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BEFORE THE

INTERSTATE COMMERCE COMMISSION

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In the Matter of: :

SANTA FE SOUTHERN PACIFIC CORPORATION : Finance Docket

-- CONTROL -- : 30400 et al.

SOUTHERN PACIFIC TRANSPORTATION :

COMPANY :

- x

Hearing Room A

12th & Constitution, N.W.

Washington, D.C.

Tuesday, October 23, 1984

The hearing in the above-entitled matter was convened, pursuant to notice, at 9:00 a.m.

BEFORE:

JAMES E. HOPKINS,

Administrative Law Judge

APPEARANCES AS HERETOFORE NOTED

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P R O C E E D I N G S

JUDGE HOPKINS: Let's go back on the record.

Mr. Kharasch, are you ready?

MR. KHARASCH: Groggy but ready, Your Honor.

Whereupon,

NEWTON D. SWAIN,

the witness on the stand at the time of recess, resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

CROSS EXAMINATION - RESUMED

BY MR. KHARASCH:

Q Mr. Swain, during discussion yesterday you said you would check on the contents of the tapes that were provided by request of some of the Protestants here.

A That's correct, I did.

Q And tell us if the contents of those tapes contain information as to the matrix multipliers and the -

A I was in error. I thought that the matrix line had been included in the tapes. It was not included in the tapes.

Q Thank you.

Also yesterday, I understood that, in connection with the E to E and E to C multipliers which

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appear at page 6 of DOT-C-2, that you indicated that there was a place in the work papers that these multipliers for station-service relationship was indicated. Did I understand you correctly?

A I think you did, yes.

Q Could we have one of your associates look for that piece of the work papers and let us have a look at it this morning?

A Okay. I'm trying to figure out. I have to go through a slightly laborious process here to reference the question you asked me last Friday, to which I have an answer.

Q It was based on page 5 of SFSP-31, where you indicated that multipliers were used but don't supply the multipliers there.

A Okay, and my response was that RDR-147 had a description of those multipliers and that they were also included in DOT-C-2 -- 150, RDR-150.

Q Do you have those pages, sir?

A Yes, I do.

Q I would like to see them.

(Pause.)

Q Now, you've shown me a page designated at the bottom RDR-147, and it is labeled at the upper right "12.8 Draft," and it has the title "Specific Info

Influences," and then it has a line that says "first multiplier" and then "P&M traffic matrix." There's a series of numbers and in some cases, in five cases, the numbers have another number written to th right.

For example, in the E to C, E origin, C destination, and there was 105 and then there is 1.11. Let's look at that page if you would, sir. Tell me what the number written to the right of the number means in the instances where that occurs.

A Again, you're going to have to bear with me. What I'm going to do here is verify that there are -- that the work paper was what we actually used in the final process, to make sure I don't misspeak.

(Pause.)

A I don't recall these numbers specifically, sir. I would presume that what we were doing was looking at using a slightly higher multiplier at closed stations.

Q Now would you look, please, at the paper which has the designation RDR-00150 from the work papers. That has in the upper right-hand corner a circled "2". Then it says "SII" and then it says "TOFC," T-O-F-C, "traffic matrix," and then it gives a list of nine combinations of origin to destination characteristics, not the full list of 25 that appears on page 6 of

DOT-C-2.

And then it has at the bottom a line that says "second multiplier," and it says "significantly more efficient route, 1.3." Would you look at that, sir.

MR. WILSON: Your Honor, I would point out that the designation "EDR" indicates that these are Mr. Reyff's work papers, and it might be appropriate to ask Mr. Reyff rather than Mr. Swain this question.

MR. KHARASCH: Let's see what this witness knows.

MR. WILSON: Okay.

JUDGE HOPKINS: Go right ahead.

THE WITNESS: Well, this is the TOFC matrix, diversion percentage matrix.

BY MR. KHARASCH: (Resuming)

Q Is the TOFC matrix different from the matrix presented on page 6 of DOT-C-2, your responses to the Department of Transportation?

A It is different in the sense that there are fewer multipliers, because we do not have the distinction of served and reciprocal. TOFC ramps are either open exclusive or closed to the Applicants.

Q Now, on page 5 of your SFSP-31, you tell us that a multiplier of 1.2 was applied to the cumulative diversion percentage if the post-diversion route was

significantly shorter than the pre-diversion route. Do you see that testimony?

A I see that.

Q In RDP-00150, there seems to be a multiplier of 1.3.

A That is correct.

Q What's that?

A We used a 1.3 on intermodal traffic.

Q Is there any place in SFSP-31 that you tell us you used a multiplier of 1.3 on intermodal traffic?

A No, sir, I don't believe there is.

Q In RDP-00147, do you know whether the bold figures for multipliers or the light figures written opposite the bold figures were used in the final multipliers?

A The bold figures were used.

Q And were you able to tell me what the other figures were?

A As I say, I think they represented -- I think that document was used as part of our discussion in the development of the percentage diversion matrix, and at one point we thought about increasing the multiplier for closed traffic.

Q But decided not to?

A But decided not to.

Q That's the so-called final evaluator's decision?

A Yes, sir.

Q Did Mr. Wilson participate in the final evaluator's decisions?

A I think Mr. Wilson was present when -- during part of the discussions, at least. I know he was there.

Q He was present. Did he participate?

A He certainly talked, yes.

Q Did he participate in the decision as to the setting of the Fremont interchange at 15 miles impedance?

A No, sir. We had done that in many prior uses of the model.

MR. KHARASCH: Your Honor, may we have marked as the exhibit next in order, as MKT counsel Exhibit MKT-C-34, a three-page exhibit, sir. I think the record might be clarified if we put in these two pages from the pile of 12 boxes.

JUDGE HOPKINS: Are you going to put them in?

MR. KHARASCH: Yes. I need to ask your permission to have them marked now and then we will have them reproduced. May we put in the two pages as one Exhibit MKT-C-35 and ask permission to withdraw them,

have them copied?

JUDGE HOPKINS: They will be marked for identification as MKT-C-35.

(The document referred to was marked Exhibit No. MKT-C-35 for identification.)

JUDGE HOPKINS: The explanation of diversion percentage calculation will be marked for identification as MKT-C-34.

(The document referred to was marked Exhibit No. MKT-C-34 for identification.)

BY MR. KHARASCH: (Resuming)

Q Mr. Swain, do you have a copy of MKT-C-34 in front of you?

A Yes, sir, I do.

Q Let me give you a small explanation, sir. It's only fair. We were not privy to the information about what multipliers had been used, but by division --

MR. WILSON: Your Honor, I object to that. Of course they were privy. They visited our depository. It's clearly in the depository. They could have asked

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questions. We explained it to anyone who asked, and I object to that characterization.

JUDGE HOPKINS: This is a preliminary statement, Mr. Kharasch?

MR. KHARASCH: Yes.

JUDGE HOPKINS: We don't need the preliminary statement.

MR. KHARASCH: I have to explain that.

BY MR. KHARASCH: (Resuming)

Q Mr. Swain, by division we attempted to discover the multipliers, and you will find on MKT-C-34 opposite line 10 that we attempted to find the E to R multiplier.

A Yes, sir. It looks like you did a pretty good job.

Q Thank you, sir.

The E to R multiplier is shown in DOT-C-2, page 6, as 1.27, do you see that?

A Yes, sir, I see that.

Q But when we divided and we found several places that had been used, we found that the multiplier precisely appeared to be 1.269925, and it was uniformly used with six decimal places as 1.269925. Now, was the actual multiplier correct to six decimal places and is it rounded in the table you give, or was it developed by

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some other procedure?

A The multiplier was 1.27.

Q I see. Then the explanation of this is that there was some rounding error in our calculation?

A I think so, yes.

Q Let's look -- well, put MXT-C-34 aside for a moment. Let's look at SFSP-31 and look at attachment A, page 3.

A I have it.

Q Now, here are your general traffic class divisions; is that correct?

A That is correct.

Q Is there what you called yesterday any internal logic in the relationship of these general traffic class divisions that led you to figures such as .336 or .576? That is, figures correct to the -- or precise to the thousandth?

A Basically, yes. We went through a process where we would specify the major types of traffic flows. In the work papers, you will see that we had a preliminary matrix. We had a work paper similar to that one, where we had these percentages prepared and we had lumped together the AB1's and the A1's and the AB12's and the -- yes, the AB12's -- the A12's and the A1's were lumped together, and the AB1's and the AB12's were

lumped together, as I recall.

And we gave them the same basic -- we treated an AB1 the same way as an A1 in the first time we sat down to talk about the matrix. And then we decided, no, that's not right, those should be differentiated. And so we reduced the AB1's or the AB12's by ten percent.

And that's why you see some of these factors developed out to the third decimal. The original numbers were in two decimal points and these others were developed when we changed that relationship to more distinguish the situation where you have two of the carriers versus one of the carriers.

That's my recollection. I may be slightly faulty on part of it, but that is how we got to three points, three decimal points.

Q Look over, for example, in the middle of the page, a route that you classify as A1 and it becomes a diverted A12. Do you see, you have the figure .072?

A That's right.

Q How did that happen?

A That is again reflective of two things. There was another exercise here. We picked the major traffic flows or the major -- the A1 to A, 1A to A, 12 to A. Now, we determined the percentages for those, and then when you're trying to develop a matrix for all of the

possible diversion movements that can occur you have a large number of combinations of routes and merging carriers positioned in the routes.

And so in some cases to make sure we had all the possibilities covered we would say one percentage would be 25 and another would be 35 and we would split the difference on the intermediate stage and we would make that 30 percent.

Q That I can understand, Mr. Swain. But how do you get to a figure like .072?

A Well, I can try to work it out, but it may take a while, because my memory on all of the precise details of how each one of these numbers was formed is relatively hazy.

Q Let's take just that one example. Tell us how the figure of .072 was developed, and we will skip all the other examples?

A Well, I can tell you that what we're talking about here is, this is again a number that was developed -- I'm not even sure I can tell you how this one was developed, because what we have here is a two-line route, an A1 in the history route, and it is becoming a three-line route with the merging carriers still originating the traffic.

Now, off the top of my head I can't think of a

situation where this would occur.

Q Sir, I'm not asking you about the physical situation where it occurred. I simply want to know how a figure like .072 appears in your table.

(Pause.)

Q What is this that counsel suggests you look at?

A This is in the work papers. This is not a work paper, but it is in the work papers. It has the original multipliers, which are not shown here, from the first matrix that we first developed. And then, as I explained previously, we adjusted some of these numbers by ten percent.

MR. FLAGG: RDR-145.

THE WITNESS: Well, the first answer to your question is, as I explained earlier, where the original in the first matrix that we had, we had the AB1's and the A1's grouped together, then AB1 or an A1 to an A12 was originally given an eight percent division.

JUDGE HOPKINS: Are we saying "diversion" rather than "division"?

THE WITNESS: I'm sorry, eight percent diversion.

Subsequently, if there was only one merging carrier on the route, instead of both merging carriers,

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we would have less influence. So we differentiated between AB1's and A1's, and we reduced the A1 to an A12 by ten percent. That's how we got to 7.2 percent.

BY MR. KHARASCH: (Resuming)

Q Thank you.

In yesterday's discussion, you told me that with respect to Los Angeles to Chicago TOFC traffic, you determined to make no diversions; is that correct?

A That was in the PRS adjustments.

Q I have checked through the statements of yourself, Mr. Reyff, Mr. Guerin, and SFSP-31, and I don't find that stated in the statements. Would you confirm that?

A Well, I know it's not mentioned in my statement.

Q Are there any other examples which have not been stated in your statement, Reyff, Guerin, or SFSP-31, where certain traffic was simply not treated as not subject to diversion?

A I believe there may have been in the PRS adjustment, there may have been some other TOFC traffic besides the Los Angeles to Chicago, but I don't recall precisely what that is. In the other adjustments, to my recollection, there are no other global exclusions of traffic that were made such as that.

Q Are there any partial or non-global exclusions that we have not been informed about in the statement?

A No, I don't believe so.

Q Let's look for a moment at SFSP-C-5, which was distributed at the Friday hearing. It's a memo from Bengt Muten, M-u-t-e-n.

A Yes, sir.

Q Is it correct that this is the first writing in which the changes in reason code exclusions are set forth in detail?

A In this precise detail, yes. The reason code 107 has been described in Mr. Reyff's statement.

Q Yes, it's been described. But is there anything in Mr. Reyff's statement that tells us about, either in detail or particular, what these various --

A It's certainly not in the detail that's included here.

Q What is the program, if it is a program, called DVRT, referred to in SFSP-C-5?

A DVRT is the program that does the routing.

Q That does the routing?

A It does the routing.

Q I'm not understanding that. Is that the network --

A That is the program that selects --

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Q You have to let me finish my question.

A I apologize.

Q I appreciate your eagerness to answer. Let me just get the question on the record.

Is that the program that selects the diversion route for consideration?

A Yes, sir.

Q What is the program called DVOK?

A DVOK is the program that prepares the routes for -- prepares the waybills for the entrance into the routing program. It prepares and selects the waybills for going into the routing program.

Q What does it mean when the statement says that DVOK was generated by DVRT?

A It means that the movement went into the routing program, a diverted route was selected, and we automatically assume the diverted route will be accepted unless there is a reason for rejecting the diverted route. And there's another program which -- well, I am oversimplifying it, but basically there's another program that then provides the screens which accept or reject the diverted route, and if a route is rejected, for example, the reason for the rejection replaces the reason code 2 which is put on the route by DVRT.

Q I would thank you for your answer if I

understood it at all, but my question is what is the meaning of the word "generated"? One program generates another program?

A No, that means that -- well, it's not generated. The reason code 2 is put on the route record by -- in that program. That's what I'm saying. That's what is meant by "generated".

Q "Generating" means that the reason code is put in the record by that program?

A That is correct.

Q And that is true throughout here, where things are indicated as generated by DVPC?

A That is correct.

Q Well, I haven't asked you, what is DVPC, referred to later on?

A DVPC is the combination program that has diversion screens. Well, that's where the diversion screens are handled, Rule 107, Rule 108, all of the other exception rules, most all of the exception rules.

Q What is DVPCIP. Over on page 2 and on page 3, suddenly we begin to read about DVPCIP.

A DVPCIP is a program that we had to write prior to DVPC. DVPCIP means DVPC input, and it is in that program where we checked for the origin and destination routes, where we make these exclusions or acceptance of

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diversions based on which carriers serve the origin and destination in the pre- and post-merger routes.

Q What is the program mentioned on page 2 of SFSP-C-5 called DVRV?

A That is the program that calculates the revenue. DVRV calculates the revenue in the pre-diversion routes, the revenue in the post-diversion route, and then makes a calculation as to the change in revenue. And if the merging carriers lose money in the post-diversion route, we attach to that reason code 99, which says merging carriers lose revenue, and we reject the diversion because we don't believe the merging carriers would want to divert to a route that loses money.

Q They wouldn't want to divert to a route that loses money, even though it's the most efficient route and the shippers would want to flow their cargo that way, yes?

A That is correct.

Q The assumption of your reason code 99 rejections of diversion is that the merging carriers would want to make as much money as possible and they would not let cargo move by what was selected as the most efficient route; is that correct?

A We have selected a route that uses the most

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efficient lines of the merging carriers in the situation and of the other carriers, and the most efficient junctions. And for some reason, the merging carriers lose money.

I can't say it's because it's a less efficient route. It may be because of the way the divisions are calculated, the difference in the short-line miles over the junctions, which cause one route to have a difference in divisions. I can't say that it's because this is not the most efficient route.

Q Wait a minute. The route that is chosen as a diversion candidate is selected by your procedure as what you call the "efficient route"?

A Efficient route.

Q Under reason code 99, you are not going to calculate any diversions via this most efficient route if the merging carrier revenue division is lower --

A That is correct, sir.

Q -- than it used to get?

A It is very possible that the post -- the pre-merger route, the history route, may be an inefficient route which gives them a lot of money. That's what we're comparing it to. We're comparing the revenue in the old route with the new route, and we're saying: one, the new route has passed a screen which

says that on an operating mileage basis it is less -- or it meets certain circuity tests.

The only thing I can say here is that the pre-diversion route gave the merging carriers more money, perhaps because of some inefficiencies in that route.

Q Therefore, reason code 99 contains in it a judgment by the final evaluators or some less august tribunal that carriers don't like to lose money?

A That I think goes without saying. The carriers don't like to lose money, yes.

Q In selecting diversion routes, did you look to see if carriers other than the Applicants would lose money in the so-called most efficient diversion route candidate?

A No, sir, we did not.

Q I have observed, in looking through some of the samples you have, that you have selected as diversion route candidates routes where, say, the origin carrier, instead of getting 800 miles, suddenly gets 300 miles. Is that possible?

A That is correct.

Q And you have not allowed in your model for the distaste of the origin carrier in my example to losing five-eighths of its haul?

A We have allowed -- we have rejected diversions where the origin or terminating carrier is short-hauled by more than 20 percent.

Q By more than 20 percent?

A Excuse me, I misspoke.

Q I think you did misspeak yourself. Go to reason code 9 on page 2 -- I'm sorry. On page 2 of SFSP-C-5. As I read your reason code 9, you will reject a diversion if the originating carrier's mileage is less than one-fifth of its mileage in the pre-diversion route

A That's correct.

Q Thank you.

Now let's go back to reason code 99. We're agreed, are we not, that when a movement is kicked out by reason code 99 no diversions are calculated?

A That's correct.

Q Reason code 99, when it talks about revenue division, is not talking about settled revenues; it is talking about revenues as calculated by the formula that has been explained by Dr. Hill in the Keyes statement?

A Yes, sir.

Q That's what "revenue" means in this case?

A Pre- and post-diversion revenue is calculated using the formula.

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Q In your experience, sir, have you ever found that carriers who are faced with a potential new route have bargained about their division shares and altered their division shares?

A Yes, sir, they have.

Q That's a subject of some daily bargaining, is it not, in the industry?

A Yes.

Q And is it possible that a movement was kicked out as not subject to diversion for reason code 99 where the most efficient route, as you call it, might have been considered by the participating carriers and they might have adjusted their divisions and allowed the most efficient route to carry the traffic?

A Well, the renegotiation of divisions is not, I don't think, a proper subject of the traffic study. We examined the old route, we estimated the revenue on the new route, and rejected that because we lose money. I think that is a reasonable rejection.

Q I think it is a reasonable rejection, too, Mr. Swain. But I observe in reason code 9 that many of your routes will allow carriers other than the Applicants to lose up to but not beyond 80 percent of the money that they would obtain by your revenue allocation formula; is that correct?

A We have made the judgment that when an origin and destination carrier is short-hauled by too much, he will not allow that to happen.

Q And "too much" in reason code 9 means four-fifths?

A That is correct.

Q Let's continue looking at page 2 for a moment of SFSP-C-5. We have discussed reason code 9. Let's discuss reason code 5 for one minute, sir. I thought we agreed yesterday that the diverted route here means the route that was chosen as a candidate for division by your network procedure, and that there might be a merging carrier in a route considered to be 1,001 efficiency miles, but that wouldn't matter if the route candidate for diversion did not include the merging carrier.

A That's right. As I've explained, we set the impedances and other factors in the model to make sure that that rarely, if ever, happens.

Q Have you conducted any checks to see when that happened?

A We have looked at all of the output, scanning it very carefully, scanning the rejections, the routes that are rejected for diversion, to make sure that that has not happened.

Q You say you've looked at all of the output?

A All of the sample output.

Q All of the selection output, I think a statistician would call it, is that right? Are you referring to Appendix C to SFSP-31?

A That's correct.

Q And that sort of thing?

A That's correct.

Q Let's run quickly down here. How could a reason code 11 happen?

A Reason code 11 could happen on a very, very furry route where the Applicants, for example, appeared -- it would have to be in a several carrier route, where the Applicants appear in widely scattered parts of the route. It would have to be a 12A345B67 type of route, because I think when you have a 45-cell matrix we have provided for almost every possible combination.

Q Explain how there could ever be a zero diversion percentage in the matrix as a reason code 10 for rejecting diversion. I understood your matrix consists of multipliers which, though sometimes small, are never zero.

A I'm going to have to check on that. Oh, I don't have to check on that. That could occur for automotive shipments.

Q On what?

A On automotive shipments, where we have diversions that don't fit the criteria of the originating, the serving carrier -- excuse me -- the merging carrier having to serve the automotive shipper. We put zeroes in the matrix for all those situations for automotive traffic where the origin and serving situation did not meet our criteria for diverting the automotive traffic.

Q Thank you.

Let's look at SFSP-C-5, and we get to reason code 12 on page 2. The statement is that diversion is rejected if the diverted route mileage exceeds the mileage of the pre-diversion route -- and I emphasize -- by a user-specified factor.

Explain what a user-specified factor is?

A Those are the factors that we used in what we have described in Mr. Beyff's statement and in SFSP-31. These are not hard-wired factors. We can plug them into a table. I think that's what is meant by that, by user-specified factor.

Q How does a user go about specifying a factor when using the DVEC program?

A How does a user -- a user tells us that he wants to use a circuity factor of X and X is put into

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the program. X is put into the table. We don't have to write a whole new program to change the diversion or the circuity provision.

Q Are there other user-specified factors in DVIC, DVBT, DVPCIP, DVRV, and DVOK?

A No, sir, no.

Q Let's look down to reason code 13. It's a reason code for rejecting diversions as possible if the merged system origin or on-junctions and destination or off-junction are unchanged, further explained on this page; is that right?

A That's correct.

Q How does the computer procedure work to look up the origin or on-junction? Does it just look up the name of the place or the SPLC when it is speaking of origin or on-junctions? There's a match being implied here.

A That's correct.

Q You have two matches. Find the origin or on-junction and find the destination or off-junction, and you're going to compare them in the postulated diversion route and the pre-diversion actual route.

A That's correct.

Q Or if not actual, at least hypothetical from a previous iteration.

A That's correct.

Q First define how the origin is defined. Is it defined in this SPLC business or is it more refined than that?

A It is, if my recollection is correct -- and I will verify that this is correct at the break -- the origin is what we call the SPM station, which is the node at which the shipment originates.

Q It's the node.

Now, how many SPLC's can be included within a node?

A Several.

Q Top number?

A I have no idea what the top number is.

Q Average number?

A I have no idea what the average number is. It could be several. It could be 10, 20. As I said, Chicago is a node. There are 20, at least 20 SPLC's.

Q And when we were looking at Hamlin, Texas, a fascinating excursion yesterday, Hamlin is within an SPLC and there may be a node that includes that whole SPLC?

A That's true, that's correct.

Q And may more than one SPLC be included within the node?

A It may.

Q And there are only how many nodes in your whole system?

A My recollection is 15,500.

Q Now, how many particular stations may there be within the node?

A Many.

Q And how many industries served by carriers exclusively may there be within a node?

A Many.

Q Many times more than the previous many?

A Each time you get larger.

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Q Is it possible, then, that in comparing merged system origins or on junctions, that the comparison may include nodes that could contain, say, as many as 1,000 individual industries rail served?

A Well, now, let me explain something. We don't divert within a node unless we divert to the merging carrier. We don't divert at an origin or destination. We will not divert from a station within a node unless it is to a merging carrier in that node, which means that that merging carrier did not serve the movement to that node to begin with, so that by making this comparison on a nodal basis, I don't think there is any room for error. Either the merging carrier was at the node or he wasn't at the node in the prediversion route.

Q Let me look over -- I am just trying to understand how reason code 13 operates to project the possibility of diversion. First, it looks up the node of the movement and asks it if the node of the movement is the same in the actual route and the postulated diversion route.

Is that right?

A That's correct.

Q Then it looks up the node of the destination and asks the same sort of question.

A That's correct.

Q If both of those questions are answered yes, they are the same, then the movement is rejected as a candidate for diversion.

A That's correct.

Q And it is rejected even though the interral routing may be changed.

A There are some exceptions to this.

Q Well, please look with me, Mr. Swain, at Page 2 of SFPC-5.

A I am seeing it.

Q Is there any exception to reason code 13 shown on this statement, SFSP-C-5?

A Yes, there are. Well, no, wait a minute.

Q I want you to point me to a word that says there are exceptions when SFSP-C-5 is talking about reason code.

A I misspoke. There are no exceptions.

Q You are now saying there are no excerticrs to reason code 13?

A I was confusing an exception to reason code 107 in my mind.

Q Reason code 13 rejections have no exceptions.

A That's correct.

Q Is the Southern Pacific shown in your model as serving the node that includes Kansas City?

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A Yes, sir, it is.

Q Is the Southern Pacific shown in your model as serving the node that includes Houston?

A Yes, sir.

Q Does the procedure described as followed in reason code 13 rejections in any way consider the possible circuity of the Southern Pacific route between Kansas City and Houston?

A I am guilty of two compounding errors. I said there were exceptions, and I said there weren't exceptions. There are exceptions to rule 13, and they do occur at Kansas City.

Q Now, you are telling us -- well, excuse me. Let me finish one subject, and we will get to that exception. Do you recall what my precise question was to you? That is, does reason code 13 rejections include anything about circuity?

A Specifically, no, sir.

Q All right. Now you were going to tell us that there are exceptions to reason code 13, and we start with a preliminary observation that they are not stated in SFSP-C-5. Is that correct?

A No, they are stated in SFSP -- they are in here.

Q Now, I am afraid I have to ask you to explain,

and I may say to explain seven months after we asked you for a complete statement of procedures followed in this operation, go ahead and tell us on the record precisely what exceptions there are to reason code 13.

MR. WILSON: Your Honor, I object to Mr. Kharasch's comments. His editorial comments are not very helpful, and they are misleading.

MR. KHARASCH: They are in no way misleading.

JUDGE HOPKINS: I am overruling the objection here. Go ahead. I think there are too many things that are being explained on the record that should have been explained a long while ago myself. So go ahead, Mr. Kharasch.

BY MR. KHARASCH: (Resuming)

Q We are offering you the opportunity, Mr. Swain, to tell us exceptions to reason code 13. In your answer, please be good enough to point to where those exceptions are explained in SFSP-C-5.

A They are explained in SFSP-C-5 on Page 4.

(Pause.)

MR. WILSON: Your Honor, perhaps we could handle this after the break.

JUDGE HOPKINS: Well, how many things are we going to handle after the break? The problem that I find is, this is a continual thing. And it is about

time, I am afraid, that something be straightened out, because it is taking too much time on these things where he doesn't know the answer. If he doesn't know, then let him state it. If he can answer it after the break, I am perfectly willing to let him answer after the break.

THE WITNESS: I would prefer to do that, rather than give an incorrect answer.

BY MR. KHARASCH: (Resuming)

Q Does there exist, Mr. Swain, a statement such as SFSP-C-5 for each stage of the iteration that precedes the SFSP final iteration?

A No, sir. There is no such statement for each of the previous iterations. There are notes in the work papers but there are no statements like this.

Q Do you remember our discussion yesterday about the Fremont impedence of 15 miles?

A Yes, sir.

Q Would a change in that impedence to 20 miles have a substantial effect on the traffic flow, do you know?

A Would a change of impedence to 20 miles --

Q To make it 20 miles instead of 15 miles have a substantial effect on the traffic flow?

A No, sir, I don't think it would.

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Q Therefore a change of the impedence to 16 -- Let's go to the car ownership multipliers. I just don't think I could bear going through reason code 107 objections with you, sir. Let's go to car ownership multipliers. There is a multiplier in the matrix that changes the diversion otherwise calculated depending on ownership of car in certain circumstances. Is that correct?

A That is correct.

Q Some equipment used in the move is treated as apparently neutral. That is, not calling up a multiplier. Is that correct?

A That is correct.

Q Explain what equipment is treated as neutral.

A Non-special equipment. Equipment -- special equipment that is owned by -- not owned by a competing carrier that is also in the route.

Q Shipper equipment, say?

A Shipper equipment.

Q Do you have a piece of blank paper there, sir?

A I do.

Q Let's consider one of our little route diagrams, O for origin. We go J to junction. Let's call that Junction 1. And then we go to Junction 2, and

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then to destination. Okay?

A Yes, sir.

Q Let's suppose that the move from Junction 2 to destination was by one of the applicants historically, and by historically I mean at least in the move that is being considered in the fourth iteration, the last iteration. Let's suppose that the equipment used in the move was special equipment and was owned by the applicants that's in the move from Junction 2 to destination.

What happens to the diversion percentage?

A The diversion percentage is increased by a multiplier of 1.2. It is increased by 20 percent.

Q Twenty percent?

A Twenty percent. Oh, I am sorry. It is not 20 percent. It is 30 percent. I had it confused with the route efficiency.

Q Would you please draw underneath your O to J-1 to J-2 to destination, let's assume that's the historic route. Let's draw O to J-1 and then straight through to destination, and suppose that's the diversion route. All right?

A Yes, sir.

Q Let's suppose the J-1 to destination is all applicants, SFSP, okay?

0021 0036

A Yes, sir.

Q Let's say O might be on the Soo Line. Oh, let's pick someone else, because I want to get it to Kansas City. O is on the Chicago North Western. And J-1 is Kansas City, and since we're going to put the applicant in the move, J-2 is going to be Dennison, and we'll assume, just to please me, that the MKT carried it from Kansas City to Dennison.

A This is the first route?

Q That's right. From a point on the North Western to Kansas City, it moves from Kansas City to Dennison on the MKT, and from Dennison to destination on the Southern Pacific.

A Yes, sir.

Q There are indeed such moves, are there not?

A Yes, sir.

Q And then the potential diversion move that we are going to look at, the diversion route is origin to Kansas City, and then the SPSP is going to carry it all the way to destination.

A Yes, sir.

Q Do you know of your own knowledge whether the SP has today a noncircuitous route between Kansas City and -- I suppose our destination is Houston. Does the SP system have a noncircuitous route to Houston today?

A The SP has a route to Houston.

Q From Kansas City?

A From Kansas City.

Q But it is circuitous, is it not?

A I don't know how much circuitous it is. It is not the shortest route from Kansas City to Houston.

Q All right. And therefore it is quite possible that there are examples, and we can dig them out, if you want, of where the diverion route would be from origin to Kansas City, and then the SPSP would carry it to Houston if that is the destination.

A Yes.

Q All right. Now, the car ownership multipliers, the car ownership multiplier, if the SP owns the cars historically that are used in the move will be 1.3. That is, 30 percent more diversion will be taken because the SP controls the cars.

A That is correct.

Q Do you make any distinction whether the cars are owned at origin or destination by the origin or the destination carrier?

A No, sir, we do not.

Q Now, if on the other hand these cars are special equipment and they are owned by anyone except the applicants, that is, in the historic route, the

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diversion is reduced by 80 percent, is it not?

A The diversion is reduced to 20 percent, reflecting the fact that -- the impact of that car ownership. Yes, sir.

Q I will give you an opportunity by asking you a question, why is it when the applicants own the car the diversion is increased by 30 percent, but when someone else owns the car, the diversion is lowered by 80 percent?

A It reflects our view as evaluators that ownership of the car is a very important factor in the diversion decision, and we have weighted it that way.

Q I understand that. Please explain why the ownership of the car is 80 percent down and 30 percent up.

A The 80 percent down, originally we had considered rejecting the diversion in entirety and in fact in previous studies all of the evaluators had done just that. If a carrier in a competing route -- a competing carrier in the prediversion route furnished the equipment, the diversions were rejected. We have modified our view, and we will allow a diversion to occur at 20 percent that normally would have occurred.

Q Why isn't the 1.3 1.8, reflecting an 80 percent upkick for the applicants' ownership of

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equipment?

A It reflects our view that we have a 30 percent more chance of -- we have the car today. We don't have the car in the other case. If you already furnish the equipment today, you have, and presumably serve either the origin or the destination, it does give you some leverage.

But all we are doing is extending our haul basically in this case. In the cases we are talking about here, we don't furnish the equipment. A competing carrier does. He is furnishing that equipment for some reason. It is going to be very hard for us to get the diversion.

Q I don't think you have answered my question, Mr. Swain, which is, why is it 30 percent up if you have it and 80 percent down if someone else -- why isn't it 80 percent up if the SP --

A We believe it is harder to get diversions when somebody else furnishes the car. That is the simple basis for the difference.

Q If you want to leave it at that, I will. Now let's discuss what you mean by competitor owning the car. In our example where the car originated on the CNW and came to Kansas City and was moved down MKT-SP joint through Dennison.

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A Yes, sir.

Q In our example, I believe that your system would treat the car as owned by the competitor even if it was owned by the North Western in the example and the North Western had the identical haul in the history case, and the potential diversion case. Am I right?

A That is correct.

Q Let's look at an example of that.

MR. KHARASCH: May we have an MKT counsel's exhibit marked, Your Honor, four pages, counsel's Exhibit 36?

JUDGE HOPKINS: It will be marked for identification.

(The document referred to was marked for identification as Exhibit Number MKT-C-36.)

BY MR. KHARASCH: (Resuming)

Q Mr. Swain, MKT-C-36 is based on information supplied in response to interrogatories. We were told yesterday that Mr. Beyff had changes, and we were given the changes in these calculations, but what we want to look at here does not have to do with those changes, I believe.

We are looking here at a movement that

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originated in North Dakota on the Soo line. It got its way to Kansas City, and then you see in Kansas City it was moved to Dennison by the MKT, and then on to Corpus Christi and Laredo, correct?

A That's correct.

Q On this movement, we observe we didn't have a matrix line supplied at this time, but special equipment was said to be involved. Do you see that at the bottom of Page 1 of MKT-C-36?

A Yes, sir. I see that.

Q And the special equipment was stated to be owned by a competitor. Correct?

A That's correct.

Q And the competitor designator was given to this equipment when it was owned by the Soo line.

A That's correct.

Q Now, look back at Page 1. You see in the diverted route, which might better be called the candidate diversion route, that the Soo Line in the diverted route is carrying from North Dakota to Chicago.

A Yes, sir.

Q And I observe that in the original route and the diverted route the Soo Line has the same haul, that is, origin to Chicago.

A That is correct.

Q Even though the Sco Line has the same haul in the diverted route, a multiplier of .2, that is, only one-fifth of the diversion is taken, because the Sco Line owned the cars.

A That is correct.

Q Now, in the diverted route, the MKT has dropped out. No more haul for the MKT in the diverted route, right?

A (Nods in the affirmative.)

Q And it's SFSP to Corpus Christi, correct?

A That's correct.

Q Is there not a distinction between -- a distinction in your mind as one of the final evaluators between a movement where the originating carrier owns the cars and is presented with another route which gives it just as long a haul, and the situation where a carrier in a potential diverted route is cut out entirely and owns the car?

A Well, the distinction that we were trying to measure here is the fact that if one of the carriers in the diversion, in the prediversion route furnishes the equipment, he is doing that for some reason. He is chosing -- he has some influence.

There is some reason why the present route

exists, and he has some influence on that by furnishing the special equipment. That is what we are trying to replicate here.

The Soo could have chosen many other routes to Laredo. They could have gone Soo-BN-MP, Soo-BN-Tex Mex. There are lots of possible candidate routes here.

Q Please explain in your last answer, I think you got confused about Mexico, how there would be a Soo-BN-Tex Mex route.

A Does the BN not interchange with the Tex Mex?

Q There is no way to get to Mexico except via the MPA or the SP. That is correct.

Q Or the SF, or today the Santa Fe. Let's look at it this way. In the diverted route, your formula would give the Soo just as much money. It is still carrying North Dakota to Chicago. Is that correct?

A That's correct.

Q They would get just as much money in the diverted route as they did in today's route.

A That's correct.

Q And surely your matrix does not assume that the Soo doesn't like the Santa Fe or the Southern Pacific.

A We were assuming that the Soo has a

multiplicity of relationships with its connections, and that there are reasons for this route today. This is, after all -- am I reading this right? This is Soo, Chicago, Norfolk Southern, Kansas City, SP, Tex Mex? Am I reading that right?

Q It was supplied to us. Let's see.

A This is a five-carrier route.

Q Yes.

A Well, it is a strange route. What we are saying is that the multiplier reflects the multiplicity of relationships in this case that the Soo has with its many connections and the many alternative routes that it has in going from North Dakota to Laredo.

Neither of the applicants furnished the special equipment. There are many routes available. We have reduced the diversion to 20 percent of what it would have been because of the influence of this equipment.

Ordinarily we would have rejected it. In previous diversion studies we would have rejected it completely.

Q Now, if the MKT owned the equipment, the reduction of 80 percent would have been just the same.

A That is exactly right.

Q And the MKT has no place at all in the

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diverted route.

A That's correct.

Q Assume, Mr. Swain, what I believe to be a fact, there are only two ways to get to Laredo. One is going via the SP to Corpus Christi and then over on the Tex Mex, and the second is to go to Laredo on the MP.

A Yes, sir.

Q You are saying that the Soo has chosen this routing which it carries to Chicago and it owns the equipment, and it would continue to use this routing four times out of five when presented with the diverted route possibility?

A That's exactly right. One of the diverted route possibilities is Soo-Chicago-MP today, which is the two-line haul. There is obviously some reason why it is moving this way.

Q Would it have been possible for your matrix to have applied a different factor for equipment owned by a competitor who was being cut out of the diversion candidate route and to a competitor who remains in the diversion candidate route?

A It would be possible to do that.

Q We understand, Mr. Swain, that your various programs and procedures treated coal, automobiles, time sensitive traffic somewhat differently than all other

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traffic.

A That's correct.

Q Is there any special treatment or particular provision made in your programs for grain traffic?

A No, sir, there is not.

Q Grain is treated like any other commodity that is not one of the special treatment commodities?

A That is correct.

Q Explain, please, how a transit grain movement would be put into your original 1982 data base.

A Well, in the first instance, an inbound transit movement is not -- it may be registered for transit, but it is not known at the time that it moves that it is going to be registered for transit.

It is handled like an inbound, a normal inbound move. Outbound transit movements are handled in our model in the same way.

Q In other words, each half of the transit move into the transit point and out of the transit point is called --

A A separate move. We handle them as two complete movements.

Q How about revenue?

I had better add a little to the question. You have a revenue allocation formula but you take some

revenue total into the computer at the time before you apply your revenue allocation formula if it is a joint line movement?

A Would you repeat that?

Q It is not a question yet. Let's strike that. It is not clear.

JUDGE HOPKINS: That will be stricken.

BY MR. KHARASCH: (Resuming)

Q What revenue is reported on a grain move into the transit point?

A The revenue on the inbound move.

Q What revenue is reported on the outbound move from the transit point?

A For a transit shipment, the balance due of the outbound shipment and any transit charges that are assessed.

Q Once a grain shipment has moved into a transit point under a transit rate agreement, does it not tend almost 100 percent of the time to move out of that transit point by the carrier that carried it in, because of the transit rate arrangement?

A Well, yes. If it is going to move out on a transit billing, yes, it does tend to -- a lot of the tonnage also moves out by truck, and a lot of it moves out on flat rates also, potential --

Q We are talking about transit movements. There is no outbound movement by truck on a transit movement, is there?

A There is outbound movements of tonnage that has been registered, inbound movements which have been registered for transit by both truck and on flat rates, multiple car rates.

Q Well, if the tonnage moves out by truck or on flat rates, it does not take advantage of the transit rate which has been accorded.

A That is correct.

Q Is it not true that in the great preponderance of cases where transit rate is available, it is used?

A No. I think my experience and the experience of the other evaluators will bear this out, that transit is of diminishing importance. It certainly was on my time on the Rock Island.

Q Maybe the Rock Island was of diminishing importance.

A Well, you could make that statement. There has been increased on farm storage. There has been increased capacity in the country elevators which have served to reduce the importance of transit movements, so that --

Q So that you think in a lot of cases, half of

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the cases, transit is available, but not used?

A I would say in the cases where there are transit rates available, I don't know what the percentage is, but I will stick with my original statement that the use of transit is diminishing, and that it is far less important than it was several years ago.

Q In any event, in this study, no effect is given to transit rates?

A We have diverted the transit shipments if they are transit shipments in the way the model handles normal diversions. It is not that they haven't been handled. They have been hardled.

Q Was there any way for you to know whether a grain shipment was a transit shipment when the reports were made that you used for the data base?

A There was a transit indicator in the ICC way bill file, and there was a transit indicator in the SP file, and there was not one in the Santa Fe. They may have been able to put one in. I don't know.

Q Although those indicators that these were transit movements appeared, you made no use of them in the procedures you followed?

A There was -- we talked about this and determined that the difficulties of going back and

getting the revenues, matching inbound revenues in this type of process, it is not possible to do it.

Q Were you informed during the construction and the performance of your procedures that led to this diversion result of the existence of any contracts for transit grain or contracts with shippers that covered grain from a number of origins in one contract?

A I know that those exist. I am not sure whether my knowledge of that came from this study, or whether I had prior knowledge of that. I know that such contracts exist, yes, sir.

Q Did you have any designators or indicators on the Santa Fe, information that was going in as to whether the commodities were being carried under contract or not?

A No, we did not. We had no indicators as to what is being carried by the contract.

Q In dealing with coal, did you in your diversion study, did you give some effect to the fact that coal is covered by contract?

A We gave effect to the fact that there are multiple car coal movements.

Q That is not my question. Contracts.

A The treatment we gave coal is that we excluded multiple car movements. Some of those, I am sure, are

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covered by contract. These are very, very large moves from -- well, I won't say any more.

Q On Friday, Mr. Swain, I inquired if you knew the dates when you completed the various iterations in your study. Have you had any chance to look that up?

A No, I haven't, sir.

Q Let's look at Page 13 of SFSP-31. I am sorry. We have to start back on Page 12. It is a runover sentence. With a deep sigh, I wish to discuss the special Oregon rule that was adopted in the SFSP final study, final iteration.

A Yes, sir.

Q You tell us in SFSP-31 that the evaluator decided that a special Oregon rule was acquired to treat appropriately certain transcontinental traffic moving to and from Oregon, and then we are referred to Mr. Reyff's statement at Page 26 and Mr. Guerin's statement at Pages 9 and 10.

Q If I read Mr. Reyff's statement correctly at Page 26, your model applied the Oregon rule only to traffic moving between Oregon and Kansas City or the northeast, and routed via the Ogden gateway in the prediversion route.

Is that correct?

A My recollection is that the Oregon rule

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applied on all traffic that moved through Ogden. I don't recall any exception for Kansas City.

Q Well, it's your company, DNS, that wrote the programs that accomplished things like this rule. Is that not right?

A Yes, sir.

Q Now, my question to you is, is Mr. Reyff's statement correct on Page 26 that the rule applies only to traffic moving between Oregon and Kansas City or the northeast and routed via the Ogden gateway in the prediversion route?

A My belief is that that statement is slightly incorrect. My belief is that the Oregon rule applies on all traffic going through Ogden.

Q As the program was written?

A As the program was written.

Q All traffic via Ogden?

A That's my recollection. I can check my recollection at the break, but I think that's what it is.

Q And the multipliers are a factor of .1 for expedited traffic? In other words, all traffic moving via Ogden diversions are reduced to a tenth. Is that right?

MR. WILSON: Is your question all traffic to

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or from Oregon moving via Ogden? Just for the record, I think that is not clear the way this conversation is going.

BY MR. KHARASCH: (Resuming)

Q To whatever traffic the Oregon rule applies, the multiplier is .1, which means that only 10 percent of the diversion otherwise calculated by your program will be taken.

A Would apply.

Q Right?

A That's correct.

Q That is for expedited traffic, and .3 for all other traffic?

A That's correct.

Q That is only 30 percent of diversion.

A That is correct.

Q Now, the origin territory of traffic for the Oregon rule is what?

A Traffic which originates or terminates in Oregon. Excuse me. Traffic which originates in Oregon.

Q Originates in Oregon?

A Yes. Traffic that originates in Oregon.

Q It is not traffic moving through a junction in Oregon, is it, or is it?

A It is traffic that originates in Oregon and

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moves via the Ogden gateway.

Q Were you one of the final evaluators that adopted the Oregon rule?

A Yes, sir, I was. We had extensive discussions about the Oregon rule. Mr. Guerin, the SP representative, had been a sales manager in that territory. He was familiar with the situation. Both the UP and the Denver and Rio Grande had been --

Q Wait a minute. My question was, were you one of the evaluators? What is your answer about?

A I was trying to explain the process I went through to be convinced that the Oregon rule was a valid rule.

Q Mr. Swain, my question was only -- I think we will go much faster and get through with this if you will just say, yes, I was one of the evaluators. That is my question.

JUDGE HOPKINS: If you want to say yes.

THE WITNESS: I would like to explain my reasons for saying yes.

JUDGE HOPKINS: The only question is, were you one of the evaluators.

THE WITNESS: Yes, sir, I was one of the evaluators.

BY MR. KHARASCH: (Resuming)

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Q Over on Page 9 of Mr. Guerin's statement, which is referred to in SFSP-31, Mr. Guerin says that the Oregon rule was accomplished by adding a column, and I am on Page 9 of Guerin, we added a column to the diversion matrix which limits the percentage of diversions expected on most traffic. Do you see that, most traffic? The word "most?" On most traffic moving to or from Oregon on the one hand and to Kansas City and points east thereof on the other hand.

Now, is Mr. Guerin correct in his use of the word "most traffic" in that there is some traffic that is excluded from the Oregon rule application?

A Well, there seems to be a difference between the three of us here.

Q Yes, there is, sir.

A My recollection is that it applied on Oregon traffic that moved through Ogden, traffic which originated in Oregon and moved through the Ogden gateway. I do not recall the Kansas City qualification, but as I said, I can check this very quickly at the break, and I will do so.

Q Now, I want to ask you about most traffic. That implies to me that there is some traffic to which the Oregon rule does not apply. Is that your recollection?

A Well, I think what Mr. Guerin meant here was that traffic that did not go through Ogden was excluded. He doesn't mention Ogden, but I am confident that Ogden was part of the rule, and I think that what Mr. Guerin meant to say was, or implied in this is that traffic that didn't go through the Ogden gateway was not part of the subject traffic.

JUDGE HOPKINS: I think this would be a good time for a recess. Let's take 15 minutes.

(Whereupon, a brief recess was taken.)

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JUDGE HOPKINS: Let's get back on the record.

BY MR. KHARASCH: (Resuming)

Q Mr. Swain, let's look together at SFSP-C-5, Page 2, where an explanation is supplied for reason code 13 rejections.

A Yes, sir.

Q You were going to check at the recess and tell us --

A There are no exceptions.

Q Thank you. Did reason code 13 appear in previous iterations?

A I believe it did, sir.

Q Were there exceptions in the previous iterations?

A None that I recall, no.

Q Let's return to the Oregon rule.

A Yes, sir.

Q Have you during the recess been able to solve any apparent inconsistency between SFSP-31 and Beyff and Guerin and Swain descriptions?

A Yes, sir, I have. The rule as programmed in the model is as I stated it.

Q Perhaps you had better restate that.

A That traffic has to originate in Oregon and

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move through the Ogden gateway. Now, it turns out that the traffic that would move, that would be diverted, that would move that way in the prediversion route and that would be diverted would be traffic that goes through Kansas City and thence to points in the east, as stated in Mr. Guerin's statement and as stated in Mr. Keyff's statement.

So, the effect is that the rule as programmed effects traffic that originates in Oregon as it is interchanged at the Ogden gateway and the postmerger -- merger diversion route would be through Kansas City, and that is to the east on either the SP or the SP.

Q I wish to be very precise on the record. The rule as it was applied by the DNS computer program deals with traffic originating in Oregon and moving through the Ogden gateway.

A Yes, sir.

Q Is there any cutoff or precision in the program as to the destination beyond the Ogden gateway?

A No, sir. There is no qualification.

Q So although much traffic may move to Kansas City and points east, the Oregon rule applies to all traffic originating in Oregon and moving through Ogden.

A That is correct.

Q Would you turn around, Dr. Swain, if you

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would, and look at this extremely large map of the Santa Fe Southern Pacific railway systems?

A Yes, sir.

Q I observe that there is a Souther Pacific route from Oregon points that runs south and across and reaches into Texas. Do you confirm that?

A Yes, sir.

Q And Ogden is in Utah, is it not?

A Yes, sir.

Q Traffic subject to the Oregon rule could get to Texas by moving through Ogden to Kansas City and then south to Texas.

A That is correct.

Q When you applied the Oregon rule, did you apply it to traffic that moves from Oregon through Ogden to Kansas City and then south to Texas?

A As I said, there were no exceptions.

Q At Pages 9 and 10 of Mr. Guerin's statement, there is an explanation of the reasoning for the Oregon rule. Have you seen that statement that was referred to in SPSF-31 to which you provided a verification, sir?

A Yes, sir.

Q The first element of the reasoning is the equal and sometimes superior efficiency of Ogden routes for most traffic moving to or from Oregon. Do you see

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that?

A That is correct.

Q Does that part of the reasoning apply to Texas traffic that could be carried by the SFSP system across the southern route to Texas?

A I find it difficult to answer that, Mr. Kharasch, because I don't know what the mileages are, and I don't know what the densities are, so I don't really know.

Q Did you conduct any examination of the efficiencies of the southern route to Texas versus the Ogden route at the time you determined to apply the Oregon rule?

A I don't recall any specific studies of -- we did no specific studies. I remember us discussing the impact of the rule. My general recollection of the impact of the rule, the feeling was that the Ogden gateway was most efficient -- an efficient route for predominantly eastern movements.

Q For eastern movements. But you see, my problem representing a railroad that serves Texas has to do with southern movements.

A Yes, sir. I understand that.

Q And for those southern movements, did you conduct any examination of the efficiency of route?

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A I don't recall any, but perhaps you can ask Mr. Reyff or Mr. Guerin. Their recollection may be better.

Q Please turn to Page 12 of SFSP-31.

A Yes, sir.

Q We have to talk about the DRGW iteration. Do you see the discussion at the top of the page of the DRGW iteration and the reference to Reyff verified statement at 22 in connection with the DRGW iteration?

A Yes, sir.

Q You do not specify in SFSP-31 what adjustments were made, though you say adjustments were made, and let's look at Page 22 to see what Mr. Reyff's statement cited tells us about adjustments.

He tells us, without saying exactly what they are, that impedences were lowered in this iteration between SP and Rio Grande at Ogden and at Kansas City. Do you see that?

A Yes, sir, I see that.

Q Then he tells us that there was fine tuning of this adjustment.

A Yes, sir.

Q Explain what fine tuning means.

A We adjusted the impedences to get at traffic that was originating in northern California between a

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line that extends from King City to, I believe, Cochilla, which -- the borders of the solicitation agreement were defined, northern California as being as far south as the line from King City to Cochilla, and on up into Oregon.

And what we were trying to do was make sure that traffic in that territory flowed over the Ogden gateway, so that we had to adjust the impedences within the model so that the model would select an Ogden route.

Q The word "fine tuning" implies to me that you moved a dial one way, and then you moved the dial the other way.

A We adjusted the impedences. We had sample movements, and we ran the sample movements and adjusted the impedences to get the desired effect on the routing.

Q This is one of that set of test runs that you have described to us?

A Yes, sir.

Q And if you hadn't fine tuned and adjusted the model would not have come out with the traffic suction that you wanted?

A Flowing over the Ogden gateway. Yes, sir.

Q And then you created new impedences at

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Harrington, Kansas, and at Kansas City? The word "creation" implies that you reached into the model and set some numbers. Is that right?

A Yes, sir. We had to because prior to this merger, the SP -- the DRGW was not in Harrington.

Q Now, read down on Page 22 of Mr. Reyff's statement about six lines up. Do you see the sentence beginning, "Impedences between Rio Grande and other carriers at Kansas City were set at a relatively higher level?"

A Yes, sir.

Q Again, that means you reached into the model and you set some -- you put some numbers in for an impedence?

A We had to set the impedences at Kansas City. We were replicating an extension of the Rio Grande to Kansas City that was not represented in the data base that we used to establish the impedences, so we had to establish impedences at Kansas City for the Rio Grande.

And in doing that, we set the impedences slightly lower between the Rio Grande and the KCS to reflect the fact that they are in the same yard, and that there are some efficiencies that are caused by that.

0021 0064

Q At the bottom of Page 22 of Mr. Reyff's statement, it says, "We adjusted upward the impedence from Ric Grande to both Missouri Pacific and Santa Fe at Pueblo in order to negate the undue impact of coal traffic." I am reading on to Page 23.

Do you see that?

A Yes, sir, I see that.

Q You say that coal traffic volume at a point does not have the same effect on the efficiency of the route as other traffic volume at a point. Is that a correct recital of the logic there?

A No, that is not what that means. It means that there is a heavy volume of interchange of coal traffic in the 1982 data base between the Ric Grande and the Santa Fe and MP at Pueblo which results in a very low impedence, a relatively low impedence at Pueblo between those carriers.

And what we wanted to do was to raise those impedences so that the model would choose a longer haul, DRGW route through Kansas City. A car of coal has the same impact on impedences as any other car has. A car is a car in the formula.

Q Is there any other point in your various iterations where you removed coal traffic from the impedence calculations?

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A We have not removed the coal traffic from the calculations. We simply changed the number that was calculated in the base impedences, as we have in the other examples that are cited throughout SFSP-31 and Mr. Reyff's statement.

Q Is there any other point in your procedure where you adjusted impedences in order to negate the undue impact of coal at any other places?

A Well, we have adjusted impedences at various places. I am not sure of the volume of coal going through each of those places. We have not made any specific adjustments on coal that I am aware of for coal movements.

Q Yes. Are there any other impedence numbers which were changed anywhere in any of your iterations in order to negate the undue impact of coal?

A No. As I say, there weren't any, and I think this is used here as an example. There is a lot of coal traffic at Pueblo, and we were not directing this impedence change at coal.

We are directing this impedence change at not having traffic routed through Pueblo. This is not -- we are not trying to do anything with coal here at all. We are trying to in this iteration prevent the model from choosing a route at Pueblo.

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We want to select a route at Kansas City.

Q Let's continue reading down Page 23 where he is describing the DRGW iteration. He says in the first new paragraph on Page 23, Mr. Reyff says, we classified all movements by looking only at the west of Kansas City portion of the route, instead of looking at the entire route west of the major midcontinent gateways.

I have used and you have used frequently, Mr. Swain, personifiers like "looking at" as if the model was actually an intelligent human being. Please explain what computer procedures were followed in classifying movements so that you look only at the west of Kansas City portion.

A Well, in the calculation of the diversion percentage, in the diversion matrix, for purposes of classifying the route as a 'A or a 12A or an A12 in the prediversion and in the postdiversion route, if it is an east-west movement, we only count that portion of the route which is west of the river gateways, Chicago, Streator, St. Louis, Memphis, and New Orleans.

We don't consider the carriers east of those points in calculating those arguments for entering the diversion matrix, and that is to reflect the fact that the western carriers do not have any influence beyond the river. They don't go beyond the river. Their

impact stops at the river.

To be consistent, we wanted to treat Kansas City the same way in this iteration, because the DRGW did not go beyond Kansas City.

Q Did the DRGW move traffic which did go beyond Kansas City?

A Yes, sir, it certainly did.

Q Could such traffic, for example, have moved to Kansas City and then south into Oklahoma and Texas?

A That is correct.

Q Now, I wish the record to be exact on the question of "looking at." First you tell us that the classification of routes, which I assume are those classifications shown on Page 3 of Attachment A to SFSP-31 -- is that the classification you looked at?

A Yes, sir.

Q These route classifications were the same in the DRGW iteration as in other iterations?

A Yes, sir.

Q But in classifying for purposes of applying the general traffic class diversions, you discarded the portions of the route east of Kansas City. Is that right? Is that what looking at only the west of the Kansas City portion means?

A That is correct. Now, let me -- I don't

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recall any exclusions to that.

Q Was there a sort of Kansas City rule as there is an Oregon rule?

A How do you mean that, sir?

Q Well, the Oregon rule seems to have been a computer procedure where you multiplied by .1 or .3 otherwise calculated diversions. You gave that procedure a name like a rule.

Did you have a Kansas City rule for the Rio Grande?

A I don't recall any specific rule, no.

Q What was the computer method you had to rerun all movements to truncate moves east of Kansas City or beyond Kansas City?

A No. It looks at the route and when it is calculated in the 1A, 12A, it stops when it gets to Kansas City and doesn't calculate beyond that.

The impact of this, I might add, is to increase diversions. It increases the diversion percentage.

Q Increase the diversion to the D&RGW?

A That's correct.

Q In the final SPSP iteration, was the Kansas City rule, what I call the Kansas City rule, the truncation rule, applied?

0021 0064

A No. We went back to the river gateways and we calculated the diversion percentages based on the description of the route within the west.

Q On Page 23 of the Beyff statement, Mr. Beyff says, "We reclassified all Southern Pacific origins in the solicitation agreement territory as open to Rio Grande service."

That, I assume, means recreating a whole new matrix?

A We added another cell to the matrix which we call the Rio Grande cell, which reflected the fact that the SP stations in California in the area covered by the solicitation agreement would be considered open for diversion percentage calculations in this particular data base adjustment.

This was done to reflect the cooperation between the SP and the DRWG and the fact that the SP had agreed to solicit via the Rio Grande routes, and that ordinarily in the matrix these stations would be considered as being closed to the Rio Grande since the Southern Pacific was not one of the merging carriers.

So, to counteract that, and to get more realistic, what we considered the realistic diversion percentages, we treated the stations in California and Oregon as open.

Q This Rio Grande cell that you added would be a cell in the sense that the Oregon rule is a column we look at in the matrix if we want to see if the Oregon rule is applied?

A This was another -- yes. It wasn't another column. It was another row.

Q Does the Rio Grande's cell appear in any subsequent iteration?

A The cell appears in the matrix as used in the SPSF merger, but it is not used in the SPSP merger.

Q It is not used?

A It only applies in the Rio Grande trackage rights iteration. The cell is there. We have a matrix. The arguments are never used for accessing that line of the matrix, those lines of the matrix.

Q I am looking at a matrix, a reproduction of a page of your matrix printout which is in MKT-C-24 in the last page.

Do you have a copy of that with you?

A Which exhibit was it, sir?

Q C-24. Do you still have one of those?

Take a look at Page 4 of MKT-C-24.

A Yes, sir.

Q Here is a line of the matrix. Point to me where -- and on the top line is as good as any -- where

does the indicator appear for the DERGW cell?

A It only appears, sir, where you have a closed station at either origin or destination. In other words, the column --

Q What column number is it in?

A It would be in the last column before you get to the diversion percentage. It would appear in that last column, and it would appear as an R, and it would appear where you have a closed to an open or a closed to a served or a closed to an exclusive, and it would show the R for the Rio Grande rule, and it would show a recalculation of that percentage in that situation to reflect the fact that for that purpose, even though the station is closed to the Rio Grande for diversion percentages, we are showing it as open, and we are using that percentage.

Q And that last column with an R in it or no R in it, the Rio Grande column was operative during the SPSP iteration?

A No. The column was in the matrix, or the row was in the matrix. It was never accessed. There was no special rule for that. It was not applied in the SPSP merger.

Q Well, is it correct to say that during the SPSP merger iteration you did not pay attention to the

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SP-D&RGW special solicitation agreement?

A That is absolutely correct, sir.

Q Look at Page 8 of SFSP, please, 31. In this case, on this page, you are describing the general process in each study iteration.

A Yes, sir.

Q In the second paragraph designated by a dash, you talk about the system mileage multiplier of .7.

A Yes, sir.

Q The system mileage multiplier of .7 was used in which of the five iterations?

A It was used in the DRS iteration. It was used in the Rio Grande trackage rights, and it was used in SFSP merger.

Q It was not used in the first iteration?

A It was not used in eastern route closings because we were not merging carriers, so we were using a special program there.

Q And it was not used in the Southern Pacific trackage rights?

A That is correct. We did not think it was appropriate to use that in the Southern Pacific trackage rights.

Q Are there points in your procedures where, let's say, in the SFSP iteration you gave effect to new

or faster service that you thought could be offered by the merged carrier?

A Implicit in the entire study is the fact that the merged system has opportunities for providing improved service.

Q I thought we wouldn't have to go back to this, but maybe we had better look at SFSP-C-5 again, and at reason code 107 exceptions.

Some of these exceptions to exclusions were made exceptions because a superior service would be introduced by the SFSP. Is that correct?

A That is correct, sir.

Q I am looking for a point in these testimonies, sir. Maybe you can help me, Mr. Swain. Where other than at Page 11 of SFSP-31 is there a discussion of the use of the .7 merged system multiplier?

Oh, I have found it. It is on Page 8 of SFSP-31.

A Yes.

Q Let's look at Page 8.

A Yes, sir.

Q You used a system mileage multiplier of .7 in the cases where you used it to ensure that all movements for which the new rail system service would be likely to be competitive would be tested against other diversion

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criteria.

A That's correct. Yes, sir.

Q By not using a system mileage multiplier of .7 in considering the SP's trackage rights in the iteration that dealt with the SP, did you ensure that all movements for which the new rail system service would be likely to be competitive would be tested?

A We believe that we did do that, sir. We are faced in the SP trackage rights, the extension of trackage rights to St. Louis, with a situation where the SP already serves St. Louis today. There are no new entrants into the market. They are there. They are a competitive force.

They have routes via St. Louis. There is no synergistic effect of combining two carriers with a strengthened sales force, combined management information systems, and those kinds of efficiencies, yard consolidations at other points, line efficiencies at other points besides those points directly, this line segment here.

Those are all affected, all go into the calculation or the -- not the calculation, but our judgment that a seven-tenths multiplier should be used when evaluating the merging carrier's mileages. Very few of those. In fact, the only circumstance that

pertains in this situation is the fact that the SP has a shorter haul to St. Louis.

We thought and believed that the impact of that shorter haul in and of itself should be sufficient to calculate the most efficient routes. So we did not use the .7 multiplier, and instead used .1.

Q I am over here at the map, Mr. Swain. The trackage rights you are talking about are from Kansas City to St. Louis. Is that right?

A That is correct.

Q If I am looking at this map correctly, and the red lines are the SP line --

A That's correct.

Q -- it appears that the historic move before they had those trackage rights to St. Louis would have been to go from Kansas City to El Paso, Texas, back through Houston, up through -- well, past Little Rock, and then up to St. Louis.

Let me sketch it out. Here you are at Kansas City. The assignment is to get to St. Louis via the SP. You start and you go all the way west and south to El Paso, back through San Antonio, Houston, and then you start going up and east and you go up through Arkansas to a point on the Missouri border, and then up to St. Louis, correct?

A That's my point precisely.

Q And you say that you didn't think the acquisition of the direct route trackage rights between Kansas City and St. Louis called for the application of the multiplier?

A Not when you have that improvement in efficiency, and you don't have the other attributes which I cited earlier. You have a much shorter route. That in and of itself is -- the impact of that decrease in haul is precisely what we are trying to measure in SP trackage rights.

Q If you had applied a .7 multiplier in the SP trackage rights iteration, would you have created a larger diversion to the SP?

A It is possible that we might have diverted more to the SP. We carefully evaluated the routes that were selected and we couldn't think of any movements that were rejected, where we would have gotten other candidate routes which would have been candidates for diversion with a .7 multiplier. But you are right. If we had, we would have increased the diversions as a result of the SP trackage rights.

Q The time that you were considering this SP iteration was, say, in January, 1984?

A Yes, sir.

Q Do you recall that you asked for any information from Sante Fe traffic department as to what happened actually when the SP got trackage rights?

A Well, I recall that when we were discussing whether or not to use the .7 multiplier versus the nonuse of the multiplier, that -- well, I am trying to think. Basically the discussion seemed to be around the fact that the SP was not a new force in the market, and that the circuity or reduction in circuity should stand on its own.

Q That is not my question.

A I know that.

Q My question is, did you go to the Santa Fe or the SP traffic departments and obtain any information about the effect of the trackage rights?

A The two evaluators discussed it, and my impression was that they were not -- Santa Fe wasn't too concerned about it.

Q Do you think that is what Santa Fe said in the Commission proceeding involving the trackage rights?

A I can recall no big blocks of traffic, but Mr. Reyff or Mr. Guerin are better equipped to speak to that than I am.

Q I want an answer to my question. You did not go to the Santa Fe or the Southern Pacific traffic

departments and obtain any information about the effects of the trackage rights?

A I personally did not, but I suspect that perhaps Mr. Beyff did.

MR. KHARASCH: I see.

Your Honor, may we be off the record?

JUDGE HOPKINS: Sure.

(Whereupon, a discussion was held off the record.)

MR. KHARASCH: Your Honor, may we have marked at this point a series of exhibits starting with -- we will just enter these in no particular order, Your Honor. May we have marked as Counsel's Exhibit MKT counsel's exhibit next in order, MKT-C-37, a three-page exhibit dealing with a Dickens, Iowa, to Houston, Texas, move?

JUDGE HOPKINS: That will be marked for identification.

(The document referred to was marked for identification as Exhibit Number MKT-C-37.)

MR. KHARASCH: As the next exhibit, MKT-C-38, a four-page exhibit dealing with a movement from Eau Claire, Wisconsin, to Laredo, Texas.

JUDGE HOPKINS: It will be marked for identification.

(The document referred to was marked for identification as Exhibit Number MKT-C-38.)

MR. KHARASCH: As the next exhibit, a two-page exhibit dealing with a movement from Chanute, Kansas, to Eagle Pass, Texas.

JUDGE HOPKINS: That is MKT-C-39, and it will be marked for identification.

(The document referred to was marked for identification as Exhibit Number MKT-C-39.)

MR. KHARASCH: As the next exhibit, Your Honor, a four-page exhibit dealing with the movement from Eau Claire, Wisconsin, to Laredo, Texas.

JUDGE HOPKINS: It will be marked for identification as MKT-C-40.

(The document referred to was marked for identification as Exhibit Number MKT-C-40.)

MR. KHARASCH: As the next exhibit, a

four-page exhibit dealing with a movement from Aberdeen, South Dakota, to Laredo, Texas.

JUDGE HOPKINS: That will be marked for identification as MKT-C-41.

(The document referred to was marked for identification as Exhibit Number MKT-C-41.)

MR. KHARASCH: As the next exhibit, a three-page exhibit dealing with a movement from Enid, Oklahoma, to Dennison, Texas.

JUDGE HOPKINS: That will be marked for identification as MKT-C-42.

(The document referred to was marked for identification as Exhibit Number MKT-C-42.)

MR. KHARASCH: The next exhibit, MKT-C-43, is a three-page exhibit dealing with a movement from Kansas City to San Antonio, Texas.

JUDGE HOPKINS: That will be marked for identification as MKT-C-43.

(The document referred to was marked for identification as Exhibit

Number MKT-C-43.)

MR. KHARASCH: As the next exhibit, a three-page exhibit dealing with a movement from Enid, Oklahoma, to Dennison, Texas, way bill 163575.

JUDGE HOPKINS: That will be marked for identification as MKT-C-44.

(The document referred to was marked for identification as Exhibit Number MKT-C-44.)

MR. KHARASCH: As the next exhibit, a three-page exhibit dealing with a movement from Memphis, Tennessee, to Tulsa, Oklahoma.

JUDGE HOPKINS: That will be marked for identification as MKT-C-45.

(The document referred to was marked for identification as Exhibit Number MKT-C-45.)

MR. KHARASCH: As the next exhibit, a four-page exhibit dealing with a movement from Harvey, North Dakota, to Laredo, Texas.

JUDGE HOPKINS: That will be marked for identification as MKT-C-46.

(The document referred to

was marked for identification as Exhibit Number MKT-C-46.)

MR. KHARASCH: As the next exhibit, a three-page exhibit dealing with a movement from Clinton, Iowa, to the well-known spot of Bayport, Texas.

JUDGE HOPKINS: That will be marked for identification as MKT-C-47.

(The document referred to was marked for identification as Exhibit Number MKT-C-47.)

MR. KHARASCH: As the next exhibit, a three-page exhibit dealing with a movement from Pasco, Washington, to Cyprus, Texas.

JUDGE HOPKINS: That will be marked for identification as Exhibit MKT-C-48.

(The document referred to was marked for identification as Exhibit Number MKT-C-48.)

MR. KHARASCH: As the next exhibit, a four-page exhibit dealing with a movement from Etter, Texas, to Dennison, Texas.

JUDGE HOPKINS: That will be marked for

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identification as Exhibit MKT-C-49.

(The document referred to was marked for identification as Exhibit Number MKT-C-49.)

MR. KHARASCH: As the next exhibit, a three-page exhibit that deals with a movement from Aberdeen, South Dakota, to Laredo, Texas, called Example Number IIA.

JUDGE HOPKINS: That will be marked for identification as Exhibit MKT-C-50.

(The document referred to was marked for identification as Exhibit Number MKT-C-50.)

MR. KHARASCH: As the next exhibit, a three-page exhibit dealing with a movement from Sherman, Texas, to Brenham, Texas.

JUDGE HOPKINS: That will be marked for identification as Exhibit MKT-C-51.

(The document referred to was marked for identification as Exhibit Number MKT-C-51.)

MR. KHARASCH: As the next exhibit, a

three-page exhibit dealing with a movement from Fremont, Nebraska, to Seguin, Texas, S-e-g-u-i-n.

JUDGE HOPKINS: That will be marked for identification as Exhibit MKT-C-52.

(The document referred to was marked for identification as Exhibit Number MKT-C-52.)

MR. KHARASCH: As the next exhibit, a three-page exhibit dealing with a movement from Bentonite, Wyoming, to Port Lavaca, I-a-v-a-c-a, Texas.

JUDGE HOPKINS: That will be marked for idertification as Exhibit MKT-C-53.

(The document referred to was marked for identification as Exhibit Number MKT-C-53.)

MR. KHARASCH: As the last in this series, a three-page exhibit dealing with a movement from Oroville, Washington, to San Antonio, Texas.

JUDGE HOPKINS: That will be marked for idertification as Exhibit MKT-C-54.

(The document referred to was marked for

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identification as Exhibit Number MKT-C-54.)

MR. KHARASCH: I propose on the record, Your Honor, that I be treated as having asked Mr. Swain if the information recited on the first page of these exhibits correctly reflects the information in the sample or selection printout and the matrix line, and that he has answered yes.

I propose that as a stipulation subject always to the right of the applicants or any party to correct that statement.

JUDGE HOPKINS: Mr. Wilson?

MR. WILSON: I think we would basically agree with that.

JUDGE HOPKINS: Subject to correction.

MR. WILSON: Subject to correction. Some of the multipliers seem to be slightly off, and some of the apparent error footnotes may not be right. We would not agree with all of those. Other than that, we will stipulate.

JUDGE HOPKINS: Thank you.

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BY MR. KHARASCH: (Resuming)

Q Before I ask you the final questions, Mr. Swain, I understand that you have prepared, in answer to my questions as to where in SFSP 31, Beyff, Swain or Guerin statements, there is the specific information which is generally described in, oh, 40 different places in SFSP 31. And I understood you arranged that.

You have conducted some research over the weekend, and you prepared to answer.

A Yes, sir.

JUDGE HOPKINS: You've been waiting for that, haven't you?

THE WITNESS: I've been waiting for a day and a half. My big moment.

BY MR. KHARASCH: (Resuming)

Q Now, if you would start, sir, I would just let you read along. If I have a question, I may ask leave in this case, Your Honor, to interrupt the answer, to get a more precise answer or a clearer answer.

JUDGE HOPKINS: All right.

THE WITNESS: Okay. Your first question had to do with page 2, right below where I described the branch line classifications, I stated SFSP 31, the line classifications are based on a 1977 FRA evaluation of the U.S. rail network, but have modified in some cases

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to reflect changing conditions recognized by DNS and its clients during the past marketing studies. Swain, at page 3.

Okay. On page 3, I think I explained that, first of all, the FRA network is the network that was initially designed by the FRA in 1977 and subsequently updated in 1980. I say in my verified statement on page 3: "The FRA network has also been augmented by basic Canadian lines. The network has also been updated to reflect changes in ownership of sections of the former Rock Island Rail System and sections of the Milwaukee Rail System, including the creation of many new short line railroads in the west, to reflect all rail consolidations which were in effect --

JUDGE HOPKINS: Mr. Kharasch, do we need to read --

MR. KHARASCH: No. I don't want him to read it.

BY MR. KHARASCH: (Resuming)

Q Where in your statement, Mr. Swain, or in Mr. Reyff's statement, or in Mr. Guerin's statement, or in the papers that Applicants submitted as evidence in this case, the specifics were given that explain the general statement.

I don't at all ask you to go through 40

readings of the testimony. I want to know where the specifics are given.

A All right. The specifics of the line segment charges are shown in RDS 92, 109, 168, 308, 311, 322, 245, 247, RDR 1, RDR 98 through 133.

JUDGE HOPKINS: Mr. Kharasch.

BY MR. KHARASCH: (Resuming)

Q Again, Mr. Swain, the question is -- I think you are giving me pages of your document depository numbers.

A That's correct.

Q I asked you where in the statements or in the material you have submitted as evidence. Now, I understand the material you have submitted in evidence, I suppose, includes the appendices to SPSP 31, and I will ask counsel to say were those submitted as evidence? They were filed with the Commission's office.

MR. WILSON: Well, I don't really know whether they are in the record or not. Traditionally, in rail traffic studies, work papers behind the study, the sample study movement sheets, are submitted to the Commission staff. I believe they are considered part of the record in most cases, but I'm not sure.

JUDGE HOPKINS: You're talking about SPSP 31

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now? That's what he's referring to.

MR. WILSON: The question deals with some appendices to SFSP 31 that we submitted. And upon checking, it appears that generally those types of work papers underlying a rail traffic diversion study had been considered part of the record.

I don't know whether there has been a ruling in this case, so I don't.

MR. KHARASCH: Sir, I am just asking the Applicants' counsel if the Applicants' counsel consider that the appendices which are designated in SFSP 31 as appendices are submitted as exhibits in the record. Then I would be glad to hear from Mr. Swain where in those pieces of paper there is the reference.

That is my question. That is, evidence submitted. In no way would I agree, without asking Your Honor an opportunity for argument would I agree that this 12 volumes of work papers in any way is evidence in this case.

JUDGE HOPKINS: I don't think they have ever been --

MR. WILSON: No. We don't submit that all of the work papers over there are appendices.

MR. KHARASCH: There were appendices submitted, and I think one copy was filed with the

Commission.

JUDGE HOPKINS: Are you talking about those specific appendices?

MR. KHARASCH: Well, those specific appendices, I thought, were submitted as exhibits in this case. I don't know.

JUDGE HOPKINS: Were they submitted originally?

MR. WILSON: We would consider those appendices as part of the record, Your Honor.

JULGE HOPKINS: All right. Thank you.

BY MR. KHARASCH: (Resuming)

Q Now, Mr. Swain, please confine your answer simply to tell me where those 40 or 50, what I call imprecisions, were precised in any papers that you submitted. That includes your statement, Reyff, Guerin, or SFSP 31, or the papers submitted as appendices to SFSP 31.

MR. WILSON: Your Honor, we took the question obviously as a question for where are the specifics either in the testimony or in the work papers. Obviously, it would be very large testimony if it were to go into every detail in this study and to include all of the material that is in the work papers.

So what portions of Mr. Swain's answer deals

with are specific page number references in the work papers where, in some cases, underlying detail can be found. And we understood that that was the question on Friday.

If Mr. Kharasch is not interested in where that material can be found, then we can address the question in that way, I suppose.

JUDGE HOPKINS: Mr. Kharasch.

MR. KHARASCH: Your Honor, I am looking at page 3052 of this transcript, which is where the question was asked on Friday. And at page 3052, the question refers to the papers submitted as evidence in this case.

I do not want at this time references to the work papers. I was desperate for references. I asked Applicants over and over for a detailed statement. We asked for a detailed description of where things were in the work papers. We never received them. I don't want them at this stage in the case.

THE WITNESS: Mr. Kharasch, wait a minute; wait a minute. I don't want to be argumentative about this, but I only had three phone calls from your consultant. I believe I answered every one of his questions.

I was available to answer more questions. The

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work papers are available. I have a list here of work papers that cite the specific changes that went into every one of the points that you asked about Friday afternoon.

I have held myself out to be cooperative. The work papers have been available. We were available to answer questions about the work papers, and I am now here, willing to specifically point out each one of the work papers, most of which I might point out are also pointed to in SFSP 31. Almost every reference here to either my statement or Mr. Reyff's statement is also accompanied by a reference to the underlying work papers.

Now, I think we have been responsive, and we would have been more responsive had we been asked more questions.

MR. KHARASCH: If I may comment, Your Honor.

JUDGE HOPKINS: Go ahead.

MR. KHARASCH: I would say to Mr. Swain that I do not accuse Mr. Swain of being uncooperative. I state without qualification that I think the Applicants have been totally uncooperative to the point of refusing to give a complete documented statement of procedures in this case with references to what was done.

I see no point in arguing that at this point.

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JUDGE HOPKINS: We have been going through this before.

MR. KHARASCH: But I don't want to know at this stage, as Mr. Swain is leaving the stand, where in that 12 boxs of assorted this and that there are the specifics.

I would like to point out that we have many times during the examination today found that there was nothing in the work papers that would explain things like exceptions to Rule 107 and the like.

JUDGE HOPKINS: It appears you are not interested in what he has done with the answers and the way he has prepared them.

MR. KHARASCH: I don't want 5,000 references to work papers which were not organized and keyed to a complete statement of procedures when we were given it.

I wanted to know the points in what he is submitting as evidence in this case, there are specifics given.

JUDGE HOPKINS: Are you willing to try that, Mr. Wilson?

MR. WILSON: Well, it's Mr. Swain's testimony. We will let pass many of the editorial comments that Mr. Kharasch has made.

Certainly, I think he could probably go

through and answer it on that basis.

THE WITNESS: Most of what I have here is directed towards the work papers because I spent a substantial amount of time this weekend going through the work papers and finding and addressing each one of your points and listing a work paper that goes with it.

JUDGE HOPKINS: But Mr. Kharasch is not interested --

MR. KHARASCH: I'm interested in what is in evidence in this case.

JUDGE HOPKINS: What I'm saying is, right now you're not interested in what is in the work papers. You want something specifically where the specifics are shown in the evidence that's been presented. Is that correct?

MR. KHARASCH: Yes, sir.

JUDGE HOPKINS: Can we try, will you be able to --

THE WITNESS: Well, it's going to be a laborious process, because I'm going to have to pick through the ones where I have work papers versus those where there is evidence. There are cases where there is information in evidence.

The preponderance of my effort was directed towards the work papers.

0021 0095

MR. KHABASCH: I have a perhaps speeding-up method, since there's been a misunderstanding here of what was asked for.

JUDGE HOPKINS: Thank you.

M. KHABASCH: I would be quite open to receiving, as a late filed exhibit, the tabulation. And if the Applicants think it does any good to add words in the workpapers, that's fine. But my answers could come as a late filed exhibit.

JUDGE HOPKINS: It seems to me that's a simple way of handling it.

MR. WILSON: Okay. We are agreeable to that, Your Honor.

JUDGE HOPKINS: What is your next number?

MR. WILSON: SFSP-C-6 is what we would name this.

JUDGE HOPKINS: We will set that aside as SFSP-6 then, a late filed exhibit.

(The document referred to was marked Exhibit SFSP-C-6 for identification.)

JUDGE HOPKINS: Now, let's get it straight before you go forward with this. We don't have to discuss it on the record, if you could discuss it with him afterwards. If there's any question, I want it

0023 0096

clear so you both understand what it is you want.

MR. KHARASCH: My statement is exactly the same as it was last Friday. I want pointers to where the specifics are given in the material submitted as evidence.

JUDGE HOPKINS: All right. Now, that's as clear as you can be.

MR. WILSON: Understood.

JUDGE HOPKINS: Mr. Swain, you work it out with your attorney if there's any question.

BY MR. KHARASCH: (Resuming)

Q Mr. Swain, a few closing questions, and I will part company temporarily with you.

Did you ever run the program that was used in the SFSP iteration against the original 1982 data base?

A No, sir; we did not.

Q Have you applied your program to the trackage rights requested in this case?

A No, sir; we have not.

Q When Mr. Wilson participated in discussions with the three fates, the final evaluators --

A The three --

Q Fates -- strike the beginning, please.

When Mr. Wilson participated in discussions with the final evaluators, was he acting as counsel to

0023 0097

you or your firm, DNS?

A No, sir; he was not. He was not employed by DNS.

Q And he has not been retained by counsel for DNS?

A He's not been retained by counsel for DNS.

Q As counsel for DNS.

A No, sir. Not as counsel for DNS.

MR. KHARASCH: I have no further questions.

JUDGE HOPKINS: Thank you.

Let's go off the record, then.

(Discussion off the record.)

JUDGE HOPKINS: Let's get back on the record. Now, short and sweet, if you can.

THE WITNESS: Both Hamlin, Texas and Etter, Texas are miscoded, as you surmised.

MR. KHARASCH: Thank you.

JUDGE HOPKINS: Is that it?

Thank you. That was short and sweet.

Off the record again.

(Discussion off the record.)

JUDGE HOPKINS: We will be in recess until 1:35.

(Whereupon, at 12:35 p.m. o'clock the hearing in the above-entitled matter was recessed, to reconvene

0023 0038

at 1:35 p.m. o'clock, this same day.)

0021 0099

AFTERNOON SESSION

(2:00 P.M.)

JUDGE HOPKINS: Let's get back on the record.

Are you going to be next, Mr. Sanford?

MR. SANFORD: Yes.

JUDGE HOPKINS: Go ahead.

Whereupon,

NEWTON D. SWAIN,

the witness on the stand at the time of recess, having been previously duly sworn, resumed the stand, and was examined and testified further as follows:

CROSS EXAMINATION

BY MR. SANFORD:

Q Mr. Swain, good afternoon. My name is Kendall Sanford, and I represent the Denver and Rio Grande Western Railroad Company.

I am going to try to be brief. I just have a few questions for clarification.

If I understand the purpose of your traffic study, it is a prediction, attempted to be a prediction of traffic patterns postmerger. Is that correct?

A That is correct.

Q And you are essentially, if I understand these iterations and the involvement of the evaluators, you are essentially trying to quantify the judgment of the

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final evaluators. Is that correct?

A Right, we are trying to quantify their judgments and measure the impact of the merger on the Santa Fe and the other affected carriers.

Q So at each iteration, whatever stage of the proceeding you are in, after you have run the iteration, the evaluators look at the results and exercise their subjective judgment, and then you run another one. Is that correct?

A Well, they have made their judgments. We have programmed their judgments. We have produced output which reflects that. They review the output, or we review the output, and make a decision as to whether that iteration does reflect our judgments.

If it does, then we move on to the next iteration.

Q We have heard a highly technical term through the course of this proceeding of apples and oranges. I assume some of these iterations represent the computer technical phrase of garbage in, garbage out. Is that right?

In other words, when the data goes in wrong, the results come out wrong. Is that correct?

A Could you give me an example?

Q Well, rather than example, when you input to a

computer, the result is dependent upon the input. Is that correct?

A That's correct.

Q And if you input erroneous data, you will get an erroneous result.

A If you have erroneous information, and act on erroneous information, you will get an erroneous result.

Q Did you ever run the base case, traffic through the base case model to determine whether it would reproduce the existing traffic?

A I think the question you are asking me, and correct me if I am wrong, did we ever run the base case traffic, i.e., origins and destinations --

Q Correct.

A -- through the traffic diversion model --

Q Correct.

A -- to see if, and here is where I am interpreting your question, to see if we flowed the traffic the same way the traffic flowed in the data base itself.

Q That's correct.

A I think I have answered that question, and I will repeat the answer. The answer is that, no, sir, we did not. We have a traffic diversion model here rather

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than a global network flowing model. The purpose of the model is to select and evaluate one candidate route and to make diversion decisions based on that one route.

Q Mr. Swain, the impedence adjustments that we have heard about, if I understand it, they are mileage factors applied at various locations attempting to quantify judgment factors.

Is that correct?

A They are weighting factors which are used in an algorithm. They are equated miles which represent the volume with which junctions and interchanges between carriers are used, and they are a weighting factor in calculating the lowest weighted mile route.

Q So that after you have adjusted the impedences at each stage, when the computer looks at the possible diverted route, it is comparing the sum of the impedence factors in the line segments.

Is that correct?

A It's comparing the sum of the mileage on the line segments multiplied by the weighting factor for each line segment plus the impedences at all of the junctions.

Q Okay. Focusing briefly on the DRGW/SP solicitation agreement, and that set of iterations to adjust the base case traffic for both the DRGW trackage

rights and the solicitation agreement, were the adjustments that were made in the various iterations primarily impedence adjustments?

A Well, the adjustments in the PRS iteration included some impedence adjustments and included the circuity rule at Fremont for TOFC traffic, and the exclusion of TOFC traffic from Los Angeles to Chicago.

The SP trackage rights iteration used a different multiplier. There were some impedence changes. The answer to your question is yes. Most of the changes were impedence changes in the two prior iterations.

Q My question basically is, we are now on Page 12 of SFSP-31. We are talking about the adjustment as a result of the DRGW trackage rights, Pueblo, Kansas City, and SP-DRGW solicitation agreement.

A Yes, sir.

Q What adjustments were made in this series of iterations?

A There were impedence adjustments. There were adjustments to the diversion matrix to reflect the fact that closed stations in the area affected by the solicitation agreement on the SP would be treated as open for diversion matrix purposes, and the arguments or the calculation of the route arguments for entry into

0021 0104

that matrix only extended as far as Kansas City as opposed to the river gateways in the previous iterations.

Q Now, I believe you have testified that the purpose of this adjustment must reflect the fact that the 1982 traffic base did not include the DRGW's trackage rights, nor did it include the solicitation agreement.

Is that correct?

A That is correct.

Q So after these various iterations, and I think you have testified somewhere between four and seven, I don't recall which, you were satisfied that you had produced a result that reflected those changes.

Is that correct?

A That is correct.

Q Did you compare that result against any historical time period where those conditions were in effect?

A We did not. We were simulating here four base case adjustments, and we were adjusting a data base that occurred in 1982 to reflect the conditions that we thought pertained in 1983.

Q But you did not compare them to patterns that occurred in 1983?

A We did not make any specific comparisons in terms of actually going back to either the SF data base or the SF data base, but the traffic evaluators were familiar with what had happened and what traffic -- how traffic was moving, and that familiarity was the basis for our judgment that that is what was happening, that the model was accurately reflecting what was happening.

Q At each iteration, apparently you looked at the results, and the evaluator decided that the results were not in accordance with what they felt they ought to be, is that correct, until we get to the final?

A That is correct.

Q And then you make an adjustment in impedences and so forth, and run it again to determine whether they now fit.

A Many of those iterations are -- two things can happen when you go through an iteration. You can see errors in judgment, traffic flowing that you don't think should flow that way, and that you want to change, or you can see that a decision that we have made, an impedence that we have put in, a projection rule is not working correctly.

So, when the evaluators were looking at the output, the sample output, they were looking for both of those types of things, and it was both of those types of

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changes that we were making.

Q Well, when you say that the impedence didn't work the way it should, what you are saying is, it didn't meet the result you expected. Is that correct?

A It did not flow the traffic the way the evaluators thought the traffic should flow, or did not choose a route that reflected the route that the evaluators thought would be used.

Q Now, these base case iterations actually created new routes, or showed the traffic moving over new routes as a result of these changes. Is that correct?

A That is correct.

Q And that output was then utilized in the SFSP diversion. Is that correct?

A That is correct. It served as an input for the SFSP merger.

Q So the results that were generated by use of, for example, the changes established to the traffic base by the LRGW trackage rights solicitation agreement series of iterations flowed through to the SFSP diversion study.

A That's exactly right. We were trying to create a data base for input to that study.

Q That's correct. Now, if you assume that the

DRGW solicitation agreement with the SP would not exist post-consummation of the merger, what adjustments would you have to make.

A In which?

Q In the SFSP diversion model.

A We have assumed that the solicitation agreement will not be in effect after the merger.

Q Didn't you just tell me that the results of the SFSP -- of the SP-DRGW solicitation agreement iterations served as the traffic base for the SFSP diversion study?

A That's true.

Q Did you reverse those adjustments?

A Did we assume that the DRGW would not be handling that traffic?

Q That's correct. Did you reverse any of the impedences that you created as a result of that agreement? Did you reverse those impedences, change them back in the SFSP diversion study?

A Yes, sir, we did.

Q You did?

A My recollection is that most of them --

Q Where is that demonstrated in the evidence?

A It is one of these things that I think is implicit in what we have done, but perhaps it requires

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some explanation. As we explained in the testimony, the impedences are recalculated after every iteration to reflect the changes in volumes at the junctions that are affected by that iteration.

So, we start with a new set of junction impedences. We then have to manually change those impedences that we want to change to reflect the next iteration. The changes that we made to reflect -- that were reflected in the DRGW trackage rights and solicitation agreement adjustment were wiped out in that process.

We reverted back to the normal, so-called normal calculation of impedences.

Q Is there a table that shows what the ultimate DRGW impedences were?

A Yes, sir, there is. There is a table. In the work papers there are the impedences for every single one of the adjustments. There are also work papers, as I was going to explain earlier this afternoon, showing the charges to all of those impedences for each of the iterations.

Q But they are not in the evidence?

A They are not in the evidence because the specific changes that --

Q I just asked you if they were in the evidence.

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MR. WILSON: I think the witness should be able to complete his answer.

JUDGE HOPKINS: Why weren't they in the evidence?

THE WITNESS: They are not in the evidence because a change in impedences, taken in and of -- by itself, we change an impedence from 600 miles to 800 miles, or from 900 miles to 1,200 miles, that numeric change really does not mean anything unless you compare it with all of the other 10,000 impedences that are in the junction.

What is in the testimony is the statement of myself and the other evaluators that we did, yes, change these impedences. It is not necessary to know, I think, to understand how the model works, that the impedence went from 600 miles to 800 miles, or from 800 miles to 500 miles.

The important thing is that we did change the impedences. We were trying to get -- with the express purpose of directing the traffic flows in the manner in which the evaluators wanted to do that.

Q Okay. Now, you say that you changed the impedences in the SESP diversion model from those that have been utilized in the solicitation agreement iteration, but you didn't change the diversions that

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occurred as a result of the SP-DRGW solicitation agreement iteration.

Is that correct?

A The diversions to the traffic?

Q Yes. You created a new traffic flow in this iteration, as I understand it.

A That's exactly right. We were trying to represent the fact that the DRGW, as a result of their trackage rights to Kansas City and as a result of their solicitation agreement with the SP, were going to gain additional traffic.

That additional traffic would then be diverted in the SFSP merger. If we hadn't diverted the traffic to the DRGW, we couldn't take it away in the SPSF merger. If we had not made the adjustment, we would have understated the diversions from the DRGW.

Q Let's look at that. When you go to the diversion model, before you go to the diversion model, you have some exclusionary criteria, don't you?

A Yes, sir, we do.

Q Do you have SFSP-C-5 in front of you?

A Are these the responses to --

Q SFSP-C-5.

A Yes, sir. I have it.

Q Page 5.

A Yes, sir.

Q Reason code 108.

A Yes, sir.

Q Explain reason code 108. What does it mean?

A Single merging carrier serves both end points. Also, an old route. One of the merging carriers serves both ends of the merged systems portion of the diverted route. That merging partner was in the prediversion route.

Q Okay. Let's assume the traffic is moving between Eugene, Oregon, and Kansas City. Prediversion it moved Eugene SP Coder, DFGW Harrington, SSW Kansas City.

Would that movement fall within reason code 108?

A What is the diverted route?

Q The diverted route would be Eugene SFSP Kansas City over Barstow.

A Yes, sir. That would fall in 108.

Q So it could not be diverted?

A That could not be diverted in SFSP.

Q That's correct. Could not be diverted to SFSP. That is all I want to know.

A That's exactly right.

Q Now, we have heard some discussion this

morning on the Oregon rule, and just to clarify today's record, at what iteration did the Oregon rule arise?

A Well, at what iteration?

Q That's correct. The question is, at what iteration -- I will make it clearer.

At what iteration of the SPSP diversion study did the Oregon rule arise?

A It arose, as I recall, right at the beginning, if not before the first iteration, certainly after the first or second iteration.

Q And the factors that are in the record are Point 1 for expedited traffic, Point 3 for nonexpedited traffic. Is that correct?

A That's correct.

Q Were any other factors ever used in any iteration?

A Not to my recollection, no.

Q That has the effect of preventing a total diversion on any traffic subject to the Oregon rule, does it not?

A That has the result of substantially reducing the diversions on traffic that originates and terminates in Oregon. Yes, sir.

Q Now, you testified yesterday, and I quote, "No doubt that the merging carriers will favor their long

haul." Is that correct?

A That is correct.

Q Now, let me take a piece of traffic, Eugene to Kansas City, and see if I can take it through everything that occurs. That traffic would go through the base case adjustments, and let's assume that it ends up, out of all the base case adjustments, it is now as I described, Eugene SP Ogden, DRGW Harrington, and then on to Kansas City SSW.

Now, if I understand correctly, that traffic will not be considered for diversion because of reason code 108. Is that correct?

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A That is correct. There is no -- that's correct.

Q So that traffic doesn't even get the benefit of the Oregon rule, the 20 percent or 10 percent or 30 percent that it might be diverted; correct?

A Let me make sure that it is not not excepted in Rule 107.

Q Is there any Oregon traffic moving over the Rio Grande with SP at one end and SSW at the other end that could be diverted?

A I'm still trying to answer your previous question, sir. I apologize.

Q Take your time.

A There is no exception. It originated in Oregon and terminated in Kansas City.

Q And the reverse of that?

A And the reverse of that.

Q So that the Oregon rule also applies to traffic which terminates in Oregon and moves over Ogden?

A I was talking about the Rule 108.

Q Okay.

Well then, let me ask the question: Doesn't the Oregon rule apply both to traffic originating and terminating in Oregon?

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A Yes, sir; it does.

Q And there is no Oregon traffic that moves over Ogden via the DRGW with SP at one end and SSW at the other end that even survives Rule 108?

A No, sir. Wait a minute. That's not true at all.

Q What Oregon traffic that moves SP Ogden, DRGW Harrington, and SSW Kansas City can be diverted?

A Traffic where the post-diversion route is SP Santa Fe Chicago Conrail.

Q I just postulated Kansas City.

A Kansas City is the originating and terminating point.

Q Or the off-junction.

A Well, you didn't say off-junction.

Q I'm now saying or the off-junction.

A Oh. And it's the off-junction and the post-diversion route?

Q Yes.

A If it's the off-junction and the post-diversion route, I think it would be subject to diversion. But let me refresh my memory a little bit here.

If the merger went through Kansas City or was interchanged at Kansas City in the post-diversion route,

those diversions would be allowed to occur.

Q Well, it's not diversions. It then gets subject to the Oregon rule.

A It then gets subject to the Oregon rule, that's correct -- reflecting --

Q We go from zero to 10 percent or 30 percent; right?

A That is what happens to the traffic.

Q Well, isn't that the purpose of the study, to determine what happens with the traffic?

Now, earlier in this proceeding, we discussed with Mr. Neal Owen the relationship of the operating plan and the traffic diversion study, and it's my understanding that the output of the traffic diversion study, the ultimate traffic diversion study, was given Mr. Owen to put together his final plan.

Is it correct that you did not have the actual operating plan when you ran the SFSP TDS in this case?

A That is not the case at all. We had had discussions with the people developing the operating plan. We knew what the schedules would be, for instance, many of the TOFC schedules.

One of the exceptions that we have in Rule 107 reflects the fact that we will have improved TOFC schedules from Los Angeles to Memphis and other points.

We were aware of what the operating plan would be.

I believe Mr. Reyff testifies in his statement to some impedance changes that we made, line designation changes that we made to reflect the fact of how we were going to operate in and around Kansas City.

We did have a very, I think, adequate understanding of what the operating plan would be.

Q But you did not have the operating plan, isn't that correct?

Q We did not have a document that said this is the operating plan, but we were talking with the people who were developing the operating plan as it was being developed. The two were being developed simultaneously.

As there were changes made in the operating plan, we were informed of these changes.

Q Did you know that there is a schedule over Barstow, Eugene SFSP Kansas City?

A In the operating plan?

Q In the operating plan.

A I don't recall that specifically, but one of the other evaluators might.

Q Didn't the three of your evaluators sit down --

A Yes, we did.

Q Do you know what the Nevada rule is?

A The Nevada rule excludes traffic which originates or terminates in Nevada from being rejected for diversions.

Q Well, if the traffic originates and terminates in Nevada, it won't be diverted? Is that what happens?

A That is correct. The purpose of that rule was the feeling of the evaluators that traffic that originates or terminates in Nevada, to take advantage of the -- to be affected by the merged system, would have to go back around through California and down, and we felt that that would not be diverted because of that.

Q Are you aware that traffic today is moving down and around?

A My impression was that there is little very traffic that moves that way today, and that traffic that was moving via Ogden was moving that way for obvious service reasons and would continue to do so.

The SP has always had the option of moving that traffic through its other junctions and has been unable to solicit it that way. And it was felt that the combined SFSP system would be in no better position today than the SP is today to solicit that traffic.

If it is going via Ogden, we believe it should stay via Ogden.

Q There is no service improvements in the SFSP?

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A I did not say that, sir. I said that from the Nevada and Utah origin points, that traffic -- it was the opinion of the evaluators that that traffic will continue to move via Ogden.

Q But you are aware that some is moving today?

A I would suspect that there is some today, because the SP is trying to solicit via its long haul routes.

Q And there is improvements in the SFSP system?

A There are definitely improvements in the SFSP system.

MR. SANFORD: Your Honor, I'd like to have marked two documents as DRGW-C-18 and DRGW-C-19. C-18 is a two-page document which comes from Mr Swain's work papers and appears to be notes. C-19 is a four-page document which also comes from Mr. Swain's work papers and again appears to be notes.

JUDGE HOPKINS: They will be marked for identification.

(The documents referred to were marked Exhibits DRGW-C-18 and DRGW-C-19 for identification.)

BY MR. SANFORD: (Resuming)

Q Mr. Swain, do you see DRGW-C-18?

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A I see it.

Q Can you identify that for me for the record?

A It looks like a copy of some notes that I made after the Santa Fe-SP meeting on the 12th of December 1983.

Q Would you please read note number 8 for the record?

A Yes, sir. Note 8 says don't project routes for revenue loss if the junction is Ogden DRGW, Ogden DRGW, but not UP.

Q Was that rule followed?

A No, sir. That rule was not followed. That rule was, as I recall -- my recollection is that at this point we were thinking about -- it has not been determined whether or not the SP DRGW solicitation agreement would be in effect; that this rule would have affected -- we would have had to put some rule like this into effect if we had simulated the results, if we had simulated a continuation of that agreement.

Q Would you look at DRGW-C-19 -- this is merely an informational question -- and identify that for the record?

A This is another note, primarily to myself, dated the 2nd of February 1984 of things to do for this project.

Q On page EDS C00347, you show a bunch of Kearney commodity groups. What are the numbers to the right of the particular commodities?

A Those numbers are combinations of 2, 3, 4, and 5-digit standard transportation commodity code numbers which were included in the various groups that are listed down the left-hand side of the page.

Q Did you provide some reports to Kearney on the basis of these groupings?

A Yes, sir; we did.

Q And these are the listing of the STCC codes provided?

A Yes, sir; they are.

Q Now, let me ask you a question that deals with your study and whether it can be run or not. Is it possible, with the tapes provided and the fact that we do not have copies of each iteration, to run the study, eliminating any adjustments that took place for the solicitation agreement, and eliminating the origin?

Is that possible?

A Let me make sure I understand your question. When you say eliminating any adjustments that took place with the solicitation agreement, what are you referring to?

Q I'm referring to reversing the entire process

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that was created as a result of the solicitation agreement in the DRGW iterations and eliminating the origin.

A We would still keep the DRGW trackage rights.

Q That's correct.

A But not the -- it would be -- well, it would certainly be possible to run that through the model, yes.

Q And we have the information necessary to make those distinctions?

A No. You have the input -- well, you have the output data from the -- at the end of all of the data base adjustments, and you have the output data as a result of the SPSP merger.

You are saying, could you go back yourself and back out this information manually?

Q By computer.

A For the --

Q Do we have enough information to do it is my question.

A Well, for the Oregon rule, I think you do have enough information to back out the effects of the trackage rights, separate the effects of the trackage rights and the solicitation agreements, since they are so closely intertwined.

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I'd have to think about it. Let me think about it.

(Pause.)

In the output of the adjusted base case, it would be difficult to separate the effects of both the trackage rights agreements and the solicitation agreement. We could re-run the model and not make the assumptions that we made regarding the impedances and regarding the open and closed stations.

We can make those changes, and we could replicate -- we could then just replicate the impact of the trackage rights agreeements.

Q But we couldn't, with the information we have.

A Well, you can make an estimate. You can look at the traffic flows and make an estimate of it.

MR. SANFORD: Thank you, Mr. Swain. I don't have any further questions.

JUDGE HOPKINS: Who's next? Mr. Dreiling.

BY MR. DREILING:

Q Mr. Swain, in your verified statement, among your credits that you list is work that you did for the Illinois Central Gulf Railroad Company; is that correct?

A Yes, sir.

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Q And that was work done with your DNS model; correct?

A I believe the statement that I make in my qualifications refers to a study that we did for the ICG that was back in 1980 that developed a strategic business plan for the Illinois Central Gulf and that did not involve this traffic diversion model.

Q Have you had occasion to do any other studies for the ICG that has involved the use of your DNS model?

A I would like to keep confidential, if I might, the many clients -- well, the clients who have used the model. I don't know that it serves any purpose to --

MR. DREILING: Your Honor, I will withdraw that question, strike it from the record, and respect your wishes in that regard.

I think I can get at it in another way.

BY MR. DREILING: (Resuming)

Q Have you had occasion to use your model on behalf of any client with the purpose of measuring the impact of a potential merger of the Southern Pacific Transportation Company and the Santa Fe Company?

A Let me make sure I understand your question, because I don't want to misspeak.

Q Do you want me to repeat it?

A Yes. Would you, please?

Q With respect to any of your clients, have you had occasion to use your DRS model in their behalf and at their request for the purpose of measuring the potential impact of a merger of the Southern Pacific Transportation Company and the Atchison, Topeka & Santa Fe Railway Company?

A We started to do a study like that for one of our clients.

Q Did you run the model at all in the course of that study?

A We ran -- we were working at the time on another study, and we were using a model that uses the basic routing algorithm, but none of the other features that are involved in this model. So it's not -- well, many of the mechanics are the same. A lot of the mechanics are obviously different.

The diversion percentage matrix which was, for instance, supplied by the client was different. As I say, the study was in its preliminary stages and was never completed.

Q Let me get this straight. One of the major differences between your use of the model in that instance and in your use of the model in this instance was that the diversion percentage matrix was different?

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A That is correct. That client had different views of how traffic would be diverted and in what percentages it would be diverted.

Q So in reality, then, the use of a diversion percentage matrix is really based upon the judgment of the people who are using it?

A That is exactly right. That's what we have said.

Q In using that model in that instance, did you have occasion to come to a final conclusion -- strike that.

Did you develop a figure of potential losses which the Kansas City Southern Railway Company would incur if the Santa Fe and the Southern Pacific merged?

A Well, as I say, we were in the preliminary stages of developing this.

Q I didn't ask you. I was going to ask you if you developed a final number, and I didn't. I intentionally did not. I asked if you developed a number.

A As I recall, we developed a report which said, which listed all of the -- as we usually do -- the impact on all of the railroads.

Q And considering the Kansas City Southern Railway Company in particular, would I be close to your

number if I would suggest the figure of $30 million?

A I don't really know. There were several -- I don't know.

Q You don't recall?

A I don't recall precisely what the number was; no.

Q Now, I'm going to direct you to page 2 of SFSP-31. And I'm referring to paragraph B and to the factors which you indicate generally reflect the relative service inefficiencies and competitive disadvantages of interline railroads.

I won't take time on the record to repeat them. They have been gone over a good number of times.

With those factors in mind, however, I'm going to ask you to assume some facts with me for the purpose of a judgment, hypothetical type or opinion testimony on your part.

First of all, this is not an assumption. Do you know that the Kansas City Southern has an existing interchange with the Atchison, Topeka & Santa Fe Railway Company at Dallas, Texas?

A I know that.

Q If you were to assume that the evidence of record in this proceeding will show that with regard to particular TOFC traffic, the Santa Fe and the KCS

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interchange their traffic through a run-through train operation; I ask you further to assume that the character of that run-through train operation is such that the train operates between Brownwood, Texas on the Santa Fe and Shreveport, Louisiana on the L&A KCS as an integrated unit. And by that, I mean that --

A I just want to note down where is the run-through train?

Q Assume the run-through train operation.

A But you stated two points, an origin and a destination.

Q Perhaps I ought to back off and say assume the run-through train between New Orleans, Louisiana --

A Well, I believe you said another junction. You had another point. Shreveport.

Q Mr. Swain, let me go back. My initial assumption was an integrated train. Now I'm talking about a run-through train operation.

Assume a run-through train operation for interchange purposes. Do you have me there? Are you with me that far?

A I'm not sure what the difference between an integrated train and a run-through train is.

Q I'm about to explain it.

A Okay.

Q Assume a run-through train operation. Assume that that run-through train operates between New Orleans, Louisiana on the L&A and Richmond, California on the Santa Fe. Assume further that the character of that run-through train is such that it operates between Brownwood, Texas on the Santa Fe and Shreveport, Louisiana on the L&A KCS.

Without changing power, that is, with the engine intact, assume further that the only action that that train -- that occurs with respect to that train at Dallas is that the train is stopped and that the respective crews of the two railroads change position. Crew change.

Now, let's assume further that this run-through train operation is part of an overall service program entered into by and between the Santa Fe and the KCS, which includes among its features joint and cooperative solicitation and marketing of traffic for this run-through train service.

Let's further assume that the operation includes preblocking at both Shreveport and Brownwood. At Brownwood, the Santa Fe creates blocks of traffic for interchange at New Orleans, Louisiana, directly to the Norfolk and Southern on the one hand and the Seaboard Coast Line on the other.

Furthermore, the assumption is that the KCS at Shreveport, Louisiana, creates blocks of traffic for, one for Southern California destination, and the other for Northern California destination.

Now, finally, the final assumption is that the interchange operation at New Orleans, Louisiana, between the KCS and the two southeastern carriers mentioned, the Norfolk and Southern and the Seaboard Coast Line, is a direct interchange, that is, a direct terminal interchange.

By that, what I mean is, on an eastbound movement, the KCS carries the Seaboard Coast Line cut directly into the Seaboard Coast Line's yard without stopping at the KCS yard. And the same would be true of the N&S.

With that description, and with the four listed factors which you say reflect the relative service and efficiencies and competitive disadvantages of interline rail routes on Page 2 of SFSP-31, would you

characterize the interchange operation at Dallas as an efficient or an inefficient interchange?

A I would certainly say that the interchange of traffic at Dallas of that train seems to happen very quickly. I am not sure what happens at Brownwood and Shreveport.

Q But at Dallas, what happens? First of all, would you have any terminal delay feature involved in that runthrough interchange?

A If your train worked as is described every day --

Q We are assuming that it does.

A Are we assuming this is a hypothetical situation?

Q I am going to ask you to assume that the evidence of record would say this. I am not asking you to say that it is right or wrong. I am just asking you to assume it. It is my job to attempt to prove it.

A That -- I would say that that is a very rapid interchange. Yes, sir.

Q What about the additional car handling feature? Would there be any additional car handlings in the Dallas terminal?

A On this particular train?

Q Yes, on this particular train.

A Probably for bad order cars.

Q What about lack of schedule coordination between connecting carriers? Wouldn't you characterize a runthrough train operation as being the ultimate in scheduling coordination between two independent railroads?

A Yes, I would. I would say that is very applicable.

Q We have also indicated, have we not, that there is not a lack of cooperation in the solicitation marketing efforts of the connecting carriers, that that is part of the assumption, so that feature is missing, right?

A Well, you have cooperation. You have spoken of cooperation between the Santa Fe and, I presume, the KCS.

Q Yes.

A I haven't heard any discussion of cooperation between the other connecting carriers.

Q I haven't assumed that.

A Can I assume that most of this traffic goes beyond New Orleans?

Q I think you can assume that the traffic goes either beyond New Orleans, originates beyond New Orleans, or terminates at New Orleans, originates at New

Orleans.

A Okay.

Q Let me ask you this. Now, you, as one of the traffic evaluators, first of all, you personally, DNS, had occasion to make certain specific adjustments at certain terminals to reflect efficient runthrough train operations, have you not?

A When those efficient runthrough train operations replicate or represent the majority of the operation at that terminal, we have made that adjustment.

Q A preliminary question I ought to ask you is, your model, is it capable of taking a specific movement, a specific train operation, and developing specific impedences at terminals to reflect that specific -- the characteristics of that specific train operation?

A No, sir. This is a flowing model which flows traffic in groups. We have never run it putting in specific impedences for specific trains. We do have another model which does handle the operation of specific trains. That is called the operations cost model, but it has not been used in this proceeding.

Q In the course of your discussions with your fellow final evaluators, did you ever discuss the Santa Fe-KCS runthrough train operation at Dallas?

0021 0136

A It was a subject of discussion. Yes, sir. We discussed it.

Q You made adjustments at other points to reflect how you thought the traffic should be flowing, if I remember your testimony correctly. That is, you ran the test runs, and if the traffic flows didn't match up to what the evaluators thought the manner in which it ought to be flowing, the impedences were adjusted.

Is that correct?

A That is correct.

Q Was there any discussion of adjusting the impedences for the KCS at Dallas to reflect the runthrough train operation?

A No, there wasn't. I think our discussion centered around the fact that we thought diversions would occur, and what were the reasonable level, what level of diversions did we expect to have occur at Dallas.

Q Was there any discussion as to the manner in which the volume of runthrough train, Santa Fe-KCS runthrough train interchange traffic at Dallas related to the total volume of KCS-Santa Fe interchange traffic at Dallas?

A My recollection was that the discussion indicated that in terms of the total volume of traffic

interchanged at Dallas, the KCS-Santa Fe runthrough train was --

Q Perhaps you didn't understand my question.

A Maybe I didn't.

Q You referred to the total traffic interchanged at Dallas. I am asking you whether you had a discussion with regard to the manner in which the runthrough train traffic between the L&A and the Santa Fe at Dallas related to all of the traffic interchanged between the L&A and the Santa Fe at Dallas.

A I think I am answering that question. My recollection -- I know we had discussions about Dallas. Whether it was precisely directed to the volume of traffic on the runthrough train versus the total volume of traffic interchanged between the Santa Fe and the KCS, I don't recall.

We certainly did not -- I know we did not adjust the impedences to reflect any such thing.

MR. DREILING: I am going to ask that a document be marked for identification, Your Honor, as KCS-C-13.

JUDGE HOPKINS: It will be marked for identification.

(The document referred to was marked for

0021 0138

identification as Exhibit Number KCS-C-13.)

BY MR. DREILING: (Resuming)

Q Mr. Swain, what I have handed you as KCS-13 is a ten-page compilation of various documents. The top page is a construction of route mileages which my people have done for me or prepared for me comparing a movement from Los Angeles to Jacksonville, Florida, and there are four routes involved.

The first route is a joint Santa Fe-I&A-Norfolk and Southern route. The second is a Union Pacific-Norfolk and Southern route. And by the way, the Santa Fe-I&A-Norfolk and Southern route is via the New Orleans gateway. There is a Union Pacific-Norfolk and Southern route via the Memphis gateway.

Then there are two SPSF routes. The one is via the Memphis gateway. The other is via the New Orleans gateway. And what I would like to do is ask you if our determinations of the mileages, line segment miles, and the impedences imputed at the involved terminals is consistent with those which you have used in your DNS model at the fifth iteration level.

First of all, I take it that the mileage for the line segments we have here, and if you want, you can

0021 0034

take some time to look at it, basically we are talking about the Santa Fe between Los Angeles and Dallas, the L&A between Dallas and New Orleans, and the Norfolk and Southern between New Orleans and Jacksonville, would be -- it would be fair to characterize those as a main line model, correct?

A Yes, sir.

Q So they would get a multiplier of one?

A Yes, sir.

Q So, from a weighted mileage standpoint, the actual route miles shown here would be the weighted miles as used in your model to determine relative route efficiencies?

Would that be correct?

A To determine --

Q Relative route efficiencies?

A With the exception of the .7 multiplier for --

Q That comes later. I am talking about a base case situation.

A Okay.

Q The same, I take it, would be true of the Union Pacific's line segment between LA and Memphis and the Norfolk Southern's line segment between Memphis and Jacksonville. That would be a main line?

A Yes, sir.

Q And I ask you just to look at the two SPSF routes and ask if those both involve only A main line and do not involve B main line.

A I would assume they involve all A mains.

Q Now, I am going to lead you back into this packet to try to establish the source of the mileage figures you used, and first, I would ask you with regard to the I&A Los Angeles to Dallas route segment for the Santa Fe of 1,722 miles, if you would turn to Page 2 of KCS-C-13, and look at the third entry.

First of all, Page 2 is actually Page 128 of Appendix C to SPSP-31. And on the third entry, you have a present route shown being the very route we are talking about on the front page, a Los Angeles to Jacksonville movement via the New Orleans gateway involving the Santa Fe, KCS, M&S, and beside the ATSF, you have a route mileage of 1,722 miles.

Is that correct?

A That's correct.

Q Now, with respect to, if I were attempting to reconstruct the work of your model to a certain degree, and I wanted to develop all of the factors of the weighted miles in the route miles, that would be the figure I would use for that line segment portion.

Is that not correct?

A That's correct.

Q Now, going down to the I&A portion from Dallas to New Orleans, I have 510 miles, and if we stay on Page 2, that is, on Page 1 of the Dallas-New Orleans portion, I have 510 miles, and if we go to Page 2, directly under the 1,722 miles shown for the Santa Fe line segment, we have the 510 miles.

So would it be appropriate to use that 510 miles as my weighted miles for that line segment of the route?

A Yes, it would.

Q And the same thing can be said with respect to the 865 miles, because I would direct your attention to Page 2, and the 865 is shown as the mileage for the Norfolk and Southern between New Orleans and Jacksonville.

MR. WILSON: Mr. Dreiling, perhaps, to speed this up, we could stipulate that the numbers at the top of the page are correctly stated results from those in the packet.

Would that speed things up?

MR. DREILING: Certainly. If we can have a stipulation that you have had an opportunity to review the packet, and that I have stated the line segment miles and the impedances, terminal impedences as shown

above correct, so that when I get route miles at the route miles line on Page 1, we have there, with the exception of the .7 multiplier, the weighted miles that would have been used in the SPSF fifth iteration in your study.

MR. WILSON: Yes. We will stipulate to that.

THE WITNESS: Yes.

JUDGE HOPKINS: Thank you.

MR. DREILING: I guess where I said route miles -- what about the terminal impedences there, too?

MR. WILSON: We will stipulate to that, too.

BY MR. DREILING: (Resuming)

Q Now, Mr. Swain, if you would turn to Page 2 -- strike that.

Turn to Page 2. Yes. Looking at the third entry now, this shows a diversion from the joint Santa Fe-KCS-N&S route to a new route, that is, a new SPSF route from Los Angeles to the Memphis gateway, thence via the Norfolk and Southern to Jacksonville.

A That's correct.

Q Can you explain to me why the traffic was diverted away from the New Orleans gateway to the Memphis gateway?

A Because that is the most efficient route.

Q Would you turn back to Page 1? It strikes me

0082 0443

that even after you have applied the .7 multiplier to the -- to both of the figures on the SFSF routing between Los Angeles and Jacksonville, that the route via the New Orleans gateway has the lower weighted miles.

A Well, that is because the .7 multiplier is applied incorrectly.

Q And how is that?

A You have applied the .7 multiplier to the entire weighted route miles, the sum of the route miles for all carriers, as I look at it.

Q I see that. I will accept your correction. You are exactly right.

A To which you have added the impedences, and in fact the .7 multiplier is only applied to the route miles of the merging carriers, which in this case would be 2,121 for Los Angeles to Memphis, and for the Los Angeles to New Orleans route, it would be 2,016.

I don't have a calculator, but I think if you recalculate, I certainly hope if you recalculate these routes that the Memphis route comes out --

Q So we apply the .7 multiplier to the 2,121, and you apply the .7 multiplier to the 2,016.

A That's correct.

MR. DREILING: Could I have just a second?

JUDGE HOPKINS: Yes.

0023 0344

(Pause.)

BY MR. DREILING: (Resuming)

Q I have had it calculated for me, Mr. Swain, and the application of the .7 multiplier to the 2,121 miles for the Memphis routing comes to 1,485 miles. Its application to the New Orleans gateway routing comes to 1,411 miles.

I apologize for cluttering the record with my mistake, but I think the point is still shown that it strikes me that from a weighted mile standpoint, the New Orleans gateway route is still the more efficient route.

A Well, it shows that if you make the assumption that all of the lines shown in the route are A main lines, that that is in fact -- that the New Orleans route is 20 miles shorter.

We have chosen the Memphis route obviously because it has a lower impedence, and the only reason we would do that is because it has a lower weighted mileage route. Now, assuming the impedences are correct, that must mean that there are some other than A main line segments in the New Orleans route.

Q Do you know?

A I do not know precisely which segments they would be, but I have to assume that they would be.

0823 0145

Q Are we able to determine that from any evidence of record in this proceeding?

A Well, I am not sure what that term means. We have in the work papers, we have all of the adjustments that the applicants have made to the various main lines, line segments, and we have clearly stated that our model is based on the FRA network classifications as adjusted.

We haven't had anybody come and ask us for a copy of our network. It has been available. It is available from the FRA.

MR. WILSON: I would add, Your Honor, we did, of course, supply the network to the Union Pacific when they asked for it.

JUDGE HOPKINS: Thank you.

BY MR. DREILING: (Resuming)

Q Mr. Swain, turn to Page 3, would you?

There you have an interchange -- strike that.

There you have an existing routing via the Union Pacific to the Memphis gateway between LA and Jacksonville. And the potential candidate diverted route was Los Angeles to Jacksonville via the Memphis gateway or the SPSF, which is the identical route that you selected with respect to the diversion on Page 2 from the L&A.

A Yes, sir.

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Q Yet you show no diversion of that traffic to the SPSF, correct?

A That is correct.

Q And yet if we were to look at Page 1, and compare the relative mileage efficiencies, it would appear that the SPSF, either of the SPSF routes would be more efficient than the UP's.

Now, you show reason code 107. Could you explain to me the application of reason code 107 in that instance?

A Reason code 107 says single merging carrier serves both end points not covered by exceptions.

Q Which single merging carrier serves both these end points?

A The Southern Pacific.

Q And so, am I -- let me ask you a question, going back to Page 2. The diverted route there, Los Angeles to Memphis to Jacksonville, the SPSF portion of it, would it be completely via the Southern Pacific, the old Southern Pacific route?

A I would assume not completely, no.

Q But at any rate, Southern Pacific serves both the origin and the end point?

A Southern Pacific serves the origin and end point today, sir.

0024 0147

Q Can I ask you this? Why could not reason code 107 apply to the diversion to the case that you diverted on Page 2, and yet apply to the case that you didn't -- refused to divert on Page 3?

A Because the Santa Fe was in the previous route. Santa Fe was in the route on Page 2. The Santa Fe cannot serve the -- Memphis today. They do serve Los Angeles. They do not serve Memphis today, so --

Q Go ahead.

A They are capable of handling that today. They are incapable of handling that today. They are in the route today. We are allowing them to extend their haul. We could have taken a very restrictive --

Q Mr. Swain --

JUDGE HOPKINS: One at a time. Finish your answer.

THE WITNESS: We could have taken a very restrictive position and said that any time one of the merging carriers had the opportunity to handle the traffic between an origin and a gateway, we could have rejected that completely. We did not.

BY MR. DREILING: (Resuming)

Q Are you finished?

A Yes.

Q Would you turn to Page 3? Does the Santa Fe

0023 0348

serve the Memphis gateway?

A No, sir, they do not.

Q Why does the Santa Fe not reaching the Memphis gateway justify an exception to reason code 107 on Page 2 and yet not justify an exception on reason code 107 on Page 3?

A In this case, neither the Santa Fe nor the SP were in the prediversion route. One of the merging carriers was able to make this movement today.

Q Can you go to SFSP-C-5?

A Yes, sir.

Q And tell me which of the exceptions under reason code 107 describes your basis for finding a diversion on Page 2 but no diversion on Page 3?

A The exception that allows the diversion on Page 2 is the one that is at the bottom of Page 3, which says one or both of the merging carriers are in the prediversion route, and a merging carrier interchanges the move at a designated junction.

In the case of the diversion on Page 2, the designated junction in the prediversion route is Dallas. Dallas is listed as one of the junctions in this rule which is an exception to the application of 107.

Q Did you discuss with your fellow evaluators

0021 0194

the character of the L&A interchange to the N&S and the Seaboard Coast Line at New Orleans?

A I don't recall any such discussion. No, sir.

Q Did you discuss with them the fact that the Norfolk and Southern and Seaboard Coast Line's terminal facilities are on the east bank of the Mississippi River, whereas -- and that the L&A -- strike that.

Did you discuss with them the fact that the L&A along with the N&S and the Seaboard Coast Line all have their yards, terminal yard facilities on the east bank of the Mississippi River?

A I don't recall any such discussion, no.

Q Did you discuss with them any -- the fact that the SP has its terminal yard facility on the west bank of the Mississippi River and the fact that in order to effect interchange to the N&S and Seaboard Coast Line, it must cross the Mississippi River bridge?

A I don't recall that being a subject of discussion.

Q Do you consider that the need to cross a bridge like that might have some impact upon the relative efficiency of their interline operations between the SP on the one hand and the Norfolk and Southern and Seaboard Coast Line on the other hand?

A Given the facts that I have at hand, a bridge

is just a piece of track that is going over water. It is no different than the one track that connects two yards on a given railroad and a terminal area.

I don't see anything --

Q My question was, did you discuss that issue with your fellow evaluators?

A No, sir, we didn't discuss the issue of a bridge at New Orleans.

Q Did you discuss adjusting KCS's impedences at New Orleans?

A I can't ever recall discussing KCS impedences at New Orleans.

Q Could we go back to KCS-C-13 for just one minute?

Now, Mr. Swain, we have Pages 2 and 3 describe two movements, existing movements. One is a joint line movement between Santa Fe, KCS, and Norfolk and Southern. The other is a joint line move between the Union Pacific and Norfolk and Southern.

But if you were to look at those two movements, they involve the same origin and destination points, do they not?

A Yes, sir, they do.

Q And they involve the same commodity.

A Yes, sir, they do.

Q Now, Mr. Swain, because we are unable to get back into your first, second, third, and fourth iterations, I am unable to establish that certain of the traffic which would have been diverted from the I&A, the Santa Fe and I&A to the UP in the second iteration might not show up as the traffic that is set forth on Page 3.

First of all, I am going to ask you whether to your knowledge there was any joint Santa Fe-KCS traffic diverted to the UP in the second iteration.

A I am sure there was.

Q Then I am going to ask you whether it is possible that certain of that traffic turned up again in the fifth iteration as UP traffic to be considered as potentially divertible to the SPSF.

A I am sure it did, yes.

MR. DREILING: I have no further questions.

JUDGE HOPKINS: Let's take a 15-minute recess at this time.

(Whereupon, a brief recess was taken.)

JUDGE HOPKINS: Let's get back on the record.

Mr. Levy?

BY MR. LEVY:

Q Good afternoon, Mr. Swain. I think there is a light at the end of your tunnel.

I would like to just go through the specific

0021 0352

points that we covered last Friday, and ask whether on each of those points you have had an opportunity to determine the answer. I have the transcript in front of me, as well as a list of specific questions that we read out for you so that you could move through this as quickly as possible.

The first question I have is whether or not you were able to find a printout reflecting the diversion detail for the Denver, Rio Grande, Western trackage rights iteration.

A No, we have not. Apparently my recollection is faulty. I was convinced at the time that we did have one in Lexington. I am still not 100 percent convinced that we don't, because in my own mind I know it was there at one point, but we did have somebody who was familiar with the study check through our set of work papers, and they did not find it. So if it was there, I think they would have.

We will produce another set of results as quickly as we can.

Q I understand from your counsel that that new printout that you intend to generate is not likely to be available for at least a week. Is that right?

A We hope to have it available much before a week, but it may take as long as a week. Yes, sir.

0023 0353

Q What do you have to do to generate this new printout?

A The problem is, we are not sure that we have the tape showing the output that was produced by that printout, so we are going to have to go through and recreate that output.

Q Will that require a special program?

A No, it will not require -- well, it requires going back and getting the programs and putting them in order and running them. It requires a little special programming. But it is mainly getting the data files, and making sure the data files are correct, and making sure the impedences are correct, and that all the diversion rules are correct, and that the matrix is correct, that entire process.

Q May I assume that you will make available to us in addition to this printout all of the work papers that you generate in the process of creating the printout, so that our people can confirm the accuracy of the process by which you create the printout?

A Yes.

MR. LEVY: Maybe that is a question better directed to counsel.

MR. WILSON: Yes.

THE WITNESS: Yes, we will make any work

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papers available.

BY MR. LEVY: (Resuming)

Q Mr. Swain, on Friday, I asked you with regard to the diversion matrix used for the Rio Grande trackage rights iteration whether when you classified certain stations on the west coast not served by the Rio Grande as open, whether you meant open and served or open but not served.

Did you check on that question?

A The answer is that they are open, and not served.

Q I asked you on Friday whether on the last pages of your diversion details with regard to the summary data set forth there, how you define the term "route records" or "records."

Do you recall that question?

A Yes, I do.

Q Can you tell me what the term "records" means in the context of the summary data on diversion detail?

A Basically a record is an aggregation of all moves with the same origin SPLC, destination SPLC, same seven-digit commodity group, same origin and destination railroads, same routes, same consignee number, same consignor number, same TOFC commodity designator, same van plan.

0023 0155

Q I asked you about the SFSP diversion matrix and the code R that appears in the last column of that matrix. Could you tell me what that is?

A The R applies only on the Rio Grande trackage rights adjustments, and it is used for closed -- stations that are on the SP in the area affected by the solicitation agreement which would normally be closed to the Rio Grande to change those to open stations.

Q What is the effect of the R appearing in the last column?

A The effect of the R is to increase the diversion percentage.

Q By what factor?

A The difference between open and closed, which would be --

Q About 1.78?

A On the origin side, it would -- if we were going, for example, from a closed to an open, the percentage would be -- the multiplier would be 56, whereas by going from an open to an open, the percentage or the multiplier is one, so it is that kind of relationship.

Q I also asked you, I believe -- Let me strike that and start over.

Mr. Wilson suggested that the substance of

0021 0156

SFSP-C-5 was reflected in your work papers, and I asked for the page references in your work papers.

Do you have those available? SFSP-C-5, as you will recall, was the document that was prepared for you for cross examination.

A Right. There is a work paper. Here is one of them. It is RDS-300 through 303.

Q May I see that, please?

A Which describes some of the exceptions for the diversion rules.

Q But it does not describe all of them?

A No, it does not describe all of them.

Q I will give that back. Mr. Swain, I asked you about several movements that appear in UP-MP-C-5 -- excuse me, -C-11, and the questions involved the SPIC code for movement that appeared in Exhibit 11.

Have you determined what the appropriate SPLC code is? I can show you the exhibit if you would like.

A I remember the exhibit. The answer that I have noted down here is that I checked and confirmed that all of my statements concerning UP-C-10, 11, 12, and 13 are correct on the transcript, are correct.

I also checked on the movement on C-13 and the diversion was from a point which was not served by the SP.

Q Not served by the SP?

A No, the nondiverted record was from a point served by both Santa Fe and the SF.

MR. KHARASCH: Excuse me, Your Honor. I think in the last answer the witness misspoke. He said both by the Santa Fe and the SF.

THE WITNESS: You are right. The SP and the SF.

BY MR. LEVY: (Resuming)

Q I asked you about an adjustment that you thought was made at Chicago to allow the diversion of certain automobile traffic, and I asked whether that adjustment resulted in the diversion of any automobile traffic to the applicants.

A The answer is yes.

Q Did you check to determine how St. Joseph, Missouri, was treated, whether open or closed to railroads other than the Missouri Pacific in the diversion study?

A We apparently missed that question in the transcript, because I did not check that. I can check it.

Q I would be satisfied with a letter from counsel.

A Okay.

Q I asked you how the model treated in the SP-DRGW joint solicitation agreement iteration Southern Pacific stations in Oregon. Do you recall that question?

A Would you repeat that, please?

Q Yes. In the DRGW trackage rights joint solicitation iteration, you said that certain adjustments were made to Southern Pacific stations in Oregon, and I asked the same question that I asked earlier.

A I think it is the same question.

Q It is the same question. Those stations were treated as open but not served by other railroads?

A That's correct.

MR. WILSON: Excuse me, counsel. Could you repeat your last question? I think there may be some confusion. You said they were treated as open and then what did you say?

MR. LEVY: Open but not served by other railroads.

THE WITNESS: Open but not served -- open but the shipper wasn't served.

BY MR. LEVY: (Resuming)

Q I asked you how the model treated Rio Grande equipment for the purpose of processing moves affected

0028 0159

by the joint solicitation agreement.

A How was most Rio Grande equipment treated or SP equipment?

Q Well, did the model treat Rio Grande equipment as SP equipment for purposes of that iteration?

A No, it did not.

MR. LEVY: Can we go off the record?

JUDGE HOPKINS: Surely.

(Whereupon, a discussion was held off the record.)

JUDGE HOPKINS: Back on the record.

MR. LEVY: The only other point I have in the transcript is, we still have not received a copy of the diversion matrix which Mr. Wilson made available to us temporarily on Friday. That is the one that bears the handwritten initials RDS 000420.

MR. WILSON: We have one here in the hearing room we can give you.

MR. LEVY: I don't intend to ask questions about it. I would like to take one home with me for bedtime reading.

MR. WILSON: Mr. Guerin could give you one.

BY MR. LEVY: (Resuming)

Q Mr. Swain, I have a variety of other questions that we have furnished to you in advance. They are all

0021 0164

questions about SFSP-C-5. Do you have the handwritten notes that we gave you?

A Yes, I do.

Q Maybe we can go through these one after the other. These all refer to the exceptions to reason code 107 that appear in Applicant's Exhibit 5. The first question is, with regard to -- well, I don't know quite how to characterize these. With regard to the fourth full paragraph on Page 4, which begins "Both merging carriers serve the origin of the move. Santa Fe is in the move. Southern Pacific is not. Southern Pacific serves the destination, and the move is interchanged in Kansas City."

With reference to the phrase "Southern Pacific serves the destination," do you mean that they serve it exclusively, or can it also be served by the Santa Fe or other carriers?

A It can also be served by Santa Fe or another carrier.

Q Is that answer the same for other paragraphs in the Exhibit 5 that refer to either the Santa Fe or the Southern Pacific serving a destination or origin?

A Yes, it is.

Q With regard to the exceptions that begin with the paragraph that I read and continue on to the next page, approximately six paragraphs, when you use the term "origin" or "destination," do you mean the actual origin or destination or do you mean the on-junction or off-junction, or can it be both?

A We mean the actual origin and destination.

Q Does that apply only to river junctions?

A It does not apply to river junctions unless they happen to be the origin or destination.

Q With regard to the paragraph immediately before the one I read -- it's the third full paragraph on page 4 which reads, in part: "The merging carrier's route went through Kansas City, though not necessarily interchanged there."

Do you mean the old route, the new route, or both?

A The post-diversion route. The new route.

Q The new route.

With regard to the fourth paragraph on page 3 of Exhibit 5 which begins: "None of the merging carriers are in the pre-diversion move," what assumptions did you use in determining the serving carrier when no shipper information was provided?

It's Question No. 5 on the list we gave you.

A I have the question. I missed your reference

0021 0362

because I'm not sure -- let me look.

Q The reference is to the fourth paragraph on page 3 which concludes with the phrase: "The other merging carrier serves the shipper or consignee."

A This only applied when we had the shipper information.

Q With regard to the first two paragraphs on page 5 of Exhibit 5, is it possible, or are there circumstances where the Santa Fe could be in the route when the SP originates or terminates traffic at Louisiana or Texas?

A It is possible that the Santa Fe could be in the route. This exception rule would not apply if the Santa Fe was in the pre-diversion route.

Q Let me invite your attention to the last full paragraph on page 3 which reads: "One or both of the merging carriers are in the pre-diversion route and a merging carrier interchanges the movement at a designated junction." And there's a list of junctions.

Does this rule apply when the designated interchange is in the pre-diversion route or post-diversion route, or does it have to be both?

A It only applies in the pre-diversion route, the historic route.

Q All right.

0021 0363

I have just have a few questions to follow up and then we can put this to an end, I hope.

You told us Friday that the reason there was no Los Angeles to Chicago TOFC traffic in the diversion detail is because you came up with a special exception similar to the exception you have for multi-car coal shipments which assume there would be no diversion of that traffic in the UP/MP merger. Is that correct?

A That's correct.

Q Did that special exception that you created apply to movements that went beyond Chicago or originated beyond Chicago, or did it apply only to movements originating or terminating in Chicago?

A My recollection is that it applied on traffic that -- only on traffic between Los Angeles and Chicago. It did not apply on traffic that went beyond.

Q Or originated beyond?

A Or originated beyond.

Q Were there any exceptions similar to the exception that you had for L.A./Chicago traffic that we have not yet heard about today, or is that listed in Applicants' Exhibit 5?

A I don't recall any other exceptions; no.

Q With regard to the Rio Grande joint solicitation agreement, is an SP car treated as

0021 0364

equipment of another carrier in the route, is it treated as a car of a neutral carrier, or is it treated as new system equipment?

A Most of the time, since the majority of the movements are in non-special equipment, it is treated as neutral. When it is special equipment, it is treated as a competing carrier.

Q Is that also true of Cotton Belt cars?

A It is, but let me make sure that I am speaking correctly about that.

No. I am correct in what I just told you.

Q Did we confirm earlier this afternoon that the Oregon rule applies to traffic both originating or terminating --

A We have confirmed that.

Q Where do we stand on the issue of whether the Oregon rule applies in terms of the eastern junctions? Does it apply only to traffic moving via Kansas City? Or does it apply to traffic moving via other eastern junctions?

And by eastern junction, I mean mid-continental junctions.

A I understand. The Oregon rule applies on traffic that originates or terminates in Oregon and is interchanged at Ogden. Most of that traffic in the

0021 0165

post-diversion route goes through Kansas City and thence on to the east, either via St. Louis or Chicago or Streator.

Q But the Oregon rule, as you designed it and integrated it into your model, also applies if the other conditions are met, to traffic that is interchanged at Fremont or at Omaha or at other junctions; does it not?

A That is correct; yes. But I'm speaking now about the post-diversion route. Yes, it would apply on traffic that previously had moved via Fremont.

Q Let me make sure I understand you. You are talking about -- when you say post-diversion route, I thought you were talking about the pre-diversion route.

A I was talking about what the impact is.

Q So just to make sure the record is clear, if the other conditions of the Oregon rule are met, if the traffic moves through an Ogden interchange, a Fremont interchange, a Kansas City interchange, or there may be other interchanges, the Oregon rule applies.

It need not be limited to the Kansas City, or is not limited to the Kansas City interchange.

A It is not limited to Kansas City.

Q And where do we stand on the issue of whether the Oregon rule is limited to lumber? Is it limited to lumber or is it not?

0028 0366

A There has been no limitation on the Oregon rule.

Q I think you told Mr. Kharasch this morning that the matrix I.D. number was not provided on the tapes that were made available to Protestants.

A That is correct.

Q And it is also correct, is it not, that there was no information on those tapes that would enable the Protestants to calculate the divisions or revenue breakdowns among the participating carriers; is that correct?

A That is correct.

Q So you would agree with me, would you not, that on the basis of the materials that were made available to Protestants in discovery, it would be impossible for us to generate diversion detail similar to those that you have produced to us as part of your discovery.

And I can take as an example the one that is sitting in front of me. It's NCS-C-13, the second and third pages. We could not have generated those documents, could we?

A We did not provide data with the short line mile calculation on it. No one has asked us for that information. We would have been happy to provide it,

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but --

Q No one has asked you for that information; correct?

A No one has asked me for that information; that is correct.

MR. WILSON: No one has asked Applicants for that information is also correct.

MR. LEVY: I think the record will show to the contrary, but that's another issue.

JUDGE HOPKINS: Nice little dissertation going back and forth. Do you have anything more to say, Mr. Levy?

MR. LEVY: No, I have nothing more to say on this issue now. Maybe more later.

BY MR. LEVY: (Resuming)

Q Mr. Swain, can you tell me who Mr. William J. Rust is?

A Mr. Rust is an employee of DNS.

Q What was his role in preparing or implementing the model that was used to develop Applicants' diversion study?

A He was involved in some of the coding, not very much. He was involved more in babysitting runs that took place over night and setting up files, making sure that things ran efficiently.

0021 0168

Q Mr. Swain, can you tell me what instructions your employees had to cover the situation where they received telephone calls from technical employees of railroads asking for assistance, interpreting the computer tapes and other materials that were made available in discovery?

A They were supposed to let me know when they had such calls and what information they were requested to furnish and what information they furnished.

Q And do you know what Mr. Rust told the employees of the Union Pacific Railroad when they called for help, asking for assistance in interpreting the data, understanding the computer programs, and getting the technical assistance that is normally exchanged between parties in proceedings like this?

A I know that Mr. Rust had several conversations with UP personnel about the data. I think all of those exchanges were satisfactory, to my knowledge.

Q Satisfactory from Mr. Rust's perspective? Wasn't it true that he was instructed that he couldn't have substantive discussions with UP technical personnel?

A No, that is not the case. He was told that if anybody called and wanted to discuss the details of the traffic diversion model itself, that those questions

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were to be referred to the Santa Fe law department.

To my knowledge, the Santa Fe law department has had no such requests, because they haven't passed them on to us. The idea was to set up a channel to make sure that we didn't violate any, you know, problems with the lawyers. We were not trying to withhold information; we were just trying to comply and make sure that we did everything, to coin a phrase, "according to Hoyle."

Q I'm going to close the loop here, Mr. Swain. You told me yesterday, and I think you confirmed earlier this afternoon, that despite repeated requests that we made to Santa Fe counsel, you never received a request for the DRGW iteration diversion detail that we think is essential for purposes of analyzing your study. Isn't that correct?

A Well, I don't personally recall being asked for that. That does not mean that one of our employees was not asked for it. We have a very informal relationship with the Santa Fe. We've been working with them very, very closely. Not every request for information has to go through me.

It is quite likely that the Santa Fe could have called any one of a number of people and asked them. They are all familiar with the work papers.

MR. WILSON: My recollection on that point, Mr. Levy, is that I talked with Hugh Stewart about that particular point. My recollection may not be correct, but that's what I recall.

BY MR. LEVY: (Resuming)

Q Mr. Swain, can you tell me how the diversion percentages that were used in the matrices for this model differed from the diversion percentages that you used in matrices for previous uses of your model?

Is that question clear?

A No, that is clear. I can't tell you in any precise detail. The general form and content of the diversion percentage matrices used in previous studies by other clients are substantially the same as they relate to the relationship between forwarded, received, and overhead traffic, and as they relate to whether or not the either of the merging carriers are in the pre-diversion route.

In other words, in all previous exercises, traffic where neither of the merging partners was in the pre-diversion route, the diversion percentages were quite low.

Q They are identical?

A I don't recall them precisely. In all cases that I can recall, the forwarded traffic is always

diverted at a higher rate than is received traffic. Received traffic is, in turn, diverted at a higher rate than overhead traffic.

The distinction between open and closed stations is also essentially the same. Traffic that originates at a closed station on one of the Applicants or one of the merging partners has a higher diversion percentage than traffic which originates or terminates at an open station.

So that the essential structure of the diversion percentages and the essential logic is very similar to what we have done here, but here we have the additional distinction of the served and reciprocal information which was provided by the SP tape.

That's really all I can say. Its form and structure are very similar; the diversion percentages themselves I'm sure do differ.

Q Would you be willing to produce to us a sample of diversion matrices that you have used in other applications of this model so that we can compare these percentages to the percentages used here?

A I have no objection to that. As a matter of fact, when I was going through the work papers to answer Mr. Kharasch's questions that he asked Friday, when I thought we were going to be able to provide answers from

the work papers, I noticed that there is in there a copy of the presentation that I made to the Santa FE SP -- to the Santa Fe first, and then later on to the Southern Pacific personnel, describing the basic form of our model.

And in that presentation is the first copy of what is really the genesis of what is called the DNS traffic diversion model, and that is the matrix that is used -- was used by John McMichael, the former Vice President of Marketing of Norfolk & Western in the Norfolk Southern case and in the CSC case, as well as in other cases.

The interesting thing there is that had they attempted to do in that case the same thing that we are doing in this case, and that is, to replicate the impact of events that will precede the occurrence of that merger, but which are not reflected in the data base.

So that matrix is available in the work papers and it is representative of the matrix that we have used previously.

Q Thank you. That is helpful.

My last question is, Mr. Swain, based on the computer tapes that you have provided to the Protestants, the work papers that you have provided to Protestants, your testimony here over the last 2-1/2

enjoyable days, how much time would it take competent railroad personnel, experienced with traffic models, to replicate the results of your study?

Would six months be a reasonable estimate?

A I would say that since this model has been developed to the form it is in now over essentially a two-year period, that it could certainly, with the programs that we have already in place, which we have provided, for example, to your railroad, our internal -- my guess is that it would take, with a dedicated effort, admittedly, could be done starting from scratch, amassing the data which takes some time, understanding the models, which can go on parallel with the data clean-up and preparation process, that it could be done without any assistance on our part in somewhere between two months and three months.

Q What do you mean by a dedicated effort?

A A dedicated effort -- I have not thought about this in any great detail, but I would assume that we have had on this project at least -- well, we have had at various points in time many, many people, and then less people. So it is up and down.

It would take, I would say, probably three or four men.

Q Full time for two or three months?

0023 0034

A Full time.

Q Starting from today?

A Starting from today. That's without any assistance.

Q I understand. But you assume we've gotten the assistance that you have provided us through your testimony.

A Well, you have that; yes.

MR. WILSON: Your Honor, as a point on Mr. Levy's earlier question, the work paper reference Mr. Swain was referring to is RDS 64 through 67.

MR. LEVY: Is that the Santa Fe presentation?

MR. WILSON: Yes, that is the McMichael matrix in the Santa Fe presentation.

MR. LEVY: Thank you.

Mr. Swain, I'm grateful for your patience.

JUDGE HOPKINS: Who's next? Ms. Reed?

BY MS. REED:

Q Good afternoon, Mr. Swain. My name is Mary Reed, and I'm appearing on behalf of the U.S. Department of Transportation.

Do you have before you DOT-C-2 which is the Applicants' responses to questions that we presented?

A Yes, sir -- excuse me.

Q It's been a long day.

A I apologize. Yes, ma'am, I have it in front of me.

Q Did you prepare the responses to Questions 1 through 4?

A I participated in the preparation of these responses; yes.

Q And those are correct, to the best of your knowledge?

A Yes, ma'am, they are.

Q Turning to page 10, on the bottom of the page, you indicate that Oregon shippers understand that outbound loads substantially exceed inbound loads, resulting in an empty car situation.

On the next page, you indicate that empty car supply is an important factor for Oregon shippers. Is that correct?

A Yes, ma'am.

Q Did you consider in the diversion analysis whether or not the increase in equipment utilization, which are projected to result from the merger, would have an impact on car supply in Oregon?

A Yes, we did. The impact on the car supply that the merger will bring is reflected in the case of special equipment with the 1.3 multiplier for special equipment which is taken into account when the Oregon

0021 0196

rule -- prior to the application of the Oregon rule.

As far as the supply of general service equipment, we talked about that, and there is in most types of boxcars, for example, an ample supply of that type of equipment. And we did not think that the combination of the SFSP would bring any substantial change in that area.

Q On page 11, you also mention that service via Ogden is viewed as fast and dependable, and that this is particularly important for lumber receivers.

How much traffic moving out of Oregon is lumber?

A I can't give you a precise estimate, but a large, large amount of it is lumber.

Q It's over 50 percent of the traffic?

A I would guess that over 50 percent is --

Q That's all I have on that.

The Kansas Department of Transportation ha a few questions which they have asked me to ask you.

On page 25 of Mr. Reyff's statement, there are two assumptions which I believe were inputted into the DNS diverson model, and these are that the SP's line segment from Hutchinson to Topeka was changed to a B main line and that Southern Pacific's trackage rights route between Kansas City and St. Louis was changed in

part to a B main line.

Do you see that?

A Yes, ma'am, I see that.

Q Could you tell me what revisions you made to the model as a result of that assumption?

A Well, in the case of the first revision, the revision on the line segment from Hutchinson to Topeka, that was made strictly for operational reasons. It had little or no impact on traffic flow. It's just the way you route around that area there, whether you use the Southern Pacific line or the Santa Fe line.

The second change was done so that we would divert traffic from St. Louis to Chicago.

Q Were additional impedances added to those existing routes?

A Well, the impact of changing from an A main to a B main has the impact of adding -- increasing the weighted miles over those routes.

Q How many weighted miles were added to those routes; do you know?

A It would be one times the length of the mileage, and I don't know what the mileage is, but if the mileage from Hutchinson to Topeka -- which I think is around 100 miles, but I'm not sure -- something less than 100 miles -- if that was 100 miles previously, it

would now be 200 miles.

MS. REED: That's all the questions I have. Thank you very much.

JUDGE HOPKINS: Thank you.

Any other questions? Mr. Wilson, no questions?

MR. WILSON: I don't think I'm going to ask any redirect, Your Honor.

JUDGE HOPKINS: Thank you.

MR. WILSON: I would move the admission of Mr. Swain's verified statement and of SFSP-C-9.

JUDGE HOPKINS: Do you have something, Mr. Kharasch?

MR. KHARASCH: Yes, Your Honor. We are going to move to strike this traffic diversion study. I think the testimony has been, many times, startling about it. There are two other witnesses that purport to support it.

I think we have to have a little time to draw from the record the statements made on the record about the non-auditability of this study, the non-reproducibility of this study, arbitary decisions in this study.

And we would like you not to receive it at this time and give us a chance -- and we will try to

coordinate the presentation so that you are not snowed with documents -- to receive a consolidated presentation urging that this not be received.

JUDGE HOPKINS: When are you talking about making this particular motion?

MR. KHARASCH: Well, that raises a procedural problem which counsel on this side of the dividing line -- I guess that's east of the Mississippi -- discussed at lunch. We have this problem.

We really think that there are serious, serious defects here that make this not receivable. If it is to be received, then we have to, in the opposition testimony, take account of all that we have learned in the cross-examination -- exhibits popping up and new deals, new rules, and so on.

And in order to let testimony be prepared in the opposition study, that will take some time. We all feel that with a push, we can reasonably meet, especially if you give us the two days we lost, we can meet the 19th date to put in the material that doesn't deal with this traffic study.

But there is no way in the time from the end of this hearing that we can put in comments on what we learned in the last two days by the 19th.

Also, if it is to be stricken, and we

seriously think it should be stricken, not received, that is, then we wouldn't want to put in all this gabble about it again.

That is our combined problem on the thing. I would say for the 19th, the problem of getting the motion is that we have to simultaneously take everything in the record and prepare everything not, I hope, involving this traffic study. And it has to be presented by the 19th of November on the present schedule. And that is going to occupy a lot of time.

Perhaps ten days after the date that material comes in, we can give you the motion.

JUDGE HOPKINS: You're saying you're proposing to put in all your other evidence, except the evidence regarding the traffic study. Is that what you're talking about?

MR. KHARASCH: We can put in -- the opposition case is due November 19th, and that has to do with economists and what have you.

JUDGE HOPKINS: I know.

MR. KHARASCH: Everyone is, of course, working toward the 19th date. We've asked you to give us back the two days I figure that we have lost so far. But beyond that, we would meet that date. But we cannot possibly on that date present any expert testimony,

speaking for all counsel on this side, I think. We can't possibly by that date deal with what we learned in the last two days and Friday about how the machinery worked here, and present anything on the 19th sensibly on that subject.

We wouldn't have to present anything if the study were put where it is as a monument to labor and effort, but not to reliability.

JUDGE HOPKINS: If you're proposing a motion to strike the traffic diversion study, I don't understand what you're saying as to when you are proposing to file something or speak directly to that.

Are you saying you're not going to do that until after you file your testimony? Is that what you're saying?

MR. KHARASCH: I am just laying before Your Honor the problems. We would like to get this record, draw from the record what was said about the study, and on that basis present you with a serious, annotated, and complete set of reasons why this traffic study should not be received.

That will take some time. I would say about two weeks is the time that that would need to be prepared. Meanwhile, we are faced with our 19th deadline. Everything is running simultaneously.

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Perhaps we could be off the record on this.

JUDGE HOPKINS: Off the record.

(Discussion off the record.)

JUDGE HOPKINS: Let's get back on the record.

There has been discussion off the record about the motion to strike, I guess we'd call it, the testimony of Mr. Swain -- or is it going to be the diversion study itself?

MR. KHARASCH: The diversion study itself.

JUDGE HOPKINS: In the discussion off the record, it's been decided we will have an oral argument on this point at 8:30 next Wednesday. What is that date?

MR. KHARASCH: The 31st.

JUDGE HOPKINS: We have it at 8:30 on Wednesday, the 31st.

There was also discussion off the record where the opposition testimony now will be -- the date for filing the opposition testimony will now be extended from November 19th to November 21st as to everything but responsive statements concerning the diversion study.

That will be required to be filed on December 10th unless the motion to strike is granted, I would say.

Anything further?

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MR. WILSON: Your Honor, this will just be opposition testimony to the rail traffic diversion study, would it not -- not to the truck traffic diversion study?

JUDGE HOPKINS: No. We're only talking about the rail traffic diversion study. Mr. Kharasch?

MR. KHARASCH: May we then leave until after Wednesday the question of introducing the exhibits that were introduced during the cross-examination of Mr. Swain?

JUDGE HOPKINS: Is there any argument as to any of those?

MR. KHARASCH: No, but they don't mean much in the record unless the study is in.

JUDGE HOPKINS: If you want to, as long as everybody remembers, because usually at the end of this, say, any that haven't been received are now received, so we don't have to worry about that.

If you want to wait, that's all right with me.

MR. KHARASCH: Whatever you say, Your Honor.

JUDGE HOPKINS: If you prefer to do it that way, you're the one that's presented the testimony. If you don't want to put it in now, that's up to you.

MR. DREILING: Your Honor, I prefer to offer

0021 0184

my little exhibit at this point.

JUDGE HOPKINS: You see, you have a split in the organization.

MR. DREILING: I will forget it. And I'd like to, however, do so by first asking you if I could strike certain portions of it.

JUDGE HOPKINS: The first part?

MR. DREILING: KCS-C-13. Basically, what I'd like to strike is one portion that I did not get into, and that is the beginning on the line, the 563 in parenthesis. Strike 563 and strike the 3631 below that and the words "without Dallas IMP." And then strike the times .7 at the end of the last two columns, and the last line, the numbers 3694, 2402, and 2366.

With those changes, I offer KCS-C-13.

JUDGE HOPKINS: I'm certain there is no objection to that.

MR. WILSON: No objection.

JUDGE HOPKINS: It will be received into evidence.

(The document referred to, previously marked Exhibit KCS-C-13 for identification, was received in evidence.)

MR. LEARY: Your Honor, could we please offer

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Rio Grande 18 and 19?

JUDGE HOPKINS: Any objection?

MR. WILSON: No objection.

JUDGE HOPKINS: They will be received.

(The documents referred to, previously marked Exhibits DRGW-R-18 and 19 for identification, were received in evidence.)

MR. KHARASCH: In that case, Your Honor, you might as well take MKT-23 to 54 which had been stipulated to anyway -- most of them.

JUDGE HOPKINS: Any objection?

MR. WILSON: Not to 24 through 54. But MKT-C-23 contains some pages that had some mistaken information as our next witness, Witness Reyff, has told Mr. Kharasch a few days ago, and told me also.

We had some replacement pages for those pages that had mistaken information in MKT-C-23. So I would prefer to wait on that particular exhibit which Mr. Swain explained he di not prepare and didn't know anything about it -- well, didn't know very much about at any rate -- until Mr. Reyff testifies.

So, with the exception, I think we should wait on the admission of MKT-C-23. We don't have any

objection to the admission of any of the other Katy documents.

MR. KHARASCH: I would just as soon that the record keep MKT-C-23 as copies of the interrogatories and the responses received. I am delighted to have them corrected. I'd like to have them in this form, and we will receive the correction.

JUDGE HOPKINS: I understand. Do you still object?

MR. WILSON: I would still object at this time, since there haven't been any questions to the witness who prepared this document at this time. I am sure that Mr. Kharasch will ask the witness who prepared the documents.

JUDGE HOPKINS: I am going to receive it at this time. I will receive all of these. And you can bring up that point when the next witness comes on.

(The documents referred to, previously marked Exhibits MKT-C-23 through 54 for identification, were received in evidence.)

MS. REED: I offer DCT-C-2.

JUDGE HOPKINS: It will be received in evidence.

0824 0187

(The document referred to, previously marked Exhibit DOT-C-2 for identification, was received in evidence.)

JUDGE HOPKINS: Off the record a minute.

(Discussion off the record.)

JUDGE HOPKINS: Let's get back on the record.

MR. WILSON: I offer Exhibit SFSP-C-5 also, Your Honor.

JUDGE HOPKINS: Any objection?

MR. KHARASCH: I feel, since it is part of the explanation of the study, that ought to come in Wednesday, if it is coming in.

JUDGE HOPKINS: What? You want to argue it on Wednesday?

MR. KHARASCH: Well, it's part of the whole thing. If you're not going to receive the study, Your Honor, and I think you should --

JUDGE HOPKINS: I'm going to receive it at this time.

(The documents referred to, previously marked Exhibits SFSP-C-5 and 6 for identification, were received in evidence.)

JUDGE HOPKINS: Anything further?

Off the record again a minute.

(Discussion off the record.)

JUDGE HOPKINS: We'll be in recess until 9:00 o'clock tomorrow morning.

(Whereupon, at 4:55 p.m. o'clock the hearing in the above-entitled matter was recessed, to reconvene at 9:00 a.m. o'clock the following morning, Wednesday, October 24, 1984.)