STB FD 32760 6-3-96 E 83911

83911

Radermacher, Whiteside & Associates

Transportation & Marketing Consultants

Item No.

Page Count 20

JUNE, 1996 #81

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

May 31, 1996

Hon. Vernon A. Williams, Secretary
Attn. Finance Docket No. 32760
Surface Transportation Board
12th & Constitution Avenue N.W.
Washington, D.C. 20423

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

Dear Sir:

Enclosed please find the original and 20 copies of the Montana Wheat and Barley Committee's, Brief in the above-styled proceeding, due June 3, 1996, pursuant to the procedural schedule adopted by the Surface Transportation Board. I am also enclosing a diskette on which are copied this pleading in Word Perfect 5.1 format.

Please receipt duplicate copy of this transmittal and return to address below.

Sincerely,

Sandy Poynor

Sandy Poynor,

Enc.

ENTERED
Office of the Secretary
JUN 03 1996
Part of Public Record

ENTERED
Office of the Secretary
JUN 03 1996
Part of Public Record

3203 Third Avenue North, Suite 301
Billings, Montana 59101
Phone: (406) 245-5132
FAX: (406) 252-3776

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 Corporation,
and The Denver Rio Grande Western Railroad Company

Brief

submitted on behalf of
the

Montana Wheat and Barley Committee

Montana Wheat and Barley Committee, (MWBC) pursuant to the procedural schedule adopted by the Interstate Commerce Commission and thereafter by the Surface Transportation Board in this proceeding, and the Commission's regulations, hereby submits the following Brief in support of (1) the specific protective conditions MWBC has requested the Board place on its approval of the Railroad Control and Merger Application ("Application") submitted by Union Pacific Corporation (UP) et al, and Southern Pacific Rail Corporation (SP) et al.(Applicant); and in support of (2) MWBC's Comments on the Application filed pursuant to the schedule outlined in Decision 6 (served October 19, 1995) and affirmed in Decision 9 (served December 27, 1995).

1. STATEMENT OF THE CASE

In response to the primary transaction – the merger of SP into UP – MWBC filed comments and evidence in support of their contention that the proposed consolidation of

UP and SP would reduce competition and disadvantage certain Montana grain shippers by allowing a pre-merger agreement between UP and BN/SF to be consummated. MWBC further requested specific protective conditions that the Board should impose that would tend to mitigate the anti-competitive effects of this merger on Montana grain producers.

Applicants oppose some, but not all, of the relief sought by MWBC. Applicants have represented that one of the proposed MWBC conditions would expand "the proportional rate arrangement that is provided for in the BN/SF settlement agreement to cover all Montana shippers and Silver Bow[1]." This is true.

Applicants further assert that MWBC seeks this because of the competitive benefit that others will receive from the transaction, and this is 'clearly improper.[2]' This is not true.

The applicants also question the MWBC proposal for a twenty year oversight of service on the Silver Bow Line, stating that it "has no justification in any effect of the merger[3]."

The applicants did not specifically rebut MWBC's alternative, alternatively supporting the sale of the Pocatello, ID to Silver Bow, MT line to Montana Rail Link (MRL) and inclusion of MRL in the proportional rate agreement.

The applicants also did not rebut MWBC requested condition allowing applicant to solicit and price competitively agricultural commodities to Portland, OR as well as points south of Portland which are included in the pre-merger agreement between BN and UP-SP.

2. MWBC COMPETITIVE RESPONSE

MWBC's responsive application defines its proposed response to the anti-competitive effects of establishment of the proportional rate scheme, between UP-SP and BN/SF. Said scheme was designed supposedly to ameliorate the anti-competitive effects

---

[1] Applicants Rebuttal, Volume 1 - Narrative, Page 276
[2] Applicants Rebuttal, Volume 1 - Narrative, Page 276
[3] Applicants Rebuttal, Volume 1 - Narrative, Page 277

of this merger. In reality, the proportional rate scheme was offered by the BN/SF to UP-SP in order to 'payback' the UP-SP for granting of extensive trackage rights, lines sales, etc. throughout the UP-SP proposed system.

There will be serious detrimental adverse effects on existing competition and competitive relationships between shippers and among rail carriers who serve Montana if this Application is not conditioned by this Board to ameliorate the anti-competitive effects. Specifically, the Pre-Merger agreement filed with this application could alter long standing regional cross-country competitive relationships between Montana and surrounding states as well as Western Canada, thus further increasing the monopolistic control of the Burlington Northern (BN) over Montana transportation. Accordingly, MWBC respectfully requested the Board, pursuant to its authority under 49 U.S.C. § 11344 (c) of the Interstate Commerce Act, impose conditions requiring the Applicants, upon consummation of their proposed merger and consolidation, to establish and maintain a rail competitive balance within the State of Montana and treat all Montana shippers equally and fairly. Those requested conditions, and the reasons why such conditions must be imposed, were specified in detail.

It is curious that the UP suggests, in their rebuttal, that the particular geographic boundaries of the pre-agreement of "which were negotiated at arm's -length[4]." The boundaries of the pre-agreement were negotiated at arm's-length implies that the UP-SP were somehow not involved in the negotiations and this agreement was just given to them? The fact of "how" they were negotiated be it. "at arm's-length" or some other length, has no bearing on the anti-competitiveness effect of the pre-merger agreement. It is possible "at arm's-length" or any other length to negotiate an agreement that is harmful to a state's shippers.

It is noted that the UP also stated that 'many Montana shippers' will benefit from the proportional rate agreement[5], however, by their response, they recognize that not all Montana shippers will benefit from the proportional rate agreement. The effect of the

---

[4] Applicants Rebuttal, Volume 1 - Narrative, Page 276

proportional rate agreement is to divide the state of Montana right down the middle and according to the UP-SP, provide benefit to 'many Montana shippers' but effectively preclude many more Montana grain shippers from participating in markets all of the Montana grain shippers have traditionally participated in together. MWBC in its Request for Conditions, proved that 45% of the grain production of Montana would fall outside the contiguous area subject to the pre-merger agreement. Yet, Montana grain producers have since Statehood, marketed their grain to the same western markets with equal access to the market place. The anti-competitive effect of the pre-merger agreement would be to destroy this historical marketing relationship. Why is it so difficult for the UP to include all Montana shippers in the proportional rate agreement? Is it because the agreement was negotiated "at arms-length?" and thus UP-SP had no part in the negotiations? The fact is it would not be difficult. The BN gave the area designated in the proportional rate agreement to the UP-SP as a competitive offset to the UP-SP granting to the BN, trackage rights and line sales in other parts of the west. MWBC proposes that the Board impose conditions to amend the proportional rate agreement so it does not treat part of Montana shippers differently than other Montana grain shippers. If Montana grain shippers didn't traditionally market as a unit, to the same markets for their grain for the past 100 years, the proportional rate agreement would not upset traditional marketing patterns. However, the UP-SP now knows that the Montana shipping community would be effectively cut in half by this proposed proportional rate agreement. Why? There is no explained reason given by UP why they refuse to request that the BN expand the pre-merger agreement. Their response in their rebuttal[6] is that many Montana shippers will benefit from the proportional rate arrangement, yet offer <u>no</u> evidence that such benefits will accrue.

---

[5] Applicants Rebuttal, Volume 1 - Narrative, Page 276

[6] Applicants Rebuttal, Volume 1 - Narrative, Page 277

3. ARGUMENT

While Applicant shrugs off some reduction of rail competition in those limited areas where the effects of the pre-merger agreement is felt[7], the Commission (now Board) has itself recognized that the Staggers Act requires increased vigilance in identifying anti-competitive effects of consolidation transactions. UP/MP/WP 366 ICC at 502

The proposed merger has two potentially anti-competitive consequences for Montana shippers. One arises from the proposed proportional rate agreement between BN/SF and the applicants, namely the introduction of new competition from Washington and northern Idaho on UP-SP through the granting of proportional rate agreement access and the potential loss of traditional markets by Montana producers. The other, resulting from the pre-merger agreement, will be the potential devastating effect the merger will have on the traffic moving south over the Silver Bow, MT line.

As will be demonstrated, MWBC have requested conditions specifically tailored to ameliorate each anti-competitive concern.

Applicants have not agreed to some of the proposed conditions suggested by MWBC[8]. Essentially they contend that some of the MWBC's conditions do not respond to a reduction of competition due to the merger. As MWBC will show, Applicant's assessment of competitive options faced by Montana grain shippers is wrong and flawed. Applicants, on the other hand, have not opposed other conditions MWBC proposed.

4. STATUTORY CRITERIA

Since this proceeding involves the merger of two Class I railroads, the Board is governed by the following standards found in 49 U.S.C. § 111344 (b) (1):

A. The effect of the proposed transaction on the adequacy of transportation to the public

B. The effect on the public interest of including, of failing to include, other rail carriers in the [illegible] involved in the proposed transaction.

---

[7] Applicants Rebuttal, Volume 1 - Narrative, Page 276

[8] Applicants Rebuttal, Volume 1 - Narrative, Pages 276-77

C. The total fixed charges that result from the proposed transaction.

D. The interest of the carrier employees affected by the proposed transaction.

E. Whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

The first and last of these criteria define the essential analytic framework for considering the claims of MWBC. For present purposes, the two are intertwined in that the adequacy of transportation service in Montana will depend on the competitive options open to the shipping public post-merger.

When Congress added subsection (E) of the Section 11344 (b) (1) in enacting the Staggers Rail Act of 1980, it intended that the Board (formerly the ICC) analyze the effect of merger transactions on each of the sections of the country affected, not merely the net effect on the entire region affected by the merger. The sponsor of that subsection described its objective as follows:

> I am offering an amendment…to specifically direct the Interstate Commerce Commission to consider the question of rail competition whenever making a determination of a railroad merger transaction.
>
> The escalation of rail mergers now taking place in the industry is causing concern among our Nation's farmers and ranchers as well as other shippers. The Interstate Commerce Commission is facing decision on several mergers that would have the effect of eliminating or nearly eliminating rail competition within entire sections of the country. I think it is important, therefore, that the ICC consider the question of competition as a regular part of the process of evaluating whether to allow mergers. *126 Cong. Rec. H8604 dated 9/9/1980; Remarks of Representative Panetta*

The ICC recognized that a relevant geographic market may be "as small as individual cities and …as large as the entire country." Union Pacific – Control – Missouri Pacific, Western Pacific, 366 I.C.C. 462, 505 (1982).

In Railroad Consolidations Procedures, 363 ICC 786, 786-87 (1981), the ICC observed that its concern was not only with the possible "elimination" of competition by consolidations, but it was also concerned about any significant "lessening" or "reduction" in competition caused by a consolidation. The Commission's rail transportation policy is that, while the focus will be on the preservation of effective intermodal competition in some markets, "in other markets (such as long-haul movements of bulk commodities) effective intramodal competition may also be important." 49 CFR § 1180.1 (c) (2) (1).

5. CRITERIA FOR IMPOSING CONDITIONS

Section 11344 (c) of the Interstate Commerce Act empower the Board to impose conditions governing consolidation transactions. In Union Pacific Corp., et al. - Control - Chicago and Northwestern Trans. Co., et al., Finance Docket No. 32133, ICC served March 7, 1995, the Commission described the prerequisites for the imposition of conditions:

> Criteria for imposing conditions to remedy anti-competitive effects are uncodified but were set out in our UP/WP/SP decision, 366 ICC at 562-565. There, we stated that we will not impose conditions on a railroad consolidation unless we find that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an effective market), that the conditions to be imposed be operationally feasible, and that the conditions will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger.

Slip Op. At 56-57. In deciding whether imposition of the conditions sought by MWBC are an appropriate response to the anti-competitive effects on Montana grain producers, the key questions to be resolved are whether the anti-competitive effects will produce effects harmful to the public interest and the proposed response will ameliorate or eliminate the harmful effects. As the ensuing discussion will demonstrate, the answers to these questions are plainly in the affirmative.

6. EFFECT OF MERGER ON COMPETITIVE POSITION OF MONTANA GRAIN PRODUCERS

MWBC, in its responsive application proved that the effect of the pre-merger agreement will be to allow UP-SP access to Montana barley and wheat competitors in Washington and northern Idaho via a proportional rate agreement, who prior to this merger, UP-SP could not access. This new competition for barley and wheat movements from Montana into the southwest is provided through the proportional rate agreement whereby the UP can solicit and move traffic from Washington and northern Idaho to the west and southwest U.S. However, Montana producers, must move up to 800 miles further, over the distant gateway of Portland, OR rather than through a much closer gateway, Silver Bow, MT. The effect of this merger then is to artificially diminish the competitive position of Montana producers by forcing them to market grain on the UP-SP over Portland, OR. The UP-SP, in its rebuttal, is wrong when it states that the effect of the proportional rate scheme is to increase opportunities for Montana producers by offering single line service over Portland, OR[9]. Railroad economics will dictate that the rates for this single line service will be much higher from Montana origins than from the much shorter Washington and northern Idaho origins. MWBC also expects that the introduction of single line proportional rates from the UP will induce Canadian barley and wheat shipments to enter into the U.S. over the Montana-Canada border, thereby further deteriorating the Montana competitive position. MWBC is well-versed in the movement of Canadian grain into Montana and knows well the effect of the proposed pre-merger agreement.

Montana producers will see, as a result of this merger, increased competition from new UP-SP origins granted, to UP-SP by the BN/SF, on both wheat and barley in Washington and northern Idaho. That fact, remains undisputed by the applicant in its rebuttal.

Montana producers do not seek expanding the proportional rate scheme because of competitive benefits that others will receive, as the Applicant states in its rebuttal[10], but rather because Montana producers will be required to compete from the end-of-the-line when a shorter and more efficient route over Silver Bow, MT is available with slight modification of the pre-merger agreement.

---

[9] Applicants Rebuttal, Volume 1 - Narrative, Page 277
[10] Applicants Rebuttal, Volume 1 - Narrative, Page 276

It is not improper for Montana producers to seek an alternative route over Silver Bow, MT which will cut the direct mileage from Great Falls to Los Angeles by 604.8 miles or 45%.

It is not improper for Montana shippers to seek conditions of protection against new competitive forces that arise out of this merger that further deteriorate the competitive position of Montana grain shippers into markets they have traditionally marketed in for many years. It is the applicants and their hand-picked chosen competitor, the BN/SF, that cut this scheme, without consultation with Montana grain interests, which results in diminishing the competitive posture of Montana grain producers.

It is not improper for Montana grain producers to offer common-sense alternatives that mitigate these artificially introduced anti-competitive effects. Montana grain producers should not be required to shoulder this new competition because of artificial and circuitous rate construction by the applicant. This Board should be mindful that the reason the proportional rate scheme was put in place and granted by the BN was as payback for the many concessions the UP-SP gave up in their system, including extensive trackage rights, line sales in California, etc. This payback via a proportional rate scheme leaves Montana grain producers to bear the burden of this payback while disadvantaging Montana in the traditional markets it has served.

SILVER BOW, MT MOVEMENTS WILL SUFFER DUE TO THE PRE-MERGER AGREEMENT

If the UP-SP merger is consummated, and the proportional rate agreement is consummated as a result of the merger, use of the Silver Bow route will suffer. The route provides, albeit, extremely limited, the only other class I railroad access into the State of Montana, besides the market dominant BN.

If this merger is consummated, the need for the UP to continue to utilize Silver Bow shipments for barley and wheat shipments to California will diminish. When the UP-SP receives, due to the pre-merger proportional rate agreement, access, for the first time, of Washington and northern Idaho barley and wheat reserves, their needs for barley and wheat supplies, from the more distant Montana, will be diminished. This merger will definitely serve to diminish traffic over Silver Bow, where UP does not have direct rail access to the barley and wheat elevators in the western and central Montana regions. The UP knows this very well, yet states in their Rebuttal, that this assertion is a foreclosure assertion[11]. Common sense about railroad marketing would tell this Board that if the UP picks up access, to Washington and northern Idaho barley production with single line service, that they do not possess today, then the more distant Montana barley shippers, whom the UP does not have direct access to via Silver Bow, MT gateway, will be adversely affected. Further, Montana shippers will not participate, after this merger, in traditional markets in the southwest U.S. that these Montana producers have been participating in for many years, via truck/rail shipping over Silver Bow, MT. The argument suggested in the UP Rebuttal that this argument is a 'foreclosure' argument is clearly improper, and untruthful. The applicant knows that their proposed proportional rate agreement will have an adverse effect on shipments currently moving over the Silver Bow, MT gateway and, any adverse effects, could have serious implications on the longevity of this line from southern Idaho to Montana. One of the long-term effects of this merger will be to ultimately cause abandonment of portions of the Pocatello-Silver Bow line into Montana, thereby further exacerbating the captive status of Montana grain shippers. This Board must condition this merger against loss of the only other class I railroad into Montana. The applicant is unwilling to guarantee long-term utilization of the Silver Bow line. Why? Because, the applicant, knows full-well, that one of the potential effects of this merger, due to the pre-merger agreement, will be, the reduction of traffic over the Silver Bow, MT line. The UP, in conversations, with the MWBC, have indicated that they will not guarantee the use of the Silver Bow line in the future. Not even one day past the effective date of the merger!

[11] Applicants Rebuttal, Volume 1 - Narrative, Page 276

APPLICANT HAD NO CONCERN WITH CONDITION 5 OF THE MWBC

Apparently the Applicant has no concern with the Condition 5 of the requested relief. In Condition 5, the MWBC seeks from this Board, the modification of the Pre-Merger agreement to allow the applicant to solicit and price competitively, agricultural commodities to Portland, OR, as well as points south of Portland. This condition would serve to allow competition from Montana origins on grain to its principal destination, namely, Portland, OR. Since the movements, outlined in the Pre-Merger Agreement are moving over the Portland gateway, this condition would not change any operating characteristics of the proposed merger and would allow Montana access into Portland with single line UP service.

UP offered no rebuttal evidence of the Portland, OR requested condition. Applicant has no objection to this Board conditioning the pre-merger agreement to allow access into Portland as well as points beyond Portland. Such a modification would greatly ameliorate the anti-competitive effects of the pre-merger agreement on Montana grain shippers.

6. REGIONAL GEOGRAPHIC COMPETITIVE ISSUES ARE PROPER

This Board is faced with creating the largest railroad in U.S. history with tremendous anti-competitive effects.

Today, in Montana, we have one major railroad, the Burlington Northern Railroad, operating as a monopoly in the transportation of bulk commodities from the farm to market, a situation the Commission has deemed a 'market dominant' transportation condition in the *McCarty Farms Case*, Docket Nos. 37809, 37809 (Sub-No.1).

MWBC Condition 5, Modification of the Pre-Merger Agreement, and the trackage rights contained therein, to allow UP access to solicit and move traffic, under the Pre-Merger proportional agreement, to Portland as well as points south of Portland, OR would provide real and effective competition and diminish the anti-competitive effects of introducing new competition for Montana wheat and barley producers to their traditional markets.

As was demonstrated by MWBC, approval of this merger, as proposed, will result in the segregation of areas and commodities in Montana from access to competitive rail under this Pre-Merger agreement. Consequently, any conditions that merely allow only part of Montana's commodities access to the proportional rate structures will not preserve competition and will create competitive damage to Montana farm producers. It will have the effect of further stratifying and isolating Montana shippers from traditional markets while positioning their competitors, in Washington, Northern Idaho and Oregon, with unfettered access to compete.

Under Section 11343 of the IC Act, a consolidation or merger of two carriers may be carried out only with the approval and authorization of the Board. 49 U.S.C. § 11343 (a). The agency must carefully and broadly consider the potential adverse effects on competition among rail carriers in an affected region. Where a proposed merger results in harmful competitive effects, the Board must impose conditions on the merger to eliminate those effects, as long as the conditions are operationally feasible and will produce benefits which are of greater benefit to the public than they are detrimental to the transaction.

The history of rail mergers that have been approved, show that the anti-competitive effects of mergers have not been adequately addressed and have caused long-lasting hardships on many classes of transportation users. Currently the Board is relying on criteria for imposing conditions to remedy anti-competitive effects as set out in *Union Pacific –Control—Missouri Pacific; Western Pacific*, 366 I.C.C. 462, 562-65 (1982).

The Commission, in that same decision, recognized that "the rail transportation policy emphasizes the importance of the relationship between ensuring adequacy of transportation and the retention of competition." *Union Pacific–Control—Missouri Pacific; Western Pacific*, 366 I.C.C. 462, 484 (1982).

The Board's power to attach conditions to its approval of a major rail merger is, under the statute, unqualified, and the Commission has indicated that it considers its authority as broad.' *UP/MP*, 366 I.C.C. 462, 562.

The Pre-Merger Agreement Will Alter Traditional Cross-Country Relationships in Montana Between Grain Elevators

This merger and its provision in the Pre-Merger agreement would alter the present competitive situations in areas like Montana, such that cross-country differential relationships will be altered. Within the state of Montana, all of the wheat traditionally is marketed to the west or south. Grain from North Dakota, to the east of Montana, moves predominantly east to the Minneapolis and Great Lakes markets. Grain from Montana moves west to the Pacific Northwest Markets. Because traditional marketing areas east of a Billings-Havre, MT line will not be included in the Pre-Merger proportional rate agreement, the potential exists for significant anti-competitive effects on the farm producers of Eastern Montana. This Pre-Merger agreement selectively cuts Montana in half.

Approximately 45% of Montana's grain is grown in the area east of the Billings-Havre line or about 86,492,140 bushels, the contiguous Montana area which is excluded from the Pre-Merger Agreement.

THE ARM'S LENGTH NEGOTIATIONS BETWEEN APPLICANT AND BN DID NOT INVOLVE SHIPPER INPUT

The selection by UP-SP of the BNSF to provide 'competition' and 'competitive balance' to overcome the massive anti-competitive aspects of this proposed rail merger creates great concern here in Montana. After the UP merged with the Chicago and Northwestern last year, the decline in service levels on the newly merged railroad has become legend in their own time. MWBC is advised the UP-SP did not consult with shippers in Montana, Montana State Government, or according to news reports, other shippers or railroads either, prior to selecting the BNSF as its competitor through the use of trackage rights.

Selection of alternative competitive carriers, by affected shippers, would most certainly result in selection of carriers to best meet the needs of affected shippers, and service levels equal to greater than that proposed by UP-SP in this merger proposal.

The selection, by the merging railroads (UP-SP), of its future competitor (BNSF) on its merged system, by granting of trackage rights to a single railroad (BNSF), thereby closing out any other viable options, by affected shippers, does not, on-the-surface, serve the public interest.

The second consequence of the UP-SP action in selecting BNSF, is to make it difficult on shippers to suggest and support alternative proposals to overcome the anti-competitive effects of this merger. Never, in the history of the Commission, has a major parallel railroad merger not been conditioned by establishment of one or more major intramodal competitors to provide competitive balance to the anti-competitive aspects of a parallel merger.

The Merger of the UP and SP Will Eliminate Competitive Rail Transportation Alternatives From About ½ of Montana's Origins

For those Montana shippers located east of the Billings-Havre arbitrary line, they will not have access to proportional rate structure proffered in the Pre-Merger agreement.

The effect of the Pre-Merger proportional rate agreement disadvantages Montana producers when compared with producers located in Western Canada, Washington, Northern Idaho and Oregon. By artificially establishing Portland, OR as the only gateway, the proposed proportional movement will require Montanans to haul 40+% further mileage than is necessary. Montana producers will be effectively embargoed from participating in the markets they traditionally participate and compete in today.

This Board should strongly consider development of an alternative gateway at Silver Bow, MT to shorten the distances to California and Arizona markets for Montana farm producers and, thus, [illegible]ring the comparable distances from Washington and Northern

Idaho in line compared with this out-of-route hauling procedure suggested by Applicants in their Pre-Merger Agreement.

This Board should also grant a modification, of the Pre-Merger agreement, to allow Montana producers to utilize the Portland, OR gateway proportional rate solicitations by Applicant for wheat destined to Portland, OR itself, through the issuance of trackage rights from Montana origins to Portland, OR on the UP-SP. This proposed grant was not opposed by the Applicant in their rebuttal statement.

This would potentially offset the anti-competitive effects of the Pre-Merger agreement requiring use of the longer Portland, OR gateway by allowing Montana farm producers to have access to local markets with potentially competitive rail. The UP-SP should be allowed to competitively price to Portland, over this gateway. Over 94% of Montana's wheat movement moves to the west, therefore a grant of utilization of the Portland, OR gateway for Portland, OR destined traffic as well as traffic beyond, would go a long way to solving the potential anti-competitive effects of this Pre-Merger Agreement and indeed the merger itself.

In its past decisions on merger and control applications, the Commission has stated that a party seeking protected conditions on a proposed merger must show:

1. that the requested conditions are operationally feasible
2. that the requested conditions ameliorate or eliminate the harm threatened by the transaction, and
3. that they *(the protective conditions)* are of greater benefits to the public than they are detrimental to the transaction. (emphasis added) *UP/MP*, 366 I.C.C. 462, 564.

The conditions sought by MWBC, are operationally feasible, ameliorate harm threatened by the transaction and are of greater benefit to the public than they are detrimental to the transaction. In fact, the Applicant, in its rebuttal, did not show that the proposed conditions were detrimental to the transaction in any way.

MWBC SUPPORTS THE REQUESTED CONDITION FILED BY MONTANA RAIL LINK

In the alternative, MWBC requests the Commission require that requested conditions and responsive/inconsistent application filed by Montana Rail Link (MRL) be approved and that portions of the Pre-Merger agreement applying proportional rate agreements to UP-SP in Montana including the proposed protective conditions outlined herein (including the Silver Bow, MT gateway), be similarly applied to MRL in Montana. This action would provide for long-term service over the line as MRL would not have alternative routes for southern bound shipments.

<u>MWBC Requests that the Board Condition its Approval of the Merger of the UP and SP on the Establishment of Continued Oversight for the Next 20 Years On the Silver Bow, MT line</u>

As stated in the MWBC's Request for Conditions, "The Commission in the *Northern Lines Merger*, 331 I. C. C. 228 was concerned enough with anti-competitive effects of this parallel merger that it held it should "retain jurisdiction over these proceedings for a like period of 5 years ..." 331 I.C.C. 288. The reality was that 5 years was insufficient! The Milwaukee Road failed in 1978, eight years after the merger and three years after the Commission gave up jurisdiction over the Northern Lines Merger of 1970. The Commission granted protections to Milwaukee Road to protect it from the anti-competitive effects of the merger and to provide competitive balance for this basic parallel railroad merger."

The UP is unwilling to commit to service over the line for more than one day past the effective date of the merger. Therefore, one has to be concerned that the merger will, because it will provide alternative north-south corridor lines for the UP-SP, result in the Applicant abandoning the Silver Bow line.

If this Board granted, the alternative sale of the line between Pocatello, ID and Silver Bow, MT to Montana Rail Link (MRL) together with the granting of a proportional rate agreement similar to the agreement between UP-SP and BNSF for all traffic moving over Silver Bow, MT from all Montana origins, it would provide a competitive alternative to future abandonment. The Board's policy has been to encourage the development of short lines, recognizing that they avoid line abandonments and improve service to shippers. Rail Consolidation Procedures – Continuance in Control of a Nonconnecting Carrier, 2 ICC 2d 677, 679 (1986).

7. THE CONDITIONS SOUGHT ARE OPERATIONALLY FEASIBLE AND DESIRABLE

The conditions sought by MWBC are clearly operationally feasible and could be implemented by requiring relatively little or no change to operations contemplated by UP-SP and the BNSF. The station of Silver Bow is presently served by the Union Pacific on a regularly scheduled basis. Consequently, little or no operational changes should be required to effectuate the requested conditions.

As discussed previously, the proposed Responsive Application by Montana Rail Link could provide an alternative means, by which the competitive harm to MWBC and the Montana transportation users, caused by this merger, as proposed, could be alleviated or minimized, albeit only partially.

The Proposed Conditions Will Produce Substantial Public Benefits Outweighing Their Effect on the Merger

Clearly, the proposed conditions will produce substantial public benefits outweighing any detrimental effect on the merging carriers. The rail transportation policy of the Board indicates that competition, not regulation, should be the touchstone of the Board's regulatory approach. e.g. 49 U.S.C. § 10101a(1). Montana shippers of grain have already been judged by the Commission as being captive and in a 'market dominant' position, in which direct rate regulation is the only alternative, *McCarty Farms Case*, Docket Nos. 37809, 37809 (Sub-No. 1). Here, with the UP being the last vestige of intra-modal competition in Montana, imposition of the requested condition will permit, limited but viable competition, to offset the gains made by other shippers in the Pacific Northwest under this Application.

8. CONCLUSION

For the reason set forth herein, as well as in the MWBC Request for Conditions, the Board is requested to find that the conditions, as forth below, satisfy the criteria set forth in 49 C.F.R § 1180.1 (d) (1), that they are in the public interest and otherwise in accordance with law.

9. RELIEF CONDITIONS

MWBC herein requests:

1. The establishment of a UP Interchange to interchange all traffic designated in the Pre-Merger agreement, as amended therein including the right by UP, to solicit movement and price competitively, at the Silver Bow, MT gateway, a shipping point located on the UP railroad. This UP interchange will be in addition to the proposed gateway in Portland, OR which is outlined in the Pre-Merger Agreement filed with the Application. This request for condition will not require additional connections, crossings or related rail facilities to facilitate the exercise and use of this interchange.

2. In the alternative MWBC seeks the sale of the line between Pocatello, ID and Silver Bow, MT to Montana Rail Link (MRL) together with the granting of a proportional rate agreement similar to the agreement between UP-SP and BNSF for all traffic moving over Silver Bow, MT from all Montana origins to Portland, OR and points south of Portland, OR.

3. Modification of the Pre-Merger Agreement, and the trackage rights contained therein, to allow UP access to solicit, competitively price and move traffic, under the pre-merger proportional agreement, made up of all commodities whose shipments originate in Montana, not just a limited number of commodities.

4. Modification of the Pre-Merger Agreement, and the trackage rights contained therein, to allow UP access to solicit, competitively price and move traffic, under the pre-merger proportional agreement, from all points in Montana, not just the western half of the state.
5. MWBC further seeks, from this Board, the modification of the Pre-Merger agreement to allow the Applicant to solicit and price competitively agricultural commodities to Portland, OR as well as points south of Portland.
6. For all conditions, herein requested, the merged carrier must guarantee service intentions on the line from Pocatello, ID to Silver Bow, MT for a period of 20 years.

Dated: May 31, 1996

Respectfully submitted,

Terry C. Whiteside
Registered Practitioner
Radermacher, Whiteside & Associates
3203 Third Avenue North, Suite 301
Billings, MT 59101
Phone: (406) 245-5132
for Montana Wheat and Barley Committee

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing REQUEST FOR CONDITIONS AND COMMENTS has been served upon all parties of record, as amended, by U.S. mail, postage prepaid, this 31th day of May, 1996.

Susie Sprague

Susie Sprague

STB FD 32760 6-3-96 83909

Item No. 83909

Page Count 6

JUNE, 1996 #8

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION,
UNION 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 EXXON CHEMICAL COMPANY,
A DIVISION OF EXXON CORPORATION

Exxon Chemical Company submits this brief in support of the merger proposed by Union Pacific and Southern Pacific.

1. Exxon Chemical Company is a division of Exxon Corporation with operations in 80 countries including the U.S. We are a major manufacturer and marketer of primary petrochemicals, polymer derivatives and, chemical intermediates. We have seventeen manufacturing facilities in the U.S. which produce a wide range of primary petrochemical products such as paraxylene, benzene, normal paraffins, olefins and olefins - based polymers. Olefin - based polymers include products such as polyethylene, polypropylene and synthetic rubber, adhesive intermediates, and hydrocarbon resins. We also produce a wide range of plasticizer and vinyl intermediates, oxygenated and hydrocarbon solvents, additives for lubricating and fuel oils, and oil and gas production processing chemicals. Exxon Company, U.S.A. (a division of Exxon Corporation) is a major producer, refiner and

ORIGINAL

marketer of petroleum products. (Exxon Chemical Company and Exxon Company, U.S.A. will be collectively referred to herein as "Exxon").

2. Exxon is vitally interested in issues affecting chemicals and petroleum products and their transportation, as evidenced by active memebership in Chemical Manufacturers Association ("CMA"), The Society of the Plastics Industry ("SPI") and The National Industrial Transportation League ("NITL"). Exxon products are shipped by rail, intermodal, package truck and hopper truck throughout North America. We also use marine transporation for shipments throughout the world. Exxon has 7 plants in Texas, Louisiana and California that are served today by either the Union Pacific Railroad ("UP") or the Southern Pacific Railroad ("SP"). Exxon is a major plastics, chemical and petroleum products rail shipper with over 80% of Exxon's 54,000 railcars per year handled by one of these two railroads. The UP and SP handle nearly 100% of Exxon's plastics traffic in Texas. Further, Exxon has a contract with the UP to build a new rail line into our Mont Belvieu, Texas Plastics Plant to compete with the SP. The intention was that once that line was constructed, all of the Exxon facilities in Texas would have competition between the UP and SP. Clearly, this merger will have a dramatic impact on the competitive environment for Exxon's rail traffic.

3. After extensive study, review and discussion with the involved railroads, Exxon fully supports the UP's application to the Surface Transportation Board (STB) to purchase the SP and supports the UP/SP merger as conditioned by the Burlington Northern Santa Fe ("BNSF") agreement and the recent CMA Settlement Agreement. Other railroads have come forward with various proposals to either buy pieces or operate on trackage rights over the SP lines. This could result in the UP's offer being thwarted. If the merger does not occur, we have concerns that the SP may not be a viable independent railroad longer

term, and that their lines would be sold in pieces. Indeed, UP has indicated that the merger benefits would be gutted if significant additional conditions are imposed over and above UP/SP's grant of 3,800 miles of trackage rights to BNSF. If these proposals result in dismantling the BNSF agreement, or cause the merger to fail, Exxon believes that it and other shippers will suffer significant decreases in levels of competitive rail service. If the additional conditions requested by other railroads are imposed, we believe the UP or BNSF withdrawing from the arrangements is a real possibility. The UP has stated several times that they will not go forward with this merger if there are significant additional conditions imposed on it. Also, the BNSF has stated that they would not participate in the trackage rights agreement if other railroads are given access to the lines. Exxon has no reason to doubt these statements by the UP and BNSF.

4. Exxon believes this merger and the BNSF agreement and CMA Settlement Agreement will benefit shippers. Exxon does not want to see this merger abandoned. The UP is the only railroad to have made a credible public offer to buy the entire SP. We are concerned that without this merger, the SP will be sold piecemeal resulting in a less efficient operation and a reduced level of service than that offered by the currently proposed UP/SP merger. Service levels of a parceled out SP could be even worse than current SP service levels. Exxon, other shippers and customers of those shippers will suffer through higher costs, increased transit times and dubious supply and transportation reliability. The UP and the BNSF have the resources to maintain and operate the SP routes in a safe and efficient manner while maintaining a high degree of competition. We believe this will result in significantly improved levels of service and operation, such as reduced transit times, safer rail cars and tracks, and increased levels of maintenance on cars and tracks.

5. Based on extensive discussions with UP and BNSF, Exxon is satisfied that the BNSF trackage rights agreement will provide a competitive environment for our rail traffic. We do not find it necessary for the UP to grant additional trackage rights or to divest itself of parallel lines created by the merger with the SP for this competition to occur. We believe we will receive satisfactory commercial terms from each railroad not only immediately after the merger, but into the future. We further believe the BNSF trackage rights agreement and the UP operation of the SP routes will improve rail service at many of our facilities and enhance competition for our traffic at our Baytown, Texas, and Benicia, California, sites.

6. Exxon believes the merger, BNSF agreement and CMA agreement further the goals of the Rail Transportation Policy of the United States. Exxon does not believe this merger increases actual concentration in Class I railroads versus what we believe would occur in its absence. After many discussions with SP and assessments by our advisors, we believe the SP may not survive as an independent railroad if this merger were not to occur. Its financial strength and level of service have been on the decline and we are concerned that this trend will continue. Without this merger, existing SP lines will likely be sold piecemeal, resulting in further declines of service levels due to such factors as the increased number of railroads involved in each movement and the real possibility that pieces of SP lines will not generate enough revenue to maintain the track and equipment. The public is not benefited by such occurrences.

The UP/SP merger will create a railroad well positioned to compete vigorously with the new BNSF system. Piecemeal sales of the SP line would not allow other railroads, and perhaps not even the UP, to compete as effectively with the BNSF. We are satisfied that the trackage agreement will permit BNSF to compete for our business on an equal footing with UP. In fact we demanded satisfactory evidence of that before deciding to support this merger. We also are confident that BNSF is eager to compete vigorously for our business. We feel the recent UP settlement agreement with CMA has further strengthened the ability of BNSF to compete for our business and that of other shippers.

7. We urge the STB to approve the UP/SP merger as conditioned by the BNSF Settlement Agreement and the CMA Settlement Agreement and to resist any additional conditions that would result in UP abandoning the merger, or BNSF voiding its agreements.

Respectfully submitted,

B. Kenneth Townsend/pp 5/.

B. Kenneth Townsend, Jr.
Exxon Chemical Company,
a division of Exxon Corporation
13501 Katy Freeway
Houston, Texas 77079-1398
713/870-6032

Dated: May 31, 1996

WW/LAWPAS033

CERTIFICATE OF SERVICE

I certify that on this 3rd day of June, 1996, copies of the Brief of Exxon Chemical Company, a division of Exxon Corporation, were served on all parties of record by first-class mail, postage prepaid.

Jennifer J. Arexco

STB FD 32760 6-3-96 E 83903

83903 Item No. ____________

Page Count 15

JNE, 1996 #7

LAW OFFICES
McFARLAND & HERMAN
20 NORTH WACKER DRIVE-SUITE 1330
CHICAGO, ILLINOIS 60606-2902
TELEPHONE (312) 236-0204
FAX (312) 201-9695

THOMAS F. MCFARLAND, JR — STEPHEN C. HERMAN

May 31, 1996

<u>By UPS Overnight (Monday delivery)</u>

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

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

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

and

Finance Docket No. 32760 (Sub-No. 16), *Responsive Application -- Wisconsin Electric Power Company*

Dear Mr. Williams:

Enclosed please find an original and 20 copies of Brief In Support Of Responsive Application (Sub-No.16), for filing with the Board in the above referenced matter.

Also enclosed is a disk containing WEPC-4 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 Wisconsin Electric Power Company

TMcF:kl:521

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

ENTERED
Office of the Secretary
JUN - 7 1996
5 Part of Public Record

ORIGINAL

WEPC-4

BEFORE THE
SURFACE TRANSPORTATION BOARD
UNITED STATES DEPARTMENT OF TRANSPORTATION

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

UNION PACIFIC CORPORATION, ET AL. -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, ET AL.	)	FINANCE DOCKET NO. 32760
RESPONSIVE APPLICATION -- WISCONSIN ELECTRIC POWER COMPANY	)	FINANCE DOCKET NO. 32760 (SUB-NO. 16)

BRIEF IN SUPPORT OF RESPONSIVE APPLICATION (SUB-NO.16)

ENTERED
Office of the Secretary
JUN - 3 1996
5 Part of Public Record

WISCONSIN ELECTRIC POWER COMPANY
231 West Michigan Street
P.O. Box 2046
Milwaukee, WI 53201-2046

Responsive Applicant

THOMAS F. McFARLAND, JR.
McFARLAND & HERMAN
20 North Wacker Drive
Suite 1330
Chicago, IL 60606-2902
(312) 236-0204

Attorney for Responsive Applicant

Date Filed: June 3, 1996

WEPC-4

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 DOCKET NO. 32760
RESPONSIVE APPLICATION -- WISCONSIN ELECTRIC POWER COMPANY	)	FINANCE DOCKET NO. 32760 (SUB-NO. 16)

BRIEF IN SUPPORT OF RESPONSIVE APPLICATION (SUB-NO. 16)

Pursuant to Decision Nos. 6, 9 and 29, WISCONSIN ELECTRIC POWER COMPANY ("WEPCO" or "Responsive Applicant") hereby files this brief in support of its Responsive Application in Finance Docket No. 32760 (Sub-No. 16), filed March 29, 1996.

SUMMARY

The rights of hundreds of thousands of customers to whom WEPCO provides electricity are directly affected by the UP-SP merger and by WEPCO's Responsive Application. WEPCO is a regulated utility whose costs of electrical generation, transmission and distribution are borne by its customers. An important element of such costs is the delivered cost of coal burned at WEPCO's generating plants. In order to protect the interests of its customers, WEPCO carefully monitors that delivered cost. A major factor affecting that delivered cost is competition between rail carriers for transportation of coal.

WEPCO has taken the extraordinary step of filing a Responsive Application because without the relief sought in that Application, the UP-SP merger would have an extraordinarily adverse effect on competition for rail transportation of coal to WEPCO's Oak Creek Power Plant. The merger would eliminate significant and growing source competition between SP-served coal mines in the Uinta Basin of Colorado and Utah and UP-served mines in the Powder River Basin of Wyoming. Those mines represent 75 percent or more of the coal likely to be consumed by the Oak Creek Power Plant in the near future. As the dominant rail carrier by far at origin and as the sole rail carrier serving the Oak Creek Power Plant at destination, the merged UP-SP would be able to exert its market power over rail rates to determine from which western origin WEPCO's Oak Creek Plant would be able to receive coal at any time. That anticompetitive practice would cause WEPCO to pay substantially higher freight charges for receipt of coal than it would pay in a competitive market. WEPCO's electric customers served by the Oak Creek Power Plant would be burdened with significantly increased costs as a result of those higher transportation charges.

The relief sought in WEPCO's Responsive Application is designed to lessen that anticompetitive effect, but without unfairly penalizing the merged UP-SP or bettering WEPCO's pre-merger position. As an offset to the reduction from two carriers to one at western coal origins, there would be an increase from one carrier to two at destination by providing for trackage rights over the merged UP-SP from Chicago, Milwaukee, and/or Cleveland, WI to Oak Creek Power Plant, and from that Plant to Cudahy freight car repair shop. But those trackage rights would be provided to a local carrier, Canadian Pacific-Soo Line or Wisconsin Central, which itself does not serve any origin coal mines, so that the merged UP-SP would continue to be the only rail carrier capable of providing single-line rail service on coal from origin mines to Oak Creek Power Plant. The relief in WEPCO's Responsive Application thus meets the basic test of fairness to all concerned, while still alleviating particular anticompetitive effects of the merger.

That kind of thoughtful, measured means of curing competitive defects in rail merger cases is very strongly in the public interest. In the sound exercise of its discretion, the Board should grant the relief sought in WEPCO's Responsive Application.

PROCEDURAL BACKGROUND

On January 29, 1996, in accordance with Board procedural requirements in this matter, WEPCO filed a Description of Anticipated Inconsistent and Responsive Application and Petition for Waiver and Clarification (Doc. No. WEPC-1). The relief to be sought in the anticipated responsive application was described as overhead trackage rights in behalf of a rail carrier unaffiliated with UP-SP over the rail line of UP (a) between Chicago, IL and Oak Creek Power Plant at Oak Creek, WI; (b) between Chicago, IL and Oak Creek Power Plant on the one hand, and Cudahy Shop, Inc., a railcar repair facility in Milwaukee (Cudahy), WI, on the other; and (c) terminal trackage rights in the Milwaukee, WI terminal area (*id.*, at 1-2). It was pointed out that the line over which trackage rights are to be sought is the line of the former Chicago and North Western Transportation Company ("CNW") between Chicago, IL and Milwaukee, WI, plus such other lines in the Chicago, IL or Milwaukee, WI terminal areas as may be necessary to implement the trackage rights (*id.*, at 2). CNW was merged into UP in October, 1995. It was stated that the rail carrier(s) to receive the trackage rights was not known at that time (*ibid*).

The petition in that pleading sought clarification that the responsive application would not be subject to environmental and historic reporting requirements, and sought waiver of the six-month prenotificaiton requirement for applications requiring an environmental impact statement and all requirements in 49 C.F.R. § 1180 for inclusion of information from "applicant carriers" in a responsive application (Doc. No. WEPC-1, at 2-3).

In Decision No. 12 served February 15, 1996, the Board granted WEPCO's petition for waiver of filing requirements.[1]

On March 29, 1996, WEPCO filed its Responsive Application (Doc. No. WEPC-2). The relief sought in that Application was made more particular, as follows (*id.*, at 2):

> Overhead trackage rights in behalf of Wisconsin Central (WC) or Canadian Pacific - Soo Line (CP-Soo) over the following rail lines of UP:
>
> (1) between Chicago, IL, Milwaukee, WI and Cleveland, WI on the one hand, and on the other, WEPCO's Oak Creek Power Plant at Oak Creek, WI:
>
> (2) between that Plant at Oak Creek, WI and Cudahy Shop, Inc., a railcar repair facility located at Cudahy, WI; and
>
> (3) in the terminal areas of Chicago, IL and Milwaukee, WI as may be necessary or desirable to implement the operations described in (1) and (2).

The Responsive Application explained that WEPCO filed the application in behalf of WC or CP-Soo because no carrier had committed to applying for the sought trackage rights at the point in the merger proceeding when parties were required to describe any anticipated responsive applications. The intent of the requested trackage rights was stated to be that WC or CP-Soo in addition to UP-SP would provide rail service to WEPCO's Oak Creek Power Plant and to Cudahy Repair Shop. It was stated that WEPCO did not yet know whether WC or CP-Soo would serve Oak Creek from Chicago, Milwaukee, or (in the case of WC) Cleveland, or from some combination of those points, so that WEPCO sought trackage rights authority from all of such

---

[1] In Decision No. 12, the Board stated that in its responsive application, WEPCO should file a preliminary draft environmental assessment or verified statement certifying that the trackage rights proposal in the application meets the criteria for exemption from environmental and historic reporting requirements. WEPCO filed such a verified statement in its Responsive Application of March 29, 1996 (Doc. No. WEPC-2, Appdx. 1).

points. It was stated that the destination trackage rights were sought in order to replace competition that the UP-SP merger would eliminate between SP-DRGW from coal mines in the Uinta Basin in Colorado-Utah and UP from mines in the Powder River Basin in Wyoming. It was stated that a trackage rights carrier that does not serve origin coal mines was requested so that UP-SP would continue to be the only rail carrier that could transport coal to Oak Creek in single-line rail service. It was emphasized that in that manner, WEPCO would be made whole in regard to replacement of lost competition, but UP-SP would not be placed in a worse position as a result of the relief granted to WEPCO (Doc. No. WEPC-2, at 2-3).

WEPCO's Responsive Application contained supporting evidence filed by Robert M. Quinlan of John T. Boyd Company, WEPCO's coal consultant (Doc. No. WEPC-2, Appdx. 2), and by Gerald A. Abood, WEPCO's Director-Resource Supply and Services, Fossil Operations (*id.*, Appdx. 3), as well as much of the information called for in 49 C.F.R. § 1180, even though compliance with those regulations had been waived.

In Decision No. 29 served April 12, 1996, the Board accepted WEPCO's Responsive Application for filing, assigning it Sub-No. 16.

On April 29, 1996, UP-SP filed evidence in opposition to the relief sought in WEPCO's Responsive Application.

On May 14, 1996, WEPCO filed Rebuttal in Support of its Responsive Application (Doc. No. WEPC-3), consisting of reply verified statements in behalf of Messrs. Quinlan (Appdx. 1) and Abood (Appdx. 2).

UP-SP took the depositions of Messrs. Quinlan and Abood in regard to their reply verified statements on May 28, 1996, in Washington, DC.

This filing is WEPCO's brief in support of the relief sought in its Responsive Application, under due date of June 3, 1996.

FACTS

WEPCO's Oak Creek Power Plant is rail-served solely by UP. Waterborne deliveries are not a competitive alternative to rail at that location. In view of population density and development in the area, there is no reasonable opportunity for a rail line build-out from Oak Creek to another rail carrier. In light of the foregoing, UP has a destination monopoly in transporting coal for delivery at Oak Creek Power Plant (Doc. No. WEPC-2, Appdx. 3, at 2).

SP originates bituminous coal from the Uinta Basin in Colorado and Utah. UP originates sub-bituminous coal from the Powder River Basin in Wyoming. According to a public statement made by SP prior to its agreement to merge with UP, SP's coal traffic is subject to intense competition from Wyoming Powder River Basin coal. (SP 10-K Report to SEC for 1993, at 9). An ally of Applicants, Utah Railway, has acknowledged that Uinta Basin coal is competitive with Powder River Basin coal (Doc. No. UTAH-5, VS Vann, at 6: " . . . (O)ver a range of likely prices, Utah coal coming off UTAH (Railway) can compete with PRB coal.") Numerous electric generating stations burn both Uinta Basin coal and Powder River Basin coal (Doc. No. WEPC-2, Appdx. 2, at 8, and Appdx. RMQ-8; Doc. No. WEPC-3, Appdx. 1, at 9-11).

WEPCO's Oak Creek Power Plant has burned both Uinta Basin and Powder River Basin coal in moderate amounts since 1993. In 1996, Oak Creek is likely to receive over one million tons of coal from the Powder River Basin. Oak Creek is likely to receive another one million tons of coal from Pennsylvania in 1996, but that coal is under a short-term contract. Some or all of that coal will be rebid later in 1996. Such tonnage would be open for competition provided by

SP-served mines in the Uinta Basin. Those mines are providing increasingly-strong competition for coal deliveries to Oak Creek. In August, 1989, WEPCO received bids from two SP-served Colorado mines to supply coal to Oak Creek, and one of those mines made WEPCO's short-list of five finalists for the successful bid. In June, 1995, six SP-served mines in Colorado bid to supply coal to Oak Creek, and two made WEPCO's six-mine short-list. This is consistent with dramatically-increasing shipments of Colorado coal to Midwestern and Eastern utilities in recent years as Colorado mines have increased productivity and SP has aggressively lowered rail rates. <u>The competitive posture of WEPCO's Oak Creek Power Plant has been strongly influenced by either the actual receipt of SP-originated Uinta Basin coal or the prominence of that coal in the bidding process</u>. (Doc. No. WEPC-2, Appdx. 3, at 3-4, Appdx. GAA-1, GAA-2; *id.*, Appdx. 2, at 5-12, Appdx. RMQ-3, RMQ-4, RMQ-5, RMQ-6, RMQ-7, RMQ-9).

WEPCO does not have a history of seeking to obstruct rail mergers. WEPCO provided a statement in support of the UP-CNW merger because that merger did not have an adverse effect on competition for rail transportation of coal. In contrast, the UP-SP merger would eliminate significant competition for rail transportation of coal between SP-served mines in the Uinta Basin in Colorado and Utah and UP-served mines in the Powder River Basin in Wyoming. That would essentially allow UP-SP to control the origin of virtually all of the low-sulfur bituminous coal and about half of all sub-bituminous coal west of the Mississippi River, and to control the delivery of all coal to the Oak Creek Power Plant. In terms of coal likely to be received at Oak Creek in the near future, the merged UP-SP would control 75 percent or more of the coal origins and 100 percent of the coal deliveries at destination. (Doc. No. WEPC-2, Appdx. 3, at 2; *id.*, text at 5).

The extent of that control would allow the merged UP-SP to exert excessive market power in the transportation of coal to Oak Creek. The unrestrained pricing power of UP-SP would dictate where WEPCO would have to buy its coal and what WEPCO would have to pay for transportation. WEPCO would be required to pay substantially higher freight charges for such transportation. Ultimately, consumers of WEPCO's electric power would suffer as they would be required to bear increased resulting costs for the generation of electricity. (Doc. No. WEPC-2, Appdx. 3, at 2-3; *id.*, text at 5-6).

The limited destination trackage rights sought in WEPCO's Responsive Application would lessen the adverse effect of loss of origin source competition between UP and SP, but it would do so without unfairly disadvantaging UP-SP and without bettering WEPCO's pre-merger position. The destination trackage rights would be provided to a rail carrier which does not serve any coal mines itself so that after the merger and trackage rights UP-SP still would be the only rail carrier able to transport coal in single-line rail service to Oak Creek. Limited trackage rights of that nature thus would offset the loss of origin competition, but would not unduly harm the competitive position of UP-SP nor improve WEPCO's pre-merger position. (Doc. No. WEPC-2, Appdx. 2, at 15-17; Doc. No. WEPC-3, Appdx. 2, at 2).

LEGAL PRINCIPLES

The UP-SP merger is to be approved and authorized only if the Board finds that it is "consistent with the public interest" 49 U.S.C. § 11344(c). That statute gives the Board power to "impose conditions governing the transaction" (*ibid*). That conditioning power is broad; any condition can be imposed which is reasonably deemed to be "useful in protecting competition" or for other statutory purposes. *United States v. Rock Island Company*, 340 U.S. 419, 431 (1951).

Criteria for imposing conditions to remedy anticompetitive effects are described in *Burlington Northern, Inc. et al. -- Control and Merger -- Santa Fe Pacific Corporation, et al.*, _____ I.C.C.2d _____, Finance Docket No. 32549, Decision No. 38, at 55-56 (ICC served Aug. 23, 1995) ("*BNSF* case"), viz.:

(1) the merger would produce harmful effects to the public interest, such as a significant reduction of competition in an affected market;

(2) the condition would ameliorate or eliminate the harmful effects;

(3) the condition would be operationally feasible;

(4) the condition would produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger.

In addition , it must appear that the condition is designed to remedy a problem caused by the merger, and that the condition would not put its proponent in a better position than it occupied before the merger (*id.*, at 56).

DISCUSSION AND CONCLUSION

The relief sought in WEPCO's Responsive Application fits squarely within those criteria. The limited destination trackage rights sought by WEPCO are specifically designed to offset the loss of origin source competition, without bettering WEPCO's pre-merger position or worsening Applicants'. WEPCO's condition would cure competitive harm in a fair manner. It is precisely the kind of thoughtful, measured means of alleviating competitive harm contemplated by the public interest standard of 49 U.S.C. § 11344(c).

An unconditioned UP-SP merger would harm the public interest by eliminating source competition for transportation of coal to WEPCO's Oak Creek Power Plant between SP from Uinta Basin mines in Colorado and Utah and UP from Powder River Basin mines in Wyoming. Applicants have gone through all kinds of gyrations attempting to establish that such competition does not exist or that it is minimal. But try as they might, Applicants cannot overcome SP's own pre-merger, non-self-serving acknowledgement that their Colorado and Utah coal traffic is intensely competitive with UP's Powder River Basin coal traffic. And the overwhelming evidence is that SP-coal is becoming even more intensely competitive with UP-coal as Colorado and Utah mines have lowered their production costs and SP has lowered its freight charges. Notably, Utah Railway, an ally of Applicants which itself operates in the Uinta Basin, has acknowledged that Uinta Basin coal competes with Powder River Basin coal (VS Vann). There are too many different expert witnesses who independently testified that Uinta Basin coal competes with Powder River Basin coal for that not to be true. Applicants stand alone on the other side of that issue. In light of SP's acknowledgement, Utah Railway's unsolicited statement and the independent, consistent testimony of numerous coal and transportation experts, the Board should find that there is significant and growing competition for transportation of coal between SP from the Uinta Basin and UP from the Powder River Basin, which would be eliminated as a result of the merger.

The relief sought in WEPCO's Responsive Application would ameliorate the harmful effect of lost source competition at origin, but would do so in a manner that would not unduly dilute the public benefits of the merger (second and fourth criteria).[2/] The trackage rights condition sought by WEPCO is carefully crafted to remedy competitive harm, but not to attempt to take undue advantage of the situation. WEPCO seeks trackage rights at destination for a rail carrier that does not itself directly serve any origin coal mine (WC or CP-Soo). Those limited local destination trackage rights are an appropriate offset for the loss of origin source competition between UP and SP. But the voluntary restriction to a trackage rights carrier not serving coal mines would ensure that the merged UP-SP would continue to be the only carrier capable of transporting coal in single-line service to WEPCO's Oak Creek Power Plant. WEPCO's condition thus would not better WEPCO's pre-merger position nor worsen Applicants'. That kind of measured, fair condition is decidedly in the public interest.

Based on the foregoing, the Board should grant the relief sought in WEPCO's Responsive Application.[3/]

[2/] There is no evidence that the trackage rights sought in WEPCO's Responsive Application would not be operationally feasible (third criterion).

[3/] The presumption associated with the "one lump" theory does not apply in this case because unlike the cases in which that presumption has been applied, here there is coal source competition between UP and SP that would be eliminated by the merger (<u>see</u> Doc. No. WSC-11, at 48-51, 17, n. 14). According to that presumption, the merger of a bottleneck destination carrier with one of several origin or bridge carriers will not enhance or extend the bottleneck carrier's market power, and thus will not harm shippers. *BNSF* case, at 72. The presumption is rebuttable by showing that (1) prior to the merger, the benefits of origin competition flowed through to the utility and were not captured by the destination monopoly carrier, and (2) such a competitive flow-through would be significantly curtailed by the merger. *Id.*, at 71. Even if the presumption were applicable in the present case, it would be rebutted by evidence that WEPCO has benefitted from origin competition between UP and SP in the coal bidding process, but would lose the benefit of that competition as a result of the merger. (Doc. No. WEPC-2, Appdx. 3, at 4, and Appdx. GAA-2). In any event, the one-lump theory is fallacious in assuming perfect knowledge by the destination carrier of the total delivered price to destination; UP acknowledges the reality that a destination carrier cannot reap all profit from a joint movement (<u>see</u> Doc. No. WSC-11, at 49-50).

Respectfully submitted,

WISCONSIN ELECTRIC POWER COMPANY
231 West Michigan Street
P.O. Box 2046
Milwaukee, WI 53201-2046

Responsive Applicant

Thomas F. McFarland Jr.

THOMAS F. McFARLAND, JR.
McFARLAND & HERMAN
20 North Wacker Drive
Suite 1330
Chicago, IL 60606-2902
(312) 236-0204

Attorney for Responsive Applicant

Date Filed: June 3, 1996

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 1996, I served the foregoing document, Brief In Support Of Responsive Application (Sub-No. 16), by U.P.S. overnight, June 3, 1996 delivery, on the following:

Arvid E. Roach, II
Covington & Burling
1201 Pennsylavnia Avenue, N.W.
P.O. Box 7566
Washington, DC 20044

Paul A. Cunningham
Harkins Cunningham
1300 Nineteenth St., N.W.
Washington, DC 20036

Erika Z. Jones
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W., Suite 6500
Washington, DC 20006-1882

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.

LAW OFFICES
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE-SUITE 1330
CHICAGO, ILLINOIS 60606-2902
TELEPHONE (312) 236-0204
FAX (312) 201-9695

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

Finance Docket No. 32760 (Sub-No. 16), *Responsive Application -- Wisconsin Electric Power Company*

Dear Mr. Williams:

Enclosed please find an original and 20 copies of Brief In Support Of Responsive Application (Sub-No.16), for filing with the Board in the above referenced matter.

Also enclosed is a disk containing WEPC-4 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 Wisconsin Electric Power Company

TMcF:kl:521

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

WEPC-4

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 DOCKET NO. 32760
RESPONSIVE APPLICATION -- WISCONSIN ELECTRIC POWER COMPANY	)	FINANCE DOCKET NO. 32760 (SUB-NO. 16)

BRIEF IN SUPPORT OF RESPONSIVE APPLICATION (SUB-NO.16)

WISCONSIN ELECTRIC POWER COMPANY
231 West Michigan Street
P.O. Box 2046
Milwaukee, WI 53201-2046

Responsive Applicant

THOMAS F. McFARLAND, JR.
McFARLAND & HERMAN
20 North Wacker Drive
Suite 1330
Chicago, IL 60606-2902
(312) 236-0204

Attorney for Responsive Applicant

Date Filed: June 3, 1996

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 DOCKET NO. 32760
RESPONSIVE APPLICATION -- WISCONSIN ELECTRIC POWER COMPANY	)	FINANCE DOCKET NO. 32760 (SUB-NO. 16)

BRIEF IN SUPPORT OF RESPONSIVE APPLICATION (SUB-NO. 16)

Pursuant to Decision Nos. 6, 9 and 29, WISCONSIN ELECTRIC POWER COMPANY ("WEPCO" or "Responsive Applicant") hereby files this brief in support of its Responsive Application in Finance Docket No. 32760 (Sub-No. 16), filed March 29, 1996.

SUMMARY

The rights of hundreds of thousands of customers to whom WEPCO provides electricity are directly affected by the UP-SP merger and by WEPCO's Responsive Application. WEPCO is a regulated utility whose costs of electrical generation, transmission and distribution are borne by its customers. An important element of such costs is the delivered cost of coal burned at WEPCO's generating plants. In order to protect the interests of its customers, WEPCO carefully monitors that delivered cost. A major factor affecting that delivered cost is competition between rail carriers for transportation of coal.

WEPCO has taken the extraordinary step of filing a Responsive Application because without the relief sought in that Application, the UP-SP merger would have an extraordinarily adverse effect on competition for rail transportation of coal to WEPCO's Oak Creek Power Plant. The merger would eliminate significant and growing source competition between SP-served coal mines in the Uinta Basin of Colorado and Utah and UP-served mines in the Powder River Basin of Wyoming. Those mines represent 75 percent or more of the coal likely to be consumed by the Oak Creek Power Plant in the near future. As the dominant rail carrier by far at origin and as the sole rail carrier serving the Oak Creek Power Plant at destination, the merged UP-SP would be able to exert its market power over rail rates to determine from which western origin WEPCO's Oak Creek Plant would be able to receive coal at any time. That anticompetitive practice would cause WEPCO to pay substantially higher freight charges for receipt of coal than it would pay in a competitive market. WEPCO's electric customers served by the Oak Creek Power Plant would be burdened with significantly increased costs as a result of those higher transportation charges.

The relief sought in WEPCO's Responsive Application is designed to lessen that anticompetitive effect, but without unfairly penalizing the merged UP-SP or bettering WEPCO's pre-merger position. As an offset to the reduction from two carriers to one at western coal origins, there would be an increase from one carrier to two at destination by providing for trackage rights over the merged UP-SP from Chicago, Milwaukee, and/or Cleveland, WI to Oak Creek Power Plant, and from that Plant to Cudahy freight car repair shop. But those trackage rights would be provided to a local carrier, Canadian Pacific-Soo Line or Wisconsin Central, which itself does not serve any origin coal mines, so that the merged UP-SP would continue to be the only rail carrier capable of providing single-line rail service on coal from origin mines to Oak Creek Power Plant. The relief in WEPCO's Responsive Application thus meets the basic test of fairness to all concerned, while still alleviating particular anticompetitive effects of the merger.

That kind of thoughtful, measured means of curing competitive defects in rail merger cases is very strongly in the public interest. In the sound exercise of its discretion, the Board should grant the relief sought in WEPCO's Responsive Application.

PROCEDURAL BACKGROUND

On January 29, 1996, in accordance with Board procedural requirements in this matter, WEPCO filed a Description of Anticipated Inconsistent and Responsive Application and Petition for Waiver and Clarification (Doc. No. WEPC-1). The relief to be sought in the anticipated responsive application was described as overhead trackage rights in behalf of a rail carrier unaffiliated with UP-SP over the rail line of UP (a) between Chicago, IL and Oak Creek Power Plant at Oak Creek, WI; (b) between Chicago, IL and Oak Creek Power Plant on the one hand, and Cudahy Shop, Inc., a railcar repair facility in Milwaukee (Cudahy), WI, on the other; and (c) terminal trackage rights in the Milwaukee, WI terminal area (*id.*, at 1-2). It was pointed out that the line over which trackage rights are to be sought is the line of the former Chicago and North Western Transportation Company ("CNW") between Chicago, IL and Milwaukee, WI, plus such other lines in the Chicago, IL or Milwaukee, WI terminal areas as may be necessary to implement the trackage rights (*id.*, at 2). CNW was merged into UP in October, 1995. It was stated that the rail carrier(s) to receive the trackage rights was not known at that time (*ibid*).

The petition in that pleading sought clarification that the responsive application would not be subject to environmental and historic reporting requirements, and sought waiver of the six-month prenotificaiton requirement for applications requiring an environmental impact statement and all requirements in 49 C.F.R. § 1180 for inclusion of information from "applicant carriers" in a responsive application (Doc. No. WEPC-1, at 2-3).

In Decision No. 12 served February 15, 1996, the Board granted WEPCO's petition for waiver of filing requirements.[1]

On March 29, 1996, WEPCO filed its Responsive Application (Doc. No. WEPC-2). The relief sought in that Application was made more particular, as follows (*id.*, at 2):

> Overhead trackage rights in behalf of Wisconsin Central (WC) or Canadian Pacific - Soo Line (CP-Soo) over the following rail lines of UP:
>
> (1) between Chicago, IL, Milwaukee, WI and Cleveland, WI on the one hand, and on the other, WEPCO's Oak Creek Power Plant at Oak Creek, WI:
>
> (2) between that Plant at Oak Creek, WI and Cudahy Shop, Inc., a railcar repair facility located at Cudahy, WI; and
>
> (3) in the terminal areas of Chicago, IL and Milwaukee, WI as may be necessary or desirable to implement the operations described in (1) and (2).

The Responsive Application explained that WEPCO filed the application in behalf of WC or CP-Soo because no carrier had committed to applying for the sought trackage rights at the point in the merger proceeding when parties were required to describe any anticipated responsive applications. The intent of the requested trackage rights was stated to be that WC or CP-Soo in addition to UP-SP would provide rail service to WEPCO's Oak Creek Power Plant and to Cudahy Repair Shop. It was stated that WEPCO did not yet know whether WC or CP-Soo would serve Oak Creek from Chicago, Milwaukee, or (in the case of WC) Cleveland, or from some combination of those points, so that WEPCO sought trackage rights authority from all of such

---

[1] In Decision No. 12, the Board stated that in its responsive application, WEPCO should file a preliminary draft environmental assessment or verified statement certifying that the trackage rights proposal in the application meets the criteria for exemption from environmental and historic reporting requirements. WEPCO filed such a verified statement in its Responsive Application of March 29, 1996 (Doc. No. WEPC-2, Appdx. 1).

points. It was stated that the destination trackage rights were sought in order to replace competition that the UP-SP merger would eliminate between SP-DRGW from coal mines in the Uinta Basin in Colorado-Utah and UP from mines in the Powder River Basin in Wyoming. It was stated that a trackage rights carrier that does not serve origin coal mines was requested so that UP-SP would continue to be the only rail carrier that could transport coal to Oak Creek in single-line rail service. It was emphasized that in that manner, WEPCO would be made whole in regard to replacement of lost competition, but UP-SP would not be placed in a worse position as a result of the relief granted to WEPCO (Doc. No. WEPC-2, at 2-3).

WEPCO's Responsive Application contained supporting evidence filed by Robert M. Quinlan of John T. Boyd Company, WEPCO's coal consultant (Doc. No. WEPC-2, Appdx. 2), and by Gerald A. Abood, WEPCO's Director-Resource Supply and Services, Fossil Operations (*id.*, Appdx. 3), as well as much of the information called for in 49 C.F.R. § 1180, even though compliance with those regulations had been waived.

In Decision No. 29 served April 12, 1996, the Board accepted WEPCO's Responsive Application for filing, assigning it Sub-No. 16.

On April 29, 1996, UP-SP filed evidence in opposition to the relief sought in WEPCO's Responsive Application.

On May 14, 1996, WEPCO filed Rebuttal in Support of its Responsive Application (Doc. No. WEPC-3), consisting of reply verified statements in behalf of Messrs. Quinlan (Appdx. 1) and Abood (Appdx. 2).

UP-SP took the depositions of Messrs. Quinlan and Abood in regard to their reply verified statements on May 28, 1996, in Washington, DC.

This filing is WEPCO's brief in support of the relief sought in its Responsive Application, under due date of June 3, 1996.

FACTS

WEPCO's Oak Creek Power Plant is rail-served solely by UP. Waterborne deliveries are not a competitive alternative to rail at that location. In view of population density and development in the area, there is no reasonable opportunity for a rail line build-out from Oak Creek to another rail carrier. In light of the foregoing, UP has a destination monopoly in transporting coal for delivery at Oak Creek Power Plant (Doc. No. WEPC-2, Appdx. 3, at 2).

SP originates bituminous coal from the Uinta Basin in Colorado and Utah. UP originates sub-bituminous coal from the Powder River Basin in Wyoming. According to a public statement made by SP prior to its agreement to merge with UP, SP's coal traffic is subject to intense competition from Wyoming Powder River Basin coal. (SP 10-K Report to SEC for 1993, at 9). An ally of Applicants, Utah Railway, has acknowledged that Uinta Basin coal is competitive with Powder River Basin coal (Doc. No. UTAH-5, VS Vann, at 6: ". . . (O)ver a range of likely prices, Utah coal coming off UTAH (Railway) can compete with PRB coal.") Numerous electric generating stations burn both Uinta Basin coal and Powder River Basin coal (Doc. No. WEPC-2, Appdx. 2, at 8, and Appdx. RMQ-8; Doc. No. WEPC-3, Appdx. 1, at 9-11).

WEPCO's Oak Creek Power Plant has burned both Uinta Basin and Powder River Basin coal in moderate amounts since 1993. In 1996, Oak Creek is likely to receive over one million tons of coal from the Powder River Basin. Oak Creek is likely to receive another one million tons of coal from Pennsylvania in 1996, but that coal is under a short-term contract. Some or all of that coal will be rebid later in 1996. Such tonnage would be open for competition provided by

SP-served mines in the Uinta Basin. Those mines are providing increasingly-strong competition for coal deliveries to Oak Creek. In August, 1989, WEPCO received bids from two SP-served Colorado mines to supply coal to Oak Creek, and one of those mines made WEPCO's short-list of five finalists for the successful bid. In June, 1995, six SP-served mines in Colorado bid to supply coal to Oak Creek, and two made WEPCO's six-mine short-list. This is consistent with dramatically-increasing shipments of Colorado coal to Midwestern and Eastern utilities in recent years as Colorado mines have increased productivity and SP has aggressively lowered rail rates. The competitive posture of WEPCO's Oak Creek Power Plant has been strongly influenced by either the actual receipt of SP-originated Uinta Basin coal or the prominence of that coal in the bidding process. (Doc. No. WEPC-2, Appdx. 3, at 3-4, Appdx. GAA-1, GAA-2; *id.*, Appdx. 2, at 5-12, Appdx. RMQ-3, RMQ-4, RMQ-5, RMQ-6, RMQ-7, RMQ-9).

WEPCO does not have a history of seeking to obstruct rail mergers. WEPCO provided a statement in support of the UP-CNW merger because that merger did not have an adverse effect on competition for rail transportation of coal. In contrast, the UP-SP merger would eliminate significant competition for rail transportation of coal between SP-served mines in the Uinta Basin in Colorado and Utah and UP-served mines in the Powder River Basin in Wyoming. That would essentially allow UP-SP to control the origin of virtually all of the low-sulfur bituminous coal and about half of all sub-bituminous coal west of the Mississippi River, and to control the delivery of all coal to the Oak Creek Power Plant. In terms of coal likely to be received at Oak Creek in the near future, the merged UP-SP would control 75 percent or more of the coal origins and 100 percent of the coal deliveries at destination. (Doc. No. WEPC-2, Appdx. 3, at 2; *id.*, text at 5).

The extent of that control would allow the merged UP-SP to exert excessive market power in the transportation of coal to Oak Creek. The unrestrained pricing power of UP-SP would dictate where WEPCO would have to buy its coal and what WEPCO would have to pay for transportation. WEPCO would be required to pay substantially higher freight charges for such transportation. Ultimately, consumers of WEPCO's electric power would suffer as they would be required to bear increased resulting costs for the generation of electricity. (Doc. No. WEPC-2, Appdx. 3, at 2-3; *id.*, text at 5-6).

The <u>limited</u> destination trackage rights sought in WEPCO's Responsive Application would lessen the adverse effect of loss of origin source competition between UP and SP, but it would do so without unfairly disadvantaging UP-SP and without bettering WEPCO's pre-merger position. The destination trackage rights would be provided to a rail carrier which does not serve any coal mines itself so that after the merger and trackage rights UP-SP still would be the only rail carrier able to transport coal in single-line rail service to Oak Creek. Limited trackage rights of that nature thus would offset the loss of origin competition, but would not unduly harm the competitive position of UP-SP nor improve WEPCO's pre-merger position. (Doc. No. WEPC-2, Appdx. 2, at 15-17; Doc. No. WEPC-3, Appdx. 2, at 2).

<u>LEGAL PRINCIPLES</u>

The UP-SP merger is to be approved and authorized only if the Board finds that it is "consistent with the public interest" 49 U.S.C. § 11344(c). That statute gives the Board power to "impose conditions governing the transaction" (*ibid*). That conditioning power is broad; any condition can be imposed which is reasonably deemed to be "useful in protecting competition" or for other statutory purposes. *United States v. Rock Island Company*, 340 U.S. 419, 431 (1951).

Criteria for imposing conditions to remedy anticompetitive effects are described in *Burlington Northern, Inc. et al. -- Control and Merger -- Santa Fe Pacific Corporation, et al.*, _____ I.C.C.2d _____, Finance Docket No. 32549, Decision No. 38, at 55-56 (ICC served Aug. 23, 1995) ("*BNSF* case"), viz.:

(1) the merger would produce harmful effects to the public interest, such as a significant reduction of competition in an affected market;

(2) the condition would ameliorate or eliminate the harmful effects;

(3) the condition would be operationally feasible;

(4) the condition would produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger.

In addition , it must appear that the condition is designed to remedy a problem caused by the merger, and that the condition would not put its proponent in a better position than it occupied before the merger (*id.*, at 56).

DISCUSSION AND CONCLUSION

The relief sought in WEPCO's Responsive Application fits squarely within those criteria. The limited destination trackage rights sought by WEPCO are specifically designed to offset the loss of origin source competition, without bettering WEPCO's pre-merger position or worsening Applicants'. WEPCO's condition would cure competitive harm in a fair manner. It is precisely the kind of thoughtful, measured means of alleviating competitive harm contemplated by the public interest standard of 49 U.S.C. § 11344(c).

An unconditioned UP-SP merger would harm the public interest by eliminating source competition for transportation of coal to WEPCO's Oak Creek Power Plant between SP from Uinta Basin mines in Colorado and Utah and UP from Powder River Basin mines in Wyoming. Applicants have gone through all kinds of gyrations attempting to establish that such competition does not exist or that it is minimal. But try as they might, Applicants cannot overcome SP's own pre-merger, non-self-serving acknowledgement that their Colorado and Utah coal traffic is intensely competitive with UP's Powder River Basin coal traffic. And the overwhelming evidence is that SP-coal is becoming even more intensely competitive with UP-coal as Colorado and Utah mines have lowered their production costs and SP has lowered its freight charges. Notably, Utah Railway, an ally of Applicants which itself operates in the Uinta Basin, has acknowledged that Uinta Basin coal competes with Powder River Basin coal (VS Vann). There are too many different expert witnesses who independently testified that Uinta Basin coal competes with Powder River Basin coal for that not to be true. Applicants stand alone on the other side of that issue. In light of SP's acknowledgement, Utah Railway's unsolicited statement and the independent, consistent testimony of numerous coal and transportation experts, the Board should find that there is significant and growing competition for transportation of coal between SP from the Uinta Basin and UP from the Powder River Basin, which would be eliminated as a result of the merger.

The relief sought in WEPCO's Responsive Application would ameliorate the harmful effect of lost source competition at origin, but would do so in a manner that would not unduly dilute the public benefits of the merger (second and fourth criteria).[2] The trackage rights condition sought by WEPCO is carefully crafted to remedy competitive harm, but not to attempt to take undue advantage of the situation. WEPCO seeks trackage rights at destination for a rail carrier that does not itself directly serve any origin coal mine (WC or CP-Soo). Those limited local destination trackage rights are an appropriate offset for the loss of origin source competition between UP and SP. But the voluntary restriction to a trackage rights carrier not serving coal mines would ensure that the merged UP-SP would continue to be the only carrier capable of transporting coal in single-line service to WEPCO's Oak Creek Power Plant. WEPCO's condition thus would not better WEPCO's pre-merger position nor worsen Applicants'. That kind of measured, fair condition is decidedly in the public interest.

Based on the foregoing, the Board should grant the relief sought in WEPCO's Responsive Application.[3]

---

[2] There is no evidence that the trackage rights sought in WEPCO's Responsive Application would not be operationally feasible (third criterion).

[3] The presumption associated with the "one lump" theory does not apply in this case because unlike the cases in which that presumption has been applied, here there is coal source competition between UP and SP that would be eliminated by the merger (see Doc. No. WSC-11, at 48-51, 17, n. 14). According to that presumption, the merger of a bottleneck destination carrier with one of several origin or bridge carriers will not enhance or extend the bottleneck carrier's market power, and thus will not harm shippers. *BNSF* case, at 72. The presumption is rebuttable by showing that (1) prior to the merger, the benefits of origin competition flowed through to the utility and were not captured by the destination monopoly carrier, and (2) such a competitive flow-through would be significantly curtailed by the merger. *Id.*, at 71. Even if the presumption were applicable in the present case, it would be rebutted by evidence that WEPCO has benefitted from origin competition between UP and SP in the coal bidding process, but would lose the benefit of that competition as a result of the merger. (Doc. No. WEPC-2, Appdx. 3, at 4, and Appdx. GAA-2) In any event, the one-lump theory is fallacious in assuming perfect knowledge by the destination carrier of the total delivered price to destination; UP acknowledges the reality that a destination carrier cannot reap all profit from a joint movement (see Doc. No. WSC-11, at 49-50).

Respectfully submitted,

WISCONSIN ELECTRIC POWER COMPANY
231 West Michigan Street
P.O. Box 2046
Milwaukee, WI 53201-2046

Responsive Applicant

Thomas F. McFarland Jr.

THOMAS F. McFARLAND, JR.
McFARLAND & HERMAN
20 North Wacker Drive
Suite 1330
Chicago, IL 60606-2902
(312) 236-0204

Attorney for Responsive Applicant

Date Filed: June 3, 1996

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 1996, I served the foregoing document, Brief In Support Of Responsive Application (Sub-No. 16), by U.P.S. overnight, June 3, 1996 delivery, on the following:

Arvid E. Roach, II
Covington & Burling
1201 Pennsylavnia Avenue, N.W.
P.O. Box 7566
Washington, DC 20044

Paul A. Cunningham
Harkins Cunningham
1300 Nineteenth St., N.W.
Washington, DC 20036

Erika Z. Jones
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W., Suite 6500
Washington, DC 20006-1882

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.

STB FD 32760 6-3-98 E 83149

REDACTED - To Be Filed on the Public Record STRC-12

BEFORE THE

SURFACE TRANSPORTATION BOARD

WASHINGTON, D.C.

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

BRIEF OF SAVE THE ROCK
ISLAND COMMITTEE, INC.

William P. Jackson, Jr.
Attorney for Save the Rock
Island Committee, Inc.

OF COUNSEL:

JACKSON & JESSUP, P.C.
Post Office Box 1240
Arlington, VA 22210
(703) 525-4050

Due and Dated: June 3, 1996

6-5-98 83149

LAW OFFICES
JACKSON & JESSUP, P.C.
3426 NORTH WASHINGTON BOULEVARD
POST OFFICE BOX 1240
ARLINGTON, VIRGINIA 22210
(703) 525-4050
TELECOPIER
(703) 525-4054
INTERNET
TRANSLAW@DOS.DOSYS.COM

WILLIAM P. JACKSON, JR.
DAVID C. REEVES
JOHN T. SULLIVAN
JOHN R. COPLEY

GERALD E. JESSUP
(1911-1994)

June 3, 1996

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
12th & Constitution Ave., N.W.
Washington, DC 20423

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

Dear Mr. Williams:

Enclosed for filing in the referenced proceeding is the Brief of Save the Rock Island Committee, Inc. (STRC-12). The original and 20 copies of STRC-12 are being filed under seal because they contain material designated as "Confidential" and "Highly Confidential" by the Applicants in the proceeding. An additional 20 copies of STRC-12 redacted for filing on the public record are also enclosed. Also enclosed are two 3.5-inch disks, one containing the redacted version of the text of STRC-12 and the other containing the confidential version of the text of STRC-12, each in WordPerfect 5.1 format.

The confidential version of STRC-12 is being served only upon such parties of record that appear as outside counsel or counsel for governmental agencies on the restricted service list established pursuant to the discovery guidelines served December 7, 1995, in this proceeding. All other parties of record have been served with the version of STRC-12 that is being filed on the public record.

Please acknowledge the receipt and filing of STRC-12 by receipt stamping the copy of this letter, the extra copy of the confidential version of STRC-12, and the extra copy of the redacted version of STRC-12 enclosed for that purpose and returning them to me in the enclosed self-addressed, postage prepaid envelope.

Very truly yours,

William P. Jackson, Jr.

WPJ/jmb

Enclosures
cc: Mr. Bruce Hanson
Mr. Jack Wright

REDACTED - To Be Filed on the Public Record STRC-12

BEFORE THE

SURFACE TRANSPORTATION BOARD

WASHINGTON, D.C.

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

BRIEF OF SAVE THE ROCK
ISLAND COMMITTEE, INC.

William P. Jackson, Jr.
Attorney for Save the Rock
Island Committee, Inc.

OF COUNSEL:

JACKSON & JESSUP, P.C.
Post Office Box 1240
Arlington, VA 22210
(703) 525-4050

Due and Dated: June 3, 1996

TABLE OF CONTENTS

	Page
WHAT STRICT WANTS	2
BACKGROUND	2
1. The Kansas City-St. Louis Rail Corridor	3
2. The Proposed UP-SP Merger	6
3. The Interests of STRICT	7
ARGUMENT	10
I. There is No Public Benefit to the Applicants' Continued Retention of Any Part of SSW's Kansas City-St. Louis Line	12
II. Applicants' Post-Merger Plans Have the Potential to Cause Serious Competitive Harm in the Important Kansas City-St. Louis Rail Corridor	15
III. The Conditions Requested Are Appropriate in Light of the Serious Public Harm Identified	22
A. The Conditions Requested are Designed to Address Harms That are Clearly Related to the Merger	22
B. The Requested Conditions Satisfy All Four of the Board's Standards	25
CONCLUSION	29
APPENDIX OF DEPOSITION TRANSCRIPT EXCERPTS	

TABLE OF AUTHORITIES CITED

Page

JUDICIAL DECISIONS:

Astoria Federal Savings and Loan Association v. Solimino, 501 U.S. 104, 111 S. Ct. 2166 (1991) 20

Missouri-Kansas-Texas Railroad Co. v. United States, 632 F.2d 392 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981) 10

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 21

United States v. Utah Construction, 384 U.S. 394 (1966) 20

ADMINISTRATIVE CASES:

Burlington Northern Inc. and Burlington Northern Railroad Co.--Control and Merger--Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Railway Co., Finance Docket No. 32549, slip. op. served August 23, 1995 .... 10, 11

Chicago, Milwaukee, St. Paul & Pacific Railroad Co.--Reorganization-- Acquisition by Grand Trunk Corp., 2 I.C.C.2d 161 (1984) 11, 16

General American Transportation Corp. v. Indiana Harbor Belt Railroad Co., 3 I.C.C.2d 599 (1987) 20

Railroad Consolidation Procedures, 363 I.C.C. 784 (1981) 11

St. Louis Southwestern Railway Co.--Purchase (Portion) --William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Co., Debtor, 363 I.C.C. 323 (1980) .... passim

The St. Louis Southwestern Railway Co.--Abandonment Exemption--In Gasconade, Maries, Osage, Miller, Cole, Morgan, Benton, Pettis, Henry, Johnson, Cass, and Jackson Counties, MO, Docket No. AB-39 (Sub-No. 18X), served April 1, 1994 5

Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific Railroad Co.--Control--Missouri Pacific Corp. and Missouri Pacific Railroad Co., 366 I.C.C. 462 (1982), aff'd in part and remanded in part sub nom. Southern Pacific Transportation Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984), cert. denied sub nom. Kansas City Southern Railway Co. v. United States, 469 U.S. 1208 (1985) .... passim

Page

Union Pacific Corp., Union Pacific Railroad Co. and Missouri Pacific Railroad Co.--Control--Missouri-Kansas-Texas Railroad Co., 4 I.C.C.2d 409 (1988), petition for review dismissed sub nom. Railway Labor Executives Association v. ICC, 883 F.2d 1079 (D.C. Cir. 1989) 17

Union Pacific Corp., Union Pacific Railroad Co., and Missouri Pacific Railroad Co.--Control--Chicago and North Western Transportation Co. and Chicago and North Western Railway Co., Finance Docket No. 32133, slip. op. served March 7, 1995 .... passim

STATUTES:

49 U.S.C. Section 11344(b)(1) 10

49 U.S.C. Section 11344(c) 10, 11

The ICC Termination Act of 1995, Pub. L. No. 104-88, § 204(b)(1), 109 Stat. 803, 841-42 2

REGULATIONS:

49 C.F.R. § 1152.29(c) 13

49 C.F.R. § 1180.1(c) 11

49 C.F.R. § 1180.1(c)(2)(i) 15

BEFORE THE

SURFACE TRANSPORTATION BOARD

WASHINGTON, D.C.

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

BRIEF OF SAVE THE ROCK
ISLAND COMMITTEE, INC.

Save the Rock Island Committee, Inc. ("STRICT"), submits this Brief in support of its request for the imposition of conditions upon any approval of the transactions for which authority is sought in this proceeding by Union Pacific Corporation ("UPC"), Union Pacific Railroad Company ("UPRR"), Missouri Pacific Railroad Company ("MPRR"), Southern Pacific Rail Corporation ("SPR"), Southern Pacific Transportation Company ("SPT"), St. Louis Southwestern Railway Company ("SSW"), SPCSL Corp. ("SPCSL"), and The Denver and Rio Grande Western Railroad Company ("DRGW") (collectively "Applicants").[1]

---

[1] On November 30, 1995, the Applicants filed their Railroad Merger Application ("Application") in this proceeding with the Interstate Commerce Commission ("ICC"), the statutory predecessor of the Surface Transportation Board ("Board"). The Application seeks authorization under 49 U.S.C. Sections 11343 to 11345 for the acquisition of control of SPR by UP Acquisition, an indirect wholly-owned subsidiary of UPC, the merger of SPR into UPRR, and the resulting common control of UPRR, MPRR, SPT, SSW, SPCSL, and DRGW by UPC. Consistent with the practice in this proceeding, those rail carriers presently affiliated with UPC will be referred to herein as "UP" while those rail carriers affiliated with SPR will be referred to herein as "SP." UP together with UPC will be referred to as "Union Pacific".

Because this proceeding was pending with the ICC prior to January 1, 1996, the date the ICC was abolished and certain of its functions, (continued...)

WHAT STRICT WANTS

STRICT wants the Board to order sale of the SSW line between St. Louis and Kansas City to a purchaser who will agree to rehabilitate and operate the entire line. Offering the line for sale should be imposed as a condition to approval of the proposed merger. The line is parallel to one presently owned by MPRR. Since discovery has shown that little or no operation of the line by UPRR following the merger is proposed, such action would create no impediment to the merger but would give back to Missouri a rail line that is important for economic development of rural areas. STRICT has located at least one purchaser who is willing to buy and operate the line as a unit if unrestricted interchange is allowed at both ends, but neither SSW nor UPRR will agree to such a sale without impossible restrictions that limit competition and the economic chance for success of the line in the hands of a new operator.

BACKGROUND

STRC-8, the comments and evidence in opposition STRICT filed on the Application and its request for conditions on any approval of the Application, contains an extensive discussion of why STRICT is participating in this proceeding. The facts stated therein were entirely unrebutted by Applicants, both in discovery and in the multi-volume Applicants' Rebuttal.[2]

---

[1](...continued)
including its rail merger authority, were transferred to the Board, the law in effect prior to January 1, 1996, governs this proceeding. See The ICC Termination Act of 1995, Pub. L. No. 104-88, § 204(b)(1), 109 Stat. 803, 841-42. Consequently, unless otherwise noted, citations herein will be to the former law, as that is the applicable law in this proceeding.

[2] At the outset it should be noted that the Applicants have characterized STRC-8 as containing "vitriolic and misguided attacks on Applicants' motives and morals." UP/SP-230 at 299. STRICT maintains that STRC-8 is simply fair comment on the evidence adduced thus far in (continued...)

Consequently, in this brief STRICT will not completely restate the factual background of the issues it believes the Board must address in this proceeding, but only summarize it.

1. <u>The Kansas City-St. Louis Rail Corridor</u>

Kansas City and St. Louis are, along with Chicago, the three busiest rail gateways in the United States. As the maps that accompany the Application indicate, there are two UP lines from the Kansas City area to Jefferson City, MO, each of which are MPRR lines. There is then one MPRR line between Jefferson City and St. Louis.[3] These MPRR lines form the eastern end

---

[2](...continued) this proceeding. The acidic level of STRICT's submissions could be increased an order of magnitude without reaching the bounds of propriety. But more importantly, Applicants' Rebuttal contains absolutely no evidence which contradicts the evidence submitted in STRC-8, most of which is of Applicants' own creation.

If STRC-8 is mistaken in some regard, it is up to Applicants to demonstrate as much. They have done not so, choosing instead to sponsor a witness who simply characterizes STRC-8 as "a mean-spirited filing full of false accusations." <u>See</u> UP/SP-232, Rebuttal Verified Statement of R. Bradley King ("King R.V.S.") at 51. That same witness, however, when questioned regarding his knowledge of many of the issues addressed by STRC-8, testified that he knew little or nothing regarding those issues. <u>See, e.g.</u>, Transcript of Deposition of R. Bradley King at 581 (not familiar with plans for UP operation of western segment of SSW Kansas City-St. Louis line), 589 (can't recall whether merger team looked at line segment), 597 (not involved in abandonment decisions), 607 (doesn't know Applicants' post-merger plans for SSW line at issue), and 609 (knows nothing of Applicants' plans to install an alternative operator at eastern end of SSW line). The Board should therefore judge the credibility of his rebuttal statement accordingly, at least with respect to the issues raised by STRICT.

Unfortunately, this is just another indication of Applicants' apparent "hide the ball" strategy in this proceeding. Other parties have addressed this issue at greater length, and STRICT commends the Board to those discussions. <u>See</u>, <u>e.g.</u>, KCS-33 at 117-25.

[3] <u>See generally Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific Railroad Co.--Control--Missouri Pacific Corp. and Missouri Pacific Railroad Co.</u>, 366 I.C.C. 462 (1982), <u>aff'd in part</u> (continued...)

of UP's Central Corridor route, and have been recognized since before the ICC's decision in Tucumcari[4] as excellent, first class, high-speed lines. Just last year, in UP/CNW,[5] the ICC found UP to have a rail market share of 58.6 percent for the Kansas City-St. Louis city pair.

In addition, as the Application states and its maps indicate, SP trains presently operate via trackage rights over the MPRR lines between Kansas City and St. Louis, in connection with SP's own Central Corridor route. UP/SP-24 at 118-19. The Application states that SP has a Kansas City-St. Louis rail market share of nearly { } percent.[6]

What the Application does not show is that SP has its own line, owned in its entirety by applicant SSW, that connects the St. Louis and Kansas City areas (hereinafter the "SSW Kansas City-St. Louis line").[7] The Application

---

[3](...continued)
and remanded in part sub nom. Southern Pacific Transportation Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984), cert. denied sub nom. Kansas City Southern Railway Co. v. United States, 469 U.S. 1208 (1985) (hereinafter "UP/MP/WP"). The northern MPRR line between Kansas City and Jefferson City is via Marshall, MO, and is known as UP's River Subdivision, while the southern such line is via Sedalia, MO, and thus is known as UP's Sedalia Subdivision. Id. at 585.

[4] St. Louis Southwestern Railway Co.--Purchase (Portion)--William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Co., Debtor, 363 I.C.C. 323, 406 (1980).

[5] Finance Docket No. 32133, Union Pacific Corp., Union Pacific Railroad Co., and Missouri Pacific Railroad Co.--Control--Chicago and North Western Transportation Co. and Chicago and North Western Railway Co., slip. op. served March 7, 1995, at 70.

[6] As can be seen from Application maps, three other carriers presently provide service between Kansas City and St. Louis. Gateway Western Railway Company, Norfolk Southern Railway Company, and the recently merged Burlington Northern Railroad Company and Atchison, Topeka and Santa Fe Railway Company ("BN/Santa Fe") have independent single-line routes between Kansas City and St. Louis, though all are handicapped to one extent or another in relation to the MPRR lines. See STRC-8 at 38-40.

[7] The line in question was purchased by SSW from the estate of the bankrupt Rock Island, pursuant to the ICC's order in Tucumcari. It
(continued...)

maps only show: (1) an SP branch line running parallel to UP's Sedalia Subdivision between the Kansas City, MO, area and Pleasant Hill, MO (hereinafter "Leeds Junction-Pleasant Hill"); and (2) an SP branch line between Owensville, MO, and the St. Louis area. The nearly 200-mile SSW line segment which connects Pleasant Hill and Owensville is thus missing from the Application.

Despite express promises SSW made in Tucumcari as well as a commitment implicit in the representations it made in UP/MP/WP[8] that local service would be provided on that segment of line, neither that segment of line nor the Leeds Junction-Pleasant Hill line segment have ever been operated by SSW since their purchase in 1980. See STRC-8 at 15-17. SSW has instead kept in place an embargo it placed upon the line between Leeds Junction and Owensville immediately upon taking possession of the line in 1980.

Since late 1993, SSW has been seeking to abandon the embargoed segment of the line. SSW's request for an abandonment exemption is presently being held in abeyance. Applicant UPRR has previously indicated its desire to purchase the Leeds Junction-Pleasant Hill line segment pursuant to 49 U.S.C. Section 10905.[9]

---

[7](...continued)
was part of SSW's acquisition of Rock Island's "Tucumcari" line from Santa Rosa, NM, to St. Louis via Kansas City.

[8] Full citation in footnote 3.

[9] See Docket No. AB-39 (Sub-No. 18X), The St. Louis Southwestern Railway Co.--Abandonment Exemption--In Gasconade, Maries, Osage, Miller, Cole, Morgan, Benton, Pettis, Henry, Johnson, Cass, and Jackson Counties, MO. In a decision served April 1, 1994, in that proceeding, the ICC declared an SSW exemption notice void ab initio. See STRC-8 at 18-19.

2. <u>The Proposed UP-SP Merger</u>

The Application is almost entirely silent regarding post-merger plans for the Applicants' Kansas City-St. Louis operations. The only instance in which the subject is substantively addressed in the Application is an acknowledgement that, in light of SP's existing trackage rights over the MPRR lines, the merger will result in no benefits with respect to the Applicants' operations between Kansas City and St. Louis. UP/SP-24 at 118-19.

The Application has even less to say regarding post-merger use of the SSW Kansas City-St. Louis line. With respect to the Leeds Junction-Pleasant Hill segment, apart from its bare appearance on the Application maps, there is no mention of it whatsoever in the Application, even though, if Applicants had any concrete plans to use the line segment, there would have been a number of instances in which it would have been appropriate to discuss the line segment, including in the Environmental Report that accompanied the Application and was purportedly in compliance with the Board's regulations. <u>See</u> STRC-8 at 23-26. When confronted on the issue, all the Applicants will say is that they plan to "railbank" the line segment indefinitely until they can overcome local opposition to operating a third UP mainline east of Kansas City. UP/SP-230 at 299-300.

Little more reason has been provided by Applicants regarding why they would intend to retain the eastern end of the SSW line in the St. Louis area. Having dropped their claim that Applicants must retain ownership of the line between St. Louis and Labadie, MO, in order that an alternate carrier can serve the Union Electric Company power plant located at Labadie,[10] Applicants

[10] <u>See</u> STRC-8 at 28-34. In Applicants' Rebuttal, it is stated that a proportional rate agreement that Applicants have entered into with Union Electric will permit Union Electric to receive direct interline service to Labadie via Kansas City or St. Louis. UP/SP-231, Part C, (continued...)

are left with arguing that UP/SP plans to operate or lease the east end of the line to continue to serve customers. UP/SP-230 at 299.

Left unrebutted, however, is the evidence STRICT submitted with its comments. That evidence shows that, apart from Union Electric traffic, which, as discussed, is almost certain to travel over the MPRR lines post-merger, in 1994 SSW only originated or terminated { } carloads of traffic in linehaul service to or from stations on the 80 miles of the SSW line that are still in service. See STRC-8 at 35 and Exhibit 6. That led Applicants' own operating officers and officials to recommend that {

} STRC-8, Exhibit 8.

3. The Interests of STRICT

STRICT is composed of rail shippers, potential rail shippers, and local government agencies representing them and the interests of the general public in central Missouri counties, cities and communities between Kansas City and St. Louis. STRICT's sole objective is to obtain operation of the SSW Kansas City-St. Louis rail line in an unrestricted manner over its entirety, as was promised when SSW purchased the line in 1980. For over two years, STRICT has been active on multiple fronts to accomplish that objective, in order to

---

[10](...continued)
Rebuttal Verified Statement of John H. Rebensdorf at 7. Routing via Kansas City must occur via the MPRR lines, as the SSW Kansas City-St. Louis line is out of service for much of the distance between Kansas City and Labadie. {

} Transcript of May 13, 1996, Deposition of Applicants' Witness John H. Rebensdorf at 5-7. Consequently, Applicants had no choice but to concede that no part of the SSW Kansas City-St. Louis line will be required for provision of the rail service contemplated by the agreement with Union Electric. See UP/SP-244, Response to Interrogatory No. 29.

further the cause of economic development in central Missouri. See STRC-8 at 4-5, 15-22, and Exhibit 1, the Verified Statement of James A. Link.

No party is a more reluctant participant in this proceeding than STRICT, for it believes its dispute with SP, and now UP, never should have reached this stage. Unfortunately, the actions of SP now make it painfully clear that SP is intent on dismembering the SSW Kansas City-St. Louis line, thereby making it impossible for an operator to acquire and rehabilitate all of the line and operate it as a unit. While STRICT had all but given up hope that SSW would ever voluntarily live up to the promises it made in a number of ICC proceedings and provide local rail service over the entire Kansas City-St. Louis line, it was STRICT's wish that SP would at least agree to sell the line in its entirety to a short line operator so that the line could be operated by a party seriously interested in providing the long-promised local service under economic conditions that would permit success. If SP had done so, STRICT would have had no reason to participate in this proceeding, saving both its and the Board's scarce resources. But unfortunately, SP has been as obstinate regarding divestiture of the little-used SSW Kansas City-St. Louis line as it has been neglectful of that line. See STRC-8 at 17-21.

The convolutions attendant to STRICT's attempts to have the entire Kansas City-St. Louis line sold to a short line operator were increased by an order of magnitude following announcement of the proposed UP-SP merger. The Applicants' proposal to retain relatively short segments at each end of the SSW line is in STRICT's view a contrived use transparently designed to provide an excuse not to divest the line in its entirety and thus reduce its competitiveness as well as its ability to be economically successful.

For that reason STRICT has requested the Board to impose the following conditions upon any approval of the Application:[11]

1. Divestiture of the entire Kansas City-St. Louis rail line that SSW owns, including appurtenant real estate, between Leeds Junction, MO (at or near milepost 288.3), and Rock Island Junction, MO (at or near milepost 10.3), at a price to be mutually agreed, failing which it will be set by the Board. Sale must be to a single entity or group unaffiliated with the Applicants which certifies in writing to the Board that: (a) it is the acquirer's intention in acquiring the line to reactivate rail operations with a single operator providing local service over the entire line within three years of taking possession; and (b) before abandoning or selling (except in connection with a financing transaction) less than the entire line, it will attempt for a reasonable period of time to sell the entire line as a single unit and assign to the purchaser thereof any trackage rights acquired in connection with owning the line.

2. Included in the purchase price will be assignment of all of SSW's rights and interests under agreements granting to SSW, or any of its predecessors in interest in the aforementioned line, trackage and similar rights that have been, are or could be used by a rail carrier in connection with operating any part of the line.

As the record in this proceeding indicates, there is significant support for such conditions. No less a figure than Mel Carnahan, the Governor of Missouri, in a letter to the Board dated March 29, 1996, indicated his concern regarding the reduction of rail competition within Missouri if the Application is granted. He specifically suggested divestiture of the entire SSW line as an appropriate method of providing for competition in the Kansas City-St. Louis rail markets in the future.

---

[11] STRICT originally requested the imposition of a third condition, which would have required the Applicants to permit an alternate carrier to use the MPRR lines to serve Union Electric at Labadie, so that one of the pretexts for the Applicants' continued retention of selected segments of the SSW Kansas City-St. Louis line would be eliminated. *See* STRC-8 at 50-68. Because, as was discussed, Applicants have entered into a proportional rate agreement with Union Electric whereby the MPRR lines will be used in alternative rail routings to Union Electric, there no longer is the need for such a condition. Consequently, STRICT is withdrawing its request for that third condition.

In contrast, Applicants have been unable to show any support for their plans to retain the end segments of the SSW Kansas City-St. Louis line. While Applicants have been able to muster letters from shippers and government officials opposed to other divestiture proposals in this proceeding, Applicants have yet to produce a statement from anyone opposed to the conditions STRICT seeks to have imposed.[12]

ARGUMENT

As has been repeatedly recognized, "the single and essential standard of approval" for a proposed merger of two rail carriers is that the transaction proposed must be found to be "consistent with the public interest."[13] While there are certain factors that the Board is required to consider in this case, which are set forth at former 49 U.S.C. Section 11344(b)(1), it is former 49 U.S.C. Section 11344(c) that imposes the ultimate standard that the proposed transaction must be found to be in the public interest before it can be approved.

In determining the public interest, the Board's regulations state that the Board will perform a balancing test in which it weighs "the potential benefits to the applicants and the public against the potential harm to the

---

[12] Indeed, shippers in the Kansas City area who have filed statements opposing divestiture proposals in this proceeding have limited that opposition to those other divestiture proposals, such as for SP lines between Chicago and Texas and Kansas and Colorado. See, e.g., UP/SP-233 at 318-19 (statement from KC Reload Center, Inc.); UP/SP-233 at 587-88 (statement from Terminal Consolidation Kansas City Piggyback).

[13] See Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern Railroad Co.--Control and Merger--Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Railway Co., slip. op. served August 23, 1995, at 50-51 (hereinafter "BN/Santa Fe") (quoting Missouri-Kansas-Texas Railroad Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981)); UP/C&NW, slip. op. at 53.

public." 49 C.F.R. § 1180.1(c). It was recognized by the ICC in BN/Santa Fe[14] that harm to the public interest is "usually (though not invariably)" shown by a reduction of competition in a market affected by the proposed merger. BN/Santa Fe, slip op. at 93.[15] In addition, "[t]he policies embodied in the antitrust laws provide guidance on public interest considerations in control proceedings." Id. at 52.

In approving a rail consolidation, the Board, like the ICC before it, has broad authority under 49 U.S.C. Section 11344(c) to impose conditions to protect the public interest. The ICC's practice under certain circumstances was to impose conditions in two separate situations: (1) to protect a competing carrier from the impacts of the merger at issue; and (2) to protect the public from any anticompetitive consequences of that merger.[16]

With respect to the latter type of condition - a "public interest" condition - the prerequisites for imposition have never been codified, but were first stated in UP/MP/WP. There, the ICC stated that it would impose public interest conditions on a railroad consolidation proposal when it found

> that the consolidation may produce effects harmful to the public interest (such as an anticompetitive

---

[14] The full citation is in footnote 13.

[15] As will be discussed later, the ICC acted in merger proceedings not only to prevent harm to the public interest from a "reduction" in post-merger competition per se, but also to prevent the public interest from being harmed by Applicants' ability to impede potential future competition. Thus, the harmful effects of a merger are not determined solely by traditional market share analysis. It is important to note that the ICC never stated that "harm to the public interest" can only be demonstrated by evidence that there will be a reduction in existing competition.

[16] UP/MP/WP, 366 I.C.C. at 562; see also Chicago, Milwaukee, St. Paul & Pacific Railroad Co. -- Reorganization -- Acquisition by Grand Trunk Corp., 2 I.C.C.2d 161, 263 (1984) (hereinafter "Soo/Milwaukee") (citing Railroad Consolidation Procedures, 363 I.C.C. 784, 788-89 (1981)).

> reduction of competition in the affected market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, and that the conditions will produce public benefits (through reduction or elimination of the possible harm) outweighing their harm to the merger.

<u>UP/MP/WP</u>, 366 I.C.C. at 565.

I. There is No Public Benefit to the Applicants' Continued Retention of Any <u>Part of SSW's Kansas City-St. Louis Line</u>

STRICT has spent countless hours in this proceeding searching for one single public benefit to the Applicants' continued retention of any part of the SSW Kansas City-St. Louis line, and has yet to find it. It simply cannot be stated that the public interest in the Kansas City-St. Louis rail corridor will be served by granting the Applicants merger authorization which includes the right to retain possession of any part of the SSW Kansas City-St. Louis line. This is plain from an examination of the reasons Applicants have put forth for retaining the end segments of the SSW Kansas City-St. Louis line.

As stated hereinbefore, Applicants attempt to justify retention of the Leeds Junction-Pleasant Hill line segment at the western end of the SSW Kansas City-St. Louis line on the ground that they want to "railbank" the segment for an indefinite period of time in case they ever need a third main line east of Kansas City. UP/SP-230 at 299-300. In its comments STRICT unequivocally demonstrated that there is no need in the foreseeable future for a UP third main line. <u>See</u> STRC-8 at 61-63. Applicants' Rebuttal conceded as much when it provided absolutely no supporting rationale for Applicants' railbanking scheme.[17] Clearly, the need for a third UP main line east of Kansas City is

---

[17] In fact, Applicants' Rebuttal significantly undercuts their explanation for retaining the Leeds Junction-Pleasant Hill line (continued...)

a contrived fabrication which cannot stand scrutiny. It is a device that seeks to limit future competition by destroying the utility of the line in the hands of a potential competitor.

Moreover, there is absolutely no support in applicable law for Applicants' railbanking scheme. The Board's regulations clearly state that railbanking can only occur after abandonment or discontinuance of service authorization is granted. Even then, a carrier's right to railbank the remnants of a rail line must give way to the rights of others to acquire the line at issue for rail service purposes. See 49 C.F.R. § 1152.29(c).[18]

Unlike the western end of the SSW Kansas City-St. Louis line, there is existing traffic on the eastern end of the line. The amount of that traffic is so small, however, especially for a carrier of the size that Applicants intend to construct, that there is no valid explanation why the Applicants would retain such a low-density segment of rail line as a short branch line on their combined system.

---

[17](...continued)
segment. As STRICT discussed in its comments, the MPRR lines are in large part operated directionally, which has significantly increased their capacity for rail traffic. See STRC-8 at 63. Applicants not only agree with that assessment, but include in Applicants' Rebuttal a detailed description of how those particular directional operations work and the great success UP has had with them, permitting UP to avoid "tens of millions of dollars" in capacity improvements on the River Subdivision alone. UP/SP-232, King R.V.S. at 18-20. Moreover, Applicants' Rebuttal cites the extensive capacity additions on the MPRR lines between Kansas City and Jefferson City that have taken place over the past 13 years. See UP/SP-232, Rebuttal Verified Statement of Dale W. Salzman at 4.

[18] STRICT notes that this is not the only instance in this proceeding in which Applicants stand accused of unreasonably manipulating their proposed post-merger operations so as to prevent one of their lines from possibly being used by others to compete against Applicants. See KCS-33, Vol. 2 at 222 (operating officer of rival pointing out that Applicants' contrived directional southcentral operations defeat divestiture).

While SP's pre-merger retention of the eastern segment is arguably justified by SP's service to Union Electric at Labadie,[19] that justification disappears post-merger since then Union Electric will be served exclusively over MPRR track.[20] Applicants are thus left with arguing, { }, that they intend to retain in service a 50-mile rail line over which { } linehaul carloads per mile moved in 1994 after subtracting the Union Electric traffic.

It is thus clear that the only benefit to Applicants of retaining either end-segment of the SSW line is to suppress potential competition in the Kansas City-St. Louis corridor. By signaling a scheme to withdraw the Leeds Junction-Pleasant Hill line segment from the scope of the proposed SSW abandonment while at the same time failing to provide any sign that any operations over the segment will be conducted post-merger, Applicants are plainly trying to prevent the line from being used for single-line rail service to connect the Kansas City area with points east. Similarly, Applicants' present position with respect to what, post-merger, will be a lightly used branch line at the eastern end of the SSW line can also only be justified in light of such a plan.

Applicants' position with respect to the SSW Kansas City-St. Louis line is thus anticompetitive on its face and provides ample reason for the Board to condition granting the Application on divestiture of that line, provided a willing buyer is found. When, as here, the only benefits to the Applicants that will result from one aspect of a merger proposal are private benefits which at the same time constitute serious public harm, the Board should use

---

[19] As can be seen from Exhibit 6 to STRC-8.

[20] *See* STRC-8 at 30-31.

the discretion with which it has been entrusted to condition the transaction under review from having such an effect.

II. Applicants' Post-Merger Plans Have the Potential to Cause Serious Competitive Harm in the Important Kansas City-St. Louis Rail Corridor

The Applicants' plans to retain the end segments of the SSW Kansas City-St. Louis line are totally unjustified by any resultant public benefits. Moreover, such retention also has the potential to cause serious public harm because of the proposed merger's parallel effects in the Kansas City-St. Louis market. Such effects are an indication that the merger may be anticompetitive, at least in that market. See 49 C.F.R. § 1180.1(c)(2)(i) ("If two carriers serving the same market consolidate, the result would be the elimination of the competition between the two"). Because of the importance of both Kansas City and St. Louis as busy rail gateways, the Board should not ignore any adverse competitive effects in the Kansas City-St. Louis rail corridor.

The ICC was always especially vigilant with respect to rail competition between the Kansas City, St. Louis, and Chicago markets. In UP/C&NW, the ICC recognized that the merger of two potential competitors could be "problematic" with respect to the St. Louis-Chicago and Kansas City-Chicago corridors, but its concerns were allayed by the fact that, post-merger, there still would be six rail carriers serving the St. Louis-Chicago corridor and six serving the Kansas City-Chicago corridor. UP/C&NW, slip. op. at 70.[21]

---

[21] It is clear in the case of those three gateways that the "relevant market" for purposes of competitive analysis is freight rail transportation. While Chicago, Kansas City and St. Louis are all close enough to each other for truck service to be used between those points, the ICC, in analyzing competition in UP/C&NW between those three points, focused just on intramodal rail competition. That is (continued...)

In contrast, if approved by the Board, the UP-SP merger would reduce the number of rail carriers serving the Kansas City-Chicago and Kansas City-St. Louis corridors to only four in each of those important corridors. The merger proposal thus raises a red flag as far as competitive effects are concerned in those corridors, according to authoritative testimony presented in this proceeding.[22]

This is especially true for the Kansas City-St. Louis rail corridor. As the STRICT comments showed, and figures previously cited herein demonstrate, the merger of UP and SP could result in the Applicants' rail market share between those two points exceeding { } percent. See STRC-8 at 39-40.[23] Coupled with the handicaps the Applicants' competitors in the corridor face, see STRC-8 at 38-40, there is a very real possibility that the proposed merger

---

[21](...continued)
consistent with the ICC's approach in defining the parameters of a relevant market to take into account "commercial realities." See, e.g., Soo/Milwaukee, 2 I.C.C.2d at 222. The commercial reality with respect to Kansas City, Chicago and St. Louis is that those points are the preeminent rail gateways, and thus any proposal which would result in an appreciable diminution in rail competition in those markets merits strict scrutiny.

[22] See NITL-10, Verified Statement of William G. Shepherd at 17 (each reduction below five in the number of competitors holds out the potential for a significant loss of competition). That reduction may not be a concern in the Kansas City-Chicago corridor, because BN/Santa Fe will continue to own the best routes between those two points, and the Soo Line Railroad Company route between Kansas City and Chicago will continue to be much more direct than any of the routes that will be owned post-merger by the Applicants.

[23] Applicants' Rebuttal does not argue with this figure, but instead attempts to muddy the waters by stating that "SP handles a mere 2% of the total business moving between Kansas City and St. Louis and points east." UP/SP-230 at 299 (emphasis added). That is not surprising, because SP's east-west Missouri route goes no farther east than the St. Louis area; it is hardly relevant, however, to the clear reduction in rail competition between Kansas City and St. Louis that will occur as a result of the merger.

will lead to a significant reduction in competition in the Kansas City-St. Louis rail market.

Moreover, Applicants' plans to retain the end segments of the SSW Kansas City-St. Louis line have the potential for additional harmful effects in the corridor. If the Application is approved without the conditions requested by STRICT, not only will the Applicants consolidate their present operations in the Kansas City-St. Louis corridor, but they will also be able to ensure that the SSW line in the corridor can never be used on a single-line basis by a competitor to connect those important rail gateways.[24]

While the line has not been used in such a fashion in a number of years, at present there still is the potential for one carrier to do so. Although disgracefully neglected, the line has not been formally abandoned. If the Application is approved without the requested conditions, however, and the Applicants implement their "plans" for the line, the probability of the line ever being used for service over its entire length drops dramatically.

That is because Applicants, with their own MPRR lines between Kansas City and St. Louis, will resist entering into any arrangement which would permit another carrier to provide unrestricted single-line and joint-line service of all kinds over the SSW line between and through the Kansas City and St. Louis gateways. Given the clear probability of such a scenario, the Board is obligated to seriously consider it in deciding whether to grant unconditioned merger authority to the Applicants with respect to their Kansas City-St. Louis rail operations. <u>See</u> <u>Union Pacific Corp., Union Pacific Railroad Co. and Missouri Pacific Railroad Co.--Control--Missouri-Kansas-Texas</u>

[24] Ironically, no less an authority than Applicants' trackage rights partner BN/Santa Fe trumpets the competitive importance of a rail carrier being able to reach <u>both</u> Kansas City and St. Louis. <u>See</u> BN/SF-54, Second Verified Statement of Neal D. Owen at 16.

Railroad Co., 4 I.C.C.2d 409, 436 (1988) (serious competitive problems presented by parallel rail mergers requires that post-merger competitive environment be carefully examined), petition for review dismissed sub nom. Railway Labor Executives Association v. ICC, 883 F.2d 1079 (D.C. Cir. 1989).

The very prospect of the potential for suppression of competition in the Kansas City-St. Louis rail corridor led the ICC in Tucumcari to directly address the issue of whether the carrier that owns the MPRR rail lines between Kansas City and St. Louis should also be permitted under the policies of the antitrust laws to take possession of what is now the SSW line. In circumstances strikingly similar to those presented by the Application, the ICC emphatically denied such an acquisition as not only contrary to the public interest, but possibly as being an outright violation of the antitrust laws. See Tucumcari, 363 I.C.C. at 404-07.

MPRR, which is now a part of the UP rail system but at that time was still an independent rail carrier, filed a competing application in Tucumcari to purchase the Rock Island's Kansas City-St. Louis line. That MPRR had no valid need for a third line between Kansas City and St. Louis quickly became clear from the content of its competing application. Id. at 405-06.[25]

The ICC wasted little time disposing of MPRR's application as a blatantly anticompetitive tactic, holding that the MPRR competing application had been "submitted principally for anticompetitive reasons" and thus could not be granted. Id. at 407. The ICC was clear regarding the anticompetitive

---

[25] The fact that MPRR already possessed two of the most direct routes between Kansas City and St. Louis did not prevent MPRR from filing such an application; indeed, that is the primary reason MPRR filed the application. MPRR admitted that approval of its application instead of SSW's primary application for the Rock Island Kansas City-St. Louis line would have prevented the line from becoming part of the SP rail system and thus have prevented it from being used to divert traffic from MPRR. Tucumcari, 363 I.C.C. at 404.

nature of MPRR's application. The ICC explained that it could not lawfully permit the acquisition of a parallel line when that line could otherwise be used in competition against the carrier applying to purchase the line. The ICC went so far as to imply that MPRR's designs on the Rock Island line were violative of the antitrust laws, stating that in light of "the competitive considerations enunciated in Section 7 of the Clayton Act," 15 U.S.C. § 18, "[t]he anticompetitive effects resulting from the acquisition of a bankrupt carrier's parallel line for the purpose of eliminating competition are contrary to public policy." Tucumcari, 363 I.C.C. at 407.

There are substantial grounds for the Board to simply rely on the ICC's previous findings, and hold that it would be just as anticompetitive for UP, which now controls the MPRR lines, to be permitted to acquire the SSW Kansas City-St. Louis line as it would have been to permit MPRR to have done so. Most if not all of the facts remain the same. The MPRR lines remain the preferred lines of shippers in the Kansas City-St. Louis corridor, yet UP has applied to acquire the SSW line in the corridor as well, with an almost identical justification to the one unsuccessfully presented to the ICC by MPRR. See STRC-8 at 44. It is thus clear that the Application in this proceeding is designed to accomplish what MPRR's competing application in Tucumcari was unsuccessful in doing, which is to prevent any other party from acquiring the entire former Rock Island Kansas City-St. Louis line and thus suppress potential competition in that important rail corridor. The ICC saw through MPRR's application for the anticompetitive tactic that it was; the Board should do the same with respect to the merger application in this case.

Indeed, because MPRR is one of the carriers seeking merger authorization in this proceeding, there is a very sound basis for the Board to simply hold that, under the doctrines of res judicata and collateral estoppel, the

Applicants cannot be allowed to acquire the SSW Kansas City-St. Louis line through merger because of the preclusive effect of the ICC's decision in Tucumcari denying MPRR's competing application in that proceeding. To do otherwise, and to grant MPRR and the other Applicants merger authorization with respect to that SSW line, would nullify the ICC's strong statements in Tucumcari regarding the lawfulness and competitive impact of such an acquisition.

The related doctrines of res judicata and collateral estoppel are unquestionably applicable to an administrative proceeding, including this one. In explaining the doctrines, the Supreme Court has stated "that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise," regardless of whether the proceeding is that of a court or of an administrative agency. See Astoria Federal Savings and Loan Association v. Solimino, 501 U.S. 104, 111 S. Ct. 2166, 2169 (1991). As the ICC recognized, in the latter instance the doctrine of res judicata "applies when the agency is acting in a judicial capacity and resolves disputed issues of fact properly before it that the parties had an adequate opportunity to litigate." General American Transportation Corp. v. Indiana Harbor Belt Railroad Co., 3 I.C.C.2d 599, 616 (1987) (citing United States v. Utah Construction, 384 U.S. 394, 421-22 (1966)). Because the ICC definitively decided in Tucumcari that it is contrary to the public interest to permit the SSW Kansas City-St. Louis line to be controlled by the same party that controls the two MPRR Kansas City-St. Louis lines, the Board should not even consider Applicants' implicit request that the ICC's decision on this issue be overturned in this proceeding.

Res judicata is clearly applicable in this instance, because Applicant MPRR had ample opportunity in the Tucumcari proceeding to convince the ICC that it should be permitted to acquire the SSW line, and in fact filed an application to do so. The ICC, acting in a judicial capacity, clearly found against MPRR on the issue.

In this proceeding, MPRR has returned with the other Applicants to request authorization for, among many other things, control of both the MPRR lines and the SSW line.[26] Applicants have thus made a claim that is "identical in substance" to a claim previously raised by Applicant MPRR and denied by the ICC, and therefore should be precluded from raising that claim before the Board. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979) (judgement on merits in prior suit bars second suit involving same parties or their privies). It is hard to imagine a more vivid example of an instance in which the doctrine of res judicata would better its serve its intended purpose.[27]

---

[26] Applicants' Rebuttal attempts to claim that res judicata is not applicable because of the difference between the Application and the MPRR responsive application in Tucumcari. See UP/SP-230 at 299. Applicants cite no authority for such a proposition and STRICT has yet to locate any. The fact that the merger Application requires the Board to address many more issues than the MPRR responsive application required the ICC to address in Tucumcari is irrelevant for purposes of res judicata, as the anticompetitive nature of the proposal remains the same regardless of the other issues the Board must address in this proceeding.

[27] In addition, Applicants are collaterally estopped from raising the issue of whether it is anticompetitive for the same carrier to own both the MPRR lines and the SSW line between Kansas City and St. Louis. Applicant MPRR litigated this issue before in Tucumcari and lost. Just because STRICT and any other parties in this proceeding who oppose this aspect of the Application may be different adversaries than MPRR had in Tucumcari does not mean that the Applicants are free to relitigate the issue. All litigants are to be protected from relitigating an identical issue with the same party or his privy. See Parklane Hosiery Co. v. Shore, 439 U.S. at 329 (collateral estoppel precludes parties from relitigating identical issues by merely switching adversaries).

III. The Conditions Requested Are Appropriate in Light of the Serious Public Harm Identified

As was stated, STRICT is not suggesting that the Application be totally denied on the basis of the public harm that may result from a grant to the Applicants of authorization to carry out their plans with respect to the SSW Kansas City-St. Louis line. Rather, the Board, through its power to impose conditions, can act in this proceeding to require Applicants to divest that line and thus prevent the clear public harm that will sooner or later flow from Applicants' suppression of potential competition. The Board in making this determination can also consider the potential for economic development of deprived areas in Missouri if the SSW Kansas City-St. Louis line is saved for operation by an independent operator, and the harm that will occur if this potential is snuffed out.

Briefly summarized, the proposed conditions will permit an interested party to acquire the SSW Kansas City-St. Louis line as a single unit, along with accompanying trackage rights. The trackage rights at issue are those which were originally granted to Rock Island in connection with its operation of its Kansas City-St. Louis line, and thus were assigned to SSW as a result of its acquisition of that line, as well as those trackage rights that SSW subsequently acquired in the course of its ownership of the line in furtherance of its limited operations over the eastern segment of the line in the St. Louis area.

A. The Conditions Requested are Designed to Address Harms That are Clearly Related to the Merger

In its request for conditions, STRICT provided extensive evidence and discussion of how the conditions requested met the four prerequisites the ICC first set forth in <u>UP/MP/WP</u> for the imposition of such conditions, previously quoted herein. See STRC-8 at 52-68. Apart from Applicants' feeble attempts to justify their plan to retain the end segments of the SSW Kansas City-St. Louis line, Applicants' Rebuttal presented no argument on this point. Rather, Applicants simply made the unsupported claim that the need for the requested conditions is unrelated to the proposed merger. See UP/SP-230 at 300.

Applicants are flatly wrong on this point. They ignore the fact that the two carriers which strenuously compete in the Kansas City-St. Louis rail corridor will be combining operations after the merger, thus extinguishing one of the competitive rail options between those two important points and creating the carrier that will overwhelmingly dominate traffic in the corridor. In addition, the combined carrier will control the potential alternative route provided by the SSW Kansas City-St. Louis line, for which it, unlike SP,* will have absolutely no use.

Belying the contention by Applicants that the proposed conditions should not be considered in this merger case by the Board, there is very recent precedent for imposition of conditions where a merger would result in an increased opportunity for post-merger suppression of competition. Moreover, in that case, UP/CNW, the ICC expressly rejected the applicants' claims that such a harm could not be viewed as merger-related.

In UP/C&NW, it was recognized that control of C&NW by Union Pacific would create the preeminent rail routing in the Upper Midwest-South Central Corridor, because of the unique ability of UP and C&NW to provide the equivalent of single-line service in that corridor. At the same time, it was

---

* Whereas SP has a plausible reason to retain the right to operate over the eastern segment of the SSW line, in order to serve Union Electric at Labadie, post-merger that justification vanishes, because Union Electric can and most likely will receive all of its rail service over the MPRR lines. Consequently, Union Electric now supports the proposed merger. See UP/SP-195, Verified Statement of Udo A. Heinze.

found that the transaction would broaden the circumstances in which there would be an incentive for UP to exercise veto power granted to C&NW in certain C&NW-Soo Line joint track agreements with respect to Soo Line's right under the agreements to admit other carriers onto the C&NW/Soo Line joint track. The ICC held that because C&NW's veto power could potentially be used by UP to prevent competitive responses to UP's new single-line service, it would condition its approval of UP's control of C&NW on the termination of that veto power. See UP/C&NW, slip. op. at 89-91. In so doing, the ICC rejected claims that the harm which the condition was designed to ameliorate was not merger-related. See id. at 90.

In other words, the ICC, with respect to a market in which there was already a number of other rail competitors, conditioned its control approval so as to prevent the applicants from being able to act to suppress competition in the future by keeping new entrants out of the market at issue. That is the exact type of condition that is being requested by STRICT; moreover, in this case there is overwhelming evidence, from the structure of the Application, that the Applicants are already taking steps to suppress future competition.

The ICC correctly recognized in UP/C&NW that if a rail carrier has the ability to suppress competition in a market it will do so, and that, when possible, merging carriers should be prevented by the imposition of merger conditions from using that ability. In this proceeding, the Board has the power, by ordering divestiture of the SSW Kansas City-St. Louis line in its entirety, to deny the merging carriers the ability to prevent that line from being used in the future as a competitive alternative in the Kansas City-St. Louis rail corridor. Thus, Applicants' claim that the harm STRICT's requested conditions are designed to address is not merger-related is just as spurious as a similar claim many of the same applicants made in UP/CNW, if not more so.

B. The Requested Conditions Satisfy <u>All Four of the Board's Standards</u>

As STRICT demonstrated in its request for conditions, the proposed conditions will not only foster divestiture of a line marked for extinction by Applicants, but are also consonant with the Board's standards for the imposition of merger conditions, previously set forth herein. Much of the foregoing discussion has been devoted to showing that the Applicants' post-merger plans with respect to the SSW Kansas City-St. Louis line will plainly result in effects that are harmful to the public interest in competitive rail transportation service in the important Kansas City-St. Louis rail corridor, thus satisfying the Board's first standard.

With respect to the Board's second standard, it is clear that the requested conditions will at least ameliorate, if not entirely eliminate, those harmful effects. As stated, the harm of the merger in the Kansas City-St. Louis corridor is that it will give the Applicants, who have no other significant use for the SSW Kansas City-St. Louis line but will be after merger the dominant carrier between Kansas City and St. Louis, the ability to prevent any other party from putting the SSW line in the corridor to its highest and best use as a single-line route between Kansas City and St. Louis. What the requested conditions are designed to accomplish is creation of the opportunity for a new carrier to succeed to the former Rock Island's facilities and rights in the Kansas City-St. Louis market and thus make it possible for another carrier to take the place of SSW, while at the same time improving local service that has been disgracefully neglected by SSW.

With regard to the third standard of operational feasibility, STRICT demonstrated in support of its request for conditions that there is no issue regarding the operational feasibility of the conditions, as divestiture of rail lines has long been recognized as an appropriate merger condition and because the line at issue is easily severable from the Applicants' post-merger rail system. See SIRC-8 at 59-61. Applicants' Rebuttal recognizes as much; it takes serious issue only with those divestiture proposals covering Applicants' lines in Texas, Arkansas and Louisiana, as well as those for Applicant DRGW's lines. See UP/SP-230 at 29-31.

The Board should not confuse feasibility of the conditions requested with the feasibility of rail operations contemplated by the conditions, as it is only the former that is relevant under ICC precedent. As STRICT predicted in requesting the imposition of conditions, Applicants' Rebuttal attempts to disparage the physical condition of the SSW Kansas City-St. Louis line, but entirely fails to provide any evidence on the issue. See UP/SP-230 at 298-99.[3] While that may be expected of rail carriers that are working for the destruction of a competitive alternative, it is a position that is contradicted by the actions, past and present, of many of the Applicants.

First of all, Applicants must be referring to the middle segment of the SSW line, between Pleasant Hill and Owensville, as beyond "economic rehabilitation," since Applicants have stated an intention to rehabilitate the

[3] The party line now is that the SSW rail line has been found to "have deteriorated beyond economic rehabilitation." UP/SP-232, King R.V.S. at 51; see also UP/SP-232, Rebuttal Verified Statement of Michael D. Ongerth at 95. It is almost comical to read Applicants' Rebuttal citing the paving over of grade crossings on the line as a reason the line cannot be rehabilitated, when it is Applicant SSW, the owner of the line, that permitted such to occur.

western end of the line for rail operations,[30] and since operations are currently conducted on the eastern end. Otherwise, Applicants would not be proposing to retain those segments post-merger.

As for the middle segment, it is true that trains have not operated over much of that segment since SSW took possession in 1980 following the ICC's decision in Tucumcari.[31] It was in that proceeding that both SSW and MPRR made sworn representations to the ICC regarding the feasibility of operating the entire Kansas City-St. Louis line. As neither carrier has yet to formally withdraw its previous statements on the issue, the Board is left with deciding whether to credit the previous testimony of Applicants SSW and MPRR or accept the unsupported and clearly self-serving statements contained in Applicants' Rebuttal. Given the Applicants' past history on this issue, as well as their interest in seeing the SSW line destroyed in major part, STRICT urges the Board to hold the Applicants to their prior testimony on this issue, at least until such time that Applicants come forward to formally withdraw it.

Finally, as detailed in STRC-8, it as indisputable that the public benefits which will result from the Board's imposition of the requested conditions will greatly outweigh any harm to the merger from those conditions, thus satisfying the Board's fourth and final standard. See STRC-8 at 61-68. There simply will be no harm to the merger from the requested conditions. Moreover, substantial and significant public benefits will flow from

---

[30] At some unspecified time in the future beyond UPRR's current five-year plan, insofar as the western end of the line is concerned. See STRC-8 at 26.

[31] The lack of rail operations simply means that the condition of the line segment has not appreciably worsened due to wear and tear since that time. STRICT is not as fearful as Applicants are that the growth of vegetation on the right-of-way since the line was acquired by SSW will prevent the line from being returned to service. See UP/SP-230 at 298. That can be dealt with more easily than the recalcitrance of Applicants to sell the line to someone who will operate it.

imposition of the requested conditions upon approval of the merger. Applicants' Rebuttal did not take issue with this assessment of the conditions requested by STRICT, and the conditions requested would satisfy one of the primary concerns expressed by Missouri's governor about the proposed merger.

It cannot be denied that the conditions STRICT is requesting are in actuality market-based, pro-competitive solutions to an issue that needs to be addressed in this proceeding. Simply put, if the entire SSW line between Kansas City and St. Louis is made available for acquisition, along with accompanying trackage rights, it is the market for rail service which will ultimately decide the need for and value of the line. If there is no market for the reactivation of rail service over the line, it will not occur, leaving the Kansas City-St. Louis rail corridor no different than it would be if the Application is granted without the conditions requested by STRICT.

If, however, Applicants are wrong, and there is, as there was in the past, a market for local and single-line service over the SSW line between Kansas City and St. Louis, the market for such service should be permitted to freely operate, and the entire SSW line should be conveyed as a single unit. It is STRICT's view that the fact that Applicants have been fighting so hard to prevent that from occurring provides the Board with a significant indication of the Applicants' true feelings on whether the SSW Kansas City-St. Louis line can be resuscitated. Consequently, the Board should permit the market for rail service to decide this issue and impose the conditions STRICT has requested, in the absence of any sensible alternative proposed by the Applicants.

CONCLUSION

The Board has a wonderful opportunity to show its sensitivity to public needs in this proceeding by imposing the conditions suggested by STRICT. Imposition of the conditions will not be harmful to Applicants, yet will give the deprived economy of central Missouri a way to bootstrap out of depressingly high rates of rural poverty and unemployment. Failure to impose the conditions will reduce the potential for competition in this corridor, and most of the line will be ripped up. The choices available to the Board have seldom been as starkly juxtaposed as here. What is being requested by STRICT is a hand - not a handout.

WHEREFORE, the foregoing considered, STRICT requests the Board to condition approval of the Application as requested herein, or alternatively to deny the Application because granting it without the conditions requested would be inconsistent with the public interest. STRICT also requests that the Board grant such other, further, and general relief to which STRICT may, in the circumstances, be entitled.

Respectfully submitted,

SAVE THE ROCK ISLAND COMMITTEE, INC.,

By ______________________
William P. Jackson, Jr.
Its Attorney

OF COUNSEL:

JACKSON & JESSUP, P.C.
Post Office Box 1240
Arlington, VA 22210
(703) 525-4050

[redacted]

<u>APPENDIX OF DEPOSITION TRANSCRIPT EXCERPTS</u>

<u>Deponent</u>	<u>Deposition Date</u>	Transcript <u>Pages</u>	Confidentiality <u>Designation</u>
R. Bradley King	Feb. 9, 1996	581, 589, 597, 607, 609	Public
John H. Rebensdorf	May 13, 1996	1 through 12	Highly Confidential (Redacted from this copy)

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, February 9, 1996

Deposition of R.B. (BRAD) KING and MICHAEL D. ONGERTH, witnesses herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witnesses having been previously duly sworn, taken at the offices of Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C., 20044, at 9:10 a.m., Friday, February 9, 1996, and the proceedings being taken down by Stenotype by FERNITA R. FINKLEY and CRAIG KNOWLES and transcribed under their direction.

Island Line that S.P. owns under the S.S.W. name. It runs between the Kansas City area and St. Louis area.

Are you familiar with that line?

A. (Mr. King) Well, just having seen it on a map or something.

Q. Okay. Well, I will ask you first, Mr. King, are you familiar with U.P.'s plans, either as a result of the merger or independent of the merger to purchase and operate what I will call the western end of the line, it can extend east from Kansas City for a length of about 25 miles or so.

A. (Mr. King) Not really. John Rebensdorf would probably be more familiar with it.

Q. Okay. I take it then that operations over this line were not contemplated as part of the operating plan?

A. (Mr. King) Not that I am aware of, no.

Q. And the operating plan I believe the application represents is a, based on the assumption that it will be implemented within five years, is that correct?

A. (Mr. King) Yes.

Q. On page 118 of the operating plan under rehabilitating it for overhead traffic?

A. (Mr. Ongerth) I have never actually seen the study.

I have seen and talked with people about the conclusions in the study. And my understanding of that study is that it was done, the study focused on rehabilitating that line as a through route for overhead traffic.

Q. Okay.

A. (Mr. Ongerth) In the course of doing that you would also put it back into service.

Q. Right.

A. (Mr. Ongerth) For whatever local traffic you might find.

Q. Regarding the western end of the line, maybe Mr. King is best suited to answer this, that would be common team number 4 that, if it considered it, would have been the team to consider that?

A. (Mr. King) I don't remember the number. There was a team that had Kansas City in that area, and whether they looked at it or not I don't recall.

Q. If they did would that consideration appear in the work papers?

BY MR. SULLIVAN:

Q. Okay.

A. (Mr. Ongerth) I will confirm that there is nothing on the map east of P. Hill to Owensville.

Q. Okay. We can turn now, Mr. King, feel free to jump in here, but I think your testimony yesterday was that Mr. Ongerth was responsible for abandonments under the operating plan, is that correct?

A. (Mr. King) I think I said he was involved with it.

Q. Okay.

A. (Mr. King) Whereas, I was not.

Q. Okay. What was, Mr. Ongerth, what was the extent of your involvement in deciding, I will just say under the area of abandonments?

A. (Mr. Ongerth) First, the line rationalization group at Southern Pacific is under my direct jurisdiction.

Q. Yes.

A. (Mr. Ongerth) Report directly to me. And I am corporate vice president that has overall responsibility for line rationalization at S.P.

So all of the decisions relative to which

A (Mr. Ongerth) I haven't studied that part. Post-merger, it's not my decision. I don't know what my role will be post-merger.

Q. Understood.

Mr. King, do you know anything about this subject.

A. (Mr. King) What his role will be?

(Laughter.)

BY MR. SULLIVAN:

Q. No, I mean the future of the Rock Island Line.

A. (Mr. King) No, I don't.

Q. Would Mr. Rebensdorf know about that?

A. (Mr. King) He could. I don't know.

Q. As you can see, Mr. Ongerth, there were two recommendations made in that last paragraph under S.F. Lackland yard. You stated that the abandonment recommendation regarding the line west of Airpark was rejected.

What about the other recommendation that Airpark, which I believe can be summarized as Airpark and east, you should find an alternative operator for that, were you involved in that -- recommendation?

A. (Mr. Ongerth) No, I was not involved in we short-line that section.

I know of no discussions that involve putting a short line or regional carrier in place on this line.

Q. I take it, Mr. King, that you don't know anything about such discussions, either?

A. (Mr. King) No, I don't.

MR. HEMMER: At this point you better put the period after "anything."

(Laughter.)

MR. KING: I thought that was where he was going. I was going to be offended.

MR. SULLIVAN: A second.

(Pause.)

BY MR. SULLIVAN:

Q. Mr. Ongerth, going back a few minutes to what we started to discuss, which was the determination of abandonments, of what should be abandoned, as opposed to what shouldn't, would that determination have first been made like in this case, at the common point team level?

A. (Mr. Ongerth) This is a much more strategic type of decision, and that was made at a higher level.

Abandonments were handled outside of the

CERTIFICATE OF SERVICE

I, William P. Jackson, Jr., counsel for Save the Rock Island Committee, Inc., certify that on this 3rd day of June, 1996, I caused a copy of Brief of Save the Rock Island Committee, Inc., to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery, on all known parties of record in Finance Docket No. 32760. Only outside counsel and counsel for governmental agencies appearing on the restricted service list established pursuant to paragraph 9 of the Discovery Guidelines served December 7, 1995, in this proceeding were provided an unredacted copy containing material designated in the proceeding as "Confidential" or "Highly Confidential."

W. P. J.

William P. Jackson, Jr.

6-3-98 83749

LAW OFFICES
JACKSON & JESSUP, P.C.
3426 NORTH WASHINGTON BOULEVARD
POST OFFICE BOX 1240
ARLINGTON, VIRGINIA 22210
(703) 525-4050
TELECOPIER
(703) 525-4054
INTERNET
TRANSLAW@DOS.DGSYS.COM

WILLIAM P. JACKSON, JR.
DAVID C. REEVES
JOHN T. SULLIVAN
JOHN R. COPLEY

GERALD E. JESSUP
(1911-1994)

June 3, 1996

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
12th & Constitution Ave., N.W.
Washington, DC 20423

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

Dear Mr. Williams:

Enclosed for filing in the referenced proceeding is the Brief of Save the Rock Island Committee, Inc. (STRC-12). The original and 20 copies of STRC-12 are being filed under seal because they contain material designated as "Confidential" and "Highly Confidential" by the Applicants in the proceeding. An additional 20 copies of STRC-12 redacted for filing on the public record are also enclosed. Also enclosed are two 3.5-inch disks, one containing the redacted version of the text of STRC-12 and the other containing the confidential version of the text of STRC-12, each in WordPerfect 5.1 format.

The confidential version of STRC-12 is being served only upon such parties of record that appear as outside counsel or counsel for governmental agencies on the restricted service list established pursuant to the discovery guidelines served December 7, 1995, in this proceeding. All other parties of record have been served with the version of STRC-12 that is being filed on the public record.

Please acknowledge the receipt and filing of STRC-12 by receipt stamping the copy of this letter, the extra copy of the confidential version of STRC-12, and the extra copy of the redacted version of STRC-12 enclosed for that purpose and returning them to me in the enclosed self-addressed, postage prepaid envelope.

Very truly yours,

William P. Jackson, Jr.

WPJ/jmb

Enclosures
cc: Mr. Bruce Hanson
Mr. Jack Wright

STB FD 32760 6-1-96 83897

83897

STTX-7

RECEIVED
JUN 1 1996
MAIL MANAGEMENT
I.C.C. 7

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

STATE OF TEXAS' BRIEF IN OPPOSITION OF MERGER

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

LAQUITA A. HAMILTON
Deputy Attorney General for Litigation

Communications with respect to this document should be addressed to:

THOMAS P. PERKINS, JR.
Assistant Attorney General
Chief, Consumer Protection Division

MARK TOBEY
Assistant Attorney General
Deputy Chief for Antitrust

REBECCA FISHER
AMY KRASNER
WESLEY OLIVER
Assistant Attorneys General
Antitrust Section
P.O. Box 12548
Austin, TX 78711-2548
(512) 463-2185
(512) 320-0975 [FAX]

ENTERED
Office of the Secretary
JUN 3 1996
5 Part of Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

STATE OF TEXAS' BRIEF IN OPPOSITION OF MERGER

I. STATEMENT OF FACTS

On November 30, 1995, the Union Pacific Corporation, the Union Pacific Railroad Company, and the Missouri Pacific Railroad Company (collectively "UP") and the Southern Pacific Rail Corporation and its subsidiaries (collectively "SP") have requested approval of their consolidation, which, if approved, would create the largest railway system in the country, serving 25 states, Mexico and Canada. Of the 31,000 joined miles in the proposed merged system, approximately 7,000 (or 22 percent) are in Texas, extending into almost every corner of the state. The Applicants have requested the Surface Transportation Board ("The Board") approve their merger along with the terms of a settlement agreement reached with Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company ("BNSF") which currently operates the largest rail network of all Class I railroads. The proposed settlement agreement would grant BNSF trackage rights of approximately 3,500 miles over the UP/SP system, while divesting only 335 miles to BNSF. One-third of the proposed trackage rights to BNSF are in Texas. Applicants have also requested that the Board approve the merger conditioned on a settlement agreement between themselves and the Chemical Manufacturers Association, dated April 18, 1996, which provides some additional trackage rights to BNSF and provides more detail for the BNSF settlement agreement. Earlier agreements between BNSF and UP and between BNSF and SP provided for exchange of substantial trackage rights between the potential duopolists.[1]

More than 300 entities or individuals are parties of record in this proceeding, and approximately 130 filed comments. Most comments have expressed concerns about the proposed transaction, while many have indicated unequivocal opposition.

II. SUMMARY OF THE STATE OF TEXAS' POSITION

There is no dispute that the Board's ultimate mandate is to determine if the proposed transaction is within the public interest. However, opinions diverge in defining and weighing the determining factors.

Analysis of this merger convinces the State of Texas the most crucial factor to define and weigh is "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region." 49 U.S.C.A. §11344(b)(1)(E). The railroad industry is already highly concentrated. Applicants propose the Board approve the merger and create a duopoly in two-thirds of the U.S. and in virtually the entire state of Texas. The history of the

[1] In August, 1995 the Interstate Commerce Commission ("ICC") approved the BNSF merger and as part of that proceeding, the BNSF and the Applicants entered into settlement agreements whereby BNSF granted trackage rights to UP and SP which totaled approximately 4,000 miles of track. *See Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and the Atchison, Topeka and Santa Fe Railway Company.* Finance Docket No. 32549 (I.C.C. Decision No. 38, served Aug. 23, 1995) at Appendix B: Settlement Agreements, p. 121. ("*BNSF*").

railroad industry, economic theory, antitrust policy, shippers' experience, and case law all buttress the presumption that market concentration creates an environment conducive to the use and abuse of market power by the two remaining players. The potential for such unfettered exercise of market power is anathema to free enterprise, is the bedrock of antitrust concerns and cannot be in the public interest. Therefore, the State of Texas believes the Board should deny the application to merge.

III. ANTICOMPETITIVE EFFECTS

A. MARKET CONCENTRATION AND THE CREATION OF MARKET POWER

By confining competitive harm assessment to specific points, Applicants have attempted to minimize the proposed transaction's potential anticompetitive effects, thereby minimizing the weight such effects will bear in the Board's decision. UPSP claim that, unlike prior merger applicants, they have addressed all anticompetitive effects head-on by devising the settlement agreement with BNSF. However, Applicants ignore the fact that this proposed transaction--at best--creates a duopolistic rail system in Texas while either building or entrenching a duopoly in the remaining western United States. They refer to precedent and policy, failing to even acknowledge, much less address, the fact that no other requested or approved consolidation has created this level of market concentration over such a large geographic area.

The Board cannot accurately determine the proposed transaction's adverse effects on competition by myopic assessment of specific points and individual shippers. An assessment of this proposed merger's immense potential for anticompetitive harm requires the Board to take a more global approach--one that integrates economic theories and antitrust principles in analyzing the expected public effects of increased market concentration.

Both the National Association of Attorneys General Horizontal Merger Guidelines and the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines encapsulate these theories and principles. Such principles include the "...presumption that an increase in market concentration increases the likelihood and degree to which competition in the industry is adversely affected" and that the increase in concentration which results from horizontal mergers "can allow firms to attain market power or monopoly power, raise prices to consumers above competitive levels and lessen competition. In economic terms, market power is the ability of a firm to raise or maintain prices to consumers above competitive levels and lessen competition." National Association of Attorneys General Horizontal Merger Guidelines, adopted March 30, 1993. ("NAAG Merger Guidelines"). *See, also,* Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, released April 2,1992. ("DOJ Merger Guidelines").

Economic and antitrust scholars, as well as antitrust enforcers and regulators, have identified the perils attendant to market concentration and increased market power in the railroad industry.[2] Even scholars who disagree about the efficacy of transportation regulation agree that a major public harm is the uncontrolled market power that usually accompanies high market concentration. Professor Robert M. Hardaway,[3] in a 1985 article was extremely

---

[2] Indeed, Dr. Robert D. Willig, one of Applicants' retained experts observed that "The view that a reduction in the number of firms facilitates coordinated use of assets among the incumbent firms is a rock upon which much of industrial economics has been built. Consistent with this view is the economic theory underlying the [DOJ] Guidelines; that the main evil of horizontal mergers is their potential of facilitating oligopolistic cooperation leading to elevated prices and resource misallocation." Janusz A. Ordover and Robert D. Willig, *The 1982 Department of Justice Guidelines: An Economic Assessment,* Cal. L. Rev. 555 (1983).

[3] Robert M. Hardaway, at the time of this writing, wasan Associate Professor at University of Denver College of Law with a B.A. from Amherst College and a J.D. from New York University.

critical of railroad regulation. However, he identified the crucial reason why the industry needs regulation, albeit limited:

> [The fact that regulation has been misapplied in the past] does not mean that economic regulation should not play an important role in a mixed economy...Since [perfectly competitive] markets rarely occur, it follows that equilibrium in imperfectly competitive markets can result in economically and socially harmful resource misallocation. The textbook definition of an imperfectly competitive industry is an industry where an individual seller controls such a large percentage of the total market that it can affect the price of a product by restricting or expanding its own production. In such an oligopoly (or monopoly) the equilibrium point of supply and demand does not result in maximum production or efficiency because it is always to the imperfect competitor's advantage to keep prices above marginal cost by restricting production. With no need to cut price in order to increase quantity, the incremental marginal revenue of each additional unit produced is 'precisely the price received for that last unit, with no loss on previous units being subtracted.' Therefore an oligopolistic producer 'maximizes profits by equating marginal revenue to marginal costs, which leads to a price that is above marginal cost... the canny seller contrives an artificial scarcity of his product so as not to spoil the price he can get on the earlier premarginal units.' [Footnotes omitted].

Robert M. Hardaway, *Transportation Deregulation 1976-1984: Turning the Tide*; 14 TRANSP. L.J. 101, 107 (1985).

Professor Paul Dempsey, a noted transportation expert,[4] expressed an opposing opinion about the role of rail regulation but identified, as had Professor Hardaway, that the effect of increased market concentration was injurious to the public.

> If this trend [of increased concentration] continues unabated the resultant monopolies and oligopolies will be the death knell of meaningful competition, perhaps leading to a return to the market problems that preceded regulation...The public will have been ill-served by deregulation should the trend be an oligopoly of megacarriers. If air, rail and motor carrier deregulation is construed broadly to embrace not only reform of economic regulation, but erosion of antitrust standards as well, then concentration most

---

[4] Paul Stephen Dempsey is Professor of Law and Director of the Transportation Law Program at the University of Denver. He formerly served as an attorney with the Civil Aeronautics Board and the Interstate Commerce Commission in Washington, D.C. and has written six books and more than fifty law review and professional journal articles.

> surely is inevitable. With the market power engendered by increased concentration, transportation prices will rise while service declines, wealth will be transferred from consumers to producers. [Footnotes omitted].

Paul Stephen Dempsey, *Antitrust Law and Policy in Transportation: Monopoly is the Name of the Game*, 21 GA. L. REV. 505, 589 (1987).

The railroad industry has experienced the negative effects of excessive market concentration. Congress established the Interstate Commerce Commission ("ICC"), this nation's first independent regulatory agency, in 1887 in response to rail carriers charging exorbitant rates in monopoly and oligopoly markets, and predatory rates in competitive markets. Three years later, Congress enacted the first federal antitrust statute, the Sherman Act, because of the intensifying concentration of market power in several industries, including railroads. In fact, one of the first cases interpreting the Sherman Act involved an association of railroads whose members illegally agreed to control and maintain freight rates to avoid rigorous competition.[5] In further response to increasing consolidation and market abuses in the rail industry, the State of Texas established the Texas Railroad Commission in 1891.

Market abuse is not just of theoretical or historical interest. It is of direct concern to shippers, the consumers of rail service. In written comments to the House of Representatives' Transportation and Infrastructure Subcommittee On Railroads, the Chemical Manufacturers Association ("CMA") clearly articulated this concern:

> CMA supported the Staggers Rail Act of 1980 as a means to revitalize the rail industry from the severe physical and financial condition that many railroads found themselves in during the 1970's....This situation now requires balanced improvements. The past 15 years have brought about the rebirth of the

[5] In *United States v. Trans Missouri Freight Association*, 166 U.S. 290 (1897) the Supreme Court held that railroads were subject to the provisions of the Sherman Act.

> railroads because there remained market balance between shippers and carriers. Unrestricted railroad market power does not serve this country's need to be globally competitive..Although CMA supports the on-going motor and water carrier deregulatory efforts, the potential for the exercises of monopoly power by a railroad makes continued regulatory oversight of that industry essential. However, regulation cannot be so restrictive as to hamper a railroad's ability to compete effectively and maximize profits on competitive traffic. Regulations must be sufficiently vigilant, forceful, and effective to provide the constraints needed to protect the public from abuses of monopoly power.

Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearings on H.R. 2539 Before the Subcomm. on Railroads of the House Comm. on Transportation and Infrastructure, 104th Cong., 1st Sess. 42 (1995) (statement of Chemical Manufacturers Association).[6]

Significantly, the ICC has acknowledged that gaining and exercising market power is easier in the present deregulated rail industry. The Commission has articulated that deregulation requires that market power abuse should be weighed heavier in determining the public interest. The ICC, even while reiterating that it was not an antitrust tribunal, cited earlier decisions in making this point:

> In *UP Control*, we recognized that the extensive deregulation of the rail industry brought about by the Staggers Act, other recent reform legislation and numerous administrative actions undertaken by the Commission to reduce regulation require that the anticompetitive effects of a consolidation be examined even more carefully than in the past because "[t]he ability of the railroads to take various actions free of regulatory restraints will make it easier to exert or abuse market power gained as a result of a consolidation." (Cite omitted).

Santa Fe Southern Pacific Corporation--Control--Southern Pacific Transportation Company. Finance Docket No. 30400 (I.C.C., decided July 24, 1986) at 13. ("*SFSP*").

The market power gained as a result of the proposed consolidation is immense. The past deregulation, as well as specifics attendant to this proposal, increase the likelihood that it will be exerted by the two post-merger firms.

---

[6] Although the CMA originally filed comments opposing the proposed transaction, it entered into a settlement agreement with the Applicants on April 18, 1996, and withdrew its official opposition. The CMA has not agreed to support this merger.

B. THE PROBABLE EXERCISE OF MARKET POWER BY UPSP AND BNSF POST MERGER

Market power abuse is not automatic with every market concentration increase. However, the proposed transaction presents many factors that indicate that the merged entity and BNSF will exercise their increased market power to the detriment of the public.

1. The market concentration level will greatly increase. The excessive market concentration in countless specific markets and the breadth of the duopolistic systems that will be created by this proposed transaction present grave concerns.[7]

a. At best a duopoly is created. Significant debate and testimony have examined whether BNSF can and will provide true competition to UPSP in the areas where BNSF will have overhead trackage rights. (This issue is more specifically discussed below.) Even assuming BNSF does establish a consequential presence over the trackage rights routes, this does not eliminate or even acceptably reduce the potential for market abuse. At best, BNSF's presence will establish networks of only two rail carriers throughout the entire western United States.

Applicants deny that this duopoly creates any problem. However, abundant testimony and commentary support the common sense belief that this level of high market concentration

---

[7] Calculations of the increased market concentration, applying the Herfindahl-Hirschman Index ("HHI"), have been done by various experts in this proceeding for several specific markets. For example, the HHI levels for polyethylene and polypropylene pre-merger were calculated at 2,440 and 3,275, respectively. These figures indicate "highly" concentrated markets. Post-merger, the HHI index would increase for polyethylene to 4,075, and for polypropylene to 5,778. Such increases of 1,635 and 2,503 far exceed the 100-increase employed as a benchmark for anti-competitive climates. *See* Verified Statement of Thomas D. Crowley, Comments of the Society of the Plastics Industry, Inc., at 27-28 ("V.S. of Crowley").

in so many markets facilitates both coordinated activity between the two remaining firms as well as unilateral exercise of market power.[8]

Applicants contend that these duopolists, unlike other duopolists, will not engage in either explicit or tacit coordinated behavior, claiming various unique mitigating factors. But such collusive behavior is so pernicious to the public that these contentions require careful scrutiny. Ample expert testimony addresses and refutes many of these contentions. The State of Texas presents two additional thoughts regarding collusion.

First, Dr. Robert D. Willig, Applicants' expert, analyzed several factors in concluding that collusion is virtually impossible in the proposed situation. For example, he explained how many of the differences between these two post-merger firms and the products they offer would heavily mitigate against the possibility of reaching and sustaining a collusive agreement. Differences between the two firms include cost variations, product heterogeneity, the extent of non-price competition and the size and frequency of major transactions as well as variations in other characteristics. But if Applicants correctly predict the consequences of the merger and the agreements concerning BNSF, many of these differences will be acutely reduced, if not eliminated.

The post-merger firms would be more alike in trackage and operations, would have similar (and in many places identical) route structures, would anticipate comparable transit

---

[8] "Similarly, in some circumstances, where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist, by either explicitly or implicitly coordinating their actions." DOJ Merger guidelines, section 0.1. *See, also*, Verified Statement of Dr. Henry McFarland, Comments of the Texas Attorney General, at 2-7 ("V.S. of McFarland"); Verified Statement of Dr. W. Robert Majure, Department of Justice Comments, at 37-53 ("V.S. of Majure"); Paul Stephen Dempsey, *Antitrust Law and Policy in Transportation: Monopoly is the Name of the Game*, 21 GA. L. REV. 505, 589 (1987); and NAAG Merger Guidelines, section 2.11.

times and would be equally able to attract and serve large, long-haul customers. The more these two firms resemble each other, the more diminished is the basis for Dr. Willig's conclusion that collusion is impossible.

Secondly, Dr. Richard J. Barber, another expert for Applicants, cites to a prior proceeding as support for his assertion that the railroad industry is less prone to coordinated activity because, unlike other industries, rail capacity is generally not full. He argues this will allow other railroads to offset the capacity loss resulting from a merger and will restrain any tendencies for coordination. (*See* Rebuttal Verified Statement of Dr. Richard J. Barber, at 50-51). But, again, if Applicants are accurate, and BNSF quickly becomes a significant competitor over the trackage rights routes, the capacity of the only remaining rail in the market will be severely restricted. The possibility of coordinated activity thereafter increases.

Dr. McFarland testified that even if one accepts the Applicants' premise that collusion is impossible, the unilateral exercise of market power is still problematic. This creates potential for market power abuse. As Dr. McFarland explained:

> When a firm in a differentiated product market raises its price, some of its customers begin to buy from its various rivals, while others, those who value its product the most, simply pay the higher prices. The firm will raise its price to the profit-maximizing level, the level where the loss of profits from the customers who switch to its rivals just matches the increased profits from the customers who do not switch. If the firm then acquires a rival, it no longer need be concerned about the prospect of losing sales to that rival when it increases its price. Those sales are no longer lost, they remain within the merged entity.

V.S. of McFarland, at 3-4. (*See also* V.S. of Majure, at 41-48).

It is probable that the merged firm in the instant case will be even less concerned about losing sales upon a price increase than the firm in Dr. McFarland's example. His example assumes three competitors in the market at the time of the acquisition. Presently, the shippers on the trackage rights routes have knowledge of, proximity to and experience only with UP and SP. The SP shippers on these tracks will be more likely to stay with UPSP post merger, even in the face of a price increase, because BNSF has little or no "brand identification" for many of these shippers. This will increase the merged firm's ability to unilaterally raise its price.

b. Potential monopoly power will likely increase. If BNSF fails to significantly compete on any of the routes with trackage rights, this transaction then creates a monopoly for each such route. These include the entire Texas Gulf Coast, the route to Eagle Pass, the route from Houston to Memphis, the route along the I-5 corridor and the route spanning the central corridor of the United States. The State of Texas believes that BNSF may not be willing or able to adequately compete on many of these routes.

Several opponents argue that BNSF will likely be inconsequential as a competitor over many of the trackage rights routes. In particular, DOJ, the Railroad Commission of Texas ("RCT"), the National Industrial Transportation League ("NITL") and the Society of Plastics Industry ("SPI") address issues that directly concern many Texas shippers. Some of the compelling points of these arguments can be summarized as follows: 1) BNSF lacks infrastructure within Texas, 2) BNSF's only competitor will govern operational control for most of BNSF's movement in Texas, 3) BNSF traffic density potential is, at best, arguable, and, at worst, insufficient to induce genuine competition on many Texas routes, 4) the agreement's cost structure (regardless of whether it is consistent with previous agreements) may pose a substantial competitive disability for BNSF, and 5) restrictions on BNSF's ability to serve new shippers will disadvantage Texas in luring new rail-dependent industries.[9]

Applicants note that the ICC concluded that "two independent railroads can provide strong, effective competition." (Applicants' Rebuttal to Comments, at 39). BNSF, however, will not be independent over these routes because of the lack of operational control, shared infrastructure, payment of compensation to a rival and so forth. It is precisely this dependence that causes the State of Texas and other opponents of the merger to doubt BNSF's ability to compete under the terms of the settlement agreement.

To the extent BNSF is not a real competitor over the trackage rights routes, the merged entity will be able to brandish immense monopoly power on many routes in the Western U.S., including Texas. In that event, the potential for extensive public harm is alarming.

2. **Entry is prohibitive.** The nature of the railroad industry forecloses new entrants, a fact that Drew Lewis, the President and CEO of UP, has publicly emphasized.[10] The fact that this industry has no potential new entrants especially enhances the chances that the merged entity will wield its increased market power. Obviously, the probability of any entity

---

[9] "Because Texas is fast growing, any private agreements between duopolists which create impediments to development must be viewed with suspicion, if not outright hostility." Comments of the Railroad Commission of Texas, at 6.

[10] *Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearings on H.R. 2539 Before the Subcomm. on Railroads of the House Comm. on Transportation and Infrastructure*, 104th Cong., 1st Sess. 42 (1995) (statement of Drew Lewis, President and CEO of Union Pacific).

raising prices above competitive levels will increase there is no fear that a new entrant will emerge to remedy skewed price levels.

3. Intermodal and source competition may provide little restraint. In specific cases, source and intermodal competition can restrain the exercise of market power. But both these restraints may be of limited effect in the present case. For example, the fact that the transaction, as proposed, is so broad in its reach, creates a significant potential for decline in source (geographic) competition. Commissioner McDonald in the BNSF merger identified this potential loss of source competition in the West as an "issue that may be important or decisive in future large rail consolidations." He states:

> While most of the competitive analysis in this case focused on reductions in the number of railways in specific corridors or at specific points. the Western Coal Traffic League emphasized a broader focus, looking at the transactions' impact on geographic competition in the West. I agree that this is a useful and important perspective. A significant reduction in geographic competition could be a major concern...But it is equally true that a proposed merger which eliminates geographic competition over a broad area may be objectionable for that reason alone, even if little or no reduction in point to point rail competition occurs...While a reduction from four to three railroads very likely would be of little concern in a point-to-point rail market, that is not necessarily so in the context of geographic competition...I do believe, nonetheless, that WCTL has identified an issue that may be important or decisive in future large rail consolidations and an issue that may extend beyond coal to other markets as well. (Emphasis added).

BNSF at 96.

As noted in Dr. McFarland's Verified Statement, truck competition provides little competitive restraint for many rail movements into and out of Texas. (V.S. of McFarland at 16, 19-21). Because of the State's sheer size and the fact that the most populated areas lie several hundred miles from each other,[11] only a negligible amount of goods will travel the distance that Dr. McFarland found to be within the competitive range for truck transport. Additionally, the unique characteristics of aggregates and plastics, two of the most revenue-producing commodities for rails in Texas, make those industries captive to rail transportation.[12]

4. **Intramodal competition may be reduced.** The potential for market power restraint that intramodal competition may provide on route segments will also be limited due to the concentration of shippers captive to the merged entity. In addressing this issue concerning Texas petrochemical shippers, the ICC said:

> SPT [a merging party] owns a line between Houston and Texas City, passing through Bayport. Numerous chemical shippers, producing a significant portion of the nation's petrochemicals, are located on the line. While these shippers are now subject to a monopoly on traffic moving to or from other SPT exclusively-served points, they enjoy competition between other carriers for portions of movement beyond SPT's lines. To the extent that ATSF[the other merging party] competes for those hauls, the merger may result in vertical foreclosure of the competing carriers from those markets.

SFSP at 73.

Intramodal competition may be lost, not just as a consequence of the consolidations, but as an effect of the post-merger firms exercising their recent market power. Decreased intramodal competition, if effectuated in this manner, portends public harm.

> In merger proceedings, most revenue transfers result from the diversion of traffic to the merged carrier from other rail carriers. Intramodal diversion,

---

[11] A graphic illustration of this point is that the distance between Houston (on Texas' southeastern border) and El Paso (on the western border) is approximately the same as from El Paso to Los Angeles, and the distance from Texarkana (at Texas' northeastern corner) to El Paso is approximately the same as from Texarkana to Chicago.

[12] V.S. of McFarland, at 17-19.

> intrinsically neither a public benefit nor a harm, may reflect improved service or may result from the exercise of market power. This may result in reduced competition, the ability to achieve monopoly profits, inefficiency, and harm to essential services.

SFSP at 12.

C. THE EFFECTS OF POST MERGER FIRMS EXERCISING MARKET POWER

The most probable and direct negative effect of market power abuse is an increase in the price for the goods or services at issue. This general truth is no less applicable to the rail industry. The enormity of public harm resulting from increased rates throughout the post-merger duopolistic networks is the obvious impetus for heightened scrutiny of the proposed transaction. But even if price increases only occur in certain Texas-related rail markets, the public harm could be formidable.

Although Texas has the most operated railroad mileage of any state in the United States, the merged firm and BNSF will be the only Class I railroads to serve essentially the entire State.[13] The parallel nature of this merger in Texas and the loss of SP as a competitor in many Texas-related rail markets will cause those markets to experience increased market concentration. In addition to the increased concentration, a large percentage of Texas-related shipments will suffer from the lack of competitive restraints discussed in III. B, *supra*. All of this will increase the likelihood that many shippers moving products to or from Texas will experience market power abuse in the form of increased prices or decreased services.

---

[13] UP, SP, and BNSF own the vast majority of track in the state. Kansas City Southern Railway Company ("KCS") owns limited track which is part of its routes from Dallas/Ft. Worth to Shreveport, Louisiana and from Beaumont, Texas to Shreveport.

Commodities such as petrochemicals, plastics, aggregates, and crushed stone, all vital to Texas and the national economy, are especially vulnerable to the anticompetitive impacts of the merger, as confirmed by Dr. McFarland's analysis. Most of these commodities are chiefly captive to rail and incur transportation costs representing a high percentage of their total costs.[14]

Shippers moving product through the Texas-Mexican gateways will also be acutely vulnerable to market power abuse. Most of the nation's gateways to Mexico are located on the Texas-Mexico border, with approximately 70 percent of all international rail traffic between the United States and Mexico moving through Laredo. That makes Laredo the premier railroad border-crossing point. Only two United States railroads reach Laredo directly: UP and Texas and Mexican Railway Company ("Tex-Mex"). As fully discussed in the Comments filed by Tex-Mex, the merger may well significantly reduce the traffic they can carry.[15]

Eagle Pass accounts for most of the remaining US - Mexican traffic. SP owns the only rail track at this gateway. BNSF will be granted trackage rights to Eagle Pass under the proposed transaction, but BNSF was earlier granted haulage rights over the SP line to Eagle Pass and has to date moved relatively little tonnage over this line. BNSF would have to develop new traffic over its trackage rights to Eagle Pass to compete against the owning rail which will control the two major border crossings. Concerns that BNSF will fail to fill the competitive void left by SP are especially germane to traffic moving through Eagle Pass.

---

[14] For the plastic resins industry, transportation is second only to raw materials in cost, amounting to approximately 20 percent of the delivered price. *See* Verified Statement of A.O. Bowles, Society of Plastic Industry Comments, at 2 ("V.S. of Bowles").

[15] Comments of the Texas and Mexican Railway Company.

A merged firm's potential for unilateral exercise of market power in a differentiated market is created, in part, by the fact that certain consumers will have preferences and loyalties to a particular product.[16] This potential is exacerbated in the context of the traffic through the Texas-Mexican gateways. Shippers now using UP or SP at the border are less likely to switch to BNSF in the face of a price increase post-merger. BNSF has no experience dealing with the international aspects of moves (including customs checks as well as language and cultural differences) and has no border infrastructure or personnel familiar with Mexican rail transport. All of these circumstances compel the conclusion that the proposed transaction will increase market concentration and the ability for the merged firm to unilaterally exercise its dominant market power over the US - Mexican rail traffic.

Shippers captive to rail and shippers of goods across the border will be especially vulnerable to price increases after the merger, but they are not the only Texas-related shippers who may become victims to post-merger market power abuse. All shippers at "three-to-two" areas will immediately lose a competitor and experience increased market concentration. This effects a vital amount of traffic. For instance, the BEA for Houston is a "three-to-two" area for which Dr. McFarland identified a significant amount of rail traffic subject to a loss of competition. Greater Houston is one of the country's largest metropolitan areas as well as a major international port.

Captive shippers account for a tremendous amount of UP and SP traffic.[17] Contrary to applicants assertions, these so-called "one-to-one" shippers may also experience increase

---

[16] *See* III B 1.a, *supra*, for a more complete discussion of this principle.

[17] "Of the traffic that UP and SP handle, fully $6 billion, or almost two-thirds, is 'one-to-one' traffic." Rebuttal Verified Statement of Richard Peterson, at 23.

in competitive restraints. By combining the monopoly customers of SP with those of UP, the merged entity eliminates the potential competition that often exists because of nearby railroads. That potential competition is identified by the shippers themselves and may be the only negotiating leverage captive shippers have.[18]

Increase in prices and/or decrease in services are the obvious effects of market power abuse, but approval of this merger may have an additional effect. Loss of meaningful competition that may result from this proposed transaction could generate more regulatory oversight to check unreasonable rates and other market abuses. This potential result would directly contradict Congress' mandate to allow railroads more freedom to set prices and provide services.

> [It would be] inconsistent with the Rail Transportation Policy to create a post merger situation where it might be necessary to become involved in recurring questions of market dominance or rate reasonableness that could well develop where there is the elimination of or massive reduction in competition.

SFSP at 25.

IV. PUBLIC INTEREST

The Board must assess at least five statutory criteria, including whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.[19] The Board must then determine if the proposed transaction is in the public interest

---

[18] A powerful example of a captive shipper that will lose this potential competition if the merger is approved is Central Power and Light, whose rail service situation is explained in the V.S. of McFarland, at 12-13.

[19] "(T)he Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

by balancing the potential anticompetitive effects and other public harm it has identified against the potential public benefits.[20] The Board must deny the application if it is found not to be in the public interest.

Applicants argue that the Board must make its public interest determination consistent with Congressional intent to encourage mergers.[21] But this misconstrues the purpose of deregulation. Mergers were a consequence of the enactment of the Staggers Act. Competition, not consolidation, was the underlying and repeatedly expressed purpose of Congress in passing this Act. This purpose is not fulfilled by allowing a merger to duopoly. Sanctioning such a combination of railroads to control so much of the nation's rail traffic creates such a "radical transformation" of the rail industry that deregulation may be resurrected.

Clearly, the merger will produce some efficiencies. But when a merger results in increased market power and decreased competition, the likelihood that the benefit from the efficiencies will inure to the public diminishes. For example, Applicants have often identified increased single-line service as one of the significant efficiencies of the proposed transaction. However, the solidification of the duopoly network will create more shippers who are captive at both origination and destination points. Many shippers may prefer to forgo the anticipated decreased transit times that result from single-line service if they are to be subjected to monopolist market power.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region." 49 U.S.C.A. §11344(b)(1).

[20] 49 C.F.R. S 1180.1(c).

[21] Applicants' Rebuttal Narrative, at 33.

Dr. Laurits R. Christensen (an expert for DOJ) has, in fact, testified that many of the efficiencies touted by Applicants as public benefits are really private gains. Dr. Christensen also determined that many of the Applicants' professed public benefits are either likely to be achieved regardless of the merger or could be achieved through less anticompetitive means. *See, generally*, Verified Statement of Dr. Laurits R. Christensen, Department of Justice Comments.

Applicants argue that the proposed transaction is the only way to create the larger, more efficient entity that is needed to effectuate true competition. They argue that the Board must approve this transaction so UP can be on more equal footing with BNSF.[22] If one accepts the premise that without the merger BNSF will have no competitive restraint, one ignores not only the potentially anticompetitive situation a duopoly would create but the present reality as well.

Although BNSF is the largest competitor for rail traffic in Texas, both UP and SP have been very viable competitors to BNSF and to each other. As identified by the Texas Railroad Commission, UP "surpasses BN in several main economic indicators." Comments of Texas Railroad Commission, at 31. And, for all its ostensible shortcomings, SP has provided a competitive alternative in many Texas markets. *See, generally*, V.S. of McFarland. A competitor does not have to match BNSF rail for rail and route for route to be effective.

---

[22] The paradox of Applicants' argument is obvious: BNSF is such a large and effective competitor that the Board must approve the proposed transaction, which will, according to Applicants, make BNSF a larger and more effective competitor.

V. CONCLUSION

The merger of UP and SP, conditioned on their settlement agreements with BNSF, would have a devastating effect on competitive rail service in Texas. Not only does the proposed transaction create a duopolistic rail system in Texas, it relegates two large and vital geographic areas in Texas to potential monopoly abuses. The Gulf Coast region, the heart of the petrochemicals and plastic resins industries, has relied on the presence of SP as a small, but aggressive competitor to UP. At the Texas-Mexican gateways, SP's presence has been a significant competitive force. Indeed, while it is accurate to say BNSF is UP's *biggest* competitor in certain geographic areas, in these two economically indispensable Texas locales, UP is buying up its most aggressive competition.

The potential for public harm is not confined to the borders of Texas. Approval of the merger, as proposed, creates a duopolistic rail network throughout the western United States. Intramodal and source competition, touted by the Applicants as an effective check to the exercise of market power, are limited by the unprecedented breadth and reach of this particular transaction and by the unique characteristics of the Texas-related rail markets. The creation of a duopolistic system will confer upon the Applicants and BNSF unfettered market power, rendering unbound opportunity for abuse of that power.

The potential anticompetitive effects of this merger eclipse any potential public benefits, especially for Texas. Therefore, the State of Texas implores the Board to find that the proposed transaction is not in the public interest and deny the Merger Application of Union Pacific and Southern Pacific.

DATED this 31st day of May, 1996.

Respectfully submi‹ ed,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

LAQUITA A. HAMILTON
Deputy Attorney General for Litigation

THOMAS P. PERKINS, JR.
Assistant Attorney General
Chief, Consumer Protection Division

MARK TOBEY
Assistant Attorney General
Deputy Chief for Antitrust

Rebecca Fisher

REBECCA FISHER
Texas Bar No. 07057800
Assistant Attorney General
Antitrust Section
P.O. Box 12548
Austin, TX 78711-2548
(512) 463-2185
(512) 320-0975 [FAX]

CERTIFICATE OF SERVICE

I hereby certify th‹ ‹ a true and correct copy of the foregoing instrument has been sent to all parties of record including the restricted service list, via U. S. Postal Service, first class mail, on this the 31st day of May, 1996.

Rebecca Fisher

STB FD 32760 6-1-96 E 83894

Item No. 83894

Page Count 21

JUNE, 1996 #4

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 RISS INTERMODAL

RISS Intermodal, a nationwide Intermodal Marketing Company (IMC)[1], based in Northern California, generates approximately $94 million annually in intermodal revenue. RISS has grown rapidly over the last dozen years, and we now rank among the ten largest IMCs in the nation. Since our inception in 1983, our focus has been on "Fortune 500" accounts with a special emphasis on companies in food processing and related lines of business; wines, spirits and specialty waters; retail merchandise; and non hazardous chemical products.

---

[1] An IMC markets intermodal service by contracting for motor carrier transportation at origin and destination and purchasing long-haul rail transportation, which it assembles for beneficial owners of freight. The IMC provides management, shipment tracing, billing functions and other services valuable to shippers.

<u>Summary of RISS' Perspective on the UP/SP Merger</u>

RISS Intermodal's rapid growth has come, in part, because it has focused on developing a consultative relationship with its shippers on intermodal matters, supported by a significant investment of its own resources in understanding the economic and structural issues which confront the railroad industry. We believe this is essential to fully perform the role of an Intermodal Marketing Company. That role is, at its best, not just to sell and secure intermodal freight, but to forge a better understanding of the respective interests and needs of shippers and carriers.

As a major and active participant in the intermodal business, RISS believes it is essential for the Board to devote special attention to the interests of intermodal shippers in considering the UP/SP merger. We seek to forcefully emphasize to the Board that the single most important issue facing carriers and, especially, intermodal shippers today is capacity and infrastructure. *Route capacity and terminal infrastructure, along with ensuring sufficient motive power and crews, will be the seminal issues facing carriers and shippers in coming years.* Intermodal shippers, represented by RISS and other IMCs, face a particular challenge in this context. We believe that, unless we receive the benefits of the efficiencies and capital productivity associated with the UP/SP merger, intermodal shippers in the West will be crippled by reduced access to the rail network as growing bulk traffic consumes the available capacity and as SP's inability to invest and provide competent service impairs competition. As a result, RISS Intermodal strongly supports the UP/SP merger along with the BNSF agreement. This merger is essential to the economic future of intermodal in the West.[2]

While intermodal represents the fastest growing segment of the railroads' traffic base, it is not the most profitable. In fact, virtually all other segments provide higher rates of return for the railroads in the short term. Therefore, intermodal growth requires the type of long-term commitment to a business strategy which is unusual in American business today. Only companies with the financial resources and potential productivity of a UP/SP and BNSF can afford to make these kinds of commitments to shippers. In fact, the continuing growth of intermodal services requires what BNSF's Chairman Rob Krebs described as a "leap of faith" during his keynote remarks to the International Intermodal EXPO in Atlanta in 1995. As we explain below, a merged UP/SP will be, as an automatic consequence of its route structure, forced to commit itself to intermodal growth and development. Without this merger, intermodal competition and service in the West will be crippled, dominated by BNSF and hampered by a weak SP.

This is why we actively support the combination of Union Pacific and Southern Pacific. Furthermore, the significant concessions made to BNSF in proposed trackage rights and line sales arrangements with BNSF strengthen our view that this transaction has very important, and long lasting, benefits for shippers, both intermodal and carload, and for

---

[2] RISS' President, Thomas R. Brown, filed a verified statement in support of the merger. It is in volume UP/SP-25, Part 1, p. 401 ("Brown Statement"). Our decision to file a brief in this proceeding was motivated by our interest in and commitment to the intermodal business. We have been neither offered nor have we secured any special privileges, contracts or understandings with either UP or SP.

the public at large. By creating a second, far reaching railroad network in the West, this merger will provide competition on a level playing field with BNSF, enhancing, rather than diminishing, rail competition. In fact, it may well be the only realistic hope for facilitating intermodal growth and capacity in the coming decades.

The UP/SP Merger is Essential to Development of Intermodal Service in the West

In RISS' opinion, as described in the Brown Statement, SP's essential problem as an independent railroad in the modern era is that it operates more miles of route structure than its existing traffic base can support. With most of its valuable real estate sold, it no longer has the resources to finance adequate service to its existing customers, much less to invest heavily in infrastructure, as quality intermodal service will require. If this merger is not approved, SP will almost certainly be forced to retrench to certain core operations in order to survive.

The UP/SP merger will bring the synergies, network efficiencies and financial backing that are necessary to develop intermodal service in the West. In many ways, this merger is structured to support intermodal service. By the nature of its network and traffic base, UP/SP will be compelled to be an aggressive intermodal competitor against BNSF.

Simply put, Union Pacific did not need the SP to continue to be an efficient and very profitable bulk carrier in the West. Although acquiring the SP certainly brings UP additional and valuable bulk and carload traffic, it also creates a substantial route network with an undeveloped potential for intermodal service, including routes between California and the Midwest, routes in the I-5 Corridor between California and Seattle and routes between Texas and the Pacific Northwest. Only through aggressive development and solicitation of new traffic, a very large share of which will be intermodal traffic, will the UP/SP combination achieve its potential.

The simple fact is that once this merger is consummated, UP/SP will have literally thousands of route miles whose principal utility will be high quality intermodal service - most of it unexploited today. In our view, the key challenges for UP/SP managers going forward will be to increase efficiency as they create the service and capacity to build the premier intermodal network in the West.

A UP/SP system will have the capital productivity, the necessary route structure and the competitive will to drive down costs and aggressively develop intermodal markets. UP's commitment to invest over $250 million in intermodal terminals is unprecedented in our industry. Just as important, UP/SP will have the land inventory in key metropolitan areas to develop more efficient terminals in the future. Much of the $500 million UP/SP will invest to upgrade the Sunset, Texas and Pacific, and Tucumcari routes is targeted at primarily intermodal traffic. There is simply no other scenario in the West that offers this powerful combination of opportunities to shippers.

Any form of divestiture (which we will treat at greater length below) undermines the basis for all of this: efficiency through route and network specialization. Eliminating

UP ownership and control of any of the major route linkages would destroy the network which the operating plan envisions and from which the financial benefits and lower costs to shippers are derived. Furthermore, divestiture may undermine UP's willingness to go forward with this transaction.

Nonetheless, neither shippers, nor the Commission itself, can be expected to share this view of the "natural benefits" of UP's control of SP absent a tangible demonstration of the economic and commercial value of this transaction to the general public and to the shipping public. Mindful of the Commission's charge to protect the public interest in such matters, we present a number of arguments below based on specific and personal experience in this industry to present our view of the many tangible benefits of the transaction to companies such as ours, to capacity providers such as APL and CSXI, and, most importantly, to the beneficial shippers of freight.

The Merger Will Enhance Intermodal Competition Throughout the West

Our support for UP/SP is a natural and logical extension of the positions we have taken in the past in supporting BN's acquisition of Santa Fe and UP's acquisition of C&NW. We supported those mergers because we saw each of them as logical next steps in the rationalization of the railroad network in the United States, leading to greater route, labor and capital efficiencies and, ultimately, to increased commerce and enhanced global competitiveness for U.S. products.

We believe in the rationalization of the railroad network in the United States, while maintaining rail-to-rail competition, as a step along the critical path for the railroads to reach their economic potential. Efficiencies can be achieved through elimination of management duplication; new services can be developed and operations improved by eliminating parochial views of markets now divided between two or more carriers; and capital can be used much more productively. These goals can be achieved only through merger.

Because of the unique characteristics of the railroad industry, reductions in the number of railroads do not necessarily mean a reduction in meaningful, sustainable competition. For railroads, unlike other industries, geographic scope, size and quality are intertwined because railroading is so much a network business. Expansion of the rail network under the control of a single management, to link major markets, is critical in this context.

Once BNSF was created, the balance in western rail competition was upset in a way that made a UP/SP combination both desirable and necessary for shippers. The BNSF merger combined the dominant intermodal carrier in the West, Santa Fe, with the dominant bulk hauler, BN, into a new and very powerful system. A merged BNSF will pose competitive threats that neither road did independently. BNSF will now serve all West Coast ports, as well as be able to reposition containers between Northern and Southern California and across the Southern Corridor -- an important marketing advantage in the international trade.

Today, BNSF dominates the intermodal marketplace in the key Northeast-California and Midwest-California markets, handling in excess of 70% of the intermodal truckload market and virtually 100% of the LTL market moving by rail. Only BNSF offers multiple departures per day between the Midwest and California for its intermodal customers, and only BNSF offers the primary third A.M. service between the Midwest and West Coast, and fifth A.M. service between the Northeast and West Coast necessary to attract high service truckload carriers and LTL carriers. While UP and APL do field a third A.M. service between the Midwest and California, it has not matched Santa Fe's reliability and lacks many of the attractive aspects of Santa Fe's service, and thus has not attracted the customer base drawn to Santa Fe. With BNSF's new found resources, we can expect that the merged BNSF will become an even more potent competitor in these lanes for high service traffic.

Given the testimony of SP's officers in this case regarding the company's negative cash position, SP could not stand alone as effective competitor for BNSF even in the near term. We can characterize the reasons for this in three ways. First, SP has franchise advantages that its financial shortcomings have made it unable to optimize. Secondly, SP's lack of capital has kept it from expanding its domestic intermodal program into the product offerings that have been critical to converting traffic from highway carriers as BN, UP and Santa Fe have done. Finally, SP has been unable to retain high service traffic that it has secured in the recent past - even when that traffic was in corridors where it had a route advantage (such as Memphis-Southern California).

Where has SP been unable to exploit its franchise advantages? The most efficient vehicle for handling domestic trailerload freight by rail is the double stack container. In the SP's solely-served "I-5" corridor along the West Coast, it has been unable to make the relatively modest investment required to provide the line clearances for double stack operations. In the L.A. basin, SP, uniquely among Western roads, has an excellent land inventory affording it the opportunity to site new, modern intermodal terminals. While its international facility south of downtown Los Angeles (the "ICTF") is excellent, its domestic intermodal terminals have seen little investment in recent years and are, generally, in need of modernization. Furthermore, SP has been unable to build new terminals to compete on a par with Santa Fe or Union Pacific in certain new market areas.

Another important way in which SP has been unable to exploit its franchise advantages has been its inability to consistently attract business from the high service IMCs, such as RISS Intermodal, and from the high service truckload carriers. Nor has SP been able to retain the traffic of the high revenue, small package shippers which are integral to the profitability of a domestic intermodal program in the West. Alarmingly, SP has lost major segments of business from each of these important customer bases on its key routes (such as Memphis-L.A. and Chicago-L.A.) during the past few years.

In the IMC business, it is common to make presentations to the beneficial owners of freight demonstrating to them the underlying carrier options available in their shipping lanes. We commonly offer our major accounts UP, APL, and Santa Fe options in each of their lanes. Due to SP's lack of modern 48 ft. trailer or container capacity, along with its lack of reliable service, we generally make such presentations without any mention of SP. Quite simply, SP's weaknesses as a domestic intermodal carrier make it an ineffective competitor for the business of many important intermodal accounts. This is especially true for those presentations focused on the conversion of highway freight to intermodal service. This is a very tangible demonstration of SP's less than meaningful role as a viable competitor today in the important transcontinental lanes.

Identifying SP's current difficulties in retaining a domestic intermodal traffic base leads us, naturally, to a discussion of its ability to retain even its current base of business after BNSF has integrated its marketing and operations. International traffic is even more important to SP than its domestic traffic, representing two-thirds of its intermodal revenues and virtually all of its intermodal profitability. Historically, SP's ICTF in Southern California has provided it an unique advantage when soliciting international business. However, with completion of the Alameda Corridor project, and with the evolution toward on-dock intermodal terminal facilities, this advantage will be minimized in the near term future.

What's more, with BNSF's greater financial strength it can choose readily to target segments of SP's profitable international traffic and attract specific customers through incentive pricing at levels below those remunerative to an independent SP. Furthermore, with BNSF's expanded route structure, it will be able to offer liner companies packages of services over multiple ports, engage in domestic container repositioning, and offer inland logistics services that SP will simply not have the financial or infrastructure wherewithal to respond to. BNSF will be able to incrementally price large segments of SP international traffic, while SP will be forced to view this business as base load business not viewed through the prism of incremental costing. On the domestic side, with no likely remedy in sight for the deficiencies discussed above, the cycle of traffic loss will likely accelerate.

The SP witnesses in this case have attested themselves to most of the difficulties we have experienced. They have also indicated that SP has operated in, essentially, a cash negative position since acquisition by the Anschutz interests. The key issue here is critical mass. SP is a carrier with definite franchise advantages, some excellent routes, and certain excellent base traffic. Unfortunately, it simply lacks the critical mass in revenue necessary to support the route structure required to serve its customer base at profitability and investment levels comparable to those of its competitors. Intermodal shippers need an effective alternative to BNSF's dominant position in the West, and SP cannot provide it.

As we have indicated above, RISS believes that the UP/SP merger, along with the BNSF agreement, enhances competition and is necessary to secure the future structural capacity for intermodal growth. We believe this for the several reasons which we set out below.

The UP/SP Merger Presents No Risk to Competition

We understand that the Justice Department and some other parties express concern about the change from three-railroad competition to two-railroad competition. RISS and its shippers experience vigorous two-railroad competition today in the Pacific Northwest between UP and BN, and in the Southeast between Norfolk Southern and CSXI. In many senses this competition is a model of the workings of the free market. Nothing about our experience in these markets would give us concern about the efficacy of two railroad competition in the future. Each carrier aggressively seeks the intermodal business of shippers and, though each carrier has a markedly different approach to the marketplace, each is quite effective. Brown Statement, pp. 8-9.

As we explained previously, in the Southeast CSXI has developed as a vertically integrated full-service intermodal company providing everything from ramp operations, to equipment, to customer sales support. CSXI has even extended its geographic reach beyond the Southeast to the Far West by creating a container network running on a Western road. Further, CSXI has negotiated agreements with Conrail, with whom it aggressively competes in certain East/West corridors, to extend its Florida service into the New York/New Jersey metropolitan area.

Norfolk Southern, on the other hand, has taken an opposite tack, focusing more on its capabilities as a wholesaler of intermodal transportation. Yet, it has been equally successful and equally creative, engaging in a joint venture with Conrail to expand its

Triple Crown Roadrailer network and joint venturing with Conrail and Union Pacific to create the first nationally managed domestic container program - the "EMP". Norfolk Southern has also concluded agreements with Conrail allowing it to reach certain Northeastern terminals which "complete" certain city pairs in its network. It goes without saying that both railroads aggressively compete for IMC and beneficial owner business. NS is extending its intermodal network via partner carriers into the Northeastern territory heretofore dominated by Conrail.

Our expectation is that we will see this same kind of multi-faceted, market and customer focused competition and creativity in the West as BNSF and UP/SP square off. We see this today and our customers benefit from it between the Northwest and Chicago. This experience is at the heart of our argument that UP/SP will strengthen, not weaken, competition in the West.

The second general concern among shippers is that with any removal of a competitor in the West, today's considerable spread between typical motor carrier rates (in "pure" over the road service) and intermodal service may be reduced. There are two important reasons why we do not believe that to be likely. Brown Statement, pp. 7-8.

First, the network nature of the transportation business mitigates against this, as do the high returns associated with incremental revenue in such a high fixed cost business. Railroads simply cannot raise their intermodal rate levels to so-called "supra-competitive" levels. Market forces from motor carriers, multiple intermodal vendors, and intramodal competition all militate against this.

Second, the intermodal business has a component style of organization. As a result, competition is not created solely by, nor necessarily limited to, the number of rail carriers serving a given market. To bring the intermodal product to market requires the involvement of multiple parties beyond the railroad itself: IMCs, drayage companies, equipment leasing companies, and, in some cases, capacity providers such as APL and CSXI who resell the railroad's linehaul services, create unique and powerful competitive pressures on the railroads of their own.

An excellent example of this would be in the transcontinental Southern tier today where we can view the workings of multiple vendor competition using a single rail carrier. CSXI and APL, for example, both resell the services today of the same railroad in the Southern corridor. Both companies aggressively market their services to IMCs today in that corridor, competing on price, service, and equipment size and availability. Both companies use their sizable international volumes to leverage railroad rates for domestic services from a single Southern tier provider. Furthermore, the underlying rail carriers here offer their own service and equipment packages to IMCs and bi-modal carriers. Rate competition in this corridor, which is served by two railroads, has consistently been aggressive.

Intermodal shippers will benefit in another important way through the UP/SP merger in that the associated line sales and trackage rights to BNSF not only provide access to new markets for BNSF but also improve and enhance that carrier's route structure. We have every expectation that BNSF will be an important presence in the Central Corridor. While BNSF's operating plan call for three trains at inception of their traffic rights, we would not surprised to find them a much heavier user as they add route capacity on their lines east of Denver. BNSF may follow a similar course between Memphis and St. Louis and Houston. Finally, their competitive situation between their entire system and Mexico will be dramatically improved.

The impact on the I-5 corridor along the west coast and on the central corridor will also be dramatic. Today, SP lacks the financial ability to clear this route for efficient double stack operation and, as the sole carrier in the corridor, does not have to respond to aggressive intramodal competition. Following the UP/SP merger this picture will change dramatically as UP/SP and BNSF square off in this lane, which is essentially for international as well as domestic customers. Furthermore, lower cost and improved train service will have the important associated impact of lower domestic and international repositioning costs along this critical corridor. The positive implications for shippers are far reaching.

Divestitures Are Not in the Public Interest

RISS does not believe that divestiture of Central Corridor routes, or of any other critical route segment from the UP/SP network, would be in the public interest. We emphasized this position to the California Public Utilities Commission in a letter and testimony which is included here as an attachment.

Particularly compared to the alternative of a high-quality BNSF operation across the Central Corridor to Salt Lake City, Denver and beyond, MRL's proposal to acquire parts of the UP and to use the slow SP routes across Tennessee Pass to Kansas City would be a severe loss for intermodal shippers. MRL's route between Kansas City and Northern California is not competitive for intermodal service that requires any degree of expedited handling. SP has already given up on intermodal service using an even better route (the SP's route over the Sierras, instead of UP's route). The Tennessee Pass route is so slow that SP runs intermodal trains from Kansas City to Oakland by way of El Paso. MRL's lack of interest in intermodal service is also reflected in the fact that MRL did not propose direct service to the Port of Oakland, let alone other important intermodal traffic nodes of Modesto, Sacramento and the Bay Area. For MRL, intermodal service is clearly an afterthought. The Board should understand that MRL will not be able to meet the need for competitive intermodal service in the Central Corridor.

The MRL proposal is also a step backwards in time. Railroad consolidations have produced major service improvements by eliminating interchanges and other limitations, as discussed above. The MRL divestiture would displace single-line BNSF Central Corridor service throughout the BNSF network with multi-carrier routings to most destinations. For example, a shipment from Oakland to Chicago via MRL would require handling by three carriers and two slow interchanges. Shippers want railroads to meet the 95 percent or better on-time performance that BNSF often achieves, but there is no way a three-carrier route can do that.

Finally, RISS is concerned about MRL engaging in another highly-leveraged transaction, similar to the Anschutz acquisition of SP. Intermodal service requires investment, and a lot of it. MRL does not indicate any plans to invest in new facilities, and we are concerned that it would have neither the incentive nor the capital necessary to make essential investments.

For the reasons stated above, RISS Intermodal urges the Board to approve the UP/SP merger, along with the agreement with BNSF, without divestitures or other major conditions.

Respectfully submitted,

Thomas R. Brown
President
RISS Intermodal
4 Orinda Way, Suite 100A
Orinda, CA 94563
(510) 253-3801
May 31, 1996

RISS INTERMODAL

Thomas R. Brown
President

4 Orinda Way, Suite 100-A
Orinda, California 94563

510.253.3801
510.253.3880 Fax

May 17, 1996

The Honorable P. Gregory Conlon
California Public Utilities Commission
505 Van Ness Avenue, #5200
San Francisco, CA 94102

Dear Commissioner Conlon:

I am writing to you and each of our PUC commissioners, to express my personal concern over our Public Utilities Commission's expressed interest in the Montana Rail Link (MRL) proposal that it become the competitive alternative in the "Central Corridor." My concern is that the Commission and its fine staff, with its honest and deep concern for the public interest, has been led to believe that the Montana Rail Link proposal is much more than it is in fact.

I can tell you from long personal experience from within the railroad industry in this state, and as an owner and the President of an Intermodal Marketing Company based in Orinda, CA, that the MRL proposal, rather than being a competitive benefit for California shippers is a potential competitive disaster. A railroad without a meaningful network, such as the MRL, does not represent a route to the future for shippers or the public, rather it represents a return to the most ineffective and fragmented practices of the Western railroads' past.

I worked for several years, in intermodal marketing and operations, for the Western Pacific.[1] A railroad which was as the MRL will be: a railroad without sufficient network reach to quote single line prices between major markets and gateways and without the deep pockets to make the capital investments in locomotives, terminals and route capacity to protect even its own captive traffic. Truly, Commissioner Conlon, in this context, the past is a very poor author to the future.

Perhaps what is even more important is that the major shipping interests in California have spoken loudly, clearly and articulately in favor of the UP-SP merger and in favor of the associated BNSF trackage rights as an effective and meaningful competitive remedy. Please bear in mind this includes the Ports of Los Angeles, Long Beach and Oakland; American President Lines and all of the major intermodal companies.

We at Riss Intermodal believe that the UP-SP merger along with BNSF trackage rights are critical to facilitating the creation of adequate route and terminal capacity to support large scale, competitively aggressive intermodal programs in the face of the growing appetite for capacity of the bulk traffic segments. We, and many other California shippers, very much want this merger to go through and we value the BNSF as a solution to the competitive concerns because it meets the realistic criteria of network reach and capital investment capacity. Unfortunately, the MRL proposal brings nothing to the table in either of these categories.

And, if you will forgive my directness, I fear that the California PUC, by focusing on the Montana Rail Link's unrealistic proposals and propositions is off on a tangent that does not reflect the concerns and views of most California shippers. In fact, we believe that divestiture of Central Corridor routes to the MRL would have very negative implications for intermodal and carload shippers.

Should the UP-SP merger be impeded by a divestiture order, intermodal shippers face the very real prospect, in the long term, of being forced off the rail network (except in a limited number of high-volume, internationally-based lanes) due to inadequate route capacity as the more lucrative bulk traffic grows. One can only imagine the economic impact this would have on California ports and highways as intermodal traffic leaves the more efficient rails for rubber-tired alternatives.

Finally, having BNSF serve the Central Corridor is a much superior alternative to what the MRL is proposing to do. The proposed MRL route structure is demonstrably incapable of supporting intermodal service - it lacks not only terminals but also any meaningful network beyond the lines it proposes to purchase. SP, in its daily operations, has already recognized that with a better route than MRL proposes to use that it cannot provide competitive service over this route. As a result, today it routes Oakland-Kansas City traffic over El Paso.

Basically the MRL undermines intermodal competition in the Central Corridor rather than strengthens it. The commission must be mindful of the real and negative impacts, as opposed to purported positive impacts, of the MRL proposal.

May I say that I am also struggling with understanding where the impetus at the PUC is coming from for the MRL proposal. Certainly it is not coming from California shippers -- or at least, not the intermodal shippers, nor the 255 California shippers openly supporting the merger and BNSF trackage rights.

I know the PUC works tenaciously in the public interest in these matters, so perhaps the PUC believes that we could still achieve all of the benefits of the UP-SP merger along with the very real benefits of the BNSF trackage and simply and benignly add the MR' Perhaps the PUC believes this is a simple and logical addition of competition, and therefore, not harmful to the underlying transactions between UP-SP and BNSF in this context.

First of all, even assuming that UP would go ahead with the SP acquisition under the terms of a divestiture to MRL, it is highly unlikely that BNSF would continue to seek to operate over this segment as the traffic it sought would be divided three ways rather than two. As Neal Owen, BNSF's consultant on rail operations, wrote in his second verified statement, loss of traffic to MRL or any other added carrier in the central corridor, "would leave BN/SF without sufficient density to keep service competition in the central corridor alive and well."[2]

So, the likely outcome of the PUC's position would be to substitute the MRL for BNSF. Now let's consider what that would mean. The many negative impacts of that should already be apparent from what has been written above: loss of the network reach necessary to offer meaningful intermodal service products, inadequate terminal capacity to support demand and growth, inability to offer competitive through rates between major markets, etc. etc. MRL is neither a meaningful alternative to, nor even the shadow of an appropriate substitute for BNSF.

Please allow me to thank you, Commissioner Conlon, for the opportunity to express these arguments forcefully and directly to you, the commission and its staff. I hope you will find them insightful in the context of your deliberations.

I would look forward to discussing this with you at your convenience, or, perhaps at the public workshop scheduled for this coming Monday, May 20th. I enjoyed our brief exchange at the earlier workshop.

Very truly yours,

Thomas R. Brown
President

TRB/lc

cc: James T. Quinn, Esq.

---

[1] At the time of Western Pacific's acquisition by Union Pacific, I was Senior Vice President - Intermodal. Previously, I held a number of operating positions including that which set the railroads schedules and blocking. As such, I was also responsible for managing interline operations.

[2] BNSF 54, Second Verified Statement of Neal Owen, p.150.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June 1996, I caused copies of the foregoing documents, RISS Intermodal's Petition to Intervene and For Leave to File Brief and Brief of RISS Intermodal, to be served via first-class mail, postage prepaid on all parties on the service list.

Thomas R. Brown

RECEIVED
MAY 1 1996
BUILDING
GUARD DESK

STB FD 32760 6-1-96 E 83891

Item No. 83891

Page Count 6

JUNE, 1996 #1

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
AMERICAN PRESIDENT COMPANIES

I. Introduction

American President Companies ("APC") submits this brief in support of the merger proposed by Union Pacific ("UP") and Southern Pacific ("SP").

APC is a multi-national company which provides international and domestic containerized transportation service. It contracts with various rail and motor carriers for inland movement of its international cargo as well as for the movement of domestic containerized cargo throughout North America. APC provides domestic wholesale and retail transportation brokerage service through its subsidiary, APL Land Transport Services, Inc. APL also provides international consolidation services through its subsidiary American Consolidation Services, Ltd., as well as logistic consulting services through its subsidiary, American President Business Logistics Services, Ltd.

APC strongly supports the merger between Union Pacific Railroad Company ("UP") and Southern Pacific Transportation Company ("SP"). APC believes the merger will benefit APC and its subsidiaries as well as its many thousands of customers by offering an efficient rail network which can compete vigorously with Burlington Northern/Santa Fe ("BNSF"). APC strongly opposes all requests for divestiture because any divestiture will undermine the competitive and service effectiveness of the broad system contemplated by the proposed merger. Further, any divestiture could negatively impact the operating plan which UP/SP have proposed as well as jeopardizing the trackage rights agreement which UP/SP have entered into with BNSF. Indeed, any divestiture may result in UP's unwillingness to consummate the merger at all, a result which is directly contrary to the interests of APC and the customers it serves.

II. Description of APC's Rail Use and Needs

APC provides international transportation service and domestic brokerage service to thousands of beneficial owners, either directly or through our intermodal marketing company customers ("IMCs"). In 1995, APC transported in excess of one million containerized shipments. Approximately 650 thousand of these shipments moved in rail service in the United States, Canada and Mexico. APC's freight payments to North American rail carriers exceeded $650 million in 1995.

APC maintains three major ocean terminals on the west coast of the United States and has over 100 locations throughout the United States where it maintains container depots. APC provides international joint water/rail service and domestic wholesale brokerage service to hundreds of points within the United States. APC also provides service from and to multiple points in Canada and Mexico. All of these North American points are served by either direct rail service or a combination of rail and motor carrier service.

APC owns and operates a fleet of 374 doublestack cars and contracts with the various United States, Canadian and Mexican rail carriers for use of 58,000 doublestack cars annually. APC has over 126,000 containers in its fleet, of which 14,000 are dedicated to transportation exclusively within North America.

Although APC provides all water service to the East Coast of the United States, the vast majority of its international volumes move in joint water/rail or rail/water service over West Coast ports. The newer vessels in the APC fleet, and those of APC's ocean partners, are too large to transit the Panama Canal. As a result, APC's future is inextricably intertwined with that of the rail industry, and thus APC is vitally interested in the long term viability of the U.S. railroads.

Over the past eleven years, in the west APC has contracted primarily with UP and SP for rail movement of its international and domestic containers. APC's well-being is thus closely tied to the well-being of SP and UP. It is critical for APC's future is to assure that SP and UP can compete vigorously and effectively against BNSF.

III. Why APC Supports the Merger and Opposes Divestiture

A. Basis for Support of the Merger

When the Interstate Commerce Commission approved the merger of BNSF, it created a giant rail network within the west. Based on the current service levels and system scope of each railroad, APC does not believe that either SP or UP alone can effectively compete against this behemoth. Indeed, APC has serious concerns that SP would not survive long in this environment. Combining UP and SP creates a rail network which can effectively compete with BNSF. Moreover, the trackage rights agreement between BNSF and UP/SP assures competition throughout the west.

In deciding whether the UP/SP merger should be approved, what is essential for the Board to recognize here is a key difference between this proposed merger and other mergers. The critical distinction is this: having two rail competitors of equal size in the west is better than having three competitors of unequal size. The reason is simple.

In today's transportation market, because many of today's customers want to single source their business to one rail carrier, the network or system scope of a railroad is critical to maintaining an effective competitive stance. Rail carriers who are able to offer packages of transportation covering a broad geographic area stand a better chance of getting a shipper's business than rail carriers whose scope is limited.

UP alone cannot meet the broad system network which BNSF has since UP lacks the Southern Corridor. SP also falls far below BNSF's system scope, particularly in the Pacific Northwest. Furthermore, SP cannot serve all the West Coast ports while BNSF and UP can; thus, SP is hampered in offering transportation packages to customers who ship internationally to and from all the West Coast ports. SP's serious lack of system scope creates grave concern that SP does not have the long term capability to provide effective competition in the west. However, combined, UP and SP can meet the BNSF system scope and can compete effectively.

APC will benefit directly from the single line network which UP/SP proposes in many significant ways. As an example, a portion of APC's ocean borne business continues to move in rail service from Los Angeles to San Antonio and then via motor carrier over the Laredo border crossing to Mexican points. A through single line service from Los Angeles to Laredo will allow APC to reduce its cost and improve its service on this business. This in turn will allow APC to reduce its price to its customers. Further, the new single line route would provide the capability for APC to offer a containerized intermodal service for shippers now moving products in highway service between Southern California and the Laredo, Texas/Monterrey, Mexico areas.

The merger will also provided added capacity in both intermodal terminal and trackage areas through the potential rationalization of the UP and SP infrastructure. This added capacity provides the ability for APC to grow. For example, APC is currently building two new "on-dock" rail terminals, one at Los Angeles and one at Seattle, to serve our growing international volumes. APC will be able to initiate a cost effective single line service between Los Angeles and Seattle in the so-called "I-5 Corridor".

In the past, APC has seen service performance levels fluctuate dramatically on both UP and SP. APC strongly believes that the proposed merger will provide the means for both carriers to stabilize their performance levels and to provide the quality of service which APC and its customers desire.

B. Divestiture Should Not Be Granted

Divestiture of any line in this proceeding creates unnecessary inefficiencies. Divestiture would place another carrier in the middle of the UP/SP rail network, creating more handoffs, more costs and more administrative expense. It would also negatively impact APC's ability to manage its container, chassis and rail car fleet. APC can perceive no benefits to injecting a carrier like Montana Rail Link, for example, into the middle of the UP/SP system.

Divestiture of the Central Corridor line in particular would critically undermine the network scope of the UP/SP railroad. The proposed UP/SP operating plan would use one Central Corridor line as a highspeed intermodal line and the other for manifest freight. This is critical to APC, whose volume is all intermodal. If UP/SP retain only the Western Pacific line after divestiture, that line will be severely congested with both intermodal and manifest traffic.

UP stated at the Cal PUC hearing this month that if the Montana Rail Link application for divestiture were accepted, the merger would be dead. APC understands that divestiture of the Cotton Belt to Conrail could also jeopardize the merger, or at the very least, jeopardize the BNSF trackage rights agreement. To APC, either of those results would be a severe blow to effective competition in the west. Without the Cotton Belt, the combined UP/SP could not offer the broad systems scope necessary to compete effectively against BNSF. If the merger fails, there is nothing in the current environment to create any assurance that SP and UP as separate entities can compete effectively in the future. In short, divestiture would be the death knell to effective competition with BNSF.

IV. Conclusion

In summary, APC supports the proposed UP/SP merger and the BNSF/UP trackage rights agreement without conditions and respectfully requests the Board to grant the applicants' petitions.

Respectfully submitted,

Ann Fingarette Hasse

ANN FINGARETTE HASSE
American President Companies, Ltd.
1111 Broadway
Oakland, California 94607
(510) 272-7284

Dated: May 30, 1996

STB FD 32760 5-28-96 E 83788

83788

DONELAN, CLEARY, WOOD & MASER, P.C.

ATTORNEYS AND COUNSELORS AT LAW
SUITE 750
1100 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3934

OFFICE: (202) 371-9500

TELECOPIER: (202) 371-0900

RECEIVED MAY 28 1996 MAIL MANAGEMENT I.C.C.

May 28, 1996

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12th and Constitution Avenue, NW
Washington, D.C. 20423

Re: 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.*

Dear Mr. Williams:

Enclosed for filing in the above-captioned proceeding are an original and twenty (20) copies of the BRIEF OF THE DOW CHEMICAL COMPANY (HIGHLY CONFIDENTIAL VERSION), designated DOW-23 and an original and twenty (20) of the BRIEF OF THE DOW CHEMICAL COMPANY (REDACTED VERSION), designated DOW-24. Also enclosed is a diskette formatted in WordPerfect 5.1 with a copy of the Brief (Highly Confidential Version).

If you have any questions, please do not hesitate to contact me.

ENTERED
Office of the Secretary
MAY 29 1996
5 Part of Public Record

Sincerely,

Nicholas J. DiMichael
Jeffrey O. Moreno

ENCLOSURES
1750-020

cc: All Parties of Record (Redacted Version)

181

STB FD 32760 5-28-96 E 83787

83287

DOW-24

RECEIVED MAY 28 1996 MAIL MANAGEMENT I.C.C.

REDACTED
(To Be Filed in the Public Record)

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

- Control And Merger -

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

---

BRIEF OF

THE DOW CHEMICAL COMPANY

ENTERED
Office of the Secretary
MAY 29 1996
5 Part of Public Record

Nicholas J. DiMichael
Jeffrey O. Moreno
DONELAN, CLEARY, WOOD & MASER, P.C.
1100 New York Avenue, N.W.
Suite 750
Washington, D.C. 20005-3934
(202) 371-9500

Attorneys for The Dow Chemical Company

May 28, 1996

TABLE OF CONTENTS (CONTINUED)

		Page
V.	INTERMODAL AND SOURCE COMPETITION ARE NOT ADEQUATE SUBSTITUTES FOR INTRAMODAL COMPETITION AT FREEPORT ..	26
VI.	THE CONDITIONS REQUESTED BY DOW ARE JUSTIFIED BY THE EVIDENCE	27

TRANSCRIPT EXCERPTS (CONFIDENTIAL SUBMISSION ONLY)

- WILLIAM L. GEBO, APRIL 17, 1996
- JAMES S. GEHRING, MARCH 19, 1996
- JAMES S. GEHRING, MAY 16, 1996
- RICHARD B. PETERSON, FEB. 6-10, 1996
- GERALD R. GRINSTEIN, FEB. 16, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

- Control And Merger -

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

BRIEF OF THE DOW CHEMICAL COMPANY

The Dow Chemical Company ("Dow") hereby submits its brief in support of its "Comments, Evidence, and Request for Conditions" (DOW-11) filed on March 29, 1996 in the above-captioned proceeding.[1] Without the requested conditions, the proposed merger between the Union Pacific Railroad ("UP")[2] and the Southern Pacific Lines ("SP")[3] (collectively referred to as "Applicants") will have serious adverse consequences for competition for chemicals and plastics traffic at Dow's production facilities located in Freeport, Texas.

1 Although the due date for the submittal of briefs to the Board is June 3, 1996, Dow is submitting this Brief early in order to give the Board and its staff as much time as possible to evaluate Dow's evidence and argument.

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

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

Through this brief, Dow summarizes and highlights its major arguments and supporting evidence; discusses evidence submitted by other parties to this proceeding which further support Dow's request for conditions; and contrasts the evidence submitted by the Applicants. This brief is intended to be a guide for the benefit of the Board. The Board is referred to Dow's detailed submissions on March 25 and 29 (DOW-10 and 11) for a more in-depth presentation.

Summary of Facts

In addition to its concerns over the anti-competitive effects of the proposed merger on the market for chemicals and plastics transportation on the Gulf Coast generally (expressed in DOW-10), Dow also is concerned with the loss of a build-in option from the SP to Dow's Freeport, Texas chemicals and plastics facilities. The history of this project demonstrates that it is both physically and economically feasible.

The current build-in discussions between Dow and the SP began in April 1994 with the SP's suggestion that a build-in was a possible means to break the UP's strangle-hold on Freeport and to reduce Dow's transportation costs. (DOW-11, Comments at 5)

The first meetings between Dow and the SP took place on a second meeting of personnel from Dow and the SP (*Id.* at 7) At this meeting,

Dow and the SP were to meet again a

Due to personnel scheduling changes, the parties rescheduled this meeting . Before this meeting could take place, the merger was publicly announced. The SP then cancelled the meeting,

At no time prior to the commencement of Applicants' testimony in this case, did SP suggest to Dow that the build-in was not feasible.

Argument

I. <u>THE APPLICANTS INCORRECTLY APPLY THE BOARD'S STANDARDS TO IDENTIFY BUILD-IN OPTIONS THAT SHOULD BE PRESERVED POST-MERGER</u>.

Throughout this proceeding, the Applicants have suggested that they have identified and preserved all build-in opportunities that would be lost as a result of the merger pursuant to standards adopted by the Board in 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 Aug. 23, 1995) ("*BNSF-Control*"). Yet, despite the significant length of parallel lines that are part of this merger, the Applicants initially identified only one build-in that they have deemed worth preserving, the Mont Belvieu project, to which the UP had made an irrefutable commitment to build-in to three SP-served shippers. Until the submission of their rebuttal, however, the Applicants had never publicly articulated the standard they were using and how they have applied that standard in practice. Now that they have done so for Dow's Freeport build-in, it is clear that the Applicants' self-proclaimed standard significantly diverges from and exceeds the standards that the Board has applied in past cases.

Citing to *BNSF-Control*, slip op. at 68, 98, Applicants state that a remedy for a lost build-in

> is appropriate where the shipper seeking the condition presents evidence that demonstrates: (1) either (a) that a shipper had successfully used the threat of a build-in as negotiating leverage, or (b) that a build-in was physically viable and economically feasible and thus could have given the shipper leverage to negotiate for lower rates; (2) that the leverage provided by the build-in opportunity will disappear as the result of the merger; and (3) that other competitive constraints to the shipper are not as effective as the build-in opportunity.

(Applicants' Rebuttal, Vol. I - Narrative (UP/SP-230) at 148-49) Applicants have sought to cleverly impose *additional* requirements which *never* have been imposed by the Board and, in fact, would have precluded certain build-out relief granted by the Interstate Commerce Commission ("ICC") in *BNSF-Control* had Applicants' standards been applied in that decision.

For example, Applicants assert, through the piecemeal storyline of Mssrs. James S. Gehring and John T. Gray, that there were "major unresolved questions about the feasibility of a build-in to Dow's facilities." (UP/SP-230 at 154) Although the testimony of Dow's witnesses when read together with the Applicants' witnesses is evidence of continued discussion over feasibility issues, Dow has provided ample evidence to demonstrate both the physical and economic feasibility of the build-in. The fact that there were some unresolved issues is a result of timing, not an indication of an infeasible project. Both Dow and SP were in the midst of working on the build-in project when the merger announcement stopped that work and rendered further pursuit of the project a pointless endeavor for either party. As a result, there has been no opportunity to finally resolve the few issues highlighted by the Applicants. This, however, does not mean that those issues could not have been resolved. Indeed, the Applicants have not made any such claim. Neither does the failure to resolve all issues in the limited time in which they were discussed mean that the build-in is not feasible.

In fact, the existence of some uncertainty actually weighs *in favor* of granting Dow's request for conditions. Obviously the indicators up until the announcement of the merger were favorable enough to warrant a continuing investment of time and money by both Dow and the SP. Furthermore, these indicators were more than preliminary, as evidenced by

Only at the submission of evidence in the merger case has the SP aggressively attempted to discredit the build-in. This was precisely the situation faced by Phillips Petroleum Company in the BN/Santa Fe merger, in which the Board imposed a condition to preserve Phillips' build-out option, although the parties had not yet agreed to construct the build-in or resolved all the access issues. In that proceeding, the ICC recognized the conflicting evidence of feasibility: "Though evidence is conflicting, the build-out option *may be feasible*." *BNSF-Control*, slip op. at 98 [emphasis added]. On that basis, the ICC granted trackage rights to a build-in point.

However, Applicants in this case would have it another way. Applicants have noted, "build-in opportunities that Applicants identified as feasible happened to be ones that were actively under way." (UP/SP-230 at 148) The Applicants appear to turn precedent on its head by requiring that "feasibility" be equal to actual construction of trackage. Dow submits that Applicants' view is wrong.

The Applicants also argue that Dow has not satisfied the Board's standards because it has not demonstrated "that it used a potential build-in as leverage in bargaining with UP." (UP/SP-230 at 154) This is not and should not be a requirement for the imposition of a build-out condition.

These two facts clearly show that, at the time the merger was announced, Dow had not yet had any opportunity to use the build-in as leverage in bargaining with the UP. But, if Dow had attempted unsuccessfully to use the build-in as leverage with the UP, this would not indicate the project was not feasible, because a feasible project would be constructed and UP would lose the traffic. Thus, the feasibility of the build-in is the essential factor, and not the actual exercise of leverage to obtain lower rates from the incumbent carrier.

II. THE APPLICANTS' FACTUAL WITNESSES ON THE BUILD-IN LACK CREDIBILITY.

The Applicants have presented two SP witnesses who testify about the build-in discussions between the SP and Dow. However, these witness, Mr. James S. Gehring and Mr. John T. Gray, were not participants in most of the discussions and, therefore, lack direct knowledge of the events and conversations to which they testify. In contrast, Dow witness Gebo was directly involved in all phases of the build-in discussions from the very beginning.

As Mr. Gebo testifies, the current build-in discussions originated in a meeting between Dow and the SP in March 1994 to discuss ways to reduce Dow's transportation costs. (DOW-11, Gebo V.S. at 8) After this meeting, the SP sent Dow a letter which included the idea of a direct rail link with the SP at Freeport. (*Id.*)

meetings were held

in addition to numerous communications between Dow and SP before and after those meetings. (*Id.* at 9-10) Mr. Gehring confirms this chronology of events. (UP/SP-231, Gehring R.V.S. at 4-5, 10)

Although these build-in discussions were on-going , Mr. Gehring did not become personally involved until . (Deposition Transcript of James S. Gehring, March 19, 1996 ("Gehring Tr.") at 106-07) Similarly, Mr. Gray concedes that he was not present at any meeting with Dow prior to (UP/SP-231, Gray R.V.S. at 63) Yet, both of these witnesses testify to facts and events that pre-date their involvement in the build-in discussions. This has led to numerous misrepresentations and outright factual errors in their testimony.

Although these errors are addressed at various points throughout this Brief, some of the more egregious ones are worth noting here. For example, Mr. Gehring testifies that,

This is simply not true. In fact, Mr. Gebo testifies that

Mr. Gehring was not present and, thus, his statement is pure heresay.

Mr. Gehring also testifies that the meeting in Denver was "the first time SP had received

other important information." (UP/SP-231, Gehring R.V.S. at 9) This also is not true.

Finally, Mr. Gehring states that a meeting, scheduled for

"was postponed

231, Gehring R.V.S. at 11) This is a blatantly false statement. The meeting, was rescheduled because Mr. Gebo himself had a scheduling conflict. However, when the merger was publicly announced on August 3rd,

Although both Mr. Gehring and Mr. Gray purport to speak for the SP (in very few instances does either one use the pronoun "I"), they occasionally present conflicting testimony,

. For example, Mr. Gehring avers that SP was "shock[ed]"

while Mr. Gray states "we were not surprised"

(*Compare* UP/SP-231, Gehring R.V.S. at 10 *with* Gray R.V.S. at 64) This type of inconsistency only spotlights the limited involvement of these witnesses in the Dow build-in project.

A final matter that is particularly disturbing to Dow is the impression created by Mr. Gehring that he can speak for Dow. For example, Mr. Gehring notes several times that "both Dow and SP recognized . . ." certain facts. However, he cannot possibly be informed enough to present Dow's testimony in this case, especially since he was not present at many of the key discussions.

There are several SP personnel who were present throughout the build-in discussions with Dow and could testify to the true facts. Instead of relying upon the testimony of these people, the SP has elected to present the testimony of two individuals whose involvement was very limited and whose knowledge of the actual events is mostly second and third-hand. The credibility of these witnesses, therefore, should be in serious doubt, particularly when contrasted with the testimony of Mr. Gebo who was directly involved in all build-in discussions on behalf of Dow.

III. <u>THE APPLICANTS HAVE FAILED TO REBUT DOW'S EVIDENCE THAT THE BUILD-IN WAS FEASIBLE</u>.

In its March 29th comments (DOW-11), Dow presented a volume of evidence, in the form of testimony and documentation, demonstrating the physical and economic feasibility of a SP build-in to Dow's Freeport, Texas facilities. Most of the documentary evidence actually was generated

while the build-in was under study. Now, the Applicants, in direct contravention of this evidence, have claimed that the build-in is not feasible. To support this claim, they submit the rebuttal verified statements of two SP employees, Mssrs. James Gehring and John Gray, neither of whom, according to their own testimony, were directly involved in discussions with Dow prior to

. *See* Part II, *infra*. Neither witness presents even a single supporting document that might lend some credence to their stilted and generalized opinions. As a result, both witnesses utterly fail (separately or together) to refute the feasibility testimony of Dow witness William L. Gebo or any of the documents submitted by Dow as evidence of feasibility.

A. The Only Study Conducted of the Physical Feasibility of the Build-In Concludes that the Build-In is Feasible.

Dow has presented extensive evidence that a build-in to Freeport from the SP is physically feasible. (DOW-11, Comments at 17-19; Gebo V.S. at 11-13) Of particular note is a study which is attached to DOW-11 as Exhibits WLG - 6 and 7. Although several of Applicants' witnesses attempt to characterize these presentations as "preliminary," they do not present any evidence that contradicts or refutes the conclusion

Applicant witness Gehring actually states that (UP/SP-231, Gehring R.V.S. at 12) All that he testifies to are the feasibility issues that would have to be addressed. Nowhere does Mr. Gehring claim that these issues are insurmountable or otherwise would render the build-in project physically not feasible. The fact that certain issues were unresolved when the public announcement of the merger terminated build-in discussions should not automatically lead to the conclusion that the build-in is not physically feasible.

The issues raised by Mr. Gehring either are not very significant, were at least partially addressed by Dow and the SP, or are raised for the first time in this proceeding. For example, Mr. Gehring (and also Mr. Gray) raises the spectre that the SP might have to rehabilitate at extra cost, in order to serve Dow via a build-in. (*Id.* at 13; Gray R.V.S. at 63) However, he cannot affirmatively state that this would be the case. Furthermore, the SP never raised this matter with Dow during their build-in discussions.

Because the SP currently reaches

presumably the SP palnned to serve Dow in the same manner.

Mr. Gehring further questions the ability of the SP to gain interplant and intraplant access at Freeport via a build-in. (UP/SP-231, Gehring R.V.S. at 13)

Intraplant access was not a problem because, contrary to Mr. Gehring's statement (*Id.* at 7), Dow owns its intraplant track at Freeport. (DOW-11, Gebo V.S. at 7)

Although the UP does own most of the interplant trackage, Dow did not believe this would pose an insurmountable problem because Dow owns most of the land between its plants upon which interplant track could be constructed. (*Id.* at 12)

Mr. Gehring also raises the fact that the build-in would have to cross

as an obstacle to physical feasibility. This argument is without merit. The Board is well aware of the procedures in place to force a crossing of another carrier's track. Indeed, under the ICC Termination Act, Congress directed that such crossing matters should be decided expeditiously, within 120 days. 49 U.S.C. § 10901(d) (1996).

Finally, Mr. Gehring points out that the build-in route was through wetlands, but,

(UP/SP-231 Gehring R.V.S. at 13-14) Rather, Mr. Gehring hangs his hat upon idle speculation that legal and public relations obstacles *might* a e. However. he ignores the fact that

Furthermore, this route does not

actually pass through protected wetlands but, rather,

This should have moderated most environmental concerns that theoretically might have arisen and it certainly indicates that the physical construction of track is feasible. The speculative nature of Mr. Gehring's concern does not demonstrate physical infeasibility.

B. <u>The SP's Rates for Transporting Traffic Over the Build-In Were Sufficient to Render the Build-In Economically Feasible</u>.

Dow has presented extensive empirical, documentary and testimonial evidence of the economic feasibility of the SP's proposed build-in to Freeport. (DOW-11, Comments at 19-24; Gebo V.S. at 13-16) Much of this evidence has been largely ignored by the Applicants. To the extent the Applicants have attempted to refute Dow's evidence of economic feasibility, they have engaged in misinformation and have used inaccurate data in their empirical analyses.

Applicants' claim of economic infeasibility is based upon three factors. First, the Applicants assert that the rates the SP could offer over the build-in would be higher than the rates Dow currently pays to the UP at Freeport. (UP/SP-231, Gehring R.V.S. at 12) Second, they claim that the cost of the build-in is under-estimated. (UP/SP-230 at 154) Finally, they argue that SP was unable to finance the build-in and Dow was unwilling to do so. (*Id.*) Each of these claims is erroneous and unsupported by the facts.

1. <u>Mr. Gehring's rate analysis is based upon incorrect rate data and factually flawed assumptions</u>.

The first claim, that the SP's build-in rates would be higher than the UP's current rates to Dow, is simply not true. Mr. Gehring based his conclusion upon incorrect UP rates and upon the incorrect assumption that only Dow traffic would be carried over the build-in.

Mr. Gehring, an SP employee, did not have access to the UP's actual rates to Dow and, therefore, he decided to guess. (Gehring Rebuttal Tr. at 35-36) His estimates, however, are far from accurate. The UP rates estimated by Mr. Gehring are lower than Dow's actual rates from the UP. (*Compare* Gehring Rebuttal Tr., Ex. 3 *with* DOW-11, Verified Statement of Thomas D. Crowley ("Crowley V.S."), Ex. 3) Thus, Mr. Gehring's first critical error was the use of an artificially low UP rate to reach his conclusion that the SP's build-in rates would be higher than the UP rates.

Compounding his rate error, Mr. Gehring makes another erroneous assumption that only Dow traffic would support the cost of the build-in. (Gehring Rebuttal Tr. at 31-32) But, this is highly unlikely. Dow witness Gebo testified that, in addition to Dow's carloads of traffic per year,[5] the SP could access another carloads from other shippers at Freeport and yet another carloads from several shippers over the build-in. (DOW-11, Gebo V.S. at 13) At least one of these additional shippers, Quantum, located at Chocolate Bayou, also has submitted comments expressing concern about losing the SP build-in option post-merger. (QCC-2)

Mr. Gehring was well aware of these facts, as evidenced by references to these other shippers and to a Quantum build-in, in particular, in his rebuttal testimony.

---

5 Mr. Gehring's analysis assumes that SP would originate only of the carloads available to it. (Gehring Rebuttal Tr. at 31-32) However, Dow estimated that SP would originate at least carloads out of Freeport. (Gebo Tr. at 90) As demonstrated in the text, above, even using Mr. Gehring's extremely conservative figures, the build-in is economically feasible at the rates quoted by the SP.

(UP/SP-231, Gehring R.V.S. at 6, 9-10, 14-15) However, in order to obtain the desired results from his analysis, he chose to ignore this traffic.

At most, Dow's traffic would have represented of the potential build-in traffic. Adjusting Mr. Gehring's analysis to reflect this fact, Dow's per carload portion of the build-in cost would total at most.[6] This is significantly less than projected by Mr. Gehring. (Gehring Rebuttal Tr., Ex. 3) When per car is added to the build-in rates developed by the SP, they compare quite favorably to the UP rates:[7]

Dest State	UP Rate	SP Rate (including build-in cost)
CA	$	$
GA		
NJ		
PA		

Thus, Dow would realize significant savings over the UP from an SP build-in even after the cost of a build-in is considered.

This is consistent with Dow's evidence that its status as a captive shipper to a market dominant UP, at Freeport, Texas and Plaquemine, Louisiana, has resulted in Dow paying a rate premium over competitively served

---

6 This figure was calculated as follows using Gehring Rebuttal Tr., Ex. 3:

7 This chart is derived from DOW-11, Crowley V.S., Ex. 3. The UP rates are from Col. 2 and the SP rates are Col. 3 +

chemicals and plastics shippers.[8] (DOW-11, Comments at 22) Dow's estimated annual savings from access to a competing carrier is (*Id.* at 22-23) When combined with the savings of other captive shippers along the build-in route, the economic feasibility of the build-in is unquestionable. Mr. Gehring's analysis confirms this fact when the true traffic volumes accessible via the build-in are considered.

2. <u>There is no evidence to support Applicants' claim that the build-in costs are under-estimated</u>.

Both Mssrs. Gehring and Gray suggest that the cost estimate of the build-in is understated. There is no basis for this claim.

Dow witness Crowley concludes that, in his experience, the price tag may be over-estimated. (Id., Crowley V.S. at 4) There simply is no evidence to conclude that the estimate is inaccurate.

3. <u>Dow has been and remains willing to finance a build-out</u>.

Applicants accuse Dow of "obscur[ing] the fact that nobody has been willing to finance a build-in, and that SP is . . . in no position to finance one." (UP/SP-230 at 154) This statement is an example of Applicants' use of half-truths and misinformation.

---

8 Applicants have not disputed any of Dow's evidence that it is rate disadvantaged by the UP. Specifically, Applicants have not challenged Mr. Gebo's statement that

First of all, it is Applicants who have created the confusion over financing. Dow witness Gebo has testified that

(DOW-11, Gebo V.S. at 15) This statement, however, clearly is inconsistent with Applicants' claims in this proceeding.[9] The SP, therefore, now claims that it could not finance the build-in, although, interestingly, it still claims that it would want . (Gehring Tr. at 142)

Applicants further assert that Dow was unwill g to finance a build-out. This is blatantly untrue. Although Dow would be the single largest shipper over the build-out, its traffic would account for (DOW-11, Gebo V.S. at 13) Dow was willing to finance its fair share of a build-out, but Dow did not want to finance the entire build-out which would benefit other shippers at Freeport without a proportional contribution from those other shippers. (*Id.* at 14)

Applicants then suggest that This is not true. Mr. Gehring also states that:

(UP/SP-231, Gehring R.V.S. at 9)

---

9 Furthermore, the United States Department of Justice, among many others, has seriously challenged Applicants' claims that the SP is in weak financial condition that will render it an increasingly ineffective competitor over time. (DOJ-8, Verified Statement of Eileen Zimmer).

In the final analysis, whether the project was to be financed as a build-out or build-in is irrelevant. This was not one of the considerations examined in *BNSF-Control* and the Applicants' attempt to make an issue of this is just another example of the application of a greater standard than that adopted by the Board in previous mergers. The focus should be upon the feasibility of the project. A Freeport build-in undoubtedly is feasible.

* * *

Finally, perhaps the most telling evidence of the overall feasibility of an SP build-in has been the SP's own treatment of the matter in this proceeding. Ever since Dow first expressed its concerns about the merger in this proceeding, the SP has insisted on maintaining a level of confidentiality even *greater* than that provided for in the Protective Order in place in this proceeding. Notably, all build-in documents produced by the SP in this proceeding have been designated "Highly Confidential" but have not been placed in the Applicants' document depository and have not been made accessible to anyone other than Dow's outside legal counsel and consultants. In addition, all deposition transcripts of SP personnel who address the build-in have been designated "Highly Confidential." Furthermore, at the SP's insistence, Dow reluctantly was compelled to redact virtually its entire discussion of the build-in project in the public submission of Dow's March 29th comments (DOW-12). Indeed, only after a prolonged debate with the SP's counsel was Dow even permitted even to use the words "SP", "build-in", and "Freeport" in the same sentence of Dow's public filing.

IV. BNSF WILL NOT PROVIDE DOW WITH A BUILD-IN OPTION AT FREEPORT AFTER THE MERGER.

Applicants rely heavily upon the presence of the BNSF as a potential build-in carrier to Freeport after the merger as a reason why Dow will not suffer competitive harm at Freeport as a consequence of the merger. Although this proposed merger may appear to render Dow a "3 to 2" point, the true impact will more accurately resemble that of a "2 to 1" point. Regardless of how the anticompetitive effects are characterized, Dow will suffer a loss of competition at Freeport as a result of the merger. As a "3 to 2" scenario, Dow loses the aggressive competition provided by the SP as a maverick third carrier. As a "2 to 1" scenario, the merger effectively will eliminate build-in options from both the SP and BNSF. From either perspective, BNSF will not provide Dow with a build-in option after the merger.

A. SP is the Catalyst that has Sustained BNSF's Interest in a Build-In to Freeport.

Applicants contend that Dow has failed to show how it will be harmed by a reduction from three carriers to two. (UP/SP-230 at 154-55; UP/SP-231, Vol. 2, Pt. B, Rebuttal Verified Statement of Richard B. Peterson ("Peterson R.V.S.") at 56) This claim ignores the testimony of Dow witness Kwoka, which is supported by Dow's actual experience pursuing build-in options for Freeport, and by the testimony of the Applicants themselves.

Dow's Freeport build-in is a textbook example of reality proving theory. Dr. Kwoka's survey of economic research demonstrates that a third competitor frequently plays a critical role in the market because the third firm frequently refuses to coordinate with the dominant two, which forces them to respond in a similar competitive manner. (DOW-11, Verified Statement of John E. Kwoka ("Kwoka V.S.") at 12-15, 17-24)

In the pre-merger three-carrier environment, Dow's build-in discussions

are directly attributable to intense competition among all three carriers in the Gulf Coast.

This was the genesis of the build-in discussions that followed.

The duopoly that will exist on the Texas Gulf Coast after the merger will provide BNSF with an incentive not to construct a build-in to Freeport.

. After the merger, both UP and BNSF will serve numerous shippers exclusively over a large geographic area and both will have strong incentives to protect their captive territories from one another. The best way to do this will be to reach a tacit understanding that each will not raid the other's captive shippers, thus preserving to each its monopoly profits from these shippers. (DOW-11, Kwoka V.S. at 5-6) Therefore, it would be competitively dangerous for BNSF to pursue a build-in to the UP's largest chemicals and plastics shipper, Dow at Freeport, because BNSF would be inviting a similar response from the UP at a captive BNSF location.

Applicants' witness Spero has attempted to dispute this fact

This is a textbook example of competitive harm in a either a "2 to 1" or "3 to 2" situation.

B. <u>The Merger Will Further Weaken the Economic Feasibility of a BNSF Build-In</u>.

Even if BNSF would have sufficient competitive incentive to pursue a build-in to Freeport after the merger, the economic feasibility of a BNSF build-in will be significantly weakened.

(Gebo Tr. at 89-91)

Applicants have attacked Dow's analysis because Dow witnesses Gebo and Crowley do not consider traffic BNSF could haul to New Orleans, under the settlement agreement between Applicants and BNSF, which BNSF cannot haul currently. (UP/SP-231, Spero R.V.S. at 15) First of all, as explained by Mr. Gebo, above, Dow did not reach its conclusions solely on the basis of BNSF's inability to reach New Orleans. Dow also looked at

Equally important, Mr. Crowley did not consider New Orleans traffic because BNSF does not have the infrastructure to enable it to handle the traffic efficiently. The extensive analyses of Consolidated Rail Corporation ("Conrail"), the Kansas City Southern Railway Company ("KCS"), the Society of the Plastics Industries ("SPI"), the Chemical Manufacturers Association ("CMA"), and others confirm this conclusion and justify Mr. Crowley's analysis.

Conrail has presented highly detailed evidence that BNSF will not be an adequate substitute for SP on the Gulf Coast, even under the BNSF settlement agreement. (CR-21 at 56-59) In particular, BNSF service will be handicapped at Houston, which BNSF concedes is the "anchor" for all the lines BNSF would acquire, and through which all of Dow's traffic would have to travel. (CR-21 at 56; BNSF-1, Verified Statement of Neal D. Owen ("Owen V.S.") at 25) Gerald Grinstein, the former chairman of BNSF candidly concedes that BNSF will suffer a "severe service disability" at Houston. (Deposition of Gerald R. Grinstein, February 16, 1996 ("Grinstein Tr.") at 161)

Conrail has identified several major service problems for BNSF at Houston. (CR-21 at 62-66) For example, while SP traffic at Houston largely avoids reliance upon terminal carriers, BNSF will be required to use one and sometimes two terminal carriers. (*Id.* at 62) The additional handling of this traffic at Houston will add both cost and time to traffic moving via BNSF, as compared to the same traffic flows over the SP today, not to mention the implications for safety, potential misrouting, and damage. (*Id.* at 64)

Similarly, BNSF traffic will be disadvantaged at St. Louis by its need to use switching carriers, such as TRRA, to cross the Mississippi River in order to access eastern carriers. (*Id.* at 73) The SP is not burdened by this problem today and neither will the combined UP/SP. The same problems associated with the Houston terminal will be present here too.

Another critical factor is BNSF's lack of infrastructure in the Gulf Coast for handling chemicals and plastics traffic. (CR-21 at 79-81) BNSF will have access to of switching and classification yards in the Gulf Coast post-merger, critical facilities for chemicals and plastics traffic. (*Id.* at 80; SPI-11 at 40) This is less than of the facilities available to SP today. (CR-21 at 80) Similarly, BNSF will have of the available storage-in-transit capacity in the Gulf Coast post-merger, a significant infrastructure requirement for plastics traffic. (*Id.*; SPI-11 at 39) This is less than of SP's capacity today. These deficiencies have not been cured by the Applicants' settlement agreement with CMA. (CR-37 at 7, 10-12)

BNSF's low market share for Gulf Coast chemicals and plastics traffic, relative to UP and SP shares, is indicative of its poor infrastructure for handling this traffic. Thus, BNSF cannot be expected to provide service comparable to the SP today and certainly not comparable to the combined UP/SP post merger. Any analysis by the Applicants that assumes BNSF can and will handle all the chemicals and plastics traffic to which it will have access is grossly overstated.

As a consequence of its poor infrastructure for handling chemicals and plastics traffic, BNSF is not likely to construct a build-in to Dow at Freeport. Nor is it likely to be able to handle Dow's traffic efficiently if Dow were to construct a build-out to BNSF.

In contrast, the SP has the infrastructure to handle it efficiently and cost-effectively. Thus, the merger will eliminate Dow's only true build-in option, the SP.

V. INTERMODAL AND SOURCE COMPETITION ARE NOT ADEQUATE SUBSTITUTES FOR INTRAMODAL COMPETITION AT FREEPORT.

In their primary application, Applicants submitted very generalized testimony about intermodal and source competition for chemicals and plastics traffic. (UP/SP-23 at 232-48, 486-500, 714-17) In response to this testimony, Dow witness Gebo addressed source and intermodal competition in great detail. (DOW-11, Gebo V.S. at 18-31) Although Mr. Gebo acknowledged the limited existence of such competition, he also explained that such competition is severely constrained by many variables. As a consequence, intermodal and source competition are effective only on selected traffic lanes or for selected commodities, and cannot provide an effective competitive check to the market dominance of a merged UP/SP.

Applicants have barely acknowledged Mr. Gebo's factual testimony in their rebuttal, and have elected simply to rely upon their initial self-serving testimony. However,

Thus, Dow's loss of a competitive build-in option can only be rectified by providing Dow with an equivalent option from another rail carrier.

Applicants would suggest that Dow's problems, like those of the plastics and chemicals industries in general, can simply be solved by putting products on trucks, ships and barges. They are wrong. As Mr. Gebo has explained, Dow's challenge of economically moving broad range of chemicals and plastics products is immense. Competitive rail access is essential.

VI. THE CONDITIONS REQUESTED BY DOW ARE JUSTIFIED BY THE EVIDENCE.

Dow has formulated its request for conditions as a request for primary relief and a request for alternative relief. The primary request contains the relief that Dow believes will restore a build-in option to Dow that is equivalent to the build-in option currently provided by the SP. Dow's alternative request contains the minimum relief to which Dow is entitled.

Specifically, to ameliorate the anticompetitive effects of the proposed merger upon Dow's Freeport facilities, Dow has requested the following relief:

Primary Request

1. Trackage rights for a carrier other than the BNSF, to be determined by Dow, over --

   a. The SP's line between New Orleans, LA and Houston, TX;

   b. The SP's line between Houston, TX and Memphis, TN;

   c. The UP's line between Houston, TX and Algoa, TX (including the portion of the BNSF line over which the UP currently operates pursuant to trackage rights); and

   d. The UP's line between Algoa and Angleton, TX with the right to connect to new line construction to serve Dow at Freeport and any other shippers located along the new line.

and

2. Trackage rights for the BNSF over the UP line between Algoa and Angleton, TX with the right to connect to new line construction to serve Dow at Freeport and any other shippers located along the new line.

Alternative Request

Trackage rights for a carrier other than the BNSF, to be named by Dow, over

a. The SP's line between New Orleans, Louisiana and Houston, Texas;

b. The SP's line between Houston, Texas and Memphis, Tennessee; and

c. The UP's line between Houston, Texas and
with the right to connect to new line construction in the vicinity of in order to serve Dow at Freeport and any other shippers located along the new line.

Remarkably, the Applicants have singled out Dow as "a prime example of a shipper using this merger to obtain a windfall." (UP/SP-230 at 153) Dow's request for conditions, however, is much narrower than the request of any other shipper seeking to preserve a build-in. While Dow has requested only trackage rights for a carrier to a build-in point, other shippers have requested trackage rights directly into their facilities. Dow can hardly be accused of overreaching when it has asked for the most narrow scope of relief.

Dow's primary request for relief asks that the trackage rights build-in point be shifted from to a point between Angleton and Algoa, Texas. The reason for this shift is to ensure that the tenant carrier has the same economic incentive to construct a build-in as the SP has currently. Dow has demonstrated that no other carrier has the route structure that will permit it to terminate as much Dow traffic or obtain as many extended hauls as the SP. As a result, the net economic benefit of a build-in from will be less for other carriers than for the SP, because, while the cost of construction would be the same for all carriers, the revenue benefits to any new carrier will be less than they are for the SP. Therefore, no other carrier will have as much to gain economically as the SP does today. However, a less costly build-in from a closer point will be viable for these carriers; thus, restoring Dow's competitive position for a build-in.

Dow's primary request for relief includes trackage rights for both BNSF and a third carrier because

Also, as demonstrated by Dow, BNSF's current build-in option would be weakened significantly as a result of the merger and, thus, may not be feasible, if it ever was.

Dow's alternative request seeks trackage rights for a carrier, other than BNSF, to the build-in point under consideration by Dow and the SP.

. This relief is wholly consistent with the build-in relief granted in *BNSF-Control*.

Applicants also make the absurd proposition that Dow's primary and alternative request for trackage rights from Houston to New Orleans and from Houston to Memphis is overreaching. (*Id.*) However, without these conditions, the tenant carriers (most likely KCS, Conrail, or Illinois Central) would not be able to connect with their existing lines, thereby rendering the right to build-in to Freeport useless. In addition, these conditions will ensure that the same efficient connections that can be provided by the SP today will also be provided by the tenant carrier post-merger.

WHEREFORE, Dow requests that its request for conditions be imposed upon the proposed merger.

Respectfully submitted,

Nicholas J. DiMichael
Jeffrey O. Moreno
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Avenue, N.W., Suite 750
Washington, D.C. 20005-3934
(202) 371-9500

May 28, 1996

Attorneys for The Dow Chemical Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF OF THE DOW CHEMICAL COMPANY has been served via first class mail, postage prepaid on all parties of record in this proceeding on the 28th day of May, 1996, and by hand delivery to Washington, DC counsel for Applicants.

Aimee L. DePew

STB FD 32760 5-23-96 E 83700

Item No. ______________

Page Count ______________

May, 1996 # 132

83700

ORIGINAL

LAW OFFICES
FRITZ R. KAHN, P.C.
SUITE 750 WEST
1100 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3934
(202) 371-8037
FAX (202) 371-0900

RECEIVED
MAY 23 1996
MANAGEMENT
I.C.C.

May 22, 1996

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
Washington, DC 20423

Dear Secretary Williams:

Enclosed for filing in Finance Docket No. 32760, Union Pacific Corp., et al.--Control and Merger--Southern Pacific Rail Corp., are the original and twenty copies of the Brief of Mountain Coal Company.

Extra copies of the Brief and of this letter are enclosed for you to stamp to acknowledge your receipt of them and to return to me in the enclosed self-addressed, stamped envelope.

By copy of this letter, service is being effected upon counsel for each of the parties.

If you have any question concerning this filing or if I otherwise can be of assistance, please let me know.

Sincerely yours,

Fritz R. Kahn

enc.
cc: ALJ Jerome Nelson
All parties
Thomas F. Linn, Esq.

ENTERED
Office of the Secretary
MAY 23 1996
5 Part of Public Record

ORIGINAL

MTN-3

RECEIVED MAY 23 1996 MANAGEMENT I.C.C.

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

Finance Docket No. 32760

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

BRIEF
OF
MOUNTAIN COAL COMPANY

Pursuant to the decision of the Interstate Commerce Commission, served December 27, 1995, Decision No. 9, Mountain Coal Company submits the attached letter of its Vice President, Mr. Michael W. DeGenring, dated May 17, 1996, as its Brief herein.

Respectfully submitted,

MOUNTAIN COAL COMPANY

By its attorney,

ENTERED
Office of the Secretary
MAY 23 1996
5 Part of Public Record

Fritz R. Kahn
Fritz R. Kahn, P.C.
Suite 750 West
1100 New York Avenue, NW
Washington, DC 20005-3934
Tel.: (202) 371-8037

Dated: May 22, 1996

Mountain Coal Company
555 Seventeenth Street
Denver, Colorado 80202
Telephone 303 293 4300
Facsimile 303 293 4128

May 17, 1996

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

Re: **UP/SP Merger, F.D. No. 32760**

Dear Mr. Williams:

On March 29, 1996, several parties filed comments with the Surface Transportation Board (STB) requesting conditions that would result in divestiture of the Central Corridor (Kansas City-Stockton, CA).

We have made large investments in coal mining operations that in our opinion would be adversely impacted by this divestiture. Our mine is located at Paonia, Colorado and is currently served by Southern Pacific on the Central Corridor. We believe our mine will be better served by the merged UP/SP system than it would by any alternative which dismembers the SP. We specifically do not favor the proposal advanced by Montana Rail Link (MRL).

While we are, through our ARCO Coal Company parent, a member of Western Shippers' Coalition ("WSC") and WSC supports the MRL proposal, we do not believe divestiture of the Central Corridor and conveying it to a third party is the appropriate solution. Accordingly, we do not support that aspect of WSC's comments.

Divestiture would deny us single line service and would add substantially to our transportation costs. Efficient, competitive rail transportation is essential to our ability to survive and grow in a rapidly changing coal market. Therefore, please do not impose this condition.

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement. Executed on May 17, 1996.

MOUNTAIN COAL COMPANY

Michael W. DeGenring
Vice President

CERTIFICATE OF SERVICE

Copies of the foregoing Brief this day were served by me by mailing copies thereof, with first-class postage prepaid, to counsel for each of the parties.

Dated at Washington, DC, this 22nd day of May 1996

Fritz R. Kahn

Fritz R. Kahn

STB FD 32760 5-23-96 J 83726

SENT BY: 5-23-96 ; 14:58 ; GALLAND KHARASCH→ 202 927 5984:# 2/ 3

83726

GALLAND, KHARASCH, MORSE & GARFINKLE, P.C.
ATTORNEYS AT LAW

EDWARD D. GREENBERG
DIRECT LINE: (202) 342-5277
FACSIMILE: (202) 342-5219

CANAL SQUARE
1054 THIRTY-FIRST STREET, N.W.
WASHINGTON, D.C. 20007-4492
TELEPHONE: (202) 342 5200

May 23, 1996

ENTERED
Office of the Secretary
MAY 24 1996
Part of
Public Record

RECEIVED
MAY 23 1996
MAIL
MANAGEMENT
I.C.C.

VIA FACSIMILE

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch, Room 1324
12th St. & Constitution Avenue, N.W.
Washington, DC 20423

Re: Finance Docket No. 32760 Oral Argument

Dear Secretary Williams:

Pursuant to Decision No. 36 of the Board served May 9, 1996, this is to advise that the undersigned, counsel for The International Paper Company ("IP"), wishes to participate in the oral argument scheduled to be held in this proceeding on July 1, 1996.

IP intends to address the following issues:

1. Whether the "Settlement Agreement" entered into between the Applicants and the BNSF, as modified by the "CMA Settlement," provides a true competitive alternative to shippers in replacing the intramodal rail competition that would be lost in the Houston/Memphis corridor if the merger is approved; and

2. Whether additional conditions must be imposed on Applicants in the State of Oregon to alleviate continued inappropriate control of the Central Oregon & Pacific Railroad by the Southern Pacific in order to permit the BNSF to freely interchange traffic at commonly-served points and provide true competitive service for all rail shippers, rather than a favored few, in the "I-5" corridor.

As IP believes that the conditions offered to date by the Applicants do not provide reasonable assurances of continued competitive rail service, any approval of the merger must be conditioned upon the following:

1. Divestiture of the SSW lines and all related rail facilities between Houston and Memphis, such divestiture to include all property interests currently held by the SP including trackage and/or joint facility rights through KCS' Shreveport yard;

Item No.

Page Count

May 1996 #137

XINJIYUAN-GKMG LAW OFFICE
AFFILIATED FIRM
NO. 535-538, FENGYUAN CRESTWOOD HOTEL
NO. 23, DONG JIAO MIN XIANG
BEIJING 100006 PEOPLE'S REPUBLIC OF CHINA
TEL: 011-86-10-523-5567 FAX: 011-86-10-523-5569

Item No. 83749

Page Count 1

May, 1996 #170.171

LAW OFFICES

KELLER AND HECKMAN LLP

1001 G STREET, N.W.
SUITE 500 WEST
WASHINGTON, D.C. 20001
TELEPHONE (202) 434-4100
FACSIMILE (202) 434-4646

BOULEVARD LOUIS SCHMIDT 87
B-1040 BRUSSELS
TELEPHONE 32(2) 732 52 80
FACSIMILE 32(2) 732 53 92

WRITER'S DIRECT DIAL NUMBER

(202) 434-4144

RECEIVED
MAY 24 1996
MAIL MANAGEMENT 7
I.C.C.

May 24, 1996

SPI-20
MONT-8
UCC-13

Vernon A. Williams, Secretary
Surface Transportation Board
1201 Constitution Ave., NW, Rm 2223
Washington, DC 20423

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

Dear Secretary Williams:

Responsive to Decision No. 36 issued by the Board on May 9, 1996, the purpose of this letter is to request time at oral argument on behalf of the following parties:

(i) The Society of the Plastics Industry, Inc.
- (a) Issues: Impact of the proposed merger on the plastics industry and appropriate remedy;
- (b) Position of SPI: Opposed to primary application, and supports request for conditions;
- (c) Time Requested: 15 minutes.

(ii) Montell USA, Inc.
- (a) Issue: Loss of competition at West Lake Charles;
- (b) Position of Montell: Opposed to primary application and supports request for conditions;
- (c) Time Requested: 5 minutes.

(iii) Union Carbide Corporation
- (a) Issue: Loss of build-out opportunity and appropriate remedy;
- (b) Position of Union Carbide: Opposed to primary application and supports request for conditions;
- (c) Time Requested: 5 minutes

ENTERED
Office of the Secretary
MAY 28 1996
4 Part of Public Record

Respectfully submitted,

Martin W. Bercovici

Martin W. Bercovici

cc: All Parties of Record

STB FD 32760 5-6-96 83077 E

Item No. ____________

Page Count 14

may # 47

83077

TROUTMAN SANDERS LLP

ATTORNEYS AT LAW

A LIMITED LIABILITY PARTNERSHIP

1300 I STREET, N.W.
SUITE 500 EAST
WASHINGTON, D.C. 20005-3314
TELEPHONE: 202-274-2950
FACSIMILE: 202-274-2994

WRITER'S DIRECT DIAL:

May 6, 1996

RECEIVED MAY 6 1996

HAND DELIVERED

Mr. Vernon A. Williams
Surface Transportation Board
Case Control Branch
Room 2215
1201 Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 32760, *Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company -- Terminal Trackage Rights -- Kansas City Southern Railway Company*

Dear Secretary Williams:

Enclosed for filing in the above-captioned case are an original and twenty copies of The Kansas City Southern Railway Company's Brief in Opposition to Burlington Northern/Santa Fe Request to Strike ("KCS-52").

Also enclosed is a 3.5 inch Word Perfect diskette containing the text of KCS-52.

Sincerely yours,

Alan E. Lubel

Alan E. Lubel

Enclosures

cc: The Honorable Jerome Nelson
Restricted Service List (Outside Counsel Only)

ENTERED
Office of the Secretary

MAY 7 1996

5 Part of Public Record

KCS 52

HIGHLY CONFIDENTIAL
FILED UNDER SEAL

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

THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
BRIEF IN OPPOSITION TO BURLINGTON NORTHERN/
SANTA FE REQUEST TO STRIKE

Richard P. Bruening
Robert K. Dreiling
The Kansas City Southern
Railway Company
114 West 11th Street
Kansas City, Missouri 64105
Tel: (816) 556-0392
Fax: (816) 556-0227

John R. Molm
William A. Mullins
Alan E. Lubel
Troutman Sanders LLP
601 Pennsylvania Ave., N.W.
Suite 640 - North Building
Washington, D.C. 20004-2608
Tel: (202) 274-2950
Fax: (202) 274-2994

May 6, 1996

HIGHLY CONFIDENTIAL
FILED UNDER SEAL

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

THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
BRIEF IN OPPOSITION TO BURLINGTON NORTHERN/
SANTA FE REQUEST TO STRIKE

In its rebuttal Comments filed on April 29, 1996, Burlington Northern/Santa Fe (hereinafter "BN/Santa Fe") suggested that a certain exhibit (Bredenberg Deposition, Exhibit 1) relating to admissions made by BN/Santa Fe regarding its lack of interest in competing in South Texas, as well as admissions that the BN/Santa Fe Trackage Rights Agreement with Applicants was a "package deal" under which BN/Santa Fe was required to take rights in South Texas in order to get rights in which it had more interest, should be stricken from the record. (BN/Santa Fe - 54, p.33) Although no motion to strike has been filed, to the extent BN/Santa Fe's request is taken as a motion to strike, The Kansas City Southern Railway Company makes the following response.

I. The Call Report at Issue.

The disputed evidence at issue is found in a record of an October 5, 1995 telephone conversation, entitled a Call Report, between Mr. Brad Skinner, Chief Operating Officer of Intermodal and North American Operations of Transportacion Maritima Mexicana and a member of the Board of the Executive Committee of the Tex-Mex Railway, and Mr. Rollin Bredenberg of Burlington Northern/Santa Fe. Mr. Bredenberg had been put in charge of matters relating to traffic to Mexico for BN/Santa Fe and they were discussing possible coordination between the two railroads. The portion of the Call Report cited by KCS in its testimony provides as follows:

> WE TALKED ABOUT MEXICO. ROLLIN TOLD ME THAT THEY <u>ARE NOT</u> INTERESTED IN MEXICO. . . . I SAID - WELL, IF YOU ARE NOT INTERESTED IN MEXICO, THEN WHY . . . ARE YOU GOING TO BE HANDLING THE TRACKAGE RIGHTS ALL THE WAY DOWN TO BROWNSVILLE? HE SAID, BRAD, I WAS IN THE CONVERSATION WHEN THE TRACKAGE RIGHTS WERE AWARDED. DICK DAVIDSON SAID THE FOLLOWING: THAT HE WOULD AWARD THE WESTERN TRACKAGE RIGHTS AS LONG AS WE WOULD TAKE . . . THE RIGHTS FROM TEXAS TO NEW ORLEANS, TO MEMPHIS AND TO BROWNSVILLE: IT WAS A PACKAGE DEAL. ROB AND ROLLIN SAID - WELL, WE WOULD PREFER THAT TEX-MEX BE OUR OPERATOR FROM CORPUS TO HOUSTON - DICK'S RESPONSE WAS AS FOLLOWS: IT WILL BE A COLD DAY IN HELL BEFORE PEPE SERRANO, ANY MEXICAN, OR ANY MEXICAN COMPANY EVER OPERATES ON MY RAILROAD.

(Bredenberg Deposition, Exhibit 1.)

It is understandable that Applicants and their trackage rights partner BN/Santa Fe wish to insulate the Board from the disclosures of this Call Report. The Call Report strips open the veneer of respectability and good intentions that these parties try to portray and provides a rare glimpse at the true motivations and nature of bargaining between Applicants and BN/Santa Fe in regard to South Texas.

As explained below, the information is relevant, the Call Report has been authenticated, and there was no basis for the Board not to consider this evidence.

II. The Call Report has been authenticated by Mr. Skinner.

In the smoke screen that BN/Santa Fe raises in its Comments, it tries to obscure the basic fact that Mr. Skinner, in his deposition, did authenticate the Call Report. He stated that this was his accurate record of his telephone conversation with Mr. Bredenberg. (Deposition of Brad Lee Skinner, pp. 44-45.) Thus, in response to questions concerning the October 5, 1995 Call Report, Mr. Skinner testified that:

Q. Is that call report sworn testimony?

A. Is that sworn? No, it was an internal report for my file.

(Skinner Dep., pp. 43-44.)

Q. That call report reflects what you understand Mr. Bredenberg said other people said, is that a fair statement?

A. That call report reflects what I heard on the phone and that's it.

(Id., p. 45.)

Q. Were those [the call report] Mr. Bredenberg's words, to the best of your recollection: We don't have a lot of interest in Houston south?

A. Yes. I mean, this -- I dictated that call report ten minutes after I got off the phone, into a dictation machine. To my recollection, that's what I heard.

(Id., p. 50.)

This testimony meets the most basic requirement that the document be identified by its author, that it was prepared at or near the time of the conversation with Mr. Bredenberg and that it is an accurate reflection of the conversation. See, Federal Rules of Evidence, Rule 901(b)(1) authentication by testimony of witness with knowledge,[1] Rule 803(4) recorded recollection and 803(5) records of regularly conducted activity.

The fact that Mr. Skinner may not have prepared the Report with the intention of submitting it to the Board is immaterial and lends heightened credibility to the document. If whether or not documentary evidence was prepared to be submitted in Court the standard of relevant evidence was, Courts would hardly ever accept evidence of transactions and events.[2] The important fact

---

[1] Federal Rule of Evidence 901, Requirement of Authentication or Identification, provides in relevant part:

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

[2] Indeed, if on October 5, 1995, (almost two months prior to the November 30, 1995 filing of the Application in this proceeding) Mr. Skinner had prepared a document intending to submit it to the Commission, there might be grounds to question his motivation and the consequent credibility of the document. BN/SF's attorneys are apparently so accustomed to dealing with lawyer-prepared testimony and exhibits, that they have trouble accepting an item of real, original evidence.

is that Mr. Skinner prepared the Call Report as a contemporaneous reflection of his conversation with Mr. Bredenberg, an employee of Burlington Northern/Santa Fe.

Mr. Skinner not only vouched for the accuracy of the Call Report, but also testified consistently with the substantive points of the Call Report.

Q. Okay. Thank you. Do you understand that Burlington Northern/Santa Fe's settlement agreement with Union Pacific and Southern Pacific was a package deal?

A. That was my understanding in the conversation I had, as I indicated.

Q. And what did you understand package deal to mean?

A. As I indicated, that handling traffic Houston south BN/Santa Fe and not having any one like Tex-Mex handling it for them. They would have to handle the entire -- all of the trackage rights that were being proposed and not -- they would not be selective.

Q. Does that mean you thought that some of those rights were forced on BN/Santa Fe or --

A. No. I think it's very similar to what UP told us when we were meeting with them, saying that this is a package deal; we want you to high rail this traffic, all of these tracks; we want you to consider what you could do it for; we want you to come back to us with a proposal.

And we would say, well, do we have to handle this?

Said, yeah, it's a package deal.

(Skinner Dep., p. 48.)

Q. Would you find it plausible that Union Pacific might have said to Burlington Northern/Santa Fe, if you want the central corridor, you have to take Houston to Memphis and Houston to Brownsville?

A. I would think of that being plausible, yes. It's usually on their terms.

Q. And would you think it plausible that BN/Santa Fe would not want the Houston to Brownsville rights and the Houston to Memphis rights but would accept them nevertheless in order to get the central corridor?

A. I don't know about the Houston to Memphis rights, but I do believe, as I indicated in my call report, that I was told they didn't have a lot of interest Houston south.

Q. You were told by whom?

A. As I said in the call report, Rollin Bredenberg.

. . .

Q. Is it your belief, as you sit here today, that Burlington Northern and Santa Fe does not have a lot of interest in the rights from Houston south?

A. Yes.

(Skinner Dep., pp. 49-50.)

III. <u>Mr. Bredenberg himself corroborates the conversation reflected in the Call Report</u>.

Rollin Bredenberg of Burlington Northern/Santa Fe is obviously embarrassed to have his candid remarks made a part of this record. Nevertheless, Mr. Bredenberg, in his own deposition, confirmed almost the entire contents of the Call Report. Set forth below is a chart that compares the subjects and statements made in the Call Report with the testimony given by Mr. Bredenberg as to whether these matters were, in fact, discussed with Mr. Skinner and whether he made certain statements. It is evident that on almost every key point, Mr. Bredenberg agrees with the Call Report.

POINTS FROM BRAD SKINNER OCTOBER 5, 1995 "CALL REPORT" (BREDENBERG DEPOSITION, EXHIBIT 1) THAT ROLLIN BREDENBERG CONFIRMED IN HIS DEPOSITION OF MARCH 8, 1996.

	Call Report	Deposition
1.	The call took place.	Yes. (Pages 29-30)
2.	Discussed coordination between BN/Santa Fe and Tex Mex.	Yes. (Pages 38-39)
3.	Bredenberg appointed "point person" for Mexican issues.	Yes. (Page 39)
4.	Mention of Greg Swenton and Steve Marlin.	Yes. (Page 40)
5.	D. J. Mitchell now reports to Bredenberg.	Yes. (Pages 40-41)
6.	Grinstein does not speak for the company.	Yes. (Pages 41-42)
7.	Discussion of Mexican Privatization Process.	Yes. (Page 42)
8.	Told Skinner BN/Santa Fe will not bid on any	Yes. (Page 42)

	Mexican concessions.	
9.	BN/Santa Fe has "limited capital budget" and does not want to be distracted by Mexico while trying to absorb its own merger.	Yes. (Pages 42-43)
10.	Discussion of BN/Santa Fe interest in rights from Houston to Brownsville. (Skinner asked why BN/Santa Fe took trackage rights to Brownsville if it was not going to be bidding in Mexico.)	Yes. (Page 44)
11.	Bredenberg attended meeting when trackage rights awarded.	No. (But participated in internal discussion with Krebs and Ice.) (Pages 54-55.)
12.	Trackage rights offered by UP/SP were a "package deal."	Yes. This was Bredenberg's "working assumption" (Page 68); and he might have said this to Skinner. (Page 67.)
	Davidson said it was a "package deal"	Bredenberg not in negotiations.
13.	BN/Santa Fe wanted Tex Mex as its operator for Houston to Corpus Christi.	Ice may have believed this (Page 72-73) (May have been true at one point; but after Trackage rights Agreement, Bredenberg disagrees). (Skinner discussed possibility of Tex-Mex acting as agent for BNSF to Houston. (Page 45.)
14.	UP would not allow Tex-Mex over UP lines to Houston.	Yes. ("And I told him there was no way in hell that [Tex-Mex as an agent to handle BNSF business south of Houston] was going to be allowed... I guess what I said was there is no way in hell the UP would ever... I may have even said knowing Dick Davidson if Brad says I used Davidson's name, then I probably did." (Page 45-46.) "But I told him that there was no way that the Union Pacific was going to

		allow Tex-Mex to operate on its trackage rights." (Page 46.)
15.	Reference to Pepe Serrano (in connection with whether UP would allow Tex-Mex over its lines).	Yes. ("I did either in that conversation or other conversations, ask him how his, if Pepe Serrano or Dick Davidson what kind of personal relationship they had was it a good one, was there animosity in it... If I were running UP and did not trust the guy running TMM anymore than I had had reason to trust the management of Tex-Mex in the past, I wouldn't do it... (Pages 76-77.) Q. "And do you remember indicating that Mr. Davidson or Union Pacific might have some reluctance to allow any Mexican railroad to operate over UP lines?" A. I think I was probably even stronger than that. I just told him that it wouldn't happen." (Page 77.)

IV. <u>Other witnesses corroborate the Call Report also</u>.

On the key points that the trackage rights deal between the Applicants and Burlington Northern was a "package deal" under which Burlington Northern/Santa Fe had to accept rights in South Texas in order to get other rights which it desired more, the testimony of Mr. Ice, BN/Santa Fe's lead negotiator with the Applicants, provides corroboration. Mr. Ice agreed that in the initial negotiations, an offer was presented by the Applicants through the presentation of a map of proposed routes. (Ice Dep.,

p. 177.) Mr. Ice also confirmed that BN/Santa Fe had some interest in using Tex-Mex as BN/Santa Fe's agent from Houston to Brownsville. (Ice Dep., pp. 484-485.)

V. The information in the Call Report is not inadmissible.

The information in the Call Report, particularly Mr. Bredenberg's admission that Burlington Northern/Santa Fe is not interested in bidding for the Mexican Concession clearly is an admission by that party. This can be taken as an admission against interest.

Furthermore, to the extent that Mr. Bredenberg's relating what Mr. Davidson's said might be considered hearsay, the information is highly reliable and would be admitted under various exceptions, including Federal Rules of Evidence 803(24). This exception allows a federal court to accept any evidence, even if it might be technically hearsay, if that evidence is otherwise reliable.

This evidence is highly reliable because it was a contemporaneous record of a candid discussion between two railroad executives concerning the position taken by the Applicants in this case. There was no motive at the time for either party to the conversation to misrepresent what was said or for Mr. Skinner to not report accurately what was said. Therefore, it should be considered by the Board.

VI. Conclusion.

For all these reasons, if BN/Santa Fe's statement in its rebuttal is taken as a motion to strike, such request and motion should be denied.

This 6th day of May 1996.

Alan E. Lubel

John R. Molm
Alan E. Lubel
William A. Mullins
Troutman Sanders LLP
601 Pennsylvania Avenue, .W.
Suite 640 - North Building
Washington, D.C. 20004-2608
Tel: (202) 274-2950
Fax: (202) 274-2994

Richard P. Bruening
Robert K. Dreiling
The Kansas City Southern
Railway Company
114 West 11th Street
Kansas City, Missouri 64105
Tel: (816) 556-0392
Fax: (816) 556-0227

James F. Rill
Sean F.X. Boland
Virginia R. Metallo
Collier, Shannon, Rill & Scott
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
Tel: (202) 342-8400
Fax: (202) 338-5534

Attorneys for The Kansas City
Southern Railway Company

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S BRIEF IN OPPOSITION TO BURLINGTON NORTHERN/SANTA FE REQUEST TO STRIKE was served this 6th day of May, 1996, by hand delivery to attorneys for Applicants and by depositing a copy in the United States mail in a properly addressed envelope with adequate postage thereon addressed to all outside counsel on the restricted service list.

Alan E. Lubel

Attorney for The Kansas City
Southern Railway Company