

FINANCE NO-30400

DEC 21 1984

OH

ALJ 5

INTERSTATE COMMERCE COMMISSION
Washington, DC

Finance Docket No. 30400*

3392
SANTA FE SOUTHERN PACIFIC CORPORATION
CONTROL-SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: December 18, 1984

By a motion filed December 13, 1984, applicants Santa Fe Southern Pacific Corporation, Southern Pacific Transportation Company, and the Atchison Topeka and Santa Fe Railway Company, move for an order striking from the record in this proceeding, the "Responsive Statement to Applicants' Diversion Study," filed on December 7, 1984, by Texas Mexican Railway Company. Applicants contend that the responsive statement was in fact not a responsive diversion study, but was a separate independent diversion study which should have been filed prior to November 21, 1984, under the requirements of this ALJ's order dated November 8, 1984. The Judge's order of November 8, 1984 stated as follows:

(5) The non-government parties opposition testimony in the merger proceeding, except for such testimony as it concerns applicants rail diversion study, will now be due on November 21, 1984.

Non-government parties opposition testimony concerning applicants rail diversion study will now be due on December 10, 1984.

The applicants consider the Texas Mexican submission to be nothing more than a subterfuge, which achieves by "self help" an extension of time for opposition evidence that the Judge expressly declined to grant. The applicants further claim that the study, filed a short period before the commencement of the next phase of hearing in this case, will require applicants to spend a considerable period of time and effort in analyzing the diversion study and supporting materials. This it is said would disrupt applicants preparations for the next phase of hearing.

*Embraces F.D. Nos. 30400 (Sub-No. 1-20) and MC-F-15628.

Texas Mexican (TM) responded to the motion to strike in a response filed December 14, 1984. In such response TM claims that it is properly responding in the only way it could, since applicants in their diversion study excluded the TM from their study, and that therefore the only proper response was through its own responsive study. It further indicates among other points that if applicants need more time in preparing its cross-examination of TM's witnesses that such witnesses could be made available late in the cross-examination so that the needs of cross-examing counsel can be accomodated. TM also argues that striking its statement will create a faulty record which leads to the necessary, but erroneous, conclusion that the merger: "(1) will not impact on the Texas Mexican Railway; and (2) the elimination of competition between Santa Fe and Southern Pacific for international U.S./Mexico rail traffic will have no impact on that international rail traffic."

The Administrative Law Judge finds some merit in both the argument of the applicants as well as TM, but believes that in order to fully complete the record so as to allow the Commission to render a decision in the public interest, the motion to strike should be denied. While the Judge denied a motion to strike applicants diversion study he specifically allowed an extension of time for protestants to respond to such study because of certain claimed defects in that study. I find that TM's responsive statement is in substantial conformity with my order dated November 8, 1984. If applicants find it difficult to prepare cross-examination of TM's responsive witnesses because of a tight time frame for such preparation, TM is willing to arrange for cross-examination of its witnesses late in the next phase of hearing, therefore eliminating any prejudice the applicants may believe they have suffered.

It is therefore ordered;

That the motion to strike Texas Mexican Railway Company's Responsive Statement to applicants' Diversion Study is denied.

James E. Hopkins
By the Commission, James E. Hopkins, Administrative Law Judge.

JAMES H. BAYNE
Secretary

(SEAL)