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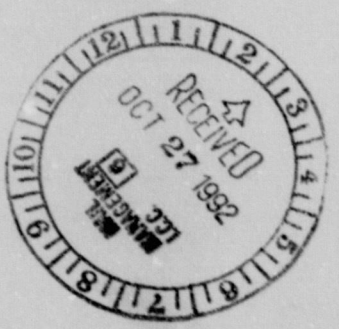
October 27, 1992



By Hand

The Honorable Sidney L. Strickland, Jr.
Secretary
Interstate Commerce Commission
12th Street and Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 30400 (Sub-No. 21),
Santa Fe Southern Pacific Corporation --
Control -- Southern Pacific Transportation Company

Dear Secretary Strickland:

Enclosed please find, for filing with the Commission, the original and eleven copies of the Reply of Santa Fe Pacific Corporation to Motion of Sieu Mei Tu for an Order Relating to Various Discovery Matters. Please time and date stamp one copy and return it to our messenger.

Please call me if you have any questions regarding the enclosed materials. Thank you for your assistance.

Sincerely yours,

Erika Z. Jones

Erika Z. Jones
Counsel For Santa Fe
Pacific Corporation

Enclosures

cc: Honorable Paul S. Cross
All Parties of Record

BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 30400 (SUB-NO. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

REPLY OF SANTA FE PACIFIC CORPORATION TO MOTION OF SIEU MEI TU FOR AN ORDER RELATING TO VARIOUS DISCOVERY MATTERS

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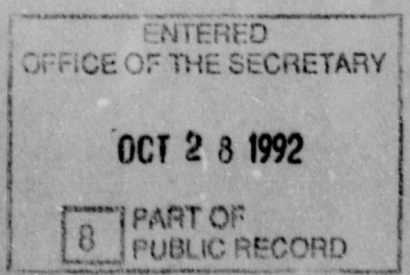
DATED: October 27, 1992



BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 30400 (SUB-NO. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

REPLY OF SANTA FE PACIFIC CORPORATION TO MOTION
OF SIEU MEI TU FOR AN ORDER RELATING TO
VARIOUS DISCOVERY MATTERS

Pursuant to a conference call with Chief Administrative Law Judge Paul S. Cross on October 21, 1992, Santa Fe Pacific Corporation (formerly Santa Fe Southern Pacific Corporation) ("SFP") replies to the "Motion Of Injured Party Sieu Mei Tu For Order Compelling Inspection And Production; Sanctions For Failure To Give Discovery; Extension Time To Complete Discovery And Submit Evidence" ("Tu's Motion") dated October 16, 1992.

Tu's Motion against SFP should be denied inasmuch as SFP already has fully responded to the "Demand for Inspection and Production" dated September 25, 1992, served by Sieu Mei Tu and Joseph Z. Tu (jointly referred to herein as the "Tus").

SFP further submits that Tu's Motion should be denied because the discovery sought by the Tus is unlikely to lead to admissible evidence inasmuch as the Tus are not proper parties to this proceeding. Mr. Tu lacks standing to be a party to this proceeding because he is not and never has been an employee of any Commission regulated carrier. Mrs. Tu is not a proper party because:

1) Pacific Fruit Express Company ("PFE"), her former employer, was not a carrier subject to the Commission's jurisdiction; 2) her furlough by PFE has been fully litigated in arbitration and federal court and has been determined to have resulted from a "precipitous" decline in PFE's business, a proper circumstance for laying off employees under her collective bargaining agreement and one which would not entitle her to employee protection under the Interstate Commerce Act (the "ICA"); and 3) the Commission's Decision reopening this phase of the proceeding precludes Mrs. Tu from pursuing an individual claim at this time.

Finally, even if Mrs. Tu elects to submit evidence in this proceeding, the Commission should not allow her to prolong this proceeding over issues relating to her pending discovery. Some of Mrs. Tu's pending discovery requests seek information which does not relate either to PFE or Mrs. Tu. Other requests seek information that is irrelevant to this phase of the Commission's inquiry. Moreover, Mrs. Tu already has had extensive discovery opportunities in her federal court case, and her pending discovery requests would appear to seek documents the Tus learned of and could have obtained during discovery in their prior litigation. It would be highly prejudicial to the other parties to create further delays in the procedural schedule in order to accommodate the conduct of discovery which repeats discovery opportunities she has already had and, in any event, which is unlikely to lead to admissible evidence in this proceeding.

ARGUMENT

I. BECAUSE SFP ALREADY HAS FULLY RESPONDED TO THE TUS'S DISCOVERY REQUESTS, THE MOTION TO COMPEL SHOULD BE DENIED.

Mrs. Tu's motion to compel discovery against SFP is meritless and should be denied by the Commission. The record is clear that SFP already has timely responded to the Tus's discovery requests. SFP served upon the Tus's counsel by Express Mail on October 15, 1992, separate responses to each of the Tus's nine document requests, and a copy of those responses is appended as Exhibit B to Tu's Motion.

SFP thus has fully responded to the Tus's discovery, subject to its general and specific objections which are renewed in this Reply. There is simply no basis for Tu's motion to compel inspection and production against SFP, nor against The Atchison, Topeka and Santa Fe Railway Company ("ATSF"), on whose behalf SFP already has responded. Accordingly, Tu's Motion to compel against SFP should be denied.

II. THE TUS'S DISCOVERY SHOULD BE DENIED BECAUSE IT IS UNLIKELY TO LEAD TO ADMISSIBLE EVIDENCE INASMUCH AS THEIR PARTICIPATION IN THIS SUB-DOCKET IS IMPROPER AND SUBJECT TO DISMISSAL.

As discussed above, SFP already has answered the Tus's discovery requests in the spirit of cooperation and in an effort to expedite completion of this protracted proceeding. Since the Commission's reopening of this proceeding on June 18, 1992, the procedural schedule has been extended on two separate occasions, already delaying submission of this matter to the Commission by more than four months. Because the Tus's pending discovery requests threaten further to delay the already twice-extended

schedule, SFP submits that the Commission should at this time evaluate the merits of the Tus's participation in this proceeding in order to determine whether their discovery should be allowed. By so doing, it is clear that, for each of the independent reasons set forth below, the Tus are subject to dismissal and that their discovery should accordingly not be allowed because it is unlikely to lead to admissible evidence.1/

A. Mr. Tu Is Not And Has Not Been An Employee Of SPT Or Any SPT Subsidiary And Thus Is Not A Proper Party.

The sole reason for Mr. Tu's participation in this proceeding is his claim for loss of consortium. Nowhere in the Tus's filings is there any indication that Mr. Tu is or was an employee of any carrier subject to Commission jurisdiction. Absent an employment relationship with SPT, Mr. Tu has no standing to pursue a claim under the ICA for labor protection in this proceeding. The Commission can only impose protection for the benefit of a dismissed employee who is an employee of the railroad. New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60, 84 (1979). See also Pennsylvania R. Co. - Merger - New York Central R. Co., 347 I.C.C. 536, 549-51 (1974). The Commission also has no jurisdiction to impose labor protection that would extend to claims for loss of consortium, and any discovery by Mr. Tu is unwarranted.

1/ In this regard, SFP reserves the right to move at an appropriate time to dismiss the Tus from this proceeding on the grounds discussed in this Reply, and on other grounds.

B. Mrs. Tu Is Not A Proper Party To This Proceeding Because PFE, Her Former Employer, Was Not A Carrier Subject to Commission Jurisdiction.

The stated basis for Mrs. Tu's participation in this sub-docket is that she is a former clerical employee of PFE who was furloughed from her position sometime in 1985 just prior to the time when PFE, a wholly-owned subsidiary of the Southern Pacific Transportation Company ("SPT"), was merged into SPT. PFE, however, was not a common carrier by railroad; its business was the ownership, maintenance, and leasing of refrigerator cars to railroads for the transport of perishable products in commerce. Edwards v. Pacific Fruit Express Co., 390 U.S. 538 (1968) (holding PFE not a common carrier by railroad for purposes of the Federal Employers' Liability Act); see also Ellis v. Interstate Commerce Commission, 237 U.S. 434 (1915) (holding that a corporation owning refrigerator and other cars, leasing them to railroads and operating an icing station was not a common carrier); Pennsylvania R. Co. - Merger - New York Central R. Co., 347 I.C.C. 536, 549-51 (1974) (holding that a wholly-owned subsidiary of a railroad that owned and leased refrigeration cars to railroads and that provided refrigeration car services to various railroads was not a common carrier and that its employees were not entitled to labor protection). Mrs. Tu's status as an employee of PFE is therefore insufficient to support her claim for labor protection under the ICA.2/ Nor would the fact that PFE's employees were covered by

2/ If Mrs. Tu were now to contend in this proceeding that PFE is a rail carrier, then the PFE/SPT merger would have been a merger (continued...)

collective bargaining agreements under the Railway Labor Act establish that PFE is a "carrier" under the ICA. See further discussion below, in particular footnote 3.

C. Mrs. Tu Is Barred From Relitigating The Reason For Her Furlough From PFE When It Has Been Determined In Arbitration and In Federal Court To Have Resulted From Economic Conditions And Was Authorized Under Her Collective Bargaining Agreement.

Even if Mrs. Tu had standing to seek labor protection as a former rail carrier employee, she is precluded from relitigating the reason for her furlough from PFE which already has been determined in arbitration and in federal court to have resulted from a precipitous decline in PFE's business.

Mrs. Tu's union brought a claim on behalf of 42 clerical employees of PFE under their collective bargaining agreement alleging that PFE wrongly transferred work to other companies or took steps to lay off employees in violation of the agreement's decline in business provisions. The arbitrator denied the claim finding: "It is evident from an analysis of the figures that there was a precipitous decline in [PFE's] revenue and ton-miles during

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2/ (...continued)
between rail carriers subject to ICC approval and employee labor protection under the ICA. Instead, the record is clear that the merger was consummated outside the jurisdiction of the ICC, and employees who alleged that their employment was affected by the merger were left to remedies available under their collective bargaining agreements. Indeed, Mrs. Tu availed herself of her right to arbitration under her collective bargaining agreement, never challenging the PFE/SPT transaction as one between carriers subject to ICC jurisdiction.

Furthermore, even in the Merger Application filed in Finance Docket No. 30400, PFE was considered not to be a carrier. Application Volume IV, Exhibit 11, page 8.

the year 1985." See In re Pacific Fruit Express Company and Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, Arbitration Opinion and Award at 4 (November 30, 1987) (copy attached as Exhibit A). The arbitrator further held that PFE had a right under the agreement to lay off clerks as a result of a decline in business.3/ Id.

The United States District Court for the Northern District of California similarly found in an action brought by the Tus against SFP, ATSF, and SPT for employment discrimination and loss of consortium that Mrs. Tu was furloughed from PFE prior to the 1985 merger of PFE into SPT due to a severe decline in business caused by competition from the trucking industry. Sieu Mei Tu v. Southern Pacific Transportation Company, Order Granting Defendants' Motions For Summary Judgment and Denying Defendants' Motion to Disqualify at 5 (N.D. Calf. Feb. 6, 1989) (copy attached as Exhibit B). In granting the defendants' motion for summary judgment, the District Court found insufficient evidence to support the Tus's contention that "PFE intentionally turned away business prior to the merger in order to facilitate the combination of SP[T] and PFE . . . ." Id. at 6. The U.S. Court of Appeals for the Ninth Circuit later affirmed the District Court stating there existed "substantial proof of a nondiscriminatory, legitimate reason for her furlough, that is, that PFE had experienced economic decline and that

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3/ Although PFE's employees were covered by collective bargaining agreements negotiated under the Railway Labor Act, that does not establish that PFE is a "carrier" within the meaning of the ICA. See Pennsylvania R. Co. - Merger - New York Central R. Co., 347 I.C.C. 536, 550 (1974).

plaintiff's position was not needed at SP[T] when PFE's business was transferred to the parent company." Sieu Mei Tu v. Southern Pacific Transportation Co., No. 89-16186, slip op. at 5 (9th Cir. June 1, 1992) (copy attached as Exhibit C). Therefore, even if the Commission were to find labor protection warranted in this proceeding, Mrs. Tu would be barred from receiving the benefits of such protection because the finding from the prior arbitration that she was laid off because of a decline in business collaterally estops her from proving that she was harmed by alleged SFP actions or omissions.

These prior decisions conclusively show that Mrs. Tu already has litigated and lost her challenge to PFE's reason for furloughing her. The arbitrator and the federal courts independently have found that Mrs. Tu was furloughed by PFE for economic reasons and that such action was permissible under her collective bargaining agreement. Mrs. Tu is therefore precluded from relitigating the cause for her furlough in this proceeding, and, accordingly, her requests for discovery should be denied.

D. Mrs. Tu Is Not A Proper Party Under The Commission's Decision Reopening This Proceeding.

Mrs. Tu's participation is also improper because the Commission's Decision reopening this proceeding explicitly states that it is not "at this time seeking personal statements from individual employees who believe they were adversely affected by SPT actions", but that the proceeding would encompass only "SPT employees (as a class)". Commission's June 18, 1992 Decision at 3 (emphasis added). Mrs. Tu's filings make abundantly clear that

she is seeking to pursue an individual claim, not appropriate for consideration by the Commission at this phase of the proceeding.4/ Unlike BMWE and IAMAW which are acting in representative capacities for their members, Mrs. Tu's former union declined to pursue her interests and those of its other members in this proceeding. See Tu's Motion at 4. Moreover, the inclusion of Mr. Tu's claim for loss of consortium -- a noncompensable grievance in this proceeding and before this forum -- further underscores the individual nature of the Tus's participation.

Therefore, consistent with the Commission's clearly stated intentions, the Tus's claims are appropriate for consideration, if at all, only after the initial phase of this proceeding has concluded. Allowing their continued participation to delay discovery needlessly wastes the Commission's resources and threatens to cause further delays in the resolution of this protracted proceeding.

4/ Although Mr. Lee Kubby, Mrs. Tu's counsel, suggests in his initial filing that other PFE employees' concerns are at issue, see Petition To Revise at 3 (filed August 8, 1992), Mr. Kubby stated during the conference call with Judge Cross on October 21, 1992, that he has not been retained nor is he authorized to represent other claimants in this proceeding. This confirms the fact that Mrs. Tu is acting in an individual capacity and is seeking redress for her individual grievance.

III. EVEN IF THE TUS ARE PROPER PARTICIPANTS IN THIS PROCEEDING, THEIR DISCOVERY REQUESTS ARE IRRELEVANT TO THE SUBJECT MATTER INVOLVED IN THE PROCEEDING AND THEY ALREADY HAVE HAD EXTENSIVE DISCOVERY OPPORTUNITIES IN PRIOR LITIGATION.

Even if the Tus are proper participants in this proceeding, their pending discovery requests do not relate to the subject matter of this phase of the proceeding and should not be allowed. The Commission has succinctly delineated the scope of its inquiry and the evidence which is admissible at this stage in the proceeding: "We seek specific evidence from the parties with respect to those actions or orders issued by [SFP] which may have affected SPT operations and work-related assignments." Commission's June 18, 1992 Decision at 3.

Even a liberal reading of the Tus's discovery requests demonstrates that the information sought either does not relate to PFE or Mrs. Tu or is irrelevant to the Commission's inquiry in this proceeding. For instance, Request No. 1 seeks all documents produced to the plaintiffs in Kraus v. Santa Fe Southern Pacific Corp., et. al. The Kraus case did not, however, involve any PFE employees; it concerned claims under Oregon state law of tortious interference by two non-agreement SPT employees who worked in the public relations department. 878 F.2d 1193 (9th Cir. 1989). Request No. 1 thus seeks documents wholly unrelated to PFE and irrelevant to any matter involving the Tus in this proceeding.

Similarly, the Tus's Request No. 2 -- minutes of all meetings attended by SPT, ATSF, and SFP during which the proposed ATSF/SPT merger was discussed -- seeks the production of documents not

relating to PFE and therefore irrelevant to any matter involving the Tus in this proceeding.

In Request No. 3, the Tus seek all editions of a newsletter published by the SPT during a nine year period. It is inconceivable that a newsletter, which is publicly disseminated by SPT, could possibly contain information revealing that SPT undertook actions concerning PFE employees at the direction of SFP. This request therefore seeks information that could not by any stretch of the imagination be germane to the scope of the Commission's inquiry or lead to the discovery of relevant information.

Other pending discovery relates to matters already litigated in two different forums by the Tus, i.e., whether PFE was experiencing a decline in business, and bear no relevance to the limited scope of the Commission's inquiry concerning alleged actions or orders issued by SFP which may have affected SPT's operations. For example, Request Nos. 4 and 9 seek documents which appear to contain internal discussions of the business climate for PFE, including profit and loss expectations and future prospects for perishable business. The Tus's requests for PFE internal documents simply are irrelevant to the subject matter of this phase of the proceeding and should not be permitted to delay the procedural schedule.

Moreover, to the extent that the Tus's discovery requests pertain to documents generated internally at PFE and SPT, they would appear to be documents the Tus learned of and could have

obtained during discovery in their prior litigation against SPT, SFP, and ATSF. The Tus had extensive discovery opportunities in their federal court action in which they alleged the very issue which is the subject of this proceeding, i.e., whether SFP exercised undue influence in the ATSF/SPT merger, and their complaint included a count alleging undue influence in the cessation of operations of PFE and termination of Mrs. Tu. Sieu Mei Tu v. Southern Pacific Transportation Co., slip op. at 14 (copy attached as Exhibit C). Thus, even if Mrs. Tu elects to submit evidence in this proceeding, the Commission should not allow Mrs. Tu to prolong this proceeding over the issues relating to discovery, particularly when she already has had extensive discovery opportunities in prior litigation.

Finally, it would be highly prejudicial to SFP's interests if the Tus's discovery was to jeopardize the expeditious submission of this matter to the Commission, particularly when SFP has made every reasonable accommodation to provide prompt responses to discovery, and any such delay would cause prejudice to the parties who seek finality to the Commission's proceedings in this sub-docket. The Tus's discovery should therefore not be allowed and should not, in any event, serve as a basis for further delay.

CONCLUSION

The Commission should deny Tu's Motion to compel discovery against SFP because it already has fully responded to the Tus's requests. SFP also submits that the Tus's discovery should not be allowed because neither Mr. Tu nor Mrs. Tu is a proper party to

this limited proceeding. Alternatively, even if the Tus are proper participants, the Commission should deny their further discovery on grounds that it unlikely to lead to admissible evidence in the Commission's inquiry during this phase of the proceeding.

Respectfully submitted,

Erika Z. Jones / KAK

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Of Counsel

Attorneys for Santa Fe Pacific Corporation

DATED: October 27, 1992

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of October, 1992, I served the foregoing "Reply of Santa Se Pacific Corporation To Motion Of Sieu Mei Tu For An Order Relating To Various Discovery Matters" by causing a copy thereof to be delivered to each of the following in the manner indicated:

Lee J. Kubby
Lee J. Kubby, Inc.
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Sunnyvale, California 94086-0485
(By Federal Express)

William G. Mahoney
Donald F. Griffin
Highsaw, Mahoney & Clarke, P.C.
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Washington, D.C. 20036
(By Messenger)

Wayne M. Bolio
Southern Pacific Transportation Company
819 Southern Pacific Building
One Market Plaza
San Francisco, California 94105
(By Federal Express)

Charles Kong
1017 Brown Street
Bakersfield, California 93305
(By Federal Express)

Kathryn Kuske

In the Matter of the Arbitration Between

PACIFIC FRUIT EXPRESS COMPANY

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

OPINION AND AWARD
(Transfer of work-
separation allowance)

The hearing in the above matter, upon due notice, was held in Stamford, Connecticut on August 6, 1987, before I.M. Lieberman, serving as Chairman of the Board of Arbitration, in accordance with the agreement between Pacific Fruit Express and Brotherhood of Railway, Airline and Steamship Clerks dated July 15, 1987. The parties waived the tripartite provisions of the Agreement in favor of a single arbitrator.

The case for Pacific Fruit Express, hereinafter referred to as the Carrier, was presented by K. R. Peifer, Assistant Vice President, Labor Relations. The case for the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, herein after referred to as the Organization, was presented by R.B. Brackbill, General Chairman.

At the hearing the parties were offered full opportunity to offer evidence and argument. Both parties submitted documents with the substance of evidence in the case together with oral arguments to supplement that documentation:

THE ISSUE

From the entire record the issue may be posed as follows:

> "Did the Carrier violate the Agreement by failing to grant Claimants the right to follow work from the Pacific Fruit Express Company to the Southern Pacific Transportation Company or, in lieu thereof, grant Claimants separation allowances as provided for in the January 7, 1980 Agreement?"

DISCUSSION

The Carrier herein during this period was a wholly owned subsidiary of the Southern Pacific Transportation Company. On August 15, 1985 following an article which appeared in the press the Organization filed a claim on behalf of all the employees (42) on the Pacific Fruit Express Seniority District I Roster alleging that Carrier was wrongly transferring their work to other companies in violation of the Agreements and also was taking steps to lay off all the Claimants through misapplication of the Agreement's decline in business provisions.

In the Claim the Organization insisted that the employees follow their position and/or work with their full rights and be compensated at their last assigned rate or protected rate, which ever is higher. until normal retirement age, or be given, if the employee so elects, a lump sum severance of 360 days pay at their last assigned or protected rate, which ever is the higher. The organization alleged that Carrier was taking steps to

discontinue the Perishable Freight Division of its activities, namely the Carrier herein, and was giving away the work of Claimants.

Carrier insisted that the Claim in question herein was premature and anticipatory. Further, Carrier alleged that its actions were in total concord with the provisions of the applicable Agreements of 1971 and the Special Agreement of January 7, 1980. By letter dated September 9, 1985, Carrier gave notice under those Agreements (20 days notice required) of its intent to abolish a number of positions in its Brisbane Headquarters and to transfer the clerical work of those positions to Southern Pacific Transportation Company. Nine employees were offered the opportunity to transfer with their positions. The remaining positions were abolished. Nine positions were created at the Southern Pacific Transportation Company in its San Francisco General office. All employees who were not offered the opportunity to follow their work when the Brisbane office was subsequently closed, were furloughed, thus triggering the claims herein.

Carrier relies in part on the decline in business of this Carrier. Specifically, Carrier notes that the business decline

was caused by the competition of the trucking industry to the particular speciality of this Carrier. In that context it is noted that the 1971 Agreement between the parties provided for a formula to determine decline in business which set forth that a decline in business in excess of 5% of the average percentage of both gross operating revenue and net ton miles in any 30 day period. compared with the average of the same period for the years 1968 and 1969 would permit a reduction in permanent positions and employees.

It is noted that that formula was amended in the course of the January 7th 1980 Agreement between the parties (specifically Pacific Fruit Express) which specified that the percentages would be compared to 1978 and 1979 and that the old formula would be no longer applicable. In accordance with the new formula, Carrier submitted information concerning its activities during 1985 as compared to the averages of 1978 and 1979. These figures on a month by month basis indicated declines ranging from January of 1985 where there was a 32.5% decline to December of 1985, where there was an 85.18% decline. It is evident from an analysis of the figures that there was a precipitous decline in Carrier's revenue and ton-miles during the year 1985. In fact the figures show that the least percentage of decline during the 12 month

period occurred in June of 1985, when there was merely a 16.09% decline (minus the 5%) and the high occurred in November of 1985 when there was a 97.06% decline.

Several problems exist in this claim. First, it is evident that there were certain specific functions and work which were transferred from Carrier to the Southern Pacific Transportation Company. Those were specified and spelled out in Carrier's notice to the organization in accordance with the Agreement. Certain employees were permitted to transfer and follow their position.

The organization alleges that certain other work was also transferred to the Southern Pacific Transportation Company upon the closing of the Brisbane office of Carrier. However, there is no evidence whatever to indicate precisely what amount of work the Organization claims was indeed transferred. The lack of evidence makes it impossible for the Arbitrator to determine that there was indeed sufficient work transferred without the concomitant opportunity for employees to follow their work. There is no evidence, and this is particularly significant, of the establishment of any new positions beyond those indicated by Carrier after the closing of the Brisbane office. The Organization relies on Article IV Section 1 (a) of the January 7,

1980 Agreement in support of its claims. Unfortunately, those provisions which deal with an employee following his work or being permitted a severance allowance rely on facts which are not evident in this matter. Carrier has submitted ample evidence that its business declined precipitously during the year 1985. In addition there is no evidence that any positions were established at the Southern Pacific Transportation Company to which the furloughed employees from Brisbane could aspire. Carrier supported this practical application of the Agreement by providing copy of former B. R. A. C. General Chairman T. J. Diehl's October 5, 1982 letter interpreting the Agreement wherein he stated: "...parties to the September 16, 1971 Agreement Article IV Section 1 (a)...since no positions are being established, an employee cannot follow his work...." Clearly, Paragraph 3 of Article IV Section 1A which provides a severance allowance is not applicable since that provision relies in principal part on the requirement of an employee to move his residence in order to follow his position or work. There was no requirement that an employee from Brisbane going to San Francisco, even if a position were available, would be required to move his residence (the distance was not that great).

In summary, therefore, it is apparent that the Organization has not presented facts which would indicate that there was work

indeed transferred from Carrier to its parent in San Francisco, which accrued to the incumbents who were laid off in Brisbane. In addition, Carrier has submitted significant evidence with respect to its decline in business. It is also apparent that this entire matter may be characterized as the parent company taking back work from its own subsidiary. Such actions have long been held to be proper and do not constitute "coordinations" or triggering mechanisms for various protective benefits (see S.B.A. 605, Awards 390, 414, 420 and others). There is, in fact, no Rule support for Claimant's position. However, it must be noted that it is extremely desirable that the employees who were laid off at Brisbane and furloughed should be given priority consideration for future openings at the Southern Pacific Transportation Company in the San Francisco General office. The Arbitrator cannot mandate such action but can recommend it strongly.

For the foregoing reasons, however, the Claims in this instance do not have merit and they must be denied.

AWARD

Carrier did not violate the Agreement by failing to grant employees the right to follow work from Carrier to the Southern Pacific Transportation Company or in lieu thereof grant employees a separation allowance.

I. M. Lieberman, Arbitrator

Stamford, Connecticut

November 30, 1987

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIEU MEI TU AND JOSEPH TU,

Plaintiffs,

v.

SOUTHERN PACIFIC TRANSPORTATION CO., et al.,

Defendants.

C87-1198-DLJ
JUDGMENT

ENTERED IN CIVIL DOCKET 2/5, 1989

For the reasons stated in the Order signed on this date, this Court enters JUDGMENT in favor of defendants.

IT IS SO ORDERED.

DATED: February 6, 1989.

D. Lowell Jensen
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FILED

FEB 06 1989

WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIEU MEI TU and JOSEPH TU,

Plaintiffs,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, et. al.,

Defendants.

C87-1198-DLJ

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION TO DISQUALIFY

The Court heard defendants' Motions for Summary Judgment and for Disqualification on February 2, 1989. Appearing for plaintiffs Sieu Mai Tu and Joseph Tu was Lee J. Kubby. Appearing on behalf of defendant Southern Pacific and Pacific Fruit Express was Kevin P. Block. Appearing for the Union defendants were James M. Darby and Kathleen S. King.

Plaintiff Sei Mei Tu is a sixty-two year old asian female. Plaintiff claims that her employment with defendant Pacific Fruit Express ("PFE") was terminated because of her age, sex and race in violation of the California Fair Employment and Housing Act ("FEHA"). Cal.Gov.Code §§ 12900-12993 (1980). Plaintiffs also contend that they have suffered a loss of consortium as a result of defendants' actions. Finally, plaintiffs claim that the defendant unions breached their duty of fair representation under federal labor law. After reviewing the briefs submitted by the parties, the arguments of counsel and the applicable law, the Court hereby

GRANTS defendants' Motions for Summary Judgment.

Also before the Court is defendants' Motion for Disqualification of plaintiffs' counsel. This motion is based on defendants' contention that plaintiffs' counsel engaged in unethical conduct by communicating, ex parte, with an employee of Southern Pacific regarding this litigation. Based on the representations made by Mr. Kubby during oral argument that no such communication occurred, the Court hereby DENIES defendants' Motion for Disqualification.

I.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the party is entitled to a judgment as a matter of law."

In a motion for summary judgment, the Supreme Court has held that the moving party has the "burden of showing the absence of material fact." Adickes v. S.H. Kress and Co., 90 S.Ct. 1598, 1608 (1970). However, the Court has also stated that summary judgment could issue "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catfett, 106 S.Ct. 2548, 2552-54 (1986).

The Court finds that there is not a genuine issue regarding the following material facts in this action. Plaintiff Sieu Mei was furloughed from her position as an accountant with defendant PFE when it merged with defendant Southern Pacific ("SP"), its parent corporation, during a reorganization of SP in 1985. This reorganization was the result of economic hardships suffered by PFE due to increased competition in the transportation industry.

There were 16 clerical employees at PFE at the time of the merger. Prior to the reorganization, PFE and SP management determined that PFE employees in those positions that would not be required at SP after the merger would be furloughed and those employees in the remaining positions would be transferred to SP. Out of the 16 clerical positions on the "seniority district one" roster at PFE, 7 were furloughed and 9 were transferred to SP. Within this group of 16 PFE employees, there were 15 clerks over the age of 40, 7 female clerks and 2 asian american employees. Following the merger, defendants transferred 9 of the 15 clerks over the age of 40, 4 of the 7 female clerks, and 1 of the 2 asian american employees to positions at SP. Defendants have interviewed Sieu Mei since furloughing her, but she has not been rehired.

II.

To state a prima facie case under the FEHA for intentional discrimination, plaintiff must show that:

1) she belongs to a protected group;

2) her job performance was satisfactory;

3) she was discharged from her position;

4) others not in the protected class were retained by defendants.

Nixon v. Fair Employment & Housing Commission, 192 Cal.App.3d 1306, 1318 (1987)(citing McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976)).

After the initial prima facie case is presented by plaintiff, defendants are given an opportunity to rebut plaintiff's case by showing that there was a legitimate reason for dismissal. Id. at 1317. "The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Id. at 1318 (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)). The Ninth Circuit has held that economic hardship is a sufficient reason to terminate an employee. Gianaculas v. Trans World Airlines, Inc., 761 F.2d 1319, 1395 (9th Cir. 1985); Clutterham v. Coachmen Industries, Inc., 169 Cal.App.3d 1223, 1227, 215 Cal.Rptr. 795 (1985).

If a defendant succeeds in creating a genuine issue of material fact concerning the reason for dismissing an employee, the burden of proof then shifts back to the plaintiff to prove "that the proffered reason was not the true

reason for the employment decision." Id. A plaintiff may accomplish this either directly by "persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. at 1318-19. (citing Burdine, 450 U.S. at 256).

In the present case, plaintiff Sieu Mei has stated a prima facie case of discrimination. She is a member of three protected groups. Her job performance prior to her dismissal was at the very least satisfactory, and several of her superiors rated her work as exceptional. She was furloughed instead of being transferred to SP in 1985. Other employees who were not over 40, female, or asian, were transferred into positions at SP that Sieu Mei was qualified to perform. Thus, a prima facie showing of intentional discrimination has been made by plaintiffs.

Defendants have rebutted the presumption of discrimination created by plaintiffs' initial showing by offering substantial proof supporting their contention that Sieu Mei was furloughed for economic reasons. PFE had experienced a severe decline in business due to increased competition from the trucking industry prior to the 1985 merger. Defendants assert that Saiu Mei was not transferred to SP because the position she was in at PFE was not needed at SP. Defendants provided the Court with sufficient evidence to create a genuine issue of material fact as to whether

intentional discrimination motivated the decision to furlough plaintiff. This position is supported by the fact that other employees who are not members of a protected class were also not transferred to SP following the merger. Accordingly, defendants have satisfied their burden of rebutting plaintiffs' prima facie case of discrimination.

Plaintiffs have failed to present evidence which raises a genuine issue related to defendants' factual showing of economic hardship. Although plaintiffs assert that PFE intentionally turned away business prior to the merger in order to facilitate the combination of SP and PFE, the evidentiary showing necessary to support this assertion is clearly insufficient. After ample time for discovery has passed, plaintiffs have not presented the Court with evidence sufficient to overcome defendants' justification for their actions. Thus, plaintiffs have not met their overall burden and have not stated a valid claim for intentional discrimination against SP and PFE.

III.

Plaintiffs' state tort claim for loss of consortium is dependent upon the validity of the underlying discrimination action. Santigo v. Employees Benefits Services, 168 Cal.App.3d [illegible], 906, 241 Cal.Rptr. 679 (1985). Because plaintiffs have failed to state a claim for discrimination, summary adjudication of this claim is also appropriate. Accordingly, defendants' Motion for Summary Judgment is also

GRANTED for plaintiffs' loss of consortium claim.

IV.

Plaintiffs claim against the defendant Unions alleges that Union representatives breached their duty of fair representation under section 301 of the National Labor Relations Act, 29 U.S.C. §§ 151-188 (1984), by not fully prosecuting plaintiff Sieu Mai's grievance against PFE.

Claims for breach of a union's duty of fair representation under section 301 are subject to a six month statute of limitations. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983). This statute of limitations begins to run when "an employee knows or should know of the alleged breach of the duty of fair representation." Galindo v. Stoody Co., 793 F.2d 1502, 1503 (9th Cir. 1986).

This cause of action was filed in April of 1988. Plaintiffs and their attorney were aware of the procedures being followed by the Union defendants to prosecute plaintiffs' grievance in 1986. Plaintiffs' counsel admitted knowledge of the acts alleged to constitute a breach of defendants' duty in a letter dated January 20, 1986, threatening to sue defendants for breach of their duty. Therefore, because the six month statute of limitations had expired prior to the filing of this claim, defendant Unions' Motion for Summary Judgment of plaintiffs' claim under section 301 is GRANTED.

V.

Therefore, defendants' Motions for Summary Judgment are hereby GRANTED as to plaintiffs' claims for discrimination, loss of consortium and breach of the duty of fair representation. Defendants Motion for Disqualification is hereby DENIED.

IT IS SO ORDERED.

DATED: February 6, 1989.

D. Lowell Jensen
United States District Judge

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIEU MEI TU and JOSEPH Z. TU, Plaintiffs/Appellants/ Cross-Appellees, v. SOUTHERN PACIFIC TRANSPORTATION CO., PACIFIC FRUIT EXPRESS CO., ATCHISON, TOPEKA, SANTE FE RAILROAD CO., SANTA FE SOUTHERN PACIFIC CORP., and BROTHERHOOD OF RAILWAY, AIRLINE, AND STEAMSHIP CLERKS, Defendants/Appellees/ Cross-Appellants.	CA Nos. 89-161[illegible]6, 89-16292 DC No. CV-87-[illegible]98-DLJ M E M O R A N D U M *

Appeal from the United States District Court
for the Northern District of California
D. Lowell Jensen, District Judge, Presiding

Argued and Submitted September 12, 1991
San Francisco, California

BEFORE: CANBY and KOZINSKI, Circuit Judges, and CARROLL**, District Judge

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The Honorable Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

OVERVIEW

Plaintiffs Sieu Mei Tu and Joseph Z. Tu, her husband, appeal from the District Court's orders denying plaintiffs' motion to remand, and granting defendants' motions to dismiss and motions for summary judgment. Defendant Brotherhood of Railway, Airline and Steamship Clerks cross appeals.

FACTUAL BACKGROUND

In May, 1962, Sieu Mei Tu ("Tu" or "plaintiff"), a woman of Chinese Ancestry who is now 64 years old, began working in various clerical positions for Pacific Fruit Express Company ("PFE"), a wholly-owned subsidiary of Southern Pacific Transportation Company ("SP"). Plaintiff was a member of the Brotherhood of Railway, Airline and Steamship Clerks ("Union").[1] When PFE merged with SP in 1985, the plaintiff was furloughed from her position. The Union filed a grievance on August 15, 1985, alleging that the collective bargaining agreement prohibited the company from laying off plaintiff and seven other clerical workers without payment of certain sums. On November 30, 1987, the arbitrator held against the Union, holding that the employer had a right under the collective bargaining agreement to lay off the clerks due to the decline in business experienced by PFE.

Before the case went to arbitration, the plaintiff filed a charge of discrimination with the California Department of Fair

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[1]Effective September 1, 1987, the Union changed its name to Transportation Communications International Union.

Employment and Housing ("DFEH"), alleging discrimination on the basis of race, sex or age. Pursuant to her right-to-sue letter from DFEH, plaintiff filed a lawsuit on September 26, 1986, in the San Francisco County Superior Court against PFE, SP, the Atchison, Topeka, Santa Fe Railroad Company ("ATSF"), Santa Fe Southern Pacific Corp. ("SFSP"), various individuals, and Doe corporations. The plaintiff's complaint alleged two counts of wrongful termination, violation of good faith and fair dealing, violations of 42 U.S.C. §§ 1981, 1983, 1985, California Government Code § 12900, et. seq., and California Public Utilities Code § 453(a), conspiracy, and loss of consortium.[2]

The action was removed to the United States District Court for the Northern District of California on March 20, 1987. The plaintiff moved to remand the action to state court, which was denied by the Honorable D. Lowell Jensen on October 13, 1987. The District Court ruled that federal jurisdiction existed due to the plaintiff's membership in a union whose conditions of employment were governed by a collective bargaining agreement negotiated pursuant to the Railway Labor Act ("RLA"). 45 U.S.C. § 151, et. seq.

Defendants SP and PFE thereafter moved to dismiss the complaint. On April 6, 1988, the District Court did so, agreeing with the defendants that the wrongful termination claims and breach of good faith and fair dealing claim were "minor disputes"

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[2]As only the consortium claim involves plaintiff Joseph Tu, the singular "plaintiff" will be used throughout this disposition.

within the meaning of the RLA and must thus be referred to the National Railroad Adjustment Board ("NRAB") for mandatory arbitration. The Court declined to exercise pendent jurisdiction over the state discrimination claims and consortium claim.[3] The plaintiff was given leave to amend the complaint within 30 days in order to state a federal claim.

The plaintiff filed her First Amended Complaint on May 2, 1988, again alleging wrongful termination, breach of good faith and fair dealing, violations of 42 U.S.C. §§ 1981, 1983, 1985, California Government Code § 12900, et. seq., and California Public Utilities Code § 453(a), conspiracy, and loss of consortium. The plaintiff added a claim against the Union for breach of fair representation.

On July 1, 1988, upon motion by defendants, the District Court dismissed defendant ATSF and SFSP pursuant to Fed.R.Civ.P. Rule 4(j), for plaintiff's failure to timely serve. Further, the District Court again dismissed Counts 1 - 3 alleging wrongful termination and breach of good faith and fair dealing, and Count 7 for intentional infliction of emotional distress, as "minor disputes" subject to mandatory arbitration. The Court further dismissed Count 5, alleging conspiracy of all defendants to merge SP with ATSF and cease operations of PFE in order to avoid their contractual responsibilities to plaintiff, holding that the ICC was the proper forum for the initial determination of violations

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[3]The District Court did not address the claims for violations of 42 U.S.C. §§ 1981, 1983 and 1985, or the conspiracy count.

of 49 U.S.C. § 11347. Finally, the Court dismissed the claim against the Union for failing to file within the applicable statute of limitations. Two counts remained: the District Court exercised pendent jurisdiction over plaintiff's claim for discrimination and plaintiff Joseph Tu's claim for loss of consortium against defendants SP and PFE; the Court construed the claims as state claims for discrimination.[4]

On January 5, 1989, defendants PFE and SP filed a motion for summary judgment which was granted on February 6, 1989. The Court held that although the plaintiff had established a prima facie case of employment discrimination, the defendants had introduced substantial proof of a nondiscriminatory, legitimate reason for her furlough, that is, that PFE had experienced economic decline and the plaintiff's position was not needed at SP when PFE's business was transferred to the parent company. Further, the plaintiff had not introduced sufficient evidence to satisfy her burden of showing that the defendants' asserted nondiscriminatory reason was pretextual. Because Joseph Tu's claim for loss of consortium was wholly reliant on the success of plaintiff Sieu Tu's claims, that claim was dismissed. Judgment was entered on February 8, 1989.

The plaintiff thereafter moved for reconsideration. On May 5, 1989, the Court denied the motion for reconsideration

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[4]The District Court did not explain why it did not address the claims under 42 U.S.C. §§ 1981, 1983, and 1985, although the plaintiff does not challenge this decision, presumably because the plaintiff seeks to remand the action.

regarding summary judgment to defendants SP and PFE, but granted the motion for reconsideration as to the Union. The Union appeals this ruling.

The plaintiff filed a Second Amended Complaint on June 2, 1989, again alleging wrongful termination, breach of good faith and fair dealing, violations of 42 U.S.C. §§ 1981, 1983, 1985, California Government Code § 12900, et. seq., and California Public Utilities Code § 453(a), conspiracy, loss of consortium, and breach of fair representation by the Union. The Union responded to the second amended complaint by filing a motion for summary judgment. The District Court granted that motion on August 14, 1989, holding that the plaintiff had made no evidentiary showing that the Union's actions were discriminatory or taken in bad faith. The Court also dismissed the individual union officials, which is not challenged by the plaintiff on appeal.

Plaintiff appeals the denial of her motion to remand to state court, the dismissal of defendants ATSF and SFSP for plaintiff's failure to timely serve under Fed.R.Civ.P., Rule 4(j), the dismissal of plaintiff's claims of conspiracy and intentional infliction of emotional distress, the denial of her request for more time for discovery, and the granting of summary judgment in favor of defendants SP, PFE and the Union.

The Union appeals the District Court's finding that the statute of limitations for plaintiff's breach of fair representation claim had not lapsed.

DISCUSSION

(1) Denial of plaintiff's motion to remand

The denial of a motion to remand to state court is reviewed de novo. Chmiel v. Beverly Wilshire Hotel Co., 873 F.2d 1283, 1285 (9th Cir. 1989).

Under the well-pleaded complaint rule, federal jurisdiction exists only if a federal question is presented on the face of a complaint. Caterpillar, Inc. v. Williams, 482 U.S. 386, 107 S.Ct. 2425, 2428, 96 L.Ed.2d 318 (1987). A case may not be removed based on a defense unless an area of state law has been completely preempted, and the claim is therefore considered as arising under federal law. Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24, 103 S.Ct. 2841, 2853, 77 L.Ed.2d 420 (1983).

Plaintiff first argues that all causes of action were pled under state law and that the District Court erred in failing to remand the suit. In point of fact, Count 4 of the original complaint alleges violations of 42 U.S.C. §§ 1981, 1983 and 1985.

The District Court denied the plaintiff's motion to remand, holding that the state law claims constituted "minor disputes" under the RLA, 45 U.S.C. § 151, et seq. If plaintiff's claims are characterized as "minor disputes" within the meaning of the RLA, state law is preempted and her exclusive remedy is under the RLA. Andrews v. Louisville & N.R.Co., 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972). If the defendants' actions are "arguably" governed by the collective bargaining agreement or

have a "not obviously insubstantial" relationship to the contract, the dispute is "minor" and governed by the RLA. Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369-70 (9th Cir.), cert. denied 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323 (1978). Alternatively, "minor" disputes involve the "interpretation or application of collective bargaining agreements." Edelman v. Western Airlines, Inc., 892 F.2d 839, 843 (9th Cir. 1989).

The plaintiff argues that reference to the collective bargaining agreement is unnecessary, and that the action can therefore be decided under state law. Plaintiff contends that she and her employer have a "common law agreement" arising out of a letter written on December 18, 1978, by plaintiff's employer in order to assist Mrs. Tu in her father's immigration to the United States. The letter states:

> Mrs. Tu was employed by this company on May 31, 1962 and has worked continuously for us from that date. Her position with this company is not only permanent in nature but she also is, under our contract with the Brotherhood of Railway, Airline & Steamship Clerks, "fully protected" so that in the unlikely event we were not to have a job for her, she would continue to be paid under that contract until she reaches age 65 and can retire under the provisions of Railroad Retirement Act and receive the appropriate pension therefrom...
>
> She is, and has always been, a valued employee and even if her present position were to be eliminated, we would find some other position for her to hold as we would not want to lose her services.

The letter on which plaintiff bases her claims refers to the collective bargaining agreement as the source by which the plaintiff is "fully protected". Further, plaintiff's complaint

alleges that certain promises were implied "by said defendant's contracts with plaintiff's bargaining agent," and that plaintiff is "a beneficiary of contracts of employment entered into between defendant PFE and defendant [Union]." Reference to the collective bargaining agreement in the complaint and reliance on the contract through the grievance process brings the complaint within federal preemption. Newberry v. Pacific Racing Ass'n, 854 F.2d 1142, 1147 (9th Cir. 1988).[5]

While plaintiff cites Caterpillar, Inc., supra, for the contention that remand is required where an employee alleges breach of an individual employment contract, in Caterpillar the employees relied on contracts made while they were salaried employees not covered by a collective bargaining agreement. Here, the plaintiff was covered by the collective bargaining agreement at all relevant times. In addition, "any independent agreement of employment could be effective only as part of the collective bargaining agreement. " Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044, 1048 (9th Cir. 1987), citing Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1474 (9th Cir. 1984). Thus, plaintiff's claims are "arguably" governed by the collective bargaining agreement and have a "not obviously insubstantial"

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[5]In Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, 1885, 100 L.Ed.2d 410 (1988), the Supreme Court held that state law is preempted by § 301 of the Labor Management Relations Act of 1947 "only if such application requires the interpretation of a collective-bargaining agreement." The Court in Newberry, 854 F.2d at 1147, determined that reference to the collective bargaining agreement in the complaint and reliance on the grievance process required interpretation of the collective bargaining agreement.

relationship to the contract.

The plaintiff also argues that under 28 U.S.C. § 1445(a), all civil actions against a railroad arising under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-60, are not removable. However, the plaintiff has not alleged a claim under FELA.

The District Court properly denied the plaintiff's motion to remand, and this Court has jurisdiction pursuant to 45 U.S.C. § 151, et seq.

(2) Dismissal of defendants ATSF and SFSP for plaintiff's failure to timely serve under Fed.R.Civ.P., Rule 4(j)

This Court reviews a dismissal of a complaint pursuant to Rule 4(j) for abuse of discretion. Wei v. State of Hawaii, 763 F.2d 370 (9th Cir. 1985).

On July 1, 1988, the District Court dismissed defendants ATSF and SFSP for plaintiff's failure to serve the defendants within 120 days, finding that plaintiff had not demonstrated good cause for her failure to do so.

Plaintiff first argues that the District Court in fact gave her an extension of time to serve defendants ATSF and SFSP, based on the following colloquy during the hearing on the motion to remand:

> THE COURT: I think we also ought to schedule a status conference on this matter for about 60 days. Could you give us a date in November?
>
> MR. KUBBY [plaintiff's counsel]: Your honor, if it's going to be necessary to serve all of the other defendants, I wonder if 60 days...

> THE COURT: Maybe we'll give you some more time than that. There isn't any real reason to have it earlier. Let's put it on December 16th. That will be at 9:00 o'clock and we'll review where we are at that time. In the meantime you can discuss this issue among yourselves.

This language -- ambiguous at best -- does not clearly indicate that the District Court extended the time for service. Further, the plaintiff did not raise this issue before the District Court, and Rule 46 of the Federal Rules of Civil Procedure provides that a party "should make[] known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor..." The limited exceptions to the general rule that failure to raise an issue in the trial court will prevent review include, (1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) when a change in law raises a new issue while an appeal is pending, and (3) when the issue is purely one of law. Javanovich v. United States, 813 F.2d 1035, 1037 (9th Cir. 1987), citing Bolker v. Commissioner of Internal Revenue, 760 F.2d 1039, 1042 (9th Cir. 1985). Plaintiff does not argue the applicability of these exceptions, and none of these factors militates in favor of their application. Plaintiff cannot therefore argue on appeal that the District Court extended the time period for service.

Next, plaintiff argues that she showed good cause for her failure to serve defendants. Plaintiff has the burden of showing good cause. Geiger v. Allen, 850 F.2d 330 (7th Cir. 1988); Townsel v. Contra Costa County, CA, 820 F.2d 319, 320 (9th Cir.

1987). First, plaintiff contends that she purposefully did not serve ATSF and SFSP due to defendant SP's request that plaintiff delay service on those defendants in order to facilitate settlement. However, plaintiff cites nothing in the record to support this contention.[6]

Second, plaintiff argues that she had good cause to believe that the case would be remanded to the California state court, where three years is allowed for service. However, given that plaintiff's complaint alleged violations of federal statutes, including 42 U.S.C. §§ 1981, 1983, and 1985, and explicitly referred to plaintiff's "bargaining agent" thus implicating the collective bargaining agreement, plaintiff's belief that the case would be remanded was unreasonable, and not good cause for failure to serve the remaining defendants in the case.

The plaintiff also argues that the District Court's dismissal of defendants ATSF and SFSP only applied to the original complaint, as the first amended complaint had been served by the date of the dismissal. However, this argument was raised in plaintiff's reply brief, and an appellant "cannot raise a new issue for the first time in [her] reply brief." Eberle v. City of Anaheim, 901 F.2d 814, 818 (9th Cir. 1988). Moreover, the

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[6]Plaintiff cites Kraus v. Santa Fe Southern Pacific Corp., 878 F.2d 1193 (9th Cir. 1989), for the contention that SP's request not to serve ATSF and SFSP was in fact the request of ATSF and Santa Fe. In Kraus, this Court had recited evidence introduced at trial that all non-rail operations between SFSP and SP had been merged. However, plaintiff cites no authority for her argument that SP's request not to serve the other defendants should be attributed to the other defendants.

District Court's order dismissed the first amended complaint.

Plaintiff also contends that the District Court erred by dismissing the second amended complaint, contending that the filing of the second amended complaint brought all defendants who had been previously dismissed back into the lawsuit. The plaintiff argues, "All parties who have appeared in an action remain in the action until a final judgment is rendered." However, a final judgment was rendered on February 6, 1989, before the second amended complaint was filed on June 2, 1989.

Next, the plaintiff argues that Rule 4(j) is not applicable in removed cases, and that Rule 81(c) applies instead.[7] Again, this argument was raised in plaintiff's reply brief, and issues raised for the first time in appellant's reply brief need not be considered. Eberle, 901 F.2d at 818 (9th Cir. 1988).

Finally, plaintiff argues that the defendants ATSF and SFSP waived the Rule 4(j) objection by answering without raising objections to untimely process. Here again, plaintiff raised this issue for the first time in her reply brief. Eberle, 901 F.2d at 818 (9th Cir. 1988).

The District Court's dismissal of ATSF and SFSP was not an

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[7] Rule 81(c) states, in relevant part:

> In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest.

abuse of discretion.

On appeal, defendants ATSF and SFSP have requested an award of sanctions against plaintiffs and their counsel pursuant to Fed.R.App.P. Rule 38, Fed.R.Civ.P. Rule 11, and 28 U.S.C. §§ 1912 and 1927. This Court declines to do so.

(3) Dismissal of conspiracy claim

This Court reviews de novo the dismissal of a complaint for failure to state a claim. Gobel v. Maricopa County, 867 F.2d 1201, 1203 (9th Cir. 1989). Dismissal under Fed.R.Civ.P. 12(b)(6) is not appropriate "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

In Count 5 of the original and first amended complaint, plaintiff alleged that all defendants conspired to merge defendant SP into defendant ATSF, cease operations of PFE, and terminate plaintiff in order to avoid their "contractual and moral responsibilities" to plaintiff. On July 1, 1988, the District Court dismissed this count in the first amended complaint as to all defendants. The Court ruled, in part:

> Insofar as a private cause of action might exist for termination due to the aborted merger, this Court concludes that it is not the proper forum for an initial determination of any claimed violation of 49 U.S.C. § 11347, which provides for employee protection in any rail carrier merger. See, Walsh v. United States, 723 F.2d 570 (7th Cir. 1983), Engelhardt v. Consolidated Rail Corp., 594 F.Supp. 1157, 1164 (N.D.N.Y. 1984).

When plaintiff filed her second amended complaint on June 2,

1989, she alleged a violation of 49 U.S.C. § 11705, stating that the Interstate Commerce Commission (ICC) had terminated its proceedings and allowed SP employees to pursue civil remedies. Plaintiff challenges the dismissal of the second amended complaint.

Defendant SFSP is a holding company formed in contemplation of the proposed merger. The holding companies of SP and ATSF had merged when defendant SFSP acquired the stock of SP in December of 1983 in an independent voting trust. When the ICC denied the proposed merger on October 10, 1986, SFSP was required to divest its interest in either SP or ATSF, and sold the stock of SP to Rio Grande Industries. The voting trust was dissolved on October 13, 1988 when that acquisition was approved.

On February 9, 1989, the ICC concluded that it could not provide protection for those employees harmed by any actions taken in anticipation of the merger:

> [W]e do not have the authority to impose labor protection as a condition of our action disapproving a merger proposal. Section 11347 speaks in terms of approved transactions....
>
> ***
>
> If any actions adverse to employees are shown to have been ordered by [SFSP] in anticipation of consolidation and in violation of the provision of 49 U.S.C. § 11343, which prohibits common control absent Commission approval, the adversely affected individuals have a remedy as provided by 49 U.S.C. § 11705. [SP] employees who believe they were harmed by actions take in anticipation of the proposed [SP]-ATSF consolidation would be required to show, in addition to causation, that [SFSP] exercised unlawful control of [SP], in violation of the Act or the conditions in our approval of [SFSP's] voting trust for [SP] stock. Persons injured by a carrier violating the Act or an order of

the Commission may file suit, and the carrier is liable for the damages sustained as a result of those violations. 49 U.S.C. § 11705. We do not think that the essentially factual matters that would be in issue in a civil proceeding are such that would require the exercise of administrative expertise, so as to invoke the doctrine of primary jurisdiction. [Citations omitted].

However, this Court has held that there is no private right of action pursuant to 49 U.S.C. § 11705 due to the exclusive jurisdiction of the ICC. In Kraus v. Santa Fe Southern Pacific Corp., 878 F.2d 1193 (9th Cir. 1989), plaintiffs had brought suit against SP, SFSP, and ATSF, stemming from plaintiffs' allegations that ATSF had induced SP to terminate plaintiffs in order to avoid post-merger liabilities which may have been imposed by the ICC. Plaintiffs alleged state law claims of tortious interference with economic relations[8] and a federal claim pursuant to 49 U.S.C. § 11343 for unauthorized merger or acquisition of control by ATSF over SP. This Court held:

> Neither 49 U.S.C. § 11343(a), however, nor any other provision of the subchapter governing combinations of carriers, provides for any remedy by way of a private civil damage action for violation of its provisions...
>
> The jurisdictional provision upon which plaintiffs attempt to rely is contained in a separate statutory subchapter relating to the enforcement of interstate commerce laws and regulations. The precise provision relied upon is 49 U.S.C. § 11705(b)(2), which states that a carrier is "liable for damages sustained by a person as a result of an act or omission of that carrier in violation of [the ICA]"...
>
> [T]he subchapter of the ICA relating to mergers specifically provides that "the authority of the Interstate Commerce Commission under this subchapter is exclusive." 49 U.S.C. § 11341. Under the statutory

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[8]The plaintiffs' recovery on this count was upheld.

> grant of authority over mergers, the ICC, and not the courts, has been given authority to define what constitutes an unauthorized merger or acquisition of control within the meaning of the statute.
>
> ***
>
> We agree with [ATSF] that the provision upon which plaintiffs rely, 49 U.S.C. § 11705(b)(2) & (c)(1), authorizes court enforcement for violations of the merger provisions only after the ICC has considered whether the alleged violations have occurred.

Kraus, 878 F.2d at 1197 - 1198. There has been no finding of a violation by the ICC in this case. Further, this Court specifically rejected the contention that the February 9, 1989 ICC decision, quoted above, conferred a private right of action. Kraus, 878 F.2d at 1198, n. 2. Thus, the District Court here properly dismissed Count 5 as to all defendants.

The defendants also argue that plaintiff's claim of conspiracy is preempted by the RLA as a "minor dispute". Because this Court has clearly held that there is no private right of action pursuant to § 11705, it is unnecessary to reach this issue.

(4) Dismissal of plaintiff's claim for intentional infliction of emotional distress

The dismissal of a claim is reviewed de novo. Gobel, 867 F.2d at 1203.

On July 1, 1988, the District Court dismissed Count 7 of plaintiff's complaint alleging intentional infliction of emotional distress. The Court correctly held that claims for emotional distress arising from termination are subject to mandatory arbitration under the RLA. Lewy, 799 F.2d at 1290 ("We

have consistently held that the RLA preempts state tort claims by employees against railroads for wrongful discharge or for intentional infliction of emotional distress, where the alleged tortious activity is "arguably" governed by the collective bargaining agreement or has a "not obviously insubstantial" relationship to the labor contract, and where the "gravamen of the complaint is wrongful discharge"); Stallcop, 820 F.2d at 1049, citing Carter v. Smith Food King, 765 F.2d 916, 921 (9th Cir. 1985); Olguin, 740 F.2d at 1475-76; Tellez v. Pacific Gas & Electric, 817 F.2d 536, 539 (9th Cir. 1987) (actions for intentional and negligent infliction of emotional distress not preempted since they arose from conduct not covered by the collective bargaining agreement); Magnuson v. Burlington Northern, Inc., 576 F.2d at 1367.

(5) Denial of plaintiff's request for additional discovery time

The plaintiff next claims that the District Court was in error by failing to allow more time for discovery. This Court reviews a denial of discovery for abuse of discretion. Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1442 (9th Cir. 1986), citing Foster v. Arcata Associates, Inc., 772 F.2d 1453, 1467 (9th Cir. 1985), cert. denied, 475 U.S. 1048, 106 S.Ct. 1267, 89 L.Ed.2d 576 (1986).

Pursuant to Fed.R.Civ.P. Rule 56(f), a court may refuse an application for summary judgment or may continue a matter for further discovery if a party opposing a motion "cannot for reasons stated present by affidavit facts essential to justify

the party's opposition." Plaintiff's counsel submitted an affidavit in opposition to the motions for summary judgment in which he averred that he had been unable to resolve discovery disputes with the defendants. He stated that the union cancelled the depositions of two union officials, and the continuance of the depositions was granted by a magistrate; the date then set for the deposition was cancelled due to plaintiff's counsel's trial schedule, and the union had not been cooperative in resetting the date.

The Union provided the declaration of Kathleen S. King, counsel for the Union, in reply to the plaintiff's opposition to summary judgment, stating that the Union had cooperated with all discovery requests; further, the Union had been willing to produce Union officials for deposition but plaintiff's counsel did not attempt to reschedule until the date on which defendants filed motions for summary judgment. Plaintiff's counsel also did not take the deposition of either Tom Ellen or Rick Fend, PFE officials whom plaintiff claims were instrumental in the discriminatory actions.

At the hearing on February 2, 1989, plaintiff's counsel asked the District Court for more time to take the depositions of the Union officials. The Court took the matter under advisement, and in the February 6, 1989 Order, the Court held that the plaintiff had had ample time for discovery.

Given the plaintiff's dilatory efforts at discovery and because the plaintiff has not indicated what facts this discovery

STB FD-30400 (SUB 21) 10-21-92 D 179205

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Southern Pacific Transportation Company

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October 20, 1992

BY FEDERAL EXPRESS
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The Honorable Paul Cross
Administrative Law Judge
The Interstate Commerce Commission
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket Number 30,400 (Sub-No. 21),
Santa Fe Pacific Corp. -- Control -- Southern
Pacific Transportation Company

To The Honorable Judge Cross:

Southern Pacific Transportation Company hereby responds to the letter and Motion dated October 19, 1992 from Donald Griffin, attorney for BMWE and IAMAW (hereinafter "Unions"). In light of the arguments made by the Unions in support of the Motion to Allow Discovery, and in preparation for the conference call scheduled for October 21, 1992 at 1:00 p.m. (Eastern Time) Southern Pacific believes its position should be clearly stated for the record.

Initially, Southern Pacific is not claiming that it is not within the jurisdiction of the ICC as suggested in the Union's moving papers. Rather, Southern Pacific's position is that, up until the present, the overwhelming majority of activity directed in this proceeding was with reference to Santa Fe. Southern Pacific's October 12, 1992 correspondence in no way asserted that it was not subject to the jurisdiction of the ICC. Rather, the carrier merely questioned the Unions' attempt to embroil Southern Pacific in a proceeding with which it previously had little contact or activity. Given that Southern Pacific believed the focus and intent of the ICC proceeding was directed at Santa Fe, it has refused to engage in informal discovery pending ICC consideration of the matter.

Southern Pacific respectively suggests that the BMWE and IAMAW anticipated this argument. For example, the Unions' September 25,

1992 correspondence asks Southern Pacific to "agree" to "informal" discovery requests. Clearly, if Southern Pacific had been an active participant in the sub proceeding no such request would have been made. Rather, it would seem more likely the Unions would have directly engaged in discovery without any "informal" requests or without seeking an Order of the ICC.

Should the ICC compel Southern Pacific to respond to the Union's outstanding discovery requests, the carrier will respectfully request an additional amount of time beyond the seven days currently demanded by the Unions. An additional amount of time is necessary to consider the following issues:

1. Retention of outside counsel if necessary;
2. Consideration and possible revision of any protective Order governing discovery;
3. Consideration of any legal and proper objections which may be made to the discovery sought by the Unions or the scope of that discovery;
4. Adequate time in which to assemble the information sought by the Unions, keeping in mind the massive number of cut-backs in employment levels which have occurred since the mid-1980s at Southern Pacific and in light of the acquisition of Southern Pacific Transportation Company by Rio Grande Industries.

I look forward to discussing this matter with all parties concerned during the conference call currently scheduled for October 21. A copy of this letter is being sent by fax to counsel of record in this case.

Very truly yours,

Wayne M. Bollo

cc: Donald F. Griffin
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ADRIAN L. STEEL, JR.

WRITER'S DIRECT DIAL NUMBER
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October 15, 1992

By Hand

The Honorable Sidney L. Strickland
Secretary
Interstate Commerce Commission
12th Street and Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 30400 (Sub-No. 21),
Santa Fe Southern Pacific Corporation --
Control -- Southern Pacific Transportation Company

Dear Secretary Strickland:

Enclosed please find, for filing with the Commission, the original and eleven copies of the Responses and Objections of Santa Fe Pacific Corporation to Request for Production of Documents of Sieu Mei Tu and Joseph Z. Tu. Please time and date stamp one copy and return it to our messenger.

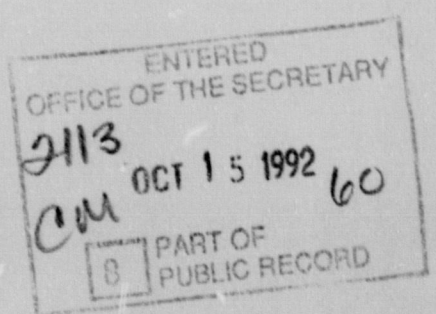
Please call me if you have any questions regarding the enclosed materials. Thank you for your assistance.

Sincerely yours,

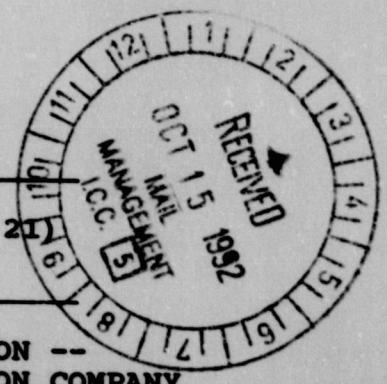
Adrian L. Steel, Jr.
Counsel for Santa Fe Pacific Corporation

Enclosures

cc: Honorable Paul S. Cross
All Parties of Record



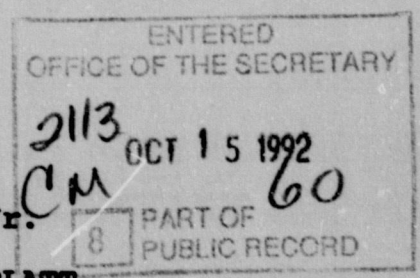
BEFORE THE
INTERSTATE COMMERCE COMMISSION



FINANCE DOCKET NO. 30400 (SUB-NO. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

RESPONSES AND OBJECTIONS OF SANTA FE PACIFIC CORPORATION TO REQUEST FOR PRODUCTION OF DOCUMENTS OF SIEU MEI TU AND JOSEPH Z. TU



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Attorneys for Santa Fe Pacific Corporation

DATED: October 15, 1992

BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 30400 (SUB-NO. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

RESPONSES AND OBJECTIONS OF
SANTA FE PACIFIC CORPORATION TO REQUEST
FOR PRODUCTION OF DOCUMENTS OF SIEU MEI TU AND JOSEPH Z. TU

Pursuant to the Commission's Rules of Practice (49 C.F.R. § 1114), Santa Fe Pacific Corporation (formerly Santa Fe Southern Pacific Corporation) ("SFP") hereby submits the following responses and objections to the "Demand for Inspection and Production" dated September 25, 1992, filed by Sieu Mei Tu and Joseph Z. Tu (jointly referred to herein as the "Tus").

GENERAL OBJECTIONS

The following general objections are asserted as to each document request propounded by the Tus and are incorporated by reference in the responses to each document request below. The fact that SFP responds to all or part of any document request is not intended to, and shall not be construed to be, a waiver of any general or specific objection made by SFP to any document request.

1. SFP objects to the Tus's document requests on the ground that the Tus have not complied with the Commission's rules for serving document requests on a party. See 49 C.F.R. § 1114.21(b). The Tus have not contacted counsel for SFP to secure an informal

agreement concerning their document requests, and, in the absence of such an agreement, have not obtained a decision from the Commission approving document requests as required by 49 C.F.R. § 1114.21(b)(2).

2. SFP objects to the Tus's document requests on the ground that Sieu Mei Tu's participation in this proceeding is improper because the Commission's order reopening the proceeding specifically states that it is not "at this time seeking personal statements from individual employees who believe they were adversely affected by SPT actions", but that the proceeding would encompass only "SPT employees (as a class)". Commission's June 12, 1992 Order at 3 (emphasis added). Sieu Mei Tu is apparently a former clerical employee of Pacific Fruit Express Company ("PFE"), a wholly-owned subsidiary of SPT until its merger with SPT in 1985.

3. SFP objects to the Tus's document requests insofar as they request SFP to provide responsive information on behalf of The Atchison, Topeka and Santa Fe Railway Company ("ATSF") (a wholly-owned subsidiary of SFP). ATSF is not now, and has never been, a party to this sub-docket proceeding.

4. SFP objects to the Tus's document requests to the extent they seek documents and information for the time period prior to December 23, 1983 (the service date of the Commission's decision approving the SPT voting trust) or subsequent to August 4, 1987 (the service date of the Commission's order denying the Applicants' petition for reconsideration). Actions taken or omitted by SFP

prior to December 23, 1983 or subsequent to August 4, 1987 are beyond the scope of the issues raised by this reopened proceeding, and the Tus's requests are not therefore reasonably calculated to lead to the discovery of admissible evidence.

5. SFP objects to the Tus's document requests insofar as they seek the production of documents protected against disclosure by the attorney-client privilege or by the attorney work product doctrine.

6. SFP objects to the Tus's document requests insofar as they seek the production of proprietary or confidential business information of SFP. Without waiving this objection, SFP will agree to produce any proprietary or confidential information responsive to the Tus's document requests pursuant to an appropriately framed Protective Order that safeguards the confidentiality and commercially sensitive nature of the requested information.

7. Subject to and without waiving the foregoing objections and subject to SFP's other objections, SFP will respond below to the Tus's document requests.

RESPONSES AND OBJECTIONS TO SPECIFIC DOCUMENT REQUESTS

Document Request No. 1

All documents produced to the plaintiffs in Kraus v. Santa Fe Southern Pacific Corp. et al.

Response to Document Request No. 1

SFP objects to this document request to the extent that it seeks the production of documents not relating to PFE, the former employer of Sieu Mei Tu, on the ground that it seeks the production

of documents irrelevant to any matter involving the Tus in this proceeding and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections and its other objections, SFP states that it has located no documents responsive to this document request which relate to PFE.

Document Request No. 2

Minutes of all meetings attended by SPTC., ATSF, and SPSF CORP. wherein any discussion took place concerning the proposed merger between ATSF and SPTC.

Response to Document Request No. 2

SFP objects to this document request to the extent that it seeks the production of documents not relating to PFE on the grounds that it is overly broad and unduly burdensome and that it seeks the production of documents irrelevant to any matter involving the Tus in this proceeding and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections and its other objections, SFP states that it has located no documents responsive to this document request which relate to PFE.

Document Request No. 3

All editions of the Southern Pacific Update, from January 1, 1980 to December 31, 1989.

Response to Document Request No. 3

Subject to its objections, SFP states that it has located no documents responsive to this document request.

Document Request No. 4

Document entitled "The Future of the Perishable Business and PFE" and all exhibits and addenda thereto prepared by Thomas D. Ellen, Vice President & General Manager, on or about June 7, 1985.

Response to Document Request No. 4

Subject to its objections, SFP states that it has located no documents responsive to this document request.

Document Request No. 5

All memorandum, minutes, notes, regarding personnel to be moved to SPTC offices from PFE, of all meetings held wherein said subject was discussed from January 1, 1981 to October 30, 1985.

Response to Document Request No. 5

SFP objects to this document request on the ground that it is overly broad and unduly burdensome. Subject to this objection and its other objections, SFP states that it has located no documents responsive to this document request.

Document Request No. 6

All memos from E. E. Clark to T.D. Ellen from January 1, 1985 to October 30, 1985.

Response to Document Request No. 6

Subject to its objections, SFP states that it has located no documents responsive to this document request.

Document Request No. 7

Minutes of all special and regular Board of Directors meetings of PFE from January 1, 1981 to October 30, 1985.

Response to Document Request No. 7

Subject to its objections, SFP states that it has located no documents responsive to this document request.

Document Request No. 8

Document from T. D. Ellen to D. K. McNear and D. M. Mohan dated April 2, 1984.

Response to Document Request No. 8

Subject to its objections, SFP states that it has located no documents responsive to this document request.

Document Request No. 9

Memorandum to T. R. Ashton, from T. C. Wilson, Re: SP's Revenue Estimation Process w/P& L implications received by T. D. Ellen on or about June 29, 1984.

Response to Document Request No. 9

Subject to its objections, SFP states that it has located no documents responsive to this document request.

Respectfully submitted,

Adrian J. Steel, Jr.

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Of Counsel

Attorneys for Santa Fe Pacific Corporation

DATED: October 15, 1992

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of October, 1992, I served the foregoing "Responses and Objections of Santa Fe Pacific Corporation to Request for Production of Documents of Sieu Mei Tu and Joseph Z. Tu" by causing a copy thereof to be delivered to each of the following in the manner indicated:

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*ADMITTED IN MICH. & MAINE ONLY

OF COUNSEL:
JAMES L. HIGHSAW

October 13, 1992

via messenger

Sidney Strickland, Secretary
Interstate Commerce Commission
12th Street & Constitution Avenue, N.W.
Washington, DC 20423

Re: Finance Docket No. 30400 (Sub-No. 21), Santa Fe Southern Pacific Corp.--Control--Southern Pacific Transportation Co.

Dear Mr. Strickland:

Enclosed for filing with the Commission are the original and ten copies of the enclosed "Motion of the Brotherhood of Maintenance of Way Employes and International Association of Machinists and Aerospace Workers for an Extension of Time in Which to File Opening Brief and Evidence". Please file stamp the extra copy and return it to the messenger for its return to the undersigned. Thank you for your cooperation.

Sincerely,

Donald F. Griffin

Donald F. Griffin

An attorney for BMWE and IAMAW

cc: Hon. Paul Cross
all parties of record

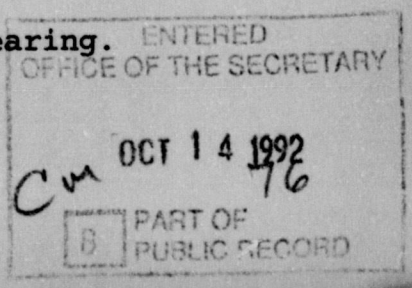
BEFORE THE
INTERSTATE COMMERCE COMMISSION

SANTA FE SOUTHERN PACIFIC CORPORATION--CONTROL--SOUTHERN PACIFIC TRANSPORTATION COMPANY	Finance Docket No. 30400 (Sub-No. 21)

MOTION OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS FOR AN EXTENSION OF TIME IN WHICH TO FILE OPENING BRIEF AND EVIDENCE

The Brotherhood of Maintenance of Way Employes ("BMWE") and International Association of Machinists and Aerospace Workers ("IAMAW") respectfully move the Commission for an extension of time in which to file their opening brief and evidence in the above captioned proceeding. Pursuant to an order of the Commission served September 10, 1992, BMWE's and IAMAW's deadline for filing their opening brief and evidence is October 19, 1992. By this motion, BMWE and IAMAW request an additional 14 days until November 2, 1992 in which to file their brief and evidence. In support of their motion, BMWE and IAMAW state that following.

Counsel for BMWE and IAMAW also is the counsel primarily responsible for the handling of plaintiffs' case in American Train Dispatchers Ass'n v. National Mediation Board, Civ. No. 92-2076 (RCL)(D.D.C.). Late Friday afternoon, October 9, 1992, the court scheduled a hearing on plaintiffs' application for a preliminary injunction for October 16, 1992. Counsel has been fully engaged preparing rebuttal declarations and a reply memorandum in that case and preparing for the hearing.

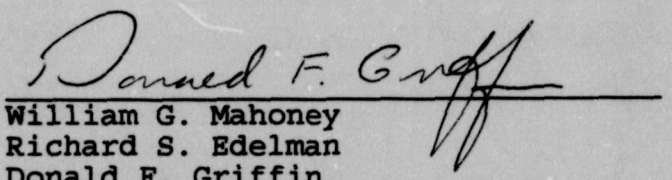


Additionally, BMWE and IAMAW served limited discovery requests upon the Southern Pacific Transportation Company ("SPT") on September 25, 1992. Responses to those requests are due to be served today, however, those responses have not been received and BMWE and IAMAW have no knowledge as to the manner in which SPT will respond to these requests.

Finally, BMWE and IAMAW notes the possible intervention of another party, Sieu Mei Tu, whose counsel has served requests for production of documents upon SPT and Santa Fe Pacific Corporation ("SFP") that are due to be responded to on October 15, 1992. Again, it is unclear exactly how either SPT or SFP will respond to those requests. Since Ms. Tu's interests appear to be aligned generally with that of BMWE and IAMAW it is important that briefing from all employee parties be presented to the Commission at the same time. Extension of the filing deadline for opening briefs and evidence by 14 days will serve that end.

WHEREFORE, based upon the foregoing, BMWE and IAMAW respectfully request that the Commission grant their motion and extend the deadline for filing opening briefs and evidence for 14 days, up to and including November 2, 1992.

Respectfully submitted,



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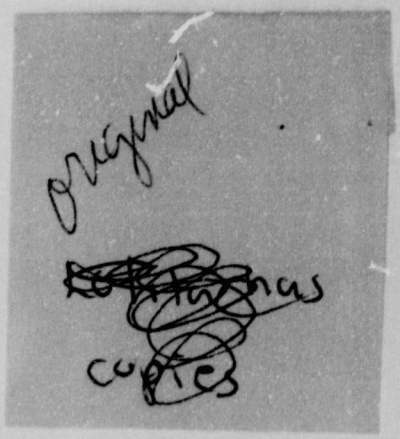
Attorneys for BMWE and IAMAW

Dated: October 13, 1992

CERTIFICATE OF SERVICE

I hereby certify that today I served copies of the foregoing upon the following persons by hand delivery:



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and by overnight delivery upon:

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Lee J. Kubby, Esq.
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Donald F. Griffin
Donald F. Griffin

Dated: October 13, 1992

38377

From Fuchs

BEFORE THE
INTERSTATE COMMERCE COMMISSION

SANTA FE SOUTHERN PACIFIC CORPORATION--CONTROL--SOUTHERN PACIFIC TRANSPORTATION COMPANY	Finance Docket No. 30400 (Sub-No. 21)

38377

RESPONSE OF BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES TO SANTA FE PACIFIC CORPORATION'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

The Brotherhood of Maintenance of Way Employes ("BMWE"), respectfully submits the following response to the first set of interrogatories and requests for production of documents served by the Santa Fe Pacific Corporation ("SFP").

INTERROGATORY NO. 1:

(A) Identify and produce each response (including attachments) to the questionnaire of the form included as Attachment A hereto, or to any other questionnaire or survey the purpose of which was to obtain from BMWE or IAMAW members information concerning the possible adverse effect on employees resulting from the proposed ATSF/SPT merger, from alleged SFSP control of SPT or from actions taken in anticipation of the proposed ATSF/SPT merger, completed by any present or former member of BMWE or IAMAW.

(B) Identify and produce all correspondence, memoranda, instructions and other documents concerning the questionnaires and questionnaire responses identified in response to Interrogatory No. 1(A).

RESPONSE TO INTERROGATORY NO. 1:

(A) BMWE will produce the requested questionnaires.

(B) OBJECTION: BMWE objects to the request to the extent that it seeks the production of privileged materials. Without a waiver of that objection, BMWE will produce relevant, non-privileged documents, if such exist.

INTERROGATORY NO. 2:

(A) Identify and produce a copy of each collective bargaining agreement or other written contract or agreement entered into between BMWE and SPT or between IAMAW and SPT, in effect at any time during the period from December 23, 1983 until August 4, 1987, providing for the payment of monetary or other employment-related benefits to SPT employees in the event of any action by SPT involving the termination, separation, lay-off, furlough, relocation or transfer of any employees covered by such contract or agreement.

(B) Identify and produce a copy of each written unilateral severance offer, voluntary resignation program or other employee separation program offered or implemented by SPT during the period from December 23, 1983 until August 4, 1987 and affecting members of BMWE or IAMAW, and all documents concerning any such offer or program.

RESPONSE TO INTERROGATORY NO. 2:

(A) The only agreement in question is the agreement settling Mediation Case No. A-7128, dated February 7, 1965. BMWE will produce the requested agreement.

(B) After a diligent search of its records, BMWE cannot identify any "written unilateral severance offer, voluntary resignation program or other employee separation program" offered to BMWE represented employees of the Southern Pacific Transportation Company ("SPT") during the period requested in the interrogatory.

INTERROGATORY NO. 3:

Identify and produce all documents supporting or otherwise concerning any claim, by BMWE and IAMAW or other employee representatives, that rail carrier employees were adversely affected by actions taken or orders issued by SFSP (a) in anticipation of the proposed ATSF/SPT merger, (b) in alleged violation of the SPT Voting Trust Agreement or (c) in alleged violation of the carrier merger, consolidation and control provisions of the Interstate Commerce Act (49 U.S.C. §§ 11341-11351).

RESPONSE TO INTERROGATORY NO. 3:

Other than the instant proceeding, BMWE has not presented a "claim" before any forum regarding the matters set forth in (a), (b) and (c) in Interrogatory No. 3, above.

INTERROGATORY NO. 4:

(A) Identify, separately for each calendar year from 1983 until the present and separately for each United States Class I rail carrier that employed persons represented for collective bargaining purposes by BMWE, the total number of BMWE members who were terminated, separated, laid off or furloughed, who accepted

(B) After a diligent search of its records, BMWE cannot identify any "written unilateral severance offer, voluntary resignation program or other employee separation program" offered to BMWE represented employees of the Southern Pacific Transportation Company ("SPT") during the period requested in the interrogatory.

INTERROGATORY NO. 3:

Identify and produce all documents supporting or otherwise concerning any claim, by BMWE and IAMAW or other employee representatives, that rail carrier employees were adversely affected by actions taken or orders issued by SFSP (a) in anticipation of the proposed ATSF/SPT merger, (b) in alleged violation of the SPT Voting Trust Agreement or (c) in alleged violation of the carrier merger, consolidation and control provisions of the Interstate Commerce Act (49 U.S.C. §§ 11341-11351).

RESPONSE TO INTERROGATORY NO. 3:

Other than the instant proceeding, BMWE has not presented a "claim" before any forum regarding the matters set forth in (a), (b) and (c) in Interrogatory No. 3, above.

INTERROGATORY NO. 4:

(A) Identify, separately for each calendar year from 1983 until the present and separately for each United States Class I rail carrier that employed persons represented for collective bargaining purposes by BMWE, the total number of BMWE members who were terminated, separated, laid off or furloughed, who accepted

early retirement or who otherwise ceased their employment with such rail carrier due to the closing or downsizing of facilities, lack of work, consolidation of work, rail line sales, transfers or abandonments or other workforce reductions.

(B) Identify, separately for each calendar month from December 1, 1983 until the present and separately for each United States Class I rail carrier that employed persons represented for collective bargaining purposes by BMWE, the total number of BMWE members who were employed by each such rail carrier at mid-month (or at such other time during each calendar month for which the requested information is available).

RESPONSE TO INTERROGATORY NO. 4:

(A) OBJECTION: BMWE objects to the interrogatory as overly broad in that it seeks information beyond the date SPT was sold to Rio Grande Industries, Inc ("RGI"). BMWE also objects to the interrogatory as excessively burdensome and not reasonably likely to lead to the discovery of relevant evidence. In this proceeding, the Commission has framed the issue presented to the employee representatives thus:

> we are reopening this proceeding to give SPT employees (as a class) an opportunity to demonstrate that they were adversely affected as a direct consequence of actions taken or orders issued by SFSP in contemplation of the proposed ATSF-SPT merger. We seek specific evidence from the parties with respect to those actions or orders issued by SFSP which may have affected SPT operations and work-related assignments.

Finance Docket No. 30400 (Sub-No. 21), Santa Fe Southern Pacific Corp.--Control--Southern Pacific Trans. Co., at 3, served June 18, 1992 (not published). Accordingly, BMWE submits that

employment levels on other Class I railroads is irrelevant to the determination of the issue presented by the Commission in this proceeding.

(B) See the Objection to Interrogatory No. 4 (A) above. Without a waiver of the foregoing objection, BMWE also notes that, during the period December 1, 1983 to date of the sale of SPT to RGL, such information was filed by Class I rail carriers at the Commission's Bureau of Accounts pursuant to 49 C.F.R. § 1246.1 and is available at that location.

INTERROGATORY NO. 5:

(A) Identify, separately for each calendar year from 1983 until the present and separately for each United States Class I rail carrier that employed persons represented for collective bargaining purposes by IAMAW, the total number of IAMAW members who were terminated, separated, laid off or furloughed, who accepted early retirement or who otherwise ceased their employment with such rail carrier due to the closing or downsizing of facilities, lack of work, consolidation of work, rail line sales, transfers or abandonments or other workforce reductions.

(B) Identify, separately for each calendar month from December 1, 1983 until the present and separately for each United States Class I rail carrier that employed persons represented for collective bargaining purposes by IAMAW, the total number of IAMAW members who were employed by each such rail carrier at mid-

employment levels on other Class I railroads is irrelevant to the determination of the issue presented by the Commission in this proceeding.

(B) See the Objection to Interrogatory No. 4 (A) above. Without a waiver of the foregoing objection, BMWE also notes that, during the period December 1, 1983 to date of the sale of SPT to RGI, such information was filed by Class I rail carriers at the Commission's Bureau of Accounts pursuant to 49 C.F.R. § 1246.1 and is available at that location.

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(B) Identify, separately for each calendar month from December 1, 1983 until the present and separately for each United States Class I rail carrier that employed persons represented for collective bargaining purposes by IAMAW, the total number of IAMAW members who were employed by each such rail carrier at mid-

month (or at such other time during each calendar month for which the requested information is available).

RESPONSE TO INTERROGATORY NO. 5

(A) and (B) BMWE cannot answer Interrogatory No. 5 because it concerns another, independent labor organization.

Objections presented by:

HIGHSAW, MAHONEY & CLARKE, P.C.
1050 17th Street, N.W. - Suite 210
Washington, DC 20036
(202) 296-8500

By: Donald F. Griffin
Donald F. Griffin

Attorneys for BMWE

VERIFICATION

I, William A. Bon, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Response of Brotherhood of Maintenance of Way Employes to First Set of Interrogatories and Requests for Production of Documents by Santa Fe Pacific Corporation. Executed on September 25, 1992.

William A. Bon

CERTIFICATE OF SERVICE

I hereby certify that today I served copies of the foregoing "Response of Brotherhood of Maintenance of Way Employes to First Set of Interrogatories and Informal Request for Production of Documents by Santa Fe Pacific Corporation" upon the following by overnight mail delivery to:

Jerome F. Donohoe, Esq.
Santa Fe Pacific Corporation
1700 East Golf Road
Schaumburg, IL 60173

Guy Vitello, Esq.
The Atchison, Topeka & Santa Fe Railway Company
1700 East Golf Road
Schaumburg, IL 60173

and by hand delivery to:

Kathryn Kusske, Esq.
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006

first class mail delivery to:

John MacDonald Smith, Esq.
Southern Pacific Transportation Company
819 Southern Pacific Bldg.
One Market Plaza
San Francisco, CA 94105

Charles Kong
1017 Brown Street
Bakersfield, CA 93305

Vincent Prada, Esq.
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, DC 20006

Donald F. Griffin

Dated: September 25, 1992

38376

BEFORE THE
INTERSTATE COMMERCE COMMISSION

SANTA FE SOUTHERN PACIFIC CORPORATION--CONTROL--SOUTHERN PACIFIC TRANSPORTATION COMPANY	Finance Docket No. 30400 (Sub-No. 21)

RESPONSE OF INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS TO SANTA FE PACIFIC CORPORATION'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

The International Association of Machinists and Aerospace Workers ("IAMAW"), respectfully submits the following response to the first set of interrogatories and requests for production of documents served by the Santa Fe Pacific Corporation ("SFP").

INTERROGATORY NO. 1:

(A) Identify and produce each response (including attachments) to the questionnaire of the form included as Attachment A hereto, or to any other questionnaire or survey the purpose of which was to obtain from BMWE or IAMAW members information concerning the possible adverse effect on employees resulting from the proposed ATSF/SPT merger, from alleged SFSP control of SPT or from actions taken in anticipation of the proposed ATSF/SPT merger, completed by any present or former member of BMWE or IAMAW.

(B) Identify and produce all correspondence, memoranda, instructions and other documents concerning the questionnaires and questionnaire responses identified in response to Interrogatory No. 1(A).

RESPONSE TO INTERROGATORY NO. 1:

(A) IAMAW will produce the requested questionnaires.

(B) OBJECTION: IAMAW objects to the request to the extent that it seeks the production of privileged materials. Without waiver of that objection, IAMAW will produce relevant, non-privileged documents, if any exist.

INTERROGATORY NO. 2:

(A) Identify and produce a copy of each collective bargaining agreement or other written contract or agreement entered into between BMWE and SPT or between IAMAW and SPT, in effect at any time during the period from December 23, 1983 until August 4, 1987, providing for the payment of monetary or other employment-related benefits to SPT employees in the event of any action by SPT involving the termination, separation, lay-off, furlough, relocation or transfer of any employees covered by such contract or agreement.

(B) Identify and produce a copy of each written unilateral severance offer, voluntary resignation program or other employee separation program offered or implemented by SPT during the period from December 23, 1983 until August 4, 1987 and affecting members of BMWE or IAMAW, and all documents concerning any such offer or program.

RESPONSE TO INTERROGATORY NO. 2:

(A) There are two agreements responsive to the Interrogatory. One agreement is that resolving Mediation Case No. A-7030, dated September 25, 1964; the second is an

implementing agreement, dated July 8, 1987, negotiated pursuant to the provisions contained in the September 25, 1964 agreement. IAMAW will produce the requested agreements.

(B) After a diligent search of its records, IAMAW cannot identify any "written unilateral severance offer, voluntary resignation program or other employee separation program" offered to IAMAW represented employees of the Southern Pacific Transportation Company ("SPT") during the period requested in the interrogatory.

INTERROGATORY NO. 3:

Identify and produce all documents supporting or otherwise concerning any claim, by BMWE and IAMAW or other employee representatives, that rail carrier employees were adversely affected by actions taken or orders issued by SFSP (a) in anticipation of the proposed ATSF/SPT merger, (b) in alleged violation of the SPT Voting Trust Agreement or (c) in alleged violation of the carrier merger, consolidation and control provisions of the Interstate Commerce Act (49 U.S.C. §§ 11341-11351).

RESPONSE TO INTERROGATORY NO. 3:

Other than the instant proceeding, IAMAW presented a claim under the September 25, 1964 agreement decided by Special Board of Adjustment No. 570, Case No. 1060, Award No. 895. Documents related to Award No. 895 will be produced.

INTERROGATORY NO. 4:

(A) Identify, separately for each calendar year from 1983 until the present and separately for each United States Class I rail carrier that employed persons represented for collective bargaining purposes by BMWE, the total number of BMWE members who were terminated, separated, laid off or furloughed, who accepted early retirement or who otherwise ceased their employment with such rail carrier due to the closing or downsizing of facilities, lack of work, consolidation of work, rail line sales, transfers or abandonments or other workforce reductions.

(B) Identify, separately for each calendar month from December 1, 1983 until the present and separately for each United States Class I rail carrier that employed persons represented for collective bargaining purposes by BMWE, the total number of BMWE members who were employed by each such rail carrier at mid-month (or at such other time during each calendar month for which the requested information is available).

RESPONSE TO INTERROGATORY NO. 4:

(A) and (B) IAMAW cannot answer Interrogatory No. 4 because it concerns another, independent labor organization.

INTERROGATORY NO. 5:

(A) Identify, separately for each calendar year from 1983 until the present and separately for each United States Class I rail carrier that employed persons represented for collective bargaining purposes by IAMAW, the total number of IAMAW members who were terminated, separated, laid off or furloughed, who

accepted early retirement or who otherwise ceased their employment with such rail carrier due to the closing or downsizing of facilities, lack of work, consolidation of work, rail line sales, transfers or abandonments or other workforce reductions.

(B) Identify, separately for each calendar month from December 1, 1983 until the present and separately for each United States Class I rail carrier that employed persons represented for collective bargaining purposes by IAMAW, the total number of IAMAW members who were employed by each such rail carrier at mid-month (or at such other time during each calendar month for which the requested information is available).

RESPONSE TO INTERROGATORY NO. 5

(A) OBJECTION: IAMAW objects to the interrogatory as overly broad in that it seeks information beyond the date when SPT was sold to Rio Grande Industries, Inc ("RGI"). IAMAW also objects to the interrogatory as excessively burdensome and not reasonably likely to lead to the discovery of relevant evidence. In this proceeding, the Commission has framed the issue presented to the employee representatives thus:

> we are reopening this proceeding to give SPT employees (as a class) an opportunity to demonstrate that they were adversely affected as a direct consequence of actions taken or orders issued by SFSP in contemplation of the proposed ATSF-SPT merger. We seek specific evidence from the parties with respect to those actions or orders issued by SFSP which may have affected SPT operations and work-related assignments.

Finance Docket No. 30400 (Sub-No. 21), Santa Fe Southern Pacific Corp.--Control--Southern Pacific Trans. Co., at 3, served June

18, 1992 (not published). Accordingly, IAMAW submits that the employment levels on other Class I railroads are irrelevant to the determination of the issue presented by the Commission in this proceeding.

(B) See the Objection to Interrogatory No. 5 (A) above. Without a waiver of the foregoing objection, IAMAW also notes that, during the period December 1, 1983 to date of the sale of SPT to RGI, the information requested in this interrogatory was filed by the Class I rail carriers at the Commission's Bureau of Accounts pursuant to 49 C.F.R. § 1246.1 and is available at that location.

Objections presented by:

HIGHSAW, MAHONEY & CLARKE, P.C.
1050 17th Street, N.W. - Suite 210
Washington, DC 20036
(202) 296-8500

By: Donald F. Griffin
Donald F. Griffin

Attorneys for IAMAW

VERIFICATION

I, A. F. Carillo, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Response of International Association of Machinists and Aerospace Workers to First Set of Interrogatories and Requests for Production of Documents by Santa Fe Pacific Corporation. Executed on September 24, 1992.

A. F. Carillo

CERTIFICATE OF SERVICE

I hereby certify that today I served copies of the foregoing "Response of International Association of Machinists and Aerospace Workers to First Set of Interrogatories and Informal Request for Production of Documents by Santa Fe Pacific Corporation" upon the following by overnight mail delivery to:

Jerome F. Donohoe, Esq.
Santa Fe Pacific Corporation
1700 East Golf Road
Schaumburg, IL 60173

Guy Vitello, Esq.
The Atchison, Topeka & Santa Fe Railway Company
1700 East Golf Road
Schaumburg, IL 60173

and by hand delivery to:

Kathryn Kusske, Esq.
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006

first class mail delivery to:

John MacDonald Smith, Esq.
Southern Pacific Transportation Company
819 Southern Pacific Bldg.
One Market Plaza
San Francisco, CA 94105

Charles Kong
1017 Brown Street
Bakersfield, CA 93305

Vincent Prada, Esq.
SIDLEY & AUSTIN
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Washington, DC 20006

Donald F. Griffin

Dated: September 25, 1992

LAW OFFICES
LEE J. KUBBY, INC.
A PROFESSIONAL CORPORATION

BOX 60485
SUNNYVALE, CALIFORNIA 94086-0485
(415) 691-9331

38375

September 09, 1992

Secretary
Interstate Commerce Commission
12th and Constitution Aves. N.W.
Washington, D.C. 20423

Re: Interstate Commerce Commission
Decision
Finance Docket No. 30400
(Sub-No. 21)
Santa Fe Southern Pacific Corporation
Control
Southern Pacific Transportation Company

Dear Gentle People:

It is my understanding that Appendix Four previously forwarded to you in the matter, may either have some pages missing or misnumbered. Therefore, I am resubmitting the appendix in toto. Please substitute the enclosed nine (9) copies in youe file for the ones previously submitted.

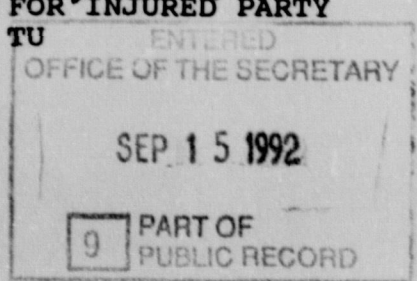
Please add the name of
Sieu Mei Tu
1697 Hickory Ave.
San Leandro, CA 94579
to the mailing list in the above entitled matter.

Thank you for your courtesies.

Respectfully submitted,
LEE J. KUBBY, INC.
A Professional Corporation
By:

LEE J. KUBBY
ATTORNEY FOR INJURED PARTY
SIEU MEI TU

LJK:me
Encls.
Appendix 4 (9 Copies)



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Attorney for Plaintiffs
Appellants

UNITED SATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIEU MEI TU AND JOSEPH Z. TU Plaintiffs Appellants VS SOUTHERN PACIFIC TRANSPORTATION COMPANY; ATCHISON, TOPEKA, SANTA FE RAILROAD COMPANY; PACIFIC FRUIT EXPRESS COMPANY; T. ELLEN; E.E.CLARK; d. W. FEND; T. R. ASHTON; DOE DEFENDANTS ONE TO TWO THOUSAND; WHITE COMPANY; BLACK CORPORATION; BROTHERHOOD OF FAILWAY, AIRLINE AND STEAMSHIP CLERKS; R. B. BRACKBILL; J. M. BALOVICH; SANTA FE SOUTHERN PACIFIC CORP. Defendants Appellees	NO: 89-16186 APPELLANTS' ANSWERING/ REPLY BRIEF

APPEAL

APPENDIX FOUR

1A. TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES ALPHABETICAL

STATUTES and RULES

INTRODUCTION

THIS ANSWERING/REPLY BRIEF IS ORGANIZED SO AS TO GROUP ANSWERS TO A PARTICULAR APPELLEES' BRIEF IN ONE SECTION, SO THAT THERE ARE THREE SECTIONS TO THIS BRIEF. NOT WITH STANDING THAT ORGANIZATION, TO THE EXTENT THE SAME IS APPLICABLE TO TWO OR MORE APPELLEES, SUCH ORGANIZATION SHOULD NOT PREJUDICE APPROPRIATE APPLICATION

This Answering/ Reply Brief is organized so as to group answers/replies to a particular Appellees brief in one section, so that there are three sections to this brief. The first responds to Appellees Southern Pacific Transportation Company-Paific Fruit Express' Brief (SP), the second to the brief of Union Defendants (who are also the only defendants who have filed a cross appeal herein), and the third to the Brief of Atchison, Topeka and Santa Fe Railway Co. and Santa Fe Southern Corp. (ATSF). Not withstanding that division of this brief, to the extent any argument is applicable to two or more appellees, such application should be made.

I

THE SP DEFENDANTS

(A) DEFENDANTS WERE CONTRACTUALLY, EQUITABLY, AND LEGALLY PROHIBITED FROM APPLYING A CLAIM OF DECLINE IN BUSINESS TO DENY SIEU MEI TU OF HER EMPLOYMENT AND BENEFITS

It is undisputed that PFE is a wholly owned subsidiary of Southern Pacific (DEN*115 page 2, paragraph 2) that Plaintiff commenced working at the SP San Francisco

*DEN refers to Docket Entry Number

general office(ER*36, 73, 663, 664, 815, 856), that plaintiff was advised in writing on December 18, 1978, that if there was no work for her, she would still be paid her full salary-she would be fully protected (DEN 115, Exhibit A). The representation in that exhibit before the court, makes reference to the fact that the contract between her employer and her Union gives her that protection. That full protection requires the non application of section 11 termination for economic decline. (DEN 30; Supplemental Excerpts of Record** filed by SP at 000215-000234.). That she would be fully protected until she was 65 was told to her by various of her supervisors (DEN 30, Exhibit I; SP Supp ER 000231-000234). As of October, 1985, Sieu Mei Tu was the only terminated employee having a seniority date preceding March 16, 1963 (DEN 71 Exhibit D)

The complaint alleges that each of the defendants was the agent of each of the other defendants in doing the acts complained of (DEN 115, page 3, paragraph 7) and alleges that PFE was at all times material a wholly owned subsidiary of SPT (DEN 115, page 2, paragraph 2). That Sieu Mei Tu worked in the SP General office from the time of her employment until 1980 when the building she worked in was

*ER refers to plaintiffs Excerpt of Record.
**It should be noted that the Supplemental Excerpts of Record filed by SP is incomplete in that for instance the declaration of Kevin Block lists Exhibits A-I, but only what purports to be Exhibit I is included in the Supplement. It should also be noted that SP'S Supplemental Excerpts includes a brief of said defendants in contravention of the Rules of this court-Rule 30-1.4).

changed to Brisbane, a town adjacent to San Francisco (ER 36, 73, 663, 664, 815, 856) even after the move to Brisbane the SP office supervised the activities of Sieu Mei Tu (ER 127, 130, 131, 343, 364). The intention to merge SP and ATSF commenced in 1980 (Kraus v. Santa Fe Southern Pacific Corp, 878 F2d 1193 (9th Cir 1989) at 1195). * The defendants acted to avoid giving terminated employees New York Dock conditions upon the merger. (Kraus, supra at 1196). In issues of this type, it is proper to look not only at the condition of the subsidiary entity claiming financial decline, but upon the financially fit parent as well. (New York Dock RY-Control-Brooklyn Eastern Dist. Fin. Dkt. 28250 at 401-403 (April 11, 1978)

The conditions applicable hereto which the defendants sought to avoid by terminating Sieu Mei Tu prior to the complete merger of the railroads are set forth in Appendix III New York Dock, supra at 415-421.

(B) THIS COURT HAS RULED THAT AN AGGRIEVED EMPLOYEE CAN PROCEED ON STATE LAW ACTION NOT WITHSTANDING THAT A MATTER MAY BE PENDING AND UNDECIDED BEFORE THE ICC.

In Kraus, supra at 1199, these same defendants argued that the ICA preempted the state law tort claim. This court held at 1200:

> "The judgment of liability and damages in favor of the plaintiffs on the state law claim is AFFIRMED."

*The Kraus case supra was decided on appeal on July 3, 1989, and published after plaintiffs' Motion for Reconsideration had been denied as to SP (May 3, 1989).

In the instant action plaintiffs' state court actions are not pre empted by the jurisdiction of the ICC. These defendants motions for summary judgement on the state court causes of action should be denied. The matter should be remanded to the state court for trial.

(C) IN THIS ACTION PLEADINGS, DEPOSITIONS, ANSWERS TO INTERROGATORIES, AND ADMISSIONS ON FILE AND THE AFFIDAVITS FILED SHOW THERE IS A GENUINE ISSUE AS TO WHETHER ECONOMIC DECLINE WAS THE REASON FOR THE TERMINATION OF PLAINTIFF SIEU MEI TU AND THE RIGHT OF THE DEFENDANTS TO RELY ON ECONOMIC DECLINE AS A LEGITIMATE CAUSE FOR HER TERMINATION AND DENIAL OF BENEFITS

Exhibit A to the Complaint (ER 15), to the First Amended Complaint (DEN 38) and to the Second Amended Complaint (ER 937) is SP's own admission that Plaintiff was "fully protected" as an employee- if the employer did not have a job for her she would continue to be paid and accumulate credit for appropriate retirement. (See also SP ER 000231-234). Said Exhibit A also establishes that Sieu Mei Tu was hired May 31, 1962. Plaintiff worked in the San Francisco General Offices of the SP from the time of her initial employment, until her operations were moved to Brisbane (ER 36, 73, 663, 664, 815, 856,). This is further proved in the declarations of the defendants filed herein and in Sieu Mei's personnel file, (ER 740-867).

The applicable collective bargaining agreement exempted Sieu Mei Tu from discharge because of a decline in business (ER 971, 1003, 1007-1014, 1039) stating:

" The provisions of this section will not apply to Pacific Lines Employes in the San Francisco General Offices with seniority date of March 16, 1963 or earlier."

Sieu Mei Tu earned that benefit at least as early as September 16, 1971 (ER 958, 1003, 1007-1014, 1039).*

The evidence (DEN 38 & 115 Exhibit A; DEN 90; ER 937) further demonstrates that SP advised Sieu Mei that under no circumstances would she loose the benefits of her employment.

The lower court correctly pointed out that plaintiff had demonstrated a prima facie case of discharge due to discrimination (ER 894) stating , "In the present case, plaintiff Sieu Mei has stated a prima facie case of discrimination."

The opening Brief on Behalf of Appellees SP claims to the court (SP Brief 29) that PFE employees were not included in the Pacific Lines employees under the September 16, 1971 Tops agreement. This is patently incorrect. Defendants have not produced a scintilla of evidence to support that proposition. That proposition is contrary to the admitted and uncontested facts presented to the lower court and at a minimum presents a factual issue for trial, (DEN 1003, 1005-1014) so that summary judgment should not be

*Defendant SP's contentions in its brief at 37 et seq. that plaintiffs' contentions were not based on admissible evidence is without foundation. All the evidence necessary to a determination that Sieu Mei was terminated without cause, for discriminatory reasons, and that SP was not entitled to rely on economic decline as an excuse for such termination were before the District Court. In fact much of it was from the declarations of the defendants themselves.

> opinions or inferences which are which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Clearly what is a fact and what is opinion, perception, or inference needs reference to the record. Here defendants blocked the taking of discovery by plaintiff from the defendants, while plaintiff fully cooperated in giving discovery to the defendants (ER 694-732; 33-239; 321-525).

Likewise SP's argument that plaintiffs deposition testimony was not before the District Court is without merit. It has been cited and referred to through out this case. (for example see DEN 123,Exhibits A and B, DEN 30 Exhibit I, SP's Supplemental ER 000215-000234). SP's contention (SP Brief 42) that deposition testimony and interrogatory answers are not properly included in the excerpts of record pursuant to 9th Cir. R. 30-1 is not to be found in the rule. The matters which are specifically excluded under some circumstances under that rule are briefs or other memoranda of law filed in the district court, not depositions or declarations. It is to be noted that SP in its Supplemental Excepts includes a brief filed by itself contrary to the very rule it seeks to use against plaintiff. (SP Sup ER 000210).

Plaintiffs' complaint is verified, is based on personal knowledge, and sets forth specific facts as do her declaration, the excerpts of her depositions, and the declarations of the defendants so that as observations, percep-

granted. The evidence demonstrated that the provision applies to Sieu Mei Tu. No evidence was produced to the contrary.

Defendant's reliance on Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986) is misdirected. There the court found that there was a complete failure of proof concerning an essential element of the non moving party's case. That certainly is not the situation with Sieu Mei Tu. The Kraus case supra collaterally estops defendants and is res judicata of the fact that the railroad defendants (SP and ATSF) from 1980 forward were embarked on a conspiracy to avoid their responsibilities to their employees as part of the imminent merger.

Clearly, summary judgement should not be granted and this matter should proceed to trial.

(D) DEFENDANTS SP'S EVIDENTIARY OBJECTIONS TO THE DECLARATION OF SIEU MEI ARE NOT TIMELY, NOT HAVING RAISED THEM IN THE DISTRICT COURT, AND ARE INCORRECT UNDER APPLICABLE RULES OF EVIDENCE.

Defendant SP argues that certain declarations of plaintiff Sieu Mei are inadmissible under evidentiary rules. No objection was made by SP in the District Court. The declarations were before the District Court. SP incorrectly argues that a party can not testify as to their opinions or inferences. Federal Rule of Evidence 701 specifically permits the same, stating:

> "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those

tions, admissions, business records what otherwise might be excludable as heresay, are admissible. (FRE 701; 801 (d 2); 803(1),(6),(24); 804(b 1); 805; 901(a);902 (6))

E DEFENDANT SP'S CONTENTION THAT SIEU MEI FAILED TO PRODUCE ANY EVIDENCE OF HER QUALIFICATION FOR JOBS TRANSFERRED TO SP IGNORES THE RECORD WHICH SHOWS SHE WAS ALWAYS FOUND EXCEPTIONAL IN THE PERFORMANCE OF HER DUTIES, AND HAD PERFORMED THE SAME ADMINISTRATIVE DUTIES FILLED BY SP WITH YOUNGER, NON CHINESE, AND OR MALE WORKERS

Defendant SP argues (SP Brief page 33) that plaintiff did not submit any evidence that she was qualified for the jobs available. This ignores ER 748, a business document and an admission against interest, in her personnel file (DEN 88-90) which is an assessment by her immediate supervisor which states:

> October 2, 1985
> TO WHOM IT MAY CONCERN:
> REGARDING: PFE Employee, Sieu Mei Tu
>
> This is a letter expressing my thoughts about a PFE employee who has worked for me for a period of 10 years, and possibly more, with occasional jobs in other departments due to job abolishments and subsequent displacements.
>
> I had heard good reports of her when she first came to work under my supervision. My Head Clerk of Materials/Supplies gave her a 10 on the rating scale, which I downgraded to an 8, or thereabouts, after reaction from Asst. Controller who said "nobody is perfect."
>
> She proved to be a very fine efficient worker and absorbed new information rather fast. Little supervision was required of her but she always gave the opportunity to "check" her work, and would take correction in proper stride.
>
> In later years, after the Split, Sieu held

> almost every job in disbursements at one time or another, and she did not have to be "baby sat" to learn it. A few questions now and then to get the basics would get her going full speed ahead. Once acquainted with the job, she was very fast and efficient. In a pinch, due to job abolishments, she has performed three jobs at once.
>
> She would anticipate ahead for deadlines, discounts, schedules, and "issue alert warnings" when a facet of work was falling behind.
>
> She was furloughed effective October 9, 1985, and a good worker has been lost. This letter is for her personal record for whomsoever may read it.
> Charles C. Carroll
> Chief Clerk Disbursements

ER 749, describes the duties Sieu Mei performed just prior to her discharge (Position 141). The same page describes Position 150, clerk, then filled by S.A. Hauff. S. A. Hauff, a white, younger, female was transferred to the SP (ER 531). Sieu Mei had previously been employed in Position 150 (ER 733-734). That position was less demanding than Position 141. (ER 734) Thus there was material evidence presented as to her qualification for positions not terminated and transferred.

(F) DEFENDANTS HAVE TOTALLY FAILED TO RESPOND TO PLAINTIFFS EVIDENCE THAT THE DEFENDANTS ARE ESTOPPED FROM ASSERTING DECLINE IN BUSINESS AS A CAUSE FOR DISCHARGING PLAINTIFF WITHOUT CONTINUING BENEFITS. PLAINTIFF HAS PRESENTED EVIDENCE OF ESTOPPEL SO THAT SUMMARY JUDGMENT SHOULD NOT BE GRANTED TO DEFENDANTS

Plaintiff has presented significant evidence of representations by the defendants and her reliance thereon (ER 937, 958, 1003, 1007-10014, 1039; SP ER 231-234; DEN

90) to invoke an equitable estoppel of the defendants prohibiting them from raising an issue of economic decline as cause for her termination.

Defendants do not respond to this equitable right which establishes Sieu Mei Tu's discharge as pretextural.

(G) PLAINTIFFS SECOND AMENDED COMPLAINT (DEN 115) SPECIFICALLY CHARGES DEFENDANTS WITH RETALIATORY DISCRIMINATION CONTINUING TO JUNE 1, 1989

Each of Plaintiff's complaints have charged Defendants with retaliatory discrimination. (DEN 115 page 10; DEN 38 page 10; DEN 1 Complaint Exhibit A page 7).

All of the retaliatory discrimination is evidence of the initial discrimination and of the unlawfulness of the discharge of Sieu Mei Tu.

II

THE UNION DEFENDANTS

(A) MATERIAL FACTS PRESENTED AS TO BREACH OF DUTY OF FAIR REPRESENTATION BY UNION

All of the facts applicable to the claim against SP are equally applicable against Union, but will not be repeated here. In addition, the following material facts are before the court:

On October 18, 1985, plaintiff in writing advised ATSF that her employment had been wrongfully terminated for discriminatory reasons because of her age, sex, and national origin (DEN 30, Exhibit G). On the same day

Plaintiff sent a copy of that writing to the Union and demanded "for your union to protect its member, Sieu Mei Tu, and to provide her legal representation and support in this time of great travail." (DEN 30 Exhibit G). The Union did not feel that demand requested a response or that one was necessary (DEN 71 page 9). On January 20, 1986, counsel for plaintiff wrote to the Union as follows:

> "On October 18, 1985, I wrote to you concerning the termination of Mrs. Tu from her position with Southern Pacific and demanded for you to protect her interest and support. You have made no response to that letter and taken no action to protect the interest of Mrs. Tu.
> This is to advise that unless you immediately take action no later than five (5) days from the date of this letter, I intend to include you in an action concerning her rights and to hold you responsible for a bad faith refusal to perform your contractual duties to Mrs. Tu regarding this distressing incident." (DEN 71 Exhibit R)

On January 28, 1986 the Union advised Sieu Mei's counsel as follows (DEN 71 Exhibit S):

> "Let me assure you, Mr. Kubby, that B.R.A.C. is progressing a claim in accordance with the PFE/B.R.A.C. Agreement in behalf of Mrs. Tu...."

No further word was received by Plaintiff concerning that process until January 4, 1988, when DEN 71 Exhibit T (the Leiberman arbitration) was received.(DEN 50) The Leiberman arbitration demonstrates that the Union did not process Sieu Mei Tu's individual claims under the collective bargaining agreement.

Thus there were triable material issues of fact of failure to perform ministerial and/or procedural

acts, ignoring Sieu Mei's individual rights and claims, failure to investigate her claims, recklessly disregarding her individual rights.

The Union during the period it was supposedly processing Sieu Mei's discrimination claim was also negotiating to become the sole bargaining agent for the combined railroads and also to purchase the SP. (DEN 115 page 15, ER 158-159, 877, 883-884, 933). Even if there had been a judgment call by the Union not to process her claims, which the Union has never claimed it made there would be a triable issue of fact as to a bad faith motive on the part of the Union.

The Union has never claimed it made a knowing decision not to submit Sieu Mei's individual claim for wrongful discriminatory discharge or her individual right to be exempt from the decline in business provision of the collective bargaining agreement to arbitration, so that the Union's failure to arbitrate Sieu Mei's discrimination claim or individual exemption from the collective bargaining agreement decline in business provision was a failure to perform a procedural or ministerial act. There was no rational or proper basis for its conduct. Such conduct presents a triable material issue of fact of reckless disregard for the rights of the individual employee that must be tried before a jury so that summary judgment should not be granted.

On at least three occasions after January 28, 1986 Counsel for Plaintiff telephoned the office of the

Union representative in charge of the PFE matter, Mr. Brackbill, to determine the nature and progress of the claim the Union was supposedly pursuing for Plaintiff, and the name and location of the attorney handling the matter. Counsel was finally given the name of an attorney on the East Coast, who counsel called. That attorney advised counsel that he was acting for the Union in a suit filed against the Railroads and then pending in the United States District Court in Utah, but that action only concerned PFE employees who had been transferred to SP and did not involve any issues concerning PFE employees that had been "furloughed". Plaintiffs counsel requested copies of the pleadings filed in that matter, but never received the same. (DEN 89 pages 3-4).

On April 29, 1988, plaintiffs filed their First Amended Complaint (DEN 38) setting forth their claims against the Union.

Plaintiff called Mr. Brackbill and advised him of her desire for employment with SP (DEN 71 page 12 15-17). On April 29, 1988, Sieu Mei interviewed at SP for such a position. (DEN 64) She was not given employment.(DEN 90 page 5 lines 21-24). The Union took no action to procure such employment for her, nor to commence arbitration for retaliatory discrimination on behalf of Sieu Mei. (ER 602).

In September, 1988, plaintiff attempted to take discovery from the Union. The Union did not comply. (DEN 89) in full and only partially later complied not with its own records but with records allegedly procured from

SP.*

On Motion for Summary Judgment filed November 23, 1988, SP argued that the ICC had exclusive jurisdiction of Sieu Mei's conspiracy claim. (DEN 62) In fact a proceeding had been held before the ICC prior to September 12, 1988, and an issue raised as to imposition of labor protective conditions to be imposed by reason of the ATSF merger. The Union, well knowing of the claims of Sieu Mei, did not present her matter to the ICC, did not advise her that such a proceeding was being conducted, and did not advise the District Court of the same, nor the fact that a decision had been arrived at on January 29, that the ICC did not have jurisdiction to determine the same, and that employees such as Sieu Mei, that were adversely affected by the disallowed merger could proceed in a civil proceeding. (DEN 115, EX F) The Union stood moot on the matter before the District Court (ER 869).

(B) THE UNION'S ASSURANCE THAT IT WAS ADMINISTRATIVELY PURSUING SIEU MEI'S CLAIMS UNDER THE COLLECTIVE BARGAINING AGREEMENT RELEASED PLAINTIFF (1) TO PURSUE HER STATE COURT REMEDIES FOR HER EMPLOYERS BREACH OF PRIVATE CONTRACT AND TORTIOUS CONDUCT, (2) NOT SEEK ENFORCEMENT OF FEDERAL CAUSES OF ACTION, AND (3) NOT TO NAME UNION IN HER STATE COURT ACTION

*It should be noted that SP also did not comply leaving plaintiff in a disadvantaged position to respond to the Summary Judgment motions of SP and Union. Plaintiff requested the District Court to allow completion of discovery before considering the Motions for Summary Judgment, but the court did not grant the request. (ER 879).

The Union's assurance that it was pursuing Sieu Mei's termination claim under the collective bargaining agreement, (DEN 120, Exhibit S; ER 682; Union's Supplemental ER 102) was sufficient cause for plaintiff to rely on the Union to pursue her claims under the collective bargaining agreement and not to sue the Union until after receipt of the Leiberman Award, when she first learned that the position of the Union was not true--that the Union had not progressed an administrative claim under the collective bargaining agreement on behalf of Sieu Mei as to the unlawfulness of her discharge. Thus the provisions of Galindo v. Stoody Co, 793 F. 2d 1502 (9th Cir. 1988) are very applicable to this matter.

In Galindo, supra the district court found a breach of the duty of fair representation in the manner in which the union investigated, prepared, and handled a grievance, the Court of Appeals stated at 1513:

> "To establish a breach of a union's duty of fair representation, an employee most show that the Union's conduct was 'arbitrary, discriminatory, or in bad faith.' Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct, 903, 916, 17 L.Ed.2d 1244, 1253 (1967); Peterson v. Kennedy, 771 F. 2d 1244, 1253 (9th Cir., 1985), cert. denied, __U.S. __, 106 S. Ct. 1642, 90 L.Ed.2d 187 (1986); Castelli v. Douglas Aircraft Co., 752 F. 2d 1480, 1482 (9th Cir. 1985. In the grievance context, this standard prohibits a union from ignoring a meritorious grievance or processing that grievance perfunctorily." (emphasis added)

The court then went on at 1514 quoting with approval from Dutrisac v. Caterpillar Tractor Co., 749 F. 2d 1270, 1274 (9th Cir. 1983):

> "([W]e limit or holding that union negligence may breach the duty of fair representation to cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim") cited in Evangelista v. Inlandboatmen's Union of Pacific, 777 F.2d 1390, 1399 n. 4 (9th Cir.1985); see also Eichelberger v. NLRB. 765 F. 2d 851, 855 n. 7 (9th Cir.1985) ("Dutrisac may further be limited to situations where a true ministerial act is involved.").
> Under Peterson and Dutrisac then, the crucial inquiry is whether the union's error involved a judgmental or ministerial act. Additionally, the union's conduct must prejudice a strong interest of the employee. See Dutrisac, 749 F.2d at 1274; Eichelberger, 765 F. 2d at 855.
>
> **C. The Failure to Notify Stoody**
>
> Under the Peterson Standard, or any other test, it is hard to imagine a more clear case of arbitrary conduct than Peon's failure to notify Stoody that Galindo was a steward. This was a mere "ministerial" act that required no judgment. There is no rational explanation for Peron's failure simply to write or telephone Stoody. Moreover, the act was severly detrimental to a strong individual interest; had Stoody been notified, Galindo would probably not have been laid off. See Dutrisac, 749 F.2d at 1274 (finding breach of duty of fair representation where union failed to pursue a meritorious grievance); Tenorio v. NLRB, 680 F.2d 598, 602 (9th Cir. 1982)(finding breach of duty of air representation where union rejected grievance without hearing employees' explanation of facts leading to their discharge).

The Union has never presented any factual material that it exercised any judgement not to pursue Sieu Mei's claim of unlawful dicriminatory discharge. It's

failure to do so was purely procedural or ministerial demonstrating a reckless disregard for the rights of the individual, Sieu Mei Tu, and falling squarely within the authority of Peterson v. Kennedy, 771 F.2d 1244, (9thCir. 1985), cert. denied, 475 U.S. 1122 (1986).

The authority of Peterson, supra was considered by the District Court (DEN 130 page 7). The District Court recognized it had the duty to determine whether the act in question involved the union's judgment or whether it was "procedural or ministerial." (DEN 130 page 4). The District Court misconstrued whether there was any evidence before the court presenting an issue of whether the failure to act in question involved the union's judgment or was procedural or ministerial. There was evidence before that court that the failure to act was not judgmental but was procedural or ministerial presenting a material question of fact to be determined by a jury [illegible] not on motion for summary judgment.

The Union cited Peterson, supra in its motion brief before the District Court (DEN 122 pages 3, 5, 6, 21) and conceded that the court was required to determine whether the acts complained of required judgment on the part of the Union or was procedural or ministerial.

(C) THE ISSUE AS TO THE UNION DEFENDANTS IS AND ALWAYS HAS BEEN WHETHER A MATERIAL ISSUE OF FACT EXISTS AS TO WHETHER THE UNIONS CONDUCT FALLS WITHIN THE LAW ESTABLISHED BY VACA V. SIPES, 386 U.S. 171 (1967). NEITHER SINGLETON V. WULFF, 428 U.S. 106 (1976) NOR GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC. V. ZOLIN, 812 F.2D 1103 (9TH Cir. 1987) ARE APPLICABLE HEREIN

Consistently since the filing of the First Amended Complaint and through two motions for summary judgment, plaintiffs' have argued that the Union under the facts of this case have failed to fairly represent Sieu Mei Tu and that this failure falls within the authority established in Vaca v. Sipes, supra. (DEN 125 page 2; ER 1135-1137; DEN 105 page 5; ER 911-912; ER 877-879.) The facts concerning the Union's conduct as being unfair representation have likewise been before the court since the Union's appearance.

Defendant urges the application of Singleton v. Wulff, supra to this matter.* Neither it nor Greater Los Angeles v. Zolin, supra, are applicable here because all of the facts argued here were before the District Court and the District Court itself recognized if the evidence presented showed a triable issue of fact as to the action of the union being ministerial or procedural, summary judgment could not be granted, and if the evidence presented showed a triable

*The Union further argues that the plaintiff enmeshed the federal courts in her labor dispute before the Union had exhausted the contractual remedies. This completely flies in the face of the facts that plaintiff initiated her action in the state court, solely on state court causes of action and left to the Union the pursuit of her federal causes of action when the Union assured her that it was in fact progressing her claims of discrimination under the collective bargaining agreement. It was the defendants that brought plaintiffs into the Federal Courts over the plaintiffs objections. It was only after the Union failed to fairly represent her, and the arbitration process had terminated that she amended her complaint to spell out her federal causes of action (DEN 1 and DEN 38). See Woolley v. Eastern Airlines,250 F2 86 (CA Fla 1957); cert. denied 356 U.S. 931.

issue of fact that the union made a judgmental call for a bad motive, or in bad faith, or arbitrarily, summary judgment should also not be granted.

In Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151, at 164 n. 14, 103 S. Ct. at 2290 n. 14 the Supreme Court stated:

> "The duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative. In such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the duty of the representative organization to "serve the interests of all members without hostility or discrimination toward any, to exercise it discretion with complete good faith and honesty, and to avoid arbitrary conduct."

In Peterson, supra, at 1253 this court stated:

> "Whether in a particular case a union's conduct is "negligent", and therefore nonactionable, or so egregious as to be "arbitrary", and hence sufficient to give rise to a breach of duty claim, is a question that is not always easily answered. A union acts "arbitrarily" when it simply ignores a meritorious grievance or handles it in a perfunctory manner, see Vaca v. Sipes, 386 U.S. at 191, 87 S.Ct. at 917, for example, by failing to conduct a "minimal investigation" of a grievance that is brought to its attention. See Tenorio v. National Labor Relations Board, 680 F.2d 598, 601 (9th Cir. 1982). We have said that a union's conduct is "arbitrary" if it is "without rational basis," see Gregg v. Chauffeurs, Teamsters and Helpers Union Local 150, 699 F.2d 1015, 1016 (9th Cir. 1983), or is "egregious, unfair and unre-

lated to legitimate union interests." See Johnson v. United States Postal Service, 756 F.2d 1461, 1465 (9th Cir.1985). In Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1089-90 (9th Cir.1978), we held that a union's unintentional mistake is "arbitrary " if it reflects a "reckless disregard" for the rights of the individual employee, but not if it represents only "simple negligence violating the tort standard of due care." In Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1274 (9th Cir.1983), we concluded that unintentional union conduct may constitute a breach of the duty of fair representation in situations where "the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim."

There are some significant general principles that emerge from our previous decisions. In all cases in which we found a breach of the duty of fair representation based on a union's arbitrary conduct, it is clear that the union failed to perform a procedural or ministerial act, that the act in question did not require the exercise of judgment and there was no rational and proper basis for the union's conduct. For example, we found a union acted arbitrarily where it failed to: (1) disclose to an employee its decision not to submit her grievance to arbitration when the employee was attempting to determine whether to accept or reject a settlement offer from her employer, see Robesky, 573 F.2d at 1091; (2) file a timely grievance after it had decided that the grievance was meritorious and should be filed, see Dutrisac, 749 F2d at 1274; (3) consider individually the grievances of particular employees where the factual and legal differences among them were significant, see Gregg, 699 F.2d at 1016; or (4) permit employees to explain the events which led to their discharge before deciding not to submit their grievances to arbitration. See Tenorio, 680 F.2d at 601)."

In Castanedo v. Dura-Vent Corp. 648 F. 2d 612 (9thCir. 1980) this court stated at 618:

> "After reviewing the record, we agree with the district court that appellants have not made a showing that they exhausted the contractual grievance procedures. However, appellants really do not contend to the contrary. They contend that their efforts to obtain the Union's assistance in processing their grievances were repeatedly ignored and, because of the lack of Union support, many employees were fearful of retaliatory discharges if they complained. Their main thrust on appeal is that the Union breached its duty of fair representation in handling and processing their grievances. And, as to this issue, we agree with the appellants that summary judgment was not appropriate."

In the instant matter, the union did not do the simple act of calling up the plaintiffs attorney to find out what her beef was, or to let the arbitrator know that as to Sieu Mei's claim her seniority date preceded March 16, 1963, so that tne decline in business provision of the contract did not apply to her, or when learning that she had not been reemployed initiating a claim on her behalf for retaliatory discrimination. There was a complete failure by the union to act, without any judgment on its part not to act, so that its conduct was completely arbitrary causing plaintiff to loose the benefits earned after twenty three plus years of service to her employer and twenty three plus years of membership and paying dues to her union.

III

THE ATSF DEFENDANTS

(A) THE LOWER COURT CONTRARY TO LAW DISMISSED DEFENDANTS ATCHISON, TOPEKA, SANTA FE RAILROAD COMPANY AND SANTA FE SOUTHERN PACIFIC CORP. UNDER RULE 4 (j) RULES OF FEDERAL PROCEDURE

The docket of the instant matter (ER* 1150) demonstrates the following time sequence:

March 20, 1987 (DEN 1) case removed to Federal Court
October 15, 1987 Summons issued
July 20, 1987 (DEN 16) Plaintiff moves to remand to state court
October 9, 1987 (DEN 24) Motion to remand denied
October 15, 1897 Summons issued
November 2, 1987, (DEN Exhibits A and B) copies of the Summons and Complaint mailed to ATSF* defendants
December 8, 1987, (DEN 40 Exhibits A and B) Defendants ATSF acknowledge receipt of Summons and Complaint
December 24, 1987 (DEN 25) Answer filed by Atchison, Topeka, Santa Fe Railroad Company and Santa Fe Southern Pacific Corp.(ATSF)
April 29, 1988 (DEN 28) First Amended Complaint filed and served by mail on ATSF.
May 19, 1988 (DEN 39) ATSF Motion to Dismiss Complaint
June 30, 1988 (DEN 51) Motion granted

Thereafter all Plaintiffs pleadings were served on ATSF by service by mail to their attorneys of record, pursuant to Rule 5. No motion was ever made by ATSF to dismiss the First Amended Complaint or the Second Amended Complaint.

(B) THE FIRST AMENDED COMPLAINT WAS PROPERLY SERVED ON THE ATSF DEFENDANTS

The First Amended Complaint was served on the ATSF Defendants by mail pursuant to Rule 5 (b) on April 29, 1988. The order of the court of June 30, 1988, does not dismiss these defendants on the First Amended Complaint. Therefore these defendants remained of record in the matter not withstanding the court order of June 30, 1988.

(C) THE TRIAL COURT SPECIFICALLY GRANTED PLAINTIFFS LEAVE TO FILE A FIRST AMENDED COMPLAINT

The trial court by its order of April 6, 1988, specifically authorized leave for Plaintiffs to amend and file its amended complaint. The order (DEN 36) specifically states:

> "Defendants motion to dismiss is GRANTED; plaintiffs are GRANTED leave to amend the complaint to state a federal cause of action; amendment must be filed with 30 days."

Thus defendants argument that amendment was made without leave of court is without merit. These defendants chose not to move for dismissal of the First Amended Complaint under Rule 4(j) which would have been a frivolous act since the First Amended Complaint had been properly served, but limited their motion only to dismissal of the original complaint, at a time (May 19, 1988 DEN 39) when the original complaint had already been dismissed (April 6, 1988 DEN 35), and a First Amended Complaint been served and filed (April 29, 1988 DEN 38).

(D) IT WAS ABUSE OF DISCRETION TO APPLY RULE 4 (J)

When a named party defendant answers the complaint voluntarily, service of summons is an idle act which the law abhors. An answer is a authorized pleading (Rule 7). Here also service was effected on two defendants, Southern Pacific Transportation Company and Pacific Fruit Express (SP), before removal. The 1988 Practice Commentary C-4-35 points out that in removed cases the Rule 4 120 day provision does not apply but Rule 81 (c), would be applicable, requiring a defendant to plead 20 days after the receipt of a copy of the initial complaint. ATSF was mailed a copy of the original complaint on November 2, 1987 and accepted service on December 8, 1987 (DEN 40 Exhibits A and B; DEN 45 page 8 lines 11-14). Defendants ATSF accepted service of the complaint and answered without raising any issue of 120 day service, evidencing lack of prejudice to these defendants, and waiver of the issue of the application of Rule 4 (j).

(E) IF RULE 4 (j) WERE POSSIBLY APPLICABLE THE LOWER COURT SHOULD NOT HAVE APPLIED 4(j) AS PLAINTIFFS SHOWED GOOD CAUSE AND/OR UNDER Rule 6 (b)(2) EXCUSABLE NEGLECT. TO HAVE DISMISSED WAS AN ABUSE OF DISCRETION

Rule 4(j) provides in its pertinent parts:

> "If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice...." (emphasis added).

Rule 6(b)(2) provides:

> When by these rules... an act is required... within a specified time, the court for cause shown may at any time in its discretion... permit the act to be done where the failure to act was the result of excusable neglect...."

Here the action originated in the State Court. (DEN 1) The removal to the Federal Court was not proper. Plaintiffs had filed in the state court, a complaint which they believed was a well pled complaint of actions all triable in the state court, and not necessarily implicating the collective bargaining agreement. At the time of that filing, the statute of limitations for action by the Union had not expired, Plaintiffs were told by Defendants that Union was pursuing Plaintiff Sieu Mei Tu's claims under the collective bargaining agreement, so Plaintiff had good cause to believe that it was not necessary for her to pursue her collective bargaining rights in the Federal system, but recognized that as to her state law causes of action it was necessary to move forward with the filing of her complaint. Furthermore Defendants SP, subsidiaries of Defendants ATSF, through their counsel, requested Plaintiffs not to serve the other defendants inorder to facilitate early settlement of this matter (DEN 45 attached declaration).

Pursuit of the objective of settlement rather

than trial appeared to Plaintiffs to be a worthy objective. Plaintiffs' reliance on such a representation was good cause for not serving the other defendants. When it became apparent that there would be no good faith meaningful settlement discussions, and the case would not be remanded to the state court Plaintiffs served the other defendants.

Until the lower court ruled that the matter was properly removed to the Federal Court Plaintiff had good cause to believe that the matter would be remanded to the State Court, and thus good cause to believe that Rule 4(j) would be inapplicable to this action.

Since California permits the service of summons within three years of issuance (CCP 583.210) Rule 4(j) was not applicable under the holding of Russo v. Prudential Ins. Co., 116 FRD 10, (E.D. Pa., 1986).

A defendant may waive and be estopped any application of Rule 4(j). See United States v. Gluklick, 801 F2d 834 (CA6 1986). In this proceeding ATSF answered the complaint without raising the Rule 4(j) objection thus waiving any procedural issue.

At the time of the filing of the original complaint all non rail activities of the railroad defendants were merged into ATSF (Kraus v. Santa Fe Southern Pacific Corp, 878 F2d 1193 at 1195 (9th Cir. 1989) so that SP'S request not to serve the other defendants was in fact the request of ATSF.

The lower court abused its discretion by dismissing ATSF defendants under the circumstances.

Defendants argument that the filing of an amended complaint can not overcome the effect of a Rule 4(j) dismissal (Brief of Defendants/Appellees Atchison, Topeka and Santa Fe Railway Co. and Santa Fe Southern Corp page 17) completely ignores that the rule itself provides that a dismissal pursuant to its terms is without prejudice.

(F) THE ICC DETERMINED THAT IT HAD NO JURISDICTION TO IMPOSE EMPLOYEE PROTECTION PROVISIONS TO THE SUBJECT MERGER, BECAUSE THEIR JURISDICTION ONLY EXISTED IF THEY APPROVED THE MERGER, AND HERE THEY DENIED THE MERGER

Excerpt of Record 1126 is the ICC decision concerning the imposition of Employee Protection Provisions to the subject merger. It specifically states:

> "Based upon the comments and replies filed and upon further consideration, we conclude that we do not have authority to impose labor protection as a condition to our action disapproving a merger proposal. Section 11347 speaks in terms of approved transactions....
> Persons injured by a carrier violating the Act or an order of the Commission may file suit, and the carrier is liable for the damages sustained as a result of those violations. 49 U.S.C. 11705."

Thus defendants argument that plaintiffs' conspiracy claim must first be decided by the ICC (Brief of ATSF page 18-21) is without merit. This Court in Kraus, supra has ruled that a injured plaintiff can pursue their state court cause of action for interference with advantageous relationship even though the ICC had not determined the application of 49 USCA

§10101 et seq. This court held that 49 USCA 10101 et seq. does not preempt state law claims.

Plaintiffs' conspiracy claim is a state law cause of action which plaintiff is entitled to pursue pursuant to Kraus, supra and is not pre empted by the ICA.

(G) THE TRIAL COURTS ORDER OF JUNE 30, 1988, IN SO FAR AS IT DEALS WITH THE DISMISSAL OF DEFENDANTS SANTA FE AND RAILROAD FROM ALL CAUSES OF ACTION (DEN 51 PAGE 4 PARAGRAPH 6) MAKES REFERENCE ONLY TO PLAINTIFFS COMPLAINT AND ITS SERVICE. IT DOES NOT ADDRESS THE FACT THAT A FIRST AMENDED COMPLAINT HAD BEEN SERVED AND FILED

The trial courts order of June 30, 1988, in so far as it dealt with the dismissal of the ATSF defendants from all causes of action makes reference only to Plaintiffs' complaint and its service, but did not address the fact that a First Amended Complaint had been served and filed, after the original complaint had been dismissed on grounds other than the application of Rule 4 (j) and before Defendants motion to dismiss the complaint (not the First Amended Complaint) under Rule 4(j). (DEN 51 page 4 paragraph 6).

(H) DEFENDANTS REQUEST FOR SANCTIONS IS UNSUPPORTED BY THE RECORD

Defendants request for sanctions based upon a charge of frivolous appeal, misstatement of record and vexatiously multiplying these proceedings is totally unsupported by the record. The record is scrupulously documented in Plaintiffs brief (page 11) as to what transpired (ER 251). at the cited hearing.

The appeal is meritorious and necessary so as to achieve justice for an injured person, who has been wronged by each of the defendants.

IV

CONCLUSION

It is respectfully submitted that applying the required standard on appeal that all possible inferences from the record must be drawn in favor of the non-moving party (Gee v. Tenneco, Inc., 615 F.2d 857, 859 (9th Cir.1980); Dolphin Tours v. Pacific Creative Services, 773 F.2d 1506, 1509 (9th Cir.1985) considering all of the declarations, pleadings, depositions, admissions, answers to interrogatories it is shown that there are genuine issues for trial and summary judgment should not have been granted as to any defendant nor should plaintiffs state causes of action have been dismissed. This matter should be remanded for trial to the state court, and if not there to the District Court.

The SP defendants and the ATSF defendants for the clear purpose of avoiding their responsibilities to their employees and the Unions stubborn failure to look at Plaintiffs individual rights, have caused plaintiff great harm. Equity cries out that Sieu Mei Tu be treated justly.

August 6, 1990

Respectfully submitted,
LEE J. KUBBY, INC.
A Professional Corporation

Attorney for Plaintiffs
SIEU MEI TU AND JOSEPH Z. TU

DECLARATION OF SERVICE BY MAIL

I, Lee J. Kubby, say and declare:

I am a citizen of the United States, over eighteen years of age, and not a party to the within action. My business address is BOX 60267, Palo Alto, California 94306. I am an attorney at law licensed by the State of California. That on August 6, 1990, I served TWO (2) copies of the attached:

APPELLANTS ANSWERING/REPLY BRIEF

via United States First Class Mail on the following parties of record:

PATRICK W. JORDAN
WAYNE M. BOLIO
McLAUGHLIN AND IRVIN
ROBERT S. BOGASON
111 Pine Street, Suite 1200
San Francisco, CA 9411-5109
(415) 433-6330

James A. Bowles
445 South Figueroa Street
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(213) 620-0460

James M. Darby
Kathleen S. King, Esq.
Henning, Walsh & King
TCIU
3 Research Place
Rockville, MD. 20850
(415) 981-4400

and by then sealing said envelope and depositing same into the United States mail, postage fully prepaid.

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

Executed on AUGUST 6, 1990 at Palo Alto, California.

LEE J. KUBBY

38372

MAYER, BROWN & PLATT

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NEW YORK
HOUSTON
LOS ANGELES
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TELEX 892603
FACSIMILE:
202-861-0473

ERIKA Z. JONES
202-778-0642

September 1, 1992

By Hand

The Honorable Sidney L. Strickland
Secretary
Interstate Commerce Commission
12th Street and Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 30400 (Sub-No. 21),
Santa Fe Southern Pacific Corporation --
Control -- Southern Pacific Transportation Company

Dear Secretary Strickland:

38372

Enclosed please find, for filing with the Commission, the originals and eleven copies of (i) the Responses and Objections of Santa Fe Pacific Corporation to Request for Production of Documents of BMWE and IAMAW and (ii) Santa Fe Pacific Corporation's First Set of Interrogatories and Informal Requests for Production of Documents Addressed to BMWE and IAMAW in the above-referenced matter. Please time and date stamp one copy of each and return it to our messenger.

38373

Please call me if you have any questions regarding the enclosed materials. Thank you for your assistance.

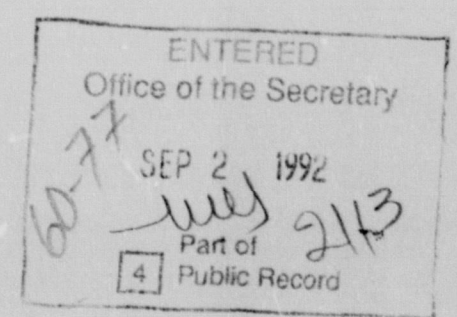
Sincerely yours,

Erika Z Jones/dds

Erika Z. Jones
Counsel for Santa Fe Pacific
Corporation

Enclosures

cc: Honorable Paul S. Cross
Donald F. Griffin, Esq.



BEFORE THE
INTERSTATE COMMERCE COMMISSION

38372

FINANCE DOCKET NO. 30400 (SUB-NO. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

RESPONSES AND OBJECTIONS OF SANTA FE PACIFIC CORPORATION TO REQUEST FOR PRODUCTION OF DOCUMENTS OF BMWE and IAMAW

G. Paul Moates
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DATED: September 1, 1992

BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 30400 (SUB-NO. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

RESPONSES AND OBJECTIONS OF
SANTA FE PACIFIC CORPORATION TO REQUEST
FOR PRODUCTION OF DOCUMENTS OF BMWE AND IAMAW

Pursuant to the Commission's Rules of Practice (49 C.F.R. § 1114), Santa Fe Pacific Corporation (formerly Santa Fe Southern Pacific Corporation) ("SFP") hereby submits the following responses and objections to the "Request for Production of Documents," dated July 27, 1992, filed by the Brotherhood of Maintenance of Way Employes ("BMWE") and the International Association of Machinists and Aerospace Workers ("IAMAW") (jointly referred to herein as "BMWE/IAMAW").

GENERAL OBJECTIONS

SFP hereby incorporates by reference, as if fully set forth herein, each of the General Objections set forth in the Responses and Objections of Santa Fe Pacific Corporation to BMWE/IAMAW's Interrogatories, filed August 17, 1992.

RESPONSES AND OBJECTIONS TO SPECIFIC DOCUMENT REQUESTS

Document Request No. 1

Produce each document identified in response to Interrogatory Number 2.

Response to Document Request No. 1

See Response to Interrogatory No. 2.

Document Request No. 2

Produce each document identified in response to Interrogatory Number 4.

Response to Document Request No. 2

See Response to Interrogatory No. 4.

Document Request No. 3

Produce each document identified in response to Interrogatory Number 6.

Response to Document Request No. 3

See Response to Interrogatory No. 6.

Document Request No. 4

Produce each document identified in response to Interrogatory Number 7.

Response to Document Request No. 4

See Response to Interrogatory No. 7.

Document Request No. 5

Produce each document identified in response to Interrogatory Number 8.

Response to Document Request No. 5

See Response to Interrogatory No. 8.

Document Request No. 6

Produce each document identified in response to Interrogatory Number 10.

Response to Document Request No. 6

See Response to Interrogatory No. 10.

Document Request No. 7

Produce each document identified in response to Interrogatory Number 11.

Response to Document Request No. 7

See Response to Interrogatory No. 11.

Document Request No. 8

Produce each document identified in response to Interrogatory Number 13.

Response to Document Request No. 8

See Response to Interrogatory No. 13.

Document Request No. 9

Produce each document identified in response to Interrogatory Number 15.

Response to Document Request No. 9

SFP objects to this Document Request to the extent that it seeks the production of documents relating to other than SPT employees in SPT's maintenance of way or maintenance of equipment departments on the ground that it seeks the production of documents irrelevant to any matter properly at issue in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence. Subject to this objection, see Response to Interrogatory No. 15.

Document Request No. 10

Produce each document identified in response to Interrogatory Number 16.

Response to Document Request No. 10

SFP objects to this Document Request to the extent that it seeks the production of documents relating to other than SPT employees in SPT's maintenance of way or maintenance of equipment departments on the ground that it seeks the production of documents irrelevant to any matter properly at issue in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence. Subject to this objection, see Response to Interrogatory No. 16.

Document Request No. 11

Produce each document identified in response to Interrogatory Number 20.

Response to Document Request No. 11

See Response to Interrogatory No. 20.

Document Request No. 12

Produce each document presented to the ICC's Office of Compliance and Consumer Assistance in response to the investigation referenced in the decision in Santa Fe Southern Pacific Corp.--Control--Southern Pacific Trans. Co., Finance Docket No. 30400, served February 27, 1987 (not published).

Response to Document Request No. 12

Relevant, non-privileged documents responsive to this document request will be made available to BMWE/IAMAW's counsel for review

pursuant to the terms and conditions of the proposed Protective Order and by special arrangement with SFP's counsel.

Respectfully submitted,

Erika Z. Jones/cls

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Of Counsel

Attorneys for Santa Fe Pacific Corporation

DATED: September 1, 1992

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of September, 1992, I served the foregoing "Responses and Objections of Santa Fe Pacific Corporation to BMWE/IAMAW's Request for Production of Documents" by causing a copy thereof to be delivered to each of the following in the manner indicated:

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Donald F. Griffin
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Washington, D.C. 20036
(By Messenger)

John MacDonald Smith
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819 Southern Pacific Building
One Market Plaza
San Francisco, California 94105
(By Federal Express)

Charles Kong
1017 Brown Street
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(By First-Class Mail)

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Sunnyvale, California 94086-0485
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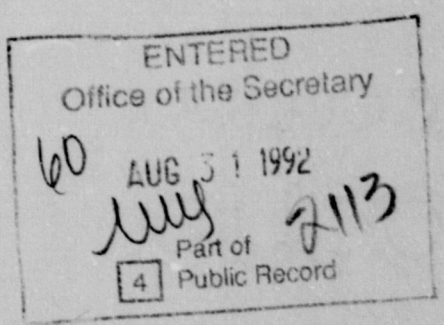
38371

BEFORE THE
INTERSTATE COMMERCE COMMISSION

SANTA FE SOUTHERN PACIFIC CORPORATION--CONTROL--SOUTHERN PACIFIC TRANSPORTATION COMPANY	:	Finance Docket No. 30400 (Sub-No. 21)

REPLY OF BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS TO MOTION BY SANTA FE PACIFIC CORPORATION FOR ENTRY OF A PROTECTIVE ORDER



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Attorneys for Brotherhood of Maintenance of Way Employes and International Association of Machinists and Aerospace Workers

Dated: August 28, 1992

BEFORE THE
INTERSTATE COMMERCE COMMISSION

SANTA FE SOUTHERN PACIFIC CORPORATION--CONTROL--SOUTHERN PACIFIC TRANSPORTATION COMPANY	:	Finance Docket No. 30400 (Sub-No. 21)

REPLY OF BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS TO MOTION BY SANTA FE PACIFIC CORPORATION FOR ENTRY OF A PROTECTIVE ORDER

The Brotherhood of Maintenance of Way Employes and International Association of Machinists and Aerospace Workers ("BMWE/IAMAW") respectfully submit the following reply to the motion for protective order filed with the Commission by the Santa Fe Pacific Corporation ("SFP")[1/] on August 27, 1992. BMWE/IAMAW concurs with SFP that the only contested issue regarding the proposed protective order is whether confidential information obtained by BMWE/IAMAW during discovery in this proceeding may be used by present or former members of those organizations in claim or arbitration proceedings to enforce or apply any employee protective conditions that the Commission may impose in this proceeding. For the reasons set forth below, BMWE/IAMAW submit that such a use of discovery is proper, provided, of course, that such employees agree to be bound by the terms of the protective order.

1/ SFP is the successor to the Santa Fe Southern Pacific Corporation ("SFSP").

In Ry. Labor Executives' Ass'n v. I.C.C., 958 F.2d 252, 258 (9th Cir. 1992), the court remanded this proceeding to the Commission in order to determine if, as a matter of Commission discretion, employee protective conditions should be imposed as a condition of the Commission's oversight of the above captioned proceeding. Subsequently, in a decision and order served June 18, 1992, the Commission reopened this proceeding in order "to give SPT [Southern Pacific Transportation Company] employees (as a class) an opportunity to demonstrate that they were adversely affected as a direct consequence of actions taken or orders issued by SFSP in contemplation of the proposed [Atchison, Topeka & Santa Fe Railway Company] ATSF-SPT merger." Santa Fe Southern Pacific Corp.--Control--Southern Pacific Trans. Co., ICC Finance Docket No. 30400 (Sub-No. 21), served June 18, 1992 (not published)("Reopening Decision").

BMWE/IAMAW interpret the Reopening Decision as requiring the organizations to come forward with evidence establishing an adverse affect upon the classes of employees which they represent in order for the Commission to impose employee protections. In other words, this proceeding is similar to those under former Section 1(18) of the Interstate Commerce Act ("ICA") where employee representatives were required to make some showing of potential adverse affect on employees in order to obtain discretionary employee protective conditions from the Commission. E.g., Seaboard-All Florida Ry. Receivers--Abandonment, 261 I.C.C. 334, 341 (1945). Since the Reopening Decision emphasizes that

the Commission's inquiry will be directed towards adverse affects caused by "actions taken or orders issued by SFSP", the pending document requests are relevant. Accordingly, BMWE/IAMAW submit that should these documents provide evidence relevant to this threshold proof of class-wide adverse affect, such documents also will be relevant to individual proofs of adverse affect in any subsequent claim and arbitration proceeding held to enforce and apply Commission imposed protective conditions.

Due to the interrelated nature of the proofs of class wide adverse affect and proofs of individual adverse affect, BMWE/IAMAW submit that it is both reasonable and just that present and former members of the organizations have access to this evidence for use in claim and arbitration proceedings to enforce and apply such conditions, provided that they are willing to abide by the terms of the protective order. Indeed, it would be ironic if the documents to be obtained in discovery are of sufficient probative value as to convince the Commission that discretionary employee protection conditions are warranted, yet the documents subsequently would be unavailable to the employees to help establish their claim to protective benefits.

In response to BMWE/IAMAW's proposed language, SFP has raised a number of objections.[2/] SFP presents three basic

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2/ SFP also contends that the proposed language by BMWE/IAMAW is overbroad because it arguably includes employees of ATSF. SFP Motion at 7, n.9. While BMWE/IAMAW submit that the scope of the remand order in RLEA v. ICC, does not exclude a consideration of the interests of ATSF employee in a remand proceeding, the

(continued...)

objections to BMWE/IAMAW's proposed language thus: (1) the proposal undermines the purpose of the protective order; (2) the proposal is premature; and (3) the proposal is inconsistent with standard employee protective claim arbitration procedures. These objections are unconvincing because they fail to acknowledge the unique character of this proceeding.

SFP believes that the BMWE/IAMAW proposal would undermine the purpose of the protective order because it would expand the potential number of individuals with access to documents SFP has unilaterally deemed "confidential". SFP Motion at 8. However, as the SFP acknowledges, the protective order is designed to give persons with a "genuine need" for information the opportunity to review while at the same time guarding SFP's interest in confidentiality. Id. Given the manner in which the Commission has focused the inquiry in this proceeding, it is extremely likely that the documents produced under this protective order will be relevant to the proof any class-wide adverse affect. Therefore, if protective conditions are imposed, the present and former members of BMWE/IAMAW will have a "genuine need" for these documents in order to prove their individual adverse affect. Moreover, BMWE/IAMAW never has objected to each individual being bound by the terms of the protective order before the documents are produced and SFP's contentions that the individuals will disregard the terms of that order is sheer speculation.

2/(...continued)
scope of the remanded proceeding need not be resolved here.

The second objection raised by SFP is that any expansion of the list of persons eligible to see the documents is premature because the Commission can modify the order after protective conditions are imposed. SFP Motion at 9. This contention does not adequately address why the present BMWE/IAMAW proposal is unreasonable. At this point, the interests of present and former members of BMWE/IAMAW are being represented on a class-wide basis and adoption of the proposed language similarly will resolve this dispute on a class-wide basis. Adoption of SFP's argument that the protective order may be changed on a case by case basis following the imposition of employee protective conditions, places a burden upon each claimant to negotiate any such changes with SFP and greatly increases the complexity and cost of any claimant's attempt to obtain protective benefits.[3/]

Finally, SFP contends that under the standard New York Dock Conditions,[4/] claimants cannot use discovery materials obtained during the pendency of the proceeding to which the protective conditions were imposed. SFP Motion at 10. However, under standard New York Dock Conditions claims and arbitrations, employees usually present claims after the carrier has

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3/ Moreover, should the Commission decline to impose any protective benefits, the BMWE/IAMAW proposal would become moot because there would be no subsequent claims or arbitrations to enforce and apply protective conditions.

4/ The employee protective conditions imposed in New York Dock Ry.--Control--Brooklyn Eastern Dist. Term., 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Ry. v. U.S., 609 F.2d 83 (2d Cir. 1979).

acknowledged that a particular "transaction" is subject to the protective conditions. See, New York Dock Conditions, Art. I, Sec. 4. Moreover, under the New York Dock Conditions once an employee has identified the "transaction" which he claims affected him adversely, it then is "the railroad's burden to prove that factors other that a transaction affected the employee." New York Dock Conditions, Art. I, Sec. 11(e). Here, the scope of the protective conditions and how they will be applied procedurally has yet to be determined, (Reopening Decision at 3-4), therefore SFP's reliance on standard New York Dock Conditions claim and arbitration procedures for its opposition to BMWE/IAMAW's proposed protective order language is unavailing.

In sum, BMWE/IAMAW seeks to ensure that if it prevails in convincing the Commission to impose employee protective conditions in this proceeding, relevant information obtained by those organizations will be readily available to their present and former members in any subsequent claim and arbitration proceedings where those protective conditions will be enforced and applied. SFP's proposed order, by contrast, would unduly restrict and complicate this proceeding and has the potential to deprive potential claimants of the information necessary to prove their claims. Since the purpose of Commission imposed protective conditions is remedial and in the public interest, (U.S. v. Lowden, 308 U.S. 225, 238 (1939)), the procedures used to enable employees to establish eligibility for such protections should

not be applied in a way that complicates the process. Accordingly, BMWE/IAMAW respectfully requests that the Commission adopt the proffered protective order with their proposed changes.

Respectfully submitted,

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(202) 296-8500

Attorneys for BMWE and IAMAW

Dated: August 28, 1992

CERTIFICATE OF SERVICE

I hereby certify that today I served copies of the foregoing upon the following by hand delivery to:

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Washington, DC 20006

Kathryn A. Kusske, Esq.
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and by overnight delivery to:

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Donald F. Griffin

Dated: August 28, 1992

38369

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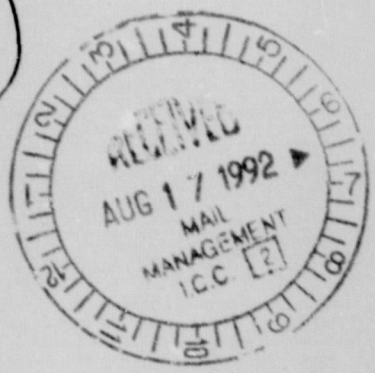


August 17, 1992

BY MESSENGER

Sidney L. Strickland, Jr.
Secretary
Interstate Commerce Commission
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 30400 (Sub-No. 21), Santa Fe Southern Pacific Corp. -- Control -- Southern Pacific Transportation Co.

Dear Mr. Strickland:

Enclosed for filing on behalf of Santa Fe Pacific Corporation in the above-referenced proceeding are a signed original and 11 copies of "Responses and Objections of Santa Fe Pacific Corporation to Interrogatories of BMWE and IAMAW."

Please acknowledge receipt of these papers for filing by date-stamping the enclosed duplicate copy and returning it with our messenger. Thank you for your attention to this matter.

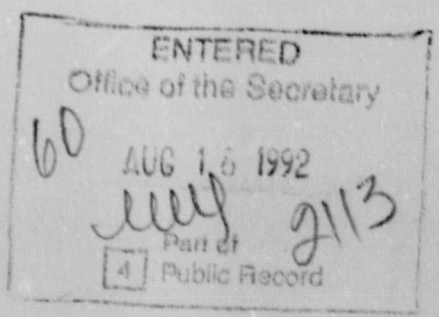
Very truly yours,

Vincent F. Prada

G. Paul Moates
Vincent F. Prada

Enclosures

cc: Honorable Paul S. Cross (w/encls.)
Donald F. Griffin (w/encls.)

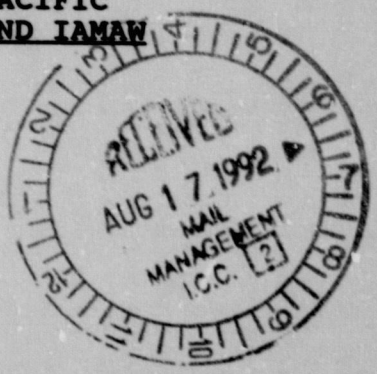


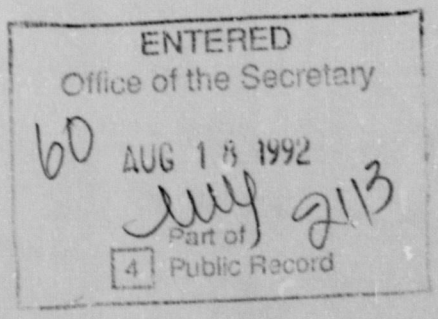
BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 30400 (SUB-NO. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

RESPONSES AND OBJECTIONS OF SANTA FE PACIFIC CORPORATION TO INTERROGATORIES OF BMWE AND IAMAW





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Of Counsel

Attorneys for Santa Fe Pacific Corporation

DATED: August 17, 1992

BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 30400 (SUB-NO. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION --
CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

RESPONSES AND OBJECTIONS OF SANTA FE PACIFIC CORPORATION TO INTERROGATORIES OF BMWE AND IAMAW

Pursuant to the Commission's Rules of Practice (49 C.F.R. § 1114.26), Santa Fe Pacific Corporation (formerly Santa Fe Southern Pacific Corporation) ("SFP") hereby submits the following responses and objections to the "Interrogatories," dated July 24, 1992, served on SFP by the Brotherhood of Maintenance of Way Employes ("BMWE") and the International Association of Machinists and Aerospace Workers ("IAMAW") (jointly referred to herein as "BMWE/IAMAW").

GENERAL OBJECTIONS

The following general objections are asserted as to each interrogatory propounded by BMWE/IAMAW and are incorporated by reference in the responses to each interrogatory below. The fact that SFP answers all or part of any interrogatory is not intended to, and shall not be construed to be, a waiver of any general or specific objection made by SFP to any interrogatory.

1. SFP objects to BMWE/IAMAW's Interrogatories on the ground that neither BMWE nor IAMAW has properly made itself a

party to this proceeding, which was recently reopened by the Commission following the decision of the United States Court of Appeals for the Ninth Circuit in Railway Labor Executives' Association v. ICC, 958 F.2d 252 (9th Cir. 1992). Neither union was a party to the Commission's prior proceedings in this sub-docket or the Ninth Circuit judicial review proceedings that followed. Indeed, neither union participated as a party in either the SFSP[1] or Rio Grande[2] rail consolidation proceedings, in which the labor-protection issues now before the Commission were first raised. Having failed to establish party status in these prior proceedings, BMWE and IAMAW are not proper parties in this limited reopening.[3]

Without waiving this objection to the right of BMWE and IAMAW to participate in this reopened proceeding, and subject to other objections, SFP will respond to BMWE/IAMAW's Interrogatories.

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[1] Finance Docket No. 30400, Santa Fe Southern Pacific Corp. -- Control -- Southern Pacific Transportation Co., 2 I.C.C.2d 709 (1986), reconsideration denied, 3 I.C.C.2d 926 (1987).

[2] Finance Docket No. 32000, Rio Grande Industries, Inc. -- Control -- Southern Pacific Transportation Co., 4 I.C.C.2d 834 (1988), aff'd sub nom. Kansas City Industries, Inc. v. United States, 902 F.2d 423 (5th Cir. 1990).

[3] The membership of IAMAW and BMWE in the Railway Labor Executives' Association ("RLEA"), a trade association which did participate in these prior Commission proceedings and in the judicial review proceedings in the Ninth Circuit, is not sufficient to confer party status on the individual unions. See, e.g., Alabama Power Co. v. ICC, 852 F.2d 1361, 1368 (D.C. Cir. 1988).

2. SFP objects to BMWE/IAMAW's Interrogatories on the ground that, even if BMWE and IAMAW were regarded as proper parties to this proceeding by virtue of their membership in RLEA (a trade association that was a party to the Commission's prior proceedings in this docket and in the Ninth Circuit judicial review proceedings), BMWE/IAMAW's requests for discovery are untimely. In more than seven years of litigation, BMWE and IAMAW (through RLEA) have had every opportunity both to seek relevant discovery concerning their factual allegations that SPT employees were adversely affected by operating changes prematurely implemented in anticipation of Commission approval of the ATSF/SPT merger and to submit evidence supporting their request for labor protection conditions. Having slept on their rights for so long, BMWE and IAMAW should not be allowed at this late juncture to pursue the kind of wide-ranging discovery reflected in their Interrogatories.

Without waiving its objection that BMWE/IAMAW's Interrogatories are untimely, and subject to other objections, SFP will respond to BMWE/IAMAW's Interrogatories.

3. SFP objects to BMWE/IAMAW's Interrogatories insofar as they request SFP to provide responsive information on behalf of all corporate subsidiaries and affiliates of SFP, including ATSF (a wholly-owned subsidiary of SFP). ATSF is not now, and has never been, a party to this sub-docket proceeding.[4]

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[4] The Commission's order served September 27, 1988 initiating this sub-docket proceeding identified the parties and their (continued...)

Moreover, in its June 18, 1992 order reopening this proceeding, the Commission stated (at 3) that the limited purpose of the reopening was to receive "specific evidence from the parties with respect to those actions or orders issued by SFSP which may have affected SPT operations and work-related assignments" (emphasis supplied). The Commission also made clear (at 2) that the jurisdictional basis for its consideration of these issues was its reservation of jurisdiction over the terms of the SPT voting trust, to which ATSF was not a party. Actions taken or omitted by ATSF thus are not at issue in this proceeding, and information concerning ATSF is not relevant.

Without waiving its objection that ATSF is not a party to this proceeding and that information concerning ATSF is not relevant to the matters properly at issue in this proceeding, and subject to other objections, SFP will respond to BMWE/IAMAW's Interrogatories on behalf of ATSF.

4. SFP objects to BMWE/IAMAW's Interrogatories to the extent they seek documents and information for the time period prior to December 23, 1983 (the service date of the Commission's decision approving the SPT voting trust) or subsequent to August 4, 1987 (the service date of the Commission's order denying the SFSP Applicants' petition for reconsideration of the Commission's prior decision disapproving the proposed ATSF/SPT merger).

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[4](...continued)
representatives to include only SFSP (now SFP) and RLEA. ATSF was not identified as a party, and at no point participated in the Commission's proceedings.

BMWE/IAMAW's Interrogatories request information covering the entire time period from January 1, 1982 until October 13, 1988 (the date on which Rio Grande Industries, Inc. consummated its acquisition of SPT and on which the SPT voting trust was dissolved).

The time period covered by BMWE/IAMAW's Interrogatories is plainly overbroad. In its February 9, 1989 order in this proceeding, the Commission stated (at 3):

> This leaves only the question of what relief, if any, we may appropriately afford SPT employees for the adverse effects that can be shown to be causally related to actions ordered by SFSP to be taken by SPT management in anticipation of the consolidation of the ATSF and SPT under the control of SFSP. Such actions by definition could only have been ordered during the period SFSP had the power to control decisions of SPT and prior to disapproval of their application to control SPT, i.e., during the period December 23, 1983 to October 10, 1986 (emphasis supplied).

As the Commission recognized, the sole focus of this proceeding is on actions taken or orders issued by SFSP to SPT management during the period that SFSP arguably could have had power to control SPT's decisions.[5] This period commenced, at the earliest, with the Commission's approval of the SPT voting trust on December 23, 1983 and concluded, at the latest, with the Commission's August 4, 1987 decision denying the SFSP Applicants'

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[5] SFP, of course, vigorously disputes any suggestion that the SPT voting trust conferred on SFP power to control decisions of SPT. During the period of the voting trust, the power to control decisions of SPT management rested with SPT's independent board of directors, which was elected by the Voting Trustee through exercise of its authority to vote SPT's common stock. The purpose and effect of the voting trust was to insulate SPT from SFP control by transferring stock voting rights to an independent voting trustee.

petition for reconsideration of the Commission's October 10, 1986 order disapproving the proposed ATSF/SPT merger. Actions taken or omitted by SFSP prior to December 23, 1983 or subsequent to August 4, 1987 are beyond the scope of the issues raised by this reopened proceeding, and BMWE/IAMAW's requests for information related to such time periods are not reasonably calculated to lead to the discovery of admissible evidence.

Accordingly, SFP's responses are limited to information and documents relating to the time period from December 23, 1983 through August 4, 1987.

5. SFP objects to BMWE/IAMAW's Interrogatories insofar as they seek disclosure of information and documents protected against disclosure by the attorney-client privilege or by the attorney work product doctrine.

6. SFP objects to BMWE/IAMAW's Interrogatories insofar as they seek disclosure of proprietary or confidential business information of SFP. Without waiving this objection, SFP will agree to produce any proprietary or confidential information responsive to BMWE/IAMAW's Interrogatories pursuant to an appropriately framed Protective Order that safeguards the confidentiality and commercially sensitive nature of the requested information. SFP is working with counsel for BMWE/IAMAW to reach agreement on the terms of such a Protective Order and expects shortly to file a motion seeking entry of the Protective Order by the Commission.

RESPONSES AND OBJECTIONS TO SPECIFIC INTERROGATORIES

Interrogatory No. 1

Identify those persons at SFSP concerned with plans or proposals, communicated in any fashion, involving the utilization of maintenance of way employees on the combined SPT - ATSF system created by the proposed SPT - ATSF merger.

Response to Interrogatory No. 1

SFP objects to this Interrogatory because it is overbroad and unduly burdensome and because the information it seeks is irrelevant to any matter properly at issue in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving its objections, SFP responds to this Interrogatory as follows:

Pursuant to the express requirements of the Commission's Rail Consolidation Procedures (see 49 C.F.R. §§ 1180.6, 1180.8), SFP and the other Applicants in the SFSP proceeding conducted and submitted as part of their testimony in support of their merger application detailed studies identifying changes in railroad operations expected to result from implementation of the proposed ATSF/SPT merger and evaluating the impact of the proposed merger on affected rail carrier employees. SFP conservatively estimates that the SFP and ATSF personnel involved in these merger-impact analyses and other merger-related activities numbered in the hundreds, and included numerous individuals who are no longer employed by SFP or ATSF. Many (but not all) of the SFP and ATSF personnel involved in these activities either submitted verified statements on behalf of Applicants in the SFSP

proceeding or were qualified as members of the "Restricted Access Group" pursuant to the Protective Order served February 3, 1984 in the SFSP docket. The identities of these individuals can be ascertained from records publicly filed with the Commission in that docket. To the extent that other "persons at SFSP" were involved in these activities during the relevant time period (December 23, 1983 through August 4, 1987), BMWE/IAMAW can ascertain their identities from an inspection of the documents that SFP is making available in response to other Interrogatories.

Interrogatory No. 2

Identify those documents concerning the proposed utilization of maintenance of way employees on the merged SPT - ATSF system.

Response to Interrogatory No. 2

Relevant, non-privileged documents responsive to this Interrogatory will be made available to BMWE/IAMAW's counsel for review pursuant to the terms and conditions of the proposed Protective Order and by special arrangement with SFP's counsel.

Interrogatory No. 3

Identify those persons at SFSP concerned with plans or proposals, communicated in any fashion, involving the utilization of maintenance of equipment employees on the combined SPT - ATSF system created by the proposed SPT - ATSF merger.

Response to Interrogatory No. 3

See Response to Interrogatory No. 1.

Interrogatory No. 4

Identify those documents concerning the proposed utilization of maintenance of equipment employees on the merged SPT - ATSF system.

Response to Interrogatory No. 4

Relevant, non-privileged documents responsive to this Interrogatory will be made available to BMWE/IAMAW's counsel for review pursuant to the terms and conditions of the proposed Protective Order and by special arrangement with SFP's counsel.

Interrogatory No. 5

Identify those persons at SF&P concerned with plans or proposals, communicated in any fashion, involving the utilization of maintenance of equipment facilities on the combined SPT - ATSF system created by the proposed SPT - ATSF merger.

Response to Interrogatory No. 5

See Response to Interrogatory No. 1.

Interrogatory No. 6

Identify those documents concerning the proposed utilization of maintenance of equipment facilities on the merged SPT - ATSF system.

Response to Interrogatory No. 6

Relevant, non-privileged documents responsive to this Interrogatory will be made available to BMWE/IAMAW's counsel for review pursuant to the terms and conditions of the proposed Protective Order and by special arrangement with SFP's counsel.

Interrogatory No. 7

Identify those documents prepared by or for SFSP concerning staffing levels in the maintenance of way department on SPT.

Response to Interrogatory No. 7

Relevant, non-privileged documents responsive to this Interrogatory will be made available to BMWE/IAMAW's counsel for review pursuant to the terms and conditions of the proposed Protective Order and by special arrangement with SFP's counsel.

Interrogatory No. 8

Identify those documents prepared by or for SFSP concerning staffing levels in the maintenance of equipment department on SPT.

Response to Interrogatory No. 8

Relevant, non-privileged documents responsive to this Interrogatory will be made available to BMWE/IAMAW's counsel for review pursuant to the terms and conditions of the proposed Protective Order and by special arrangement with SFP's counsel.

Interrogatory No. 9

Identify those SPT locomotive and car repair facilities which SFSP intended to close or reduce operations at following ICC approval of the SPT - ATSF merger.

Response to Interrogatory No. 9

Proposed changes in the utilization of SPT locomotive and car repair facilities expected to result from implementation of the proposed ATSF/SPT merger were identified by the SFSP Applicants in the Operating Plan and testimony accompanying their

merger Application, and in their subsequent testimony in the SFSP proceeding. The Application and supporting testimony were filed with and are publicly available from the Commission. In addition, any other relevant, non-privileged documents containing information responsive to this Interrogatory will be made available to BMWE/IAMAW's counsel for review pursuant to the terms and conditions of the proposed Protective Order and by special arrangement with SFP's counsel.

Interrogatory No. 10

Identify those documents concerning the matters set forth in Interrogatory Number 9.

Response to Interrogatory No. 10

Relevant, non-privileged documents responsive to this Interrogatory will be made available to BMWE/IAMAW's counsel for review pursuant to the terms and conditions of the proposed Protective Order and by special arrangement with SFP's counsel.

Interrogatory No. 11

Identify those documents sent either by SFSP to SPT or by SPT to SFSP, regarding staffing levels in the maintenance of way department on SPT.

Response to Interrogatory No. 11

Relevant, non-privileged documents responsive to this Interrogatory will be made available to BMWE/IAMAW's counsel for review pursuant to the terms and conditions of the proposed Protective Order and by special arrangement with SFP's counsel.

Interrogatory No. 12

Identify any communication either by SFSP to SPT or by SPT to SFSP, regarding staffing levels in the maintenance of way department on SPT.

Response to Interrogatory No. 12

SFP objects to this Interrogatory because it is vague, overbroad and unduly burdensome. In particular, the term "communication" is vague and ambiguous. If that term is intended to embrace any oral conversation involving any of the hundreds or thousands of SFP, ATSF and SPT personnel involved in activities relating to the proposed ATSF/SPT merger, it is plainly overbroad and unduly burdensome, and it would be virtually impossible for SFP to respond to the Interrogatory. To the extent that the term "communications" is intended to refer to statements or information contained in documents, relevant, non-privileged documents responsive to this Interrogatory will be made available to BMWE/IAMAW's counsel for review pursuant to the terms and conditions of the proposed Protective Order and by special arrangement with SFP's counsel.

Interrogatory No. 13

Identify those documents either sent by SFSP to SPT or by SPT to SFSP, regarding staffing levels in the maintenance of equipment department considered desirable by SFSP.

Response to Interrogatory No. 13

Relevant, non-privileged documents responsive to this Interrogatory will be made available to BMWE/IAMAW's counsel for

review pursuant to the terms and conditions of the proposed Protective Order and by special arrangement with SFP's counsel.

Interrogatory No. 14

Identify any communication either by SFSP to SPT or by SPT to SFSP regarding staffing levels in the maintenance of equipment department considered desirable by SFSP.

Response to Interrogatory No. 14

See Response to Interrogatory No. 12.

Interrogatory No. 15

Identify any documents prepared by SFSP regarding the impact, implementation, effect, etc. of Interstate Commerce Act mandated employee protective conditions upon the SPT - ATSF merger.

Response to Interrogatory No. 15

Relevant, non-privileged documents responsive to this Interrogatory will be made available to BMWE/IAMAW's counsel for review pursuant to the terms and conditions of the proposed Protective Order and by special arrangement with SFP's counsel.

Interrogatory No. 16

Identify any documents either sent by SFSP to SPT or sent by SPT to SFSP, regarding the impact, implementation, effect, etc. of Interstate Commerce Act mandated employee protective conditions upon the SPT - ATSF merger.

Response to Interrogatory No. 16

Relevant, non-privileged documents responsive to this Interrogatory will be made available to BMWE/IAMAW's counsel for

review pursuant to the terms and conditions of the proposed Protective Order and by special arrangement with SFP's counsel.

Interrogatory No. 17

Identify any communication either by SFSP to SPT or by SPT to SFSP, regarding the impact, implementation, effect, etc. of Interstate Commerce Act mandated employee protective conditions upon the SPT - ATSF merger.

Response to Interrogatory No. 17

See Response to Interrogatory No. 12.

Interrogatory No. 18

Identify by date and location and reason for service, those locomotives owned or operated by SPT that were repaired, rebuilt or maintained at ATSF maintenance of equipment facilities.

Response to Interrogatory No. 18

SFP objects to this Interrogatory because the information that it seeks is irrelevant to any matter properly at issue in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence. As both ATSF and SPT have demonstrated in testimony filed in the SFSP proceeding and in the instant proceeding, railroads regularly and for a variety of lawful business reasons perform maintenance and repair work on locomotives of other rail carriers. See Verified Statement of John P. Frestel, Jr. and Kenneth R. Peifer (filed January 10, 1985 in SFSP) (SFSP-50), at 5-6; Reply Comments of Southern Pacific Transportation Company (filed November 17, 1988 in the instant proceeding), at 4-10. That ATSF may have performed

service on SPT locomotives thus has no bearing on the issues raised in this proceeding. Without waiving its objection, SFP responds to this Interrogatory as follows:

The information requested in this Interrogatory could be ascertained (if at all) only through an examination of locomotive maintenance records maintained by ATSF. Such records, which by corporate policy are retained only for a period of five years, are maintained at the particular ATSF locomotive shop facility at which specific maintenance or repair work was performed on a particular locomotive unit. During the relevant time period (December 23, 1983 through August 4, 1987), ATSF operated between 20 and 30 separate locomotive shop facilities. To the extent that ATSF locomotive maintenance records containing information responsive to this Interrogatory are still in existence for maintenance or repair work performed on SPT locomotives during the relevant time period, SFP is willing to grant BMWE/IAMAW's counsel reasonable access to these records by appointment during normal business hours at the offices where such records are maintained in the normal course of business.

Interrogatory No. 19

Identify by date, location and reason for service, that non-locomotive rolling stock owned or operated by SPT that was repaired, rebuilt or maintained at ATSF maintenance of equipment facilities.

Response to Interrogatory No. 19

SFP objects to this Interrogatory because the information that it seeks is irrelevant to any matter properly at issue in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence. Railroads regularly and for a variety of lawful business reasons perform maintenance and repair work on freight cars of other rail carriers. That ATSF may have performed service on SPT freight cars thus has no bearing on the issues raised in this proceeding. Without waiving its objection, SFP responds to this Interrogatory as follows:

The information requested in this Interrogatory could be ascertained (if at all) only through an examination of ATSF accounting records reflecting bills issued to foreign rail carriers (such as SPT) for maintenance or repair work performed by ATSF on freight cars owned by such foreign carriers. Such records, which by corporate policy are retained only for a period of five years, are maintained at ATSF's offices located in Topeka, Kansas. To the extent that ATSF's freight car maintenance billing records are still in existence for maintenance or repair work performed on SPT freight cars during the relevant time period (December 23, 1983 through August 4, 1987), SFP is willing to grant BMWE/IAMAW's counsel reasonable access to these records by appointment during normal business hours at ATSF's offices in Topeka, Kansas.

Interrogatory No. 20

Identify any documents either from SFSP to SPT or from SPT to SFSP, relating to the subject matter of Interrogatories Numbered 18 and 19, above.

Response to Interrogatory No. 20

Relevant, non-privileged documents responsive to this Interrogatory will be made available to BMWE/IAMAW's counsel for review pursuant to the terms and conditions of the proposed Protective Order and by special arrangement with SFP's counsel.

Interrogatory No. 21

Identify any communications either between SFSP and SPT or from SPT to SFSP, relating to the subject matter of Interrogatories Numbered 18 and 19, above.

Response to Interrogatory No. 21

See Response to Interrogatory No. 12.

Respectfully submitted,

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Of Counsel

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Attorneys for Santa Fe Pacific Corporation

DATED: August 17, 1992

COUNTY OF Cook)
) ss:
STATE OF ILLINOIS)

VERIFICATION

I, Guy Vitello, being duly sworn, do hereby depose and state that I am a General Attorney of The Atchison, Topeka and Santa Fe Railway Company; that my offices are located at 1700 East Golf Road, Schaumburg, Illinois 60173; and that I have read the foregoing responses to the "Interrogatories," dated July 24, 1992, filed by the Brotherhood of Maintenance of Way Employees and the International Association of Machinists and Aerospace Workers, and that such responses are true and correct to the best of my knowledge and information.

Guy Vitello
Guy Vitello

Subscribed and Sworn to
Before Me This 17th Day
of August, 1992.

Sherry L. Voelco
Notary Public

My Commission expires: February 6, 1994

"OFFICIAL SEAL"
Sherry Voelco
Notary Public, State of Illinois
My Commission Expires 2/6/94

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of August, 1992, I served the foregoing "Responses and Objections of Santa Fe Pacific Corporation to Interrogatories of BMWE and IAMAW" by causing a copy thereof to be delivered to each of the following in the manner indicated:

William G. Mahoney
Donald F. Griffin
Highsaw, Mahoney & Clarke, P.C.
1050 17th Street, N.W.
Suite 210
Washington, D.C. 20036
(By Messenger)

John MacDonald Smith
Southern Pacific Transportation Company
819 Southern Pacific Building
One Market Plaza
San Francisco, California 94105
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Charles Kong
1017 Brown Street
Bakersfield, California 93305
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Lee J. Kubby
Lee J. Kubby, Inc.
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Sunnyvale, California 94086-0485
(By First-Class Mail)

Vincent F. Prada

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BEFORE THE
INTERSTATE COMMERCE COMMISSION

SANTA FE SOUTHERN PACIFIC CORPORATION--CONTROL--
SOUTHERN PACIFIC TRANSPORTATION COMPANY

38358

Finance Docket No. 30400 (Sub-No. 21)

REPLY OF RAILWAY LABOR EXECUTIVES' ASSOCIATION

William G. Mahoney
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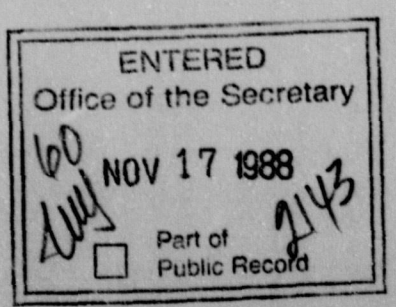
Attorneys for
Railway Labor Executives'
Association

November 17, 1988



BEFORE THE
INTERSTATE COMMERCE COMMISSION

SANTA FE SOUTHERN PACIFIC CORPORATION--CONTROL--
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Finance Docket No. 30400 (Sub-No. 21)

REPLY OF RAILWAY LABOR EXECUTIVES' ASSOCIATION

Pursuant to the Commission's decision served September 27, 1988, as amended by the decision served October 14, 1988, the Santa Fe Southern Pacific Corporation ("SFSP"), Southern Pacific Transportation Company ("SPT") and the Railway Labor Executives' Association ("RLEA") simultaneously filed Comments in the above-captioned proceeding. RLEA submits the following Reply in response to the aforementioned Comments of SFSP and SPT.

Initially, RLEA respectfully submits that much of what was said in its Comments addressed SFSP's contentions regarding the Commission's authority and jurisdiction to impose employee protective conditions in this docket. Specifically, RLEA submits that the Commission's authority to impose employee protective conditions in the public interest upon any transaction within its jurisdiction, has been settled law since United States v. Lowden, 308 U.S. 225 (1939) and Interstate Commerce Commission v. Railway

Labor Executives' Association, 315 U.S. 373 (1942). In this proceeding, the Commission stated that divestiture must be accomplished "in a manner wholly consistent with the public interest." Santa Fe Southern Pacific--Control, 2 I.C.C. 2d ___ (1986), (Slip op. at 107.) Therefore, the Commission has the authority to impose employee protections upon its approval of the divestiture. Further, as set forth more fully at pp. 7-10 of RLEA's Comments, RLEA respectfully submits that employee protective conditions are mandatory in this proceeding.

However, SFSP also has raised contentions regarding: 1) the applicability of protections to Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") employees; 2) the alleged lack of factual proof of any adverse affect suffered by Santa Fe or SPT employees as a result of SFSP's failed attempt to acquire control of SPT; and 3) the alleged need for an employee-by-employee inquiry by the Commission into the applicability of protections for any violations of SFSP's violation of the Commission's voting trust decision. RLEA will address detailed replies to those contentions.

I. SANTA FE EMPLOYEES ARE ENTITLED TO PROTECTIONS

SFSP contends that Santa Fe employees cannot be eligible for any protective conditions imposed upon the divestiture because ATSF was never subject to the Commission's voting trust. According to SFSP, any control exercised by SFSP over ATSF was presumptively legal and SFSP was free to manage ATSF's assets in any way it chose. SFSP Comments at pp. 4-5. SFSP's argument is based upon the underlying premise that the only matter left for

Commission review in this proceeding is a case by case determination of whether or not SFSP violated the terms of the voting trust imposed upon SPT stock. Id. at pp. 7-8. RLEA submits that SFSP's underlying premise is flawed and, consequently, Santa Fe employees should be eligible for protective conditions.

The questions posed by the Commission for comment are not limited to issues related to the violation of the voting trust. Rather, the Commission expressly sought comments upon the general issue of what employee protective conditions should be imposed for the benefit of Santa Fe or SPT employees "who were adversely affected by actions taken in contemplation of the merger of those railroads." Commission decision of September 27, 1988, at p. 1. The manner in which the question was framed clearly indicates that the Commission's inquiry is concerned with the effects upon employees arising out of all aspects of the divestiture, not just the narrow questions of whether or not SFSP violated the terms of the voting trust in individual cases.

RLEA submits that the Commission's consideration of the appropriate employee protections is entirely consistent with prior Commission handling of the divestiture. The initial divestiture order required SFSP to divest itself of either SPT or Santa Fe. Once SFSP presented its divestiture plan to the Commission in December 1987, the Commission treated the divestiture as an integral part of the consummation of the Rio Grande Industries parties ("RGI") control of SPT. RLEA submits that the Commission's handling of the divestiture must be seen as

part of an evolutionary process beginning with 1) SFSP's initial attempts to control SPT; 2) the subsequent voting trust order by the Commission; 3) the failed attempt by SFSP to gain Commission approval of its control of SPT and; 4) the divestiture of SFSP's interest in SPT.

If the divestiture transaction is viewed as an integrated proceeding beginning with the proposed merger and ending with formal divestiture, as RLEA submits it must be and as the Commission's question indicates it is; then the effects upon the Santa Fe of actions taken in anticipation of the merger with the SPT must be considered regardless of merely whether or not SFSP had lawful control over Santa Fe during this period. RLEA submits that the question to be arswered is not merely whether SFSP had lawful control over Santa Fe. Instead, the inquiry is, was Santa Fe involved in the divestiture proceeding? RLEA submits that Santa Fe was involved in the failed initial SFSP attempt to merge SPT and Santa Fe and Santa Fe continued to be involved in the divestiture proceeding because the Commission's order gave SFSP the option of divesting either SPT or Santa Fe. Therefore, the Santa Fe employees are entitled to the benefit of any employee protective conditions imposed upon the divestiture proceeding.

II. THE EMPLOYEES DO NOT NEED TO PROVE ADVERSE AFFECT AS A THRESHOLD CONDITION TO OBTAINING COMMISSION IMPOSITION OF EMPLOYEE PROTECTIONS

SFSP has presented the novel argument that the employees must prove adverse affect for some or all of the employees as a threshold condition to Commission imposition of employee

protective conditions. SFSP Comments at pp. 5-7. This contention seriously misconstrues the purpose of employee protective conditions in the rail industry over the past fifty years and the manner in which those protections have historically been administered.

According to SFSP, the only evidence of adverse effect submitted by the employees were the Verified Statements of R.B. Brackbill and E.B. Kostakis originally filed on December 7, 1984.[1/] SFSP contends that it subsequently rebutted those statements with Verified Statements of J.P. Frestel and K.R. Peifer filed on July 10, 1985. This rebuttal, according to SFSP, was sufficient to establish that the effects complained of by Messrs. Brackbill and Kostakis were not merger related. Id. at p. 7.

SFSP contends that the employees have failed to prove that certain operational plans or changes in traffic levels and routing were related to actions taken in anticipation of the merger of Santa Fe and SPT. Further, SFSP argues that the employees have failed to document further force changes since the Verified Statements of Messrs. Brackbill and Kostakis were submitted to the Commission. SFSP Comments at p. 6. RLEA submits that not only are SFSP's contentions incorrect, they are irrelevant because they are contrary both to prior Commission handling of employee protections and to the intent of Congress with respect to employee protections.

1/ The Verified Statements also were submitted by RLEA in its Comments filed on October 28, 1988.

RLEA respectfully submits that as a general proposition, employees do not need to prove adverse affects flowing from a transaction as a threshold condition to obtaining employee protections in a 49 U.S.C. §§11343 and 11344 proceeding.[2/] The employee protective conditions imposed upon such proceedings are mandatory pursuant to a Congressional decision that such conditions should be available to any employee of a carrier involved in the transaction. The imposition of the conditions does not establish that all, or indeed any, of the carriers' employees were adversely affected by the transaction subject to Commission review and thus entitled to benefits. The determination of whether an employee is adversely affected is determined on a case by case basis under the dispute resolution procedure set forth in the Commission's protective conditions.

In this case, the Commission reviewed and approved the divestiture as part of a 49 U.S.C. §§11343 and 11344 proceeding. Congress has made Commission imposition of protections on such proceedings mandatory. However, SFSP argues that in order for such protections to be imposed, the employees must prove adverse affect. According to SFSP, such proof should include information regarding operational plans, routing plans and traffic levels. RLEA submits that such a showing is contrary to the language and intent of the ICA and Commission precedent.

2/ This contrasts with the entitlement to employee protections in proceedings in Section 10901 transactions under the class exemption set forth at 49 C.F.R. §1150, where the Commission has held that employees must establish "special circumstances" justifying the Commission's discretionary imposition of such conditions.

Moreover, the information which SFSP says must be provided is in the sole possession of the Carrier, therefore SFSP's contention would, mean the de facto elimination of employee protective conditions because SFSP would require the employees to prove adverse effect with evidence the Commission has acknowledged is held solely by the carrier. See, Railway Labor Executives' Association v. Durango and Silverton narrow Gauge R.R. Co., et al., 363 I.C.C. 841, 846 (1981).

Additionally, SFSP's argument that the employees must prove the existence of adverse effect as a threshold condition to the imposition of employee protections runs counter to the burden of proof required as part of individual employee claims for protective benefits. In this case, since the conditions applicable to the divestiture are the New York Dock conditions,[3/] the dispute resolution procedures under those conditions apply here. Under New York Dock an employee submits his claim to the carrier in the first instance, and then to arbitration if the carrier denies the claim. In order for an employee to sustain a claim pursuant to Article I, §11 of the New York Dock conditions, the employee is obligated to identify the transaction and specify the pertinent facts of the transaction relied upon to sustain the claim. Then, the burden of proof shifts to the carrier to prove that "factors other than a transaction affected the employee." Id. Yet here, SFSP contends, without citation to supporting

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3/ Those conditions contained in New York Dock Ry.--Control--Brooklyn Eastern Dist. Term., 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

Commission precedent, that not only must the employees prove adverse effect as a threshold condition to the Commissions's imposing employee protective conditions; but also that the burden of proof remains upon the employees at all times. Indeed, SFSP's proposal would appear to make the submission of individual claims superflous because adverse effects upon employees arising out of the transaction would be proved prior to the Commissions imposition of protective conditions. RLEA contends that SFSP's proposal perverts the Congressionally mandated employee protection scheme established under the Interstate Commerce Act and should be rejected by this Commission.

Finally, SFSP has proposed that the Commission can resolve any employee claims of adverse affect on a case by case basis. SFSP Comments at pp. 7-8. Apparently, SFSP concedes that employees adversely affected by actions taken in anticipation of the merger may have individual claims for protective conditions although such conditions should not be imposed as a general condition to the divestiture. RLEA submits that SFSP's proposal manifests a profound confusion over the operation of employee protective benefits and the Commission's role in the adjudication of individual employee protection claims.

As stated above, employee protections are generally imposed upon Commission review and approval of a 49 U.S.C. §11343 transaction. Each employee's claim for benefits is resolved on a case by case basis and, conceivably, no employee may obtain the benefit of the conditions. However, the imposition of the conditions themselves is not dependent upon proof of adverse

affect upon one, some or all of the employees of a carrier involved in the transaction. Further, each individual employee claim for protective benefits under the conditions imposed by the Commission is resolved through the claim and arbitration process. The Commission does not generally review the merits of any individual employee claim. Indeed, the Commission has expressed the position that it will seldom review arbitration decisions resolving individual employee claims. In Chicago and North Western Trans. Co.--Abandonment, __ I.C.C. 2d ___, Docket No. AB-1 (Sub-No. 83), Served April 28, 1987, ("Lace Curtain") the Commission stated:

> We do not intend to review arbitrators' decisions on issues of causation, the calculation of benefits, or the resolution of other factual questions. Accordingly, we will not become a regular participant in the process as reviewer of arbitration decisions. In applying this standard in future cases, we will treat summarily those that do not meet this standard of review.
>
> Slip op. at p. 7.

Despite the Commission's unambiguous statement regarding its role in determining individual employee claims, SFSP proposes that each employee must present a claim, in the first instance, to the Commission. Such a process is not only inconsistent with Commission precedent, it would swamp the Commission with cases better served by resolution first between the carrier and the employees and, if such resolution fails, submission of the claim to arbitration. RLEA respectfully requests that the Commission reject SFSP's proposed manner of resolving individual employee

claims alleging an adverse affect arising out of actions taken by SPT or Santa Fe in anticipation of the merger of SFSP and SPT.

CONCLUSION

Based upon the foregoing, RLEA respectfully request the Commission to reject SFSP's arguments and, instead, impose the New York Dock conditions for the benefit of all Santa Fe or SPT employees adversely affected by actions taken by Santa Fe, SPT or SFSP in anticipation of the merger of SPT and SFSP.

Respectfully submitted

Donald F. Griffin

William G. Mahoney
John O'B. Clarke, Jr.
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Attorneys for
Railway Labor Executives' Association

Dated: November 17, 1988

CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Reply of Railway Labor Executives' Association" was served by first class mail on the following parties:

Jerome F. Donohoe
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Thormund A. Miller
Douglas E. Stephenson
John MacDonald Smith
Southern Pacific Transportation Co.
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Dated at Washington, D.C. this 17th day of November, 1988.

Donald F Griffin

Donald F. Griffin

9

Santa Fe Southern Pacific Corporation

224 South Michigan Avenue
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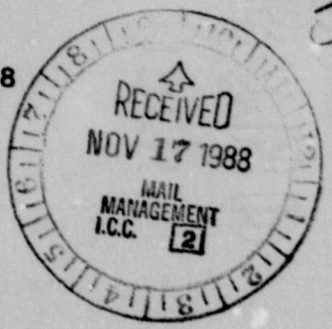
38357

November 16, 1988



Office of the Secretary
Case Control Branch
Interstate Commerce Commission
12th Street & Constitution Ave., N.W.
Washington, D.C. 20423

Re: Finance Docket No. 30400 (Sub No. 21) Santa Fe Southern Pacific Corporation - Control - Southern Pacific Transportation

Dear Sir or Madam:

In response to the Commission's notice served October 14, 1988, in the above proceeding, forwarded herewith are the original and twenty copies of the REPLY OF SANTA FE SOUTHERN PACIFIC CORPORATION TO COMMENTS OF RAILWAY LABOR EXECUTIVES' ASSOCIATION.

Very truly yours,

Jerome F. Donohoe

Jerome F. Donohoe
Vice President-Law

Enclosures

cc: Mr. William G. Mahoney
Mr. John O'B. Clark, Jr.
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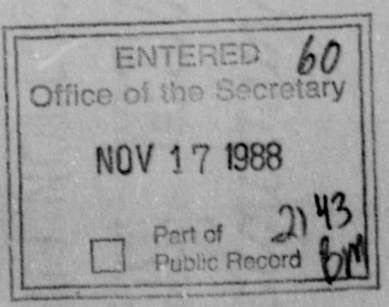

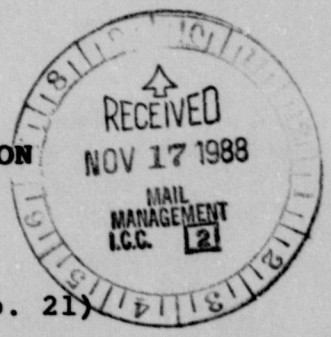

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION
CONTROL
SOUTHERN PACIFIC TRANSPORTATION COMPANY

REPLY OF SANTA FE SOUTHERN PACIFIC CORPORATION TO COMMENTS OF RAILWAY LABOR EXECUTIVES' ASSOCIATION

Jerome F. Donohoe
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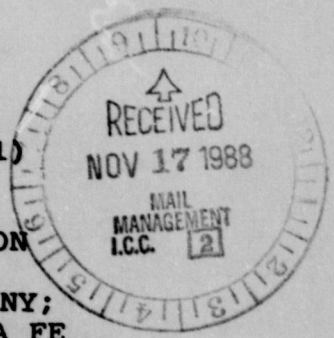
Dated: November 16, 1988
Due Date: November 17, 1988

BEFORE THE
INTERSTATE COMMERCE COMMISSION



Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION
CONTROL
SOUTHERN PACIFIC TRANSPORTATION COMPANY;
MERGER--THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY AND SOUTHERN PACIFIC TRANSPORTATION
COMPANY

REPLY OF
SANTA FE SOUTHERN PACIFIC CORPORATION TO
COMMENTS OF RAILWAY LABOR EXECUTIVES' ASSOCIATION

Santa Fe Southern Pacific Corporation ("SFSP") submits the following reply to the comments filed herein on October 28, 1988, on behalf of Railway Labor Executives' Association ("RLEA").

INTRODUCTION

In its decision served September 12, 1988, in F.D. No. 32000, Rio Grande Industries -- Control -- SPT, the Commission indicated it would request public comments on the issues of whether and the extent to which the Commission has authority to impose labor protective conditions upon SFSP for the benefit of employees of The Atchison, Topeka and Santa Fe Railway Company ("ATSF") or Southern Pacific Transportation Company ("SPT") "who can demonstrate that they were adversely affected as a direct consequence of actions taken, or orders issued, by SFSP in contemplation of the [ATSF-SPT] merger which [was] ultimately denied." Id. at 96. By subsequent notices dated

September 27 and October 14, 1988, the Commission invited public comments to be filed in this docket on or before October 28, 1988.

Other than SFSP, the only parties who filed comments on October 28, 1988, were RLEA and SPT.*/ As shown below, RLEA's comments lack factual or legal support for their conclusion that New York Dock conditions are necessary or permissible in this case. RLEA has introduced no new evidence which would support the need for such conditions, and it has not demonstrated that the Commission has the authority to impose such conditions.

I. RLEA OFFERS NO NEW EVIDENCE THAT ANY EMPLOYEES WERE ADVERSELY AFFECTED BY SFSP ACTIONS OR ORDERS IN CONTEMPLATION OF MERGER

The premise of the imposition of any labor protective condition is that some group or class of employees has suffered or is likely to suffer adverse employment effects as a result of a transaction. Since the Commission's disapproval of the ATSF-SPT merger over two years ago, RLEA has come forward with no new evidence of any changes in ATSF or SPT employment situations -- e.g., evidence (if it existed) that ATSF or SPT reestablished positions which had been abolished prior to

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*/ SFSP has no specific comments in response to SPT's October 28, 1988, comments.

the disapproval of the merger. Without such specific evidence, the record in this proceeding on the threshold issue of the existence of adverse effects on employment does not permit the Commission to impose protective conditions.

In this case, despite multiple opportunities*/ to introduce any new evidence indicating that SPT or ATSF employees sustained adverse employment impacts as a consequence of SFSP action or in anticipation of the ultimately disapproved ATSF-SPT merger, RLEA continues to rely solely upon the Brackbill and Kostakis verified statements submitted in 1984 to attempt to satisfy the threshold test of need for conditions. See RLEA comments at 11. As discussed in SFSP's opening comments, the Brackbill and Kostakis statements are insufficient to establish that the force reductions described were caused by any actions or direction of SFSP in anticipation of the merger. Indeed, as mentioned previously, the Brackbill and Kostakis statements were squarely rebutted (and the force reductions explained) by evidence submitted by primary applicants. See, e.g., Verified Statement of J. P. Frestel and K. R. Peifer, F.D. No. 30400, SFSP-50, Statement No. 4 at 5-7 (July 10, 1985).

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*/ RLEA could have updated the record in F.D. No. 32000 where it first raised its labor protection claims against SFSP in relation to the disapproved merger, and could have done so again when it submitted its opening comments herein on October 28, 1988.

In Gulf, Mobile & Ohio R.R. -- Abandonment, 282 I.C.C. 311 (1952) (cited by RLEA in its comments at 10), the Commission refused to impose labor protections for one class of employees where the only indication of adverse employment effects upon that group was "unsupported assertions in the record . . . ." 282 I.C.C. at 338. The Commission concluded under the circumstances that no labor protective conditions would be imposed as to this group of employees because the chance of adverse effects were "remote, and that there would be no means of determining whether any adverse effect which they may suffer in the future was caused by the abandonment of operation proposed or otherwise." Id. The same result should apply here. Given nothing more than RLEA's unsupported assertions of adverse employment effects, there is simply no need for the Commission to address the novel legal and procedural issues involved here, or otherwise to proceed any further in this matter.

II. THE COMMISSION HAS NO POWER TO IMPOSE LABOR PROTECTIVE CONDITIONS UPON SFSP AS PROPOSED BY RLEA

Even if one disregards as a threshold matter the absence of the required factual showing of adverse employment effects caused by SFSP in anticipation of the disapproved merger, the imposition of labor protective conditions in connection with a disapproved transaction would be unprecedented. As discussed below, neither the legal authorities nor the logic relied upon

by RLEA supports the conclusion that the Commission has the power to impose against SFSP liabilities for the sweeping labor protections proposed by RLEA.

RLEA relies upon United States v. Lowden, 308 U.S. 225 (1939)("Lowden") and Interstate Commerce Commission v. Railway Labor Executives' Association, 315 U.S. 373 (1942)("I.C.C.") for the proposition that the Commission has inherent authority to impose labor protective conditions pursuant to a public interest standard. See RLEA comments at 6-7. Those cases are wholly inapposite here. Both addressed proceedings in which the conditions were imposed upon the Commission's approval of a transaction, where the authority conferred by the Commission was permissive. By contrast, in the present case the Commission denied the ATSF-SPT merger, and the order that SFSP divest SPT (or ATSF) was mandatory, not permissive. Unlike the situation of the applicants in Lowden and I.C.C., SFSP did not have the option of consummating an approved consolidation or of declining to carry out a transaction and thereby avoiding Commission-imposed conditions. Moreover, both of the Supreme Court decisions cited by RLEA relied, in part, on the notion that the approval of the transactions extended the applicant:

> "a privilege relieving it of the cost of performing its carrier duties, on condition that the savings be applied in part to compersate the loss to employees occasioned by the exercise of the privilege."

Lowden, 308 U.S. at 240. See also, I.C.C., 315 U.S. at 378:

> "It must not be forgotten, however, that the immediate result of permitting the abandonment itself is a private benefit for the railroad in the form of savings realized by discontinuing uneconomic services . . . . There is nothing in the Act to prevent the Commission from taking action [i.e., imposing labor protective conditions] in furtherance of the 'public convenience and necessity' merely because the total impact of that action will include benefits to private persons, either carriers or employees."

No such situation exists here; the Commission denied the ATSF-SPT merger and ordered divestiture. SFSP has realized no savings as a result, nor does the Commission's order confer any "privilege" upon SFSP in that regard.

RLEA's contention that the Commission's order served December 23, 1983, approving the voting trust was a 49 U.S.C. §11344 proceeding (RLEA comments at 8) is incorrect. First, the fundamental purpose of the voting trust was to avoid a control transaction, by insulating SPT from control by SFSP. As the Commission recognized, "[i]t has been established that a properly constituted voting trust is a sufficient barrier against premature control under the consolidation provisions of the Interstate Commerce Act." December 23, 1983, order at 12. See also, B. F. Goodrich Co. v. Northwest Industries, 303 F.Supp. 53, 58-61 (D. Del. 1969), aff'd., 424 F.2d 1349 (3rd Cir.), cert. denied, 400 U.S. 822 (1970); and Water Transport Ass'n. v. I.C.C., 715 F.2d 581 (D.C. Cir. 1983), cert. denied, 465 U.S. 1006 (1984). RLEA's contention that Commission

approval of the voting trust was tantamount to approval of SFSP "control" of SPT within the meaning of the consolidation provisions of the Interstate Commerce Act ignores the purpose and effect of a voting trust, and is contrary to judicial and Commission precedent.*/

Secondly, the Commission's December 23, 1983, order itself confirms that the voting trust arrangement was not a Section 11344 "control" transaction. The Interstate Commerce Act consolidation provisions confer exclusive jurisdiction upon the Commission to approve carrier "control" transactions, and state that such transactions "may be carried out only with the approval and authorization of the Commission." 49 U.S.C. §11343(a). The Commission's December 23, 1983, order, however, expressly recognized that the Commission had no jurisdiction to prohibit the use of a voting trust as long as no law was violated:

> "Nevertheless, the decision to merge these two parent corporations is essentially a private one, so long as no provision of law has been violated." (Decision at 11.)

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*/ The Commission's own regulations on voting trusts, 49 C.F.R. Part 1013, provide that an independent voting trust must be established "[i]n order to avoid an unlawful control violation . . . ." 49 C.F.R. §1013.1(a).

"Regardless of the concerns we have about the wisdom of the chosen course, we cannot interfere if it is lawful." (Id. at 12.) */

RLEA relies upon Missouri Pacific R.R. -- Reorganization, 257 I.C.C. 479 (1944)("Missouri Pacific"), and Florida East Coast Ry. -- Reorganization, 307 I.C.C. 5 (1958)("Florida East Coast"), for the proposition that the Commission has in the past included divestitures within related proceedings. RLEA comments at 9. Both of these decisions involved railroad bankruptcy proceedings related to control proceedings. Neither supports RLEA's position that the Commission has authority to award labor protective conditions against SFSP here.

In Missouri Pacific, the Commission imposed labor protective conditions on the "approval of the conveyance of the properties of the debtors to the reorganized company . . . ." Missouri Pacific, 257 I.C.C. at 563. The transaction at issue

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*/ The Commission's regulations do not require Commission approval of a voting trust; rather, they provide that a carrier "may voluntarily submit a copy of the voting trust to the Commission for review," in the form of the staff's "informal, nonbinding opinion as to whether the voting trust effectively insulates the settlor . . . from unauthorized acquisition of control of a regulated carrier." 49 C.F.R. §1013.3(a). Thus, the Commission's own regulations refute RLEA's contention that approval of a voting trust confers authority to "control" a carrier within the meaning of 49 U.S.C. §11343 et seq.

in that case was one over which the Commission had undeniable authority to approve and condition pursuant to former Section 5(2). Similarly, in Florida East Coast, labor protective conditions were imposed for the benefit of employees who would lose employment due to the "acquisition of control herein approved." Florida East Coast, 307 I.C.C. at 20. In both of those cases, the fact that bankruptcy and control proceedings were consolidated is irrelevant to the SFSP situation. The labor protective conditions imposed in those cases were incidental to approved acquisitions of control, while SFSP's control application here was denied.

RLEA cites Texas & Pacific Ry. Co. -- Operation, 247 I.C.C. 285 (1941)("Texas & Pacific") and Gulf, Mobile & Ohio R.R. - Abandonment, 282 I.C.C. 311 (1952) ("Gulf, Mobile & Ohio"), for the proposition that the Commission has in the past imposed labor protective conditions on "component transactions" in a "unified proceeding." RLEA comments at 10. Again, unlike the situation here, both of those cases involved former Section 5(2) control applications approved by the Commission, in conjunction with abandonment applications. The Commission held that because the abandonments were part "of an inseparable plan of operation" which could not take place absent Section 5(2) approval, labor protection would attach to the entire transaction. Texas & Pacific, 247 I.C.C. at 293; Gulf, Mobile & Ohio, 282 I.C.C. at 337. In the present situation, the only

"control" transaction is the acquisition of control of SPT by an affiliate of Rio Grande Industries.*/ Neither the Commission's approval of the voting trust nor its disapproval of the ATSF-SPT merger here were in the same sense "inseparable" from the divestiture sale of SPT to RGI approved in F.D. No. 32000 within the meaning of Texas & Pacific and Gulf, Mobile & Ohio. Indeed, SFSP and ATSF were not applicants in F.D. No. 32000 within the meaning of the Commission's rail consolidation regulations.

Finally, as pointed out in SFSP's opening comments, the voting trust has expired by its terms, and the Commission's authority to amend the terms of the trust is no longer applicable. RLEA has not proposed a basis to justify retroactive imposition of labor protective conditions after termination of the trust even assuming the Commission had such authority in the first instance.

In its opening comments, SFSP acknowledged that the Commission has exclusive jurisdiction and power to remedy past SFSP violations of the Commission's orders approving the voting

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*/ Indeed, labor protective conditions were imposed for the benefit of SPT and DRGW employees in the Commission's decision served September 12, 1988, in F.D. No. 32000. Slip opinion at 94, 109.

trust and of the Interstate Commerce Act.*/ The Commission, however, is not seeking comments in this proceeding about remedying any alleged violations of those orders, which would represent procedural and substantive issues distinct from the imposition of labor protective conditions.

CONCLUSION

For the above reasons, the Commission should decline to take the unprecedented and unsupported step of imposing sweeping labor protective conditions upon SFSP in this case. Such a drastic step is unwarranted by the record in this proceeding, and is beyond the power of the Commission as a matter of law.

Respectfully submitted,

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Dated: November 16, 1988
Due Date: November 17, 1988

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*/ The Commission described its reserved jurisdiction in its order of December 23, 1983, to deal with allegations of violations of its orders in this proceeding. December 23, 1983, order at 13.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served by first class mail or express service a copy of the foregoing reply of Santa Fe Southern Pacific Corporation upon the following party in accordance with the Commission notice in F.D. 30400 (Sub No. 21) served October 14, 1988.

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Dated: November 16, 1988

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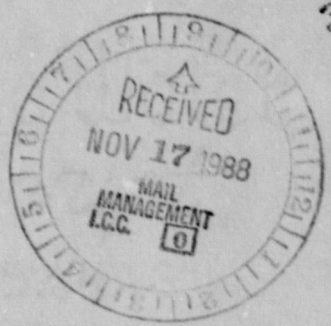


VIA OVERNIGHT COURIER

Office of the Secretary
Case Control Branch
Interstate Commerce Commission
12th Street & Constitution Ave., N.W.
Washington, D.C. 20423

Re: Santa Fe Southern Pacific Corporation-Control-Southern Pacific Transportation Company, Finance Docket No. 30400 (Sub-No. 21)

Dear Secretary:

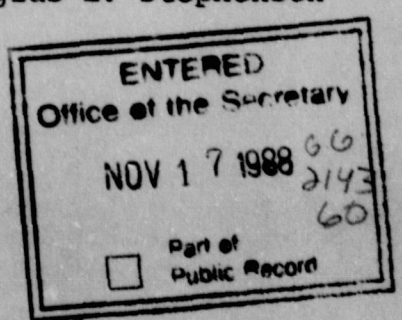
Enclosed for filing please find enclosed the original and twenty (20) copies of the Reply Comments of Southern Pacific Transportation Company in the above proceeding.

Very truly yours,

DEStephenson

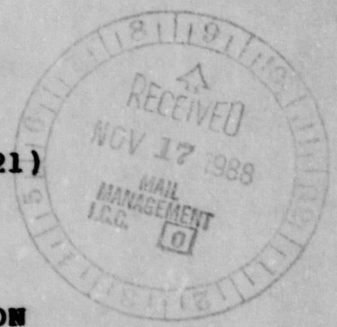
Douglas E. Stephenson

Enclosures



BEFORE THE

INTERSTATE COMMERCE COMMISSION



FINANCE DOCKET NO. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION
-- CONTROL --
SOUTHERN PACIFIC TRANSPORTATION COMPANY

REPLY COMMENTS OF SOUTHERN PACIFIC TRANSPORTATION COMPANY

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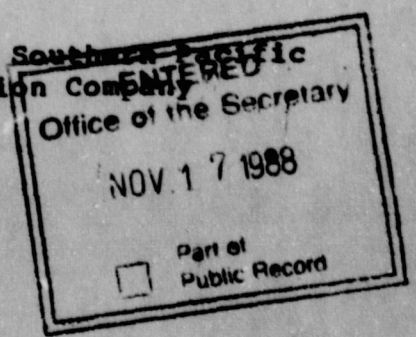

Due Date: November 17, 1988

BEFORE THE
INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION
-- CONTROL --
SOUTHERN PACIFIC TRANSPORTATION COMPANY

REPLY COMMENTS OF SOUTHERN PACIFIC
TRANSPORTATION COMPANY

In its comments filed October 28, 1988, Southern Pacific Transportation Company ("SP") stated its position that:

(1) employee protective conditions may not be attached, pursuant to 49 USC §11347, to <u>disapproved</u> mergers;

(2) the Commission has jurisdiction to examine any fact issues concerning alleged violations of the voting trust established pursuant to the Commission's orders in Finance Docket No. 30400; and

(3) whether conditions are warranted, and what procedural and substantive provisions should be framed, are questions which cannot be answered in the abstract, but must await identification of the claims asserted.

Concurrently, comments were filed by Railway Labor Executives' Association ("RLEA") asserting that:

(1) the Commission has jurisdiction to attach protective conditions if Santa Fe Southern Pacific Corporation ("SFSP") was in fact in control of SPT during the term of the voting trust;

(2) the SFSP divestiture is being treated by the Commission as a "component part" of a larger proceeding, i.e., the acquisition of SPT by another rail carrier, so that the two control applications are in effect merged for the purpose of imposing protective conditions;

(3) New York Dock conditions should be applied for the benefit of SPT and Santa Fe employees adversely affected by actions taken by SFSP during the pendancy of the control and divestiture proceedings;

(4) evidence in this proceeding establishes an extensive consolidation of SPT and Santa Fe operations prior to the issuance of the Commission's decision in the SFSP-SPT control case; and

(5) the fact of control is demonstrated by the evidence given by RLEA witnesses R. B. Brackbill and E. B. Kostakis.

It is to the RLEA comments, and the positions asserted above, that this reply is filed.

REPLY COMMENTS

RLEA Claim That Adverse Effects To SPT Employees Arose From The Failed SFSP Acquisition Is Not Supported By The Evidence

The fundamental problem with the RLEA position is that the facts fail to support its contentions. RLEA's petition is in the main taken up with arguments in favor of ICC jurisdiction, and assertions of New York Dock conditions as appropriate for SPT employees, and relies for its factual demonstration on brief, four-year old affidavits submitted by Mr. R. B. Brackbill and Mr. E. B. Kostakis.

SPT believes that regardless of the theory under which the Commission's jurisdiction is sought to be invoked, whether under 49 USC § 11347, or alternatively, under the Commission's orders approving the voting trust, the party arguing for conditions has

an obligation to make a prima facie showing of adverse impact and causal connection warranting the granting of the sought order. This is not a case in which the parties stipulate that conditions may be imposed; this is instead a case in which the carriers vigorously dispute the claim of adverse impact and causal connection to the transaction.

Given the fact that the RLEA claims are forthrightly disputed, and there is no stipulation for application of New York Dock conditions to the class of employees which are the subject of the RLEA comments, it is incumbent upon RLEA to present more than a "what-if" scenario to the Commission to justify the issuance of a supplemental order asserting jurisdiction in this novel context.

There is no contention made by RLEA that SPT employees were adversely affected by actions taken in contemplation of RGI control. No suggestion is made that RGI or SPT should be held financially responsible for adverse impacts on SPT employees resulting from claimed acts of control exercised by SFSP. RLEA's claim is that SFSP should be responsible for the alleged adverse impact on SPT employees assertedly arising from SFSP acts of control of SPT, control which could only have been exercised in violation of the Commission's orders and regulations governing the voting trust then in effect.

Whether RLEA is seeking a novel, unprecedented application of § 11347, or whether RLEA relies upon a claim that a direct

violation of the Commission's orders approving the voting trust has taken place, it is incumbent upon RLEA to at least make out a prima facie case that its suppositions are worth pursuing. It would be a classic case of putting the cart before the horse to launch extensive procedural and substantive remedial actions without first establishing a need to do so.

Accordingly, SPT urges that RLEA's claims first be closely examined to see what they are all about, and what the Commission is being asked to cure.

The 1984 verified statement of Mr. R. B. Brackbill, relied upon in the RLEA comments, points to reduction-in-force notices issued by SPT during 1984, covering 58 positions*. It asserts that the geographic location of the force reductions posted exhibits a pattern of preparation for consolidation of SPT with Santa Fe operations, from which it may be inferred that Santa Fe brought about this result.

What the RLEA evidence failed to say is that the reduction-in-force notices used to demonstrate its point were hand-selected from a large number of notices covering general force reductions throughout SPT's Pacific Lines. SPT was, during the term of the voting trust, continuously engaged in cost saving measures,

*At first reading, it appears that the reduction in force notices cover 74 positions, but it will be noted that the 16 positions listed on Exhibit 6 are the same 16 listed on Exhibit 2; both are copies of notice number 718, dated August 29, 1984.

including reductions in force wherever possible, in order to reduce its operating costs and remain viable. Reductions in force were pursued throughout the SPT system. The nine reduction-in-force notices cited by Mr. Brackbill reflected only a portion of this program.

The reduction notices are each serially numbered, and it will be noted that the 9 notices cited by Mr. Brackbill range from serial number 663 to serial number 758. The remaining notices in the series, covering hundreds of comparable positions at other locations, were not mentioned.

To illustrate, we show, in Appendix A, the complete list of notices issued in the series from numbers 660 to 760, the range from which Mr. Brackbill's examples were taken. A total of 58 positions were covered by the notices cited by Mr. Brackbill. However, the entire series covers more than 350 proposed reductions and 37 transfers, in the states of California, Oregon, Nevada, Utah, Arizona, New Mexico and Texas.

But there is even more that was omitted from the RLEA presentation. A notice of proposed reduction in force does not automatically produce a layoff; in many cases it initiates discussions with the union for reductions or reassignments. Notices, once given, may be rescinded, in whole or in part, as a result of the discussions with the union, or as the result of increased business demands which restore a need for a particular position. Thus, not all of the 58 positions cited by Mr.

Brackbill were in fact eliminated. A review of the positions covered by the 1984 notices cited by Mr. Brackbill shows that:

Of the 13 positions covered by Notice No. 711, five have not yet been abolished, and 8 were only abolished in March and July, 1986, when the position holders accepted a voluntary severance program (including severance payments);

Of the 16 positions in Notice No. 718, five were abolished in 1984, one was reclassified in 1985, five were abolished under the voluntary separation program in 1986, and five positions remain in effect;

Of the six positions listed in Notice No. 663, five were abolished in 1984, and one was retained;

The five positions listed in Notice No. 704 were abolished in November, 1984;

Two of the three positions listed in Notice No. 713 were abolished in November, 1984, and one remains;

The position listed in Notice No. 727 was abolished in December, 1984;

Of the seven positions listed in Notice No. 728, three were abolished in 1986 pursuant to the voluntary separation program, one was abolished through layoff, and three remain;

Of the six positions listed in Notice No. 749, none was abolished in 1984, two were abolished pursuant to subsequent notice in 1986, and four were abolished as a result of the voluntary separation program in 1986;

The one position listed in Notice No. 758 was not abolished in 1984, but was abolished pursuant to subsequent notice in July, 1985.

Thus, of the 58 positions listed by Mr. Brackbill, exactly eighteen, or less than one-third, were actually eliminated pursuant to the notices in 1984. The total actual position eliminations covered by this union contract in 1984 were 158 (covering the territory of El Paso, Texas and west), of which the 18 positions in the notices cited by Mr. Brackbill accounted for 11.4%. These position eliminations resulted from a system-wide belt tightening by SPT.* None was undertaken in anticipation that the work performed would be picked up by Santa Fe, either then or in the future. As the evidence in this proceeding already establishes (see joint verified statement of J. P. Frestel, Jr. and K. R. Peifer, dated July 8, 1985, pages 5-6), the large decline in SPT's north-south traffic, and the drop in SPT's local business in the San Joaquin Valley, were responsible for these specific notices. Given the general shrinkage in SPT's business during that time period, and the overall reduction in employment, not only at the locations listed by Mr. Brackbill but throughout the SPT system, no inference can be drawn that these reductions were manipulated by SFSP.

The two-page statement of Mr. Kostakis asserts that machinists employed by SPT at Bakersfield, California, were laid off in anticipation of the merger, and that the work which they had formerly done was undertaken by Santa Fe employees at Barstow, California.

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*For comparison to the 158 reductions in 1984, the comparable reductions for prior years were: 1979, 225; 1980, 298; 1981, 237; 1982, 402; 1983, 198.

Bakersfield is located at the southern end of California's Central Valley, separated by the Tehachapi Mountains from Los Angeles and the rest of Southern California. For many years, SPT maintained a large pool of helper engines at Bakersfield, to provide additional power for trains crossing the Tehachapis. Prior to October 1, 1984, 26 helper units were regularly maintained at Bakersfield for the helper pools, and a shop force consisting of 53 employees (machinists, electricians, sheet metal workers, carmen, etc.) was involved in maintaining them. This force worked seven days per week, three shifts per day.

SPT felt that its declining volume of business simply could not sustain this intensive activity, and studied alternate ways of powering its trains over the mountains which would not require such an extensive base at Bakersfield. On September 27, 1984, it terminated the practice of adding and subtracting all helper units at Bakersfield Yard and placed responsibility on the dispatchers to establish locations for en-route power swapping between eastbound and westbound trains. Light maintenance and fueling was continued at Bakersfield, and the helper units were cycled through to Los Angeles or Roseville for more extensive maintenance at SPT facilities.

The claim that the work formerly performed by shop forces at Bakersfield had been or was being transferred to Santa Fe is simply unfounded. Santa Fe did no work on SPT's units except on run-through power, but this practice is no different from that followed by the other railroads with which SPT has run-through

agreements: if servicing is needed while the units are on the other road's lines, necessary servicing will be furnished so that the unit may work its way home to SPT. Very few of the Bakersfield helpers operated on run-through trains with Santa Fe, and Santa Fe servicing was uncommon. There is simply no substance to the claim asserted by Mr. Kostakis that the reduction of the shop force at Bakersfield was performed in anticipation of an SFSP merger. It was performed to cut expenses, and it succeeded in doing so.

RLEA's members have already asserted similar claims in another forum. SPT's collective bargaining agreements all contain a transfer-of-work provision which, while the language may differ, prohibits the unilateral transfer of work to another railroad with corresponding layoffs by SPT -- exactly what RLEA is claiming here. If such a unilateral transfer of work has taken place, the adversely affected employees are entitled to compensation for breach of the collective bargaining agreement. If the carrier does not agree that a breach has taken place, the union may press its grievance, and have the matter heard by an arbitration panel.

What RLEA has not disclosed is that three transfer-of-work grievances have already been <u>decided</u>, adverse to RLEA; attached as Appendix B is a copy of the March 18, 1988, decision of Special Board of Adjustment No. 570, Case No. 1014, Award No. 796, <u>which deals specifically with the Bakersfield yard</u>. In

denying the claim of 11 carmen at Bakersfield yard, the Board said (pp. 506):

> "... mere speculation or conjecture by the Organization cannot satisfy its burden to present prima facie evidence of an actual operational change falling within the causes specified in Section 2. Here, as in that case (Award No. 795), the Carrier has denied from the outset that the furloughs were in anticipation of the Santa Fe merger, and it is simply not enough for purposes of Article I that the Organization suspects otherwise. Article I will apply only when the employees have been displaced by an operational change described in Section 2 and have been able to produce a prima facie showing thereof. S.B.A. 570, Awards No. 662, 728. Since the claimants in this case are unable to make such a showing, their claim under Article I of the agreement must fail."

Accord: Award No. 795, covering 6 SPT carmen at Yuma, Arizona, furloughed September 5, 1984, and Award No. 823, covering 33 SPT carmen at Los Angeles, California, furloughed May 3, 1985. The specific claim of the Bakersfield machinists cited by Mr. Kostakis is currently awaiting decision before the same Special Board of Adjustment, Case No. 1060, and, absent some intervention by this Commission, it is predictable that the decision will follow Award No. 796.

To recapitulate, neither the evidence submitted by Mr. Brackbill, nor that submitted by Mr. Kostakis, can reasonably be held to establish a <u>prima facie</u> case for control or manipulation by SFSP of SPT during the period covered by the voting trust.

No Basis For § 11347 Protective Conditions Has Been Established

The Commission's power to impose protective conditions pursuant to § 11347 is limited to those instances in which the Commission approves a transaction. This is plain from the language of former §5(2)(f), which § 11347 was intended to carry forward without substantive change; the Commission's exercise of authority is "As a condition of its approval", to be set forth "In its order of approval". The SFSP application was not approved. The RGI application was approved, but the employees claimed to be adversely affected were not "affected by the transaction" which was approved, but by a prior unrelated application, which RGI had vigorously protested. In these circumstances, there is no causal basis for imposing upon RGI any responsibility for the alleged misconduct of SFSP, undertaken at a time when RGI was powerless to influence or control SFSP's actions.

There is also no basis for imposing conditions upon SFSP under § 11347 for, as noted, SFSP's application was not approved, and SFSP is therefore not within the reach of § 11347.

No Basis Has Been Shown For Imposing Conditions To Redress Any Violation Of The Commission's Orders Approving The Voting Trust

We have shown that RLEA has failed to make any prima facie showing of improper control of SPT by SFSP. The particular actions cited reflect no more than the systemwide efforts of a

hard-pressed carrier to tighten its belt, cut expenses, and remain viable.

CONCLUSION

The Commission should find and conclude that no basis has been shown for any further proceedings or procedures concerning RLEA's unsubstantiated allegations.

SPT believes that no showing has been made which would warrant a finding of New York Dock (or any other) conditions for SPT employees, a finding which would open the door to opportunistic claim-filing by every employee who was furloughed by SPT in its general contraction during the five-year period from 1983 to 1988. We do not have the energy, nor the resources to spare from the paramount task ahead of us, that of building a new, unified, competitive SPT-RGI system, to undertake the enormous burden of detailed investigation and response to potentially thousands of claims which would cost little to file, but would require substantial time and effort to investigate and refute.

We do not believe that any case has been made for such extraordinary procedures, and it would be unreasonable and inequitable to saddle SPT (or RGI) with the costs of

investigation and defense of these vague allegations directed at SFSP.

Respectfully submitted at San Francisco, California this 16th day of November, 1988.

THORMUND A. MILLER
DOUGLAS E. STEPHENSON
JOHN MacDONALD SMITH

By D E Stephenson

Attorneys for Southern Pacific
Transportation Company

APPENDIX A

Notice No.	Locations, State	Number of Positions Abolished
660	Colton, Los Angeles, CA	8
661	Los Angeles, CA	2
662	San Francisco, CA	1
663*	Tracy, CA	6
664	San Francisco, CA	1
665	Oakland, CA	1
666	Eugene, OR	1
667	San Jose, CA	1
668	San Francisco, CA	1
669	Portland, OR	1
670	Transfer-Various, NM	<4>
671	Sparks, NV	1
672	Roseville, CA	1
673	San Francisco, CA	2
674	Not Applicable	-
675	Roseville, CA	2
676	Roseville, CA	9
677	Anaheim-Long Beach, CA	4
678	San Francisco, CA	1
679	San Francisco, CA	1
680	San Francisco, CA	1
681	Roseville, CA	3
682	San Francisco, CA	3
683	Oakland-Newark-Susiun, CA	10
684	Eugene-Lebanon, OR	5
685	Sparks, NV	1
686	Oakland, CA	1
687	Various Locations, NM	11
688	Marysville, CA	4
689	Salem, OR	1
690	Anaheim, CA	2
691	Los Angeles, CA	5
692	Long Beach, CA	4
693	Los Angeles, CA	8
694	Sacramento, CA	1
695	San Francisco, CA	1
696	Bayshore, CA	1
697	San Francisco, CA	1
698	Oakland, CA	1
699	Sacramento, CA	2
700	San Francisco, CA	2
701	San Francisco, CA	2
702	Not Applicable	-
703	San Francisco, CA	1
704*	Stockton, CA	5
705	Red Bluff, CA	3
706	San Francisco, CA	1
707	Brooklyn, OR	1
708	Ashland, OR	3

Notice No.	Locations, State	Number of Positions Abolished
709	Eugene, OR	3
710	Sacramento, CA	12
711*	City of Industry, CA	12
712	Colton-El Centro, Los Angeles, CA	11
713*	Fresno, CA	3
714	Sparks, NV	2
715	Oakland, CA	7
716	Gilroy, San Jose, CA	6
717	San Francisco, CA	4
718*	Bakersfield, CA	16
719	Yuma, AZ	1
720	Los Angeles, CA	6
721	Carlin-Fenley-Reno, NV	5
722	Woodland, CA	1
723	Various Locations, OR	23
724	Newark-Oakland, CA	7
725	Redwood Jct-Watsonville, CA	7
726	Dunsmuir-Klamath Falls, OR	8
727*	Fresno, CA	1
728*	Lodi-Modesto-Stockton, CA	7
729	San Francisco, CA	2
730	San Francisco, CA	1
731	San Francisco, CA	3
732	San Francisco, CA	3
733	Guadalupe-Surf, CA	7
734	Oxnard-Santa Barbara, CA	8
735	El Paso, TX	1
736	San Francisco, CA	3
737	San Francisco, CA	1
738	Oakland, CA	2
739	Portland, OR	6
740	San Francisco, CA	2
741	Various Locations, OR	<13 transfers to SF>
742	Oakland, CA	4
743	San Francisco, CA	1
744	Santa Fe Springs, CA	2
745	San Francisco, CA	1
746	San Francisco, CA	1
747	Ogden, UT	5
748	Sparks, NV	4
749*	Tracy, CA	6
750	Portland, OR	6
751	Eugene, OR	1
752	Cottage Grove, OR	2
753	San Francisco, CA	3
754	San Francisco, CA	3
755	San Francisco, CA	1
756	Woodland, CA	1
757	Various, AZ, NV, UT, NM	<20 transfers to SF>
758*	Modesto, CA	1

Notice No.	Locations, State	Number of Positions Abolished
759	San Francisco, CA	1
760	San Luis Obispo, CA	4

* Notice cited by Mr. Brackbill
<> Transfer of Positions

APPENDIX B

S.B.A. No. 570
Award No. 796
Case No. 1014

SPECIAL BOARD OF ADJUSTMENT NO.570
ESTABLISHED UNDER AGREEMENT OF SEPTEMBER 25, 1964

Parties to Dispute: The Brotherhood Railway Carmen of the United States and Canada, AFL-CIO,

and

Southern Pacific Transportation Company (Western Lines)

Statement of Claim:

1. That the carrier violated the terms of the September 25, 1964 Agreement, as amended, Article I, Section 2 and 4, when eleven (11) carmen were furloughed at Bakersfield, California and the carrier did not give a proper sixty (60) day notice or ninety (90) day notice as the case may be pursuant to the provisions of Section 4 of the Agreement.

2. That the Carrier be ordered to make whole the following claimants: J.M. Carpenter, D.L. McCutcheon, E. Soto, Jr., C. Kong, B.T. Maxwell, K.E. Bridges, K.I. Bridges, G. Ramirez, G. R. Fischer, J.D. Veley and O. Watson, by providing all of their benefits outlined in Article I of the September 25, 1964 Agreement, as amended.

Opinion of the Board: The Carrier's train yard at Bakersfield, California, is an intermediate point on its main line running from Sacramento to Los Angeles. Trains operating on that main line stop at Bakersfield for crew change, and cars are frequently set out from or added to trains at Bakersfield. In addition, some new trains are made up at Bakersfield. Owing to its location in the San Joaquin Valley, a substantial amount of agricultural and

some petroleum traffic originates at Bakersfield.

To accommodate this business the Carrier has employed both switchmen and carmen at Bakersfield. Until October 1984, carmen were employed on three shifts, seven days a week. Some of them were assigned to a rip track, while the others were assigned to the train yard to conduct inspections and perform light repairs on cars passing through.

On September 25, 1984, however, the Carrier posted a bulletin abolishing all fifteen carmen positions at Bakersfield effective the close of their shifts on October 1, 1984. At the same time the Carrier posted five new carmen positions at Bakersfield. After a series of additional bulletins rearranging carmen postions at Bakersfield, the net result was that the eleven named claimants were furloughed during the month of October as a consequence of the abolishment of their positions.

On November 27, 1984, the Organization presented this claim to the Carrier, seeking backpay and protective benefits on behalf of the eleven claimants. The Organization contends that the furloughs resulted from operational changes within the scope of Article I of the Agreement of September 25, 1964, and that consequently the claimants were entitled to at least 60 days notice before their furloughs, and then were entitled to receive

protective benefits under that Article. The Carrier replied to the Organization's claim by letter dated January 18,1985, asserting that the claimants' furloughs did not result from any of the operational changes or causes enumerated in Article I, Section 2 of the Agreement, but instead were "a reflection of the business conditions and the needs of service" including "a substantial decrease in car loading of agricultural and food products which originate in Bakersfield."

In support of its contention that the furloughs were occasioned by reasons enumerated in Section 2 of Article I, the Organization points to two circumstances. First, the Organization notes that at the time of the furloughs, the Carrier and the Atchison, Topeka and Santa Fe Railway had pending before the Interstate Commerce Commission a proposal for the merger of their railroad operations. That proposal, identified as I.C.C. Finance Docket No. 30,400, filed in March 1984, included a "labor impact" exhibit which projected that, if the merger were approved, it was expected to facilitate the elimination of eight carmen positions at Bakersfield during the first year following the merger. Second, the Organization offered evidence that the Carrier did not in fact experience an appreciable decline in its car loadings at Bakersfield from June through September of 1984.

The Organization's evidence indicated that, across those four months, the average number of cars departing Bakersfield each day declined only 3 percent, while the average number of trains departing daily declined 12 percent.

The Organization's evidence was not disputed or rebutted by the Carrier during consideration of this dispute on the property. As to the asserted decline in its business at Bakersfield, the Carrier simply contended that its car loadings of agricultural and food products had declined 14.4 percent in August and September 1984 from the levels recorded in the same months of 1983. And the Carrier offered no hard evidence in support of even that figure.

The Organization argues that, because the Carrier did not carry its burden of establishing a decline in its Bakersfield business while this dispute was considered on the property, the Board must disregard any belated attempt to prove such a decline and must rule in favor of the Organization's claim. It is true that the Board may not consider arguments and evidence not presented by the parties on the property. However, the Carrier does not assume the burden of establishing that a decline in its business warranted the furloughs until the Organization has made a prima facie showing that the furloughs resulted from an

operational change enumerated in Section 2 of Article I. See, S.B.A. 570, Awards Nos. 415, 651, 662, and 728

The Organization asserts that the furloughs resulted from the Carrier's "discontinuance for six (6) months or more, or consolidation of facilities or services or portions thereof" within the meaning of Article I, Section 2(b) of the Agreement. But the Organization has offered no evidence that such a discontinuance or consolidation in fact occurred. Instead, the Organization relies on the projected elimination of positions, as set forth in the I.C.C. docket, to bolster its claim. The Organization appears to assume that the Carrier planned to discontinue or consolidate facilities or services after approval of the merger proposal, and that the Carrier undertook this reduction in force in anticipation of that approval.

This case is thus comparable to Case No. 1013 involving the same parties, which case is the subject of the Board's Award No. 795. In that Award, the Board reiterated that mere speculation or conjecture by the Organization cannot satisfy its burden to present prima facie evidence of an actual operational change falling within the causes specified in Section 2. Here, as in that case, the Carrier has denied from the outset that the furloughs were in anticipation of the Santa Fe merger, and it is

simply not enough for purposes of Article I that the Organization suspects otherwise. Article I will apply only when the employees have been displaced by an operational change described in Section 2 and have been able to produce a prima facie showing thereof. S.B.A. 570, Awards Nos. 662, 728. Since the claimants in this case are unable to make such a showing, their claim under Article I of the agreement must fail.

AWARD

Claim denied.

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to Claimants not be made.

Adopted at Chicago, Illinois on March 18, 1988.

Lamont E. Stallworth, Neutral Member

SEE WRITTEN DISSENT ATTACHED

Carrier Member

Carrier Member

Carrier Member

Labor Member

Labor Member

Labor Members

VERIFICATION

STATE OF CALIFORNIA)
)
COUNTY OF SAN FRANCISCO)

K. R. Peifer, being duly sworn, deposes and says that he has read the foregoing Reply Comments, knows the contents thereof, and that the factual assertions therein are true as stated.

K. R. PEIFER

Subscribed and sworn to before me this 15th day of November, 1988.

J. E. JURGENS
NOTARY PUBLIC-CALIFORNIA
Principal Place of Business in
CITY AND COUNTY OF
SAN FRANCISCO
My Commission Expires Nov. 20, 1989

Notary Public

My Commission Expires:

CERTIFICATE OF SERVICE

I hereby certify that I have on this 16th day of November, 1988, caused to be served a copy of the foregoing Reply Comments of Southern Pacific Transportation Company upon the below listed parties of record by U.S. first class mail, postage prepaid.

Jerome F. Donohoe
Richard E. Weicher
Santa Fe Southern Pacific Corporation
224 South Michigan Avenue
Chicago, IL 60604

William G. Mahoney
John O'B. Clark, Jr.
Highsaw & Mahoney, P.C.
1050 17th Street, N.W.
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Washington, D.C. 20036

DE Stephenson

DOUGLAS E. STEPHENSON

38355 6

Southern Pacific Transportation Company

Southern Pacific Building • One Market Plaza • San Francisco, California 94105

(415) 541-1000

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SENIOR GENERAL ATTORNEYS

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DAVID W. LONG
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ASSISTANT GENERAL ATTORNEYS

DAVID B. BURNETT
ROBERT E. PATTERSON
JAMES T. BERTRAM III
ATTORNEYS

October 27, 1988

VIA OVERNIGHT COURIER

Office of Secretary
Case Control Branch
Interstate Commerce Commission
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

Re: F.D. No. 30400 (Sub-No. 21)

Dear Sir or Madam:

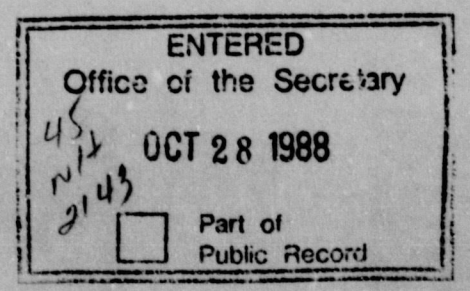
Herewith for filing with the Commission is the original and twenty (20) copies of the Comments of Southern Pacific Transportation Company.

You will note that the original contains my certificate of service.

Very truly yours,

John MacDonald Smith

Attachments



BEFORE THE

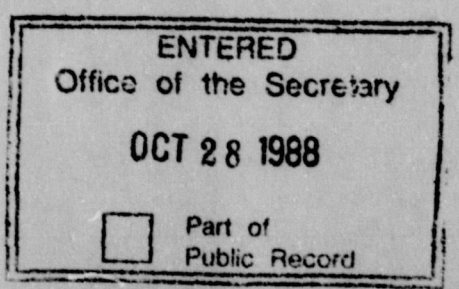
INTERSTATE COMMERCE COMMISSION

WASHINGTON, D.C.

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION -
CONTROL - SOUTHERN PACIFIC TRANSPORTATION COMPANY

COMMENTS OF SOUTHERN PACIFIC TRANSPORTATION COMPANY



THORMUND A. MILLER
DOUGLAS E. STEPHENSON
JOHN MacDONALD SMITH

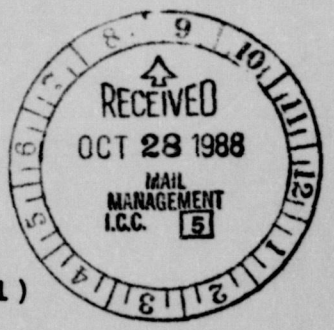
Attorneys for
Southern Pacific
Transportation Company
819 Southern Pacific Bldg.
One Market Plaza
San Francisco, CA 94105
(415) 541-1783

Due Date: October 28, 1988

BEFORE THE

INTERSTATE COMMERCE COMMISSION

WASHINGTON, D.C.



Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION -
CONTROL - SOUTHERN PACIFIC TRANSPORTATION COMPANY

COMMENTS OF SOUTHERN PACIFIC TRANSPORTATION COMPANY

In its decision of August 25 (served September 12) 1988, the Commission approved the application of Rio Grande Industries, Inc. (RGI) and its subsidiaries, SPTC holding, Inc. and the Denver and Rio Grande Western Railroad Company (DRGW), to acquire and exercise control over Southern Pacific Transportation (SPT) and its carrier subsidiaries.

In the course of that proceeding, certain contentions were made by Railway Labor Executives Association (RLEA) and the International Brotherhood of Teamsters (IBT) that employees of either the Atchison, Topeka and Santa Fe Railway Company or the Southern Pacific Transportation Company had been adversely affected by actions taken by those companies in contemplation of the merger of those railroads, a merger which was denied by this Commission. RLEA and IBT requested that the labor protective conditions of the Interstate Commerce Act be invoked for the benefit of such employees, even though the conduct alleged had nothing to do with the RGI control application.

In ruling upon these contentions, the Commission stated (page 95-96):

> ".....the Commission provides labor protection pursuant to 49 U.S.C. 11347 only in situations where it approves a merger transaction. We have no authority to mandate protective conditions as sought by the unions [i.e., for asserted conduct taken in anticipation of an SPT-SFSP merger] in connection with the RGI acquisition in this proceeding. Accordingly, we will not do so.
>
> "However, in light of proceedings in Finance Docket No. 30400, SFSP is in a different situation. In authorizing it to control SPT through a voting trust, we subjected SFSP to our continuing jurisdiction with respect to any number of matters, including the possible imposition of additional conditions that we might deem necessary.....
>
> "In these circumstances, we believe it is within our power to provide that ATSF or SPT employees who can demonstrate that they were adversely affected as a direct consequence of actions taken, or orders issued, by SFSP in contemplation of the merger which we ultimately denied, be afforded labor protection in Finance Docket No. 30400.

"However, we believe that the issue needs further exploration, and we will issue a notice in Finance Docket No. 30400 permitting comments on the extent of our authority to impose such conditions, on the merits of the unions' request, and on the precise nature of the substantive and procedural conditions that should be imposed (if at all). An appropriate procedural schedule will be included in the notice."

By notice of request for comments served September 28, as amended by corrected notice served October 14, 1988, the Commission has requested comments on whether it has authority to impose such conditions, whether such conditions are warranted in this instance, and if so, how the procedural and substantive provisions and such conditions should be framed.

SPT agrees that employee protective conditions may not be attached, pursuant to 49 USC § 11347, to <u>disapproved</u> mergers. The issues raised here, however, are unique, and contend that an unlawful exercise of control has taken place in contravention of the voting trust agreement, the Commission's orders with respect to it (as, Decision 2 dated Dec. 22, 1983), and the Commission's voting trust guidelines (49 CFR, part 1013).

SPT believes that any fact issues concerning alleged violation of the voting trust or the Commission's orders and regulations pertaining thereto, may properly be reviewed by the

Commission. SPT agrees that this Commission has retained jurisdiction to examine such claims by virtue of its orders previously entered.

Whether conditions are warranted, and what procedural and substantive provisions should be framed, are questions which cannot be answered in the abstract, but must await identification of the claims asserted.

Respectively submitted at San Francisco, California, this 27th day of October, 1988.

Southern Pacific Transportation Company, by:

Its Attorney

Thormund A. Miller
Douglas E. Stephenson
John MacDonald Smith

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of October, 1988 served a copy of the foregoing document upon the parties listed in the commission's order of September 27, 1988 namely:

Jerome F. Donohoe, Esq.
Richard E. Weicher, Esq.
Santa Fe Southern Pacific Corporation
224 South Michigan Avenue
Chicago, Illinois 60604

William G. Mahoney, Esq.
John O'B. Clarke, Jr. Esq.
Highsaw & Mahoney
Suite 210
1050 17th Street NW
Washington, D.C. 20036

John MacDonald Smith

38354

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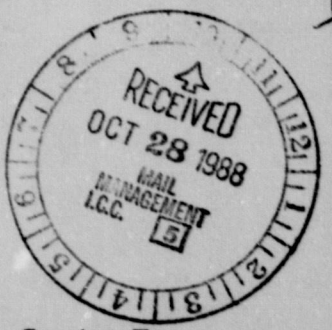
D

Santa Fe Southern Pacific Corporation

224 South Michigan Avenue
Chicago, Illinois 60604

October 27, 1988



Office of the Secretary
Case Control Branch
Interstate Commerce Commission
12th Street & Constitution Ave., N.W.
Washington, D.C. 20423

Re: Finance Docket No. 30400 (Sub No. 21) Santa Fe Southern Pacific Corporation - Control - Southern Pacific Transportation

Dear Sir or Madam:

In response to the Commission's notice served October 14, 1988, in the above proceeding, forwarded herewith are the original and twenty copies of the COMMENTS OF SANTA FE SOUTHERN PACIFIC CORPORATION.

Very truly yours,

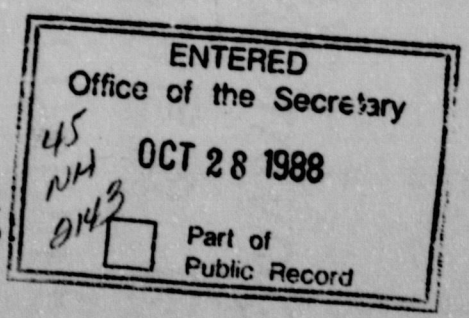
Jerome F. Donohoe

Jerome F. Donohoe
Vice President-Law

Enclosures

cc: Mr. William G. Mahoney
Mr. John O'B. Clark, Jr.
Highsaw & Mahoney, P.C.
Suite 210
1050 Seventeenth St., N.W.
Washington, D.C. 20036

Mr. Thormund A. Miller
Vice President and General Counsel
Southern Pacific Transportation Co
One Market Plaza
San Francisco, CA 94105



BEFORE THE
INTERSTATE COMMERCE COMMISSION

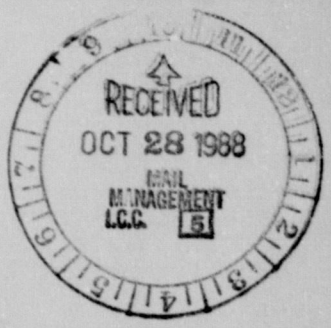
Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION
CONTROL
SOUTHERN PACIFIC TRANSPORTATION COMPANY

COMMENTS
OF
SANTA FE SOUTHERN PACIFIC CORPORATION

Jerome F. Donohoe
Richard E. Weicher
Attorneys for
Santa Fe Southern Pacific
Corporation
224 S. Michigan Avenue
Chicago, Illinois 60604
(312) 786-6000

Dated: October 27, 1988
Due Date: October 28, 1988



BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION
CONTROL
SOUTHERN PACIFIC TRANSPORTATION COMPANY;
MERGER--THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY AND SOUTHERN PACIFIC TRANSPORTATION
COMPANY

COMMENTS
OF
SANTA FE SOUTHERN PACIFIC CORPORATION

These comments are filed on behalf of Santa Fe Southern Pacific Corporation ("SFSP") in response to the Commission's notices served September 27 and October 14, 1988 requesting comments on (1) whether the Commission has the authority to impose protective conditions for the benefit of employees of either The Atchison, Topeka and Santa Fe Railway Company ("ATSF") or the Southern Pacific Transportation Company ("SPT") who may have been adversely affected by actions, if any, taken in contemplation of the merger of those railroads, (2) whether and to what extent such conditions are warranted in this instance, and (3) if so, how the procedural and substantive provisions of such conditions should be framed.

In accord with the Commission's discussion in its notices in this docket and its decision served September 12, 1988, in F.D. No. 32000, Rio Grande Industries - Control - SPT, SFSP's remarks address the extent to which the Commission should, or even may, order SFSP to provide labor protective

benefits to ATSF or SPT employees who it may be alleged were adversely affected by actions taken in anticipation of the transaction disapproved in this docket.

I. There is No Statutory Authority for the Commission To Order Traditional Labor Protection For Either ATSF or SPT Employees Alleged to Have Been Adversely Affected by Unilateral Acts of ATSF or SPT

Sections 11344 and 11347 of the Interstate Commerce Act ("Act"), 49 U.S.C. §§ 11344 and 11347, reflect the only explicit statutory authority for the Commission's imposition of traditional labor protective conditions in connection with a transaction such as the proposed ATSF-SPT merger.

Section 11344(c) states, in relevant part:

> 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.

With respect to employee protection, section 11347 states:

> When a rail carrier is involved in a transaction for which approval is sought under section[] 11344 . . . , the [ICC] shall require the carrier to provide a fair arrangement . . . protective of the interests of employees who are affected by the transaction . . . . The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction . . . .

The language above contemplates the assignment of liability for the costs of conventional labor protection only to "a rail carrier" (emphasis added) and then only on behalf of "employees

who are affected by [a] transaction' (emphasis added), "for which approval is sought."

These statutory provisions give the Commission no power to award traditional, mandatory labor protection on behalf of employees who, even if deprived of employment opportunities, suffer this fate "as a result of" some event other than effectuation of "the transaction." Accordingly, only if the transaction ultimately disapproved in this docket had occurred and had adversely affected ATSF or SPT employees, could the Commission have awarded statutory labor protection benefits. Even then, only a carrier, i.e., either ATSF or SPT in the instant case (or the proposed merged carrier that would have resulted, Southern Pacific and Santa Fe Railway Company ("SPSF")), could be ordered to provide this protection. Since neither ATSF, SPT, nor SPSF effectuated the transaction for which approval was sought, none of these carriers can be held responsible for employee protection. The Commission recognized this principle in its September 12, 1988 decision in F.D. No. 32000, stating:

> We also reject the unions' request for employee protection from SPT or ATSF for SPT, SFSP, and ATSF employees adversely affected by actions taken in anticipation of, or resulting from, SFSP's aborted control-merger application. The Commission provides labor protection pursuant to 49 U.S.C. 11347 only in situations where it approves a merger transaction. We have no authority to mandate protective conditions as sought by the unions in connection with the RGI acquisition in this proceeding. Accordingly, we will not do so.

Rio Grande Industries - Control - SPT, served September 12, 1988, slip opinion at 95.

The Commission's treatment of this issue in its September 12 order in F.D. 32000 was consistent with its decision in F.D. 30400 in December, 1983 approving the voting trust, in which the Commission found requests for labor protection moot because of its denial of the merger, Santa Fe Southern Pacific Corporation - Control - Southern Pacific Transportation Company, 2 I.C.C. 2d 709, 836 (1986). It is also consistent with its decisions requiring divestiture and defining the terms of divestiture (F.D. 30400, Decisions served July 2, and August 4, 1987), and its oversight of the divestiture process. A similar finding is warranted in this subproceeding.

II. There Has Been No Factual Showing to Warrant Imposition of Protective Conditions

A. The record in this proceeding provides no basis for protection of ATSF employees

ATSF has at all times been free to take action affecting its own employees which did not otherwise violate its obligations under existing labor agreements or law. Whether or not taken in anticipation of the merger, any such action, even had it occurred, similarly would not have violated any restriction imposed by the voting trust. Independent of the existence of the voting trust and the attempted merger of ATSF and SPT, ATSF was, of course, lawfully controlled by SFSP, and nothing in the Act or the voting trust limited any exercise of control by SFSP over ATSF during the period of the voting trust. Thus, any decision by ATSF management to reduce ATSF

forces at points where a merger might have resulted in employee surpluses would not constitute an unlawful acquisition of control by SFSP or a potential violation of the terms of the voting trust necessary to justify Commission action. No evidence in this proceeding has identified any instance in which an ATSF employee was alleged to have been adversely affected by action taken in anticipation of the proposed merger.

B. The record in this proceeding likewise does not support imposition of protection for SPT employees

(1) There is no statutory authorization for the imposition of labor protection liability for unilateral actions of SPT management affecting SPT employees

Any unilateral acts by SPT management, even if committed in anticipation of the proposed merger with ATSF, would not have violated the Act or the terms of the voting trust. Any hypothetical work force adjustments by SPT management fall outside the scope of the Commission's review or approval under section 11343.

Even assuming for the sake of argument that actions by SPT in anticipation of a merger were relevant, the only evidence submitted by rail labor in F.D. 30400 which pertains to the allegation that employees were adversely affected by preparations for a merger was contained in the Verified Statements of R.B. Brackbill and E.B. Kostakis, submitted by the Railway Labor Executives' Association ("RLEA") on

December 7, 1984.[1/] These documents and their exhibits raise at most a contention that between March and December, 1984, forty-five SPT clerical positions were abolished at points where SPT theoretically might have had post-merger excess capacity, and that nine SPT machinists, once assigned to a facility of that carrier in Bakersfield, California, also were furloughed at some unspecified time before the merger.

These verified statements do not demonstrate any link between the furlough of SPT employees and any merger planning or anticipation. The statements do not suggest, for example, that any possible changes in traffic levels or routing, or any other operational plans related to the disapproved merger inspired the force reductions. In particular, labor fails to indicate whether the jobs it says were abolished in 1984 were reestablished during the two years since the merger's disapproval. If there has been no restoration of these jobs in the wake of the merger's rejection, there is no basis to contend that positions were eliminated due to merger preparations.

Moreover, primary applicants introduced evidence in this docket responding to labor's contentions that SPT job

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1/ In F.D. 32000, where rail labor most recently discussed a claim for protection on behalf of employees allegedly furloughed in anticipation of an ATSF-SPT merger, the Brackbill and Kostakis statements were not supplemented or expanded.

reductions were made in anticipation of the merger. Applicants' evidence established that the questioned job reductions resulted from declines in SPT business wholly unrelated to the pendency of the merger proceedings. See, Verified Statement of J.P. Frestel and K.R. Peifer (SFSP-50) at 5-7, filed July 10, 1985. Applicants' evidence on this issue was never rebutted or challenged by any party.

(2) **No evidence has been presented in this docket or F.D. 32000 showing that SPT employees were adversely affected by SFSP in anticipation of the merger**

As discussed above, there has been no showing that any SPT employees were adversely affected by actions taken in anticipation of a proposed merger. In addition, even were there evidence that SPT took such actions in anticipation of a merger, there is nothing to suggest such action was compelled or controlled by SFSP. Mere conjecture and speculation cannot support an unprecedented imposition of protective conditions in favor of SPT employees for actions beyond the control of SFSP.

SFSP recognizes that the Commission retains exclusive jurisdiction, in general, to determine whether the Act or its order approving the voting trust has been violated, e.g, the implicit prohibition in section 11343 against a railroad holding company exercising control over an unaffiliated carrier without Commission approval. See, e.g., Allegheny Corp. v. Breswick & Co., 353 U.S. 151, 163, pet. for rehearing denied,

353 U.S. 989 (1957). Thus, the Commission would have both the jurisdiction and authority to review a claim that an employee was adversely affected by an exercise of control by SFSP over SPT in violation of section 11343 of the Act or its orders approving the voting trust, although such an inquiry does not appear to be the focus of this subproceeding. The nature and extent of an appropriate remedy the Commission might impose would depend upon the facts and circumstances determined in a given instance on a case-by-case basis. Nonetheless, as discussed above, there is no basis for the Commission to conclude that any such claim is justified.

In addition, by its terms, the voting trust expired on October 13, 1988, when SFSP consummated the divestiture of SPT to SPTC Holding, Inc., as authorized by the Commission in F.D. 32000. Accordingly, the Commission may retain jurisdiction over SFSP in this proceeding only to the extent necessary to remedy a past violation of the order approving the trust. While the Commission has exclusive jurisdiction to remedy past violations, if any, of the Act or of the voting trust, it may not impose new conditions on the voting trust at this stage of the proceeding.

III. Conclusion

There is no evidence before the Commission that SPT or ATSF employees were adversely affected by any actions taken in anticipation of the proposed ATSF-SPT merger. On October 13,

1988, SFSP completed the sale of SPT to SPTC Holding, Inc., which the Commission approved in F.D. 32000. At that time, the voting trust was dissolved. The contemplated merger of ATSF and SPT never occurred, and thus the predicate for the imposition of traditional labor protective conditions for employees affected by a transaction did not occur.

Consistent with the comments above, SFSP believes that the Commission would have exclusive jurisdiction to entertain complaints specifically alleging some adverse effect on an employment opportunity proximately caused by an SFSP act in violation of section 11343 of the Act or its orders approving the terms of voting trust on a case-by-case basis. Accordingly, SFSP respectfully asks that the Commission deny all pending requests in this docket for labor protection on behalf of ATSF or SPT employees.

Respectfully submitted,

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Dated: October 27, 1988
Due Date: October 28, 1988

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served by first class mail or express service a copy of the foregoing comments of Santa Fe Southern Pacific Corporation upon the following party in accordance with the Commission notice in F.D. 30400 (Sub No. 21) served October 14, 1988.

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