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Item No. 60004

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August 18, 1995

**BY HAND**

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:

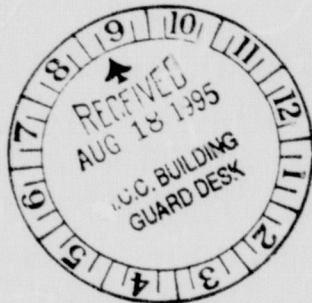
Enclosed for filing in the above-captioned docket are the original and twenty copies of Applicants' Reply to KCS' Comments on Proposed Procedural Schedule and Discovery Guidelines (UP/SP-6) and the original and twenty copies of Applicants' Reply to KCS' Opposition to Proposed Protective Order (UP/SP-7). Also enclosed is a 3.5-inch disk containing the text of both pleadings in WordPerfect 5.1 format.

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

Sincerely,

Michael L. Rosenthal

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



Enclosures

BEFORE THE  
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 32760

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

APPLICANTS' REPLY TO KCS'  
OPPOSITION TO PROPOSED PROTECTIVE ORDER

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August 18, 1995

BEFORE THE  
INTERSTATE COMMERCE COMMISSION

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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

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APPLICANTS' REPLY TO KCS'  
OPPOSITION TO PROPOSED PROTECTIVE ORDER

Union Pacific Corporation ("UPC"), Union Pacific  
Railroad Company ("UPRR"), Missouri Pacific Railroad Company  
("MPRR"),<sup>1/</sup> Southern Pacific Rail Corporation ("SPR"),  
Southern Pacific Transportation Company ("SPT"), St. Louis  
Southwestern Railway Company ("SSW"), SPCSL Corp. ("SPCSL"),  
and The Denver and Rio Grande Western Railroad Company  
("DRGW"),<sup>2/</sup> collectively, "Applicants," hereby reply to the  
Opposition of the Kansas City Southern Railway Company to  
Proposed Protective Order (KCS-2).

In its Opposition, KCS objects to Applicants'  
proposed protective order (UP/SP-2), which is modelled on the

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<sup>1/</sup> UPC, UPRR and MPRR are referred to collectively as "Union  
Pacific." UPRR and MPRR are referred to collectively as "UP."

<sup>2/</sup> SPR, SPT, SSW, SPCSL and DRGW are referred to  
collectively as "Southern Pacific." SPT, SSW, SPCSL and DRGW  
are referred to collectively as "SP."



protective order entered by the Commission in BN/Santa Fe. See Finance Docket No. 32549, Burlington Northern, Inc., & Burlington Northern R.R. -- Control & Merger -- Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry., Decision served July 15, 1994. KCS acknowledges that the proposed protective order is essentially identical to the order in BN/Santa Fe. It argues (p. 1), however, that the Commission's adoption of the order in BN/Santa Fe does not provide "any legal or policy justification" for using the protective order in this proceeding. The argument refutes itself. The very fact that the order was adopted in BN/Santa Fe after careful consideration and worked well in that case is a compelling reason for the Commission to adopt that order in this case.

KCS attempts (pp. 2-3) to distinguish Applicants' proposed protective order from orders entered in proceedings prior to BN/Santa Fe. KCS' effort is irrelevant, as BN/Santa Fe, which built on the experience in prior cases, is clearly the applicable precedent. Moreover, KCS' argument is fundamentally misleading.

What KCS does not explain is that, in merger cases prior to BN/Santa Fe, the protective order entered by the Commission at the beginning of the proceeding was designed to regulate only the sharing of confidential information between applicants for the purpose of preparing their application. It was the routine practice that when the proceeding reached the

discovery stage, applicants and opposing parties negotiated separate, bilateral protective orders that very commonly included a "highly confidential" classification. Thus, KCS' statement (p. 3) that in those prior proceedings "all parties to the proceeding, including the employees and in-house counsel of competing railroads, were allowed to review all confidential material" is demonstrably false.

KCS should know. KCS attaches to its Opposition a copy of the initial ICC protective order issued in UP/CNW, which did not create a separate category for "highly confidential" information that could only be shared with outside counsel and consultants. But when the time came to produce its own documents for discovery in that case, KCS insisted on a distinction exactly like the one it challenges here. Had KCS been forthcoming with the Commission, it would also have attached its "Stipulation and Order Regarding KCS' Production of Confidential Documents to UPC, UPRR, MPRR, Holdings, and CNW" in UP/CNW. That order, which is attached hereto as Exhibit A, was entered on December 16, 1993 by the Administrative Law Judge assigned to the case, and provided (p. 2):

"3. Any Documents provided hereunder and stamped 'CONFIDENTIAL--OUTSIDE COUNSEL/EXPERTS ONLY' and any data contained therein shall not be disclosed in any way to any person not authorized under paragraph 8. hereof to receive access to such Documents unless such disclosure is preceded by the prior written consent of KCS or an order of the

Commission or the Administrative Law Judge in the above-captioned proceeding."

It is baffling how, in light of its own past practice, KCS can claim that in-house counsel have had access to all sensitive competitive information in all merger cases prior to BN/Santa Fe.<sup>3/</sup>

Because the "highly confidential" classification has been used in rail merger cases for at least the past decade and a half, KCS' suggestion (pp. 3-4) that the restriction created special problems in BN/Santa Fe falls flat. The protective order in BN/Santa Fe differed from those in prior cases only in that it resolved the troublesome issue of access to highly sensitive material early in the proceeding, avoiding the time-consuming, resource-wasting process of separate negotiation and approval of dozens of bilateral protective orders to govern the discovery phase of the case.

In fact, BN/Santa Fe actually demonstrates how well the protective order worked. First, the parties acted in good faith when designating certain material as "highly confidential," and KCS points to no instance in which any party abused the classification. Second, when an issue arose

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<sup>3/</sup> KCS was not the only party to obtain a similar confidentiality order in UP/CNW. See, e.g., Stipulation and Order Regarding SP's Production of Confidential Documents to Applicants, entered Dec. 3, 1993, p. 2; Stipulation and Order Regarding Soo Line Railroad Company's Production of Confidential Documents to Applicants, entered Dec. 9, 1993, p. 2.



-- either a special need for access to "highly confidential" materials or a disagreement over the classification of certain documents -- the parties worked together to resolve the issue.

For example, in two of the three instances that KCS describes as "problems" that required Commission intervention (p. 3), the Commission merely modified the protective order to reflect parties' agreements to allow in-house counsel access to particular "highly confidential" information. See BN/Santa Fe, Decisions served Mar. 13 & June 20, 1995. At other times throughout the proceedings, disagreements over the appropriate level of confidentiality were resolved informally -- for example, UP's dissatisfaction with the applicants' initial classification of settlement agreements was resolved through discussions with the applicants. Finally, and crucially, in the single dispute that the Commission did have to resolve, the Commission properly denied a party's request for access to highly confidential information, and it forcefully reaffirmed the need to protect certain types of business information in a proceeding such as this. See BN/Santa Fe, Decision served May 3, 1995.

It is difficult to understand how KCS can seriously argue (p. 6) that to deprive in-house counsel of "access to all relevant information is nothing short of scandalous," in light of its own prior use of identical restrictions. See Ex. A, p. 2. As recently as its May 3 decision in BN/Santa Fe,



the Commission upheld the applicants' refusal to allow a party's in-house counsel access to information classified as "highly confidential." The Commission explained that the "highly confidential" classification protects "the type of proprietary information for which the primary applicants have a reasonable and very substantial expectation of confidentiality," because "the disclosure of such proprietary information . . . could adversely affect the primary applicants' future business dealings" (p. 2).

The notion that approval of Applicants' proposed protective order would indicate Commission mistrust of in-house counsel (KCS Opposition, p. 4) is nonsense. The Commission has simply recognized the potential problems involved in allowing in-house counsel unrestricted access to sensitive competitive information. Especially in a proceeding of this size and scope, the risk of inadvertent disclosure of confidential business information is substantial. In-house counsel are routinely involved in business decisions as well as purely legal matters, and their involvement is continuous. Access to confidential competitive information places in-house counsel in the untenable position of having to refrain from offering advice on a host of issues in order to avoid disclosing highly confidential information. When outside counsel are available to protect a party's interests, such

risk and such conflicts can be avoided at the same time as the applicants' interest in confidentiality is preserved.

The Commission's resolution of the conflict between applicants' need to preserve confidential business information and other parties' interest in discovery is not by any means unique. The Federal Rules of Civil Procedure specifically provide that a court may protect a party from "undue burden" in discovery by ordering "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Fed. R. Civ. P. 26(c). Courts faced with problems similar to those here have drawn the same line between in-house counsel, on the one hand, and outside counsel and experts, on the other. See, e.g., Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1470-72 (9th Cir.), cert. denied, 113 S. Ct. 198 (1992) (upholding district court's decision to issue a protective order restricting access to certain discovery material to outside counsel and consultants); Akzo N.V. v. U.S. International Trade Commission, 808 F.2d 1471, 1482-83 (Fed. Cir. 1986), cert. denied, 482 U.S. 909 (1987) (upholding ALJ's decision to issue a protective order restricting access to confidential information to outside counsel).

Finally, KCS' complaint (pp. 4-5) that the proposed protective order is unfair because it allows each Applicant's in-house counsel access to the other Applicant's confidential

materials, which might include materials that would be classified as highly confidential in discovery, brushes over the essential difference between adversaries and co-applicants. Although co-applicants must remain business competitors until the application is approved, the need to share certain confidential data for the purpose of preparing the application is compelling: a transaction of this type simply cannot proceed without such cooperation. Applicants bear the burden of presenting evidence to support their case, and this cannot be done without the sharing of certain otherwise-confidential information. Furthermore, use of confidential information by applicants to collude or conspire would risk Commission disapproval of the entire transaction and subject the applicants to severe legal sanctions. The balance must fall on the side of the applicants' compelling need to share certain information if this type of transaction is ever to occur.

Collusion is not the main concern where non-applicant parties seek discovery. With respect to non-applicant parties, access to confidential competitive information presents the danger that competitors or customers will acquire information that "could adversely affect the primary applicants' future business dealings." BN/Santa Fe, Decision served May 3, 1995, p. 2. And, while the danger of collusion between the applicants ends if the Commission



EXHIBIT A



BEFORE THE  
INTERSTATE COMMERCE COMMISSION

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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

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APPLICANTS' REPLY TO KCS'  
OPPOSITION TO PROPOSED PROTECTIVE ORDER

Union Pacific Corporation ("UPC"), Union Pacific  
Railroad Company ("UPRR"), Missouri Pacific Railroad Company  
("MPRR"),<sup>1/</sup> Southern Pacific Rail Corporation ("SPR"),  
Southern Pacific Transportation Company ("SPT"), St. Louis  
Southwestern Railway Company ("SSW"), SPCSL Corp. ("SPCSL"),  
and The Denver and Rio Grande Western Railroad Company  
("DRGW"),<sup>2/</sup> collectively, "Applicants," hereby reply to the  
Opposition of the Kansas City Southern Railway Company to  
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In its Opposition, KCS objects to Applicants'  
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<sup>1/</sup> UPC, UPRR and MPRR are referred to collectively as "Union  
Pacific." UPRR and MPRR are referred to collectively as "UP."

<sup>2/</sup> SPR, SPT, SSW, SPCSL and DRGW are referred to  
collectively as "Southern Pacific." SPT, SSW, SPCSL and DRGW  
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Item No. 60002

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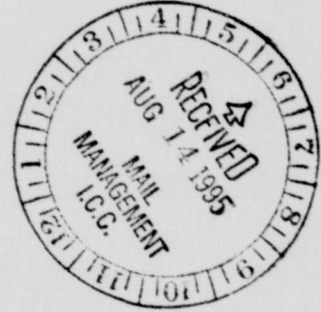
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August 14, 1995



Mr. Vernon A. Williams  
Secretary  
Interstate Commerce Commission  
Room 1324  
Washington, D.C. 20423

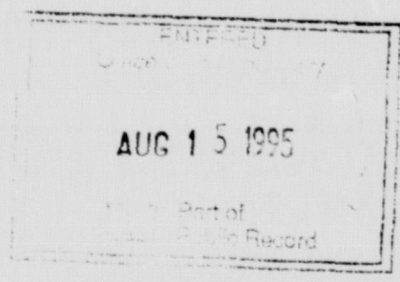
RE: *Finance Docket No. 3276 - Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, S. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company*

Dear Secretary Williams:

Enclosed herewith are one original and eleven copies of the following two filings:

1. Comments of The Kansas City Southern Railway Company on Proposed Procedural Schedule and Discovery Guidelines, designated KCS-1; and
2. Opposition of The Kansas City Southern Railway Company to Proposed Protective Order, designated KCS-2.

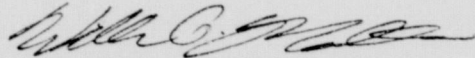
Please date and time stamp one of the copies of each filing and return them to the courier for return to our offices.



Mr. Vernon A. Williams  
August 14, 1995  
Page 2

No filing fee is required for replies to motions. *See 49 C.F.R. Part 1002.2(f).*  
Copies have been served on all known parties of record.

Very truly yours,



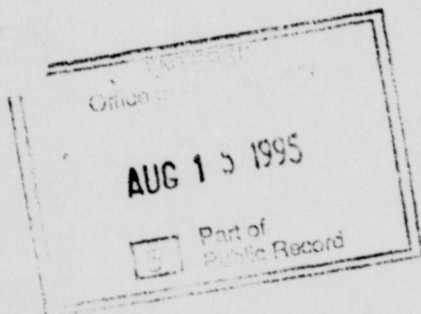
William A. Mullins

Enclosures

cc: Parties of Record  
Robert K. Dreiling

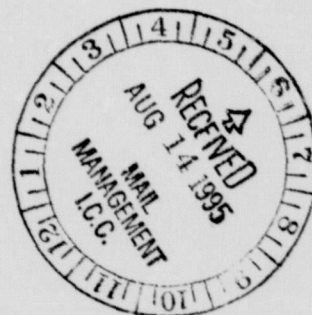


KCS-1



**BEFORE THE  
INTERSTATE COMMERCE COMMISSION**

\_\_\_\_\_  
**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**

\_\_\_\_\_  
**COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY  
ON PROPOSED PROCEDURAL SCHEDULE AND DISCOVERY GUIDELINES**  
\_\_\_\_\_

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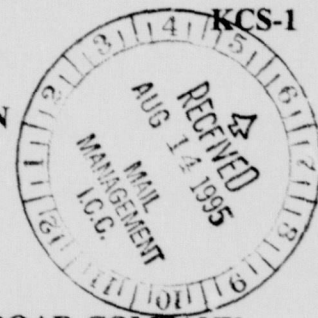
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**August 14, 1995**

**Attorneys for The Kansas City  
Southern Railway Company**

**BEFORE THE  
INTERSTATE COMMERCE COMMISSION**

**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**

**COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY  
ON PROPOSED PROCEDURAL SCHEDULE AND DISCOVERY GUIDELINES**

On August 4, 1995, Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, collectively, "Applicants," filed a "Petition to Establish Procedural Schedule" and attached, as Appendix A to that petition, "Proposed Discovery Guidelines." The Kansas City Southern Railway Company ("KCS") hereby files these comments on the proposed procedural schedule and the proposed discovery guidelines.

While the proposed procedural schedule is modelled after that followed by the Commission in *Burlington Northern Inc. & Burlington Northern R.R. -- Control and Merger* -- *Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry.*, Finance Docket No. 32549

(ICC served Mar. 7, 1995) ("*BN/Santa Fe*"), Applicants have not presented any legal or policy justifications as to why the procedural schedule adopted in that proceeding should also be adopted in this proceeding without first seeking public comments on the proposed schedule.

Applicants only justification for its proposed schedule is to point to the *BN/Santa Fe* proceeding and the Commission's proposed Ex Parte No. 282 (Sub-No. 19)<sup>1</sup> rules and claim "me too." Such an argument does not provide any justification for departing from the Commission's current regulations governing the processing of major rail merger proceedings. See 49 C.F.R. § 1180. The Commission has never adopted, as final rules, the proposed schedule contained in Ex Parte No. 282 (Sub-No. 19). Until the Commission adopts that proposal as final rules, the current regulations governing the processing of merger proceedings apply, and Applicants must provide an independent basis for departing from the regulations.

It is not enough to point to the *BN/Santa Fe* proceeding as a reason for automatically adopting Applicants' proposed schedule. The schedule in that proceeding was adopted only after considerable debate and public comment. Indeed, in that proceeding, when BN and Santa Fe first filed a Notice of Intent to File an Application and a Petition for Procedural Schedule, the Commission solicited specific public comment on the proposed procedural schedule. *BN/Santa Fe* (ICC served Aug. 4, 1994). At that time, BN and Santa Fe were

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<sup>1</sup> *New Procedures in Rail Acquisitions, Mergers & Consolidation*, Ex Parte No. 282 (Sub-No. 19) (ICC served Jan. 26, 1995).



requesting a 430 day schedule. The Commission solicited public comment on this "accelerated schedule" and after considerable comment, adopted a 540 day procedural schedule. *BN/Santa Fe* (ICC served Oct. 5, 1994). Even after issuance of the Ex Parte No. 282 decision, the Commission again sought public comment on whether it should adopt the Ex Parte No. 282 schedule for the *BN/Santa Fe* proceeding, notwithstanding the prior Commission decision establishing a 540 day schedule. After considerable debate and controversy, the Commission did adopt the shorter schedule.

The process of soliciting public comment on proposed procedural schedules that deviate from the established regulations has been followed in every major merger transaction since the Staggers Act. See *Illinois Central Corporation -- Common Control -- Illinois Central Railroad Company and The Kansas City Southern Railway Company*, Finance Docket No. 32556 (ICC served Aug. 26, 1994); *Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control -- Chicago & North Western Holdings Corp. & Chicago & North Western Transportation Co.*, Finance Docket No. 32133 (ICC served Sept. 10, 1992); *Rio Grande Indus. Inc., SPTC Holding, Inc., & Denver & Rio Grande Western R.R. -- Control -- Southern Pacific Transp. Co.*, 4 I.C.C.2d 834 (1988); *Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control -- Missouri-Kansas-Texas R.R.*, 4 I.C.C.2d 409, 419 (1980); *Norfolk Southern Corp. -- Control -- Norfolk & Western Ry, & Southern Ry.*, 366 I.C.C. 173, 177 (1982); *Rio Grande Indus. Inc. -- Purchase & Related Trackage Rights -- Soo Line R.R. Line Between Kansas City, MO & Chicago, IL*, 6 I.C.C.2d 854 (1990); *Chicago, Milwaukee, St. Paul & Pacific R.R. -- Reorganization -- Acquisition by*



*Grand Truck Corp.*, 2 I.C.C.2d 161 (1984). In each of these cases, the Applicants proposed a procedural schedule, the Commission requested public comment on the proposed schedule, comments were filed, and the Commission then adopted a procedural schedule. In every case, the Commission's adopted schedule provided for time periods different from the procedures and time periods contained within the regulations, but only after the public had an opportunity to provide comment.

As with the *BN/Santa Fe* proceeding, KCS has significant concerns regarding its, and the public's, ability to conduct adequate discovery and sufficiently analyze the competitive concerns within the time frame proposed by Applicants. These concerns are only amplified by the fact that this proposed transaction would far eclipse the *BN/Santa Fe* proceeding in terms of size, scope, and the nature of the competitive problems. The Applicants' combined system would have 35,000 miles of track, operate in 25 states, and have annual revenue from rail operations of \$9.5 billion. Union Pacific to Acquire Southern Pacific In a Cash-Stock Pact Totaling \$3.9 Billion, Wall Street Journal, August 4, 1995, A3. Because of the complexities of this proposal and the greater need to focus on potential anticompetitive impacts, KCS and the public need additional time to develop an alternative procedural schedule that would provide all parties with an opportunity to make its case.<sup>2</sup>

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<sup>2</sup> In that KCS is requesting the Commission to solicit public comment on Applicants' proposed procedural schedule, KCS does not here detail all of its concerns regarding the schedule. Only if given an opportunity to provide additional comment will KCS and others be in a position to develop its concerns and propose an alternative schedule.

Soliciting public comment before adopting Applicants' proposed schedule will not jeopardize Applicants' proposed transaction in any way. The Applicants have indicated that they will not file the application until December 1, 1995. This gives the Commission over three months to solicit comment and adopt a procedural schedule. In reality, the Commission could resolve this issue within the next month. During this time, Applicants can be preparing their application. There is nothing in the process of soliciting public comment on the proposed procedural schedule that prevents Applicants from going forward with their preparation and transaction.

Likewise, KCS's ability to thoroughly conduct discovery will be seriously jeopardized if the Commission adopts Applicants' proposed discovery guidelines without allowing input from the public and presentation of alternative discovery guidelines. Applicants have not established any reason why this proceeding cannot be conducted under the Commission's normal rules of discovery, 49 C.F.R. § 1114. It is Applicants' burden to justify departing from the normal rules of discovery, and they have not done so.

In *BN/Santa Fe*, the public was given an opportunity to comment on the proposed discovery guidelines and to propose alternative guidelines. The Commission declined to rule on the discovery guidelines and instead deferred that decision to the Administrative Law Judge ("ALJ") assigned to the proceeding:

If the parties wish to engage in any discovery or establish any discovery guidelines . . . they are directed to consult with Stephen L. Grossman, Administrative Law Judge. Judge Grossman is authorized to convene a discovery conference, if necessary and as appropriate, in Washington, D.C., and to establish such discovery guidelines, if any, as he deems appropriate.


*BN/Santa Fe*, Decision No. 10 at 9 (ICC served Mar. 7, 1995). The ALJ then conducted a

conference whereby all parties had an opportunity to comment. The ALJ then issued discovery guidelines. *BN/Santa Fe* (ICC served Mar. 27, 1995). This process worked well and involved cooperation by all parties. Because this proceeding is dramatically more complex than *BN/Santa Fe*, this same process for developing discovery guidelines appropriate to this case should be allowed to occur, rather than simply adopting the same guidelines used in *BN/Santa Fe*.

In conclusion, the Commission, in order to be consistent with past precedent, must first solicit comment on the Applicants' proposed schedule. Accordingly, KCS respectfully requests the Commission to not adopt Applicants' proposed schedule until the public has had an opportunity to analyze it and provide public comment. Likewise, the Commission should not adopt the proposed discovery guidelines but should defer that issue to resolution by the ALJ assigned to this proceeding.

Respectfully submitted,

Richard P. Bruening  
W. James Wochner  
Robert K. Dreiling  
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Railway Company  
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Fax: (202) 274-2994

Attorneys for The Kansas City  
Southern Railway Company



**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing "COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY ON PROPOSED PROCEDURAL SCHEDULE AND DISCOVERY GUIDELINES" was served this 14th day of August, 1995, by hand-delivery, facsimile, or overnight delivery on counsel for all known parties of record.

  
William A. Mullins

Attorney for The Kansas City  
Southern Railway Company

STB

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1201 PENNSYLVANIA AVENUE, N. W.

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BRUSSELS CORRESPONDENT OFFICE

44 AVENUE DES ARTS

BRUSSELS 1040 BELGIUM

TELEPHONE: 32-2-512-9890

TELEFAX: 32-2-502-1598

August 11, 1995

BY HAND

Honorable Vernon A. Williams  
Secretary  
Interstate Commerce Commission  
Twelfth Street and Constitution Avenue, N.W.  
Room 2215  
Washington, D.C. 20423  
Attention: Ms. Ann Quinlin



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

Dear Secretary Williams:

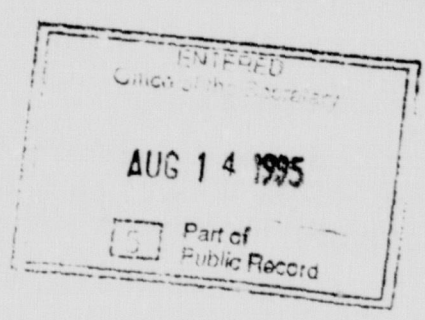
Enclosed please find 21 copies of pages 12 and A1  
from Exhibit B to the Agreement and Plan of Merger by and  
among Union Pacific Corporation, UP Acquisition Corporation,  
Union Pacific Railroad Company and Southern Pacific Rail  
Corporation. These pages were inadvertently omitted from the  
copies of the Merger Agreement we provided to the Commission  
on Friday.

Sincerely,

*Michael L. Rosenthal*

Michael L. Rosenthal

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



Enclosures

Item No. \_\_\_\_\_

Page Count 3

AUG#10



EXHIBIT A

IRREVOCABLE PROXY

The undersigned hereby revokes any previous proxies and appoints Union Pacific Corporation ("Parent"), Drew Lewis and Richard K. Davidson, and each of them, with full power of substitution, as attorney and proxy of the undersigned to attend any and all meetings of shareholders of Southern Pacific Rail Corporation, a Delaware corporation (the "Company") (and any adjournments or postponements thereof), to vote all shares of Common Stock, \$.001 par value, of the Company that the undersigned is then entitled to vote, and to represent and otherwise to act for the undersigned in the same manner and with the same effect as if the undersigned were personally present, with respect to all matters specified in Section 3(a) of the Shareholder Agreement (the "Shareholder Agreement"), dated as of August 3, 1995, by and among Parent, UP Acquisition Corporation, and the undersigned. Capitalized terms used and not defined herein have the respective meanings ascribed to them in, or as prescribed by, the Shareholder Agreement.

This proxy shall be deemed to be a proxy coupled with an interest and is irrevocable during the



(book-entry or otherwise) of any certificated or uncertificated interest representing any of the securities of the Company or of Parent, as the case may be, unless the Shareholder represents to the Company that such transfer is made in compliance with this Agreement.

(b) Shareholder shall promptly surrender to the Company all certificates representing the Shares, and other Company Voting Securities acquired by Shareholder or its Affiliates after the date hereof, and the Company shall place the following legend on such certificates:

"THE SECURITIES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO A SHAREHOLDER AGREEMENT, DATED AS OF AUGUST 3, 1995 BY AND AMONG UP ACQUISITION CORPORATION, UNION PACIFIC CORPORATION AND THE MORGAN STANLEY LEVERAGED EQUITY FUND II, L.P. WHICH, AMONG OTHER THINGS, RESTRICTS THE TRANSFER AND VOTING THEREOF."

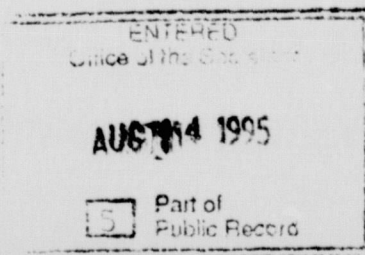
9. Termination. Except as otherwise provided in this Agreement, this Agreement shall terminate at the end of the Voting Period.

10. Miscellaneous.

(a) This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and oral, between the parties with respect to the subject matter hereof.

(b) Shareholder agrees that this Agreement and the obligations hereunder shall attach to any Company Voting Securities that may become Beneficially Owned by Shareholder.

(c) All costs and expenses incurred in connection with this Agreement and the transactions contemplated hereby shall be paid by the party incurring such expenses, and each of Parent and Purchaser, on the one hand, and Shareholder, on the other hand, shall indemnify and hold the other harmless from and against any and all claims, liabilities or obligations with respect to any brokerage fees, commissions or finders' fees asserted by any person on the basis of any act or statement alleged to have been made by such party or its Affiliates.



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59998

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BRUSSELS CORRESPONDENT OFFICE  
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(202) 662-5448  
DIRECT TELEFAX NUMBER  
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August 11, 1995

Item No. \_\_\_\_\_

Page Count 7

Aug #7

BY HAND

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:

Enclosed for filing in the above-captioned docket are the original and twenty copies of Applicants Modification of Notice of Intent to File Railroad Control Application (UP/SP-5). Also enclosed is a 3.5-inch disk containing the text of this pleading in WordPerfect 5.1 format.

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

Sincerely,

*Michael L. Rosenthal*

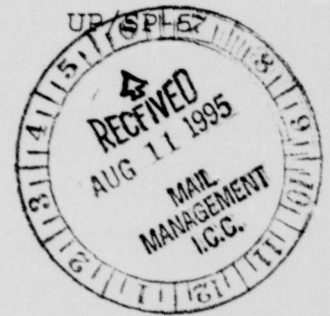
Michael L. Rosenthal

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

ENTERED  
Office of the Secretary  
**AUG 14 1995**  
5 Part of Public Record

Enclosures

BEFORE THE  
INTERSTATE COMMERCE COMMISSION

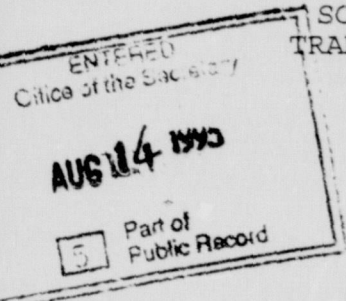


Finance Docket No. 32760

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



MODIFICATION OF NOTICE OF INTENT  
TO FILE RAILROAD CONTROL APPLICATION

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(202) 973-7601

Attorneys for Southern  
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Southern Pacific Transportation  
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Railway Company, SPCSL Corp.,  
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Western Railroad Company

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

BEFORE THE  
INTERSTATE COMMERCE COMMISSION

---

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

---

MODIFICATION OF NOTICE OF INTENT  
TO FILE RAILROAD CONTROL APPLICATION

Union Pacific Corporation ("UPC"), Union Pacific Railroad Company ("UPRR"), Missouri Pacific Railroad Company ("MPRR"),<sup>1/</sup> Southern Pacific Rail Corporation ("SPR"), Southern Pacific Transportation Company ("SPT"), St. Louis Southwestern Railway Company ("SSW"), SPCSL Corp. ("SPCSL"), and The Denver and Rio Grande Western Railroad Company ("DRGW"),<sup>2/</sup> collectively, "Applicants," hereby modify their Notice of Intent to File Railroad Control Application (UP/SP-1) to state that, if the 1994 ICC Waybill Sample is available by September 1, 1995, Applicants will use 1994 as the base year, and if it is not, 1993 will be used.

---

<sup>1/</sup> UPC, UPRR and MPRR are referred to collectively as "Union Pacific." UPRR and MPRR are referred to collectively as "UP."

<sup>2/</sup> SPR, SPT, SSW, SPCSL and DRGW are referred to collectively as "Southern Pacific." SPT, SSW, SPCSL and DRGW are referred to collectively as "SP."



Applicants' Notice of Intent to File indicated that they planned to submit impact analyses based on 1993 data. Before filing the Notice, Applicants had consulted with the Commission's Office of Economic and Environmental Analysis regarding the timing of the availability of the 1994 ICC Waybill Sample, and had been told that it would not be available until early October -- too late to permit preparation and filing of the application on or before December 1.

Today, one of Applicants' consultants, Atlantic Systems, Inc., was contacted by an individual at ALK Associates, Inc., the contractor that processes the Waybill Sample for the Commission, and was advised that ALK had been retained by a potential opponent of the transaction which intended to argue that use of the 1993 Sample was inappropriate. This individual indicated that ALK would complete its processing of the data in time for the Commission to release the data by the end of August.

Applicants then contacted the Commission's Office of Economic and Environmental Analysis ("OEEA") and were advised that ALK indeed planned to complete its processing work in time for the Commission to make the 1994 Sample available to the public by the beginning of September. OEEA also faxed to Applicants this afternoon its approval of their request for access to the 1993 Sample, and granted access to the 1994 Sample as well.

Later in the day, Applicants were served by Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company (collectively, "Santa Fe") with their "Partial Objection to Notice of Intent" (SF-2), stating that the 1994 Sample "will be available at the end of August or the start of September," and urging that the Commission "require Applicants to submit impact analyses based on 1994 data."

Santa Fe's filing is clearly aimed at delaying this proceeding. However, if the 1994 Waybill Sample is available by September 1, Applicants will base their impact analyses on 1994 data. Otherwise, they will use 1993 as the base year. The Commission will thus know definitively by September 1 what the base year will be, and will be able to specify that date in the public notice to be published by September 4 in the Federal Register pursuant to 49 C.F.R. § 1180.4(b)(2).

Contrary to Santa Fe's argument, the Commission should not "require" Applicants to base their impact analyses on 1994 data, because any delay in the availability of the 1994 Sample would then delay the filing and review of the application. While 1994 data will of course be more current than 1993 data, and is preferred by Applicants if it will be available in a timely manner, Santa Fe offers no reason to believe that the effects of the proposed transaction cannot be amply evaluated through traffic studies and market analyses based on 1993 data. Santa Fe says only that traffic volumes and revenues increased in 1994, but the fact that rail traffic

varies from year to year provides no basis for concluding that 1993 data are not fully adequate for reviewing this application.

Respectfully submitted,

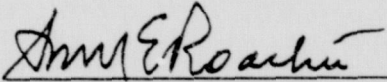
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Attorneys for Union Pacific  
Corporation, Union Pacific  
Railroad Company and Missouri  
Pacific Railroad Company

August 11, 1995

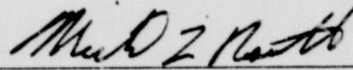


CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 11th day of August, 1995, I cause a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

Director of Operations  
Antitrust Division  
Room 3218  
Department of Justice  
Washington, D.C. 20530

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



---

Michael L. Rosenthal

STB FD

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COVINGTON & BURLING

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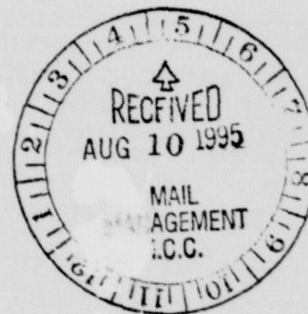
TELEFAX 32-2-502-1598

August 10, 1995

FD-32760

BY HAND

David M. Konschnik  
Director  
Office of Proceedings  
Interstate Commerce Commission  
Room 2118  
Twelfth Street and Constitution Avenue, N.W.  
Washington, D.C. 20423



Re: Request for Informal Opinion --  
Voting Trust Agreement

Dear Mr. Konschnik:

As you requested of Arvid Roach this afternoon, I am enclosing a copy of the Agreement and Plan of Merger by and among Union Pacific Corporation, UP Acquisition Corporation, Union Pacific Railroad Company and Southern Pacific Rail Corporation along with all of its exhibits.

Sincerely,

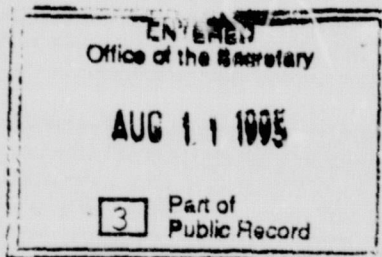
Michael L. Rosenthal

Enclosure

Item No. \_\_\_\_\_

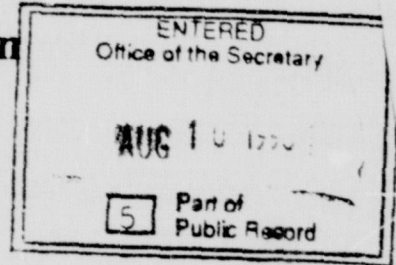
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Aug #6





Offer to Purchase for Cash  
Up to 39,034,471 Shares of Common Stock  
of  
**Southern Pacific Rail Corporation**  
at  
**\$25.00 Net Per Share**  
by  
**UP Acquisition Corporation**  
an indirect wholly owned subsidiary of  
**Union Pacific Corporation**



THE OFFER, PRORATION PERIOD AND WITHDRAWAL RIGHTS WILL EXPIRE AT 12:00 MIDNIGHT, NEW YORK CITY TIME, ON WEDNESDAY, SEPTEMBER 6, 1995, UNLESS THE OFFER IS EXTENDED.

THE OFFER IS CONDITIONED UPON, AMONG OTHER THINGS, (i) THE RECEIPT BY UP ACQUISITION CORPORATION ("PURCHASER"), PRIOR TO THE EXPIRATION OF THE OFFER, OF AN INFORMAL WRITTEN OPINION IN FORM AND SUBSTANCE SATISFACTORY TO PURCHASER FROM THE STAFF OF THE INTERSTATE COMMERCE COMMISSION (THE "ICC"), WITHOUT THE IMPOSITION OF ANY CONDITIONS UNACCEPTABLE TO PURCHASER, THAT THE USE OF A VOTING TRUST (THE "VOTING TRUST") IS CONSISTENT WITH THE POLICIES OF THE ICC AGAINST UNAUTHORIZED ACQUISITIONS OF CONTROL OF A REGULATED CARRIER AND (ii) THE RECEIPT BY PURCHASER, PRIOR TO THE EXPIRATION OF THE OFFER, OF AN INFORMAL STATEMENT FROM THE PREMERGER NOTIFICATION OFFICE OF THE FEDERAL TRADE COMMISSION EITHER THAT (1) NO REVIEW OF THE OFFER, THE MERGER (AS DEFINED HEREIN) AND THE TRANSACTIONS CONTEMPLATED BY THE ANCILLARY AGREEMENTS (AS DEFINED HEREIN) WILL BE UNDERTAKEN PURSUANT TO THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976, AS AMENDED (THE "HSR ACT"), OR (2) THE TRANSACTIONS CONTEMPLATED BY THE OFFER, THE MERGER AND THE ANCILLARY AGREEMENTS ARE NOT SUBJECT TO THE HSR ACT, OR IN THE ABSENCE OF THE RECEIPT OF SUCH INFORMAL STATEMENT REFERRED TO IN CLAUSE (1) OR (2) ABOVE, ANY APPLICABLE WAITING PERIOD UNDER THE HSR ACT SHALL HAVE EXPIRED OR BEEN TERMINATED PRIOR TO THE EXPIRATION OF THE OFFER. SEE SECTION 15.

THE BOARD OF DIRECTORS OF SOUTHERN PACIFIC RAIL CORPORATION (THE "COMPANY") UNANIMOUSLY HAS APPROVED THE OFFER AND THE MERGER, DETERMINED THAT EACH OF THE OFFER AND THE MERGER IS FAIR TO AND IN THE BEST INTERESTS OF THE STOCKHOLDERS OF THE COMPANY AND RECOMMENDS THAT STOCKHOLDERS OF THE COMPANY WHO DESIRE TO RECEIVE CASH FOR THEIR SHARES ACCEPT THE OFFER AND TENDER THEIR SHARES PURSUANT TO THE OFFER.

**IMPORTANT**

Any stockholder desiring to tender all or any portion of such stockholder's Shares (as defined herein) should either (i) complete and sign the Letter of Transmittal (or a facsimile thereof) in accordance with the instructions in the Letter of Transmittal, have such stockholder's signature thereon guaranteed if required by Instruction 1 to the Letter of Transmittal, mail or deliver the Letter of Transmittal or such facsimile and any other required documents to the Depository and either deliver the certificates for such Shares to the Depository along with the Letter of Transmittal or facsimile or deliver such Shares pursuant to the procedure for book-entry transfer set forth in Section 3 prior to the expiration of the Offer or (ii) request such stockholder's broker, dealer, commercial bank, trust company or other nominee to effect the transaction for such stockholder. A stockholder having Shares registered in the name of a broker, dealer, commercial bank, trust company or other nominee must contact such broker, dealer, commercial bank, trust company or other nominee if such stockholder desires to tender such Shares.

Any stockholder who desires to tender Shares and whose certificates for such Shares are not immediately available, or who cannot comply with the procedures for book-entry transfer described in this Offer to Purchase on a timely basis, may tender such Shares by following the procedures for guaranteed delivery set forth in Section 3.

Questions and requests for assistance or for additional copies of this Offer to Purchase, the Letter of Transmittal or other tender offer materials, may be directed to the Information Agent (as defined herein) or the Dealer Manager (as defined herein) at their respective addresses and telephone numbers set forth on the back cover of this Offer to Purchase.

The Dealer Manager for the Offer is:

**CS First Boston**

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Schedule I—Information Concerning the Directors and Executive Officers of Parent, UPRR and Purchaser	



Facsimile copies of the Letter of Transmittal, properly completed and duly signed, will be accepted. The Letter of Transmittal, certificates for the Shares and any other required documents should be sent by each stockholder of the Company or his broker, dealer, commercial bank, trust company or other nominee to the Depository at one of its addresses set forth below:

*The Depository for the Offer is:*

## **Citibank, N.A.**

*By Mail:*  
Citibank, N.A.  
c/o Citicorp Data  
Distribution, Inc.  
P.O. Box 1429  
Paramus, New Jersey 07653

*By Overnight Delivery:*  
Citibank, N.A.  
c/o Citicorp Data  
Distribution, Inc.  
404 Sette Drive  
Paramus, New Jersey 07652

*By Hand:*  
Citibank, N.A.  
Corporate Trust Window  
111 Wall Street, 5th Floor  
New York, New York

*By Facsimile Transmission:*  
(for Eligible Institutions Only)  
(201) 262-3240

*By Telex:*  
(710) 990-4964  
Answerback: CDDI PARA

*Confirm by Telephone:*  
(800) 422-2066

Any questions or requests for assistance or additional copies of the Offer to Purchase, the Letter of Transmittal and the Notice of Guaranteed Delivery may be directed to the Information Agent or the Dealer Manager at their respective telephone numbers and locations listed below. You may also contact your broker, dealer, commercial bank or trust company or other nominee for assistance concerning the Offer.

*The Information Agent for the Offer is:*

## **D.F. King & Co., Inc.**

77 Water Street  
New York, New York 10005  
(Call Toll Free) 1-800-697-6974  
or (212) 269-5550 (call collect)

*The Dealer Manager for the Offer is:*

## **CS First Boston**

Park Avenue Plaza  
55 East 52nd Street  
New York, New York 10055  
(212) 909-2000 (call collect)

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**COVINGTON & BURLING**

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**ARVID E. ROACH II**  
DIRECT DIAL NUMBER  
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Item No. \_\_\_\_\_

Page Count 3

~~000~~ AUGUST #5  
August 10, 1995

**BY HAND**

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

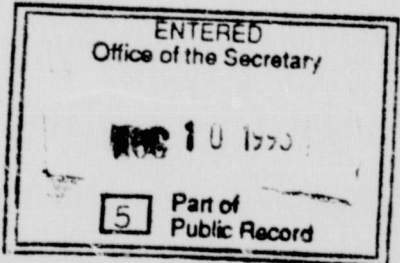


Re: Request for Informal Opinion --  
Voting Trust Agreement

Dear Secretary Williams:

On August 4, 1995, we submitted on behalf of Union Pacific Corporation ("UPC"), Union Pacific Railroad Company and Missouri Pacific Railroad Company a Voting Trust Agreement proposed to be entered into by and between UPC, UP Acquisition Corporation ("Acquisition"), an indirect wholly-owned subsidiary of UPC, and Southwest Bank of St. Louis, an institutional trustee. We explained that Acquisition would shortly initiate a cash tender offer for approximately 25% of Southern Pacific Rail Corporation's ("SPR") voting stock.

This is to advise that Acquisition yesterday commenced a tender offer for 25% of SPR's voting stock. A copy of the Offer to Purchase is attached. The tender deadline, which we indicated in our August 4 submission would be approximately September 5, 1995, has been set for Wednesday, September 6, 1995, as explained in the Offer to Purchase.



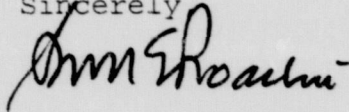


COVINGTON & BURLING

Honorable Vernon A. Williams  
August 10, 1995  
Page 2

We will continue to keep the Commission apprised of any developments.

Sincerely



Arvid E. Roach II

Enclosure

cc (w/enc):      Honorable David M. Konschnik  
                         Director  
                         Office of Proceedings  
                         Room 2118