

INTERSTATE COMMERCE COMMISSION 07/03/96

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1 CHAIRMAN MORGAN: The other number, the
2 600 million number includes traffic that would be
3 highly competitive and for which there would not be
4 any harm that we would need to address?

5 MR. REDISCH: That's correct as well. You
6 can really see the focus of this debate by looking at
7 the L.A. to Chicago corridor, which is the largest
8 3-to-2 traffic flow that the Department of Justice has
9 uncovered. \$700 million, multiplied by 10.9 percent;
10 they say there will be \$60 million of harm to
11 shippers. You can't find any shippers that believe
12 that.

13 There was no discussion on the record of
14 harm in that flow. The shippers in California who
15 participate in that flow all favor the merger. The
16 intermodal shippers all favor the merger. The
17 applicants say and we find this quite credible that
18 that flow is currently dominated by the Burlington
19 Northern/Santa Fe.

20 It is mainly intermodal traffic moving
21 off, much of it, foreign containers coming into the
22 port of L.A. and moving into Chicago. The applicants

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1 say they are going to use their two routes in
2 different ways. They are going to run intermodal
3 trains on one route and manifests on another and they
4 are going to offer more, in effect, competition to the
5 carrier that is currently on them, dominates that
6 route, BN.

7 The people in California seem to buy that.
8 The shippers using the route seem to buy it. But
9 Justice, applying very blindly its methodology for
10 assessing competitive harm, finds that that route
11 faces a significant potential harm, that on brief they
12 were proposing that we require applicants to divest
13 one of their two lines in that route if we didn't
14 accept their primary proposal, which is simply to deny
15 the merger in its entirety.

16 CHAIRMAN MORGAN: Thank you.

17 Any other questions on this particular
18 section?

19 VICE CHAIRMAN SIMMONS: I'm concerned more
20 generally with how the Assistant Attorney General
21 considers approval of this merger rational, underline,
22 rational? How can you justify it? I'm concerned

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1 about the word "rational".

2 MR. MACKALL: I can address that a little
3 bit. We have a different statute from the Sherman
4 Antitrust Act. We have a statute --

5 COMMISSIONER OWEN: You might need to pull
6 the speaker a little closer.

7 MR. MACKALL: We have a statute that is
8 somewhat pre-merger. Congress has assumed throughout
9 all the time we have had jurisdiction over these rail
10 mergers since 1920 that there are efficiencies that
11 are obtained through rail mergers when carriers put
12 networks together and get more efficient networks,
13 that that is an important benefit.

14 The Commission's job, the Board's job has
15 always been to balance these efficiency benefits
16 against any competitive harm. That's what the Staff
17 has done here.

18 I think it comes up with a very different
19 result than if you just look at one issue, and that's
20 competition.

21 VICE CHAIRMAN SIMMONS: I agree with you
22 a hundred percent, considering the BN/Santa Fe

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1 agreement and the CMA agreement; it just puzzled me
2 how that word could be used.

3 COMMISSIONER OWEN: One other thing before
4 we move on is the word "collusion." Do we have a
5 history of any problems in collusion as far as most of
6 the Staff can remember?

7 Someone has been around quite a long time.

8 MR. REDISCH: I will jump into that. We
9 have given this a lot of thought and discussion
10 amongst ourselves.

11 In particular --

12 CHAIRMAN MORGAN: You colluded amongst
13 yourselves?

14 MR. REDISCH: Yes.

15 (Laughter.)

16 MR. REDISCH: Quietly and in back rooms.
17 You can tell how successful we have been
18 by the surprise at our ongoing deliberations. We have
19 actually kept this pretty much to ourselves, I am
20 pleased to say, our discussions.

21 CHAIRMAN MORGAN: That is definitely
22 collusion.

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1 MR. REDISCH: Yes.

2 We have looked at the Southeast where two
3 railroads, CSX and Norfolk Southern, offer two
4 railroads as the only two railroads operating over a
5 wide territory. We have said to ourselves, is there
6 sufficient competitive pressure to push those
7 railroads to efficient operations? And the answer is
8 yes, indeed, there is.

9 Their costs have gone down each year
10 through productivity gains. Competition has forced
11 them to seek that out. Then we asked, is there
12 sufficient competitive pressure to compel them to pass
13 on to their shippers a significant amount of those
14 productivity gains?

15 The answer again is yes, indeed; that
16 competition in the Southeast has been a win-win
17 situation for the Norfolk Southern, the CSX, and their
18 competition. Since the Staggers Act, the two
19 railroads effectively compete. A more narrow
20 instance, of course, is the two railroads that have
21 very vigorously offered competition out of the Powder
22 River Basin, the Burlington Northern and the Union

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1 Pacific.

2 At oral argument, I thought that there was
3 one party that seemed confused. He kept saying well,
4 but we went from a one to two, shouldn't rates go
5 down? That might explain it the first year, but rates
6 have gone down every year for 10 years.

7 Rates -- everyone is talking about how
8 coal rates out of Powder River Basin, just from 1988
9 to 1992 or 1993, the study seems to show they were
10 down by 30 percent.

11 So you do get vigorous competition from
12 two railroads operating within fairly large markets.

13 COMMISSIONER OWEN: The conclusion would
14 be that Justice probably had no reason to raise that
15 issue inasmuch as they had no history of it and there
16 is no proof?

17 MR. REDISCH: Justice can think of
18 examples in other industries where two firms or three
19 firms or four firms have reached alliances. I can
20 think of those as well. But they couldn't really
21 offer examples where that has occurred in railroads;
22 and the applicants have offered, as Jack Ventura

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1 explained, a series of cogent explanations as to why
2 railroading with its networking economies, its hidden
3 contracts, with a whole slew of structural impediments
4 to collusion.

5 COMMISSIONER OWEN: I just wanted that
6 cleared up.

7 Thank you.

8 CHAIRMAN MORGAN: Thank you.

9 Why don't we move on to you, Mr. Markoff,
10 and your presentation? Then we will ask more
11 questions.

12 MR. MARKOFF: Chairman Morgan, Vice
13 Chairman Simmons, Commissioner Owen, good morning.

14 We have prepared a series of 35
15 recommendations with respect to the various matters at
16 issue in the UP/SP merger proceeding.

17 (1) We recommend that the Board approve
18 the UP/SP merger. We believe that the merger, subject
19 to certain conditions, will yield tremendous public
20 benefits in the form of service improvements,
21 efficiencies, and cost savings; it will revitalize SP;
22 and it will strengthen competition throughout the

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1 West.

2 (2) We recommend that the Board impose as
3 a condition the terms of the BN/Santa Fe agreement, by
4 which we mean the agreement dated September 25, 1995
5 as modified by the supplemental agreement dated
6 November 18, 1995, and as further modified by the
7 second supplemental agreement dated June 27, 1996.

8 This recommendation reflects our view
9 that, for many snippers throughout the West, the
10 various rights provided for in the BN/Santa Fe
11 agreement will ameliorate the competitive harms that
12 would be generated by an unconditioned merger. We
13 further recommend that the Board clarify that the
14 BN/Santa Fe agreement includes or will include all of
15 the clarifications and amendments described in
16 applicants' rebuttal filing dated April 29th, and also
17 the West Lake Charles extension referenced in
18 applicants' brief dated June 3rd.

19 (3) We recommend that the Board impose as
20 a condition the terms of the CMA agreement. Many of
21 the pro-competitive provisions of the CMA agreement
22 require amendments to the BN/Santa Fe agreement, and

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1 are reflected in the second supplemental agreement
2 dated June 27th; other such provisions do not require
3 amendments to the BN/Santa Fe agreement.

4 Applicants have not asked that approval of
5 the merger be made subject to the CMA agreement, but,
6 because the CMA agreement is largely tied to the
7 BN/Santa Fe agreement and its provisions are necessary
8 to ameliorate competitive harm, we recommend that the
9 Board impose the CMA agreement in its own right.

10 (4) The CMA agreement provides that the
11 BN/Santa Fe agreement will be amended to grant
12 BN/Santa Fe the right to serve any new facilities
13 located post-merger on any SP-owned line over which
14 BN/Santa Fe receives trackage rights in the BN/Santa
15 Fe agreement.

16 The CMA agreement further provides,
17 however, that the term "new facilities" does not
18 include expansions of or additions to existing
19 facilities or load-outs or transload facilities. We
20 recommend that the Board modify this provision in two
21 respects: first, by requiring that BN/Santa Fe be
22 granted the right to serve new facilities on both

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1 SP-owned and UP-owned track over which BN/Santa Fe
2 will receive trackage rights; second, by requiring
3 that the term "new facilities" shall include transload
4 facilities, including those owned or operated by
5 BN/Santa Fe. These modifications will help to assure
6 that the BN/Santa Fe trackage rights will indeed allow
7 BN/Santa Fe to replicate the competition that would
8 otherwise be lost when SP is absorbed into UP.

9 (5) The CMA agreement provides a
10 post-merger procedure by which a shipper can raise a
11 claim that the merger deprived it of a
12 build-out/build-in option. We recommend that the
13 Board modify this procedure in two ways: First, by
14 making this procedure applicable to all shippers;
15 second, by removing the time limit to which this
16 procedure is subject. These modifications will allow
17 BN/Santa Fe to replicate the competitive options now
18 provided by the independent operations of UP and SP.

19 We further recommend that the Board
20 clarify that a shipper invoking this procedure need
21 not demonstrate economic feasibility; the only test of
22 feasibility is whether the line is actually

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1 constructed. And we further recommend that the Board
2 provide that any technical disputes with respect to
3 the implementation of this build-out/build-in remedy
4 may be resolved either by arbitration or by the Board.

5 (6) The CMA agreement provides that,
6 immediately upon consummation of the merger,
7 applicants must modify any contracts with shippers at
8 2-to-1 points in Texas and Louisiana to allow BN/Santa
9 Fe access to at least 50 percent of the volume. We
10 recommend that the Board modify this provision by
11 extending it to all 2-to-1 points incorporated within
12 the BN/Santa Fe agreement, not just 2-to-1 points in
13 Texas and Louisiana. The extension of this provision
14 to all 2-to-1 points will help ensure that BN/Santa Fe
15 has immediate access to a traffic base sufficient to
16 support effective trackage rights operations.

17 (7) With respect to storage-in-transit
18 facilities, the CMA agreement provides: First, that
19 BN/Santa Fe shall have equal access to Dayton Yard for
20 storage-in-transit of traffic handled by BN/Santa Fe
21 under the BN/Santa Fe agreement; and second, that
22 applicants shall work with BN/Santa Fe to locate

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1 additional storage-in-transit facilities on the
2 trackage rights lines as necessary.

3 Various parties have criticized these
4 provisions as inadequate, and we think that these
5 provisions can and should be strengthened. We
6 therefore recommend that the Board order that the
7 BN/Santa Fe agreement be modified to require that in
8 addition, BN/Santa Fe shall have access to all SP Gulf
9 Coast storage-in-transit facilities on economic terms
10 no less favorable than the terms of UP/SP's access,
11 for storage-in-transit of traffic handled by BN/Santa
12 Fe under the BN/Santa Fe agreement.

13 (8) We recommend that the Board condition
14 approval of the merger by establishing oversight for
15 five years to examine whether the conditions imposed
16 by the Board have effectively addressed the
17 competitive issues they were intended to address. The
18 oversight condition we envision will include an
19 explicit statement by the Board that it is retaining
20 jurisdiction to impose additional remedial conditions
21 if and to the extent it determines that the conditions
22 already imposed have not effectively addressed the

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1 competitive harms caused by the merger.

2 Applicants have consented to oversight to
3 confirm that the BN/Santa Fe agreement has effectively
4 addressed competitive issues; but we think that any
5 such oversight should properly consider whether all
6 conditions imposed by the Board have effectively
7 addressed competitive issues.

8 (9) Various parties have expressed
9 concerns that BN/Santa Fe will not provide the
10 vigorous competition that is the premise of the
11 BN/Santa Fe agreement. We recommend that the Board
12 address these concerns in two ways: First, by making
13 clear that the Board expects that BN/Santa Fe will
14 compete vigorously for the traffic opened up to it by
15 the BN/Santa Fe agreement; second, by imposing upon
16 BN/Santa Fe a common carrier obligation with respect
17 to the traffic opened up to it by the BN/Santa Fe
18 agreement. We further recommend that the Board make
19 clear that the competition provided by BN/Santa Fe
20 will be one of the key matters that will be considered
21 in the oversight proceeding. And we further recommend
22 that the Board require that BN/Santa Fe submit a

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1 progress report and an operating plan on October 1st
2 of this year, and further progress reports on a
3 quarterly basis thereafter.

4 (10) Various parties have expressed
5 concerns that BN/Santa Fe may not immediately commence
6 the trackage rights operations made possible by the
7 BN/Santa Fe agreement. We recommend that the Board
8 address these concerns in two ways: first, by
9 acknowledging that, to some extent, immediate
10 commencement of trackage rights operations may not be
11 physically possible; but second, by making clear that
12 the Board expects that, as soon as reasonably
13 practicable, BN/Santa Fe will commence trackage rights
14 operations in the key corridors opened up by the
15 BN/Santa Fe agreement. The key corridors we have in
16 mind are the Houston-New Orleans corridor, the
17 Houston-Memphis corridor, and the Central corridor.
18 We further recommend that the Board make clear that a
19 failure to conduct trackage rights operations in these
20 corridors could result in termination of BN/Santa Fe's
21 trackage rights and substitution of another carrier or
22 in divestiture.

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1 (11) We recommend that the Board impose
2 as a condition the terms of the Utah Railway
3 agreement. This recommendation reflects our view
4 that, for certain coal shippers, the rights provided
5 for in the Utah Railway agreement will ameliorate the
6 competitive harms that would be generated by an
7 unconditioned merger.

8 (12) We recommend that the Board
9 condition approval of the merger by granting Tex Mex
10 the trackage rights sought in its Sub-No. 13
11 responsive application; these trackage rights would
12 run over UP/SP lines from Robstown and Corpus Christi
13 to Houston, and on to a connection with KCS at
14 Beaumont. We further recommend that the Board grant
15 the terminal trackage rights in Houston sought by Tex
16 Mex in its Sub-No. 14 terminal trackage rights
17 application. These recommendations reflect our belief
18 that such trackage rights are required to ensure the
19 continuation of an effective competitive alternative
20 at Laredo and to ensure the continued provision of
21 essential services to shippers located on Tex Mex.

22 We further recommend that these trackage

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1 rights be restricted to traffic having a prior or
2 subsequent movement on the Laredo-Robstown-Corpus
3 Christi line, that Tex Mex and applicants be permitted
4 to negotiate the terms and conditions of these
5 trackage rights, and that Tex Mex be permitted to
6 operate via these trackage rights immediately
7 following consummation of the merger.

8 (13) With respect to traffic moving from
9 and to Lake Charles, West Lake Charles, and West Lake,
10 Section 4(b) of the second supplemental agreement
11 dated June 27 provides as follows: that BN/Santa Fe
12 shall have the right to handle traffic of shippers
13 open to all of UP, SP, and KCS at Lake Charles and
14 West Lake, and also traffic of shippers open to SP and
15 KCS at West Lake Charles; provided, however, that such
16 rights shall be limited to traffic from, to, and via
17 New Orleans, and from and to points in Mexico via the
18 border crossings at Eagle Pass, Laredo, and
19 Brownsville. We recommend that the Board expand
20 BN/Santa Fe's single line access to this traffic by
21 removing the proviso; the principal effect of this
22 recommendation will be to allow BN/Santa Fe to handle

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1 traffic moving to Houston and to other points on
2 BN/Santa Fe. We further recommend that the Board
3 expand BN/Santa Fe's joint line access to this traffic
4 by allowing BN/Santa Fe to interchange this traffic at
5 Shreveport and Texarkana with KCS; the principal
6 effect of this recommendation will be to substitute a
7 post-merger KCS-BN/Santa Fe joint-line routing via
8 Texarkana and Shreveport for the pre-merger KCS-UP
9 joint-line routing via Texarkana.

10 (14) With respect to Texas Utilities
11 Electric, we recommend that the Board condition the
12 merger by requiring that BN/Santa Fe be allowed to
13 interchange TUE's coal trains with KCS at Texarkana
14 and Shreveport. Without this condition, all but one
15 of TUE's Powder River Basin routings would involve
16 UP/SP, and the one that would not be excessively
17 circuitous.

18 (15) With respect to Dow at Freeport, we
19 recommend that the Board preserve Dow's existing SP
20 build-out option by providing that trackage rights
21 will be granted to a carrier to be named by Dcw,
22 subject to Board approval, over UP's line from Texas

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1 City to Houston and over UP's or SP's line from
2 Houston to connections with KCS and BN/Santa Fe at
3 Beaumont, with the right to connect to the build-out
4 line in the vicinity of Texas City in order to serve
5 Dow and any other shippers located on the build-out
6 line. Although this condition preserves an SP AP
7 build-out option, the trackage rights will run over
8 the UP line from Texas City to Houston because the SP
9 line is being abandoned.

10 (16) With respect to the Capital
11 Metropolitan Transportation Authority, we recommend
12 that the Board condition the merger by providing
13 Giddings-Llano shippers a Class I connection at
14 Giddings. The potential competition that exists today
15 rests upon an SP connection at Giddings; and this
16 potential competition can be preserved by providing
17 that the operator of the Giddings-Llano line is to be
18 regarded as a 2-to-1 short line for purposes of
19 Section 8i of the BN/Santa Fe agreement, the so-called
20 "omnibus" provision. We further recommend that the
21 Board note that applicants will be held to their
22 representation that they will allow BN/Santa Fe to

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1 establish a connection at Elgin, if and when
2 operations are reactivated over the Smoot-Elgin
3 segment. We further recommend, however, that the
4 Board note that CMTA has a right to a single
5 connection with BN/Santa Fe, either at Elgin or at
6 Giddings, but not to two such connections, and that
7 CMTA will therefore be required to choose between
8 Elgin and Giddings, unless the parties agree
9 otherwise.

10 (17) With respect to Entergy Services and
11 its affiliates, we recommend that the Board condition
12 approval of the merger by requiring that the BN/Santa
13 Fe agreement be amended to permit BN/Santa Fe to serve
14 the White Bluff plant via a build-out line between
15 White Bluff and Pine Bluff, if and when that line is
16 constructed. This recommendation is designed to
17 preserve the build-out status quo at White Bluff.

18 (18) With respect to the City Public
19 Service Board of San Antonio, we recommend that the
20 Board impose a condition allowing BN/Santa Fe to serve
21 Elmendorf Station via CPSB's existing trackage rights
22 agreement with SP. This recommendation is designed to

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1 preserve the pre-merger status quo respecting the CPSB
2 trackage rights.

3 (19) With respect to Union Carbide
4 Corporation, we recommend that the Board condition the
5 merger by granting BN/Santa Fe trackage rights over
6 SP's Victoria-Lavaca line between the UP main line and
7 a point near Kamey. This recommendation is designed
8 to preserve the build-out status quo at the Seadrift
9 Plant.

10 (20) Applicants have made numerous
11 representations to the effect that certain points will
12 be covered, certain services will be provided, and so
13 on. By way of example, applicants have represented,
14 with respect to the City Public Service Board of San
15 Antonio, that the BN/Santa Fe agreement will be
16 amended to clarify that Elmendorf is a covered point.
17 That is one particular representation; there are many
18 others. We recommend that the Board condition
19 approval of the merger by requiring applicants to
20 adhere to the various representations they have made.
21 We would note, of course, that to the extent these
22 recommendations are reflected in the second

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1 supplemental agreement dated June 27, nothing further
2 needs to be done.

3 (21) We recommend that the Board
4 determine that the terms of the UP/SP Merger Agreement
5 with respect to the purchase of the SPR common stock
6 are fair both to the stockholders of UPC and also to
7 the stockholders of SPR.

8 (22) We recommend that the Board note
9 that the securities request contained in the lead
10 docket, respecting approval or exemption of securities
11 issuances to finance UP/SP common control, terminated
12 by force of law effective January 1, 1996.

13 (23) We recommend that the Board exempt,
14 in the Sub-No. 1 docket, the trackage rights provided
15 for in the BN/Santa Fe agreement and included in the
16 Sub-No. 1 notice filed November 30, 1995. These
17 trackage rights are vital to the competitive service
18 that BN/Santa Fe will provide, and we believe that the
19 trackage rights class exemption can be invoked with
20 respect to trackage rights provided for in a
21 settlement agreement.

22 (24) We recommend that the Board direct

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1 applicants and BN/Santa Fe to file, no later than
2 seven calendar days prior to the effective date of the
3 decision approving the merger, an additional class
4 exemption notice covering the trackage rights that
5 will be added to the BN/Santa Fe agreement in
6 accordance with the amendments required by the CMA
7 agreement. These trackage rights are also vital to
8 the competitive service that BN/Santa Fe will provide,
9 but were not included in the Sub-No. 1 notice filed
10 November 30.

11 (25) We recommend that the Board direct
12 applicants and Utah Railway to file, no later than
13 seven calendar days prior to the effective date of the
14 decision approving the merger, a class exemption
15 notice covering the trackage rights provided for in
16 the Utah Railway settlement agreement. These trackage
17 rights are vital to the competitive service that Utah
18 Railway will provide.

19 (26) We recommend that the Board exempt,
20 in the Sub-No. 2 docket, the line sales provided for
21 in the BN/Santa Fe agreement. These line sales are an
22 important part of the arrangements provided for in the

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1 BN/Santa Fe agreement.

2 (27) We recommend that the Board exempt,
3 in the Sub-Nos. 3, 4, 5, 6 and 7 dockets, the common
4 control by applicants of The Alton and Southern
5 Railway Company, the Central California Traction
6 Company, the Ogden Union Railway and Depot Company,
7 the Portland Terminal Railroad Company and the
8 Portland Traction Company.

9 (28) We recommend that the Board exempt,
10 in the Sub-No. 8 docket, common control of UP and the
11 two motor carriers controlled by SP, and common
12 control of SP and the one motor carrier controlled by
13 UP.

14 (29) We recommend that the Board grant in
15 the Sub-No. 9 docket the application filed by
16 applicants and BN/Santa Fe for an order permitting
17 BN/Santa Fe to use two segments of KCS track in
18 Shreveport and one segment of KCS track in Beaumont.
19 The order has been sought under section 11103, which
20 allows the Board to require terminal facilities owned
21 by one railroad to be used by another if the use is
22 practicable and in the public interest, and will not

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1 substantially impair the ability of the owning carrier
2 to handle its own traffic. The segments involved in
3 the Sub-No. 9 docket are essential to the planned
4 BN/Santa Fe operations in the Houston-to-Memphis and
5 Houston-to-New-Orleans corridors.

6 (30) With respect to the proposed
7 abandonments and discontinuances of the two segments
8 of the Tennessee Pass Line, we recommend that the
9 Board deny the abandonments but grant the
10 discontinuances. We are recommending denial of the
11 Tennessee Pass abandonments because there is some risk
12 that Tennessee Pass traffic cannot be rerouted
13 successfully via Moffat Tunnel. We are, however,
14 recommending approval of the Tennessee Pass
15 discontinuances because local traffic on the Tennessee
16 Pass Line is minimal. Our recommendations will allow
17 a commonly controlled UP/SP an opportunity to
18 demonstrate that Tennessee Pass traffic can be
19 rerouted successfully; but our recommendations will
20 also preserve the Tennessee Pass corridor until such
21 time as that demonstration has been made.

22 (31) We recommend that the Board approve

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1 all other abandonment and discontinuance requests made
2 by applicants. The 15 lines subject to this
3 recommendation are presently used primarily, in a few
4 instances exclusively, for overhead traffic, and the
5 evidence demonstrates, with respect to each such line,
6 that this overhead traffic can be rerouted by a
7 post-merger UP/SP. The local traffic generated by
8 these 15 lines is minimal; in a few instances, it is
9 nonexistent, and these lines simply cannot be
10 sustained by the limited amounts of local traffic they
11 generate.

12 (32) We recommend that the Board impose
13 the standard labor protection conditions: for the
14 merger, the line sales, and the terminal railroad
15 control transactions, New York Dock; for the trackage
16 rights, Norfolk and Western; and for the abandonments
17 and discontinuances, Oregon Short Line.

18 (33) With one exception, we recommend at
19 this time that the Board impose the various mitigation
20 measures recommended in the Post-environmental
21 Assessment that was served on June 24, 1996. The one
22 exception relates to the Tennessee Pass line: if the

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1 Board adopts our recommendation to deny the
2 abandonment but to approve the discontinuance, the
3 mitigation measures recommended in the post-EA will
4 have to be adjusted accordingly.

5 (34) We recommend that the Board find
6 that the UP/SP merger, subject to the recommended
7 environmental mitigation measures, will not
8 significantly affect the human environment, and we
9 further recommend that the Board find that an
10 environmental impact statement is not required.

11 (35) Finally, we recommend that the Board
12 deny all requests for conditions except those we have
13 specifically indicated should be granted in whole or
14 in part.

15 We would be glad to take any questions.

16 CHAIRMAN MORGAN: Thank you. We all get
17 training here in how to read fast.

18 You have run through many conditions. The
19 key to many of these conditions is to try, as I
20 understand it, to preserve the competition that exists
21 today at points that become 2-to-1 points post-merger?

22 MR. MARKOFF: Yes.

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1 CHAIRMAN MORGAN: Obviously the staff, in
2 coming up with these conditions, looked at the CMA
3 agreement and felt it was not adequate.

4 Could you summarize where you found the
5 CMA agreement to be inadequate?

6 MS. FARR: I would like to have Lou
7 Mackall speak to that.

8 MR. MACKALL: One of the problems with the
9 CMA agreement was that the traffic rights under it
10 only covered what have been designated as 2-to-1
11 points. There are other shippers at 1-to-1 points
12 that also enjoy the fact that they have a second
13 carrier near them, although the second carrier does
14 not serve them directly.

15 We addressed those problems, as CMA does,
16 by expanding build-in and build-out options, by
17 expanding transloading options and new facility
18 options, that kind of thing that are in the CMA
19 agreement.

20 But the problem with the CMA agreement is
21 that it did not cover, for the most part, people that
22 weren't members or had restrictions on who could take

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1 advantage of these options.

2 So we basically broadened the type of
3 things that are in CMA to cover all the shippers that
4 are affected by the merger.

5 CHAIRMAN MORGAN: So if a shipper today
6 had a build-out option, it would have one post-merger?

7 MR. MACKALL: We tried to replicate the
8 impact of direct competition that happened in the
9 Florida merger.

10 CHAIRMAN MORGAN: Now the plastics
11 industry, of course, had several issues they were
12 concerned about. You have indicated a condition
13 related to storage in transit facilities which I know
14 is of importance to the plastics and petrochemical
15 industries.

16 Are we amending a provision that is
17 already in one of the other agreements?

18 MR. MARKOFF: There is a provision in the
19 CMA agreement regarding storage and transit
20 facilities, and we are recommending that provision be
21 expanded.

22 CHAIRMAN MORGAN: So that as I heard you

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1 when you read it, all shippers would have -- would be
2 able to work with BN/Santa Fe in getting access to all
3 of the current SP storage and transit facilities; is
4 that correct?

5 MR. MARKOFF: Yes.

6 CHAIRMAN MORGAN: Now, you also discussed
7 an arbitration process that is under the CMA agreement
8 that would continue as a condition here.

9 Do you have any concerns about how that
10 arbitration process is going to work?

11 MR. MARKOFF: The arbitration, under
12 arbitration, or before the Board, only for technical
13 questions that come up, because the basic question
14 that applicants have been talking about is
15 feasibility. We made it quite clear that there is no
16 test of feasibility. The line gets built; it is
17 feasible. If it doesn't get built, it is not
18 feasible, there is nothing to dispute.

19 CHAIRMAN MORGAN: In other words, under
20 the CMA agreement, there was a requirement for
21 feasibility.

22 MR. MARKOFF: There was no specific

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1 requirement for feasibility, but the applicants made
2 clear they were under the impression that that was
3 implicit in the CMA agreement. We are making clear
4 no.

5 CHAIRMAN MORGAN: Now, the Utah Railway
6 conditions I see it is an attempt to address some of
7 the concerns raised by Western Coal shippers. Would
8 you explain specifically how the Staff feels it will
9 address their concerns?

10 MR. MARKOFF: The Utah Railway agreement
11 grants Utah Railway access to several additional lines
12 that it does not have access to now. In addition, it
13 grants Utah Railway trackage rights from Utah Railway
14 junction east to Grand Junction, Colorado.

15 It is going to provide for shippers
16 located east and midwest and some shippers west of
17 Salt Lake City. It will provide them an option they
18 don't have now with coal out of the Uinta Basin
19 originated by the railway and either at Provo or Grand
20 Junction. There will be a routing competitive with
21 the UP/SP rate.

22 CHAIRMAN MORGAN: There was some concern

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1 in the record about whether this type of competitive
2 alternative would indeed work. Maintaining what the
3 coal shippers view as the source of geographic
4 competition as between the Powder River Basin and the
5 Colorado-Utah coal, does the Staff feel that this
6 addresses that concern specifically?

7 MS. FARR: I would like to have Michael
8 Redisch address that.

9 MR. REDISCH: The short answer is yes, it
10 does. I will give you a slightly extended answer.

11 There are two different types of coal in
12 the west, at least, bituminous and subbituminous. I
13 learned a lot about coal production by reading through
14 the record in this proceeding.

15 The subbituminous coal is mined
16 exclusively in the Padworthy Basin through very
17 efficient mining methods. I've not been there. I've
18 seen the pictures. Huge gashes in the earth, \$4 or \$5
19 per ton at the mine now for the coal.

20 The Uinta Basin coal, which is accessed by
21 the Southern Pacific in Colorado and the Utah Railway
22 in Utah, is a higher Btu content coal. That would

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1 make it slightly more desirable by utilities, but it
2 is also more difficult and more costly to mine. It
3 costs as much as \$15 to mine, to produce, and sell at
4 a profit.

5 So these coals tend not to compete
6 directly for those utilities that have constructed
7 plants and boilers that have the opportunity to burn
8 Powder River Basin coal; that is the coal of choice.

9 You do see a lot of utilities who can't
10 burn all Powder River Basin coal because even though
11 it is a low sulfur coal and will help them comply with
12 the Clean Air Act under Phase I and by the year 2000
13 under Phase II their boiler capacity is such that
14 there is a process called derating that takes place if
15 they burn all Powder River Basin coal. They tend to
16 blend those coals. There is quite a bit on the record
17 of utilities that have purchased some Powder River
18 Basin coal and some coal originated by the Southern
19 Pacific out of the Uinta Basin in Colorado.

20 But in general, those have not been
21 competitive. They have been complementary. The major
22 competitor of the Uinta Basin coal is, in fact, the

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1 low sulfur, high Btu coal produced in the Appalachian
2 region and elsewhere and sold to Midwestern utilities.
3 That, in fact, is exactly where the Utah Railway hopes
4 to sell its coal as it hopes to extend its routes east
5 under this agreement.

6 We did look at the relative market shares
7 out west. SP is not a significant presence for coal.
8 It originates about 8 percent of all coal. Burlington
9 Northern is about 57 percent, UP about 30 percent.

10 What we have determined is that with the
11 exception of a few shippers who might be situated
12 close enough to the Uinta Basin to make the shorter
13 rail haul overcome the much higher mine price, there
14 is very, very limited competition between these two
15 coals. They are, in fact, distinct. The Union
16 Pacific's competitor for coal, as we all know, is the
17 Burlington Northern out of the Powder River Basin.

18 SP has a franchise. It has pursued it
19 vigorously. It has entered into backhaul arrangements
20 and offered very competitive rates heading east by
21 offering one of its local shippers in Utah, Geneva
22 Steel, very attractive rates for steel products, steel

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1 inputs moving west and coal moving east.

2 There is a limit to that because there is
3 a limit to how much of those backhauls Geneva Steel
4 will take; but we looked at the record. We decided
5 that UP will not suppress Uinta Basin coal. Why would
6 it? It is a good business. It is complementary to
7 its own business.

8 We are suggesting a monitoring condition
9 so if UP chooses to suppress that coal, that we would
10 see it quite clearly. The protestants here are not
11 alleging that there's going to be much of a price
12 effect, as I see it. They are really alleging that UP
13 simply suppress all the fine efforts Southern Pacific
14 made in marketing that Utah coal and Colorado coal.
15 We will see if that is so.

16 The Montana rail link, which bases its
17 responsive application largely on coal, suggested in
18 a brief that even though existing utilities may be
19 locked in to boiler requirements and the types of coal
20 that they can burn, that there would be significant ex
21 ante competition between Uinta Basin and Powder River
22 Basin coal while the utility is in the planning and

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1 site selection stage.

2 Our assessment is that utilities at this
3 stage, before they site a plant, before they choose a
4 coal source, before they choose a railroad, before
5 they have chosen a coal mine, need not be worried
6 about any mergers between the Union Pacific and the
7 Southern Pacific cutting off their opportunities to
8 purchase coal. They will be able to purchase Powder
9 River Basin coal, they will be able to purchase Utah
10 coal, they will be able to purchase coal from any of
11 the Midwestern producers.

12 So we did not see merit in that ex ante
13 argument pursued on brief by Montana Rail Link.
14 That's the long answer.

15 CHAIRMAN MORGAN: Very thorough. Thank
16 you.

17 Let me ask about grain in NAFTA and Texas.
18 The Tex-Mex condition, to what extent does that
19 reflect and respond to the concerns raised about
20 competition as it relates to NAFTA movements, grain,
21 and also Texas?

22 MS. FARR: This question, I too would like

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1 to have Michael Redisch respond to.

2 MR. REDISCH: How kind.

3 (Laughter.)

4 CHAIRMAN MORGAN: You're doing fine.

5 MR. REDISCH: Thank you, Chairman Morgan.

6 VICE CHAIRMAN SIMMONS: You get a cigar
7 when you are over.

8 MR. REDISCH: I'm looking forward to that,
9 sir.

10 CHAIRMAN MORGAN: A lot of months have
11 gone into this.

12 MR. REDISCH: For all of us.

13 I would like to take this opportunity to
14 mention, going back to coal, we have found one
15 potential anti-competitive effect that we raised
16 concern about with Staff. It was not a pricing
17 effect. It was not a Uinta Basin versus Powder River.
18 It was our concern over the Tennessee Pass Line. We
19 have defined anti-competitive effects of the merger as
20 higher prices or poorer service that producers might
21 face as a result of this merger.

22 It did concern us that the applicants'

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1 plan to shift traffic to a more efficient tunnel
2 routing might degrade service and lead to backups on
3 that route. This would actually hit coal shippers in
4 the pocketbook. They are the ones who own the coal
5 cars.

6 If those coal cars are strung out over
7 greater time periods on the Moffat Tunnel line, then
8 you need to own a lot more cars to meet whatever
9 delivery schedule you are going to need for your
10 utilities. We were concerned about that. We didn't
11 listen to what the applicants had to say.

12 Yes, there were 25 trains a day running
13 through that line by the Denver-Rio Grande 20 years
14 ago. They were a different type of train. So we have
15 recommended as part of our coal assessment the -- that
16 the Board deny the abandonment application for that
17 line and only permit the discontinuance. I'm glad I
18 had an opportunity to jump in there.

19 CHAIRMAN MORGAN: Grain?

20 MR. REDISCH: Yes. Tex-Mex, Mexico,
21 wonderful area. NAFTA working well. We want to
22 maintain that.

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1 The key border crossing is Laredo. It
2 gets 55 percent of U.S.-Mexican movements. It is
3 currently served by the Union Pacific directly and by
4 the Tex-Mex which is a hundred-plus year old small
5 U.S. carrier that connects with both the Union Pacific
6 and the Southern Pacific at Corpus Christi, runs about
7 150 or so miles.

8 It is Tex-Mex that has essentially
9 preserved a second competitive option for the major
10 gateway for U.S.-Mexican trade.

11 There is some concern after the merger it
12 will have an opportunity to use the Burlington
13 Northern/Santa Fe under the settlement agreement, but
14 the Tex-Mex has offered its responsive application not
15 as a replacement for the Burlington Northern but as an
16 addition to it.

17 Tex-Mex has suggested a different routing
18 than the Burlington Northern route, one that would
19 follow a less congested Southern Pacific routing into
20 Houston and on to a connection with the Kansas City
21 Southern Railway at Beaumont.

22 Our assessment is that Tex-Mex has some

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1 reason for concern. Almost 10 percent its traffic
2 today is originated on the Southern Pacific,
3 exclusively at points served by SP. That traffic is
4 likely to flow toward the more efficient single line
5 routing SP will gain when it merges into UP toward
6 Laredo. Another large block of Tex-Mex's traffic is
7 originated by the Burlington Northern/Santa Fe; less
8 today than about a year-and-a-half ago because BN has
9 been essentially embargoing all grain traffic moving
10 on the SP.

11 So the Tex-Mex's traffic has declined
12 markedly, although BN has explained that this has
13 nothing at all to do with the Tex-Mex and everything
14 to do with the poor service offered by SP. It keeps
15 losing BN grain cars on its way back and forth between
16 Houston and Corpus Christi.

17 But there is still a risk that the new
18 trackage rights that will replace BN's hauling rights
19 to Eagle Pass will provide a new efficient routing for
20 it, and that rather than operating at a 31,000 mile
21 funnel offers BN shippers an opportunity to use
22 Laredo, it will instead offer a lot of those shippers

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1 a single line routing into Eagle Pass.

2 So as a safety feature, we would recommend
3 that the Board grant the Tex Mex its responsive
4 application as the Tex Mex has explained. If it is
5 wrong and the applicants' assessment is correct, then
6 few shippers will use this new arrangement and most
7 shippers will use the Burlington Northern settlement
8 agreement routing into Corpus Christi.

9 Our feeling, and one that was provided by
10 a large number of shippers on the record, most of them
11 grain, but some other commodities as well, was that
12 economical access to important international trade
13 routes should not be jeopardized. The Tex Mex
14 responsive application not only met with significant
15 shippers' support, grain shippers in the Midwest, from
16 Volkswagen of America, but also from the Texas
17 parties, from the Railroad Commission of Texas.

18 We are also recommending that the Tex Mex
19 not be given unrestricted access to use these trackage
20 rights but that they only be used in conjunction with
21 traffic that moves on to or off of the Tex Mex.

22 Tex Mex has said such limitation would not

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1 undermine the purpose for which the rights are sought,
2 and it would not significantly affect Tex Mex's
3 ability to provide essential services to customers
4 local to its lines. We have taken it at its word.
5 These would be additional competition, what I might
6 call pro-competitive tinkering that Tex Mex has asked
7 for but they concede does not require it to meet the
8 goals of their responsive application, which is to
9 provide an alternative competitive routing for the
10 grain and other commodity movements that are expected
11 to flow south when NAFTA trade with Mexico expands.

12 Thank you.

13 CHAIRMAN MORGAN: Let me turn to some of
14 the environmental issues.

15 We heard some testimony at the oral
16 argument regarding both Laredo and Wichita. Ms.
17 Kaiser, if you could just summarize for us the
18 suggestions in both of those areas and the progress in
19 the discussions that have been going on?

20 MS. KAISER: I would be glad to do that.

21 CHAIRMAN MORGAN: Pull the mike close to
22 you.

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1 MS. KAISER: We first want to emphasize --

2 VICE CHAIRMAN SIMMONS: A little louder.

3 MS. KAISER: My family tells me I am
4 awfully loud, so this is a new experience.

5 CHAIRMAN MORGAN: I have the same problem.

6 (Laughter.)

7 MS. KAISER: We first want to emphasize we
8 have recommended an independent mitigation study for
9 both Reno and Wichita. When we say independent, we
10 mean independent. This study would be conducted under
11 the auspices of the Board. The Section on
12 Environmental Analysis would select an independent
13 contractor who would work under the sole supervision
14 and direction to ensure there was an independent
15 analysis. This independent environmental analysis
16 would look to the effects associated with the
17 additional traffic that would result from the proposed
18 merger.

19 After this independent mitigation study
20 was completed, we would present it to the Board for
21 its review with these recommendations, so you all
22 would have an opportunity to look at the study very

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1 closely and then have an opportunity to issue a
2 decision which would impose conditions that would
3 embrace the mitigation you determined appropriate was
4 recommended in the study.

5 I would like to take a minute to tell you
6 a little bit about what we envision the study would
7 do. Again, I want to emphasize the study would focus
8 on the environmental effects associated with the
9 proposed merger. In conducting the study, we would
10 certainly solicit comments from the public, community,
11 Federal, state, and local agencies affected.

12 Also, the study would look to shared
13 costs. There is no single cost agent here. There
14 have been multiple contributing parties. We would
15 look at ways to share the costs if there are effects
16 that need to be remedied with the mitigation.

17 One example I would like to point out to
18 you --

19 CHAIRMAN MORGAN: I think the mike is not
20 working very well.

21 I want to make sure everybody has the
22 benefit of your work.

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1 MS. KAISER: Is this better now?

2 Again, we want to emphasize this
3 independent study would look at different vehicles for
4 shared costs. For example, in the City of Reno, the
5 best visual example I can give you is this conference
6 table. You have here a situation where, when we first
7 walked in, the table was clear, so to speak. If you
8 envision the rail line going through the center of the
9 table, that would be the start.

10 But you see here our papers and how they
11 built. Well, on both sides you have this type of
12 situation where you have business development, you
13 have casinos, tourists, et cetera.

14 And in looking to these two independent
15 studies, we have identified Reno and Wichita because
16 they are so unique in this overall merger.

17 For example, with Reno, there is the
18 24-hour test vehicular traffic, proximity of casinos
19 to the right of way has created the right of way to
20 fine tune mitigation.

21 So as a result of this study, we will look
22 further to refine very specific mitigation that meets

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1 the unique circumstances of these two communities and
2 we will -- during this time, we will not implement the
3 desired increase in projected traffic as a result of
4 the merger.

5 So potentially we would maintain an
6 environmental status quo while fine tuning would go
7 on; and again, I want to emphasize that that
8 mitigation study would then be presented to all of you
9 for review and then a decision would be issued with
10 appropriate mitigation conditions for these two
11 locales.

12 CHAIRMAN MORGAN: Are there discussions
13 ongoing now in these two locations?

14 MS. KAISER: There are discussions
15 ongoing. This is a very difficult situation because
16 you have many polarized issues. It is not simply one
17 issue. Cost is a very, very big concern here. How is
18 that going to be shared? That is a primary hurdle.
19 We do view this as a shared cost.

20 VICE CHAIRMAN SIMMONS: Do you feel
21 reasonably assured, then, that this study will allay
22 the fears and possibly solve the safety concerns of

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1 these two communities?

2 MS. KAISER: We are going to make every
3 effort to do just that. We feel there are certain
4 steps that can be taken such as separating crossings,
5 pedestrian overpasses and underpassss that go to the
6 heart of safety. We are going to look very carefully
7 at that. We are going to work very closely, again,
8 with the communities to make sure they have an input
9 and we present to you a very well-rounded, balanced
10 study.

11 VICE CHAIRMAN SIMMONS: Very good.

12 COMMISSIONER OWEN: Along that line of
13 thinking, I think you did mention in your presentation
14 you were looking backward in time to the way you
15 described the conference table there as the building
16 permits and so forth and buildings continuing to
17 encroach upon the lines as the city grows.

18 I would hope the cities would take a look
19 at that and say that they do have some responsibility
20 and that the environmentalists that you are sending
21 out there to do this appraisal would take into
22 consideration and take a look and remind them of their

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1 responsibility that you have issued some of these
2 building permits in the last 20 years or 50 years that
3 have encroached upon this right of way here and moved
4 into it, and you have impacted this area here so that
5 now that it is restricted in such a sense, that you
6 have no other solution other than sell the casinos and
7 make it into a park.

8 Who is to bear that cost and that burden?
9 Local citizenry would probably fight you on that. I
10 wish you well on that.

11 CHAIRMAN MORGAN: During this 18-month
12 period, what would be the Board's involvement in this
13 process?

14 MS. KAISER: As I said earlier, the
15 section on environmental analysis would work very
16 closely with the contractor. We would be the sole
17 supervisor and director of control. We would report
18 back to you on the progress of the study as it went
19 along to answer any questions you might have about
20 this study's scope.

21 Then again, we would work -- I have to
22 emphasize with the community, the city. We would look

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1 at the shared costing option and then come forward
2 with a recommendation to all of you which you can
3 either accept in full or in part based upon the
4 analysis in the study.

5 CHAIRMAN MORGAN: During that 18-month
6 period, what would be the level of traffic
7 specifically over those lines in that -- during that
8 period?

9 MS. KAISER: We propose an additional two
10 trains a day on these lines while the study is going
11 on. This would potentially maintain the environmental
12 status quo but not create any shifts that could throw
13 the environment, if you will, out of whack.

14 CHAIRMAN MORGAN: Because the plan, but
15 for this particular problem, would be to run many more
16 trains than two a day over that track; is that
17 correct?

18 MS. KAISER: That's correct.

19 CHAIRMAN MORGAN: Are there any other
20 questions?

21 COMMISSIONER OWEN: I might have a couple
22 more, if you don't mind, regarding the quarterly

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1 reports of Burlington Northern, I believe, to ensure
2 there is going to be an effective competitor.

3 I was wondering, what are we looking at?
4 What might go along? A hundred years? I would like
5 reports of any kind.

6 MS. FARR: We don't envision the reports
7 to continue indefinitely, just until the time when
8 Santa Fe would implement its trackage rights.

9 COMMISSIONER OWEN: I will continue to
10 remind you of that every quarter.

11 One other question. There have been a
12 number of conditions imposed here, environmental
13 constraints. What type of a financial impact would
14 that have been upon the Applicants as to whether or
15 not it would be prohibitive for them to go ahead with
16 this merger?

17 MR. MACKALL: Overall, most of the
18 conditions have to do with making sure that UP doesn't
19 have increased monopoly power, competitive power that
20 they didn't have before.

21 So, out-of-pocket, there would be very
22 little, with the possible exception of the

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1 environmental conditions, which we don't know exactly
2 how that will come out.

3 But there might be some fairly significant
4 dollars in that.

5 COMMISSIONER OWEN: I just wondered about
6 the granting of the Tex Mex trackage rights this
7 morning. When you propose this, what kind of an
8 impact does that have?

9 MR. REDISCH: Our assessment is that it
10 should have a limited impact, operationally. It is
11 going to propose to move over an SP line which does
12 have room on it for the traffic. It will not impede
13 the settlement agreement.

14 We are not talking about a lot of
15 interference with the Applicants' existing operations
16 as the Tex Mex has proposed it. So I don't see much
17 in the way of an adverse impact on the Applicants'
18 operation.

19 COMMISSIONER OWEN: I would like to
20 monitor that. If we go ahead and vote this morning,
21 whatever the vote turns out to be, if it is approved,
22 I would like to monitor that as we go along over the

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1 next year or so to see if there was a significant
2 impact financially. For us sitting here in
3 Washington, D.C. and being the economists and
4 attorneys and so forth in this room, you have done an
5 outstanding job. I commend all of you on that.

6 Is it real in the real world when you get
7 out in the field? I guess that is my question.

8 A year from now, I would like to take a
9 look at that.

10 VICE CHAIRMAN SIMMONS: Commissioner Owen,
11 is that with regard to marketing?

12 COMMISSIONER OWEN: No.

13 VICE CHAIRMAN SIMMONS: Okay.

14 Madam Chairwoman, if we are going back to
15 the monitoring, if this Board should see fit to vote
16 and the recommendations of the Staff are approved and
17 the Wisconsin Central, the ICC-imposed monitoring, an
18 oversight for a five-year period, and we decided that
19 -- to discontinue it after finding no competitive harm
20 after three years. I would like to have somebody's
21 comment as it relates to that, how you might feel
22 about it.

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1 What would be your recommendations? Maybe
2 they would be down the line further.

3 MR. MACKALL: It is hard to tell what is
4 going to happen. As a staff, we feel very confident
5 the various anti-competitive effects that have been
6 predicted here will not come to pass.

7 If they do not come to pass and we don't
8 have problems with this, it could be that we might
9 take at some point -- we would be a little less than
10 active in our monitoring. If problems do emerge, then
11 we would be more active. I think we have to play it
12 a little loose right now.

13 VICE CHAIRMAN SIMMONS: Okay.

14 MR. KONSCHNIK: One thing I would like to
15 add in response to Commissioner Owen's question about
16 monitoring is to see the effects to the Union Pacific
17 on the imposition of some of the conditions. I think,
18 based on our recommendation, we expect that the net
19 effect of many of these conditions will simply be to
20 constrain the pricing by Union Pacific.

21 So I'm not sure that that would be
22 particularly measurable from our standpoint; but we

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1 think that we will have good, positive effects for the
2 public interest in that the pricing decisions made by
3 the Union Pacific will certainly be affected by the
4 alternative competitive presence that is provided for
5 if you accept our recommended conditions.

6 CHAIRMAN MORGAN: Well, I believe that we
7 are now prepared to vote on the Staff's
8 recommendations.

9 Briefly summarized, they are to approve
10 the merger application with the BN/Santa Fe trackage
11 rights agreement and the CMA agreement as further
12 significantly amended by the Staff recommendations; is
13 that an accurate summary?

14 MS. FARR: Yes. Also the Utah Railway
15 settlement agreement.

16 CHAIRMAN MORGAN: I would move, then, to
17 adopt the Staff recommendations.

18 VICE CHAIRMAN SIMMONS: I second.

19 SECRETARY WILLIAMS: Commissioner Owen?

20 COMMISSIONER OWEN: If I could, please, I
21 would like to start off with a little statement on
22 this.

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1 Since 1920, it has been the public policy
2 of this agency to encourage railroad mergers that were
3 in the public interest. Overwhelming evidence was
4 presented that if we approve this merger, there will
5 be substantial operating cost savings, improved rail
6 service, renewed financial strength for Southern
7 Pacific, more effective rail competition.

8 Nonetheless, this agency is obliged to
9 consider the likelihood of competitive harm.
10 Competitive harm is likely to be substantial in
11 certain important markets. The conditions proposed
12 are intended to ease and often eliminate that harm.
13 There are many publics and many interests, as we heard
14 this morning. We cannot satisfy each. What we have
15 achieved will allow the greatest good to be achieved
16 with the minimum harm.

17 Therefore, I vote to approve the
18 transaction with the conditions proposed by Staff, and
19 with a few other remarks, because this is a historic
20 moment in my lifetime.

21 Let me stress to skeptics that this agency
22 will be an alert policeman using its extensive powers

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1 to command immediate remedies as necessary, as you
2 heard outlined this morning. I have every intention
3 of walking the beat with a soft voice and a big stick.

4 I wish to make several additional points.

5 First, with respect to Amtrak, I remind
6 the Applicants that the Rail Passenger Service Act of
7 1970 requires Amtrak trains to have preference over
8 freight traffic.

9 Furthermore, I accept the applicants'
10 assurances given during the oral arguments that UP/SP
11 will move immediately to correct Amtrak's service
12 problems on the Southern Pacific line.

13 I will continue to watch very closely
14 every railroad's handling of Amtrak trains.

15 With respect to labor, the allied rail
16 unions asserted during oral argument that there is a
17 link between a previous STB decision and a recent
18 fatal train wreck. It is as absurd to blame Board
19 decisions for human factor accidents as it is to blame
20 society for the violent behavior of some citizens.
21 Adults are responsible for their own actions, even
22 when they belong to unions and are employed by

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1 railroads.

2 I am concerned, however, with labor union
3 complaints that merging railroads use implementing
4 agreements to circumvent collective bargaining
5 agreements. The very fact that UP/SP addresses the
6 matter positively in its agreement with the United
7 Transportation Union is evidence that the issue has
8 merit. The purpose of implementing agreements is to
9 permit consummation of a merger, not to achieve other
10 objectives meant for collective bargaining.

11 Since rail labor and management
12 voluntarily negotiated the Job Protection Agreement of
13 1936, disputes over implementing agreements have been
14 submitted to binding arbitration. That is still the
15 case. The parties to the dispute choose the
16 arbitrators and it is the parties' responsibility to
17 ensure that the arbitrators have the necessary
18 qualifications and are evenhanded.

19 STB's role is not to second-guess
20 arbitrators chosen by management and labor.

21 As the Supreme Court ruled, a review of
22 arbitration decisions is limited to various specific

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1 circumstances. I see no reason to change what
2 rail-labor agreed to 60 years ago.

3 Also, I wish to say something with respect
4 to my home state of California. I don't have anything
5 for Oklahoma today, but California.

6 Nowhere are the benefits of this
7 transaction more apparent than California, which is
8 home to one of every nine Americans. One of every
9 nine Americans of this merger has the support of
10 Governor Pete Wilson, Attorney General Dan Lungren,
11 the Public Utilities Commission, the congressional
12 delegation, the ports that handle almost half of our
13 Nation's waterborne international trade, and almost
14 all rail shippers.

15 Attorney General Dan Lungren ordered an
16 economic analysis with Southern Pacific. He found SP
17 unable to compete but found the capital investments
18 enough to satisfy the demands of shippers. It is a
19 conclusion joined in by the railroad's largest union,
20 whose members are working under a concessionary
21 contract.

22 In fact, Southern Pacific's employees are

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1 the best informed about that railroad's financial
2 problems. They are the best informed because they
3 must live with the below-industry wages, even though
4 California has one of America's highest costs of
5 living.

6 This merger will enable Southern Pacific
7 to gain access to the capital resources necessary to
8 upgrade track and other facilities and to renew the
9 locomotive fleet, which is very important and
10 critical. These investments are essential now in the
11 corridor between Seattle and Los Angeles, called the
12 I-5 is to be made competitive with passengers, trucks
13 and if the Alameda corridor and the NAFTA agreement
14 are to benefit the United States.

15 Finally, there is a group of people I want
16 to congratulate. They are the people making possible
17 for efficient transportation and American
18 competitiveness in the world markets for more secure
19 jobs as we compete in the international market. It is
20 possible only because of investors, your shareholders,
21 those who save more than they earn and invest the
22 difference into companies such as Union Pacific, so it

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1 may purchase locomotives, computers, train employees,
2 and rehabilitate the SP.

3 UP stockholders repeatedly have been asked
4 to give up portions of their projected savings to
5 share them with shippers, unionized employees and
6 communities. Union Pacific has negotiated in good
7 faith and entered into concessionary agreements. They
8 have gone the extra mile with regard to environmental
9 concerns.

10 The stockholders and management of Union
11 Pacific, the capitalists, are to be congratulated.
12 Capitalism is about building and creating and always
13 has been, always will be.

14 I cast my aye vote.

15 SECRETARY WILLIAMS: Vice-chairman
16 Simmons.

17 VICE CHAIRMAN SIMMONS: Yes.

18 SECRETARY WILLIAMS: Chairman Morgan?

19 CHAIRMAN MORGAN: Before we get to that,
20 do you have a statement?

21 VICE CHAIRMAN SIMMONS: I passed the
22 Chairman a little yellow note here and asked her to

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1 tolerate me as an admission of my three gray hairs.

2 My concerns are closer to home. I have
3 been here 13 years.

4 I am concerned and I congratulate this
5 Staff, starting with mail clerks, messengers, right up
6 through the office directors, to the General Counsel,
7 right up to this Board that we have today.

8 This is the finest Board with which I have
9 ever served. This is the finest chairman with whom I
10 have ever served. It is remarkable what has been done
11 here. And I didn't want this -- everybody to jump up
12 with what they did get or didn't get to pass this up,
13 to praise these people that are working down in the
14 bowels of our organization for what they have done and
15 those that are sitting in front of me today.

16 It is a remarkable job, and I guess
17 because maybe I'm expendable, I'm going to say
18 something else. I respectfully -- and I underline
19 respectfully -- urge this Congress and the President
20 to give this Board the people and the necessary
21 economic wherewithal to continue to do the fine job
22 that has been demonstrated here today.

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