

INTERSTATE COMMERCE COMMISSION

07/01/96

FINANCE DOCKET # 32760

241-300

5+

1 shippers in the western United States.

2 USDA therefore opposes the proposed merger  
3 and asks that the Surface Transportation Board deny  
4 the merger.

5 CHAIRPERSON MORGAN: You mentioned a  
6 particular market of concern, which is movements into  
7 Mexico under NAFTA. Is there a particular point or  
8 market that we should be looking at in response to  
9 that particular concern of the department's?

10 MR. DUNN: A particular area of concern?

11 CHAIRPERSON MORGAN: Yes.

12 MR. DUNN: As I outlined in my proposal,  
13 there is the potential for shift in grain operations  
14 in that area. Presently there is a number of cattle  
15 going into the Mexico market area which could provide  
16 us with new opportunities for shipping grain into  
17 Mexico.

18 COMMISSIONER OWEN: There seems to be an  
19 awful lot of agricultural interests that are  
20 supporting the merger. And how many agricultural  
21 interests are you -- are behind you, are you  
22 representing -- I guess I'd phrase it that way. Is it

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 just the Department?

2 MR. DUNN: We have virtually -- we have  
3 received concern from American Farm Bureau, American  
4 Bankers Association, American Corn Growers  
5 Association, American Soy Bean Association, National  
6 Association of Wheat Growers, National Grain Sorghum  
7 Producers, National Grain, National Oil Seed Processor  
8 Association, U.S. Rice Federation.

9 COMMISSIONER OWEN: Those are letters of  
10 concern or opposition? See, because we've also  
11 received an awful lot of letters in here from  
12 agricultural interest in support of it. So it's kind  
13 of confusing to us to say okay, here's the Department  
14 and they had a preponderance of letters coming in from  
15 different associations saying we support this merger.

16 MR. DUNN: Commissioner, the positioning  
17 of the merger as we go through these other two factors  
18 of NAFTA and new GATT agreements plus the 1996 Farm  
19 Bill which gives farmers greater flexibility -- we  
20 will see a tremendous shift here in the next few years  
21 on what is planted and where. And whether or not we  
22 have the infrastructure to move that transportation

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 gives us great concern.

2 And that is the types of letters that we  
3 received from many of these organizations that they  
4 have a real concern is there is not a divestiture, if  
5 there is not competition out there that can react  
6 swiftly to these new market signals and where grain is  
7 being produced and how.

8 COMMISSIONER OWEN: In other words, by the  
9 new agriculture -- well, new bill that's come out and  
10 everything or the proposal you're working on here,  
11 that means that deregulation is coming down the line  
12 for farmers and the subsidies as a whole. So by doing  
13 that and deregulating them and eliminating the  
14 subsidies, then you're freeing up the market so it  
15 will really grow.

16 And yet, on the other hand, you're  
17 proposing that we continue to regulate with a tight  
18 hand on the transportation system. And as they have  
19 indicated in a number of other sources that based upon  
20 the inflationary factor since 1980 that transportation  
21 costs have gone down 38%.

22 I talked to my family on a farm back in

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 Oklahoma this morning, and they don't notice a  
2 difference. They don't even know we're doing this  
3 today. I thought it was the most important event in  
4 the world. They were worried about getting the beans  
5 in or getting the corn or the alfalfa. So --

6 MR. DUNN: When it comes time to get the  
7 crops in or out of the field, that is the most  
8 important time for our producers. What is of concern  
9 to them is that there is the availability to move that  
10 grain. The farmer feels that it's their job to  
11 produce it.

12 The great deal of concern that I had, the  
13 Secretary had as we went -- traveled through the upper  
14 midwest this last year on the inability to have grain  
15 cars come and take that grain to market on a timely  
16 basis -- ended up with grain being stored on the  
17 ground with a tremendous loss, tremendous cost of  
18 interest cost to grain elevators to keep that grain  
19 there because of the lack of availability of grain  
20 cars.

21 This sends a shock to the producer out  
22 there. If I produce it, can I sell it? They are

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 looking for Ag. Marketing Service, Foreign Ag. Market  
2 Service to find foreign markets and internal markets  
3 for what they produce out there. We have to be  
4 assured that we have the infrastructure there to move  
5 that grain.

6 COMMISSIONER OWEN: I share your concerns  
7 very much so, but I don't know if we'll ever have that  
8 remedied because crops come in at a particular time of  
9 the year. We don't have enough grain car hoppers, we  
10 don't have enough locomotives. We have -- to get them  
11 all to the market where everybody with the highest  
12 yield per bushel or whatever it is.

13 One of the questions, and I'll not bother  
14 you anymore, but I do have very much concern about the  
15 farmers of our country. Doesn't the USDA marketing  
16 orders reduce competition among growers? And why do  
17 you focus on railroads and not marketing orders? I  
18 guess that would be the double part of it.

19 MR. DUNN: We see the use of marketing  
20 orders in agriculture as an orderly way to provide  
21 marketing access to ensure that there is quality and  
22 quantity available for the producer, which is also a

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 constituency of the Department of Agriculture.

2 CHAIRPERSON MORGAN: Might there be some  
3 efficiencies from this merger that could benefit the  
4 agricultural community -- single line service, certain  
5 areas?

6 MR. DUNN: Madame Chairman, --

7 CHAIRPERSON MORGAN: Is that something  
8 you've looked at?

9 MR. DUNN: -- if there are those type of  
10 efficiencies, originally what the Department's  
11 position was with some divestitures that we did not  
12 oppose the merger. But as we -- as your proceedings  
13 went on and we got more and more information and more  
14 and more concern for producers out there without  
15 allowing that type of divestiture, we do feel that  
16 there is not a gain for agriculture producers.

17 COMMISSIONER OWEN: I would just like to  
18 say thank you and good luck on getting all the crops  
19 to the market in time.

20 MR. DUNN: Thank you, and I wish you the  
21 best in making this decision.

22 CHAIRPERSON MORGAN: Thank you, Mr. Dunn.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 Moving on to the Shipper Organizations, we will hear  
2 from Nicholas Di Michael who will represent the  
3 National Industrial Transportation League, and you  
4 have ten minutes.

5 MR. Di MICHAEL: Thank you, Madame  
6 Chairman. The League believes that there is an anti-  
7 competitive effect of this merger in two specific  
8 corridors, the Texas corridors and in the Central  
9 corridor. And League is asking that a condition be  
10 imposed on this merger that would require the  
11 applicants to divest in those specific corridors, the  
12 parallel lines.

13 VICE CHAIRPERSON SIMMONS: Then would you  
14 be happy?

15 MR. Di MICHAEL: Yes.

16 VICE CHAIRPERSON SIMMONS: Okay.

17 (Laughter.)

18 MR. Di MICHAEL: It's a simple answer to  
19 a direct, quick question. Instead of going through my  
20 prepared remarks here, what I'd like to do is to kind  
21 of focus -- sort of jump right away into some of the  
22 questions that have come up this morning. And the

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 first one of these things is perhaps the matter of  
2 shipper support.

3 If the sole issue facing you were to say  
4 yea or nay, up or down, and there was nothing else you  
5 could do, the question of 1,300 shipper support  
6 letters stacked up over here would be a relevant one.  
7 But that's not the question that you have before you.  
8 Rather, it's a question of the anti-competitive effect  
9 in particular markets, the Central corridor and in the  
10 Texas corridors.

11 And so what you have to ask yourself about  
12 the 1,300 shipper support letters is what do they have  
13 to say about the Texas corridor and the Central  
14 corridor? Now, if you take a look at those -- I  
15 think if you have a candid examination of those, you'd  
16 find a number of things.

17 First of all, a lot of those shipper  
18 support letters are dealing -- are from people who  
19 have competitive options -- who have non-rail options  
20 or other options. And those, by their very nature,  
21 can't go to the question of the anti-competitive  
22 effects in particular corridors. Some of them are

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 from shippers who might be captive but in other  
2 places.

3 And they might be getting, for example,  
4 extended hauls, and so the merger might be good for  
5 them. But again, that by it's very nature doesn't go  
6 to anti-competitive effect in the Central corridor or  
7 in the Texas corridor. So you've got to take a look  
8 at those from the point of view of what is before you  
9 and what choices you have.

10 Your choice is not just to say yes or no,  
11 but your choice is also to say we can let this merger  
12 go forward if we fix the problem. And that's what the  
13 League is asking you to do. Now, I guess I can't go  
14 past the issue of shipper support without at least  
15 saying one thing. Mr. Roach this morning indicated  
16 that hundreds of NIT League members support, I think,  
17 even by -- if you would think about that, that is an  
18 exaggeration by a whole lot.

19 And even the ones that he has, you would  
20 need to know that the NIT League has two kinds of  
21 membership. One kind of member is actual shippers,  
22 and then there is an associate category where carriers

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 or their affiliates -- and I would say that -- just  
2 point out that of the list of NIT League members, the  
3 applicants have identified such shippers as Yellow  
4 Freight, CSX, Intermodal, and organizations like that,  
5 and that just kind of shows that for the shippers who  
6 have options like Intermodal Carriers, for example,  
7 that is fine.

8 But that doesn't go to shippers who don't  
9 in the corridors who are affected here. The second  
10 issue that has come up -- what is the anti-competitive  
11 effect? Commissioner Owen, before you talked about  
12 \$100 million dollars being real money, I guess. The  
13 applicants, by their own admission here, have  
14 indicated that there is \$800 million dollars of  
15 traffic at two to one points, eight times I guess what  
16 you talked about as a threshold of money.

17 And that -- and the effectiveness of the  
18 competition at those two points, even if you just look  
19 at that problem -- at just the two to one point  
20 problem -- the effectiveness of the competition  
21 depends upon the effectiveness of the Burlington  
22 Northern/Santa Fe agreement.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 Will that provide effective competition?  
2 And the League believes it won't. Or at least there's  
3 a real serious problem, a real serious doubt if it  
4 will or not. And we're down to two carriers if this  
5 merger goes forward.

6 VICE CHAIRPERSON SIMMONS: So it doesn't  
7 help?

8 MR. Di MICHAEL: It doesn't help. We  
9 don't think it does.

10 VICE CHAIRPERSON SIMMONS: The CMA  
11 agreement doesn't help?

12 MR. Di MICHAEL: Well, I can tell you the  
13 CMA agreement is a marginal improvement over what was  
14 there before. But if you're talking about -- and  
15 what we want is real competition here. We don't want  
16 marginal things. We want real competition.

17 VICE CHAIRPERSON SIMMONS: How many  
18 members do you have? You've got two categories now.  
19 How many do you have?

20 MR. Di MICHAEL: There are about 1,200  
21 shipper members.

22 VICE CHAIRPERSON SIMMONS: I see. And out

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 of that 1,200, who are against and who are for -- how  
2 many?

3 MR. Di MICHAEL: We -- well, like CMA, we  
4 did not take a poll. But what we did do is we had a  
5 meeting and we -- announced to the whole membership  
6 that could come and debate the question and discuss  
7 the question. And that's what we did.

8 VICE CHAIRPERSON SIMMONS: Well, if I read  
9 the papers -- and I realize you can't rely on  
10 everything you see, but in the papers, it sounds like  
11 you are against the merger.

12 MR. Di MICHAEL: We are. We want the  
13 merger to be conditioned upon divestiture.

14 VICE CHAIRPERSON SIMMONS: I see.

15 MR. Di MICHAEL: So the merger can go  
16 forward as long as there's divestiture to cure the  
17 anti-competitive effect in the Central corridor and in  
18 the Texas corridor.

19 COMMISSIONER OWEN: Everybody keeps  
20 talking about divestiture here, but nobody is really  
21 specific about -- you say Central corridor or the  
22 Texas corridor -- you say city to city and where and

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 which track you're really looking at. And when you  
2 speak about it in general terms, we say okay, are you  
3 talking about Chicago to Los Angeles or --

4 MR. Di MICHAEL: You know, in our papers,  
5 Mr. Owen, we have identified the specific lines. And  
6 basically what you have is lines going from Houston  
7 west and Houston east and then Houston north to --

8 COMMISSIONER OWEN: I apologize. I read  
9 most of those and I can't keep them all straight.

10 MR. Di MICHAEL: Well, this is a massive  
11 record here. The applicants are proposing -- kind of  
12 to get back to the CMA agreement -- a cure for  
13 potential future anti-competitive problems in this  
14 five year oversight condition. We really think this  
15 is not the way to go. A five year oversight involves  
16 -- or would involve a potentially minute examination  
17 into rates and costs and contracts and service  
18 practices, basically a reexamination, a reregulation  
19 for five years of the practices not only of UP/SP, but  
20 also of the BNSF, the only two remaining competitors  
21 presumably in that market.

22 We are looking at that as almost a

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 reregulation of the rail industry in the western  
2 United States. It will leave the market unsettled for  
3 five years, and it will get this board involved in  
4 very, very difficult problems. And it is not creating  
5 what we think the Staggers Act said should be created,  
6 and that is structural competition, real competition  
7 by people -- by two carriers who own railroads and who  
8 can do what they need to do to make those railroads  
9 run the most efficiently possible can.

10 CHAIRPERSON MORGAN: Now in following up  
11 on that, in talking about structural competition, I  
12 mean, one of the things that the NIT League has  
13 supported in the past is the notion of competitive  
14 access of trackage rights -- more universal trackage  
15 rights. Here you are not in favor of the BN/Santa Fe  
16 trackage rights agreement as modified because of your  
17 concern about trackage rights and the fact that in  
18 your mind they do not create the competitive  
19 alternative that you feel is needed here.

20 How do you square the position in this  
21 case that you have taken with the overall position of  
22 the NIT League regarding competitive access on

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1       trackage rights?

2               MR. Di MICHAEL:   The League definitely  
3       believes there should be   more competitive access.  
4       And certainly there is no secret, but that the League,  
5       for example, disagrees with certain of the competitive  
6       access decisions in the past.   But here, we are in a  
7       sense trying to avoid the need to have a broader  
8       competitive access.

9               What we're trying to do is to get two  
10       railroads who can really compete on a structural basis  
11       so we don't need to have the regulatory solutions that  
12       the competitive access provisions of the statute would  
13       require.   If we don't get that, then what is likely to  
14       happen is there would likely be an increase emphasis  
15       by shippers upon competitive access as their  
16       competitive options become less and less and less.

17               So here we're talking about a structural  
18       solution that will avoid the need for much regulatory  
19       involvement in the marketplace and will cure the  
20       problem at the outset and final.

21               CHAIRPERSON MORGAN:   But if -- just a  
22       hypothetical, if one feels that this merger has

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 efficiencies, that you want to make sure are not  
2 undercut, there is an argument to be made that an  
3 oversight process allows you to realize the  
4 efficiencies and then to continue to monitor very  
5 carefully what is the after effect.

6 MR. Di MICHAEL: Well, I think that is a  
7 very good point. But it seems to me that the real  
8 point here is that we really strongly believe that the  
9 efficiencies in this merger are created in areas other  
10 than the lines that we seek to be divested. That you  
11 can get, it seems to me, virtually all of the  
12 efficiencies of this merger and all of the public  
13 benefits of this merger and still divest the lines  
14 that we seek in the Texas Gulf -- in the Texas  
15 corridors and in the Central corridor.

16 There are a number of parties in this case  
17 and -- who have made that point very, very strongly,  
18 and I'm sure some of them will be following me and  
19 they'll make that point again. But we really believe  
20 that you can get the efficiencies, get the public  
21 benefits, but avoid the anti-competitive effects.

22 Divestiture -- let me sum up since I see

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 my time is over. This merger will create  
2 unprecedented, we think, competitive problems in two  
3 specific corridors, and the League strongly believes  
4 that competition should be the regulator, and that  
5 failure to correct the anti-competitive effects here  
6 finally and fully and firmly would call into question  
7 the very underpinnings of the Staggers Act as a pro-  
8 competitive model that the Leagues believes has worked  
9 very, very well.

10 And we think that divestiture is the  
11 remedy so that we can create the structural  
12 competition that would best serve the shipping --

13 VICE CHAIRPERSON SIMMONS: So the League  
14 wants divestiture, is that what you're telling me?

15 MR. Di MICHAEL: That's correct.

16 VICE CHAIRPERSON SIMMONS: I'm trying to  
17 get you to speak --

18 MR. Di MICHAEL: That is exactly the  
19 point.

20 VICE CHAIRPERSON SIMMONS: -- for the  
21 League, but I haven't been able to find out what the  
22 League is first. We're back to where we started.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 MR. Di MICHAEL: Okay.

2 CHAIRPERSON MORGAN: In terms of  
3 divestiture, and this is a question I've asked others  
4 before today, if the Board were to pursue a  
5 divestiture route, how would you envision -- as  
6 representative of a shipper organization, how would  
7 you envision that process working?

8 MR. Di MICHAEL: I think from what I heard  
9 here today and what I would add to, there is fairly  
10 strong agreement, I guess, on how that would go. It  
11 seems to me that the Board would order a divestiture  
12 condition in the decision it will issue in this case.  
13 The applicants would then go forward to implement  
14 that, to have an auction or sale of the lines that are  
15 identified by the Board.

16 And then the carrier to whom the sale is  
17 to be made would come before this Board again to seek  
18 approval of that. And I think that's what a number of  
19 --

20 CHAIRPERSON MORGAN: That process would  
21 take --

22 MR. Di MICHAEL: I don't see that process

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 as an extremely lengthy one. I believe that Ms. Jones  
2 for the BN talked about months. And I think that  
3 process could move forward fairly quickly because the  
4 person -- or the railroad to whom the sale would be  
5 made would presumably have a whole lot less anti-  
6 competitive problems than the current one.

7 So I think a divestiture remedy could be  
8 completed in a fairly short time.

9 CHAIRPERSON MORGAN: Now let's talk a  
10 little bit about the CMA agreement which you  
11 mentioned. Now I realize the position of the NIT  
12 League is divestiture.

13 MR. Di MICHAEL: Yes.

14 CHAIRPERSON MORGAN: But if we were  
15 looking at the BN/Santa Fe agreement as amended by  
16 CMA, your view is CMA nibbles around the edges in  
17 terms of concerns but does not fully address some of  
18 the competitive concerns that have been raised. How  
19 would you broaden the CMA agreement to address some of  
20 those concerns?

21 Obviously we've got provisions in there  
22 about contracts, provisions in there about build outs,

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 build ins, new facilities and so on.

2 MR. Di MICHAEL: I think the problem is  
3 that the CMA agreement accepts the underlying premise  
4 here, and that is that a railroad in the position of  
5 a trackage rights tenant can be as good a competitor  
6 as a railroad in the position as a -- can be as good  
7 a competitor as a railroad that is in an ownership  
8 position in these extensive areas involved here.

9 Certainly there are problems with the  
10 trackage rights in terms, for example, of the cost of  
11 the trackage rights fees and all of those things. But  
12 I think fundamentally it's the thing that has been  
13 identified by the League, has been identified by DOT  
14 that a trackage rights tenant simply is not in the  
15 same position as a trackage rights owner.

16 It can't and does not have the same  
17 control, the same ability, for example to cut costs on  
18 its line, the same ability to manage.

19 CHAIRPERSON MORGAN: But I understand that  
20 in theory, but are there specific instances where  
21 trackage rights has been a problem in this respect?

22 MR. Di MICHAEL: In the past, it seems to

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 me trackage rights in the context of a merger  
2 proceeding have been used to solve anti-competitive  
3 problems at very specific points. And the League was  
4 involved, for example, in the Burlington  
5 Northern/Santa Fe merger. And the League entered into  
6 a settlement with the Burlington Northern/Santa Fe  
7 that had a trackage rights arrangement in it.

8 But there we had very much smaller --

9 VICE CHAIRPERSON SIMMONS: How much  
10 smaller?

11 MR. Di MICHAEL: A lot smaller. A lot  
12 smaller.

13 VICE CHAIRPERSON SIMMONS: How much?

14 MR. Di MICHAEL: Well, I don't have the  
15 figures right here, but I can tell you what you had  
16 was you had very specific points --

17 VICE CHAIRPERSON SIMMONS: In miles,  
18 that's what I'm talking about.

19 MR. Di MICHAEL: Here you have 4,000 miles  
20 of trackage rights.

21 VICE CHAIRPERSON SIMMONS: Okay, I know  
22 how many.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 MR. Di MICHAEL: It was probably 1/5th of  
2 that perhaps.

3 VICE CHAIRPERSON SIMMONS: It was more.

4 MR. Di MICHAEL: What I'm saying is there  
5 was -- although the trackage rights extended for more,  
6 the anti-competitive problems were at discreet points.  
7 Whereas here, the anti-competitive problems are all  
8 over.

9 VICE CHAIRPERSON SIMMONS: So at some  
10 particular -- too much is too much or too little is  
11 too little then?

12 MR. Di MICHAEL: There is obviously --

13 VICE CHAIRPERSON SIMMONS: I think the  
14 important thing is how it works.

15 MR. Di MICHAEL: And we have some strong,  
16 very strong doubts that when you have trackage rights  
17 over this extensive an area where there is this many  
18 problems for such a long time, they are not going to  
19 work. You need something surer than that.

20 CHAIRPERSON MORGAN: And I think there are  
21 provisions, as I understand it, in the CMA agreement  
22 that do try to address some of those concerns,

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 specifically money set aside for investment,  
2 dispatching, protocols and so on.

3 MR. Di MICHAEL: I would say that those  
4 are after the fact solutions that are not going to --  
5 I mean, markets work immediately. And markets, you  
6 have to make a sale today tomorrow. It is impossible  
7 to really say well, I have a problem, therefore I'm  
8 going to go to a court or going to go back to a board  
9 and try to get a solution then. It just simply won't  
10 work.

11 CHAIRPERSON MORGAN: And I presume that  
12 the NIT League does not agree with the DOT's position  
13 as it relates to the Central corridor because DOT has  
14 spoken today about pursuing trackage rights in that  
15 corridor. I presume you are not in agreement with  
16 that.

17 MR. Di MICHAEL: If I could speak to that  
18 just for a minute, because DOT has certainly been a  
19 thoughtful -- has made a thoughtful presentation and  
20 submission here. But I think in the Central corridor  
21 we do have some problems with that. There's two or  
22 three things. First of all, DOT seems to indicate

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 that the problem is the lack of gathering lines.

2 And that to me is not necessarily a  
3 significant problem. This Board has for many, many  
4 decisions, for example, stated that a railroad will  
5 not prefer its own single line route if a joint line  
6 route would provide efficiencies. The fact that it --  
7 that the purchaser of a Central corridor line may not  
8 have gathering lines shouldn't under that theory make  
9 any difference.

10 There are persons out there who are -- who  
11 have sought to purchase the Central corridor lines --  
12 short line railroads who traditionally have made very  
13 creative operations even without extensive gathering  
14 line systems. The other thing is that we're very  
15 concerned that the solution proposed by DOT simply  
16 doesn't go far enough and would not remedy the real  
17 managerial problems here.

18 And frankly, you know, they are -- DOT has  
19 suggested, for example, an up front payment by the  
20 Burlington Northern. I mean, no one has asked the  
21 Burlington Northern about that and whether they  
22 believe, for example, that if they would put up \$300

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 million dollars in an up front payment, they could  
2 beat the brains out of the UP.

3 So it is a solution that may be a little  
4 too fine, a little too careful for the serious anti-  
5 competitive problems we have here.

6 Thank you very much.

7 CHAIRPERSON MORGAN: Thank you very much.  
8 We will next hear from William Jackson on behalf of  
9 Save The Rock Island Committee, Inc. Mr. Jackson, you  
10 have four minutes.

11 MR. JACKSON: May it please the Board, I  
12 do represent the Save The Rock Island Committee, which  
13 in this context refers not to the old Rock Island in  
14 its entirety, but only the section between St. Louis  
15 and Kansas City. As STRIC has requested in its  
16 pleadings in this case, it would like to have a  
17 condition imposed on approval of the merger for sale  
18 of the line between St. Louis/Kansas City currently  
19 owned by the St. Louis Southwestern subsidiary of  
20 Southern Pacific.

21 Of course, with the pertinent property and  
22 trackage rights, to a carrier not affiliated in any

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 way with Union Pacific or Southern Pacific and to have  
2 the sale occur at a fair price, if the parties cannot  
3 agree on the price, then the Board should set it upon  
4 the request of the purchaser. Sale of the entire  
5 Kansas City St. Louis line as a unit is necessary if  
6 there is to be any reasonable chance of admitting a  
7 successfully operated line.

8 Studies by potential purchasers have shown  
9 that if it is not operated as a unit, the line will  
10 fail. Operating the line with the eastern and western  
11 parts amputated would leave a cripple that no company  
12 in its right mind would want to buy. UP as late as  
13 last week flatly refused if this merger were approved  
14 to ever consider selling the entire line, and has  
15 instead basically demanded impossible conditions from  
16 a would be purchaser.

17 I think this shows the need for the  
18 Board's intervention in this matter. We've attempted  
19 negotiation. It simply has not been possible.  
20 Divestiture would be in the public interest. It would  
21 also promote competition by putting the Kansas  
22 City/St. Louis line in the hands of someone interested

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 in rehabilitating and operating it rather than killing  
2 it.

3 Rail service would again be made available  
4 to shippers in economically depressed central  
5 Missouri. Governor Carnahan of Missouri has called  
6 for this action due to its importance to the Missouri  
7 economy. And as we heard this morning, Senator Bond  
8 likewise supports the divestiture of parallel lines in  
9 this particular case.

10 And certainly this is a parallel line  
11 without any question. Ordering the divestiture would  
12 not harm the merger, nor the merger parties. All but  
13 a small amount of traffic now moving over the line  
14 would be entirely diverted to the existing Missouri  
15 Pacific line, which is of course a Union Pacific  
16 subsidiary which runs between Kansas City and St.  
17 Louis after the merger is approved.

18 The exact details of this traffic and its  
19 diversion are confidential, but they are contained in  
20 STRIC's unredacted brief, and I would simply cite that  
21 to you. At the present time, STRIC is aware of at  
22 least two companies that are actively interested in

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 acquiring and rehabilitating the old Rock Island line  
2 between St. Louis and Kansas City, including one  
3 company that's publicly traded and one which is  
4 private held, and obviously there may be more  
5 interested if the line is actually put up for sale.

6 Because up to this point, there's been a  
7 flat refusal to consider selling the entire line as a  
8 unit, which STRIC believes is necessary if it's going  
9 to have a chance of success. You've got to be able to  
10 get to both the gateway of St. Louis and the gateway  
11 of Kansas City, and you've got to be able to do it  
12 without having impossible conditions put on the  
13 ownership or the operation of the line, and that's  
14 basically what we're seeking to have happen, a sale  
15 under economically viable conditions at a fair price.

16 If the line is put up for sale and  
17 purchased, that will authoritatively prove that there  
18 is a market for the line and for the service that can  
19 be provided over it. But if no one steps forward to  
20 buy the line, then that of course would be the end of  
21 it. STRIC is asking for a chance to be given for the  
22 sale of the line.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 And frankly, this Board is STRIC's last  
2 chance to get service to its area revived as a result  
3 of the line being sold to someone who will operate it  
4 after it is rehabilitated. To prevent a sham  
5 purchaser from entering the picture, STRIC is also  
6 asking that the condition be imposed that the  
7 purchaser must commit to rehabilitate and operate the  
8 entire unit as a line and as a unit within three years  
9 of its purchase.

10 Most of the line in question has been  
11 embargoed on a year to year basis since it was  
12 acquired by the St. Louis Southwestern. Many members  
13 of STRIC were misled into supporting the St. Louis  
14 Southwestern acquisition of the Rock Island's  
15 Tucumcari line with a promise that operations would be  
16 resumed over the entire line, but that has never  
17 happened.

18 Members of STRIC are located across --  
19 along the entire line and have been hurt to varying  
20 degrees over the years by the failure to resume rail  
21 service. Now is the time in this merger case to  
22 address this issue. No serious reasons have been

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 advanced by the applicants why this should not be done  
2 and why divestiture should not be ordered as a  
3 condition to merger.

4 And I would certainly request the Board to  
5 consider very strongly imposing the divestiture  
6 condition if this merger is approved. STRIC does not  
7 oppose the merger if the condition is imposed if the  
8 divestiture is required.

9 CHAIRPERSON MORGAN: Now what does this  
10 have to do with the merger, this particular condition  
11 that you're --

12 MR. JACKSON: The line involved is a  
13 parallel line, and therefore there's a competitive  
14 aspect here. If the line is divested, it will be a  
15 competitively operated line. And so it's definitely  
16 related to the merger.

17 Thank you.

18 CHAIRPERSON MORGAN: Thank you. Next we  
19 will hear from John Estes on behalf of the Coalition  
20 for Competitive Rail Transportation.

21 MR. ESTES: Thank you, Madame Chair,  
22 commissioners. At Gettysburg on November 19, 1863

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 where the nation's future had hung in the balance,  
2 President Lincoln in 272 words established a precedent  
3 that a presentation need not be long to be effective  
4 and enduring. The President accomplished his mission  
5 in two minutes. I have the luxury of three.

6 Like the President, I represent  
7 individuals and organizations who are also deeply  
8 troubled. In our case, the nation's life does not  
9 hang in the balance. But depending on your decision,  
10 the businesses and farms of shippers does. Our  
11 coalition represents shippers who, like Lincoln, also  
12 believe in equality -- equal access to rail  
13 competition.

14 Shippers will never forget what happens  
15 here today if they are forced out of business because  
16 of rising rates and inadequate or no rail service  
17 resulting from this duopoly. We believe millions of  
18 Americans directly or indirectly have expressed  
19 opposition or concern about this merger. And our  
20 government of, by and for the people must take notice  
21 of that fact.

22 How can any merger possibly be in the

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 public interest when that many people believe it is  
2 harmful? Applicants are wrong. Most oppose this  
3 merger. In an applicants presentation to you this  
4 morning, almost no mention was made of agriculture  
5 except when Commissioner Simmons brought it up.

6 How about grain? How about the Central  
7 corridor? How about the American Farm Bureau, the  
8 Colorado Farm Bureau, the Idaho Wheat Commission, the  
9 Kansas Farm Bureau, the Montana Farmer's Union, the  
10 Oklahoma Grain and Feed Association, the Texas Farm  
11 Bureau, the Texas Wheat Producers and others, all who  
12 have gone on record against the merger.

13 We have submitted that documentation for  
14 your file, and I believe some of them may have  
15 contacted you directly. Lincoln got his message  
16 across in two minutes and dedicated a cemetery. Our  
17 mission is to convince you in three minutes not to  
18 dedicate an economic graveyard for thousands of  
19 shippers by approving this merger. We are a coalition  
20 of, by and for shippers, particularly small shippers.

21 Our shippers agree the merger should be  
22 rejected. Let me just say one quick thing about

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 oversight. Oversight in our judgement of an approved  
2 merger would be a disaster for a small shipper. The  
3 market moves fast; they have to move fast. They have  
4 to get the products out right away. They are not  
5 Exxon or Monsanto or a large company that can ship  
6 from another plant or another location. They have to  
7 move now, and that's why oversight, and an  
8 investigation, and the time it would take to look into  
9 and prosecute those types of incidents would hurt the  
10 small shipper who we represent.

11 In conclusion, on behalf of our shipper  
12 members, many of whom are small organizations, and on  
13 behalf of the millions of Americans whose  
14 representatives have joined with us in fearing the  
15 merger, we urge that it be rejected.

16 CHAIRPERSON MORGAN: Thank you. Now, in  
17 terms of the coalition -- you've got three minutes to  
18 speak, but then you get a few questions.

19 (Laughter.)

20 MR. ESTES: That wasn't part of the deal.

21 (Laughter.)

22 CHAIRPERSON MORGAN: In terms of your

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 coalition, I just wanted to get some idea of who your  
2 membership is, how do you become a member, and also  
3 what other issues the coalition is involved in as  
4 well, so I can get some idea of the shipper --

5 MR. ESTES: Sure. Right. We are also an  
6 Inc. We are incorporated in Virginia. We started  
7 just for this purpose, regarding this particular  
8 issue. We have 200 and some members, most of them  
9 small shippers and corporations, although there are a  
10 few larger shippers in there, but most of them are  
11 small. Most of them are located in the Mississippi  
12 corridor and then west. We charge membership dues,  
13 and that's how we finance our operations.

14 VICE CHAIRPERSON SIMMONS: So you just  
15 formed during the pendency of this merger?

16 MR. ESTES: Yes, sir. Commissioner, we  
17 formed last September.

18 VICE CHAIRPERSON SIMMONS: You couldn't  
19 get heard in NIT League?

20 MR. ESTES: Pardon me? We work with NIT  
21 League and with other shipper groups, right.

22 VICE CHAIRPERSON SIMMONS: Okay.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 CHAIRPERSON MORGAN: And the 200 shippers  
2 represent, I presume, various commodity groups. I  
3 heard you speak of agriculture. Of the 200, for  
4 example, how many members are agricultural members?

5 MR. ESTES: Yes.

6 CHAIRPERSON MORGAN: How many are --

7 MR. ESTES: Yes, it's a mixed bag of  
8 industrial, agriculture. We have, for example, seven  
9 organizations out of Oklahoma. We have a number out  
10 of Texas. We have a few in the central corridor.

11 The agricultural organizations that I  
12 mentioned are not members of our coalition. We work  
13 with them. The Farm Bureau, with its 4.5 million farm  
14 families, is not a member of our coalition, but we  
15 work with them. That's where I got the figure  
16 millions of Americans, because when you add up all of  
17 those, even if you discount 50 percent of them or  
18 more, you still have a large number of people whose  
19 authorized representatives have expressed concern  
20 about the merger.

21 VICE CHAIRPERSON SIMMONS: And what do you  
22 suggest we do now?

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 MR. ESTES: We agree with Senator Bond's  
2 recommendation to you for divestiture.

3 VICE CHAIRPERSON SIMMONS: Okay.

4 MR. ESTES: And we also strongly urge,  
5 once again, that you look carefully at Mr. Oberstarr's  
6 letter to you regarding oversight and its problems,  
7 particularly with respect to the small shipper.

8 COMMISSIONER OWEN: Do you have any  
9 railroads that are members or did financing of --

10 MR. ESTES: No, we have no railroad  
11 members. We have a board of directors of shippers  
12 only for shippers. We have -- most of our  
13 contributions come from shipper organizations.

14 We did enter into a stipulation and  
15 discovery that roughly six percent of our income over  
16 and above our cost would be financed by others than  
17 shippers. And so --

18 COMMISSIONER OWEN: Fascinating.

19 MR. ESTES: Yes.

20 CHAIRPERSON MORGAN: Are they other  
21 transportation companies?

22 MR. ESTES: Yes. Right.

NEAL R. GROSS  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1 CHAIRPERSON MORGAN: Any railroads in  
2 that?

3 MR. ESTES: There is no direct railroads,  
4 no one a party to this proceeding. But there are  
5 organizations that are not shipper related.

6 COMMISSIONER OWEN: That's what I was  
7 shooting for. Thank you.

8 MR. ESTES: Okay.

9 CHAIRPERSON MORGAN: Thank you, Mr. Estes.

10 Okay. We will now move to the coal  
11 shippers. First, we will hear from Michael Loftus,  
12 who will be representing Western Coal Traffic League,  
13 Wisconsin Power & Light Company, Wisconsin Public  
14 Service Corp.

15 MR. LOFTUS: Chairman Morgan, Vice  
16 Chairman Simmons, Commissioner Owen, my name is  
17 Michael Loftus. I'm appearing on behalf of the  
18 Western Coal Traffic League, Wisconsin Power & Light  
19 Company, and Wisconsin Public Service Corporation.

20 WCTL's members ship about 95 million tons  
21 of coal each year at a delivered cost in excess of  
22 \$2 billion. Wisconsin Power & Light and Wisconsin

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 Public Service each rely heavily on western coal to  
2 fuel their generating facilities.

3 WCTL is opposed to the proposed merger and  
4 requests that the application be denied. Its reasons  
5 are simple and straightforward. First, the market for  
6 western coal transportation is already dangerously  
7 concentrated as a result of the BN/Santa Fe merger.  
8 Eliminating the SP, the third largest originator of  
9 western coal, would leave UP/SP and BNSF in control of  
10 96 percent of all western coal traffic.

11 This level of concentration will lead to  
12 a substantial relaxation of competition and increasing  
13 rate levels as each of the two remaining systems finds  
14 it more profitable to raise rates on its share of the  
15 market than to go after the other's share.

16 Second, the merger would eliminate source  
17 competition between SP-served coal mines in Colorado  
18 and Utah, and UP-served coal mines in Wyoming.  
19 Aggressive SP pricing of rail transportation has made  
20 Colorado and Utah coals increasingly competitive with  
21 other western coals for many utilities. This  
22 competition has constrained costs for coal

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 transportation from Wyoming mines.

2 The merger would end this source  
3 competition and the associated benefits, as UP is  
4 likely to favor the Wyoming coal origins that would  
5 yield it the greatest profits.

6 There is a great deal of testimony in the  
7 record about the extent to which SP origin coals  
8 compete with UP origin coals. Our time permits us to  
9 emphasize only one point with regard to that issue.  
10 None of the applicant's witnesses, who say that these  
11 coals do not compete, are actually involved in buying  
12 or selling coal.

13 On the other side are the actual coal  
14 users, like Wisconsin Power & Light Company, and the  
15 many other utilities identified in WCTL's evidence,  
16 who have either actually used coals from both regions  
17 or have actively considered doing so. We submit the  
18 latter group is inherently more believable.

19 Third, the merger would cause substantial  
20 deterioration of coal service in the central corridor.

21 And, Commissioner Owen, we are one of  
22 those guilty of perhaps confusion about central

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 corridor. We are talking from Provo, Utah, east to  
2 Chicago, when we talk about the central corridor.

3 The UP/CNW merger caused tremendous  
4 problems for UP coal shippers, particularly in the  
5 midwest. Wisconsin Public Service experienced  
6 additional rail car lease costs in excess of  
7 \$2 million in 1995 alone, as a result of those UP  
8 service problems. The operating plan for the proposed  
9 merger is inadequate to deal with coal traffic demands  
10 on the central corridor.

11 The BNSF agreement and CMA agreement will  
12 not offset the anti-competitive effects of the merger,  
13 even in two to one situations, due to the high level  
14 of the trackage rights compensation and to other  
15 factors which have been noted by others.

16 If the Board decides to approve this  
17 merger, WCTL requests the imposition of the following  
18 protective conditions. One, divestiture or additional  
19 trackage rights in the central corridor to an  
20 independent carrier, other than BNSF, as reflected on  
21 the map at Tab 1A of our handout.

22 Two, a limitation on integration of UP and

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 SP operations in certain defined areas until UP  
2 demonstrates that it has complied with its service  
3 commitments under coal contracts.

4 Three, a reduced trackage rights fee under  
5 the BNSF agreement.

6 Four, inclusion of all shippers with  
7 buildout options as protected two to one shippers.

8 And, five, application to two to one coal  
9 shippers of Section 3 of the CMA agreement, which  
10 would relieve certain contractual commitments.

11 As shown at Tab 1B of our handout,  
12 applicants have attempted to carve the Lower Colorado  
13 River Authority and the city of Austin, Texas, out of  
14 this provision, even though they have acknowledged  
15 elsewhere they are a two to one shipper.

16 Thank you very much for your attention.  
17 I'd be pleased to respond to any questions.

18 CHAIRPERSON MORGAN: The one condition  
19 that you just mentioned regarding commitments under  
20 contracts. Now, how is it that we would get into that  
21 type of issue, given that a contract is essentially an  
22 agreement that is upheld in court? How would we

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 interject ourselves into that? I just need to  
2 understand the condition a little bit more.

3 MR. LOFTUS: When one looks at the  
4 statutory obligations of the Board in a rail merger  
5 proceeding, one of the first listed, if not the first,  
6 is to examine the adequacy of rail transportation.  
7 The UP and CNW recently merged, and despite the  
8 glowing predictions of what would occur as a result of  
9 that merger, the fact is -- and there has been some  
10 acknowledgement of this -- that there were serious  
11 service problems that resulted from the integration of  
12 the UP and the CNW.

13 Coal shippers felt those problems  
14 severely. Those coal shippers have coal  
15 transportation contracts, almost invariably, that have  
16 frequently service commitments in them. The condition  
17 we're suggesting to you would be self-policing. You  
18 just tell the UP that they're not going to be  
19 permitted to integrate operations over the lines we've  
20 identified until they can certify to you that they are  
21 in compliance with their service commitments under  
22 those existing contracts.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 CHAIRPERSON MORGAN: And these are  
2 existing --

3 MR. LOFTUS: Existing.

4 CHAIRPERSON MORGAN: -- as SP contracts?

5 MR. LOFTUS: UP contracts.

6 CHAIRPERSON MORGAN: UP? Okay. UP. So  
7 if we were not to impose this condition, and their  
8 service problems ensued under the contract, would you  
9 then go to court to try to correct the problem?

10 MR. LOFTUS: It's possible, Madam  
11 Chairman, to go to court. The history has been that  
12 these shippers are very reluctant to take these  
13 carriers to court over these issues, and I would  
14 imagine that that reluctance would continue for very  
15 good reason.

16 CHAIRPERSON MORGAN: But it does relate to  
17 an issue of provisions in the contract that you want  
18 to make sure are fulfilled.

19 MR. LOFTUS: It does, indeed.

20 VICE CHAIRPERSON SIMMONS: Did the  
21 settlement agreements allay any of your fears at all  
22 between Utah Railway and the Burlington Northern Santa

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 Fe?

2 MR. LOFTUS: Vice Chairman Simmons, the  
3 Utah Railway settlement did not address the concerns  
4 we had. The concerns we had with regard to source  
5 competition from SP origin coals is very simply that  
6 the SP didn't have other coals to market. And,  
7 therefore, in order to grow its volumes it had to be  
8 an aggressive pricer to get that product moving. And  
9 that made those coals competitive.

10 The Utah settlement does not affect most  
11 of those coal mines that we're concerned about.

12 VICE CHAIRPERSON SIMMONS: I see.

13 MR. LOFTUS: The BN Santa Fe settlement we  
14 have major problems with by virtue of the landlord  
15 tenant situation that has been described, by reference  
16 to the high trackage rights compensation level that's  
17 been described. And if I might, I'd like --

18 VICE CHAIRPERSON SIMMONS: So you don't  
19 think the Burlington Northern would be a competitor,  
20 then, is that what you're saying? Because of the high  
21 price?

22 MR. LOFTUS: We think that their ability

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 to compete would be severely constricted.

2 VICE CHAIRPERSON SIMMONS: Okay.

3 MR. LOFTUS: I would like to contrast the  
4 Powder River Basin where what happened there was you  
5 had a new entrant that had a zero market share going  
6 in. It put up big dollars to buy in, and then it had  
7 to go after market share aggressively to justify that  
8 investment that it had made.

9 VICE CHAIRPERSON SIMMONS: And they did.

10 MR. LOFTUS: And they did. And they're up  
11 to about 50 percent of the market share now. But our  
12 concern from the duopoly perspective is they now have  
13 a mature market, and they're better off just both  
14 sitting back and raising rates than going --

15 VICE CHAIRPERSON SIMMONS: That's not  
16 happening. That's not happening.

17 MR. LOFTUS: Well, I'd say that the  
18 impacts of the Burlington Northern Santa Fe merger in  
19 that regard remain to be seen.

20 VICE CHAIRPERSON SIMMONS: Well, I mean  
21 time, you mean, but I'm talking about what's happening  
22 right now.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 CHAIRPERSON MORGAN: Regarding the  
2 Colorado Utah coal, as I understand your concern, it  
3 is that the competitiveness of that coal after the  
4 merger would not be as strong as it is now. SP serves  
5 that coal market, as I understand it.

6 MR. LOFTUS: They do.

7 CHAIRPERSON MORGAN: And the loss of a  
8 separate SP is of concern to you from a geographic  
9 competition perspective.

10 Now, what I am confused about is that if  
11 I'm UP, and I'm acquiring this new market of coal from  
12 SP now that I've taken over SP, why would I not pursue  
13 markets where Colorado Utah coal would be needed?

14 MR. LOFTUS: You would. But you would  
15 follow the opportunity that yielded you the greatest  
16 profits for the available business. There are really  
17 two separate concerns with the UP. One is the fact  
18 that the -- I'm sorry -- with regard to the SP as a  
19 coal originator.

20 One was that it was more aggressive  
21 because it had to be. That's all they had. That's  
22 clearly not the case with the UP, nor is it the case

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 with the BN. And the second concern is that where the  
2 two coals compete the carrier is in the position to  
3 determine which coal will get the business, and it is  
4 in a position to ensure that it is the coal that  
5 yields it the greatest profit.

6 CHAIRPERSON MORGAN: But Colorado Utah  
7 coal right now is a viable commodity, right?

8 MR. LOFTUS: It is a viable commodity.  
9 And what we're talking about is in the areas where  
10 this competition exists, there are certain markets  
11 where the Colorado Utah coal clearly will continue to  
12 do well.

13 CHAIRPERSON MORGAN: Now, the other thing  
14 that you mentioned in your brief was a discussion of  
15 efficiency gains related to this merger, indicating  
16 that because unit coal trains are efficient enough  
17 there is no additional benefit, as you see it, to the  
18 coal community from this merger in terms of  
19 efficiencies.

20 Given that this merger will create single-  
21 line service, longer lines to certain markets, so on,  
22 isn't there some benefit to the coal community by

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 being connected with a system that goes to new  
2 markets, different distances, different markets? Is  
3 there no efficiency gained from that at all? No  
4 benefit to the coal community with that new network?

5 MR. LOFTUS: Madam Chairman, the point  
6 with regard to efficiencies is that unit train service  
7 is already very efficiency by the nature of the  
8 operation. And, therefore, the benefits from single-  
9 line service, as opposed to joint line service, are  
10 not as great when you're talking about unit train coal  
11 service.

12 We're not suggesting that there would be  
13 no situations in which coal shippers might not be  
14 advantaged as a result of the merger. We would not  
15 make a categorical statement like that. It would  
16 depend on the individual facts.

17 CHAIRPERSON MORGAN: Because there may be  
18 new markets perhaps that you would be getting into as  
19 a result of a new network of connected lines.

20 MR. LOFTUS: That's possible. But our  
21 point is that the dangers associated with this merger  
22 far outweigh any such benefits.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 COMMISSIONER OWEN: I think the dangers  
2 might be inherent in having a coal mine in an isolated  
3 place like that where it has to be serviced by any  
4 mean of transportation. But I would question if the  
5 transportation industry would price itself out of the  
6 market at the local market, or at the international  
7 market, by moving coal, or grain as we've heard all  
8 day here, that everybody is fearful that prices are  
9 going to go through the ceiling. That could be the  
10 case, but it hasn't happened in years past.

11 And so I think that as we see that --  
12 also, the competition from the wheeling of electricity  
13 now will be very severe as we get the grid system  
14 going a little bit more so and people are able to buy  
15 cheaper power -- hydropower -- in different parts of  
16 the country. So coal will have another competitor  
17 there.

18 And so I don't think that someone that has  
19 made a major investment in building a line to the  
20 Powder River Basin, or putting a few hundred million  
21 dollars into Utah, are going to abandon that just  
22 because they want to raise the ton mile another mill.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 or another penny. It's not a sound business  
2 proposition to me, as I see it, to continue to raise  
3 price where you price a product out of the market.

4 And since history hasn't proven you right  
5 in that, nor any of the other people here protesting  
6 today, I kind of question -- you know, I know you  
7 should have concern, but the concern was there when  
8 you built the coal mine as to how you are going to get  
9 it to the market, because that was a captive position  
10 then.

11 MR. LOFTUS: Commissioner Owen, I  
12 certainly agree that the railroads, I don't think, are  
13 bent on pricing the service to the point where they  
14 lose the business. I don't suggest that's what is  
15 going to occur, but there is a big difference between  
16 that and the type of competition that will force the  
17 carriers to pass through the benefits of productivity  
18 gains, and so on, as they have been doing in the past.

19 Whether that will continue, whether you  
20 will have strong competition, or rather, you will  
21 settle back into comfortable duopoly, that is what  
22 we're talking about. And we think this merger will

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 help make the latter the reality.

2 COMMISSIONER OWEN: I have concerns also,  
3 but we haven't seen it yet. Thank you.

4 CHAIRPERSON MORGAN: Thank you very much.

5 MR. LOFTUS: Thank you.

6 CHAIRPERSON MORGAN: Next, we will hear  
7 from Christopher Mills, who will be speaking on behalf  
8 of Entergy Services, Inc., Arkansas Power & Light  
9 Company, Gulf States Utilities Company.

10 MR. MILLS: Good afternoon. I think that  
11 Vice Chairman Simmons will be delighted to hear I'm  
12 the first -- or my client is the first opponent of the  
13 merger who is not seeking divestiture of any lines.

14 VICE CHAIRPERSON SIMMONS: Good. None of  
15 the rest have told us how to do it. They've all  
16 suggested it, though.

17 MR. MILLS: Entergy operates two large  
18 coal fire power plants -- the White Bluff plant in  
19 Arkansas and the Nelson plant in Louisiana -- that  
20 burn Powder River Basin coal. And what Entergy does  
21 want is a trackage rights condition in favor of the BN  
22 Santa Fe that will enable it to preserve existing

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 competitive options for the movement of coal to these  
2 plants that would otherwise be nullified by the  
3 merger.

4 The two plants have slightly different  
5 competitive situations, so I'll talk about them in  
6 turn. The first one is the White Bluff plant, which  
7 is shown on the schematic to your right, and also in  
8 Tab 2 to the books that you have. This plant involves  
9 a buildout opportunity of exactly the kind that you  
10 said should be preserved in the BN Santa Fe merger  
11 case.

12 The buildout is shown in light blue on the  
13 schematic. It's a buildout to the SP at Pine Bluff,  
14 Arkansas, which is one of the two to one points  
15 covered by the BN Santa Fe settlement agreement with  
16 the applicants, and Entergy seeks trackage rights to  
17 enable the BN Santa Fe just to get to the buildout  
18 point over the Southern Pacific. This buildout ought  
19 to be covered as a two to one point under the  
20 settlement agreement, but it is not.

21 And the relief that is sought is identical  
22 to the relief that the ICC granted in the BN Santa Fe

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 merger case to preserve buildout options for two  
2 shippers -- Oklahoma Gas & Electric and Phillips  
3 Petroleum Company. This White Bluff situation fits  
4 squarely within the precedents set by the BN Santa Fe  
5 case.

6 Entergy has presented evidence showing  
7 that the buildout is a feasible competitive option  
8 that it will pursue vigorously when its present  
9 contractual commitments to UP expire. And this kind  
10 of showing is all that is required to justify  
11 imposition of a trackage rights condition to preserve  
12 an existing buildout option under the BN Santa Fe  
13 decision, which is all that Entergy is asking for  
14 here.

15 This kind of relief is also supported by  
16 both the Department of Justice and the Department of  
17 Transportation in this case, at least in concept.

18 The Nelson plant involves a slightly  
19 different situation. This plant will lose competitive  
20 routing options as a result of the merger, and those  
21 options are shown on the second map, which also is in  
22 Tab B. The Nelson plant is now served by the Kansas

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 City Southern, but Entergy is constructing a four-mile  
2 line from the plant to the SP at Lake Charles,  
3 Louisiana.

4 This buildout will give Entergy four  
5 competitive routing options for Nelson coal, as shown  
6 on the map. The options involve the UP and the BN  
7 Santa Fe as competing origin carriers from the Powder  
8 River Basin mines to the gateways of Kansas City and  
9 Fort Worth, and SP and KCS as competing destination  
10 carriers.

11 The merger will nullify the competitive  
12 balance between these four interline routes, because  
13 SP will no longer be a neutral destination carrier.  
14 The UP will now have a single line route, and it will  
15 participate in all of the other routes except the  
16 BN/KCS route via Kansas City.

17 UP's control of the other routes will  
18 enable it to make sure that the most effective  
19 alternative to the single line route it will obtain as  
20 a result of the merger, which is the BN/SP route via  
21 Fort Worth, is not competitive. The end result, in  
22 Entergy's view, will be higher rates than if SP

**NEAL R. GROSSE**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 remained independent and had four interline routing  
2 options available to it.

3 If the merger is approved, the only way to  
4 preserve the kind of competitively balanced routing  
5 options that exist today for Nelson coal is to enable  
6 BN Santa Fe to use SP's 60-mile line between Pine  
7 Bluff and Beaumont, Texas, where it now has a  
8 connection with that line, in order to access the  
9 Nelson plant.

10 This would result in a single line BN  
11 Santa Fe route that would counterbalance the single  
12 line UP route that will be created by the merger, and  
13 thus preserve balance between the competitive options  
14 that the Nelson plant now has.

15 I thank you for your attention, and I'd be  
16 happy to answer any questions.

17 CHAIRPERSON MORGAN: And that BN Santa Fe  
18 route would then hook up with --

19 MR. MILLS: That BN Santa Fe route for  
20 Nelson would then be a single line route, because the  
21 BN Santa Fe would operate over the SP to get to the  
22 connection with this buildout that is now under

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 construction to get to the Nelson plant. And it would  
2 create a balance between two single line routes,  
3 whereas absent the merger there would be balance  
4 between four interline routes.

5 VICE CHAIRPERSON SIMMONS: I don't have  
6 any questions.

7 CHAIRPERSON MORGAN: Thank you very much.

8 MR. MILLS: Thank you.

9 CHAIRPERSON MORGAN: We will next hear  
10 from John Le Seur, who will speak on behalf of the  
11 Texas Utilities Electric Company, and then will speak  
12 on behalf of City Public Service Board of San Antonio.

13 MR. Le SEUR: Right. It will be  
14 sequential, because they filed separate comments.

15 CHAIRPERSON MORGAN: Yes.

16 MR. Le SEUR: May it please the Board, my  
17 name is John Le Seur. My first argument is on behalf  
18 of Texas Utilities Company of Dallas, Texas.

19 TU Electric opposes the proposed merger of  
20 UP and SP because of the significant anti-competitive  
21 impacts the merger would have on the transportation of  
22 Powder River Basin coals to TU Electric's Martin Lake

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1 Electric Generating Station. We've put together a  
2 schematic, which is also in our evidence, that  
3 illustrates TU Electric's concerns.

4 The Martin Lake Generating Station is  
5 situated in northeastern Texas. Starting in the year  
6 2000, that station will begin to receive approximately  
7 five million tons of Powder River Basin coal per year.

8 TU Electric has identified two efficient  
9 routings to transport that coal. The first, which is  
10 shown in red, is a UP direct routing of approximately  
11 1,510 miles. The second is a three-carrier routing,  
12 originating on the BN, with the KCS and SP as  
13 intermediate carriers, and it also ends on the BN.

14 Before the merger of UP and SP, TU  
15 Electric can play off these two competitive routings  
16 in order to obtain the lowest available transportation  
17 prices. Following the merger, if it goes through as  
18 presently conditioned, TU Electric will lose the  
19 competition because the little SP piece between  
20 Shreveport and Tenaha would be in control of the UP  
21 and the SP. The UP and SP will control both of these  
22 routings, and, therefore, we will have no competition.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1           What TU Electric asks if the merger of the  
2           UP and SP is approved are trackage rights in favor of  
3           the BN Santa Fe between Shreveport and Tenaha. If we  
4           have BN Santa in there as opposed to the SP, we again  
5           have competition. The trackage rights are very narrow  
6           in scope. It's only 54 miles.

7           The Shreveport to Tenaha line is part of  
8           a longer line between Houston and Memphis, and UP/SP  
9           has already accorded overhead trackage rights to BN on  
10          that line. So we're involved in -- we're a short  
11          distance on a line that is already going to be subject  
12          to trackage rights.

13          The applicants oppose our request,  
14          principally on grounds that, following the merger of  
15          the UP and the SP, TU Electric will have a BN direct  
16          routing. And it is true that we will, but the routing  
17          is extremely circuitous. It's 540 miles longer on a  
18          round trip basis than the three carrier routings.

19          It's also, as our evidence shows,  
20          substantially more costly to operate over. So the BN  
21          direct routing is not a viable substitute for the  
22          three carrier route.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 I can entertain questions at this time, or  
2 go on to San Antonio.

3 CHAIRPERSON MORGAN: Please proceed.

4 VICE CHAIRPERSON SIMMONS: Better go while  
5 you're ahead.

6 MR. Le SEUR: Good. My second argument  
7 this morning -- this afternoon is on behalf of City  
8 Public Service Board of San Antonio, Texas. San  
9 Antonio opposes the proposed merger of UP and SP  
10 unless BN Santa Fe access to San Antonio's Elmendorf,  
11 Texas, generating facilities is properly perfected.  
12 And we have a schematic up here showing CPSB's  
13 historic coal routes to its Elmendorf, Texas,  
14 facilities.

15 As shown in the circle, CPSB is served  
16 exclusively by an SP line. However, in 1985, San  
17 Antonio acquired trackage rights from the SP, and  
18 after that time we've been able to get the UP into  
19 Elmendorf over San Antonio's trackage rights. So  
20 we're served at destination by the UP and the SP.  
21 Obviously, the merger of these two carriers eliminates  
22 our destination competition.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 Last December we brought this issue to the  
2 attention of the UP, and it was only last Friday that  
3 they finally got around to amending their settlement  
4 agreement to include BNSF service to Elmendorf.  
5 However, that service has some significant  
6 restrictions that we would like to see lifted.

7 We'd be happy if the condition was crafted  
8 that ordered the applicants to negotiate with them.  
9 But if the Board doesn't want to do that, the Board  
10 can move forward, and based upon the record that's  
11 before it now make the following findings, which would  
12 be included in a San Antonio condition.

13 First, as the applicants have structured  
14 their condition, it applies only to coal  
15 transportation. If San Antonio wants to move a  
16 generator down to Elmendorf, under the arrangements  
17 the applicants and BN have put together, we're stuck  
18 with the UP. And we would like to, for service of  
19 that type, have BN access as well.

20 Also, the way the deal has been structured  
21 we cannot utilize our trackage rights, "our" being San  
22 Antonio's trackage rights, to move BNSF trains. The

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433