

INTERSTATE COMMERCE COMMISSION 07/01/96

FINANCE DOCKET # 32760

479-538 9+

1 Plastics, Inc. and Brandt Consolidated, Inc.

2 MR. McFARLAND: I'm aware of the hour.

3 I'm going to be very brief. My clients just wanted
4 you to know there is a contested abandonment in this
5 case in Central Illinois that has a kind of a unique
6 legal issue to it and I'll just talk about it very
7 briefly. The issue is the applicants themselves made
8 this abandonment contingent on them getting trackage
9 rights over another railroad, the other railroad is
10 called the Illinois Midland and you have a regulation
11 that requires the applicants to come forward with all
12 of their evidence in their case in chief with the
13 merger of the abandonment application.

14 When the applicants filed this application
15 they did not provide any evidence that they had these
16 trackage rights and here we are seven months and one
17 day after the abandonment application was filed and
18 there's still no evidence that they have the trackage
19 rights. Without the trackage rights, the applicants
20 themselves would not go forward with the abandonment
21 and we think that's a legal impediment to the
22 application. That's really -- there are other issues,

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 but that's the only one I wanted to highlight.

2 CHAIRPERSON MORGAN: Thank you.

3 MR. McFARLAND: Thank you.

4 CHAIRPERSON MORGAN: Next we will hear
5 from, I should say the Honorable Paul Lambole, y,
6 talking, representing City of Reno.

7 VICE CHAIRPERSON SIMMONS: You have one
8 minute and it took you 15 seconds to get up here.

9 (Laughter.)

10 CHAIRPERSON MORGAN: You didn't use to
11 work here, did you?

12 (Laughter.)

13 MR. LAMBOLEY: And that chuckle took up
14 another portion of my time.

15 It's a pleasure for me to be here, Madam
16 Chairman and Vice Chairman and Commissioner. I'm here
17 on behalf of the City of Reno who is participating
18 because of their concern of the impact of this merger,
19 if approved, it would have on the public health and
20 safety and environment of their community.

21 The City of Reno has been operating on two
22 levels. One, the informal level which has been, I

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 think, a very active negotiation with the railroad
2 applicants to see if there isn't a basis upon which we
3 can find a mutual agreement and that's been pursued,
4 I think, with some good faith and some vigor.
5 Unfortunately, it's also necessary since we don't have
6 agreement in place or a consensus developed in place
7 necessary to protect the city's participation in these
8 proceedings as well as its legal remedy, should that
9 become necessary.

10 So I'm here today to ask you if you'll do
11 two things. One, I think it's necessary in these
12 proceedings for you to consider for preparation of an
13 environmental impact statement, an EIS, specific to
14 the Reno-Sparks-Trucky Meadow basin and secondly, to
15 do a prepared and informative determination under the
16 Clean Air Act for that same area which happens to be
17 a nonattainment area for three air quality pollutants,
18 ozone, particulate matter, as well as carbon monoxide.
19 In that regard, I'd like us first of all, to
20 compliment the Board's SEA unit. They have spent
21 endless hours, I think, in the investigation and
22 preparation of both the EA and the post-EA

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 documentation. We're still concerned, as you can
2 tell, about the environmental documentation. We truly
3 believe that if the proposed 18 month study that is
4 proposed in the post-EA were done under the standards
5 of an EIS and the statutory criteria, that that would
6 do an awful lot to help shape and define the issues
7 that we have been negotiating about and can bring
8 about the necessary resolution. We think further,
9 because of the nonattainment area and the air quality
10 issues that there is no discretion, despite the fact
11 that this agency is not responsible for emissions. It
12 is nonetheless, responsible in this context to have a
13 conformity determination for any approval that they
14 may consider in this case be consistent with the air
15 quality requirements.

16 Thank you.

17 COMMISSIONER OWEN: If we were to do an
18 EIS, I would hope they would address it to where the
19 casinos, the air conditioning units and the
20 automobiles that have been brought up alongside of the
21 railroad line rather than focusing on the railroads.

22 MR. LAMBOLEY: I agree. I think an EIS

NEAL R. GROSS

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

1 does get you to a point where you can identify what
2 you're talking about on both sides of the table, if
3 you will.

4 COMMISSIONER OWEN: If we take a look at
5 the railroad that's been there since 1860, the city
6 fathers and the planners -- I used to live in Reno for
7 a short while -- and they keep allowing building
8 permits to be issued until they encroach right up on
9 top of the rail line, and then come something like
10 this, they come and say we have got to do something
11 about the railroads. They should have thought about
12 that 50 years ago and kept the building back a couple
13 of hundred feet.

14 MR. LAMBOLEY: They have, they did, in the
15 past, as you can suspect and Reno, frankly, in terms
16 of development of the West, it's not untypical of any
17 of the Western cities who grew up around railroads.
18 I notice, with interest, I just simply say there was
19 a flyer that somebody put out and I assume it was the
20 railroads because it was first the railroads, then
21 came the city.

22 Unfortunately, there happened to be a town

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 called Lakes Crossing that was there before the
2 railroad arrived, but I think you're absolutely right
3 that the EIS can operate to well define what both
4 parties in this problem-solving event should be
5 looking at and do much to help shape and define the
6 issues.

7 If there are no further questions, thank
8 you.

9 COMMISSIONER OWEN: I have a couple more
10 here. Is it true that the City of Reno has suggested
11 that the line be relocated so that the UPSP train can
12 travel beneath the hospital? Is that one of your
13 alternate routes?

14 MR. LAMBOLEY: It isn't beneath the
15 hospital. Let me tel you that the city and the
16 railroads have considered a number of alternative
17 situations. One would be to leave the rail line in
18 place and there are 15 grade level crossings in the
19 city and that's a real significant problem. The
20 questions are whether there are some ability to close
21 some of those crossings, whether there are some
22 underpasses that can be constructed that will have

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 meaningful impact, is one, if you will, collection of
2 considerations. That's keeping the line at grade
3 level and you work around that.

4 The second one would be change the level
5 of the line, that is, to press the railroad tracks in
6 the same corridor they're in.

7 The third situation that the city and the
8 railroad have been pursuing is to relocate the tracks
9 in what is called the I-80 corridor or some other
10 place that would -- the I-80 corridor, which is a
11 corridor probably two blocks north of the current rail
12 track corridor is a depressed corridor that housings,
13 if you will, the interstate system, which has
14 apparently technically and from an engineering design
15 standpoint, enough room and space to accommodate a
16 rail line.

17 Now, you're right. It does come close to
18 the hospital and the hospital issue is an issue that
19 people are talking about, but it isn't one of those
20 situations where it goes underneath the hospital.

21 COMMISSIONER OWEN: You have 18 months to
22 work it out and I hope the city participates in 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 contributions to solve the problem.

2 MR. LAMBOLEY: We're very optimistic. As
3 I said at the outset, the good faith, I think,
4 engendered on both sides has been credible and real
5 and the parties have worked very diligently. The City
6 of Reno has worked, as has the railroad, by the way,
7 but we've invested a lot of time and energy in the
8 study and survey and engineering, so it hasn't been
9 without trying and we're very hopeful.

10 CHAIRPERSON MORGAN: Thank you. Next, we
11 will hear from Steven Kalish, Sedgwick County, Kansas,
12 City of Wichita, Kansas.

13 MR. KALISH: Thank you. We'd like to
14 believe that the railroads are paying their own way,
15 that they're not being subsidized. It just doesn't
16 happen to be true.

17 Wichita has lived with a few UP trains for
18 a number of years. We know the problems that they
19 cause. We don't want those problems tripled by
20 overhead traffic of coal and grain just because the UP
21 wants to trade congestion in Kansas City for
22 congestion in Wichita and doesn't want to use yet

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 another alternate route.

2 Just a few examples of the very real world
3 costs of having that railroad moving just a few trains
4 a day through the city. A train blocking a Wichita
5 street prevented an ambulance from reaching a hospital
6 just yards away. Another train prevented the fire
7 department from reaching a building burning just on
8 the other side of the track. They could see the
9 building burning, they couldn't get there because the
10 train was blocking the road.

11 Another example, if I may, very real, very
12 pointed, I think, for people who live here in
13 Washington. A woman's whose car was hijacked and then
14 was run over by her own car by the hijacker could not
15 get ambulance service because the ambulance was
16 blocked by the train. We are in a situation in which
17 at least once every month with 4.4 trains per day
18 moving through Wichita, at least once every month
19 emergency service vehicles are blocked by the UP's
20 trains and the UP wants to triple the level of trains
21 running through the heart of Wichita. This is a very
22 real world cost that they do not propose to bear.

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 NEPA and the transportation policy require
2 consideration of public health and safety.
3 Prohibiting additional trains going through Wichita
4 will do no harm to these railroads. They've run over
5 additional routes for years, but the proposed
6 condition on the merger will save lives in Wichita.

7 The mitigation proposals of the June 24th
8 PEA deal with this in a totally unsatisfactory manner.
9 The PEA finds that Wichita would be hit harder than
10 any other place in the country in terms of traffic
11 delays. This will delay the fire. It will delay the
12 police. It will delay the ambulance services and
13 create more incidents of the type that I've just
14 mentioned. Even so, for the first 18 months the PEA
15 would allow the UP to increase its train levels by 50
16 percent from 4.4 to 6.4 per day. After 18 months, the
17 sky would be the limit.

18 During those 18 months, a consultant
19 retained by the UP would be studying Wichita and the
20 PEA gives away your power to revise that consultant's
21 recommendations. UP would be required to abide only
22 by its own consultant's recommendations as if they had

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 been issued by the Board.

2 If more study is needed, and we're not
3 certain that it is, there should be no increase in the
4 number of trains running through Wichita until the
5 Board issues a subsequent order. The consultant
6 should be picked by the SEA after getting
7 recommendations from UP, Reno and Wichita. We should
8 be permitted to appoint a technical committee that
9 will work with the consultant and the consultant's
10 report should not be the final word. This Board
11 should issue the final decision.

12 Thank you.

13 CHAIRPERSON MORGAN: Any questions?

14 COMMISSIONER OWEN: I have no questions.

15 CHAIRPERSON MORGAN: Thank you very much.

16 Next we will hear from Laura Middleton, representing
17 the Rails to Trails Conservancy.

18 MS. MIDDLETON: Madam Chairman, Vice
19 Chairman and Commissioner, I am here today on behalf
20 of Rails to Trails Conservancy, a nonprofit
21 organization dedicated to the preservation of inactive
22 railroad corridors for public use.

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 RTC has one primary point that they would
2 like to make before the Board today. Should this
3 Board approve the merger between UP and SP, RTC
4 requests that the merger agreement contain a rail
5 banking condition to preserve otherwise to be
6 abandoned rail corridors for interim trail use and
7 other compatible public uses under Section 8D of the
8 National Trail System Act.

9 UP and SP propose approximately 600 miles
10 of merger-related railroad abandonments. This is a
11 particular note, due to the concerns raised about the
12 possible anti-competitive and capacity effects of this
13 merger. Rail banking conditions in the merger
14 agreement would allow these 600 miles of rail line to
15 remain under this Board's jurisdiction for possible
16 future rail reactivation. Thus, a rail banking
17 condition is an easy and cost-effective way to address
18 some of these concerns, while at the same time,
19 proposing no undue burden on the merged railroad.

20 RTC understands that the merged railroad
21 has agreed to negotiate with RTC and other entities
22 under the Trails Act for a number of these lines that

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 are to be abandoned. However, negotiating a trail use
2 rail banking agreement can be very complex,
3 particularly since many of the railroad corridors
4 involved are federally granted rights of way. Unless
5 the merger agreement contains rail banking conditions,
6 there's no guarantee at all that part or all of these
7 valuable rights of way will be preserved for future
8 reactivation.

9 In short, RTC would like this Board to
10 adopt conditions on all merger-related abandonments
11 essentially requiring rail banking where a qualified
12 management entity is willing to assume all management
13 and financial liabilities. RTC itself has submitted
14 several statements of willingness in this matter.

15 That is all I have.

16 CHAIRPERSON MORGAN: Thank you very much.

17 MS. MIDDLETON: Thank you.

18 CHAIRPERSON MORGAN: Next, we will hear
19 from Donald Griffin, representing the Allied Rail
20 Union Transportation-Communications International
21 Union.

22 MR. GRIFFIN: Good evening, Madam

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 Chairman, Vice Chairman Simmons and Commissioner Owen.

2 I'd like to begin with just a brief correction. I'm
3 not here representing the Transportation and
4 Communications International Union. That union has
5 graciously conceded their four minutes to the Allied
6 Rail Union with a caveat that I place on the record
7 that TCU remains adamantly opposed to this transaction
8 for the reasons set forth in their brief.

9 The Allied Rail Union is also opposed to
10 this merger. The Allied Rail Union, Vice Chairman
11 Simmons, we're worried about membership here, consists
12 of the Train Dispatchers Union, the Brotherhood of
13 Maintenance of Railroad Employees and the Brotherhood
14 of Railway Signalmen.

15 The ARU opposes this transaction and we're
16 not going to go into the competitive effects here.
17 Other parties have talked about that issue at great
18 length today. I'd like to focus, if I may, on three
19 issues that are important to the ARU.

20 The first issue here is one that seems to
21 come up constantly before this Board and that's the
22 question of 11341(A) immunity attaching to 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 approved transaction and how it impacts on labor and
2 specifically on labor's collective agreements.

3 Now the Board has taken the position
4 recently in the C&O, B&O, Western Maryland, RF&P
5 coordination that was effected under the O'Brien award
6 that immunity granted under Section 11341 is
7 prospectively self-executing. It's a position that
8 the ICC previously took in the UP/C&W merger. The ARU
9 disputes that. The O'Brien award case is on appeal at
10 the present time.

11 Nevertheless, even if the Board's
12 interpretation of 11341(A) is correct, what ARU asks
13 you to do in this particular case is expressly limit
14 the application of that immunity to only those changes
15 at most that are identified in the operating plant.
16 I'd like to give two real world examples why the Board
17 should limit the immunity in the labor relations
18 sphere.

19 The first one is on Friday, the Washington
20 Post ran an article about hearings before the National
21 Transportation Safety Board related to the MARC train
22 accident in Silver Spring on February 16th. In that

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 accident, 11 people were killed. Now it was suggested
2 in testimony before the NTSB that one possible
3 contributing factor in that tragic accident was the
4 implementation of the O'Brien award and how it had so
5 turned seniority rights upside down on the B&O, C&O,
6 Western Maryland and RF&P that the entire train crew
7 and other crew members of those MARC train crews were
8 so distressed over the fact that they were no longer
9 going to be operating a passenger service, that their
10 seniority had been completely changed, that it was
11 weighing on their minds to the extent that the CSXT
12 had held a meeting in Brunswick, Maryland earlier, a
13 few days earlier, to try to calm everything down. So
14 the point is that when the Board sanctions an
15 interference and collective relations between the
16 railroads and the unions, that interference can have
17 unforeseen and potentially tragic consequences.

18 Certainly, the Board didn't intend that
19 something like what happened at Silver Spring
20 happened, but the problem is when you go in and you
21 begin to change seniority rights and expectations
22 employees have had based on a transaction and use of

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 11341(A) immunity that was cobbled together out of
2 transactions that were put together over the prior 32
3 years, you're treading in a very, very delicate area,
4 almost 60 years ago. I guess almost 60 years ago.

5 The Supreme Court said in a Loudoun case
6 that employee morale and safety suffers when employee
7 interests aren't considered. The second point, the
8 second real world point I'd like to talk about on the
9 use of immunity is in this transaction the applicants
10 have proposed, at least as it relates to maintenance
11 of weigh employees that they want to be able to go in
12 and change agreements under the auspices of Commission
13 approval of this transaction, the New York dock
14 conditions, change meal periods, change starting
15 times, and create two huge system gangs seniority
16 districts, one in the East and one in the West. Well,
17 the problem for the applicants is they tried to
18 negotiate something like that just recently.
19 Presidential Emergency Board 229 investigated
20 collective bargaining disputes between the BMW and
21 many of the nation's major rail carriers, the UP
22 included. Presidential Emergency Board consisted of

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 three experts appointed by the President. That Board,
2 after hearing eight days of testimony and after due
3 deliberation refused to recommend anything the
4 carriers had proposed regarding changes in meal
5 periods, changes in starting times or an expansion in
6 the use of these systems gangs.

7 What we, from ARU, want to bring to this
8 Board's attention is the carriers tried to make change
9 in their agreements through the front door of the
10 Railway Labor Act. Those dispute resolution processes
11 worked. The carriers were unsuccessful. They didn't
12 obtain the recommendation from the PEB that they
13 sought. We want to make sure that this Board if it
14 approves this transaction does not permit the
15 applicants to obtain through the back door, Commission
16 approval here, or excuse me, Board approval here or
17 the New York dock conditions what they could not
18 obtain before a Presidential Emergency Board. That's
19 why we ask you that when you discuss the question of
20 the immunity as it relates to labor contracts that you
21 expressly limit it, at most, to those changes that are
22 proposed in the operating plan that are concretely

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 proposed in the operating plan. The meal periods and
2 starting periods are just something they said they may
3 want to do. They haven't said what they intend to do,
4 how they intend to do it.

5 It's a very important real world issue.
6 The McLean Trucking decision says that when this Board
7 acts, it must act in approving a transaction keeping
8 in mind the policies that underlie the Railway Labor
9 Act. One of the important policies, two important
10 policies in the Railway Labor Act, are promoting
11 collective bargaining and the Railway Labor Act
12 exhibits a profound hostility to compel changes in
13 collective bargaining agreements.

14 My second point, and it's in the
15 alternative, the Commission -- excuse me, I've said it
16 again, the Board believes and wishes to affirmatively
17 state that there is this immunity power and the Board
18 has the ability to get in and micromanage federal
19 railway relations and ARU requests that a condition be
20 imposed on any approval of this transaction, that this
21 \$1.3 billion in rail construction work that's proposed
22 by the applicants be done by the applicants'

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 employees.

2 There is no reason if the applicants are
3 going to furlough 298 maintenance and weigh employees
4 and 47 signalmen at the same time they're going to
5 engage in the largest peacetime railroad construction
6 project in the nation's history. It's obscene. So if
7 the Board wishes to take upon this labor relations
8 mantle, then a just and fair order would be to require
9 the applicants to use their employees.

10 I have one final point, I notice the red
11 line is on. A very minor point, and it relates to a
12 request that we had made earlier that the applicants
13 be required to periodically report to the Board about
14 the savings and the benefits that they have actually
15 achieved from this transaction and whether or not they
16 were being passed on to the public. This actually has
17 relevance now in light of the proposed five year
18 oversight in the CMA settlement agreement.

19 When we asked that and asked the
20 applicants to simply quantify the post-transactions
21 savings that were obtained from the merger and where
22 those savings were being directed, were they going 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 the public, were they going to the shippers or were
2 they going to the carriers, officers and shareholders?
3 Mr. Peterson of the applicants said calculation of
4 something like that would be a "hopeless undertaking".
5 Well, if the methodology of calculating post-
6 transaction savings is a hopeless undertaking, then we
7 would submit two things. One, that the Board should
8 take with extreme skepticism the applicant's self-
9 serving claims now that there will be transaction,
10 say, public savings and benefits, and two, it
11 certainly indicates that five-year oversight
12 proceeding might be extremely difficult indeed if the
13 applicants themselves concede that it would be a
14 hopeless undertaking to try to quantify the savings
15 and benefits that flow from this transaction.

16 Thank you, if you have any questions.

17 CHAIRPERSON MORGAN: I believe in your
18 submissions you requested Norfolk & Western conditions
19 as opposed to New York dock conditions, is that in
20 your --

21 MR. GRIFFIN: No, we had proposed, this
22 was a dispute perhaps related to Montana Rail Link 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 what Vice Chairman Simmons had asked. We are unions
2 who are opposed to that particular responsive
3 application. What we're seeking, if it were approved,
4 would be the New York dock conditions applied to the
5 acquisition companies, acquisition of those lines. We
6 believe it's sort of common fairness and justice if
7 Montana Rail Link takes over, if there's going to be
8 a pool of employees that will be cut loose on the SP
9 and UP systems and we believe that they should have
10 first priority for the work and locations they used to
11 work. It's only common sense. It's only fairness.
12 Those people want to work. They don't want to sit
13 home and collect money and quite frankly, it makes the
14 most sense if they would go to work for a new entity
15 in the same place they had worked before.

16 COMMISSIONER OWEN: Don't you agree though
17 since Southern Pacific is so weak then they have given
18 some concessionary collective bargaining agreements to
19 them, but it would be proper for SP to merge with much
20 stronger entities so that their employees would be
21 protected to a degree?

22 MR. GRIFFIN: No, at this time. 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 unions that are operating under the umbrella of the
2 Allied Rail Unions are skeptical of the claims of
3 weakness for the SP and quite frankly, the terms that
4 have been proposed by the applicants as to how
5 employees will be affected by this merger as it
6 relates primarily to maintenance and weigh employees,
7 signalmen and the dispatchers were insufficient for
8 those unions to withdraw their opposition.

9 Mr. Miller from the United Transportation
10 Union will follow me and the UTU is one of the
11 organizations that reached an understanding with the
12 applicants. I just would like to say for the record
13 that there was no overture, meaningful overture made
14 to the BMWF along these lines, none that I know of to
15 the train dispatcher and discussions with the
16 signalmen broke down in acrimony when it was made
17 quite clear to signalmen that the only understanding
18 was going to be reached as an understanding under UP's
19 terms and they were not exactly having a bilateral
20 exchange of positions, so I would like to leave it at
21 that.

22 VICE CHAIRPERSON SIMMONS: So negotiations

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 were held in some respect?

2 MR. GRIFFIN: The signalmen did meet with
3 the UP, as I said, there were no meaningful overtures
4 made to the BMW or to my knowledge to the
5 dispatchers.

6 VICE CHAIRPERSON SIMMONS: I see.

7 CHAIRPERSON MORGAN: Thank you very much.
8 Next we will hear from Clinton Miller and he will
9 represent the United Transportation Union and the
10 Transportation Communications International Union.
11 No? I can't get that right today, I guess.

12 MR. MILLER: May it please the Board, I'm
13 Clint Miller. I'm general counsel to the United
14 Transportation Union. The Transportation
15 Communications International Union conceded their four
16 minutes to Mr. Griffin who just made the presentation
17 on behalf of the Allied Rail Union.

18 Seated at the table with me is UTU
19 National Legislative Director James M. Broganhoffer.

20 The United Transportation Union, as the
21 Board well knows, represents conductors, trainmen,
22 yard masters, Hostlers and some engineers of 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 applicants. UTU is in support of the proposed merger.

2 UTU's support of the merger is based on
3 the concerns as to the survivability of a stand alone
4 SP in the current environment in the West and
5 importantly, upon the agreements of the applicants, to
6 conditions that will help mitigate the impact of job
7 loss on our members.

8 UTU asks the Board to condition any
9 approval of the application upon those agreements that
10 were made part of our verified statement and comments
11 and brief, pursuant to its authority under Section
12 11324(C) as we requested in those documents.

13 The agreements with UP contain conditions
14 in the form of commitments in applying the New York
15 dock labor protected conditions which is the basis, as
16 I stated, for UTU's support for the proposed merger.

17 The chief condition that the applications
18 have agreed to with UTU is the automatic certification
19 as adversely affected by the merger of the train
20 service, yardmaster, hostler employees that are
21 projected to be adversely affected by the labor impact
22 study that was submitted with the application and of

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 all other train service employees and UTU
2 representative yard masters, hostlers and engineers
3 that are identified in any merger notice that is
4 served after Board approval.

5 Moreover, the UP has agreed to supply UTU
6 with names and test period averages of those employees
7 adversely affected on an automatic certification basis
8 as soon as possible, upon the implementation of the
9 merger.

10 Further, and just as importantly, in any
11 merger notice served after Board approval, the
12 applicants in using the immunity provision will only
13 seek those changes in existing collective bargaining
14 agreements that are actually necessary to implement
15 the approved transaction, meaning such changes that
16 produce a public transportation benefit is not based
17 solely on savings achieved by changes in the labor
18 agreements themselves.

19 In the event that there are any
20 differences between UP and UTU, that arise with regard
21 to UP's application of the New York dock conditions
22 along the lines of these agreements and UTU takes the

NEAL R. GROSS

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

(202) 234-4435

(202) 234-4433

1 position that their behavior is inconsistent with
2 these commitments, UTU and UP personnel will meet upon
3 five days' notice from the UTU International President
4 and agree to expedited arbitration with a written
5 agreement within 10 days.

6 Finally, in the event UP uses a lease
7 arrangement or lease arrangements to complete the
8 merger of various SP properties into MP or UP, the New
9 York dock conditions would nevertheless be applicable,
10 rather than the N & W conditions as modified by
11 Mendocino Coast. UP has also voluntarily agreed with
12 UTU as to this condition.

13 In view of UP's agreement to these
14 conditions, UTU agreed to support this merger. These
15 commitments will eliminate a lot of the problems that
16 UTU has recently experienced in the UP-CNW merger that
17 are indicated by UTU's petitioned review of the
18 implementing agreement arbitration award that was
19 rendered therein by Arbitrator John McRut. Although
20 I am happy to advise the Board that late last Friday,
21 that matter was resolved by agreement of the parties
22 and as soon as I return to my office in Cleveland, 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 will be filing a withdrawal of our petition to review
2 the McRut award.

3 The UTU represents 79,000 transportation
4 industry workers in the United States and Canada and
5 believes itself to be the largest labor organization
6 in the rail industry representing a very substantial
7 portion of the employees of the applicants.

8 UTU views its chief responsibility to
9 protect the economic interest of its members and it's
10 the UTU members who actually make the national rail
11 transportation work.

12 As the Board is award, rail labor,
13 including UTU has been very concerned about and highly
14 critical of rail mergers in general because of the
15 significant job loss and family dislocations that they
16 entail, particularly where parallel lines are
17 involved.

18 UTU supports the proposed UP/SP merger,
19 not only because UP has agreed to conditions as to how
20 the New York dock conditions will be applied that will
21 help mitigate the impact of job loss on its members,
22 but also because of its concern about the continued

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 viability of SP without a merger in a UPCS&W BNSF
2 environment in the West.

3 UTU is very familiar with the financial
4 condition of SP. UTU retained financial experts to
5 analyze the SP when it was sold to Rio Grande
6 industries, and again, when UP sought concessionary
7 labor agreements because of its cash losses in what
8 were termed wage adaptation negotiations that were
9 mandated by the report of Presidential Emergency Board
10 219 and Public Law 102-29 in 1991.

11 The congressional recognition of SP's cash
12 losses at that point provided SP with a way to pay our
13 members less money than employees doing exactly the
14 same work on other railroads. Our members now earn
15 about 20 to 25 percent less at SP than at other Class
16 1 railroads.

17 Congress did not want another Conrail,
18 Milwaukee or Rock Island situation on its hands when
19 it passed Public Law 102-29 which mandated the wage
20 adaptation negotiations.

21 As UTU understands it, SP has lost about
22 \$1.3 billion from rail operations since the SP 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 merger was rejected by the ICC. SP itself has been
2 spun out prematurely, we believe, of the SF SP holding
3 company pending the approval of that carrier merger.

4 As far as UTU is concerned, there just
5 isn't enough real estate left in either the original
6 spin out from SFSP holding company and the later Rio
7 Grande acquisition for the SP to continue to offset
8 its net operating losses from rail operations by
9 selling the real estate that it does have left. That
10 has been, as the Board knows, the modus operandi of SP
11 for quite some time.

12 UTU believes the approval of the BN Santa
13 Fe merger actually makes things worse for SP. SP
14 couldn't efficiently compete before that merger to
15 generate net income from rail operations. It probably
16 could not survive in UTU's view competing against the
17 UPCS&W and the BN Santa Fe in the current environment.

18 UTU believes that the financial condition
19 of an applicant carrier may be taken into
20 consideration in a merger, as well as negative
21 competitive consequences. There is a clear case of
22 financial need that has been made by the SP in this

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 application.

2 UTU is not concerned with the niceties of
3 the failing carrier doctrine. Its concerns are
4 intensely more practical. We represent practical
5 people. UTU represents operating employees. They
6 know that single line service is more efficient than
7 interchange operations. They also know that trackage
8 rights can provide a way to address problems related
9 to competition. In fact, our SP members operate all
10 the new trains that SP now has a result of the
11 trackage rights that were obtained in the BN Santa Fe
12 merger. The SP operates over BN Santa Fe trackage
13 rights between Chicago and Kansas City, Kansas City
14 and Forth Worth and Pueblo and Fort Worth.

15 UTU also has concerns about the safety
16 implications of a stand alone SP. Financially
17 troubled railroads don't invest as much in safety and
18 in general are forced to cut corners. Deferring
19 required maintenance is the first corner cut in UTU's
20 experience and that in the long run leads to more
21 hazards to our members.

22 UTU also does not want the SP to be forced

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 be sold in pieces. As far as UTU is concerned,
2 that's just another unwelcome possibility if this
3 application is not approved. What happens to the
4 pieces that nobody wants?

5 More importantly, UTU members will lose
6 more jobs in piecemeal line sales at least some of
7 which which may be done by the exemption line sale
8 method with no labor protection at all. The new
9 owners likely will pay less and have worse working
10 conditions and UTU knows that from too much painful
11 past experience.

12 Support of this merger application is, in
13 sum, the best of a bad lot of choices for UTU. The
14 support itself is conditioned on the applicants'
15 agreements as to how applicable protective conditions
16 will be administered. On balance, because of the
17 uncertainty of the long-term survival of a stand-alone
18 SP, intact, in the current environment in the West
19 where two mega-carriers dominate rail service, UTU
20 submits approval of the merger is the best of a bad
21 lot of choices for this Board itself.

22 If there are no questions, that would

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 complete the presentation.

2 COMMISSIONER OWEN: I would just like to
3 say one thing. I compliment you, first of all, for
4 working it out and I think that the gentleman sitting
5 to your left might have something to do with it.

6 Secondly, why doesn't some of the other
7 unions learn from your experience on how to sit down
8 and work with the railroad in trying negotiate some
9 kind of compromise situation?

10 MR. MILLER: Commissioner Owen, I'll say
11 in defense of all the other labor organizations that
12 as the former International President of this union,
13 Fre. Harden, used to say it takes two to tango. I
14 heard Mr. Griffin say that no invitation had been made
15 to the Brotherhood of Maintenance and Weighing
16 Employees, for example. We have no criticism of other
17 parties. They have perhaps different needs and
18 different choices. Those are the kinds of things that
19 have to be approached by both parties. They have to
20 tango together in order to reach adjustment.

21 COMMISSIONER OWEN: I appreciate that very
22 much.

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: But clearly from your
2 perspective there's concern among the workers about
3 the future of SP. We heard a lot of discussion today
4 about whether it's the failing firm or whether it can
5 carry on for a while longer. But the workers are
6 concerned.

7 MR. MILLER: Chairman Morgan, the general
8 chairpersons of the general committees of adjustment
9 which are the bodies that we have that are chiefly
10 responsible for the administration of our contract
11 have made the International aware of their concerns
12 along these lines. They're the ones that have dealt
13 with the wage adaptation negotiations. They're the
14 ones that were in on the retention of the financial
15 experts in the two instances that I talked about and
16 they are the spokespersons for the employees that we
17 represent. They are the people who are on the ground.
18 They're on the firing line. And it is their concerns
19 that have driven UTU to make the adjustments that it
20 has made with Union Pacific, yes.

21 CHAIRPERSON MORGAN: And clearly if the SP
22 were to shrink its system or end up being sold 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 pieces that would not necessarily be in the interest
2 of your membership?

3 MR. MILLER: No, that would be a very
4 unwelcome prospect and that, as much as the conditions
5 that the Union Pacific has agreed to is what drives
6 us. We want the SP to remain as intact as possible.
7 The alternative of piece meal line sales to carriers
8 that we have no good relationship with or horror of
9 horrors, the prospect of exemption line sales to
10 regionals, particularly given the amendments to the
11 Interstate Commerce Act are something we don't want to
12 have anything to do with.

13 VICE CHAIRPERSON SIMMONS: You're to be
14 congratulated for your initiatives.

15 MR. MILLER: Thank you. It's the
16 initiative of the International President on down.

17 CHAIRPERSON MORGAN: Thank you. We will
18 now go to rebuttal time. Mr. Roach?

19 MR. ROACH: Thank you very much, Madam
20 Chairman. I know it's been a long day and I apologize
21 for the fact that I'm going to make it longer.

22 (Laughter.)

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'm tempted to --

2 CHAIRPERSON MORGAN: I'm sure you have a
3 lot to answer to.

4 MR. ROACH: I'm tempted to just defer to
5 Commissioner Conlon of the California PUC and sit
6 down, but I may be able to add a few things to what he
7 said.

8 CHAIRPERSON MORGAN: But no lawyer can
9 ever sit down when there's an opportunity to speak.

10 MR. ROACH: Right. Let me start, perhaps
11 oddly, perhaps not, with the environmental matter
12 because I want to make sure I make these remarks.

13 We can, we the applicants can accept
14 virtually all the mitigation conditions that SEA has
15 included in its post-EA report.

16 The one exception is that we appeal to you
17 to revise in certain respects the recommendations with
18 regard to Reno and Wichita. Those communities, as you
19 heard today, have concerns about traffic impacts. The
20 applicants have settled similar concerns with a number
21 of local communities, class or county, city or the
22 town of Truckee, the East Bay Regional Park District

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 others.

2 We've had more trouble with Reno and
3 Wichita coming to agreement and I hope we will come to
4 agreement, but we also have to recognize as the SEA
5 states in its report that the problem of those
6 communities and in particular the problem of Reno as
7 Commissioner Owen noted, is largely the product of
8 their own development decisions over a period of many
9 years and not universal. Las Vegas, for example,
10 installed overpasses and underpasses on a continuing
11 running basis with shared cost-sharing and instead,
12 what we have here is a situation where Reno, I would
13 suggest, and I don't want to be too harsh on this and
14 we're still talking, but I would suggest they're
15 taking advantage as any good advocate would of a
16 merger, to take, to gain in respect of a problem
17 that's been around for a long time. Train volumes in
18 that community have been much higher than they ever
19 will be as a result of this merger.

20 Nonetheless, we don't contest that there
21 should be mitigation in Reno and in Wichita. The
22 recommendation of SEA is to limit the applicants of

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 the UPSP train increases for 18 months to two trains
2 above a base period, have a consultant do a study
3 during that time and then we must follow the
4 consultant's recommendations.

5 First of all what I would ask of the Board
6 is that it simply decide on the mitigation, right now,
7 on Wednesday. There's a record in place. That was
8 the recommendation of the Council for Wichita. We
9 agree with it. We think you can decide right now
10 based on the record before you.

11 Second, if you decide to go this
12 consultant route, we would request three modifications
13 of the wording of the mitigation provision. The first
14 is that we would ask that it be the Board and this
15 again is agreeing with Wichita, that it be the Board
16 that has the ultimate decision making authority over
17 the mitigation measures, not the consultant. It's a
18 real legal question whether you can delegate final
19 authority to a consultant. I don't think you can.

20 Number two, we would ask that you clarify
21 what I think is implicit or reasonably explicit in the
22 current wording, but I'm not sure and I'm worried

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 about it and that is that the mitigation should be a
2 reasonable number of grade separations, not for
3 example, a half billion dollar line relocation which
4 is what Reno started desiring when this merger came
5 along. Before this merger we were talking about more
6 reasonable things and I think now they've decided hey,
7 let's move the whole railroad line. If they can find
8 federal funding for that, fine, but meanwhile the
9 mitigation that should be imposed on this pro-
10 competitive, publicly beneficial merger should not be
11 a \$500 million project.

12 Finally, we would ask that you clarify
13 that the financial responsibility for grade
14 separations be shared in accordance with federal and
15 state law and regulations and the standard funding
16 arrangements that are followed. Again, I assume
17 that's implicit and I think Commissioner Owen made the
18 point earlier today, but the wording of the -- the
19 current wording of the recommendation is so broad that
20 it could be read by someone as meaning that the
21 railroads have to pay 100 cents on the dollar.

22 We don't agree with Mr. Lamboley with all

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 respect that there's any justification for an EIS
2 here. All that does is buy you lots of delay and
3 litigation. He mentioned litigation. I wouldn't be
4 surprised if we see some. But the scope of the
5 environmental impact here does not rise to the level
6 of those requiring a EIR consistent with all of your
7 -- the ICC's many precedents in similar cases.

8 We also take issue with the notion that
9 there is a so-called conformity issue presented under
10 the Clean Air Act. Again, there's clear precedent on
11 that. The Commission held that conformity
12 determinations do not have to be made.

13 With those words on environment, I want to
14 turn to the -- I think, probably the key issue before
15 the house and that is divestiture. I had answered all
16 the questions this morning so I'm going to ask my own
17 rhetorical questions tonight.

18 What they really all sum up to is the old
19 saw where's the beef? Where's the beef? We've heard
20 three hours about divestiture, where are the answers?
21 Where are the explanations?

22 Did anyone tell you why you should force

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 UPSP to transfer hundreds of thousands of cars of
2 exclusively served traffic to someone else as a
3 condition of this merger? It's a supposedly
4 competition-preserving condition. I didn't hear it.
5 The record shows that in south central region there
6 are 265,000 cars of exclusively served traffic on the
7 divestiture lines that Conrail would like. First,
8 it's only 90,000 cars of 2 to 1 traffic.

9 They're not after the 2 to 1 traffic.
10 They're after the exclusive traffic. And they never
11 explained to you and no one all day explained to you
12 why that makes any sense. Central corridor is 350,000
13 cars of exclusive versus 75,000 cars of 2 to 1. MRL
14 wants the DRGW franchise. They want the coal
15 business. They don't want the competitive business.
16 It's a veneer of competition to promote a remedy that
17 has nothing to do with competition.

18 Did anyone tell you why those exclusively
19 served shippers should be forced to accept worse
20 service when the merger will do nothing but benefit
21 them? In terms of single line service, the
22 divestiture proposal for the south central region

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 would wipe out 350,000 cars a year of single line
2 service that would exist after this merger if you do
3 not order divestiture.

4 The answer to Mr. Mullins questions of
5 what are the single line routes that are going to be
6 broken up is routes between every single local shipper
7 on those lines and every point served by UP and SP
8 anywhere else in the west. Those will be single line
9 routes with the merger and the settlement. There will
10 be joint line routes if you force divestiture.

11 In the central corridor, it's 220,000 cars
12 that will lose single line service. That's a lot more
13 destruction of single line service than any rail
14 merger that you've approved to date has created single
15 line service. We do a little better. We create
16 150,000 cars. These people want to destroy similar
17 amounts.

18 Did anyone explain to you why you should
19 use a nuclear warhead to achieve a pinpoint strike?
20 I asked that question this morning and I never heard
21 the answer all day today. And again, remember the
22 prejudice is to shippers that aren't going to have 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 say in this matter. They're solely served shippers.
2 They are up in arms. There are 500 of them that
3 submitted rebuttal statements saying don't do this to
4 us. Don't rip us out of a large comprehensive western
5 rail system and hand us over to God knows who under
6 the guise of some sort of competitive remedy that
7 isn't a competitive remedy at all.

8 Now what are the harms? What are the
9 harms of these divestiture proposals? We heard Mr.
10 Hut and others say no problem, the benefits are
11 somewhere else. They can have all their benefits. We
12 can do these divestitures. There are huge harms.
13 They know that. It's all in the record. They just
14 ignored it all day.

15 In the south central region it will wipe
16 our directional running with all the benefits that
17 has. Conrail proved the benefits in its own
18 testimony. It showed how much time you saved with
19 directional running.

20 It will eliminate our ability to
21 specialize those terminals as I explained this
22 morning. Turn the terminals into directional

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 terminals, you get tremendously more throughput,
2 tremendously more effective switching. It will wipe
3 out all the enhanced preblocking we were going to do
4 throughout the Gulf Coast, saving a day for chemical
5 shippers, running those trains through to the eastern
6 railroads. It will undermine all the runthroughs with
7 the other railroads in the east. It will cut up the
8 Sunset route and force Houston and New Orleans traffic
9 over a much longer route up through Dallas instead of
10 straight across because they want to rip out the line
11 to Eagle Pass. This is DOT's proposal? Pick the line
12 to Eagle Pass, sunder it out of this 100 year old
13 Sunset Route and hand it to someone else? It will
14 fragment the traffic, undermine service quality.
15 There's a very extensive record on this and nobody
16 talked about it all day. It's as if it didn't exist.

17 Redland Stone is SP's largest customer in
18 the Southwest and what they said was "any mandated
19 divestiture of SP rail lines in Texas would be
20 devastating. Shippers like ourselves on lines that
21 are divested would find themselves the victims of less
22 efficient or more costly rail service."

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 the central corridor you're going to
2 have -- I did mention this this morning, all the
3 traffic forced into the congested Kansas City
4 terminals for interchange instead of through service
5 as we will have. You'll have interchanges out in the
6 middle of California and Oregon if you hand these
7 lines to MRL, not in Roseville Yard which we're going
8 to spend millions and millions of dollars to upgrade
9 and make into a hub. It's going to be splintered out
10 into Stockton and up into Klamath Falls.

11 You'll have every carload, as I said this
12 morning, on the DRGW line forced to interchange where
13 it wouldn't interchange with the merger. You're going
14 to jam UPSP's traffic into inadequate yards and harm
15 intermodal service very severely and all the
16 intermodal shippers as you heard Mr. Connolly say are
17 dead set against divestiture.

18 All the traffic that MRL would handle
19 would move over significantly worse routes than the
20 route that BN Santa Fe will have under the settlement.
21 BN Santa Fe has a straight shot from Chicago to
22 Denver, comes across the Rio Grande to Utah and then

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 has the right under the settlement to use both the UP
2 and the SP line into the Bay Area. That is a dynamite
3 route. The MRL route will be hundreds of miles
4 longer. It will go over mountain passes. It will go
5 either across Tennessee pass which they want to buy
6 and keep running or over to Denver and down over the
7 mountains in the very congested Denver Pueblo line
8 that's shared with BN Santa Fe and all the way across
9 Kansas on the Pueblo Line. I mean this is circuitous
10 route that SP struggles with today. They want to
11 recreate it instead of letting shippers have the
12 fantastic benefits of this merger. We're going to
13 spend hundreds of millions of dollars to upgrade that
14 KP line across Kansas, move the coal out of Utah and
15 Colorado in a straight shot, get it off all these
16 mountain passes. They want to undo all that and put
17 it all back over the mountains. It's insanity. It
18 has no competitive rationale because those are
19 exclusively served shippers. It's almost laughable
20 that we've spent all this time focusing on these
21 illogical remedies.

22 Once Oregon and California saw what it was

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 all about and heard from the shippers they repudiated
2 their support for MRL. Colorado is opposed. Utah is
3 opposed. I've got some things to say about the
4 Governor's comments, but he's opposed to divestiture.
5 He's very clear on that.

6 Divestiture does not give shippers more
7 competition. It just gives them a different
8 competitor inferior to BN Santa Fe with worse service.
9 How it is supposed to save us from the specter of
10 collusion is a complete mystery to me. You're going
11 from two railroads to two railroads. It's just a
12 different two railroads.

13 I wish I could read you quote after quote
14 from the shippers. I don't have the time, but they
15 are eloquent and I urge you to look at that rebuttal
16 volume, if you have any doubt about it.

17 What's it going to do to the merger
18 benefits beyond the service benefits I've talked
19 about? Well, UPSP would have to spend hundreds and
20 hundreds of millions of dollars more in capital to
21 achieve worse service. If we had to take that traffic
22 around Dallas to get it to New Orleans and Houston,

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 we'd have worse service, but we couldn't even do it
2 without spending hundreds of millions of dollars to
3 add more capacity to that line.

4 Same thing in the Houston to Memphis
5 corridor. We'd have to expand a yard somewhere, North
6 Little Rock doesn't have room to expand, but God knows
7 where we'd do it and it would cost hundreds of
8 millions of dollars to do.

9 Same thing in the central corridor. We've
10 got capacity problems. One of the great benefits of
11 this merger is having alternative routes. Divestiture
12 eliminates all those benefits of route specialization
13 and flexibility.

14 The testimony is very conservative on
15 efficiencies and that's just purely saving on train
16 miles and employees and so forth. The divestitures
17 would take at least \$150 million out of our efficiency
18 gains. Conrail says that's all that it would do.
19 They've misread that. That's just one small part of
20 what it would do, \$150 million in efficiency losses.

21 I guess the last point and this -- the
22 numbers are eye popping is all of our investment

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 plans, \$1,300,000,000 in investment plans, a new state
2 of the art intermodal facility in the eastern Los
3 Angeles basin, to compete with BN Santa Fe, upgrading
4 Sunset Route, upgrading the Tucumcari Route, upgrading
5 Roseville Yards, upgrading the OKT line to get trains
6 out of Kansas City and on and on, are going to be
7 undercut if we lose the revenues that will go with
8 these divestitures. You know you fund investment out
9 of revenue. Anybody in business understands that.
10 Conrail divestiture would cost us \$924 million a year
11 in revenue. They don't contest that.

12 COMMISSIONER OWEN: What is your time
13 schedule on the buildout there of spending \$1.3
14 billion or when are you going to start that?

15 MR. ROACH: Four years.

16 COMMISSIONER OWEN: Four years?

17 MR. ROACH: The total operating plan is
18 five. The investments happen in the first four.

19 COMMISSIONER OWEN: Congress has been on
20 the safety issue and there have been a number of
21 wrecks. Do you have a pre-merger plan here for a
22 little bit more intensive training of the employees 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 safety-related issues, especially the gentleman here
2 this morning also?

3 MR. ROACH: Yes. Safety is a top
4 priority. It's part of the overall effort. You heard
5 a reference this morning about BN Santa Fe achieving
6 larger benefits through best practices. Well, you
7 look for best practices in the safety area as well and
8 that's one of the things we're going to do.

9 The one other thing I'd like to say --
10 well, there's more than one other, but another about
11 divestiture is that Chairman Morgan asked a number of
12 times about how is this going to be done if we're
13 going to have a divestiture? I submit to you that
14 you're looking at a regulatory nightmare if you go
15 down that path. That trackage rights are
16 straightforward, they're time tested. The work is all
17 done. The agreements are written. We filed them last
18 Friday, way before anybody has ever done so before in
19 a merger case.

20 Divestiture, you're going to have a huge
21 long contentious fight on your hands. You know, if
22 you read the pleadings carefully, there have bene

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 pleadings from Norfolk Southern, CSX, Canadian
2 National, all the other railroads that have interests
3 in this matter, if you open up some sort of auction on
4 pieces of SP and I think you're absolutely on the
5 money, Chairman Morgan, as to the fact that someone is
6 going to contest the outcome no matter what it is.

7 If UP agreed to sell a line to IC, you can
8 bet that Conrail is going to come in screaming that
9 they would pay more and we're going to be right back
10 in months of discovery. You're going to have CSX and
11 NS saying what about the effects on us, second and
12 third level effects? There's no precedent as to how
13 you go about this. These are all the same parties
14 that demanded delay every step of the way in the case.

15 You'll hear Mr. Mullins back again saying
16 he needs a few more weeks, time and again, if you have
17 the divestiture proceed.

18 I don't think anybody told you all day why
19 trackage rights will not work. DOT and DOJ never told
20 you why they supported trackage rights in dozens of
21 merger cases and suddenly decided they don't work.

22 These rights, as I said this morning, are

NEAL R. GROSS

COURT REPORTER 3 AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

1 no longer segment by segment, the numerous
2 arrangements that are working perfectly in the real
3 world right now. Everybody keeps saying every 4,000
4 miles. It's not 4,000 miles from here to there.
5 These are shorter segments in a number of different
6 locations all well within the range of links that are
7 operated routinely by SP, BN Santa Fe, Conrail, other
8 railroads all across the country every day.

9 The record shows that they work just as
10 effectively and competitively for local service as for
11 overhead service. UP gets half the business up in the
12 Pacific Northwest where we run for hundreds of miles
13 over Burlington Northern and we serve all the local
14 shippers. We get a nice share of the business down in
15 the L.A. area where we run over the Santa Fe and
16 service all the local shippers. And so it goes all
17 over the country.

18 The other thing I didn't hear any
19 explanation of is how it is that BN Santa Fe, the
20 biggest, strongest, most comprehensive rail system in
21 the world with the capital, the equipment, the nearby
22 terminal facilities, the presence and experience 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 these very markets, somehow is going to be a less
2 effective competitor than somebody like KCS or
3 Conrail. I don't get it.

4 As far as the amount of traffic that's
5 available to BN Santa Fe, the record is very extensive
6 and clear on that. Mr. Peterson put in a long
7 rebuttal statement explaining all the details of how
8 much traffic BN Santa Fe would be able to carry over
9 these rights. The grand total is \$1,900,000,000.
10 It's an eye popping figure. And in each of the
11 corridors, he analyzed how much they could carry, how
12 much they would be projected reasonably to actually
13 carry and he concluded that it's going to be enough to
14 run a couple of trains or more a day in every one of
15 these corridors. Nobody has laid a glove on that
16 testimony.

17 What you had was Mr. Crowley, or a number
18 of witnesses, who came in with a study that I can only
19 describe as bogus and I don't know say that lightly
20 because what he did was he took every car that UP
21 handled in the base year from origin to destination or
22 SP did, and said that's not anything BN Santa Fe could

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 get their hands on which is absurd. That's what BN
2 Santa Fe is going to take. They're going to take all
3 those cars from the Mexican gateways to Memphis to the
4 Mexican gateways to St. Louis and the Mexican gateways
5 to Chicago that Mr. Crowley threw in the waste basket
6 in his diversion study and they're going to divert and
7 they're going to reroute a lot of traffic and they're
8 going to capture new marketing opportunities galore.
9 They're going to have hundreds of miles of shorter
10 routes across the central corridor from places like
11 Omaha, the Twin Cities, Denver and they will move
12 Nebraska wheat in large volumes into the feeders in
13 California. Mr. Crowley just ignored all that stuff.

14 So the record is just abundantly clear.
15 They're going to have enough traffic. The
16 compensation terms which people have just sort of
17 conclusively said they don't like today, were set at
18 arms' length. They're lower than what you approved in
19 BN Santa Fe merger case which is moving large volumes
20 of traffic right now. They are in line with costs.
21 They are in line with other agreements that have been
22 entered into at arms' length by railroads. And there

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 is simply no case that the compensation level is too
2 high.

3 VICE CHAIRPERSON SIMMONS: How do you
4 respond to the Texas claims?

5 MR. ROACH: I'll be delighted to respond
6 briefly to the Texas claims. First, I will say that
7 you bet there's parallelism in Texas and BN Santa Fe
8 is therefore receiving extensive trackage rights: San
9 Antonio to Houston and Houston to Memphis and Houston
10 to Louisiana. We've cured all the competitive
11 problems.

12 Now their arguments are at a general
13 level, so it's hard to even know how to respond. They
14 don't say that the trackage rights don't cover all the
15 shippers that will lose two railroad competition.
16 They just talk about massive parallelism. I don't
17 think it's massive, but we've dealt with it 100
18 percent.

19 The rhetoric you heard about control of 90
20 percent of the chemicals is just dead wrong. It's
21 wrong. We looked at every single significant chemical
22 commodity at the 7 digit stick level and we examined

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 percent of that commodity will be available to
2 other railroads after the merger in the Gulf Coast.
3 We just looked at Texas and Louisiana which is a very
4 conservative way to go about it. And there's actually
5 a map which my colleagues will show you for plastics.
6 I'm responding now to Texas and to Mr. Bercovici very
7 quickly on plastics.

8 Plastics is the biggest one by far,
9 biggest single chemical commodity. What the numbers
10 show -- see, he didn't want to talk about this way of
11 looking at it, but this is the right way of looking at
12 it. The numbers show that over 65 percent of the
13 plastics are going to be accessible to other railroads
14 than UP and SP. All the points are shown on there.
15 Part of it is the 2 to 1 points which BN Santa Fe will
16 serve. Part of it is the points served by IC and KCS.
17 Part of it is all the places the BN Santa Fe already
18 serve such as Houston. And there's testimony in the
19 record that with that very large percentage of the
20 total volume of a commodity accessible to competitors,
21 you can't squeeze the rates on that commodity. Your
22 shippers, as Commissioner Owen said, will simply lose

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 their business and the volumes of the plants on the
2 other railroads will grow. So it's suicidal. It's
3 self-defeating.

4 In fact, the testimony is it doesn't have
5 to be anywhere near 65 percent, that even if 10 or 20
6 percent of a commodity can be moved by competitors,
7 you've got a source competition constraint on you.
8 All we're talking about here is source competition.
9 That's the only issue that Mr. Bercovici's even
10 talking about. He's not talking about direct
11 competition being lost because we've preserved it for
12 every shipper that goes from 2 to 1, we've preserved
13 it. Nobody becomes captive in this merger. So what
14 he's talking about is a broader concept of source
15 competition and he's hid the ball on you. He didn't
16 even show you how much there is.

17 The same thing with the notion that we're
18 going to dominate the traffic to Mexico or monopolize
19 the Gulf Coast. How do you respond to rhetoric like
20 that except by going back to the facts. The facts are
21 that BN Santa Fe will be a much stronger competitor
22 for Mexican traffic than SP is, that all those Mexican

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 gateways, as I said this morning, will go from having
2 a choice of UP versus SP to having the much richer
3 choice of UPSP versus BN Santa Fe. And for the total
4 Mexican traffic, what the record shows is sure UP and
5 SP dominate it. They're the two railroads that serve
6 it right now, but it's interesting. The way it works
7 right now is traffic that goes west, only SP has a
8 route across the southern corridor is dominated by SP.
9 Traffic goes north and east out of Mexico or into
10 Mexico is overwhelmingly dominated by UP. So yeah,
11 there's competition, but it's a funny kind of
12 competition. They're dominating respective segments.
13 With these conditions, BN Santa Fe will be right at
14 our throat in both of these markets. They'll have a
15 straight shot across the southern corridor from all
16 those Mexican gateways that would love to get access
17 to and they will have single line route, the shortest
18 route available because it will be our route up to
19 Memphis and St. Louis and over to New Orleans where
20 we're selling most of the line. That's another
21 strange thing about the divestiture argument is that
22 BN Santa Fe is spending \$150 million on lines here.

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 They're buying the SP line across Louisiana and those
2 people say they don't have an investment that they're
3 going to try to earn back are forgetting about that.

4 I guess the one last thing I'd say about
5 Texas is that the hearings in Texas went the same way
6 as the hearings in California. If you read the Texas
7 filing carefully, they bury in the middle of a
8 footnote the statement that shippers overwhelmingly
9 supported the merger, but somebody decided that there
10 were some points to be made here and Texas is pursuing
11 this crusade to set up terminal railroads and have all
12 these divestitures and I think it's just tremendously
13 not in the interest of Texas shippers. I think Texas
14 is as big a beneficiary state as any state in the
15 Union in this merger. We're going to upgrade every
16 made route in Texas. We're going to introduce BN
17 Santa Fe to all these major points, exposing a
18 constellation of new single line service opportunities
19 for Texas shippers. Nobody becomes captive. It's a
20 disconnect between their rhetoric and our facts.

21 Let me talk about the Governor of Utah for
22 a moment since we were alluding to him. He suggests

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 perhaps we should have a rate audit and for 40
2 years or more have a rule that says you can't raise
3 rates in Utah by any more than you raise them
4 somewhere else for similar commodities or similar
5 links of haul and so forth.

6 I would suggest to you that that is
7 unnecessary and potentially very pernicious. If
8 anything, it's re-regulation. A lot of people throw
9 that term around and some things are and some things
10 aren't. Boy, that is. That's re-enacting the Elkins
11 Act. That's an anti-discrimination law that's going
12 to tie the railroads in knots. I will say to you that
13 the Governor of Utah doesn't have any shippers
14 constituents that he can point to that are concerned
15 about this merger. The Western Shippers Coalition
16 vanished from this case because all their members
17 changed their position, Coastal, the big coal company;
18 Utah Railway; ARCO, the big coal producer out there;
19 Geneva Steel, you know, on and on and on, and Monroai
20 Feed, Savage Industries. You can go down the list of
21 Western Shippers Coalition members, they're all
22 supporting the merger now or they've dropped out of

NEAL R. GROSS

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

(202) 234-4433

(202) 234-4433