STB FD 32760 9-2-98 I 190950

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September 2, 1998

ENTERED
Office of the Secretary

SEP 04 1998

Part of
Public Record

By Hand

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, D.C. 20423

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of the Petition for Leave to File and Reply of The Burlington Northern and Santa Fe Railway Company in Support of Petition for Enforcement of Merger Condition (BNSF-85). Also enclosed is a 3.5 inch disk containing the text of the Petition and Reply in WordPerfect 6.1 format.

I would appreciate it if you would date-stamp the enclosed extra copy of this submission and return it to the messenger for our files. Thank you for your assistance.

Sincerely,

Erika Z Jones/als

Erika Z. Jones

Enclosures

cc: All Parties of Record

BN/SF-85

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

PETITION FOR LEAVE TO FILE AND REPLY OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY IN SUPPORT OF PETITION FOR ENFORCEMENT OF MERGER CONDITION

Jeffrey R. Moreland
Richard E. Weicher
Michael E. Roper
Sidney L. Strickland, Jr.

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Attorneys for The Burlington Northern and Santa Fe Railway Company

BN/SF-85

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

PETITION FOR LEAVE TO FILE AND REPLY OF
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
IN SUPPORT OF
PETITION FOR ENFORCEMENT OF MERGER CONDITION

The Burlington Northern and Santa Fe Railway Company ("BNSF") respectfully petitions for leave to file this Reply to "Applicants' Reply to BNSF's Petition for Enforcement of Merger Condition" (UP/SP-351) ("Applicants' Reply") in order to correct significant misstatements in Applicants' Reply so that the Board will have a complete and accurate record on which to determine in an informed manner whether BNSF's request for access to the South Texas Liquid Terminal ("STL Terminal") transload facility in San Antonio, TX should be granted.

In the Applicants' Reply, UP has argued that BNSF should not have access to STL Terminal because BNSF had no "reasonable expectation" and "no reason to believe" at the time the "BNSF Agreement" was executed that it would have access to that facility. Applicants' Reply, at 2-3. In framing the issue in this way, UP has

misstated the fundamental issue raised by BNSF's Petition, which is whether, under Section 9(g) of the BNSF Agreement, UP must grant BNSF access to STL Terminal because under the binding UP tariff supplement on file and in effect on September 25, 1995, STL Terminal was located within the "designated switching limits" of San Antonio, which is a "2-to-1" location under the BNSF Agreement.[1/]

UP's misstatement of the fundamental issue raised by BNSF's Petition reflects an attempt by UP to divert the Board's focus from the following facts which objectively establish that BNSF is entitled to access to STL Terminal:

1. The standard under Section 9(g) of the BNSF Agreement for determining whether BNSF has access to an existing transload facility is whether the facility was within the "designated switching limits of the location" where the facility is situated at the time the Agreement was executed.

   Contrary to UP's argument that BNSF's "reasonable expectations" should be examined in resolving this type of access dispute, the BNSF Agreement sets an objective standard for determining whether BNSF is entitled to access to a transload facility existing at a "2-to-1" point at the time the Agreement was executed (i.e., September 25, 1995). In Section 9(g) of the Agreement, it is expressly provided that all locations referenced in

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[1/] UP's attempt to focus on BNSF's reasonable expectations concerning access to STL Terminal not only misstates the issue raised by BNSF's Petition, but also exaggerates the importance of the isolated statement in BNSF's Petition concerning "reasonable expectations" that UP seizes upon, and misconstrues that statement. BNSF's Petition (at 12-13) refers to "reasonable expectations" only to buttress BNSF's principal argument that, pursuant to Section 9(g) of the BNSF Agreement, BNSF should be permitted to serve STL Terminal, because it was within the designated San Antonio switching limits as set forth in UP's published tariff in effect on September 25, 1995. In addition, the reasonable expectations to which BNSF's Petition refers are not expectations with respect to STL Terminal specifically, but are expectations (i) that UP's tariff items describe the switching limits of "2-to-1" points and (ii) that UP will abide by the terms of these tariff items.

the Agreement "include all areas within the present designated switching limits of the location." (Emphasis added.)

2. The "present designated switching limits" of a location are set forth in the UP tariffs in effect on September 25, 1995.

   UP does not dispute that the relevant "present designated switching limits" for determining whether BNSF should have access to STL Terminal are the UP tariffs in effect on September 25, 1995.

3. The UP tariffs in effect on September 25, 1995, defined the switching limits of the former MKT line on which STL Terminal is located to be MP 1028.55 and MP 1038.5.

   UP does not dispute that the "present designated switching limits" for San Antonio in effect on September 25, 1995, were contained in Supplement 149 to Tariff MP 8170-C. In addition, Item 2650 of that supplement described the switching limits for the former MKT line that runs north from San Antonio as between MP 1028.55 on the north and MP 1038.5 on the south.

4. The designated switching limits set forth in Item 2650 were not canceled until June 1998.

   The designated switching limits of MP 1028.55 and MP 1038.5 remained in Item 2650 until June 30, 1998, when -- only after this access dispute had arisen and BNSF had begun to provide service in competition with UP to STL Terminal -- UP finally canceled the Item.

5. The STL Terminal facility was between MP 1028.55 and MP 1038.5 on the former MKT line on September 25, 1995.

   Finally, although it claims that they were "obsolete", UP does not dispute the fact that the STL Terminal facility was physically located on the trackage between MP 1028.55 and MP 1038.5 on the former MKT line on September 25, 1995.

Faced with these five objective facts which establish that BNSF is entitled to access to STL Terminal, UP has asserted that the switching limits set forth in Item 2650 were "obsolete" and no longer relevant because the mileposts on the former MKT line

were changed several years before the merger. UP further argues that the fact that the mileposts were changed was physically reflected on the line itself and on the applicable UP track charts, and thus BNSF has no grounds to assert that the published tariff (i.e., Item 2650) was still in effect on September 25, 1995.

UP's argument is both inaccurate and disingenuous. First, UP may not argue that, on September 25, 1995, when it executed the BNSF Agreement, it was not bound by the terms of its published tariff. When the BNSF Agreement was entered into, it was "well established that '[u]ntil changed, tariffs bind both carriers and shippers with the force of law.'" *Missouri-Kansas-Texas R.R. Co. and Ford Motor Company — Petition to Exempt Flat Glass From Broken Arrow, OK to Fraser, Ontario*, 365 I.C.C. 724, 725 (1982) (quoting *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939)) (alterations in original); *see also Crancer v. Lowden*, 315 U.S. 631, 635 (1942) (same).

Second, the purpose for which switching limits were published in tariffs was to allow other carriers and the shipping public to know with certainty what those limits were. It is improper for UP to argue that BNSF and shippers need to go outside of the published tariff to determine the switching limits that were in effect on September 25, 1995. In addition, to BNSF's knowledge, UP never published any tariff amendment or supplement advising of any change in the mileposts on the former MKT line or that the milepost change should be read to contradict the limits set forth in the tariff. Further, the track charts on which UP relies so heavily in arguing that Item 2650 was no longer in effect are not generally available to BNSF and shippers, and thus it is unreasonable to

suggest that those charts should be binding. Moreover, it can hardly be argued that, during the UP/SP merger proceeding, BNSF, concerned shippers, and other parties to the merger proceeding should have inspected each location designated in the BNSF Agreement in order to determine whether each piece of track designated in UP or SP tariff items as being within the switching limits of those locations still had the mileposts listed in those tariff items or whether the tariffs had somehow otherwise become "obsolete." Thus, UP has offered BNSF and the public no realistic alternative to reliance on UP's own tariffs in order to determine the applicable switching limits for the former MKT line on September 25, 1995.

Therefore, UP's argument that BNSF had no reasonable expectation that it would have access to STL Terminal is irrelevant. The issues here are whether under section 9(g) of the BNSF Agreement the switching limits of San Antonio and other "2-to-1" points were those designated in UP tariffs that were on file and in effect on September 25, 1995, and whether UP should be required to abide by the terms of its tariffs and the BNSF Agreement. UP has failed to show why it should not be bound by its tariffs or why it should be excused from the representations it made in the BNSF Agreement that BNSF would be accorded access within the "designated switching limits" of all "2-to-1" points.[2/]

[2/] UP also argues (Applicants' Reply, at 8) that BNSF should have simply asked UP about the STL Terminal's status. The short answer to this argument is that BNSF *did* ask about the STL Terminal's status in 1997 (*see* BNSF's Petition, at 6; Colby V.S. at 5), and that, in accordance with the plain terms of the UP tariff and the BNSF Agreement, Robert B. Price, the employee designated by UP to respond to such inquiries, stated that BNSF could have access to STL Terminal. There is no reason to believe that BNSF would have received a different answer if it had asked about the STL Terminal's status in September 1995. Of course, UP has devoted much of its Reply to BNSF's Petition to explaining why it should not be bound by Mr. Price's answer to BNSF's inquiry, so the value to BNSF of the inquiry suggested by UP is altogether

Accordingly, BNSF's petition for enforcement should be granted.

Respectfully submitted,

Erika Z. Jones/cls

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and

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(847) 995-6887

Attorneys for
The Burlington Northern and Santa Fe Railway Company

September 2, 1998

---

unclear.

Moreover, UP's argument that BNSF should have asked about the STL Terminal's status also ignores UP's well-known delays in providing answers to BNSF's requests for information about shippers' status. Thus, as detailed in BNSF's Petition, UP took months to respond to BNSF's repeated requests for UP to correct its shipper lists to conform to Mr. Price's oral representation that STL Terminal is open to BNSF service.

Therefore, UP's suggestion that, prior to the execution of the BNSF Agreement, BNSF could simply have "ask[ed] UP" (Applicants' Reply, at 8) whether STL Terminal is an open facility also fails to provide a realistic alternative to reliance on UP's tariffs in determining the extent of BNSF's access to San Antonio industries.

CERTIFICATE OF SERVICE

I do hereby certify that, on this 2nd day of September, 1998, a copy of the foregoing Petition for Leave to File and Reply in Support of Petition for Enforcement (BN/SF-84) was served, by first-class mail, postage prepaid, on all Parties of Record in Finance Docket No. 32760.

STB FD 32760 9-11-96 I 85996

85996

BARNES & THORNBURG

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September 11, 1996

SURFACE TRANSPORTATION BOARD
SEP 11 3 09 PM '96
ICC
OFFICE OF SECRETARY

Vernon Williams, Secretary
Office of the Secretary
Case Control Branch
Attn: Finance Docket No. 32760
Surface Transportation Board
1201 Constitution Avenue, N.W.
Washington, D.C. 20423

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

Dear Secretary Williams:

Enclosed is the original and twenty (20) copies of the letter petition of the Railroad Commission of Texas ("RCT-8") seeking clarification from the Surface Transportation Board concerning Decision No. 44 along with two (2) additional copies to be date-stamped and returned to the undersigned in the envelope provided.

Thank you for your assistance in this matter. If you have any questions, please feel free to contact me.

Very truly yours,

Richard H. Streeter

RHS.kd
Enclosures

ENTERED
Office of the Secretary
SEP 12 1996
5 Part of Public Record

RHS 10622

RAILROAD COMMISSION OF TEXAS

September 10, 1996

The Honorable Linda J. Morgan
Chairman
Surface Transportation Board
Washington, D.C.

The Honorable J.J. Simmons, III
Vice Chairman
Surface Transportation Board
Washington, D. C.

The Honorable Gus A. Owen
Commissioner
Surface Transportation Board
Washington, D.C.

Re: Decision No. 44 in Finance Docket No. 32760, Union Pacific Corporation, et al.

Dear Commissioners Morgan, Simmons, and Owen:

By this letter petition, the Railroad Commission of Texas (the "RCT") respectfully requests that the Surface Transportation Board (the "STB") cure a significant deficiency in Decision No. 44.

The RCT strongly suggests that the STB clarify the ground rules under which the Applicants are required to open contracts representing 50% of **volume** to the Burlington Northern Santa Fe railroad ("BNSF") at 2-to-1 points. Particularly, the issues of the method of calculating **volume** and the mechanism for determining which contracts will be opened to BNSF should be addressed.

On Page 145 of Decision No. 44, the STB imposed the terms of the agreement between the BNSF and the Applicants (the "BNSF Agreement") and the terms of the agreement between the Chemical Manufacturers Association (the "CMA") and the Applicants (the "CMA Agreement") as conditions to the STB's approval of the proposed merger between the Union Pacific and Southern Pacific railroads.

1701 NORTH CONGRESS AVENUE ★ POST OFFICE BOX 12967 ★ AUSTIN, TEXAS 78711-2967 ★ PHONE: 512/463-7158 FAX: 512/463-7161

TDD 800-735-2989 OR TDY 512-463-7284 AN EQUAL OPPORTUNITY EMPLOYER

The BNSF agreement and the CMA agreements were designed to ameliorate certain of the anticompetitive aspects of the proposed merger which, among other things, reduces the number of Class One railroads available to serve shippers and the public throughout the western United States. Effective competition can be preserved, the STB has determined, by granting substantial access to the BNSF through trackage rights; however, the plan is incomplete.

One of the terms of the CMA agreement reads as follows:

" 3. Effective upon consummation of the UP/SP merger, UP/SP shall modify any contracts with shippers at "2-to-1" points in Texas and Louisiana so that at least 50% of the volume is open to BN/Santa Fe."

Indeed, the STB not only adopted the CMA agreement (including the foregoing term) as a condition to the proposed merger, but the STB expanded the geographical scope of the condition to include **all** 2-to-1 points (See Decision No. 44 on Page 146.) However, Decision No. 44 offers no clue as to how this condition can be implemented.

What is meant by "50% of the volume"? Is it 50% of the number of contracts? Caveat, 50% of the number of contracts could equal only 10% of the total revenue. Is it 50% of total revenue? Or 50% of total carloads? Or 50% of total tonnage? These questions must be answered, and the STB is the appropriate arbiter of these issues.

Under this condition, it appears that UP/SP has to give BNSF access to at least 50% of the volume of traffic at 2-to-1 points at the outset and that the remaining volume of traffic continues to be available to UP/SP exclusively until the expiration of the contracts. If BNSF is to truly receive access to 50% of such volume, however, it may well be necessary to allow BNSF to bid on more than 50% of the volume.

Without a clarification and a well-defined mechanism for determining how BNSF can be assured of access to at least 50% of the volume, the foregoing condition is unworkable. Therefore, the RCT respectfully asks the STB to finish painting the canvas so that the picture may become clear.

One possible solution for the STB to consider would be for the STB to simply mandate that all contracts at 2-to-1 points be open to new competitive bidding between UP/SP and BNSF at the outset. Such a solution would assure BNSF a meaningful opportunity to give UP/SP real competition.

Under that scenario, UP/SP and BNSF could each be allowed to submit new bids for all contracts at 2-to-1 points. If the BNSF bid is lower, BNSF would get the business. If the UP/SP's new bid is lower, it would get the business. UP/SP could be given the option of not bidding, in which case, if the existing contract price is lower than BNSF's bid, UP/SP could continue to handle the traffic at the existing contract price.

To be sure, other solutions are possible. The point, however, is that **clarification is essential.**

If the STB determines that further consideration of this issue is appropriate, the Railroad Commission of Texas would be pleased to offer more extensive comments on the matter.

Very truly yours,

Carole Keeton Rylander, Chairman

Barry Williamson, Commissioner

Charles R. Matthews, Commissioner

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 1996, copies of the letter petition of the Railroad Commission of Texas (RCT-8) seeking clarification of Decision No. 44 were served on all parties of record in Finance Docket No. 32760 via first class mail.

Rick H. Stuart

_____

STB FD 32760 9-5-96 I 85580

85580

TROUTMAN SANDERS LLP

ATTORNEYS AT LAW

A LIMITED LIABILITY PARTNERSHIP

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WILLIAM A. MULLINS

DIRECT: 202-274-2953

September 3, 1996

HAND DELIVERED

Mr. Vernon A. Williams
Surface Transportation Board
Case Control Branch
Room 2215
1201 Constitution Avenue, N.W.
Washington, D.C. 20423

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

Dear Secretary Williams:

✓ Enclosed for filing in the above-captioned case are an original and twenty copies of a Highly Confidential and Public (redacted) version of The Kansas City Southern Railway Company's Petition to Reopen/Reconsider (KCS-65).

Copies of the public version of this Petition have been served on all parties of record and copies of the Highly Confidential version of this petition have been served on parties on the outside counsel Restricted Service list.

We are also enclosing a 3.5 inch Word Perfect diskette containing the Highly Confidential version of the text of KCS-65.

Sincerely yours,

William A. Mullins
Attorney for Kansas City Southern
Railway Company

cc: · Parties of Record

STB FD 32760 9-4-96 I 85628

85628

SLOVER & LOFTUS
ATTORNEYS AT LAW
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CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III

202 347-7170

September 4, 1996

BY HAND DELIVERY

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

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

Dear Mr. Secretary:

Enclosed for filing in the above-referenced case please find an original and twenty (20) copies of Motion of City Public Service Board of San Antonio, Texas for Leave to File Reply (CPSB-10) and Reply of City Public Service Board of San Antonio, Texas to Submission of BNSF Respecting Terms for CPSB Conditions (CPSB-11).

Also enclosed is a diskette containing both documents in Word Perfect 5.1 format.

Thank you for your attention to this matter.

Respectfully submitted,

John LeSeur

John H. LeSeur
An Attorney for City Public Service Board of San Antonio, Texas

JHL:mfw
Enclosures

Item No.
Page Count 5
Seq #16

Original

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

MOTION OF
CITY PUBLIC SERVICE BOARD
OF SAN ANTONIO, TEXAS
FOR LEAVE TO FILE REPLY

CITY PUBLIC SERVICE BOARD
OF SAN ANTONIO
P.O. Box 1771
San Antonio, Texas 78296

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

By: William L. Slover
John H. LeSeur
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys for City Public
Service Board of San Antonio

Dated: September 4, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

MOTION OF
CITY PUBLIC SERVICE BOARD
OF SAN ANTONIO, TEXAS
FOR LEAVE TO FILE REPLY

City Public Service Board of San Antonio, Texas ("CPSB") files this Motion for leave to file the enclosed reply to the "Submission of BNSF Respecting Terms for CPSB Conditions," and in support hereof states as follows:

(1) On August 23, 1996, CPSB and the Applicants filed their "Submission of Applicants and CPSB Respecting Terms for CPSB Conditions" ("Joint Submission"). The Joint Submission contained the terms CPSB and the Applicants agreed upon to implement the relief the STB accorded CPSB in its Final Decision in the UP/SP merger case (served August 12, 1996).

(2) On August 30, 1996, the BNSF filed its "Submission of BNSF Respecting Terms for CPSB Conditions" ("BNSF Submis-

sion"). Therein, BNSF asks the STB to order that a modification be made to the Joint Submission.

(3) Also on August 30, 1996, the Applicants filed a motion asking to reply to the BNSF submission, along with a reply submission. In their reply, Applicants object to BNSF's proposed modification of the Joint Submission.

(4) The dispute between BNSF and Applicants involves the CPSB implementing conditions. Like Applicants, CPSB has had no opportunity to respond to the BNSF Submission on the record. For purposes of insuring a complete record, CPSB requests permission to file the enclosed reply to BNSF's Submission.

Respectfully submitted,

CITY PUBLIC SERVICE BOARD
OF SAN ANTONIO
P.O. Box 1771
San Antonio, Texas 78296

By: William L. Slover
John H. LeSeur
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys for City Public
Service Board of San Antonio

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: September 4, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 1996, copies of the Motion of City Public Service Board of San Antonio, Texas for Leave to File Reply were served on counsel for Applicants and counsel for BNSF via hand delivery.

John H. LeSeur

STB FD 32760 9-4-96 I 85593

FAX # 202 927-5984 85593

To Surface Transportation Board

Ref: Petition for Reconsideration

ATTN: Secretary FD32760

Please find FAXed here with
A Petition for Reconsideration
Please File
Copies Mailed to Applicants!

S Manatt
501-857-3163

Item No. _____
Page Count 3
Sep #13

BEFORE THE
INTERSTATE COMMERCE COMMISSION
NOW SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

SCOTT MANATT, PETITIONER

PETITION FOR RECONSIDERATION

Comes now the petitioner and for his Petition for Reconsideration states:

Petitioner has not received a copy of the written Order entered in the merger case, even though Petitioner was and is a party and appeared in Washington, D. C. for the oral arguments. Petitioner was unaware of the time periods from the date of entry of the Order which has not been received which started the time for request running. Accordingly, Petitioner prays that this Petition be filed as a formal request, and herewith formally does request a reconsideration of the ruling allowing the merger in its entirety, and specifically states that the approval of the merger was not in the public interest and would request that the reconsideration address the question of the public interest, and not the interest of rails and shippers, the position of the United States Department of Justice anti trust division, which was well founded, rail safety, and a failure to address the issues of rail safety in the public interest as provided and as referenced as filed but not extended due to time constraints.

In addition, the petitioner respectfully submits that the public interest is not served in that there has been a failure to consider all of the displacements of

people, loss of jobs, environmental impact, both noise and pollution, and the economic impact involving the directional use of rails (one way rails proposed).

Accordingly, petitioner respectfully submits that the hearing officer reconsider the entire application for merger. This petitioner acting pro se is unable to post a stay bond and accordingly does not, but does request a reconsideration of all matters during the pendency and implementation of this matter. Further, that this reconsideration be at the earliest time and consider, giving due regard to the inconvenience of the parties, and especially this Petitioner, rail safety as addressed by this Petitioner at oral arguments and the public interest of citizens, towns, and people throughout the United States, in particular as to derailments, toxic pollution, constructions of crossings, overall rail dangers and the failure of the railroad to properly provide safety. Petitioner further prays that the board review the now monopolistic effect on the public now that the merger is approved, and the effect it has on citizens being unable to communicate with a rail just to large for the good of the public.

Respectfully Submitted,

Scott Manatt, pro se

Scott Manatt, #70044
P.O. Box 473
Corning, Arkansas 72422
(501) 857-3163

CERTIFICATE OF SERVICE

I, Scott Manatt, certify that I have served a copy of the foregoing pleading upon attorneys for all parties to this action, by mailing a copy properly addressed by U.S. Mail, postage prepaid, this 3rd day of Sept., 1996.

Scott Manatt

Scott Manatt
P.O. Box 473
Corning, Arkansas 72422
(501) 857-3163

STB FD 32760 9-3-96 I 85586

ORIGINAL

85586

CWD-3

Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760, et al.

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

PETITION TO REOPEN

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington, DC 20036

Attorney for Charles W. Downey

Due Date: September 3, 1996

Item No. 22

Page Count Sep #11

Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760, et al.

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

PETITION TO REOPEN

Comes now Charles W. Downey, [1/] for and on behalf of General Committee of Adjustment for United Transportation Union, on lines of SPCSL Corp. (SPCSL), Gateway Western Railway Company (GWWR), and Illinois Central Railroad Company (IC), and petitions to reopen the Decision (No. 44), served August 12, 1996, on the ground of material error. 49 U.S.C. 10327(g). (Decision 44 at 238).

Protestant submitted a verified statement (CWD-1), and brief (CWD-2). Upon reopening, the Board should impose the New York Dock conditions upon the settlement agreement between applicants and GWWR.

Background

Applicants entered into a settlement agreement with GWWR to eliminate the opposition of GWWR and to secure the support of GWWR for the UP/SP merger. (UP/SP-204, UP/SP-206; GWWR-6). The Board noted the settlement agreement was not intended to address merger-related

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1/ General Chairman for UTU on SPCSL, GWWR, and IC, with offices at 1301½ Morrissey Drive, Unit 4, Bloomington, IL 61701.

competitive issues. (Decision 44 at 9). However, the settlement does provide for revision of certain agreements between applicants and GWWR. (UP/SP-204).

The Board first discussed its understanding of the contentions between Mr. Downey and applicants (Decision 44 at 88-89, and nn. 82-84), and then ruled that Mr. Downey's requests are denied. (Decision 44 at 175). The Board reasoned that the arrangements provided for in the settlement agreement are "non-jurisdictional" with respect to GWWR employees, and SPCSL employees will be protected from any merger-related adverse impacts. (Decision 44 at 175):

> "GWWR Agreement. We will deny the requests made by Mr. Downey. The arrangements provided for in the GWWR agreement are non-jurisdictional, which necessarily means that there is no basis for imposing labor protection with respect to GWWR employees; and the New York Dock conditions will adequately protect SPCSL employees from any merger-related adverse impacts. (fn. 222). When we say that the arrangements provided for in the GWWR agreement are "non-jurisdictional," we mean that such arrangements do not require our approval. Labor protection benefits are intended to protect only employees of the carriers participating in the 49 U.S.C. transaction, and are not intended to protect employees of carriers not participating in that transaction. See, e.g., UP/CNW slip op. at 96."

The Board should reopen its decision. All employees affected by the transaction, including those employeed by carriers parties to the transaction by way of settlement, should be protected.

To a certain and important extent, the Board's deference to the carriers' wishes is bottomed upon the Board's finding that railroad competition has thrived despite the merger movement, with the average rate per ton declining more than 37% from 1981 through 1993. (Decision 44 at 104 & n.99, 119, 245). The Board should reopen the record on this matter of giving official notice to its Staff study, pursuant to 5 U.S.C. 556(e).

ARGUMENT

The Board should find that the GWWR settlement agreement is part of the UP-SP transaction, such that protective conditions should be imposed for all employees affected thereby; and the Board should find the former ICC Staff Study, "Rail Rates Continue Multi-Year Decline," to be invalid.[3/]

I. THE BOARD ERRS IN DENYING CONDITIONS FOR EMPLOYEES WHO MAY BE AFFECTED BY A SETTLEMENT AGREEMENT BETWEEN THE PARTIES.

The Board's conclusion to deny the requests by Mr. Downey is erroneous. The Board does not give a rational explanation. The Board states that the settlement agreement is non-jurisdictional, in that it does not require Board approval. But the UP/SP consolidation does require Board approval, and it is the settlement agreement which facilitates such approval.

The Board's reasoning also seems to suggest that since GWWR is not an "applicant," its employees are precluded from receiving protection. But there have been exceptions to such a general notion, a number of which have been forced unwillingly upon the former ICC. See: Black v. Interstate Commerce Commission, 814 F.2d 769 (D.C. Cir. 1987). Moreover, GWWR is a party to this merger proceeding. Cf. Railway Labor Executives' Ass'n v. ICC, 914 F.2d 276 (D.C. Cir. 1990). Employee conditions may be imposed for non-applicant carrier employees where a

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3/ Protestant's preparation of this petition is without access to the oral argument transcript cited throughout Decision 44. Although conducted on July 1, 1996, and available shortly thereafter, the Board's Secretary continues to deny access, when last requested on August 30, 1996. Protestant was directed to the Board's reporter, who indicated there would be a charge of $2,440.11, plus a 5.75% DC Sales Tax. This is a change in the Board's (former ICC) policy, of public access after the transcript was received by the agency. Protestant contents this new practice is contrary to the availability mandated by the Administrative Procedure Act, where the prior ICC charge was $ 0.20 per page in the public docket room, and is prejudicial to protestant.

settlement agreement is involved. Union Pacific-Control-Missouri Pacific; Western Pacific, 366 I.C.C. 459, 618, 621 (1982).

See also: Soo Line Railroad Company v. United States, 280 F.Supp. 907, 921-26 (D. Minn. 1968)(three-judge); Railway Labor Executives' Association v. United States, 216 F.Supp. 101 (E.D. Va. 1963)(three-judge); Cosby v. ICC, 741 F.2d 1077, 1080, 1084 (8th Cir. 1984); Louisville & Nashville R. Co. v. United States, 244 F.Supp. 337 (W.D. Ky. 1965). The former ICC recognized that employees of non-applicant carriers "are not automatically precluded from receiving labor protection." Finance Docket No. 32167, Kansas City Southern Industries, Inc., The Kansas City Southern Railway Company and K&M Newco, Inc.--Control--MidSouth Corporation, MidSouth Rail Corporation, MidLouisiana Rail Corporation, SouthRail Corporation and TennRail Corporation at 3 (not printed)(served May 4, 1994).[4/]

The Board's finding that the New York Dock conditions prescribed for SPCSL employees for any merger-related adverse impact will be adequate for SPCSL employees is meaningless in the context of the GWWR settlement agreement. The Board has turned the request for New York Dock conditions in the instant UP/SP case, to mean only the standar conditions, if applicable, at the time the settlement agreement may be implemented. (Decision 44 at 88-89 n.84).[5/]

The implementation of the settlement agreement may involve one or more transactions accorded either no protective conditions, or protective conditions less than New York Dock, yet the settlement agreement would not have been made without UP/SP merger approval,

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4/ The Board's reliance upon the UP/CNW decision (Decision 44 at 175 n.222) is misplaced.

5/ Compare the final sentence of Decision 44 at 89 n.222, with UP/SP-250 at 4.

The cause should be reopened to impose the New York Dock conditions upon the GWWR settlement agreement.

II. THE BOARD SHOULD RESCIND ITS RELIANCE UPON A PURPORTED 1995 STAFF RATE STUDY.

The Board took official notice of a February 1995 ICC Staff study purporting to show that rail rates declined more than 37 percent between 1981 and 1993. We point to three reference in Decision 44 to this figure, which has an important bearing upon rail competition in the Board's conclusion. ICC, Office of Economic and Environmental Analysis, Rail Rates Continue Multi-Year Decline, 1995. (Decision 44 at 104):

> "The efficiency savings of the merger are very substantial, and the clear trend since 1980 has been that when railroads have reduced their costs through mergers or otherwise, those savings have largely been passed on to their shippers in terms of lower rates and improved service. Rail rates have decreased remarkably since 1980, despite the face that most shippers are served by a single rail csrrier, and few are served by three. Because of the several major mergers since that time, and due to the formation of Conrail as the single Class I carrier in the Northeast, large regions of the country are now served by a single major rail carrier or by two such carriers. Even with this structure, rail competition has thrived, and shippers have continued to enjoy increasingly lower rates. Since 1980, the number of Class I railroads has decreased from 26 to 10, while the average rail rate per ton has declined more than 37% on an inflation-adjusted basis from its peak in 1981 through 1993."

The Board emphasized its reliance on the "rate decline," at 119:

> "As we have previously explained, numerous mergers since 1980 have sharply reduced the number of major railroads. During that time, the ICC's policy focused on preserving two-railroad competition, not on preserving three-railroad competition. Overall, however, railroad costs and rates have declined a great deal, with the average inflation-adjusted rail rate per ton declining 37.7% from its 1981 peak to year-end 1993."

The Board referred to 9 years of experience since the ICC's denial of the SF/SP merger proposal. Decision 44 at 117:

> "The agency also has the benefit of nine years of additional experience with decreasing rates in two-carrier rail markets."

The separate expression of Member Simmons termed the rate decline as "conclusive" evidence. Decision 44 at 245:

> "The evidence is conclusive, that although the number of Class I railroads have fallen, prices, for the most part have declined since enactment of the Staggers Act."

1. The Rate Decline Report-1995. Protestant could find reference to the document, ICC, Office of Economic and Environmental Analysis, Rail Rates Continue Multi-Year Decline, 1995 (Decision 44 at 104) only in the brief by U.S. Department of Transportation, filed June 3, 1996. (DOT-4, 23). Inquiry revealed that the "Rate Decline" annual reports ended in 1993, with no report for 1994. The 1995 report, dated February 1995, was not announced by the ICC, or by the Board. Protestant received the attached Appendix 1, at the Office of Economic and Environmental Analysis subsequent to the August 12, 1996 release of Decision 44. The two-page document appears to have been received by the Office from personnel at the Federal Communications Commission.[6/]

2. Prior Rate Decline Reports. The "Rate Decline" notion of rail ratemaking since 1980 has been attacked by the Chicago Board of Trade and UTU's Illinois Legislative Director, in their joint May 2, 1994 submission in Ex Parte No. 347 (Sub-No. 2), Rate Guidelines--Non-Coal Proceedings. The 11-page submission is attached at Appendix 2. It describes the history of the Rate Decline reports, understood to have terminated in 1993, and last based upon data for the year 1991.

6/ The ICC Staff member most identified with the "Rate Decline" reports was Walter D. Strack (Appendix 2, p. 3), who we understand left the ICC in September, 1995, and is now employed at the Federal Communications Commission.

3. Rising Rail Rates. Contrary to the "Rate Decline" report for 1995, given official notice by the Board throughout Decision 44, rail rates have risen. As indicated by the U.S. Bureau of Labor Statistics, the average rail rate increased about 44% between 1980 and 1991, and about 45% between 1980 and 1992. (Appendix 2, p. 5). To the best of protestant's knowledge, Decision 44 is the first major decision where the ICC or Board has placed heavy reliance upon the "Rate Decline" report.[7/] The report is generally discredited among economists.

It is appropriate for parties to challenge such use of official notice, and to introduce materials showing the contrary. Pennsylvania R. Co.-Merger-New York Central R. Co., 327 I.C.C. 475, 487 (1966).

A "revenue per ton," irrespective of changes in length of haul, and bearing other infirmities (Appendix 2), cannot be relied upon as an indicator of any declining rate level. An important error is to adjust revenue by the GDP implicit price deflator (GDP-IPD).

The Federal Energy Regulatory Commission (FERC) rejected the use of GDP-IPD, in favor of PPI-1%, which was judicially affirmed, the Court noting different indicies may be appropriate. Association of Oil Pipe Lines v. FERC, 83 F.3d 1424 (D.C. Cir. 1996).

The Board's use of the "Rate Decline" report for February 1995 impacts the tenor of Decision 44 in all its phases, including employee conditions and oversight to commence October 1.

Upon reopening, the Board should disclaim reliance upon a notion of declining rail rates.

CONCLUSION

The Board should reopen Decision 44 to impose New York Dock

7/ The ICC's Study of ICC Regulatory Responsibilities (Oct. 25, 1994) did not assert declining rail rates; but the DOT's Draft Report on the Functions of the ICC (Feb. 1995), and Final Report (July 1995), both asserted declining rail rates. (Draft at 6,40; Final at 43). See also Decision 44 at 118.

conditions on the GWWR settlement agreement, and rescind the Board's reliance upon the concept of declining rail rates.

Respectfully submitted,

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September 3, 1996

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

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Strack

Interstate Commerce Commission

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Office of Economic and Environmental Analysis

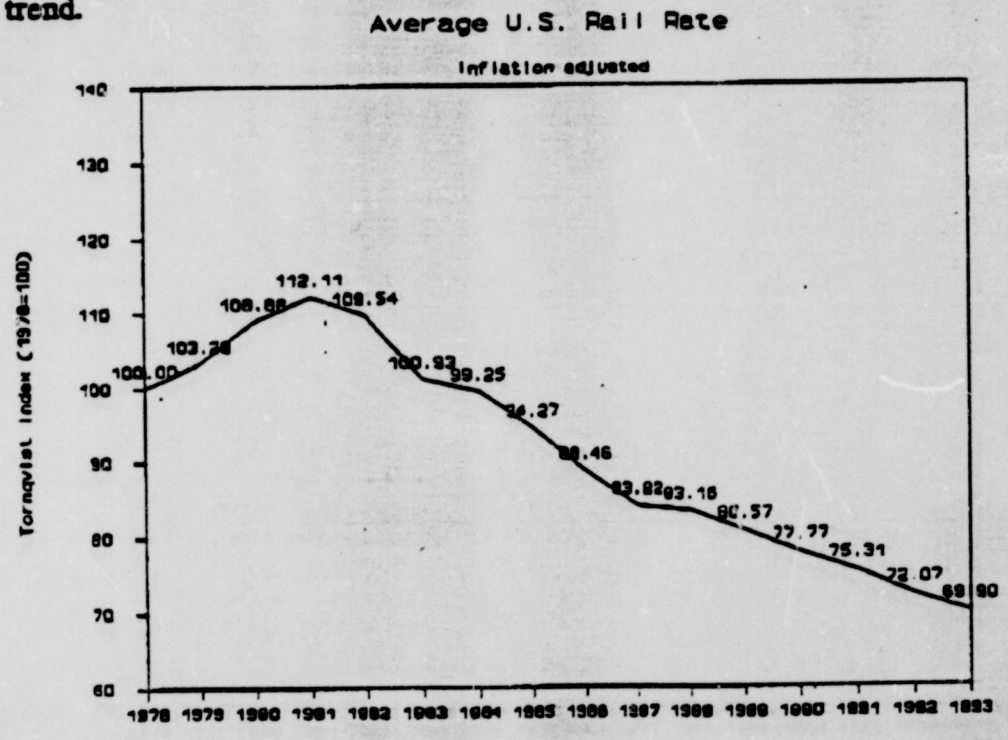
February 1995

RAIL RATES CONTINUE MULTI-YEAR DECLINE

The average, inflation-adjusted U.S. railroad rate has fallen substantially since 1978. As shown below, the average rate fell 35.9 percent between 1980—the year of major regulatory reform legislation affecting both railroads and motor carriers—and 1993. From the year of the peak rate in 1981 through 1993 the average rate fell 37.7 percent.

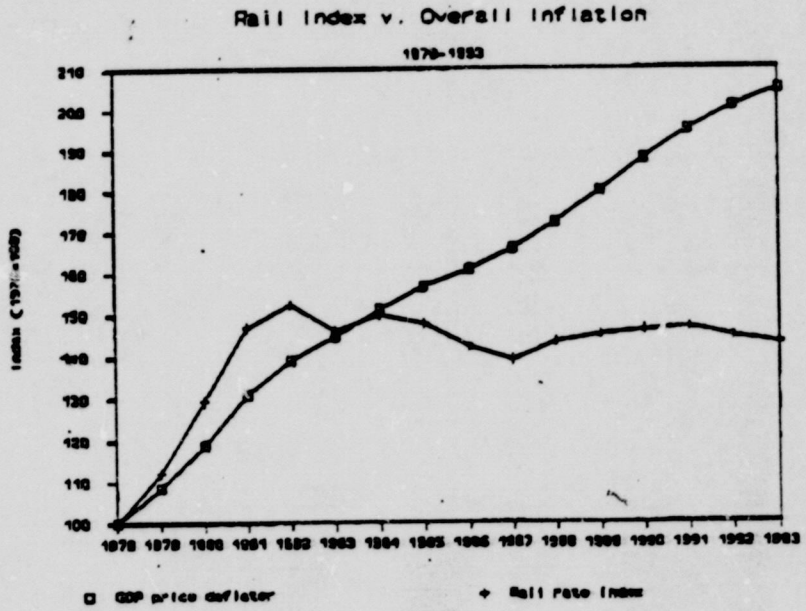
"Rate" is defined as gross revenue per ton of freight originated, and is converted to constant 1993 dollars using the Gross Domestic Product Implicit Price Deflator. The average rate is calculated using a "Tornqvist" index. That is, annual rate changes for 15 rail outputs are aggregated together by weighting each by its share of revenue. The revenue share weights change over time, reflecting the changing output mix during the period. The 15 outputs are made up of 14 major commodity groups, defined by two-digit Standard Transportation Commodity Codes (STCCs), and an "all other" category.

The data come from the annual railroad Freight Commodity Statistics. Data for 1993 are the most recent included in this report. Other available evidence for 1994 and early 1995, however, suggests that there has been no significant alteration in the 1981-1993 trend.



APPENDIX 1

The graph below shows the rail rate index in current dollars—that is, unadjusted for inflation—plotted with the GDP Implicit Price Deflator for comparison.



Note:

The 14 largest 2-digit STCC categories, as measured by 1992 revenues, together with an "all other" category, are used as individual components of the index. The 14 STCC categories account for 96.6% of 1992 revenue. They are:

2 DIGIT STCC	TITLE
01	FARM PRODUCTS
10	METALLIC ORES
11	COAL
14	NONMETALLIC MINERALS, EXCEPT FUELS
20	FOOD AND KINDRED PRODUCTS
24	LUMBER AND WOOD PRODUCTS
26	PULP, PAPER AND ALLIED PRODUCTS
28	CHEMICALS AND ALLIED PRODUCTS
29	PETROLEUM AND COAL PRODUCTS
32	STONE, CLAY, GLASS AND CONCRETE PRODUCTS
33	PRIMARY METAL PRODUCTS
37	TRANSPORTATION EQUIPMENT
40	WASTE AND SCRAP MATERIALS
46	MISC. MIXED SHIPMENTS

Before the

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 347 (Sub-No.2)

RATE GUIDELINES--NON-COAL PROCEEDINGS

COMMENTS

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APPENDIX 2

Before the

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 347 (Sub-No.2)

RATE GUIDELINES--NON-COAL PROCEEDINGS

COMMENTS

These comments are submitted in response to the Commission's February 7, 1994 decision (served February 14), inviting comments from interested persons addressing the written and oral presentations made by the Association of American Railroads (AAR), to the full Commission on March 30, 1994.

Identity and Interest of Joint Commentors

The Board of Trade of the City of Chicago (CBOT) is a corporation which maintains a commodity exchange at Chicago, IL, where its members buy and sell grain, grain products and non-agricultural commodities. The membership of CBOT includes grain terminal and subterminal storage operators, grain merchandisers, cash grain merchant, processors, millers, exporters and farmers who ship and receive grain and grain products by rail, barge, truck and ocean vessel in interstate and foreign commerce.

The United Transportation Union (UTU) is the collective-bargaining representative for the majority of persons employed in the operation of freight trains throughout the U.S. and Canada. The Illinois Legislative Board of UTU participates in state and federal proceedings involving the interest of railroad employees. All of the Class I railroad systems, except Kansas City Southern,

operate in the State of Illinois.

These commentors have an interest in promoting sound, economical, and efficient rail transportation, with reasonable rates, in keeping with the goals of the rail transportation policy. Freight rates which are unreasonable tend to inhibit the maximum flows of commerce, to the detriment of the interest of CBOT members and carrier employees represented by UTU.

I. THE FUNDAMENTAL PREMISE OF THE AAR RESTS UPON A NOVEL AND UNPROVED RATE YARDSTICK.

The AAR, by the collective action of its member carriers, through its Chief Operating Officers (CEO), advances a novel measure for denying small non-coal transportation traffic a speedy and inexpensive reasonableness determination by the Commission. The fundamental premise of the CEOs is the assertion that the average rate per ton peaked in 1981 and since then has, as adjusted for inflation, dropped 33% on the average. (AAR Comments, CEO, p. 4):

> "As the Commission's own recent report shows, the average rate per ton peaked in 1981 and since then has, as adjusted for inflation, dropped 33% on average."

The CEO attach a study, dated November 1993, from the Commission's Office of Economics, "Rail Rates Continue Multi-Year Decline," in support of their claim for a 33% drop in rail rates. (AAR Comments, CEO, Exh.1). Further, the CEOs presented a panoply of charts--ten in all--based upon the Office of Economics study into the purported decline in rail rates. (AAR Oral Presentation, Charts).

There is a need for a speedy and inexpensive reasonableness determination for small non-coal movements. The assertion of a

massive decline in rail rates is baseless and is unsupported.

1. Genesis of the "Rate Decline" Claim. To our knowledge, this is the first occasion where the CEOs of the Class I rail carriers have advanced the "Rate Decline" claim in a major Commission proceeding. It appears that the rate decline index first formally appeared as a five-page Commission issuance on April 19, 1989 (No. 89-91), ICC Issues Staff Report Showing Decline in Inflation-Adjusted Rail Rates since Passage of Staggers Rail Act. The report itself was titled, "Rail Rates Experience Multi-Year Decline." Persons interested in securing copies of the report were advised to directly contact Walter D. Strack. The report claimed at 22.4% decline in the average rate between 1980 and 1987, and a 25.7% decline in 1981 through 1987. The term "Rate" was defined as gross revenue per ton of freight originated, converted to constant 1987 dollars using the GNP Implicit Price Deflator, with the average rate calculated using a "Tornqvist" index based on the year 1978.

Similar five-page reports were issued in 1990 (No. 90-63, May 4, 1990), and in 1991 (No. 91-55, May 14, 1991), but with the title changed to "Rail Rates Continue Multi-Year Decline."[1/]

The reports for 1992 (No. 92-95, June 11, 1992), and for 1993 (Nov. 1993),[2/] were a lesser three-page documents. The Gross

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1/ The 1990 report claimed the average rail rate, converted to constant 1988 dollars, had fallen 22.4% between 1980 and 1988, and 25.0% between 1981 and 1988; the 1991 report claimed the average rail rate, converted to constant 1989 dollars, had fallen 24.6% since Staggers, and the overall rail rate declined 2.8% from 1988 to 1989.

2/ The 1993 report was unaccompanied by a press release, according to our inquiry.

Domestic Product (GDP) Implicit Price Deflator was substituted for the former GNP figure.[3/]

Beginning in 1991, and for 1992 and 1993, the reports listed the purported actual increase in the average rail rate of 1.2%, 1.1%, and 1.1%, respectively, in current dollars.

The Commission's annual reports to the U.S. Congress for the years 1989 through 1993, included the above five "Rate Decline" studies in its list of agency publications,[4/] but specific reference to the text of the studies appeared only in the annual reports for the years 1991 and 1992.[5/]

2. Prior Informal "Rate Decline" Studies. The lead 1989 study had been preceded by correspondence. The Commission presented information on revenue per ton, asserting rail rates had declined since Staggers, using the GNP deflator, based upon 1975-85 data, but without mention of a "Tornqvist" index, before Congressional committees, at least as early as 1987. See: U.S. Senate Subcommittee on Antitrust, Hearings on S. 443, The Clayton Act Amendments of 1987 (Railroad Antitrust Immunity), 38-39, 82-84 (May 13, 1987); U.S. Senate Subcommittee on Surface Transportation, Hearings: Rail Industry/Staggers Act Oversight, 143-44, 187-89 (June 17, 1987); and U.S. House Subcommittee on

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3/ The 1992 report claimed the average rail rate, converted to constant 1990 dollars, fell 28.8% between 1980 and 1990, and the overall rail rate declined 3.1% from 1989 to 1990. The 1993 report claimed the average rail rate, converted to constant 1991 dollars, fell 31.2% between 1980 and 1991, and 33.3% between 1981 and 1991.

4/ ICC 103rd Report, 126 (1990); ICC 104th Report, 109 (1991); ICC 105th Report, 112 (1992), ICC 106th Report, 123 (1993), and ICC 107th Report, 99 (1994).

5/ ICC 105th Report at 37; ICC 106th Report at 41.

Transportation, Hearings on Staggers Rail Act Oversight, 432-33, 475-77 (May 28, 1987).

The "Tornqvist" index was later applied in materials submitted to the Congress on June 6, 1988, for the period 1978-86. See: U.S. House Subcommittee on Appropriations , Hearings on Department of Transportation and Related Agencies Appropriations For 1990 (Part 5), 816-18, 827-30 (Feb. 28, 1889).

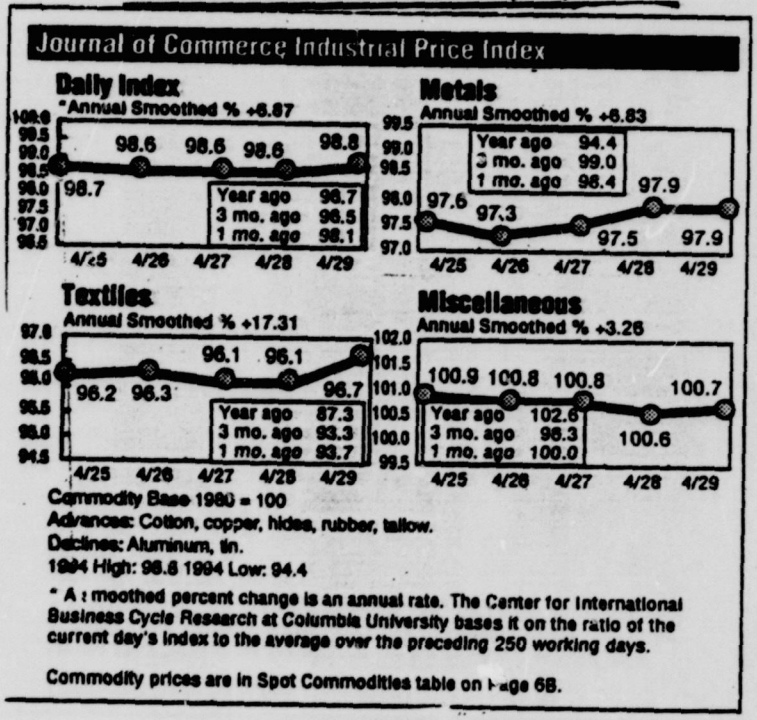
3. Obvious Infirmities. The "Rate Decline" study has obvious infirmities. The revenue per ton, for a given movement, or in the aggregate, does not constitute a "rate." A tariff may contain more than one "rate," dependent upon the service offered, i.e., carload, trainload, specific minimum weights, etc. For excellent background reading, see: Shinn, Glenn L., Freight Rate Application (Simmons-Boardman, 1948); Reasonable Freight Rates (Traffic Serv. Corp., 1952).

It is a misnomer to construe average revenue per ton as average rate per ton. Rather than decrease of 31.2% in the average rail rate between 1980 and 1991, the U.S. Bureau of Labor Statistics indicates that the average rail rate increased about 44% between 1980 and 1991, and about 45% between 1980 and 1992. See: Statistical Abstract of the U.S., No. 1053 (1993).

A. GNP/GDP Deflators. There is no basis for deflating average rail revenue per ton by a GNP or GDP general deflator. To be sure, the purchasing value of the 1980 dollar declined 28.5% and 41.3%, on PPI or CPI basis, respectively, between 1980 and 1992. But rail traffic is heavily dominated by raw materials, coal, and agricultural products, rather than by the transportation of finished goods for consumer markets. The average coal price,

measured by PPI, rose only apx. 9% between 1980 and 1992. The average price for wheat declined apx. 9% in the same period, the average price of corn declined by apx. 20%, and the price for soybeans declined by apx. 17% during the same 1980-92 period. Statistical Abstract, supra at No. 766. Shown below is a price index taken from today's issue of the New York Journal of Commerce, indicating virtually no price increases for industrial commodities since 1980.

THE JOURNAL OF COMMERCE, Monday, May 2, 1994



The use of a general deflator for rail rates is clearly inappropriate.

B. 1978 Tornqvist Index. The use of a "Tornqvist" index to adjust the average rail revenue per ton is questionable.

The AAR's Railroad Facts (1993), uses a straight revenue per ton, indicating an 11.4% increase in revenue per ton between 1980 and 1992. (Ibid, p.30). Of course, the rail revenue per ton showing is not comparable with a rail rate.

C. Reporting Changes. There have been changes in the reporting of rail revenue. For example, rather than publish rates with allowances for shipper owned or leased equipment, some tariffs publish rates for movement in such equipment. Another change has been to shift sums paid by Class I railroads to their short-line feeder connections from an expense category in favor of a reduction in gross revenue.

The ICC's change in carrier reporting requirements has rendered tonnage and revenue data further suspect. The Commission's "Rate Decline" index is purportedly based upon the R-1 reports and the annual railroad Freight Commodity Statistics. However, this data is only for Class 1 rail carriers, as other carriers do not file reports with the Commission. The Eno Transportation Foundation, Inc., in its Transportation in America (11th ed. 1993),[6/] adjusts for the deficiency in ICC reporting subsequent to the discontinuance of Class II carrier reporting in 1976, so as to lift rail tonnage by 15%. (Ibid., p.46):

> "Sources: Rail. All years represent Class I and II carriers' revenue tons originated. 1975-1992 figures for Class I carriers from AAR reports, including Railroad facts, published annually, plus an estimated percentage share (5% for 1975-77, 6.5% for 1978-1984, and progressively higher to 15% in 1992) to reflect rapid growth of small railroads as large carriers sell off branch lines. Earlier years from Transport Statistics in the U.S., ICC, published annually."

6/ Frank A. Smith, editor.

II. THE COMMISSION SHOULD INSTITUTE A SPECIAL PHASE OF THIS PROCEEDING TO DEAL WITH THE "RATE DECLINE" STUDY.

The November 1993 "Rate Decline" study (AAR Comments, CEO Stmt., Exh. 1) invites discussions with the Commission's Office of Economics. (Ibid., Exh. 1, p.2). We believe it inadvisable for an indicator given such importance by the rail industry to be the subject of informal discussion with the Commission's Office of Economics. Instead, this matter should be made part of a formal and public phase of this proceeding. Commentors have taken steps to secure expert outside assistance on this project.

We ask that the Commission direct its Office of Economics to place its underlying working papers, beginning in 1987, in a depository under the supervision of an Administrative Law Judge, and that one or more persons responsible for the "Rate Decline" studies be made available for cross-examination, if requested.

The Commission should institute a special phase of this proceeding to deal with the "Rate Decline" Study.

III. A SIMPLE AND INEXPENSIVE TEST IS APPROPRIATE.

These commentors suggest the Commission adopt a simple and inexpensive test for determining the reasonableness of rates for small non-coal movements. Rather than Constrained Market Pricing or Simplified Stand-Alone Cost, the Commission should rely upon traditional tests of reasonableness.

Rate comparisons--not complicated and changing cost comparisons--should be a primary consideration in applying the rule that freight rates shall be reasonable. The Commission recently reached such a conclusion in dealing with motor carrier rates prior to Congressional enactment of recent legislation.

See: Georgia-Pacific Corp. Pet. for Declar. Order, 9 I.C.C.2d 103 (1992), 9 I.C.C.2d 796 (1993), and 9 I.C.C.2d 1052 (1993). The use of the rate comparison test in rail cases is traditional, and does not appear, at this time, to have the unfiled tariff problems associated with prior practices of motor carriers. Cf. Railroad Transportation contracts, 8 I.C.C.2d 730 (1992).

We appreciate that the rail industry sometimes does not wish to have one of its favorable rates used as a comparison to guide the reasonableness of other rates, and this subject came up at the March 30, 1994 hearing. But the speaker is well-versed in the necessity and background for rate comparisons. (Hearing, 3/30/94, at Tr. 19-21).

CONCLUSION

WHEREFORE, the Commission should institute a separate phase for inquiry into the "Rate Decline" study presented by the CEOs of the railroad industry and issued by the Commission's Office of Economics; and the Commission ultimately should issue a rule or policy for determining the reasonableness of non-coal rates for small traffic volumes with reliance upon traditional tests, primarily rate comparisons.

Respectfully submitted,

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May 2, 1994

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington, D.C. Gordon P. MacDougall

STB FD 32760 I 85583 • 9/3/96

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

Dear Secretary Williams:

Enclosed for filing are an original and twenty copies of the highly confidential version, and twenty-one copies of the public version, of TM-44, The Texas Mexican Railway Company's Petition to Reopen Decision No. 44. Also enclosed is a 3.5" floppy computer disc containing a copy of the filing in Wordperfect 5.1 format.

Sincerely,

Richard A. Allen

Enclosures

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September 3, 1996

Via Hand Delivery

Vernon A. Williams
Secretary
Surface Transportation Board
Room 2215
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

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

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Sincerely,

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Item No.

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Sep #6

ORIGINAL

REDACTED - To be filed on the public record

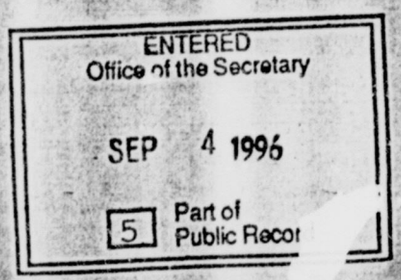
ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORP., UNION PACIFIC RR. CO. AND MISSOURI PACIFIC RR CO.
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORP., SOUTHERN PACIFIC TRANS. CO., ST. LOUIS SOUTHWESTERN RW. CO., SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN CORP.

THE TEXAS MEXICAN RAILWAY COMPANY'S PETITION TO REOPEN DECISION NO. 44



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Attorneys for The Texas Mexican Railway Company

September 3, 1996

REDACTED - To be filed on the public record TM-44

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORP., UNION PACIFIC RR. CO. AND MISSOURI PACIFIC RR CO.
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORP., SOUTHERN PACIFIC TRANS. CO., ST. LOUIS SOUTHWESTERN RW. CO., SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN CORP.

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September 3, 1996

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Union Pacific Corp., Union Pacific RR. Co. and Missouri Pacific RR Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Trans. Co., St. Louis Southwestern Rw. Co., SPCSL Corp. and The Denver and Rio Grande Western Corp.	Finance Docket No. 32760

THE TEXAS MEXICAN RAILWAY COMPANY'S
PETITION TO REOPEN DECISION NO. 44

Pursuant to 49 C.F.R. § 1115.3, the Texas Mexican Railway Company ("Tex Mex") files this petition to reopen the Board's Decision No. 44 in this proceeding.

Introduction and Summary

By this petition, Tex Mex requests the Board to remove the limitation imposed in that decision on the trackage rights granted to Tex Mex in Sub-Nos. 13 and 14 restricting Tex Mex's use of such rights to "the transportation of freight having a prior or subsequent movement on [Tex Mex's] Laredo-Robstown-Corpus Christi line." That limitation will have a relatively minor effect on Applicants' traffic but will have a major adverse effect on Tex

Mex and its ability to provide a strong competitive alternative to a merged UPSP.[1/] Imposing that limitation was material error for several reasons:

1. The limitation leaves uncorrected a serious competitive harm that the merger will cause to many shippers, including particularly shippers located in Houston, one of the largest rail markets in the United States. Those shippers are now served by three railroads, and if the limitation imposed on Tex Mex is not removed, after the merger they will have only two with respect to all traffic except shipments moving to or from Tex Mex's line in south Texas. Unique aspects of the Houston market make that loss of a third competitive outlet significantly more harmful than in most other rail markets.

2. The routing restriction imposed on Tex Mex's trackage rights will impose unnecessary costs and operating inefficiencies, and it will prevent Tex Mex from effectively competing for much traffic that would in fact traverse the Tex Mex system.

3. The Board appears to have based the limitation in part on a misreading of Tex Mex's position in the case that led the Board to the erroneous conclusion that Tex Mex had conceded the correctness of Applicants' objections to Tex Mex's carrying traffic not having a prior or subsequent movement on its line. On the contrary, Tex Mex urged the Board not to limit its rights and argued that there was no basis for any such limitation. The decision's citation to Tex Mex's rebuttal statement omitted these statements.

4. Contrary to the Board's apparent belief, Tex Mex's evidence shows that granting unrestricted rights is extremely important to Tex Mex and to its ability to function

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1/ All abbreviations and acronyms used in this petition are the same as those use in Tex Mex's responsive and terminal trackage applications (TM-23) and are generally the same as those use by the Board in Decision No. 44.

as a viable competitor to a merged UPSP. The evidence of Tex Mex's witnesses showed that granting unrestricted rights will produce $822,000 more in revenues and $250,000 more in net income to Tex Mex in the first year of operation that granting rights limited to traffic having a prior or subsequent movement on Tex Mex's line. In fact, the evidence showed that granting limited rights would leave Tex Mex with only $19,000 in net income in the first year of operation (instead of $269,000 with unrestricted rights). That income, though not negative, provides Tex Mex with little margin for weathering business cycles and, more importantly, competing aggressively for traffic.

These errors in the Board's decision are discussed more fully below and in the attached verified statements of Tex Mex's economic witnesses, Dr. Curtis Grimm and Joseph Ellebracht.[2/]

STATEMENT OF FACTS

On March 29, 1996, Tex Mex filed a responsive application seeking trackage rights over SP and UP lines from Robstown and Corpus Christi, Texas through Houston to a connection with KCS at Beaumont, Texas (Finance Docket No. 32760, Sub-No. 13) together with an application for terminal trackage rights over lines of the HB&T in Houston (Finance Docket No. 32760, Sub-No. 14). In those applications (contained in TM-23), Tex Mex stated:

2/ This petition for reopening is based on material error and, to the extent the attached verified statements present new evidence, on new evidence. 49 C.F.R. § 1115.3(b). These statements appear as Appendices A and B hereto.

> Tex Mex seeks rights over those lines to permit it to carry overhead traffic and to serve all local shippers currently capable of receiving service from both the Union Pacific Railroad ("UP") and the Southern Pacific Transportation Company ("SP"), directly or through reciprocal switching, with full rights to interchange traffic with UP, SP and any other railroad at any interchange point on such lines.

TM-23 at 3. See also TM-23 at 158-174 (Operating Plan).

Tex Mex contended that the foregoing trackage rights were needed to preserve competition that would otherwise be lost as a result of the merger. Tex Mex also contended that they were needed to keep Tex Mex viable and thereby preserve essential rail services provided by Tex Mex for which there are no other transportation alternatives. Tex Mex's arguments and evidence concerning competition focused primarily on the importance of preserving competition in the market for rail services between the United States and Mexico, because that is a market in which Tex Mex is currently an important participant and because preserving competition in that market is vital to the policies of both countries as reflected in the North American Free Trade Agreement.

Tex Mex's arguments and evidence, however, were not limited to just that market. By seeking the right to use the trackage rights to serve all shippers currently capable of receiving service from both UP and SP and by seeking full interchange rights with all other railroads at any point on the lines, such as HB&T and the Port Terminal Railway Association ("PTRA") in Houston, Tex Mex's applications served to preserve the existing level of competition for all shippers on the lines in question with respect to <u>all</u> their traffic, not just that moving to and from Mexico or to and from points on Tex Mex's current line. Thus, the traffic and revenue projections in Tex Mex's traffic study, performed by Joseph Ellebracht,

included all traffic that Tex Mex expected to move if its applications were granted, not only traffic moving to and from Mexico and points on Tex Mex's line.

In their response to Tex Mex's applications, the Applicants argued that the real purpose of Tex Mex's applications was not to preserve competition for the U.S.-Mexico market but was simply to provide KCS access to Houston shippers via Tex Mex. Applicants contended that Tex Mex's applications should be rejected in their entirety, asserting that "[t]here is significant evidence that Tex Mex's role is aimed principally at enriching KCS, whose parent recently acquired 49% ownership of Tex Mex's holding company." UP/SP-230 at 305. In support of this claim, they stated:

> As Mr. Peterson points out, moreover, much of the traffic that Tex Mex anticipates handling using its rights would move between Houston and KCS at Beaumont, and never traverse Tex Mex's existing system. Peterson RVS, pp. 118-19. Those rights are clearly designed to give KCS the general access to Houston that it has long desired. . . . No proper purpose would be served by acceding to these self-serving and commercially-motivated requests.

Id. at 305-306. See also UP/SP-231, Peterson RVS at 115-120.

In its rebuttal, Tex Mex, far from conceding the validity of Applicants' argument regarding this traffic, argued at length that Applicants' argument "is completely unfounded" and that the Board should grant the full rights sought in Tex Mex's applications without restriction. TM-34 at 5-7 (attached hereto as Appendix C). Tex Mex reiterated that its principal objective is to preserve for shippers of goods between the United States and Mexico an effective third rail alternative to a merged UPSP and BN/Santa Fe." Id. at 5. It stated that "Applicants' suggestion that Tex Mex's real object is to give KCS access to Houston shippers is absurd" because KCS already has direct access to those shippers for its own traffic via a haulage agreement with UP and interline access to them with UP, SP,

HBT and PTRA. Id. at 6. It stated that the right to carry some shipments between Houston and Beaumont that had no prior or subsequent movement south of Houston was not a central purpose of its application but would be an "incidental competitive benefit of it" which the Board should not deny. Tex Mex stated:

> Tex Mex submits that there is no reason to deny a remedy that is appropriate to mitigate anticompetitive effects of a merger merely because the remedy has other competitive benefits, or to perform some Procrustean operation on that remedy just to prevent it from being too beneficial.

Id. at 7.

Tex Mex was concerned, however, that if the Board concluded, contrary to Tex Mex's submission, that there was no competitive justification for this aspect of Tex Mex's trackage rights application, the Board might feel compelled to accept Applicants' arguments and deny Tex Mex's applications altogether.[3/] Accordingly, Tex Mex also stated that if the Board concluded that Tex Mex's request to carry this traffic was not competitively justified, it could limit the rights granted to exclude Tex Mex from carrying shipments between Houston and Beaumont that have no prior or subsequent movement south of Houston, and that doing so would not prevent Tex Mex from carrying out the principal purposes of the applications or from providing essential services for its local customers. TM-34 at 7. These statements were based on traffic and revenue projections by Tex Mex's witnesses Joseph Ellebracht and Patrick Krick showing that Tex Mex would still be profitable, albeit

---

[3/] If the Board concluded, contrary to Tex Mex's submission, that the right to carry this traffic was not justified, it might also have concluded that there was an insufficient basis for granting any part of Tex Mex's applications in the absence of evidence showing whether Tex Mex could survive at all without that traffic.

much less so, if such a limitation were imposed. TM-34, Ellebracht RVS at 43, Krick RVS at 2-3.

Nothing in Tex Mex's response to Applicants' arguments conceded the correctness of their arguments, indicated Tex Mex's view that the Board should limit the rights sought in any way, or indicated that the right to carry traffic having no prior or subsequent movement south of Houston was unimportant to Tex Mex or was not justified. On the contrary, its response expressly urged the Board not to limit the rights sought. In fact, to remove any possible doubt on that score, Tex Mex filed an "Errata By Way of Clarification" two days after filing its rebuttal statement stating:

> The Texas Mexican Railway Company ("Tex Mex") has reason to believe that some parties may be misconstruing and may misrepresent statements made on page 7 of TM-34, Rebuttal In Support of the Responsive Application of Texas Mexican Railway Company, concerning certain traffic between Houston, Texas and Beaumont, Texas. Accordingly, Tex Mex is filing this errata by way of clarification to make clear that it has made no concessions or amendments to its responsive application, and does not support or endorse any limitation of the trackage rights sought in that application.

TM-35 at 1 (attached hereto as Appendix D).

In Decision No. 44, the Board granted Tex Mex's Sub-No. 13 and Sub-No. 14 applications, restricted in both instances, however, to "the transportation of freight having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line." Decision No. 44 at 150. The reasons given for this restriction were as follows:

> Finally, we note that applicants and BNSF have raised legitimate concerns over Tex Mex's request that it have unrestricted access to interline with other carriers along its trackage rights route. Tex Mex has conceded this point, explaining:
>
> > An incidental competitive benefit of granting the rights Tex Mex seeks is that Tex Mex could carry some shipments between Beaumont and Houston that have no prior or subsequent rail movement south of

> Houston. This, however, would be a relatively minor benefit, and it was certainly not a central purpose of the application. . . . [The Board] could limit the rights granted to exclude Tex Mex from carrying shipments between Houston and Beaumont that have no prior or subsequent movement by rail south of Houston.
>
> TM-34 at 7. Although we have accepted Tex Mex's arguments that it may need to replace traffic it will lose via the merger in order to preserve competition at Laredo, the trackage rights we are granting here may only be used in conjunction with traffic that moves on the Tex Mex.

Id. at 149-150. The language quoted in the decision omitted the statements in Tex Mex's rebuttal disputing Applicants' arguments and urging the Board not to limit the rights being sought, and made no reference to the subsequently filed clarification. As a result of these omissions, the Board's decision reached the clearly erroneous conclusion that Tex Mex had conceded Applicants' arguments and had urged the Board to limit Tex Mex's rights. As we show below, that limitation was unwarranted and should be removed.

ARGUMENT

I. THE LIMITATION IMPOSED ON TEX MEX'S TRACKAGE RIGHTS LEAVES A SERIOUS LOSS OF COMPETITION TO HOUSTON SHIPPERS UNREMEDIED.

Although the focus of Tex Mex's applications and evidence was naturally on the markets currently served by Tex Mex, particularly the U.S.-Mexico market, its applications, if granted in full, would have alleviated a serious loss of rail competition in other markets as well, particularly in the Houston, Texas market. Currently (pre-merger), the shippers in Houston are served by three Class I railroads: UP, SP and BN/Santa Fe.[4/] After the

---

[4/] Houston is also served by two local switching railroads, HB&T (which is owned (continued...)

merger, with the conditions imposed by the Board, it will be served by only two: UPSP and BN/Santa Fe. It will also be served by Tex Mex, but only with respect to traffic having a prior or subsequent movement over Tex Mex's line. Were Tex Mex's applications granted without this limitation, Houston shippers would retain a third alternative for all of their traffic, namely via the Tex Mex, KCS and other railroads connecting to Tex Mex.

Because of the characteristics of the Houston rail market, the loss of a third competitive alternative for Houston shippers will cause substantial harm that can and should be easily rectified. It is true that in Decision No. 44 the Board generally found that the 3-to-2 competitive harms that will result from this merger are outweighed by the public benefits of the merger and will be adequately remedied by the conditions imposed by the Board. Decision at 119-121. Significantly, however, the Board did not conclude that the reduction of railroads serving a market from three to two causes no significant competitive harm, either generally or in the context of this merger. On the contrary, the Board recognized that the "pervasive reduction of the major rail carriers across the West from three to two carriers could be grounds for concern" (id. at 119), and it acknowledged that the 3-to-2 impact in this case could result in substantial rate increases to the affected shippers, although it expressed doubts as to the exact extent of these increases (id. at 121).[5/]

[4/](...continued)
50/50 by UP and BNSF) and PTRA, whose members are UP, SP, BNSF and the Port of Houston.

See also Decision at 267 ("Appendix E: Duopoly Issues"), where the Board stated: "It is true that tacit collusion is more likely in two-firm markets, where one firm can anticipate the other's response, than in multi-firm markets."

The Board's assessment of the 3-to-2 impacts of this merger was based on an analysis of the particular circumstances of this proceeding, and its conclusion that the resulting harm to competition is outweighed by the merger's benefits or is adequately remedied by conditions rested largely on two specific findings. First, the Board stated:

> We have examined in detail the nature of the 3-to-2 traffic at issue, and have determined that it presents little potential for significant, merger-related competitive harm. Most of this traffic is either intermodal or automotive traffic that enjoys vigorous motor carrier competition.

Id. at 119. Second, it stated:

> Another key factor in our analysis is the limited role now played by SP as the third carrier in these markets. . . . As a result [of SP's poor financial condition], SP's role, particularly with regard to the very service-sensitive automotive and intermodal traffic that makes up a large part of the 3-to-2 traffic, has diminished. (According to applicants, SP now handles only 20% of 3-to-2 traffic.)

As Professor Grimm explains in his supplemental verified statement, neither of these facts apply to the Houston rail market. Very little of the 3-to-2 traffic to or from Houston is intermodal, automotive or otherwise subject to substantial truck competition. Half of that traffic is chemical traffic and three quarters of it moves more than 600 miles. Grimm SVS at 6. In addition, SP is a much more significant competitor in the Houston market than in most other 3-to-2 markets, accounting for 42% of the 3-to-2 traffic. The loss of SP as an independent competitor will therefore be much more harmful to Houston shippers than to shippers in most other markets.

Furthermore, for much of the traffic in Houston, BN/Santa Fe has such a small share -- less than 15% -- that the competitive situation is in fact closer to 2-to-1 than to 3-to-2.

Grimm SVS at 6-7. With such a small market share, BN/Santa Fe is not likely to be an effective competitive replacement for SP, even with the trackage rights BN/Santa Fe will have. As Professor Grimm explains, for this traffic the competitive situation is very similar to what the Board found to exist with respect to U.S.-Mexican traffic. Grimm SVS at 7, n.2; Decision No. 44 at 148 and n. 182.

In short, the Houston market is significantly different from other 3-to-2 markets discussed in the Board's decision. There was no reason for the Board to deny shippers in that market with at least some competitive remedy for their competitive loss by prohibiting Tex Mex the right to interchange their traffic with KCS at Beaumont.

II. THE ROUTING RESTRICTION IMPOSED BY THE BOARD WILL SERIOUSLY IMPAIR TEX MEX'S ABILITY TO COMPETE FOR TRAFFIC.

The restriction the Board imposed on Tex Mex's trackage rights is a restriction based on the routing of the freight. Trackage rights, both those voluntarily negotiated and those imposed in merger cases, commonly contain restrictions limiting the trackage tenant's access to particular shippers or limiting the commodities the tenant can carry. Routing restrictions like those imposed here, however, are much less common and are very different from access or commodity restrictions. As explained in the supplemental verified statement of Joseph Ellebracht, routing restrictions present special difficulties for the tenant. Not only do they inject artificial inefficiencies into its operations but also, more importantly, they can seriously impair its ability to compete effectively even for the traffic it is permitted to carry.

The principal difficulty presented by routing restrictions arises from the fact, as Mr. Ellebracht explains, that shippers will often deliver cars to a railroad before the ultimate

destination of the car is known. Manufacturers of plastics, for example, will often deliver their products directly to a railroad for storage in transit before the product is sold and its ultimate destination determined. In fact the Board noted in its decision that the ability to deliver cars to railroads before the product is sold is extremely important to the plastics industry because it "allows plants to run at capacity and product to be readily available for prompt movement to various markets as market price and demand change." Decision No. 44 at 151.

If such a shipper initially routes a group of 100 cars to Tex Mex and later sells 90 of the carloads to Mexican buyers and 10 to buyers in Chicago and Kansas City, Tex Mex could carry the 90 cars to Laredo but would have to arrange to have the 10 cars switched to UPSP or BN/Santa Fe in Houston rather than taking them to Beaumont to interchange them with KCS -- even though Tex Mex will be operating a regular train between Houston and Beaumont consisting of freight having prior or subsequent movements on Tex Mex's line. This switching will entail costs and additional transit times that would not be incurred by UPSP or BNSF if the cars had been delivered to them and would not have been incurred if Tex Mex had been able to transport the cars itself in its regular train to Beaumont.

Not only will such circumstances entail unnecessary costs and inefficiencies, they will tend to discourage shippers from routing <u>any</u> carloads to Tex Mex whose ultimate destination is not known for certain at the time of initial delivery. For shippers, like plastic shippers, who are concerned about having their products "readily available for prompt movement to various markets as market price and demand change," the risk of incurring additional delays if they give cars to Tex Mex that may later have to be switched to other carriers will create a

significant disincentive to using Tex Mex. This will seriously impair Tex Mex's ability to compete even for traffic that would ultimately traverse its line and will give UPSP and BN/Santa Fe an artificial advantage with respect to that traffic.

The same difficulties and disadvantages arise from the fact that routings are sometimes changed in transit. Cars that may have been given to Tex Mex initially with a Laredo destination might be rerouted to Kansas City, requiring Tex Mex to switch the cars to UPSP or BNSF in Houston rather than interchanging them with KCS at Beaumont. That fact will also tend to discourage shippers from tendering cars to Tex Mex.

The routing restriction imposed by the Board will also impair Tex Mex's ability to use its trackage rights to compete effectively for another, related reason. In Decision No. 44, the Board recognized that how effectively a trackage tenant can compete over its trackage rights depends critically on the density of the traffic it will be able to attract. The lower the density, the higher the tenant's costs per unit of traffic and the higher the rates that must be charged to cover those costs. Indeed, to ensure that BN/Santa Fe would have sufficient traffic density to compete effectively with UPSP, the Board significantly enhanced BN/Santa Fe's rights beyond what Applicants and BN/Santa Fe themselves agreed to. Decision No. 44 at 146 (expanded rights to serve new facilities, build-ins and build-outs and current UP and SP contract customers) and 153 (expanded access to shippers at Lake Charles, West Lake and West Lake Charles by removing agreed-to routing restrictions). The Board explained that it was imposing these additional conditions to address "both the competitive problems that have been raised with the BNSF agreement and the CMA agreement and concerns about

whether BNSF will have sufficient traffic to compete effectively." Id. at 106 (emphasis supplied). See also id. at 133, 134, 140.

The same considerations apply with even greater force to Tex Mex, given its far smaller resources and the very narrow margin it will be required to operate with. By restricting the type of freight Tex Mex is permitted to carry, which will further impair its ability even to compete for much of that traffic, the Board's routing restriction will seriously erode the density of traffic Tex Mex will be able to attract with its trackage rights.

In sum, the routing restriction imposed on Tex Mex's trackage rights will create unnecessary costs and operating inefficiencies and will impair Tex Mex's ability to compete for traffic.

III. THE BOARD ERRED IN CONCLUDING THAT TEX MEX CONCEDED APPLICANTS' ARGUMENTS REGARDING HOUSTON-BEAUMONT TRAFFIC.

The Board's view that Tex Mex had conceded the validity of Applicants' arguments about traffic not traversing Tex Mex's line was clearly erroneous. As indicated in the Statement of Facts, Tex Mex in fact disputed those arguments at length and urged the Board not to impose any restrictions on the rights sought by Tex Mex.

IV. THE LIMITATION IMPOSED BY THE BOARD WILL HAVE A SERIOUS ADVERSE AFFECT ON TEX MEX'S REVENUES AND INCOME AND WILL WEAKEN ITS ABILITY TO BE AN EFFECTIVE COMPETITOR.

The Board granted Tex Mex's responsive and terminal trackage rights applications in order "to ensure the continuation of an effective competitive alternative to UP's routing into

the border crossing at Laredo." Decision No. 44 at 149. The Board was persuaded that, without such rights, "the merger will diminish [Tex Mex's] traffic base to the point where it is unable effectively to preserve a second competitive routing at Laredo, and that the merger might endanger the essential service it provides to the more than 30 shippers located on its line." Id. at 148.

The evidence Tex Mex submitted with its applications and in its rebuttal statement, however, shows that the routing limitation the Board imposed will, in fact, have a serious adverse effect on Tex Mex's revenues and income and will greatly reduce its ability to be an effective competitor. In his traffic study, Mr. Ellebracht projected that with the full trackage rights requested by Tex Mex, Tex Mex would handle 14,354 carloads and intermodal units with those trackage rights.[6/]

Of these, 410 carloads and 3100 intermodal units were traffic that Mr. Ellebracht projected Tex Mex would move between Houston and Beaumont that had no prior or subsequent move south of Houston. Although these cars represented a relatively small portion of Tex Mex's total projected traffic and total revenues -- and pale to insignificance in comparison to UPSP's and BNSF's post-merger Houston traffic -- the loss of this traffic will a very dramatic effect on Tex Mex's net income. Based on Mr. Ellebracht's traffic projections, Patrick Krick projected that Tex Mex's net income in the first year of operation would be $269,000 with unrestricted rights but only $19,000 -- $250,000 less -- if it could not carry this traffic. TM-34, Krick RVS at 2-3.

6/ See Ellebracht workpapers and UP/SP-231, Peterson RVS at 118-119. These carloads do not include traffic that Tex Mex would continue to handle without using the trackage rights.

Although Tex Mex correctly stated in its rebuttal statement that it could survive without this traffic, it should be apparent that its survival will be extremely tenuous under the limitation imposed by the Board.[2/] Its marginal income will hardly be sufficient to permit it to weather adverse business cycles of any substantial duration, and will make it very difficult to compete aggressively against UPSP and BNSF with its trackage rights.

CONCLUSION

The Board should reopen Decision No. 44 in this proceeding and remove the routing restriction on the trackage rights granted to Tex Mex in Sub-No. 13 and Sub-No. 14.

Respectfully submitted,

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Attorneys For Texas Mexican Railway Company

Dated: September 3, 1996

2/ As noted earlier, Tex Mex's submission of evidence showing that it could survive without this traffic was not to suggest that the traffic was unimportant but was for the purpose of ensuring that the Board would not reject is applications in their entirety if it concluded, contrary to Tex Mex's contention, that the right to carry it had not been justified.

APPENDIX A
SUPPLEMENTAL VERIFIED STATEMENT OF
CURTIS M. GRIMM

SUPPLEMENTAL
VERIFIED STATEMENT OF DR. CURTIS GRIMM
IN SUPPORT OF
PETITION TO REOPEN

SUPPLEMENTAL VERIFIED STATEMENT
OF DR. CURTIS GRIMM
IN SUPPORT OF
PETITION TO REOPEN

I. QUALIFICATIONS

My name is Curtis M. Grimm, and I am Professor and Chair of Transportation, Business and Public Policy, College of Business and Management, University of Maryland at College Park. I have been a member of this College since 1983. I received my B.A. in economics from the University of Wisconsin-Madison in 1975 and my Ph.D. in economics from the University of California-Berkeley in 1983. My Ph.D. dissertation investigated competitive impacts of railroad mergers.

My background includes extensive exposure to public policy issues regarding transportation, including Interstate Commerce Commission ("ICC") merger adjudication. I have previously been employed by the Wisconsin Department of Transportation, the ICC, and the Australian Bureau of Transport and Communication Economics, and I have provided consulting services to several other government agencies and private firms regarding transportation issues.

My research has involved deregulation, competition policy, competitive interaction and management strategy, with a strong focus on transportation. This research has resulted in over 60 publications, including articles in leading journals such as Journal of Law and Economics, Transportation Research, Transportation Journal, Logistics and Transportation Review, Academy of Management Journal, Management Science, Strategic

Management Journal, and Journal of Management. More than two dozen of my publications have dealt specifically with the railroad industry, mainly on deregulation, mergers, and competition issues. I have also co-authored four monographs. Further details may be found in the vitae attached to my March 29, 1996 submission for the Kansas City Southern Railway Company ("KCS") in this proceeding (KCS-33 at 244-259).

I am simultaneously submitting a statement for KCS with regard to the competitive effects of the merger in the Lake Charles area. Specifically, my analysis shows that the addition of a third carrier - BNSF - is not justified by "monopoly bottleneck" effects of the UP/SP merger.

I previously submitted statements in this case on behalf of KCS and the Texas Mexican Railway (Tex Mex). In my previous statements, I provided evidence regarding the anti-competitive effects of the UP/SP merger. My evidence pertained to the competitive effects of the merger in the United States generally and with regard to U.S.-Mexico traffic. More specifically, in *Comments of Kansas City Southern Railway Company and Request for Conditions* (KCS-33) dated March 29, 1996, I testified regarding the competitive effects of the merger, based on a BEA-BEA analysis. The purpose of this statement is to briefly review and summarize the results of that analysis with regard to Houston traffic.

I have been assisted in developing this statement by

Joseph J. Plaistow, Senior Consultant for Snavely King Majoros O'Connor & Lee, Inc. with offices at 1220 L Street, NW, Washington, DC 20005. Mr. Plaistow has submitted three previous statements in this proceeding on behalf of KCS.

II. THE COMPETITIVE HARM RESULTING FROM A 3-TO-2 REDUCTION OF CARRIERS IS FAR MORE SEVERE IN THE HOUSTON MARKET THAN IN OTHER MARKETS.

The Board in Decision No. 44 generally concluded that the competitive harm to shippers who will go from being served by three railroads to two railroads was outweighed by the public benefits that the merger will bring and is adequately remedied by the conditions imposed by the Board. Decision No. 44 at 119-121. In reaching that conclusion, it is significant that the Board did not conclude that a 3-to-2 reduction will not result in a loss of competition, either as a general matter or specifically in the context of this merger. On the contrary, the Board acknowledged that "the pervasive reduction of the major rail carriers across the West from three to two carriers could be grounds for concern," (id. at 119) and that shippers going from 3-to-2 carriers were likely to experience substantial rate increases as a result, although it expressed some doubt about certain estimates of the magnitude of those increases (id. at 121). The Board's conclusion that the overall 3-to-2 competitive harms caused by this merger are outweighed by the public benefits and

are adequately remedied by the conditions imposed was based its analysis of the specific circumstances of this merger, and it rested heavily on two findings. First, it stated:

> We have examined in detail the nature of the 3-to-2 traffic at issue, and have determined that it presents little potential for significant, merger-related competitive harm. Most of this traffic is either intermodal or automotive traffic that enjoys vigorous motor carrier competition.

Id. at 119. Second, it stated:

> Another key factor in our analysis is the limited role now played by SP as the third carrier in these markets. . . . As a result, SP's role, particularly with regard to the very service-sensitive automotive and intermodal traffic that makes up a large part of the 3-to-2 traffic, has diminished. (According to applicants, SP now handles only 20% of 3-to-2 traffic.) Two decades ago, for example, SP was the dominant automotive carrier in the West, with direct service to and from four automobile assembly plants in California. Since then, as a result of the closure of three of these four plants and SP's decline in service, SP has fallen to a very small share (less than 10% in 1994) of the automobile business handled by the western railroads. SP has been unable to make necessary investments in new automobile facilities and auto-handling freight cars.

Id. at 121.

Neither of these findings apply to the Houston market. In terms of 3-to-2 effects, that market is unique and the competitive harms resulting from the loss of a third major carrier are far more severe than in other markets. First, unlike other 3-to-2 markets discussed in the Board's decision, very little of the

8/29/96

Snavely King

Traffic and Route Shares of Traffic to and from Houston BEA: All Commodities
3 Independent Competing Routes Pre-Merger, 2 Independent Route Post-Merger
UP and SP Each in at Least One Competing Route
UP, SP, CNW, BN, ATSF, and KCS 100% Traffic Tapes and 1994 ICC Waybill Sample

Origin BEA		Destination BEA						ORIGIN TO DESTINATION								
								CARLOAD MARKET SHARE				SP	REVENUE MARKET SHARE			
No.	Name	No.	Name	Carloads	Net Tons	Total Revenue	Avg Miles	UP	SP	UP/SP	OTHER	Carloads	UP	SP	UP/SP	OTHER

REDACTED

8/29/96

Snavely King

Traffic and Route Shares of Traffic to and from Houston BEA: All Commodities
3 Independent Competing Routes Pre-Merger, 2 Independent Route Post-Merger
UP and SP Each in at Least One Competing Route
UP, SP, CNW, BN, ATSF, and KCS 100% Traffic Tapes and 1994 ICC Waybill Sample

Origin BEA		Destination BEA						ORIGIN TO DESTINATION								
								CARLOAD MARKET SHARE					REVENUE MARKET SHARE			
No.	Name	No.	Name	Carloads	Net Tons	Total Revenue	Avg Miles	UP	SP	UP/SP	OTHER	SP Carloads	UP	SP	UP/SP	OTHER

REDACTED

this traffic is chemicals. These markets, although theoretically capable of service by three carriers before the merger, are in fact closer in character to 2-to-1 markets.[2]

The harm to Houston shippers that will result from the loss of one of three competing carriers can be seen from examining the relationship between rate levels for chemical traffic and the degree of competition for the traffic. To assess this, I reviewed the rail rates for chemical traffic contained in Appendix 8 of my statement in KCS-33. I averaged the rail rates for chemicals in Houston 2-to-1 markets (i.e. markets currently served by two carriers which the merger will reduce to one), as well as the rail rates for chemicals in Houston 3-to-2 markets (i.e. markets currently served by three carriers which the merger will reduce to two). I found that the chemical traffic in Houston markets served by two carriers moves at average rates of 48 mills per ton-mile, whereas the chemical traffic in Houston markets served by three

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2 These markets are in fact similar to the pre-merger market for U.S.-Mexican traffic, as to which the Board found it appropriate to grant Tex Mex trackage rights to preserve effective competition in that market. Although Tex Mex had argued that the U.S.-Mexican market was a 3-to-2 market because three carriers, UP, SP and BNSF, now serve it, the Board found that this market was "not a 3-to-2 situation" because "in 1994, BNSF handled only 3% of all U.S.-Mexican rail traffic at the border" and was an "extremely limited presence." Decision No. 44 at 148. In support of this conclusion, the Board cited my testimony that, as to U.S.-Mexican rail transportation, "the effects of the merger will be much closer to a 2-to-1 reduction than a 3-to-2 reduction. Although BNSF will be a theoretical competitor, it will be a very minor and ineffective one." Id. at 148, n. 182, citing Grimm VS, TM-23 at 122. The same conclusion applies to many rail markets originating or terminating in Houston.

carriers moves at average rates of 38 mills per ton-mile, which are 22% lower than rates in the two-carrier markets. This data provides persuasive evidence that the loss of three competitive rail alternatives for Houston shippers will result in a substantial increase in rates.

In summary, the Board's analysis in rejecting the importance of 3-to-2 competitive harm simply does not apply to the Houston 3-to-2 traffic. Accordingly, I believe the Board should grant Tex Mex full access in Houston, just as it has with respect to U.S.-Mexico to remedy a serious loss of competition that will otherwise occur.

VERIFICATION

I, CURTIS M. GRIMM, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Supplemental Verified Statement. Executed on September 2nd, 1996.

Curtis M. Grimm

Curtis M. Grimm

APPENDIX B
SUPPLEMENTAL VERIFIED STATEMENT OF
JOSEPH F. ELLEBRACT

VERIFIED STATEMENT OF JOSEPH F. ELLEBRACHT

I. INTRODUCTION

My name is Joseph F. Ellebracht. I am an independent transportation consultant and I have submitted two verified statements in Finance Docket 32760 in support of the responsive application and the terminal trackage rights application of The Texas Mexican Railway Company ("Tex Mex"). The Surface Transportation Board granted the two applications, in part to ensure that Tex Mex has the traffic necessary to keep it competitive and viable, and further to ensure its continued presence at Laredo for U.S.-Mexican traffic. The Board, however, placed certain restrictions on the rights it granted to Tex Mex. In this statement I discuss how the restrictions will be impractical to apply in some cases and will prevent Tex Mex from competing for certain traffic.

II. SUMMARY OF THE RESTRICTIONS

The Board granted Tex Mex trackage rights from Robstown through Houston and on to Beaumont, TX. These rights, including the terminal trackage rights through Houston, were restricted to the transportation of freight having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line of the Tex Mex.[1] The routing restrictions imposed on Tex Mex's mileage rights are very different from access and commodity restrictions more commonly imposed on trackage rights. In my opinion, based

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[1] Surface Transportation Board Decision No. 44 in Finance Docket No. 32760, August 12, 1996, at page 150.

on many years experience marketing for Southern Pacific, [illegible] routing restrictions will impose unwarranted costs and ope[illegible] inefficiencies on Tex Mex and will seriously impact its ab[illegible] to compete for much traffic from the United States to Mexic[illegible] otherwise would in fact traverse its line.

III. ADVERSE IMPACT OF THE BOARD'S RESTRICTIONS

It is common practice for some shippers to consign traffic to carriers before an ultimate destination has been determined. Additionally, traffic is sometimes diverted from one destination to another. For example, manufacturers of plastics in Houston often will produce plastic pellets that will be sent straight from the manufacturer into storage in transit until a buyer can be found.

If the shipper were to send to Tex Mex traffic that was later destined to locations Tex Mex was not permitted to handle, that traffic would have to be switched from Tex Mex to another carrier that could handle the traffic. The shipper would incur at least a switch charge and possibly additional transit time that would not be incurred if the traffic was sent to another carrier instead. Without the restriction, Tex Mex would move the traffic along towards its ultimate destination, interchanging it with the carrier that would eventually deliver it.

In my opinion, the Board's routing restriction is likely to discourage shippers from giving any freight to Tex Mex if the ultimate destination of the freight has not yet been determined

or the traffic may later be diverted to another destination, even if it is very likely that the freight will eventually be routed to Mexico. That is so because the shipper will not want to take the chance of the significant additional costs in switch charges and transit time that the restriction might impose.

VERIFICATION

I, Joseph F. Ellebracht, certify under penalty of perjury the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement.

Executed on August 29, 1996.

Joseph F. Ellebracht

APPENDIX C
REBUTTAL IN SUPPORT OF THE RESPONSIVE APPLICATION
OF THE TEXAS MEXICAN RAILWAY COMPANY (TM-34)
PAGES 5-7

REDACTED - To be filed on the public record TM-34

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORP., UNION PACIFIC RR. CO. AND MISSOURI PACIFIC RR CO.
– CONTROL AND MERGER –
SOUTHERN PACIFIC RAIL CORP., SOUTHERN PACIFIC TRANS. CO., ST. LOUIS SOUTHWESTERN RW. CO., SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN CORP.

Finance Docket No. 32760, Sub No. 13

THE TEXAS MEXICAN RAILWAY CO.
– TRACKAGE RIGHTS OVER LINES OF
THE UNION PACIFIC RR. CO. AND SOUTHERN PACIFIC TRANS. CO.

Finance Docket No. 32760, Sub No. 14

THE TEXAS MEXICAN RAILWAY COMPANY
– TERMINAL TRACKAGE RIGHTS OVER LINES OF
THE HOUSTON BELT & TERMINAL RAILWAY CO.

REBUTTAL IN SUPPORT OF THE RESPONSIVE APPLICATION OF THE TEXAS MEXICAN RAILWAY COMPANY

Richard A. Allen
Andrew R. Plump
John V. Edwards
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W., Suite 600
Washington, D.C. 20006-3939
(202) 298-8660
Attorneys for The Texas Mexican Railway Company

May 14, 1996

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the federal and state agencies with primary responsibility for protecting competition have concluded that the merger as proposed by the Applicants will have profound anticompetitive consequences. This Board may not be bound by the views of the Department of Justice, the Department of Agriculture and all of the pertinent agencies of the State of Texas, but the Board should respect the important responsibilities of those agencies and for that reason should give their views the most careful consideration. Conditions designed to mitigate the anticompetitive effects found by those agencies should not be rejected by this Board unless there is compelling evidence that they are wrong or that the requested conditions will substantially harm Applicants or significantly reduce the public benefits of the transaction. There is no such e[illegible]ce in this case.

I. TEX MEX'S MOTIVATIONS ARE NO SECRET.

Applicants and their witnesses have argued that Tex Mex's real motives are not to preserve competition in the markets Tex Mex serves but are simply to enrich KCS and "give KCS the general access to Houston that it has long desired." UP/SP-230 at 305-306; see also, UP/SP-231, Peterson RVS at 115-120. This claim is completely unfounded.

Tex Mex's motivations are no secret. As Tex Mex made clear in its responsive application, Tex Mex's principal objective is to preserve for shippers of goods between the United States and Mexico an effective third competitive rail alternative to a merged UPSP and BN/Santa Fe. The most logical means of achieving this objective, which also has the least impact on Applicants, is for Tex Mex to obtain trackage rights enabling it to connect directly with KCS at Beaumont. This remedy is needed and justified because the remedy the

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Applicants have proffered -- BN/Santa Fe trackage and haulage rights -- is not by itself sufficient to remedy the loss of competition that will result from the loss of SP as an independent competitor.

Tex Mex also made clear that the remedy it seeks would also further a related objective -- the effort of TMM and KCSI[2/] to establish an effective and competitive rail service between the midwestern United States and central Mexico by obtaining one or more rail concessions in Mexico in the upcoming privatization of Mexico's rail lines. Such a service would further the policies of NAFTA as well as Mexico's efforts to introduce efficiency and competition to Mexico's rail system. The trackage rights Tex Mex seeks and the direct connection to KCS will greatly strengthen the competitiveness and efficiency of that service.

Applicant's suggestion that Tex Mex's real object is to give KCS access to Houston shippers is absurd. KCS already has direct access to Houston for grain traffic via a haulage rights agreement with UP, and KCS can also serve shippers in Houston via interline service with UP, SP, HBT and PTRA. Tex Mex's responsive application seeks the right for Tex Mex to carry overhead traffic on the lines on which it requests trackage rights, the right to interchange with other railroads at any interchange point on those lines and the right to serve shippers currently capable of receiving service from both UP and SP directly or through reciprocal switching. Tex Mex is not seeking the right to serve any shippers on those lines that are currently served only by UP or SP.

[2/] TMM and KCSI are the corporate parents of Tex Mex. KCS is also a subsidiary of KCSI. TMM has no corporate affiliation with KCS.

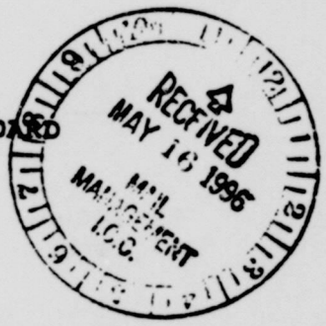
The justification for Tex Mex being able to serve 2-to-1 shippers in Houston and the shippers served by the Houston terminal railroads, HBT and PTRA, via interchange with those railroads is the same as for its being able to carry overhead traffic to Beaumont. For shipments through Laredo, those shippers, like shippers beyond Beaumont, will lose an important competitive alternative -- service by an independent SP -- as a result of the merger. BN/Santa Fe service via the BN/Santa Fe Settlement will not be an adequate competitive replacement for those shippers.

An incidental competitive benefit of granting the rights Tex Mex seeks is that Tex Mex could carry some shipments between Beaumont and Houston that had no prior or subsequent rail movement south of Houston. This, however, would be a relatively minor benefit, and it was certainly not a central purpose of the application. Tex Mex submits that there is no reason to deny a remedy that is appropriate to mitigate anticompetitive effects of a merger merely because the remedy has other incidental competitive benefits, or to perform some Procrustean operation on that remedy just to prevent it from being too beneficial. However, if the Board concludes that providing those shippers with this modicum of additional competition is not competitively justified, it could limit the rights granted to exclude Tex Mex from carrying shipments between Houston and Beaumont that have no prior or subsequent movement by rail south of Houston. Such a limitation would not undermine the purposes for which the rights are being sought. Nor would it significantly affect Tex Mex's ability to provide essential services for customers local to its line.

In sum, there is no basis for Applicants' suggestion that Tex Mex's application is driven by undisclosed objectives unrelated to the competitive impacts of the merger.

APPENDIX D
ERRATA BY WAY OF CLARIFICATION TO THE REBUTTAL STATEMENT IN SUPPORT OF THE RESPONSIVE APPLICATION OF THE TEXAS MEXICAN RAILWAY COMPANY (TM-35)

TM-35



BEFORE THE
SURFACE TRANSPORTATION BOARD

Union Pacific Corp., Union Pacific RR. Co. and Missouri Pacific RR Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Trans. Co., St. Louis Southwestern Rw. Co., SPCSL Corp. and The Denver and Rio Grande Western Corp.	Finance Docket No. 32760

ERRATA BY WAY OF CLARIFICATION TO THE REBUTTAL STATEMENT IN SUPPORT OF THE RESPONSIVE APPLICATION OF THE TEXAS MEXICAN RAILWAY COMPANY

The Texas Mexican Railway Company ("Tex Mex") has reason to believe that some parties may be misconstruing and may misrepresent statements made on page 7 of TM-34, Rebuttal In Support of the Responsive Application of Texas Mexican Railway Company, concerning certain traffic between Houston, Texas and Beaumont, Texas. Accordingly, Tex Mex is filing this errata by way of clarification to make clear that it has made no concessions or amendments to its responsive application, and does not support or endorse any limitation of the trackage rights

sought in that application.

Respectfully submitted,

Richard A. Allen
Andrew R. Plump
John V. Edwards
ZUCKERT, SCOUTT & RASENBERGER, LLP
888 Seventeenth Street, NW
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Washington, DC 20006-3939
202/298-8660

Attorneys for Texas Mexican Railway

Dated: May 16, 1996

47

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served the foregoing TM-35, "Errata by way of Clarification to the Rebuttal Statement in Support of the Responsive Application of the Texas Mexican Railway Company," by hand delivery upon the following persons:

Arvid E. Roach II
J. Michael Hemmer
Michael L. Rosenthal
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-7566

Paul A. Cunningham
Richard B. Herzog
James M. Guinavan
Harkins Cunningham
Suite 600
1300 Nineteenth Street, N.W.
Washington, D.C. 20036

I have also caused to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery, all persons on the official service list in Finance Docket No. 32760.

John V. Edwards
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& Rasenberger, L.L.P.
Brawner Building
888 17th Street, N.W.
Washington, D.C. 20006-3959
(202) 298-8660

Dated: May 16, 1996

46

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served both the Highly Confidential and Public versions of the foregoing TM-44, the Texas Mexican Railway Company's Petition to Reopen Decision No. 44, by hand delivery upon the following persons:

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J. Michael Hemmer
Michael L. Rosenthal
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-7566

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1300 Nineteenth Street, N.W.
Washington, D.C. 20036

I have also caused to be served by first-class mail, postage pre-paid, or more expeditious manner, the Highly Confidential version of the filing on the Honorable Judge Nelson and all persons on the restricted service list and the Public version of the filing on all other persons on the official service list.

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Dated: September 3, 1996

STB FD . 32760 9-3-96 I . 85581

85581

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September 3, 1996

HAND DELIVERED

Mr. Vernon A. Williams
Surface Transportation Board
Case Control Branch
Room 2215
1201 Constitution Avenue, N.W.
Washington, D.C. 20423

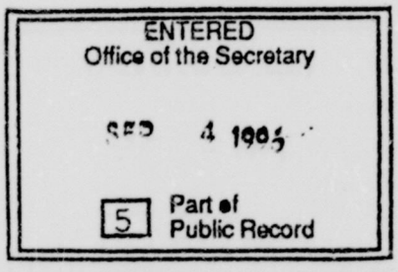
Re: Finance Docket No. 32760, *Union Pacific Corporation, et al. -- Control & Merger -- Southern Pacific Rail Corporation, et al.*

Dear Secretary Williams:

Enclosed for filing in the above-captioned case are an original and twenty copies of a Highly Confidential and Public (redacted) version of The Kansas City Southern Railway Company's Petition to Reopen/Reconsider (KCS-65).

Copies of the public version of this Petition have been served on all parties of record and copies of the Highly Confidential version of this petition have been served on parties on the outside counsel Restricted Service list.

We are also enclosing a 3.5 inch Word Perfect diskette containing the Highly Confidential version of the text of KCS-65.



Sincerely yours,

William A. Mullins
Attorney for Kansas City Southern
Railway Company

cc: Parties of Record

Item No. _____

Page Count 52

Sep #4

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

PETITION OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY TO
REOPEN/RECONSIDER

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September 3, 1996

Attorneys for The Kansas City
Southern Railway Company

BEFORE THE
SURFACE TRANSPORTATION BOARD

ORIGINAL

Finance Docket No. 32760

PETITION OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY TO REOPEN/RECONSIDER

PREFACE AND SUMMARY OF ARGUMENT

The Kansas City Southern Railway Company ("KCS"), pursuant to 49 U.S.C. § 10327(g)(1) and Section 1115.3 of the Commission's Rules of Practice, 49 C.F.R. § 1115.3(b)(1) and (3), respectfully petitions the Surface Transportation Board ("Board") to reopen the above captioned proceeding and to reconsider portions of Decision No. 44 dated August 6, 1996,[1] for the reason that the Commission's decision has been affected materially by new evidence and contains material error.[2]

The BNSF and CMA agreements granted BNSF access to shipper facilities in Louisiana at Lake Charles, Westlake, and West Lake Charles (collectively, the "Lake Charles area").[3] Decision No. 44, however, lifted certain route and rate restrictions that were imposed on BNSF's access in the Lake Charles area in the CMA agreement, which

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[1] Decision No. 44 was served on August 12, 1996, and this petition is therefore timely. 49 CFR § 1115.3(e).

[2] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, took effect on January 1, 1996 (the "Act"). The Act abolished the ICC and transferred certain functions and proceedings, including this proceeding, to the Surface Transportation Board ("STB"). Except as otherwise noted, all citations contained in these comments are to the former section of the Interstate Commerce Act. It is also assumed for purposes of the filing, that all references to the "Commission" or "Interstate Commerce Commission" or the "ICC" are interchangeable with references to the "Board" or the "STB."

[3] *See* CMA Agreement at ¶ 8, amended at UP/SP-260 at 23, n. 9; and as further implemented by the second supplemental agreement to the BNSF agreement dated June 27, 1996 (UP/SP-266, Exhibit A, amending the BNSF agreement ¶ 5b).

thereby expanded BNSF's access to the Lake Charles area shipper facilities. *See* Decision No. 44 at 152-154; and 188-189.[4]

While the Board, in expanding on BNSF's access, was attempting to deal with certain arguments raised by KCS, Montell, and The Society of Plastics Institute (SPI), based upon the new evidence submitted herein, it appears that the Board has inadvertently violated Commission precedent. Furthermore, unbeknownst to the Board, UP/SP did not have the authority to provide BNSF, in the CMA agreement, access to the Lake Charles facilities without KCS's consent or without requiring BNSF to file a terminal trackage rights application under 49 U.S.C. § 11102 (formerly § 11103). Accordingly, the Board should not have granted BNSF access to the Lake Charles area as a condition to the merger, and at a very minimum, should not have expanded upon that access. Instead, the Board should substitute the conditions proposed herein. These proposed conditions would preserve, but not enhance, the competitive options available to Lake Charles area shippers.

ARGUMENT

A. DESCRIPTION OF RAILROAD OPERATIONS IN THE LAKE CHARLES AREA

The Lake Charles area consists of three distinct railroad stations, Lake Charles, Westlake, and West Lake Charles. A description of the physical location of these 3 stations, including a map, is contained in the Verified Statement of Kenneth D. Clark, Jr., KCS's Vice President-Marketing, Chemical and Petroleum business units, attached as Exhibit "A" (V.S. Clark).

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[4] Despite KCS's request, KCS was not allowed to submit argument and evidence on the CMA agreement. Decisions Nos. 35 and 38. Furthermore, UP/SP modified the CMA and BNSF agreements in their brief and June 28th filing, far after the time available to KCS to submit evidence and argument. *See* UP/SP-260 at 23, n. 9 and UP/SP-266. As noted, the Board further modified these provisions in their decision. Accordingly, this is the first opportunity that KCS has to submit argument and evidence on these issues.

Lake Charles, LA is on the east side of the Calcasieu River. Currently, the majority of rail traffic activity there is the general cargo docks of the Port of Lake Charles Authority. Those docks are served exclusively by Missouri Pacific Railroad Company ("MoPac")[5] but are open through reciprocal switching to SP and KCS. V.S. Clark at 1.

On the west bank of the Calcasieu River and North of Interstate 10 is Westlake, a point served by KCS and SP jointly, but open to MoPac through reciprocal switching. The main shippers are PPG Industries, Vista Chemical, Conoco Oil Refinery, and Olin Chemical. On the western edge of Westlake, south of I-10 lies the KCS-SP terminal yard referred to as Rose Bluff Yard. The yard is owned jointly by KCS and SP and is designed to allow KCS and SP to interchange cars with each other that move to/from industries on the west side of the river. MoPac does not have access to Rose Bluff Yard. V.S. Clark at 2.

West Lake Charles is south of Rose Bluff Yard and also on the western side of the Calcasieu River. West Lake Charles is not open to reciprocal switching to MoPac, and is served only by KCS and SP. Some of the industries there are West Lake Polymers, Citcon, Firestone - Bridgetone Rubber Co., Montell Plastics, Kronos Corp, NL Baroid, Citgo Refinery, Davison Chemical, Conoco Pecan Grove, Venco Carbon, and Port of Lake Charles Bulk Terminal No. I. V.S. Clark at 3.

The 3 stations combined generate $99.4 million of originated traffic -- 45% of the originated traffic is generated at West Lake Charles, 39% is generated at Westlake and the remaining 16% is generated at Lake Charles. KCS originates 55% of the total traffic. SP originates 38% of the traffic and UP originates the remaining 7%. KCS originates 63% of

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[5] Missouri Pacific Railroad Company is a sister corporation to Union Pacific Railroad Company, both of which are applicants herein. References to "MoPac" or to "UP" shall refer to both entities.

its traffic from Westlake and 37% from West Lake Charles. V.S. Grimm, Table 1.[6] Due to the 1982 bridge washout and SP's high switching charge for KCS's access over SP's bridge, KCS originates less than 1% of the traffic at Lake Charles. *Id.*

The 3 stations combined receive $35.5 million of terminated traffic--63% of the traffic terminates at Lake Charles, 28% terminates at West Lake Charles, and 9% terminates at Westlake. KCS terminates 37% of the traffic. SP terminates 20%, and UP terminates 42%. KCS terminates 68% of its traffic at West Lake Charles, 13% at Westlake, and 19% at Lake Charles. V.S. Grimm, Table 2.

To accommodate the shippers' needs in the most efficient and economical manner, KCS and SP have shared the switching responsibilities at Westlake, Rose Bluff Yard, and West Lake Charles. V.S. Clark at 2-3; V.S. Tom J. Nelson (HC 0001455K through HC 0001517 K). This agreement has undergone changes from time to time, but it basically divides the area into Zones I and II. Zone responsibility changes every other year (odd numbered years) on March 1; that is, KCS currently switches Zone II and SP switches Zone I, with Bayou D'Inde being the general dividing line. Zone I embraces Westlake and Rose Bluff Yard. Zone II embraces all industries at West Lake Charles. V.S. Nelson (HC 0001503K - HC0001517K). On March 1, 1997, KCS is scheduled to take over switching in Zone I and SP (UP/SP post merger) will assume switching in Zone II. The zones were established to achieve a balance of overall switching volumes.

These joint KCS and SP operations have evolved over 50 years of operations and involve complex contracts, tariffs, and switching operations. The addition of BNSF as another carrier with direct access in this area would further complicate the operational and

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[6] The Verified Statement of Dr. Curtis Grimm ("V.S. Grimm") is attached as Exhibit B.

switching aspects. V.S. Clark at 6. It would create new problems regarding operations, the use of joint facilities, and issues surrounding the proper amount of compensation to be paid for the use of the KCS/SP facilities. None of these issues were raised or addressed by Applicants, BNSF, or the Board.

B. THE EVIDENCE ESTABLISHES THAT GRANTING BNSF DIRECT ACCESS TO THE LAKE CHARLES AREA FOR ALL DESTINATIONS VIOLATES LONG STANDING PRECEDENT

The original BNSF agreement, dated September 25, 1995, did not include BNSF access to shippers in the Lake Charles area. The supplemental BNSF agreement, dated November 18, 1995, also failed to include access for BNSF to Lake Charles area shippers. Perhaps due to the arguments of KCS, Montell, and others, Applicants, in the CMA Agreement, Paragraph 8, granted BNSF access to the Lake Charles area:

> The BN/Santa Fe Settlement Agreement shall be amended to give BN/Santa Fe the right to handle traffic of shippers open to all UP, SP, and KCS at Lake Charles and West Lake [sic], Louisiana (a) to, from and via New Orleans, and (b) to and from points in Mexico, with routings via Eagle Pass, Laredo (through interchange with Tex Mex at Corpus Christi or Robstown) or Brownsville, Texas. BN/Santa Fe access to the covered shippers at Lake Charles and West Lake [sic] shall be on the same basis as is provided for in the BN/Santa Fe Settlement Agreement for "2-to-1" points, except at West Lake [sic] BN/Santa Fe shall be required to pay a fee to UP/SP equal to the haulage fee that UP must now pay to KCS to access the traffic, adjusted per Section 12 of the BN/Santa Fe Settlement Agreement.

The Agreement did not give BNSF access to West Lake Charles, which is served only by SP and KCS and is not open to UP. V.S. Clark at 2. Due to continued arguments by Montell (who is located at West Lake Charles and thus did not receive BNSF access in the original CMA agreement) and others, Applicants amended the CMA agreement to include

shippers at West Lake Charles, but continued the routing restrictions.[7] The CMA agreement as modified made available to BNSF less than $5 million of the $134.9 million total Lake Charles area traffic.

The Board imposed Applicants' agreements with BNSF and CMA regarding the Lake Charles area as a condition to the merger, but modified the agreements in 3 ways important to the Lake Charles area:

> Applicants must permit interchange of Lake Charles area traffic at Texarkana, Texas, and Shreveport, Louisiana with KCS.
>
> Applicants must remove the routing restriction which limit traffic (a) to, from and via New Orleans, and (b) to and from points in Mexico, with routings via Eagle Pass, Laredo (through interchange with Tex Mex at Corpus Christi or Robstown) or Brownsville, Texas.
>
> Applicants must remove the phantom haulage charge.[8]

Decision No. 44 at 153-154.

In imposing the CMA/BNSF agreements (at least as they pertain to the Lake Charles area) as a condition and in expanding that access in the decision, the Board attempted to deal with two arguments made by KCS, SPI, Montell, and others. The first argument made, especially by KCS and Montell, dealt with the so-called "monopoly bottleneck" problem.

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[7] *See* CMA Agreement at ¶ 8, amended at UP/SP-260 at 23, n. 9; and as further implemented by the second supplemental agreement to the BNSF agreement dated June 27, 1996 (UP/SP-266, Exhibit A, amending the BNSF agreement ¶ 5b).

[8] The haulage fee referenced was $350 per car that was intended to compensate KCS for moving the traffic from Westlake to UP at DeQuincy. Because BNSF will have direct access to the Lake Charles area and would not need to utilize UP or KCS for switching, the Board refers to this fee as a "phantom haulage charge" since UP/SP would be exacting a charge for services that will never be performed. In place of the $350 charge, the Board imposed switching or haulage charges no higher than those contained in other sections of the BNSF agreement. Decision No. 44 at 153.

The second argument, made mainly by SPI, addressed the plastics shippers' need for adequate storage facilities.[9]

The monopoly bottleneck theory concerned the need to preserve two independent routings, post merger. For example, prior to the merger, shippers in West Lake Charles or Westlake have utilized two independent routes for shipments to Houston, New Orleans, or St. Louis; either a KCS/UP joint line route--where KCS interchanges the traffic with UP at DeQuincy, LA for movements to Houston or New Orleans, or with UP at Texarkana, TX, for movements to Memphis or St. Louis--or an SP single-line route. After the merger, UP/SP would have a "monopoly bottleneck" for either one of these routes and shippers would thus lose 1 of 2 independent routes. *See* Decision No. 44 at 152-153. As Dr. Grimm's statement shows, when it issued its decision. The Board did not have before it the evidence that shows the potential monopoly bottleneck traffic represented only $11.7 of the Lake Charles area traffic, a small fraction of the total Lake Charles area traffic. V.S. Grimm at 8.

To deal with this potential bottleneck problem, the Board required Applicants to ensure that KCS could interchange traffic with BNSF at Texarkana and Shreveport for movements to Memphis, St. Louis, and beyond. "This will have the principal effect of substituting a KCS-BNSF joint-line movement via Texarkana and Shreveport for the existing KCS-UP joint line routing via Texarkana." Decision No. 44 at 153. Had this been the only condition imposed with respect to the Lake Charles area, it indeed would have eliminated the potential bottleneck problem and preserved two independent routings, at least with respect to those shippers who had previously utilized a KCS-UP joint-line route for movements to

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[9] It should be noted that SPI's concerns regarding storage facilities related to the Dayton area and not to the adequacy of storage facilities in the Lake Charles area.

Memphis, St. Louis, and beyond, and such a condition would have been entirely consistent with long standing Commission precedent.[10]

On the other hand, this condition alone would not alleviate the potential bottleneck problems for those shippers who currently utilize a KCS-UP joint-line movement to compete against an SP single-line movement from the Lake Charles area to Houston and New Orleans. The Board could have addressed those bottleneck routes by merely giving KCS interchange rights at Lake Charles with BNSF for New Orleans traffic and ensuring that KCS could interchange Houston bound traffic with BNSF at Beaumont, where KCS already has a connection with BNSF. These remedies would have been significantly less intrusive than those ultimately adopted by the Board.

Instead of adopting this less intrusive means of resolving the monopoly bottleneck problem, however, the Board imposed ¶ 8 of the CMA agreement, which amended the BNSF agreement, to give BNSF the right to handle traffic of shippers open to UP, SP, and KCS at Lake Charles and Westlake. Applicants later added West Lake Charles to this provision. There was one important distinction between the agreement reached between Applicants and BNSF and the Board's decision: in an apparent effort by Applicants to resolve the monopoly bottleneck problems and nothing more, ¶ 8 of the CMA agreement limited BNSF's access only to shipments to and from New Orleans and to and from points in Mexico.[11] This, in

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[10] *See UP/MP/WP*, 366 I.C.C. at 562-65; *SF/SP*, 2 I.C.C.2d at 827, 3 I.C.C.2d at 928; *UP/MKT*, 4 I.C.C.2d at 437; and this proceeding, Decision No. 44 at 144-145.

[11] *See* CMA Agreement at ¶ 8, amended at UP/SP-260 at 23, n. 9; and as further implemented by the second supplemental agreement to the BNSF agreement dated June 27, 1996 (UP/SP-266, Exhibit A, amending the BNSF agreement ¶ 5b). By itself, this arrangement did not resolve the bottleneck problem for Houston bound shipments from the Lake Charles area.

effect, substituted a single-line BNSF movement for the previous KCS-UP joint-line movement.

However, the Board did not merely impose ¶ 8. The Board went even further and required Applicants to remove the routing restrictions contained within ¶ 8 and to reduce the haulage charge. Decision No. 44 at 153-154. The principal effect of these changes will be to provide BNSF direct access to all Lake Charles area shippers, even those that will suffer no competitive harm from the merger. Thus, all West Lake Charles traffic, not just potential bottleneck traffic, now has access to 3 carriers at origin rather than 2. Indeed, at least for Westlake and Lake Charles shippers, it appears that the Board has provided competitive relief for a 3 to 2 situation as these shippers prior to the merger had service from UP, SP, and KCS, and post-merger, absent the Board's grant of BNSF access, would have had service from only 2 carriers, KCS and UP/SP. With the Board's action, these shippers have 3 carrier competition preserved, KCS, UP/SP, and BNSF.

The Board's policy has always been clear:

> Competitive harm results from a merger to the extent the merging parties gain sufficient market power to raise rates or reduce service (or both), and to do so profitably, relative to premerger levels. In evaluating whether a merger is in the public interest, we seek to determine what competitive harm is directly and causally related to the merger and to distinguish that harm from any pre-existing, anticompetitive condition or disadvantage that other railroads, shippers, or communities may have been experiencing. We attempt to ameliorate harm that is caused by the merger with conditions.

Decision No. 44 at 100. Furthermore, any condition imposed must be "narrowly tailored," must not put a shipper "in a better position than it occupied before the consolidation," and should be "confined to restoring that option rather than creating new one."[12] Giving BNSF

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[12] "[A] condition must also be narrowly tailored to remedy those effects. We will not ordinarily impose a condition that would put its proponent in a better position than it occupied (continued...)

access to all of the Lake Charles area traffic, even that traffic that is not in any way subject to the monopoly bottleneck problem, is violative of those tests.

To preserve the competitive options for those potential monopoly bottleneck shippers, to be consistent with the condition imposed by the Board respecting KCS's rights to interchange with BNSF at Texarkana, and to be consistent with long standing precedent, the Board should have required Applicants to ensure that KCS could interchange traffic with BNSF at Beaumont for movements to Houston and with BNSF at Lake Charles for movements to New Orleans,[13] thereby creating a KCS-BNSF joint-line movement (replacing the previous KCS-UP joint-line movement) to compete against a UP/SP single-line movement, rather than creating a new single-line BNSF option that did not previously exist. V.S. Grimm at 11.[14] As another alternative, at least with respect to Houston bound traffic from the Lake Charles area, if the Board had granted Tex Mex's full responsive application

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[12](...continued)
before the consolidation." Decision No. 44 at 145 (citations omitted). "If, for example, the harm to be remedied consists of the loss of a rail option, any conditions should be confined to restoring that option rather than creating new ones." *Id.*, at 145, n. 176 (citations omitted)(emphasis added). Thus, the placement of BNSF with direct access to Lake Charles area shippers, even with the limited routing restrictions, would dramatically alter the competitive balance between the carriers in the Lake Charles region in violation of Commission precedent. As the Board stated, "we will not impose conditions that will restructure the competitive balance among railroads." Decision No. 44 at 157-158. The Board had previously made it clear that "[w]e are disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects." *Id.*, at 144. *See also*, Decision No. 44 at 157-158 (Board should not resort to more intrusive remedies when other remedies are available).

[13] Although KCS currently does not serve Lake Charles directly, it could effect a Lake Charles interchange with BNSF through intermediate switching service by SP (*see* Tariff ICC SP 9500-D, Item 6500, issued November 16, 1995 and effective January 1, 1996), or, if KCS were granted access over SP's bridge that separates Westlake and Lake Charles, KCS could directly interchange with BNSF at Lake Charles.

[14] For joint KCS/BNSF traffic moving throughout the BNSF system, KCS and BNSF also have established interchanges at Beaumont and Dallas, TX; Tupelo, MS; Neosho and Kansas City, MO.

rather than imposing the limitation on those rights, KCS could have interchanged Lake Charles area traffic at Beaumont with Tex Mex, thereby substituting a KCS-Tex Mex alternative for the prior KCS-UP move.[15] *Id.* These proposed remedies are less intrusive, merely preserve competitive options (as opposed to enhancing them), and are operationally feasible.[16]

Resolving the potential monopoly bottleneck problem is not the only justification the Board used for imposing ¶ 8 of the CMA agreement and for expanding that access. The Board's second justification addresses the need to resolve the arguments put forth by plastics shippers regarding their ability to have adequate storage capacity,[17] which concerns the Board addressed by granting BNSF access to "all SP Gulf Coast SIT [storage] facilities," Decision No. 44 at 152, and by removing the geographic restrictions placed upon BNSF's Lake Charles area access in order to "permit BNSF to offer SIT facilities for a full range of destinations, without which shippers might be hesitant to use BNSF service for any shipments requiring SIT." *Id.*, at 153. As set forth in Dr. Grimm's statement, lifting this restriction, while intended to help the Lake Charles area plastics shippers who would use the newly granted BNSF access for plastics shipments, had the effect, in complete violation of precedent, of granting BNSF access to traffic that was not impacted by the merger in any

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[15] KCS understands that Tex Mex is filing a Petition To Reopen requesting removal of the limitation placed upon its responsive application by the Board, Decision No. 44 at 149-150. KCS fully supports Tex Mex's request and believes that an added benefit of granting Tex Mex's request would be to preserve two independent routings from Lake Charles to Houston in the least intrusive manner.

[16] As is discussed below in Section C, there are serious legal and operational questions caused by BNSF's direct access to the Lake Charles area. These issues were completely ignored by Applicants and not addressed in the decision.

[17] *See* Decision No. 44 at 151-152, citing SPI-11, V.S. Bowles at 3-4; V.S. Ruple at 15-17; Exhibits 8, 14, and 18.

way. Furthermore, these Lake Charles area plastics shippers represent only a fraction of the total Lake Charles area traffic. Accordingly, by removing the geographic limitation on BNSF's access, the Board once again provided enhanced access for the majority of Lake Charles area shippers who in no way need, or otherwise utilize, SIT facilities. The condition is simply not "narrowly tailored" toward resolving any alleged problems that Lake Charles area plastics shippers may suffer.

Indeed, the restriction was lifted without any evidence in the record that KCS's or SP's current plastics storage capability was inadequate for Lake Charles area shippers and without any consideration of a less intrusive remedy. KCS has ample storage capacity. In addition to its storage facilities at Westlake and West Lake Charles, KCS has constructed and provides extensive storage for plastics and other products at DeQuincy, Luddington, Beaumont, Mossville, and Buhler, all of which are near the Lake Charles area. In fact, the Mossville yard can handle all storage requested, and, unlike the SP yard at Lake Charles, the Mossville yard has room to expand. These KCS storage areas allow KCS to return cars to the manufacturing facility efficiently (within a day, in most cases on the same day) or to forward to destinations after storage. There is no need to provide another carrier direct access to this area to increase storage availability. These KCS storage areas are closer to Westlake and West Lake Charles than comparable SP facilities to which BNSF was granted access, and they remain available for use in interline shipments with BNSF just as they were in the past on interline shipments with the MoPac at DeQuincy.

Removing BNSF's direct access from the Lake Charles area and substituting a narrowly tailored condition as suggested herein by KCS would not only resolve the potential monopoly bottleneck situation without enhancing competition for the other shippers, but would also provide more than adequate plastics storage capability. Even if KCS or UP/SP

did not provide enough storage capacity (a highly unlikely event in that Lake Charles area shippers have not complained about KCS's or SP's current plastics storage capabilities and provided no such argument in this proceeding), such shippers would have the option of a KCS-BNSF interchange at Beaumont, Lake Charles, and Texarkana. Besides its own storage capability, BNSF could then take advantage of its access to all SP Gulf Coast SIT facilities, which access would not be impacted in any way by removing direct access for BNSF in the Lake Charles area. Thus, KCS-BNSF joint line service would more than sufficient for Lake Charles area plastics shippers, and further, due to the numerous KCS/BNSF interchanges, also allow such shippers to avoid the UP/SP monopoly bottleneck problem.

C. UP/SP DID NOT HAVE AUTHORITY TO PROVIDE BNSF ACCESS TO LAKE CHARLES SHIPPERS WITHOUT KCS'S CONSENT, AND BNSF THEREFORE MUST OBTAIN TERMINAL TRACKAGE RIGHTS AUTHORITY UNDER 49 U.S.C. §11102 BEFORE BNSF CAN ACCESS LAKE CHARLES SHIPPERS

The railroad operations of KCS, UP and SP in the Lake Charles area are governed by a multitude of trackage, haulage, switching, and other operating agreements among those parties. Applicants acquired access over KCS main line trackage in the area primarily pursuant to four agreements dating back to the first half of this century.[18] As shown below, Applicants did not have the authority under these agreements to grant BNSF access over KCS trackage in the Lake Charles area, as ¶ 8 of the CMA agreement purports to do.

On September 19, 1934, KCS and The Texas and New Orleans Railroad Company ("T&NO," predecessor to SP) entered into a joint facility agreement (HC 0001455 K through HC 0001467 K) whereby, among other provisions, KCS granted T&NO trackage rights over a portion of the main line of KCS's Lake Charles Branch for it to serve Mathieson Alkali

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[18] These agreements are marked Highly Confidential and are attached to the Verified Statement from Tom J. Nelson, Exhibit C, as document numbers HC 0001455 K through HC 0001517 K.

Works, Inc. (predecessor to Olin Corporation). Under a similar contract dated August 30, 1940 (HC 0001468 K through HC 0001487 K), KCS granted trackage rights to T&NO over another portion of KCS's Lake Charles Branch main line in order to serve the Continental Oil Company (predecessor to Conoco Oil Company).[19] The trackage segments described in the 1934 and 1940 agreements are part of the access grant to BNSF purportedly conveyed under ¶ 8 of CMA agreement. However, under the 1934 and 1940 agreements, Applicants did not have the authority to admit another carrier onto the trackage. The 1940 agreement merely allows T&NO, and its successors and assigns, to use track "jointly with the Kansas City Company and such other carriers as may be admitted by the Kansas City Company to the use of same." A similar provision exists in the 1934 agreement. Under these joint facility agreements, KCS remains the sole owner of the trackage, and only KCS has the right to grant another carrier access over the track.[20]

On May 21, 1947, the United States and the Reconstruction Finance Corporation deeded to KCS and T&NO, as joint owners, approximately 4.788 miles of industrial lead track and 1.635 miles of other track in the Westlake area. Although the 1947 deed conveyed to T&NO a joint ownership interest in the trackage, the operations over the trackage are governed by an agreement between KCS and T&NO dated March 29, 1948 (HC 0001488 K through HC 0001492 K). In that agreement, KCS and T&NO defined the rights of the parties in connection with the operations over the jointly owned track. The trackage segments governed by the 1948 agreement also are part of the access rights purportedly

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[19] This August 30, 1940 joint facility agreement was supplemented by an agreement dated May 5, 1951 to include new construction by T&NO and another segment of KCS main line track.

[20] These agreements generally cover the West Lake Charles and Rose Bluff Yard facilities.

granted to BNSF by Applicants under the CMA agreement. However, the 1948 operating agreement expressly provides that neither KCS nor T&NO, nor their successors and assigns, may "sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without advance written approval by the other party."[21]

Similarly, in an agreement dated July 26, 1954 (HC 0001493 K through HC 0001502 K), KCS and T&NO defined the various obligations with respect to the ownership and operation of jointly owned trackage serving the Lake Charles Harbor and Terminal District. The trackage segments governed by this agreement are also part of the access rights purportedly granted to BNSF by Applicants under the CMA agreement. Among the obligations defined in the 1954 agreement is an express provision that "neither [party] shall sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without advance written approval by the other party." Indeed, KCS is the sole owner of the "Continental Oil Company" trackage, and thus only KCS can grant additional access.

The contractual provisions found in these four governing joint facility agreements clearly prohibit Applicants from granting access to BNSF without KCS's consent.[22] Prior to entering into the CMA agreement, Applicants did not seek KCS's consent to allow BNSF to operate over KCS's trackage, nor did KCS provide its consent. Therefore, Applicants do not have authority to grant BNSF operating rights over KCS trackage. As such, any

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[21] These agreements generally cover the Westlake facilities.

[22] The intent of the joint facility agreements described above is further supported by an agreement dated September 2, 1981 (HC 0001503 K through HC 0001517 K), whereby the parties sought to change the operating procedures in the Lake Charles area in order to provide more efficient service. That agreement, which incorporates all four of the joint facility agreements, provides that "each and every provision [of the agreement] is for the exclusive benefit of the parties hereto and not for the benefit of any third party."

purported grant of operating rights to BNSF in the CMA agreement is illegal, unenforceable, and void.

It is long standing precedent that a railroad that desires access over another railroad's facilities, including jointly operated facilities, must file a terminal trackage rights application under 49 U.S.C. § 11103 (now, § 11102), even in the context of a merger or line acquisition proceeding.[23] Indeed, the terms of the statute itself provide that it is only the Board that "may require terminal facilities . . . owned by a rail carrier . . . to be used by another carrier" and then only if certain conditions are met. If a joint facility rail partner, even in the context of a merger proceeding, could simply allow another carrier over the joint facilities, over the objections of the other partner and in the face of contractual provisions to the contrary, the statute, and private contracts, would become meaningless. Applicants and BNSF must first file a section 11103 terminal trackage rights application in order for BNSF to receive the access over KCS facilities that was purportedly conveyed under the CMA agreement.

Additionally, even if ¶ 8 of the CMA agreement should be imposed by the Board as a condition to the merger, which it should not,[24] the Applicants cannot simply invoke the

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[23] *See CSX Corp. -- Control -- Chessie and Seaboard C.L.I.*, Finance Docket No. 28905 (Sub-No. 1), 363 I.C.C. 584 (ICC Decided September 23, 1980; *UP/MP/WP*, 366 I.C.C. at 574-576; *Rio Grande Indus., et al. -- Purchase and Related Trackage Rights -- Soo Line Railroad Company Line Between Kansas City and Chicago, IL*, Finance Docket No. 31505, Decision No. 6 (ICC Served November 15, 1989); and *Rio Grande Indus., Inc. et al -- Purchase and Trackage Rights -- Chicago, Missouri & Western Railway Company Line between St. Louis, MO and Chicago, IL*, Finance Docket No. 31522, 5 I.C.C.2d 952 (1989).

[24] By adopting ¶ 8 and imposing it as a condition, the Board actually increased the number of carriers at West Lake Charles from two (KCS and SP) to three (KCS, UP/SP, and BNSF) and maintained three carrier competition at Westlake and Lake Charles. The imposition of ¶ 8 as a condition, granting BNSF direct access to the Lake Charles area, was thus itself contrary to Commission precedent.

immunity provision of 49 U.S.C. § 11341(a) (now, § 11321(a)) to override the contractual provisions found in the joint facility agreements in the absence a terminal trackage rights application under § 11103. Although § 11341 provides that a person participating in an approved railroad merger is "exempt from antitrust laws and from all other law . . as necessary to let that person carry out the transaction," this section cannot be interpreted to deprive another carrier of the use of its property without adequate due process of law, adequate compensation, and without an opportunity to resolve operational problems.

Under the rules of statutory construction, section 11341(a) cannot be read to exempt applicants from the requirements of § 11103, just as § 11341(a) could not be read to exempt the merger from any other provision of the Interstate Commerce Act, such as labor protection. In reading Section 11341 and Section 11103, the Board must interpret the statutes as being consistent with one another when possible. *Local 478 Trucking and Allied Industries Pension Fund v. Jayne*, 778 F. Supp. 1289 (D.N.J. 1991). In resolving the apparent conflict between § 11341 and § 11103, the Board must regard each statute as effective wherever possible, absent clearly expressed congressional intent to the contrary. *Muller v. Lujan*, 928 F.2d 207 (6th Cir. 1991); *U.S. v. Norquay*, 905 F.2d 1157 (8th Cir. 1990). The Board's discussion of the section 11341(a) issue in the context of that terminal trackage rights application makes it clear that § 11103 and § 11341 may be harmoniously applied in the context of a merger.

If Applicants wish to gain trackage rights in the face of contractual provisions to the contrary, even in the context of a merger proceeding, they must file an application for terminal trackage rights under § 11103. If Congress did not intend Section 11103 to apply in the context of a merger proceeding, it would have expressed that intent in the language of the

statute.[25] Therefore, a terminal trackage rights application is a necessary prerequisite for Applicants to use the immunity provision of § 11341 to override the contractual obligations governing the Lake Charles area trackage.

Applicants themselves recognized that a § 11103 terminal trackage rights application is necessary in order to override contractual provisions protecting a carrier's ownership interest in a terminal facility.[26] In Sub-No. 9, Applicants and BNSF sought terminal trackage rights for BNSF over three segments of KCS trackage (joint facility segments in Beaumont and Shreveport) despite contractual provisions limiting access to carriers approved by KCS. Instead of relying solely upon § 11341 to override the consent provisions in the governing contracts, Applicants acknowledged the necessity for a § 11103 terminal trackage rights application requesting BNSF access over the KCS trackage. In granting the relief, the Board likewise did not invoke § 11341 immunity to override the contractual consent provisions. Instead, the Board recognized that there was no need to invoke the immunity provision as long as § 11103 remained available.[27]

Accordingly, a § 11103 terminal trackage rights application is necessary to ensure that an owner of the facilities is afforded constitutional due process before its property is taken for another's use. The application procedure provides the owner with an opportunity to

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[25] In that Congress only recently rewrote the Interstate Commerce Act, after Applicants had filed their merger application, Congress had the full opportunity to change the terminal trackage rights statute, but Congress did not modify, repeal, or otherwise substantively change former § 11103. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, enacted December 29, 1995, effective January 1, 1996, section 11102.

[26] Similarly, Tex Mex, instead of relying upon § 11341(a)'s preemptive authority, also filed a terminal trackage rights application seeking access to the Houston Belt Terminal railroad.

[27] "We think that an override of the restrictions in KCS' trackage rights agreements would be necessary to carry out the merger here if section 11103 were unavailable." Decision No. 44 at 170 (emphasis added)(footnote omitted).

demonstrate that the proposed usage is not practicable and not in the public interest; it allows the owner to show that the proposed usage would substantially impair its ability to handle its own business over the trackage and that the relief is not operationally feasible; and it allows the owner to prove that such access is not in the "public interest." A § 11103 proceeding also allows the owner a forum in which to pursue appropriate conditions and compensation for the use of its facilities.

Therefore, in the present case, if the Board continues to believe that BNSF should be granted direct access to the Lake Charles area, which it should not be, the Board, at a minimum, must require BNSF and Applicants to file a § 11103 terminal trackage rights application before that access can be implemented, and KCS must be afforded the opportunity to respond to that application. If the Board revokes its imposition of ¶ 8 of the CMA agreement (and its later modification to that section) and instead, substitutes the conditions proposed herein by KCS, the filing of a terminal trackage rights application would not be necessary.

CONCLUSION

By imposing ¶ 8 of the CMA agreement as a condition to approval of the proposed merger and then by further expanding upon BNSF's access granted in ¶ 8, the Board has violated long standing precedent regarding the criteria for the imposition of conditions in merger proceedings. By substituting the conditions proposed herein, (1) removing BNSF's direct access to the Lake Charles area, or at a minimum, eliminating the Board's expansion of that access and requiring BNSF to file a terminal trackage rights application; and (2) establishing new KCS/BNSF interchanges at Texarkana, Beaumont, and Lake Charles, the

Board can resolve both the monopoly bottleneck problem and the concern over plastics storage capacity in the least intrusive way and without violating Commission precedent.

This 3rd day of September, 1996.

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Verified Statement

of

Kenneth D. Clark, Jr.

I. BACKGROUND

My name is Kenneth D. Clark, Jr. I have been employed by The Kansas City Southern Railway Company (KCS) in various marketing capacities for over thirty years. I am currently Vice President-Marketing, Chemical and Petroleum business units. I have been in my current position since April 1992. In this position, I am responsible for all marketing functions including pricing, customer relations, and strategic planning for chemical and petroleum customers, including those at Westlake and West Lake Charles, Louisiana. I have been involved with KCS's operation and traffic to and from Westlake and West Lake Charles area for over fifteen years.

The Lake Charles area consists of three distinct railroad stations, Lake Charles, Westlake, and West Lake Charles. A map depicting these three locations is attached hereto as Attachment A. Lake Charles, LA is on the east side of the Calcasieu River. Currently, the majority of rail traffic activity there is the general cargo docks of the Port of Lake Charles Authority. Those docks are served exclusively by Missouri Pacific Railroad Company ("MoPac")[1] but are open through reciprocal switching to SP and KCS.

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[1] Missouri Pacific Railroad Company is a sister corporation to Union Pacific Railroad Company, both of which are applicants herein. References to "MoPac" or to "UP" shall refer to both entities.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S PETITION TO REOPEN/RECONSIDER" was served this 3rd day of September, 1996, by hand delivery to attorneys for Applicants and by depositing a copy in the United States mail in a properly addressed envelope with adequate postage thereon addressed to each other party on the restricted service list.

Attorney for The Kansas City Southern Railway Company

On the west bank of the Calcasieu River and North of Interstate 10 is Westlake, a point served by KCS and SP jointly, but open to MoPac through reciprocal switching. The main shippers are PPG Industries, Vista Chemical, Conoco Oil Refinery, and Olin Chemical. On the western edge of Westlake, south of I-10 lies the KCS-SP terminal yard referred to as Rose Bluff Yard. The yard is owned jointly by KCS and SP and is designed to allow KCS and SP to interchange cars with each other that move to/from industries on the west side of the river. MoPac does not have access to Rose Bluff Yard.

West Lake Charles is south of Rose Bluff Yard and also on the western side of the Calcasieu River. West Lake Charles is not open to reciprocal switching to MoPac, and is served only by KCS and SP. Some of the industries there are West Lake Polymers, Citcon, Firestone-Bridgetone Rubber Co., Montell Plastics, Kronos Corp, NL Baroid, Citgo Refinery, Davison Chemical, Conoco Pecan Grove, Venco Carbon, and Port of Lake Charles Bulk Terminal No. I.

Currently, KCS and SP are the only carriers directly serving West Lake Charles and Westlake shippers. MoPac has never had direct access to West Lake Charles or Westlake. Moreover, while Westlake has been open to reciprocal switching to MoPac, West Lake Charles has not been open to reciprocal switching to MoPac. For operating reasons, KCS and SP, with the concurrence of the rail labor unions, have divided West Lake Charles and Westlake into two zones. West Lake Charles, which has never been open to reciprocal switching to MoPac, is located in Zone I. Westlake, which has been open to reciprocal

switching to MoPac, is located in Zone II. This arrangement is set forth in an Agreement between KCS and SP dated September 2, 1981.[2]

Prior to 1982, KCS had direct access to Lake Charles on the east side of the Calcasieu River. In 1982, a runaway barge destroyed the KCS bridge at Lake Charles. KCS did not rebuild its bridge based upon its belief that KCS would have access to Lake Charles over SP's bridge via reciprocal switching. When all was said and done, however, SP's reciprocal switching charge for KCS's use of SP's bridge was prohibitive. As a result KCS lost direct access to MoPac on the east side of the river for interchange purposes. Accordingly, in order to continue to interchange traffic with MoPac, KCS entered into a voluntary divisional agreement with MoPac to interchange cars at DeQuincy, LA.

Over the past 15 years, during which I have been directly involved in the transportation of chemicals from Westlake and West Lake Charles, KCS has met the transportation requirements of shippers through interline movements with other carriers. KCS is and has been an active participant in the movement of outbound shipments from both Westlake and West Lake Charles over the New Orleans Gateway. KCS also has interlined traffic to MoPac at DeQuincy for movement over the New Orleans, St. Louis, Memphis, and Chicago Gateways. In addition, under the arrangement with SP, KCS has provided switching jointly with SP, and KCS separately has provided storage near the shippers' facilities.

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[2] This Agreement is attached to the Verified Statement of Tom J. Nelson as HC 0001503 K through HC 001517 K.

II. COMPETITIVE ALTERNATIVES AVAILABLE TO SHIPPERS IN THE LAKE CHARLES AREA

A. Competitive Option

I have read the STB's Decision No.44 and have concluded that there are no practical or factual grounds for the STB to grant BNSF direct access to shippers at Westlake, West Lake Charles, or Lake Charles. The effect of the STB's decision will be to grant shippers at West Lake Charles access to three carriers, UPSP, BNSF and KCS, while access in the past had been limited to two carriers. Furthermore, because of BNSF's access to the Lake Charles area, the Decision will also preserve three carrier competition at Lake Charles and Westlake, areas that otherwise would have seen a reduction in the number of carriers from three (UP, SP, and KCS) to two (UPSP and KCS).

As set forth above, KCS's agreement with MoPac to continue to interchange eastbound traffic with MoPac at DeQuincy was a voluntary agreement brought about by competitive market factors created by KCS's loss of direct access to Lake Charles. That agreement was not subject to ICC or STB jurisdiction and is scheduled to expire in 1999. KCS stands ready and willing to enter into an agreement with BNSF similar to the MoPac/DeQuincy agreement. Using the interchange rights granted at Texarkana and Shreveport, the KCS/BNSF routes will create an effective alternative to the prior joint routes with MoPac. Furthermore, KCS and BNSF also could interchange traffic at many other points with BNSF, including Beaumont and Dallas, TX; Tupelo, MS; and Neosho and Kansas City, MO. These interchanges afford joint KCS/BNSF routes throughout the BNSF system, and would provide more than adequate substitutes for Lake Charles area shippers who desire to maintain a competitive option to the merged UPSP.

B. Storage

Chemical manufacturers, and in particular plastic manufacturers, require leased track storage. Certain plastic producers may require storage for 75 to 90% of their cars, while other chemical and petroleum product manufacturers require storage for a much smaller percentage of their cars. In addition to its storage facilities at Westlake and West Lake Charles, KCS has constructed and provides extensive storage for plastics and other products at DeQuincy, Luddington, Beaumont, Mossville, and Buhler, all of which are near the Lake Charles area. In fact, the Mossville yard can handle all storage requested, and, unlike the SP yard at Lake Charles, the Mossville yard has room to expand. These KCS storage areas allow KCS to return cars to the manufacturing facility efficiently (within a day, in most cases on the same day) or to forward to destinations after storage. There is no need to provide another carrier direct access to this area to increase storage availability. KCS has been providing these facilities for nearly fifty years. These KCS storage areas are closer to Westlake and West Lake Charles than comparable SP facilities to which BNSF was granted access, and they remain available for use in interline shipments with BNSF just as they were in the past on interline shipments with the MoPac at DeQuincy. Moreover, the availability of these existing facilities could be expanded by granting KCS trackage rights over the SP bridge at Lake Charles to interchange cars from storage directly to BNSF in Lake Charles.

C. SP/KCS Joint Switching Agreement

As previously indicated, Westlake and West Lake Charles are switched under a longstanding joint switching agreement between SP and KCS. In this regard, the Decision's inference that BNSF needs direct access to shippers in Westlake and West Lake Charles,

raises a number of practical problems. The use by KCS and SP of zones with one carrier switching each zone has led to a more practical and workable switching operation than would be possible if both carriers switched all shippers. This factor is of particular importance because of the congestion problems on the West Lake Charles-Westlake rail facilities. Delays in access to facilities are currently encountered with two carriers serving the area. If BNSF is provided direct access to trackage in Westlake and West Lake Charles, the result will be an increased operational and switching problems, increased congestion, and increased probability of injury to employees of all rail carriers involved, together with less responsive service to shippers.

III. CONCLUSION

The increase in the number of carriers accessible to shippers in Westlake and West Lake Charles provided for in the Decision is not warranted by the evidence, as supplemented herein, or any perception that shippers need more competitive options or storage capacity. KCS remains an effective competitive option in the area. The option provided in the Decision to interchange traffic with the BNSF in Shreveport and Texarkana and KCS's other remaining interline options, especially if additional interchanges were added at Beaumont and Lake Charles, would effectively replace the prior KCS/UP joint line routes. KCS is ready and willing to enter into interline agreements with BNSF and other carriers to replace the KCS/MP joint line moves. Such arrangements will allow shippers to continue to utilize the car storage facilities KCS has constructed during the past one hundred years it has served the Lake Charles area.

VERIFICATION

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

I, Kenneth D. Clark, Jr., being first duly sworn, upon my oath state that I have read the foregoing statement and the contents thereof are true and correct as stated.

Kenneth D. Clark, Jr.

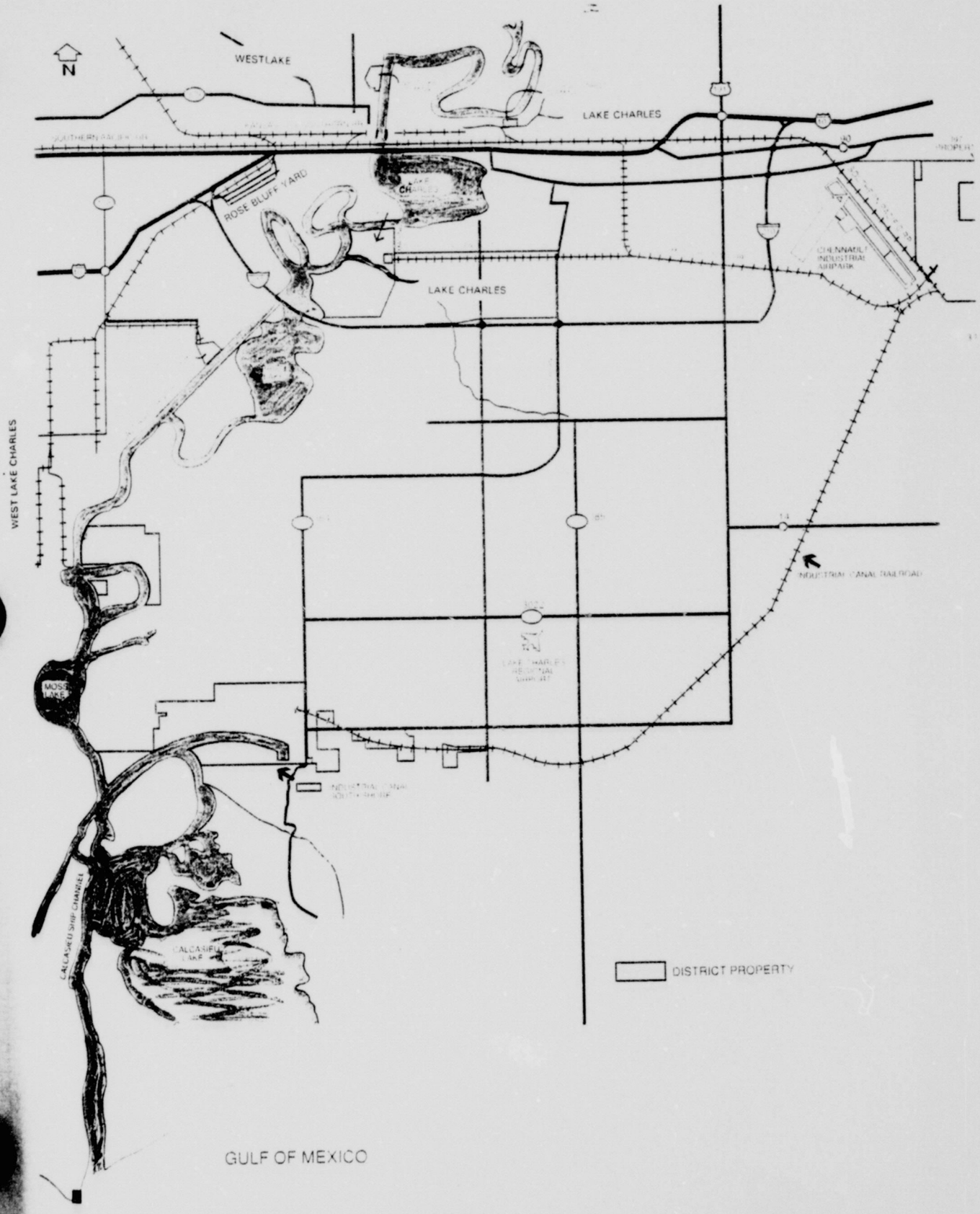
Subscribed and sworn to before me this 28th day of August, 1996.

Julie A. Robinson
Notary Public

My Commission Expires:

JULIE A. ROBINSON
Notary Public - State of Missouri
Commissioned in Jackson County
My Commission Expires May 18, 1998

AREA MAPS



ATTACHMENT A

VERIFIED STATEMENT OF DR. CURTIS GRIMM
IN SUPPORT OF
PETITION FOR RECONSIDERATION

1. QUALIFICATIONS

My name is Curtis M. Grimm, and I am Professor and Chair of Transportation, Business and Public Policy, College of Business and Management, University of Maryland at College Park. I have been a member of this College since 1983. I received my B.A. in economics from the University of Wisconsin-Madison in 1975 and my Ph.D. in economics from the University of California-Berkeley in 1983. My Ph.D. dissertation investigated competitive impacts of railroad mergers.

I previously submitted statements in this case on behalf of Kansas City Southern Railway Company and the Texas Mexican Railway (Tex-Mex). In my previous statements, I provided evidence regarding the anti-competitive effects of the UP/SP merger. In *Comments of Kansas City Southern Railway Company and Request for Conditions* (KCS-33) dated March 29, 1996 (hereinafter, KCS Request for Conditions), I testified regarding the "monopoly bottleneck" circumstance, the subject of this statement.

I have been assisted in developing this statement by Joseph J. Plaistow, Senior Consultant for Snavely King Majoros O'Connor & Lee, Inc. with offices at 1220 L Street, NW, Washington, DC 20005. Mr. Plaistow submitted previous statements in this proceeding

on behalf of KCS addressing the ability of the BNSF and the CMA agreements[1] to ameliorate the competitive harm of the UP/SP merger.

2. INTRODUCTION

The CMA Agreement, as later modified in Applicants' brief, granted access to BNSF to shippers at Lake Charles, Westlake and West Lake Charles, Louisiana (the Lake Charles area) for traffic to Mexico or New Orleans. In its Decision No. 44, the STB found that these Lake Charles area shippers suffered competitive harm through loss of the competitive joint-line alternative of KCS originating traffic and interchanging that traffic to UP.[2] The STB found that the CMA Agreement did not adequately deal with this "monopoly bottleneck" condition and directed that Applicants open all Lake Charles area traffic to BNSF access regardless of traffic destination. I have been asked by KCS to provide summary statistics on traffic from and to the Lake Charles area and to assess what portion of that traffic is "monopoly bottleneck" traffic.

3. BACKGROUND

Applicants' agreement with BNSF grants BNSF trackage rights over SP track between Houston and Iowa Junction, LA. (near Lake Charles, LA) and sells to BNSF the SP track from Iowa Junction to Avondale (near New Orleans). In the Avondale area and near West

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[1] The BNSF agreement was intended to address competitive issues raised by the merger. The CMA Agreement made certain amendments to the BNSF Agreement intended to address concerns of the chemical manufacturers.

[2] This loss of a competitive alternative occurs because after the merger Applicants will control both the single-line UP/SP routing alternative and the joint-line KCS-UP/SP alternative. Applicants are said to have "monopoly bottleneck" control over the traffic at issue.

Bridge Junction, BNSF receives trackage rights over UP's and SP's line. The trackage rights BNSF receives are for overhead traffic only.[3]

Along each line segment in the BNSF Agreement, BNSF was granted access only to 2-to-1 points, *i.e.*, "...only to industries which are presently served (either directly of by reciprocal switch) only by both UP and SP and by no other railroad...".[4] However, according to UP/SP, there were no 2-to-1 industries in Louisiana and, therefore, no access was granted.

Before it was later modified, the CMA Agreement granted access specifically to shippers open to all of UP, SP and KCS at Lake Charles and Westlake for traffic "...(a) to, from and via New Orleans, and (b) to and from points in Mexico, with routings via Eagle Pass, Laredo (through interchange with Tex Mex at Corpus Christi or Robstown) or Brownsville, Texas."[5] On brief, the Applicants extended this relief to incorporate West Lake Charles traffic open to SP and KCS.[6] The CMA Agreement modified the original BNSF Agreement and granted BNSF access to less than $5 million of Lake Charles area traffic destined to New Orleans or Mexico.

In its decision, the STB imposed the CMA Agreement as a condition to its approval of the merger, including its provisions regarding BNSF access at Lake Charles. However, the STB also recognized that plastic and chemical shippers in the Lake Charles area have

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[3] See BNSF Agreement, Sections 5a), 5b), and 5g).

[4] See BNSF Agreement, Sections 5.

[5] See CMA Agreement, Section 8.

[6] See STB's August 12th decision, page 152.

access to both SP and KCS, "[b]ut KCS must interline with UP or SP to provide efficient routings to the New Orleans, Houston, and St. Louis gateways. Thus, while these shippers now benefit from direct rail competition, an unconditioned merger would place all their efficient rail routings under applicants' control." The KCS - UP/SP joint-line routing competes with an independent UP/SP single line routing "...giving applicants control of a 'bottleneck' for these movements."[7]

In finding the CMA Agreement inadequate to resolve the "bottleneck" problem, the STB directed Applicants to modify the Agreements regarding Lake Charles area traffic in two ways:

1. Applicants must remove the routing restrictions which limit traffic "...(a) to, from and via New Orleans, and (b) to and from points in Mexico, with routings via Eagle Pass, Laredo (through interchange with Tex Mex at Corpus Christi or Robstown) or Brownsville, Texas."
2. Applicants must permit interchange of this traffic at Texarkana, Texas, and Shreveport, Louisiana between BNSF and KCS.[8]

The effect of the STB modifications was to open <u>all</u> Lake Charles area traffic to BNSF, increasing BNSF access by about $130 million of Lake Charles area traffic regardless of destination, that is, <u>without regard to the competitive effect of the merger on each traffic movement</u>. As a result, BNSF's access to Lake Charles area traffic was expanded from the

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[7] See STB's August 12th decision, page 152.

[8] See STB's August 12th decision, pages 153 and 154.

less than $5 million contained within the CMA Agreement to now give BNSF access to $134.9 million of traffic. The STB also permitted BNSF and KCS to interchange traffic at Texarkana and Shreveport saying the interchange provision "...will have the principal effect of substituting a KCS-BNSF joint-line movement via Texarkana and Shreveport for the existing KCS-UP joint-line movement via Texarkana.[9]

4. TRAFFIC DESCRIPTION

The STB's "monopoly bottleneck" condition deals with traffic originating or terminating at three stations: Lake Charles, West Lake Charles, and Westlake. The physical location of these 3 stations is described in the Verified Statement of KCS witness Kenneth D. Clark and illustrated on the map attached thereto.

The 3 stations involved generate $99.4 million of originated traffic and receive $35.5 million dollars of terminated traffic. Originated traffic is described in Table 1. 45% of the originated traffic is generated at West Lake Charles, 39% is generated at Westlake and the remaining 16% is generated at Lake Charles. KCS originates 55% of the traffic; SP originates 38% of the traffic and UP originates the remaining 7%. KCS originates 63% of its traffic from Westlake, 37% from West Lake Charles, and less than 1% at Lake Charles.

Table 2 describes the $35.5 million of traffic terminating in the Lake Charles area. In contrast to the originated traffic, Lake Charles itself is the most important of the 3 stations and terminates 63% of the area's traffic. 28% of the traffic is terminated at West Lake Charles, 9% is terminated at Westlake. KCS terminates 37% of the traffic; SP terminates 20% of the traffic and UP terminates the remaining 42% (note that while UP originated only

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[9] See STB's August 12th decision, page 153.

7% of the Lake Charles area traffic, it terminates 42%). KCS terminates 19% of its traffic at Lake Charles, 68% at West Lake Charles, and 13% at Westlake.

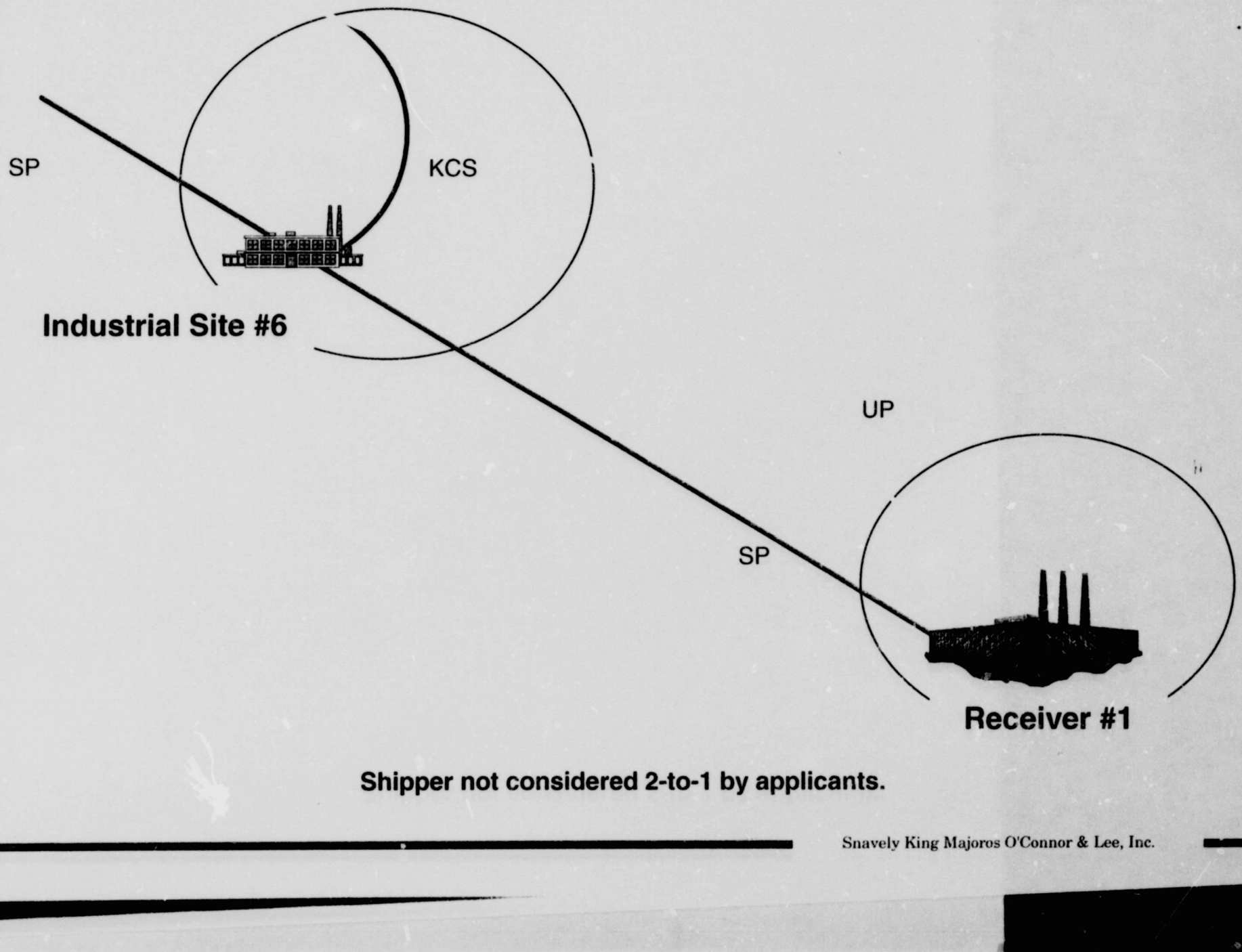
5. MONOPOLY BOTTLENECK

In KCS Request for Conditions, I diagrammed and explained the state of affairs under which such a "bottleneck" is created. At page 178 and 179, I cited an example at West Lake Charles to illustrate "bottleneck" circumstances. That figure and the related discussion will be repeated here.

Beginning at page 178 I said,

> For example, Montell Plastic's plant located at West Lake Charles has access to SP and KCS. Currently, Montell ships its product from its West Lake Charles plant to New Orleans. It has two independent rail routings prior to the merger: (1) it can ship either KCS to DeQuincy, LA where KCS interchanges the traffic with UP, which takes the traffic to New Orleans; or (2) it can ship the traffic SP single-line from the plant to New Orleans. After the merger, because UP and SP will be merged, there will no longer be two independent rail route alternatives, as UPSP would be in either movement and would thus serve as "bottleneck" carrier.

In Figure 3.5 following page 167 of KCS Request for Conditions, I illustrated schematically circumstances where "bottlenecks" arise. Figure 3.5 is repeated on the following page as Exhibit 1. Industrial Site #6 is analogous to the Montell plant and is served by both SP and KCS, but has a SP single-line and KCS-UP interline routing option. The merger eliminates this shipper's independent joint-line routing alternative because, post-merger, UP/SP has "monopoly bottleneck" control over the traffic. A necessary but not sufficient condition for such monopoly bottleneck traffic is that KCS must handle the traffic at the Lake Charles area and interchange it with UP or SP.



Shipper not considered 2-to-1 by applicants.

In the Lake Charles area, KCS's originated traffic is 25% single line; 25% is interchanged to BNSF; 21% is interchanged to UP; and the remaining 29% is interchanged to eastern carriers. "Potential bottleneck" traffic must be from the sub-set of this traffic originated by KCS and interchanged to UP, *i.e.*, 21% of KCS originated traffic or $11.7 million. Table 3 shows the detail of that traffic.

Of the $11.7 million potential bottleneck of traffic, KCS interchanges 43% to UP/SP at Texarkana, 21% at DeQuincy, 19% at Kansas City, and 14% at Beaumont.[10] However, much of this "potential bottleneck" traffic is not actual "bottleneck" traffic for a number of reasons which include:

1. Much of the traffic is terminated by carriers that have a bottleneck at destination even before the merger, *i.e.*, the UP/SP merger will not create the bottleneck: it existed pre-merger. This includes much of the Conrail traffic which Conrail terminates in the Northeast.
2. For many of the markets served by KCS-UP, alternative routings exist that do not involve UP or SP. For example, traffic currently handled by KCS-Kansas City-UP-Salt Lake City may alternately be handled by KCS-Kansas City-BNSF-Salt Lake City.

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[10]
- 96% of the **Texarkana** interchanged traffic is forwarded by UP/SP to eastern carriers at East St. Louis.
- 84% of the **DeQuincy** traffic is interchanged to eastern carriers at New Orleans.
- 56% of the **Kansas City** traffic is interchanged to UP for termination primarily in the western states of California, Nevada, Utah, Washington or Oregon. 43% of the **Kansas City** traffic is interchanged to CNW for termination into their territory.
- 65% of the **Beaumont** interchanged traffic terminates at the Mexican border points. 28% terminates at Houston.

These two factors explain why the Kansas City interchanged portion of the "potential bottleneck" traffic is not actual "bottleneck" traffic.

Table 4 provides information regarding traffic terminated in the Lake Charles area. 4% is KCS single line; 11% is interchanged from BNSF; 41% is interchanged from UP/SP; and the remaining 43% is interchanged from eastern carriers. Any "bottleneck" traffic would be from the 41% or $5.5 million terminated by KCS after interchanging with UP; however, KCS receives 91% of this traffic at Kansas City, which we have already seen is not a junction point for actual "monopoly bottleneck" traffic problems.

6. APPROPRIATE REMEDY

Competitive harm exists when merging partners are able to profitably increase rates and/or reduce service as a consequence of market power gained through the merger. The STB's policy is to ameliorate in the least intrusive manner the competitive harm caused by mergers with conditions leaving, to the extent possible, shippers with neither more nor less competition for their traffic than existed pre-merger.[11]

"Bottlenecks" created by mergers cause competitive harm to shippers by reducing shippers' competitive alternatives. While the STB did address the competitive harm done to shippers such as Montell, it went much too far by granting access to all $134.9 million of Lake Charles area traffic to correct the "bottleneck" problem that existed for a much smaller segment of traffic. For the "non-bottleneck" traffic the STB added an independent routing alternative (that is, an independent BNSF single-line or joint-line routing alternative) for substantial traffic that will not suffer competitive harm. As reflected in Table 1, "KCS

[11] See page 100 of the STB's August 12th decision.

single-line" and "KCS interlining with Eastern" carriers constitutes 54% of the traffic originated in Lake Charles. Providing BNSF access in Lake Charles will add an independent alternative for this traffic, so long as BNSF can serve the destination or interchange with a carrier who can serve the destination. This, in effect, will create the potential for three independent routings where only two existed before.

It is clear that in resolving the competitive harm arising from the "bottlenecks" created in the Lake Charles area, the STB was not aware of the modest extent of the "monopoly bottleneck" problem in need of any remedy. Referring again to Tables 1 and 2, the primary potential "monopoly bottleneck" interchange points are Beaumont, DeQuincy, Texarkana, and Kansas City. As discussed above, Kansas City is not the site of actual "monopoly bottleneck" traffic. The STB decision resolves any "monopoly bottleneck" problems which might otherwise exist at Texarkana by prescribing that KCS be allowed to interchange with BNSF at Texarkana.

The two remaining "potential bottleneck" interchange points are DeQuincy and Beaumont:

At **DeQuincy** the vast majority of the KCS/UP traffic is interchanged with eastern carriers at New Orleans. I recommend that a Lake Charles interchange be permitted to replace the lost KCS-UP DeQuincy interchange. This interchange could be accomplished by granting KCS the necessary trackage rights over SP's track and bridge between Westlake, and Lake Charles or by having SP serve as an intermediate switch carrier (charging rates no higher than those included in the CMA and BNSF agreements). BNSF must then be permitted to interchange KCS traffic at Lake Charles.

At **Beaumont** most of the Lake Charles area interchanged traffic terminates at the Mexican border points or at Houston. For the Mexican traffic, the provisions of the CMA agreement ameliorate competitive harm by imposing a BNSF originated alternative independent route. Due to the grant of Tex Mex's responsive application, the Mexican traffic also has a KCS-Tex-Mex independent alternative through Laredo. The small segment of the Lake Charles area traffic terminated in Houston will lose an independent competing route alternative unless some provision is made for these shippers; however, providing BNSF access to all Lake Charles area traffic to address this modest bottleneck problem is clearly a monumental overreach. One alternative remedy would be to allow KCS to interchange Lake Charles area traffic with BNSF at Beaumont.[12] Further, if Tex Mex is permitted to service this traffic at Houston in connection with KCS, it would also relieve the "monopoly bottleneck" for these shippers.

The modest addition of the KCS/BNSF interchanges at Beaumont and Lake Charles in conjunction with KCS's pre-existing interchanges with BNSF and Eastern carriers for Lake Charles area traffic also addresses the Board's storage-in-transit (SIT) issue. With these additional interchanges, KCS retains an routing independent of UP/SP to all major markets, and shippers will maintain the level of pre-merger competition, rather than adding a third carrier to the market.

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[12] This expansion of interchange authority is necessary because, while KCS can already interchange Lake Charles area traffic with BNSF at Beaumont, BNSF cannot use its newly acquired trackage rights over SP's track between Beaumont and Houston without the additional authority requested.

7. CONCLUSION

The Board has erred in concluding that the merger causes bottleneck monopoly problems for Lake Charles traffic. Given the voluminous set of issues faced by the Board and the Lake Charles monopoly bottleneck example in the record, this error is quite understandable. However, a closer examination of the Lake Charles traffic indicates that the monopoly bottleneck problem is insignificant. The problem can be addressed by allowing KCS to interchange Lake Charles traffic with BNSF at Beaumont and Lake Charles. If the CMA extension is endorsed, allowing KCS to interchange with either BNSF or Tex Mex at Beaumont would also solve the problem. The alternative solution proffered by the Board, granting BN access to all Lake Charles traffic, is a substantial overreach entirely inconsistent with Board policy.

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VERIFICATION

I, Curtis M. Grimm, certify under penalty of perjury, that to the best of my knowledge, the foregoing is true and correct. Executed August 31, 1996.

Curtis M. Grimm

Tables 1-4

Attached to Highly Confidential Version Only

VERIFIED STATEMENT OF TOM J. NELSON

My name is Tom J. Nelson, and I am Director of Joint Facilities and Contracts for The Kansas City Southern Railway Company ("KCS"). I have testified earlier in this proceeding, and my previous Verified Statement appears in KCS-32, *"Response of The Kansas City Southern Railway Company to Application for Terminal Trackage Rights "*, filed in Docket No. 32760 (Sub-No. 9) on March 29, 1996. My job description and work experience and qualifications are set forth in that Verified Statement.

My purpose in offering testimony in this Verified Statement is to identify and authenticate the KCS business records referred to in the foregoing Petition for Reconsideration and to substantiate discussion of the content and import of those records as set forth in that Petition for Reconsideration. The joint facility contracts and deeds covering the rail facilities at Westlake and West Lake Charles, Louisiana and the joint KCS/SP operations of those joint facilities, all as identified and discussed in the foregoing Petition for Reconsideration, are business records of The Kansas City Southern Railway Company, maintained in the ordinary course of KCS's business, prepared contemporaneous to the transactions which they purport to document, and I have recourse to and rely upon the authenticity of those documents in the course of my regular duties. The descriptions of the import and effect of those Agreements and their contents, as set forth in the foregoing Petition for Reconsideration are accurate, true, and correct.

These Agreements contain competitively sensitive information, and they therefore have been designated Highly Confidential. True and correct copies of the Agreements referred to and relied on in KCS's Petition for Reconsideration are attached hereto as document numbers HC 0001455 K through HC 0001517 K, and incorporated herein by reference.

HC 0001455K - HC 0001517K

Attached to Highly Confidential Version Only

VERIFICATION

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

I, Tom J. Nelson, being first duly sworn, upon my oath state that I have read the foregoing statement and the contents thereof are true and correct as stated.

Tom J. Nelson
Tom J. Nelson

Subscribed and sworn to before me this 29th day of August, 1996.

Julie A. Robinson
Notary Public

My Commission Expires:

JULIE A. ROBINSON
Notary Public - State of Missouri
Commissioned in Jackson County
My Commission Expires May 28, 1998

STB FD . 32760 9-3-96 . I 85578

85578

PEPPER, HAMILTON & SCHEETZ

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September 3, 1996

Via Hand-Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1201 Constitution Avenue, N.W.
Washington, D.C. 20549

Re: Finance Docket No. 32760

Dear Mr. Williams:

Enclosed for filing in the above referenced proceeding are the original and 20 copies of Geneva Steel's Petition for Clarification (GS-3). In addition, we are simultaneously filing the original and 20 copies of the highly confidential Appendix to the Petition for Clarification (GS-4) to be filed under seal. Also, enclosed is a 3.5 inch diskette containing the Petition for Clarification in WordPerfect 5.1.

Geneva Steel ("Geneva") has served the highly confidential Appendix to the Petition only on outside counsel where Geneva is aware that such counsel have executed the highly confidential undertaking issued in Decision No. 2 in the above referenced docket. The unrestricted Petition for Clarification has been served on all parties of record.

Geneva Steel will provide the Highly Confidential Appendix to the outside counsel of any party who is eligible to receive highly confidential material and who provides Geneva with copies of an executed highly confidential undertaking. In order to receive such copies, please contact Michelle Morris at (202) 828-1220.

Item No. _____
Page Count 18
Sep #2

An extra copy of the Petition for Clarification and Appendix is also enclosed. Please date stamp this additional copy and return it to our messenger.

Thank you for your assistance.

Sincerely,

Michelle J. Morris

Michelle J. Morris

cc: All parties of record

Enclosure

BEFORE THE

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760

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

-- CONTROL AND MERGER --

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

PETITION FOR CLARIFICATION

Geneva Steel Company ("Geneva") seeks clarification of the condition imposed on the approval of the primary transaction that requires modification of existing Union Pacific ("UP") or Southern Pacific ("SP") contracts with shippers at 2-to-1 points to provide Burlington Northern Santa Fe ("BNSF") with access to at least 50 percent of the traffic volume. 49 C.F.R. § 1117.1; Finance Docket No. 32760, Union Pacific Corp., et al -- Control and Merger -- Southern Pacific Rail Corporation, et al., (decision served August 12, 1996) (hereinafter "UP/SP Decision") at 13 n.18. Geneva believes that under the purposes animating the Surface Transportation Board's ("STB") "contract modification condition" that

(1) a shipper must bear no negative consequences as a result of accepting a bid from BNSF for at least 50 percent of its volume:

(2) a shipper must be free to specify which portion of its contract volume, up to 50 percent of its total rail traffic, will be granted to BNSF; and

(3) a shipper must be free to specify when the bid proposal from BNSF may be entertained.

Based upon recent discussions with UP, Geneva believes that UP disagrees that the STB's contract modification condition has these three attributes. Geneva asks the STB to clarify that the contract modification does possess these three essential characteristics which are critical to giving the condition practical meaning in the marketplace.[1]

PRELIMINARY STATEMENT

An explanation of how this petition for clarification may impact Geneva's interests requires a discussion of certain commercial information which is extremely confidential and sensitive to Geneva. This includes information which Geneva's outside counsel cannot even share with Geneva because it was received under the Highly Confidential restrictions of the protective order in this case. To raise the issues which the Journal of Commerce article shows to be in need of general clarification and to resolve Geneva's specific concerns which implicate highly confidential information, Geneva has adopted the following approach.

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1. The important practical consequences of clarifying the meaning of the contract modification condition were the subject of an August 21, 1996 article in the Journal of Commerce. That article is attached hereto as Exhibit A.

This petition for clarification has been written as a document appropriate for the public file and raises clarification issues of general interest. Attached to this petition is a highly confidential Appendix which is being filed under seal and served only on outside counsel for parties who are known to have executed the Highly Confidential undertaking of the protective order in this case. Exhibit 1 in the Appendix is the verified statement of Ralph D. Rupp, Manager-Traffic of Geneva. Mr. Rupp's verified statement sets forth the portion of Geneva's clarification request that is specific to Geneva. Exhibit 2 in the Appendix contains highly confidential information subject to the protective order in this case which cannot and has not been made available by Geneva's outside counsel to Geneva. Identifying references to the material in Exhibit 2 will be made in this public petition for clarification. Those references, however, will not disclose any of the content of that material which is covered by the protective order in this case.

DISCUSSION

I. THE BACKGROUND OF T[illegible] CONTRACT MODIFICATION CONDITION.

A. The Record

In order to address the extensive anticompetitive impacts of the primary transaction on 2-to-1 points, UP and SP entered into a settlement agreement with BNSF. The settlement agreement gives BNSF actual operational access to shippers at all 2-to-1 points. Despite the unprecedented scope of the rights extended BNSF under the settlement agreement, many parties in the

case argued, in their March 29, 1996, comments that these rights did not practically preserve the pre-merger competitive environment.

One important shipper trade association, the Chemical Manufacturers Association ("CMA"), however, signalled that it would be satisfied that competition would be preserved if Applicants could meet a discrete list of conditions. As counsel for CMA explained at the July 1, 1996 oral argument (Tr. 123), "those conditions . . . dealt principally with giving BNSF access to more traffic, with making certain operational improvements that would facilitate BNSF's ability and incentives to compete" -- what CMA saw as "the main issue" (Tr. 122). (See also Tr. 77, 79-80). This list became the basis of the negotiations which produced the CMA settlement agreement.

In its paragraph 3, the CMA agreement contains the following provision (UP/SP-219, April 19, 1996, Settlement Agreement, at 2):

> "Effective upon consummation of the UP/SP merger, UP/SP shall modify any contracts with shippers at '2-to-1' points in Texas and Louisiana so that at least 50% of the volume is open to BN/Santa Fe."

The Applicants viewed paragraph 3 of the CMA agreement as providing for a "modification of shipper contracts to allow BN/Santa Fe to compete at once for half of every shipper's traffic." UP/SP-266, June 28, 1996, at 3 n.1.[2] The Applicants

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2. CMA itself explained that the contract modification paragraph "[p]rovides UP/SP will release at least 50% of any business (continued...)

agreed to this provision "to eliminate any possible issue with regard to the corridor of special interest to CMA," by "releas[ing] from contractual commitments at least 50% of the volume of business of every '2-to-1' shipper in Texas and Louisiana." UP/SP-230, April 29, 1996, Rebuttal Narrative at 18. Nevertheless, UP stated that "[w]e don't anticipate any sizable changes in traffic diversions or traffic flows because of the CMA agreement." Peterson Reply Deposition, May 8, 1996 at 295-96.

BNSF's understanding of paragraph 3 was significantly different than UP's. Certain concepts tracked. For example, BNSF witness Ice noted "UP/SP will modify all contracts with shippers to 2-to-1 points in Texas and Louisiana so as to open at least 50% of the volume to BN/Santa Fe." BN/SF-54, April 29, 1996, V.S. Ice at 2. And BNSF witness Kalt recognized the "CMA Agreement . . . clarifies the scope of 2-1 and new shipper access by BN/Santa Fe, providing, for example, for CMA shippers with existing contracts with UP or SP to be able to convert up to half of their contract volumes to BN/Santa Fe." BN/SF-55, April 29, 1996, V.S. Kalt at 9.

BNSF witness Rose's verified statement, however, offered a different perspective. Rose began with the effects of the contract modification (BN/SF-54, April 29, 1996, V.S. Rose at 3) (emphasis supplied):

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2. (...continued)
subject to contracts at '2-to-1' points in Texas and Louisiana. This will enable BNSF to compete for this business earlier than it otherwise would be able to." CMA-12, June 3, 1996, Brief at 3.

"In addition, opening 50% of the volume of shipments under contracts at 2-to-1 points in Texas and Louisiana to bidding by BN/Santa Fe and granting access to a fraction of the traffic at West Lake, Shreveport and Texarkana will increase the traffic volume open to competition immediately, although substantial tonnage will remain committed to UP/SP or otherwise unavailable to BN/Santa Fe."

Mr. Rose also disclosed an understanding which never was confirmed by Applicants but which, in effect, was subsumed by the contract modification condition imposed by the STB in its decision (id.):

"We also understand that, after one year, bidding will be opened on the business of any customer in an area covered by the BN/Santa Fe Agreements who signed a contract with UP or SP in anticipation of the UP/SP merger, and opening up the business of such shippers to new competition would be an important element in making competitive options meaningful."

Similarly, BNSF witness Owen indicated that further access would be required for BN/SF to have "sufficient density to keep service competition in the Central Corridor 'alive and well.'" In particular, Mr. Owen stated that "BN/Santa Fe must have access to traffic at the several important two-to-one points in Utah and Nevada." BN/SF-54, April 29, 1996, V.S. Owen at 15.

Several weeks later in his deposition, Mr. Rose expanded further on his understanding of the contract modification provision of the CMA settlement agreement (Rose Deposition, May 10, 1996 at 119-20):

"Q. With regard to the opening of the contracts by the UP/SP, do you have any idea of what methodology

they will use to select contracts or contract volumes to open to BN/SF bidding?

A. No, I don't. Again, I think a reasonable business approach would be to allow the customers to make that determination of what contracts will be open, and that's what I'm assuming is inherent in that agreement.

Q. Could your ability to compete for traffic be impeded if there are volume incentives in the UP or SP agreements with their customers?

A. If those volume incentives were not released or relinquished, yes.

Q. Do you have any understanding with regard -- from UP/SP as to how they may treat any volume incentives which may exist in these contracts?

A. No, I don't have any understanding. But again, my business understanding of the conceptual framework of the agreement says that they would be relinquishing those customers from those incentives.

Q. But that's your interpretation, you don't get that from any discussion --

A. That's correct."

In light of the record, the Department of Transportation in its brief recognized that preservation of competition requires transforming the contract modification provision in the CMA agreement into a broad-based condition applicable to every 2-to-1 point that BNSF would serve under the BNSF settlement agreement. Thus, in its June 3 brief, DOT strongly urged that "as in the CMA settlement, the STB should order the Applicants to open their contracts with shippers on the Central Corridor at two-to-one points until the BNSF has access to fifty percent of the traffic." DOT-4, June 3, 1996, Brief at 41.

B. The STB Decision

In its decision, the STB offered the public its assurance that "the BNSF trackage rights will allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP." (UP/SP Decision at 145). In doing so, the STB stated -- "because so much depends on BNSF's performance" (UP/SP Decision at 134) -- that it had devised additional conditions to "directly address[ ] both the competitive problems that have been raised with the BNSF agreement and the CMA agreement and concerns about whether BNSF will have sufficient traffic to compete effectively." (UP/SP Decision at 106). In particular, with respect to the CMA contract modification provision, the STB required that "this provision be modified by extending it to shippers at all 2-to-1 points incorporated within the BNSF agreement, not just 2-to-1 points in Texas and Louisiana" (UP/SP Decision at 146).

II. THE CONTRACT MODIFICATION CONDITION IS A REMEDIAL PROVISION THAT SHOULD BE LIBERALLY CONSTRUED TO IMPLEMENT ITS PURPOSE.

The purpose of extending the contract modification provision to "all 2-to-1 points [is to] help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations." (UP/SP Decision at 146). This condition, as with the other "[b]road-based conditions" imposed in the STB's decision should be implemented in a way "to

replicate the competition that would otherwise be lost when SP is absorbed into UP." (UP/SP Decision at 145).[3]

A. The Shipper Should Bear No Negative Consequences On The Traffic Retained By UP If It Accepts A Bid From BNSF.

Rail transportation contracts, especially covering large volume requirements over substantial time frames, often have volume incentive price and service conditions.[4] In such contracts, if the shipper does not meet its minimum volume condition, it can suffer significant negative consequences. As to price, the shipper may suffer explicit or implicit economic penalties for failure to meet the minimum volume. As to service, the shipper may lose a guarantee of a particular operations service level required to meet its needs.

A shipper must bear no negative consequences as a result of accepting a bid from BNSF for at least 50 percent of the volume pursuant to the contract modification condition. If such negative consequences were to apply, the shipper's incentive to accept a superior BNSF quote would be undercut and, depending

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3. BNSF's understanding of the meaning of the STB's contract modification condition is set forth in a letter dated August 30, 1996 from BNSF's outside counsel to Geneva's outside counsel attached hereto as Exhibit B.

4. Certain contracts of this type involving 2-to-1 points were deposited in the document depository by Applicants under the highly confidential terms of the protective order. Copies of these contracts are included in Exhibit 2A in the highly confidential Appendix to this Petition; a discussion of possible misimpressions on the record concerning these contracts is included in Exhibit 2B. As reported in the Journal of Commerce, UP and SP themselves apparently do not yet have an accurate inventory of which contracts exist for 2-to-1 points much less their contractual terms.

on the nature and magnitude of the negative consequences, could be wholly destroyed. Any such result could eviscerate the purpose of the contract modification condition and could transform the STB's assurance to the shipping public to replicate the protection of a competitive environment from a solemn promise into a sham. See Appendix, Exhibit 2B.

B. The Shipper Should Be Free To Specify Which Portion Of At Least 50 Percent Of Its Traffic Volume Will Be Granted To BNSF.

In a competitive environment, a shipper would be free to specify which portion of its traffic it wished to make available to a rail carrier. Naturally, the shipper would submit for bid that portion of its contract volume for which BNSF could maximize economic benefits to the shipper. To replicate the competitive environment here, the contract modification condition should permit the shipper -- rather than UP -- to specify which portion of at least 50 percent of its traffic volume will be available to BNSF.

C. The Shipper Should Be Free To Specify When The Bid Proposed From BNSF May Be Entertained.

In a competitive environment, a shipper is free to decide when it wishes to solicit a bid from a railroad for transportation services. The competitive dynamic is complex and fluid. To replicate it, the contract modification condition should enable the contract shipper to entertain a bid from BNSF at any time from the effective date of the condition (on the consummation date of the primary transaction) until the

termination date of the contract under which the traffic volume would otherwise move.

CONCLUSION

For the foregoing reasons, the STB should clarify the contract modification condition in the manner specified herein.

Respectfully Submitted,

Michelle J. Morris

John Will Ongman
Marc D. Machlin
Michelle J. Morris
PEPPER, HAMILTON & SCHEETZ
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200

Counsel for Geneva Steel Company

Date: September 3, 1996

Exhibit B

MAYER, BROWN & PLATT

2000 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006-1882

202-463-2000
TELEX 892603
FACSIMILE
202-861-0473

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ROY T. ENGLERT, JR.
202-778-0657

August 30, 1996

John Will Ongman, Esq.
Pepper, Hamilton & Scheetz
1300 19th Street, N.W.
Washington, D.C. 20036

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

Dear Mr. Ongman:

You have advised us that you intend to file a petition for clarification of certain aspects of Decision No. 44 and have asked that we state in writing, on behalf of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (collectively, "BN/Santa Fe"), BN/Santa Fe's understanding of the provision of the April 19 CMA Agreement requiring that "at least 50% of the volume" of certain contracts be "open to BN/Santa Fe" and of the Surface Transportation Board's August 12 decision requiring that the CMA Agreement be modified to extend it to all 2-to-1 points incorporated within the BN/Santa Fe Agreement and that, "immediately upon consummation of the merger, applicants must modify any contracts with shippers at 2-to-1 points * * * to allow BNSF access to at least 50% of the volume." Dec. No. 44, at 146.

Applicants, in order to induce CMA to drop its opposition to the UP/SP merger, consented to the CMA provision (following which BN/Santa Fe also consented), and the Board imposed the additional condition, which UP/SP have announced they will accept. The purpose of both the CMA Agreement provision and the Board's extension of it was to open up additional traffic at 2-to-1 points to meaningful competition from BN/Santa Fe. It was plainly the Board's expectation that BN/Santa Fe would capture a significant amount of traffic from such competition; the Board was concerned about whether BN/Santa Fe would have sufficient density to support its trackage rights operations and intended BN/Santa Fe to obtain "immediate access to a traffic base sufficient to support effective trackage rights operations." Dec. No. 44, at 146.

Both the CMA Agreement provision and the Board's extension of it would be virtual shams -- and would not serve the Board's purpose of ensuring immediate, meaningful competition and providing BN/Santa Fe with a likely source of added traffic density -- if UP/SP could effectively penalize a shipper for choosing BN/Santa Fe to carry a percentage of its traffic. UP/SP could -- if the contract provision and the Board's condition are not construed to preclude them from doing so -- penalize such a shipper in several ways. Among others:

- Many contracts contain incentives for higher volumes or provisions that impose substantially higher charges if the shipper fails to meet minimum volume requirements. BN/Santa Fe often may have no realistic chance of counteracting the value of those volume incentive provisions in bidding for only half the volume of the current contracts unless the STB's decision and the CMA Agreement mean that these volume provisions must be rescinded (in a way that does not leave the shipper worse off) or, at the shipper's option, any incentives prorated to apply only to the closed portion of the contract.

- UP/SP might try to retain the shipper's business by offering concessions on the contract terms covering both the open and closed portions of a reopened contract. BN/Santa Fe is unlikely to be able to match such aggregated concessions (offered on 100% of the volume) if BN/Santa Fe is limited to bidding on half the volume.

BN/Santa Fe believes that the CMA Agreement and the Board's condition must be construed, in accordance with their manifest intent, not to allow these scenarios, under which shippers at 2-to-1 points would lose the benefit of BN/Santa Fe competition until current contracts expire, and the conditions would lose their value in hastening and strengthening BN/Santa Fe competition by increasing BN/Santa Fe density in the affected corridors.

Although the CMA Agreement and additional STB condition must be construed to prevent these tactics, there is more than one construction that would accomplish that purpose. Of course, the shipper would at all events have the option to hold UP/SP to the terms of the contract. The key point is that the shipper must also have the real option of accepting a competing offer from BN/Santa Fe for the contract volumes opened to BNSF bidding by the CMA Agreement and additional STB condition.

The most direct and clearest resolution of the issue to accomplish the intent of the CMA Agreement and the Board decision to open up real competition would be to construe the words "at

least" and "access" (or "open") to require that UP/SP open up 100% of its contract volumes in the affected points and corridors to competition. UP/SP and BN/Santa Fe would then compete head to head in every case, with neither having an artificial advantage over the other, and the railroad offering the shipper a better package would win the business. This is the simplest and most direct way of ensuring that volume incentives and across-the-board sweeteners do not give UP/SP competitive advantages so great that they undermine what the Board was trying to accomplish by requiring UP/SP to open up contract volumes to competition.

A more cumbersome and less effective resolution would be to construe the CMA Agreement and additional STB condition to mean that all volume incentive provisions (whether incentives or higher charges for volume shortfalls) on contracts that are subject to being opened under the CMA Agreement and the Board's condition must be rescinded (in a way that does not leave the shipper worse off) or the incentives pro-rated to 50% volumes, at the shipper's option, and that, if UP/SP offers to modify any of the terms of a contract with a 2-to-1 shipper, then the shipper must be permitted to solicit a competitive bid from BN/Santa Fe on all volumes to which UP/SP's offer to modify applies.

It is BN/Santa Fe's position that the contract and condition must be construed in one of these ways because any other construction defeats their purpose and renders them virtual shams. Which of these constructions is to prevail may require clarification from the Board. A contrary construction that allows UP/SP to penalize shippers for taking advantage of BN/Santa Fe competition, however, cannot be correct.

Sincerely,

Roy T. Englert, Jr.

Roy T. Englert, Jr.

Counsel for Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company

Continued from Page 1B

Volume

When asked about the 50% clause, a UP spokesman said, "That's a very good question. Our attorneys are wrestling with that right now."

No timetable

UP officials promise that they will communicate their decision as soon as possible, but there is no predetermined timetable. UP and SP are reviewing their own contract data before a final decision is made.

STB gave both UP and BNSF a tight timetable, requiring detailed implementation plans by Oct. 1.

A BNSF spokesman said the company is talking to shippers about the volume calculation process. BNSF contends that shippers basically will determine the question. "It's a contract by contract situation and a commodity by commodity situation," the BNSF spokesman said. "If current contracts call for carloads, it would be half of that. It will not all be one single form of measurement."

Shippers have a major stake in the definition issue, since they have an incentive to seek inclusion in the renegotiation group if they think they can get a better rate out of BNSF than they have now.

Those who stay on the sidelines risk being outflanked.

One striking fact is the lack of direction from an agency that for years has thrived on elaborate decisions — like the rest of the 290-page, single-spaced merger approval that deals with issues such as trackage rights in extensive detail.

Key factors

Those familiar with rail contracts believe UP must be evaluating these key factors relating to the 50% issue:

- UP could ask the STB through a petition for reconsideration to better define the term, or ask the agency to set a date when 50% of the contracts could be put up for bids.
- UP could decide to open 50% of every contract and use the existing standard in each pact, such as carloads.
- Or it could decide to expose all of the business moving under 50% of the contracts with the most favorable terms.
- Another prospect is to use 50% of the commodities within each contract.
- Customers could be asked which half of their contract business they want opened.
- Still another choice is for UP to consider one customer's multiple contracts and commodities as a single entity and claim the 50% is based on the number of customers covered by contracts.
- Once the company decides the broad question of which 50% gets opened, it has to determine what volume means, because there are several common methods of structuring rail contract rates — including carloads, ton-miles (one ton of freight hauled one mile) or tonnage.
- Some insiders have argued that, without knowing every contract variable (such as dollar value, carloads and ton-miles), it will be hard to defend UP's decision on whether to include or exclude a specific contract.
- If a carrier other than UP or SP is involved in the contract, UP has to evaluate whether renegotiation will hurt its share of the revenue and profit margin.

Not an oversight

STB officials suggested that the decision not to define volume more precisely was not an oversight, because the issue did not come up during oral argument about the merger last month and was not specified in an agreement between UP and the Chemical Manufacturers Association that was the basis for the 50% mandate.

The agency's commitment to five years of close oversight of the merger's impact also could be a vehicle for stepping in and mandating how the parties should resolve the issue. Any disputes that arise could be solved by arbitration.

The contract definition process may be blunted in the future because SP claimed during the proceeding that 90% of its contracts will expire within a year after the merger is consummated. The timing of UP's future contract expirations was not revealed.

Exhibit A

Vague 'volume' definition a boon to UP

• *The STB has created a question embracing hundreds of millions in post-merger business.*

BY RIP WATSON
JOURNAL OF COMMERCE STAFF

Union Pacific Railroad stands to make a mint from vague wording in last week's Surface Transportation Board decision approving its mammoth rail merger with **Southern Pacific Rail Corp.** — if UP figures out how to manipulate hundreds of rail contracts to its advantage.

The Aug. 12 decision requires UP to expose to competitive bidding 50% of the contract volume for customers at points now served exclusively by UP and SP.

The STB has allowed UP rival **Burlington Northern Santa Fe** the right to compete for $1 billion in annual freight volume at those exclusively served points. By failing to define what volume means, that STB decision gives UP free rein to decide how to determine the 50% figure.

The story is developing as a mystery, because both UP and SP say they don't yet know how much contract business moves through those exclusively served locations, known in the merger lexicon as 2 to 1 points.

Once UP (and SP) determine what's actually in their contracts, UP will be in a position to dictate the shape of the competitive playing field.

For example, UP could choose to open the contracts with the lowest profit and protect the higher-margin business.

Though UP and SP don't have contract details, industry-wide statistics from the Association of American Railroads show 69% of rail tonnage moved under contract in 1994, the latest measurement year available.

Applying that 69% figure to the $1 billion made available for competition means that UP can pick and choose from a pool of $690 million in contract freight.

If BNSF is frozen out of 50% of the contracts by revenue, the effective amount of business open for competition shrinks by $345 million, or 50% of the $690 million in contract tonnage.

However, UP cannot make bottom-line-based decisions until it has a handle on the profitability of each contract.

A further complication lies in the fact that UP does not have any revenue, carload, routing and other information about SP contracts at 2 to 1 points that might be included in the 50% figure. An STB order early in the merger proceeding blocked SP from sharing contract details with UP until the deal is closed on Sept. 11.

"This is the kind of thing that will keep railroad commerce lawyers very busy for a long time," one industry official said.

UP officials admit they are struggling with the issue.

See VOLUME, Page 6B

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Clarification (GS-3) and highly confidential Appendix to Petition for Clarification (GS-4) was served on the following parties via hand delivery this 3rd day of September, 1996:

Paul A. Cunningham
Richard B. Herzog
James M. Guinivan
HARKINS CUNNINGHAM
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Arvid E. Roach, II
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Washington, D.C. 20044

Erika Z. Jones
Adrian L. Steel, Jr.
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

A copy of the foregoing Petition for Clarification (GS-3) was sent by first class mail to all parties of record. The Highly Confidential Appendix to the Petition for Clarification (GS-4) was also sent by first class mail to select outside counsel and consultants in accordance with the terms of the protective order issued in Decision No. 2 in the above-captioned docket.

Michelle J. Morris

Michelle J. Morris

85571

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*ADMITTED IN PENNSYLVANIA ONLY

202 347-7170

September 3, 1996

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BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

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

Dear Mr. Secretary:

Enclosed for filing in the above-referenced proceeding please find the original and twenty (20) copies of the Petition for Clarification of Entergy Services, Inc., Arkansas Power & Light Company, and Gulf States Utilities Company (ESI-27). Also enclosed is a Wordperfect 5.1 diskette containing the text of this pleading.

An extra copy of this filing is enclosed. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

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

Sincerely,

Christopher A. Mills
An Attorney for Entergy Services, Inc., Arkansas Power & Light Company, and Gulf States Utilities Company

CAM:mfw
Enclosures

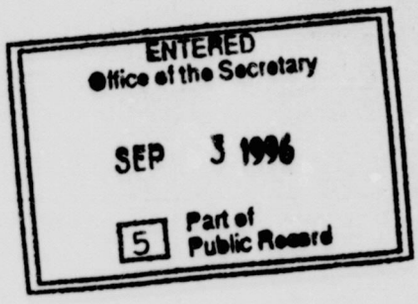
Item No. _____
Page Count 12
Sep 41

ESI-27

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

PETITION FOR CLARIFICATION OF ENTERGY SERVICES, INC., ARKANSAS POWER & LIGHT COMPANY AND GULF STATES UTILITIES COMPANY



ENTERGY SERVICES, INC. and its affiliates ARKANSAS POWER & LIGHT COMPANY and GULF STATES UTILITIES COMPANY

By: Wayne Anderson
General Attorney-Regulatory
Entergy Services, Inc.
631 Loyola Avenue
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(202) 347-7170

Attorneys and Practitioners

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: September 3, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

PETITION FOR CLARIFICATION OF ENTERGY SERVICES, INC., ARKANSAS POWER & LIGHT COMPANY AND GULF STATES UTILITIES COMPANY

Entergy Services, Inc. ("ESI") and its affiliates Arkansas Power & Light Company ("AP&L") and Gulf States Utilities Company ("GSU") (collectively, "Entergy")[1] hereby petition the Board for clarification of Decision No. 44 in this proceeding served August 12, 1996 ("Decision"), approving the common control and merger of Union Pacific Railroad Company and its rail affiliates ("UP") and Southern Pacific Transportation Company and its rail affiliates ("SP") (collectively "applicants"), subject to certain conditions.

One of the conditions imposed by the Board in granting the merger application requires UP and SP to modify any contracts with shippers at 2-to-1 points incorporated within the BNSF

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[1] AP&L's name was recently changed to Entergy Arkansas, Inc., and GSU's name was recently changed to Entergy Gulf States, Inc. The former names are used herein for consistency.

agreement,[2] regardless of the state in which they are located, to allow BNSF access to at least 50% of the existing contract volume.[3] Entergy requests clarification of this condition in two respects. First, the Board should make it clear that 50% of the contract volume of shippers presently served by only UP or SP, but with potential build-outs to (or build-ins from) the other at a 2-to-1 point under the BNSF agreement, must be opened up for potential movement by BNSF upon completion of the build-out or build in. Second, the Board should make it clear that 50% of the contract volume of each shipper at any 2-to-1 point must be opened to BNSF, and not merely 50% of the aggregate contract volume of all shippers, collectively, at a 2-to-1 point.

BACKGROUND

In the Decision, the Board granted Entergy's request for a condition authorizing BNSF to its trackage rights over SP's Memphis-Houston line under the BNSF agreement to serve AP&L's White Bluff Generating Station in Arkansas ("White Bluff") upon completion of a build-out from the plant to Pine Bluff, Arkansas, which is a 2-to-1 point under the BNSF agreement, in order to preserve this plant's present competitive options. (See Decision

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[2] "BNSF agreement" refers to the agreement between applicants and Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railroad company (collectively "BNSF") dated September 25, 1995, as amended by a supplemental agreement dated November 18, 1995 and a second supplemental agreement dated June 27, 1996.

[3] This condition, which appears at page 146 of the Decision, is hereinafter referred to as the "50% condition".

at 154, 185, 232.) However, 100% of the White Bluff coal tonnage (amounting to 6.5 million tons annually) is contractually committed to UP. Until this contract expires, which will not occur for several years, Entergy cannot take advantage of this condition in order to obtain competitive rail service from BNSF. If the 50% condition applies to the White Bluff plant, UP will be required to modify its existing contract with Entergy to allow BNSF access to 50% of the coal tonnage moving to White Bluff upon completion of the build-out, or 3.25 million tons of coal annually.

Entergy believes the 50% condition does apply to the White Bluff situation, because it involves a build-out from a facility served exclusively by UP to an acknowledged 2-to-1 point under the BNSF agreement. In the spirit of the Board's suggestion that parties attempt to resolve among themselves disputes concerning the meaning or applicability of any of the conditions imposed before resorting to the Board for resolution (Decision at 156), Entergy's counsel contacted applicants' counsel shortly after the Decision was served, advised counsel of Entergy's interpretation that the 50% condition applies to the White Bluff build-out situation, and requested applicants' concurrence in this interpretation. Applicants' counsel responded unequivocally that applicants do not agree with Entergy's interpretation, and that in applicants' view the 50% condition applies only to shippers who are presently 2-to-1

shippers -- that is, who are presently served by both UP and SP and by no other carrier.

Given the parties' inability to resolve their differing interpretations of the 50% condition among themselves, Entergy seeks clarification of the condition to determine its ability to shift 50% of the White Bluff coal tonnage to BNSF upon completion of the White Bluff build-out. As explained below, resolution of this question will affect the timing of this build-out and the volume of traffic available to BNSF to support effective trackage rights operations over SP's Memphis-Houston line.

I. THE BOARD SHOULD CONFIRM THE APPLICABILITY OF THE 50% CONDITION TO SHIPPERS WITH BUILD-OUTS TO 2-TO-1 POINTS.

The 50% condition originally appeared in applicants' settlement agreement with the Chemical Manufacturers' Association ("CMA agreement"). Paragraph 4 of the CMA agreement provides:

> Effective upon consummation of the UP/SP merger, UP/SP shall modify any contracts with shippers at "2-to-1" points in Texas and Louisiana so that at least 50% of the volume is open to BN/Santa Fe.

The Board imposed the CMA agreement as a condition to the merger, but expanded its terms in several respects. With respect to the above-quoted provision, the Board stated:

> [T]he CMA agreement requires applicants to open at least 50% of existing contract volume at 2-to-1 points in Texas and Louisiana to BNSF, and we will require that UP/SP similarly open at least 50% of existing contract volume at all other 2-to-1 points served by BNSF's trackage rights.

(Decision at 133.) The reason given by the Board for this modification was that extension of this provision to all 2-to-1 points, wherever located, "will help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations." (Decision at 146.)

Unfortunately, neither the CMA agreement nor the Decision contains any discussion as to whether the 50% condition was intended to apply only to existing 2-to-1 shippers, or whether it also applies to a shipper such as Entergy who is presently captive to one of the merger applicants but who has a feasible build-out to the other merger applicant at a 2-to-1 point under the BNSF agreement, and thus would be in the position of a 2-to-1 shipper when the build-out is constructed. However, both logic and the fundamental purpose of the 50% condition support its application to shippers with such build-out options.

As a matter of logic, a shipper who is captive to UP but who has a feasible build-out to SP (or vice versa) will suffer a loss of competition as a result of the merger that is conceptually very similar to the lost competition suffered by a shipper presently served by both UP and SP.[4] For all practical

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[4] The Board confirmed as much in noting that the fundamental purpose of the BNSF agreement is to "permit BNSF to replace, to a large extent, the competitive service that is lost when SP is absorbed into UP" (Decision at 103), which includes competition "lost by shippers that now have only a direct connection with either UP or SP, but who benefit from having the other carrier nearby to provide the potential for transloading, build-ins, or build-outs." (Id. n. 97; see, also, Decision at 121-122.) The Board went on to conclude that, with the other conditions imposed, "BNSF will be an effective replacement for SP at these 2-to-1 points and affected 2-to-1 points." (Decision at 124.)

purposes, the only difference between these shippers is one of timing. For example, if the White Bluff build-out were presently under construction, and completed prior to consummation of the merger, White Bluff would then unquestionably be a 2-to-1 facility under any definition. Denial of the benefits of the 50% provision to a shipper simply because its build-out has not yet been constructed (which itself may be due to the existence of contractual tonnage commitments that caused the shipper to defer construction) would give undue weight to timing, and thus exalt form over substance.

Moreover, the wording of the 50% condition supports Entergy's interpretation. The condition is not worded in terms of "2-to-1 shippers", but rather in terms of "shippers at 2-to-1 points" (emphasis added). The White Bluff build-out will connect the plant to SP's Memphis-Houston line at Pine Bluff, Arkansas, which is specifically listed as a 2-to-1 point in Exhibit A to the BNSF Agreement. Thus, for purposes of the BNSF agreement, BNSF service to White Bluff via the build-out would effectively be service to a shipper facility at the 2-to-1 point of Pine Bluff.[5]

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[5] Entergy is not asking that the 50% condition be made available to any UP or SP-served shipper with a potential build-out to any point on a line of the other carrier over which BNSF may operate. Rather, Entergy seeks only confirmation that a shipper served exclusively by UP or SP with a potential build-out to an acknowledged 2-to-1 trackage rights point under the terms of the BNSF agreement can avail itself of BNSF competition for 50% of its contracted tonnage if and when the build-out is constructed.

Finally, Entergy's interpretation of the 50% condition will increase the tonnage available for movement by BNSF during its early years of operations on the trackage rights lines. This will advance the Board's specific objective in expanding the condition's coverage, which was to "help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations." (Decision at 146.)

This is demonstrated by the White Bluff situation itself. White Bluff consumes approximately 6.5 million tons of coal annually, and 100% of this coal is contractually committed to UP for several years into the future. If Entergy's interpretation of the 50% condition is correct, half of this traffic, or 3.25 million tons annually, would be available for movement by BNSF as soon as the build-out is completed. This would give Entergy a strong incentive to construct the build-out immediately, rather than waiting several years until its UP contract expires.[6] Upon its completion, BNSF would be in a position to compete for the movement of 3.25 million tons of White Bluff coal annually over one of the trackage rights lines. This large block of traffic would undoubtedly help "support

---

[6] Because of another contractual commitment to UP, the coal tonnage available for movement by another carrier after Entergy's current contract expires will be substantially less than half of the total tonnage consumed at White Bluff for several additional years. (See Giangrosso Verified Statement in Entergy's Comments filed on March 29, 1996 (ESI-12), at 6-7.) Thus, making additional tonnage available for movement via BNSF when the build-out is completed would enhance the economics of the build-out and make its immediate construction even more likely.

effective trackage rights operations" by BNSF. (Decision at 146.)

II. THE BOARD SHOULD CONFIRM THE AVAILABILITY OF THE 50% CONDITION TO EACH INDIVIDUAL SHIPPER AT 2-TO 1 POINTS.

The 50% condition is also unclear as to whether 50% of the contract volume of each individual shipper at 2-to-1 points must be opened to competition by BNSF, or whether 50% of the tonnage of all shippers, collectively, at a 2-to-1 point must be opened to BNSF. The ambiguity arises from inconsistent descriptions of the 50% condition appearing at pages 133 and 146 of the Decision.

The language at page 133 indicates that UP/SP is being required to "open at least 50% of the existing contract volume at 2-to-1 points", which could be interpreted to mean that 50% of the collective traffic of all shippers at a 2-to-1 point must be opened to BNSF, wiithout distinction as to which individual shipper's traffic is opened. However, at page 146 -- which contains the operative language imposing the condition -- the Board speaks in terms of modifying "any contracts with shippers at 2-to-1 points". This appears to require that 50% of each shipper's contract volume at a 2-to-1 point be opened to BNSF.

If the 50% condition applies collectively to all traffic of all shippers at a 2-to-1 point, UP/SP would have the ability to pick and choose the traffic it wishes to make available to BNSF -- and it would be likely to select the lowest-rated (and thus most undesirable) traffic. This could result in

severe competitive dislocations. For example, at UP/SP's discretion, all of one shipper's traffic could be opened to BNSF while none of a next-door shipper's traffic is opened. Such a situation is both inequitable and a likely disincentive to BNSF to compete for the traffic that is opened up -- thus defeating the purpose of the 50% condition in the first place.

Requiring that 50% of each shipper's traffic be opened to BNSF is more even-handed, avoids the opportunity for UP/SP to select the traffic that it wants to be made available to BNSF, and better promotes the Board's policy objective of maximizing the traffic available for movement by BNSF over the trackage rights lines. The operative language on page 146 clearly supports this interpretation, and Entergy urges the Board to affirm that it is the correct one.

CONCLUSION

For the reasons set forth above, Entergy respectfully requests that the Board clarify its August 12, 1996 Decision in this proceeding by specifying that the 50% condition is available to each individual shipper at a 2-to-1 point, and to any shipper presently served only by UP or SP but who has a potential build-out to the other at a 2-to-1 point on a BNSF trackage rights line upon completion of the build-out.

Respectfully submitted,

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Dated: September 3, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of September, 1996, caused the foregoing Petition for Clarification of Entergy Services, Inc., Arkansas Power & Light Company and Gulf States Utilities Company to be served by hand upon Applicants' counsel:

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and by first class mail, postage prepaid, on all other parties of record in Finance Docket No. 32760.

Christopher A. Mills

STB FD 32760 8-30-96 I 85584

8-5584

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KELLEY E. O'BRIEN
MEMBER OF THE VIRGINIA BAR
NOT ADMITTED IN THE
DISTRICT OF COLUMBIA
202-778-0607

August 30, 1996

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12th Street & Constitution Ave., NW
Room 2215
Washington, DC 20423

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

Dear Secretary Williams:

Enclosed for filing please find the original and twenty (20) copies of Submission of BNSF Respecting Terms for CPSB Conditions (BN/SF-63). Also enclosed is a disk containing the text of BN/SF-63 in WordPerfect 5.1 format.

Please date-stamp the enclosed extra copy and return it to the messenger for our files. Thank you for your time and attention to this matter. Please call me if you have any questions.

Sincerely,

Kelley E. O'Brien

Kelley E. O'Brien

Enclosures

Item No.
Page Count 9
Aug 26

BN/SF-63

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

SUBMISSION OF BNSF RESPECTING TERMS FOR CPSB CONDITIONS

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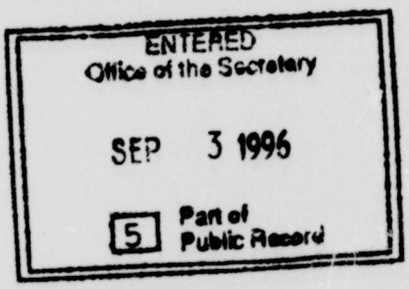

August 30, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

SUBMISSION OF BNSF
RESPECTING TERMS FOR CPSB CONDITIONS

Pursuant to the Board's Order served August 12, 1996, see Decision No. 44, at 185-86, 223, BNSF1/ has discussed with the primary Applicants and CPSB the terms for the implementation of the conditions imposed by the Board in favor of CPSB. On August 23, 1996, Applicants and CPSB submitted their proposed terms for the implementation of those conditions (UP/SP-273/CPSB-9). BNSF has continued its discussions with Applicants and CPSB concerning the CPSB implementation terms, but has been unable to reach an agreement with Applicants as to the appropriate terms. Accordingly, BNSF submits this separate proposal with respect to such terms.2/

1/ The acronyms used herein are the same as those in Appendix B to Decision No. 44.

2/ Pursuant to Decision No. 46 (served August 26, 1996), BNSF was granted an extension of time until August 30, 1996, to file its separate proposal.

In Decision No. 44, the Board granted BNSF trackage rights to serve CPSB's two plants located at Elmendorf, TX near San Antonio, TX. It did so by holding Applicants to their representation that the BNSF agreement would be amended to clarify that Elmendorf is a covered point, i.e., BNSF will receive trackage rights sufficient to enable it to serve the point. Decision No. 44, at 185. The Board noted, however, that there was a question as to whether BNSF had received trackage rights over the appropriate UP line between Ajax and San Antonio.3/ Id.

In the initial discussions among the parties, Applicants took the position that BNSF should serve the CPSB plants by using Track No. 1 via Tower 105 to connect to the SP Elmendorf branch line at SP Junction (Tower 112). However, that routing is different from the routing which is currently used by UP to serve the CPSB plants. Based on BNSF's understanding of the relevant facts, UP uses Track No. 2 via Flatt to reach SP Junction (Tower 112) for virtually all of its service to the plants. UP uses the Track No. 2 routing because of the operational problems UP encountered in the mid-1980's when it tried to use the Track No. 1 routing via Tower 105. That routing apparently is very inefficient because it required complex switching, multiple

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3/ As shown on the attached map, the two UP lines from Ajax to San Antonio are in fact a single line from Ajax to a point called Craig Junction and then the line diverges into two lines from Craig Junction to San Antonio. The line from Craig Junction to Tower 105 in San Antonio is called "Track No. 1" while the line from Craig Junction through Fratt to SP Junction (Tower 112) and then to Tower 105 is called "Track No. 2."

railroad clearances, and the backing of trains several miles on main lines through an urban area of San Antonio. There were apparently also several derailments. In fact, we understand that it was because of these operational problems that UP and CPSB developed a routing over Track No. 2 that would enable UP to deliver its unit coal trains to the plants.

After further discussions, UP agreed to allow BNSF to also serve the CPSB plants via the Track No. 2 route, but UP insisted that BNSF could use the Track No. 2 route solely for the purpose of serving the CPSB plants and would not be able to serve new industries or transloading facilities on the line between Craig Junction and Tower 112. Because that limitation is contrary to the Board's decision, BNSF refused to agree to the limitation and is submitting this separate proposal.4/

In its decision, the Board modified the BNSF agreement, as it had been amended by the CMA agreement, to require that BNSF would have the right to serve any new facilities (including transload facilities) on any UP or SP line over which BNSF was to receive trackage rights under the BNSF agreement. Decision No. 44, at 145-46. Because the only viable trackage rights routing to the CPSB plants that exists is over Track No. 2, the trackage rights which the Board ordered that BNSF should receive to serve the CPSB plants must necessarily be over the Track No. 2 route. Such a trackage rights routing does nothing more than replicate

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4/ BNSF agrees with all of the other terms proposed by Applicants and CPSB in their August 23, 1996 submission.

the service route which UP traffic currently uses, and there is no reason why BNSF should not receive -- and any potential new shippers and customers along the route should not benefit from -- the right to serve new facilities and transload facilities that accompanies all other trackage rights BNSF is receiving.

In fact, the Board expressly recognized in its decision that BNSF should receive that right. Immediately after it awarded trackage rights to BNSF to serve the CPSB plants, the Board noted that the conditions it had imposed confirmed that BNSF would be allowed to serve all new facilities along lines over which BNSF receives trackage rights. Decision No. 44, at 185. Thus, although the Board was unable to determine which UP line between San Antonio and Ajax was the appropriate line for BNSF to use to serve the CPSB plants, it clearly expressed its view that BNSF would receive the right to serve new facilities (which would include transload facilities) on whatever line was determined to be appropriate. As set forth above, the Track No. 2 line is the appropriate (and, in fact, only viable) routing for BNSF to serve the plants.

Accordingly, BNSF requests that the terms for the implementation of the CPSB conditions submitted in UP/SP-273/CPSB-9 be modified to eliminate the restriction proposed by Applicants that BNSF would not be able to serve new industries

and transload facilities on UP's Track No. 2 between Craig Junction and SP Junction (Tower 112).

Respectfully submitted,

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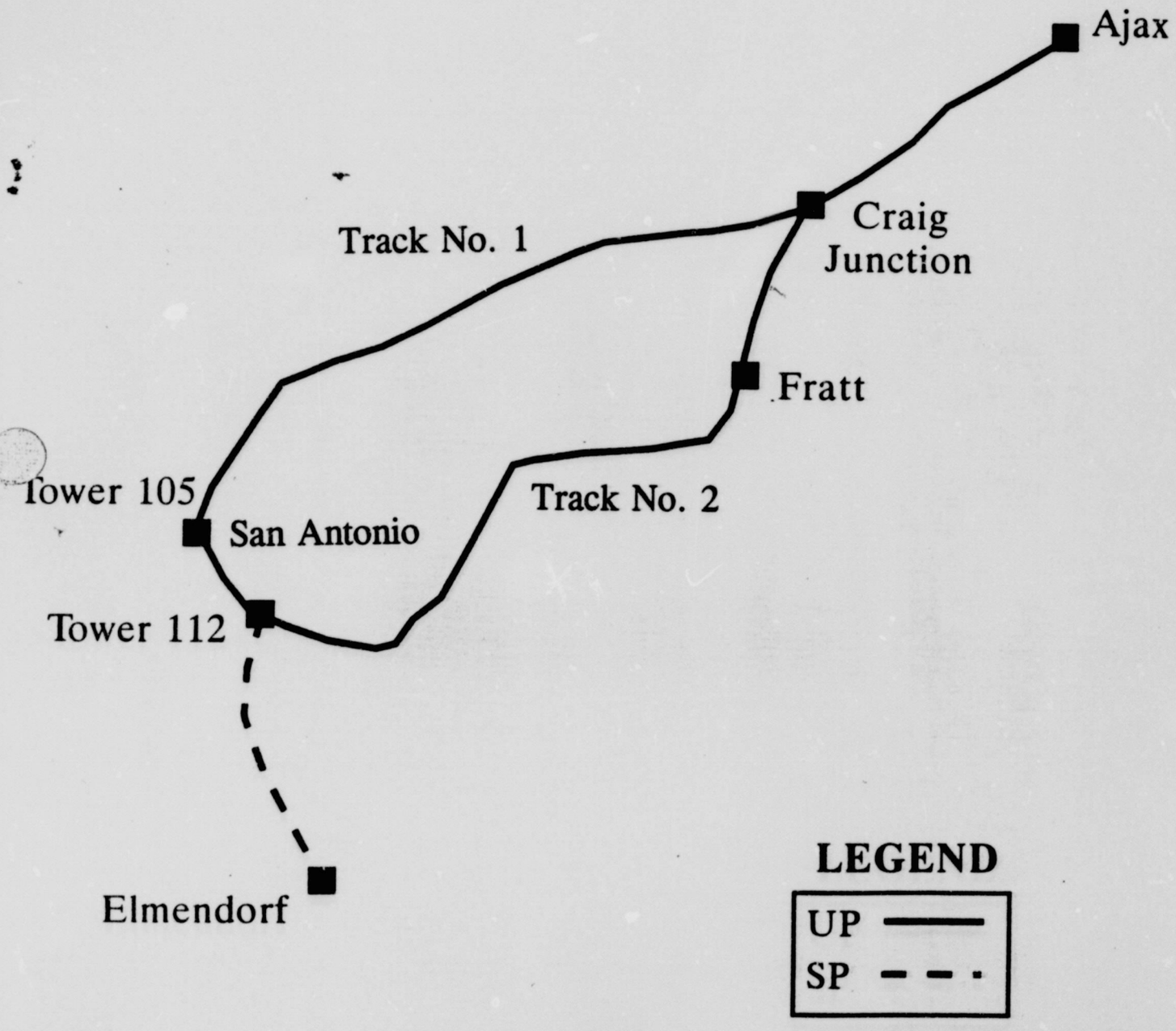
August 30, 1996

Schematic of UP and SP Lines From Ajax, TX to Elmendorf, TX



CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 1996, copies of Submission of BNSF Respecting Terms for CPSB Conditions (BN/SF-63) were served on counsel for the Applicants' and the City Public Service Board of San Antonio via hand-delivery.

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STB FD 32760 8-30-96 I 85563

Page Count 14
Aug #24

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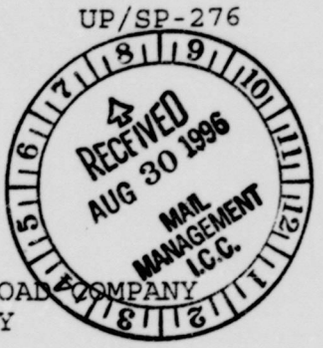
UP/SP-276



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

MOTION FOR LEAVE TO FILE REPLY

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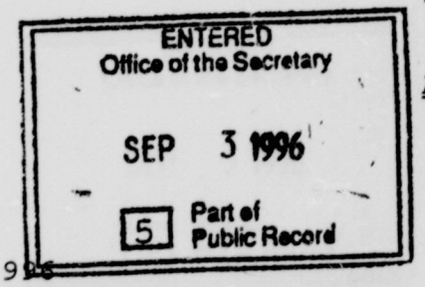

August 30, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

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UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
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COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

MOTION FOR LEAVE TO FILE REPLY

The primary applicants, UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL and DRGW[1/] hereby petition the Board for leave to file the attached Reply to the "Submission of BNSF Respecting Terms for CPSB Condition" filed with the Board on August 30, 1996.[2/] When Applicants and CPSB filed their submission respecting terms for the CPSB conditions on August 23, Applicants understood that BNSF did not concur with the filing. Applicants had no opportunity, however, to respond to BNSF's specific allegations until they were set forth in BNSF's Submission. To ensure that the Board decides this matter in an informed manner based on a full and complete

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1/ The acronyms used herein are the same as those in Appendix B to Decision No. 44.

2/ Applicants are uncertain whether BNSF's filing is properly characterized as a "Reply" to the August 23 submission by Applicants and CPSB, but are filing this motion to moot any claims that they have impermissibly filed a reply to a reply.

record, Applicants respectfully request permission to file the attached Response to BNSF's Reply.

Respectfully submitted,

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August 30, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

APPLICANTS' REPLY TO THE SUBMISSION OF BNSF
RESPECTING TERMS FOR CPSB CONDITIONS

The primary applicants, UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL and DRGW[1/] hereby reply to the "Submission of BNSF Respecting Terms for CPSB Conditions." The Board should reject BNSF's argument that Decision No. 44 requires Applicants to allow BNSF to serve new industries and new transloading facilities on the MKT line[2/] over which Applicants have agreed to grant BNSF trackage rights, purely for operating convenience, as a second, alternative route to reach CPSB's Elmendorf facilities. BNSF has been granted access over two viable routes to reach CPSB's Elmendorf facilities, and its claim that it should be entitled to serve new industries and new transloading facilities on both routes is a case of pure overreaching.

1/ The acronyms used herein are the same as those in Appendix B to Decision No. 44.

2/ BNSF refers to this line as the "Track 2 route."

Applicants have long made clear their commitment to allow BNSF to serve CPSB's Elmendorf facilities. As part of the BNSF settlement agreement, as amended, and the Sealy, Texas to Waco and Eagle Pass, Texas Trackage Rights Agreement, dated June 1, 1996, Applicants and BNSF agreed on a route over which BNSF would have trackage rights necessary to serve CPSB's Elmendorf facilities.

In their August 23 "Submission of Applicants and CPSB Respecting Terms for CPSB Conditions" (UP/SP-273/CPSB-9), Applicants and CPSB agreed that BNSF would be provided rights over a segment of track inadvertently omitted from the implementing agreement governing San Antonio traffic. This additional grant of trackage rights was all that was necessary to meet the Board's requirement that Applicants fulfill their commitment to CPSB that BNSF would be able to serve CPSB's Elmendorf facilities via trackage rights.[3/] But Applicants also took an extra step, as a courtesy to CPSB, and agreed to provide BNSF with an alternative route over a line of the former MKT, which CPSB prefers as an operational matter, for the sole purpose of handling CPSB traffic.

BNSF now demands the right to serve new industries and new transloading facilities on the MKT route as well as on

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[3/] Applicants also met the Board's requirement that Applicants preserve CPSB's option to have BNSF serve the Elmendorf facilities via CPSB's existing trackage rights over SP.

the original MPRR route[4/] upon which Applicants and BNSF had previously agreed.

BNSF is not entitled to these additional rights. In Decision No. 44, the Board required Applicants to allow BNSF to serve new industries and new transloadng facilities along trackage rights granted to solve competitive problems. But Applicants' agreement to grant BNSF trackage rights over the MKT route was purely for operational convenience, not to preserve competition.

BNSF argues that the MPRR route is not viable, and thus that its rights under the Board's Decision No. 44 to serve new industries and new transloading facilities should apply to the MKT route. But as explained in the attached verified statement of Steve Searle, Superintendent of Merger Projects/Shortline Operations for UP, the MPRR route, over which Applicants originally granted BNSF rights as part of the BNSF settlement agreement, is a viable route to serve CPSB's Elmendorf facilities. This route is comprised of trackage rights over (a) MPRR's line between Ajax, Texas, and San Antonio, Texas, via Adams, Texas; (b) SP trackage between SP Tower 105 and SP Junction (Tower 112);[5/] and (c) SP's li[illegible] between SP Junction (Tower 112) and Elmendorf. This MPRR

[4/] BNSF refers to this as the "Track 1 route."

[5/] Applicants clarified their intention to provide BNSF with rights over this segment in the "Submission of Applicants and CPSB Respecting Terms for CPSB Conditions" (UP/SP-273/CPSB-9).

route via Adams is the same route that UP used to deliver unit coal trains to CPSB's Elmendorf facilities from the time UP won the CPSB contract in 1985 until it obtained rights to use the MKT route in 1987. In fact, UP won the CPSB contract because it was able to out-compete a joint BN-SP move over a route configured similarly to the MKT route.

BNSF has long known that Applicants' grant of trackage rights to reach CPSB's Elmendorf facilities related to the MPRR line via Adams and not the MKT line, and never suggested it needed rights elsewhere to serve CPSB -- much less rights to serve new industries on some other line. The MPRR route is clearly designated in the San Antonio area implementing agreement, which was entered into long after Applicants and BNSF inspected the San Antonio area trackage during a March 29, 1996 inspection trip. See UP/SP-266, Ex. B, Sealy, Texas to Waco and Eagle Pass, Texas Trackage Rights Agreement, dated June 1, 1996. In fact, the agreement establishes a BNSF set out and pick up point on the MPRR line at Adams, Texas.

BNSF offers no justification for its obtaining the right to serve new industries and new transloading facilities along both the MPRR route and the MKT routes.[6/] BNSF simply

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[6/] The availability of the MKT route for CPSB traffic will not eliminated BNSF's need for and use of the MPRR route. The MPRR trackage between Ajax and San Antonio will be used by BNSF for Eagle Pass traffic and to set out and pick up San

(continued...)

wants more than it is entitled to -- additional rights over both lines.

Applicants and CPSB have resolved their differences, and Applicants took an extra step to provide CPSB with the ability to use its preferred routing. BNSF's attempt to grab additional rights along this alternative routing is completely unjustified.

6/ (...continued)
Antonio traffic. See UP/SP-266, Ex. B, Sealy, Texas to Waco and Eagle Pass, Texas Trackage Rights Agreement § 2(e)(i) ("User shall have the right to set out and pick up traffic on MPRR's line at Adams, Texas, MPRR Milepost 254.0").

Respectfully submitted,

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August 30, 1996

VERIFIED STATEMENT OF STEVE SEARLE

My name is Steve Searle. I am Superintendent of Merger Projects/Shortline Operations for UP. I served on the UP/SP-BNSF settlement agreement team that performed joint inspections of the UP and SP lines that were part of the trackage rights granted to BNSF, and I led the UP team involved in the joint inspection of trackage rights lines in the San Antonio area on March 29, 1996.

In the San Antonio area, Applicants granted BNSF trackage rights to allow BNSF to serve the City Public Service Board of San Antonio's Elmendorf facilities. The rights upon which Applicants and BNSF agreed run over (a) an MPRR route between Ajax and San Antonio, via Adams, Texas; (b) SP trackage between SP Tower 105 and SP Junction (Tower 112); and (c) SP's route between SP Junction (Tower 112) and Elmendorf.

I am told that BNSF claims that the only viable route to CPSB's Elmendorf facilities runs over the line of the former MKT that branches off to the south of the MPRR Ajax-San Antonio route described above at a point called Craig Junction. UP currently serves CPSB using this route, moving its trains from Craig Junction south over the former MKT's line, via Fratt, Texas, to SP Junction (Tower 112), and thence to CPSB's Elmendorf facility.

Before UP acquired its MKT route, however, UP used the MPRR route to deliver unit coal trains to CPSB's Elmendorf facilities. UP won the CPSB contract because, using the MPRR route, it was able to out-compete a joint BN/SP move which

used a route more like the MKT route than the MPRR route. UP used the MPRR route from the time it won the CPSB contract in 1985 until UP obtained trackage rights from MKT and built a connection necessary to use the MKT line and began to use that line in 1987.

Moreover, the MPRR route granted to BNSF includes the same MPRR trackage rights between Ajax and San Antonio that BNSF will use for its Eagle Pass traffic and to set out and pick up San Antonio traffic.

BNSF was clearly aware that Applicants' grant of trackage rights in the San Antonio area was over the MPRR line and not the MKT line. One of the topics discussed on the inspection trip to the San Antonio was the possibility of granting BNSF additional trackage rights over the MKT line to allow BNSF to build a connection to reach East Yard. (BNSF ultimately determined that it would not be feasible to build a connection from that line to reach East Yard.) Another topic of discussion was the location of a point at which BNSF could set out and pick up traffic, and we discussed locations along the MPRR track.

As the above makes clear, the route granted to BNSF to serve CPSB's Elmendorf facilities is clearly viable, and BNSF knew the route it was getting, even though UP's current routing to CPSB's Elmendorf facilities over the former MKT is

operationally preferable to the MPRR route as presently configured.[1/]

1/ I understand, however, that a more efficient connection could be constructed between the MPRR line and the SP line between Tower 105 and SP Junction (Tower 112).

AFFIRMATION

I, STEVE SEARLE, declare under penalty of perjury, that I have read the foregoing statement, that I know its contents, that its contents are true as stated to the best of my knowledge and belief, and that I am authorized to make this statement. Executed on Aug 30, 1996

Steve Searle

STEVE SEARLE

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 30th day of August, 1996, I caused a copy of the foregoing document to be served by hand delivery on counsel for BNSF and the City Public Service Board of San Antonio, and by first-class mail, postage prepaid on:

Director of Operations
Antitrust Division
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Department of Justice
Washington, D.C. 20530

Premerger Notification Office
Bureau of Competition
Room 303
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Washington, D.C. 20580

Michael L. Rosenthal

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Item No. _____

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UP/SP-275

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

APPLICANTS' PETITION FOR CLARIFICATION

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August 29, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

APPLICANTS' PETITION FOR CLARIFICATION

The primary applicants in this proceeding, UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL and DRGW,[1] respectfully request, pursuant to 49 C.F.R. § 1117.1, that the Board clarify certain aspects of Decision No. 44.[2] This Petition asks, first, that the Board clarify that BNSF's right to serve new transloading facilities located on the UP or SP lines on which BNSF will have overhead trackage rights is for the purpose of handling traffic transloaded to or from points on the other merging railroad, and not for the purpose of accessing exclusively-served shippers of the merging railroad over which BNSF has overhead trackage rights. Second, the petition asks that the Board clarify that BNSF's right to

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[1] The acronyms used herein are the same as those in Appendix B to Decision No. 44.

[2] Applicants believe that the points raised herein involve making clear what was in fact the intent of Decision No. 44. Should Applicants be mistaken as to the intent of that decision, Applicants respectfully request that this petition be treated as a petition to reopen pursuant to 49 C.F.R. § 1115.3 on the ground of material error.

serve new facilities on UP-owned, as well as SP-owned, lines over which it will have trackage rights does not apply to (a) the segment between Placedo and Harlingen, Texas, where, because SP operates over UP via overhead trackage rights, there is no competition for siting new industries today, or (b) segments where BNSF was given trackage rights solely for operating convenience.

Transloading Condition

The first matter as to which clarification is requested is the scope of the condition requiring that BNSF be permitted to serve new transloading facilities not only at "2-to-1" points, but at all points on the lines over which BNSF will receive trackage rights. (Transloading involves the movement of a shipper's goods by truck between the shipper's facility and a transloading facility, where the goods are transferred between the truck and a rail car.)

This condition is repeatedly explained in Decision No. 44 as preserving existing competitive options that shippers served by UP now have to truck their goods to or from transloading facilities at points on SP, or vice versa.[3/]

[3/] E.g., Decision No. 44, pp. 103 n.97 ("shippers that now have only a direct connection with either UP or SP, but who benefit from having the other carrier nearby to provide the potential for transloading"), 106 ("where a shipper served only by UP or SP could have transloaded shipments to the other carrier, that option would not be replaced by the terms of the CMA agreement"), 124 ("today UP or SP may locate transloading facilities anywhere on their lines to reach shippers on the other carrier"; "when UP or SP lines run near the plant of an

(continued...)

However, the transloading condition imposed by the Board, read literally, could be understood as going far beyond this: it could be interpreted to permit BNSF to serve, via new transloading facilities on the lines where it will receive overhead trackage rights, not only traffic trucked to or from a point on the other merging railroad, but also traffic trucked to or from a shipper on the very line where the transloading facility is located (or, say, a nearby branch of that merging railroad).[4/]

The attached Verified Statement of Richard B. Peterson provides a number of concrete examples that illustrate the overbreadth of the condition if given this literal reading. For instance, a coal mine at Cameo, Colorado, on the SP mainline over which BNSF will receive overhead trackage rights, is served today by only one

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[3/](...continued)
exclusively served shipper, the ability of that shipper to transload . . . to a second carrier can provide important leverage in rate and service negotiations with the carrier providing direct service to the plant, and the conditions which we are imposing reflect the importance of this arrangement").

[4/] See, e.g., id., pp. 106 (requirement "that the term 'new facility' [in the CMA agreement] include new transload facilities, and that applicants make available all points on their lines (over which BNSF receives trackage rights) to transload facilities, wherever BNSF or some third party chooses to establish them"), 124 ("allowing BNSF or third parties to locate transloading facilities anywhere on the lines where BNSF will receive trackage rights"), 146 ("requiring that the term 'new facilities' shall include transload facilities, including those owned or operated by BNSF").

railroad, SP, and the nearest points on other railroads to or from which traffic might be trucked -- Denver, which is served by BNSF and UP, and Creston, Wyoming, which is served by UP -- are over 225 highway miles away. Yet, read literally, the transloading condition could be understood as permitting BNSF to build and serve a new transloading facility right at the mine, and to handle coal trucked a de minimis distance from the mine itself to that transloading facility -- thereby giving the mine the very near equivalent of direct two-railroad service.[5/] This would create new competition -- something the Board repeatedly held in Decision No. 44 that it would not use its conditioning authority to do.[6/] Indeed, as Mr. Peterson explains, the transloading condition, read in this literal fashion, would come very close to opening all the exclusively-served shippers on the overhead trackage rights lines to a second railroad -- which the Board found to be unjustified when it rejected the divestiture proposals advanced by various parties.[7/]

The Board clearly did not intend this result, for it expressly stated that the purpose of the transloading

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[5/] Though the shipper would have to bear the costs of truck loading and unloading and of trucking its coal a trivial distance to the transloading facility, it would no longer face the prohibitive cost of a 225-mile truck haul.

[6/] E.g., id., pp. 188, 189, 193.

[7/] E.g., id., p. 158; see also id., p. 239 (Chairman Morgan).

condition was to "preserve [the existing] competition" that arises from the ability of UP-served shippers to transload to SP points, and vice versa.[8/]

Applicants submit that the unintended overbreadth of the transloading condition can be very simply rectified by clarifying that the condition applies only to shippers trucking traffic between a point on one of the merging railroads and a new BNSF transloading facility at a point on the other merging railroad.[9/] BNSF would not be able to set up a transloading facility on a trackage rights line to handle the business of an exclusively-served shipper on that same

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[8/] Id., p. 124 (emphasis added). See also, e.g., id., p. 240 (Chairman Morgan) ("conditions are carefully crafted to preserve competitive alternatives existing today").

It is clear that the Board did not intend to grant BNSF access to additional traffic willy nilly, without regard to whether existing competitive options were being preserved. For example, recognizing that the competition to site a new industry has ended once it is located on a particular railroad, the Board sustained the exclusion of expansions of existing facilities from the definition of "new facility" in the CMA agreement. Id., p. 185. Moreover, the Board found that BNSF will have access to more than enough traffic to be fully competitive, without gaining access to exclusively-served UP and SP traffic. Id., pp. 133, 138-40, 244-45.

[9/] The Board's discussion of Monsanto Company's UP-exclusive plant at Chocolate Bayou, Texas, makes plain that this is exactly what the Board intended. The Board stated, at p. 190 of Decision No. 44, that this plant would not lose transloading options "because BNSF will have (under the transload condition we have imposed) the rights to operate new transload facilities on the nearby SP line." (Emphasis added.) Though BNSF will have overhead trackage on the UP line through Chocolate Bayou, the Board did not contemplate that BNSF could handle Monsanto's business through a new transload right at Chocolate Bayou.

line (or, say, on a nearby branch of that merging railroad). This will ensure that the condition preserves transloading alternatives that now may exist because UP and SP are competitors, without creating new alternatives.[10/]

BNSF Right to Serve New Facilities on UP-Owned Lines

Applicants also submit that the condition expanding BNSF's right to serve new facilities on UP-owned as well as SP-owned lines should not apply to (a) the UP segment between Placedo and Harlingen, Texas; (b) the additional UP lines over which BNSF was given trackage rights pursuant to the CMA agreement; or (c) the line between Craig Jct. and SP Jct., Texas, over which Applicants have agreed to grant BNSF trackage rights to provide an alternative route, solely for operating convenience, for CPSB traffic.

(a) On the Placedo-Harlingen segment, which makes up a substantial part of SP's route between Houston and Brownsville, SP operates via overhead trackage rights on UP, and long ago abandoned its own parallel line. Because SP

10/ The Board did not specifically cite preserving transloading options for off-rail shippers as part of its stated rationale for the transloading condition. But if the Board wishes to extend the condition to off-rail shippers, it should specify that the condition applies to such a shipper only if the distance from the shipper to a new BNSF-served transloading facility on one of the merging railroads is at least as great as the distance from the shipper to the nearest point on the other merging railroad. Again, as Mr. Peterson discusses, this would avoid the overbreadth that would result from allowing such a shipper to truck its goods to or from a BNSF transloading facility just a mile away on one of the merging railroads, if its only present transloading option on the other merging railroad is hundreds of miles away.

lacks local service rights on this segment and has no parallel line, there is no competition today between SP and UP for the location of new industries in this area. It thus goes beyond the Board's competition-preserving purpose to permit BNSF to serve new industries on this segment.

(b) Pursuant to the CMA agreement, Applicants granted BNSF trackage rights over two UP-owned segments: UP's line between Houston and Valley Junction, Illinois (near St. Louis); and UP's line between Fair Oaks and Bald Knob, Arkansas. These rights were granted to address claims that BNSF might encounter operating problems running "against the flow" in the Houston-Memphis corridor, and would have more efficient access to St. Louis over UP/SP than over its own line. As the sole purpose for these additional rights was operating convenience, the rationale for expanding BNSF's access to new facilities does not apply to them.[11/]

(c) The same point applies to the Craig Jct.-SP Jct. rights, which were also granted solely for operating convenience.[12/]

[11/] Also, BNSF's ability to serve new industries on the nearby SP line between Houston and Memphis fully preserves siting competition in this "2-to-1" corridor, and BNSF itself has a line in the Memphis-St. Louis corridor where it can compete for new industry sitings.

[12/] Applicants also note the following further minor points of clarification in Decision No. 44: (a) At the bottom of p. 1, there appears to be text missing from footnote 2. (b) Footnote 5, on p. 8, states that SSW is a 99.9%-owned subsidiary of SPR. In fact, SSW is a 99.9%-owned subsidiary

(continued...)

Respectfully submitted,

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August 29, 1996

12/ (...continued)
of SPT. See UP/SP-22, p. 66. (c) At the end of p. 63, there is either a period missing or text missing. (d) Footnote 240 at p. 199 and the associated text suggests that Herlong, California, comes within the "omnibus clause" of the BNSF settlement agreement. In fact, Herlong is a "2-to-1" point located on a BNSF trackage rights line and listed in Exhibit A to the agreement. This treatment of Herlong was corrected in the supplemental agreement dated November 18, 1995. See UP/SP-22, p. 358.

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 29th day of August, 1996, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

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Washington, D.C. 20530

Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

Michael L. Rosenthal

VERIFIED STATEMENT

OF

RICHARD B. PETERSON

My name is Richard B. Peterson, and I am Senior Director-Interline Marketing of UP. I previously submitted verified statements in this proceeding as part of the application (UP/SP-23, pp. 1-369) and the Applicants' rebuttal (UP/SP-231, Tab 17).

In my prior testimony, I explained that Applicants carefully reviewed transloading situations involving UP and SP, and concluded that no UP or SP shipper that has a viable transloading option would be left without such an option following the merger and BNSF settlement agreement. With its extensive Western route network, and the rights it will receive under the settlement agreement to serve existing and new transloading facilities at all "2-to-1" points, BNSF will provide such a viable transloading option to all UP and SP shippers that enjoy it now. UP/SP-23, Peterson, p. 164 n.79; UP/SP-231, Peterson, pp. 76-80. No one submitted any evidence to the contrary.

Nonetheless, in Decision No. 44, the Board concluded that BNSF should receive additional rights to serve new transloading facilities on the overhead portions of its trackage rights over UP/SP lines. The Board explained this holding as aimed at preserving options that shippers at UP

points have to truck their goods to or from SP points, and vice versa.

I can understand that, notwithstanding my prior testimony, the Board was concerned that there might theoretically be such options that would be lost following the merger -- even though we found none. However, if it were read literally, the Board's transloading condition would go far beyond preserving such options. Read literally, it would allow BNSF to locate a transloading facility immediately adjacent to a shipper that is now exclusively served by one of the merging railroads on a line where BNSF will receive overhead trackage rights, and to handle traffic to or from that shipper via transloading, even though the shipper has no remotely comparable transloading option via the other merging railroad today. This comes very close to opening all exclusively-served shippers on or near the lines where BNSF will receive overhead trackage rights to two-railroad service.

Three concrete examples, among hundreds, may help to illustrate the point:

- At Cameo, Colorado, about 15 miles east of Grand Junction on the SP mainline over which BNSF will receive overhead trackage rights, SP exclusively serves the coal mine of Powder Horn Coal Co. The nearest points on other railroads -- Denver, which is served by BNSF and UP, and Creston, Wyoming, which is served by UP -- are more than 225 highway

miles away. If the Board's transloading condition were read literally, BNSF would be entitled to build a transloading facility right at Cameo, and to handle Powder Horn Coal's outbound coal at that facility -- even though trucking the coal 225+ miles to Denver or Creston is not an economically feasible option today. Similarly, BNSF could move, say, inbound machinery from exclusive BNSF points to the shipper via the transloading facility, even though the merger in no way reduces competitive options for such traffic.

- SP provides the only line-haul rail service for a major paper plant of Champion International near Moscow, Texas, a point on the SP Houston-Memphis line over which BNSF will receive overhead trackage rights.[1/] Champion today uses truck transloading as an alternative to SP service, with 93% of its transload shipments moving via a BNSF transloading facility at Cleveland, Texas, 30 miles to the south, and only 7% moving via a UP transloading facility at Palestine, Texas, nearly 100 miles to the northwest.[2/] If the transloading condition were read literally, BNSF -- which already provides the far superior transloading option -- could build a transloading facility right at Moscow, and use it to move

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1/ The plant is located at Camden, Texas, on the Champion-owned Moscow, Camden & San Augustine Railway, which connects solely to SP at Moscow.

2/ See Champion International Comments, Dec. 19, 1995, Kerth, p. 7.

Champion's traffic. This simply gives BNSF and the shipper an improved competitive option that they do not have today.

- SP exclusively serves an Eagle-Picher diatomaceous earth plant at Lovelock, Nevada, located on the SP mainline over which BNSF will receive overhead trackage rights. The closest UP points are Reno, 88 miles away, and Winnemucca, Nevada, 75 miles away. Under the BNSF settlement agreement, the shipper will be able to transload via BNSF both at Reno, which is a "2-to-1" point, and at Weso (just adjacent to Winnemucca), also a "2-to-1" point. If the transloading condition were read literally, BNSF could also build a transloading facility right at Lovelock, and use it to move Eagle-Picher's traffic -- again an outcome that, rather than preserving any existing competition, simply provides a windfall to BNSF.

A literal reading of the transloading condition thus leads to unintended overbreadth. This can be very simply remedied by clarifying that the condition applies only to shippers trucking traffic between a point on one of the merging railroads and a new BNSF transloading facility at a point on the other merging railroad. This will preserve all actual and potential transloading competition that now exists between UP and SP, without creating extensive new competition that all but opens to joint service hundreds of shippers that are exclusively served today.

The same basic analysis applies to off-rail shippers, though Decision No. 44 mentions only shippers trucking between a point on one of the merging railroads and a transloading facility on the other. If an off-rail coal mine is located one mile from the SP mainline at Cameo, Colorado, and today trucks to an SP transloading facility at Cameo, with its closest theoretical transloading options at the far-too-distant points of Denver and Creston more than 225 miles away, it is clearly not appropriate to allow BNSF to open its own new transloading facility right next door to SP's transloading facility at Cameo, a mile from the mine, and handle the mine's coal through that facility. If the Board wishes to specify a straightforward rule clarifying the applicability of the condition to off-rail shippers, it should provide that the condition applies only if the distance from the off-rail shipper to a new BNSF-served transloading facility at a point on one of the merging railroads where BNSF has overhead trackage rights is at least as great as the distance from the shipper to the nearest point on the other merging railroad. This would avoid creating extensive <u>new</u> competition for such shippers.

AFFIRMATION

I, RICHARD B. PETERSON, declare under penalty of perjury, that I have read the foregoing statement, that I know its contents, that its contents are true as stated, and that I am authorized to make this statement. Executed on August 29, 1996.

Richard B. Peterson

RICHARD B. PETERSON

85624

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ARVID E. ROACH II
DIRECT DIAL NUMBER
(202) 662-5388
DIRECT TELEFAX NUMBER
(202) 778-5388

September 4, 1996

BY HAND

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Room 2215
12th St. & Constitution Ave., N.W.
Washington, D.C. 20423

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

Dear Secretary Williams:

The Applicants have been served with petitions to reopen or for clarification, all dated September 3, by Entergy, Dow, Tex Mex and KCS. We intend to respond to these petitions on or before the deadline of September 23.

Sincerely,

Arvid E. Roach II

On Behalf of the Applicants

cc: All Parties of Record

Item No. _____

Page Count 1

Sep # 15

STB FD 32760 8-7-96 I 85107

Item No. 85107
Page Count 2
August, 1996 # 8

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August 7, 1996

BY HAND

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Room 2215
12th St. & Constitution Ave., N.W.
Washington, D.C. 20423

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

Dear Secretary Williams:

The Applicants are in receipt of a July 30 letter to Chairman Morgan from Dow, and an August 2 letter, corrected August 5, from KCS to Chairman Morgan replying to Dow. Dow's letter reargues a request for various trackage rights in association with a right to build in to Dow's facility at Freeport, Texas, which the Board voted on July 3 to grant in part and deny in part. We repeat what we have said in response to similar submissions by Wichita and Amtrak: The record is closed; the Board has not yet issued its written decision memorializing the matters it voted upon on July 3; and this is not the time to be seeking to reargue, change or "clarify" a Board decision that has not yet been issued. While the Applicants strongly disagree with Dow's arguments, we do not propose to respond unless requested to do so by the Board.

The Applicants are also in receipt of a July 29 letter from Railco, Inc., to the Board, the Applicants, Utah Railway, DOJ and various Members of Congress asking that the Applicants' settlement agreement with Utah Railway (filed in this proceeding on February 2) be changed to allow Utah Railway to serve a Railco loadout facility at Savage, Utah, that is solely served by SP. Railco was an active party to the case, and made no such request in the comments it filed on March 21, which simply opposed the merger. This was no inadvertent omission on Railco's part, since it advised UP in a letter dated March 22 that it would withdraw its opposition if UP gave it the relief it is now asking the Board to grant. Railco's request should be denied as clearly out of time. It

should also be denied because, among other reasons, it is simply one more of a large number of requests by shippers -- all of which the Board voted on July 3 to reject -- which seek to add competition that does not exist now rather than to rectify any loss of competition that the merger would cause.

Sincerely,

Arvid E. Roach II

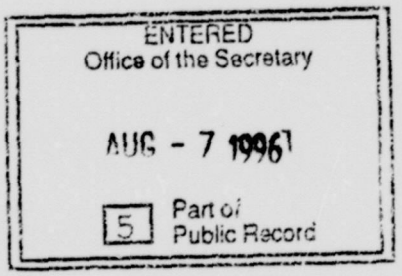
cc: All Parties of Record

8 57103

Item No. _____

Page Count 2

Merger 1996 # 57



1 AUGUST 1996

OFFICE OF THE SECRETARY
SURFACE TRANSPORTATION BOARD
12TH STREET AND CONSTITUTION AVE.NW
WASHINGTON, DC 20423

FD32760

I HAVE ATTACHED A COPY OF AN ARTICLE THAT APPEARED IN OUR HOME TOWN PAPER. IT IS A PRESS RELEASE ON THE UP/SP RAILROAD MERGER, AND HOW THE RESULTING REORGANIZATION WILL AFFECT SOME OF THE WORKERS.

AS YOU CAN SEE BY THE ARTICLE IT WILL CAUSE MANY FINE PEOPLE TO LOSE THEIR JOBS. WHEN YOU COMBINE THIS LOSS WITH THE BLASE ATTITUDE BEING EXPRESSED BY MR SHATTUCK, UP TOP MARKETING EXECUTIVE., IT BECOMES UNCONSCIONABLE.

REMARKS LIKE 'THIS TIME THE COMPANY WILL DECIDE WHO WORKS FOR THE NEW RAILROAD.', AND 'THE COMPANIES ARE DECIDING WHO TO HIRE AND WHERE THEY WILL WORK' ARE IN DIRECT OPPOSITION TO WHAT I BELIEVE TO BE A GOOD FAITH CONTRACT BETWEEN LABOR AND MANAGEMENT.

I BELIEVE THAT ALL WORKERS, ORGANIZED OR NOT, ARE ENTITLED TO SOME BASIC RIGHTS AND CONSIDERATIONS. FOR ANY COMPANY TO BE ALLOWED TO DISREGARD AND THROW AWAY THEIR PEOPLE IN SUCH A MANNER IS OBSCENE.

THIS WOULD BE A GIANT STEP BACKWARD IN OUR FIGHT FOR WORKER RIGHTS-IT WOULD BE BACK TO FAVORITISM AND KICK-BACKS. WHAT NEXT, THE COMPANY TOWN/STORE SO THEY CAN REALLY CONTROL OUR LIVES.

I CAN ONLY HOPE THAT THE POWERS THAT BE, WHO ARE MAKING THIS MERGER DECISION WILL LOOK VERY CLOSE AT WHAT THEY ARE CREATING.

YOUR HELP IN AVERTING WHAT WOULD BE A TERRIBLE INJUSTICE TO THE AMERICAN WORKER WILL BE GREATLY APPRECIATED.

SINCERELY

Carmen L. Lolley

CARMEN L. LOLLEY
6707 ICHABOD AVENUE
GILLETTE, WYOMING 82717

30 July '96 Gillette News-Record

Rail merger brings worries over job security

By The Associated Press

Employees in the marketing departments apparently will be the first to learn if they will stay or go in the merger of Union Pacific Railroad and Southern Pacific Rail Corp.

Jim Shattuck, Union Pacific's top marketing executive, said company planners are deciding how to consolidate the marketing departments, the first divisions scheduled to be combined after formal merger approval.

Shattuck estimated UP's marketing department in Omaha would gain around 60 positions through the merger. He said most of the approximately 275 positions at SP's marketing department in Denver will be transferred or eliminated.

About 325 employees work in UP's marketing department in Omaha. Another 130 marketing employees work in other areas along the UP system, he said.

Shattuck said employees won't be able to volunteer for buyouts as they did during UP's acquisition last year of the Chicago & North Western Transportation Co. This time, he said, the company will decide who works for the new railroad.

"We wanted to get the very best people we have into those positions," Shattuck said. "They'll either get a good job or a good severance package."

Shattuck said other departments probably will reduce staff in the same manner, although company spokesman John Bromley declined to comment Monday in detail on the matter.

"It's way too early for us to talk about this stuff publicly," Bromley said.

Union Pacific gained preliminary approval last month for its $5.4 billion acquisition of Southern Pacific. Together, the companies will create the largest railroad in North America.

Shattuck and Bromley cautioned that merger planning remains in the preliminary stages, making precise employment numbers impossible.

In a merger application filed last year, Union Pacific said it intended to eliminate about 3,400 jobs in the consolidation. The companies, which employ about 53,000 people, are deciding who to hire and where they will work.

A new marketing department should be put together and operating under the Union Pacific name by November, Shattuck said. Other administrative departments — such as accounting, human resources, corporate communications and labor relations — should be consolidated after the marketing departments, he said. The railroads' operating departments will remain separate for a longer period of time, Shattuck said. The companies will integrate computer systems and complicated labor agreements.

STB FD 32760 7-2-96 I 84609

84609

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202-778-0642

July 2, 1996

VIA HAND DELIVERY

Item No. _____
Page Count 8
July 1, 1996 # 10

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12th Street & Constitution Ave., NW
Room 2215
Washington, DC 20423

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket are the original and twenty (20) copies of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company's Motion to Strike Portions of the Oral Argument of The Society of the Plastics Industry, Inc. (BN/SF-61). Also enclosed is a 3.5-inch disk containing the text of BN/SF-61 in Wordperfect 5.1 format.

I would appreciate it if you would date-stamp the enclosed extra copies and return them to the messenger for our files.

Sincerely,

Erika Z. Jones

Erika Z. Jones

Enclosures

BN/SF-61

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

BURLINGTON NORTHERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY'S MOTION TO STRIKE PORTIONS OF THE ORAL ARGUMENT OF THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

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Richard E. Weicher
Janice G. Barber
Michael E. Roper
Sidney L. Strickland, Jr.

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and

The Atchison, Topeka and Santa Fe
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Erika Z. Jones
Adrian L. Steel, Jr.
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Kathryn A. Kusske

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2000 Pennsylvania Avenue, N.W.
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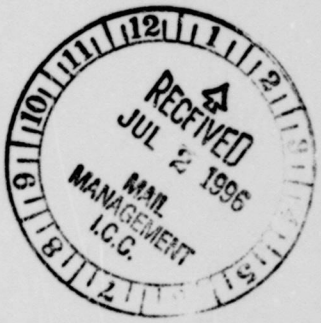
(202) 463-2000

Attorneys for Burlington Northern Railroad Company
and The Atchison, Topeka and Santa Fe Railway Company

July 2, 1996

BN/SF-61



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

BURLINGTON NORTHERN RAILROAD COMPANY AND
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY'S
MOTION TO STRIKE PORTIONS OF THE ORAL ARGUMENT OF
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

Burlington Northern Railroad Company ("BN") and The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") (collectively, "BN/Santa Fe") hereby submit this Motion to Strike portions of the oral argument of counsel for the Society of the Plastics Industry, Inc. ("SPI") during the public oral hearing before the Surface Transportation Board ("Board") on July 1, 1996. Specifically, BN/Santa Fe moves the Board to strike from the transcript of the oral argument in this proceeding the impertinent, scandalous, and wholly outrageous statements made by counsel for SPI that BN/Santa Fe "lied" about its ongoing implementation process with respect to

storage-in-transit ("SIT") facilities.1/ As shown below, SPI's counsel has no basis to accuse BN/Santa Fe of any improprieties with respect to its implementation process, and his comments should be stricken because they impugn the character of BN/Santa Fe and its officers and executives.2/

BN/Santa Fe believes that SPI's counsel's accusation was based on an alleged inconsistency between BN/Santa Fe's response to requests for admissions and the deposition testimony of BN/Santa Fe Vice President Carl R. Ice. In the response to the requests for admissions filed on February 20, 1996, BN/Santa Fe stated that it "is currently in the process of developing * * * plans" for storage-in-transit facilities. BN/SF-25, at 4. **Consistent** with that response, Mr. Ice stated during his deposition on March 4, 1996 that "we are still in the process of developing those plans." Ice Dep. 347. He went on to say that the work was not "done yet." Ice Dep. 347-348. Nothing in Mr. Ice's deposition testimony is in any respect inconsistent with BN/Santa Fe's representation that it is "in the process of developing * * * plans." It is clear from the deposition transcript that Mr. Ice thought he was being asked

---

1/ BN/Santa Fe does not seek to have SPI's counsel's argument stricken in its entirety, but seeks only an order striking all claims that BN/Santa Fe or its officers and executives lied in written or deposition testimony, public statements, or written discovery. Because BN/Santa Fe does not yet have a transcript of the proceedings, it is unable to supply page and line references to SPI's counsel's argument.

2/ Although BN/Santa Fe recognizes that, at this point in the proceedings, it is not entitled to reply to the substance of the arguments made by parties opposing BN/Santa Fe's agreements with Applicants, it is setting forth the underlying facts in order to explain why this Motion to Strike should be granted.

whether the implementation process was "done" -- that is, **completed**. SPI's counsel, however, deliberately played upon the ambiguity of the word "done" to argue that nothing yet had been undertaken, which, allegedly, would be inconsistent with BN/Santa Fe's response to the requests for admissions. SPI's counsel then totally mischaracterized this alleged ambiguity and accused BN/Santa Fe as having "lied" when he stood before this Board, the parties to this proceeding, the media, and the American public.

Twice before -- in SPI's March 29, 1996 comments and June 3, 1996 brief -- SPI's counsel has grossly mischaracterized this same alleged inconsistency between BN/Santa Fe's response to requests for admissions and Mr. Ice's testimony. *See* SPI-11, at 34; SPI-21, at 19 & n.16. Because, however, SPI's prior mischaracterizations did not rise to the level of accusing BN/Santa Fe of lying, BN/Santa Fe chose not to seek Board intervention to strike the material, but rather sought to correct SPI's erroneous statements by detailing, in its April 29, 1996 submission, BN/Santa Fe's substantial progress in implementation planning for service to the plastics industry . *See* BN/SF-54, at 5, 14-16; Ice 2d V.S. at 11-12; Clifton V.S., *passim*. Indeed, several of BN/Santa Fe's officers and executives specifically testified about how the CMA Agreement confirmed BN/Santa Fe's access to the Dayton Yard SIT facility, and they attested to BN/Santa Fe's commitment to locate and invest in additional SIT space to accommodate its customers, if the need were to arise. Ice 2d V.S. at 3; Rose V.S. at 5; Clifton V.S. at 10. SPI's counsel had the opportunity to cross-examine

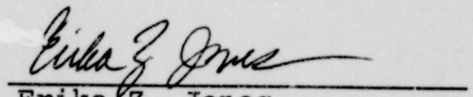
each of these witness during their depositions in May and in fact took the opportunity on May 10, 1996 to cross-examine Mr. Rose, BN/Santa Fe's Vice President, Chemicals of the Industrial Business Unit, on this very subject. Rose Dep. Tr. at 127-128. During his deposition, Mr. Rose specifically referred to the ongoing tasks of the implementation team with respect to the Dayton Yard SIT facility. Rose Dep. Tr. at 104.

In light of the extensive record that BN/Santa Fe submitted over a three month period to document its ongoing development of plans to implement the trackage rights agreements and serve the plastics industry, SPI's counsel's inflammatory, outrageous, and unfair accusation at oral argument about BN/Santa Fe and its officers and executives was completely inappropriate and unconscionable. BN/Santa Fe thus feels compelled to move for an order striking his impertinent and scandalous remarks from the transcript of the July 1, 1996 public oral hearing. Material that is "impertinent, or scandalous" is subject to a motion to strike under 49 C.F.R. § 1104.8.3/ SPI's counsel clearly exceeded the bounds of fair argument.

3/ Section 1104.8 specifically refers to striking impertinent or scandalous matter "from any document." BN/Santa Fe submits that Section 1104.8 is applicable to SPI's counsel's oral argument because the statements are part of the record in this proceeding and will be memorialized in a transcript of the public oral hearing.

Accordingly, for the reasons stated above, BN/Santa Fe respectfully requests the Board to grant this motion to strike.

Respectfully submitted,



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Schaumburg, Illinois 60173
(847) 995-6887

Attorneys for Burlington Northern Railroad Company
and The Atchison, Topeka and Santa Fe Railway Company

July 2, 1996

CERTIFICATE OF SERVICE

I hereby certify that copies of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company's Motion to Strike Portions of the Oral Argument of The Society of the Plastics Industry, Inc. (BN/SF-61) have been served this 2nd day of July, 1996, by first-class mail, postage prepaid on all Parties of Record in Finance Docket No. 32760 and by fax and hand-delivery on counsel for The Society of the Plastics Industry, Inc.

Kelley E. O'Brien

Kelley E. O'Brien
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
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STB FD 32760 6-17-96 I 84285

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TELEPHONE (415) 398-3344

Item No. _____

Page Count 3

JUNE, 1996 # 152

LARRY W. TELFORD
DIRECT NO. (415) 677-5605

June 10, 1996

Vernon A. Williams, Secretary
Case Control Branch; Attn: Finance Docket 32760
Surface Transportation Board
1201 Constitution Ave., N.W.
Washington, D.C. 20423

Re: Application of Union Pacific Corporation, et al., Finance Docket 32760

Dear Mr. Secretary:

Transmitted herewith for filing and the attention of the Board are original and twenty copies of Withdrawal of Opposition and Statement of Support of the Town of Truckee, a California municipal corporation ("TRCK-4"). A Certificate of Service is included in the filing confirming service by mail upon The Honorable Jerome Nelson, Erika Z. Jones, Esq., Arvid E. Roach II, Esq., Paul A. Cunningham, Esq. and the other parties designated "POR" on the service list attached to Decision No. 15, as amended and supplemented by Decision No. 17.

Also enclosed is one 3 1/2 inch computer diskette containing the contents of the filing in WordPerfect 5.1 format.

Should there be any question about this filing please call me collect at the number set forth above.

Very truly yours,

LARRY W. TELFORD

cc: Mr. Stephen L. Wright, Town Manager, Town of Truckee

BEFORE THE

SURFACE TRANSPORTATION BOARD

UNITED STATES DEPARTMENT OF TRANSPORTATION

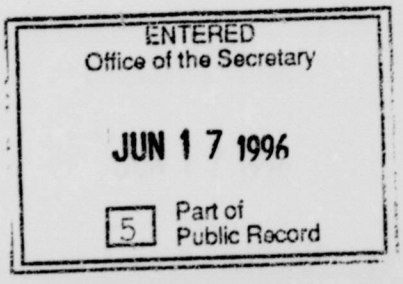
In the matter of the Application of Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad Company	)	Finance Docket No. 32760

WITHDRAWAL OF OPPOSITION AND STATEMENT OF SUPPORT OF THE TOWN OF TRUCKEE, CALIFORNIA

Larry W. Telford, Esq.
Severson & Werson, a
Professional Corporation
One Embarcadero Center, 26th Fl.
San Francisco, CA 94111
Tel. (415) 398-3344
Fax. (415) 956-0439

Attorneys for the Town of Truckee

TRCK-4



WITHDRAWAL OF OPPOSITION
AND
STATEMENT OF SUPPORT

The undersigned, counsel of record to the Town of Truckee ("Town") in the within proceeding, has been instructed by the Town to advise the Board that the Town and the Union Pacific Railroad Company have reached agreement on mutually satisfactory remedial measures to address the requests for conditions set forth in the Statement of Stephen L. Wright, TRCK-1. The Town therefore changes its position regarding the Application from one of opposition to the proposed merger, to one of support. The Town believes that the combination of Union Pacific and Southern Pacific proposed in the Application will result in a financially strengthened merged carrier with greater ability to address the issues raised in the verified statements submitted on behalf of the Town.

Respectfully submitted,
The Town of Truckee,
a California municipal corporation

By _____
Larry W. Telford
Severson & Werson, a
Professional Corporation
One Embarcadero Center, 26th Fl.
San Francisco, CA 94111
Tel. (415) 398-3344

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of June, 1996, I served a copy of the foregoing document upon each Party of Record in this proceeding by mailing first-class mail a copy thereof properly addressed to each such party.

Dated at San Francisco, California, this 10th day of June, 1996.

_____
Larry W. Telford