

F.D. 30400 - 1/8/85 - PAGES 5429- 5487

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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, January 8, 1985

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.)

0018 0233

C O N T E N T S

| <u>WITNESS</u> | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RE CROSS</u> |
|---|---------------|--------------|-----------------|-----------------|
| William B. Tye | | | | |
| By Mr Kharasch | 5430 | | | |
| By Mr. Svolos | | 5431 | | |
| By Mr. Ratner | | 5495 | | |
| By Ms. Reed | | 5534 | | |
| Michael K. Noser | | | | |
| By Ms. Mahon | 5546 | | | |
| By Mr. Wilson | | 5547 | | |
| By Ms. Mahon | | | 5597 | |
| By Mr. Wilson | | | | 5599 |
| Harry T. Dimmerman and Jerry M. Sheridan | | | | |
| By Mr. Kharasch | 5602 | | | |
| By Mr. Moates | | 5603 | | |

E X H I B I T S

| <u>Exhibit No.</u> | <u>IDENTIFIED</u> | <u>RECEIVED</u> |
|--------------------|-------------------|-----------------|
| SFSP-C-21 | 5555 | 5601 |
| SFSP-C-22 and 23 | 5572 | 5601 |
| SFSP-C-24 and 25 | 5573 | 5601 |
| SFSP-C-26 and 27 | 5577 | 5601 |
| SFSP-C-28 | 5583 | 5601 |
| SFSP-C-29 | 5589 | 5601 |
| SFSP-C-30 | 5591 | 5601 |
| SFSP-C-31 | 5595 | 5601 |
| SFSP-C-32 | 5622 | |
| SFSP-C-33 | 5630 | |
| SFSP-C-34 | 5633 | |
| SFSP-C-35 | 5638 | |
| SFSP-C-36 | 5645 | |
| SFSP-C-37 | 5650 | |
| SFSP-C-38 | 5662 | |
| SFSP-C-39 | 5667 | |
| SFSP-C-40 | 5673 | |

P R O C E E D I N G S

(9:00 a.m.)

JUDGE HOPKINS: On the record.

Mr. Kharasch.

MR. KHARASCH: Dr. Tye, please.

Whereupon,

WILLIAM B. TYE

was called as a witness by counsel for the Missouri-Kansas-Texas Railroad and, having been first duly sworn, was examined and testified as follows:

D I R E C T E X A M I N A T I O N

BY MR. KHARASCH:

Q Dr. Tye, may we have for the record your name and business address?

A William B. Tye, T-y-e, Putnam, Hayes and Bartlett, University Place, Cambridge, Massachusetts 02138.

Q Dr. Tye, are you the William Tye whose statement appears as MKT-25 in this case with associated errata in the tables which appear at MKT-31?

A Yes.

Q And are you also the witness who produced MKT-28, the statement dealing with the responsive application of MKT?

A Yes, I am.

ALDERSON REPORTING COMPANY, INC.

20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

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1 Q I beg your pardon. MKT-28 is the opposition
2 statement. MKT-25 is the statement in support of the
3 responsive application for trackage rights.

4 Dr. Tye, do you have any textual corrections
5 at this time to either MKT-25 or MKT-28?

6 A No, I do not.

7 MR. KHARASCH: Dr. Tye's submitted for cross
8 examination, Your Honor, on both statements at this time.

9 JUDGE HOPKINS: Thank you.

10 Mr. Svolos.

11 CROSS EXAMINATION

12 BY MR. SVOLOS:

13 Q Mr. Tye, my name is Gus Svolos. I represent
14 the applicants in this case.

15 Dr. Tye, would you begin by turning to page 3
16 of your testimony in MKT-25?

17 A I have it.

18 Q In the first complete paragraph you describe
19 how your testimony will proceed. You state that first
20 you review the procompetitive goals of the Staggers Act
21 and relate them to potential anticompetitive
22 consequences, and then later you state you will address
23 specific anticompetitive problems that would be
24 redressed by the application for trackage rights by the
25 MKT.

1 Does that basically outline the purpose of
2 your statement in MKT-25?

3 A Well, it's about a hundred pages of testimony
4 almost. I think most of the topics I discuss are within
5 the scope of that general outline of that paragraph. I
6 don't mean to exclude anything.

7 Q Basically your objective, however, in MKT-25,
8 which was to support the trackage rights application of
9 the MKT, was to identify anticompetitive problems and
10 then describe how the trackage rights requested by the
11 MKT would help to rectify those problems; isn't that
12 correct?

13 A I think that's a fair summary.

14 Q Dr. Tye, would you turn to page 4 of your
15 testimony? On page 4 you have included a section of the
16 Staggers Act, 101(A), and the first subsection states
17 that "It is the policy of the United States government
18 to allow to the minimum" -- "to the maximum extent
19 possible competition and demand for services to
20 establish reasonable rates for transportation by rail."

21 Is it your view that the term "competition" as
22 used in that subsection is limited to competition
23 between railroads?

24 A Well, first I think I need to say that the
25 context of this discussion is my review as an economist,

1 and I am not in a position to give a lawyer's statutory
2 interpretation of what Congress meant. To me, however,
3 I think competition means competition of any sort is to
4 be taken into account and promoted. But it does say in
5 this paragraph, it refers specifically to rail
6 transportation policy is the title of this section; so
7 that is the context I think one should interpret this
8 paragraph.

9 Q Let me ask another question. In relating the
10 potential anticompetitive consequences of the merger to
11 the goals of the Staggers Act did you consider
12 competition which the merged company would face from
13 trucks and water carriers?

14 A Yes, I did.

15 Q Dr. Tye, would you please turn to page 5 of
16 your statement? You state in the middle of the page
17 that "The Staggers Rail Act was based on a finding by
18 Congress in Section 2 that" and then you quote two
19 subsections in Section 2.

20 I wonder if we could -- I would like to have
21 you look at the rest of the findings in Section 2, which
22 are not included there, but I have copies which I will
23 distribute; and I would like to discuss them with you.

24 MR. KHARASCH: I don't think we have to mark
25 that section, do we?

1 MR. SVOLOS: As long as we're examining the
2 witness, maybe it'd be a good idea.

3 JUDGE HOPKINS: Do you want it marked? I
4 don't see where it's needed to be marked. We have
5 enough in here, and I think it's available everywhere.

6 MR. SVOLOS: Okay.

7 BY MR. SVOLOS: (Resuming)

8 Q Dr. Tye, you have before you Section 101(A) of
9 the Rail Transportation Policy. Would you turn to the
10 second page of Historical Notes, which contains Section
11 2, Congressional Findings; and would you take a minute
12 to read to yourself the first five findings under
13 Section 2?

14 A Yes.

15 Q Dr. Tye, when you read the first five
16 subsections of Section 2 in sequence, doesn't that
17 reading reveal that the major impetus behind the
18 deregulation of railroads in the Staggers Act was a
19 recognition by Congress that railroads had to compete
20 with other modes of transportation?

21 A I'm not sure I understand the question. Had
22 to compete, or were competing already, or should compete
23 more?

24 Q No. Had to compete in the market that they
25 were in. Subparagraph 5, for instance, states "Nearly

1 two-thirds of the national intercity freight is
2 transported by modes of transportation other than
3 railroad."

4 A I don't think that Congress was oblivious to
5 the fact that railroads often compete with other modes
6 of transportation.

7 Q Well, when you read those five paragraphs in
8 sequence doesn't it state that the reason that Congress
9 has decided in the Staggers Act that they could
10 deregulate railroads was that there was pervasive
11 competition from other modes of transportation?

12 A Well, I think that Congress recognized that,
13 but they also, as I say in my testimony, there were
14 numerous other places where Congress also appeared to
15 recognize that promotion of competition between
16 railroads was a goal. So I don't think you can take one
17 particular aspect of the Staggers Act out of context and
18 say this is the only thing Congress was concerned
19 about. It seems to me that promotion of competition
20 within the rail industry was also a goal of Congress,
21 and that that competition was there and should be
22 promoted.

23 Q Dr. Tye, all I am -- I'm not taking anything
24 out of context. I am including additional sections of
25 Section 2 of the Staggers Act that you have included on

1 page 5. You have included three of them, and I have
2 included more; and I have asked you if you read the
3 entire or if you read the first five paragraphs of the
4 act in sequence, doesn't it reveal that a major impetus
5 for deregulation in the Staggers Act was the recognition
6 by Congress that railroads had to face competition from
7 other modes?

8 I'm not saying it's the only reason but a
9 major reason.

10 I would agree that Congress was taking into
11 account the need of railroads to compete with other
12 modes of competition in the Staggers Act; but that was
13 not the only thing that motivated Congress, at least
14 from my reading and the discussion in my testimony.

15 Equally important was the promotion of
16 intramodal competition between railroads, among
17 railroads.

18 Q Would you return to page 7 of your testimony?
19 Now, you state near the top after the quotation, the
20 indented quotation, "The Staggers Act also made this
21 commitment to competition explicit in the case of rail
22 merger policy in Section 228(A) by adding a fifth
23 consideration for the Commission in deciding whether to
24 approve a merger, and if so, what conditions to
25 impose." And then you quote from Section 11344(B)(5).

1 Do you see that?

2 A I do.

3 Q Now, isn't it true, Dr. Tye, that the
4 subsection you quoted merely codified prior ICC practice
5 and does not restrain the factors which the Commission
6 may consider in a merger case?

7 A I have to say, Mr. Svolos, you seem to be
8 asking for a legal opinion about --

9 Q Well, Dr. Tye, if you feel you can't answer
10 the question because it calls for a legal opinion, that
11 is a satisfactory answer as far as I am concerned. Is
12 that your answer?

13 A Well, I would say the Congress -- rather, the
14 ICC prior to this did consider the effect of
15 competition. That is my review of previous decisions.
16 The way the question itself was phrased, however, seemed
17 to call for a legal rather than an economist's
18 interpretation.

19 Q Well, I will accept that.

20 Dr. Tye, did you take a look at the historical
21 notes on Section 101(A)? That also includes a statement
22 of purposes and goals in Section 3 of the Act. Do you
23 see that in the righthand column?

24 A Yes, I do.

25 Q Did you review the congressional purposes and

1 goals stated in that section in evaluating the
2 anticompetitive potential presented by this merger?

3 A I was aware of this section when I wrote my
4 testimony. I can't recall specifically reviewing this
5 portion of the Act. I was aware of it.

6 Q I would like to direct your attention to
7 subsections 2 and 3 shown in Section 3. Do you believe
8 that the financial stability of the Southern Pacific
9 would be relevant to the stated congressional goals in
10 those two subsections?

11 A Well, I'm not sure that Congress had any
12 specific railroad in mind in writing those sections, but
13 clearly, the financial stability of the rail industry
14 overall was a factor that Congress was taking into
15 account in the Staggers Act.

16 Q All right. And, of course, the Southern
17 Pacific now forms an important part of the rail network
18 in the western United States, so it would be embraced in
19 this policy, would it not?

20 A Speaking in general terms, yes.

21 Q All right. Now, with that in mind, in
22 evaluating the anticompetitive consequences potentially
23 involved in this merger, would the fact that in 1982 on
24 an FRB basis the Southern Pacific suffered a loss from
25 operations of \$69 1/2 million be a relevant

1 consideration for those goals?

2 A Well, you take reported profits for one year.
3 Obviously, all factors, all data relevant to the
4 financial strength of the rail industry would have some
5 relationship to Congress' goals to promote the financial
6 health of the rail industry.

7 Q And that would be true if in 1983 the Southern
8 Pacific sustained an operating loss of \$143 million, and
9 it would also be relevant to your determination of the
10 potential anticompetitive consequences of the merger to
11 consider the fact that at the end of the third quarter
12 in 1984 the Southern Pacific was faced with a deficit in
13 net working capital of \$100 million. Those would also
14 be relevant factors, wouldn't they?

15 A You have suddenly switched your questions from
16 a discussion of Congress' goals here under Section 3 of
17 the Act and are now discussing the impact on
18 anticompetitive consequences. I don't see the
19 connection.

20 Q You don't see connection between the Southern
21 Pacific's financial condition and your consideration of
22 the potential anticompetitive consequences of this
23 merger?

24 A If there are going to be anticompetitive
25 consequences of the merger, I think they should be

1 evaluated as anticompetitive consequences. Your
2 questions suddenly made a switch from discussion of
3 Congress' objectives to promote the rail system to
4 remain viable in the private sector of the economy over
5 to a discussion of potential anticompetitive
6 consequences of the merger.

7 I am troubled by this switch in basis for the
8 questioning.

9 Q Can you answer?

10 A The anticompetitive aspects relate to the
11 effects of mergers eliminating competition between
12 railroads.

13 Q Well, let's forget the prior question. Let me
14 ask this question. Is the Southern Pacific's financial
15 condition relevant to your consideration of the
16 potential for anticompetitive consequences in this
17 merger?

18 A The answer to that question depends on which
19 attitude of the role of intramodal competition is in the
20 railroad industry and whether you believe that a viable
21 system of intramodal competition would be successful in
22 promoting revenue adequacy and the financial health of
23 the rail industry.

24 I myself object to the position taken, which
25 is that -- which has often been heard and which

1 association you are implying, which is the only way to
2 make the Southern Pacific a financially viable railroad
3 is to eliminate intramodal competition.

4 MR. SVOLOS: I ask that that be stricken as
5 being nonresponsive to the question.

6 JUDGE HOPKINS: I am going to deny the motion.
7 I am going to leave it in.

8 BY MR. SVOLOS: (Resuming)

9 Q Dr. Tye, you have in your testimony attempted
10 to define market shares of various participants in the
11 market; isn't that right?

12 A Yes.

13 Q In doing that, did you keep the antitrust
14 guidelines of the Justice Department in mind?

15 A Yes, I did.

16 Q Don't the guidelines specifically provide in
17 an amendment in 1984 that one of the factors affecting
18 the significance of market share and concentration in a
19 relevant market is the financial condition of the firms
20 in the market?

21 A Could I see that section you're referring to?

22 Q It's Section 3.22.

23 A I have that section.

24 Q All right. Can you answer the question that I
25 asked?

1 Would you read back the last question I asked?

2 THE REPORTER: "Don't the guidelines
3 specifically provide in an amendment in 1984 that one of
4 the factors affecting the significance of market share
5 and concentration in a relevant market is the financial
6 condition of the firms in the market?"

7 THE WITNESS: I think your characterization of
8 this section has oversimplified what the guidelines
9 actually say, if I might. "If the financial
10 difficulties of a firm cannot be explained as a
11 phenomenon of, for example, the business cycle, but
12 clearly reflect an underlying structural weakness of the
13 firm, the firm's current market share may overstate its
14 likely future competitive significance. For example, a
15 firm's market share may overstate its future competitive
16 significance if that firm has chronic financial
17 difficulties resulting from obsolete productive
18 facilities in a market experiencing long-term decline in
19 demand."

20 I don't think that's how the merger applicants
21 have characterized the Southern Pacific Railroad.

22 Q They gave an example of obsolete facilities,
23 but that's not the only instance or cause of a financial
24 decline.

25 Well, let me ask you a couple of questions

1 about this section, if I might, now that you have read
2 it.

3 In considering whether this section is
4 applicable to a particular merger, would it be
5 important, then, to determine whether the financial
6 problems of a company were far worse than those faced by
7 its principal rivals in the market?

8 A I think you'd want to look at the financial
9 status of all the competitors in a market in
10 implementing this section.

11 Q And you would want to know if the inability of
12 that company to finance necessary plant improvements or
13 replacements is not shared by its rivals in the market?
14 Would that be a relevant factor?

15 A Could I have that read back? I'm not sure I
16 understand that question.

17 Q Wouldn't it also be relevant to determine
18 whether that particular firm's inability to finance
19 necessary plants, improvements and replacements is not
20 shared by its rivals in the market?

21 A I would want to investigate where this
22 inability came from: Why couldn't they finance if they
23 were a viable competitor in the market; why would they
24 be unable to finance needed investments? Again, that
25 doesn't seem to be a feature that characterizes Southern

1 Pacific's statement about its own situation. They're
2 proposing to expand investment as one of the benefits of
3 the merger.

4 Q Dr. Tye, you don't believe that that section
5 has any application to your evaluation of market shares
6 in this merger?

7 A I was aware of this section, but in performing
8 my evaluation in this particular proceeding I took the
9 Southern Pacific's own characterization of its situation
10 under the voting trust as being a viable competitor, and
11 I took them at their word.

12 Q Did you investigate to determine whether or
13 not conditions have changed since that voting trust was
14 entered into in December of 1963?

15 A No information came to my attention that
16 would, in the course of this proceeding certainly, to
17 make me believe that that situation had changed.

18 Q You didn't know, for instance, that there had
19 been a further decline in cash of \$119 million during
20 that period?

21 A I was not aware of that fact.

22 C Dr. Tye, please turn to page 31 of your
23 testimony. Actually, it's the sentence beginning on
24 page 30 at the bottom and ending at the top of page 31.
25 You state that trackage rights or protective conditions

1 should be granted only to serve the public interest,
2 here defined to be the promotion of competition.

3 You agree, then, that trackage rights --

4 MR. KHARASCH: Excuse me. Are you asking the
5 witness if he agrees with your characterization of the
6 sentence?

7 MR. SVOLOS: That's my next question.

8 JUDGE HOPKINS: What's the first question?

9 MR. SVOLOS: I just read what he said. All
10 right. I'll read it again.

11 MR. KHARASCH: He is stating an assumption in
12 this sentence.

13 MR. SVOLOS: I will read the whole sentence.
14 "The following analysis of the potentially
15 anticompetitive consequences of the proposed merger
16 assumes that trackage rights or protective conditions
17 should be granted only to serve the public interest here
18 defined to be the promotion of competition."

19 BY MR. SVOLOS: (Resuming)

20 Q Now, that's what you stated. Now, I would
21 like to ask a question. Do you agree that trackage
22 rights should be granted only to remedy a loss of
23 competition resulting from the merger?

24 A Well, this is my understanding of what
25 Commission policy is. There would be other situations

1 where I think trackage rights might be warranted, but
2 that is the assumption that I am proceeding on in this
3 merger.

4 Q That is the assumption you proceeded on in
5 supporting the specific trackage rights requested by the
6 Katy in this case?

7 A That's correct.

8 Q All right. I wonder if we can apply that
9 standard, then, to the specific trackage rights
10 requested. Would you turn to page 61, please? Page 61
11 refers to service to Corpus Christi. What is the
12 anticompetitive consequence of the merger to which the
13 Corpus Christi trackage rights request is directed?

14 A I believe I discussed that under the section
15 on Beaumont. To summarize my testimony, I believe I
16 stated that as a result of the merger there would be an
17 elimination of the extent to which Southern Pacific and
18 Santa Fe compete with one another at multiple ports;
19 that if MKT were to have rights to serve Corpus Christi,
20 it would remedy the situation which was created by the
21 merger, which is that we now had -- prior to the merger
22 we had four Texas Gulf ports that were served both by
23 the Santa Fe and Southern Pacific at Corpus Christi.
24 MKT would then supplant either the Santa Fe or the
25 Southern Pacific as a carrier capable of serving all of

1 these ports.

2 As I discussed in my testimony, shippers cited
3 that this ability to serve multiple ports is one of the
4 factors that was important in the ability to compete.

5 Of course, the service at Corpus Christi would
6 also permit the MKT to interchange traffic with the
7 TexMex for access to Mexico.

8 Q Dr. Tye, Santa Fe and the Southern Pacific do
9 not today both serve Corpus Christi, do they?

10 A This is true.

11 Q So there is no lost competition in there that
12 has to be remedied by Katy access to Corpus Christi, is
13 there?

14 A I didn't say that. I just said that there was.

15 Q There was what?

16 A A loss of the ability of a carrier to compete
17 across a whole range of ports; that is to say, prior to
18 the merger we at Santa Fe and Southern Pacific were
19 competing with one another at four ports. If the Katy
20 were given rights to Corpus Christi, we would have a
21 situation where now the MKT would be competing against
22 the Santa Fe-Southern Pacific at each of the major grain
23 export terminals -- ports rather.

24 Q The Katy now serves just one port, isn't that
25 right?

1 A No, sir.

2 Q What do they serve -- Houston, Galveston?

3 A Houston, Galveston and Texas City.

4 Q And is your testimony that if they're also
5 granted authority to serve an additional port, it will
6 correct an anticompetitive consequence of this merger?

7 A It would correct two anticompetitive
8 consequences: one, the elimination of competition
9 between Santa Fe and Southern Pacific across the range
10 of ports. It would also correct the anticompetitive
11 consequence of denying MKT access to Mexico.

12 Q How is MKT being denied access to Mexico?

13 A Well, after the merger it would no longer have
14 a friendly connection to the TexMex.

15 Q Why is that?

16 A Because in my opinion the Southern Pacific
17 would not find it in its interest to continue to provide
18 joint line rates with the Katy to Mexico. It would
19 favor their own routes.

20 Q Are you referring now to the connection
21 between the Katy and the Southern Pacific at Denison
22 which is now being used to route traffic to Mexico?

23 A I believe that is the interchange, yes, to the
24 TexMex and then to Mexico.

25 Q And it's brought to the TexMex at Corpus

1 Christi and the TexMex takes it to Laredo. That traffic
2 originates at Kansas City, at other points in Iowa,
3 Nebraska and Missouri, goes through Kansas city and then
4 is delivered by the Katy to the Southern Pacific at
5 Denison, and the Southern Pacific takes it from Denison
6 to Corpus Christi where it gives it to the TexMex, which
7 delivers it to Laredo, and that is the Mexican traffic
8 that the Katy is concerned about and that you say is
9 going to be cut off as a result of this merger.

10 MR. KHARASCH: Your Honor --

11 MR. SVOLOS: I've just asked him a question.

12 JUDGE HOPKINS: He hasn't finished.

13 MR. KHARASCH: This question has about five
14 subparts which may or may not be true: one, whether
15 this is an accurate description of the source, all of
16 the sources of the Mexican traffic. And I don't
17 believe, but the witness can at least be asked that.
18 Two, whether Denison is the only interchange between the
19 SP and the MKT for Mexican traffic and so on.

20 The series of assumptions here ought to be
21 tested one by one. I request that the question be
22 broken down.

23 JUDGE HOPKINS: Well, you have answered all
24 the questions for the witness anyway. Why don't you
25 proceed? Let him answer whatever he can answer

1 himself. Go ahead.

2 THE WITNESS: I believe that your summary of
3 this traffic is something of an oversimplification. For
4 example, all of that traffic is not routed through
5 Kansas.

6 BY MR. SVOLIOS: (Resuming)

7 Q All right. Mr. Kharasch just said that.

8 Now, one of the gateways or connections that
9 the Katy has with the Southern Pacific which gives them
10 access to Mexico is Denison; isn't that right?

11 A I believe that's true, yes.

12 Q Is it your testimony that they are going to
13 lose that connection after this merger?

14 A Well, it's my testimony that the Southern
15 Pacific will be highly motivated where it's their
16 interest to deny access to MKT for traffic which they
17 can move over their own system, and there will be
18 diversions of this type of traffic. Whether -- to
19 Mexico. Whether there will be additional traffic that
20 will be exchanged at Denison I'm not really in a
21 position to speak.

22 Q Let's just take the portion of the traffic
23 that originates on the Katy at Kansas City and then is
24 interchanged with the SP at Denison and then routed on
25 through Mexico via the TM.

1 Do you think that the SFSP will close the
2 connection at Denison on that traffic?

3 A I think it is highly likely.

4 Q And what would the reason be for doing that?

5 A To favor their own route.

6 Q In other words, to get the traffic that is
7 moving on that route over to the SFSP route?

8 A Yes, sir.

9 Q Now, have you considered the possibility that
10 if they close that route that the business would then go
11 -- if that joint route was closed, the business would
12 then go not to the SFSP but to a third carrier, namely
13 the Union Pacific, Union Pacific-Missouri Pacific?

14 A I considered that possibility. If this were
15 the great fear that was motivating railroads, I don't
16 think we would see the vast number of route
17 cancellations that we see today. So I think a more
18 realistic assumption is that they would cancel that
19 route for the purpose of favoring their own traffic.

20 Q I am not talking in a general area of route
21 cancellations. I am talking about a specific route, Dr.
22 Tye, and I am asking you if you analyze the competitive
23 situation on that route for the transportation of grain
24 from Kansas City to Laredo, if the SFSP cancelled the
25 joint rate with the Katy did you consider the

1 possibility of the business then going to the Union
2 Pacific?

3 A I did consider that, yes.

4 Q And what was your conclusion?

5 A I didn't see any reason to believe that that
6 would happen.

7 Q Do you know whether or not the Union Pacific
8 has a superior route from Kansas City to Laredo than
9 either the joint line route that the Katy and the SP or
10 the new single line route that would be created by this
11 merger?

12 A This is Union Pacific from Kansas City to
13 Laredo?

14 Q Yes.

15 A I am aware that they have a good route, and I
16 believe I looked at the distances. It is undeniable
17 that they have a good route.

18 Q They have a superior route, don't they?

19 A Well, I wouldn't say that. The Katy and
20 Southern Pacific and TexMex are moving traffic today
21 over that route in competition with the Union Pacific;
22 so what do you mean by --

23 Q Do you know what percentage of the grain is
24 being moved on the Union Pacific that moves between
25 Kansas City and Laredo?

1 A I have figures on the total laredo traffic in
2 my testimony.

3 Q Do you know what percentage is delivered by
4 the Union Pacific traffic moving from Kansas City to
5 Laredo?

6 A That particular market share I do not have. I
7 did look at the market shares, however, of all of the
8 carriers at Laredo. I have that data.

9 Q That doesn't show destination and origin
10 points, does it?

11 MR. KHARASCH: Could that question be
12 clarified?

13 BY MR. SVOLOS: (Resuming)

14 Q I'm sorry. It doesn't show origin points.

15 A It doesn't in my testimony. I believe it is
16 in the work papers that it shows the junctions that the
17 traffic is coming from.

18 Q Can you testify as to what that percentage is?

19 A No, I cannot, although I do, as I say, have
20 the data on the total shares at Laredo, but not for that
21 one particular route.

22 Q Would you refer to page 20 of your testimony?
23 In the last sentence at the top of the page, the first
24 incomplete paragraph, you state that the SFSP will not
25 make any competitive rates or routes from Bayport, Texas

1 to any SFSP point because the SFSP will have the power
2 to require Bayport shippers to use SFSP routes.

3 Is that the basis for the request for trackage
4 rights on the Bayport line?

5 A This is what I focused on in my testimony is
6 the ability after the merger for the combined carrier to
7 control routings beyond Bayport by denying, as they have
8 in other route cancellation programs, the ability of
9 competing carriers to haul that traffic.

10 Q Do you know, Dr. Tye, who now serves the
11 shippers on the Bayport line over which the Katy is
12 asking for trackage rights?

13 A Southern Pacific.

14 Q And that is only the Southern Pacific; is that
15 right?

16 A That's correct.

17 Q So there is no competition now between the
18 Santa Fe and Southern Pacific for that traffic from
19 those shippers?

20 A That's not correct.

21 Q Why isn't it correct?

22 A Because there is upstream and downstream
23 competition for subsequent movements after it gets off
24 of the 20-mile haul on the Bayport line, and that is the
25 competition that is going to be eliminated between Santa

1 Fe and Southern Pacific and between the merged carrier
2 and other carriers.

3 Q And that results from the extension of the
4 single line service which the Southern Pacific -- Santa
5 Fe-Southern Pacific is now going to be offering to
6 shippers who are now served by only one railroad?

7 A It's an extension of the euphemism of the
8 route simplification program, namely cancelling routes
9 that other carriers can participate in on traffic that
10 is over their own system.

11 Q I don't believe that that answered my
12 question. I will try again. The shippers on the
13 Bayport line are now going to have available to them the
14 single line service which goes to many more points than
15 the service of the Southern Pacific at the present time;
16 isn't that correct?

17 A That is correct.

18 Q That is extended single line service, a term
19 that is commonly used in merger cases. Now, hasn't the
20 Commission found in a number of major railroad cases
21 that shippers prefer single line service for a number of
22 reasons?

23 A I think the Commission found that they
24 preferred single line service, but they also preferred
25 competition in keeping routes open; so I don't think, if

1 you look at only one --

2 Q I just asked the question hasn't the
3 Commission found --

4 A My recollection is one of the benefits of
5 mergers that has been recognized by the Commission in
6 previous decisions is extended single line service.

7 Q And that is because extended single line
8 service presents certain advantages to shippers? For
9 instance, the Commission has found that shippers prefer
10 to rely on one carrier instead of several carriers on
11 questions of schedules, special service requirements,
12 car tracing and loss of damage claims. Those are the
13 factors which the Commission has found cause shippers to
14 prefer single line service.

15 A Could I see that citation?

16 Q I am just reading a question.

17 JUDGE HOPKINS: Do you understand it?

18 THE WITNESS: I understand the question, but
19 I'm not prepared from memory to cite all of the factors
20 which the Commission --

21 BY MR. SVOLOS: (Resuming)

22 Q If you don't know whether the Commission has
23 done that, then I think you should just say you don't
24 know.

25 A I'm not able to testify on each of the factors

1 which you have cited specifically.

2 JUDGE HOPKINS: That is the easy way to answer
3 a question if you don't know the answer specifically on
4 each instance.

5 BY MR. SVGLOS: (Resuming)

6 Q Do you know if the Commission has ever granted
7 trackage rights on the ground that so-called captive
8 shippers are going to be granted extended single line
9 service?

10 A My recollection is that in each one of the
11 cases in which trackage rights are involved the question
12 of eliminating anticompetitive consequences over a
13 series of joint routes is one of the factors that has
14 been taken into account.

15 Q Dr. Tye, would you please turn to page 67? At
16 page 67, the second paragraph, you state, "An example of
17 a likely vertical foreclosure is the traffic from
18 Liberal to Enid for SP origin traffic will be foreclosed
19 from enjoying the present competition between MKT and
20 Santa Fe at Enid."

21 A I have that.

22 Q Dr. Tye, how would SP origin traffic get into
23 Enid where it could enjoy the competition between the
24 MKT and the Santa Fe?

25 A It could be routed either by the MKT or the

1 Santa Fe today.

2 Q To which point?

3 A To Enid.

4 Q The SP doesn't go to Enid.

5 A That's correct.

6 Q How would the SP and the OKT interchange
7 traffic that would go to Enid?

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1 A I don't recall offhand. I picked this example
2 out. It was an example that came to my attention of
3 traffic that at one time moved or would be diverted as a
4 result of the merger. I can't remember, I can't recall
5 which one. I don't recall the interchange, but that
6 particular movement did come to my attention during the
7 course of my testimony.

8 Q All right. Then you say, likewise, SSW
9 traffic originating at Hutchinson bound for the Texas
10 points of Galveston and Houston via the MKT will lose
11 that routing option.

12 Now, how does traffic originating at
13 Hutchinson on the Cotton Belt get to the OKT for further
14 movement to Galveston and Houston?

15 A Mr. Svolos, you are testing my knowledge of
16 railroad interchanges. That particular piece of
17 traffic, I do not recall what interchange point it was.
18 But I specifically recall having seen that traffic which
19 was perhaps traffic which was diverted as a result of
20 the merger.

21 Q I think I can help you if you will let me. I
22 think what you are referring to is the possibility of
23 that traffic moving from Hutchinson to Harrington, which
24 is 80 miles. Yesterday I said it was 67. I measured
25 this morning, and I think it is closer to 80 miles up to

1 Harrington -- rail miles -- and then down by the MKT
2 route. That is one option.

3 The other option is by interchange at Santa Fe
4 with Hutchinson or with other carriers located at
5 Hutchinson. But the route you're talking about is 80
6 miles longer, much more circuitous route.

7 A Well, I can only say I picked that example
8 because that was a specific example of traffic that has
9 moved either in the past or in the 1982 traffic. And it
10 came to my attention that that was an example of traffic
11 that would move, so I picked that case not as a
12 hypothetical one, but one in which it represented a real
13 movement.

14 Q The reason it doesn't move that way anymore,
15 if it did, is that there is a terminal located at
16 Hutchinson for the storage of grain, and there isn't one
17 up at Harrington. And it's just much more economical to
18 move itself out of Hutchinson on the Santa Fe after
19 storage in that terminal.

20 MR. KHARASCH: I move to strike the last
21 statement as testimony, and inaccurate testimony.

22 JUDGE HOPKINS: It is testimony, Mr. Svolos.

23 MR. SMITH: I was just helping the witness.

24 JUDGE HOPKINS: I know you were, but I will
25 grant the motion to strike.

1 THE WITNESS: I can only repeat my example, my
2 statement.

3 JUDGE HOPKINS: There is no question.

4 BY MR. SVOLOS: (Resuming)

5 Q The last sentence says that Wichita, Kansas is
6 another major grain point served by MKT that would be
7 subject to diversion for SSSW origin grain from the
8 Tucumcari Line.

9 And my question, Doctor, is how would that
10 happen, since the Tucumcari Line doesn't go to Wichita?

11 A I didn't say it did.

12 Q Then how would the diversion take place?

13 A Well, MKT is a carrier which presently serves
14 Wichita, Kansas, a joint line service between the
15 Southern Pacific and Santa Fe. I'm sorry, MKT and
16 Southern Pacific. The Southern Pacific would not have
17 any interest in providing that joint line service.

18 Q To Wichita?

19 A Yes.

20 Q From where?

21 A Off the Tucumcari Line.

22 Q It's your testimony, then, that there are
23 available routes off the Tucumcari Line which
24 interchange with the MKT to go to Wichita?

25 A Yes.

1 Q And that these are valuable options for
2 shippers?

3 A Yes.

4 Q Dr. Tye, would you refer to page 68, bottom of
5 the page. You discuss the justification for the
6 trackage rights to Beaumont. And I believe it continues
7 on the next page.

8 A I have it.

9 Q Dr. Tye, do you know if the Southern Pacific
10 is presently competing for the shipment of grain in the
11 State of Kansas to Beaumont?

12 A Well, I believe in my tables, I have data on
13 the extent to which there is competition at Beaumont.

14 Q Look at Table 15.

15 A Table 15.

16 Q I don't see the SF shown. Is it on there?

17 A No.

18 Q At any rate, does Table 15 show the Southern
19 Pacific with any revenue or carloads at Beaumont?

20 A It shows no grain traffic for Southern Pacific
21 at Beaumont.

22 Q Do you know how most of the grain originated
23 by the Southern Pacific in southwest Kansas moves? And
24 by that, I mean in which direction?

25 A My recollection from Mr. Anderson's study was

1 that it moved westward. Certainly in the east-west
2 axis.

3 Q Doesn't it indicate that most of it went to
4 feedlots located in Arizona and the Imperial Valley of
5 California?

6 A I don't recall specifically where those
7 destinations were. I'm not sure that those data were in
8 his study.

9 Q If that's true, wouldn't that indicate that
10 the Southern Pacific and Santa Fe are not competing in
11 the shipment of grain in southwest Kansas?

12 A No. I don't agree. I think this is a major
13 inconsistency in your case to argue that they are not
14 competing with one another, whereas that is just the
15 competition that you find when you are looking for
16 alternative competitors in your market impact study.

17 So that type of competition, it seems to me,
18 is the kind that you seize upon to show that there's no
19 anticompetitive consequences of the merger.

20 So to turn around and now say it's not
21 competitive in southwest Kansas is not really consistent
22 in my opinion.

23 Q I don't understand that. The Southern Pacific
24 is shipping its grain to Phoenix in the Imperial Valley
25 and the Santa Fe is shipping to Gulf points. Are they

1 competing with each other?

2 A I think your Mr. Anderson would say yes in his
3 market impact studies.

4 Q I'm asking you, Dr. Tye.

5 A I would say yes; that that was an extent of
6 competition, geographic competition between two rail
7 carriers in that region.

8 Q Geographic competition?

9 A Well, it's intermodal in the sense that it is
10 two railroads, but it meets the Commission's definition
11 of geographic in the sense that it's shipping the
12 traffic to an alternative destination. It would be
13 included as a form of geographic competition.

14 Q Well, who is competing? The owners of the
15 feedlots in Arizona and the Imperial Valley with the
16 receivers of the grain at the Gulf ports?

17 A The two railroads are competing.

18 Q But they are shipping it in different
19 directions.

20 A That's what geographic competition is.

21 Q Doesn't geographic competition mean that the
22 competition exists between either the consignees or the
23 consignors?

24 A No. Well, it could mean that traffic
25 originating in a certain area such as southwest Kansas

1 has a choice of alternative destinations, and that would
2 meet the Commission's standards for geographic
3 competition where two carriers originating traffic in
4 the same general region were shipping to alternative
5 destinations.

6 If you say that's not, then most of your
7 market impacts study would not --

8 Q Dr. Tye, you have lost me. So I am just going
9 to go on to another question.

10 Let me ask --

11 MR. KHARASCH: Could we at least have his last
12 sentence finished?

13 BY MR. SVOLOS: (Resuming)

14 Q Go ahead. I did not mean to cut you off.

15 A I would only say that if you take that
16 position in southwest Kansas, most of your market impact
17 study goes out the window because that's the kind of
18 competition you've been relying on for the rest of your
19 market impact study, for the most part, not competition
20 between two railroads, between A and B.

21 Q Isn't it true that from major grain points in
22 Kansas, like Salina, Topeka, Kansas City, shippers have
23 available the excellent service line service of Union
24 Pacific-Missouri Pacific from those points to Beaumont?

25 MR. KHARASCH: If the question is about the

1 Union Pacific service, Mr. Svolos, maybe we can speed it
2 up. I have a Railway Guide with the Union Pacific map
3 which would make it simpler for the witness to look at,
4 rather than trace things through the Rail Atlas.

5 I am handing Dr. Tye a copy of the Official
6 Railway Guide.

7 JUDGE HOPKINS: Thank you.

8 THE WITNESS: The Railway Guide shows the
9 Union Pacific serving Salina, Topeka, and Kansas City to
10 Beaumont. I am not in a position at this point to say
11 that -- to characterize the type of service which they
12 are presently rendering. I presume it is adequate.

13 I don't know.

14 BY MR. SVOLOS: (Resuming)

15 Q Do you know if it would be highly competitive
16 to the routes which would be offered by the merged
17 system from those points?

18 A I haven't investigated each of those routes to
19 analyze the competition between UP and MP and the merged
20 system for those specific routes.

21 However, I think the market shares which I
22 show in my analysis of Gulf ports shows the MP a
23 competitor, especially for grain at Beaumont. It's got
24 21 percent of the revenue and 21 percent of the carloads
25 at Beaumont.

1 Q But you haven't analyzed the Union Pacific
2 routes from the points I asked you about to determine
3 the extent of the competition which the Union
4 Pacific-Missouri Pacific would present to the merged
5 system?

6 A Not on those specific routes; no, sir.

7 Q All right. Dr. Tye, can we turn now to page
8 44 of your testimony, Table 1. It is captioned "U.S.
9 Agricultural Land Shipments Exports to Mexico, 1983."

10 And this table shows the dollar value -- well,
11 let me ask you, does this table show the dollar value of
12 the grain moving by rail to those ports in 1983?

13 A It's the total value.

14 Q Does all of that move to those ports by rail?

15 A No. It's not all rail.

16 Q Would it include water transportation?

17 A There was a certain amount of water that
18 arrived, I believe it was at Laredo; not a lot, but
19 some. I was very confused about that.

20 Q I was just wondering if you could give us some
21 idea of what percentage of this was moved in by rail.

22 A My recollection was that it was the majority
23 of that traffic. As you see from Table 3, Brownsville
24 includes Port Isabel, which was included in the Laredo
25 District.

1 Q Would you say over 95 percent, in your
2 judgment?

3 A I don't recall the figure right offhand.

4 Q Do you know if it's more than half?

5 A It's more than half rail. Yes, sir.

6 Q But you can't tell us whether it's more than
7 75 percent?

8 A My recollection is that it's more than 75
9 percent rail. The water was a small amount is my
10 recollection. I have the figure, but not with me.

11 Q Would you please refer to Table 9 at page 55?
12 I don't know if that is one of the revised tables or
13 not. I guess not.

14 MS. MAHON: Yes, it is.

15 BY MR. SVOLOS: (Resuming)

16 Q Dr. Tye, the figures shown there are based on
17 1982 waybill statistics taken from the Interstate
18 Commerce Commission.

19 A As provided to me by Mr. Anderson.

20 Q Provided to you by Mr. Anderson?

21 A Yes.

22 Q Do you know how the carload sample of the
23 Interstate Commerce Commission was used to create the
24 carload data shown on Table 9?

25 A Well, I asked Mr. Anderson to provide data for

1 each of these gateways on rail traffic for each of the
2 carriers. And that's where those data came from.

3 Q Well, let's look at Table 9 under SP which
4 shows carloads. That's 2,300; is that correct?

5 A Yes.

6 Q Did Mr. Anderson give you that number?

7 A Yes. I believe he did. But we also checked
8 it against another set of data which he gave me.

9 Q Well, the waybill sampling for the ICC is a 1
10 percent sample, isn't it?

11 A Not exactly, but generally speaking it is 1
12 percent, a stratification.

13 Q And the 2,300 carloads shown for the SP there
14 is a number that is created from that sample?

15 A Yes.

16 Q Now, is it your testimony that Mr. Anderson
17 created that number for you from the sample?

18 A He provided the data which is in my work
19 papers from which these numbers were derived. In some
20 cases he -- we developed these numbers from a set of
21 underlying data which he had, and he also checked those
22 numbers against other totals which he himself
23 developed.

24 So we did it two different ways, to ensure
25 that there was no errors. And in fact, the revisions

1 which you see noted, resulted from his efforts to
2 independently check and test the numbers in our tables.
3 So we did it two different ways to try to eliminate any
4 potential errors.

5 Q Were any checks run to determine margin of
6 error in these projections?

7 A Well, let me say that the individual numbers
8 for individual railroads and individual cities I did not
9 test at that level for margin of error.

10 However, when I began to aggregate, to develop
11 things such as Herfindahl indices and so forth, I began
12 to ask myself, you know, how sensitive were these
13 results to possible errors. Most of these market shares
14 and Herfindahl changes are very dramatic, so that at
15 that level, I felt that such problems would be less.

16 In other words, as you aggregate up, the
17 potential sampling error becomes less.

18 Q Do you know what expansion factor was applied
19 to the percentage samples of the Interstate Commerce
20 Commission?

21 A I think it depends on the strata in which it
22 is sampled.

23 Q Did you do that, or do Mr. Anderson do that?

24 A Mr. Anderson did.

25 Q He did that?

1 A Well, he provided me numbers from which I was
2 able to commute these, and he independently checked the
3 results to make sure that his results came up the same.
4 I did not apply any expansion factors myself.

5 Q You did not apply the expansion factor?

6 A No, I did not.

7 Q Who applied the expansion factors?

8 A I think you'll have to ask Mr. Anderson.

9 Q As far as you know, it was Mr. Anderson or
10 someone else?

11 A That's correct.

12 Q You did not apply the expansion?

13 A I did not.

14 Q Is that true with respect to all of the tables
15 in your testimony?

16 A I applied no expansion factors.

17 Q That would be true then for Tables 5, 6, 10,
18 11, 14, 15, 16, 17.

19 A I applied no expansion factors to the waybill
20 data.

21 Q On all of those tables it was either Mr.
22 Anderson who applied the expansion factor or someone
23 else?

24 A That's correct.

25 Q And you don't know who the someone else is?

1 A No.

2 Q Dr. Tye, would you turn to Table 5. It is
3 captioned "Permerger Market Shares of Carriers at All
4 U.S. Gateways To and From Mexico."

5 Now, does the term "all U.S. Gateways to and
6 from Mexico" define an economic market?

7 A I think in the context of this, these are rail
8 gateways to Mexico. In my opinion, that's an
9 appropriate standard for applying in this case.

10 Q Well, you applied a Herfindahl index to those
11 numbers, so does it follow that you determined that all
12 U.S. gateways to and from Mexico constituted an economic
13 market?

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1 A I think the rail gateways that I have
2 identified in my analysis here constitute a role of an
3 economic market.

4 Q I am referring to Table 5, All U.S. Gateways
5 To and From Mexico. You ran a Herfindahl index on that
6 in Table 6 in which you determine that all U.S. gateways
7 to and from Mexico constituted an economic market.

8 A Well, you omitted the crucial term, "rail
9 gateways." So these data apply to rail crossings to
10 Mexico. And that was the market that I analyzed.

11 Q You concluded that all U.S. rail crossings to
12 Mexico constituted an economic market?

13 A Yes, I did.

14 Q I assume that transportation by rail is the
15 product that you determine in that market?

16 A Yes.

17 Q What is the geographic area of the market?

18 A Well, I looked at a variety of geographic
19 areas. So I looked at Texas crossings, and I looked at
20 all U.S. crossings, rail crossings to Mexico to see if
21 the results were sensitive.

22 The total U.S. crossings as you expand the
23 geographic market, since the merged carriers have a
24 higher market share, the Arizona and California
25 crossings market shares go up as you expand the

1 geographic size of the market because those markets are
2 not served by the UP/MP.

3 So I did it both ways.

4 Q All right. And you excluded trucks and water
5 carriers from that market.

6 A Yes.

7 Q And that was based on your determination that
8 trucks and motor carriers were not an adequate
9 substitute in the market?

10 A For this particular market, yes.

11 MR. KHARASCH: Excuse me. Was that last
12 question trucks and motor carriers?

13 BY MR. SVOLOS: (Resuming)

14 Q If it was motor carriers, I meant water
15 carriers.

16 MR. KHARASCH: I think your question, as the
17 record will show you, asked truck and motor carriers
18 were not an adequate substitute.

19 JUDGE HOPKINS: I think you did.

20 MR. SVOLOS: I meant trucks and water
21 carriers.

22 BY MR. SVOLOS: (Resuming)

23 Q Your answer would be the same? They were not
24 an adequate substitute?

25 A In this market, no.

1 Q Do you know how much grain was delivered to
2 Mexico by water in 1983, what the percentage was of the
3 total grain that was purchased in Mexico?

4 A I have seen the figure. I don't have it.

5 Q Well, there is an exhibit that was introduced
6 yesterday from the Katy traffic department which
7 indicated that in 1983, it was 60 percent. Sixty
8 percent went in by water of all the grain purchased by
9 Mexico.

10 Dr. Tye, in view of that, how do you justify
11 not including water carriers in the product market?

12 A Well, the 60 percent number, as I recall, is
13 the number that I saw. The reason that I excluded them
14 is that I made inquiries to determine the extent to
15 which there was rate competition between water transport
16 and rail transport, and everything that I was able to
17 determine on the basis of how Conasupo makes decisions
18 about transportation led me to believe that this
19 competition was not active and that inclusion of water
20 carriers was not warranted in this case.

21 Q You concluded that water carriers and rail
22 carriers were not competing in the market for the
23 transportation of grain to Mexico?

24 A I concluded that, as far as I was able to
25 determine, that the rate competition between these

1 alternatives was not sufficient and that the competitive
2 alternatives were such that analysis of this market on
3 the basis of rail transportation was warranted.

4 Q I wonder if I could get a direct answer. You
5 concluded that water carriers and rail carriers are not
6 competing in the market for the transportation of grain
7 into Mexico; is that true?

8 A They were not competing. For the purpose of
9 my analysis of what the impact of this merger would be
10 on competition, they were not competing.

11 Q And you concluded that -- would your
12 conclusion be the same if you knew that in 1983, 60
13 percent of the grain was purchased by Mexico, moved to
14 that country by water?

15 A Well, of course, grain isn't the only relevant
16 market we are looking at here. If you look at the
17 numbers, grain is actually a fairly small percentage of
18 the total. Most of the traffic is non-grain traffic.

19 So you would have to consider the fact that
20 that 60 percent figure applies only to your grain
21 traffic. So the non-grain numbers wouldn't be changed
22 at all by your computation.

23 Q But it would change the grain numbers?

24 A I didn't say it would change the grain
25 numbers.

1 Q If you included them, it would have to
2 change.

3 A It would change them if it were included;
4 yes. Obviously.

5 Q And if it's 60 percent, it would change them
6 significantly?

7 All right. In the non-grain category --

8 JUDGE HOPKINS: Are you waiting for an answer
9 to that last question?

10 BY MR. SVOLOS: (Resuming)

11 Q Did you answer the last question?

12 A No, I didn't. For the grain traffic
13 specifically, I did not compute a new Herfindahl index.
14 It's possible that the Justice Department's standards
15 would be violated even in that case, even if you
16 included the 60 percent.

17 Q But you don't know.

18 A I did not make that computation.

19 Q But you don't know if they would be violated?
20 You say "quite possibly."

21 A I haven't tested it. I could do it.

22 Q Do you know how many water carriers there
23 are?

24 A No, sir.

25 Q Now, in the non-grain category, what did you

1 do to determine that trucks did not belong in the
2 relevant market?

3 A I looked at the data that I cited. I'm sorry;
4 you are referring to the non-grain portion?

5 Q Yes.

6 A I was unable to get accurate data on the level
7 of truck traffic overall. In the agricultural area, I
8 was able to determine that the numbers were small. But
9 for the non-agricultural truck transportation, I was not
10 able to establish what that number was, although I was
11 told that one of the problems has to do with the quality
12 of Mexican highways as it applies to the grain traffic.

13 Q Well, is it correct, then, that in the
14 non-grain area, you did not undertake a detailed
15 analysis to determine the presence of trucks in that
16 market?

17 A I did not have data. I did rely, however, on
18 a substantial body of literature and research on rail
19 transportation, all of which concludes that rail
20 transportation is a distinct market. And this was a
21 factor which I relied upon in my conclusions. The truck
22 and rail do not provide identical services at identical
23 rates, and that was the basis of my computation of these
24 numbers.

25 Q All right. Dr. Tye, is it correct, then, that

1 you did not run any statistical analysis to determine
2 the presence of trucks in the non-grain area of this
3 market; that you based your conclusion that trucks were
4 not in the market based on things that you read, the
5 general literature dealing with this subject?

6 A That's correct. I did not have data that
7 permitted me to make that determination.

8 Q Could you tell me what literature there is on
9 the subject dealing with the economic market of all U.S.
10 gateways to and from Mexico?

11 A Well, that was not the literature I analyzed.
12 I looked at studies of rail/truck competition in
13 general. I was not able to find any study which
14 particularly applied to the Mexico traffic.

15 Q Dr. Tye, referring back to Table 5, I noted
16 that the shares -- the market share of the TM, the Texas
17 Mexico Railroad, is shown separately when you make an
18 analysis of premerger market shares.

19 And then in Table 6, the postmerger market
20 shares, the shares of the Tex Mex are allocated to the
21 Southern Pacific and the Union Pacific.

22 What was the reason for treating the market
23 share of the Tex Mex differently before the merger and
24 after the merger?

25 A Clarification, really, so that it would be

1 possible to see independently what the Tex Mex share was
2 in Table 5 before I took traffic which Tex Mex had
3 interchanged with the MP and the SP.

4 So it was for the convenience of the reader.

5 Q Did that distort your findings on the
6 Herfindahl in any way? Well, let me ask it
7 differently. If you had treated the Tex Mex separately
8 in your postmerger analysis, would you have come up with
9 different conclusions?

10 A The numbers would have changed but the
11 conclusion that the Herfindahl guidelines would be
12 violated was not changed. I did it both ways, and I
13 found that it was not sensitive to that assumption.

14 I think the way I did it was the correct way,
15 but I wanted to test to see how sensitive the conclusion
16 was.

17 Q Okay. Let's look at Table 6. You found a
18 premerger Herfindahl index of 4,006. Is that correct?

19 A Yes.

20 Q Now, referring to the Antitrust Guidelines, do
21 you know, Dr. Tye, at what level do the guidelines
22 define a market as being highly concentrated?

23 A 1,800.

24 Q So if the guidelines define a market as being
25 highly concentrated at 1,800, how would you define a

1 market with a Herfindahl index of 4,000?

2 A Obviously, one that exceeds the guidelines.

3 Q Would it attain the status of a cartel? If
4 1,800 is highly concentrated, 4,000 obviously means that
5 there are firms operating in that market which have
6 extremely powerful market capability. Isn't that
7 correct?

8 A Well, I'm a little troubled by your
9 characterization, "extremely powerful." It shows a
10 concentrated market.

11 Q Well, 1,800 is highly concentrated. 4,000
12 must be something more than highly concentrated.

13 A It is.

14 Q In my mind, it's almost an OPEC situation,
15 just looking at the numbers.

16 MR. KHARASCH: Is that a question. I think
17 the record is confused and I am confused, whether he is
18 asking the witness whether it is a cartel or an OPEC or
19 whether it is concentrated or not.

20 Those are two different questions.

21 JUDGE HOPKINS: I think we need a question.

22 BY MR. SVOLOS: (Resuming)

23 Q Would you define that as a cartel at 4,000 if
24 a market is highly concentrated at 1,800?

25 A I would not define it as a cartel.

1 Q Do you know -- well, let me ask another
2 question. Find Table 8. Table 8 on page 54 shows a
3 premerger Herfindahl index of 4,423.

4 MR. KHARASCH: That is a revised table.

5 BY MR. SYOLOS: (Resuming)

6 Q The revised table shows a premerger Herfindahl
7 index of 4,311. Is that correct?

8 A Yes, sir.

9 Q How many firms are operating in the market to
10 which that Herfindahl index is directed as shown on your
11 exhibit?

12 A There were four firms in the premerger
13 Herfindahl index.

14 Q One of those firms is the Southern Pacific?

15 A Yes, sir.

16 Q The Southern Pacific, then, is one of the
17 principal players in that market; is that correct?

18 A This is true.

19 Q Now, Dr. Tye, doesn't the fact that the
20 Southern Pacific, one of the principal players in this
21 market, is now operating with a deficit of net working
22 capital of \$145 million and hasn't made any money in the
23 past three years, cause you to question your market
24 definition?

25 A No, it does not.

1 Q Why isn't the economic power that one of the
2 four firms in this highly concentrated market reflected
3 on Southern Pacific's economic performance?

4 A I don't think you can go from concentration
5 index in one particular market that the Southern Pacific
6 operates to a conclusion about his overall financial
7 performance.

8 Q What about the rates that are being charged by
9 the firms in the market? If you found that the
10 railroads serving this market were moving most of the
11 grain by contract which were at levels below tariff,
12 would that indicate to you that there is something wrong
13 with your market?

14 A Not necessarily. It would cause me to
15 conclude that if this merger had the consequence of
16 reducing competition and eliminating competitors, then
17 the Commission should take steps to reinstitute that
18 competition through trackage rights.

19 Q My question is, shouldn't the concentration of
20 the market show up in the profit levels realized by the
21 firms operating in the market?

22 A Well, in general terms, the answer is yes. I
23 think concentration -- I cited a number of studies in my
24 testimony that said that concentration -- you know,
25 adding a third viable competitor -- does affect

1 competition.

2 So these concentration indices and the extent
3 of the numbers in the market do have an impact.

4 Q You would expect the carriers, the four
5 carriers operating in this market, to be hauling this
6 traffic in the market at very high levels of rates above
7 variable cost, would you not?

8 A Prior to the merger?

9 Q Yes.

10 A Not necessarily.

11 Q Despite the Herfindahl index that you found in
12 the range of 4,000?

13 A The use to which I put the Herfindahl index
14 was primarily to look at the increase. It turns out
15 that the increase is two times the market shares prior
16 to the merger.

17 So that I think that the main focus of the
18 Herfindahl indices is not to seize upon one index, that
19 is, one interpretation, but rather to look at what the
20 impact of a merger is on the concentration in that
21 market, and where it is going to increase that
22 concentration, I think the Commission has an obligation
23 to step forward and assert trackage rights to prevent
24 that decline in competition.

25 Q Are you saying now, Dr. Tye, that your

1 findings of premerger Herfindahl index are not
2 important?

3 A I didn't say they weren't important.

4 Q Or that they are not accurate?

5 A I said they are important and they are
6 accurate. What I said was I didn't think you could go
7 from one number like this to a computation of revenue to
8 variable cost ratios. I used these not for the purpose
9 of computing revenue to variable cost ratios, but as
10 indicated, as a concern about anticompetitive
11 consequences that I think the Commission should take
12 into account.

13 And where a reduction in the number of
14 competitors would result in a merger, I think the
15 Commission should take assertive action to prevent that
16 reduction in competition.

17 Q Dr. Tye, what is the reason that the Justice
18 Department is concerned about a situation in which a
19 high Herfindahl index exists in a market?

20 A Because high levels of concentration and low
21 numbers of competitors -- there is a tendency towards
22 noncompetitive pricing.

23 Q In other words, a high level of concentration
24 fosters the potential for collusion by the competitors
25 in the market; is that correct?

1 A It wouldn't necessarily take collusion. As
2 your own Professor MacAvoy shows, you can have
3 non-collusive behavior that results in effects on
4 price.

5 Q It could be price leadership?

6 A He employed an oligopoly model.

7 JUDGE HOPKINS: Let him finish his answer.

8 THE WITNESS: He employed an oligopoly model
9 in which the two primary determinants of the level of
10 prices and the level of competition were the number of
11 competitors and the anticipated response of those
12 competitors.

13 So you can have oligopoly responses in which
14 there are effects, even without collusion. The
15 collusive case, of course, would be the one that had the
16 greatest concern. But I think that's the basis for the
17 Department of Justice's use of concentration indices.

18 BY MR. SVOLOS: (Resuming)

19 Q The potential for collusion?

20 A No, sir. I said it didn't take collusion.

21 Q Well, let me ask the question, then. Is the
22 potential for collusion one of the reasons that the
23 Justice Department is concerned about a highly
24 concentrated market?

25 A It is one of the factors; yes.

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

3 (Recess.)
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1 JUDGE HOPKINS: Let's get back on the record,
2 Mr. Svolos.

3 BY MR. SVOLOS: (Resuming)

4 Q Dr. Tye, just for clarification, you mentioned
5 that Mr. Anderson provided some statistics for you.

6 What is his first name?

7 A Bill. It was not your Mr. Anderson.

8 Q All right.

9 I think we broke off when we were discussing
10 concern about collusion being one of the things the
11 Justice Department is concerned about, where there is a
12 high Herfindahl.

13 Would you turn to Table 14, please?

14 Table 14, is that revised, by the way?

15 A It is.

16 Q It shows a premerger Herfindahl of 2,411, and
17 the MKT is in that market, is it not?

18 A Yes, that is premerger for revenues. The MKT
19 is in that, shows 5.8 percent of revenues.

20 Q How many participants are there in that
21 market?

22 A Well, in the case where the market is defined
23 for all rail carriers at all Texas Gulf ports, I believe
24 that prior to the merger we showed seven carriers with
25 shares of the market prior to the merger.

1 Q All right.

2 Now, Dr. Tye, yesterday Mr. Gastler testified
3 that in 1983 the Katy was unable to take a general rate
4 increase because of competitive factors.

5 Is the fact that one of the participants in
6 the market is unable to take a general rate increase
7 because of competitive factors consistent with the high
8 level of concentration in that market?

9 A For clarification, was this general rate
10 increase export traffic at Texas Gulf ports or all
11 traffic?

12 Q All traffic.

13 A I guess in that case you can't relate one to
14 the other directly.

15 Q All right.

16 What about the fact that on grain moving to
17 Gulf ports, most of it, according to Mr. Gastler, or 50
18 percent of it moved by contract at lower than tariff
19 rates?

20 Is that consistent with a concentrated
21 market?

22 MR. KHARASCH: I'm not sure, Your Honor, that
23 that is Mr. Gastler's testimony, but I am perfectly
24 agreeable to a question saying, assume he testified to
25 that.

1 JUDGE HOPKINS: Why not?

2 BY MR. SVOLOS: (Resuming)

3 Q Assume that he testified to that.

4 A If that were in fact the case, I don't think
5 it is necessarily inconsistent with these numbers.

6 Q Well, does the number of over 2000 indicate a
7 highly concentrated market according to the Justice
8 Department guidelines?

9 A It does. It indicates the area where you
10 should be concerned about increases in concentration.

11 Q And the fact that one of the players in the
12 market has to cut prices below tariff rates to get
13 business is not inconsistent with his participation in
14 an allegedly high concentration market?

15 A I don't think there is any law that says
16 competitors don't cut prices in highly concentrated
17 markets? I don't think you can go from --

18 Q Is it typical for monopolists to be cutting
19 prices?

20 A I didn't say they were monopolists.

21 Q Is it typical of monopolists to cut prices?

22 A Monopolists to cut prices?

23 Q Only for predatory purposes.

24 A Not necessarily. It may be in their interest
25 to cut prices. It may be more profitable.

1 Q Do you think that's why the Katy did it?

2 A I don't think the Katy is a monopolist.

3 Q Dr. Tye, let's look at Table 9, your revised
4 Table 9. It shows Mexican border points.

5 Would you go down to Laredo and then across to
6 the Union Pacific, Laredo?

7 Am I correct that that shows that the Union
8 Pacific delivered 100 cars in Laredo in 1983, or 1982,
9 rather, excuse me.

10 A That's what the data show.

11 Q Now, we know that that is quite a bit off the
12 mark, don't we?

13 A I would be surprised if the MP did not carry
14 more traffic than that.

15 Q Will you look at the column on the far right,
16 total revenue from Laredo?

17 Is that \$5,655,000?

18 A Yes.

19 Q Now, up at the top, Calexico, California is
20 shown as having \$7,164,00 in revenue, is that correct?

21 A Yes.

22 Q Based on these numbers, there's more grain
23 moving through Calexico than Laredo.

24 A This is correct.

25 Q Are you aware that Laredo is by far the most

1 important crossing for grain?

2 A I believe I have those numbers on another
3 table.

4 (Pause)

5 I'm sorry, I was incorrect. I don't think
6 that can be determined by these data.

7 Q Where do you suppose the grain that crosses at
8 Calexico, California originates?

9 A I'm not sure.

10 Q Dr. Tye, would you look at Table 4? You show
11 National City, California, as a border point served by
12 Santa Fe for the San Diego & Arizona Eastern connection,
13 is that right?

14 A Yes.

15 Q Do you know if the San Diego & Arizona Eastern
16 is still operating there?

17 A I looked into that. It is something of a
18 puzzle, or was to begin with, at one point. My
19 understanding was San Diego & Arizona Eastern had
20 connections to both SP and Santa Fe, and a bridge washed
21 out so that their only connection was with Santa Fe, and
22 I believe at one point they were a subsidiary as well
23 and are now under separate ownership.

24 Q Isn't it true that at the present time they
25 just serve as a connection to Tijuana, Mexico, to serve

1 several local industries just over the border?

2 I am just wondering why you classify it as a
3 rail gateway.

4 A I was trying to be as complete as possible.
5 If you look back at the data, there was traffic moving
6 to Mexico through it, and it was a connection. I was
7 trying to be as complete as possible.

8 Q All right.

9 And then you also show Douglas, Arizona.
10 Isn't that a crossing that is used to access a mine
11 across the border?

12 A Once again I am not familiar with the exact
13 traffic which is moving over the Douglas gateway. I
14 included it so that we would have a complete set of
15 figures for all the traffic moving to Mexico, and I also
16 did an analysis, you know, Texas only and all U.S.
17 gateways to try to account for that fact. I believe
18 that shows up as a relatively modest share of the market
19 in each one of these computations.

20 Q What about Naco, Arizona? Did you find any
21 traffic moving over that?

22 A I am checking my tables. There was no grain
23 traffic in Table 9, no non-grain traffic southbound.

24 Q Let me say, Dr. Tye, the reason I asked the
25 question is that my information is that it has been

1 closed for some time as a rail crossing.

2 A That certainly shows up in the data that I
3 used.

4 Q It has been closed.

5 A Then no traffic is moving over that gateway.

6 Q Isn't the same thing true for Ashley, Texas,
7 Del Rio, Texas, and Hidalgo, Texas, and Rio Grande City,
8 Texas, that no traffic moves over those gateways
9 because no rail connections exist to Mexico at those
10 points?

11 A What were the cities again, Ashley?

12 Q Ashley, Texas, Del Rio, Texas, Hidalgo, Texas,
13 and Rio Grande City, Texas.

14 (Discussion off the record.)

15 MR. KHARASCH: I have an objection. I think
16 there are two questions here. One is whether they were
17 physical rail connections, and then there is a question
18 of whether there was traffic moving or shown in the
19 tables as moving.

20 JUDGE HOPKINS: He asked about traffic.

21 MR. KHARASCH: The question, Your Honor, has
22 those two parts.

23 JUDGE HOPKINS: Separate them.

24 BY MR. SVCLOS: (Resuming)

25 Q Let me ask, Dr. Tye, do you know if there are

1 any rail connections to Mexico existing at Ashley,
2 Texas, Del Rio, Texas, Hidalgo, Texas, and Rio Grande
3 City, Texas?

4 A I was aware when I did my study that some of
5 these cities did not have direct rail connections for
6 traffic. I included each of these points for the
7 purpose of establishing what data from the waybill
8 sample was included. As I think you will see in most
9 cases, for the reason you point out, the traffic is
10 either nonexistent or very small.

11 MR. SVOLOS: I have nothing further.

12 JUDGE HOPKINS: Thank you.

13 BY MR. RATNER:

14 Q Dr. Tye, my name is James Ratner. I am with
15 the United States Department of Justice.

16 I will try not to go over all of the ground
17 that you already talked about this morning, but one
18 preliminary question. A little earlier you indicated in
19 reference to Mexican gateways that you didn't think that
20 rail and water were competing. You said they are not
21 competing.

22 Did you mean by that that water is not able to
23 fully prevent rail rates from rising?

24 A What I had in mind was that for the shippers
25 presently using rail services to Mexico, that they were,

1 in my opinion, not fully substitutable services. That
2 would be a constraint on the market power of a
3 railroad.

4 Q And what do you mean by constraint?

5 A Pricing constraint, that I wouldn't be
6 satisfied to see mergers that had anticompetitive
7 consequences in the rail industry simply by the fact
8 that the water carriers were in existence. That is the
9 way I would define my concern about anticompetitive
10 consequences.

11 Q Is it correct to say that in your opinion, in
12 the circumstance you are talking about, that shippers
13 who are using rail would not be able to turn to water
14 carrier in the event of any significant rail price
15 increase?

16 A For many shippers, yes.

17 Q If you would turn to pages 17 and 18 of
18 MKT-25, this is your Figure 1 on page 18.

19 Do you have that?

20 A Yes, I do.

21 Q Concerning the Y problem, am I correct that
22 the competition which may be foreclosed is source
23 competition in the Y problem case?

24 A Yes.

25 Q Are the reasons why in the Y problem Southern

1 Pacific has not already monopolized the movement and
2 forced both Santa Fe and the USC railroad to take a
3 division that is no higher than the competitive rate,
4 are those reasons the reasons that are discussed in
5 Appendix A of your opposition testimony?

6 A Yes.

7 Q Moving to the rat-tail problem, are the
8 reasons in that situation why Southern Pacific Railroad
9 has not already monopolized the entire movement the
10 reasons that are discussed in Appendix A of your
11 opposition traffic?

12 A Yes.

13 Q Is it correct that in the rat-tail problem,
14 the competition to be foreclosed is head-to-head
15 competition between Santa Fe and the upstream
16 competitive railroads?

17 A Between B and C, yes.

18 Q Is it correct that in the sausage problem, the
19 competition, at least part of the competition to be
20 foreclosed is horizontal competition on movement from A
21 to B?

22 A Yes. And A to C.

23 Q Right. But in terms of a movement from A to B
24 or B to A, premerger, you would have a shipper having
25 two options, one being Santa Fe single line and another

1 option being the upstream carrier and Southern Pacific,
2 and that after the merger, those competing options will
3 no longer exist.

4 A Yes.

5 Q Would you turn to page 25, please?

6 Do you see the sentence in the middle of the
7 first full paragraph that says "Trackage rights simply
8 give the same competitive advantage?"

9 A Yes.

10 Q What does that sentence assume about the
11 rental rate that is going to be set for the trackage
12 rights?

13 A That it would be set in a competitive way so
14 that both of the carriers would have a fair ability to
15 compete for the traffic.

16 Q Is it correct that the rental rate would have
17 to be set in such a way that the costs borne by either
18 of the carriers would be very close to the same for the
19 same movements?

20 A Not necessarily, in the sense that both should
21 have an equal competitive opportunity with the traffic,
22 but inherent efficiencies between the two carriers might
23 be different and have different cost levels. But I
24 think the rental rate should not be structured in a way
25 so as to bias it.

1 Q How would we know whether the rental rate has
2 been biased or not?

3 A Well, I think you have to set the price for
4 trackage rights in a way that gives each carrier an
5 ability to compete on the basis of his own inherent cost
6 service advantages to the shipper, so I think you would
7 have to look at setting it so that the most efficient
8 carrier with the most cost would be getting the
9 business.

10 Q Does that involve evaluating the costs
11 associated with the trackage rights in making some sort
12 of valuation as to what they are?

13 A ICC valuation?

14 Q Somebody is going to have to set the rates,
15 presumably, Mr. Tye. Whoever does that, how are they
16 going to set the rate?

17 A Hopefully it will be done through some
18 negotiated agreement.

19 Q A little further down on page 25, if I am
20 paraphrasing you correctly, you indicated that
21 protective conditions could possibly be evaded by means
22 of various dirty tricks.

23 Do you see that?

24 A I do.

25 Q All right.

1 I realize you are citing from the Commission,
2 but what dirty tricks do you have in mind?

3 A Well, in any joint line movement, it obviously
4 requires the cooperation of the two joint line
5 carriers. So what I have in mind by dirty tricks, which
6 is in quotation marks, is efforts of one carrier to
7 impede the efficient provision of service by another
8 carrier through whatever might come to mind.

9 Q I guess I am interested in the whatever might
10 come to mind.

11 Do you have any specific examples of something
12 you know that has occurred or that would be feasible
13 that one or the other carrier could do?

14 A Train schedules might be an example. I have
15 been made of examples where carriers that were hoping to
16 impede another carrier's efficient utilization of
17 equipment might provide operational obstacles.
18 Difficulties may arise which just makes life hard for
19 another carrier by failing to coordinate schedules, for
20 example.

21 Q A little further down you mentioned some even
22 more subtle means of evading the spirit of protective
23 conditions.

24 What do you have in mind there?

25 A An example might be efforts to get around the

1 protective conditions by various pricing mechanisms,
2 that sort of thing.

3 Q How would a pricing mechanism get around the
4 protective condition?

5 A Well, you might sign a contract, for example,
6 to in effect undercut and put a price squeeze on another
7 carrier.

8 Q Any other examples that come to mind?

9 A Not right off, and at this point I was
10 primarily quoting the Commission's concerns of
11 enforcement of protective conditions.

12 Q How do trackage rights rather than protective
13 conditions avoid the problems of either dirty tricks or
14 more subtle methods of avoiding the implementation of
15 the protective conditions?

16 A Well, since both carriers are providing the
17 through service and have the opportunity to move the
18 traffic from A to B, that in this case hopefully few of
19 these opportunities will arise.

20 Q These opportunities may still arise under a
21 trackage rights situation, though, too, isn't that
22 correct?

23 A They may but I have been -- I have heard less
24 concerns about that type of arrangement, but even under
25 a trackage rights agreement, if you are determined to

1 undermine it, I suppose you could find a way.

2 Q Is it correct to say that trackage rights
3 impose costs upon the owning and the renting railroad
4 that are not present in the absence of trackage rights?

5 A Yes.

6 Q One such set of costs would just be
7 transaction costs, is that correct?

8 A What do you mean by transactions costs in this
9 context?

10 Q Well, in this context, I mean the negotiation
11 and coordination of routes that must be engaged in by
12 both railroads in order to implement the trackage rights
13 scheme.

14 A In any system in which cooperation and
15 coordination are necessary between two railroads,
16 clearly this is one of the things that has to get worked
17 out.

18 Q Negotiation between two railroads as to what
19 an appropriate rental rate is may involve a nontrivial
20 amount of transactions costs, isn't that correct?

21 A It may.

22 Q In addition to transactions costs, is it
23 correct that if the ultimate rental rate is set too low,
24 resource costs may be imposed on the owning railroad?

25 A I am troubled by your term "resource costs."

1 If it is too low, there is obviously a cost of lost
2 revenue to the landlord railroad.

3 Q Is it also correct that if the rental rate is
4 set too low that the trackage rights would be used more
5 often than they should and the physical plant in effect
6 will be used more often than it should be based upon the
7 costs associated with using that physical plant?

8 A Well, not necessarily. It might just affect
9 the allocation of traffic between the two carriers. It
10 would ultimately depend on what was the total impact on
11 traffic as to what the impact was. I mean, it is very
12 difficult to generalize.

13 Q Is it correct that if the trackage right
14 rental rate is set too high, then the trackage rights
15 may not serve as effectively as they could at being a
16 competitive check on the owning railroad?

17 A Yes.

18 Q Is it correct that a possible result of that
19 would be supercompetitive pricing by the owning railroad
20 and associated welfare lost with that?

21 A It's a possible outcome. It would depend on
22 the circumstances in any particular situation.

23 Q At the bottom of page 25, the second footnote,
24 you refer to the granting of trackage rights as a first
25 best solution and protective conditions as a second best

1 solution, is that right?

2 A Yes.

3 Q Isn't it correct that in terms of overall
4 welfare to society, trackage rights may not be the first
5 best solution?

6 A As compared with what?

7 Q As compared with not allowing the merger at
8 all, for example?

9 A That's very possible.

10 Q Is it correct that the point of this footnote
11 is that compared to protective conditions, trackage
12 rights appear to be in many cases a preferable
13 solution?

14 A Yes. I was comparing the scenario in which a
15 merger went forth, and recognizing that there were
16 difficulties of enforcing protective conditions, that
17 the Commission has established that it was not going to
18 do this as a general matter in mergers, then granting of
19 trackage rights is the preferred answer to potentially
20 anticompetitive consequences of the merger.

21 Q On page 26, the second to the last sentence,
22 you say we would expect the merged carrier to resist the
23 award of trackage rights most strongly in those
24 situations where it had the most to lose.

25 Do you see that?

1 A Yes.

2 Q Is it correct that the merged carrier may have
3 "the most to lose" because it has market power that it
4 doesn't want to lose?

5 A That was the alternative that I had in mind.
6 I was applying Professor Baumol's test of protest.

7 Q I understand.

8 Is it also correct, however, that the merged
9 firm might consider that it had most to lose in a
10 situation where the trackage rights might strongly
11 negate operating efficiencies associated with a
12 particular line?

13 A Well, it would depend upon how the price for
14 trackage rights were set. If it were set in a
15 compensatory way, then the merged carrier would be
16 compensated for its costs.

17 Q So you are speaking hypothetically so that the
18 trackage right rental might have to take into
19 consideration the optimal level of density for traffic
20 on a particular route, is that what you are saying?

21 A Well, it would be a host of factors that are
22 taken into account in setting the rates. I would not
23 have put it in terms of optimal traffic density.

24 Presumably the problem is to -- is that the
25 traffic is there, and the trackage rights should be set

1 in a way that makes a fair, competitive situation
2 between the two railroads.

3 Q Is it correct that what you are saying is that
4 compensation for trackage rights should include possible
5 inefficiencies that are imposed on the owning road by
6 the granting of trackage rights?

7 A Of what type?

8 Q I'm not sure I understand. What exactly about
9 my question don't you understand?

10 A Well, congestion costs might be an example,
11 both carriers imposing congestion costs on each other.
12 You see, once trackage rights are granted, it is mutual,
13 you need to look at the types of impacts, and presumably
14 the grant of trackage rights would enhance efficiency,
15 encourage carriers to be more efficient.

16 Q Isn't it correct that trackage rights could
17 interfere with operations of one particular road or the
18 other, or reduce the density associated with the owning
19 road and thus cause an inefficient result?

20 A I am troubled by the reduced density because
21 if two carriers are sharing the traffic on the system,
22 the density doesn't change.

23 Q Well, to use a gross example, you can either
24 have two trains carrying 25 cars or one train carrying
25 50 cars, can't you?

1 A That is possible, but the shorter train
2 providing more efficient, frequent service might be the
3 more competitive outcome. I think under the -- when
4 trackage rights are granted, the purpose is to encourage
5 competition and promote more efficient operations on the
6 part of the carriers, and that is when you would expect
7 to see efficiencies promoted.

8 A A reduced density of one carrier would result
9 in an increased density to the other.

10 Q To the extent that there are inefficiencies
11 imposed on the owning railroad, is it correct that those
12 inefficiencies must be accounted for in the trackage
13 rights compensation level?

14 A I am troubled by the term "inefficiencies."
15 Costs, yes, but inefficiency is kind of a grand thing
16 with all possible ramifications of which I am not clear
17 on what you mean by an inefficiency. I may or may not
18 agree as to whether, what someone may characterize as an
19 inefficiency is something that should be a candidate for
20 compensation.

21 Q I am happy in this case to substitute "cost"
22 for "inefficiency."

23 A Okay.

24 I think generally speaking, it is a matter
25 that the main railroad should be compensated for costs

1 incurred in the use of its facilities. And that is what
2 the determination of the trackage right fee should
3 establish.

4 Q In this you consider all costs associated with
5 the imposing of the trackage rights, is that correct?

6 A All economically relevant costs.

7 Q Fine.

8 Dr. Tye, do you agree that the fact alone that
9 a party takes one position or another either in support
10 or in opposition or in partial support or partial
11 opposition to a merger, that fact alone doesn't shed a
12 significant amount of light on the issues surrounding
13 whether the merger is anticompetitive or whether
14 trackage rights should be granted?

15 A As I understand the question is should I
16 disregard the position that people have taken,
17 interested parties in this merger, and I would say no.
18 I think you should consider what their positions are.

19 Q Well, you read a little more into my question
20 that was there. I didn't ask whether you should
21 disregard it, I asked whether any one particular party's
22 position sheds a significant amount of light on the
23 issues surrounding whether the merger is anticompetitive
24 or whether trackage rights is an appropriate remedy.

25 JUDGE HOPKINS: Are you talking about the

1 Justice Department's position?

2 THE WITNESS: I think our opinion sheds a
3 great deal of light on the issue.

4 BY MR. RATNER: (Resuming)

5 Q I should have said any party other than the
6 government party's. We will just move on.

7 On page 39, next to the first dot there, you
8 indicate that the merger will have the effect of
9 eliminating competition for traffic to and from Mexico
10 in California and Arizona gateways, is that right?

11 A Yes.

12 Q And correct me if I am wrong, the gateways you
13 are referring to there are Calexico, National City,
14 Douglas, and Waco, is that right?

15 A Did you say Nogales?

16 Q No, I didn't.

17 A Those are the Mexican border points served by
18 these two carriers.

19 Q The ones I mentioned?

20 A Yes.

21 Q Did you develop any data showing for which
22 origination and destination pairs and commodities these
23 gateways compete as alternative routings with each other
24 but don't compete with other Mexican gateways?

25 A Not explicitly. I did the market share

1 analysis for all gateways and for Texas gateways to see
2 if it had a material difference, made a material
3 difference. The conclusions weren't sensitive to that
4 result.

5 But let me say that my primary concern in this
6 testimony was the evaluation of the MKT request for
7 trackage rights, so my primary focus was on Texas
8 gateways since MKT would be serving Mexico via either
9 Laredo or Eagle Pass.

10 Q I understand.

11 On the other hand, since you did indicate that
12 competition over the far west gateways would be
13 eliminated, I am just trying to explore with you exactly
14 what the nature of that competition is.

15 Did you evaluate, for example, whether
16 shippers that are currently routing to Mexico through
17 National City could adopt a routing through Calexico or
18 Douglas in the event that the price that they were being
19 charged for the routing through National City went up
20 substantially?

21 A No, I did not.

22 Q You may have already explained this and I
23 didn't understand it, so let me just ask you quickly,
24 what is your basis, if any, for thinking that the far
25 west gateways are a separate area that should be looked

1 at for possible anticompetitive implications of the
2 merger?

3 A Well, the focus of my testimony was not upon
4 the far west gateways as a separate market analysis. I
5 looked at the total picture of all U.S. rail gateways to
6 Mexico, and I looked at Texas. I observed that there
7 were only two carriers that were serving Mexican border
8 points, SP and SF, and these were the only carriers that
9 were even potentially able to compete in that market,
10 and the two of them are merging.

11 Q But it is correct that you didn't evaluate how
12 likely it would be that a shipper routing through the
13 western ones could adjust its routing to go through
14 Laredo, El Paso, any Texas gateways?

15 A No, I did not.

16 Q Is it your testimony that the Texas gateways
17 alone is an appropriate framework for evaluating
18 possible anticompetitive aspects of this merger?

19 A I think they are a useful way of looking at
20 it, but as I say, I tried to do the analysis from the
21 point of view of the total U.S. gateways, and Texas
22 gateways separately to see whether the results were
23 sensitive to it. Since they weren't, I didn't feel
24 compelled to say one was more correct than the other.

25 Q Why is it useful just to look at Texas

1 gateways?

2 A Because I was asked to look at the MKT's
3 request for trackage rights, and I thought that that
4 request was more relevant to competition in Texas
5 gateways than it was to Calexico, California, for
6 instance.

7 Q I know I asked you the other side of this, but
8 did you evaluate whether shippers using Mexican
9 gateways, I mean, Texas gateways, could adjust their
10 routings so as to use non-Texas gateways in the event
11 that rates rose on Texas gateways?

12 A No, I didn't. The SF-SP would have all of the
13 California and Arizona gateways as a result of the
14 merger, so an increased concentration in Texas, it
15 cannot be avoided by going to California and Arizona
16 since the merged carrier would serve all of those points
17 as well.

18 Q You may have also explained this, but if you
19 could do it briefly for me, how is the merger of Santa
20 Fe and Southern Pacific going to enable the merged firm
21 to raise price to shippers who are currently routing
22 grain and other commodities through Laredo?

23 A I don't recall that my testimony said
24 explicitly that this merger and the increased
25 concentration wasn't going to cause higher prices. What

1 I said was that it was going to eliminate a presently
2 viable competitor in that market, and that I believe the
3 Commission should take steps to prevent that elimination
4 of competition. I did not make a prediction as to what
5 would happen to prices in that market.

6 Q Fair enough, but let me ask you this, then.
7 Is it your opinion that the merger will give the merged
8 firm market power so that they would be able to raise
9 the rates to shippers that are currently routing through
10 Laredo?

11 A I don't think you have to go that far to
12 approve trackage rights to the MKT in this proceeding.
13 I did not go so far as to make a prediction as to what
14 would happen to rates. What I said was that we have a
15 competitor being eliminated from the market, that I
16 believe the Commission should take steps under the
17 Staggers Act and under the merger proceedings to ensure
18 that potentially anticompetitive consequences of the
19 merger would be remedied.

20 So, and I also said there were tendencies in
21 more concentrated markets for there to be price
22 effects. But I think you are somewhat extrapolating the
23 results of my statement to translate it into a
24 particulare forecast of prices in this market, which I
25 did not undertake.

1 Q At this point I am just asking your opinion as
2 an expert transportation economist who is familiar with
3 this merger whether it is your opinion that the merger
4 will enable the merged firm to have market power over
5 shippers that are currently routing to Mexico through
6 Laredo.

7 A Well, I think it will increase market power in
8 the market without any lessening of competition and a
9 tendency towards higher prices and reduce competitive
10 transportation alternatives for shippers, and that is
11 what the Commission should be taking steps to avoid in a
12 merger proceeding such as this.

13 Q When you said --

14 A I continue to resist your efforts to
15 characterize my testimony as a prediction as to what
16 will happen, at least --

17 Q Forgive me if you think I am characterizing
18 it. I don't believe I am characterizing, Dr. Tye. I am
19 asking you whether you have an opinion as to the effect
20 of the merger on a specific set of movements, and those
21 movements are movements from all points in the United
22 States through Laredo into Mexico.

23 And what I am asking you is do you have an
24 opinion as to whether the merger will further enable the
25 merged firm to exercise market power over shippers who

1 are interested in shipping over those routes.

2 MR. SVOLOS: Your Honor, I think I am going to
3 object to this. The witness has testified that he
4 didn't feel it was his role to examine or to try to
5 predict whether the merged carrier would have the
6 ability to increase prices.

7 JUDGE HOPKINS: Well, he can just state that,
8 then. He can answer the question in that way.

9 MR. SVOLOS: Well, he did state that.

10 JUDGE HOPKINS: I did not hear him state it
11 that way. You must have better ears than I have.

12 Go ahead.

13 THE WITNESS: Well, let me try to answer the
14 question. I did not make a prediction as to what would
15 happen to prices. I said that if you look at the body
16 of industrial organization literature and the testimony
17 of persons such as Professor MacAvoy and evidence such
18 as one of the studies that I cited that there is a
19 tendency in markets with fewer competitors, in more
20 concentrated markets, towards higher prices. But I did
21 not go so far as to develop an explicit procedure for
22 computing what the effect of this merger would be on
23 prices in these markets.

24 What I said was I thought there was enough of
25 a concern of what the effects would be that I thought

1 the Commission in this case should take action to
2 prevent any such potential price increases.

3 BY MR. RATNER: (Resuming)

4 Q Let me try to ask you one other area on this
5 topic, which is did you evaluate in any way whether --
6 what it would be that shippers would do if Southern
7 Pacific and Missouri Pacific based their rates upon
8 movements that go through Laredo?

9 A Not in the context of that particular phrasing
10 of the problem.

11 Q Is it correct that you did not look at that
12 issue that I phrased in the last question concerning El
13 Paso either?

14 A No, I did not.

15 Q On page 49, you discuss some economic
16 literature that shows that decreasing the number of
17 competitors from three to two can have an
18 anticompetitive effect.

19 Do you see that?

20 A Yes, I do.

21 Q It is correct, isn't it, that when three
22 competitors exist, the likelihood of collusion in this
23 industry still may be rather significant, isn't it?

24 A Three competitors can collude, yes. I am not
25 forecasting that they are going to be indicted by the

1 Department of Justice after this merger.

2 Q Perhaps I should be more explicit. When I
3 refer to collusion, I mean explicit or implicit
4 collusion which may be legal or illegal. I am referring
5 to all behavior by firms which takes into account the
6 pricing and service decisions of the other firms in the
7 industry.

8 A Well, if you look at models of oligopoly which
9 are models involving a small number of competitors, the
10 two primary determinants or factors that most influence
11 the outcomes in these markets of most of these models is
12 the numbers of competitors and their expectations of the
13 responses of competitors to their own behavior. In most
14 of these models, if the number of competitors decreases,
15 there is an upward effect on the price level, as there
16 was in Professor MacAvoy's analysis.

17 Q For example, if there was a decrease from four
18 to three, does the economic literature show that there
19 is an upward effect on the ability of firms to collude?

20 A There is an article by George Hay on this
21 subject looking at various price-fixing conspiracies and
22 the numbers of people involved and so forth. I can't
23 remember what happened between four and three in terms
24 of collusive behavior, but my recollection was that his
25 analysis showed the decreasing numbers of competitors in

1 markets was more likely to result in a conviction on
2 price fixing, but that in some cases, a larger number of
3 competitors were also convicted. That is my
4 recollection of that survey.

5 Q On page 63 of your testimony, you discuss
6 southwest Kansas grain, and I know you have been asked
7 about this before, and I will try and be very brief.

8 Is it correct that your testimony indicates
9 that the Southern Pacific and Santa Fe compete with each
10 other for movements of southwest Kansas grain?

11 A Yes.

12 Q Is it also correct that the two railroads
13 don't both serve very many common points in that area,
14 directly serve?

15 A In southwest Kansas, yes. In other parts of
16 the Tucumcari line, I believe there is an overlap.

17 Q Toward the southwest Kansas area, could you
18 explain the process by which the two railroads compete,
19 given that they don't actually serve the same common
20 points?

21 A It is a process of geographic competition
22 between the two carriers where both are moving grain to
23 different destinations, where farm origin grain has a
24 choice of what line the traffic will move on.

25 Q If you know, how much direct competition is

1 there in southwest Kansas between Santa Fe and Southern
2 Pacific, and by direct, I mean that both railroads are
3 competing to serve the same shipper to the same ultimate
4 destination.

5 A Was that a question?

6 Q How much direct competition is there between
7 Santa Fe and Southern Pacific in southwest Kansas for
8 southwest Kansas grain?

9 A I'm not sure.

10 Q Is it correct that you calculated Herfindahls
11 for all Texas Gulf ports?

12 A Yes.

13 Q Could you explain to me the process by which
14 you conclude that all Texas Gulf ports was a proper
15 framework for using Herfindahls?

16 A Well, the Texas Gulf ports were the market
17 area which was once again influenced by MKT request for
18 trackage rights. So I computed what the effects of the
19 merger would be on market shares within that geographic
20 area and used that as the basis for my valuation of
21 these trackage rights requests.

22 Q Did you evaluate, for example, whether if the
23 rates for movements through Beaumont went up, whether
24 those shippers using that routing would switch to
25 movements, information, through Port Arthur?

1 A Your question is not well chosen because very
2 little grain moves out of Port Arthur, I think.

3 Q I don't know whether it does or not. I am
4 asking whether you evaluated that sort of question.

5 A Well, I certainly looked at the fact that
6 shippers often had a choice of these ports, and the
7 ability to route traffic through alternative ports is an
8 advantage to shippers, and that looking at these Texas
9 Gulf ports, there would be a reduction in the number of
10 carriers serving them, and that MKT trackage rights
11 would help remedy that problem.

12 Q Did you evaluate whether, for example, other
13 Texas Gulf ports are substitutes for Beaumont?

14 A I think I answered that, that these ports were
15 alternatives for shippers and that my -- the basis for
16 my evaluation of the advantages of MKT trackage rights
17 would be to allow MKT to compete effectively in all of
18 the major grain ports since one effective competitor was
19 going to be eliminated as a result of the merger to
20 those ports.

21 Q Okay.

22 What was the basis for the conclusion that the
23 ports are in some sense substitutable?

24 A The statements by shippers that they needed a
25 set of alternatives. I did not undertake an explicit

1 analysis of the competition among these ports, but --
2 and I think it depends from one circumstance to another
3 for a particular shipper when one port is an alternative
4 or another.

5 Q Did you evaluate whether barge movements can
6 act as a constraint on rail rates through Texas ports?

7 A I don't see how they would be in this case
8 since much of the grain is coming from major terminals
9 in places such as Kansas where barge transportation is
10 not an alternative.

11 Q On page 67, the second sentence on the first
12 paragraph, do you see that?

13 A Yes.

14 Q Can you explain for me, hopefully briefly, the
15 example of how shippers can use leverage in negotiations
16 with competing carriers?

17 A This sentence doesn't refer to shipper --

18 Q I'm sorry.

19 How a monopoly origin carrier can leverage the
20 lack of effective competition.

21 A By cancelling the joint line rate and
22 eliminating any competition from upstream or downstream
23 competitors.

24 Q That's fine.

25 Q On page 68 you refer to shipper leverage in

1 negotiation with competing carriers.

2 Can you give me an example of what that
3 shipper leverage is?

4 A An example might be where a shipper has a set
5 of routes as alternatives, that shipper might gain
6 concessions by certain carriers that are participating
7 in the move through contracts.

8 Q What sort of concessions?

9 A Allowances contracts, fairly common.

10 Q On page 86, second to the last sentence of the
11 first paragraph where it says MKT also asks for
12 guarantees to prevent SP from simply embargoing MKT by
13 imposing arbitrarily high switching charges.

14 Do you see that?

15 A Yes.

16 Q Does the ICC currently regulate switching
17 charges, do you know?

18 A You mean should they? Do they?

19 A I asked do they.

20 MR. KHARASCH: Your Honor, we got into some
21 trouble on this yesterday. I think Mr. Greenberg's
22 comment yesterday was the wise one, that this sort of
23 question is best left to the expertise of the ICC itself
24 which may in fact tell us in a pending case whether it
25 is going to regulate switching charges or not.

1 JUDGE HOPKINS: Are you willing to accept
2 that, Mr. Ratner?

3 MR. RATNER: Well, that was really a
4 foundation question.

5 I would like to know if in the opinion of Mr.
6 Tye as an economist, whether the regulation that exists,
7 whether it is some or none, is inadequate to restrain.

8 I will just go ahead and ask that question.,
9 and maybe we will get the same objection.

10 BY MR. RATNER: (Resuming)

11 Q Is it your opinion that any regulation that
12 exists concerning switching charges is inadequate to
13 deal with the potential problem that you have raised
14 here in your testimony?

15 A Well, at the beginning of my testimony, I
16 tried to state that it was my opinion that in these
17 merger proceedings, the ICC should be taking steps to
18 minimize the need for regulation. So I think if this
19 condition were imposed in the merger, then we wouldn't
20 have to worry about what the ICC is going to be doing in
21 regard to switching charges, and it is my position that
22 where the Commission can take steps to minimize that
23 need for regulation, they should be doing it.

24 So this is a good example.

25 (Discussion off the record.)

1 BY MR. RATNER: (Resuming)

2 Q Could you turn to page 12 of MKT-28.

3 A I have it.

4 Q Do you see the sentence, second sentence of
5 the only full paragraph on that page that starts with
6 "By ignoring totally?"

7 A Yes.

8 Q Is it correct that on page 7, which is
9 Professor MacAvoy's diagram, that the transfers that you
10 are referring to are represented by rectangle A?

11 A Yes, that's correct.

12 Q And that in that diagram, Area A represents a
13 transfer from shippers to the merged firm?

14 A Yes.

15 Q Is it correct that economists do not generally
16 consider pure transfers between, in this example,
17 railroad and shippers, to cause economic harm to society
18 because the transfers cannot be concluded to misallocate
19 resources in an inefficient manner?

20 A There are lots of things economists don't
21 consider, and this is one of them.

22 Q I think I understand your answer, but maybe
23 you could answer a little more clearly for me.

24 A Essentially, this Area A is treated as a wash
25 because it is robbing Peter to pay Paul essentially. So

1 in theoretical welfare economics, the economics
2 profession, there is a great simplification which allows
3 the theoretical economist to say something about a
4 problem, ignores this Area A. Once you begin to take
5 this Area A into consideration, economists often have to
6 fall silent on discussion of a number of things because
7 they have to begin to take these things into account.

8 So it is a simplification that is often
9 employed by economists but not widely shared outside of
10 the economics profession.

11 Q Is it correct that as a question of allocative
12 efficiency, economists generally don't make a conclusion
13 as to whether it is better for society that the railroad
14 has the area represented by Rectangle A or the shipper
15 has the area represented by Rectangle A?

16 A Well, I think many economists often have
17 opinions about it that they will in essence try to
18 ignore that problem in their analysis, just treat it as
19 a wash. It is one of the limitations.

20 Q Does "treat it as a wash" in your answer mean
21 that from an allocative efficiency standpoint, society
22 is indifferent as to whether the railroad or the shipper
23 has the Rectangle A?

24 A I would say what I mean by that is that
25 economists who employ that technique are indifferent as

1 to who gets the money. Whether society is indifferent
2 or not is a totally different matter.

3 I think you would find, for example, in the
4 discussion in Fisher & Lande's review of this whole
5 methodology, that society does care, and that's what the
6 antitrust laws are all about.

7 Q I would include in my question as a matter of
8 allocative efficiency. Now, that is different from
9 society as a whole, isn't it?

10 A In the narrow concept by which economists
11 compute allocative efficiency, that area is treated as a
12 wash.

13 Q And in the context of this answer, "a wash"
14 means there is no allocative efficiency reason why it is
15 better that either the shippers or the railroad has the
16 Rectangle A, is that correct?

17 A That is the assumption.

18 Q So it is correct, then, that the fact by
19 itself is that shippers will be paying a higher rate and
20 the railroads will be making more profit after the
21 merger, if such a fact would occur, does not by itself
22 mean to the economist that the merger is harmful to
23 society.

24 A To the economist applying this narrow measure
25 of public interest, the answer is yes. People don't

1 share this narrow concept of the public interest.

2 Q Is it correct that in the context of
3 allocative efficiency, harms to allocative efficiency
4 occur due to output reduction associated with
5 supercompetitive pricing rather than the fact that some
6 shippers will pay high prices?

7 A That is correct.

8 Q It is correct, isn't it, that it is the
9 shippers who are unable to purchase as a result of a
10 higher price that are the shippers that are really
11 harmed rather than the shippers who actually purchase
12 the same quantity they purchased before but at a higher
13 price in terms of allocative efficiency.

14 A I think you have it exactly backwards.

15 Q Can you explain for me why?

16 A Well, in the narrow metric, public welfare
17 here, the shippers that have no other alternative but
18 simply pay the higher rate and don't abandon the system
19 when rates go up, those are the shippers who are deemed
20 to have no social welfare costs associated with them.
21 It is the shippers who leave the system, who seek out
22 alternatives are the ones that in this narrow rubric are
23 the ones who are causing the social welfare losses.
24 This is the origin of the paradox, that the more
25 complete the monopoly after the merger, and the fewer

1 customers there are seeking alternatives, the less the
2 social cost because as long as the merged system
3 efficiently squeezes out all the revenue from the
4 shippers, letting no one outside the system and causing
5 no volume losses after the merger, there is no welfare
6 loss at all. It is something of a paradox in the whole
7 methodology.

8 Q Is it correct that economists in general would
9 term the issue about whether shippers or the merged firm
10 gets the Rectangle A, is it correct that economists
11 would term that issue as a distributional issue rather
12 than an allocative efficiency issue?

13 A Yes.

14 Q Is it your testimony that this is a
15 significant distributional issue which the ICC should
16 take note of in deciding this merger?

17 A My testimony said that I think that
18 fundamental assumption of Professor MacAvoy's
19 methodology should cause you extreme concern in applying
20 it and you should understand what it is you are
21 assuming, and it should raise a red flag in applying
22 this methodology by glossing over that point.

23 Q Is it possible that there will be a large
24 distributional transfer to the merged firm away from
25 shippers as a result of this merger?

1 A It depends a good deal on how the merger would
2 be conditioned by trackage rights.

3 Q Assuming there are no trackage rights, is it
4 possible that there will be a large distributional
5 transfer to the merged firm away from shippers as the
6 result of this merger?

7 A It's possible, yes. I haven't made a precise
8 computation.

9 Q In the context of Professor MacAvoy's diagram,
10 that transfer would be represented by Rectangle A,
11 wouldn't it?

12 A Yes.

13 Q Is it correct that this distributional shift
14 could occur in addition to actual resources losses that
15 result from output reduction due to possible
16 supercompetitive prices that are charged by a merged
17 firm?

18 A It is in addition -- in fact, I think I showed
19 some numbers that it was anywhere, 25 times the amount
20 of the loss as it would be computed by looking only at
21 the smaller, so-called allocative efficiency losses.
22 The number is in my testimony. I don't have it at the
23 tip of my tongue.

24 Q On page 29 of your testimony -- and this is
25 MKT-28 -- and I think also in Appendix A, pages 9 and

1 10, you refer to the possibility of regulatory evasion.

2 A Yes.

3 Q Could you give me some examples of how the
4 misallocation process works?

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1 A Which misallocation process are you referring
2 to?

3 Q I think that is the term I got from you. Let
4 me look. Yes; on the top of page 29 you refer to the
5 arbitrary allocation of revenues.

6 A Oh, I'm sorry. I thought you meant a resource
7 allocation.

8 Q We are trying to get away from that topic,
9 hopefully.

10 A By that, I meant that only the merged carrier
11 were providing the service for this traffic, and that
12 there were no independently established rates over
13 portions of the system, then it would be possible to
14 ship revenues from a place where the carrier had market
15 power to a place that it did not have market power, just
16 by allocating revenues between those two portions of the
17 system.

18 That is what I had in mind.

19 Q What I was asking is, how do they exactly go
20 about doing that? How does a carrier go about
21 allocating revenue to one portion or another portion?

22 A Well, if it was a joint line move, for
23 example, and the carrier had market power, then they
24 would price the total move and the extent to which they
25 were earning unusually high rates of profit on one

1 portion would be averaged in with competitive rates in
2 another portion.

3 And the extent to which there was earning at
4 super-rate of normal profit would be obscured by this
5 process. This is a fairly well-recognized exception
6 which I believe even Professor Baumol conceded; that a
7 regulated firm would have an incentive to evade
8 regulation by means of this process.

9 Q Do you happen to have any specific example of
10 this being done right now?

11 A I would have to have some specific examples of
12 the ICC applying standards of maximum rate guidelines
13 which I believe they have not yet determined. So I am
14 afraid the answer is no.

15 Q On page 53, you refer to various unobserved
16 attributes of the modal choice process.

17 A Yes.

18 Q And I think you indicate that one such
19 attribute is size of consignment?

20 A Yes.

21 Q Are there any other attributes that you know
22 of?

23 A The rate and service differentials that
24 shippers got within the market would be important. For
25 example, all shippers would not be facing the same set

1 of service attributes of the modes nor the same set of
2 prices.

3 Furthermore, shippers might have different
4 internal distribution systems, different warehousing,
5 different logistics systems, all kinds of -- any
6 differences that were across shippers that were relevant
7 to mode choice would be a consideration.

8 It was not accounted for in Mr. Anderson's
9 market segmentation scheme.

10 Q In Appendix A on pages 14 and 15, the last
11 sentence on 14 and spilling over to 15, do you see that
12 sentence?

13 A Yes.

14 Q Can you give me an example of how divisions on
15 a particular route may be part of a larger structure of
16 a divisions?

17 A Well, two carriers might have an agreement on
18 divisions that would apply not to just one route, so it
19 would be administratively difficult for each carrier to
20 single out every route and every movement and identify
21 how to use the divisions process to squeeze out every
22 element of market power that it has on that move.
23 Administratively difficult.

24 That is, an agreement might cover numerous
25 routes, traffic between carriers.

1 Q Is this larger structure of divisions
2 currently present between railroads?

3 A There are large divisions structures; yes.

4 MR. RATNER: Thank you, Dr. Tye. I have
5 nothing else for this witness, Your Honor.

6 JUDGE HOPKINS: Thank you.

7 Ms. Reed?

8 BY MS. REED:

9 Q Will you turn to page 67 of MKT-25? At the
10 top of the page in the first paragraph, in the second
11 sentence, you express your concern whether it's a
12 monopoly origin at one end.

13 Did you do any study or did you ask anyone at
14 the MKT to do any study as to how many SP/Santa Fe
15 points would become exclusively SPSF System, exclusively
16 points as a result of the merger?

17 A There was some discussion as to the total
18 number of points, that it was large. We focused our
19 attention primarily on those points that related to the
20 trackage rights, however, so I can't give you a number
21 as to the total.

22 But there were a number of points that were
23 identified as potentially affected by this concern.

24 Q Do you know who would know?

25 A Well, I think you can do it by means of

1 looking at the ICC waybill sample, combined with a
2 Railway Guide.

3 Q I mean as far as the MKT, they did not do a
4 study to determine the exact number of points which
5 would become exclusively served as a result of the
6 merger, to your knowledge?

7 A I have not seen such a study.

8 Q Now, could you turn to Table 6 at page 52? Is
9 Table 6 a compilation of the statistics in Table 5, as
10 far as the market shares?

11 A It is based on the same set of data. However,
12 we took SDA and combined it with SF, and we took Tex Mex
13 traffic that was interlined with UP and SF and allocated
14 those market shares to those respective carriers on the
15 grounds that Tex Mex did not have independent access to
16 shippers, since Tex Mex was dependent on those two other
17 carriers for any prior or subsequent moves.

18 Q Am I correct that on Table 5, the figures for
19 Tex Mex for 5 million carloads of grain, 5.45 million
20 carloads of grain, were basically added on to the
21 carloads -- or, excuse me -- revenues of the Southern
22 Pacific, is that correct?

23 A And the UP/MP, depending upon which was the
24 connecting carrier.

25 Q So they were split up between the two of

1 them?

2 A With the exception of the \$1,772,600 worth of
3 revenues in accompanying cars that were local Tex Mex
4 traffic that was not interlined.

5 Q So there was no double counting of SP/Tex Mex
6 cars. You didn't include them once in looking at
7 Southern Pacific's share?

8 A No. This was all traffic associated with the
9 terminating carrier, so that -- at each of the
10 gateways.

11 Q Now, earlier, you were asked a question by the
12 attorney for the Applicants regarding a movement from
13 Kansas, grain to California, and grain also moving from
14 Kansas down to the Gulf.

15 A And you indicated that there was competition
16 between the railroads for those two movements. Is that
17 correct?

18 A That there was geographic competition out of
19 southwest Kansas?

20 Q And that it would be proper to look at the
21 competition between the two railroads for that traffic;
22 is that correct?

23 A That's correct.

24 Q Now, would the same also be true of traffic --
25 for example, fertilizer moving to this farmer or

1 shipper, receiver, in Kansas from, say, points in
2 California, from points in the Gulf?

3 A I'm just not familiar with the fertilizer
4 traffic as to what the origins of fertilizer traffic
5 are.

6 Q Just taking a hypothetical, let us assume that
7 there is fertilizer moving from California to the same
8 county that the shipper is located at in Kansas, and
9 that there also is fertilizer moving from the Gulf.

10 Wouldn't you, in looking at the competitive
11 impacts of the merger, have to consider both of those
12 movements?

13 A Well, I want to look at the potential of those
14 two railroads in competing for that traffic. But that's
15 about as far as I can go right now, since I haven't
16 looked at it and don't know what the situation is.

17 This region has a substantial imbalance
18 outbound, as I recall.

19 Q I was just using it as a hypothetical.

20 Now, turning to page 84, where you are talking
21 about service on the SP's Bayport Line, you indicate
22 basically that the Southern Pacific will have an
23 incentive to extend its single line haul to include the
24 Santa Fe which will reduce upstream competition; is that
25 correct?

1 A Yes.

2 Q Do you know how much of traffic presently
3 moving off of this line goes to points located on the
4 Santa Fe?

5 A I don't have an exact figure. I know that
6 there is such traffic.

7 Q But you don't know how much?

8 A Not right off hand; no.

9 Q Do you know how much traffic would move to a
10 point located on the Santa Fe and another carrier, a
11 jointly served point?

12 A Not right off hand; no.

13 Q You also indicated earlier that most of the
14 traffic moving to Mexico is non-grain. Is that
15 correct?

16 A Yes.

17 Q What other commodities move to Mexico?

18 A I looked at that data once. I know there was
19 paper, there was scrap. Those are two things that come
20 to mind. But right offhand, I don't recall.

21 Q Did you consider whether or not those
22 commodities were handled by other modes?

23 A I did not do an analysis of these individual
24 commodities and what the transportation alternatives to
25 Mexico were for them. I relied, not having the data for

1 that, I relied on more general studies about the nature
2 of competition between the modes and the extent to which
3 trucks and rail were competitive, more general studies
4 of rail transportation overall, not specifically for
5 this market.

6 Q And not specifically for those movements as
7 far as origin and destination points; is that correct?

8 A You are talking now only about --

9 Q Traffic into Mexico.

10 A Into Mexico. I did not undertake a specific
11 analysis of what the competitive alternatives -- you
12 know, in terms of modes for each one of these
13 commodities on a commodity-by-commodity basis; no.

14 Q Could you now turn to MKT-28 which is the blue
15 volume? Now, at page 15, in the first paragraph, you
16 indicate that you believe that the Commission should
17 make liberal grants of trackage rights where there are
18 reasonably possible chance of anticompetitive harm,
19 should the merger be approved.

20 A Page 15?

21 Q Page 15. Do you see where I am?

22 A Yes.

23 Q Do you have an opinion as to what the
24 Commission's standard should be if two different parties
25 are seeking trackage rights to eliminate the same

1 anticompetitive problem?

2 A Well, I would say it is easiest to take the
3 case where the two parties would agree, which is the
4 preferrable. So if you had two parties applying for the
5 same trackage rights, and the Commission decided to
6 grant those trackage rights, and they were to agree to
7 allow one of the two carriers to do it, I think that
8 would be a factor the Commission should consider.

9 Q Just so that I understand, you are saying if
10 the Commission determines that trackage rights are
11 necessary, then it would then say to the Applicants,
12 pick whichever one you think is most in your
13 self-interest; is that correct?

14 A No, not quite. If there were two carriers,
15 and one carrier stepped aside and said let the other one
16 do it -- I mean I think it's a factor the Commission
17 should consider.

18 I think, certainly --

19 JUDGE HOPKINS: Practically, do you think that
20 would happen?

21 THE WITNESS: I think it is possible that it
22 might happen. That's one easy case to take. But I
23 think essentially that the Commission should be looking
24 at the pro-competitive goals of the Staggers Act, and
25 that should be the primary determinant of which of the

1 two -- those are the public policy considerations I
2 looked at.

3 Q Would it be the trackage rights that are the
4 most pro-competitive? Is that the standard you would
5 use?

6 A Consistent with the goals of the Staggers Act,
7 consistent with considerations that led the Commission
8 to implement the trackage rights. So I think you are
9 looking at the factors that you took into account in
10 awarding the trackage rights, and then examine the
11 status of the two applicants in terms of these
12 considerations and see which of the two is best
13 qualified to meet the objectives in granting the
14 trackage rights.

15 Q Now, turning to page 29, please. The last
16 sentence of the page: "Another approach is to preserve
17 that vigorous intermodal competition in the rail
18 industry by a skeptical attitude toward rail mergers and
19 by fully granting trackage rights where necessary."

20 MR. KHARASCH: Could we note that that is
21 "preserve vigorous 'intramodal.'"

22 BY MS. REED: (Resuming)

23 Q My question to you is, what is your standard
24 for determining where trackage rights are necessary?

25 A I think I outlined that in my testimony, where

1 there were potentially anticompetitive consequences of
2 the merger.

3 Q Did you have in mind any kind of carload or
4 revenue or cutoff figure as to where reduction in
5 competition is so significant that trackage rights are
6 warranted?

7 A I don't think I had any specific figure in
8 mind to say here it is important enough, and there it is
9 trivial and we will ignore it. No, I did not.

10 Q Would you agree that there would be some kind
11 of a cutoff point where the reduction in competition
12 would be so small that trackage rights would not be
13 justified?

14 A I would say yes. Otherwise, if you found that
15 a merger was anticompetitive, you would have to grant
16 trackage rights all over the entire system of the merged
17 carrier. Clearly, there would be circumstances where
18 you wouldn't do that.

19 Q Turning to page 27, you indicate that shippers
20 are signing contracts with connecting carriers in
21 competitive situations, despite a monopoly at one end.

22 Have you done any studies showing the number
23 of contracts involving single line service, versus a
24 joint line service as you state here?

25 A Not an overall study, but I am certainly aware

1 of circumstances.

2 Q Do you know what proportion of contract rates
3 are for a railroad offering, say, a rebate or an
4 allowance on a joint line move?

5 A There are such contracts; yes.

6 Q Do you know how many?

7 A Not right offhand, but I am familiar with some
8 particular examples.

9 Q Do you know, for example, what percentage of
10 the MKT's contracts would be for this type of movement?

11 A No.

12 MS. REED: Thank you. That's all I have.

13 JUDGE HOPKINS: Thank you.

14 Mr. Kharasch?

15 MR. KHARASCH: No redirect.

16 JUDGE HOPKINS: You are excused then, sir.

17 MR. SVOLOS: Your Honor, at this time I have a
18 motion to strike certain tables of Dr. Tye's testimony;
19 specifically, Tables 5 through 11 and 15 through 17
20 which contain statistics taken from an ICC waybill
21 sample.

22 Those numbers were created on those exhibits
23 from a waybill sample. Dr. Tye testified he doesn't
24 know how the numbers were created, what expansion
25 factors were used, and I think we have no foundation in

1 the record to test the accuracy of those numbers on
2 which Dr. Tye based his assessment of market shares.

3 And for that reason, I believe they should be
4 stricken.

5 MR. KHARASCH: Your Honor, Mr. William
6 Anderson who provided the tables to Dr. Tye is going to
7 be a witness in this case, and I would suggest that we
8 not argue Mr. Svolos' motion at this time, but wait for
9 Mr. Anderson to appear, and then he can inquire of Mr.
10 Anderson.

11 JUDGE HOPKINS: I was already thinking, and I
12 knew that the other witness had been indicated, and if
13 he doesn't, of course, have the information then the
14 motion to strike will lie at that time. So I will defer
15 it at this present time.

16 MR. KHARASCH: May we receive --

17 JUDGE HOPKINS: Any other objection?

18 MR. KHARASCH: -- 25 and 38 and 31?

19 JUDGE HOPKINS: The testimony will be received
20 in evidence with the errata.

21 MR. SVOLOS: Your Honor, can we withhold the
22 reception of the tables that I referred to?

23 JUDGE HOPKINS: That's what I said. We will
24 defer until you can cross-examine Mr. Anderson. At that
25 time, your motion will lie again.

1 We will be in recess until 2:00 o'clock.

2 (Whereupon, at 12:45 o'clock p.m. the hearing
3 was recessed, to reconvene at 2:00 o'clock p.m., this
4 same day.)

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AFTERNOON SESSION

(2:00 p.m.)

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2
3 JUDGE HOPKINS: Let's get back on the record.

4 Mr. Kharasch?

5 MS. MAHON: Our next witness is Mr. Noser,
6 Your Honor.

7 Whereupon,

8 MICHAEL K. NOSER

9 was called as witness in the above-entitled case and,
10 having first been duly sworn by the Administrative Law
11 Judge, was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MS. MAHON:

14 Q Mr. Noser, would you state your name, business
15 address, and position for the record, please?

16 A Michael K. Noser, Director of Price and
17 Negotiations, 420 Gimblin Road, St. Louis, Missouri.

18 JUDGE HOPKINS: You're going to have to speak
19 up.

20 BY MS. MAHON: (Resuming)

21 Q Do you have before you your verified statement
22 in opposition which appears in MKT-27?

23 A Yes, I do.

24 Q Do you have any changes to make in that
25 statement?

1 A No, ma'am.

2 Q Is that statement true and correct to the best
3 of your knowledge and belief?

4 A Yes, it is.

5 MS. MAHON: The witness is tendered for
6 cross-examination, Your Honor.

7 JUDGE HOPKINS: Mr. Wilson?

8 MR. WILSON: Yes.

9 CROSS EXAMINATION

10 BY MR. WILSON:

11 Q Good afternoon, Mr. Noser. My name is Dennis
12 Wilson, representing the Applicants.

13 A Good afternoon.

14 Q Sir, could you turn first to page 3 of your
15 verified statement? It is there that you discuss the
16 SPSF joint route and rate policy, and you criticize the
17 fact that the policy leaves SPSF at liberty to decide
18 which joint routes are efficient.

19 Is it EKT's position that SPSF should be
20 required to maintain all joint routes which either SP or
21 Santa Fe has today, regardless of how costly or how
22 inefficient they might be?

23 A Well, first of all, as you know, the Santa Fe
24 and SP have both closed a lot of routes today. So
25 obviously, if they are adopting the same policy or the

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1 same routes they had as of the merger, a lot of routes
2 would already be gone to us.

3 Second of all, if we leave it up to the
4 Applicants' definition of efficiency, I think they have
5 already demonstrated in their prior testimony that the
6 only grounds they feel are efficient are their single
7 line routes.

8 Q Okay. On the two points that you raise, the
9 first one is that a number of routes have been closed
10 today. Isn't it also true that it is part of the SPSF's
11 routing policy to look at currently closed routes to
12 consider reopening them on a case-by-case basis? Wasn't
13 that Mr. Fitzgerald's testimony?

14 A That was Mr. Fitzgerald's testimony, I
15 believe, but the facts are that the Santa Fe has opened
16 routes to their larger competitors, but they refuse to
17 deal with the MKT on a like basis.

18 Q And then getting back to your second point,
19 those routes that we still have in effect with you, SP
20 and Santa Fe still have a number of joint line routes
21 and rates with the MKT, do they not?

22 A Their route closings were not in every
23 territory all-encompassing, so there are still some
24 available; yes.

25 Q In fact, could you estimate a number?

1 A No, sir; I could not.

2 Q Would it be in excess of 500?

3 A You know, there's probably a million routes on
4 file with the ICC, and you know it's hard to estimate
5 how many were closed or how many are still open.

6 Q So do you think that it would be in excess of
7 500 joint routes that SP and Santa Fe have with MKT
8 today?

9 A Out of a million, I would say yes, probably.

10 Q Now, is it MKT's position that SP and Santa Fe
11 should be required to maintain all of the joint routes
12 which they currently have with Santa Fe, getting back to
13 my initial question?

14 A If you're asking MKT's position, I think MKT's
15 position is that if we're going to eliminate routes that
16 are inefficient, they should be done on a case-by-case
17 basis. And the party proposing the route cancellations
18 should prove the inefficiencies of that route.

19 Q To whom should the party prove the
20 inefficiencies of the route?

21 A To the party whose route they are cancelling.

22 Q And the party whose route is being canceled
23 will be the final judge of whether or not that action
24 was appropriate?

25 A Well, as you probably know, there's a lot of

1 negotiations going on right now between AAR and various
2 groups. There are groups like RAM and CURE involved,
3 and we are a member of the RAM group, Railroads Against
4 Monopoly, and that group has proposed a revenue to
5 variable cost relationships to decide whether a route is
6 efficient or inefficient -- a joint line route I am
7 talking about -- as compared to a single line.

8 Q Now, this is a current proposal that is going
9 through Congress or could be presented to Congress? Is
10 that what you are referring to?

11 A Well, I guess it's all part of the 456
12 hearings.

13 Q And that would be an industry-wide solution to
14 the problem of joint route and cancellations; is that
15 right?

16 A Yes, sir.

17 Q Wouldn't you feel that it would be better to
18 have an industry-wide solution to this problem and at
19 that time solve the problems that you are identifying in
20 the SPSF joint route and rate policy?

21 A The problem with it is that the SP and SF have
22 chosen to give all of their large competitors' routes
23 back and have discriminated against the NKT.

24 Q Okay. I understand that's your position. But
25 my question is --

1 A It's not my position. It's a fact.

2 Q My question is, wouldn't it be better, in your
3 opinion, to have an industry-wide solution to solve
4 situations like that or any situations that exist?

5 A We would certainly like to have an
6 industry-wide solution, I'm sure.

7 Q And if you had an industry-wide solution,
8 would you then be concerned about SPSF closing out the
9 Denison Gateway, for instance?

10 A Certainly, we would be concerned with them
11 closing out the gateway, no matter if there is a
12 solution or not. We don't want the gateway closed. We
13 don't think the solution would close the gateway. We don't
14 think your route closings, as they deal with the MKT --
15 we can't see where there was any inefficient routes that
16 you closed. We think you closed efficient routes.

17 Q Well, do you agree that it is in the public
18 interest to permit railroads to close costly and
19 inefficient routes?

20 A Definitely. And we have letters from
21 Steiniger to Mr. Fitzgerald saying that.

22 Q Okay. And MKT, for example, would not want to
23 be required by the Commission to open all of its closed
24 industries at joint points it serves with the Santa Fe
25 in Texas, would it?

1 A Would they want to be required by the
2 Commission to do that?

3 Q That's my question.

4 A No, I don't think they would.

5 Q Why do you think that would not be in the
6 public interest to require MKT to open its closed
7 industries in Texas?

8 A I think the MKT probably would be willing to
9 open its closed industries if the Santa Fe is willing to
10 open their closed industries. As you know, there was a
11 proposal from Mr. Fitzgerald from Mr. Steiniger to open
12 some closed industries. But part of that proposal
13 wasn't for the Santa Fe to open industries to the Katy.

14 Q Sir, I assume you are aware of the provision
15 of the Interstate Commerce Act that applies to rail
16 joint route rate closings. Are you aware of that
17 statutory provision?

18 A Which provision?

19 Q I am referring to, I think it is -- in fact, I
20 know it is 49 U.S.C. Section 10705 sub (e). I have an
21 extra copy here for you to look at.

22 That provision provides specifically for a
23 railroad to be permitted to close joint routes and to
24 cancel joint rates where the Commission determines that
25 the proposal is consistent with the public interest.

1 Isn't that right?

2 MS. MAHON: Objection, Your Honor.

3 MR. WILSON: I will give you a minute to look
4 at it.

5 MS. MAHON: I don't think the witness should
6 be required to answer a legal question.

7 MR. WILSON: I don't think it is a legal
8 question, Your Honor.

9 JUDGE HOPKINS: He is reading from it.

10 THE WITNESS: This particular section says:
11 "When the Commission suspends for an investigation." To
12 me, that's the preface for the whole thing. They
13 haven't suspended it or investigated it, so I'm not sure
14 this even comes into play.

15 BY MR. WILSON: (Resuming)

16 Q Well, isn't that how the practice works? If a
17 railroad proposes a joint route cancellation, the
18 connecting line, if it wants, requests that the tariff
19 that would cancel the route be suspended and
20 investigated.

21 A Similar to the Santa Fe's request when the SP
22 canceled routes, you mean -- their protest?

23 Q Similar, for example, to Katy's protest when
24 Santa Fe --

25 A That's the same type of thing?

1 Q Yes. And you are familiar with how those
2 procedures work where you have 20 days advance notice of
3 the cancellation and then within 10 days the connecting
4 railroad can come in and request the suspension and
5 investigation?

6 A Yes, sir.

7 Q And you are familiar with how that works?

8 A Yes, sir.

9 Q So that if there were a rate cancellation or a
10 route cancellation that were contrary to the public
11 interest, the connecting railroad could come in, get the
12 ICC Suspension Board to suspend the route and rate
13 cancellation, and it wouldn't occur; isn't that right?

14 A No, sir. I don't agree with that. I don't
15 think the Commission has been suspending these route
16 cancellations. I don't think they are in the public
17 interest. But the Commission has apparently ignored
18 that fact.

19 Q Oh, so it's your position that the Commission
20 is ignoring the law, not enforcing the federal law?

21 A That's right.

22 Q And because the Commission is not enforcing
23 federal law, you need to have a joint route and rate
24 policy that has some better definition of efficient
25 routes than the policy that we are proposing.

1 here is traffic from an MKT local point. My question
2 about that type of traffic is this: Isn't it true that
3 it would be in SFSP's interest to continue to
4 participate in all joint routes with Katy via the
5 Denison Gateway for all traffic moving to or from MKT
6 local points?

7 A If there is no geographic competition involved
8 from a point on the SFSP, then I would say that is
9 true.

10 Q Okay. And you would agree, I take it, with
11 Mr. Dimmerman's testimony yesterday that SFSP can be
12 expected to continue to participate in joint routes with
13 Katy to and from Katy local points?

14 A Like I say, unless there is some geographic
15 competition. If the same commodity can come from a
16 point on the SFSP, I think they would try to encourage
17 that, but they have no reason to cancel routes from
18 local stations.

19 Q Okay. And moving to set 2, and this gets a
20 little more complicated, but this is an MKT point in
21 common with another railroad, but it's not in common
22 with SFSP. And it's not in common with the Union
23 Pacific either.

24 Now, from this type of a point which SFSP
25 cannot serve directly, you would agree, would you not,

1 that again SFSP could be expected to continue to
2 participate in joint line routes and rates over
3 Denison?

4 A I see no reason why they would want to deny
5 that route.

6 Q Okay. And then turning to set 3, which is an
7 MKT point in common with the UP System, but it is still
8 not in common with SF or SP -- now, from those types of
9 points, you would agree there also, would you not, that
10 SFSP would continue to participate in joint line
11 routings with Katy over Denison?

12 A Yes, sir.

13 Q Now, getting to set 4, this is where your
14 testimony, or at least the testimony of Katy witnesses,
15 has raised the possibility that SFSP would refuse to
16 participate with Katy in joint routes and rates.

17 My question is, assuming that this did happen
18 from MKT point in common with us, but not in common with
19 the UP System, like Enid, Oklahoma, for example, to and
20 from that type of point, would it not be likely that the
21 Union Pacific System would join with the MKT in joint
22 line routes and rates to and from Mexico?

23 A I can't answer that because I don't think they
24 are doing that today. I don't know why they wouldn't.
25 But I don't think they are doing it today.

1 Q Why are they not doing it today?

2 A I have no idea.

3 Q From MKT's standpoint, is MKT willing to
4 negotiate joint rates and routes with the UP?

5 A MKT is willing to negotiate with anybody on
6 joint rates and routes.

7 Q But the traffic is currently moving on the SP
8 as the access to Mexico?

9 A That is my understanding.

10 Q Now, on set 5, we have an MKT point in common
11 with both the UP System and the Santa Fe or Southern
12 Pacific. This would be a point such as Kansas City or
13 Wichita.

14 Now, first, wouldn't you agree that shippers
15 at that type of point would have the benefit of two
16 single line routes to Mexico in addition to the joint
17 line route over Denison?

18 A No, sir. The benefit of two single line
19 routes, I don't think there will be a joint route left.

20 Q Your concern is that the joint line route
21 won't be left. Now, if -- well, okay. Do you agree
22 with Mr. Castler's testimony yesterday that the most
23 competitive routing alternative to the UP's single line
24 route from Kansas City to Laredo was an
25 MKT-Denison-SP-Corpus-Tex Mex route?

1 A I certainly agree that that would be a
2 competitive alternative.

3 Q Do you agree that that is the most competitive
4 alternative to parties trying to get traffic from the
5 Union Pacific?

6 A It's a good route. The Katy's sharp between
7 Kansas City and north Texas. So I think that would be a
8 good alternative.

9 Q So my question to you is, why would not SPS
10 have the incentive to maintain that joint line route and
11 the service via Denison in order to keep from losing the
12 traffic to Union Pacific's single line route?

13 A Because it's been the testimony of your
14 witnesses that they were going to try to get single line
15 wherever they can.

16 Q Do you have any citations to that?

17 A I believe -- and I'm going by memory -- I
18 believe it was Mr. either Fitzgerald or McNear or
19 somebody that said that. Plus I think there are
20 documents in evidence already that say they are going to
21 try to -- well, your evidence enhancement program for
22 one.

23 Q Well, I'm not sure. How does it enhance
24 revenue to close a joint line route where you are
25 getting, say, a 50 percent division, then lose all the

1 traffic to the Union Pacific?

2 A You have closed Kansas City routing on
3 Canadian lumber to the Katy and haul it around through
4 St. Louis.

5 Q Wait a second. I think you are probably
6 referring to a Southern Pacific routing action, are you
7 not? That's not a Santa Fe routing action.

8 A Okay.

9 Q Are you aware of the fact that Mr. Fitzgerald,
10 in fact, stated that in his view, the Southern Pacific
11 routing actions were more detrimental than positive for
12 Southern Pacific?

13 A Yes, sir.

14 Q So it is not at all clear that that's the type
15 of policy that SFSP would engage in after the merger;
16 isn't that right?

17 A I think they'll try to get their single line
18 haul whenever they can.

19 Q Now, back to page 3 of your testimony, the
20 second paragraph up from the bottom. You state that the
21 routing policy we propose leaves SPSF "free to do
22 whatever it wishes in the way of route closings."

23 Now, in making that statement, you are not
24 taking into consideration, are you, any limitations
25 caused by competition from other railroads or from

1 trucks or water carriers or product or source
2 competition or any shipper leverage? Isn't that right?

3 A I think you are free to do whatever you are
4 doing today as far as closing routes. This policy
5 doesn't change anything from what you can do today.

6 Q Do you agree that the factors that I listed,
7 competition from other railroads, from trucks, from
8 water carriers, product competition, geographic
9 competition, and shipper leverage, are all factors out
10 there in the marketplace today; they will be out there
11 in the marketplace after the merger, and they would all
12 tend to limit the merged system's ability to close joint
13 line routes.

14 A They are out there today, but they haven't
15 stopped you from closing routes on a scattergun approach
16 in the past. None of those things apparently were
17 considered when you closed routes, because you did it on
18 a general basis.

19 So I don't know that those types of things
20 would be considered in the future.

21 Q Do you know whether those factors were
22 considered by Santa Fe, for example, in connection with
23 this --

24 A I know that Santa Fe closed routes in general
25 in 125 southwest tariffs and 105 WTL tariffs. I know

1 it's general routing. I know it's got to be thousands
2 of routes that they closed. I don't see how they could
3 have possibly took those things into consideration.

4 Q Okay, we will get to that route closing and
5 the amendments to it in a few minutes. Right now, I
6 want to focus on your sentence, the first sentence in
7 the bottom paragraph where you discuss your concern
8 about Applicants' definition of efficiency.

9 Now, you say that your concerned because SPSF
10 is at liberty to decide what joint routes are
11 efficient. Did you read Mr. Fitzgerald's testimony when
12 he explained what the term "efficient" meant in the
13 joint route policy?

14 A I read his testimony. I don't recall that
15 particular part.
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1 Q Let me read it to you very quickly. Mr.
2 Miller of the Union Pacific asked: "My question to you
3 is, have you internally or in your planning efforts
4 developed any more precise definition as to what you
5 mean by efficient or efficiency that you would apply in
6 administering the joint routing policy?"

7 Mr. Fisher answered: "Well, the word
8 'efficient' is a word that I added to this policy. The
9 only purpose for putting the word 'efficient' in there
10 when I did it was to suggest that there may be some
11 places at which the volumes of traffic are going to be
12 such that it may not be an economic step to keep an
13 interchange open. So certainly, with respect to any of
14 the principal interchanges which either the company has
15 today with any of its connecting railroads, I can't
16 envision that any of those would be closed."

17 Would be "abandoned," actually is the word.
18 That's from transcript 1096 to 1097. Now that you have
19 heard that definition of efficiency, do you still have
20 concerns?

21 A Absolutely.

22 Q Sir, this definition states that any principal
23 interchanges which either the company has with any of
24 its connecting carriers would remain open. Do you
25 regard the Denison Gateway as a principal interchange

1 between -- for SP and for MKT?

2 A Yes, sir. What other principal interchanges
3 do you see between SP and MKT, if any?

4 A Normal junctions, I think, between the SP and
5 the Katy are probably Dallas, Denison, or Ft. Worth.

6 Q Are there any principal interchanges between
7 Santa Fe and MKT that you can think of?

8 A Kansas City.

9 Q Now, sir, would you agree that the
10 MKT-Denison-SP joint line route today provides an
11 effective competitive alternative to Union Pacific's
12 single line service between Kansas and Mexico?

13 A I thought you asked me that question already.
14 Didn't you ask me that question previously?

15 Q Not that specific question.

16 A I said it was a competitive route, I believe.

17 Q Okay. And if this joint line remained open
18 after the merger, that competition would be preserved,
19 would it not?

20 A If the route remained open?

21 Q Right.

22 A I don't think it will remain open.

23 Q Right. I'm asking a hypothetical.

24 A If it remains open, then it's the same as it
25 is today.

1 Q And the competition would still be the same.
2 Okay.

3 Now, at the bottom of page 3, you state that
4 you are informed that the testimony makes it clear in
5 this case that efficient service is, for the most part,
6 single line service. Who informed you of that?

7 A I talked to the attorneys about it, and I have
8 also read the Fitzgerald and Edwards statements, and Mr.
9 Edwards referred to the route from Kansas City to Texas
10 through St. Louis, and I believe he said it could be
11 "very, very efficient."

12 And I don't see how he could say that.

13 Q What did Mr. Fitzgerald say about that route,
14 do you recall?

15 A He said he couldn't believe they would route
16 it that way.

17 Q So your citations are to Mr. Fitzgerald also
18 with respect to this statement?

19 A Mr. Fitzgerald's statement, I believe, talked
20 about traffic to Rosenberg, Texas and called it
21 scandalous and some of the most efficient routes we have
22 ever seen, I have ever seen in my life.

23 Q We will get to that. That is in your
24 testimony.

25 A I am trying to answer your question.

1 Santa Fe. The Santa Fe handles it right down again.
2 It's about 300 miles or 200 miles out of route.

3 We pointed out to the Santa Fe hey, this route
4 efficiency of yours is as inefficient as hell, and they
5 agreed to put the Chanute route back in.

6 Q Well, as my foundation question I understand
7 your point there, but could you agree with me that this
8 is the tariff that implemented that agreement and put
9 the Chanute route back in?

10 A Yes. It looks like it is.

11 Q And then you state that the Chanute, Kansas
12 routing is shorter than Santa Fe routings to and from
13 official territory. Now, in addition to mileage, I
14 believe we discussed earlier that you have to look at
15 things such as service in trying to determine whether or
16 not a route is efficient. And my question is isn't the
17 average interchange time between the Santa Fe and the
18 MKT at Chanute, Kansas about two days?

19 A You have to ask Mr. Todd that.

20 Q Isn't it true that Chanute, Kansas is on a
21 branch line for the MKT?

22 A I believe it is.

23 Q And also on a branch line for the Santa Fe?

24 A I don't know if it is or not.

25 Q Isn't it true that both the Santa Fe and the

1 Q That is your citation for Mr. Fitzgerald?

2 A It doesn't really show how it is efficient or
3 inefficient unless you let me finish what I am saying.
4 The fact is that the route that we're talking about
5 there from Ft. Worth to Rosenberg, the joint line route,
6 is slightly more miles. I believe it is 280 to 307
7 single line versus the joint route over Sealey, Texas.

8 Now, of course, it could be routed over
9 Temple, Texas, and that joint route is even less miles
10 than the Santa Fe single line. We have shipper
11 testimony. Mr. Shipley of Ralston Purina has submitted
12 a verified statement in this case that shows that he
13 preferred the joint line rate because it took three days
14 less joint line than it did via single line.

15 Q Okay. Since you want to talk about that, we
16 will move to that part of my cross-examination.

17 A I'm just trying to answer your question.

18 Q That's all right. I don't mind. You're the
19 witness.

20 Isn't it true that Santa Fe single line
21 mileage from Houston to Rosenberg, Texas is only 60
22 miles?

23 A From Houston?

24 Q Right.

25 A I have no idea.

1 Q And the actual origin of this transit movement
2 is Houston?

3 A No, sir.

4 Q Isn't it a rice milling in transit movement
5 that's going on a through bill from Houston back to
6 Santa Fe at Rosenberg, Texas?

7 A No, sir; that's not my understanding. Ft.
8 Worth is the transit station.

9 Q Ft. Worth is the transit station and the
10 origin of the inbound transit movement is Houston; isn't
11 that right?

12 A Not that I know of.

13 Q Okay. We will ask this in the hypothetical.
14 If it's true that the origin of the inbound is Houston
15 and that single line route is 60 miles, and the route of
16 movement via the joint line route up to Ft. Worth for
17 transit and back down is 450 miles on MKT and 152 on
18 Santa Fe, for a total of over 600 miles or ten times
19 longer than the single line route, don't you agree that
20 that is an example of an extremely inefficient
21 movement?

22 A If that were the hypothetical case, I would
23 agree. But that is not the case because inbound transit
24 tonnage is coming off the OKT. The OKT doesn't serve
25 Houston, so it couldn't be coming out of Houston.

1 Q Would it surprise you, sir, that Santa Fe was
2 losing almost 20 percent on every car it moved on that
3 rate?

4 A Yes, it would surprise me.

5 Q Are you aware that Santa Fe discussed with
6 Ralston Purina whether we could increase the rates to
7 break even levels in order to keep handling the move?

8 A There was a comment by Mr. Fitzgerald and a
9 letter to Mr. Steiniger that said that.

10 Q Are you aware that because we could not get an
11 agreement with Ralston Purina, this traffic has now
12 shifted to truck?

13 A No, sir.

14 Q Well, let's go back to the reference to Mr.
15 Fitzgerald. Now, you would agree, wouldn't you, that
16 single service is usually more efficient than
17 competitive joint line service, wouldn't you?

18 A It could be.

19 Q And you state on page 4, line 3, a concern
20 that under the routing policy, there might be no
21 "efficient" joint routes.

22 In light of Mr. Fitzgerald's definition of an
23 efficient joint route as anywhere where there is a
24 principal interchange and more than an insignificant
25 volume of traffic, is your concern alleviated?

1 A No, sir.

2 Q I'd like to draw your attention to another
3 statement by Mr. Fitzgerald about the relative
4 efficiency of a joint route versus a single line
5 route.

6 At transcript page 1098, Mr. Miller asked:
7 "Now, is there any concept of relativity here in the
8 definition of efficiency? I mean by that, do you
9 compare the efficiency of the joint route with the
10 efficiency of your new routes under your combined
11 system, for example?"

12 Mr. Fitzgerald said -- well, it continues on
13 the next page: "Is that going to bear on your decision
14 as to whether to maintain a joint route?"

15 Mr. Fitzgerald said: "No. We are going to
16 keep the gateways open regardless."

17 "Question: Which means you will maintain a
18 joint route?"

19 "Answer: We will have a joint route."

20 Now, does that relieve your concerns about
21 Applicants' routing policies?

22 A No, sir, because you have to look at what the
23 Applicants have done in the past. Right now, they have
24 cut us out of the Kansas City Gateway already, and yet
25 they have Kansas City Gateway routes with the Missouri

1 Pacific, with the Union Pacific, BN, you know. But we
2 don't have a route through our own industries.

3 If it's a Katy-served industry at Dallas,
4 Texas, the MP can come in there with a route out of
5 Kansas City, but the MKT cannot.

6 Q Okay. Let's go down the page a bit further.
7 The first paragraph under the Santa Fe route
8 reinstatement section. You say in the last sentence,
9 that a number of joint routes cancelled were shorter
10 than the Santa Fe routing that remained.

11 You would agree, would you not, that the
12 length of a route in terms of miles does not equate to
13 its efficiency?

14 A That is one part of it, I would say.

15 Q Right. Would you agree that in considering
16 the efficiency of a line, you also have to consider
17 whether it's a main line or a branch line, for example?

18 A That would probably be a consideration.

19 Q You'd also have to consider how
20 well-maintained the line is or how it is signaled,
21 wouldn't you?

22 A I suppose.

23 Q You'd have to consider how many sidings it has
24 or what grades it has, wouldn't you?

25 A I guess. You're getting into more operating

1 questions. You'll have to ask one of the operating
2 people about those types of efficiencies.

3 Q Okay. In considering route efficiency,
4 though, you'd have to look at the frequency of the train
5 service or whether it's reliable train service, though,
6 wouldn't you, or whether it's local service only or
7 through service on the route?

8 A There's a lot of considerations.

9 Q All of those factors bear on whether a route
10 is efficient. You would agree with that?

11 A I think we can sit here and argue efficiencies
12 and what could be considered efficient and inefficient
13 all day long.

14 Q I'm not sure we're arguing. You're agreeing
15 with me.

16 Wouldn't you also have to consider the cost of
17 providing rail service over the route in determining how
18 efficient the route is?

19 A I don't know if I could agree with that or
20 not.

21 Q Now, did you study or analyze any of these
22 factors when you were looking at Santa Fe routes that
23 remained open as opposed to Katy routes that were closed
24 on July 11?

25 A Definitely. We feel that the Katy route, as

1 an example, south of Kansas City, is not only shorter,
2 but it's faster, it's more efficient. We don't think
3 anybody else compares to us into north Texas.

4 Q Okay. Since you discuss correspondence with
5 Mr. Fitzgerald in the next four pages of your statement,
6 I'd like to have marked at this time the Santa Fe route
7 closing tariff so that we have the full tariffs in the
8 record.

9 Actually, I have two exhibits that I would
10 like to have marked. The first exhibit, I'd like to
11 have, SFSP-C-22, is the Southwestern Freight Bureau
12 Tariff, and the second exhibit, SFSP-C-23, is the
13 Western Trunk Lines Tariff which accomplish those route
14 closings.

15 JUDGE HOPKINS: They will marked for
16 identification.

17 (The documents referred to
18 were marked Exhibits
19 SFSP-C-22 and SFSP-C-23 for
20 identification.)

21 BY MR. WILSON: (Resuming)

22 Q Sir, do these seem to you to be the two
23 tariffs that you are referring to at page 4 of your
24 testimony?

25 A Yes, sir.

1 Q And, sir, were not each of these tariffs
2 amended prior to their effective dates of July 11,
3 1984?

4 A I believe they accepted another carrier before
5 that date, the Union Pacific, I believe.

6 Q Okay. Well, just to make sure the record is
7 clear on that point, I would like to have marked as
8 exhibits the initial amendments in the Santa Fe route
9 closings tariffs also.

10 I would like the Southwestern Freight Bureau
11 Tariff to be marked as Exhibit SFSP-C-24 and the Western
12 Trunk Lines Tariff marked as Exhibit SFSP-C-25.

13 Sir, do you have the two amended tariffs,
14 SFSP-C-24 and SFSP-C-25?

15 A Is that just a three-page supplement, the
16 amendment?

17 Q Yes. The SWFB is a three-page supplement and
18 the WTL is a four-page supplement.

19 A Yes, I have them.

20 JUDGE HOPKINS: They will be marked for
21 identification.

22 (The documents referred to
23 were marked Exhibits
24 SFSP-C-24 and SFSP-C-25 for
25 identification.)

BY MR. WILSON: (Resuming)

Q Sir, each of these tariffs indicate on their cover page that they were effective on July 11, 1984, the same day that the route closing tariffs were effected, do they not?

A Yes, sir.

Q And looking at the amendment to the Southwestern Freight Bureau Tariff, that amendment is set forth on the title page stating the provisions of this item will not apply in traffic from, to, or via any of the following lines, listing the SP, Cotton Belt, UP, MP, East Camden and Highland, and the Texas Mexican Railway.

A I see that.

Q Is that -- doesn't that mean that Santa Fe joint routes for traffic to, from, or via any of this line, these lines, were never effected by the Santa Fe route closing?

A That's the way I would read it.

Q And in your testimony, when you discuss the fact that, in general, routes remained open to the larger carriers, you weren't referencing, I assume, the Texas Mexican Railway or the East Camden and Highland Railroad Company, were you?

A We were talking about the Union Pacific and

1 the Southern Pacific.

2 Q Okay. Now, on exhibit SFSP-C-25, the WTL
3 tariff, that amendment states: "The provision of this
4 item will not apply on traffic moving from, to, or via
5 any of the following lines," listing the Cotton Belt,
6 the UP, and the Missouri Pacific.

7 That means, does it not, that Santa Fe route
8 closings were never effected with regard to traffic
9 moving to, from, or via these railroads?

10 A Yes, sir.

11 Q Okay. Now, if we go back to, say, Exhibit
12 SFSP-C-22, it had some exceptions in terms of types of
13 traffic when it was originally proposed.

14 If you turn to page 2 of that, under the
15 title, "Exceptions," the third entry states: "The
16 provisions of this item will not apply on motor vehicles
17 or motor vehicle parts and accessories."

18 Doesn't that mean that route closings were
19 never applied to this automotive traffic?

20 A Yes, sir.

21 Q What do you think was the reason why
22 automotive traffic was excepted from this publication?

23 A I really don't know. We talked in our shop
24 about this when this thing came out and we couldn't
25 figure out why it was excepted.

1 Q Suppose it might have something to do with the
2 shipper leverage of the shippers involved?

3 A I have no idea.

4 Q Well, it is true that Santa Fe, for example,
5 serves the General Motors plant at Oklahoma City, and
6 yet it is not insisting on its long haul through route
7 closings; isn't that right?

8 A I don't know. Oh, as far as this particular
9 tariff? You are right.

10 Q Now, looking down to exception No. 6, that one
11 states: "The provisions of this item will not apply on
12 chemicals when moving from or to Houston or Texas
13 City." That means the route closings never apply to
14 this chemical traffic; isn't that right?

15 A Yes, sir.

16 Q Now, this exception to the route closing
17 tariff has been expanded since the tariff's initial
18 publication, has it not?

19 A This list has?

20 Q Yes. Or do you know whether this list has?

21 A I think there has been other supplements out.
22 I think the list, if you are referring to part 6, I
23 believe they have included a couple of other points down
24 in the Houston area.

25 Q In Texas at any rate.

1 I would like to have marked two more exhibits
2 at this time, in fact, to get that on the record. First
3 is a July 30th amendment to the tariff, which I would
4 like to have marked as Exhibit SFSP-C-26, and next is an
5 October 6th amendment to the route closing tariff which
6 I would like to have marked as Exhibit SFSP-C-27.

7 JUDGE HOPKINS: They will be marked for
8 identification.

9 (The documents referred to
10 were marked Exhibits
11 SFSP-C-26 and SFSP-C-27 for
12 identification.)

13 BY MR. WILSON: (Resuming)

14 Q Now, the July 30th amendment, Mr. Woser,
15 looking at the title page and looking at paragraph (b)
16 adds some other points. As we discussed, it adds
17 chemical traffic from Tampa, Kings Mill, and South Bay
18 City, Texas as traffic that would not be subject to the
19 route closing tariff; is that correct?

20 A Yes, sir.

21 Q Now, these points, Tampa, Kings Mill, and
22 South Bay City, Texas all involve chemical facilities
23 that are closed facilities served by Santa Fe, do they
24 not?

25 A I think they do. I don't know for sure.

1 Q Now, sir, why do you suppose that Santa Fe
2 would cancel its route closings and not insist on long
3 haul routings on chemical traffic moving to or from the
4 Santa Fe local points?

5 A I think probably because if they excepted the
6 Houston/Texas City traffic, they were forced to except
7 these other points.

8 Q How were they forced to do that? Would that
9 be shipper leverage?

10 A I think since they excepted the others and
11 their other carriers that serve the Houston to Texas
12 City, Katy for instance, we could have hauled it out of
13 there. But you would prefer to have it go out of your
14 local point, so you had to keep them competitive.

15 Q I see. So it's kind of like it would be
16 geographic competition like Dr. Tye was talking about,
17 that we had to keep our local points competitive with
18 other points that are served in common with other
19 railroads.

20 Is that what you are referring to?

21 A To some extent, I think that's right.

22 Q Okay. Do you suppose another reason why we
23 were forced to put these people back in, the usual word,
24 would be because we wanted to make sure the traffic kept
25 moving by rail and we didn't lose it to trucks or water

1 carriers?

2 A I have no idea. I don't know where that
3 traffic goes to.

4 Q Now, turning to the next exhibit, SFSP-C-27,
5 you have to look at page 2 to find the amendments
6 there. Paragraph (b) and paragraph (h) are both amended
7 to add, as an exception to the route closing tariff,
8 chemical traffic from Youens, Texas. Isn't that right?

9 A Yes, sir. Was there another supplement in
10 between here that we don't have?

11 Q Yes. We will get to it. The Chanute
12 supplement that Katy requested.

13 A I notice you had the Burlington Northern
14 excepted in this one which we haven't brought up yet.

15 Q We will get to that one, too. You are ahead
16 of me as usual.

17 A I am getting swamped with paper here. I just
18 wanted to make sure we had them all.

19 Q Now, isn't it true that Youens, Texas is also
20 a Santa Fe local point?

21 A I don't know that. If you say it is, I will
22 believe you.

23 Q Assuming Youens, Texas is a Santa Fe local
24 point, why would you suppose Santa Fe canceled its route
25 closings, didn't insist on long haul routings to or from

1 this local facility?

2 A It seems like they are putting them back in
3 one at a time, as they get pressure. I don't know. I'm
4 just guessing.

5 Q Where do you think that pressure is coming
6 from?

7 A I would assume whoever is at Youens, Texas.

8 Q Well, Youens, Texas is Columbian Chemical's
9 company, and that is the shipper that would take
10 advantage of this. Is that what you are referring to?

11 A I suppose. Either that -- you know, the Santa
12 Fe may have lost some traffic from Youens and recognized
13 it and tried to take care of it this way.

14 Q I see. And we would have lost traffic again
15 to the MKT routings from Houston?

16 A Or Santa Fe routing from Houston.

17 Q Okay. So this is an attempt to recapture
18 traffic that we lost? Could you say yes for the
19 record?

20 A Yes, I believe that's right.

21 Q Now, I would like you to look at item (c) too,
22 and you are ahead of me. It lists as an exception to
23 the tariff, as you pointed out, Burlington Northern
24 Railroad, in addition to the others that were there.

25 And it also has a second sentence which lists

1 as an exception any Norfolk & Western traffic routed via
2 Kansas City. Isn't that right?

3 A I'm sorry. Where was that reference?

4 Q I'm talking about the second sentence in
5 paragraph (c).

6 MS. MAHON: Could you read the sentence,
7 counsel? I am lost. I am not following you.

8 MR. WILSON: Page 2, paragraph (c), the second
9 sentence which starts about five lines down with the
10 word, "Further, the provisions of this item will not
11 apply on shipments routed via N&W between Kansas City,
12 Missouri," et cetera.

13 THE WITNESS: I'm still lost. Which exhibit
14 are you in?

15 BY MR. WILSON: (Resuming)

16 Q 27.

17 A Okay. Now, page 2 --

18 Q Paragraph (c). It has a 5 under it. And then
19 it is the sentence right after the one where you noticed
20 Burlington Northern.

21 A Okay. I noticed Burlington Northern up in
22 (a). That's why I was confused.

23 Q Okay. I see what you mean. That's right.
24 It's in both (a) and (c). Okay.

25 In (c), I will give you a second to read that

1 second sentence, and then I have a question about it.

2 (Pause.)

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1 My question is the second sentence is
2 excepting from the route cancellation, Santa Fe-N&W
3 traffic interchanged at Kansas City. Isn't that what it
4 is doing?

5 A That's what it looks like.

6 Q Do you know when these exceptions, the N&W
7 exception and the Burlington Northern exception,
8 occurred?

9 A No, sir.

10 Q Okay. Let's get that clarified for the
11 record. I would like another exhibit please, Your
12 Honor. That's Exhibit SFSP-C-27. I would like Santa
13 Fe's August 10th amendment to the route closing tariff
14 marked. C-28. I apologize.

15 JUDGE KOPKINS: That will be marked for
16 identification.

17 (The document referred to was
18 marked Exhibit No. SFSP-C-28
19 for identification.)

20 BY MR. WILSON: (Resuming)

21 Q Sir, this tariff, dated less than a month
22 after the route closings originally became effective is
23 the one, is it not, if you look at page 2, that removed
24 from the routing restriction all traffic moving from, to
25 or via the Burlington Northern railroad, and also

1 traffic moving Santa Fe-N&W over the Kansas City gateway.

2 A Yes, sir. It looks like that's what it did.

3 Q Now, going back to the July 11th route closing
4 tariff that was originally filed, which the Katy
5 protested, the ICC Tariff Review Suspension Board
6 decided not to suspend or investigate the July 11th
7 route closing tariff; isn't that right?

8 A Yes, sir.

9 Q And in reaching that decision, the board
10 presumably applied the standards that are set forth in
11 Section 10705(E) that I gave you a little while ago,
12 didn't it?

13 A I don't recall what they quoted.

14 Q So you don't know whether they applied those
15 standards or not? Okay. Let's assume that the board
16 did follow the Interstate Commerce Act. Now, if it did
17 --

18 MS. MAHON: Objection, Your Honor. That's an
19 improper question.

20 MR. WILSON: I'm asking as a hypothetical
21 isn't that at least a reasonable assumption.

22 JUDGE HOPKINS: He is assuming they applied
23 the law. What's wrong with that?

24 MR. GREENBERG: That assumes a point not in
25 evidence.

1 JUDGE HOPKINS: We are assuming. I'm not
2 saying it's happened, but we are assuming. Have any of
3 them ever been suspended? Will you answer me that
4 question?

5 MR. WILSON: I don't know if any of them have
6 ever been inconsistent with the public interest.

7 JUDGE HOPKINS: Well, that's a good answer.
8 Thank you.

9 BY MR. WILSON: (Resuming)

10 Q Well, assuming that the Tariff Review
11 Suspension Board did apply the provisions in Section
12 10705(E), and looking at it, if you will, sir, then it
13 would have considered point three that is listed there;
14 that is, it would have considered the overall impact of
15 the cancellation on the shippers and the carriers that
16 are affected by it; isn't that right?

17 A If they had used that, I would assume they
18 would have applied everything here. Point three is one
19 of the points here.

20 Q Right. And the failure to suspend and
21 investigate is a decision, is it not, not by the
22 Commission but by the board that the tariff publication
23 is consistent with the public interest, if you know.

24 MS. MAHON: Objection, Your Honor. That is a
25 legal point.

1 JUDGE HOPKINS: It is.

2 THE WITNESS: I don't know.

3 JUDGE HOPKINS: He doesn't know, he says.

4 BY MR. WILSON: (Resuming)

5 Q All right. Now, as another point on the July
6 11th route closings, those restrictions affected only
7 routing in connection with rates that are governed by
8 the general routing sections of the tariffs; isn't that
9 right?

10 A Yes, sir.

11 Q And where specific rates are published in
12 connection with specific routes, those routes were not
13 affected at all by the July 11th publication, isn't that
14 correct?

15 A That's correct.

16 Q And doesn't Santa Fe participate with MKT in
17 quite a bit of traffic moving under rates that are
18 subject to specific routes?

19 A I don't know if I want to categorize it as
20 quite a bit. They do where they have to.

21 Q Well, you're familiar with a number of
22 movements, aren't you, joint Santa Fe-MKT movements that
23 are moving under rates that are tied to specific routes?

24 A From my experience, personal experience, the
25 Santa Fe will give you routes to a local station, points

1 where they have to give you route, a closed industry.
2 Other than that they will not.

3 Q Are you familiar with Santa Fe and MKT joint
4 line rate on scrap iron and steel moving from Oklahoma
5 City to Ward Spur, Texas, and it's moving via a route of
6 MKT-Dallas and Santa Fe? But since the rate is tied to
7 a specific route, it was not affected by the July 11th
8 tariff publication?

9 A Let me say this. I'm not familiar with what
10 you're talking about, but if I recall the way the Santa
11 Fe runs out of Oklahoma City, I'm not surprised that we
12 have a joint route on that traffic. I believe the Santa
13 Fe is circuitous out of Oklahoma City going to Texas, if
14 I'm not mistaken.

15 Q The Santa Fe line goes directly south out of
16 Oklahoma City into Texas, doesn't it?

17 A I don't believe so.

18 Q Well, regardless of whether the Santa Fe route
19 is more circuitous or not, Santa Fe is still
20 participating in a joint line route with Katy in that
21 move rather than having a single line route; isn't that
22 right?

23 A I don't know if it's a closed industry at
24 Oklahoma City. I don't know the particulars of it, so I
25 can't tell you why it would be a joint route there.

1 Q Are you aware of any other specific examples
2 of Santa Fe-Katy joint line movements moving under rates
3 that are specific rates that were unaffected?

4 A I can say from my experience the only time
5 they concur in specific movements is where they have to.

6 Q And by "have to" you mean where they need to
7 in order to get the business?

8 A That's right. Where they need to in order to
9 get to the point that's a closed industry or it's a
10 local point on the MKT.

11 Q Except for the Oklahoma City to Ward Spur
12 example.

13 A I don't know if that's closed or not.

14 Q Now, you would agree, though, wouldn't you,
15 that where there was a joint Santa Fe-MKT route that was
16 published in connection with specific rates, that that
17 route is still in effect and wasn't affected by any of
18 these route closing tariffs we've been talking about?

19 A These route closing tariffs are on general
20 routing provisions.

21 Q And getting back to your verified statement,
22 at the bottom of page 5 you discuss Santa Fe's
23 reinstatement of the Chanute, Kansas routings with the
24 MKT, and as a result, I would like at this point to have
25 another exhibit, the exhibit that did that, the tariff

1 that did that was effective August 24, 1984. I would
2 like that marked as Exhibit SFSP-C-29, Your Honor.

3 JUDGE HOPKINS: That will be marked for
4 identification.

5 (The document referred to was
6 marked Exhibit No. SFSP-C-29
7 for identification.)

8 BY MR. WILSON: (Resuming)

9 Q Sir, looking at page 2, if you will, and
10 paragraphs (D) and (E) for your further benefit -- it is
11 immediately following the rate reduction symbol -- there
12 is an insertion of the junction Chanute, Kansas in each
13 of those paragraphs. And my question is isn't this the
14 tariff that implemented Santa Fe's agreement to restore
15 Santa Fe-MKT routings via Chanute, Kansas?

16 A The way this came about, as I recall, was an
17 example really of how this cancellation didn't take into
18 consideration the efficiency or inefficiencies of the
19 route. What happened here as an example, from St.
20 Louis, Missouri, which the Santa Fe does now serve, to
21 Dallas, Texas, as an example, before they put the
22 Chanute in there, the only route we had was Kansas
23 City. And if you think about the way the Katy runs, we
24 have to run down through Parsons, Texas through Chanute,
25 down near Chanute up to Kansas City, give it to the

1 MKT have less than daily train service to and from
2 Chanute?

3 A I don't know that for a fact.

4 Q Well, if those facts are the case, wouldn't it
5 be possible that even if a Chanute, Kansas routing were
6 shorter in terms of miles between a point like
7 Pittsburgh and Oklahoma City that routings over Chicago
8 still could be much more efficient and provide much
9 better service to shippers as compared to routings via
10 the St. Louis gateway and then Chanute?

11 A If we use those assumptions, it's a
12 possibility.

13 Q All we can do is use assumptions when we don't
14 know. Okay.

15 Now, getting back to your discussion of the
16 Fitzgerald-Steiniger correspondence, we have another
17 letter from Mr. Fitzgerald to Mr. Steiniger about joint
18 routes on automobile traffic, and I would like that
19 marked as an Exhibit SFSP-C-30, Your Honor.

20 JUDGE HOPKINS: That will be marked for
21 identification.

22 (The document referred to was
23 marked Exhibit No. SFSP-C-30
24 for identification.)

25 BY MR. WILSON: (Resuming)

1 Q Now, sir, you may or may not have seen this.
2 Do you normally look at correspondence like this in your
3 capacity there at the MKT?

4 A Not normally, but I have seen this one.

5 Q Okay. I'm glad to hear that. Now, this is,
6 is it not, Santa Fe's agreement to a joint route and
7 rate with the Katy from Kansas City and to Santa Fe's
8 unloading facility at Houston, Texas?

9 A Yes, sir.

10 Q And the last sentence of the first page
11 states, "Ford Motor Company has an interest in using the
12 joint route, even in light of the single line service
13 via Santa Fe, and for that reason we are willing to
14 forego the handling of this traffic single line to
15 accommodate one of our valued customers."

16 Isn't this an example of Santa Fe's
17 willingness to participate in joint routes where it has
18 a competing single line route?

19 A No, sir. I don't believe it is. It's my
20 understanding from talking to our automobile people that
21 Santa Fe did everything they could with Ford to try to
22 get the single line route, and the Katy already had a
23 contract in place on this business, and Ford refused to
24 break that contract.

25 Q Well, absolutely we're going to do everything

1 we can to get single line route, but it is an example of
2 cooperation and participation on a joint line route
3 where we have a competing single line route.

4 A It was going to go out of convoy if they had
5 not concurred in the joint line route.

6 Q Would you say one of the reasons Santa Fe is
7 agreeing to this might be the leverage of the shipper?

8 A Like I say, it was probably going to go truck
9 if it had not been agreed to a joint lot route.

10 Q Otherwise it would have gone truck?

11 A I think so. That's my understanding.

12 Q And whatever leverage, if any, Ford Motor
13 Company has and the possibility of traffic going truck
14 if we don't agree to joint line routes, those factors
15 are still going to be present in the marketplace after
16 the SFSP merger, aren't they?

17 A Ford Motor Company is still going to be there.

18 Q And so are trucks, aren't they?

19 A I suppose, unless we put them out of business.

20 Q Now, turning to Santa Fe's request, which you
21 discuss, Exhibit SFSP-C-3 from the first phase when we
22 asked for opportunity to go into eleven industries, and
23 there were really only ten industries that were closed
24 on the MKT.

25 MS. MAHON: Excuse me. Does the witness have

1 a copy of that?

2 THE WITNESS: I think I have one here some
3 place, if I can find it.

4 MR. WILSON: I don't think he needs one for my
5 question.

6 THE WITNESS: I've got it.

7 BY MR. WILSON: (Resuming)

8 Q Our traffic people have identified over 150
9 MKT closed industries at stations in Texas alone which
10 MKT serves jointly with the Santa Fe. Now, from your
11 knowledge of the traffic, does that sound like a
12 reasonable estimate to you, that there are over 150 MKT
13 closed industries at joint points in Texas with the
14 Santa Fe?

15 A Where do they identify these from, what
16 source, these industries?

17 Q It was from a field survey that our people
18 took. You are the witness. We will get our turn. I'm
19 asking you if that sounds like a reasonable estimate to
20 you?

21 A It sounds high, but I don't know.

22 Q Would you say there are in excess of 100 Katy
23 closed industries?

24 A I have no idea how many there are.

25 Q If you can give me an estimate, that's fine.

1 A No. I don't have any idea.

2 Q Do you have any idea how many closed
3 industries there are at Santa Fe-MKT common points in
4 Kansas and in Oklahoma?

5 A No, sir.

6 Q Are you aware that the Katy within the last
7 two years closed two industries at Oklahoma City and two
8 other industries at Enid, Oklahoma?

9 A As far as I know, it's not true. We've
10 checked back on our records, tried to figure out if we
11 had closed any, and I think Mr. Gastler testified
12 yesterday that we hadn't closed any in the last six
13 years or so. If you found some, you found some that we
14 didn't.

15 Q We did. We will tell you about that later,
16 too.

17 Now, finally, Your Honor, I'd like to attach
18 Mr. Fitzgerald's reply to Mr. Steiniger's letter, which
19 is attached to Mr. Noser's testimony. I would like that
20 marked as Exhibit SFSP-C-31.

21 JUDGE HOPKINS: That will be marked for
22 identification.

23 (The document referred to was
24 marked Exhibit No. SFSP-C-31
25 for identification.)

1 BY MR. WILSON: (Resuming)

2 Q Sir, have you had the opportunity to see this
3 letter?

4 A Yes. This was that timely filed one that we
5 got last Friday.

6 Q Now, sir, in the second paragraph of this
7 letter near the bottom Mr. Fitzgerald points out that
8 route reopenings and reciprocal switching must go hand
9 in hand, and that shippers at MKT closed industries have
10 been denied the benefit of competitive service via Santa
11 Fe routes.

12 My question to you is a hypothetical one.

13 A Where are you reading from, sir?

14 Q The last two sentences of the second
15 paragraph. Focusing on the point that shippers at MKT
16 closed industries have been denied the benefit of
17 competitive Santa Fe service, would you agree
18 hypothetically that if the ten Dallas and Fort Worth
19 industries that are referred to in this series of
20 letters that you have testified to, that if they were
21 open to reciprocal switching that Santa Fe could offer
22 competitive routes for this traffic over Kansas City or
23 Chicago or Streator gateways?

24 A I don't think your route would be as good as
25 the Katy route, but if they were open, you could surely

1 compete for that traffic.

2 MR. WILSON: Thank you. Those are all the
3 questions I have, Your Honor.

4 JUDGE HOPKINS: Ms. Reed.

5 MS. REED: I have no questions, Your Honor.

6 JUDGE HOPKINS: Thank you.

7 Ms. Mahon.

8 MS. MAHON: Yes. We have a few questions,
9 Your Honor.

10 REDIRECT EXAMINATION

11 BY MS. MAHON:

12 Q Mr. Noser, if you would refer, please, to
13 SFSP-C-21.

14 A Is that one of the tariffs?

15 Q No. That was the first one with five sets of
16 joint routes to Mexico.

17 A Okay. I have it.

18 Q On set 2 are there any such origin points of
19 any significance; that is, MKT points common with
20 another railroad but not with the SFSP or the UP?

21 A Santa Fe and the UP pretty well blanket most
22 origins. I can't think of any significant points
23 offhand that one of them don't get to.

24 Q So you think there are no significant points
25 that provide traffic to Mexico?

1 A I think that's true.

2 Q Take a look at set 3. In that situation if
3 the traffic were moving to a Mexican crossing served
4 only by the SFSP, would the SFSP insist on its own
5 longest haul?

6 A Definitely.

7 Q Take a look at set 4. If the destination in
8 that circumstance is a Mexican crossing served only by
9 the SFSP, would the SFSP let the MKT participate?

10 A Could I have that one more time?

11 Q If the destination is a Mexican crossing
12 served only by the SFSP, would the SFSP let the MKT
13 participate?

14 A No, they wouldn't.

15 Q In connection with Mr. Wilson's questions
16 about the SFSP claimed intentions to keep the Denison
17 interchange open after the merger, does the fact that a
18 route is open mean that there is agreement on the rate
19 to be charged to the shipper?

20 A Absolutely not.

21 Q Does the fact that the route is open mean that
22 the contract rate or conditions or agreement on
23 divisions of the rate or agreement on service frequency
24 or service arrangement?

25 A There's no agreement whatsoever.

1 Q So does the fact that a route is open mean
2 that a competitive joint rate can be set or competitive
3 service can be offered?

4 A No, ma'am.

5 MS. MAHON: That's all I have.

6 JUDGE HOPKINS: Thank you.

7 Anything further?

8 MR. WILSON: I have a recross question.

9 RECROSS EXAMINATION

10 BY MR. WILSON:

11 Q Mr. Noser, you stated in connection with set
12 3, you indicated you thought SFSP would insist on its
13 own longest haul if it was to an SFSP gateway, but if
14 it's from an MKT origin, why wouldn't MKT insist on its
15 longest haul, say via San Antonio or Houston?

16 A It's a common point with another carrier.

17 Q Right. Well, but not with SFSP.

18 A No, but you could deal with the UP. The
19 destination's only Santa Fe-SP destination.

20 Q Isn't that an example really of the kind of
21 problem that you have in the rail industry where MKT
22 could try to get a long haul to Houston or to Denison
23 and SFSP could try to get a long haul to Wichita or
24 Topeka or something like that, but in reality, the
25 junction that is settled upon between the connecting

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1 railroads is the service route junction, and in this
2 case that is Penison, Texas?

3 A I don't think that's true. I think that the
4 SFSP would demand their longest haul.

5 Q Would the MKT agree to that junction? Would
6 it agree to short haul itself?

7 A We may be forced to. We're not as market
8 dominant as the Santa Fe-SP is going to be.

9 Q I'm sorry you said that. What is your
10 definition of market dominance?

11 A You can force this traffic on us. We are a
12 little railroad. If we want to handle the traffic, we
13 have to accept what you give us.

14 Q Tell me what you mean by market dominant.

15 A I think I told you I think you can force the
16 traffic.

17 JUDGE HOPKINS: I don't think he is going by
18 the Commission's definition or lack of definition.

19 MR. WILSON: He's nowhere close to the
20 Commission's definition.

21 JUDGE HOPKINS: I don't think he's going by
22 that, so I don't see anything to be gained by going into
23 that.

24 MR. WILSON: Okay. I will stop.

25 JUDGE HOPKINS: Anything further?

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MS. MAHON: No, Your Honor.

JUDGE HOPKINS: You are excused, sir.

(The witness was excused.)

MS. MAHON: Your Honor, I move the admission of his testimony.

JUDGE HOPKINS: Any objection?

MR. WILSON: No.

JUDGE HOPKINS: It will be received in evidence.

MR. WILSON: I move the exhibits SFSP-C-21 through SFSP-C-31.

JUDGE HOPKINS: Any objection?

MS. MAHON: No objection.

JUDGE HOPKINS: They will be received in evidence.

(The documents previously marked Exhibit Nos. SFSP-C-21 through 31 for identification were received in evidence.)

JUDGE HOPKINS: Call the next witness.

MR. KHARASCH: Your Honor, at this point we are presenting Mr. Dimmerman and Mr. Sheridan as joint witnesses in support of their joint verified statement in volume MKT-27 in opposition, and the joint statement

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1 deals with their conduct of the diversion study; that
2 is, the impact of the merger on the MKT.

3 Whereupon,

4 HARRY T. DIMMERMAN

5 was called as a witness by counsel for the
6 Missouri-Kansas-Texas Railroad Company and, having been
7 previously duly sworn, was examined and testified as
8 follows:

9 AND

10 Whereupon,

11 JERRY M. SHERIDAN

12 was called as a witness by counsel for the
13 Missouri-Kansas-Texas Railroad Company and, having been
14 first duly sworn, was examined and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. KHARASCH:

17 Q Mr. Sheridan, will you give the Reporter at
18 this time your name, and your business address, and your
19 title?

20 A (WITNESS SHERIDAN) The name is Jerry M.
21 Sheridan. I'm at 701 Commerce Street, Dallas, Texas
22 75202. I'm Assistant Vice President of Administration.

23 Q Now, Mr. Sheridan, are you the Mr. Sheridan
24 who made the joint statement that we've just referred to
25 in volume MKT-27?

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1 A (WITNESS SHERIDAN) Yes, sir.

2 Q And, Mr. Dimmerman, are you the Mr. Dimmerman
3 who made that statement?

4 A (WITNESS DIMMERMAN) Yes, sir.

5 Q Are there any changes in this statement, Mr.
6 Sheridan or Mr. Dimmerman?

7 A (WITNESS SHERIDAN) No changes.

8 A (WITNESS DIMMERMAN) None.

9 MR. KHARASCH: The witnesses are tendered
10 jointly for cross examination.

11 JUDGE HOPKINS: Thank you.

12 Mr. Moates.

13 MR. MOATES: Thank you, Your Honor.

14 CROSS EXAMINATION

15 BY MR. MOATES:

16 Q Good afternoon, witnesses. My name is Paul
17 Moates, and I am one of the lawyers representing
18 applicants.

19 Just so we have the context set here, I think
20 Mr. Kharasch has begun to do it, but let's get it
21 clear. The purpose of this study, as I understand it,
22 was your attempt to quantify the losses, the traffic
23 diversion losses that you would expect the MKT-OKT
24 system to suffer as a result of the SESP merger, correct?

25 A (WITNESS SHERIDAN) Yes.

1 A (WITNESS DIMMERMAN) Yes.

2 Q I think you indicate that you were instructed
3 to conduct the study by Mr. Gastler; is that right?

4 A (WITNESS DIMMERMAN) That's correct.

5 Q Mr. Dimmerman, why don't you tell me, when did
6 Mr. Gastler instruct you to conduct this loss study?

7 A (WITNESS DIMMERMAN) I can't tell you the
8 exact date, but it was shortly after the merger was
9 announced he told Jerry and I that we would have to
10 conduct the study.

11 Q Well, when did you complete the study?

12 A (WITNESS DIMMERMAN) Jerry could better answer
13 that.

14 A (WITNESS SHERIDAN) I have some dates written
15 down, but I don't have them with me.

16 Q If it helps you, look at the cover of this
17 volume. It was filed on November 21, 1984. Was the
18 study finished shortly before or a long time before you
19 filed this evidence?

20 A (WITNESS SHERIDAN) We worked early on a pilot
21 study, and I would say as far as the final completion on
22 the full study, it was not, except very shortly
23 probably, before the filing deadline. I don't recall
24 the exact date.

25 A (WITNESS DIMMERMAN) Wasn't that when I came

1 back from Detroit?

2 Q I don't think, Mr. Dimmerman, the exact date
3 is important, but I want to establish that you conducted
4 your traffic diversion studies in support of your
5 trackage rights applications before you completed this
6 opposition study; is that right?

7 A (WITNESS DIMMERMAN) That's true. I was going
8 to give you just about an exact date. I was coming back
9 from the Detroit traffic dinner, so it was right in
10 November, I believe it was, wasn't it?

11 A (WITNESS SHERIDAN) Yes. Sometime just before
12 this was filed.

13 Q I hope you had a good return. Let me ask you
14 this. You mentioned a minute ago a pilot study. Before
15 Mr. Gastler asked you to commence this study, you say
16 shortly after the merger was announced, had either of
17 you conducted any kind of a preliminary analysis or a
18 preliminary impact study of what the SFSP merger might
19 mean to the MKT in terms of traffic diversion losses,
20 either one of you?

21 A (WITNESS SHERIDAN) We took and made some
22 preliminary studies on, you know, printouts that we
23 received from our mapper system. We had the pilot
24 study. We were also looking at trackage rights, so bear
25 with me if I have to think on these a while, because we

1 were doing sometimes a little bit of both.

2 Q Mr. Dimmerman, do you recall having filed an
3 affidavit late last year -- not in 1984 but the previous
4 year -- at the time of the holding company merger of the
5 Santa Fe and Southern Pacific holding companies?

6 A (WITNESS DIMMERMAN) Yes.

7 Q Do you recall having made some loss estimates
8 at the time that you drafted that affidavit?

9 A (WITNESS DIMMERMAN) I may have, but I don't
10 just recall what they were.

11 Q Well, without dragging the affidavit out --
12 and I can if we need to -- does a \$15.6 million loss
13 sound familiar to you at all or refresh your
14 recollection?

15 A (WITNESS DIMMERMAN) It could be. I just
16 don't remember.

17 Q Now, with respect to this pilot study, who
18 suggested that that be conducted?

19 A (WITNESS SHERIDAN) Well, that was normal what
20 we do on a pilot study. Generally, on the study we will
21 have a pilot study before we get into the full study.

22 Q What's the purpose of that, Mr. Sheridan -- to
23 see whether the basic framework and methodology you have
24 identified will apply in a certain case is going to
25 produce results that are within the realm that you would

1 anticipate as an expert traffic man would be correct?

2 A (WITNESS SHERIDAN) No. Our main purpose was
3 to see what the money would be, to see, you know, some
4 idea as to what our loss would be, to see, you know, to
5 that extent then we would decide from there, you know,
6 to go forward or what we needed to do.

7 Q You and I may be saying the same thing a
8 little differently. You mean you did it initially to
9 see what, as you say, the money impact would be.
10 Suppose the money impact had been \$2 million in the
11 pilot study, a \$2 million loss. What would that have
12 told you?

13 A (WITNESS SHERIDAN) That would have been
14 reported to Mr. Castler, and he would have made the
15 decision what we would do, whether we would proceed with
16 any type of further study or not.

17 Q I see.

18 A (WITNESS SHERIDAN) All we did was make the
19 study to see what the impact would be and report that.

20 Q Let me ask you this. Did you use any written
21 assumptions or diversion guidelines for the pilot study?

22 A (WITNESS SHERIDAN) I think we cover our
23 assumptions pretty well.

24 Q For your pilot study. Are those the same
25 assumptions?

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1 A (WITNESS SHERIDAN) It's the same thing.
2 Q They are the same assumptions?
3 A (WITNESS SHERIDAN) Yes.
4 Q Did those assumptions -- were they changed in
5 any way or modified after you completed the pilot study
6 but before you undertook the study that is in evidence
7 in this case?

8 A (WITNESS SHERIDAN) The assumptions?

9 Q The assumptions.

10 A (WITNESS SHERIDAN) No.

11 Q They were not changed in any way?

12 A (WITNESS SHERIDAN) Not to my recollection.

13 Q Okay. Now, can we look at your Appendix A,
14 please, which are your diversion factors that are
15 applied to this study. I think they follow the
16 affidavit of Mr. Sheridan.

17 A (WITNESS SHERIDAN) Yes.

18 Q Now, from the answer you just gave me, I take
19 it these factors were developed at least prior to the
20 time that you did the pilot study or at the time you did
21 the pilot study.

22 A (WITNESS SHERIDAN) Yes.

23 Q Are these the same diversion factors that you
24 two gentlemen employed in the Union Pacific-Missouri
25 Pacific study?

1 A (WITNESS SHERIDAN) Pretty much similar to it.

2 A (WITNESS DIMMERMAN) I believe so.

3 Q Are they the same factors that you used in the
4 Tucumcari line acquisition diversion study?

5 A (WITNESS DIMMERMAN) It may have been. I
6 don't recall.

7 Q You two did appear, did you not, as joint
8 evaluators in both of those cases for the MKT?

9 A (WITNESS SHERIDAN) Yes.

10 A (WITNESS DIMMERMAN) Yes.

11 Q A detailed question, if I may. On page 1 of
12 the statement you make reference to the fact that all
13 rock movements and volume coal movements were viewed as
14 not affected, and therefore were eliminated from the
15 study. The question is did that elimination -- was that
16 also done in your trackage rights study? I don't want
17 to cross you on that now, but I just want to know about
18 that one fact.

19 A (WITNESS SHERIDAN) On the trackage rights
20 study?

21 Q In other words, did you eliminate this from
22 the data that you used to carry forward for the trackage
23 rights study?

24 A (WITNESS SHERIDAN) On the trackage rights
25 studies we were using documentation from the SP-Santa Fe

1 and also the ICC study.

2 Q And therefore this assumption did not apply?

3 A (WITNESS DIMMERMAN) We didn't have any --
4 there would not be any like movements that I am aware of.

5 Q Would you turn to page 2 of the statement?

6 Let me direct your attention to the first full paragraph
7 on the page. You say that in making your study, "We
8 considered the many factors which influence shippers'
9 routing of cars and choice of carriers. In addition to
10 the fact of single line service, single line control of
11 rates and routes, we also considered those other items
12 which influence shippers, such as tracing shipments,
13 avoidance of interchanges, which railroad serves the
14 industry and the shippers' desire for competitive
15 routes. And, of course, we relied on our own experience
16 and knowledge as to shippers' routing preferences."

17 The first question is with respect to these
18 items that you recite in the sentence I just read, are
19 those generally the benefits that are associated with
20 what is known as single line or single system service?

21 A (WITNESS SHERIDAN) Sometimes yes, sometimes
22 no.

23 Q Which of them are no, Mr. Sheridan?

24 A (WITNESS SHERIDAN) It depends upon what the
25 circumstances are on the movements and the shipper. All

1 items don't apply to everybody at the same equal way.

2 A (WITNESS DIMMERMAN) Avoidance of
3 interchanges, for example, could apply to a runthrough
4 train as well as a single line shipment.

5 Q How did you weight your diversion judgments
6 with these factors then? You say you considered these
7 factors. I want to know how did that consideration get
8 translated into your study? You know, pick an example
9 -- tracing shipments. How was that weighted in your
10 decision whether a shipment was divertible or not
11 divertible?

12 A (WITNESS DIMMERMAN) Minor. But it could fit
13 into where you talk about shippers' individual
14 requests. There could be an individual shipper that is,
15 you know, very extremely fussy of the fact that he wants
16 to be able to get into your computer, for example, and
17 utilize that for tracing or whatever.

18 Q Where on the reasons that you put on each of
19 your study movement sheets in the study do we find
20 shipment tracing as an element in your consideration?
21 Does that show up anywhere?

22 A (WITNESS SHERIDAN) Not on the diversion
23 factor sheet, no, sir.

24 Q Then how does the Commission or how do the
25 applicants or anyone else interested in the study

1 determine the significance that you gave, albeit, as Mr.
2 Dimmerman said, it may be perhaps minor with respect to
3 tracing shipments, how do we determine on what shipment
4 you thought it was a minor influence?

5 A (WITNESS DIMMERMAN) If it's in there, we'll
6 certainly tell you, and if you have any question about a
7 certain shipment, just ask us.

8 Q Oh, I see. I have to ask you. That is not
9 apparent from your work papers or from the study
10 movement sheet?

11 A (WITNESS DIMMERMAN) It may be, but I don't
12 recall.

13 Q What about avoidance of interchanges? Is that
14 a reason I can find in your work papers or on your study
15 movement sheets as affecting your diversion judgment in
16 a particular --

17 A (WITNESS SHERIDAN) It's not an exact reason
18 on there. It's more of a judgment reason when we looked
19 at the individual movements.

20 Q Also, I stopped reading in that paragraph.
21 There's one sentence left. That sentence reads as
22 follows, quote -- and this is again on page 2 of your
23 verified statement -- "We also considered the ability of
24 applicants to close and the past history of applicants
25 closing joint routes in assessing what applicants would

1 do in the future."

2 Can you tell me how that factor -- that is,
3 your consideration of the applicants' ability to close
4 and what you call the past history of applicants closing
5 joint routes -- how did that affect your diversion
6 judgment specifically in terms of the percentages
7 applied to a particular movement?

8 A (WITNESS SHERIDAN) Specifically to a
9 percentage?

10 Q To a particular percentage on a particular
11 diversion.

12 A (WITNESS SHERIDAN) There again we'd have to
13 look at the examples and give you the questionnaire.
14 But as far as assigning a percentage on this to a
15 specific case, we didn't on that. We were under the
16 assumption that the applicants would close what routes
17 that they could.

18 Q Okay. I think there are two parts to that
19 answer that I want to clarify. One, if I understood
20 you, Mr. Sheridan, I cannot find as a written reason in
21 any particular diversion abstract route closing as
22 affecting the percentage applied to that. I don't find
23 that written down as a reason. Is that true? I have to
24 ask you?

25 A (WITNESS SHERIDAN) That's an assumption that

1 was made on our understanding of the study, that they
2 would do this.

3 Q All right. Then let's clarify that. They
4 would do this. Was it your assumption when you made
5 this study that the applicant Southern Pacific-Santa Fe,
6 the new railroad, the merged railroad would close all
7 existing joint routes and gateways with the MKT Railroad?

8 A (WITNESS SHERIDAN) Not all.

9 Q Which ones?

10 A (WITNESS SHERIDAN) Competitive ones.

11 Q Would you list those for me, please?

12 A (WITNESS SHERIDAN) It would be difficult to
13 list all of them. I would say offhand I could --

14 Q Here's what I'm getting at. How do I tell
15 when I look at a particular study movement sheet -- if
16 you made a judgment that that car will be diverted as a
17 result of that merger, how can I tell what influence, if
18 any, you assigned to the applicants' ability to close
19 routes in making your judgment to divert that car?

20 A (WITNESS DIMMERMAN) I think the statement
21 speaks for itself. We did take it into consideration.
22 For example, if there is a movement that moves through
23 Kansas City in connection with the SP at Denison, Texas
24 and the movement is going to an SP industry, almost
25 invariably we would say that they would control the

1 movement. We have no control over it. It didn't come
2 from an MKT industry at Kansas City. And the movement
3 would be lost.

4 Q On the assumption that the merged company
5 would close that route to you, is that right?

6 A (WITNESS DIMMERMAN) Either close the route or
7 control the movement of the traffic through influence
8 with their customer.

9 Q Again, Mr. Dimmerman, so that I'm very clear
10 on this and so that we can help the Commission staff
11 understand your study, if I find -- and I will show you
12 some of these later -- but if I show you a particular
13 movement that routes via Denison and is going to an SP
14 industry, and you diverted -- and I agree you sure did
15 divert it a lot -- how do I tell from that particular
16 sheet whether it was the ability or the alleged ability
17 of the applicants to close the route as opposed to some
18 other factor or factors that caused you to divert that
19 car?

20 Is the only way I can find that out to ask you
21 the question when we come to the movement?

22 A (WITNESS DIMMERMAN) I think you can just
23 about assume it, but probably if there's nothing on
24 there to indicate it, sometimes we put in there, for
25 example, a new route. A lot of times we forgot to put

1 that in there. I can tell you that right now. But
2 where that new route was available, that was almost
3 invariably the reason for it.

4 Q New route is diversion rule 10, diversion
5 factor 10?

6 A (WITNESS SHERIDAN) Yes. Also, single line
7 rate for the applicant. Most times, like there, where
8 they had the advantage on it, we figured we would not be
9 included on a joint route where they have single line
10 route. So there again, we are assuming that on a single
11 line route, in that case it would definitely be routed
12 your way because we wouldn't be able to maintain a route
13 with you.

14 Q One specific location I wanted to ask you
15 about right now, and we may come to it later, the Agri
16 Industries elevator at Houston. You would agree with me
17 there are a number of movements in your study that went
18 to the Agri export, is the elevator that you seek to
19 have a condition imposed with respect to here in terms
20 of the switching?

21 With respect to movements to that elevator,
22 did you assume that after the merger the SPSF would have
23 cancelled the reciprocal switching arrangement, and
24 therefore kept you from serving the elevator at all?

25 A (WITNESS DIMMERMAN) Not necessarily. You

1 certainly could, but not necessarily. There is more
2 invlved in that industry than just a reciprocal
3 switching agreement. That is the only -- to my
4 knowledge, that is the only large grain elevator in
5 Houston, Texas not located on the Port Terminal Railway
6 Association. It is located exclusively on the Southern
7 Pacific.

8 At one time the elevator belonged to the
9 Goodpasture people, and at that time it was just a lot
10 of controversy. The Southern Pacific really indicated
11 on several occasions that they didn't like handling it.
12 They didn't move grain themselves. It was a troublesome
13 thing to them. I think there was also -- and I have
14 been in on some of the meetings that indicated there was
15 unhappiness between the two people.

16 Agri Industries bought the elevator.
17 Unfortunately, there was an explosion down there. But
18 one of the things that was done immediately is the Agri
19 Industries recognized the fact that they had to get
20 along with the SP, because the SP was the one that was
21 serving them. The SP told them that there was a problem
22 with that grain traffic moving through their Englewood
23 yard. You can question Mr. Todd later on that, because
24 he actually made the agreements. But agreements were
25 made to deliver that traffic to, I believe it was, Pay

1 Siding or something to that extent. And the unit trains
2 are delivered right from the Katy right to that point.
3 It's something separate. And as sure as I am sitting
4 here, if these agreements are cancelled or the charges
5 are changed, you would make a noncompetitive movement of
6 traffic to Agri Industries.

7 Q Mr. Dimmerman, please don't think me rude. I
8 did not want to interrupt you. But if you are going to
9 give me answers like that, with the stack of material I
10 have we are literally going to be here for two days.
11 All I asked was whether you assumed in your study that
12 applicants would close the elevator. What you said was
13 very interesting. I'm sure it might be fun to talk
14 about some time. But if we're going to proceed through
15 these questions, I'm really not going to be able to --

16 A (WITNESS DIMMERMAN) I'm sorry, Mr. Moates,
17 but I wanted everybody to understand that there is more
18 to it than just a closing or not closing the elevator.

19 Q I think your other witnesses' testimony
20 addressed that, but for present purposes, you said, I
21 believe, at the very beginning of all of that that not
22 in every case did you assume that applicants had closed
23 the reciprocal switching. I don't understand how we
24 closed it for some purposes and not others. So is the
25 answer no, you did not assume that the elevator had been

1 closed after the merger?

2 A (WITNESS DIMMERMAN) That's right. What we
3 assumed was that if anything good happened down there,
4 being an exclusive SP point, it could be closed. They
5 certainly could cancel that agreement, and that would
6 take us out of the business. It would slow down the
7 movement. It wouldn't be practical for you to have this
8 movement of grains for your Englewood yard.

9 Q On page 2 you list your diversion factors that
10 were applied to the study, and they are 100 percent, 75
11 percent, 50 percent or 25 percent, correct?

12 A (WITNESS SHERIDAN) Yes.

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1 Q Those are not the same percentages that you
2 used in your leakage rights study, are they?

3 A (WITNESS SHERIDAN) No. We have some
4 different ones there.

5 Q Tell me, Mr. Sheridan, when did you decide on
6 these particular percentages for this study?

7 A (WITNESS SHERIDAN) Basically, starting the
8 study, we decided what percents we would use, and these
9 are the ones we basically came up with. We made a
10 little bit of preliminary in the pilot and just looked
11 at some movements, and we considered what we thought
12 would hopefully cover every case here.

13 And that's what we had and that's what we're
14 stuck with.

15 Q Now, this is important because I really don't
16 understand this. Where does one look if one is
17 interested in understanding your study and your
18 diversion judgements -- where does one look to correlate
19 a 100 percent, a 75, a 50 or a 25 with the reasons that
20 are shown in Appendix A?

21 A (WITNESS SHERIDAN) On the SMS sheets, it
22 shows the percents that we used from our judgment
23 factors.

24 Q Let's look at one of those.

25 JUDGE HOPKINS: We will mark that and then

1 take a recess.

2 MR. MOATES: I'd like to have this marked as a
3 counsel's exhibit, Your Honor. There is going to be a
4 large number of these exhibits, so for the record we
5 ought to clarify how we are going to handle them.

6 JUDGE HOPKINS: Why don't you do them off the
7 record if you could? 31 is the last number. All I'm
8 saying is what do you mean by a large number?

9 MR. MOATES: I mean in the course of the
10 examination, which is going to take until tomorrow, I'm
11 going to have a number of these study movement sheets.
12 I already have them assembled as exhibits, and I just
13 wanted for identification purposes each time, I think I
14 can conveniently read the first MKT strata and page
15 number to identify it, and then say how many pages are
16 attached, and that should it, rather than reading all of
17 the numbers.

18 I think we have done that in the past in other
19 cases and it has worked.

20 JUDGE HOPKINS: What I was going to say is if
21 you are going to have, like this one, a group of four
22 pages, it will be the next exhibit number, and then go
23 on like that. And it might be better to have you, if
24 you have a whole bunch of them that you're going to do
25 now, that we do this off the record.

1 Have somebody do it for you off the record,
2 and then we won't run into any problem as we go along.

3 MR. MOATES: Okay, fine. This is No. 32,
4 SFSP-C-32. We will mark that for identification.

5 (The document referred to
6 was marked Exhibit SFSP-C-32
7 for identification.)

8 JUDGE HOPKINS: Now let's take a 15-minute
9 recess.

10 (Recess.)

11 JUDGE HOPKINS: Let's get back on the record.
12 Mr. Moates.

13 MR. MOATES: Thank you, Your Honor.

14 BY MR. MOATES: (Resuming)

15 Q Mr. Dimmerman and Mr. Sheridan, just before
16 the break we distributed SFSP-C-32 for identification,
17 which is a four-page exhibit consisting of four of your
18 study movement sheets from this oppositor study.

19 I am -- excuse me. The first sheet is strata
20 BAX page 16. I am particularly interested in looking at
21 the diversion reasons and the percentages which appear,
22 do they not, at about the middle of the page on the
23 right-hand side under the caption "Evaluation."

24 A (WITNESS SHERIDAN) Yes, sir.

25 Q Okay. On the first sheet, we have a 100

1 percent diversion, and the diversion reasons given are 1
2 and 4; is that correct?

3 A (WITNESS SHERIDAN) Yes.

4 Q 1 and 4, again referring to your Appendix A,
5 are single line rate route service and track location of
6 cosignor; correct?

7 A (WITNESS SHERIDAN) Yes.

8 Q All right. Now, the next sheet underneath,
9 same strata, page 39.

10 A (WITNESS SHERIDAN) May I ask a question? You
11 gave us a list of what we were to be asked questions on,
12 and I pulled them and I put them in the order of the
13 numbers you gave so that I could look at our original
14 documents, because in these decisions -- in other words,
15 the original documents consisted of a number of sheets
16 of paper and in making our decisions we looked at each
17 of those documents in order to make our decision.

18 So I would prefer to look at the original
19 document so that we are looking at the same things that
20 we looked at when we made our decision.

21 Q Well, I understand that. We are not going to
22 go through them in the order I gave them to you
23 yesterday. I organized them all last night and put them
24 together in exhibits. Now, if on a particular movement,
25 you want to refer to the background detail, I'd be glad

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1 to stop. I think that my questioning will not require
2 that, except for one or two particulars, and when that
3 happens I have the background documents in my exhibits.

4 I think there are only two times.

5 A (WITNESS SHERIDAN) You're asking us to tell
6 you our decision. That's what I am saying. Our
7 decision is based upon looking at all of the documents
8 that we had attached.

9 Q Okay. Well, let me continue with this and
10 maybe you will be making something to clear to me. When
11 I look at this first sheet, page 16, and I see diversion
12 reasons 1 and 4 and 100 percent diversion, you're
13 telling me that I need to look at something more than
14 just this sheet to understand why you diverted this 100
15 percent?

16 A (WITNESS SHERIDAN) Possibly not, but what I
17 am saying is, in our study we showed what we had
18 attached to the documents attached, and that's what we
19 did. We looked at the attached documents before we made
20 our final decision, our joint decision on the
21 diversion.

22 Q Mr. Sheridan, is there a reason that caused
23 you to divert this particular movement 100 percent of
24 the time to an SFSP System haul that does not relate
25 either to SFSP single line rate route service or the

1 track location of the consignor?

2 A (WITNESS SHERIDAN) Not that I can tell by
3 this one sheet. No, sir.

4 Q In any example in your study, would there be
5 instances where the reasons would be something other
6 than the one shown under the heading "Reasons"?

7 A (WITNESS SHERIDAN) Basically, there may have
8 been some factors that, you know, would help make the
9 final decision.

10 Q Stated differently, one cannot determine in
11 every instance the reasons for your diversion from the
12 face of the SMS; is that right?

13 A (WITNESS SHERIDAN) Possibly not.

14 Q Possibly not. Would you look at the next page
15 of the counsel's exhibit which again in the same strata
16 was page 39? It's page 2 of the exhibit.

17 This also shows the diversion reasons of 1 and
18 4, does it not?

19 A Yes.

20 Q And the percentage diversion for this car is
21 50 percent?

22 A (WITNESS SHERIDAN) Yes.

23 Q Now, how do I correlate the same diversion
24 reason shown on sheet 1 and sheet 2 with the fact that
25 one is diverted 100 percent of the time and the other 50

1 percent of the time? Where in your testimony do I go to
2 find the explanation of why one is 50 and one is 100?

3 A (WITNESS SHERIDAN) Of course, here again, our
4 study -- I don't know that there is anything that should
5 be misleading. This is the same type of study that we
6 have used in this case. We used it in the UP case and
7 the Tucumcari case. We used the same type of study in
8 each case.

9 It seemed to be clear on that. Here again,
10 just like we have said in there, is our knowledge of the
11 shippers and things like that, just like on your first
12 one. In other words, there is the case, as far as we
13 are concerned on our joint decision, we said okay, it's
14 coming from a Santa Fe local point and it's going to a
15 competitive point, of course, on that, but there is no
16 reason that we believe that the merged lines would
17 continue to have a joint route when they could go single
18 line.

19 Today, they couldn't do that, but after the
20 merger you will have the only single line, and I know of
21 no reason that that would not be 100 percent divertible.

22 Q Let me understand that. The diversion reason
23 for sheet no. 1 is not just 1 and 4. It is really --

24 A (WITNESS SHERIDAN) Single line factor. That's No.
25 1.

1 Q Single line factor. And when you say track
2 location consignor, does that mean that you're telling
3 us that that is a local point on the Santa Fe?

4 A (WITNESS DIMMERMAN) Not necessarily. Just
5 that it's located on the Santa Fe.

6 Q As a matter of fact, the next sheet, 50
7 percent diversion, is also located on the Santa Fe and
8 it's 30 percent diversion; correct?

9 A (WITNESS SHEPIDAN) Yes.

10 A (WITNESS DIMMERMAN) Yes.

11 A (WITNESS SHEPIDAN) Here's a case just like on
12 this one where we looked at documents to make our
13 decision on this one, like we said from our experience
14 with the customers and what else have you. On that
15 particular one, it's going from Pillsbury to Enid. It's
16 going to Pillsbury at Denison. It's going from and to
17 the same shipper.

18 We know what their policy has been. Just like
19 today, this car could have moved OKT-MKT direct. It
20 didn't. And, of course, there are some movements from
21 this customer which we handled directly.

22 Pillsbury normally will divide their
23 movements, and in this case, after the merge, our
24 feeling was that we'll both have a single line rate and
25 we are hoping we will get half and be able to retain

1 half, and you'll get half.

2 Q Mr. Sheridan, I think those are excellent
3 reasons and I understand them. But what I am trying to
4 get at is, if I hadn't sat here listening to you give me
5 that explanation, how would I know that that is the
6 reason you diverted that car 50 percent and the first
7 car 100 percent?

8 Is there somewhere in your testimony, for
9 example, that I could go and I would find a diversion
10 rule for 50 percent that would explain to me that that
11 is the way you applied the factor here?

12 A (WITNESS DIMMERMAN) Mr. Moates, isn't that
13 the reason you are here? If you could understand
14 everything, you would not need us here.

15 Q I respectfully disagree, Mr. Dimmerman. If I
16 look at your trackage rights testimony in MKT-19 at page
17 12, you give me some very specific diversion rules. I
18 am not going to cross you on this, but I think you are
19 both familiar with your testimony.

20 You've got a very long paragraph on page 12 of
21 that study that explains in some detail why 100 percent,
22 50 percent, 25 percent, 15 percent and 10 percent
23 factors were applied. And I can take each of those
24 rules and apply them to the diversions you made in that
25 study. And whether or not I agree with your rule, at

1 least I can understand that that is the reason you
2 diverted it.

3 I can't do that with this study, can I? There
4 is no set of written rules like this that tell me when
5 you divert 50 percent or 75 percent or 100 percent, is
6 there?

7 A (WITNESS DIMMERMAN) Well, if this is an
8 error, it is like Jerry said. It's the way we have done
9 it for the last four cases, and to my knowledge the
10 Commission has never not understood any of our
11 practices. And where they may have disagreed with us on
12 a point as far as divertible or not divertible, I don't
13 think there was ever any confusion as to the actual
14 diversions.

15 If we are wrong, that is probably --

16 Q I am not accusing you of an error. I am
17 trying to understand, and I think I do now understand
18 that indeed the reasons do not all appear on the
19 sheets. In fact, as you've just explained to me on this
20 Pillsbury movement, your knowledge about a particular
21 shipper, even a particular movement, were applied on a
22 case-by-case basis in the study.

23 A (WITNESS SHERIDAN) Yes. That's what we said
24 in our statement basically.

25 MR. MOATES: Your Honor, I'd like to have

1 marked for identification Counsel's Exhibit 33. This is
2 an eight-page exhibit and for simplicity I will simply
3 say that these eight diversions, which I believe are all
4 from Harrington, Kansas to Galveston, are all diverted
5 75 percent of the time.

6 JUDGE HOPKINS: It will be marked for
7 identification.

8 (The document referred to
9 was marked Exhibit SFSP-C-33
10 for identification.)

11 BY MR. MOATES: (Resuming)

12 Q All I want to ask you gentlemen about these
13 movements is, we were only able to identify a total of
14 13 times in your study when you diverted a car 75
15 percent. Eight of those times are with this particular
16 movement.

17 Can you explain, therefore, either one of you,
18 why diversion reasons 1, 4, and 10 -- 10 is new route
19 available -- caused these cars to be diverted 75 percent
20 instead of some other number?

21 A (WITNESS SHERIDAN) On these, the factor is
22 that in every case they are from Harrington, Kansas and
23 they are from Schooler-Bishop, and there is a case there
24 -- the Cotton Belt, of course, serves the elevator.
25 While it would give them a new single line haul to

1 destination, in this case with Schooler-Bishop, we were
2 hopeful that we could hold onto 25 percent of the
3 movement.

4 We both have a single line, and as far as we
5 are concerned, with SP serving the industry in this
6 case, that they will get the preponderance of the
7 traffic. And we felt, by Schooler-Bishop, that we
8 should be able to retain hopefully 25 percent.

9 Q Let me see if I can understand that. In other
10 words, these moves, all of which are Katy single system
11 moves today --

12 A (WITNESS SHERIDAN) Yes.

13 Q -- would in many cases -- and I am going to
14 paraphrase your answer -- in many cases, you would have
15 felt this would be a 100 percent diversion, but because
16 of your knowledge of Schooler-Bishop or your
17 relationship with Schooler-Bishop, you feel that you can
18 save 25 percent of this traffic. Is that correct?

19 A (WITNESS SHERIDAN) We are hopeful that we
20 can. Yes, sir.

21 Q You are saying yes, and you are shaking your
22 head no.

23 A (WITNESS DIMMERMAN) That's not what Jerry
24 said. What you said is not what Jerry said. And that's
25 when I said no.

1 Q I said I was going to paraphrase, and he
2 seemed to agree.

3 A (WITNESS DIMMERMAN) That's why I said no.
4 The reason that we say that we hopefully will be able to
5 retain 25 percent is that we have a single line route.
6 However, you, the Cotton Belt, serves the industry, and
7 you will have a leg up on us.

8 So it isn't a case of two single line routes
9 being 50/50. You will have a leg up on us, but we will
10 be able to establish routes, competitive routes,
11 providing that the switch charge remains competitive.

12 Q Does that mean, Mr. Dimmerman, that in all
13 cases, on the study movement sheet where the Katy System
14 has a single system route or where the merged company
15 would have a single system route, that you divided the
16 traffic either 50/50 or 75/25?

17 A (WITNESS DIMMERMAN) Not necessarily.

18 Q You, in fact, diverted a number of those
19 movements 100 percent, didn't you?

20 A (WITNESS DIMMERMAN) Very likely. Very
21 likely.

22 Q Now, do you gentlemen know how often you
23 applied the four diversion percentages used in this
24 study to particular diversions? In other words, do you
25 know what the allocation of diversions in this study is,

1 how many were 100 percent, how many were 50 percent?

2 A (WITNESS SHERIDAN) Not offhand I don't; no.

3 MR. MOATES: I'd like to have marked as a
4 counsel's exhibit a one-page document, SFSP-C-34 for
5 identification, which does identify the 631 diversions in
6 the MKT study with the associated revenue impact by the
7 diversion categories.

8 JUDGE HOPKINS: That will be marked for
9 identification.

10 (The document referred to
11 was marked Exhibit SFSP-C-34
12 for identification.)

13 MR. MOATES: I would be glad to have this
14 exhibit subject to check. I think, in fact, it's only
15 fair if it is. But I will ask you to assume with me for
16 present purposes that it is correct.

17 A (WITNESS DIMMERMAN) The bottom one at 183
18 percent?

19 BY MR. MOATES: (Resuming)

20 Q That's the next exhibit.

21 MR. KHARASCH: Could I ask a clarifying voir
22 dire question?

23 JUDGE HOPKINS: Go ahead.

24 MR. KHARASCH: It's my understanding, Mr.
25 Moates, that there are some 3,000 sample movements. I

1 don't understand what is the selection principle for 631.

2 MR. MOATES: Those are the ones that were
3 diverted; 631 were diverted.

4 MR. KHARASCH: And this is simply your count
5 of those that were diverted at this percent or that
6 percent?

7 MR. MOATES: That's right. We put them in
8 piles and counted them up.

9 A (WITNESS SHERIDAN) We did have a 183 percent
10 item.

11 MR. MOATES: That's the next exhibit. We will
12 come to that.

13 BY MR. MOATES: (Resuming)

14 Q With respect to the exhibit here, gentlemen,
15 was there a particular diversion rule used to apply to
16 the 13 cars diverted 75 percent of the time? Since we
17 have eight of them here in front of us and there are
18 only five others, is there something special about the
19 75 percent category?

20 A (WITNESS SHERIDAN) As far as our study, we
21 looked at all of the documents, each one individually.
22 We came up with a decision and whatever we chose on that
23 is based upon looking at the documents that were
24 attached to that specifically SMS sheet.

25 In other words, we didn't look for X number

1 had to be this percent or X number that percent. It was
2 whatever it fell in that percent.

3 Q I understand that, Mr. Sheridan. But I guess
4 I am asking you, after you went through that procedure,
5 did it turn out that the 13 75 percent diversions fell
6 into a particular category? Was there something special
7 about them, something different about them?

8 A (WITNESS SHERIDAN) I didn't pull out all the
9 75 percents and look at them.

10 Q Again, looking back at Exhibit C-33, the one
11 we looked at previously, those eight 75 percent
12 diversions, was the status of the origin and destination
13 switching carriers a factor in your determination of
14 making those 75 percent diversions?

15 A (WITNESS SHERIDAN) The what?

16 Q The origin and destination switching areas.
17 The Cotton Belt switches it at origin and it's open
18 industry, for example.

19 A (WITNESS SHERIDAN) Partly due to the shipper
20 in this case, like we just said on our testimony, on our
21 statement. It wasn't just because it was served or not
22 served by the Cotton Belt. It was a combination. It
23 was not a single item that made our decision.

24 We looked at all of the items and then made
25 our decision.

1 Q Mr. Sheridan, looking at counsel's exhibit
2 C-34 for identification, doesn't it strike you, sir,
3 that the fact that nearly 83 percent of all the
4 diversions in your study were at 100 percent, suggest
5 that you had a bit of a strong bias built into the
6 diversion rules that you used?

7 A (WITNESS SHERIDAN) What do you mean by strong
8 biased opinion?

9 Q I mean that you have four sets of diversion
10 percentages, 25, 50, 75, and 100. And it turns out that
11 83 percent of the time, you gentlemen decided that a car
12 was 100 percent divertible.

13 Doesn't that strike you as a bit unusual?

14 A (WITNESS SHERIDAN) Again, we looked at each
15 of the SMS sheets and information attached and made our
16 decision. We wasn't looking for any certain number of
17 cars at any percent.

18 Q Did you go back when you completed this study
19 and analyze the distribution of diversion percentages in
20 any manner like I have done with this exhibit for
21 yourselves?

22 A (WITNESS SHERIDAN) I had the number counted.
23 Yes, sir. I don't have it with me here. But I did have
24 them counted.

25 Q You knew at some point that there were over

1 500 of your diversions that were at the 100 percent
2 level?

3 A (WITNESS DIMMERMAN) He didn't know it very
4 long ago, Mr. Moates. He just told me yesterday. I
5 told him you've got it, and he said I don't have it
6 here.

7 A (WITNESS SHERIDAN) It was just recently
8 because there again, I was trying to make sure of our
9 counting of all of the documents. And as we were
10 looking at them, I'd say well, I wonder what percent we
11 did.

12 Really, again, the number we designated for
13 each percent was not a concern of ours.

14 Q It was not a concern?

15 A (WITNESS SHERIDAN) The number that we
16 diverted by each percent was not a concern.

17 A (WITNESS DIMMERMAN) A factor. It wasn't a
18 factor in the diversion.

19 Q There was no conscious attempt on your part to
20 apply higher percentages in this study; is that right?

21 A (WITNESS SHERIDAN) No, sir.

22 MR. MOATES: Your Honor, just so the record is
23 complete, I would like to have identified a counsel's
24 exhibit that does identify the diversions shown on
25 counsel's exhibit 34 as 183 percent.

1 I don't know that there is much that I can do
2 with these gentlemen about it. I suspect Mr. Anderson
3 would have to be the witness to deal with this abstract
4 which is strata OSX, page 183, shows on the face a 100
5 percent diversion, but my experts tell me that when the
6 computer tape is run, this fact at 183 percent applied
7 to it.

8 JUDGE HOPKINS: It will be marked for
9 identification as SFSP-C-35.

10 (The document referred to
11 was marked Exhibit SFSP-C-35
12 for identification.)
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1 BY MR. MOATES: (Resuming)

2 Q Again I take it you gentlemen would agree that
3 if a car was diverted in the computer process for
4 purposes of determining revenue impact of your
5 judgments, if it was diverted at 183 percent factor that
6 would be a mistake, would it not?

7 A (WITNESS DIMMERMAN) We didn't have anything
8 to do with the revenue.

9 Q I understand that. I understand Mr. LaGrone
10 did. But if they had taken your judgment, which shows
11 as 100 percent on the exhibit, and through the process
12 that you had nothing to do with the revenues
13 attributable to that movement were determined to be 183
14 percent rather than 100, that is not what you had
15 intended, is it?

16 You didn't divert this car more than one
17 time?

18 A (WITNESS DIMMERMAN) We only diverted this car
19 one time, but I don't know what factors they might have
20 used as a percentage basis of other movements. I don't
21 know just what was done. If you're just talking about
22 this one car, it should show 100 percent diversion.

23 How that was -- what LaGrone did with it after
24 that, I don't know.

25 A (WITNESS SHERIDAN) Our statement clearly

1 shows we diverted it 100 percent. The process after
2 that, as I say, we could not answer the money factor
3 that they did on it. That would be Mr. LaGrone.

4 Q Perhaps Mr. Anderson will have an opportunity
5 to check that before he comes on.

6 Now would you turn back to your testimony, the
7 verified statement, at the very bottom of page two in
8 the paragraph that carries over to the top of page
9 three, you indicate there, did you not, that you believe
10 that 90 percent of the diversions that you have
11 projected in the study will occur in the first year
12 following this merger and that 100 percent will have
13 occurred by the second year; is that correct?

14 A (WITNESS DIMMERMAN) Yes.

15 A (WITNESS SHERIDAN) Yes.

16 Q Without getting the exhibit out, and I can if
17 you want me to refresh your recollection, do you recall
18 that with respect to the gains that you project from
19 your trackage rights that you estimate that the
20 percentages at which you will achieve those gains are
21 different than the percentages by which you say you will
22 lose traffic here?

23 A (WITNESS DIMMERMAN) Yes, sir.

24 A (WITNESS SHERIDAN) Yes, sir.

25 Q Specifically, I think you say that you would

1 gain 60 percent in year 1 and 85 percent in year 2, and
2 100 percent in year 3. Why do those percentages vary?

3 A (WITNESS DIMMERMAN) The reason that they vary
4 is that the diversions that we have attributed on the
5 gain side, is that we have achieved through
6 competitiveness, is that you have a route, we have a
7 route, and it's up to us to go out there and compete for
8 the traffic. And, therefore, in order to achieve that
9 it is going to take some time to do it.

10 But when you are closed out of a route, like
11 we will on whatever that number was on the 100 percent
12 diversion, we can't expect to retain that maybe two
13 weeks beyond the merger date. That's the reason. We're
14 doing it through competition and the SP/SF will be doing
15 it through locking us out of the routes in most cases.

16 Q Is it your experience, Mr. Dimmerman, that the
17 losses you incurred as a result of, for example, the
18 Burlington Northern and Union Pacific mergers all
19 occurred in two weeks after the merger took place?

20 A (WITNESS DIMMERMAN) A good many of them. We
21 had cars that were routed via the SP at Denison that we
22 would receive at Kansas City, and the Burlington
23 Northern just took us out of the route and moved the
24 cars directly to Denison and interchanged to you at
25 Sherman, which is the sister city to Denison.

1 In some cases we were able to get the
2 Burlington Northern to give us on a deprived revenue,
3 but this was done on the day of the merger.

4 Q I'm sure merged railroads do something to try
5 to achieve the diversions right away. My question was
6 did you experience 100 percent of the diversions that
7 you gentlemen projected would happen from those mergers
8 in the first two weeks after they took place?

9 A (WITNESS DIMMERMAN) Wherever the single line
10 routes were, I think it was done immediately.

11 Q Do you plan to use the trackage rights that
12 you are applying for in this case, if they are granted,
13 immediately, or do you plan to use them sometime after
14 the merger is consummated?

15 A (WITNESS DIMMERMAN) It would depend on
16 whatever the Commission's decree was. For example, on
17 the Union Pacific-Missouri Pacific merger, I think their
18 merger was effective late 1982, and January of 1983 we
19 commenced operation into our new northern districts. So
20 as soon as practical, sir, yes.

21 Q You have no plan not to use them as soon as
22 practical is what I am getting at.

23 A (WITNESS DIMMERMAN) No, sir.

24 Q Did you do any kind of a market survey or an
25 analysis to support your estimates of either the

1 percentage losses, the 90 percent in year 1, 100 percent
2 in year 2, or the percentage gains in trackage rights
3 study of 60, 85, and 100? In other words, are those
4 anything other than your expert judgments, talking it
5 over, or did you do something in addition like survey
6 shippers or have some kind of a study made?

7 A (WITNESS SHERIDAN) Would you repeat that?
8 Are you talking about both the trackage rights and the
9 opposition case?

10 Q Let me restate it. I am not talking about the
11 percentages of diversion applies to sheets. I am
12 talking about this paragraph at the bottom of page 2,
13 top of page 3, where you estimate how quickly you will
14 suffer diversion losses and contrasting that with the
15 speed with which you project you will have gains on
16 trackage rights.

17 Okay, those percentages in particular. I am
18 asking did you do anything other than simply talk it
19 over, come up with these numbers, or did you in fact
20 conduct some kind of a market analysis, shipper survey,
21 or what have you?

22 A (WITNESS SHERIDAN) Well, basically on the
23 bottom of page 2 we're talking about, just like Mr.
24 Dimmerman has said, our assumption is we believe that
25 the merged line would take quick action to change those

1 routes. It was our opinion that that would happen.

2 Now as far as the gains, we did talk with some
3 of our sales managers and, you know, hey, if we get
4 these, what was their opinion. How fast or what can we
5 do to get a certain amount of traffic? And through that
6 we did discuss it with some of our sales managers, yes,
7 sir.

8 Q When the two of you discussed these two sets
9 of percentages, am I clear on what percentages we're
10 talking about?

11 A (WITNESS DIMMERMAN) I believe so. I was just
12 going to say, using your figures, this 83 percent on the
13 100 percent divertable, that's pretty close to the 90
14 percent that we're talking about in the first year. So
15 I think that your figures probably agree with us. That
16 83 percent is awfully close to the 90, and 100 percent
17 divertable means it's going to happen quick.

18 Q It's 183 percent.

19 A (WITNESS DIMMERMAN) I'm talking about the
20 82.7, 83 percent on 100 percent divertable.

21 Q Oh. All right. But when the two of you
22 discussed these phase-in and phase-out percentages, I
23 will call them, traffic phases out on this study because
24 of loss and they phase in on the other study because of
25 a gain, did you make any effort to correlate the

1 numbers? That is, how much of your loss in the first
2 year, 90 percent of it, is in dollars, and how much of
3 your gain in the first year, 60 percent of it, is in
4 dollars?

5 A (WITNESS DIMMERMAN) I didn't.

6 A (WITNESS SHERIDAN) No, sir. We did not do
7 that.

8 Q Well, we have made that kind of a correlation,
9 gentlemen. I would like to have that exhibit marked,
10 Your Honor, as Exhibit C-36. This is Katy's estimate of
11 revenue impacts following the merger, assuming a grant
12 of all of their trackage rights, and the exhibit notes
13 that it assumes the grant to Corpus Christi, since the
14 numbers are slightly different as between Corpus Christi
15 and Eagle Pass.

16 JUDGE HOPKINS: It will be marked for
17 identification.

18 (The document referred to
19 was marked Exhibit Number
20 SFSP-C-36 for
21 identification.)

22 BY MR. MCATES: (Resuming)

23 Q Now directing your attention to the first
24 column there, gentlemen, the first year after the
25 merger, the calculations show that 60 percent of your

1 projected gain of \$27.9 million was \$16.7 million, while
2 90 percent of your projected loss of \$19.3 million is
3 \$17.4 million, a difference of less than \$1 million.

4 Again I ask you were those numerical
5 relationships unknown to you when you made your
6 decisions about which percentages to apply to these two
7 studies?

8 A (WITNESS SHERIDAN) These figures were not
9 known to us.

10 Q This is just a coincidence that you were going
11 to lose the traffic at the same speed you are going to
12 gain it?

13 A (WITNESS DIMMERMAN) Mr. Moates, this is the
14 first time I have ever seen these figures, and I don't
15 believe that these figures are known in our shop by
16 anybody.

17 Q I am glad to help the Katy traffic department
18 better understand.

19 A (WITNESS SHERIDAN) I question their
20 correctness.

21 Q You question the numbers, sir?

22 A (WITNESS SHERIDAN) Yes, sir.

23 Q What number in particular?

24 A (WITNESS SHERIDAN) MKT revenue gains. Now
25 where did those come from?

1 Q Simply the \$27.9 million that you say is the
2 result of all of your trackage rights studies you will
3 obtain, and the \$16.7 million or 60 percent of that in
4 year 1. You understand, of course, I am not conceding
5 that you're going to get all your trackage rights.

6 Simply for an exercise, we are comparing the
7 total gains you project versus the total losses you
8 project.

9 A (WITNESS SHERIDAN) I don't have our trackage
10 rights case here, but I thought we made some mention in
11 there that those were not net gains.

12 Q That's true, and we're going to talk about
13 that tomorrow. I'm not trying to argue whether these
14 are or not. I'm just showing the relationships.

15 It is pointed out to me, and I think it's
16 implied in this exhibit, but I should state for the
17 record that these dollars are in millions. It is not
18 \$16.70.

19 JUDGE HOPKINS: Thank you.

20 BY MR. MCATES: (Resuming)

21 Q Would you now turn to the bottom of page 3 and
22 the top of page 4 of your verified statement?

23 Do you see the paragraph, the carry-over
24 paragraph that starts on the bottom of page 3? "Our
25 study indicates that a substantial portion of the total

1 diversions occur in areas where MKT is seeking trackage
2 rights as a condition to approval of the merger." Do
3 you see that?

4 A (WITNESS DIMMERMAN) Yes, sir.

5 Q Did you two discuss the likelihood of their
6 being significant diversions in these areas prior to
7 your conducting the opposition loss study?

8 A (WITNESS DIMMERMAN) We were very concerned
9 about the agri industry. We knew that there would be a
10 diversion there. We were concerned about Mexican
11 traffic. We knew that we would, you know, lose our
12 routes to Mexico and in fact we just said you can kiss
13 the Mexican traffic goodbye.

14 And so those two areas were, you know, I know
15 we discussed because it was so obvious. I don't believe
16 we discussed the other areas. Maybe you recollect
17 something, Jerry.

18 A (WITNESS SHERIDAN) I think that was basically
19 the two major ones. I don't think that we really had
20 much discussion on the other parts.

21 Q Did you discuss before commencing the
22 opposition study the desirability of being able to show
23 significant or some losses in the areas where Katy
24 wanted to seek trackage rights?

25 A (WITNESS DIMMERMAN) No, sir.

1 Q Were you able to discover these facts -- the
2 fact that you were going to incur some losses in areas
3 where you are seeking trackage rights? Did you discover
4 that in the pilot study? Could you tell it from the
5 pilot study?

6 A (WITNESS DIMMERMAN) I think there are some
7 areas where we showed little or no loss in relation to
8 the traffic study, the trackage study. Didn't we say
9 there was very little loss at Midlothian and very little
10 loss to Beaumont?

11 A (WITNESS SHERIDAN) Yes.

12 Q I agree with both of those, but I was focusing
13 on what you say.

14 A (WITNESS DIMMERMAN) I'm just trying to answer
15 as usefully as I can.

16 Q Okay. That's helpful. Thank you.

17 Did you do any reanalysis of any portion of
18 your opposition study to go back to determine or maybe
19 take a harder look at whether you in fact didn't lose or
20 would lose more traffic in some of the areas where you
21 wanted to seek trackage rights?

22 A (WITNESS SHERIDAN) No, sir. We didn't go
23 back and readjust our study at all. We made our study,
24 and that was it, based upon the facts that we had here.

25 MR. MOATES: I'd like to have marked for

1 identification, Your Honor, as a counsel's exhibit, a
2 multiple-page document, a nine-page document. I'm
3 producing it this way because it appears this way in the
4 work papers. I am actually at this point only going to
5 ask about one page.

6 JUDGE HOPKINS: It will be marked for
7 identification as SFSP-C-37.

8 (The document referred to
9 was marked Exhibit Number
10 SFSP-C-37 for
11 identification.)

12 BY MR. MOATES: (Resuming)

13 Q This is a cover memorandum from Mr. Roper of
14 the Katy to a number of individuals, including Mr.
15 Sheridan, and this document was produced in the
16 Dimmerman-Sheridan work papers, and I believe, Mr.
17 Sheridan, this would be your copy, wouldn't it, since
18 your name is circled and your initials appear on the
19 top?

20 A (WITNESS SHERIDAN) Yes, sir.

21 Q This cover memorandum makes reference, does it
22 not, to a meeting related to this merger that took place
23 in the MKT offices in Dallas on March 8 and 9, 1984?

24 A (WITNESS SHERIDAN) Yes, sir.

25 Q Did you attend those meetings?

1 A (WITNESS SHERIDAN) Yes, I attended them.

2 Q Would you turn in to the sixth page of this
3 exhibit, sir? There are some handwritten notes. At the
4 very top of the page it says "impact study". I think it
5 says May 15 deadline. Do you see that at the very top,
6 sort of half-cut off?

7 A (WITNESS SHERIDAN) Yes.

8 Q By the way, is this your handwriting?

9 A (WITNESS SHERIDAN) Yes.

10 Q The first entry under that impact study, May
11 15 deadline, would you read that, please, Mr. Sheridan,
12 since it is in your handwriting? Would you read it for
13 the record?

14 A (WITNESS SHERIDAN) "Review pilot study"?

15 Q Yes.

16 A (WITNESS SHERIDAN) "Identify movements that
17 were diverted in connection with trackage rights
18 request."

19 Q Okay. Now was this that task you were given
20 at that meeting on March 8 and 9, 1984? Is that
21 something you were asked to do?

22 A (WITNESS SHERIDAN) Yes.

23 Q Why were you asked to determine what movements
24 were diverted in connection with the trackage rights
25 request before you had conducted the opposition study?

1 A (WITNESS SHERIDAN) That I don't recall
2 offhand, sir.

3 Q Do you recall who asked you to do this?

4 A (WITNESS SHERIDAN) No, sir, I sure don't.

5 Q Mr. Sheridan, was it the case that you were
6 asked to identify movements diverted in connection with
7 the trackage rights request from a pilot study before
8 you did the final opposition study so that you could be
9 certain that the final study supported the kind of
10 impacts that you talk about on page 3 of your
11 testimony?

12 A (WITNESS SHERIDAN) No, sir. I don't think
13 that. To my knowledge, we would not have adjusted
14 anything based upon that. I mean, like I say, again we
15 took our study, and what was there we made our decision
16 based upon the documents attached.

17 Q Had you conducted the opposition study that
18 we're discussing now on March 8 and 9, 1984? Had you
19 done it that early?

20 A (WITNESS SHERIDAN) Not the full study, no,
21 sir, just the pilot study.

22 Q Exactly. So it would not have required any
23 adjustment to the study to have identified these
24 movements in the pilot and then to have them in mind
25 when you conducted the study, would it? Since you

1 hadn't done the study, there was nothing to adjust, was
2 there?

3 A (WITNESS SHERIDAN) No, sir.

4 Q Other than your thinking.

5 MR. KHARASCH: If there is a nasty implication
6 in the words "other than your thinking" and there's no
7 answer from the witness saying that their thinking was
8 ever adjusted here.

9 JUDGE HOPKINS: He indicated there was nothing
10 nasty.

11 MR. MOATES: Absolutely. Nothing nasty at
12 all.

13 MR. KHARASCH: What we have is a comment from
14 counsel without a question. I think we ought to have
15 the witnesses state whether their thinking was ever
16 adjusted.

17 JUDGE HOPKINS: They may state it.

18 WITNESS SHERIDAN: No, sir. Our thinking was
19 not adjusted because of any study.

20 WITNESS DIMMERMAN: What this was was a
21 meeting to more or less have each individual appointed
22 to certain responsibility for certain things that had to
23 be done prior to our securing information for the
24 trackage rights or whatever.

25 BY MR. MOATES: (Resuming)

1 Q Mr. Dimmerman, since you volunteered that, do
2 you recall the reason that Mr. Sheridan was asked to
3 identify these movements?

4 A (WITNESS DIMMERMAN) I know that Jerry is very
5 meticulous and he writes a lot of notes. Maybe he won't
6 write so many after today. But, anyway, for example, I
7 know that my individual assignment was to interview
8 shippers and I did that, but I didn't make any notes,
9 and I didn't even remember that Jerry was to do this
10 here, and I'm not sure exactly what the connotation
11 means.

12 Q Not wanting to get Mr. Sheridan into any
13 trouble, we will move on.

14 Let's turn to page 5, at the top of the page.
15 You have the statement: "Admittedly the carrier who
16 actually switches the shipper has substantial influence
17 over that shipper's routing, as well as furnishing
18 better overall transit time, as compared with the
19 carrier who can serve that shipper (or consignee) only
20 by means of reciprocal switching."

21 Are you gentlemen saying that it is
22 appropriate to apply a high diversion probability to a
23 particular movement when the Southern Pacific or the
24 Santa Fe switches an industry, but a lesser percentage
25 when MKT performs the switching?

1 A (WITNESS DIMMERMAN) Could you state that
2 again, please? I just found the page. I was looking
3 for the fifth page in here.

4 Q Why don't you take a second and read that
5 sentence.

6 A (WITNESS DIMMERMAN) "Admittedly"?

7 Q Yes.

8 (Pause.)

9 Q Read the next sentence, too, because really my
10 question relates to those two statements.

11 (Pause.)

12 Q Are you telling us there in those two
13 sentences on the top of page 5 that when you looked in
14 your study at a movement and you found that the Southern
15 Pacific or the Santa Fe switched the industry that you
16 applied a higher diversion percentage than if the Katy
17 switched the industry? Is that what we get out of that
18 statement?

19 A (WITNESS SHERIDAN) I don't believe you can
20 take it in that context. That is part of what we had in
21 our mind when we looked at our documents, making
22 decisions. In other words, on this there is times it
23 did make a difference. There was times in which there
24 were other factors that were more -- that were stronger
25 things that happened.

1 As an example, where today -- like we reviewed
2 one earlier. It came off of a Santa Fe local point,
3 coming to a Katy industry. If you are the only single
4 line, you are going to be the carrier. So it's one of
5 the things when we looked at this that we kept in mind,
6 yes, sir.

7 Q Let's suppose we're talking about interline
8 movements.

9 A (WITNESS DIMMERMAN) Mr. Moates, let's go back
10 to it. Jerry did not identify the fact that we are
11 saying the shipper normally has more control over the
12 shipment than the consignee. That's what we're saying.
13 The consignor --

14 Q The consignor has more influence than the
15 consignee?

16 A (WITNESS DIMMERMAN) That's right. And as far
17 as do we have more or less, you'd have to look at each
18 individual movement, and one thing, for example, we have
19 not closed routes. We haven't had any indication that
20 we are going to close routes. And so the answer to that
21 could be yes, we could be more inclined to divert a
22 shipment that originated on the SPSF rather than the
23 MKT.

24 The movement that you enjoyed may be half of
25 it. We may leave you in it because of the fact that we

1 haven't closed any routes and you are in that movement
2 now. But as far as you're concerned, as far as SPSF,
3 you have shown that you are closing routes, and yes, we
4 have taken that into consideration. I believe we have
5 said so.

6 Q Thank you, Mr. Dimmerman.

7 How did you gentlemen treat contracts in your
8 study? If you came upon a particular movement that was
9 under a Staggers Act contract in the study year, the
10 backup documentation reflected that, did you deem that
11 movement to be divertable nonetheless?

12 Or, stating it differently, was contract
13 traffic treated as divertable or non-divertable?

14 A (WITNESS SHERIDAN) Contract traffic was
15 divertable traffic because in past experience we have
16 had some contracts where routes have been cancelled and,
17 therefore, the contracts were cancelled. So just
18 because there's a contract we did not feel that that was
19 justification for not diverting the movement, because
20 contracts have been cancelled because of route
21 cancellations.

22 A (WITNESS DIMMERMAN) They also have an
23 expiration date.

24 Q And did it make any difference to you whether
25 if a movement was a contract movement it was a Katy

1 contract movement as opposed to an SF or SP contract
2 move?

3 A (WITNESS DIMMERMAN) No, sir.

4 A (WITNESS SHERIDAN) No, sir.

5 Q Let me ask you a general question without
6 looking at a movement, just about your diversion logic,
7 a simple question. If in a particular movement the Katy
8 was in the route as an overhead carrier and either SP or
9 Santa Fe was also in the route, did that, did those
10 facts alone, without knowing anything else, did that
11 mean that there would be a diversion?

12 A (WITNESS SHERIDAN) Not based on just that
13 fact alone, no, sir. We would have to look at all of
14 the information available on the document to make a
15 decision.

16 Q What if -- would you want to know further, or
17 if I told you further that rather than just being in the
18 route that the Santa Fe or the Southern Pacific was the
19 originating carrier and you were the overhead carrier,
20 and again you knew nothing else about it, did that
21 result automatically in a diversion of some type?

22 A (WITNESS SHERIDAN) Here again on our
23 statements we looked at all of the information on each
24 movement, so really it wasn't any time that there was a
25 single factor like that.

1 Q There was never a time when there was a single
2 factor like that?

3 A (WITNESS SHERIDAN) Yes.

4 Q I think you gentlemen, one or both of you,
5 have already made reference to the fact that you did
6 testify in the Tucumcari and the Union Pacific cases.
7 You appeared as joint witnesses, as traffic evaluators,
8 did you not?

9 A (WITNESS DIMMERMAN) Yes, sir.

10 Q Do you recall that in the Tucumcari case,
11 Finance Docket 28799, that in the traffic diversion
12 study you conducted you used only two percentages of
13 diversion -- 100 percent or zero?

14 A (WITNESS DIMMERMAN) No, sir.

15 A (WITNESS SHERIDAN) I don't recollect.

16 Q You don't recall that? Do you recall the fact
17 that in the Union Pacific-Missouri Pacific case you used
18 three percentages -- 95, 25, and 10?

19 A (WITNESS SHERIDAN) I don't recall offhand.

20 Q Did you go back and review your prior studies
21 prior to undertaking your analysis in this case?

22 A (WITNESS DIMMERMAN) No, sir, but we are much
23 more experienced as far as divertable traffic.

24 Q Do you recall what the Commission found about
25 your diversion projections in the Tucumcari case? Did

1 they accept your projections?

2 A (WITNESS DIMMERMAN) Not 100 percent, no,
3 sir.

4 Q In fact, they found that you had overstated
5 your projected losses by some 40 percent, didn't they?

6 A (WITNESS DIMMERMAN) I would be willing to
7 look at those, the cars that were diverted. Just for an
8 example, in both the BN and the UP case, in that
9 succession, the Burlington Northern was the largest
10 deliverer of grain to the MKT at Kansas City prior to
11 their merger, the Union Pacific, prior to their merger,
12 and now they are so far down the line on delivery of
13 competitive traffic that it's almost meaningless.

14 They went from our number one connection in
15 each case to maybe seven or eight.

16 Q And in the Union Pacific-Missouri Pacific
17 merger case, Mr. Dimmerman and Mr. Sheridan, the
18 Commission found that you had overstated your projected
19 losses by at least 20 percent, did they not --
20 specifically that you had estimated a \$23.5 million
21 diversion, which the Commission found would not exceed
22 \$18.8 million?

23 A (WITNESS DIMMERMAN) I don't recall the
24 number.

25 A (WITNESS SHERIDAN) I don't recall the

1 number.

2 Q Did you gentlemen make any effort to review
3 the ICC criticisms of your study submitted in the Union
4 Pacific-Missouri Pacific merger case prior to
5 undertaking this study?

6 A (WITNESS SHERIDAN) I had read it.

7 A (WITNESS DIMMERMAN) I believe Mr. Poper
8 discussed it with us prior, but I just can't recall the
9 exact.

10 Q Did you in fact -- and either one of you can
11 tell me this -- did you in fact change any of your
12 percentages of diversion, any of your methodology, or
13 any of your logic in response to the Commission
14 criticisms in the Union Pacific case?

15 A (WITNESS SHERIDAN) Did we go back and change
16 anything?

17 Q Yes. Did you go back and readjust anything?

18 A (WITNESS DIMMERMAN) No, sir.

19 A (WITNESS SHERIDAN) No, sir.

20 MR. KHARASCH: Excuse me. I don't think the
21 question and answer are very clear. The question was
22 whether they went back and changed a Union Pacific
23 diversion study or whether they changed their procedures
24 in this case because of what the Commission said?

25 JUDGE HOPKINS: The latter, I believe.

1 WITNESS DIMMERMAN: My answer, the way I took
2 it to mean, did we go back and change after I had my
3 conversation with Roper. I had my conversation with
4 Roper before the diversion study.

5 JUDGE HOPKINS: Let Mr. Moates ask the
6 question again.

7 BY MR. MOATES: (Resuming)

8 Q My question, gentlemen, was when you went
9 back, if you went back and reviewed the ICC criticisms
10 of your study in the Union Pacific case did that cause
11 you to alter any of your percentages of diversion or any
12 of your methodology or logic that you applied to this
13 study -- not did you go back and rejudge the UP
14 diversions, but did it cause you to do something
15 differently in this study.

16 A (WITNESS DIMMERMAN) No, sir.

17 MR. MOATES: Your Honor, I'd like to have
18 identified as Counsel's Exhibit 38 a six-page document
19 produced in the work papers of Messrs. Sheridan and
20 Dimmerman. I will note for the record it is a
21 memorandum from Mr. Roper to Mr. Crawford in the Katy
22 Law Department dated December 29, 1983.

23 JUDGE HOPKINS: It will be marked for
24 identification.

25 (The document referred to

1 was marked Exhibit Number
2 SFSP-C-38 for
3 identification.)

4 BY MR. MOATES: (Resuming)

5 Q Mr. Sheridan, do you have a copy of this
6 document?

7 A (WITNESS SHERIDAN) Yes.

8 Q Are those your initials in the upper righthand
9 corner?

10 A (WITNESS SHERIDAN) Yes, sir.

11 Q What are your initials, JWS?

12 A (WITNESS SHERIDAN) JM.

13 Q JMS copy; is that what it says? JMS copy?

14 A (WITNESS SHERIDAN) Yes.

15 Q Do you recall reviewing this memorandum?

16 A (WITNESS SHERIDAN) Yes, I said I had read
17 it.

18 Q This is the one you had reference to?

19 A (WITNESS SHERIDAN) Yes.

20 Q In particular, if you turn to page 3 of the
21 memo there's a part 2 that is headed ICC Criticism of
22 MKT Traffic Study. Do you see that?

23 A (WITNESS SHERIDAN) Yes.

24 Q Have I lost you gentlemen?

25 A (WITNESS DIMMERMAN) I am with you. Page 3.

1 Q Do you see it?

2 A (WITNESS SHERIDAN) Yes.

3 Q Mr. Dimmerman, did you review this
4 memorandum?

5 A (WITNESS DIMMERMAN) Like I told you, I
6 discussed it with Mike Roper way back probably when it
7 was written. That's all my recollection.

8 Q Okay. It was written on December 29, 1983.
9 Was that before you had initiated any of the studies in
10 this case?

11 A (WITNESS SHERIDAN) I believe this was prior
12 to the study, the best I can recollect.

13 Q We have established, haven't we, that it's
14 certainly well before you undertook the final study that
15 was submitted in MKT-27?

16 A (WITNESS SHERIDAN) Yes.

17 Q Now did you two gentlemen discuss Mr. Roper's
18 memorandum with each other?

19 A (WITNESS DIMMERMAN) I don't recall. We may
20 have, but I don't recall.

21 Q Let me draw your attention to a couple of
22 particular paragraphs in this memorandum. The section I
23 am drawing attention to starts Part 2, ICC Criticism of
24 MKT Traffic Studies. In particular, if you turn first
25 to page 4, the next page, look at Mr. Roper's paragraph

1 number 5.

2 It says: "The next category of traffic
3 involved, forwarded traffic moving in MKT equipment,
4 again the ICC stated that MKT would continue to handle
5 the movement because it furnished the equipment." I
6 probably should have said "preliminarily", in fact, let
7 me say "preliminarily" and pardon me, that these pages,
8 the bottom of 3, page 4, and page 5, Mr. Roper goes
9 through and summarizes, does he not, the ICC criticisms
10 of your traffic diversion study in the Union Pacific
11 case?

12 A (WITNESS SHERIDAN) Yes.

13 Q Category by category of movement?

14 A (WITNESS DIMMERMAN) Yes, sir. But the world
15 changed. Even though some of these, certain examples I
16 can cite as we go through it, where traffic has been
17 diverted, is about to be diverted, and even though the
18 Commission made a decision at that time because there
19 were different factors involved when they made their
20 decision, that are prevalent now.

21 Q Okay. Apropos of that, Mr. Dimmerman, turn to
22 page 5 of this memorandum. The second full paragraph
23 reads as follows: "These, then, are the basic
24 objections the ICC had to our traffic study which was
25 presented in the UP-MP case. In preparing for the

1 ATSF-SP merger case we need to decide whether to
2 continue to hold to our position with regard to these
3 diversions or whether we should now accept the ICC's
4 judgment. It appears to me that unless we can come up
5 with some new and convincing arguments with regard to
6 these types of diversions then it is very unlikely the
7 ICC would accept them in the ATSF-SP merger case."

8 Are you suggesting to me in that last comment
9 that you volunteered that you have some new and
10 convincing arguments about these movements that you
11 applied to this study?

12 A (WITNESS DIMMERMAN) Yes, sir.

13 Q Where are those new and convincing arguments?

14 A (WITNESS DIMMERMAN) I just glanced through
15 it, but I see, for example, on the soda ash, soda ash is
16 one of the movements to Waco, Texas, and I have already
17 been informed by the consignee that we are out of that
18 traffic as soon as the contract expires. The only way
19 we held on was through a contract, but I have been told
20 that we are going to lose the movement into Waco, Texas,
21 a plant that the Katy has served for many, many years.

22 Q Did you divert any soda ash in this study?

23 A (WITNESS DIMMERMAN) In some cases, yes.

24 Q In this opposition study?

25 A (WITNESS DIMMERMAN) In this case here, no.

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1 I'm talking about the UP/MOP case.

2 Q I'm talking about this case. Did you divert
3 any code ash in this case?

4 A (WITNESS DIMMERMAN) No.

5 Q Let's talk about something you did divert.

6 A (WITNESS DIMMERMAN) I just wanted to tell you
7 how the world had changed.

8 Q I understand.

9 MR. MOATES: Your Honor, can I have marked for
10 identification as Counsel's Exhibit C-39 a nine-page
11 exhibit?

12 JUDGE HOPKINS: It will be marked for
13 identification.

14 (The document referred to
15 was marked Exhibit Number
16 SFSP-C-39 for
17 identification.)

18 BY MR. MOATES: (Resuming)

19 Q The first page of the exhibit is Katy Movement
20 Sheet from Strata FSX, page 0049 for identification. If
21 you gentlemen would just look at the first page, that's
22 all I want to ask you about at this time. Take a moment
23 to familiarize yourselves with it, if you want to. I'm
24 just going to ask you something simple.

25 (Pause.)

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1 Q Mr. Sheridan, what is a forwarded movement?
2 Just define it for me.

3 A (WITNESS SHERIDAN) A forwarded movement?
4 That's a movement that originated at a point and is
5 forwarded by that railroad.

6 Q Is this movement that we're looking at on page
7 49 an interline forwarded movement originated by the
8 OKT?

9 A (WITNESS SHERIDAN) Yes.

10 Q And did it move in an MKT car?

11 A (WITNESS SHERIDAN) Yes, sir.

12 Q Looking again at Mr. Roper's memorandum,
13 category 5 of the ICC criticism, isn't this exactly the
14 type of category of diversion that he told you there the
15 Commission had rejected?

16 A (WITNESS SHERIDAN) The thing about it is we
17 are talking about two completely different cases at two
18 completely different times. In other words, I do not
19 see where that statement applies to this movement.

20 Q Doesn't that paragraph 5 of Mr. Roper's memo
21 talk in generic terms about traffic that is forwarded
22 traffic moving in MKT equipment? That's all it says.

23 A (WITNESS SHERIDAN) Yes.

24 Q That's all that the ICC decision discussed in
25 that respect, isn't it?

1 A (WITNESS SHERIDAN) Yes. Do we want to go
2 back and discuss that case, or what we did in this
3 case?

4 Q We are going to discuss this case and the fact
5 that you diverted this car, which is the same type that
6 you diverted in the Union Pacific, and I want to know
7 what new and convincing arguments you have with respect
8 to this car that causes you to feel that it is 100
9 percent divertable in this case.

10 A (WITNESS SHERIDAN) As far as we're concerned,
11 it is our judgment in this case is, number one, we are
12 not going to have a route after the merger. Now if we
13 have no route, what difference does it make whose car
14 this is in? We will have no route.

15 Q So, to be very clear on this, the premise for
16 your diversion here and your new and convincing argument
17 is that the route will be cancelled and you simply won't
18 be able to participate in the traffic?

19 MR. KHARASCH: I object to the questions being
20 asked in terms of "new and convincing" argument. It's
21 all right to ask the witness what is the premise for the
22 diversion or the reason for the diversion.

23 JUDGE HOPKINS: I think that is a reasonable
24 request.

25 MR. MOATES: I will honor that request.

1 BY MR. MOATES: (Resuming)

2 Q The reason for your diversion of this car is
3 that you assume that the SP&SF railroad would close the
4 joint route with the Katy; is that right? That's the
5 reason?

6 A (WITNESS SHERIDAN) One of the reasons, yes.

7 Q What are the other reasons?

8 A (WITNESS SHERIDAN) On this, like I say, the
9 SP is in the route today -- Cotton Belt-SP -- and we
10 will not have any way to get to Fresno. And so I guess
11 the major reason is a single line route for the
12 applicants, and we're certainly not going to again have
13 a route, as far as we are concerned.

14 Q Do you recall the ICC dealing with that exact
15 same reason when it dealt with your movements that were
16 interline forwarded movement in MKT equipment in the
17 Union Pacific case? Isn't that exactly what you said
18 there and exactly what they rejected?

19 A (WITNESS SHERIDAN) Again I think we are
20 dealing with an entirely different case. I don't think
21 that applies today.

22 Q Would you look at the next page of this
23 exhibit? We won't go through each one of these pages.
24 I will simply represent to you that they are all the
25 same type in this sense. I represent to you that each

1 of these movements in this exhibit is an interline
2 forwarded movement from an OKT or MKT station, moving in
3 an OKT or MKT car.

4 Can you confirm that simple fact for me? In
5 other words, it just originated at a Katy station and
6 moves in a Katy car.

7 A (WITNESS SHERIDAN) Each one?

8 Q Each one.

9 (Pause.)

10 A (WITNESS SHERIDAN) Each one moved in a Katy
11 car, yes.

12 Q From a Katy point?

13 A (WITNESS SHERIDAN) Yes. But here again, due
14 to the past experience we have had with route closures
15 from the applicants we certainly do not feel we would
16 have a route and, therefore, I do not find where that
17 equipment-furnishing factor would have the bearing you
18 are claiming in number 5.

19 Q So again you believe you would not have a
20 route and for that reason this would be 100 percent
21 diversion?

22 A (WITNESS DIMMERMAN) We know we won't have a
23 route.

24 Q Do you have a piece of correspondence from Mr.
25 Fitzgerald that tells you you won't have a route?

1 A (WITNESS DIMMERMAN) Everything has been done
2 by the Santa Fe and the SP regarding single line routes
3 or overhead routes where they can cut out another
4 railroad, especially the MKT. It has been done. There
5 is no way that they will leave our route in here.

6 As far as the equipment is concerned, the
7 covered hopper type equipment, it is in surplus. Every
8 railroad in the country has made deals in the last three
9 years on getting equipment. Every railroad has a
10 surplus.

11 Although we have the opportunity to furnish
12 the car at origin, it has nothing to do with the control
13 of the route. In fact, in cases if they want to furnish
14 their own car they can even do so. It is -- the
15 equipment has nothing to do with it. The equipment is
16 surplus.

17 There are times that we are furnishing
18 equipment at Enid, Oklahoma for Santa Fe movement simply
19 because we want to get our equipment moving, and Mr.
20 Todd can testify to that.

21 Q By the way, look at page 66, if you would. I
22 think that's the third one. Or you could look at 67,
23 whichever one. Does one of you have it?

24 A (WITNESS SHERIDAN) Yes.

25 Q Isn't it true that that movement could have

1 moved, in the year that you studied it, on the Union
2 Pacific system? UP serves the origin and the MoPac
3 serves the destination, doesn't it?

4 A (WITNESS SHERIDAN) I'm sure they were
5 handling some traffic like this, but they didn't handle
6 this particular movement.

7 Q But there was a single system service
8 available at that time?

9 A (WITNESS SHERIDAN) Yes, sir.

10 Q Now would you look at Mr. Roper's memorandum
11 again, please -- category 6, the next one. "The next
12 category of forwarded traffic involved traffic
13 originating at points served by MKT but open to
14 reciprocal switching. The ICC concluded that since MKT
15 switched the consignor it would have influence over the
16 routing of these movements and would continue to exert
17 enough influence to remain in the routing."

18 MR. MOATES: Your Honor, could I have marked a
19 six-page Counsel's Exhibit as Counsel Exhibit C-40?

20 JUDGE HOPKINS: It will be marked for
21 identification.

22 (The document referred to
23 was marked Exhibit Number
24 SFSP-C-40 for
25 identification.)

1 BY MR. MOATES: (Resuming)

2 Q The first page is from Kelly strata OSX. I
3 guess that's OKT strata OSX, page 0051.

4 Mr. Sheridan, do you have in front of you page
5 0051?

6 A (WITNESS SHERIDAN) Yes.

7 Q Can you confirm for me that that represents a
8 movement of traffic that originated at a point served by
9 the OKT, which is open to reciprocal switching?

10 A (WITNESS SHERIDAN) Yes.

11 Q And we didn't do this before. We should for
12 clarity. The OKT is operated as a complete part of the
13 MKT system, is it not?

14 A (WITNESS SHERIDAN) Yes, sir.

15 Q So, just to save time, if we see OKT in a
16 route instead of MKT, it really doesn't mean anything,
17 does it, other than it is part of the MKT system?

18 A (WITNESS SHERIDAN) It is part of the system.

19 A (WITNESS DIMMERMAN) It may mean something
20 because we have routing at Ft. Worth with other
21 carriers, so it is not necessarily a single line route.
22 I mean, it could be, for example, OKT-Santa Fe or
23 OKT-SP, even though the MKT could share in the route.

24 Q I understand that. Very quickly, Mr.
25 Sheridan, would you confirm that the next two pages,

1 page 52 and then SFX 75, also represent shipments
2 originated by the OKT at a station which is switched by
3 the OKT but is open via the reciprocal switching to
4 other carriers?

5 A (WITNESS SHERIDAN) Yes.

6 Q By the way, number 75, which is the car from
7 Wichita, Kansas, to San Leandro, California, do you have
8 that one in front of you?

9 A (WITNESS SHERIDAN) Yes.

10 Q That shipment also could have moved in the
11 study year via the Union Pacific system direct, could it
12 not, since the consignor and the consignee were both
13 served by the Union Pacific system?

14 A (WITNESS DIMMERMAN) That's one of the reasons
15 that we diverted it 100 percent. It could have moved by
16 the UP, but it didn't. The SP was in the route.

17 Q Somehow the logic of that escapes me. You
18 diverted it 100 percent --

19 A (WITNESS DIMMERMAN) I'm saying the fact that
20 the UP is in the route only as far as Ogden and the SP
21 actually delivered the car where the UP could have
22 handled it all the way shows that there was SP control,
23 just like in the first two cases. They are going to
24 local points on the SP and there is no way we would have
25 a route with those first two.

1 This other one here, if we had a route, we
2 would never be able to enjoy the movement.

3 Q Notwithstanding the fact that you originated
4 it and moved it in an OKT car?

5 A (WITNESS DIMMERMAN) That has nothing to do
6 with it whatsoever. It's just a common boxcar. There
7 is so much of a surplus on boxcars the railroads are
8 cutting them up all over the nation.

9 JUDGE HOPKINS: We will recess now until 9:00
10 tomorrow morning.

11 (Whereupon, at 6:00 o'clock p.m., the hearing
12 recessed, to reconvene at 9:00 o'clock a.m., Wednesday,
13 January 9, 1985.)

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