

INTERSTATE COMMERCE COMMISSION 07/01/96

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1 Hut. I will present argument today for Consolidated
2 Rail Corporation. With me today at counsel table is
3 Constance Abrams, a general counsel with Con Rail.

4 Con Rail opposes the merger unless it is
5 conditioned on the required divestiture of
6 specifically identified lines and assets in the
7 eastern portion of the SP system, what we at Con Rail
8 call SP East.

9 I will, Commission Owen, specifically
10 identify the lines to which I refer later in my
11 argument.

12 Like others before me this afternoon, I am
13 going to try to set aside in large part my prepared
14 remarks and address the principle questions that as I
15 listened to earlier colloquy seemed to me to emerge.

16 First, why the BN trackage rights won't
17 work as a remedy here. Second, why divestiture will
18 work and will preserve the benefits of the merger.

19 Third, Vice Chairman Simmons, I will try
20 to address the question you have put, how the
21 divestiture process would work. Fourth, I want to
22 speak to the question why further regulatory oversight

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1 will not work.

2 Let me begin, however --

3 VICE CHAIRPERSON SIMMONS: You are going
4 to do an awful lot in a short time.

5 MR. HUT: I'm going to try by telling you
6 why Con Rail is here. The answer is because our
7 customers have said to us and in record numbers, they
8 have said to you, that they will be seriously harmed
9 by the merger as proposed.

10 An enormous portion of the traffic that
11 originates or terminates in the SP East region goes
12 from or to a point on Con Rail. If service suffers
13 there or if rates go up, or both, Con Rail customers
14 are hurt.

15 These customers have said to us that the
16 competitive harms in the SP East region are
17 substantial, that they are not outweighed by any
18 benefits produced there, and that they are not
19 remedied by the BN trackage rights deal in any of its
20 incarnations.

21 Instead, SP East shippers in vast numbers
22 support divestiture, because only divestiture

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1 establishes a property owning carrier with an
2 investment in the lines sufficient to create
3 incentives for business development, for growth, and
4 for further investment.

5 Con Rail has said that its divestiture
6 proposal would remain on the table as long as our
7 customers support divestiture as the solution to the
8 harms caused by the merger. They do, and the offer
9 remains.

10 Let me stress, however, that this stage of
11 the proceeding is not about Con Rail or any
12 divestiture carrier. It is about framing a remedy
13 that will work and that will meet the needs of the
14 shipping public.

15 Turning to the problems with the merger,
16 it creates acknowledged and unacknowledged competitive
17 harms. The two to one points are only a part of the
18 story. Even as to them, applicants preferred remedy,
19 the BN trackage rights doesn't work. An applicants
20 preferred excuse, the endless tail of SP competitive
21 and financial loads is wrong.

22 SP is today, it would remain tomorrow, a

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1 vital competitive force in the SP East.

2 VICE CHAIRPERSON SIMMONS: Without
3 anything?

4 MR. HUT: Well no one, Vice Chairman, not
5 even SP says that they will go out of business. They
6 are in the SP East region, not a distant third at all,
7 but a strong and vital second. They are through
8 April, as I last look at the data, the only of the
9 class one carriers who have reflected or who have
10 recorded an increase in car load market share.

11 Contrary to what you heard today, SP has
12 a solid inter-modal business as testified to by Con
13 Rail Railroad professional's testimony in the record,
14 Mr. Bridges, familiar with the inter-modal traffic.

15 VICE CHAIRPERSON SIMMONS: You are almost
16 a man who stands alone then in your set. But go right
17 ahead.

18 MR. HUT: I do think that they have, hold
19 out significant promise as the testimony of Professor
20 Hess said, with solid attention to management. They
21 have assets. They have resources to continue to
22 provide competitive service in the SP East.

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1 Let me turn to the matter of the BN
2 trackage rights. First let me address the question of
3 BN's interest in the matter. You have raised that
4 earlier, Vice Chairman Simmons.

5 The transportation department has pointed
6 out that BN's position in this proceeding is seriously
7 compromised. It has provided a small fraction of the
8 information about its proposed service that the
9 shipping public and the Board have a right to expect.
10 Each new submission raises more questions about BN
11 service than it answers.

12 It had no involvement in negotiating the
13 latest effort to fix the trackage rights in the form
14 of the CMA agreement. It has been reluctant to quote
15 rates to shippers. As you heard earlier, those it has
16 quoted have not been competitive. Its refusal to
17 commit itself in the face of repeated customer demand
18 speaks volumes.

19 Now its silence may very well reflect the
20 lack of commitment. It may also, however, reflect
21 BN's understanding of the serious operating problems
22 associated with the trackage rights, to which I would

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1 like now briefly to turn.

2 The heart of the story on the SP East
3 trackage rights operations is Houston. BN's former
4 chairman Grinstein acknowledged that BN faces "severe
5 service disability in Houston." The significance of
6 that is that Houston anchors each principle route that
7 BN would acquire in the SP East system.

8 You heard Mr. Roach this morning
9 acknowledge the disabilities produced by multiple
10 switching and handling and the assistance given to
11 operations by the ability to pre-block. Both these
12 problems characterize BN's service at Houston, both
13 produce disability.

14 They will have multiple handling and
15 switching. They do not have the capacity to pre-
16 block. This results in increased transit time, cost,
17 increased potential for mis-routing, increased safety
18 risks. SP's Houston service today faces none of these
19 problems which are not addressed or rectified by the
20 CMA agreement.

21 BN would be further disabled at Houston
22 and elsewhere by insufficiency in switching and

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1 classification yard capacity, as well as insufficient
2 storage and transit capacity, as Mr. Bercovici
3 mentioned earlier in the CMA agreement, as he
4 indicated does not fix these problems.

5 Once out of Houston and particularly for
6 traffic moving toward St. Louis, BN's operation
7 problems continue. We have specified in detail in our
8 comments, testimony and brief, that each of the
9 routing alternatives available to them comes hobbled
10 by significant operating disabilities. The CMA
11 agreement has not cured any of these problems that
12 were so graphically described earlier by counsel for
13 IP.

14 Even if all of them could be solved and UP
15 has been unable to do so in numerous tries, BN service
16 would still rely on trackage rights and not ownership.
17 BN would have no investment in the lines, no incentive
18 to invest or develop business. What it will have are
19 substantial transactions costs. Disputes between the
20 parties are inevitable. The communications problems
21 between SP and UP that Mr. Roach described this
22 morning as the well-spring of the concerns in CNW are

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1 perfect examples of these transactions costs.

2 In sum, the merger can not be approved
3 with the BN trackage rights as the remedy for the
4 competitive harms in the SP East region. That
5 condition will not work.

6 But let me turn to the question why
7 divestiture will work, why it will preserve the
8 benefits. No one questions the Board's authority to
9 order divestiture. It was confirmed recently by
10 Congress in the ICC Termination Act. Divestiture
11 readily meets the four part test that the ICC cases
12 establish, the imposition of conditions.

13 No one disputes that the merger creates
14 competitive harms in the SP East region, or that
15 divestiture will remedy those harms, or that it is
16 operationally feasible.

17 Significantly, as the Justice Department
18 points out, none of the railroads that has expressed
19 interest in becoming the divestiture carrier would
20 pose competitive concerns.

21 Importantly, SP East divestiture will also
22 preserve the benefits claimed for the merger. Why?

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1 It will do so because as applicants themselves
2 acknowledge, these benefits, route shortening,
3 increased single line service, capital savings, and
4 targeted capital investment, are almost entirely in
5 the western portion of the post merger network.

6 Those claimed in the SP East region by
7 contrast, are either not benefits. There are
8 substantial questions about the benefits of
9 directional running, or the purposes served by some of
10 these can be achieved in other ways.

11 That aspect that benefits are achievable
12 in other ways is, Chairman Morgan, a principle focus
13 under the regulations that govern these proceedings in
14 Section 11.80.1.

15 Earlier Staggers Act cases, I should note,
16 and there have been references to benefits produced by
17 those, were overwhelmingly end to end mergers. This
18 Board has not since the SF/SFP merger faced one with
19 parallel aspects that this one has.

20 It is for these reasons that the
21 divestiture fixes the harms while preserving the
22 benefits that divestiture in SP East commands such

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1 widespread shipper support. The shipper associations,
2 from individuals, and indeed, from governmental
3 entities such as the transportation department, the
4 Texas Railroad Commission, and state attorneys general
5 in the region.

6 Let me now address the third and fourth
7 questions I wanted to get to. How would divestiture
8 work and the problems with oversight.

9 Divestiture can be accomplished easily and
10 expeditiously. It is a market produced structural
11 remedy that will cure the harms once and for all. It
12 involves far less need for continuing regulatory
13 involvement than the proposed trackage rights deal.

14 VICE CHAIRPERSON SIMMONS: You sound like
15 you are from the Department of Justice.

16 (Laughter.)

17 MR. HUT: Well, we agree --

18 VICE CHAIRPERSON SIMMONS: Go right ahead.

19 MR. HUT: -- in significant part. A
20 concern that you must have about the regulatory
21 oversight proposed for the trackage rights is the risk
22 that BN and UP during the period of that oversight

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1 would have substantial question about making
2 investments in lines that could turn out to be as both
3 counsel indicated this morning, there after candidates
4 to divestiture. They said well if it doesn't work,
5 you can divest later. How is that going to produce
6 the necessary investment and the necessary hard
7 competition from the --

8 CHAIRPERSON MORGAN: Well, we have heard
9 this morning I think from the applicants that they
10 would be willing to run that risk.

11 MR. HUT: They may say that now, but are
12 they going to put their money where their mouth is?

13 CHAIRPERSON MORGAN: Well, if they don't
14 know exactly where divestiture might occur, they'd
15 have to put their money a lot of places.

16 MR. HUT: Or not. And that's --

17 CHAIRPERSON MORGAN: Then they'd probably
18 have to do a lot of non-divesting throughout their
19 system.

20 MR. HUT: That seems to be a major
21 concern.

22 CHAIRPERSON MORGAN: Which I would hope

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1 they would not do.

2 MR. HUT: If their concern was the SP East
3 region where the competitive problems, I submit to
4 you, Chairman Morgan, are most acute, that is where
5 they may not do their investing as against the day
6 that this Board would order divestiture.

7 The kind of regulatory oversight --

8 VICE CHAIRPERSON SIMMONS: Pardon me. You
9 have to keep in mind that under your divestiture
10 proposal, that there are those that say if you were
11 the successful buyer of SP East, you'd be getting a
12 huge windfall. Do you disagree or not?

13 MR. HUT: No. I do disagree. We think
14 that we could provide a first-rate competitive service
15 to shippers in the area, to introduce single line
16 service for substantial numbers of shippers elsewhere
17 in the country. But with the proposal, the question
18 whether Con Rail now would become the divestiture
19 carrier, it's not before you now.

20 VICE CHAIRPERSON SIMMONS: If you were
21 successful, I think there would be a lot of points
22 where you wouldn't even have any competition.

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1 MR. HUT: We have, Vice Chairman Simmons,
2 pledged and promised in testimony that were Con Rail
3 to become the divestiture carrier, and that's not a
4 question I submit before you now, that we would
5 maintain open gateways, on non-discriminatory terms,
6 our merger would be or that acquisition, excuse me,
7 that connection, that divestiture, would be entirely
8 end to end. Con Rail is prepared as to the testimony
9 indicates and as the public record indicates, to
10 expend a very substantial amount of money, a
11 substantial 10 figure offer.

12 CHAIRPERSON MORGAN: You just a minute ago
13 said that divestiture is not really an issue here, but
14 it really is, which leads me to my next question.
15 That is, obviously you have an interest in divestiture
16 and in acquiring SP East or your version of SP East.
17 But there is no responsive application before us from
18 you on this.

19 MR. HUT: That is correct, Chairman
20 Morgan.

21 CHAIRPERSON MORGAN: So if divestiture is
22 an issue in this case, and clearly it is because you

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1 and others have made it an issue, and you are
2 interested, then why is there nothing before us?

3 MR. HUT: First of all, I think that there
4 is a good deal before you. Let me tell you why we did
5 not submit a responsive application.

6 We did not do so because we thought that
7 this phase of the proceeding ought to be about the
8 shape of the remedy, not about the identity of any
9 specific --

10 CHAIRPERSON MORGAN: But again, in this
11 day of trying to get as much done as efficiently as
12 possible, which I think is certainly what this Board
13 is about, and what Government these days hopefully is
14 about so that we can get decisions more quickly for
15 the business community, it would seem that all of
16 these issues should be before us fully at the same
17 time.

18 MR. HUT: I think that the issues can come
19 before you in very short order. The way we would
20 envision divestiture operating is in large part the
21 way Ms. Jones suggested.

22 First, that the merger could not be

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1 consummated without investiture. Second, that as
2 promptly as possible upon the rendition of any
3 decision approving the merger conditional on
4 divestiture, UP would be required to make known how it
5 intends to conduct the operation, the divestiture
6 process.

7 Third, that interested divestiture
8 carriers, and there are many who have expressed
9 interest, with substantial value being offered, would
10 make competitive auction type proposals to forge a
11 market-driven response.

12 That process, which would culminate in
13 negotiation and the development of a definitive
14 agreement, could be accomplished very very promptly in
15 a matter of weeks, and would then be submitted to this
16 Board, which given the expedition with which the
17 proceedings have been conducted to date, I have no
18 doubt, although it would be your judgement, could
19 accomplish the necessary proceedings with greater
20 expedition, because the issues would be --

21 CHAIRPERSON MORGAN: That assumes of
22 course that one person prevails in negotiations with

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1 UP for a divestiture.

2 If that is not the case, then I would not
3 expect it to go quickly. I would expect that it would
4 be another proceeding with differing views on
5 divestiture, how much, who, and so forth.

6 MR. HUT: That is conceivable, but one
7 person would prevail with UP in the sense I think that
8 UP would select a single divestiture carrier with
9 which it would negotiate --

10 CHAIRPERSON MORGAN: And then if there is
11 opposition to that selection, then we get into round
12 two and further proceedings. Is that possible?

13 MR. HUT: It's possible if there were a
14 serious opposition. But the nature of most of the
15 proposals on the table, not all, but certainly many,
16 suggest that the opposition would be certainly far
17 less than you have --

18 CHAIRPERSON MORGAN: Well I can envision
19 a situation in which one railroad would end up being
20 the selected one, and another railroad would not be
21 favorably disposed to that selection. That could
22 present us with another controversial proceeding.

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1 MR. HUT: It could, but the controversy I
2 think would be far less broad in its scope and could
3 be resolved far more quickly than this one, which
4 after all, has been only seven months from the filing
5 of --

6 CHAIRPERSON MORGAN: Well, you recall when
7 the sale of Con Rail was at issue, that certainly was
8 not an easy issue to deal with because there were a
9 lot of differing views, even within the railroad
10 community about how that should turn out. So I'm not
11 sure about that.

12 MR. HUT: That is so. You can not
13 eliminate all together the possibility of disputes
14 with these complex transactions that have difficult
15 operational and other issues. But this Board in this
16 proceeding has demonstrated that it knows how to move
17 matters along with extraordinary and commendable
18 expedition.

19 I want to turn, if I can, and my red light
20 has been on for some time, so if the board would bear
21 with me, to one further component of my presentation.
22 That is, the content of the divestiture we are

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1 requesting.

2 In framing a divestiture remedy, the Board
3 would begin with the lines that virtually all parties,
4 and there are many, who endorse SP East divestiture
5 advocate, Houston-New Orleans, Houston-Memphis-St.
6 Louis. Those routes are identified by the heavy blue
7 line on the map that we submitted with our brief that
8 is reproduced to my left, to the Board's right. I
9 believe you have a presentation before you on an 8-1/2
10 by 11.

11 Beyond that, there's further widespread
12 agreement that SP East also comprises the Houston-
13 Brownsville route, which applicants acknowledge is a
14 two to one corridor.

15 The Houston-Eagle Pass route and the St.
16 Louis-Chicago route. Again, the map to my left with
17 its broad multi-colored bands tells that story. It is
18 over these routes that SP's traffic moves today.
19 These routes should all be divested.

20 Finally, numerous shippers along with Con
21 Rail, also urge the divestiture of the route to El
22 Paso in order to assure competition at Mexican

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1 gateways. As the Justice Department has suggested,
2 the Board should include routes like this one that are
3 necessary to realize fully the pro-competitive
4 commercial and operating benefits of a divestiture
5 remedy.

6 COMMISSIONER OWEN: In as much as we are
7 talking about divestiture here, can you identify how
8 many class one railroads compete with Con Rail in its
9 territory?

10 MR. HUT: Two.

11 COMMISSIONER OWEN: Territory -- Con Rail
12 also requests that the applicants be ordered to sell
13 to Con Rail the eastern lines of Southern Pacific in
14 support of divestiture. Con Rail speaks of resulting
15 efficiencies from single line operations, faster
16 transit times, lower operating costs, and pure freight
17 car handling. Does it not follow that similar
18 efficiencies would result if either Norfolk Southern
19 or CSX gained access to Northeast markets, now served
20 exclusively by Con Rail?

21 I think that when we come to the Christmas
22 tree here, we should start taking a look at what we're

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1 going for and see if it goes in the opposite
2 direction.

3 MR. HUT: Well, Commissioner Owen, it
4 seems to me that different standards apply. What
5 we're talking about here is a merger that is proposed,
6 is a merger that reduces rail competition from two to
7 one, and not to a pre-existing condition.

8 I should add also that Con Rail at this
9 stage is not asked the Board to require divestiture
10 specifically to it, but rather to require divestiture,
11 we believe that for some of the reasons you have
12 identified and others, that the proposal that we could
13 put on the table and present to UP would be in the
14 best interests of shippers, the public, UP
15 shareholders, and that it would commit itself for
16 acceptance in presentation back to you for approval.

17 CHAIRPERSON MORGAN: But there are several
18 different SP East divestiture proposals. There's
19 yours, there's KCS's which is a little different,
20 there's the Justice Department's proposal. There are
21 a variety of proposals out there, correct?

22 MR. HUT: The Justice Department, as I

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1 understand it, actually suggests, turned down in its
2 entirety.

3 CHAIRPERSON MORGAN: Right. But if you
4 were to do a divestiture.

5 MR. HUT: Yes. There are a variety of
6 proposals. As I say, there is virtual anonymity as
7 reflected there in the heavy blue line. The multi-
8 colored bands down to Brownsville, Chicago, and out to
9 Eagle Pass do reflect the overwhelming number of
10 parties recommending SP East divestiture and to
11 endorse divestiture of those lines.

12 VICE CHAIRPERSON SIMMONS: You cite
13 shipper support for Con Rail's proposal. Are any of
14 these shippers located on SP's effected lines, to your
15 knowledge?

16 MR. HUT: I believe so, Vice Chairman
17 Simmons. We had support from Dow, PPG, Corning,
18 Huntsman --

19 VICE CHAIRPERSON SIMMONS: They have
20 expressed support of you being the Con Rail support
21 then?

22 MR. HUT: They have expressed support for

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1 Con Rail. There are numerous others in the record,
2 and support for divestiture.

3 VICE CHAIRPERSON SIMMONS: Well I know
4 they support divestiture. I am trying to find out who
5 is supporting Con Rail.

6 MR. HUT: At least those that I have
7 mentioned. Others, Chrysler, Citgo Petroleum,
8 Liondell.

9 VICE CHAIRPERSON SIMMONS: Okay.

10 CHAIRPERSON MORGAN: Just to make it clear
11 in terms of your divestiture proposal. I understand
12 the consensus proposal, which is the heavy navy line
13 over there. But yours is El Paso, Eagle Pass,
14 Brownsville, Houston, and on up to Chicago. Is that
15 the --

16 MR. HUT: That's right. Everything on the
17 chart.

18 CHAIRPERSON MORGAN: That's how many miles
19 total? Do you know?

20 MR. HUT: Approximately 1,200.

21 COMMISSIONER OWEN: You didn't ask to go
22 all the way to Port of Los Angeles, Long Beach.

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1 If Con Rail acquires South Pacific Eastern
2 lines, those shipping to the northeast will have a
3 choice of Union Pacific and then Con Rail, or Con Rail
4 direct. Doesn't it follow that Con Rail will refuse
5 to set competitive joint rates with Union Pacific in
6 order to force all of the traffic onto Con Rail lines?

7 MR. HUT: Not at all.

8 COMMISSIONER OWEN: Oh.

9 MR. HUT: We have promised the contrary.
10 We have promised in sworn testimony through the
11 testimony of principle Con Rail officers, to keep open
12 gateways, non-discriminatory terms of interchange. We
13 think that efficient joint line service is something
14 that we want to encourage, not discourage.

15 COMMISSIONER OWEN: Who would enforce that
16 then?

17 MR. HUT: Any aggrieved party could lodge
18 complaints in an appropriate way.

19 VICE CHAIRPERSON SIMMONS: If you were
20 successful --

21 MR. HUT: This Board.

22 VICE CHAIRPERSON SIMMONS: If you were

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1 successful in your quest of this SP East, do you have
2 the economic wherewithal to handle the traffic?

3 MR. HUT: Absolutely.

4 VICE CHAIRPERSON SIMMONS: Where is it?
5 Do you have the equipment and everything to do it
6 right now, presently?

7 MR. HUT: Part of the proposal, Vice
8 Chairman Simmons, contemplates the required
9 divestiture of locomotives and rolling stock
10 sufficient to be able to permit Con Rail to provide
11 competitive service from day one.

12 VICE CHAIRPERSON SIMMONS: From who, SP?
13 From SP?

14 MR. HUT: From SP.

15 VICE CHAIRPERSON SIMMONS: I find that
16 hard to believe.

17 CHAIRPERSON MORGAN: Getting back to
18 trackage rights for a minute. Obviously on Con Rail,
19 in your system, you probably have trackage rights to
20 other places as well as individuals have trackage
21 rights on your system. Your position here seems to
22 indicate that trackage rights here would not work.

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1 However, clearly they must work in your markets and
2 you use them effectively. How do you square those two
3 positions?

4 MR. HUT: Our position here, Chairman
5 Morgan, is that the trackage rights will not work
6 because of the serious operating problems that
7 characterize these trackage rights.

8 We do not suggest that trackage rights can
9 not work, although we do note that I think any
10 railroad would prefer to offer service as an owning
11 carrier, just as any shipper would rather have service
12 from an owner carrier. But in some circumstances, of
13 course trackage rights do work and have worked.

14 Earlier this morning it was suggested to
15 you that Con Rail operates over trackage rights for
16 some 16 percent of its system. Those trackage rights,
17 however, are quite different from the ones that are
18 before you. Some two-thirds of those are freight
19 exclusive routes over Amtrak and other passenger
20 agencies. The other one-third is for overhead traffic
21 only. So these are not rights that are developed to
22 facilitate local service to specifically affected

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1 shippers who would otherwise suffer a reduction in
2 competition.

3 COMMISSIONER OWEN: Why is Con Rail, who
4 reports to be revenue inadequate, so anxious to spend
5 2 billion dollars to acquire the Southern Pacific
6 Eastern lines?

7 MR. HUT: Well revenue adequacy is
8 probably not the test. Otherwise, there would be a
9 number who would flunk it.

10 We believe that we can offer a first rate
11 quality service to the shipping public in the public
12 interest. We look forward to the day that we can
13 demonstrate that to the UP and to this Board, and that
14 we can of course in doing so, earn an appropriate
15 return on the assets invested in that operation.

16 CHAIRPERSON MORGAN: Thank you very much.

17 MR. HUT: Thank you, Madam Chairman.

18 CHAIRPERSON MORGAN: Next, we will hear
19 from William Mullins and James Rill, on behalf of
20 Kansas City Southern Railway Company.

21 MR. MULLINS: Chairman Morgan, before you
22 start the clock, I would like to make a procedural

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1 request. First, let me state for the record that my
2 name is William Mullins. I am with the law firm of
3 Troutman Sanders. Our firm represents the Kansas City
4 Southern Railway Company.

5 Second, I have given Secretary Williams,
6 I see that they have passed those out. I appreciate
7 that. Those are handouts of the visuals that we'll be
8 using.

9 Third, we've been allocated 10 minutes.
10 I plan on speaking for eight of those 10 minutes, and
11 reserving the remaining two minutes for our co-
12 counsel, Mr. James Rill, former assistant attorney
13 general for anti-trust in the Bush Administration.

14 Accordingly, I would like that you notify
15 me when my two minutes are left. At that point, I
16 would like to stop, take any questions that you may
17 have, and then turn it over to Mr. Rill. Thank you.

18 Chairman Morgan, Vice Chairman Simmons,
19 Commissioner Owen, as many of you know, I spent six
20 and a half years at the ICC. In that capacity, I sat
21 right where all my former colleagues are sitting right
22 now, right behind the commissioners. I advised three

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1 different commissioners on various merger proceedings.
2 I advised them on the Denver Rio Grande's purchase of
3 the SP, the KD case and the Wisconsin Central merger
4 case. I was involved in all of those.

5 I was proud of what the commission and the
6 staff did in those cases. I thought those were good
7 mergers. They were in the public interest. I think
8 history has proven that correct.

9 However, the proposed UP-SP merger is not
10 like those mergers. This is not an end to end merger
11 like every other post-Staggers Act merger. This is
12 not a four to three merger like the KD case, or for
13 that matter, the BNSF case. This is not a
14 consolidation of the regional railroads like in the
15 Wisconsin Central case.

16 The proposed transaction is significantly
17 different from all of those previously approved
18 mergers. This merger will result in the largest
19 consolidation of parallel track in history. Everyone
20 talks about the parallel nature of this merger. I
21 believe this first graph graphically illustrates that
22 with the colored lines representing the parallel areas

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1 where UP and SP compete. That is unlike any other
2 previous merger.

3 This Commission has previously stated that
4 the burden of proof in a parallel merger is a heavy
5 burden, and can only be met with substantial evidence.
6 KCS submits that applicants have not met this burden.
7 The burden is on the applicants to prove the
8 transaction is in the public interest, not on the
9 opponents to prove otherwise.

10 I also want to tell you that this merger
11 is the most anti-competitive merger ever proposed. As
12 Exhibit no. 2 shows, this merger has seven times the
13 anti-competitive effect of the BNSF merger and twice
14 the anti-competitive effect of the Santa Fe Southern
15 Pacific merger, which the Commission flatly denied.

16 VICE CHAIRPERSON SIMMONS: Are you telling
17 me that if KCS finds the successful acquire, that
18 there wouldn't be any parallel lines?

19 MR. MULLINS: That is basically correct,
20 Commissioner Simmons.

21 VICE CHAIRPERSON SIMMONS: Oh no. You
22 haven't looked at the map.

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1 MR. MULLINS: We would not have a parallel
2 competitive problem at all, because you would have UP
3 and the SP merged system there. You would have the
4 BNSF system there. You would have the KCS system
5 there, all competing in the same markets. You would
6 have three carriers.

7 I want to tell you that the parallels of
8 this transaction and the Santa Fe Southern Pacific
9 merger are uncanny. As here, it involves significant
10 parallel effects. The Santa Fe, like the UP, proposed
11 a series of trackage and other rights to remedy those
12 problems. And as in this case, every time the
13 opponents pointed out a problem with that remedy, they
14 would change it.

15 Finally, there were threats that the SP
16 would go bankrupt, would have to retrench if Santa Fe
17 were not allowed to buy the SP. But despite the
18 threats of walking away from the deal, the changed
19 remedies and Santa Fe's last minute attempt to grant
20 an extensive set of trackage rights, the Santa Fe
21 Southern Pacific merger was denied. It was denied
22 because the anti-competitive effects were simply too

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1 great to be fixed.

2 But unlike the Santa Fe Southern Pacific
3 merger, however, the Board does not have to deny this
4 merger. While there are significant anti-competitive
5 effects, there are benefits, Chairman Morgan. We'll
6 gladly admit those benefits.

7 The question for the Board, and I know you
8 are struggling with it. I know the staff and the
9 commissioners are all struggling with it, which is
10 what is the best way to fix those anti-competitive
11 effects and preserve the benefits? That is what the
12 debate is going on right now, the internal debate
13 among the staff.

14 Applicants have put forth a set of
15 trackage right. They are the most extensive set ever
16 proposed. They have changed this trackage rights over
17 four times.

18 They first said it fixed all the problems.
19 Then they changed it again. Again last Friday, they
20 put in some new changes without an adequate
21 opportunity to comment on those changes.

22 Indeed, I'm a little unsure as to what

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1 transaction I am supposed to be submitting evidence on
2 because it keeps changing throughout this whole
3 proceeding.

4 VICE CHAIRPERSON SIMMONS: I suggest you
5 better catch that with them then.

6 (Laughter.)

7 MR. MULLINS: Well, I'm trying. I'm
8 trying. If you'd give me 30 more days, I'd love to,
9 Commissioner Simmons.

10 VICE CHAIRPERSON SIMMONS: You're not
11 going to get 30 days.

12 MR. MULLINS: That's too bad.

13 CHAIRPERSON MORGAN: You're not going to
14 get 30 more days.

15 MR. MULLINS: Ten, all right? I'll take
16 10.

17 Nevertheless, is it true that shippers
18 will be protected by the ever-changing BNSF agreement.
19 If it were true, then all the shippers and shipper
20 groups would not be here today.

21 As they have told you, the trackage rights
22 proposed will not solve the competitive problems.

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1 Attempts by this Board to fix those competitive
2 problems by further tinkering with those rights will
3 be wholly inadequate.

4 Even the trackage rights sought by other
5 carriers such as Tex Mex will also fail to resolve the
6 competitive problems of this merger. For instance,
7 Tex Mex proposal to use trackage rights does nothing
8 to resolve the competitive harms in the Houston to St.
9 Louis corridor, or for that matter, NAFTA traffic
10 coming out of Chicago.

11 Now let me explain to you why divestiture
12 is a better remedy than trackage rights. Applicants
13 say divestiture would reduce service quality,
14 undermine the benefits, eliminate new single line
15 service, re-balkanize the railroad system. These
16 claims are simply untrue.

17 Applicants propose a 1.3 billion dollar
18 corridor upgrade program to rebuild and re-configure
19 a merged UP/SP system. The purpose of this upgrade
20 program is to provide new single line service for
21 certain routes that have never before had single line
22 service.

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CORRECTION

**THE PREVIOUS DOCUMENT(S)
MAY HAVE BEEN FILMED
INCORRECTLY.....**

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1 But I'd like to direct your attention to
2 the chart where the blue lines represent the lines
3 included in the corridor upgrade program, while the
4 red lines represent the KCS divestiture proposal.

5 As is clearly shown, none of the lines
6 included in the KCS divestiture proposal are scheduled
7 for the corridor upgrade program. Indeed, they can do
8 their entire 1.3 billion dollar upgrade program with
9 divestiture.

10 As a result of this merger, applicants
11 will be able to provide new single line service over
12 numerous new routes. But as the chart showed, the
13 maps in the brief showed, and as the next chart shows,
14 not any of the single line routes that are put forth
15 in the applicants proposal, in their brief, none, none
16 of the single line routes, the new ones that they
17 identify will be impacted by the KCS divestiture
18 proposal.

19 Indeed, I challenge Mr. Roach to come up
20 with one single line route that will be impacted by
21 the KCS divestiture proposal. When you asked him that
22 question later today, he talked about maybe some

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1 problems in the central corridor. But did he tell you
2 a single line route in the Houston to St. Louis
3 corridor that would be impacted? No. All he talked
4 about was the bidirectional problem and the capacity
5 problem, because they will be able to preserve every
6 single single-line route with the KSC divestiture
7 proposal.

8 Furthermore, divestiture is not an
9 unreasonable Government intrusion in the market place.
10 Whereas monitoring by this Board would be.

11 Monitoring conditions may have worked well
12 in the Wisconsin Central case, but such a condition in
13 a transaction of this magnitude is tantamount to a
14 bureaucratic nightmare.

15 Furthermore, it would be impossible to
16 determine at some later date whether certain rate
17 increases were a result of the merged power of the
18 UP/SP or a result of general economic conditions.

19 I believe if you put on a five-year
20 monitoring condition, you are getting this Board right
21 back into the pre-Staggers days of government
22 regulation, where every time there's a little problem,

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1 everybody has to run into the government to ask for a
2 fix. But there is a better way.

3 Congress made it clear in the Staggers
4 Act, in the Interstate Commerce Determination Act,
5 that the best way to prevent anti-competitive conduct
6 is to foster and preserve competition through
7 structural conditions such as divestiture, and not
8 impose government supervised regulations and oversight
9 conditions.

10 VICE CHAIRPERSON SIMMONS: You are
11 sounding like the Department of Justice.

12 MR. MULLINS: The Department of Justice
13 wants denial. We don't want denial. We want
14 divestiture.

15 VICE CHAIRPERSON SIMMONS: All right.

16 MR. MULLINS: Unlike applicants terminal
17 trackage rights request to have the Government force
18 KCS to allow BNSF over its tracks, despite private
19 contracts to the contrary, divestiture does not result
20 in the confiscation of private property at rock bottom
21 prices as some have claimed.

22 In conclusion, the Board has a clear

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1 choice in remedying the anti-competitive effects of
2 this merger. It can accept the cumbersome ill-defined
3 set of overhead trackage rights which will not
4 preserve the competitive options for shippers. Or the
5 Board can order divestiture of parallel track.

6 Divestiture is quick and easy, and
7 preserves all competitive options for shippers. It
8 provides a structure for continued competition without
9 additional government intervention or the risk of some
10 future tacit collusion.

11 Without divestiture, this merger should be
12 denied.

13 COMMISSIONER OWEN: I was going to ask you
14 at the start of your presentation, Mr. Mullins, to
15 stand a little bit closer to the microphone.

16 (Laughter.)

17 MR. MULLINS: You have got to remember
18 that this is my first time on this side of the aisle,
19 you know.

20 VICE CHAIRPERSON SIMMONS: You have made
21 some vague assertions about collusion in your brief.
22 Do you want to enlarge upon that?

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1 MR. MULLINS: There are two risks of
2 collusion. One is future collusion, tacit collusion.

3 VICE CHAIRPERSON SIMMONS: But I mean has
4 it already gone on? That's what you --

5 MR. MULLINS: I believe Mr. Rill would
6 probably be the best person to answer that question,
7 but we certainly believe --

8 VICE CHAIRPERSON SIMMONS: I have never
9 seen you short of an answer.

10 MR. MULLINS: We believe that this Board,
11 whatever, if there has been anything, and that by the
12 way is how we proposed it in our brief, if there has
13 been collusion, we don't think this Board should
14 immunize in its 11341 power such conduct.

15 All we are asking for is a statement by
16 this Board that its power does not immunize any
17 conduct that may have otherwise --

18 VICE CHAIRPERSON SIMMONS: When you put it
19 in that context, you almost say something has gone on.
20 You leave that illusion that something might have
21 happened.

22 MR. MULLINS: Well I think the facts are

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1 in the record. We don't have all the facts because we
2 were denied discovery on some of those facts. But the
3 facts are in the record. You can read the facts and
4 make your own conclusion, Vice Chairman.

5 CHAIRPERSON MORGAN: You can make your own
6 collusion.

7 (Laughter.)

8 CHAIRPERSON MORGAN: It's late in the day.

9 COMMISSIONER OWEN: I would like to ask a
10 question. I think it's a fairly serious one. It was
11 in Sunday's Washington Post. I question if it was
12 totally misquoted in this particular capacity.

13 Kansas City Southern's President Michael
14 Haverty is quoted as saying that the merger decision
15 is going to come down to politics, and that big-time
16 political forces have spent a ton of money on this.

17 These are very serious, inflammatory
18 charges. Does Mr. Haverty have any evidence that this
19 Board is being influenced by political forces? Have
20 you any evidence that members of this board or staff
21 of this board has accepted any money from the
22 applicants or been influenced in any indirect way?

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1 I think that's a very strong statement.
2 I have been involved in the political process for 30
3 something years. I take very -- I am extremely
4 disturbed by someone saying that in the news media
5 here.

6 MR. MULLINS: I think he was not accusing
7 the Board of some sort of political corruption. I
8 don't believe that's what he was --

9 COMMISSIONER OWEN: Even the staff.

10 MR. MULLINS: Or the staff, for that
11 matter. Believe me, I know this staff. They are a
12 very professional staff. I worked for them for six
13 and a half years, and they would not do anything like
14 that.

15 COMMISSIONER OWEN: But you can carry it
16 back to Mr. Haverly for me that I take exception to
17 those remarks very much so.

18 MR. MULLINS: I think what he was saying,
19 Commission Owen, was that this is a very politicized
20 decision.

21 COMMISSIONER OWEN: Well this is the
22 nation's capital. Naturally it's political.

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1 MR. MULLINS: I think that's all he was
2 saying. I don't believe he was trying to accuse the
3 Board of any sort of political graft or corruption.
4 He just would not say that.

5 COMMISSIONER OWEN: I think it's wrong to
6 even allude to that in the papers.

7 CHAIRPERSON MORGAN: Let me ask you about
8 divestiture. When Con Rail was presenting their
9 testimony, I asked them the same question, which is
10 given your interest in this matter and given your
11 interest in divestiture, and also your argument that
12 we can't really decide upon the BN Santa Fe trackage
13 rights agreement because we don't have enough before
14 us to make that decision, why did you not file a
15 responsive application?

16 MR. MULLINS: Well first, I would ask why
17 didn't the BNSF not file a responsive application or
18 an operating plan or any of those types of things that
19 you accuse us of not filing.

20 CHAIRPERSON MORGAN: I am not accusing.
21 I am just asking.

22 MR. MULLINS: You are asking the question.

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1 I would also say as a matter of pure law, Chairman
2 Morgan, that if you look at the precedence of this ICC
3 going back to 1986, any time somebody has filed a
4 responsive application and there has been more than
5 one party wanting that piece of track or that
6 information, the Board doesn't pick and choose. The
7 Board always goes out and says let the market place
8 decide.

9 If that is going to be the precedent,
10 which by the way is a precedent that we support and
11 think is a good precedent, then what is my incentive
12 to go through all of the costs and expense of filing
13 a --

14 CHAIRPERSON MORGAN: Well Montana Rail
15 Link obviously felt --

16 MR. MULLINS: And they are the only
17 carrier filing in the central corridor. You would
18 have had three or four carriers filing in the Houston
19 to St. Louis corridor.

20 CHAIRPERSON MORGAN: That leads to my next
21 question which is if there is that much interest in
22 divestiture, then what kind of process are we looking

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1 at and what kind of time table for resolving this
2 matter?

3 MR. MULLINS: Sure. If you announce on
4 Wednesday, if you come in here and announce Wednesday
5 that you are going to order divestiture of the
6 parallel lines in let's say the Cotton Belt corridor,
7 let's say, UP and SP will, if they decide to go
8 forward with the merger, they will be on the phone the
9 minute that is announced on Wednesday trying to cut a
10 deal with as many parties as they could to try to get
11 divestiture quick and easy, because they want to
12 consummate.

13 I'll bet you, you could have a divestiture
14 order done -- by the time you announce your decision
15 on Wednesday, you could have divestiture done,
16 completed, another procedure done and over with in
17 less than two or three months after the issuance of
18 your August 12th decision. I'll guarantee it, because
19 you can do that.

20 CHAIRPERSON MORGAN: If, as I indicated
21 earlier, if one railroad ends up being the person to
22 whom the lines are divested, is that going to make all

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1 the other railroads happy?

2 MR. MULLINS: I doubt if it will make them
3 happy, but that's what the market place is all about.
4 The market will decide what carrier gets to be
5 divested. You'll have a quick and easy, maybe two
6 month proceeding in here where they will have their
7 say. Everybody can have their say. This board can
8 make a ruling on that.

9 But we're not talking six months. We're
10 talking two or three months. You've got to remember,
11 there's a whole 45 days in there between your
12 announcement on Wednesday and the time you issue your
13 decision where all the negotiating and all of that can
14 be taking place.

15 I would also argue that divestiture is no
16 lengthier in terms of details than trying to implement
17 the merger itself. I mean this merger with UP and SP
18 was going to take months, if not a year to implement.
19 So how is that any different than trying to go through
20 that process of implementing that than trying to do a
21 two-month divestiture process while that process is
22 going on. Thank you very much.

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1 CHAIRPERSON MORGAN: Thank you.

2 MR. RILL: Chairman Morgan, and members of
3 the Board, Vice Chairman Simmons, let me save you just
4 one comment. You are going to say I sound like the
5 Department of Justice, and I'm going to say guilty.

6 The principle message that I'd like to
7 bring to the Board today is that the competition
8 policy assessment that's been presented by the
9 Department of Justice and remarkably I think with the
10 basic logical fundamental concurrence of the
11 Department of Agriculture and the Department of
12 Transportation, is very much in the traditional
13 mainstream of competition policy enforcement that has
14 governed our market place in this country for at least
15 the last 20 years.

16 I say that with deference to the special
17 statutory mandate of this board with the deference to
18 the expertise of this board and particular industries.
19 But there is nothing in the statute and nothing in
20 your predecessor's statutes that detracts from the
21 fundamental notion that competition policy is an
22 intricate essential element of the public interest.

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1 Competition policy with respect to mergers
2 is embraced in the 1992 merger guidelines that were
3 issued. I had the privilege of being assistant
4 attorney general for anti-trust when they were issued
5 in the last year of the Bush Administration in 1992.
6 They actually were a fine tuning, we like to think an
7 improvement, on the merger guidelines that were issued
8 in 1982 as Assistant Attorney General Bingaman said in
9 the Reagan Administration.

10 Under each of the five prongs of the
11 analysis of those merger guidelines which are
12 generally applicable. They should be applicable in
13 every industry. This merger would be considered to be
14 bad, would be wrong, would be anti-competitive.

15 It creates undue concentration from three
16 to two, to duopoly, even I would suggest to monopoly.
17 The intricate inter-relationships created under this
18 merger and the ability of the firms to have legitimate
19 knowledge of each other's businesses as conducive to
20 non-collusive coordination which would constitute harm
21 to consumers, to shippers. Entry barriers I think as
22 the Board has acknowledged throughout the day are very

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1 high, very difficult. Efficiencies are achievable
2 through other routes. We do not deny, as Mr. Mullins
3 said, efficiencies exist in this merger. But they
4 certainly do not outweigh the anti-competitive forces
5 that would be set at large were this merger to be
6 approved as proposed.

7 Finally, there's been much discussion
8 about whether the Southern Pacific would go forward,
9 what would happen to the Southern Pacific. I only
10 recall to you Mr. Roach's opening statement. This is
11 not a failing company case. This is not a failing
12 company case.

13 So under each of the five prongs of the
14 merger guideline analysis, which should be generally
15 applicable to competition assessments in all industry,
16 this merger goes down, DOJ with DOT and USDA applied
17 the merger guidelines analysis, applied mainstream
18 competition analysis carefully, I submit correctly.
19 They got it right. You should disapprove this merger,
20 at least order the divestitures suggested by the
21 Kansas City Southern.

22 VICE CHAIRPERSON SIMMONS: Are you

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1 concerned that the rates will go up as competition
2 subsidies?

3 MR. RILL: Normally when competition
4 subsidies, prices go up, yes.

5 VICE CHAIRPERSON SIMMONS: Ms. Bingaman
6 didn't answer my question about two railroads that are
7 in the Powder River Basin.

8 MR. RILL: I wonder, was that from one to
9 two or from three to two?

10 VICE CHAIRPERSON SIMMONS: It doesn't
11 matter what it is, there are two there.

12 MR. RILL: Well there are two there, but
13 what was the pre-condition?

14 VICE CHAIRPERSON SIMMONS: And the rates
15 have gone down.

16 MR. RILL: My understanding is the pre-
17 condition was actually improved by the presence of two
18 railroads, which is my understanding, it was a
19 contributing factor to the rate decline.

20 VICE CHAIRPERSON SIMMONS: You are going
21 to say that the presence of the UP is responsible for
22 the rates decline?

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1 MR. RILL: I would say that two is better
2 than one. Three is better than two.

3 VICE CHAIRPERSON SIMMONS: I see. So four
4 is better than three?

5 MR. RILL: Not necessarily. You would
6 have to look at it in a given market context and
7 figure out what the scale economies and the cost
8 functions are. There is not a magic number except
9 that in this analysis, in the economic studies I've
10 seen supporting this analysis, under mainstream
11 application of competition policy, three is better
12 than two in this case.

13 It's not a magic number that can be
14 generally applied across the board, but it is a
15 functional element of appropriate competition policy
16 analysis.

17 COMMISSIONER OWEN: That is an odd
18 statement to make in a way, that three is better than
19 two, because when you take Montana Rail Link or some
20 of the short lines, one is better than three because
21 there's not enough traffic.

22 MR. RILL: Well I said in a particular

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1 factual context, and in this particular factual
2 context, we don't want to over-generalize. I agree
3 with the Board we don't want to over-generalize. In
4 certain cases not here proposed, scale economies are
5 such that one may be all that the market can handle.
6 That's certainly not even being argued in this case.

7 There are admitted anti-competitive
8 concerns here.

9 COMMISSIONER OWEN: I concur.

10 CHAIRPERSON MORGAN: I think that on the
11 record, the question really is with respect to three
12 to two, first off, whether that is indeed a situation
13 of harm that needs to be addressed. Obviously the
14 Justice Department and you all have taken one position
15 on that. The Department of Transportation feels that
16 the evidence is inconclusive as it relates to the
17 three to two. It does not cause us to automatically
18 conclude that three to two is an issue.

19 Two to one I think is where there's more
20 agreement that there's an issue there that needs to be
21 addressed. The question is, how much and how.

22 MR. RILL: Well certainly two to one is an

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1 issue that would need to be addressed. We think the
2 parties proposals for addressing it is wholly
3 inadequate.

4 I think on mainstream merger analysis,
5 generally speaking, and I will generalize now, that
6 where scale economies will permit and market
7 conditions are such, three is better than two.

8 Then one has to go beyond that analysis
9 and look at the underlying facts in the case, and
10 determine whether or not that generality applies to
11 this particular situation.

12 The fact of the matter is, our area of
13 principle concern and the one that was addressed
14 primarily by Mr. Mullins and in our brief, the line
15 from St. Louis to Houston really is two to one.

16 VICE CHAIRPERSON SIMMONS: Well the one
17 reason I continue to talk about the Powder River
18 Basin, that happens to be the energy source for the
19 future for a long time for this country. That was why
20 when only the Burlington Northern was there, I was
21 very instrumental in being sure that the CNNW was in.

22 But I am here to tell you that I am

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1 gratified that those rates have continued to decline.
2 Now I realize there are many other factors in that,
3 because you have two railroads in the east primarily,
4 large ones.

5 MR. RILL: I haven't studied the eastern
6 railroad lines. Vice Chairman Simmons, I think if you
7 moved from one to two, if you were instrumental in
8 moving a competitive context from one to two, you
9 should take great pride in that. I'm not surprised,
10 without knowing what the other factors are, that rates
11 did in fact go down.

12 VICE CHAIRPERSON SIMMONS: And the rates
13 have gone down in the east.

14 MR. RILL: So I think you should be very
15 careful that we don't go two to one here.

16 VICE CHAIRPERSON SIMMONS: Well, I don't
17 think anybody is going to go from two to one.

18 MR. RILL: Well, that's a question of --

19 VICE CHAIRPERSON SIMMONS: Have you got
20 plans?

21 MR. RILL: We have no plans, but that's a
22 question of what is the viable competitive

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1 alternative. At best, or the best solution is the one
2 proposed for divestiture.

3 I would if I may, Madam Chairman, just
4 like to come back to Vice Chairman Simmon's question
5 on collusion, because there is no charge of collusion
6 being made by Kansas City Southern here today or
7 elsewhere.

8 There is a question of examining certain
9 events where discovery was blocked, and the very fact
10 that one can not conduct discovery makes it obvious
11 that one can not make a charge other than what may be
12 based on full discovery. But that is not what's here
13 today. We are not suggesting that collusion has
14 occurred for purposes of this or for any other purpose
15 at this point.

16 Nor are we suggesting that anybody is
17 going to get together in a smoke-filled room
18 afterwards. We don't have to. Because the fact is,
19 that the functionality of this merger brings into
20 close coordination, by virtue of trackage rights and
21 other factors, obviously the relationships of Union
22 Pacific and Burlington Northern.

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1 No one is suggesting that that
2 coordination in and of itself is an anti-trust
3 violation. However, in the context of a merger, where
4 two dominant firms meet each other daily, discuss
5 trackage rights, discuss operating conditions, it is
6 hornbook competition law that without any illegal act
7 whatever, they can simply observe the rate setting,
8 the service, the practices of one another that would
9 make what we call duopoly or oligopoly coordination a
10 lot easier than if that relationship didn't exist.

11 That also is in the merger guidelines, but
12 it's basic economic theory. I can say as assistant
13 attorney general, when I was in office, we were very
14 concerned with those kinds of structural and
15 relationships.

16 VICE CHAIRPERSON SIMMONS: Well I am
17 concerned about it also. That is why I brought it up.

18 MR. RILL: I appreciate that, Vice
19 Chairman Simmons. I hope that my remarks clarified
20 that there are no charges of illegal conduct being
21 made, but there is a grave concern over the structural
22 conditions that would flow if this merger would

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1 proceed as it's been proposed.

2 VICE CHAIRPERSON SIMMONS: I have no other
3 comments.

4 MR. RILL: Thank you very much, Madam
5 Chairman and members of the board.

6 CHAIRPERSON MORGAN: Thank you.

7 VICE CHAIRPERSON SIMMONS: That was a long
8 two minutes.

9 MR. RILL: Good questions though.

10 CHAIRPERSON MORGAN: Next we will hear
11 from Mark Sidman, representing Montana Rail Link Inc.

12 MR. SIDMAN: Madam Chairman, board
13 members, my name is Mark Sidman. I appear before the
14 Board today on behalf of Montana Rail Link. Seated to
15 my left is the President of Montana Rail Link, William
16 Brodsky.

17 MRL filed a responsive application in
18 these proceedings in which it proposed that a newly
19 formed entity called Acquisition Company acquire one
20 of the two central corridor routes that would be owned
21 by the combined UP/SP. The rail lines and rights
22 covered by the responsive application are indicated on

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1 the map before you.

2 There are three issues that I will address
3 today. One, to preserve competition in the central
4 corridor, the Board should approve MRL's responsive
5 application rather than ordering UP/SP to auction off
6 one of its lines in that corridor.

7 Two, central corridor shippers strongly
8 support the divestiture of a central corridor route to
9 MRL.

10 Three, the United States Department of
11 Transportation's criticisms of the MRL proposal are
12 unfounded and should be rejected by the Board.

13 You have heard numerous shippers and
14 shipper groups argue today that BNSF operating as a
15 trackage rights tenant will not provide effective
16 competition in the central corridor. MRL agrees with
17 those conclusions. Preservation of rail competition
18 in the central corridor can be accomplished only if
19 the shippers in that market are served as they are
20 today by two owner operators.

21 In order to preserve the competitive
22 status quo, the Board must impose a condition that

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1 results in a divestiture by UP/SP of a central
2 corridor route.

3 You can do this in two ways. Either the
4 Board could approve the MRL responsive application or
5 the Board could direct UP/SP to sell off a line to the
6 highest bidder.

7 There are several reasons why the public
8 interest will be best served by approving responsive
9 application. First, an auction condition will put
10 UP/SP once again in the position of trying to cobble
11 together a transaction that passes Board scrutiny.

12 The Commission recognized in SF/SP that
13 sending off a party to address the anti-competitive
14 aspects of its own merger application is inherently
15 suspect. The Commission in that case doubted that the
16 applicants would place public benefits above private
17 ones. There is no reason to believe that UP and SP
18 would do so in this case.

19 The second reason for rejecting an auction
20 condition is that it necessarily would involve a full
21 blown second stage to these proceedings. A sale to an
22 unidentified party that has not filed the responsive

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1 application would delay consummation of the merger
2 pending Board and public scrutiny of the proposed
3 transaction.

4 MRL's responsive application on the other
5 hand, could be approved now, thereby allowing the
6 public benefits of the merger to be realized
7 immediately.

8 A third reason why the Board should
9 approve MRL's responsive application rather than
10 imposing an auction condition is the existence of the
11 settlement agreements between applicants and Illinois
12 Central and Wisconsin Central. In the event of a
13 divestiture order, these agreements presumably will
14 result in one of those two carriers negotiating to
15 acquire central corridor route. But the few
16 criticisms that have been leveled at the MRL proposal,
17 principally the loss of some single line service and
18 operational issues in the Kansas City terminal, even
19 if valid, would apply equally to Illinois Central and
20 Wisconsin Central. Neither of those companies has a
21 presence in Kansas City. Neither operates in
22 California.

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