

STB

FD-32760

2-13-01

J

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CLIENT/MATTER NUMBER
424277-040

February 9, 2001

The Honorable Vernon Williams
Secretary
Surface Transportation Board
Case Control Unit
1925 K Street, NW
Washington, DC 20423-0001



Re: STB Finance Docket No. 32760

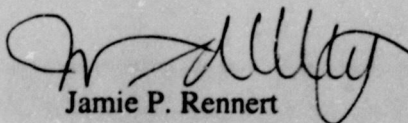
Dear Secretary Williams:

This letter is to notify the Board of a change in our firm name, for the purpose of future filings and orders issued in the above referenced docket. Effective February 1, 2001, the firm of Hopkins & Sutter has merged into Foley & Lardner. Our address and telephone number remain the same:

Robert P. vom Eigen
Jamie P. Rennert
FOLEY & LARDNER
888 Sixteenth Street, N.W.
Washington, DC 20006
(202) 835-8000

Thank you for your attention to this matter.

Sincerely,


Jamie P. Rennert

Foley & Lardner

The Honorable Vernon Williams

February 9, 2001

Page 2

cc: J. Michael Hemmer
COVINGTON & BURLING
Counsel to Union Pacific Railroad

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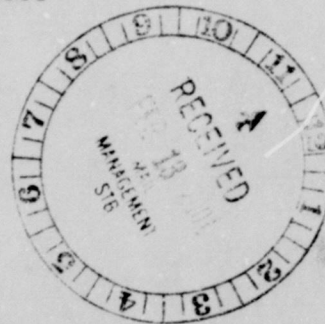
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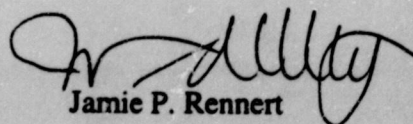
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Foley & Lardner

The Honorable Vernon Williams

February 9, 2001

Page 2

cc: J. Michael Hemmer
COVINGTON & BURLING
Counsel to Union Pacific Railroad

STB

FD-32760

3-20-00

J

MOC

Congress of the United States
Washington, DC 20515

FILE IN DOCKET
FD-32760

March 15, 2000

The Honorable Linda J. Morgan
Chairman
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

RECEIVED
SURFACE TRANSPORTATION BOARD
MAR 20 5 13 PM '00
COMMUNICATIONS SECTION

Re: AmerenUE's "2-to-1" status resulting from the Union Pacific Corp. et al—Control and Merger—Southern Pacific Rail Corp. et al. proceeding, STB Finance Docket No. 32760

Dear Chairman Morgan:

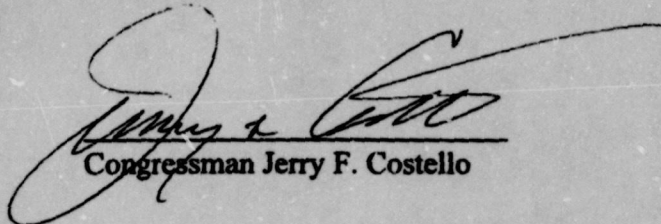
We are writing to express our interest in the above-referenced matter. We request that AmerenUE ("UE") receive prompt attention to its concerns. The Surface Transportation Board should consider, as quickly as possible, UE's request that it be restored to its prior position as a shipper with two rail carrier access at its Labadie plant.

UE's coal-fired electric generating station in Labadie, Missouri is UE's largest plant, shipping nearly 9 million tons of coal annually. UE provides energy service and electricity to 1.2 million customers in Missouri and Illinois. The Labadie plant currently is a "captive" shipper, serviced by the Union Pacific Railroad ("UP"). AmerenUE's Labadie plant previously was not a captive shipper. Prior to the merger of the UP and the Southern Pacific Railroad ("SP"), the Labadie plant had direct rail service from both UP and SP, making Labadie a "2-to-1" shipper.

In the interest of the Missouri and Illinois electricity customers served by AmerenUE's Labadie plant, we ask that you rule on AmerenUE's petition as soon as possible and in accordance with established administrative law procedure. Restoring two rail carrier access to the Labadie coal-fired electric generating plant could benefit all the Missouri and Illinois electricity consumers served by Labadie.

Thank you for your attention to this matter and please keep us informed on the progress of your action on AmerenUE's "2-to-1" status.

Sincerely,



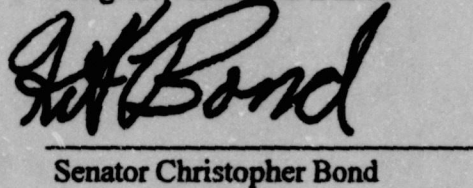
Congressman Jerry F. Costello



Congresswoman Pat Danner



Senator John Ashcroft



Senator Christopher Bond

cc: Vice-Chairman Wayne O. Burkes
Commissioner William Clyburn, Jr.

STB

FD-32760

2-25-00

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COVINGTON & BURLING

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February 25, 2000

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K. Street, N.W.
Room 715
Washington, D.C. 20434-0001

ENTERED
Office of the Secretary

FEB 28 2000

Part of
Public Record



**Re: Finance Docket No. 32760, Union Pacific Corporation,
Union Pacific Railroad Company and Missouri Pacific
Railroad Company -- Merger and Control -- Southern
Pacific Rail Corporation, Southern Pacific
Transportation Company, St. Louis Southwestern
Railway Company, SPSCCL Corp. and the Denver and
Rio Grande Western Railroad Company**

Dear Secretary Williams:

On February 23, 2000, AmerenUE ("UE") filed, without seeking leave, an impermissible reply to Union Pacific Railroad Company's ("UP") reply to UE's petition that seeks clarification and enforcement of certain merger conditions. The Board could disregard UE's reply because UE failed to seek leave to file the reply and because the Board's rules do not permit a reply to a reply. 49 C.F.R. § 1104.13(c). UP urges it to withhold consideration of UE's petition until UP has the opportunity to address the latest UE filing. UP will file on or before March 4, 2000.

Sincerely,

John M. Scheib
Attorney for Union Pacific Railroad
Company

cc: J. Michael Hemmer
James V. Dolan

Honorable Vernon A. Williams
February 25, 2000
Page 2

Larry E. Wzorek
Beverly S. Greer
Steven R. Sullivan
Brent L. Motchan
John R. Molm
Sandra L. Brown

STB

FD-32760

2-25-00

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RECEIVED
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FEB 09 2000
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February 8, 2000



By Hand

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

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of the Reply of The Burlington Northern and Santa Fe Railway Company to AmerenUE's Petition for Clarification and Enforcement of Merger Conditions (BNSF-90). Also enclosed is a 3.5 inch disk containing the text of the pleading in WordPerfect 6.1 format.

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

Sincerely,

Erika Z. Jones/als

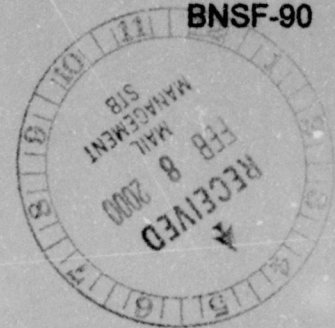
Erika Z. Jones

Enclosures

cc: All Parties of Record

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

REPLY OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
TO AMERENUE'S PETITION FOR CLARIFICATION
AND ENFORCEMENT OF MERGER CONDITIONS

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

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Attorneys for The Burlington Northern and Santa Fe Railway Company

February 8, 2000

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

REPLY OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
TO AMERENUE'S PETITION FOR CLARIFICATION
AND ENFORCEMENT OF MERGER CONDITIONS

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies to the Petition of AmerenUE ("UE") for clarification and enforcement of merger conditions in this proceeding.^{1/} In its Petition, UE seeks an order from the Board declaring that UE's coal-fired plant in Labadie, Missouri is a "2-to-1" shipper entitled to all conditions and rights imposed by the Board in Finance Docket No. 32760, Decision No. 44 (served August 12, 1996), and declaring that UE's Labadie Plant, as a "2-to-1" shipper, is entitled to invoke the 50% contract modification condition imposed by the Board in Decision No. 44 (at 146) and clarified in Decision No. 57. Through its Petition, UE seeks to obtain direct access to BNSF service as a replacement for the competitive options lost as a result of the UP/SP merger.

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

In its negotiations with UE, UP has taken the position that UE's agreement (on March 14, 1996) to a "Conceptual Framework" drafted by UP waived UE's rights, as a "2-to-1" shipper, to seek enforcement of the conditions and rights imposed by the Board in approving the UP/SP merger. See, e.g., UE Petition at 2-3; Letter from J.P. Klym, UP, to R. Neff, UE, dated January 13, 2000 (Ex. 5 to UE's Petition) (hereinafter "Klym Letter"). UP has taken the same position in response to a January 20, 2000 request by BNSF for access to the Labadie plant under the "2-to-1" Point Identification Protocol, claiming that "UP entered into a settlement agreement with Union Electric to provide" UE with a competitive alternative "which satisfies the conditions established by the STB in the UP/SP proceeding." Letter from Lawrence E. Wzorek, Assistant Vice President-Law, UP, to Peter J. Rickershauser, Vice President Network Development, BNSF, dated February 7, 2000 (hereinafter "Wzorek Letter"). (A copy of Mr. Wzorek's February 7th letter is attached hereto as Attachment A.)

UP also has asserted that UE's agreement to a modification of its existing coal transportation contract with UP precludes UE from invoking the contract modification condition.

UP's contentions, however, both with respect to the effect of the "Conceptual Framework" agreement and the modification of the coal transportation contract, do not affect UE's right to obtain BNSF service to the Labadie plant if the Board were to conclude that, as a result of UP's actions since the execution of the Conceptual Framework, UE has been denied a "competitive option" that "satisfies the conditions established by the STB in the UP/SP proceeding." See Wzorek Letter. As explained in UE's Petition, there are ample grounds for such a conclusion.

ARGUMENT^{2/}

A. UE IS A "2-TO-1" SHIPPER.

Under the BNSF settlement agreement, which, as modified by the Board, was imposed as a condition to the Board's approval of the UP/SP merger, a "2-to-1" shipper facility is defined to be a facility at a point where, prior to the UP/SP merger, service was provided by both UP and SP, but no other railroad. See BNSF Agreement, Section 1(b) ("[f]or purposes of this Agreement, '2-to-1 shipper facilities' shall mean all industries that were open to both UP and SP, whether via direct service or via reciprocal switching, joint facility or other arrangements, and no other railroad when the Agreement was executed").^{3/} This definition was adopted by the Board in Decision No. 44. See Decision No. 44, at 16.

As UE has demonstrated in its Petition, the Labadie plant meets this definition. In fact, the plant was directly served by UP and SP under separate transportation contracts. See UE Petition at 5-6; Verified Statement of William B. McNally at 1- 2 (attached as Ex. 1 to UE's Petition).

Moreover, UP has publicly referred to the Labadie plant as a "2-to-1" shipper. Thus, in a verified statement submitted in support of the UP/SP merger application, UP's Richard B. Peterson conceded Labadie's "2-to-1" status by stating that "in all events the Labadie plant is covered by the [BNSF] 'omnibus' clause". Verified Statement of Richard B.

^{2/} The background necessary for comprehending this dispute is set forth in UE's Petition and will be repeated here only as necessary for framing BNSF's arguments.

^{3/} Following the Board's practice, the agreement entered into by BNSF and UP on September 25, 1995, as modified thereafter by the Supplemental Agreement, dated November 18, 1995, and the Second Supplemental Agreement, dated June 27, 1996, shall be referred to herein as the "BNSF Agreement."

Peterson at 167 (UP/SP-23). *See also* Map 1 to UP/SP Merger Application (identifying Labadie as a "2-to-1" point); Peterson V.S. at 164 (discussing map). Similarly, the verified statement of UP's John H. Rebensdorf in support of the UP/SP merger application asserted that "Labadie is covered by the [omnibus] clause." Verified Statement of John H. Rebensdorf at 297 n.1 (UP/SP-22). *See also* Rebensdorf Rebuttal V.S. at 7 (UP/SP-231) ("[UE] meets the definition of a '2-to-1' point, even though Labadie is not expressly mentioned in Section 8(i) of the [BNSF] settlement agreement.").^{4/} Correspondence cited by UE in its Petition (at 12) further confirms that UP has acknowledged the UE Labadie plant's "2-to-1" status.

B. AS A "2-TO-1" SHIPPER, UE'S LABADIE PLANT IS ENTITLED TO BNSF SERVICE.

In Decision No. 44, the Board conditioned its approval of the UP/SP merger on a variety of conditions (including the BNSF Agreement, as modified) that were designed to protect the competitive options and rights of "2-to-1" shippers. *See, e.g.*, Decision No. 44, at 103, 105-107, 121-124, 144-146.

The BNSF Agreement provides BNSF with the unilateral option to serve a shipper located at a "2-to-1" point via direct trackage rights service or reciprocal switch. *See* BNSF Agreement, Sections 1(c), 3(e), 4(c), 5(c).

In addition, a shipper may have access to BNSF under the BNSF Agreement's Section 8(i) "omnibus" clause, which protects shippers — such as UE's Labadie plant —

^{4/} The fact that BNSF was "agreeable" to UP's "entering into an arrangement with" UE whereby UE's competitive rail options would be preserved through "service by a different railroad" or "some other form of continued rail competition" (Peterson V.S. at 167) does not preclude UE from obtaining access to BNSF, or BNSF from providing service to UE, now, as discussed below.

which have lost two-carrier service as a result of the UP/SP merger, but are not directly accessible to BNSF's trackage rights lines. As noted above, UP has publicly acknowledged that UE's Labadie plant is an "omnibus" "2-to-1" shipper under Section 8(i) of the BNSF Agreement. As such a shipper, the Labadie plant is entitled to BNSF service not only via direct trackage rights service and reciprocal switch, but also via haulage rights, ratemaking authority or other mutually acceptable means. See BNSF Agreement, Section 8(i).^{5/} Under Section 8(i), any such service must be sufficient to permit BNSF to compete effectively with UP as a replacement for SP.

It should be noted in this regard that UE and BNSF executed a transportation contract on January 18, 2000, for coal tonnage not subject to UE's contractual volume commitment under the existing UE-UP contract. UE is entitled to immediate direct BNSF access to the Labadie plant for deliveries under this contract regardless of the other pending disputes between UE and UP raised by UE's Petition.

In its submissions in support of its merger application, UP repeatedly affirmed its commitment to the principle that no shipper would suffer a loss of competition as a result of the UP/SP merger. Thus, in its brief, UP stated that "[t]he steps agreed upon with CMA, together with other steps taken by Applicants, resolve any conceivable question as to the effectiveness of the BN/Santa Fe settlement in preserving and enhancing competition." UP/SP-260 at 8. Contrary to UP's stated commitment to preserve competition for "2-to-1" shippers, however, UE's Petition makes it clear that, throughout negotiations with UE during the merger proceeding, UP sought to prevent UE from obtaining competitively

^{5/} Section 8(i) accords the right to receive competitive service under Section 8(i)'s "omnibus" clause to "2-to-1" shippers who are not expressly identified in Section 8(i).

adequate service options to replace the loss of SP service resulting from the UP/SP merger.^{6/}

And now, once again in blatant contradiction to its merger proceeding commitments, UP apparently has, in negotiations with UE, sought to deny UE the option of obtaining BNSF service as an effective replacement for UE's loss of its two pre-merger competitive rail options.^{7/} It should not be permitted to do so.

C. THE MARCH 1996 CONCEPTUAL FRAMEWORK WOULD NOT PRECLUDE UE FROM SEEKING ACCESS TO BNSF AT ITS LABADIE PLANT IF UP HAS DEPRIVED UE OF ITS REMEDY FOR THE LOSS OF ITS PRE-MERGER COMPETITIVE RAIL OPTIONS.

As noted above, UP has taken the position that, by agreeing to UP's March 1996 "Conceptual Framework," UE waived all of its potential claims for relief arising out of its

^{6/} UP's anti-competitive tactics are apparent in the conditions that it attached to the sale of the former SP Rock Island line to Missouri Central. By prohibiting Missouri Central from using that line to serve the Labadie plant, UP, in effect, sought to deny the Labadie plant a competitively effective replacement for the loss of two-carrier service resulting from the UP/SP merger, notwithstanding UP's promise to the Board that replacement two-carrier service would be available for all "2-to-1" shippers.

It also is clear that UP's unilateral action in selling the Rock Island line and limiting the buyer's subsequent access to the Labadie plant neither affects the plant's "2-to-1" status or BNSF's right to provide competitive service to the plant. Thus, UP should not be heard to argue that the sale of the Rock Island line precludes BNSF from obtaining direct access to the Labadie plant in order to replace the loss of SP service to the plant. For one thing, Section 8(i) of the BNSF Agreement requires that BNSF's method of access enable BNSF to provide competitive service. Section 8(k) further provides that, in the event, "for any reason," any of the trackage rights under the BNSF Agreement cannot be implemented, UP is obligated to provide an alternative route or means of access commercially equivalent to the unavailable route.

^{7/} The various exhibits to UE's Petition reflect the efforts which UP has devoted to denying BNSF service to UE at Labadie. *See, e.g.*, Exs. 10 and 12 to UE's Petition. These efforts began almost immediately upon the announcement of the merger and continued after the execution of the BNSF Agreement notwithstanding UP's statements that BNSF would be able to serve all "2-to-1" shippers such as the Labadie plant.

status as a "2-to-1" shipper. See Klym Letter at 1-2. UP's position, however, would not be determinative of UE's right to BNSF service at the UE facility if, as UE argues in its Petition, UP has effectively denied UE a viable competitive rail alternative to replace the loss of SP service resulting from the UP/SP merger.

UE apparently entered into the Conceptual Framework because it believed, as a result of UP's misleading arguments, that the framework provided the only basis then available to UE for the maintenance of its right to two-carrier service.^{8/} See UE Petition at 6-7; Udo A. Heinze V.S. at 2 (Ex. 2 to UE's Petition). UE's belief in this respect, mistaken though it turned out to be, was understandable in the circumstances, and was perfectly consistent with UE's view that it had not waived its rights.

Moreover, as is clear from UE's Petition, the Conceptual Framework plainly has *not* "met Union Electric's needs for substitute rail competition" or "satisfie[d] the conditions established by the STB in the UP/SP proceeding." See Wzorek Letter at 1. Although the

^{8/} Among the alleged misleading representations made by UP to UE were that UE would not be entitled to BNSF service because access to BNSF would constitute an improvement over UE's previous SP service option. See UE Petition at 19. UP's argument that direct BNSF service would put UE in a better competitive position than it had pre-merger is both factually inaccurate and irrelevant.

Pre-merger, the Labadie plant was served single-line from coal origins by two carriers (UP and SP); direct BNSF service would do nothing more than replicate the SP service. Moreover, as the Board's imposition of the BNSF Agreement as a condition to the UP/SP merger makes clear, the fact that direct BNSF service might put UE in a position of receiving two-carrier service from PRB origins (as opposed to SP's western origins) in no way undercuts UE's right to receive BNSF service.

Further, UP touted to the Board that one of the benefits of the merger would be that "[e]very '2-to-1' shipper will enjoy stronger competition" and that UP and SP went "beyond what might strictly be required by an analysis of the competitive effects of the merger." Peterson V.S. at 163-64. See also Applicants' Brief (UP/SP-260) at 1 (the merger "will strengthen competition for *every* affected shipper" (emphasis original)).

Conceptual Framework is premised on the assumption that UE and UP would be able to reach final agreement on a transportation contract that would ensure long-term competition at the Labadie plant, they obviously have not been able to do so. Indeed, as described by Mr. Heinze in his verified statement, UP refused to allow UE to utilize the Conceptual Framework to attempt to deal with UP's 1997-98 service crisis. Heinze V.S. at 3. Thus, UP should not be allowed to claim that UE is bound by the Conceptual Framework while at the same time refusing to let UE to have any benefits under it. UE, therefore, is entitled to avail itself of the competition-preserving conditions imposed by the Board for the benefit of "2-to-1" shippers in approving the UP/SP merger by obtaining access to BNSF.

D. THERE IS NO BASIS FOR UP'S ARGUMENT THAT, BY MODIFYING ITS TRANSPORTATION CONTRACT, UE WAIVED ITS RIGHT TO INVOKE THE CONTRACT MODIFICATION CONDITION.

Citing Decision No. 57, UP also has taken the position that UE's execution of an addendum to the coal transportation contract between UE and UP which existed at the time of the merger precludes UE from exercising its rights under the contract modification condition. See Klym Letter at 1. Decision No. 57 does not support UP's position.

The sole limitations on the applicability of the contract modification condition set forth in Decision No. 57 are that the condition is available only to "2-to-1" shippers whose traffic was committed either to UP and SP by a contract "that was formed when two-carrier competition was available." Decision No. 57, at 6. As demonstrated above, UE clearly is a "2-to-1" shipper. Thus, the only issue is whether UE's contract was in effect at the time of the merger or whether the modifications to the existing contract formed a new contract.

As UE's Petition (at 20-22) makes clear, there is no basis for UP's assertion that the modifications made to the existing UE-UP contract effectively created a new contract. In

fact, the addendum contemplates and is premised upon the continued existence of the contract. Accordingly, because the addendum did not create a new contract, the underlying contract, which was in effect prior to the UP/SP merger, clearly remains in effect, and UE is entitled to the benefit of the contract modification condition.

CONCLUSION

For the reasons set forth above, UE's Petition should be granted. UE's Labadie plant is no less entitled than any other "2-to-1" shipper to avail itself of the competition-preserving rights and conditions, including the contract modification condition, imposed by the Board in approving the UP/SP merger. UP should be held to the representations it made as early as its August 3, 1995 letter to shippers when the merger was announced in which it guaranteed that shippers at "2-to-1" points would "continue to enjoy two-railroad competition". UE is not currently enjoying such competition, and its Petition should therefore be granted.

Respectfully submitted,

Erika Z. Jones/als

Erika Z. Jones
Adrian L. Steel, Jr.
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Washington, DC 20006-1101
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Attorneys for The Burlington Northern and Santa Fe Railway Company

February 8, 2000

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Assistant Vice President-Law

UNION PACIFIC RAILROAD COMPANY



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February 7, 2000

Via Facsimile (817) 352-7154

Peter J. Rickershauser
Vice President Network Development
Burlington Northern Santa Fe
2600 Lou Menk Drive, 2nd Floor
Fort Worth, TX 76131

Re: Union Electric Co. (d/b/a Ameren UE), Labadie, MO

Dear Pete:

John Ransom has referred your letter of February 2 concerning Union Electric at Labadie, MO, to me for a response.

The "2-to-1" Point Identification Protocol which you refer to does not apply in this situation. As you know, that protocol "is to establish procedures and mechanisms for further identifying 2-to-1 shipper facilities open to BNSF as a result of the conditions imposed in the UP/SP merger." During the negotiations among UP, SP and BNSF which led to the Settlement Agreement that the STB approved as a condition of its approval of the UP/SP merger, our railroads agreed that the Union Electric plant at Labadie would receive unique treatment. The parties agreed that UP could negotiate directly with the shipper, and that BNSF would not object to an arrangement, even with another railroad, that met Union Electric's needs for substitute rail competition. After extensive negotiations, UP entered into a settlement agreement with Union Electric to provide the competitive alternative. That agreement remains in effect, leaving BNSF no right to demand direct access to the Labadie plant.

Nevertheless, since you insist that UP would have only two options in responding to your request under the protocol, if in fact it did apply, UP denies BNSF's request for access on the ground that all of the interested parties reached an agreement on a competitive option for the Labadie plant which satisfies the conditions established by the STB in the UP/SP proceeding. UP will describe its position in detail in a submission to the Surface Transportation Board tomorrow, February 8, which responds to a petition by Union Electric's owner, Ameren. A copy of that response will be delivered by hand to BNSF's counsel in Washington.

Sincerely

A handwritten signature in black ink, appearing to read "Lawrence E. Wzorek". The signature is fluid and cursive, written over the word "Sincerely".

cc: John Ransom
Michael Roper (via fax 817-352-2397)

CERTIFICATE OF SERVICE

I hereby certify that copies of the Reply of The Burlington Northern and Santa Fe Railway Company to AmerenUE's Petition for Clarification and Enforcement of Merger Conditions (BNSF-90) have been served on all Parties of Record.

LEON J. BEECH

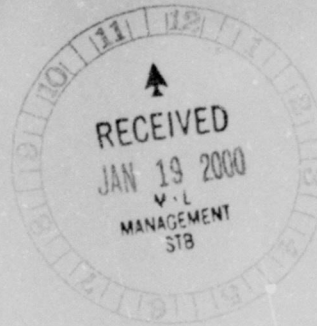
STB

FD-32760

1-19-00

J

January 13, 2000



Surface Transportation Board (STB)

Gentlemen:

I would like to draw your attention to what I believe to be several flagrant violations of the SP/UP Merger Agreement.

Per LETTER OF UNDERSTANDING NO. 5, incumbents whose work was transferred from SP to the UP were not ALL allowed equivalent positions on the UP. Ten (10) Rate Clerks on the SP were forced to bind on lower paying positions on the UP in order to relocate to St Louis. This infraction was not remedied until 2/1/98 when the appropriate positions were finally assigned to those previously denied.

Regarding LETTER OF UNDERSTANDING NO. 12, no former SP employee, to my knowledge, myself included, were advised of who the UP appointed to be the ombudsman nor given information as to how to contact him/her.

In connection with LETTER OF UNDERSTANDING NO. 13, more SP employees made applications for positions bulletined on the UP than were available and no UP employee was offered the separation allowance benefits, even though the work was transferred.

Before relocating to St Louis, Mo., all former SP employees were repeated assured that their jobs and benefits would be protected. This has not been the case. Prior to the arrival of the SP employees, all UP clerks within Revenue Accounting were made Sr. CAR IIs. CAR IIs, CARs and General Clerk positions created on the UP for the incoming SP employees. After little more than a year's time, some of those same positions (except for the Sr. CAR IIs, were abolished and are still slated to be abolished; one (1) so far this year. It appears UP created the SP jobs with the idea of abolishing them when the downsizing commenced. Job abolishment's were not done by seniority but rather by job positions. Only positions held by former SP employees were affected!

I firmly believe that downsizing is an inevitable side affect of all mergers. My concern, however, is that it's not being done in accordance with either the Rules and Provisions contained within the MEMORANDUM OF AGREEMENT entered into by the UP and the SP nor the TCU Union Rules.

Would appreciate your perusal of the above complaint and, hopefully, an encouraging response.

Thank You.

Mary Warren
1128 Rue La Ville Walk
Creve Coeur, Mo. 63141
314-542-0023

CC: Ike Evans, UP President
R. A. Scardellitti, IVP
J. L. Quilty, GC
L. Shields, VGC
Tony Feliciano, LC
Nat'l Labor Relations Board

STB

FD-32760

1-11-00

J



Office of the Chairman

Surface Transportation Board
Washington, D.C. 20423-0001

FILE IN DOCKET

JD-32760

January 11, 2000

Mr. Richard M. Cota
District Chairman 890
Allied Service Division
Transportation•Communications
International Union - AFL-CIO, CLC
980 3rd Street
Gilroy, CA 95020

Dear Mr. Cota:

You have previously written to me regarding the implementation of the Union Pacific (UP) and Southern Pacific (SP) railroad merger and certain adverse effects on clerical employees represented by the Transportation•Communications Union (TCU). As I said I would in my prior response to you, I am getting back to you on certain matters that you raised.

I am enclosing a copy of a response from Mr. J.J. Marchant, Vice President for Labor Relations at UP. Mr. Marchant has reviewed your concerns and has provided information on the actions being taken by the railroad and the protections available to affected employees. I trust that you find this information helpful in addressing your concerns.

As I have in the past, I will have Mr. Marchant's letter and my response made a part of the public docket for the UP-SP merger proceeding. I appreciate your interest in these matters.

Sincerely,

Linda J. Morgan
Linda J. Morgan

Enclosure

J. J. MARCHANT
VICE PRESIDENT
LABOR RELATIONS

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179



December 13, 1999

Ms. Linda Morgan, Chairwoman
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

FILE IN DOCKET

Dec 20 12 27 PM '99

RECEIVED
SURFACE TRANSPORTATION
BOARD

Dear Ms. Morgan:

This has reference to ASD/TCU District Chairman Richard M. Cota's letter addressed to you dated September 27, 1999.

Mr. Cota's concerns center on the abolishment of clerical positions at West Colton, California, and at City of Industry, California. Mr. Cota alleges that, in both instances, Union Pacific either has or will require employees not covered by the ASD/TCU Agreement to perform work previously performed by the clerical positions. We have thoroughly reviewed the allegations made by Mr. Cota and cannot agree with his assessment of the situation.

At West Colton, the Carrier is reducing the number of clerical crew hauling positions simply because there are fewer crews to be hauled at that location. Clerical employees will continue to haul crews at West Colton on an as-needed basis. Moreover, employees affected by abolishment of the surplus positions will be afforded the enhanced employee protective conditions provided by Implementing Agreement No. NYD-217 between Union Pacific and ASD/TCU.

Regarding the use of Crest Conductors at City of Industry to perform certain computer work, the bulk of the computer work has been transferred to clerical employees at St. Louis, Missouri, in accordance with the provisions of Implementing Agreement No. NYD-217. Clerical employees affected by this change will, of course, receive the benefits of Implementing Agreement No. NYD-217. The residual computer work performed at that location by Crest Conductors is being done under the auspices of an Agreement with the UTU Organization which was signed prior to the merger of the SP and UP. The performance of such residual work is not a violation of the ASD/TCU Agreement.

Let me assure you that Union Pacific continues to abide by its labor agreements and apply labor protective conditions in a fair and timely manner.

Sincerely,

A handwritten signature in dark ink, appearing to read "J. J. Marchant", written in a cursive style.

STB

FD-32760

1-11-00

J



Office of the Chairman

Surface Transportation Board
Washington, D.C. 20423-0001

FILE
FD-32760

January 11, 2000

Mr. Richard M. Cota
District Chairman 890
Allied Service Division
Transportation•Communications
International Union - AFL-CIO, CLC
980 3rd Street
Gilroy, CA 95020

Dear Mr. Cota:

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As I have in the past, I will have Mr. Marchant's letter and my response made a part of the public docket for the UP-SP merger proceeding. I appreciate your interest in these matters.

Sincerely,

Linda J. Morgan
Linda J. Morgan

Enclosure

STB

FD-32760

11-25-98

J

*Your Printing Solution.*

700 Rollingbrook
Baytown, Texas 77521
(281) 420-2309
FAX (281) 420-1372



FAX TRANSMISSION

DATE:

11/25/98

TO: SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

FROM:

MARVIN SCHMIDT

FAX #:

565-9004
202-~~565-1611~~

FAX #:

DEAR STB,

Message:

THIS IS FORWARDED
TO ADD TO MY CASE, ~~INDICATING THAT I~~ WILL NOT
RECEIVE THE SUPPORT OF
TEU/ASO, IN THIS MATTER,
LEAVING ME FREE TO ACT
UNILATERALLY.

Thank you,
[Signature]

Number of Pages to Follow:

2

Signed:

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION



AFL-CIO, CLC



ROBERT A. SCARDELLETTI
International President

File: 279-095-40

Subject: Grievances - Southern Pacific
Transportation Company

November 23, 1998

Mr. Marvin Schmidt
P. O. Box 2013
La Porte, Texas 77572

Dear Brother Schmidt:

This will acknowledge receipt of your letter of November 18, 1998, received on November 20, 1998, in which you request assistance in changing the option you elected pursuant to New York Dock Implementing Agreement (IA) No. 217 of December 18, 1996.

Brother Schmidt, the application and interpretation of Implementing Agreement No. 217 is a matter that falls fully under the jurisdiction of Robert F. Davis, President Allied Services Division. Therefore, I provided President Davis with a copy of your letter for his information and comment. I have been informed by Brother Davis that he is aware of the situation and has advised you that the dictates of IA No. 217 are controlling.

Article III - Selection of Forces and Allocation of Seniority of the IA provides in Section 3 that employees affected by the transaction will have four (4) separate and distinct options. Option A is the election of a severance allowance under the separation program as defined in Attachment "A".

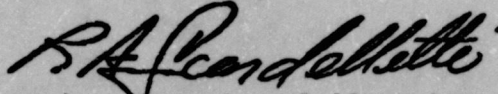
Section 3 also states in pertinent part that the option of each employee will be honored in seniority order and that election or assignment of benefits (options) shall be irrevocable. This particular language is clear and unambiguous.

You have had a change of heart and no longer desire to sever your relationship with the Carrier. You believe you should be permitted to change your mind as a "matter of fairness and equity."

Mr. Marvin Schmidt
November 23, 1998
Page 2

However, the language of the IA leaves no alternative option in regard to your election.

In solidarity,

A handwritten signature in dark ink, appearing to read "R.A. Scardelletti". The signature is fluid and cursive, with a prominent initial "R" and a long, sweeping underline.

Robert A. Scardelletti
International President

cc: Mr. R. F. Davis, Pres. ASD/TCU
Mr. J. A. Prejean II, DC

STB

FD-32760

6-22-98

J



U.S. Department
of Transportation

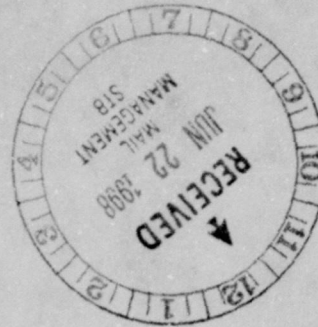
**Federal Railroad
Administration**

Office of the Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

JUN 19 1998

FD-32760



The Honorable Kay Bailey Hutchison
United States Senator
10440 North Central Expressway, Suite 1160, LB 606
Dallas, Texas 75231

Dear Senator Hutchison:

Thank you for your letter on behalf of your constituent, Mr. Noe Gutierrez Jr., who is concerned about a potential Union Pacific Railroad abandonment which he indicated will affect the communities of Bryan and College Station, Texas.

The Federal Railroad Administration (FRA), an agency in the Department of Transportation, has jurisdiction over railroad safety. FRA does not have jurisdiction over economic regulation of the rail industry. The Surface Transportation Board (STB) has jurisdiction over certain surface transportation economic regulatory matters pursuant to Subtitle IV of Title 49, United States Code, as amended by the Interstate Commerce Commission (ICC) Termination Act of 1995. The S.B. is the proper forum to hear and rule on rail abandonment issues raised by Mr. Gutierrez. I have, therefore, taken the liberty of forwarding Mr. Gutierrez's letter to Ms. Anne Quinlan, Office of the Secretary, Surface Transportation Board, 1925 K Street, N.W., Washington, D.C. 20423-0001. Ms. Quinlan can be reached at (202) 565-1652.

I appreciate your interest in this matter and look forward to working with you on other transportation issues of importance to you and your constituents.

Sincerely,

Jolene M. Molitoris
Administrator

cc: Washington Office

KAY BAILEY HUTCHISON
TEXAS

COMMITTEES:
APPROPRIATIONS
COMMERCE, SCIENCE,
AND TRANSPORTATION
RULES AND ADMINISTRATION

United States Senate

WASHINGTON, DC 20510-4304

May 11, 1998

RESPECTFULLY REFERRED TO:
Congressional Liaison
Federal Railroad Administration
400 Seventh Street Sw
Washington, DC 20590

Dear Sir/Madam:

The attached communication was forwarded to Senator Hutchison by a constituent who is concerned about a matter over which you have jurisdiction. I would appreciate it if appropriate inquiries could be initiated on this individual's behalf, and if a full response could be prepared for me to report to the constituent.

It would be very helpful if the attached were to accompany your response. In the event you require more information, please do not hesitate to contact me in Dallas at (214)361-3500.

Thank you for your courtesy.

PLEASE REPLY TO:

Office of Senator Kay Bailey Hutchison
Attention: Mary Fae Kamm
10440 North Central Expressway, Suite 1160
LB 606
Dallas, Texas 75231

Enclosure

Author: "Noe Gutierrez; Jr." <noeg@ci.bryan.tx.us> at internet
Date: 5/1/98 5:37 AM
Priority: Normal
CC: amy henderson at Hutchison-DC
CC: cynthia hall at Hutchison-Dallas
CC: larry dirita at Hutchison-DC
TO: senator at Hutchison-DC
Subject: Impending Union Pacific Problems

----- Message Contents -----

The following letter is being sent to Senator Hutchison's e-mail address as well as those of several of her staffers. Written copies will be sent to other individuals who do not indicate an e-mail address. If your software can not handle the .gif attachment, please let me know and I will mail you a printed copy.

Noe Gutierrez, Jr.
4006 Woodcrest Dr.
Bryan, Tx 77802

Dear Senator Hutchison,

It is with great concern that I write to you regarding a situation which has arisen here in the communities of Bryan and College Station, Texas. As you are well aware, the Union Pacific Railroad (UP) has been experiencing unprecedented difficulties in meeting the transportation needs of many of their customers throughout their service territory. The problems UP is experiencing also affect customers not directly served by them in other parts of the country. I was under the belief that UP was now under strong pressure to upgrade their infrastructure in order to improve their capacity for handling trains. It seems that this is not necessarily the case.

As I describe the impending problems coming our way, I will make reference to several geographic locations. A map has been prepared which can be found at the following web site: <http://www.ipt.com/aboard/bcs/regional012798.gif>. The references made on the map regarding Amtrak are out of date as Amtrak quit serving our area in 1995, so I have updated the map and attached it to this mailing as a file called localrxr.gif.

I would also like to point out that the issue I am addressing here does not have anything to do with the proposed study to relocate ALL railroad mainline operations out of Bryan and College Station. That study is being sponsored by Texas A&M University and you may have already heard of it. That is a separate issue which I am sure will generate a much greater storm of protest from the county residents who may be displaced by the rail relocation proposed by that study. I may write regarding that issue at a later date.

It is my understanding that UP is considering an agreement with the Texas Department of Transportation (TXDOT) in which UP is to abandon a section of rail line through downtown Bryan which used to be the Southern Pacific Railroad's (SP) Dallas to Houston mainline. The reason for this abandonment is so that TXDOT can proceed with the widening of State Highway 21 through Bryan without having to rebuild a rail bridge which currently carries the aforementioned mainline over the highway. In exchange for this abandonment, UP will concentrate the rail traffic of both lines onto their other line (a

former Missouri Pacific Line) through Bryan and College Station. TXDOT would pay for the minor track rebuilding necessary to convert the one remaining rail-served business in Bryan, a Producer's Cooperative Distributor just north of the rail bridge, to a dead-end customer. They would be served by the remainder of the SP mainline which would be downgraded to an approximately 18-mile long spur from Hearne, Tx.

In addition to the above changes, TXDOT was also to have paid for the construction of an interchange track north of the Mumford Community in Robertson County where the combined rail traffic would be separated at a place called Tatsie where another former SP rail line (the Dalsa line) intersects with the UP's line to Ft. Worth. By doing this, TXDOT hopes to save approximately \$1-2 million dollars by not rebuilding the rail bridge. I believe this arrangement is not in the best interests of the rail industry, its customers, and the people of this community and respectfully request that your office intervene until the arrangement can be more thoroughly evaluated.

One reason I believe this agreement should not be consummated is the fact that the former SP line through Bryan is a direct Dallas-Houston route. The proposed abandonment flies in the face of current pressure on UP to expand it's infrastructure in order to alleviate the capacity problems UP has been experiencing since its acquisition of the SP. Railroad companies have been downsizing for decades, but UP has a history of acquiring other major rail carriers, stripping out "redundant" assets, and selling them off while concentrating increasing amounts of rail traffic on fewer lines. Where "shortline" or other railroads could not substitute for the rail service in those areas, smaller rail customers have been abandoned in favor of operational downsizing. While short term cost-cutting may please investors, the future of the rail industry is being placed in jeopardy. This shortsighted "make the profits now" trend which has pervaded railroad philosophy for the last several decades must stop.

The former SP line offers a ready-made solution to future capacity growth and an alternative route for trains on the UP's former Missouri Pacific route should temporary re-routing be needed. Even with current operations on both lines, it is not unusual to see sidings in the region blocked for days with crewless trains. On April 14th, the Bryan Siding was blocked with a crewless train and another was approaching. The crew on that train was about to expire their maximum 12-hour work limit, so they were forced to go north and park their train on the former SP mainline to keep the other line fluid. Several hours went by before a fresh crew could be put on the train to take it to Hearne.

I can not imagine how UP can successfully proceed with their plan to eliminate the former SP route and concentrate all its traffic on the other lines which are already heavily used. Once the SP line is abandoned, the right-of-way sold off, and the SH21 widening project completed without a provision for a future rail bridge, the route will be lost forever. There will be no room for future growth and rail service integrity can only deteriorate for both local customers and those UP serves throughout the state.

Another reason I believe this arrangement is folly is because of the direct impact it will have on local rail customers. There are several customers along the former Missouri Pacific route, but there is only one (now) on the former SP route. There used to be one located in the Bryan Business Park in far north Bryan, but they have since terminated their shipping agreement with UP citing unreliable service. I doubt UP is lamenting this at all since they probably received less than 50 carloads of material per year. This leaves just one customer, Producers Cooperative, just north of the SH21 bridge. UP has assured them and local government

officials that there would be no interruption of service and supposedly no rate increase. I understand that UP has done this before, then reneged on their statements in other similar situations. Burlington Northern-Santa Fe (BNSF) has also done this. Most notable have been UP abandonments in Garland, Tx which eventually led to the formation of a "shortline" railroad to serve several local customers. West of Amarillo, BNSF raised rates on the remaining section of a former Rock Island Railroad mainline of which only 14 miles remained. The remaining customers were forced to relocate or cease business. That line is now being torn up.

One customer receiving only about 100 carloads per year at the end of an 18-mile dead-end track will not keep the line profitable, and abandonment of the remaining line would be inevitable. The only possibility of a long spur track from Hearne being profitable enough for UP to keep it "alive" is the impending construction of a new rail-served chemical plant this year in the Bryan Business Park and a future textile plant which is also planned for that area. Still, one would have to have concrete figures with which to work to determine profitability. As these plants are in the future, I do not have that information. Operationally, though, it makes more sense to abandon the rail line from Hearne to north Bryan and serve the north Bryan customers via the remains of the former SP line as a spur from downtown Bryan, a much shorter distance and which would allow one local train to service all the customers rather than two. This would necessitate rebuilding of the rail bridge, however, and I feel TXDOT would oppose such a move. (Why does TXDOT seem to be so anti-rail?)

Another reason the former SP line should not be abandoned is the possibility of the return of passenger rail service to the area. AMTRAK ceased operation through here in 1995 as part of the ill-advised Mercer study. Now, there is no direct passenger rail link between two of the largest population centers in the state, Dallas-Ft. Worth and Houston. Retaining the former SP route intact would not only yield capacity relief for the UP but a route through this part of Texas where a passenger train could travel while minimizing the impact of additional traffic on UP's more heavily travelled Ft. Worth route. When AMTRAK's Houston leg of the Texas Eagle did pass through here, it did not stop in Bryan - it stopped in College Station. Minimizing stops makes sense, but if AMTRAK (or, in the event of AMTRAK's demise, some other passenger carrier) were to restore service through here and a stop in Bryan were planned, the former SP route offers a path directly through the center of the city. A stop here would be entirely appropriate if passenger patterns justified it. As far as College Station, there is only one set of tracks through the city, but the AMTRAK station (such as it was) was torn down shortly after the cessation of service. A new facility would have to be built.

The proposed abandonment of the former SP line through Bryan would also have another impact. If the proposed rail relocation project I mentioned at the beginning of this letter were to actually succeed, the right-of-way corridor could be converted to some sort of rail transit system whereby local freight traffic could use the lines as a through route by night to switch local customers and some sort of "heavy rail" commuter system could use them by day. Passengers could be taken directly between the centers of College Station (Texas A&M) and Bryan, with possible route extensions to the Business

Park and even Hearne. The future textile plant would need over 300 employees, and Hearne could serve as a possible source of employees. Such a system would necessitate the rebuilding of the rail bridge over SH21, again something which TXDOT would likely oppose. If the downtown Bryan section of line is abandoned and the right-of-way sold off, there would be no way to

establish any sort of rail-based transit system between Bryan and College Station..

I am well aware that there are federal mandates for railroads to reduce the number of grade crossings by 25% by the end of the century. While this may seem like a noble and responsible concept, I feel that the huge rail "monopolies" will be using this as another excuse to abandon "redundant" or less profitable routes. Unfortunately, rushing to fulfill this mandate while realizing short-term cost benefits will further damage the rail industry and compromise it's reliability. Such compromises have already cost billions of dollars to the rail customers of this state and this nation, costs which will ultimately be passed down to the consumer. I feel that there is insufficient planning in place to try to meet both the federal goals and customer requirements.

TXDOTS's and UP's desire to cut short-term costs with no apparent concern for the future of the rail freight or passenger industry is deplorable and irresponsible. I believe that if such an arrangement is actually planned, or if indeed it is already in progress, it should be stopped immediately. Please let me know if your office supports the basic concepts of this letter and, if so, what you can do to help or what additional information you need. Thank you.

STB

FD-32760

6-2-98

J

1

OF

2

CASE NOT SCHEDULED FOR DEBATE
AS OF THIS FILING

No. 96-1373, at 41.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WESTERN COAL TRAFFIC LEAGUE, ET AL.
Petitioners

v.

SURFACE TRANSPORTATION BOARD
AND UNITED STATES OF AMERICA,
Respondents

and

UNION PACIFIC, ET AL.,
Intervening Respondents

ON PETITIONS FOR REVIEW OF ORDERS OF
THE SURFACE TRANSPORTATION BOARD

BRIEF OF RESPONDENT
SURFACE TRANSPORTATION BOARD

CENTRAL ADMINISTRATIVE UNIT

REC'D:

DOCUMENT # 6-2-98 11:04:09 am

FD#32760 B.09

HENRI F. RUSH
General Counsel

LOUIS MACKALL, V
Attorney

Surface Transportation Board
Washington, D.C. 20430

CERTIFICATE AS TO PARTIES,
RULINGS AND RELATED CASES

We concur in the joint certificate filed by the parties on October 10, 1997. We would update that statement by noting that there are only four remaining petitioners: Western Coal Traffic League, Enterprise Products Company, The Burlington Northern and Santa Fe Railway Company, and the City of Reno. No interveners have joined these petitioners in the opening briefs filed in this Court challenging the decision of the Surface Transportation Board (STB or Board). It is our understanding that City of Austin, City Public Service Board of San Antonio, National Industrial Transportation League, Society of the Plastics Industry, Inc. (amicus only), Montell USA, Inc., PPG Industries, Inc., and Geneva Steel Company have formally withdrawn, or have sought leave to withdraw, from this case.

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GLOSSARY OF ABBREVIATIONS USED IN THIS BRIEF

BNSF	Burlington Northern and Santa Fe Railway Company
BTU	British Thermal Unit
CAA	Clean Air Act
CEQ	Council on Environmental Quality
CPL	Central Power and Light
DOJ	United States Department of Justice
DOT	United States Department of Transportation
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FONSI	Finding Of No Significant Impact
ICC	Interstate Commerce Commission
ICCTA	ICC Termination Act of 1995
J.A.	Joint Appendix
NEPA	National Environmental Policy Act
PMP	Preliminary Mitigation Plan
PRB	Powder River Basin
R.V.S.	Reply Verified Statement
SEA	Section of Environmental Analysis (STB)
SIP	State Implementation Plan
SP	Southern Pacific Rail Corporation
STB	Surface Transportation Board
UP	Union Pacific Railroad Company
V.S.	Verified Statement
WCTL	Western Coal Traffic League

Nos. 96-1373, et al.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WESTERN COAL TRAFFIC LEAGUE, ET AL.,
Petitioners

v.

SURFACE TRANSPORTATION BOARD
AND UNITED STATES OF AMERICA,
Respondents

and
UNION PACIFIC, ET AL.,
Intervening Respondents

ON PETITIONS FOR REVIEW OF ORDERS
OF THE SURFACE TRANSPORTATION BOARD

BRIEF OF RESPONDENT
SURFACE TRANSPORTATION BOARD

STATEMENT OF JURISDICTION

We concur in the joint statement of jurisdiction filed by
the parties on October 10, 1997.¹

ISSUES PRESENTED

1. The Western Coal Traffic League (WCTL) represents 20
electric utility companies that receive rail shipments of coal.
The issue raised by WCTL is whether the Board's refusal to deny
the merger or to require a substantial divestiture of rail lines

¹ That joint document reflected our position that the City
of Reno's issues were not ripe or final. See this Court's order
of April 30, 1997, responding to our motion of March 4, 1997.

— based on claims that WCTL's members would be substantially harmed (a) by a reduction in the number of major railroads in the "western coal market" from 3 to 2, (b) and by collusion among the remaining railroads — was arbitrary and capricious.

2. Enterprise Products Company (Enterprise) was served by only one of the applicants before the merger. The merger removed the possibility that the other applicant would construct a new spur that would have reached a point a mile away from Enterprise's plant, from which it believes a connection could have been constructed. The Board declined to require applicants to permit a second rail carrier direct access to Enterprise's plant over applicants' lines unless the shipper or some other party actually constructs a connection. The issue is whether the Board's decision denying the requested relief — because it would have improved Enterprise's pre-merger situation and because vigorous geographic competition made that remedy unnecessary — was arbitrary and capricious.

3. The Burlington Northern and Santa Fe Railway Company (BNSF) received 4000 miles of trackage rights as a condition to the approval of this merger. The Board also gave the Texas Mexican Railway Company (Tex Mex) restricted trackage rights to operate over one small segment of applicants' lines between Corpus Christi and Beaumont, TX, overlapping a tiny part of BNSF's newly granted trackage rights. BNSF claims that the Board's decision granting these rights to Tex Mex was arbitrary and capricious.

4. The Board prepared an environmental assessment (EA) in this case and determined that no environmental impact statement (EIS) was required. The Board also determined that the conformity guidelines under the Clean Air Act (CAA) do not apply. The issue raised by the City of Reno (Reno) is whether the Board's decision not to prepare an EIS or to undertake a conformity determination was arbitrary and capricious.²

STATUTES INVOLVED

The relevant statutes are set forth in Addendum A.

STATEMENT OF THE CASE

a. Overview. The proceeding under review concerns an application under 49 U.S.C. 11343-47 for a merger between two major western railroads — the Union Pacific Railroad Company (UP) and the Southern Pacific Rail Corporation (SP) — and their affiliates. The application was approved by the STB on August 12, 1996. Decision No. 44 (STB Aug. 12, 1996) (J.A. ____). The Board found that the merger would result in significant transportation benefits in terms of improved service and reduced costs that would substantially outweigh any anticompetitive

² Reno/Sparks Indian Colony has lodged an amicus brief in support of Reno. Because that brief focuses only on an issue not raised by any other party, i.e., the adequacy of the Board's consultation with native Americans during the environmental process, UP, et al., have asked the Court not to accept or consider this brief. If the Court permits the brief to be filed, we request an opportunity to file a short reply brief demonstrating the extensive contacts by the STB with the Colony during the environmental process.

consequences, as mitigated by the conditions that were imposed.
Id. 104 (J.A. ____).

b. Statutory Background. In 1920, Congress established a national policy favoring railroad consolidations in the interest of economy and efficiency. United States v. Lowden, 308 U.S. 226, 232 (1939). Congress reaffirmed its rail consolidation policy in 1940, 1976,³ in 1980,⁴ and most recently in the ICC Termination Act of 1995 (ICCTA).⁵ 49 U.S.C. 11324-25 (new).

Under former 49 U.S.C. 11344(c) (now 49 U.S.C. 11324(c)), the Board is required to approve rail consolidation transactions that are in the public interest. "The Act's single and essential standard of approval is that the Commission find the [transaction] to be 'consistent with the public interest.'" ⁶

³ Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31 (1976).

⁴ Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

⁵ ICCTA, Pub. L. No. 104-88, 109 Stat. 803, abolished the ICC and transferred certain functions and proceedings to the STB. Section 204(b)(1) of ICCTA provides, in general, that proceedings pending before the ICC on the effective date of ICCTA shall be decided under the law in effect prior to that date, insofar as they involved functions retained by ICCTA. The administrative proceeding was pending with the ICC prior to the ICCTA's effective date and relates to functions that continue to be subject to Board jurisdiction. Although the prior law is applicable, ICCTA made no changes that would affect this proceeding.

⁶ See Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980) (MKT), cert. denied 451 U.S. 1017 (1981); accord Penn Central Merger Cases, 389 U.S. 486, 498-499 (1968); Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir. 1997) (Western Resources), pet. for rehearing denied May 16, 1997.

In determining the public interest,⁷ the agency's well-established and court-approved practice is to balance the gains in operating efficiency and marketing capability realized through a particular railroad consolidation against any consequent reduction in competition. 49 CFR 1180.1(c); Southern Pacific Transp. Co. v. ICC, 736 F.2d 708, 717 (D.C. Cir. 1984) (SP v. ICC); Western Resources, 109 F.3d at 784.⁸

Merger Conditions. As this Court has consistently recognized, the STB has broad discretion in determining whether or not merger conditions are required, and in shaping those conditions. See, e.g., Grainbelt, et al. v. STB, 109 F.3d 794, 798 (D.C. Cir. 1997) (Grainbelt). Although the STB has broad power to impose conditions (see 49 U.S.C. 11344(c)), the agency

⁷ The statute listed five factors to be considered, among others, in making that public interest determination:

(A) the effect of the proposed transaction on the adequacy of transportation to the public; (B) the effect on the public interest of including or failing to include, other rail carriers in the area involved in the proposed transaction; (C) the total fixed charges that result from the proposed transaction; (D) the interest of carrier employees affected by the proposed transaction; and (E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

Former 49 U.S.C. 11344(b)(1), new 49 U.S.C. 11324(b).

⁸ The Board's statutory mandate thus contrasts somewhat with that of the United States Department of Justice (DOJ) and the Federal Trade Commission in enforcing the antitrust laws. The policies embodied in the antitrust laws provide guidance in the agency's competitive analysis, but they are not determinative. See McLean Trucking Co. v. United States, 321 U.S. 67, 87-88 (1944); Minneapolis & St. Louis Ry. Co. v. United States, 361 U.S. 173 (1959) (Minneapolis).

has a long-established policy of not burdening a merger with conditions unless they are necessary either to ameliorate anticompetitive impacts or to protect essential services. See Railroad Consolidation Procedures, 363 I.C.C. 784, 788-789 (1981), codified at 49 CFR 1180.1. The ICC adopted, and the Board has continued, this policy because conditions may lessen the benefits of a consolidation to both the involved carriers and to the shipping public, thereby reducing the incentive for carriers to initiate or proceed with efficiency-producing consolidations. 49 CFR 1180.1(d)(1); Union Pac. - Control - Mo. Pac.; W. Pac., 366 I.C.C. 459 (1982) (UP/MP/WP); *aff'd SP v. ICC*, 736 F.2d at 721 (ICC has extraordinarily broad discretion whether to impose protective conditions).

The agency's consistent policy is to impose conditions only if they are operationally feasible, would ameliorate or eliminate a harm resulting from the transaction, and would result in greater public benefit than detriment to the transaction. See, e.g., UP/MP/WP, 366 I.C.C. at 562-565. Moreover, the ICC's policy was to impose conditions commensurate with the competitive harm threatened by the transaction, not to level the playing field by introducing new competition. Burlington Northern, Inc. - Control & Merger - St. L., 360 I.C.C. 784, 952 (1980) (BN/Frisco), *aff'd MKT*, 632 F.2d 392, cert. denied 451 U.S. 1017 (1981). Nor would the agency "broadly restructure the competitive balance among railroads with unpredictable results."

Santa Fe Southern Pacific Corp. — Control — SPT Co., 2 I.C.C.2d 709, 827 (1986); 3 I.C.C.2d 926, 928 (1987) (SFSP).

c. The Merger Proceeding Before the STB. UP and SP filed their merger application on November 30, 1995, proposing to create an integrated rail system of approximately 40,000 miles in the western United States. After reviewing a voluminous record of thousands of pages of pleadings submitted by many parties, and hearing eleven hours of oral argument, the STB granted the application on August 12, 1996. See Decision No. 44 (J.A. ____).

The STB found that the merger would result in annual cost savings to the merging carriers of \$627 million. Savings include better equipment use, more efficient use of yards and terminals, more efficient through routes, and elimination of redundant facilities and personnel. The STB carefully examined the competitive arguments raised by the petitioners here and by many other parties. The Board concluded that any competitive harms from the merger "will be heavily outweighed by the broad-based, positive effects of the merger as conditioned." *Id.* 104 (J.A. ____). It said that "many of these benefits will be passed through to shippers in terms of lower rates and better service." *Id.* The Board explained that (*id.* 104):

The efficiency savings of the merger are very substantial, and the clear trend since 1980 has been that when railroads have reduced their costs through mergers or otherwise, those savings have largely been passed on to their shippers in terms of lower rates and improved service. Rail rates have decreased remarkably

since 1980, despite the fact that most shippers are served by a single rail carrier, and few are served by three. Because of the several major mergers since that time, and due to the formation of Conrail as the single Class I carrier in the Northeast, large regions of the country are now served by a single major rail carrier or by two such carriers. Even with this structure, rail competition has thrived, and shippers have continued to enjoy increasingly lower rates. Since 1980, the number of Class I railroads has decreased from 26 to 10, while the average rail rate per ton has declined more than 37% on an inflation-adjusted basis from its peak in 1981 through 1993.

In approving the merger, the Board took into account the weakened and declining condition of SP. The Board explained that "SP has been declining for over a decade; it is not able to generate sufficient capital to invest in the quality service desired by many of its shippers." *Id.* 104. The Board also noted that under these circumstances, SP will not be able to maintain its competitive presence in the long run. *Id.* 272.

The Board rejected the claims of various parties that the competitive consequences of the merger would be severe, and declined to require divestiture of major portions of SP's lines, to other rail carriers.⁹ The Board found that a breakup of the SP network would not be in the public interest because it would negate many of the public benefits of the extensive unified

⁹ These parties sought divestiture of lines between: Houston and New Orleans; Houston and St. Louis; Houston and Laredo, TX; and Chicago and Oakland.

system resulting from the merger, would restructure the competitive balance among railroads with unpredictable effects, and would not be necessary to correct competitive problems. *Id.* 156-164.

The Board found that potential anticompetitive impacts would be greatly ameliorated by various settlement agreements. The most important of these, between applicants and BNSF, permitted BNSF, by far UP's most vigorous competitor, to serve all shippers that would otherwise have gone from two directly serving railroads to one (2-to-1 shipper).¹⁰ *Id.* 103. This was accomplished mainly by giving BNSF trackage rights over about 4,000 miles of UP and SP lines, and permitting it to serve all 2-to-1 shippers (but not other shippers) located on those lines.¹¹ In addition, the BNSF agreement gave BNSF access to certain individual shippers other than 2-to-1 shippers. Another key settlement agreement was that entered between applicants and the Chemical Manufacturers Association, which expanded competitive options for shippers.

Using the two major settlement agreements as a starting point, the Board imposed several broad-based, additional conditions. First, the Board gave BNSF the authority to serve

¹⁰ The agreement also defined 2-to-1 shippers to include all shippers who before the merger could reach both UP and SP, and no other rail carrier, through reciprocal switching or over a short-line carrier.

¹¹ BNSF was also permitted to purchase an important 350 mile line between Iowa Junction and Avondale, LA.

all new facilities, including transloading facilities, located on all UP and SP lines over which BNSF obtained trackage rights. Second, the Board permitted all 2-to-1 shippers to open up existing contracts with UP and SP to permit BNSF to gain immediate access to half of that traffic. *Id.* 106. Third, the Board permitted any exclusively-served shipper that builds out (or induces someone else to build out) to a point that would have allowed UP service in addition to SP service, or vice versa, to receive service from BNSF or some other neutral carrier at the new connection point. Finally, the Board imposed a 5 year oversight provision to ensure that its competitive conditions are working as intended.

d. The petitioners. This section focuses on the specific issues raised by the four petitioners and the parts of the record relevant to their particular claims.

1. WCTL is a trade association representing 20 electric utility companies interested in rail shipment of western coal. See list in WCTL comments, attachment 1 (J.A. ____). It claims generally that the merger will have anticompetitive impacts within the "western coal transportation market" by reducing by one the number of major coal hauling carriers originating coal shipments in the west. It also asserts that the remaining carriers will collude rather than compete, and that it is impossible for BNSF to compete effectively where it is operating over the trackage rights the Board imposed because the fee paid to UP is too high. WCTL argues that the Board erred in not

denying the merger or requiring divestiture to another carrier of SP's lines from Provo, UT, through Denver, CO, Kansas City, KS, St. Louis, MO, to Chicago, IL.

A. Market Definition. The STB did not agree with WCTL's definition of the west as a single coal transportation market. The Board explained that "there is little meaningful source competition between UP and SP for coal because each originates coal that typically serves different markets." *Id.* 127 (J.A.__). The Board noted that most of UP's coal originates in the PRB, while SP's coal comes out of the Uinta Basin in Utah and Colorado. *Id.* The Board said that:

[t]hose coals are fundamentally distinct in terms of price and physical characteristics. PRB coal is lower-cost, lower-BTU coal that invariably offers a lower delivered cost than Colorado/Utah coal, with the exception of minemouth coal-burning operations or for utilities with significantly shorter rail hauls from the Uinta Basin than the PRB.

The Board explained that if a plant can burn PRB coal, it will do so except to the extent that it needs to use Colorado/Utah coal or other higher-BTU coal for blending purposes. *Id.* The Board also indicated that (*id.*):

those plants (especially those in the Midwest and East) that cannot burn lower-BTU coal will instead look to Colorado/Utah coal and other higher-BTU coals in the East and West, and not PRB coal, as their competing alternative source.

The Board concluded that "UP competes intensively, head-to-head, against BNSF for originations of PRB coal, and not against SP movements of higher-priced Colorado/Utah coal." *Id.* In sum, the Board found that the very broad and vague market definition offered by WCTL, "western coal transportation," was not valid for purposes of analyzing the effects of the merger or determining the likelihood of competitive harm for particular coal shippers.

B. Duopoly. The Board addressed WCTL's duopoly arguments in detail in Decision No. 44, at 116-21, and 267-273 (J.A. ____) where it found that the merger should result in rivalry, not collusion. First, the Board distinguished and partially overruled another merger decision where the ICC had expressed concerns that a merger resulting in two-railroad markets might risk collusion. See, SFSP, 3 I.C.C.2d at 935.¹² The Board explained that (*id.* 117):

The agency also has the benefit of nine years of additional experience with decreasing rates in two-carrier rail markets under Staggers Act deregulation. We now believe that rail carriers can and do compete effectively with each other in two-carrier markets. We also think that the fact that applicants and BNSF have

¹² In SFSP, the ICC had expressed annoyance with applicants' proposed settlement agreement in light of their earlier insistence that any such agreements to ameliorate competitive problems would kill the merger. When applicants submitted a settlement proposal at the eleventh hour, the ICC rejected it as untested by public scrutiny, and possibly dangerous. In Decision No. 44, *id.* 117, the Board said: "Here in contrast, applicants presented their plan for addressing competitive harms at the outset. This permitted us to examine the plan in detail in light of numerous comments."

granted access to each other's markets is not a splitting of markets, but a pro-competitive action that promotes the public interest.

The Board agreed with the assessment of the United States Department of Transportation (DOT) that where two firms compete, the result may vary from intense rivalry to tacit collusion, depending on the industry, but that in the U.S. rail industry, two-carrier competition appears to work well, generally making a Board remedy in 3-to-2 situations unnecessary. *Id.* 117, 120, DOT Br. (in STB proceeding) at 9, 21-24 (J.A. ____ - ____). The Board indicated that it has been its experience that two-carrier rail markets have been characterized by intense competition. *Id.* 118. It noted that CSX and NS are the only two rail carriers serving a large portion of the east, and that "competitive pressures have been sufficient to spur railroads to enhance productivity," and that these "competitive pressures have ensured that the preponderance of these gains have been passed along to shippers in the form of lower rates and better and more responsive service." *Id.* The Board also noted that "[t]here is no evidence that railroads have colluded, overtly or tacitly, to maintain inefficient operations, unresponsive service, or above-market rate levels." *Id.*¹³

¹³ It pointed out that the United States Department of Justice (DOJ) was unable to cite any such examples. Decision No. 44 at 118 (J.A. ____).

The Board also noted that another example of effective competition in a two-carrier market is the PRB, where rates offered by both BNSF and UP have continued to decline. The Board concluded that BNSF will continue to compete aggressively with UP/SP.

C. The Trackage Rights Fee. The Board rejected the argument of WCTL and others that the trackage rights fee that BNSF will pay to UP is too high to permit it to be an effective competitor using those rights. *Id.* 140-142 (J.A. ____). It found that the negotiated fee of 3.0 to 3.1 mills per gross ton mile to be well within a reasonable level. The Board found this level to be fully consistent with the principles set forth in St. Louis S.W. Ry. Compensation—Trackage Rights, 4 I.C.C.2d 668 (1988); 5 I.C.C.2d 525 (1989); 8 I.C.C.2d 80 (1991); 8 I.C.C.2d 213 (1991) (SSW Compensation) (compensation must include portion of fixed costs and of return on investment of shared properties to place trackage rights tenant in same position as landlord).¹⁴

The Board found that the calculation of 1.8 mills submitted by WCTL witness Crowley contains "several significant errors that make his calculation totally unreliable." *Id.* 141 (J.A. ____). It ruled that Crowley erred by valuing all of the trackage rights property, including the better maintained and generally more

¹⁴ The ICC's use of the SSW Compensation method was affirmed by this Court in Missouri Pac. R.R. Co. v. ICC, 23 F.3d 531 (D.C. Cir. 1994) (MoPac).

valuable UP property,¹⁵ by pro-rating the sales price for the entire SP system; that he improperly depreciated the investment base to zero over 32 years despite the fact that the plant will have to be constantly replaced; and that he used the wrong interest rate, "an after-tax cost of capital, despite the fact that the ICC consistently found that the pre-tax cost of capital should be used to reflect income taxes." *Id.* The Board noted that just correcting the depreciation and interest rate errors would yield a fee of 3.84 mills, which would be much higher than the rate the parties actually negotiated. *Id.* 141.

2. Enterprise is a producer of hydrocarbons at Mont Belvieu, TX. Although Enterprise was solely served by SP prior to the merger, it claims the merger eliminated the possibility that UP would construct a spur (the proposed Mont Belvieu Branch) to serve other nearby shippers. It argues that if that 10½ mile spur had been built to reach various shippers on SP's Baytown Branch, the spur could have been extended, or an industrial track constructed, about 1 mile to allow a second rail carrier, UP, to provide service to Enterprise.

Enterprise asked for the Board to require UP/SP to build the Mont Belvieu Branch, and to give BNSF or some other carrier trackage rights over it. Alternatively, it asked for the Board to require a shortline carrier to take over the Baytown Branch

¹⁵ BNSF would operate over 1,727 miles of UP track, and 2,241 miles of SP track. *Id.* 141, n. 166 (J.A. ____).

and permit another major railroad to provide a connection, presumably through trackage rights.

The Board explained in Decision No. 68 (J.A. ___ ___) that it had already imposed generic relief addressing lost opportunities to build-in/build out to a second carrier of which Enterprise may take advantage. Decision No 68, at 4, Decision No. 44 at 146 (J.A. __, __). Under the build-out condition, if a shipper was served solely by UP or SP before the merger, but could have built out to the other carrier, that option is preserved. To take advantage of the condition, however, a connection must actually be built by the shipper or by someone other than UP/SP. If that is done, then BNSF or some other carrier will be granted trackage rights necessary to reach a connection with the new line and provide competitive service.

The Board found, however, that the relief Enterprise sought — permitting Enterprise access to a second carrier where no connection is ever built — would have exceeded the relief previously accorded in the build-in/build-out context. Decision No. 68, at 3. Shippers that lose a build-out option have not been treated as 2-to-1 shippers immediately eligible for service from a second carrier. Moreover, the Board found that remedy unnecessary because Enterprise's rates will continue to be restrained by substantial geographic and source competition after the merger. *Id.* 5, n. 7.¹⁶ The Board explained in Decision No.

¹⁶ The record also shows that "a sizeable portion of Enterprise's transportation requirements are met by trucks and (continued...)"

44, at 124-126, that geographic competition is particularly strong for plastics and chemicals shippers in the Gulf Coast region because numerous producers of fungible products, many having multiple rail carrier service, are located very near each other, and must compete in the same end markets. See Enterprise March 28 Comments at 2-3 (J.A. ____).

3. BNSF, a major Class I rail carrier operating over 35,000 miles of rail lines throughout the western United States, supported the merger. It was the beneficiary of a settlement agreement in which it obtained 4,000 miles of trackage rights over which it is now operating, permitting more efficient routings for many of its existing shippers and serving new shippers and new markets over UP and SP lines. As noted above, the BNSF settlement agreement was expanded in several respects and imposed by the Board as a condition to the merger. Nevertheless, BNSF is objecting that the Board, in another condition that it imposed, permitted Tex Mex to operate over trackage rights between Beaumont, TX and Corpus Christi, TX which overlaps with a small portion of BNSF's new trackage rights. The Tex Mex and BNSF trackage rights actually overlap only on the tiny subsegment between Placedo and Bloomington, TX, a segment which to the best of our knowledge contains no 2-to-1 shippers eligible for service from either Tex Mex or BNSF.

¹⁶(...continued)
pipelines." Enterprise March 28 comments at 2 (J.A. ____).

Tex Mex is a small Class II railroad that owns and operates a 157-mile line between Laredo and Corpus Christi in the southern panhandle of Texas. In Decision No. 44, the Board gave it limited trackage rights between Corpus Christi and Beaumont, TX. The traffic Tex Mex moves over these rights must move over Tex Mex's lines in prior or subsequent service. Tex Mex had argued that the merger would result in a loss of 34% of its revenues as Mexican traffic that it once interlined with SP would be diverted to a more efficient, single-line UP routing through Laredo. The Board granted Tex Mex trackage rights to assure that it would be able to continue to be economically viable and to provide essential service and a strong competitive alternative to UP's route, over the important Laredo gateway into Mexico. *Id.* 147-151. Applicants do not contest this condition here.

4. Reno. Reno's concerns relate to projected increased traffic that will move over existing rail lines through that city due to the merger.¹⁷ Before the Board, Reno raised issues about such issues as safety at grade crossings, noise, and air pollution. Reno argues on brief that the Board erred because it declined to do an Environmental Impact Statement (EIS) and because it did not comply with certain EPA regulations adopted under the Clean Air Act (CAA).

¹⁷ We note that the projected increase here, from about 13 trains per day to about 25, would merely bring traffic back to its level in the 1980's, before SP's severe financial decline. In the late 1940's, traffic levels were as high as 40 trains per day. See Preliminary Mitigation Plan, at 4-2 (J.A. ____).

A. The EIS issue. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq., requires federal agencies to "the fullest extent possible" to consider the environmental consequences of "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). The Council on Environmental Quality (CEQ) has promulgated regulations establishing a general framework for federal agency compliance with NEPA. 40 CFR 1500-1508. Under CEQ's rules, where there may be significant environmental effects, agencies are to prepare Environmental Assessments (EAs) which are defined as "concise public document[s]," that "[b]riefly provide sufficient evidence and analysis for determining" whether the proposed agency action will significantly affect the environment. 40 CFR 1508.9. An EA that concludes with a "finding of no significant impact" (FONSI) provides the basis for a decision not to prepare an EIS.

The STB's environmental regulations call for preparation of an EA in railroad merger cases. 49 CFR 1105.6(b)(4).¹⁸ The EA is prepared by the agency's environmental staff, the Section of Environmental Analysis (SEA).¹⁹ SEA only prepares an EIS where

¹⁸ Implementation of Environmental Laws, 7 I.C.C.2d 807 (1991), codified at 49 CFR 1105.

¹⁹ The EA is prepared by SEA, usually with the assistance of an independent third-party consultant, based on the information supplied by applicants, comments from interested parties and environmental agencies and officials, and the results of the independent investigation and verification by SEA. 49 CFR 1105.7; 1105.10(b), (d).

its analysis reveals that, even with environmental mitigating conditions, the proposal may result in a substantial impact on the environment. Where an EA is prepared, the Board considers the EA, public comments on the EA, and any Post EA recommendations of SEA in rendering its final decision. 49 CFR 1105.10(b), (f).

SEA issued a comprehensive five volume EA in this case on April 12, 1996.²⁰ SEA received numerous comments thereon (including comments filed by Reno), and as a result SEA undertook additional environmental analysis addressing the comments, and issued a detailed Post EA (June 24, 1996), which further refined the mitigation SEA had recommended in the EA.

As relevant here, SEA recommended certain general and regional mitigation measures pertaining to Reno and other areas potentially affected by increased rail traffic as a result of the merger. Although SEA concluded that, overall, the merger would result in several environmental benefits,²¹ it also concluded

²⁰ Its analysis included verifying projected rail operations and estimating increases in air emissions; assessing potential impacts on safety; and performing land use, habitat, surface water and wetlands surveys, ground water analyses, and historic and cultural resource surveys. SEA and its independent third-party consultant conducted approximately 150 site visits, analyzed UP/SP's operating plan, applicants' environmental pleadings, all of the settlement agreements reached with competing railroads and trade associations during the environmental review process, and technical studies. See Decision No. 44 at 218.

²¹ These benefits include a systemwide annual net reduction of consumption of 35 million gallons of diesel fuel (based on 1994 figures) from rail operations and truck-to-rail operations, systemwide improvements to air quality from reduced fuel use, and
(continued...)

that, absent appropriate environmental mitigation, the merger could have potential adverse environmental effects regarding safety, air quality, noise, and transportation of hazardous materials. Accordingly, SEA proposed extensive mitigation measures addressing those environmental concerns (including Reno's).²² See discussion in Decision No. 44, 220 & n. 261.

SEA concluded that, with these mitigation measures, the merger would not significantly affect the quality of the human environment on a systemwide, regional, or local basis, and that an EIS was not required. *Id.* 219-220.

Despite this extensive process, SEA determined that a further, 18-month study should be undertaken to develop additional mitigation for Reno and Wichita, KS (*id.* 220-223) and that during the study period, UP/SP should be permitted to add only an average of two additional daily freight trains to the affected rail line segments, essentially preserving the environmental status quo.²³ *Id.* 222.

²¹ (...continued)
a reduction in long-haul truck miles, highway congestion and maintenance, and motor vehicle accidents. See Decision No. 44 at 219 (J.A. ____).

²² SEA had conducted several site visits to Reno, during which concerns such as noise levels, grade crossing activity, and safety were evaluated.

²³ SEA explained that this increase would be below the threshold level for environmental analysis in the STB's environmental regulations, which exempt from environmental scrutiny railroad proposals that would result in operation of up to three additional trains per day.

After extensively considering the various environmental issues (*id.* 218-225), the STB imposed all of the mitigation measures proposed by SEA, including those applicable to Reno (*id.* 220-223, App. G, 276-280). The STB also adopted SEA's recommendation for a further mitigation study for Reno²⁴ and the related stay of traffic increases to permit the agency to develop "specifically tailored mitigation plans" for that city. *Id.* 220-223. The Board agreed with SEA that, with this environmental mitigation, there will be no significant adverse impact on the environment, and that an EIS was therefore unnecessary (*id.* 219-220).

B. The CAA issue. In a letter comment to the EA filed May 23, 1996 (J.A. ___), Reno argued, without elaboration, that the STB needed to make a so-called "conformity determination" concerning the Reno/Sparks/Truckee Meadows Basin in order to meet the Board's requirements under the CAA and related EPA regulations.

CAA requires states to adopt State Implementation Plans (SIPs) for implementation, maintenance, and enforcement of "national ambient air quality standards." 42 U.S.C. 7410(a)(2)(A). In 1977, Congress amended CAA to require federal

²⁴ SEA issued its preliminary mitigation study on September 15, 1997, and its final mitigation plan will soon be issued. Those plans will be available for public comment before being submitted to the Board for its review. The STB will then issue a final decision imposing specific mitigation measures it believes are appropriate. This process is scheduled to be completed in February of 1998.

agencies to determine whether proposed activities conform to the SIPs. 42 U.S.C. 7506. See, generally, Environmental Defense Fund, Inc. v. EPA, 82 F.3d 454 (D.C. Cir. 1996) (Defense Fund). EPA has adopted rules for making such "conformity determinations." 40 CFR 51. EPA's conformity rules apply, however, only to actions that the federal agency "can practically control and will maintain control over due to a continuing program responsibility. . . ." 40 CFR 51.852, Defense Fund, 82 F.3d at 463-64. As the Court noted in Defense Fund, other federal actions are exempt from compliance.

In the Post EA, SEA found that "[t]he Board has no ongoing enforcement authority in air quality matters," and that accordingly the conformity guidelines under CAA do not apply. See Post EA, Vol. 2, App. A, at AG-225 (J.A. __), and Post EA, Volume 1, at 4-18 (J.A. __). The Board adopted SEA's position. It noted that, while EPA filed a comment concerning the EA and Post EA addressing clean air matters,²⁵ EPA did not object to or even mention SEA's clear determination that the CAA conformity guidelines do not apply in this case. Decision No. 44, at 224 and n. 273. The Board specifically adopted SEA's reasoning that the conformity guidelines do not apply because the Board does not

²⁵ See EPA letter comments of July 12, 1996, Technical Comments, Air (J.A. __-__). That letter advised the Board not to neglect consideration of "maintenance" areas. In its analysis, SEA took a conservative approach, treating maintenance areas in the same way as nonconformity area. Decision No. 44 at 223-24 (J.A. __).

maintain program control over railroad emissions as part of its continuing responsibilities.

SUMMARY OF ARGUMENT

Hundreds of parties participated in this merger proceeding affecting rail service throughout the entire western United States. Only four parties have challenged the Board's decision, and only one of these, WCTL, has attempted to mount a broad-based challenge of the merger. The issues raised by Enterprise, BNSF, and Reno are extremely narrow. The reason for the scarcity of remaining opposition is clear: the Board has crafted adequate conditions to preserve competition wherever it was threatened in order to permit this merger, which will ultimately result in major efficiency improvements for the merging carriers and their shippers, to proceed. In aid of that decision, the Board has undertaken an extensive and thorough environmental process.

WCTL has fallen short of justifying the broad relief it seeks, either outright denial of the merger or divestiture of a major part of the SP system to another carrier. Although WCTL represents 20 coal shippers, it has not even attempted to explain how the merger will have a significant impact on any of them. Nor has WCTL explained how the divestiture remedy would alleviate any of the harms it alleges.

WCTL relies totally on a very general and broad market definition, western coal transportation, that the Board correctly rejected as inaccurate and contrary to the evidence of record.

The Board also properly rejected WCTL's predictions that after the merger railroads will begin to collude, either overtly or tacitly, to maintain above-market rates in two-railroad markets. The Board was well within its discretion in rejecting these unsupported predictions, and finding that it is likely that railroads will continue to compete aggressively in two-railroad markets, as they have done in the past. Finally, the Board correctly rejected WCTL's arguments that the trackage rights fee that BNSF pays to applicants will not permit it to be an effective competitor where it competes under trackage rights. The Board thoroughly explained why the trackage rights fee calculated by WCTL's witness was fatally flawed, and why the fee negotiated by applicants and BNSF is actually much lower than the Board would have prescribed under the agency's well-established and court-approved method.

The Board properly exercised its discretion in finding that the merger condition requested by Enterprise should not be granted because it would have unjustifiably improved its pre-merger competitive situation, and because Enterprise would continue to enjoy vigorous geographic competition that made a condition competitively unnecessary.

BNSF quibbles that the Board allowed Tex Mex to operate over a tiny trackage rights segment over which BNSF also operates. BNSF has not shown that Tex Mex's operations will have any impact on it. Nor has BNSF shown that the Board abused its discretion in declining to craft a merger remedy for the Mexico trade that

relied upon BNSF totally, and that would have threatened the viability of an existing carrier, Tex Mex. The Board's solution here preserved the BNSF settlement to the extent possible, without forcing Tex Mex out of the picture. That result, not opposed here by UP, was well within the Board's broad conditioning authority.

Finally, Reno argues conclusorily that the Board erred by failing to prepare an EIS for Reno or to make a conformity determination under the Clean Air Act. Reno has not demonstrated that the merger, as conditioned, will have a significant impact on the human environment in and around Reno, nor has it demonstrated that the STB exercises the kind of program control over continuing railroad operations that would necessitate a conformity determination under the Clean Air Act. Further, the Board has fully complied with NEPA by thoroughly investigating environmental issues with regard to Reno in its voluminous EA, Post EA, and ongoing mitigation study for Reno. If at the end of that process Reno is still not satisfied, it can challenge the Board's final decision concerning additional mitigation measures for that city.

ARGUMENT

I

THE SCOPE OF REVIEW IS NARROW

The courts have consistently recognized that the balancing of the various competing interests under the public interest test by the ICC, and now the STB, in a merger decision is entitled to substantial deference. McLean Trucking, 321 U.S. at 87-88; Minneapolis, 361 U.S. at 187-89. The role of the court in reviewing such a decision is limited to determining whether the agency's conclusions are reasonably drawn from the evidence and findings in the case. Illinois C.R. Co. v. Norfolk & W.R. Co., 385 U.S. 57, 69 (1966). The Fifth Circuit noted in affirming an earlier rail merger that the ICC should use its "broad experience, and expert judgment to make the complex decisions necessary to evaluate whether a railroad merger is consistent with the public interest." MKT, 632 F.2d at 399-400 (cited with approval by this Court in SP v. ICC, 736 F.2d at 714.) Moreover, the "projection of carrier economic conditions . . . into the future is a kind of agency function . . . peculiarly subject to the judgment of the Commission." MKT, 632 F.2d at 406. The STB's decision here thoroughly explained the balancing of the various interests the agency was required to undertake, and that decision was well within its broad discretion.

The statute also gives the agency extremely broad latitude whether or not to impose conditions, providing merely that: "[t]he Commission may impose conditions governing the

transaction." 49 U.S.C. 11344(c). Thus, the courts have recognized that the decision of the ICC or the Board whether or not to impose protective conditions sought in a merger proceeding is entitled to very substantial deference. Grainbelt, 109 F.3d at 798; Seaboard Coast Line R. Co. v. United States, 599 F.2d 650, 652 (5th Cir. 1979). As this Court explained in SP v. ICC, 736 F.2d at 720-21, the issue of whether or not to impose conditions involves the same kind of "judgmental or predictive" judgments, and that "our scope of review of the Commission's decisions as to protective conditions is even more narrow than our scrutiny of its public interest determination." The STB properly exercised its discretion in determining which conditions to impose here, and which not to impose.

Finally, it is also well settled that the agency has broad discretion in fashioning its environmental procedures and in making determinations about the environmental consequences of a proposed action. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978); Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 97-98 (1983); Stryckers's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980); Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989); Goos v. ICC, 911 F.2d 1283, 1292 (8th Cir. 1990).²⁶

²⁶ In determining whether an impact is substantial, the agency may take into account, as the STB did here, the role of environmental conditions that it imposes to mitigate environmental harm. Cabinet Mountain Wilderness v. Peterson, 685 F.2d 120, 127 (D.C. Cir. 1985) (Cabinet Mountain); Sierra Club v. DOT, 753 F.2d 120, 127 (D.C. Cir. 1985) (Sierra Club).

II

WCTL FAILED TO JUSTIFY THE BROAD RELIEF IT SOUGHT

WCTL claims generally that its members were harmed by a reduction in the number of major Class I carriers serving the "western coal market" from 3 to 2. It notes that before the merger, 8.4% of the coal shipments in the west were originated by SP, while most of the rest were handled by BNSF or UP. WCTL argues that the merger reduced competition by leaving utility companies with fewer carrier options for the origination of western coal. WCTL also claims that now that there are only two remaining Class I rail carriers in the west, these carriers will collude rather than compete. Finally, WCTL maintains that where BNSF is operating under trackage rights, the fee that BNSF will be paying to UP is too high to permit it to be an effective competitor to UP. Because of these alleged harms, WCTL argues that the Board had no choice but to deny the merger or require divestiture of SP's lines from Provo to Chicago.

As we will demonstrate, the Board carefully examined and properly rejected WCTL's arguments. At the outset, however, we would emphasize the striking lack of concreteness of WCTL's brief, and its refusal to refute or even acknowledge the substantial record evidence that squarely contradicts its positions, each of which severely undermines its credibility. WCTL mentions not a single coal shipper that is a WCTL member, much less does it attempt to apply any of its competitive

arguments to the circumstances of any particular coal shipper.²⁷ Perhaps WCTL would prefer to generalize because the particular facts are fatal to its case.

There may be circumstances where a utility company could be competitively disadvantaged by the merger. Indeed, where parties have explained the circumstances that would have produced competitive harm, the Board has imposed appropriate conditions to mitigate such harms. But no utility company has filed a petition for review in this case claiming that the agency improperly declined to impose a protective condition. Nor does WCTL mention any utility company that was improperly denied such a condition.

As explained below, WCTL neglects to mention two crucial facts: (1) most utilities are bottleneck shippers; and (2) the Board assured in its merger conditions that no utility or coal mine that had service by more than one railroad before the merger is reduced to a single serving railroad. As we will demonstrate, those facts greatly reduce the possibility that any particular utility company, or the electric utility industry in general, experienced severe and pervasive competitive harm justifying denial of the merger or the divestiture of thousands of miles of rail line that WCTL has sought.

²⁷ The brief does not even list the 20 western utility companies that make up WCTL's membership. WCTL does cite (WCTL Br. at 5) evidence submitted before the Board submitted by witnesses Malhotra and Weishaar that mentions particular coal shippers, but most of these shippers are not WCTL members. See list at J.A. _____. This evidence is discussed below.

• The Bottleneck Issue. Most coal burning utility plants are served by a single rail carrier at the destination; they are what is referred to as "bottleneck" shippers. WCTL scrupulously avoids mentioning that this Court recently rejected challenges by bottleneck shippers, including several WCTL members, to the ICC's merger decision that permitted the formation of BNSF²⁸ in Western Resources, 109 F.3d at 786-793. There the Court affirmed the ICC's longstanding presumption — known as the one-lump theory — that the bottleneck destination carrier will typically be able to extract most of whatever monopoly rents are available from the shipper, regardless of whether it is also one of three, one of two, or the only coal originating carrier. Western Resources, 109 F.3d at 788. The Court described the one-lump theory as "a broadly accepted economic proposition, whose internal logic and predictive power petitioners did not, as a general matter, contest." The Court explained that "the one lump theory says that end use customers will be no worse off even if the backward-integrating monopolist extends its monopoly to the upstream phase." Id.

On brief here, WCTL fails to indicate which, if any, of its members are not bottleneck shippers. Nor does it explain how bottleneck destination shippers could be substantially harmed by

²⁸ See Burlington Northern Inc. and Burlington Northern Railroad Company—Control and Merger—Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company (ICC Aug. 23, 1995) (BNSF).

a reduction in the number of rail carriers originating coal shipments.²⁹

• The STB's Merger Conditions. Moreover, WCTL fails to take into account that, if a utility company or coal mine had two independent rail carriers serving it before the merger, but would have had only one after, it was deemed by the Board to be a 2-to-1 shipper, and thus, under the merger conditions, the shipper was absolutely entitled to service by BNSF or some other carrier.³⁰ WCTL has not argued, nor could it, that the number of rail carriers serving the plants of any of its member utility companies or of any of the mines that supply their coal have been reduced to a single carrier by the merger.

1. WCTL's Market Definition is Fatally Flawed. With this crucial background in mind, we turn to WCTL's argument that the West is a single transportation market for coal. The Board correctly rejected that argument as contrary to its own expertise and experience and as contrary to substantial and persuasive record evidence submitted by applicants. See, e.g., UP/SP-23, Peterson at 176-84 (J.A. ____); UP/SP-231, Peterson at 86-93 (J.A. ____). It determined that "there is little meaningful source competition between UP and SP for coal because each

²⁹ Indeed, the Board found that no bottleneck shipper party had met its burden of showing that the one-lump theory does not apply to its circumstances. Decision No. 44 at 128, n. 140. WCTL does not challenge that ruling here.

³⁰ WCTL has not identified any particular western coal shipper that enjoyed the services of three rail carriers before the merger.

originates coal that typically serves different markets." Almost all of UP's coal is lower-BTU coal that originates in the PRB, while SP originates higher-BTU coal from the Uinta Basin in Utah and Colorado. Decision No. 44 at 127. Both types of coal have sufficiently low sulfur content to qualify as "compliance coal" under CAA.

The Board properly recognized that because PRB coal usually has a much lower delivered cost, utility companies use it whenever they can. The main exception is for utilities with significantly shorter rail hauls from the Uinta Basin than from the PRB. If a plant can burn PRB coal, it will do so except to the extent that it needs to use Colorado/Utah coal or similar higher-BTU coal for blending purposes to satisfy the technical requirements of its plant. Plants (especially those in the Midwest and East) whose boilers cannot burn lower-BTU PRB coal can use Colorado/Utah coal, which competes directly with other higher-BTU coals in the East and West, and not with PRB coal.

The Board correctly found that UP competes intensively, head-to-head, against BNSF for originations of PRB coal, and not against SP movements of higher-priced Colorado/Utah coal. There may be some minor exceptions to the STB's analysis,³¹ but it is

³¹ For example, the record indicates that Colorado Springs Utilities may have the technology to permit the burning of either PRB or Colorado coal. That company's proximity to Colorado coal sources may continue to make that coal part of its relevant market. See Malhotra, at 16-17 (J.A. ____).

clearly reasonable and squares well with the record in this case.³²

WCTL cites evidence submitted by its witnesses Malhotra and Weishaar, but this evidence largely confirms the Board's analysis, as does extensive record evidence submitted by applicants.³³ Malhotra attempts to show that there is a western market for coal originations by describing coal choices considered by 17 utility companies. Most of these are Midwestern or Eastern companies. The evidence shows that many of these companies face a choice between using Colorado/Utah coal originated by SP or Appalachian coal originated by one of the three major eastern carriers.³⁴ Thus, the coal origin market for these companies is not SP-served Utah/Colorado coal versus UP or BNSF served PRB coal. In other words, the coal alternatives of these companies are not defined by a "western coal transportation" market. Others of the 17 companies listed by

³² As WCTL's witness Borts testified in BNSF, "[t]he western coal transportation market is comprised of specific individual origin-to-destination movements. The specific impact of the merger . . . on each of these movements depends upon the facts and circumstances of the transportation required." We agree with that assessment.

³³ See WCTL Br. at 18, citing WCTL witnesses, V.S. Weishaar at 6-13, V.S. Malhotra, at 13-34 (J.A. ____ - ____, ____ - ____) and see applicants' witnesses, R.V.S. Hutton, at 28-29, R.V.S. Sansom, at 17-34, and R.V.S. Sharp at 28-55 (J.A. ____ - ____; ____ - ____).

³⁴ These include Central Illinois Public Service, CINergy, Illinois Power, Mississippi Power, Tampa Electric, Wisconsin Electric Power, Wisconsin Power & Light, Detroit Edison (for blending only), and Georgia Power (same).

Malhotra used Colorado or other higher-BTU coals solely for blending with, but not to replace, PRB coal.³⁵ The Board recognized that companies that are able to burn PRB coal are likely to do so because it is so much cheaper. PRB coal is priced at \$3-4 per ton at the minehead, while western bituminous coal costs \$10-15, which much more than compensates for the 25% lower BTU content of the PRB coal. R.V.S. Sansom, at 7-8 (J.A. ____ - ____). This means that companies using the more expensive Colorado coal for blending use only as much as is technically required, and no more.

PRB coal is also preferred because it is clean burning. The only problem with PRB coal is that its lower BTU content typically requires capital investment to convert plants engineered to burn higher-BTU coals. V.S. Weishaar at 7-8 (J.A. ____ - ____). Several of the companies discussed by Malhotra have converted, or are considering conversion, to PRB coal. As the Board noted, companies considering such a switch had, and continue to have, a choice of UP or BNSF PRB origins. Once a company has made the initial investment required to switch to PRB coal, however, it will be extremely unlikely to switch back to Utah/Colorado or other available coals because of the significant price differential.³⁶

³⁵ These include Detroit Edison, Consumers Power, and Georgia Power.

³⁶ WCTL witness Weishaar claims that there is competition between PRB coal and Utah/Colorado coal at Commonwealth Edison's Kincaid plant. V.S. Weishaar at 12, (J.A. ____). That plant,
(continued...)

Central Power and Light (CPL), a WCTL member, is a typical example. CPL is a bottleneck utility located southwest of Houston, TX that is considering a shift to PRB coal from SP-served Colorado coal, made possible by the expiration of its supply contract with a Colorado mine. Indeed, CPL has installed a blending system that apparently makes a high ratio of PRB burn possible. Sansom R.V.S. at 48 (J.A. ____). If CPL shifts to PRB coal, it will have a choice of UP or BNSF coal origins, and it will continue to be served at destination by a single carrier. Cf. BNSF at 77-78. Under the one-lump theory, however, competition among carriers originating coal shipments will not significantly affect the overall freight rate paid by the shipper, because the bottleneck destination carrier will typically extract all or nearly all of whatever rents are available from the movement.

In sum, the Board thoroughly explained that WCTL failed to demonstrate that "western coal" is a proper, or even a useful, market definition for coal originations for most utility companies. Even if all coal were fungible, which it is not, electric utilities would still be able to choose among UP and BNSF origins in the west and among other eastern origins. Under a proper market definition, one based on the particular type and

³⁶(...continued)
which has now been sold to Dominion Resources, has announced that it is modifying its plant to burn PRB coal. R.V.S. Sansom at 70 (J.A. ____). After conversion, it will have a choice of BNSF and UP coal origins in the PRB.

quality of coal, and on the circumstances of particular shippers, substantial evidence of record amply supports the Board's finding that the merger of UP and SP will have at most a very limited impact on competition for rail movements of western coal.

2. The Merger Will Not Lead to Collusion. The Board thoroughly addressed, and properly rejected, WCTL's arguments that the merger will lead to collusion in the west. Decision No. 44, at 116-21, and 267-273 (J.A. ____). The Board overruled SFSP where the ICC said that a merger resulting in two-railroad markets might risk collusion, noting:

The agency also has the benefit of nine years of additional experience with decreasing rates in two-carrier rail markets under Staggers Act deregulation. We now believe that rail carriers can and do compete effectively with each other in two-carrier markets.

DOT agreed that in the U.S. rail industry, two-carrier competition appears to work well, generally making a Board remedy in 3-to-2 situations unnecessary. DOT Br. at ____ (J.A. ____); Decision No. 44 at 117, 120 (J.A. ____). WCTL does not dispute the Board's essential findings that two-carrier rail markets have been characterized by intense competition, and that "competitive pressures have ensured that the preponderance of [productivity] gains have been passed along to shippers in the form of lower rates and better and more responsive service." Id. Rather, its

argument is that these trends will not continue.³⁷ WCTL Br. at 17.

WCTL relies upon the ETSI pipeline litigation, in which 5 western railroads settled ETSI Pipeline Company's claims that they violated the antitrust laws by conspiring to take various measures to prevent or delay ETSI from entering the coal transportation market in the west. WCTL Br. at 16. Although it is always possible for companies in a given market to get together to fix prices or take other anticompetitive actions, the prospect of treble damages and criminal liabilities under the antitrust laws is ordinarily sufficient to preclude such activities. The settlement of conspiracy charges concerning pipeline market entry in ETSI certainly does not controvert the Board's finding that "[t]here is no evidence that railroads have colluded, overtly or tacitly, to maintain inefficient operations, unresponsive service, or above-market rate levels." *Id.*³⁸ ETSI did not concern tacit collusion or price fixing among railroads but a totally different type of activity, preventing pipeline market entry, not relevant to this merger case.

As the Board found, the kind of collusive possibilities that are relevant to this merger, price fixing or market share

³⁷ Nor does WCTL dispute the Board's finding that SP would not have been able to continue to be a vigorous competitor due to its inability to return sufficient revenues to replace its badly deteriorating capital.

³⁸ The Board pointed out that the United States Department of Justice (DOJ) was unable to cite any such examples.

division among rail carriers, whether tacit or overt, would be particularly difficult to accomplish due to the prevalence of confidential contracts between railroads and shippers and due to the heterogeneity of rail service. Decision No. 44 at 267. WCTL claims that approximations of PRB rail rates can be deduced from publicly available Federal Energy Regulatory Commission data. We seriously doubt that any meaningful rate approximations can be obtained given the complexity of service options, and the complex tiered nature of most coal contract rates.

The Board, following the lead of DOJ, properly focused upon the likelihood of tacit collusion, activity which would not be unlawful under the antitrust laws, which nevertheless could result in shippers paying above-market rates for rail services. DOJ, V.S. Majure, at 41, n. 42 (J.A. ____). DOJ did not argue that the merger would make unlawful collusion more likely. Nor did it present any evidence, as WCTL implies (WCTL Br. 16), to show that rail carriers have overtly colluded or will do so in two-carrier markets. DOJ's evidence was intended to show that rates would increase in 3-to-2 markets due to tacit collusion. That evidence was deeply flawed and was properly rejected by the Board. Decision No. 44, at 119-121 (J.A. ____). WCTL has not challenged those findings here.

In rejecting claims that tacit collusion would be likely in two-carrier markets, the Board relied upon the fact that most of the East is served by but two carriers, as is the PRB. In both of these large and important examples, the Board found that rates

have continued to fall significantly despite the presence of only two carriers. See e.g., R.V.S. Sharp at 59-60, 91 (J.A. ____). Although WCTL concedes that there has been effective competition out of the PRB, it claims that competition either has ended, or will soon end. See V.S. Weishaar at 7, 17-18 (J.A. ____). On brief, WCTL argues tersely that facts that generated competition in the PRB "are no longer operative." WCTL Br. 17. WCTL witness Weishaar claims that rates will not continue to be so competitive in the southern part of the PRB because by 1993 both BNSF and UP had reached parity in market share and full capacity. V.S. Weishaar at 16-19 (J.A. ____).

WCTL has not, however, presented any empirical evidence to support its claim that the era of aggressive pricing in the PRB is now over, even though its members would have first hand knowledge of such pricing trends. Further, the record shows that both UP and BNSF have continued to extend the reach of PRB coal, as receivers far removed from those mines are offered competitive rate incentives to convert their facilities to permit use of this coal. See V.S. Malhotra, 15-23 (J.A. ____ - ____). There is no reason to believe that it will not continue to be profitable for these two railroads to continue to compete for these markets and other two-carrier markets as railroads have done since 1980.

In any event, the Board has retained jurisdiction to oversee competitive developments for five years and impose additional conditions if necessary. This permits WCTL or individual utilities to develop a much more thorough record (in contrast to

WCTL's undocumented surmises here) if they believe that the railroads are tacitly colluding.³⁹

3. The Trackage Rights Fees are Reasonable. UP and BNSF agreed to trackage rights fees of 3.0 to 3.1 mills per gross ton mile for shipments BNSF moves under trackage rights. WCTL claims that those fees would not allow BNSF to compete on an equal footing with UP, but would reward UP with monopoly rents. WCTL Br. 19-20. WCTL does not even mention the STB's extensive discussion of this issue in Decision No. 44, at 140-144, much less does it begin to explain why it thinks that decision was wrong. The Board thoroughly explained that the fee that the parties negotiated is actually much lower than the fee that would have been prescribed under the principles of SSW Compensation. The SSW Compensation method is intended to place the trackage rights tenant in the same position as the owner by requiring the tenant to pay a usage-based share of (1) maintenance and other costs of operation, and (2) a rate of return (the current pre-tax nominal cost of capital) on the cost of the shared assets. See BNSF at 90-91, and Mopac, 23 F.3d at 533.

WCTL witness Crowley calculated a fee of 1.84, purportedly following SSW Compensation;⁴⁰ but, as the Board explained, Crowley's analysis was fatally flawed. Crowley valued all of the

³⁹ The first annual oversight proceeding was completed with service of a decision on October 27, 1997 (attached as Addendum B).

⁴⁰ WCTL has not challenged the SSW Compensation approach here.

property at issue using average values for the SP system, even though almost half of the track over which BNSF received trackage rights was actually much more valuable, better maintained UP property. Crowley also depreciated the investment base to zero over 32 years, which was improper because UP will constantly have to replace its rail plant in order to continue to provide quality service. Finally, Crowley used the wrong cost of capital, one that fails to take account of the effect of federal income tax. The Board found that just correcting the last two of these three major errors yields a fee of 3.84 mills per gross ton mile, a fee substantially higher than the fee that the carriers negotiated. Accordingly, WCTL's challenge that the negotiated fees of 3.0 to 3.1 are too high is clearly frivolous.

III

THE BOARD PROPERLY DENIED ENTERPRISE'S REQUEST FOR CONDITIONS

Although Enterprise has shown that its circumstances have changed somewhat due to the merger, it has not shown any substantial competitive harm that would justify the relief it seeks. Enterprise has shown that because of the merger UP will not build, nor will nearby shippers such as Exxon, Amoco, and Chevron build, a new Mt. Belvieu branch. Before the merger, Enterprise might have been able to take advantage of a planned 10½ mile branch line by building a 1-mile industrial spur to permit Enterprise to receive service from a second carrier. Now, Enterprise would have to build the entire branchline, or induce

other shippers on the line⁴¹ or some carrier other than UP/SP to share in the cost of building it, to take advantage of the Board's build-out condition and receive service from a second rail carrier. Given its other competitive options, Enterprise has not shown that it was substantially harmed by this change in circumstances. Moreover, the Board correctly relied upon the fact that the remedies Enterprise has sought are inappropriate because they would significantly improve its pre-merger competitive situation.

As a preliminary matter, Enterprise claims that because of its circumstances, it is a 2-to-1 shipper, which entitles it to BNSF service now. Enterprise Br. at 21-24. This is clearly wrong. Enterprise was served only by SP before the merger, and not by UP. See Decision No. 68 at 2 (J.A. ____).

As the Board noted, Enterprise is eligible to take advantage of the build-out condition. In order for Enterprise to do so, however, the branch that would have permitted service to a second carrier must be built. That was a sufficient remedy given Enterprise's circumstances.

As the Board noted, to justify a condition, a party must show a significant loss of competition. Decision No. 44, at 144. Enterprise failed to make this showing. It did not show that the increased cost of executing a build-out was a significant change in its competitive options, given its overall competitive

⁴¹ Enterprise indicates that there are 16 shippers on the line. March 28 comments at 4 (J.A. ____).

circumstances. The Board ruled, and Enterprise does not here dispute, that Enterprise's rates are protected by vigorous geographic competition that remains after the merger. As the Board explained, and as Enterprise's own evidence confirms, Enterprise competes with numerous producers of fungible chemical commodities and these firms are located near each other in the Gulf Coast region. Indeed, as Enterprise notes (March 28 comments at 3 (J.A. ____)):

Materials are fungible in the markets served by Enterprise, so transportation — its dependability and cost — is often the determining factor in dealings between buyers and sellers. Enterprise's ability to purchase a particular feedstock or sell a given product frequently hinges on its ability to negotiate a satisfactory rail rate and obtain reliable service commitments. If the rate and service are adequate, the deal gets done. Without both of these essential components in place, the deal dies, and neither Enterprise nor the railroad does the business.

Thus, Enterprise has essentially conceded that the fact that it competes with these similar companies in the same end markets requires applicants to offer reasonable rates to preserve its traffic.

Nevertheless, Enterprise complains that the BNSF settlement agreement gave BNSF access to other shippers such as Chevron, Amoco, and Exxon that would have been served by the Mt. Belvieu branch, but not to it. The fact that UP voluntarily agreed to give BNSF access to these particular shippers does not require UP

to grant access to others. The Board has consistently approved such procompetitive, voluntary agreements as in the public interest. Moreover, the Board has imposed procompetitive agreements as conditions consistent with the public interest at the request of applicants and settlement parties, even if it would not have imposed such conditions absent the agreement. But the Board has consistently refused to require the parties to such agreements to extend them to other shippers. See, e.g., BNSF, slip op. at 99, rejecting similar arguments of Bunge Corporation, and Decision No. 44, at 183 rejecting similar arguments of various Montana interests.⁴² Enterprise has not shown that the agency's longstanding approach, which fosters pro-competitive settlement agreements, is arbitrary and capricious.

IV

THE BOARD PROPERLY GRANTED TEX MEX FRACKAGE RIGHTS OVER BNSF'S OBJECTIONS

BNSF obtained a voluntary settlement agreement, which, with numerous modifications mostly favorable to BNSF, was imposed by the Board as a merger condition. As a result, BNSF obtained access to hundreds of new shippers and the right to use new, more efficient routes for any of its traffic over thousands of miles of new lines as a result of this merger. Yet BNSF is not

⁴² In any event, Enterprise stands in somewhat of a different position than Chevron, Amoco, and Exxon, since they supported UP's application to build the Mt. Belvieu branch, and made contractual commitments to use it. Enterprise provided no support and made no commitments.

satisfied. Apparently, BNSF believes that the Board has infringed upon its exclusive proprietary right to use these new trackage rights by permitting Tex Mex to overlap them over a tiny, 50-mile segment. BNSF has this situation exactly backwards. BNSF is only operating over these lines as a result of the Board's approval of this merger, and its approval (and imposition as conditions) of various related settlement agreements as in the public interest. With the merger or without it, BNSF would have needed the approval of the STB under section 11343 to obtain such trackage rights.

It is well settled that the Board has broad discretion in determining what conditions are necessary in a merger proceeding. It is also undisputed that the merger without conditions would have resulted in significant competitive harm south of Houston, particularly in the U.S.-Mexico trade over the important Laredo gateway, which is served only by UP and Tex Mex. The Board had a wide range of options available to it to preserve competition; by no means was the Board constrained to choose the solution proposed by the applicants, total reliance on BNSF. The Board could have declined to approve or permit this portion of BNSF's trackage rights, and could have given Kansas City Southern Railway Company, Tex Mex, or some other carrier exclusive trackage rights over UP to replace the service formerly provided by SP. Instead of choosing either of these exclusive options, the Board chose an option that preserved a limited role for Tex Mex in providing a part of an alternative route for shipments

moving to and from Mexico. At the same time, the Board also approved BNSF's trackage rights service under the BNSF settlement agreement to preserve access to the extensive BNSF system for shippers.

It is true that the Board has a policy of not imposing protective conditions in a merger proceeding except where necessary to preserve essential services or to prevent significant competitive harm. As BNSF correctly points out, the ICC and the Board have generally subjected parties seeking such relief to an exacting standard of proof. The situation here is unusual in that the potential harm to Tex Mex, and in turn to this important alternative Laredo routing, would be caused not just by the merger itself, but also by the settlement agreement, which gave BNSF a new role in this region.

The settlement agreement was a voluntarily negotiated merger condition that for the most part was procompetitive and in the public interest. Indeed, without the settlement agreement, it would have been impossible to approve this merger. But that does not mean that the Board was required to endorse or permit every part of the agreement and impose it alone as a condition. The Board properly declined to impose conditions giving exclusive access south of Houston to BNSF, conditions that could have resulted in Tex Mex being forced out of the market, and its assets being sold to some other carrier, most likely BNSF.

It is not clear to us how BNSF was harmed by the Board's remedy other than by the fact that it has lost the ability to use

this merger as an opportunity to gain an advantage on Tex Mex and its affiliate, KCS, in the U.S.-Mexico trade. BNSF has not claimed that Tex Mex's trackage rights will unduly interfere with its operations. Nor will BNSF compete with Tex Mex for any 2-to-1 shippers, since there are no such shippers on the small segment where the BNSF and Tex Mex trackage rights overlap. Assuming that BNSF has standing to complain about Tex Mex's trackage rights, BNSF has not shown that the Board's choice of remedy was arbitrary and capricious or contrary to the public interest.

V

THE ENVIRONMENTAL PROCESS ISSUES
RAISED BY RENO ARE WITHOUT MERIT

Reno is concerned that the merger will return rail traffic on an existing line through the city from its pre-merger level of about 13 trains a day to its level in the 1980's of about 25 trains per day. Although it does not make this very clear in its brief, Reno has argued before the Board that this additional traffic will adversely affect pedestrian safety and increase air pollution and noise impacts. All of these impacts either have been or will be thoroughly addressed by the Board, and appropriate mitigating conditions have been already imposed or will be imposed after the Board completes its special study of Reno impacts. Therefore, Reno's arguments should be rejected by the Court.

1. NEPA. Reno argues that the Board erred in declining to prepare an EIS in this case.⁴³ Under NEPA, however, an EIS is only required for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). The Board's environmental rules provide that an EA is normally sufficient in rail merger proceedings to permit the agency to take the "hard look" at the proposed action required by NEPA. 49 CFR 1105.6(b)(4).

This Court has used a four-part test for determining whether an agency properly declined to prepare an EIS. See Cabinet Mountain, 585 F.2d at 681-82 and Idaho v. ICC, 35 F.3d 585, 595 (D.C. Cir. 1994) (Idaho). The Court considers whether the agency took a hard look at environmental issues, whether it identified the relevant issues, and whether the agency made a convincing case that the impact was insignificant or that such impacts can be reduced to a minimum.

The Board has already met the first two parts of that test. The Board compiled a very extensive and comprehensive EA and Post EA, and those documents and Decision No. 44 thoroughly demonstrate that the Board took the hard look and properly identified environmental issues as NEPA requires. See discussion at pp. 20-22 above. As explained there, the Board is also in the

⁴³ Reno previously filed a mandamus petition in a United States District Court seeking to force the STB to prepare an EIS for Reno in this case. The court dismissed for lack of jurisdiction in City of Reno v. STB, No. CV-N-96-441-HAM (RAM), on September 17, 1996. Reno has appealed that decision to the Ninth Circuit in No. 97-15562, City of Reno v. STB (pending).

process of an extensive further study of mitigation for Reno. The proper place for the Board's full explanation of the extent to which impacts on Reno can be reduced to a minimum is in its final decision on Reno mitigation. When that decision is issued, and not before, this issue will be final and ripe for review.⁴⁴

Reno's main argument on brief is that the Board "admitted" that the impact on the environment was substantial by the very act of instituting its special study to develop further mitigation for that region. Reno Br. at 10. It may be that without the substantial mitigation the Board has already imposed, and such further mitigation as it may impose, the impacts on Reno could be substantial. But the fact that the Board undertook this additional study to fine-tune mitigation for impacts in the Reno area is not an admission that those impacts cannot be adequately mitigated.

Indeed, when the Board made its FONSI in Decision No. 44, it already had sufficient information to know that the impact of the merger on the broad area served by these carriers, including Reno, would not be severe because it could be successfully mitigated to insubstantial levels.⁴⁵ As the Board noted there,

⁴⁴ This ripeness issue was fully set out in our motion to sever and hold in abeyance filed on March 4, 1997, which remains pending.

⁴⁵ This merger as it affects Reno may be "controversial" in a political sense, but it is not "controversial" within the meaning of Greenpeace Action v. Franklin, 14 F.3d 1324, 1333 (9th Cir. 1992). That is, there is no substantial controversy over the effect of this project as there was in Greenpeace, where the scientific community could not agree with regard to the impact of
(continued...)

Reno has grown up around this rail line, and over the years, the city has permitted casino and other entertainment industry development immediately abutting the railroad right-of-way. Decision No. 44 at 223 (J.A. ____). The Board noted the agency's longstanding policy of not imposing merger conditions to attempt to rectify preexisting conditions, but only to mitigate merger impacts. See e.g., BN/Frisco, 360 I.C.C. at 952. The Board explained that the merger will merely result in increased traffic over an existing main line,⁴⁶ and that any additional impacts caused by the merger on Reno's environmental problems in the area of pedestrian safety, air pollution, and noise can effectively be addressed with conditions. Decision No. 44 at 221, ____ (J.A. ____).⁴⁷

Reno has not even discussed in its brief the environmental consequences of the merger for Reno, nor does it dispute the

⁴⁵(...continued)
pollack fishing in the Gulf of Alaska.

⁴⁶ As explained in note 17, this merely brings the traffic back up to levels SP carried in the 1980's.

⁴⁷ The Board imposed systemwide and regional mitigation that applies to Reno in Decision No. 44. As the Board has emphasized throughout this process, however, SEA is continuing to explore the issue of how best to craft fine tuned mitigation for Reno in its further mitigation study process. Until that study is completed, the Board has essentially stayed traffic increases through Reno resulting from the merger. After the process is completed, the Board will issue a reviewable final decision concerning mitigation for Reno. If Reno is still not satisfied, it will then have another opportunity to challenge the Board's decision in an appropriate court of appeals. 28 U.S.C. 2321 and 2342.

Board's analysis of these issues in its environmental documents or in Decision No. 44. Reno also says very little about the supposed inadequacy of both systemwide and localized mitigating conditions that have been and will be crafted to deal with the environmental problems of that area other than to argue that some of the conditions merely require consultation with other agencies or compliance with existing law.⁴⁸ Reno Br. at 11. Reno ignores, however, those conditions that are most important to its interest. As we have noted, the Board essentially stayed traffic increases through Reno pending the results of a special study, which may result in recommendations for substantial additional environmental mitigation.

And by no means can the conditions that the Board has already imposed be termed insubstantial, as Reno implies. In Decision No. 44 the Board imposed 108 separate environmental conditions. Decision No. 44 at 276-289. For example, the Board's conditions required applicants to pay millions of dollars to upgrade their locomotive fleet, to hire more staff for hazardous materials handling, and to hire additional securities forces. Moreover, the mitigation study is thoroughly considering the need for additional mitigation for Reno and may result in further conditions. *Id.*

Next, Reno claims that the STB has improperly delegated its decision making responsibility to the applicants because it

⁴⁸ Requiring compliance with existing regulation is appropriate, where, as here, that regulation substantially alleviates the environmental problems that were identified.

relied upon applicants' environmental report in its EA. Reno Br. at 9. Reno claims that for this reason this case is like Idaho, 35 F.3d at 595, where the ICC was found to have improperly delegated its environmental review responsibilities to other federal agencies. Idaho is inapposite. In Idaho, a railroad proposed to abandon a rail line and undertake salvage activities in an EPA superfund toxic waste site. The ICC permitted the abandonment subject to consultation by the railroad with appropriate federal officials to derive proper procedures for the salvage activities. The court held that the ICC erred by failing to retain control over the matter to make a final determination under NEPA in light of the procedures actually required or suggested by those federal agencies.

Here, the Board's analysis did not stop with applicants' environmental report. Rather, SEA and its contractor independently verified the important details of this analysis,⁴⁹ and conducted its own study and analysis in an extensive EA and Post EA, and in the extensive ongoing mitigation study, and the Board itself will issue a final decision at the end of that process.

⁴⁹ SEA's analysis included verifying projected rail operations, noise level impacts, and increases in air emissions; assessing potential impacts on safety; and performing land use, habitat, surface water and wetlands surveys, ground water analyses, and historic and cultural resource surveys. SEA and its independent third-party consultant conducted approximately 150 site visits to perform this analysis. Decision No. 44 at 218.

2. Clean Air Act. Reno argues, without elaboration, that the STB needed to make a "conformity determination" concerning the Reno/Sparks/Truckee Meadows Basin in order to meet the Board's requirements under the CAA and related EPA regulations. Reno Br. at 11. The Board was thoroughly justified in adopting SEA's reasoning, not challenged by EPA in its formal comment on the Board's EA and Post EA, that the conformity guidelines do not apply to this merger because the Board does not maintain program control over railroad emissions as part of its continuing responsibilities. See discussion at pp. 23-24 above. Reno makes no more than a cursory challenge to that determination here, arguing that "the STB has and exercises the ability to control operations of rail carriers which impact emissions." Reno Br. at 12. It cannot dispute, however, that the STB's program responsibilities relate to financial transactions, rates and line abandonments of rail carriers, and not to assuring that rail operations are conducted so as to minimize adverse impacts on air quality.⁵⁰

⁵⁰ Although the conformity guidelines do not apply, the Board has already imposed several broad and substantial conditions relative to air quality and it is in the midst of comprehensive air quality analysis for Reno in its mitigation study.

CONCLUSION

The petitions for review should be denied.

Respectfully submitted,

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CERTIFICATE AS TO WORD COUNT

I, Louis Mackall, hereby certify that this principal brief contains no more than 13,750 words, as set forth in this Court's order of July 31, 1997.

Louis Mackall, V
Louis Mackall, V

CERTIFICATE OF SERVICE

I, Louis Mackall, hereby certify that on this, the 9th day of December, 1997, I have served true and accurate copies of the foregoing Brief of Respondent Surface Transportation Board (Typewritten Copy) on all parties of record as set forth in the attached list by first-class mail.

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49 U.S.C. § 11343. Consolidation, merger, and
acquisition of control

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and

persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliated with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which may be acquired by that person, will be managed in the interest of the other carrier.

(d) (1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than \$2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

(e) (1) Notwithstanding any provisions of this title, the Interstate Commerce Commission, in a matter related to a motor carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, may exempt a person, class of persons, transaction, or class of transactions from the merger, consolidation, and acquisition of control provisions of this subchapter if the Commission finds that--

(A) the application of such provisions is not necessary to carry out the transportation policy of section 10101 of this title; and

(B) either (i) the transaction is of limited scope, or (ii) the application of such provisions is not needed to protect shippers from the abuse of market power.

(2) At least 60 days before any transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter may take effect, each carrier intending to participate in such transaction shall file with the Commission a notice of its intention to participate in such transaction and shall give public notice of such intention. The Commission shall prescribe the information to be contained in such notices, including the nature and scope of the transaction.

(3) The Commission on its own initiative or on complaint, may revoke an exemption granted under this subsection, to the extent it specifies, when it finds that application of the provisions of this section to the persons, class of persons, or transportation is necessary to carry out the transportation policy of section 10101 of this title.

(4) If the Commission, on its own initiative, finds that employees of any carrier intending to participate in a transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter are or will be adversely affected by such transaction or if employees of such carrier adversely affected by such transaction file a complaint concerning such transaction with the Commission, the Commission shall revoke such exemption to the extent the Commission deems necessary to review and address the adverse effects on such employees.

49 U.S.C. § 11344.

Consolidation, merger, and
acquisition of control;
general procedure and
conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b) (1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapters 105 of this

title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall approve such an application unless it finds that--

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall with respect to any application that is part of a plan or proposal developed under section 333(a)-(d) of this title, accord substantial weight to any recommendations of the Secretary of Transportation. The provisions of this subsection do not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title.

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not protested by interested parties within 30 days following receipt of such application.

SERVICE DATE - OCTOBER 27, 1997

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 32760 (Sub-No.21)

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 RAILWAY COMPANY

[OVERSIGHT]

(Decision No. 10)

Decided: October 24, 1997

INTRODUCTION

Oversight Condition. In a decision in a related proceeding [Decision No. 44, served August 12, 1996, in Finance Docket No. 32760 (UP/SP)], we approved the common control and merger of Union Pacific and Southern Pacific Rail Corporation.¹ Because an unconditioned merger raised serious competitive issues in various transportation corridors, our approval was subject to numerous conditions addressing the competitive harm that the merger would otherwise have produced. In addition to the specific mitigation measures we imposed, one of our conditions provided for a 5-year oversight process. As explained in the decision authorizing the merger, the oversight condition was intended to "examine whether the conditions we have imposed have effectively addressed the competitive issues they were intended to remedy." See UP/SP, Decision No. 44, slip op. at 146.

The key competitive condition that we imposed required UP to grant extensive trackage rights to The Burlington Northern and Santa Fe Railway Company (BNSF). In light of the breadth of the trackage rights condition imposed, we indicated that we would closely monitor BNSF's operations, particularly in certain corridors. We also specifically reserved the authority to impose additional remedial conditions as necessary to alleviate unanticipated competitive harm, if the trackage rights or the other specific conditions were shown to be ineffective.

¹ We gave authority for merger and common control of all of the carriers controlled by Union Pacific Corporation and by Southern Pacific Transportation Company. Where we are discussing pre-merger service, references to "UP" include only service by carriers controlled by Union Pacific Corporation. Otherwise "UP" refers to all of the carriers to which we gave merger authority. "SP" refers to all of the railroads formerly controlled by Southern Pacific Rail Corporation.

As part of this oversight condition, UP and BNSF have filed quarterly reports beginning October 1, 1996. More recently, the Board, on May 7, 1997, initiated a specific oversight proceeding in which UP and BNSF filed extensive progress reports on July 1, 1997, to which 34 parties filed comments, and to which, in turn, UP, BNSF, and certain other parties replied. This decision represents the Board's findings and recommendations based on the record compiled in this first formal oversight proceeding regarding the competitive conditions imposed by the Board.

Summary of Findings. The record indicates that thus far the merger, with the conditions we imposed, has not caused any substantial competitive harm. The record also shows that, after a somewhat slow start with regard to certain lines, BNSF had already initiated by July 15, 1997, what appear to be viable competitive operations over each of its key trackage rights lines. We emphasize that these conclusions are preliminary, and that our oversight is continuing. As numerous commenters have pointed out, it is too early in the process to determine with certainty just how vigorous the competition between UP and BNSF will be over the long term, and whether BNSF's operations will be efficient and responsive to shipper needs.

While the record to date does not reflect any serious competitive problems, commenters have raised concerns, which applicants readily acknowledge, about UP's service and safety performance during the period following the consummation of this transaction.² These service and safety deficiencies are quite serious and disturbing, and in response, we are taking the unusual step of convening a special hearing so that parties may address these problems and discuss proposals to resolve them.³ However, the oversight record does not indicate that these service problems have resulted from any new market power conferred by our approval of the underlying merger. Thus, the evidence submitted does not indicate any reduction in competition in the markets that UP serves, which is the focus of the oversight condition imposed by the Board in its approval of the merger. Rather, the record reflects that disruptions have been caused by a variety of factors, including UP's efforts to rehabilitate the deteriorating SP system and establish facilities that will ultimately benefit shippers with improved service, and by other system integration efforts that have not proceeded as they should have.

Board Action. As explained in more detail below, nothing presented on this record indicates to us that any major adjustments in the conditions we have imposed to assure continued competition are necessary, although we will impose certain additional requirements and include certain directives to ensure

² Common control of the railroads was consummated on September 11, 1996.

³ Rail Service in the Western United States, STB Ex Parte No. 573, served Oct. 2, 1997.

that the existing conditions are implemented more efficiently. Several parties have claimed reduced competition in their efforts to reargue, or to assert for the first time, an entitlement to special protective conditions, but we have examined those arguments carefully, and find them to be without merit. See section V below. However, our oversight will remain vigilant: we will require both UP and BNSF to continue to report on their progress; we will continue to assess the evidence in those reports, and any other evidence that we may seek; and we will make any adjustments to the conditions that we find necessary.

I.

ARE THERE COMPETITIVE PROBLEMS?

The UP/SP railroad merger is unprecedented in scope, encompassing most of the western United States. If this merger had been effectuated without the settlement agreements and additional conditions that we imposed, it would have led to substantial competitive harm. While several parties that opposed the merger predicted that the merger would result in substantial competitive harm even with the BNSF trackage rights proposed by applicants, so far, we have seen no evidence of the major and pervasive rate increases that various parties predicted.

Thus, although some of the commenters imply that competitive problems might result from the merger, in fact, the record shows impressive systemwide rate reductions on the UP since the transaction was consummated. UP's July 1 progress report (UP/SP-304, Confidential Appendix E) indicates rate reductions in each of the following categories: Utah and Colorado coal traffic, Gulf Coast plastics traffic, all 3-to-2 traffic, all 2-to-1 traffic,⁴ Gulf Coast chemicals, and grain traffic. This systemwide evidence is confirmed by a substantial amount of evidence of particular rate reductions both on the UP system and on the BNSF trackage rights segments.

Not surprisingly, there have been several requests by individual shippers for additional competitive conditions. None, however, has been justified, and there has been no complaint by shippers of rate increases on the UP lines. Notwithstanding the speculation and concern reflected in some of the comments, as the Department of Justice (DOJ) notes, it is too early to tell whether any competitive problems will emerge, and we will therefore continue to monitor the situation.

⁴ In Decision No. 44, we awarded BNSF access to shippers located along its trackage rights only where, as a result of the merger, shippers previously served by two carriers would now be served by only one carrier (2-to-1 points). We did not give BNSF access to shippers that had previously been served by only SP or UP (1-to-1 points), or where shippers previously served by three carriers would now be served by only two (3-to-2 points).

II.

ARE THE BNSF TRACKAGE RIGHTS CONDITIONS WORKING?

BNSF Activities. In approving this merger, we stated that the competition provided by the BNSF trackage rights would be one of the key matters to be considered in our oversight proceedings. We directed BNSF to begin trackage rights operations over the essential corridors between Houston, TX, and New Orleans, LA; between Houston, TX, and Memphis, TN; and in the Central Corridor. We warned that a failure by BNSF to do so could result in a termination of these trackage rights and substitution of (or even divestiture to) another carrier.

In this regard, BNSF noted in its July 1, 1997 progress report that, since the merger transaction was consummated, it has implemented direct train service through trackage rights over all of the routes to which it received access, with the exception of the 150-mile segment between Corpus Christi and Brownsville, TX, and the I-5 Corridor on the west coast. Subsequent to the filing of that report, however, service over the I-5 Corridor began on July 15, 1997. BNSF also indicated that it increased the total number of trackage rights trains in operation over the various corridors from 392 trains in May to 468 trains in July. As of June 30, 1997, BNSF had instituted the following train service: daily intermodal and daily manifest service between Houston and New Orleans; daily manifest service between Houston and Memphis, and Temple and Corpus Christi, TX; 5-day-a-week service between Denver, CO, and Provo, UT; 3-day-a-week service between Provo, UT, and Stockton, CA, and over the Eagle Pass corridor, a gateway into Mexico. BNSF-PR-4, v.s. Rickershauser at 4. It is evident that BNSF has been able to garner a significant amount of traffic already, and both BNSF and UP anticipate that BNSF's traffic levels will continue to grow.⁵

In the crucial corridor between New Orleans and Houston, BNSF has purchased the segment between Iowa Junction and Avondale, LA, and has made significant capital improvements to upgrade this line. (UP has retained trackage rights over this line segment.) As explained below, operational problems have greatly hampered both BNSF and UP service over this corridor, which will be further explored in the service proceeding initiated by the Board. However, BNSF's commitment to providing competitive service in this corridor appears solid.⁶

⁵ Some parties have argued that BNSF has "inflated its traffic figures by including traffic that BNSF handled before the merger and has now rerouted over the trackage rights lines." As DOJ notes, however, such rerouted traffic does contribute to the density necessary to make competitive service possible. DOJ-2 at 7, n.1.

⁶ BNSF has raised concerns that UP service problems are adversely affecting BNSF's competitiveness, see BNSF-2 at 9-12, and UP has responded, see UP/SP-314. BNSF has not requested that

The only corridor on which BNSF's emergence as a competitive force has been somewhat slow developing — as confirmed by the comments by the California Public Utility Commission (CPUC), National Industrial Transportation League (NITL), and Sierra Pacific Power Company (SPP) — is the Central Corridor.⁷ CPUC claims that BNSF has made little use of the Central Corridor to handle intermodal trains. But on July 14, 1997, BNSF did institute 7-day-a-week manifest service on the Central Corridor, which seems to be a sufficient service frequency to give BNSF a competitive presence over this corridor. In addition, UP notes that now BNSF handles a substantial amount of intermodal traffic from Salt Lake City, UT, on a daily basis. Although we are somewhat concerned that much of the traffic that BNSF is hauling in these trains consists of empty cars, BNSF's opening of its brand new I-5 Corridor⁸ service should make available additional traffic flows for this line.

One commenter, Kansas City Southern Railway Company (KCS), argues that the BNSF trackage rights should not ultimately be considered successful unless BNSF is able to capture the same share of the market as SP enjoyed prior to the merger. We disagree with this approach, and agree with the assessment of the Department of Transportation (DOT) in its submission that "BNSF market share . . . should not be the decisive criterion by which the level of competition is judged. BNSF must have sufficient traffic to sustain service levels that allow it to be a realistic choice for shippers, but the traffic level could be far less than that of an independent SP." DOT notes in its comments that: "the most important indicator of the impact of the trackage rights conditions is the effect BNSF's presence in the market has on the rates offered by UPSP."

we take any action, but instead has explained that it is reviewing these issues with UP and will seek recourse from us only if workable operating procedures are not adopted.

⁷ Because of concerns raised by various parties that UP's plans to route both its own and BNSF's central corridor traffic over its Moffat Tunnel line might lead to undue congestion and delay, we permitted UP to discontinue service over its alternative route (the Tennessee Pass line), but we withheld our approval for abandonment. The Public Service Company of Colorado asks that we continue oversight on the question of whether the Central Corridor traffic can be adequately served by the Moffat Tunnel route. We agree with that commenter that it is too early to tell whether the Moffat Tunnel is capable of handling traffic diverted from the Tennessee Pass line.

⁸ As part of the BNSF Settlement Agreement imposed by the Board as a condition of the merger, both BNSF and UP were able to offer for the first time a single-line service along the west coast.

Another commenter, the United States Department of Agriculture (USDA), conducted "Listening Sessions" in Dodge City and Wichita, KS, concerning the impacts of the merger. Based on those sessions, USDA contends that BNSF is not providing effective competition on grain movements from points in Kansas, Oklahoma, and Texas to the Gulf of Mexico. In particular, USDA notes that both BNSF and UP increased their rates \$200 per car on September 1, 1997. USDA further claims that the Texas Mexican Railway Company (Tex Mex) has been receiving inferior haulage rights service from UP connecting KCS with Tex Mex; it argues that we erred in permitting abandonment of the "Pueblo line" in Colorado; and it raises concerns about the car supply practices of all of the western railroads.

The one concrete example of a rate increase that USDA provides as support for its argument that BNSF is not providing effective competition is a seasonal adjustment that the grain-hauling carriers have been making each year in anticipation of the heavy demand during the harvest season. This increase does not appear to be anything out of the ordinary. Indeed, UP points out that, systemwide, grain rates have decreased since the merger, and there is no evidence presented by any grain shipper of increased rates on this record.

Regarding its other arguments, we note first that USDA is mistaken about the nature of the rights that Tex Mex received between Beaumont and Corpus Christi. Tex Mex received trackage rights, not haulage rights, and there has been no showing that those rights are inadequate, or that there is any other basis on this record to revisit the extent of the access granted to Tex Mex.

Second, USDA seeks to reargue the merits of the abandonment permitted by the Board between NA Junction and Towner Junction, CO. We granted that abandonment based upon a substantial record in UP/SP, Decision No. 44, slip op. at 204-206. There, we found that traffic on the line was extremely light and that the carrier was experiencing a yearly loss on the line of over \$2.6 million. USDA has presented no evidence to cast doubt on those findings.

Finally, the issues that USDA raises about the car supply practices of railroads in general are not related to this merger oversight proceeding.

Another commenter, International Paper Company (IP), argues that BNSF is not an effective competitor over the trackage rights lines. Notwithstanding the fact that it has tendered substantial traffic to BNSF at Camden and Pine Bluff, AR, IP asserts that it cannot tender a greater percentage of its traffic to BNSF because that carrier has failed to supply the equipment the shipper desires. BNSF responds that it has met with IP representatives, and has agreed to work to meet IP's equipment and service needs. BNSF has also indicated that IP has agreed to make additional traffic available to BNSF. We see no basis on which to intervene in this matter now.

Summary. The record to date indicates that BNSF has actively pursued its trackage rights, and there is no evidence that UP has deliberately hampered BNSF's ability to provide service over its trackage rights. There is also no evidence that to date BNSF has not been working hard to become the effective competitor envisioned by the trackage rights condition. Nevertheless, as part of our ongoing oversight condition, we will continue to monitor carefully the efficacy of the BNSF trackage rights.

III.

ARE THERE DETAILS ABOUT IMPLEMENTATION
OF THE CONDITIONS IMPOSED BY THE BOARD THAT
NEED TO BE FURTHER WORKED OUT?

a. Definition of 2-to-1 points. BNSF has noted that it and UP still have not agreed upon a definitive list of 2-to-1 shipper facilities to which BNSF is entitled to access under our merger conditions. It suggests that we establish a presumption that all shippers at 2-to-1 points were served by both UP and SP prior to the merger, and thus that UP bears the burden of showing that this was not the case in particular instances. Arguing that all questions about which shippers at 2-to-1 points may be served by BNSF should have been resolved by now, DOJ and DOT suggest that BNSF should be given access to all shippers at 2-to-1 points regardless of whether those shippers had access to both UP and SP service prior to the merger. Their view is that ensuring BNSF access to additional traffic will enhance BNSF's potential traffic base and hence its ability to be an effective competitor. As a result, they conclude that, even if some shippers obtain a windfall, no shipper that is entitled to BNSF service would be deprived of it.

UP claims that BNSF has greatly overstated any difficulties that the two railroads are having in identifying 2-to-1 points. UP notes that, after the merger was approved, it provided BNSF with an initial listing of 2-to-1 points and 2-to-1 shortlines, and that the carriers have been engaged in an ongoing process of refining that list. UP asserts that, when BNSF has inquired concerning a particular shipper that it is prepared to serve, UP has responded promptly. UP also notes that BNSF has requested confirmation of the 2-to-1 status of a long list of shipper facilities that BNSF research indicates received two-carrier service through reciprocal switching at some time in the past. UP states that it is in the process of answering this request, and that fewer than 20 of the 250 facilities at issue moved any rail traffic this year, which it suggests makes this dispute more theoretical than real.

The possibility that BNSF may be unable to obtain a prompt determination of whether BNSF is entitled to serve a particular shipper facility is unacceptable. If BNSF has traffic that it would like to be able to move, then it would be inexcusable for

UP not to give a prompt reply indicating whether UP believes that shipper may be served. We suggest that UP and BNSF establish a protocol for resolving such issues. For example, UP could be given 5 business days to respond. If it does not so respond, then BNSF would be authorized to provide service. If UP objects, then the issue could be resolved through arbitration or by us. UP and BNSF will have 30 days to decide on a protocol for resolving these issues and report back to us. If they are unable to agree, each carrier shall set forth the precise protocol it believes we should adopt and a brief argument in support of its position. We then will adopt a protocol for resolving 2-to-1 disputes.

We stand ready to resolve promptly all disputes concerning issues of whether BNSF may serve a particular shipper. It does not now appear, however, that we need to redefine 2-to-1 shippers just to give BNSF additional traffic. There is no evidence that BNSF lacks access to sufficient traffic to be an effective competitor, or that UP has unreasonably impeded BNSF's access to shippers. We should note that, so far, we have been asked to resolve only two disputes about whether a particular shipper could be served under our conditions, neither of which involved a simple determination of 2-to-1 shipper status. We quickly resolved one of these concerning an existing shipper that asked for an expedited ruling to move traffic immediately.⁹ The other dispute concerns a shipper contemplating rehabilitating a facility located on the trackage rights lines, which we are resolving in another decision issued today.¹⁰ BNSF has pointed to no circumstance where it has come to UP with a request for a clarification with respect to an actual shipper that desired to tender traffic to BNSF concerning which UP did not promptly respond.

It is understandable that there is a healthy tension between UP and BNSF about the exact parameters of our various conditions. These carriers are direct competitors, and as we predicted, our approval of the merger has led to continued rivalry rather than collusion. If a dispute threatens to impede the ability of BNSF to provide competitive service — and that appears not to have been the case so far — we will take appropriate action.

b. Contract reopener condition and related traffic density concerns. Several parties have asked that we reinterpret and broaden the contract reopener provision. That provision requires UP to modify its contracts with shippers at 2-to-1 points so that BNSF will have access to at least 50% of the volume of each 2-to-1 shipper that was under contract with either UP or SP. The purpose of the contract reopener condition was to increase BNSF's

⁹ See Decision No. 73 in UP/SP, served August 14, 1997.

¹⁰ See BNSF-81 (UP/SP, Decision No. 75, ruling on the joint petition of BNSF and R.R. Donnelley & Sons Company filed August 12, 1997).

potential traffic base during the early months of its trackage rights operations.¹¹

At the same time, we recognized that, in at least some cases, shippers were given favorable contract terms only because UP could obtain efficiencies by virtue of it being able to handle the shipper's entire volume. To give BNSF the benefits of the contract reopener provision while also providing UP with the right to extricate itself from contracts that would be unfavorable at 50% volume levels, we adopted Guideline No. 9. Guideline No. 9 permits UP to release the entire volume under contract if a shipper elects to use the contract modification provision. See UP/SP, Decision No. 57 (STB served Nov. 20, 1996) slip op. at 12. Under Guideline No. 9, if UP notifies the shipper that it would release the entire contract, then the shipper has the choice of either enforcing its existing UP contract in its entirety, or negotiating a contract with BNSF for whatever volume of traffic the shipper chooses.

Certain parties have asked us to eliminate Guideline No. 9, on the ground that it has somehow impeded the use of the contract reopener provision and that little use has been made of this provision.¹² BNSF notes that it has been able to contract with fewer than 10 shippers whose traffic would otherwise have been under contract with UP.

We will not revisit the contract reopener provision and Guideline No. 9 at this time. In Decision No. 44, we broadened the contract reopener provision in response to arguments that, prior to the merger, UP and SP had locked up much of the traffic at 2-to-1 points in contracts. Certain parties argued that, because of this pre-merger contracting, BNSF would not have adequate traffic densities to provide competitive service over its trackage rights segments. We imposed the contract reopener condition to assure that BNSF would not be foreclosed from competing for sufficient traffic to allow it to provide efficient service, especially in the period immediately after the merger.

We never viewed the contract reopener provision as the linchpin of BNSF's ability to compete over these routes. Rather, as noted earlier, the most important role of the condition was to

¹¹ The contract reopener provision was initially proposed in an agreement between the Chemical Manufacturers Association (CMA) and the UP. As initially structured, the provision was limited to CMA members in Louisiana and Texas. We broadened it to all 2-to-1 shippers.

¹² The suggestion of the CMA and the Society of the Plastics Industry, Inc. (CMA/SPI) that Guideline No. 9 is unlawful because the Board lacks authority to override a contract is without merit because the shipper retains the option of enforcing its entire contract. Moreover, if Guideline No. 9 were unlawful, the contract reopener provision would suffer from the same defect.

assure that the new entrant, BNSF, was not foreclosed from competing for adequate traffic during the early months of BNSF's operations.¹³ The contract reopener provision, in fact, has enabled BNSF to obtain at least some additional traffic that would not otherwise have been available.¹⁴ If the record had shown that BNSF has not been able to capture sufficient traffic for viable operations, then we would have been more disposed to modify the contract reopener provision or find some other means of giving BNSF additional traffic. No such showing, however, has been made.

In short, the contract reopener provision, with Guideline No. 9, has given BNSF additional competitive opportunities; it has protected UP; and it has guaranteed that shippers will be no worse off -- and may well be better off -- than they were before the merger, when they had UP/SP competition. We will not revisit this matter.

In addition to the parties that have suggested that we should modify the contract reopener provision by eliminating Guideline No. 9, DOT contends that, even when all of UP's and SP's pre-merger contracts have expired, BNSF may continue to be hampered in its ability to contract for traffic because of its inability to offer discounts for serving all of a shipper's traffic at several different points. DOT argues that this problem stems from the fact that BNSF is only able to serve 2-to-1 shippers, not all of the shippers that UP serves. DOT is concerned that BNSF may not be able to amass sufficient traffic to provide competitive service over its trackage rights. Although they do not propose any remedy, CMA and SPI also express concern that UP's merger-enhanced "leveraging power" may impede BNSF's ability to build traffic densities sufficient to compete successfully via its trackage rights. Similarly, BNSF has argued that it should be given access to any exclusively served UP traffic that UP "bundles" with 2-to-1 traffic.

There is no basis on this record for us to conclude that the economies UP could achieve by serving several of a shipper's plants along BNSF's trackage rights routes are so substantial as to impair unduly BNSF's ability to compete for 2-to-1 traffic. To the contrary, it is just as likely -- indeed, probably much more likely -- that BNSF will be able to attract substantial traffic through the economies of scale that can be realized by

¹³ Moreover, UP and SP submitted evidence in the merger proceeding, which they also cite here, indicating that the majority of the relevant UP and SP contracts were of short duration (expiring in 1996), and that 94% of these existing UP/SP contracts would expire by their own terms by the end of 1997. None of the parties has challenged this evidence. Under those circumstances, BNSF's limited use of the provision is not surprising.

¹⁴ At the same time, the record shows that shippers in many cases have been able to obtain lower contract rates, either from BNSF or from UP, because of the contract reopener provision.

serving all of a shipper's requirements at a single location. Therefore, while we will remain vigilant in assuring the effectiveness of BNSF's trackage rights, at this point and on this record, there is no reason to believe that BNSF will be unable to provide a competitive presence through its trackage rights service. Thus, no changes in our remedial conditions are needed at this time.

c. New facilities and transloading condition. The new facilities and transloading condition originated in the BNSF and CMA agreements. The condition gave BNSF the right to serve any facilities that are established after the merger on SP-owned lines over which BNSF receives trackage rights. We expanded the condition in Decision No. 44 by giving BNSF the right to serve new facilities established on both UP-owned and SP-owned lines over which BNSF obtained trackage rights, and by specifying that new facilities would be defined to include new transload facilities, including those owned or operated by BNSF.

The purpose of this condition was to replicate indirect competition that was available prior to the merger to shippers considering new operations at locations defined as 1-to-1 points. Those shippers were not protected by BNSF's ability to serve 2-to-1 shippers via its trackage rights. This and other similar conditions addressing the preservation of direct and indirect competition made divestiture unnecessary.¹⁵ It was not our intention to open up UP's and SP's existing exclusively served traffic to direct BNSF service through this condition. That would have been a substantial overreach, and would have gone beyond remedying the competitive harm that was at issue.

Ordinarily, shippers can lock in the competitive benefits of their ability to locate new facilities on the lines of two or more independent railroads by negotiating a long-term contract with the railroad on which they ultimately will locate. Permitting BNSF to serve new facilities was intended to replace competition that was lost by shippers who before the merger had a choice to locate facilities at points served by UP or SP.

One aspect of the new facilities condition, on which some commenters have focused here, involves transloading facilities. In authorizing the merger, the Board permitted BNSF to serve new transloading facilities, in order to preserve the role that transloading played before the merger in limiting UP's and SP's market power at exclusively served points. For example, it protected shippers that were exclusively served by only one of the merging railroads (either UP or SP) but whose rates would have been constrained by their ability to transload to or from the other nearby railroad. With this condition in place, such shippers at 1-to-1 points have the opportunity to initiate transloading operations served by BNSF over its trackage rights.

¹⁵ We also saw this condition as another way to assure adequate traffic for BNSF on its trackage rights lines.

UP and BNSF have been unable to reach agreement on a protocol for determining exactly when and how shippers will be able to take advantage of the important new facilities condition, and each has agreed that it might well be desirable for this dispute to be resolved by the Board. Particularly, they seem to be unable to agree on what constitutes a "new facility" or a "new transloading facility." With regard to new facilities, we noted in Decision No. 61 (STB served Nov. 20, 1996) slip op. at 9, merely that "new facilities" was defined in the CMA agreement, from which this condition originated, to exclude expansions of or additions to existing facilities. BNSF now asks that we determine that new facilities include:

- (1) vacant or existing rail-served facilities that undergo a change of ownership or lessee and (a) change the product shipped from or received at the facility, or (b) have not shipped or received by rail for at least 12 months prior to the resumption or proposed resumption of rail service;
- (2) existing facilities constructing trackage for accessing rail service for the first time; and
- (3) newly constructed rail-served facilities.

UP submits that only the third item in BNSF's proposed definition is appropriate, but concedes that, in an offer at compromise that has since been withdrawn, it had been willing to incorporate the second item as well.

We do not believe that it is necessary or appropriate for us to determine, in advance, the exact parameters of the new facilities condition. As we have noted, the underlying purpose of the condition is to replace competition that would have been lost pursuant to the merger. A determination of whether a new facility such as a transload facility addresses the loss of competition that this condition was intended to remedy, or whether it instead amounts to an overreach, however, is fact-specific; it cannot be made in a vacuum, nor can it be broadly defined. Rather, each determination will no doubt be unique, given the expected differences in each shipper's circumstances. Thus, in each case, we must examine the particular circumstances to determine whether the condition has been met. See, e.g., our decision issued today in UP/SP, Decision No. 75 (STB served Oct. 27, 1997) (Donnelley). In Donnelley, we determined that a particular facility was covered by the "new facilities condition" because (a) prior to the merger, SP would have been able to offer a transloading alternative in competition with a direct UP movement into the shipper's plant; (b) the facility had not been served by rail for four to five years; and (c) the transloading operation will be entirely different in nature and purpose from that of the facility's prior use.

There are, of course, situations in which broad rules, policy guidelines, or agency declarations are necessary and appropriate to provide expedition or predictability in individual

cases. Here, however, we do not believe that broadly applicable rules or declarations are warranted. There has not been a flood of new facility controversies; to the contrary, the condition has been in place for over a year, and to date, only one controversy has been brought to our attention. Moreover, we are confident that we can resolve any controversies that are brought before us quickly. We note that, in the only controversy that we have been asked to resolve, we were able to act in just over two months. See Donnelley, supra.¹⁶ We understand the parties' desire for predictability, and indeed, we believe that our decision in Donnelley should provide substantial guidance for the future. A rule or guideline to cover all possible fact patterns, however, is simply not feasible or appropriate now.¹⁷

IV.

WHAT ABOUT SAFETY AND SERVICE PROBLEMS?

Several commenters are understandably concerned about the significant post-merger service deterioration on UP's lines. They note problems in all segments of UP's system,¹⁸ in terms of poor transit times and inadequate car supply and delivery performance. UP has also experienced three tragic train accidents in recent months, which have triggered concern and action by the Federal Railroad Administration (FRA).

UP acknowledges that operating problems have proven to be more severe than originally anticipated, and that they are creating significant difficulties for its customers. UP maintains, however, that its current post-merger service and safety problems are for the most part unrelated to the merger of the operations of its rail carriers.

In discussing the operational problems that it is experiencing, UP points to several causes. First, UP notes the poor condition of SP's plant. Also, because the labor agreements needed to implement the merger were not finalized until recently, UP has been largely precluded until now from even beginning its workforce integration. In addition, the new system-wide computerized control network needed to operate the merged system has not been fully in place; it is being implemented in phases, with the final implementation expected by March 1, 1998 (instead of the earlier projection of May 1998). Finally, UP cites

¹⁶ Indeed, we would have acted more quickly in Donnelley had we not had to consider the broader request for relief being sought here by BNSF.

¹⁷ Cf. the comments of DOJ and DOT, suggesting that the definition of "new facility" should be functional, in that it should turn on whether new service is being established rather than whether existing structures are being served.

¹⁸ In particular, the Houston/Gulf Coast, the SSW Corridor, the Central Corridor, the I-5 Corridor, and the Powder River Basin area.

several unrelated events that have exacerbated its operating and service problems. These events include delays for traffic moving to and from Mexico related to the recent privatization of that country's rail lines; a dramatic increase in the volume of plastics shipments requiring storage in transit; CSX problems east of New Orleans caused by hurricane Danny; a major flood in the nation's largest coal mine in the Powder River Basin; and the hiring of a number of former SP crew members by BNSF to staff its new operations, leaving UP with a shortage of skilled workers.

UP's July 1 progress report in this oversight proceeding outlines its implementation or planned implementation of a number of measures that will reduce the current operational difficulties. More recently, on August 29, 1997, UP issued a press release indicating that it has stepped up the measures outlined on July 1, which it has further modified in its October 1 progress report. As we would expect, UP has indicated that the prompt resolution of its service and safety problems is its highest corporate priority.

As noted above, we have instituted a proceeding to look into what should be done about the very real rail service problems in the western United States. With regard to safety, UP appears to be fully cooperating with FRA, the federal agency with responsibility for rail safety enforcement, in addressing concerns identified by that agency.

The essential point for the purposes of this oversight proceeding, however, is that the service and safety matters we have just discussed do not appear to be the result of a lack of adequate competition or the anticompetitive acts of the merging carriers, or, most specifically, the ineffectiveness of the competitive conditions imposed by the Board on the merger. Nevertheless, we will continue to monitor closely the competitive situation resulting from our approval of this merger.

V.

ARE ANY NEW CONDITIONS REQUIRED?

Our review of the record indicates that no major new conditions are required to assure the preservation of vigorous competition in the markets affected by the merger. Several parties have requested new conditions or have renewed condition requests that we previously denied. It is not the purpose of this oversight proceeding to give the parties an opportunity to relitigate our merger decision, and in the absence of a competitive problem, it would not be appropriate for us to reopen the merger and impose additional conditions. Our resolution of various requests for additional conditions and our examination of specific concerns follows.

a. Tex Mex's contention that the trackage rights condition that we imposed may not be accomplishing its intended purpose is without support. Tex Mex is essentially rearguing the Board's decision to limit the trackage rights granted to it to traffic

having a prior or subsequent movement over Tex Mex's lines. The Board granted these trackage rights to Tex Mex to assure that the merger would not erode its traffic base and undermine its ability to provide an alternative route to the Laredo gateway for traffic to and from Mexico. Tex Mex concedes, however, that the trackage rights have permitted it to increase its traffic since the merger. Thus, the condition we imposed is working as anticipated.

b. Sierra Pacific Power Company and Idaho Power Company (SPP) contend that UP and BNSF/Utah Railway (UR) competition for their coal traffic to the North Valmy Station in Nevada has been inadequate. SPP seeks essentially the same broad relief that it sought, and we denied, in the merger proceeding. SPP argued there, as it continues to argue here, that BNSF will not be able to provide an adequate substitute for SP's service and that SPP should be given the authority to choose another carrier to operate at reduced trackage rights fees (i.e., fees lower than those now paid by BNSF) from all coal mines in Utah and Colorado served by SP.

SPP has not justified the broad relief it seeks, nor has it justified narrower relief directed to the situation at the North Valmy facility. The short answer to SPP's claims is that competition has not decreased because of the merger. UP proposed contract rates on SPP's traffic that were lower than those that prevailed before the merger, but SPP declined the offer. Subsequently, BNSF contracted with SPP to carry some coal to North Valmy. These events do not show any decrease in competition since the merger.

We are aware that SPP has filed a rate complaint against UP's rates between the loadout facilities at Sharp, UT, serving the Southern Utah Fuel Company (SUFCO) mine and the North Valmy station;¹⁹ as part of that proceeding, SPP must show that UP is market dominant over SPP's traffic. We do not intend to prejudge that complaint here. We conclude, however, that, on this record, no basis has been provided to disturb our original finding in UP/SP, Decision No. 44, that SPP's competitive alternatives at North Valmy are not impaired by the merger. Id., slip op. at 187.

UP notes that the principal source of coal for the North Valmy facility is the SUFCO coal mine, which is served only by truck. SUFCO coal moves by truck 81 miles to the Sharp transloading facility on the UP lines, and then 460 miles by rail to Valmy. SUFCO coal can also move by truck 94 miles to the Savage transloading facility, and then 491 miles by rail to

¹⁹ UP is now moving SUFCO coal from the Sharp load-out to North Valmy under a newly established common carrier rate. SPP has challenged the reasonableness of that rate in Sierra Pacific Power Company, et al. v. Union Pacific Railroad Company, STB Docket No. 42012, filed Aug. 1, 1997.

Valmy, using a UR/BNSF movement.²⁰ The availability of these apparently comparable routings indicates that there continues to be competitive rail service to allow SPP to receive its coal requirements from the SUFCO mine. Moreover, as UP notes, there are other BNSF/UR-served mines even closer to Savage than the SUFCO mine that could be used to meet North Valmy's needs, at least to the extent that they exceed its minimum contractual commitment to receive coal from SUFCO. The service SPP is now receiving from BNSF to move coal to North Valmy under contract is but one of the options that we observed in UP/SP Decision No. 44.

In short, SPP has not shown that we should impose conditions to create additional competition for its traffic.

c. Railco operates a coal transloading facility near the Savage transloading facility in Utah. UP reached a settlement agreement with UR giving that carrier access to the Savage facility for the first time. The agreement did not give UR access to the Railco facility. This issue was decided in UP/SP, Decision in No. 44, and again in Decision No. 66 (STB served Dec. 31, 1996), where we explained that:

We realize that the [UR] agreement, by providing an increased rail option for one shipper but not for another, may disadvantage the one for whom the increased option has not been provided. That, however, is not the kind of harm that should be rectified under the 49 U.S.C. 11344(c) conditioning power, which was not used by the ICC and will not be used by us to equalize rates and service among competing shippers.

(Id., slip op. at 14). Railco has presented no reason here to disturb that determination.

d. Cyprus Amax is in the process of shifting production from the Plateau Mine to its new facility at Willow Creek, where UR, as the sole originating carrier, will provide equal competitive access to UP and BNSF. Cyprus Amax argues that BNSF's trackage rights for movements of coal from Utah origins to Los Angeles, CA, for export should be expanded. It maintains that BNSF should be granted trackage rights over UP's route to Los Angeles through Las Vegas, NV, or by some other means. Before the merger, Cyprus Amax used SP to haul coal, even though its route was 470 miles longer than UP's. Although BNSF service is available over the same route that SP previously used, Cyprus Amax claims that BNSF's rates are significantly higher than were SP's rates.

Given UP's substantial geographic advantage, it is not surprising that UP has been able to offer a lower rate on these movements than BNSF can. Although SP was evidently offering a low rate for these movements, BNSF has explained that SP's

²⁰ As we explained in UP/SP, Decision No. 44, joint-line movements of unit-train coal are not inherently less efficient than single-line movements.

pricing package apparently reflected equipment backhauls that made the movement for Cyprus Amax economically viable, and UP states that BNSF has every opportunity and incentive to establish similar backhauls with shippers in the Utah Valley. Indeed, Cyprus Amax quotes approvingly from UP's original merger application that the export coal market "is intensely competitive with lower cost Australian coal(,) the leading contender in end-markets...." UP submitted evidence in its July 1, 1997 report indicating that its systemwide rates for export coal declined 4-5% over the last year. Thus, Cyprus Amax has shown no evidence here of competitive harm resulting from the merger that is sufficient to justify additional conditions.

e. New Orleans. In its July progress report and its August 1st filing, BNSF asserts that access by BNSF to former UP or SP customers at New Orleans through reciprocal switching has not been permitted by UP, allegedly disadvantaging shippers of westbound traffic out of New Orleans by denying them access to the competitive two-carrier service they enjoyed prior to this merger. BNSF indicates that it plans to file a separate petition concerning this matter. BNSF-PR-4 at. 12, BNSF-1 at 18. DOT urges us to inquire into this problem and to take whatever remedial action is necessary. DOT-1 at 6.

UP responds that this condition request by BNSF is (a) untimely, (b) contrary to the BNSF settlement agreement, and (c) wholly unjustified. UP argues that the request is unjustified because the relatively few shippers in New Orleans that are served by it and open to reciprocal switching are also open to KCS and Illinois Central Railway (IC), and thus those shippers did not lose rail competition as a result of the merger. UP notes that, contrary to DOT's statement, KCS and IC are free to handle traffic of these shippers that is bound to or from points west of New Orleans. It notes that no New Orleans shipper has shown that the merger left it without any rail competition.²¹

BNSF has not presented any basis on this record for us to conclude that an additional condition is warranted at New Orleans. If BNSF files a petition concerning this matter, we will examine it in more detail.

f. North American Logistics Services (NALS) has attempted to reargue its request for direct BNSF service for its Wunotoo, NV, plant near Reno, NV, which was denied in UP/SP, Decision No. 44, slip op. at 192. That plant was an exclusively served site before the merger, and continues to be exclusively served by UP. NALS has presented no new evidence or changed circumstances sufficient to support its request for direct BNSF service.

²¹ UP indicates that it will offer a full response when and if BNSF's petition is filed.

VI.

LABOR ISSUES

The United Transportation Union (UTU) alleges that there have been instances where UP has made certain labor changes prior to negotiating an implementing agreement to permit those changes. UP admits that there have been a handful of occasions where this has occurred, but states that when these matters have been brought to its attention, it has taken prompt corrective action. UP has now negotiated or arbitrated most of the necessary new agreements as contemplated by the New York Dock²² conditions. While no further labor protective conditions have been justified, we admonish UP scrupulously to observe its New York Dock obligations.

VII.

ARE WE GETTING ENOUGH INFORMATION?

Although the information that UP and BNSF submitted in their first three quarterly reports lacked sufficient detail, the reports that were filed on July 1, 1997, were much more comprehensive. We believe that we are now getting the appropriate type and amount of information.²³ UP and BNSF have proposed, and we agree, that the existing quarterly reporting schedule, with comprehensive summary presentations to be filed in the July 1, 1998 progress reports, should be continued. With respect to the July 1 reports, interested parties will then have 45 days from July 1, 1998, to comment on oversight issues, and replies by UP and BNSF will be due 15 days later. We will continuously monitor the quarterly reports, and we anticipate issuing another report concerning oversight issues following a review of the July 1 submissions and the comments. Of course, we always reserve the right to alter the reporting schedule or intensify the monitoring. Any parties seeking immediate, merger-related relief should use our ordinary formal complaint or declaratory order procedures.

²² New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979) (standard labor protective conditions for mergers, consolidations, and control proceedings).

²³ DOT and the National Railroad Passenger Corporation (Amtrak) have requested that UP provide detailed information in its quarterly reports on the effect that the merger has had on on-time passenger train performance. By statute, Amtrak is required to negotiate contractual incentives and penalties for on-time performance. UP and Amtrak are apparently in the midst of renegotiating their contracts. Except to the extent that we are required to do so under 49 U.S.C. 24308, we see no reason to interpose ourselves in this process, which is unrelated to the issue of competitive service for shippers, the focus of this oversight proceeding.

There is no reason to open this proceeding for formal discovery procedures as some parties have suggested. Rather, the Board hereby directs that UP and BNSF shall make available their 100% traffic tapes by July 15, 1998. The type of data that would then be available for traffic from July 1 of the previous year to June 30 of the reporting year would permit interested persons to address whether the competitive conditions imposed by the Board are working as envisioned. Formal discovery procedures would add no new relevant information on competition and would complicate this oversight process unnecessarily.

We note that, on October 16, 1997, we issued an order prescribing the type of information that UP must file periodically in the proceeding involving service in the western United States. We will continue to examine that information, as well as any filings that shippers and others make in that proceeding. In addition, shippers may continue the existing informal process of bringing individual rail service complaints to our Office of Compliance and Enforcement.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UP and BNSF shall submit their proposed protocol(s) concerning identification of 2-to-1 points within 30 days.
2. UP and BNSF shall continue to report quarterly, with comprehensive summary presentations included in their progress reports due on July 1, 1998.
3. UP and BNSF shall make their 100% traffic tapes available by July 15, 1998.
4. Comments of interested parties concerning oversight will be due on August 14, 1998.
5. Replies will be due September 1, 1998.
6. This decision is effective immediately.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

STB

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32760

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Item No. _____

Page Count 1
JAN 399

6 1123

LAW OFFICES

McCARTHY, SWEENEY & HARKAWAY, P. C.

1750 PENNSYLVANIA AVE., N. W.

WASHINGTON, D. C. 20006

TELEPHONE (202) 393-5710

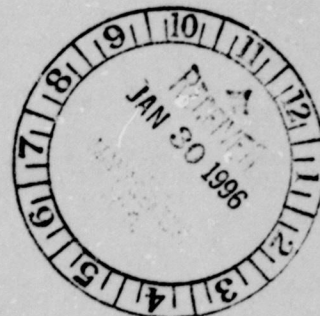
TELECOPIER (202) 393-5721

DOUGLAS M. CANTER
JOHN M. CUTLER, JR.
WILLIAM I. HARKAWAY
STEVEN J. KALISH
KATHLEEN L. MAZURE
HARVEY L. REITER
DANIEL J. SWEENEY

ANDREW P. GOLDSTEIN
Counsel

January 30, 1996

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
Room 1324
12th & Constitution Avenue N.W.
Washington DC 20423



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

Dear Mr. Williams:

The undersigned counsel hereby enter their appearance on behalf of Archer Daniels Midland Company, which has filed a Notice of Intent to Participate in the captioned proceedings. Archer Daniels Midland Company chooses to be identified by the acronym "ADMC" in these proceedings.

Sincerely,

Andrew P. Goldstein

Andrew P. Goldstein
John M. Cutler, Jr.
Attorneys for
Archer Daniels Midland Company

JAN 31 1996

cc: Counsel for Applicants
Administrative Law Judge Nelson

APG/rmm

STB

FD

32760

1-25-96

J

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RICHARD J. DURBIN

20TH DISTRICT, ILLINOIS

AT-LARGE WHIP

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEE ON AGRICULTURE AND
RURAL DEVELOPMENT

SUBCOMMITTEE ON TRANSPORTATION

SUBCOMMITTEE ON THE DISTRICT OF COLUMBIA



Congress of the United States

House of Representatives

Washington, DC 20515-1320

January 8, 1996

9600520 61061

2143 RAYBURN BUILDING
WASHINGTON, DC 20515-1320
(202) 225-5271

525 SOUTH 8TH STREET
SPRINGFIELD, IL 62703
(217) 492-4082

400 ST. LOUIS STREET, SUITE #2
EDWARDSVILLE, IL 62025
(618) 492-1082

221 EAST BROADWAY, SUITE #106
CENTRALIA, IL 62801
(618) 532-4285

FD-32766

Mr. Richard S. Fitzsimmons
Director
Interstate Commerce Commission
Office of Congressional and Public Affairs
Washington, D.C. 20423-0001

Dear Mr. Fitzsimmons:

Please find enclosed copies of correspondence my office has received regarding the Union Pacific/Southern Pacific Proposed Railroad Consolidation.

I would respectfully request that these letters be placed in the public docket for this proceeding. I would also greatly appreciate it if these constituents might be added to the service list to that they will receive copies of all future Commission decisions in this proceeding.

Please feel free to contact my Congressional office if you have any questions regarding this matter.

Thank you for your attention to this matter.

With best wishes,

Sincerely,

Richard J. Durbin
Member of Congress

RJD:wf
Enclosures

JAN 6 1996

OFFICE OF
CHAIRMAN MORGAN

JAN 25 9 00 AM '96

INTERSTATE COMMERCE
COMMISSION
RECEIVED

Item No. _____

Page Count 1

JAN 336

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Item No. _____

Page Count 2

JAN 324

CAPITOL OFFICE:
P.O. BOX 2910
AUSTIN, TX 78768-2910
(512) 463-0592
FAX: (512) 463-8792

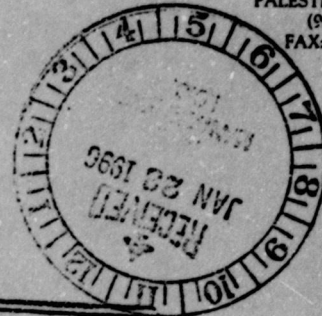


TODD STAPLES
STATE REPRESENTATIVE
DISTRICT 11

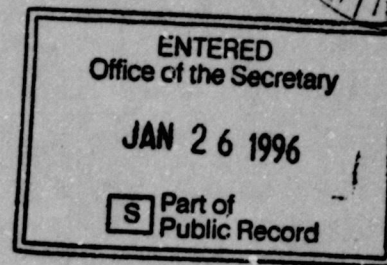
61048
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DISTRICT OFFICE:
P.O. BOX 257
PALESTINE, TX 75802-0257
(903) 729-7717
FAX: (903) 729-8708

January 17, 1996



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



Dear Mr. Williams:

It has been brought to my attention that Representative Staples' opposition letter regarding the proposed Union Pacific/Southern Pacific merger was inadvertently dated January 12, 1995. I have enclosed a new letter with the current year so that your records will be correct. Thank you for your time and help in this matter.

Sincerely,

Shannon Wickliffe
Legislative Coordinator

enclosure

xc: Mr. Jerry Martin, Texas Railroad Commission





CAPITOL OFFICE:
P.O. BOX 2910
AUSTIN, TX 78768-2910
(512) 463-0592
FAX: (512) 463-8792

TODD STAPLES
STATE REPRESENTATIVE
DISTRICT 11

DISTRICT OFFICE:
P.O. BOX 257
PALESTINE, TX 75802-0257
(903) 729-7717
FAX: (903) 729-8708

January 12, 1996

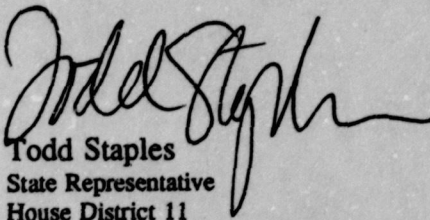
The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12th St. & Constitution Ave., NW
Room 2215
Washington, D.C. 20423

AMENDED POSITION ON
Finance Docket No. 32760, Union Pacific Corporation, et al - Control & Merger -
Southern Pacific Rail Corporation, et al.

Dear Mr. Williams:

I withdrew my support on January 3, 1996 in order to gain more facts regarding the proposed Union Pacific/Southern Pacific merger. The negative labor impact coupled with possible rail access limitations for Texas House District 11 results in my opposition of the merger as currently filed.

Respectfully submitted,


Todd Staples
State Representative
House District 11

TS/sw

xc: Mr. Jerry Martin, Texas Railroad Commission



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Item No. _____
Page Count 1
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LUMBER PRODUCTS COMPANY

GREEN LANE IND. PARK • P.O. BOX 719 • BRISTOL, PA 19007 • 215-785-6100 • FAX 215-785-5450

January 5, 1996

Ms. Linda J. Morgan, Chairman
Interstate Commerce Commission
1201 Constitution Avenue, N.W., Room 4126
Washington, DC 20423

INTERSTATE COMMERCE
COMMISSION
RECEIVED
JAN 23 2 42 PM '96
OFFICE OF
CHAIRMAN MORGAN

Dear Ms. Morgan:

Lumber Products Company is extremely concerned about the competitive effects on us of the proposed acquisition of SP by UP. While we have reviewed the proposed agreement between UP and BN/Santa Fe, which is intended to remedy those effects, we are far from persuaded that it will produce effective competition for our traffic.

We have also considered the possibility that Conrail acquire some of SP's Eastern Lines in connection with the merger, especially the lines running from Chicago and St. Louis and Louisiana. We find this possibility to be much more appropriate and effective in addressing our concerns. We think their proposal is better because it involves their ownership of the lines, whereas most of the UP-BN/Santa Fe deal involves only trackage rights. We have learned that the benefits of trackage rights are uncertain in that they can be easily lost if the railroads argue about whose traffic has priority, who is in charge of operations on the line, and so forth.

We favor Conrail's proposal as it would provide the best through service between Texas and the Northeast/Midwest markets. This routing would involve the fewest handlings between carriers which is very important to industries in the above market place.

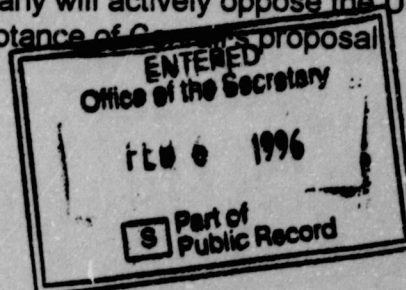
Finally, we think Conrail's proposal helps to assure that we, and other rail customers, will have multiple rail options. We are extremely concerned about the trend toward only a few giant railroads. This is definitely not in the customers' interest.

For these reasons, Lumber Products Company will actively oppose the UP-SP merger at the ICC, unless it is conditioned on acceptance of Conrail's proposal.

Sincerely,

William Eisler

William Eisler
President



STB

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Item No. _____
Page Count 1
JAN 322

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FD 32760

January 10, 1996

Linda J. Morgan
Chairman
Surface Transportation Board
Department of Transportation
1201 Constitution Ave., N.W., Room 4126
Washington, DC 20423

Dear Ms. Morgan:

We are extremely concerned about the competitive effects on us of the proposed acquisition of SP by UP. While we have reviewed the proposed agreement between UP and BN/Santa Fe which is intended to remedy those effects, we are far from persuaded that it will produce effective competition for our traffic.

We have also considered the possibility that Conrail acquire some of SP's eastern lines in connection with the merger, especially the lines running from Chicago and St. Louis to Texas and Louisiana. We find this possibility to be much more appropriate and effective in addressing our concerns. We think their proposal is better because it involves their ownership of the lines, whereas most of the UP-BN/Santa Fe deal involves only trackage rights. We have learned that the benefits of trackage rights are uncertain in that they can be easily lost if the railroads argue about whose traffic has priority, who is in charge of operations on the line, and so forth.

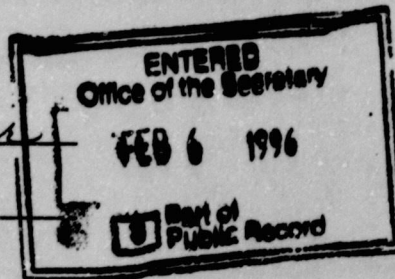
We favor Conrail's proposal as it would provide the best through service between Texas and the Northeast/Midwest markets. This routing would involve the fewest handlings between carriers which is very important to industries in the above market place.

Finally, we think Conrail's proposal helps to assure that we and other rail customers will have multiple rail options. We are extremely concerned about the trend toward only a few giant railroads. This is definitely not in the customers' interest.

For these reasons, we will actively oppose the UP-SP merger at the Department of Transportation, unless it is conditioned on acceptance of Conrail's proposal.

Sincerely,

Paula Barry Jones
President
Claude Barry & Co.



INTERSTATE COMMERCE
COMMISSION
RECEIVED
JAN 23 2 42 PM '96
OFFICE OF
CHAIRMAN MORGAN

cc: Honorable Kay Bailey Hutchinson
Honorable Phil Gramm
Chairman Barry Williamson, Texas Railroad Commission

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Nevada Legislature

SIXTY-EIGHTH SESSION

COMMITTEES:

Member

Commerce and Labor

Natural Resources

Transportation

JOSEPH M. NEAL, JR.

SENATOR

Clark No. 4

January 18, 1996



The Honorable Vernon A. Williams
Secretary, Interstate Commerce Commission
Twelfth Street & Constitution Avenue, NW., Rm. 2215
Washington, D.C. 20423

Subject: Finance Docket No. 32760
Proposed Merger Between the Union Pacific and Southern Pacific Railroad

Dear Secretary Williams:

It has come to my attention that the Union Pacific is proposing a merger between itself and the Southern Pacific Railroad. It is my expressed opinion that this merger would not affect the State of Nevada. According to information I have received, there are three railroad lines which transgress this state, Union Pacific in the south and the Union and Southern Pacific in the north. The lines in the north overlap.

If the merger is successful, and we lose one of the lines in the north, the impact upon our state would be nil. The reason is that the Union Pacific and Southern Pacific have the same destination point in our state, Reno, Nevada.

I am aware of the problems the merger may have caused in the Midwest and East. Due to the larger trains, farmers now have to haul their grain, at their expense, to main rail lines where the larger 75- and 100-car elevators are now located. This activity mirrored the British Free Trade Extractive Policy of the Colonial Period by having located a few large elevators which the farmers had to transport their grain at their expense. In the past, this had lead to looting the captive growers by raising the prices and rates.

I cannot think that the level of sophistication in the market today would not permit this to happen. People looking for new ways of doing business would capitalize on this. The Union Pacific has proven to be a good corporate citizen in the State of Nevada. It is my belief that they would exercise the necessary compassion and correct any condition that might have been caused by the merger and work with the people to achieve a solution.

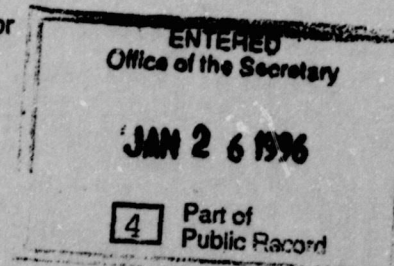
I do support the merger.

Respectfully yours,

Joseph M. Neal, Jr.
Nevada State Senator

JMN/lip:60009.54

Item No. _____
Page Count 1
JAN 30 9



DISTRICT OFFICE:

304 Lance Avenue, North Las Vegas, Nevada 89030 • Home: (702) 399-2114

LEGISLATIVE BUILDING:

401 S. Carson Street, Carson City, Nevada 89710 • (702) 687-3644 or 387-5742 • Fax No. (702) 687-5962

STB FD

32760

1-22-96

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FD-32760



Ohio Senate
Senate Building
Columbus, Ohio 43215-4276
614/466-8082

Committees:
Education & Retirement, Chair
Economic Development,
Science & Technology
Highways & Transportation
Human Services & Aging
Rules
Legislative Office on Education
Oversight, Chair
Ohio Retirement Study
Commission, Chair
State Board of Education, Ad Hoc
Ohio Board of Regents, Ad Hoc

Cooper Snyder
14th District

January 12, 1996

Mr. Vernon A. Williams, Secretary
Interstate Commerce Commission
12th Street & Constitution Avenue
Washington, D. C. 20423

Re: Conrail/Southern Pacific

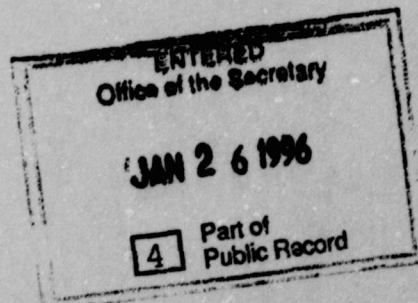
Dear Secretary Williams:

As a member of the Ohio Rail Development Commission, I have carefully examined the proposed Conrail purchase of the eastern lines belonging to Southern Pacific...from Chicago through St. Louis and on into Arkansas, Texas and Louisiana. It is clear this rail transfer is important to Ohio. Not only would this connection strengthen domestic commerce, it would substantially advance Ohio's competitive position with respect to NAFTA. The one-line direct function of this opportunity simply makes good common sense. I encourage favorable consideration on the merits of the plan.

Sincerely,

Cooper Snyder
State Senator

CS/aja



g:wp/misc/williams

Item No. _____

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JAN 30 8

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Ohio Senate
041 Senate Building
Columbus, Ohio 43215
614/466-3780
1-800-282-0253

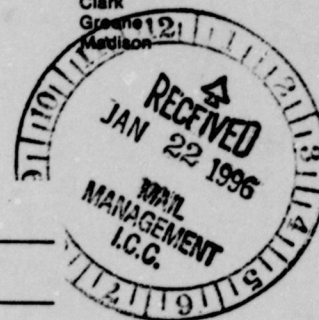
Committees:
Human Services & Aging
Chair
Agriculture
Vice Chair
Education & Retirement
Health
Joint Committee on
Agency Rule Review
Ohio Children's Trust Fund
Chair

Counties:

Clark
Greene
Madison

Merle Grace Kearns
State Senator
10th District

January 17, 1996



Vernon A. Williams, Secretary
Interstate Commerce Commission
12th Street and Constitution
Washington DC 20423

Item No. _____

Page Count 1

JAN 30 7

Dear Mr. Williams

I'm writing in strong support of Conrail's efforts to acquire some of the Southern Pacific Railroad's Eastern Lines.

The acquisition has particular value for Ohio as it will provide direct rail connection to the Southwest markets as well as put Ohio into a superb position to take full advantage of the NAFTA agreements as Ohio would be connected to Mexico and Canada via Conrail.

These new routes will be an advantage for our automobile manufacturing industry, as well as for shippers who are or intend to do business in these markets.

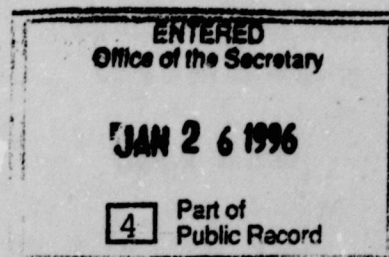
Union Pacific Railroad has proposed acquiring the Eastern line SP but Conrail offers a better alternative, one that will enhance competition and be beneficial to shippers throughout the Gulf Coast, Mid-South, Mid-West, and Eastern markets. Conrail's proposal would provide for one-line direct capacity, a rapid, most direct, and least complicated mode. It is hoped that during the ICC hearings, it will be made clear that the UP-SP merger is not in the public's interest and is anti-competitive.

Obviously this merger is important to Conrail, but I feel it is very important to Ohio as well and I urge your support.

Sincerely,

Merle G. Kearns

Merle Grace Kearns
State Senator
10th Senate District



STB FD

32760

1-22-96

J

61030

FD-32760

61030

Ohio House of Representatives



JACK CERA
MEMBER

63899 Violet Lane
Bellairs, Ohio 43906
Office: 614-466-8035
Fax: 614-644-9494
Toll Free: 1-800-282-3253

99th House District
Belmont, Monroe, Noble and
Northern Washington Counties

COMMITTEES:
Finance and Appropriations
Agriculture & Development
Subcommittee - (Ranking
Minority Member)
Ways and Means
Veterans' Affairs
Board on Unreclaimed Strip
Mined Lands
Emergency Management
Study Committee



January 16, 1996

Mr. Vernon A. Williams, Secretary
Interstate Commerce Commission
12th Street and Constitution Avenue
Washington DC 20423

Dear Mr. Williams:

It has come to my attention that Union Pacific Railroad is currently in the process of trying to acquire Southern Pacific Railroad's Eastern Lines. As a State Representative from southeastern Ohio, I am concerned about the effect this merger will have on the steel, aluminum and coal industries in my district.

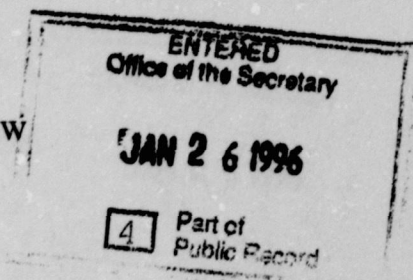
I believe that Conrail offers a better alternative, as it will provide direct rail connection to Southwest markets. Conrail's offer will enhance competition and would prove to be beneficial to shippers throughout the Gulf Coast, Mid-South, Mid-West and Eastern markets. In addition, Conrail's proposal would benefit Ohio by helping the State to take full advantage of NAFTA. Finally, Conrail has been a good corporate citizen in Ohio.

Therefore, I am encouraging ICC's favorable consideration in permitting Conrail to acquire some of Southern Pacific Railroad's Eastern lines. Specifically, these lines would include Chicago to St. Louis and Arkansas, Texas and Louisiana. This endeavor is not only important to Conrail, it is important to Ohio as well.

Sincerely,

JACK CERA
State Representative
99th House District

JC/PDW



Item No. _____

Page Count 1

JAN 30 6

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32760

1-22-96

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Item No. _____

Page Count 1

JAN 30 5

ROBERT L. BURCH
State Senator
30th Senate District

January 10, 1996



The Honorable Vernon A. Williams
Secretary
Interstate Commerce Commission
12th Street & Constitution Avenue
Washington, DC 20423

Dear Secretary Williams,

I write to you today regarding the upcoming hearings that your agency will hold on the possible merger of Union Pacific-Southern Pacific Railroads. It is my understanding that the merger has raised some concerns that this is not in the public interest and will prove anti-competitive. As a state senator, I believe Ohio holds an interest in the matter.

As you are well aware, Conrail is very interested in acquiring the eastern routes of Southern Pacific. The plan set forth by Conrail would have particular value for Ohio, in that it would provide direct rail access to the growing Gulf Coast and Mexican markets. Ohio is the second largest auto manufacturing state in the country and also is a major producer of auto parts, glass, steel, paper and cellular equipment. Through Conrail's proposed acquisition, Ohio would be able to significantly increase its exports to the South in general and to the Mexican markets in particular.

I urge the Interstate Commerce Commission to consider favorably Conrail's proposed acquisition as an alternative to the UP-SP merger. Thank you for your consideration in this regard.

Sincerely,

Rob Burch

ROBERT L. BURCH
State Senator

RLB/psb

Address:
Ohio Senate
Statehouse
Columbus, Ohio 43215
614/466-6508

Committees:
Agriculture
Board on Unreclaimed Strip
Mined Lands
Financial Institutions and Insurance
Joint Committee on Agency
Rule Review
Low-Level Radioactive Waste
Advisory Committee
Ways and Means

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1-22-96

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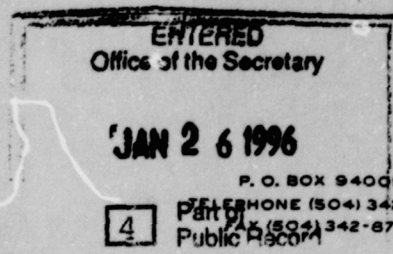
61027



RICHARD P. LEYOUS
ATTORNEY GENERAL

State of Louisiana
DEPARTMENT OF JUSTICE
Baton Rouge
70804-9005

January 17, 1996



P. O. BOX 94005

TELEPHONE (504) 342-7013
FAX (504) 342-8703
Public Records

The Honorable Vernon A. Williams, Secretary
Interstate Commerce Commission
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423



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

Dear Secretary Williams:

My office has carefully reviewed information relevant to the proposed merger of Union Pacific Corporation and Southern Pacific Rail Corporation. I am convinced that the merger of these rail service providers will serve the interests of Louisiana by substantially strengthening service over the long term.

This merger, combined with the Union Pacific\Southern Pacific agreement with Burlington Northern\Santa Fe, will, I believe, enhance competition thereby providing additional benefits to the State's shippers and receivers. We will be provided a new single-line service for both Union Pacific and Southern Pacific shippers, reducing transit times and opening new markets for Louisiana chemicals, forest products and other commodities. With the availability of Southern Pacific's Southern Corridor line, Union Pacific shippers will gain a much better route to Arizona and California. Additionally, the merger will enable Union Pacific and Southern Pacific shippers to enjoy more direct routes and more efficient service. For example, service between New Orleans and California will improve since shippers will be able to use a combination of Union Pacific lines through Louisiana and Texas and Southern Pacific's Southern Corridor route.

Coordination of terminal operations will also improve service significantly. Service on the New Orleans - St. Louis - Chicago corridor, and connections to the Northeast, will improve due to terminal coordination, availability of alternative routes, and increased opportunity to pre-block traffic and create through trains.

The chemicals industry and other shippers in south Louisiana, where Southern Pacific and Union Pacific have parallel lines, have not been adequately served by Southern Pacific due to that railroad's financial constraints. Shippers have been frustrated by lengthy transit times and equipment shortages. The merger with Union Pacific should give Southern Pacific greater service capabilities and the financial backing to make the

Item No. _____

Page Count 2

JAN 30 3

The Honorable Vernon A. Williams
January 17, 1996
Page Two

necessary capital investments, providing assurance of long-term quality service to Southern Pacific shippers in this problem area.

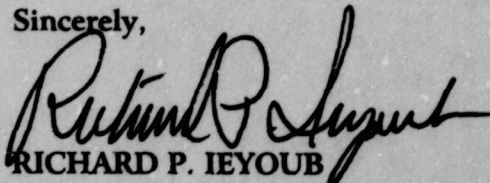
The agreement reached by Union Pacific and Southern Pacific with Burlington Northern and Santa Fe is of particular importance to us. Under that agreement, Burlington Northern\Santa Fe will purchase Southern Pacific's line through southern Louisiana and will acquire trackage rights that provide it with a direct route between New Orleans and Houston. This agreement also gives Burlington Northern\Santa Fe access to several points that are served only by Union Pacific and Southern Pacific today. Compared with Southern Pacific, Burlington Northern\Santa Fe will provide our shippers with better, more efficient service, as well as a far more extensive route system. It will offer a stronger competitive option for Louisiana businesses than the Southern Pacific offers today.

Additionally, Union Pacific\Southern Pacific and Burlington Northern\Santa Fe will be two strong, well-matched railroads. Together with Kansas City Southern which also serves Louisiana, Union Pacific\Southern Pacific and Burlington Northern\Santa Fe will offer vigorous competition to meet the State's rail transportation needs. Truck and barge competition will continue to provide alternatives that temper transportation rates.

For these reasons, I urge the Interstate Commerce Commission to approve the merger proposed by Union Pacific Corporation and Southern Pacific Rail Corporation.

With best wishes, I am

Sincerely,



RICHARD P. IEYOUB
Attorney General

RPI/sp

STB FD . 32760 1-22-96 J. 61026

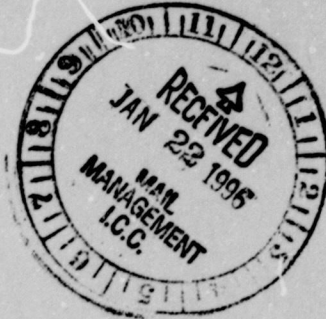
Item No. _____

Page Count 1

147 S. Michigan Ave.
Bradley, IL 60915
January 11, 1996

JAN 302

61024
FD-32760



The Honorable Vernon A. Williams
Secretary
Interstate Commerce Commission
12th Street and Constitution Avenue
Washington, D.C. 20423

Dear Secretary Williams:

I recently learned of the proposed merger between the Union Pacific and Southern Pacific railroads. This merger raises some competitive concerns here in Illinois. I encourage you to consider a proposal that I think adequately addresses these concerns: Conrail's offer to purchase the eastern lines of the Southern Pacific railroad.

As a village official, I am concerned about fostering a climate where business can thrive. Because many businesses and industries in my region rely on railroads, a healthy rail industry is key to their survival and growth.

It seems to me that Union Pacific's proposal would erode competition by giving Union Pacific control of the two main freight lines between Chicago and St. Louis and on to the southern United States. This could destroy competitive pricing, and ultimately affect the transportation of goods throughout Illinois.

But if Conrail acquired the eastern lines of the Southern Pacific, the expanded system would offer a competitive alternative to the Union Pacific, giving Illinois businesses another choice for efficient, single-line freight service to southern markets. Illinois businesses would save on transportation costs and could become more competitive in other markets.

Conrail's proposal would provide more than just convenience and savings for industries. The resulting business development and investment could bring additional jobs to communities along the Conrail and Southern Pacific East lines. And the proposal would preserve rail competition in the state. I urge you to consider it.

Sincerely,

William Ponikvar

William Ponikvar
Trustee
Village of Bradley

cc: David M. Levan
President and Chief Executive Officer
Conrail
2001 Market Street, 17N
Philadelphia, PA 19101-1417

STB FD

32760

1-22-96

J

61024

Item No. _____

Page Count _____

JAN 300

Ohio House of Representatives



Home: 645 Georgetown Ave.
Elyria, Ohio 44035
(216) 365-5250

(614) 644-5076 - Columbus Office
(800) 282-0253 Toll Free Number
FAX: (614) 644-3494

JOHN R. BENDER
STATE REPRESENTATIVE
62ND HOUSE DISTRICT
LORAIN COUNTY (PART)

COMMITTEES:

Education
Economic Development &
Small Business
Energy & Environment
Transportation & Public Safety
Agriculture & Natural Resources
Colleges & Universities
Subcommittee

January 17, 1996

The Honorable Vernon A. Williams
Interstate Commerce Commission
12th Street & Constitution Avenue
Washington, D.C. 20423

Dear Secretary Williams:

As a member of the Ohio House Committee on Transportation, I am very interested in developing our rail system in Ohio. I recently became aware of the plans by Union Pacific Railroad to acquire Southern Pacific Railroad. But I believe Conrail has a better alternative.

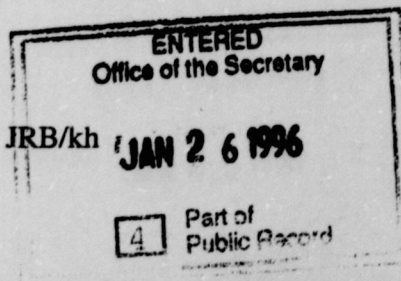
As you know, Conrail is very interested in acquiring the eastern routes of Southern Pacific. Conrail's plan would give Ohio direct rail access to the growing Gulf Coast and Mexican markets. Ohio is the second largest auto manufacturing state in the country as well as a major producer of auto parts, glass, steel, paper and cellular equipment. Conrail's proposed acquisition would help our industries export numerous products to the South and to the new Mexican markets now available because of NAFTA. My district includes some heavy industry that depends on good rail transportation. The Conrail alternative would provide access to new markets for our area businesses.

The company has a superb reputation for service and is a vital part of our economic well-being. The access to new markets that could be created through the Conrail proposal would be extremely advantageous to our economy.

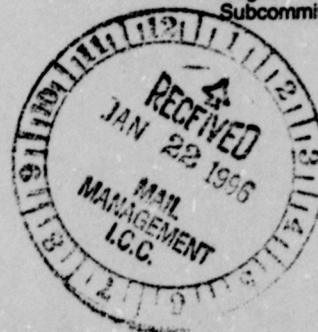
Please give favorable consideration to the Conrail alternative to the UP-SP merger.

Sincerely,

A handwritten signature of John R. Bender in dark ink.
JOHN R. BENDER
State Representative
62nd House District



77 South High Street, Columbus, OH 43266-0603



STB FD

32760

1-19-96

J

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MAYER, BROWN & PLATT

2000 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006-1882

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

CHICAGO
ERLIN
BRUSSELS
HOUSTON
LONDON
LOS ANGELES
NEW YORK
TOKYO
MEXICO CITY CORRESPONDENT
JAUREGUI, NAVARRETE, NADER Y ROJAS

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

January 19, 1996



BY HAND

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

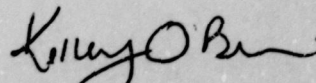
Re: Finance Docket No. 32760, Union Pacific Corp., et al. --
Control & Merger -- Southern Pacific Rail Corp., et al.

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket are twenty (20) copies of a January 19, 1996 letter from Erika Jones to Alan Lubel.

I would appreciate it if you would date-stamp the enclosed extra copy and return it to the messenger for our files.

Sincerely,


Kelley O'Brien

Office of the Secretary

JAN 22 1996

Item No. _____

Page Count 3

JAN 280

MAYER, BROWN & PLATT

2000 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006-1882

CHICAGO
IRLIN
RUSSELS
HOUSTON
LONDON
LOS ANGELES
NEW YORK

MEXICO CITY CORRESPONDENT

JAUREGUI, NAVARETTE, NADER Y ROJAS

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

JAN 22 1996

ERIKA Z. JONES
202-778-0642

January 19, 1996



VIA HAND DELIVERY

Alan E. Lubel, Esq.
Troutman Sanders, LLP
601 Pennsylvania Ave., N.W.
Suite 640 - North Building
Washington, D.C. 20004-2608

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

Dear Alan:

Attached please find a revised record layout for The Atchison, Topeka and Santa Fe Railway 1994 traffic tapes which contain a record field identifying those movements which were re-billed. With respect to the Burlington Northern Railroad 1994 traffic tapes, already in Snaveley, King & Associates' possession, the following methodology can be utilized to identify movements which were re-billed:

Step 1: If the move is not local, e.g., the waybill type=3, 5 or 7, and

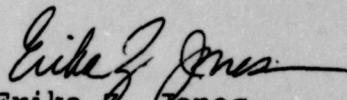
Step 2: the Freight Revenue=Total Revenue, then the move was re-billed.

These revised tapes, along with an identical revised record layout, have been forwarded directly to Snaveley, King & Associates, as you requested. These tapes are Highly Confidential and, as such, should only be reviewed by outside counsel and consultants who have signed a highly confidential undertaking.

Alan E. Lubel, Esq.
January 19, 1996
Page 2

Should your consultants need any assistance, they should
contact Chris Kent at Klick, Kent & Allen (703) 683-1120.

Sincerely,


Erika Z. Jones

cc: Administrative Law Judge Jerome Nelson
Honorable Vernon A. Williams
Restricted Service List (via Regular Mail)

STB

FD

32760

1-19-96

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61003

9600528

PARKER BROTHERS & Co., INC.
 POST OFFICE BOX 107
 HOUSTON, TEXAS 77001

January 10, 1996

Item No. 61003Page Count 1

Linda J. Morgan
 Chairman

JAN 27 9

Surface Transportation Board
 Department of Transportation
 1201 Constitution Ave., N.W., Room 4126
 Washington, DC 20423

JOHN L. STRADER
 VICE PRESIDENT

713/928-8400
 FAX 713/928-8490

JD - 32760

Dear Ms. Morgan:

We are extremely concerned about the competitive effects on us of the proposed acquisition of SP by UP. While we have reviewed the proposed agreement between UP and BN/Santa Fe which is intended to remedy those effects, we are far from persuaded that it will produce effective competition for our traffic.

We have also considered the possibility that Conrail acquire some of SP's eastern lines in connection with the merger, especially the lines running from Chicago and St. Louis to Texas and Louisiana. We find this possibility to be much more appropriate and effective in addressing our concerns. We think their proposal is better because it involves their ownership of the lines, whereas most of the UP-BN/Santa Fe deal involves only trackage rights. We have learned that the benefits of trackage rights are uncertain in that they can be easily lost if the railroads argue about whose traffic has priority, who is in charge of operations on the line, and so forth.

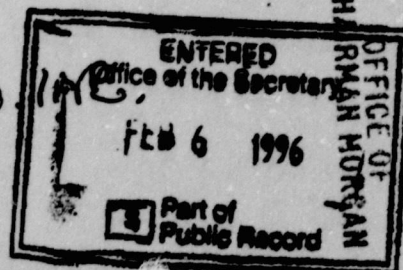
We favor Conrail's proposal as it would provide the best through service between Texas and the Northeast/Midwest markets. This routing would involve the fewest handlings between carriers which is very important to industries in the above market place.

Finally, we think Conrail's proposal helps to assure that we and other rail customers will have multiple rail options. We are extremely concerned about the trend toward only a few giant railroads. This is definitely not in the customers' interest.

For these reasons, we will actively oppose the UP-SP merger at the Department of Transportation, unless it is conditioned on acceptance of Conrail's proposal.

Sincerely,

John L. Strader
PARKER BROS & CO.



JAN 19 4 39 PM '96

INTERSTATE COMMERCE
 COMMISSION
 RECEIVED

cc: Honorable Kay Bailey Hutchinson
 Honorable Phil Gramm
 Chairman Barry Williamson, Texas Railroad Commission

STB

FD

32760

1-18-96

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DENSIMIX, INC.
13501 INDUSTRIAL ROAD
HOUSTON, TEXAS 77015

(713) 453-7988

January 10, 1996

Item No. _____

Page Count 1JAN 26 3

Linda J. Morgan

Chairman

Surface Transportation Board

Department of Transportation

1201 Constitution Ave., N.W., Room 4126

Washington, DC 20423

JAMES STRICKLAND

PLANT MANAGER

FAX: (713) 450-1839

FD-32761

Dear Ms. Morgan:

We are extremely concerned about the competitive effects on us of the proposed acquisition of SP by UP. While we have reviewed the proposed agreement between UP and BN/Santa Fe which is intended to remedy those effects, we are far from persuaded that it will produce effective competition for our traffic.

We have also considered the possibility that Conrail acquire some of SP's eastern lines in connection with the merger, especially the lines running from Chicago and St. Louis to Texas and Louisiana. We find this possibility to be much more appropriate and effective in addressing our concerns. We think their proposal is better because it involves their ownership of the lines, whereas most of the UP-BN/Santa Fe deal involves only trackage rights. We have learned that the benefits of trackage rights are uncertain in that they can be easily lost if the railroads argue about whose traffic has priority, who is in charge of operations on the line, and so forth.

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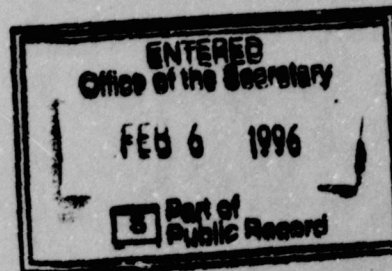
Finally, we think Conrail's proposal helps to assure that we and other rail customers will have multiple rail options. We are extremely concerned about the trend toward only a few giant railroads. This is definitely not in the customers' interest.

For these reasons, we will actively oppose the UP-SP merger at the Department of Transportation, unless it is conditioned on acceptance of Conrail's proposal.

Sincerely,

DENSIMIX, INC

HOUSTON, TX

OFFICE OF
CHAIRMAN MORGAN

JAN 18 1 03 PM '96

INTERSTATE COMMERCE
COMMISSION
RECEIVED

cc: Honorable Kay Bailey Hutchinson
Honorable Phil Gramm
Chairman Barry Williamson, Texas Railroad Commission

STB

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• Item No. _____

January 11, 1996

Page Count 1

JAN 262

Linda J. Morgan
Chairman
Surface Transportation Board
Department of Transportation
1201 Constitution Ave., N.W., Room 4126
Washington, DC 20423

O.E.I. BUSINESS FORMS

4949 Lialock Road
Houston, TX 77041-7786
713-462-6031, Ext. 237
Order FAX 713-462-8207
Sales FAX 713-690-2231

David Buckson
Operations Manager

JD - 32760

Dear Ms. Morgan:

We are extremely concerned about the competitive effects on us of the proposed acquisition of SP by UP. While we have reviewed the proposed agreement between UP and BN/Santa Fe which is intended to remedy those effects, we are far from persuaded that it will produce effective competition for our traffic.

We have also considered the possibility that Conrail acquire some of SP's eastern lines in connection with the merger, especially the lines running from Chicago and St. Louis to Texas and Louisiana. We find this possibility to be much more appropriate and effective in addressing our concerns. We think their proposal is better because it involves their ownership of the lines, whereas most of the UP-BN/Santa Fe deal involves only trackage rights. We have learned that the benefits of trackage rights are uncertain in that they can be easily lost if the railroads argue about whose traffic has priority, who is in charge of operations on the line, and so forth.

We favor Conrail's proposal as it would provide the best through service between Texas and the Northeast/Midwest markets. This routing would involve the fewest handlings between carriers which is very important to industries in the above market place.

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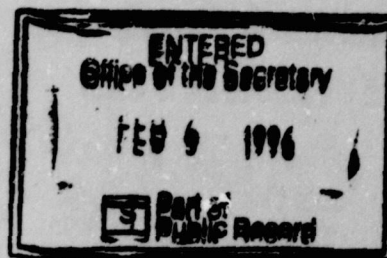
For these reasons, we will actively oppose the UP-SP merger at the Department of Transportation, unless it is conditioned on acceptance of Conrail's proposal.

Sincerely,

David Buckson

O.E.I. Business Forms

Houston, Tx



OFFICE OF
CHAIRMAN MORGAN

JAN 18 1 03 PM '96

INTERSTATE COMMERCE
COMMISSION
RECEIVED

cc: Honorable Kay Bailey Hutchinson
Honorable Phil Gramm
Chairman Barry Williamson, Texas Railroad Commission

STB

FD

32760

1-18-96

J

60985

9600608

Jim Garmatz
INGREDIENT MERCHANDISER
HOME (915) 585-3785
CELLULAR (505) 390-2535
(915) 549-7656

Item No. 60985

January 10, 1996

Page Count 1JAN 26 1

Linda J. Morgan
Chairman

Surface Transportation Board
Department of Transportation
1201 Constitution Ave., N.W., Room 4126
Washington, DC 20423

SWIC

SOUTH-WESTERN IRRIGATED COTTON GROWERS ASSOCIATION
P.O. BOX 1708 / EL PASO, TEXAS 79901
(915) 581-5441 / FAX (915) 581-5442
1-800-451-1111

FD-32760

Dear Ms. Morgan:

We are extremely concerned about the competitive effects on us of the proposed acquisition of SP by UP. While we have reviewed the proposed agreement between UP and BN/Santa Fe which is intended to remedy those effects, we are far from persuaded that it will produce effective competition for our traffic.

We have also considered the possibility that Conrail acquire some of SP's eastern lines in connection with the merger, especially the lines running from Chicago and St. Louis to Texas and Louisiana. We find this possibility to be much more appropriate and effective in addressing our concerns. We think their proposal is better because it involves their ownership of the lines, whereas most of the UP-BN/Santa Fe deal involves only trackage rights. We have learned that the benefits of trackage rights are uncertain in that they can be easily lost if the railroads argue about whose traffic has priority, who is in charge of operations on the line, and so forth.

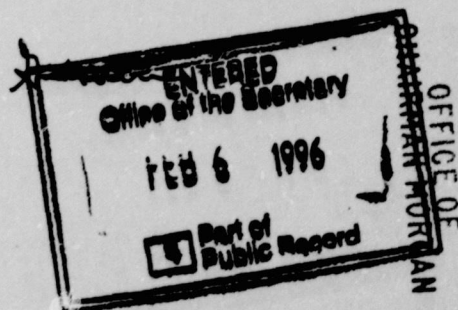
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Finally, we think Conrail's proposal helps to assure that we and other rail customers will have multiple rail options. We are extremely concerned about the trend toward only a few giant railroads. This is definitely not in the customers' interest.

For these reasons, we will actively oppose the UP-SP merger at the Department of Transportation, unless it is conditioned on acceptance of Conrail's proposal.

Sincerely,

Southwestern Irrigated Cotton
James Jarmatz



JAN 18 1 03 PM '96

INTERSTATE COMMERCE
COMMISSION
RECEIVED

cc: Honorable Kay Bailey Hutchinson
Honorable Phil Gramm
Chairman Barry Williamson, Texas Railroad Commission

STB

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32760

1-18-96

J

60984

9600529

JAVIER ALVAREZ
TRAFFIC

January 10, 1996

Item No. 60984Page Count 1JAN 260Linda J. Morgan
ChairmanSurface Transportation Board
Department of Transportation
1201 Constitution Ave., N.W., Room 4126
Washington, DC 20423

MECEMENT, INC.

2825 W. PAISANO
EL PASO, TX. 79922PH. (915) 544-1750
FAX 544-1762

JD-32760

Dear Ms. Morgan:

We are extremely concerned about the competitive effects on us of the proposed acquisition of SP by UP. While we have reviewed the proposed agreement between UP and BN/Santa Fe which is intended to remedy those effects, we are far from persuaded that it will produce effective competition for our traffic.

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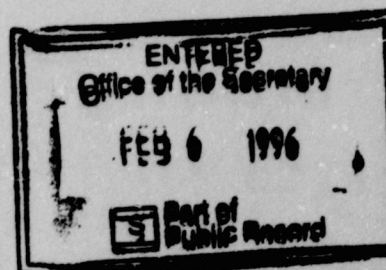
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For these reasons, we will actively oppose the UP-SP merger at the Department of Transportation, unless it is conditioned on acceptance of Conrail's proposal.

Sincerely,

Javier Alvarez

OFFICE OF
CHAIRMAN MORGAN

JAN 18 1 03 PM '96

INTERSTATE COMMERCE
COMMISSION
RECEIVED

cc: Honorable Kay Bailey Hutchinson
Honorable Phil Gramm
Chairman Barry Williamson, Texas Railroad Commission

STB

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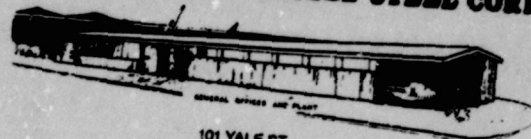
1-18-96

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60982

9600602

HOUSTON COMPRESSED STEEL CORP.

101 YALE ST.
HOUSTON, TEXAS 77007

Item No. 60982

Page Count 1

JAN 25 8

January 9, 1996

Linda J. Morgan
ChairmanSurface Transportation Board
Department of Transportation
1201 Constitution Ave., N.W., Room 4126
Washington, DC 20423

JD - 32760

Dear Ms. Morgan:

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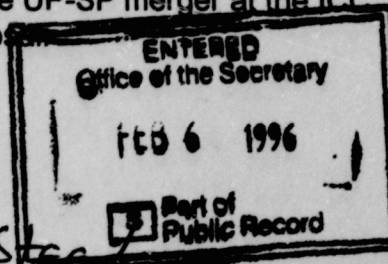
Finally, we think Conrail's proposal helps to assure that we and other rail customers will have multiple rail options. We are extremely concerned about the trend toward only a few giant railroads. This is definitely not in the customers' interest.

For these reasons, we will actively oppose the UP-SP merger at the ICC unless it is conditioned on acceptance of Conrail's proposal.

Sincerely,

Howard Segal, VP

VP Houston Compressed Steel

OFFICE OF
CHAIRMAN MORGAN

JAN 18 1 03 PM '96

INTERSTATE COMMERCE
COMMISSION
RECEIVED

cc: Honorable Kay Bailey Hutchinson
Honorable Phil Gramm
Chairman Barry Williamson, Texas Railroad Commission

STB

FD

32760

1-18-96

J

60981

9600604

January 10, 1996

Linda J. Morgan
Chairman
Surface Transportation Board
Department of Transportation
1201 Constitution Ave., N.W., Room 4126
Washington, DC 20423

Item No. 60981

Page Count 1

JAN 25 7

M
MARINE
LUMBER
COMPANY

713/672-7487

Concrete Accessories
Radwood Headers
Centerstrip Plastic Paving
Chairs Curb Ears Rebar
Curing Compounds Fibered
Expansion Joint Bar Ties
Curing Mats Keyloc Joint
System Grouts and Epoxies
Cement Repair Products
Waterstops Joint Sealants
Timber Fabrication Custom
Resawing and Milling

JD - 32760

Dear Ms. Morgan:

We are extremely concerned about the competitive effects on us of the proposed acquisition of SP by UP. While we have reviewed the proposed agreement between UP and BN/Santa Fe which is intended to remedy those effects, we are far from persuaded that it will produce effective competition for our traffic.

We have also considered the possibility that Conrail acquire some of SP's eastern lines in connection with the merger, especially the lines running from Chicago and St. Louis to Texas and Louisiana. We find this possibility to be much more appropriate and effective in addressing our concerns. We think their proposal is better because it involves their ownership of the lines, whereas most of the UP-BN/Santa Fe deal involves only trackage rights. We have learned that the benefits of trackage rights are uncertain in that they can be easily lost if the railroads argue about whose traffic has priority, who is in charge of operations on the line, and so forth.

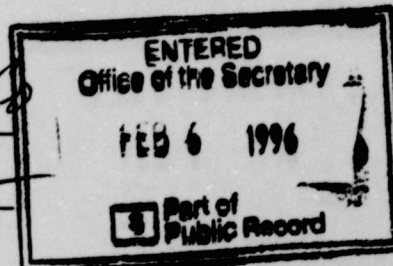
We favor Conrail's proposal as it would provide the best through service between Texas and the Northeast/Midwest markets. This routing would involve the fewest handlings between carriers which is very important to industries in the above market place.

Finally, we think Conrail's proposal helps to assure that we and other rail customers will have multiple rail options. We are extremely concerned about the trend toward only a few giant railroads. This is definitely not in the customers' interest.

For these reasons, we will actively oppose the UP-SP merger at the Department of Transportation, unless it is conditioned on acceptance of Conrail's proposal.

Sincerely,

Marine Lumber Co.
James Miller



OFFICE OF
CHAIRMAN MORGAN

JAN 18 1 03 PM '96

INTERSTATE COMMERCE
COMMISSION
RECEIVED

cc: Honorable Kay Bailey Hutchinson
Honorable Phil Gramm
Chairman Barry Williamson, Texas Railroad Commission

STB

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1-18-96

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60980

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Clampitt Paper Company

Item No. 60930

January 11, 1996

Page Count 1JAN 256Linda J. Morgan
ChairmanSurface Transportation Board
Department of Transportation
1201 Constitution Ave., N.W., Room 4126
Washington, DC 20423BILL ASHBROOK
VICE PRESIDENT • GENERAL MANAGER4707 BLALOCK
HOUSTON, TX. 77041TEL. (713) 690-7171
FAX. (713) 690-1649
PAGER 615-2876

FD-32760

Dear Ms. Morgan:

We are extremely concerned about the competitive effects on us of the proposed acquisition of SP by UP. While we have reviewed the proposed agreement between UP and BN/Santa Fe which is intended to remedy those effects, we are far from persuaded that it will produce effective competition for our traffic.

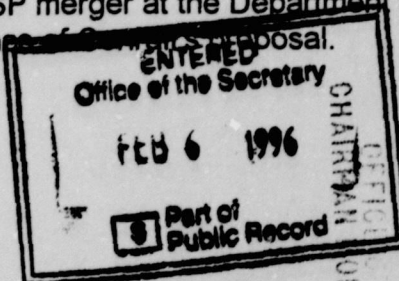
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For these reasons, we will actively oppose the UP-SP merger at the Department of Transportation, unless it is conditioned on acceptance of our proposal.

Sincerely,

William P. AshbrookV.P. Gen MgrClampitt Paper Co - Houston

cc: Honorable Kay Bailey Hutchinson
Honorable Phil Gramm
Chairman Barry Williamson, Texas Railroad Commission

INTERSTATE COMMERCE
COMMISSION
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JAN 11 1996

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1-18-96

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Ac
cAsia Chemical Corp., Inc.
Poly United Inc.

January 10, 1996

Item No. 60979

吴 连 山

Lain Wu
Sales RepresentativeLinda J. Morgan
ChairmanPage Count 1

Office:

Surface Transportation Board
Department of Transportation
1201 Constitution Ave., N.W., Room 4126
Washington, DC 20423JAN 25Factory:
1815 Turning Basin Dr. Suite 200
Houston, Tx. 77029
Tel: (713) 671-2104
Fax: (713) 671-295211950 Alkimo Dr. Suite 300
Houston, Tx. 77037
Tel: (713) 445-1793
Fax: (713) 445-8515

Easy Link Telen: 5106002975 (ASIA CHEM)

FD-32760

Dear Ms. Morgan:

We are extremely concerned about the competitive effects on us of the proposed acquisition of SP by UP. While we have reviewed the proposed agreement between UP and BN/Santa Fe which is intended to remedy those effects, we are far from persuaded that it will produce effective competition for our traffic.

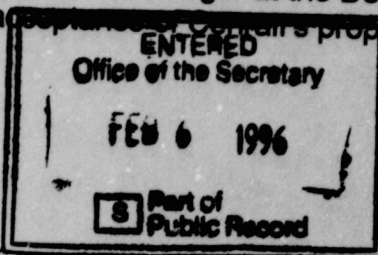
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For these reasons, we will actively oppose the UP-SP merger at the Department of Transportation, unless it is conditioned on acceptance of Conrail's proposal.

Sincerely,

Lain WuAsia Chemical Corp Inc1815 Turning Basin #200
Houston. TX 77029cc: Honorable Kay Bailey Hutchinson
Honorable Phil Gramm
Chairman Barry Williamson, Texas Railroad CommissionOFFICE OF
CHAIRMAN MORGAN

JAN 18 11 03 PM '96

INTERSTATE COMMERCE
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Item No. 60978

January 11, 1996

Page Count 1

JAN 254

Linda J. Morgan

Chairman

Surface Transportation Board

Department of Transportation

1201 Constitution Ave., N.W., Room 4126

Washington, DC 20423

BRIDGESTONE
MICHELINFirestone
DUNLOP

7011 MARKET AVENUE • EL PASO, TEXAS 79915

MIKE RAMIREZ

BRANCH/SALES MANAGER

OFFICE (915) 774-0256

FAX (915) 772-4640

WATTS 1-800-786-0256

LADA DE MEXICO (95) 800-010-1418

FD-32760

Dear Ms. Morgan:

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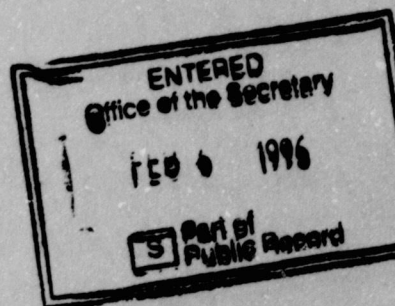
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For these reasons, we will actively oppose the UP-SP merger at the Department of Transportation, unless it is conditioned on acceptance of Conrail's proposal.

Sincerely,



cc: Honorable Kay Bailey Hutchinson
Honorable Phil Gramm
Chairman Barry Williamson, Texas Railroad Commission

OFFICE OF
CHIEF OF
TRANSPORTATION

JAN 18 1 03 PM '96

INTERSTATE COMMERCE
COMMISSION
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Item No. 60977

January 11, 1996

Page Count 1JAN 253

Linda J. Morgan
Chairman
Surface Transportation Board
Department of Transportation
1201 Constitution Ave., N.W., Room 4126
Washington, DC 20423



PRO-PLASTICS, INC.
A PLASTIC BAGS MANUFACTURER
SPECIALIZING IN PRINTING

Emily Rogacion
Vice President

4702 WINDFERN ROAD
HOUSTON, TX 77041

FD - 32760

Dear Ms. Morgan:

We are extremely concerned about the competitive effects on us of the proposed acquisition of SP by UP. While we have reviewed the proposed agreement between UP and BN/Santa Fe which is intended to remedy those effects, we are far from persuaded that it will produce effective competition for our traffic.

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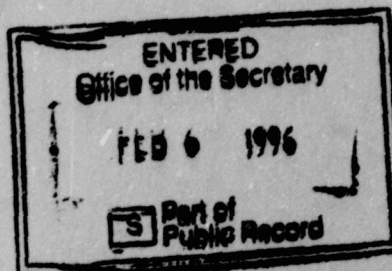
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For these reasons, we will actively oppose the UP-SP merger at the Department of Transportation, unless it is conditioned on acceptance of Conrail's proposal.

Sincerely,

Emily Rogacion
Pro-Plastics, Inc.



OFFICE OF
CHAIRMAN MORGAN

JAN 18 1 03 PM '96

INTERSTATE COMMERCE
COMMISSION
RECEIVED

cc: Honorable Kay Bailey Hutchinson
Honorable Phil Gramm
Chairman Barry Williamson, Texas Railroad Commission

STB FD 32760 1-18-96 J 60976

9600601

ChemPak Quality Chemical Services
INTERNATIONAL INC.
3647 Willowbend Blvd., Suite 800
Houston, Texas 77054
Phone: 713-661-1330
Fax: 713-661-3299

Item No. 60976
Page Count 1
JAN 252

January 9, 1996

Linda J. Morgan
Chairman
Surface Transportation Board
Department of Transportation
1201 Constitution Ave., N.W., Room 4126
Washington, DC 20423

GREGORY W. LYONS

JS-32760

Dear Ms. Morgan:

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For these reasons, we will actively oppose the UP-SP merger at the ICC, unless it is conditioned on acceptance of Conrail's proposal.

Sincerely,

G. W. Lyons President
ChemPak International Inc
Houston, TX 77054

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Office of the Secretary
JAN 18 1996
Part of
Public Record

INTERSTATE COMMERCE
COMMISSION
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JAN 18 1 03 PM '96
LINDA J. MORGAN

cc: Honorable Kay Bailey Hutchinson
Honorable Phil Gramm
Chairman Barry Williamson, Texas Railroad Commission

STB FD

32760

1-18-96

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60983

9600606

Item No. 60983

January 10, 1996

Page Count 1JAN 259

Linda J. Morgan

Chairman

Surface Transportation Board

Department of Transportation

1201 Constitution Ave., N.W., Room 4126

Washington, DC 20423



ROBERT "BOB" HARTLEY

President

P.O. Box 870
Channelview, Texas
77530-087015155 Jacintoport Blvd.
Houston, Texas 77015
Tel 713-457-5800
Fax 713-457-5830

JN - 32760

Dear Ms. Morgan:

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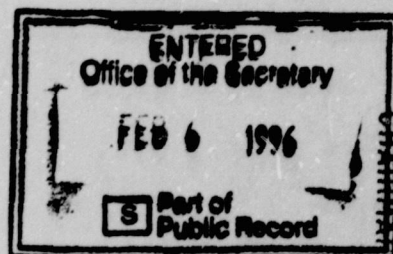
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Sincerely,

Mega Lubricants, Inc.
Robert C. Hartley
President



INTERSTATE COMMERCE
COMMISSION
RECEIVED
JAN 18 1 03 PM '96
OFFICE OF
CHARTER MORGAN

cc: Honorable Kay Bailey Hutchinson
Honorable Phil Gramm
Chairman Barry Williamson, Texas Railroad Commission

STB

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32760

1-17-96

J

60968

Item No. _____

Page Count 3JAN 24H

México D.F., January 16, 1996.

VIS Status.
AKQComisión
Federal de
Competencia

TO: Ms. Julia M. Farr
Office of Proceedings
Administration Section
Interstate Commerce Commission
Phone number (202) 927 75 13
Facsimile (202) 927 6728 / 927 55 29

RECEIVED
OFFICE OF THE
SECRETARY
JAN 17 10 00 AM '96
SERVICE SECTION

From: Mrs Alexandra Cortina
International Division
Mexican Federal Competition Commission
Tamaulipas 150 piso 16
Hipódromo - Condesa
Mexico 06140 D.F.
Mexico
Phone number (525) 629 65 17
Facsimile (525) 286 60 76

Comments :

Please, forward to Ms. Julia Farr at the Interstate Commerce Commission.

ENTERED
Office of the Secretary

JAN 25 1996

5 Part of
Public Record

1. This message is intended only for the use of individual or entity to which it is addressed and may contain information that is privileged and confidential. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone at our cost.



COMISION FEDERAL
DE
COMPETENCIA

México D.F., January 16, 1995.

Ms. Julia Farr
Contact as stated in Action:
Decision No. 9; Notice of Acceptance
of Application, December 27, 1995
Interstate Commerce Commission

Dear Ms. Farr:

Concerning the Notice of Acceptance Application, the Federal Competition Commission of Mexico City, Mexico is interested in responding to the notification of intent to participate in the proposed proceedings. According to Mr. Brian Elwood, at the Embassy of Mexico's Commerce office, interested parties are instructed to contact you for more information. Unfortunately, the Commission has not been able to contact you sooner for more information as to how to proceed formally.

It is understood from the documentation that the final date of application is January 16, 1996. Bearing in mind this final date, the Federal Competition Commission of Mexico can only inquire as to whether this deadline has been extended due to last week's closing of the Federal Government due to weather conditions.

I apologize for the delay and look forward to contacting you soon with regard to our concerns.

Sincerely,

Alexandra Cortina

Deputy Director of the International Division

c.c.p. Dr. Fernando Sánchez Ugarte, President of the Federal Competition Commission.
Lic. Rafael Valdés Abascal, Executive Secretariat of the Federal Competition Commission.

EMBASSY OF MEXICO • Trade Office
1911 Pennsylvania Avenue, N.W., 7th floor
Washington, D.C. 20006
(202) 728-1700 • FAX (202) 728-1712

Secretaría de
Comercio y
Fomento Industrial

TELEFAX

DATE:	JANUARY 17, 1996	REF.#:	<u>45/96</u>
TO:	MS. JULIA FARR (FINANCE DOCKET NO. 32760) INTERSTATE COMMERCE COMMISSION		
FAX #:	(202) 927-6419		
FROM:	MIGUEL LEAMAN / BRYAN ELWOOD		
FAX #:	(202) 728-1712		
PAGE(S):	<u>1</u> INCLUDING THIS COVER PAGE		

FD 32760

COMMENTS:

As per our telephone conversation, please note that the service address for the *Comisión Federal de Competencia* of Mexico is as follows:

- Embassy of Mexico, Trade Office
1911 Pennsylvania Avenue, N.W., 7th floor
Washington, D.C. 20006

If you have any questions, you may contact me at (202) 728-1708.

RECEIVED
JAN 17 2 48 PM '96
DIRECTOR
OFFICE OF
PROCEEDINGS

Best Regards,

Bryan Elwood
First Secretary

ENTERED Office of the Secretary
JAN 25 1996
<input checked="" type="checkbox"/> Part of Public Record

STB FD

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1-2-96

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61028

DEANNA BRAUNLIN
ASSEMBLYWOMAN
District No. 4



COMMITTEES:

Vice Chairman
Government Affairs

Member
Education
Health and Human Services

State of Nevada
Assembly
Sixty-Eighth Session

December 30, 1995

61028
DISTRICT OFFICE:
Mailing Address:
2251 North Rampart Boulevard, No. 378
Las Vegas, Nevada 89128
Office: (702) 256-1935
Fax No.: (702) 255-1169

LEGISLATIVE BUILDING:
401 S. Carson Street
Carson City, Nevada 89710
Office: (702) 687-8157 or 687-5739
Fax No.: (702) 687-5962



The Honorable Vernon A. Williams
Secretary, Interstate Commerce Commission
Twelfth Street and Constitution Avenue, N.W.
Room 2215
Washington, D.C. 20423

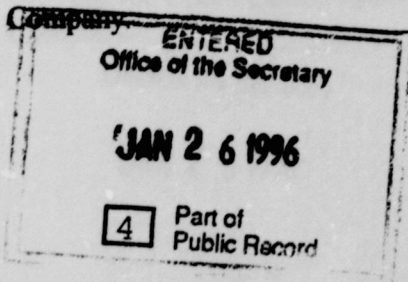
RE: Finance Docket No. 32760, Union Pacific Corp., et al.—Control &
Merger—
Southern Pacific Rail Corp., et al.

Dear Secretary Williams:

I am writing to express my support for the proposed merger of the Southern Pacific and Union Pacific railroads and to urge your support. The UP/SP merger will dramatically improve service and strengthen competition.

Nevada shippers should see improved equipment supply from the combined fleets and major cost savings from reduced overheads, facility consolidations, and use of the best systems of each railroad. Nevada shippers will also benefit from improvements in operations on Union Pacific's Overland route. The combined Union Pacific/Southern Pacific will allow for the concentration of different categories of transcontinental traffic on different routes. This will reduce delays, increase reliability, and create new capacity for the merged system.

It is vital that we preserve competition in this industry. I urge your support of the merger between the Union Pacific Railroad Company and the Southern Pacific Transportation



Sincerely yours,

Deanna Braunlin

Deanna Braunlin

Item No. _____

Page Count 1

JAN 30 4

STB FD

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1-2-96

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Item No. _____

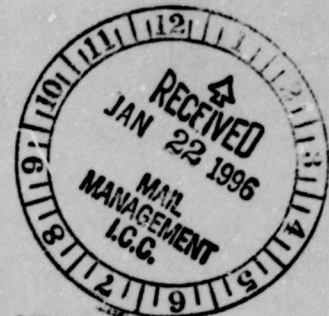
Page Count 1

JAN 30 1

61025
FD-32760

January 18, 1996

The Honorable Vernon A. Williams
Secretary-Interstate Commerce Commission
12th Street and Constitution Avenue
Washington, D.C. 20423



Dear Secretary Williams:

My name is Leroy Niebrugge. I am the village president in the Village of Teutopolis. I urge you to support Conrail's proposal to purchase the eastern portion of the Southern Pacific railroad.

Many of our local businesses and industries ship their products to other regions of the country via rail. Usually that involves relying on a network of track rights and haulage agreements to get products to market. But if Conrail acquired the eastern lines of the Southern Pacific, the expanded system would offer efficient, single-line freight service to businesses in Illinois.

Under the proposal, businesses along the Conrail line that now contract with at least two railroads to move their products between Illinois and the Gulf of Mexico could use a single line. Because Conrail's proposal would reduce the number of car changes involved in shipping goods to the south, Illinois businesses would save on transportation costs and could become more competitive in other markets. A takeover of the SP East lines by Union Pacific would not offer these benefits to Illinois businesses.

The merger would provide more than just convenience and savings for industries. The resulting business development and investment could bring additional jobs to communities along the Conrail line. And the proposal would preserve the present level of rail competition in the state. UP's proposal, on the other hand, would erode competition by giving the UP control of the two main freight lines between Chicago and St. Louis.

I understand that Conrail plans to make substantial investments in track maintenance and equipment such as new locomotives and service facilities following the purchase of the SP line. Those improvements are further reason to back Conrail's proposal.

Thank you for your consideration.

Sincerely,

Leroy Niebrugge SW

Leroy Niebrugge
Village of Teutopolis President

cc: David M. Levan

