBAs. As is discussed above, since Applicants plan major changes in the terms of existing agreements and the transfer of large numbers of employees to different agreements, Applicants are hardly in a position to oppose any condition on the basis that it would interfere with RLA bargaining processes. Additionally, this particular request would not permanently change the parties' agreements, nor would it apply to any actions unrelated to the merger; rather the ARU only request a condition that the construction, rehabilitation and upgrade work which are identified as Transaction related, and indeed as reasons for approval of the Application, should be done by employees who would otherwise be furloughed as a result of the merger. Thus this proposed condition is narrowly tailored to alleviate the adverse effects of the Transaction on maintenance of way employees and signalmen, and it would not last beyond the completion of the specified projects.

Applicants have also failed to address the ARU argument that by using the workers who would otherwise be furloughed to do Transaction related construction, rehabilitation and upgrade work, Applicants would reduce their employee protection obligations by putting to work persons who otherwise would receive employee protection benefits. Since the railroads often complain

about their monetary obligations under the employee protections, a condition like this should be appealing to the railroads; their opposition to this condition seems to indicate a greater concern with "downsizing" and showing Wall Street reduced employment than it does with any actual business determination.

The ARU respectfully submit that this proposed condition is a matter of fundamental fairness. If the Applicants are to benefit by construction, rehabilitation and upgrading of lines and signal systems to improve their networks of operations, and if one element justifying approval of the Transaction is that the public will benefit from those improvements, then UP and SP workers who might otherwise be furloughed should be utilized to do this work. Applicants have failed to offer any reasoned basis for denial of this condition and their is simply no principled basis on which such a condition could be denied.

E. If The Application Is Approved, Applicants Should Be Required To Report Annually On Their Attainment Of Projected Efficiencies And How The Savings From Those Efficiencies Are Used

A key foundation for Applicants' arguments in favor of the Transaction is their assertion of savings they contend will flow from the "efficiencies" which they plan to implement if the Application is approved. In support of this argument Applicants have offered a summary of benefits (Volume 1 Appendix A at 93) which in turn is supported by verified statements explaining how the numbers on Appendix A were derived, and numerous task force charts and studies providing back-up for the verified statements.

Significantly, almost half of the savings from changes in operations and other efficiencies come under the heading of "Labor Savings". Application Vol. 1 at 93.

According to the Applicants, these savings will translate into benefits to the public in the form of improved service and lower rates (or slower rate increases). This all depends of course on the assumption that the savings from the efficiencies discussed by the Appilcants are actually passed on to shippers and then to the public at large, or are invested in the railroad. However, as demonstrated in the ARU Comments (at 74-75) Applicants are unwilling to commit that they will either pass the savings along to shippers or reinvest those monies in the railroad, or even to report on how the savings have been utilized.

In their rebuttal papers Applicants reiterated their initial position regarding this ARU requested condition. Their arguments on this point are: 1) that it would not be possible to keep track of the actual savings from Transaction related efficiencies or how the savings are used, 2) that the Board should just determine whether savings will be achieved and then assume that the savings will be passed on to shippers or reinvested in the railroad and 3) that the reporting sought by the ARU would be inordinately costly. Narrative Rebuttal at 317, Peterson R.V.S. at 218-219.

Applicants' assertion that it would not be feasible or reasonable to attempt to track attainment of projected savings and the uses to which the savings are put is peculiar since Applicants have presented the Board with detailed analyses of projected

savings from Transaction related efficiencies. If the anticipated savings can be projected to the degree of specificity that they have been presented in the Application, then surely Applicants will be able to perform retrospective calculations as to actual savings. Indeed, if the Board is to afford any weight to Applicants' prospective projections of Transaction related savings, it must reject the assertion that Applicants would be unable to do retrospective calculations.

Applicants' assertion that the Board should be satisfied that whatever savings are realized will benefit of the public asks the Board and the public to place an inordinate amount of faith in the good intentions of the Applicants. Applicants apparently ask the Board to assume that market pressures will require Applicants to reinvest in the railroad and/or pass savings on to shippers. But other than under utopian economics assumptions in theoretically perfect market environments, there is no basis for the Board to accept the notion that Applicants will necessarily reinvest the transaction related savings and/or pass them on to their shippers. And in view of the substantial debate in this proceeding regarding the nature of the market that will result if the Transaction is approved, there is even less basis for accepting Applicants' assurances--even if the Board does not accept the assertions that approval of the Application will result in a duopoly, it is clear that the market that will result from an approval will not be the sort of market that will impose the type of discipline that would compel a firm to pass

its savings on to its customers, or to reinvest to improve service in the long run. Also relevant on this point is the history of the railroads from the days of the robber barons through the SFSP voting trust violations. Simply put, the history of the railroads does not support a "just trust us" approach. Moreover, even if good faith is assumed, it must be recognized that pressures from Wall Street or from key executives could lead to utilizations of the savings from the Transaction which differ from the uses which were assumed by the Board in approving the Transaction; a reporting requirement would apply pressure to assure that any savings are indeed invested or passed along to shippers, notwithstanding other pressures for different uses of the monies saved.

Applicants' assertions that a reporting requirement would be unacceptably expensive should be rejected as totally without merit. First, Applicants have not even bothered to explain whether they tried to determine the costs of the reporting requested by the ARU; Mr. Peterson's bald assertion that it would be too expensive is not a basis for the Board to reject the ARU request. Second, Applicants are apparently willing to gather data and make reports on an annual basis regarding their settlement with BNSF (Rebuttal Narrative at 21); if they are willing to engage in that exercise despite its costs, then little weight should be afforded their assertion that the cost of the reporting sought by the ARU is unacceptable. Third, the potential costs of the reporting sought by the ARU are hardly significant in compar-

ison with the hundreds of millions of dollars of savings every year that are forecast by Applicants as likely to flow from approval of the Application. Applicants assert that consummation of the Transaction will result in dramatic savings through actions which will have adverse consequences for railroad workers, communities, some shippers and other railroads; given that the argument for approval of the Application depends upon the validity of Applicants' assertion that these savings will ultimately benefit the public, it is entirely reasonable to require that some of those savings be utilized to document whether the public does indeed receive benefits from an approval of the Transaction.

The ARU further submit that they have a strong and unique interest in requesting reporting on the realization of the forecast savings and the manner in which the savings are utilized. As is noted above, almost half of the projected savings will come from labor through reductions in employment. Additionally, labor will also suffer uncompensated changes in existing agreements and rules, working conditions and seniority districts. The premise for approval of the Application notwithstanding its impact on rail workers is that the public will benefit. Indeed, this type of reasoning was the premise for the Commission's decision affirming the changes in agreements authorized in the *O'Brien Award*. *O'Brien Review Decision* at 13. The Board needs to know whether that premise is indeed valid in this proceeding, and that the savings are not being utilized to increase dividends to shareholders and to pay executive bonuses. The only way for the

Board to assure itself in this regard is to require the type of reporting sought by the ARU. The ARU therefore respectfully submit that if the Application is approved, Applicants should be required to report annually on their attainment of projected efficiencies and how the savings from those efficiencies were utilized.

III. THE BOARD SHOULD NOT APPROVE MONTANA RAIL LINK'S RESPONSIVE APPLICATION UNDER SECTION 10901; IF THE RESPONSIVE APPLICATION IS APPROVED, IT SHOULD BE SUBJECT TO THE *NEW YORK DOCK* CONDITIONS IMPOSED IN THE PRIMARY APPLICATION

The ARU have argued that the Responsive Application of Montana Rail Link ("MRL") on behalf of its subsidiary-to-be- named-later, referred to as "Acquisition Company" ("AC"), can not be approved under Section 10901; the ARU have also argued that if the Board approves the Responsive Application, the AC acquisition must be subject to the protective conditions imposed in the Primary Application. The ARU will briefly respond to two rebuttal arguments offered by MRL.[9]

MRL asserts that Section 11343(a)(1) would not be applicable to AC's acquisition of UP and SP lines because Section 11343(a)(1) does not refer to "non-carrier" acquisitions and because AC

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[9] Because the substantive Responsive Comments to the MRL Responsive Application were filed only in the name of the ATDD, BMWE and BRS as the ARU, MRL has *assumed* that only those organizations oppose the Responsive Application. MRL Rebuttal at 33 n.6. MRL has assumed incorrectly. The International Brotherhood of Boilermakers and Blacksmiths, the International Brotherhood of Electrical Workers, the National Council of Firemen and Oilers and the Sheet Metal Workers International Association all filed separate statements in which they expressly concurred in, and adopted as their own, the Responsive Comments of the ARU to the MRL filing. *See* IBB-1, IBEW-1, NCFO-1 and SMWIA-1.

will not be acquiring UP and SP. MRL Rebuttal at 34-35. However, Section 11343(a)(1) applies to the consolidation of the properties of two or more carriers into one corporation for ownership, management and operation of the previously separately owned properties--that is exactly what AC would be doing. Section 11343(a)(1) is not limited in scope to consolidations by carriers; nor is it limited to consolidations of whole carriers, indeed it refers to consolidations of *properties* of separate carriers. MRL proposes for AC to acquire properties of SP and UP and to consolidate them into a new carrier, that is a Section 11343(a)(1) transaction.

MRL has argued that ARU is in error in arguing that if the MRL Responsive Application is approved, it would have to be subject to the *New York Dock* conditions imposed on the Application and would be required to become party to an implementing arrangement with the unions representing the UP and SP employees under those conditions. MRL Rebuttal at 38, *citing Wilmington Terminal, supra*. Unfortunately, MRL's counsel apparently chose not to read the cases cited by ARU on the assumption that *Wilmington Terminal* was dispositive on the issue raised by the ARU. MRL Rebuttal at 38. Had they actually read the cited cases, they perhaps would have realized that *Wilmington Terminal* is not dispositive on this issue. The cases cited by ARU (Comments at 13-14) state that where two transactions are integrally related or part of an inseparable plan, the protections imposed apply in both transactions, so that even if one of the transactions is not

subject to any protections, the employees affected by that transaction are covered by the protections imposed in the related transaction. *Id.*[10] Accordingly, it does not matter that protections imposed in connection with a stand-alone acquisition by AC might not require AC to participate in an implementing arrangement with the unions which represent UP and SP workers, or might not require AC to afford a priority in hiring to UP and SP employees; such an obligation would arise not from the protections imposed on AC, but rather on the protections imposed on the Primary Application. Since there is no doubt that the MRL Responsive Application is inseparably linked to the Primary Application,[11] if the Application and the Responsive Application are both approved, the Responsive Application would have to be subject to the protections imposed on the approval of the Application.

CONCLUSION

For the reasons stated herein and in the ARU Comments, the Application should be rejected; however, if the Application is approved, it should be subject to the conditions requested by the ARU.

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[10] The fact that the decisions cited by the ARU are "pre-Staggers Act cases" (MRL Rebuttal at 38) is of no consequence. The Staggers Act did not reverse all pre-1980 decisions and the cited cases have never been overruled by the ICC or the STB.

[11] *See e.g.* MRL Rebuttal at 34--"In the absence of the merger, there would be no need for such a divestiture of property and no need for an independent third party like Acquisition Company to provide service on the lines."

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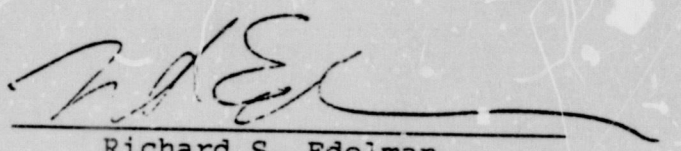
CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing Brief Of The Allied Rail Unions to all parties of record on the attached service list, by first-class mail, postage prepaid.

Dated at Washington, D.C. this 3rd day of June, 1996.



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STB FD 32760 6-3-96 E 83983

83983

ORIGINAL

CRP-2

Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760, et al.

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

Item No.

Page Count 4

June 6, 1996 #36

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington, DC 20036

Attorney for Clarence R. Ponsler

Due Date: June 3, 1996

Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760, et al.

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

BRIEF

This brief is submitted by Clarence R. Ponsler,[1/] for and on behalf of General Committee of Adjustment-United Transportation Union, for The Alton and Southern Railway Company (ALS). The interest of this protestant is with respect to the proposed control of ALS by Union Pacific Corporation through a 100 percent stock interest.

Background. ALS heretofore has been an important carrier serving the St. Louis-East St. Louis gateway. In addition to serving local industries, ALS provides interchange service between rail carriers. The recent history of ALS may be found in St. Louis SW Ry. Co.-Pur.-Alton & S.R., 331 I.C.C. 515 (1968); St. Louis Southwestern Ry.-Pur.-Alton and Southern R., 342 I.C.C. 498 (1972), aff'd Congress of Railway Unions v. United States, 373 F.Supp. 1339 (D.D.C. 1974). ALS today is jointly owned by Union Pacific and Southern Pacific, or their affiliates.

Proposed Transaction. If the primary application is granted, the present divided ownership of ALS by two competitors--Union Pacific

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1/ General Chairman for UTU on The Alton and Southern Railway Company, with offices at 1017 W. Main Street, Belleville, IL 62220.

and Southern Pacific--will come to an end. Such control by a single entity--Union Pacific Corporation--is the subject of F.D. No. 32760 (Sub-No. 3), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Alton & Southern Railway Company, set forth in Volume 5, at pp. 75-81.

The adverse effects of the proposed control of ALS are demonstrated by the application in this proceeding. The record references are set forth by Mr. Ponsler in his verified statement, filed April 4, 1996. (CRP-1, 1-2). Subsequent to the filing of opposition verified statements applicants on April 18, 1996 entered into a settlement agreement with the Chemical Manufacturers Association (CMA). The CMA agreement would grant BN/Santa Fe trackage rights over Union Pacific between Houston, TX and Valley Junction, IL, and between Fair Oaks, AR and Valley Junction, IL, among other concessions.

The full extent of the injury to ALS employees cannot be ascertained at this time. However, as Mr. Ponsler stated, the impact would be serious and warrants denial of the applications. (CRP-1, 2):

> "ALS employees would be seriously impacted by the unification of Union Pacific with Southern Pacific, and common control of ALS. The applications should be denied."

A review of the evidence shows that the Union Pacific-Southern Pacific unification, and control of ALS, would result in the substantial rerouting of traffic, and diversion of business from ALS. Work presently performed by ALS employees would be transferred to other carriers as well as to Union Pacific and Southern Pacific affiliates.

Since the transaction in Sub-No. 3 can come about only if the

primary application is granted, it is logical that ALS employees be allowed to participate in appropriate implementing agreements involving primary carrier work, should the Board actually approve the primary application.

However, the havoc which approval of the primary application would have upon ALS employees, directly and thrcugh the Sub-No. 3 proceeding, dictate that the consolidation be denied, in which event employee protective conditions would become unnecessary.

Respectfully submitted,

GORDON P. MacDOUGALL
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Attorney for Clarence R. Ponsler

June 3, 1996

Certificate or Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington, DC

Gordon P. MacDougall

STB FD 32760 6-3-96 E 83981

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ORIGINAL

CWD-2

Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760, et al.

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

Item No. _____

Page Count 4

JUNE, 1996 #37

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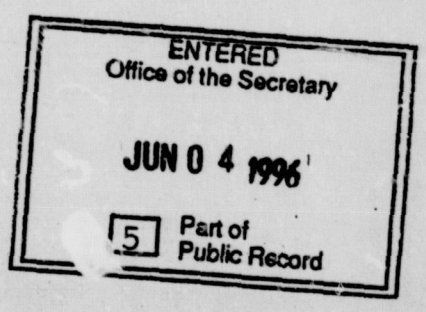
Due Date: June 3, 1996



Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760, et al.

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

This brief is submitted by Charles W. Downey,[1] for and on behalf of General Committee of Adjustment for United Transportation Union, on lines of SPCSL Corp. (SPCSL), Gateway Western Railway Company (GWW), and Illinois Central Railroad Company (IC).

Protestant on May 10, 1996, filed a verified statement, expressing concern with the settlement agreement between applicants and GWW. (CWD-1). The settlement agreement is dated April 8, 1996 (UP/SP-204), and was supported by the verified statement of Richard B. Peterson. (UP/SP-206). Protestant pointed out that certain terms of the settlement agreement are inconsistent with the understanding of the Interstate Commerce Commission (ICC) in F.D. No. 31522, decided October 31, 1989.[2] (CWD-1, 3-4). Moreover, certain work would be transferred between SPCSL and GWW. (CWD-1, 3).

Applicants responded that no agreement had been reached regarding changes in operations. (UP/SP-250, 1-2). Applicants contended that the

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1/ General Chairman for UTU on SPCSL, GWW, and IC, with offices at 1301½ Morrissey Drive, Unit 4, Bloomington, IL 61701.

2/ Rio Grande Industries, Inc., Et Al.--Purchase and Trackage Rights--Chicago, Missouri & Western Railway Company Line Between St. Louis, MO and Chicago, IL. Reproduced in CWD-1, Attachment.

ICC did not approve or prescribe any pattern of rail service in its 1989 decision. (UP/SP-250, 2n.1). Applicants objected to an implementing agreement for the settlement agreement prior to consummation of the application. (UP/SP-250, 3).

ARGUMENT

If the Board should approve the application, the settlement agreement should be subject to the same New York Dock conditions. This is not to hold the entire merger "hostage" as claimed by UP/SP. (UP/SP-250, 3). New York Dock conditions have expedited arbitration, and the process can run its course on the same schedule as all other implementing agreements subject to New York Dock.

The settlement agreement speaks for itself. Applicants summarized their agreement as one resulting in changes in service. (UP/SP-231, 12):

> "The agreement eliminates a variety of contractual restrictions contained in agreements between Gateway Western and SP on any sale of Gateway Western or its assets to a Class 1 railroad. The settlement will also allow Gateway Western to provide shippers with improvements in service."

Moreover, it is clear that applicants made their agreement with GWW, and also with Wisconsin Central,[3/] in order to secure support for the merger at little cost to applicants. (UP/SP-231, 13):

> "In the case of WC and Gateway Western, the settlements had little cost to the Applicants yet resolved issues of concern to those two carriers."

The real "cost" may be to employees. Applicants should not thrust such expense upon employees. The New York Dock conditions should be imposed upon the settlement agreement, just as if it were part of the

---

3/ It appears that GWW and Wisconsin Central are under common control, through interlocking directors/officers, or otherwise. See: Traffic World, Vol. 246, No. 10, at 37, "Wisconsin Central names McCarren head of operations" (June 3, 1996).

application.

Of course, the Board need not reach the matter of the appropriate employee protective conditions, if the application is denied. However, if approved, New York Dock are minimum conditions.

Respectfully submitted,

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June 3, 1996

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8 3980

ORIGINAL

UTUI-3

Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760, et al.

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

Item No.

Page Count 3

JUNE 1996 #38

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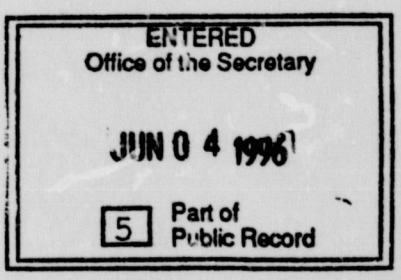
Due Date: June 3, 1996



Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760, et al.

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

Protestant, Joseph C. Szabo,[1/] submits this brief in opposition. Protestant is concerned with the abandonments proposed for Illinois, which are contingent upon approval of the primary application.

Protestant's participation is for and on behalf of Illinois Legislative Board-United Transportation Union.

Protestant submitted a verified statement on March 29, 1996, in opposition to the three abandonments proposed for Illinois.[2/] He concentrated on Docket No. AB-33 (Sub-No. 96), the Barr/Girard line of the former Chicago & North Western Railway. (C&NW). The proposed Barr/Girard abandonment is vigorously objected to by the public.

It is understood that the principal shippers, Springfield Plastics Inc. and Brandt Consolidated, Inc., will be filing a joint brief, and the Board is urged to carefully consider their evidence and

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1/ Illinois Legislative Director for United Transportation Union, with offices at 8 So. Michigan Ave., Chicago, IL 60603.

2/ Docket No. AB-33 (Sub-No. 96), Union Pacific Railroad Company--Abandonment--Barr-Girard Line In Menard, Sangamon, and Macoupin Counties, IL; Docket No. AB-33 (Sub-No. 97), Union Pacific Railroad Company--Abandonmert Exemption--DeCamp-Edwardsville Line in Madison County, IL; and Docket No. AB-33 (Sub-No. 98), Union Pacific Railroad Company--Abandonment Exemption--Edwardsville-Madison Line In Madison County, IL.

arguments.

Present service, apart from coal trains, and irregular or special movements, is a single train daily in each direction between South Pekin and Madison, and for two trains daily in each direction between South Pekin and Nelson, one for the west, and one for the east.

In the event the line is abandoned between Barr and Girard, train service would still be required between South Pekin and Barr for shippers situated between South Pekin and Barr. Accordingly, it would be a simple matter to serve Compro and any intermediate shippers.

Applicants have failed to make out a case for abandonment of the entire Barr/Girard line, or even for a partial abandonment. (UTUI-2, V.S. Szabo at 2-3).

The abandonment proposals for Illinois, supra n. 2, should not be permitted.

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June 3, 1996

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Item No. _____ WRITER'S DIRECT DIAL:
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JUNE, 1996 #39 June 3, 1996

VIA HAND DELIVERY

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

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

Dear Secretary Williams:

Enclosed are an original and 20 copies of the "Brief for Farmland Industries, Inc. Opposing the Merger Unless Competition is Preserved in the Central Corridor and to the Texas Gulf Coast and Mexico," for filing in the above-referenced proceeding. A 3.5" diskette containing the text of the Brief in Wordperfect format is also enclosed.

Please date stamp and return the three additional copies of the Brief via our messenger.

Very truly yours,

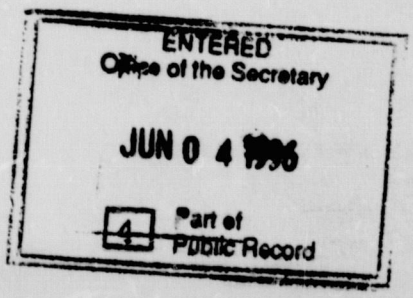
Michael F. McBride

Michael F. McBride

Attorney for Farmland Industries, Inc.

Enclosure

cc: All Parties of Record



FARM-2

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

BRIEF FOR FARMLAND INDUSTRIES, INC. OPPOSING THE MERGER UNLESS COMPETITION IS PRESERVED IN THE CENTRAL CORRIDOR AND TO THE TEXAS GULF COAST AND MEXICO

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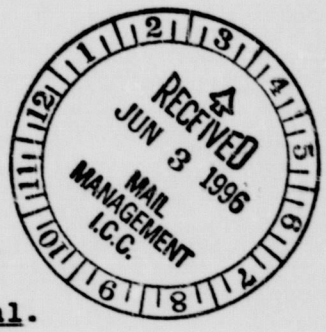
Attorney for Farmland
Industries, Inc.

Due Date: June 3, 1996
Dated: June 3, 1996

FARM-2

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD



Finance Docket No. 32760

**UNION PACIFIC CORP., et al. --
CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORP., et al.**

BRIEF FOR FARMLAND INDUSTRIES, INC. OPPOSING THE MERGER UNLESS COMPETITION IS PRESERVED IN THE CENTRAL CORRIDOR AND TO THE TEXAS GULF COAST AND MEXICO

Farmland Industries, Inc. ("Farmland"), a party of record in this proceeding, hereby files its Brief.[1] To avoid imposing a burden on the Board and its Staff, Farmland hereby incorporates by reference the Comments and Evidence filed by WSC (WSC-1) on March 29, 1996 as part of this Brief. In addition, Farmland wishes to advise the Board of the following:

1. Failure to Address Interests of Grain Shippers. Despite the fact that Applicants have arrived at numerous settlement agreements with other parties, including shippers,

[1] Farmland is a member of Western Shippers' Coalition ("WSC"). Until now, except for its initial letter seeking leave to become a party to this proceeding, Farmland has participated through WSC, as well as through its membership in the National Industrial Transportation League. Now that Farmland is filing its own Brief, it has chosen a unique acronym -- "FARM" -- for this filing, consistent with the practice in this proceeding. We are numbering it "FARM-2" to distinguish it from Farmland's earlier request to become a party of record, which is hereby deemed "FARM-1".

which have evidently led those parties to change their positions in this proceeding to support, neutrality, or silence (see, e.g., UP/SP-231, Tab 10, Gray/Shattuck V.S., and UP-233), Applicants have made no effort to approach Farmland or, to the best of Farmland's knowledge, virtually any grain interests[2] in this proceeding. While Applicants have no obligation to attempt to accommodate Farmland or the other grain interests, it is remarkable that they have not even attempted to do so. The concerns of the agricultural community are profound, and the adverse effects of this proceeding will be extremely adverse to grain shippers, as has been explained by the filings of the Mountain-Plains Communities and Shippers Coalition, the Kansas Grain and Feed Association, and numerous other farm-related interests. Applicants' failure even to attempt to address the concerns of the agricultural farm community is merely a

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[2] There appears to be at least one stray grain interest supporting Applicants. See, e.g., the letter from Kansas Feed Company (UP-233, p. 317). However, the Board should not consider the statement to be any more than a form statement, because the letter is identical in wording to other such letters, such as the immediately prior letter from Kalama International, L.L.C. (UP-233, pp. 315-16). Witnesses Gray and Shattuck admit that these are "form statement[s]". UP-231, Tab 10, at 55 n.3. The reason given, though, for the form statements -- that the "30 days" between March 29, 1996, when the comments of other shippers were filed, and the due date for Applicants' April 29, 1996, rebuttal (which was actually 31 days) was insufficient for the shipper to do more than prepare a form statement (id.) -- is an obvious non sequitur. Applicants' counsel and personnel were busy during that period with this proceeding, to be sure, but Kansas Feed Company was not. Evidently, what Witnesses Gray and Shattuck meant was that Applicants' counsel and personnel did not have enough time to draft a statement for the shippers who signed the form statements. But that just proves that such statements should not be given much weight.

continuation of the historic refusal of the Western railroads to resolve the problems of grain shippers.

2. Loss of Competition and Service in the Central Corridor. Farmland's most fundamental problem in this proceeding is the effect of the proposed transaction on SP's Central Corridor. The loss of rail service on the line east and west of Pueblo, Colorado, and the re-routing of traffic from SP's Denver to Salt Lake City line to UP's Central Corridor, will greatly and adversely affect grain shippers. At the present time, the Pueblo, CO-Herington, KS line carries substantial coal and other overhead traffic, in addition to grain traffic. The loss of the overhead traffic, particularly the coal traffic, to other lines, will increase the likelihood that further abandonments, beyond those proposed in the Application, will occur.

None of this needs to happen. The Application is adverse to the public interest in the Central Corridor unless rail service is preserved over all of SP's lines, especially east and west of Pueblo, and unless the Board orders divestiture of SP's Central Corridor to a carrier not affiliated with Applicants. Farmland supports the Responsive Application of Montana Rail Link, Inc. ("MRL"). MRL is fit and willing to provide the necessary service over SP's Central Corridor from Kansas City, Missouri to the Bay Area of Northern California, which Applicants have conceded they do not have an interest in doing, given the proposed abandonments and re-routings discussed above. MRL's willingness to invest a very substantial sum of money in SP's Central Corridor -- in excess of $615 million -- is

the best possible indication that MRL would aggressively seek business to recover its investment in that single line. Applicants, by contrast, will have two parallel lines in the Central Corridor if the Application is granted without divestiture of one of those lines, and obviously will not have a commitment to service over both, let alone the sort of commitment MRL would have to its new, and only, line in the Central Corridor.

Divestiture is also important to preserve competition for SP-origin coal, vis-a-vis UP-origin coal.[3] Applicants are the only parties to this proceeding who claim that SP- and UP-origin coals do not compete. Clearly, they do. WSC Witness Vaninetti demonstrates that. UP Witness Nock and the other UP coal rebuttal Witnesses tried to claim otherwise, but Witness Nock's Table 9 (UP-231, Tab 15, at 35) treats the "competition" (id. at 34) to be the coal "displaced", i.e., Illinois and Appalachian coal, for the most part.[4] But that is clearly wrong. Those coals were displaced because Phase I of the Clean Air Act

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[3] Although Farmland does not ship coal, we are discussing that commodity because of its importance to the Central Corridor and its grain traffic. As we show infra, there is substantial overhead traffic -- 33 trains daily -- much of which is coal traffic, on the former MP line through Pueblo to Kansas City.

[4] Ironically, Witness Nock admits that the competition also included "Hanna Basin" coal (UP-231, Tab 15, at 35 Table 9), which only UP serves. Of course, since an affiliate of UP had a 50 percent ownership interest in the Hanna Basin Black Butte Mine, it is remarkable that SP could have taken that business away from UP. If UP does not has a sufficient incentive to compete with SP to keep existing Hanna Basin coal business, when it had a substantial ownership in that coal, it is difficult to imagine UP having a substantial interest in Colorado/Utah coal, when it has no ownership interest in any such coals.

Amendments of 1990 prevents the use of such high-sulfur coals, so they cannot any longer be considered the "competition." An excellent Verified Statement of Witness Quinlan making this point, and refuting all of the UP coal testimony, was filed by Wisconsin Electric Power Company as part of its Rebuttal in support of its Responsive Application on May 14, 1996.

As WSC Witness Vaninetti showed (Figure 19 on page 29 of his Verified Statement, WSC Ex. 3, filed March 29, 1996 as part of WSC-11), the competition in many cases for SP's new coal customers is Powder River Basin ("PRB") coal. In 7 of the 14 instances identified in that Figure by Witness Vaninetti, PRB coal was tested along with Colorado or Utah coal. Clearly, therefore, PRB coal competes with Colorado/Utah coal. If it were not considered as part of the competition, why would it have been tested?

Obviously, the people who know best whether two sources of coal compete are the customers, which are, by and large, electric utilities. Not a single electric utility has agreed with Applicants that PRB coal and Colorado/Utah coal do not compete.[5] Even Utah Railway, which supports Applicants, filed the Verified Statement of Dr. Barry Vann demonstrating that Colorado/Utah coals compete with PRB coal (see Utah-5, filed April 29, 1996). The testimony of other Witnesses, such as those

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[5] Only two utilities, to the best of our knowledge, support the merger, and many are opposed. Neither of the two utilities who support the merger claim that PRB coal and Colorado/Utah coal do not compete. Thus, not a single coal customer supports Applicants' far-fetched claim that the coals do not compete.

for the Western Coal Traffic League, also demonstrate that the coals compete. The evidence is overwhelming that they do.

Once the Board concludes as it must that the coals compete, the Board has a serious problem that it must resolve. Coal, like grain, is obviously of great importance to the Nation, as well as to providing a traffic base in SP's Central Corridor and over the Pueblo-Herington line. The Board must do whatever is necessary to preserve that competition, for existing and future customers. Obviously, if Applicants do not desire to provide rail service east and west of Pueblo, and MRL is fit and willing to do so, the only possible outcome for the Board, consistent with its statutory obligations, is to permit another carrier to do so.

Moreover, since SP has been shown to have aggressively marketed coal from its origins as against UP, the best solution is to replicate that competition by allowing MRL to stand in SP's shoes in the Central Corridor. An independent, low-cost, efficient, motivated carrier such as MRL would provide assurance that the competition occurring today in coal markets continues. Divestiture of SP's Central Corridor to MRL or another carrier not affiliated with Applicants is the solution.

3. Loss of Competition for Grain Movements to the Texas Gulf Coast and Mexico. Finally, the merger will reduce competition for grain movements south from Kansas City, Missouri through Herington, Kansas and Wichita, Kansas to the Texas Gulf Coast and Mexican gateways, which is a matter of great importance to Farmland and many other parties, such as the members of the

Kansas Grain and Feed Association (MRL-21, Exhibit 5). This problem is intimately related to the problems created by Applicants in SP's Central Corridor, for the reasons discussed in the KGFA letter and discussed herein, including the loss of overhead traffic to lines other than the Pueblo-Herington line. As KGFA put it, after explaining that UP apparently intends to lease the portion of the Pueblo-Herington line still in service after Applicants' abandonments:

> This line supports the movement of approximately 31 daily trains now, which amounts to more than 466,000,000 gross tons of overhead traffic. If rail shipments are reduced to agricultural products and fertilizers, we contend that competitive rate structures can not support the expected high lease cost that the UP/SP would surely require, plus a reasonable return to the shortline operator.

KGFA is right. The Board must ensure a third alternative carrier from Kansas City through Herington and Wichita to the Texas Gulf and Mexican gateways for export of grain.

Conclusion

For the foregoing reasons, and those provided in the Comments of WSC filed March 29, 1996, as well as those filed by numerous other parties, including NIT League, MRL, Tex-Mex, KCS, and Conrail, the Board should not approve the proposed merger unless (1) SP's Central Corridor is divested to a carrier not affiliated with Applicants, preferably MRL, and (2) the Board ensures that a third carrier not affiliated with Applicants, preferably KCS, be allowed to provide competition from Kansas City, Missouri through Herington and Wichita, Kansas to the Texas Gulf Coast and the Mexican gateways for export. These conditions are vital to protect the public interest and provide adequate

competition for coal and grain, two of the most important commodities to the Nation carried by the railroads.

Respectfully submitted,

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FARM-2

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

CERTIFICATE OF SERVICE

I hereby certify that I have served, this 3rd day of June, 1996, a copy of the foregoing "Brief for Farmland Industries, Inc. Opposing the Merger Unless Competition is Preserved in the Central Corridor and to the Texas Gulf Coast and Mexico" by hand delivery to Arvid E. Roach, Esq. and Paul A. Cunningham, Esq. and on all other parties of record on the Service List in this proceeding by First Class mail, postage prepaid, or by a more expedited form of service.

Michael F. McBride

Michael F. McBride

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ORIGINAL

SEDG-16

BEFORE THE
SURFACE TRANSPORTATION SAFETY BOARD

Finance Docket No. 32760

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

BRIEF OF
SEDGWICK COUNTY, KANSAS AND
CITY OF WICHITA, KANSAS

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760

UNION PACIFIC CORP., et al.,
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SOUTHERN PACIFIC RAIL CORP., et al.

BRIEF OF
SEDGWICK COUNTY, KANSAS AND
CITY OF WICHITA, KANSAS

Pursuant to Decision No. 9, served December 27, 1995, Sedgwick County, Kansas ("Sedgwick County" or "County") and the City of Wichita, Kansas ("Wichita" or "City") hereby submit their brief in the above-entitled proceeding. For the reasons stated herein, the Surface Transportation Board ("Board") is requested to condition any approval of the proposed merger upon a prohibition against the applicants increasing the number of trains operating daily through Sedgwick County and Wichita. In the event that the Board is not prepared at this time to impose such a condition on the merger, Sedgwick County and Wichita request that the Board prepare an environmental impact statement ("EIS") prior to issuing any decision that would permit the applicants to increase the daily number of trains running through Sedgwick County and Wichita.[1/]

[1/] Sedgwick County and Wichita recognize that the Board has committed itself to holding its voting conference on July 3, 1996 and to serving its final decision on August 12, 1996. See Decision No. 9 at 15. One procedural alternative would be for the August 12th order to contain a condition prohibiting increased train traffic through Sedgwick County and Wichita until such time as the Board has issued an EIS and a supplemental order pursuant to 49 U.S.C. § 11327 including appropriate environmental mitigation measures.

SUMMARY OF ARGUMENT

While any number of complex factual issues have been raised by the parties supporting and opposing the merger of two giant railroads, Sedgwick County and Wichita raise a straightforward environmental issue. The Union Pacific Railroad Company ("UP") has a line of track that proceeds through the heart of Sedgwick County and Wichita, communities with a combined population of 417,000. The applicants propose to invest $91 million in improvements for that line and to use it for an additional ten or more unit trains of coal or grain per day.

If the applicants are permitted to effectuate their rerouting proposal, the adverse environmental impacts on Sedgwick County would be immediate, severe, and irreparable. Increased noise levels would be borne by large numbers of residents, air quality levels could fall to the point at which Wichita would be in "nonattainment" status, and daily traffic patterns for tens of thousands of vehicles would be adversely affected.

As serious as these matters are, they pale in significance to the crux of the concerns of Sedgwick County and Wichita, i.e., the public health and safety concerns that are part of this Nation's Rail Transportation Policy[2/] and that must be considered[3/] in determining whether the proposed merger is "consistent with

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[2/] 49 U.S.C. § 10101a(8) (1995).

[3/] Chesapeake and Ohio Ry. Co. v. United States, 704 F.2d 373, 376 (7th Cir. 1983) states that the Rail Transportation Policy "is to guide the Commission in applying the rail provisions of the Interstate Commerce Act."

the public interest."[4] If the Board approves the applicants' rerouting proposal, each additional train that would pass through Wichita would block the streets of the City for approximately seven minutes. And if, as the applicants originally predicted, an additional ten trains per day move through the City, its streets would be blocked by those trains for 70 minutes per day. Or if, as the applicants now hint[5], even more new trains are scheduled to run through the City, its streets would be blocked for an even greater portion of the day.

From the standpoint of the public interest, that result is unthinkable. Moreover, it is directly contrary to the "... policy of the United States Government--(8) to operate transportation facilities and equipment without detriment to the public health and safety."[6] When the City's streets are blocked, emergency services vehicles and personnel are blocked as well. Fire, police, and ambulance personnel would be sitting in traffic waiting for the applicants' trains to pass rather than preventing loss of life and property.

What makes this case particularly distressing is that the applicants' business rationale for their proposed rerouting of traffic through Sedgwick County and Wichita is so obviously insignificant in comparison to the harms that the rerouting proposal immediately and irrevocably would create. The

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[4] 49 U.S.C. § 11324(c) (1996).

[5] See infra.

[6] Note 2, supra.

applicants have not stated that the proposed rerouting is fundamental either to their existing businesses or to business they seek to secure through the merger. They have not stated that the current routing for this traffic, via Kansas City, would be unavailable after their merger. They have not stated that other routings to avoid Kansas City, including the one suggested by Sedgwick County and Wichita, are impossible substitutes for the proposed route through Sedgwick County and Wichita. Rather, they have put forth a "rerouting" proposal that would place public safety at risk, increase noise levels, degrade air quality levels, and otherwise degrade the quality of life in Wichita and Sedgwick County while asserting only that they wish to reduce congestion along the present Kansas City routing.

The applicants' featherweight rationale cannot possibly justify the Board's approval of a rerouting proposal that would put life and property at undenied and undeniable risk. That rerouting proposal through Wichita and Sedgwick County violates the Rail Transportation Policy, offends applicable environmental standards, has not been subjected to necessary and appropriate environmental scrutiny, and should not be approved if the merger is sanctioned.

ARGUMENT

I. SUMMARY OF THE FACTS ESTABLISHED BY SEDGWICK COUNTY AND WICHITA

In their May 3, 1996 Joint Comments on the April 12, 1996 Environmental Assessment ("EA")[1], Sedgwick County and Wichita initially established the following facts:

1. The sole rationale presented by the applicants for the proposed rerouting of at least ten trains per day through Sedgwick County and Wichita is "to reduce congestion in Kansas City and improve service." Comments at 4.

2. Emergency services, i.e., police, fire, and ambulance equipment and personnel would be delayed if the applicants are permitted to run additional trains through the heart of the City. Comments at 7, et seq.

3. In the case of incidents requiring the response of more than one emergency services department, e.g., a crime leading to injury or fire, if the police are delayed by a train, ambulance and fire personnel may not respond to the scene until the police arrive. Comments at 8 and 9.

4. Police, fire, and rescue units collectively are blocked more than once each month by a train under current conditions, i.e., with only two UP trains operating through northern Wichita and Sedgwick County and approximately four UP trains operating through the remainder of the City and the County. Those delays of emergency services personnel and equipment have resulted in

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[1] SEDG-4, hereinafter referred to as "Comments."

increased damage to property, additional accidents involving emergency services vehicles attempting to find another route, and delays in assisting victims of crime and other injured and ill people.[8] Comments at 10-12.

5. Each train of the length and configuration of the type proposed to be added to the streets of Wichita would block vehicular traffic for up to seven minutes. The ten additional trains per day proposed by the applicants would block vehicular traffic in Wichita for up to 70 additional minutes per day. The total of 12 trains per day originally proposed by the applicants (i.e., two current and ten additional) would block vehicular traffic in Wichita for up to 84 minutes per day. Comments at 15. The total of 16 trains per day most recently suggested by the applicants would block vehicular traffic in Wichita for up to 112 minutes per day.

6. 9,471 vehicles would be blocked each day by the ten additional trains originally proposed by the applicants. Comments at 16.

7. Because streets in Wichita with grade separations are over three miles apart, there is no possibility of vehicular traffic avoiding the streets blocked by the trains. Comments at 17.

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[8] The Kansas Department of Transportation ("KDOT") noted the "... historic problems with rail crossings in several Kansas communities" and directed "... the Board's attention to the unusually difficult situation in Wichita." See KDOT's March 28, 1996 comments at 10.

8. During the last six years, with the current number of UP trains operating, there have been 15 auto/train collisions, including two fatalities, within Wichita and Sedgwick County on the UP tracks at issue in this case. Comments at 18.

9. Using "exposure rates" calculated in the manner utilized by KDOT, the level of daily train traffic originally proposed by the applicants would require grade-separation, i.e., raising or lowering the streets, at fully 20 grade crossings in Wichita. Comments at 19.

10. Wichita previously has been designated as being in "nonattainment" status by the Environmental Protection Agency ("EPA") under federal air quality guidelines for carbon monoxide. While Wichita is currently in "attainment" status, the additional train traffic proposed by the applicants could put Wichita back in nonattainment status and could, inter alia, place its federal funding for road projects at risk. Comments at 19-21.

11. Fully 1,253 residences, three schools, and 12 churches would be in the noise impact zones of the applicants' trains. Noise levels resulting from the UP's current trains in Wichita have been measured at 109.4 db(A), i.e. not quite at the pain level, but distinctly unpleasant. Comments at 21.

Second, the Comments of Wichita and Sedgwick County also demonstrated (1) that the EA ignores public safety issues of vital importance (Comments at 21-25) and (2) that to the extent the EA does attempt to quantify environmental impacts, it makes a

number of serious errors. The EA's principal errors in the subject areas that it did address may be summarized as follows:

1. The EA assumes that the applicants would run 12 trains a day through Sedgwick County and Wichita even though the applicants' calculations appear to be internally inconsistent and even though the applicants are now using a much higher daily train count figure. Comments at 5 and 25. Also, see infra.

2. The EA understates both the number of receptors of train noise and the impact of train noise on those receptors. Comments at 27-28.

3. The EA's air quality analysis ignores Wichita's previous EPA "nonattainment" status, and is based on a woefully incorrect assumption as to the amount of vehicular traffic in Wichita. That is, the EA assumes that Wichita's vehicular traffic counts are less than 5,000 at grade crossings while the facts establish that Wichita has 12 grade crossings that carry 5,000 vehicles or more per day. Moreover, the EA ignores the fact that the carbon monoxide emissions from vehicles idling while the applicants' trains pass through Wichita could result in Wichita falling back into EPA noncompliance status for carbon moxide. Carbon monoxide levels also would be increased by the trains themselves. Comments at 28-30.

4. The EA dramatically understates grade crossing delays due to the above-discussed incorrect assumption as to the amount of vehicular traffic in Wichita and due to an equally incorrect assumption as to the amount of time each train would delay

vehicular traffic in Wichita. This latter error contains a number of components. First, the EA incorrectly assumes that the trains passing through Wichita would be 5,000 feet in length. The actual figure for the massive unit trains of coal and grain that applicants would reroute through Wichita and Sedgwick County is approximately 7,400 feet. Second, the EA understates the amount of time that gates are closed before and after the trains pass through the crossing. Third, the EA's formula for calculating grade crossing delays does not include the time lost by lines of cars, up to 61 vehicles per lane, as they first slow down and stop for the train or for traffic lights[9/] and then accelerate after the trains pass through the crossing. Fourth, the EA assumes that the applicants' trains would average a speed of 30 m.p.h. through Wichita. Because of the applicants' proposed construction of a rail yard, current slow orders, and general congestion in Wichita, Wichita and Sedgwick County have assumed that the applicants' trains will average approximately 15 m.p.h. through the City. Comments at 16-18 and 30-33. Also, see infra.

5. The EA understates the likely increase in train/vehicle accidents that would result from the proposed increased number of trains. Comments at 33-34.

9/ Wichita's traffic lights are synchronized assuming a normal speed for vehicular traffic. Train delays obviously disrupt normal traffic speeds and result in vehicles being stopped not only by the trains, but by additional traffic signals.

In the third section of their Comments, Wichita and Sedgwick County established that the EA's mitigation proposals are, individually and collectively, inadequate to mitigate the environmental degradations identified by the EA, let alone the environmental degradations identified by Wichita and Sedgwick County. Comments at 34-38.

Finally, in the fourth section of their Comments, Sedgwick County and Wichita established that an EIS is required by law. Comments at 38-41.

II. SUMMARY OF THE COMMENTS OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION

The United States Department of Transportation ("DOT") offered its "comments on the environmental and safety aspects of the EA" on May 9, 1996. DOT's comments may be summarized as follows:

1. DOT "is concerned that the [Section of Environmental Analysis's] recommendations to the Board are not sufficiently specific with respect to measures necessary to fully mitigate" the environmental and safety impacts that would result from the merger and the projected increases in rail traffic volume. DOT comments at 2.

2. "... DOT strongly urges the Board to impose specific measures to mitigate the negative impacts" of the merger. DOT comments at 3.

3. Wichita, Kansas "may face increases in noise, congestion, air pollution and safety risks if adequate mitigation measures are not implemented. Again, the DOT urges the Board to

impose specific requirements to mitigate these real impacts..." DOT comments at 3.

4. "Perhaps as a result of the compressed [procedural] schedule, the mitigating measures outlined in the EA are, in DOT's view, too vague to assure specific relief." DOT comments at 4.

5. "... the EA does not explain how the recommendations [with regard to grade-separated crossings] were arrived at or, if implemented, how fully they would mitigate the adverse impacts identified." DOT comments at 4-5.

6. DOT believes that the EA's proposed meetings between UP/SP and communities to develop mitigation plans relating to air quality and noise "... will be ineffective where sigificant impacts are expected, unless the Board also identifies the minimum level and type of mitigation required..." DOT comments at 5.

7. "The [Board] should identify mitigation measures that the merged carriers will be required to implement to assure that there are no significant adverse [safety] impacts." DOT comments at 5.

8. "... overall grade crossing risk should be no greater in [Wichita, Kansas] after the merger than before the merger, and the merging lines should ... bear the cost of such equalization." DOT comments at 7 (emphasis added).

9. The rerouting proposal of the City of Wichita, Kansas and Sedgwick County, Kansas "... certainly should be discussed,

as it may offer a relatively low cost solution to the problem." DOT comments at 8.[10/]

III. SUMMARY OF NEW INFORMATION FROM THE APPLICANTS AND THE SEDGWICK COUNTY/WICHITA RESPONSE THERETO

A. The Number Of Additional Trains

Particularly in light of the public safety concerns expressed by Sedgwick County and Wichita, the precise number of trains that the applicants propose for our streets is of critical importance. That is, since each train brings noise, air pollution, traffic delays, and public safety risks, the Board cannot possibly approve the rerouting proposal and/or establish legally sufficient mitigation measures until it knows the precise number of trains involved.

According to the applicants' operating plan, which divided Wichita and Sedgwick County into two "line segments"[11/], the 1994 traffic count for the "Lost Springs to Wichita segment" was two trains per day and the applicants were proposing to increase the number of daily trains by ten to reach a total of 12. According to that same document, the 1994 traffic count for the "Wichita to Chickasha segment" was four trains a day, a figure that the

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[10/] Wichita and Sedgwick County certainly agree with DOT that the Board must consider all reasonable alternatives to the applicants' proposed rerouting. Such consideration is mandated by both the Rail Transportation Policy, supra, and by the National Environmental Policy Act of 1969 ("NEPA"). See, e.g., 42 U.S.C. § 4332(2)(C) (1996); 40 CFR § 1502.14 (1995), and Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551, 98 S.Ct. 1197, 1215 (1978).

[11/] UP/SP-24, Railroad Merger Application, Volume 3 at 379.

applicants were proposing to increase by seven to reach a total of 12.[12/]

The applicants have never explained to the Board how it is possible that ten trains per day will be added to the Lost Springs to Wichita segment and that only seven trains per day will be added to the Wichita to Chickasha segment. In fact, this is impossible given that (1) the involved unit trains of coal or grain are destined to points south of Wichita and (2) the applicants have not identified any reductions in their current levels of service to and through Wichita.

If anything, the applicants have made the train count issue even more unclear in their Rebuttal, UP/SP-230. The applicants are now speaking in terms of "some 16 trains per day." Id. at 274.

Without a definitive number of the trains proposed to be rerouted through Sedgwick County and Wichita, the Board cannot conduct, let alone complete, an assessment of the environmental impacts of the applicants' rerouting proposal and of reasonable alternatives to that proposal. Without such an assessment, the Board cannot approve that proposal.

B. **Crossing Gate Down Times**

A second quantitative issue of particular importance in this proceeding is the amount of time Wichita's streets would be blocked by each of the ten or more new coal or grain trains

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[12/] The fact that four and seven do not add to 12 is discussed in our Comments at 25-26.

proposed to be rerouted through Sedgwick County and Wichita. That is, only by knowing both (1) the precise number of additional trains that the applicants propose to run through Sedgwick County and Wichita and (2) a realistic approximation of the amount of time that each train would block the streets of Wichita and Sedgwick County will the Board know the degree to which the public health and safety would be negatively impacted by the proposed rail traffic increases.

Wichita and Sedgwick County addressed this issue at pages 31-33 of our Comments. We there demonstrated (a) that the EA assumed that each train would block streets for 2.5 minutes and (b) that seven minutes is a more realistic figure.

Even the applicants do not accept the 2.5 minute figure assumed by the EA. To the contrary, while the EA used this same 2.5 minute figure in its discussion of Placer County, California[13], Mr. Michael D. Ongerth, Vice President-Strategic Planning for Southern Pacific Rail Corporation ("SP") states that "4.5 minutes is a much more realistic estimate of crossing gate down times."[14]

The point here is not the obvious dispute between the SP's Mr. Ongerth, on the one hand, and Sedgwick County and Wichita, on the other hand, with regard to whether 4.5 minutes or seven minutes is the correct figure. Rather, the point is that the SP,

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[13] EA, Volume 2 at 4-38.

[14] See Mr. Ongerth's Rebuttal Verified Statement (UP/SP-232) at 79.

Sedgwick County, and Wichita all recognize that the EA's estimate of 2.5 minutes is substantially understated. Accordingly, the EA's 2.5 minute estimate should not form the basis of the Board's decision.

C. The Applicants May Not Be Wedded To The Original Rerouting Proposal

As noted in our Comments and supra, the applicants' sole rationale for the rerouting of a minimum of ten new trains daily through Sedgwick County and Wichita is to "reduce congestion" at Kansas City. As also noted in our Comments and supra, a comparison of this "benefit" with the harms to Sedgwick County and Wichita that would be caused by the applicants' rerouting proposal should result in the conclusion that the rerouting is contrary to the public interest and thus should be prohibited. This is particularly the case in that other routing alternatives are available, notwithstanding the EA's failure to consider such alternatives.

Now, the applicants have sent a signal that a prohibition against their proposed rerouting through Sedgwick County and Wichita may not be unacceptable to them in any event.

In volume 3 of the applicants' rebuttal, UP/SP-232, R. Bradley King, Vice President-Transportation at UP, addresses the concerns of Sedgwick County and Wichita in one paragraph at page 52. Mr. King states:

> ... we are nevertheless willing to work with Wichita to determine whether rerouting these trains over an alternative BN/Santa Fe line would address its concerns.

While Mr. King has not provided any map reflecting the "alternative BN/Santa Fe line", Sedgwick County and Wichita assume that Mr. King is referring to the routing first proposed by Mr. Stagner in SEDG-3, i.e., a Topeka-Emporia-Cassoday-El Dorado-Wellington routing that would accomplish the "Kansas City bypass" desired by the applicants without running any additional trains through Sedgwick County and Wichita.

Let us be perfectly clear. If Mr. King's proposal is to use the routing proposed by Mr. Stagner for all of the additional train traffic, we gladly accept. Nonetheless, Sedgwick County and Wichita still ask the Board for a condition prohibiting the applicants from adding to current daily train traffic levels in Wichita.

The applicants have proposed to invest $91 million in track and facilties improvements to reroute traffic through Sedgwick County and Wichita. It has been difficult for Sedgwick County and Wichita to believe that the applicants would spend this amount of money just to reroute ten trains per day.[15/] However, it is even more difficult for us to believe that, if this proceeding is terminated without a condition prohibiting an increase in rail traffic through Wichita, the applicants will not seek a return on their $91 million investment in the future by increasing rail traffic through Wichita. This is the occasion for the Board to act under the Rail Transportation Policy and NEPA. Wichita and Sedgwick County urge it to do so.

[15/] Comments at 3.

D. The Board Should Not Be Misled By Groundless Assertions and Should Not Shirk Its Responsibilities Under NEPA

Notwithstanding the conciliatory tack taken by the UP's Mr. King, supra, the SP's Mr. Ongerth takes a more harsh approach. UP/SP-232, Ongerth at 71-87.

As here applicable, Mr. Ongerth first states that he

> ... cannot see how the merger will precipitate such adverse environmental consequences as to justify some of the expensive measures proposed by the various government authorities. On the contrary, I see traffic patterns that are within historic levels, are within the capabilities of the existing railroad plant, and should not cause injury to the community. I am unable to recognize any merger-related effects that would justify the ambitious requests that these public agencies would have the Board adopt. Id. at 72.

Since Mr. Ongerth's statement was filed on April 29th, Sedgwick County and Wichita can only hope that our May 3rd Comments have helped him to understand the seriousness of our concerns. We also will advise Mr. Ongerth and the Board that while it may be true that the proposed traffic patterns are within "historic levels" in some communities, that is not the case in Sedgwick County and Wichita.[16/] Similarly, while it may be true that "existing railroad plant" is adequate for proposed railroad traffic levels in other regions, that is not true for the rerouting of traffic of concern to Sedgwick County and Wichita. In fact, the inadequacy of the "existing railroad

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[16/] See also the table at page 73 of Mr. Ongerth's statement which does not include any historic traffic data for Wichita.

plant" in Sedgwick County and Wichita for the proposed traffic levels is precisely why the applicants are proposing to invest $91 million in improvements to that railroad plant.

Notwithstanding the fact that the Board's authority over railroad mergers is "exclusive"[17], Mr. Ongerth also seems convinced that the Board should abdicate its responsibilities under the Rail Transportation Policy and under NEPA by leaving issues involving the need for (and financial burdens associated with) crossing protection, overpasses, underpasses, and signal protection to the states.[18] Still further, Mr. Ongerth seems to view the communities seeking environmental mitigation of various types as villains unfairly taking advantage of the applicants, which he paints as "particularly vulnerable, defenses down and reluctant to press [their] interests." Id. at 74-75.

Nonsense. The environmental issues that are the subject of the Sedgwick County/Wichita Comments and the above-summarized DOT comments, including public health and safety concerns of the utmost importance, are caused solely by the applicants' proposed merger and the applicants' proposal to reroute at least ten trains, each substantially in excess of a mile in length, through the heart of Wichita. Sedgwick County and Wichita ask nothing more of the railroads than either to continue to use the Kansas

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[17] 49 U.S.C. § 11321(a) (1996).

[18] In contrast, the applicants suggest that leaving noise issues to the states "may also be inconsistent with the Noise Control Act, which preempts state and local regulation of noise from rail operations meeting federal regulatory standards." UP/SP-239 at 13.

City routing they have been using for many years or to choose an alternative routing that does not pass through our heavily populated urban area. But, let us be clear on the question of dollars and cents as well. If the applicants are successful in their efforts to route ten or more additional trains a day through Sedgwick County and Wichita, they cannot possibly expect the citizens of Sedgwick County and Wichita to bear all or even a fraction of the massive cost of grade separations that would be necessary in order to avoid a public safety disaster.[19] As unequivocally stated by the DOT, every dollar of that cost must be paid by the applicants. And, every new grade separation must be in place before a single additional train is routed through Wichita and Sedgwick County.

The railroad applicants that Mr. Ongerth describes as "vulnerable" and "reluctant to press their interests" somehow or other find the courage to do so at page 15 of their May 3, 1996 comments on the Environmental Assessment. Applicants there specifically accuse Wichita of seeking to "'export' a problem to a neighboring jurisdiction."

Applicants' assertion is categorically absurd.[20] Sedgwick

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[19] Reduced to its essentials, the applicants' argument appears to be that it is appropriate for the citizens of Wichita and Sedgwick County to pay for the cost of reducing train "congestion" in Kansas City. This argument should be rejected in its entirety by the Board.

[20] In fact, applicants' assertion runs afoul of the D.C. Circuit's "'chutzpah' doctrine." Marks v. Commissioner, 947 F.2d 983, 986 (D.C. Cir. 1991). The court has defined "chutzpah" as "a young man, convicted of murdering his parents, who argues for (continued...)

County and Wichita entered this proceeding only after it became abundantly clear that discussions with the applicants were inadequate to convince them that their proposal to increase daily train traffic through Wichita would result in intolerable safety risks to the citizens of Sedgwick County and Wichita. Again, it is the applicants that have proposed a merger, not Sedgwick County and Wichita. It is the applicants that have proposed to spend $91 million to allow a rerouting of traffic through Sedgwick County and Wichita, not the County and the City. And, most fundamentally, it is the applicants who propose to increase daily train traffic through Sedgwick County and Wichita from appoximately two to four trains per day to either 12 or "some 16" trains per day, depending upon which of applicants' presentations is accurate.

IV. NEPA'S REQUIREMENTS

Sedgwick County and Wichita have discussed NEPA's requirements at pages 38-41 of their May 3rd Comments and, in the interest of brevity, will incorporate that discussion by reference here. In brief, Sedgwick County and Wichita already have established that the EA's conclusion that the preparation of an EIS is not necessary is devoid of merit. The statute, the applicable regulations, and precedent all mandate the preparation

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20/ (...continued)
mercy on the ground that he is an orphan." Harbor Ins. Co. v. Schnabel Foundation Co., 946 F.2d 930, 937 n.5 (D.C. Cir. 1991).

of an EIS before[21] the Board can consider, let alone approve, the applicants' proposal to reroute their traffic to the clear and serious detriment of the citizens of Sedgwick County and Wichita. Sedgwick County and Wichita also have established that under any reasoned weighing of the merits of the applicants' proposal, i.e. reduced congestion of rail facilities in Kansas City, against the environmental degradation proposed for Wichita and Sedgwick County, the sole reasonable conclusion would be the need for a condition prohibiting increased train traffic through Wichita.

Having said that, it remains worthwhile to consider the most recent commentary of the applicants and of the DOT as it applies to the purely legal standards of NEPA and of judicial review.

As noted above, applicants take the position that the Board should not burden itself with either a detailed analysis of the facts or a detailed program of mitigation. As Mr. Ongerth puts it, "To ask this Board to research, investigate, mediate, or resolve each of those conflicts in the context of the merger is not reasonable, and could not be fair to either the cities or the railroad." UP/SP-232, Ongerth at 75.

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[21] "NEPA was intended to ensure that decisions about federal actions would be made only after responsible decision-makers had fully adverted to the environmental consequences of the actions, and had decided that the public benefits flowing from the actions outweighted their environmental costs." Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502, 512 (D.C. Cir. 1974), cert. denied, 423 U.S. 937, 96 S.Ct. 299, 46 L.Ed.2d 271 (1975) (footnote omitted).

Mr. Ongerth is wrong. Leaving aside the Board's "exclusive" authority over railroad mergers and the Board's statutory obligation to consider public health and safety issues as part of its determination of whether a merger is consistent with the public interest, if the Board wishes to avoid the preparation and issuance of an EIS, State of Idaho By & Thru Idaho Pub Util. v. I.C.C., 35 F.3d 585, 595 (D.C. Cir. 1994) clearly requires the Board to take a "hard look" at the problem, to identify the relevant areas of environmental concern, to make a convincing case that the environmental impacts are insignificant, and, if there are impacts of true signficance, to convincingly establish that the changes it orders to the project sufficiently reduce environmental impact to a minimum.

As recognized not only by Sedgwick County and Wichita, but also by the DOT, the EA fails each of these tests. Until the Board correctly quantifies, inter alia, (1) the increase in the number of trains that the applicants propose to run through the heart of Wichita, (2) the amount of time that each additional train will block Wichita's streets, (3) the amount of vehicular traffic in Wichita, (4) the extent to which additional trains blocking Wichita's streets will harm the ability of public safety personnel to prevent loss of life and property, (5) the number of noise receptors, (6) the noise impacts on these receptors, and (6) the likelihood that increased train traffic will put Wichita in an air quality nonattainment status, it cannot be found to have taken the legally mandated "hard look" at the problem.

Until the Board's environmental analysis fully reflects the public safety hazards resulting immmediately and potentially irreversibly from the proposed increase in traffic, it will not even have identified all of the relevant areas of environmental concern.

Unless the Board finds alternate routes for emergency vehicles in Wichita that are currently unknown to the City, to its police, to its fire department, and to its emergency medical services department, the Board cannot make a convincing case that the environmental impact of blocking Wichita's streets at least an additional ten times daily is environmentally insignificant.

And, unless the Board prohibits the applicants from running additional trains through the heart of Wichita, it cannot establish, convincingly or otherwise, that it has ordered changes to the merger proposal that reduce environmental harms to a minimum.

The DOT has raised two additional areas of concern shared by Sedgwick County and Wichita. First, the DOT has noted the "limited time available" to the Section of Environmental Analysis for the completion of the EA. This weakness in the procedural schedule is compounded by the schedule applicable after issuance of the EA. That is, interested parties were provided only three weeks to comment on the EA and, given the July 3, 1996 date for the Voting Conference, it appears that the Board's newly-limited staff will have only six weeks after receipt of comments on the

EA and only two weeks after receipt of briefs to prepare a draft decision for the Board.[22/]

Of perhaps greater significance, the DOT has flagged what must be deemed an "arbitrary and capricious" element of the EA that is of critical importance to Sedgwick County and Wichita. That is, while the EA recommends, in the absence of an agreement between the City of Reno and the applicants, the construction of three grade-separated crossings to mitigate the transportation and safety impact of increases in rail traffic in Reno, "... the EA does not explain how the recommendations were arrived at or, if implemented, how fully they would mitigate the adverse impacts identified." DOT comments at 4-5.

Stated another way, the EA evidences no analytical framework for its recommendations with regard to the construction of grade-separated crossings. Without such an analytical framework, the Board has no way of understanding why grade-separated crossings are deemed necessary by the EA for one community, but not for another. Accordingly, a Board decision adopting the EA's proposed "mitigation" measures could not possibly survive judicial review.

As already noted in the Sedgwick County/Wichita Comments, the significance of the EA's failure to explain how its grade-separation recommendations were arrived at is particularly

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22/ Sedgwick County and Wichita assume that a draft decision, or at the very least, a comprehensive options paper, must be made available to Board members by mid-June in order to permit a July 3rd voting conference.

critical when Reno's situation is compared to that of Wichita. For example, if we assume that the EA's mitigation recommendations for Reno were based on daily vehicular traffic counts, it would be perfectly clear that an even greater number of grade-separations would have to be ordered for Wichita. That is, the record reveals that the highest traffic level for the Reno streets considered by the EA is 15,200 vehicles per day. In contrast, Wichita has three at-grade crossings with daily traffic levels greater than 15,200.

In brief, the EA's failure to conduct the analyses mandated by NEPA and to recommend adequate mitigation for Sedgwick County and Wichita is arbitrary, capricious, discriminatory, and otherwise legally deficient.

CONCLUSION

Sedgwick County, Kansas and the City of Wichita, Kansas adhere to the analysis of the applicants' rerouting proposal provided in their Joint Protest and Request for Conditions (SEDG-1). Were the UP/SP to propose to run approximately 16 unit trains daily through the heart of Washington, D.C., blocking the movement of police, fire, and other emergency vehicles, not to mention thousands of school buses, commercial, and private vehicles, and hindering access to hospitals and commercial and public buildings, their proposal would be considered laughable and would be rejected out-of-hand. No greater respect should be shown for a proposal that would so profoundly and negatively affect the citizens of Wichita and Sedgwick County.

Wherefore, Wichita and Sedgwick County request the Board to impose a condition on any approval of the UP/SP merger that would prohibit any increase in daily train traffic through Wichita.

Respectfully submitted,

BOARD OF COUNTY COMMISSIONERS
OF SEDGWICK COUNTY, KANSAS

CITY OF WICHITA, KANSAS

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Dated: June 3, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 3rd day of June, 1996.

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ORIGINAL

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JDF-4

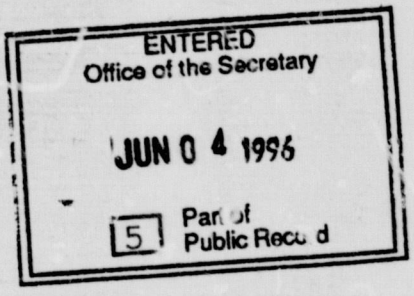
Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760, et al.

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



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Due Date: June 3, 1996

Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760, et al.

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

This brief is submitted by John D. Fitzgerald,[1/] protestant, for and on behalf of General Committee of Adjustment-United Transportation Union for certain lines of Burlington Northern Railroad Company (BN).

Protestant submitted a verified statement in opposition to the merger movement now transpiring in the Western District, whereby the four major rail carriers (BN, Santa Fe, Union Pacific, and Southern Pacific) are proposed to be reduced to but two systems, BN/Santa Fe and Union Pacific/Southern Pacific. (JDF-2). Protestant was an active participant in the BN/Santa Fe case, F.D. No. 32549, including pending judicial review. No. 95-1580 (USCA-DC Cir.), United Transportation Union-General Committee of Adjustment, Etc. v. STB.

Protestant's verified statement, in addition to its general challenge to the merger movement, also focused on an aspect of the settlement agreement between applicants Union Pacific (UP) and Southern Pacific (SP), on the one hand, and BN and Atchison, Topeka & Santa Fe (Santa Fe), on the other hand. The settlement agreement is dated

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1/ General Chairman for United Transportation Union, with offices at 400 E. Evergreen Blvd., Vancouver, WA 98660.

September 25, as amended November 18, 1995. Section 8(c) and (d), as amended by Section 6(a), and as explained by applicants' witness, provide a swap of trackage rights for UP/SP at Superior, WI, for BN/Santa Fe purchase of UP's line between Dallas and Waxachie, TX. (JDF-2, V.S. Fitzgerald, 1-2).

I. THE BOARD SHOULD CONSIDER AND RENDER FINDINGS FOR THE INSTANT UP/SP MERGER TOGETHER WITH A REOPENED BN/SANTA FE CASE.

The major justification urged for approval of the instant UP/SP merger, is the prior approval by the Board's predecessor of the BN/ATSF merger. But the Board is not placed in the bind of such a case-by-case procedure.

The BN/Santa Fe consolidation has not been fully consummated. The carriers have not merged. BN and Santa Fe remain separate carriers. To be sure, the Interstate Commerce Commission (ICC) approved the consolidation in mid-1995. However, the ICC's approval is pending judicial review by at least nine separate petitions for review in the U.S. Court of Appeals for the District of Columbia Circuit. Although filed beginning August 24, 1995, these cases have not been calendared.[2/] BN and Santa Fe appear in no hurry to expedite the review processess. For all that appears, these carriers are content to await the outcome of the UP/SP agency proceeding, either by neglect or by design.

At this stage, it would be fatal error for the Board not to consider the instant UP/SP merger on a consolidated basis with a reopened BN/Santa Fe record in F.D. No. 32549. The primary issue

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2/ Ordinarily, the Court disposes or defers ruling upon motions prior to calendaring, according to our understanding. BN seeks to dismiss UTU-GCA (Fitzgerald) as a petitioner in No. 95-1580, and STB seeks to dismiss the action in a related trackage rights matter brought by UTU-IL (Simmons/Szabo).

is whether the U.S. Western District should go from the present four systems down to two systems. Because the BN/Santa Fe approval has not been fully consummated, the Board has full options. The Supreme Court has stayed comsummation of rail mergers which are interrelated, so that the public interest may be evaluated. See: B. & O.R. Co. v. United States, 386 U.S. 372 (1967); Penn-Central Merger Cases, 389 U.S. 486 (1968).

II. IF THE MERGER IS APPROVED, THE NEW YORK DOCK CONDITIONS SHOULD APPLY TO THE TRANSACTION AT MERC DOCK IN SUPERIOR, WI.

BN currently handles the coal traffic from the Powder River Basin to MERC Dock at Superior, WI. BN has agreed to accord access by trackage rights to UP/SP between Saunders and Superior, WI, so that UP may participate in the movement. This is a "swap" arrangement. (JDF-2, V.S. Fitzgerald, 1-2). If the merger is approved, the trackage rights (embraced in Sub-No. 1), should be subject to the New York Dock conditions, rather than the standard trackage rights conditions. (JDF-2, V.S. Fitzgerald, 2).

UP/SP argues that the difference in employee conditions does not involve the extent of protection, but is whether unions can block the start-up of operations. (UP/SP-230, p. 316). In any event, UP/SP expects BN/Santa Fe to respond to Mr. Fitzgerald's request. (UP/SP 230, p. 316).

The short answer to UP/SP is that the extent of coverage may differ between N&W/Mendocino and New York Dock, particularly with respect to an implementing agreement. Moreover, we are unaware of any objection by BN/Santa Fe, as contemplated by UP/SP, to Mr. Fitzgerald's request for specific relief. See: BN/SF-54, 42-45.

BN emplolyees presently engaged in the transportation of coal destined to the MERC dock should be considered in any implementing agreement governing transfer of the business to UP/SP. BN/Santa Fe, in dealing with a similar request by the Allied Rail Unions, points to two recent instances where the coverage under trackage rights may not be identical with that under New York Dock. (BN/Santa Fe 54, 44). Special relief is warranted in the instant situation involving the coal movement. Mr. Fitzgerald's claim is not really challenged.

III. THE MONTANA RAIL LINK PROPOSAL IS UNSOUND.

Protestant submitted a verified statement in opposition to the application by Montana Rail Line (MRL) in Sub-No. 11. (JDF-3). The MRL proposal is unsound.

In the unlikely event the MRL application is somehow approved, the Board should impose protective conditions for BN employees. Such minimum conditions would be New York Dock.(JDF-3, 3).

CONCLUSION

The Board should evaluate the proposed consolidation in light of a reopened BN/Santa Fe record in F.D. No. 32549, and opt for a four-system Western District. If the instant consolidation is nevertheless approved, New York Dock conditions should be substituted for N&W/Mendocino in Sub-No. 1 for the Saunders/Superior, WI trackage rights. The transaction in Sub-No. 11 should be denied; if not denied, should be subject to New York Dock for BN employees.

Respectfully submitted,

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June 3, 1996

Attorney for John D. Fitzgerald

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington, DC

Gordon P. MacDougall