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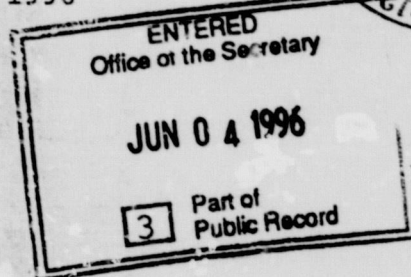
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June 3, 1996



BY HAND DELIVERY

Honorable Verron A. Williams  
Secretary  
Surface Transportation Board  
Case Control Branch  
12th Street & Constitution Ave. N.W.  
Washington, D.C. 20423

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

Dear Mr. Secretary:

Enclosed for filing in the above-referenced proceeding please find an original and twenty (20) copies of the Brief of the Western Coal Traffic League In Opposition to the Proposed UP/SP Merger (WCTL-22). In accordance with prior orders in this proceeding, we have also enclosed a Wordperfect 5.1 diskette containing this Brief.

We have also enclosed an extra copy of this document. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

*C. Michael Loftus*

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

CML/raw  
Enclosures

cc: Arvid E. Roach II, Esq.  
Paul A. Cunningham, Esq.  
The Honorable Jerome Nelson  
Parties of Record

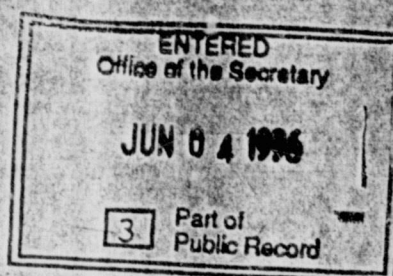
BEFORE THE  
SURFACE TRANSPORTATION BOARD



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

Finance Docket No. 32760

BRIEF OF THE WESTERN COAL  
TRAFFIC LEAGUE IN OPPOSITION  
TO THE PROPOSED UP/SP MERGER



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Dated: June 3, 1996



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tion composed of shippers and receivers of coal mined west of the Mississippi River -- i.e., in Wyoming, Montana, Colorado and New Mexico. Each WCTL member is a major consumer of western coal, and each moves substantially all of its coal by rail. Presently, WCTL members ship in excess of 95 million tons of coal per year, and their delivered coal costs exceed \$2 billion annually.

WCTL opposes the proposed UP/SP merger because of its probable anti-competitive effects on the western coal transportation market. Last year's BN/Santa Fe merger<sup>2</sup> resulted in a reduction in the number of major western coal-hauling railroads from four to three. The UP/SP merger would further reduce this number to only two. The merger is not in the public interest, because it will (1) lead to duopoly pricing in the western coal market; (2) reduce source competition between SP-served mines and UP-served mines; (3) cause a loss of aggressive SP pricing for Colorado and Utah coals; and (4) increase service problems for coal shippers in the Central Corridor.<sup>3</sup> WCTL further submits that the "Settlement Agreement" among Applicants and BNSF does not adequately address the acknowledged anti-competitive impacts of the proposed merger,

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<sup>2</sup> "BN" refers to Burlington Northern Railroad Company and "Santa Fe" refers to The Atchison, Topeka and Santa Fe Railway Company. BN and Santa Fe will be referred to collectively as "BNSF."

<sup>3</sup> As the term is used herein, "Central Corridor" refers to UP's east-west transcontinental main line running from Ogden, Utah to Chicago, Illinois, via Cheyenne, Wyoming, North Platte, Nebraska and Fremont/Omaha/Council Bluffs, Nebraska/Iowa.



and that SP is not a "failing firm" as Applicants would have the Board believe.

Given the extensive record that has been developed in opposition to the proposed merger, Applicants' claim that "[t]here is also no basis for concern about any anti-competitive effects on coal transportation" is clearly overstated. See Applicants' Rebuttal filed on April 29, 1996 ("Rebuttal"), Volume 1 ("Narrative"), at 27. The proposed merger will have unprecedented adverse competitive consequences for coal shippers. It is not in the public interest, and the Board should turn it down. If, however, the Board determines that the merger should be approved despite its adverse effects on competition, WCTL requests that the Board impose protective conditions to ameliorate the merger's anti-competitive effects on coal shippers, as described below and in WCTL's Comments (WCTL-11) which were filed in this proceeding on March 29, 1996.

## II

### UP/SP'S RESPONSE TO WCTL'S POSITION

Applicants proclaim that "[n]ot a single UP/SP customer will lose a choice of railroads. Every UP/SP customer will benefit from dramatic improvements in route mileages, single-line service, equipment supply, service reliability, operating efficiency, and cost." Rebuttal, Narrative, at 3. WCTL submits that this statement reflects a degree of optimism that is belied by the level of opposition this merger has faced since it was

announced last year. Insofar as coal shippers are concerned, Applicants have been able to attract only token support -- indeed, only three of the shippers whose support is proclaimed by Applicants are electric utilities. The reason is simple: in the view of coal shippers, this merger will not result in improvements in service, operating efficiency, or rates.

In response to WCTL's (and others') Comments, Applicants' argue that UP-served Powder River Basin ("PRB") mines do not compete with SP-served Colorado/Utah mines to a meaningful extent and that, post-merger, UP/SP will not favor PRB coal sources as UP/SP will have every incentive to promote the sale of Colorado/Utah coal. Rebuttal, Narrative, at 27-28, 215-16. Applicants further complain that SP is financially unstable and will simply hobble along if this merger is not approved. Id. at 84-88. In Applicants' words, "SP may survive, but at the price of sacrificing genuine transportation competition." Id. at 87. Finally, Applicants submit that the BNSF Settlement Agreement will intensify competition, not reduce it, especially since the trackage rights fee to be charged is, in Applicants' opinion, reasonable.

WCTL's Comments refute each and every one of Applicants arguments in detail. In this Brief, WCTL will address new points or counter-arguments raised by Applicants and will show, as WCTL did in its Comments, that Applicants' arguments are contradicted by the evidence.



### III

#### ARGUMENT

The evidence of most relevance to the issues affecting WCTL establishes that the proposed merger is not in the public interest. The impact of the proposed merger on western coal traffic will be dramatic, as WCTL has shown in its Comments, and as discussed below. If the merger is approved notwithstanding its anti-competitive consequences for coal shippers, the evidence of record demonstrates that the imposition of protective conditions is necessary to ameliorate the adverse effects of the merger on competition for western coal traffic and is fully justified and in keeping with the Board's statutory responsibilities in merger proceedings.

#### A. Applicable Legal Standards.

The Interstate Commerce Act's<sup>4</sup> "single and essential standard of approval" for merger transactions is that "the [Board] find the [transaction] to be 'consistent with the public

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<sup>4</sup> The ICC Termination Act of 1995 (the "Act"), Pub. L. No. 104-88, 109 Stat. 803 (1995) abolished the Interstate Commerce Commission ("ICC") and transferred responsibility for the economic regulation of rail carriers to the Board, effective January 1, 1996. The Act also made several changes to the rail regulatory authority that had been administered by the ICC, and recodified various provisions of the former Revised Interstate Commerce Act (49 U.S.C. § 10101, et seq.) without substantive change. The Act's savings provision (Section 204) directs that matters pending before the ICC on January 1, 1996 that relate to functions transferred to the Board -- such as the instant case -- shall continue to be heard without regard to the statutory changes wrought by the Act. References herein to statutory provisions, therefore, will be to the former Revised Interstate Commerce Act.

interest."<sup>5</sup> Finance Docket No. 32133, Union Pacific Corp., Union Pacific R.R. Co. and Missouri Pacific R.R. Co. -- Control -- Chicago and North Western Transp. Co. and Chicago and North Western Railway Co., at 53 (Decision served March 7, 1995) (unprinted) citing, Missouri-Kansas-Texas R.R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981) ("UP/CNW").<sup>6</sup> Among the factors the Board is required to evaluate in determining whether a merger is in the public interest are (a) the effect of the merger on the adequacy of transportation to the public; (b) the effect of failing to include other rail carriers in the area; and (c) the effect on competition among rail carriers in the affected region. See 49 U.S.C. § 11344(b)(1)(A), (B) and (E). The Board has broad authority to facilitate the public interest by imposing conditions on consolidations, including those that might be useful in ameliorating potential anti-competitive effects of a consolidation. See Union Pacific -- Control -- Missouri Pacific; Western Pacific, 366 I.C.C. 459, 562-64 (1982) ("UP/MP/WP"), aff'd sub nom. Southern Pacific Transp. Co. v. I.C.C., 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985); Santa Fe

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<sup>5</sup> The applicable legal standards are discussed in more detail in the "Statement of Position" section of WCTL's Comments, at 5-8.

<sup>6</sup> This standard was recently re-affirmed in the BN/Santa Fe Merger proceeding. Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Decision No. 38, served August 23, 1995, at 50-51 (unprinted) ("BN/Santa Fe").



Southern Pacific Corp. -- Consolidation -- Southern Pacific Transp. Co., 2 I.C.C. 2d 709, 807-08 (1986) ("Santa Fe/SP"); see also 49 U.S.C. § 11344(c). As explained below, WCTL has satisfied the legal standards under these precedents and, if the merger is approved, should be granted the relief it requests.

B. The Proposed Merger Is Not In The Public Interest.

The public interest demands preservation of rail competition and adequate rail service in the western United States. The proposed merger would have serious anti-competitive effects for coal traffic, would adversely affect the adequacy of service to unit train coal shippers, and offers little in terms of benefits that might be passed on to western coal shippers.

1. The Merger Will Cause Significant Anti-Competitive Effects In The Western Coal Transportation Market.

WCTL's Comments in this proceeding presented extensive evidence demonstrating the substantial anti-competitive impact that the proposed merger will have on the western coal transportation market.<sup>7</sup>

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<sup>7</sup> Applicants incorrectly contend that WCTL, and others, have misdefined the relevant transportation market for coal shippers, and that there is no "western coal market." Rebuttal, Narrative, at 213-29. WCTL defined the western coal transportation market for purposes of its competitive analyses as the market for utility coal transportation service from the nine major western coal origin areas in the western United States. See WCTL Comments, Crowley V.S., at 3 and Exhibit\_\_\_\_(TDC-1). That is the market from which WCTL members -- who transport over 95 million tons of coal annually -- purchase western coal. Currently, only three major carriers -- BNSF, UP and SP -- provide origin rail service in this market.

(continued...)

a. The Proposed Merger Will Lead To Collusive Behavior And Duopoly Pricing.

The National Rail Transportation Policy ("N RTP")<sup>8</sup> seeks "to avoid undue concentrations of market power." 49 U.S.C. § 10101a(13). The proposed UP/SP merger runs counter to this goal. If the UP/SP merger is approved, there will be but two major carriers serving the western United States coal market -- UP/SP and the recently merged BNSF.<sup>9</sup> Accordingly, in reaching its decision in this matter, the Board must consider the cumulative anti-competitive effect of these two, back-to-back, mega-mergers on the western coal transportation market. See BN/Santa Fe, supra, Decision No. 39, at 7.

The concentration of market power that would exist in the hands of the two remaining western rail systems is very clearly evidenced by application of the Herfindahl-Hirschman

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<sup>7</sup>(...continued)

As the ICC observed "[r]elevant markets must ... reflect commercial realities." Santa Fe/SP, 2 I.C.C.2d at 737. The commercial "realities" for most western coal shippers are that they must obtain coal deliveries originated by one of the three above-named carriers. Applicants' unsupported contentions that the relevant market should be expanded to include Eastern and Midwestern coals is simply an attempt to divert attention from the extensive market power that the three remaining western rail carriers have over western utility coal transportation.

<sup>8</sup> The 15 elements of the N RTP are set forth at 49 U.S.C. § 10101a of the Revised Interstate Commerce Act.

<sup>9</sup> The Utah Railway Company originates coal at a few mines on the western fringe of the Uinta Basin in Utah. It is not a major player as compared to BNSF, UP and SP.



Index ("HHI").<sup>10</sup> An HHI analysis was performed by WCTL's witness Crowley which demonstrates that the current western coal market is extremely concentrated, and will be more so if the pending merger is approved. The pre-merger HHI is 4322; post-merger, that number increases to 4831. WCTL Comments, Crowley V.S., at 8. Together, UP/SP and BNSF would control 96.4% of all western coal traffic. WCTL Comments, at 12. Increases of this magnitude have repeatedly been found to violate the antitrust laws, particularly where, as here, there is past evidence of collusive pricing behavior. WCTL Comments, at 13-15; Crowley V.S., at 8, 13; Borts V.S., at 15.<sup>11</sup>

The net result of the increased market power of UP/SP and BNSF in the western coal transportation market will be duopoly pricing. See WCTL Comments, at 16-18; Crowley V.S., at 9-10; Borts V.S., at 16-19; Weishaar V.S., at 4-5, 14. As WCTL explained in its Comments, and as supported by WCTL witnesses' testimony, UP/SP and BNSF will have the ability to charge higher

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<sup>10</sup> Although Applicants state otherwise, Rebuttal, Narrative, at 178 n.69, the Board can and does look to antitrust principles in judging whether a merger is in the public interest. See, e.g., UP/CNW, supra, at 54 (stating that "[t]he policies embodied in the antitrust laws provide guidance on public interest considerations in control proceedings"); Santa Fe/SP, 2 I.C.C.2d at 727.

<sup>11</sup> As Dr. Borts and Mr. Crowley have testified, the ETSI Pipeline Project case demonstrates that western railroads, like firms in other industries, are fully capable of collusion where their market share is threatened. See ETSI Pipeline Project v. Burlington Northern, Inc., Civil Action No. B-84-979-CA, 1989 U.S. Dist. LEXIS 18796 (E.D. Tex. June 5, 1989). Applicants, of course, conveniently deny that the ETSI litigation is relevant to this merger. See Rebuttal, Narrative, at 184 n.73.

rates to shippers since they will have complete control over the western coal market, including both bituminous and sub-bituminous coal producing regions. The great potential for harm to competition which is posed by this duopoly situation is best summarized by the testimony of Dr. Borts and Mr. Weishaar. Dr. Borts explains that:

... Even where the BNSF and the merged UP/SP would compete directly, there is a serious danger that the intensity of that competition may be relaxed. The result would be increasing rate levels as each of the two carriers seeks to obtain greater profits on the portion of the market they serve rather than aggressively going after the other's market share by lowering rates.

WCTL Comments, Borts V.S., at 8.

Mr. Weishaar, who was Vice President, Sales and Marketing-Energy for the former Chicago and North Western Railway Company ("CNW"), and who has over 30 years' experience in the marketing and pricing of rail transportation service, further describes the manner in which this phenomenon would be likely to occur:

Notwithstanding the huge volumes of coal tonnage moving by rail from the SPRB, the number of individual movements exceeding one million tons is not large -- certainly fewer than 50. Monthly delivered-cost data pertaining to these movements are filed by electric utilities with the Federal Energy Regulatory Commission ("FERC"), and approximations of rail rates can be derived from the publicly-available FERC data. The major coal-hauling railroads thus have an acute awareness of what utility coal rate trends are, which in turn is likely to give rise to activity similar to the parallel pricing that occurs in the airline industry with respect to passenger fares.



The consolidation of the western coal-hauling railroads to two major systems will result in more probing of the market for opportunities to raise prices. If one of the two railroads loses a contract as a result of a price increase, it knows it will have another opportunity to bid for the movement within a few years. If it wins, it knows its competitor has not bid aggressively, and that prices may be rising.

This kind of market-probing behavior is more likely to occur in a mature duopoly market such as the market for transportation of SPRB coal, where both participants have relatively equal market shares, contracts are for relatively short terms, and there are enough transactions to eliminate the fear that significant market share will be lost if bids are occasionally "above market" -- but not so many that each of the duopolists cannot generally keep track of what the other is doing in terms of price trends.

WCTL Comments, Weishaar V.S., at 19-20.

The anti-competitive nature of the proposed merger in the already highly concentrated western coal transportation market is clear. Moreover, the adverse rail pricing effects on western coal shippers of such additional concentration in the market would be compounded by the adverse effects of the proposed merger on existing source competition for coal and on the adequacy of unit train coal service in the west, as discussed below.

b. The Proposed Merger Will Eliminate Existing Competition Among PRB and Colorado/Utah Coals.

WCTL, through its witnesses Malhotra and Weishaar, has addressed the effect of the proposed merger on existing competition among the several western coal sources in the PRB, Colorado

and Utah. Mr. Malhotra has 20 years experience in coal marketing, both on the production side (as President of NERCO Coal Company, a major PRB producer) and on the consumption side (as President of Coal Network, Inc., a coal brokerage firm that works closely with both producers and utilities in the midwest and east to develop marketing opportunities into sales transactions). As noted earlier, Mr. Weishaar has over 30 years' experience in the marketing and pricing of rail transportation. Together, the testimony of Messrs. Malhotra and Weishaar provides compelling evidence that the proposed merger will reduce source competition from UP-served mines in the PRB and SP-served mines in Colorado/Utah, and that it will also cause the related loss of aggressive SP pricing for its Colorado/Utah coals.

As witnesses Weishaar and Malhotra have testified, PRB coal competes directly with coal from Colorado/Utah, particularly in the emerging midwestern and eastern "acid rain" market.<sup>12</sup> This competition, in turn, has led to active transportation competition between UP and SP for coal moving from these origins. The effect is to benefit the shippers of coal in the form of lower delivered costs for coal. In the last two years, as the deadline for compliance with the 1990 Clean Air Act Amendments has approached, this competition has intensified. SP has extended the competitive reach of Colorado/Utah coals by

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<sup>12</sup> The "acid rain" market is the market for low-sulfur coal necessary to enable utilities to achieve compliance with the Clean Air Act Amendments of 1990. WCTL Comments, Weishaar V.S., at 7-8; Malhotra V.S., at 3-4.



aggressively pricing its coal traffic through marketing incentives such as the SP "backhaul" or "reload" program. See WCTL Comments, at 23; Weishaar V.S., at 8-9. Messrs. Weishaar and Malhotra have testified, however, that, post-merger, this competition will be eliminated as UP will have a strong incentive to favor its PRB sources over Colorado/Utah coal sources for economic and other reasons. See, e.g., WCTL Comments, Malhotra V.S., at 25-28.

In response to WCTL, Applicants claim that PRB coals do not compete with coal from Colorado/Utah; that SP does not act as a competitive restraint on western coal rail rates; and even that SP has not priced its Colorado/Utah coal transportation service aggressively. In support of their position, Applicants have submitted testimony by four witnesses in an attempt to rebut the testimony of Mr. Weishaar and Mr. Malhotra (among others who have presented similar evidence on behalf of other parties in this proceeding). Specifically, Applicants' witnesses Sansom, Sharp, Nock and Hutton purport to refute the evidence of record which demonstrates that Colorado/Utah coal sources actively compete with coal mined in the PRB such that rail competition for this traffic exists.

Applicants' rebuttal evidence on source competition between Colorado/Utah coal and PRB coal boils down to a few mistaken propositions. First, Applicants argue that because PRB coal has a significantly lower production cost (and minemouth sale price) than western bituminous coal, the latter cannot

compete effectively with the former where both coals can be used in the same power plant boilers. As a corollary to this argument, Applicants assert that western bituminous coal can (and does) compete only with eastern bituminous coal, and thus that the utility bituminous coal market is a separate and distinct market from the sub-bituminous (PRB) coal market. Second, they argue that because UP desires to grow all of its coal business in the future, it will have an incentive to market Colorado/Utah coal aggressively in the markets where it is able to compete with eastern bituminous coal. Both of these arguments miss the mark.

The plain fact is that PRB and Colorado/Utah coals do compete with each other. The degree of direct competition varies with power plant design.<sup>13</sup> If a plant was designed specifically for PRB coal, as many plants located between the Rocky Mountains and the Mississippi River were, PRB coal does indeed have a significant advantage over western bituminous coal due to lower minemouth coal prices.<sup>14</sup> However, in other kinds of power plants -- in particular, plants that were originally designed for high-sulfur bituminous coal -- the two types of coal can and do compete. Moreover, this competition is of recent vintage,

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<sup>13</sup> As WCTL witness Malhotra testified, almost any kind of coal can be burned in almost any kind of power plant boiler. The particular boiler design affects the degree to which modifications may be required to burn a particular coal or whether, for example, low-btu, sub-bituminous PRB coal must be blended with high-btu eastern (or western) bituminous coal in order to avoid a boiler derate. WCTL Comments, Malhotra V.S., at 7, 10-11.

<sup>14</sup> The large number of such plants accounts for the much higher historical production volume of PRB coal compared with western bituminous coal.



because these are the plants, located primarily in the midwest and east, that must switch coal sources (or install scrubbers) in order to comply with the 1990 Clean Air Act Amendments.

Because PRB coal cannot be burned "straight" in most of these plants -- that is, without boiler modifications, boiler derates, and/or the necessity for blending with higher-btu bituminous coal -- it loses much of the "natural" advantage it has in plants where it can be burned straight. It must be assigned delivered-cost "penalties" to account for its 30-35% lower btu content, loss of heat efficiency ("boiler derates"), the cost of necessary modifications to boilers and coal handling systems, et cetera. These penalties serve to narrow the gap in delivered costs (customarily measured in cents per million btu's) between PRB coal and western bituminous coal -- and to enhance the latter coal's competitiveness -- in the many midwestern and eastern power plants that historically have burned high-sulfur bituminous coal. WCTL Comments, Malhotra V.S., at 8-14; Weishaar V.S., at 7-8.

The historical comparative-use data relied upon by Applicants does not measure the present and future competitiveness of PRB and SP-originated bituminous coals. Rail rates play a very large role in the delivered cost of all western coals moving to the midwest and east, due to the great distances involved. Until very recently, rail rates from the PRB have been much lower than rail rates from western bituminous-coal origins, due to the competition between UP/CNW and BNSF following CNW's

entry into the PRB in the mid-1980's.<sup>15</sup> Just as PRB coal penetrated new markets in the late 1980's and early 1990's due to rail rate reductions, so Colorado/Utah coal is now reaching new midwestern and eastern markets due to more aggressive SP rail rates.<sup>16</sup>

Moreover, whether or not a particular utility has actually used Colorado/Utah coal, the fact that it has considered using it (or tested it) serves as a constraint on PRB coal pricing. A particular coal source or type may exert genuine competitive pressure on prices for coal from a rival source, regardless of whether it actually garners a share of a utility's fuel requirements. For example, if a utility requests bids from producers and transporters of coals from different regions (a fact that soon becomes known in the marketplace), this alone can influence the prices offered -- regardless of which coal is actually used. WCTL Comments, Weishaar V.S., at 10. The fact that Colorado/Utah coal is being aggressively marketed in the midwest and east, and that minemouth prices and rail rates for

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<sup>15</sup> Because BNSF was already entrenched in the PRB, UP/CNW marketed their services very aggressively in order to gain market share. At present, UP and BNSF both originate approximately equal volumes of coal at the jointly served PRB mines, which means they are inherently less likely to compete as vigorously for additional business as they did when UP was building market share. WCTL Comments, Weishaar V.S., at 16-18.

<sup>16</sup> In addition, minemouth prices for Colorado/Utah coals are also dropping due to greater efficiency in mining operations (efficiency arising from, for example, new longwall mining systems). This is a recent phenomenon, and it further enhances the competitiveness of Colorado/Utah coal with PRB coal. WCTL Comments, Malhotra V.S., at 28-29.



this coal have been reduced in the recent past, has had a direct and positive influence on delivered costs for all western coals -- including sub-bituminous (PRB) coal.

In the final analysis, it is instructive to contrast the witnesses who have asserted that Colorado/Utah coal does not compete with PRB coal with the witnesses who say the two coals do compete with each other. On the non-competitive side are two in-house coal marketing witnesses for UP and SP, and two outside consultants -- none of whom are actually involved in the buying or selling of coal. On the other side are the actual coal users, represented by the numerous electric utilities who either are participating actively in this proceeding in opposition to the merger, or who have recently used (or actively considered using) both Colorado/Utah and PRB coal.<sup>17</sup> Which category is the more believable?

Finally, Applicants' witnesses contend that, in spite of the inherent cost (and revenue) advantages that a merged UP/SP will gain by transporting PRB coal in preference to Colorado/Utah coal, UP will aggressively market its Colorado/Utah coal transportation service after the merger in order to increase this commodity's volume. This claim is simply not credible. Economics will control the decision, and in this case, economics

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<sup>17</sup> Seventeen utilities in the latter category are identified, and discussed, in Mr. Malhotra's Verified Statement on behalf of WCTL. WCTL Comments, Malhotra V.S., at 15-23. As President of Coal Network, Inc., Mr. Malhotra himself is involved on a daily basis in the purchase of a variety of coals from different sources on behalf of numerous electric utilities.

clearly favor PRB origins over Colorado/Utah origins. See WCTL Comments, at 20-23. Both Messrs. Malhotra and Weishaar have testified that a merged UP/SP can maximize both its revenues and its profits by hauling more PRB coal and less Colorado/Utah coal. WCTL Comments, Malhotra V.S., at 26-27; Weishaar V.S., at 20-23.

Simply put, if UP/SP controls transportation from Colorado/Utah origins in addition to PRB origins, UP/SP will make the rational economic choice to maximize its return -- and it will have the ability to manipulate rail rates in order to make one coal source more competitive than the other.<sup>18</sup> An independent SP clearly has an incentive to promote its own coal origins, which are limited to Colorado/Utah mines. SP thus serves as a check, or cap, on the pricing of PRB coal by both UP and BNSF. If SP is eliminated as an independent originator of coal from the largest western coal-producing region outside the PRB, UP and BNSF will have unprecedented opportunities to engage in anti-competitive duopoly pricing behavior.

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<sup>18</sup> An example from Mr. Nock's Verified Statement in Applicants' Rebuttal demonstrates this fact. Table 4 on page 25 of Mr. Nock's testimony shows that, using representative minehead prices, the same rail rate produces a delivered cost of 107¢/MMBTU for Colorado/Utah coal, but only 97¢/MMBTU for PRB coal. However, if a delivered cost of 107¢ is sufficient to induce a utility to switch to western low-sulfur coal (whether bituminous or sub-bituminous), UP could raise its PRB rail rate by \$1.50 per ton and this would still produce a lower delivered cost (106¢/MMBTU) than that for Colorado/Utah coal. (Of course, this example assumes both coals can be burned by the utility without boiler modifications, and that rail competition for the movement of the PRB coal would not prevent UP from raising its PRB rate. Both of these assumptions are clearly valid in numerous situations).



c. The Proposed Merger Will Exacerbate Existing Service Problems In The Central Corridor.

WCTL has previously expressed its concerns regarding the likely further decline in the quality of rail service over UP's Central Corridor if the UP/SP merger is approved. See WCTL Comments, at 24-26. Under the governing statute, the very first of the factors that the Board must consider in determining a proposed merger's consistency with the public interest is the effect of the merger on the adequacy of transportation to the public. See Lamoille Valley R.R. Co. v. I.C.C., 711 F.2d 295 (D.C. Cir. 1983).

Serious service problems presently exist with respect to PRB coal traffic originated by UP. These problems stem from inadequate track capacity to handle the growth in PRB coal traffic over the past decade, and they have been exacerbated by UP's acknowledged inability to assimilate CNW in a timely manner following its acquisition of that carrier over a year ago. See WCTL Comments, Weishaar V.S., at 25-26; Lyman V.S., at 8, 13. While the UP/CNW merger was approved amidst promises of better service and benefits to the shipping public, see UP/CNW, supra, at 67-68, in fact, service deteriorated badly. WCTL Comments, Lyman V.S., at 11.<sup>19</sup> The UP/CNW merger, in a nutshell, has been a service disaster.

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<sup>19</sup> Cf. WCTL Comments, at 26, citing, Weishaar V.S., at 26 (stating that UP's service problems caused UP to revise its SPRB coal tonnage projections for 1995 several times throughout the year, with actual 1995 tonnage reflecting a substantial decrease from its mid-year projection).

These UP service problems are likely to get worse if UP acquires SP. For example, WCTL's witness Lyman, a former chief transportation officer of Santa Fe, testifies concerning the increase in traffic congestion along the UP's Central Corridor that would result from the merger. Mr. Lyman explains:

... [F]ollowing a merger of UP and SP[,]  
traffic over the UP [C]entral [C]orridor  
lines will increase significantly from the  
levels assumed in the Operating Plan. Par-  
ticularly given that coal traffic is assigned  
no greater priority than other traffic and,  
indeed, usually gives way to time-sensitive  
intermodal traffic, the increased traffic  
inevitably will lead to higher cycle times  
for coal shippers. In their Operating Plan  
... Applicants are projecting transit times  
to Midwestern destinations from Uinta Basin  
and PRB origins significantly lower than  
those recently experienced by coal shippers  
... I come to the opposite conclusion: ab-  
sent expanded capacity, UP/SP transit times  
for coal moving on the [C]entral [C]orridor  
are more likely to get worse than better. ...

WCTL Comments, Lyman V.S., at 15-16. Accordingly, Mr. Lyman concludes that "if the UP/SP merger is effected in the manner planned, coal shippers who depend upon service via the [C]entral [C]orridor will see the quality of that service deteriorate, particularly with respect to unit train cycle times." Id. at 4.

As WCTL witness Weishaar notes, SP is a much larger carrier than CNW was, and Applicants' Operating Plan indicates that numerous changes are planned with respect to the routing and manner of operation of several different categories of traffic, including coal, intermodal, automotive and manifest traffic. WCTL Comments, Weishaar V.S., at 27; Lyman V.S., at 5-6. Much of SP's originated coal traffic moving to the midwest will be



shifted to UP's Central Corridor main line via North Platte, Nebraska, thus adding to the congestion on the principal line used by UP in transporting PRB coal traffic.

In addition to existing service problems, UP/SP are unprepared for future traffic growth in the Central Corridor. Their Operating Plan is predicated on 1994 traffic volumes. However, SP expects near-term growth in its originated coal traffic of at least five trains per day, and UP forecasts growth in its PRB coal traffic of 16 trains per day over the 1994 level by the end of 1997, as well as growth in other commodities. WCTL Comments, Lyman V.S., at 9-10.

Applicants' response to WCTL's service concerns consists of vague statements, primarily by witness King, to the effect that UP's current service should improve due to investments in additional coal-related capacity, reductions in switching of other traffic at yards such as North Platte, et cetera. Rebuttal, King R.V.S., at 43-47. Moreover, Mr. King does not indicate that UP is prepared to handle future traffic growth, and his statements concerning UP's future plans to add coal capacity (which could take years) are not binding commitments.

A further concern related to service involves SP-originated coal from Colorado/Utah. SP presently has two routes from central/western Colorado and Utah over the Continental Divide to points east of the "Front Range": the line from Dotsero, Colorado to Denver via the Moffat Tunnel, and the line

from Dotsero to Pueblo via the Tennessee Pass.<sup>20</sup> SP-originated coal traffic destined for points east (and south) of Colorado presently moves over the Tennessee Pass line -- but UP plans to abandon this line after the merger, and shift all of the coal traffic that presently uses this line to the Moffat Tunnel line. This will add to congestion on the Moffat Tunnel line (as well as on UP's main line across central Nebraska via North Platte), which will exacerbate service problems already being experienced by coal shippers on that line.

Applicants argue that the Tennessee Pass line is a difficult line to operate because of heavy grades. However, it has been used successfully for many years by SP and by its predecessor, the Denver & Rio Grande Western ("DRGW"), and at a minimum, represents an alternate route that can be used if congestion or service problems occur on the Moffat Tunnel line. WCTL notes that Montana Rail Link, which has filed a Responsive Application seeking to acquire all of the former DRGW lines in Colorado and Utah, has represented that it would continue to operate over the Tennessee Pass line if its application is granted. WCTL believes this alternative is preferable to abandonment of this important line.

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<sup>20</sup> These two lines are connected on the east by SP's so-called "Front Range" line, which extends between Denver and Pueblo.



2. The Merger Offers No Benefits To Western Coal Shippers.

Applicants argue that the "public interest" standard is met in this case because the merger will produce cost savings that will "largely" be passed on to shippers. Rebuttal, Narrative, at 3-4. However, any cost savings that Applicants may experience as a result of the merger would benefit the public served by Applicants only if those cost savings are passed along to the public in the form of lower rates. Despite Applicants' rhetoric that "efficiency savings are largely passed on to shippers," see id. at 4, Neither the Railroad Merger Application nor Applicants' Rebuttal filing contains representations that any of the purported merger-generated cost savings would actually flow through to coal shippers in the form of rate reductions.<sup>21</sup> In fact, the opposite can be expected to occur.

As explained by WCTL's witness Borts:

... While the Merger Application speaks of cost savings, there is little indication that western coal traffic will experience cost

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<sup>21</sup> Applicants' witness Whitehurst's testimony includes an analysis suggesting that for Class I Railroads generally, approximately fifty percent (50%) of railroad productivity gains have been passed through to shippers in the period 1983-1994. Mr. Whitehurst's analysis is seriously flawed because it fails to hold the mix of traffic constant, and it does not factor out inflation, with the resultant effect of overstating the gains passed through to shippers. Referring, for example, to line 1 of Mr. Whitehurst's Table 6 (Rebuttal, Whitehurst R.V.S., at 19), 63.28% of productivity improvements are shown as being passed through to shippers for the period 1983-1994. Mr. Whitehurst's workpapers show that this is based on a reduction in expenses of 19.5% and a reduction in revenues of 12.4%. However, when inflation is taken into account, the reduction in expenses is actually 41.6%, so the percent passed through is only 29.8% (12.4% ÷ 41.6%). See HC123-100008.

reductions, or that cost savings, if achieved, will be passed on to coal shippers in the form of lower freight rates.

Indeed, the reduction in the number of major rail carriers in the West poses a very serious threat of higher freight rates on coal, because of the increased market power the remaining railroads will enjoy. The merger of Union Pacific and Southern Pacific will increase concentration in the western coal transportation market, and decrease the competitive coal transportation alternatives available to western coal shippers. Such increases in concentration and decreases in competition are bound to lead to higher freight rates for coal shippers. Except in situations where strong competition exists, the bulk of any cost savings associated with the merger will be kept by the railroads.

WCTL Comments, Borts V.S., at 2-3.

Applicants further state that coal shippers will benefit from "single-line operations and marketing." Rebuttal, Narrative, at 221. However, the claimed benefits from single-line service are largely illusory with regard to coal unit train traffic. Unit train coal service is already extremely efficient whether it is single-line or joint-line. As Applicants' witness Sharp acknowledged in his deposition, because unit train coal traffic is already highly efficient, it will not stand to benefit significantly from claimed single-line efficiencies. See Sharp Dep. Tr., at 27-29 (dated February 13, 1996).<sup>22</sup>

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<sup>22</sup> As required by the Board, relevant deposition transcript excerpts cited herein are attached hereto in the Appendix.



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C. SP Is And Will Continue To Be A Viable Railroad.

While Applicants "cry the blues" about SP's allegedly desperate financial straits, the fact remains that SP is in no danger of folding. The touting of SP's dire circumstances appears to be no more than a fallback position which SP willingly adopts, at its convenience, in merger proceedings. See Santa Fe/SP, 2 I.C.C. 2d 709 (1986). WCTL, and its witnesses Crowley and Weishaar, have addressed the weaknesses of Applicants' arguments in this regard, see WCTL Comments, at 36-37, and like the Department of Justice,<sup>23</sup> WCTL believes that predictions of SP's imminent demise are greatly exaggerated.

The applicants in Santa Fe/SP argued that SP was a failing firm, but the ICC rejected this argument in turning down that merger. Since Santa Fe/SP, SP has continued to operate, has undertaken numerous capital improvements, and has been an effective competitor -- as evidenced by its traffic growth (particularly in coal) during recent years.

An interesting analogy to SP's present claims of precarious financial status is presented by CNW. During the 1960's and 1970's, CNW was regarded as a marginal carrier, and

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<sup>23</sup> DOJ's witness Eileen Zimmer concludes (i) that "SP is likely to survive for the foreseeable future and will remain a significant competitor;" (ii) that "[a]bsent a merger with UP, SP is likely to have other sources of funding available for additional capital expenditures;" and (iii) that "SP has not explored alternatives to the proposed transaction that are available to it, including a sale of itself in whole or in part. SP's rail assets would not likely exit the rail market."

unlikely to survive.<sup>24</sup> It was surrounded by intramodal competitors, had a short average length of haul, and suffered from a poor physical plant compared with larger western carriers. See, e.g., Chicago and North Western Transportation Company -- Abandonment Exemption between Stanwood and Tipton, Iowa, 348 I.C.C. 708, 713 (1976) (noting that CNW was a financially marginal railroad); Chicago and North Western Transportation Company -- Abandonment between Irvington and Bennington, Nebraska, 348 I.C.C. 445, 451 (1976). Yet it did survive -- and even thrive, by obtaining access to the PRB and marketing its service aggressively -- until its merger last year with UP.

SP's claims of financial woe in this proceeding are no more valid today than they were at the time of the Santa Fe/SP merger proceeding. The ICC rejected such arguments in Santa Fe/SP, and the Board should reject them here as well.<sup>25</sup>

D. The BNSF Settlement Agreement And The CMA Settlement Agreement Do Not Protect The Rights Or Interests Of Western Coal Shippers.

As evidenced by the BNSF Settlement Agreement and the Chemical Manufacturers Association ("CMA") Settlement Agreement, Applicants have acknowledged that the proposed merger is anti-

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<sup>24</sup> Applicants' witness Barber acknowledged that CNW was not as strong during the 1950's and 1970's as it would later become when it entered the PRB coal business. See Barber Dep. Tr., at 139-44 (dated January 24, 1996).

<sup>25</sup> Even if these arguments were correct, it is obvious, from the many requests for divestiture conditions filed in this proceeding by various other railroads, that willing buyers exist for many parts of the SP. Its essential services clearly will be continued regardless of whether it merges with UP.



competitive in several respects. These agreements, however, do not address many of WCTL's concerns, as explained below.

1. The Trackage Rights Compensation  
Established In The BNSF Settlement  
Agreement Should Be Modified To Protect  
Competition.

WCTL, through its witness Crowley, has demonstrated that the trackage rights fee under the BNSF Settlement Agreement is set at a level that will prevent BNSF from effectively competing for traffic on the trackage rights lines. See WCTL Comments, at 26-32. As Mr. Crowley explains, the fee for unit train coal traffic, as set by the BNSF Settlement Agreement, allows Applicants to recover far more than their "below-the-wheel" costs. As a result, BNSF will clearly not be able to compete on equal terms for traffic covered by the Settlement Agreement, and the anti-competitive effects of the merger will not be alleviated. WCTL has submitted evidence which shows that in order to place BNSF on equal footing with the merged UP/SP, the fee should be set at 1.48 mills per gross ton-mile. WCTL Comments, Crowley V.S., at 22. A fee at this level would offset the below-the-wheel costs (including a return on investment) that UP/SP would incur for coal traffic moving over the trackage rights lines. Mr. Crowley testified that he believes even this fee level is high based upon his extensive experience in analyzing costs for unit train coal movements.

Mr. Crowley also calculated a trackage rights fee based on the fair market value of SP road property investment (derived

from UP's acquisition cost for SP) of 1.8 mills per gross ton-mile which WCTL proposed as an alternative should the Board insist on a fair market value approach for calculating interest rental. See id. at 29-32.

Applicants' witnesses Whitehurst, Rebensdorf, and Kauders attack various aspects of Mr. Crowley's analysis. However, rather than discrediting WCTL's position, Applicants' rebuttal testimony confirms the excessive level of the compensation.

As the ICC explained in BN/Santa Fe:

The reason for imposing trackage rights as a condition to a merger is to preserve effective competition in markets that would otherwise experience a reduction in competition. As we have stated in cases involving disputes about compensation for trackage rights imposed in mergers, the tenant must be put on an equal footing with the landlord.

BN/Santa Fe, supra, Decision No. 38, at 90.

In his testimony, Applicants' witness Whitehurst recognizes that both SP's and UP's below-the-wheel variable costs are substantially lower than the 3.0 mills per gross ton-mile trackage rights fee in the Settlement Agreement. Mr. Whitehurst calculates SP's below-the-wheel costs at 1.701 mills per gross ton-mile (Rebuttal, Whitehurst R.V.S., at 5, Table 1, line 2, col. 2) and the UP's below-the-wheel costs at 1.109 mills per gross ton-mile (id. at 22, Table 9, line 2, col. 2). These figures are generally consistent with, but lower than, the below-the-wheel costs for SP and UP calculated by Mr. Crowley. WCTL Comments, Crowley V.S., Exhibit TDC-10 (SP costs = 1.743 mills



per GTM (line 19, col. 4 ÷ line 22, col. 5) and UP costs = 1.128 mills per GTM (line 19, col. 3 ÷ line 22, col. 5)).

Mr. Whitehurst also shows that BNSF's below-the-wheel costs are only 1.495 mills per gross ton-mile or approximately one-half of the 3.0 mill trackage rights fee under the Settlement Agreement. Rebuttal, Whitehurst R.V.S., at 5, Table 1, line 2, col. 3. Thus, the 3.0 mill trackage rights fee is vastly higher than the below-the-wheel costs for any of the three railroads in question.

Mr. Whitehurst does not dispute that it is proper to compare these below-the-wheel variable costs in evaluating whether BNSF would be able to compete effectively for traffic under the Settlement Agreement. However, he suggests that BNSF's substantial cost disadvantage for below-the-wheel costs (3.0 mills versus SP's 1.701 mills) is more than offset by BNSF's cost advantage over SP on "above the rail" variable costs. As a result, he concludes that BNSF's variable costs would be essentially the same as SP's 1994 variable costs. Mr. Whitehurst's analysis is deeply flawed both in terms of his data and his theory.

As to data, Mr. Whitehurst is not comparing apples to apples for BNSF and SP (or UP). For SP and UP, Mr. Whitehurst uses 1994 system average URCS costs. However, for BNSF, Mr. Whitehurst doctors the system average URCS costs in a manner that reduces the 1994 unit costs for BN and Santa Fe. Mr. Whitehurst has reduced BNSF's costs for the operating savings projected in

Finance Docket No. 32549, BN/Santa Fe, supra. It appears that he has done this both by reducing costs and increasing volumes, producing a "double whammy" effect on unit costs. Rebuttal, Whitehurst R.V.S, at 3. The projections of savings in the merger case are just that -- projections. The adjustments made by Mr. Whitehurst to BN and Santa Fe historical costs are not appropriate and his BNSF costs are accordingly understated.

Even if it were proper to rely upon the estimates of cost savings and traffic volume gains that might be achieved due to the BN/Santa Fe merger for purposes of Mr. Whitehurst's analysis of whether BNSF would be able to compete effectively with UP/SP, it would also be necessary to adjust UP and SP's historical costs in a like manner. Without such adjustments, there is no basis for a valid comparison.

The best that can be said for the Applicants, based on the cost analysis presented by Mr. Whitehurst, is that the trackage rights fee under the Settlement Agreement is set at a level that would completely offset BNSF's superior cost structure (including the synergies of the BN/Santa Fe merger) and only allow BNSF to "compete" with UP/SP at a cost level equal to SP's 1994 costs. In other words, all of Applicants' rhetoric about the benefits shippers would enjoy because BNSF is the leanest, meanest, most cost efficient competitor available is utter nonsense because the trackage rights fee has been set at such a ridiculously high level that even after the BN/Santa Fe merger-generated cost savings are taken into account, BNSF's cost



Mr. HENDERSON's initial testimony in this proceeding stated that a typical package rights fee fell in the range of \$10 to \$20 per song.

less than 20¢ per car-mile as Mr. Crowley noted, but 7 of those 12 should not be considered comparable to the Settlement Agreement, primarily because they do not involve overhead trackage rights. Despite Mr. Rebensdorf's attempts to provide rationales as to why seven of the agreements he chose to ignore should not be viewed as "comparable" to the Settlement Agreement, the true fact is that none of the trackage rights agreements are really comparable. The avowed purpose of the Settlement Agreement is to make BNSF an effective competitor against UP/SP on the covered lines. Railroads enter into trackage rights agreements in the normal course for numerous reasons that vary widely depending upon specific factual circumstances. It is safe to say that no non-merger related agreements are designed by the participants to satisfy the same goal as that to be served by the Settlement Agreement, or involve anything remotely approaching its scope in terms of miles of track covered.

In any event, the aim of Mr. Crowley's analysis was to show that Applicants are in possession of, and are party to, several trackage rights agreements which set compensation levels lower than the range which Mr. Rebensdorf declared to be reasonable and which Mr. Rebensdorf chose to ignore in his analysis. Mr. Crowley is clearly correct in that regard. While Mr. Rebensdorf quibbles with the comparability of some of the identified agreements, the fact remains that even Mr. Rebensdorf must acknowledge that there are at least five existing agreements which are comparable to the BNSF Settlement Agreement and which



have fees lower than 20¢ per car mile (Mr. Rebensdorf's lower fee limit). Mr. Rebensdorf's analysis cannot, therefore, be viewed as comprehensive and credible.

Mr. Rebensdorf also criticizes Mr. Crowley as to the manner in which he calculated trackage rights compensation for several UP/SP agreements where compensation is based on costs. The thrust of this criticism is that Mr. Crowley should have used actual billings or made calculations based on the traffic using the facilities. In fact, however, Mr. Crowley requested, but was refused, actual billings. See WCTL's First Set of Interrogatories and Document Production Requests to Applicants (dated December 18, 1995), at Interrogatory No. 18 and Document Production Request No. 14 (Applicants' response consisted of producing certain trackage rights agreements; however, no billing or compensation documentation was included in the response). The most notable aspect of Mr. Rebensdorf's testimony on this subject is that although Mr. Rebensdorf goes on at length about the terms of the individual trackage rights agreements involved, he does not provide the actual billing data which he clearly has access to -- despite his criticism of Mr. Crowley on this ground.

Applicants' witness Kauders also responds to Mr. Crowley's testimony. He argues that Mr. Crowley is wrong in asserting that BNSF can only be placed on equal footing with UP/SP if trackage rights compensation is based on variable below-the-wheel costs and that Mr. Crowley's alternative fair market value based trackage rights fee is flawed in several respects.

As to reliance on variable below-the-wheel costs, WCTL recognizes that the ICC has rejected this approach in the past, but submits that the issue should be re-examined in view of the magnitude of the trackage rights involved in this proceeding (covering nearly 4,000 miles of UP and SP lines). Very simply, to accomplish a level playing field, UP/SP should only recover its costs associated with BNSF's use of its lines.<sup>27</sup> Those costs should include an allocated share of actual maintenance and dispatching expense and a return at the current cost of capital on original investment cost less depreciation. This is the manner in which UP/SP's below-the-wheel costs are determined for traffic that UP/SP moves over the lines. WCTL Comments, Crowley V.S., at 21-23.

It is appropriate to include only the variable portion of road property accounts in calculating such costs. Only the variable portion is consumed by the movement of traffic over the line. By definition, the fixed costs do not change with the volume of traffic and cannot properly be allocated to individual units of traffic. Id. at 29, n.21.

Mr. Kauders also criticizes the manner in which Mr. Crowley calculated a fair market value based trackage rights fee. Rebuttal, Kauders R.V.S., at 53-70. His principal points are that there is no sales price for UP that can be used to establish a fair market value for the UP system, and that the interest rate

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<sup>27</sup> Applicants' witness Whitehurst's analysis recognizes the appropriateness of using variable costs in evaluating ability to compete, and thus supports this approach.



used should be pre-tax rather than after-tax. As to UP's fair market value, WCTL explained that there was no available data to support a UP fair market value and suggested that the SP-derived figure of 1.8 mills per gross ton-mile be used until such time as UP might present evidence as to its actual costs and the fair market value of the involved lines.<sup>28</sup> Mr. Kauders does not respond with a calculation, based on the necessary UP data, that develops a fair market valuation for the UP lines. He does not provide net investment, annual depreciation expense, or traffic volumes for the lines in question, or the UP's effective tax rate. Rather, he presents annuity method and replacement cost new less depreciation method calculations, neither of which are reflective of current fair market value,<sup>29</sup> as the ludicrous numbers which Mr. Kauders produces demonstrate.<sup>30</sup>

With regard to the use of an after-tax cost of capital, as reflected in Mr. Crowley's testimony, this is consistent with the 1991 trackage rights agreement between UP and SP for track

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<sup>28</sup> As Mr. Crowley explained, he was unable to develop a fair market valuation for the UP lines. Efforts to obtain the information for only a small portion of the lines through discovery were completely frustrated by UP. WCTL Comments, Crowley V.S., at 21 n.11, 31.

<sup>29</sup> What they most reflect is the performance of the indices upon which Mr. Kauders relies.

<sup>30</sup> As WCTL witness Weishaar has testified, the trade press reports coal unit train rates as low as 7.5 mills per revenue ton-mile. WCTL Comments, Weishaar V.S., at 30-31. Mr. Kauders calculates costs for the track alone at "as much as 9.05 mills per gross ton-mile." Rebuttal, Kauders R.V.S., at 54. On a revenue ton-mile basis, Mr. Kauders' below-the-wheel costs are more than 200% of such coal unit train rates!

between Alazon and Weso, Nevada. WCTL Comments, Crowley V.S., at 31.

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The trackage rights compensation under the Settlement Agreement is inherently anti-competitive because it does not track UP/SP's below-the-wheel costs. As a result, it rewards UP/SP with monopoly rents for the many lines covered by the Settlement Agreement, and denies BNSF the ability to operate over these lines under economic conditions comparable to UP/SP. See UP/MP/WP, 366 I.C.C. at 590; BN/Santa Fe, supra, Decision No. 38, at 90.

2. The BNSF Settlement Agreement Should Be Modified To Protect Shippers With Build-Out Options.

The purpose of the BNSF Settlement Agreement is to preserve the opportunity for service from two competing carriers for so-called "two-to-one" shippers who, at present, are served by both UP and SP. However, for the most part, the BNSF Settlement Agreement fails to protect shippers who are presently served by UP (or SP) but who, absent the UP/SP merger, could build out to the other merger applicant in order to obtain two-carrier service.

A few such shippers are accorded "two-to-one" treatment in that BNSF would be able to serve their facilities if build-outs or build-ins are constructed. However, the only such situations involve build-out or build-in plans that are in an extremely advanced stage. See Peterson Dep. Tr., at 80-81 (dated



February 5, 1996); Rebensdorf Dep. Tr., at 320-30 (dated January 23, 1996).<sup>31</sup> Thus, a total of only four build-out/build-in situations are accorded two-to-one status under the BNSF Settlement Agreement, which is a very limited subset of shippers -- all as determined at Applicants' sole option. Peterson Dep. Tr. at 56, 260 (dated May 8, 1996).

WCTL submits that all shippers with potential build-in or build-out options should be protected by the BNSF Settlement Agreement. The Agreement as it is now written is too narrow, and is patently unjust to shippers now served by UP or SP who could build a spur to the other carrier in order to gain rail competition at their facilities. The protection of all shippers with potential build-outs is also entirely consistent with the relief granted in BN/Santa Fe to certain shippers served by one of the proposed merger partners, but with build-out options to the other merger partner (and thus in a position similar to that of acknowledged "two-to-one" shippers). See BN/Santa Fe, supra, Decision No. 38, at 37-38, 68, 98 (providing Oklahoma Gas & Electric Company ["OG&E"] and Phillips Petroleum Company ["PPC"] with trackage rights to points on BN to which these companies

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<sup>31</sup> Mr. Peterson is the Senior Director-Interline Marketing for UP and Mr. Rebensdorf is the Vice President of Strategic Planning for UP who was the Applicants' primary representative in the Settlement Agreement negotiations. These two individuals are very knowledgeable about how UP identified "two-to-one shippers." In their Rebuttal, Applicants' put a new slant on the "two-to-one" shipper identification issue -- i.e., Applicants now state that in identifying "two-to-one" shippers, they considered "whether a build-in was feasible or had had an effect on rates." Rebuttal, Narrative, at 148. This new spin is contradicted by Applicants' own witnesses, however.

could build-out to obtain two-carrier, and thus competitive, rail service).

In BN/Santa Fe, conflicting claims concerning the feasibility of a build-out arose, and the ICC resolved the conflicting evidence in favor of the shipper. The ICC was presented with a disagreement between PPC and BN as to whether a 32.5-mile build-out from a PPC refinery at Borger, Texas to BN was feasible. The ICC held for PPC as follows:

We will impose a condition to maintain PPC's current competitive situation as respects the prospective PNR build-out. Though evidence is conflicting, a build-out option may be feasible. If so, it would have given PPC leverage to negotiate with Santa Fe for lower rates.

BN/Santa Fe, supra, Decision No. 38, at 98 (emphasis added).

As WCTL noted in its Comments, there are sound policy reasons for the conclusion reached by the ICC with respect to PPC. Disagreements are common between railroads and captive customers as to whether a particular build-out opportunity is feasible. If the practice were to resolve such disagreements in favor of the railroad, a carrier proposing a merger would have a strong incentive to claim that any prospective build-out to its merger partner is not feasible. If doubts as to feasibility are resolved in favor of the shipper, however, its own subsequent actions or inactions will determine, in a neutral manner and based on market forces, whether the build-out is a realistic competitive option.



It is wholly inappropriate to place the feasibility of shippers' competitive options at the whim of Applicants. If the Board authorizes potential ENSF service to all UP-captive or SP-captive shippers near the lines over which BNSF will receive trackage rights under the BNSF Settlement Agreement that have possible build-outs (upon actual construction of such build-outs) -- and not just the ones that Applicants have deemed feasible -- each shipper would then have to decide whether or not to proceed with construction of the build-out. If the build-out is not, in fact, feasible, it will not be constructed, BNSF will not gain access to the facility, and UP/SP will suffer no harm as a result of imposition of the condition.

WCTL thus urges the Board to require that the BNSF Settlement Agreement be amended to protect all shippers who might have a build-out opportunity in the manner described above. This will not reduce the public benefits that would otherwise result from the merger -- or increase any shippers' present competitive options over those available today -- because BNSF would not be able to serve any such shipper via its trackage rights except via the build-out. Thus, it meets the criteria of prior merger decisions for granting conditions, as summarized in BN/Santa Fe, supra, Decision No. 38, at 55-56.

3. The CMA Agreement's Arbitration Remedy  
Should Be Extended To Non-CMA Members  
With Build-Out Options.

Applicants' recent settlement agreement with BNSF and CMA -- the "CMA Agreement" -- contains a provision under which

CMA members who have facilities exclusively served by UP, and who seek the right to build out from such facilities to a point on SP (or vice versa) to which BNSF will have trackage rights under the BNSF Settlement Agreement in order to obtain two-carrier service, may seek arbitration of the feasibility of their build-out claim by the Board.<sup>32</sup> Such arbitration may be sought within one year following consummation of the UP/SP merger, or one year following the expiration of a contract covering the traffic in issue that was in effect on the date of the CMA Agreement (April 18, 1996). The legal standard to be applied by the Board in any such arbitration is stated as follows in Section 13 of the CMA Agreement:

... The standard for decision as to whether the Shipper shall be entitled to relief shall be the principles with regard to build-ins articulated by the Interstate Commerce Commission in Finance Docket No. 32549, Decision served Aug. 23, 1995, or, if more favorable to the Shipper, any principles with regard to build-ins articulated by the STB in the Control Case [Finance Docket No. 32760].

Although the arbitration provision is limited to CMA members, Applicants have stated that, should the Board "find cause to do so," they are prepared to extend this remedy to other shippers. Rebuttal, Narrative, at 20.

As articulated by BNSF witness Kalt, the purpose of the CMA Agreement's arbitration provision is to provide a neutral mechanism to resolve disputes over whether a shipper with a

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<sup>32</sup> The CMA Agreement is appended to Volume 1 of Applicants' Rebuttal. The build-out arbitration provision appears at Section 13, pages 4-5, of the CMA Agreement.



build-out option should be treated as a 2-to-1 shipper to which BNSF has access in order to preserve competition.<sup>33</sup> Indeed, Dr. Kalt believes the arbitration provision is consistent both with the essential purpose of the BNSF Settlement Agreement, and with the public interest:

... In the event of disputes, public policy considerations over the protection of competition imply that settings which, economically, satisfy the criteria of a 2-1 location should be protected with replacement service from BN/Santa Fe.<sup>34</sup>

The "public policy considerations" cited by Dr. Kalt clearly mandate that the CMA Agreement's arbitration remedy be extended to cover non-CMA members.<sup>35</sup> Any shipper that is presently served only by UP or SP, and that has a build-out opportunity to a point on one of the lines over which BNSF will receive trackage rights under the BNSF Agreement, is entitled, at a minimum, to have its claim for relief decided by an independent forum at the appropriate time.

If the Board extends the CMA Agreement's arbitration provision to cover non-CMA members, WCTL submits that the arbitration standard needs further definition. Consistent with the relief accorded to PPC in BN/Santa Fe, supra, a shipper

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<sup>33</sup> See BNSF's Response to Inconsistent and Responsive Applications, Response to Comments, et cetera (dated April 29, 1996), Kalt V.S., at 8-9.

<sup>34</sup> Id. Kalt V.S., at 9.

<sup>35</sup> Indeed, other provisions of the CMA Agreement provide for amendments to the BNSF Settlement Agreement that are of general applicability, and whose benefit thus would extend to non-CMA members.

should be required only to make a reasonable prima facie showing of feasibility in order to prevail. Consistent with the NRTP, this will allow market forces to determine the ultimate extent to which coal shippers will benefit competitively from their build-out options.

E. Pro-Competitive Protective Conditions Are Necessary To Alleviate The Anti-Competitive Effects Of The Merger.

It is clear that this merger offers no benefit to coal shippers, and instead, raises substantial competitive concerns. Applicants themselves recognize the severity of the competitive concerns raised in that they have struck deals with several different parties in order to alleviate some of these concerns. Despite the extensive opposition to this merger and its expected anti-competitive effects, WCTL recognizes that the Board may find that, overall, the proposed merger is in the public interest, if its anti-competitive effects can be ameliorated through appropriate protective conditions. If the Board does so find, WCTL requests that the Board impose certain protective conditions. The relief that WCTL seeks is as follows:

1. Divestiture of SP's lines from Provo, Utah, serving coal mines in Colorado and Utah, through Pueblo, Colorado, to Kansas City, Kansas/Missouri, and either its lines from Kansas City through St. Louis, Missouri to Chicago, Illinois, or its trackage rights over BNSF from Kansas City to Chicago, to an independent rail carrier other than BNSF;
2. In lieu of complete divestiture of the aforementioned Central Corridor lines, a grant of unrestricted trackage rights in favor of an indepen-



dent railroad such as Montana Rail Link, over these Central Corridor lines;<sup>36</sup>

3. A prohibition against the integration of UP and SP rail operations over the Central Corridor until UP can certify to the Board that it is in full compliance, for a period of twelve (12) consecutive months, with its service commitments under its rail transportation contracts for coal transportation;
4. The imposition of a trackage rights compensation fee for unit-train coal traffic under the UP/SP-BNSF September 25, 1995 Settlement Agreement, in the amount of 1.48 mills per gross ton-mile (or, in the alternative, 1.8 mills per ton-mile), in lieu of the 3.0 mills per gross ton-mile contained in the BNSF Settlement Agreement; and
5. The inclusion of shippers with build-out options as protected two-to-one shippers under the Settlement Agreement.

The conditions requested by WCTL are in full compliance with Board precedent. As noted above, the Board will impose conditions, pursuant to 49 U.S.C. § 11344(c), to remedy anti-competitive effects of a proposed merger where:

... [W]e find that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), and that the conditions will ameliorate or eliminate the harmful effects. will be operationally feasible, and will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger.

BN/Santa Fe, supra, at 55-56, citing, UP/MP/WP, 366 I.C.C. at 562-65.

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<sup>36</sup> Montana Rail Link has filed a responsive application which seeks acquisition of (or trackage rights over) these, as well as other, SP lines in the so-called "Central Corridor."

As discussed in this Brief, the proposed UP/SP consolidation will harm the public interest by reducing competition in the western coal transportation market. The conditions requested by WCTL meet the above-quoted standard because (i) the conditions will "ameliorate" some anti-competitive aspects of the merger for western coal shippers (specifically, the conditions will ensure that an independent carrier will have the right to originate Central Corridor coal traffic if UP and SP merge, that adequacy of service for SPRB coal traffic (which is currently tenuous) will not be severely impacted by efforts to integrate UP and SP operations over the Central Corridor as contemplated by Applicants until current difficulties are brought under control; that, for Settlement Agreement trackage rights lines, an appropriate trackage rights fee will be levied which allows BNSF to compete on equal footing with UP/SP; and that shippers with build-out options are treated fairly); (ii) the conditions are "operationally feasible"; and (iii) the conditions will produce positive public benefits in the form of preservation of competition and adequate rail service, which positive public benefits will not substantially impact the purported private benefits which Applicants tout in this merger.

#### IV

#### CONCLUSION

For the reasons discussed in this Brief, and in WCTL's Comments, the proposed UP/SP merger is inconsistent with the



public interest. If the Board approves the merger, WCTL respectfully requests that the Board impose, pursuant to its authority, the protective conditions outlined above to preserve the benefits of western rail competition for western coal shippers, and ultimately, for their ratepayers.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE

By: C. Michael Loftus *C. Michael Loftus*  
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Washington, D.C. 20036

Attorneys for the Western Coal  
Traffic League

Dated: June 3, 1996

## APPENDIX



**Sharp Deposition Excerpts**

1                               BEFORE THE  
2                               SURFACE TRANSPORTATION BOARD  
3                               Finance Docket No. 32760  
4       UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD  
5       COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY  
6                               -- CONTROL MERGER --

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

11                               HIGHLY CONFIDENTIAL

12                               Washington, D.C.

13                               Tuesday, February 13, 1996

14               Deposition of RICHARD G. SHARP, a  
15       witness herein, called for examination by counsel  
16       for the Parties in the above-entitled matter,  
17       pursuant to agreement, the witness being duly  
18       sworn by JAN A. WILLIAMS, RPR, a Notary Public in  
19       and for the District of Columbia, taken at the  
20       offices of Covington & Burling, 1201 Pennsylvania  
21       Avenue, N.W., Washington, D.C., 20044, at  
22       10:05 a.m., Tuesday, February 13, 1996, and the  
23       proceedings being taken down by Stenotype by JAN  
24       A. WILLIAMS, RPR, and transcribed under her  
25       direction.

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1 nature of the study. It was basically an  
2 arm's-length study and my focus was on examining  
3 existing coal consumption and coal transportation  
4 patterns.

5 Q. And, if I were to ask you the same  
6 several questions I just asked with regard to the  
7 SP but substituted the UP, I take it the answers  
8 would be the same?

9 A. They would be.

10 Q. At page 670 of your statement,  
11 Mr. Sharp.

12 MR. LIVINGSTON: I think the record  
13 ought to show that Mr. Sharp has the statement in  
14 front of him and is referring to it.

15 MR. LOFTUS: Thank you.

16 BY MR. LOFTUS:

17 Q. In describing the benefits of the  
18 proposal merger, you start off in your first  
19 sentence and describe as a principal benefit of  
20 the proposed merger the expansion of efficient  
21 single-line routing. Do you see that, sir, down  
22 at the bottom of the page?

23 A. Yes.

24 Q. You say a principal benefit of the  
25 proposed merger is the expansion of efficient,

1 single-line routings that will be made possible  
2 by the expanded network.

3 A. Yes.

4 Q. Would you agree that joint-line service  
5 can be efficient for unit train coal movements?

6 A. Yes.

7 Q. And it can be competitive with  
8 single-line coal movements?

9 A. Yes, it can. There are basically I  
10 think two obstacles with interline service. One  
11 is, if one of the carriers has limited  
12 participation in a movement and doesn't have an  
13 incentive because of that very limited  
14 participation to invest in the movement or to  
15 undertake the efforts needed to provide efficient  
16 operations and, on the other hand, one of the  
17 parties engaged in the interline service have a  
18 conflict of interest, for example, a reason to  
19 prefer their own origins over the origins of  
20 another carrier, in those instances it may be  
21 very difficult to put together efficient  
22 competitive interline service.

23 But, if the carriers do not have a  
24 conflict of interest and both have a substantial  
25 degree of participation in the interline

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1 movement, I do believe that efficient interline  
2 service is possible.

3 Q. And can be competitive with single-line  
4 service?

5 A. Yes.

6 Q. And, in fact, you're familiar with the  
7 fact that the CNW and UP engaged in a number of  
8 interline movements of Western coal; is that  
9 correct?

10 A. Yes. And I think, in fact, prior to  
11 the full consummation of the Union  
12 Pacific/Chicago Northwestern merger, the  
13 movements of WRPI and Union Pacific out of the  
14 Powder River in competition with Burlington  
15 Northern did demonstrate that interline movements  
16 can be certainly for many shippers competitive  
17 with single-line movements.

18 Q. To your knowledge what cost savings are  
19 achieved by converting a joint-line unit train  
20 movement, an interline unit train movement to a  
21 single-line movement by combining the two  
22 participants into one carrier?

23 MR. LIVINGSTON: We're still talking  
24 about coal traffic, coal unit trains?

25 BY MR. LOFTUS:

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**Barber Deposition Excerpts**



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

HIGHLY CONFIDENTIAL

Washington, D.C.

Tuesday, January 24, 1996

Deposition of RICHARD J. BARBER, a  
witness herein, called for examination by counsel  
for the Parties in the above-entitled matter,  
pursuant to agreement, the witness being duly  
sworn by JAN A. WILLIAMS, RPR, a Notary Public in  
and for the District of Columbia, taken at the  
offices of Covington & Burling, 1201 Pennsylvania  
Avenue, N.W., Washington, D.C., 20044, at  
10:20 a.m., Tuesday, January 24, 1996, and the  
proceedings being taken down by Stenotype by JAN  
A. WILLIAMS, RPR, and transcribed under her  
direction.

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1 wonderful book.

2 MR. EDELMAN: Thank you. I don't have  
3 any further questions.

4 MR. ROACH: Rich, I would just like to  
5 make a statement for the record, and that is that  
6 further illumination on the issue of where the  
7 benefits go can be had from Mr. Peterson,  
8 particularly on the issue of how much of the  
9 efficiencies will or won't get passed through as  
10 rate reductions and what assumption was made with  
11 regard to rate changes.

12 This is something that seems as though  
13 a lot of parties have been confused on and I just  
14 want to make that statement and you can see what  
15 he has to say.

16 MR. EDELMAN: I'm certainly glad to  
17 have had the opportunity to provide you with that  
18 opportunity.

19 I'm finished, we can move on to the  
20 next person.

21 (Recess)

22 EXAMINATION BY COUNSEL FOR  
23 WESTERN COAL TRAFFIC LEAGUE  
24 BY MR. MILLS:

25 Q. Mr. Barber, my name is Chris Mills and

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1 I represent the Western Coal Traffic League and a  
2 number of electric utilities including Arizona  
3 Electric Power Cooperative; Central Power & Light  
4 Company; City Public Service Board of San  
5 Antonio, Texas; City Utilities of Springfield,  
6 Missouri; Colorado Springs Utilities;  
7 Commonwealth Edison Company; Entergy Services,  
8 Inc., and its affiliates Arkansas Power & Light  
9 Company and Gulf States Utilities Company; Lower  
10 Colorado River Authority and the City of Austin,  
11 Texas; Texas Utilities Electric Company;  
12 Wisconsin Power & Light Company; and Wisconsin  
13 Public Service Company.

14 As you may gather from that list, my  
15 primary focus will be on coal and the effects of  
16 the merger on coal transportation. But, before I  
17 turn specifically to that subject, I'd like to  
18 ask a couple of questions about Chicago  
19 Northwestern or CNW, following up on Mr. Molm's  
20 questions?

21 A. You said Chicago Northwestern CNW?

22 Q. Or CNW.

23 A. Okay. I thought it was another rail  
24 and I was trying to figure out what it was.

25 Q. In addition to the proceedings that you

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1 appeared in on behalf of the CNW or UP that  
2 Mr. Molm asked you about, you also appeared on  
3 behalf of the CNW in connection with the  
4 proceedings involving the acquisition of the  
5 Chicago, Milwaukee, St. Paul, & Pacific Railroad,  
6 did you not?

7 A. Yes, or at least one stage of that. I  
8 think that was broken up into a couple of parts,  
9 wasn't it, that there was some line bought which  
10 was split off from the proceeding at which I did  
11 testify.

12 Q. I'm referring to the proceedings  
13 involving the acquisition of the Milwaukee Road  
14 by the CNW. There was also a proposal to acquire  
15 the Milwaukee Road by the Soo Line.

16 A. Okay, I remember.

17 Q. If memory serves me correctly, that  
18 would have been in approximately 1987; does that  
19 sound about right to you, give or take a year or  
20 two?

21 A. I don't have a sharp year recollection  
22 of it, but that could be about right.

23 Q. Is it fair to say that, as a result of  
24 your appearances in these proceedings on behalf  
25 of the CNW and in the other proceedings you

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1 testified to earlier on behalf of Union Pacific,  
2 that you have acquired a substantial knowledge of  
3 the CNW's route structure, operations, finances,  
4 et cetera, over the last years?

5 A. Some knowledge of it, but I have not  
6 been in -- doing work every year and only in some  
7 things in other years. And some of it your  
8 question implies goes back. So I would have to  
9 say my knowledge has kind of ebbed and flowed.

10 Q. I want to tell you that I have no  
11 personal or vested interest in how you answer  
12 this question, but would it be fair to say that,  
13 prior to the Interstate Commerce Commission's  
14 approval of the Union Pacific's application to  
15 control CNW which resulted in a merger of the new  
16 companies last spring, that the CNW was managed  
17 and operated independently of the Union Pacific?

18 A. Yes.

19 Q. Is it fair to say that 20 to 25 years  
20 ago, the CNW was regarded as a rather marginal  
21 carrier?

22 A. I don't know whether that would be a  
23 fair word to put. Certainly roads like the  
24 Milwaukee and the Rock Island were viewed in that  
25 period as weak. Northwestern was stronger than

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1 they are -- than they were, although not as  
2 strong as it was later to become when it  
3 developed the coal and WRPI business later in  
4 that time period.

5 Q. You're referring to CNW's entry into  
6 the Powder River Basin in the mid 1980s, are you  
7 not?

8 A. Yes.

9 Q. And, prior to that time or during let's  
10 say the period of the 1970s, is it fair to say  
11 that the CNW's principal competitors in its  
12 territory were railroads such as the Milwaukee  
13 Road and the Rock Island?

14 A. I don't think that would be complete.  
15 They also certainly competed to some extent with  
16 the Soo and with the BN and we have to remember  
17 also that CNW has operations south from Chicago  
18 including those into the coal fields in Illinois,  
19 where it competes with a variety of other  
20 railroads in those areas and in the nearby states  
21 that can supply coal that competes with Illinois  
22 coal.

23 Q. Let me refer you to pages 442 and 443  
24 of your testimony appearing in volume 2 of the  
25 application. In particular I'm focusing on the

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1 carryover paragraph at the bottom of page 442 and  
2 carrying over to 443 which I believe Mr. Edelman  
3 asked you about which indicates that for years SP  
4 has been regarded as a high cost railroad. And  
5 there's a quotation from a registration statement  
6 by its management in 1994 that says, at the time  
7 of its acquisition, SPT was burdened with excess,  
8 unprofitable and low density track, inefficient  
9 operations, and a generally higher and less  
10 competitive cost structure than other Class I  
11 railroads.

12           Isn't it true that a similar statement  
13 could have been made about the CNW during the  
14 1970s?

15           A. As I sit here, I can't confirm that.  
16 They probably had some excess track. They did  
17 have a profitable -- I would gather a very  
18 profitable operation as it involved connections  
19 with UP after it had forged its line haul  
20 relationship with UP.

21           My impression is that CNW was really  
22 operating quite efficiently at that time. Their  
23 operation across Iowa from Omaha, Council Bluffs  
24 into Chicago I think was well run. Their costs  
25 were higher. But I think I would say, subject to

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1 fuller exploration which I obviously haven't had  
2 a chance to do it, that their margin was better  
3 than SP's margin. So there are some similarities  
4 and some I think dissimilarities.

5 Q. Would you agree that a number of  
6 financial analysts in the late 1960s or early  
7 1970s predicted CNW's demise within the ensuing  
8 decade?

9 A. I don't recall. But certainly at that  
10 time, when railroads like Milwaukee and Rock  
11 Island were in trouble, some may have felt that  
12 way about the Northwestern. But I recollect that  
13 others thought that the Northwestern would  
14 inherit a lot of that business because it was  
15 doing better, even if it wasn't a giant, but that  
16 it could pick up business from Rock Island, pick  
17 up business from Milwaukee, compete and improve  
18 its position.

19 Q. In any event it did manage to hang  
20 around until the Powder River Basin coal came  
21 around, didn't it?

22 MR. ROACH: Object to the form of the  
23 question.

24 THE WITNESS: I really don't think the  
25 word hang around is quite correct. I think that

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**Peterson Deposition Excerpts**

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

11                               HIGHLY CONFIDENTIAL

12                               Washington, D.C.  
13                               Monday, February 5, 1996

14               Deposition of RICHARD B. PETERSON; a  
15       witness herein, called for examination by counsel  
16       for the Parties in the above-entitled matter,  
17       pursuant to agreement, the witness being duly  
18       sworn by JAN A. WILLIAMS, RPR, a Notary Public in  
19       and for the District of Columbia, taken at the  
20       offices of Covington & Burling, 1201 Pennsylvania  
21       Avenue, N.W., Washington, D.C., 20044, at  
22       10:10 a.m., Monday, February 5, 1996, and the  
23       proceedings being taken down by Stenotype by JAN  
24       A. WILLIAMS, RPR, and transcribed under her  
25       direction.



BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

---

**BRIEF OF THE WESTERN COAL  
TRAFFIC LEAGUE IN OPPOSITION  
TO THE PROPOSED UP/SP MERGER**

Pursuant to the procedural orders issued by the Surface Transportation Board ("STB" or "Board") in this proceeding, the Western Coal Traffic League ("WCTL") hereby submits this Brief in opposition to the proposed merger of Applicants Union Pacific Railroad Company ("UP") and Southern Pacific Transportation Company ("SP") (jointly, "Applicants" or "UP/SP").<sup>1</sup>

I

**SUMMARY OF WCTL'S POSITION**

WCTL's identity and interest are more fully set forth in its Comments. Briefly, however, WCTL is a voluntary associa-

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<sup>1</sup> "Applicants" include UP and SP, and other related corporate entities which have been identified as Applicants in the Board's Decision No. 1 in this proceeding (at 1 n.1).

STB

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1 come forward, and we'll study it, talk about it.  
2 And, if we've made a mistake, we'll consider that  
3 as well.

4 Q. Now, Mont Belvieu is one of the points  
5 that you are granting access to BN/Santa Fe; am I  
6 correct?

7 A. Correct.

8 Q. And Mont Belvieu, does it have a spur  
9 line or industrial line to both carriers?

10 A. Mont Belvieu is a situation where we  
11 looked additionally -- and maybe I should have  
12 mentioned this in my overall description of our  
13 approach, but where not only is there  
14 two-railroad service to a shipper but is there  
15 likely be to be two-railroad service to a shipper  
16 in the near future.

17 And so a decision was made that our  
18 build-in to Mont Belvieu, UP building its track  
19 in to jointly serve those heretofore exclusively  
20 SP shippers, was so far downstream, that we had  
21 been negotiating with the shippers in good faith,  
22 we had progressed an ICC application, we had done  
23 track designs, we had talked about environmental  
24 problems and had serious ongoing discussions with  
25 the shippers, the feeling was let's take the

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1 conservative approach and also include Eldon and  
2 Mont Belvieu as two-to-one points, even though  
3 today, you know, they are not precisely  
4 two-to-one points.

5 Q. Are there any other situations like  
6 Mont Belvieu where UP was proposing to build a  
7 line in to a customer served by SP?

8 A. Well, along with thinking about the  
9 Mont Belvieu situation, we looked for any and all  
10 other situations, because, if we had found one,  
11 then we would have treated it the same way, if  
12 the facts were the same. But we didn't. We  
13 couldn't find any other situation that was even  
14 remotely close to the Mont Belvieu situation.

15 Q. And what was the length of the track  
16 approximately involved in the Mont Belvieu  
17 circumstance?

18 A. Frankly I'm not sure. We didn't use  
19 length of track as a criteria. It's not  
20 particularly long, I think it's less than ten  
21 miles.

22 Q. Is it eight miles?

23 A. I could find out the exact miles for  
24 you, but I don't know them.

25 Q. Would you.

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

11                               HIGHLY CONFIDENTIAL

12                               Washington, D.C.

13                               Wednesday, May 8, 1996

14               Deposition of RICHARD B. PETERSON, a  
15       witness herein, called for examination by counsel  
16       for the Parties in the above-entitled matter,  
17       pursuant to agreement, the witness being duly  
18       sworn by JAN A. WILLIAMS, a Notary Public in and  
19       for the District of Columbia, taken at the  
20       offices of Covington & Burling, 1201 Pennsylvania  
21       Avenue, N.W., Washington, D.C., 20044, at  
22       10:05 a.m., Wednesday, May 8, 1996, and the  
23       proceedings being taken down by Stenotype by  
24       JAN A. WILLIAMS, RPR, and transcribed under her  
25       direction.

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1 situations, industrial site No. 2 and industrial  
2 site No. -- let's say industrial site No. 2 has  
3 a hypothetical build-out to the SP line.

4 A. Okay.

5 Q. Now, I know you all have tried to  
6 diligently find out those situations where that  
7 existed and where it did exist you gave BN/Santa  
8 Fe access; is that correct?

9 A. Yes, we searched for all those  
10 locations and we've agreed to open up I believe  
11 four locations.

12 Q. Four on top of the how many did you  
13 open up before that, do you remember?

14 A. Well, it's two on top of -- two on top  
15 of two.

16 Q. So you searched all of UP and SP's  
17 system, entire systems, and you found only four  
18 places that there's potential build-outs that  
19 you're going to give BN/Santa Fe access to?

20 A. That's a long complicated issue here  
21 and that's too simplistic. I mean we searched  
22 the entire UP/SP system, we looked at each  
23 build-out opportunity that we were aware of, and  
24 then determined those where the shipper had  
25 successfully used the threat of a build-out to

1 get -- to successfully negotiate better rates and  
2 have, in fact, a physically feasible build-out.

3 And we identified -- when you said two  
4 initially, I was referring to the Mont  
5 Belvieu-Bayer situation, it's all in the same  
6 area over east of Houston. And then subsequently  
7 we have agreed that we would allow two more  
8 build-outs even though the conditions that I just  
9 described really in my view weren't met. But we  
10 did it to put this issue to rest once and for  
11 all.

12 Q. So you've got four locations where  
13 you're going to give BN/Santa Fe access due to  
14 build-out possibilities?

15 A. Yes.

16 Q. Okay. Now, under the CMA agreement I  
17 believe is that, if a shipper felt that he is  
18 losing a build-out opportunity, he can bring an  
19 arbitration claim; is that correct?

20 A. I would have to go back and read the  
21 CMA agreement which I'm not as intimately  
22 familiar with as I should have been because of as  
23 I say all our application work here in the last  
24 few weeks. So I might need to refer back to  
25 that. But I mean it allows for negotiations

1 percent or 20 percent to keep the business or  
2 whatever.

3 Q. I believe you have testified that, in  
4 the totality of the build-in situations or  
5 build-out situations that you looked at in trying  
6 to determine what were the appropriate two-to-one  
7 places at which the BN/SF would have rights of  
8 access of various kinds, that you ultimately have  
9 as of now come up with four locations where  
10 access to those locations by BN/SF in the realm  
11 of a build-out or a build-in has now been  
12 determined to be part of the transaction. I  
13 refer to Mont Belvieu, Eldon, North Seadrift for  
14 Union Carbide, and the place where ARCO and  
15 Lyondell are located whose name I can't quite  
16 remember?

17 A. Channelview.

18 Q. Channelview. So those four places as I  
19 understand it are the four places that you all  
20 have now agreed would be accessible to BN/SF to  
21 serve through a build-out were such a situation  
22 to arise; in other words, they have the right  
23 under your agreement with them to participate in  
24 a build-out; is that correct?

25 A. Well, I don't believe that's precisely



1 correct. I believe at Mont Belvieu BN/Santa Fe  
2 will have direct rail access. We decided in a --  
3 to go the extra mile or beyond to actually allow  
4 direct two-railroad service to those plants,  
5 because our build-in was so far along, to Eldon  
6 and Mont Belvieu.

7 To Channelview and North Seadrift, that  
8 remedy would be too strong because there's only  
9 sort of this distant threat of a possible  
10 build-in. And so the thing that we've agreed to  
11 is to allow BN/Santa Fe or the shipper to connect  
12 to each other at a point where there had been  
13 talk of connecting to the SP, in one case it's on  
14 a branch line, in another case it's on an  
15 industrial spur.

16 Q. So as of now, if I understand what you  
17 said correctly, BN/SF could connect via build-in  
18 or build-out to these particular shippers at  
19 Channelview based upon there being some  
20 indication that a build-out or build-in was at  
21 least a possibility in those cases; is that  
22 correct?

23 A. Well, I mean they can -- I mean they  
24 can do it. And I'm not sure that in those two  
25 cases -- I'd have to refer to the agreement, I'm

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**Rebensdorf Deposition Excerpts**

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

11                               HIGHLY CONFIDENTIAL

12                               Washington, D.C.

13                               Tuesday, January 23, 1996

14                               Continued deposition of JOHN H.

15       REBENSdorf, a witness herein, called for  
16       examination by counsel for the Parties in the  
17       above-entitled matter, pursuant to agreement, the  
18       witness being previously duly sworn, taken at the  
19       offices of Covington & Burling, 1201 Pennsylvania  
20       Avenue, N.W., Washington, D.C., 20044, at  
21       9:10 a.m., Tuesday, January 23, 1996, and the  
22       proceedings being taken down by Stenotype by JAN  
23       A. WILLIAMS, RPR, and transcribed under her  
24       direction.

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1 to answer the pending question.

2 BY MR. LOFTUS:

3 Q. Mr. Rebensdorf, I have several  
4 questions relating to the two-to-one shipper  
5 category. First do I recall properly that  
6 yesterday you said that there was a point  
7 included on Exhibit A, I believe you referred to  
8 Mont Belvieu, Texas, at which there were some  
9 shippers that were included because there was an  
10 outstanding proposal to build in to those?

11 A. That is correct.

12 Q. And does that mean then that those  
13 shippers at that point did not actually meet the  
14 definition of two-to-one shipper that is  
15 contained at section 8i in the supplemental  
16 agreement? And I refer your attention to the  
17 first sentence of 8i appearing at page 352.

18 A. I'm not sure I understand your  
19 question. Would you repeat it.

20 Q. Okay. The definition appearing at  
21 section 8i, where it says it is the intent of the  
22 parties that this agreement result in the  
23 preservation of service by two competing railroad  
24 companies for all customers listed on Exhibit A  
25 to this agreement presently served by both UP and

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1 SP and no other railroad. Do you see that, sir?

2 A. That's right.

3 Q. All right. Now, are the customers  
4 listed on Exhibit A under points referred to in  
5 section 5b; i.e., Amoco, Exxon, Chevron plants in  
6 Mont Belvieu, Texas, are they presently served by  
7 both UP and SP?

8 A. They are -- the Exxon plant at Baytown  
9 is served by UP. The Chevron and the Exxon plant  
10 at Mont Belvieu are currently served only by SP,  
11 but they are the subject of a build-in that UP  
12 had filed for at the ICC.

13 Q. I understand. And that was the reason  
14 that you included them there. I'm just trying to  
15 determine whether they meet the technical  
16 definition as it's set out at 8i?

17 A. I believe that, if you go to page 351,  
18 it amended the grant of trackage rights because  
19 we had inadvertently left off the Dayton branch  
20 in the September 25 settlement. The amendment to  
21 section 5, item 4 at the top of page 351,  
22 includes that as part of the settlement with  
23 BN/Santa Fe. And what is shown at the top of  
24 page 351 is, in fact, SP's line between Dayton,  
25 Texas, and Baytown, Texas. That is Mont Belvieu.

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1 MR. ROACH: Mike, I'm prepared to  
2 stipulate, if this helps you, for the applicants  
3 that the applicants included within the  
4 definition of two-to-one shippers that were  
5 subject to an active build-in and that that is  
6 not covered by the literal words of the first  
7 sentence of 8i. It wasn't intended to be, it's  
8 simply a separately agreed posture that we have  
9 included those shippers, if that's helpful in  
10 terms of the applicants' position.

11 MR. LOFTUS: Well, that is helpful.  
12 But I would like also just to get an answer to  
13 the question.

14 MR. ROACH: Sure.

15 BY MR. LOFTUS:

16 Q. As to the definition in 8i -- I might  
17 add, it's not only 8i, it's also 5b at page 325.  
18 It says BN/SF shall receive access on such lines  
19 only to industries which are presently served,  
20 either directly or reciprocal switch, only by  
21 both UP and SP. And my question is technically  
22 is that accurate with regard to all of the points  
23 and the shippers identified at page 359 under  
24 section 5b?

25 A. I'm sorry, go back to 325 again. What

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1 are you referring to?

2 Q. I'm sorry. What I was pointing out is  
3 that this same language about service by both UP  
4 and SP appears both in section 8i and in section  
5 5b which is at the middle of page 325. Do you  
6 see that, sir?

7 A. Yes, I do.

8 Q. Where it refers to BN receiving access  
9 on such lines only to industries which are  
10 presently served, either directly or indirectly  
11 by reciprocal switch, only by UP and SP. And my  
12 question is under that language would each of the  
13 shippers identified for Mont Belvieu, Texas, on  
14 Exhibit A be a two-to-one shipper?

15 A. Well, as counsel has indicated,  
16 technically UP and SP currently -- UP does not  
17 currently serve Mont Belvieu. The intent of this  
18 agreement was, where there is an outstanding  
19 proposal to build in, that we would grant access  
20 to Mont Belvieu to BN/Santa Fe. I think that is  
21 reflected on page 355 in item C, where we say add  
22 the phrase, quote, Amoco, Exxon, and Chevron  
23 plants after the reference to Mont Belvieu, in  
24 the section captioned points referred to in  
25 section 5b, at section 5b which you have just

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1 addressed me to.

2 Q. Okay. So is it fair to say then that  
3 technically they would not meet the definition?

4 A. The definition on page 325 of the  
5 September 25 agreement technically states  
6 presently served by both UP and SP and no other  
7 railroad. But I would again say that on page  
8 355, in the addendum to that agreement, we  
9 specifically reference Mont Belvieu as being a  
10 point that would be covered.

11 Q. Okay. And is it your position as one  
12 of the negotiators of this document that it was  
13 clearly the intent of the parties that those  
14 shippers be covered whether they technically  
15 satisfy the definition or not?

16 A. It was our intent that Mont Belvieu  
17 would be considered a two-to-one point because of  
18 the existence of an outstanding build-in  
19 proposal.

20 Q. So that in your view any arbitrator or  
21 the Surface Transportation Board should so  
22 interpret the document?

23 A. We are on record as stating that Mont  
24 Belvieu would be covered by this agreement.

25 Q. You say there was a filing at the

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1 commission with regard to that build-in, did you  
2 say that, sir?

3 A. I believe there was.

4 Q. Do you know when that was made?

5 A. I don't know the exact date, I would  
6 have to ask my counsel.

7 MR. ROACH: All the pleadings are in  
8 the depository.

9 BY MR. LOFTUS:

10 Q. Okay. Were there any other points  
11 listed on Exhibit A as two-to-one points due to  
12 possible build-outs or build-ins?

13 A. On page 359?

14 Q. Yes, sir.

15 A. Eldon, Texas, Bayer; that is all in the  
16 same general vicinity of Mont Belvieu.

17 Q. And is that also covered by the same  
18 build-in --

19 A. Yes.

20 Q. -- that you referred to earlier?

21 A. Yes.

22 Q. Are there any others, sir?

23 A. Not that I'm aware of.

24 MR. ROACH: We'll stipulate there are  
25 not for the applicants.

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1 MR. LOFTUS: I have a highly  
2 confidential document that I'd like to have  
3 marked.

4 (Rebensdorf Exhibit No. 3 was  
5 marked for identification.)

6 BY MR. LOFTUS:

7 Q. Mr. Rebensdorf, I'll hand to you marked  
8 as Rebensdorf Exhibit 3 a copy of a document. I  
9 have a few of these.

10 This is a document that consists of  
11 several pages, the first five of which are a  
12 letter dated December 22, 1993, to Thomas R.  
13 Phalin of Miles, Inc., from -- I have difficulty  
14 making out the name, a gentleman with UP  
15 marketing. And attached to that is a feasibility  
16 study for Baytown Branch Miles Industry Spur.

17 And I ask you, sir, do you recognize  
18 this document?

19 A. I have not seen this before, no.

20 Q. Were you aware at the time you were  
21 making your determinations of two-to-one  
22 situations about the existence of this proposal?

23 A. I was aware that there was  
24 consideration being given to a build-in to this  
25 facility.

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1 Q. And was there ever discussion of  
2 including that facility as a two-to-one point?

3 A. Was there discussion when?

4 Q. In any of your -- well, let me strike  
5 that and start over.

6 Did UP consider including this shipper  
7 as a two-to-one shipper?

8 MR. ROACH: Can I clear something up  
9 with a statement.

10 MR. LOFTUS: Please.

11 MR. ROACH: This is Bayer, this is the  
12 Bayer facility, if there's any misunderstanding  
13 about that. We produced this document in  
14 response to a discovery request as a document  
15 sufficient to identify that transaction. Bayer  
16 was acquired by Miles or vice versa, I'm not sure  
17 which, but their name has changed.

18 MR. LOFTUS: Well, that is helpful. So  
19 this would not be the Baytown, Texas, point?

20 MR. ROACH: No.

21 MR. LOFTUS: Under 5b?

22 MR. ROACH: No, sir. This is Eldon,  
23 Texas. That's the station name. If you look at  
24 map No. 2 to Peterson's statement, it's right  
25 near Baytown, but it's a different station name.

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1 MR. LOFTUS: Okay. So it is covered as  
2 a two-to-one facility?

3 MR. ROACH: Yes, sir.

4 MR. LOFTUS: Thank you.

5 BY MR. LOFTUS:

6 Q. Were there any other points that the UP  
7 considered including as two-to-one facilities on  
8 the basis that there was a potential build-in or  
9 build-out that would have made them a two-to-one?

10 A. Not that I am aware of.

11 Q. Did UP and SP undertake any research do  
12 determine whether there were any such points?

13 A. There was discussion. I was told that  
14 the only place where there was an outstanding  
15 build-in proposal was the proposal to build in to  
16 Mont Belvieu.

17 Q. Does that mean you inquired as to the  
18 existence of outstanding build-in proposals?

19 A. My recollection is there was discussion  
20 on that point and that the only one that was  
21 outstanding was Mont Belvieu. I am not -- as  
22 I've indicated, I am not aware from the position  
23 that I am in of any other outstanding build-in  
24 proposals.

25 Q. I understood that response, sir. But

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1 my question at this point is as to what efforts  
2 the UP undertook or you or others at your  
3 direction or in cooperation with you undertook to  
4 determine whether there were other feasible  
5 build-outs that would have resulted in two-to-one  
6 situations?

7 A. I think the key word -- you've defined  
8 this differently now. As I indicated our  
9 criteria was where there was an outstanding  
10 build-out proposal. You've now used the term a  
11 feasible build-out.

12 Q. That's correct.

13 A. I did not in my deliberations consider  
14 feasibility. I considered where there was an  
15 outstanding build-out proposal.

16 MR. ROACH: Just for the record, Mike,  
17 this is a topic that Mr. Peterson testifies about  
18 and you can question him on just exactly that  
19 issue further.

20 MR. LOFTUS: Okay.

21 BY MR. LOFTUS:

22 Q. In response to an earlier question, you  
23 indicated that there had been some discussions  
24 internally, it wasn't clear to me whether it was  
25 UP alone or UP/SP, as to build-out situations.

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E.	Pro-Competitive Protective Conditions Are Necessary To Alleviate The Anti-Competitive Effects Of The Merger . . . . .	42
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IV	CONCLUSION . . . . .	45
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1 In those discussions was there identification of  
2 any other possible build-outs even if there was  
3 not an outstanding proposal?

4 A. Not that I recall.

5 Q. But that, in terms of the work you were  
6 doing, you felt the inquiry was solely where does  
7 UP or SP have an outstanding proposal to build  
8 the line in to a customer?

9 A. That is correct.

10 Q. Do you, in fact, know whether there are  
11 other situations where shippers had discussed the  
12 possibility of a build-in by the UP or the SP  
13 that were not treated as two-to-one points?

14 A. I am not aware of any.

15 Q. Mr. Rebensdorf, have you read the  
16 Interstate Commerce Commission's decision in the  
17 BN/Santa Fe merger case?

18 A. No.

19 Q. You did not do that prior to engaging  
20 in the discussions with the carriers to address  
21 the adverse impacts of the proposed UP/SP merger?

22 A. No.

23 Q. Are you aware of the fact, sir, that in  
24 that decision the Interstate Commerce Commission  
25 granted trackage rights in two situations to

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CERTIFICATE OF SERVICE

I certify that I have this 3rd day of June, 1996,  
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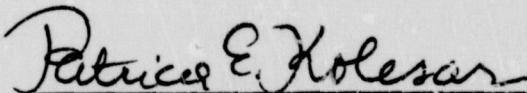
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The Honorable Janet Reno  
Attorney General of the United States  
U.S. Department of Justice  
10th & Constitution Ave., N.W., Room 4400  
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and upon all other parties of record in Finance Docket No. 32760.

  
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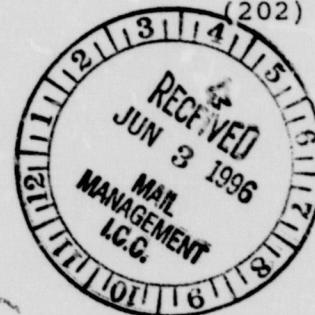
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June 3, 1996 Item No. \_\_\_\_\_

Page Count 61

JUNE, 1996 #34

Vernon A. Williams  
 Secretary  
 Surface Transportation Board  
 Room 2215  
 1201 Constitution Avenue, NW  
 Washington, DC 20423



(202) 434-4144

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

Dear Mr. Williams:

Enclosed for filing in the above-captioned docket proceeding, please find the original and twenty (20) copies of Montell USA, Inc.'s Brief (MONT-9). Also enclosed is a 3.5" disk containing the text of the Brief in Word Perfect 5.1.

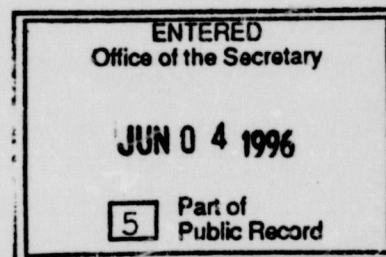
Copies of the enclosed Brief are being served on the parties shown below.

Cordially yours,

Martin W. Bercofici

Enclosures

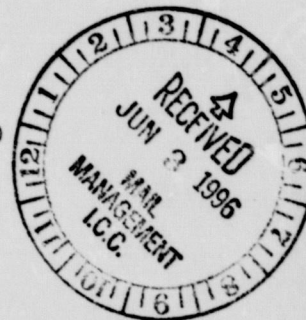
cc: Arvid E. Roach II, Esquire (By Hand)  
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 All Parties of Record (By Mail)





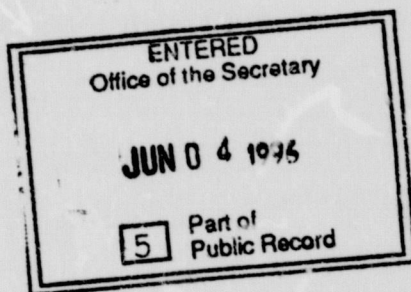
BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760



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

BRIEF  
OF  
MONTELL USA INC.



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June 3, 1996

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Montell USA, Inc. ("Montell"), submits the following Brief in support of its Request for Conditions on the proposed merger of the Union Pacific ("UP") and Southern Pacific ("SP") railroads. See Comments and Request for Conditions of Montell USA Inc. and Olin Corporation, MONT-2.<sup>1/</sup>

### SUMMARY

Montell USA Inc. seeks conditions on the proposed merger necessary to preserve its competitive position in the marketplace and its existing rail competition.<sup>2/</sup> Specifically, Montell seeks the imposition of conditions to maintain its plant on a competitive footing with the other plants in the Lake Charles, Louisiana area to which the Applicants have recently granted certain "concessions". Moreover, Montell seeks the Board to provide that whomever obtains trackage rights to remedy the loss of competition in the Louisiana-Texas Gulf Coast area be able to interchange with the Kansas City Southern ("KCS") so that Montell maintains the transportation option to the Southern Pacific that it currently has. Although the KCS has other options to move Montell's traffic in competition with the merged railroad, those options are not competitive. Thus, Montell requests that the Board:

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<sup>1/</sup> Olin has chosen not to join Montell in this Brief.

<sup>2/</sup> Montell is a member of The Society of the Plastics Industry, Inc. ("SPI"), and the National Industrial Transportation League ("NITL"), and supports the positions of SPI and NITL in this proceeding. If the relief requested by SPI and/or NITL is granted in full by the Surface Transportation Board ("Board"), the issues raised in this Brief will be moot.



- 1) Condition the merger on the granting of KCS/BNSF line haul interchange for Montell's traffic at Shreveport to provide competitive routing to the Eastern gateways above New Orleans to replace the KCS/UP friendly connection at DeQuincy, and also KCS/BNSF interline interexchange at Lake Charles for Montell's traffic on the BNSF's Houston-Iowa Junction trackage rights to replace the KCS/UP DeQuincy friendly connection to Houston and New Orleans; and,
- 2) At a minimum, condition the merger on the granting to the BN/Santa Fe the right of access to Montell's West Lake Charles plant similar to that offered shippers in West Lake, Louisiana and Lake Charles, Louisiana since the admittedly non-competitive routes from the two stations to which BN/Santa Fe has been given access cannot be differentiated from Montell's West Lake Charles plant, with the further condition that Montell's traffic be given stop-off rights in Houston to compensate for Montell's loss of competition to that location.

#### THE KEY FACTS NOT IN DISPUTE

The facts relating to Montell's situation are not disputed.

The key facts are the following:

1. The Lake Charles, Louisiana area has four rail stations: Harbour, Lake Charles, West Lake and West Lake Charles. All four stations are within a 10 to 12 mile range.
2. Montell has a plant at West Lake Charles, one of the four rail stations in the Lake Charles area, that produces plastic resins and is dependent on rail to transport its products. See MONT-2 at 5-6.
3. Montell's principal rail movements are to Houston and the Eastern gateways at New Orleans, Memphis, St. Louis and Chicago.
4. Montell now has competition for its rail traffic. Montell can ship via the SP direct to New Orleans and the other Eastern gateways as well as to Houston. Alternatively, Montell can ship via a KCS/UP joint route to those locations. KCS will lose its friendly connection if the merger is approved since the KCS/UP routing will no longer be an option for Montell. See MONT-2 at 7.

5. None of the settlements entered into by Applicants address Montell's requirements. BN/Santa Fe was not given trackage rights to the Montell plant nor does it have interchange rights with the KCS at Lake Charles and Shreveport. Second, although the Chemical Manufacturers Association ("CMA") "settlement" addresses two of the rail stations in the Lake Charles area, it does not address Montell's West Lake Charles station - one of the two stations not covered. Further, the CMA "settlement" limits BNSF to handling traffic only between Lake Charles/West Lake and either New Orleans or the Mexico border points. It does not grant BN/Santa Fe the ability to take Lake Charles area traffic to Houston.
6. Applicants admit that the KCS routing from Lake Charles and West Lake to New Orleans is circuitous and non-competitive with the merged railroad. Applicants also admit that the interline KCS/BNSF route to the Mexican border through Houston from West Lake and Lake Charles is circuitous and not competitive.

On these facts, there can be no serious argument that Montell is not entitled to the same relief given to shippers at Lake Charles and West Lake. Montell's traffic has to go past those two stations and therefore is disadvantaged to the same extent as are shippers at those locations. Further, Montell's current ability to ship to Houston is not remedied by the limited rights given to BN/Santa Fe and therefore requires the BN/Santa Fe be given the ability to deliver Montell's products to Houston.

#### DISCUSSION

**A. THERE ARE FOUR RAIL STATIONS SERVING THE LAKE CHARLES, LOUISIANA AREA.**

There are four railroad stations serving industry in the Lake Charles, Louisiana area: Lake Charles; West Lake; West Lake Charles, and Harbour. Peterson Deposition of May 8, 1996 at 219



(hereinafter "Peterson May Deposition").<sup>3/</sup> Even though all four stations are within 10 to 12 miles of each other, they are not all served by the same railroad(s). Id. at 221-222. Matthew Rose, the chemicals marketing manager for the BN/Santa Fe, admitted that there is not any substantive difference in terms of transportation requirements between the plants at West Lake Charles and the plants at West Lake and Lake Charles. Deposition of Matthew K. Rose ("Rose Deposition") at 116.

Montell is located in West Lake Charles. It is served by a branch line that is a joint facility operated by the KCS and the SP. Peterson May Deposition at 222. Id. The line on which Montell is located goes through West Lake, which is served by KCS and SP and is open to the UP under reciprocal switching. Id. See map attached as Exhibit 1.

**B. MONTELL'S LOSS OF COMPETITION FOR SHIPMENTS TO NEW ORLEANS AND HOUSTON NEEDS TO BE REMEDIED.**

Montell currently ships plastics resins to the gateway in New Orleans. Montell has viable shipping alternatives via SP direct or KCS to DeQuincy, interchanging with UP to New Orleans. Peterson May Deposition at 223. This route is also available for shipments to Houston. The parties agree that the KCS/UP alternative will disappear if the merger is approved.

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<sup>3/</sup> Deposition extracts are associated herewith in an appendix to this Brief.



1. APPLICANTS HAVE ADMITTED THAT THE MERGER AS CURRENTLY PROPOSED DOES NOT REMEDY MONTELL'S LOSS OF COMPETITION FOR TRAFFIC TO NEW ORLEANS AND HOUSTON.

Applicants admit that the "Lake Charles/West Lake, Louisiana, that are open to UP, SP and KCS, and, on the other hand, New Orleans and the Eastern Mexico gateways" can reasonably be argued to be a "2-to-1" flow. Applicants' Rebuttal, UP/SP-230, at 14. As Applicants stated: "one could reasonably conclude that, for shippers at Lake Charles and West Lake served by UP, SP and KCS, KCS' direct or interline routes would be too circuitous to New Orleans and Mexico to provide a competitive alternative to the current SP and UP single-line routes." Id. at 293. This position was repeated by Applicants' witness Rebensdorf. Mr. Rebensdorf said:

UP, SP and KCS all serve certain shippers in Lake Charles and West Lake, Louisiana.... [T]he KCS route from Lake Charles and West Lake to New Orleans is circuitous in comparison to the UP and SP route. Similarly, any KCS interline routing connection with BN/Santa Fe to Mexican border crossings from Lake Charles and West Lake is also circuitous. Accordingly, we will treat these "3-to-2" traffic flows as "2-to-1" in recognition of the argument that KCS is not a competitive alternative for them.

Rebensdorf, UP/SP-231, RVS-18 at 6. Applicants, therefore, expanded BN/Santa Fe's trackage rights to cover these additional flows. Id. This adjustment, however inexplicably failed to address similar conditions existing at West Lake Charles although West Lake Charles represents the overwhelming majority of traffic from the four Lake Charles area stations. See Rose Deposition at 116.

As noted above, the West Lake Charles, Louisiana rail station serving Montell is part of the Lake Charles area and is within the 10-12 mile area that includes the West Lake and Lake Charles stations. Further, as noted by Applicants' witness Peterson and is shown by the attached map, the West Lake Charles station is at the end of the line that also serves the West Lake station. Thus, there clearly is no basis for distinguishing the situation at West Lake Charles from that at West Lake and Lake Charles. The routes being the same, the circuitry being the same, and the proposed merger eliminating one of the two competitive routing options in the same manner, Montell is at least entitled to the same relief offered shippers at the other stations.<sup>4/</sup>

2. APPLICANTS' SUGGESTED ALTERNATIVE ROUTE OF KCS FROM LAKE CHARLES TO BEAUMONT/BNSF TO NEW ORLEANS IS NOT COMPETITIVE BECAUSE IT IS CIRCUITOUS.

Applicants assert that Montell is not harmed by the proposed merger and existing settlement agreement with the BN/Santa Fe because there exists a competing route for shipments to the New Orleans gateway. According to Applicants, Montell can either ship SP single line direct from Lake Charles to New Orleans, a current option, or KCS from Lake Charles north to DeQuincy and then west to Beaumont, Texas interlining with the BN/Santa Fe for movement back east through the Lake Charles area to New Orleans. Applicants assert that this routing replaces the

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<sup>4/</sup> It is understood that CMA has approached Applicants about extending this provision to West Lake Charles. But see Sections B.4., C. and D., infra.



KCS/UP route of KCS/West Lake Charles to DeQuincy and UP/DeQuincy east to New Orleans. Applicants ignore that this "competing" route is not competitive because of obvious circuitry.

Applicants' suggested route adds 27 rail miles north from West Lake to DeQuincy, 47 rail miles west from DeQuincy to Beaumont (both via KCS) and 60 rail miles from Beaumont back east through Lake Charles (via trackage rights on the SP line). Thus, Applicants' "competitive" route is 134 miles longer than -- 161% of -- the 220-mile SP route, and 95 miles longer than -- 137% of -- the existing KCS/UP route. Given Applicants' observation that "if you're over 150 percent circuitous, it's highly unlikely that you could play any meaningful role," and that "routes that are somewhat less than 150 percent of the direct mileage can also be very weak or almost ineffective competitors," Peterson May Deposition at 184, Applicants cannot seriously offer the West Lake Charles - DeQuincy - Beaumont - New Orleans route as a competitive alternative to either the SP direct West Lake Charles - New Orleans or the existing KCS/West Lake Charles - UP/DeQuincy - New Orleans route.<sup>5/</sup> Applicants ignore the fact that they originally postulated the concept of circuitry as being the most

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<sup>5/</sup> Applicants' attempt to argue during Mr. Peterson's deposition that post-merger they would not, in fact, operate a direct train raises issues that would complicate this merger beyond all possible resolution. Peterson May Deposition at 227. We do not believe that Applicants truly want the Board to analyze each movement as it may actually happen (if indeed Applicants would so operate post-merger) rather than based on the most direct route available and currently utilized.



important factor by calling the increased 134 miles as "modest".  
Applicants Rebuttal, UP/SP-230, at 293.

Applicants attempt to overcome the circuitry of this route by claiming that it requires an interchange similar to that in the existing KCS/UP routing. Applicants raise, for the first time, this method of comparing routes for competitiveness. This is contrary to the testimony of Witness Peterson when he stated that circuitry is measured against "the most direct route." Peterson Deposition at 184-185. Moreover, under this newly proffered criteria, no route coming out of West Lake and Lake Charles using the KCS to switch to the BN/Santa Fe is competitive. The response, however, is that KCS/UP currently is competitive; and the BN/Santa Fe has stated that it too could be competitive with the merged railroads if appropriate access is granted. Rose Deposition at 134.

3. MONTELL CAN OBTAIN COMPETITION FOR ITS TRAFFIC TO NEW ORLEANS EITHER THROUGH DIRECT ACCESS TO ITS PLANT BY THE BN/SANTA FE SIMILAR TO THAT BEING OFFERED TO THE OTHER SHIPPERS IN LAKE CHARLES OR THROUGH INTERLINE INTEREXCHANGE RIGHTS BETWEEN THE KCS AND THE BN/SANTA FE.

As a result of the "settlement" with CMA, Applicants have proposed to give BN/Santa Fe access to plants at West Lake and Lake Charles for traffic to New Orleans. Montell is entitled to similar access because its competitive position is no different from the plants at those other locations. To grant access to West Lake and Lake Charles, but to fail to grant similar access to Montell, will illegally discriminate against

Montell. Alternatively, the Board can relieve Montell's loss of competition to New Orleans by granting the KCS interchange line haul rights with the BN/Santa Fe or whomever obtains trackage rights between New Orleans and Houston. (This solution would also solve Montell's loss of competition to Houston.)

4. MONTELL REQUIRES REPLACEMENT COMPETITION  
FOR MOVEMENTS TO HOUSTON.

Applicants admit that shipments from the Lake Charles region to the Mexican border on carriers other than Applicants are circuitous; and again, then offer a partial remedy. Rebensdorf, UP/SP-231, RVS-18 at 6 (quoted at 5, supra). The remedy, however, does not provide for shipments to Houston even though the Mexico bound traffic goes through Houston. Peterson May Deposition at 234. Montell requires competitive rail service to Houston. MONT-2 at 6. Montell currently has that competition with the KCS/UP friendly connection at DeQuincy. Post-merger, the loss of this connection can be remedied by allowing interchange line haul rights between KCS and the railroad given trackage rights or, alternatively, granting BN/Santa Fe direct access to the Montell plant, as has been given at the other Lake Charles stations, with stop off rights in Houston. Applicants have offered no reason why these conditions should not be granted.<sup>6/</sup>

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<sup>6/</sup> BNSF's witness Rose described the traffic destined to the New Orleans and Mexico gateways as "a small fraction" of the traffic from the two open shipping points. Rose Deposition at 117.



**C. MONTELL'S LOSS OF COMPETITION FOR TRAFFIC TO THE EASTERN GATEWAYS NEEDS TO BE REMEDIED.**

Montell ships a large percentage of its traffic to the eastern gateways of Memphis, St. Louis and Chicago. MONT-2, Granatelli V.S. at ¶ 7. Routings to these gateways from West Lake Charles currently are either SP direct or via KCS/Texarkana/UP to Memphis and beyond. MONT-2 at 7. Necessarily, this friendly KCS/UP connection will be lost if the merger is approved.

**1. MONTELL'S SHIPMENTS TO THE OTHER EASTERN GATEWAYS ARE CIRCUITOUS - MERIDIAN IS NOT AN OPTION.**

Applicants suggest that the KCS MidSouth route to Meridian offers a competitive alternative to shipments to Memphis. This suggestion clearly shows that there is not a viable alternative to the KCS/UP routing that now exists.

First, Applicants offer no factual support for this assertion. Second, as pointed out by Mr. Badger in his verified statement, the KCS MidSouth route is not a viable competitive option from the Lake Charles area due to length of haul and operational delays. OLIN-2, Badger V.S. at ¶ 9. Additionally, Montell has found that this route is not economically competitive. MONT-2 at 21. Third, there are no KCS joint line rates with CSXT or NS for plastics over the MidSouth route; and if such rates were to be established, they would be non-competitive, considering the much longer KCS route to Meridian than New Orleans and the practice of the destination carriers of protecting their long haul via the New Orleans gateway. See



Exhibit 2<sup>7</sup>; see also MONT-2, Granatelli V.S. at ¶ 7. Finally, shipment on the MidSouth would by-pass Memphis and not allow for movement to and through Memphis to the other eastern gateways and the savings that such blocking allows.

Applicants ignore that they identified the Houston - Memphis corridor as a 2-to-1 corridor and offered the BN/Santa Fe trackage rights as a remedy. Applicants did not address in that settlement, however, the traffic that KCS hands off to UP into that corridor; and they have failed to offer a remedy for that situation. All Montell seeks is the ability to interline exchange with the carrier that will be traveling on the Houston-Memphis corridor.

The Memphis gateway offers two options: shipments into the Southeastern United States and shipments north along the Mississippi River to St. Louis and Chicago. Applicants have admitted that shipment via Memphis to the other Eastern gateways improves the BN/Santa Fe routes to said gateways. A cursory examination of the map will show that Memphis provides better and more direct access into the Southeastern United States than the MidSouth line. Clearly, Applicants offer no realistic alternative to the conditions that Montell requests.

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<sup>7</sup> Montell requests the Board to take official notice of the KCS' rate information provided to Montell. Just as the ICC's rules provided for official notice of filed tariffs, 49 C.F.R. Part 1114, Subpart A, so the Board should take official notice of rate quotations under Section 11101 of the Act in the post-tariff environment of the ICC Termination Act. See also 49 C.F.R. 1114.3.

**D. BECAUSE MONTELL'S SHIPMENTS CUSTOMARILY MOVE INITIALLY TO STORAGE AT THE TIME THEY ARE HANDED OVER TO THE RAILROAD, MONTELL CANNOT ACCEPT LIMITED DESTINATION ACCESS.**

Because of the dynamics of the plastics business, Montell generally does not know the destination of its rail cars at the time they are delivered to the railroad. Montell, like other plastics manufacturers, produces a certain quantity of a particular resin that is immediately placed in rail cars and delivered to the railroad for storage. See MONT-2 at 6-7. As much as 70% of a plant's output may be assigned initially to storage. Rose Deposition at 93. Generally, it is only after the car has been in storage that its contents are sold and a delivery destination determined. Any rail service that is limited in the destinations to which it can deliver Montell's traffic cannot be competitive. See Rose Deposition at 113-114. Montell cannot be faced with the possibility of having to order a rail car returned to its facility so that it can be shipped on a different carrier with the added expense of paying two rather than one carrier. If the merger is approved without offering Montell a second carrier with full access to all relevant destinations, then Montell will not have competition for its rail service.

**CONCLUSION**

If the Commission were to approve the UP/SP merger as proposed, competition for Montell's West Lake Charles rail traffic will be extinguished. The Interstate Commerce Act and case precedent, as detailed in MONT-2, prohibit such a result. Accordingly, Montell respectfully requests the Surface



Transportation Board, if it approves the merger as proposed, to impose the following as conditions on the merger of the Applicant carriers:

- 1) The merged carrier must grant interchange rights with the KCS at Shreveport to the BN/Santa Fe or whomever obtains trackage rights over the existing rail lines owned by Applicants between Houston, Texas and Memphis, Tennessee;<sup>8/</sup>
- 2) The merged carrier must grant interchange line haul traffic rights at West Lake Charles to the BN/Santa Fe or whomever obtains trackage rights over the existing rail line owned by the SP between Houston, Texas and Iowa Junction, Louisiana, for traffic moving between West Lake Charles and Houston or New Orleans; and,
- 3) The merged carrier must grant access to the Montell plant to the BN/Santa Fe on the same basis as granted at West Lake and Lake Charles but with the added provision that BN/Santa Fe can deliver Montell's traffic to Houston.

Respectfully submitted,



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June 3, 1996

Attorneys for Montell USA, Inc.

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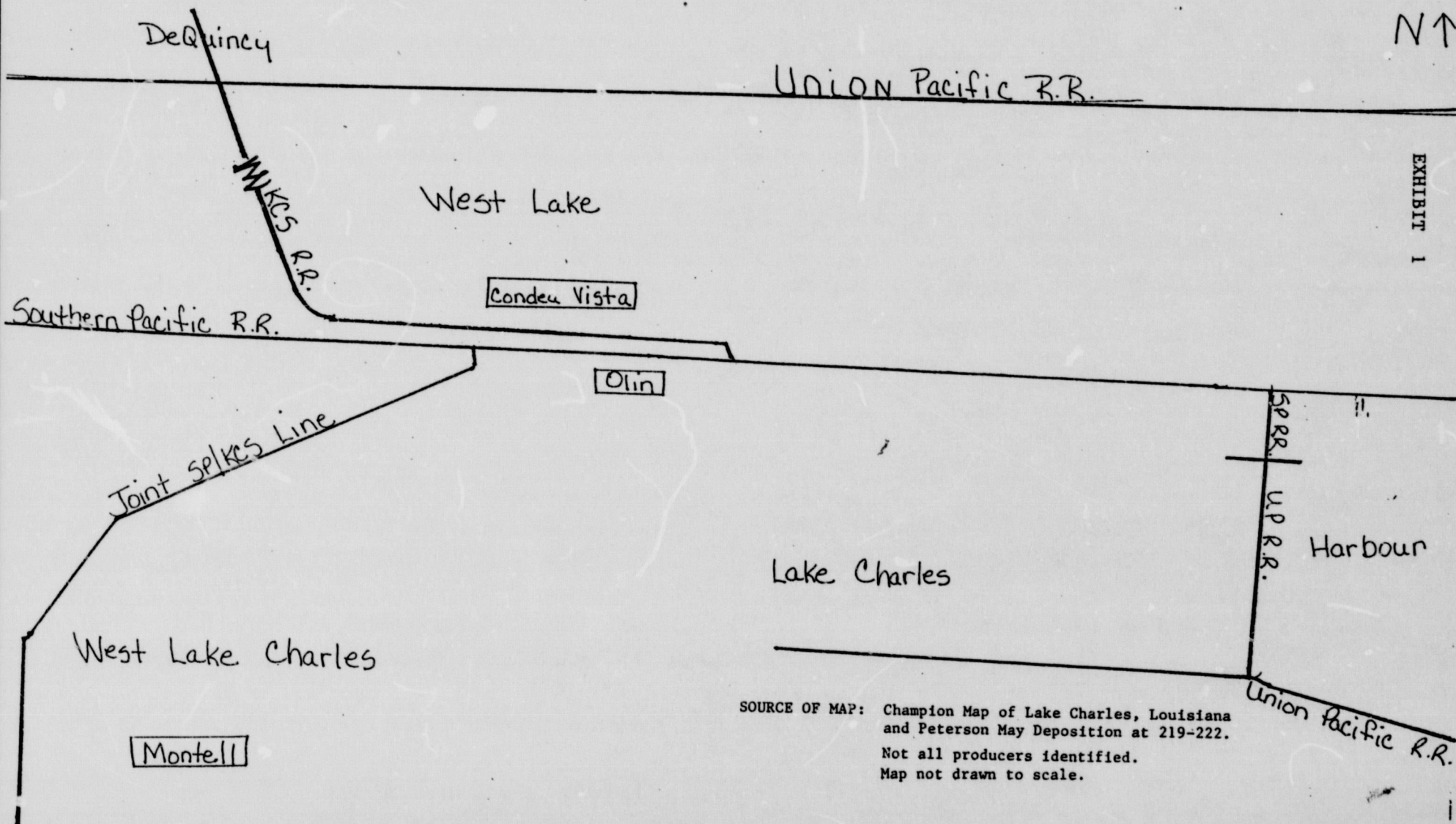
<sup>8/</sup> Arizona Chemical Company, which operates a chemical plant in Springhill, Louisiana, also complains about the potential loss of the Shreveport interchange. See Comments of Arizona Chemical Company filed with the Board on April 29, 1996, attached hereto as Exhibit 3.



# West Lake Charles Area Railroad Access

N↑

EXHIBIT 1



**THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

Marketing Department  
114 West 11th Street  
Kansas City, MO 64105  
Direct (816) 556-0406  
FAX (816) 556-0418

**Kenneth D. Clark, Jr.**  
Vice President  
Chemical and Petroleum Products

VIA FEDERAL EXPRESS

May 14, 1996

Mr. Robert W. Granatelli  
Manager  
Transportation Operations - North America  
Montell USA, Inc.  
2801 Centerville Road  
P. O. Box 15439  
Wilmington, DE 19850

Dear Bob:

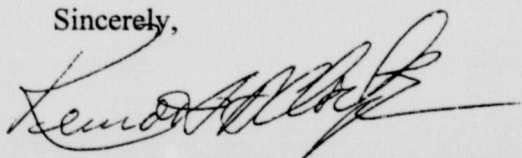
This will respond to your request, pursuant to new Section 11101 of the Interstate Commerce Act, that we provide you with rate information on plastic resins moving from West Lake Charles into Georgia, North Carolina and South Carolina via the MidSouth route.

There are no existing rates on plastics moving via the MidSouth route (KCS/Meridian/NS or KCS/Birmingham/CSXT). Prior rate application by our connecting carriers has been cancelled.

Based upon our recent experience, we believe that New Orleans is a more advantageous gateway to Montell than Meridian or Birmingham since NS or CSXT likely will seek rate factors into the eastern seaboard states through the MidSouth connections equivalent or comparable to the rate factors available via New Orleans. Considering the substantially greater length of haul for movement via the MidSouth gateways than for connecting at New Orleans "via joint line movement (KCS/DeQuincy/MP)" and the consequential greater cost to Montell to ship via the MidSouth route, we suggest that you consider routing via New Orleans.

We anticipate meeting with NS in the near future for discussions on re-establishing effective connections via the MidSouth route. We cannot predict how those through rates may compare with rates via New Orleans; however, if you wish to be advised of the outcome of those discussions, or if you desire that we pursue rates via the MidSouth routing at this time, please so advise, and provide us with customary detail concerning volumes, destinations, etc.

Sincerely,



BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

COMMENTS OF  
ARIZONA CHEMICAL COMPANY

In accordance with the governing procedural order in this matter, Arizona Chemical Company hereby submits its comments on the proposed settlement agreement reached between the Chemical Manufacturers' Association ("CMA") and the Applicants<sup>1/</sup> in this proceeding. Arizona Chemical Company is a member of CMA, and has been participating in this proceeding through that membership. Arizona Chemical Company adopts the comments filed by CMA on March 29, 1996 as its own.<sup>2/</sup>

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<sup>1/</sup> "Applicants" refers collectively to 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.

<sup>2/</sup> Arizona Chemical Company believes that it does not need to separately intervene due to its participation in this proceeding through its membership in CMA. To the extent any formal procedures are deemed necessary, Arizona Chemical Company hereby requests a waiver of those requirements.



My name is Thomas S. Brzowski, and I am the Manager Transportation and Distribution at Arizona Chemical Company. I hereby certify that I am qualified and authorized to submit these comments on behalf of the Arizona Chemical Company.

CMA, Burlington Northern Railroad Company and the Atchison, Topeka and Santa Fe Railway Company ("BNSF") and Applicants have entered into a Settlement Agreement ("the CMA Settlement"), see UP/SP-219, filed April 19, 1996, purportedly to resolve the problems and concerns about the merger raised by CMA in their comments on March 29, 1996. see Attachment 1 to CMA-7, filed March 29, 1996. While the CMA Settlement does address some of the issues raised by CMA, and is therefore indicative of the possibility of resolving these issues, it fails to address others, and therefore is not a sufficient solution to the anti-competitive problems raised by CMA in its comments.

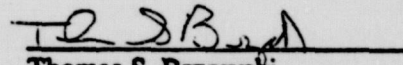
Arizona Chemical Company operates a chemical plant in Springhill, Louisiana. This facility is served exclusively by KCS, which must interchange with other railroads for much of our outbound traffic. For traffic moving to Houston, Mexico, and the Western United States, KCS connects with both UP and SP at Shreveport for beyond movement. Arizona Chemical Company presently has annual contracts in place with both UP and SP, and these contracts are awarded to these carriers based on the price and service options they provide. If the merger is approved, however, Arizona Chemical Company will lose this important price and service competition. Hence, it is a so-called "2-to-1" shipper, due to the Shreveport interchange, but Arizona Chemical Company will, in no way, benefit from the BNSF or CMA Settlement agreements.

Nonetheless, the CMA Settlement is a constructive start to resolving the anti-competitive effects of the proposed merger, but only a start. For example, the CMA settlement will resolve the traffic-flow directional problem CMA referred to in its comments, which is useful. The CMA

settlement will also reduce the reciprocal switching charges, which is another useful benefit for shippers.

Despite these benefits, however, the CMA settlement fails to resolve basic concerns of CMA raised in its March 29 comments. We therefore adhere to those comments as the position of Arizona Chemical Company on the proposed merger.

Respectfully submitted,

  
Thomas S. Brzowski  
Manager Transportation and Distribution  
Arizona Chemical Company

DATE: April 29, 1996

DEPOSITION

APPENDIX

RICHARD B. PETERSON  
MATTHEW K. ROSE



BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL MERGER --

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

HIGHLY CONFIDENTIAL

Washington, D.C.

Wednesday, May 8, 1996

Deposition of RICHARD B. PETERSON, 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 Covington & Burling, 1201 Pennsylvania  
Avenue, N.W., Washington, D.C., 20044, at  
10:05 a.m., Wednesday, May 8, 1996, and the  
proceedings being taken down by Stenotype by  
JAN A. WILLIAMS, RPR, and transcribed under her  
direction.

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1 MR. ROACH: Same objection.

2 THE WITNESS: Well, let me restate what  
3 we did. We looked at those customers and  
4 identified those customers that had direct rail  
5 competition from UP and from SP and from no other  
6 railroads.

7 Q. And you confined your analysis to rail  
8 competition?

9 A. We did not -- no, believe me, we didn't  
10 confine our analysis to rail competition.

11 Q. In determining those points that you  
12 just described, you looked at whether or not they  
13 were rail, in other words; is that correct?

14 A. In the small subset of our total  
15 analysis that was involved in identifying the  
16 two-to-one, what are known as the two-to-one  
17 shippers, we looked at rail competition first to  
18 identify those specific customers. That was a  
19 piece of our analysis and that is what's known as  
20 the two-to-one shipper identification, yes.

21 MR. MULLINS: I would like to have  
22 marked as Exhibit 1 a diagram that actually  
23 appeared in the KCS comments.

24 (Peterson Rebuttal Exhibit  
25 No. 1 was marked for

1 identification.)

2 BY MR. MULLINS:

3 Q. Referring to this diagram, industrial  
4 site No. 1, your analysis would have considered  
5 such an industrial site as a two-to-one point; is  
6 my understanding correct?

7 A. Now, these drawings -- yeah, these were  
8 the drawings performed by Mr. Grimm?

9 Q. That's correct.

10 A. Okay. I'm just trying to remember them  
11 without having to go back through all that.

12 Okay. And in this drawing he is saying that  
13 there is a direct rail line of SP and a direct  
14 rail line of UP to the industrial site No. 1, and  
15 that would be a two-to-one shipper, correct.

16 Q. And, if that little piece of track in  
17 the middle was simply, you know, owned by a  
18 switching carrier, for example, that would be  
19 considered a two-to-one point?

20 A. Yes.

21 Q. Because the switching carrier could  
22 either give it off to UP or take it up to SP,  
23 correct?

24 A. That's correct.

25 Q. But it had to be open, it had to be an



1 have used them. They're used from time to time.

2 Q. So did not UP use BEAs in the Santa  
3 Fe/Southern Pacific case?

4 A. We may have.

5 Q. So this isn't the first case where BEAs  
6 have been used as a -- for the definition of a  
7 relevant geographic market?

8 A. I believe that's an accurate statement.

9 Q. Let's go into your criticisms, some of  
10 your criticisms of Mr. Grimm's analysis. You,  
11 for example, state in one case that -- you attack  
12 him for using a circuitry screen of 160 to 180  
13 percent. Do you recall your disagreement with  
14 Dr. Grimm on that?

15 A. Yes.

16 Q. And what did you say was the proper  
17 circuitry screen?

18 A. Well, I didn't. I said that at the  
19 most a screen of 150 percent should have been  
20 used. And in many markets a screen much less  
21 than that should be used.

22 Q. So what is your basis for arguing that  
23 160 to 180 is somehow dramatically different than  
24 150?

25 A. Well, as I said, first of all, to use

1 one blanket number is a pretty -- you know, a  
2 pretty incomplete analysis. If you're going to  
3 use one number and recognize that it's sort of a  
4 superficial analysis, I certainly wouldn't go  
5 over 150. But, once using the 150, I would  
6 recognize that there are markets where, due to  
7 the physical characteristics of the routes and a  
8 host of other factors, routes that are not 150  
9 percent circuitous still are a minimal  
10 competitive force.

11 Q. Besides circuitry what other factors  
12 would you use?

13 A. Well, circuitry is important obviously.  
14 But you need to look at the capabilities of the  
15 routes in terms of capacity, density, schedules,  
16 efficiency, rise and fall, gradient, curvature,  
17 whether there are strategically located terminals  
18 and classification yards that can handle the  
19 business, and so forth.

20 Q. If you're trying to determine the  
21 market share between certain city pairs, for  
22 example, L.A. and Houston, for example, would you  
23 throw out a certain route if it had less than a  
24 certain percentage?

25 A. Well, I mean a percentage of --

1 Mr. Mullins and I think even this afternoon with  
2 Mr. Wood, you talked a little bit about the  
3 circuitry factor in terms of what I believe was a  
4 test used by applicants in evaluating whether  
5 certain routes were two-to-one routes and whether  
6 or not the BN/SF which may have served the same  
7 points were effective competitors on those  
8 routes; is that a fair characterization?

9 A. Yes.

10 Q. And the circuitry factor as I understand  
11 was 150 percent in terms of measuring whether or  
12 not the BN/SF would be an effective competitor  
13 under their current route of movement?

14 A. No, that's not necessarily correct. I  
15 indicated that almost in no event would we  
16 consider a route greater than 150 percent  
17 circuitous to be a competitive factor. However,  
18 it's also true that routes that are somewhat less  
19 than 150 percent of the direct mileage can also  
20 be very weak or almost ineffectual competitors,  
21 specifically if they have other disabilities such  
22 as grades and slow track, lack of good terminals,  
23 and so on and so forth.

24 Q. So the 150 percent would be kind of an  
25 outside factor; is that right?



1           A.    Yeah, it's a rule of thumb. I guess  
2           it's my own rule, personal rule of thumb, that,  
3           no matter how good your route is in other ways,  
4           if you're over 150 percent circuitous, it's  
5           highly unlikely that you could play any  
6           meaningful competitive role.

7           Q.    And, when you talk about 150 percent  
8           circuitous, you referred I believe to direct  
9           route, are you measuring against the most  
10          efficient of the direct routes?

11          A.    Yes, probably the most direct route,  
12          yes.

13          Q.    You talked this morning with  
14          Mr. Mullins about the build-out situation or  
15          build-out opportunities and stated that you had  
16          searched and found only two situations which  
17          qualified, and those were the Mont Belvieu and  
18          the Bayer or Miles situation. Can you review for  
19          us please the factors that you took into account  
20          in determining that those situations qualified  
21          for protection in the merger?

22          A.    Well, I will refer you to the build-in  
23          section here in the first part of my statement, I  
24          believe it starts on page 49, the Normandy  
25          building, yeah.

1 the St. Louis storage in transit, or is that  
2 railroad convenience?

3 A. No, that's -- I mean those tracks are  
4 committed to just certain customers. We have  
5 three customers in St. Louis that use those  
6 tracks.

7 Q. With regard to the potential that BN/SF  
8 may route or may utilize some of these facilities  
9 you've identified on page 159 and 160, the  
10 storage yards, did you take those into account in  
11 your trackage rights flow calculations which  
12 appear on the color chart between pages 171 and  
13 172 of your testimony?

14 A. No.

15 Q. Let's talk about Lake Charles for a few  
16 minutes.

17 A. Okay.

18 Q. There are as I understand it three  
19 railroad stations in the area generally known as  
20 Lake Charles. Please confirm or correct me if  
21 I'm wrong, there's Lake Charles, West Lake, and  
22 West Lake Charles; is that accurate?

23 A. That's correct. There's also a place  
24 called Harbor.

25 Q. And they're all in the same general

1 geographic vicinity?

2 A. Correct.

3 Q. In fact, isn't it true that the  
4 facilities at West Lake Charles are served by a  
5 branch line coming through Lake Charles?

6 A. Well, it actually goes through West  
7 Lake.,

8 Q. Through West Lake. Who operates that  
9 branch line?

10 A. That branch line is a joint facility  
11 between KCS and Southern Pacific.

12 Q. And the UP has certain trackage rights  
13 arrangements with the Southern Pacific in the  
14 Lake Charles area; is that correct?

15 A. Well, no. I think that's -- no.

16 Q. Go ahead. Please explain.

17 A. Why don't I explain. Lake Charles is a  
18 port area separated by the Calcasieu River. The  
19 reason I mention that is the thing to keep in  
20 mind is that Union Pacific's tracks are only on  
21 the east side of the river and KCS' tracks are  
22 only on the west side of the river. And SP's  
23 east/west main line goes across the river and  
24 serves both sides.

25 So one railroad serves all our

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1 stations, and that is Southern Pacific. It  
2 serves going from east to west, it serves Harbor,  
3 Louisiana, which is a joint facility between SP  
4 and UP, and it's a two-to-one point and it's part  
5 of the UP/BN settlement.

6 Then we come over to Lake Charles,  
7 still on the east side of the river. That is  
8 served by UP, SP, and KCS. has rights to .  
9 reciprocal switching there through haulage  
10 arrangements with UP. But Lake Charles has three  
11 railroads today, UP, SP, and KCS. Now, I said  
12 KCS did not come across the river, that is why  
13 they're there under a haulage arrangement. So  
14 Lake Charles is what we call a three-to-two  
15 point.

16 Then we cross the river and we come to  
17 West Lake. West Lake is the location of Olin and  
18 PPG and their chemical plants. And West Lake is  
19 served by KCS and SP and is open to UP under  
20 reciprocal switching and haulage, because as I  
21 said we don't come over on the west side of the  
22 river. So those are three-to-two points. That  
23 is a three-to-two point, West Lake.

24 Then, as you go west, down the branch  
25 that you referred to, the points are -- which is

1 where most of the chemical companies are and your  
2 client, Montell, it used to be Himont, and others  
3 are, and that is known as West Lake Charles. And  
4 those points are all served only by KCS and SP.,  
5 So it is a complicated area, but that's kind of  
6 the foundation. Okay.

7 Q. Okay. Thank you. In terms of  
8 facilities at any of these four points,  
9 essentially isn't it true that they are similarly  
10 situated with regard to routing traffic from the  
11 plant to any of the major gateways?

12 A. No.

13 Q. I'm not talking about serving carriers,  
14 I'm talking about their physical location in  
15 terms of getting out of their plants, in terms of  
16 getting --

17 MR. ROACH: Objection.

18 BY MR. BERCOVICI:

19 Q. In terms of distances, let me put it  
20 that way, in terms of distance.

21 A. All of these four areas are within ten,  
22 12 miles of each other.

23 Q. A shipper at West Lake Charles trying  
24 to move product to New Orleans, what options does  
25 that shipper have today?

1           A.     Today he has two options. He has SR,  
2     ~~single line~~ from West Lake Charles to New  
3     Orleans. And then he has a joint-line route,  
4     KCS/UP, which is accomplished through an  
5     interchange point about 20 miles north of Lake  
6     Charles, a place called De Quincy. So he's got a  
7     single line and a joint line.

8           Q.     Do you know what the relative mileages  
9     are for those movements?

10          A.     Well, the SP is the shortest because it  
11     goes straight to New Orleans, KCS goes north  
12     let's say about 20 miles, and then UP goes east  
13     and then southeast. So I don't know, I suppose  
14     the UP is maybe 50 miles longer than the SP,  
15     something like that.

16          Q.     In the testimony of Montell and Olin,  
17     Montell identified the KCS/UP route as 259 miles  
18     and Olin identified the SP direct route to New  
19     Orleans as about 220 miles.

20          A.     Thirty-nine. What did I say? 50? I  
21     won't argue over 11 miles.

22          Q.     You're being very agreeable this  
23     afternoon, Mr. Peterson.

24                 You state on page 33 of your rebuttal  
25     statement that, for traffic to New Orleans into



1 the South and into the Southeast, that the  
2 KCS-Beaumont-BN/Santa Fe route is not  
3 significantly different than the current KCS-De  
4 Quincy-UP route?

5 A. Right.

6 Q. If the merger goes through as proposed,  
7 do I understand that the shippers at West Lake  
8 Charles could route to New Orleans either on  
9 UP/SP direct under the current SP line or they  
10 could route from West Lake Charles to Beaumont,  
11 and connect with the BN/SF, hand off to the BN/SF  
12 into New Orleans, is that the routing option?

13 A. That is correct.

14 Q. You state that those two routes are not  
15 significantly different. What factors did you  
16 take into account in looking at whether those  
17 were significantly different?

18 A. Well, I compared them to the two  
19 current routes. Again I think the customer is  
20 going to have an improved situation. First of  
21 all, UP/SP is going to replace SP as a single  
22 line. We think we're going to bring some  
23 improvements to SP service and make a more -- you  
24 know, a more efficient route and a better service  
25 route than SP has today.

1           As far as the joint line, instead of  
2 going up to KCS, going across to UP to Baton  
3 Rouge and coming down, you'll go back to  
4 Beaumont, then he'll get on the BN/Santa Fe, but  
5 then he'll use your 220 mile short route  
6 straight, you know, to New Orleans.

7           So he can use KCS, he'll have BN/Santa  
8 Fe who will be operating its own railroad,  
9 running its own railroad. Many of you seem to be  
10 awfully concerned about that here. You shouldn't  
11 be concerned. That joint route will be at least  
12 as good as the current joint route. So it  
13 appears to me that competition has been  
14 maintained or even improved.

15          Q.   Going on the joint route on the  
16 KCS-West Lake Charles-De Quincy is a movement  
17 that goes in a northwesterly direction, correct?

18          A.   Correct.

19          Q.   From De Quincy they would go to  
20 Beaumont which is in a southwesterly direction,  
21 correct?

22          A.   Correct.

23          Q.   And the point of interchange or point  
24 of destination is east of the West Lake Charles,  
25 correct?

1 A. Correct.

2 Q. Do you have any idea what the distance  
3 is from West Lake Charles to Beaumont?

4 A. It's not very far, 30 miles, 40 miles,  
5 somewhere in there.

6 Q. Did you review the Montell testimony in  
7 conjunction with your preparation of your --

8 A. I think I read it, yeah.

9 Q. According to Montell's witness, the  
10 distance from West Lake Charles to Beaumont is 74  
11 miles.

12 A. From West Lake Charles to Beaumont is  
13 74 miles?

14 Q. Seventy-four miles.

15 A. Let me look at the map here.

16 It could be that long, it just never  
17 seems that long to me. Are you sure that's from  
18 Lake Charles, that's not from West Lake Charles.

19 Q. That's what I was told and that was  
20 confirmed to me yesterday afternoon according to  
21 whatever the official guide is of the tariff that  
22 they use.

23 A. All right.

24 Q. So that means that, in terms of this  
25 route which is not significantly different, that



1 that movement would have to go 74 miles from West  
2 Lake Charles to Beaumont, return back through  
3 Lake Charles, another distance of approximately  
4 another 74 miles, plus travel the 220 miles from  
5 Lake Charles into New Orleans. That is a total  
6 by my pencil and paper of 368 miles.

7 A. Okay. And the UP would be about 250.

8 Q. About 220, the UP/SP direct route.

9 A. Yeah. But we're not going to operate  
10 that way.

11 Q. You're not going to operate the UP/SP  
12 direct route?

13 A. Probably not. On carload business we  
14 take it up to our Livonia yard and preblock it  
15 there which is near Baton Rouge. I may be wrong  
16 on that, we might take it over to the SP. It  
17 could go either way.

18 Q. When I asked you before about your rule  
19 of thumb on circuitry, you said that you use the  
20 most direct route of movements. Do you recall  
21 that?

22 A. Well, no. Come on, that was a  
23 different context. I said that was using --  
24 comparing a circuitous route to the direct routes  
25 of movement.

1 Q. Well, isn't this a circuitous route  
2 going from West Lake Charles to Beaumont and back  
3 to New Orleans as opposed to --

4 A. Oh, - don't deny there's some circuitry  
5 here. I'm just saying because UP would use a  
6 route that's 30 miles longer than another route  
7 doesn't have anything to do with the statement I  
8 made earlier. Maybe it may be 220 miles, it may  
9 be 250 miles. And this joint-line route may be  
10 360 miles. But those are the circumstances.

11 Q. And you consider a route with  
12 approximately 70 percent circuitry in it not  
13 significantly different than the direct route  
14 available to the shipper at West Lake Charles?

15 MR. ROACH: Object to the form of the  
16 question.

17 THE WITNESS: We're comparing the  
18 future joint-line route with the current  
19 joint-line route which I thought was 260 miles  
20 long.

21 BY MR. BERCOVICI:

22 Q. I'm comparing from my perspective the  
23 competitive posture of the Montell facility to  
24 get competitive rate quotes going from its  
25 facility into New Orleans. So they are looking



1 at a UP/SP with a direct route of 220 miles  
2 versus a replacing a joint line today which has  
3 about 18 percent circuitry, 220 miles versus 259  
4 miles, with a route that's got about 70 percent  
5 circuitry.

6 A. Right. And I'm comparing the 70 with  
7 the 18, not the 70 with the zero. And you  
8 objected to that. I'm comparing the -- we're  
9 both agreeing the single-line routes are direct.  
10 I'm saying there's a somewhat circuitous  
11 joint-line route today and there will be a  
12 circuitous, somewhat circuitous, we acknowledge  
13 that, joint-line route tomorrow to New Orleans.

14 Now, I find it hard to believe that  
15 Montell is shipping any significant amount of  
16 business to New Orleans itself. I assume its  
17 real interest here is the New Orleans gateway for  
18 traffic moving into the Southeast, in Florida,  
19 and so on.

20 For that traffic those percent circuitry  
21 calculations don't mean anything because, you  
22 know, you may have a 1,000 mile movement to  
23 Atlanta or to Jacksonville and, on a movement  
24 like that, if you're 100 miles longer, yeah,  
25 maybe that's 10 percent circuitry. But, you know,



1 depending on the overall efficiency of your  
2 route, you might be highly competitive.

3 The other thing we're losing sight of  
4 here is that KCS has its own single-line route  
5 all the way into the Southeast, by going from  
6 West Lake Charles up to Shreveport and going  
7 straight to Meridian into the Southeast and  
8 connecting to the Eastern carriers that way.  
9 That exists today, that's going to exist in the  
10 future, and so that's a third competitive  
11 option.

12 Q. Well, before we get to that competitive  
13 option, let's finish up talking about the  
14 movement across New Orleans. You talked about  
15 the total route of movement. At New Orleans who  
16 would handle the traffic from New Orleans going  
17 to the ultimate destination?

18 A. It could be CSX, it could be NS, it  
19 could be Illinois Central.

20 Q. So you've got two segments of movement,  
21 one would be from your origin carrier or  
22 carriers, if it's a joint-line movement, and the  
23 other would be the movement from the gateway to  
24 ultimate destination; isn't that correct?

25 A. I believe so, yes.

1 Q. If there is a -- strike that. Let me  
2 rephrase the question.

3 The connecting carrier presumably will  
4 charge the same factor regardless of whether the  
5 car is handed off by UP/SP or by BN/SF; is that  
6 not correct?

7 A. Probably. There could be some  
8 differences depending on interchange costs. I'll  
9 assume with you for now that those would be  
10 equal.

11 Q. So the circuitry factor would not be  
12 averaged out in the total length of all because  
13 the circuitry factor would only affect the origin  
14 carrier's rate element; is that correct?

15 A. No, I don't with that.

16 Q. Well, if CSX, for example, is going to  
17 charge the same regardless of which carrier they  
18 get traffic from at New Orleans, isn't the real  
19 question from Montell's standpoint what's going  
20 to be the cost to get it from plant to New  
21 Orleans?

22 A. Well, I'm saying that the cost to get  
23 it from Montell's plant in West Lake Charles to  
24 Atlanta, Georgia, is probably \$3,000 or something  
25 in that neighborhood. And probably over half of

1 it, let's say half of it is going to the Eastern  
2 carrier. And so, when you look at a rate of  
3 \$3,000 through route and you say I've got two  
4 routes that can give this to me, one is 10  
5 percent longer than the other, you know, one is  
6 100 miles longer than another, do you think they  
7 can meet a rate of \$3,000. It's very likely they  
8 could, because of the overall route -- what I'm  
9 saying is; on the overall rate and the overall  
10 route of movement, the circuitry is not very  
11 significant.

12 Q. An Olin or a PPG shipping out of West  
13 Lake would not be subject to that circuitry, would  
14 they?

15 A. Under the CMA agreement, they will have  
16 two single-line routes as I understand it. Well,  
17 they will have the UP/SP single line and then  
18 they will have a route with BN/Santa Fe. But  
19 that route will require KCS switching and  
20 handling and I believe at rates roughly equal to  
21 what KCS is charging UP today to originate its  
22 traffic at West Lake.

23 Q. But they wouldn't be subject to routing  
24 the traffic 74 miles to the west and bringing it  
25 back 74 miles east again in order to move the



1 traffic to New Orleans, would they?

2 A. That's correct.

3 MR. ROACH: Let me ask you a question,  
4 is the 74 miles, since you're quoting from your  
5 own testimony here, is that the KCS route from  
6 West Lake to Beaumont or is that the SP route?

7 MR. BERCOVICI: That is the -- that's  
8 the KCS route according to the testimony.

9 THE WITNESS: That's the reason I  
10 questioned it, is because you've got -- the SP is  
11 the hypotenuse of the triangle. You didn't  
12 explain that to me when you were telling me about  
13 the 74 miles.

14 BY MR. BERCOVICI:

15 Q. But, if it's --

16 A. That's why I questioned.

17 Q. But, if they routed via KCS, they would  
18 have to route it via De Quincy in order to get to  
19 Beaumont?

20 A. In one direction.

21 Q. Yes.

22 A. But not in both directions.

23 Q. But not in both directions.

24 A. Which is the way you characterized it.

25 Q. Well, coming back it could be somewhat

1 shorter mileage?

2 A. It sounds like it, right.

3 Q. But still you have the circuitry?

4 A. Yes. Next time I'll take the time to  
5 think that through more carefully.

6 Q. With regard to the CMA settlement and  
7 the option given to the Lake Charles and West  
8 Lake shippers of using BN/SF service to reach the  
9 Mexican border points including Brownsville, does  
10 that traffic go through Houston?

11 A. Yes.

12 Q. Why don't we come back to the question  
13 you mentioned about the KCS route over Meridian  
14 which you speak to on page 33 of your testimony.  
15 Is that a viable route today?

16 A. Yes.

17 Q. Are there tariff rates for plastics  
18 going KCS over the Meridian route connecting  
19 either with Norfolk Southern or with CSX going  
20 into the eastern district?

21 A. Are there tariff rates?

22 Q. Yes.

23 A. I don't know. I don't know KCS'  
24 rates.

25 Q. So you don't know whether or not

1 there's any service actually available over  
2 the --

3 A. Well, I know there's service. I mean,  
4 you know, all the shippers at West Lake and West  
5 Lake Charles are switched directly by KCS and  
6 SP. They have a joint facility where they rotate  
7 switching, they each provide switch engines into  
8 that joint facility. So they have direct service  
9 to both -- to those shippers.

10 Then KCS runs a train north direct to  
11 Shreveport, that's their main hump yard. They  
12 have a lot of service between there and  
13 Meridian. So service is not a problem. I mean  
14 they -- they are switching the chemical plants  
15 directly at both West Lake and West Lake  
16 Charles. And UP doesn't switch any chemical  
17 plants at all in that area. So KCS has got the  
18 best opportunity to provide service because they  
19 originate their train there, as I say it goes to  
20 Shreveport and then it can go straight east to  
21 Meridian.

22 Q. When you speak about connecting with  
23 the Eastern carriers, you're speaking about  
24 Norfolk Southern and CSX?

25 A. Right.



1 Q. And not Conrail?

2 A. Correct.

3 Q. In terms of determining whether or not  
4 there is an actual available route of movement  
5 via the Meridian routing, wouldn't it be  
6 important to determine whether or not KCS and its  
7 connecting carriers in the East offer rates to  
8 the plastics shippers by that route?

9 A. I would not consider it terribly  
10 significant if rates had not existed in the past,  
11 because KCS has just recently in the past couple  
12 of years purchased Mid-South and spent a lot of  
13 money upgrading it. So they are just in the  
14 process now of starting to really develop that  
15 route.

16 If major chemical companies indicate to  
17 rail carriers that they want to utilize a route  
18 for service reasons, my experience is that the  
19 railroads provide rates for moving via those  
20 routes. If they don't, the chemical companies  
21 will move their traffic on a different route.

22 Q. On routing via this Meridian routing  
23 we're talking about, that would give KCS a much  
24 longer route of haul going into the Southeastern  
25 states?

1 A. Yes..

2 Q. And it would give Norfolk Southern and  
3 Conrail a shorter length of haul than routing via  
4 New Orleans; is that not correct?

5 A. Well, not Conrail.

6 Q. Not Conrail --

7 A. But it would give Norfolk Southern  
8 and -- it would give CSX and Norfolk Southern a  
9 somewhat shorter route, somewhat shorter haul.

10 Q. Is it possible in pricing service from  
11 either Norfolk Southern or CSX that they would  
12 price their movement at the same price whether  
13 the traffic was picked up via the Meridian route  
14 or at New Orleans?

15 A. I guess anything is possible. Given  
16 all the costs and miles they would save, it would  
17 seem surprising to me and especially if major  
18 chemical companies came to them and negotiated  
19 with them, that would be even more surprising to  
20 me.

21 Q. You've never heard of railroads trying  
22 to protect their long haul by saying, you know,  
23 here's our rate and you can have it through any  
24 gateway that you want to move your traffic  
25 through?

1 A. It doesn't happen that much anymore.

2 Q. But it's not out of the question?

3 A. I guess it's not out of the question.

4 But we're talking about the chemical business  
5 here, we're talking about big chemical companies,  
6 we're talking about a lot of business, we're  
7 talking about various different routing options.  
8 So I would find it surprising that a major  
9 chemical company would accept that as a rational  
10 explanation from a carrier.

11 MR. BERCOVICI: I have no further  
12 questions. Thank you.

13 (Recess)

14 EXAMINATION BY COUNSEL FOR THE  
15 NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

16 BY MR. WOOD:

17 Q. Mr. Peterson, let me, if I may, just  
18 ask a few questions about Exhibit 9 now that I've  
19 had a chance to look at it. And this relates to  
20 the paragraph on page 169 that we discussed  
21 before, this particular exhibit relates to the  
22 backup for the number on page 169?

23 A. Yes.

24 Q. Let me ask first, is there a similar  
25 work sheet or whatever for the paragraph on page

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL MERGER --

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

HIGHLY CONFIDENTIAL

Washington, D.C.

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.

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1 about plastics producers in the region.

2 A. I don't really know. I would guess  
3 that they operate typically that 60 to 70 percent  
4 of their loads go into a storage-in-transit and  
5 the other 30 to 40 goes direct, but I -- again,  
6 that's just a guess of using how many of our  
7 other customers operate of plants that we have  
8 access to now.

9 Q. You say 60 to 70 percent go into  
10 storage-in-transit. Is that your typical  
11 experience with the plastics industry?

12 A. That's with several of our customers we  
13 operate with out of Houston now, and they might  
14 stay in storage-in-transit for a day, they might  
15 stay in storage-in-transit for two months. It's  
16 rather a random event.

17 Q. You state in the -- or it is stated in  
18 the implementation plan work paper, page 09992,  
19 end of the first paragraph: In general,  
20 customers have indicated the need for  
21 approximately 150 cars storage capacity for a  
22 thousand cars annual growth and shipments.

23 Can you explain what that statement  
24 means?

25 A. Again, I haven't done a map on it but

1 Q. Do you have any sense for whether it  
2 was beginning of March, middle of March, end of  
3 March?

4 A. I just -- I really don't.

5 Q. In dealing with customers and signing  
6 contracts for their traffic, how were those  
7 traffic commitments custom rily framed? Is it in  
8 terms of specific origin/destination pairs or is  
9 it in terms of percentage of traffic out of a  
10 facility or number of car units per year or a  
11 combination of the above?

12 A. Typically it's in origin/destination  
13 pairs. So if there were two railroads serving a  
14 plant one, bids would be put out to where one  
15 railroad would have all the traffic going to  
16 Southern California, another railroad may have  
17 the traffic going to Arizona, another traffic --  
18 another railroad may have Chicago gateway.

19 Typically it's in gateways if you think  
20 about the interchanges, the interchange network,  
21 so that you don't have multiple carriers  
22 delivering multiple shipments to multiple  
23 interchange partners.

24 Q. Is this typical with plastic industry  
25 customers?



1 A. Yes.

2 Q. If 60 to 70 percent of the plastics  
3 shipments go into storage, are you still able to  
4 reliably enter into a contract where the customer  
5 commits to a certain number of cars going to  
6 certain points?

7 A. When it comes to volume commitments  
8 they will contract -- if the customer's typical  
9 arrangement might be the customer will say we'll  
10 contract this on the carrier receiving 70 percent  
11 of the volume, and then they'll have in  
12 preference order which 70 percent they want. So  
13 it's -- when it does go into storage it's -- it  
14 is a little more complicated because you can't  
15 make that decision initially at the plant of  
16 which carrier is going to get it.

17 Q. So if you're limited to serving under  
18 the trackage rights agreement only certain  
19 points, that imposes -- that provides an  
20 impediment in terms of reliably estimating the  
21 customer's traffic -- I'm talking plastics as on  
22 which points, as on how much traffic would be  
23 available. Is that --

24 A. I understand your point but I do not --  
25 I don't agree with it because we have all the

1 major interchange points as a destination. There  
2 are locations that we will not be able to serve  
3 but those are -- those will be far and few  
4 between. The majority of the destinations served  
5 we will have access to, so if we have -- we've  
6 underestimated or if we've overestimated what we  
7 have potential to, it's a fairly small amount.

8 Q. In terms of destinations you cannot  
9 serve, is that because you do not -- the railroad  
10 does not serve the destination point?

11 A. Correct.

12 Q. The point would be local on the UP/SP  
13 line; is that correct?

14 A. Correct.

15 Q. With regard to access that you have at  
16 Lake Charles and West Lake, isn't it true under  
17 the CMA settlement that you're only enabled to  
18 serve the traffic going to the New Orleans  
19 gateway and to the Mexican border points?

20 A. That's correct, yeah, that location.

21 Q. So that in terms of dealing with those  
22 customers, they would have to have a very  
23 reliable knowledge of what their movements are to  
24 those points in order to be able to contract with  
25 you?

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1 A. That's correct.

2 Q. And to the extent that they can't  
3 reliably predict their volumes to those points,  
4 that would provide an impediment in terms of  
5 dealing with them on a contract basis because you  
6 couldn't reliably predict your volumes and hold  
7 them to volume commitments; is that correct?

8 A. For West Lake and Lake Charles, that's  
9 correct.

10 Q. Do you know why the UP and the CMA  
11 settlement limited the access of BN/SF only to  
12 West Lake and Lake Charles and not also -- and  
13 did not include West Lake Charles?

14 A. No, I do not.

15 Q. Do you have any views on why they did  
16 not?

17 MR. WEICHER: Are you asking him to  
18 speculate or --

19 MR. BERCOVICI: Yes, I'm asking him if  
20 he has any opinions. I'm not asking him to  
21 spec -- I'm asking him if he has an opinion on  
22 that.

23 THE WITNESS: No. It's somewhat of a  
24 puzzle.

25 BY MR. BERCOVICI:



1 Q. I'd like to direct your attention to  
2 the work paper bearing number 24561.

3 MR. WEICHER: Can I ask you, just  
4 time-wise, how you think you're doing, because  
5 we're getting a little tight on -- we're getting  
6 quite tight on Mr. Rose's schedule. I don't want  
7 to cut you off.

8 MR. BERCOVICI: What time is his  
9 flight?

10 (Discussion off the record.)

11 BY MR. BERCOVICI:

12 Q. Looking at that page, is my  
13 understanding that the only traffic to which  
14 BN/SF gets access is that to which the UP/SP and  
15 KCS has access? Is that your understanding?

16 A. Yes.

17 Q. Do the relative volumes shown on this  
18 page between the traffic available to all three  
19 carriers as opposed to traffic available only to  
20 the SP and KCS give you any suggestion as to why  
21 the UP may have limited your access to just the  
22 traffic available to all three carriers?

23 A. Again, I wouldn't want to speculate on  
24 why it did. I don't understand it. So I can  
25 leave it at that, I guess.

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

7 A. Is there any substantive difference in  
8 transportation?

9 Q. In the transportation for those  
10 producers.

11 A. No.

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

16 A. That is correct.

17 Q. By your calculations here, it's about a  
18 13-to-one ratio; is that right?

19 A. That's correct.

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

25 A. That's correct.

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1 Q. And of that traffic you only got access  
2 to whatever portion goes to either the Mexican,  
3 gateways or the New Orleans gateway?

4 A. That's correct.

5 Q. Do you have any understanding as to  
6 what portion of the traffic that you do have  
7 access to goes to either of those gateways or any  
8 of those gateways?

9 A. It would be a fraction of it..

10 Q. A small fraction?

11 A. A small fraction.

12 Q. Can you estimate for us what small  
13 means?

14 A. No. I mean it would -- I really  
15 haven't looked at it. I would want to look at  
16 the numbers again, but it's again there -- we  
17 have access to a fairly small amount of freight  
18 there and we have based our operation around  
19 that.

20 Q. Talked with Mr. Molm about pricing and  
21 he asked you about whether there was a  
22 differential in market price between exclusively  
23 served points and competitively served  
24 facilities. Do you recall that?

25 A. Yes.



EXAMINATION BY COUNSEL FOR  
UNION PACIFIC CORPORATION

BY MR. ROSENTHAL:

Q. My first question is do shippers in West Lake Charles have any single line UP routes today, do you know?

A. I don't know.

Q. Do you know whether UP serves any shippers in West Lake Charles?

A. I don't know which shippers -- I don't know the answer to that.

Q. Do you know whether UP serves any shippers in Lake Charles and in West Lake today?

A. I assume they do, but again, I don't -- I would have to look at maps and figure out what that flex looks like.

Q. So when you told Mr. Bercovici you saw that substantive difference between the shippers in West Lake, West Lake Charles and Lake Charles, you really don't know whether there's a substantive difference because --

MR. WEICHER: I object to the characterization of his prior answers. He did not say shippers, he said transportation characteristics.

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BY MR. ROSENTHAL:

Q. You don't know whether shippers in West Lake versus West Lake Charles and Lake Charles have different options to use different railroads, you just don't know who serves who?

A. I know that they have different options. I just don't know which one has which.

Q. And my second question is have you done any analysis of KCS and UP interline service available to shippers in West Lake Charles versus KCS/PN/Santa Fe interline service that would be available to shippers in West Lake Charles after the merger?

A. I don't know -- I don't know of a study. If it has been done, I'm not familiar with it.

MR. ROSENTHAL: That's all.

MR. BERCOVICI: I have one follow-up question.

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

BY MR. BERCOVICI:

Q. With regard to West Lake Charles, if BN/Santa Fe were given trackage rights to serve facilities in West Lake Charles, you consider

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1 that you would be competitive in serving those  
2 plants with a UP/SP direct line movement,  
3 recognizing that you would need to have a joint  
4 line movement with the KCS? Will you attempt to  
5 be competitive in those markets?

6 A. Yes.

7 MR. BERCOVICI: Thank you.

8 (Whereupon, at 12:30 p.m., the taking  
9 of the instant deposition ceased.)

10  
11 \_\_\_\_\_  
12 Signature of the Witness  
13

14 SUBSCRIBED AND SWORN to before me this \_\_\_\_\_  
15 day of \_\_\_\_\_, 19\_\_.

16  
17 \_\_\_\_\_  
18 NOTARY PUBLIC

19 My Commission expires: \_\_\_\_\_  
20  
21  
22  
23  
24  
25

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Item No. \_\_\_\_\_

Page Count 17

JUNE, 1996 #15

June 3, 1996

202 347-7170

\* ADMITTED IN PENNSYLVANIA ONLY

BY HAND DELIVERY

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
Case Control Branch  
12th Street & Constitution Avenue, N.W.  
Washington, D.C. 20423



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

Dear Mr. Secretary:

Enclosed for filing in the above-referenced proceeding please find an original and twenty (20) copies of the Brief of Arizona Electric Power Cooperative, Inc. (AEPC-8). In accordance with prior orders in this proceeding, we have also enclosed a Wordperfect 5.1 diskette containing this Brief.

We have also enclosed an extra copy of this document. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

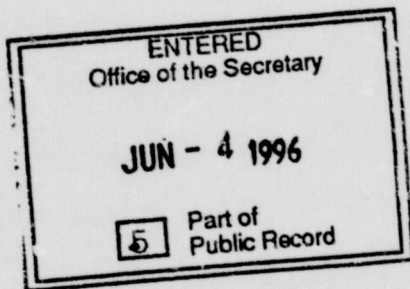
Thank you for your attention to this matter.

Sincerely,

*Andrew B. Kolesar III*

Andrew B. Kolesar III

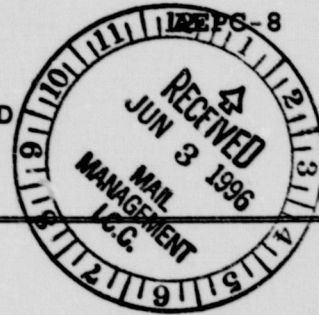
An Attorney for Arizona Electric Power Cooperative, Inc.



ABK:dsm  
Enclosures

cc: Arvid E. Roach II, Esq.  
Paul A. Cunningham, Esq.  
The Honorable Jerome Nelson

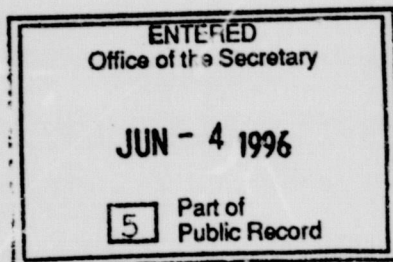
BEFORE THE  
SURFACE TRANSPORTATION BOARD



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, SPSCL CORP., AND THE )  
DENVER AND RIO GRANDE WESTERN )  
RAILROAD COMPANY )

Finance Docket No. 32760

BRIEF OF ARIZONA ELECTRIC POWER  
COOPERATIVE, INC.



ARIZONA ELECTRIC POWER  
COOPERATIVE, INC.

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Dated: June 3, 1996

Attorneys for Arizona Electric  
Power Cooperative, Inc.



BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

---

BRIEF OF ARIZONA ELECTRIC POWER  
COOPERATIVE, INC.

Pursuant to the Board's prior Decisions in this proceeding, Arizona Electric Power Cooperative, Inc. ("AEPCO") hereby submits this Brief in opposition to the pending Merger Application filed by Union Pacific Corporation, Union Pacific Railroad Company ("UP"), and Missouri Pacific Railroad Company ("MP"), and Southern Pacific Rail Corporation, Southern Pacific Transportation Company ("SP"), St. Louis Southwestern Railway Company ("SSW"), SPCSL Corp., and The Denver and Rio Grande Western Railroad Company ("DRGW") (collectively "Applicants"). As AEPCO demonstrated in the Comments that it filed on March 29, 1996 ("AEPCO Comments"), approval of the subject Merger Application would jeopardize the public interest, would contravene the national rail transportation policy to maintain and encourage

competition, and would hinder AEPCO's ability to obtain reasonable rail rates.

#### SUMMARY

AEPCO is a generation and transmission electric cooperative serving some 89,000 homes and business in Arizona, California, and New Mexico. AEPCO's only generating facility, i.e. the Apache Station in Cochise, Arizona, has historically burned some 1.2 million tons of coal per year. Since the Apache Station is captive to SP for destination rail service,<sup>1</sup> any consideration of the effect of the proposed consolidation upon AEPCO must necessarily focus upon this captivity. While AEPCO's present dependence upon SP-destination service is admittedly problematic, the proposed consolidation of UP and SP could actually worsen AEPCO's competitive position.

In particular, by allowing the merged entity to raise the highly suspect, but as-of-yet unrejected, "long-haul/short-haul" (or simply "short-haul") defense either:

- (i) as the basis for a refusal to quote a rate over AEPCO's destination bottleneck segment; or
- (ii) in an effort to thwart potential rate reasonableness litigation,

---

<sup>1</sup> See Incentive Rate on Coal -- Gallup, New Mexico to Cochise, Arizona, 357 I.C.C. 683, 696 (1977), aff'd sub nom. Houston Lighting & Power Co. and Arizona Electric Power Cooperative, Inc. v. United States, 606 F.2d 1131 (D.C. Cir. 1979), cert. denied, 444 U.S. 1073 (1980) ("[W]e find that respondents do have market dominance over the AEPC traffic.").



the merger of UP and SP could dramatically extend the effective reach of AEPCO's destination captivity.<sup>2</sup> Such an extended reach would allow the combined entity not only to control AEPCO's destination service, but to exert tremendous influence over its access to Powder River Basin ("PRB") coal origins, as well. Therefore, unless the Board has rejected the short-haul defense prior to the effective date of the merger, approval of the Merger Application could hinder AEPCO's ability to obtain reasonable transportation rates.

In addition, approval of the Merger Application would degrade the quality of rail service to Cochise from western-Colorado origins. Specifically, the dramatic increase in the volume of traffic on the "Moffat Tunnel line" would necessarily lead to costly delays in SP-originated coal transportation. On the basis of these concerns, which the Applicants have failed to address in a satisfactory fashion, and in light of the complete absence of any beneficial effect of the consolidation to AEPCO, AEPCO respectfully submits that the Board should decline to

---

<sup>2</sup> The issue of the validity of the "short-haul" defense is currently being raised by railroads in support of their refusal to offer rates over bottleneck segments. See Docket No. 41626, MidAmerican Energy Co. v. Union Pacific R.R. and Chicago and North Western Ry., UP Motion to Dismiss filed November 15, 1995; Docket No. 41242, Central Power & Light Co. v. Southern Pacific Transp. Co., SP Motion to Dismiss filed September 23, 1994. To the extent that the Board resolves the issue in the shippers' favor prior to its decision in this proceeding, AEPCO's concern regarding the impact of the merger in this regard would be removed. However, if the Board has not resolved this issue prior to that time, the Board should recognize the risk that this consolidation would allow the merged entity to raise this defense to the detriment of shippers such as AEPCO.



approve the subject Merger Application. In the alternative, AEPCO requests that the Board approve the Application only upon the grant of certain conditions designed to ameliorate the merger's anticompetitive effects.

## ARGUMENT

### I. Legal Standard

The Board may only approve a merger between two class I railroads if it is satisfied that the Applicants have made a showing of proof of public benefit sufficient to outweigh the unavoidable anticompetitive effect of a reduction in the number of competitors providing rail service.<sup>3</sup> In this regard, Congress has decreed that when evaluating a proposed merger of this magnitude, the Board must consider not only the effect of the transaction on general notions of the "public interest,"<sup>4</sup> but more particularly, must consider "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region." 49 U.S.C. § 11344(b)(1)(E) (emphasis added).

---

<sup>3</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 ("the Act"), which was enacted on December 29, 1995 and which took effect on January 1, 1996, abolished the Interstate Commerce Commission and transferred certain functions to the Surface Transportation Board. Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996. Therefore, citations in this Brief are to the former sections of the statute.

<sup>4</sup> "The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." 49 U.S.C. § 11344(c).

Similarly, the Board's regulations indicate that when the Board considers a proposed merger, it will balance the impact of a reduction in competition between rail carriers serving a given market against any supposed public benefit:

(i) Reduction of competition. If two carriers serving the same market consolidate, the result would be the elimination of the competition between the two. Even if the consolidating carriers do not serve the same market, there may be a lessening of potential competition in other markets. While the reduction in the number of competitors serving a market is not itself harmful, a lessening of competition resulting from the elimination of a competitor may be contrary to the public interest.

49 C.F.R. § 1180.1(c)(2)(i).

## **II. Approval of the Merger Application Could Augment SP's Monopoly Power Over AEPCO's Coal Deliveries**

As indicated above, the preeminent consideration in this proceeding with respect to AEPCO is the effect that the proposed consolidation would have on SP as AEPCO's destination monopolist.<sup>5</sup> By enabling this monopolist to originate service from the PRB, the proposed consolidation would allow the new merged entity to attempt to hide behind a "long-haul/short-haul" defense. If the Board were actually to legitimize such a defense -- or even if the Board were to permit the question of its

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<sup>5</sup> SP is the only carrier with rail access to AEPCO's Apache Station in Cochise, Arizona. Verified Statement of Mark W. Schwirtz at 3 (hereinafter "Schwirtz V.S. at \_\_\_\_"). This captivity presently extends east from the plant 151 miles to Deming, New Mexico. Id.



legitimacy to remain unresolved -- approval of the Merger Application could frustrate AEPCO's ability to constrain the merged entity's pricing demands.

A. Approval of the Merger Application  
Could Preclude AEPCO From Receiving the  
Benefits of Potential Origin Competition  
Between UP and BNSF for PRB Traffic

As indicated in its Comments, AEPCO presently has the ability to arrange for the transportation of southern PRB coal via either Burlington Northern Railroad Company<sup>6</sup> or UP at origin. See Schwirtz V.S. at 7. If AEPCO were to reach an agreement with BNSF to provide contract carrier service, and if SP refused to offer AEPCO a reasonable contract rate for the associated destination service (i.e. from Deming to the plant), then AEPCO would be positioned both to secure and litigate the reasonableness of SP's common carrier destination service. See 49 U.S.C. § 11701.<sup>7</sup> Consequently, if the competitive bidding between BNSF and UP were to generate any savings, then AEPCO could use regulatory means to prevent SP from usurping more of those savings than is permissible under the Board's rate reasonableness standards.

AEPCO further explained in its Comments, however, that if UP and SP were commonly controlled, this competitive opportu-

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<sup>6</sup> Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company will hereinafter be referred to collectively as "BNSF."

<sup>7</sup> Significantly, such litigation can prevent SP from securing the entire "one lump" of monopoly profit that would otherwise be available on AEPCO's coal traffic.



nity could be impeded. In particular, a combined UP/SP would argue that since it has the ability to originate AEPCO's traffic, the short-haul defense should preclude AEPCO from obtaining a UP/SP rate for service from Deming to the plant.<sup>8</sup> While AEPCO believes that such a refusal would be unlawful, if the Board has not officially discredited that defense prior to the effective date of the merger, a consolidated UP/SP could certainly be expected to take such a position.

The effect of a carrier's refusal to offer a rate over a bottleneck segment is significant. Specifically, if AEPCO were to secure a competitive rate from BNSF for service from the PRB to Deming, AEPCO could currently require SP to quote a rate from Deming to the plant; a distance of only 151 miles. In litigation involving the reasonableness of that rate, the Board's stand-alone cost pricing analysis would only apply to this segment of the movement. If the Board were to approve the Merger Application, however, and if the short-haul defense were accepted as legitimate, then AEPCO would be forced to challenge the reasonableness of UP/SP's rate for the entire origin to destination movement. The consequent requirement to apply the Board's stand-alone cost analysis over this greater distance would be harmful to AEPCO's interests. The lowest rate the Board can prescribe is

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<sup>8</sup> A combined UP/SP would only offer contract rates for a joint movement with BNSF if that contract assured UP/SP of at least as much profit as it would receive moving the traffic in single-line service. See AEPCO Comments at 6-8.

180% of variable cost, which rate is higher than competitive rate levels for unit train coal transportation.<sup>9</sup>

AEPCO's concern that the merged entity would not voluntarily offer a competitive bottleneck rate is not merely based upon speculation. In particular, while the Commission hypothesized in its BN/Santa Fe Decision that a destination monopolist such as SP would refrain from favoring the originating service of its merger partner,<sup>10</sup> UP and SP's recent activities before the Board confirm that the converse is true. For example, in Docket No 41626, MidAmerican Energy Co. v. Union Pacific R.R. and Chicago and North Western Ry., supra, UP declined to offer a bid for common carrier service over the final ninety miles of a movement from the PRB (to be used in conjunction with BNSF service), and instead, moved to dismiss MidAmerican's complaint. See Docket No. 41626, UP Motion to Dismiss, filed November 15, 1995. UP based this action upon the argument that the Board cannot require UP to short-haul itself. Id. Similarly, in Docket No. 41242, Central Power & Light v. Southern Pacific Transp. Co., supra, SP sought dismissal of the shipper's com-

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<sup>9</sup> See, e.g., UP, C&NW Moving Powder River Coal to Scherer Plant in Georgia, Traffic World, Oct. 11, 1993, at 21 ("UP and C&NW won a hotly contested bidding battle with Burlington Northern to carry low sulphur coal . . . with a bid in the neighborhood of 8 mills per ton-mile.").

<sup>10</sup> See Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern R.R. -- Control and Merger -- Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Ry., Decision served August 23, 1995, at 74 ("BN/Santa Fe Decision") ("[T]here is no reason for a carrier to foreclose an efficient connecting carrier just to achieve a longer haul.").



plaint on the basis of the short-haul defense. See Docket No. 41242, SP Motion to Dismiss, filed September 23, 1994. Both of these motions remain pending before the Board.

In light of these recent litigation tactics, AEPCO respectfully submits that if the Board were to approve the instant Merger Application without having rejected the short-haul defense, UP/SP would view itself as having obtained the exclusive right to transport any future PRB coal to AEPCO. The loss of BNSF originating service out of the PRB would represent a substantially detrimental effect of the merger.

B. Approval of the Merger Application  
Could Preclude AEPCO From Receiving  
the Benefits of Source Competition  
Between Uinta Basin and PRB Coal Suppliers

Similarly, if the Board were to approve the Merger Application, any potential savings that AEPCO may be able to generate through negotiation between competing coal suppliers would likely be usurped by UP/SP. At the present time, SP is only able to originate coal transportation service from origins in the Uinta Basin of western-Colorado and eastern-Utah. A combined UP/SP, on the other hand, would serve both the Uinta and southern Powder River Basins. Therefore, although BNSF would still enjoy physical access to the southern PRB, a combined UP/SP would endeavor to prevent AEPCO from contracting for such service by refusing to offer a rate from Deming to the plant, or by offering a rate for that service that is so high that it effectively rules out a joint BNSF-UP/SP service option.



If such a scenario were to come to pass and if the Board had not yet formally rejected the short-haul defense -- or had actually validated the defense, UP/SP would be positioned to appropriate the savings generated by producer competition in a way that SP alone, which lacks PRB origination capability, could not. In particular, absent a requirement to offer a rate for service in conjunction with BNSF, UP/SP could quote long-haul rates from the Powder River and Uinta Basins at a level high enough to appropriate any savings derived from competition between the various coal suppliers.

**III. SP's Destination Monopoly Precludes the  
Pass-Through of Any Purported Merger Benefits**

While the proposed consolidation could hinder AEPCO's interests in the manner described above, it is equally significant to observe that the merger would fail to yield any new benefits to AEPCO. Despite the Applicants' assertions of substantial public benefits, the increased efficiencies and expanded single-line service options purportedly offered by this merger are of no use to AEPCO.<sup>11</sup> The reasons supporting this conclusion are simple -- SP has no incentive to share any merger "benefits" with AEPCO. Without some competitive threat or the assurance of relief through rate reasonableness litigation, AEPCO has no means through which it can pressure SP to turn its new-found

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<sup>11</sup> As demonstrated in Section II, supra, expanded single-line service could actually harm AEPCO and other similarly situated shippers.

efficiency gains over to a captive customer. SP has no need to foster good will with AEPCO.<sup>12</sup>

Similarly, the Applicants have offered no explanation as to the manner in which AEPCO would benefit from the presence of a strong UP/SP to compete with the recently consolidated BNSF. Again, with control over AEPCO's destination, and with a new-found (albeit questionable) excuse from the requirement to publish a rate for the bottleneck segment, there is no reason to believe that the merged entity would voluntarily tolerate competition from BNSF for AEPCO's PRB traffic.

#### **IV. Approval of the Merger Application Would Lead to the Degradation of SP's Service**

As AEPCO reported in its Comments (AEPCO Comments at 11-13; Schwirtz V.S. at 11-12), there are two significant aspects of the merger that would lead to quality of service problems over SP's "Moffat Tunnel line" through Colorado: (i) the Applicants have sought authority to abandon the heavily utilized Tennessee Pass line through Colorado, and intend to redirect traffic from this line over the Moffat Tunnel line; and (ii) the Applicants have entered into a Settlement Agreement with BNSF dated Septem-

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<sup>12</sup> In this regard, it is reasonable to question the significance of Witness Sansom's declaration that in light of the merger, although "[i]t is still captive, . . . for the first time [AEPCO] could tap a single-line haul of UP coal from Utah [via California]." Rebuttal Verified Statement of Robert L. Sansom at 45. The Applicants offer no assurance that the merged entity would share any savings from such single-line service (to the extent that such savings would exist) with AEPCO. There is no reason to believe that it would do so.



ber 25, 1995 which provides for BNSF trackage rights over the Moffat Tunnel line. See AEPCO Comments at 11-13.

On the basis of the Applicants' and BNSF's own projections, traffic over the Moffat Tunnel line will double -- increasing from nine to eighteen trains per day. Id. at 13. The Applicants have made no indication, however, that they intend to make improvements to the line to increase its capacity. As stated by Witness Schwirtz, "this creates a significant concern . . . regarding the prospect of using western-Colorado coal." Schwirtz V.S. at 12.

#### V. Conditions

In the event that the Board should find that approval of the merger is in the public interest, AEPCO submits that the Board should only approve the Application upon a grant of certain conditions designed to protect AEPCO from the anticompetitive impacts of the proposed consolidation:

- (1) The Board should clarify that the so-called "short-haul" defense neither removes a carrier's obligation to quote rates over bottleneck segments, nor prohibits rate reasonableness litigation pertaining to such rates;
- (2) In the event that the Board is not prepared to offer such a general clarification at this time, the Board should condition approval of the Merger Application upon the requirement that AEPCO be entitled to obtain a rate from UP/SP, the reasonableness of which would be subject to review by this Board, for the movement of unit trains in interchange from Deming to the plant;
- (3) Third, the Board should require divestiture of SP's line from Grand Junction, Colorado eastward to Dotsero, Colorado, and its lines from Dotsero



to Denver, Dotsero to Pueblo, and Denver to Pueblo, as well as the branch lines to the Craig and Montrose coal-origination areas;<sup>13</sup>

- (4) Fourth, the Board should decline to approve the abandonment of the Tennessee Pass line and should preclude the re-routing of existing Tennessee Pass line traffic over the Moffat Tunnel line.

## VI. Conclusion

In light of the fact that the consolidation of UP and SP could exacerbate AEPCO's destination captivity and would reduce the quality of rail service from western Colorado origins, and the fact that no purported benefits of the merger would flow through to AEPCO, the Board should decline to approve the Merger Application. In the event that the Board elects to approve the Merger Application, however, the Board should do so only upon the conditions outlined herein.

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<sup>13</sup> A less favorable, but still helpful condition would be to require UP to grant trackage rights over the lines of the DRGW to a carrier other than BNSF.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this 3rd day of June, 1996,  
served copies of the foregoing Brief of Arizona Electric Power  
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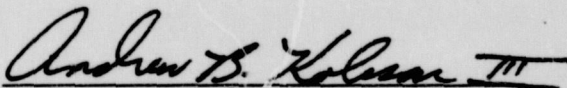
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and by first class mail, postage prepaid on:

The Honorable Federico Pena  
Secretary  
U.S. Department of Transportation  
400 7th Street, S.W., Suite 10200  
Washington, D.C. 20590

The Honorable Janet Reno  
Attorney General of the United States  
U.S. Department of Justice  
10th & Constitution Ave., N.W., Room 4400  
Washington, D.C. 20530

and upon all other parties of record in Finance Docket No. 32760.

  
Andrew B. Kolesar III



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Page Count 20

JUNE, 1996 #16

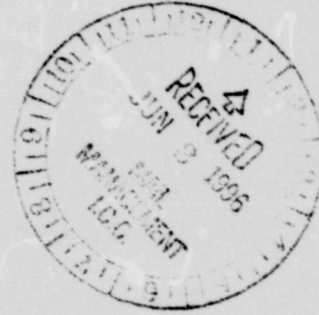
June 3, 1996

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\*ADMITTED IN PENNSYLVANIA ONLY

BY HAND DELIVERY

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
Case Control Branch  
12th Street & Constitution Avenue, N.W.  
Washington, D.C. 20423



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

Dear Mr. Secretary:

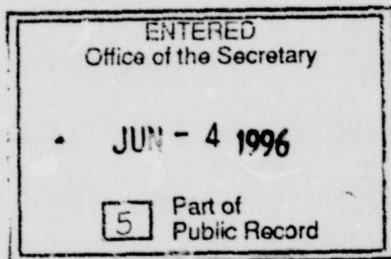
Enclosed for filing in the referenced proceeding please find an original and twenty (20) copies of the Joint Brief of Wisconsin Power & Light Company and Wisconsin Public Service Corporation (WPL-12 and WPS-12).


In accordance with the Board's order in this proceeding, we also enclose a Wordperfect 5.1 diskette.

An extra copy of the brief is enclosed. Kindly indicate receipt and filing by time-stamping the copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,



  
Kelvin J. Dowd  
An Attorney for Wisconsin Power  
& Light Company and  
Wisconsin Public Service  
Corporation

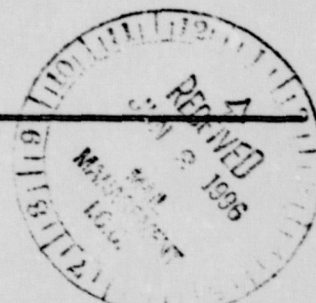
Enclosures

WPL-12  
WPS-12

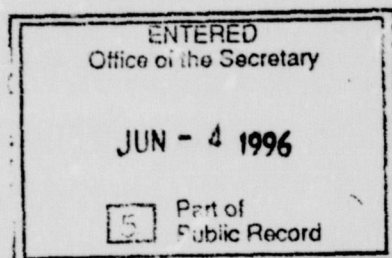
BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

Finance Docket No. 32760



JOINT BRIEF OF  
WISCONSIN POWER & LIGHT COMPANY  
AND  
WISCONSIN PUBLIC SERVICE CORPORATION



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Dated: June 3, 1996

Attorneys and Practitioners



BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

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JOINT BRIEF OF  
WISCONSIN POWER & LIGHT COMPANY  
AND  
WISCONSIN PUBLIC SERVICE CORPORATION

Pursuant to the procedural orders issued by the Surface Transportation Board ("Board") in this proceeding, Wisconsin Power & Light Company ("WPL") and Wisconsin Public Service Corporation ("WPS")(jointly, "WPL/WPS") submit this Joint Brief in opposition to the unconditioned merger of Applicants Union Pacific Railroad Company ("UP") and Southern Pacific Transportation Company ("SP")(jointly, "UP/SP").<sup>1</sup> As demonstrated by WPL/WPS in their Joint Comments and summarized below, absent the imposition of certain critical conditions, the

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<sup>1</sup> Applicants include UP and SP, and other related corporate entities which have been identified as Applicants in the Board's Decision No. 1 in this proceeding.

proposed merger is not in the public interest, and accordingly the Board should deny approval.

I

SUMMARY OF WPL/WPS's POSITION

In their Joint Comments filed on March 29, 1996, WPL/WPS demonstrated that the proposed merger is not in the public interest because it would (i) significantly handicap if not eliminate Uinta Basin bituminous coal as an effective competitive force in the market for coal supplies to electric utilities; and (ii) cause a further decline in the quality of unit train service over UP's east-west Central Corridor, which is used for the transportation of coal to Upper Midwestern utilities such as WPL/WPS.<sup>2</sup>

Given the extensive record which has developed in this proceeding in opposition to the proposed merger, Applicants' sweeping claim that "[t]here is also no basis for concern about any anticompetitive effects on coal transportation" is wrong. See UP/SP Rebuttal, Narrative, at 27 (dated April 29, 1996). As WPL/WPS have shown in their Joint Comments, the merger, as proposed, threatens a number of significant adverse shipper impacts, which collectively preclude its being found consistent with the public interest. Accordingly, if the merger is to be approved by

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<sup>2</sup> Herein, Central Corridor refers to UP's east-west transcontinental main line running from Cheyenne, Wyoming, to Chicago, Illinois, via North Platte and Fremont, Nebraska and Council Bluffs, Iowa.

the Board, conditions must be imposed to ameliorate the erstwhile harmful effects of the combination on competition and service quality.

In order to provide the Board with a context for analysis, WPL and WPS' individual factual circumstances are briefly summarized below.

A. Wisconsin Power & Light Company.

WPL is an investor-owned electric, gas and water utility based in Madison, Wisconsin, which relies heavily upon four (4) coal-fired generating facilities to fulfill its customers' electricity needs. As WPL Fuel Service Director William R. Knight testified, the proposed merger would adversely impact WPL's fuel supply and transportation arrangements for these facilities in at least two (2) ways. First, the merger would reduce coal source competition currently available to WPL, particularly with respect to shipments of bituminous coal. Second, the merger threatens a further deterioration in the quality of coal transportation service to WPL's stations, since Applicants' Operating Plan envisions a shift of current and increased coal and freight traffic on to UP's Central Corridor, with no significant planned capacity improvements.

Each of WPL's coal-fired plants is capable of burning both bituminous and sub-bituminous coal, and two (2) in particular -- Rock River and Edgewater -- have used significant volumes of higher Btu bituminous coal (including coal from the Uinta Basin) in varying blends with Powder River Basin sub-bituminous



coal. As Mr. Knight testified (V.S. Knight, at 11-13), even where the Uinta Basin origins served by SP have not won a particular contract, aggressive marketing of this coal has had a direct and positive influence on the prices not only of bituminous coal from other sources, but on delivered costs for sub-bituminous coal as well. The proposed merger threatens to squelch this competition unless conditions are imposed which at least will allow another, independent rail carrier to replicate SP's role. See V.S. Knight, at 12.

In addition to concerns regarding source competition, WPL has shown that the merger, as proposed, threatens to exacerbate problems of rail service adequacy to all four (4) of its plants, which already have resulted in coal inventory shortfalls and consequentially higher electric production costs. See V.S. Knight, at 14-15. Accordingly, WPL opposes the merger unless conditions which will permit a restoration and preservation of adequate rail service are imposed by the Board.

B. Wisconsin Public Service Corporation.

WPS is an integrated electric and gas utility which is located in Northeastern Wisconsin and Upper Michigan. Like WPL, a high percentage of WPS's generation depends upon two (2) coal-fired facilities. Although WPS's facilities most recently have been fueled almost exclusively with Powder River Basin coal, they have burned and remain capable of burning significant amounts of bituminous coal. In fact, as WPS Director of Fossil Fuels John L. Waltman testified, WPS' Pulliam Generating Station was de-

signed exclusively for higher Btu coal, which was the sole fuel source as recently as 1992. Thus, for WPS (like WPL), the functional interchangeability of bituminous and sub-bituminous coals give rise to a real threat of foreclosed competition as a consequence of the acquisition of SP by the PRB-centered UP System. Nevertheless, the principal concerns of WPS regarding the proposed merger remain its likely impact on Central Corridor coal service quality.

As Mr. Waltman explained, WPS has been suffering the consequences of Central Corridor service delays and associated problems for approximately two years. V.S. Waltman, at 5-6. During that time, for example, UP cycle times to key rail interchanges for coal deliveries to WPS facilities increased by 30-40% above the historic levels on which WPS based its railcar investment decisions. The result was a coal delivery shortfall, which necessitated an expenditure by WPS of some \$2 million for additional leased railcars in 1995 alone. V.S. Waltman, at 6.

Applicants' Operating Plan contemplates traffic shifts from the SP system on to the same UP lines used to serve WPS. These traffic shifts will be coupled with inevitable overall traffic volume growth, as well as potential traffic shifts from other carriers. As a result, in the absence of added investment in upgraded facilities, the quality and reliability of unit train coal service over UP's Central Corridor will suffer further deterioration. For these reasons, WPS opposes the merger unless it is conditioned in a manner that will restore adequate service



to existing shippers before consolidation of UP and SP operations over the affected lines takes place.

## II

### ARGUMENT

Applicants' Rebuttal, as relevant to WPL/WPS, fails to respond effectively to WPL/WPS's showings concerning adverse competition and service impacts. Applicants' Witness Sansom, for example, abruptly dismisses concerns regarding the benefits to WPL/WPS of source competition and SP's independence without any meaningful analysis, stating merely that neither utility will be affected by the proposed merger. R.V.S. Sansom, at 51. Likewise, Applicants' Witness King responds to WPL/WPS's evidence of service inadequacies with a combined denial of any continuing problem, and an unsubstantiated claim that to the extent utility coal service problems are a concern, the utilities themselves are to blame. R.V.S. King, at 36-38.

The discussion which follows synthesizes the evidence most relevant to the issues affecting WPL/WPS, which are contained in the record developed in this proceeding. That evidence establishes several critical facts with regard to the adverse impacts of the proposed merger on competition for WPL/WPS's coal traffic and the adequacy of unit train coal service over the Central Corridor. Imposition of the protective conditions sought by WPL/WPS is necessary to ameliorate these effects, and is fully



justified and in keeping with the Board's statutory responsibilities in merger proceedings.

A. The Applicable Legal Standards.

The Interstate Commerce Act's<sup>3</sup> "single and essential standard of approval" for merger transactions is that "the [Board] find the [transaction] to be 'consistent with the public interest.'"<sup>4</sup> Finance Docket No. 32133, Union Pacific Corp., Union Pacific R.R. Co. and Missouri Pacific R.R. Co. -- Control - - Chicago and North Western Transp. Co. and Chicago and North Western Railway Co., Decision served March 7, 1995, at 53, citing, Missouri-Kansas-Texas R.R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981) ("UP/CNW").<sup>5</sup> Among the factors the Board is required to

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<sup>3</sup> The ICC Termination Act of 1995 (the "Act"), Pub. L. No. 104-88, 109 Stat. 803 (1995) abolished the Interstate Commerce Commission ("ICC") and transferred responsibility for the economic regulation of rail carriers to the Board, effective January 1, 1996. The Act also made several changes in the statutory scheme that had been administered by the ICC, and recodified other provisions of the former Revised Interstate Commerce Act (49 U.S.C. § 10101, et seq.) without substantive change. The Act's savings provision (Section 204) directs that matters pending before the ICC on January 1, 1996 that relate to functions transferred to the Board -- such as the instant case -- shall continue to be heard without regard to the changes wrought by the Act. References herein to statutory provisions, therefore, will be to the former Revised Interstate Commerce Act.

<sup>4</sup> See also Joint Comments of WPL/WPS, Argument, at 2-6.

<sup>5</sup> This standard was recently re-affirmed in the BN/Santa Fe Merger proceeding. Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Decision served August 23, 1995, at 50-51 ("BN/Santa Fe").

evaluate in determining whether a merger is in the public interest is whether the merger would have an adverse effect on the adequacy of transportation to the public, or on competition among rail carriers. See 49 U.S.C. § 11344(b)(1). The Board has broad authority to ensure protection of these public interest considerations where necessary, by imposing pro-competitive or other conditions on consolidations. See Union Pacific -- Control -- Missouri Pacific; Western Pacific, 366 I.C.C. 459, 562-64 (1982), aff'd sub nom. Southern Pacific Transp. Co. v. I.C.C., 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985); Santa Fe Southern Pacific Corp. -- Consolidation -- Southern Pacific Transp. Co., 2 I.C.C. 2d 709, 807-08 (1986); see also 49 U.S.C. § 11344(c). As explained below, proper application of these legal standards warrants granting the relief sought herein by WPL/WPS.

B. Absent Conditions, The Proposed Merger Is Not In The Public Interest.

The public interest demands the preservation of rail competition and adequate rail service in the western United States. As the evidence adduced in this proceeding shows, insofar as coal shipments to Midwestern utilities such as WPL/WPS are concerned, the UP-SP merger as proposed would run afoul of these straightforward rail policy goals.

1. The Merger Will Eliminate Uinta Basin Coal As A Competitive Force In The Western and Midwestern Coal Markets.



WPL/WPS, through their Witnesses Knight, Weishaar and Malhotra, have demonstrated the effect of the proposed merger on the relevant coal and coal transportation markets, particularly as it relates to critical facilities in their respective systems. As Mr. Knight summarized:

... [t]he loss of SP as an independent origin coal hauler will reduce competition in the market for bituminous coal, and may reduce generally the competitive pressure felt by all participants in the utility coal market. These effects would lead inevitably to higher prices for the coals that WPL relies on to fuel our generating stations.

V.S. Knight, at 10-11.

Both WPL and WPS have coal-fired plants which are capable of burning a variety of coals -- including coal from the Powder River Basin and the Uinta Basin. As Witnesses Weishaar and Malhotra have testified, PRB coals compete directly with coal from Colorado/Utah. This competition, in turn, has led to active transportation competition between UP and SP for coal moving from these origins, competition which directly benefits utility shippers. See V.S. Weishaar, at 6-13; V.S. Malhotra, at 13-23.

Witnesses Weishaar and Malhotra further testified that post-merger, this competition will be eliminated as UP will favor its PRB sources over Colorado/Utah coal sources, for economic and other reasons. Id. Applicants claim that these coals do not compete, and that SP, therefore, does not act as a competitive restraint on western coal rail rates. However, the four witnesses gathered by Applicants to support this claim, (Witnesses Sansom, Sharp, Nock and Hutton) essentially measure a coal's



competitiveness solely on the basis of actual use. That is, if a utility is not using a particular coal or has not done so in the very recent past, Applicants' witnesses seem to conclude per se that the coal is not competitive. See e.g., R.V.S. Sharp, at 49-51. This is hardly an accurate reflection of the realities of the marketplace, however, as Mr. Knight demonstrated. See V.S. Knight, at 11-12. There are many circumstances in which a coal source or type may exert genuine competitive pressure on prices for rival products, without actually garnering a share of the customer's fuel requirements. Put another way, a utility like WPL does not have to currently use coal from a given source in order to benefit from the competitive pressure that that coal's presence in the market generates. See V.S. Weishaar, at 8-11.

To the extent that Uinta Basin coal competes directly with Hanna Basin and PRB coals, an unconditioned merger of SP into UP obviously will eliminate competitive alternatives. However, the matter does not end there. As Mr. Knight testified, and Applicants' own Witness Sharp acknowledged (R.V.S. Sharp, at 39-40), Uinta Basin coal also competes with other bituminous coal sources for sales to Midwestern utilities (like WPL) whose plants rely upon coal blends. The adverse impact of a UP-SP merger here, though less direct, is no less significant. As a far larger carrier with an enormous existing investment in the Powder River Basin, UP will not have nearly the incentive that SP does to aggressively market Uinta Basin coals. As a consequence, an adverse secondary market impact will result, as WPL and other

similarly-situated shippers experience a reduction in competition among bituminous coal sources.

Simply put, the evidence sponsored by WPL/WPS demonstrates that a merger of SP into UP, as proposed, will result in a significant loss of coal source and transportation competition, to the detriment of Midwestern and other utilities. Conclusory findings offered by Applicants' witnesses in response<sup>6</sup> are insufficient to rebut this evidence, which collectively points to the conclusion that the merger is not in the public interest.

2. The Merger Will Contribute To A  
Decline In The Quality of Unit Train  
Coal Transportation Service In The  
Central Corridor.

The impact of a merger on the adequacy of transportation service to the public is a key consideration in the discharge of the Board's oversight responsibility under the governing statute. See Lamoille Valley R.R. Co. v. I.C.C., 711 F.2d 295 (D.C. Cir. 1983). In their Joint Comments, WPL/WPS demonstrated that a merger of SP into UP in the manner proposed threatens to exacerbate recent and current service inadequacies along key line segments, particularly with regard to utility coal shipments over the Central Corridor. As summarized by Witness William C. Lyman, an expert with over 20 years' experience in

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<sup>6</sup>As WPL/WPS Witnesses Knight, Crowley and Weishaar explained, the so-called Settlement Agreement between UP-SP and the Burlington Northern Santa Fe Railway is inadequate to resolve these competitive problems. See V.S. Knight, at 12-13; V.S. Crowley, at 20-26; V.S. Weishaar, at 28-30.



railroad operations:

... [F]ollowing a merger of UP and SP[,] traffic over the UP central corridor lines will increase significantly from the levels assumed in the Operating Plan. Particularly given that coal traffic is assigned no greater priority than other traffic and, indeed, usually gives way to time-sensitive intermodal traffic, the increased traffic inevitably will lead to higher cycle times for coal shippers. In their Operating Plan ... Applicants are projecting transit times to Midwestern destinations from Uinta Basin and PRB origins significantly lower than those recently experienced by coal shippers ... I come to the opposite conclusion: absent expanded capacity, UP/SP transit times for coal moving on the central corridor are more likely to get worse than better. . .

V.S. Lyman, at 15-16. Accordingly, Mr. Lyman concluded that "if the UP/SP merger is effected in the manner planned, coal shippers who depend upon service via the central corridor will see the quality of that service deteriorate, particularly with respect to unit train cycle times." Id. at 4.

Applicants acknowledged that in developing their proposed Operating Plan, no consideration was given to future coal traffic growth or shifts from other carriers. See Joint Comments, Argument, at 9. Nevertheless, Applicants' Witness King opined on rebuttal that this traffic will not be affected by the merger, and attempted to rebut WPL/WPS's specific showings regarding service deficiencies and their consequences with coal train utilization statistics for WPL's Edgewater and WPS's Weston and Pulliam Stations. See R.V.S. King, at 37-38. The percentage of time that rail equipment is in use versus standing idle, however, is no indicator of the number of cycles being



accomplished with that equipment within a given timeframe, nor does it contradict the fact that WPL has experienced inventory shortfalls, or that WPS had to spend an additional \$2 million to acquire extra equipment just to enable UP to deliver its scheduled tonnage. Put another way, a train utilization rate of 100% coupled with slow transit times still can produce an overall service deficiency for a given shipper or body of traffic.<sup>7</sup>

Applicants proclaim that after the merger, "[e]very UP/SP customer will benefit from dramatic improvements in route mileages, single-line service, equipment supply, service reliability, operating efficiency, and cost."<sup>8</sup> Applicants' Rebuttal Narrative, at 3. The unrebutted testimony sponsored by WPL/WPS regarding the merger's impact on coal service over the Central Corridor, however, tells a different story. As contrasted with dramatic improvements in service or operating efficiency, the merger threatens a further deterioration in the level and frequency of service available to WPL/WPS, in derogation of the public interest criteria which govern the Board's merger approval authority.

C. Protective Conditions Are Necessary To Ameliorate the Adverse Effects Of The Merger.

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<sup>7</sup>As noted supra Mr. King also suggests that any remaining UP service problems are the fault of coal source loading or power plant unloading delays, not congestion along the UP's lines. R.V.S. King, at 37. However, he offers no empirical data to support such a general conclusion, and as to WPL and WPS it is contradicted by the firsthand testimony of Messrs. Knight and Waltman.

WPL/WPS respectfully submit that the evidence of record supports denial of the merger as proposed by the Applicants. If the Board nonetheless determines that overall, the proposed merger is consistent with the public interest, then at a minimum the following conditions must be imposed to alleviate the adverse impacts on competition and service demonstrated by WPL/WPS.

First, to remedy the loss of SP as an aggressive competitor in the marketing and transportation of Uinta Basin coal, the Board should require the divestiture of the SP main and branch lines serving bituminous coal sources in the Uinta Basin, from Provo, Utah, through Pueblo, Colorado and Herington, Kansas to Kansas City, Kansas/Missouri, together with either (1) divestiture of the SP lines from Kansas City to Chicago via St. Louis, Missouri, or (2) unrestricted assignment of SP's trackage rights over the lines of BNSF from Kansas City to Chicago. The divestitures and/or assignment should be to an independent western rail carrier other than BNSF. WPL/WPS submit that Montana Rail Link would be an appropriate candidate for this condition.

As an alternative to divestiture, the Board may require SP to grant unrestricted trackage rights over the lines described above to an independent western rail carrier, such as Montana Rail Link. Compensation for such rights, however, should be determined pursuant to the methodologies recommended by WPL/WPS's Witness Crowley (see V.S. Crowley, at 20-33), which are adequate to ensure full coverage of SP's legitimate costs while still



permitting the tenant carrier to establish competitive rates for coal service over the subject lines.

Second, to ameliorate the significant risk that merger of the UP and SP operations over their main east-west lines will lead to a deterioration in the level of service available to utility coal shippers, a separate service protection condition should be imposed. Specifically, UP and SP should be precluded from consolidating or making other changes in present operations over (1) SP's lines between Provo, Utah and St. Louis, Missouri and (2) UP's lines between Cheyenne, Wyoming and Chicago via North Platte, Nebraska and Council Bluffs, Iowa, including those discussed generally in Applicants' Operating Plan (e.g., Application, Volume 3, at 28-59), until Applicants have certified to the Board that for a period of twelve (12) consecutive months, UP and SP each have been in full compliance with all service guarantees, standards or other obligations undertaken in any contract for coal transportation service via any of the aforescribed lines.

Under the circumstances, and given the record assembled in this case, the public interest clearly favors imposition of the protective conditions sought by WPL/WPS. Consistent with the policy goals of the Rail Transportation Policy and the Board's own guidelines for merger oversight, these conditions are specifically tailored to counter the adverse public impacts of the proposed merger, while still preserving the principal benefits which the Applicants anticipate from the planned



consolidation. See Union Pacific Corp., Et Al. -- Control --  
Missouri - Kansas - Texas RR, Et Al., 4 I.C.C. 2d 409, 437  
(1988).

IV

CONCLUSION

For the reasons discussed in this Brief, and in WPL/WPS' Joint Comments, the proposed UP/SP merger is contrary to the public interest in that it would eliminate significant western coal source and transportation competition, and would lead to a further decline in the quality of rail service over UP's Central Corridor. Approval of the merger in the manner proposed therefore should be denied. If, however, the Board nevertheless determines to approve the merger, WPL/WPS respectfully request that the Board do so only subject to the protective conditions outlined herein.

Respectfully submitted,

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Dated: June 3, 1996

Attorneys and Practitioners

CERTIFICATE OF SERVICE

I certify that I have this 3rd day of June, 1996,  
served copies of the foregoing Joint Brief of Wisconsin Power &  
Light Company and Wisconsin Public Service Corporation by hand  
upon Applicants' counsel:

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by hand upon:


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Joan S. Huggler, Esq.  
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and by first class mail, postage prepaid on:

The Honorable Federico Pena  
Secretary  
U.S. Department of Transportation  
400 7th Street, S.W., Suite 10200  
Washington, D.C. 20590

The Honorable Janet Reno  
Attorney General of the United States  
U.S. Department of Justice  
10th & Constitution Ave., N.W., Room 4400  
Washington, D.C. 20530

and upon all other parties of record in this proceeding.

  
\_\_\_\_\_  
Kelvin J. Dowd

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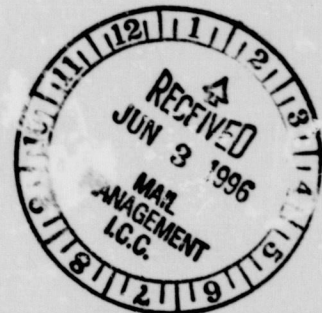
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June 3, 1996

BY HAND

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
Twelfth Street and Constitution Avenue, N.W.  
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Washington, D.C. 20423

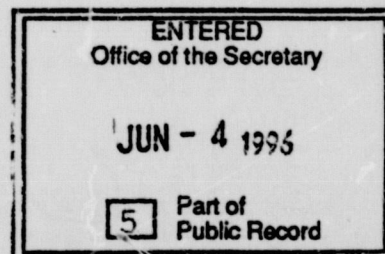


Re: Finance Docket No. 32760, Union Pacific Corp., et al. -- Control & Merger -- Southern Pacific Rail Corp., et al.

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket are the original and twenty copies of Applicants' Brief (UP/SP-260). Also enclosed is a 3.5-inch disk containing the text of this pleading in WordPerfect 5.1 format.

Please note that Appendix E to Applicants' Brief, excerpts of deposition transcripts, is bound separately and has two versions: one, which is being served on all parties of record, contains material that is redacted for the public file, and the other contains material that includes "Highly Confidential" information. The "Highly Confidential" version is clearly marked and is being separately filed with the Board under seal. The Board is being provided with 5 copies of both versions. The "Highly Confidential" version is also being served on parties that have indicated that they will adhere to the restrictions of the protective order.



Honorable Vernon A. Williams  
June 2, 1996  
Page 2

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

Sincerely,

*Arvid E. Roach II*  
Arvid E. Roach II

Enclosures

STB FD

32760

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Item No. \_\_\_\_\_

Page Count 18JUNE, 1996 #18

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STEPHEN C. HERMAN

May 21, 1996

By UPS Overnight (Monday delivery)

Vernon A. Williams, Secretary  
 Surface Transportation Board  
 U.S. Department of Transportation, Rm 1324  
 12th & Constitution Avenue, NW  
 Washington, DC 20423



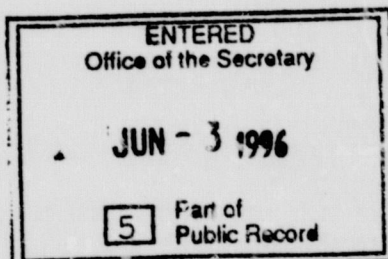
Re: Finance Docket No. 32760, *Union Pacific Corporation, et al. - Control and Merger - Southern Pacific Rail Corporation, et al.*  
 and  
 the related abandonment cases

Dear Mr. Williams:

Enclosed please find an original and 20 copies of Joint Brief In Opposition To Merger Unless Conditioned As Requested In Responsive Application Of Montana Rail Link, Inc. And In Opposition To Proposed Abandonments, for filing with the Board in the above referenced matters.

Also enclosed is a disk containing MPCSC-3 in Word Perfect 5.1 format.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.



Very truly yours,

*Tom McFarland*

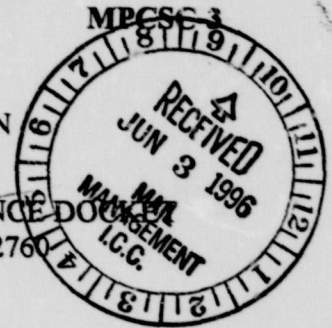
Thomas F. McFarland, Jr.  
 Attorney for Protestants

TMcf:kl:528

cc: All parties of record - by first-class mail

ORIGINAL

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
UNITED STATES DEPARTMENT OF TRANSPORTATION



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

FINANCE DOCUMENT  
NO. 32760

MISSOURI PACIFIC RAILROAD COMPANY --  
ABANDONMENT -- TOWNER-NA JUNCTION LINE IN  
KIOWA, CROWLEY AND PUEBLO COUNTIES, CO

DOCKET NO. AB-3  
(SUB-NO. 130)

MISSOURI PACIFIC RAILROAD COMPANY --  
ABANDONMENT -- HOPE-BRIDGEPORT LINE IN  
DICKINSON AND SALINE COUNTIES, KS

DOCKET NO. AB-3  
(SUB-NO. 131)

THE DENVER AND RIO GRANDE WESTERN  
RAILROAD COMPANY -- DISCONTINUANCE --  
MALTA -- CANON CITY LINE IN LAKE, CHAFFEE AND  
FREMONT COUNTIES, CO

DOCKET NO. AB-8  
(SUB-NO. 39)

THE DENVER AND RIO GRANDE WESTERN  
RAILROAD COMPANY -- DISCONTINUANCE  
EXEMPTION -- SAGE-LEADVILLE LINE IN EAGLE  
AND LAKE COUNTIES, CO

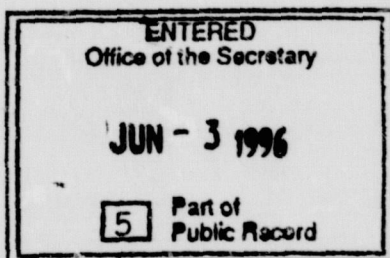
DOCKET NO. AB-8  
(SUB-NO. 36X)

**JOINT BRIEF IN OPPOSITION TO MERGER UNLESS CONDITIONED AS  
REQUESTED IN RESPONSIVE APPLICATION OF MONTANA RAIL LINK, INC.,  
AND IN OPPOSITION TO PROPOSED ABANDONMENTS**

MOUNTAIN-PLAINS COMMUNITIES  
& SHIPPERS COALITION  
JUNIOR STRECKER, Chairman  
123 North Main Street  
Hoisington, KS 67544

COLORADO WHEAT  
ADMINISTRATIVE COMMITTEE  
DARRELL HANAVAN, Executive Director  
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Englewood, CO 80111

Joint Protestants



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Attorney for Protestants

Date Filed: June 3, 1996



BEFORE THE  
SURFACE TRANSPORTATION BOARD  
UNITED STATES DEPARTMENT OF TRANSPORTATION

UNION PACIFIC CORPORATION, ET AL. -- CONTROL	)	FINANCE DOCKET
AND MERGER -- SOUTHERN PACIFIC RAIL	)	NO. 32760
CORPORATION, ET AL.	)	
	)	
MISSOURI PACIFIC RAILROAD COMPANY --	)	DOCKET NO. AB-3
ABANDONMENT -- TOWNER-NA JUNCTION LINE IN	)	(SUB-NO. 130)
KIOWA, CROWLEY AND PUEBLO COUNTIES, CO	)	
	)	
MISSOURI PACIFIC RAILROAD COMPANY --	)	DOCKET NO. AB-3
ABANDONMENT -- HOPE-BRIDGEPORT LINE IN	)	(SUB-NO. 131)
DICKINSON AND SALINE COUNTIES, KS	)	
	)	
THE DENVER AND RIO GRANDE WESTERN	)	DOCKET NO. AB-8
RAILROAD COMPANY -- DISCONTINUANCE --	)	(SUB-NO. 39)
MALTA -- CANON CITY LINE IN LAKE, CHAFFEE AND	)	
FREMONT COUNTIES, CO	)	
	)	
THE DENVER AND RIO GRANDE WESTERN	)	DOCKET NO. AB-8
RAILROAD COMPANY -- DISCONTINUANCE	)	(SUB-NO. 36X)
EXEMPTION -- SAGE-LEADVILLE LINE IN EAGLE	)	
AND LAKE COUNTIES, CO	)	

**JOINT BRIEF IN OPPOSITION TO MERGER UNLESS CONDITIONED AS  
REQUESTED IN RESPONSIVE APPLICATION OF MONTANA RAIL LINK, INC.,  
AND IN OPPOSITION TO PROPOSED ABANDONMENTS**

MOUNTAIN-PLAINS COMMUNITIES & SHIPPERS COALITION ("Coalition") and  
COLORADO WHEAT ADMINISTRATIVE COMMITTEE ("Committee") hereby jointly file  
their brief in opposition to the merger unless it is conditioned as requested in the Responsive  
Application of MONTANA RAIL LINK, INC. ("MRL") in Sub-No. 11, and in opposition to the



related abandonments proposed in the AB dockets identified above.<sup>1/</sup>

### **FOREWORD**

It is a contradiction in terms to contend that a powerful rail transportation duopoly is in the best interest of the public. How can two huge rail systems actively agree to cede all Western rail markets to themselves on one day, and expect the public to believe that they will vigorously compete with each other the next day? UP-SP and BNSF are attempting to sell an untenable proposition.

That's why there was such a broad outpouring of opposition on March 29 based on anticompetitive concerns. Key elements of the public have concluded that the BNSF settlement agreement would not lessen the anticompetitive effects of the merger. Look at the shipper position reflected in the filing of the diversified NIT League: for the first time in NIT League's 89-year history, anticompetitive concerns have caused it to seek extensive divestiture of rail lines as a condition to any approval of the merger (Doc. No. NITL-10, at 6). Consider what was said by the Justice Department, whose expertise in competition entitles its views to great weight: BNSF trackage rights would be ineffective to prevent the widespread anticompetitive effects of the merger (Doc. No. DOJ-8, at 2).

No prior merger has been authorized without substantial conditions to preserve essential rail competition in the face of such serious shipper and Justice Department concern. Neither should this one. The merger thus should be denied unless approval is conditioned on divestiture of rail lines to carriers independent of UP-SP and BNSF and on other conditions necessary to

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<sup>1/</sup> The Coalition and the Committee each filed individual comments on March 29, 1996. In addition, the Coalition joined in a Joint Shippers' Statement filed on that date (Doc. No. JSS-1).

preserve essential competition.

That can be done in the Central Corridor without unduly diluting merger benefits because neither Applicants nor BNSF needs nor wants to provide through transcontinental service over most of the rail lines that would be divested to Montana Rail Link. On the contrary, Applicants propose to abandon over 330 miles of those main lines. Montana Rail Link is the perfect solution in the Central Corridor because it would provide the effective competition with UP-SP that is required in the public interest and because it would moot those extensive main line abandonments that would be contrary to the national rail policy and to public convenience and necessity.

### **ARGUMENT**

#### **I. THE MERGER SHOULD BE DENIED UNLESS APPROVAL IS CONDITIONED AS REQUESTED IN THE RESPONSIVE APPLICATION OF MRL**

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##### **Summary of Position**

The interest of the Coalition and the Committee relates to the Central Corridor for transcontinental traffic -- i.e., generally, the traffic lane between Kansas City and northern California (Stockton and Oakland) via rail lines over the central Rocky Mountains. In regard to the Central Corridor, the evidence and applicable law compel the following conclusions:

- (1) loss of competition between UP and SP, the only current competitors for Central Corridor traffic, would be contrary to the public interest;
- (2) trackage rights for BNSF between Denver, CO and Oakland, CA would not effectively replace the loss of UP-SP competition in the Central Corridor;
- (3) divestiture to MRL of the lines currently used by SP to provide through service via the Central Corridor, together with other conditions specified in MRL's



Responsive Application, would effectively replace the loss of UP-SP competition in the Central Corridor; and

- (4) consequently, the merger should be denied unless approval is conditioned as requested in MRI's Responsive Application.

### **The MP Pueblo Line Protestants**

Before providing evidentiary and legal support for the above propositions, let us briefly explain who we are. The Coalition consists of over 100 shippers, communities, farm interests and others located along a 443-mile rail line between Herington, KS and Pueblo, CO owned by UP's affiliate, Missouri Pacific Railroad Company (MP).<sup>2/</sup> That rail line will be referred to as the "MP Pueblo Line." By far the predominant commercial activity in the territory adjacent to the MP Pueblo Line is production and marketing of wheat. The Committee speaks for the wheat interests adjacent to the MP Pueblo Line in Colorado. The Coalition and Committee will be referred to collectively as the MP Pueblo Line Protestants.

### **Background**

Traditionally, the MP Pueblo Line has been operated as part of a major competitive through route for transcontinental traffic via the Central Corridor. At Pueblo, the MP Pueblo Line connects with the Tennessee Pass Line of SP's DRGW affiliate, which extends west from Pueblo to Dotsero, CO, thence to Utah gateways to northern California. At Herington, KS, the MP Pueblo Line connects with a line owned by SP's SSW affiliate, which extends to Kansas City, MO and points beyond. The MP Pueblo Line itself formerly extended to Kansas City, but UP-MP

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<sup>2/</sup> A 26-mile segment of that line between Pueblo Junction and NA Junction, CO is jointly owned by MP and BNSF.



recently abandoned portions of that line east of Herington.

For many years prior to 1982, the MP Pueblo Line was part of a transcontinental route consisting of MP from Kansas City to Pueblo, DRGW from Pueblo to Salt Lake City and Western Pacific (WP) from Salt Lake City to Stockton and Oakland. That MP-DRGW-WP route was the major Central Corridor competitor of a UP-SP route via Ogden, UT.

In 1982, UP acquired control of both MP and WP. *Union Pacific - Control - Missouri Pacific; Western Pacific*, 366 I.C.C. 462 (1982) ("UP-MP-WP case"). That transaction would have had an adverse effect on Central Corridor competition. As the ICC put it in the *UP-MP-WP* case (*id.*, at 510):

... The proposed consolidation would eliminate the MP as an independent connection for the DRGW alternate routing and thereby enhances the UP's ability to exert market power.

In order to avoid that adverse effect, the ICC conditioned approval of the UP-MP-WP consolidation on a grant of trackage rights for DRGW over the MP Pueblo Line between Pueblo and Kansas City (*id.*, at 572-578).

The UP-MP-WP consolidation as so conditioned resulted in two realigned competitive routes in the Central Corridor: (1) a UP single line route via Cheyenne, WY and the former WP west of Salt Lake City; and (2) a SP-DRGW route via Ogden, Pueblo and the MP Pueblo Line trackage rights, initially with SP and DRGW acting as interchange partners, and after 1988 in single-line service as affiliates.<sup>3/</sup> See *Rio Grande Industries, et al. - Control - SPT Co., et al.*, 4 I.C.C.2d 834, 890-894 (1988), *Santa Fe Southern Pacific Corp. - Control - SPT Co.*, 2 I.C.C.2d

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<sup>3/</sup> The UP-SP route via Ogden, UT diminished in importance as UP and later SP bypassed it by means of their own single-line routes.

709-778-785 (1986); and *Control of Central Pacific by Southern Pacific*, 2 I.C.C.2d 685, 697-699 (1986).

After 1982, local rail service deteriorated on the MP Pueblo Line. SP-DRGW was operating over that line via trackage rights to provide through service for transcontinental traffic, but UP (MP) continued to provide local service on the line. Under UP control, MP has been unenthusiastic about providing local service on the MP Pueblo Line. UP's grain rates favor larger shippers located on UP's neighboring Kansas Pacific line to the north. UP's grain car ordering system stifles new demand for rail transportation of grain from the MP Pueblo Line. Those factors and others have led directly to substantially-reduced local rail traffic on the MP Pueblo Line in the 14 years during which UP has controlled MP.

Thus, divestiture to MRL of the MP Pueblo Line (and connecting lines to the West) not only would ensure continued utilization of the MP Pueblo Line as part of an essential through route for transcontinental traffic via the Central Corridor, it would also result in sorely-needed improvement of local rail service on the MP Pueblo Line. Consequently, the relief preferred by the MP Pueblo Line Protestants is approval of the merger conditioned on Central Corridor divestiture to MRL. However, absent such a condition, the merger should be denied. That would mean that the MP Pueblo Line Protestants would continue to face unsatisfactory UP-MP local service on the MP Pueblo Line, but at least the abandonments on that line proposed by UP-SP would not take place (see Section II of Argument, *infra*, against proposed abandonments).



### **Support for Protestant's Position**

**1. Loss of Competition between UP and SP, the Only Current Competitors for Central Corridor Traffic, Would Be Contrary to the Public Interest**

It is evident that an unconditioned merger would be unduly anticompetitive in the Central Corridor, and thus contrary to the public interest, because it would eliminate the only competitive rail services in that market, as provided by UP and SP. Applicants don't dispute that fundamental proposition. Instead, in recognition of it, they propose that BNSF provide service in that Corridor in competition with the merged UP-SP.

**2. Trackage Rights for BNSF between Denver and Oakland Would Not Effectively Replace the Loss of UP-SP Competition in the Central Corridor**

The most basic reason why trackage rights for BNSF between Denver and Oakland would not provide the effective competition with UP-SP in the Central Corridor that is required in the public interest is that BNSF lacks incentive to provide that vigorous competition.<sup>4/</sup> BNSF already has its own routes for transcontinental traffic via the Northern Corridor and the Southern Corridor. As recognized in Applicants' own evidence, the BNSF Southern Corridor route via the former Santa Fe is the "service leader" for California-Midwest traffic (Doc. No. UP-SP 23, at 13-14). Why would BNSF solicit traffic away from its own most efficient transcontinental route (its Southern Corridor route) to move it over a less efficient route in the Central Corridor? It is evident that it would be contrary to BNSF's own interest to do so.

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<sup>4/</sup> The MP Pueblo Line Protestants agree with numerous additional reasons for the insufficiency of BNSF competition advanced by a variety of parties, none of which has been effectively rebutted by Applicants or BNSF.



Where carriers lack incentives to attract traffic to routes, such routes do not provide effective competition. The ICC specifically recognized that principle in the *UP-MP-WP* case when it said (366 I.C.C., at 515-516, emphasis added):

... MP is DRGW's only connection to the East that does not now operate its own transcontinental route.<sup>45/</sup> Loss of the neutral MP connection will require DRGW to interline its transcontinental traffic with carriers that have incentives to use their resources, and route their traffic, elsewhere.

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<sup>45/</sup> DRGW's connection to the East are BN (northern corridor), Santa Fe (southern corridor) and UP (central corridor) in addition to MP.

Consequently, the ICC conditioned approval of the UP-MP-WP consolidation on a grant of trackage rights for DRGW over MP so that a carrier wholly committed to Central Corridor routing would provide the effective competitive service required in the public interest (*id.*, at 572-578).

No differently from its predecessors, BNSF lacks the singular commitment to Central Corridor routing that is required for the provision of effective competition via that Corridor. BNSF has overriding incentives to attract traffic to its most efficient Southern Corridor route and to its Northern Corridor route. Just as its predecessors, BNSF is not motivated to provide the effective competition for Central Corridor traffic that is required in the public interest. *See Santa Fe Southern Pacific Corp. - Control - SPT Co.*, 2 I.C.C.2d 709 (1986) at 826 ("We have serious doubts whether SPSF would have sufficient incentive to do its necessary part in soliciting traffic for Ogden. And without such incentive, the service it would provide might discourage the use of the route, as might its less than enthusiastic solicitation").

BNSF's basic lack of incentive to route traffic via the Central Corridor certainly is not rebutted by its President's general testimony that BNSF would make the most out of the trackage

rights received in the BNSF settlement agreement (Doc. No. BN-SF 54, VS Krebs, p. 2). In determining the presence or absence of sufficient incentive for routing, the Board should look to the objective evidence of relative Corridor efficiency and routing options and to the precedent of the *UP-MP-WP* case, not to BNSF's self-serving subjective testimony in furtherance of a rail transportation duopoly in the West. Based on that objective evidence and precedent, the Board should find that Denver-Oakland trackage rights for BNSF would not result in effective Central Corridor competition for UP-SP.

**3. The Relief Sought in MRL's Responsive Application Would Result in Effective Competition in the Central Corridor without Being Disruptive Of UP-SP's Operations**

MRL is an established and successful regional rail carrier operating in the West. MRL's existing rail line extends approximately 950 miles between a point near Billings, MT and Sandpoint, ID. As proposed in MRL's Responsive Application, a carrier affiliated with MRL would acquire a Central Corridor route between Stockton, CA and Klamath Falls, OR on the west and Kansas City, MO on the east, via Pueblo, CO and Ogden, UT, connecting that route with MRL by means of acquiring trackage rights and ownership from UP between Ogden, UT and Garrison, MT, via Pocatello, ID (plus agreed operation for a short stretch over Montana Western Railroad).

That route would provide the effective Central Corridor competition that is required in the public interest. Lacking transcontinental routes via the Southern or Northern Corridors, the MRL affiliate would have a strong incentive to attract traffic to its Central Corridor route. MRL is experienced in operating in the mountains on its existing rail line: the MRL affiliate thus should be operationally capable of providing service over the mountainous Central Corridor route. The



MRL affiliate would have the motivation and the financial wherewithal to provide vigorous competition for UP. Rail line acquisition pursuant to divestiture would ensure that the MRL affiliate would not suffer the substantial service and cost impediments that are shown to be associated with trackage rights. In sum, unlike BNSF, MRL would provide effective competition in the Central Corridor.

Significantly, MRL's proposal would not be disruptive of UP's post-merger operations in the Central Corridor because the MRL proposal involves lines that UP does not need or want for through service. The MRL affiliate would provide competitive Central Corridor service via the MP Pueblo Line and DRGW's Tennessee Pass Line between Pueblo and Dotsero, CO. Neither of those lines fits into UP's plans for post-merger transcontinental service. On the contrary, UP proposes to abandon multiple segments of both of those lines totaling over 330 miles (i.e., (1) MP line between Hope and Bridgeport, KS, 31 miles; (2) MP line between Towner and NA Junction, CO - 122 miles; (3) DRGW line between Cañon City and Malta, CO - 109 miles; and (4) DRGW line between Leadville and Sage, CO - 69 miles. Thus, the MRL proposal would satisfy a vital public interest need for effective competition in the Central Corridor, but it would not be inconsistent with, nor disruptive of, UP's post-merger Central Corridor operations.

Applicants' opposition to the MRL Responsive Application is thus a classic dog-in-the-manger situation. Applicants don't need or want the MP Pueblo Line and the SP-DRGW Tennessee Pass Line for their own transcontinental operation, but they don't want MRL to have those Lines because they don't want to face MRL's competition for transcontinental traffic. Applicants' position in that respect is directly contrary to the national rail policies in favor of rail-to-rail competition. 49 U.S.C. § 10101a(1), (4), (13).



Granting the MRL Responsive Application would also provide badly-needed improved local service on the MP Pueblo Line. The MRL affiliate acquiring that line would be willing and able to provide a variety of markets for grain originating on the MP Pueblo Line. That grain could go west on MRL to the Stockton, CA area for domestic consumption or to Pacific Northwest ports for export (via Klamath Falls, OR). Such grain could go south to Gulf ports for export in coordinated MRL-KCS service, which was described in the Joint Shippers' Statement (Doc. No. JSS-1, at 1 and attached map Appendix 1). Grain could go east to Kansas flour mills or to points east of Kansas City via other friendly connections. Grain producers, elevators and local economies flourish when grain can be sold in so many competing markets. Grain thus would return to the MP Pueblo Line in large volumes in response to the MRL acquisition. That would add significantly to the public interest benefits associated with MRL's operation over the Central Corridor as an effective competitor for transcontinental traffic.

**4. Consequently, the Merger Should Be Denied Unless Approval Is Conditioned As Requested in MRL's Responsive Application**

Conditions to approval of merger will be imposed when the following criteria are met: (1) the merger would produce effects harmful to the public interest (such as a significant reduction of competition in an affected market); (2) the conditions would ameliorate or eliminate the harmful effects; (3) the conditions would be operationally feasible; and (4) the conditions would produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger. *Burlington Northern, Inc., et al. -- Control and Merger -- Santa Fe Pacific Corporation, et al.*, \_\_\_\_\_ I.C.C.2d \_\_\_\_\_, Finance Docket No. 32549 (ICC served Aug. 23, 1995), Slip Op., at 55-56; *Union Pacific Corporation, et al. --*

*Control -- Chicago and North Western Transportation Company, et al., \_\_\_\_\_ I.C.C.2d \_\_\_\_\_,*  
Finance Docket No. 32133 (ICC served March 7, 1995), Slip Op., at 56-57.

It is undisputed that the first criterion is met as to the Central Corridor, i.e., there would be a significant reduction of competition in the Corridor. We have shown that divestiture to MRL would satisfy the second criterion, but Denver-Oakland trackage rights for BNSF would not, i.e., MRL would provide the required effective competition in the Central Corridor, but BNSF would not. That failure disqualifies the proposed BNSF condition. We have shown that divestiture to MRL would satisfy the third and fourth criteria. Compliance with the fourth criterion is unusually strong. In addition to providing needed effective competition for transcontinental traffic in the Central Corridor, MRL would provide much needed improvement in local service on the MP Pueblo Line. And those public benefits would be achieved without undue disruption of the benefits of the merger because Applicants do not want or need the MRL divestiture lines to provide their own through transcontinental service, but instead propose to abandon over 330 miles of those main lines.

Conditions that would stem from secondary settlements agreed to by Applicants should not be imposed because such conditions have not been shown to meet the applicable legal criteria and because it is incompatible with the public interest for applicants to choose their preferred competition. We understand that as part of settlement agreements, Applicants have promised Illinois Central Railroad Company (IC) the right to acquire or operate rail lines involved in conditions to approval of merger to the extent such lines are not acquired or operated by BNSF, and have promised Wisconsin Central, Ltd. (WCL) such a right as to lines not acquired or operated by BNSF or IC. There is nothing in this record to show that acquisition or operation of



Central Corridor lines by IC or WC would be compatible with the applicable legal criteria for imposing conditions.<sup>5/</sup> And the Board should have no part of any arrangement whereby UP-SP would choose its preferred competition in ranked order. Such an approach was rejected by the Board's predecessor in *Santa Fe Southern Pacific Corp. - Control - SPT Co.*, 2 I.C.C.2d 709 (1986), at 815-817.

Based on all of the foregoing, the merger should be denied unless it is conditioned as requested in the Responsive Application filed by MRL in Sub-No. 11.<sup>6/</sup>

**II. APPLICATIONS FOR ABANDONMENT OF PORTIONS OF THE MP PUEBLO LINE AND THE SP-DRGW TENNESSEE PASS LINE SHOULD BE DISMISSED OR DENIED**

The portions of the MP Pueblo Line and the SP-DRGW Tennessee Pass Line here proposed for abandonment are not dead-end branch lines of the type usually proposed for abandonment. Instead, they are integral parts of main lines that have functioned together for many years as a continuous through route for transcontinental traffic. Factors such as operating losses or opportunity costs that may warrant abandonment of branch lines are not dispositive of abandonment of segmented portions of main lines when dismantling of a through route is attempted. Were it otherwise, a rail carrier could effectively dismantle any of its most

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<sup>5/</sup> MRL is preferable to IC or WC as a Central Corridor competitor in a number of respects. Unlike IC or WC, MRL has extensive experience operating in mountainous terrain on its own rail line between Billings, MT and Sandpoint, ID. The Central Corridor would be an island operation for IC or WC. MRL would connect the Central Corridor to its existing rail line by means of acquisition and operation of rail lines north from Ogden, UT into Montana.

<sup>6/</sup> While the condition sought by Utah Railway would be preempted by divestiture to MRL and failure of the Denver-Oakland BNSF condition, hopefully Utah Railway may be able to work out alternate arrangements with MRL.



heavily-used main lines merely by showing that isolated segments of such lines are not independently profitable. That is not the law. Where abandonment of a main line segment that is part of an established through route is sought, the overriding issue is whether the public interest requires retention intact of the through route itself. *Consolidated Rail Corporation -- Exemption -- Abandonment of the Wierton Secondary Track in Harrison and Tuscarawas Counties, OH*, Docket No. AB-167 (Sub-No. 1088X) (ICC served June 14, 1989), at 7-9. And that issue is to be decided in light of the national rail policy in favor of continuation of a sound rail transportation system to meet the needs of the public and the national defense. 49 U.S.C. § 10101a(4).

As we have shown, the public interest requires preservation intact of the Central Corridor route, of which the MP Pueblo Line and the SP-DRGW Tennessee Pass Line are essential parts. Acquisition of those lines by MRL as a condition to approval of the merger would moot abandonment of the involved portions of those lines.<sup>71</sup> That being the case, the abandonment

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<sup>71</sup> So would denial of the merger, the proposed abandonments having been expressly made contingent on approval of the merger.

applications and petition as to those segments should be dismissed as moot. Alternatively, the proposed abandonments should be denied as not permitted by public convenience and necessity.

Respectfully submitted,

MOUNTAIN-PLAINS COMMUNITIES  
& SHIPPERS COALITION  
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COLORADO WHEAT  
ADMINISTRATIVE COMMITTEE  
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Joint Protestants

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Attorney for Protestants

Date Filed: June 3, 1996

**CERTIFICATE OF SERVICE**

I hereby certify that on May 31, 1996, I served the foregoing document, Joint Brief In Opposition To Merger Unless Conditioned As Requested In Responsive Application Of Montana Rail Link, Inc., And In Opposition To Proposed Abandonments, by U.P.S. overnight, June 3, 1996 delivery, on the following:

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on all parties of record by first-class, U.S. mail, postage prepaid, this 31st day of May, 1996.

Thomas F. McFarland Jr.  
THOMAS F. McFARLAND, JR.



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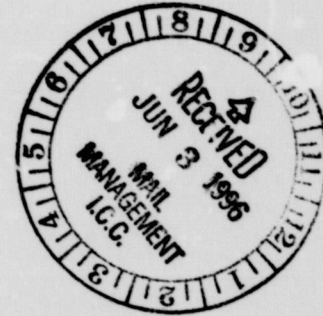
THOMAS F. McFARLAND, JR.

STEPHEN C. HERMAN

May 31, 1996

By UPS Overnight (Monday delivery)

Vernon A. Williams, Secretary  
Surface Transportation Board  
U.S. Department of Transportation, Rm. 1324  
12th & Constitution Avenue, NW  
Washington, DC 20423



Re: Docket No. AB-33 (Sub-No. 96), *Union Pacific Railroad Company -- Abandonment -- Barr-Girard Line in Menard, Sangamon and Macoupin Counties, IL*

and

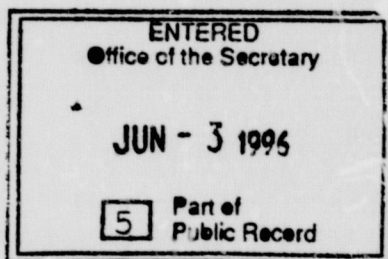
~~Finance~~ Docket No. 32760, *Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al.*

Dear Mr. Williams:

Enclosed please find an original and 20 copies of Joint Brief in Opposition to Proposed Barr-Girard Abandonment, for filing with the Board in the above referenced matters.

Also enclosed is a disk containing SPI-BCI 2 in Word Perfect 5.1 format.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.



Very truly yours,

*Tom McFarland*

Thomas F. McFarland, Jr.  
Attorney for Springfield Plastics, Inc. and  
Brandt Consolidated, Inc.

TMcf:kl:526

cc: All parties of record - *by first-class mail*

ORIGINAL

SPI-BC12

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
UNITED STATES DEPARTMENT OF TRANSPORTATION

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

UNION PACIFIC RAILROAD  
COMPANY -- ABANDONMENT --  
BARR-GIRARD LINE IN MENARD,  
SANGAMON AND MACOUPIN  
COUNTIES, IL

) FINANCE DOCKET  
) NO. 32760

) DOCKET NO. AB-33  
) (SUB-NO. 96)



JOINT BRIEF IN OPPOSITION TO PROPOSED  
BARR-GIRARD, IL ABANDONMENT

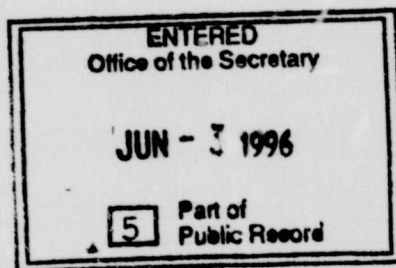
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Date Filed: June 3, 1996



BEFORE THE  
SURFACE TRANSPORTATION BOARD  
UNITED STATES DEPARTMENT OF TRANSPORTATION

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UNION PACIFIC CORPORATION, ET	)	
AL. -- CONTROL AND MERGER --	)	FINANCE DOCKET
SOUTHERN PACIFIC RAIL	)	NO. 32760
CORPORATION, ET AL.	)	
	)	
UNION PACIFIC RAILROAD	)	
COMPANY -- ABANDONMENT --	)	DOCKET NO. AB-33
BARR-GIRARD LINE IN MENARD,	)	(SUB-NO. 96)
SANGAMON AND MACOUPIN	)	
COUNTIES, IL	)	

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**JOINT BRIEF IN OPPOSITION TO PROPOSED  
BARR-GIRARD, IL ABANDONMENT**

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Protestants SPRINGFIELD PLASTICS, INC. (SPI) and BRANDT CONSOLIDATED, INC. (BCI) hereby jointly submit this Brief in opposition to abandonment of the rail line between Barr and Girard, IL, proposed in Docket No. AB-33 (Sub-No. 96).

**I. THE ABANDONMENT APPLICATION IS REQUIRED TO BE DENIED AS A MATTER OF LAW BECAUSE OF LACK OF EVIDENCE OF TRACKAGE RIGHTS ACKNOWLEDGED BY APPLICANTS TO BE A CONDITION PRECEDENT TO ABANDONMENT OF THE LINE**

The 38.4-mile Barr-Girard, IL rail line is part of the Chicago-St. Louis main line of the former Chicago and North Western Transportation Company (C&NW). C&NW was merged into Union Pacific Railroad Company (UP) in October, 1995. The proposed merger of UP and Southern Pacific Transportation Company (SP) would provide the merged company with another Chicago-St. Louis route (SP's route). However, the former C&NW route would continue to be the superior route for traffic moving between western Illinois and eastern Iowa on the one hand,

and St. Louis and points beyond on the other.

Applicants propose to abandon parts of the former C&NW Chicago-St. Louis route including the Barr-Girard line, but only if they can secure alternative routing for the western Illinois-eastern Iowa-St. Louis traffic. Applicants propose to do that by obtaining trackage rights over Illinois & Midland Railroad, Inc. (I&M) (formerly Chicago & Illinois Midland Railway Company, C&IM<sup>1/</sup>) between Barr and Springfield, IL, and by operating over SP's line from Springfield to St. Louis. It is 11 miles over I&M between Barr and Springfield. Obtaining Barr-Springfield trackage rights over I&M is a condition precedent to the proposed Barr-Girard abandonment, as evidenced by the following from Doc. No. UP-SP 26, p. 398:

The proposed (Barr-Girard) abandonment is contingent upon acquisition of the trackage rights over C&IM (now I&M) which are currently being negotiated.

In view of the expedited nature of processing of rail mergers, a Board regulation requires that all direct evidence constituting applicants' case-in-chief in support of the proposed merger and related abandonments be filed and served with the merger-abandonment application 49 C.F.R. § 1180.4(c)(3). Pursuant to the plain meaning of that regulation, if applicants wanted the Barr-Girard abandonment considered in conjunction with the proposed merger, and if that proposed abandonment were to be contingent on applicants obtaining trackage rights over I&M between Barr and Springfield, IL, applicants were required to prove, in the merger-abandonment application filed November 30, 1995, that I&M has agreed to grant them trackage rights between Barr and Springfield, and to identify the essential terms of those trackage rights.

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<sup>1/</sup> I&M acquired C&IM during the course of this proceeding on February 8, 1996. See Finance Docket No. 32862, *Illinois & Midland Railroad, Inc. -- Acquisition and Operation Exemption -- Chicago & Illinois Midland Railway Company*, 61 F.R. 8105 (March 1, 1996).



Applicants failed to do so. In the merger-abandonment application filed November 30, 1995, applicants stated only that such trackage rights are being negotiated. In view of the explicit Board regulation requiring all supportive evidence to be submitted in the merger-abandonment application, that failure is fatal to applicants' case for abandonment of the Barr-Girard line. See former 49 U.S.C. § 10904(d)(1)<sup>2/</sup> (applicant has the burden of proof as to proposed abandonments); *Illinois Central Gulf R. Co. - Abandonment*, 363 I.C.C. 93, 101 (1980) (applicants rail carrier has the burden to go forward with evidence on every element of its case-in-chief required by governing regulations). Where applicants themselves state that abandonment is contingent on obtaining trackage rights over the line of another carrier, an essential element of applicants' case-in-chief is evidence that it has obtained such trackage rights. Where, as here, applicants fail to provide that evidence as part of the case-in-chief, the proposed abandonment cannot be lawfully authorized.

It is elementary that the Board is required to abide by its own regulations. *Yosemite Tenants Asso. v. Clark*, 582 F.Supp. 1342 (E.D. Cal., 1984). Consistently with due process of law, the Board cannot strictly enforce procedural regulations against protestants as it has done by denying all requests for extensions of filing dates, while at the same time allowing applicants to ignore the regulation that all direct evidence be filed in the merger-abandonment application, and instead let applicants file evidence of I&M trackage rights at some future date. Applicants knew that the Barr-Girard abandonment would be contingent on trackage rights over I&M between Barr and Springfield. Applicants knew that pursuant to Board regulation they were required to

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<sup>2/</sup> In that the merger-abandonment application was filed prior to the January 1, 1996 effective date of the ICC Termination Act of 1995 (Termination Act), provisions of the Interstate Commerce Act in effect prior to the Termination Act govern.



file any evidence of such trackage rights in the merger-abandonment application. Despite that knowledge, applicants failed to provide evidence of I&M trackage rights. In view of such failure, procedural due process requires denial of the Barr-Girard abandonment at this time.

Even now, over five months after filing of the merger-abandonment application, and having been put on notice by SPI-BCI's March 29, 1996 filing that absence of evidence of I&M trackage rights would be a major issue, applicants have failed to provide evidence of trackage rights over I&M between Barr and Springfield. UP states that UP and I&M have reached an agreement in principle, and that a term sheet for trackage rights has been sent to I&M for its review and approval (Doc. No. UP-SP 232, Tab G, VS Allamong, p. 11). That is not evidence of trackage rights. Nothing is submitted in behalf of I&M to confirm UP's unilateral, self-serving contention that I&M has agreed in principle to a grant of trackage rights. The Allamong statement is evidence that there is no agreement for trackage rights, and that there may never be such an agreement. I&M may reject the terms proposed by UP for trackage rights. The parties may not be able to agree on trackage rights terms. If so, trackage rights never will come to pass. The Allamong statement thus is evidence of the continued absence of trackage rights, not evidence that there is an agreement for trackage rights.

Summarizing, by applicants' own admission, the Barr-Girard abandonment is contingent on UP trackage rights over I&M between Barr and Springfield. The applicable Board regulation required applicants to provide evidence of such trackage rights in the merger-abandonment application. Applicants failed to do so, and have continued to fail to do so in their rebuttal statement filed five months later. That leaves the Board no legal choice but to deny the Barr-Girard abandonment application for lack of essential proof. If UP later secures Barr-Springfield

trackage rights over I&M, the merged company can refile for the Barr-Girard abandonment at that time. But there would be no such flexibility if the Barr-Girard abandonment were to be approved prior to a grant of trackage rights. Abandonment is irreversible. *Southern Pacific Transp. Co. - Abandonment*, 354 I.C.C. 752, 754 (1978). It would be too late for protestants and public convenience if negotiations between UP and I&M failed to result in an agreement for Barr-Springfield trackage rights, but the Barr-Girard line already had been abandoned pursuant to Board approval. In the above circumstances, abandonment of the Barr-Girard line is not permitted by public convenience and necessity under 49 U.S.C. § 10903(a).

The finality of abandonment serves to distinguish the present case from *Rio Grande Ind., Inc. - Pur. and Track. - Soo Line R. Co.*, 6 I.C.C.2d 854 (1990), cited by applicants in rebuttal (Doc. No. UP-SP 232, Tab 6, p. 20). It may be acceptable in rail consolidation proceedings for there to be elements of consolidation proposals which remain to be finalized at the time of the Board's decision (*id.*, at p. 877). Significantly, the ICC emphasized that the Rio Grande-Soo Line purchase could be reopened to address any legitimate concerns resulting from trackage rights agreements that might be entered into after the Board's decision (*id.*, at p. 878). That is not possible where abandonment has been authorized and consummated. Reopening based on subsequent confirmation of the absence of trackage rights would serve no purpose if abandonment had been accomplished. Consequently, the consolidation case cited by applicants does not support a decision authorizing abandonment prior to an agreement for UP-I&M trackage rights. Having made abandonment contingent on obtaining trackage rights and having failed to obtain such trackage rights, applicants cannot abandon the Barr-Girard line at this time as a matter of law.



That is dispositive of the Barr-Girard abandonment application. The Board need not review the merits of that proposed abandonment. However, as appears in the next section of this Brief, even apart from that dispositive failure of proof, public convenience and necessity does not permit abandonment of the 26.7-mile segment of the Barr-Girard line between Barr and Compro, IL.

**II. PUBLIC CONVENIENCE AND NECESSITY DOES NOT PERMIT  
ABANDONMENT OF THE BARR-COMPRO LINE SEGMENT**

Even if the Barr-Girard abandonment were not required to be denied for failure of proof, public convenience and necessity would not permit abandonment of the Barr-Compro line segment. That segment can be operated profitably, and the harm to protestants from its abandonment would outweigh any harm to applicants from continued operation.

As to profitability of the line, the issues involving the most dollars are appropriate costs for track maintenance and locomotive-related costs in the forecast year. The line is a main line. It has been designed and maintained to accommodate heavy overhead traffic between Chicago and St. Louis. It has heavy-weight welded rail and good crosstie conditions. It is rated as an FRA Class 3 rail line, allowing train operations at 40 m.p.h. However, in the forecast year all of the heavy traffic would be rerouted off the segment. The segment would be used for transportation of only 47 to 53 carloads per year in local service (i.e., a single carload per train moving about once per week).

It is ludicrous for applicants to contend, as they have (Doc. No. UP-SP 232, Tab G, p. 23; RVS Beck, p. 2), that such a lightly used line in such good shape will require capitalized costs for crosstie replacement, surfacing and lining and renewal of grade crossings and signals in the



forecast year. Capital costs of that nature can be foregone for numerous years before the light local traffic would cause the line segment to evolve from FRA Class 3 to FRA Class 1 condition, at which time it would be appropriate to begin capital costs in order to retain FRA Class 1 condition. This is something that the Board's predecessor and major rail carriers themselves have recognized as an indisputable physical fact. *Union Pacific R.R. Co. - Aban. - Wallace Branch*, ID, 9 I.C.C. 325, 345, 373-375 (1992); *CSX Transportation, Inc. -- Abandonment in Ben Hill and Irwin Counties, GA*, Docket No. AB-55 (Sub-No. 352) (ICC served Feb. 25, 1991) p. 3; *Consolidated Rail Corporation -- Abandonment -- between Warsaw and Valparaiso in Kosciusko, Marshall, Starke, LaPorte and Porter Counties, IN*, Docket No. AB-167 (Sub-No. 1125) (ICC served Feb. 14, 1994). Thus, it is settled that inclusion of capitalized maintenance costs in the forecast year is not appropriate where a former main line maintained at a high standard for heavy overhead traffic would be used in the forecast year and thereafter only for light local traffic.

Applicants have failed to establish that this settled precedent should not be followed. Applicants argue (Doc. No. UP-SP 232, Tab G, p. 23) that protestants failed to provide testimony in support of the principle, but testimony is not necessary where, as here, the principle is settled as a result of ICC precedent. Applicants argue (*id.*, p. 24) that capitalized maintenance costs should be included in the forecast year because such costs will be avoided sometime in the future. The three cases cited above find otherwise. Similarly, applicants argue (*ibid*) that the principle is out of step with the treatment of train crew labor costs as avoidable in the forecast year even though such costs would continue to be paid for six years after abandonment, citing *Illinois Commerce Com'n v. ICC*, 776 I.C.C.2d 355 (D.C. Cir. 1985). But the Court in that case recognized a

different result where the current cost scenario would extend farther into the future, viz., 776

F.2d, at p. 359:

... It may be that some costs ... will terminate so far in the future that it is unrealistic to assume that the current balance of benefits and burdens will exist at that distant time, and unreasonable to impair the immediate public interest for benefits so remote ...

As shown by the ICC cases cited earlier, capitalized maintenance costs are in that category where a rail line will not require such costs for an extended period of time.

In the end, applicants are left to argue (Doc. No. UP-SP 232, Tab G, p. 25) that the ICC cases establishing the principle are "wrongly decided." That is plainly not so. Those cases recognize the common-sense tenet that replacement of track parts is not required where a rail line historically maintained in FRA Class 3 condition for transportation of large volumes of overhead traffic now will be used only for sporadic transportation of a light volume of local traffic, so that the line can be permitted to evolve into FRA Class 1 condition over a long period of time.

Application of the foregoing principle reduces forecast year maintenance costs by \$69,263 (Doc. No. SPI-BCI 1, p. 8). Another \$13,382 in such maintenance costs must be eliminated because those are costs to maintain the Compro-Girard segment that are not attributable to the Barr-Compro segment. In a related adjustment, locomotive-related costs of \$8,632 must be eliminated because they are erroneously based on a 10 m.p.h.-operation (FRA Class 1) rather than the 40 m.p.h.-operation (FRA Class 3) that is permissible on the Barr-Compro segment. Those adjustments alone virtually eliminate the forecast-year operating loss claimed by applicants.

Any slight remaining loss would be wiped out by trackage rights payments by UP to I&M. It is appropriate to treat those payments as an offset to avoidable costs because the proposed



abandonment is acknowledged by applicants to be contingent on trackage rights over I&M between Barr and Springfield and because such payments reduce the amount that would be saved as a result of the abandonment. Applicants have not identified the amount of such trackage rights payments (nor, as noted, whether there is an agreement for trackage rights). It cannot be known, therefore, whether such payments would fully offset the claimed operating loss after the above adjustments. But applicants should not be allowed to benefit from having failed to identify such trackage rights payments. In the absence of proof of the actual amount of such payments, such payments should be treated as cancelling out any loss in operating the Barr-Compro segment.

That leaves only opportunity costs in support of abandonment. Such opportunity costs are highly suspect. The element of such costs for land value is extremely questionable because applicants have not shown that UP has marketable title to the land, and because UP's valuation was performed in-house rather than by an independent appraiser. The element of such costs for track materials appears to be negative because the cost to implement trackage rights for rerouting of overhead traffic exceeds the total value of the track materials. Applicants argue (Doc. No. UP-SP 232, Tab G, p. 23; VS Matthiessen, p. 5) that the cost to reroute the overhead traffic is not attributable to the abandonment because the overhead traffic would be rerouted whether or not the abandonment is approved. On the contrary, however, both the abandonment and rerouting of overhead traffic depend on obtaining trackage rights over I&M between Barr and Springfield. In that circumstance, the cost of rerouting is attributable to the abandonment.

Even giving full credence to the opportunity costs claimed by applicants, such opportunity costs do not warrant abandonment of the Barr-Compro segment. On many occasions, abandonment has been denied despite the existence of extensive opportunity costs where



abandonment would result in significant harm to local interests.<sup>3/</sup> See, e.g., *CSX Transportation, Inc. -- Abandonment -- in Ben Hill and Irwin Counties, GA*, Docket No. AB-55 (Sub-No. 352) (ICC served Feb. 25, 1991), p. 11; *CSX Transportation, Inc. -- Abandonment -- between Dayton and Arcanum, in Darke, Preble and Montgomery Counties, OH*, Docket No. AB-55 (Sub-No. 336) (ICC served July 31, 1990), p. 19; *Southern Pacific Transportation Company -- Abandonment -- in El Dorado and Sacramento Counties, CA*, Docket No. AB-12 (Sub-No. 113) (ICC served Aug. 10, 1987, p. 8, *aff'd* by decision served Nov. 12, 1987), *aff'd sub nom. Southern Pacific Transp. Co. v. ICC*, 871 F.2d 838, 843 (9th Cir., 1989); *The Toledo Terminal Railroad Company -- Abandonment -- between Temperance and Gould in Lucas County, OH*, Docket No. AB-226 (Sub-No. 2) (ICC served Dec. 8, 1987), p. 5; *Burlington Northern Railroad Company -- Abandonment -- in Morrison County, MN*, Docket No. AB-6 (Sub-No. 253) (ICC served Jan. 6, 1986), p. 5; *Burlington Northern Railroad Company -- Abandonment -- in Emmons and McIntosh Counties, ND and Campbell and McPherson Counties, SD*, Docket No. AB-6 (Sub-No. 236) (ICC served July 8, 1985), p. 13; *Burlington Northern Railroad Company -- Abandonment -- in Benson, Pierce and Rolette Counties, SD*, Docket No. AB-6 (Sub-No. 104F) (ICC served Feb. 9, 1982), p. 12-13.<sup>4/</sup>

Abandonment of the Barr-Compro segment would significantly harm local interests,

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<sup>3/</sup> The rationale is that because they do not involve out-of-pocket losses, opportunity costs are not as harmful as increased transportation costs suffered by shippers (which come out of their pockets).

<sup>4/</sup> Opportunity costs alone can justify abandonment where local interests would not be significantly harmed. *Chicago and North Western Transp. Co. - Abandonment*, 366 I.C.C. 373, 380 (1982), *aff'd sub nom. Cartersville Elevator, Inc. v. ICC*, 724 F.2d 668, and 735 F.2d 1059 (8th Cir. 1984).

particularly SPI. Applicants argue that SPI overstated the adverse effect that abandonment would have, but applicants acknowledge that abandonment would increase SPI's transportation costs by \$66,480 per year (Doc. No. UP-SP 232, Tab G, RVS Coale, p. 3). Applicants contend (*id.*, RVS Allamong, pp. 8-9) that such increased costs are small in relation to SPI's yearly income, but such increased costs would reduce SPI's yearly profit by 3.8 percent.<sup>5/</sup> In contrast, the operating loss of \$100,924 per year claimed (but not proven) by applicants (*id.*, RVS Matthiessen, Ex. HM-1, p. 1) is less than two-hundredths of one percent (.0001303) of UP's net income of \$766,996,000 in 1994 (*see* Doc. No. UP-SP 22, p. 137, for UP's 1994 net income). A 3.8-percent reduction of UP's profit would amount to over \$29 million per year; UP would be unlikely to consider such a reduction small and insignificant. Under the abandonment statute, the Board is required to consider the degree and severity of the benefits and burdens of abandonment to all concerned. *City of Cherokee v. ICC*, 641 F.2d 1220, 1229-1230 (8th Cir. 1981). As illustrated above, abandonment would result in harm to SPI and BCI of significant degree and severity, which would outweigh any more modest harm to applicants from opportunity costs (*see* cases on opportunity costs cited, *supra*).<sup>6/</sup>

### **CONCLUSION AND REQUESTED RELIEF**

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<sup>5/</sup> Abandonment applicants sometimes argue that increased transportation costs resulting from abandonment are not harmful because they would not force shippers out of business. That argument misses the point in conjunction with the balancing process. Operating losses experienced by Applicants would not force them out of business either.

<sup>6/</sup> \* Applicants have not provided support for their contention (Doc. No. UP-SP 232, Tab G, RVS Coale, p. 3) that three of SPI's five principal competitors are not rail-served. That statement is not true. All five of those competitors are rail served. Similarly, Applicants' claim (*id.*, Tab G, p. 26) that the Economic Development Council of Greater Springfield is wrong about the abandonment negatively affecting economic growth in the area is itself wrong. The rail line has enabled SPI to grow very substantially and virtually double its rail traffic in the past five years.



**CERTIFICATE OF SERVICE**

I hereby certify that on May 31, 1996, I served the foregoing document, Joint Brief In Opposition To Proposed Barr-Girard, IL Abandonment, by U.P.S. overnight mail on Robert T. Opal, Union Pacific Railroad Company, 1416 Dodge Street, Room 830, Omaha, NE 68179, and on all other parties by first-class, U.S. mail, postage prepaid.

Thomas F. McFarland Jr.

THOMAS F. McFARLAND, JR.



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## PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3228

May 31, 1996

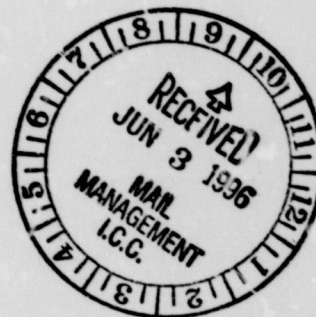
PETE WILSON, Governor



Item No. \_\_\_\_\_

Page Count 30JUNE 1996 # 9VIA FEDERAL EXPRESS

Office of the Secretary  
Case Control Branch  
Attn: Finance Docket No. 32760  
Surface Transportation Board  
1201 Constitution Avenue, N.W.  
Washington, D.C. 20423



Dear Commission Secretary:

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

Enclosed for filing please find an original and 21 copies of a document titled **Brief of The Public Utilities Commission of the State of California**. Please file-stamp the extra copy and return it to the undersigned in the enclosed stamped, self-addressed envelope. Thank you for your cooperation in this matter.

Also enclosed is a 3.5" floppy computer disc containing a copy of the filing in Wordperfect 5.1 format.

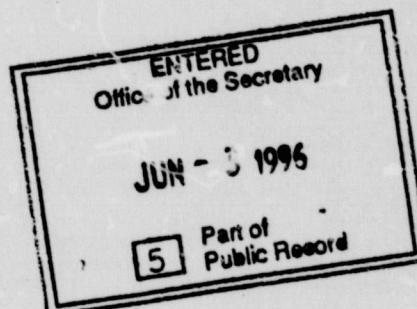
Sincerely,

*James T. Quinn*  
James T. Quinn  
Commission Attorney

JTQ-dd

Enclosures (22)

cc: Parties of Record



# ORIGINAL

## BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 32760

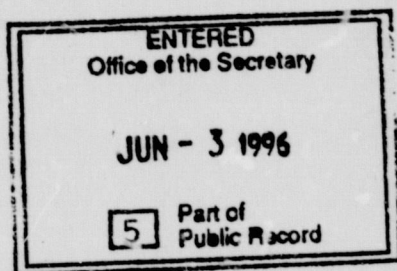
UNION PACIFIC CORPORATION,  
UNION PACIFIC RAILROAD COMPANY  
AND MISSOURI PACIFIC RAILROAD COMPANY

--- CONTROL AND MERGER ---

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



### Brief Of The Public Utilities Commission Of The State Of California



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BEFORE THE SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 32760

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

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**Brief Of The Public Utilities Commission  
Of The State Of California**

Pursuant to the schedule set forth by the Surface Transportation Board (Board) in  
Decision No. 6, the Public Utilities Commission of the State of California (CPUC),  
hereby submits its brief.

**I.**

**INTRODUCTION**

The CPUC is an administrative agency established under the Constitution and  
laws of California. Among its responsibilities, the CPUC regulates various aspects of  
railroad operations in California. Service of merger applications on the CPUC is  
pursuant to 49 CFR § 1180.4(c).



In their application, Union Pacific Corporation, et al. (UP) and Southern Pacific Rail Corporation, et al. (SP) seek authorization for the merger of SP into UP and the consolidation of their railroad operations. The application would create the largest railroad in the nation, encompassing approximately 37,000 track miles.

The merger would have special significance for California where SP (and predecessor Central Pacific) has been the state's largest railroad for more than 125 years. SP has by far the most track miles within the state, serves more California communities and shippers than any other rail carrier, interchanges with more short lines, and provides more rights-of-way for Amtrak.

Currently three Class 1 freight railroads serve California, namely, SP, UP and the Burlington Northern Santa Fe (BNSF). SP has by far the weakest earnings of the three while UP has been the nation's most profitable railroad. SP claims that denial of the merger would force it to drastically reduce its service.

UP and SP announced their plans to merge in August 1995 and jointly filed their application on November 30, 1995. In September 1995, addressing concerns that the merger could sharply reduce competition, UP and SP entered into an extensive trackage rights and line sale agreement with BNSF. It provides, among other things, that BNSF may serve any shipper currently served only by UP and SP -- preserving competing service for such shippers.

The application calls for SP to be merged into UP, and no further use of the name "Southern Pacific." Most analysts see the principal advantages of the merger for UP to be the acquisition of SP's Chicago-Kansas City-El Paso "Golden State Route" together with SP's Houston-San Antonio-El Paso-Los Angeles "Sunset Route," the creation of the

north-south I-5 Corridor between the Pacific Northwest and Los Angeles, the ownership of most railroad gateways into Mexico, and better access to Gulf Coast chemical traffic.

## II.

### SUMMARY OF BRIEF

The CPUC's primary position is one of strong support for the UPSP merger. SP's problems have been serious and long-standing, and the proposed merger appears to offer sound solutions. New management, more efficient routes, better service and stronger funding for maintenance and new equipment are all in California's best interests. SP's future as a stand-alone railroad does not seem promising.

As the largest railroad in California, SP's demise or a drastic reduction in its operations would have a profoundly negative impact on the state. Conversely, the consolidation of SP into UP should vitalize SP's extensive rail system. In turn this would enhance railroad efficiency in the state, increasing the competitiveness of California products.

While strongly supporting the merger, the CPUC also urges the Board, pursuant to its broad authority described in 49 CFR § 1180.1(d), to require Applicants to implement various conditions in the public interest. The CPUC believes these modifications are necessary if the full benefit of the merger is to be realized in California. Six conditions, as proposed earlier in CPUC Comments filed March 29, 1996, are addressed in the brief, as follows:

- Term of UPSP-BNSF Agreement and Provision for Possible Replacement of BNSF as UPSP's Competitor
- BNSF Right to Serve Future Industries
- Central Corridor Competition
- BNSF Option to Acquire Keddie-Stockton Line
- Continued Modoc Line Operation
- Interchange Rights With Second Carrier for Reconstituted Northwestern Pacific Railroad

Principally, the above conditions focus on promoting and safeguarding competition, clearly the key consideration in the instant merger. With respect to the Central Corridor, the CPUC outlines its reasons for supporting BNSF over Montana Rail Link (MRL) as UP's competitor. The conditions also call attention to the Modoc Line and why a moratorium on its abandonment is necessary and reasonable. Further, the CPUC urges the Board to authorize an interchange with BNSF for the largely publicly funded Northwestern Pacific Railroad.

Finally, in additional comments, the CPUC reminds the Board of California's concern about the merger in relation to the Capitol Corridor, the Alameda Corridor, NAFTA and the impacts of the merger on railroad employees.



### III.

#### ARGUMENT

##### A. The Merger Will Vitalize California's Rail System

Applicant's proposal calls for SP to be merged into UP. Presently, UP operates approximately 22,600 miles of track and SP 14,500 miles. The new UP system would range from St. Paul, Chicago, Memphis and New Orleans to the ports of Seattle, Portland, Oakland and Los Angeles-Long Beach, and from the Mexican border to Idaho and the Powder River Basin of Wyoming. UP's principal competitor would be the newly constituted Burlington Northern Santa Fe (BNSF), which operates about 31,000 miles of track throughout the West. Indeed, much of the competition between the two new lines will be pursuant to the UPSP-BNSF Agreement signed in September 1995, whereby BNSF would obtain about 3,800 miles of trackage rights over UPSP and the right to purchase other lines.

The UPSP consolidation offers numerous advantages. First, it will accomplish the essential preservation of the SP system, which reaches to far more points in California than any other railroad. SP's weak overall financial performance in recent years makes its survival questionable without the merger. It is likely that SP would be forced to deeply cut back its railroad operations, were it not allowed a merger partner. This not only would reduce the scope of SP service but also make it an even weaker competitor vis-a-vis UP and BNSF.

UP's ability to invest large amounts of capital in the SP system should result in better equipment, improved facilities, more reliability and a reversal of the service

declines that have plagued SP for many years. Service gains also will be realized from the new routes that will be created by the merger, most notably for California in the I-5 Corridor. Moreover, UP's premier route through the Central Corridor will be shortened.

Improved service also will include an increased incidence of single-line service. This will be true not only for the new UP system but also for BNSF because of the new routes that would be created by the UPSP-BNSF trackage rights and sales agreement that is part of the merger application.

In sum, the merger will infuse new life into California's largest railroad system at a time when a stand-alone SP appears ripe for failure. The merger's route efficiencies and its leveling of the competitive field vis-a-vis BNSF can only benefit California and its shippers.

B. Competition Is The Key Issue In The Instant Merger Proceeding

Clearly, the central issue in this merger case is the merger's effect upon competition. The applicants have essentially demonstrated this point by their entrance into an extensive trackage rights and line sale agreement with BNSF. The agreement is a response to the parallel nature of much of the right-of-way subject to merger and the number of "2 to 1" shippers. Such shippers currently are served by both SP and UP, but after the merger would be served only by the new UP. Applicants' agreement with BNSF assures that such shippers will continue to have access to a competing carrier, namely, the BNSF.

The importance being accorded to competition herein is consistent with federal law and regulations. Both the Interstate Commerce Act (Act) and the Code of Federal



Regulations (Code) give prominence to considerations about competition and a merger's potential to have anti-competitive effects. Thus, the Board must consider whether the merger "would have an adverse effect on competition among rail carriers in the affected region." 49 U.S.C. § 11344(b)(1)(E). The Code, in a General Policy Statement, manifests reluctance about authorizing a merger that would "substantially reduce the transport alternatives available to shippers." 49 CFR § 1180.1(a). Such reductions in competition can only be justified when the merger offers "substantial and demonstrative benefits" which "cannot be achieved in a less anticompetitive fashion." *Id.*

This safeguarding of competition in deliberations about mergers also reflects the pro-competitive theme of the National Rail Transportation Policy Statement. *Southern Pacific Transp. Co. v. I.C.C.*, 736 F.2d 708, 717 (DC Cir. 1984). Therein the following are shown to be part of the regulatory policy of the federal government: allowing, as much as possible, for rates to be established through competition and demand; ensuring that the nation's rail system manifests "effective competition among rail carriers and with other modes;" prohibiting "predatory pricing and practices" and avoiding "undue concentrations of market power." 49 U.S.C. § 10101a(1),(4),(13).

Finally, the importance of analyzing competitive impacts of a merger is deemed "especially critical" because of the post-Staggers Act commitment of Congress towards allowing railroads greater freedom to formulate rates "without regulatory interference." 49 CFR § 1180.1(a); *Rio Grande Industries, Inc., et al. - Control - Southern Pacific Transp. Co., et al.*, 4 I.C.C. 2d 834, 852 (1988). In other words, now that railroads are largely deregulated, fostering competition is the principal means of preventing a single railroad from dominating markets to the detriment of the public interest. 4 I.C.C. 2d at



853. This is the main concern prompting the setting forth of the CPUC's conditions *infra*.

#### IV.

#### THE CPUC'S PROPOSED CONDITIONS

The Board is authorized to impose conditions "governing" a merger. 49 U.S.C. § 11344(c). *Missouri - Kansas - Texas R. Co. v. United States*, 632 F.2d 392, 395 (5<sup>th</sup> Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981). Indeed it has "broad authority" to do so, including the imposition of conditions "that might be useful in ameliorating potential anti-competitive effects of a consolidation." 49 CFR § 1180.1(d)(1).

In its initial comments filed March 29, 1996, the CPUC set forth six conditions regarding its support of the merger. Herein the CPUC offers its final and fully considered position on these conditions.

**Condition 1: Term of UPSP-BNSF Agreement and Provision for Possible Replacement of BNSF as UPSP Competitor**

Pursuant to the extensive private agreement between UPSP and BNSF that was reached on September 25, 1995, BNSF will replace SP as UP's competitor in selected corridors and at selected stations within California, for a term of 99 years.

The CPUC sees two problems with this agreement provision. First, no explanation is offered as to what ensues at the expiration of the 99-year term. No succession process is described and thus it appears that after a span of 99 years, UP would assume monopoly status. As the CPUC mentioned in its initial comments, it is likely that the instant UPSP merger will accomplish the final restructuring of railroad competition in California. It therefore is appropriate that BNSF's furnishing of

competition in place of SP likewise be in perpetuity. In other words, 99 years hence, vigorous competition between UP and the BNSF will likely be as much in California's public interest as it is now. Therefore, the Board should require that the term of the competition be changed from "99 years" to "in perpetuity."

The second problem concerns the agreement's lack of a remedy for ineffective competition. While the BNSF has stated in workshops conducted before the CPUC that it is "totally committed to making the most" out of the trackage rights and line purchases set forth in its agreement with UPSP, the BNSF will do so pursuant to trackage rights, with the exception of the Bieber-Keddie Line, which BNSF will purchase from UP. Thus, the BNSF has no inherent financial commitment to continue to provide adequate and effective competition over former SP lines in California. This is particularly of concern given the wholly variable character of the agreed-upon rates of compensation that BNSF will be required to pay for its use of trackage rights.

Again, though, the agreement does not provide any process whereby a successor to BNSF would be designated -- should the BNSF fail to live up to its part of the bargain. To counter this, the CPUC requests that the Board interpose the following provision: Upon complaint by any interested party and the Board's subsequent finding that BNSF has provided inadequate or ineffective competition to UPSP in any selected corridor or to any selected station in California, the Board should order any appropriate corrective action, including the replacement of BNSF as the designated railroad competitor against UP.



**Condition 2: BNSF Right to Serve Future Industries**

Except in those instances where local access was specified, the UPSP-BNSF Agreement only grants bridge trackage rights to BNSF for the movement of overhead traffic in California. Only UP would be authorized to serve new customers locating on lines where BNSF would have these bridge trackage rights. In other words, the agreement would reserve for UP a geographic monopoly with respect to new industries locating on such lines. As can be seen, this monopoly was a function of the UPSP decision not to sell the routes to BNSF but rather to only grant bridge trackage rights. Had UPSP elected to sell the lines, BNSF would also receive the benefit of soliciting business from any new industries.

As it turned out, however, following complaints from parties about the UPSP-BNSF Agreement, UPSP moved to make various changes in it. Many of the changes, including a relenting with respect to service to new industries, are set forth in the Settlement Agreement that UPSP reached with the Chemical Manufacturers Association (CMA) on April 18, 1996. UP/SP-230, p. 12. Subsequently, UPSP has extended these changes (and others) to all routes, not just to those affected by the CMA settlement. Id. It is noteworthy, though, that BNSF's improved status with respect to new industries only applies to former SP lines and does not encompass those UP lines over which it would receive trackage rights pursuant to the UPSP-BNSF Agreement. Thus, BNSF still could not use trackage rights to serve new industries that locate on UP lines (pre-merger UP lines).



As regards CPUC Condition 2, therefore, California has received half a loaf.

Although BNSF may use its trackage rights to serve some new industries in California, it still is barred from serving others. The CPUC is aware of no sound justification for this differentiation between California's SP and UP lines. If UPSP truly is sensitive to California's need for rail competition, it would further amend its offer so that it is inclusive of new industries locating on UP lines where BNSF has the right to operate via trackage rights.

This extension of BNSF's right to serve new industries should not be seen as an injustice to UP. UP would still retain an exclusive right to serve customers that before the merger had only been served by UP. Moreover, as a result of the merger, it would acquire the right to exclusively serve customers on SP lines that presently are only served by SP. Why should UP, in addition, be allowed to carry valuable monopoly rights with respect to new industries far into the future? A growing and expanding California should not be saddled with such a hindrance to a competitive transportation market.

Also, why should new industries locating on former SP lines enjoy the benefit of being served by competing railroads while new industries locating on pre-merger UP lines do not? Concomitantly, property owners and communities that happen to be located on pre-merger UP line should not have to see their industrial sites lose value vis-a-vis sites located on former SP lines simply because of distinctions made by UP with respect to how many railroads may serve new industries.

Further, the Board should be mindful of the routes affected by UP's distinction. UP's Keddie to Stockton line, for example, extends for approximately 190 miles, serving sizable communities such as Oroville and Marysville/Yuba City, and also Sacramento

and Stockton, both extremely large and prosperous business centers that can be expected to have many new industrial sites in future years.

Finally, there can be no objection to this condition on the basis that it does not arise out of the merger. It is because of the merger and its largely parallel nature that UPSP were led to enter into the original UPSP-BNSF Agreement and later to grant the CMA settlement and other concessions. They now should be required to "go the extra mile" and grant BNSF access to new industries on any route where it receives trackage rights.

**Condition 3: Central Corridor Competition**

With respect to the issue of competition, the CPUC has focused much of its attention on the Central Corridor, the transcontinental route between Northern California and the Midwest. Presently, UP owns and operates one of the two routes through the Corridor, and SP owns and operates the other. After the proposed merger, UP would own both routes. However, pursuant to the UPSP-BNSF Agreement, BNSF would be authorized to operate via trackage rights through the Central Corridor between Oakland and Denver. (Beyond Denver, BNSF, would operate over its own track to the Midwest.) Portions of the former SP route through the Corridor would be abandoned.

In its initial written comments filed March 29, 1996, the CPUC noted that in 1988, when Rio Grande Industries (RGI) was seeking to acquire SP, RGI advanced the argument that its acquisition of SP would be in the public interest because it would enhance competition against UP in the Central Corridor. Conversely, our comments noted, the instant merger proposal appears to minimize such competition because it



would result in UP owning the facilities and trackage of both Corridor routes. Moreover, the CPUC stated that competitor BNSF's primary service route between the Central Corridor and the Midwest would continue to be the excellent Southern Corridor route of the former Santa Fe.

Accordingly, the CPUC asked that Board approval of the merger be conditioned either on a finding and order (1) that BNSF is committed to and will provide adequate and effective competition to UP using the Central Corridor or (2) that UP divest a stand-alone Central Corridor route to a carrier other than BNSF.

Subsequently, MRL filed its Responsive Application proposing that one of the two Central Corridor routes be purchased and operated by a company formed by MRL's chief stockholder. Also, while UPSP plans call for the abandonment of the Modoc Line through Northeastern California, MRL proposed to preserve and operate that line. In its April 29, 1996 comments, the CPUC indicated that MRL's proposal appeared to have merit but that it saw a need for further information and would schedule a workshop.

Having benefited from the workshop and further reviewed the record herein, the CPUC has concluded that BNSF and not MRL would best provide the kind of single-line service that will be in California's public interest. A key consideration is that BNSF, with trackage rights to numerous SP points and its own extensive routes throughout the Midwest, will be able to offer a much greater volume of single-line service to California shippers than would MRL. Moreover, whereas MRL's routes from the Midwest would end at Stockton, BNSF's reach to the Port of Oakland where the merger would provide it with greatly improved access. For its part, MRL would have to rely on UP and BNSF both to deliver freight destined for points beyond Stockton and to gather MRL loads that



would be outbound from Stockton over the Central Corridor. BNSF also appears to be better equipped to furnish expedited intermodal service out of the Bay Area.

The record herein reflects another consideration that bolsters the reasonableness of supporting BNSF as the better competitor in the Central Corridor. This other consideration stems from the Settlement Agreement that Applicants have made with CMA and specifically involves Applicants' consent to a five-year annual Board oversight proceeding. UP/SP-230, p. 21. Pursuant to this oversight, "[t]he Board would have the authority to impose any additional remedial conditions that it found to be called for." *Id.* Applicants have stated to the CPUC that they have no objection to submitting to this requirement with respect to the Central Corridor. Of course the proposal is subject to the Board's consent to assume such oversight.

The CPUC urges the Board to agree to what the Applicants have proposed, namely, a five-year oversight program with respect to BNSF's performance in the Central Corridor. A successful outcome in the Central Corridor, where both routes will be owned by the same carrier, is no less vital to the public interest of California and its rail freight users than it was to the CMA and shippers affected by the CMA Settlement Agreement.

**Condition 4: BNSF Option to Acquire Keddle-Stockton Line**

The Keddle to Stockton line is a key segment of right-of-way over which the BNSF would have trackage rights in California pursuant to the UPSP-BNSF Agreement. The line is crucial to BNSF's capability to provide adequate and effective competition against UP in the North-South I-5 Corridor (where UP plainly will have the preferred

route). UP's Keddie to Stockton line also is vital to the ability of BNSF to provide adequate and effective competition in the east-west Central Corridor.

In light of this, the CPUC requests that UP be required to grant a perpetual option to BNSF to acquire UP's Keddie-Stockton Line at its net liquidation value, as determined by the Board. This option could be exercised by BNSF upon its complaint and the Board's subsequent finding that UP had failed to provide with respect to the Keddie-Stockton Line either (1) equal-priority, non-discriminatory dispatching or (2) adequate roadway maintenance or capital improvements.

The CPUC continues to view this option as a worthwhile safeguard despite modifications that Applicants set forth in their rebuttal regarding dispatching and maintenance on lines where BNSF would operate via trackage rights. UPSP has devised "a detailed written protocol to govern the dispatching of trackage rights trains." UP/SP-230, p. 16. One of the protocol's measures allows a BNSF manager to be stationed at UP's principal dispatching center in order to monitor the dispatching of BNSF trains operating on UP lines. *Id.*, pp. 16-17. Another measure provides for the creation of a "dedicated fund" where trackage rights fees received from BNSF for its operations over the Central Corridor would be deposited. These monies would be spent for maintenance and capital improvements on the lines used by BNSF in the Central Corridor via trackage rights, as well as for offsetting depreciation. UP/SP-230, pp. 14-15 and CMA Settlement Agreement, Sect. 6(b).

While these measures provide some relief for CPUC concerns, an option to purchase still seems appropriate. It provides the ultimate solution to any persistent problem that may develop on this important line segment and also will serve as an



incentive to UP to abide by its agreements. Also, the presence of an ongoing option regarding the Keddie-Stockton Line places no financial burden on UP.

**Condition 5: Continued Modoc Line Operation**

The Modoc Line extends for 217 miles between Klamath Falls, Oregon, and Flanigan, Nevada, and has long served as an SP shortcut to the Central Corridor. UP/SP-27, p. 53. All but negligible portions of the line are located within California, where it extends across the northeastern corner of the state. The Modoc Line also constitutes the only interconnection for two short lines -- the Great Western Railroad, which was purchased by the City of Lakeview, Oregon, in the 1980's to serve its lumber industry, and the Quincy Railroad, which runs between Susanville and Wendel. UP/SP-26, p. 357.

Applicants propose to abandon 85.5 miles of the line -- from Wendel to a point 10 miles south of Alturas, the commercial center and county seat of Modoc County. Abandonment would cut off the shipment of wood chips between Lakeview and Wendel, where a cogeneration plant is located, and render the line useless as a through route.

SP's Senior Manager of Plant Rationalization Paul Turney describes the Wendel - Alturas Lines as being "in generally good condition." Id., p. 358. The extent of SP's usage of the line is in dispute, however. Originally, the Applicants stated in one portion of its application that the line served "seven trains each day, seven days a week." Id., p. 56. But in another section of the application the figure of one train daily in each direction was given. Subsequently, in its rebuttal submission, Applicants claim that the



larger volume was a misprint and that "the current volume is one train a day in each direction." UP/SP-232, p. 88.

In two appearances at CPUC workshops on the merger, the planning director for the City of Alturas and the County of Modoc declared that traffic volumes have been considerable higher on the line. Indeed, at a March workshop he said that the volume was six to ten trains a day. Subsequently, at a later workshop, he said there had been a recent, sudden decline in traffic but he indicated that usage of the line was more extensive than what SP has claimed.

The remote area served by the Modoc Line suffers from a very marginal economy and has only meager transportation resources. Alturas, the largest community, has no scheduled intercity bus service and no airline or Amtrak service. Presently, Alturas and Modoc County are striving to capitalize on the recent construction of a large natural gas pipeline through the region. This project, which required the shipment of almost 150 carloads of pipe via the Modoc Line, is making the area a more attractive site for new industry. The presence of a through railroad to the Central Corridor is a crucial element in plans for future industrial growth. In these circumstances, the loss of the rail line would have a severe impact on rural and community development. Pursuant to 49 U.S.C. § 10903(a)(2), the Board should give special consideration to these impacts on the region's depressed economy.

In their March 29, 1996 Comments to the Board, the County of Lassen and the City of Susanville set forth their opposition to the abandonment of the Wendel-Alturas Line and the loss of the Modoc Line. They pointed out that a recent decision of the U.S. Base Realignment and Closure Commission has made large portions of the Sierra Army

Depot at Herlong on the Modoc Line available for civilian purposes. The local committee on reuse of the base sees the continuation of the Modoc Line as a through railroad between the Pacific Northwest and the Central Corridor to be vital to the development of proposed industrial parks at the military site.

According to the comments, it is "axiomatic" that Susanville and Lassen County are "in a depressed economic state" and that the loss of the railroad would exacerbate matters. Finally, the comments give a much higher figure regarding current usage of the line than does UPSP.

In 1988 when RGI was conducting its successful campaign to acquire the SP, an effective public interest argument that it made was that it would reopen the Modoc Line and continue it in operation. Indeed this was one of the reasons why the CPUC supported RGI's acquisition of the SP.<sup>1</sup> Now, having been taken over by RGI, SP proposes -- along with UP -- to destroy the Modoc Line by abandoning almost a 100 miles of track in the middle of the line. The CPUC strongly believes that UPSP should be kept to RGI's commitment to California and the public regarding the Modoc Line.

Accordingly, the CPUC requests that Board approval of the UPSP merger be conditioned on the continued operation of the entire Modoc Line by UPSP from Klamath Falls, OR to Flanigan, NV for a period of not less than five years, subject to continued

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<sup>1</sup> Rio Grande Industries, Inc., et al. - Control - Southern Pacific Transp. Co., et al., 4 ICC 2d 834, 863-864 (1988) (F.D. 32000).



oversight by the Board. At UPSP's option, the operation could be performed by some other financially and operationally qualified railroad operator. However, any such operator shall operate the entire Modoc Line without traffic surcharges, with any financial losses paid for by UP, and with full and unrestricted interchange rights with BNSF at Klamath Falls, at Flanigan, and at such other locations as the operator may elect.

Among other things, the five-year period will give Alturas and Modoc County time to capitalize on its new gas pipeline by fostering industrial development and increased usage of the Modoc Line. It also would allow time for Susanville and Lassen County to demonstrate that the conversion of part of the Sierra Army Depot to civilian purposes will result in greater activity for the railroad. Assisting both of these regional economic efforts is reasonable, given the RGI/SP Commitment to the Modoc Line and the Board's responsibility to carefully weigh adverse impacts on rural and community development under § 10903(a)(2).

Further underscoring this responsibility is the requirement that the Board must balance competing interests when determining the reasonableness of an abandonment. *Georgia Public Service Com'n v. United States*, 704 F.2d 538, 541 (11<sup>th</sup> Cir. 1983). Here the public interest considerations and the previous RGI/SP pledge to keep the line open fully justify the five-year oversight period.

**Condition 6: Interchange Rights With Second Carrier For Reconstituted Northwestern Pacific Railroad**

On April 29, 1996, the close of escrow was announced on purchases from SP that reconstituted the former Northwestern Pacific Railroad (NWP). The 300-mile line extends from Eureka on California's remote North Coast to a point just south of Napa in



the Bay Area. Since 1992, the North Coast Railroad Authority (NCRA), a public entity, has owned and (through the North Coast Railroad) operated the northern half of the line, while the California Northern Railroad (CFNR) has leased (from SP) and operated the southern half. Starting in July, the NCRA will assume operation over the entire line.

The NWP provides the only link to the nation's interconnected railroad system for a vast area of Northwest California. Over the years the NWP has principally served the lumber industry in Eureka and the North Coast counties, and lumber remains the line's main freight commodity. The railroad is an important component of the regional economy. It also promotes highway safety by removing many lumber trucks from the area's principal highway, which comprises many miles of winding, undivided two-lane roadway.

The State of California has long deemed the preservation of the railroad to be strongly in the public interest. With the recent purchase and planned rehabilitation of the NWP, more than \$75 million in public funds -- both state and federal -- will have been expended on the line.

In 1983 SP sought authorization from the Interstate Commerce Commission (ICC) to abandon the northern half of the line. After extensive hearings in Northwest California, authorization was denied, with the ICC fearing an "environmental disaster" along the Eel River if the railroad and its numerous bridges, tunnels, and culverts were abandoned. *Northwestern Pacific Railroad Co. - Abandonment - In Mendocino, Trinity and Humboldt Counties, CA*; Docket No. AB-14 (Sub-No. 4), Served Feb. 7, 1984. Subsequently the line was sold by SP to a private operator and eventually was acquired by the NCRA in 1992 with public funds.

Throughout this entire period and presently, neither the NCRA nor the CFNR has had the right to interconnect with any Class 1 carrier other than SP. The NCRA has repeatedly experienced car supply problems and delays in the movement of its freight. Moreover, SP alone has had the right to price all traffic to and from NCRA and CFNR points. In short, the railroad has been beholden to a single Class 1 carrier and has suffered grievous economic harm because of this.

Accordingly, and in light of the recent changed status of the line, the CPUC (and the NCRA) seeks as a condition of the merger, competitive access to the BNSF. As the CPUC stated in earlier comments filed with the Board:

"such competitive access is of great importance given SP's historic failure to provide NCRA's freight shippers with adequate car supply, reasonable and consistent transit times, and competitive rates, and because of SP's threatened use of its power to surcharge NCRA out of business."

Consequently, approval of the merger would be conditioned on NCRA being granted bridge trackage rights over UPSP-owned lines between Lombard and the designated BNSF interchange at Suisun-Fairfield, a distance of only 20 miles. Alternatively, at the Board's option, trackage rights could be extended to the BNSF yard at Richmond, a further distance of about 25 miles. The terms and conditions of the arrangement should replicate those set forth in the UPSP-BNSF Agreement.

In his rebuttal testimony, SP's Vice-President for Strategic Development, Michael Ongerth, acknowledges that NCRA has engaged in a lengthy and concerted effort to secure access beyond SP. UP/SP-232, Part B, p. 91. He is brief and dismissive of the matter, however, explaining inexplicably that "NCRA's situation is being addressed by a



political solution" and, further, that NCRA's operations do not have anything to do with the merger. Id.

Neither of these arguments has merit. Portraying the problem as "political" appears to be an effort to obscure and complicate the matter, and to give the impression that there is some "ongoing discussion" and "ongoing political resolution" taking place regarding NCRA access to a second Class 1. Id., pp. 91-92. The CPUC staff is well informed about NCRA matters and strongly doubts what SP seeks to establish in its rebuttal testimony about political discussions aimed at helping shippers. In other words, it does not agree that there is any effective "ongoing political resolution of the service needs of shippers..." Id. Actually, shippers on the line have experienced recurring service problems and would welcome Board action. Indeed, action by the Board as part of the merger is the only likely hope that the matter will be resolved reasonably for shippers.

The second argument advanced by Mr. Ongerth -- namely, that the condition sought is not related to the impact of the merger -- is likewise inapt.

49 CFR § 1180.1(d)(i). The criteria for imposing conditions were not intended to be inflexible. Thus the text of the pertinent regulation states that the Board "will not normally" impose conditions on a merger unless the matter affects "essential services" and certain factors are present -- one of which is a link to an impact of the merger. Id.

Use of the word "normally" implies that there are circumstances when an exception to the general rule is appropriate. Certainly, this merger is exceptional. It involves not only Class 1 applicants UP and SP but, through the largest trackage rights agreement in history, it also involves the only other Class 1 railroad in the Western



United States, the BNSF. These three railroads transport about 60 percent of rail freight in the West.

Given this setting, it hardly seems reasonable to argue against the NCRA condition on the grounds that the problem does not directly arise out of the merger. Surely there is no denying the point that the merger would represent the final disadvantageous positioning of the NCRA, for if the merger is authorized, there will be no other Class 1 railroad, aside from BNSF, to provide competitive access. If ever there was a time to make an exception about criteria that "normally" apply, this is such a time, the CPUC respectfully submits. The fate of California's only publicly-owned freight line -- whose services have been deemed essential by the State of California and worthy of extensive public funding -- hangs in the balance.

Further, there can be no question that the NCRA renders "essential services," a fact underscored by the substantial state action to preserve the line. The State of California's views about the line's positive impacts have remained constant since California's strong opposition to the 1983 abandonment before the ICC.

Finally, the condition would not impede the consolidated carrier from realizing the "anticipated public benefits" of the merger. 49 CFR § 1180.1(d)(iv). Indeed, the Applicants have not even hinted that this is a problem. Certainly Mr. Ongerth of SP made no mention of it in his rebuttal statement.

In light of all this, the CPUC strongly urges the Board, in the public interest, to grant the requested condition that would allow the recently reconstituted NWP competitive access to a second carrier, namely, the BNSF. Surely, in this case, where the

Board is being asked to authorize thousands of miles of trackage rights, as privately agreed to by the West's three Class 1 railroads, it is appropriate to approve 20-45 miles of trackage rights to provide competitive access to a line that serves a large area of California.

V.

**ADDITIONAL COMMENTS**

In March 29, 1996 comments, the CPUC noted four subject areas important to California, namely, the Capital Corridor passenger service, the proposed Alameda Corridor between the Ports of Los Angeles/Long Beach and rail yards in Central Los Angeles, NAFTA traffic and the Calxico-Mexicali railroad gateway, and the impacts of the merger on railroad employees. The CPUC requested that in any decision authorizing a UPSP merger, the Board memorialize certain responsibilities that would be incumbent upon UP as a result of its becoming SP's successor.

At this time, the CPUC reiterates these requests, as set forth in its earlier comments, and advises the Board of a further development with respect to NAFTA and the buildup of trade at the Calxico-Mexicali gateway. In materials distributed at the CPUC merger workshop held on March 15, 1996 in Los Angeles, UPSP stated that if the merger were approved, more than \$95 million would be spent for a second track on SP's Sunset Route between Los Angeles and Yuma, Arizona

This route runs through the Coachella Valley where a large increase in truck and railroad traffic is expected as a result of NAFTA. The plan to double-track the line coincides with efforts by Palm Springs and Coachella Valley leaders to establish a rail passenger service between Los Angeles and the Coachella Valley. These leaders have

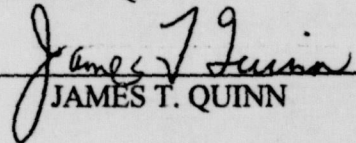
requested that the CPUC amend its comments on NAFTA to include a request that UP be asked to cooperate in these rail passenger plans and their implementation. The CPUC endorses this request and considers it to be in California's public interest.

VI.

CONCLUSION

Subject to the conditions discussed above, the CPUC strongly supports the proposed merger. The CPUC sees the UPSP merger as a necessary and timely development that should substantially improve rail transportation, both for the nation and for California.

PETER ARTH, JR.  
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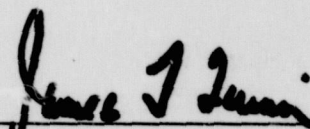
May 31, 1996



CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the Surface Transportation Board via express courier for delivery on June 3, 1996. I also certify that the foregoing document will be served upon all parties of record by mailing on June 3, 1996, by first class mail, a copy thereof properly addressed to each party.

Dated at San Francisco, California, this 31st day of May, 1996.

  
\_\_\_\_\_  
James T. Quinn

STB FD

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
UNITED STATES DEPARTMENT OF TRANSPORTATION**

**Finance Docket No. 32760**

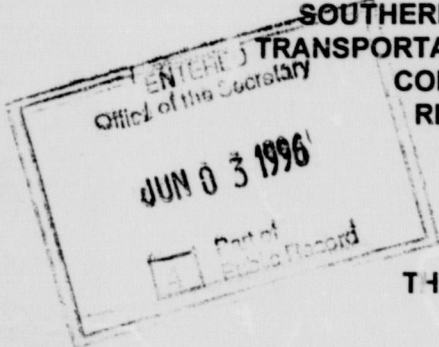
**UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY  
AND MISSOURI PACIFIC RAILROAD COMPANY**

**--CONTROL AND MERGER--**

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

**FINAL BRIEF SUBMITTED BY**

**THE PORT OF PORTLAND, PORTLAND OREGON**



**INTRODUCTION**

On March 22, and April 18, 1996, the Port of Portland filed comments with the Surface Transportation Board voicing full support for Union Pacific's (UP) application to purchase and merge with Southern Pacific (SP). Our comments also supported the settlement agreement Union Pacific reached with Burlington Northern Santa Fe Railroad (BNSF).

The Port of Portland is involved with import and export cargo activities covering all modes of transportation of automobile, container, bulk (mineral and agricultural), and breakbulk shipments within the Pacific Northwest.

**SUMMARY OF ISSUES**

We believe the merger, along with the settlement agreement, will significantly enhance competition and service for international shippers throughout the Pacific Northwest and the nation. Specifically, the merger and BNSF settlement agreement will help cure a number of long-standing competitive impediments in the Northwest and create the following benefits:

- The rationalization of facilities and capacity improvements which the UP/SP plans in the Portland area will greatly enhance export freight mobility. We have worked very closely with the UP management on their operating plan in Portland and are assured that critical capital investments and operating changes will be implemented which will improve service to existing export bulk and grain shippers while creating capacity to facilitate increased exports from the Pacific Northwest, Mountain, and Midwest regions. These investments will be made not because they are mandated, but rather because they will be justified based on the market and logistical opportunities created by the merged UP/SP rail system.

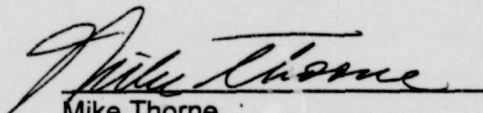


- The UP/SP merger will consolidate a currently disjointed north-south rail system on the West Coast facilitating for the first time triangulated rail service which will benefit high-value general merchandise trade by intermodal container shippers. Portland and the entire Pacific Northwest region is a net exporter of container cargo with a severe deficit of empty container equipment while Southern California has a consistent surplus of empty containers. The merger will create the opportunity to provide single-line, triangulated rail service from California to Portland--including direct access from the current SP system to Pacific Northwest container terminals--so that containers can finally flow into our region cost effectively to facilitate exports.
- Likewise, the merger will also create competitive single-line service from the Southwest region and central corridor to and from Portland's bulk and automobile facilities, which we believe will facilitate increased international trade in those regions.
- The BNSF settlement agreement will for the first time bring competitive service by two rail carriers to export shippers throughout the Northwest region. Many shippers in the Northwest, including grain exporters in Montana, are currently captive to BNSF. The UP/SP access rights agreed to in the settlement agreement with BNSF will finally allow a second rail carrier to provide competitive rates from this important exporting region assuring that U.S. products will remain competitive in today's world market.

#### CLOSING STATEMENT

The Port of Portland again urges the Surface Transportation Board to approve the merger conditioned only with the agreement reached between UP and BNSF. Approval will provide strong competition and improved service for both existing and expanded exports from the Northwest, Mountain, and Midwest states through the Port of Portland. We urge the Board to not impose conditions which would jeopardize the consummation of the merger or undermine its benefits, leaving this region with the current incomplete rail network.

Respectfully submitted,



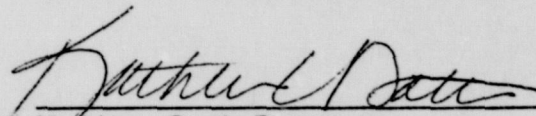
Mike Thorne  
Executive Director  
The Port of Portland  
P.O. Box 3529  
Portland, OR 9. 208

Date: May 30, 1996



**CERTIFICATE OF SERVICE**

I certify that on this 31st day of May, 1996, copies of the Brief of the Port of Portland were served on all parties of record by first-class mail, postage prepaid.

  
Kathleen Curtis Dotten