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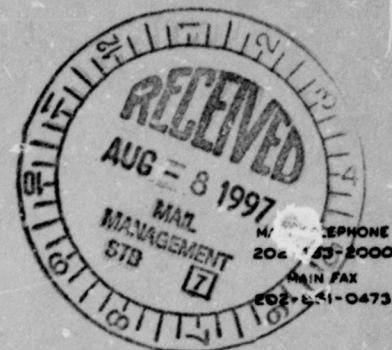
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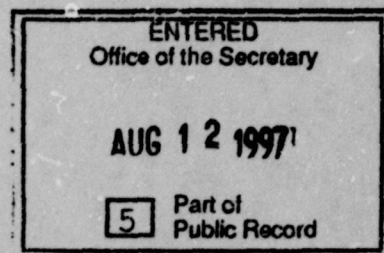


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August 8, 1997

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Room 711
Washington, DC 20423



Re: Finance Docket No. 32760 (~~Sub. No. 21~~), 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 Joint Petition of The Burlington Northern and Santa Fe Railway Company and R.R. Donnelley & Sons Company for Enforcement of Merger Condition (BN/SF-81/RRD-1). Also enclosed is a 3.5-inch disk containing the text of the Joint Petition in WordPerfect 6.1 format.

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

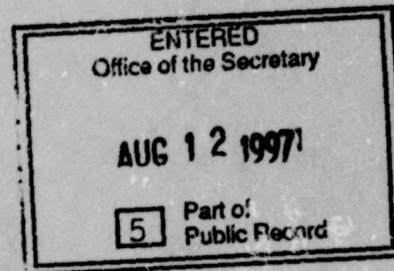
Sincerely,

Erika Z. Jones

Erika Z. Jones

Enclosures

cc: All Parties of Record



BN/SF-81
RRD-1

**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**

**JOINT PETITION OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY AND
R.R. DONNELLEY & SONS COMPANY
FOR ENFORCEMENT OF MERGER CONDITION**

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

JOINT PETITION OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY AND
R.R. DONNELLEY & SONS COMPANY
FOR ENFORCEMENT OF MERGER CONDITION

Pursuant to Decision No. 44 and Decision No. 72 in the above-referenced proceeding, petitioners The Burlington Northern and Santa Fe Railway Company ("BNSF")^{1/} and R.R. Donnelley & Sons Company ("Donnelley") petition the Surface Transportation Board ("Board") for enforcement of the transload condition.^{2/} In Decision No. 44 in this proceeding, the Board imposed a condition providing BNSF access to any

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

^{2/} In Decision No. 72, the Board stated that "any beneficiary of the Decision No. 44 conditions has the right to seek relief from the Board if it believes that these conditions have not been implemented in a manner that achieves their competition-preserving objectives." Slip op. at 8 (footnote omitted; emphasis added). See also *id.* at 8 n.18 ("We wish to clarify that shippers have rights under the BNSF agreement because we have imposed the terms thereof as a condition of the merger. * * * [S]hippers have recourse to the Board for enforcement of the merger conditions.").

new transload facility located on a UP-owned or SP-owned line over which BNSF received trackage rights. *See* Decision No. 44, slip op. at 106, 145-146; *see also* Decision No. 61, at 12. Pursuant to this condition, petitioners seek an order stating that a facility at Sparks, Nevada, which Donnelley intends to use to transfer paper products from rail to truck for shipment to its Reno, Nevada commercial printing plant, is a new "transload facility" that may be served by BNSF via the trackage rights granted to it in this proceeding.

The facility is located in Sparks and, although it has physical access to a rail spur, it has not received or shipped freight by rail for at least the past four or five years. (Sketches of the facility and the adjacent trackage are attached to the Verified Statement of F.E. Kalb (hereinafter "Kalb V.S."), which is attached to this petition.) Thus, the track adjacent to the facility is dormant. Kalb V.S. at 6. The dormant track is connected to an SP line over which BNSF received trackage rights in this proceeding. *Id.* at 6; Verified Statement of William J. Staab (hereinafter "Staab V.S.") at 1 (attached hereto).

Previously, Rubbermaid Cleaning Products, Inc. ("Rubbermaid") used the structure to warehouse its products, which were transported to and from the facility solely by truck. *Id.* at 5. Under the proposal for use of the facility as a transload, Sprint, Inc. ("Sprint") will lease space previously occupied by Rubbermaid and will provide new transload services to Donnelley, transferring rolled paper stock brought to the facility by rail to motor carrier for movement to Donnelley's commercial printing facility at Reno. *Id.* at 3-5; Staab V.S. at 2-3. Conversion of the warehouse to a transload facility will involve new construction to accommodate rail traffic directly into the facility. Kalb V.S. at 4-5; Staab

V.S. at 3. The truck segment of the proposed transload move will be fourteen miles. Kalb V.S. at 5; Staab V.S. at 2.

Because the rail track leading into the facility has been dormant for four to five years, and because the facility will now be used to transload products and, thus, will require conversion to accommodate this new use, the facility will be a new "transload facility" under the condition imposed by the Board. Accordingly, BNSF should have access to the new transload facility at Sparks. However, UP has taken the position that BNSF should not have access to the facility because the facility is an existing facility that received rail service in the past. Kalb V.S. at 6-7. Petitioners BNSF and Donnelley, therefore, ask the Board to enforce the transload condition by ordering that UP allow BNSF access, under the conditions imposed in Decision No. 44, as clarified in Decision No. 61, to the proposed new transload facility at Sparks.

BACKGROUND

The Sparks facility was leased to Empire Brush, Inc., on November 1, 1993. Kalb V.S. at 5. When Rubbermaid purchased Empire Brush, Inc., on January 2, 1995, the lease was assigned to Rubbermaid. *Id.* Rubbermaid, which used the facility as a warehouse, moved out during June 1997, although its lease runs until October 31, 1997. *Id.*

Although there is track connecting the facility to SP's line, neither Rubbermaid nor the other tenants of the facility have utilized rail service for at least four to five years. Kalb V.S. at 5-6. Instead, the facility has been used as a warehouse served solely by trucks. *Id.* at 6.

Under the plan for conversion and use of the facility, the existing structure will be converted for use as a paper transloading facility serving Donnelley's printing plant in Reno. Kalb V.S. at 3-5; Staab V.S. at 2-3. Conversion will involve construction of three new doors for unloading rail cars and the modification of three existing doors to accommodate the delivery of shipments by rail. Kalb V.S. at 4-5; Staab V.S. at 3. The conversion of the facility to accommodate rail service is expected to cost approximately \$50,000. Kalb V.S. at 4-5; Staab V.S. at 3.

It is contemplated that paper materials will be brought to the facility by rail and then transloaded to truck for carriage to the Reno printing plant on an as-needed basis. Kalb V.S. at 4; Staab V.S. at 2-3. The truck segment from the Sparks facility to Donnelley's printing plant in Reno will be fourteen miles in length. Kalb V.S. at 5; Staab V.S. at 2. Operation and maintenance of the facility are expected to cost in excess of \$1 million yearly. Kalb V.S. at 5; Staab V.S. at 3. These expenses are over and above the costs of providing direct rail service to Donnelley's Reno plant. Kalb V.S. at 5,

Currently, rolled paper stock is shipped to Donnelley's Reno plant by truck or by direct rail service provided by UP. Kalb V.S. at 2-3; Staab V.S. at 2. The motor carrier shipments are first moved by BNSF from mills located in Minnesota or from interchanges in Chicago. BNSF then transports the loaded cars to Hambone, California, for interchange to the McCloud Railway Company ("MCR"). Kalb V.S. at 2-3; Staab V.S. at 2. The MCR carries the paper stock to McCloud, CA, where the paper is transloaded to trucks for delivery to Donnelley's Reno printing plant. Kalb V.S. at 2; Staab V.S. at 2. The truck segment of the move is 203 miles. Kalb V.S. at 2; Staab V.S. at 2.

Access to the new transload operation at Sparks would facilitate Donnelley's plans to consolidate its operations and would provide Donnelley greater control over its inventories, enhancing its ability to respond to fluctuations in production at its Reno printing facility, and providing a competitive counterweight to UP direct rail service. Kalb V.S. at 3; Staab V.S. at 3.

ARGUMENT

I. THE BOARD SHOULD ORDER UP/SP TO PERMIT BNSF TO SERVE THE PROPOSED SPARKS FACILITY.

The Board has granted BNSF the right to serve "any new transload facility * * * located post-merger on any UP/SP line over which BNSF has received trackage rights in the BNSF agreement." Decision No. 61, slip op. at 7. The proposed facility at issue here meets the criteria set forth by the Board for new transload operations, and the order that BNSF now seeks is consistent with the Board's intent in imposing the transload condition.

A. UP Has Wrongfully Denied BNSF Access To Serve This New Transload Facility.

UP has refused to permit BNSF to serve the proposed new transload facility. UP's position is that "BNSF has the ability to *build or acquire a new facility* including a new transload operation along the SP trackage in order to handle [Donnelley's] traffic," but that the converted structure at Sparks would not constitute either a new facility or a new transload facility. See July 2, 1997 Letter from Jim Shattuck, Executive Vice President, Marketing and Sales, Union Pacific Railroad Company, to Bill Staab, Operations Support Manager, Donnelley (attached as an Exhibit to Kalb V.S.). In effect,

UP's position is that Donnelley could obtain competitive rail service from both BNSF and UP only if BNSF or Donnelley built a new transload facility from the ground up or acquired a facility without existing trackage and built new track to connect to the SP line. *See also* July 10, 1997 Letter from Charles F. Penner, Director, Industrial Development, Union Pacific Railroad Company, to Peter J. Rickershauser, Vice President, Marketing UP/SP Lines, BNSF (attached as an Exhibit to Kalb V.S.) (asserting that the proposed facility would not be a new transload facility because "the warehouse is an existing facility on the SP line"). UP also asserted that the Sparks facility would not qualify as a transload operation under the Board's condition. *Ibid.* Nothing in Decision Nos. 44 or 61 supports UP's position.

The Board has set forth the requirements for a "legitimate transload operation" in Decision No. 61 (Slip op. at 12). There, the Board stated that a "transload operation will necessarily entail *both* the construction of a railroad transload facility as that term is used in the industry *and* operating costs above and beyond the costs that would be incurred in providing direct rail service." *Ibid.* (emphasis in original). The proposed new transload operation at Sparks meets these criteria.

First, the plan calls for construction to accommodate rail operations, thus converting the existing structure into a new rail-served transload facility that will be used to transfer paper products from rail to truck for carriage to Donnelley's Reno plant. As noted above, the costs of that construction are projected to be approximately \$50,000. *See* Kalb V.S. at 4-5; Staab V.S. at 3. Thus, there will be construction, which will result in a new "railroad transload facility as that term is used in the industry." Decision No.

61, slip op. at 12. Moreover, the scope of construction contemplated by the plan meets the Board's first criterion for legitimate transload operations, which requires that there be some construction, but does not call for construction from the ground up or construction of new trackage.^{3/}

Second, there will be costs of more than \$1 million per year entailed in operating and maintaining the Sparks transload facility and trucking the paper stock the fourteen miles from the Sparks facility to Donnelley's Reno printing plant. *Kalb V.S.* at 5; *Staab V.S.* at 3. These operating costs will be "above and beyond the costs that would be incurred in providing direct rail service." Decision No. 61, slip op. at 12. Accordingly, the proposed Sparks facility clearly meets the Board's criteria for new transload operations.

Moreover, it would be economically inefficient and contrary to the overall public interest to engraft on the transload condition a new requirement that a shipper must build an entirely new structure in order to realize the benefits of the transload condition, when an existing structure not currently served by rail could be converted to a new transload facility at less cost. An interpretation of the transload condition that would require the building of new facilities or track even when it would be cheaper to convert existing ones to new uses would discourage the optimal use of facilities and resources and, therefore, would be expensive, inefficient, and wasteful. See *Kalb V.S.* at 7-8 (detailing

^{3/} There is no basis in the Board's decisions for I/P's assertion that the transload condition requires that new transload operations involve construction from the ground up or construction of new trackage. Moreover, as we show below, UP's interpretation of the transload condition would be economically inefficient and inconsistent with the Board's purposes and intent in imposing the transload condition.

contemporary industrial development strategy of rehabilitating existing facilities in order to transform resources to more productive uses), 8-9 (describing anticompetitive effects that would result in mature industrial markets if transload condition applied only to entirely new structures).

Thus, UP's contention that this is not a new transload facility is meritless. Nothing in the Board's decisions, or in public policy or logic, supports the assertion that only facilities built from the ground up subsequent to the UP/SP merger or those which had never previously received rail service may qualify as "new transload facilities" for purposes of receiving the benefits of competitive rail service from both UP/SP and BNSF. See also Comments of United States Dept. of Transp., Aug. 1, 1997 (DOT-1), Fin. Dkt. No. 32760 (Sub-No. 21) (hereinafter "DOT Aug. 1 Comments"), at 6-7 (stating that what constitutes a new transload should be decided on a "functional basis, i.e., if newly rail-served or newly established as a transloading operation, a facility should be considered 'new' regardless of whether a building or structure was already in place on the property").

B. An Order Holding That The Proposed Facility Is A New Transload That May Be Served By BNSF Is Consistent With The Board's Stated Intent and Purposes In Imposing The Transload Condition.

1. The Order Is Consistent With the Board's Stated Intent.

In Decision No. 61, the Board made it clear that BNSF was to have access to all new transload facilities located adjacent to the lines over which it received trackage rights. Slip op. at 7. The only limitation placed on BNSF service was that "BNSF will be allowed to access exclusively served shippers only by a legitimate transload operation." *Id.* at 12. As noted above, the proposed transload at Sparks meets the

criteria established by the Board for a legitimate transload operation, because there will be construction and the operation of the transload will entail costs above and "beyond the costs incurred in providing direct rail service." *Id.* Moreover, there are a number of other factors that establish that the proposed new transload at Sparks is consistent with the Board's stated intent to provide BNSF access only to *legitimate* transloads.

First, the facility at issue here is to be used by an entirely different shipper than the one that previously used it. Donnelley is not a successor in interest to Rubbermaid and engages in an altogether different business than does Rubbermaid. Thus, this petition does not involve a shipper who is seeking to use the transload condition to increase the number of rail carriers available to it at a pre-existing location.

Second, the facility will be used for different purposes than it was used for previously. Rubbermaid used the structure as a warehouse served solely by trucks. Donnelley, by contrast, wishes to convert it into a new transload facility for the transfer of paper stock from trains to trucks for shipment to Donnelley's Reno printing plant. This conversion, which as noted above, will entail both construction and ongoing operational and maintenance costs, conclusively shows that this petition concerns a "legitimate transload operation" (Decision No. 61, slip op. at 12), not a contrivance to obtain a competitive option not available to the shipper prior to the merger.

Third, the facility has not been served by rail for four to five years. The fact that the rail line into the facility has been inactive for years supports the argument that this is *not* a case where an exclusively-served shipper is contriving to improve the rail service it was receiving at the time of the UP/SP merger.

And fourth, the length of the truck segment of the proposed transload operation — fourteen miles to the Reno plant — also shows that the new facility will be a "legitimate transload operation" (Decision No. 61, at 12), not a sham to obtain competitive rail access at the Reno plant that was not available to the shipper before the UP/SP merger. *See ibid.* ("By way of example, we do not expect that BNSF will construct a truck transload facility adjacent to an exclusively served coal mine, and then truck the coal a short distance (say, 100 feet) from the mine to the facility; that would not be acceptable.").⁴

2. The Order Is Consistent With the Purposes of the Transload Condition.

An order stating that BNSF should be allowed to serve the proposed new transload facility is also fully consistent with the purposes for which the transload condition was imposed. In granting BNSF the right to serve new transloads on UP/SP lines, as well as the right to serve all "new facilities" on those lines (Decision No. 61, slip op. at 9), the Board sought to retain for shippers the same competitive options post-merger that they had pre-merger and to assure that BNSF had sufficient traffic density on the trackage rights lines to make operations over those lines commercially feasible. *See id.* at 9-10; *accord* DOT Aug. 1 Comments, at 6. The Board's determination that BNSF should have access to the proposed new transload facility at Sparks would further both of those purposes.

⁴ Because BNSF is willing to contribute one-half of the original cost of the trackage built (probably by SP) to access the facility (*see* Kalb V.S. at 7), there is no basis for any concern that BNSF or Donnelley is trying to exploit existing UP/SP capital without paying for it.

First, by confirming that the Sparks facility is a new transload facility, and thereby enabling BNSF to serve it, the Board would preserve the "indirect UP vs. SP competition provided by siting and transload options" (Decision No. 61, slip op. at 10) that was available to Donnelley before the merger. As the Board stated in Decision No. 61 (slip op. at 10), the transload condition was intended "to guarantee[] that all pre-merger UP vs. SP siting competition would survive the merger." Prior to the merger, Donnelley had the option of having its Reno plant served either directly by UP or by a transload facility located on SP's line. Further, Donnelley had the option of building a new transload on the SP line from the ground up or converting an existing structure, if a suitable structure were available. Because the Sparks facility is suitable for conversion to a transload operation, Donnelley would have been able to use the option of moving into that existing structure with dormant track, and thereby obtaining transload service from SP, as a bargaining chip in negotiating with UP, which, presumably, would want to retain Donnelley's business and would, therefore, offer inducements to persuade Donnelley to continue to utilize direct UP service. SP, in turn, would have to find a way to offset the inducements offered by UP. Under a post-merger regime in which Donnelley would have to build a new transload facility from the ground up or acquire an existing structure and construct new trackage in order to reap the benefits of two-carrier competition, Donnelley's bargaining position would be much worse than under the pre-merger state of affairs, and BNSF's position would be worse than SP's had been. Accordingly, a decision that BNSF may serve the Sparks facility — thereby replicating SP's position as

a competitor to UP — would preserve the competitive options that Donnelley would have had but for the merger.

Second, as noted above, the Board has stated that the transload condition is also intended to enable BNSF to "achieve sufficient traffic density on its trackage rights lines." Decision No. 61, slip op. at 9. The order sought by petitioners here would clearly contribute to BNSF's traffic volume on the trackage rights that have been granted in this proceeding and, therefore, would contribute to BNSF's "traffic density on its trackage rights lines." *Ibid.* See also DOT Aug. 1 Comments, at 7 ("We believe the STB should rule on [the transload] issue in such a way that allows BNSF access to the maximum number of shippers.").

CONCLUSION

For the foregoing reasons, the Board should enforce the transload condition by holding that the proposed new facility at Sparks, Nevada will be a new "transload facility" and that as such the new transload facility may be served by BNSF.

Respectfully submitted,

Casey Kuzmicki/ej

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Attorneys for
The Burlington Northern
and Santa Fe Railway Company

August 8, 1997

VERIFIED STATEMENT

OF

WILLIAM J. STAAB

My name is William J. Staab. I am Operations Support Manager for the Reno Division of R.R. Donnelley & Sons Company ("Donnelley"). My business address is 14100 Lear Boulevard, Reno, Nevada 98506-1657. I have been employed by Donnelley for twenty-three years. In my present position, which I have held since 1992, I am responsible for virtually all non-production aspects of R.R. Donnelley's operations at its Reno web printing facility. My duties include oversight of maintenance, engineering, and facilities, as well as management of inbound paper and ink supplies.

The purpose of my statement is to support the efforts of The Burlington Northern and Santa Fe Railway ("BNSF") to obtain access to serve a new transload facility to be located at 1141 E. Glendale Avenue in Sparks, Nevada. The new Sparks transload facility is adjacent to trackage that, prior to the consolidation of Southern Pacific Transportation Company ("SP") and Union Pacific Railroad Company ("UP"), was owned by SP. As a condition of the consolidation of SP and UP, BNSF was given trackage rights over the SP track segment, and it is my understanding that, under various agreements that were modified and imposed by the Surface Transportation Board as conditions of the UP/SP merger, BNSF was given the right to serve all new transload facilities located on the trackage rights lines. Because the Sparks facility will be a new transload on a trackage rights line, BNSF should

be allowed access to it. Such access will preserve the competitive rail option that Donnelley had prior to the UP/SP merger to locate a transload facility on SP's line.

The Donnelley web printing plant in Reno is located on a UP line, and UP is the only rail carrier that provides direct rail service to the printing plant. The plant is a four-color printing facility that produces newspaper advertising inserts for a large variety of customers, including such national retailers as J.C. Penney, Toys-R-Us, Dayton-Hudson, and K-Mart. The plant also prints several publications, including the *National Enquirer* and the *Star*, as well as *USA Weekend* and the *Los Angeles Times Sunday Magazine*. The plant's products are shipped via truck to numerous Western states.

The primary materials used by the plant are ink and rolled paper stock. The ink is delivered to the plant via truck. The paper is delivered to the plant by UP and by truck. Much of the paper delivered by UP originates in the East. The majority of the paper that is trucked to the facility originates on the BNSF — from eastern and overseas mills through the Chicago gateway, from mills in Minnesota, and from Canada via the I-5 Corridor. BNSF interchanges the paper to the McCloud Railway Company, which, in turn, transloads it to trucks at McCloud. The trucks then carry the paper to the Reno facility — a 203 mile trip.

Under the plan for the new transload facility at Sparks, BNSF will carry the paper to the Sparks facility, where it will be transloaded to trucks for the 14 mile trip to the Reno plant. The operation will be managed by Sprint, Inc. ("Sprint"), which will lease space in the Sparks facility. The trucking will be performed by Sprint. We expect between 125

million and 160 million pounds of paper (approximately 1,000 rail cars) to pass through the Sparks transload facility each year.

The paper to be processed through the Sparks facility will be owned by Donnelley or its customers and will be used solely by Donnelley. Much of the paper will be transferred directly from train to truck for carriage to Donnelley's Reno plant, although some may be held temporarily at Sparks and trucked to the Reno printing plant on an as-needed basis. The Sparks facility will thereby enhance Donnelley's ability to control its inventories and respond quickly to the widely varying needs of our many customers.

In order to convert the existing warehouse facilities at Sparks into a viable transload, approximately \$50,000 in construction will be required. This construction will involve the installation of new doors and the modification of other doors.

The transload operation will cost more than \$1 million per year, for operational and maintenance expenses, as well as the costs of trucking the paper the fourteen miles to the Reno plant, and other expenses.

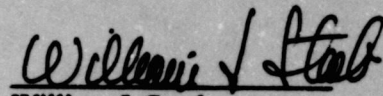
For the reasons stated in the petition and in this verified statement, R.R. Donnelley & Sons Company urges the Board to grant the petition and order that BNSF be granted access to the Sparks transload facility.

VERIFICATION

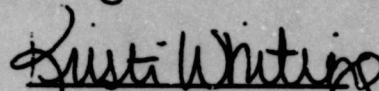
THE STATE OF NEVADA)

COUNTY OF WASHOE)

William J. Staab, being duly sworn, deposes and says that he has read the foregoing statement and that the contents thereof are true and correct to the best of his knowledge and belief.


William J. Staab

Subscribed and sworn before me on this 4 day of August, 1997.


Notary Public

My Commission expires: 6/19/98



VERIFIED STATEMENT

OF

F. E. (SKIP) KALB, JR.

BACKGROUND

My name is Skip Kalb and I am Assistant Vice President-Industrial Development for The Burlington Northern and Santa Fe Railway Company ("BNSF"). My business address is 2650 Lou Menk Drive, Fort Worth, Texas 76131. In my present position, which I have held since September 25, 1995, following the consolidation of The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") with Burlington Northern Railroad Company, I am responsible for all of BNSF's Industrial Development and Distribution Services activities.

Prior to the BNSF merger, I spent over 20 years with the Santa Fe, all in Santa Fe's Industrial Development Department. (See attached biographical sketch.)

As the officer of BNSF responsible for Industrial Development, I have been directly involved in our efforts to locate new customers along the lines to which BNSF has been granted trackage rights in the Union Pacific/Southern Pacific merger ("UP/SP trackage rights lines"). This activity has included making inspections of the UP/SP trackage rights lines; meeting with prospective industry interested in locating facilities in these areas; communicating with state and local economic development officials, industrial real estate brokers, and other BNSF Business Units about BNSF's rights to serve new facilities along the UP/SP trackage rights lines; and overseeing specific industrial development and transload projects, such as the R. R. Donnelley & Sons Company ("Donnelley") proposal at Sparks, Nevada.

My efforts on the Donnelley project have included an inspection trip on March 5 and 6, 1997, to locate industrial space in Sparks that is capable of meeting Donnelley's needs. I have had numerous meetings and internal correspondence with BNSF's Forest Products, Distribution Services, UP/SP Marketing & Operating, and Industrial Development personnel. I also wrote to the Union Pacific on May 29, 1997, concerning this matter. (A copy of the correspondence is attached.)

DONNELLEY'S OPERATIONS, NEEDS, AND PLANS

Donnelley has a commercial printing facility located at 14100 Lear Blvd., Reno, Nevada 89506. The facility is served directly by the Union Pacific Railroad Company ("UP"). Historically, Donnelley has received inbound rolls of paper stock from both domestic and foreign producers via motor carrier, rail direct, rail thence transload, and intermodal service. This inbound paper is used in the printing of Donnelley's products, which include advertisements for such major retailers as Toys 'R Us, J.C. Penney, and Dayton-Hudson, catalogues, and coupons that appear in Sunday newspaper editions.

Some of the inbound paper received by Donnelley at its Reno facility has been delivered by truck from a transload facility located on the McCloud Railway Company ("MCR") at McCloud, California, a distance of some 203 miles from Reno. BNSF participates in the routing to MCR and, in 1996, interchanged approximately 450 carloads to the MCR at Hambone, California for delivery to the small transload at McCloud. The paper originates at mills located on BNSF in Minnesota or is interchanged to BNSF at Chicago, and moves by rail to the McCloud transload facility.

Donnelley also had a printing operation at Casa Grande, Arizona. On May 15, 1997, Donnelley closed the Casa Grande facility and consolidated into an expanded printing

operation at Reno. This consolidation necessitates two changes in the way in which Donnelley's Reno facility operates. First, the expanded Reno commercial printing operation (which requires the use of additional printing machinery) will take up a large amount of Donnelley's current warehouse space and will limit the number of inbound rail cars that Donnelley can receive via direct rail service. Secondly, the increased production will double Donnelley's inbound paper requirements, precluding it from using the current transload operation at McCloud, because the McCloud operation is incapable of handling the additional paper that is contemplated.

In addition to the expansion-related changes in Donnelley's Reno operations, Donnelley wishes to move to a more time-sensitive Just-In-Time delivery system in order to eliminate unnecessary warehousing/inventory costs. These two factors prompted Donnelley to discuss with the BNSF Forest Products Business Unit ("BNSF Forest Products") the availability of industrial space that could be used to establish a new transload facility in the Reno/Sparks area.

Based upon its existing commercial relationships, Donnelley prefers for such a transload to have rail service provided by BNSF and for Sprint, Inc. ("Sprint") to serve as a transload operator providing the receiving, cross-dock, handling and storage. Sprint will also handle the drayage of paper products to Donnelley's Reno commercial printing facility.

The proposed transload in the Reno/Sparks area would receive direct rail shipments of inbound rolls of paper from various suppliers in the U. S., Canada, and overseas. The paper would then be unloaded from the railcars and either moved directly to the Reno commercial printing facility or stored at the transload facility for some period of time before being delivered to the Reno printing facility. The rail rates would include 30 days storage

at the transload. In some instances the paper may be stored longer than 30 days, and the cost for any additional storage would be the responsibility of Donnelley.

THE FACILITY AT SPARKS

As a result of Donnelley's discussions with BNSF Forest Products, BNSF's Industrial Development Department was requested to assist Donnelley in locating a suitable industrial space for the Donnelley account, as described above. BNSF's efforts in this regard were consistent with BNSF's interpretation of its rights to locate new facilities, including transloads, along the UP/SP trackage rights lines and with customary industry practice in evaluating potential sites for new facilities and transloads.

BNSF contacted an industrial real estate broker in the Reno/Sparks area and learned of approximately 135,000 square feet of unoccupied, industrial space that was available in a 404,280 square foot warehousing complex. We informed Donnelley and Sprint of the availability of this site, and Sprint then entered into negotiations to lease approximately 94,080 square feet of this available space, with an option to lease an additional 40,320 square feet. Sprint will also be attempting to secure contracts with other firms to provide transloading operations at the facility for other commodities.

This space contains four existing rail doors that access an adjacent industrial spur track, which formerly served this building. In order to accommodate the rail car lengths required, it will be necessary to modify three of these doors and to construct three new rail doors at an estimated cost of approximately \$50,000.

Besides the construction costs related to modifying the facility for use as a transload operation, Sprint will incur substantial expenses in connection with its lease of this space, estimated to be approximately \$316,090 annually. Additional operational and transloading

expenses, and the costs of drayage for the approximately 14 mile truck haul to Donnelley's commercial printing facility, will bring the projected costs of the operation to in excess of \$1 million per year. The substantial expenses of the transload operation are separate and distinct from the costs of providing direct rail service to Donnelley's Reno commercial printing operation. (Sketches of this warehouse complex and industrial trackage showing dimensions, footages, etc., are attached hereto.)

TENANT AND RAIL SERVICE HISTORY OF THE SPARKS FACILITY

To the best of my knowledge, based upon the research we have done with the previous tenants and the property management company, the space to be used for this new transload facility was formerly leased to Empire Brush, Inc. ("Empire"), effective November 1, 1993. Empire was acquired by Rubbermaid Cleaning Products, Inc. ("Rubbermaid") on January 2, 1995, and the Empire lease on this space was assigned to Rubbermaid in that transaction. Although Rubbermaid discontinued its use of this space during June of this year, the lease runs through October 31, 1997, according to the information that I have received.

Mr. Kevin Osborne, former Facility Manager for Rubbermaid at the Sparks location, has advised my staff that neither Empire nor Rubbermaid shipped or received any direct rail shipments at the facility during the lease period. Based on our inquiries, we believe that the adjacent rail spur that formerly served this space was never part of Empire's or Rubbermaid's lease.

The other major tenant of the complex is Wesco, Inc. ("Wesco") and is located to the south of the area leased to Rubbermaid. We have been advised by Mr. Glen Dixon, Facility Manager of Wesco, that Wesco has not handled any direct rail shipments at the facility

since the inception of their lease on July 1, 1992. In addition, the Manager-West Distribution for Hart & Cooley, Inc., the only other tenant in the building, has advised that his company has not received any direct rail shipments since the inception of Hart & Cooley, Inc.'s lease on December 16, 1991. Therefore, to the best of our knowledge, it would appear that, during the last four or five years, this facility has been operated exclusively as a truck-oriented warehousing facility and not as an integrated rail-oriented, multi-tenant warehouse.

UP'S POSITION

When satisfactory business arrangements were achieved through negotiations among Donnelley, Sprint, and BNSF, and in negotiations between Sprint and the owner of the Sparks facility, I wrote to UP on May 29, 1997, in compliance with the requirements of the various Trackage Rights Agreements, providing notice of BNSF's Proposed Rail Service Plan ("PRSP"). This PRSP is designed to provide UP with all of the pertinent information required for its approval of this new rail service to the new transload facility on the trackage rights lines, as BNSF and UP have been discussing over the course of this year under a draft BNSF-UP/SP Industrial Development Protocol.

On June 24, 1997, UP replied to my May 29 communication, stating that it did not regard the proposed operation to be a new facility. (A copy of UP's June 24, 1997 letter is attached). UP's position was that Sprint was simply a tenant moving into an existing multi-tenant warehouse which had been rail served for many years as a local point on the former Southern Pacific.

In a letter, dated July 2, 1997, to Donnelley (copy attached), UP reiterated its position that the proposed transload operation did not qualify as a new facility or as a

transload facility and further stated that BNSF has the ability to acquire or build a new facility, but not to access existing facilities that had previously received rail service.

Finally, in response to a clarification letter of July 1, 1997 (copy attached) written by Peter Rickershauser, Vice President-Marketing UP/SP Lines, UP wrote another letter, dated July 10, 1997 (copy attached), stating that the facility would not qualify as a "new facility" or a "new transload." In Mr. Rickershauser's letter of July 1, 1997, BNSF offered to discuss participation in any costs that Southern Pacific may have incurred in construction of trackage accessing this warehouse when it was originally constructed.

THE IMPLICATIONS OF UP'S POSITION

This is not a new subject. In the initial meeting with UP to discuss the UP/SP Industrial Development Protocol, I raised the issue of the use of vacant existing facilities for new customer locations on BNSF trackage rights on UP/SP lines. (The meeting took place in Omaha, Neb. on December 10, 1996.). At that meeting, Union Pacific indicated that existing facilities in its exclusively-served territory did not qualify as "new facilities." As we have stated in our quarterly reports, protracted negotiations on this matter to date have proved fruitless.

The reason that BNSF wanted to clarify the new facility and transload issues early in the merger implementation process is that satisfactory definitions of these concepts are critical to BNSF's ability to implement the merger agreements and conditions that were designed and imposed to preserve head-to-head rail competition following the UP/SP merger. Increasingly, rail-oriented industrial development involves not only new construction and/or the addition of new trackage to facilities that previously were not served by rail, but also reinstallation of previously removed spur tracks that have deteriorated from

non-use, as well as the revival of dormant rail-served facilities through locating new customers in facilities that were otherwise vacant or occupied by tenants who had not been using rail services. Such rail-oriented industrial development puts otherwise nonproductive industrial facilities in the U.S. to productive uses and fosters the utilization of the inherent fuel, environmental, safety, and economic efficiencies that rail shipping provides.

The interest that U.S. and international firms have displayed in developing such facilities is a testament to the successful modernization and streamlining of the rail industry that has occurred since deregulation in 1980. By fostering creative industrial development through conversion of existing facilities, the current rail renaissance can continue to move forward.

The location of new customers and transload facilities in available industrial buildings is a development strategy used by both UP and BNSF, as well as by other rail carriers of all sizes. Under UP's definition of a new transload facility, however, Donnelley, BNSF, or a third party would necessarily have to construct a new building and track from the ground up (a greenfield site), or construct new track at an existing facility. The economics involved in this approach would have the effect of negating any possible transportation savings and synergies that are provided by the Just-In-Time transload strategy.

Additionally, the requirement of new facility and track construction in the major metropolitan markets in which, pursuant to the UP/SP merger conditions, BNSF has trackage rights would have the undesirable effect, in many instances, of preventing BNSF from being able to offer the competitive option envisioned by the STB in establishing the new facility/transload conditions. This is because, in these mature industrial markets — especially in the Central Corridor of Utah and Nevada — the strategically located industrial

centers are "built-out." There are few remaining viable industrial sites for construction of new facilities and track, even if they were economical to build. While new emerging industrial projects may come on line, they are located further away from the central business districts and require additional drayage to reach end destination markets.

Thus, UP's interpretation of the new facilities and transload conditions would discourage the use of the productive industrial development strategy of converting existing facilities to accommodate use of rail service and would force new shippers to locate away from central business districts, thereby increasing their dependence on trucks and their costs. I do not believe that, in imposing the new facility and transload conditions in the UP/SP merger, the STB intended to adopt the position espoused by UP, which would have the effect of limiting rail shipper choices and reducing rail competition.

Moreover, UP's definition of what constitutes a new transload would deny rail shippers, like Donnelley, an option that they otherwise had prior to the UP/SP consolidation and would place BNSF in a distinctly inferior position to UP or the pre-merger SP in developing siting alternatives. In fact, before the UP and SP merged, Donnelley had the option of establishing a new transload facility in the complex at Sparks, which could have been served by the SP. This option would have at the very least enabled Donnelley to keep UP's service to its Reno, Nevada printing facility competitive.

CONCLUSION

In my dealings with many of BNSF's customers, transload operators, state and local economic development allies, industrial real estate developers and brokers, I have encountered a widely-shared sense that the conditions imposed in the UP/SP merger can confer numerous economic benefits on the shippers of the nation. These conditions will

work if BNSF has the same rights to locate new customers and facilities on UP lines as UP does on its own lines, subject only to the conditions set forth by the STB.

Accordingly, I respectfully urge the STB to clarify that BNSF has the right to serve the new transload facility that is proposed to be located at the Sparks facility.

ATTACHMENTS

BIOGRAPHICAL SKETCH

F. E. "SKIP" KALB, JR.

JULY 25, 1997

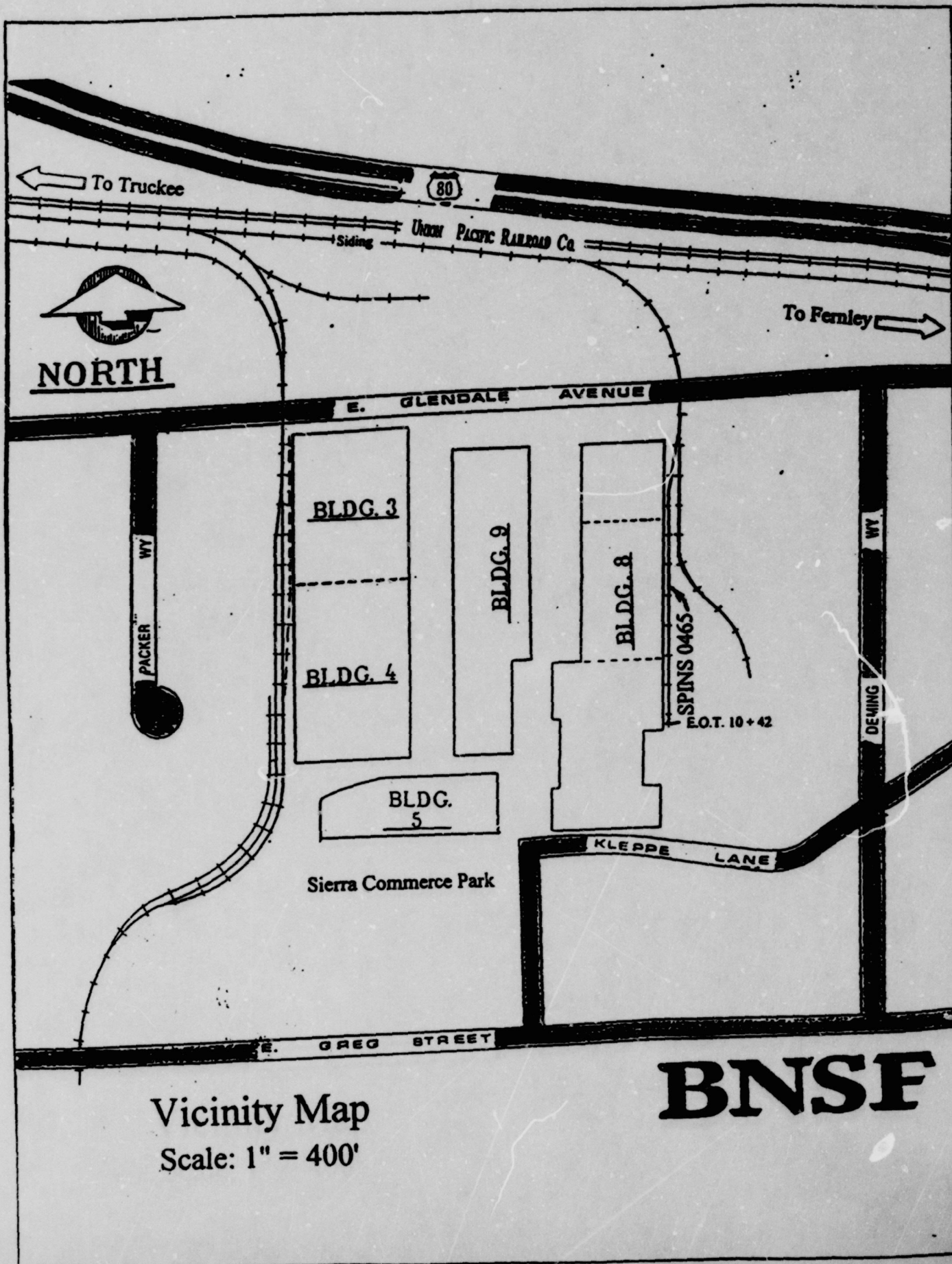
Skip Kalb is Assistant Vice President-Industrial Development for the Burlington Northern and Santa Fe Railway Company (BNSF). Mr. Kalb is responsible for all Industrial Development activities for BNSF's 35,000 mile system that stretches across 29 states, 2 Canadian Provinces and the Gulf of Mexico. He held a similar position with the Santa Fe Railway prior to their merger with the Burlington Northern.

Skip is a graduate of Baker University and obtained his MBA from the University of Kansas in 1975. He is a past President of the American Railway Development Association and is a member of both the American Economic Development Council and the Texas Economic Development Council. Mr. Kalb was recently appointed as Associate Director of the International Development Research Council, an organization in which he holds a Master Professional Designation, which is limited to 5% of IDRC membership.

Skip has published papers in several trade journals and publications dealing with the Transportation component of Economic Development, including "Intermodal Strategies for Industrial Development" and "The Private Capital Decision-Making Process: An Analytical Tool for Industrial Development".

Some of the major developments that Skip has initiated include the UPS Super Hub in Willow Springs, Ill., Santa Fe's facility developments at Alliance, Tx. and numerous other customer facilities along the the BNSF system.

Skip and his family have lived in Argyle, Texas for the past seven years.



Sierra Commerce Park

NORTH



E. Glendale Avenue

Bldg. 8

Wesco 196,800 ± S.F.
Under lease since July 1, 1992
No rail traffic

Vacant 94,080 ± S.F.
Proposal
to serve: R.R. Donnelley
in a portion of Bldg. 8 at
Sierra Commerce Park
1141 E. Glendale Avenue
Sparks, Nevada 89431

Prior Tenant - Empire Brush, Inc. leased space Nov. 1, 1993
Lease assumed by Rubbermaid Cleaning Products, Inc. Jan. 2, 1993
Rubbermaid canceled lease effective October 31, 1997
and has vacated space as of July 1, 1997
No rail traffic

Vacant
40,320 ± S.F.

Hart & Cooley 73,080 ± S.F.
Under lease since Dec. 16, 1991
No rail traffic

1 - 20 Bays
Industry Facility

SPINS 0465

Burlington Northern Santa Fe

Proposal to use
existing rail spur, SPINS 0465
to serve: R.R. Donnelley
in a portion of Bldg. 8 at
Sierra Commerce Park
1141 E. Glendale Avenue
Sparks, Nevada 89431

Location Plan

Scale: 1" = 100'

Date: July 28, 1997

BNSF



F. E. KALB, JR.
Assistant Vice President
Industrial Development

Burlington Northern Santa Fe

2550 Lou Menk Dr.
P. O. Box 961058
Fort Worth, Texas 76131

May 29, 1997

Mr. Charlie F. Penner
Director Industrial Development
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179

Dear Charlie:

This is in reference to BNSF service to new industries locating on UP/SP Trackage Rights lines.

Enclosed is our Proposed Rail Service Plan covering our intent to establish service to Jamco, Inc. at Sparks, Nevada on or around July 1, 1997. I am also attaching a copy of a letter dated May 29, 1997 which our Vice President Operations-UP/SP Lines, Buck Hord, has sent to Stever Searle, Superintendent Trackage Rights, Union Pacific, which provides BNSF's written service notification.

Please provide your approval of the above at your earliest convenience.

Sincerely,

A handwritten signature in dark ink, appearing to read "F. E. Kalb, Jr.", written over a horizontal line.

F. E. Kalb, Jr.

Project Number
1

BNSF Industrial Development
UP/SP Track Rights New Industry
Proposed Rail Service Plan

Project Request Date
5/29/97

Shipper/Receiver Name
Jamco, Inc.

Description of Transportation Requirements
Rail service to new industry at Sparks, NV as described below.

Address
P.O.Box 206
1000 Corporate Park Road

City State Zip Code
Forest VA 24551

Shipper/Receiver Contact Person
Jesse Rosser - Sales Manager

Company Phone
(804) 525-6238

Company Fax
(804) 525-5318

----- Product/Shipment Information -----

Commodity(s) handled:
Paper, various merchandise commodities, non-hazardous

Car Type(s) Utilized
Various boxcars

Desired Project Completion Date
7/1/97

Customer Operations and Shipping Hours:

Number of Cars Shipped:

Number of Cars Received:

of days/week
5

Time of day
N/A

AM/PM
N/A

Daily
0

Weekly
0

Daily
4

Weekly
20

Loading / unloading time per car:
Hours
24

Track Capacity Requirements: Number of car spots required for:

Loading/unloading: Spots
Rail car storage: Spots

----- Current Facility Data -----

Facility Type
Warehouse

Acreage/property dimensions
required for:

Facility: Acres
N/A

Acres
N/A

Track Construction:

Any space requirements for handling
equipment adjacent to rail car?

Any environmental considerations?

Describe:
None

Environmental issues:
None

Special requirements:
(Loading/unloading, etc.)

Special requirements/comments:
Rail car to warehouse doors. Warehouse is
located at 1141 East Glendale Avenue,
Sparks, NV.

Is facility security and safety adequate? YES ☒ NO ☐

Rail Access:

Is Rail Diagram/Plan attached?: ☐ YES ☒ NO

Distance to main line or spur track (miles, feet, adjacent, etc.):

Distance to existing industry track (miles, feet, adjacent, etc.):

Distance parameters:
Adjacent to spur track.

Distance parameters:
Not applicable.

Rail Switching Services:

Distance to existing switch service (i.e. yard limits):

Switch parameters:
Union Pacific to provide this information.

Present level of switch service (hrs/day; days/week):

Switch service levels:
Union Pacific to provide this information.

Does proposed level of service meet customer requirements? ☒ YES ☐ NO

If no, will additional car storage capacity satisfy business requirements? ☐ YES ☒ NO

BNSF

E. L. (Buck) Hord
Vice President Operations UP/SP Lines

Burlington Northern Santa Fe

2650 Lou Menk Drive
P.O. Box 961065
P.O. Box 961065
.817-352-6678

May 29, 1997

Mr. Steve Searle
Superintendent Trackage Rights
Union Pacific Railroad Company
P. O. Box 961034
Fort Worth, TX 76131

Re: New Industry Access

Dear Mr. Searle:

Reference BNSF service to new industries locating on the Trackage Rights lines.

It is BNSF's intent to establish service to Jamco, Inc. at Sparks, Nevada on or around July 1, 1997.

BNSF requests that UP provide service to this facility via reciprocal switch and further requests that traffic for this company be exchanged with UP at Roper Yard in Salt Lake City with appropriate haulage to and from Sparks, NV.

Would you please advise your approval of the above requests at your earliest convenience.

Very truly yours,

A handwritten signature in dark ink, appearing to read "E. L. Hord".
E. L. Hord

cc: P. J. Rickershauser
Skip Kalb ✓
E. W. Woolley

JUL 15 1997 2:53PM

NO. 3757 P. 13/21

CHARLES F. PENNER
DIRECTOR
INDUSTRIAL DEVELOPMENT

UNION PACIFIC RAILROAD COMPANY



1410 DODGE STREET
OMAHA, NEBRASKA 68179

June 24, 1997

VIA FAX: 817-352-7113

P. E. Kalb, Jr.
Assistant Vice President
Industrial Development
Burlington Northern Santa Fe
2650 Lou Menk Drive
P. O. Box 961058
Fort Worth, TX 76131

Dear Skip:

Refers to your letter of May 29 about Proposed Rail Service Plan (Project Number 1) for Jamco, Inc. at Sparks, NV.

We have reviewed the proposal and determined that it does not qualify as a new facility. Jamco is simply a tenant moving into an existing multi-tenant warehouse which has been rail-served for many years as a local point on the former Southern Pacific.

I will continue to coordinate new facility proposals with you as you identify opportunities for new facilities on Trackage Rights lines.

Yours truly,

Charles F. Penner
Director Industrial Development

cc: P. J. Fackenhauer - BNSF

BNSF



PETER J. RACKENLAUSEN
Vice President
Marketing UP/SP Lines

Burlington Northern Santa Fe

P. O. Box 961065
Fort Worth, TX 76161-0065
817-352-6686
817-352-7154

Via Facsimile 402-271-4890

July 1, 1997

Mr. Charles F. Penner
Director, Industrial Development
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179

Dear Charlie:

Reference your letter dated June 24, 1997, regarding BNSF's "Proposed Rail Service Plan" (Project #1) for Jamco, Inc., at Sparks, NV, forwarded to you by Skip Kalb, BNSF's Assistant Vice President, Industrial Development, under cover of May 29.

I have been following this project proposal from my accountabilities at BNSF for marketing our services along our line acquisitions and trackage rights lines to existing and potential customers. My review of this file shows the following:

1) We did not inform you that the proposed Jamco, Inc. facility at Sparks is a "QDC", or Quality Distribution Center, a BNSF term for a paper transloading center similar in concept to either a TSSI facility on Southern Pacific or a +1 Program facility on Union Pacific. Jamco will be BNSF's contractor, and will permit BNSF to provide door-to-door service and one-bill capabilities on paper destined R. R. Donnelley's Reno, NV printing plant. If you need more information on this QDC operation, or verification from BNSF that the Sparks facility will indeed be a QDC, please let either Skip Kalb or I know.

2) Having established that, the BNSF Settlement Agreement and supplements clearly state that, at Reno, BNSF can have access to "only intermodal, automotive (BNSF must establish its own automobile facility), transloading, and new shipper facilities located on the SP line." Our previous correspondence with Union Pacific has referred to the Jamco site as a new shipper facility. However, BNSF believes our access to this facility should be as a transload, as clearly spelled out in the Settlement Agreement and other merger conditions. BNSF is also willing to discuss whether it would be appropriate to contribute one-half of the original cost of the trackage built to access the facility by Union Pacific or, most likely, Southern Pacific.

I, Burlington Northern Santa Fe, and the beneficial owner of paper moving through the proposed QDC transload facility at Sparks, R. R. Donnelley, continue to strongly believe that, in accordance with the merger settlement agreements and conditions, BNSF should be able to

Mr. Charles F. Penner
Union Pacific Railroad Company
Page 2

establish and serve the Jamco facility outlined. With the clarification provided above, and in an effort to clear up any misunderstanding based on our prior communications about the nature of the proposed Jamco facility at Sparks, I request your reconsideration and approval of the proposal made by Burlington Northern Santa Fe. If, upon reviewing the file, you have additional questions or concerns, please do not hesitate to contact either Skip Kalb at 817-352-6133 or myself at 817-352-352-6686 for clarification.

Sincerely,



Peter J. Rickershauser

cc: F. E. Kalb, BNSF
Mike Roper, BNSF
John Ransom, UP (Facsimile 402-271-2438)
Larry Wzorek, UP (Facsimile 402-271-5610)

JIM SHATTUCK
EXECUTIVE VICE PRESIDENT
MARKETING AND SALES

UNION PACIFIC RAILROAD COMPANY



ROOM 1130
1416 DODGE STREET
OMAHA, NEBRASKA 68179
402-271-3700
FAX 402-271-3142

July 2, 1997

VIA FAX (702-677-3996)

Mr. Bill Staab
Operations Support Manager
R. R. Donnelley & Sons Company
14100 Lear Boulevard
Reno, Nevada 98506-1657

Dear Mr. Staab:

Your letter of June 30 asked that the warehouse facility at 1141 E. Glendale Ave., Sparks, NV, be accessible to Burlington Northern Santa Fe pursuant to the conditions that the Surface Transportation Board established in approving the Union Pacific/ Southern Pacific merger. You are correct that one of the STB conditions requires that BNSF be granted the right to serve new facilities (including transload facilities) on UP and SP lines over which BNSF received trackage rights in the UP - BNSF Agreement. I must advise you, however, that the warehouse location is an existing facility which has been rail-served for many years as a local point on the former Southern Pacific. It does not qualify as a "new facility" along the trackage over which BNSF has trackage rights simply because a new tenant moves into an existing facility. We previously so advised BNSF.

The warehouse location also does not qualify as a new transload facility. In its decision clarifying this condition, the STB stated that a legitimate transload operation will necessarily entail both the construction of a rail transload facility as that term is used in the industry and operating costs beyond the costs that would be incurred in providing direct rail service. The warehouse you have referred to is not a "transload facility."

Additionally, Sparks is not a "2-to-1" location. Sparks historically was served by SP only. Therefore, the number of railroads at Sparks was not reduced from two to one as a result of the merger. Nevertheless, as part of the Settlement Agreement with BNSF prior to the merger, UP/SP agreed that BNSF would have trackage rights through Sparks and the right to use the SP's intermodal facility at Sparks. This enables BNSF to provide you with intermodal service for your commodities destined to your Reno facility. Of course, BNSF has the ability to build or acquire a new facility including a new transload operation along the SP trackage in order to handle your traffic.

There are a number of alternatives available to you and BNSF. However, the Glendale Ave. warehouse is not open to service by BNSF.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jim Shattuck". The signature is fluid and cursive, with the first name "Jim" being more prominent and the last name "Shattuck" following in a similar style.

CHARLES F. PENNER
DIRECTOR
INDUSTRIAL DEVELOPMENT

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179



July 10, 1997

VIA FAX (817) 352-7154

Mr. Peter J. Rickershauser
Vice President
Burlington Northern Santa Fe
2650 Lou Menk Drive
P. O. Box 961058
Fort Worth, Texas 76131

Re: Jamco, Inc. at Sparks

Dear Pete:

This is in response to your letter of July 1 concerning BNSF access to the warehouse on the former Southern Pacific line at Sparks, NV. You ask that UP authorize access to this warehouse as a transload facility, not a "new facility". Union Pacific has also received correspondence on this matter from R. R. Donnelley. I am enclosing as information a copy of Jim Shattuck's response to Donnelley's letter since Mr. Staab of R. R. Donnelley copied BNSF on his correspondence to UP.

Your characterization of the warehouse as the site for a new transload on BNSF along the trackage rights lines does not qualify the warehouse as a location that BNSF has access to under the Settlement Agreement, as amended, or any of the conditions in the STB's approval of the UP/SP merger. The facts remain that the warehouse is an existing facility on the SP which was served only by the SP prior to the merger. BNSF's plans to utilize the warehouse as a BNSF Quality Distribution Center for paper transloading with Jamco as BNSF's contractor indicates that this is a new transload facility, which like a "new facility", must meet the criteria established in the Settlement Agreement and the STB's modification of that agreement. As you know, when the STB clarified the "new facility" condition in Decision No. 61 last November, the STB said that "a legitimate transload operation will necessarily entail both the construction of a rail transload facility . . . and operating costs above and beyond the costs that would be incurred in providing direct rail service."

Your request of July 1 does not convince me that this is a facility to which BNSF is entitled to have access. Therefore, the existing warehouse at 1141 E. Glendale Avenue will not be opened for service by BNSF.

Sincerely,

Charlie

Charlie Penner
Director Industrial Development

RECT LAW DEPT

JUL 16 1997

FORT WORTH

cc: F. E. Kalb - BNSF
Mike Roper - BNSF
John Ransom - Room 1110
Larry Wzorek - Room 830

VERIFICATION

THE STATE OF TEXAS)
)
COUNTY OF TARRANT)

F. E. (Skip) Kalb, Jr., being duly sworn, deposes and says that he has read the foregoing statement, and that the contents thereof are true and correct to the best of his knowledge and belief.

F. E. (Skip) Kalb, Jr.
F. E. (Skip) Kalb, Jr.

Subscribed and sworn to before me on this 29 day of July, 1997.



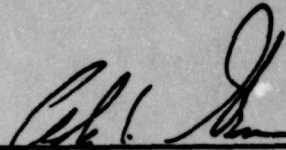
Tina Hutson
Notary Public

My Commission expires

6-26-98

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Joint Petition for Enforcement (BN/SF-81; RRD-1) was served, by first-class mail, postage prepaid, on all Parties of Record in Finance Docket No. 32760.

A handwritten signature in black ink, appearing to read 'Adam C. Sloane', is written over a horizontal line.

Adam C. Sloane
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

STB

FD

32760

6-29-96

I

82865

82828

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE



Item No. _____

50 FREMONT STREET, SUITE 300
SAN FRANCISCO, CA 94105
(415) 356-6000

Page Count _____

Apr # 433

FACSIMILE: (415) 356-6370
(415) 356-6377

April 25, 1996

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1201 Constitution Ave., N.W.
Washington, D.C. 20423



RE: Union Pacific Corp., et al. -- Control -- Southern Pacific Corp., et al.; Finance Docket No. 32760

Dear Mr. Williams:

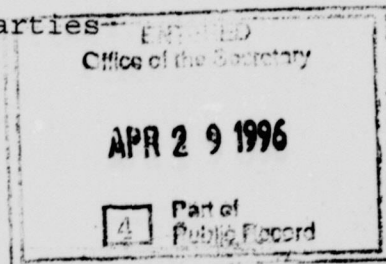
Enclosed for filing are an original and twenty copies of the Petition for Leave to File Exhibit Late or, in the Alternative, Petition to File Report as Rebuttal Evidence.

Sincerely,

DANIEL E. LUNGREN
Attorney General

Lindsay Bower
LINDSAY BOWER
Deputy Attorney General

cc: All parties



APR 29 1996

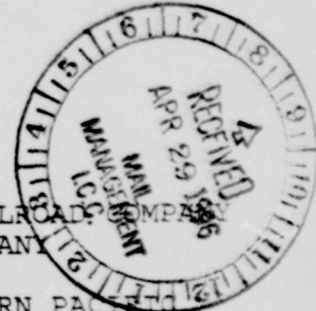
ORIGINAL

Panel CA AG-2

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD,
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 EXHIBIT LATE OR,
IN THE ALTERNATIVE, PETITION TO FILE REPORT
AS REBUTTAL EVIDENCE

The Attorney General of the State of California petitions the Surface Transportation Board for leave to file late the attached Analysis of Southern Pacific Rail Corporation. This office has retained Lloyd Levitin of JurEcon, Inc. to analyze the financial "viability" of Southern Pacific. Based in part upon Mr. Levitin's findings, we supported the proposed merger in the Statement in Support of Proposed Merger we submitted to the Board on April 4, 1996. Subsequently, Mr. Levitin reduced his findings to writing in the Analysis, which is attached as Exhibit A and dated April 24, 1996.

In the alternative, this office petitions the Board to file the Analysis as rebuttal evidence under Decision No. 31. Various parties raised the financial condition of Southern Pacific in

their March 29 filings. Exhibit A is clearly relevant to that issue.

DATED: April 25, 1996

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California

DAVID STIRLING, Chief

Deputy Attorney General

RODERICK E. WALSTON, Chief

Assistant Attorney General

THOMAS GREENE,

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By

Lindsay Bower

LINDSAY BOWER

Attorneys for the State of California
State of California

EXHIBIT A

Printed and Confidential

**An Analysis of
Southern Pacific Rail Corporation
in connection with the
Union Pacific/Southern Pacific Merger**

Prepared for:

**Lindsay Bower
Deputy Attorney General
State of California
Department of Justice
50 Fremont Street, Suite 300
San Francisco, California 94105-2239**

Prepared by

**JurEcon, Inc.
520 South Grand Avenue, Suite 665
Los Angeles, California 90071
Telephone: (213) 892-8200
Fax: (213) 892-8207**

April 24, 1996

EXECUTIVE SUMMARY

JurEcon, Inc. was asked to provide an opinion as to whether the Southern Pacific Rail Corporation ("SPR") would continue to be a "viable" railroad if it were unable to merge with Union Pacific. For purposes of this report, "viability" is defined as the ability of SPR to continually access capital on acceptable terms to meet its minimum cash needs in order to continue its business as a major western railroad in the markets it presently serves.

In our opinion, SPR will continue to generate a negative net cash from operating activities for the foreseeable future. Therefore SPR will have to continue to rely on asset sales, borrowings and equity issuance to finance its cash deficit. We believe that it is unlikely that SPR will be able to obtain the cash required from asset sales, or from the capital markets in the amount required, when required, and on acceptable terms. Therefore, we do not expect that SPR on a stand-alone basis will remain a viable major western railroad.

ABOUT JURECON AND THE FINANCIAL EXPERT

Since 1981, JurEcon, Inc. has been providing economic, financial and statistical analysis to the nation's major law firms, corporations, courts, governors, Congressional Committees and State Attorneys General. JurEcon specializes in economic and financial analysis and valuation, general corporate matters, cost-benefit analysis and in litigation support.

The Financial Expert on this project is Lloyd A. Levitin, J.D., MBA, CPA. Mr. Levitin (MBA, *University of Pennsylvania, Wharton School*), (JD, *University of San Francisco*) is a Senior Consultant with JurEcon and is on the graduate faculty teaching finance in the Department of Finance and Business Economics at the Graduate School of Business Administration at the University of Southern California.

Before joining JurEcon, Mr. Levitin was the Executive Vice President, Treasurer and Chief Financial Officer of Pacific Enterprises and simultaneously Executive Vice President and Chief Financial Officer of Southern California Gas Company.

LIMITING CONDITIONS

1. This analysis has been provided to State of California, Office of the Attorney General for the purposes stated herein and should not be used for any other purpose.
2. Our analysis is based solely upon public information provided to us by State of California, Office of the Attorney General and was performed without the benefit of due diligence or access to all documents confidential or otherwise.
3. The report contains information that Southern Pacific regards as "highly confidential" and which is subject to a confidentiality agreement JurEcon signed with Southern Pacific.
4. In the course of our analysis, we were provided with both written and oral information related to the structure and operation of subject company which we accepted as accurate without verification. We assume no responsibility for information furnished to us by others and believed to be reliable. We have relied on the accuracy and completeness of this information without independent verification.
5. Any information contained herein is only intended to represent our beliefs about the financial viability of SP based on the information provided to JurEcon, Inc. as of the dates described herein. Changes in the operating condition of SP or its competitors could result in a recommendation of viability which is substantially different.
6. We assume no responsibility for matters of a legal nature.

7. The fee for this analysis is not contingent upon the nature of the results or conclusions derived herein.
8. Neither JurEcon nor any of its employees or independent contractors has a financial interest in the subject company.
9. Neither all nor part of the contents of this report shall be disseminated to the public through advertising, public relations, news, sales, or any other public media.
10. The estimates of future operations included herein are solely for use in this analysis and are not intended for use as forecasts or projections of future business operations. We have not performed an examination, in accordance with standards established by the American Institute of Certified Public Accountants, or other standards, of the accompanying prospective data, and accordingly, do not express an opinion or any other form of assurance, as contemplated by such standards on the accompanying prospective data or assumptions. In addition, there will usually be differences between estimated and actual results because events and circumstance frequently do not occur as expected, and those differences may be material.
11. The historical financial data used in this Expert Opinion have been derived from financial statements and other summary information provided to JurEcon; such reports may include disclosures required by generally accepted accounting principles or other disclosures which are not repeated herein. We also may have relied on unaudited financial materials, including but not limited to Analysts' Reports.
12. This report does not evaluate SPR's strategic options such as "bust-up". The intent of this report is to address whether SPR on a stand-alone basis - as presently constituted

and without a "bust-up" or major restructuring - can remain viable.

SECTION 1

BACKGROUND INFORMATION

Introduction

Southern Pacific Rail Corporation ("SPR") is a holding company that, through the integrated network of its principal subsidiaries, transports freight throughout the Western United States. In 1995, the company generated \$3.2 billion in revenues. SPR's principal operating subsidiary is Southern Pacific Transportation Company ("SPT").

SPR has sustained an aggregate negative net revenue from railway operations since 1983.¹ In addition, in every year since 1983, SPR's cash flow from railroad operations failed to cover its capital expenditures. As a result, SPR relied on proceeds from property sales, borrowings, and equity financings to meet its operating cash needs.

The company's primary competitors are Burlington Northern Santa Fe ("BNSF")² and Union Pacific. SPR is financially much weaker than these competitors.

Shown below is the cumulative "free operating cash flow" for SPR for the period 1983-1994 together with the same data for its western competitors: Burlington Northern, Santa Fe, and Union Pacific. SPR's cumulative free operating cash flow was a negative \$1.5

¹ For the period 1983-1994 as reported to the Interstate Commerce Commission and reproduced by Anestis & Co., September 30, 1995.

1995 data not yet available but it is not believed that 1995 data will change the statement.

² Burlington Northern and Santa Fe merged on 9/22/95.

billion while Burlington Northern and Union Pacific each had a positive free operating cash flow in excess of \$5 billion. This is shown below.

CUMULATIVE FREE OPERATING CASH FLOW

Cumulative Free Operating Cash Flow ¹ —1983-1994 (in millions)	
SPR ²	\$(1,491)
Burlington Northern	\$5,775
Santa Fe	\$720
Union Pacific	\$5,266

¹ Data taken from report prepared by Anestis & Company, dated 9/30/95 and is based on data culled from material submitted on Form R-1 and other reports to the Interstate Commerce Commission. 1995 data is not yet available. Free operating cash flow is defined as revenues less expenses plus depreciation less capital expenditures. It excludes income taxes and interest expense. Capital expenditures includes capital leases.

² Southern Pacific data is on a "proforma" basis combined with SLSW and DRGW.

SPR's operating ratio (i.e. the ratio of operating expenses to operating revenues) has averaged over 100% for the period 1983-1994. This means that operating expenses have exceeded operating revenues over this period. SPR's competitors have enjoyed operating ratios significantly below SPR. This is shown below:

OPERATING RATIOS

Average 1983-1994 ¹	
SPR	104.0%
Burlington Northern	87.0%
Santa Fe	93.5%
Union Pacific	85.3%

¹ Data taken from report prepared by Anestis & Company, dated 9/30/95 and is based on data submitted on form R-1 to ICC.

SPR's return on equity has averaged only 3.2% for the period 1983-1994. This amount is clearly inadequate. SPR's competitors (except Santa Fe) enjoyed healthy returns in equity as shown below.

RETURN ON EQUITY

Average 1983-1994 ¹	
SPT	3.2%
Burlington Northern	9.8%
Union Pacific	10.5%
Santa Fe	3.6%

¹Data taken from report prepared by Anestis & Company, dated 9/30/95 and is based on data submitted on form R-1 to ICC.

History

SPR's roots date back to the 1860's when the predecessor of its principal subsidiary, Southern Pacific Transportation Company ("SPT") began as the Western half of America's first transcontinental railroad. In the early 1980s, SPT and Santa Fe merged their operations pending Interstate Commerce Commission (ICC) approval. The ICC reviewed the case from 1983 to 1988, during which time the company was held in a trust until the ICC disallowed the merger in 1988. As a result, the SPT side had to be spun off, and was acquired in October 1988 by the Anschutz Corporation for \$1.02 billion. The latter bought the Denver and Rio

Grande Western Railroad Company in 1984. In 1989 and 1990, SPR acquired access to Chicago from St. Louis and Kansas City, respectively.

During the period SPR was held in trust, SPT fell significantly behind other Class I railroads that were then consolidating, streamlining and strengthening their railroads.³ SPR management has stated that when it acquired SPT in 1988, "SPT was burdened with excess, unprofitable and low density track, inefficient operations and a generally higher and less competitive cost structure than other class I railroads."⁴ Moreover, at the time of the proposed merger of SPT and Santa Fe, SPT was an investment grade credit, it had access to capital, it was financially viable.⁵ However, in 1988, SPR was given a below investment grade credit ("BB") and its bonds have been below investment grade credit ever since.⁶

In July, 1993, SPR hired Ed Moyers, formerly of Illinois Central, as President and Chief Executive Officer. Moyers had a reputation as a prudent cost cutter, with a history of streamlining operations and increasing efficiency. The company developed and implemented a strategy to improve its operating results by enhancing customer service and increasing revenues while lowering the cost and improving the productivity of its railroad operations.⁷ During Moyer's tenure, the operating ratio for SPR improved 820 basis points,

³ SPR Corp., Form S-1 Registration Statement (filed with the SEC 8/10/93) at 19.

⁴ SP Rail Corp., Form S-1 Registration Statement, Amendment #2, (filed with the SEC 2/18/94) at 36.

⁵ Deposition of James A. Runde, 11.

⁶ See Appendix.

⁷ SP Rail Corp., Form S-1 Registration Statement, Amendment #2, (filed with SEC 2/18/94) at 5.

Work Product for Counsel

from 100.6% in 1993 to 92.4% in 1994.⁸ Mr. Moyers received Railway Age's Railroader of the Year Award for his performance at SPR.⁹

In early 1995, Ed Moyers resigned for health reasons and was replaced by Jerry Davis, who came from CSX Transportation, where he was Chief Operating Officer.

Performance deteriorated in 1995, for three major reasons. First, the turnaround effort encountered greater obstacles than management had anticipated.¹⁰ Secondly, management underestimated the adverse impact of the Burlington Northern-Santa Fe merger.¹¹ Finally, 1994 was an exceptional year for the railroad industry, capacity was tight, and customers migrated to SPR as shipper of last choice.¹²

SPR contends that the merger of Burlington Northern and Santa Fe, which was completed in the third quarter of 1995, has substantially changed the competitive environment in the west, and the competitive environment for SPR.¹³ SPR believes that the "increasing service competition that has developed and will be accelerating will require substantial additional capital expenditures for additional equipment, track improvements, and other new facilities and technology."¹⁴

In this regard, SPR has identified \$1 billion that it believes should be made in

⁸ Anestis & Company Report dated 9/30/95 based on data submitted to ICC. Based on SPR's purchase accounting basis, the operating ratio improved 750 basis points, from 96.5% in 1993 to 89% in 1994.

⁹ Deposition of Philip F. Anschutz at 129.

¹⁰ Verified statement of Yarberry, at 278-279.

¹¹ 1995 Annual Report, page 20; Verified Statement of Lawrence C. Yarberry, at 262.

¹² Deposition of Philip F. Anschutz at 49, 50.

¹³ 1995 Annual Report, page 5.

¹⁴ 1995 Annual Report, Page 20.

excess of normal capital expenditures over the next four years "simply to maintain its current competitive position."¹⁵ However, SPR contends that it is "subject to financial constraints that limit its ability to make the investments necessary in the new competitive environment."¹⁶ In fact, SPR claims it "likely will not be able to obtain, either from internal sources or from the public capital markets, the funds necessary to avoid falling farther and farther behind in competition against BN/Santa Fe and UP."¹⁷ SPR believes a merger with Union Pacific is the only solution to its critical need for additional capital.¹⁸ Finally, SPR believes that if the proposed merger with Union Pacific were not completed, SPR would have to "shrink its service."¹⁹ The company concluded that "after several years of extraordinary capital expenditures to build its locomotive fleet, the company will not be able to match the financial resources of BN/ATSF or UP going forward to provide the facilities and other service enhancing investments necessary to be fully competitive on a stand-alone basis".²⁰

This report will address the question of whether SPR can remain financially "viable" in its present form in the foreseeable future.²¹ We conclude that it cannot remain financially viable.

¹⁵ 1995 Annual Report, Page 20. Some of these investments include technology, additional equipment, inland intermodal facility, terminal and yard facilities, reload centers, additional capacity, and Mexican gateways. Verified statement of Yarberry, at 221-224.

¹⁶ Verified statement of Lawrence C. Yarberry, at 274.

¹⁷ Ibid., at 260. Also see deposition of Philip F. Anschutz at 46,47

¹⁸ Ibid., at 260-261.

¹⁹ 1995 Annual Report, page 20.

²⁰ Ibid, page 21.

²¹ Philip F. Anschutz stated in his deposition that "most of the analysts have said a stand-alone SP

SECTION 2

FINANCIAL MODEL USED TO EVALUATE "VIABILITY"

We were asked to provide an opinion as to whether the Southern Pacific Rail Corporation ("SPR") would continue to be a "viable" railroad if it were unable to merge with Union Pacific.

For purposes of this report, "viability" is defined as the ability of SPR to continually access capital on acceptable terms to meet its minimum cash needs in order to continue its business as a major western railroad in the markets it presently serves.²² There are five principal sources of capital. They are:

1. Net cash from operating activities
2. Cash reserves
3. Sale of assets
4. Borrowing
5. Sale of stock

Each of these sources is discussed below:

cannot possibly survive against a combined BN/Santa Fe." See deposition at 287.

²² James A. Runde, of Morgan Stanley, SPR's financial advisor since 1986, defines financial viability in terms of the company's access to capital. See Deposition of Runde at 18,74. Further Runde testified that "the easiest way to tell whether or not a company has access to capital is whether it has an investment grade credit rating." Deposition of Runde at 12. Currently, SPR does not have an investment grade credit rating.

Net Cash from Operating Activities

Net cash from operating activities indicates the amount of cash that the firm is able to generate from its ongoing business activities. It represents the company's cash receipts less cash operating expenditures including interest, taxes and capital expenditures.²³

A business that spends more cash on its ongoing activities than it generates has to finance these activities somehow. It can use up its cash reserves, liquidate assets, borrow additional cash or raise additional equity.

Cash Reserve

Cash and short-term investments are the most assured source of capital to meet cash needs. SPR's cash reserves are discussed in Section 5.

Sale of Assets

Many railroads have substantial value in excess real estate, particularly the Western land-grant railroads. However, asset sales are not predictable and cannot be relied upon to meet specific cash needs at a given time. Also, the supply of assets diminishes as assets are sold. SPR's excess real estate is discussed in Section 6.

Borrowings

The ability of a company to sell debt depends upon the company's credit rating and whether it is in compliance with existing loan covenants. Bonds are rated by Standard &

²³ This report emphasizes cash flows and not accounting profits. There are many differences between earnings and cash flows. For example, accounting profits depreciate capital expenditures over a number of years while cash flows include capital expenditures as cash outflows in the year they are incurred. What is important here is cash flow because a firm can default on debt if it lacks cash to pay debt service even though it may have substantial accounting earnings.

Poor's, Moody's, Duff and Phelps, and Fitch. Each of the agencies use a unique set of criteria, but their ratings are similar enough in practice that the Standard & Poor's nomenclature can be used to describe bond ratings in general. Bond ratings range from AAA, the designation of gilt-edged quality, all the way to D when the issue is in payment default or obligor has filed bankruptcy. Beneath AAA are the AA rated companies that, although also held in very high regard, possess slightly more long-term risk than the top rating. The next category, A, contains the largest group of rated companies. Although A is a good rating, it implies that there may be an impairment of timely debt service in the future. Just below A are BBB rated issues, the lowest of the investment-grade bonds. Beneath BBB are speculative, high yielding junk bonds with ratings of BB and B.

The likelihood of default is directly related to a company's bond rating. Moody's examined the default experience of 3,042 issuers over the 20-year period from 1970 through 1989. Their study confirmed other research by showing that progressively lower-rated companies are much more likely to default in their obligations to bond holders. The report shows that among the companies rated B at a given time, 26% defaulted on their bonds within an ensuing 10 - year period and 21% defaulted within an ensuing 5 - year period.²⁴

A bond rating less than BBB is clearly risky. First, the likelihood of default increases appreciably as the rating falls below investment-grade, the term used to connote a rating of BBB or better. Also, companies with debt ratings below BBB cannot assume continuous

²⁴ "Corporate Bond Defaults and Default Rates, 1970-1989", April 1990, Moody's Investor Service, cited in Stewart, "The Quest for Value", page 393..

access to debt capital at times and in amounts of its choosing. Further, in times of tight credit, companies that are below investment grade can find themselves literally locked out of the market, because investors will settle for nothing less than investment grade bonds. SPR currently has junk bond ratings and SPR's ability to borrow is discussed in Section 7.

Sale of Stock

Equity is in a junior position to debt in the event of bankruptcy. Thus, the quality of a company's debt affects the quality of equity since equity is in a junior position. It is impossible to have a low quality debt and a high grade equity.

The amount of equity that can be sold at any given time depends upon general market conditions and the prospects for the company selling stock. A company like SPR with a weak financial condition, as evidenced by low-earning power, inadequate cash flow, high leverage, combined with a lack of solid prospects for improvement in financial performance will have difficulty in selling stock. Investors do not want to buy stock unless they are convinced they will receive a return on the capital invested that compensates them for the risk taken. The prospects for sale of equity are discussed in Section 8.

Summary

A company that generates a positive net cash from operating activities over the long-term is financially strong and is likely to remain financially viable. A company that generates a negative net cash from operating activities for a prolonged period has to rely on a combination of existing cash reserves, sale of assets, borrowing and sale of stock. A company cannot rely on existing cash reserves or sale of assets for a prolonged time because the

supply diminishes. The ability of a company to rely on borrowings and sale of stock is directly related to the company's credit ratings, which quantify the default risk to which a company is exposed. The lower the credit rating, the greater the probability of default and in turn the greater the difficulty the company will have in accessing debt and equity capital. If the company cannot access the right amount of capital at the right time with acceptable terms, it will no longer remain viable.²⁵

²⁵ Runde, SPR's financial advisor from Morgan Stanley, testified he told SPR's Board of Directors in 1995 that SPR's "access to capital was in doubt because they had a junk bond credit rating and because investors were concerned that the equity could be wiped out by the difficult operating environment that could be produced by railroad consolidation away from the SP". See Deposition of Runde, at 72.

SECTION 3

CONCLUSION

In our opinion, SPR will continue to generate a negative net cash from operating activities for the foreseeable future. Therefore SPR will have to continue to rely on asset sales, borrowings and equity issuance to finance its cash deficit. We believe that it is unlikely that SPR will be able to obtain the cash required from asset sales, or from the capital markets in the amount required, when required, and on acceptable terms. Therefore, we do not expect that SPR on a stand-alone basis will remain a viable major western railroad.

SECTION 4

NET CASH FROM OPERATING ACTIVITIES

Financial Summary

A company that generates positive net cash from operating activities (i.e. cash receipts that exceed cash operating expenditures, interest, taxes and capital expenditures) is financially strong. Historically, SPR has not been able to generate a positive net cash from operating activities and is not likely to do so in the foreseeable future.

SPR's net cash from operating activities for the period 1991-1995 was a negative \$2,214 million. This is shown below:

NET CASH FROM OPERATING ACTIVITIES (Dollars in Millions)

	1995	1994	1993	1992	1991	TOTAL 1991-1995
Operating Cash Flows ¹	\$ 124	\$ 228	\$ (105)	\$ 107	\$ (45)	\$ 309
Investments ^{2,3}	(913)	(578)	(371)	(364)	(297)	(2,523)
Net Cash from Operating Activities	\$(789)	\$(350)	\$(476)	\$(257)	\$(342)	\$(2,214)

¹From SPR's consolidated statement of cash flows as published in its Annual Report

²From SPR's consolidated statement of cash flows as published in its Annual Report except excludes change in short-term investments and includes long-term capital leases

³1995 investments are abnormally large due to acceleration of some \$150 million of capital expenditures from 1996 to 1995.

1993 Strategy

The new management team that took charge of SPR in 1993 (headed by Ed Moyers) formulated a strategy to improve operating results - and cash flow- by improving customer service (thereby increasing revenues) while lowering the cost of operations.²⁶

1994- A Record Year

Moyers' strategy was bearing fruit by the end of 1994. In that year, SPR set new records for earnings, gross freight revenues, and total carload volume.

By successfully handling higher traffic volumes with greater efficiency, SPR strongly improved earnings in 1994 compared to previous years. Operating income for 1994 increased by 235% to \$345.7 million, compared to 1993 operating income of \$103.2 million. As a result, SPR's operating ratio improved over eight points, from 100.6% in 1993 to 92.4% for 1994.²⁷

During 1994, SPR substantially improved its liquidity and debt-to-capitalization ratio.

As a result of improved operating performance, the sale of the Alameda Corridor in Los Angeles for \$235 million, and \$504 million of new equity capital, SPR significantly reduced its debt. As a result, SPR's debt-to-capitalization ratio, which stood at 94% in December 31, 1992, was reduced to 53% at the end of 1994.

A critical element of SPR's cost reduction strategy is to lower its labor expenses, the single largest component of its operating expenses, by continuing to improve labor

²⁶ SPR February 7, 1994 Form S-1, Registration Statement at 43.

²⁷ Anestis, Sept. 1995 Report. Based on data filed with ICC

productivity. From December 31, 1992 to December 31, 1994, SPR reduced the number of its employees from 22,793 to 18,010, or 21%. During the same period, labor productivity increased as measured by approximately 47% increase in revenue ton-miles per employee and the approximately 39% increase in carloads per employee over the same period.

Despite the success of the strategic cost-cutting program and increases in revenue, SPR's financial performance in 1994 compared unfavorably with that of its competitors. SPR still suffered from a high operating ratio, low return on equity, low density and low free operating cash flow. This is shown below:

1994 PERFORMANCE¹

	SPR	Burlington Northern	Santa Fe	Union Pacific
Operating Ratio	92.4%	83.4%	84%	79.2%
Return on Equity	9.27%	16.9%	10.1%	15.1%
Density (Revenue ton-miles per mile of road) (millions)	9.6	11.7	12.0	13.4
Free Operating Cash Flow (millions) ²	\$(74)	\$469	\$(24)	\$779

¹Anestis, Sept. 1995; based on reports filed with ICC.

²Defined in the Anestis Report as revenues less expenses plus depreciation less capital expenditures. Expenses exclude income taxes and interest expense. Capital expenditures include capital leases. Net cash from operating activities as used in this report reduces cash flow by taxes and interest expense and is thus a lower amount than free operating cash flow.

SPR Management Expected To Do Even Better In 1995.

In the 1994 SPR Annual Report, Jerry R. Davis, President and Chief Executive Officer,

stated in his letter to stockholders that "Looking ahead through 1995, we expect to build on the momentum we achieved in 1994 and continue to improve our operations."

Performance Deteriorated in 1995

In fact, financial performance in 1995 deteriorated significantly from 1994 results.

Moreover, financial performance deteriorated significantly from management's expectations.

Shown below is a summary of financial performance for 1994, management's expectation for 1995 as set forth in its March, 1995 projection²⁸, and actual 1995 results.

INCOME STATEMENT DATA (Dollars in Millions)

	ACTUAL 1994	PROJECTED 1995	ACTUAL 1995
Operating Revenues	\$3,143	\$3,327	\$3,151
Operating Expenses	<u>2,797</u>	<u>2,879</u>	<u>3,002⁽¹⁾</u>
Operating Income	<u>\$ 346</u>	<u>\$ - 448</u>	<u>\$ 149</u>
Gains from Real Estate Sales	\$ 262	\$ 67	\$ 31
Net Income (Loss)	242	203	(3)
Operating Ratio ⁽²⁾	89%	86.5%	95.3%

⁽¹⁾ Includes special charges of \$65 million.

⁽²⁾ Based on SPR's purchase accounting basis. Operating ratios reflected in Anestis Report shown above are based on SPT's historical costs.

²⁸ SPR's Schedule 14 D-9 filed with SEC at 17. (File N11-000011).

CASH FLOW
(Dollars in Millions)

	ACTUAL 1994	PROJECTED 1995	ACTUAL 1995
Operating Cash Flows	\$ 228	\$ 309	\$ 124
Investments ⁽¹⁾	<u>\$(578)</u>	<u>\$(716)</u>	<u>\$(913)</u>
Net Cash Flow from Operating Activities	<u>\$ (350)</u>	<u>\$(407)</u>	<u>\$(789)</u>

⁽¹⁾ Includes long-term capital leases.

Management expected operating income in 1995 to increase 29% over 1994.

Instead, actual 1995 operating income decreased 57%.

Management expected 1995 net income to be \$203 million. Actual 1995 results was a net loss of \$3 million.

The forgoing schedule of Cash Flow data shows that management expected operating cash flows to reach \$309 million in 1995, an increase of 36% over 1994. Actual operating cash flows were \$124 million, 60% below expectations for 1995, and 46% below actual operating cash flows for 1994.

Management expected 1995 net cash from operating activities to be a negative \$407 million. Actual net cash from operating activities was a negative \$789 million. Of this \$382 million deterioration, \$185 million was due to lower operating cash flows and \$197 million was due to higher investments. A substantial part of the increase in investment was due to acceleration of 1996 investments into 1995. However, the \$185 million deterioration in operating cash flow indicates that management underestimated the magnitude of the problems.

In July, 1995, based on disappointing performance for the first six months,

management revised downward its projections for 1995. However, management still greatly overstated 1995 expected performance. A comparison of income statement data for March and July projections²⁹ and actual 1995 results follow (\$ in millions):

1995

	MARCH PROJECTION	JULY PROJECTION	ACTUAL
Operating Revenue	\$3,327	\$3,220-3,200	\$3,151
Operating Expenses	<u>2,879</u>	<u>2,900-2,920</u>	<u>3,002</u>
Operating Income	<u>\$ 448</u>	<u>\$ 320-280</u>	<u>\$ 149</u>
Gains from the Sale of Real Estate	\$ 67	\$ 70-70	\$ 31
Net Income (Loss)	\$ 203	\$134-110	\$ (3)

Actual 1995 Operating Income of \$149 million was substantially below the July projected operating income of \$280-320 million.

SPR's Liquidity Substantially Deteriorated In 1995

The progressive deterioration in SPR's financial strength during 1995 is evidenced by the changes in the Company's disclosures on "Liquidity and Capital Resources" contained in quarterly filings with the S.E.C. on Form 10Q.

The substantive changes during 1995 are as follows:

1. In the first and second quarter 10Q the Company stated "*The capital and debt transactions completed over the last two years*

²⁹ Ibid.

have substantially improved the Company's liquidity." This sentence was omitted from the third quarter 10Q and the 1995 Annual Report. One can infer from this that the Company has concluded that liquidity has substantially deteriorated during the last half of 1995.

2. In the first quarter 10Q, the Company stated *"The Company anticipates that, for the next few years, cash generated by rail operations, while expected to continue to improve, will be insufficient to meet its cash needs including acquisition of equipment and other necessary capital expenditures. In order to satisfy these cash flow requirements, as well as satisfy financial covenants in its credit facilities, the Company must continue to improve its operating results . . ."* The words *"while expected to continue to improve"* were deleted in the second and third 10Q and in the 1995 Annual Report. Thus, disclosures in the 1995 quarterly 10Q's and the 1995 Annual Report state the Company must improve its operating results but only in the first quarter 10Q does the Company state that it actually expects cash flows to continue to improve. This infers less confidence (or more conservatism) on the part of management.

3. In the third quarter 10Q the Company states: *"Based on projected operating results and land sales in the fourth quarter of 1995, the Company presently believes it should meet the financial covenant tests in its bank credit facilities by a small margin."* This disclosure did not appear in the first and second quarter 10Q. One can infer that liquidity has deteriorated in the latter part of 1995.

4. In the third quarter 10Q the Company states: *"The Company faces large capital investment requirements in order to meet the challenges of its major competitors, particularly as a result of the recent BN/ATSF merger. The intense service competition that has developed and will be accelerating will require capital expenditures for additional equipment, track improvements and other new facilities and technology."* This disclosure that the Company needs to make additional capital expenditures to remain competitive did not appear prior to the third quarter 10Q. (The BN/ATSF merger was not effective until the end of the third quarter, 1995). This disclosure was repeated in the 1995 Annual Report together with the added disclosure that

"The Company has identified capital expenditures of more than \$1 billion that it believes should be made in excess of normal capital expenditures over the next four years simply to maintain its current competitive position." The need to make additional capital expenditures would lessen liquidity.

5. In its third quarter 10Q the Company also disclosed the following with respect to the BN/ATSF merger: "Pressure on the Company to improve service and price more aggressively may continue and could adversely impact operating results because the Company may not be able to reduce costs as rapidly as it would have without the increased service competition from the BN/ATSF merger, and expend capital equivalent to its competitors and compete with equal service. If the company's proposed merger with UPRR were not completed, management now believes the Company would have to shrink its service." In the 1995 Annual Report, the Company repeated this disclosure with changes indicating an even more bearish outlook. Instead of saying "Pressure on the Company to improve service and price more aggressively may continue, ..." the wording was changed to: "Pressure on the Company to improve service and price more aggressively are expected to continue . . .". Instead of saying that "The Company may not be able to reduce costs as rapidly as it would have without the increased service competition", the wording was changed to "The Company does not expect to be able to reduce costs as rapidly as it would have without the increased service competition." These disclosures make it clear that the BN/ATSF merger had a major impact on SPR's management thinking and that its timetable for reducing costs was set back and that SPR would, absent a merger with UPRR, have to shrink its service.
6. In the 1995 Annual Report, the Company added two disclosures: (1) "As a result of not achieving certain ratios and covenants in its \$375 million Senior Notes at December 31, 1995, the Company is restricted in incurring additional indebtedness, except for certain permitted categories of debt, including \$300 million available under its revolving credit facility."; (2) "Because continued compliance with the financial terms and covenants under its credit facilities would require significant gains from the sales of properties in the first and second quarters, the Company and its banks have agreed to

amend the covenants through the second quarter 1996 to eliminate the fixed charge coverage tests for these periods. Management of the company currently believes it will meet its revised financial covenants in 1996, although the margin is narrow. If the Company were unable to meet these requirements, its liquidity would be significantly constrained in the latter part of 1996." These disclosures in the 1995 Annual Report reveal that SPR is now restricted in incurring additional indebtedness, except under its \$300 million revolving credit facility, but even its ability to use that facility is under pressure since SPR expects to meet its financial covenants by only a "narrow" margin.

Deteriorating Financial Performance in 1995 Surprised SPR's Security Analysts

Security analysts, like SPR Management, over-estimated 1995 earnings. SPR had a net loss of \$.02 per share for 1995. Excluding the special charge, 1995 earnings per share would have been \$.23 per share.

Shown below are security analysts' projections of SPR's 1995 earnings per share, together with date of the projection.

	DATE OF PROJECTION	PROJECTED EPS
Salomon Brothers	July, 1995	\$.80
Merrill Lynch	May, 1995	\$1.10
Lehman Brothers	January, 1995	\$1.35
Natwest Securities	January, 1995	\$1.30
C.J. Lawrence/Deutsche Bank	January, 1995	\$1.35

Estimates of 1995 EPS in January 1995 were in the \$1.30 - \$1.35 range. This compares to the actual loss of \$.02 per share.

Morgan Stanley's Valuation of SPR for Purposes of Merger with Union Pacific Based on July 1995 Projections

Presumably the July projections given Morgan Stanley for purposes of rendering financial advice on the merger were the projections that SPR now acknowledges were too optimistic.³⁰

Unexpected Problems Encountered in 1995

Management concluded in 1995 that its strategy to improve service while simultaneously reducing cost was not working. Also, management underestimated the competition from the merger of Burlington Northern and Santa Fe.

In 1995, SPR's Management Revised Its Thinking That It Could Improve Service And At the Same Time Continue To Reduce Cost and Placed A Higher Priority On Improving Service

SPR's efforts to improve operating results by improving customer service and thereby increasing revenues while simultaneously reducing costs encountered greater obstacles than were anticipated when the efforts commenced in 1993. During 1995, it was necessary to hire additional employees in order to maintain service levels, and certain planned cost reductions proved difficult to achieve.³¹ Operating expenses increased by approximately 7%

³⁰ See Deposition of Runde, page 72. July projections are discussed on page 18 of this report.

³¹ Verified Statement of Yarberry at 278, 279.

in 1995 over 1994, even though overall revenues remained essentially flat due to competitive pressures.

The largest component of operating expenses, labor and fringe benefit costs increased \$34.6 million, or 3.2%, for 1995 compared to 1994. The Company increased rail employment by approximately 5.7% during the year. The increase in employment was due primarily to an increase in train and engine crews in order to improve customer service and to address congestion in certain high volume corridors.³²

The increase in employees reversed in part the downsizing of the labor force that has taken place over recent years.

SPR Underestimated the Impact of the Burlington Northern and Santa Fe Merger

Burlington Northern and Santa Fe merged in the third quarter of 1995. This merger has substantially changed the competitive environment in the west and the competitive situation for SPR. BNSF is financially much stronger than SPR.

Shown below is a comparison of 1995 financial data for SPR and Burlington Northern Santa Fe ("BNSF").

³² 1995 Annual Report at 14.

1995 FINANCIAL PERFORMANCE
(Dollars in Millions)

	SPR ⁽¹⁾	BNSF ⁽²⁾
Operating Revenues	\$3,151	\$8,170
Operating Income	214	1,576
Net Income	36	759
Operating Ratio	93.2%	80.7%
Debt to Capital (year-end)	62%	46%
Stockholders Equity (year-end)	1,061	5,037
Operating Cash Flow	124	1,416
Capital Expenditures ⁽³⁾	412	890
Operating Cash Flow Less Capital Expenditures	(288)	526

⁽¹⁾ Operating income, net income, operating ratio is before special charge of \$65 million (pre-tax).

Operating ratio based on SPR's purchase accounting basis.

⁽²⁾ Operating revenues, operating income, net income and operating ratio represents combined Burlington Northern and Santa Fe operations after adjustment to exclude special items as reflected in BNSF's Investor's Report. Cash flow and capital expenditure data is as reported in published financial statements and represents full year data for BN, and SF amounts from date of merger (9-22-95).

⁽³⁾ Excludes capital leases.

BNSF's 1995 combined operating income was over 7 times larger than SPR's operating income.

BNSF's debt to capital ratio is 16 percentage points below SPR's debt to capital ratio.

This indicates that BNSF has substantially more borrowing capacity than SPR.

BNSF's equity is nearly 5 times larger than SPR's equity.

BNSF's operating cash flow is 11 times larger than SPR's operating cash flow.

Finally, BNSF generated operating cash flow that exceeded its capital expenditures by \$526 million, while SPR's operating cash flow was \$288 million short of its cash capital

expenditures.

SPR management has come to realize that the financial power of the BNSF combination is greater than originally thought. BNSF's CEO Rob Krebs has been reported to state that the railroad has \$1 billion of savings to realize over the next 3-4 years. This is about twice as much as filed in the merger application.

Moreover, the integration of Burlington Northern and Santa Fe is occurring more quickly than SPR initially anticipated. BNSF's CEO, Rob Krebs, is reported also to have said that the railroad will realize the entire \$1 billion of merger synergies two years ahead of the schedule submitted to the Commission.³³ Mr. Krebs has also stated he believes there is \$500 million worth of savings above the merger benefits.

Salomon Brothers is projecting BNSF to achieve an operating income of \$1,866 million in 1996 and \$2,252 million in 1997. This compares to a combined pro forma operating income of \$1,576 million in 1995. This reflects a projected increase in operating income of 43% in two years.

The large merger synergies generated from the combined BNSF railroad makes the combined railroad a substantially stronger competitor than either railroad was separately.

The stronger financial condition and resources of BNSF will allow it to make more investments designed to enhance service, attract new customers, gain market share and achieve even more efficient operations.

Salomon Brothers projects that BNSF's capital expenditures (including capital leases)

³³ Verified Statement of Yarberry at 264.

will total \$1.8 billion each year for 1996 and 1997. This is much higher than the \$1.5 billion combined BN and SF capital spending Salomon Brothers projected for 1995 and is more than three times the amount SPR projects to spend in 1996 and 1997.

Evidence of the increasing competitive environment can be seen in the downward trend of SPR's revenue per ton-mile which declined to \$0.019 in 1995 from \$0.021 in 1994. This decline in revenue per ton-mile occurred even though SPR had been successful in increasing traffic volume in 1995.

Other evidence of the increasing competitive environment is that in 1995, for the first time in several years, volumes and revenues on intermodal business declined. SPR believes this is largely attributable to increased service competition from its major competitors relating to transit time and consistency, areas in which SPR has historically lagged behind. Intermodal container and trailer operations are SPR's largest single traffic category, accounting for 30.4% of 1995 carloads and 25.6% of gross freight revenue.

In 1995, SPR's intermodal carloads were down 2.5% and gross freight revenues from intermodal were down 2.2%. While SPR lost intermodal business, its competitor, BNSF gained business. Combined BNSF intermodal carloads for 1995 was up 3.8% in 1995 resulting in a 3.8% increase in intermodal revenues.

Solomon Brothers projects 3%-5% growth for intermodal within the industry in 1996, with the best growth to be experienced by Norfolk Southern and BNSF, two carriers "that are instituting new marketing and service programs."

The intense service competition, including new single line service provided by the

merged BNSF is expected to continue and is impacting commodities other than intermodal. This new competitive environment places pressure on SPR to improve service and price more aggressively. As a result, SPR probably cannot reduce costs as rapidly as it would have without the increased service competition from BNSF or to expend capital equivalent to its competitors and be able to compete with equal service.

Standard & Poors is also concerned about the impact of the BNSF merger in SPR. On October 30, 1995 it stated that SPR's "financial performance has deteriorated in recent quarters while competing railroads are posting improved results. SPR's competitive position and market share appear to be weakening in the face of pressure by the combination of Burlington Northern Railroad and the Atchison, Topeka and Santa Fe Railway Co."

First Quarter Results for 1996

The conclusion that it is unlikely SPR will produce a positive net cash from operating activities in the foreseeable future is based in part on a judgment that the adverse trend that began in 1995 will continue. First quarter results for 1996 will be reported on April 24, one day after the date of this report. It is our judgment that it is more likely than not that first quarter results for 1996 will be below that of the first quarter results in 1995 indicating that the adverse trend will continue into 1996.³⁴

³⁴ Consensus of security analysts is that SPR will report 6 cents per share for the first quarter of 1996 compared to 11 cents in the first quarter of 1995. See Zacks, March 1996.

THE IMPROVEMENT NEEDED BY SPR TO PRODUCE A POSITIVE NET CASH FROM OPERATING ACTIVITIES IS UNLIKELY IN THE FORESEEABLE FUTURE GIVEN THE CURRENT COMPETITIVE ENVIRONMENT

Operating Cash Flow Needs to Increase by \$376 million, or 300%, from 1995 Levels for SPR to Become Cash Self-Sufficient

Assuming a capital expenditure program of \$500 million per year, (approximately the amount projected by management through 1999)³⁵, the required annual operating cash flow is \$500 million per year. Any shortfall would have to be financed by asset sales, borrowings and equity issuance. A \$500 million operating cash flow requirement is a high hurdle to overcome considering 1995 operating cash flow was only \$124 million. To produce positive net cash from operating activities (after capital expenditures) and thus be cash self-sufficient, SPR would need to increase its operating cash flow by \$376 million or an increase of 300% from 1995 levels.

For SPR To Become Cash Self-Sufficient, It Would Have To Do A Combination Of The Following: Increase Revenues, Reduce Costs, Increase Asset Sales, Reduce Capital Expenditures. It Is Unlikely That SPR Can Accomplish This Given Its Present Environment

Increase Revenues

In 1995, the BNSF merger took place and SPR's management has concluded that it cannot maintain its current competitive position without spending an additional \$1 billion over the next four years. It is not likely that SPR will have the access to \$1 billion more

³⁵ Schedule 14D-9 filed with SEC. (Exhibit N11-000011 at 17)

capital given its financial condition. The implication is that it will lose business to BNSF and revenues will fall short of expectations. As noted above, revenues only increased by 0.3% in 1995 and the merger did not take place until late September, 1995. In short, the prospect of SPR becoming cash self-sufficient by increasing revenues is not bright.

Reduce Costs

In the March 1995 Plan, SPR projected for the 1995-1996 period average annual revenue increases of 4.8% combined with average annual increases in operating expenses of 2.5%. Subsequent to the March projection, management concluded that its strategy of simultaneously increasing revenues while reducing costs was not feasible in that it needed to spend money to generate more revenues. This implies that SPR may have to actually increase expenses over the amounts contained in the March Plan in order to bring customer service to the desired level.

Even if SPR could grow revenues at 3% per year and hold operating expense increases to 2% per year, annual cash deficits are estimated to average over \$225 million per year for the next four years (assuming annual capital expenditures of \$500 million and annual asset sales of \$70 million). The ability of SPR to be able to access this amount of funds from the capital markets is highly uncertain.

The consensus estimate of security analysts is that SPR will earn \$.60 per share in 1996 and \$.98 per share in 1997.³⁶ The March 1995 long range projection shows SPR is cash self-sufficient when it makes approximately \$2.00 per share. The consensus estimate of

³⁶ Zacks, March 1996

security analysts is that SPR's 5 year growth rate is 17.5% per year.³⁷ This growth rate is not sufficient to elevate SPR's EPS to \$2.00 within 5 years, which is the assumed EPS level to be cash self-sufficient.

Capital Expenditures

The March, 1995 long range plan assumed capital expenditures of \$500 million per year, increasing to \$550 million in 1999, including capital leases³⁸. About \$300 million of this amount relates to roadway and other expenditures needed to maintain the firm's current level of operations. About \$150-200 million represents capital equipment upkeep as well as the acquisition of new locomotives and rolling stock to replace retired equipment.³⁹ This plan leaves only a very small amount to spend on increasing efficiency and the quality of SPR's service. This budget falls far short of the amount necessary to compete with BNSF. Many necessary investments must be deferred simply because SPR's capital budget is confined to expenditures that must be made simply to keep the railroad operating. As stated previously, subsequent to the March projection, SPR has determined it needs to spend \$1 billion more on capital expenditures simply to maintain its current competitive position. Thus, reducing capital expenditures from the \$500 million per year contained in the March Plan does not appear feasible.

³⁷ Ibid.

³⁸ Schedule 14D-9; filed with Securities and Exchange Commission, page 17 (See NII-000060)

³⁹ Verified statement of Lawrence C. Yarberry, pg. 269

Summary

SPR to become cash self-sufficient needs large increases in revenues and large reductions in costs. This requires investments of large sums of capital. However, SPR is not generating sufficient earnings and cash flow to attract the necessary capital. The lack of earnings and cash flow is in turn attributable to high costs and low revenues. SPR is caught in a vicious circle. It has gotten by in previous years by sales of property. However, asset sales are not predictable and the supply is diminishing.

SECTION 5

CASH RESERVES

It was concluded in the prior section that it is likely that SPR will continue to generate a negative net cash from operating activities (after capital expenditures) in the foreseeable future. Thus, SPR must rely on existing cash reserves, sale of assets, borrowing and sale of stock to finance its cash deficit.

This section discusses cash reserves. SPR's cash reserves at December 31, 1995 were only \$106 million. This is down from \$241 million at the end of 1994. Based on \$500 million of capital expenditures per year, and 1995's operating cash flow of \$124 million, the shortfall assuming no improvements is \$376 million. Obviously, cash reserves could be used up this year unless SPR sells assets or borrows.

SECTION 6

ASSET SALES

Historically, SPR has sold real estate assets to help offset its cash deficit. Over the past 5 years, SPR has sold \$1.3 billion of assets (primarily real estate) or 60% of its total negative cash from operating activities. This is shown below:

Cash Deficit After Sales of Real Estate (\$ in Million)

	1995	1994	1993	1992	1991	TOTAL 1991-1995
Net Cash from						
Operating Activities ¹	\$(789)	\$(350)	\$(476)	\$(257)	\$(342)	\$(2,214)
Sales of Assets ²	\$49	\$343	\$54	\$362	\$517	\$1,325
Remaining Cash						
Deficit	\$(740)	\$(7)	\$(422)	\$105	\$175	\$(889)

¹ After capital expenditures

² 1994 amount included proceeds of \$235 million from the sale of Alameda Corridor to the ports of Los Angeles and Long Beach. The 1992 amount includes \$124 million from sales to the Peninsula Corridor Joint Powers Board ("JPB"), \$45 million from sales to Metro Transit of Houston, Texas, \$83 million from sales to the Los Angeles County Transportation Commission ("LACTC"). The 1991 amount includes \$332 million from sales to LACTC and \$ 92 million from sales to the JPB.

In order to reduce the need for further borrowing, SPR expects to continue to sell real estate assets that are not necessary to its transportation operations. SPR possesses sizable holdings that fall into two distinct types: (1) "traditional" real estate and (2) "transit corridors."

Historically, SPR has received substantial cash flow from "traditional" real estate sales involving industrial and commercial properties located in developed areas on SPR's system.

More recently, transit corridor sales have become a dominant component of SPR's asset sales program.

Transit corridor properties consist of SPR's rights of way and related tracks and rail stations that provide a natural corridor over which a metropolitan, regional or other geographic area can establish and operate public transportation systems or consolidated freight corridors (for use by more than one railroad). In an attempt to alleviate traffic congestion and to provide for alternative modes of transportation, public agencies have recognized that existing rail lines and rights of way provide a ready and cost effective solution. SPR usually retains freight operating rights over these corridors to continue rail service to its customers.

The funding to purchase transit corridors often comes through either accumulated funds from past taxes or new bond issues.

SPR has sold in excess of \$1.3 billion of transit corridors and traditional real estate during the five-year period ended December 31, 1995 and management estimates that the remaining real estate is worth \$1 billion.⁴⁰

The timing of asset sales is difficult to predict and varies from period to period depending on market conditions at the time. The timing of sales of transit corridors for use by public transportation systems can be subject to delays created by funding issues or

⁴⁰ Deposition of Larry Yarberry, page 66.

political considerations that are typically involved in negotiations with public agencies.

Though SPR's has extensive real estate assets available for sale, the supply of assets available for sale will diminish as sales are made. In that regard, in the 1994 prospectus for the sale of common stock, SPR stated that management considers the company's extensive supply of real estate assets available for sale to be sufficient for the Company to meet its capital expenditure, debt service and other cash needs. SPR no longer states that its supply of real estate can be counted on to meet its cash needs.

As SPR's supply of real estate available for sale diminishes, proceeds from such sales will also decline. Thus additional sources of cash flow will be required from improved operations and, if operations do not improve sufficiently, from debt and equity financing. It is uncertain, however, whether such debt and equity financing will be available. The ability to access external financing to cure cash shortfalls is likely to diminish to the extent the Company has to rely more and more on these sources. This is discussed in the next section.

SECTION 7

BORROWING

History

SPR's net borrowings (after repayment) over the last five years were \$125 million. This is shown below:

	1995	1994	1993	1992	1991	TOTAL 1991-1995
Net Debt Issuance (Repayment)	\$607	\$(320)	\$118	\$(86)	\$(194)	\$125

The large repayment of debt in 1994, some \$ 320 million, was financed from the sale of \$504 million of common stock on March 2, 1994. Common stock sales are discussed in the next section.

As of December 31, 1995, SPR's total debt was \$1,767 million. It consisted of the following:

	\$Millions
Equipment Obligations (9.25-14.25%; due 1996-2007)	\$279
Mortgage Bonds (8.2%; due 1996-2001)	\$30
SPT Term Loan (6.813% - 6.875%; due 1997-1999)	\$150
SPR Senior Notes (9.375%; due 2005)	\$375
Other Debt (4-6%; due 1996-2018)	\$92
Capitalized Leases	\$841
Total	\$1,767

During 1995, SPR borrowed the \$150 million available under its term loan facility and repaid \$75 million previously borrowed under its \$300 million revolving credit facility. At December 31, 1995, SPR had \$300 million available under its revolving credit facility.

Senior Notes

The Senior Notes were issued in a public debt offering in an aggregate principal amount of \$375 million in 1993. The Senior Notes bear interest payable semi-annually at an annual rate of $9\frac{3}{8}\%$ and will mature in 2005. The Senior Notes will be redeemable at the option of SPR, in whole or in part, commencing in 1998 at a premium, declining to par in 2002. The Senior Notes are unsecured obligations of SPR (the parent company) and will rank pari passu in right of payment with all other unsecured and unsubordinated indebtedness of the company. The Senior Notes are effectively subordinated to all existing and future indebtedness, preferred stock, lease obligations and guarantees of the company's subsidiaries.

The Senior Note indenture contains covenants that, among other things, limits (subject to certain exceptions) the ability of the company and its subsidiaries to incur additional indebtedness, create certain liens, and enter into sale and lease back transactions.

New Credit Agreement

In November 1994, the company entered into a new \$300 million, three year, unsecured revolving credit facility. The interest rates on borrowings under the new credit agreement will be based on floating rate indices plus an applicable margin. The agreement contains quarterly financial covenants, including required minimum tangible net worth, a maximum funded debt to net worth ratio and a minimum fixed charge coverage ratio.

Debt Maturities

Contractual maturities of debt (including capital lease obligations) for the period 1996-2000 and thereafter are as follows:

(In Millions)

1996	\$59
1997	\$86
1998	\$106
1999	\$146
2000	\$63
Thereafter	<u>\$1,302</u>
Total	<u>\$1,767</u>

SPR is Highly Leveraged

In 1993 and 1994, SPR was able to reduce its debt level by selling stock. However, the Company's debt has subsequently increased in 1995 while its equity remained essentially flat. SPR was unable to generate sufficient cash flow from railroad operations and property sales to fund its investments and thus relied on debt financing to make up the deficit.

Shown below is SPR's long-term debt and equity at year-end since 1991 together with the debt to capital ratio:

YEAR ENDED DECEMBER 31
(Dollars in Millions)

	1995	1994	1993	1992	1991
Long-Term Debt ⁽¹⁾	\$1,758	\$1,149	\$1,475	\$1,329	\$1,411
Equity	<u>1,061</u>	<u>1,059</u>	<u>313</u>	<u>89⁽²⁾</u>	<u>65⁽²⁾</u>
Total Capital	<u>\$2,819</u>	<u>\$2,208</u>	<u>\$1,788</u>	<u>\$1,418</u>	<u>\$1,476</u>
Debt to Capital Ratio	<u>62%</u>	<u>52%</u>	<u>82%</u>	<u>94%</u>	<u>96%</u>

⁽¹⁾ Including current maturities.

⁽²⁾ Before common stock subject to repurchase.

The above table shows that in 1995, SPR increased its debt by \$609 million while equity (due to absence of earnings) only increased \$2 million. As a result, the debt to capital ratio increased 10 percentage points, rising from 52% to 62%.

However, certain lease obligations are "off balance sheet" and are excluded from the above debt to capital ratios. Generally Accepted Accounting Principles distinguishes between two major types of leases - capital leases and operating leases. Assets under capital leases are recorded as assets on the balance sheet with offsetting liabilities among long term debt. Thus, debt of \$1,767 million at 12/31/95 included capitalized leases of \$841 million. (See Schedule on page 37). However, assets under operating leases are not shown on the balance sheet as assets, nor are the commitments under these leases shown as liabilities on the balance sheet. Commitments under operating leases are thus referred,

to as "off-balance sheet" liabilities.⁴¹ Theoretically, the promise to make any lease payments in the future should be treated as a liability, regardless of whether the leased asset is de-facto purchased or not. Similarly, the right to obtain benefits from using the leased asset in the future should be construed as an existing asset, regardless of whether the leased asset is de-facto owned by the lessee or not.

SPR has incurred substantial operating lease obligations covering freight cars, locomotives, and other equipment. As of December 31, 1995, total payments of \$894 million were due under these leases - \$642 million due over the next five years, with an additional \$252 million due thereafter. These lease obligations are off-balance sheet and the present value of these obligations are not reflected in the above debt to capital ratios. Thus, SPR is more leveraged than the balance sheet shows.

Another way to show SPR's high leverage is to look at its earnings before interest expense and taxes ("EBIT") to see whether its EBIT covers its interest expense. The ratio of EBIT to interest expense in 1995 was 1 to 1 meaning that SPR's pre-tax earnings before interest expense just covered its interest expense. This is shown below (dollars in millions except as indicated):

	1995	1994	1993	1992	1991
EBIT ^(*)	\$145.7	\$566.7	\$ 80.8	\$199.1	\$(131.2)
Interest Expense	145.5	158.2	156.0	143.3	152.0
Ratio of EBIT to Interest Expense	1.0	3.6	.5	1.4	N/A

^(*) Before cumulative effect of change in accounting charges.

⁴¹ The distinction between operating and capital leases is mainly through several tests that are intended to determine whether the benefits and risks of ownership were, in fact, transferred from lessor to lessee. If they were, the lease is classified as a capital lease.

The ratio of total EBIT to total interest expense over 1991-1995 was only 1.1 to 1.0.

As a result of its limited financial resources, SPR has a program since 1989 of selling its accounts receivables.

Constraints on Additional Borrowing

SPR is expected to continue to have negative cash from operating activities. This cash deficit must be financed out of cash reserves, asset sales, borrowings or equity sales. The ability of any company to sell debt depends upon (1) the company's credit rating and (2) continued compliance with covenants in existing indebtedness.

As discussed below, SPR's poor credit ratings combined with restrictions in existing covenants will make it difficult for SPR to borrow what it needs, when it needs it, on acceptable terms.

Credit Ratings

SPR's senior unsecured debt is rated by Standard & Poor's as BB- and Southern Pacific Transportation Co.'s senior secured debt as BB+. ⁴² These ratings are below investment grade and are considered clearly risky. ⁴³ The ratings from Moody's and Duff & Phelps are also below investment grade. Schedule 1 in the appendix sets forth the rating history of 14 railroads. Currently, only two of these railroads have below investment grade ratings: SPR

⁴² Per Standard & Poors release on 10/30/95.

⁴³ Debt with credit ratings below investment grade are often referred to as speculative junk bonds.

and Transtar Holdings L.P. Thus, SPR is the only major railroad with a below investment grade rating at this time and has had a below investment grade rating since 1988. Illinois Central had a below investment grade rating prior to 1992 and succeeded in getting it upgraded to investment grade in 1993.

SPR had a B+ rating in 1990. Based on the Moody's study cited in Section 2, there is a 21% probability that SPR will default on its indebtedness by year 2000. (This is not our prediction; this data is included to emphasize the correlation between financial distress and low debt ratings.) If the merger with Union Pacific is not consummated, based on recent deteriorating performance, it would not surprise us to see SPR's credit rating reduced to the B category.

Compliance with Covenants

Certain of SPR's debt agreements contain quarterly financial covenants and restrictions based on minimum tangible net worth, a maximum funded debt to net worth, ratio and a minimum fixed charge coverage ratio. As a result of not achieving certain ratios and covenants in its \$375 million Senior Notes at December 31, 1995, SPR is restricted from incurring additional indebtedness, except for certain permitted categories of debt, including \$300 million available under its revolving credit facility.⁴⁴

In general, this means that SPR's sources of liquidity are limited to the \$106 million cash on hand at year-end 1995 plus \$300 million available under its revolving credit facility.

However, in order to satisfy the financial covenants in its revolving credit facilities,

⁴⁴ 1995 Annual Report, at 18.

SPR must improve its operating results.⁴⁵ Continued compliance with the financial terms and covenants under its credit facilities would require significant gains from the sales of properties in the first and second quarters of 1996. SPR has secured from its banks an agreement to amend the covenants through the second quarter 1996 to eliminate the fixed charge coverage test for these periods.⁴⁶ SPR's management currently believes it will meet its revised financial covenants in 1996, although the margin will be "small."⁴⁷ If SPR were unable to meet the revised covenants, the holders of such indebtedness could elect to declare all amounts owed them thereunder due and payable. In addition, default on one debt instrument could, by reason of cross-default provisions, result in defaults under other indebtedness.

As a result of the restrictions in the \$375 million Senior Notes against additional borrowing, combined with burdensome financial covenants in the \$300 million revolving credit facility, SPR faces severe constraints on liquidity.

Prospects for Additional Borrowings

SPR could try to refinance the \$375 million Senior Notes and secure new terms which permit additional borrowing. These notes are not redeemable until 1998, therefore, SPR would have to purchase these notes at a substantial premium. In any event, SPR's poor credit rating would make a refinancing difficult.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

Likewise, SPR could attempt to renegotiate the burdensome covenants in its bank credit facility. However, more burdensome covenants may result, including possible restriction on capital expenditures, which SPR needs to make to remain competitive.

In our judgment, SPR with its current below investment grade ratings will encounter difficulty in financing through customary means. SPR cannot assume continuous access to public debt markets at times and in amounts of its own choosing. Smaller issue size and significantly higher interest costs characterize debt issues of B and BB companies compared to the financings of stronger-rated credits.

In adverse markets financing may be unavailable to such credits at any cost. Other sources of debt financing - commercial bank loans or private placement - could be available, but again SPR would encounter limited availability, high interest costs and restrictive covenants.

SPR's ability to borrow what it needs, when it needs it, on acceptable terms requires higher credit ratings. For SPR to achieve higher credit ratings, it would need to (1) substantially increase its net cash from operating activities, (2) increase its earnings and (3) reduce its leverage.

To reduce its high leverage, SPR needs to (1) generate positive net operating cash and apply the cash surplus to repayment of debt (2) sell substantial amount of assets thereby financing the current negative operating cash flow and use the surplus proceeds to repay debt and/or (3) sell equity and apply the proceeds to repayment of debt.

Generating positive net operating cash in the near future is not likely. Selling a

sufficient amount of assets to finance the negative net operating cash flow and have surplus cash left over to reduce debt cannot be predicted and or relied upon. In any event, this would only give SPR more breathing room; it does not solve the chronic cash shortage, low earnings, and high dependence on external financing. This brings us to selling equity as a possible way to reduce debt. This is discussed in Section 8.

SECTION 8

EQUITY SALES

History

SPR's net equity sales over the last five years were \$811 million. This is shown below:

NET EQUITY SALES

	1995	1994	1993	1992	1991	1991-1995
Common Stock Proceeds		\$504	\$391			\$895
Redemption of Preferred Stock			(75)			\$(75)
Redeemable Preference Shares						
Repayment	(2)	(2)	(2)	(2)	(1)	\$(9)
Total	\$(2)	\$502	\$314	\$(2)	\$(1)	\$811

SPR sold 30,783,750 shares of common stock in an IPO for \$13.50 per share (before underwriting discounts and commissions and offering expenses) on August 17, 1993. Net proceeds were \$391 million. Also on August 17, 1993, SPR sold \$375 million principal amount of 9 3/8% Senior Notes due 2005. See page 38 for discussion. The proceeds from the stock offering and Senior Notes were used to repay debt, purchase equipment operated pursuant to operating leases, redeem preferred stock and for general corporate purposes.

On March 2, 1994, SPR sold an additional 25,000,000 shares for net proceeds of \$504 million. The proceeds were used to repay debt and for general corporate purposes.

Prospects for Future Equity Sales

Equity is in junior position to debt in the event of bankruptcy. Thus, if it is difficult to sell debt because of low credit ratings, it is even more difficult to sell equity.

Financing through the sale of preferred stock would suffer greater difficulties than sales of debt because preferred stock is normally rated one step lower than senior debt.

Financing through the sale of common stock, if possible, would be at prices which we believe would be very depressed for three reasons. First, assuming the merger between SPR and Union Pacific is not consummated, SPR's stock price would fall sharply. The consensus estimate of security analysts is that SPR will earn \$.59 per share in 1996.⁴⁸ The current price earnings multiple based on the consensus estimate of 1996 earnings for Burlington Northern is 13, and Union Pacific is 15.⁴⁹ Assuming SPR is able to command a price earnings multiple of 15, its selling price would be about \$9 per share ($15 \times \$.59$), down from \$25 at April 19, 1996.

Secondly, any sale of common stock will be dilutive in earnings per share. The market expects SPR's EPS to grow at the annual rate of 17.5% per year for the next five years.⁵⁰ Issuance of additional shares - whether the proceeds are used to repay debt or invest in new equipment - are likely to reduce this growth rate causing a declining share price. Indeed, in the deposition of Lawrence C. Yarberry, he was asked whether the

⁴⁸ Zacks investment research, 3/31/96. Consensus based on seven analysts

⁴⁹ Zacks investment research, 3/31/96

⁵⁰ Ibid.

investment of the additional \$1 billion discussed in Yarberry's Verified Statement would produce an adequate return. Yarberry's response was "Personally I could not say that [the investment] would provide a return. In my opinion, the billion dollars allows us to be competitive with other roads. It doesn't guarantee that we will grow our revenues, that we will earn a profit."⁵¹

It is our interpretation of Yarberry's statement that SPR must spend \$1 billion to merely hold on to its existing customer base. The investment is not likely to add substantial revenues and profits but to stop the loss of current revenues and profits. In short, without the investment, SPR will lose ground. Making the investment does not necessarily add ground. This interpretation is consistent with SPR's statement in its 1995 Annual Report that "the Company has identified capital expenditures of more than \$1 billion that it believes should be made in excess of normal capital expenditures over the next four years simply to maintain its current competitive position."⁵²

Thus, whether common stock is sold to finance investments or repay debt, the earnings on the proceeds are not likely to be sufficient to prevent dilution in EPS and a resulting decline in stock price.

The third reason the sale of stock would be at depressed prices is that the mere decision to sell stock sends a negative message that trouble lies ahead. Perhaps things are not going well and downside earnings and cash flow forecasts are likely to become reality.

⁵¹ Deposition of Yarberry, at 186. See also Verified Statement of John T. Gray, at 200.

⁵² 1995 Annual Report at 20.

A related concern would be that management may believe that SPR's stock is overvalued based upon their insider knowledge of the firms' future prospects (i.e. sell high, buy low).⁵³

In any event, assuming SPR can sell 25,000,000 shares (16% of outstanding shares and the amount sold in 1994) for a net \$8.50 per share, it would raise approximately \$212 million. This is only 56% of the \$376 million cash deficit based on 1995's cash flow from operating activities before capital expenditures (\$124 million) and projected future capital expenditures (\$500 million).

In 1993 and 1994 SPR was able to sell equity based on a "story" of an impending turnaround. In 1994, the company had record earnings and it appeared that the turnaround was highly successful. In 1995, performance deteriorated raising the serious question whether the turnaround was overstated in 1994 by excessive reductions in employees. Unless SPR is able to show several quarters of convincing performance - performance showing that the turnaround is possible and that SPR can reduce its operating ratio to lower levels and sustain it at these levels - it will be difficult for SPR to assume it can sell equity when it needs capital in the amounts it requires.⁵⁴

⁵³ See Paul Asquith and David Mullins, "Equity Issues and Offering Dilution", *Journal of Financial Economics*, 15(1986):61-89

⁵⁴ Yarberry testified in his deposition that based on SPR's performance and expected performance, absent a merger, "it would be very difficult to issue additional shares of stock at any suitable price." Yarberry Deposition, at 37.

APPENDIX

RATING FACTS

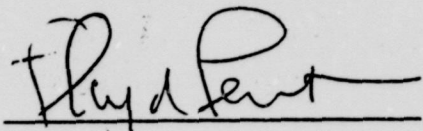
Rating History

	1995	1994	1993	1992	1991	1990	1989	1988	1987	1986	1985
Burlington Northern Inc.	BBB	BBB	BBB	BBB	BBB	BBB	BBB	BBB	A-	A-	A
Burlington Northern Railroad Co.	BBB+	BBB+	BBB+	BBB+	BBB+	BBB+	BBB+	BBB+	AA	AA	AA
Canadian National Railway Co.	AA-	AA-	AA-	AA-	AA	AA	AA	AA	AA	AA	AA
Canadian Pacific Ltd.	A-	A-	A-	A+	A+	AA-	AA	AA	AA	AA	
Canadian Pacific Enterprises Ltd.	A-	A-	A-	A+	A+	A+	AA-				
PanCanadian Petroleum Ltd.	A-	A-	A-	A+	A+						
Consolidated Rail Corp.	A	A	A	A	A	A	AA-	AA-			
CSX Corp.	BBB+	BBB	BBB	BBB	BBB	BBB+	BBB+	BBB+	A	A	A
Baltimore & Ohio Railroad Co.	BBB+	BBB+	BBB+	BBB+	BBB+	A-	A-	A-	A+	A+	A-
Chesapeake & Ohio Railway Co.	BBB+	BBB+	BBB+	BBB+	BBB+	A-	A-	A-	A+	A+	A-
Clinchfield Railroad Co.	BBB+	BBB+	BBB+	BBB+	BBB+						
Hocking Valley Railway Co.	BBB+	BBB+	BBB+	BBB+	BBB+	A-	A-	A-	AA	AA	AA
Louisville & Nashville Railroad Co.	BBB+	BBB+	BBB+	BBB+	BBB+	A-	A-	A-	A+	A+	A-
Monon Railroad	BBB+	BBB+	BBB+	BBB+	BBB+	A	A	A	A	A	A
Seaboard Systems Railroad Inc.	BBB+	BBB+	BBB+	BBB+	BBB+	A-	A-	A-	A+	A+	A-
Western Maryland Railway	BBB+	BBB+	BBB+	BBB+	BBB+	A	A	A	A	A	A
Seaboard Coast Line Railroad Co.	BBB+	BBB+	BBB+	BBB+	BBB+	A-	A-	A-	A+	A+	A-
American Commercial Lines Inc.	BBB+	BBB+	BBB+	BBB+	BBB+	A-	A-	A-	A	A	A
CSX Transportation Inc.	BBB+	BBB+	BBB+	BBB+	BBB+	A+	A+	A+	A+		
Sea-Land Service Inc.	BBB+	BBB	BBB	BBB	BBB	BBB+	BBB+	BBB+	A		A-
East Japan Railway Co.	AA	AA	AA								
Illinois Central Railroad Co.	BBB	BBB	BBB	BB+	BB-	BB-	B+	BB	BB	BB	BB
Kansas City Southern Industries Inc.	BBB+	BBB+	BBB+	BBB+	BBB	BBB	BBB	A	A	A	A
Norfolk Southern Corp.	AA	AA	AA	AA	AA	A-1+					
Norfolk Southern Railway Co.	AA	AA	AA	AA	AA	AA	AA	AA	AA	AA	AA
Santa Fe Pacific Corp.	BBB	BBB	BBB				BBB+	BBB+	A+	A+	A-1
Atchison, Topeka & Santa Fe Railway Co.	BBB	BBB	BBB	BBB-	BBB-	BBB-	BBB+	BBB+	AA-	AA-	AA-
Southern Pacific Rail Corp.	BBB+	BBB+	BBB	B+	B+	B+	BB	BB	BBB-	BBB	BBB
Denver & Rio Grande Western Railroad Co.	BBB+	BBB+	BB	B+	B+	B+	BBB+	BBB+	BBB	BBB+	BBB+
Southern Pacific Transportation Co.	BBB+	BBB+	BB	B+	B+	B+	BBB+	BBB+	BBB	BBB	BBB
Transtar Holdings L.P.	B-	B-									
Union Pacific Corp.	A-	A	A	A	A	A	A	A+	A+	A+	AA
Chicago & North Western Transportation Co.	A-	BBB+	BBB+	BB	B+	BB	BB	BB	BB	BB	BB
Missouri Pacific Railroad Co.	A-	A+	A+	A+	A+	A+	A+	AA	AA	AA	AA
Missouri-Kansas-Texas Railroad Co.	A-	A+	A+	A+	A+	A+	A+	AA	B	B	B
Texas & Pacific Railway Co.	A-	A+	A+	A+	A+	A+	A+	AA	AA	AA	AA
Union Pacific Railroad Co.	A-	A+	A+	A+	A+	A+	A+	AA	AA	AA	AA
Wisconsin Central Transportation Corp.	BBB-	BBB-									

Ratings are as of July 14, 1995.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and accurate to the best of my actual knowledge and belief. Executed at Los Angeles, California on 24th day of April, 1996.

A handwritten signature in dark ink, appearing to read "Lloyd Levitin", is written over a horizontal line.

Lloyd Levitin

CERTIFICATE OF SERVICE

I hereby certify that I have this date caused the foregoing document,

PETITION FOR LEAVE TO FILE EXHIBIT LATE

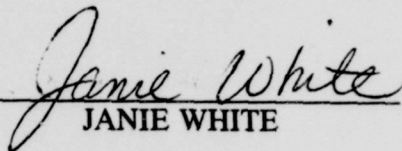
OR, IN THE ALTERNATIVE, PETITION TO FILE

REPORT AS REBUTTAL EVIDENCE

to be served on all parties of record in Finance Docket No. 32760 by mailing by first class mail postage prepaid, a copy thereof, properly addressed to each party.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Francisco, California this 26th day of April.


JANIE WHITE

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Page Count 6

LAW OFFICES

May # 11

ZUCKERT, SCOUTT & RASENBERGER, L.L.P.

888 SEVENTEENTH STREET, N.W.

WASHINGTON, D.C. 20006-3939

TELEPHONE : (202) 298-8660

FACSIMILES: (202) 342-0683

(202) 342-1316

May 1, 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

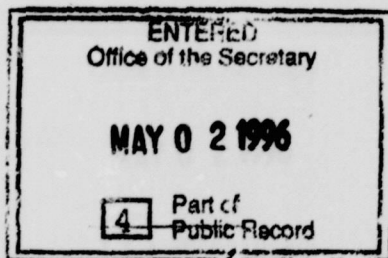
Dear Secretary Williams:

Enclosed for filing are an original and twenty copies of TM-33, The Texas Mexican Railway Company's Fourth Set of Interrogatories to Applicants. Also enclosed is a 3.5" floppy computer disc containing a copy of each of the filings in Wordperfect 5.1 format.

Sincerely,

Richard A. Allen
Richard A. Allen

Enclosures



**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
FOURTH SET OF INTERROGATORIES TO APPLICANTS**

Pursuant to 49 C.F.R. Part 1114, Subpart B, The Texas Mexican Railway Company ("Tex Mex") directs the following interrogatories to Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company and to Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, collectively referred to as "Applicants."

INSTRUCTIONS

The instructions are the same as those stated in Tex Mex's First Interrogatories to Applicants (TM-4), served December 18, 1995, which are incorporated herein by reference, except as to

the time in which the Applicants should respond. Pursuant to the procedural schedule set forth by the Administrative Law Judge in the discovery conference held on Monday, April 29, 1996, Applicants should respond as soon as possible, and in no event later than 5:00 p.m. on the sixth calendar day from service of these interrogatories. You are requested to contact the undersigned promptly to discuss any objections or questions regarding these interrogatories with a view to resolving any disputes or issues of interpretation informally and expeditiously. Applicants should contact the undersigned if they need another copy of TM-4.

DEFINITIONS

The Definitions are the same as those stated in TM-4, incorporated herein by reference, except for the following additional definitions.

1. "CMA Agreement" refers to the agreement between the Applicants, BN/Santa Fe, and the Chemical Manufacturers' Association, dated April 18, 1996, and submitted to the Surface Transportation Board on April 19, 1996 in UP/SP-219, Applicants' Submission of Settlement Agreement with CMA.

INTERROGATORIES

1. On page 109 of UP/SP-231, Applicants' Rebuttal, Volume II, Part B - Statements on Competition and Public Benefits, Mr.

Peterson states that "Second, leaving aside traffic to and from Eastern U.S. and Midwest gateways, grain accounts for 35% of Tex Mex's SP-interchanged traffic." Identify all the "Eastern U.S. and Midwest gateways" to which Mr. Peterson refers.

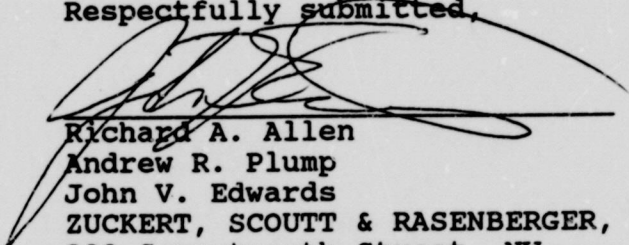
2. Section 11 of the CMA Agreement provides, in part, that "Section 4b of the BN/Santa Fe Settlement Agreement shall be amended by adding at the end thereof: "BN/Santa Fe's access and interchange rights at Corpus Christi and Brownsville must be at least as favorable as SP has currently." Section 4b of the BN/Santa Fe Settlement Agreement, before it was amended, provides, in part, that "BNSF shall also have the right to interchange with (i) the Tex-Mex Railway at Corpus Christi and Robstown. . . ." State whether:

a) BN/Santa Fe's access and interchange rights at Corpus Christi under the BN/Santa Fe Settlement Agreement changed from before the CMA Agreement amendment to after the CMA Agreement amendment; and

b) If the answer to subsection a) is "yes", identify the differences between: (1) the BN/Santa Fe's access and interchange rights before the CMA Agreement amendment and (2) the BN/Santa Fe's access and interchange

rights after the CMA Agreement amendment.

Respectfully submitted,



Richard A. Allen

Andrew R. Plump

John V. Edwards

ZUCKERT, SCOUTT & RASENBERGER, LLP

888 Seventeenth Street, NW

Suite 600

Washington, DC 20006-3939

202/298-8660

Attorneys for Texas Mexican Railway

Dated: May 1, 1996

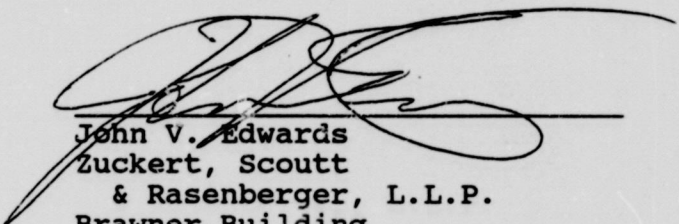
CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served the foregoing TM-33, The Texas Mexican Railway Company's Fourth Set of Interrogatories to the Applicants, 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. Guinivan
Harkins, Cunningham
Suite 600
1300 Nineteenth Street, N.W.
Washington, D.C. 20036

I have also served by first-class mail, postage pre-paid, the Honorable Judge Nelson and all persons on the restricted service list.



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

Dated: May 1, 1996

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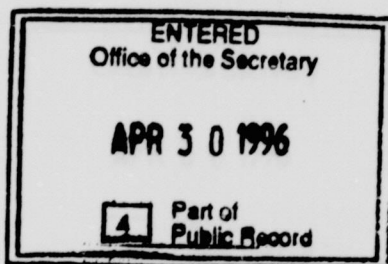
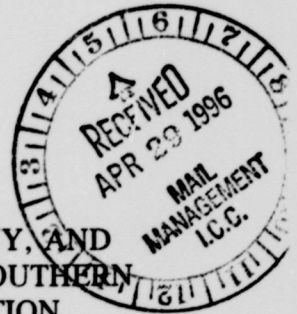
SDIV-2

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

OPPOSITION OF
THE SAN DIEGO & IMPERIAL VALLEY RAILROAD COMPANY
TO THE CONDITIONS REQUESTED BY
UNITED STATES GYPSUM COMPANY
AT PLASTER CITY, CA



Karl Morell
Louis E. Gitomer
Of Counsel
BALL, JANIK & NOVACK
1101 Pennsylvania Avenue, N.W.
Suite 1035
Washington, D.C. 20004
(202) 466-6530

Attorneys for:
SAN DIEGO & IMPERIAL VALLEY
RAILROAD COMPANY

Dated: April 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

OPPOSITION OF
THE SAN DIEGO & IMPERIAL VALLEY RAILROAD COMPANY
TO THE CONDITIONS REQUESTED BY
UNITED STATES GYPSUM COMPANY
AT PLASTER CITY, CA

The San Diego & Imperial Valley Railroad Company ("SDIV") responds in opposition to United States Gypsum Company's ("USG") requested conditions for access by The Atchison, Topeka and Santa Fe Railway Company (the "Santa Fe") to USG's facility at Plaster City, CA. The Surface Transportation Board (the "Board") should deny USG's requested conditions because the issues raised by USG are not related to the proposed consolidation of the Union Pacific Railroad Company, *et al.* ("UP") and the Southern Pacific Transportation Company, *et al.* ("SPT"). Also, the Board does not have jurisdiction to grant the requested trackage rights.

CONDITIONS REQUESTED BY USG

On March 29, 1996, in USG-2, USG filed a request for conditions concerning four of its facilities that allegedly will be adversely affected by the proposed UP-SPT consolidation. SDIV opposes USG's request that the Board grant Santa Fe access to USG's Plaster City,

CA manufacturing plant. With respect to the Plaster City plant, USG seeks: (1) trackage rights for Santa Fe over the 129.61 mile line that SDIV is authorized to operate between Plaster City, CA and SDIV's interchange with Santa Fe in San Diego, CA (the "SDIV Line"); and (2) haulage rights for Santa Fe for the movement of loaded and empty cars over SPT's lines between USG's Plaster City plant and (i) USG's Santa Fe Springs plant in Los Nietos, CA;¹ and (ii) Santa Fe's interchange point with SPT at West Colton, CA. USG argues that SPT has provided USG poor service in moving shipments between Plaster City and Los Nietos, and claims service after the consolidation of UP and SPT will further deteriorate. USG explains that this service is covered by a transportation contract and complains that SPT is failing to meet its contractual commitments. USG also argues that its competitors located elsewhere on the proposed UP-SPT system will receive benefits of new single line service that will make USG's Plaster City facility less competitive.

BACKGROUND

Plaster City is in south central California, just over 10 miles north of the United States-Mexican international border. Prior to the late 1970's, rail service to Plaster City was provided only by the San Diego & Arizona Eastern Railway Company ("SD&AE"), a wholly owned subsidiary of SPT. The SD&AE ran between: (1) San Diego, CA (milepost 0.454) and the Mexican border at San Ysidro, CA (milepost 15.56); (2) San Ysidro and Division, CA, over the Sonora-Baja California Railway Company in Mexico ("SBCR"); and (3) Division, CA (milepost 59.94) and El Centro, CA (milepost 148.1). Until September 1976, shippers in Plaster City (milepost 129.61) had the option of shipping rail traffic about 18.5

¹Los Nietos is just east of Los Angeles and is served by both SPT and Santa Fe.

miles east over the SD&AE to an interchange with SPT at El Centro, CA, or about 129 miles west over the SD&AE, through Mexico, to an interchange with the Santa Fe in San Diego. In September 1976, a storm caused extensive damage to portions of SD&AE's line between Plaster City and Division. After September 1976, Plaster City was only accessible by rail from El Centro in the east. That remains the situation today.

In 1979, SPT sold the stock of the SD&AE to the San Diego Metropolitan Transit Development Board (the "MTDB"), a public transit agency. As part of the transaction, SPT acquired the assets of the SD&AE between Plaster City and El Centro from SD&AE. The MTDB entered an agreement with Kyle Railways, Inc. ("Kyle") to provide freight service over the SD&AE. Kyle provided service through its operating company, the San Diego & Arizona Eastern Transportation Company (the "Transportation Company"). See ICC Finance Docket No. 28917 (Sub-No. 1F), *Southern Pacific Transportation Company-Acquisition (Portion)-San Diego & Arizona Eastern Railway Company* (not printed), served August 22, 1979.

In 1984, SDIV, a subsidiary of Railtex, Inc. ("Railtex"), was authorized to operate over the SD&AE between San Diego and San Ysidro and between Division and Plaster City and replaced Transportation Company. See ICC Finance Docket No. 30457, *San Diego & Imperial Valley Railroad Company, Inc. - Exemption from 49 U.S.C. 10901 and 11301* (not printed), served August 17, 1984 ("*SDIV Operations*").² In exempting SDIV's operations, the Interstate Commerce Commission ("ICC") agreed with SDIV's contention that SDIV is

²SDIV is authorized to operate in Mexico between San Ysidro and Division under an agreement with SBCR.

not required to operate between Division and Plaster City until that portion of the line is repaired because the exemption was permissive and did not obligate SDIV to operate. SDIV is in the second year of its second ten year service agreement with the MTDB.

Since 1979, rail shippers in Plaster City have received direct rail service only from SPT. Prior to that time, service was provided exclusively by the SD&AE. Today, SPT continues to be the only railroad serving Plaster City.

SDIV has not been a party to this proceeding as its interests were not directly affected until now. SDIV is a subsidiary of Railtex, and is not an applicant in these proceedings as that term is defined under 49 U.S.C. § 11343³ and 49 C.F.R. § 1180.3(a and b), as modified in Decision Number 3. The Plaster City conditions sought by USG directly affect SDIV. SDIV is, therefore, filing this response in opposition to those conditions.

**USG HAS NOT AND CANNOT DEMONSTRATE A NEXUS BETWEEN
ALLEGED SPT SERVICE FAILURES
AT PLASTER CITY AND THE UP-SPT CONSOLIDATION**

~~Before a condition can be imposed on a rail consolidation, among other requirements,~~ the proponent of the condition must present evidence that the condition ameliorates potential anticompetitive effects of the consolidation or preserves essential services and that the condition would not pose operating problems. 49 C.F.R. § 1180.1(d)(1). USG has not met any of these requirements.

USG is served by SPT at Plaster City, as it has been for nearly 20 years. After the consolidation of UP and SPT, USG will continue to be served by UP-SPT at Plaster City.

³Unless otherwise noted, citations are to the former sections of the statute.

The consolidation will not reduce the number of railroads serving USG at Plaster City nor will the consolidation harm essential services at that location.

USG does not contend that the proposed consolidation will have an adverse competitive impact at Plaster City. Rather, USG simply alleges that SPT's service from Plaster City fails to meet the transit time commitments provided for in the USG-SPT rail transportation contract. The Board, however, does not have jurisdiction to address an alleged breach of a rail transportation contract. That is the exclusive province of a court of competent jurisdiction. See current 49 U.S.C. § 10709(c). USG also expects service from Plaster City to deteriorate after the consolidation, and argues that UP-SPT will not be able to meet the contractual service obligations. USG's remedy, if any, under its contract is the same after the consolidation as before.

USG's concerns are not related to the proposed consolidation but appear to be long festering service complaints. When confronted with similar requests, the ICC explained that "[w]e will not impose conditions 'to ameliorate longstanding problems which were not created by the merger,' nor will we impose conditions that 'are in no way related either directly or indirectly to the involved merger.'" Finance Docket No. 32549, *Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company* (not printed), served August 23, 1995, at 56, and 97-101 (the "BN-Santa Fe Merger"); Finance Docket No. 32133, *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Company and Chicago and North Western Railway Company* (not printed), served March 7, 1995, at 98

("UP-CNW"); *Burlington Northern, Inc.-Control & Merger-St. L.*, 360 I.C.C. 784, 952 (1980)("BN-Frisco").

USG also has not addressed the operational impediments and impacts of the new service it seeks at Plaster City. The requested haulage rights over SPT can only harm and not improve service at Plaster City. Under a typical haulage arrangement, the owning railroad provides the service for the new entrant. If the consolidated company's service is going to be as congested as USG claims, then providing the Santa Fe with haulage over the congested lines will only cause additional service problems, not reduce them. As to the requested trackage rights over the line between Plaster City and San Diego, a portion of that line west of Plaster City has been out of service for about 20 years. The tunnels on the segment between Jacumba and Plaster City require repairs that have been estimated to cost between \$7 million and \$12 million. USG has not indicated who will pay for these repairs.

**USG IS NOT ENTITLED TO CONDITIONS BECAUSE
USG's COMPETITORS MAY HAVE MORE DIRECT
RAIL SERVICES AS A RESULT OF THE UP-SPT CONSOLIDATION**

USG contends that its competitors in Las Vegas, NV will gain access to new single-line rail service as a result of the proposed UP-SPT consolidation, reducing the ability of USG's Plaster City facility to compete in major markets. The ICC addressed the same argument in the recent *BN-Santa Fe Merger*. There, Bunge Corporation ("Bunge") sought protection from increased rail options for its competitors. The ICC denied the relief stating:

We will deny the condition requested by Bunge. We realize that the SP settlement agreement, by providing increased rail options for Bunge's competitors but not for Bunge, may work to Bunge's disadvantage. But that will not be the kind of harm that we should rectify under our conditioning power. We typically do not use our conditioning power to preserve the

competitive balance among the industries served by rail carriers. Bunge, after all, is not concerned that it is losing a transportation option, but that its competitors are gaining one. Given this context, a condition requiring that a settlement agreement be changed to improve a particular shipper's competitive situation is not proper.

BN-Santa Fe Merger at 99. The Board should follow this precedent here.

**THE BOARD DOES NOT HAVE JURISDICTION TO
GRANT THE REQUESTED TRACKAGE RIGHTS**

USG seeks trackage rights over the rail line SDIV is authorized to operate pursuant to *SDIV Operations*. SDIV operates the SDIV Line under agreements with the owners, MTDB and SBCR. SDIV is not an applicant in these proceedings. Nor is SDIV affiliated with or controlled by UP or SPT. The ICC consistently recognized that, in the context of consolidation proceedings, it did not have jurisdiction to grant involuntary trackage rights over nonapplicant carriers. *See, e.g., St. Louis S.W. Ry. Co.-Trackage Rights*, 363 I.C.C. 8. 9, 902 (1981) ("*SSW-TR*"); *Boston & Maine Corp. Trackage Rights over Conrail*, 360 I.C.C. 239, 241-244 (1979) ("*B&M-Conrail*"). Similarly, the ICC has no general power to force a carrier to grant trackage rights over its lines. *City of Hialeah, Fla. v. Florida East Coast Ry. Co.*, 317 I.C.C. 34, 36 (1962); *Baltimore & O. R. Co. Operation*, 261 I.C.C. 535, 544 (1945); *Alabama, T. & N.R. Corp. Construction*, 124 I.C.C. 114, 115 (1927). The Board should reach the same conclusion here.⁴

⁴The Board can impose involuntary terminal trackage rights under 49 U.S.C. § 11103. However, USG has not requested such rights and made none of the showings required under section 11103 and 49 C.F.R. § 1144. In any event, the involved 129-mile line could not be deemed a terminal area or main-line track for a reasonable distance outside of a terminal.

Moreover, before the Board can grant trackage rights as a condition to a merger, an application must be filed. See Ex Parte No. 282 (Sub-No. 1a), *Railroad Consolidation Procedures* (not printed), served March 24, 1978. USG has not filed an application for the requested trackage rights, nor has Santa Fe.⁵ The trackage rights request is further flawed in that the part of the line between San Ysidro, CA and Division, CA is located in Mexico. The Board does not have jurisdiction over property outside the United States. 49 U.S.C. §10501(a)(2); Finance Docket No. 30387, *Canadian National Railway Company and Canadian Pacific Limited - Acquisition - Interests of Consolidated Rail Corporation in Canada Southern Railway Company and Detroit River Tunnel Company* (not printed), served February 15, 1984. Because the Board cannot grant trackage rights over rail lines located in Mexico, and because SDIV has no authority to permit another carrier to operate over the line owned by SBCR, Santa Fe would not be able to operate between Plaster City and San Diego even if SDIV were agreeable to the requested conditions.

As previously noted, trackage rights must be operationally feasible before they may be imposed as a condition by the Board. The SDIV Line between Jacumba, CA and Plaster

⁵Indeed, the Board does not even have the jurisdiction to accept an application under 49 U.S.C. § 11343 for trackage rights from a noncarrier like USG. See ICC Finance Docket No. 28583 (Sub-No. 20F), *Application of the Montana Wheat Research and Marketing Committee for Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor--Trackage Rights--Over Burlington Northern, Inc., Lines in MT* (not printed), served August 25, 1978; ICC Finance Docket No. 28583 (Sub-No. 21F), *Application of Wyo-Ben, Inc., for Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor--Trackage Rights--Over Burlington Northern, Inc., Between Billings, MT and Shobon, WY a distance of 227.1 Miles* (not printed), served August 25, 1978; *Pere Marquette Ry. Co., Trackage Rights*, 261 I.C.C. 750, 751 (1946).

City is not operable, and has not been operated since 1976.⁶ USG is seeking to have a west bound service reinstated that has not existed for about 20 years. SDIV has spent about \$7 million rehabilitating a portion of the SDIV Line east of Campo. To complete the rehabilitation of the SDIV Line between Jacumba and Plaster City, another \$7 million to \$12 million is required. SDIV is actively seeking other parties (both governmental and private sector) to share in this cost, but has not yet been successful. If the SDIV Line is fully repaired, SDIV will begin serving the USG facility in Plaster City, which will be the first time Plaster City is served by more than one railroad. Given the condition of the SDIV Line today, USG is seeking a condition that is not operationally feasible, and as such should not be imposed. *BN-Frisco*, at 952; *Detroit, T. & I. R. Co.-Control*, 275 I.C.C. 455, 485 (1950); 49 C.F.R. § 1180.1(d)(1)(iii).

**THE REQUESTED HAULAGE RIGHTS WILL NOT
IMPROVE SERVICE TO PLASTER CITY**

USG seeks to justify the grant of haulage rights for Santa Fe by alleging that SPT has been providing poor service from USG's Plaster City facilities to USG's Santa Fe Springs plant, and that USG expects service to further deteriorate after the consolidation of SPT with UP. USG's allegations of service deficiencies, even if true, are not a proper basis for the Board to impose the requested conditions. SPT's current service to USG at Plaster City is not related to the proposed consolidation with UP. As previously noted, the Board should not impose conditions to ameliorate longstanding problems which are not created by the consolidation. *BN-Frisco*, at 952; *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co.*

⁶There are no shippers on the SDIV Line between Campo, CA (about 16 miles west of Jacumba) and Plaster City.

Merger, 324 I.C.C. 1, 31; 49 C.F.R. § 1180.1(d)(1)(i). SPT's operational problems, as alleged by USG, pre-date the proposed consolidation. Service at USG's facility in Plaster City by one railroad seems to have been the status quo for over 20 years, and apparently extends back to the construction of the rail line serving Plaster City. The harm alleged by USG is not related to the UP-SPT consolidation.

The haulage rights requested by USG could easily exacerbate the operational problems USG seeks to solve. USG claims that SPT service is poor today and that the added traffic proposed for West Colton yard after the consolidation will worsen service because of congestion. The haulage operation, as proposed by USG, would continue to rely on SPT providing the service, so no change in operations should be expected. If anything, the requested haulage service would entail additional coordination, possibly cause added congestion on SPT's lines and only lead to further delays to USG's shipments. The Board should deny the haulage condition requested by USG to serve Plaster City.

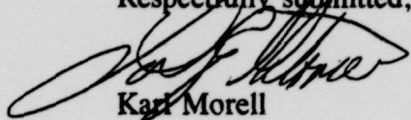
CONCLUSION

USG has not demonstrated that the proposed consolidation of UP and SPT will cause any competitive harm to its plant in Plaster City. Plaster City appears to have always been served by one railroad, either a subsidiary of SPT or SPT itself.

Not only has USG failed to provide a predicate for the conditions it seeks, but USG has not demonstrated that the conditions are operationally feasible. In addition, the Board does not have jurisdiction to grant trackage rights over the line of a nonapplicant party or in Mexico. Accordingly, SDIV urges the Board to deny USG's requests that Santa Fe be granted trackage rights and haulage rights from Plaster City.

If USG is truly interested in receiving competitive rail service at Plaster City, USG should continue to work with SDIV to obtain the necessary funds for the rehabilitation of the portion of the line that is not operable. Once the line is placed back in service, SDIV will provide USG the competitive service it seeks in this proceeding.

Respectfully submitted,



Karl Morell

Louis E. Gitomer

Of Counsel

BALL, JANIK & NOVACK

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(202) 466-6530

Attorneys for:

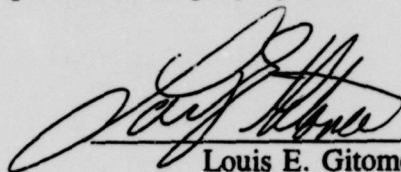
SAN DIEGO & IMPERIAL VALLEY

RAILROAD COMPANY

Dated: April 29, 1996

CERTIFICATE OF SERVICE

I certify that on April 29, 1996, copies of the Opposition of the San Diego & Imperial Valley Railroad Company to the Conditions Requested by United States Gypsum Company at Plaster City, CA (SDIV-2) have been served on all parties of record and Administrative Law Judge Nelson by first class mail, postage prepaid and on counsel for Union Pacific Railroad Company and Southern Pacific Transportation Company by hand.



Louis E. Gitomer

STB

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32760

4-17-96

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81512

Item No. _____

Page Count 7

Apr. #305

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Office of the Secretary

APR 22 1996

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Public Record

April 17, 1996

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HAND DELIVERED

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1201 Constitution Avenue, N.W., Room 1324
Washington, D.C. 20423



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

Dear Mr. Williams:

Enclosed for filing in the above-captioned proceeding
are an original and 20 copies of a document designated as UP/SP-
218, Applicants' Fourteenth Set of Discovery Requests.

Yours truly,

Gerald P. Norton
Gerald P. Norton

cc: The Honorable Jerome Nelson
Restricted Service List

BEFORE THE
SURFACE TRANSPORTATION BOARD

UP/SP-218



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' FOURTEENTH SET OF DISCOVERY REQUESTS

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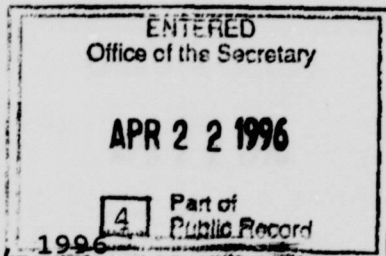
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Southern Pacific Transportation
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April 17, 1996

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' FOURTEENTH SET OF DISCOVERY REQUESTS

Pursuant to 49 C.F.R. §§ 1114.21 et seq., and the Discovery Guidelines entered in this proceeding on December 7, 1995, and the rulings of Judge Nelson on March 8, 1996 ("March 8 rulings"), Applicants UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL and DRGW direct the following interrogatories and document requests to each party ("you") who made a filing on or about March 29, 1995, and is listed in the Appendix. You should respond to those requests designated for response by you.

Responses should be delivered as soon as possible, and in no event later than 5:00 p.m. on the sixth calendar day from the date of service hereof (see March 8 rulings, Tr. 2061). According to Judge Nelson, claims of undue burden must "be detailed as to time, money, physical limitations, geography, or any other factors making the alleged burden" (id., Tr. 2061), and you must bring documents for which claims of irrelevance or privilege are made to a hearing, for review by the Administrative Law Judge and immediate production (id., Tr. 2056). You are

requested to contact the undersigned promptly to discuss any objections or questions regarding these requests with a view to resolving any disputes or issues of interpretation informally and expeditiously.

DEFINITIONS AND INSTRUCTIONS

Applicants incorporate by reference the definitions and instructions in their first set of interrogatories and requests for production of documents. [A copy of those definitions and instructions is enclosed for parties not served with a first set.]

"March 29 filings" means any filing due March 29, 1996, that you made or served in response to the Application, including documents that were put or due to be put in a document depository on or about April 1, 1996, in conjunction with those filings, pursuant to the March 8 rulings, or in response to the first set of discovery requests.

INTERROGATORY

1. State the approximate number of shippers you contacted about providing a statement opposing the UP/SP merger in whole or in part or supporting the position you have stated.
[CR, KCS, MRL, Tex-Mex]

DOCUMENT REQUEST

1. Produce documents sufficient to identify the shippers you contacted about providing a statement opposing the

UP/SP merger in whole or in part or supporting the position you have stated. [CR, ECS, MRL, Tex-Mex]

Respectfully submitted,

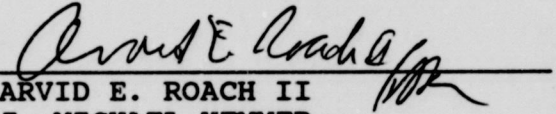
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April 17, 1996

Finance Docket No. 32760

Appendix to Applicants' Fourteenth Set of Discovery Requests

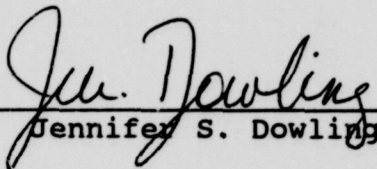
Party	Interrogatory	Document Request
Conrail	1	1
KCS	1	1
MRL	1	1
Tex-Mex	1	1

CERTIFICATE OF SERVICE

I, Jennifer S. Dowling, certify that, on this 17th day of April, 1996, I caused a copy of the foregoing document to be served by hand or facsimile transmission on all parties to whom it is directed so as to be received by 5:00 p.m., and by first-class mail, postage prepaid, or a more expeditious form of delivery, on all other parties of record appearing on the restricted service list in Finance Docket No. 32760, and on

Director of Operations
Antitrust Division
Suite 500
Department of Justice
Washington, D.C. 20530

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



Jennifer S. Dowling

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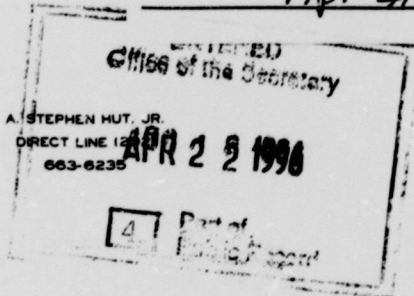
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April 17, 1996

VIA HAND DELIVERY

Mr. Vernon A. Williams
Surface Transportation Board
Case Control Branch
Room 1324
1201 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 Secretary Williams:

Enclosed for filing in the above-captioned case are one original and twenty copies of Errata to the Comments and Verified Testimony of Consolidated Rail Corporation, designated as document CR-31.

Also enclosed is a 3.5-inch WordPerfect 5.1 disk containing the text of CR-31.

Sincerely,

A. Stephen Hut, Jr.

Attorney for Consolidated
Rail Corporation

Enclosures

ENTERED
Office of the Secretary

APR 22 1996

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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

ERRATA TO THE COMMENTS AND VERIFIED TESTIMONY
OF CONSOLIDATED RAIL CORPORATION

Consolidated Rail Corporation hereby submits the
following errata to its Comments, contained in Volume I of its
March 29, 1996 filing (CR-21), and to Verified Testimony,
contained in Volume II of its March 29, 1996 filing (CR-22):

Volume I (CR-21)

<u>Page</u>	<u>Line</u>	<u>Change</u>
34	16	Change "Applicants'" to "Applicants"
42	2	Change "Automobile" to "Automotive"
74	Map	Change "BN" to "BNSF"

Volume II (CR-22)

Verified Statement of Fred L. Malan

<u>Page</u>	<u>Line</u>	<u>Change</u>
16	23-24	Delete "the UP/SP merger and"
17	1	Change "are" to "is"

Verified Statement of Douglas P. McNeil

<u>Page</u>	<u>Line</u>	<u>Change</u>
1	2	Change "Automobile" to "Automotive"

Verified Statement of Dennis H. Paranzino

<u>Page</u>	<u>Line</u>	<u>Change</u>
5	9	Add "the equivalent of" after "ship"
6	14	Change "present" to "presents"

Verified Statement of Mary L. Pileggi

<u>Page</u>	<u>Line</u>	<u>Change</u>
2	1	Add "a" after "have"
2	12	Change "their" to "its"
2	20	Delete second "the"

Verified Statement of John B. Hitchcock

<u>Page</u>	<u>Line</u>	<u>Change</u>
15	18	Add "base" after "pre-merger"
29	4	Change "V" to "VII"

Verified Statement of R. Paul Carey, Lawrence L. Ratcliffe, and
William H. Sheppard

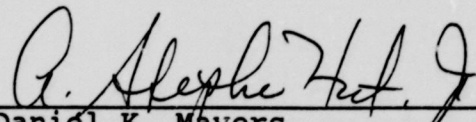
<u>Page</u>	<u>Line</u>	<u>Change</u>
31A	Map	Change "BN" to "BNSF"
64	7	Delete "away" immediately after "explain"
75	8	Delete "--"

Verified Statement of James R. McNally

<u>Page</u>	<u>Line</u>	<u>Change</u>
2	6	Insert comma after "Committee"
2	9	Insert comma after "1988"
5	21	Insert period after "Materials"
8	6	Change "more" to "longer"
11	1	Insert comma after "route" and change "when" to "which"

Respectfully submitted,

Bruce B. Wilson
Constance L. Abrams
Jonathan M. Broder
Anne E. Treadway
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Daniel K. Mayers
William J. Kolasky, Jr.
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Steven P. Finizio
Alex E. Rogers
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037

April 17, 1996

CERTIFICATE OF SERVICE

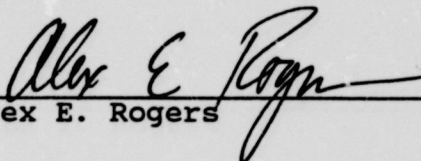
I certify that on this 17th day of April, 1996, a copy of the foregoing Errata to the Comments and Verified Testimony of Consolidated Rail Corporation was served by first-class mail, postage pre-paid, to:

Arvid E. Roach II
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Erika Z. Jones
Mayer, Brown and Platt
2000 Pennsylvania Avenue, N.W.
Suite 6500
Washington, D.C. 20006

and to all parties of record in Finance Docket No. 32760.



Alex E. Rogers

STB

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32760

4-9-96

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Item No. _____

Page Count _____

Apr #234

81349

UP/SP 197

BEFORE THE
SURFACE TRANSPORTATION BOARD

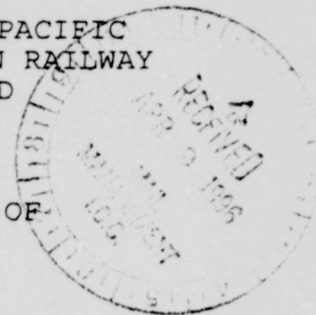
Finance Docket No. 32760

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

STIPULATION AND ORDER REGARDING PLACING OF
DEPOSITION TRANSCRIPTS ON THE RECORD



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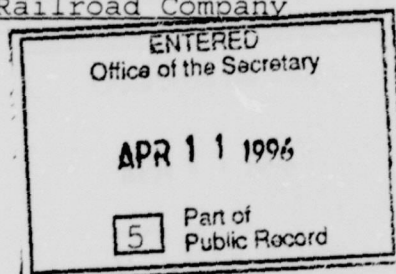
Attorneys for Southern
Pacific Rail Corporation,
Southern Pacific Transportation
Company, St. Louis Southwestern
Railway Company, SPCSL Corp. and
The Denver and Rio Grande
Western Railroad Company

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Attorneys for Union Pacific
Corporation, Union Pacific
Railroad Company and Missouri
Pacific Railroad Company



WHEREAS, large numbers of depositions have been, and may be, taken by the parties to these proceedings; and

WHEREAS, it is in the interest of the parties to these proceedings that evidence given in those depositions be placed on the evidentiary record without undue expenditure of resources; and

WHEREAS, the undersigned parties have agreed to the terms of this Stipulation and Order,

IT IS HEREBY ORDERED THAT:

1. The transcript of any deposition (including corrections thereto) taken, or to be taken, by any party in these proceedings shall constitute part of the evidentiary record, and may be cited in the filings of any party, upon its filing with the Board in accordance with 49 C.F.R. § 1114.24(h), or upon its filing with the Board by one of the parties in lieu of the procedure set forth in 49 C.F.R. § 1114.24(h).

2. This Order shall be without prejudice to the right of any party to argue that deposition testimony is not relevant or to raise evidentiary objections as bearing on the weight or admissibility of such testimony.

3. This Order shall be without prejudice to the right of any party to request that any errors in filing any

deposition transcript (including but not limited to omissions of exhibits or individual pages) be corrected.

Shirley Roach

Counsel for Applicants Union
Pacific Corporation, Union Pacific
Railroad Company and Missouri
Pacific Railroad Company

Counsel for Applicants Southern
Pacific Transportation Company,
the Denver and Rio Grande Western
Railroad Company, St. Louis
Southwestern Railway Company,
and SPCSL Corp.

Counsel for Antitrust Division,
U.S. Department of Justice

Counsel for The Kansas
City Southern Railway Company

Counsel for The Save the
Rock Island Coalition, Inc.
(STRICT)

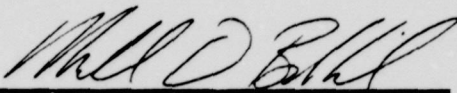
Counsel for Burlington Northern
Railroad and The Atchison,
Topeka and Santa Fe Railway Company

- 3 -

deposition transcript (including but not limited to omissions of exhibits or individual pages) be corrected.

Counsel for Applicants Union
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Railroad Company and Missouri
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Counsel for The Save the
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(STRICT)

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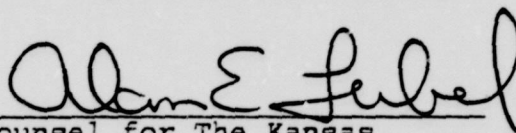
- 3 -

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(STRICT)

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Railroad and The Atchison,
Topeka and Santa Fe Railway Company

- 3 -

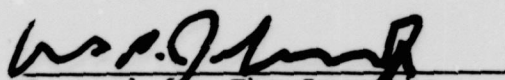
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Counsel for Applicants Union
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Counsel for Texas Mexican Railway
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Company and Idaho Power Company

Counsel for Consolidated
Rail Corporation

Counsel for International
Brotherhood of Teamsters

Counsel for Allied Rail Unions

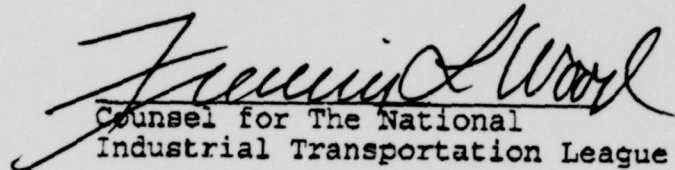
Counsel for United
Transportation Union

Attachment A

The Stipulation and Order Regarding Placing of Transcripts on the Record in Finance Docket No. 32760 has been signed by C. Michael Loftus, Esquire, Slover & Loftus, 1224 Seventeenth Street, N.W., Washington, D.C. 20036, on this 22nd day of March, 1996, on behalf of the following parties of record:

- * Western Coal Traffic League
- * Arizona Electric Power Cooperative, Inc.
- * Central Power & Light Company
- * City Public Service Board of San Antonio, Texas
- * Colorado Springs Utilities
- * Entergy Services, Inc., and its affiliates
Arkansas Power & Light Company and Gulf
States Utilities Company
- * Lower Colorado River Authority and the
City of Austin, Texas
- * Peabody Holding Company, Inc.
- * Public Service Company of Colorado
- * Texas Utilities Electric Company
- * Wisconsin Power & Light Company
- * Wisconsin Public Service Corporation

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Traffic League


Counsel for The National
Industrial Transportation League

Counsel for Transportation
Communications International Union

Counsel for Texas Mexican Railway
Company, Sierra Pacific Power
Company and Idaho Power Company

Counsel for Consolidated
Rail Corporation

Counsel for International
Brotherhood of Teamsters

Counsel for Allied Rail Unions

Counsel for United
Transportation Union

- 4 -

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Traffic League

Counsel for The National
Industrial Transportation League

Larry R. Fink
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Counsel for Texas Mexican Railway
Company, Sierra Pacific Power
Company and Idaho Power Company

Counsel for Consolidated
Rail Corporation

Counsel for International
Brotherhood of Teamsters

Counsel for Allied Rail Unions

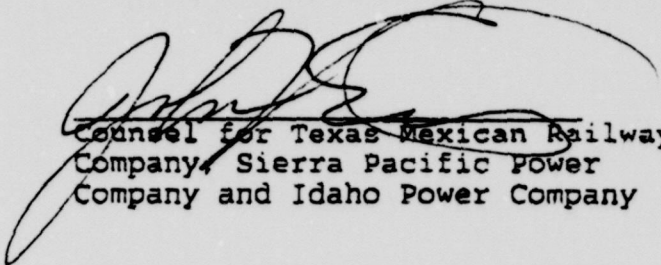
Counsel for United
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- 4 -

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Counsel for The National
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Counsel for Transportation
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Company and Idaho Power Company

Counsel for Consolidated
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Counsel for International
Brotherhood of Teamsters

Counsel for Allied Rail Unions

Counsel for United
Transportation Union

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Counsel for the Western Coal
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Counsel for The National
Industrial Transportation League

Counsel for Transportation
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Counsel for Texas Mexican Railway
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Counsel for Consolidated
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John W. Butler
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Counsel for Allied Rail Unions

Counsel for United
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Counsel for the Western Coal
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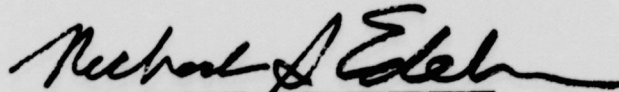
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Counsel for Transportation
Communications International Union

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Counsel for Consolidated
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Counsel for International
Brotherhood of Teamsters

A handwritten signature in dark ink, appearing to read "Richard S. Edelman", is written over the text of the block.

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Richard S. Edelman

Counsel for United
Transportation Union

- 5 -

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Counsel for International
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Counsel for Geneva Steel
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Counsel for Kennecott Utah
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Energy Company, Dow Chemical Company,
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Counsel for Chemical
Manufacturers' Association

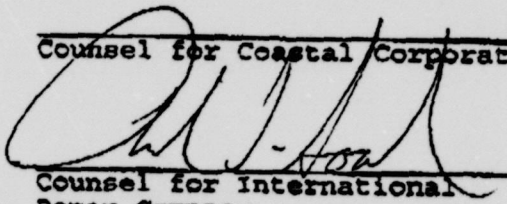
Counsel for State of Texas

Counsel for Montana Rail Link, Inc.

- 5 -

Counsel for Brotherhood of
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Counsel for Coastal Corporation


Counsel for International
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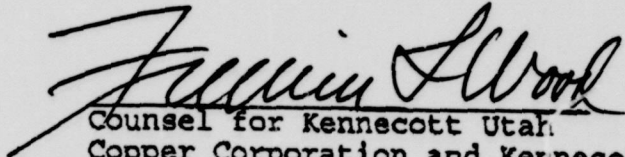
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Counsel for Chemical
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Counsel for State of Texas

Counsel for Montana Rail Link, Inc.

- 5 -

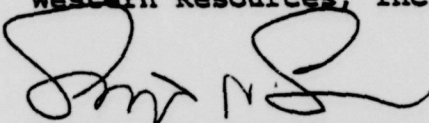
Counsel for Brotherhood of
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Rebecca Fisher
Counsel for State of Texas
Assistant Attorney General - Antitrust Section

Counsel for Montana Rail Link, Inc.

- 5 -

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Counsel for Coastal Corporation

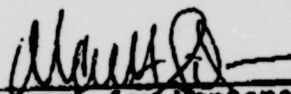
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Copper Corporation and Kennecott
Energy Company, Dow Chemical Company,
Western Resources, Inc.

Counsel for Chemical
Manufacturers' Association

Counsel for State of Texas


Counsel for Montana Rail Link, Inc.

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- 6. -

Michael F. Mc Bride
Counsel for Western Shippers'
Coalition

Counsel for The Society of
the Plastics Industry and
Union Carbide Corporation

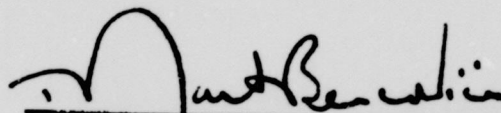
Approved and So Ordered:

ADMINISTRATIVE LAW JUDGE

Dated: _____, 1996

- 6 -

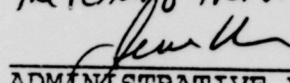
Counsel for Western Shippers'
Coalition



Counsel for The Society of
the Plastics Industry and
Union Carbide Corporation
and Montell USA, Inc.

Approved and So Ordered:

The terms of this stipulation may be altered by me upon good cause shown



ADMINISTRATIVE LAW JUDGE

Dated: April 2, 1996

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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 OF THE ALLIED RAIL UNIONS FOR ORDER
DESIGNATING THE BURLINGTON NORTHERN RAILROAD AND THE
ATCHISON TOPEKA AND SANTA FE RAILWAY AS CO-APPLICANTS
OR ALTERNATIVELY FOR IMPOSITION OF NEW YORK DOCK
CONDITIONS ON UP/SP--BNSF SETTLEMENT AGREEMENT**

INTRODUCTION

The Allied Rail Unions ("ARU")¹ hereby move the Board for an Order designating the Burlington Northern Railroad and the Atchison, Topeka and Santa Fe Railroad (referred to herein as "BNSF") as co-applicants with Applicants (referred to herein as "UP/SP") in this proceeding; alternatively, the ARU request that

¹ The organizations filing under the ARU acronym are: American Train Dispatchers Department/BLE; Brotherhood of Maintenance of Way Employees; and Brotherhood of Railroad Signalmen.

the *New York Dock* conditions be imposed on the settlement agreement between UP/SP and BNSF ("UP/SP--BNSF Agreement" or "Settlement").²

DISCUSSION

The ARU submit that the record in this case demonstrates that BNSF is not an adverse or even a neutral party in this proceeding. Rather, UP/SP and BNSF have entered the UP/SP--BNSF Agreement which was made a part of the Application itself (Volume 1 at 318, et seq.), which explicitly requires BNSF to cooperate in filings regarding the parties' Settlement, and the Settlement is a key component of the Application itself. *Id.* ¶14. Significantly, the UP/SP--BNSF Agreement also bars BNSF from opposing the Application and from assisting others or cooperating with others. *Id.* Additionally, UP/SP and BNSF are not willing to rely on their bilateral agreement, instead they seek explicit Surface Transportation Board imposition of the agreement as an express condition of an approval of the common control and merger of UP and SP ("Transaction"). *Id.* And on their own behalf, Applicants have relied heavily on the UP/SP--BNSF Agreement as resolving all

² In their Comments filed on March 29, 1996, the ARU have urged the Board to treat BNSF as a co-applicant or to subject the UP/SP--BNSF to the *New York Dock* conditions, the ARU now formally move the Board to grant such an order or condition.

competitive concerns flowing from the proposed transaction. According to UP/SP and its witnesses, this settlement is a complete cure to any competitive problems posed by the Transaction such that the STB should find that it would have no adverse competitive impacts. Application Vol. 1 at 20, Rebensdorf V.S. at 315.

Additionally, as is demonstrated in the ARU Comments, BNSF will obtain substantial benefits from the settlement with UP/SP and both parties will extend their systems in ways which are not inherently related to the UP/SP transaction. UP/SP and BNSF witnesses have conceded that the arrangement was unprecedented in that each system granted the other access to key markets, and in that UP/SP gave BNSF trackage rights over the heart of its system for thousands of miles. See e.g., Rebensdorf Dep. at 59-60, 172-173, 266-268, 308; Owen Dep. at 264. The ARU submit that these concessions were entirely dependant on the Transaction. Indeed, witnesses for Applicants and BNSF even acknowledged that such concessions were, at best, highly improbable in the absence of the Transaction. *Id.*

Additionally, Applicants' witnesses conceded that the deal with BNSF was entered specifically to ameliorate the anti-competitive effects of the proposed common control and merger, and

that a carrier would not ordinarily grant a competitor such access across the heart of its system. Rebensdorf Dep. at 59-60, 172-173, 266-267, 307-308; King/Ongerth Dep. at 697-700. Furthermore, UP officials testified that UP sought out BNSF for this deal; this was not a case of a potential opponent proposing an arrangement whereby there would be no opposition in return for certain considerations. Davidson Dep. at 51-54. Thus, unlike other merger-related trackage rights settlements, this arrangement was sought by the Applicants in order to persuade shippers to support the Applicants' plans and to enhance prospects for approval of their plans. Accordingly, the BNSF-UP/SP settlement is entirely a creature of the proposed common control/merger transaction and is clearly an integral part of the Application.

Furthermore, according to Applicants, the trackage rights deal will likely produce an additional \$450 million in gross revenues for BNSF; and BNSF estimates that the deal will give it access to a market worth over \$1 billion. Rebensdorf Dep. at 83-85, 93-95; Ice Dep. at 515-517; *see also* Davidson Dep. at 74-75, discussing the settlement's strengthening of BNSF.

The ARU respectfully submit that the foregoing evidence forcefully supports their request that BNSF be designated as a co-applicant in this proceeding.

The result of designating BNSF a co-applicant would be to impose the *New York Dock* conditions³ on all aspects of operations under the UP/SP--BNSF agreement and all actions to implement that agreement if the Transaction is approved, including but not limited to the grants of trackage rights and the lines sales. This would allow for a comprehensive implementing arrangement prior to implementation in order to address the Settlement's effects on the UP/SP and BNSF employees.

Alternatively, if the Board does not designate BNSF as a co-applicant, the ARU submit that the evidence and arguments discussed above show that if the Board approves the proposed common control/merger, it should expressly impose the *New York Dock* conditions on the UP/SP--BNSF Agreement. In this regard the ARU also note that ¶9(e) of the Settlement provides for an arrangement between UP/SP and BNSF for a form of hiring preference for employees who are adversely affected by the UP/SP Transaction for work related work on, or related to, the trackage rights territory and acquired lines. However, ¶9(e) does not provide that the unions which represent the affected employees are to be parties to this arrangement; nor does it provide for any implementing

³ *New York Dock Ry.--Control--Brooklyn Eastern District Terminal*, 360 ICC 60 (1979).

arrangement to be in place prior to consummation. Moreover, UP/SP and BNSF apparently have not established any objective criteria for placement of employees on the rosters of eligibles, or for selection from the rosters. Ice Dep. at 519-521, 530; Rebensdorf Dep. at 274-276. It appears that the eligibility criteria and selection determinations will be entirely discretionary with the two carriers. *Id.* Nonetheless, UP/SP and BNSF officials did not object to negotiations with the Unions on this matter and they could not identify any way in which Union-negotiated preferential hiring arrangements would interfere with the transaction or their Settlement (Davidson Dep. at 193-194; Ice Dep. at 523-531); accordingly, they cannot assert any principled objection to the imposition of New York Dock conditions on the Settlement or the trackage rights and lines sales covered by the Settlement.

The ARU further note that the trackage rights and the lines sales under the UP/SP--BNSF Agreement would have significant effects on railroad workers. In addition to the dislocations which would flow from approval of the UP/SP transactions, there would be dislocations of railroad workers in connection with the sales of lines on which they work and, changes in responsibilities for maintenance of track and signal systems and for dispatching on

trackage rights lines. The ARU also note that, to the extent that Applicants forecast increased revenue for BNSF as a result of the settlement, there should also be an increase in work opportunities. Cf. Rebensdorf Dep. at 273-274; Draper/Salzman Dep. at 64-65. It is entirely reasonable to require that if the UP/SP--BNSF agreement which is integral to approval of the Transaction also provides increased employment, hiring of workers dismissed as a result of the Transaction should be mandatory, not a discretionary matter between UP/SP and BNSF. Simply put, work available as a result of operations under this Transaction-dependant Settlement should be made available for employees adversely affected by the Transaction.

Only imposition of the full *New York Dock* employee protective conditions on the UP/SP--BNSF settlement, rather than *Norfolk & Western* conditions or the *Wilmington Terminal* variant of the *New York Dock* protections will provide full protection for the employees who will be subject to these dislocations by insuring that employees of the sellers/grantors will have a right to work on the purchasers/grantees.

In particular, umbrella implementing arrangements involving UP/SP, BNSF and the labor organizations would replace the bilateral arrangement between the BNSF and UP/SP. This result is not only

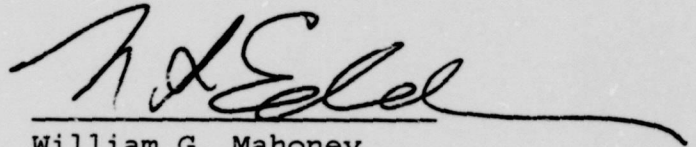
consistent with the requirements of Section 11344(b)(1)(D), and (c), it is also consistent with Supreme Court's decision in *United States v. Lowden*, 308 U.S. 225 (1939), and with the Commission's decision in *Southern Ry. Control--Central of Georgia Ry. Co.*, 331 ICC 151 (1967). In *Southern--Central of Georgia*, the Commission noted the havoc and inequity which follow without a mandatory and objective hiring preference mechanism where work forces of multiple railroads are involved in a transaction. *Id.* at 171-175.. See also *Delaware & Hudson Ry. Co.--Lease and Trackage Rights Exemption--Springfield Term. Ry. Co.*, F.D. 30965 (served February 25, 1938). The ARU further note that, to the extent that adversely affected employees of one railroad are given the opportunity to work on the other railroad, employee protection benefits payments will be reduced.

CONCLUSION

The ARU respectfully submit that the Board should designate BNSF a co-applicant, thereby covering the Settlement, and the trackage rights and lines sales provisions thereto and all implementations of those aspects of the Settlement, under the New York Dock conditions imposed on the Transaction if it is approved. Alternatively, the Board should impose the New York Dock conditions

on the UP/SP--BNSF agreement itself including the trackage rights,
lines sales and all actions related to their consummation.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'R. S. Edelman', with a long horizontal flourish extending to the right.

William G. Mahoney
Richard S. Edelman
Donald F. Griffin

HIGHSAW, MAHONEY & CLARKE, P.C.
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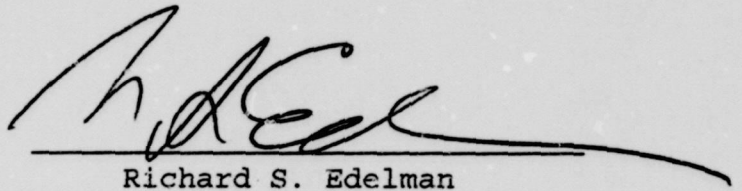
Dated: April 5, 1996

Counsel for Allied Rail Unions

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing Motion Of The Allied Rail Unions For Order Designating The Burlington Northern Railroad And The Atchison Topeka And Santa Fe Railway As Co-Applicants Or Alternatively For Imposition Of New York Dock Conditions On UP/SP--BNSF Settlement Agreement, to all parties of record on the attached service list, by first-class mail, postage prepaid.

Dated at Washington, D.C. this 5th day of April, 1996.



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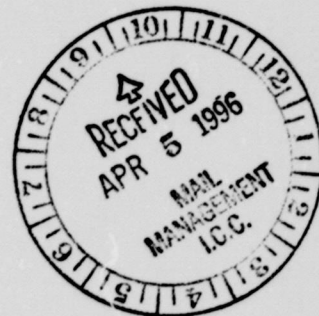
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April 5, 1996

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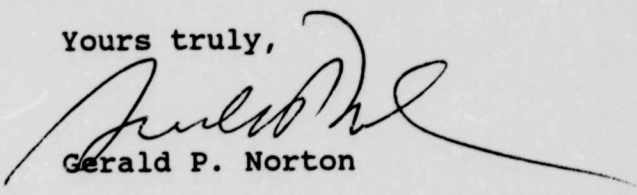


Re: Finance Docket No. 32760, Union Pacific Corp.,
et al. -- Control & Merger -- Southern Pacific
Corp., et al.

Dear Mr. Williams:

Enclosed for filing in the above-captioned proceeding
are an original and 20 copies of a document designated as UP/SP-
207, Applicants' Fourth Set of Interrogatories and Document
Requests for Production of Documents.

Yours truly,


Gerald P. Norton

cc: The Honorable Jerome Nelson
Restricted Service List

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' FOURTH SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS

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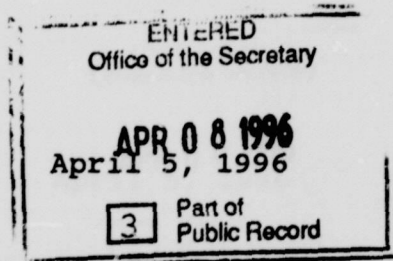
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BEFORE THE
SURFACE TRANSPORTATION BOARD

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' FOURTH SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, and the Discovery Guidelines entered in this proceeding on December 7, 1995, and the rulings of Judge Nelson on March 8, 1996 ("March 8 rulings"), Applicants UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL and DRGW direct the following interrogatories and document requests to each party ("you") who made a filing on or about March 29, 1995, and is listed in Appendix A. You should respond to those requests designated for response by you.

Responses should be delivered as soon as possible, and in no event later than 5:00 p.m. on the sixth calendar day from the date of service hereof (see March 8 rulings, Tr. 2061). According to Judge Nelson, claims of undue burden must "be detailed as to time, money, physical limitations, geography, or any other factors making the alleged burden" (id., Tr. 2061), and you must bring documents for which claims

of irrelevance or privilege are made to a hearing on or about April 12, 1996, for review by the Administrative Law Judge and immediate production (id., Tr. 2056). You are requested to contact the undersigned promptly to discuss any objections or questions regarding these requests with a view to resolving any disputes or issues of interpretation informally and expeditiously.

DEFINITIONS AND INSTRUCTIONS

Applicants incorporate by reference the definitions and instructions in their first set of interrogatories and requests for production of documents. [A copy of those definitions and instructions is enclosed for parties not served with a first set.]

"March 29 filings" means any filing due March 29, 1996, that you made or served in response to the Application, including documents that were put or due to put in a document depository on or about April 1, 1996, in conjunction with those filings, pursuant to the March 8 rulings, or in response to the first set of discovery requests.

INTERROGATORIES

1. Identify the type of boilers at the North Valmy Station, state the manufacturer of the boilers, and the year(s) that those boilers were installed. [Sierra Pac.]
2. State the coal specifications for which the North Valmy Station boilers were designed. [Sierra Pac.]

3. State any alternative coal specifications for which the North Valmy Station boilers were designed. [Sierra Pac.]

4. State whether any modifications have been made to the North Valmy Station boilers since they were originally installed that affect the coal specifications for which they are designed and, if so, specify those modifications. [Sierra Pac.]

5. State all specifications developed for purposes of any actual or contemplated coal solicitations. [Sierra Pac.]

6. State all constraints on the coal that can be burned in the boilers at North Valmy Station, including without limitation:

- (a) HGI;
- (b) ash fusion;
- (c) BTU per pound;
- (d) ash percentage;
- (e) sulfur percentage; and
- (f) other constraints. [Sierra Pac.]

7. State (a) the pulverizer capacity at North Valmy Station, (b) whether there is spare pulverizer capacity at North Valmy Station, and (c) whether pulverizer capacity constrains the ability to use different kinds of coal at North Valmy Station. [Sierra Pac.]

8. With respect to the precipitator at North Valmy Station, state:

- (a) The SCA of the precipitator.
- (b) Whether the precipitator is hot-side or cold-side.
- (c) Whether fine gas conditioning capability has been installed.
- (d) Whether any evaluations have been undertaken as to whether fine gas conditioning capability is necessary and, if so, what the conclusions of such evaluations have been. [Sierra Pac.]

9. Describe in detail the blending capabilities and capacity at North Valmy Station, including without limitation a description of the facilities used for blending operations. [Sierra Pac.]

10. State each basis for the statement at page 13 of the Verified Statement of Jeffery Hill that the modification of the North Valmy Station boilers to burn PRB coal would "require millions of dollars," specify the dollar amount being referred to, and each basis on which that dollar amount has been determined. [Sierra Pac.]

11. State each basis for the statement at page 14 of the Verified Statement of Jeffery Hill that using higher moisture content coal "would result in a 1.5 to 2.0 percent decrease in boiler efficiency." [Sierra Pac.]

12. State the anticipated useful life of the boilers at North Valmy Station. [Sierra Pac.]

13. With respect to the transcript cited at KCS-33, p. 48, (a) who prepared it; (b) was it prepared from a recording (if so, produce it); (c) are there any notes (if so, produce them); (d) who provided it to KCS; (e) is KCS aware of any alterations from what was in fact said on the conference call, inserted by anyone; (f) if so, identify same and who inserted them; (g) state fully KCS' knowledge, or lack of knowledge, as to the accuracy of the transcript. [KCS]

DOCUMENT REQUESTS

1. To the extent not done as part of your prior discovery responses or March 29 filings, produce the analysis described at page 14 of the Verified Statement of Jeffery Hill concerning whether the North Valmy Station could use PRB coal. [Sierra Pac.]

2. To the extent not done as part of your prior discovery responses or March 29 filings, produce any proposals or studies relating to modifications at North Valmy Station to allow it to burn sub-bituminous coal. [Sierra Pac.]

3. To the extent not done as part of your prior discovery responses or March 29 filings, produce all engineering studies of the ability to burn alternative coals at North Valmy Station, including without limitation any engineering studies of the ability to burn sub-bituminous coal at North Valmy Station. [Sierra Pac.]

4. To the extent not done as part of your prior discovery responses or March 29 filings, produce all engineering studies of the ash fusion characteristics of coal burned at North Valmy Station. [Sierra Pac.]

5. To the extent not done as part of your prior discovery responses or March 29 filings, produce all engineering studies of the fine gas conditioning capability of the precipitator at North Valmy Station. [Sierra Pac.]

6. To the extent not done as part of your prior discovery responses or March 29 filings, produce all engineering studies of blending capabilities at North Valmy Station, including without limitation any studies of the need for additional blending capacity. [Sierra Pac.]

7. To the extent not done as part of your prior discovery responses or March 29 filings, produce the "preliminary analyses" referred to at page 14 of the Verified Statement of Jeffery Hill. [Sierra Pac.]

8. To the extent not done as part of your prior discovery responses or March 29 filings, produce all filings (including discovery responses) made with any Public Service Commission concerning the ability of the Valmy unit to burn alternative coals. [Sierra Pac.]

9. To the extent not done as part of your prior discovery responses or March 29 filings, provide copies of any

specifications developed for purposes of actual or contemplated coal solicitations. [Sierra Pac.]

10. Produce all documents relating to the survey conducted by L.E. Peabody & Associates, Inc., that is described on pp. 23-24, n.9, and Exhibit TDC-1 in Mr. Crowley's Verified Statement for SPI. [SPI]

Respectfully submitted,

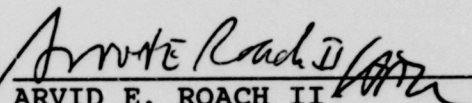
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April 5, 1996

APPENDIX

Parties upon whom this request is served:

Party	Interrogatory	Document Requests
KCS	13	
SPI		10
Sierra Pacific Power	1-12	1-9

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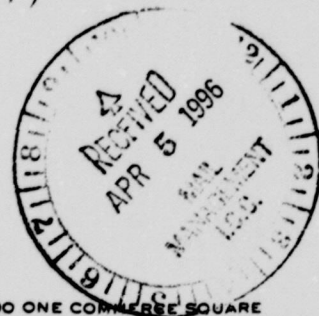
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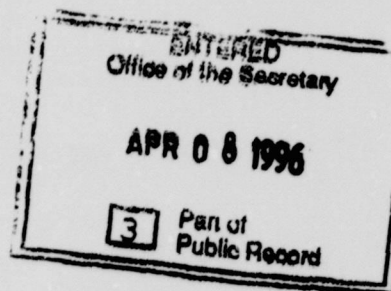


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April 5, 1996

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Mr. Vernon A. Williams, Secretary
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Washington, D.C. 20423



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

Dear Mr. Williams:

Enclosed for filing in the above-captioned proceeding
are an original and 20 copies of a document designated as UP/SP-
208, Applicants' Petition to Strike or Dismiss Request for
Conditions of Cen-Tex/South Orient Due to Failure to Respond to
Discovery.

Yours truly,

Gerald P. Norton

cc: The Honorable Jerome Nelson
Service List

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 TO STRIKE OR DISMISS
REQUEST FOR CONDITIONS OF CEN-TEX/SOUTH ORIENT
DUE TO FAILURE TO RESPOND TO DISCOVERY

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April 5, 1996
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**EXPEDITED HANDLING REQUESTED
EXPEDITED RESPONSE REQUESTED¹**

**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 TO STRIKE OR DISMISS
REQUEST FOR CONDITIONS OF CEN-TEX/SOUTH ORIENT
DUE TO FAILURE TO RESPOND TO DISCOVERY**

Union Pacific Corporation ("UPC"), Union Pacific
Railroad Company ("UPRR"), Missouri Pacific Railroad Company
("MPRR"),² Southern Pacific Rail Corporation ("SPR"), Southern
Pacific Transportation Company ("SPT"), St. Louis Southwestern
Railway Company ("SSW"), SPCSL Corp. ("SPCSL"), and The Denver
and Rio Grande Western Railroad Company ("DRGW"),³
collectively, "Applicants," hereby petition, pursuant to 49

¹Given the need for prompt action, the Board should require Cen-Tex to file any response it intends to offer within three business days, if that is not already required. See Decision No. 6, p. 14 n.3.

²UPC, UPRR and MPRR are referred to collectively as "Union Pacific." UPRR and MPRR are referred to collectively as "UP."

³SPR, SPT, SSW, SPCSL and DRGW are referred to collectively as "Southern Pacific." SPT, SSW, SPCSL and DRGW are referred to collectively as "SP."

C.F.R. § 1114.31(d),⁴ that the request for conditions filed by Cen-Tex Rail Link, Ltd./South Orient Railroad Company, Ltd. ("Cen-Tex") on March 29, 1996, be stricken and dismissed based on Cen-Tex's willful and unexcusable failure to respond to discovery.

BACKGROUND

Cen-Tex operates lines over 500 miles in Texas between Ft. Worth and Presidio, on the Mexican border. Cen-Tex manifested its intent to be an active party participating in this proceeding. On January 26, 1997, Cen-Tex also filed a statement of intention to seek conditions and file a responsive application.

On February 26, 1996, applicants served their first set of interrogatories and document requests on Cen-Tex by delivery to its President (copy attached as Exh. A). Unlike many other parties who received similar requests, Cen-Tex (1) failed to file any objections by March 4 (the five-day deadline established by the Discovery Guidelines (§ 1)), or at any point thereafter, and (2) failed to file a response by

⁴Section 1114.31(d) provides (emphasis added):

If a party or a person or an officer, director, managing agent, or employee of a party or person willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under § 1114.26, after proper service of such interrogatories, the Commission on motion and notice may strike out all or any part of any pleading of that party or person, or dismiss the proceeding or any part thereof.

March 12 (the 15-day deadline established by the Guidelines (§ 1)), or at any point thereafter.⁵

Applicants initially raised Cen-Tex's failure to respond by letter of March 13, 1996, to Judge Nelson, with a copy to Cen-Tex, putting that failure on the agenda for the next discovery hearing (copy attached as Exh. B). That hearing was held on March 20, 1996, and Cen-Tex did not attend (Tr. 2079-80).⁶ As shown at a hearing on April 3, 1996, Applicants' counsel contacted Cen-Tex officials and spoke about the failure to respond on several occasions (March 20, 26, 29 and April 2), yet, while Cen-Tex said it would "get back" to applicants, it did not respond (Tr. 2605-13) (copy of transcript and letters attached as Exh. C).

On March 29, 1996, Cen-Tex filed a request for conditions opposing the merger as reducing rail competition, and seeking significant relief: various trackage rights in Fort Worth, Dallas and East Texas, and elimination of payments and passenger restrictions on certain trackage rights over SP. On April 1, 1996, applicants requested a hearing on April 3 and a ruling on Cen-Tex's failure to respond to discovery, including a request that Cen-Tex's request for conditions be stricken or dismissed (copy attached as Exh. D).

⁵Cen-Tex also failed to contact applicants about any problem responding within the 15-day period, as required by the Guidelines (§ 1).

⁶Because the record before Judge Nelson was incomplete, he denied relief without prejudice to renewal (Tr. 2156-58).

Although advised of the hearing, Cen-Tex again did not appear, and otherwise offered no response (Tr. 2604-05). Applicants explained that they are substantially prejudiced by Cen-Tex's failure to meet its discovery obligations because they must devote time and resources to addressing Cen-Tex's request for conditions if it is not stricken or dismissed, and the deadline for filing rebuttal is April 29 (Tr. 2614-16).

Judge Nelson concluded that the Board would be fully justified, pursuant to Rule 1114.31(d), in striking or dismissing Cen-Tex's request for conditions because of Cen-Tex's failure to respond to discovery. He said that, if he had the authority, he would grant that relief, but he concluded that only the Board could act under Section 1114.31(b) (Tr. 2619). However, he recommended that the Board take such action in view of the repeated, unwarranted refusals and failures of Cen-Tex to respond to applicants' first set of discovery requests (Tr. 2625-26).

Judge Nelson also ordered Cen-Tex to respond fully to applicants' first set of discovery on or before April 5, 1996, by 5:00 p.m. C.S.T., with documents and other information to be in the hands of applicants' counsel by facsimile, courier, or otherwise by 7:00 p.m. E.S.T. on that date (Tr. 2626-27). He also ruled that Cen-Tex may not assert objections to those requests, having waived all objections by failing to assert them in a timely manner (Tr. 2634).

Applicants promptly advised Cen-Tex of that ruling on April 3 and sent the transcript on April 4 (copies attached as Exhibits E, F). As of 7:00 p.m. on April 5, applicants had not received any response from Cen-Tex, nor any indication that a response would be forthcoming.⁷

ARGUMENT

Applicants ask the Board, pursuant to Section 1114.31(b), to strike and dismiss Cen-Tex's request for conditions.⁸ Under the circumstances, there can be no dispute that Cen-Tex, with knowledge of its discovery obligations, willfully chose to disregard them. Applicants' repeated inquiries about responses were met with promises that Cen-Tex would "get back" to them about the matter, but Cen-Tex never did respond.

If Cen-Tex had legitimate grounds for resisting the requests, it had ample means of protection that imposed modest burdens. They merely needed to file objections, as most parties did, which would have triggered a process of

⁷Of course, if Cen-Tex makes a still further belated response, that should not moot or undercut this petition, for otherwise there could be no effective sanction for such repeated and continued disregard of discovery obligations.

⁸If necessary to bring the issue before it, the Board can treat this petition as an appeal from Judge Nelson's decision, insofar as he concluded as a matter of law that he had no authority to impose the relief provided for under § 1114.31(b). However, by acting directly on applicants' petition, the Board need not resolve the issue whether Judge Nelson had such authority. In any event, since he made clear that the relief requested should be granted, there would be no need to remand for further action by him.

negotiation and ruling. Or they could have filed a motion for relief (or joined one of the motions filed by others).⁹ Yet, it did none of this.

Cen-Tex has flagrantly and inexcusably disregarded its discovery obligations, while at the same time it is seeking significant relief from the Board and imposing rebuttal burdens on applicants. Cen-Tex has filed a request for conditions that, though it is wholly unwarranted, applicants must address on the merits to ensure that the Board has a full record on the matter. But Cen-Tex's delaying and refusal to respond to discovery prejudices applicants in their ability to prepare their rebuttal in the 30-day period allowed.

This is a classic case for applying Section 1114.31(d) by striking and dismissing Cen-Tex's request for conditions. Cf. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (upholding dismissal where responses had eventually been filed, noting importance of deterrent effect upon others). Otherwise, its willful, dilatory tactics are beyond effective sanction. The Board must act decisively and promptly in order to uphold the integrity of its discovery process,

⁹See Decision No. 23.

particularly in the context of a proceeding moving on a tight schedule. No extenuating circumstances were presented or are apparent.

Respectfully submitted,

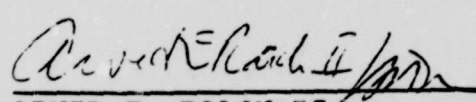
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April 5, 1996

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' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO
CEN-TEX RAIL LINK, LTD./SOUTH ORIENT RAILROAD COMPANY, LTD.

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APPLICANTS' FIRST SET OF INTERROGATORIES
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CEN-TEX RAIL LINK, LTD./SOUTH ORIENT RAILROAD COMPANY, LTD.

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, and
the Discovery Guidelines entered in this proceeding on
December 7, 1995, Applicants UPC, UPRR, MPRR, SPR, SPT, SSW,
SPCSL and DRGW direct the following interrogatories and
document requests to Cen-Tex Rail Link, Ltd./South Orient
Railroad Company, Ltd.. ("Cen-Tex/South Orient").

Responses should be served as soon as possible, and
in no event later than 15 days from the date of service
hereof. Cen-Tex/South Orient is requested to contact the
undersigned promptly to discuss any objections or questions
regarding these requests with a view to resolving any disputes
or issues of interpretation informally and expeditiously.

DEFINITIONS AND INSTRUCTIONS

I. "Applicants" means UPC, UPRR, MPRR, SPR, SPT,
SSW, SPCSL and DRGW.

II. "Board" means the Surface Transportation Board.

III. "BN/Santa Fe" means the Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company.

IV. "The BN/Santa Fe Settlement Agreement" means the agreement between UP and SP and BN/Santa Fe dated September 25, 1994, as supplemented by the November 18, 1995 agreement between those parties.

V. "The BN/Santa Fe Settlement Agreement Lines" means the lines that BN/Santa Fe will receive trackage rights over or purchase under the BN/Santa Fe Settlement Agreement.

VI. "CNW" means Chicago and North Western Railway Company.

VII. "Cen-Tex/South Orient" means Cen-Tex Rail Link, Ltd./South Orient Railroad Company, Ltd.

VIII. "DRGW" means The Denver and Rio Grande Western Railroad Company.

IX. "Document" means any writing or other compilation of information, whether printed, typed, handwritten, recorded, or produced or reproduced by any other process, including but not limited to intra-company communications, correspondence, telegrams, memoranda, contracts, instruments, studies, projections, forecasts, summaries or records of conversations or interviews, minutes or records of conferences or meetings, records or reports of negotiations, diaries, calendars, photographs, maps, tape

recordings, computer tapes, computer disks, other computer storage devices, computer programs, computer printouts, models, statistical statements, graphs, charts, diagrams, plans, drawings, brochures, pamphlets, advertisements, circulars, trade letters, press releases, invoices, receipts, financial statements, accounting records, worksheets, drafts, revisions of drafts, and original or preliminary notes.

Further, the term "document" includes

- (a) both basic records and summaries of such records (including computer runs);
- (b) both original versions and copies that differ in any respect from original versions; and
- (c) both documents in the possession, custody or control of Cen-Tex/South Orient and documents in the possession, custody or control of consultants or others who have assisted Cen-Tex/South Orient in connection with this proceeding.

X. "FNM" means Ferrocarriles Nacionales de Mexico.

XI. "The IC Settlement Agreement" means the agreement between UP and SP and Illinois Central Railroad Company dated January 30, 1996.

XII. "Identify," when used in relation to an individual, corporation, partnership or other entity, means to

state the name, address and telephone number thereof.

"Identify," when used in relation to a document, means to

- (a) state the nature of the document (e.g., letter, memorandum, etc.);
- (b) state the author, each addressee, each recipient, date, number of pages, and title of the document; and
- (c) provide a brief description of the contents of the document.

XIII. "MPRR" means Missouri Pacific Railroad Company.

XIV. "Produce" means to make legible, complete and exact copies of responsive documents and send them by expedited delivery to the undersigned counsel. The originals of responsive documents should be retained in the files of / Cen-Tex/South Orient, its counsel, or the consultants or others who have assisted Cen-Tex/South Orient in connection with this proceeding and have documents in their possession, and made available if requested. Applicants will pay all reasonable costs for duplication and expedited delivery of documents to their attorneys.

XV. "Relating to" a subject means referring to, discussing, describing, dealing with, consisting of, or constituting, in whole or in part, the subject.

XVI. "SP" means SPT, SSW, SPCSL and DRGW.

XVII. "SPCSL" means SPCSL Corp.

XVIII. "SPR" means Southern Pacific Rail Corporation.

XIX. "SPT" means Southern Pacific Transportation Company.

XX. "SSW" means St. Louis Southwestern Railway Company.

XXI. "Shipper" means any user of rail services, including but not limited to a consignor, a consignee, and a receiver.

XXII. "Southern Pacific" means SPR and SP.

XXIII. "This proceeding" means Finance Docket No. 32760 and all subdockets and related dockets.

XXIV. "UP" means UPRR and MPRR, including the former CNW.

XXV. "UPC" means Union Pacific Corporation.

XXVI. "UPRR" means Union Pacific Railroad Company.

XXVII. "The UP/SP merger" means the transactions proposed in this proceeding, including all related applications.

XXVIII. "Union Pacific" means UP and UPC.

XXIX. "The Utah Railway Settlement Agreement" means the agreement between UP and SP and Utah Railway Company dated January 17, 1996.

XXX. Discovery responses should be supplemented when a supplemental response is required pursuant to 49 C.F.R. § 1114.29.

XXXI. Documents need not be produced if they have been produced by Applicants in this proceeding.

XXXII. Produce a privilege log in accordance with the guidelines established at the December 20, 1995 discovery conference (Tr., pp. 313-14).

XXXIII. References to railroads, shippers, consultants or companies (including Cen-Tex/South Orient) include affiliates, subsidiaries, officers, directors, employees, attorneys, agents and representatives thereof.

XXXIV. All uses of the conjunctive include the disjunctive and vice versa. Words in the singular include the plural and vice versa.

XXXV. Unless otherwise specified, these requests cover the period January 1, 1993 and thereafter.

INTERROGATORIES

1. Identify and describe in detail any agreements that Cen-Tex/South Orient has with any other party to this proceeding regarding positions or actions to be taken in this proceeding. Routine procedural agreements, such as agreements concerning the order of questioning at depositions or the avoidance of duplicative discovery, need not be identified. If Cen-Tex/South Orient contends that any such agreement is

privileged, state the parties to, date of, and general subject of the agreement.

2. What is the (a) best and (b) average operating time for Cen-Tex/South Orient trains operating between (i) Fort Worth and Presidio, (ii) Alpine and Presidio, (iii) Fort Worth and Chihuahua (in conjunction with FNM), and (iv) Alpine and Chihuahua (in conjunction with FNM)?

3. Describe in detail how South Orient/Cen-Tex would utilize trackage rights between Sulphur Springs, Texas, and Texarkana, Texas, if granted, and how Cen-Tex/South Orient trains would reach Sulphur Springs from Ft. Worth and Dallas.

4. Describe what traffic would be handled over Cen-Tex/South Orient trackage rights between Sulphur Springs and Texarkana, if such rights were granted.

5. Identify, as of (a) the date this interrogatory is answered, and (b) January 29, 1996, all owners of, investors in, general partners of, and limited partners of (a) Cen-Tex Rail Link, Ltd., (b) South Orient Railroad Company, Ltd., (c) Bristol Investment Company, Inc., and (d) Orient Gernereral Partner, Ltd.

DOCUMENT REQUESTS

1. Produce no later than April 1, 1996 (a) all workpapers underlying any submission that Cen-Tex/South Orient makes on or about March 29, 1996 in this proceeding, and (b) all publications, written testimony and transcripts, without

limitation as to date, of any witnesses presenting testimony for Cen-Tex/South Orient on or about March 29, 1996 in this proceeding.

2. Produce all documents relating to benefits or efficiencies that will result from the UP/SP merger.

3. Produce all documents relating to potential traffic impacts of the UP/SP merger.

4. Produce all documents relating to competitive impacts of the UP/SP merger, including but not limited to effects on (a) market shares, (b) source or destination competition, (c) transloading options, or (d) build-in options.

5. Produce all documents relating to the BN/Santa Fe Settlement Agreement.

6. Produce all documents relating to the IC Settlement Agreement.

7. Produce all documents relating to the Utah Railway Settlement Agreement.

8. Produce all documents relating to conditions that might be imposed on approval of the UP/SP merger.

9. Produce all studies, reports or analyses relating to actual or potential competition between UP and SP.

10. Produce all studies, reports or analyses relating to competition between single-line and interline rail transportation.

11. Produce all studies, reports or analyses relating to the benefits of any prior rail merger or rail mergers generally.

12. Produce all studies, reports or analyses relating to the financial position or prospects of SP.

13. Produce all communications with other parties to this proceeding relating to the UP/SP merger or the BN/Santa Fe Settlement Agreement, and all documents relating to such communications. This request excludes documents already served on Applicants.

14. Produce all presentations, solicitation packages, form verified statements, or other materials used to seek support from shippers, public officials, railroads or others for the position of Cen-Tex/South Orient or any other party in this proceeding.

15. Produce all presentations, letters, memoranda, white papers, or other documents sent or given to DOJ, DOT, any state Governor's, Attorney General's or Public Utilities Commission's (or similar agency's) office, any Mexican government official, any other government official, any security analyst, any bond rating agency, any consultant, any financial advisor or analyst, any investment banker, any chamber of commerce, or any shipper or trade organization relating to the UP/SP merger.

16. Produce all notes of any meetings with DOJ, DOT, any state Governor's, Attorney General's or Public Utilities Commission's (or similar agency's) office, any Mexican government official, any other government official, any security analyst, any bond rating agency, any consultant, any financial advisor or analyst, any investment banker, any chamber of commerce, or any shipper or trade organization relating to the UP/SP merger.

17. Produce all documents relating to shipper surveys or interviews concerning (a) the UP/SP merger or any possible conditions to approval of the merger, or (b) the quality of service or competitiveness of any railroad.

18. Produce all documents relating to the price to be paid for, or the value of, any UP or SP lines that might be sold as a condition to approval of, or otherwise in connection with, the UP/SP merger.

19. Produce all documents relating to trackage rights compensation for any of the BN/Santa Fe Settlement Agreement Lines or any other line of UP or SP that might be the subject of a proposed trackage rights condition in this proceeding.

20. Produce all documents relating to actual or estimated maintenance-and-operating costs, taxes and return-to-capital costs with respect to any of the BN/Santa Fe Settlement Agreement Lines or any other line of UP or SP that

might be the subject of a proposed trackage rights condition in this proceeding.

21. Produce all documents relating to any agreement or understanding that Cen-Tex/South Orient has with any other party to this proceeding regarding positions or actions to be taken in this proceeding. Documents relating to routine procedural agreements, such as agreements concerning the order of questioning at depositions or the avoidance of duplicative discovery, need not be produced.

22. Produce all presentations to, and minutes of, the boards of directors (or other governing bodies) of Cen-Tex/South Orient relating to the UP/SP merger or conditions to be sought by any party in this proceeding.

23. Produce all studies, reports or analyses relating to collusion among competing railroads or the risk thereof.

24. Produce all studies, reports or analyses relating to the terms for or effectiveness of trackage rights.

25. Produce all computerized 100% Cen-Tex/South Orient traffic data for 1994, containing at least the fields listed in Attachment A hereto, a Rule 11 or other rebilling indicator, gross freight revenue, and freight revenue net of allowances, refunds, discounts or other revenue offsets, together with documentation explaining the record layout and the content of the fields. To the extent particular items are

unavailable in machine-readable form, (a) provide them in hard-copy form, and (b) provide any similar machine-readable data.

26. Produce all studies, reports or analyses relating to competition for traffic to or from Mexico (including but not limited to truck competition) or competition among Mexican gateways.

27. Produce all documents, other than the study itself, relating to the January 1996 study by The Perryman Group entitled, "The Impact of the Proposed Union Pacific-Southern Pacific Merger on Business Activity in Texas."

28. Produce all documents relating to any efforts to develop traffic to or from Mexico.

29. Produce track charts, diagrams, profiles and other documents reflecting all trackage over which Cen-Tex/South Orient operates, including but not limited to documents sufficient to show (a) type and age of rail, (b) maintenance history, (c) curvature and grade, (d) passing sidings, (e) signalling, (f) speed limits, and (g) any speed or operating restrictions.

30. Produce documents sufficient to describe Cen-Tex/South Orient's operations from January 1, 1994 to present, including but not limited to all (a) service plans, (b) system maps and (c) employees' or other operating timetables.

31. Produce all Cen-Tex/South Orient financial statements, including but not limited to statements for Cen-Tex and South Orient separately, since their formation.

32. Produce all agreements with KCS, Conrail, or TRL, Inc., to which Cen-Tex/South Orient (or either of them individually) is a party.

Respectfully submitted,

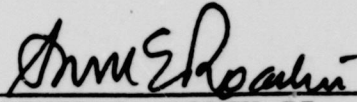
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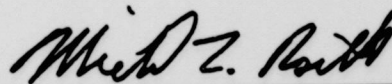
February 26, 1996

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 26th day of February, 1996, I caused a copy of the foregoing document to be served by overnight mail on Joel T. Williams, III, President, Cen-Tex Rail Link, Ltd./South Orient Railroad Company, at 4809 Cole Avenue, Suite 350 LB-126, Dallas, Texas 75205, and by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties appearing on the restricted service list established pursuant to paragraph 9 of the Discovery Guidelines in Finance Docket No. 32760, and on

Director of Operations
Antitrust Division
Suite 500
Department of Justice
Washington, D.C. 20530

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



Michael L. Rosenthal

Attachment A

Commodity Code (STCC)
Hazardous Commodity Code
Shipper Name
Origin City
Origin State
Origin SPLC
Origin FSAC
Receiver Name
Destination City
Destination State
Destination SPLC
Destination FSAC
Car Initial
Car Number
Waybill Number
Waybill Date (yy/mm/dd)
Type Move Indicator
AAR Car Type
Origin Railroad
Railroad From
Railroad To
Destination Railroad
On Junction
Off Junction
Net Tons
Freight Revenue
Unit Count
Carload Count
Trailer/Container Count
First Railroad - RR Code
First Railroad - Alpha
Interchange Received Junction #1
First Railroad - Split Revenue
First Railroad Distance
Second Railroad - RR Code
Second Railroad - Alpha
Interchange Received Junction #2
Second Railroad - Split Revenue
Second Railroad Distance
Third Railroad - RR Code
Third Railroad - Alpha
Interchange Received Junction #3
Third Railroad - Split Revenue
Third Railroad Distance
Fourth Railroad - RR Code
Fourth Railroad - Alpha
Interchange Received Junction #4
Fourth Railroad - Split Revenue
Fourth Railroad Distance
Fifth Railroad - RR Code

Fifth Railroad - Alpha
Interchange Received Junction #5
Fifth Railroad - Split Revenue
Fifth Railroad Distance
Sixth Railroad - RR Code
Sixth Railroad - Alpha
Interchange Received Junction #6
Sixth Railroad - Split Revenue
Sixth Railroad Distance
Seventh Railroad - RR Code
Seventh Railroad - Alpha
Interchange Received Junction #7
Seventh Railroad - Split Revenue
Seventh Railroad Distance
Eighth Railroad - RR Code
Eighth Railroad - Alpha
Interchange Received Junction #8
Eighth Railroad - Split Revenue
Eighth Railroad Distance
Ninth Railroad - RR Code
Ninth Railroad - Alpha
Interchange Received Junction #9
Ninth Railroad - Split Revenue
Ninth Railroad Distance
Tenth Railroad - RR Code
Tenth Railroad - Alpha
Interchange Received Junction #10
Tenth Railroad - Split Revenue
Tenth Railroad Distance
Eleventh Railroad - RR Code
Eleventh Railroad - Alpha
Interchange Received Junction #11
Eleventh Railroad - Split Revenue
Eleventh Railroad Distance
Car Ownership Code
Mechanical Designation
Tare Weight
Railroad System Revenue
Railroad System Miles
Railroad Ton Miles

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March 13, 1996

VIA FACSIMILE

The Honorable Jerome Nelson
Administrative Law Judge
Federal Energy Regulatory Commission
Room 11F21
888 First Street, N.E.
Washington, D.C. 20426

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

Dear Judge Nelson:

Without waiving their appeal from Your Honor's March 8 rulings, Applicants wish to place on the agenda for Friday, March 15, the following discovery disputes we have identified as to the responses we received yesterday (because of late service, we have not yet been able to assess closely all of the responses). For Your Honor's convenience, we will be hand delivering to you separately a set of the responses.

● The refusal of Illinois Power, International Paper, South Orient and TRL, Inc., to file any responses.

● KCS responded to many of Applicants' narrow requests for specific information that clearly exists with the statement that information responsive to the requests will be contained in its March 29 filing or in documents to be placed in KCS' document depository at some time after March 29. Applicants submit that to the extent responsive information exists, it should be produced immediately. KCS responded to other, similar focused requests for information with the statement that the information may be contained in its March 29 filing, and if so relevant documents will be placed in KCS' document depository. Again, Applicants' submit that to the extent the information currently exists, KCS should be required to produce it now. These issues are raised with respect to Applicants' Interrogatories Nos. 5, 6, 7, 8, 17, 19 and 20, and Document Requests Nos. 36, 42, 43, 44, 53, 54, 55, 58, 59, 60, 61 and 62 to KCS.

The Honorable Jerome Nelson
March 13, 1996
Page 2

● KCS also indicated, with respect to requests where Your Honor clearly required, at the March 8 conference, a response by March 12, that it would place responsive documents in its document depository at some time after its March 29 filing. Again, Applicants submit that the responsive documents must be produced now. This issue is raised with respect to Applicants Document Requests Nos. 15, 16, 23, 24, 36, 39, 47 and 48 to KCS.

● KCS failed entirely to reply by March 12 to a number of Applicants' focused, relevant discovery requests. This issue is raised with respect to Applicants' Document Requests Nos. 25, 50 and 51 to KCS. These are all narrow requests that relate to issues raised by KCS.

● KCS responded to Applicants' Document Request No. 28, which asked for 100% KCS traffic data, by stating that it will produce the tapes, but that they "do not contain all the information requested." KCS repeatedly demanded that Applicants supplement the UP and SP data tapes that were given to it last October, and Applicants complied. KCS should provide Applicants no less information than Applicants provided KCS, and should do so promptly.

● Conrail objected to producing documents in response to Applicants' Document Request No. 35 to Conrail based on a burden objection. Applicants have provided the same type of documents, and Conrail should provide Applicants no less than it was provided.

● The refusal of association parties -- Western Coal Traffic League, National Industry Transportation League, Coalition for Competitive Rail Transportation, Society of the Plastics Industry and Western Shippers' Coalition -- to make any inquiry of members about responsive information. These parties clearly intend to submit evidence provided by their members, yet seek to shield those members from any discovery. They should be required to gather responsive information, failing which they should be precluded from filing any information obtained from their members.

● Dow, having received the complete UP and SP files on their traffic (approximately 10,000 pages), has refused to produce its files regarding traffic handled by UP and SP to the Applicants. It should be ordered to do so promptly.

● Gateway Western filed its objections after the time period established by the Discovery Guidelines had expired, and should be deemed to have waived all objections.

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Also, it has also objected, and not responded, to several requests that Your Honor indicated on March 8 were candidates for early response: Document Requests Nos. 23 (studies of collusion), 28 (haulage or trackage rights agreements), and 29 (annual reports) to Gateway Western.

- Wisconsin Electric: In its tardy response, dated and served March 13, this utility merely stated a blanket objection to all discovery on the ground that it "is a receiver of coal by rail not a rail carrier," although admittedly it is "a shipper opponent" and is seeking conditions (p. 1). Wisconsin Electric cites inapposite authorities dealing with abandonment proceedings, and ignores the applicable rules, decisions and orders providing for discovery here. While it promises to produce workpapers for its March 29 filing, it has not otherwise addressed Applicants' specific requests, and did not even make specific objections. It should be deemed to have waived such objections and should be directed to respond fully, forthwith.

- Refusal of utilities to produce state PUC filings discussing sources of fuel. While Wisconsin Public Service answered this request, Western Resources objected, and others, including Texas Utilities, Arizona Electric and Entergy, referred Applicants to unidentified filings in Texas, Louisiana, Arkansas and Arizona. These filings are much more readily available to the utilities than to Applicants, and the utilities should be directed to produce them, promptly.

- One interrogatory concerned information on coal used by each utility. Most answered substantially, but Western Resources objected in toto (Interrogatory No. 2). It should be required to respond.

- Applicants asked the utility parties for average minehead prices of coal. Several refused to answer on the ground that the underlying price data are said to be covered by confidentiality agreements. Texas Utilities Interrogatory No. 2(c); Wisconsin P&L Document Request No. 27(c); Wisconsin Public Service Interrogatory No. 2(c); Entergy Interrogatory No. 2(c) and Document Request No. 27. Applicants have produced trackage rights agreements, transportation services contracts, and other materials that are subject to such confidentiality provisions, either by securing waivers or pursuant to Your Honor's orders. These parties should do the same.

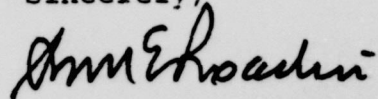
- Tex Mex (Document Request No. 31) and KCS (Document Request No. 33) refused to provide information about

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KCS' acquisition of a 49% interest in Mexrail, Inc. (the parent of Tex Mex), and agreements between KCS and Tex Mex (KCS Document Request No. 33; Tex Mex Document Request No. 31). These documents are essential to informing the Board about these parties' interests and motives for their conduct and statements in this proceeding. Prompt compliance with these requests should be ordered.

- Montana Rail Link has refused to provide information about its haulage and trackage rights agreements (Document Request No. 31). Applicants have responded to such requests, and Montana Rail Link should be ordered to do so.

Sincerely,



Arvid E. Roach II

cc: Restricted Service List

04/03/96: STB: UNION PACIFIC MERGER: DISCOVERY CONFERENCE

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Page 260

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IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the said Court, at the City of New York, this 14th day of January, 1964.

day period specified by your guidelines or at any (18) time. They did not file any responses within the 15 (19) days required or at any time. They did not contact (20) us to say when responses would be due as required by (21) your guidelines. (22) They did not file any motion seeking

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(1) relief claiming privileged prematurity or any of the (2) other issues that other parties raised. They did not (3) join in any of those motions. They took no action at (4) all basically. When we raised this question at the (5) hearing - well, we raised this issue by - I think it (6) was March 13 for a hearing that was then held on (7) March 20th. (8) At that time, Your Honor denied it without (9) prejudice because the papers were not complete. We (10) did not press the matter at that time. As I believe (11) you had suggested, we contacted them about what was (12) going on that day and I think three times, perhaps - (13) I think it was March 20, March 26, March 29 and again (14) yesterday, we called them, talked to them, tried to (15) get some indication of whether they were going to (16) respond and when. (17) We couldn't. They yesterday said they'd (18) get back to us. They never did. We said that (19) otherwise we were going to have to go on with this (20) hearing today, and they were fully aware of that. We (21) talked to them and faxed them the letter

(22) JUDGE NELSON: Why don't you detail these

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(1) conversations a little more? Who spoke to whom and (2) who said what? (3) MR. NORTON: On March 20, I spoke to James (4) Craig, who was returning my call to the individual who (5) was initially listed on the papers who we had served (6) and explained that we had these discovery requests (7) that they had - (8) JUDGE NELSON: Who is Mr. Craig? (9) MR. NORTON: I don't believe I know his (10) title. He was identified as being a representative of (11) the entities. And he was responding to my call to the (12) designated individual, being Joel Williams, the (13) president, who is the person I had initially called. (14) And he returned my call to Mr. Williams. (15) JUDGE NELSON: The discovery shows as the (16) applicant's first set of interrogatories and request (17) for production of documents to Cen-Tex Railroad (18) Limited/South Orient Railroad Company Limited

(19) MR. NORTON: That's correct. (20) JUDGE NELSON: There's a certificate of (21) service that says you made service by overnight mail (22) on Mr. Joel T. Williams, (1) President, Cen-Tex

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(1) Railroad Limited/South Orient Railroad Company at 4809 (2) Cole Avenue, Suite 350 LD 126 Dallas, Texas, 75205. (3) That is what the certificate says. (4) MR. NORTON: That's right. (5) JUDGE NELSON: Do you know whether Mr. (6) Williams received those interrogatories? (7) MR. NORTON: Well, whether he did at that (8) time, he did subsequently because that day, March 20, (9) I faxed him another set overnight. I don't recall (10) whether it was faxed or overnight delivery, but we (11) sent another set. (12) JUDGE NELSON: Then what happened? (13) MR. NORTON: And then nothing further (14) happened. We - my colleague, Mr. Bulgocz, - (15) JUDGE NELSON: Well, when was (16) you had (17) this - (18) MR. NORTON: That was March 20th.

(19) JUDGE NELSON: March 20th? (20) MR. NORTON: It was right after the (21) hearing. (22) JUDGE NELSON: Did you first fax him (23) another set or first phone him?

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(1) MR. NORTON: First I called Mr. Williams, (2) the president, and Mr. Craig returned my call to Mr. (3) Williams. (4) JUDGE NELSON: And then what did you say (5) and what did he say? (6) MR. NORTON: I explained that we had - I (7) was calling about these discovery requests which we (8) had served at the time for objections - you know, (9) deadlines for objections and responses that they had (10) passed that we had not received anything and that, you (11) know, we were going to be seeking relief from your (12) Honor - they didn't respond. And - (13) JUDGE NELSON: What did he say? (14) MR. NORTON: He said he would look into (15) it. (16) JUDGE NELSON: When did this faxing of the (17) additional copy occur? Was that before that (18) conversation or after? (19) MR. NORTON: No, it was immediately (20) afterward. (21) JUDGE NELSON: Immediately afterwards? (22) MR. NORTON: Yes, yes, March

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(1) P.R.C.E.E.C.N.G.S. (2) 19 27 a.m. (3) JUDGE NELSON: This discovery conference (4) was convened by the Southern Pacific. Well, let's get (5) a record of who's here. (6) MR. NORTON: Gerald Norton representing (7) Southern Pacific on behalf of applicants. (8) JUDGE NELSON: And that's all we have, the (9) - let the record who no one else is here representing (10) any party. (11) MR. NORTON: No, Mr. Pergolizzi. (12) Believe. (13) MR. PERGOZZI: Right, Frank Pergolizzi (14) on behalf of WCTL, TU Electric, Arizona Electric, (15) Wisconsin Public Service, Wisconsin Power & Light, and (16) Entergy. (17) JUDGE NELSON: All right. (18) MR. NORTON: They're here as observers. (19) JUDGE NELSON: Mr. Norton, this is about (20) a discovery request - interrogatories which you (21) propounded to the Cen-Tex and South Orient Railroad? (22) MR. NORTON: That's correct.

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(1) JUDGE NELSON: Which they have never (2) answered? (3) MR. NORTON: They have never answered, (4) they have never objected to they have - however, if (5) Your Honor - please, I could just go through the (6) sequence and maybe put things in context. (7) JUDGE NELSON: Please do, and we'll have (8) a record of exactly what's gone on here and what (9) hasn't. (10) MR. NORTON: There's been a lot of paper (11) flowing around. Cen-Tex and South Orient are related (12) entities that operate some short lines in Southwest (13) Texas. They filed a notice of intent to seek (14) conditions. We served discovery on them on February (15) 26th at the same time we served the other parties. (16) They did not file any objection during the (17) five

20. Mr.

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(1) letter indicates - a copy of which was sent to your (2) Honor. This was by facsimile. Enclosed is a copy of (3) the discovery that had previously been served. So (4) they got it - a second copy was sent on March 20. On (5) March 26, my colleague, John Bulgodzy, in my absence, (6) followed up not having heard anything, called Mr. (7) Craig and did not get any concrete response about (8) whether or when there would be a response.

(9) JUDGE NELSON: Did he converse with Mr. (10) Craig?

(11) MR. NORTON: Yes, he did.

(12) JUDGE NELSON: What did he say, if you (13) know?

(14) MR. NORTON: I don't have first hand - (15) I have a copy of a letter that was sent that day (16) confirming the conversation, which I can provide you. (17) Your Honor.

(18) JUDGE NELSON: Can the reporter take (19) these letters and make them part of the transcript? (20) Let's do that: Why don't you give them to the (21) reporter. (22) *****INSERT LETTERS*****

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(1) MR. NORTON: In fact, I'll run through (2) them first, and then - (3) JUDGE NELSON: Of course. (4) MR. NORTON: - I'll turn them over. This (5) was a confirming - a letter confirming a telephone (6) conversation which is described in the letter, which (7) again restated a history of the service of the papers (8) in the absence of any response. And again, that Mr. (9) Craig told Mr. Bulgodzy that he would take it under (10) advisement and get back and that we would have to seek (11) remedies if they did not respond. (12) March 29, Mr. Bulgodzy again had a (13) conversation with Mr. Craig about their failure to (14) respond. He said he hadn't seen the request until a (15) few weeks ago. This was what Mr. Craig told Mr. (16) Bulgodzy. And he indicated that one item we were (17) particularly interested in was the 100% traffic tape, (18) and there was some reference to the rulings indicating (19) that matters such as the traffic tape should be served (20) no later than April 1 under your earlier rulings on (21) Phase I and Phase II, although they were not parties (22) to those motions.

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(1) But if we're to apply those standards, - (2) and I - that's the essence of it. The - we got no (3) response on April 1. We got no response yesterday. (4) Mr. Bulgodzy again called Mr. Craig and

spoke with (5) him. We had sent them Monday the letter noticing the (6) hearing for today. We faxed a copy of that letter to (7) them. (8) They had not responded, so we - to us, so (9) we called - we confirmed that they had received a (10) copy of the April 1 letter. He was aware of the (11) hearing and said he would - he couldn't answer as to (12) when we would get response of information. He would (13) consult with his principals and get back to us. (14) And we never heard further. So we've (15) talked to them four times. We get promises about (16) we'll get back to you, but nothing has happened. And (17) I would be happy to submit these for the record.

(18) JUDGE NELSON: At no time in these four (19) conversations, according to your recital, did Mr. - (20) what's his name, Carrey? (21) MR. NORTON: Craig. (22) JUDGE NELSON: Craig - did Mr. Craig deny

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(1) having received the interrogatories? (2) MR. NORTON: No. (3) JUDGE NELSON: And indeed, on one (4) occasion, gave knowledge that he had had them for (5) several weeks. Is that correct? (6) MR. NORTON: That's correct. (7) JUDGE NELSON: What is it you want me to (8) do? (9) MR. NORTON: Well, what I would like you (10) to do, Your Honor - (11) JUDGE NELSON: First of all, why don't you (12) give those letters to the reporter. (13) MR. NORTON: Under the - I think (14) extraordinary circumstances here. Your Honor, we've (15) had a lot of discovery disputes, but no one has taken (16) this brazen an approach disregarding their (17) obligations. We think there's really only one (18) practical option that makes sense to preserve the (19) integrity of the process. (20) And that is to dismiss their request for (21) conditions. And let me go back and - (22) JUDGE NELSON: I don't think I have the

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(1) power to do that. (2) MR. NORTON: Well, Your Honor, I think (3) there is authority under - let me just explain what (4) I'm referring to there for the record. On March 29th, (5) they did take some action. They filed a request for (6) conditions, a copy of which - (7) JUDGE NELSON: I have a copy of that. It (8) came with your papers. (9) MR. NORTON: That's correct.

(10) JUDGE NELSON: And it has the name James (11) R. Craig on there shown as Chief Financial Officer. (12) MR. NORTON: Right. And that request has (13) now imposed upon applicants a significant burden to (14) have to - even though it is not itself a substantial (15) document, they - in their briefing, they can invoke (16) evidence that is submitted by others. We don't know (17) whether they're a stalking horse for others in any (18) event. (19) JUDGE NELSON: What is it they want? (20) MR. NORTON: They want various trackage (21) rights in Texas. And we have to respond to those (22) requests and address them, and they impose a very

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(1) substantial burden on the applicants along with having (2) to respond to the - you know, I think over 100 (3) filings that were made on March 29. (4) I think it's four feet of paper that - on (5) my table. And even though it may not be a substantial (6) document, it does impose substantial burdens. And (7) what we want is the relief that is authorized under (8) Commission Board Rule 1114.31(v), which provides that (9) in circumstances where a party fails to serve answers (10) to interrogatories after proper service, the (11) commission on motion and notice may strike out all or (12) any part of any pleadings of that party or dismiss the (13) proceeding or any part thereof. (14) We think that gives the board, and hence (15) Your Honor, as the board's delegate - (16) JUDGE NELSON: How would I get that power? (17) MR. NORTON: Because this is a discovery (18) - this is part of the discovery rules. And as we (19) understand the Commission's decisions and decision (20) six, I believe it was, and it was implemented in (21) 20 (21) and 23, you have essentially the authority of the (22) Commission or the Board now with respect to discovery.

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(1) - (2) JUDGE NELSON: I could certainly answer on (3) the order of directing these people to answer the (4) interrogatories and produce whatever it is you're (5) requesting. No question we would have that power. (6) But the power to strike them out of the case (7) altogether seems to me a more substantive remedy that (8) the Board would have to render

(9) MR. NORTON: Well, Your Honor, that (10) were the case, that really would deprive you of a - (11) of what would be the only significant remedy to deal (12) with this kind of discovery problem. Directing them (13) to answer is giving them a fourth bite at the apple (14). And that doesn't seem to be the appropriate response (15) for this kind of a circumstance.

(16) JUDGE NELSON: When is your next filing?

(17) MR. NORTON: April 29.

(18) JUDGE NELSON: Okay, we're a month away.

(19) MR. NORTON: Well, we have printer's (20) deadlines that shorten that period. And Your Honor, (21) if there is a question of authority, I think the way to (22) test it - and we think -

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(1) JUDGE NELSON: If you have all this (2) background, and the record will show it, and you have (3) an order from me to produce, and that order goes (4) ignored, why can't you simply tell the Board that (5) those circumstances you can't even - can't be (6) expected to fashion any meaningful response to the (7) Gen-Tex people?

(8) MR. NORTON: Well, Your Honor, if you were (9) to take that approach, that basically vindicates their (10) strategy of disregard. Because it means that (11) ultimately they don't get any sanction for just (12) sitting on their hands.

(13) JUDGE NELSON: You could urge the (14) Commission to reject their request - the Board, (15) rather.

(16) MR. NORTON: Well, if they end up (17) responding to the discovery, I would - it would be - (18) it would not be a very appealing position to have to (19) argue that - it would be a mighty -

(20) JUDGE NELSON: What I'm trying to get at (21) -

(22) MR. NORTON: Let me suggest, if I might.

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(1) if there is a question about the authority, a way that (2) that can be resolved is to take the action that we are (3) suggesting. And if they think that's beyond your (4) authority, they can take an appeal to the Board and (5) get a resolution on it.

(6) JUDGE NELSON: I was going to suggest (7) something different. Say I enter an order requiring (8) production within one week. And if that week comes (9) and goes and you've got nothing, you then go to the (10) Board.

(11) MR. NORTON: Your Honor, that -

(12) JUDGE NELSON: Over the Board for -

(13) MR. NORTON: That is putting on us a (14) further burden at a time when we are, you know, (15) desperately -

(16) JUDGE NELSON: The burden of making one (17) simple motion? That doesn't sound so - you've got (18) all sorts of lawyers involved there. That's not a (19) significant -

(20) MR. NORTON: I really - I don't want to, (21) you know, cry too much, but we do have just (22) extraordinary demands in a very short period of time.

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(1) to try to deal with the filings that have been made, (2) And that approach seems to me just to, you know, (3) vindicate and reward their -

(4) JUDGE NELSON: No, it doesn't. It gives (5) them one more week to produce the -

(6) MR. NORTON: Which is a lot more time than (7) the people who went - followed the rules, filed (8) objections, filed responses, raised questions before (9) Your Honor. They've had to respond to most of these (10) or a lot of these same questions already. And there's (11) just - it just turns everything upside down to say (12) that someone who disregards all of their obligations (13) gets a free ride for another - still another period (14) of time and puts us having to deal with - further (15) behind the schedule in dealing with their response.

(16) JUDGE NELSON: Well, let the record show (17) that I don't think I have the authority to put them (18) out of the case. If I did have the authority, I would (19) exercise it in your favor in the present (20) circumstances. Given the conversations, the notice, (21) the amount of time that's gone by, I would put them (22) out of the case.

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(1) I don't think I have the power to do that, (2) And that's a power that seems to be in the Board, not (3) me. It's a more draconian remedy, so serious that I (4) think you ought to take it to the Board. (5) Now, what can I do for you? I can (6) certainly enter an order which could be the predicate (7) for such a motion, be it next week or in a few days or (8) whatever. Given the fact that I don't think I have (9) the authority to throw someone out of the case (10) altogether, what next - what would your request be?

(11) MR. NORTON: Well, let me - I think two (12) variations on that. One would be that if you were to (13) enter the order that we're seeking and it turns out (14) that the Board concludes that you didn't have that (15) authority, we would run the risk of not getting the (16)

discovery that we're seeking. (17) So that the risk on the legal question - (18) because I went up on appeal and then the Board (19) says no -

(20) JUDGE NELSON: I've decided that in my own (21) mind, I don't have the power to do it. So I'm not (22) going to do it - asking you is there anything less.

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(1) than that that I can do?

(2) MR. NORTON: Well, I suppose you could (3) preclude them from making any further filings, which (4) I think is something short of dismissal. I don't know (5) whether you would see it as subject to the same (6) question of authority.

(7) JUDGE NELSON: I don't know where I get (8) that either. It seems to me the most I can do, unless (9) you have some other thought, is to enter an order (10) directing production. And whether you want that order (11) is up to you.

(12) MR. NORTON: If the order could be crafted (13) in such a way that it would not - their production (14) and response would not moot our argument that you had (15) the authority to dismiss their request for conditions (16) - if we were to appeal that -

(17) JUDGE NELSON: You could appeal to the (18) Board right now from my ruling that I have no (19) authority to dismiss someone from a case. I could (20) then enter an order and recite that whatever (21) proceedings occur under that order would be without (22) prejudice to your position that these people should

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(1) have been thrown out effective today, (2) I would not say that you were waived (3) anything or overtaken. You will have a higher (4) argument if I enter an order to produce and Mr. Craig (5) ponies up material by Friday going to the Commission (6) saying because you didn't have it on Monday, he should (7) have been thrown out of the case retroactively, even (8) though you've gotten it Friday. (9) That's not going to be a good package to (10) sell. But you could try.

(11) MR. NORTON: Well, Your Honor -

(12) JUDGE NELSON: If the Gen-Tex people (13) continue to do what they've done, nothing will happen. (14) They'll ignore the order. And then you have the (15) predicate to seek whatever relief you want from the (16) Board by way of drawing negative inferences (17) unilaterally declaring that negative inferences or (18) seeking relief by a motion. (19) So I don't know what I

could go more than (20) enter an order of production. In other words, once (21) you get from discovery over the threshold into the (22) merits of the case, it seems to me that's in the

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(1) province of the Board. (2) And to go over that threshold and start (3) dealing with remedies that pertain to the merits. (4) Those seem to me sanctions that the Board ought to be (5) imposing, not me.

(5) MR. NORTON: Would it be Your Honor's view (7) that you would also lack authority if, after you (8) ordered them to respond - let's say by Friday, and (9) they did not go so that you could not at that point (10) strike their request?

(11) JUDGE NELSON: If you've shown me (12) something - is there anything in the Commission (13) orders in this case that address the question of (14) sanctions? I don't remember anything.

(15) MR. NORTON: I don't believe anything (16) there so specifically, but I think the - decision (17) four authorizes Your Honor to entertain the rule upon (18) all the -

(19) JUDGE NELSON: Let me find it. I have the (20) file here, I believe. I see that. I have authority (21) for the handling of all discovery matters and initial (22) resolution of all discovery disputes. I think we've

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(1) gone beyond a discovery dispute into the impact of (2) sanctions as they impacts merits. (3) And I don't think I have that authority.

(4) MR. NORTON: Well, Your Honor, the rule (5) that we're invoking is part of the Commission's (6) discovery rules.

(7) JUDGE NELSON: I understand that. (8) Normally the trial judge would have authority to (9) impose sanctions. But I'm a borrowed agent of the (10) Board here. I think I have only so much authority as (11) the Board has given me, and I do not find an authority (12) to impose sanctions. And I can see a rational basis (13) for them not wanting me to have that authority. (14) That ought to be their business. That (15) goes to the ultimate shape of the merits of the case. (16) It's a different question from the mechanics of (17) discovery and the privileges and the burdens and the (18) relevance and all the disputes we've had. So I adhere (19) to the view that I don't think I have the authority to (20) impose sanctions, absent some Commission expression to (21) that effect.

(22) MR. NORTON: Your Honor, this might be a

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(1) variation on what -

(2) JUDGE NELSON: We're talking up time now (3) and repeating ourselves, and I don't know that we're (4) getting anywhere.

(5) MR. NORTON: No, this is just in terms of (6) how you phrase your view - I was thinking that an (7) analogue to what we're dealing with here is the (8) authority of magistrates to make recommended decisions (9) as opposed to definitive decisions. And would it be (10) fair to say that what you would be - the view you (11) would be expressing would be that - equivalent to a (12) recommendation for the -

(13) JUDGE NELSON: I would certainly recommend (14) that in the circumstances you've outlined here, (15) corroborated by these repeated conversations with this (16) party and corroborated by your letters, I would

(17) certainly recommend the imposition of some sanctions (18) upon the Cen-Tex Raillink Limited/South Orient (19) Railroad Company Limited for their repeated ignoring (20) of the rules of the game of discovery in this case. (21) If I had the power to impose them, I would (22) impose them. I don't think I do, but I will certainly

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(1) recommend that the Board impose them. And you have a (2) record of my saying that.

(3) MR. NORTON: Okay.

(4) JUDGE NELSON: Any other questions?

(5) MR. NORTON: No, Your Honor. In that (6) event, I think the - we talked about Friday. I think (7) that's an appropriate deadline to impose for (8) responses. And we'll have to take it from there.

(9) JUDGE NELSON: So I would hereby direct (10) the Cen-Tex Raillink Limited/South Orient Railroad (11) Company Limited to respond to the applicant's first (12) set of interrogatories and request for production of (13) documents dated February 26, 1996, and to respond by (14) - I'm trying to think. What time is it in Dallas? (15) They're two hours earlier than we are?

(16) MR. NORTON: One hour earlier.

(17) JUDGE NELSON: One hour different? So (18) let's say 5:00 p.m. Dallas time on Friday.

(19) MR. NORTON: So it's clear, Your Honor -

(20) JUDGE NELSON: And such response shall (21) constitute transmittal of the response to your office (22) at Markins Cunningham by fax or overnight delivery

Page 2627

(1) service. And you should have that response by, at the (2) latest, 7:00 p.m. Eastern this coming Friday.

(3) MR. NORTON: And just so it's clear, a (4) response, I take it, means respond in full, not a raft (5) of objections. They've waived - the time for (6) objections is long past.

(7) JUDGE NELSON: I don't know that I can say (8) that.

(9) MR. NORTON: Well, Your Honor, that would (10) be -

(11) JUDGE NELSON: I'm just saying that they (12) have to make a kind of response everyone else has been (13) making.

(14) MR. NORTON: Your discovery guidelines (15) specifically require all objections to be stated (16) within five days. And that's what everyone else has (17) been doing. And they haven't done even that. And I (18) think at a minimum the response ought to be a (19) substantive response, not a response full of (20) objections.

(21) JUDGE NELSON: Let's say that it can be (22) whatever response they want to make. And if there are

Page 2628

(1) objections, then we have a schedule conference Friday (2) the 12th, I believe, concerning other matters, don't (3) we?

(4) MR. NORTON: That's correct, yes.

(5) JUDGE NELSON: And I will add to that (6) agenda on the 12th any discovery disputes then (7) outstanding with reference to the response of the Cen- (8) Tex/South Orient Railroad - what's their other name? (9) Cen-Tex Raillink Limited/South Orient Railroad Company (10) Limited. So if there is some response, we can examine (11) it at that time.

(12) MR. NORTON: Your Honor, that puts us in (13) - as if they had - they're in no worse position than (14) if they had done everything properly. And we are (15) severely prejudiced that way because they can file, (16) you know, objections to everything and we won't be (17) able to get a response until the 12th. (18) They have had repeated opportunities to (19) file objections. The rules impose a five day limit (20) for very good reason to get objections aired so they (21) can be ruled on promptly so the substantive response (22) can come within the 15 day period that's specified

Page 2629

(1) under the rules and the guidelines. (2) And to permit them still to be able to (3) raise objections at this late date is totally (4) inconsistent with the purpose

and thrust of the rules (1) -

(6) JUDGE NELSON: Maybe they'll have material (7) to turn over.

(8) MR. NORTON: Well, if they're able to make (9) objections, I can - given their approach to date - (10) would be confident that we'll see objections rather (11) than material.

(12) JUDGE NELSON: Then we address the (13) objections.

(14) MR. NORTON: Your Honor, the time to raise (15) objections was back in February. That's what everyone (16) else did. If they didn't raise the objections then, (17) they should be deemed to have waived any objections.

(18) JUDGE NELSON: Well, I see that point. (19) What is you want me to do then? You -

(20) MR. NORTON: Just to make clear -

(21) JUDGE NELSON: - order a response and I (22) did, and you say that's not good enough.

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(1) MR. NORTON: No, no, no. I just want to (2) clarify that response means substantive response. (3) Documents and information, not objections. The time (4) to raise objections passed back on the beginning of (5) March, a month ago. And they can't come in now (6) raising objections that they could and should have (7) raised then.

(8) JUDGE NELSON: I see your argument.

(9) MR. NORTON: It would be totally - (10) would be grossly unfair to us to leave us in the (11) position where they can - after ignoring repeatedly (12) their obligations to respond, and repeatedly ignoring (13) the letters and say that they're going to follow up - (14) to be able to come in and give something other than (15) complete responses on the merits and substance -

(16) JUDGE NELSON: What if we told them to (17) show up here on April 12th?

(18) MR. NORTON: Your Honor, what we want -

(19) JUDGE NELSON: I've already recommended (20) some discovery sanction. I told you I don't think I (21) have the authority to issue one. I'm ordering them to (22) respond. And the fact that it's late and they should

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(1) have responded earlier, that's all the predicate for (2) why there ought to be a sanction imposed. If I had (3) the authority, I'd impose one. (4) But I don't know what else I can do now.

(5) MR. NORTON: Well, I think it's simply, (6) Your Honor. And I think all

you have to indicate is (7) that their right to make objections to the particular (8) request has passed because they didn't do it in a (9) timely fashion and objections are waived. And they (10) have to respond to the request without objections. (11) I suspect on a lot of them they're not (12) going to - they don't have any documents.

(13) JUDGE NELSON: Are they a small operator?

(14) MR. NORTON: Well, they're -

(15) JUDGE NELSON: Like a one person office?

(16) MR. NORTON: I don't know. They run some (17) railroads. I don't know how many people they have. (18) But they run a couple of different railroads, and they (19) are seeking significant trackage rights over parts of (20) the applicant's lines in various parts of Texas. (21) I mean, it is not tiny relief that they're (22) seeking here. It is very significant. And it is

Page 2632

(1) imposing on us a very substantial burden to try to (2) respond -

(3) JUDGE NELSON: Why don't you appeal from (4) my ruling that I don't have the authority to impose (5) sanctions?

(6) MR. NORTON: Well, I can't say what we'll (7) do. I have to consult with my client, but we may well (8) do that.

(9) JUDGE NELSON: You could do that quickly. (10) And if the Commission reverses, then we have some (11) guidance on it.

(12) MR. NORTON: Do - should we prepare -

(13) JUDGE NELSON: I don't know that these (14) people realize the seriousness of the situation (15) they're in here. Do they have lawyers?

(16) MR. NORTON: Well, I don't know whether -

(17) JUDGE NELSON: It isn't a fly by night (18) outfit?

(19) MR. NORTON: No, it -

(20) JUDGE NELSON: Do they have money, do they (21) have equipment?

(22) MR. NORTON: Yes.

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(1) JUDGE NELSON: Do they -

(2) MR. NORTON: They run railroads. I can (3) show you where they are in the map.

(4) JUDGE NELSON: If it's just some little (5) phoney thing, then what do you even care about them?

(6) MR. NORTON: They run railroad lines that (7) go from over here, from Presidio to -

(8) JUDGE NELSON: Well, there's a line there. (9) It says on it SP - I can't read it, it's so small. (10) SQR?

(11) MR. NORTON: Think it's SQ.

(12) JUDGE NELSON: What does that stand for?

(13) MR. NORTON: South Orient.

(14) JUDGE NELSON: That's their railroad?

(15) MR. NORTON: They run over here and then (16) the Cen-Tex runs from - I can't read it - Brownwood (17) over through Fort Worth.

(18) JUDGE NELSON: That says CTE.

(19) MR. NORTON: Yeah, that's -

(20) JUDGE NELSON: That's the Cen-Tex?

(21) MR. NORTON: Cen-Tex to Fort Worth. And (22) they're seeking other rights -

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(1) JUDGE NELSON: So they've got a railroad (2) that runs from Fort Worth, Texas southwest to the (3) Mexican border?

(4) MR. NORTON: That's correct. And they're (5) seeking trackage rights -

(6) JUDGE NELSON: And they own -

(7) MR. NORTON: - in east Texas to

(8) Texarkana.

(9) JUDGE NELSON: All right, so they look (10) like a substantial enough outfit.

(11) MR. NORTON: Oh, yeah.

(12) JUDGE NELSON: At least on paper. All (13) right, I'm going to grant your request for - I'm (14) going to say that they've - their conduct so far (15) constitutes waiver of objections, and that what (16) they've got to do now is answer the interrogatories (17) and produce the documents. (18) If they've got any business that they want (19) to conduct before me, I'll be here on April the 12th (20) and you'll be here. I assume, on April the 12th -

(21) MR. NORTON: I'm afraid so.

(22) JUDGE NELSON: - on other matters, and

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(1) I'll be happy to hear from them then as to what's (2) going on in this situation.

(3) MR. NORTON: Should we prepare an order -

(4) JUDGE NELSON: They ought to be advised (5) that they're better represented by counsel if they can (6) hire one or have one. And if not, we can certainly (7) talk to Mr. Craig or whoever the railroad wants to (8) send here. Will you see that they get a copy of this (9) transcript?

(10) MR. NORTON: Yes, I was thinking that it (11) might expedite things to prepare an order that we (12) could get signed and sent out today just boiling down (13) -

(14) JUDGE NELSON: I'm not sure mechanically (15) whether it would because I think that an order has to (16) go from here over to the Board which then issues it.

(17) MR. NORTON: Well -

(18) JUDGE NELSON: I'm willing to consider (19) one.

(20) MR. NORTON: Let me consult with my (21) colleagues. If we think -

(22) JUDGE NELSON: You may prepare an order if

Page 2636

(1) you want me to sign it and bring it over. I'll be (2) here. I'm hearing oral argument this afternoon on an (3) oil pipeline case -

(4) MR. NORTON: Okay.

(5) JUDGE NELSON: - in this room. And you (6) can just walk in and I'll see you and know what you're (7) here for if that's what it is.

(8) MR. NORTON: Very good.

(9) JUDGE NELSON: I don't guarantee I'll sign (10) it unless I like it, but you can -

(11) MR. NORTON: I have every confidence that (12) that would be the case.

(13) JUDGE NELSON: Have it fairly reflect our (14) discussions here. If there is no order, then it's up (15) to you if you want to send this transcript to the Cen- (16) Tex Rail Link/South Orient Railroad Company. Do they (17) have a fax machine?

(18) MR. NORTON: Yes.

(19) JUDGE NELSON: You've sent them faxes (20) before?

(21) MR. NORTON: Yes, they do.

(22) JUDGE NELSON: All right. So you may want

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(1) to send them the transcript so that they get a feel (2) for what's going on. And then the choice is theirs.

(3) MR. NORTON: Thank you. Your Honor.

(4) JUDGE NELSON: You can ignore things, and (5) you ultimately end up paying a price. If this company (6) continues down that route, they may have to pay that (7) price. (8) All right, that concludes this proceeding. (9) If you have an order you want to prepare and bring it (10) around, I will take a look at it this afternoon. If (11) you decide otherwise, simply deal with the transcript.

(12) MR. NORTON: Thank you.

(13) JUDGE NELSON: So in any event, I will see (14) you and all the others. I guess, at the next (15) conference on April the 12th. That concludes this (16) proceeding.

(17) (Whereupon, the proceedings

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March 20, 1996

VIA FACSIMILE

Mr. James Craig
South Orient Railroad
4809 Cole Avenue
Suite 350, LB 126
Dallas, Texas 75205

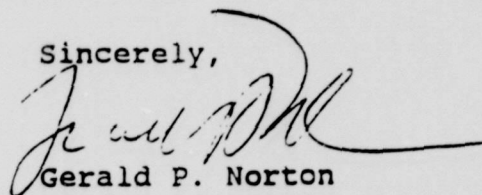
Re: Finance Docket No. 32760, Union Pacific Corp.,
et al. -- Control & Merger -- Southern Pacific
Corp., et al.

Dear Mr. Craig:

Following up on our telephone conversation today, here is a copy of the discovery served on Cen-Tex/South Orient on February 26, objections were due March 7 and answers March 12.

Please contact me or John Bulgozdy (ext. 7617) as soon as possible about this.

Sincerely,



Gerald P. Norton

Enclosure

cc: Arvid E. Roach, II
The Honorable Jerome Nelson

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March 26, 1996

VIA FACSIMILE

Mr. James Craig
South Orient Railroad
4809 Cole Avenue
Suite 350, LB 126
Dallas, Texas 75205

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

Dear Mr. Craig:

This will confirm our telephone conversation yesterday concerning Applicants' discovery that was served on South Orient/Cen-Tex and TRL. As I confirmed, Applicants served this discovery on February 26, 1996. Neither South Orient/Cen-Tex nor TRL filed any objections by March 5, 1996 as required by the Discovery Guidelines. Neither South Orient/Cen-Tex nor TRL filed any responses on March 12, 1996, as required by the Discovery Guidelines. We had previously brought this to your attention in two letters sent last week.

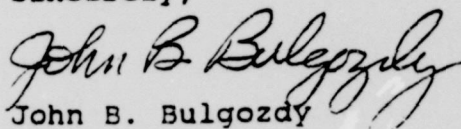
The purpose of my call was to determine when Applicants will be served with responses by South Orient/Cen-Tex and TRL. In response, you stated that these parties had ignored Applicants' discovery because, in your view, Applicants should wait to see what the parties filed on March 29th. When I reiterated my request for some estimate of when Applicants would receive responses to discovery, you stated that you would take it under advisement and get back to me.

HARKINS CUNNINGHAM

James Craig
March 26, 1996
Page 2

I am waiting for your response. If discovery responses are not forthcoming, Applicants will seek all reasonable and appropriate remedies for the inaction of South Orient/Cen-Tex and TRL.

Sincerely,


John B. Bulgozdy

cc: Arvid E. Roach, II

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March 29, 1996

VIA FACSIMILE

Mr. James Craig
South Orient Railroad
4809 Cole Avenue
Suite 350, LB 126
Dallas, Texas 75205

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

Dear Mr. Craig:

This will confirm our telephone conversation today concerning Cen-Tex/South Orient's failure to respond to Applicants' discovery. Cen-Tex/South Orient has neither objected, nor responded, to Applicants' discovery. This complete omission to obey the Surface Transportation Board's ("STB") discovery guidelines is inexplicable.

During our conversation today, you gave as various reasons for your failure to respond that you had not seen the properly served discovery requests until a few weeks ago, and that you had just read today the STB's decision on the appeal from Judge Nelson's March 8 rulings. However, Judge Nelson's rulings clearly provided for some discovery to go forward.

One of the items sought by Applicants' discovery requests is all computerized 100% Cen-Tex/South Orient traffic data for 1994. See Doc. Req. 25. As I reiterated emphatically today, it is critical that Applicants receive any and all traffic data from Cen-Tex/South Orient. Under Judge Nelson's rulings, such data should be served no later than April 1, 1996.

HARKINS CUNNINGHAM

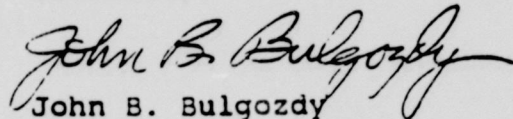
James Craig
March 29, 1996
Page 2

In an effort to obtain responsive information, I asked when Applicants would be provided with 100% traffic data. You stated that you would wait until Applicants re-filed discovery, and provide responsive information "in the normal course." When I indicated that this is not the substance or effect of Judge Nelson's rulings, on traffic data, you stated that you would take a look at Applicants' discovery today, see what we were requesting, see what is available, and "go from there." When I asked how long it would take for you to gather traffic information, you said that you did not know, and you would get back to me on Monday or Tuesday with an estimate of time. I requested that you respond no later than Monday, April 1, 1996.

You should be aware that the ALJ clearly required responses to certain discovery requests on April 1, 1996. The ALJ has also provided for expedited responses to additional discovery. To the extent you are seeking to rely on the March 8, 1996 order, you should be aware of its provisions.

We appreciate all efforts to expedite production of responsive information.

Sincerely,


John B. Bulgozdy

Enclosure

cc: The Honorable Jerome Nelson (w/enc.)
Arvid E. Roach, II, Esq. (w/o enc.)
David L. Meyer, Esq. (w/o enc.)
Paul A. Cunningham, Esq. (w/o enc.)

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April 2, 1996

VIA FACSIMILE

Mr. James Craig
South Orient Railroad
4809 Cole Avenue
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Dallas, Texas 75205

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

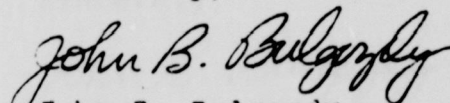
Dear Mr. Craig:

This will confirm our telephone conversation earlier today concerning the discovery hearing to be held tomorrow, April 3, 1996, on the failure of Cen-Tex/South Orient to respond to Applicants' discovery. You confirmed that you had received a copy of our April 1 letter to Judge Nelson, and that you were aware of the hearing.

I asked again if Cen-Tex/South Orient would provide responsive information, but you were unable to answer and said you would consult your principals and get back to me.

Not having heard further, we will be advising Judge Nelson that it will evidently be necessary to proceed with the hearing tomorrow.

Sincerely,


John B. Bulgozdy

cc: Arvid E. Roach, II, Esq.

ANDREWS OFFICE PRODUCTS CAPITOL HEIGHTS, MD (K)

D

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April 1, 1996

VIA FACSIMILE

The Honorable Jerome Nelson
Administrative Law Judge
Federal Energy Regulatory Commission
Room 11F21
888 First Street, N.E.
Washington, D.C. 20426

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

Dear Judge Nelson:

This is to confirm our advice to your office this afternoon that we are deferring our request for a ruling on the issue concerning the duties of associations to seek responses from their members, which had been tentatively scheduled for hearing on April 3 at 9:30. That issue can be addressed if necessary at the hearing tentatively set for April 12.

However, we regrettably must ask for a ruling at the April 3 hearing concerning the repeated failure and refusal of Cen-Tex/South Orient Railroad ("Cen-Tex") to respond to applicants' discovery requests.

Our first set, served February 26, 1996, included requests specifically tailored to Cen-Tex, as well more general requests served on other parties as well (Exhibit A). Cen-Tex (1) served no objections (within five days or at all) as required by Your Honor's discovery guidelines; (2) served no responses (within 15 days or at all) as required by those guidelines; and (3) did not move for a protective order or join in any motions filed by other parties concerning similar requests. Applicants' letters of March 13 and 18 to Your Honor noted the failure of

HARKINS CUNNINGHAM

The Honorable Jerome Nelson
April 1, 1996
Page 2

Cen-Tex to respond as an issue to be addressed at the hearing on March 20, at which Cen-Tex made no appearance.

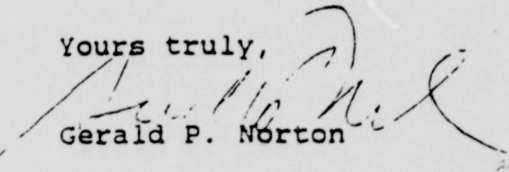
Immediately following that hearing, as suggested by Your Honor, applicants contacted Cen-Tex and again advised them of the need to respond. Yet Cen-Tex has not done so and has made no promises or representations about when or to what extent it will respond.

On March 29 Cen-Tex filed a request for conditions (Exhibit B). In that filing Cen-Tex opposes the merger and seeks trackage rights, including over the SP main line between Sulphur Springs, Texas, and Texarkana, asserting broadly:

We believe the trackage rights settlement between UPRR/SPR and BN/SF (BN/SF-1) will not adequately address the reduction of competition in Texas, but will create a Class I railroad duopoly to the detriment of Texas shippers, and Class II and III rail carriers. Cen-Tex/South Orient, therefore, opposes the merger of UPRR and SPR unless the approval of the merger is conditioned whereby the applicant is required to negotiate certain trackage rights. (p. 3)

The unwarranted refusal of Cen-Tex to respond is hindering applicants in preparing their rebuttal. Cen-Tex should be ordered to respond in full, without objections, to all of applicants' requests by delivery to applicants' counsel by April 8 (and to document request 25 by April 5), or else face having its conditions request stricken, or being precluded from offering evidence or comments.

Yours truly,


Gerald P. Norton

Enclosures

cc: James R. Craig (without enclosures)
Restricted Service List (without enclosures)
Surface Transportation Board (without enclosures)

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April 3, 1996

VIA FACSIMILE

Mr. James Craig
South Orient Railroad
4809 Cole Avenue
Suite 350, LB 126
Dallas, Texas 75205

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

Dear Mr. Craig:

I have called twice for you today and not heard back. This will confirm my message left with your secretary earlier today. At the discovery hearing held this morning, Administrative Law Judge Nelson ordered South Orient/Cen-Tex to respond in full, without objections, to the discovery requests previously served by Applicants. The Judge ordered that Applicants must receive responses no later than 7:00 p.m. E.S.T. on April 5, 1996.

In the meantime, you should be aware that Judge Nelson also said that the failure of Cen-Tex/South Orient to respond would justify striking or dismissing their request for conditions if he had the authority to do so, that the Board should take such action if requested, and that if they respond to the requests pursuant to his order that would not necessarily preclude the Applicants from obtaining such relief from the Board.

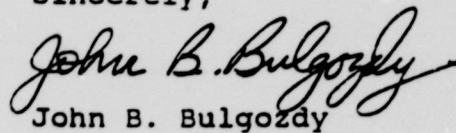
Judge Nelson had initially thought he might issue an order, but has been on the bench in another matter and asked that we advise you of his ruling and send you a copy of the transcript, in lieu of an order, when it becomes available.

HARKINS CUNNINGHAM

James Craig
April 3, 1996
Page 2

We look forward to your prompt response to Applicants' discovery.

Sincerely,


John B. Bulgozdy

cc: The Honorable Jerome Nelson
Arvid E. Roach, II, Esq.

ANDREWS OFFICE PRODUCTS CAPITOL HEIGHTS, MD (K)

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April 4, 1996

VIA FACSIMILE

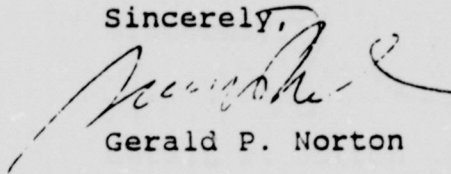
Mr. James Craig
South Orient Railroad
4809 Cole Avenue
Suite 350, LB 126
Dallas, Texas 75205

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

Dear Mr. Craig:

Attached at Judge Nelson's direction, in lieu of an order, are pp. 2626-27, 2634 of the transcript of the April 3, 1996, hearing, where he ordered responses to applicants' discovery requests, with no objections, by 5:00 p.m. C.S.T. April 5, as we advised you yesterday. Because of its length, we are sending the rest of the transcript by overnight delivery, but will fax the balance if you request.

Sincerely,



Gerald P. Norton

cc: The Honorable Jerome Nelson (without enclosures)
Arvid E. Roach, II (without enclosures)

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760

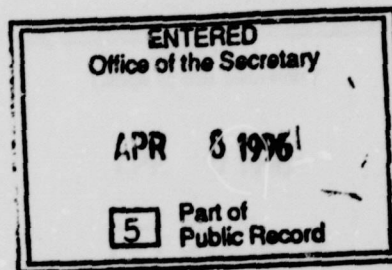
UNION PACIFIC CORPORATION, ET AL, CONTROL AND
MERGER OF SOUTHERN PACIFIC RAIL CORPORATION, ET AL

PETITION OF ARCHER DANIELS MIDLAND COMPANY
TO BECOME A PARTY OF RECORD

Archer Daniels Midland Company
4666 Faries Parkway
P.O. Box 1470
Decatur. Illinois 62525

By Scott A. Roney
Attorney

Dated: January 11, 1996



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760

UNION PACIFIC CORPORATION, ET AL, CONTROL AND
MERGER OF SOUTHERN PACIFIC RAIL CORPORATION, ET AL

PETITION OF ARCHER DANIELS MIDLAND COMPANY
FOR PARTY OF RECORD STATUS

Archer Daniels Midland Company ("ADM"), a Delaware Corporation says that it is an agribusiness engaged in the handling, processing, and distribution of grain, oilseeds, and direct products thereof in the domestic and world markets. ADM petitions this agency for party of record status. On October 10, 1995, ADM notified the Interstate Commerce Commission ("ICC") of its intention to participate and of its request to receive copies of all pleadings, orders, and notices. ICC allowed non party of record status as ADM did not meet certain Commission requirements codified at 49 CFR 1104 to achieve party of record status. ADM is complying with the above referenced service requirement as detailed in the attached certificate of service and requests that it be allowed to participate as its interests may require and to receive copies of all the applications and all supplemental pleadings, decisions, and notices filed in this proceeding.

Respectfully submitted,

Scott A. Roney

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 1996, I submitted the original plus twenty (20) copies and a 3.5 inch floppy diskette formatted for Work Perfect 5.1 of this petition upon the Surface Transportation Board, 12th & Constitution Avenue, N.W., Washington, DC 20423, and one (1) copy upon the following by overnight delivery:

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