

FD30400 - Pages 856 thru 914

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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In the Matter of: :

SANTA FE SOUTHERN PACIFIC CORPORATION : Finance Docket

-- CONTROL -- : 30400 et al.

SOUTHERN PACIFIC TRANSPORTATION :

COMPANY :

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Hearing Room A
12th & Constitution, N.W.
Washington, D.C.
Friday, October 5, 1984

The hearing in the above-entitled matter was
convened, pursuant to notice, at 9:35 a.m.

BEFORE:

JAMES E. HOPKINS,
Administrative Law Judge

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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>
Thomas J. Fitzgerald				
By Mr. Kharasch- resumed		867		
By Mr. Dreiling		1032		

E X H I B I T S

<u>Exhibit No.</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
MKT-C-10	938	1031
MKT-C-11	938	1031
SFSP-C-3	939	
MKT-C-12	960	1031
MKT-C-13 and 14	995	1031
MKT-C-15	996	1031
MKT-C-16	1018	1031

P R O C E E D I N G S

1
2 JUDGE HOPKINS: The hearing will come to
3 order. Go ahead.

4 MR. NELSON: In an off-the-record discussion,
5 Your Honor, request has been made by a number of the
6 parties to make the KCS-C-1 available to outside
7 economic consultants, if I state that correctly, and
8 with that understanding there will be no objection -- of
9 course, pursuant to the protective order.

10 JUDGE HOPKINS: Mr. Smith, are you going to
11 state it for the Southern Pacific?

12 MR. SMITH: Yes, Your Honor. While we were
13 off the record, I distributed to Your Honor, the
14 Commission, and parties a document entitled "Order
15 Regarding Certain Confidential Exhibits Filed Under
16 Seal," and the purpose of this order is to provide a
17 mechanism whereby the parties in this case can have
18 access, subject to terms of this protective order, to
19 any confidential exhibits that are received in the
20 record.

21 I would ask that this time that Your Honor
22 enter, sign this order, and enter it, and make it
23 effective so that we can begin to comply with it.

24 JUDGE HOPKINS: I have signed it.

25 MR. SMITH: Thank you.

◁

1 MR. LEARY: Your Honor, may I just ask for a
2 point of clarification? In paragraph 5, the second line
3 up from the bottom of the paragraph, do I understand
4 that those words, "if practicable," are intended to
5 incorporate the kind of rule of reason consideration
6 that we have discussed previously in other connections?

7 Sometimes, something will arise in the middle
8 of the examination of a witness that will cause someone
9 to want to refer to one of these documents.

10 MR. SMITH: Yes. I'm always willing to go by
11 a rule of reason.

12 JUDGE HOBKINS: Thank you. We have the rule of
13 reason prevailing here. Let's hope it prevails all the
14 time.

15 Are there any other preliminary matters?

16 Mr. Kharasch, you can go ahead.

17 Whereupon,

18 THOMAS J. FITZGERALD,
19 the witness on the stand at the time of the recess,
20 resumed the stand and, having been previously duly
21 sworn, was further examined and testified as follows:

22 CROSS EXAMINATION - RESUMED

23 BY MR. KHARASCH:

24 Q Mr. Fitzgerald, let's get some definitions at
25 this point in the record which will, I hope, clarify

1 further discussion here and later on.

2 We have discussed the fact yesterday that many
3 rail points which originate or terminate traffic are
4 exclusively served by only one railroad.

5 Is that true so far?

6 A That is true.

7 Q At such points, one hears that they are either
8 open or closed. Would you explain what open or closed
9 means?

10 A Open or closed is railroad traffic shorthand
11 for open to reciprocal switching or closed to reciprocal
12 switching. If they are open, that means that they are
13 within a terminal area where, although they may be
14 exclusively served by a particular rail carrier, other
15 carriers within that terminal area can also serve such a
16 customer by effectively extending its movement on the
17 other carrier's line by having the other carrier switch
18 it.

19 And, typically, the carrier that does the
20 switching receives a fee for that service which is
21 absorbed by the line haul carrier. That is called
22 reciprocal switching.

23 And, of course, the reason it's called
24 reciprocal switching is -- the premise for it is that it
25 is reciprocal.

1 Q Now, the fee charged by the carrier
2 exclusively serving the point may also be assessed, may
3 it not, against the shipper of the traffic, in which case
4 it is not absorbed.

5 A Yes. I would say that's more the exception
6 than the rule. But that happens.

7 Q And as a slight further complication, when an
8 exclusively served point is open to reciprocal
9 switching, it may be open for some traffic and not open
10 for other traffic. Is that true?

11 A Yes, it could be. The industry or the
12 railroad that serves the industry can exact whatever
13 terms it wants in deciding whether it's open and, if so,
14 to what extent.

15 Q Now, continuing with our definitions, let's
16 talk about railroad routes which we discussed a little
17 bit yesterday.

18 If movements are occurring under published rail
19 tariffs, there will be a routing tariff, will there not,
20 that will explain whether a particular combination of
21 carriage on one rail carrier and then another is
22 permitted or not.

23 A That's right.

24 Q And for cargo that does not move under tariffs
25 such as cargo that has been deregulated TOFC, T-C-F-C,

1 traffic or traffic moving under Staggers Act contracts
2 with the shippers, what's the situation on how one finds
3 out whether routes are available or not?

4 A Well, you can readily find out by asking any
5 carriers. Typically, there would be a circular that
6 would cover the subject similar to a tariff.

7 Q Similar to a tariff. Are these circulars
8 public or not?

9 A I don't know. I think so.

10 Q Now, when two carriers participate in a joint
11 line movement, the shipper pays one sum of money for the
12 total transportation; is that correct?

13 A Yes, if it's moving on a joint rate. That's
14 right.

15 Q And that single sum of money paid by the
16 shippers is divided among the carriers participating in
17 the joint line?

18 A Yes. It's what known as an interline
19 settlement, and the carriers settle up among
20 themselves.

21 Q Those divisions occur in some instances by
22 agreed proportions that appear in general agreements
23 among carriers, and those are called division sheets; is
24 that right?

25 A Yes.

1 Q And then, in some instances, say on a Staggers
2 Act contract move, divisions may be separately
3 negotiated.

4 A That's right.

5 Q In general, carriers, if they can agree, can
6 change their divisions on a joint line move.

7 A Yes.

8 Q If carriers are dissatisfied with division
9 under a joint line movement, there is a procedure in the
10 Interstate Commerce Act, is there not, for a hearing
11 before the Commission about divisions?

12 A I really don't know.

13 Q Are carriers free, under Staggers Act
14 contracts with shippers for joint line movements, to
15 change their divisions?

16 A Yes, with the concurrence -- I'm assuming
17 you're talking about with concurrence of the other
18 carrier.

19 Q Both carriers must agree?

20 A Yes.

21 Q From your experience, can you tell us how much
22 traffic carried by the Santa Fe moves under divisions
23 that are in the division sheets, the division sheet, the
24 general divisions?

25 A I don't know. I testified yesterday that half

1 of our traffic is local. So half of it, then, is
2 interline. How much of that moves pursuant to published
3 divisions, I can't tell you, but it would be most of
4 it.

5 Q The rates to charge a shipper on a single line
6 movement appear either in the carrier's tariffs or are
7 established by the carrier privately; is that correct,
8 if they are not regulated tariff rates?

9 A Yes.

10 Q The joint line rates that are published, the
11 joint line rates again may appear in tariffs or may not
12 appear in tariffs, depending on whether it is exempt
13 traffic, contract traffic or, on the other hand, traffic
14 subject to tariff?

15 A Yes.

16 Q Does it occur in the case of joint line
17 traffic that between two points, there may be one joint
18 line movement in which Carrier A has the longer part of
19 the haul and Carrier B the shorter part, and another,
20 still involving the same two carriers, in which B has
21 the longer haul and A has the shorter haul?

22 A Yes.

23 Q Under these division sheets that we talked
24 about, is it generally true, just in general, that the
25 carrier getting a longer haul gets more of the division

1 of the rate paid by the shipper?

2 A Generally.

3 Q What happens in the joint line example we're
4 talking about if two different -- if there are two
5 different joint line rates, one published by A and B,
6 and one by B and A between two points?

7 A I'm sorry, I don't understand.

8 Q That's perhaps not clear enough. Let's try to
9 pick two points between which two railroads carry --
10 let's say Los Angeles and San Francisco. Are there two
11 railroads today serving between Los Angeles and
12 San Francisco?

13 A No. Unless you want to count our barge in
14 San Francisco.

15 Q Well, give me two points, if you would, where
16 some traffic moves where there are two railroads
17 between.

18 A Where there are two single line railroads,
19 sir?

20 Q Yes.

21 A Wichita and Houston.

22 Q Between Wichita and Houston, there are two
23 different single line railroads.

24 A Yours and mine.

25 Q Between those two points, may there be joint

1 line rates published?

2 A There could be.

3 Q What happens if the two joint line rates are
4 different, or can that happen?

5 A Yes, it could happen.

6 Q And if those two joint line rates are
7 different, what happens to the traffic?

8 A I don't know. It's going to move, I suppose
9 in your example, but it may not move at the lowest
10 rate. There's a lot of evidence to that effect around.
11 It would depend on all sorts of things besides cost is
12 what I am suggesting to you.

13 Q We'll get back to that, but I thank you for
14 clarifying the record on this.

15 Now, would you clear up one point that I was a
16 little confused about yesterday? In 1983, you became
17 Vice President, Traffic, of Santa Fe.

18 A That's right.

19 Q Between 1979 and 1983, what were your duties,
20 sir?

21 A Started out in 1979 as General Attorney,
22 California, for the Athison, Topeka & Santa Fe Railway
23 Company, with the general responsibility for its legal
24 affairs in California.

25 In August of '79, I became Assistant Vice

1 President, Santa Fe Industries, responsible for
2 coordination of the staff functions of the holding
3 company level.

4 In 1980, I assumed responsibility for
5 coordinating the operating subsidiaries, other than the
6 railroad, at Santa Fe Industries.

7 January 1, 1981, I was appointed Vice
8 President of that company.

9 Q And your duties in 1981 involved what field
10 when you became Vice President?

11 A Again, worked basically as Mr. Schmidt's
12 assistant, coordinating the reporting responsibilities
13 of the operating subsidiaries exclusive of the
14 railroad.

15 Q At what date did you assume any traffic policy
16 and activity functions?

17 A My appointment was effective January 1, 1983,
18 but I stayed at the holding company about a month and a
19 half after that, and wrapping up some things, and
20 essentially went to work there in the middle of February
21 1983.

22 Q Mid-February 1983 is the first date that you
23 assumed policy responsibility for traffic marketing
24 policy and activity?

25 A In conjunction with the gentleman who was

1 still there at that time, Mr. F. J. Wright, who had been
2 Vice President, Traffic and was named Senior Vice
3 President, Traffic on January 1, 1983.

4 Q And when did you become Chief Vice President
5 for Traffic and Marketing Policy and Activity?

6 A February 1st of this year.

7 Q In the course of your work at Santa Fe, did
8 you become familiar at any time with the position the
9 Santa Fe took in various merger or acquisition cases
10 pending before this Commission?

11 A Certainly, in a general sense.

12 Q Do you know, for example, what the Santa Fe
13 position was in the case that involved the Southern
14 Pacific's acquisition of the Tucumcari line?

15 A Yes, I know that we opposed it.

16 Q Do you know why you opposed it?

17 A Not in any detail.

18 Q Are you familiar with the Santa Fe position in
19 the Union Pacific, Western Pacific, Missouri Pacific
20 consolidation?

21 A Yes, again generally.

22 Q And what position was it?

23 A We opposed it.

24 Q Do you know in detail the reasons you opposed
25 it?

1 A From a business standpoint, I know in general
2 what the reasons were. I don't know how it was worked
3 into a legal theory.

4 Q What were the business reasons for opposing
5 it?

6 A We felt that that merger would engulf us, make
7 it impossible for us to continue to compete effectively
8 in the West.

9 Q Has that proven to be so? Is the Santa Fe
10 unable to compete effectively in the West today?

11 A Well, we talked yesterday about the traffic
12 diversions, and my answer to you would be that in the
13 long run, we very definitely are going to have
14 difficulty continuing to compete.

15 The noose is being tightened around our neck
16 each day in the marketplace.

17 Q I see. You are making a distinction about the
18 long run and the short run.

19 In the short run, are you unable to compete
20 effectively?

21 A Sometimes.

22 Q Where?

23 A We're seeing, with the Western Pacific now
24 having been fixed up, a much more definite presence of
25 Union Pacific in Northern California. And we're having

1 increasing difficulty holding our markets there.

2 Q Would you be kind enough to tell us, please,
3 between what points the traffic is flowing that you're
4 having difficulty in competing?

5 A Transcontinental traffic from the Bay Area to
6 the east and vice versa. And there are other areas.

7 Q That's one area, however. Transcontinental
8 traffic from the Bay Area to the east. And on that
9 traffic, there is Union Pacific service today?

10 A Where there had not been before; that's
11 right.

12 Q Describe the flow of that traffic or an
13 important piece of that traffic, if you would. Where
14 does it go?

15 A All right. You know, one of the real beauties
16 of the merger from the standpoint of the Union Pacific
17 is that they can take traffic that they never had any
18 substantial participation in prior to that, except on an
19 interline basis.

20 Let's take eastbound for a moment and talk
21 about originating in the Bay Area. They can handle that
22 either themselves directly, now that they have the
23 Missouri Pacific also from the Bay Area, single line to
24 St. Louis.

25 They can also handle it single line to Chicago

1 on the Missouri Pacific, and they worked out, I think, a
2 very nice arrangement with the Northwestern which
3 enables them also to use Fremont as an interchange point
4 -- Fremont, Nebraska -- I'm sorry. And you can go
5 through Chicago that way.

6 So they have flexibility on the eastern end,
7 and they have a single end service that they never had
8 before, and that certainly has cut into our markets.

9 Q Now, from the point of view of the shippers in
10 these markets, transcontinental eastbound from the Bay
11 Area, are the shippers receiving good service from the
12 Union Pacific?

13 A As far as I know.

14 Q Is it your position in this case that the
15 shippers also need service by the Santa Fe for the SESP
16 from the Bay Area to these eastern points -- St. Louis,
17 Chicago -- via Fremont, Nebraska?

18 A I'm sorry. I thought I had the question, and
19 then I heard some more of it. Is what you're asking me,
20 do we want to operate over the Union Pacific's tracks in
21 this proceeding?

22 Q No, sir.

23 Is it your position in this case that there is
24 a need for service, in addition to the Union Pacific
25 service, from the Bay Area to St. Louis and to Chicago?

1 A Well, there is such service today, and I think
2 that it's my position that the service we provide today,
3 if it's going to be competitive in the long run, we're
4 going to have available to us, as the Union Pacific has,
5 the option of gateways and particularly the single line
6 ability to get to St. Louis.

7 Q Do shippers need your service in addition to
8 the Union Pacific service from the Bay Area to St.
9 Louis?

10 A Our position in the merger case is that they
11 did not need the Union Pacific at all. We have been
12 there forever. I think they need it; yes.

13 Q Do you think they need your service in
14 addition to the Union Pacific's service?

15 A I don't think they need the Union Pacific's.

16 Q Okay. Let us assume that the Union Pacific's
17 service exists. Is that a correct assumption, that it
18 exists?

19 A Because of the merger of the Union Pacific, it
20 is now able to provide that service; yes.

21 Q Yes, it exists is your answer.

22 A Yes.

23 Q All right. The Union Pacific's service
24 exists.

25 Is your service from the Bay Area to St. Louis

1 needed, in addition to the Union Pacific's service?

2 A It's needed from our point of view. I can't
3 answer on the part of the shippers.

4 Q You don't know whether there is any shipper
5 need for an additional service to the Union Pacific
6 service?

7 A Some customers certainly route Santa Fe where
8 we go. For example, from the Bay Area to Chicago. I
9 would assume they think, whether they need it or not,
10 they use it.

11 Q At other points now served by the Union
12 Pacific as it exists today, whether as Union Pacific
13 service, other than Bay Area, St. Louis, Bay Area to
14 Chicago, and such service as is provided over Fremont,
15 Nebraska, is there any need for additional service?

16 A You asked me the same question with respect to
17 more general --

18 Q Yes.

19 A Again, you're asking me with respect to need
20 of the shippers?

21 Q Well, let's talk about need generally, and
22 then I'll be glad to discuss with you, if you wish to,
23 the subdivisions of different needs.

24 Can you see any need for service in addition
25 to the Union Pacific service?

1 A Well, we feel the necessity to try to stay in
2 the markets where we already are, even though our
3 position in them has become less tenable by reason of
4 the Union Pacific's having jumped into the boat, if you
5 will.

6 Q You see a need for maintaining your presence
7 in these markets. That is, is that a need you feel for
8 the financial benefit of the Santa Fe?

9 A That's right.

10 Q It's for the benefit of the Santa Fe?

11 A Yes.

12 Q That's because you will get revenue and do
13 your business in those markets.

14 A Freight transportation is what we do for a
15 living.

16 Q Right.

17 Now, as to needs of shippers and the public
18 for service, do you see any shipper need in the public
19 for service between these points that are served by the
20 UP?

21 A Shippers like to have all the options that
22 they can in a transportation sense. So I would have to
23 say "need" is the word that is hanging me up. They like
24 options; there's no question of that.

25 Q Do they need options? Is there not a

1 difference between "like" and "need"?

2 MR. WILSON: Objection, Your Honor. I think
3 we've gone too far in this. The witness has explained
4 that it depends on each shipper; the shippers like
5 options. And that's the answer.

6 MR. KHARASCH: The witness did not say
7 anything about how it depends on each shipper. He said
8 that the shippers like options. I am pressing my
9 question.

10 JUDGE HOPKINS: I'll allow it. Go ahead. I
11 don't see why he can't answer the question anyway.

12 BY MR. KHARASCH: (Resuming)

13 Q Do shippers need the option of your service?

14 A It's going to vary from case to case, I
15 suppose. My feeling is that, for the most part, they
16 wouldn't go out of business if they didn't have us.

17 Q Now, we've talked about the UP. Let's talk
18 about the BN system. Are there movements between points
19 served by the BN where the Santa Fe also provides
20 service between the same pair of points?

21 A Yes.

22 Q Can you give us an important example of
23 traffic moving between two points where the Santa Fe and
24 the BN are competitive?

25 A Chicago and Kansas City.

1 Q Was the Chicago-Kansas City traffic of the
2 Santa Fe affected by the BN-Frisco merger?

3 A Not to any appreciable extent, I wouldn't
4 think.

5 Q Can you give me an example of BN traffic
6 moving between points where you compete, that was
7 affected by the BN-Frisco merger?

8 A Let me think about it a minute.

9 (Pause.)

10 I'm trying to focus on some point in the
11 Frisco system. I would think possibly traffic coming
12 out of the Southeast and going to the West Coast might
13 be an example.

14 Q And you are competitive for that traffic?

15 A We, together with the L&A, have a route that
16 we attempt to work. We also have a route with the
17 Burlington which they send some business over.

18 Q Do they control the business?

19 A The shippers control the business.

20 Q With respect to this traffic that you've just
21 mentioned of the BN, do you see a need, either of the
22 Santa Fe or of shippers, for service in addition to BN
23 service?

24 A I'd answer the question the same as I did with
25 respect to those on the Union Pacific.

1 Q We can summarize by that, saying you see a
2 need for your company, for your company's health and
3 business, and shippers like --

4 A Like options, but probably wouldn't go away if
5 we did.

6 Q They would not go out of business if you went
7 out of business?

8 A That's right.

9 Q Why do shippers like options of carriers
10 between points?

11 A If a shipper has a dozen options, he would
12 like 13. And the reason is that it gives him the
13 opportunity to spread business around to work packages
14 with some in some territories, others in other
15 territories. It has to do with finding the optimum mix
16 from that customer's point of view of what service,
17 price, equipment, or liability -- kind of the situation
18 that's going to eventually cause him to make his
19 decision as to what he's going to buy.

20 Q And can I deduce correctly from what you just
21 said, that there are some business reasons for shippers
22 wanting to have rail transportation options between two
23 points?

24 A I didn't answer it with respect to rail
25 transportation options. You asked me about carriers,

1 and I understood that more broadly.

2 Q Let's talk about rail transportation options.
3 Do shippers like to have rail transportation options
4 between two points?

5 A I just couldn't generalize on that one. Some
6 do, some don't.

7 Q Do you know of any reasons why shippers in
8 specific instances want to have rail options between two
9 points?

10 A Yes.

11 Q Please tell us some of the specific reasons
12 that shippers want to have rail options between two
13 points.

14 A The basic reason is that they think it gives
15 them more flexibility with respect to reaching their
16 market.

17 Q Explain what you mean by flexibility.

18 A They can negotiate on price, they can
19 negotiate on equipment, they can negotiate on service
20 levels. And, similarly, they can do that with other
21 modes to determine what they're going to buy.

22 Q And shippers like to buy what shippers think
23 is best for them; is that right?

24 A That's been my experience.

25 Q And that would include the ability to make a

1 package deal or to get the right equipment or to get the
2 most reliable or frequent level of service?

3 A Yes. Each shipper is going to have a set of
4 constraints that are going to be specific to that
5 individual movement. A shipper is going to try to
6 maximize his utility as he sees it.

7 Q Do you think that shippers are wrong in trying
8 to maximize their utility as they see it?

9 A No. That's the basis of our system, I think.

10 Q Our American economic system?

11 A Yes.

12 Q If we could turn to your statement, sir, and
13 discuss some of the points you're making at pages 4 and
14 following, in which you are discussing the BN and the
15 UP, at the top of page 4, you discuss, in the past, one
16 of Santa Fe's most important marketing assets, if not
17 the most important," as being the fact that you could
18 offer shippers single service in the Chicago gateway to
19 the fast-growing economies of the Southwest and
20 California.

21 A Yes, sir.

22 Q Where did you obtain your information about
23 the past, Santa Fe's most important marketing asset?

24 A I'm a third generation Santa Fe employee, and
25 I grew up on the railroad. So I guess you'd have to say

1 it's in my experience.

2 Q In your experience as a son or a grandson, I
3 gather.

4 A Both.

5 Q Now, are you able today to offer shippers
6 single line service from Chicago gateway to the
7 fast-growing economies of Southwest and California?

8 A Can we today? Yes. Are we the only one?
9 No.

10 Q Now, at that time, in the past when you had
11 this important marketing asset, you were the only single
12 line service, and your rail competitors could offer only
13 interline service competition.

14 A That's right

15 Q And sometimes, I gather, their competition had
16 to be via circuitous railroads.

17 A That's right.

18 Q So the Santa Fe had the best service?

19 A Yes, sir.

20 Q And has your service deteriorated since this
21 past time?

22 A In that corridor?

23 Q Yes.

24 A No.

25 Q Meanwhile, has your competitors' service

1 improved in that corridor?

2 A Yes.

3 Q And the improvement of your competitors'
4 service means they get more traffic.

5 A That's what it would tend to mean over time.

6 Q Has it meant that?

7 A I think so.

8 Q Is it important for a railroad that is
9 attempting to compete with a railroad with a single line
10 service to have single line service itself in order to
11 be competitive?

12 A It's certainly helpful.

13 Q Well, is not the point you are making at the
14 top of page 4 that when you had the only single line
15 service, you got a lot of the traffic; and now that
16 there are other single line competitors, you get less?

17 A Yes.

18 Q And is that not generally true in
19 railroading?

20 A Yes. I say it's certainly helpful.

21 Q In the second paragraph on page 4, you're
22 talking about not serving southeastern gateways of
23 Memphis and New Orleans.

24 A Yes.

25 Q And apparently that seems to be a competitive

1 disadvantage with the other major western systems?

2 A It is.

3 Q The UP serves Memphis and New Orleans?

4 A Yes. The old Missouri Pacific, now part of
5 the Union Pacific.

6 Q And the BN serves Memphis and New Orleans?

7 A Well, the BN doesn't serve New Orleans.

8 Q It serves Memphis?

9 A Yes. It, of course, got that in the merger of
10 the Frisco.

11 Q And is it a competitive disadvantage not to be
12 able to offer single line rail service to and from these
13 gateways?

14 A Is it a competitive disadvantage? Yes, it
15 is.

16 Q Is it generally in the rail business a
17 competitive disadvantage not to be able to offer single
18 line rail service to and from gateways?

19 A Yes. One of the things we're talking about
20 here is the importance of having a single line haul.

21 Q And let's move onto the bottom paragraph on
22 page 4 of your statement.

23 A Okay.

24 Q Where you state that, "because of the BN
25 mergers and the UP mergers, Santa Fe's relative

1 competitive posture has been greatly altered."

2 A Yes.

3 Q Now, they have placed Santa Fe, you say, in an
4 increasingly more difficult competitive position.

5 A Yes. That's what I was talking about when we
6 were discussing it earlier.

7 Q And the more difficult competitive position is
8 the result of them having more gateways and them having
9 single line routes like you have?

10 A Only having them in greater abundance than I
11 have. The more places you go, the more markets you
12 serve. Generally speaking, the greater your ability to
13 provide single line service. Single line service is
14 absolutely a key advantage to doing business as a
15 railroad in this day and age.

16 Q If, as a result of this merger, the SFSP has
17 single line service it did not have before, and other
18 railroads serving the points where you acquire new
19 single line service have to continue with joint line
20 service, will they placed -- these other railroads be
21 placed in an increasingly more difficult competitive
22 position?

23 A They could be.

24 Q They would find it difficult to get traffic?

25 A It could very well happen. I understand that

1 we're anticipating something like \$221 million in
2 diversions that I testified to here later on. Those
3 rail diversions are anticipated to come from some
4 carriers.

5 So the premise is yes. Some carriers would
6 have a more difficult time.

7 Q Let's go over to page 5. You said something
8 about please explain in detail, if you would, why the
9 number of miles of railroad operated by the Burlington
10 Northern over the UP is a factor which concerns the
11 Santa Fe.

12 A Well, mileage, in and of itself, is not really
13 that important. It's just a convenient way of getting a
14 measure of the markets. And that's really all I was
15 intending to indicate there.

16 Relative size is kind of a barometer of how
17 many places can you go and what sort of flexibility do
18 you have.

19 Q You keep talking about flexibility.
20 Flexibility -- if you serve a lot of places, you want to
21 serve the origins and the destinations both?

22 A Sure.

23 Q And that's important in railroading, to serve
24 the origin and destination both?

25 A Single line service is very important.

1 Q Put the mere fact that the BN and the UP have
2 a lot of miles, in itself doesn't affect you if they're
3 not in markets that --

4 A That's right. For example, I didn't list
5 CSX's mileage in here which is, I think, somewhere
6 around 27,000. And the reason that I didn't is that
7 they are in a different part of the world.

8 Q Does the fact that the BN or the UP are rich,
9 in itself have any effect on you? Just that one fact?

10 A I don't know that any railroads are rich.

11 Q Veritable money machines?

12 A Did I say that?

13 Q One of your co-applicants did so.

14 A Oh. Well, I wouldn't characterize those
15 railroads as being veritable money machines.

16 Q You wouldn't?

17 A No.

18 Q Let's look at the factor of size of rail
19 equipment fleet. Is size of rail equipment fleet an
20 importance in affecting the Santa Fe? That is, that the
21 BN or the UP has a lot of rail equipment?

22 A It can be, sure.

23 Q How is that? Please explain.

24 A One of the things that -- and it has to come
25 together in order to form a transportation package -- is

1 cars and locomotives. To the extent that one carrier
2 has them and another doesn't, it's apt to influence a
3 rail movement.

4 Q Having sufficient cars to move the traffic
5 available is important; is that right? Is that what
6 you're saying?

7 A Yes, I think so. Having sufficient equipment
8 to be able to hold yourself out to provide a
9 transportation service, and know that you're going to be
10 able to do it.

11 Q Do you know whether, post-merger, the Santa Fe
12 and Southern Pacific are going to have more cars or less
13 cars than they have today?

14 A In the aggregate?

15 Q Let's take today's cars, freight cars of Santa
16 Fe and Southern Pacific, add them up. Do you know
17 whether, after merger, they're going to have more cars
18 or less cars?

19 A They're going to have -- A and B equals C.
20 You mean what are they going to do after that?

21 Q Yes. Do you know?

22 A I would think that we have to take a look and
23 assess where we're going. What we're saying here is
24 that by adding ours to theirs, we would have 131,975, if
25 we just added them together.

1 Now, you know, I would be happy to acknowledge
2 that I would anticipate that there would be a way to, by
3 combining the fleet and operating it more efficiently
4 and reducing empty miles and so on, the likelihood is
5 that we would be able to reduce the number of cars in
6 the fleet.

7 But I don't know that anybody has done a study
8 on it yet.

9 Q Would reducing the number of cars in the fleet
10 make you less competitive?

11 A It would make you more competitive because it
12 would cut your costs, assuming you're still able to hold
13 yourself out to provide the transportation service in
14 the marketplace.

15 Q Does the Santa Fe have today enough freight
16 cars and locomotives to carry its business?

17 A It's touch and go.

18 Q Do you know whether the Southern Pacific has
19 enough cars and locomotives to handle its business?

20 A I heard some testimony that they had a lot of
21 locomotives stored. I don't know what their car
22 situation is.

23 I have to say, with respect to cars, that cars
24 are commodity-specific. You may have all kinds of
25 flatcars, but if what you need is a covered hopper,

1 that's not going to do you much good. So there is a lot
2 of subsets when we talk about equipment.

3 Q Well, what equipment is it that the Santa Fe
4 doesn't have that makes it touch and go today, whether
5 you have enough to carry your business?

6 A Well, we have had some short-term tightness in
7 covered hoppers. We have been attempting to add to our
8 flatcar fleet. I'd say those would be two.

9 Automotive racks has been a short area for
10 us.

11 Q Is there seasonal demand for covered hopper
12 cars, variants in season?

13 A I'd say yes. There is certainly seasonal
14 demand in connection with the harvest. The other
15 demand, which is not exactly seasonal, but certainly
16 sporadic or cyclical or something, involves when, for
17 example, the Russians decide they want to buy wheat,
18 which is what we're going through right now.

19 Q And are there enough covered hopper cars in
20 your fleet at all times to meet all shippers' seasonal
21 demands?

22 A No.

23 Q Is this fact peculiar to the Santa Fe, or do
24 other railroads also meet peaks and valleys in demand
25 for their equipment?

1 A Yes. It's been one of the real problems with
2 transportation. You can't really say there is any sort
3 of an average day.

4 Q Have you heard shippers say that they like to
5 have competitive rail service because they can get
6 equipment from more than one railroad?
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1 A I don't know if I've ever heard it phrased
2 that way, but I can't quarrel with the notion that that
3 is probably an accurate statement.

4 Q That it is an advantage of the shipper to be
5 served by more than --

6 A It just falls into the category of being, you
7 know, one of the many options. Shippers like options.

8 Q Ms. Mahon has been kind enough to find Mr.
9 McNear's statement. The verified statement of Mr.
10 McNear in this case, already received in evidence, says
11 on Page 14, "Thus, BN came through the recession
12 relatively unscathed, and has emerged as a virtual money
13 machine."

14 Q You don't agree with that, or you do agree
15 with that?

16 A I think they are doing very well as a
17 railroad. I guess the characterization bothers me a
18 little bit. You don't make any easy money in
19 transportation.

20 Q Since we are looking at Mr. McNear's statement
21 here for a moment, let's see what your view is on his
22 statement that the UP system will be unrivaled as a
23 competitor. Do you agree with that?

24 MR. WILSON: Just a minute, counsel. Where is
25 that statement?

1 MR. KHARASCH: On Page 15.

2 THE WITNESS: They certainly will be unrivaled
3 as a rail competitor, and are already.

4 BY MR. KHARASCH: (Resuming)

5 Q Let's go back to your statement, and continue
6 examining the factors you are talking about. At the
7 bottom of Page 5 you say that "Santa Fe serves only one
8 of the principal mid-continent gateways (Chicago), the
9 others being St. Louis, Memphis, and New Orleans.
10 Burlington Northern serves three of the four, and Union
11 Pacific serves all four."

12 And you would get parity by service to all
13 four gateways as well if you merged with the Southern
14 Pacific?

15 A Yes.

16 Q Parity in what? In number of gateways? Is
17 that what you are pointing out?

18 A Yes.

19 Q Why is parity in number of gateways
20 important?

21 A With only Chicago, the only freight that we
22 can interline directly with the eastern systems is
23 freight moving over Chicago. That means it has to be
24 coming to or from the northeast, and really well up in
25 the northeast.

1 If it is freight that is going to or from
2 anything below, say, the Chic River Valley, it is not
3 going to move through Chicago, it is going to move
4 through St. Louis, Memphis, or New Orleans, and for us
5 to reach those three points, we would need to work with
6 an intermediate carrier.

7 Q What is a runthrough train, sir?

8 A As I understand it, it is an interline train
9 with probably a locomotive consist and a caboose that
10 remain on the train with the train intact through an
11 interchange point.

12 Q Has the Santa Fe, to your knowledge, made any
13 attempt in the past ten years to run runthrough trains
14 from gateways served by the Southern Pacific so that you
15 would have a runthrough train, Southern Pacific Santa
16 Fe, going west, or vice versa?

17 A Not to my knowledge.

18 Q Are runthrough trains considered efficient?

19 A Well, they provide the operators, I guess,
20 with the ability to save time. That is the principal
21 advantage.

22 Q They speed up the movement?

23 A That's right.

24 Q And does the fact that the train is all made
25 up and doesn't have to be reblocked, doesn't that save

1 time, too, and money, I should suppose?

2 A You hope so. Obviously, they have to be
3 blocked somewhere. What happens is, frequently the
4 place where the interchange is is not a convenient place
5 to work the train for physical reasons. We have a
6 runthrough train with Conrail, for example, the
7 interchange point being Streator, and neither of us has
8 a yard there to amount to anything, so you have to work
9 on putting a train together so they can go from their
10 yard to your yard without switching the train.

11 Q Do you have other runthrough trains today
12 besides those with Conrail?

13 A We have a runthrough operation with the KCS
14 over Dallas, and I want to say we had one with the
15 Burlington over Fort Worth, and we have one with the
16 Burlington over Avard.

17 Q I don't think the record got that last place.

18 A Avard, A-v-a-r-d, Oklahoma.

19 Q Let's look at your runthrough with the KCS.
20 The train is made up where? Do you know? If you could
21 give us the rough area.

22 A Going which way?

23 Q Let's start west.

24 A I guess the train originates in New Orleans.
25 I don't know if they work it at intermediate stations.

1 Q And then it goes from New Orleans to where?

2 A Dallas.

3 Q And at Dallas you take the train all made up
4 and carry it west?

5 A That's right.

6 Q How is that working?

7 A Well, I think from an operating point of view,
8 it is a success.

9 Q And is it getting patronage from shippers?

10 A Some.

11 Q Do you have any runthrough trains with the
12 Southern Pacific?

13 A I understood that you had asked that, and to
14 my knowledge the answer is no.

15 Q I am on Page 6 of your statement, Mr.
16 Fitzgerald. Now, you say here you are talking about
17 service to principal Gulf and west coast ports.

18 A Yes.

19 Q And you list the ports that you reach only.
20 Is it an advantage to a railroad to serve a lot of
21 ports?

22 A Yes.

23 Q What are the factors that make it an
24 advantage?

25 A Ocean carriers are responsible for what ports

1 they call at, and international shippers are responsible
2 for what ports they would choose to route traffic
3 through, and if you don't serve the port, you don't
4 participate in the traffic.

5 Q So they are important as traffic originators,
6 or destination points?

7 A Yes.

8 Q Are there some shippers that need choices of
9 ports?

10 A They have choices of ports.

11 Q Isn't it an advantage to a railroad in dealing
12 with shippers, some types of shippers, to be able to
13 offer them service to a number of ports?

14 A Yes.

15 Q Why is that?

16 A Because if the shipper, ocean carrier isn't
17 calling at places where you are able to reach, you are
18 not going to participate in the traffic.

19 Q To what ports do you think shippers need
20 additional service, rail service today?

21 A I don't think shippers need additional rail
22 service.

23 Q To any port?

24 A I am not aware of anybody trying to build any
25 railroad trackage into a port.

1 Q To what ports do shippers need additional
2 single line rail service?

3 A Ah.

4 MR. WILSON: Excuse me. You are still talking
5 about the word "need," and I think we have beat that
6 into the ground. I think it would be clearer for the
7 record if you refrain from using it in your question.

8 MR. KHARASCH: I shall not. Public need is
9 one of the issues in this case.

10 JUDGE HOPKINS: Go right ahead. I am allowing
11 him to use the term.

12 THE WITNESS: I don't mind. To what
13 additional ports --

14 BY MR. KHARASCH: (Resuming)

15 Q Do shippers today need additional single line
16 rail service?

17 A Oh, I think they need it to San Diego. They
18 need it to New Orleans.

19 Q San Diego. New Orleans.

20 A I guess they could use additional single line
21 service anywhere.

22 Q Was the principle that to any port shippers
23 could use additional single line rail service?

24 A Yes, I think it would increase transportation
25 efficiency.

1 Q If shippers got more single line service to
2 ports?

3 A Sure.

4 Q Shippers in Oklahoma would be benefitted by
5 having more single line service to ports where they
6 could --

7 A Generally, sure.

8 Q All right. Now, can we say it is in the
9 public interest that shippers have additional single
10 line service to ports?

11 A I think so.

12 Q Is it in the public interest that a shipper at
13 Enid, Oklahoma, should have additional single line
14 service to Gulf coast ports?

15 A A shipper at Enid, Oklahoma, I am sure would
16 feel quite good about the idea that he could reach
17 Corpus Christi, for example, as a result of this merger,
18 yes.

19 Q That would be good?

20 A I think it would give us the opportunity to
21 maybe get involved in some traffic we are not handling.

22 Q How about -- suppose as a result of this
23 merger and such conditions that the Commission might put
24 on it, shippers received the opportunity for other
25 railroads to give single line service to ports. Would

1 that be something that shippers would want in the public
2 interest?

3 A I don't think that would be in the public
4 interest, and I don't know whether shippers would want
5 it. I think there is a pretty good bit of disagreement
6 about that.

7 Q So if you want to give additional single line
8 service, that is something that shippers want, and it is
9 in the public interest. Would you say that?

10 A I did.

11 Q But if someone else offers single line
12 service, that is something shippers don't want, and it
13 is not in the public interest?

14 A I think it is not in the public interest, and
15 I think there is a good bit of disagreement about what
16 the shippers want.

17 Q So I am just trying to establish the principle
18 with you. The dividing line is the single line service
19 that the Santa Fe wants to obtain in this hearing is
20 good for shippers and in the public interest, but that
21 that the protestants in this case is proposing is not
22 needed and not in the public interest.

23 Is that what you are saying?

24 A Well, what I am saying is that your Enid,
25 Oklahoma, shipper will be able to reach additional ports

1 as a result of the merger. That is, I think, in the
2 best interest of this country, to give shippers the kind
3 of flexibility where they can go to a variety of ports
4 which they presently can't reach with single line
5 service.

6 Now, the next question you asked me is, if it
7 is good to have single line service one time to these
8 ports, should we have two or three or more railroads
9 reaching the same points, and I am saying that is not
10 necessary, that is not in the public interest, because
11 what is going to happen is, you are going to threaten
12 the viability of the carriers that are going to
13 survive.

14 Q Let's look at a shipper on the OKT, since we
15 are in Oklahoma. Do you know what the OKT is?

16 A Isn't that a part of the Missouri-Kansas-Texas
17 which was financed by shippers and states and the
18 federal government?

19 Q It is a part of the Missouri-Kansas-Texas
20 system.

21 A Ch.

22 Q Now, do you know what it is?

23 Okay, would you like to look at a map?

24 A Well, I know where it is.

25 Q Then you have identified it for yourself.

1 Good.

2 Are there shippers on that line that are
3 served only by the OKT but no other rail serves it?

4 A I imagine.

5 Q Let's look at those shippers. Does your
6 concept of the public interest and the public need
7 extend to saying that those shippers would benefit and
8 have a need for single line service to ports?

9 A I don't know how representative they would be
10 of the public. As you know --

11 Q I asked you a question about those shippers.

12 MR. WILSON: Excuse me, counsel. Let him
13 finish.

14 THE WITNESS: That railroad went broke once
15 already, counsel. The question is, are we going to have
16 a viable railroad network in this country, not are we
17 going to inconvenience a shipper or two who already are
18 at a substantial disadvantage because they are on that
19 line?

20 BY MR. KHARASCH: (Resuming)

21 Q Do you think you can answer my question, Mr.
22 Witness? As to the shippers on the OKT line who are
23 served by the OKT alone, does your concept of the public
24 need and the public interest extend to the fact that
25 those people would benefit from having single line

1 service to port?

2 A I think what is in the public need with
3 respect to them has long since been satisfied by the
4 bailout of that railroad in the first place.

5 Q So those shippers that are served exclusively
6 by the OKT, they don't need additional -- they don't
7 need single line service to ports.

8 MR. WILSON: Objection. That has been asked
9 and answered.

10 JUDGE HOPKINS: No, it hasn't. Overruled.

11 THE WITNESS: To the extent that the public
12 need means that operations that don't have an economic
13 vitality in and of themselves are going to become
14 socialized railroads and I would have to say that what
15 we are going to wind up with is a socialized rail
16 system. I say it is not in the public need to protect
17 those particular shippers.

18 BY MR. KHARASCH: (Resuming)

19 Q And that would be true in your view of
20 everybody on the OKT because it got a federal loan?

21 A There is ample competition in that area, and
22 as I told you, if we went out of business, there
23 wouldn't be too many shippers that wouldn't also go out
24 of business. I think the same thing is true of the
25 OKT.

1 Q So your advice as far as public need of the
2 OKT shippers is that the OKT doesn't need single line
3 service to Gulf ports because they could go out of
4 business and it wouldn't hurt anybody, it would lead to
5 socialism?

6 A Well, that is your characterization now. I
7 have explained what I think.

8 Q Do you think, sir, that the financial problem,
9 problems of a railroad justify the Commission taking any
10 action to be sure that the railroad continues?

11 A Any action? Sure.

12 Q And do you think that if we have a railroad
13 that is balanced, not making much money, and not losing
14 much money --

15 A That is all we have in this country.

16 Q They are all like that, aren't they?

17 A I think so, with the possible exception of --

18 Q Except those money machines.

19 A Yes.

20 Q Is one of the benefits that you see the Santa
21 Fe Southern Pacific getting out of this merger the
22 benefit of obtaining an increased density of traffic on
23 its line?

24 A Some lines, yes.

25 Q Isn't increased density of traffic one of the

1 important benefits to you here?

2 A Sure.

3 Q Does the diversion of \$200 million of rail
4 traffic as a result of the merger seem to you to be a
5 diversion that would create an increased density of
6 traffic?

7 A Yes.

8 Q And please explain for us why density of
9 traffic is important on a line.

10 A I guess there are a couple of reasons. Number
11 One, you can run your trains at an optimal length and
12 tonnage, not run uneconomic trains. Number Two, you can
13 run them more frequently, which increases the
14 reliability of your service, which tends to then have a
15 cumulative effect on your ability to attract business.

16 But I guess probably most simply the reason is
17 that you have this ribbon of rail going between two
18 points, and it has in most cases a lot of unused
19 capacity. And so all you need to worry about is
20 covering your variable costs in that kind of a
21 situation. The fixed cost is already cut there.

22 Q So it has unit cost-lowering advantages?
23 Higher density should lower your unit cost?

24 A It should.

25 Q Does lower density on a line mean that unit

1 costs tend to increase?

2 A I would say so.

3 Q To the extent that there is a transfer of
4 traffic as a result of the merger you propose, the lines
5 from whom the traffic is diverted will tend therefore to
6 experience higher unit costs. Is that correct?

7 A Well, again, going back to our conversation
8 yesterday, except to the extent that they are able to
9 achieve other economies, yes.

10 Q But because of the density factor, at least,
11 they will experience higher unit costs because they have
12 shorter trains, not as frequent, and less traffic to
13 spread the cost of the rail line?

14 A Yes, in the absence of, you know, doing
15 something to try to control that situation, that is
16 true.

17 Q In your functions and in the functions of the
18 part of the division you head that have to do with rail
19 pricing, is cost important in pricing rail services?

20 A Yes.

21 Q And in pricing the rail service that you will
22 offer, do you consider the cost on a particular line
23 segment, or do you use overall system costs?

24 A It may be either.

25 Q In the instances where you look at a

1 particular line segment's cost in your pricing, are you
2 going to look at the density of traffic? Do you make
3 that kind of calculation?

4 A It would be rare for us to do that.
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1 But if for some competitive reason we feel
2 that the result may be closer to the truth if we do it
3 then we will do it.

4 Q After you have considered cost in your
5 pricing, do you then go on to consider what rate you can
6 charge and still get the traffic?

7 A Sure.

8 Q Is your attempt to get as much as you can get
9 and still get the traffic?

10 A Once we have gotten past the point where we
11 feel we are covering our variable costs.

12 Q Yes?

13 A I'd say yes.

14 Q We are still on Page 6. We have a little bit
15 to finish on this segment of your statement.

16 On Page 6, you were talking about the Union
17 Pacific's vast scope of service territory, and they seem
18 to serve 72 percent of the total population of the
19 western United States, you say.

20 A Yes.

21 Q Whereas Santa Fe serves only 40 million
22 people, or 59 percent. Now, again, what is the
23 significance in terms of competition between railroads
24 of serving a lot of the population of a region?

25 A Well, this is just a little bit of demographic

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1 background to broaden out the reader, I guess. My
2 intention was only to suggest to you that it's people
3 that produce and consume, and we are in the business of
4 moving goods that are produced and consumed, and there
5 is a correlation between, you know, the number of people
6 that you reach and the market a railroad might serve or
7 want to serve.

8 Q So it is good for a railroad to get new people
9 to reach?

10 A Yes.

11 Q And is it good for the people it serves if it
12 can extend its service territory?

13 A I don't know. I can't answer that generally.

14 Q Aren't you saying in this case that it is good
15 for the people the Santa Fe serves if you can get a
16 bigger system and reach more people?

17 A I am saying it is good for the Santa Fe, and
18 we will try to make it good for the people.

19 Q Is it not good for other railroads to reach
20 more people and give their shippers more access to more
21 population?

22 A I guess you would have to look at the
23 particular system.

24 Q We haven't mentioned Mexico.

25 Is this a convenient time to break, Your

1 Honcr?

2 JUDGE HOPKINS: I would like to break in about
3 five minutes.

4 BY MR. KHAFASCH: (Resuming)

5 Q Let's look at Mexico. Are you familiar with
6 the purchasing of grain in Mexicc?

7 A Generally.

8 Q Would you agree with the statement that the
9 grain is purchased by a Mexican government agency called
10 Conasupo, C-o-n-a-s-u-p-o?

11 A Yes.

12 Q And Conasupo designates for grain being
13 purchased by rail that is to arrive by rail what Mexican
14 border point the grain will be delivered at?

15 A Yes.

16 Q Does Conasupo on occasion designate purchase
17 of grain at gateways now served by the Santa Fe?

18 A Yes.

19 Q What gateways do you have?

20 A El Paso and Presidio.

21 Q You have some Mexican gateways on the west?

22 A They are both on the west.

23 Q West coast?

24 A No.

25 Q Is Presidio a point through which a

1 substantial portion of grain moves?

2 A It has from time to time. My understanding is
3 that Conasupo is intending to cut back its importance.

4 Q If you are familiar, then what are the points
5 that Conasupo considers it important to move the grain
6 through to Mexico?

7 A I don't know. Laredo is certainly one. El
8 Paso is another. I'm not sure about the relative
9 importance of the others.

10 Q Are there Mexican border points now served by
11 the Southern Pacific?

12 A Yes.

13 Q Does the Southern Pacific have more Mexican
14 crossing points than the Santa Fe at the moment?

15 A Yes.

16 Q If the Santa Fe Southern Pacific merger is
17 approved, what railroad will have the most Mexican
18 border crossings?

19 A The merged carrier. It would not, of course,
20 have Laredo.

21 Q Do you know something about the grain traffic
22 through Laredo, sir?

23 A Why don't you ask me?

24 Q I wouldn't ask you unless you said you were
25 familiar with the situation.

1 A I am not familiar terribly, but I would be
2 happy to try to help if I can.

3 Q Let's talk about rail grain moving to Laredo,
4 from Laredo to Corpus Christi. There is a connection by
5 the Texas Mexican. Is that correct?

6 A Right.

7 Q And the Southern Pacific serves Corpus
8 Christi, does it not?

9 A Yes, and the Missouri Pacific Union Pacific.
10 Of course, they go directly to Laredo.

11 Q Now, the Southern Pacific today can move grain
12 into Corpus Christi, interchange with the Texas Mexican,
13 and move it on to Laredo that way.

14 A It certainly can. I don't know how much they
15 do, though.

16 Q You know, they can do it, they do some, but
17 you don't know the figures.

18 A Yes, I just don't. You know, they are in
19 trust. And I have made a concerted effort not to know
20 anything that wouldn't come to my knowledge through
21 customers about what movements there are on the Southern
22 Pacific.

23 Q You didn't mean that you made an effort for
24 this hearing not to know anything?

25 A No.

1 Q Is grain traffic the sort of traffic where you
2 think single line service is important in a shipper's
3 selection?

4 A Yes, it is.

5 Q Do you know -- I guess you don't, then --
6 where the grain being carried via the Southern Pacific
7 to the Texas Mexican and thence to Laredo is
8 originated?

9 A No, I don't know. I don't even know if there
10 is any.

11 Q Suppose there is a railroad that serves the
12 originating points for that grain that is now moving to
13 Laredo via the SP and the TexMex. Would the shippers on
14 that railroad have a need for and would it be of public
15 benefit if they got single line service to the Gulf?

16 A Over the TexMex? We are not asking for any
17 trackage rights over the TexMex.

18 Q No, you are not.

19 A You are? I am lost. I am sorry.

20 Q All right. Let's consider this. I hear you
21 saying in your statement that it is good that you should
22 be able to get to a lot of Gulf ports. One of these
23 Gulf ports is Corpus Christi, of course.

24 A Okay. I thought we were still dealing with
25 Mexico. That is my problem.

1 JUDGE HOPKINS: He is going to get to it.

2 BY MR. KHARASCH: (Resuming)

3 Q One of these ports is Corpus Christi.

4 A Yes, sir.

5 Q And Corpus Christi is important as a
6 connection with the TexMex which allows one to get to
7 Laredo, which I think you agreed that the extent of your
8 knowledge is that it is a pretty important grain point.

9 A Laredo is, yes.

10 Q Now, let's take a shipper in the grain
11 producing area who is shipping his grain on an origin
12 railroad, and then it is going down to the Southern
13 Pacific to be carried to the TexMex and thence across to
14 Laredo.

15 A Okay.

16 Q For that shipper would it be an advantage and
17 is it in the public interest that that shipper should
18 have improved service for his grain to Corpus Christi
19 and thence to Laredo?

20 A It is always to the shipper's advantage to
21 have improved service.

22 Q And is it in the public interest that he have
23 such service?

24 A Oh, I think so.

25 MR. KHARASCH: I am happy with that answer,

1 and --

2 JUDGE HOPKINS: We will recess for 15
3 minutes.

4 (Whereupon, a brief recess was taken.)

5 JUDGE HOPKINS: We will go back on the
6 recrd.

7 BY MR. KHAFASCH: (Resuming)

8 Q Mr. Fitzgerald, a little before the break we
9 were discussing the CKT, and we had your views on the
10 OKT situation and whether shippers on the OKT needed to
11 obtain single line service to ports and gateways. Would
12 you say that the Southern Pacific today is in the same
13 situation as the OKT?

14 A In what respect?

15 Q Would you say it is in the same situation in
16 that it is not financially strong?

17 A I think its rail operations are not
18 financially strong particularly, and I think that's one
19 of the reasons it is here before the Commission.

20 Q Do you see for the Southern Pacific shippers a
21 need for them to obtain direct service to ports and
22 gateways and border crossings?

23 A Well, they have much of that already. It is
24 important that the railroad maintain a vitality so they
25 can continue to have it.

1 Q And if they don't obtain the vitality,
2 Southern Pacific shippers will lose rail service?

3 A Lose effective rail service as the case may
4 be.

5 Q Are there point pairs, origins and
6 destinations, for traffic flows where the Southern
7 Pacific serves today where there are other competing
8 railroads?

9 A Sure.

10 Q Do you see a need for Southern Pacific
11 shippers between such point pairs to continue to have
12 rail competition via the Southern Pacific?

13 A Shippers again like to have the option of as
14 many transportation alternatives as they can get. Would
15 any of them go out of business if the Southern Pacific
16 were to fail? I doubt it.

17 Q And in terms of a need less than the need to
18 survive and going out of business, do they need the
19 Southern Pacific service today, those shippers?

20 A Some use it, which suggests to me that as a
21 shipper considers what is in his best interest as to a
22 particular movement, Southern Pacific wins. So to that
23 extent, to the extent that use and need can somehow or
24 other be put together, which I am not sure that they
25 can, I would say the answer is really more in the

1 shipper's mind

2 Q Have you examined the Southern Pacific's
3 traffic flows?

4 A No. My understanding is that that would
5 violate the trust. I have had access to no confidential
6 material whatsoever with respect to the SP.

7 Q Let's look at the situation between Kansas
8 City and Houston. Are you familiar with the Southern
9 Pacific's rail network? I see you are looking at a
10 map.

11 A I am familiar with where they go and generally
12 what markets they serve.

13 Q Does the Southern Pacific have a
14 non-circuitous connection between Kansas City and
15 Houston today?

16 A It looks to be reasonably straight. I assume
17 you mean the MKT Dennison Southern Pacific route.

18 Q No, let's look at just the Southern Pacific
19 itself, sir. Does the Southern Pacific by its lines or
20 its subsidiary lines today have a non-circuitous
21 connection?

22 A A non-circuitous connection or a single line
23 route?

24 Q A non-circuitous route between Kansas City and
25 Houston.

1 A No, it doesn't.

2 Q It is circuitous in that the route must go via
3 St. Louis or via El Paso if you want to go on the
4 Southern Pacific all the way, Kansas City to Houston.

5 A That's right.

6 Q Now, you did mention that today the Southern
7 Pacific has a connection at Dennison with the MKT.

8 A It appears to.

9 Q And would you consider that route from Kansas
10 City MKT to Dennison, that's Southern Pacific to
11 Houston, is that a circuitous or non-circuitous route?

12 A It appears to be reasonably non-circuitous, as
13 we have been using the term.

14 Q Do you know any particulars of the mileages?

15 A No.

16 Q Do you know today whether any traffic moves
17 from the Southern Pacific lines all the way from Kansas
18 City to Houston?

19 A Through St. Louis or El Paso?

20 Q Yes.

21 A No, I don't know. I doubt it.

22 Q You doubt it. Please assume with me today for
23 the purpose of the next couple of questions that there
24 is traffic moving today on the Southern Pacific lines
25 all the way from Kansas City to Houston. From your

1 knowledge and experience, can you tell us why such
2 traffic would move this circuitous route?

3 A We are dealing strictly with a hypothetical,
4 because as you understand that would surprise me. Why
5 would it move this single line route? I assume that is
6 the reason that the shipper wanted it to move, and his
7 utility was served by whatever package Southern Pacific
8 was offering to him in this particular case. It strains
9 credulity. But --

10 Q Let us suppose that the shipper is so situated
11 that at destination it -- the cargo must move to a
12 station exclusively served by the Southern Pacific.

13 A Okay.

14 Q Could that be a reason that the traffic would
15 move on the assumption that it moved from Kansas City
16 circuitously to Houston?

17 A It could be a reason.

18 Q Suppose the Southern Pacific said to that
19 shipper, I will not make a route except if I carry it
20 all the way. Would that be a reason that the traffic
21 would move by rail circuitously?

22 A As you premise that hypothetical, the answer
23 is yes. Assuming, I guess, that it is going to move at
24 all, and secondly, that it is going to move by rail.

25 Q Do you agree with this statement? "Today

1 ATSF, SPT, and other western railroads attempt to
2 maximize their own long haul wherever possible."

3 MR. WILSON: For the record, Your Honor, I
4 understand a discussion of this paragraph came up during
5 the cross examination of Mr. McNear, and counsel advised
6 that Mr. Edwards was going to be correcting this
7 sentence, or at least part of this paragraph when he
8 appears as a witness.

9 Counsel can, of course, still ask if he agrees
10 with the statement, but it may or may not be part of Mr.
11 Edwards' testimony.

12 JUDGE HOPKINS: Thank you.

13 Go ahead, Mr. Kharasch.

14 BY MR. KHARASCH: (Resuming)

15 Q "Today ATSF, SPT, and other western railroads
16 attempt to maximize their own long haul wherever
17 possible."

18 A Yes, but wherever possible I think requires
19 some explanation, at least as far as the Santa Fe is
20 concerned. I already indicated that I don't know what
21 the Southern Pacific might be doing if they are moving
22 traffic that way.

23 As to the Santa Fe, we attempted to maximize
24 our long haul and solicit that way where that situation
25 is going to be in the shipper's best interest and afford

1 us our best revenue situation.

2 Let me change revenue there to profit
3 situation.

4 Q Let's say that the Santa Fe can today get some
5 traffic which would move let's say 1,200 miles if it
6 moved via Santa Fe, but it might move 1,000 miles if he
7 used connections and gave a joint line service.

8 A A thousand? On which, sir?

9 Q Joint line service, Santa Fe and some other
10 railroad would be possible. Santa Fe all the way would
11 be 1,200 miles.

12 A All right.

13 Q Now, I thought I just heard you say that you
14 would look at the revenue and you would also look at the
15 cost. Is that right?

16 MF. WILSON: I object, Your Honor. He said he
17 would look at the profit and look at the cost.

18 JUDGE HOPKINS: As long as you can straighten
19 it out. Go ahead.

20 BY MR. KHARASCH: (Resuming)

21 Q In this situation, you look first at the
22 revenue from the movement. Start with that.

23 A Sure.

24 Q And from the revenue one would have to deduct
25 the cost.

1 A That's right.

2 Q And at the end of that, you would end up with
3 the profit or the contribution.

4 A Yes, you would certainly look at the
5 contribution both ways. You'd look at what service you
6 can provide on both routes. You would look at the whole
7 question we went through this morning about open or
8 closed, whose line is it on, and so on, which takes into
9 account not only cost but service.

10 You would look at equipment. You would look
11 at any number of things. Obviously, one of the things
12 you would look at is the mileage.

13 Q You would look at the mileage from the point
14 of view of cost, or what other point of view?

15 A Cost, service, whether you really have a
16 friendly connection at this 1,000 mile point or on a
17 1,000 mile route. What I am saying is that all things
18 being equal, the shorter the better. There is a
19 tradeoff in terms of efficiency between short and single
20 line service.

21 Q Now, aside from looking at that tradeoff,
22 let's look at money, and this contribution or profit.
23 Assuming the shipper would accept or is in a situation
24 where he will accept the longer haul, would your
25 decision be made on whether to do the longer haul on

1 your own route or the shorter haul joint line be based
2 on the profitability to you?

3 A It is going to be based on the shipper's
4 choice in the final analysis.

5 Q Suppose the shipper is at a point served
6 exclusively by the Santa Fe, and let's suppose also that
7 the shipper chooses rail service. At that point, would
8 you present to the shipper the option of joint line or
9 the option of moving on Santa Fe all the way?

10 A Probably both.

11 Q You would probably present both.

12 A Yes.

13 Q If you found that Santa Fe all the way was the
14 more profitable, would you present both alternatives?

15 A I think so. We have always been a carrier
16 that has advocated over routing. From time to time,
17 that may mean sub optimizing your profits on a given
18 move, but given the interdependent nature of the
19 railroad network, you can't always maximize profits with
20 respect to every bit of business you do.

21 What we are interested in is the part of the
22 question that you just assumed, which is that the fellow
23 is going to move rail. That is the most important.

24 Q Let's say we are over that point. He is going
25 to move over rail.

1 A But we are never over that, Mr. Kharasch. We
2 are never over that.

3 Q I see.

4 I think I will just distribute again, Your
5 Honor, a piece of paper that is already in the record
6 attached to the statement of Mr. Noser which is in
7 MKT-21, Volume 4, Part 2. I will distribute a two-page
8 exhibit which appears at MKT-21, Volume 4, Part 2, and
9 it is Attachment 2 to Mr. Noser's statement.

10 Are you looking at Attachment 2, sir, which
11 is, as I understand it, a title page of a tariff
12 issuance, and the page of a tariff?

13 A Yes.

14 Q Let's look at Page 2 of Attachment 2 to Mr.
15 Noser's statement. What is the Garden City Western
16 Railway Company?

17 A It is a short line that operates out of Garden
18 City, Kansas.

19 Q Is that controlled by any other railroad?

20 A I don't think so. I think it is owned by some
21 industry.

22 MR. WILSON: Excuse me, counsel. As I am
23 reading this tariff, it appears to me at least possible
24 that this is not a complete tariff. I am not an expert
25 on this particular topic, but I believe that by the time

1 this tariff was effective, there were other provisions
2 to the tariff which for some reason are not included in
3 this document.

4 Is that your understanding?

5 MR. KHARASCH: This is an attachment to Mr.
6 Noser that is described as a tariff. As far as I know,
7 it is what is in the tariff. There may be some
8 application pages or such. This is the substance of
9 it.

10 JUDGE HOPKINS: You are only interested in
11 this one page? Is that all we are talking about?

12 MR. KHARASCH: That is right.

13 MR. WILSON: My concern, Your Honor, is that I
14 don't believe that this is the complete tariff when it
15 went into effect. I believe it had other provisions,
16 and I would assume that counsel would supply a complete
17 tariff with all provisions at some point in the record.
18 That was really my only point.

19 MR. KHARASCH: You can put in any later
20 tariffs you want to. As far as this tariff, I guess we
21 can call up and get the tariff. I don't think it has
22 much of substance but this. I remember looking at it,
23 and this is all that seemed relevant.

24 JUDGE HOPKINS: It appears that he is only
25 interested in the one. Now, if there are any

1 differences that you think from his testimony that you
2 need to go into, I think you could present that at a
3 later time.

4 MR. WILSON: Okay.

5 MR. KHARASCH: I am quite sure the tariff may
6 be amended later on. That is not what I am concerned
7 with.

8 BY MR. KHARASCH: (Resuming)

9 Q The Garden City runs from where to where?

10 A I don't know. It connects with us at Garden
11 City, Kansas, and goes out and serves some industry.

12 Q Is there any other line haul railroad that the
13 Garden City Western connects with except the Santa Fe?

14 A Oh, it may connect with the Garden City Gulf
15 and Northern. We own that. We own that, though, so I
16 guess the answer is no as far as I know.

17 Q What is the North Western Oklahoma Railroad,
18 sir?

19 A That is a puzzler to me, Mr. Kharasch. It
20 must be a short line that was formed out of the Rock
21 Island, the old Rock Island bankruptcy, but I am just
22 not sure.

23 Q What about the Texas Central Railroad
24 Company?

25 A That is a line that we connect with down in --

1 down in Texas. I want to say Dublin, but there are
2 experts here that can do a lot better than me on that.
3 My cousin, Mr. Fitzgerald, will be along, and you ought
4 to ask him that.

5 Q Now, on June 21, 1984, which is the issue date
6 of this tariff, the tariff on its title page says it
7 amends the general routing section by the addition of
8 the items shown on Pages 2 to 6 herein, and then it
9 gives the title, Applications of Rates (Routing
10 Restrictions) In Connection With Line Haul Shipments
11 Moving From, To, Or Via AT&SF.

12 Is this the way one publishes a tariff if one
13 -- if a railroad wishes to restrict routings that had
14 previously been published?

15 A Yes. Incidentally, going back to the Texas
16 Central Railroad, what I do know about that railroad is,
17 they originate peanuts on that line, so that is really
18 more important to me than where it starts.

19 Q Do you know whether it is a railroad
20 connecting only with the Santa Fe?

21 A I believe it is.

22 Q Does your information either from your service
23 as the chief traffic officer since February this year or
24 as gleaned from your father or grandfather's knee extend
25 back to the situation in 1981 as to the state of routing

1 restrictions in transcontinental tariffs?

2 A Oh, it does. And it has really pretty much
3 been a personal experience.

4 Q In 1981, if we go back that far, is it
5 generally correct that there was open routing on
6 transcontinental tariffs?

7 A Yes.

8 Q And by open routing, do you mean that at
9 designated points of connection between western
10 railroads, I mean, western and other railroads, a
11 shipper had the choice of designating how the traffic
12 would be carried?

13 A You say the shipper would?

14 Q Yes.

15 A Yes.

16 Q Are we clear, are we in agreement that under
17 the Interstate Commerce Act, if routing is open, a
18 shipper has the right to designate routing?

19 A Yes. As among the routes that are open.

20 Q Now, let's look at Page 2, please. It states,
21 "Rates in this tariff applying between stations in
22 southwestern territory on the one hand and western trunk
23 line territory on the other hand served by carriers in
24 Note 1 will apply only via routes authorized in this
25 tariff composed wholly of one or more of the carriers

1 listed in Note 1."

2 Let's see if we can understand the meaning of
3 that. That means that the transcontinental tariff
4 publications which give rates for moving things will
5 apply only between stations of the railroads listed in
6 Note 1.

7 A Yes. You and I are about in the same boat
8 when it comes to reading tariffs, I assure you, but that
9 would be my understanding.

10 Q And the railroads listed in Note 1, I believe,
11 from our prior discussion consist of the Santa Fe or
12 three short lines that connect only with the Santa Fe.

13 A I think that is right.

14 Q Let's look down, please, to Exception 5.

15 A Okay.

16 Q Exception 5 says, "The provisions of this item
17 will not apply on traffic moving from, to, or via the
18 Southern Pacific Transportation Company and/or St. Louis
19 Southwestern Railway Company."

20 A Yes.

21 Q Now, would the effect of that exception mean
22 that with respect to Southern Pacific and St. Louis
23 Southwestern, the routes in the transcontinental tariffs
24 were open, as they were before this piece of paper would
25 apply?

1 A The effect of this exception is that the
2 routing restrictions described in the top part of the
3 page do not apply against the Southern Pacific or the
4 Cotton Belt.

5 Q And if we look at Item 6, it also appears that
6 the routing restrictions will not apply on chemicals
7 moving from or to Houston or Texas City, Texas.

8 A That's what it says, yes.

9 Q And the note STCC 28 means for purposes of the
10 record what?

11 A I don't know. It's a STCC code. Apparently
12 it has to do with chemicals.

13 Q Is the tariff publication policy of the Santa
14 Fe under your control and jurisdiction?

15 A Yes.

16 MR. WILSON: Your Honor, my problem here is
17 that there are more exceptions to this tariff. If
18 counsel had provided the complete tariff, we could tell
19 that. Other railroads were excepted from application of
20 this tariff, and the cover page of the tariff itself
21 says "Amend general routing section of tariff by the
22 addition of items shown on Pages 2 to 6 herein." And
23 we have only one page attached.

24 I think it is very misleading for this type of
25 information to go into the transcript without the

1 complete story being shown on this issue. That is my
2 problem with this entire line of cross examination.

3 BY MR. KHARASCH: (Resuming)

4 Q Let's look at June 21, 1984, Mr. Fitzgerald,
5 and on the date of June 21, 1984, in the publications on
6 behalf of the Santa Fe, were there any railroads
7 excepted from this other than the Southern Pacific or
8 the St. Louis Southwestern?

9 A There would not appear to be.

10 Q Is it possible that after June 21, 1984, this
11 tariff was amended so that other railroads were
12 excepted?

13 A It is more than possible that it did happen.

14 Q I believe what your counsel is agitated about
15 is that in later publications the BN was excepted from
16 this.

17 A And the Union Pacific, and to some extent the
18 client you represent.

19 Q Now, sir, did the client I represent object to
20 this tariff publication?

21 A Oh, yes.

22 Q Did you receive a letter dated August 14,
23 1984, from Mr. T.F. Steiniger of the MKT with respect to
24 these route closings?

25 A Well, I don't know --

1 Q I will show you a copy of the letter.

2 A I think you said August 4th, and this shows
3 14th. Yes, after the Commission concluded not to
4 suspend the tariff publication that you have been
5 referring to this morning, Mr. Steiniger and I had a
6 series of correspondence of which this forms a part.

7 JUDGE HOPKINS: Mr. Kharasch, is this already
8 an MKT --

9 MR. KHARASCH: No, it is not, Your Honor.
10 Let's mark this one, if we may, as MKT-C-10.

11 JUDGE HOPKINS: It will be so marked for
12 identification.

13 (The document referred to
14 was marked for
15 identification as Exhibit
16 Number MKT-C-10.)

17 MR. KHARASCH: And may we have marked as
18 MKT-C-11 a letter of September 13, 1984, from Mr.
19 Steiniger -- to Mr. Steiniger from Mr. T.J.
20 Fitzgerald?

21 (The document referred to
22 was marked for
23 identification as Exhibit
24 Number MKT-C-11.)

25 BY MR. KHARASCH: (Resuming)

1 Q Is that the only response, MNT-C-11, the only
2 response to date that you have given Mr. Steiniger in
3 writing?

4 A No.

5 Q You have a later than September 13, 1984,
6 response in writing?

7 A Yes.

8 Q What is the date of that?

9 A I think it is October the 2nd.

10 MR. WILSON: That is right. In fact, counsel,
11 I could perhaps help the proceeding along. I would like
12 a counsel's exhibit that would contain that response.
13 That might help the question if I introduced that at
14 this time.

15 MR. KHARASCH: I have no objection under these
16 special circumstances.

17 JUDGE HOPKINS: Let's go right ahead.

18 MR. KHARASCH: So that we can complete the
19 correspondence.

20 MR. WILSON: I think it would make it clear.
21 I would like to mark Exhibit SFSP-C-3.

22 JUDGE HOPKINS: It will be so marked.

23 (The document referred to
24 was marked for
25 identification as Exhibit

Number SFSP-C-3.)

BY MR. KHARASCH: (Resuming)

Q SFSP-C-3, dated October 2, 1984, is your further response to MKT-C-11, right?

A It is really my substantive response. The reason I wrote Tom on September the 13th was that I had asked my people to develop some information, and it was not ready yet, and I thought I owed him the courtesy of at least letting him know that I was still working on it, and had gotten his letter.

Q Let's go back to Page 2 of attachment to Mr. Noser's statement, so that we can have that language in front of us.

A Okay.

Q Suppose this routing restriction that appears on Page 2 were in effect for the SFSP after the time the SFSP merges, if it is permitted to merge. Just assume that statement for the moment.

A Okay. You understand that the exhibit that was marked, I believe, as SISP-C-2, might cause that assumption to be suspect.

MR. WILSON: C-3.

THE WITNESS: No. C-2.

BY MR. KHARASCH: (Resuming)

Q For purposes of my question, I am asking you,

1 suppose that Page 2 of Attachment 2 to Mr. Noser's
2 statement, the routing restriction we are looking at,
3 were in effect at the future time when there is an
4 SFSP. If it were in effect, could the MKT obtain any
5 joint routes to the Mexican border point of Presidio?

6 A Yes.

7 Q How?

8 A Well, if it was traffic coming off of a
9 Katy-served point, there would be a through route,
0 exclusively Katy-served.

11 Q Let's look at the top of the routing section.
12 I hope you will clarify for me and the record. At the
13 top it says, "The rate in these tariff will apply only
14 via routes authorized in this tariff composed wholly of
15 one or more of the carriers listed in Note 1."

16 So, isn't the meaning of that that in order to
17 get to Presidio, Texas, we would have to get to
18 Presidio, Texas, via the SFSP if this were in effect for
19 the SFSP?

20 A Well, you would have to get there. That is
21 not the problem with my answer to your question. You
22 asked me, is there any way that the Katy could
23 participate in routes, and my answer to you was yes, if
24 we didn't serve the origin, we have a joint route.

25 Now, understand that, you know, your

1 assumption is flawed additionally, but even under those
2 circumstances, the answer is still yes.

3 Q From a point that the Katy serves
4 exclusively --

5 A Yes.

6 Q -- it could get a route to Presidio?

7 A Yes, sir.

8 Q What is the flaw in the assumption in the
9 reading of the note saying that, or the beginning, that
10 says rates apply only via routes authorized composed
11 wholly of one or more?

12 A The flaw in the assumption is that Hearing
13 Exhibit SFSP-C-2 would suggest to me that we are not
14 interested in maintaining routing restrictions except to
15 the extent that we are not allowed the fair opportunity
16 to compete for traffic that will be moving on other
17 lines.

18 Q That is the flaw in the assumption?

19 A Yes.

20 Q But if you make the assumption that this is in
21 force, which is my question, that this tariff is in
22 force as we are reading this provision, then how --
23 then, question: Could the MKT obtain a joint route to
24 Presidio, Texas?

25 A From points it serves exclusively.

- 1 Q From points it does not serve exclusively?
- 2 A That the Santa Fe does serve?
- 3 Q Yes.
- 4 A No, it couldn't.
- 5 Q And Eagle Pass, Texas?
- 6 A Of course, we don't go to Eagle Pass.
- 7 Q But the SFSP would, and if this tariff were in
8 effect for the SFSP after the SFSP is formed, could the
9 Katy obtain any route to Eagle Pass, Texas?
- 10 A Points that it does not exclusively serve?
- 11 Q Yes.
- 12 A I have a lot of problem answering that,
13 because of my problems with the assumptions, but as you
14 phrase the question, I guess the answer is no.
- 15 Q Now, we had some discussion which was helpful,
16 sir, earlier in the day defining certain terms.
- 17 A I hope so.
- 18 Q One of the terms that we talked about was the
19 division of a rate between carriers. In 1981, when
20 transcontinental routing was generally open, were
21 divisions generally governed by agreed pattern
22 divisions?
- 23 A They were really governed very closely by the
24 ICC and there were some epic cases that determined what
25 carrier got what division.

1 Q The divisions would you agree were in general
2 negotiated by the carriers but if they could not agree
3 ther the Commission would step in?

4 A I don't think I can agree to that. I think it
5 was basically determined by the Commission.

6 Q What is the situation today on divisions, when
7 you have joint routes, in establishing divisions?

8 A Well, when deregulation came along, the
9 carriers pretty much adopted existing divisions, and
10 there has been, I would say, a trend away from that to
11 at this point a limited extent, but I would say that the
12 trend is toward negotiating divisions based on specific
13 movements.

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1 Q A trend to negotiating divisions bilaterally?

2 A That's right.

3 Q Let me pass you, Mr. Fitzgerald, a copy of
4 MKT-C-9 that's already been marked and received.

5 Was the subject of establishing reciprocal
6 switching with the arrangements and routing arrangements
7 and so on with the Southern Pacific a subject of some
8 importance in the early part of this year, 1984?

9 A Yes.

10 Q And did it come to your attention?

11 A Yes.

12 Q And did you discuss it with a Mr. Grygiel?

13 A Grygiel, yes.

14 Q G-r-y-g-i-e-l.

15 And he serves directly under you in the
16 management structure?

17 A Yes.

18 Q Let's look, if we could, first at page 1 of
19 MKT-C-9, sir.

20 A I have it.

21 Q What is a long and short-haul junction
22 concept?

23 A Well, first of all, maybe a little
24 background. What we are dealing with here is a
25 situation where two rail carriers are attempting to both

1 participate in a single rail movement. As we discussed
2 yesterday when we were talking about this subject, in
3 March -- I believe March 12th of 1983, the Southern
4 Pacific had closed transcontinental routes.

5 That meant that in every case where we were
6 going to be participating with them in an interline
7 movement, that they would be entitled to their maximum
8 haul, just plain length of haul.

9 We have always, on the other hand, been an
10 open route carrier, favored open routing. And what that
11 essentially means is, you afford the shipper the option
12 of either taking a long haul with one carrier and a
13 short with a second, or vice versa.

14 So long and short is railroad traffic
15 shorthand for saying that on this given interline
16 movement, the tariff would provide that Carrier A could
17 have the long haul and B the short haul; or conversely,
18 A the short, and B the long.

19 Q And that long or short haul for Carrier A and
20 B might be designated in the tariff, I suppose, by
21 stating the point at which traffic would be
22 interchanged.

23 A Precisely.

24 Q Now, you mentioned the Southern Pacific's
25 action closing transcontinental routings. Had the BN

1 closed transcontinental routing?

2 A Yes. I believe I testified yesterday that
3 they had closed routes. Now, I don't know -- and I
4 should remember, but I don't -- whether transcontinental
5 routes were involved. But they had closed a number of
6 routes in May of 1983.

7 Q You mentioned in your previous answer that
8 when the Southern Pacific closed its routings, you would
9 have to give them their long haul.

10 A That would be the effect of their route
11 closings; yes.

12 Q In other words, they would carry it as far as
13 they possibly could on their system, if it were a
14 movement that then had to continue on your system.

15 A Or conversely, we had to give it to them at
16 the first point where we intersected with them.

17 Q And you had some objection to that
18 arrangement, since it meant the SP was getting the long
19 haul.

20 A Well, I had some objections to that. The
21 precise nature of them, I think, is not fairly
22 characterized by your question.

23 Q Did it cost you money to not have the profit
24 contribution, to not have the long haul?

25 A I would say it cost both carriers.

1 Q How did it cost the SF if they were going to
2 get the long haul?

3 A I think they lost tens of millions of dollars
4 in this action by diverting traffic to other modes, by
5 themselves being cut out of routes that they might
6 otherwise participate in.

7 Q Did you take -- you, the Santa Fe -- take
8 retaliatory action against the SP?

9 A Well, I took action. We took action.

10 Q And what was the nature of your action?

11 A We closed our industries that -- to reciprocal
12 switching as to the Southern Pacific, and put in the
13 tariff that the restriction on reciprocal switching
14 against the Southern Pacific would only apply so long as
15 they had routing restrictions against us.

16 Q Please turn to page 2 of MKT-C-9. This is, I
17 take it, the draft contract that you received, Mr.
18 Grygiel received from the Southern Pacific.

19 A If you say so.

20 Q Well, did you receive a draft contract from
21 the Southern Pacific?

22 A I assume we did. I was hoping you could tell
23 me what this was.

24 Q Well, sir, it came from Santa Fe files in
25 response to a discovery request in this proceeding.

1 They are serially numbered from page 1434 through 1439,
2 and the serial numbering indicates to me that this is
3 the draft contract which is on page 1 of MKT-C-9,
4 referred to by the words, "I am including a revised
5 draft herewith."

6 A Okay. That's good enough for me.

7 Q Let's go to page 7 now, sir.

8 A All right.

9 Q Page 7, Mr. Gryciel is writing to Mr. Sharp of
10 the Southern Pacific, and at this point in the first
11 sentence, he says: "This has reference to past
12 correspondence, as well as our discussions regarding a
13 new routing agreement and reciprocal switching contract
14 between our companies."

15 Are there two different subjects under
16 discussion at this time in March 1984?

17 A Different but related. And the relationship
18 I've already tried to explain to you; that when the
19 Southern Pacific closed routes, we canceled reciprocal
20 switching as to them.

21 So I guess you'd have to say we tie them
22 together for purposes of this discussion.

23 Q What you need in order to make a deal with
24 another railroad for joint transportation of the
25 commodity movement is an agreement on switching, if

1 that's necessary in the case; an agreement on routing,
2 what path it will follow; and an agreement on price,
3 what would be charged the shipper. Yes?

4 A Yes.

5 Q And an agreement on division of the money that
6 is to come from the shipment?

7 A Yes. Those are all problems with joint line
8 routes, as I attempt to explain in my statement. It's
9 the reason single line route works so much better.

10 Q What is a routing matrix?

11 A As I understand it, as it applies to the
12 question you're asking in this context, it's a table
13 where specific junction points at which interchanges
14 might take place are set forth.

15 Q Please look at page 7 of MKT-C-9. We are down
16 to the last paragraph. We have a request to the
17 Southern Pacific from the Santa Fe, request that you
18 allow us to participate on a joint line basis with you
19 at a rate level that is competitive with your single
20 line rates when Santa Fe physically serves the shipper
21 at origin or destination.

22 And this is said to be primarily in connection
23 with lumber rates. Would you explain the situation
24 there? You're talking about a place -- maybe we better
25 take it in pieces, by questions.

1 First, does Santa Fe physically serve shipper
2 at origin or destination?

3 A Well, with respect to lumber, why don't we say
4 destination?

5 Q Okay. And apparently, this is a situation
6 where the Southern Pacific has its own single line
7 service to bring the lumber down from origin.

8 A Yes.

9 Q To destination.

10 A Well, to the vicinity of the destination. To
11 the terminal area of the destination.

12 Q Right.

13 And apparently, the Southern Pacific has single
14 line rates published that are lower than the joint line
15 rates they would agree to at this time.

16 A Well, either they did, or that was a concern.
17 One of the two.

18 Q One of the conditions that the Santa Fe wants
19 is that the joint line rate will be brought to the level
20 of the single line rate. Yes?

21 A Yes.

22 Q Let's look at page 9, if you would, please, of
23 MKT-21.

24 In connection with this negotiation between
25 the Santa Fe and the Southern Pacific, was it discovered

1 that you were dealing with situations where the rates
2 differed on certain traffic as between the rates that
3 the Santa Fe had established and those that the SP had
4 established?

5 A I think so, in some cases.

6 Q And if we look at page 10, perhaps that will
7 refresh your recollection about some of the cases.
8 Grain products --

9 A I probably shouldn't look at this. This looks
10 to be a Southern Pacific document.

11 Q You can look at it now. It's in the record.

12 JUDGE HOPKINS: It's all right.

13 BY MR. KHARASCH: (Resuming)

14 Q There were apparently different rates on grain
15 products?

16 A That's apparently what the Southern Pacific is
17 saying.

18 Q Second, automotive and machinery. Let's look
19 at that particularly.

20 A Okay.

21 Q On automotive and machinery, the document
22 says: "Santa Fe serves origin and has tariff
23 restriction forcing ATSF long haul when they serve
24 origin-destination."

25 Do you happen to know whether that is true at

1 the Santa Fe?

2 A No, I don't know that that is true.

3 Q And that the shipper is apparently pressing
4 Santa Fe to open for route over LA Junction? Where is
5 LA Junction?

6 A That's L.A.

7 Q Los Angeles?

8 A Yes.

9 Q You don't know whether that's true?

10 A No, I don't. Well, I do know that if General
11 Motors is pressing, it has some considerable pressure.
12 That's true.

13 Q As to forest products on page 10, is it true
14 that there were major differences in the rates?

15 A Well, that's a situation that Mr. Grygiel was
16 apparently dealing with. And I don't know what you mean
17 by "major," but apparently he was sufficiently concerned
18 about it to bring it up.

19 I'm not suggesting that I know these rates or
20 that these are correct.

21 Q But you do know that there was a problem about
22 a forest product rates, that the two of you had
23 different rates?

24 A It still is a problem.

25 Q And you have very substantial volumes here;

1 that is, 40 to 50,0000 annual carloads. That is of
2 interest to you no doubt.

3 A It's still a problem.

4 Q Let's look at energy and chemicals. Do you
5 know whether there was longstanding rate competition
6 from the Gulf Coast to Los Angeles?

7 A There's plenty of competition between Los
8 Angeles and the Gulf Coast, and it's been longstanding.
9 And I don't mean just between the Southern Pacific and
10 the Santa Fe.

11 Q As between the Southern Pacific and the Santa
12 Fe, there was competition?

13 A That's what someone says here.

14 Q Do you agree that there was longstanding?

15 A I'm saying that we are two of the players in a
16 market that has many, many players.

17 Q And on page 11, are you aware that there were
18 different rates on molasses and wallboard?

19 A No.

20 Q Let's turn to page 12 and maybe we can clarify
21 some of this.

22 A All right.

23 Q Here's a letter to Mr. Crygiel.

24 A Yes.

25 Q Where the Southern Pacific says: "It is

1 appropriate to set down in writing our agreement as to
2 joint routing."

3 And then in the next paragraph he says: "This
4 agreement on routing is contingent on the execution,
5 implementation, and continuation of the reciprocal
6 switching contract."

7 A Yes.

8 Q Did you agree with the Southern Pacific that
9 the routing agreement would be contingent upon the
10 switching being settled?

11 A Yes. As I told you, the way we had our
12 reciprocal switching tariff, the restrictions against
13 the Southern Pacific automatically went away if we
14 reached a routing agreement with them.

15 That was implicit in all of our dealings.
16 That was explicit, too.

17 Q The principle of the routing agreement, says
18 the letter to Mr. Grygiel from Mr. Sharp is one of joint
19 routes between MTST and SP/SSW when one serves customer
20 at origin, and the other customer at destination.

21 Now, let's stop there. Was your agreement on
22 routing confined only to that situation, joint routes
23 where one is the serving carrier at origin and one at
24 destination?

25 A Yes. But keep in mind that in conjunction

1 with the reciprocal switching agreement, you have to
2 read the two together. You may not physically serve a
3 customer that you have access to through reciprocal
4 switching.

5 Q All right.

6 Well, I'm trying to establish precisely, for
7 the record, what the classes of traffic were to which
8 the routing agreement applied. If one railroad was the
9 switching railroad at origin, did it apply in all
10 cases? What are the conditions for the routing
11 agreement to apply?

12 A That would cause it to apply.

13 Q If one railroad is the switching railroad at
14 origin and the destination could be served physically by
15 both, or served by one by reciprocal switching?

16 A Yes. It would apply in that circumstance. In
17 other words, our idea was to give the shipper the
18 broadest array of options that we could.

19 Q Now, in that condition, I want to continue and
20 establish what it applies to. In the condition you just
21 describe, Railroad A, which physically serves at origin
22 and can also physically serve at destination, would have
23 a single line route, and you are establishing also a
24 joint line route A to F. Yes?

25 A If I understand the question correctly, yes.

1 The idea is not that there will always be joint
2 participation in an actual movement, but only that we
3 would lay out there the possibility that there could
4 be.

5 So, yes. As I understand your question, it is
6 yes.

7 Q Now, the first class of traffic that we are
8 agreed it would apply to, Railroad A is the only
9 physically serving railroad at origin. And both A and B
10 can go direct. Direct access at destination. It would
11 apply in that case?

12 A My understanding is, that's right.

13 Q And in that case, it would be possible for
14 Railroad A to have a single line rate quotation, A to B
15 from origin to destination?

16 A Yes.

17 Q Whereas, B would have to participate only via
18 joint line.

19 A That's right.

20 Q And your agreement was that A could have a
21 single line and B could have the joint line?

22 A Yes.

23 Q Now, let's take another class. You have open
24 -- excuse me. Let's take another class of traffic. You
25 have a situation where, at origin, both Railroads A and

1 B can serve, and at destination, both Railroads A and B
2 can serve.

3 A Clearly, it would be applicable there.

4 Q It would be applicable there.

5 Can you tell us -- and then, Your Honor,
6 whenever --

7 JUDGE HOPKINS: After this question.

8 BY MR. KHARASCH: (Resuming)

9 Q Can you tell us, please, to what sort of
10 situations would the routing agreement not apply?

11 A Well, it would not apply, for example, where
12 we didn't serve either origin or destination, and they
13 did.

14 Q You couldn't participate in the route under
15 this agreement if you didn't serve either origin or
16 destination. I gather you're saying in that case, you
17 might be an overhead carrier?

18 A Yes.

19 Q And even though the shortest line would be via
20 your overhead, it still wouldn't apply?

21 A That was the best deal we could negotiate.

22 JUDGE HOPKINS: Off the record a minute.

23 (Discussion off the record.)

24 JUDGE HOPKINS: We'll be in recess until

25 1:30.

(Whereupon, at 12:30 o'clock p.m. the hearing
was recessed, to reconvene at 1:30 o'clock p.m., this
same day.)

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AFTERNOON SESSION

(1:30 p.m.)

1
2
3 Whereupon,

4 THOMAS J. FITZGERALD

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

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

9 MR. KHARASCH: Let me have marked as this
10 time, Your Honor, as the exhibit next in order,
11 MKT-C-12. It is a two-page routing matrix, and it is
12 the routing matrix that appears attached to the letter
13 which is pages 12 and 13 of MKT-C-9.

14 JUDGE HOPKINS: It will be so marked for
15 identification.

16 (The document referred to
17 was marked Exhibit MKT-C-12
18 for identification.)

19 CROSS EXAMINATION - RESUMED

20 BY MR. KHARASCH:

21 Q At the lunch break, Mr. Fitzgerald, we were
22 looking at Exhibit MKT-C-9, page 12, and you were
23 explaining some of the language in the application of
24 that exhibit.

25 A Yes, sir.

1 Q Is it correct that there was a routing matrix
2 that was agreed on by the two participants in this
3 negotiation, Santa Fe and Southern Pacific, and I show
4 you Exhibit MKT-C-12, a small crossword puzzle?

5 A Yes.

6 Q Is that the routing matrix?

7 A I believe it is.

8 Q Would you look at the first page of MKT-C-12
9 and explain first what appears across the top under the
10 heading ATSF?

11 A Well, those are the areas where Santa Fe will
12 be involved in its end of these interline movements we
13 have been discussing.

14 Q And, similarly, in the column at the far left,
15 we have the areas where Southern Pacific would be
16 involved?

17 A Yes. They would be shown vertically in this.

18 Q Suppose we read down a column under ATSF and
19 we come -- let's go under NM, which I suppose is New
20 Mexico?

21 A Yes.

22 Q And let's read down to Arizona on the left.
23 And there I see a little LP, which I suppose is El
24 Paso?

25 A Sure.

1 Q What is the meaning of that?

2 A It means that the junction point through which
3 a joint line movement between Santa Fe and Southern
4 Pacific would be interchanged would be El Paso, Texas.

5 Q And that's if it was originating on the Santa
6 Fe?

7 A Either way.

8 Q In this case, either way?

9 A Yes, I think so.

10 Q Are they always -- well, strike that, please.
11 Let's look under --

12 A Let me say, I am not reading the footnotes
13 here which apparently are on the next page. Arizona has
14 an F next to it. Without wanting to belabor the issue,
15 unless we're going to find out what that is, in general,
16 the answer I gave is the correct one.

17 Q Let's go under the third column under this
18 ATSE. It is SCA, footnote C.

19 A Yes. Southern California.

20 Q Which seems to be defined on page 2, and it
21 tells you what it is.

22 A Geographically, yes.

23 Q And as I read Southern California, let's read
24 down on the lefthand column to north Texas. And there
25 it says Clinton/Fort Worth.

1 A That's Colton.

2 Q And Fort Worth. What is the meaning of having
3 both Colton and Fort Worth there?

4 A Well, in that movement, there would be two
5 practical junction points. The one we started with, El
6 Paso, is really the only junction where there is any
7 kind of efficient movement that could be developed, so
8 there's only one shown there.

9 So what we have done here is, both carriers
10 would be able to participate in joint line traffic
11 between north Texas and southern California by routing
12 in connection with the other with a junction point at
13 Colton or a junction point of Fort Worth.

14 Q Now, if I look under the left column for
15 southern California, and I look at north Texas, under
16 the Santa Fe I see Fort Worth/Clinton. Is there a
17 meaning in the -- Colton -- I beg your pardon.

18 A The effect, if I understand your question, the
19 effect would be the same. The same junction points
20 would be available as options.

21 Q Is it the sense of the table that it doesn't
22 matter whether you're going one way or the other way,
23 there is always one junction point specified, which
24 would be the same whether you are going east or west or
25 north or south? Does it matter which end of the move

1 you start, or not?

2 A Well, that's generally true, but as I recall,
3 it is not true with respect to traffic going to Southern
4 Freight Association territory. Well, I beg your
5 pardon. It's not true with respect to traffic going
6 east into official territory.

7 Q What happens on the traffic going east into
8 official territory?

9 A It's not covered by this agreement.

10 Q But for the traffic that is covered by the
11 agreement, it doesn't matter whether between two points,
12 whether it's moving from a Santa Fe to SF?

13 A Yes, with the one exception I gave you.
14 Because what you need to understand is westbound traffic
15 out of official territory is covered.

16 Q But as to the traffic covered, other than the
17 westbound traffic out of official territory --

18 A Yes.

19 Q -- it doesn't matter whether it's coming from
20 the Santa Fe point to a Southern Pacific point or the
21 other way around. The junction points that are
22 permissible are the same; is that right?

23 A I hope so. I have to tell you that I did not
24 review that aspect of the agreement. But I believe so.

25 Q Well, the problem I have with that

1 understanding, sir, is the letter that is page 12 of
2 MKT-C-9 which says it was agreed that long and short
3 haul junctions should be provided where practical.

4 A Yes.

5 Q And I thought you had explained that; that it
6 means the origin carrier should get the long haul.

7 A No. That's not the way I explained it. In
8 fact, that's not the way I did explain it. I explained
9 long and short as being the originating carrier may get
10 the long or may get the short at the instance of the
11 customer.

12 Q So what does the letter mean when it says:
13 "It is agreed that long and short haul junctions should
14 be provided where practical."

15 There are two different junctions?

16 A Yes. For example, on the one we were
17 discussing, Colton, California/Fort Worth, Texas.

18 Q And if it's moving eastbound from California,
19 Colton is the short haul junction and Fort Worth would
20 be the longer haul.

21 A For whom?

22 Q Well, let's say the carrier originating in
23 California would like to carry it to Fort Worth. That's
24 the long haul.

25 A That's the long haul; right.

1 Q And Colton is the short haul?

2 A Yes, right.

3 Q Okay.

4 Now, on this routing matrix, what is the
5 agreement as to divisions of such freight rates as you
6 get from customers?

7 A There's no agreement on divisions to my
8 knowledge in here. There's only an agreement as to
9 routing.

10 Q Right. That's as far as the routing matrix
11 applies.

12 Now, on such traffic as is now moving between
13 points covered by the routing matrix, what is the
14 agreement as to divisions?

15 A There is a case-by-case agreement, I guess, is
16 the only way I could describe it to you. There's no
17 agreement that's incorporated in the routing matrix
18 other than rates that were in existence at the time,
19 obviously subject to change from time to time.

20 Q Division rates you mean?

21 A Yes.

22 Q Divisions that were in effect at the time?

23 A Yes.

24 Q Isn't there a general agreement among
25 railroads as to divisions in transcontinental traffic?

1 A Yes.

2 Q If there are tariffs.

3 A Yes, and that was my point.

4 Q And that is what applies today?

5 A Yes. All I was suggesting to you is that on a
6 case-by-case basis, those could vary, going back to our
7 conversation this morning about the trend being away
8 from division sheets to bilateral agreement. But I
9 didn't have anything special in mind, other than just to
10 indicate that possibility to you.

11 Q Under the situation as it exists today, are
12 railroads free, if they agree, two railroads
13 participating in a joint route -- free to agree to
14 variations of the general division sheets?

15 A Yes.

16 Q Now, what has happened to rates quoted between
17 the points that are indicated on the routing matrix?

18 A What has happened to them?

19 Q What will the rates be between the points
20 indicated on the routing matrix?

21 A As established or as negotiated from time to
22 time.

23 Q If they are as established, you go back to the
24 rates that in the transcontinental tariff before --

25 A Yes. That was the frame of reference into

1 which these negotiations and the routing matrix were
2 concerned.

3 Bad syntax. If you have any problems with
4 that, I'll try to clear it up.

5 Q Back on page 7 of MKT-C-9, Mr. Grygiel was
6 indicating to Mr. Sharp that "We request that you allow
7 us to participate on a joint line basis with you at a
8 rate level that is competitive with your single line
9 rates."

10 A Yes.

11 Q Was that part of the agreement reached here?

12 A No, I don't think so. If you look at page 14,
13 the first paragraph of that letter, I think, embodies
14 the eventual agreement. Page 13 of MKT-C-9.

15 Q The page 13 that I have is -- oh, I see.
16 There's no agreement as to the level of rates. "At the
17 request of either party, we will enter into meaningful
18 discussions about establishment of competitive joint
19 rates consistent with this agreement."

20 Did you do anything about the Santa Fe, about
21 the Southern Pacific single line lumber rates?

22 A Well, we have been having meaningful
23 discussions about it, but we don't have an agreement.

24 Q Have the rates changed any?

25 A I don't know. I don't think so. But I don't

1 know that we have given up yet.

2 Q The shipper's option under this routing matrix
3 and the publication that would follow it is to
4 designate, I assume, under the example we are using, El
5 Paso or Colton -- you designate that route, and you can
6 designate the carrier to El Paso or the carrier to
7 Colton. Those are the two routes available.

8 A I don't believe I understand that question.

9 Q Let's go back to MKT-C-12, page 1. Let's say
10 we have a movement from central California to SP to
11 north Texas. There are two points shown there, Fort
12 Worth and --

13 A Bakersfield.

14 Q Okay. Fort Worth and Bakersfield.

15 If I am understanding you, there would be a
16 central California to Fort Worth via -- Fort Worth to
17 north Texas via Santa Fe. That's the routing
18 possibility under this matrix.

19 Yes? Isn't that what it means?

20 A I was trying to think how I could straighten
21 it up in an easy way, if you will allow me.

22 Any situation where we're trying to get
23 between central California and north Texas, going east,
24 that means that there can be a junction point,
25 regardless of who is originating this traffic. There

1 can be a junction at Bakersfield which essentially means
2 that's the short route for the originating carrier, or
3 there could be a junction at Fort Worth, Texas, which
4 means the originating carrier gets the long route.

5 By definition, all of this has to do with
6 where one carrier originates the traffic and the other
7 terminates it.

8 So what we're saying is that the shipper has
9 an array of routing options, can route possibly single
10 line Santa Fe, single line Southern Pacific, Santa Fe to
11 or from Bakersfield, or Santa Fe to and from Fort
12 Worth.

13 Q Those are the shipper's four options?

14 A Well, the shipper has lots of other options.
15 Those are the four that are embodied in this agreement.

16 Q This does not -- this routing matrix does not
17 then provide for routes with other carriers intermediate
18 to Santa Fe or Southern Pacific?

19 A No. It's a bilateral agreement.

20 Q Taking a sample of central California to north
21 Texas points, under SP central California to north
22 Texas, Santa Fe, we had those four routes. On which of
23 those four routings today are the rates the same?

24 A I don't know.

25 Q Would it not follow logically from the tariff

1 structure that the two joint routes would have the same
2 rate?

3 A Yes, unless there's been some change since
4 1981, which there may be with respect to specific
5 movements, but as a general rule, I think they would be
6 the same.

7 Q And the two possible single line competitive
8 routes with these joint routes?

9 A Might be more, might be less.

10 Q Now, your switching agreement does cover the
11 situation where the Southern Pacific quotes a rate to a
12 Santa Fe served industry in north Texas, does it not?

13 A Yes. Yes.

14 Q Your switching agreement covers it, but the
15 routing matrix does not.

16 A I'm sorry. You lost me.

17 Q The routing matrix does not apply to a single
18 line movement Southern Pacific point in southern
19 California to a north Texas point served by Santa Fe.

20 A I think it would.

21 Q Oh, it would? Then that single movement that
22 you are describing, Southern Pacific all the way, would
23 or would not have to go through Fort Worth and Colter --
24 or Colton?

25 A It wouldn't have to go through any given

1 point. All I'm saying is that we would have the right
2 to participate in the joint route because of the routing
3 matrix under those circumstances.

4 How the traffic is actually handled is another
5 matter.

6 Q You would have the right to participate in a
7 joint route if you could get some traffic for that joint
8 route.

9 A Yes.

10 Q But you also describe that it's possible that
11 there is single line service.

12 A Because of the reach of the reciprocal
13 switching, yes.

14 Q So for that reason, I say the reciprocal
15 switching opens the possibility of single line service
16 as well as joint line.

17 A That's right; yes. Single line in the sense
18 we are using it here, of course.

19 Q Well, it would appear in the tariff as a
20 single, let's say, Santa Fe move; Santa Fe move from
21 California to Fort Worth.

22 A Right. It's kind of a fiction that it is
23 actually a single line because, by definition, it's
24 going to be switched by a second carrier. But for
25 purposes of the tariff, it would be single line.

1 Q Let's turn to the interesting question of
2 grain.

3 A I hope.

4 MR. WILSON: Your Honor, at the outset here, I
5 see Mr. Kharasch is about to hand out some contracts. I
6 wish -- could you perhaps hold those just for a moment?

7 Santa Fe objects to the distribution and use
8 of this sample grain contract in this proceeding, Your
9 Honor. As Your Honor may recall, during the discovery
10 phase of this proceeding, we had quite a dispute about
11 these grain transportation contracts between Santa Fe
12 and its customers.

13 We provided to MKT 13 grain transportation
14 contracts under the terms of a very strict protective
15 order. That order, which Your Honor signed on August
16 9th, stated that only eight individuals could have
17 access to the contract.

18 Those eight individuals are all outside
19 counsel or consultants of MKT. No railroad employee has
20 access to the contract, no railroad employee of any
21 other railroad.

22 It was with this express limitation that we
23 did turn these contracts over in discovery.

24 However, now Mr. Kharasch -- and he has
25 advised me of what he is planning to do -- has a sample

1 transportation contract. The sample transportation
2 contract contains terms that are similar to and, in many
3 cases, identical with the terms in these confidential
4 rail transportation contracts that we provided under
5 discovery.

6 We object to those contracts, this sample
7 contract being introduced, precisely because its terms
8 are similar to or identical with those confidential
9 terms in our confidential agreement. In the contract
10 itself, Your Honor, in each contract, Santa Fe and its
11 customer expressly agreed to maintain the
12 confidentiality of the contract. This is very important
13 to Santa Fe. It is very important to our customers.

14 We haven't even been given the opportunity to
15 be heard on Mr. Kharasch's planned disclosure of these
16 documents.

17 Now, the Commission, as you know, Your Honor,
18 takes great pains to ensure the confidentiality of rail
19 transportation contracts. This is because the
20 Commission recognizes that confidential contracts are
21 important to free competition in a deregulated
22 environment.

23 I think it's important for you to uphold that
24 principle here. I'm sure every other railroad in this
25 room, other than Katy, will be very disturbed if

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1 railroad transportation contracts are introduced into
2 the record in this proceeding and distributed among all
3 the counsel for all the parties who are present here.

4 And, furthermore, these contracts are
5 short-term in nature. They are not even going to be in
6 existence at the close of the record in this proceeding.
7 These contracts expire within three months. And it's
8 typical of rail transportation contracts that they are
9 short-term in nature.

10 And, therefore, Your Honor, I submit they are
11 not relevant to this Commission's consideration. But
12 primarily in order to protect the sanctity of the rail
13 transportation contracts and their confidentiality,
14 which I am sure Your Honor is aware of, the Commission
15 has regulations to protect that.

16 We feel it's necessary for ourselves and for
17 our customers to protect this sample contract from being
18 distributed because its terms are identical to or
19 similar to those in confidential contracts we have
20 signed with our customers.

21 So, therefore, Applicants strongly object to
22 this. I don't think there is any procedure under which
23 this can be used. This is not similar to the other
24 confidential agreements that have come in. The
25 protective order that we have with Katy on this point

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specifically -- and this was different from our other protective orders, as Your Honor remembers -- specifically said no railroad employee may have access to the documents. Only eight named individuals may see them.

And the protective order will be gutted if Mr. Khararsch is permitted to distribute this sample contract. So we strongly object to this, Your Honor, in the strongest term possible that this be used in this proceeding.

1 JUDGE HOPKINS: Mr. Kharasch?

2 MR. KHARASCH: Your Honor, this is a little
3 peculiar. We received, as demanded, a list of origins
4 and destinations. We received a list of volumes,
5 carloads and volumes. Those were as demanded.

6 We took those. We found the contract which
7 was, is, as counsel said, substantially identical. We
8 took in those contracts all rates, where supplied,
9 deleted. We have no idea what the rates are. We
10 deleted the shipper name. We provided a contract that
11 is completely a dummy contract. It is typical, and so
12 tendered. We provided a table of locations and
13 percentages in which we carefully scrambled the shippers
14 so that no shipper, because it would be necessary in
15 these contracts to tie together shippers with the number
16 of points. We provided in our table just the
17 identification, a point in Kansas, another point in
18 Kansas, another point, so you cannot tell what shipper
19 is involved in any way at all. We can just tell that
20 there are contracts tying together shippers. Then we
21 provided a table of totals of product moving and the
22 number of cars and so on as provided.

23 These were shipped to Mr. Wilson by a letter
24 from me saying this is the way it is going to go, that
25 we are going to tender it under the confidentiality

1 agreement saying they had to have adequate notice of
2 their use in the hearing.

3 It was shipped to Mr. Wilson.

4 Then something else interesting happened. I
5 received a call at my office saying Mr. Wilson had no
6 objection to the use of these papers. Now, this is the
7 first I have heard that he has any objection to the use
8 of these papers.

9 I tendered them to him with a letter saying we
10 have gone to these extreme pains to sterilize the
11 contract so that no shipper can be sterilized. We
12 sterilized the totals so that no shipper can be
13 identified. We sterilized the table of locations and
14 percentages tied up by the contract so that no shipper
15 can be identified, and I received in my office a notice
16 from Mr. Wilson that they had no objection, and
17 proceeding on that basis.

18 I submit to you that we have, if Your Honor
19 would look at this, we have so sterilized these
20 contracts that nothing can be told about it, about what
21 shipper. There are no rates because we were provided
22 none. You can't tell what shipper is doing what. You
23 can tell something about the behavior of the Santa Fe,
24 and that's why they are being tendered. I can't
25 understand at all why Mr. Wilson has discovered today,

1 when he had these two and a half weeks ago and told me
2 he had no objection, that now he has objection. But if
3 he wants to change his position, he is entitled to, I
4 suppose.

5 But I would like to know, Your Honor, why
6 these should not go in in that no particular of any
7 contract is here. Totals of contracts are here. Totals
8 of the arrangements with the shippers, all unidentified,
9 are here. And a dummy contract form is here which, as
10 counsel says, is their typical form. You can't tell
11 what shipper -- what is being done with what shipper.

12 If Mr. Wilson is entitled to change his
13 position, and that's fine, I submit these are
14 appropriate for inclusion in the public record, and I
15 ask that they be received in the public record.

16 JUDGE HOPKINS: Mr. Wilson?

17 MR. WILSON: Your Honor, there must have been
18 a faulty phone message at Mr. Kharasch's office because
19 I have always objected to this procedure.

20 What Mr. Kharasch's letter indicated was he
21 asked whether I had any suggestions as to how he could
22 purify the documents to make them less objectionable. I
23 said I had no objections, but I reserved the right to
24 object to the documents.

25 MR. KHARASCH: Where did you say that?

1 I got a phone message. I sent it to you in a
2 letter, and we will get the letters here when we can go
3 back to the office and get them. The letter says here
4 is the stuff; I intend to introduce it. If you have any
5 objections, let me know. Maybe we can sterilize
6 further. I believe they are sterilized to the point
7 of --

8 JUDGE HOPKINS: I remember seeing a copy of
9 that letter, and I didn't receive anything in
10 opposition.

11 MR. KHARASCH: And neither did I.

12 MR. WILSON: Well, we object to it at this
13 time, Your Honor, and I objected to it throughout. I
14 was reserving my opportunity to object to it at the time
15 it is admitted. That is what the protective order
16 indicated. The protective order specifically provided
17 for advance notice so at the time the document was
18 submitted we could object.

19 We are hereby objecting. I have always
20 objected to this procedure.

21 I also object to two of Mr. Kharasch's
22 characterizations; one, that there are no particulars.
23 This is a lengthy document which has many particular
24 provisions. It is true that the rates have been
25 deleted, but there are a number of very important

1 particular provisions in there that are important to
2 Santa Fe and important to our customers, Your Honor.

3 The other thing I object to is Mr. Kharasch's
4 use of the word "tying." I assume he was not using it
5 in any legal sense, but of course, these are not tying
6 contracts.

7 JUDGE HOPKINS: You don't believe it has been
8 sanitized enough, or you don't believe that any contract
9 should be allowed to --

10 MR. WILSON: This has not been sanitized
11 enough. It has far too many particulars. I don't know
12 whether it could be sanitized enough or not. I don't
13 think they could be, and that's why my suggestion to
14 counsel was that I had no suggestion as to how he could
15 improve this contract to make it acceptable.

16 JUDGE HOPKINS: Well, I think it would be wise
17 for you to point out -- it seems to me that this should
18 have been discussed between you two.

19 MR. KHARASCH: I sent it two and a half
20 ago.

21 As to particular points that you raised, that
22 you can't sanitize it, if you believe you can't sanitize
23 it in any way, that's one thing.

24 MR. WILSON: That's my position, and that's
25 why I didn't think it was necessary to have a negotiation

1 on the point.

2 JUDGE HOPKINS: In other words, no contract
3 that the Santa Fe has ever entered into could be
4 sanitized enough to be presented in any of these cases,
5 is that what you are saying?

6 MR. WILSON: My position with respect to
7 these, Your Honor, are -- well, it is twofold. One,
8 these are confidential contracts. Most of our contracts
9 are confidential. And two, they are not sufficiently
10 relevant that it should override the confidential nature
11 of this in a situation where our shippers haven't been
12 permitted to participate and where we just don't feel
13 that it is necessary at all.

14 These contracts, to put it in context, Your
15 Honor, these contracts expire in less than three
16 months. How is it relevant to the merger before the
17 Commission right now?

18 JUDGE HOPKINS: Where is the relevancy, Mr.
19 Kharasch?

20 MR. KHARASCH: Your Honor, the contracts --
21 I'm going to answer immediately, but before I forget one
22 point made by Mr. Wilson.

23 MR. WILSON: Go ahead.

24 MR. KHARASCH: First he said he objects to the
25 procedure. The procedure is that specified in the

1 confidential order that you should give notice of use
2 sufficiently in advance to permit counsel to make an
3 objection, which we have certainly done. Two and a half
4 weeks is enough notice of use.

5 Second, as to the relevancy of it, the
6 contract and the next two exhibits which follow are
7 tendered as examples of the market power of a large
8 railroad. Southwest Kansas is one of the important
9 points to the Katy in this case, the trackage rights
10 application is there. This is the point where our
11 position is that after the merger there will be no rail
12 competition in southwest Kansas because the Tucumcari
13 line of the SP is the only competition to the Santa Fe,
14 and that will be absorbed in the SFSP. We wish to
15 demonstrate by these contracts that the Santa Fe has the
16 market power to tie up -- and I use the word "tying"
17 advisedly -- has the power today, and does make tying
18 contracts with its customers.

19 The terms of the contract are important.
20 Percentages of transit grain that are tied are
21 important, 100 percent, and the percentages of
22 nontransit grain that are tied are important, ranging up
23 to 95 percent. And the --

24 MR. WILSON: Your Honor, I object to Mr.
25 Kharasch talking about terms of the contract on the

1 recrd before Your Honor has made a decision.

2 JUDGE HOPKINS: Mr. Kharasch, make it as
3 general as you can.

4 MR. KHARASCH: I cannot have a confidential
5 discussion --

6 JUDGE HOPKINS: One of the problem is that
7 they are afraid you are getting into all the
8 confidential aspects of the documents before they have
9 been allowed in.

10 MR. KHARASCH: Your Honor, something can be
11 confidential, as between the shipper and the carrier,
12 and it can be relevant to the hearing, and it would come
13 in. At that point the Commission provides that it comes
14 in, if you so rule, in a separate, sealed document, in
15 as testimony separate and sealed. That is one way. The
16 second way to proceed -- and that's the way I have
17 proceeded, because I think that makes it very clumsy --
18 in that way I would have to give you the 13 contracts;
19 God knows who would find the shippers' names. In this
20 way I have protected all shipper names. The only thing
21 that is going to be revealed with these documents is
22 that the Santa Fe has a series of contracts that are
23 very broad in scope and may tie up grain
24 transportation.

25 That's the point here. That has to do with

1 the effect of the merger, the effect of there being no
2 competition in southwest Kansas, and the effect, of
3 course, on the diversion that one can expect by
4 formation of this, how much traffic will be controlled.

5 Now, I put it in a form so no shipper can
6 object because it is not shown as any shipper's
7 contact. No shipper volume is shown. It is impossible
8 to tell because even the points name are just called
9 points in Kansas, points in Texas and so on. You can't
10 tell anything about any shipper here.

11 That's the sort of thing that I think, if it
12 had to come in, could come in, and it might come in if
13 you ruled in a separate hearing, so that a shipper's
14 business is not spread on the public record.

15 Here no shipper's business is being spread on,
16 it is the Santa Fe's business. No shipper's
17 confidentiality is violated. You don't even know
18 whether the shipper signed or not. It is just a form
19 contract which he admits is a form contract, table of
20 locations and percentages, and a series of volumes of
21 traffic moving.

22 JUDGE HOPKINS: Mr. Wilson?

23 MR. WILSON: Your Honor, I disagree with Mr.
24 Kharasch's characterization. I think that these are not
25 just any contracts. These are grain contracts. It is

1 well known who the grain shippers are that have major
2 points. Certainly Mr. Kharasch's later planned exhibit
3 can be read by almost anybody knowledgeable in the grain
4 traffic flow, and shippers can be identified by people
5 who know traffic. These contracts do identify our
6 shippers. They do identify the traffic flows. They do
7 breach the confidentiality agreement, and that is my
8 problem.

9 My problem is we are not talking about any
10 contract, we are talking about grain contracts, we are
11 talking about a breach of the confidentiality that we
12 have with our shippers. And we just do not see the
13 relevance, and we do not see the need to undertake such
14 an unusual procedure to put these contracts into the
15 record in this case.

16 MR. KHARASCH: Your Honor, I can't understand
17 either the reversal of Mr. Wilson's position, his
18 failure to point out how the aggregation was performed
19 so that it would be faulty, or what he is now telling
20 you, which I believe to be totally false, that anybody
21 can look at the aggregation table and identify
22 shippers.

23 Look at it. You would have to see the table
24 yourself, Your Honor. It says that Contract B,
25 nonidentifying, deals from a point in Kansas, a point in

1 Kansas, a point in Kansas, a point in Kansas, a point in
2 Oklahoma, a point in Texas. That's the next contract, H.
3 How could identify anybody from that?

4 JUDGE HOPKINS: Mr. Wilson?

5 MR. WILSON: Your Honor, maybe we could clear
6 up that point. Mr. Kharasch doesn't seem to think that
7 he can identify shippers there. I could ask a witness
8 who is a traffic witness whether shippers could be
9 identified there, and we could have on the record some
10 testimony on that point, if you would like me to do
11 that.

12 I would ask Mr. Fitzgerald one question.

13 Mr. Fitzgerald, if this exhibit is presented
14 in this record, in your opinion, do you think other
15 knowledgeable rail traffic personnel could identify the
16 shippers?

17 THE WITNESS: I believe they could.

18 JUDGE HOPKINS: What about if these are put in
19 a confidential docket?

20 MR. WILSON: Your Honor, the way this has come
21 out so far in this case, that means that all the counsel
22 representing all the parties in this room have them, and
23 it is really pretty broadly distributed.

24 Our shippers and --

25 JUDGE HOPKINS: Well we are talking about

1 counsel.

2 Don't we trust counsel at all here?

3 I understand what you are saying, but I am
4 also saying don't we have to accept the fact that
5 counsel -- we should trust counsel, and why couldn't we
6 put this in a confidential docket, because from what Mr.
7 Khawrasch said, I see some relevancy from this.

8 Now, I am also faced with the fact of the
9 confidentiality of these contracts. Mr. Kharasch,
10 though, has said he has sterilized them. Now, there is
11 a question whether he has sterilized them enough.

12 All right, let's just assume that he hasn't
13 sterilized them enough. Then if we put them in a
14 confidential docket, where would the problem be in that
15 regard?

16 MR. WILSON: Well, unlike other documents
17 produced in discovery, we made special efforts that no
18 Missouri-Kansas-Texas Railroad employee or marketing
19 person see or read these contracts. We felt that we
20 needed to take the extra step and limit it to just a few
21 specifically named individuals.

22 And the problem that you get into, of course I
23 am not doubting any counsel, that they would comply with
24 this protective order, but the problem you get into, the
25 wider the group of people with access to the

1 information, the more likely it is that accidentally
2 they will refer to it or that someone will wander into
3 the hearing room and pick up a copy, or that some
4 knowledge gained by people from looking at this could be
5 used for pricing and competing and taking business away
6 from us, hurting the competitive positions of our
7 shippers. One shipper will know what the contract with
8 the other shipper is.

9 The problem is that in a deregulated
10 environment, it is important to have confidential
11 transportation contracts.

12 JUDGE HOPKINS: Mr. Wilson, haven't some of
13 the other carriers probably got similar contracts
14 themselves?

15 MR. WILSON: I think so.

16 JUDGE HOPKINS: Well, what I am getting at, so
17 what is the difference in their contracts, say, and your
18 contract? What are they going to learn from your
19 contracts that they don't already know?

20 MR. WILSON: Well, these contracts have their
21 own particular provisions, Your Honor, and I don't know
22 whether they are the same or different from other
23 railroads' contracts.

24 JUDGE HOPKINS: What I am getting at, let's be
25 practical. Don't you think each of the carriers have

1 contracts that are in large measure similar? So what
2 knowledge will they gain from something like this if we
3 put it in a confidential docket, for example?

4 MR. WILSON: I don't know that your first
5 assumption is correct, that each carrier has contracts
6 that are similar in dealing with grain. I just really
7 don't know. And I think that some of the particular
8 provisions in these contracts could be disadvantageous
9 to us competitively and to the shippers competitively,
10 and that is our objection.

11 JUDGE HOPKINS: You said that they are short
12 term contracts, didn't you?

13 What happens when a shipper has had these and
14 has signed these contracts? Doesn't he have copies of
15 them?

16 MR. WILSON: Yes.

17 JUDGE HOPKINS: And at the end of the three
18 months or whatever it is, if he doesn't continue to have
19 the contract with you, what does he do?

20 MR. WILSON: I do not know.

21 JUDGE HOPKINS: Well, what I am getting at, it
22 seems to me you have probably got a broad number of
23 people who have copies of contracts now. I cannot
24 believe that, you know, if you don't have this same --
25 if he doesn't agree to another contract at the end of

1 three months or something like that, what happened to
2 the contract that he had?

3 It seems to me there probably is a broad
4 number of people who have copies of similar contracts at
5 the present time. That is where I find difficulty.

6 MR. WILSON: Your Honor is of course the
7 judge, and we will accept the ruling. If Your Honor
8 rules that these do come in, I would like for these to
9 be in a confidential docket.

10 JUDGE HOPKINS: Well, I think, Mr. Kharasch,
11 in order to treat this properly, I think we ought to
12 have these in a confidential docket.

13 MR. KHARASCH: Your Honor, just so that I
14 understand, in the first place, I cannot believe that
15 any traffic man, however knowledgeable, can look at a
16 list that says we have a contract from a point in Texas
17 and say which shipper is shipping from a point in Texas.

18 Second, it is most important that Your Honor
19 understand the 13 contracts produced there is a standard
20 form. This is the standard form. It is known to all
21 those shippers already. This is the standard form.

22 I don't know what the rates are for any one
23 shipper, or the demurrages for any one shipper because
24 that was all deleted. The shippers' names were all
25 deleted. You just have a standard form contract,

1 nothing confidential about that.

2 There is no way, contrary to what Mr. Wilson
3 said, for any traffic man to say that this shipper C
4 from a point in Kansas is one guy or the other guy. It
5 is just impossible.

6 The third exhibit is just traffic totals. I
7 don't see that there is the slightest thing confidential
8 about a traffic total of the amount of traffic coming in
9 under these --

10 JUDGE HOPKINS: The problem I find also is we
11 are faced with the Commission's rules on contracts.
12 They are changing them eventually, and I'm not saying
13 what they are going to come up with, probably, but we
14 are supposed to, under the rules, keep them secret.

15 Now, I think they should be put in a
16 confidential docket in that regard. We will put them in
17 a confidential docket.

18 MR. KHARASCH: I wish to examine on them.
19 Shall we have a confidential portion of the
20 records?

21 JUDGE HOPKINS: Do you really feel the need
22 for that?

23 MR. WILSON: Just a moment, Your Honor.

24 (Pause)

25 THE WITNESS: Are there any railroad marketing

1 people in the room right now? That might be a relevant
2 question.

3 JUDGE HOPKINS: Are there any?

4 (A show of hands.)

5 JUDGE HOPKINS: Well, are you talking about
6 your own people?

7 MR. WILSON: We can take care of that, Your
8 Honor.

9 MR. MOATES: Can we find out what railroad
10 this gentleman is with?

11 VOICE: Rio Grande.

12 MR. WILSON: You Honor, we would not want to
13 go to the trouble of clearing the entire hearing room,
14 but we really do think that marketing people from other
15 carriers should be present.

16 JUDGE HOPKINS: It is only one from the Rio
17 Grande that we need to worry about?

18 MR. WILSON: And also Southern Pacific's, Your
19 Honor. We are still in a voting trust situation.

20 JUDGE HOPKINS: All right.

21 Well, then, let's ask the gentleman from the
22 Rio Grande and anybody from Southern Pacific marketing
23 people to withdraw.

24 Sorry, gentlemen.

25 (Pause)

1 JUDGE HOPKINS: I didn't want to be faced with
2 this particular type of thing. I don't like it.

3 MR. KHARASCH: I thought we had cleared it up
4 two and a half weeks ago.

5 MR. WILSON: It is cleared up now, it seems.

6 JUDGE HOPKINS: Go ahead, Mr. Kharasch.

7 MR. REMES: Your Honor, under the confidential
8 docket, may counsel see copies that are used as the
9 basis for this cross examination?

10 JUDGE HOPKINS: Yes. You are all subject to
11 the same protective order that was issued previously.

12 MS. MAHON: Your Honor, does that include
13 counsel, in-house counsel for railroads, or only outside
14 counsel?

15 MR. WILSON: We will take counsel's word for
16 the fact that they will not discuss this with railroad
17 marketing personnel or use it for any purpose other than
18 in this case.

19 JUDGE HOPKINS: Thank you.

20 MR. KHARASCH: How will we mark this exhibit?
21 The first exhibit is a 24-page --

22 JUDGE HOPKINS: You can mark it the same way
23 you marked it, the way you would mark it, and I will
24 just indicate to the reporter that this should be put in
25 a confidential docket, these particular exhibits.

1 (Pause)

2 MR. KHARASCH: While we are at it, let's get
3 the rest of this in, a sterilized document, two pages,
4 ATSF export grain contract supplied in discovery. Next
5 exhibit in order is MKT-C-14, Your Honor, I believe.

6 JUDGE HOPKINS: The first one is MKT-C-13.

7 (The documents referred to
8 was marked Exhibit MKT-C-13
9 and MKT-C-14 respectively
10 for identification.)

11 MR. KHARASCH: And then, Your Honor, if we
12 may, a counsel's exhibit MKT-C-15, which I suggest can
13 have no possible confidential status.

14 We will hand up one and ask for a ruling to
15 that effect.

16 JUDGE HOPKINS: We will have Mr. Wilson look
17 at it in a hurry and see if he feels the same way.

18 MR. WILSON: Yes, Your Honor, I have seen all
19 three of these documents.

20 JUDGE HOPKINS: Do you feel the same way about
21 all three of these documents?

22 MR. WILSON: No. Actually, Your Honor -- well
23 they may as well all be treated the same.

24 JUDGE HOPKINS: I think it would be more
25 sensible to have them together and treated one after the

1 other in the confidential docket.

2 (The document referred to
3 was marked Exhibit MKT-C-15
4 for identification.)

5 BY MR. KHARASCH: (Resuming)

6 Q Mr. Fitzgerald, there was a discovery demand
7 for contracts which link in the contract the handling of
8 transit grain and the handling of any other grain in the
9 specified grain areas, and we received from Santa Fe 13
10 contracts which appear to be export grain contracts and
11 a summary of statistics for export grain contracts.

12 Is it a fact that Santa Fe, as of about the
13 middle of this year, had 13 export grain contracts which
14 link the carriage of transit grain with the carriage of
15 other grain?

16 A Well, I can't agree with your characterization
17 of the word "link." There are 13 contracts that deal
18 with the two subjects.

19 Q Is it correct that under these 13 contracts,
20 the shipper has agreed to tender to Santa Fe 100 percent
21 of the transit grain that is covered by the contract?

22 A Can you refer me to a section?

23 Q Not in our sanitized contract, I believe,
24 though we will go through it together.

25 I'll tell you what. Let's strike that section

1 and work our way quickly through the contract. We may
2 come to that.

3 In our aim at sterilizing, we note that all of
4 the contracts had 100 percent transit coverage.

5 Let's go through and see what the facts are.

6 These are Staggers Act contracts, isn't that
7 true, looking at page 2 of MKT-C-13?

8 A Well, they are made pursuant to 49 U.S. Code
9 Section 107.13

10 Q Which is a section that appeared in the
11 Staggers Act for contract rates?

12 A I think that's right. That is the contract
13 section.

14 Q All right.

15 Let's look at page 3 of 24, and looking at the
16 paragraph 2, volume commitment, under these contracts
17 the shipper agrees to tender for Santa Fe for
18 transportation pursuant to this contract the minimum
19 percentage set forth in Note 1 of all of its nontransit
20 tonnage of "corn, sorghum, soybeans, sunflower seeds and
21 wheat."

22 A Okay.

23 Q To the Gulf ports Beaumont, Galveston, Houston
24 and Texas City.

25 Then read the next sentence, sir, with me and

1 see if it does not answer the question whether 100
2 percent of transit times. Also "shipper agrees to
3 tender to Santa Fe during the life of this contract for
4 transportation pursuant to this contract all its transit
5 rail shipments in covered hopper cars."

6 A Right.

7 Q Now, let's look at the geographic coverage.

8 The geographic coverage in this contract is
9 owned by shipper and routed ATSF direct to the transit
10 station from stations in the states of Colorado, Kansas,
11 Missouri, Nebraska, New Mexico, Oklahoma and Texas,
12 yes?

13 A Yes.

14 Q And that's grain producing states which you
15 serve, isn't it?

16 A Yes, that we serve.

17 Q And the Gulf ports of Beaumont, Galveston,
18 Houston and Texas City for export.

19 A Yes.

20 Q Do you serve any other ports?

21 A Not on the Gulf.

22 Q So essentially, it is your grain states to
23 your Gulf ports.

24 A Yes.

25 Q Then if we look on page 4, you have a Note 1,

1 and it says, "The provisions of this contract shall
2 apply on nontransit tonnage contained in shipments
3 tendered to ATSF at the stations, subject to minimum
4 percentage volume commitments shown below."

5 At this point, would you explain for the
6 record transit shipments and nontransit shipments?

7 A The transit shipment is one on which there is
8 inbound freight billing into the terminal elevator, and
9 with respect to the outbound movement, the shipper is
10 sort of entitled to a through rate from the point of
11 original origin on the railroad to the point of final
12 destination. In practice, what that can result in is a
13 favorable billing arrangement from the standpoint of the
14 shipper on movements like that, and nontransit is what
15 we sometimes refer to as flat tonnage, and all that
16 means is that there is no inbound freight billing, rail
17 billing on the tonnage in the terminal elevator, so that
18 the shipper simply pays whatever rate is negotiated for
19 that without reference to any credit against the balance
20 kind of a thing.

21 Q Now, the flat tonnage may come into the
22 terminal by truck.

23 A Yes.

24 Q Or it may come into the terminal possibly by
25 another railroad.

1 A Yes.

2 Q In any event, it is stuff that is sitting
3 there not subject to a transit rate.

4 A Yes. You have to, of course, distinguish
5 between the rail fiction of a kernel of grain, if you
6 will, going through from out in the country through a
7 terminal elevator and then to the gulf ports. Really,
8 all that is happening is that is the way the rail
9 billing fiction works. In practice, the grain is
10 fungible, and it moves really wherever it moves without
11 any particular regard to the billing.

12 In other words, the product sort of loses its
13 specific identify, in fact.

14 Q Let's look at page 5 of MKT-C-13. The
15 requirement under these contracts for shipment routing
16 is it must be routed Santa Fe direct.

17 A Yes.

18 Q On page 7 of the exhibit, which is page 6 of
19 the contract, in paragraph 5, the transit privilege is
20 explained, one transit privilege.

21 A Yes. It is a single transit.

22 Q Now, on page 8 of the exhibit, page 7 of the
23 contract, in the subparagraph 3 in the middle of the
24 page that is deleted by you, there is provided a rate to
25 the shipper for the transit tonnage.

1 A Yes, apparently so, yes.

2 Q And as far as paragraph 4 seems to indicate
3 transit rate, transit privileges are good for a year,
4 and then you get an extra charge.

5 A That looks right, yes.

6 Q Isn't there a minimum shipment from the
7 transit station required under these contracts?

8 A I think there is, yes.

9 Q There appears to be a minimum volume
10 commitment specified in the contract.

11 A Well, and also a minimum level per shipment.

12 Q Okay.

13 Now, let's go over to page 11 of the exhibit,
14 page 10 of the contract.

15 I gather that the way you make the rates is
16 you have a base rate, and then you give the shipper an
17 allowance which he applies for.

18 A That's a way that we make contract rates. It
19 appears to be the setup with respect to this particular
20 example. It is essentially a refund arrangement.

21 Q I don't think we need to go into disability
22 and demurrage and so on.

23 Let's go over to page 16 and 17. There's a
24 penalty if the shipper doesn't make the volume, 50
25 percent of the volume.

1 A Okay. I would choose to think of it, of
2 course, being a lawyer, as liquidated damages, if you
3 don't mind.

4 Q And the contracts ran for about a year and a
5 half?

6 A I don't know the answer to that.

7 Q I have deleted the date so that no one could
8 find any shipper's date, and deleted the date of
9 publication of the contract summary so that no one can
10 find what contract summary was published or what date.

11 A Including me.

12 Q Including you.

13 We have in the room the original contracts,
14 and you may refer to them if you like.

15 A It's up to you. I can't answer the question
16 as you have asked it with regard to what I have in front
17 of me.

18 Q Now, let's look at Counsel's Exhibit
19 MKT-C-14. That is an export grain contract supplied
20 under discovery, table of locations and percentages.

21 Now, for this we also have to go back to page
22 4 of MKT-C-13, which is page 3 of the contract.

23 A Okay.

24 Q In Note 1, a series of stations with real
25 names in the real contracts are provided, XYZ Kansas is

1 stated, and then a percentage of nontransit tonnage that
2 must be tendered to Santa Fe under this contract is
3 stated, is that right?

4 A I don't know.

5 Q I'm going to get you one of the contracts in
6 the form as sanitized by the Santa Fe but not
7 resanitized by me so that you can check this point.

8 In this special case I suggest to counsel that
9 what is appearing is what is appearing in this table.

10 A I'm not saying that it doesn't. I just don't
11 know.

12 (Pause)

13 A Mr. Kharasch, maybe I could shorten this and
14 suggest to you that if you represented to me that --

15 JUDGE HOPKINS: Whatever it is you represent.

16 THE WITNESS: Whatever it is you represent
17 about this, I accept it.

18 BY MR. KHARASCH: (Resuming)

19 Q Let me show you a contract. I suppose it is
20 all right to show you this semi-sanitized contract.

21 A Absolutely.

22 JUDGE HOPKINS: Ask Mr. Wilson.

23 MR. WILSON: Oh, that's fine. I just thought
24 I would look at it, too.

25 BY MR. KHARASCH: (Resuming)

1 Q Here is the contract, and on page 3 of the
2 contract you see the statics are listed and a minimum
3 percent of nontransit tonnage is listed.

4 A And that will tie to one of these?

5 Q Yes. These are scrambled.

6 Q Which one is it? Maybe we can just look at
7 it.

8 Ch, here it is.

9 Q No, it is not.

10 (Pause)

11 Q I'm going to have to go look at the table to
12 see which one it is.

13 JUDGE HOPKINS: Off the record.

14 (Discussion off the record.)

15 JUDGE HOPKINS: Back on the record.

16 BY MR. KHARASCH: (Resuming)

17 Q The question pending during our off the record
18 inspection of these documents, Mr. Fitzgerald, is that
19 in Note 1 on page 4 of MKT-C-13, you will find a minimum
20 percent of nontransit tonnage specified that is supposed
21 to be given to the Santa Fe under the contract.

22 A Yes.

23 Q And the point is named and a percentage.

24 A Yes. And we checked one of them, and it came
25 out. We checked the one we couldn't figure out, but --

1 Q But we have the work paper here that is
2 available. It is not a witness' work paper, it is a
3 lawyer's work paper, and we have in the room the
4 documents produced.

5 A Well, I know you wouldn't try to trick me.

6 Q Now, let's look at MKT-C-14. Based on this,
7 it appears that your contract specify that the shipper
8 will give a percentage of nontransit grain at locations
9 where the shipper ships grain to Santa Fe. These
10 percentages vary by shippers.

11 A And origin, apparently.

12 Q And origin, yes.

13 And now let us look at MKT-C-15, the recap.
14 The Santa Fe supplied to us as a result of discovery a
15 table showing particular origins, and we grouped them
16 again so as not to hurt my shipper to show the Kansas
17 origins, Oklahoma origins, others. We repeated the
18 tonnage and the cars shown and the revenues shown, and
19 the destinations are remarkably the same because all we
20 did was then group by destinations.

21 Would you agree that this shows that for
22 apparently the year 1983, Santa Fe export grain
23 contracts such as we are discussing covered 22,450
24 cars?

25 A I would agree that's what this says. I don't

1 know what the facts are.

2 Q Shall we get out the discovery which I think
3 came from within your department, came through counsel?

4 A It is up to you.

5 MR. WILSON: For the record, Your Honor, this
6 tonnage represents tonnage shipped under all export
7 grain contracts which met the terms of MKT's discovery
8 request, as opposed to all Santa Fe export grain
9 contracts, just for clarification.

10 MR. KHARASCH: Oh, it's a recap of those.

11 Now, we asked the office to send over the
12 contracts. Apparently they did not send over that one
13 piece of paper. It is a one-pager that we received from
14 Mr. Wilson. No doubt Mr. Wilson has his copy of the
15 production?

16 MR. WILSON: I'm afraid I fail you, Mr.
17 Kharasch.

18 MR. KHARASCH: You fail me because you do not
19 wish to cooperate?

20 MR. WILSON: No, I don't have it. It is over
21 in the hotel.

22 MR. KHARASCH: It's a one-page production
23 which is apparently back in our office now and not in
24 these contracts unless we search them.

25 May we do this? Since this was a production

1 by counsel to counsel, I am going to ask that for the
2 acceptance of MKT-C-15, which has been in the hands of
3 counsel for two and a half weeks, subject to any
4 arithmetic correction that they make, saying that isn't
5 what you gave us, what we gave you, I did not want to
6 use the table in the form they gave it because it gave
7 individual origin points, and I wanted to group it to
8 Kansas, Oklahoma, Texas.

9 MR. WILSON: Your Honor, why don't we just
10 stipulate that these are okay. I had someone check
11 these figures when Mr. Kharasch supplied them to us, and
12 I do believe they do match the answer we gave in
13 discovery.

14 JUDGE HOPKINS: That is the simple way to do
15 it, Mr. Wilson. Thank you.

16 THE WITNESS: My problem with it is that I
17 don't know what it represents.

18 BY MR. KHARASCH: (Resuming)

19 Q Do you know in 1983 the volume of Santa Fe
20 export grain carried from Kansas, Oklahoma and Texas?

21 A No.

22 Q Approximately?

23 A No.

24 MR. KHARASCH: I think we may produce that
25 later.

BY MR. KHARASCH: (Resuming)

Q The making of these contracts represented some \$23 million worth of business to the Santa Fe.

Was the making of these contracts pursuant to a policy which you approved?

A No.

Q Was it pursuant to a policy that someone else approved?

A I don't know that it was even pursuant to a policy.

Q Who would be in charge in your organization of making contracts, grain contracts which shippers?

A Well, at the time this one that you marked as MKT-C-13 was made, it was apparently signed by the fellow who was in charge, Mr. F. J. Wright.

Q Mr. Wright was in charge of that sort of thing?

A I would say.

Q Mr. Wright's position was?

A Senior vice president of traffic.

Q This particular contract is dated in 1983, after February 15, sir, so you would have been successor to Mr. Wright at that time.

A No, he was still there.

Q Let me show you a contract which is dated in

1 1984.

2 Do you consider it harmful to state the month
3 of this contract, sir?

4 MR. WILSON: Excuse me just a second, Your
5 Honor. This document was not noticed up, and I would
6 like to see it.

7 JUDGE HOPKINS: Sure.

8 MR. KHARASCH: It is not going in the record.

9 JUDGE HOPKINS: It is not going in the record
10 anyway, Mr. Wilson.

11 MR. WILSON: Do you want to know what the date
12 is?

13 MR. KHARASCH: I say does it hurt to say what
14 the date is?

15 MR. WILSON: No.

16 BY MR. KHARASCH: (Resuming)

17 Q The date of this contract is June 1984, okay?
18 Would you look at the signature on behalf of
19 the Santa Fe and tell me whose signature that is?

20 A It's my name, Mr. Grygiel's signature.

21 Q I see.

22 And currently these are signed in your name
23 by --

24 A Various officers or myself.

25 Q Do you take care to see that officers signing

1 your name have -- are signing your name in accordance
2 with policies in effect at the Santa Fe?

3 A If there are such policies.

4 Q Are you saying you do not have a policy of
5 signing contracts such as NKT-C-13 at this date, today?

6 A I don't know.

7 Q And you don't know whether you had a policy of
8 signing contracts such as that in June of 1984 when Mr.
9 Grygiel signed your name?

10 A I don't know if that is the same contract as
11 this one or it is another one, but if you tell me --

12 Q I tell you it is. It covers the same states
13 and it has the same format.

14 A Then we were still making contracts that way
15 in June.

16 Q And have you issued any instructions to cease
17 making contracts in this way?

18 A No.

19 Q Indeed, have you any memoranda between you and
20 your subordinate officers with respect to how, where and
21 when they should make such contracts?

22 A No.

23 Q At page 13 of your verified statement in this
24 case --

25 MR. WILSON: Excuse me just for a minute,

1 counsel.

2 Are we finished with this line of questions,
3 for the people out in the hall who could come back?

4 MR. KHARASCH: Leave them just a minute.

5 JUDGE HOPKINS: Why don't we finish that
6 aspect, if you can, before the recess, and then we can
7 let them back in after the recess.

8 MR. KHARASCH: Sure.

9 THE WITNESS: Page 13.

10 BY MR. KHARASCH: (Resuming)

11 Q At page 13 of your verified statement, you say
12 the Santa Fe Southern Pacific will improve grain shipper
13 access to more foreign and domestic markets by linking
14 expanded growing areas.

15 Do you see the words "expanded growing area?"

16 A Yes.

17 Q When you are talking about that, you are
18 talking about the growing areas served by the Southern
19 Pacific?

20 A That's right.

21 Q And those will be linked by the SFSP with the
22 transit points, ports and border crossings?

23 A Right.

24 Q And since there doesn't seem to be any reason
25 that the Santa Fe has a policy against making contracts

1 like MKT-C-13, is there any reason to believe that the
2 SFSP would have a policy against making contracts such
3 as MKT-C-13?
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1 A I don't know that it would have a policy
2 either way. I'm not certain I understand what it is
3 that you think we should have a policy on.

4 Q Wouldn't you say that you have a policy of
5 making contracts when you make 13 identical contracts
6 with 13 different shippers?

7 A Every one of them is apparently different with
8 respect to the parts that have been deleted.

9 Q Can't tell you about the rates that are
10 deleted, but the format is the same. The scope is the
11 same.

12 A The percentages are obviously different.

13 Q So do you have a policy of making the same
14 format contract with different percentages and maybe
15 different rates?

16 A I would think that's a lot closer to it than
17 the notion that we simply have one contract.

18 Q It's one form of contract. It obviously, by
19 the table I have produced, shows that it has different
20 requirements as to percentages of flat grain.

21 A Yes. And what I'm suggesting to you is that
22 really every negotiation, every deal that we strike with
23 a customer is going to be based on the circumstances of
24 that transaction.

25 Q It appears to me -- and again, we have the

1 contracts in the room -- that all of these contracts
2 applied uniformly to the states of Colorado, Kansas,
3 Missouri, Nebraska, New Mexico, Oklahoma and Texas. All
4 those states are mentioned. So there doesn't seem to be
5 a negotiation for leaving out any geographic origin.

6 A Oh, I'm sure that if a customer wanted it out,
7 it would be out.

8 Q Does this sort of contract get you more grain
9 than you would have without signing this sort of
10 contract?

11 A I would hope so.

12 Q In that way it increases the density on the
13 lines?

14 A Again, we would hope so.

15 Q And -- well, would you make this sort of
16 contract if it didn't get you any more grain?

17 A Well, let me put it this way. You know, for
18 about three years there was virtually a drought of
19 export shipments out of the Gulf. The reason for that,
20 as I'm sure you are aware, is that there was a Russian
21 embargo, and 95 percent of nothing is nothing.

22 Now, the hope is that we are going to carry
23 some traffic under these contracts, but if nothing moves
24 period, nothing is going to move on our line.

25 Q Well, now, let's suppose something moves.

1 Under these contracts if something moves, some
2 percentage of the shipper's volume at the specified
3 points, talking flat volume, must move Santa Fe.

4 A If it moves rail.

5 Q If it moves rail.

6 A And if it moves in hopper cars, and if we
7 serve it direct.

8 Q Some percentage must move on the Santa Fe,
9 ranging up to 95 percent of the flat tonnage.

10 A With the qualification I have just mentioned.

11 Q And on the transit tonnage, all must move via
12 Santa Fe.

13 A I think that's what we read.

14 Q Now, to the extent that that prevents other
15 railroads that compete at points from getting the grain,
16 aren't you getting more grain and more density on your
17 line than you would if you didn't have these contracts?

18 A That's the principle of any contract.

19 MR. KHARASCH: Do you want to break now?

20 JUDGE HOPKINS: Are you through with that
21 subject so that we can let them back in after the recess?

22 MR. KHARASCH: That's sexy enough.

23 JUDGE HOPKINS: We'll recess for ten minutes.

24 (Recess.)

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

1 Mr. Kharasch.

2 BY MR. KHARASCH: (Resuming)

3 Q Mr. Fitzgerald, on pages 16 and 17 of your
4 study --

5 A My statement?

6 Q Your statement. Excuse me. Your corrections
7 were made that -- on your tax statements that various
8 people had developed information on pre-merger and
9 post-merger shares.

10 A Yes.

11 Q Pre-merger and post-merger participation. And
12 we crossed out the words "and post-merger."

13 A That's correct.

14 Q Although you haven't presented those figures,
15 does the Santa Fe have any figures on post-merger
16 participation shares in affected regional traffic flows?

17 A I don't know. I understood they were doing
18 that when this statement was in preparation, and
19 apparently they didn't. As you know, because of the
20 trust arrangement and all, we have not really been very
21 close to the traffic diversion studies, and generally
22 speaking, they have been conducted through outside
23 independent consulting firms.

24 Q Did you have any input or advice as to
25 participation in the traffic studies and diversion

1 studies and so on?

2 A I didn't have any direct involvement in them.
3 Some of my people worked on them.

4 Q As far as you are concerned, in your statement
5 where you are talking about these studies, this is just
6 what you understand is in the studies?

7 A Yes. I am certainly not sponsoring the
8 studies.

9 Q Apparently, however, you have received some
10 information about what the studies show.

11 A Really, only to the extent that I reviewed the
12 materials that have been presented as part of the
13 application, and that I would have to say was a cursory
14 review. It certainly was not a review in the sense of
15 approving it.

16 Q Have you given any attention to the
17 assumptions made in the various studies?

18 A I am generally aware of the assumptions, I
19 guess.

20 Q How about the procedures? Do you understand
21 them, the diversion procedures?

22 A No, I certainly don't.

23 Q Did you have occasion in recent months to
24 write to customers of the Santa Fe about the merger?

25 A Yes.

1 MR. KHARASCH: May we have marked as the next
2 Counsel's Exhibit MKT-C-16, a 14-page exhibit on the
3 letter of the Atchison, Topeka and Santa Fe, and the
4 cover page is signed by one T.J. Fitzgerald.

5 JUDGE HOIKINS: It will be marked for
6 identification.

7 (The document referred to was
8 marked Counsel's Exhibit
9 No. MKT-C-16 for identifica-
10 tion.)

11 BY MR. KHARASCH: (Resuming)

12 Q Did you send that letter around?

13 A Yes.

14 Q The attachment was attached to the letter?

15 A Yes.

16 Q Who prepared the attachment?

17 A Well, I think -- well, let me say it this
18 way. Pages 2 through 13 I believe was prepared by our
19 corporate communications department with input from our
20 law department. Page 14 was developed in my shop.

21 Q Do you send out a lot of these letters?

22 A This is the only one.

23 Q Did you send letters with this same text to a
24 lot of people?

25 A Oh, I'm sorry. Yes.

1 Q How many?

2 A This is to the best of my recollection. I
3 believe about 900.

4 Q Please turn to page 8, which is page 7 of the
5 attachment, page 8 of Exhibit MKT-C-16.

6 A Yes, sir.

7 Q Let's address the sentence, "The request of
8 the Katy, while seemingly modest in relation to the
9 expansive conditions sought by Union Pacific, KCS and
10 Rio Grande, are nevertheless completely unwarranted."

11 The Katy refers to the MKT?

12 A Yes.

13 Q Why are the Katy's requests seemingly modest?

14 A Well, they are not seeking hundreds of miles
15 of trackage rights, so they may appear modest in
16 relation to, let's say, the Union Pacific that want
17 trackage rights virtually everywhere the Southern
18 Pacific runs that is worth anything.

19 Q In your opinion, are the Katy's requests for
20 trackage rights, if those were the only requests granted
21 by the Commission, deal-breakers?

22 MR. WILSON: Objection, Your Honor. This is
23 not a trackage rights phase of the proceeding.

24 JUDGE HOPKINS: I'll sustain the objection.

25 BY MR. KHARASCH: (Resuming)

1 Q Let's turn over to page 9 of MKT-C-16 and your
2 -- you see on the first new paragraph, "Katy's claim
3 that its proposed trackage rights are necessary to
4 preserve competition is without merit?"

5 A I do.

6 MR. KHARASCH: Your Honor, to avoid your
7 ruling, my position is that we are talking about the
8 effects of the application at this phase of the hearing,
9 and if something is necessary to preserve competition,
10 it would affect the grant of the application.

11 JUDGE HOPKINS: I am sticking to my ruling.

12 MR. KHARASCH: I'm asking you whether the
13 ruling is going to extend to talking about --

14 JUDGE HOPKINS: You just go ahead and we will
15 see.

16 MR. KHARASCH: If you want to indicate me lay
17 off this stuff, it's all right.

18 JUDGE HOPKINS: I think I would prefer you lay
19 off that stuff.

20 MR. KHARASCH: We will take this up at the
21 time that we are talking about --

22 JUDGE HOPKINS: That's correct. I think that
23 would be a better time.

24 MR. KHARASCH: We can all study carefully Mr.
25 Fitzgerald's letter to --

1 JUDGE HOPKINS: That's right. You will have
2 plenty of time then.

3 THE WITNESS: I look forward to seeing you
4 again.

5 (Laughter.)

6 BY MR. KHARASCH: (Resuming)

7 Q In your statement at page 13, you're talking
8 about "The Gulf Coast chemical industry will see more
9 vigorous rail competition from Santa Fe-served plants to
10 southeastern and eastern markets."

11 That's the middle of the page, sir.

12 A I have it.

13 Q Then you say, "The same will be true for
14 shippers at Southern Pacific-served plants shipping to
15 the Chicago and Kansas City markets."

16 A Yes.

17 Q Today, shippers at the Southern Pacific plants
18 along what I have called the Bayport line, the chemical
19 line between Houston and Texas City, are served only by
20 the Southern Pacific at origin, are they not, south of
21 the PTRR?

22 A I think that's right, yes.

23 Q South of the PTRR access, yes?

24 A As far as I know, yes.

25 Q And those shippers today get their cargo

1 shipped up to Houston by geography necessarily, is that
2 right?

3 A Yes.

4 Q And then it must move -- cargo must move from
5 Houston onward either via the Southern Pacific or not
6 via the Southern Pacific, making those two divisions.

7 A If it's moving by rail, it's going to do one
8 or the other.

9 Q And do you know whether the Southern Pacific
10 tariffs permit anyone to have a joint line rate to any
11 destination served by the Southern Pacific from the
12 origin at the Bayport line?

13 A We're talking in the area of whether routes
14 are opened or closed again?

15 Q Yes.

16 A I believe not.

17 Q If that same practice were followed after an
18 SFSP merger -- that is the assumption of this question.
19 -- then would there be any way for a shipper to get rail
20 service to any point on the SFSP except by using SFSP
21 from Bayport to destination?

22 A If that assumption were to be the case.

23 Q There would not be any?

24 A That's right.

25 Q Now, today let's talk about Chicago. When the

1 cargo hits Kansas City, can it get to Chicago via SF?
2 SP does not serve Chicago.

3 A That's right.

4 Q Are you referring in your statement, then, to
5 the fact that the SFSP could reach Chicago direct?

6 A What I'm referring to -- and by that I assume
7 you mean the second sentence of that bullet.

8 Q That's right.

9 A Is that shippers located on the Southern
10 Pacific could now have single line service to Kansas
11 City and Chicago, which they can't do now unless you
12 indulge in the premise that you have stated earlier,
13 that after all, the Southern Pacific does have single
14 line service between Houston and Kansas City; and I
15 believe we talked about the fact that it was circuitous.

16 Q Are you at all informed about the present
17 pattern of movement of the Southern Pacific of chemicals
18 out of the Bayport line?

19 A No.

20 Q In the next bullet, as you call it, you are
21 talking about grain. You have mentioned the expanded
22 growing areas. Insofar as expanded growing areas are
23 southwest Kansas, the only rail carriers after merger in
24 southwest Kansas, south and west of Hutchinson, would be
25 Santa Fe and SFSP after merger, right?

1 A Don't forget about the Garden City Western, of
2 course.

3 Q If I knew where it was, I wouldn't forget
4 about it.

5 A Well, there is obviously some area where some
6 there would only be one railroad. Of course, there is
7 the Union Pacific out there. There's the Union Pacific
8 in Kansas --

9 Q In Kansas, but --

10 A But further north.

11 Q Are they south and west of Hutchinson,
12 Kansas? I have a dandy map for you.

13 A That would be good.

14 MR. WILSON: Your Honor, I believe Union
15 Pacific serves Hutchinson, Kansas.

16 JUDGE HOPKINS: Well, that's what we'll find
17 out. If somebody has a dandy map, we can find that out.

18 THE WITNESS: This is not dandy. It does well
19 with the two railroads, but it doesn't show much else.

20 (Pause.)

21 FY MR. KHARASCH: (Resuming)

22 Q Mr. Fitzgerald, I'll show you in technicolor a
23 beautiful yellow map here of southwest Kansas. Let's
24 find Hutchinson, Kansas. Hutchinson is sort of in the
25 middle, isn't it?

1 A Yes.

2 Q And if we go south and west of Hutchinson,
3 Kansas here, it appears to me that the lines are Santa
4 Fe lines and this green line is the Tucumcari line.

5 A What's this blue one?

6 Q And except fromn a point called Padium going
7 east, there's a blue line which is --

8 A Missouri Pacific.

9 Q Missouri Pacific.

10 A Maybe I'll do the questions, and you can do
11 the answers.

12 Q That's good. To --

13 A To Kingman, and then apparently -- well, it
14 trots around into Wichita and then down here at Hartman.

15 Q I'll tell you what. Let's ask the question:
16 west of Pratt, Kansas and south of Hutchinson do you
17 find anybody but the SP and the SF in Kansas?

18 A Only the Garden City Western.

19 MR. KHARASCH: We found the Garden City
20 Western, Your Honor. It runs for approximately 14 miles
21 from Wolf in Kenney County to Garden City.

22 JUDGE HOPKINS: Thank you. We need that for
23 the recrd.

24 MR. KHARASCH: As a matter of fact, there is a
25 railroad whose location I would like to get in the

1 record.

2 BY MR. KHARASCH: (Resuming)

3 Q The Texas North Western Railroad, TXNW, do you
4 know that one?

5 A Yes, sort of.

6 Q The Texas North Western runs, does it not,
7 from Liberal, Kansas down to a place called Etter, Texas?

8 A I'm not sure, but I could verify it for you if
9 you hand me the official guide.

10 (Pause.)

11 It's not listed in the railway guide, so I
12 can't help you.

13 Q No, but in the back at the stations you will
14 find it under "Inter-Texas," TXNW, and Liberal, Kansas,
15 TXNW.

16 I'll tell you what. Assume for the purpose of
17 the next question that the Texas North Western runs from
18 Liberal, Kansas to Etter, Texas, and at Etter, Texas it
19 connects with the Santa Fe, and at Liberal, Kansas it
20 connects with the Tucumcari line of the SP.

21 MR. WILSON: Applicants will stipulate to
22 that, Your Honor.

23 JUDGE HOPKINS: Thank you.

24 THE WITNESS: Thank you.

25 All right.

1 BY MR. KHARASCH: (Resuming)

2 Q And as of now, shippers on the Texas North
3 Western can ship up and get out on on the SF, and they
4 can ship down and get out to the rail network on the
5 Santa Fe pursuant to the stipulation, correct?

6 A Physically, the station at Liberal, Kansas is
7 on the Tucumcari line, and Etter is on our north-south
8 line from La Junta to Amarillo. And that would be a way
9 to get between the two lines.

10 Q It's a way to get between the two lines, but
11 let's look at the position of the shippers on the Texas
12 North Western.

13 A All right.

14 Q These are grain shippers, are they not?

15 A I assume there is some grain there. This is
16 part of the old Rock Island.

17 Q Right.

18 A Now defunct.

19 Q And the grain shippers on the Texas North
20 Western, what rail system will they have available to
21 them after an SFSP merger to get to market?

22 A The SFSP directly.

23 Q Any alternate?

24 A They would have the rest of the railroad
25 network of the United States available to them at

1 various junctions.

2 Q Junctions off the SFSP?

3 A Direct, but they only connect with the SFSP or
4 SPSF.

5 Q Do you know where Midlothian, Texas is?

6 A Yes.

7 Q Why did the Mazda Motor Company locate there
8 to obtain two different railroads' service?

9 A I don't know that they did.

10 Q Do you know that the Mazda Motor Company is
11 located there?

12 A Yes.

13 Q Do you know that it is located so that it can
14 connect with both rail systems, the Santa Fe and the
15 Southern Pacific?

16 A Both rail systems go to Midlothian, Texas.

17 Q Can you -- do you think from your experience
18 that a shipper would want to locate itself where it
19 could be served by two rail systems?

20 A My experience is that shippers are mainly
21 concerned about having one good railroad system.

22 Q Which of the two railroads serving Midlothian
23 would you call the good railroad system that Mazda wanted?

24 A I had in mind in answering that question that
25 the merged railroad system would be a good one.

1 Q Since they are located there already, which
2 one of the two serving Midlothian would you characterize
3 as the good rail system that they wanted to use?

4 A In fact, they used the Southern Pacific? Why,
5 you'd have to ask them.

6 MR. KHARASCH: Your Honor, Mr. Edward Hymson
7 of Conrail was necessarily absent today. He said he had
8 two important questions which he urged me to pose. I am
9 posing them on behalf of him. I was perfectly willing
10 to ask them. They appeared relevant.

11 JUDGE HOPKINS: Go ahead.

12 BY MR. KHARASCH: (Resuming)

13 Q Mr. Fitzgerald, is it true that the Santa Fe
14 has invested many millions of dollars in the Hoosier
15 Gateway TOFC facility?

16 A It's the Hoosier lift, we call it. It is a
17 piggyback ramp at Remington, Indiana, and our investment
18 is, I believe, somewhere on the order of \$7 million.

19 Q The application is silent about how the
20 facility will be used after the merger. Do you expect
21 to reroute Southern Pacific TOFC traffic through the
22 Hoosier TOFC terminal?

23 A As we've discussed many times, we don't route
24 traffic; shippers route it. And I'm sure Conrail knows
25 that as well as anyone. But we certainly would plan on

1 offering a single line alternative to Southern Pacific
2 shippers at Hoosier lift.

3 Q And that would be traffic that today might
4 move on the SP line?

5 A To St. Louis, for example, but I would not
6 expect the Hoosier lift would wind up drying up the
7 business that presently moves over St. Louis. I would
8 expect some of it to move both ways.

9 Q Are there alternative facilities in East St.
10 Louis and also Chicago at Corwith?

11 Yes, there are alternative facilities at East
12 St. Louis and Corwith in Chicago?

13 A Exactly.

14 Q And can you answer to what extent do you
15 expect to reduce the use of these alternative facilities?

16 A Well, Chicago's Corwith yard already is an
17 alternative to Hoosier lift, and it has not resulted --
18 that is, the establishment of Hoosier lift has not
19 resulted in a substantial lessening of business at
20 Chicago.

21 The St. Louis connection, of course, is the
22 Southern Pacific point, and I would anticipate that
23 there would probably be some draw away from the St.
24 Louis to Hoosier lift, but it would wind up depending in
25 the final analysis on how effective we can market that

1 service, how effectively we can market that service.

2 MR. KHARASCH: Those are the questions of Mr.
3 Hymson. I have no further questions for Mr. Fitzgerald
4 until he comes up again.

5 JUDGE HOPKINS: You can get him again.

6 MR. KHARASCH: I move Exhibits MKT-C-10, 11,
7 12, 13, 14, 15 and 16 into evidence.

8 JUDGE HOPKINS: With the understanding that,
9 what is it, 13, 14 and 15 will go in the confidential
10 docket. Any objection?

11 MR. WILSON: With that understanding, Your
12 Honor, Applicants have no objection.

13 JUDGE HOPKINS: They will be received in
14 evidence.

15 (The documents previously
16 marked Exhibit Nos.
17 MKT-C-10, 11, 12, 13, 14,
18 15 and 16 for identifica-
19 tion were received in
20 evidence.)

21 MR. KHARASCH: Now, since our outside
22 consultant has been permitted access to the basic
23 contract, may he be permitted access to the summaries of
24 the contracts, which are Exhibits 13 through 15?

25 JUDGE HOPKINS: They have already.

1 MR. WILSON: Yes. We have no problem with
2 that, if you're referring to the eight named individuals
3 within that list.

4 MR. KHARASCH: Yes.

5 JUDGE HOPKINS: As long as it's agreeable to
6 them, there's no problem.

7 Who is the next questioner?

8 BY MR. DREILING:

9 Q Mr. Fitzgerald, would you turn to page 4 of
10 your verified statement? At top of page 4 --

11 MR. MOATES: Excuse me, Mr. Dreiling. I'm not
12 sure the witness knows who you represent.

13 THE WITNESS: I do. Mr. Dreiling and I have
14 sat on the same side of the table in the past.

15 MR. MOATES: I apologize.

16 BY MR. DREILING: (Resuming)

17 Q Thank you, Mr. Fitzgerald.

18 Okay. On the top of page 4 you describe a
19 market which you indicate the Santa Fe has had a certain
20 advantage in in the past, and I want to get some
21 parameters for that market.

22 You indicated it involves the Chicago gateway
23 between the Great Lakes-northeastern U.S. industrial
24 region on the one hand, and the southwest and California
25 on the other. Could you tell me the particular states

1 which you would include in the Great Lakes-northeastern
2 United States industrial region?

3 A Yes. Illinois, of course, and then I would
4 say really the northern half of Indiana, northern half
5 of Ohio, Pennsylvania, Michigan, New York, New England,
6 New Jersey.

7 Q Okay. Now, does that cover it? And what
8 states would you include within your definition of the
9 southwest in addition to California?

10 A California, Arizona, New Mexico, and Texas. I
11 guess you would have to probably be a little bit
12 specific about what points in those. Santa Fe-served
13 points is what I was referring to.

14 Q And that's why you would not include Louisiana?

15 A No, I would not include Louisiana.

16 Q Now, you indicate that you have two principal
17 competitors or have had two principal competitors in
18 that market.

19 MR. WILSON: Objection, counsel. He did not
20 indicate it was a market at all. He defined for you two
21 regions. He didn't indicate that there was a market
22 involved.

23 JUDGE HOPKINS: Restate the question.

24 BY MR. DREILING: (Resuming)

25 Q Do you understand when I say "market" that I'm

1 referring to a corridor, the described area of the
2 Chicago gateway area between the Great Lakes and the
3 southwest and California?

4 A Fine.

5 Q With regard to traffic moving over the Chicago
6 gateway between those points, would that constitute in
7 your mind a transportation market?

8 MR. WILSON: I would object again, Your
9 Honor. We have a witness who has testified as to what
10 the transportation markets are in this case, and I don't
11 think it is fair for Mr. Dreiling to cross examine Mr.
12 Fitzgerald who is not being presented as an expert on
13 the market definitions relevant to this case.

14 JUDGE HOPKINS: Can you answer that, Mr.
15 Fitzgerald?

16 THE WITNESS: If Mr. --

17 JUDGE HOPKINS: I'll allow it.

18 THE WITNESS: If Mr. Dreiling would tell me
19 what he means by "market."

20 JUDGE HOPKINS: I think he was trying to
21 define it previously, but go ahead.

22 BY MR. DREILING: (Resuming)

23 Q Okay. You are the vice president of marketing
24 for the Santa Fe, right?

25 A Traffic.

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1 Q Right. And in your responsibilities for
2 marketing, you go out and try to sell your
3 transportation services in markets, don't you?

4 A Yes.

5 Q And so on a day-to-day basis you identify
6 transportation markets, do you not?

7 A Identify transportation opportunities. My
8 problem with answering your question is that I'm not
9 certain whether you are using marketing in some kind of
10 a legal sense where I use it in my day-to-day work in
11 kind of a business sense. And I just don't want to get
12 into semantic difficulty with you.

13 Q I am willing to accept your definition of it
14 in a business sense. And I guess the way I'll ask the
15 question of you is based upon your testimony at the top
16 of page 4 and in your practice as a marketing man, would
17 you consider that the traffic moving over the Chicago
18 gateway between the Great Lakes region and the
19 northeastern industrial region and the southwest and
20 California would constitute a business market which you
21 would take interest in and attempt to sell Santa Fe's
22 transportation services over?

23 A As I would use the term marketing, yes.

24 Q We will accept your definition.

25 A It's a non-legal kind of a definition.

1 Q And with that in mind, you indicate that you
2 have two principal competitors competing with you,
3 selling the transportation services over the Chicago
4 gateway between those points, do you not?

5 A At least two.

6 Q Well, you indicate here your two principal
7 competitors are the UP and -- the Union Pacific and the
8 Southern Pacific; is that correct?

9 A (Nods in the affirmative.)

10 MR. WILSON: Again, counsel, I believe you
11 mischaracterized. The statement is talking about his
12 two principal rail competitors. I think the sentence
13 specifically "our principal rail competitors in these
14 regions." I assume that you are trying to discuss
15 transportation markets.

16 JUDGE HOPKINS: Are you, or are you attempting
17 to just state rail competition?

18 BY MR. DEILING: (Resuming)

19 Q I will amend my question to say your two
20 principal competitors, rail competitors, for that
21 traffic, rail traffic, moving through that -- over the
22 Chicago gateway between those two points are the Union
23 Pacific and the Southern Pacific.

24 A Yes.

25 Q With regard to the Union Pacific you indicate

1 that Santa Fe has had an advantage in the past because
2 they were required to interline their traffic, and I
3 believe this morning you testified that it was a joint
4 line movement with the C&NW over Fremont; is that
5 correct?

6 A Yes. The Union Pacific did not, until
7 recently, have single line service to Chicago. It does
8 now. But it chooses, at least for some traffic, to use
9 its connection at Fremont, Nebraska with the
10 Northwestern.

11 Q Are you at all familiar with the agreement
12 entered into by the C&NW and the Union Pacific in the
13 course of the Union Pacific-Missouri Pacific-Western
14 Pacific merger?

15 A I have heard about it.

16 Q Do you realize that by that agreement which
17 was approved by the Interstate Commerce Commission,
18 Union Pacific agreed to maintain and keep open the
19 Fremont gateway for five years?

20 A Yes. With certain -- as long as certain
21 revenue requirements were agreed to by the North Western.

22 Q Are you familiar with the fact that it even
23 required that along with rate parity, it required the
24 Union Pacific to maintain the level of service by that
25 gateway?

1 A I'm not familiar with that, either part of
2 that.

3 Q Can you -- do you have any -- can you tell us
4 the degree to which the Union Pacific -- strike that.

5 Are you telling us that the Union Pacific
6 presently moves traffic over a single line route via St.
7 Louis, and heretofore it has moved via the joint line
8 route with the C&NW over Chicago?

9 A No, no. I believe they move some, but what
10 kind of traffic and where it goes I'm not sure. I know
11 they have the capability to move it.

12 Q Okay. If a part of the C&NW-UP agreement with
13 respect to routing required that the rates and routes be
14 maintained and open for all traffic interchanged with
15 the C&NW at Fremont and Omaha-Council Bluffs between
16 stations or interchanges on the UP railroad west of the
17 Missouri River, on the one hand, and stations in the
18 official territory, excluding points in Illinois south
19 of a line of the TPW between Iowa Junction and Watseka
20 via Pekin and Peoria, on the other hand; that by and
21 large, and bearing in mind your description of the
22 states that you defined as including the Great Lakes,
23 northeastern industrial districts, at least the rate and
24 route parity would have to apply to what you call the
25 Great Lakes and northeastern industrial district?

1 A I got lost somewhere around Pekin.

2 JUDGE HOPKINS: I think everybody got lost.

3 BY MR. KHARASCH: (Resuming)

4 Q I will restate the question.

5 The agreement between the C&NW and the UP
6 draws certain parameters or restrictions on the rate and
7 route parity. Do you understand that?

8 A Yes. I'm not sure in any detail what they are.

9 Q They basically do it by saying that for all
10 traffic except that moving south -- so I'm going to say
11 for all traffic moving from points north of that line --

12 A Yes.

13 Q And that line is --

14 A I understand where the line is.

15 Q Then, okay, my question is the requirements of
16 the C&NW-UP contract that require the UP, in essence,
17 maintain the Fremont interchange --

18 A Yes.

19 Q -- Would apply to the region that you have
20 referred to here, the Great Lakes-northeastern
21 industrial region, would it not?

22 A Yes, it sounds like it. At least for five
23 years.

24 Q Yes, sir. Now, your testimony is that the
25 Santa Fe has in the past experienced an advantage over

1 the Southern Pacific because of the Southern Pacific's
2 circuitous route.

3 A Yes.

4 Q Via Corsicana. I take it that route goes to
5 St. Louis, and for that reason you are saying the St.
6 Louis gateway is competitive with the Chicago gateway
7 for certain traffic?

8 A Well, I'm saying that there is a dividing
9 line, and the one that you just read into the record as
10 involving the North Western and the Union Pacific is
11 somewhere about where it falls. Traffic that originates
12 or is headed from a point south of that line would
13 customarily flow through St. Louis. Of course, again
14 we're talking exclusively here about rail traffic. If
15 it comes from north of that line, it would tend to go
16 another way.

17 Now, as you get farther east, that distinction
18 blurs.

19 Q Now, you did not name the Burlington Northern
20 as a principal competitor. Is that because even with
21 the acquisition of the St. Louis-San Francisco railroad
22 it has not become an efficient competitor in that market?

23 A Well, they're just not in the Chicago to
24 California, Arizona, New Mexico region. They are
25 certainly an effective competitor where they are, which

1 would include Texas, of course.

2 Q Now, as a result of certain rail restructuring
3 in the west, the Southern Pacific has received certain
4 benefits in the past let's say ten years; would you
5 agree?

6 A Such as?

7 Q They acquired the Tucumcari line. Would you
8 consider that a benefit?

9 A I'd say it's a mixed bag.

10 Q And in the Union Pacific-Missouri Pacific
11 merger, they acquired the trackage rights between Kansas
12 City and St. Louis over the Missouri Pacific line.

13 A Yes. I would say that more clearly is useful
14 to them given the fact that they have the Tucumcari line.

15 Q Well, considering traffic moving, let's say,
16 between California and the Great Lakes-northern
17 industrial region, does not the acquisition of the
18 Tucumcari line in conjunction with the acquisition of
19 the trackage rights over the Missouri Pacific between
20 Kansas City and Missouri Pacific benefit them by
21 eliminating the circuitry of the route you were talking
22 about over Corsicana?

23 A Yes.

24 Q Thus, of the two principal competitors --
25 strike that.

1 Let's move to the next paragraph on page 4.
2 We are talking about the Santa Fe's interest in traffic
3 moving to and from the southeastern United States via
4 the Memphis and New Orleans gateway.

5 A Yes, sir.

6 Q You indicate Santa Fe does not directly serve
7 either of these gateways.

8 A Does not.

9 Q And I take it when you referred to the other
10 major western rail systems, you're referring to the
11 Burlington Northern, the Union Pacific and the Southern
12 Pacific; is that correct?

13 A Yes. You really have kind of two megas and
14 one large there. But yes.

15 Q Now, the traffic with which the Santa Fe is
16 concerned or the traffic for which you have an interest
17 moving to and from the southeast, would it be fair to
18 say that it is predominantly the transcontinental
19 traffic moving between the West Coast points and the
20 southeastern points?

21 A Yes. And also that originating or terminating
22 in Louisiana itself, but also traffic headed into the
23 southeast, into Southern Freight Association territory.

24 Q Now, the Burlington Northern reaches only the
25 Memphis gateway, is that correct?

1 A Well, it does not reach New Orleans.

2 Q Of the two gateways.

3 A It does go right into the southeast, though,
4 by going down to Birmingham and then on to Pensacola,
5 Florida. So they're as good or better than New Orleans
6 really.

7 Q Let me ask you this. Considering traffic
8 moving between the West Coast points -- and let's talk
9 about California points --

10 A Yes, sir.

11 Q -- To and from the southeastern United States.

12 A Okay.

13 Q It's true, is it not, that the Burlington
14 Northern cannot afford a single line service?

15 A Well, it reaches very few points in
16 California, so I'd say there would not be an effective
17 single line competitor between the southeast and
18 California.

19 Q And unless you were talking about an
20 exclusive, let me say, of the BN's interchange with the
21 Santa Fe at Avard, if the BN were to interline within
22 California with any California railroad on the West
23 Coast, it would have quite a circuitous route getting
24 California traffic to and through the Memphis gateway,
25 would it not?

1 A Well, it could also choose to interline
2 traffic with either the Union Pacific or the Southern
3 Pacific at Memphis or some other point.

4 Q Let me ask you something. Does a carrier that
5 originates the traffic generally have a greater degree
6 of influencing the shipper's choice of route than would
7 any other involved carrier in the movement?

8 A Very generally I would say, speaking again of
9 a movement that is going to move by railroad, if the
10 shipper has gotten beyond that question and is now
11 thinking about what route to send it, I would say the
12 desires of the origin carrier is something that a
13 customer will bear in mind in deciding how to route.

14 Q Well let's consider your indication that the
15 BN reaches Birmingham, Louisiana.

16 A Alabama.

17 Q And let's consider a westbound movement which
18 the Burlington Northern could originate in Birmingham.

19 A Okay.

20 Q Would BN generally have a greater influence
21 over its routing as the origination carrier than it
22 would on traffic let's say moving the other direction
23 which it would terminate in Birmingham?

24 A If the shippers made the determination to use
25 the railroad, typically the origin carrier would be the

1 sales representative who would attempt to secure the
2 routing, and I would say that depending on rates,
3 service, equipment and supply, liability and so on, that
4 the origin carrier is in a position to maximize the
5 utility of that transportation movement from the
6 customer's point of view. I would say he would have a
7 better than average chance of doing so.

8 Q Now, both the SP and the Union Pacific serve
9 both the Memphis and the New Orleans gateways, is that
10 correct?

11 A Both the Union Pacific and Southern Pacific?

12 Q Yes.

13 A Yes.

14 Q And the KCS, my railroad, serves New Orleans,
15 does it not?

16 A Yes, it does.

17 Q Now, the Santa Fe has an existing interchange
18 with the Burlington Northern at Avard, Oklahoma whereby
19 it can serve the Memphis gateway, can it not?

20 A Yes.

21 Q And it has a runthrough train operation with
22 the BN at Avard, does it not?

23 A Yes, as I have defined runthrough operations
24 for Mr. Kharasch, that's right.

25 Q Santa Fe also has an existing interchange with

1 the Union Pacific at Sweetwater, Texas whereby it can
2 serve both Memphis and the New Orleans gateway, is that
3 correct?

4 A In conjunction with the Union Pacific,
5 Missouri Pacific, yes.

6 Q And it has an existing interchange with the
7 KCS at Dallas, Texas whereby it can serve the New
8 Orleans gateway?

9 A That's right.

10 Q Does the Santa Fe have an existing interchange
11 with the Southern Pacific whereby it can serve Memphis
12 and New Orleans?

13 A Well, it has one as to New Orleans at
14 Beaumont. I don't know that we have one that actually
15 moves any traffic into Memphis, but after the merger we
16 would anticipate having one.

17 Q I am not quite certain, Mr. Fitzgerald, how to
18 measure this. What I want to do is get an idea from you
19 as to the volume moving through the various
20 interchanges. I don't know whether to do that by
21 carloads or what have you.

22 Are you familiar with or do you know the
23 carloads interchanged by the Santa Fe with the four
24 railroads we have mentioned at the different interchange
25 points?

1 MR. DREILING: Your Honor, I would like to get
2 his judgment as the Vice President of Marketing as to
3 which he considers more prominent. I don't need --
4 that's why I didn't ask for carloads.

5 JUDGE HOPKINS: You are not talking about
6 volumes? You just want him to indicate what he
7 considers?

8 MR. DREILING: From the prominence
9 standpoint.

10 JUDGE HOPKINS: If you can, go ahead.

11 THE WITNESS: Well, from a volume standpoint
12 as opposed to a qualitative kind of a measurement, our
13 runthrough operation with the KCS is handily the largest
14 volume at this point. Second I think would be the Aard
15 connection. Third would probably be the Sweetwater
16 connection, and fourth would probably be the Beaumont.

17 BY MR. DREILING: (Resuming)

18 Q Okay.

19 Now, the Southern Pacific-Santa Fe interchange
20 at Beaumont has diminished over the last couple of
21 years, has it not?

22 A I don't know.

23 Q Do you know whether the Santa Fe's interchange
24 with the Missouri Pacific at Sweetwater has diminished
25 over the last couple of years?

1 A It has.

2 Q And do you know whether the Santa Fe's
3 interchanges with both the KCS and the BN have increased
4 over the last couple of year?

5 A One of each. Yours is up and Burlington's is
6 down.

7 Q Now, has the Santa Fe ever restricted
8 application of its tariff routes to foreclose the
9 SP-Santa Fe interchange at Beaumont on traffic moving
10 between the southeastern territory and the states of
11 California, Arizona and New Mexico?

12 A I think that's a discussion we had with
13 respect to the route closings in July. Well, the answer
14 is yes. In 1983 we did, and that is what was fixed up
15 by the routing matrix that I was questioned about.

16 Q We have already established that the Santa Fe
17 does not serve the southeastern gateways directly.

18 My question to you is why would the Santa Fe
19 restrict its route so as to eliminate its connection
20 with one of the carriers directly serving those
21 gateways, and that is the Southern Pacific?

22 A Because the Southern Pacific had restricted
23 its routing against the Santa Fe which as I discussed
24 earlier would in each case where we participated in any
25 movement with the Southern Pacific require us to receive

1 our minimum haul and for them to get their maximum haul,
2 and being an advocate of open routing, we tried to bring
3 them back to the table by doing that, and we did.

4 Q This is for my information.

5 With Mr. Kharasch this morning you discussed
6 certain reciprocal interchange agreements that you had
7 with the SP and the UP.

8 Did you mention that you had one with the EN?

9 A Yes, yes.

10 Q And did you indicate whether you had one with
11 the KCS?

12 A I didn't indicate. We do not, but the routing
13 restrictions that we placed in effect in July of 1984,
14 as I would understand it, would have no effect on us
15 because of our joint traffic, yours and mine, and if it
16 did, we would be happy to talk about it. But my
17 understanding is it does not.

18 Q Does the UP have single line routing
19 capabilities between California points and the Memphis
20 and New Orleans gateways?

21 A Yes.

22 Q And could you tell me which California points
23 the UP would have such capabilities for?

24 A Well, there are a lot of them, but maybe for
25 shorthand I would say the Los Angeles Basin area and the

1 Bay area, and Sacramento-Stockton area would be the
2 principal areas two and from which rail transportation
3 would move.

4 Q And those are both areas where the Santa Fe
5 can serve many of these points in common with the Union
6 Pacific, can it not?

7 A Yes.

8 Q Now, the Union Pacific, if it were to move
9 traffic from the Los Angeles basin through the Memphis
10 or New Orleans gateways would have to move through the
11 central corridor, would it not?

12 A Yes.

13 Q And how would you compare from a service
14 transit time standpoint that route with say the Southern
15 Pacific's route between Memphis or New Orleans and the
16 Los Angeles area?

17 A Well, I would have to take it in a couple of
18 steps on both ends. I would think it would be highly
19 competitive, maybe the best between Memphis and northern
20 California. I would think it would be probably close to
21 if not as good as from Memphis to southern California.
22 From New Orleans to the Bay area, I would think it would
23 be quite competitive. From New Orleans to southern
24 California I would say would be less efficient.

25 Q What if we were to compare the UP single line

1 route with Santa Fe's joint line route, let's say, to
2 Memphis with the BN via Avarad?

3 A I think probably again, do you want it broken
4 down in the four quadrants?

5 Q I had been asking about the Los Angeles basin
6 area predominantly.

7 A Oh, I have been answering about both.

8 Q That's fine with me.

9 A Well, let's do it your way.

10 Q Okay, the Los Angeles basin.

11 A All right.

12 We have a two-line route from each point, and
13 they have single service, single line service. The
14 Southern Pacific also has single line service, of
15 course, and I would say that in all three of those
16 markets -- I'm sorry, both of those markets, we are in
17 third place, that's what I am trying to say, in terms of
18 our ability to attract rail customers.

19 Q All right.

20 Is this on the standpoint of transit time or
21 circuitry?

22 A Well, I want to go back and think over the
23 last answer. I think we are not third from New Orleans
24 to Southern California. I think we are second, you and
25 us.

1 Q Second to whom?

2 A To Southern Pacific, and the reason as to New
3 Orleans is that the Union Pacific's line would be more
4 circuitous, single line, and presumably longer in
5 duration as well. I think we would be third out of
6 Memphis because those problems don't apply in that
7 corridor.

8 Q Now, in your testimony on cross examination
9 yesterday by Mr. Kharasch, you identified a Mr. J. E.
10 Wourk as your Assistant V.P. of Sales.

11 A Right.

12 Q Do you work very closely with him?

13 A Yes, sir.

14 Q Do you respect his opinions?

15 A Yes.

16 Q Would you respect his judgments concerning
17 marketing matters?

18 A Sure.

19 Q Now, you are familiar with the KCS's
20 interchange with the Santa Fe at Dallas?

21 A Yes, I am.

22 Q And it is commonly referred to as the Big E,
23 is it not?

24 A Yes, it is.

25 Q And Mr. Wourk had a great deal to do with

1 putting the Big D together, did he not?

2 A He may be one of the heroes to whom Mr. Cena
3 referred in his testimony.

4 Q And if -- well, strike that.

5 Are you familiar with the fact that the KCS
6 and the Santa Fe jointly applied or entered their entry
7 in the Modern Railroads 1982 Golden Freight car Award
8 Competition?

9 A I wasn't aware of that.

10 How did we do?

11 Q I think we lost.

12 A It wasn't our turn that year.

13 Q What I am referring to now, Mr. Fitzgerald, is
14 an attachment or exhibit to the verified statement of I.
15 W. Floth which has been filed for the record in this
16 proceeding as KCS-12, and it contains -- what it is is
17 the application that has been prepared jointly by the
18 SP-Santa Fe. It is -- the indication on it is where it
19 asks for the person submitting -- strike that.

20 One of the attachments, the cover letter to
21 it, is a letter from Mr. J. E. Wourk, General Manager,
22 Sales, to Mr. H. Wayne Davis, Vice President, Sales of
23 Kansas City Southern Railway Company, and he says, "Dear
24 Wayne, I am attaching a copy of the joint Santa Fe-KCS
25 L&A entry into the Modern Railroads 1982 Gold Freight

1 Car Award Competition. To the extent that it was
2 possible, we blended in the joint comments and feel that
3 we have an excellent submittal. At this point we can
4 only await the outcome of the judging. I feel confident
5 that our entry will make a strong run for the 1982 Gold
6 Freight Car Award."

7 The entry is the Big D connection.

8 Now, I am going to read a few sentences which
9 describe the Big D connection and ask if you agree with
10 them.

11 A Okay.

12 Q "The Big D connection required management
13 commitment, well-coordinated efforts from the
14 Departments of Sales, Operating and Advertising of each
15 carrier."

16 A I agree.

17 Q "We have created competition that has
18 precipitated better service for all shippers in this
19 corridor."

20 A Well, we have added some competition that
21 wasn't there. All we really did was shift our
22 connection.

23 Q But you don't feel that we created
24 competition?

25 A I think the competition was already there. We

1 just entered the fray in a slightly different way than
2 we had done it prior to this.

3 Q Do you feel that we precipitated better
4 service for all shippers in the corridor?

5 A I don't know.

6 Q Now, it says here, "The Kansas City Southern
7 lines has spent \$4 million on TCFC/COFC facilities in
8 New Orleans."

9 Were you aware of that?

10 A No, but I have no reason to disagree with it.

11 Q It says "The KCS strategic location in New
12 Ofleans has provided lower cost and better service for
13 patrons."

14 Would you agree with that?

15 A I have heard some problems with that, so I am
16 concerned about agreeing with that. You know, you have
17 to keep it open 24 hours a day, Mr. Dreiling if you are
18 really going to do any business there.

19 Q Okay. The next is "Most recently, terminal
20 runthroughs have been established with the Family Lines
21 and the Southern Railway System."

22 Are you familiar with the direct runthrough
23 operation?

24 A No, and I know we are having some problems
25 with that, too.

1 I am not saying we are not trying. We are
2 trying like crazy, and I know you are, too.

3 Q Now, you have already described in your
4 testimony to Mr. Kharasch one of the features of the
5 Big D operation, and that is the runthrough train
6 operation, is that correct?

7 A Yes.

8 Q Now, are you aware that there is involved in
9 the runthrough train operations or in the runthrough
10 interchange operations direct interchanges between the
11 L&A at New Orleans and the Family Lines and Norfolk &
12 Southern?

13 A Well, I know there are interchanges. I don't
14 know what the physical circumstances are at New
15 Orleans.

16 Q And I think you already have described in
17 answer to Mr. Kharasch's testimony, the preblocking
18 practices on these trains.

19 A Somebody else did. I think it was the boss.
20 I wouldn't disagree with what he had to say about it.

21 Q What was your role in developing Big D?

22 A I had no role. I guess I have a continuing
23 role to try to make it work.

24 Q Had you had any discussions with other Santa
25 Fe personnel preparatory to its establishment?

1 A Not before it was established, no.

2 Q What part does the Big D have in Santa Fe's
3 ability to compete with the SP for traffic moving
4 between the west coast points to and through the New
5 Orleans gateway into the southeast?

6 A Well, it is our principal access in those
7 lanes because we have chosen to make it that. If Big D
8 weren't there, we would probably have to go back to
9 Sweetwater or over to Beaumont, or I don't know, or
10 withdraw from that participation in that corridor.

11 Q Are you familiar with the fact that the Santa
12 Fe has number designations for the various trains it
13 operates throughout its system?

14 A Yes.

15 Q And it would be reasonable, would it not, that
16 the rurthrough train operated in conjunction with the
17 L&A over Big D would have a number designation?

18 A It does.

19 Q And what is that number designation?

20 A Eastward it is 975 and westward it is 578 or 9.

21 Q I think you will find it is 579.

22 A Okay.

23 Q The numbers are just reversed, 975, 579.

24 A Neat, huh?

25 (General laughter.)

1 JUDGE HOPKINS: Very original.

2 BY MR. DREILING: (Resuming)

3 Q Now, those trains operate, let's say, 579 is
4 the westbound train.

5 A Yes.

6 Q That operates, originates in Dallas and
7 terminates in Richmond, California, is that not
8 correct?

9 A On our line, yes.

10 Q It operates through Barstow, is that not
11 correct?

12 A Yes.

13 Q Now, if I understand it right, at Barstow,
14 out of Brownwood, you have a southern California block
15 and a northern California block on that train.

16 A I'm sure that's right.

17 Q In fact, I will back up.

18 Do you know whether at Shreveport, Louisiana
19 the L&A prepares a southern California block and a
20 northern California block?

21 A No, I don't. But I'm sure the other Mr.
22 Fitzgerald would.

23 Q And then at Barstow it would be reasonable to
24 assume that the southern California block would be sent
25 out to be carried on down to Los Angeles?

1 A Via connecting schedule, yes.

2 Q And then the northern California block would
3 continue up to Richmond?

4 A Right.

5 Q Now, the 975 is the eastbound train, and you
6 would likely have the same operations in reverse, would
7 you not?

8 A Yes. I am a little more familiar with that
9 one. I know that we get a block from Los Angeles at
10 Barstow added to that train, I think off of train 878.

11 Q And what happens to that train once it reaches
12 Brownwood, do you know?

13 A It continues on to Dallas, but it may be
14 switched there.

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1 Q Would you do any preblocking at Brownwood?

2 A Probably. Again, the other Mr. Fitzgerald
3 would be the man.

4 Q Are you at all familiar -- well, let me ask
5 you this. Did you take any part in the selecting of the
6 routes that were used to set up the train operations in
7 the operating plan submitted by the SF/Santa Fe?

8 A Very limited extent, I was involved.

9 Q Did you have anything to do with the decision
10 to route, let's say, the Oakland traffic, Oakland
11 TOFC/COFC traffic which you want to move through the
12 Memphis gateway by a dedicated train between Oakland and
13 Pine Bluff via Dallas?

14 A No, I didn't have anything to do with that
15 decision.

16 Q Do you know what the contemplated course of
17 action is with respect to Train 579 under the proposed
18 operating plan?

19 A I heard you ask another witness about it. I
20 think it was Mr. Cena. And I believe you told him that
21 it would be terminated at Clovis. Am I right?

22 Q That's right. That's what your operating plan
23 suggested will happen.

24 If Train 579 were terminated or shortened so
25 that it would terminate at Clovis, could it be used to

1 continue the Big D run-through operation?

2 A Well, Mr. Cena testified that he would fire 17
3 people if it were terminated at Clovis, and I don't want
4 to be one of the 17.

5 Let me tell you what he was saying, because I
6 think maybe we all may have missed the sense of what he
7 was saying. Clovis is just a place where our line from
8 Texas joins our transcontinental main line from
9 Chicago. And there's nothing there but railroad yards
10 and a small city that is supported that is supported by
11 the railroad.

12 If they are shortening that schedule, it is
13 with the idea that it would be integrated into a
14 transcontinental main line train at Clovis. It's not
15 going to just -- the traffic isn't going to stop and sit
16 there. Or some of us are going to be looking for a
17 job.

18 Q Aside from 579 and 975, if we were to assume
19 that the evidence will show -- and I think that the
20 operating plan does show this -- that there are no other
21 proposed train operations moving between northern
22 California and Dallas which originate or terminate at
23 Dallas --

24 A I'm sorry. I don't want to interrupt you.
25 But there would be no scheduled eastbound at all into

1 Dallas, or are we only dealing with the westbound right
2 now? We've talked about 579.

3 Q Strike that question.

4 One of the things I noticed about Trains 579
5 and 975 is that 975 terminated at Dallas and 579
6 originated at Dallas.

7 A Yes.

8 Q Now, this is necessary because in order for
9 you to have a run-through train operation, you've got to
10 show them as originating and terminating, because east
11 of Dallas they are I&A trains.

12 A That's right. Responsibility for their
13 operation is with the I&A.

14 Q So that after a merger, if you were to
15 effectuate your proposed train operation, you would have
16 to have a train or -- you would have to have a train
17 that would originate, be shown as originating and
18 terminating at Dallas in order for it to be part of a
19 run-through train operation with the I&A, would you
20 not?

21 A Yes. That's where our junction point with the
22 I&A is, is Dallas.

23 Q Well, let me ask you this. Has anybody
24 discussed with you the proposal with respect to the Big
25 D run-through interchange after the merger and how you

1 would handle it?

2 A Yes. We've had some discussions about it.

3 Q And have you come to a judgment as to how it
4 would be handled?

5 A I have.

6 Q And what are those?

7 A We're going to continue to work the Big D
8 interchange to the extent that customers want to use it,
9 and we are going to provide a service commensurate with
10 its use.

11 Q Have you determined whether or not you could
12 continue the existing train operations under the
13 proposed operating plan?

14 A Well, I haven't, but -- except to maybe give
15 you some general guidelines. If the traffic is there in
16 a volume which would justify the existing operation, I
17 can assure you that I am going to insist on that
18 operation being kept.

19 Q Now, if the traffic is diverted over time to a
20 single line Southern Pacific and Santa Fe, such that the
21 volume is not there to justify, from an economic point
22 of view, maintenance of a through service, then we're
23 going to have to see what we can do, given the volumes
24 that we have.

25 Q I think that is what I am fearful of. I am

1 wondering about the chicken or the egg there. You tell
2 me that if it is diverted and the volumes fall off, you
3 would then have to reconsider Big D.

4 And I'm suggesting that looking at your
5 operating plan, you're making certain the diversions
6 will occur.

7 MR. WILSON: Objection, Your Honor. I think
8 Mr. Dreiling's assumption is faulty. The operating plan
9 does not indicate that which Mr. Dreiling is assuming in
10 his question.

11 MR. DREILING: Let me discuss that for a
12 moment.

13 JUDGE HOPKINS: Go ahead.

14 BY MR. DREILING: (Resuming)

15 Q We presently interchange the Big D run-through
16 trains at the East Dallas Yard in Dallas.

17 A Yes, that's right.

18 Q And the L&A operates into Dallas in the East
19 Dallas Yard via trackage rights over the Santa Fe; is
20 that right?

21 A I don't know.

22 Q Your operating plan shows that in Year 3, you
23 will be downgrading the East Dallas Yard and using it
24 for storage purposes and local support purposes, and
25 that you will be moving your through-train operation to

1 the SP's Miller Yard in Dallas.

2 Are you familiar with that?

3 A I'm not familiar with the physical facts, but
4 I don't have any reason to doubt that.

5 Q Let's assume for a moment that the operating
6 plan does show that.

7 A Okay.

8 Q Do you know whether the L&A has the physical
9 means of reaching the Miller Yard?

10 A I don't know.

11 Q Well, assume for the moment it does not have
12 those physical means; that it can only operate over the
13 trackage rights it presently has over the Santa Fe into
14 the East Dallas Yard.

15 A All right.

16 Q If the SPSF portion of a run-through train is
17 operating into Miller Yard, and the L&A cannot reach
18 Miller Yard, it can only reach the East Dallas Yard, can
19 the run-through operation be effected through Dallas?

20 A Certainly.

21 Q In what fashion?

22 A We've already talked about what run-through
23 operations are. You don't have to switch a train. You
24 don't need a yard.

25 Q And where do you effect interchange?

1 A Well, normally we effect them on the main line
2 if there is no work to be done with the train.

3 But let me answer your question a second way.
4 We're not trying to drive business away from the
5 railroads. You know, that is a perverse sort of a
6 logic. What we try to do is to attract business to the
7 railroads. We're not going to dry up an opportunity for
8 us to participate in traffic.

9 We'll find a way to connect with you as we
10 always have.

11 Q Even though your new single line route to New
12 Orleans may be competing with the joint line route via
13 Dallas?

14 A Even though.

15 Q Page 6 of your verified statement. You
16 discuss on that page the fact that the Santa Fe has
17 limited coverage of the Gulf Coast ports, whereas the
18 Union Pacific and Southern Pacific have extensive
19 coverage of those ports.

20 Why is extensive port coverage necessary?

21 A A rail carrier has very limited control over
22 what port will be chosen for international traffic.

23 JUDGE HOPKINS: Excuse me a minute. Aren't we
24 getting into a subject that Mr. Kharasch went into
25 extensively?

1 MR. WILSON: I think so, Your Honor. I
2 apologize. Let me object.

3 JUDGE HOPKINS: I thought we agreed --

4 MR. DREILING: Your Honor, I have one
5 particular question I wanted to ask him on that line of
6 questions

7 JUDGE HOPKINS: Thank you.

8 BY MR. DREILING: (Resuming)

9 Q Considering port coverage, and I will agree
10 you did discuss that with Mr. Kharasch, he didn't ask
11 you one question. And that is, doesn't extensive port
12 coverage give a carrier the ability to make package
13 deals; that is, to quote one rate from a given port in
14 conjunction with a rate from another port?

15 A They certainly can.

16 Q Does that give a carrier who, let's say,
17 serves both ports, a competitive advantage over a
18 carrier, rail carrier, that serves but one of the ports?

19 A I don't know. It could, in some
20 circumstances, but it wouldn't necessarily follow.

21 Q Do you know whether the SP has ever used its
22 ability, used the fact that it serves both
23 Houston-Galveston and the New Orleans ports -- has used
24 those to quote package deals with the shippers and more
25 effectively compete with the Santa Fe which serves only

1 Houston-Galveston?

2 A I believe they may have.

3 Q And has the fact that you now can reach New
4 Orleans as well as Houston through your cooperative
5 efforts with the KCS helped you offset that sort of
6 competitive advantage held by the SP?

7 A Well, I'm not sure what they have done has
8 really resulted in any major competitive advantage to
9 the Santa Fe.

10 The difficulty that we have had is really the
11 more basic problem that we don't have the single line
12 service. And I think we're doing the best we can under
13 the circumstances.

14 MR. DREILING: Your Honor, I think that's all
15 the questions I have.

16 JUDGE HOPKINS: Off the record a minute.

17 (Discussion off the record.)

18 JUDGE HOPKINS: Let's recess until 9:30 on
19 Tuesday.

20 (Whereupon, at 4:45 o'clock p.m. the hearing
21 recessed, to reconvene at 9:30 o'clock a.m., Tuesday,
22 October 9, 1984.)
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