

FD 30409 - 1/17/85 - Pages - 7748 - 7806

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 :

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Hearing Room A  
12th & Constitution, N.W.  
Washington, D.C.  
Thursday, January 17, 1985

The hearing in the above-entitled matter was  
convened, pursuant to notice, at 9:01 a.m.

BEFORE:

JAMES E. HOPKINS,  
Administrative Law Judge

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## 1 APPEARANCES:

2 (As heretofore noted with the following  
3 addition)

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C O N T E N T S

	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1					
2	<u>WITNESS</u>				
3	William G. Shepherd				
	(By Mr. Livingston)	7750			
4	(By Mr. Martin)		7751		
5	Jerry R. Davis				
	(By Mr. Roach)	7804			
6	(By Mr. Stephenson)		7805		
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8	Jerry R. Davis (Resumed)				
	(By Mr. Stephenson)		7585		
9	(By Mr. Birney)		7921		
	(By Mr. Roach)			7951	
10	(By Mr. Stephenson)				7954
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## P R O C E E D I N G S

1  
2 JUDGE HOPKINS: Let's get back on the record.

3 Mr. Roach?

4 MR. ROACH: Mr. Livingston?

5 MR. LIVINGSTON: Your Honor, UP/MP calls  
6 William G. Shepherd.

7 Whereupon,

8 WILLIAM G. SHEPHERD

9 was called as a witness, and having been first duly  
10 sworn, took the stand, and was examined and testified as  
11 follows:

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

12  
13 BY MR. LIVINGSTON:

14 Q Would you state your name?

15 A William G. Shepherd.

16 Q And could you state your position?

17 A I am visiting professor of economics at the  
18 University of Massachusetts this year. Otherwise,  
19 professecr of economics at the University of Michican,  
20 Ann Arbor, Michigan.

21 Q I have placed in front of you a 28-page  
22 document with an 8-page attachment entitled Verified  
23 Statement of William G. Shepherd, which was filed in  
24 this case as part of UP/MP-26.

25 Is that your verified statement?

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1 A Yes, indeed.

2 Q Do you have any corrections or additions to  
3 make to it?

4 A No.

5 Q Is it true and correct to the best of your  
6 knowledge and belief?

7 A Yes.

8 MR. LIVINGSTON: Your Honor, I offer the  
9 witness.

10 JUDGE HOPKINS: Mr. Martin?

11 CROSS EXAMINATION

12 BY MR. MARTIN:

13 Q Professor Shepherd, my name is Eden Martin. I  
14 am one of the attorneys for the applicants.

15 A Good morning.

16 Q I would like to ask you first about your use  
17 of the term "market power," and I guess one place to  
18 start is Page 2, where you use the term about four or  
19 five lines down, and you use it elsewhere through the  
20 verified statement.

21 This -- actually, you use it there, but let me  
22 ask you about the sentence that starts at the bottom of  
23 that page, where you say, "A primary policy objective  
24 should be to preserve effective competition by  
25 preventing mergers which add significantly to market

1 power."

2 Is it fair to say that in a purely competitive  
3 or effectively competitive market, prices equal  
4 incremental costs?

5 A They are usually brought close to that or  
6 exactly that.

7 Q And those incremental costs would include the  
8 cost of capital?

9 A Yes.

10 Q And that cost of capital would be determined  
11 in relation to the returns available elsewhere in the  
12 market on investments of approximately equal risk?

13 A Yes.

14 Q Okay. Now, at Page 7, toward the top of the  
15 page, you say, "At the extreme, where a firm has a  
16 market share at or near 100 percent, it will be able to  
17 exert market power by raising prices and controlling  
18 innovation."

19 When you say raising prices, I take it you  
20 mean raising prices above the incremental cost floor.

21 A That's correct.

22 Q So I take it then that market power is the  
23 ability to charge prices in excess of cost?

24 A And to control other elements in the market,  
25 yes. And by incremental cost, we mean long-run

1 incremental cost.

2 Q Okay. But the ability to charge prices in  
3 excess of long-run incremental cost in addition to the  
4 other factors that you specified really is a way of  
5 defining the existence of market power?

6 A It is a major effect of market power. The  
7 existence of the market power itself is usually judged  
8 by other facts also, including the market position of  
9 the firm.

10 Q Would you say that the more market power one  
11 has, the greater the excess profits over the incremental  
12 cost floor?

13 A The greater the excess of price?

14 Q The greater the profit, I suppose is a better  
15 way of putting it. The greater the market power, the  
16 greater the profit?

17 A Well, now you are shifting to profits. It is  
18 true that both profits and price-cost ratios usually are  
19 related to market power, but it is usually wise to keep  
20 the two separate.

21 Q I apologize. I probably asked the question  
22 using the wrong term. Let me ask it this way.

23 Is it fair to say that the greater the degree  
24 of market power, the higher the price-cost ratio?

25 A That is one indicator, yes.



1 Q And at some point, market power would enable a  
2 firm to produce supracompetitive profits, profits  
3 greater than the cost of capital. Is that not so?

4 A Yes, I wouldn't say so much at some point, but  
5 just the profitability rises as the market power rises.

6 Q But is it not true that at some point there  
7 will be enough market power or so much market power that  
8 a firm will be able to earn profits that exceed a  
9 competitive level of profit?

10 A I agree with that sentence except for the  
11 phrase, "at some point." As I indicate, and as the  
12 research in the field indicates, it is a matter of  
13 gradation, so that one would not expect an abrupt rise  
14 at one point from competitive prices to monopoly  
15 prices.

16 I am not sure this is an important distinction  
17 in this context.

18 Q It may not be. Let me ask it in a slightly  
19 different way. It is true, is it not, that the  
20 existence of some market power, let us say some small  
21 degree of market power, will not necessarily lead to  
22 monopoly profits?

23 A I think that could be correct, yes.

24 Q Now, at Page 7, in the second full paragraph,  
25 you make the statement that market power reduces

1 economic performance in several ways. One way is to  
2 distort resource allocation. Do you see that  
3 statement?

4 A Yes.

5 Q Does the exercise of market power always  
6 distort resource allocation?

7 A In an economy where other markets are  
8 competitive, then monopoly in any one of them will  
9 distort allocation away from efficient patterns. If  
10 there are high degrees of monopoly, or some other  
11 interference in other markets, then some monopoly power  
12 in Market A could be consistent with less distortion.  
13 That is the so-called problem of the second best.

14 Q Now, you answered my question in terms of  
15 monopoly power. You were very careful to do so. I want  
16 to be equally careful in asking a slightly different  
17 question with respect not to monopoly power but to  
18 market power, because I believe you earlier indicated  
19 that it would be possible for some market power to exist  
20 without producing monopoly profits. Let me ask you then  
21 about market power.

22 Does the exercise of some degree of market  
23 power always distort resource allocation?

24 A Actually, the distinction you just made is not  
25 one that I would ordinarily recognize. I find in the

1 literature and in my own usage the two terms "market  
2 power" and "monopoly power" can be used interchangeably.

3 Q But you did acknowledge that the existence of  
4 some degree of market power might not produce monopoly  
5 profits, did you not?

6 A Well, you were pressing me to consider whether  
7 in some unusual possibilities that might be true, but  
8 the phraseology was yours, not mine.

9 Q Well, I was trying to use terms that you have  
10 used and that are not unfamiliar to distinguished  
11 economists, and I come back to the question, is it not  
12 the case that the existence of some small degree of  
13 market power may not yield monopoly profits or  
14 supercompetitive profits?

15 A Well, I think you are lousy chopping here. I  
16 think I did answer that in the affirmative, that that  
17 might happen. That is not, of course, the mainstream  
18 case we are concerned with here, nor usually in the  
19 research literature.

20 Q You are, I am sure, familiar from your  
21 articles with the railroads' policies of a practice  
22 known as differential pricing, sometimes referred to or  
23 in one of its forms as Ramsey pricing.

24 You are no doubt aware that the railroad  
25 industry, including the Union Pacific, has defended that

1 practice, are you not?

2 A Well, differential pricing is another term for  
3 price discrimination, value of service pricing, charging  
4 what the traffic will bear, other long-established  
5 patterns in this and other utility sectors and in other  
6 sectors outside utilities. Yes, I am familiar with  
7 that.

8 Q And does differential pricing or Ramsey  
9 pricing not involve charging higher revenue to cost or  
10 price to cost ratios where demand elasticities will  
11 permit up to a point of producing monopoly profits?

12 A Yes. You used the phrase "Ramsey pricing." I  
13 would use price discrimination instead. But the answer  
14 is yes.

15 Q It is called price discrimination. Maybe it  
16 carries a little more invidious connotation. Price  
17 discrimination inherently involves the ability to  
18 differentiate based on differences in demand elasticity,  
19 does it not?

20 A Yes.

21 Q And does it not, as you use the term, involve  
22 some exercise of market power?

23 A Well, it certainly involves differences in  
24 elasticity of demand. Now, yes, I guess it involves  
25 some degree of monopoly power or market power in those

1 products where you are charging the highest ratios,  
2 yes.

3 Q Well, suppose -- take a case where you are not  
4 charging the highest ratios, where you are charging a  
5 relatively low ratio, but the price to some extent  
6 exceeds the cost.

7 In that case, would you not agree that the  
8 exercise of market power is not a bad thing, does not  
9 produce inefficient allocation of resources?

10 A I think the context you are suggesting is a  
11 utility that can't make enough total profits unless it  
12 is able to charge in a discriminatory manner, and that  
13 has long been recognized as a possible case, and I would  
14 agree that it is a possible case.

15 Q In that possible case -- well, is not the  
16 railroad industry one of those cases?

17 A It is not clear that the sector as a whole nor  
18 any one of the railroads that may exist is always in  
19 that position. A railroad or any utility whose total  
20 capacity is at least roughly in line with its total  
21 demand will be able to charge essentially at cost rather  
22 than on a discriminatory basis, and cover its total  
23 cost.

24 Q You then don't agree that the existence of  
25 fixed costs, unallocable joint costs, economies of scale

1 and scope require a railroad to differentiate price in  
2 order to recover all of its cost?

3 A It may.

4 Q Now, let's take a case where it does. In that  
5 case, is not the exercise of some degree of market power  
6 therefore essential to the long-term viability of that  
7 railroad?

8 A The case you are suggesting I usually equate  
9 with having excess capacity in the current period, which  
10 means that marginal cost is below average cost for a  
11 substantial number of outputs, and therefore you must  
12 make up the difference somehow, but this is usually a  
13 transitional condition in the U.S.

14 Recently it has been found most commonly in  
15 the eastern railroads rather than the western ones, and  
16 so I couldn't make any blanket statement that in  
17 railroads generally or in particular railroads this is  
18 necessary.

19 But I think the more general point you are  
20 driving at is, whether market power will always have  
21 some justification in railroads as a way of covering  
22 total costs, and my answer to that would be, yes, it  
23 can, but it is not always the case.

24 Q It can be the case sometimes but isn't  
25 always?

1           A       That's right. That would be a factual matter  
2 to be established that because the railroad is so  
3 severely out of alignment in its capacity and its demand  
4 that it has to engage in substantial differential  
5 pricing so as to cover its costs.

6           These things are well covered in Fred Cohn's  
7 books and mainstream literature in utility pricing.

8           Q       You posit a case in your answer where long-run  
9 incremental costs are below average costs because of  
10 excess capacity. I want to ask you this. Is it not  
11 true that in the railroad industry long-run incremental  
12 cost may be below average cost even where there is no  
13 excess capacity?

14          A       Could you sharpen that question? Do you mean  
15 for all outputs, or for some?

16          Q       For some or all. Let me ask it this way. I  
17 will come back to the same question, with a slightly  
18 different windup.

19                 In light of the existence of fixed cost and  
20 unallocable joint cost and economies of scope and scale,  
21 is it not possible for a railroad's long-run incremental  
22 cost to be below its average cost even where there is no  
23 excess capacity?

24          A       Well, you are putting the question in the  
25 singular, that is, as if there is only one output rather

1 than many. The answer there is no. It would be only  
2 when capacity is excess that for the single output its  
3 marginal cost would be below average cost and therefore  
4 some kind of price-cost margin would be necessary to  
5 cover the total cost.

6 As soon as we move to the multi-product case,  
7 which is, of course, what we have here in railroads, a  
8 high degree of multi-products, then it becomes a matter  
9 of balancing between the outputs for which marginal cost  
10 may be above average cost and those for which it is  
11 below.

12 And that is eminently a factual matter which  
13 I, by the way, haven't seen addressed very thoroughly in  
14 this case.

15 Q Let me come to the multi-product case then.  
16 Are you saying that in the multi-product case, that  
17 differential pricing may be justified even where there  
18 is no excess capacity?

19 A Well, it is not -- you are pressing me to make  
20 an assumption I am not sure is realistic, that is, that  
21 when there are many products, you can still have or  
22 assume that all of them operate in an excess capacity  
23 situation.

24 In fact, virtually all utilities have  
25 fluctuations in demand, and at peak times costs are



1 above, marginal costs are above average costs, and so  
2 you see for some outputs, the peak outputs, there is no  
3 excess capacity. For off-peak outputs there is excess  
4 capacity in a sense, and it is the balance between those  
5 kinds that will determine whether the utility can set  
6 prices at cost throughout a fan of prices at cost which  
7 still generate enough total revenue.

8 Q One point I am still not clear on. And you  
9 may already have answered it. Are you saying that there  
10 is no case in which there is no excess capacity in which  
11 a railroad would be justified in engaging in  
12 differential pricing?

13 A No, I am certainly not saying that. That  
14 would -- I would expect that many cases do involve a  
15 balance of revenues, a balance of demands and costs in  
16 which for the short run there is excess capacity on the  
17 whole.

18 Q All right, and in those cases, then, where  
19 differential pricing would be justified in an economic  
20 sense, would that not inherently involve the exercise of  
21 some degree of market power?

22 A Yes, but you recognize this is a short-run  
23 transitional problem arising because the railroad has  
24 too much capacity on balance among its various outputs.  
25 The short and long run have been discussed by other

1 witnesses, and it has been made clear that, as in this  
2 case, where a permanent change in structure by a merger  
3 may be happening, it is not wise to let that happen if  
4 that imposes social cost for short-run reasons.

5 If the problem of the deficit arises because  
6 there is too much capacity, then the need is to whittle  
7 down the capacity, not to do a merger.

8 Q You are saying that putting excess capacity to  
9 one side, taking a case in which a railroad has no or  
10 virtually no excess capacity, then in the long run your  
11 position is that differential pricing and the exercise  
12 of any degree of market power produce economic  
13 inefficiencies and are therefore a bad thing?

14 Is that a fair statement?

15 A I don't think I either follow or agree with  
16 that.

17 Q I think this is very important. Otherwise I  
18 wouldn't press for clarification. Let's take a case  
19 where there is no excess capacity or virtually no excess  
20 capacity, so we take that justification for differential  
21 pricing out of the case. We assume a railroad is  
22 pricing efficiently, using its resources efficiently.

23 Are you then saying that for that railroad  
24 over the long-term differential pricing is not  
25 justifiable?

1           A       I would expect a well-adjusted railroad for  
2 which it seems likely -- we have examples here in this  
3 case -- would be able to set prices in line with costs  
4 rather than differential price-cost ratios and cover its  
5 costs.

6           Q       So the premise of your analysis of market  
7 power and that market power is a bad thing is that a  
8 railroad can recover all of its costs by pricing at  
9 incremental costs, and that it will not need to price in  
10 excess of that level?

11          A       Well, not in a wholesale way. That would not  
12 be its central method. There might be some degree of  
13 differential pricing on some outputs, but as I said ten  
14 minutes ago, this is a factual matter that would require  
15 study of the degree of excess or inadequate capacity,  
16 the outputs on which there is elastic or inelastic  
17 demands and the shortfall in revenues that might occur  
18 if differential pricing were not permitted.

19          Q       Now, let's take a case where there is no  
20 excess capacity. You say that differential pricing  
21 wouldn't be justified in a wholesale way, but it might  
22 be justified in particular cases, I suppose, in a  
23 non-wholesale way. What would justify in your judgment  
24 the exercise of differential pricing, assuming that  
25 there is no excess capacity?

1           A       Well, I didn't mean by admitting that some  
2 looseness might occur in pricing to indicate a  
3 fundamental difference in concept. I was simply  
4 reflecting my understanding of the mainstream  
5 literature, which is that there has been a lot of  
6 looseness in the controls over pricing, and that one  
7 must expect some degree of price discrimination.

8                    Much of it is harmless, but some of it can be  
9 sharply distorted, and the effort, the regulatory effort  
10 has always been to abate the worst instances without  
11 yielding to the fundamental shift to permitting it as  
12 the basis for pricing.

13           Q       Let me now ask you not a fact question but a  
14 logic question or an economic reasoning question.

15                    If it is the case that an efficient railroad's  
16 incremental cost of service will be below its average  
17 cost because of the existence of fixed cost, unallocable  
18 joint costs, or economies of scale, if that were  
19 factually the case, then would not differential pricing  
20 be necessary in order to recover total costs?

21           A       Now, let me make sure I understand your  
22 premise correctly. This is the case of the deficit with  
23 some --

24           Q       I asked you to assume a case factually in  
25 which there is no excess capacity, the railroad is

1 operating efficiently, but its long-run incremental  
2 costs are below its average costs because of the  
3 existence of fixed costs, economies of scale and  
4 scope.

5 In that case, if that is the case as a matter  
6 of fact, would it not be necessary to engage in  
7 differential pricing in order to recover total costs?

8 A Well, I find the assumption implausible, that  
9 is, that you can be at full capacity operations on  
10 balance and yet have deficits pending because marginal  
11 costs are below average costs, but I am aware that there  
12 are some who think that that can occur, and in fact the  
13 Baumol group as a whole tend to equate utilities, any  
14 utility with that situation.

15 Now, you have seen this morning that I don't  
16 think that that is in fact the correct basis. It may  
17 occur, but on the whole I would not expect it to occur.  
18 But of course I have considered this over the last 25  
19 years from time to time in my research and reading of  
20 the literature.

21 And even if we adopt their assumption, it is  
22 still a factual matter, that is, how extensive the price  
23 discrimination should be permitted to be, and it still  
24 would not be left to the railroads themselves to decide  
25 that, because they might well in fact normally be able

1 to overprice, to set ratios of price to cost that are  
2 too high, so that they earn heavily excess profits, so  
3 the need to regulate and to limit the price  
4 discrimination to an efficient level would still exist.

5 Q So you think that -- you point out it would be  
6 up to the Commission to review that.

7 A And try its best, if possible, which at some  
8 periods has not turned out to be possible.

9 Q But the Commission's function in that exercise  
10 would be to make sure that differential pricing was not  
11 exercised in such an extreme manner as to produce excess  
12 profits either in the total railroad or any segment of  
13 its business? Is that a fair statement?

14 A Well, yes, I think that would be the  
15 ambition. The Commission would also need to assure that  
16 costs were kept to their minimum levels in each  
17 dimension. Otherwise, the firm would raise its prices  
18 too much, let some of that excess revenue be soaked up  
19 in excess cost, seem to be just barely covering its  
20 costs, when in fact it was engaging in widespread  
21 monopoly pricing.

22 Q Following up on that, take the case where the  
23 Commission is doing its job in, I think, two ways that  
24 you expect, one, making sure that the railroads are  
25 holding their cost down to the minimum level as

1 efficiently as possible, and two, that any exercise of  
2 differential pricing is not being permitted to produce  
3 monopoly profits either in total or in part.

4 In that case, would you not agree that  
5 differential pricing within those limits is an  
6 appropriate way for a railroad to seek to recover its  
7 total cost?

8 Well, you have set a very debatable model,  
9 perfect regulation, which in fact would virtually need  
10 to duplicate the management's activity itself of the  
11 railroad as a whole, and the perfection would not only  
12 extend to the individual parts but to the identification  
13 of the exact fan of Ramsey prices or discriminatory  
14 prices, and forcing the utility to adhere just to  
15 those.

16 Yes, in theory that would be possible, and  
17 some degree of differentiation would be appropriate.  
18 However, that is a static matter. It deals only with  
19 prices and costs at the current time. It omits  
20 innovation, which competition usually tends to promote.

21 And so, that is why it has turned out in  
22 research literature and the public debate to seem much  
23 more sensible to allow competition to do this rather  
24 than to permit it to proceed under the possibility that  
25 regulation will supply the constraints and push

1 innovation forward.

2 Q Well, let's take the case where instead of  
3 relying on regulation to restrain the railroad within  
4 the levels set by a competitive return, rely on  
5 competition to do that. In that case where competition  
6 is relied upon rather than regulation, won't it still be  
7 necessary for the railroad question to be able to  
8 differentially price its services in order to recover  
9 total costs?

10 A It might. It might not. That is what the  
11 market would sort out. And if competition is effective,  
12 differential pricing on the whole would not be able to  
13 occur.

14 Q Now, if the railroads did not engage in  
15 differential pricing, do you think it would be possible  
16 for them to recover the total cost?

17 A That would be possible. It would depend on  
18 the conditions.

19 Q Can you identify -- you said earlier it is a  
20 factual matter. Can you identify any railroad in the  
21 country which you believe could recover its total cost,  
22 including its current cost of capital, without engaging  
23 in differential pricing?

24 A I don't present myself as a specialist in  
25 railroad economics, so in any case I couldn't identify



1 any specific railroad.

2 Q Now, at Page 2 and elsewhere in your verified  
3 statement, you of course use the term "monopoly" several  
4 times, and at Page 2 you refer to the monopoly position  
5 of the merged firm in markets where it would face no  
6 rail competitor.

7 I would like to focus on the sense in which  
8 you used the term "monopoly position" or "monopoly  
9 power," and this may to some degree overlap with what  
10 you have just told me. If it does, I will try to hold  
11 that to a minimum.

12 But I take it that you are using the term  
13 "monopoly" to describe any firm which has a very large  
14 market share, whether or not it is earning  
15 supracompetitive profits.

16 Is that correct?

17 A Yes. I think that here I am just conveying  
18 the sense of the literature that to judge monopoly power  
19 one looks first at the position of the firm in the  
20 market, and in addition uses other evidence if it is  
21 available and trustworthy, such as possible excess  
22 profits.

23 Q My question is not for the moment what  
24 evidence do you use to judge whether a firm is a  
25 monopolist. I am asking what it is that it takes to

1 make a firm a monopolist. How do we define monopoly?

2 What is the essential characteristic of a monopoly?

3 And I come back to this question. Is the  
4 essential character of a monopoly as you use the term a  
5 firm which has all or a very high percentage of the  
6 market, or is it a firm which is able to charge profits  
7 that exceed a competitive level?

8 A Well, I think you are trying to draw a  
9 distinction that doesn't really exist in the  
10 literature. Monopoly profits are neither necessary nor  
11 sufficient to prove market power. That is, there can be  
12 high profits even if there is no monopoly perhaps for  
13 short-term reasons, or there can be no monopoly profits  
14 even if there is a monopoly, perhaps, because the  
15 monopoly is operating inefficiently.

16 Q Okay.

17 A So it is a supplementary kind of evidence.  
18 Virtually every specialist I know starts out defining  
19 market power by saying that it is the ability to control  
20 price and other conditions in the marketplace.

21 Q So it is then the market share in your  
22 judgment which makes a monopolist rather than the  
23 ability to earn supracompetitive profits?

24 A Well, market share is about the most important  
25 single indicator that you can start with. It will

1 often, if not always lead also to some degree of excess  
2 profit. So, the two are both involved in some degree of  
3 causation.

4 Q I don't mean to over dwell on this. I want to  
5 focus not for the moment on indicators or what evidence  
6 you use to judge whether a firm is a monopoly, but what  
7 it is in essence that it takes to make a firm a  
8 monopoly.

9 Is it the high market share, or is it the  
10 ability to earn a supercompetitive profit, or is it  
11 something else?

12 A I don't think I see the difference you are  
13 trying to make. By indicator, perhaps I could -- I  
14 think I also mean an element of market power.

15 Q So you would say, I gather, that if a firm has  
16 a high, all or a very high percentage of a properly  
17 defined market, and if it is operating efficiently, then  
18 almost by definition it will be earning a  
19 supracompetitive return?

20 A Well, almost, but you see, it is likely to be  
21 influencing price. It is likely to be influencing  
22 innovation. It is likely to be earning excess profits,  
23 and perhaps have other effects as well.

24 Q Okay. Let me test the likely. Is it possible  
25 that the same market share in one market, let's say 90

1 percent, might produce supercompetitive profits for a  
2 firm which has that market share but that in another  
3 market the same market share, for example 90 percent,  
4 would not produce supercompetitive profits?

5 A Yes. The point I think you are suggesting by  
6 an either-or example could also be stated as in  
7 gradations. That is, the degree of monopoly power  
8 indicated by any given market share may differ from  
9 market to market.

10 Q So there is not a direct, precise correlation  
11 between market share and level of profitability?

12 A In theory there can be sharp differences. In  
13 fact, it has turned out through extensive research, some  
14 by myself, a lot by others, that the relation between  
15 profit rates and market shares is quite strong.

16 Q But not always?

17 A Oh, there are exceptions, but those, you see,  
18 are the exceptional cases, and in a social science like  
19 this, where you are dealing with complex reality, the  
20 first effort is to define the mainstream of basic  
21 patterns so that then you can judge carefully any sharp  
22 departures from them.

23 Q Is it possible for a firm with 100 percent  
24 market share to have inadequate profits, assuming it is  
25 operating efficiently?

1 A To have inadequate --

2 Q Inadequate profits below its cost of capital.

3 A Below its cost of capital? It is possible.

4 It may be inept. If you wish to assume that away --

5 Q I tried to assume that away because I am  
6 trying to get at the clear case. Take a case where a  
7 firm is not inept, where it is operating efficiently in  
8 a market, and it has 100 percent market share. Is it  
9 not possible for a firm in that posture not to be  
10 earning a return equal to its cost of capital?

11 A You are not asking whether it is possible that  
12 it just barely covers its cost of capital? You are  
13 going to the more extreme case?

14 Q I am testing the notion which I think I read  
15 in here, in your testimony, that there is a direct,  
16 immediate factual relationship between market share and  
17 the degree of profit, whether it is supercompetitive or  
18 subcompetitive.

19 I am trying to test that, and my question is,  
20 is it not possible that there is a case of an  
21 efficiently operated firm with a 100 percent or close to  
22 100 percent market share which is not earning an  
23 adequate rate of return equal to its cost of capital?

24 A I am willing to admit that as a theoretical  
25 possibility.

1 Q Well, I am not asking it as a theoretical  
2 possibility. As a matter of fact, aren't there some  
3 firms in some markets which have very high percentages  
4 of shares of those markets and which are operating  
5 efficiently but are not earning an adequate return equal  
6 to the cost of capital?

7 A I certainly can't think of many examples. In  
8 theory that is possible, there are some.

9 Q Don't demand elasticities make it if not  
10 likely, at least possible that in some situations a firm  
11 may have 100 percent of a properly defined market, but  
12 it can't earn an adequate return?

13 Take a small town -- this may not be a good  
14 example. You may have a better one. Take the small  
15 town ice cream seller who has got the whole market in  
16 the town. The only one who sells ice cream.

17 Isn't it possible that people prefer  
18 automobiles and bowling and TV sets and therefore they  
19 won't pay enough for the ice cream to keep the fellow in  
20 business, even though he is operating efficiently?

21 A So in the short run that firm is in business  
22 but not making profits at all. Yes, I agree that is  
23 entirely possible. It is a short-run possibility. The  
24 firm will presumably shut down.

25 Q Will presumably shut down, but during the

1 period of operations, the firm with a very high market  
2 share may not earn adequate profits. Is that not so?

3 A Well, yes. But I do want to make it clear  
4 that this is a transitional or a short-run or unstable  
5 situation. That there might be stable, continuing  
6 losses one would not expect, but of course there are  
7 many possibilities that little firms in local markets  
8 can suffer either setbacks because demand drops or be  
9 under pressure from large chains who might move in on  
10 them.

11 And this, I suppose, is where the Baumol  
12 theory may have some significant basis in reality, so  
13 that the seeming local monopolist feels it unwise to set  
14 prices above cost. Yes, there may be cases like those.

15 Q You point out in my hypothetical ice cream  
16 stand he may go out of business pretty quickly. A big  
17 firm with lots of assets that are already in place, like  
18 a railroad, may gradually be forced out of business  
19 because of inadequate profitability and ability to  
20 replace assets as they wear out, but it may take a long  
21 time. Isn't that possible?

22 A That's possible.

23 Q Many years, perhaps?

24 A That's correct.

25 Q And during that period, a firm in that

1 position, because of elasticities of demand, may have a  
2 high market share but be unable to recover a return  
3 which is equal to its cost of capital. Isn't that so?

4 A Well, you see, here again I would return  
5 instead to the concept of excess capacity. That is  
6 usually why there would be a decline in a railroad.  
7 That is why there has been the so-called railroad  
8 problem for many decades in many cases.

9 Q You do not then agree with economists or  
10 others who take the position that the existence of fixed  
11 cost and economies of scale and scope rather than excess  
12 capacity are what require differential pricing? You  
13 just don't agree with that?

14 A Well, I think that their use of that is a kind  
15 of lockstep identification of those conditions with  
16 utilities. That is not appropriate. It may be relevant  
17 in some cases, but it is surely not the correct  
18 universal assumption.

19 Q Well, I don't ask you whether it is  
20 universal. You say it may be relevant. May it not be  
21 relevant to the railroad industry?

22 A May which be relevant?

23 Q The existence of fixed costs and economies of  
24 scope and scale, may those factors not be relevant to  
25 the railroad industry? Whether they are universally



1 relevant or not, may they not be relevant to how the  
2 railroads must set their prices?

3 A They may be relevant, but as I have tried to  
4 indicate, they should not be assumed to be always  
5 present and therefore always a justification for price  
6 discrimination in the railroad sector.

7 Q But they may be sometimes?

8 A They may be sometimes. That is a factual  
9 matter.

10 Q So you think it is possible that some  
11 railroads may not need to engage in differential pricing  
12 if they are operated efficiently in order to recover  
13 their costs, but others may?

14 A I believe that's correct, and where there is  
15 effective competition in many if not most cases then the  
16 special role of fixed costs will cease to exist.

17 Q Let me ask you one further question along this  
18 line. Do you believe it would be desirable for the  
19 Interstate Commerce Commission through regulation to  
20 prevent a railroad from engaging in differential pricing  
21 up to the point at which it recovers all of its costs?

22 A Should the ICC prevent railroads from making  
23 profits in the pursuit of keeping pricing from being  
24 discriminatory?

25 Q Engaging in differential pricing in order to

1 make an adequate but not an excessive profit.

2 A Well, there have to be hidden assumptions  
3 there, again, that the management is efficient --

4 Q I assume that and ask you to.

5 A -- and that there is no other way to achieve a  
6 viable railroad --

7 Q I ask you to assume that also.

8 A -- such as competitive pressures.

9 Q Yes, sir.

10 A Then if we assume that welfare is served by  
11 having the railroad at all, then indeed the ICC should  
12 permit it just to cover its costs.

13 Q Okay. And in that case then the exercise of  
14 some degree of market power is essential, is it not?  
15 Not a bad thing, but a good thing on those assumptions?

16 A If you mean by that the taking advantage of  
17 relatively inelastic demand on some products rather than  
18 others --

19 Q Yes, sir.

20 A Yes, within the limit that the profits would  
21 not be excessive.

22 Q Up to that point, the differential pricing on  
23 those assumptions would not be a bad thing?

24 A I think that is correct.

25 Q And up to that point, exercise of market power

1 would not produce economic dislocations that would be  
2 worse than the dislocations that would occur if you made  
3 an adequate profit. Isn't that also correct?

4 A Well, again, my agreement with this is within  
5 the narrow confines of your assumed situation.

6 Q Whether they are narrow or not we leave to the  
7 Commission. We may disagree about whether they are  
8 narrow, but I have asked you to make those assumptions  
9 for purposes of the answer.

10 A In theory then we are also assuming that in my  
11 view this is a short-run case, that capacity is excess  
12 currently, but in theory, yes, that might well be  
13 justified. It would not be a license for unlimited  
14 price discrimination.

15 Q And the proper limit would be the ability to  
16 recover your cost of capital but no more than that,  
17 would it not?

18 A Yes.

19 Q Okay. Now, let me ask you another question  
20 about the limit. Your answer referred to cost of  
21 capital, but of course there are other costs of  
22 operating a railroad, maintaining and operating a  
23 railroad.

24 In assessing those costs for purposes of the  
25 analysis we have just been talking about, would you want

1 as an economist to use the so-called book costs, which  
2 are the costs that an accountant may developed based on  
3 historical financial statements, or would you want to  
4 use current replacement cost, efficient replacement  
5 cost, assuming that the asset would be replaced?

6 A Yes, this is an issue that has been in the  
7 literature for at least 100 years, and I have considered  
8 that. In principle, replacement cost is a correct  
9 basis. In fact, it is so hard to apply that often one  
10 must instead stick with the Hope natural gas arguments  
11 that go for original costs.

12 So, I suppose the judgment in practice would  
13 depend on the relative ease and validity and practice of  
14 using one method or the other.

15 Q But would you not agree that replacement  
16 costs, even though they must be estimated and will not  
17 be precisely accurate, would be better for the purpose  
18 that we are discussing than book costs, which are easy  
19 to use and known to be wrong?

20 A The degree of wrongness and the degree of ease  
21 are factual, and matters of gradation and not yes or  
22 no. An additional problem with the replacement cost is  
23 that in sifting out those assets which are no longer  
24 truly needed, one wouldn't want to replace dead assets.

25 So, I assuming that that judgment has also

1       been applied.

2           Q       Yes, and I will make a further assumption,  
3       that some assets, even though they aren't dead, wouldn't  
4       be replaced in quite the same way. What we are talking  
5       about is an efficient way of replacing them to provide  
6       the same service capability.

7           A       Well, yes. All these things are in theory.

8           Q       Well, this is a theoretical exercise, so  
9       theoretical questions may clarify theory.

10          A       But the policies are taken in practice, and  
11       the research judgments are made in practice, and if  
12       there is one thing I have learned in 25 or more years in  
13       this field, it is that one is constantly beset by  
14       troubles in trying to apply what seem like nice pure  
15       theories to unruly facts.

16          Q       You believe in the old maxim that if it  
17       doesn't work in theory it may nevertheless work in  
18       practice?

19          A       And vice versa.

20          Q       And vice versa. Let me ask you one more  
21       question about replacement cost. One of the costs that  
22       is involved in an exercise of this kind is sometimes  
23       referred to as depreciation or the wearing out of the  
24       asset.

25                 Assuming that the data are available and

1 reasonably accurate, which I agree with you is a fact  
2 question, is it not preferable to use depreciation  
3 expense based on replacement values of assets rather  
4 than book value?

5 A You are now getting to the edge of what I  
6 would regard as my training in this matter. These are  
7 accounting type issues that I haven't really reviewed  
8 recently.

9 Q We will leave them for somebody else. Now, a  
10 couple of questions about market definition. Your  
11 discussion of that commences at Page 2, and of course  
12 appears at subsequent places in your statement.

13 On Page 2 you say that markets are properly  
14 defined as including "all closely substitutable goods or  
15 services." That is the standard?

16 A I am just conveying the gist of the literature  
17 here.

18 Q Now, at Page 14, on that first full paragraph,  
19 you say that in some areas there is some degree of  
20 interaction between railroads, trucks, barges, and other  
21 forms of transport. Then you say the task then is to  
22 define particular freight markets carefully to include  
23 different modes where they are demonstrably  
24 substitutable.

25 Do you see that discussion?

1 A Yes.

2 Q So is it correct that you believe that there  
3 are some areas where rails and trucks are substitutable,  
4 if not perfectly, at least closely?

5 A Oh, yes, in some areas that is so well known  
6 that is scarcely needs noting.

7 Q Okay. Now, is the proper test of closeness  
8 how close the relative costs of the two modes are, and  
9 how much profit the lower of the two cost modes can  
10 make?

11 A I am not quite sure I would use those  
12 conditions.

13 Q How would you measure or approach the question  
14 of closeness?

15 A Well, as discussed here, it is simply how  
16 closely the shippers or customers can choose between the  
17 two products at the prices and costs that apply.

18 Q Well, that was my question. Focusing on  
19 costs, I understood that one of the ways you assess the  
20 closeness of substitutability is the levels of the costs  
21 and the difference between the two, which I suppose  
22 would be the profit flexibility that the low-cost mode  
23 might have.

24 A That is your phrase, but if the prices aren't  
25 close, and the quality is the same, then they are not

1 closely substitutable.

2 Q I asked about costs. You had indicated in  
3 your testimony that prices were one way to look at it,  
4 costs were another.

5 A Ultimately they are, yes.

6 Q And I am coming to the question of costs. Are  
7 not comparisons of costs one of the ways that you would  
8 look at the closeness of substitutability and the degree  
9 to which the lower of the two cost modes had the ability  
10 to increase its profits by pricing up to the costs of  
11 the higher cost mode?

12 A I believe so.

13 Q And would you not say that where the lower  
14 cost mode is not able to earn excess profits because of  
15 the substitutability of the other mode, then that  
16 substitutability is relatively close?

17 A Wait a minute. You are saying that one is  
18 cheaper than the other to supply, and yet the cheaper  
19 one can't make profits?

20 Perhaps you could give me an example.

21 Q Well, let me give you an example. Let's  
22 suppose a case in which the railroads are to some degree  
23 constrained by trucks. Let's suppose a case, which may  
24 or may not be true, where the railroads' incremental  
25 costs are somewhat below the truck cost for a particular.



1 commodity or a particular service.

2 But let us also suppose that the railroad is  
3 not able to charge rates despite that cost difference  
4 which produced monopoly profits for it on that  
5 service. Would you not then say that the  
6 substitutability and the restraint imposed by the truck  
7 mode is, if not perfectly substitutable, fairly close?

8 A There is something missing here. The costs  
9 are lower for rail, and yet they are not able to --

10 Q Incremental costs.

11 A Yes, but they are not able to charge a price  
12 above cost?

13 Q Total cost. Full cost. Not fully allocated,  
14 but full cost. They are not able to recover all of  
15 their costs, even though they are above incremental. Or  
16 does this take us back to our prior discussion?

17 A Well, I think you are getting into railroad  
18 special features that I haven't reviewed or I leave to  
19 my friends who are specialists in that field.

20 Q Well, without taking you into the details of  
21 costing, would it not be at least relevant in assessing  
22 how close the substitutability is to look at whether or  
23 not the railroad is able to earn monopoly profits on its  
24 services?

25 A I am not sure it would in general. It might;

1 it might not.

2 Q When might it? Under what circumstances might  
3 it?

4 A Well, you are asking me something that I am  
5 not sure I follow. It seems to relate to special  
6 features of differing cost definitions, and I just  
7 didn't want to seem categorical either way on it.

8 Q In answer to one of my questions, I believe  
9 that you said that there are some areas, and you said  
10 this was well established, where rails and trucks are  
11 closely substitutable.

12 A Yes.

13 Q Where that is the case, then I take it that  
14 you think the market definition ought to be broad enough  
15 to include both modes.

16 A Yes.

17 Q And would the same be true in cases where  
18 ocean transport were closely substitutable for rail?

19 A Oh, yes. This is all widely recognized, that  
20 there are overlaps among the various transport services  
21 as there are in other kinds of markets, and that you do  
22 want to recognize those.

23 Q Let me give you a slightly different case.  
24 Suppose that a railroad has a 1,000-mile haul from an  
25 origin to a destination and carries a commodity. Let's

1 call it coal. And it competes with another railroad  
2 from a different origin who only moves coal, say, 500  
3 miles from the different origin to the same  
4 destination.

5 And I ask you to suppose further that given  
6 the costs of the coal and the quality of the coal, that  
7 the shipper can and does substitute the one for the  
8 other. Would you not then include both of those  
9 railroad movements in an assessment of the  
10 transportation market?

11 This has come up in a thesis I have been  
12 supervising of one of my students at Michigan, and it is  
13 not clear that there is a categorical answer either  
14 way. There may be some degree of overlap in the  
15 delivery of coal to Point B even though they come from  
16 different areas.

17 However, ordinarily one thinks in terms of  
18 corridors or routes between areas, but even that may be  
19 modified if there is competition from other sources.

20 Well, if the test is substitutability, and if  
21 the shipper can substitute one coal for another and one  
22 railroad for another, would a market assessment not be  
23 unduly narrow if it failed to give any consideration at  
24 all to the railroad hauling from a different origin?

25 A Well, remember, we are defining a market, I

1 believe, for transport services.

2 Q Yes, sir.

3 A And it is not usually so much the delivery of  
4 a given commodity to a point. It is the transport of  
5 commodities between two points. That is the service,  
6 getting them from here to there. And that is usually  
7 the area within which there may be direct competition.

8 Q I thought that from your testimony and from  
9 your prior answers that it was the substitutability of  
10 one service for another that one focused on in defining  
11 the proper market. And if the shipper can substitute a  
12 service from one origin for a service from a different  
13 origin, is it not the case that an assessment of that  
14 market must take into account that substitutability?

15 A Well, I think I answered that. It might in  
16 some cases be an appropriate modification, but it would  
17 not always be.

18 Q Not always, but sometimes, depending on the  
19 facts.

20 A Well, how often might be very high or very  
21 low.

22  
23  
24  
25

1           2       But it would depend on the facts, would it  
2 not?

3           A       Yes.

4           Q       And the facts that one would inquire into is  
5 whether the services were in fact substitutable, closely  
6 substitutable.

7           A       In theory, yes, those are the correct  
8 concepts.

9           Q       Now, let me change my hypothetical only in  
10 this sense; that instead of the railroad that hauls the  
11 coal a thousand miles competing with a railroad that  
12 hauls the coal 500 miles, let's make the second movement  
13 a truck movement or a barge movement. And I ask you  
14 further to assume that as a matter of fact, the shipper  
15 can substitute the two coals, and does, and can  
16 substitute the two transportation modes from the  
17 different origins.

18                    Would not any assessment of that  
19 transportation market also require consideration of the  
20 availability of the truck haul on those facts?

21           A       Well, in principle, if the truck services are  
22 available at comparable prices, yes. Again, I do have  
23 to insist that utmost care may be needed in making sure  
24 that you are not mingling or confusing the delivery of  
25 something at a given point with the conveyance of

1 something from another point which is in fact a distinct  
2 market.

3 Q I would not suggest that those two should be  
4 confused, but having clarified in a crystalline way that  
5 they are different because they involve different  
6 origins and perhaps different modes from those different  
7 origins, nevertheless, if they are substitutable, one  
8 for the other, they should be taken into account in the  
9 assessment of the transport market? That's my  
10 question.

11 A Yes. But it's so easy to confuse the  
12 substitution of coal as delivered at point B with the  
13 market position of the shipper from point A who faces a  
14 choice of modes.

15 Q But so long as we don't make that confusion  
16 and so long as we understand that they are different,  
17 but so long also as in fact the one service is  
18 substitutable for the other, then it must be taken into  
19 account in assessing the market, is that not correct?

20 A Well, in principle, yes.

21 Q That being true in principle, possibly in  
22 fact, depending on the facts, is it therefore true that  
23 a movement from one BEA to another BEA may be too narrow  
24 a market definition, depending on the facts?

25 A Well, of course, I considered that in looking

1 at the record that's been developed here on both sides,  
2 trying to judge the market shares and the competitive  
3 impacts of the merger. I didn't see this presented in  
4 any substantial way as an important modifier of the  
5 basic patterns that emerged from any of the sides. So I  
6 regard it, as I do much of what Professor Baumol said,  
7 as an interesting theoretical exercise, but apparently  
8 of limited relevance.

9 Q Depending on the facts.

10 A Depending on the facts.

11 Q Now, you wouldn't disagree with the  
12 proposition, would you, that city pair routes for  
13 transportation service may be too narrow a definition of  
14 the market, depending on the facts?

15 A Oh, of course, I would not disagree with  
16 that. I've said things like that from time to time.  
17 Many other people say them in the literature.

18 Q And by the same token, again depending on the  
19 facts, the particular flow from a state like California  
20 to another state like Texas may be too narrow a market  
21 definition, depending on the facts?

22 A Yes, that's true. One would consider the  
23 alternative routes such as UP across the middle of the  
24 west and whether that should be in the same market.

25 Q And one might consider movements of the same

1 commodity via different modes into the same destination  
2 states from totally different origins if in fact they  
3 are substitutable; is that correct?

4 A Well, I have to say the same caution here  
5 again, because it's so easy to confuse the delivery of  
6 grain to Texas from Iowa, where I grew up, with the  
7 delivery of grain from California. That may be  
8 substitutable to the buyer in Texas, but it's not  
9 substitutable in a direct sense with the provision of  
10 transport services between those two areas, California  
11 and Texas.

12 Q But grain from Iowa moving by one railroad to  
13 Texas may be, depending on the facts, substitutable for  
14 grain moving from Illinois via a different railroad to  
15 Texas; is that not correct?

16 A That's correct. But there you've got --

17 Q And any market definition that focused solely  
18 on the flow from Iowa and disregarded the substitutable  
19 flow from Illinois or Indiana or where it would be too  
20 narrow an economic definition of the market?

21 A No, no, I wouldn't agree with that, because  
22 you said any, anything that could do that.

23 Q Closely substitutable. You're quite correct  
24 to correct me. Let's make it closely substitutable.

25 A All right. Again, in theory you're correct, I



1 believe.

2 Q Okay. On page 10 -- I should say your  
3 discussion of contestability which commences at page 7  
4 and moves on for several pages. I'm not going to ask  
5 you much about that, but I do have a couple of  
6 questions, and one of which is at page 10 in the  
7 footnote, the last sentence of which says, "The  
8 possibility that entry might restrain monopoly power  
9 inside the market is almost universally recognized. The  
10 crucial question is one of degree. The restraint ranges  
11 between loose and tight, and it depends on many  
12 conditions."

13 So I take it from that statement that you  
14 regard the possibility of or you believe that the  
15 possibility of entry may restrain monopoly power?

16 A Yes. That's been recognized for over a  
17 century in the literature. The most serious work on it  
18 came after Joe Bain did major work on it in the 1950s.  
19 The key thing to recognize is that what Baumol and his  
20 group have added is merely a very extreme theoretical  
21 version of that rather large literature, in which case  
22 the Baumol analysis unfortunately has a logical flaw at  
23 its core and is an extreme case.

24 Q Okay. Let me ask you to put aside now because  
25 I will attempt to put aside for purposes of my question

1 the extreme theoretical version of the established  
2 theory and focus on the more traditional analysis of  
3 potential entry, which I gather is what the last  
4 sentence in the footnote focuses upon.

5 A Exactly.

6 Q Let me ask you this. You say the restraint  
7 ranges between loose and tight and depends on  
8 conditions. You would agree that there are conditions  
9 in actual markets when the restraint imposed by  
10 potential entry, possible entry is in fact tight?

11 A Yes.

12 Q What are those conditions?

13 A It's ordinarily found in a relatively small  
14 market where some petty monopolist, some local firm  
15 which seems to have a high share of the market may in  
16 fact be frightened of a large firm moving in on it and  
17 have some definite idea of the firm or firms that might  
18 do it, and therefore condition their activity, their  
19 pricing, and limit it because of that fear.

20 Q But you believe that entry might restrain  
21 monopoly power not just in small markets, but in larger  
22 markets?

23 A Well, in some degree, but you asked me where  
24 it might be a strong constraint.

25 Q So the answer to my question is that the

1 degree would be stronger in smaller markets, but could  
2 also exist to some degree in larger markets, depending  
3 on the facts?

4 A Yes. Oh, yes.

5 Q And would not tightness -- you used the terms  
6 loose and tight -- would not tightness be measured by  
7 how close to the costs the possibility of entry  
8 restrained the incumbent's prices?

9 A That would be the effect of it.

10 Q Now, taking into account that more traditional  
11 body of analysis and putting to one side the extreme  
12 theoretical version, for the restraint to be tight would  
13 the potential entrant have to be able to "entirely  
14 duplicate and replace the existing firm instantly," a  
15 phrase you use on page 9?

16 A No. Some degree of restraint may occur even  
17 if the potential entrant would not be an instant  
18 replacement.

19 Q So the ability of an entrant, potential  
20 entrant to enter the market and take away part of the  
21 incumbent's business may be some restraint.

22 A Yes. And, you see, the loss of market share  
23 to an entrant or to any other existing rival, that is  
24 what at issue here. So, in fact, the role of entry is  
25 best understood in terms of the internal structure of

1 the market; that is, the loss of market share that might  
2 occur if entry is large enough.

3 Q My question was only this: whether it isn't  
4 the case that the ability to take less than the total  
5 amount of the market away from the incumbent will serve  
6 as a restraint to some degree.

7 A In some degree I agree.

8 Q And the greater the ability to take away  
9 market share or business, the greater the restraint; is  
10 that correct?

11 A Well, it's not just the amount of market share  
12 that's at stake. It's the speed with which it occurs  
13 and perhaps other conditions that the literature hasn't  
14 worked out very well.

15 I should say that although I am willing to  
16 convey these ideas about entry and its possible  
17 constraint upon monopoly power, on the whole I am  
18 skeptical of them. I think of them, as my statement  
19 indicates, as a relatively secondary matter on the  
20 whole.

21 Q Again, you understand my question now as not  
22 with respect to the extreme theoretical version but the  
23 more traditional version that's discussed in your  
24 footnote on page 10?

25 A Yes.

1 Q With respect to that, in order for the  
2 restraint that's imposed or may be imposed by potential  
3 entry to be tight, does the incumbent have to be unable  
4 to make a timely response to the new entrant's  
5 initiative, which is the phrase you use on page 9?

6 A Well, the wording suggests an either-or  
7 situation, whereas in fact, of course, activity is in  
8 some degree some response at some time which may be  
9 rapid or not quite so rapid, but that would be part of  
10 the evaluation of the likelihood of impact.

11 Q So the restraint may be tight depending on the  
12 facts, even though the incumbent may be able to make a  
13 response within some period of time?

14 A Oh, yes. This has always been recognized,  
15 that free entry where the incumbent is limited in some  
16 degree from responding or anticipating can have a strong  
17 constraining effect.

18 Q Let me ask you one more, again with reference  
19 to your language at page 9 and focusing now not on the  
20 extreme version but on the more traditional version.  
21 For the restraint, as you have discussed in your  
22 footnote, to be tight, do sunk costs have to be zero?

23 A No. Are we on page 9 or does it matter?

24 Q In the middle of page 9 you refer to three  
25 factors. I've asked you about the first two. The third

1 factor was, again with respect to the extreme version,  
2 ultra-free entry, you say, "The entrant can jump out of  
3 the market quickly at no loss because sunk costs that it  
4 will incur will be zero."

5 And my question is: Using the more  
6 traditional analysis, for the restraint to be tight, the  
7 restraint imposed by a potential entry, do sunk costs  
8 have to be zero?

9 A The role of sunk costs is hard to pin down.  
10 Baumol and his group have made it central. It can be a  
11 factor, I suppose, if it's large. It's very hard to  
12 evaluate. So I guess I would treat it as one thing that  
13 could be relevant but is not critical to the matter.

14 Q So if it is not critical, then there may be  
15 some degree of sunk costs, and yet the potential for new  
16 entry may be a significant restraint on the incumbent's  
17 pricing.

18 A Well, all these things you are suggesting deal  
19 with what is called now the robustness of the Baumol  
20 theory. In fact, although --

21 Q Excuse me for interrupting. I'm not asking  
22 you about the Baumol theory at all. I'm asking you  
23 about the traditional theory, not the extreme  
24 theoretical version.

25 A All right, then. It's the robustness of

1 either one that is the mainstream analysis of entry and  
2 the farfetched Baumol case. These are all matters of  
3 degree, and how they interact or balance out from case  
4 to case will be a matter for factual discussion.

5 Q All I'm asking is this, that the existence of  
6 some degree of sunk cost is not necessarily inconsistent  
7 with restraints imposed by potential for new entry under  
8 traditional analysis.

9 A Some degree of constraint surely.

10 Q And the constraint may be tight even though  
11 some degree, perhaps small, of sunk cost exists; isn't  
12 that also true?

13 A Well, again, tight meaning substantial, not  
14 perhaps right down to pricing cost -- price equal to  
15 cost.

16 Q Now, at page 24 let me pause for just one  
17 moment, and then I'll ask you some questions about the  
18 latter part of your verified statement.

19 (Pause.)

20 On page 24 we discussed before the degree to  
21 which increases in market share relate or don't relate  
22 to decreases in market power or monopoly profits, and  
23 I'm not going to go over that ground again. But I do  
24 want to ask you specifically about your discussion of  
25 these particular areas of the market.

1           Take California to the southeast, for example,  
2 where, relying on other people's data, you point out  
3 that the SFSP market share would be, as I read it, 64  
4 percent for the southeast and 96 for the southcentral.  
5 Is that your testimony?

6           Let me ask it the other way. That's awkward,  
7 too. What corridor does the 64 percent number apply  
8 to?

9           A     I don't recall the step. That may be the  
10 specific ones. In doing this review I was simply trying  
11 to see if there was anything about the facts of these  
12 apparent market shares and other conditions that would  
13 upset what seems like a very strong likelihood that  
14 there are significant markets within which the market  
15 shares will rise strongly. I don't recall the specific  
16 percentages, in part because I didn't conduct a detailed  
17 study.

18          Q     I know other people did that. I know that you  
19 didn't do it yourself. At this point, though, you don't  
20 recall which corridor or which area, to which area the  
21 64 percent number or the 96 percent numbers apply to; is  
22 that correct?

23          A     That's correct.

24          Q     All right. Let's assume that the Commission  
25 were to conclude that the SFSP market share in the



1 corridor between California and the southeast or the  
2 southcentral regions would be somewhere in the range of  
3 64 percent, the number that's used here. Are you saying  
4 that it is necessarily the case that with that kind of a  
5 market share, the combined SFSP would earn monopoly  
6 profits on this corridor?

7 A Well, you're touching again on whether  
8 monopoly profits are a necessary indicator or element in  
9 judging the presence of market power. The answer would  
10 still be the same, that monopoly profits in some degree  
11 would be likely. But that would be the effect, an  
12 effect of the market power itself which would be  
13 present.

14 Q I gathered, though, from your earlier  
15 statements about the absence of any necessary direct  
16 correlation that a particular market share like 64  
17 percent would not necessarily lead to monopoly profits  
18 by the merged carrier in that corridor. Am I wrong?

19 A Well, in paraphrasing my remarks just now, I  
20 think you sharply understate the degree of connection I  
21 see and the research finds between market shares and  
22 profit rates. There is really a quite strong pattern.  
23 There are the occasional exceptions; someone doesn't  
24 want to seem too emphatic about it. Nevertheless, given  
25 that there are these strong patterns, the burden of

1 proof is clearly that market shares like these do  
2 involve substantial market power and the likelihood of  
3 excess profits. And therefore, one looks for any kind  
4 of strong contrary evidence, and I just don't think  
5 there is that kind of contrary evidence in this case.

6 Q But I take it apart from the studies that you  
7 have referred to, you have made no study in this case of  
8 the data with respect to demand elasticities in the  
9 California to Texas corridor or the rates that the  
10 merged carriers might be able to charge in relation to  
11 the economic costs of providing that service that would  
12 lead you to be able to say that they would earn monopoly  
13 profits in that corridor; isn't that correct?

14 A That's correct.

15 MR. MARTIN: I have no other questions.

16 JUDGE HOPKINS: Department of Justice?

17 MR. RANNER: No questions, Your Honor.

18 JUDGE HOPKINS: Department of Transportation?

19 (No response.)

20 JUDGE HOPKINS: Any redirect?

21 MR. LIVINGSTON: No, Your Honor. Do I move  
22 the admission of this?

23 JUDGE HOPKINS: Yes. Any objection?

24 MR. MARTIN: No, sir.

25 JUDGE HOPKINS: It will be received in

1 evidence. You were a lot faster than I thought you  
2 would be. Thank you very much, Mr. Martin, for moving  
3 so fast.

4 (The witness was excused.)

5 JUDGE HOPKINS: Call the next witness, then.

6 MR. ROACH: Your Honor, Union Pacific calls  
7 Jerry R. Davis.

8 JUDGE HOPKINS: Go ahead, Mr. Roach.

9 MR. ROACH: Thank you, Your Honor.

10 Whereupon,

11 JERRY R. DAVIS

12 was called as a witness by counsel for Union Pacific  
13 and, having been first duly sworn, was examined and  
14 testified as follows:

15 DIRECT EXAMINATION

16 BY MR. ROACH:

17 Q Sir, would you please state your name?

18 A Jerry R. Davis.

19 Q And what is your position?

20 A Vice President of Operations for the Union  
21 Pacific Railroad.

22 Q I have put before you, sir, a document  
23 entitled "Verified Statement of Jerry R. Davis," a  
24 12-page statement. Is that your verified statement in  
25 this case?

1 A Yes, sir.

2 Q And do you have any corrections you wish to  
3 make in it?

4 A No, sir.

5 Q Is it true and correct to the best of your  
6 knowledge and belief?

7 A Yes, sir.

8 Q I have also put in front of you a document  
9 entitled "Appendix E, Application, Volume 1A, Operating  
10 Plan," Exhibit 13. Do you have that document?

11 A Yes, sir.

12 Q And is that the operating plan that you  
13 supervised the preparation of and that you discuss in  
14 your verified statement?

15 A Yes, sir.

16 Q And is that operating plan accurate to the  
17 best of your knowledge and belief?

18 A Yes, sir.

19 MR. ROACH: No further questions.

20 JUDGE HOPKINS: Thank you. Mr. Stephenson.

21 CROSS EXAMINATION

22 BY MR. STEPHENSON:

23 Q Good morning, Mr. Davis. I am Doug Stephenson  
24 of the Southern Pacific representing Applicants. It's  
25 nice to see you're here.

1           You indicate in your verified statement that  
2 you and your counterpart with the Missouri Pacific are  
3 responsible for the day-to-day activities of the  
4 combined UP-MP operation. Which of you has the senior  
5 rank, or is there an equivalent?

6           A     There is no senior rank.

7           Q     You're equivalent?

8           A     We are both equivalent. We both report to the  
9 same president.

10          Q     What factor led -- this is a question of  
11 curiosity more than anything else -- to the decision to  
12 have UP take over the trackage rights between Colton and  
13 El Paso rather than the Missouri Pacific?

14          A     As a major portion of the trackage rights  
15 requested ties in more closely with the Union Pacific  
16 side than it does the Missouri Pacific side such as the  
17 Colton area and the central California area.

18          Q     Now, Union Pacific has applied for trackage  
19 rights and, as you indicate at page 3 of your verified  
20 statement, ancillary rights as well. I'd like to  
21 discuss with you ancillary rights, the first being, as I  
22 understand it from the application, the right to serve  
23 all shippers at points common to the Santa Fe and  
24 Southern Pacific, but not where there is a third rail  
25 carrier at that same point; is that correct?

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1           A     What we have asked is to serve the customers  
2     that are presently being served by the Santa Fe and the  
3     Southern Pacific. I'm not sure I understand the third  
4     part of your thing.

5           Q     Is that an attempt, irrespective of whether  
6     there is another carrier presently -- another rail  
7     carrier presently serving that same shipper? In other  
8     words, if you have a shipper who today is served by  
9     Union Pacific, Santa Fe and Southern Pacific, or let's  
10    say those three carriers, but there is a reciprocal  
11    switching agreement, for example, between the service of  
12    that shipper as between Santa Fe and Southern Pacific is  
13    by virtue of reciprocal switching, do you intend to step  
14    into the contract, the reciprocal switching contract of  
15    SP and Santa Fe as part of your service to this  
16    shipper?

17          A     That would be a good starting point.

18          Q     And you would serve that shipper as well under  
19    whatever rights that you had pre-merger, pre-Santa Fe  
20    merger?

21          A     Serve them as well -- what do you mean by  
22    that?

23          Q     Well, if you were serving this particular  
24    shipper prior to the -- today, prior to the SP-Santa Fe  
25    merger.

1 A At any given location?

2 Q Los Angeles, for instance.

3 A What we're talking about is where that shipper  
4 is located on the present SP-Santa Fe. Now, we may  
5 serve a shipper that has a location in Lawrence, Kansas,  
6 and they also serve maybe a shipper or would be located  
7 on the SP-Santa Fe. We are asking for rights to serve  
8 that customer at that facility on the SP-Santa Fe.

9 Q I think I understand it. You are seeking to  
10 insert the Union Pacific system into the ability to  
11 serve any shipper who is today served by Santa Fe and  
12 Southern Pacific?

13 A That is correct.

14 Q Do you have a list of points that you consider  
15 to be common points to Santa Fe and Southern Pacific?

16 A Yes. I do not have a list of them by  
17 customer, but I have a broad knowledge of where they  
18 would be.

19 Q To your knowledge, has anyone with the Union  
20 Pacific put together a list of stations, for example,  
21 that you deem to be stations that are compatible with  
22 this definition of service by SP and the Santa Fe?

23 A Other than what's in the operating plan, I am  
24 not familiar with any list.

25 Q Well, I haven't seen any list or any



1 designation in the operating plan of stations that UP  
2 considers to be common stations, and I wondered if --

3 A We talk about the Phoenix area.

4 Q Phoenix, Fresno, Bakersfield?

5 A That's correct. And so on.

6 Q All right. One of your other ancillary rights  
7 is the right, as I understand it, to construct and  
8 operate intermodal facilities, including auto ramps,  
9 team tracks, bulk transfer facilities, TOFC-COFC  
10 facilities. UP, I take it, would be required to obtain  
11 its own sites for building these facilities; is that  
12 correct?

13 A That is correct.

14 Q And you would not expect that SPSF would have  
15 to donate property to you either on or adjacent to the  
16 right of way in order for you to --

17 A I would anticipate we would purchase that  
18 property.

19 Q All right. Now, at some point in one of your  
20 I think it is proposed trackage rights agreement there  
21 is a provision that SP could require SPSF or any of its  
22 corporate affiliates, presumably SPSF Land Company, or  
23 any of the other Santa Fe-Southern Pacific affiliates to  
24 provide property to UP, and UP is committed to paying  
25 what you say fair market value for transportation

1 purposes.

2 Are you familiar with that provision?

3 A No, I am not.

4 Q Could you take a look at the proposed  
5 contract? You are the sponsor of the proposed operating  
6 contract between the two companies, are you not, the  
7 trackage rights agreement?

8 A Yes.

9 Q If you would look at page 6 of that  
10 agreement --

11 MR. ROACH: Your Honor, I might interject here  
12 that if Mr. Stephenson has questions about compensation  
13 under this agreement, those can be addressed by George  
14 Craig who will be appearing next week.

15 Mr. Davis -- I did not put the contract in  
16 front of Mr. Davis. He can address the operating  
17 aspects of it.

18 JUDGE HOPKINS: Is that what you're going to  
19 question him on?

20 MR. STEPHENSON: Not really. It's an area  
21 that's neither fish nor fowl. It's not compensation.

22 JUDGE HOPKINS: Well, you ask him the question  
23 and we can find out whether he can answer or not or who  
24 can answer.

25 BY MR. STEPHENSON: (Resuming)

1 Q On page 6, in the section C-2 -- I'm sorry --  
2 C-1, the top paragraph at the top of page 6 --

3 A Yes, sir. I see that.

4 Q That provision provides -- and I'll try to  
5 paraphrase it -- to construct one of these facilities  
6 you need property, and if it's in the possession of SPSF  
7 or one of its affiliates that you can obtain that  
8 property from SPSF, and you will pay -- you are  
9 committing to pay fair market value for transportation  
10 purposes.

11 A That's correct.

12 Q Fair market value for transportation purposes  
13 is what as compared to pure and simple fair market value?

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1           A       That would have to be determined by either our  
2 legal department or our real estate department as to  
3 what that fair market value is.

4           Q       But what is fair market value for  
5 transportation purposes as opposed to fair market  
6 value --

7           A       I can't answer that.

8           Q       Let me give you an example, and perhaps Mr.  
9 Craig can address this kind of example. Maybe you can.  
10 Let's assume that you want to expand your projected TOFC  
11 facility in the city of Fresno, and that property, to  
12 expand that property, you want to acquire additional  
13 surrounding property from SPSF or one of the corporate  
14 entities, and that property happens to be in an area of  
15 Fresno that is growing and has a fairly good value, I  
16 would take it, for commercial purposes.

17                   And the question is, is it your intent that  
18 Union Pacific pay somewhat less for this property by  
19 giving fair market value for transportation purposes as  
20 opposed to fair market value for commercial purposes?

21           A       I am no expert on the value of property, and I  
22 cannot answer that question for you.

23           Q       Would you expect that Union Pacific would try  
24 to get out of paying what is fair and reasonable for a  
25 piece of property, whatever it is worth?

1 A No, I would not.

2 Q Whatever it is worth on the market, you would  
3 think?

4 A Fair market value.

5 Q Now, these intermodal facilities, the auto  
6 ramps and so on, would be constructed by Union Pacific  
7 at its own expense? Is that the plan?

8 A That's correct.

9 Q And would you deem it appropriate under the  
10 contract with SPSF to get permission from SPSF with the  
11 proviso that that permission not be withheld  
12 unreasonably to construct a facility so that it would  
13 not interfere with ongoing operations?

14 A Oh, I most definitely would.

15 Q Generally speaking, in any joint facility  
16 agreement the owning railroad has the right to make the  
17 ultimate decision not to be unreasonably held as to the  
18 feasibility operationally speaking of an improvement or  
19 connection?

20 A I would envision that we as operating officers  
21 would sit down and determine where that best location  
22 would be for the less disruption of operations.

23 Q And that would be true -- we are talking here  
24 in terms of the proposed intermodal facilities or  
25 whatever, but I would take it that that answer would be

1 the same whether you were talking about constructing an  
2 intermodal facility, constructing or siting a new  
3 industry on your trackage rights, or building a  
4 connection from the WP to the SP, for example?

5 A That's correct.

6 Q Has UP given any thought to where any of these  
7 intermodal facilities might be built?

8 A No, sir, I have not, not other than what is  
9 listed in the operating plan.

10 Q But to your knowledge, there isn't already a  
11 plan to construct a bulk transfer facility, for example,  
12 at Yuma?

13 A Not from the operating side there isn't.

14 Q Have you heard it from other sides?

15 A No, sir, I have not.

16 Q One of your other ancillary rights is the  
17 right to site and serve new industries along the  
18 trackage rights lines, and I take it that your answer to  
19 the previous question about fair market value if you had  
20 to acquire the property from SPSF would be the same with  
21 this as it was with the previous answer?

22 A Yes, sir.

23 Q If UP were to set up an industry, to site an  
24 industry, as you call it, next to the trackage rights  
25 operation, would UP or its -- or the industry itself pay

1 for whatever lead tracks or spur tracks were necessary  
2 to serve it?

3 A I hadn't really thought about that, but it is  
4 our policy to build the switch to clearance point for  
5 that industry.

6 Q And I think that somebody -- I am not sure if  
7 it was you or somebody else, indicated that there would  
8 be no objection to having SPSF also serve, whatever that  
9 industry, whatever industries were located by UP would  
10 be accessible to SPSF as well. Is that correct?

11 A That's correct.

12 Q Another one of your ancillary rights is the  
13 right to interchange traffic and equipment with  
14 railroads and other carriers at all existing or new  
15 physical connections and facilities located anywhere on  
16 the line.

17 I am taking that from the application filed on  
18 July 19. And the question to you is, the right to  
19 interchange traffic and equipment with railroads and  
20 other carriers, I am puzzled by the use of the term  
21 "other carriers."

22 I understand that you want the right to  
23 interchange traffic and equipment with railroads, but  
24 what other carriers do you envision?

25 A Short line carriers. Is this what you have

1 reference to?

2 Q I don't know. That is what I am asking you.

3 A Yes. As far as I know, that is what it refers  
4 to.

5 Q You would call -- a short line carrier would  
6 be another carrier rather than a railroad?

7 A You might want to define that with Mr. Craig,  
8 but from an operating standpoint that was my  
9 understanding of it.

10 Q Perhaps we could get an answer from counsel at  
11 some point as to what that is intended to be. It is  
12 sort of obscure. I don't know what they might have in  
13 mind.

14 MR. ROACH: I would suggest, Your Honor, that  
15 many of these questions about the ancillary rights are  
16 better addressed to Mr. Craig. And he can answer them.

17 JUDGE HOPKINS: Well, if he can't answer them

18 --

19 MR. ROACH: He can answer them. Mr. Craig  
20 will be able to answer questions such as the  
21 compensation issues.

22 JUDGE HOPKINS: And the question that was just  
23 asked?

24 MR. ROACH: The question that was just asked  
25 about other carriers, yes.



1 MR. TRIBE: Thank you.

2 BY MR. STEPHENSON: (Resuming)

3 Q To your knowledge, and the reason I am asking  
4 about ancillary rights is, you talk about them yourself,  
5 and they are mentioned in the operating plan. I  
6 understand that Mr. Craig is also addressing that  
7 subject, but to your knowledge, is there anything else  
8 that you can think of that is covered by these ancillary  
9 rights other than what we have talked about already?

10 A Other than what is in the operating plan?

11 Q Yes.

12 A No.

13 Q Now, in addition to these ancillary rights, UP  
14 has also asked for what you call road and terminal  
15 operations services, and these services, as I understand  
16 it, include such things as terminal switching, blocking,  
17 transportation of train crews, mechanical inspections,  
18 repairs of locomotives, cars, and so on.

19 Is that your basic understanding?

20 A That is correct.

21 Q I would like to get to those in a few minutes,  
22 but I would first like to cover a few of the points that  
23 have come up in the trackage rights agreement. If you  
24 would look at Section 2, which is on Page 6 --

25 A Of the operating plan?

1 Q No, of the trackage rights agreement, the  
2 proposed trackage rights agreement.

3 A What page, sir?

4 Q Actually, in view of counsel's comments, I  
5 think I am going to skip the first few of these, because  
6 I am sure that they relate to Mr. Craig's area.

7 Look at Page 7, if you will, at the bottom of  
8 the page. It is Section 4, Part B. It is the part of B  
9 at the last three lines of Page 7. It begins, "The  
10 joint track shall be maintained, at a minimum, to the  
11 same standards and allowing the same speeds of operation  
12 as were provided under applicable ATSF or SFT time  
13 tables in effect on October 4, 1983."

14 That is an unusual provision in a joint  
15 facility agreement, at least from my perspective, and I  
16 would like to ask you what is intended by that. What  
17 did you have in mind?

18 A That is intended so that the SP maintains  
19 their trackage at a level that we can remain  
20 competitive, and that they do not put a number of slow  
21 orders on that trackage and let it deteriorate where we  
22 are not competitive in that area with them.

23 Q Does that have specific reference to any  
24 particular part of the line?

25 A The entire line. All of the trackage rights.

1 The SP would have an opportunity to swing traffic north  
2 on the old Santa Fe line and leave us hanging on the  
3 south line by ourselves and not maintain the railroad.  
4 Therefore we would not be competitive with them. So we  
5 want assurance that they will maintain the railroad at  
6 the level it is today.

7 Q If SPSF had two parallel lines, and wanted to  
8 use one of them, wanted to make one of them a high speed  
9 line, let's say that we are talking about the southern  
10 corridor lines, and SPSF decided to raise the -- just  
11 hypothetically, that what is now the Santa Fe line  
12 through Barstow and Cadiz up to 90-mile-an-hour line --

13 A With freight trains? Better buy a lot of  
14 derricks.

15 Q Hypothetically. You wouldn't expect that  
16 sitting down on the SP line between Colton and El Paso,  
17 that you could get -- that SP would be under an  
18 obligation to raise its speed and maintenance of that  
19 line in order to compete with the other line, would  
20 you?

21 A I would expect the SP to maintain that line at  
22 its present level. That is why we have asked for  
23 trackage rights over this line, to be competitive with  
24 the SP-Santa Fe.

25 I do not personally think they would do it

1 because of the extra mileage, particularly on traffic  
2 moving out of the south into the southern California  
3 area, but I do want assurance in the trackage rights  
4 that that line will be maintained where we can remain  
5 competitive with them from an operating standpoint.

6 Q But by competitive, you mean competitive by  
7 today's standards, and not by standards five years from  
8 now?

9 A I at least want it maintained at today's  
10 level.

11 Q All right. But you do not intend by this  
12 provision to require SPSF to put the same amount of  
13 maintenance dollars and keep the same level of speed  
14 restrictions or whatever on both lines just so that you  
15 will be competitive?

16 A I am talking about the line that we want  
17 trackage rights over, and I am not talking maintenance  
18 dollars. I am talking about maintaining the railroad at  
19 a level that it is today. If they can do it cheaper,  
20 that is fine, but as long as we are able to run at the  
21 present day speeds.

22 Q I don't want to argue this point too much, but  
23 as a trackage rights tenant who wants to keep  
24 competitive, don't you have a certain responsibility or  
25 obligation to participate in that maintenance of the

1 line?

2 A I am not saying we are going to be there  
3 free.

4 Q And to the extent that there were to be a  
5 disparity between the competitiveness of the two lines,  
6 couldn't you as the tenant put in more money, reach an  
7 accord with SPSF to put more money into this --

8 A I am not saying we couldn't reach agreements,  
9 but what I am saying is that if they do not maintain the  
10 railroad at the level it is today, I have the right to  
11 come in and fix it and maintain it at that level and  
12 bill back to the SP their proportionate cost.

13 Q All right. If you would turn in this contract  
14 to Page 28, look at Section 18. Read that, and tell me  
15 what UP has in mind there.

16 A The way I understand that paragraph, over any  
17 of the trackage or terminals that we are asking for  
18 joint rights under this proposal, and either the SP or  
19 Santa Fe either has a piece of trackage leased with it  
20 in the contract, they cannot sublet that. We want the  
21 right to get on that track the same way that the Santa  
22 Fe or the SP has the right to be there.

23 Q I guess my question is, almost a year after  
24 the application has been filed, are you aware of any of  
25 these situations?

1 A I am not aware of any.

2 Q This is sort of a safety hatch?

3 A It is something the lawyers put in there to  
4 protect themselves.

5 Q I know how that goes. Would you look at Page  
6 31 of the contract, specifically the portion, Subsection  
7 (d) in the middle of the page?

8 (Pause.)

9 A Yes, sir.

10 Q I think I understand you intend by this to  
11 give yourself the right to terminate use of the trackage  
12 rights. Correct? You are not asserting that you have  
13 the right to abandon any of the trackage.

14 A No, the trackage rights is my understanding of  
15 that.

16 Q If you will look at the next section, (e).

17 (Pause.)

18 A Yes, sir.

19 Q Do you by this provision -- are you in this  
20 provision trying to set a price at which UP can buy out  
21 SP in the event that SPSF should abandon all our part of  
22 the line?

23 A I am not trying to set a price, no. This  
24 paragraph, the way I understand it, sets the terms that  
25 that would be sold.

1 Q Why wouldn't that be covered by standard  
2 provisions of the Interstate Commerce Act in terms of  
3 abandonment?

4 A I don't know. I am no lawyer. I can't say  
5 that.

6 Q You don't intend by this provision, I take it,  
7 to give yourself a price advantage over any other  
8 railroad that might be bidding on the property?

9 A From an operating standpoint, I don't know if  
10 that is so.

11 Q You wouldn't argue with the right of SPSF to  
12 sell the property if it abandons it to the highest  
13 bidder irrespective of whether that is UP or somebody  
14 else?

15 A If the UP was trying to buy it, I would try to  
16 get it as cheap as I could.

17 Q But you wouldn't --

18 A For railroad purposes. I wouldn't intend to  
19 buy it for anything other than railroad purposes.

20 Q But you wouldn't quarrel with the right of  
21 SPSF to sell this property for the best price it could  
22 get?

23 A For railroad purposes?

24 Q For whatever purposes.

25 A I would object to that, because if we intended

1 to buy it we would use it for railroad purposes. I  
2 wouldn't say that you should go out for the highest  
3 bidder to build a condominium on it when we want it for  
4 railroad purposes.

5 Q All right. Section 2, at Page 6 of this  
6 agreement, we have talked about this before, (c)(2). It  
7 is again one of the ancillary rights that UP would  
8 desire as part of its trackage rights agreement, and it  
9 would give you the right to serve shippers at common  
10 points or shippers jointly served under some contract  
11 between SP and Santa Fe.

12 Specifically addressing the contract between  
13 SP and Santa Fe that exists today for the property  
14 between Kern Junction and Mojave, the joint track  
15 agreement, you are familiar with that, aren't you?

16 A Yes, sir.

17 Q That is the one that goes over the  
18 Tahachapees?

19 A Yes, sir.

20 Q Is it the intention of this provision to  
21 permit UP to in effect choose between compensation paid  
22 for trackage rights, choose between whatever price is  
23 set by the ICC as part of this proceeding, or choose the  
24 compensation arrangement that is already part of that  
25 Kern Junction --



1           A     I would say we would negotiate that  
2 , compensation.

3           Q     I guess what I am asking you is, is the intent  
4 of this provision that would allow you at your sole  
5 option to choose which contract you wish to participate  
6 in, would this permit you to say to the ICC, we  
7 understand that you are setting compensation for all of  
8 the rest of the property, or giving us the general rules  
9 for compensation, but we have chosen to step into the  
10 shoes of the Santa Fe, and we are going to be paying  
11 SPSF compensation based upon the Kern Junction agreement  
12 rather than under the trackage rights?

13          A     My understanding of that is not that way. My  
14 understanding of it is that we will sit down with the  
15 SP-Santa Fe to negotiate a reasonable trackage rights  
16 price or cost, and if we can't agree, that we go to the  
17 Commission to set that compensation.

18          Q     Okay. I understand that is the procedure that  
19 would be followed should the Commission award trackage  
20 rights to UP. My question is one step beyond that.

21                 Assuming that the Commission granted trackage  
22 rights to you, your San Joaquin trackage rights, for  
23 example, and assume further that we sat down, tried to  
24 negotiate a compensation range but couldn't do it, went  
25 to the Commission, the Commission ordered compensation

1 based upon some formula, as they did in your own merger  
2 case.

3 Is it your understanding of this provision  
4 that this provision would not, and by this provision I  
5 mean (c)(2), this provision would not give you the right  
6 to tell the ICC, well, your compensation figure is good  
7 for the rest of the property, but it is not good for the  
8 80 some miles between Kern Junction and Mojave?

9 A That is not the way I understand it. You  
10 might want a legal opinion on that.

11 Q Well, tell me what your understanding of  
12 (c)(2) is. What is the purpose of that?

13 A Well, I think it outlines it very clearly, as  
14 I told you before, that we will sit down with the Santa  
15 Fe-SP to negotiate these costs, and if we can't agree we  
16 will go to the Commission to set them for us.

17 Q I am talking about Section 2(c)(2) that is on  
18 Page 5.

19 A On Page 6, (c)(2). I am not sure I understand  
20 your question why it leads to the Tehachapis. It  
21 doesn't mention that in there.

22 Q I understand that. The Tehachapis was a joint  
23 facility agreement that was in existence on October 4 of  
24 1983, was it not?

25 A As far as I know it was.

1 Q And so it would give Union Pacific the option  
2 that at UP's sole option to substitute itself into that  
3 agreement, and I am asking you if under that provision  
4 you would be able to choose between the compensation on  
5 the Kern Junction agreement as opposed to whatever  
6 compensation is set by the Commission in this case.

7 A I don't know if that's what it is intended to  
8 do or not.

9 JUDGE HOPKINS: I think this might be a good  
10 time for a recess. We will take 15 minutes.

11 (Whereupon, a brief recess was taken.)

12 JUDGE HOPKINS: Back on the record.

13 Mr. Stephenson.

14 BY MR. STEPHENSON: (Resuming)

15 Q If you would look at Section 14 of the  
16 trackage rights agreement, road and terminal  
17 operations.

18 A Page 15?

19 Q Page 15. Yes, sir. Now, under this road and  
20 terminal operations and services provision, SPSF is to  
21 provide certain services to UP upon UP's request. Is  
22 that right?

23 A That is correct.

24 Q And these services are specified, at least  
25 some of the services are specified in Exhibits B and C

1 of the proposed trackage rights agreement?

2 A Yes.

3 Q "Plus services which may be required from time  
4 to time by reason of emergency or special need," and I  
5 am quoting here from Section 14 of the agreement. Am I  
6 correct that UP is the one, is the party to determine  
7 whether there is a special need?

8 A I didn't understand it that way.

9 Q What is your understanding, that it is going  
10 to be by agreement between the parties?

11 A That is correct.

12 Q And what is covered by the phrase or term  
13 "special need?"

14 A Well, let's take if you have a locomotive  
15 derailed, that the SP would provide service in that  
16 designated area, that we propose to rerail that  
17 locomotive and see that the main line is clear.

18 Q Now, I would call that an emergency. They  
19 talk about emergency or special need. How do you  
20 distinguish between them?

21 A I will give you another example. Say you had  
22 a locomotive failure with a pinion down and you get the  
23 locomotive set out in a backtrack rather than run a  
24 Union Pacific mechanical crew over there, hundreds of  
25 miles, to fix it, that the SP would fix that locomotive

1 and make it safe to move into a route house area or into  
2 a terminal to be fixed.

3 Q Okay. Now, I understand that is one of your  
4 requests, but that request is covered by one of the  
5 requests in Part B or Exhibit B. That one would be  
6 covered by, at least under my reading, under the road  
7 operation service, (d)(2).

8 Let me tell you what my problem is, and maybe  
9 you can address it. Your Section 14 of your proposed  
10 agreement says that the special services or the services  
11 that UP is requesting SPSF to do are contained in  
12 Exhibits B and C, and we will go through those later  
13 on.

14 Those have a number of specific requests that  
15 UP is making of SPSF, but in addition, in Section 14, it  
16 says specified in B and C and services which may be  
17 required from time to time by reason of emergency or  
18 other special need.

19 And I am trying to find out from you what  
20 other services does UP intend SPSF to provide that are  
21 not enumerated in Exhibits B and C?

22 A Well, if I knew, I would name them, but I  
23 don't know what they are. So many times when you sit  
24 down and write agreements, joint agreements as to  
25 services to be performed, you can't name every little

1 service that we are talking about.

2 We got into that with the Katy on their  
3 trackage rights. When they started coming up into  
4 Council Bluffs, there were services that they asked us  
5 to perform that was not specified in the agreement, and  
6 our operating people took that literally.

7 They would not perform that service for the  
8 Katy, and it took a phone call between Mr. Todd and  
9 myself to settle that. That good, reasonable  
10 operations, he shouldn't have to run a crew from Kansas  
11 City to Omaha to perform a five-minute task, and it was  
12 all not defined in the agreement.

13 And what my understanding of this is is that  
14 anything we have missed or cannot think of, you will  
15 provide it or the SP will provide it.

16 Q But that is the problem that I have. We would  
17 like to know what it is that the UP is asking for, and I  
18 think I understand. If I understand --

19 A It is a catchall.

20 Q It is a catchall. It is a safety hatch that  
21 will allow you if you haven't enumerated all the  
22 possibilities in B or C to get us to do the work for  
23 you. Is that right?

24 A That is true, at a compensated price.

25 Q All right. We will talk about the compensated

1 price later. Who prepared Exhibit B and C, the itemized  
2 services that you expect us to do for you?

3 A Is that in the same document?

4 Q It is not in that one. It was filed later on  
5 as part of one of your subsequent filings.

6 A Well, I would have to look at it before I  
7 could tell you who prepared it.

8 Q Specifically it came in in the volume that has  
9 the -- on the September 10th filing. It came in Volume  
10 1A.

11 (Whereupon, the document was handed to the  
12 witness.)

13 A Now I have it. You are asking who prepared  
14 this list?

15 Q Who prepared Exhibit B and Exhibit C, to your  
16 knowledge?

17 A Well, I guess the lawyers prepared it and we  
18 in the operating department, a number of my staff and  
19 myself put in the information.

20 Q This is an operating document.

21 A Yes, it is.

22 Q And I take it that the people that you  
23 assigned to prepare the operating plan were in your mind  
24 competent individuals, correct?

25 A The best.

1 Q The best. So why can't we live with Exhibit B  
2 and C and not have a catchall that potentially --

3 A Well, I'll tell you. In my many years of  
4 being in the operating department, I have always thought  
5 I have seen everything, but I guarantee you tomorrow  
6 something will come up that I haven't seen. So no  
7 matter what your experience is, you certainly can't  
8 think of everything that could happen and write it  
9 down.

10 Q All right. Then let me suggest an alternative  
11 to you. Since it is your trackage rights that you are  
12 proposing, why don't you take care of your own problems  
13 when and if they arise?

14 A Well, in some cases that phrase in there is to  
15 the benefit of the Southern Pacific also as the owning  
16 railroad, that they have the right if we have something  
17 wrong out there that they can correct it, and bill us  
18 back for that. It is to their advantage as well as our  
19 own.

20 Q Well, that is covered by B and C perhaps, but  
21 when you --

22 A I don't know that it is, though. I may not  
23 have named everything in B and C.

24 Q Well, if your people are competent and the  
25 best people, I would expect that they would have covered



1 most everything that possibly could be --

2 A Well, I considered the D&RG and the Ka'y  
3 people very competent also, and there were things in the  
4 agreements we wrote with them on the trackage rights  
5 that was not covered.

6 Q Well, rather than fence on this all day, let's  
7 leave it that it is a safety hatch, and if you can think  
8 of anything else that UP wants SPSF to do for it as part  
9 of terminal services or road services during the course  
10 of your examination, let us know. Maybe we can add it  
11 to the list.

12 A I certainly will.

13 Q Let's talk about the terminal services first.  
14 Let me back up. Is it your intention that the terminal  
15 services requested as part of Exhibit C are to be  
16 permanent? In other words, when you request that SP,  
17 for example, fill UP trains at El Paso, is it your  
18 intention that these services that you are requesting  
19 from SPSF will be for the duration of the trackage  
20 rights?

21 A I would assume they would be as long as we  
22 have traffic coming through that area.

23 Q The reason I ask that question is, there is  
24 some doubt, looking at your verified statement, as to  
25 whether some of the requests are transitory or whether

1 they are permanent in nature, and if we come across some  
2 of these requested services that you view as being  
3 interim only until you get your operation going, I'd  
4 appreciate it if you would so advise.

5 A Okay.

6 Q Looking at El Paso first, your Exhibit B --  
7 I'm sorry, your Exhibit C requires SPSF to fill UP/MP  
8 trains in proper blocks, to reduce UP/MP trains, to  
9 reduce or add units to the locomotive consist, and to  
10 reduce or add cabooses or end-of-train protection  
11 devices to UP trains.

12 I would like to go through each one of those  
13 in some detail. What do you mean by filling UP/MP  
14 trains?

15 A That means to place cars on the train. They  
16 can either do it with a switch engine or they could have  
17 the road crew reach over and pick the fill up  
18 themselves. Whatever is the SPSF's choice at that time.

19 Q Okay, and the road crew in this instance,  
20 talking about El Paso, would be the SPSF road crew?

21 A No, sir, Union Pacific road crew.

22 Q Union Pacific on a westbound movement?

23 A That is correct.

24 Q So that I am clear on this, would the filling  
25 be done prior to the delivery of the train to SPSF's

1 yard in El Paso?

2 A What I would envision is, if it is a through  
3 train, that he would come up the main line at El Paso  
4 and then at the discretion of the SPSF yard master, that  
5 he would cut his power off and a switch engine would put  
6 that fill on that train, or if we can do so under the  
7 existing agreements, have the road crew reach over and  
8 pick that fill up, double back to their train, get the  
9 air test, and leave.

10 Q What are the problems in terms of the  
11 agreement, the labor agreements?

12 A I am not that familiar with local labor  
13 agreements at El Paso as to whether the road crew can do  
14 it or not, but I assume they can.

15 Q There is some question as to whether there is,  
16 at least in my mind, based on what you said, as to  
17 whether there is a definite plan as to how the filling  
18 of the westbound UP trains is to be handled at El Paso.  
19 Is it true that there is some doubt as to how that is  
20 going to be --

21 A No doubt in my mind, although what I am saying  
22 is, that is between the local operating officers to  
23 determine the most efficient from a cost standpoint and  
24 an operating standpoint to get that job done. I don't  
25 want to put it in the record that it has to be done this

1 way. I want flexibility between the operating officers  
2 to do it in the most efficient way.

3 Q Missouri Pacific has a yard in El Paso,  
4 doesn't it?

5 A That is correct.

6 Q Why is this work not being done in the  
7 Missouri Pacific yard?

8 A Because it is much more efficient and faster  
9 to do it on the SP main line.

10 Q It is a matter of convenience and efficiency  
11 for Missouri Pacific then?

12 A For the train operations. When we wrote the  
13 operating plan, we looked at the most efficient, least  
14 cost method of handling that traffic.

15 Q When you say fill UP/MP trains in proper  
16 blocks, what do you mean by in proper blocks?

17 A Well, we are asking for, if I recall, two  
18 blocks of traffic, or whenever we have to place it,  
19 however the train is made up and blocked coming into  
20 there. If they have to fill him behind 20 cars, I want  
21 that done.

22 Q And if it is done in the SPSF yard, that, of  
23 course, would be done by the SFSP people?

24 A In some cases it would be. It would be lined  
25 up by them, and at their discretion they could either

1 put it on with a switch engine or have a Union Pacific  
2 road crew reach over and pick it up.

3 Q What about eastbound movements, talking first  
4 about filling? Would there be any filling of eastbound  
5 UP trains coming to El Paso?

6 A Yes.

7 Q Describe what that operation would entail.

8 A The same as the westbound.

9 Q And it would be done either by the -- in the  
10 SPSF yard or when?

11 A Or off of their main line. The majority of  
12 that traffic originating at SP will be taken out on line  
13 and picked up on line, but we want the right to fill  
14 that train eastbound at El Paso also.

15 Q You want the right to have SP do it?

16 A That is correct, at a fully compensated  
17 price.

18 Q Now, when we are talking about reducing  
19 trains, I don't want to go through all the details all  
20 afternoon about this, but I just want to cover the first  
21 few.

22 JUDGE HOPKINS: Thank you.

23 BY MR. STEPHENSON: (Resuming)

24 Q Reducing the UP trains, if we talk about the  
25 eastbound trains, would there be any necessity for SPSF

1 to reduce eastbound UP trains at El Paso?

2 A There might be.

3 Q And that would be occasioned by what?

4 A That there is traffic destined for the SP or  
5 for the El Paso area. That would be taken off of that  
6 train.

7 Q Interchange traffic to SP?

8 A Could be some of that, or to Missouri Pacific  
9 traffic.

10 Q Now, if you could tell us what would be  
11 involved in reducing or adding units to the locomotive  
12 consist, first westbound and then eastbound.

13 A The same would apply for either direction. We  
14 do not anticipate, you know, on a daily basis, the  
15 reduction of power. I guess we do.

16 The westbounds are coming in there -- what we  
17 are talking about is that, let's say if we have a unit  
18 down and we have to replace that unit at El Paso, a unit  
19 is available. We will deliver that locomotive to the SP  
20 at El Paso and not put it on the train for us, reduce  
21 our power and put one on.

22 Or in the future if we ever changed our  
23 operation and we were bringing more traffic into El Paso  
24 than we were going west with, and we needed less power,  
25 we want to reduce that power at El Paso. The same

1 eastbound.

2 Q If you didn't have power and SP did under this  
3 agreement you would have the right to tell SP, add  
4 power, add your power onto this train. Isn't that  
5 right?

6 A That's correct. We may get some SP power to  
7 put on there, too. We have runthrough agreements with  
8 them.

9 Q Let's talk about reducing or adding cabooses  
10 or end of train protection devices at El Paso. What is  
11 involved in that?

12 A Well, a switch engine, either putting a  
13 caboose on or taking one off, or putting the rear end  
14 device on and off, which takes about 15 minutes, that  
15 would -- there again, to protect us if we have a bad  
16 order caboose or if we are taking cabooses off the  
17 trains and putting rear end devices on.

18 Q Have you had any negotiations with the  
19 Brotherhoods about using or not using cabooses?

20 A We most certainly have. We have run in excess  
21 of two million train miles already without cabooses.

22 Q Specifically with respect to the trackage  
23 rights?

24 A Excuse me?

25 Q Specifically with respect to the trackage

1 rights?

2 A No, we have not.

3 Q Do you anticipate that you would attempt to  
4 negotiate a deal with the Brotherhoods that would permit  
5 you to use end of train protection devices rather than  
6 cabooses?

7 A We would have an agreement with them rather  
8 than a deal. We anticipate we will negotiate that with  
9 them.

10 Q All right. Do you anticipate that you will be  
11 successful?

12 A Yes, sir.

13 Q Do you also expect to negotiate an agreement  
14 with the Brotherhoods that would permit you to operate  
15 three-man crews between Colton and El Paso?

16 A I would anticipate we would negotiate  
17 agreements with them.

18 Q Do you anticipate that you would be successful  
19 in that regard?

20 A Being an optimistic person, I would say yes.

21 Q It is a generally accepted fact, is it not,  
22 that when a railroad is conducting new operations, that  
23 the Brotherhoods are more willing to go along with  
24 modernizations or changes in the work rules rather than  
25 changing existing work rules?



1                   Wouldn't you agree with that?

2                   A     In some cases I would. That has not always  
3     been true.

4                   Q     Have you ever worked in El Paso? I mean, have  
5     you ever been assigned to El Paso?

6                   A     No, sir, I have not.

7                   Q     Do you agree that El Paso is, from a railroad  
8     operating standpoint, a difficult terminal to operate  
9     in?

10                  A     From talking to the Missouri Pacific officers,  
11     their vice president of operations, their general  
12     manager, some of their local officers, if I was to lay  
13     El Paso out from an operational standpoint new today, I  
14     would not design it the way it is designed today.

15                             It is not the most efficient. It could be  
16     designed much better.

17                  Q     I passed up a point with respect to the labor  
18     negotiations. Would you expect that the Union Pacific  
19     would make an effort should you get trackage rights in  
20     any of these corridors, make an effort to hire  
21     furloughed SPSF employees to the extent there were SPSF  
22     employees on a first come -- or give them preferential  
23     hiring over some people off the street?

24                  A     No, I would not. I would hire Union Pacific  
25     employees first of all, as we are extending crew

1 districts. I also have certain laws that I have to  
2 comply with, EEO.

3 If I recall, we still have a requirement to  
4 hire furloughed and laid off Rock Island and Milwaukee  
5 employees. By federal law we are required to do  
6 that.

7 Q Okay. So the answer is no, you would not give  
8 preference to furloughed SPSF employees?

9 A That is correct.

10 Q By preference -- I guess I should define it --  
11 any preference whatever over the man in the street.

12 A Yes, sir, I would. I would hire that  
13 experience rather than just the ordinary man on the  
14 street.

15 Q But your first objective would be to hire  
16 Union Pacific people and put them on?

17 A That is correct, because we are looking at  
18 extending crew districts at present seniority. That is  
19 one alternative.

20 Q And I think your answer was no to this. Maybe  
21 I didn't ask it properly. Have you had any discussions  
22 with any of the Brotherhoods about implementing trackside  
23 rights in connection with your application here?

24 A No, we have not.

25 Q In addition to the terminal operations

1 services you have also asked for road operation  
2 services. Is that correct?

3 A Over part of the trackage rights.

4 Q Where would the road operation services be in  
5 existence?

6 A If I recall, from Lordsburg to Indio and from  
7 Mojave to Fresno.

8 Q Now, that is for the pickup of disabled  
9 equipment out on the line. Is it your understanding  
10 that there would be no road operation services at any  
11 point between Indio and Mojave?

12 A What do you mean, road services? The  
13 repairing of boxcars?

14 Q Exhibit B, your road operation services. If  
15 your answer is --

16 A Where at?

17 Q That is Exhibit B.

18 A Okay.

19 Q It may be that your answer is the right  
20 answer. I just want to make sure I understand it. You  
21 said that the road operation services extend from  
22 Lordsburg, New Mexico.

23 A When I answered the question for road  
24 services, what I was referring to was bad orders. Now,  
25 as far as deadheading and other services, it is so

1 outlined in B. It is not limited to those territories  
2 for all road services that we are asking for.

3 Q All right. So you are asking for the right to  
4 deadhead your employees in our trains, the right to have  
5 us provide your people with office space or with locker  
6 space or with facilities for reporting to duty, filing  
7 reports, and so on. That would be throughout the  
8 trackage rights and not confined to Indio?

9 A That is correct.

10 Q All right. Let's go over briefly some of the  
11 things that are covered by the road operation services.  
12 We have already talked about the picking up disabled  
13 equipment out on the lines.

14 By the way, how far is it from Lordsburg to  
15 Indio? Do you know?

16 A Yes. I can get my time table out and figure  
17 it for you. If the mile poles are correct in the SPSF  
18 time tables, it is 537.4 miles.

19 Q All right. Now, the question is, why is it  
20 that SF should perform this service over this stretch of  
21 537 miles? Why can't Union Pacific, that is  
22 implementing these trackage rights, that is asking for  
23 them, why can't they do their own picking up of disabled  
24 equipment?

25 A We are not saying picked up. We are saying

1 repaired. It will be picked up by a UP train once it is  
2 repaired. The reason for that is that the SP now has  
3 mechanical people working those areas, and from a cost  
4 standpoint, and sometimes for operating convenience, it  
5 is better that they do them rather than have two crews  
6 out there overlapping each other.

7 From a cost standpoint, there would be less  
8 cost and less delay to that commodity in getting it  
9 repaired and moved.

10 Q Certainly less cost to the Union Pacific.

11 A In some areas possibly.

12 Q You have been out in that area before. That  
13 is a long expanse of desert for hundreds of miles,  
14 right?

15 A Yes, sir.

16 Q What is the likelihood that when a train  
17 breaks down or a car is bad ordered out in the middle of  
18 that isolate desert, that SP is going to have anybody  
19 right on the spot any more than UP would?

20 A They have a heavier volume of traffic through  
21 there, and percentagewise will have more bad orders.  
22 They now have an organization in place in their  
23 mechanical department that covers the repair of that  
24 equipment on line.

25 Q So that is the basis for it, is that it would

1 be more efficient from UP's standpoint?

2 A More efficient for the shipper, too.

3 Q It would be more efficient for the shipper to  
4 use only one railroad and completely do away with  
5 duplication of any sort, don't you think?

6 A No, sir, I don't think that.

7 Q Another item that is part of your road  
8 operation services is deadheading crews to and from  
9 wherever they tie up at night to a motel and back.

10 A Yes, sir.

11 Q Do you understand, and I am sure that UP does  
12 this itself, does UP contract out in a number of areas  
13 to have this kind of service performed for its  
14 employees?

15 A Yes.

16 Q Why can't you have that done here? Why should  
17 SP or SPSF be required to contract out on your behalf?

18 A If the SP has a contract with a hauler to haul  
19 crews, we would like to be a part of that, our crews be  
20 included in that.

21 Q Why can't that be something that UP arranges  
22 on its own? Call up the SP and find out who their  
23 contractor is?

24 A It would be more efficient. He might have  
25 that contractor going out to pick up one crew, and he

1 can pick up two.

2 Q It would also avoid UP having to do any work,  
3 wouldn't it?

4 A No, it would avoid some cost for us, and that  
5 is what we looked at when we designed the operating  
6 plan.

7 Q All right. In (D)(3)(e) is another one of the  
8 road operation services that you expect SPSF to do for  
9 you, and that would be servicing your locomotives,  
10 cabooses, or end of train devices as may be required,  
11 and the question is, as may be required means what? On  
12 a full-time basis? Or what do you have in mind?

13 A Let's see if I can find what you are reading.

14 Q Look at (D)(3)(e).

15 (Pause.)

16 A There again, that is to include anything that  
17 we may not have thought of.

18 Q Okay. And I take it that at the other  
19 locations "as may be required" is also one of these  
20 catchalls, in case you haven't thought of it?

21 A That's correct.

22 Q So the servicing of the locomotives and  
23 cabooses, apart from where it is specifically requested  
24 by location, is something that you want to keep in your  
25 bag of tricks, if you will?

1           A     I have no bag of tricks. I am not trying to  
2     trick anyone by what I have written here. All I am  
3     trying to do is cover it by agreement so we don't get  
4     into arguments later.

5           Q     You want to have the right to have us service  
6     your locomotives, cabooses, or end-of-train devices at  
7     any location on the trackage rights if you so request?

8           A     That is correct.

9           Q     (D)(C)(3), preparation of cars for safe  
10    movement such as, without limitation, the measuring of  
11    excessive dimension shipments and adjustment or  
12    resecuring of lading.

13           A     It is mechanical force operation, is it not?

14           A     Yes, normally, or an outsider, outside  
15    contractor.

16           Q     And do you cover within the phrase  
17    "preparation of cars for safe movement" the inspection  
18    of cars inbound and outbound?

19           A     Yes, as required by FRA.

20           Q     So SPSF would inspect your trains as well?

21           A     Yes, sir.

22           Q     We have already talked about the providing of  
23    power and cabooses if they are available to replace your  
24    own bad ordered locomotives or cabooses, and that is one  
25    of your requests.



1           A     Yes. And that is in an existing agreement we  
2 have with the SP.

3           Q     But that is for runthrough, is it not?

4           A     That's correct.

5           Q     Missouri Pacific and SP have a number of  
6 trackage agreements all over Texas and other states. Do  
7 you know of any situations in those trackage rights  
8 agreements where the tenant railroad can request the  
9 owning railroad to supply power, to replace bad order  
10 power?

11          A     I do it for the SP all the time.

12          Q     That is because you have runthrough  
13 agreements.

14          A     That's correct. To my knowledge the Missouri  
15 Pacific and the SP have runthrough agreements also.

16          Q     But the question is, on trackage rights  
17 between SP and Missouri Pacific, does the Missouri  
18 Pacific provide equipment to replace bad order SP  
19 equipment or vice versa on any of those trackage rights  
20 agreements?

21          A     I am not that familiar with the Missouri  
22 Pacific trackage rights agreements.

23          Q     The final one is the providing of space at  
24 Lordsburg and Tucson, Phoenix, Yuma, and Bakersfield for  
25 UP/MP crews to report to and from duty, receive and

1 report work orders.

2 Now, this would include crew lockers,  
3 restrooms, bulletin boards, and things of that nature.

4 A Existing, yes.

5 Q Are you aware of the fact that at the outset  
6 of SP's operations or Cotton Belt's operations of  
7 trackage rights between Kansas City and St. Louis, that  
8 the Cotton Belt asked for locker space and office space  
9 for its employees in order to conduct their trackage  
10 rights, their bridge trackage rights operation over the  
11 Missouri Pacific and were told by the Missouri Pacific  
12 in no uncertain terms that they couldn't even have space  
13 in their building at Jefferson City?

14 A I was not aware of that.

15 Q You were not consulted by Davidson or anybody,  
16 Mr. Davidson from the Missouri Pacific?

17 A No, sir, I was not.

18 Q Do you know of any service provided by  
19 Missouri Pacific, any service aside from dispatching of  
20 the line and perhaps picking up derailments, that is  
21 provided by Missouri Pacific to Cotton Belt in  
22 connection with the Kansas City to St. Louis trackage  
23 rights?

24 A No, I am not. I am familiar with what they do  
25 for the Rio Grande and Katy, on those trackage rights.

1 Q Do you know whether your operating people did  
2 any studies of SPT's, or actually it will be SPSF's yard  
3 and main track capacity in the El Paso terminal area?

4 A Yes. I know they looked at it and discussed  
5 it, both Missouri Pacific and Union Pacific operating  
6 people.

7 Q Aside from any simply discussions, do you know  
8 whether there were any detailed studies done by your  
9 people?

10 A Not to my knowledge.

11 Q You are aware that in El Paso the plan is that  
12 both the TOFC and the classification functions of both  
13 Santa Fe and SP will be placed in the existing SP  
14 facilities?

15 A I am sure it is in the operating plan, but I  
16 don't recall that.

17 Q Turning to Phoenix, your Exhibit C indicates  
18 that the terminal operation services contemplated by UP  
19 in Phoenix are the makeup and breakup of UP trains, the  
20 spotting and pulling of UP intermodal traffic at the  
21 SPSF intermodal facility, the ramping and deramping of  
22 UP intermodal traffic, and the weighing of cars as  
23 necessary.

24 Q Could you tell us briefly what the UP plan,  
25 trackage rights plan is for the city of Phoenix?

1           A       Well, first of all, to make a correction on  
2 the makeup and breakup of trains, we are only talking  
3 about one train.

4           Q       Well, I am just using trains, and I am just  
5 reading it.

6           A       That is what the operating plan proposes at  
7 the present time. What I would envision is that we  
8 would have the right in that terminal to deliver. I  
9 understand the SP-Santa Fe will be using the Desert  
10 ramp, which is presently a Santa Fe ramp.

11                   We want the right to move over terminal  
12 trackage to and from that ramp, and that the SP will  
13 make up our train in their yard. We are asking for one  
14 block. There is no distinction of traffic by blocks.  
15 Put our caboose on, our power, and we will operate the  
16 train out of there, and if there is a car to be weighed,  
17 that they will weigh it for us.

18           Q       What determines whether there is a car to be  
19 weighed?

20           A       Whether by tariff or by shipper it has to be  
21 weighed or not.

22           Q       You are aware, and you said that the Santa Fe  
23 facility at the Desert yard is going to be --

24           A       That is my understanding. I looked at both  
25 ramps, and by far the Desert ramp would be much better.

1 Q And that is the ramp that the two companies  
2 are going to move their consolidated operation into?

3 A That's correct.

4 Q Leaving the SP ramp without any TOFC business  
5 at all to speak of?

6 A My understanding is, they will vacate it,  
7 yes.

8 Q And is it also your understanding that the  
9 classification will be done -- of boxcar traffic,  
10 manifest traffic will be done in the SP yard, and that  
11 the Santa Fe operations will move over to the SP  
12 classification yard?

13 A That is my understanding.  
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1 Q Did you or your people who are putting the  
2 operating plan together consider the possibility of  
3 using your own -- taking over all or a portion of the  
4 SPSF -- I mean the former SP intermodal facility, and  
5 have your own intermodal facility and likewise lease all  
6 or part of this former Santa Fe yard for classification  
7 purposes?

8 A I think we did consider that. I recall  
9 discussing it with my operating people.

10 Q Why was that rejected?

11 A Because it wasn't economical to do it. The  
12 amount of traffic we were talking about for a facility  
13 that large was not practical.

14 Q In addition, if you can get SPSF to do the  
15 work for you --

16 A At a reasonable price. I would not expect  
17 them to do any work for me free. But for the efficiency  
18 of the operation and the efficiency in costs, we have  
19 proposed that they do it.

20 Q Bakersfield is the next point. There you  
21 would, under your Exhibit C, have SP classify your  
22 traffic, prepare pickups for, and handle set-outs from  
23 passing UP trains and weigh UP cars as necessary.

24 You are aware, are you not, that the proposed  
25 consolidated Bakersfield operations of SPSF will be

1 conducted in the Santa Fe facilities?

2 A No, I was not.

3 Q Will you accept my representation that that is  
4 the case?

5 A Yes, sir.

6 Q And you have chosen to have again SPSF conduct  
7 your business in Bakersfield rather than take over the  
8 empty SP TOFC facility or MP classification area?

9 A That is correct.

10 Q For the same reasons that you discussed in  
11 connection with Phoenix?

12 A That is correct.

13 Q And I take it that -- well, we'll get to  
14 Fresno in a while, later on.

15 In Fresno it's proposed in your Exhibit C that  
16 SPSF will classify UP's traffic, will prepare pickups  
17 for and handle set-outs from passing UP trains, will  
18 spot and pull UP intermodal traffic at the UP ramp, and  
19 will weigh UP cars as necessary.

20 The difference between Fresno and Bakersfield,  
21 as I see it, is that in this case you propose to  
22 actually operate the former SP TOFC facility, if I  
23 understand your proposal.

24 A I didn't understand it that way.

25 Q Well, what is your understanding of what your

1 proposal is?

2 A That we are going to handle TOFC traffic in  
3 and out of Fresno, TOFC traffic. We are not handling  
4 TOFC traffic destined for Bakersfield.

5 Q Obviously I misspoke. You are going to be  
6 operating in Fresno in the abandoned or the unused  
7 Southern Pacific TOFC ramp, is that correct?

8 A That's correct.

9 Q So you'll be conducting your own TOFC  
10 operations at Fresno, unlike in Bakersfield and unlike  
11 in Phoenix.

12 A That's correct.

13 Q What's the difference between Fresno and the  
14 others?

15 A What do you mean, what's the difference?

16 Q Why did you decide to conduct your own  
17 intermodal operation in the vacated SP facility in  
18 Fresno and not do it in Bakersfield?

19 A For the sake of expedient operations and  
20 cost.

21 Q Any other reasons?

22 A No, sir.

23 Q And just so the point hasn't been missed, in  
24 addition to these various terminal operation services at  
25 these points that we have discussed, you also expect



1 that, as we have discussed earlier, that the road  
2 operation services would be provided throughout the  
3 line, including -- or throughout the trackage rights  
4 operations, including at Phoenix, Bakersfield and  
5 Fresno?

6 A Yes, sir.

7 Q Now we'll talk about the compensation. You  
8 have indicated that it's your intention to fully  
9 compensate SPSF for the switching and blocking and car  
10 inspections and repair work and so on that you have  
11 described. Explain to us how you propose to do that.

12 A By sitting down and writing an agreement with  
13 them as to what that cost would be.

14 Q And this is all the SPSF cost; is that  
15 correct?

16 A All the what?

17 Q All SPSF costs that are incurred in connection  
18 with the support or maintenance of your trackage rights  
19 operations would be paid for by UP, is that your --

20 A You're saying all of their costs in connection  
21 with that? For our part of it, not all of their costs  
22 for their crews.

23 Q All costs incurred by SPSF in supporting your  
24 or maintaining your trackage rights operation. It's  
25 your plan to pay all of --

1 A You're talking about the services now?

2 Q Yes.

3 A The services that they're going to perform for  
4 us under this plan --

5 Q Yes.

6 A We will negotiate what that price is.

7 Q Yeah. And who has the final --

8 A I would assume that when the SP threw a price  
9 out at us that it would be to recover their costs, yes.

10 Q Okay. What costs did you have in mind --  
11 avoidable costs or avoidable and part of our fixed  
12 costs? What costs do you have in mind when you say that  
13 you are going to compensate us for our expense of  
14 supporting your trackage rights operation? What do you  
15 mean? Because cost --

16 A Avoidable costs.

17 Q Just our avoidable costs?

18 A Yes. There again, they may have a differing  
19 view on that. That's why I have to say we have to sit  
20 and negotiate that.

21 Q Would there be any profit element that would  
22 be figured into it?

23 A Oh, I'm sure there would be.

24 Q And so far as you --

25 A I wouldn't want to pay for the depreciation of

1 a yard office in Fresno, though, as part of my costs of  
2 allowing my crews to sign a train register that's  
3 required by the SP to do so. I mean we have to be  
4 reasonable about determining these costs and what  
5 factors go into them.

6 Q Well, what items do go into the cost --  
7 supervisory?

8 A Normally.

9 Q Administrative overhead costs?

10 A Sometimes.

11 Q The accounting costs necessary to keep track  
12 of who did what?

13 A Normally that's part of overhead.

14 Q A share of the equipment costs that are  
15 involved in switching your cars, for example?

16 A Possibly. I can't say what would go into  
17 those costs. That would be determined by the SP when we  
18 sat down to negotiate it, and if we think it's  
19 reasonable, we'll probably agree to it; if we don't,  
20 we'll tell them so.

21 Q Certainly, the fuel expended by your trains or  
22 our switch engines doing some of your work would be  
23 recompensable?

24 A If you can figure out how much fuel you're  
25 using on a switch engine to switch two boxcars, I'll sit

1 down and look at it.

2 Q And getting back to the question that I asked  
3 before and that I think you answered in the affirmative,  
4 you would expect that a reasonable profit ought to be  
5 recovered by SPSF in connection with this work that  
6 they're doing for you?

7 A What's a reasonable profit?

8 Q But you certainly wouldn't reject out of hand  
9 the necessity of giving SPSF something for the work that  
10 they are doing, in effect, maintaining the  
11 infrastructure of your trackage rights operation?

12 A Like I say, I wouldn't expect them to do it  
13 for nothing. We'll negotiate that.

14 Q In terms of control of employees and  
15 supervision of employees, the risk of keeping employees  
16 to do work not only for SPSF but for UP as well, let me  
17 give you a hypothetical that might be a little bit  
18 extreme, but the point, I think, will be made.

19 Assume a washout of MP lines east of El Paso  
20 results in an embargo of your traffic to and from El  
21 Paso for a period of a week, and also assume that a  
22 total of 10 employees in the SPSF work force, which are  
23 really a composite of the entire work force, are, on  
24 average, required to handle the incremental increase in  
25 business at El Paso because of the Union Pacific

1 trackage rights operation.

2           Would you think that Union Pacific would agree  
3 to compensate SPSF for those 10 employees who are on the  
4 SPSF payroll but who are on there because they do  
5 ordinarily the work of Union Pacific trackage rights,  
6 even though during that period of a week the Missouri  
7 Pacific didn't have any trains coming through El Paso?

8           A     In other words, there's no trains coming  
9 through, and under the labor agreement you could not  
10 pull those people off?

11          Q     Right.

12          A     And you're asking whether I would pay for  
13 those people that week?

14          Q     That's correct.

15          A     I'd have to look at the terms on that. We  
16 have contracts that do include that. We have a very big  
17 contract that does not include that, such as with  
18 Amtrak. We hire locomotive engineers to run Amtrak  
19 trains, but if they pull that train off of that line for  
20 some arbitrary reason and discontinue running the train,  
21 they do not pay us labor protection for that employee.  
22 So we have both contracts.

23          Q     Let's assume that our agreement with at least  
24 some of the brotherhoods arguably would allow us to  
25 furlough those employees if we knew that the line outage

1 was going to be a full week, and yet for labor relations  
2 reasons and whatever we keep them on the payroll because  
3 we're not sure if your operation is going to come back  
4 in less than a week anyway.

5           Would you think that that would be Missouri  
6 Pacific's responsibility to compensate SPSF for those 10  
7 employees who might or might not have been legitimately  
8 on the payroll for that week?

9           A     If they're not on there legitimately, I  
10 wouldn't want to pay a dime for them. If they were on  
11 there legitimately and it was because of Union Pacific,  
12 yes, I'd reimburse you.

13           Q     Well, I guess the point that that makes is  
14 that by requiring SPSF to hire all the employees and  
15 conduct, in effect, a substantial part of your operation  
16 in the yard and terminal areas, you put us at risk in  
17 terms of whether or not to hire employees?

18           A     You're talking about something first of all  
19 here that goes beyond the operating plan, and first of  
20 all, we are not anticipating having a major part of that  
21 operation in El Paso. You're talking down the line.

22                     And if the Union Pacific -- what you're saying  
23 is if the Union Pacific is successful and can have a  
24 major part of that operation in El Paso or on that line,  
25 and the SP has to put on more people, will we protect

1       them? Is that what you're saying?

2           Q       Basically that's it.

3           A       It isn't in the operating plan, what we're  
4 talking about here, because what we're seeing in El Paso  
5 is a very small part of that operation.

6           Q       I understand. It's a hypothetical question.  
7 The facts may be off. It may be one employee rather  
8 than 10. Well, let's say we have one composite employee  
9 who works on your operation, and it's questionable as to  
10 whether we have the right to lay him off because of the  
11 line outage, but we elect in the interest of employee  
12 relations to keep him on. Do you pay or do we pay?

13          A       I don't know. Whatever the contract says.  
14 Let me say this. If I was sitting down to write that  
15 contract with you, leaving it up to your discretion as  
16 to whether we pay or not, I would not like that.

17          Q       So you would like SPSF to have the  
18 responsibility of hiring people and also to take the  
19 risk of -- in effect take the risk for UP-MP.

20          A       Well, I don't know what risk you'd be taking.  
21 You lay off people now all the time anyway under their  
22 contract. And I would assume, as the good managers at  
23 the SP and Santa Fe operating people are, if it's in  
24 their contract, they would probably lay them off to save  
25 costs.

1           Q     You have said in your testimony, and you've  
2 mentioned today that your request for road and terminal  
3 operation services are patterned after similar  
4 agreements that you have had with the Rio Grande and the  
5 Katy as a result of their trackage rights and your  
6 merger.

7                     I'd like to talk to you first about the Rio  
8 Grande trackage rights between Pueblo and Kansas City.  
9 Those are essentially bridge rights, trackage rights,  
10 are they not?

11           A     That's correct.

12           Q     Rio Grande doesn't pick up cars or serve any  
13 shippers on the MP line.

14           A     Not that I know of.

15           Q     D&RG enters with a train that's made up in the  
16 D&RG yard at Pueblo, and they exit either at Harrington,  
17 where they move onto the Southern Pacific line, or they  
18 exit at Kansas City where they go into the KCS yard;  
19 isn't that right?

20           A     That's correct.

21           Q     And for traffic exiting on the east end --  
22 that is, at Kansas City -- the Missouri Pacific doesn't  
23 provide any switching or blocking for them at that end.

24           A     Who doesn't?

25           Q     The Missouri Pacific does not provide any



1 switching.

2 A No. They go into another yard.

3 Q And I guess it follows that --

4 A That also, I might add, was D&RG's decision.  
5 If I recall, the Missouri Pacific did offer to do that  
6 work in Kansas City for them, and the D&RG chose to go  
7 into the yard they are now going into because of a cost  
8 standpoint. When I am at Yuma, Arizona, I don't have  
9 much choice.

10 Q You don't get -- they got a better deal from  
11 the KCS.

12 A Sure, they did, from a cost standpoint.

13 Q Well, if you're at Yuma, you do have a choice,  
14 getting back to your example. You have a choice of  
15 using SP or using your own forces as the SP does at St.  
16 Joseph, Missouri where we are required to maintain our  
17 own forces and take care of our own equipment and  
18 inspect our own trains.

19 A At St. Joe, Missouri?

20 Q I'm sorry. Jeff City, Missouri.

21 A Okay. I was going to say how did you get up  
22 to St. Joe.

23 The choice being -- you are right in what you  
24 say -- but there again, from a cost and operating  
25 efficiency standpoint, we chose to request it this way.

1           Q     Well, let me ask you what services the  
2 Missouri Pacific did provide for the Rio Grande  
3 following their award of trackage rights.

4           A     They are using Missouri Pacific crews. They  
5 furnish facilities for the D&RG for those crews in their  
6 facilities. They haul the crews to and from the  
7 hotels. They fix bad orders en route. They pick up  
8 derailments en route. Any problem that may occur they  
9 provide the train dispatching and the supervision of  
10 that line and many more things.

11          Q     The Missouri Pacific crews were utilized --  
12 perhaps I'm being cynical, but it was an advantageous  
13 deal for the Missouri Pacific to have the Rio Grande  
14 utilize their crews, isn't it?

15          A     It was a choice made by the Rio Grande, not  
16 the Missouri Pacific.

17          Q     The Rio Grande at the time they got the  
18 trackage rights didn't have the crews to run their  
19 operations, and secondly --

20          A     They could have hired them.

21          Q     -- the Missouri Pacific would have ended  
22 paying labor protection to those crews that ended up  
23 working on the Rio Grande trains, didn't they?

24          A     I don't know that. I doubt it, because  
25 there's very little protection for the train and

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1       engineers, and that's only based on the amount of  
2       traffic you're running over the line. You could pull  
3       those people off with no protection.

4           Q       Without any labor protection under the New  
5       York Dock?

6           A       Oh, under New York Dock?

7           Q       Yes.

8           A       Well, that may be another issue. I'm talking  
9       about operating agreements with them.

10          Q       I'm talking about New York Dock.

11          A       I haven't looked into that.

12          Q       Under New York Dock, the Missouri Pacific was  
13       obligated, or the combined UP-MP was obligated to give  
14       standard New York Dock protection to the Missouri  
15       Pacific engineers and trainmen wherever they lost their  
16       job because of the merger, right? And the crew members  
17       who ran the Rio Grande trains were people who were not  
18       otherwise displaced by the merger; isn't that correct?

19          A       I guess that would be correct. But there  
20       again, I want to add that the decision was made by the  
21       Rio Grande to do that.

22          Q       That's my next point, and that is that the Rio  
23       Grande, as you may or may not know, did not ask for any  
24       of those services as part of their application, did  
25       they?

1 A I can't recall back as to what they asked for,  
2 but we do provide them for them.

3 Q That was a matter of negotiation between the  
4 UP-MP and the Rio Grande, wasn't it?

5 A I just can't recall how that scenario took  
6 place.

7 Q You do know that there were negotiations  
8 between the Rio Grande and the UP that ended up with MP  
9 providing certain services to the Rio Grande and an  
10 agreement being made as to interim operations until the  
11 trackage rights decision was made by the Commission?

12 A That is correct.

13 Q You've also mentioned the MKT as being an  
14 example of cooperation between the landlord and tenant  
15 in a trackage rights situation. That, too, was  
16 negotiated totally from scratch as opposed to being  
17 something that the Katy asked for and received as a  
18 result of its trackage rights application?

19 A I don't know that.

20 Q Now, let's assume that --

21 A If you want my opinion why that was so, I'll  
22 give that to you also.

23 Q Well, maybe your attorney will ask you on  
24 redirect.

25 A Okay.

1 Q You look like you're geared up.

2 A Well, I think it goes back, you know, to be  
3 truthful about it, I think it goes back to our  
4 experience between ourselves. First of all, the Katy,  
5 Union Pacific, Missouri Pacific, D&RGW have always been  
6 able to sit down and reach agreement on certain  
7 operating parameters. The SP and the Union Pacific have  
8 not. And I think possibly it was necessary to do what  
9 we have done in the application to see that we are  
10 protected that way.

11 Q How about UP and the Santa Fe? SP is not  
12 running the show, you know.

13 A I don't know who's running the show. The SP  
14 or the Santa Fe and the Union Pacific have always had a  
15 good relationship. We run a lot of joint track with  
16 them at the present time.

17 Q Is the intent of Union Pacific to force SFSP  
18 to provide these services based upon a Commission  
19 order? Let's assume that the Commission grants trackage  
20 rights over the San Joaquin lines, for example, and that  
21 SFSP, the management, agrees to that -- that's probably  
22 an unlikely assumption, but assuming that that was the  
23 case for purposes of discussion -- and said that they  
24 would live with the trackage rights; SFSP management  
25 said that they would live with the trackage rights, but

1 would not, in effect, provide the, as I've said earlier,  
2 the infrastructure to the UP trackage rights  
3 application, particularly in view of the fact that SFSP  
4 or SPSF and UP are probably the number one competitors  
5 around.

6 Assuming that that's the case --

7 A In the San Joaquin? Right now they're the  
8 only show.

9 Q But after the merger is implemented, there's  
10 no question that SPSF and UP would be formidable  
11 competitors in every area.

12 A If the Commission gives us our trackage rights  
13 through the San Joaquin -- I thought we were talking  
14 about the San Joaquin.

15 Q Yes. We're talking about the San Joaquin.

16 A Union Pacific doesn't operate down the  
17 trackage we have asked for in this application.

18 Q Well, let's forget about that for the time  
19 being. For purposes of discussion would you -- let's  
20 assume that SFSP's management says we can't provide  
21 these services, won't provide these services under any  
22 circumstances. They're going to have to provide their  
23 own services. Does UP walk away from the proposal at  
24 that point?

25 A That's a decision that would have to be made

1 at that time. I haven't even thought of it.

2 Q Well, think about it. What's your  
3 recommendation to Mr. Kenefick?

4 A It takes a more thought than just a few  
5 minutes. I have to evaluate some costs on what it would  
6 cost us to go in and provide that service.

7 Q You were one of UP's principal operating  
8 witnesses in your own merger case, weren't you?

9 A Yes, I was.

10 Q And you are aware that SP in that case asked  
11 for main stem trackage rights from Ogden to Omaha and  
12 from Ogden to Kansas City?

13 A Yes, sir.

14 Q How many miles is it from Ogden to Omaha?

15 A About 985, just off the top of my head.

16 Q How many from Ogden to Kansas City, roughly?

17 I don't care exactly.

18 A 1500.

19 Q Are you aware or recall that Mr. Kenefick said  
20 that that was a deal breaker; that Union Pacific would  
21 never accept a condition forcing it to give a principal  
22 competitor access to the heart of the system?

23 A I believe he said that.

24 Q Did you agree with that position?

25 A Yes.



1 Q Are you aware of the verified statement filed  
2 in that case by Mr. Tom Watts of UP in opposition to  
3 SP's trackage rights?

4 A Yes.

5 Q He worked for you at that time, did he?

6 A Yes.

7 Q And you reviewed it before he filed it?

8 A Yes.

9 Q Obviously you agreed with it.

10 A Yes.

11 Q And you still do agree with it?

12 A Yes.

13 Q In this case, UP is asking for about 800 miles  
14 of trackage rights between El Paso and Colton and about  
15 475 miles between Colton and Lat/rop or Stockton?

16 A Yes, sir.

17 Q Now, that's a total of about 1300 miles over a  
18 principal competitor?

19 A You say principal competitor. Not in the  
20 areas we have asked for trackage rights. We have asked  
21 for trackage rights so there are two principal  
22 competitors in those areas.

23 Q Over your two principal competitors?

24 A We are not competitors in these areas that we  
25 asked for trackage rights.

1 Q Let me ask you about that. Are you saying  
2 that there's no Union Pacific traffic that moves between  
3 southern California up to Salt Lake and then down to  
4 Texas points or to Memphis?

5 A You'd have to ask Mr. Craig that. I'm just  
6 not sure.

7 Q You're an operating man. You're in charge of  
8 the operations and know what trains you run, know what  
9 service you have.

10 A Sure, I know what trains are run. I run a lot  
11 of trains out of southern California to North Platte,  
12 but I can't tell you on a day-to-day basis where every  
13 car on every train is.

14 Q You're aware of the fact that there are some  
15 cars, some traffic moving between Los Angeles and Texas,  
16 Memphis, New Orleans on the Missouri Pacific today -- I  
17 mean the Union Pacific and the Missouri Pacific today,  
18 aren't you?

19 A If there is, there isn't much of it. I don't  
20 know how we're competitive on it.

21 Q Do you have any idea at all how many cars move  
22 between Texas, Louisiana and Arkansas?

23 A Via North Platte to southern California?

24 Q Yes.

25 A No, I do not.

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JUDGE HOPKINS: Off the record.

(Discussion off the record.)

JUDGE HOPKINS: We'll recess at this time  
until 1:30.

(Whereupon, at 12:30 p.m., the hearing was  
recessed for lunch, to be reconvened at 1:30 p.m., the  
same day.)

## AFTERNOON SESSION

(1:30 p.m.)

JUDGE HOPKINS: Back on the record.

Mr. Stephenson.

Whereupon,

JERRY R. DAVIS,

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

## CROSS EXAMINATION - RESUMED

BY MR. STEPHENSON:

Q Mr. Davis, could you turn to page 5 of your verified statement, please.

A Yes, sir.

Q The next to the bottom paragraph, would you look at that one, please.

A Yes, sir.

Q This is what I was alluding to earlier when I was I wasn't sure what the operating plan contemplated doing. You state in the statement that: "UP's application contemplates the right to operate over trackage rights, within terminals over the trackage rights lines where needed to provide competitive service. Such terminal rights may be required for full and effective implementation of the trackage rights."

1           Just as sort of a follow-up to my previous  
2 questions, is this one of the catch-alls, or do you  
3 specifically have in mind, besides the terminals of El  
4 Paso, Phoenix, Bakersfield and Fresno, that we've  
5 already talked about?

6           A     And Richmond, just to name a few.

7           Q     Okay. Well, give me all the terminals where  
8 you propose to operate in order to provide competitive  
9 service?

10          A     I propose all of the terminals on the trackage  
11 rights. But what I had specific reference to in this  
12 paragraph or my thinking on it was such as: El Paso,  
13 for the movement of cars between the Missouri Pacific  
14 yard and the SP yard, where we may not have rights to  
15 move them over there now; Phoenix, the right to move in  
16 that terminal area between the SP's yard and the Desert  
17 Ramp of the Santa Fe; and in Richmond, to gain access to  
18 the port railroads in the Richmond area. Those were  
19 examples.

20          Q     Okay. I understand now what you're saying.  
21 Can you fill out the list, giving us all the other  
22 terminals that you can think of?

23          A     That's all I can think of at the present time  
24 where we might need additional terminal rights.

25          Q     All right. At the bottom of page 7 of your

1 statement, at the top of page 8, you indicate some doubt  
2 as to whether UP wants to operate local switches in the  
3 areas where traffic volumes are low, your point being, I  
4 think, that it would be, in your words, economically  
5 wasteful.

6 A That's correct.

7 Q Where are these places where you would not  
8 want to operate your own local trains, and what is your  
9 plan for these areas?

10 A Well, the areas as far as local trains would  
11 be such as the Oil City spur at Bakersfield, where it's  
12 now reciprocally switched under a contract between the  
13 SP and Santa Fe; that in my opinion, it would not make  
14 economic sense to put our own local up in that area, not  
15 only from a cost standpoint but also as a disruption to  
16 the customers in that area.

17 Q So are you specifically asking the Commission  
18 to order that you have the right to have SP do the local  
19 switching? Is that what you're asking here?

20 A Yes, sir.

21 Q Okay. Now, what other areas beside the Oil  
22 City spur?

23 A As far as locals are concerned or switch  
24 engines?

25 Q That respond to this paragraph that I read a

1 part of on 7 and 8. Where is it it would not make  
2 operational sense to run your own local trains because  
3 of low traffic volumes?

4 A Another example would be the Martinez-Antioch  
5 area.

6 Q And so you would have the Commission, were the  
7 Commission inclined to grant your trackage rights -- and  
8 I hope you understand that I don't think that ought to  
9 be, but for purposes of discussion, were the Commission  
10 to grant your trackage rights -- between Sacramento and  
11 Oakland, for example, you would then have SPSF do the  
12 switching for you at Antioch?

13 A That's correct.

14 Q And would you contemplate that the  
15 Commission's order would provide that directive, or  
16 would it simply say the parties are ordered to sit down  
17 and discuss where trackage rights or where combined  
18 joint operations might be feasible in lieu of separate?

19 A I would anticipate that the Commission would  
20 do that. It wouldn't make -- first of all, what we're  
21 trying to do in this case is to put another competitor  
22 in that area where, after the Santa Fe-SP merger, that  
23 railroad would have a monopoly as far as railroads are  
24 concerned in that area.

25 Now, it wouldn't make sense for us to put a

1 local on at Antioch that would cost us \$2,000 a day to  
2 get a car of traffic that's going to give us \$50  
3 profit. That wouldn't make good sense. And what we're  
4 asking for is the Commission to give us the right in  
5 those areas and the right to negotiate with the SP on a  
6 fully compensated rate to handle that traffic for us.

7 Q All right. Let's say that you and the SP sit  
8 down and talk about switching at the Martinez-Antioch  
9 area and you can't reach an agreement. Then what do you  
10 do?

11 A Go to the Commission, I guess. I'm not a  
12 lawyer, but if we can't agree -- and we haven't in the  
13 past -- I guess that's where we'd go.

14 Q And you would contemplate that this would be  
15 so for all these other areas -- and there may not be a  
16 lot of them, there may be a whole bunch of them -- where  
17 because of traffic volumes you would think that joint  
18 operation would be more effective?

19 A Most definitely, not only from a cost  
20 standpoint, but also from a customer standpoint. It's  
21 very disruptive for customers for two railroads to be  
22 serving them, such as a big warehouse. It may have ten  
23 cars spotted. Their work force starts at 8:00 a.m. and  
24 they're set up with their cars at 8:00 o'clock, and  
25 along comes either the SP or the UP right in the middle



1 of the shift to disrupt it and spot their cars in.

2 It makes more sense from a customer relations  
3 standpoint and the handling of that traffic for one  
4 railroad to do that. We have those agreements with  
5 other railroads all over.

6 Q How is the Commission to know which areas are  
7 in controversy if you simply state that there are some  
8 areas where this might be the case, but you haven't  
9 spelled them out?

10 A I'm anticipating they'll all be in  
11 controversy.

12 Q Well, what are the other areas where -- you've  
13 given us the Oil City spur, you've given us the  
14 Martinez-Antioch local. What are the others?

15 A Phoenix.

16 Q Okay. What else?

17 A Any place where the two railroads serve now.

18 MR. ROACH: Your Honor, could we have a  
19 clarification? Is the question here about switching or  
20 about local trains? There's been reference to both and  
21 I'm not clear what we're talking about.

22 MR. STEPHENSON: Well, I'm talking about local  
23 trains, and we got onto the subject of -- the paragraph  
24 that I am mentioning or that I am questioning from is  
25 the paragraph, the bottom paragraph on 7, continuing on

1 8, which refers to local trains.

2 And I asked about that, and we got onto the  
3 Oil City proposed operation, and then I asked for others  
4 and we got Martinez and Antioch. Maybe we should go  
5 back and clarify.

6 BY MR. STEPHENSON: (Resuming)

7 Q Your reference in the bottom paragraph on 7 is  
8 to local trains. What do you have in mind by those  
9 local trains?

10 A When I mentioned that I had the local  
11 switching at the Antioch-Martinez area, the Oil City  
12 branch. I mentioned Phoenix because that is a -- we  
13 don't refer to him as a local in the operating plan  
14 because he's a -- you might call him a through-type  
15 train, where he goes down to the main line and back.  
16 But there would be a move in there that could be  
17 considered a local move, the move between the SP yard  
18 and the Desert Ramp.

19 That's all I can think of at the present  
20 time. Why you have to be so careful whether you call it  
21 local or switchers is there's a lot of agreements that  
22 railroads have with the UTU and BIE that are road  
23 switchers. They are zone switchers where they will  
24 literally switch a terminal and then have the rights to  
25 go out on the road a distance of 50 miles, in a 50-mile

1 radius.

2 And I'm not sure in the SP's case whether they  
3 have those local agreements or not with their  
4 organizations. So that's why you have to be a little  
5 careful how you define it.

6 Q Okay. At page 5 of your verified statement --  
7 wait a minute. At the bottom of page 7 of your verified  
8 statement, in that paragraph -- I'm sorry, I misspoke.  
9 We'll get off that subject entirely.

10 Page 10 of your verified statement, you  
11 indicate in the top full paragraph that UP-MP trackage  
12 rights will not have a disruptive effect on SPSF's  
13 operation over the trackage rights lines. And then you  
14 focus specifically on the El Paso to Colton line.

15 A Yes, sir.

16 Q Basically, Colton to El Paso is a single track  
17 CTC railroad, isn't it?

18 A Yes, sir.

19 Q And you've seen some of that line, and from  
20 your observations and your reading of the timetables and  
21 so on, would you guess that the average siding is about  
22 8500 feet, somewhere in there?

23 A Yes, sir, about 8,000.

24 Q What is the standard Union Pacific siding, if  
25 you know?

1 A In what territory?

2 Q Let's say in your --

3 A High density main line, of that similarity?

4 Q Yes.

5 A About 8,000 feet.

6 Q How about -- by "similarity," what specific  
7 line do you have in mind?

8 A I'm referring to the Gibbon to Manochen  
9 section.

10 Q That's single track?

11 A Single track CTC, 8,000-foot sidings. There  
12 are sections of 10,000 to 12,000-foot running tracks.

13 Q Those act basically as double tracks, do they  
14 not?

15 A That is correct. The long-range plan is to  
16 double track.

17 Q Basically, would you agree that Union Pacific  
18 is generally a multiple track railroad as opposed to a  
19 single track railroad?

20 A The original main line is a double track  
21 railroad. Most of the rest of the Union Pacific is a  
22 single track CTC with sidings on it.

23 Q And in fact, some of it is, the old double  
24 track, is now triple track and in some places four  
25 track?

1           A     Four track -- four main lines, through  
2 terminals where you trade crews, and there's also CTC on  
3 a portion of the original double track in the high  
4 density areas.

5           Q     The Southern Pacific line between Colton and  
6 El Paso is what, a 40 to 50 million gross ton  
7 operation?

8           A     I'll take your word for it, without locking it  
9 up.

10          Q     It ranges, I think, basically between 45 and  
11 50.

12          A     I relate more, when I look at capacity, to  
13 number of trains rather than I do tonnage. A million  
14 tons of coal versus a million tons of TOFC traffic,  
15 you're talking two different animals. That's why I like  
16 to relate, when I look at capacity of a line, as to what  
17 is their train volume and what are the speeds of those  
18 trains.

19          Q     In looking at a single track railroad -- and  
20 of course, on the Union Pacific you have more ways of  
21 assessing this question that I'm going to be asking,  
22 because you have a variety of trackage. You have your  
23 single track CTC with sidings, you have your double  
24 track and triple track and so on.

25                    Would you agree that basically a single track

1 railroad is more vulnerable to problems in maintaining  
2 reliable schedules as you add additional trains, as  
3 opposed to adding additional tonnage, more vulnerable or  
4 more sensitive to additional trains than a double track  
5 railroad or a triple track or multiple track?

6 A Not necessarily. It depends on the type of  
7 trains you're putting on it. I will say that on a  
8 single track railroad, CTC with sidings, when your  
9 volume of trains increases you can experience more delay  
10 normally. But that is not always the case, depending on  
11 the type of trains you're putting on that railroad.

12 Q What are the kinds that are more sensitive to  
13 delay or more insensitive to delay?

14 A Probably TOFC trains.

15 Q Are more sensitive?

16 A To delay, because they're high speed trains.  
17 But there again, you have to have the adequate capacity  
18 to get your slow-moving trains out of the way, which the  
19 SP does have on that line. They do have sidings to get  
20 them out of the way, and they are spaced at intervals  
21 that would not cause you that much delay to TOFC or to  
22 them themselves.

23 Q How were UP's projected schedules between  
24 Colton and El Paso computed or calculated?

25 A We sat down with a joint committee of the

1 operating, marketing, and sales people, looked at the  
2 market, the trains and schedules that the SP-Santa Fe  
3 had moving across that territory, looked at anticipated  
4 volumes, came up with some schedules that we felt would  
5 serve the needs of the customers that we were serving,  
6 threw some out, then looked at the traffic diversion and  
7 finalized them.

8 Q When you say you looked at the schedules, are  
9 you saying you looked at the proposed schedules of the  
10 SPSF in the operating plan?

11 A Yes, sir.

12 Q Did you look at the current schedules, the  
13 plain old SPT schedules?

14 A Yes, sir.

15 Q Did you notice that there was a substantial  
16 difference between the two, the existing schedule versus  
17 the projected schedule?

18 A It didn't stand out to me and I didn't discuss  
19 that with my staff.

20 Q Do you have any idea how your proposed  
21 schedules compare to SP's current schedules?

22 A From what standpoint, speed?

23 Q Speed, yes, elapsed time.

24 A They are comparable, maybe a little slower.

25 Q Your proposed schedules are slower than the

1 existing?

2 A To my knowledge, they are a bit slower.

3 Q What's that knowledge based on.

4 A Excuse me?

5 Q What is that statement based on?

6 A My recollection of what they told me the  
7 SP-Santa Fe schedules were. I cannot recall exactly.

8 Q Now, in your statement at page 10, I think you  
9 say that between El Paso and Colton UP-MP anticipated  
10 operating less traffic than the primary Applicants plan  
11 to divert to other SPSF routings. When you say less  
12 traffic, are you saying less trains or less tonnage?

13 A Both.

14 Q And what's your recollection in terms of  
15 trains, how many less?

16 A Five or six.

17 Q Do you have any idea how many -- let me back  
18 up. Your operating plan contemplates adding four  
19 additional trains.

20 A Two in each direction, that's correct.

21 Q And do you know where that puts the number of  
22 trains compared with today's number of trains?

23 A On the El Paso to Colton line?

24 Q Yes.

25 A About five less total.



1 Q Okay. And you're looking at what when you  
2 made that calculation?

3 A I'm calculating that looking at, they  
4 presently run about 25 trains a day. After your merger,  
5 you're anticipating running about 19 trains a day.

6 Q Does that 19 include -- the 19 does not  
7 include your four trains?

8 A It does not.

9 Q So it would be 23 trains with your four?

10 A I might add, that was calculated off of  
11 tonnages, and the tonnages we used, looking at 1984 and  
12 before, were the tonnages you furnished us, which did  
13 not include locomotives. Your tonnages post-merger did  
14 include locomotives.

15 We did not make the difference -- or we did  
16 not calculate that, because we didn't know how many  
17 locomotives we were talking about. The locomotive will  
18 weigh about 200 ton.

19 Q What did you assume in terms of average  
20 tonnage per train?

21 A I cannot recall.

22 Q Was it a straight average for all trains, or  
23 did you have different ones for the manifest and the  
24 TOFC?

25 A I think we looked at manifest versus TOFC, to

1 my recollection.

2 Q Do you have any idea -- maybe I asked this  
3 question and I'm sorry if I did. Do you have any idea  
4 how SP's trains along the southern corridor today manage  
5 to meet their schedules?

6 A I don't know.

7 Q Would that be important to you in determining  
8 whether your proposed schedules are ambitious or not  
9 ambitious?

10 A One thing: In putting a little time in our  
11 schedules versus what the SP does, I realized that when  
12 we're on the trackage rights we do not control those  
13 trains. Now, I would anticipate that the SP operating  
14 department would give our trains an even break with  
15 theirs, but there again I do not control them. So  
16 additional time was put in for that.

17 As far as whether the SP is maintaining their  
18 schedules or not, I did not ask that specific question  
19 of their operating officers, although I did discuss the  
20 operation with their local superintendents and I got  
21 elapsed times and the times that they were moving over  
22 the road.

23 And it looked to me like they were moving  
24 their TOFC trains very well. I did not see any TOFC  
25 trains sitting on any sidings. The secondary trains

1 were gotten out of the way for these hot trains. And I,  
2 by my conversation with him, came to the conclusion that  
3 they were operating their schedules very well. But I  
4 don't know that.

5 Q Okay. At page 10 you talk about potential  
6 capacity problems in the San Joaquin Valley, and you  
7 downplay that possibility by saying that, in any event,  
8 most additional Valley traffic will be moving on former  
9 Santa Fe lines over which UP is not seeking trackage  
10 rights. Do you see that?

11 A Yes.

12 Q Did you read the SP operating plan?

13 A Yes, very briefly.

14 Q Is it your understanding that the SP operating  
15 plan commits certain traffic to the former SP line and  
16 the former Santa Fe line?

17 A If I understand your question correctly -- I'm  
18 not sure I understand your question.

19 Q Is it your understanding that the SP  
20 dispatcher will be instructed that certain trains will  
21 move on the Santa Fe or former Santa Fe trackage, other  
22 trains will be moved in all cases on the former Southern  
23 Pacific trackage? Is that your understanding?

24 A There will be some trains moved over former SP  
25 trackage, and trains that are now moving over SP

1 trackage will be moved over on the Santa Fe, that's  
2 correct, that's my understanding.

3 Q Well, the operating plan indicates that the  
4 dispatcher will use those tracks more or less  
5 interchangeably, at page 73. You use the two routes  
6 interchangeably as directed by the chief train  
7 dispatcher, depending on localized conditions. And the  
8 same is true for trains operating between Fresno and  
9 Stockton en route to and from Roseland.

10 So doesn't that really mean that, to the  
11 extent that UP is on the trackage rights lines, the SP  
12 lines, that to that extent the chief dispatcher is going  
13 to be confronted with inflexibility in terms of what to  
14 do with your particular trains, your stuff on the SP  
15 line?

16 A Well, first of all, you're only talking one  
17 train each direction down that line. Now, the only  
18 reason I could think that the chief dispatcher did not  
19 want to run one of our trains down the SP line is if  
20 they were doing some maintenance of way work. Now,  
21 maintenance of way windows are something you deal with  
22 on any single-track operation.

23 Now, as far as the indiscriminate moving of  
24 trains from one line to the other, recalling back to my  
25 train dispatching days and when I worked as a chief

1 dispatcher, those decisions are daily, depending upon  
2 the volume of traffic you're putting down one side or  
3 the other.

4 But the real problem you would run into is if  
5 you had heavy maintenance of way work taking place on  
6 one line and you took all the trains over on the other  
7 line for a 12-hour period, and that is something we  
8 would have to work out with the local operating officers  
9 as to the delay that they would be giving our train  
10 under this maintenance of way window.

11 But we deal with that every day on single-line  
12 operations.

13 Q Getting back to the original point, though,  
14 the point that the Valley traffic will not be affected  
15 by our trackage rights because most of the traffic will  
16 be moving over on the Santa Fe line is really contrary  
17 to the operating plan itself, isn't it?

18 A Well, I don't think that it is. They have the  
19 opportunity to put traffic over on the other line. They  
20 have two railroads now instead of one.

21 Q Your operating plan has developed the 228-mile  
22 crew district between Stockton and Bakersfield. What  
23 input did you have in terms of determining the  
24 feasibility of that 228-mile crew district and any of  
25 the other crew districts?

1 I guess the question is, what was the decision  
2 process that you went through to come up with these crew  
3 districts?

4 A Well, we just, first of all, looked at the  
5 timetables and the maps of the railroad and looked at  
6 our present crew change points, home terminals, and  
7 determined what we felt would be good crew operating  
8 distance and wrote the operating plan. After looking at  
9 these pieces of the railroad, talking to local operating  
10 officers as to how trains move across these territories,  
11 any unusual physical characteristics that we could not  
12 determine from the timetable, we left them that way.

13 I think they are very reasonable, and I think  
14 they can be made day-in and day-out from an operating  
15 standpoint.

16 Q Assume that you can't make that 228 miles on a  
17 consistent basis. What provision do you have in the  
18 operating plan for rescuing crews that have died on the  
19 law? Do you have any plan?

20 A I'll tell you, first of all, if I can't go 228  
21 miles in 12 hours I've got a lot of problems. But in  
22 case that happens, let's say you would have trouble en  
23 route or a hot box and you were delayed, I'll go get  
24 that crew from Stockton.

25 Q And that will be something you'll do for

1 yourself or SP will be required to do?

2 A Either that or I can work it out with them to  
3 pick them up on a through-train deadhead. I've asked to  
4 deadhead crews out on their trains and I might want to  
5 do that, or have the right to go out and get them. But  
6 I don't know what the circumstance might be. There's a  
7 number of ways you could go deadhead a crew that's dead  
8 on the law.

9 Q What is the average length of the crew  
10 district on the UP?

11 A For what, engineers or trainmen? I have crew  
12 districts for trainmen of 389 miles. Excuse me -- yeah,  
13 about 380. I have an engineer crew district of 289,  
14 Omaha to North Platte.

15 Q What's your shortest?

16 A 35 miles; I mean, for some trains.

17 Q What's your average?

18 A On through trains? About 225. That's just  
19 off the top of my head. Most of our crew districts are  
20 interdivisional runs now, where 200-mile or 125-mile  
21 districts were consolidated. I would say the average is  
22 about 225.

23 Q Do you recall the testimony of Mr. Watts when  
24 he criticized SP because it had crew districts that were  
25 200 miles out on the main stem trackage rights?

1           A     No, I don't recall that. Of course, their  
2 operating plan was much different than ours. When we  
3 wrote our operating plan on this consolidation, it was  
4 to blend in our operation with the SP's. In other  
5 words, we did not make any additional or different crew  
6 change points than the SP now makes. We did not  
7 anticipate building any of our own yards, like the SP  
8 did in their operating plan.

9           For instance the SP, if I recall in their  
10 trackage rights to us, was to change crews at Laramie,  
11 change crews on our main line, which is a two-track main  
12 line with about 80 through trains a day through that  
13 area -- nothing but a disruption of our operations.

14           When we wrote our operating plan, we looked at  
15 ways that we would cause less disruption to the present  
16 SP operations. The SP did not do that on their trackage  
17 rights application to us.

18           Q     Well, I respectfully disagree with you on  
19 that.

20           A     Well, you're asking my opinion.

21           Q     You say that you tried to use the crew  
22 districts that are the established crew districts that  
23 SP and Santa Fe have. But this crew district, this  
24 228-mile crew district between Stockton and Bakersfield  
25 was not one of our crew districts, was it?



1           A       That is correct. As I recall, you have some  
2 very unusual agreements, the way those seniority  
3 districts come into Tracy.

4                    What we wrote in this particular case was a  
5 crew district on that territory that's very easy to  
6 make, and we did not want to be tied with the Fresno  
7 crew change point.

8           Q       Let's focus now on your testimony at pages 10  
9 and 11 concerning the UP proposal to operate trackage  
10 rights between Sacramento and Oakland over what we call  
11 the Cal-P route via Martinez. And you indicate that the  
12 SPSF plans to reduce traffic across SP's Cal-P line and  
13 therefore between Sacramento and Oakland your trains  
14 won't cause any congestion problems or interference  
15 problems.

16           A       That's correct.

17           Q       Including UP's unit steel trains to Pittsburgh  
18 and your through trains, how many trains total --  
19 switchers, through trains, the unit steel trains -- will  
20 you be operating through there on a daily basis on  
21 average?

22           A       Well, I can name them by symbol, the ones that  
23 we would have daily. Some of them do not run every  
24 day. They run as traffic demands. We have our WPV, our  
25 OMW, which will be TOFC-type trains into the Oakland

1 area. We have the OMV, the WPX. Then we're  
2 anticipating running an OCR or an OCW, depending upon  
3 what direction -- that's container traffic -- when  
4 needed.

5 The steel train as it runs. It does not run  
6 on a daily basis. And we're anticipating a local which  
7 will pick up traffic that has been switched out for us  
8 by the SP from Oakland to Martinez and return.

9 Q So did you count those on your fingers? I  
10 didn't.

11 A No, I didn't. I was hoping you were.

12 Q Do you know how many of the unit steel trains  
13 you're going to be operating? What is it today?

14 A It depends a whole lot on their demand and how  
15 much steel Pittsburgh needs. But you're talking at  
16 least a couple of trains a week.

17 Q And then empties in the reverse move?

18 A Empties in the return.

19 Q Are you aware that the City of Martinez has  
20 complained to the Commission and has opposed the merger  
21 because of the amount of traffic that will be going  
22 across crossings in the City of Martinez as a result of  
23 the movement of trains over onto the upgraded Yococo  
24 line which comes into Martinez?

25 A I was not aware of it, no.

1 Q Your observation in your testimony is, I  
2 believe, correct that there are going to be fewer SPSF  
3 trains on the Martinez route, that is the Sacramento to  
4 Oakland via Martinez route. But do you know the total  
5 number of trains that are going through Martinez,  
6 including your own proposed trains, as a result of the  
7 merger and the trackage rights, should they be granted?

8 A This is on the Sacramento to Oakland line, you  
9 say?

10 Q Yes.

11 A Between any two particular designated points,  
12 say?

13 Q Crossing through the City of Martinez.

14 A Between Martinez and Ozol, you run about 13  
15 trains now, and after merger about 23 trains, according  
16 to my numbers.

17 Q Right. And you add to it the six or seven or  
18 eight trains that you gave us, and so you have 30 trains  
19 a day?

20 A Like I say, I am not familiar with the  
21 complaint of the City of Martinez. There again, we have  
22 complaints from cities quite often and we work with them  
23 on our overpasses and underpasses.

24 But as far as the capacity of the railroad,  
25 the additional trains we are putting on that railroad

1 will not cause you a problem.

2 Q Can we talk about the steel train for a  
3 second. Are you aware that Southern Pacific handled  
4 that steel train from, where is it, Geneva, Utah?

5 A No, they handled it from Ogden, Utah, west.  
6 We handled it from Geneva to Ogden to them, and the Rio  
7 Grande handled it from Geneva to Ogden.

8 Q You are aware that for many years the Southern  
9 Pacific participated with the Rio Grande and with the  
10 Union Pacific in moving that traffic to Pittsburgh, are  
11 you not?

12 A They did. I am not aware if they handled it  
13 after we designed it as a unit train. I know they used  
14 to participate in that traffic as single car movements,  
15 but as a unit train I can't answer that.

16 Q Well, I can tell you that they did.

17 A Okay.

18 Q Or I'll represent to you that they did, up  
19 until last year when Union Pacific got all the traffic.

20 Do you know the route that the Southern  
21 Pacific used to haul that train to Pittsburgh, which is  
22 the destination?

23 A I think they took it up the Moco line  
24 through Tracy, if I remember.

25 Q Your plan is to move that train via the Cal-P

1 route?

2 A That's correct.

3 Q And what was the decisionmaking that went on  
4 in your shop to conclude that the Cal-P route was the  
5 better route rather than moving it via your --

6 A First of all, we'd have to build a connection  
7 at Tracy to get onto your Mocado line. And with the  
8 volume of traffic that you are anticipating moving over  
9 that line, we felt that the route that we put in the  
10 operating plan was much more efficient.

11 Q Why can't you use the route that you have  
12 there today, that you are using today?

13 A We have trackage rights over the Santa Fe from  
14 Stockton to Pittsburgh. And as you know, in your  
15 operating plan you talk of downgrading that line, and  
16 all that would remain is the Union Pacific and Amtrak,  
17 if I recall.

18 In addition, the Santa Fe has served notice on  
19 us that they want out of that joint right contract.

20 Q But that's not for another five years, is it?

21 A 1991, I believe.

22 Q Six years.

23 Would you continue to use the Sacramento  
24 northern route until -- let's assume that the trackage  
25 rights between Sacramento and Oakland were granted and

1 you were --

2 A And between Martinez and Antioch?

3 Q Yes, and between Martinez and Antioch. And  
4 you had the choice of either the Cal-P route or the  
5 Sacramento northern route for the next six years. Would  
6 you still use the Cal-P route?

7 A Probably.

8 Q Explain to me how you plan to get from the  
9 line, from the Southern Pacific line over to the  
10 industry in Pittsburgh?

11 A Come down the Cal-P main line and at a  
12 designated point where the SP wants me to -- I  
13 anticipate doing it at Ozol -- I'll run around the train  
14 and go back the trackage rights to Pittsburgh.

15 Q And in the meantime you hit the Ozol Yard; is  
16 that what you're talking about?

17 A You have a center siding at Ozol that is  
18 plenty long enough.

19 I also know that you do some setting out and  
20 picking up off of the Ozol siding, and for operating  
21 purposes I will take any track the SP so designates that  
22 I can run around that train.

23 Q So for SP to designate a track, you really  
24 have to designate two tracks, the track that the unit  
25 train is on and another track to run around?

1 A It could be a main line, too. I could run  
2 around -- it's a double track main line and I can get  
3 around through to crossovers.

4 Q And how long does that take total to make that  
5 entire move?

6 A Using a Union Pacific crew, it would probably  
7 take about ten minutes.

8 Q Ten minutes?

9 A Yes, through power crossovers.

10 Q Would you install the power crossovers?

11 A I think they're there now.

12 Q If they're not there, would you install them?

13 A I hadn't thought about it.

14 Q What basically is the principal reason for the  
15 Sacramento to Oakland trackage rights?

16 A More efficient running.

17 Q It straightens out your route?

18 A It's more direct. As I recall, it cuts about  
19 45 miles or so off the route.

20 Q Hasn't the fact that the Western Pacific has  
21 come into the Bay area over a circuitous route been sort  
22 of a thorny operating problem that they have lived with  
23 for however long they've been in existence?

24 A I don't know that. It isn't the most direct  
25 route from the Sacramento area.

1           Another problem you have with the WP line is  
2 going right down the middle of a street in Oakland, and  
3 on certain hours of the day it's not the best operation  
4 getting down that street, which we can avoid doing,  
5 doing this on the trackage rights.

6           Q     Both of those, the circuitous route and  
7 running down the city streets, are both problems,  
8 operating difficulties that the WP has had, that  
9 preceded this merger and are simply being corrected by  
10 this merger, isn't that basically it?

11           A     I wouldn't say they're operating problems.  
12 You know, from a competitive standpoint, if you have to  
13 run further your costs are higher, certainly. Now, as  
14 far as operating problems because you're running  
15 further, that isn't a problem. It just costs you more.  
16 You know, I wouldn't define them as operating problems.

17           Q     Mr. Kenefick has for quite some time, outside  
18 the context of this merger, wanted to swap trackage  
19 rights with SP, hasn't he, to get over onto the Cal-P  
20 route? That had nothing to do with this merger?

21           A     I don't know about any negotiations or any of  
22 that. I've discussed it with Mr. Kenefick, but I don't  
23 know of any negotiations that he has had with the SP to  
24 do that.

25           Q     Are you aware of the fact that he has



1 suggested to the SP that we swap trackage rights so he  
2 can get over on a more direct line into Oakland?

3 A I guess I know he has talked to them about it,  
4 but that's very common between our railroads, not only  
5 the UP-SP, but other railroads, that for operating  
6 purposes or other reasons we talk about trackage  
7 rights.

8 We have current negotiations going on right  
9 now with the Burlington Northern for that and the Rio  
10 Grande. I've been trying to get operating rights over  
11 the Rio Grande from Salt Lake to Geneva ever since I've  
12 been VFC. You know, we haven't accomplished it yet. So  
13 this was, in my opinion, normal dialogue that takes  
14 place.

15 Q But I guess my bottom line question is, isn't  
16 this effort on the part of UP to get these trackage  
17 rights sort of the culmination of a longstanding effort  
18 to get a more direct, efficient route into the Bay area,  
19 and that the merger is being used as the vehicle for  
20 doing it?

21 A I don't look at it that way. I need parts of  
22 these trackage rights, first of all, in the Richmond  
23 area for local switching and the handling of traffic,  
24 because you and the Santa Fe both serve that area  
25 today. The same with the Martinez-Antioch area. And

1 the trackage rights that we have asked for from  
2 Sacramento to Stockton allow us to get into those areas  
3 that are jointly served today and to be competitive.

4 Q What are the areas where Santa Fe serves in  
5 the Bay area that you don't serve? The Sacramento  
6 northern?

7 A Richmond and Martinez to Antioch.

8 Q Antioch is served by the Sacramento Northern?

9 A Yes, that's correct; Pittsburgh is, not the  
10 Martinez area.

11 Q All the other lines out to Antioch, Pittsburgh  
12 is served by the Sacramento Northern?

13 A That's correct.

14 Q So with the exception of Richmond and  
15 Martinez, those are the only two major points that you  
16 can think of that are going to be left without the  
17 two-railroad competition between Santa Fe and --

18 A In my opinion, from an operating standpoint we  
19 need the entire trackage rights to move that traffic so  
20 that we give the customers a competitive alternative.  
21 If I do not have those trackage rights, I cannot be  
22 competitive with the new merged railroad, the Santa  
23 Fe-SP, in those areas.

24 Q You are competitive today with your circuitous  
25 route.

1 A Not into Richmond, I'm not.

2 Q Can't you come from Richmond, from downtown  
3 Oakland, where you already exist, and just move out on a  
4 rather short trackage rights out to Richmond and  
5 Martinez?

6 A Then I have to back haul it back into Oakland  
7 to go east with it, where if I have the trackage rights  
8 I can just keep right on coming through Sacramento and  
9 on east. It has built-in delays and built-in circuitry.

10 Q Well, talking about built-in delays, when you  
11 get to Oakland using the proposed trackage rights and  
12 you move into your own Western Pacific yard, isn't it a  
13 fact that you have to shove your train back into your  
14 yard?

15 A No, sir. I'm going to pull it in. I'm going  
16 to have an engine sitting right at the switch and pull  
17 that train into the WP yard. I do not back trains that  
18 far.

19 Q So you go past the WP route, you stop the  
20 train on the SP main track, and you reach out with a  
21 switcher from inside your yard, and you pull it back  
22 in?

23 A That's correct. It's a double-track main line  
24 through there with two running tracks on either side.

25 Q What do you think the time is going to be for

1 pulling that train into the WF yard?

2 A It'll probably take you about 15 minutes to do  
3 that, although if it was a straight head-in move that  
4 would take time also. You have to slow the train down  
5 to get through the crossovers at the switches. That  
6 additional delay caused by setting that train on the  
7 main line to pull it back into the yard, you're talking  
8 10 or 15 minutes when you're talking a railroad that has  
9 sufficient capacity to handle that.

10 Q You're talking additional delay beyond what it  
11 would take if you were to head in?

12 A That's correct.

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1 Q The UP operating plan contemplates how many  
2 trains a day going in and out that would be subject to  
3 the same move?

4 A Two trains.

5 Q Two in, two out?

6 A That is correct.

7 Q So our main line is going to be subjected to  
8 your train sitting on the main at least for 15, 20  
9 minutes?

10 A No, I said ten to fifteen minutes.

11 Q You said the additional delay would be --

12 A Okay, 15 minutes. I would like to reemphasize  
13 you have a double track main line there with a running  
14 track on either side of it. There is plenty of  
15 capacity.

16 Q Well, we will see.

17 A And if you want my opinion, from an operating  
18 standpoint, there is plenty of capacity to handle that.

19 Q Has your operating plan made provision for  
20 storage tracks, either building new ones or leasing  
21 existing tracks from SPSF at any location in the San  
22 Joaquin Valley?

23 A No, it has not. You are talking about  
24 prospective loading?

25 Q No.

1           A     No, I intend to furnish those out of  
2 Stockton.

3           Q     I meant to ask you this when we were talking  
4 about Richmond earlier, and I forgot to. Does your  
5 operating plan contemplate that the local that will  
6 switch Richmond will do all the work in Richmond, or  
7 does it contemplate that your through trains will do  
8 some picking up and setting out also?

9           A     It does not contemplate through trains setting  
10 out and picking up there. The local will do the setting  
11 out and picking up.

12          Q     Okay. Where do you propose to store the cars  
13 held for loading and unloading at Richmond?

14          A     We will handle them out of the Oakland yard  
15 where the local originates.

16          Q     At the east end of SP's Colton yard, you are  
17 going to have four trains moving through the switch at  
18 the east end of the yard. Are you familiar with that?  
19 It is a hand throw switch.

20          A     At the east end of Colton? Now, what Colton  
21 yard are we talking about? The old Colton or West  
22 Colton?

23          Q     Old Colton. You are going to have four UP  
24 trains moving through that switch each day?

25          A     That is correct.

1 Q And that is a hand throw switch?

2 A That is correct.

3 Q And while your train is moving through that  
4 switch, it will, of course, have to stop to have the  
5 switch thrown, the train will have to go across, realign  
6 the switch, and then the train moves off the main line.

7 And the question is, is there a plan on UP's  
8 part to instal a power operated switch at that  
9 location?

10 A It was not in our plan to put one in, no.

11 Q Are you aware of the fact that that switch is  
12 very seldom used today by SP in current operations and  
13 under the proposed operating plan there is little need  
14 for using that switch?

15 A I am sure there is not.

16 Q In view of the fact that the principal user of  
17 it will be Union Pacific, and in view of the fact that  
18 utilizing a hand throw switch is going to compound the  
19 problems of the interference with your trains sitting on  
20 the main line, do you have any machinery for reviewing  
21 these kinds of potential problems to see if they ought  
22 to be handled by your organization rather than SPSF in  
23 the unlikely event that you got the trackage rights?

24 A I would call that, you know, future expansion  
25 or future facilities that are needed, and if we can

1 agree with the SP operating officers that it would be  
2 beneficial to put that switch in and power it, you know,  
3 we would agree to that.

4 That is something -- I don't know whether that  
5 would cause them a problem or not. If I had anticipated  
6 it would cause them a problem, I would have put it in  
7 the operating plan, but if we can agree that it does  
8 cause them a problem, it is our problem, because we will  
9 be part of the railroad.

10 Q You have contemplated in your operating plan  
11 leasing three tracks from SPSF at Colton as I understand  
12 it.

13 A That's right.

14 Q What is the purpose of those three tracks?

15 A For additional capacity.

16 Q What kind of work is going to be done on it?

17 A Additional blocks will be made there for the  
18 trains going north via the Palmdale cutoff, and then of  
19 course additional blocks needed there for trains coming  
20 off the trackage rights.

21 Q And that would be a total of six trains, four  
22 east-west and two north-south?

23 A Yes. That is correct.

24 Q All right. Do you have your operating plan  
25 available?



1 A Yes.

2 Q Can you confirm for me that Appendix (D)(2)  
3 would require UP to do an additional eight  
4 classifications daily on those three tracks?

5 A Where are we at here? Appendix what?

6 Q (D)(2).

7 A Okay. What page? I am not finding it. I  
8 have got (D).

9 Q Page 2 of 9, I believe it is. I don't have it  
10 in front of me, but I recall that is what it is.

11 A And what was the question?

12 Q The question is, can you confirm for me that  
13 there will be eight classifications made on those three  
14 tracks at Colton?

15 A That are not being made now?

16 Q Yes.

17 A That is correct.

18 Q And so these three tracks will receive six  
19 trains and build eight new blocks?

20 A That is in addition to what we now have at  
21 Colton. What we are asking for is additional tracks  
22 that we now have at Colton.

23 Q So some of the classification work will be  
24 done on existing trackage?

25 A That's correct.

1 Q Oh, okay. All right.

2 If your proposed operations receiving six  
3 trains and building eight blocks were to be done on  
4 three tracks alone, that would be difficult to do, would  
5 it not?

6 A It would not be very efficient.

7 Q How many other tracks do you have there?

8 A I can't recall off the top of my head. Six I  
9 want to say, but that may not be exact.

10 Q Nothing is said in your terminal or road  
11 operation services section about needing SPSF to supply  
12 cars to shippers who might use your trackage rights in  
13 the event that they were granted.

14 A I think car service rules would take care of  
15 that.

16 Q Well, let me ask you about that. What is the  
17 proposal? Would you provide your own empties, or would  
18 you expect that SPSF would spot the empties, not spot  
19 the empties, but provide you with empties? What is the  
20 plan?

21 A My understanding of the car service rule is  
22 that that customer would call the SP and say that they  
23 needed an empty to be spotted in their industry next  
24 Friday for loading.

25 The SP has an obligation to furnish that car.

1 If they have the car, they can furnish it from a car  
2 supply that they have. If they do not have it, they  
3 will notify the UP that they need the equipment, and we  
4 would give it to them.

5 Q It is your understanding that the SPSF would  
6 have the obligation to provide one of your shippers with  
7 a car?

8 A They have that opportunity. That's correct.

9 Q An obligation or an opportunity?

10 A They have the obligation to furnish that  
11 customer with an empty. Then the choice is theirs  
12 whether to use one of their empties or one of ours. It  
13 may be advantageous to them to use their empty.

14 If they have a bunch of boxcars that they are  
15 not making any per diem over, they can spot their own  
16 boxcars.

17 Q Insofar as UP is concerned, you would be  
18 indifferent to the type of car that was provided?

19 A As long as that car order was handled on a  
20 timely basis, it is indifferent to me.

21 Q Let's assume that there are two shippers on  
22 the line and two cars, and they are both SP cars, and  
23 one shipper says, I need two cars, and I am going to  
24 route it SP, and the other shipper says, I need two  
25 cars, and I am going to route them on the UP trackage

1 rights.

2           Would you expect that SP would be within its  
3 rights in providing those cars to the shipper using the  
4 SP haul?

5           A     Would I expect that to happen?

6           Q     Yes.

7           A     I would expect that to happen. Not that I  
8 would like it, but I would expect the SP would do that.

9           Q     And under those circumstances, the UP would  
10 then be obligated in order to get the haul from that  
11 shipper to reach out and get a car or cars, et cetera?

12          A     Yes, sir, and furnish a car to the SP to spot  
13 into.

14          Q     Now, what is your understanding of the  
15 requirement -- what is the car service rule specifically  
16 that governs this?

17          A     I can't state it by number.

18          Q     If SP were to provide an empty SP car, for  
19 example, to a Fresno shipper of UP on the trackage  
20 rights and that car terminated, let's say you got all  
21 your trackage rights, and the car terminated somewhere  
22 in Texas, Houston, would that car then be returned to SP  
23 at Houston, or whatever the local --

24          A     I imagine it would be given back to them in an  
25 SCO-90 outlet.

1 Q Which would mean that SP would get the empty  
2 return haul, and UP would get --

3 A I am not familiar with the SCO-90 outlets  
4 between the Missouri Pacific and the SP.

5 Q Also on the subject of cars, but on a slightly  
6 different point, is the UP computer system -- or in the  
7 UP computer system, do you maintain power location?

8 A Not yet on some of them. We are implementing  
9 TCS on the Union Pacific this year.

10 Q So it will be in effect this year?

11 A That's correct.

12 Q Do you maintain a standing order of cars in  
13 your yards?

14 A You mean car supply or empty supplies?

15 Q Yes.

16 A That's correct.

17 Q And do you maintain standing order of cars at  
18 industries?

19 A Not that I know of. Normally it is in our  
20 holding tracks or in our yards.

21 Q But if it was in an industry, you wouldn't  
22 have a record of it in your computer?

23 A Oh, yes, we have that record. I thought you  
24 were talking about an empty supply, to furnish empties  
25 to a customer. Our present claim records designate

1 whether the car is in an industry or not.

2 Q All right. Thank you very much. That is all  
3 I have.

4 JUDGE HOPKINS: Thank you.

5 Ms. Budeiri or Mr. Ratner.

6 BY MS. BUDEIRI:

7 Q Good afternoon, Mr. Davis. My name is  
8 Priscilla Budeiri, and I represent the United States  
9 Department of Justice.

10 In reference to Page 7 and 8 of your  
11 testimony, would you please elaborate on when it might  
12 make sense for some traffic to move in joint service  
13 with SFSP rather than using the trackage rights?

14 A In the verified statement are we talking  
15 about?

16 Q Yes.

17 A I think we discussed that earlier. It would  
18 be primarily where it would not be economically possible  
19 to operate in local for one or two cars a day, such as  
20 the Oil City spur out at Bakersfield, the Martinez to  
21 Antioch area, as we discussed earlier.

22 It would not make sense for the Union Pacific  
23 to assign a local to get into those industries to switch  
24 one or two cars a day. It does not make good sense.

25 Q How do the trackage rights enable UP to offer

1 a competitive alternative to SFSP for that traffic going  
2 into those areas?

3 A Into those areas? Maybe traffic moving across  
4 the southern part of the United States on the trackage  
5 rights territory, let's say from Texas to the California  
6 area, where we are not competitive in that market, and  
7 at the present time the only two railroads in that area  
8 are the Santa Fe, SP.

9 Maybe a car destined to that area. A shipper,  
10 where we have asked to serve the local industries, those  
11 shippers now have a choice between the SP and the Santa  
12 Fe. And what we are asking for in our trackage rights  
13 and what industries that we want to serve, we will give  
14 them an alternative, and we will be able to do so if our  
15 trackage rights are granted.

16 That will not be possible if the SP-Santa Fe  
17 merger is granted and we are not given the trackage  
18 rights. They will be captive to one railroad.

19 Q Does the UP anticipate that it would be able  
20 to make the joint line service that it would offer to  
21 those places that you described, the Oil City  
22 industries, et cetera, attractive or competitive with  
23 the single line service that the SFSP would be able to  
24 offer those shippers?

25 A Yes, I anticipate it would be.

1 Q How?

2 A It would not be competitive if I had to put a  
3 local on to serve one industry or switch one car. What  
4 we have asked for is that the merged SF-Santa Fe -- or  
5 SP-Santa Fe would serve that. We would pay them a fully  
6 compensated cost for doing that. Then we could remain  
7 competitive with them.

8 Q Based on your experience with trackage rights,  
9 can the railroad that owns the tracks interfere with the  
10 trackage rights service enough to make the trackage  
11 rights service noticeably inferior to the owner who  
12 provided service?

13 A Not if the trackage rights agreements are  
14 written properly.

15 Q Even if the trackage rights agreements are  
16 written properly, is there a possibility of that  
17 happening?

18 A Let me say on my experience with trackage  
19 rights, and the Union Pacific has a lot of them, it does  
20 not happen. The contracts are so written in handling  
21 them with the operating officers -- I am not saying that  
22 we don't get delayed on trackage rights. We do. And  
23 sometimes we get paranoid by a feeling that we are  
24 taking all of the delay and they are not.

25 But once we sit down and discuss it with our



1 operating officers and find out what the problem was,  
2 why we got delayed, then they answer us on that, the  
3 problem goes away.

4 Q What are the disadvantages to a landlord of  
5 having trackage rights over its lines?

6 A What is the disadvantage of having another  
7 railroad run over your line? If they have a derailment  
8 because they are not maintaining their equipment  
9 properly. If for any reason they would run too big a  
10 train and not enough power, where their trains could not  
11 move over the railroad in an expeditious manner, if they  
12 continuously were having locomotive failures where their  
13 trains could not move, a number of other things, but  
14 that can also happen with your own trains.

15 Q Are there any other disadvantages that you can  
16 think of?

17 A Not that I can think of. Did you have any in  
18 particular in mind?

19 Q Well, are these disadvantages that you just  
20 mentioned exacerbated by long haul traffic rights?

21 A You mean, are they greater because of it?

22 Q Yes.

23 A Not that I know of. The way we have designed  
24 our operating plan, and the size of trains we are going  
25 to run, the horsepower per trailing ton, by using the SP

1 facilities where we do not have duplication of  
2 facilities and we are not in each other's road, we have  
3 designed this operating plan to cause very little  
4 disruption to the present SP operations.

5 Q To what extent does the railroad using  
6 trackage rights provide effective competition to the  
7 landlord railroad?

8 A I think very effective.

9 Q Can you explain?

10 A Such as once the SP-Santa Fe merger is  
11 granted, let's take the southern Texas market area, and  
12 southern California, or central California. That is the  
13 most direct route to move traffic across the United  
14 States for a railroad.

15 If we were competitive in that route by coming  
16 up through Kansas City and North Platte, we wouldn't be  
17 asking for these trackage rights. We would not be  
18 asking to serve customers who are now jointly served by  
19 the two railroads if there was another competitor in  
20 that area, but there is not.

21 Does that answer your question?

22 Q Okay. Thanks a lot.

23 JUDGE HOPKINS: PLEA?

24 MR. BIRNEY: Yes, Your Honor.

25 BY MR. BIRNEY:

1 Q Good afternoon, Mr. Davis. My name is Bill  
2 Birney. I am from the law firm of Highsaw and Mahoney,  
3 and that firm represents the RLEA in these proceedings.

4 Obviously, my interest is in the labor aspects  
5 of the proposed merger. I am most interested in your  
6 testimony regarding those aspects in the event that the  
7 ICC would grant the application of the primary  
8 applicants and also grant your application for trackage  
9 rights.

10 But before I do that, I would like to discuss  
11 briefly with you another topic, and that is the effect  
12 that the proposed merger would have on UP/MP employees  
13 in the event that the ICC grants primary applicants'  
14 application for the merger in this case but declines  
15 your application for trackage rights.

16 Have you performed any studies which would  
17 indicate what effect such an order would have on your  
18 employees?  
19  
20  
21  
22  
23  
24  
25

1 A If we have, I haven't seen it.

2 Q Do you have an opinion as to what that effect  
3 would be?

4 A I haven't really thought about it. I guess in  
5 my own mind I felt if the primary merger was granted,  
6 that the trackage rights would be granted also.

7 Q You indicated that, I believe, as I recollect,  
8 that in the figures in the documents that you have  
9 submitted, that the denial of this would result in the  
10 loss of some \$97 million in revenue.

11 A That's right.

12 Q Are you able to translate the loss of that  
13 revenue into loss of employment?

14 A I am not.

15 Q I would like to move, then, into the second  
16 area of my questions, which is obviously to me the most  
17 important.

18 I would like first to ask some followup  
19 questions to Mr. Stephenson's questions. After I have  
20 done that, I will move into some questions about other  
21 matters.

22 But before I do that, I want to make certain  
23 you have got some of these documents. I believe you  
24 do.

25 Do you have UP-MP No. 22, Volume 1A?

1 A Yes, sir.

2 Q I also understand that you have a copy of  
3 UP-MP-23, which contains your verified statement?

4 A Yes, sir.

5 Q And you also have a copy of the  
6 interrogatories that have been filed?

7 A Yes, sir, I have.

8 Q I may ask questions about those towards the  
9 end of my cross examination.

10 In your testimony you have testified that  
11 among the ancillary rights that you are seeking in  
12 addition to the trackage rights would be the right to  
13 site and service new industries, is that correct?

14 A That is correct.

15 Q Who presently provides that service to the  
16 industries that you have in mind?

17 A If a new industry now is located on the SP,  
18 the SP would serve it.

19 Q So when you say new industries, you mean newly  
20 created industries?

21 A That is correct.

22 Q And now industries which are new to your  
23 operation?

24 A No, they may be old companies that we have  
25 done business with, but they are locating a new industry

1 along that trackage, and it would require a new switch  
2 to be built into it.

3 Q Now, assuming that you did not have these  
4 trackage rights, which included this particular  
5 ancillary right, who would provide that service in the  
6 event that a new industry would be created?

7 A The SP.

8 Q And the work performed pursuant to these  
9 ancillary rights would then be done by the employees of  
10 the SP, is that right?

11 A I would assume so. It might be a contractor,  
12 but I would assume the SP crews would do it.

13 Q So to that extent the work would be done by  
14 UP-MP employees rather than SPSF employees, is that  
15 correct?

16 A If there were new industries to locate on the  
17 line?

18 Q Yes, sir.

19 A That is correct.

20 Q You have testified in response to some of Mr.  
21 Stephenson's questions with regard to some provisions in  
22 the trackage rights agreement which have been called in  
23 the course of your testimony as catchall provisions.

24 Do you recall questions and answers about  
25 those provisions?

1 A Yes, sir.

2 Q As I understand your testimony, the inclusion  
3 of those provisions into the proposed trackage rights  
4 agreements in this case arose out of a dispute which has  
5 occurred between the Katy and the UP, is that right, or  
6 misunderstanding, excuse me, perhaps not a dispute.

7 I will let you characterize it in any way you  
8 choose.

9 A I don't know that it was relating that  
10 specifically.

11 What dispute are you talking about between the  
12 UP and the Katy?

13 Q Well, as I understand it with regard to  
14 trackage rights which were granted to the Katy arising  
15 out of the merger of the UP and the MP, there was some  
16 question about who would be providing some of the  
17 services which were ancillary to the trackage rights  
18 that you obtained, excuse me, that the Katy had  
19 obtained, and it was my understanding, and again, I  
20 may --

21 A I only used that as an example. Yes, I can  
22 recall after the Katy started operating over the  
23 Missouri Pacific into Omaha and there was no provision  
24 made in the contact for us to provide any service to  
25 their locomotive, let me say, if there was something

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1 wrong. So if there was a bolt missing or something on a  
2 grab iron or something, it wasn't in the contract that  
3 we would do that work for them, and our operating people  
4 were literally looking at that contract and telling the  
5 Katy, I can't do that. So the Katy would have to send a  
6 crew out of Kansas City up to Omaha to take care of it.

7 Well, it was all corrected through one phone  
8 call between Mr. Todd and myself.

9 Q Now, I am not familiar with it, but as I  
10 understand it, there was in fact no provision with  
11 regard to whose crews would be running over those tracks  
12 from Kansas City.

13 A That's not my understanding. My understanding  
14 was that the Commission gave the Katy the right to do  
15 what they wanted, operate their own crews or to use  
16 Missouri Pacific crews, and they chose to use their own  
17 crews.

18 Q Well, you can correct me if I am wrong, but as  
19 I understood it, the Commission order indicated that  
20 that was subject to negotiation.

21 A I don't know that. My understanding was the  
22 Commission gave them that right.

23 Q I am asking whether or not the proposed  
24 trackage rights agreement included a provision with  
25 regard to which crews would be operating those trains.

1 Do you know the answer to the question?

2 A No, I don't.

3 Q But in fact, the question of whose crews were  
4 going to be operating over those tracks have resulted in  
5 a dispute with the labor unions, haven't they?

6 A It certainly has.

7 Q That dispute could have been eliminated if  
8 there had been negotiations with the involved unions  
9 with regard to the labor forces to be selected, couldn't  
10 it?

11 A I don't know that. I wasn't involved in the  
12 negotiations or whatever. My understanding of it was  
13 that the Katy implemented the trackage rights in  
14 accordance with the law handed down, or what the  
15 Commission allowed them to do, and that's what they did,  
16 and a labor dispute came out of that.

17 Q And that labor dispute essentially continued  
18 in the form of litigation in the courts in that section  
19 of the country.

20 A I understand it is still going on.

21 Q My question to you is the labor dispute in all  
22 probability could have been eliminated if there had been  
23 negotiations with the labor unions representing those  
24 crews as to which crews would be operating those trains,  
25 isn't that right?

1 A That's your opinion. I am not sure of that.

2 Q I'm not asking.

3 A Well, I am not sure that you could have sat  
4 down and negotiated that with them. I think it is much  
5 cleaner when it is handed down as to how it can be  
6 done.

7 Q What do you mean cleaner?

8 A You don't have to sit and negotiate with  
9 them.

10 Q So it is easier to unilaterally select the  
11 forces rather than negotiate with regard to selection?

12 A I think the railroad that has asked for the  
13 trackage rights, they made the decision how they wanted  
14 to operate it, and that's the way it should be done.

15 Q Well, isn't it true that the employees of the  
16 UP or MP had contractual rights with regard to the  
17 operation of the railroad? Isn't that correct?

18 A For Missouri Pacific and UP traffic, not for  
19 Katy traffic.

20 Q So in your view, the employees have no rights  
21 with regard to trains which run over UP-MP track?

22 A I am not that familiar with the case. You are  
23 throwing out a lot of hypothetical things. I am not  
24 that familiar with the case itself.

25 I do know that the dispute has arisen, and I

1 do know they are in litigation over it. As to the  
2 details of the dispute, I cannot talk on that  
3 intelligently.

4 Q Would you agree that the decision of the  
5 selection of forces resulted in a change of working  
6 conditions for at least one set of crews?

7 A I will repeat my answer. I am not that  
8 familiar with the dispute.

9 Q Well, I am not asking you specifically about  
10 the dispute. I am asking you in this eventuality, when  
11 the carrier chooses one set of crews over another, that  
12 would seem to result in a change in working conditions  
13 for one set of crew, wouldn't it?

14 A Well, the Katy wasn't there before. The Katy  
15 was new on the trackage rights, and they made the  
16 decision as to what crews they wanted to operate.

17 Q If that traffic were to run from Kansas City  
18 in this particular instance north to Omaha, and it were  
19 to be run by the crews of the MP as opposed to the crews  
20 of the Katy, then the crews on the MP would have had  
21 that work, wouldn't they?

22 A Not necessarily. The traffic may have been  
23 moving over the Union Pacific from Omaha to Valley south  
24 through Marysville and back to Kansas City. I don't  
25 know.

1           Q     But in any event, there would be other  
2 employees performing that work.

3           MR. ROACH: Your Honor, I am going to object  
4 to further questioning about this.

5           JUDGE HOPKINS: Mr. Birney, what is the sense  
6 of going on and on with this line of questioning  
7 anyway? It is not related to this.

8           MR. BIRNEY: In fact, it is, Your Honor,  
9 because --

10          JUDGE HOPKINS: Well, he indicates he doesn't  
11 know all the background of that. That's the problem.  
12 If you want to get on to how in this case how it is  
13 going to be, that is different, but I wouldn't go back  
14 into that when he doesn't seem to know all the facts in  
15 that case.

16          If you want to go on to it as to this case,  
17 you have the perfect right to go ahead and do it. But I  
18 wouldn't keep stressing the fact of that situation  
19 because it appears this gentleman doesn't know all the  
20 facts.

21          BY MR. BIRNEY: (Resuming)

22          Q     To draw a conclusion from what we have just  
23 been discussing, I take it you don't recognize any  
24 obligation to negotiate with regard to the selection of  
25 forces over trackage rights, is that right?

1           A     That is correct. We want to use our crews,  
2 Union Pacific crews, on the trackage rights.

3           Q     Are there circumstances under which you would  
4 choose not to use your crews over those trackage  
5 rights?

6           A     Such as?

7           Q     Whatever you may view as a situation which  
8 would prompt you to use someone else's crew?

9           A     Let me say our desire is to use Union Pacific  
10 crews on all of our trains over the trackage rights. If  
11 there are laws that change that or the Commission hands  
12 down some other decision, we will comply with that, but  
13 that is the way we wrote the operating plan and the way  
14 we intend to do it.

15          Q     Why is it necessary for you to use Union  
16 Pacific crews?

17          A     I would rather have the employees operating my  
18 trains be employees of the Union Pacific Railroad.

19          Q     Why?

20          A     I have more control over them, I can negotiate  
21 with present Union Pacific general chairmen and general  
22 committees for the extension of seniority districts and  
23 redcing crew districts.

24          Q     Do you intend to negotiate with regard to the  
25 extension of seniority districts in this case?

1           A     That's a possibility, to extend seniority  
2 districts.

3           Q     Could you explain for the record the  
4 difference between a seniority district and a crew  
5 district?

6           A     Yes. A crew district, under my definition, is  
7 the district outlined that that crew runs from Point A  
8 to B, let's say, from Omaha to North Platte. That is a  
9 crew district. But those crew members may have  
10 seniority all the way to Cheyenne.

11           Q     One of the largest crew districts on the Union  
12 Pacific, for example, we have brakemen and conductors  
13 that hold seniority from Huntington to Granger, clear to  
14 Los Angeles. But a crew district would be from Los  
15 Angeles to Yermo, California, or Yermo to Las Vegas, or  
16 Las Vegas to Milford, Utah. There may be as many as 20  
17 to 25 crew districts on a seniority district.

18           Q     Now, as I understand it, you don't propose any  
19 change in existing seniority districts, is that  
20 correct?

21           A     I said we could expand some seniority  
22 districts to give them more seniority. I do not intend  
23 to establish new seniority districts.

24           Q     Would the expansion of those seniority  
25 districts prompt you to enter negotiations with the

1 labor representatives concerning the size of those  
2 districts?

3 A We would sit down and negotiate with the Union  
4 Pacific general chairman on that.

5 Q I would like to move now, if I could, into the  
6 operating plan, or to Volume 1A of UP-MP-22. I would  
7 like you first to turn to page 11 of the application.

8 In the second full paragraph there you  
9 indicate --

10 A Sir, to make sure I have it, these books are  
11 so hard for me to follow, I want to make sure I am on  
12 the right page.

13 JUDGE HOPKINS: You are not the only one.

14 THE WITNESS: I thought maybe lawyers  
15 understood these. Certainly operating people don't.  
16 Sometimes there's three number elevens in one book.

17 JUDGE HOPKINS: Don't give them that much  
18 credit, including the judge.

19 THE WITNESS: Yes, sir.

20 BY MR. BIRNEY: (Resuming)

21 Q Let me just say that that second full  
22 paragraph begins with the sentence "In total."

23 A Okay, I'm with you.

24 Q There again you state the traffic study  
25 concludes that traffic generating approximately \$97



1 million in gross revenues for UP-MP would be carried by  
2 the trackage rights if those rights were imposed.

3           You go on to say -- and this is the sentence I  
4 would like to ask you about -- if the primary  
5 application is approved without UP-MP trackage rights,  
6 virtually all of this traffic would move via SPSF.

7           Just to be certain, I wanted to see whether or  
8 not you can quantify the amount of that traffic.

9           A     Can I quantify the amount of it?

10          Q     Yes, to which you have referred in that  
11 sentence.

12          A     How do you want it quantified, in carloads?

13          Q     Yes. Ultimately I would like to be able to  
14 see if you can testify as to how many crews, for  
15 instance, would be affected by this change in traffic.

16          A     Whose crews, the SP crews?

17          Q     No. The UP-MP crews.

18          A     I don't have those car numbers readily  
19 available to tell you how many carloads that are  
20 involved in that, to equate that to trains and crews for  
21 you.

22          Q     That's fine.

23                 Move next, if you could, to the labor impact  
24 exhibit, which is Section 1180.6(A)(2)(5).

25          A     All right, sir.

1 Q Do you have that?

2 A Yes, sir.

3 Q That exhibit projects the impact of your  
4 trackage rights application for a period of one year.

5 A Yes, sir.

6 Q Was there any projection of what the impact  
7 would be for years beyond Year 1?

8 A I am not sure we did that.

9 Q Do you have an opinion as to what, for  
10 instance, the impact would be in Year 2?

11 A No, I do not.

12 Q So I don't suppose you have projected for Year  
13 3 either.

14 A No, sir. If we have, I am not aware of it.

15 Q That indicates that the labor impact of your  
16 application would be very favorable, at least to labor,  
17 would be an increase of approximately 314 positions.

18 A That is correct.

19 Q As I see it, based on that exhibit, in fact,  
20 on the second page, the jobs to be abolished would be  
21 abolished in only one location.

22 A That is correct. In essence, what you have  
23 done there is move the work from Stockton to Croville.  
24 If you notice, at Croville there should be an increase.

25 Q I see. So the jobs abolished in Stockton

1 would be transferred to Oroville?

2 A Yes, there would be less work taking place at  
3 Stockton which would be done at Oroville. That was so  
4 we could take advantage of the trackage rights, Haggin  
5 or Sacramento to Oakland.

6 Q Would those individuals be transferred to  
7 Oroville?

8 A Well, under present agreements, they could go  
9 there to Oroville. There is another example, you see.  
10 The WP train and engine crews have system rights on the  
11 old WP, so if they so chose and their seniority would  
12 allow them to go there, they could go to Oroville.

13 Q Turn next, if you could, to Appendix A of the  
14 UP-WP traffic study, and I guess I could help you find  
15 it. If you would turn to the fifth blue divider in the  
16 book you have got there.

17 A Appendix D?

18 Q A.

19 A Oh, five from the back?

20 Q Five from the front. I'm sorry, this exhibit  
21 is not consecutively paginated, so I can't give you any  
22 better reference.

23 If you would look at page 1, that appendix  
24 contains what is titled "General Assumptions Covering  
25 Evaluation."

1 MR. ROACH: I think the witness may still need  
2 some help.

3 THE WITNESS: Is this is?

4 MR. ROACH: Do you have Appendix A to the  
5 UP-MP traffic study?

6 Okay, I am sorry.

7 THE WITNESS: I can count to five.

8 (General laughter.)

9 MR. ROACH: Excuse me.

10 BY MR. BIRNEY: (Resuming)

11 Q I would like to invite your attention, if I  
12 could, to No. 3. The first sentence states that neither  
13 UP-MP nor Southern Pacific-Santa Fe will cancel joint  
14 rates or close routes available today. I take it that  
15 you would expect there to be no cancellation of any such  
16 joint rates between UP-MP and Southern Pacific-Santa  
17 Fe?

18 A I would rather you direct that question to Mr.  
19 Craig.

20 Q Very well.

21 Next I would like you to turn to the operating  
22 plan, if you could.

23 A Yes, sir.

24 Q On page 2, the first full paragraph, the third  
25 sentence which states "The operating plan takes into

1 account the phasing of traffic gains as stated in the  
2 traffic study, that is, 65 percent of the diverted  
3 traffic is expected to be gained in the first year of  
4 the trackage rights operation and 100 percent in the  
5 second and succeeding years."

6 You have estimated in your labor impact study  
7 that 314 jobs would be created in the first year.

8 Would it be correct for me to assume that  
9 those 314 jobs are created as a result of this 65  
10 percent increased in diverted traffic?

11 A That is correct.

12 Q So taking these figures, we could assume that  
13 there would be a proportionate increase in employees in  
14 the second year of approximately 35 percent?

15 A I hadn't really thought about that, although  
16 what you are saying in the labor impact, the labor  
17 impact takes place in Year 1.

18 Now, I am not sure that that totals to 314.  
19 If I could get my calculator, I would total those  
20 numbers.

21 Q Well, let's just assume that it does.

22 I guess my question is not really so much the  
23 figure itself but whether or not I would be correct in  
24 assuming that I could use this 65-35 percent increase in  
25 diverted traffic from Year 1 to Year 2.

1           A     I think what we said on the 314 jobs, that is  
2     the total jobs created from the total traffic diversion  
3     which would be Years 1 and 2.

4           Q     So there would not be a further increase in  
5     employment at Year 2 corresponding to these figures that  
6     are set forth here at page 2 of the operating plan?

7           A     Over -- 314 people over the two-year traffic  
8     diversion.

9           Q     If you would please turn to page 5 at the  
10    third full paragraph, the first sentence states "UP-MP's  
11    trackage rights application also encompasses the right  
12    to operate over trackage within terminals along the  
13    trackage rights where needed to provide competitive  
14    service.

15                   Whose employees will be operating over these  
16    terminals? Is this your crews going through these  
17    terminals? Is that what this means?

18           A     At some terminals, yes. If it is a Union  
19    Pacific train, there will be a Union Pacific crew on  
20    it.

21           Q     Now, turn if you would to page 7, which is not  
22    numbered but does follow page 6, fortunately.

23           A     Yes, sir.

24           Q     Under the heading "New Through Train Service,"  
25    in sentence two, the operating plan states "Appendix B

1 hereto shows the schedules and planned setouts and  
2 pickups en route of new intermodal and manifest trains  
3 that would be operated as a result of the trackage  
4 rights."

5 Do you intend then to spot cars at industrial  
6 sites?

7 A No, sir.

8 Q You do not?

9 A No, sir. I have asked to have operating  
10 agreements written where the SP-Santa Fe merged  
11 railroads would do that for me.

12 Q Are there any places, any terminals along the  
13 trackage rights that you seek at which in addition to  
14 planned setouts and pickups you propose to spot cars at  
15 industrial sites?

16 A Not unless they are new industrial sites.

17 Q So your request to spot cars was solely  
18 limited to industrial sites which do not now exist and  
19 which would be created after the implementation of the  
20 order?

21 A What we are proposing, as we said, is to write  
22 agreements where one railroad will do that switching.  
23 That would be the SP-Santa Fe merged railroads.

24 Q If you could turn to page 15 --

25 A Yes, sir.

1 Q Under the caption "Proposed Operational  
2 Organization," that first paragraph states "All of  
3 UP-MP's new trains will be powered by UP-MP locomotives  
4 and operated by UP-MP crews. In addition to operating  
5 their own trains and supplying their own crews, UP-MP  
6 will also handle routine running maintenance except as  
7 described in Section 6 below."

8 Where is the maintenance to which you refer  
9 here to be performed?

10 A I didn't find where you were reading.

11 Q I'm sorry, it is page 15.

12 A I'm sorry, I'm on 18. 15. You were reading?

13 Q Under the caption "Proposed Operational  
14 Organization."

15 Would you read that sentence, please?

16 A "All of UP-MP's new trains will be powered by  
17 UP-MP locomotives and operated by UP-MP crews. In  
18 addition to operating their own trains and supplying  
19 their own crews, UP-MP will also handle routine running  
20 maintenance except as described in Section 6 below."

21 Now, what was the question?

22 Q The question is where is the maintenance to  
23 which you have referred in that sentence to be  
24 performed?

25 A Other than as outlined in No. 6, "Other



1 Services?"

2 Q Yes.

3 A Yes.

4 Q Other than that, where is the running  
5 maintenance to be performed?

6 A Oh, you are talking about at the present  
7 locations on the Union Pacific and Missouri Pacific?

8 Q Yes. Where will that be?

9 A On what train are you talking about? Well,  
10 locomotives could be at Little Rock, or locomotives on  
11 the UP side could be at Salt Lake City or North Platte.  
12 It depends on what service or what you are talking  
13 about.

14 Q Do you intend to establish any facilities  
15 which would permit UP-MP employees to provide such  
16 maintenance on the SPSF lines?

17 A No, we do not.

18 Q Turn, if you would, to page 16. The second  
19 full sentence, the second full paragraph, third sentence  
20 states, "Actual reporting of car and train movements as  
21 well as waybilling will be handled via toll-free  
22 telephone service to existing customer service centers  
23 and operations control centers in Los Angeles, Stockton,  
24 Oakland and El Paso."

25 Isn't it true that certain documents with

1 regard to car and train movements would have to be  
2 handled by employees other than those located at the  
3 telephone service center?

4 A Information will be given those yard offices  
5 by a printer coming out of those customer service  
6 centers, but the waybilling and the handling of that  
7 work will be handled in the Union Pacific-Missouri  
8 Pacific customer service centers. Information will be  
9 given to the SP Railroad via a printer located in their  
10 yard office as to destination of equipment and switching  
11 instructions.

12 Q So if a carrier were to seek the movement of  
13 certain cargo, he could call the service center and  
14 instructions with regard to the movement of the cargo  
15 would then be printed out, for instance, at the SPSF  
16 yard where the shipper was located, is that right?

17 A Or wherever the SP has to handle that car.

18 Q Then it would be SP-SF employees who would  
19 then be responsible for preparing the documentation to  
20 effectuate the transfer of this cargo onto the train?

21 A Well, they would have to give him a message or  
22 verbal instructions to pick that car up or to their own  
23 crews, the same as they are doing now.

24 In other words, if you have a piece of traffic  
25 or a carload of traffic coming out of a customer now, an

1 SP employee tells an SP switch engine to pull that, and  
2 he gets that instruction now from probably one of his  
3 customer service centers or from the customer himself.  
4 The only difference now is he goes over to the printer  
5 and tears off a piece of paper. It shows that that car  
6 moves this way, and he so lines up his crews to handle  
7 it that way.

8 Q And that work would have to be performed by  
9 the SPSF employees?

10 A It is now.

11 Q You don't anticipate, do you, placing UP-ME  
12 employees in those stations to perform that?

13 A No, I do not.

14 Q You do not.

15 A I do not.

16 Q Turn, if you would, to page 17, at the bottom  
17 of the page.

18 A Yes, sir.

19 Q That particular section refers to your use in  
20 some instances of the use, as I understand it, of SPSF  
21 employees to run local trains.

22 If you would just examine that.

23 A What do you want me to examine there, the  
24 whole paragraph?

25 Q Yes, if you would.

1 A The whole paragraph of other services?

2 Q Yes, if you could.

3 (Pause)

4 A And the question you asked was that we  
5 would --

6 Q Have you finished examining it?

7 A Yes.

8 Q As I understand it, it means that at the  
9 present time, local conditions are such that it is  
10 necessary for UP-MP and SPSF forces to cooperate, for  
11 instance, in the switching of trains at the present  
12 time, but that there may come a time when those  
13 circumstances change.

14 A That is correct.

15 Q Now, in fact it states circumstances may lead  
16 operating officers of both companies to consider  
17 maintaining such practices or developing new ones.

18 What do you mean by develop new ones? What do  
19 you have in mind?

20 A Well, if we could figure out some smarter or  
21 easier way of handling that that we should come to an  
22 agreement for the benefit of both companies to implement  
23 a newer way of handling that or a better way.

24 Q And that implementation might involve the  
25 selection of which forces are going to perform this

1 work?

2 A Well, I hadn't thought about that.

3 Q Well, think about it.

4 A If it is being switched in an SP yard, it  
5 would be handled by an SP crew. If it was beneficial,  
6 let's say, for a UP crew to reach back in a track and  
7 make a pickup, that would involve a UP crew.

8 Q I guess as I understand what the operating  
9 plan states is that at the present time there is  
10 cooperation between the two carriers and that you would  
11 expect that cooperation to continue?

12 A That is correct.

13 Q However the plan states?

14 A As far as the operating officers are  
15 concerned, with most railroads, we have a pretty good  
16 relationship with them. Sometimes when the hierarchy  
17 gets involved, it gets messed up.

18 Q I understand that. I'm not questioning that.

19 My point here is that those circumstances,  
20 however, may change, and this operating plan provides  
21 for such change in circumstances which would require --

22 A I would say any new changes that were  
23 implemented, and as it is today, that the implementation  
24 of new ways of doing things, you always consider the  
25 labor contracts that are in effect. If it is necessary

1 that you sign a new agreement or get a new agreement  
2 with the organizations to do that, you do it.

3 Q Well, that's my point. Would you recognize  
4 the obligation --

5 A Let me say I don't intend to operate this  
6 railroad in any way, or even with the trackage rights,  
7 that in any way would violate a labor agreement.

8 Q Would you recognize the obligation then to  
9 negotiate with regard to such changes?

10 A That would be up to the SP because you would  
11 probably be talking their crews. We have always been  
12 willing to sit down when necessary to negotiate with any  
13 labor unions if it is necessary.

14 Q Okay. That paragraph then carries on to the  
15 next page, and it reads, consequently, UP-MP expects  
16 that in these instances UP-MP would elect to participate  
17 in existing SPT-ATSF joint or reciprocal switching  
18 agreements on reasonable terms, have SFSP handle some  
19 local service and switching for us on a fully  
20 compensated basis or arrive at other mutually  
21 satisfactory arrangement with SFSP.

22 Q Would you explain what you mean by other  
23 mutually satisfactory arrangements?

24 A Anything that is beneficial to the two of us.

25 Q In arriving at that determination, you would

1 negotiate the selection of forces?

2 A That is true.

3 Q If you could turn now to your verified  
4 statement at page 7, at the second full paragraph, you  
5 state "UP-MP trains would be operated with UP-MP  
6 locomotives and crews. Service would be provided to all  
7 points on the trackage rights lines that UP-MP would be  
8 entitled to serve under our application."

9 As I read that, that essentially means that  
10 this application for trackage rights involves bridge  
11 rights only and as you previously testified, only in the  
12 event of the creation of new industries would there be  
13 anything other than bridge rights over these tracks?

14 A That is not true. We have asked for bridge  
15 rights. We have asked to serve any industry that is  
16 presently being served by the UP and Santa Fe today. We  
17 have asked for the right to serve that industry. We  
18 have also asked for the right to serve new industry that  
19 is located on the trackage rights lines.

20 Q So you are asking for the right not only to  
21 serve newly created industries which might spring up  
22 around these tracks, but to serve all industries which  
23 are now being served by SFSP?

24 A SFSP has not been created yet.

25 Q I'm sorry.

1           A     That is now being served by the SP and the  
2 Santa Fe, jointly, either through reciprocal switching  
3 or joint agreements.

4           Q     You are absolutely right, and I stand  
5 corrected.

6                     My point is that in the event that this  
7 application was to be granted, that you weren't granted  
8 these rights, whose crews would be performing the work  
9 that you are seeking to do?

10          A     I don't know if they would be working for the  
11 SP. I don't know.

12          Q     That would actually allow you, then, to take  
13 away from the work being performed now by future SPSE  
14 crews and give it to your crews, is that right?

15          A     To Union Pacific crews.

16                     MR. ROACH: Excuse me. I would like to  
17 request a clarification of that question.

18                     When you say the words "work performed  
19 now" --

20                     MR. BIRNEY: I believe the witness understood  
21 it. He answered it.

22                     THE WITNESS: Well, there is some  
23 clarification there that you didn't allow me to finish.

24                     JUDGE HOPKINS: Let him finish, and then we  
25 will see, Mr. Roach.



1 THE WITNESS: What we are presenting in the  
2 operating plan to serve those local industries that are  
3 now being served jointly with the SP and Santa Fe, we  
4 are saying that they are to continue to be served by the  
5 SP and that we will pay them on a fully compensated  
6 basis for that service. The Union Pacific crews will  
7 not be in switching those industries after the merger  
8 has been granted, after our trackage rights have been  
9 granted. It will still be the present crews that are  
10 switching them today, premerger, and we will pay the  
11 SPSF fully compensated cost for the handling of that  
12 switching.

13 BY MR. BIRNEY: (Resuming)

14 Q So you don't intend to have UP-MP crews  
15 handling the switching or spotting as a result of your  
16 application?

17 A That is correct.

18 MR. ROACH: I have no further objection.

19 JUDGE HOPKINS: Thank you.

20 MR. BIRNEY: Your Honor, I have no further  
21 questions.

22 JUDGE HOPKINS: Do you have any, Mr. Roach?

23 MR. ROACH: I have two short points on  
24 redirect.

25 REDIRECT EXAMINATION

1 BY MR. ROACH:

2 Q Mr. Davis, Ms. Budeiri for the Department of  
3 Justice asked you some questions about pages 7 and 8 of  
4 your verified statement, and I believe that she  
5 suggested to you a distinction which she expressed in  
6 terms of a distinction between joint service and service  
7 using the trackage rights lines, and I want to ask you  
8 some questions to clarify what you were saying here at  
9 pages 7 and 8.

10 Am I correct, first of all, that the business  
11 that Union Pacific will carry under these trackage  
12 rights, that the through train movements will be  
13 conducted only by Union Pacific and not by SPSF?

14 A The crews handling those trains?

15 Q The actual through train movements as opposed  
16 to the local switching. Would that be conducted by  
17 Union Pacific exclusively if Union Pacific gets the  
18 business?

19 A That is correct.

20 Q So you are not proposing to pool any traffic  
21 in any through trains.

22 A No, no, we are not.

23 Q And at a location like the Oil City spur, for  
24 example, do both SP and Santa Fe independently switch  
25 that line today?

1           A     My understanding is one railroad switches it,  
2 and they take turns. They each take turns switching it  
3 for one year. That is my understanding.

4           Q     And you are not proposing to change that after  
5 the trackage rights, are you?

6           A     No.

7           Q     There will still be one railroad switching the  
8 spur?

9           A     That is correct.

10          Q     And is that true at the other locations such  
11 as Antioch-Martinez and Phoenix that you discussed?

12          A     That is correct.

13          Q     The other point I wanted to clarify has to do  
14 with the trackage rights agreement, on page 6, Section  
15 (2)(C)(2), and Mr. Stephenson asked you some questions  
16 about that, particularly relating to the existing joint  
17 track agreement between Santa Fe and Southern Pacific  
18 governing a line between Kern Junction and Mojave that  
19 is owned by the Southern Pacific and over which Santa Fe  
20 today has trackage rights.

21                   Do you recall that?

22          A     Yes, sir.

23          Q     Did you have an opportunity to review that  
24 issue and discuss it with counsel over lunch?

25          A     Yes, sir.

1 Q And is Union Pacific proposing here that it  
2 would ave the right to pay the same interest rental if  
3 it received its trackage rights that Santa Fe pays to SP  
4 under that agreement?

5 A No.

6 Q Is this paragraph directed at the issue of  
7 whether Union Pacific will have the right to participate  
8 in existing SFSP agreements relating to local switching  
9 rather than main line operations?

10 A That is correct.

11 MR. ROACH: That's all I have.

12 JUDGE HOPKINS: Anything further?

13 MR. STEPHENSON: I have one question, Your  
14 Honor.

15 RE-CROSS EXAMINATION

16 BY MR. STEPHENSON:

17 Q With respect to the local switching agreements  
18 that UP would substitute in that you just referred to,  
19 would it be your position that UP would stand in the  
20 shoes of Santa Fe with respect to the compensation paid  
21 to Santa Fe or SP for doing whatever switching was being  
22 done, or would you be guided by the ICC's decision on  
23 compensation at the conclusion of the case.

24 A It's my understanding if it is an ICC  
25 decision, that is a law and I have to abide by that.

1           Q     So to the extent that there was a conflict  
2 between the compensation provisions in the local  
3 switching agreement and the ICC's decision, it would be  
4 the intent that the ICC's overall decision would rule?

5           A     That is correct. If I don't like it, it is my  
6 understanding I have legal process to appeal it, but I  
7 most certainly would comply with the law.

8           MR. STEPHENSON: Thank you.

9           JUDGE HOPKINS: Is that all?

10          MR. ROACH: Yes, sir.

11          JUDGE HOPKINS: You are excused.

12          (The witness was excused.)

13          MR. ROACH: We are prepared to proceed with  
14 our traffic witnesses.

15          JUDGE HOPKINS: Do you move the admission of  
16 his testimony?

17          MR. ROACH: I move the admission of Mr. Davis'  
18 testimony.

19          JUDGE HOPKINS: Any objection?

20          MR. STEPHENSON: No objection.

21          JUDGE HOPKINS: It will be received in  
22 evidence.

23          I think we need a fifteen minute recess.

24          MR. ROACH: Your Honor, we have no further  
25 witnesses to present today. Parties had agreed that the

1 cross examination of the traffic witnesses would be  
2 tomorrow.

3 JUDGE HOPKINS: I'm sorry, I didn't know.  
4 Thank you.

5 We will be in recess then until 9:00 o'clock  
6 tomorrow morning.

7 (Whereupon, at 3:27 o'clock p.m., the hearing  
8 in the above-entitled matter recessed, to reconvene at  
9 9:00 o'clock a.m., Friday, January 18, 1985.)  
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