

F.D_30400 - 1/24/85 - Pgs. -8373-8431

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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 In the Matter of: :
 SANTA FE SOUTHERN PACIFIC CORPORATION : Finance Docket
 -- CONTROL -- : 30400 et al.
 SOUTHERN PACIFIC TRANSPORTATION :
 COMPANY :
 ----- x

Hearing Room A
 12th & Constitution, N.W.
 Washington, D.C.
 Thursday, January 24, 1985

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

BEFORE:

JAMES E. HOPKINS
 Administrative Law Judge

APPEARANCES:

As heretofore noted.

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C O N T E N T S

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| <u>WITNESS</u> | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> |
|--------------------|---------------|--------------|-----------------|----------------|
| Richard J. Barber | | | | |
| By Mr. Roach | 8375 | | | |
| By Mr. Martin | | 8377 | | |
| By Ms. Kooperstein | | 8534 | | |
| Richard D. Spero | | | | |
| By Mr. Roach | 8546 | | | |
| By Mr. Moates | | 8548 | | |
| By Ms. Kooperstein | | 8629 | | |
| Timothy R. Murphy | | | | |
| By Mr. Roach | 8633 | | | |
| By Mr. Moates | | 8634 | | |

E X H I B I T S

| <u>Exhibit No.</u> | <u>IDENTIFIED</u> | <u>RECEIVED</u> |
|--------------------|-------------------|-----------------|
| UP/MP-C-53 | 8514 | 8514 |
| SFSP-C-117 | 8593 | 8633 |
| SFSP-C-118 | 8598 | 8633 |

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P R O C E E D I N G S

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

3 MR. ROBERTS: Your Honor, a preliminary
4 matter. Barry Roberts for Sunkist Growers, Inc. Your
5 Honor, the Sunkist witnesses were the last on the list
6 for cross examination at this hearing schedule.

7 I have been in touch with applicant's counsel in an
8 effort to get a date, and it has been estimated and we
9 have agreed that the Sunkist witnesses will be here a
10 week from today, that is, the 31st, which is the last
11 scheduled day of the hearing, and it seems appropriate
12 for the last witnesses.

13 And I just wanted to inform Your Honor that
14 this is what we have done, and that witnesses are coming
15 in from out of town. They have made travel arrangements
16 in an effort to be here on that day.

17 JUDGE HOPKINS: I understood that. I had
18 heard that earlier yesterday. It is perfectly all right
19 with me. They will be in here at 9:00 o'clock?

20 MR. ROBERTS: 9:00 o'clock the 31st, a week
21 from today. Thank you, Your Honor.

22 JUDGE HOPKINS: Mr. Poach?

23 MR. POACH: Your Honor, Union Pacific calls
24 Richard J. Barber.

25 Whereupon,

1 RICHARD J. BARBER

2 was called as a witness, and having been first duly
3 sworn, took the stand, and was examined and testified as
4 follows:

5 DIRECT EXAMINATION

6 BY MR. ROACH:

7 Q Would you state your name, sir?

8 A My name is Richard J. Barber.

9 Q And what is your position?

10 A I am president of Richard J. Barber
11 Associates, Inc., an economic consulting firm.

12 Q I have placed before you a document marked
13 UP/MP-24, Trackage Rights Application, Volume 4, Part 2,
14 Verified Statement of R.J. Barber. Is that your initial
15 verified statement in this proceeding?

16 A Yes, it is a statement filed under date of
17 September 10, 1984.

18 Q And do you have any corrections you wish to
19 make in that statement?

20 A No.

21 Q Is it true and correct to the best of your
22 knowledge and belief?

23 A It is.

24 Q I have also placed before you a statement
25 entitled Verified Statement of Richard J. Barber

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1 containing Verified Appendices of Richard D. Spero and
2 Timothy R. Murphy. This statement bears the date
3 November 21, 1984, and then appears in Volume
4 UP/MP-28.

5 Is that your second verified statement in this
6 proceeding?

7 A Let me just correct. You said UP/MP-28. Mine
8 shows UP/MP-26.

9 Q Yes, I am sorry.

10 A So corrected, it is my statement.

11 Q Do you have any corrections you wish to make
12 in that statement?

13 A Yes. If you will turn to Page 12, five lines
14 from the bottom in the text, the beginning of that
15 paragraph, strike the word "Houston," substitute "New
16 Orleans."

17 On Page 41, in the last line of the text,
18 before the word "minimal" place a quotation mark. A
19 revised Figure 3 was circulated some weeks ago, and my
20 understanding is that the various parties have been
21 furnished a copy of that.

22 Those are my corrections.

23 MR. ROACH: I might state, Your Honor, that
24 Figure 3 was part of UP/MP-27, dated December 5, 1984,
25 and with that, the witness is available for cross

1 examination.

2 BY MR. ROACH: (Resuming)

3 Q I should have asked you, is your second
4 verified statement, with those corrections, true and
5 correct, to the best of your knowledge and belief?

6 A Yes, it is.

7 MR. ROACH: The witness is available for cross
8 examination.

9 JUDGE HOPKINS: Mr. Martin.

10 CROSS EXAMINATION

11 BY MR. MARTIN:

12 Q Good morning, Mr. Barber.

13 A Good morning, Mr. Martin.

14 Q I would like to first ask you some questions
15 about the verified statement of September the 10th,
16 UP-24. And I would ask you to turn to the section that
17 commences at Page 35, Section 4, which deals with the
18 effect of the merger on competition and shipper
19 options.

20 The first section of that chapter deals with
21 market definition, and in particular I would like to ask
22 you about what you say at Page 39. I will give you a
23 second to get the context.

24 At the top of Page 39, summarizing the facts
25 that you have discussed on the earlier pages, you say

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1 that these factors "could warrant a prescription of the
2 relevant product market as rail freight transportation
3 for purposes of assessing the competitive attributes of
4 the SFSP merger in California and the Southern
5 Corridor," citing the UP merger decision.

6 Then you go on to say, "Even if the product
7 market were more broadly defined as surface freight,"
8 this merger would substantially lessen competition. Do
9 you see that discussion?

10 A I do.

11 Q I would like to ask you about the first part
12 of it where you say that the factors you have identified
13 could warrant prescription of a product market as rail,
14 and by that I take it you mean rail only.

15 A That's correct.

16 Q Now, in fact, isn't it true that motor
17 carriers do compete with railroads generally throughout
18 the United States?

19 A Yes, with the emphasis on the word
20 "generally." But that does not mean that they compete
21 with equal effectiveness or compete even significantly
22 for all types of traffic.

23 Q Do motor carriers compete with Santa Fe for
24 some commodities within the Santa Fe service area?

25 A Yes.

1 Q Do motor carriers compete with Southern
2 Pacific for some commodities within the SP service
3 area?

4 A Yes.

5 Q Okay. At Page 37, in the first full
6 paragraph, you say, "For some shipments, truck or water
7 are obviously credible options." I take it there that
8 you are saying that for some shipments either motor
9 carriers or water carriers are credible options to
10 either the SF or the SP or both. Is that correct?

11 A Yes, with the emphasis there on the word
12 "some."

13 Q Okay. Now, where that competition exists,
14 then is it not the case that trucks and rails are part
15 of the same product market?

16 A In those cases, that is for shipments that can
17 and do move significantly or substantially by truck or
18 water as well as by rail, then in that case the product
19 market would embrace truck and water as well as rail.

20 Q Now, you said either can or do. Is that
21 correct?

22 A That's right.

23 Q Where that is the case, then am I not correct
24 that there would not be any other factors that would
25 justify a product market limited to rail only?

1 A In those cases I would use and believe that
2 the product market would be properly viewed as surface
3 freight transportation.

4 Q And that has been the thrust of your testimony
5 in other rail merger cases, has it not?

6 A The thrust of my testimony is that surface
7 freight transportation is an appropriate way of looking
8 at transportation in certain respects, and that in other
9 respects rail freight transportation is the proper way
10 to look at the market.

11 And the point of my discussion from Pages 35
12 to 39 is that here the product market could be looked at
13 in either or both ways as long as attention is given to
14 both product specifications, that is, both the surface
15 freight and to rail freight, because rail freight, as I
16 see it, must be looked at distinctively since
17 significant and indeed vary substantial blocks of the
18 traffic that move by rail move predominantly by rail and
19 confront limited or no discernible intermodal
20 competition.

21 Q If I understand you correctly, your position
22 is that where trucks and railroads compete, and they do
23 compete for some commodities, then the product market is
24 not rail only, and yet you now say that rail must be
25 looked at distinctively.

1 A That's correct.

2 Q By saying that, I take it you do not mean that
3 rail must be looked at separately and apart from motor
4 carrier competition where it exists?

5 A Where there is intermodal competition, it
6 should be looked at from a product market standpoint to
7 subsume the intermodal in cases where the products
8 involved, the specific traffic involved moves
9 predominantly by rail. Then I think as a theoretical
10 and a practical matter it is appropriate to look at the
11 product market as consisting of rail freight --

12 Q Rail only?

13 A Yes.

14 Q So you are saying that if particular
15 commodities move predominantly by rail, then your
16 judgment is that the product market should be rail
17 only. Is that your statement?

18 A Yes. If a given product, a given commodity
19 moves 100 percent by rail or moves substantially by
20 rail, then it seems to me that attention should be given
21 to rail freight transportation.

22 Q My question is rail only. We are not at this
23 point discussing whether rail should be considered. The
24 question is whether motor should be considered, too, and
25 if I understand your answer now, it is that where rail

1 has the predominant share or even where rail has a
2 substantial share, to use your term, then the relevant
3 product market is rail only rather than surface
4 freight. Is that your testimony?

5 A That is the thrust in practical terms of it.
6 Of course in that case the argument would be
7 tautological, because in those cases, even if one were
8 to look at the product market as consisting of all
9 surface freight transportation, then in instances of
10 products that move overwhelmingly by rail, then the
11 analysis would take one to the same point, that is, to
12 consideration of the spotlighted significance of rail
13 freight within that broader surface freight
14 transportation market.

15 And this is the thrust of what I said, I
16 believe, on Page 36, and that is that whether one looks
17 at it as rail freight or looks at it as surface freight,
18 one will find that there are pockets of traffic of real
19 consequence that move overwhelmingly by rail, just as
20 there is other traffic that may move by truck or rail.

21 If one looks at it either way, one should come
22 up with the correct product market specification to
23 enlighten the competitive analysis.

24 Q The thrust of my questions for the moment are
25 how the Commission should look at it in your view. I

1 want to come back to your predominantly and
2 substantially now, and I am here focusing on what should
3 be the market from an economic standpoint, not what a
4 spotlight might look at within the market, but what the
5 market definition should be. That is my question.

6 Is your testimony that where the rail carriers
7 have more than 50 percent of the traffic, that therefore
8 the market should be defined to be a rail only market?

9 A No, I would not use a 50 percent test. I am
10 suggesting here looking at cases in which or traffic in
11 which rail accounts for a much larger share than 50
12 percent. In fact, I present some tables in my testimony
13 in the UP/MP-26, that is, the November testimony, to
14 show various products being moved by SFSP as rail
15 freight, where rail freight accounts for 90 percent or
16 more of the total transportation of that long list of
17 commodity categories.

18 Q Is it your testimony then that in any
19 situation where railroads have as much as 90 percent of
20 the total traffic, including the traffic moving by other
21 modes, then in that circumstance the relevant product
22 market should be confined to rail only?

23 A I would think that at that juncture,
24 recognizing that as a practical matter one would look at
25 rail only, but it really makes no difference. If one

1 looked at it as rail only, one would see a product
2 market in a meaningful way.

3 If one looked at those kinds of commodity
4 traffic categories and found that rail was accounting
5 for 90 percent or 95 percent or 100 percent of the
6 traffic, then even if one characterized the market as
7 surface freight, one would come out and should come out
8 at the same place analytically.

9 Q Let me ask you this. Let's take a case where
10 the railroads have 90 percent, trucks have 10 percent,
11 and let me ask you to assume that the truck surface is
12 substitutable for the railroad. I ask you further to
13 assume that the truck availability does constrain to
14 some significant degree railroad pricing flexibility.

15 On those assumptions, wouldn't you agree that
16 the 10 percent market of the motor carriers means that
17 the product market would have to include those motor
18 carriers?

19 A I have considerable factual dispute with your
20 assumptions, but I will take them. In that case where
21 the share is 90 percent, it really makes no difference.
22 If one looked at it as rail freight, one could take
23 account of whatever truck was involved to see whether it
24 was a constraining influence, and noting that it was
25 only 10 percent in your example, one could come to the

1 conclusion that that is not a significant constraining
2 factor in terms of and is reflected in the share.

3 Alternatively, one could look at it as surface
4 freight, and then one could find that for that traffic,
5 under your assumption, rail was accounting for 90
6 percent, which would suggest to me, and I believe it
7 should suggest in economic terms that truck, even
8 accounting for only 10 percent, is not a significant
9 competitive constraining influence.

10 Q Is it then your testimony that the data with
11 respect to respective modal shares and flows can be
12 looked at from a variety of ways, and it doesn't matter
13 how you define the relevant product market?

14 A You can define product markets in a lot of
15 ways, but in this situation, on the facts that are
16 before us in this matter, I think one could come to the
17 same analytical insight whether one started by looking
18 at it as rail freight or looking at it as surface
19 freight, because that in turn would call for a factual
20 assessment, which would illuminate the fact that there
21 are significant pockets of traffic by commodity and by
22 length of haul and other characteristics where rail is
23 overwhelmingly dominant.

24 Q But where motor carriers do in fact compete
25 with Santa Fe or Southern Pacific, then shouldn't the

1 Commission, and I understand your testimony that they
2 can look at it in other ways, but shouldn't the
3 Commission look at it in terms of a surface freight
4 product market rather than a rail only product market?

5 A They should look at it in practical terms to
6 take that into account, and they should also -- the
7 Commission should also take into account that in other
8 commodity categories, rail or water -- rail confronts
9 little or de minimis competition from other surface
10 freight transporters.

11 Q You testified in the UP/Missouri Pacific
12 merger case, didn't you?

13 A Yes.

14 Q Wasn't the thrust of much of your testimony in
15 that case that railroads and trucks do compete
16 pervasively?

17 A They compete for a great range of traffic.
18 The main thrust of my testimony in the UP case was that
19 that merger was overwhelmingly end to end, and that
20 approval of the merger would eliminate neither
21 intermodal nor intramodal competition in a horizontal or
22 overlapping sense.

23 That is that substantial, indeed, unaffected
24 intramodal rail competition would remain throughout the
25 areas that would be involved in that combination.

1 Q My question is not for the moment whether that
2 merger was primarily horizontal or primarily vertical.
3 I ask you now not about railroad in competition with UP
4 or Missouri Pacific, but truck competition. Wasn't it
5 your testimony in that case that trucks compete
6 pervasively with both the Union Pacific and Missouri
7 Pacific?

8 A Yes, they compete for a great range of
9 products, though not with equal intensity, and in some
10 cases with de minimis impact in other cases.

11 Q Where that is so, then the relevant product
12 market in that case from your standpoint should be
13 surface freight, not rail only. Isn't that correct?

14 A One would come to the same conclusion, however
15 one looked at it, but in that case, in those instances
16 when one looks at it, takes, embraces the intermodal
17 competition, just as in the cases where intermodal
18 competition is of little meaning, that that should be
19 taken into account.

20 Q My question is not however one looks at it.
21 My question is, how do you think and how did you think
22 the Commission should look at it, and isn't the fact
23 that you said in that case that the Commission should
24 look at it in terms of surface freight and not rail
25 only?

1 A In that case I suggested or indicated that the
2 Commission should take account of intermodal competition
3 where it exists, and it exists for a number of types of
4 traffic with respect to their assessment of the
5 competitive impact of that merger.

6 Q You say taken into account. Shouldn't it be
7 taken into account, and wasn't it your testimony that it
8 should be taken into account in terms of the product
9 market definition?

10 A Yes, where that product market definition is
11 pertinent.

12 Q And wasn't it also your testimony in that case
13 that truck competition effectively constrains railroads,
14 the railroads involved in that case, at least, from
15 charging rates that generate monopoly profits?

16 A Yes. For those types of traffic where truck
17 competition is significant. And as I noted, and as we
18 noted, my colleagues noted in other portions of the
19 testimony, that competition, though affecting intermodal
20 competition, though affecting a number of categories of
21 traffic, did not affect, and I believe we used the words
22 "did not have the same effect" with respect to bulks and
23 moving over long hauls.

24 Q Was it basically your testimony in that case
25 that truck competition as an effective constraint was

1 limited to a few commodities in a few areas of the
2 country?

3 A I did not use the words "a few." I suppose if
4 you added up the commodities, you might find that the
5 number of commodities where truck was significant
6 exceeded the number where it was not significant.
7 However, the facts here, that is, in this SFSP case,
8 show that for the traffic that moves by rail, the
9 preponderance of the traffic that moves by rail is in
10 cells where the rail share of total traffic is very
11 substantial.

12 Q Let me ask you if you agree with the following
13 statement. "Clearly the combination of flexible, high
14 quality service, single system control over equipment,
15 schedules, and routings, and often competitive pricing
16 makes the motor carriers an extremely formidable force
17 in transportation. They are capable of competing for
18 virtually every kind of commodity manufactured,
19 semi-manufactured, and bulk, in LTL and FL quantities,
20 over long hauls, and in every section of the country."

21 That is pretty good prose, isn't it?

22 A Yes, it is good prose, and it sounds like what
23 I believe and probably have said on more than one
24 occasion, and I believe the statement is correct insofar
25 as it goes as a general statement.

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1 The question is, then, looking at the specific
2 facts and determining whether, as that statement
3 implies, whether there are categories of traffic,
4 whether there are bulk or long haul or short haul that
5 may involve situations in which the rail share is
6 overwhelmingly predominant, and that statement did not
7 state that in every type of traffic, for every movement,
8 for every commodity, over every category or every
9 distance length, that the trucks would be competitive.

10 They are competitive for a great many
11 situations, but not in every one.

12 Q Not in every one. You certainly didn't say
13 that. But is it still your view that the trucks are
14 capable of competing for "virtually every kind of
15 commodity," even if not every?

16 A Yes, I would say that trucks are certainly
17 capable in physical terms of competing for a great range
18 of products, and I would say that virtually is probably
19 about correct. The problem is that with respect to
20 analysis, that what is not in the category that is not
21 "virtually," that that category tends to account for a
22 very significant segment of rail traffic.

23 Q But you said that virtually every kind of
24 commodity includes bulk commodities, did you not?

25 A Yes. Trucks can move certain types of bulks,

1 but I didn't indicate in that statement that the bulk
2 traffic would be -- that all bulk traffic was involved,
3 and that all bulk traffic moving any distance would be
4 involved. Trucks can compete over long and short
5 hauls.

6 Trucks can compete for bulks. They move sand
7 and gravel, say, around an urban area, but I know of no
8 way, say, that trucks can compete for, say, the movement
9 of industrial sand from Minnesota to the San Joaquin
10 Valley of California, and I cite there the Halliburton
11 testimony, which was submitted in November in support of
12 the JP position here.

13 Q Okay. Let me ask you this. In the statement
14 that I just read, the virtually every kind of commodity
15 included not only bulk but it included LTL and TL
16 quantities over long hauls. Is it still your view that
17 trucks compete for virtually every kind of commodity,
18 including bulk, including long haul?

19 A The statement did not say, and I certainly
20 didn't intend it to state that for every type of bulk
21 traffic trucks can compete over every distance. Trucks
22 can compete obviously very effectively over all hauls
23 for LTL traffic. They can compete effectively for some
24 bulks over shorter hauls.

25 But when one reaches out to longer hauls, then

1 the number of bulks for which trucks are meaningful
2 competitors with rail declines very dramatically, as is
3 shown by the evidence of record here, and is suggested
4 by the exhibit contained in my December -- or my
5 November testimony, such as Figure 4, facing Page 16.

6 Q Your UP-MoPac testimony also referred to
7 virtually every kind of commodity in every section of
8 the country. Is it still your view that the trucks
9 compete in virtually every kind of commodity in every
10 section of the country?

11 A They can compete in really all sections of the
12 country for certain movements, but when it comes to
13 particularly, not always, but particularly the long haul
14 movements of certain traffic, such as bulks, like
15 industrial sand or chemicals or cement moving over some
16 significant range, then in those cases the data show
17 here rather clearly trucks are not competitive factors
18 of consequence.

19 Q Mr. Barber, in your UP testimony, didn't you
20 say that the trucks compete for virtually every kind of
21 commodity, including bulk, including the long haul, in
22 every section of the country? Wasn't that your
23 testimony?

24 A No, I don't believe that is a fair meaning of
25 that in the context of that statement as a whole. Can

1 trucks move bulks? Yes. Can they move bulks, can they
2 compete for every type of bulk? No. Can they compete
3 for every type of movement of every type of bulk over
4 every length of haul? No.

5 And I don't believe that statement suggested
6 that in every situation for every length of haul for
7 every conceivable bulk for every conceivable product
8 that trucks were equally competitive. And I think that
9 in fact the testimony that was submitted by me and my
10 colleagues in that case made very clear, and I think the
11 Commission in fact, I believe, cited it in its opinion,
12 to show that our recognition that for long haul
13 movements of certain bulks, that trucks were not -- did
14 not provide the same sort of competition that they might
15 for other bulks over other lengths of haul.

16 Q If I said every, Mr. Barber, as you suggest by
17 your answer, I apologize. I didn't mean to say every.
18 I meant to say virtually every, because that was your
19 language.

20 A And I used the word carefully there, because I
21 did not state every, I did not say, and I did not
22 certainly imply, and the data show quite to the
23 contrary, as I am well aware and have been aware, that
24 for many movements trucks are competitive, but for many
25 other movements over different lengths of haul,

1 depending on commodity, depending on loading
2 characteristics, shipper patterns and preferences and
3 such, that truck competition is of limited
4 significance.

5 Q Let me ask you about another statement. Would
6 you agree with the statement that trucks compete with
7 railroads for hauls of well over 1,000 miles and even up
8 to 2,500 miles?

9 A Yes, they do. For certain types of
10 commodities they will run across the country and move a
11 variety of products, so for certain traffic, for certain
12 commodities, clearly the distance, trucks can compete
13 over longer distances.

14 Q One of those would be commodities hauled in
15 TOFC rail service. Isn't that correct?

16 A Consumptually or theoretically, yes, but I
17 must say that the data offered here in the testimony of
18 the shipper witnesses such as Rates and Services, Inc.,
19 the submission of National Piggybackers in their
20 statements, the evidence that they cite shows that the
21 movement of TOFC trailers via rail is considerably
22 cheaper than the movement over the road.

23 One of the cases that they cited, the
24 testimony reports that the rates available to them for
25 TOFC movement via rail were up to 40 percent lower than

1 what it would cost them to ship it, to ship trailers in
2 TOFC service -- to move trailers over the highway.

3 Q Mr. Barber, don't trucks in fact compete with
4 rail TOFC service at distances of over 1,000 miles?

5 A On the basis of the evidence that I have seen,
6 taking those shippers' statements into account, if it is
7 a movement of the type of trailer that is being moved in
8 TOFC service with the rail costs being up to 40 percent
9 lower than the over the road cost, that would not seem
10 to be a competitive inhibition. That is, rail has a
11 considerable advantage.

12 Now, trailers, of course, loaded with some
13 types of freight, may move over the highway, but not all
14 of that type of freight being moved under those
15 circumstances is susceptible to movement by TOFC. For
16 example, an exempt owner-operator moving, say, lettuce
17 from California to Boston, typically keeps his tractor
18 with him, and so he is not going to use TOFC service at
19 all.

20 So a lot of the traffic that moves over the
21 highway is traffic that really can't be moved in TOFC
22 service. Conversely, where the Rates and Services, as
23 the other witnesses indicate, where the trailers can be
24 moved in TOFC service, certainly there seems to be a
25 considerable rate advantage in using rail rather than

1 moving it over the road.

2 Q You have answered my question in terms of rate
3 advantage, and you have said that not all commodities
4 move by truck at over 1,000 miles. You have said a lot
5 doesn't move over 1,000 miles. My question is this.
6 Isn't there a lot of traffic that does move over 1,000
7 miles via truck competing with rail TOFC, not that all
8 does, but some does?

9 A Some can, yes.

10 Q Some does. Isn't that true? Some does move
11 by truck over 1,000 miles in competition with rail TOFC,
12 not can, but does. Isn't that the fact?

13 A Yes, some does appear to move that way,
14 although taking into account the rate information
15 provided by the shippers here, it is rather apparent
16 that railroads are rapidly gaining a considerable
17 advantage over the over the road use, so as National
18 Piggybackers and Rates and Services, Inc., witnesses
19 show, by moving trailers in TOFC service rather than
20 over the highway, they can achieve significant
21 economies.

22 Q While on the subject of the UP/MoPac case, I
23 am going to ask you a question about Transearch market
24 share data. You did rely in the present case on
25 Transearch data in your testimony to show truck market

1 shares, did you not?

2 A Yes. I and the applicant's witnesses.

3 Q Do you agree that Transearch data undercounts
4 intercity truck traffic and thus understates truck
5 shares of the total transport market?

6 A It probably understates at least certain
7 categories of traffic. Probably it understates some
8 grain traffic. I think that is probably the outstanding
9 example. With respect to the other, I suspect that
10 there may be some undercounting by Transearch.

11 But since Transearch builds up and relies
12 ultimately upon the Census of Transportation for certain
13 of its baseline data, the standard errors there suggest
14 that in some cases using their sampling procedure that
15 they could overcount.

16 I suspect that there is some undercounting,
17 but on the pure statistical basis one would have to
18 concede that there could be over or undercounting.

19 Q Wouldn't you agree that in total, not with
20 respect to particular commodities, but in total a fair
21 estimate of the amount of the undercount is that
22 Transearch omits about one-quarter of the intercity
23 truck traffic?

24 A That is, I think, a fairly decent guess. I
25 don't think it can be more than a guess, but I think it

1 is a fairly decent figure with probably the great
2 preponderance of that reflecting movements of grain.

3 That is the one area where the Census data are
4 really not apposite, and where Transearch itself
5 acknowledges that they have had trouble identifying all
6 of the grain shipments that might be made by truck of
7 whatever distance.

8 So I would think that the omission that
9 Transearch makes in their data primarily involves
10 grain. It may involve some undercounting in other
11 areas, but I would think it would be nowhere as
12 significant as in the case of grain.

13 Q I have been asking you some questions about
14 your testimony in the UP/MoPac case. Let me just
15 briefly touch upon some others, or maybe not briefly.

16 Did you testify in the Norfolk Southern merger
17 case?

18 A I did.

19 Q Did you testify there that trucks are highly
20 competitive with railroads?

21 A Yes, I did, just as I have testified here,
22 that they are highly competitive for a significant
23 number of commodities and shipments.

24 Q Did you also testify there that that
25 competition exists with long hauls, with respect to long

1 hauls as well as shorter haul?

2 A Yes, for certain commodities trucks can
3 compete with rail for movements over long haul such as,
4 say, LTL shipment.

5 Q Did you also testify in the CSX merger case?

6 A I did.

7 Q Did you testify there that trucks are
8 effective competitors with railroads for long haul?

9 A Yes, I did, and I don't need to repeat the
10 answer I just gave. The same application. That is,
11 they can compete for long hauls for some traffic.

12 Q How about the Milwaukee case? Did you testify
13 in that case?

14 A I did. You mean the Chicago North
15 Western-Milwaukee proceeding?

16 Q Yes.

17 A Yes, I did.

18 Q Did you there testify that trucks are
19 competitive with the railroads involved in that case?

20 A Yes, and the trucks were, according to the
21 data, there because the hauls were relatively short, and
22 many of them involved movements, say, 100 to 200, 250
23 miles, with a great deal of that involving grain traffic
24 being moved by truck from elevators often to the
25 Mississippi River or the Missouri River for onward

1 movement by barge.

2 Q Prior to this case, have you ever testified in
3 any rail merger case in favor of a rail only market
4 definition?

5 A The issue really never has come up on the
6 facts. The other merger cases were end to end, and
7 there was frankly no great significance to determining
8 what the market would be since the intermodal rail
9 competition would be unaffected by the merger at
10 issue.

11 And in the CNW-Milwaukee case, the evidence
12 quite clearly showed that for the shipments involved
13 there, the predominant traffic, which was grain, the
14 trucks were a very big factor, along with barge.

15 And even here, I again emphasize that -- I am
16 saying that the Commission can look at this situation as
17 either surface freight or as rail freight. I think they
18 should look at it, can look at it in both ways and come
19 to the same conclusion as I come to in terms of the
20 analysis I set forth.

21 Q I may have misunderstood one aspect of your
22 just completed answer. Did I understand you to say that
23 the CNW-Milwaukee proceeding involves an end to end
24 merger?

25 A No, I did not say that. I said that in the

1 CNW-Milwaukee situation, the evidence showed and the
2 facts very clearly showed that for the predominant
3 traffic involved, mostly grains, that there was very
4 substantial intermodal competition.

5 Because the facts showed that in that
6 situation, then it seemed to me appropriate to take
7 account of that for purposes of competitive
8 assessment.

9 Q For purposes of market definition. Isn't that
10 correct?

11 A Yes, market definition is only a prelude to
12 the competitive analysis.

13 Q But an important prelude. Wouldn't you
14 agree?

15 A It is important, although it would be a
16 mistake to think here rigidly in terms of categories.
17 Here I believe that fair analysis takes one to the same
18 conclusion as I have reached, whether one looks at it as
19 surface freight or looks at the market as rail freight
20 or looks at it as some surface freight and some rail
21 freight or as a composite. It makes really no
22 difference in terms of the ultimate analysis for
23 competitive purposes.

24 Q Did you testify in the Milwaukee case that
25 trucks were part of the relevant product market with

1 respect to products other than grain?

2 A I believe there was some evidence, at least at
3 a later stage in the case, with respect to certain
4 movements. As I recall, evidence at one stage was
5 offered by some party, and I responded by showing that
6 for the commodities that they had identified, that there
7 was significant truck movement over the relatively short
8 haul lengths that were involved in that case.

9 Q Well, let's focus for a moment on other kinds
10 of intermodal competition other than truck. Have you
11 testified in other cases that water carriers compete to
12 some degree with railroads?

13 A Yes, water carriers can and do compete to some
14 degree with railroads.

15 Q And where that is so, the water carriers ought
16 to be included within the relevant product market?

17 A Yes, where that should be embraced within it,
18 where that is a significant factor.

19 Q Would you agree that to some degree, water
20 carriers compete with the Santa Fe today?

21 A Yes, to some degree for some products.

22 Q Also with respect to the Southern Pacific?

23 A Yes, with respect to both of those railroads.

24 Q And where that is the case, then competition
25 with the water carriers should in your judgment be

1 included within the relevant product market?

2 A It certainly should be considered where
3 competition has made itself known, just as where that
4 competition is not significant, then it would be a
5 mistake to think solely in terms of water or rail.

6 All I am urging is a practical, specific
7 assessment, looking at competition where it exists and
8 not getting caught up in categorical approaches, but
9 being willing to consider the evidence and look at the
10 situations where truck or water may compete with rail,
11 but also to be sure to look closely at situations where
12 truck and rail do not represent a significant
13 competitive factor in moving certain traffic for certain
14 movements.

15 Q Have you testified in other cases that oil
16 pipelines compete with railroads?

17 A Yes, oil pipelines can compete in rather
18 limited cases, but for certain types of refined
19 petroleum products they can be -- represent competition
20 for rail.

21 Q Do they compete with the Santa Fe to any
22 degree?

23 A Yes, I would say so, because in the general
24 area involved here, there are oil and product
25 pipelines.

1 Q How about the Southern Pacific?

2 A Yes. And Southern Pacific, of course, in fact
3 owns a slurry pipeline.

4 Q So it is your testimony that where trucks or
5 water carriers or pipelines do compete with the Santa Fe
6 or Southern Pacific, and to some degree they do, you
7 have said, where that is the case, those other modes
8 should, in your judgment, be included within the
9 relevant product market?

10 A They certainly should be considered where that
11 is the situation.

12 Q Now, on Page 39, you start a discussion of the
13 geographic market. Do you see that?

14 A I do.

15 Q Isn't it a fact that railroads hauling from
16 one origin to a destination sometimes compete with
17 railroads hauling from a different origin to the same
18 destination?

19 A That certainly is a possibility.

20 Q Well, it is more than a possibility, isn't it,
21 Mr. Barber? It exists, doesn't it?

22 A It can exist. One just has to look at the
23 facts.

24 Q You say it can exist, and yet in fact you know
25 that it does exist in the United States in some places.

1 A Yes, in some cases. I thought your question
2 was an abstract one, but I know in certain cases it does
3 indeed exist.

4 Q Perhaps my question was abstract, and then I
5 guess I asked the next one about factual matters, but we
6 are clear that geographic competition is not just a
7 theoretical proposition, but it exists as a matter of
8 fact in the United States, does it not?

9 A It is a matter of fact in instances of which I
10 have knowledge.

11 Q Okay. Now, that last question was with
12 respect to railroads from different origins. Isn't it
13 also a fact, not just a theory, that railroads sometimes
14 compete with trucks hauling the same commodities from
15 different origins?

16 A Yes.

17 Q And isn't that true with respect to the Santa
18 Fe?

19 A It would be true, I believe, of, or could be
20 true of any railroad. The situations of which I am
21 knowledgeable primarily involve railroads in the middle
22 west, which would include the Santa Fe, to some extent
23 the SP.

24 Q Let me ask you not simply whether it could be
25 true of the Santa Fe, but is it not in fact true of the

1 Santa Fe with respect to some movements?

2 A Yes, I was thinking in the midwest in the case
3 of coal where a movement of coal could be made by a
4 railroad delivered -- a railroad participating in a
5 movement of coal to some place, say, to a power plant
6 which could also get coal by water, by barge.

7 Q Is it your view that coal is the only
8 commodity as to which Santa Fe experiences significant
9 geographic competition?

10 A No, I would not want to limit it to coal, but
11 that is, I think, the one instance in which I have a
12 fair amount of facts about the participation, because I
13 testified on that in the CILCO case, Central Illinois
14 Electric Company case.

15 Q You wouldn't suggest that there aren't others
16 as well?

17 A No, I would not suggest there could not be
18 others.

19 Q Would your answers be the same with respect to
20 the Southern Pacific?

21 A Yes.
22
23
24
25

1 Q Where this geographic competition does in fact
2 exist, then aren't railroads and trucks providing these
3 services from different origins to the same destination
4 part of the same product market?

5 A That would depend very much on the specific
6 facts, and it would call for evidence that would show
7 with specificity a variety of things. It would have to
8 show the amount that was available from other sources,
9 the prices at which that was available, the cost of
10 transportation, the availability of other forms of
11 transportation to meet the service, and it would also,
12 in my judgment, have to show whether that alternative
13 source and/or modal competition had some meaningful
14 impact upon the ratesetting practices of the carrier at
15 issue.

16 Those are the sorts of things that I think are
17 essential to taking the theory of source competition
18 down to a level of practical competitive impact.

19 Q Let me come back to my question. I asked you
20 where geographic competition does exist, aren't
21 railroads and trucks providing services from different
22 origins part of the same product market, and then you
23 answered in terms of what you would look at in deciding
24 whether it exists.

25 I asked you to assume for purposes of the

1 question, along with your prior answer, that geographic
2 competition does exist with respect to some commodities,
3 and where it does, then as a matter of economic
4 reasoning, aren't the railroads and the trucks providing
5 those competitive services from different origins part
6 of the same product market?

7 A Yes. Provided that the specific data that I
8 suggested or indicated would have to be available, in
9 answer to your prior question, provided that showed that
10 that alternative or that source competition was a
11 meaningful competitive influence.

12 Q Haven't you testified in at least one other
13 railroad merger case and perhaps others that geographic
14 competition has to be taken into account in defining the
15 product market?

16 A I believe where an allegation is made or where
17 there is a belief that a particular -- in a particular
18 situation that the merger might have some adverse
19 effect, that one would want to look at source
20 competition. And in those cases, as I recall,
21 particularly indications about grain in the CSX case, I,
22 on behalf of the applicants, did adduce that kind of
23 evidence to show that in that situation there was
24 meaningful source competition. In other words, as an
25 applicant witness, I came forward with the evidence to

1 deal with the problem that had been raised in general
2 terms by some other party.

3 Q Let me ask you to turn for just a moment to
4 your other verified statement in this case, November 21,
5 the bottom of page 28, where you are discussing
6 Anderson's source competition screen.

7 At the bottom of the page -- and you may want
8 to get the context of this -- there is a sentence which
9 says, "While under certain conditions source options can
10 represent a potent competitive factor," and then you go
11 on and say their actual role depends on the facts.

12 I want to focus on this statement that "under
13 certain conditions source options can represent a potent
14 competitive factor." That is true in this case for the
15 Santa Fe, is it not, as to some commodities?

16 A I simply don't know, and I don't know which
17 particulars to which it might relate. Anderson said
18 that he was going to present or deal with this, but when
19 I looked at what he did present, it simply didn't deal
20 with it in a meaningful enough way to permit me to
21 really address the issue.

22 Q I didn't ask you -- I didn't mean to ask you
23 about Anderson's testimony or your critique of it. I
24 was asking you about your statement that source options
25 can represent a potent competitive factor; and I

1 understood from your statement that here you were
2 referring to geographic competition; is that correct?

3 A This sentence does relate to geographic
4 competition in general terms; that is, where such
5 competition can represent a "potent competitive factor,"
6 then it should be considered. And then I noted that the
7 Applicants had not adduced the facts which would tell us
8 where and in what specific respects that competition was
9 present.

10 Q I'm not asking you about your critique of
11 Anderson's testimony. I am asking you whether you don't
12 agree that under certain conditions with respect to
13 certain commodities, source options can represent a
14 potent competitive factor for the Santa Fe?

15 A Yes, I believe they can for any railroad
16 provided the obvious prerequisite is met; that is, that
17 somebody identifies those and lays out the evidence to
18 show that they are present.

19 Q Let me ask you to go back to your other
20 verified statement, your first one, at page 38. We were
21 at page 39 before, I believe. Let's move just to the
22 page prior to that, page 38. The last paragraph on that
23 page is referring to actual modal use patterns, and
24 about five or six lines down you're referring to large
25 shares of freight moving not only in the Southern

1 Corridor but also "to and from localized areas where SF
2 and Southern Pacific are the only railroads."

3 Do you see that discussion?

4 A Yes.

5 Q Now, here I take it you're talking about a
6 share of the market which includes products moving from
7 different origins, different origins to the Santa Fe or
8 the Southern Pacific in the Southern Corridor; is that
9 correct?

10 A No. Here, what I'm talking about is simply
11 that of the freight moving to or from localized areas,
12 say BEAs, where SF and SP are the exclusive carriers
13 transported by rail, say Arizona, that freight moving to
14 and from those -- that a large share of that freight is
15 transported by rail. My emphasis was simply the large
16 share of the freight moving to these areas does move by
17 rail and via SF and SP where, say, as in Arizona and
18 certain other places they're the exclusive rail carriers.

19 Q Perhaps I misunderstood one of your prior
20 answers, but don't you agree that transport competition
21 in an economic sense is broader in movements from the
22 same origin to the same destination?

23 A Well, it can be but it need not be. It
24 depends upon the product, the particular logistical
25 character of demand.

1 Q I understand your distinction, but didn't you
2 testify that in the case of the Santa Fe, for example,
3 that it does experience geographic competition from
4 different origins?

5 A Well, I believe the testimony is clear that I
6 said that it can or could, provided the facts are shown,
7 but it doesn't mean that it confronts that kind of
8 competition for every movement for every commodity at
9 every place to which it may transport freight.

10 Q Not every commodity, every place, every
11 movement, but wasn't your testimony that the Santa Fe
12 does in fact -- not simply could but does in fact
13 experience competition from other railroads or modes
14 from different origins, does in fact?

15 A I believe my answer was that it may confront
16 that competition in specific situations. In that sense,
17 yes. But if you're now trying to imply, I believe
18 inaccurately, but if you're trying to imply that I said
19 that they confront source competition for all traffic at
20 all areas, I don't believe that's what I said. And in
21 any event, I clearly did not -- I do not, am not of that
22 view.

23 Q I think I understand that. Let me turn your
24 attention to page 39 where the discussion of the
25 geographic market starts in the middle of the page.

1 Just below that you refer to a transportation setting
2 that reduces essentially to two parameters. Do you see
3 that discussion?

4 A I do.

5 Q Traffic flows between given origins and
6 destinations and specific localized areas in which
7 freight shipments are originated or terminated. I want
8 to ask about both of them. The first one that you
9 identify is flows between California, on the one hand,
10 and points in the south central and southeast regions.
11 That's the first parameter, correct?

12 A The traffic flow, the Southern Corridor flow,
13 yes.

14 Q Between California points and points in
15 southcentral and southeast regions. Just so I'm clear
16 on that, and perhaps you've already identified it, what
17 states are included within the south central region?

18 A I have a map which is Appendix -- it's
19 Appendix A, the last page, study regions, showing the
20 areas. South central would include Texas, Oklahoma,
21 Arkansas, Louisiana.

22 Q And just so the record is clear, what states
23 are in the southeast region?

24 A The southeast as I was thinking of it here
25 would embrace particularly Mississippi, Alabama,

1 Georgia, South Carolina and Florida.

2 Q Now, you used the term southeast rather than
3 south southeast. Did you use the term to include north
4 southeast?

5 A I believe that could be affected, but my real
6 focus was on south southeast.

7 Q But you're saying that the first parameter of
8 the geographic market in this case is flows between
9 California and points in the states that you have just
10 identified.

11 A That's right. Points in California and then
12 across, of course, Arizona and New Mexico into then the
13 south central and southeast area.

14 Q Are you saying that all of these flows, all of
15 these flows are part of a single economic market?

16 A From a geographic standpoint I believe that
17 the market should be looked at to comprehend those flows
18 through that area.

19 Q So that in your view, the geographic market
20 would include within the same market flows from northern
21 California to west Texas?

22 A Yes.

23 Q And southern California to Pensacola, Florida.

24 A Yes.

25 Q That's part of the same geographic market?

1 A Yes, in terms of the flow pattern.

2 Q In terms of the geographic definition of the
3 market.

4 A Well, keep in mind page 39 indicates the
5 geographic market, as I see it, has two parameters. One
6 is the flow, and it would be the flow across essentially
7 from California on the west across through the Southern
8 Corridor into the south central and southeast areas.

9 Q So what you're saying is all of the rail flows
10 from any point within the origin state to any point
11 within any one of the destination states could be within
12 the same geographic market?

13 A No. I'm not suggesting, say, that a movement
14 between Alabama and Georgia would be --

15 Q No, no, no. I misspoke. I didn't mean to say
16 that. What I meant to say was any rail movement
17 originating in California and moving to any one of the
18 states in the south central or southeast regions is in
19 the same geographic market for purposes of this
20 parameter with any other rail movement from California
21 to any one of those destination states.

22 A Yes. From that parameter that is basically
23 correct.

24 Q How many BEAs are there approximately in the
25 whole state of California?

1 A Well, I guess it ends up to be five or six. I
2 think it's shown on the maps in the appendix.

3 Q How about the south central and the southeast
4 regions approximately?

5 A I don't have the number at hand. It is shown
6 fairly well in the maps that are in Appendix B, or at
7 least in some respects.

8 Q It's more than that wouldn't you think?

9 A There would be several BEAs in Texas. I'm not
10 sure of the number in Texas. I think it might be
11 something on the order of eight or ten.

12 Q But in the whole of the south central and
13 southeast regions there are quite a number of BEAs,
14 isn't that correct?

15 A Yes.

16 Q Now, are the flows that you refer to as part
17 of this first parameter between California and points in
18 the south central and southeast regions, do those
19 include not only rail flows but also truck flows?

20 A Yes. They would include the traffic flows
21 between those in that flow pattern.

22 Q It would also include water carriage flows?

23 A It would, such as between, say, California and
24 the Texas gulf.

25 Q And it would include, to the extent it exists,

1 pipeline flows?

2 A Yes.

3 Q Would it include all commodities?

4 A Yes. All freight.

5 Q Have you developed a rail market share for the
6 transport market defined as including all flows between
7 California and the south central and southeast region?

8 A No. What I have done is to present in a
9 variety of specific tables set forth in the appendices
10 and summarized in the text share data for movements
11 between particular but major BEAs, especially in the
12 south central area such as Houston and Dallas, New
13 Orleans and such, and then for illustrative purposes, a
14 movement into the southeast, Atlanta, in order to
15 provide a picture of that market, the share of traffic
16 by categories and types, by mode between selected BEAs
17 in the west, in California, and those identified BEAs in
18 the south central-southeast areas.

19 Q Focus for a minute on that, because in your
20 answer you refer to movements to Atlanta as movements to
21 "that market."

22 A By "market" I meant to Atlanta.

23 Q You did not mean market?

24 A I meant Atlanta.

25 Q Because if I understand your testimony

1 correctly, the relevant parameter geographically is not
2 movements between particular BEAs but movements between
3 -- flows between California, on the one hand, and points
4 in south central and southeast regions on the other; is
5 that correct?

6 A The flow would comprehend that, yes.

7 Q No, I'm not asking you about the flow. I'm
8 asking you about the geographic market. As I understand
9 your testimony, even though you have developed share
10 data for movements between BEAs, your testimony now, as
11 I understand it, is that the relevant parameter for the
12 geographic market is not movements between BEAs. It is
13 movements or flows between California, on the one hand,
14 and points in south central and southeast regions on the
15 other; isn't that correct?

16 A The flow comprehends, or the flow dimension of
17 this comprehends the movement between the points in the
18 west and the areas identified in the east. And then to
19 eliminate that, I provide data, just as Applicants did,
20 for not every BEA but for the larger BEAs; and then I've
21 also provided data with respect to the significance of
22 the Southern Corridor flow to comprehend all movements
23 to and from that area based upon the sample that was set
24 forth, any data from which are derived from the UP
25 opinion of the Commission, some of which data I

1 initially worked up.

2 That is, if one looks at Appendix A of my
3 September statement, one finds here the movements and
4 market shares of movements all told between, say, the
5 south central states as a whole, including everything in
6 them, and movements then to northern California and from
7 northern California. So there's data in here dealing
8 with BEA to BEAs, and there are data in here showing
9 movements by corridor and by railroad as between -- and
10 through this area to include the movements between
11 northern and southern California, on the one hand, and
12 the south central states, including all those states and
13 all the shipments, as well as all those moving into the
14 southeast, the south southeast and such.

15 2 You have now told me what you did, and I
16 thought I understood that. All I'm trying to do is to
17 clarify the record as to what you didn't do; and I'm not
18 trying to argue you with you for the moment as to which
19 is right and which is wrong. I simply want the record
20 to be clear if it is accurate that for the geographic
21 parameter that you define at page 39, you discuss the
22 geographic market -- that is, flows between California,
23 on the one hand, and points in south central and
24 southeast regions -- you did not develop rail market
25 shares for that geographic market.

1 I just want to be sure that the record is
2 clear whether you did or didn't do that, what I have
3 just asked you.

4 A I presented data in two forms. First of all,
5 BEA to BEA, but this includes only the major BEAs, not
6 every BEA. It includes the bigger ones like Dallas,
7 Houston, New Orleans and such. And the ones at issue in
8 California, such as Los Angeles, the San Joaquin Valley,
9 the Bay Area. I present that information. It does not
10 include every BEA in the south central and southeast
11 areas. I also present information taken from the
12 Commission's prior assessment in the UP case of flows to
13 -- between northern and southern California and all
14 points in the south central and southeast state regions.

15 Q Mr. Barber, did you develop rail market share
16 data for a transport market defined as including flows
17 between California and south central and southeast
18 regions?

19 A Yes, I believe I did within the context of the
20 answer I just gave.

21 Q In other words, you developed it for
22 particular BEAs?

23 A Yes.

24 Q You developed it for a particular corridor?

25 A Right.

1 Q You developed it to and from parts of
2 California. But my question is different. My question
3 is did you develop rail market share data for the
4 geographic transport market that you identify in your
5 first parameter on page 39; that is, flows between
6 California, on the one hand, and points in south central
7 and southeast regions on the other. Did you do that?

8 A Yes, I believe I did that within the meaning
9 of the answer I just gave you, if I understand your
10 question correctly.

11 Q Okay. What is the rail market share of "flows
12 between California, on the one hand, and points in south
13 central and southeast regions on the other"?

14 A And the answer to that is found in the data in
15 the appendices. With respect to the BEA data, that is
16 set forth in various appendices. But on a BEA to BEA
17 basis such as from Los Angeles or San Joaquin Valley
18 BEAs or the Bay Area BEA to and from Houston BEA,
19 Dallas, New Orleans and the rest of it. And that, to
20 me, is providing the information with respect to that
21 market.

22 JUDGE HOPKINS: Are you talking about the
23 totality of the market?

24 MR. MARTIN: Yes, I'm sorry. I'm not making
25 myself clear.

1 THE WITNESS: Is your question did I add up
2 every BEA, add all the BEAs together?

3 BY MR. MARTIN: (Resuming)

4 Q No, no, that's not my question, Mr. Barber.
5 My question is this. You have identified a geographic
6 market that has two parameters. The first parameter
7 consists of flows between California, on the one hand,
8 and points in the south central and southeast regions on
9 the other.

10 My question is simple. Did you determine, did
11 you calculate a rail market share for that geographic
12 market, not some other smaller geographic flow, but that
13 particular geographic market as you identified on page
14 39? Did you do it? If you did, fine. If you didn't
15 fine.

16 A I believe I did within a meaningful sense;
17 that is, I provided information on a BEA to BEA specific
18 basis for the major BEAs, the bigger ones, and I have
19 set that forth in my tables, in my text tables and in my
20 appendices.

21 Now, if your question is did I add up the data
22 shown in each of these BEAs, I did not do that.
23 Somebody else could do it if they wanted to.

24 Q Did you have all of the flows, the data with
25 respect to all of the flows between California, on the

1 one hand, and points in south central and southeast
2 regions on the other?

3 A Not on a BEA basis.

4 Q On any basis?

5 A Yes. I have them on the basis of rail shares
6 as set forth in Appendix A.

7 Q Appendix A is a document that we're looking at
8 now that precedes the maps?

9 A Yes.

10 Q Would you tell me where in Appendix A or
11 anywhere else in the appendix I can find the rail market
12 share of the entirety of all of the traffic flows
13 between California, on the one hand, and points in south
14 central or southeast regions on the other?

15 A No. That is not in there. You can look at
16 each of the major BEAs where I provide information on 64
17 of them, as I recall, on a point directional basis. But
18 as I indicated earlier, I did not include and don't have
19 data at hand with respect to each BEA. I included the
20 major BEAs.

21 Q But Mr. Barber, unless I am seriously
22 misreading your statement, you say at page 39 that the
23 first parameter of the geographic market is not one BEA
24 to another BEA; it is instead flows between California
25 and points in the south central and southeast regions.

1 A That's right.

2 Q So is it your testimony that movements from
3 one BEA to another BEA are not a proper geographic
4 market?

5 A No. For purposes of the flow, because my
6 point here is I believe set forth clearly, and it's a
7 very elementary one. All of the traffic that is moving
8 or the traffic that is moving between California, on the
9 one hand, and moving, say, into the south central area
10 we know, we want to know how much of that traffic that
11 is moving by rail moves through the Southern Corridor.

12 Appendix A and the other appendices that I
13 have provided shows that. In other words, the thrust of
14 my assessment here is to identify the flow through the
15 bottleneck zone. The bottleneck zone, as I see it, is
16 the area in the Southern Corridor between the western
17 extremity of Texas, then across to California. That the
18 significance of that corridor, that flow is what I
19 believe to be of extreme importance, and that is what
20 the data I've provided shows. It shows that traffic
21 moving, say, between Los Angeles and Houston or Dallas
22 or New Orleans or as far east as, say, Atlanta, that the
23 great, great preponderance of that traffic moving by
24 rail moves through the Southern Corridor.

25 Q Okay. Hold on just a second. On 39 where you

1 define this first parameter as flows between California,
2 on the hand, and points in south central and southeast
3 regions on the other, did you mean to exclude flows over
4 the Central Corridor?

5 A No. And, in fact, the data I presented
6 illuminate the volumes that are moving and the shares of
7 volumes moving by the Southern and Central. And what it
8 shows is that the Southern Corridor flows account for an
9 enormous share of the traffic. The traffic moving to
10 Texas is in the range of 95 to 100 percent of the
11 traffic.

12 Q I just want to understand first what is in the
13 flow. What you're saying is, if I understand you, is
14 that the first parameter of the geographic market in
15 these flows from California to the south central and
16 southeast regions includes not only flows through the
17 Southern Corridor, but they include flows through the
18 Central Corridor.

19 Can you answer whether that is true or not
20 true?

21 A Yes. And the data I presented show that.

22 Q And it includes not only rail movements by the
23 Central and Southern Corridors, but truck movements,
24 pipeline movements and water carrier movements, to the
25 extent they exist, from the first origin area to the

1 destination area.

2 A Yes. For the BEAs that I have shown.

3 Q All of them, not just one.

4 A For the major BEAs, the same BEAs that are
5 included within Applicants' own analysis, such as
6 Houston, New Orleans, Dallas and other major points in
7 those areas such as are in the south central area, all
8 of which then I have sought to show then the
9 significance of the Southern Corridor as a flow path for
10 the movement of rail freight, and then for particular
11 BEA pairs I have shown the rail share of total traffic.
12 So the net result is to show that the Southern Corridor
13 occupies the crucial position accounting for 95 to 100
14 percent of the traffic moving into Texas out of Los
15 Angeles, for example. And I also give the shares for
16 other BEAs, and then to show on a BEA to California for
17 three BEAs in California, then show the share of traffic
18 to BEAs, say in Dallas, Houston, New Orleans and such,
19 to show modal share by categories of traffic.

20 JUDGE HOPKINS: Gentlemen, can we stop the
21 filibustering and get to the questions and answers
22 rather than long, extensive answers that are not to the
23 questions that are being asked?

24 Go ahead, Mr. Martin.

25 MR. MARTIN: I won't try to prolong it, Judge,

1 but I would like to try it just one more time.

2 BY MR. MARTIN: (Resuming)

3 Q With respect to the geographic market that you
4 define, the first parameter, page 39, flows between
5 California, on the one hand, and points in south central
6 and southeast regions on the other, did you develop a
7 rail market share for that transport market?

8 A I developed it only for the BEAs that I've
9 identified and that are included in the appendix.

10 Q Did you develop a market share for the Santa
11 Fe with respect to that geographic market?

12 A For those BEAs for which I presented the data
13 -- that is, the major BEAs.

14 Q But not for the total parameter?

15 A Not for the smaller BEAs.

16 Q Not for the total of the flows that you have
17 defined as the geographic market?

18 A No, except in the sense that I've included
19 here the data showing the shares of traffic to all
20 places in the south central and all places in the
21 southeast that moves via the Southern Corridor vis-a-vis
22 the Central Corridor by routing. In that sense, those
23 data in Appendix A comprehend all movements to all
24 points and all BEAs.

25 MR. MARTIN: Can I just take 30 seconds, Your

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1 Honor?

2 JUDGE HOPKINS: Sure.

3 (Pause.)

4 BY MR. MARTIN: (Resuming)

5 Q Okay. Let's talk for a moment about the
6 second parameter which is at page 40. As I understand
7 it, the second parameter, which you discuss at the top
8 of page 40, is "local areas in which Santa Fe and SP
9 presently compete. This would include areas in
10 California, Arizona and Texas."

11 Do you see that discussion?

12 A Yes.

13 Q Are you limiting this geographic parameter now
14 only to those states?

15 A These are the states in which, as I see it, SP
16 and SF are presently in face-to-face competition, so I
17 am limiting it to that in terms of this analysis.

18 Q No other states?

19 A That's right.

20 Q Okay. Now, within those states does the
21 second parameter include all areas within those states?

22 A Arizona, yes; Texas, not all areas;
23 California, not all areas, but it includes Los Angeles,
24 the San Joaquin Valley, including Fresno, Bakersfield,
25 and the Bay Area.

1 Q I take it that it would include any area where
2 both the Santa Fe and the SP originate or terminate
3 traffic; is that correct?

4 A Yes. In those states.

5 Q Whether either one originates or terminates
6 traffic in those states?

7 A Or both.

8 Q I'm sorry. Does it include the areas where
9 they both originate and terminate traffic? Let me ask
10 -- that's a bad question. I apologize.

11 Let me ask you to take a city, any city in
12 California, and I ask you to assume that it is served by
13 only one but not by both railroads. Would this second
14 parameter include that local area if it is served by
15 only one and not both railroads?

16 A It could. There could be a city that was
17 served only by one of them that was in a BEA for which I
18 am presenting data. But in that area there would be --
19 both of them would be present.

20 Q And your geographic analysis, I take it, would
21 include traffic that is terminated within one of these
22 local areas on one of these railroads, even though it
23 may have originated at any entirely different source not
24 served by both railroads, isn't that true?

25 A Yes. It would include that traffic coming in

1 and terminated in that way.

2 Q Would truck movements be included in this
3 market parameter?

4 A Yes. And the BEA data I present in these many
5 pages of the appendix include that.

6 Q How about water carriage?

7 A If it is coming from the indicated other BEA.

8 Q I thought that your answer just now was that
9 this relevant geographic parameter would include traffic
10 to a destination within one of these BEAs even if its
11 origination was at some totally different BEA --
12 Montana, Denver, Omaha.

13 A I'm sorry. I must have misinterpreted your
14 question. But again, I'm just trying to direct
15 attention to the types of material in all of these
16 appendices that I have. But what it shows is BEA to BEA
17 flows, so that if, for example, we were talking of Los
18 Angeles to Dallas, it would include traffic, including
19 truck traffic say coming to Dallas from say the Bay Area
20 or from Fresno, Bakersfield, or from Phoenix or vice
21 versa.

22 Q With respect to the total now, not particular
23 BEAs but the total of all of the "local areas" in which
24 SF and SP presently compete in these three states,
25 together with other surface freight transport, have you

1 developed a market share for the Santa Fe for that total
2 area?

3 A No, I have not developed one, but we have
4 addressed that in the rebuttal material to the extent
5 that it was -- that Applicants sought to present some
6 information of that sort. So some of that is contained
7 in the material in the December statement -- I'm sorry
8 -- the November statement.

9 Q Apart from your addressing of the Applicants'
10 witnesses, you have personally not developed rail market
11 share data for this parameter, or Santa Fe market share
12 for this parameter, or Southern Pacific market share for
13 this parameter, isn't that correct -- this geographic
14 parameter?

15 A From the standpoint of the identified BEAs,
16 yes. From other standpoints, no.

17 Q I'm talking about the total now of the local
18 areas in which Santa Fe and SP presently compete. I
19 understand that you did it for particular BEA
20 combinations. My question is with respect to all of the
21 local areas that are grouped as you have grouped them on
22 the top of page 40.

23 A You mean all points to, say, Phoenix?

24 Q I mean "local areas in which SF and SP
25 presently compete, including areas in California,

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1 Arizona and Texas." All of them, not just BEA to BEA,
2 all of them. You haven't calculated rail market shares,
3 or Santa Fe market shares, or SP market shares for that
4 geographic market as you have defined it, have you?

5 A No. We have done it only for the particular
6 BEAs and the particular flows that would involve use of
7 the Southern Corridor.

8 Q Would you identify for the record, to the
9 extent you may not have already in your testimony, any
10 commodity as to which you believe motor carriers do not
11 compete with either Santa Fe or Southern Pacific at any
12 distance? Let me ask you that question again.

13 Would you identify for the record any
14 commodities as to which you think motor carriers do not
15 compete with either the Santa Fe or the SP at any
16 distance?

17 A I can't give a listing. I can refer you,
18 however, to Figure 4 opposite page 16 of my December --
19 I'm sorry -- my November statement, which indicates rail
20 shares of total traffic between the identified origins
21 and destinations to show situations in which the rail
22 share of total traffic -- that is, considering all mode
23 traffic -- ranges, as shown here, from 91 percent up,
24 with a number of the items listed here at 100 percent.

25 I would have to say that in these categories

1 this presents to me quite clear evidence that there is
2 either no intermodal competition or that that intermodal
3 competition plays a very limited competitive role.

4 Q That's not my question, Mr. Barber. Your
5 Figure 4 refers to movements from a specified BEA to
6 another specified BEA, and you list them and you list
7 commodities, and you list rail and truck shares of those
8 flows. But you have agreed that those are not
9 geographic markets, and my question is this -- and I
10 want you to include -- I want to include in my question
11 not just movements from one BEA to another, but
12 geographic competition, movements from different sources.

13 MR. BOACH: Your Honor, excuse me. I have to
14 object to the characterization.

15 MR. MARTIN: I'm sorry. I withdraw the
16 characterization. I apologize.

17 JUDGE HOPKINS: Go ahead.

18 BY MR. MARTIN: (Resuming)

19 Q I shouldn't have tried to characterize your
20 figure.

21 MR. BOACH: No. I'm objecting to the
22 statement that Mr. Barber has agreed that BEA to BEA
23 flows are not relevant markets. I think he said exactly
24 the opposite several questions and answers ago.

25 JUDGE HOPKINS: Start the question again.

1 BY MR. MARTIN: (Resuming)

2 Q Let's clarify that. Mr. Barber, is it your
3 position in this case that movements from one BEA to
4 another BEA constitute a relevant geographic market?

5 A Yes. They can constitute a relevant
6 geographic market. Any flows between significant
7 origins and destinations, whether it be a state or a
8 BEA, can constitute a market. I have sought to direct
9 attention here to the flow -- that is, the flow between
10 BEAs -- that involves the Southern Corridor.

11 Q Not "can," Mr. Barber. I'm not asking you a
12 theoretical question about what could be the case. I'm
13 asking an "is" question. Didn't you say in response to
14 my questions a few moments ago that as you have defined
15 the first parameter of your geographic market, it
16 consists of flows between a number of BEAs in
17 California, on the one hand, and points which comprehend
18 a number of BEAs in the south central and southeast
19 regions? Wasn't that your definition of the first
20 parameter of your geographic market?

21 A Yes. That is the summation, if you want, of
22 particularized flows. That is, what I have done is to
23 identify BEAs, because that is the best way to get the
24 data. You could look at those individually. The
25 Commission could look at it that way. I, in fact,

1 looked at it that way. I also looked at in terms of the
2 totality of movements, say through the Southern
3 Corridor. I have looked at it really both ways, but
4 they're all part of the flow path.

5) Part of the flow. But I am asking you with
6 respect to the definition of the market, and I
7 understood you to say that the proper geographic market
8 definition in this case as far as you were concerned was
9 not from one BEA to another BEA, but it was broader than
10 that. It was the total of the flows between California,
11 on the one hand, and points in south central and
12 southeast regions on the other. And if we can't get
13 that clarified, then it's very hard to ask followup
14 questions.

15 Isn't it your testimony that the geographic
16 market consists not of -- in fact not could, but in fact
17 consists not simply of a movement from one BEA to
18 another, but instead consists of flows between
19 California and points in southeast and south central
20 United States.

21 A It's both. In other words, the flow between
22 the south central and California, say, includes
23 movements between, say, Dallas or Houston and key BEAs
24 in the west, say Los Angeles. Then the total of those
25 flows -- that is, adding them up -- would be, if you

1 want, a summation, a synthesis or consolidation of those
2 flows. You could look at either of them, and I looked
3 at both of them as part of the flow path using the
4 Central Corridor -- I mean the Southern Corridor.

5 Q Which is the relevant geographic market,
6 though, Mr. Barber? Is it L.A. to Houston, or is it
7 California to the south central and southeast regions?
8 It can't be both. One is bigger than the other. Which
9 is the relevant geographic market?

10 A In economic terms you cannot and here would
11 not have one geographic market. It is important to look
12 at flows say between a BEA like Houston and a BEA like
13 at Houston, but I believe you should also look at the
14 total of these flows. Either one illuminates the
15 significance of the Southern Corridor; that is, markets
16 consist of elements, and they consist of then a
17 summation of those elements. Both are important. Both
18 are markets.

1 Q Are you saying that -- in Figure 4 you have 33
2 lines here, Houston to Los Angeles, Phoenix to Los
3 Angeles, Los Angeles to Phoenix. Are each one of those
4 combinations of BEA's separate economic geographic
5 markets?

6 A Yes, I would believe that they are separate
7 markets, and you can look at them that way or you can
8 look at the whole composite of flows, say through the
9 Southern Corridor, and look at it that way. I believe
10 it really makes no difference, but you can look at
11 either one as the market.

12 Q Okay. Let's go on to page 46.

13 A Of which statement?

14 Q Your September 10 statement.

15 To the extent that this is repetitive -- and I
16 will try to hold it down -- I apologize. But I think
17 the record ought to be clear. At the bottom of 45, top
18 of 45, you talk about tonnage moving from Houston to Los
19 Angeles. You say railroads handle 61.6 percent of that
20 tonnage. Do you see that?

21 A I do.

22 Q You do not in your text label that tonnage as
23 a separate geographic market. Do you believe, from the
24 standpoint of economic analysis, that it is a separate
25 economic geographic market?

1 A Yes, I believe that is a market, although I
2 believe you should also look at all of these together as
3 well to make sure that one is not an isolated example.

4 Q All right. Now, this one was Houston to Los
5 Angeles. Then do I take it also that Los Angeles to
6 Houston, traffic moving in the other direction, is also
7 a separate geographic market?

8 A In theoretical terms you could do it. I
9 believe for simplicity purposes you can look at them as
10 a totality, but you could break it out that way as a
11 market for purposes of that analysis, as long as you
12 didn't look just at one, in one direction, but you
13 looked at a number in both directions moving through,
14 involving traffic moving through the Southern Corridor.

15 Q That is, I'm not suggesting you look just at a
16 particular pair in one direction and stop, but that you
17 look at these as a composite, as several of these in
18 both directions, so that you begin to see whether there
19 is a consistent pattern.

20 Q But isn't the whole point of having a market
21 definition to know what you can look at?

22 A Sure, and that's what I've just suggested.
23 You look at -- in my judgment here, you would look at
24 BEA pairs. You would look at those in both directions.
25 Then you look at a number of BEA pairs. You would make

1 sure that you had the more important BEA pairs, then you
2 would see how those involve movements through the
3 Southern Corridor, were they consistent in terms of the
4 role of that corridor for rail traffic.

5 Then you would look at larger amounts of data,
6 say by region to region, such as in Appendix A, and you
7 take all that into account for purposes of looking at
8 the market and making the economic assessment.

9 Q Looking at the market, you would take all of
10 that into account in looking at the market?

11 A Definitely.

12 Q So the market is bigger than simply one of
13 those flows between BEA and BEA. It includes them all?

14 A What you're looking at is individual point to
15 points. Then you're looking at several of these, then
16 state to state, and then region to region data, and
17 you're looking at it as a whole. And I believe that's
18 economically sound, but also it's practical. It is
19 trying to test whether there is consistency, whether
20 you've got a rare case or whether it's just a part of a
21 pattern.

22 Q Did you testify in the UP-MoPac case that
23 flows from one BEA to another BEA are too narrow to be
24 treated as separate economic markets?

25 A Looked at in isolation, yes, they would be. I

1 would never just pick say Miami to Seattle and say that
2 that is a market. If I were making a judgment, I would
3 want to see Miami to Seattle, Seattle to Miami, and then
4 look perhaps at movements say between Portland and areas
5 in the Southeast and vice versa.

6 I would never want to take just one BEA,
7 certainly not in one direction, and draw a conclusion
8 just from that case alone. I would want to look at
9 several woven together to see whether they were
10 consistent and part of the same pattern.

11 Q Is that because it is possible that movements
12 from, for example, the Dallas BEA might be substitutable
13 for movements from the Houston BEA?

14 A Less than just making a determination of
15 the way traffic was flowing. For example, suppose you
16 found between Houston and L.A. that 90 percent of the
17 traffic moved through the Southern Corridor, but between
18 Dallas and L.A. that only five percent of it moved
19 through the Southern Corridor. Then clearly that would
20 be inconsistent. You would need more information.

21 On the other hand, when you look at
22 Houston-L.A., Dallas-L.A., New Orleans-L.A.,
23 Memphis-L.A., and so forth, and find that the Southern
24 Corridor is accounting for 90, 95 percent of the
25 traffic, then it is consistent, mutually supportive, and

1 permits you then to look at the situation and make some
2 judgment, because you are getting data that simply
3 complement one another.

4 Q If tonnage from --

5 A I'm sorry, I didn't hear you.

6 Q If tonnage from the Dallas BEA to the Los
7 Angeles BEA were closely substitutable for tonnage
8 moving from the Houston BEA, then shouldn't the economic
9 market be broader than simply the separate BEA pairs?

10 A Yes, you certainly want to look at it, and the
11 approach that I have just described is one that does
12 exactly that.

13 Q Let me ask you to flip back to page 30 of your
14 testimony. In the middle paragraph you are discussing
15 the San Joaquin Valley. Do you see that?

16 A I do.

17 Q Am I correct that you would not treat traffic
18 to and from that single area as a separate economic
19 market?

20 A I would not look at that traffic alone, in
21 isolation from everything else. I would look at that
22 movement, say between San Joaquin and Houston, or
23 wherever it might be, say Houston, Fresno, Bakersfield.
24 I would look at that, but not alone.

25 I would want to look at other types of

1 movements involving the Southern Corridor and see
2 whether it was consistent, such as Fresno, Bakersfield
3 to Dallas. I would want to look at Fresno, Bakersfield
4 to New Orleans, and then look at the Bay Area traffic,
5 the Los Angeles, and put it all together to see whether
6 this was consistent, and thus whether it provided a good
7 basis for interpretation.

8 Q My question is not what you would look at. My
9 question has to do with market definition, which is the
10 subject of your testimony at page 36 and thereafter,
11 where you have a section of your testimony on market
12 definition.

13 You go into the question of how you define a
14 market before you then start assessing the impacts on
15 that market. Put to one side what you would look at or
16 ask the Commission to look at and focus on market
17 definition. Would you treat traffic to and from the San
18 Joaquin Valley as a separate economic market?

19 A Not in isolation, no. I would want to look at
20 it only along with other traffic between major points,
21 and then look at that as a whole. Then that would allow
22 you to go back and decide whether say the Houston to
23 Fresno-Bakersfield BEA traffic data appeared to be
24 representative or consistent with other data.

25 Q Now, just below that discussion of the San

1 Joaquin Valley there's a discussion of service to and
2 from areas within the Southern Corridor, and there are
3 other references to the Southern Corridor. Am I
4 correct, again focusing not on what you would look at
5 but on market definition, that traffic moving via the
6 Southern Corridor is not a separate economic market?

7 A Not in itself, no. It should be looked at
8 only as part of a pattern involving other BEA's and
9 other flows moving, say, through the Southern Corridor,
10 not just Phoenix, not just Los Angeles, not just Dallas,
11 but looking at several that the data clearly showed do
12 involve movements through the Southern Corridor.

13 Q Well, my question was whether, taking all of
14 those movements that move through the Southern Corridor,
15 you would -- it is your belief that the proper way to
16 analyze this case is to treat that traffic, all of it
17 moving via the Southern Corridor, as a separate economic
18 market?

19 A I believe it is where that traffic in rather
20 large volumes to and from various places at the west end
21 and places to the east, where it involves consistently
22 very substantial use of the Southern Corridor.

23 Q Didn't you testify in the UP-MoPac case that
24 the Central Corridor was not a separate economic
25 market?

1 A In terms of those movements such as movements,
2 say, between Los Angeles and Kansas City or
3 market-Chicago, it did not, on the basis of the evidence
4 that I had before me, appear that that was severable.
5 That is, that there was competition in very substantial
6 amounts from the Southern Corridor.

7 That is not the case when I deal with the
8 Southern Corridor for movements say between Los Angeles
9 and Dallas or Houston or New Orleans, where something
10 like 95, 98 percent of the traffic moves through the one
11 corridor.

12 Q My question is not limited to movements to or
13 from a particular BEA. If it was your testimony and
14 belief then and now that the Central Corridor traffic
15 competes with the Southern Corridor traffic, then must
16 it not be also true that the Southern Corridor traffic
17 competes with the Central Corridor traffic?

18 A No, and the data make that very clear, that
19 where the Central Corridor was meeting very substantial
20 competition from the south for movements, say, back into
21 the Midwest, which is, after all, the subject matter of
22 the UP case.

23 Here, where the overlap is in the southeast
24 and in the Southern Corridor, when you look at the flows
25 through that corridor and then pinpoint the major areas

1 in the west and the major areas in the south-central
2 area shown in Appendix A and in the other appendices in
3 my testimony, when you look at those you find that the
4 Southern Corridor is overwhelmingly dominant. We're
5 talking about shares of the rail traffic moving between
6 say Los Angeles or southern California and south-central
7 area in the upper, mid and upper 90 percent ranges.
8 That doesn't depict to me competition from the Central
9 Corridor.

10 And we also know that for movements say
11 between Los Angeles and Houston the Central Corridor is
12 hopelessly handicapped. It is more 1,000 miles or a day
13 longer, and the traffic people have shown how that
14 imperils their competitive potential.

15 Q I didn't ask my question very well and I
16 apologize for it. I meant to ask this question. Not
17 limiting my question or your answer to the traffic from
18 particular BEA's to particular BEA's, because I
19 recognize your position is that the two corridors do not
20 compete for all business of every commodity -- with that
21 to one side, it nevertheless was your belief and is your
22 belief that the Central Corridor experiences competition
23 from the Southern Corridor with respect to some traffic
24 movements, does it not?

25 A Yes, traffic movements, say, back into Chicago

1 from Los Angeles.

2 Q Is it only traffic that moves eastbound?

3 A It would be, say, Chicago-L.A. or the
4 reverse.

5 Q So it could be either way?

6 A Yes.

7 Q Now, what that means, I take it, is that you
8 believe that the Southern Corridor provides a substitute
9 for shippers using the Central Corridor, isn't that
10 true?

11 A Not as a theoretical matter, but based upon
12 the actual data showing the very extensive use of the
13 Southern Corridor for traffic moving, say, between
14 southern California and points in the Midwest and in the
15 Northeast. See my Appendix A.

16 Q Now, to the extent -- and that's all I'm
17 asking, not everybody and everything. But to the extent
18 that shippers either eastbound or westbound regard the
19 Southern Corridor as an alternative, a substitute for
20 Central Corridor movements, then must it not also be
21 true that the Southern Corridor is experiencing
22 competition from the Central Corridor, not with respect
23 to everything, but with respect to something?

24 A For certain movements, for movements say
25 between Los Angeles and Chicago, yes. For movements

1 between Los Angeles and Houston, no.

2 Q Well, let's talk about --

3 A And it is the Los Angeles-Houston that, of
4 course, is moving 95, 98 percent of the traffic that
5 moves between those industrial centers.

6 Q You are back to particular BEA's. What I want
7 in my question is to broaden it a bit and talk, as you
8 did at page 39, about California. Let's take movements
9 between northern California and Memphis, for example.
10 Is it not a fact that the Southern Corridor experiences
11 competition from the Central Corridor for that kind of
12 traffic, or at least some of it?

13 A Yes, there is some competition at Memphis,
14 although the majority of the traffic, as I recall it,
15 shown specifically in my appendices still moves via the
16 Southern Corridor.

17 Q But the fact that the majority moves by the
18 Southern Corridor does not mean that the two corridors
19 are not in the same economic market, does it?

20 A There would be some competition from the
21 Central Corridor, yes.

22 Q And to the extent there was competition, they
23 are in the same market, are they not, properly defined?

24 A That's right, and the data I present on the
25 routings in my appendices in fact present precisely

1 those figures.

2 Q I'm not yet at the question of shares. I'm
3 simply trying to get the market established without
4 regard to the shares. Your testimony, as I understand
5 it, in the UP case and now here is that the Central
6 Corridor and the Southern Corridor for purposes of some
7 kinds of traffic are in the same market, true or not?

8 A Yes, they are in the same market for say
9 movements L.A. to Chicago or L.A. to Boston.

10 Q Okay. Let's go back for a moment to -- and
11 I'm now in the September 10 statement -- to page 12,
12 where you commence a new section on SF and SP compete
13 extensively. And there are a number of figures in this
14 section -- you've already referred to them -- showing
15 shares for particular BEA combinations.

16 In reviewing these figures and your text, I
17 take it that the basic thrust of your testimony is that
18 when you put these SF and SP shares together you create
19 a huge market share and eliminate rail competition to a
20 very large degree. Is that a fair summary?

21 A Yes.

22 Q Now, let's take Figure 3, which is close to
23 page 16. We've talked about the first one, L.A. to
24 Houston, from time to time. Let's focus on that one as
25 an example so that we make clear what this figure

1 shows. If I read it correctly, it shows that, with
2 respect to rail tonnage, the SP's share of the tonnage
3 from L.A. to Houston is a little over 48 percent?

4 A Yes.

5 Q And the Santa Fe's share is almost 46 percent,
6 correct?

7 A Yes.

8 Q And that is not just from the city of Los
9 Angeles; it is from the entire BEA that is associated
10 with Los Angeles?

11 A Correct.

12 Q And somewhere you have a map that shows us how
13 big that BEA is. Is that in your Appendix B?

14 A Yes.

15 Q And the L.A. BEA is the BEA on your map that
16 starts over on the Pacific coast, loops down to Mexico,
17 and then winds its way back up the eastern corridor of
18 the state up north of Fresno and Bakersfield; is that
19 correct?

20 A Yes.

21 Q How many counties, if you know, are
22 encompassed within the L.A. BEA?

23 A I think there are nine.

24 Q Do you know approximately how many cities or
25 towns?

1 A Oh, I wouldn't know that number.

2 Q A large number?

3 A Los Angeles and then varying down there to
4 smaller ones.

5 Q Now, with respect to the Houston BEA, if you
6 turn the page you see a picture of that; is that
7 correct?

8 A Yes.

9 Q And that includes, I take it, a number of
10 counties?

11 A Yes.

12 Q All of those little squares within the dark
13 line?

14 A Yes.

15 Q Over a dozen?

16 A Something on that order.

17 Q Now let's take the L.A. BEA first. Does the
18 Santa Fe serve all the cities or communities in the
19 area? I'm sorry, let me ask the question again.

20 The Southern Pacific serves a number of cities
21 and communities in that BEA?

22 A Yes.

23 Q Does the Santa Fe serve all of the same cities
24 or communities?

25 A No.

1 Q And I take it the reverse of that is true?

2 A Yes.

3 Q That the Santa Fe serves a number of cities
4 and communities, but the SP doesn't reach all of those?

5 A Yes.

6 Q Does not in fact serve them.

7 So would it not be true that the Santa Fe and
8 the Southern Pacific are not competing with each other
9 with respect to all of the origins or destinations that
10 are included within the L.A. BEA?

11 A That's right, not at every point, not at every
12 city within that area.

13 Q Not at every point or city. You're not
14 suggesting that there are just one or two towns or
15 communities that are not served by both railroads?

16 A I don't have the number at hand. It could be
17 obtained, obviously, from the Guide.

18 Q Would you be surprised if there are more towns
19 that are not served by both railroads than are served by
20 both railroads?

21 A Towns without respect to size or anything?

22 Q Yes.

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1 A Oh, I don't think I would be surprised. I
2 don't know what the answer would be.

3 Q Well, let's take Houston. I think it would
4 also be true there that all of the cities or communities
5 served in that BEA by Santa Fe are not served by
6 Southern Pacific?

7 A Yes.

8 Q And the reverse would be true?

9 A Yes.

10 Q So not all of the traffic identified in Figure
11 3, line 1 -- Figure 3 is where you show the Santa Fe and
12 Southern Pacific tonnage, 48.6 to 45.9.

13 My question is simply this: Isn't it true
14 that not all of the traffic identified in that figure,
15 the first line, is today competitive as between the
16 Santa Fe and the Southern Pacific?

17 A That's right, in the sense of at the same
18 point. Now, it could be competitive in the sense of
19 Santa Fe, as I note in the testimony, has sought to and
20 has attracted traffic from SP points which Santa Fe did
21 not directly serve by attracting that traffic to Santa
22 Fe TOFC service at some other point served by Santa Fe.

23 In other words, just because the two do not
24 serve exactly the same latitude and longitude does not
25 mean that they are not competitive for traffic.

1 Q I'll ask you a couple of questions about
2 that. First, with respect to actual service, actual
3 originations or destinations by means of TOFC, isn't it
4 true that there are, as far as you know, many
5 communities within the L.A. BEA, communities, cities,
6 towns, which are served by the Southern Pacific but
7 which are not in fact served today by Santa Fe, either
8 directly by rail or by TOFC?

9 A Maybe they could, but they don't; isn't that
10 true?

11 A I don't understand that, because if somebody
12 was at Point A, a point served by SP in carload service,
13 and that shipper could put his freight in a trailer and
14 move it five miles or 20 miles to a Santa Fe point, then
15 that would seem to me to show that Santa Fe is competing
16 or can compete for that traffic.

17 Q So you would say that the potential to do what
18 you've just described means that the Santa Fe is
19 competing, even though they may not be originating or
20 terminating traffic by TOFC. As long as they had -- to
21 use your word -- the potential to do so, they are
22 competing; is that correct?

23 A Yes, unless somebody could show for some
24 reason that that could not be the case or was not
25 realistic.

1 Q So the ability to -- the potential, to use
2 your word, for originating or terminating traffic via
3 TOFC within the L.A. BEA would make, in your testimony,
4 Santa Fe a competitor with SP at all cities and
5 communities. Is that true?

6 A It could, provided that it was shown that the
7 particular type of traffic, the particular origin or
8 destination of that traffic and related conditions made
9 that realistic.

10 Q And that would be true of the Union Pacific,
11 would it not?

12 A It would be true of any railroad. One would
13 have to say not whether a point might be reached by rail
14 -- by TOFC or by trailer -- but whether, in fact, given
15 the economics of the matter, that was more than a
16 theory.

17 Q Well, to use your term, it's the potential
18 that makes it competitive; right?

19 A Yes. It's the meaningful economic potential,
20 not in some physical option sense, but in a specific
21 economic sense, is it economically feasible?

22 Q Well, focusing on that, have you done a study
23 to see how much of the L.A. to Houston rail tonnage set
24 out in Figure 3, line 1, originates at a point where the
25 shipper has the realistic option to load either Santa Fe

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or Southern Pacific, either directly by rail or via TOFC?

A No one has. I have looked for that in the Applicants' material and I have not found it there.

Q And you have not performed such a study?

A I have not thought to. I did look carefully to see if it had been done by Applicants, and it appears not to have been.

Q So based on everything that you know today, including what you've read in Applicants' materials and what you yourself have done, you cannot say, can you, that all of this traffic is rail-competitive today; that is, competitive as between the Santa Fe and the Southern Pacific?

A I can't say that it all is competitive, but I do know that these are movements Los Angeles to Houston, so whether if SP is making a move, and whether or not Santa Fe is making the move, I do know from the data in Appendix A and the other appendices, that for movements between Los Angeles to Houston, whether they be in carload or in TOFC service, that the only way to get that traffic there in an economically realistic way is via the Southern Corridor.

And if SFSP merged without condition, then necessarily SF and SP would control that routing,

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1 regardless of the situation as it might exist.

2 JUDGE HOPKINS: Mr. Martin, this might be a
3 good time for a recess. Let's take 15 minutes recess.

4 (Recess.)

5 JUDGE HOPKINS: Let's get back on the record.
6 Mr. Martin.

7 BY MR. MARTIN: (Resuming)

8 Q With respect to Figure 3, Mr. Barber, line 1,
9 Los Angeles to Houston, isn't it a fact --

10 A Can you pause just a moment?

11 Q Sure. It's page 6.

12 A Thank you.

13 Q Isn't it a fact that the Santa Fe and the
14 Southern Pacific are not competitors today for much of
15 that tonnage?

16 A I can't answer that question. For that
17 movement, of course, I do recall that your witness
18 Anderson assumed that in his testimony SF and SP were, I
19 believe as he called it, the only or the primary rail
20 competitors for the flow between Los Angeles and
21 Houston.

22 Q Okay.

23 Let me ask you to turn for a moment to your
24 November 21 statement. In particular, I want to ask you
25 about the discussion that commences at page 37 and it

1 continues over to page 38.

2 This is where you are discussing the
3 Baumol-MacAvoy assumptions and conclusions, and we are
4 in the middle of an intramodal competition discussion at
5 the bottom of 37, and then intermodal on 38.

6 Do you see that?

7 A I do.

8 Q I want to ask you about the intermodal
9 competition discussion on 38. In that middle paragraph,
10 after discussing -- after pointing out that the question
11 is not whether trucks or other modes may be able to
12 compete with rail, and you say, "Of course they can."

13 I want to ask you about that next sentence,
14 where you say, "The issue is whether there are
15 significant amounts of traffic now moved via SF and SP
16 for which other modes are not sufficiently close
17 competitors to restrain the merging railroads from
18 exercising market power."

19 Do you see that discussion?

20 A Yes, I do.

21 Q You have used the term "market power" at other
22 places in your testimony here and elsewhere. In this
23 statement, this sentence that I have just referred you
24 to, are you testifying that if SFSP, as a result of the
25 merger, could exercise any market power, then you would

1 not regard the other modes as sufficiently close
2 substitutes to effectively constrain the merged
3 railroad?

4 A Yes, because in the context in which I am
5 using the phrase "market power," I am here taking it as
6 a situation in which after the merger, if it were
7 unconditioned, SFSP would be in a position to exercise
8 enhanced pricing discretion; that is, enhanced upward
9 pricing discretion as a result of the merger.

10 Q Okay. I'd like to clarify what you mean by
11 that. Do you agree that market power, as you have used
12 the term, is the ability to charge prices in excess of
13 incremental costs?

14 A By market power, that would embrace that
15 situation. It would be the ability of the carrier or a
16 carrier to charge, if the cost and demand conditions
17 permitted it, to charge a price in excess of some
18 properly specified measure of cost such as line 1
19 marginal or line 1 incremental costs.

20 Q You referred a moment ago to enhanced pricing
21 discretion. Putting to one side whether --

22 A Enhanced upward.

23 Q Putting to one side the question of whether
24 the merger would enhance upward pricing discretion, is
25 it fair to say that the existence of any pricing

1 discretion over and above cost involves some market
2 power?

3 A Yes, I believe that would be generally the
4 case.

5 Q So the question, then, is not whether some
6 market power already exists. You're saying that the
7 existence of pricing discretion, upward pricing
8 discretion implies the existence of some market power.

9 You are saying that if the merger enhanced or
10 increased that market power, then it would be bad.

11 A Yes. Created, enhanced, or -- the market
12 power, the pricing discretion.

13 Q Isn't some market power, the existence of some
14 market power essential if the railroads are to be able
15 to engage in differential pricing?

16 A You cannot assume that that is the case,
17 especially when you are dealing with, as you've defined
18 it, long-run marginal or long-run incremental costs.

19 In those situations, there is no place to go
20 to look up what the long-run incremental costs are for
21 rail traffic. They are not the same as ICC variable
22 costs of fully allocated costs. There's something
23 different.

24 And right now, there is no -- other than a
25 theory, there is no specifics as to what those costs,

1 incremental costs in the long run are or would be.

2 Hence, it really becomes difficult to answer
3 whether a railroad be in a position to charge those, but
4 I'm prepared to assume -- I just want to put the caveats
5 in -- I'm prepared to assume in some situation, a
6 railroad might be in a position to charge more than that
7 level of cost.

8 I just want to make it clear on the record,
9 because it gets confused, that these long-run
10 incremental costs are different from variable costs,
11 they differ from fully costs, as those terms have been
12 traditionally used.

13 Q Thank you for the clarification. I still need
14 some more, though. Haven't you testified in numerous
15 cases that the railroads must be permitted to engage in
16 differential pricing in order to survive?

17 A Yes. They must be able to engage in
18 differential pricing. But let me hasten to caution here
19 that differential pricing does not necessarily mean
20 charging rates that would exceed long-run incremental
21 costs.

22 Q But it does, does it not, mean the ability to
23 charge differentially, depending upon differences in
24 demand elasticity?

25 A To some degree. Whether those differences,

1 when taken into account, permitted a rate to be charged
2 in excess of long-run incremental cost is unknown.

3 Q There is a floor below which a railroad should
4 not price; isn't that correct?

5 A Yes.

6 Q And that is essentially a short-term
7 incremental cost?

8 A Short-run incremental, short-run marginal
9 costs, which again I would just stress here is not the
10 same as variable cost.

11 Q I understand. Let's talk about short-term
12 marginal costs for the moment.

13 Now, it's your position, then, that railroads
14 must be permitted differentially to charge different
15 rates above that cost floor; correct?

16 A Yes.

17 Q And the ability to charge rates above that
18 cost floor varies with demand, does it not?

19 A Yes. The elasticity of demand.

20 Q Elasticity of demand.

21 And isn't it correct that a railroad which has
22 some market power will be able to price at higher levels
23 above that cost floor than a railroad which has no
24 market power?

25 A Yes.

1 Q And you would also agree that the ability to
2 charge above that cost floor is essential to long-term
3 survival?

4 A It's important that the railroad be able to
5 charge differentially. The evidence is not clear
6 whether a railroad has to charge more than long-run
7 incremental costs.

8 That is a subject of academic and economic
9 debate. But I am prepared to assume that if the rail
10 costs are declining, that is, we have a downward slope,
11 that long-run incremental costs might well, therefore,
12 if that's the case, be below what I described as average
13 cost, in which case there would have to be some rate set
14 above it in order to achieve an acceptable target
15 overall level of return.

16 Q It would have to be, in order for the
17 railroads to cover all of their cost; correct?

18 A Yes, if that assumption which I say is in
19 dispute among some economists as to whether railroad
20 costs are declining and whether they are flat and
21 whether they are increasing. And that has great
22 theoretical difference; that if you assume that the
23 costs are declining, then there will have to be some
24 margins above it, above LARIC, L-A-R-I-C.

25 Q Now let me ask you a question which is not

1 theory, but is fact.

2 Don't you believe that, as a matter of fact,
3 in the railroad industry generally today, long-run
4 incremental costs are below average costs, in fact?

5 A I believe that that's where the evidence takes
6 it, but at this point it's in rather hot dispute now
7 among economists, and some are arguing the other way.

8 My own belief is that we are still on a
9 declining cost, at least as a general theoretical
10 proposition.

11 Q Now, let's then take what you believe where
12 you believe the evidence takes us, and your own belief,
13 as if it were true for purposes of my question.

14 That is to say, let us assume as you've
15 indicated, you believe long-run incremental costs are
16 below average costs. Where that is so, if that is so,
17 then the railroads must engage in differential pricing
18 in order to survive in the long term; true?

19 A Yes. In order to achieve long-term, if they
20 are to remain in business and replace appropriate
21 segments of capital.

22 Q And that then requires differential pricing;
23 true?

24 A Yes. There will be differential pricing and
25 will have to be differential pricing, whether or not the

1 cost are declining. That is, it may well be the case
2 that even if the average cost curve is not declining,
3 then it seems to me clear that as an economic
4 proposition, railroads would still have to engage in
5 differential pricing.

6 Q Either way?

7 A Either way.

8 Q Now that, therefore, means that the railroads
9 must have some degree of market power in order to
10 survive; isn't that correct?

11 A They're going to have to have some power at
12 some points to be able to price in accordance with the
13 Ramsey rule or the inverse price elasticity rule,
14 inverse elasticity price-making rule.

15 Q Let me ask it this way. Assuming that the
16 government is not going to get back into the business of
17 subsidizing railroads, make that assumption for purposes
18 of this question; that railroads have to be able to
19 engage in differential pricing in order to cover their
20 total costs and survive in the long term.

21 A They have to be discretion to engage in
22 differential pricing.

23 Q Not only given discretion. They have to be
24 able to in fact do it; isn't that true?

25 A Yes.

1 Q They might be given discretion, and be unable
2 in terms of market circumstances, but they have to have
3 enough power to be able to do that if they are to
4 survive.

5 A Yes, if they are to achieve the revenue
6 adequacy.

7 Q Which is to say to be able survive and be
8 viable in the long term; right?

9 A Yes. To earn a fair return for the long
10 term.

11 Q Let me take it the other way around.

12 A Or, to use the statutory language, a fair
13 return on investment.

14 Q Let's suppose, to take it the other way
15 around, that a railroad had zero market power, zero
16 ability to charge rates above either long-run
17 incremental costs or, in some cases, short-run
18 incremental costs.

19 Suppose that were so; that a railroad had zero
20 market power. Isn't it your view and haven't you so
21 testified that a railroad like that could not survive
22 for very long?

23 A At least so long as the average cost curve is
24 declining. As long as average costs are declining, they
25 will be above long-run incremental costs. And if a

1 railroad could not charge more than long-run incremental
2 costs, then it would not cover its total costs, its
3 average cost.

4 Q But that assumption is one which we
5 established a little while ago, although in dispute
6 among economists, is one that you believe is correct?

7 A That is what I have said. And I just want to
8 caution that there are those who would disagree with
9 it. But I believe I have indicated that.

10 Q So assuming that that is correct, as you have
11 indicated, that a railroad with zero market power could
12 not survive and provide transportation service to the
13 public for very long -- correct?

14 A Yes. It could not survive in the long term.
15 If costs are declining, average costs are falling, and
16 if it then, under those conditions, could not charge
17 more in some cases than the long-run incremental cost.

18 Q So if that is so, then isn't the critical
19 question not whether railroads possess some market
20 power, but rather, whether they possess so much market
21 power that they are able to earn monopoly profits?

22 A No. The critical question in the context
23 here, in the context of my testimony, is not simply
24 that. But the real question is how that market power,
25 as I have defined it, has been achieved. And here, that

1 market power, the enhanced market power that I'm
2 speaking of and which is spelled out in the testimony of
3 shippers, whether that enhanced market power stems from,
4 as I believe here to be the case, from the merger of SF
5 and SP, if unconditioned, with its necessary and
6 unavoidable reduction, indeed elimination of
7 competition.

8 Q Before talking about how it's achieved or how
9 much is achieved, I would first like to establish or ask
10 you some questions about whether it is a bad thing, a
11 thing that the Commission ought to stop, preclude,
12 extirpate.

13 A And as I understand your testimony, you are
14 saying that some degree of market power, putting to one
15 side how it's created, is not simply not a bad thing,
16 but it is -- some market power is essential for the
17 railroads to remain viable or to attain viability.

18 Isn't that true?

19 A That's true. But it is equally important how
20 that market power or enhancement of market power is
21 achieved. If it is achieved as a result of the
22 elimination of competition among rail carriers in an
23 area such as here, then that, in my judgment as an
24 economist and as one who simply read the Staggers Act
25 and the UR Act, that that means of acquiring market

1 power through the elimination here of competition, that
2 is objectionable.

3 Q Well, if the existence of some degree of
4 market power by itself is not objectionable but is in
5 fact essential to attain viability over the long run, if
6 that is so, then why is the creation of that degree of
7 market power, short of monopoly power, a bad thing?

8 A Because it is being achieved here, and would
9 be achieved here through the elimination of competition
10 to a very substantial degree between SF and SP. It is
11 that elimination of competition which, in my judgment as
12 an economist concerned with competitive issues, presents
13 then precisely the kind of concern that Congress
14 reflected in the language it put into the Staggers Act
15 with respect to this as a public interest factor.

16 That is, as I see it, and I believe the
17 Congress -- others can discuss the legislation -- but as
18 I see it, what you are suggesting is that revenue
19 adequacy is a goal; that is, the need to differentiate
20 in price would sanction, permit any merger of railroads,
21 eliminating substantial competition, simply because that
22 merger, by eliminating that competition, gave the
23 resulting carrier the pricing discretion to achieve
24 revenue adequacy.

25 And I don't see that at all.

1 2 I apologize if it sounds to you like I am
2 making an argument, Mr. Barber. I am just trying to ask
3 questions to clarify your position about what market
4 power is and whether it is a bad thing.

5 Let me ask you this. Suppose that you had a
6 railroad which exercised some market power and, as a
7 result, was able to struggle along, earning some
8 profits, but not adequate profits, and that you were the
9 Commission and that you had the opportunity, by creating
10 new competition, to drive that railroad's rates down to
11 short-run incremental costs, eliminating all market
12 power.

13 Would that be a good thing to do, in your
14 judgment?

15 4 I don't believe you can generalize the
16 answer. The temptation is to say no, but on the other
17 hand, the reason that that carrier may be limping along
18 may only be in part due to its -- as you put it -- lack
19 of market power or the market power it would not possess
20 pending this development.

21 It might be that that carrier would prosper or
22 might be stimulated to improve its efficiency, improve
23 its efficiency to engage in some business developing
24 innovation if it had the spur of competition.

25 In other words, competition as I see it is

1 valuable as a spur, and not everything in the railroad
2 business, not every quest for more profits is to be
3 linked solely to raising rates.

4 There are some important areas for gaining and
5 increasing efficiency. But I think that that can only
6 come about and will only come about if there is the
7 prod, the pressure of competition. And in that sense,
8 then, encouraging the competition that you hypothesized
9 in your question could very well be useful, even though
10 the market power of the carrier might be eroded.

11 Q Let's bring that into the question. Let me
12 ask you to assume that a railroad is exercising some
13 degree of market power, and new competition is created
14 which will spur it to be as efficient as possible.
15 Let's assume that it is as efficient as reasonably
16 possible and that that competition forces its prices
17 down to its efficient cost level, efficient short-term
18 incremental cost.

19 That's the effect I ask you to assume of a new
20 competition, an elimination of that market power which
21 exists. Now, from an economic standpoint and taking
22 into account the revenue needs of the railroads and the
23 needs of the public for viable rail service, do you
24 think that would be a good thing to do?

25 A It would not be a bad thing, and I turn the

1 answer for this reason; that what the market may be
2 signaling the railroad in your example is that it
3 shouldn't be in the business in the long run.

4 That point cannot be ruled out.

5 Q Perhaps I am missing something, but I thought
6 that in an earlier answer, you told me that the
7 existence of some market power -- let's assume the
8 railroad is being efficiently operated -- the existence
9 of some market power is essential for railroads to be
10 able to recover their total costs and remain viable.
11 True?

12 A You asked me that question, and I am quite
13 clear I inserted the words "if it is to remain viable in
14 the long run." But there is no preordained reason to
15 think that all businesses, if unable to cover their
16 long-run incremental costs, should be permitted or given
17 the opportunity necessarily to charge costs that would
18 keep them in business.

19 After all, the market may tell us that a line
20 for a railroad should be abandoned. That line isn't
21 going to be covering its long-run incremental costs.
22 The signal is to get rid of the line, and that of course
23 is what is taking place.

24 Q Let's take care of that possibility in the
25 question, too. You have raised as a possibility the

1 fact that demand might not be sufficient to support
2 long-term railroad viability over a particular line.

3 But I ask you to assume for purposes of the
4 answer, that the demand is sufficient to support
5 long-term railroad replacement of assets and coverage of
6 costs. I ask you to assume that.

7 A You have added that assumption.

8 Q Even where that is so, where demand is
9 sufficient to keep the railroad in business over the
10 long term, that railroad is still, under the assumptions
11 we discussed earlier, going to have to have some market
12 power to recover its total cost, is it not?

13 A Yes.

14 Q And if it doesn't have that market power, it's
15 not going to be able to remain viable in the long term?

16 A That's right. In other words, it wouldn't be
17 covering its total costs.

18 Q Therefore, wouldn't it be a bad thing to
19 eliminate that degree of market power which is
20 essential, as you've testified, to permit that railroad
21 to stay in business and provide service to the public
22 over the long terms?

23 A It depends on how it was eliminated. And if
24 that market power -- or, to turn it around -- if such
25 market power would be created, say, through a merger

1 that eliminated or substantially lessened competition,
2 then I would say that would be objectionable.

3 Q Don't we have to know, Mr. Barber, whether the
4 market power which exists or is about to be created, is
5 a good thing or a bad thing from the standpoint of the
6 efficient allocation of resources before we get to the
7 question of how it is created?

8 A I don't think that that is necessary. But I
9 am prepared to assume that as one factor, and I stress
10 the word "one" in arriving at an overall judgment as to
11 this merger.

12 I am willing to assume that revenue adequacy,
13 by which we mean long-term revenue adequacy, is a good
14 thing. And I am prepared to work from there.

15 Q Let me follow up on that. If that is so, if,
16 as you said, some degree of market power is essential to
17 obtain that object, then it must follow that some degree
18 of market power is also a good thing; isn't that so?

19 A Yes. Or it's not a bad thing, but it
20 complements revenue adequacy.

21 Q And isn't it an important question whether or
22 not that market power is so great that it enables the
23 carrier that possesses that market power to earn profits
24 in excess of its cost of capital?

25 A No. That again is not the only -- that

1 certainly would be a legitimate concern, what you just
2 stated.

3 On the other side, it is also of importance as
4 to how this increment in market power is achieved. If
5 it is achieved through a merger that eliminates or
6 materially reduces competition, then that is
7 objectionable and that is a consideration to be weighed,
8 as I see it, in at least equal measure with the pursuit
9 of the revenue adequacy goal.

10 Q You answered that the ability to earn returns
11 in excess of the cost of capital is one factor that
12 would be important to consider.

13 A Yes.

14 Q Would you explain why that is so?

15 A Because we should be concerned in a case like
16 that with a firm that has some degree, providing some
17 degree of public -- what is regarded as public service
18 as to whether it is earning a monopoly return or not.

19 Q Isn't the reason it's important because if a
20 firm is able, through the exercise of market power, to
21 earn returns in excess of the cost of capital, that
22 distorts the efficient allocation of resources?

23 A And that's the reason why one would be
24 concerned with it, because of the resource allocation
25 inefficiencies.

1 Q That is the reason one would be concerned?

2 A From a general economic standpoint.

3 Regulators might be concerned whether it, in some sense,
4 is in a special category.

5 Q But the thing that causes that regulatory
6 concern is the ability to charge, to earn returns in
7 excess of the cost of capital, because that is what
8 distorts resource allocation; isn't that correct?

9 A That certainly distorts it.

10 Q And that distortion does not exist, does it,
11 where the railroad does not earn either on its total
12 business or on some portion of its business, returns in
13 excess of the cost of capital?

14 A That, again, goes back in economic theory to
15 the shape of the cost curve, the shape of the demand
16 schedules, and then the precise relationship between the
17 ratios to cost of each of the differently priced items
18 of traffic.

19 Q All those things affect whether the railroad
20 will earn returns in excess of cost. My question is
21 this: So long as the railroad does not, because of the
22 factors that you have considered, earn returns in excess
23 of its cost of capital, either on its total business or
24 on some segment of the business, so long as that is so,
25 then you will not have a distortion in the efficient

1 allocation of resources; isn't that true?

2 A So long as that is the case in general, yes.
3 The only qualifier is with respect to possible
4 discriminatory treatment of pricing of specific
5 sub-items of traffic where, because of the particular
6 conditions that might govern, that the ratio of the rate
7 to applicable incremental costs for that item of traffic
8 might exceed what would appear to be justified in light
9 of Ramsey pricing principles.

10 And that would have a distortionary effect,
11 even though at the overall level, the firm might not be
12 earning its identified cost of capital.

13 Q Well, Mr. Barber, looking at it from the
14 standpoint of the distortion of use of economic
15 resources, efficient allocation of economic resources,
16 that distortion would only arise, would it not, if the
17 railroad, either in its total business or on some
18 portion, some line, some community, some commodity
19 group, were charging rates which produced returns in
20 excess of the cost of capital.

21 So long as that didn't happen, you wouldn't
22 get the distortion; isn't that true?

23 A Then I'm confused. It seemed to me your
24 former question suggested that a railroad might not be
25 earning its cost of capital. And then it seemed to me

1 you were saying or implying that if that were the case,
2 then there might not be any earnings in excess for a
3 specific piece of traffic. And I said those are
4 inconsistent.

5 Q No, no, no. Then I asked a question that was
6 confusing, and for that I apologize.

7 Let me ask a better question. I ask you to
8 assume that the railroad is not earning returns in
9 excess of its cost of capital, either in its total
10 business or on any portion, any segment, any commodity
11 group, any particular shipper; that there is no place in
12 the railroad's business where it is charging returns
13 which exceed the current cost of capital.

14 Now, if that is so, then is it not correct
15 that one will not find the distortion in the allocation
16 of economic resources that is of concern to economists?

17 A Given all of those conditions, no.

18 Q So the key question is whether market power,
19 either in the total railroad or any portion thereof, is
20 sufficient to enable the railroad to earn monopoly
21 profits in excess of the cost of capital. Isn't that
22 so?

23 A Yes. Given the criteria you have set forth,
24 that's correct.

25 Q Now, just to follow up on that and see what

1 its implications are, I take it you would agree that
2 most railroads have some traffic as to which they can
3 charge rates in excess of their short-term or even
4 long-term incremental costs, engaging in differential
5 pricing.

6 Is it correct that you would not regard that
7 ability to exercise some degree of market power as
8 necessarily bad from the standpoint of an efficient
9 allocation of resources?

10 A That's right, or in terms of revenue
11 adequacy.

12 Q Okay. Now, let's go beyond that. I take it
13 you would also agree that most railroads have some
14 cities or areas where they can charge rates that are in
15 excess of their incremental costs.

16 I take it that you wouldn't regard that by
17 itself as necessarily bad from the standpoint of
18 efficient allocation of resources.

19 A It's a dimension of the former question.

20 Q And just because a railroad exclusively served
21 a particular community or a particular plant or a
22 particular coal field, you wouldn't say that the
23 existence of some market power by itself is a problem
24 that has to be faced?

25 A That's right. As I take it, you are simply

1 postulating that that is the situation now.

2 Q I'm asking you to assume it. Let's take a
3 particular case. I ask you to assume that the Union
4 Pacific has a line serving a particular plant and assume
5 that, due to the absence of other railroads or other
6 circumstances, it has some degree of market power, some
7 ability to price in excess of incremental costs.

8 Q Wouldn't you agree that so long as the UP
9 didn't earn returns on the line involved in excess of
10 its cost of capital, that the existence of that degree
11 of market power is not, per se, a bad thing?

12 A That's right.

13 Q And that it doesn't lead to an inefficient
14 allocation of scarce resources?

15 A That's right, under the assumption you have
16 stated.

17 Q So what is bad, as I understand it, that is,
18 reduces inefficient allocations of resources, is not the
19 existence of market power per se, but it is the
20 existence of so much market power that the railroad is
21 unable to earn monopoly profits; true?

22 A I'm sorry. You'll have to rephrase it. I
23 missed a couple of words.

24 Q What it is that produces an inefficient
25 allocation of resources and is therefore bad from an

1 economic standpoint is not simply the existence of
2 market power. It's the existence of so much market
3 power that the railroad is able to earn monopoly profits
4 somewhere, either in total or on some segment of its
5 business.

6 Is that a correct statement?

7 A No. That is not a correct statement in my
8 opinion. In my opinion, there is an equally important
9 concern, equal in importance to what you have been
10 speaking of; that is, revenue adequacy and returns; and
11 that is competition itself, which is viewed and I
12 believe should be viewed as a means which has benefits
13 which relate to matters other than simply the question
14 of pricing.

15 I think of competition as between railroads,
16 certainly as between the last two railroads in a
17 particular area where the merger would bring it to one,
18 that that competition is valuable with respect to the
19 stimulus it provides for a variety of end results such
20 as the spur to innovation, the spur to greater
21 efficiency, to cost cutting, to better cost control;
22 that those objectives, all of which are important from
23 the standpoint of efficient resource allocation, that
24 competition furthers and enhances those, and its denial
25 and elimination, then, undermines those objectives which

1 are of equal importance to other considerations such as
2 revenue adequacy or levels of profits.

3 And those are what would be extinguished here,
4 and I believe those are of equal importance with what
5 you have been speaking of.

6 Q Let me ask you this one question, and I won't
7 prolong this line, Judge, but I think it is important.
8 Let me ask you to assume a case where competition does
9 two things.

10 One is, it spurs efficiency, produces the
11 benefits associated with efficiency, and drives down
12 prices to incremental costs, and benefits the shippers in
13 that respect; the other of which is that it prevents the
14 railroads from covering its total costs, engaging in
15 differential pricing, and drives it out of business
16 because it can't recover its total costs. It does both
17 of those things.

18 And you are the Commissioner. Now, would you
19 regard it as more important to produce the efficiency
20 savings and reduce rates to the cost level, even though
21 it meant that the railroad would be driven out of
22 business?

23 A Are you asking me to assume that SP is going
24 out of business?

25 Q I'm not asking you about any particular

1 railroad. I'm asking you this question because I think
2 it emerges from the discussion we have had.

3 You are saying that the effect of competition,
4 if there is enough of it, is to eliminate market power,
5 spur the railroad to the degree of efficiency that is
6 humanly possible, and drive prices down to cost, and
7 that is good for the shippers.

8 That is one thing. You also agreed that it
9 eliminates the ability to differentially price and
10 eliminates the ability for the railroad to survive in
11 the long term and provide service to the public. It
12 does both of those things.

13 Now, I'm asking you which one is more
14 important?

15 A Both are important as an economic matter; both
16 are important just in light of rail policy.

17 Q But if the railroad is driven out of business
18 because it cannot cover its costs and in fact cannot
19 recover any profit in excess of short-term incremental
20 costs, won't the benefits to the shippers from that
21 short-term increase in the efficiency spur be
22 short-lived?

1 A If I were the Commission confronted with your
2 hypothetical, I would want to make certain types of
3 inquiry. For example, I would want to ask the question
4 whether if, say, a merger was the proposition before me,
5 as the hypothetical Commission I would want to ask
6 whether the merger, as proposed, offers, in the view of
7 the Applicants, to provide, say, cost savings, benefits,
8 coordination - things that would, in effect, help that
9 railroad improve its financial position through
10 economies that it would produce, economies that would be
11 good for the railroad.

12 Now, if the merger appeared reasonably likely
13 on the evidence to generate some significant economies,
14 some significant cost savings, some benefits, greater
15 efficiency and such desirable results, then the next
16 question that I would ask myself as the hypothetical
17 Commission is whether then I could achieve those
18 benefits, those economies by, say, approving the merger,
19 but also be able to maintain a significant degree of the
20 competition that would otherwise be lessened. Because
21 if I could achieve the cost savings by approving the
22 merger but also be able to preserve some of the
23 competition, then I think I'd be able to accomplish two
24 good things rather than have to pretend that I was
25 making an either/or, black and white distinction. And

1 that, as I see it, is really the situation here.

2 The merger that I am suggesting be approved
3 subject to procompetitive conditions, leaving the
4 parties able to realize their more than \$200 million in
5 annual benefits through economies. So I am moving on
6 both paths at the same time, and I would think that
7 that's the way, if I were the hypothetical Commission,
8 that I would look at the problem.

9 Q Do you agree, based on your general knowledge,
10 that over 90 percent of the cities and towns west of the
11 Mississippi River that have rail service are served by
12 only one railroad?

13 A Well, cities and towns, you mean all of the
14 little places?

15 Q Sure.

16 A It wouldn't surprise me. I don't know whether
17 it would be 90 percent or 80 percent. It could be more
18 than 90 percent.

19 Q A big percentage.

20 A I would expect that would be the case,
21 probably now and in the past.

22 Q And the fact that most towns, cities and
23 plants west of the Mississippi, in the western part of
24 the United States are served by only one railroad hasn't
25 exactly resulted in a bonanza for the western railroads,

1 has it?

2 A You mean a short-term bonanza now as distinct
3 from the last century?

4 Q Profits exceeding cost of capital.

5 A I was just thinking of a long-term view, what
6 the bonanza might have been. But in a more specific
7 sense, no. The situation is not one in which the
8 western railroads, or for that matter the eastern or the
9 southern railroads, are earning excessive profits.
10 They're not.

11 But the question is -- the issue is not
12 whether this is due to exclusive service to certain
13 points. Competition may have made the situation in fact
14 better than it would have been if the railroads had all
15 been consolidated into one Conrail or one Penn Central
16 or one French National Railroad system.

17 Q Let me ask you to refer back to your September
18 10 statement. At page 27 and at other places you use
19 the term monopoly. In this case in the bottom line you
20 term it the creation of a virtual rail monopoly,
21 referring to the SFSP.

22 Can you identify any segment of any railroad
23 in the western United States today where a railroad is
24 earning monopoly profits in excess of the cost of
25 capital?

1 A No.

2 Q Do you know of any segment on the Santa Fe
3 that is earning monopoly profits today?

4 A By "segment" you mean by geographic segment?

5 Q Any geographic segment or any class of
6 commodities.

7 A I have no way of answering your question.

8 Q But you don't know?

9 A I don't know.

10 Q You don't know?

11 A Perhaps someone at the Santa Fe could present
12 all the data that would permit me to do that, but I
13 doubt if they want to do that.

14 Q But you don't know, based on your knowledge of
15 the railroads, whether any segment of SP, either
16 geographically or in terms of its business, is earning
17 monopoly profits?

18 A Same answer.

19 Q Let's take Union Pacific-MoPac. I gather you
20 would agree that the UP-MoPac merger, although
21 predominantly vertical in your judgment, was at least
22 partly horizontal, true?

23 A Only in a very small degree was it horizontal.

24 Q To your knowledge, are there any segments of
25 UP's business anywhere where it is making profits in

1 excess of its cost of capital?

2 A I'm not aware of any.

3 Q Now, as an economist, in deciding whether a
4 particular railroad is earning monopoly profits either
5 in total or on a part of its business, wouldn't you
6 determine profitability after calculating costs at the
7 current replacement cost level, assuming that the asset
8 would be replaced?

9 A Assuming it would be replaced, yes.

10 Q And that would include cost of capital on the
11 value of the plant assets?

12 A It would include an allowance for the
13 discounted value of the assets to be replaced.

14 Q And it would include depreciation expense,
15 again with reference to the current replacement value of
16 the assets?

17 A Yes. It would include that for the assets to
18 be replaced in a way that would avoid any obvious double
19 counting, and it would make then, if you are going to
20 move to that, make suitable adjustments for the cost of
21 capital to go to real levels from nominal.

22 Q Now, in considering the cost of different
23 modes -- rail, truck -- and in determining whether one
24 is a close substitute for the other, would you look at
25 the book cost of the assets or the current replacement

1 cost, again assuming that they would be replaced.

2 A Well, the key point would be to do it on a
3 consistent basis. In theoretical terms you would do it
4 on a long-run incremental costing basis and make some
5 comparisons that way; but the key point would be to do
6 it on a compatible or consistent basis.

7 Q Well, you referred to the long-run incremental
8 cost. My question is in doing your long-run incremental
9 costing analysis, if that's what you chose to do,
10 wouldn't you look at current replacement cost of assets
11 rather than historical costs?

12 A Yes. That's the way long-run incremental
13 costs would apply, so long as you are talking about
14 assets that would be replaced.

15 Q At page 38 of your September 10 statement, in
16 the top paragraph you are comparing rail costs and truck
17 costs to assess whether the one or the other has an
18 advantage or the degree to which there is an advantage.
19 Shouldn't any proper economic comparison of the cost of
20 rail and truck service take into account current costs,
21 not just historical costs?

22 A For this purpose you could do it either way.
23 Ideally you would do it in terms of current costs.

24 Q To the extent that using current costs you saw
25 a different relationship than if you used book cost, you

1 would regard the current cost relationship as the more
2 relevant economically?

3 A The current cost relationship would be the
4 more relevant in economic theory. Now, if you were, of
5 course, comparing such a thing as rates being charged by
6 competing modes today, then since those modes typically
7 price not in terms of economic theory but in terms of a
8 shorter run cost context, then if that was what I was
9 looking at -- that is, comparative rates for truck
10 versus rail or whatever -- then in that context I would
11 look at the ratemaking in terms of the way in which say
12 a railroad and a trucker were pricing traffic, because
13 they are working in a more practical, immediate context,
14 not in the economist's theoretical long-term incremental
15 costing environment.

16 Q Let me ask you to refer back to page 4 of the
17 same verified statement. In the first full paragraph
18 you're referring to the waybill sample for '82, and you
19 state that it reveals that SF and SP together occupy a
20 near monopoly position in rail traffic between the
21 various BUA areas. That's the first full paragraph on
22 page 4.

23 Have you had a chance to review that?

24 A Yes.

25 Q Now, your statement that they occupy a near

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1 monopoly position I take it is based on shares of those
2 flows rather than on the ability to earn a monopoly
3 profit, is that true?

4 A It's the shares of those flows.

5 Q In other words, in saying that they occupy a
6 near monopoly position, you have looked solely to shares
7 and not to the ability to earn a monopoly profit?

8 A No. I have looked at two things. First, I
9 have looked at shares, of course, and those do show --
10 and by near monopoly I mean shares of Southern Corridor
11 traffic where their shares range up in the 95 to 100
12 percent block for movements, say, between southern
13 California and Houston or Texas and south central
14 points. But I've also looked at something else, and
15 that is, I have looked at the shipper testimony; I have
16 looked at the rates that the shippers involved with the
17 traffic that I show in my Figure 3 of my November
18 statement to be moved, that move predominantly -- and by
19 that I mean 95 to 100 percent -- in rail service. Such
20 things as chemicals, certain types of bulk food
21 products, certain types of special industrial products
22 like industrial sand.

23 I have looked at that testimony. I have
24 looked at testimony of people like Halliburton, and Dow,
25 and U.S. Steel, and Cargill, and I've looked at their

1 sworn testimony with respect to the rates that they're
2 paying today for rail, which they use exclusively, and
3 the best rates that they believe they can obtain for
4 truck. Those truck rates are in some cases twice as
5 high, in some cases more, in some cases somewhat less;
6 but they are substantially above rail.

7 With the elimination of the SFSP existing
8 competition, then given that information, given the
9 adherence of SF and SP to Ramsey pricing, and given the
10 board memo of May '83 to the Santa Fe board, which is a
11 confidential exhibit -- I guess it's KCS-C-1 -- putting
12 all of that together, I see that upon merger, the
13 carrier would be, absent condition, in a position
14 substantially to increase rates.

15 Now, those rates might or might not be at
16 so-called monopoly levels, but they could be as much as
17 twice or more the current railroads without bumping into
18 the truck rates. And that seems to me that is two
19 considerations: share plus potential based upon
20 specific evidence of substantial rate increases for
21 traffic that moves predominantly by rail. Those are
22 what concern me with respect to my competitive
23 assessment which I am alluding to here at page 4.

24) Isn't it a fact that a high share between BEA
25 pairs may not be an indication of the ability to earn

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1 monopoly profits?

2 A Not in and of itself, and so one should look,
3 then, to available specific evidence to determine
4 whether the carrier that emerges from the merger could
5 substantially increase existing rail rates for traffic
6 that moves predominantly by rail. That would be the
7 next key inquiry. And here the best evidence is the
8 shipper statements.

9 Q Substantially increase profits to a level in
10 excess of the cost of capital, Mr. Barber?

11 A I believe that could be made a point of
12 inquiry. But even if the rate, say, was doubled and at
13 a doubled level, even if the rate were assumed not to be
14 at a monopoly level, then the fact that the merger by
15 eliminating, wiping out competition, say, between the
16 two railroads, if the result of that merger and that
17 elimination of competition was likely to have the rate
18 be doubled, then even if the rate to which it was raised
19 did not constitute a monopoly rate, then I would see
20 that ability conferred by the merger to increase the
21 rate to be a clear manifestation of a suppression of
22 competition.

23 Q I'll ask you what I hope I can make a precise
24 question. Assume that rates to some shippers doubled.
25 I don't know if there's any evidence of that, but let's

1 assume it for the purpose of the question. I also ask
2 you to assume that the increase in profit to the
3 railroad took it from 3 percent to 4 percent, well below
4 the cost of capital. I ask you to assume that.

5 Would there, in those circumstances, would the
6 merger create any ability on the part of the railroad to
7 earn profits in excess of its cost of capital, thereby
8 producing a distortion in the allocation of economic
9 resources?

10 A No, it would not, but --

11 Q Thank you.

12 A The fact that the rate had doubled would be a
13 clear measure of the suppression of competition that had
14 been brought about as a result of the merger in your
15 hypothetical.

16 Q But whether you characterize it in that
17 fashion or not, isn't the essential point that there
18 would be none of the distortion in the allocation of
19 economic resources associated by economists with
20 monopoly power?

21 A That is not the only measure of the meaning of
22 competition. After all, as I recall, Section 7 of the
23 Clayton Act, as amended, says that a merger is
24 objectionable if it substantially lessens competition or
25 tends to create a monopoly. The law is not and

1 economists are not concerned simply with whether a
2 merger produces a monopoly. The law is concerned and
3 economists like myself are concerned with whether a
4 merger reduces competition. It may create a monopoly;
5 it may not. But if it reduces, or in this case, wipes
6 out or materially or virtually extinguishes competition
7 in this area, such as in the Southern Corridor, then
8 that is objectionable in my view per se whether or not
9 the result is to yield a monopoly profit.

10 Q Aren't economists and, in fact, haven't you in
11 particular as an economist experienced in railroad
12 transportation testified that it is essential for
13 railroads to be able to exercise the degree of market
14 power through differential pricing that will enable them
15 to achieve their current cost of capital? Isn't that
16 essential, Mr. Barber? Don't economists agree with that?

17 A Economists agree with that point, but ones
18 like, at least speaking only for myself but I think
19 sharing some view of others such as, I believe, Dr.
20 Shepherd, but it is important to bear in mind that it is
21 the means by which this or these results are achieved
22 that is of critical consequence; that if a merger snuffs
23 out competition, then the fact that that might raise
24 rates, that might not achieve a revenue adequate
25 position would in no way lead me to conclude that the

1 merger should be blessed.

2 Q But you would at least agree that in those
3 circumstances, while there may be other problems that
4 you or others would have, at least in those
5 circumstances we would not have produced the distortion
6 in efficient allocation of economic resources that is
7 associated with profits exceeding the cost of capital.
8 You would at least go that far, wouldn't you?

9 A That's correct, under your assumptions.
10 Although under your assumptions, then as long as the
11 merger did not yield a monopoly return, then even though
12 it had dramatically reduced, eliminated competition,
13 then there should be no consideration given to the
14 competitive effect. And I just find that totally
15 against my thinking.

16 Q Whatever that competitive effect is, it will
17 not produce a distortion in the allocation of economic
18 resources; isn't that your testimony?

19 A Under your assumptions, that is correct.
20 Under my test, the fact that that merger lessens
21 competition leads in and of itself to what could be a
22 doubling of rates and other adverse consequences such as
23 conceivably a reduced edge to innovation, poor service
24 or whatever else some of the shippers are speaking of
25 specifically, then I would say that those concerns --

1 the elimination of competition leading itself to higher
2 rates, potential increases, potentially poorer service,
3 removing the prod to innovation and productivity -- I
4 find those adequate basis enough to be very seriously
5 concerned with the merger, even if it did not produce a
6 monopoly level of return.

7 Q Let me ask you to turn to page 11, Mr.
8 Barber. This is at the September 10 statement, the
9 section that says the SFSP merger should only be
10 approved if corrective action designed to maintain
11 competition is taken.

12 I think in answer to one of my earlier
13 questions you may have already indicated this, but let
14 me just be clear about it. Is it your position that if
15 the corrective action is taken that you and others,
16 Union Pacific, have proposed, then the merger should be
17 approved by the Commission?

18 A Yes. If the condition that I endorse here,
19 the JP condition, trackage right condition is approved
20 as a part of the approval.

21 Q Now, at 54 you are describing the corrective
22 action that you believe is appropriate, 53 and 54, and
23 you use the term "surgical" in the first full paragraph
24 on 54. "The relief it affords is thus surgical in
25 character, remedying the principal adverse competitive

1 effects of the SFSP consolidation," by which I
2 understand you mean that the trackage rights proposal
3 made by the UP would remedy the precise anticompetitive
4 problems that you say the merger would create but do
5 nothing more?

6 A I do.

7 Q Is that what surgical means?

8 A By surgical I mean that the trackage rights
9 are designed to preserve competition in some substantial
10 measure at places where SF and SP are in competition.

11 Q But you are also saying that the surgical
12 relief would not go beyond curing the precise problems
13 that have been identified?

14 A It's not designed to cure more than the
15 competitive problem faced as a result of the merger.

16 Q Let me see if I understand how it would work.
17 Let me ask you to consider fresh fruits and vegetables
18 produced in the San Joaquin Valley, let's say Fresno,
19 which are today shipped to Chicago via the Santa Fe.

20 Now, am I correct that under the trackage
21 rights proposal one thing that the UP could do would be
22 to compete with the SFSP for this fresh fruits and
23 vegetable business over the Southern Corridor to
24 Chicago, true?

25 A It would depend upon the location to which

1 they would have access.

2 Q Assuming that the trackage rights proposals as
3 sought were granted and the UP could originate fresh
4 fruits and vegetables at Fresno, take it over the
5 Southern Corridor, and compete with the SFSP and haul it
6 into Chicago, true?

7 A Yes.

8 Q Now, would this same surgical proposal permit
9 the UP to originate produce at Fresno and take it to
10 Omaha over the Central Corridor?

11 A Yes.

12 Q Would it permit UP to originate produce at
13 Fresno and take it to Lincoln, Nebraska or Denver or
14 Butte, Montana?

15 A Yes.

16 Q So I take it, then, it is your position that
17 the right to haul produce from Fresno to Butte or these
18 other places is necessary to correct a precise
19 competitive problem created by this merger?

20 A Yes. At Fresno SF and SP, too, can provide
21 competitive service today. After the merger they would
22 not. Putting UP in with trackage rights at that
23 location then would leave the shippers where they are
24 today; that is, they would have an option as between
25 railroads rather than having only one railroad to whom

1 to look for service.

2 Q They would not only have two railroads to look
3 for single line service to Chicago, but in addition,
4 they would have a new single line railroad to take them
5 to Butte, true?

6 A Yes. They would have whatever the UP could
7 provide. They could haul it to Omaha and bridge it on.

8 Q Let's take it the other way, just to make sure
9 the record is clear. Under your UP's trackage rights
10 proposal, I gather that the UP could use the Southern
11 Corridor west of El Paso to deliver fertilizer to Denver
12 -- to Fresno, correct -- to haul fertilizer out of
13 chemical plants on the Gulf Coast and take it over the
14 Southern Corridor of the San Joaquin Valley to Fresno
15 over the merged carrier?

16 A Did you say Denver?

17 Q I misspoke. I meant Fresno.

18 A Yes.

19 Q Southern Corridor to Fresno. And that would
20 be to remedy, as is asserted, the absence of rail
21 competition in the Southern Corridor.

22 A Yes.

23 Q Could UP also deliver fertilizer to Fresno
24 from, for example, Denver?

25 A Yes.

1 Q Or Butte?

2 A Yes.

3 Q Or any other origin that would be accessible
4 via the Central Corridor?

5 A Anything to which the trackage rights would
6 apply in terms of a location at which it could provide
7 the service.

8 Q So as I understand it and as proposed, the UP
9 trackage rights would permit the UP to deliver any
10 commodity from any origin to Fresno regardless of
11 whether the commodity or the origin was adversely
12 affected by the merger, true?

13 A All commodities would be adversely affected
14 because they would be -- there would be a loss of
15 competition. Today a shipper at Fresno or a receiver at
16 Fresno has the benefit of two railroads to compete with,
17 to contract with. Tomorrow it would not. It seeks to
18 put UP in that same position. SF and SP are not limited
19 as to which commodities they would haul.

20 Q I don't know whether fertilizer moves from
21 Omaha to Fresno, but let's assume that it does. Is it
22 your suggestion that a shipper in Omaha today has two
23 railroads that it can use to get from Omaha to Fresno,
24 and after the merger it would only have one, and the
25 trackage rights would restore it to the position of two?

1 A Well, it would depend, I guess -- and some
2 traffic person could be better familiar with it -- at
3 some points in Omaha one could find a connecting
4 carrier, for example, and move it, let's say, on the BN
5 down to Kansas City and there have a choice as between
6 the SP or the Santa Fe for the movement on into Fresno.
7 Tomorrow they would not have that competitive
8 alternative.

9 Q But in either event they would have to use the
10 Union Pacific?

11 A Not necessarily. If they were at Omaha, they
12 would route it south to Kansas City, and they could
13 route it south to Kansas City over the BN or the Katy on
14 their trackage rights.

15 Q Let me try one more to see if I can understand
16 it, and let's try Phoenix. I understand that the Union
17 Pacific proposes to serve Phoenix via trackage rights
18 over the Southern Pacific, as discussed in your
19 testimony at pages 20 and 21.

20 A Yes.

21 Q Would Union Pacific's service at Phoenix be
22 limited to service to and from points on the Southern
23 Corridor?

24 A No. Although as a practical matter it would
25 be.

1 Q Well, as I understand it in your testimony,
2 one of the big commodities moving out of Phoenix is
3 cotton. There are others. Whether this would be
4 practical or not, in theory, the Union Pacific could,
5 under its trackage rights, take cotton from Phoenix via
6 Coulton and then north to Salt Lake City, couldn't it?

7 A Yes.

8 Q Or Denver, or Omaha, or Portland for that
9 matter.

10 A Yes.

11 Q And your testimony, your belief is that the
12 ability to haul cotton or some other commodity from
13 Phoenix to Omaha or Portland or any place else on the JP
14 system is necessary to correct a precise competitive
15 problem created by the merger?

16 A Yes. Today a shipper at Phoenix moving cotton
17 could look to either Santa Fe or SP to originate a move,
18 contract with it, seek the car supply and the rest,
19 enjoy the benefits of competition between SF and SP.
20 That would be gone tomorrow, and the JP, in effect,
21 comes in to fill that void.

22 Q And it fills not only that void, but it would
23 enable Phoenix shippers to ship single line to places
24 that they can't ship single line to today.

25 A In some cases that would be the case, and in

1 other cases, of course, the opposite would be the case.
2 It would not be an exact duplicate of what they could
3 have done by SF or SP.

4 Q As proposed, though, just to be clear on this,
5 and not meaning to argue with you about whether it's
6 right or wrong, but as proposed, there would be no
7 restriction on where the UP could take the traffic from
8 Phoenix or bring it to Phoenix from or of the kind of
9 commodity that could be handled?

10 A No.

11 Q No restriction. And that would be true
12 whether or not that traffic is truck competitive at
13 Phoenix today, is it not?

14 A That is the case, and of course, in all of
15 these, the specific terms, detailed terms of the
16 trackage rights proposal obviously govern in any
17 specific situation.

18 Q At page 11, again describing the proposed
19 trackage rights, you refer to not only El Paso to
20 Coulton in the San Joaquin Valley, but you say between
21 Sacramento and Oakland; and there's been a discussion of
22 that already in the record. But I want to get your
23 understanding of that.

24 Do both the Santa Fe and the Southern Pacific
25 to your knowledge today serve both Sacramento and

1 Oakland?

2 A No. Both of them do not serve other than in a
3 kind of generic sense.

4 Q In what generic sense does the Santa Fe serve
5 both Sacramento and Oakland?

6 A The Sacramento and Oakland area is what I had
7 in mind by generic. I mean somebody could speak to the
8 East Bay.

9 Q Does the Union Pacific also in a generic sense
10 today serve both Sacramento and Oakland via the Western
11 Pacific?

12 A It serves Oakland, and I'm quite certain it
13 serves Sacramento.

14 Q In the same generic sense?

15 A Yes.

16 Q So isn't the central purpose of the proposed
17 trackage rights from Sacramento to Oakland not to
18 correct a competitive problem created by the merger, but
19 to simplify the JP's operations and reduce its operating
20 costs?

21 A Well, there are two understandings. First,
22 with respect to the operating costs and the rest, that's
23 a matter dealt with in other witnesses' testimony. The
24 other thing, I am advised by the marketing people who
25 have testified or have been available for testimony on

1 this that there are certain shippers along the route
2 between Sacramento and Oakland who would lose
3 competitive service as a result of the SFSP merger. The
4 marketing people obviously are in the best position to
5 provide the specific details.

6 Q You don't know what route that is?

7 A No. I will not speak to that. That's a
8 matter for the technicians.

9 Q Skipping around just a bit, with apologies,
10 you start a new section at page 27 of the September 10
11 statement on intermodal competition, talking about the
12 rail share of the total. And at Figure 12 you have a
13 summary of certain tonnages, and the total tons column
14 is rail plus some more, right?

15 A Yes.

16 Q Is it your understanding that that includes
17 truck traffic, the total?

18 A I believe it does, but this is from your
19 exhibits, and I have provided other data of a more
20 refined character here to make that precise comparison.
21 But that was my understanding of what your testimony
22 showed.

23 Q You made it clear the source, but you have
24 used the data, and I'm trying to get your understanding
25 of it. Is it your understanding that the total also

1 includes water movements?

2 A That's the way it appears to be represented in
3 your exhibits, and that's the way I have interpreted it.

4 Q That's your understanding. Is it also your
5 understanding that it includes pipeline movements?

6 A Now, I'm not sure about that. I just don't
7 have any opinion.

8 Q It's clear, is it not, that it does reflect
9 movements to the destination area from other origins?

10 A It says between southeast and these areas. It
11 is limited to those areas.

12 Q It does not reflect geographic or source
13 competition?

14 A It reflects only the geographic areas that are
15 defined.

16 Q And the same would be true, I take it, of the
17 Figure 13 that is close to page 29?

18 A Yes.

19 Q Let's look at Figure 14 that is close to page
20 30. We might as well talk about the one that we are
21 most familiar with, Los Angeles to Houston eastbound in
22 the first line. I won't go into the others. I think if
23 we talk about one, we can clarify what the numbers mean.

24 As I understand your figure, you are saying
25 that the railroads have 30 percent of the eastbound flow

1 from L.A. to Houston, correct?

2 A Yes.

3 Q And the other carriers have 70 percent,
4 although if you omitted oil, the percentage would be
5 different.

6 A Yes.

7 Q If you omitted oil, as I take it from your
8 footnote on page 30, the other carriers other than rail
9 would only have about 41 percent. That's in the latter
10 part of the footnote.

11 A Yes.

12 Q So omitting oil, the carriers other than rail
13 have about a 41 percent share. Do you know how much of
14 that 30 percent rail share is Santa Fe and how much is
15 SP? I guess you could work out a pro rate. You haven't
16 done that, right?

17 A The shares are shown back in Appendix D.

18 Q What would be -- of that 30.5 percent rail
19 share, how much of that is Santa Fe?

20 A From Los Angeles to Houston, the Santa Fe
21 direct would be 44.7 percent.

22 Q Of the 30?

23 A Yes.

24 Q That would be about 13 percent, a little more?

25 A Something in the 14 to 15 percent range, 14

1 percent.

2 Q Whereas the trucks and the water carriers
3 have, putting oil to one side, over 40 percent of that
4 flow.

5 A Yes, as indicated in the figure.

6 Q Now, this is my question. Do you believe that
7 the trucks and water carriers with over 40 percent of
8 that flow serve as a restraint on railroad pricing in
9 that corridor?

10 A For certain traffic they do, but for other
11 traffic it's clear from my Figure 4 opposite page 16 of
12 my November statement that that is not the case for all
13 of the movements. Indeed, for something like -- for
14 three-fourths of the tonnage moving between Los Angeles
15 and Houston -- that three-fourths of the traffic between
16 Los Angeles and Houston that moves by rail consists of
17 commodities where the rail share exceeds 90 percent,
18 rail share of total traffic exceeds 90 percent.

19 Q Does that mean that the availability and
20 actual presence of trucks and water carriers does not
21 restrain railroad pricing?

22 A There's no evidence of that, and the shipper
23 testimony rather amply affirms my indication of this,
24 because they cite material dealing with the specifics on
25 here, such as the various types of chemicals which are

1 the heavier movers in that corridor.

2 Q Do you think the railroads could increase
3 their present rates by 10 or 20 percent and not
4 experience diversion?

5 A Looking at the shipper data, I would think
6 that they could achieve increased revenues if the rates
7 were higher.

8 Q Let me ask you about Figure 15, page 31, close
9 to page 31. Here we have shares of the movements
10 between Phoenix and other traffic centers. And much of
11 this, as you say, on page 31 is cotton. Do you know
12 whether railroads haul any cotton?

13 A Between where and where?

14 Q Phoenix and Los Angeles, or San Francisco or
15 Houston. Those are the three locations identified on
16 Figure 15.

17 A I'm not sure that they haul any.

18 Q Do you know whether any of it moves rail TOFC?

19 A No. I think most of it, as I indicated, of
20 the truck traffic is cotton. I believe the data
21 demonstrated to me that whatever moved by rail is de
22 minimis in the case of cotton in that flow.

23 Q I just didn't see in your statement or the
24 tables the basis for the conclusion that it is de
25 minimis. Perhaps it is there and I missed it.

1 A I believe it may have dropped out because of
2 the way the Transearch put together these tables.

3 Q Well, let's omit cotton for the moment. If
4 you omit it, as you say on page 31, then the rail share
5 -- and this just above the new heading -- if you omit
6 cotton, the rail share for Phoenix to Los Angeles
7 traffic amounts to nearly half, right?

8 A Yes.

9 Q And that means that truck would have about
10 half, right?

11 A Yes.

12 Q And then you say the rail position of one-half
13 is formidable, true? I take it that the truck position
14 of half would be equally formidable.

15 A Yes, because I'm taking into account -- if you
16 take all of the tonnage that is involved for the three
17 places that are identified here in the southwest -- that
18 is, Phoenix originations and terminations involving Los
19 Angeles, San Francisco and Houston -- the rail share is
20 formidable.

21 Q Well, coming back to the example of Phoenix to
22 Los Angeles, if the rail share -- or to the southwest
23 generally -- is about half -- let's stick to Phoenix to
24 Los Angeles which is where the half comes from -- if
25 that is formidable, and if the truck position is the

1 same, then truck competition is certainly equally
2 formidable as between Phoenix and L.A., right?

3 A Truck competition -- quite a bit of traffic
4 moves by truck in the total sense. Then one has to go
5 to the specific commodities to find out where the trucks
6 are moving. And as I indicate here, the heavy truck
7 mover in here tends to be cotton, which is not important
8 to rail.

9 Q But even putting cotton to one side, it is
10 about half. And my question is this. Even excluding
11 cotton would you say that the availability of truck
12 competitors in the Phoenix to Los Angeles flow
13 constrains the railroad's pricing flexibility?

14 A No, not for the kind of commodities that are
15 shown in Figure 4 of my November statement. For
16 example, on certain chemicals or certain of these other
17 items like cement which the railroads haul, I think it's
18 100 percent of the cement that moves into Phoenix,
19 they're not going to -- there is no evidence that they
20 are constraining that, even though they might constrain
21 pricing of, say, cotton.

22 Q Haven't you testified in the market dominance
23 phase of certain maximum rate cases that a truck
24 competitor with a share far smaller than 50 percent of a
25 flow, even as low as 10 percent of a flow, can

1 effectively constrain a rail carrier with a much larger
2 share?

3 A Theoretically it can. One has to have some
4 evidence, which is why, in turn, here I have gone over
5 to and taken into account the shipper testimony here to
6 see whether there seems to be anything to suggest that a
7 nonexistent or tiny truck share is in some way
8 constraining it.

9 There I found that the truck rates were often
10 half those of the rail rates; so I assumed and took it
11 that there's no evidence of constraint.

12 Q Haven't you testified, though, in market
13 dominance cases not only as a matter of theory but as a
14 matter of fact that smaller truck shares effectively
15 constrained with respect to some commodities rail
16 pricing?

17 A Yes, I have. And I believe in the
18 Northwestern case I was able to show in certain
19 situations that for the movement of grain over to the
20 river for barge movement, small truck shares had an
21 impact upon railroads. But there I was able to deal
22 with the railroad's marketing people and have them
23 demonstrate to me that they in fact had produced or
24 adjusted rates downward because of that truck
25 competition. I find no such situation and no such

1 evidence with respect to the kinds of heavy bulk and
2 high rail share figures shown in Figure 4 of my November
3 statement.

4 JUDGE HOPKINS: With that I think this is a
5 good time for a recess. We'll take a luncheon recess
6 until 1:30.

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

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AFTERNOON SESSION

(1:30 P.M.)

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3 MR. ROACH: Your Honor, I have two loose ends
4 from Tuesday. We said during the questioning of Mr.
5 Caron that we would look for any work papers. We have
6 made a search, and have found no work papers.

7 The other item is, Exhibit SFSP-C-108 was a
8 May, 1984, memorandum to Mr. Kenefick, and that exhibit
9 was admitted subject to our request to have another
10 document admitted to understand it, which was a
11 memorandum from Mr. Kenefick to Mr. Barrett dated April
12 24, 1984, which was also discussed during Mr. Kenefick's
13 questioning, and I believe we had the applicants'
14 agreement that that would come in as an exhibit.

15 I will offer it now as Exhibit UP/MP-C-53.

16 JUDGE HOPKINS: You have seen it, haven't you,
17 gentlemen?

18 MR. MARTIN: Some of us have. Yes, sir.

19 JUDGE HOPKINS: Somebody I know has seen it.
20 Any objection?

21 MR. MARTIN: No.

22 JUDGE HOPKINS: It will be received in
23 evidence.

24 (The document referred to
25 was marked for

1 identification as Exhibit
2 Number UP/MP-C-53, and was
3 received in evidence.)

4 JUDGE HOPKINS: Mr. Martin, how long will you
5 be with this gentleman? Are we going to finish?

6 MR. MARTIN: I think so. I am hoping to be
7 done in 15 or 20 minutes.

8 JUDGE HOPKINS: Thank you.

9 Whereupon,

10 RICHARD J. BARBER,

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

14 CROSS EXAMINATION - RESUMED

15 BY MR. MARTIN:

16 Q With respect to the September 10 statement at
17 Page 34, the section that discusses TOFC/COFC traffic,
18 Mr. Barber -- do you have that?

19 A I do.

20 Q The paragraph at the bottom of the page points
21 out that both Santa Fe and SP have some substantial TOFC
22 business, and you refer to the "rapid growth" in the
23 fourth or fifth line down from the beginning of that
24 section, rapid growth in the TOFC/COFC business.

25 Isn't it true that the railroads have recently

1 been successful in competing with the truck lines and
2 successful in attracting this business away from the
3 motor carriers, that that is the reason for that
4 growth?

5 A That isn't clear. That may be one
6 explanation, but also some of the growth appears to be
7 attributable to rail rates for TOFC movements of
8 trailers at more attractive levels than for over the
9 highway use.

10 Q Well, rail rates for the railportion of the
11 move that are more attractive vis-a-vis highway? Is
12 that what you said?

13 A That's correct.

14 Q Isn't that a form of competition by railroads
15 against truck carrier, vis-a-vis truck carriers?

16 A Not in any complete sense, because of course
17 the trucker realizes the revenue for the move. It
18 allows the railroad to participate often on a third
19 party or wholesale basis at the levels that they have
20 quoted.

21 So they have not diverted the traffic from
22 highway. It will be originated by a motor carrier,
23 terminated by a motor carrier, and it may move some
24 significant distance on the highway apart from the TOFC
25 shipper.

1 Q Mr. Barber, you said that one of the reasons
2 why you believe this traffic had been growing was that
3 the rail rates had been reduced in comparison to those
4 of the alternative highway movement, and my question is,
5 isn't the reduction of rail rates for TOFC service where
6 it occurs one form of competition as between rail and
7 motor carrier?

8 A In a partial sense, yes.

9 Q That shows that truck lines are in fact
10 competing with motor carriers for TOFC business, true?

11 A No, because the truck line continues to
12 originate the traffic, continues to terminate it, make
13 the move, handle the revenue, and all that the railroad
14 is getting, often through a third party, is a portion of
15 that haul that is moving on the rails rather than on the
16 highway.

17 Q But isn't that portion of the haul that is
18 moving on the rail competing with the motor carriers?
19 That is my question.

20 A It is competing with highway, yes.

21 Q Is it your understanding that either the Santa
22 Fe or the Southern Pacific are earning monopoly profits
23 on the TOFC business?

24 A I am not aware of it.

25 Q Do you think they would earn monopoly profits

1 on TOFC business after the merger?

2 A They could raise the rates, but I doubt if
3 they would be making a monopoly profit.

4 Q Do you think that the merged railroad could
5 increase its TOFC rates by as much as 5 percent without
6 experiencing diversions back to the motor carriers?

7 A Based upon the shipper evidence of record,
8 such as in Rates and Services, Inc.'s testimony, and the
9 National Piggybackers, I believe they could.

10 Q You don't think they would experience
11 diversion back to motor carriers?

12 A Not based upon the rate comparisons that are
13 set forth in those two shipper statements.

14 Q And that is only basis for your answer?

15 A That is the basis for my answer. And it is
16 based upon their statements. There may be other TOFC
17 related testimony, too, but those are the ones that I
18 recall now.

19 Q Does the Union Pacific offer intramodal TOFC
20 rail truck service in California?

21 A In California, yes.

22 Q Does that UP service compete with the service
23 of the Santa Fe or the Southern Pacific?

24 A In some respects it does. In other areas, it
25 does not, such as in the San Juanquin Valley, or at

1 least the central and southern portions of it.

2 Q You refer to the rapid growth of TOFC business
3 on the part of the Santa Fe and the SP. Isn't that
4 rapid growth also true of the Union Pacific's TOFC
5 business?

6 A Yes, Union Pacific along with other western
7 roads has experienced growth in traffic to, for example,
8 up over the Central Corridor and onward to Chicago.
9 Obviously, it has not participated in anything in the
10 Southern Corridor because it is not there.

11 Q When you refer below that to the portion of
12 the growth accounted for by fruit and vegetable traffic
13 with western carriers increasing their traffic, that
14 reference to western carriers is not limited to the
15 Santa Fe or the Southern Pacific.

16 A That's right.

17 Q Including the Union Pacific?

18 A Yes, it would include the Union Pacific and
19 others.

20 Q What other railroads TOFC?

21 A Other western carriers.

22 Q Which ones?

23 A Like BN.

24 Q They have TOFC business in California as
25 well?

1 A Not direct, no. Not in California. Nor, of
2 course, does UP have TOFC business in the Southern
3 Corridor.

4 Q On Page 35, I will ask you about a sentence
5 there. The paragraph, the first paragraph on the page
6 says, "Under these circumstances," which refers to the
7 prior discussion, "the competitive benefits of TOFC
8 service are most likely to provide it where there are
9 alternative rail carriers." It is the next sentence I
10 want to ask you about.

11 "Where such competitive rail service is
12 available, trucking to the ramps of different carriers
13 broadens the area in which railroads engage in head to
14 head competition for a wide array of traffic."

15 Do you see that statement?

16 A I do.

17 Q That statement is also true of the Union
18 Pacific in California to some degree, is it not?

19 A To some degree, but not significant insofar as
20 the SFSP merger's competitive consequences are
21 concerned.

22 Q Does not the Union Pacific offer TOFC service
23 within California in areas presently also served by the
24 Santa Fe or the Southern Pacific?

25 A Yes, but for movements not in the Southern

1 Corridor. For example, it does not offer that service
2 on a competitive basis for a move TOFC, say, between Los
3 Angeles and Houston.

4 Q But the Southern Corridor is used also for
5 movements to the midwest, is it not?

6 A It is used -- the Southern Corridor is used
7 overwhelmingly, of course, for movements in the south.
8 It is also used for some traffic moving into the midwest
9 and the northeast.

10 Q And to that extent the Union Pacific's TOFC
11 service is competitive with the Southern Corridor
12 today.

13 A For a move, say, to Chicago out of Los
14 Angeles, yes. But for a move, say, from Bakersfield or
15 Fresno, no, and for a movement from Los Angeles or the
16 Bazy area to San Francisco -- to Houston, no.

17 Q And to the extent that the Commission is
18 concerned not only with point to point competition, but
19 geographic competition, that is, movements to different
20 destinations as providing alternatives to shippers, the
21 Union Pacific's TOFC service provides an outlet that is
22 competitive today with the Santa Fe and the Southern
23 Pacific. True?

24 A No, I don't understand that. SF and SP, say,
25 could make a move of some product from Los Angeles in

1 carload or TOFC service, say, to Houston, compete with
2 each other as they do today, very aggressively, but UP,
3 absent trackage rights, would not be in a position and
4 is not in a position to compete for that kind of a move,
5 even though UP might be able to compete with SF for a
6 TOFC move to, say, Chicago.

7 2 Mr. Barber, I thought I made it clear I was
8 not asking about point to point competition. I was
9 talking about geographic competition. It is true, is it
10 not, that the alternative available to a San Joaquin
11 shipper today of fresh fruits and vegetables outbound on
12 the Union Pacific to Omaha provides a competitive outlet
13 that is to some degree competitive with the outlets to
14 Houston or other points on the Southern Corridor.

15 A In terms of my thinking about geographic
16 competition, that doesn't really make much sense, to say
17 to somebody in Fresno who today can take his choice
18 between a movement to Houston or Dallas or New Orleans
19 vis SF or SP, to tell him, well, tomorrow you are locked
20 into a single carrier, but if you'd like, you can ship
21 it to Lincoln, Nebraska, or Omaha. That doesn't really
22 sound like much of a competitive tradeoff.

23 Q Your thought is that alternative sources are
24 relevant for competitive purposes, but alternative
25 destinations are not? Is that right?

1 A I think they are both involved. You could
2 reverse my example in terms of a termination. If a
3 purchaser-receiver in Fresno or Bakersfield today was
4 able to obtain, receive some product out of Houston and
5 have competition between SF and SP, I don't see that it
6 is a competitive answer to say let them merge, and he
7 can buy whatever he can get tomorrow and have it
8 delivered by some other means, and of course UP isn't
9 even moving into, on a carload basis, into Fresno today
10 anyway.

11 Q You don't think then that source competition
12 of the same commodity moving from different origins is a
13 relevant constraining influence in assessing the
14 competitiveness of a market?

15 A Not on the basis of the questions that you
16 have provided, because what we are saying is that even
17 if it were in some sense the reduction or elimination of
18 competition that could be now available to a shipper or
19 receiver via using either SF or SP for moves through the
20 Southern Corridor, that is choked off. That is
21 eliminated.

22 And what you are saying then is, no problem,
23 because he can look to getting a product in some other
24 way. That alternative, which is quite substantial based
25 upon the shipper testimony, has been now placed in the

1 hands of one railroad sitting astride the Southern
2 Corridor. I see that as a diminishment of competition,
3 even if that shipper-receiver might have available under
4 some conditions some product from some other place.

5 Q Would you agree that TOFC service from origin
6 to rail ramp is generally practicable within a 125-mile
7 range?

8 A Well, certainly it is physically practicable.

9 Q Economically practicable is my question.
10 Thank you for suggesting the refinement.

11 A I would say it is economically handicapped.
12 It might be practicable by somebody's definition, but if
13 it is a 120-mile move, then you are using -- even your
14 witness Baker's estimate of \$1 to \$1.15 in cost, that
15 would mean that if traffic had to be attracted away
16 from, say, SFSP to some other railroad, and it had to
17 move, say, 125 miles, that immediately then SFSP would
18 have a \$125 drayage cost edge over the other railroad,
19 and would thus have an enhanced degree of pricing
20 discretion, as compared with the competition between
21 them that exists today.

22 Q That cost edge that you have just described
23 would exist, if it existed at all, at 110 or 100 or 50
24 or 5 miles, would it not?

25 A It would exist, but I would say that at five

1 miles or ten miles it might be regarded as small enough
2 not to be a factor, but on some of these moves where the
3 move might be \$1,000 for a particular haul, the addition
4 of, say, \$125 or \$150 in effect is adding well over 10
5 percent of the cost.

6 I regard that as an economic handicap that
7 would then give SFSP a sharply expanded margin of
8 pricing discretion within which to set its rates.

9 Q What you are saying, Mr. Barber, as I
10 understand your question, is that any time there is a
11 TOFC or truck move to a ramp, there is, as you put it,
12 an economic handicap which disables TOFC service from
13 being competitive, and if your logic is taken to its
14 conclusion, TOFC service could never be competitive.
15 Isn't that right?

16 A No. That isn't the case. I am comparing it
17 with the situation in which, say, at a point today, say,
18 in the valley of California, SF and SP compete
19 directly. If tomorrow -- and they would compete, say,
20 also for outbound carload or TOFC business. They would
21 compete then in rates. A shipper could use either one
22 of them at that location.

23 If tomorrow they merge, and the closest point
24 to which they could -- to which that shipper could
25 deliver a trailer by another railroad was 125 or 225

1 miles away, than the cost of that drayage, which could
2 then run as much as \$1.20 a mile by your witness's
3 estimate, that that is a substantial margin within which
4 SFSP could price the service from the previously
5 competitive Point A. That is what I am talking about.

6 Q Does the UP today have TOFC ramps in Los
7 Angeles?

8 A Yes.

9 Q Oakland?

10 A Yes.

11 Q Stockton?

12 A Yes.

13 Q Modesto?

14 A I am not sure about Modesto. That is a
15 question that Mr. Shum is a specialist in.

16 Q Las Vegas?

17 A I would imagine they do in the Reno or Las
18 Vegas area.

19 Q Does the Union Pacific today offer TOFC
20 service from one or several of those ramps?

21 A Yes.

22 Q To towns or shippers in the San Joaquin
23 Valley?

24 A Well, it is available if a shipper wants to
25 bring it there.

1 Q Does any move via UP TOFC service from the San
2 Joaquin Valley?

3 A Yes, some of that traffic does move.

4 Q Therefore it must be economically available,
5 economically possible to overcome what you describe as
6 that fraying handicap.

7 A It may be overcome in some cases, but the
8 indications are that the TOFC business, as I think Mr.
9 Shum testified yesterday, at those locations in the
10 valley is clearly dominated by SF and SP today.

11 Q Let me ask you this. What is the approximate
12 annual tonnage of TOFC traffic that the Union Pacific
13 originates currently in the Fresno-Bakersfield BEA?

14 A I don't have the numbers at my fingertips.

15 Q Do you have an approximation?

16 A No.

17 Q Do you have any idea?

18 A I don't want to guess.

19 Q Do you know what the current annual tonnage
20 volumes are at the particular ramps or any of them that
21 I mentioned earlier?

22 A No, and even if I did, it wouldn't show
23 anything, because that traffic in terms of its origin
24 could have been originated close to the point, not at a
25 more distant location where SFSP are the exclusive

1 provider. In other words, all I do is tell you what
2 moved over the ramp. I wouldn't tell you in detail
3 where it moved from by mileage block in the detail that
4 I would want.

5 Q Let me ask you to turn back to your final
6 verified statement, to the section at the end, Page 42.
7 This is in the discussion of the Baumol MacAvoy
8 assumptions and conclusions, which starts at Page 37 and
9 concludes, as does your statement, at Page 42.

10 The last sentence of your statement says that
11 they, referring to Baumol and MacAvoy, have not taken
12 account of the importance of preserving competition as a
13 means for ensuring that whatever merger benefits are
14 realized are disseminated to the public advantage.

15 A I am sorry. Had you gone back to 37?

16 Q No, excuse me. I wanted to point out that the
17 Section started at Page 37. I wanted to ask you about
18 Page 42.

19 A Excuse me. I have found the sentence you just
20 read.

21 Q I was trying to help put it in context so that
22 we were talking about Baumol and MacAvoy. Do you see
23 the sentence?

24 A I see it.

25 Q And you there are talking about merger

1 savings.

2 A Yes, I see that.

3 Q Now, should we understand from this sentence
4 that you believe that competition isn't effective unless
5 it forces the merged railroad to pass through to the
6 shippers and the public all of the benefits of the
7 merger?

8 A No. That could be a factor. That is, it is
9 always a factor in economics, because competition does
10 help disseminate public benefits, but quite apart from
11 that --

12 Q You said whatever. I just wanted to focus on
13 that.

14 A That is what I was just going to get to. What
15 I have in mind here is that, as I testified earlier,
16 competition is a means of stimulating a variety of
17 publicly beneficial actions that can have decided public
18 advantage.

19 I am thinking here of the stimulation of
20 marketing innovations such as the introduction of new
21 types of services or pricing packages or types of cars
22 or technology new equipment, stimulation of and building
23 of the pressure to seek greater efficiency through
24 gaining better control of cost, that is, accomplishing
25 an effective reduction in stabilized costs so as to

1 permit a service to be rendered more with, if you wish,
2 greater margins, and in other ways.

3 But my basic idea here is that competition is
4 a device not only for dealing with prices but is -- it
5 creates an environment for prodding, for stimulating,
6 for bringing about innovation, efficiency, improving
7 service, and encouraging parties because they are rivals
8 with one another to engage in the back and forth process
9 of decisionmaking that itself yields real public gains.

10 It is those aspects of competition, those
11 benefits that I refer to when I am saying that
12 competition has benefits which are important to the
13 public, which inure to the public advantage.

14 Q Mr. Barber, is it important that competition
15 results in passing through all of the merger benefits?
16 You used the term "whatever," and I simply want to
17 clarify it.

18 A No.

19 Q Are you saying that competition should pass
20 through all of the merger benefits to the shipper?

21 A No. Competition is important for all of the
22 reasons I have given, which are true and worth
23 preserving even if some of the merger benefits were not
24 passed through.

25 Q There is nothing anticompetitive about a

1 merger company retaining some of the benefits of the
2 merger?

3 A Not per se, but there is an anticompetitive
4 effect if the process of the merger itself eliminates,
5 as is here the case, competition of a rail intramodal
6 character, and thus deprives the public of the benefits
7 that would relate to all aspects of behavior that are
8 involved.

9 Q Isn't retention of some merger benefits what
10 happens in the competitive unregulated marketplace?

11 A It could.

12 Q And the fact that some of those merger
13 benefits are retained does not by itself mean that the
14 merger carrier is monopolistic?

15 A Not by itself. I would have to look at the
16 scale of the merger and whether it is here reducing the
17 market from two railroads to one, or whether it was some
18 other sort of hypothetical situation.

19 Q Including producing monopoly profits?

20 A It would take the monopoly profits into
21 account, but again I would simply make it clear that the
22 fact that a merger does not permit the realization of
23 monopoly profits to me still leads, as on the facts
24 here, to the conclusion that the merger will lessen
25 competition substantially or, as here, really wash it

1 out or eliminate it.

2 Q Now, Mr. Barber, in order to retain some of
3 the benefits of the merger, that is, the operating
4 savings, and to improve the profitability of the merged
5 carrier, that is to say, its margins over cost, doesn't
6 that mean that the merged carrier would have to exercise
7 some degree of market power in order to retain some of
8 those benefits?

9 A Some degree, but in the context whereas I
10 think we have all agreed, the railroad is revenue
11 inadequate. In that case, you may not get a passing
12 through of the benefits, but you may still, if you don't
13 get a full passthrough of the benefits, you do choke off
14 the other aspects and favorable benefits of competition,
15 the innovation, the efficiency, the pressure, and the
16 rest, as a result here of going from two railroads to
17 one.

18 Q Mr. Barber, I just want an answer to this
19 question. Would it be a good thing if the merged
20 carrier had enough market power to be able to retain
21 some of the merger benefits for itself and its
22 shareholders?

23 A The word "good" or "bad," to me, I would be
24 indifferent to it.

25 Q Well, would it produce a misallocation or

1 distortion in the allocation of economic resources if
2 the merged carrier were able to retain, had enough
3 market power to retain some of the merger benefits for
4 itself?

5 A It might not be, and I would be prepared to
6 assume that it did not, that it was not objectionable on
7 that ground alone, but that does not mean that the
8 merger, turning the market from two carriers to one
9 carrier, would not lessen competition.

10 Q That is not my question, Mr. Barber. My
11 question is this. I keep coming back to it. So long as
12 the merged carrier did not retain so much in the way of
13 merger benefits as to produce returns in excess of its
14 cost of capital, either in its total system or on a part
15 of the system, is it not a fact that the merger and the
16 retention of those benefits would not result in any
17 distortion of the allocation of economic resources?

18 MR. ROACH: I object on the grounds that the
19 question has been asked and answered.

20 THE WITNESS: I was just going to say, I think
21 I have been answering it.

22 JUDGE HOPKINS: He has been trying to get him
23 to answer and stick to one answer and not go on with the
24 rest of it.

25 THE WITNESS: I am sorry. The question

1 changes, and I am afraid the answer has to.

2 JUDGE HOPKINS: Well, answer the question and
3 then stick to it. Don't go on extensively. Just answer
4 the question.

5 THE WITNESS: I don't believe I can add
6 anything to what I have said.

7 JUDGE HOPKINS: Thank you.

8 MR. MARTIN: I won't ask it again, Your
9 Honor. That concludes my examination.

10 JUDGE HOPKINS: Thank you. Mr. Ratner, or Ms.
11 Kooperstein? Who is going to do it?

12 BY MS. KOOPERSTEIN:

13 Q Good afternoon. My name is Donna Kooperstein,
14 and I represent the Department of Justice. I have just
15 a few questions.

16 If you would please turn to UP/MP-26, Page
17 23 --

18 A Page 22?

19 Q Page 23. Do you have that page?

20 A I do.

21 Q Would you note in the first full paragraph you
22 discuss tonnage into Phoenix that Mr. Anderson ignored.
23 Do you see that spot?

24 A Yes.

25 Q Do you know where that tonnage terminated in

1 the Phoenix BEA?

2 A Some of it terminated in Phoenix and some
3 elsewhere, but I do not have in mind the specifics as to
4 exact termination. I believe Mr. Spero, who will be
5 following me, may be able to illuminate that for you.

6 Q Okay. Well, let me ask you the next question,
7 and perhaps you will refer me to Mr. Spero again. Do
8 you know what percentage of that tonnage could
9 reasonably have been trucked to either SF or SP?

10 A No, I believe Mr. Spero again has focused on
11 that, and I am here summarizing several pages from his
12 testimony in a couple of sentences. I believe he will
13 -- he can help you on that, or at least address the
14 question.

15 Q Could you please turn to your September 10th
16 testimony, UP/MP-24? If you would look at Page 15. Do
17 you have that page?

18 A Yes.

19 Q Do you see the chart there taken from the
20 Commission decision? That chart has shades of traffic
21 moving via the Southern Corridor. Do you have that?

22 A I do.

23 Q Am I correct that the remainder of the traffic
24 is moving through the Central Corridor?

25 A Yes, it is.

1 Q Have you examined whether these shares
2 accurately portray the movement of traffic subsequent to
3 the Commission's decision in UP/MP?

4 A Yes. As is detailed in one of the other
5 appendix tables, the Commission in organizing the data
6 which are shown in my Appendix A structured things
7 somewhat differently from what I did, but in Appendix D,
8 I show the traffic not on a region basis, but on a major
9 BEA to major BEA basis, and there are a series, 28
10 tables in Appendix D which show the rail traffic from,
11 say, Los Angeles to Houston or whatever the other BEA
12 pair would be by direction, and that shows you what the
13 routing is, and by then simply eyeballing that one can
14 determine what share moves by the Central Corridor. It
15 would be anything that involved UP or Rio Grande.

16 Q Based on the work you have done that is
17 reflected in Appendix D, is it your view then that the
18 shares shown on Page 15 are still accurate today?

19 A Yes.

20 Q Could you turn to your Appendix A, Pages 2 and
21 3, I believe? Do you have those tables from the
22 Commission's decision?

23 A Yes.

24 Q Do you believe the shares reflected in these
25 tables are still accurate?

1 A Yes, I do.

2 Q This morning you discussed with Mr. Martin the
3 fact that between certain city pairs there might be
4 competition between the Central and Southern Corridor,
5 and you mentioned LA and Chicago as one pair. Do you
6 recall that?

7 A I do.

8 Q Do you know other city pairs where there is
9 competition between the Central and Southern Corridor?

10 A It would be, and I think that could be shown
11 from the appendices to the Commission's opinion in the
12 UP/MP decision, there would be competition into the
13 upper midwest, say, Chicago, and then generally to the
14 northeast, say, to Philadelphia or New York or Boston or
15 Baltimore, that area, where traffic could be routed
16 overhead via St. Louis or Chicago, and come through over
17 the Southern or the Central Corridor.

18 Q Could you please turn to Pages 19 to 20? At
19 the bottom of Page 19 and continuing on to Page 20, you
20 note that from Atlanta to the Bay area about 52 percent
21 of the traffic moves by the Southern Corridor. Do you
22 see that?

23 A Yes.

24 Q Is it correct that the rest moves by the
25 Central Corridor?

1 A Yes, most of the rest moves by the Central
2 Corridor.

3 Q Also on Page 19 you cite shares of traffic
4 moving between northern and southern California and
5 certain southwest cities via the Southern Corridor. Do
6 you see that discussion?

7 A I do.

8 Q Do you know whether these shares would vary
9 significantly by commodity?

10 A I do not know precisely, but given the very
11 high shares, I would suspect that any difference would
12 have no impact on the very high shares given here.

13 Q You haven't studied it specifically?

14 A The data disaggregation available from the
15 sources really doesn't permit that to be done, but in
16 any event I do not have the data, but I would suspect as
17 long as we know that 99 percent of Houston-LA traffic
18 moves via the Southern Corridor, I would suspect that
19 for given commodities the variation from that would be
20 small, and I would at least regard it as insignificant.
21 Some might move 100 percent. Some maybe 95 percent.
22 But it is 99 percent, which is rather commanding.

23 Q If prices were to rise significantly on the
24 Southern Corridor for the cities you discuss here, do
25 you expect that much traffic would switch to the Central

1 Corridor?

2 Q No, not for the areas and the BEA pairs that I
3 have dealt with in most detail. For example, from Los
4 Angeles to Houston, the movement via the Central
5 Corridor is more than 1,000 miles longer, and it takes a
6 day of additional time to make the move.

7 On that basis, if the rate for a direct SFSP
8 move from Los Angeles to Houston were to go up, clearly
9 the costs for the alternative move plus the service
10 handicap would be so substantial as to give SFSP not an
11 unlimited, of course, but give it a substantial pricing
12 margin.

13 Q Have you discussed that matter with shippers
14 at all?

15 A No, I have not discussed it with shippers, but
16 I have gone through their statements, and some of them
17 do address that point. That is, they make the point
18 that the move via the Central Corridor for shipments
19 between Los Angeles and Texas is just really not in
20 their view a viable option. Not all of them address
21 it. But several of them do.

22 Q Would you please turn to Appendix D, Table
23 16? Do you have it?

24 A I do.

25 Q Do you know why the traffic that goes Southern

1 to MP to UP terminates on SP instead of on WP?

2 A I am certain the reason is simply that SP as I
3 recall has something like 7,000 exclusive points that it
4 serves in California, whereas WP has like 200 or 300.
5 So that it reflects, I am quite certain, SP's rather
6 substantial market position in the state of California.

7 Q I know you have discussed this topic a bit
8 with Mr. Martin, but I will try one question here. Have
9 you examined the extent to which the Central and
10 Southern Corridors provide source competition to each
11 other?

12 A Only within the framework of the data that I
13 have presented, and within the framework of the specific
14 BEA pairs for which I presented data back in Appendix
15 F.

16 Q Appendix A?

17 A Appendix F, which is the BEA to BEA pairs
18 showing movements, say, into Los Angeles from several
19 BEA's, Dallas, Houston, New Orleans, and other places.
20 In that sense, those alternative sources are considered,
21 but there are others that -- but the data are limited to
22 the ones identified in the 28 tables that form Appendix
23 F.

24 Q Appendix F gives information between two
25 BEA's, though, doesn't it?

1 A Yes, but it does deal with the source
2 competition question in this sense. If you look at the
3 first page of Appendix F, the index page, you notice
4 that from the destination BEA, that you get the same
5 destination BEA from several different origins.

6 For example, you get the destination BEA Los
7 Angeles from Dallas, from Houston, from New Orleans,
8 from Atlanta, and then from Phoenix you get then the
9 backward movement on the other side, so that you are
10 seeing whether, say, Dallas competes with Houston,
11 competes with New Orleans, competes with Atlanta,
12 whether on the outbound movement Los Angeles can ship to
13 other places.

14 It tells you that by modal share, rail share,
15 and then by commodity at the two and five digit level.
16 In that sense, it is providing information about source
17 competition.

18 Q This is the only sense in which you examined
19 it, though?

20 A To that extent, in that statement, but Mr.
21 Murphy in his statement -- he is going to appear shortly
22 -- he takes the applicant's argument where applicant
23 witness discusses source competition for chemicals
24 between Houston and Los Angeles. That was their only
25 case that they examined. Mr. Murphy deals with that at

1 some length, where he dealt with source competition
2 quite specifically and in some detail, and that is in
3 his testimony.

4 Q Well, if rates in the Southern Corridor to LA
5 were to rise, isn't it a reasonable possibility that
6 shippers and consignees could turn to alternate
7 destinations and origins in the northern United States?

8 A Applicants haven't presented anything on that.
9 The best source of information, because a lot of it is
10 privy to the shippers and receivers themselves, in my
11 judgment, is the shipper statements.

12 Now, somebody like Dow Chemical, a fairly
13 large chemical operation, in terms of what it thinks its
14 ability to shift to other sources, indicates that it
15 does not believe it can do so, and apparently in part
16 this is because their moves are intracorporate. U.S.
17 Steel and some of the other companies involved have also
18 dealt with that.

19 I looked at all the shipper statements and did
20 not discern any indication from the shippers that source
21 alternatives were a significant competitive factor. But
22 I think the best evidence then comes from the shippers
23 on source competition, because they are privy to their
24 own logistics, and what they regard as viable options of
25 supply or markets for shipment or sale.

1 Q In your view is a railroad a more effective
2 competitor when it is operating on its own track or
3 operating as a tenant on other railroads' track pursuant
4 to trackage rights?

5 A Well, I think if it has trackage rights and at
6 the end of those trackage rights ties into some
7 meaningful system, that is, ties into points at which it
8 has yards and certain necessary mechanical facilities, I
9 see no reason why a railroad cannot be an effective
10 competitor with trackage rights.

11 In other words, I see them being able to use
12 trackage rights and to be essentially as effective a
13 competitor as they would if they owned their facility.
14 Probably in some respects having your own facility,
15 owning your lines, having everything under your own
16 control, might give you a little more discretion, a
17 little more elbow room.

18 Q But if, say, in the case of UP, having an
19 established system east of El Paso, and having
20 established operations in the Los Angeles area, then I
21 would think their trackage rights as requested would
22 allow them to be, I think, a very effective competitor,
23 even though they didn't own the line between El Paso and
24 Los Angeles or Colton.

25 Q Is it correct, though, that to be effective

1 they would have to work out a lot of matters with the
2 leasing railroad?

3 A Yes, they would, through negotiation, or if
4 they had to, the parties could come to the Commission,
5 which routinely deals with trackage rights matters,
6 dealt with them in the Rio Grande and the SP cases last
7 summer. Parties disagree, but there is a mechanism to
8 do it.

9 So things have to be worked out. But they can
10 be, in economic terms, the Commission can be involved.
11 Parties can submit arguments and facts and evidence, and
12 as an operating matter we have to recognize that today
13 the Rio Grande is using trackage rights over the UP
14 between Pueblo and Kansas City, the Katy is doing it
15 between Omaha and Kansas City, SP is exercising rights
16 between St. Louis and Kansas City. You have shared
17 track arrangements in the west. You have all sorts of
18 trackage rights in the east.

19 So, to me, it is an arrangement where many
20 things can be worked out, but they all can be worked out
21 and have been many times before, and there is no reason
22 to think that they couldn't be worked out here or
23 resolved if necessary by the Commission.

24 Q But these things don't have to be worked out
25 if they are operating on their own tracks, right?

1 A If they are operating on their own tracks,
2 they wouldn't have to work them out. But these people
3 are pretty experienced, and while they may shout at each
4 other once in a while and disagree, they have proven
5 over the decades that they can work together when the
6 conditions require it.

7 MS. KOOPERSTEIN: Thank you. I have no
8 further questions.

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1 JUDGE HOPKINS: Ms. Reed.

2 MS. REED: We have no questions.

3 JUDGE HOPKINS: Mr. MacKenzie.

4 MR. VINCENT MAC KENZIE: No questions.

5 MR. ROACH: Your Honor, I move the admission
6 of Mr. Barber's two verified statements.

7 JUDGE HOPKINS: Any objections?

8 MR. MARTIN: No.

9 JUDGE HOPKINS: They will be received in
10 evidence.

11 You can be excused, Mr. Barber.

12 (Witness excused.)

13 MR. ROACH: Your Honor, UP calls Richard D.
14 Spero.

15 Whereupon,

16 RICHARD D. SPERO

17 was called as a witness in the above-entitled matter by
18 counsel for Union Pacific Railroad and, having first
19 been duly sworn by the Administrative Law Judge, was
20 examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. ROACH:

23 Q Could you state your name, sir?

24 A Richard D. Spero.

25 Q And what is your position?

1 A I'm an Assistant Vice President at Richard J.
2 Barber Associates, Inc.

3 Q Do you have before you a document entitled
4 Appendix A, the TBS Central California and Phoenix
5 Studies, Verified Statement of Richard D. Spero, with 39
6 pages and a verification page dated November 20, 1984?

7 A Thirty-eight pages and a verification page;
8 yes.

9 Q Well, my copy has page 39, witness
10 qualifications.

11 A I beg your pardon. You are correct.

12 Q And is that Appendix A to Mr. Barber's
13 verified statement in Volume UP/MP-25?

14 A Yes, it is.

15 Q Do you have any corrections to make to that
16 document?

17 A I believe it was earlier submitted to the
18 parties; a revised figure A-6, which in my testimony
19 faces page A-29. Other than that, I do not have any
20 corrections.

21 MR. ROACH: That's part of UP/MP-27 dated
22 December 5, 1984 for the record.

23 BY MR. ROACH: (Resuming)

24 Q Subject to that one correction, is this
25 verified statement true and correct to the best of your

1 knowledge and belief, sir?

2 A It is.

3 MR. ROACH: The witness is available for
4 cross-examination.

5 JUDGE HOPKINS: Mr. Moates.

6 CROSS EXAMINATION

7 BY MR. MOATES:

8 Q Good afternoon, Mr. Sperr.

9 A Good afternoon, Mr. Moates.

10 Q I'd like to ask you a few preliminary
11 questions about the sources of your analysis that you
12 describe on the first page of your statement.

13 You indicate that certain materials were made
14 available to UP by the Applicants, including certain
15 computer tapes. Do you see that reference?

16 A Yes.

17 Q Is that in particular the Beebie Transearch
18 data base that you're talking about, or is that
19 something else?

20 A I believe what I had in mind here were the
21 data tapes that underlie Witness Anderson's testimony.

22 Q Did you request Union Pacific to array or
23 format that data in a particular manner for you?

24 A Yes.

25 Q And were there directions to the Union Pacific

1 data processing personnel from you or from someone at
2 Richard J. Barber Associates with respect to those
3 instructions?

4 A There was a continuing dialogue between the
5 computer personnel in Omaha and members of my staff;
6 yes.

7 Q Well, I saw no reference to that continuing
8 dialogue in your work papers. Are there, in fact,
9 written communications either to you, from you rather,
10 to Union Pacific, or to you from Union Pacific, about
11 the computer tapes referenced here?

12 A To the best of my recollection, Mr. Moates,
13 they were all telephonic.

14 Q All oral.

15 Would you briefly tell us, then, what
16 instructions you did give the Union Pacific with respect
17 to this data?

18 A Well, one of the questions that I know we
19 wanted them to help with was with was to array the Reebie
20 data in the same sort of mileage block segments that Mr.
21 Anderson had utilized for the Southern Pacific Santa Fe
22 data that was in his testimony.

23 Q Let me interject at that point. So it is the
24 case that some of this data that you called material
25 underlying Witness Anderson's statement included the

1 Reebie Transearch data?

2 I take it that's what you just made reference
3 to?

4 A Yes, that's correct.

5 Q You say at the end of this paragraph that all
6 of these materials, including these tapes and other
7 matters that you refer to there, are referenced where
8 appropriate in the statement.

9 My question is, were all these materials
10 included in your work papers, all the materials
11 referenced in your statement, are they in your work
12 papers?

13 I did not find them; that's why I asked.

14 A You mean the computer tapes?

15 Q No. I mean the various materials that you
16 referenced in footnotes, and I will point them out as we
17 go through the statement.

18 A We certainly attempted to do so. If there is
19 any omission in that regard, we'll certainly attempt to
20 correct it.

21 Q Do you know what production numbers your work
22 papers were assigned by Union Pacific? Can you tell
23 me?

24 A No, I don't.

25 MR. MOATES: I ask, counsel, that those

1 numbers be provided separately for Witness Spero,
2 because the numbers we were given were for Barber.
3 There is no breakdown for Spero and Barber.

4 MR. ROACH: I'm not certain that that can be
5 done. We'll be glad to look at that, Your Honor, but
6 Mr. Barber talks about many of the same points that Mr.
7 Spero talks about, but we will undertake to see if we
8 can break out the different numbers.

9 MR. MOATES: He confirms what I said, which is
10 that they aren't broken down. We would at least like to
11 see if they can be done.

12 JUDGE HOPKINS: Fine.

13 BY MR. MOATES: (Resuming)

14 Q Now, turn to page A-2, if you would, Mr.
15 Spero. I want to draw your attention, first of all, to
16 the second footnote on the page, where you recite
17 Witness Anderson's definition of the competitive
18 logistics options and distribution channels.

19 Do you see that?

20 A Yes.

21 Q Do you disagree with his definition, or are
22 you simply putting it there to present the reader with
23 the context in which you are presenting your criticism?

24 A The latter.

25 Q Would it be fair to say that you agree with